

Customary International Humanitarian Law

Volume II: Practice – Part 1

Volume II: Practice – Part 2

Edited by

JEAN-MARIE HENCKAERTS
AND LOUISE DOSWALD-BECK



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INTERNATIONAL COMMITTEE OF THE RED CROSS

CUSTOMARY
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HUMANITARIAN LAW

VOLUME II

PRACTICE

Part 1

Edited by

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EDITORS' NOTE

This volume catalogues practice of international humanitarian law collected for the purpose of the study of customary international humanitarian law conducted by the International Committee of the Red Cross. The rules of customary international humanitarian law based on this practice are found in Volume I; each chapter in Volume II has a corresponding chapter in Volume I, and each section within a chapter in Volume II corresponds to a rule in Volume I. An explanation of the selection of the catalogued sources of practice is to be found in the introductory section of Volume I entitled "Assessment of Customary International Law".

The practice recorded in each chapter, section or subsection has been organised as follows:

I. Treaties and Other Instruments

Treaties

This category includes universal, regional and other treaties. They are presented in chronological order and are indicated by their short names. Their full references can be found in the relevant list at the end of this volume. Reservations and declarations made by individual States to treaty provisions are indicated immediately following the provisions in question. The status of ratification of the treaties most frequently referred to can be found in the relevant table at the end of this volume.

Other Instruments

Instruments other than treaties are presented in chronological order and are indicated by their short names. Their full references can be found in the relevant list at the end of this volume.

II. National Practice

National practice is presented in alphabetical order according to the country names that were in use at the time of the practice in question. Country names

are expressed in their short form. For example, the practice of the USSR is given under "U", while the practice of the Russian Federation, referred to as Russia, is under "R".

Military Manuals

This category of practice includes all types of instructions to armed and security forces found in manuals, directives and teaching booklets. In both the text and the footnotes, manuals are indicated by their short names. Their full references can be found in the relevant list at the end of this volume.

National Legislation

This category of practice includes constitutional law, pieces of legislation and executive orders. In both the text and the footnotes, each piece of legislation is indicated by its short name. The full references can be found in the relevant list at the end of this volume.

National Case-law

National case-law is indicated by the short name in both text and footnotes. The full references can be found in the relevant list at the end of this volume.

Other National Practice

Other national practice is organised in alphabetical order by country name and is fully referenced in the footnotes.

III. Practice of International Organisations and Conferences

United Nations

United Nations practice is ordered as follows: (i) resolutions adopted by the UN Security Council; (ii) statements by the President of the UN Security Council; (iii) resolutions adopted by the UN General Assembly; (iv) resolutions adopted by ECOSOC; (v) resolutions adopted by the UN Commission on Human Rights; (vi) resolutions adopted by the UN Sub-Commission on Human Rights; (vii) resolutions adopted by UN specialised organisations and agencies; and (viii) statements and reports of the UN Secretary-General, UN Special Rapporteurs, UN special committees and other UN officials and bodies.

Resolutions of the UN Security Council, UN General Assembly, ECOSOC, UN Commission on Human Rights and UN Sub-Commission on Human Rights are indicated in the footnotes by their number only; their full references can be found in the corresponding lists at the end of this volume. Other resolutions, reports and statements are fully referenced in the footnotes.

Each type of practice is arranged in chronological order.

Other International Organisations

This category includes resolutions and reports of regional organisations and other international organisations outside the United Nations. They are presented in alphabetical order according to the organisation and within each organisation in chronological order. Resolutions are indicated in the footnotes by their number only; their full references can be found in the relevant list at the end of this volume.

International Conferences

The practice of international conferences is presented in chronological order. Resolutions of the International Conference of the Red Cross and Red Crescent are referenced in the footnotes by their number only; their full references can be found in the relevant list at the end of this volume.

IV. Practice of International Judicial and Quasi-judicial Bodies

This category includes the various types of practice emanating from judicial and quasi-judicial bodies, such as judgements, advisory opinions, views and general comments. This practice is organised by body in the following order: (i) International Military Tribunal (Nuremberg and Tokyo); (ii) International Court of Justice; (iii) International Criminal Tribunal for Rwanda; (iv) International Criminal Tribunal for the Former Yugoslavia; (v) Human Rights Committee; (vi) Committee on the Elimination of Racial Discrimination; (vii) Committee on the Elimination of Discrimination against Women; (viii) Committee against Torture; (ix) Committee on the Rights of the Child; (x) United Nations Compensation Commission; (xi) regional judicial and quasi-judicial bodies; and (xii) arbitral tribunals.

Cases are referenced in the text and footnotes according to their short names. Their full references can be found in the relevant list at the end of this volume. Other practice in this category is fully referenced in the footnotes.

V. Practice of the International Red Cross and Red Crescent Movement

The practice in this category is presented in chronological order. Resolutions of the Council of Delegates of the International Red Cross and Red Crescent Movement are referenced in the footnotes with their number only; their full references can be found in the relevant list at the end of this volume.

VI. Other Practice

This category includes statements by armed opposition groups, reports by non-governmental organisations and other types of publications from non-governmental sources. The practice in this category is presented in chronological order.

ABBREVIATIONS

ABiH	Armija Bosne i Hercegovine (Army of Bosnia and Herzegovina)
ACHPR	African Charter on Human and Peoples' Rights (1981)
ACiHPR	African Commission on Human and Peoples' Rights
ACHR	American Convention on Human Rights (1969)
ACP	African, Caribbean and Pacific Group of States
ADF	Australian Defence Forces
ADFL	Alliance of Democratic Forces for the Liberation of Congo/Zaire
AD	Annual Digest and Reports of Public International Law Cases
AFP	Armed Forces of the Philippines
AFP	Agence France-Presse
AJIL	American Journal of International Law
ALN	Armée de Libération Nationale (National Liberation Army, Algeria)
AP	Associated Press
ARBiH	Army of the Republic of Bosnia and Herzegovina
ARDE	Alianza Revolucionaria Democrática (Democratic Revolutionary Alliance, Nicaragua)
ARDU	Asociația Română de Drept Umanitar (Romanian Association of Humanitarian Law)
BBC	British Broadcasting Corporation
BBC-SWB	BBC-Summary of World Broadcasts
BH	Bosnia and Herzegovina
BiH	Bosnia and Herzegovina
BT	Bundestag (Lower House of Parliament, Germany)
BWC	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (1972)
BYIL	British Year Book of International Law

CADIH	Comisión de Aplicación del Derecho Internacional Humanitario (Committee on the Implementation of International Humanitarian Law, Argentina)
CAT	Committee against Torture
CBOZ	Central Bosnia Operative Zone
CEDAW	Committee on the Elimination of Discrimination Against Women
CCW	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (1980)
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 1974–1977)
CE (1971)	Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 24 May–12 June 1971)
CE (1972)	Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (Geneva, 3 May–3 June 1972)
CERD	Committee on the Elimination of Racial Discrimination
CF	Canadian Forces
CFSP	Common Foreign and Security Policy (European Union)
CIDIH-ES	Comité Interinstitucional de Derecho Internacional Humanitario de El Salvador (Interinstitutional Committee of International Humanitarian Law of El Salvador)
CIS	Commonwealth of Independent States
CIVPOL	Civilian police component of UN peacekeeping missions
CJMC	Conference on Jewish Material Claims against Germany
CJTF	Combined Joint Task Force (US)
CRC	Committee on the Rights of the Child
CSCE	Conference on Security and Cooperation in Europe
CWC	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (1993)
DFAT	Department of Foreign Affairs and Trade (Australia)

DFF	De Facto Forces (Lebanon)
DoD	Department of Defense (US)
DRA	Democratic Republic of Afghanistan
DRC	Democratic Republic of the Congo (formerly Zaire)
EC	European Community or European Communities
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms (1950)
ECiHR	European Commission of Human Rights
ECtHR	European Court of Human Rights
ECOWAS	Economic Community of West African States
ECOMOG	ECOWAS Monitoring Group
ECOSOC	United Nations Economic and Social Council
EEC	European Economic Community
EHRR	European Human Rights Reports
ELN	Ejército de Liberación Nacional (National Liberation Army, Colombia)
ENMOD Convention	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (1976)
EPLF	Eritrean People's Liberation Front
ERP	Ejército Revolucionario del Pueblo (People's Revolutionary Army, El Salvador)
EU	European Union
EZLN	Ejército Zapatista de Liberación Nacional (Zapatista Army for National Liberation, Mexico)
FALINTIL	Forças Armadas de Libertação Nacional de Timor-Leste (National Liberation Armed Forces of East Timor)
FAR	Forces Armées Rwandaises (Rwandan Armed Forces)
FARC	Fuerzas Armadas Revolucionarias de Colombia (Revolutionary Armed Forces of Colombia)
FAZ	Forces Armées Zaïroises (Zairian Armed Forces)
FCO	Foreign and Commonwealth Office (UK)
FDN	Fuerzas Democráticas Nicaragüenses (Nicaraguan Democratic Forces)
FLN	Front de Libération Nationale (National Liberation Front, Algeria)
FMLN	Farabundo Martí para la Liberación Nacional (Farabundo Martí Front for National Liberation, El Salvador)
FPR	Front Patriotique Rwandais (Rwandan Patriotic Front)

FRETILIN	Frente Revolucionária de Timor-Leste Independente (Revolutionary Front for an Independent East Timor)
FRG	Federal Republic of Germany
FRY	Federal Republic of Yugoslavia
FYROM	Former Yugoslav Republic of Macedonia
GC	Geneva Convention
GCC	Gulf Cooperation Council
GDR	German Democratic Republic
GHQ	General Headquarters
GSF	General Settlement Fund
HDZ	Hrvatska Demokratska Zajednica (Croatian Democratic Community)
HQ	Headquarters
HR	Hague Regulations
HRC	Human Rights Committee
HRLJ	Human Rights Law Journal
HV	Hrvatska Vojska (Army of the Republic of Croatia)
HVO	Hrvatsko Vijeće Obrane (Croatian Defence Council, Bosnia and Herzegovina)
HZHB	Hrvatska zajednica Herceg-Bosne (Croatian Community of Bosnia and Herzegovina)
IACiHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
IAEA	International Atomic Energy Agency
ICA	International Council on Archives
ICAO	International Civil Aviation Organization
ICBL	International Campaign to Ban Landmines
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights (1966)
ICDO	International Civil Defence Organization
ICESCR	International Covenant on Economic, Social and Cultural Rights (1966)
ICJ	International Court of Justice
ICJ Reports	International Court of Justice, Reports of Judgments, Advisory Opinions and Orders
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia

IDF	Israel Defence Forces
IFOR	Implementation Force in Bosnia and Herzegovina (December 1995–December 1996)
IGNU	Interim Government of National Unity (Liberia)
IHL	International Humanitarian Law
IIHL	International Institute of Humanitarian Law (San Remo)
ILA	International Law Association
ILC	International Law Commission
ILM	International Legal Materials
ILO	International Labour Organization
ILR	International Law Reports
IMCO	Inter-governmental Maritime Consultative Organization (now the International Maritime Organization)
IMO	International Maritime Organization
IMT	International Military Tribunal
IOM	International Organization for Migration
IRRC	International Review of the Red Cross
ITU	International Telecommunications Union
IUCN	International Union for the Conservation of Nature (now known as the World Conservation Union)
JNA	Jugoslovenska Narodna Armija (Yugoslav People's Army)
LOAC	Law of Armed Conflict(s)
LRA	Lord's Resistance Army (Uganda)
LTTE	Liberation Tigers of Tamil Eelam (Sri Lanka)
MAG	Medical Action Group (Philippines)
MDC	Mouvement Démocratique de Casamance (Movement of Democratic Forces of Casamance, Senegal)
MFUA	Mouvements et Fronts Unifiés de l'Azawad (Unified Fronts and Movements of Azawad, Mali)
MINUGUA	Misión de Verificación de las Naciones Unidas en Guatemala (United Nations Verification Mission in Guatemala) (January–May 1997)
MONUA	Mission d'Observation des Nations Unies en Angola (United Nations Observer Mission in Angola) (June 1997–February 1999)
MOU	Memorandum of Understanding
MPLA	Movimento Popular de Libertação de Angola (Popular Movement for the Liberation of Angola)

MRND	Mouvement révolutionnaire national pour le développement (National Revolutionary Movement for Development, Rwanda)
MRTA	Movimiento Revolucionario Tupac Amaru (Tupac Amaru Revolutionary Movement, Peru)
MSF	Médecins Sans Frontières (Doctors Without Borders)
MVD	Ministerstvo Vnutrennykh Del (Ministry of Internal Affairs, Russian Federation)
NATO	North Atlantic Treaty Organisation
NILR	Netherlands International Law Review
NLA	National Liberation Army (Macedonia)
NPA	New People's Army (Philippines)
NPFL	National Patriotic Front of Liberia
NRA	National Resistance Movement (Uganda)
NS	National Society
OAS	Organization of American States
OAU	Organization of African Unity (now African Union)
OCHA	Office for the Coordination of Humanitarian Affairs (UN)
ODIHR	Office for Democratic Institutions and Human Rights (OSCE)
OECD	Organisation for Economic Co-operation and Development
OIC	Organization of the Islamic Conference
OLF	Oromo Liberation Front (Ethiopia)
OLS	Operation Lifeline Sudan
OPCW	Organisation for the Prohibition of Chemical Weapons
ONUCA	Grupo de Observadores de las Naciones Unidas en Centroamérica (United Nations Observer Group in Central America) (November 1989–January 1992)
ONUSAL	Misión de Observadores de las Naciones Unidas en El Salvador (United Nations Observer Mission in El Salvador) (July 1991–April 1995)
OSCE	Organization for Security and Cooperation in Europe
PMHC	Politico-Military High Command of the SPLM/A (Sudan)
PLA	People's Liberation Army (China)
PAHO	Pan American Health Organization
PCIJ	Permanent Court of International Justice
PDF	Popular Defence Forces (Sudan)
PLO	Palestine Liberation Organization

PNP	Philippine National Police
POW	Prisoner of War
PW	Prisoner of War
RAF	Royal Air Force (UK)
RAN	Royal Australian Navy
RBDI	Revue Belge de Droit International
RDPC	Revue de Droit Pénal et de Criminologie
Res.	Resolution
Rec.	Recommendation
RIAA	Reports of International Arbitral Awards
RENAMO	Resistência Nacional Moçambicana (Mozambique National Resistance)
RPF	Rwandese Patriotic Front
RUF	Revolutionary United Front (Sierra Leone)
RGDIP	Revue Générale de Droit International Public
RSA	Republic of South Africa
RSK	Republika Srpska Krajina (Republic of Serb Krajina, Croatia)
SADC	Southern African Development Community
SADF	South African Defence Forces
SANDEF	South Africa National Defence Force
SC	Security Council
SCF	Save the Children Fund
SIPRI	Stockholm International Peace Research Institute
SFRY	Socialist Federal Republic of Yugoslavia
SLA	South Lebanon Army
SPLA	Sudan People's Liberation Army
SPLM	Sudan People's Liberation Movement
SS	Schutzstaffel (Protective Echelon, Hitlerite Germany)
SSIA	Southern Sudan Independent Army
SWAPO	South Western Africa People's Organisation (Namibia)
TO	Teritorijalna zastita (odbrana) Bosne i Hercegovine (Bosnian Territorial Defence)
TPLF	Tigray People's Liberation Front (Ethiopia)
UAE	United Arab Emirates
UAR	United Arab Republic
UDHR	Universal Declaration on Human Rights (1948)
ULIMO	United Liberation Movement of Liberia
ULIMO-J	United Liberation Movement of Liberia for Democracy
UN	United Nations

UNAMIR	United Nations Assistance Mission for Rwanda (October 1993–March 1996)
UNAMSIL	United Nations Mission in Sierra Leone (October 1999–)
UNAVEM	United Nations Angola Verification Mission (I: December 1988–May 1991, II: May 1991–February 1995, III: February 1995–June 1997)
UNCC	United Nations Compensation Commission
UNCHS	United Nations Centre for Human Settlements (Habitat)
UNCRO	United Nations Confidence Restoration Operation (Croatia) (March 1995–January 1996)
UNEF	United Nations Emergency Force (Egypt) (I: October 1956–June 1967, II: October 1973–July 1979)
UNEP	United Nations Environmental Programme
UNESCO	United Nations Education, Scientific and Cultural Organization
UNFICYP	United Nations Peacekeeping Force in Cyprus (March 1964–)
UNGA	United Nations General Assembly
UNGAOR	United Nations General Assembly Official Records
UNHCR	United Nations High Commissioner for Refugees
UNIFIL	United Nations Interim Force in Lebanon (March 1978–)
UNIKOM	United Nations Iraq-Kuwait Observation Mission (April 1991–)
UNITA	União Nacional para Independência Total de Angola (National Union for the Total Independence of Angola)
UNMEE	United Nations Mission in Ethiopia and Eritrea (July 2000–)
UNMOGIP	United Nations Military Observers Group in India and Pakistan
UNMOT	United Nations Mission of Observers in Tajikistan (December 1994–May 2000)
UNMOVIC	United Nations Monitoring, Verification and Inspection Commission (Iraq) (December 1999–)
UNOMIG	United Nations Observer Mission in Georgia (August 1993–)
UNOMIL	United Nations Observer Mission in Liberia (September 1993–September 1997)
UNOMSIL	United Nations Observer Mission in Sierra Leone (July 1998–October 1999)

UNOSOM	United Nations Operation in Somalia (I: April 1992–March 1993, II: March 1993–March 1995)
UNPO	Unrepresented Nations and Peoples Organisation
UNPROFOR	United Nations Protection Force (former Yugoslavia) (February 1992–March 1995)
UNRIAA	United Nations Reports of International Arbitral Awards
UNSCOM	United Nations Special Commission (Iraq) (April 1991–December 1999)
UN Sub-Commission on Human Rights	United Nations Sub-Commission on the Promotion and Protection of Human Rights (formerly the Sub-Commission on Prevention of Discrimination and Protection of Minorities)
UNTAES	United Nations Transitional Authority in Eastern Slavonia, Baranja and Western Sirmium (Croatia) (January 1996–January 1998)
UNTAET	United Nations Transitional Administration in East Timor (October 1999–)
UNTAC	United Nations Transitional Authority in Cambodia (March 1992–September 1993)
UNTS	United Nations Treaty Series
URNNG	Unidad Revolucionaria Nacional Guatemalteca (Guatemalan National Revolutionary Unity)
USSR	Union of Soviet Socialist Republics
UK	United Kingdom of Great Britain and Northern Ireland
US	United States
USA	United States of America
UTO	United Tajik Opposition
VJ	Vojska Jugoslovenska (Army of the Federal Republic of Yugoslavia)
VRS	Vojska Republike Srpske (Army of Republika Srpska)
WARC	World Administrative Radio Conference
WCR	Law Reports of Trials of War Criminals
WEU	Western European Union
WMA	World Medical Association
WWI	World War I
WWII	World War II
YIHL	Yearbook of International Humanitarian Law
YPA	Yugoslav People's Army

PART I

THE PRINCIPLE OF DISTINCTION

DISTINCTION BETWEEN CIVILIANS AND COMBATANTS

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A. General

The principle of distinction

I. Treaties and Other Instruments

Treaties

1. Article 48 AP I provides that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants”. Article 48 AP I was adopted by consensus.¹

2. Article 24(1) of draft AP II submitted by the ICRC to the CDDH provided that “in order to ensure respect for the civilian population, the parties to the conflict...shall make a distinction between the civilian population and

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

combatants".² This proposal was amended and adopted by consensus in Committee III of the CDDH.³ The approved text provided that "in order to ensure respect and protection for the civilian population . . . the Parties to the conflict shall at all times distinguish between the civilian population and combatants".⁴ Eventually, however, it was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁵

3. According to the preamble to the 1997 Ottawa Convention, States parties based their agreement on various principles of IHL, including "the principle that a distinction must be made between civilians and combatants".

Other Instruments

4. Article 22 of the 1863 Lieber Code states that "as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms".
5. Article 1 of the 1880 Oxford Manual provides that "the state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts." In its commentary on Article 1, the manual states that "this rule implies a distinction between the individuals who compose the 'armed force' of a State and its other 'ressortissants'".
6. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 48 AP I.
7. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 48 AP I.
8. Paragraph 39 of the 1994 San Remo Manual states that "parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants".
9. Section 5.1 of the 1999 UN Secretary-General's Bulletin states that UN forces "shall make a clear distinction at all times between civilians and combatants".

II. National Practice

Military Manuals

10. Argentina's Law of War Manual provides that "the parties to the conflict must distinguish at all times between the [civilian] population and combatants".⁶

² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 37.

³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 288, § 113.

⁴ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 319.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135, § 78.

⁶ Argentina, *Law of War Manual* (1989), § 4.01.

11. Australia's Defence Force Manual states that the law of armed conflict "establishes a requirement to distinguish between combatants and civilians, and between military objectives and civilian objects. This requirement imposes obligations on all parties to a conflict to establish and maintain the distinction."⁷
12. Belgium's Law of War Manual provides that "a distinction must always be made between the civilian population and those participating in hostilities: the latter may be attacked, the former may not".⁸
13. Benin's Military Manual provides that "a distinction shall be made at all times between combatants and civilians".⁹
14. Cameroon's Instructors' Manual requires "respect for the principle of distinction, that is to say, the definition and separation of soldiers and civilians".¹⁰ It adds that "a soldier cannot fight without knowing exactly who is a combatant and who is not".¹¹
15. Canada's LOAC Manual states that "commanders shall at all times distinguish between the civilian population and combatants".¹²
16. Colombia's Circular on Fundamental Rules of IHL states that "the Parties to the conflict must at all times make a distinction between civilians and combatants in order to protect the civilian population and civilian objects".¹³
17. Colombia's Basic Military Manual provides for the obligation "to distinguish between combatants and the civilian population".¹⁴
18. Croatia's LOAC Compendium states that a distinction must always be made between combatants and civilians.¹⁵
19. Croatia's Instructions on Basic Rules of IHL requires all relevant personnel to distinguish between combatants and civilians in order to protect the civilian population and civilian property.¹⁶
20. Ecuador's Naval Manual states that "the law of armed conflicts is based largely on the distinction to be made between combatants and noncombatants".¹⁷
21. France's LOAC Summary Note states that "the civilian population and civilian objects must be spared and distinguished at all times from combatants and military objectives".¹⁸

⁷ Australia, *Defence Force Manual* (1994), § 504.

⁸ Belgium, *Law of War Manual* (1983), p. 26.

⁹ Benin, *Military Manual* (1995), Fascicule II, p. 5 and Fascicule III, p. 11.

¹⁰ Cameroon, *Instructors' Manual* (1992), p. 55.

¹¹ Cameroon, *Instructors' Manual* (1992), p. 143.

¹² Canada, *LOAC Manual* (1999), p. 4-1, § 4, see also p. 2-2, § 12.

¹³ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 7.

¹⁴ Colombia, *Basic Military Manual* (1995), pp. 48-49.

¹⁵ Croatia, *LOAC Compendium* (1991), p. 37.

¹⁶ Croatia, *Instructions on Basic Rules of IHL* (1993), § 7.

¹⁷ Ecuador, *Naval Manual* (1989), § 5.3, see also §§ 8.1 and 11.1.

¹⁸ France, *LOAC Summary Note* (1992), Part I, preamble; see also *LOAC Teaching Note* (2000), p. 4.

22. France's LOAC Manual imposes the obligation "to distinguish between military objectives, which may be attacked, and civilian objects and persons, which must not be made the object of deliberate attack".¹⁹
23. Germany's Military Manual states that it is prohibited "to injure military objectives, civilians, or civilian objects without distinction".²⁰
24. Hungary's Military Manual provides that a distinction must always be made between combatants and civilians.²¹
25. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "in principle, the IDF (Israel Defence Forces) accepts and applies the principle of distinction".²²
26. The Military Manual of the Netherlands states that "the parties to the conflict must at all times distinguish between the civilian population and combatants".²³
27. New Zealand's Military Manual states that "the principle of distinction... imposes an obligation on commanders to distinguish between legitimate military objectives and civilian objects and the civilian population when conducting military operations, particularly when selecting targets".²⁴
28. According to Nigeria's Military Manual, "the main aim for all commanders and individual combatants is to distinguish combatants and military objectives from civilian persons and objects at all times".²⁵
29. Sweden's IHL Manual states that "a distinction shall always be made between persons participating in hostilities and who are thereby legitimate objectives, and members of the civilian population, who may not constitute objectives in warfare".²⁶ The manual considers that the principle of distinction as stated in Article 48 AP I is part of customary international law.²⁷
30. According to Switzerland's Basic Military Manual, "the Parties to the conflict must at all times make a distinction between the civilian population and combatant troops".²⁸
31. Togo's Military Manual provides that "a distinction shall be made at all times between combatants and civilians".²⁹
32. The UK Military Manual refers to "the division of the population of a belligerent State into two classes, namely, the armed forces and the peaceful population".³⁰

¹⁹ France, *LOAC Manual* (2001), p. 13.

²⁰ Germany, *Military Manual* (1992), § 401, see also § 429.

²¹ Hungary, *Military Manual* (1992), p. 60.

²² Report on the Practice of Israel, 1997, Chapter 1.1, referring to *Law of War Booklet* (1986), Chapter 1.

²³ Netherlands, *Military Manual* (1993), p. IV-1, § 1.

²⁴ New Zealand, *Military Manual* (1992), p. 2-4, § 205.

²⁵ Nigeria, *Military Manual* (1994), p. 41.

²⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 40.

²⁷ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

²⁸ Switzerland, *Basic Military Manual* (1987), Article 25(1).

²⁹ Togo, *Military Manual* (1996), Fascicule II, p. 5 and Fascicule III, p. 11.

³⁰ UK, *Military Manual* (1958), § 86.

33. The US Air Force Pamphlet states that “in order to insure respect and protection for the civilian population and civilian objects, the parties to the conflict must at all times distinguish between the civilian population and combatants”.³¹

34. According to the US Naval Handbook, “the law of armed conflicts is based largely on the distinction to be made between combatants and noncombatants”.³²

National Legislation

35. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 48 AP I, is a punishable offence.³³

36. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.³⁴

National Case-law

37. No practice was found.

Other National Practice

38. A report submitted to the Belgian Senate in 1991 noted that the principle of distinction remained the foundation of the law of armed conflict.³⁵

39. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Ecuador stated that “the use of nuclear weapons does not discriminate, in general, military objectives from civilian objectives”.³⁶

40. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

The distinction between combatants and non-combatants is one of the most important victories and accomplishments of international law since the early beginnings of the nineteenth century. Any authorization of nuclear weapons will definitely cause this principle to collapse.³⁷

41. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “all parties must

³¹ US, *Air Force Pamphlet* (1976), § 5-3(b).

³² US, *Naval Handbook* (1995), § 5.3, see also §§ 8.1 and 11.1.

³³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

³⁵ Belgium, Senate, Report, *Enquête parlementaire sur l’existence en Belgique d’un réseau de renseignements clandestin international*, 1990–1991 Session, Doc. 1117-4, 1 October 1991, § 20.

³⁶ Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § D.

³⁷ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 24, see also §§ 17 and 35(B)(4).

at all times make a distinction between the civilian population and military objectives in order to spare the civilian population".³⁸

42. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India concluded that "the use of nuclear weapons in an armed conflict is unlawful being contrary to the conventional as well as customary international law because such a use cannot distinguish between the combatants and non-combatants".³⁹

43. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan stated that "with their colossal power and capacity for slaughter and destruction, nuclear weapons make no distinction between combatants and non-combatants".⁴⁰

44. The Report on the Practice of Lebanon refers to a 1996 report by the Lebanese Ministry of Justice which stated that Israel had committed serious violations of the Geneva Conventions by failing to distinguish between civilians and combatants.⁴¹

45. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated that "discrimination between combatants and those who are not directly involved in armed conflict is a fundamental principle of international humanitarian law".⁴²

46. According to the Report on the Practice of Nigeria, it is Nigeria's *opinio juris* that the principle of distinction between combatants and civilians is part of customary international law.⁴³

47. In 1991, in a Letter Directive to Commanders of Major Services and Area Commands, the Chief of Staff of the armed forces of the Philippines stated that all units must distinguish between combatants and the civilian population in order to ensure that civilians receive the respect and protection to which they are entitled.⁴⁴

48. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that:

Under international law it is clear beyond any doubt that the use of a nuclear weapon against civilians, whatever the nature or size and destructive power of the

³⁸ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 66.

³⁹ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 4, see also p. 5.

⁴⁰ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, 7 November 1995, Verbatim Record CR 95/27, p. 36.

⁴¹ Report on the Practice of Lebanon, 1998, Chapter 1.4, referring to Report by the Lebanese Ministry of Justice on possibilities for legal action against Israel, 12 April 1996.

⁴² New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 71.

⁴³ Report on the Practice of Nigeria, 1997, Chapter 1.1.

⁴⁴ Philippines, Letter Directive to Commanders of Major Services and Area Commands, Office of the Chief of Staff, 1991, § 3a.

weapon, will be rendered illegal by virtue of the application of the customary rule which states that belligerents must always distinguish between combatants and non-combatants and limit their attack only to the former. This is an old and well-established rule which has achieved universal acceptance.⁴⁵

49. In its consideration of the legality of the attack by the South African defence forces on the SWAPO base/refugee camp at Kassinga in Angola in 1978, the South African Truth and Reconciliation Commission stated that “international humanitarian law stipulates that a distinction must at all times be made between persons taking part in hostilities and civilians”.⁴⁶

50. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that “the parties to an armed conflict are required to discriminate between civilians and civilian objects on the one hand and combatants and military objectives on the other and to direct their attacks only against the latter”.⁴⁷

51. In explaining the US government’s position on the basic principles applicable in armed conflicts before the Third Committee of the UN General Assembly in 1968, the US representative stated that the principle of distinction, as set out in draft General Assembly Resolution 2444 (XXIII), constituted a reaffirmation of existing international law.⁴⁸ Subsequently, US officials have referred to General Assembly Resolution 2444 (XXIII) as an accurate statement of the customary rule that a distinction must be made at all times between persons taking part in hostilities and the civilian population.⁴⁹

52. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army pointed out that “the obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such”.⁵⁰

53. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Article 48 AP I “is generally regarded

⁴⁵ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 3.47; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, § 3.38.

⁴⁶ South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 2, pp. 52–55, §§ 44–45.

⁴⁷ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.67.

⁴⁸ US, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1634, 10 December 1968.

⁴⁹ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, pp. 122–126; Statement of the Acting Assistant Legal Adviser for Politico-Military Affairs during a symposium at the Brooklyn Law School, 25 September 1982, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3421–3422.

⁵⁰ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(E), Report on US Practice, 1997, Chapter 1.4.

as a codification of the customary practice of nations, and therefore binding on all".⁵¹ It also stated that:

The law of war with respect to targeting, collateral damage and collateral civilian casualties is derived from the principle of discrimination; that is, the necessity for distinguishing between combatants, who may be attacked, and noncombatants, against whom an intentional attack may not be directed, and between legitimate military targets and civilian objects.⁵²

54. According to the Report on US Practice, "it is the *opinio juris* of the United States that . . . a distinction must be made between persons taking part in the hostilities and the civilian population to the effect that the civilians be spared as much as possible".⁵³

III. Practice of International Organisations and Conferences

United Nations

55. In Resolution 2444 (XXIII), adopted in 1968, the UN General Assembly affirmed Resolution XXVIII of the 20th International Conference of the Red Cross and the basic humanitarian principle applicable in all armed conflicts laid down therein that "distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible".⁵⁴

56. In Resolution 2675 (XXV), adopted in 1970, the UN General Assembly recalled that "in the conduct of military operations during armed conflict, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations".⁵⁵ Resolution 2673 (XXV), adopted the same day and dealing with journalists in conflict zones, referred in its preamble to the principle of distinction.⁵⁶

57. In 1998, in a report on protection for humanitarian assistance to refugees and others in conflict situations, the UN Secretary-General noted that the changing pattern of conflicts in recent years had dramatically worsened the problem of compliance with international law and listed as an example that "in situations of internal conflicts, whole societies are often mobilized for war and it is difficult to distinguish between combatants and non-combatants".⁵⁷

⁵¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 625.

⁵² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 621.

⁵³ Report on US Practice, 1997, Chapter 1.4.

⁵⁴ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(c).

⁵⁵ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 2.

⁵⁶ UN General Assembly, Res. 2673 (XXV), 9 December 1970, preamble.

⁵⁷ UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, § 12.

58. The report pursuant to paragraph 5 of UN Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on UN forces in Somalia noted that:

The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars. But the principles they embody have a wider scope. Plainly a part of contemporary international customary law, they are applicable wherever political ends are sought through military means. No principle is more central to the humanitarian law of war than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants.⁵⁸

Other International Organisations

59. In a declaration adopted on the occasion of the 50th anniversary of the Geneva Conventions in 1999, the EU stated that it deplored the persistence of violations of IHL. It added that present-day conflicts often did not make the important distinction between combatants and civilians and that children and other vulnerable groups were targets of the conflicts.⁵⁹

International Conferences

60. The 20th International Conference of the Red Cross in 1965 solemnly declared that:

All Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles: . . . that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.⁶⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

61. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ considered the principle of distinction between combatants and non-combatants to be one of the “cardinal principles contained in the texts constituting the fabric of humanitarian law” and also one of the “intransgressible principles of international customary law”.⁶¹

⁵⁸ Report pursuant to paragraph 5 of Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on United Nations forces in Somalia conducted on behalf of the UN Security Council, UN Doc. S/26351, 24 August 1993, Annex, § 9.

⁵⁹ EU, Declaration on the occasion of the 50th anniversary of the Geneva Conventions, 12 August 1999, Pesc/99/77 10394/99 (presse 247).

⁶⁰ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

⁶¹ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 78–79.

62. In its judgement in the *Blaškić case* in 2000, the ICTY held that “the parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons”.⁶²

63. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the 1999 NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that “one of the principles underlying IHL is the principle of distinction, which obligates military commanders to distinguish between military objectives and civilian persons or objects”.⁶³

64. In 1997, in the case concerning the events at La Tablada in Argentina, the IACiHR underlined the obligation of the contending parties, on the basis of common Article 3 of the 1949 Geneva Conventions and customary principles applicable to all armed conflicts, “to distinguish in their targeting between civilians and combatants and other lawful military objectives”.⁶⁴

65. According to an IACiHR report on the human rights situation in Colombia issued in 1999, IHL prohibits:

the launching of attacks against the civilian population and requires the parties to an armed conflict, at all times, to make a distinction between members of the civilian population and persons actively taking part in the hostilities and to direct their attacks only against the latter and, inferentially, other legitimate military objectives.⁶⁵

V. Practice of the International Red Cross and Red Crescent Movement

66. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that a distinction must be made between combatants and civilians at all times.⁶⁶

67. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC stated that “fundamental humanitarian rules accepted by all nations – such as the obligation to distinguish between combatants and civilians, and to refrain from violence against the latter – have been largely ignored”.⁶⁷

68. In a press release issued in 1984 in the context of the Iran–Iraq War, the ICRC stated that “in violation of the laws and customs of war, and in particular of the essential principle that military targets must be distinguished from

⁶² ICTY, *Blaškić case*, Judgement, 3 March 2000, § 180.

⁶³ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 29.

⁶⁴ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 177.

⁶⁵ IACiHR, Third report on the human rights situation in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, § 40.

⁶⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 387.

⁶⁷ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 2, *IRRC*, No. 209, 1979, p. 87.

civilian persons and objects, the Iraqi armed forces have continued to bomb Iranian civilian zones".⁶⁸

69. In several press releases issued in 1992, the ICRC reminded the parties to the armed conflict in Afghanistan of their duty to distinguish at all times between combatants and civilians.⁶⁹

70. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the following general rules are recognized as binding on any party to an armed conflict: . . . a distinction must be made in all circumstances between combatants and military objectives on the one hand, and civilians and civilian objects on the other".⁷⁰

71. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Georgia of their obligation "to distinguish at all times between combatants and military objectives on the one hand, and civilians and civilian objects on the other".⁷¹

72. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation "to distinguish at all times between combatants and military objectives on the one hand and civilians and civilian property on the other".⁷²

73. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "a clear distinction must be made in all circumstances between civilians and civilian objects on the one hand and combatants and military objectives on the other".⁷³

74. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "a clear distinction must be made, in all circumstances, between civilian persons who do not participate in confrontations and refrain from acts of violence and civilian objects on the one hand, and combatants and military objectives on the other".⁷⁴

⁶⁸ ICRC, Press Release No. 1480, Conflict between Iran and Iraq and breaches of international humanitarian law: a renewed ICRC appeal, 15 February 1984, *IRRC*, No. 239, 1984, pp. 113–115.

⁶⁹ ICRC, Press Release No. 1712, Afghanistan: Appeal for Compliance with Humanitarian Rules, 5 May 1992; Press Release No. 1724, Kabul: ICRC urges respect for civilians as medical facilities struggle to cope, 20 July 1992; Press Release No. 1726, Afghanistan: Renewed ICRC Appeal for Compliance with Humanitarian Rules, 14 August 1992.

⁷⁰ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 24.

⁷¹ ICRC, Communication to the Press No. 93/31, Georgia: ICRC activities in Abkhazia, 20 September 1993.

⁷² ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

⁷³ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

⁷⁴ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

75. In a communication to the press in 1999, the ICRC called upon all the parties to the internal conflict in Sierra Leone to abide by the rules of IHL and in particular to make a clear distinction between combatants and civilians so as to protect persons not or no longer taking part in hostilities.⁷⁵

VI. *Other Practice*

76. In a resolution adopted at its Edinburgh Session in 1969, the Institute of International Law recalled that “the obligation to respect the distinction between military objectives and non-military objects, as well as between persons participating in the hostilities and members of the civilian population, remains a fundamental principle of the international law in force”.⁷⁶

77. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “the parties to the conflict shall at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian objects”.⁷⁷

78. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that:

Certain general principles of the customary law of armed conflict were recognized in U.N. General Assembly Resolution 2444 (XXIII), 13 January 1969, which was adopted by unanimous vote. This resolution affirms... that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population.⁷⁸

79. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that:

United Nations General Assembly Resolution 2444, *Respect for Human Rights in Armed Conflicts*... adopted by unanimous vote on December 19, 1969, expressly recognized this customary principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times... Furthermore, the International Committee of the Red Cross has long regarded these principles as basic rules of the laws of war that apply in all armed conflicts. The United States government also has expressly recognized these principles as declaratory of existing customary international law.⁷⁹

80. Rule A1 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990

⁷⁵ ICRC, Communication to the Press No. 99/02, Sierra Leone: ICRC pulls out of Freetown, 14 January 1999.

⁷⁶ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 1.

⁷⁷ ICRC archive document.

⁷⁸ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 19–20.

⁷⁹ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 126.

by the Council of the IIHL, provides that “the obligation to distinguish between combatants and civilians is a general rule applicable in non-international armed conflicts”. The commentary on this rule notes that it is based on the St. Petersburg Declaration, Article 25 HR, UN General Assembly Resolutions 2444 (XXIII) and 2675 (XXV), common Article 3 of the 1949 Geneva Conventions and Article 13(2) AP II.⁸⁰

81. In 1992, in a report on war crimes committed in the conflict in Bosnia and Herzegovina, Helsinki Watch stated that:

United Nations General Assembly Resolution 2444, adopted by unanimous vote on December 19, 1969, expressly recognized the customary law principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times.⁸¹

82. In 1995, the IIHL stated that any declaration on minimum humanitarian standards should be based on “principles . . . of *jus cogens*, expressing basic humanitarian consideration[s] which are recognized to be universally binding”. According to the IIHL, this includes the principle that “in the case where the situation is characterized by hostilities, the difference between combatants and civilians shall be made”.⁸²

Attacks against combatants

I. Treaties and Other Instruments

Treaties

83. The preamble to the 1868 St. Petersburg Declaration states that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.

84. Article 48 AP I states that “Parties to the conflict . . . shall direct their operations only against military objectives”. Article 48 AP I was adopted by consensus.⁸³

85. Article 52(2) AP I states that “attacks shall be limited strictly to military objectives”. Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.⁸⁴

⁸⁰ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A1 and Commentary, *IRRC*, No. 278, 1990, Commentary, pp. 387–388.

⁸¹ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, Vol. I, New York, August 1992, p. 203.

⁸² IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 12, reprinted in Report of the Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, pp. 8–9.

⁸³ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

⁸⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

86. Upon ratification of AP I, Australia stated that “it is the understanding of Australia that the first sentence of paragraph 2 of Article 52 is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective”.⁸⁵

87. Upon ratification of AP I, Canada stated that:

It is the understanding of the Government of Canada in relation to Article 52 that . . . the first sentence of paragraph 2 of the Article is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective.⁸⁶

88. Upon ratification of AP I, France stated that “the Government of the French Republic considers that the first sentence of paragraph 2 of Article 52 does not deal with the question of collateral damage resulting from attacks directed against military objectives”.⁸⁷

89. Upon ratification of AP I, Italy declared that “the first sentence of paragraph 2 of [Article 52] prohibits only such attacks as may be directed against non-military objectives. Such a sentence does not deal with the question of collateral damage caused by attacks directed against military objectives.”⁸⁸

90. Upon ratification of AP I, New Zealand stated that “the first sentence of paragraph 2 of [Article 52] is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective”.⁸⁹

91. Upon ratification of AP I, the UK stated that:

It is the understanding of the United Kingdom that . . . the first sentence of paragraph 2 [of Article 52] prohibits only such attacks as may be directed against non-military objectives; it does not deal with the question of collateral damage resulting from attacks directed against military objectives.⁹⁰

92. Article 24(1) of draft AP II submitted by the ICRC to the CDDH stated that “in order to ensure respect for the civilian population, the parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary”.⁹¹ This proposal was amended and adopted by consensus in Committee III of the CDDH.⁹² The approved text provided that “in order to ensure respect and protection for the civilian population . . . the Parties to the conflict . . . shall direct their operations only against military

⁸⁵ Australia, Declarations made upon ratification of AP I, 21 June 1991, § 5.

⁸⁶ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 8(b).

⁸⁷ France, Declarations and reservations made upon ratification of AP I, 11 April 2001, § 12.

⁸⁸ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 8.

⁸⁹ New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 4.

⁹⁰ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § j.

⁹¹ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 37.

⁹² CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 288, § 113.

objectives".⁹³ Eventually, however, it was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁹⁴

Other Instruments

93. Article 15 of the 1863 Lieber Code states that "military necessity admits of all direct destruction of life or limb of 'armed' enemies... it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor".

94. The commentary on Article 3 of the 1880 Oxford Manual refers to the principle laid down in the 1868 St. Petersburg Declaration that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".

95. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, "military forces" are military objectives.

96. Article 7 of the 1956 New Delhi Draft Rules states that "in order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives". Paragraph I(1) of the proposed annex to Article 7(2) stated that "armed forces, including auxiliary or complementary organizations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting" were military objectives considered to be of "generally recognized military importance".

97. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48 and 52(2) AP I.

98. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48 and 52(2) AP I.

99. Paragraph 41 of the 1994 San Remo Manual provides that "attacks shall be limited strictly to military objectives".

100. Section 5.1 of the 1999 UN Secretary-General's Bulletin states that "military operations shall be directed only against combatants and military objectives".

II. National Practice

Military Manuals

101. Australia's Defence Force Manual states that "military operations must only be conducted against enemy armed forces and military objects".⁹⁵

⁹³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 319.

⁹⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135, § 78.

⁹⁵ Australia, *Defence Force Manual* (1994), § 210.

- 102.** Belgium's Teaching Manual for Soldiers states that only enemy combatants may be attacked.⁹⁶
- 103.** Benin's Military Manual states that "a combatant must fight only combatants".⁹⁷
- 104.** Cameroon's Instructors' Manual states that armed forces are considered military objectives, with the exception of religious and medical personnel.⁹⁸
- 105.** Canada's LOAC Manual states that "combatants are legitimate targets and may be attacked".⁹⁹
- 106.** Canada's Code of Conduct requires Canadian forces to "engage only opposing forces and military objectives".¹⁰⁰
- 107.** Colombia's Circular on Fundamental Rules of IHL states that "neither the civilian population, as such, nor individual civilians may be made the object of attack. Attacks may only be directed against military objectives."¹⁰¹
- 108.** Colombia's Instructors' Manual states that it is a rule of combat to "fight only combatants".¹⁰²
- 109.** Croatia's LOAC Compendium includes armed forces among military objectives.¹⁰³
- 110.** Croatia's Commanders' Manual states that "combatants may be attacked".¹⁰⁴
- 111.** The Military Manual of the Dominican Republic states that only combatants are proper targets for attack.¹⁰⁵
- 112.** Ecuador's Naval Manual states that only attacks against combatants and other military objectives are lawful.¹⁰⁶
- 113.** France's LOAC Summary Note states that combatants are military objectives.¹⁰⁷
- 114.** Germany's Military Manual provides that military objectives include, in particular, armed forces.¹⁰⁸
- 115.** Hungary's Military Manual states that armed forces are military objectives.¹⁰⁹
- 116.** Israel's Manual on the Laws of War states that "any soldier (male or female!) in the enemy's army is a legitimate military target for attack, whether on the battlefield or outside of it".¹¹⁰
- 117.** According to Italy's IHL Manual, armed forces may be attacked.¹¹¹

⁹⁶ Belgium, *Teaching Manual for Soldiers* (undated), pp. 7, 10, 14 and 41.

⁹⁷ Benin, *Military Manual* (1995), Fascicule I, p. 17, see also Fascicule II, p. 18.

⁹⁸ Cameroon, *Instructors' Manual* (1992), p. 17.

⁹⁹ Canada, *LOAC Manual* (1999), p. 4-2, § 12. ¹⁰⁰ Canada, *Code of Conduct* (2001), Rule 1.

¹⁰¹ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 7.

¹⁰² Colombia, *Instructors' Manual* (1999), p. 15. ¹⁰³ Croatia, *LOAC Compendium* (1991), p. 7.

¹⁰⁴ Croatia, *Commanders' Manual* (1992), § 8.

¹⁰⁵ Dominican Republic, *Military Manual* (1980), p. 3.

¹⁰⁶ Ecuador, *Naval Manual* (1989), § 8.1. ¹⁰⁷ France, *LOAC Summary Note* (1992), § 1.2.

¹⁰⁸ Germany, *Military Manual* (1992), § 443. ¹⁰⁹ Hungary, *Military Manual* (1992), p. 18.

¹¹⁰ Israel, *Manual on the Laws of War* (1998), p. 42. ¹¹¹ Italy, *IHL Manual* (1991), Vol. I, § 12.

- 118.** Italy's LOAC Elementary Rules Manual states that "combatants may participate directly in hostilities and may be attacked".¹¹²
- 119.** Kenya's LOAC Manual states that "fighting is only to be directed at the enemy combatant".¹¹³
- 120.** According to South Korea's Military Law Manual, it is only permissible to kill combatants.¹¹⁴
- 121.** Madagascar's Military Manual states that "combatants must fight only enemy combatants".¹¹⁵
- 122.** The Military Manual of the Netherlands states that "operations may only be directed against military objectives". It adds that "combatants who are part of the armed forces" are military objectives "under all circumstances".¹¹⁶
- 123.** The Military Handbook of the Netherlands requires that soldiers "attack only combatants".¹¹⁷
- 124.** New Zealand's Military Manual provides that attacks must be directed against military objectives and that combatants are military objectives.¹¹⁸
- 125.** Nigeria's Military Manual and Soldiers' Code of Conduct state that combatants must "fight only combatants".¹¹⁹
- 126.** The Soldier's Rules of the Philippines requires soldiers to "fight only enemy combatants".¹²⁰
- 127.** The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that "when the use of armed force is inevitable, strict controls must be exercised to insure that only reasonable force necessary for mission accomplishment shall be taken and shall be directed only against hostile elements, not against civilians or non-combatants".¹²¹
- 128.** Romania's Soldiers' Manual states that combatants must "fight only combatants".¹²²
- 129.** South Africa's LOAC Manual requires soldiers in combat to "fight only enemy combatants".¹²³
- 130.** Spain's LOAC Manual states that the armed forces of the enemy are considered a legitimate target of attack.¹²⁴
- 131.** Sweden's IHL Manual states that "a distinction shall always be made between persons participating in hostilities and who are thereby legitimate

¹¹² Italy, *LOAC Elementary Rules Manual* (1991), § 8.

¹¹³ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15, see also Précis No. 3, p. 2.

¹¹⁴ South Korea, *Military Law Manual* (1996), p. 86.

¹¹⁵ Madagascar, *Military Manual* (1994), Fiche No. 1-T, § B, see also Fiche No. 3-O, § 8.

¹¹⁶ Netherlands, *Military Manual* (1993), pp. V-1 and V-3.

¹¹⁷ Netherlands, *Military Handbook* (1995), p. 7-36.

¹¹⁸ New Zealand, *Military Manual* (1992), p. 5-21, § 515(1) and p. 5-22, § 516(1).

¹¹⁹ Nigeria, *Military Manual* (1994), p. 39, § 5(a); *Soldiers' Code of Conduct* (undated), § 1.

¹²⁰ Philippines, *Soldier's Rules* (1989), § 2.

¹²¹ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § (2)(a)(2).

¹²² Romania, *Soldiers' Manual* (1991), p. 4. ¹²³ South Africa, *LOAC Manual* (1996), § 25(a).

¹²⁴ Spain, *LOAC Manual* (1996), Vol. I, § 4.2.b.

objectives, and members of the civilian population, who may not constitute objectives in warfare".¹²⁵

132. Switzerland's Basic Military Manual states that only military objectives may be attacked, including enemy armed forces.¹²⁶

133. Togo's Military Manual states that "a combatant must fight only enemy combatants".¹²⁷

134. The UK Military Manual states that:

The most important powers of resistance possessed by a belligerent . . . are his armed forces with their military stores and equipment, and his defence installations of all kinds. The means of reducing these powers of resistance [include] killing and disabling enemy combatants.¹²⁸

135. The US Rules of Engagement for Operation Desert Storm sets as a basic rule "fight only combatants".¹²⁹

136. The US Naval Handbook states that only attacks against combatants and other military objectives are lawful.¹³⁰

137. The YPA Military Manual of the SFRY (FRY) states that "the armed forces are an instrument of force and [may be] the direct object of attack. It is permitted to kill, wound or disable their members in combat, except where they surrender or when due to wounds or sickness they are disabled for combat."¹³¹ The manual further specifies that "it is permitted to directly attack only members of the armed forces and other persons – only if they directly participate in military operations".¹³²

National Legislation

138. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 48 and 52(2) AP I, is a punishable offence.¹³³

139. According to Italy's Law of War Decree as amended, armed forces may be attacked.¹³⁴

140. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹³⁵

¹²⁵ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 40.

¹²⁶ Switzerland, *Basic Military Manual* (1987), Article 28.

¹²⁷ Togo, *Military Manual* (1995), Fascicule I, p. 18, see also Fascicule II, p. 18.

¹²⁸ UK, *Military Manual* (1958), § 108.

¹²⁹ US, *Rules of Engagement for Operation Desert Storm* (1991), § 1.

¹³⁰ US, *Naval Handbook* (1995), § 8.1. ¹³¹ SFRY (FRY), *YPA Military Manual* (1988), § 49.

¹³² SFRY (FRY), *YPA Military Manual* (1988), § 67.

¹³³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹³⁴ Italy, *Law of War Decree as amended* (1938), Article 40.

¹³⁵ Norway, *Military Penal Code as amended* (1902), § 108(b).

National Case-law

141. No practice was found.

Other National Practice

142. At the CDDH, Canada stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) “prohibits only attacks that could be directed against non-military objectives. It does not deal with the result of a legitimate attack on military objectives and incidental damage that such attack may cause.”¹³⁶

143. At the CDDH, the FRG stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) “is a restatement of the basic rule contained in Article 43 [now Article 48], namely that the Parties to a conflict shall direct their operations only against military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.”¹³⁷

144. The Report on the Practice of Jordan notes that a booklet on the LOAC prepared by the ICRC is used by military commanders. The booklet gives a list of principles to apply in military action, among which is the obligation of the armed forces to fight only combatants.¹³⁸

145. The Report on the Practice of Malaysia states that attacks should only be “directed against combatant targets which shall be distinguished and confirmed”.¹³⁹

146. At the CDDH, Mexico stated that it believed draft Article 47 AP I (now Article 52) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.¹⁴⁰

147. At the CDDH, the Netherlands stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) “prohibits only such attacks as may be directed against non-military objectives and consequently does not deal with the question of collateral damage caused by attacks directed against military objectives”.¹⁴¹

148. At the CDDH, the UK stated that it did not interpret the obligation in the first sentence of draft Article 47(2) AP I (now Article 52(2)) “as dealing with the question of incidental damage caused by attacks directed against military objectives. In its view, the purpose of the first sentence of the paragraph was

¹³⁶ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

¹³⁷ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 188.

¹³⁸ Report on the Practice of Jordan, 1997, Answers to additional questions on Chapter 1.1.

¹³⁹ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.4.

¹⁴⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

¹⁴¹ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 195.

to prohibit only such attacks as might be directed against non-military objectives."¹⁴²

149. At the CDDH, the US stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) "prohibits only such attacks as may be directed against non-military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives."¹⁴³

III. Practice of International Organisations and Conferences

150. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

151. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

152. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "combatants may be attacked".¹⁴⁴

VI. Other Practice

153. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "attacks shall be directed solely against military objectives".¹⁴⁵

Attacks against civilians

I. Treaties and Other Instruments

Treaties

154. Article 51(2) AP I states that "the civilian population as such, as well as individual civilians, shall not be the object of attack". Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.¹⁴⁶

155. According to Article 85(3)(a) AP I, "making the civilian population or individual civilians the object of attack" is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.¹⁴⁷

¹⁴² UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 169, § 153.

¹⁴³ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 204.

¹⁴⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 210.

¹⁴⁵ ICRC archive document.

¹⁴⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977.

¹⁴⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977.

156. Article 13(2) AP II provides that “the civilian population as such, as well as individual civilians, shall not be the object of attack”. Article 13 AP II was adopted by consensus.¹⁴⁸

157. Article 3(2) of the 1980 Protocol II to the CCW and Article 3(7) of the 1996 Amended Protocol II to the CCW provide that “it is prohibited in all circumstances to direct [mines, booby-traps and other devices], either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians”.

158. Article 2(1) of the 1980 Protocol III to the CCW states that “it is prohibited in all circumstances to make the civilian population as such [or] individual civilians . . . the object of attack by incendiary weapons”.

159. Article 3 of the 1996 Israel-Lebanon Ceasefire Understanding states that “the two parties commit to ensuring that under no circumstances will civilians be the target of attack”.

160. Pursuant to Article 8(2)(b)(i) and (e)(i) of the 1998 ICC Statute, “intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities” constitutes a war crime in both international and non-international armed conflicts.

161. Article 4(a) of the 2002 Statute of the Special Court for Sierra Leone provides that:

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

- (a) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities.

Other Instruments

162. Article 22 of the 1863 Lieber Code provides that “the principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit”.

163. Article 1 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that “the civilian population of a State shall not form the object of an act of war”.

164. According to Article 6 of the 1956 New Delhi Draft Rules, “attacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited. This prohibition applies both to attacks on individuals and to those directed against groups.”

165. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam affirms that “in the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men, women and children”.

¹⁴⁸ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977.

166. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia accepted to apply the fundamental principle that “the civilian population . . . must not be attacked”.

167. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(2) AP I.

168. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(2) AP I.

169. The 1993 Franco-German Declaration on the War in Bosnia and Herzegovina condemned “the bombardment of the Muslim population” in Goražde and Mostar.

170. Pursuant to Article 20(b)(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “making the civilian population or individual civilians the object of attack” is a war crime.

171. Section 5.1 of the 1999 UN Secretary-General’s Bulletin states that “attacks on civilians . . . are prohibited”.

172. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(i) and (e)(i) of the Regulation, “intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

173. Argentina’s Law of War Manual states that “the prohibition to attack civilians and civilian objects implies that any act of violence, whether in offence or defence, against them is prohibited”.¹⁴⁹ With respect to non-international armed conflicts in particular, the manual states that “the civilian population and individual civilians shall not be the object of attack”.¹⁵⁰ Lastly, the manual states that “attacks against the civilian population [and] against individual civilians” constitute grave breaches.¹⁵¹

174. According to Australia’s Commanders’ Guide, “making the civilian population or individual civilians the object of attack” is an example of acts which constitute “grave breaches or serious war crimes likely to warrant institution of criminal proceedings”.¹⁵²

¹⁴⁹ Argentina, *Law of War Manual* (1989), § 4.03.

¹⁵⁰ Argentina, *Law of War Manual* (1989), § 7.08.

¹⁵¹ Argentina, *Law of War Manual* (1989), § 8.03.

¹⁵² Australia, *Commanders’ Guide* (1994), § 1305(g).

175. Australia's Defence Force Manual states that "attacks directed against the civilian population or civilian objects are prohibited".¹⁵³ The manual also states that "making the civilian population or individual civilians the object of attack" is an example of acts which constitute "grave breaches or serious war crimes likely to warrant institution of criminal proceedings".¹⁵⁴

176. Belgium's Teaching Manual for Soldiers states that civilians must not be attacked.¹⁵⁵

177. Benin's Military Manual states that the prohibition on attacking the civilian population, individual civilians and civilian property as a method of combat must be respected.¹⁵⁶

178. Cameroon's Instructors' Manual requires that the civilian population be protected and respected during military operations.¹⁵⁷

179. Canada's LOAC Manual states that "as a general rule, civilians . . . shall not be attacked".¹⁵⁸ It further states that "making the civilian population or individual civilians the object of attack" is a grave breach of AP I.¹⁵⁹ With respect to non-international armed conflicts in particular, the manual states that "the civilian population and civilians are to be protected against the dangers arising from the conflict. Neither the civilian population nor individual civilians may be made the object of attack."¹⁶⁰

180. Canada's Code of Conduct states that:

Force used during operations must be directed against opposing forces and military objectives. Therefore, civilians not taking part in hostilities must not be targeted. [This rule] not only makes sense morally but also helps to ensure the most efficient use of military resources. In simple terms, "warriors fight warriors" . . . An "opposing force" is any individual or group of individuals who pose a threat to you or your mission . . . In an armed conflict, on the other hand, the enemy forces are opposing forces whether or not they pose an immediate threat.¹⁶¹

181. Colombia's Circular on Fundamental Rules of IHL states that "neither the civilian population as such nor individual civilians may be made the object of attack".¹⁶²

182. Colombia's Basic Military Manual provides that "the civilian population is not a military objective".¹⁶³

¹⁵³ Australia, *Defence Force Manual* (1994), § 503; see also *Commanders' Guide* (1994), § 405.

¹⁵⁴ Australia, *Defence Force Manual* (1994), § 1315(g).

¹⁵⁵ Belgium, *Teaching Manual for Soldiers* (undated), p. 7, see also pp. 10, 14 and 41.

¹⁵⁶ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹⁵⁷ Cameroon, *Instructors' Manual* (1992), pp. 150–151.

¹⁵⁸ Canada, *LOAC Manual* (1999), p. 4-4, § 32, see also p. 7-5, § 46 (air to land operations).

¹⁵⁹ Canada, *LOAC Manual* (1999), p. 16-3, § 16(a).

¹⁶⁰ Canada, *LOAC Manual* (1999), p. 17-5, § 37.

¹⁶¹ Canada, *Code of Conduct* (2001), Rule 1, §§ 3 and 5.

¹⁶² Colombia, *Circular on Fundamental Rules of IHL* (1992), § 7.

¹⁶³ Colombia, *Basic Military Manual* (1995), p. 49; see also *Instructors' Manual* (1999), pp. 15–16.

183. Croatia's *Commanders' Manual and Instructions on Basic Rules of IHL* emphasise that attacks on civilians and civilian objects are prohibited.¹⁶⁴

184. According to Croatia's *LOAC Compendium*, "attacks on the civilian population" constitute grave breaches and thus war crimes.¹⁶⁵

185. The *Military Manual of the Dominican Republic* states that non-combatants (a term defined as including civilians) must not be attacked.¹⁶⁶

186. Ecuador's *Naval Manual* states that "civilians and civilian objects may not be made the object of attack".¹⁶⁷ The manual further states that "bombardment for the sole purpose of attacking and terrorising the civilian population" constitutes a war crime.¹⁶⁸

187. El Salvador's *Soldiers' Manual* states that "your honour as a combatant requires that you never attack nor mistreat women, children, the elderly and any person who does not bear arms".¹⁶⁹

188. France's *LOAC Summary Note* states that "civilians may not be attacked".¹⁷⁰ The manual further considers that "attacks against the civilian population or against individual civilians" constitute grave breaches and thus war crimes.¹⁷¹

189. Germany's *Military Manual* states that "the prohibition of indiscriminate warfare implies that the civilian population as such as well as individual civilians shall not be the object of attack and that they shall be spared as far as possible".¹⁷²

190. Germany's *IHL Manual* states that "pursuant to Article 85(3) of Additional Protocol I, attacks against the civilian population constitute serious violations of international law and therefore war crimes".¹⁷³

191. According to Hungary's *Military Manual*, "attacks on the civilian population" constitute grave breaches and thus war crimes.¹⁷⁴

192. Indonesia's *Military Manual* considers that attacks on civilians are prohibited.¹⁷⁵

193. With reference to Israel's *Law of War Booklet*, the *Report on the Practice of Israel* states that "the IDF is extremely conscious of the necessity to differentiate between civilians and legitimate targets. Attacks on civilians are strictly prohibited."¹⁷⁶

¹⁶⁴ Croatia, *Commanders' Manual* (1992), § 10; *Instructions on Basic Rules of IHL* (1993), § 7.

¹⁶⁵ Croatia, *LOAC Compendium* (1991), p. 56.

¹⁶⁶ Dominican Republic, *Military Manual* (1980), p. 3.

¹⁶⁷ Ecuador, *Naval Manual* (1989), § 8.1.2, see also §§ 11.2 and 11.3.

¹⁶⁸ Ecuador, *Naval Manual* (1989), § 6.2.5. ¹⁶⁹ El Salvador, *Soldiers' Manual* (undated), p. 3.

¹⁷⁰ France, *LOAC Summary Note* (1992), § 1.3; see also *LOAC Teaching Note* (2000), p. 4.

¹⁷¹ France, *LOAC Summary Note* (1992), § 3.4.

¹⁷² Germany, *Military Manual* (1992), § 404, see also § 429.

¹⁷³ Germany, *IHL Manual* (1996), § 404; see also *Military Manual* (1992), § 1209.

¹⁷⁴ Hungary, *Military Manual* (1992), p. 90. ¹⁷⁵ Indonesia, *Military Manual* (1982), § 109.

¹⁷⁶ *Report on the Practice of Israel*, 1997, Chapter 1.3, referring to *Law of War Booklet* (1986), Chapter 1.

194. Israel's Manual on the Laws of War states that the principle of distinction "clearly imposes the obligation to refrain from harming civilians insofar as possible".¹⁷⁷

195. Italy's IHL Manual states that "bombardment, the sole purpose of which is to attack the civilian population," is prohibited.¹⁷⁸

196. Italy's LOAC Elementary Rules Manual states that "civilians may not be attacked, unless they participate directly in hostilities".¹⁷⁹

197. Kenya's LOAC Manual states that "civilians are protected from attack under the law of armed conflict. They lose their protection when they take a direct part in hostilities."¹⁸⁰ The manual further states that "it is forbidden to attack the civilian population, individual civilians or civilian objects as a deliberate method of warfare".¹⁸¹

198. South Korea's Military Law Manual states that direct attacks against civilians are contrary to international law.¹⁸²

199. South Korea's Military Regulation 187 provides that "killing non-combatants" is a war crime.¹⁸³

200. Madagascar's Military Manual states that "civilian persons may not be attacked, unless they participate directly in hostilities".¹⁸⁴

201. The Military Manual of the Netherlands states that "neither the civilian population, nor individual civilians may be made the target of an attack".¹⁸⁵ The manual further states that "the carrying out of attacks against the civilian population or individual civilians" constitutes a grave breach according to Article 85(3) AP I.¹⁸⁶ With respect to non-international armed conflicts in particular, the manual states that "the civilian population and individual civilians enjoy general protection against the dangers arising from military operations. They may not be made the object of attack."¹⁸⁷

202. The Military Handbook of the Netherlands states that "it is prohibited to attack civilians".¹⁸⁸

203. New Zealand's Military Manual states that "the civilian population as such, as well as individual civilians, shall not be the object of attack".¹⁸⁹ The manual further states that "making the civilian population or individual civilians the object of attack" constitutes a grave breach. With respect to

¹⁷⁷ Israel, *Manual on the Laws of War* (1998), p. 42.

¹⁷⁸ Italy, *IHL Manual* (1991), Vol. I, § 13.

¹⁷⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 10.

¹⁸⁰ Kenya, *LOAC Manual* (1997), Précis No. 1, p. 10.

¹⁸¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2, § a.

¹⁸² South Korea, *Military Law Manual* (1996), p. 88.

¹⁸³ South Korea, *Military Regulation 187* (1991), Article 4.2.

¹⁸⁴ Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 10.

¹⁸⁵ Netherlands, *Military Manual* (1993), p. IV-1.

¹⁸⁶ Netherlands, *Military Manual* (1993), p. IX-5.

¹⁸⁷ Netherlands, *Military Manual* (1993), p. XI-6.

¹⁸⁸ Netherlands, *Military Handbook* (1995), p. 7-36.

¹⁸⁹ New Zealand, *Military Manual* (1992), § 517(1).

non-international armed conflicts in particular, the manual states that “as in international armed conflict, the civilian population and civilians are to be protected against the dangers arising from the conflict. Neither the civilian population nor individual civilians may be made the object of attack.”¹⁹⁰

204. Nigeria’s Military Manual and Soldiers’ Code of Conduct state that “civilian persons and objects must be spared”.¹⁹¹

205. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that “when the use of armed force is inevitable, strict controls must be exercised to insure that only reasonable force necessary for mission accomplishment shall be taken and shall be directed only against hostile elements, not against civilians or non-combatants”.¹⁹²

206. Russia’s Military Manual states that it is prohibited “to launch attacks against the civilian population or against individual civilians”.¹⁹³

207. South Africa’s LOAC Manual states that “the general rule is that civilians and civilian property may not be the subject, or the sole object, of a military attack”.¹⁹⁴ The manual adds that “making the civilian population or individual civilians the object of attack” constitutes a grave breach.¹⁹⁵

208. Spain’s LOAC Manual prohibits military operations directed against civilians.¹⁹⁶ The manual further states that “intentionally attacking the civilian population or individual civilians” constitutes a grave breach.¹⁹⁷

209. Sweden’s IHL Manual states that “a distinction shall always be made between persons participating in hostilities and who are thereby legitimate objectives, and members of the civilian population, who may not constitute objectives in warfare”.¹⁹⁸

210. Switzerland’s Basic Military Manual considers that “the [civilian] population as well as individual civilians must not be attacked”.¹⁹⁹ The manual further states that “attacks against the civilian population or against individual civilians” constitute grave breaches of the Geneva Conventions and AP I.²⁰⁰

211. Togo’s Military Manual requires that the prohibition of attacks on the civilian population, individual civilians and civilian property as a deliberate method of combat be respected.²⁰¹

212. According to the UK Military Manual, “it is a generally recognised rule of international law that civilians must not be made the object of attack directed exclusively against them”.²⁰²

¹⁹⁰ New Zealand, *Military Manual* (1992), § 1819.

¹⁹¹ Nigeria, *Military Manual* (1994), p. 39, § 5(c); *Soldiers’ Code of Conduct* (undated), § 3.

¹⁹² Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a)(2).

¹⁹³ Russia, *Military Manual* (1990), § 8(f). ¹⁹⁴ South Africa, *LOAC Manual* (1996), § 28(a).

¹⁹⁵ South Africa, *LOAC Manual* (1996), § 37(a).

¹⁹⁶ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1), see also § 5.2.a.(2).

¹⁹⁷ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

¹⁹⁸ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 40.

¹⁹⁹ Switzerland, *Basic Military Manual* (1987), Article 25(2), see also Article 27(1).

²⁰⁰ Switzerland, *Basic Military Manual* (1987), Article 192(1)(c) (grave breaches of the Geneva Conventions) and Article 193(1)(a) (grave breaches of AP I).

²⁰¹ Togo, *Military Manual* (1995), Fascicule III, p. 12.

²⁰² UK, *Military Manual* (1958), §§ 13 and 88.

213. The UK LOAC Manual states that “civilians are protected from attack under the law of armed conflict”.²⁰³

214. The US Air Force Pamphlet states that the “civilian population as such, as well as individual civilians, shall not be made the object of attack”.²⁰⁴ It adds that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . (4) Aerial bombardment for the deliberate purpose of killing protected civilians”.²⁰⁵

215. The US Naval Handbook states that “civilians and civilian objects may not be made the object of attack”.²⁰⁶ The Handbook also states that carrying out a “bombardment, the sole purpose of which is to attack and terrorize the civilian population” is an example of a war crime.²⁰⁷

216. The YPA Military Manual of the SFRY (FRY) states that “the civilian population may not be the direct object of military operations”.²⁰⁸

National Legislation

217. Argentina’s Draft Code of Military Justice punishes any soldier who “makes the civilian population the object of attack” or who orders such attacks.²⁰⁹

218. Under Armenia’s Penal Code, launching, during an armed conflict, an “attack on the civilian population or on individual civilians” constitutes a crime against the peace and security of mankind.²¹⁰

219. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence”.²¹¹

220. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “attacking civilians” in international and non-international armed conflicts.²¹²

221. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in international and non-international armed conflicts, attacks against civilians are prohibited.²¹³

222. Azerbaijan’s Criminal Code provides that “directing attacks against the civilian population or against individual civilians who do not take part in

²⁰³ UK, *LOAC Manual* (1981), Section 3, p. 10, § 9, see also Section 4, p. 14, § 5(a).

²⁰⁴ US, *Air Force Pamphlet* (1976), § 5-3(a)(1)(a).

²⁰⁵ US, *Air Force Pamphlet* (1976), § 15-3(c)(4).

²⁰⁶ US, *Naval Handbook* (1995), § 8.1.2, see also §§ 11.2 and 11.3.

²⁰⁷ US, *Naval Handbook* (1995), § 6.2.5.

²⁰⁸ SFRY (FRY), *YPA Military Manual* (1988), § 67(1); see also § 53.

²⁰⁹ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(1) in the *Code of Military Justice as amended* (1951).

²¹⁰ Armenia, *Penal Code* (2003), Article 390.3(1).

²¹¹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

²¹² Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.35 and 268.77.

²¹³ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.

hostilities" constitutes a war crime in international and non-international armed conflicts.²¹⁴

223. The Criminal Code of Belarus provides that it is a war crime to "direct attacks against the civilian population or against individual civilians".²¹⁵

224. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "making the civilian population or individual civilians the object of attack" constitutes a crime under international law.²¹⁶

225. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to commit or order the commission of "an attack on a civilian population . . . [or] individual civilians".²¹⁷ The Criminal Code of the Republika Srpska contains the same provision.²¹⁸

226. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "intentionally directing attacks against the civilian population as such or against individual civilians not taking a direct part in hostilities" constitutes a war crime in both international and non-international armed conflicts.²¹⁹

227. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".²²⁰

228. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.²²¹

229. China's Criminal Code as amended provides for the punishment of anyone who during war "cruelly injures innocent residents in areas of military action".²²²

230. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, carries out or orders the carrying out of . . . attacks against the civilian population".²²³

231. The DRC Code of Military Justice as amended imposes a criminal sanction on "every soldier who is guilty of committing acts of violence . . . against the civilian population in time of war".²²⁴

²¹⁴ Azerbaijan, *Criminal Code* (1999), Article 116(10).

²¹⁵ Belarus, *Criminal Code* (1999), Article 136(10).

²¹⁶ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(11).

²¹⁷ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

²¹⁸ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

²¹⁹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(a) and (D)(a).

²²⁰ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

²²¹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²²² China, *Criminal Code as amended* (1997), Article 446.

²²³ Colombia, *Penal Code* (2000), Article 144.

²²⁴ DRC, *Code of Military Justice as amended* (1972), Article 472.

232. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.²²⁵

233. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]"²²⁶

234. Under Croatia's Criminal Code, it is a war crime to commit or order the commission of "an attack against the civilian population . . . [or] individual civilians"²²⁷

235. Cuba's Military Criminal Code punishes "anyone who, in areas of military operations, commits violence against the [civilian] population"²²⁸

236. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach"²²⁹

237. The Criminal Code as amended of the Czech Republic punishes a commander who in a military operation intentionally "causes harm to the life, health or property of civilians or the civilian population"²³⁰

238. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for "anyone who, during an international or non-international armed conflict, attacks protected persons". Protected persons are defined as including civilians and the civilian population.²³¹

239. Under Estonia's Penal Code, "attacking civilians in war zones" is a war crime.²³²

240. Under Georgia's Criminal Code, "making the civilian population or individual civilians the object of an attack" in an international or a non-international armed conflict is a crime.²³³

241. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "directs an attack by military means against the civilian population as such or against individual civilians not taking a direct part in hostilities"²³⁴

242. Under Hungary's Criminal Code as amended, a military commander who "pursues a war operation which causes serious damage to the life [and]

²²⁵ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

²²⁶ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

²²⁷ Croatia, *Criminal Code* (1997), Article 158(1).

²²⁸ Cuba, *Military Criminal Code* (1979), Article 44(1).

²²⁹ Cyprus, *AP I Act* (1979), Section 4(1).

²³⁰ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(a).

²³¹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a personas protegidas".

²³² Estonia, *Penal Code* (2001), § 95. ²³³ Georgia, *Criminal Code* (1999), Article 411(1)(a).

²³⁴ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(1).

health...of the civilian population" is guilty, upon conviction, of a war crime.²³⁵

243. Indonesia's Military Penal Code provides for the punishment of military personnel who are found guilty of having committed attacks against civilians.²³⁶

244. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.²³⁷ In addition, any "minor breach" of AP I, including violations of Article 51(2) AP I, as well as any "contravention" of AP II, including violations of Article 13(2) AP II, are also punishable offences.²³⁸

245. Italy's Law of War Decree as amended states that "bombardment, the sole purpose of which is to attack the civilian population," is prohibited.²³⁹

246. Under Jordan's Draft Military Criminal Code, "attacks directed against the civilian population or against civilians" in time of armed conflict are war crimes.²⁴⁰

247. Under the Draft Amendments to the Code of Military Justice of Lebanon, "attacks directed against the civilian population or against civilians" constitute war crimes.²⁴¹

248. Under Lithuania's Criminal Code as amended, "an attack, prohibited under international humanitarian law, against civilians" is a war crime.²⁴²

249. Under Mali's Penal Code, "intentionally directing attacks against the civilian population in general or against individual civilians not taking a direct part in hostilities" constitutes a war crime in international armed conflicts.²⁴³

250. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit "the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . making the civilian population or individual citizens the object of attack".²⁴⁴ Likewise, "intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities" is also a crime, whether committed in an international or non-international armed conflict.²⁴⁵

251. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures

²³⁵ Hungary, *Criminal Code as amended* (1978), Section 160(a), see also Section 158 (committing violence in an operational or occupied area against a civilian person).

²³⁶ Indonesia, *Military Penal Code* (1947), Article 103.

²³⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

²³⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²³⁹ Italy, *Law of War Decree as amended* (1938), Article 42.

²⁴⁰ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(9).

²⁴¹ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(9).

²⁴² Lithuania, *Criminal Code as amended* (1961), Article 337.

²⁴³ Mali, *Penal Code* (2001), Article 31(i)(1).

²⁴⁴ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(i).

²⁴⁵ Netherlands, *International Crimes Act* (2003), Articles 5(5)(m) and 6(3)(a).

the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".²⁴⁶

252. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(i) and (e)(i) of the 1998 ICC Statute.²⁴⁷

253. Nicaragua's Draft Penal Code punishes "anyone who, during an international or internal armed conflict, attacks protected persons". Protected persons are defined as including the civilian population and individual civilians.²⁴⁸

254. According to Niger's Penal Code as amended, "directing an attack against the civilian population or against individual civilians" protected under the 1949 Geneva Conventions and their Additional Protocols of 1977 is a war crime.²⁴⁹

255. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁵⁰

256. Slovakia's Criminal Code as amended punishes a commander who in a military operation intentionally "causes harm to the life, health or property of civilians or the civilian population".²⁵¹

257. Under Slovenia's Penal Code, it is a war crime to commit or order the commission of "an attack on the civilian population . . . [or] on individual civilians".²⁵²

258. Spain's Royal Ordinance for the Armed Forces emphasises the obligation to pay due attention to the protection of the civilian population.²⁵³

259. Spain's Penal Code punishes "anyone who, during an armed conflict, . . . makes the civilian population the object of attack".²⁵⁴

260. Sweden's Penal Code as amended provides that "attacks on civilians" constitute a crime against international law.²⁵⁵

261. Tajikistan's Criminal Code punishes the act of "making the civilian population or individual civilians the object of attack" in an international or internal armed conflict.²⁵⁶

262. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(i) and (e)(i) of the 1998 ICC Statute.²⁵⁷

²⁴⁶ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

²⁴⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²⁴⁸ Nicaragua, *Draft Penal Code* (1999), Article 449.

²⁴⁹ Niger, *Penal Code as amended* (1961), Article 208.3(11).

²⁵⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁵¹ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(a).

²⁵² Slovenia, *Penal Code* (1994), Article 374(1).

²⁵³ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 137.

²⁵⁴ Spain, *Penal Code* (1995), Article 611(1).

²⁵⁵ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

²⁵⁶ Tajikistan, *Criminal Code* (1998), Article 403(1).

²⁵⁷ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

263. Ukraine's Criminal Code provides that "violence... committed against the civilian population in an area of military action under the pretext of military necessity" is a war crime.²⁵⁸

264. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of... [AP I]"²⁵⁹

265. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(i) and (e)(i) of the 1998 ICC Statute.²⁶⁰

266. Vietnam's Penal Code punishes "anyone who commits acts of violence against the population".²⁶¹

267. Under Yemen's Military Criminal Code, "attacks against the civilian population" are war crimes.²⁶²

268. Under the Penal Code as amended of the SFRY (FRY), it is a war crime to commit or order the commission of "an attack on the civilian population... [or] individual civilians".²⁶³

269. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of... [AP I]"²⁶⁴

National Case-law

270. In the *RA. R. case* in 1997, the District Court of Split in Croatia sentenced 39 people, both soldiers and commanders, to prison terms ranging from 5 to 20 years on charges which included attacks on civilians.²⁶⁵

271. In the *Kassem case* in 1969, the Israeli Military Court at Ramallah stated that "immunity of non-combatants from direct attack is one of the basic rules of the international law of war".²⁶⁶

Other National Practice

272. In 1996, during a debate in the UN General Assembly following the shelling of the UN compound at Qana, Australia stated that all attacks against civilians were totally unacceptable and contrary to the norms of international law.²⁶⁷

²⁵⁸ Ukraine, *Criminal Code* (2001), Article 433(1).

²⁵⁹ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

²⁶⁰ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²⁶¹ Vietnam, *Penal Code* (1990), Article 273.

²⁶² Yemen, *Military Criminal Code* (1998), Article 21(6).

²⁶³ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

²⁶⁴ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

²⁶⁵ Croatia, District Court of Split, *RA. R. case*, Judgement, 26 May 1997.

²⁶⁶ Israel, Military Court at Ramallah, *Kassem case*, Judgement, 13 April 1969.

²⁶⁷ Australia, Statement before the UN General Assembly, UN Doc. A/50/PV.116, 25 April 1996, p. 6.

273. In 1993, the Ministry of the Interior of Azerbaijan ordered that troops “in zones of combat, during military operations . . . must not shoot at children, women and elderly without defence”.²⁶⁸

274. In 1969, during a debate in the UN General Assembly, Belgium referred to the conflict in Nigeria as non-international and, in this context, referred to “the reprobation and prohibition of everything leading to total war where civilian, non-combatant inhabitants, who often have nothing whatever to do with the conflict, become the victims of war through . . . being the victims of attacks”.²⁶⁹

275. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that “Article 51 [AP I] embodies the first statement in treaty law of the customary law principle of civilian immunity [from attack], whether against individual civilians or against the civilian population as a whole”.²⁷⁰

276. The Report on the Practice of Bosnia and Herzegovina provides the following examples of alleged violations of the prohibition of attacks on civilians which were denounced by the authorities: the artillery shelling in the centre of Srebrenica, which resulted in civilian casualties;²⁷¹ the shelling of Gorazde;²⁷² the attack on the village of Pripecaj, in which several civilians were killed or wounded;²⁷³ and the attacks by Yugoslav aircraft in the Tuzla region, in which many residential facilities were destroyed and several civilians killed or wounded.²⁷⁴

277. The Report on the Practice of Botswana states that Article 51 AP I outlaws all attacks against civilians.²⁷⁵ In addition, on the basis of an interview with a retired army general, the report notes that Botswana’s military personnel would comply with the provisions of Article 13 AP II if an internal armed conflict arose.²⁷⁶

²⁶⁸ Azerbaijan, Ministry of the Interior, Command of the Troops of the Interior, Order No. 42, Baku, 9 January 1993, § 4.

²⁶⁹ Belgium, Statement before the UN General Assembly, UN Doc. A/PV.1765, 25 September 1969, §§ 130–133.

²⁷⁰ Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096-1, 9 January 1985, p. 10.

²⁷¹ Bosnia and Herzegovina, Appeal of the War Presidency of Srebrenica Municipality, No. 180/93, 25 January 1993, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.3.

²⁷² Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Letter of protest to UNPROFOR, Number 0141/21-219, 29 March 1994, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.3.

²⁷³ Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Letter of protest to UNPROFOR, Number 01-1/21-230, 30 March 1994, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.3.

²⁷⁴ Bosnia and Herzegovina, Ministry of Defence, Letter to the Headquarters of the Yugoslav Army in Belgrade, Number 02/333-232, 1 June 1992, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.3.

²⁷⁵ Report on the Practice of Botswana, 1998, Chapter 1.4.

²⁷⁶ Report on the Practice of Botswana, 1998, Interview with a retired army general, Answers to additional questions on Chapter 1.4.

278. On the basis of Chile's Code of Military Justice and in the absence of any contrary practice, the Report on the Practice of Chile states that it is Chile's *opinio juris* that the prohibition of attacks on the civilian population is an integral part of customary international law.²⁷⁷

279. During the Korean War, China confirmed that it was against the bombing of Korean cities and the civilian population by US air forces. China supported North Korea's solemn protest to the UN Security Council, and requested that the Security Council take immediate measures to stop the "atrocities" committed by the US armed forces, which were "violating international law and against normal standards of human ethics".²⁷⁸

280. On the basis of an opinion of the First Deputy Attorney-General in a case before the Council of State in 1994, the Report on the Practice of Colombia defines direct attacks against civilians as any operation that corresponds to one of the following three situations: a) it does not follow plans and strategies that respect the law of nations; b) the necessary staff and resources to save the lives of the victims are lacking; c) the attacks do not cease once the adverse party has been neutralised.²⁷⁹

281. In 1992, in a letter to the President of the UN Security Council, Croatia denounced direct attacks against the civilian population and civilian facilities carried out by "Serbs from Bosnia and Herzegovina and... from the UN Protected Area territories in Croatia". Croatia considered that "the only aim of such an aggression is the destruction of civilian population and destruction of civilian facilities", adding that "such acts are contrary to the provisions of Articles 51 and 52 of Additional Protocol I".²⁸⁰

282. The Report on the Practice of Croatia states that it is Croatia's *opinio juris* that the duty not to attack civilians is part of customary international law.²⁸¹

283. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt asserted that the use of nuclear weapons would violate basic principles of the international law of armed conflict, including "the prohibition to attack civilians".²⁸²

284. In 1983, in reply to a question in parliament, the French Minister of Foreign Affairs declared that the bombardment of civilian populations in Afghanistan was "just one of the cruel aspects of the war".²⁸³

285. In 1989, in reply to a question in parliament, the French Prime Minister stated that the civilian population had been the target of repeated bombardment

²⁷⁷ Report on the Practice of Chile, 1997, Chapter 1.4, referring to *Code of Military Justice* (1925), Article 262.

²⁷⁸ China, Telegraph of the Minister of Foreign Affairs to the UN, *Documents on Foreign Affairs of the People's Republic of China*, 1950, Vol. 1, p. 134.

²⁷⁹ Report on the Practice of Colombia, 1998, Chapter 1.4, referring to Council of State, *Case No. 9276*, Opinion of the First Deputy Attorney-General, 19 August 1994.

²⁸⁰ Croatia, Letter dated 24 August 1992 to the President of the UN Security Council, UN Doc. S/24481, 25 August 1992, p. 3.

²⁸¹ Report on the Practice of Croatia, 1997, Chapter 1.1.

²⁸² Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 35(B)(1).

²⁸³ France, Reply by the Minister of Foreign Affairs to a question in parliament regarding Afghanistan, 25 July 1983, *Politique étrangère de la France*, July 1983, p. 72.

and made a solemn appeal to Syria, General Aoun and Doctor Hoss to “stop the deliberate bombardment of the civilian population”.²⁸⁴

286. In a communiqué regarding Rwanda issued in 1994, the French Ministry of Foreign Affairs condemned “the bombardments against civilian populations who have fled to Goma in Zaire . . . These attacks on the security of populations are unacceptable.”²⁸⁵

287. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “neither the civilian population as such nor individual civilians . . . shall be made the object of attack”.²⁸⁶

288. In a communiqué issued in 1995, the French Minister of Foreign Affairs expressed his distress at “the bombardment of the centre of Sarajevo, which once again had caused numerous casualties among the civilian population of the Bosnian capital”. He further stated that “this barbarous act calls for the most severe condemnation”.²⁸⁷

289. In 1999, in reply to a question in parliament, a French Minister stated that:

We are all under the shock of the immense emotion caused by the massacre of 45 civilians in Racak, on 16 January, by the Serbian police. These atrocities have been unanimously condemned by the international community. France has expressed its revolt and distaste, the Prime Minister has denounced this “barbarous act”.²⁸⁸

290. In 1987, all parties in the German parliament condemned the Soviet “attacks against the civilian population, in particular against women and children” in Afghanistan.²⁸⁹

291. In an explanatory memorandum submitted to the German parliament in 1990 in the context of the ratification procedure of the Additional Protocols, the German government stated, with reference to Article 51(2) AP I, that the prohibition of direct attacks on individual civilians or the civilian population was an integral part of customary international law.²⁹⁰

292. In 1991, in reply to a question in parliament, the German Minister of Foreign Affairs condemned “the continued military engagements of Turkish

²⁸⁴ France, Reply by Prime Minister Michel Rocard to a question in parliament, 19 April 1989, *Politique étrangère de la France*, April 1989, p. 72.

²⁸⁵ France, Communiqué of the Ministry of Foreign Affairs regarding Rwanda, 17 July 1994, *Politique étrangère de la France*, July 1994, p. 101.

²⁸⁶ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 66.

²⁸⁷ France, Communiqué by the Minister of Foreign Affairs, Hervé de Charette, 28 August 1995, *Politique étrangère de la France*, August 1995, p. 169.

²⁸⁸ France, Reply by Pierre Moscovici, Ministre Délégué for European Affairs, to a question in parliament, 19 January 1999, *Politique étrangère de la France*, January 1999, p. 82.

²⁸⁹ Germany, Lower House of Parliament, Proposal by the CDU/CSU, SPD, FDP and the Greens, 8 Jahre Krieg in Afghanistan, *BT-Drucksache* 11/1500, 9 December 1987, p. 1.

²⁹⁰ Germany, Lower House of Parliament, Explanatory memorandum on the Additional Protocols to the Geneva Conventions, *BT-Drucksache* 11/6770, 22 March 1990, p. 112.

troops against the civilian population in Kurdish areas as a serious violation of international law".²⁹¹

293. In 1991, the German Chancellor described the missile attack carried out by Iraq against populated areas as a "brutal act of terror".²⁹² A few days later, the German President denounced Iraq's continued attacks against the civilian population of Israel as "particularly abhorrent".²⁹³

294. In 1995, the German Minister of Foreign Affairs denounced the attack on the marketplace in Sarajevo in Bosnia and Herzegovina and stated that "the authors of this barbaric attack must be brought to account for their actions with all due consequences".²⁹⁴

295. In 1995, the German Minister of Foreign Affairs stated that the restoration of Russian territorial integrity in Chechnya did not justify the conduct of the Russian army in Grozny, namely "the bombardment of civilians and the killing of so many innocent persons".²⁹⁵

296. In 1977, during a debate in the Sixth Committee of the UN General Assembly, Iran noted that until the adoption of the two Additional Protocols, the prohibition on inflicting violence on civilians was not explicitly established. However, it concluded that the protection of non-combatants in armed conflicts was not a new phenomenon: "as early as 1621, the Code of Articles of King Gustavus Adolphus of Sweden had included principles on that subject which had since developed into a customary prohibition of violence against non-combatants".²⁹⁶

297. In 1996, during a debate in the UN Security Council on the situation in Lebanon, the representative of Iran condemned what he called the "cowardly, though savage, attacks against defenceless civilians".²⁹⁷

298. The Report on the Practice of Iraq refers to several military communiqués issued by the General Command of the Iraqi armed forces during the Iran-Iraq War, one of which states that "our Armed Forces have strictly adhered to the decision of the leadership by not shelling the purely civilian centers, and in accordance with the agreement made through the UN Secretary-General".²⁹⁸

²⁹¹ Germany, Reply by the Government to a question in the Lower House of Parliament, *Mißachtung der Menschenrechte in der Türkei*, *BT-Drucksache* 12/1918, 14 January 1992, p. 3, see also p. 5; see also Reply by the Government to a question in the Lower House of Parliament, *Demokratisierungsprozeß in Irakisch-Kurdistan*, *BT-Drucksache* 12/3028, 13 July 1992, p. 2.

²⁹² Germany, Statement by the Chancellor, Helmut Kohl, 23 January 1991, *Bulletin*, No. 7, Presse- und Informationsamt der Bundesregierung, Bonn, 24 January 1991, p. 37.

²⁹³ Germany, Statement by the President, Richard von Weizsäcker, 29 January 1991, *Bulletin*, No. 10, Presse- und Informationsamt der Bundesregierung, Bonn, 30 January 1991, p. 57.

²⁹⁴ Michael Dynes and Ian Brodie, Sarajevo attack. Germany leads the condemnation of market massacre, *Times Newspapers*, 29 August 1995.

²⁹⁵ Germany, Statement by the Minister of Foreign Affairs, Klaus Kinkel, 19 January 1995, *Bulletin*, No. 5, Presse- und Informationsamt der Bundesregierung, Bonn, 23 January 1995, p. 38.

²⁹⁶ Iran, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/32/SR.18, 14 October 1977, § 20.

²⁹⁷ Iran, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 25.

²⁹⁸ Report on the Practice of Iraq, 1998, Chapter 1.8, referring to Military Communiqué No. 1632, 27 October 1983, Military Communiqué No. 1502, 20 June 1984, Military Communiqué No. 1705, 18 January 1985 and Military Communiqué No. 1723, 26 January 1985.

299. In 1996, during a debate in the UN Security Council on the situation in Lebanon, Jordan considered that, while the use of force and violence as a means to solve political problems should always be condemned, this proved particularly true when force was employed against innocent civilians and civilian installations.²⁹⁹

300. The Report on the Practice of Jordan states that there are no reported incidents of Jordanian troops resorting to direct attacks on civilians. It refers to Islam's prohibition of direct attacks on civilians, that is, in the event of the use of force and in case of armed conflicts, it is not permissible to kill non-combatants, such as old men, women and children.³⁰⁰

301. In 1996, in a statement concerning military operations in Lebanon, Kazakhstan condemned the "use of armed force with a view to killing the civilian population and destroying civilian facilities".³⁰¹

302. In 1996, during a debate in the UN Security Council on the situation in Lebanon, South Korea called upon both parties to respect immediately the non-combatant status of civilians.³⁰²

303. The Report on the Practice of South Korea states that it is South Korea's *opinio juris* that the prohibition of direct attacks against civilians is part of customary international law.³⁰³

304. The Report on the Practice of Lebanon refers to a 1996 report by the Lebanese Ministry of Justice which stated that Israel had committed serious violations of the Geneva Conventions by "engaging civilians".³⁰⁴

305. The Report on the Practice of Lebanon refers to a statement by the Director General of the Ministry of Justice in 1997 in which he stated that he considered the bombardment of civilians a war crime.³⁰⁵

306. On the basis of interviews with members of the Malaysian armed forces and the Ministry of Home Affairs, the Report on the Practice of Malaysia notes that during the communist insurgency, the security forces were barred from directly attacking civilians.³⁰⁶

307. At the CDDH, Mexico stated that it believed draft Article 46 AP I (now Article 51) to be so essential that it "cannot be the subject of any reservations

²⁹⁹ Jordan, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 27.

³⁰⁰ Report on the Practice of Jordan, 1997, Chapter 1.4 and Answers to additional questions on Chapter 1.1.

³⁰¹ Kazakhstan, Statement by Kazakhstan, annexed to Letter dated 19 April 1996 to the UN Secretary-General, UN Doc. S/1996/308, 19 April 1996.

³⁰² South Korea, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 11.

³⁰³ Report on the Practice of South Korea, 1997, Chapter 1.4.

³⁰⁴ Report on the Practice of Lebanon, 1998, Chapter 1.4, referring to Report by the Lebanese Ministry of Justice on possibilities for legal action against Israel, 12 April 1996.

³⁰⁵ Report on the Practice of Lebanon, 1998, Chapter 6.5, referring to Statement by the General Director of the Lebanese Ministry of Justice, *al Raii al ordonia*, 23 December 1997.

³⁰⁶ Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces and Ministry of Home Affairs, Chapter 1.4.

whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis".³⁰⁷

308. In 1994, the Minister of Foreign Affairs of the Netherlands described the attack on the marketplace in Sarajevo as a "horrific act" and stated that the civilian population in the safe areas of the former Yugoslavia should be granted more protection against attacks that served no military purpose and which could only be qualified as terror tactics. The Minister of Defence also vigorously condemned the attacks on the safe areas in Bosnia and Herzegovina as a very serious violation of fundamental human rights.³⁰⁸

309. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that "the general principles of international humanitarian law in armed conflict also apply to the use of nuclear weapons . . . in particular . . . the prohibition on making the civilian population as such the target of an attack".³⁰⁹

310. The Report on the Practice of Nigeria confirms the existence of a norm of a customary nature prohibiting direct attacks against civilians and cites Nigeria's Operational Code of Conduct in this respect. The report also states that, according to Nigeria's *opinio juris*, the prohibition of direct attacks against civilians is part of customary international law.³¹⁰

311. In 1996, during a debate in the UN Security Council on the situation in Lebanon, Pakistan condemned "the targeting and killing of civilian populations".³¹¹

312. The Report on the Practice of Pakistan states that it is Pakistan's *opinio juris* that direct attacks on civilians are prohibited.³¹² The report adds that the Pakistani government has regularly denounced attacks against civilians in conflict situations and cites as an example the strong condemnation of the Israeli attacks on the camps of Sabra and Shatila in Lebanon in 1982.³¹³

313. The Report on the Practice of Rwanda states that attacks against civilians are prohibited according to the practice and the *opinio juris* of Rwanda and considers that this prohibition is a norm of customary international law binding on all States.³¹⁴

³⁰⁷ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

³⁰⁸ Netherlands, Letter from the Minister of Foreign Affairs, 11 February 1994, *Handelingen der Tweede Kamer*, 1993–1994, 22.181, No. 72; Letter from the Minister of Defence, 27 July 1995, *Handelingen der Tweede Kamer*, 1994–1995, 22.181, No. 109.

³⁰⁹ Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 32; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 6 June 1994, § 39.

³¹⁰ Report on the Practice of Nigeria, 1997, Chapter 1.4.

³¹¹ Pakistan, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 29.

³¹² Report on the Practice of Pakistan, 1998, Chapter 1.4.

³¹³ Report on the Practice of Pakistan, 1998, Chapter 1.4, referring to Statement by the Pakistani government, 19 September 1982.

³¹⁴ Report on the Practice of Rwanda, 1997, Chapter 1.4.

314. In 1992, in a note verbale addressed to the UN Secretary-General, Slovenia expressed its readiness to provide information concerning violations of IHL committed by members of the Yugoslav army during the 10-day conflict with Slovenia, including “violences concerning killings and injuries of civilians”.³¹⁵

315. In 1988, Spain protested against direct attacks on the civilian population during the Iran–Iraq War.³¹⁶ The Report on the Practice of Spain considers that, in general,

the Spanish Government has tended to condemn all attacks directed against the civilian population... whether the armed conflict was internal or international. This was its position in the civil war in Liberia, the Gulf War, the conflict in the former Yugoslavia, the civil war in Sudan, the war in Chechnya, and the Turkish attacks against the Kurds in northern Iraq.³¹⁷

316. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that “under the principle of distinction, an attack on a civilian population or civilian property is prohibited”.³¹⁸

317. In 1996, during a debate in the UN Security Council regarding the conflict in Burundi, Uganda condemned “in the strongest terms the killing of innocent and unarmed civilians” and demanded that “both parties to the conflict halt immediately the killings and massacres of innocent civilians”.³¹⁹

318. In 1938, during a debate in the House of Commons, the UK Prime Minister listed among rules of international law applicable to warfare on land, at sea and from the air the rule that “it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations”.³²⁰

319. At the CDDH, the UK voted in favour of draft Article 46 AP I (now Article 51), describing its first three paragraphs as containing a “valuable reaffirmation of existing customary rules of international law designed to protect civilians”.³²¹

320. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that military operations must not be directed against civilians.³²²

³¹⁵ Slovenia, Note verbale dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24789, 9 November 1992, p. 2.

³¹⁶ Spain, Comunicado del Gobierno expresando su preocupación por el conflicto bélico entre Irán e Irak, 15 March 1988, *Actividades, Textos y Documentos de la Política Exterior Española*, Ministerio de Asuntos Exteriores, Oficina de Información Diplomática, Madrid, 1988, p. 669.

³¹⁷ Report on the Practice of Spain, 1998, Chapter 1.4.

³¹⁸ Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 2 June 1994, p. 3.

³¹⁹ Uganda, Statement before the UN Security Council, UN Doc. S/PV.3692, 28 August 1996, p. 13.

³²⁰ UK, House of Commons, Statement by the Prime Minister, Sir Neville Chamberlain, 21 June 1938, *Hansard*, Vol. 337, col. 937.

³²¹ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 119.

³²² UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 1.3.

321. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that “it is a well established principle of customary international law that the civilian population and individual civilians are not a legitimate target in their own right”.³²³

322. On 1 September 1939, the US President wrote to the governments of France, Germany, Italy, Poland and UK asking “every government which may be engaged in hostilities publicly to affirm its determination that its armed forces shall in no event, and under no circumstances, undertake the bombardment from the air of civilian populations”.³²⁴

323. In 1972, the General Counsel of the US Department of Defense considered that the prohibition on launching attacks against the civilian population was a general principle of the LOAC which was declaratory of existing customary international law.³²⁵

324. In 1974, at the Lucerne Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, the head of the US delegation stated that “the law of war also prohibits attacks on civilians and civilian objects as such. This unchallenged principle is that civilians (and persons *hors de combat*) whether in occupied territory or elsewhere must not be made the object of attack.”³²⁶

325. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that “the civilian population, as such, as well as individual civilians, should not be the object of attack”.³²⁷ In another such diplomatic note, the US reiterated that “the civilian population, as such, is not the object of attack”.³²⁸

326. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that “over 52,000 coalition air sorties have been carried out since hostilities began on 16 January. These sorties were

³²³ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.67.

³²⁴ US, Letter from Franklin D. Roosevelt to the governments of France, Germany, Italy, Poland and UK, 1 September 1939, reprinted in Eugene M. Emme (ed.), *The Impact of Airpower: National Security and World Politics*, Van Nostrand, Princeton, 1959, p. 68.

³²⁵ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, pp. 122–124.

³²⁶ US, Statement of 25 September 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, p. 713.

³²⁷ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, p. 2.

³²⁸ US, Department of State, Diplomatic Note to Iraq, Washington, 21 January 1991, annexed to Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 4.

not flown against any civilian or religious targets or against the Iraqi civilian population."³²⁹

327. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "as a general principle, the law of war prohibits... the direct, intentional attack of civilians not taking part in hostilities".³³⁰

328. In several reports submitted in 1992 to the UN Security Council pursuant to paragraph 5 of Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described "deliberate attacks on non-combatants" perpetrated by the parties to the conflict.³³¹

329. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that "the law of armed conflict precludes making civilians the object of attack as such".³³²

330. According to the Report on US Practice, "it is the *opinio juris* of the United States that it is prohibited to launch attacks against the civilian population as such".³³³

331. The Report on the Practice of the SFRY (FRY) states that:

There are many examples of direct attacks on civilians... which both parties to the conflict in Croatia in 1991 and 1992 pointed at. The mixed nature of the conflict, being both internal and international, contributed to this as well. Both parties referred to these incidents as violations of international humanitarian law. The fact that the parties did not question this norm [prohibiting attacks against civilians] when speaking about the behaviour of the opposite side is a clear indication of their *opinio juris* and a confirmation that such attacks were considered prohibited.³³⁴

332. In 1974, a State criticised the army of another State for attacks on civilians located outside the zones of military operations.³³⁵

333. In 1992, a State denounced attacks on civilians committed by separatist forces, including acts aimed at displacing the population, such as the burning of homes.³³⁶

³²⁹ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

³³⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 622.

³³¹ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, p. 8; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, p. 19; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Fourth Submission), annexed to Letter dated 7 December 1992 to the UN Secretary-General, UN Doc. S/24918, 8 December 1992, p. 14.

³³² US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 22.

³³³ Report on US Practice, 1997, Chapter 1.4.

³³⁴ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.4, referring to Vesna Bosanac, The Tragedy of the Civilian Population of the Commune of Vukovar during 1991 – A Testimony, in Zvonimir Šeparović (ed.), *Documenta Croatica, Croatian History and Identity and the War against Croatia*, p. 114, and Miodrag Starcević and Nikola Petković (eds.), *Croatia '91 – Violence and Crime against the Law*, pp. 67–69.

³³⁵ ICRC archive document. ³³⁶ ICRC archive document.

334. In 1994, a State blamed the bombing of a civilian area by its forces on bad atmospheric conditions and on the enemy's use of the civilian population as a cover for military objectives.³³⁷

335. In 1996, in a meeting with the ICRC, the head of the armed forces of a State confirmed that specific instructions had been given to soldiers concerning respect for non-combatants.³³⁸

III. Practice of International Organisations and Conferences

United Nations

336. In a resolution adopted in 1985, the UN Security Council called on "all concerned to end acts of violence against the civilian population in Lebanon and, in particular, in and around Palestinian refugee camps".³³⁹

337. In a resolution adopted in 1992, the UN Security Council expressed grave alarm at continuing reports of widespread violations of IHL in the former Yugoslavia and especially in Bosnia and Herzegovina, including reports of "deliberate attacks on non-combatants".³⁴⁰

338. In a resolution adopted in 1992, the UN Security Council expressed grave alarm at continuing reports of widespread violations of IHL in Somalia, including reports of "deliberate attacks on non-combatants".³⁴¹

339. In a resolution adopted in 1993, the UN Security Council stated that it was deeply alarmed by the continued armed attacks and deliberate bombing of innocent civilians by Serb paramilitary units in Bosnia and Herzegovina.³⁴²

340. In a resolution adopted in 1993 on the seizure of the district of Agdam in Azerbaijan, the UN Security Council condemned "all hostile actions in the region, in particular attacks on civilians and bombardments of inhabited areas".³⁴³

341. In a resolution adopted in 1994, the UN Security Council strongly condemned a "massacre" in Hebron in which more than 50 Palestinian civilians died and several hundred others were injured. The Security Council called for measures to be taken to guarantee the safety and protection of Palestinian civilians throughout the occupied territories.³⁴⁴

342. In a resolution adopted in 1994, the UN Security Council stated that it was "appalled at the ... large-scale violence in Rwanda, which has resulted in the death of thousands of innocent civilians, including women and children,"

³³⁷ ICRC archive document. ³³⁸ ICRC archive document.

³³⁹ UN Security Council, Res. 564, 31 May 1985, § 1.

³⁴⁰ UN Security Council, Res. 771, 13 August 1992, preamble.

³⁴¹ UN Security Council, Res. 794, 3 December 1992, preamble.

³⁴² UN Security Council, Res. 819, 16 April 1993, preamble.

³⁴³ UN Security Council, Res. 853, 29 July 1993, § 2.

³⁴⁴ UN Security Council, Res. 904, 18 March 1994, preamble and § 3.

and condemned “the ongoing violence in Rwanda, particularly in Kigali, which endangers the lives and safety of the civilian population”.³⁴⁵

343. In a resolution adopted in 1994, the UN Security Council condemned all attacks directed against the civilian population in Bosnia and Herzegovina.³⁴⁶

344. In a resolution adopted on 17 May 1994, the UN Security Council vigorously condemned the violence that had exploded in Rwanda and in particular the reported killings of numerous civilians.³⁴⁷ On 8 June 1994, the Security Council once again denounced the violence in Rwanda and referred to the systematic murder of thousands of civilians.³⁴⁸ On 22 June 1994, the Security Council expressed its grave concern at the systematic wide-scale killings of civilians in Rwanda and insisted that all parties to the conflict put an end to all massacres of the civilian population in areas under their control.³⁴⁹ On 1 July 1994, the Security Council recalled the statement by its President of 30 April 1994 in which it condemned all breaches of IHL in Rwanda and in particular those perpetrated against the civilian population.³⁵⁰

345. In a resolution adopted in 1994, the UN Security Council specifically condemned, among other violations of IHL, the widespread killings of civilians by the factions in Liberia.³⁵¹

346. In a resolution adopted in 1995, the UN Security Council condemned all attacks against persons in the refugee camps near the Rwandan borders. It referred to these acts as “violations of international humanitarian law” and stated that effective measures had to be taken to bring to justice those responsible for such crimes.³⁵²

347. In a resolution adopted in 1995, the UN Security Council expressed its concern about attacks against civilians in the Gali region of Georgia.³⁵³

348. In a resolution adopted in 1995, the UN Security Council condemned the “increasing attacks on the civilian population by Bosnian Serb forces”.³⁵⁴

349. In a resolution adopted in 1995, the UN Security Council expressed its deep concern at the continuing inter- and intra-factional fighting in parts of Liberia, which had further worsened the plight of the civilian population, and called upon combatants to respect the human rights of the civilian population and to respect IHL.³⁵⁵

³⁴⁵ UN Security Council, Res. 912, 21 April 1994, preamble and § 4.

³⁴⁶ UN Security Council, Res. 913, 22 April 1994, preamble.

³⁴⁷ UN Security Council, Res. 918, 17 May 1994, preamble.

³⁴⁸ UN Security Council, Res. 925, 8 June 1994, preamble.

³⁴⁹ UN Security Council, Res. 929, 22 June 1994, preamble and § 9.

³⁵⁰ UN Security Council, Res. 935, 1 July 1994, preamble.

³⁵¹ UN Security Council, Res. 950, 21 October 1994, § 7.

³⁵² UN Security Council, Res. 978, 27 February 1995, preamble and § 4.

³⁵³ UN Security Council, Res. 993, 12 May 1995, preamble.

³⁵⁴ UN Security Council, Res. 998, 16 June 1995, preamble.

³⁵⁵ UN Security Council, Res. 1001, 30 June 1995, preamble.

350. In a resolution adopted in 1995, the UN Security Council expressed its deep concern at reports of serious violations of IHL and human rights in Croatia and mentioned, *inter alia*, the killings of civilians.³⁵⁶

351. In a resolution adopted in 1996, the UN Security Council condemned the armed attacks against civilians in Liberia and demanded that such hostile acts cease forthwith.³⁵⁷

352. In a resolution adopted in 1996, the UN Security Council condemned in the strongest terms all acts of violence perpetrated against civilians and refugees during the conflict in Burundi.³⁵⁸ The Security Council later requested that the leaders of the parties to the conflict in Burundi ensure basic conditions of security and commit to abstaining from attacking civilians.³⁵⁹

353. In a resolution adopted in 1996, following the shelling of a UNIFIL site in Lebanon, which resulted in heavy losses among civilians, the UN Security Council stressed the need for all concerned to respect fully the rules of IHL regarding the protection of civilians and to respect the safety and security of civilians.³⁶⁰

354. In a resolution adopted in 1996, the UN Security Council expressed its “deep concern about the tragic events . . . which resulted in a high number of deaths and injuries among the Palestinian civilians” and asked that both the security and the “safety and protection” of this population be ensured.³⁶¹

355. In a resolution adopted in 1996, the UN Security Council expressed its deep concern at the intensification of the conflict in Afghanistan, which had caused numerous victims among the civilian population, and emphasised the need to stop a new rise in civilian casualties.³⁶²

356. In a resolution adopted in 1996, the UN Security Council condemned “the terrorist acts and other acts of violence” causing the deaths of civilians in Tajikistan.³⁶³

357. In a resolution adopted in 1998, the UN Security Council condemned “the continuing violence in Rwanda, including the massacre of civilians”.³⁶⁴

358. In two resolutions adopted in 1998, the UN Security Council demanded that UNITA put an immediate end to attacks against the civilian population.³⁶⁵

359. In a resolution adopted in 1998, the UN Security Council condemned “the continued resistance of remnants of the ousted junta and members of the Revolutionary United Front (RUF) to the authority of the legitimate government

³⁵⁶ UN Security Council, Res. 1019, 9 November 1995, preamble and § 1.

³⁵⁷ UN Security Council, Res. 1041, 29 January 1996, § 4.

³⁵⁸ UN Security Council, Res. 1049, 5 March 1996, § 2.

³⁵⁹ UN Security Council, Res. 1072, 30 August 1996, § 5.

³⁶⁰ UN Security Council, Res. 1052, 18 April 1996, preamble and § 4.

³⁶¹ UN Security Council, Res. 1073, 28 September 1996, preamble.

³⁶² UN Security Council, Res. 1076, 22 October 1996, preamble.

³⁶³ UN Security Council, Res. 1089, 13 December 1996, § 4.

³⁶⁴ UN Security Council, Res. 1161, 9 April 1998, preamble.

³⁶⁵ UN Security Council, Res. 1173, 12 June 1998, § 5; Res. 1180, 29 June 1998, § 5.

and the violence they are perpetrating against the civilian population of Sierra Leone".³⁶⁶

360. In a resolution adopted in 1999 on the protection of civilians in armed conflicts, the UN Security Council strongly condemned "the deliberate targeting of civilians in situations of armed conflict" and called on all parties "to put an end to such practices".³⁶⁷

361. In a resolution adopted in 2000 on the protection of civilians in armed conflicts, the UN Security Council reaffirmed "its strong condemnation of the deliberate targeting of civilians or other protected persons in situations of armed conflict" and called upon all parties to put an end to such practices.³⁶⁸

362. In 1992, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council condemned reported attacks by Serb militia against civilians fleeing from the city of Jajce "which constitute grave violations of international humanitarian law" and demanded that "all such attacks cease immediately".³⁶⁹

363. In 1993, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council deplored the "killing of innocent civilians" by Serb paramilitary units and required that all acts of violence directed against civilians cease.³⁷⁰

364. In 1993, in a statement by its President, the UN Security Council voiced its shock and sadness at and strong condemnation of the senseless killing of innocent civilians near Harbel in Liberia.³⁷¹

365. In 1993, in a statement by its President regarding the massacre perpetrated by Croatian soldiers in the village of Stupni Do, the UN Security Council reiterated its unmitigated condemnation of acts of violence against the civilian population.³⁷²

366. On 7 April 1994, in a statement by its President on the situation in Rwanda, the UN Security Council condemned the killing of many civilians as "horrific attacks" and urged "respect for the safety and security of the civilian population and of the foreign communities living in Rwanda".³⁷³

367. On 30 April 1994, in a statement by its President concerning the massacres in Rwanda, the UN Security Council stated that:

The Security Council is appalled at continuing reports of the slaughter of innocent civilians in Kigali and other parts of Rwanda, and reported preparations for further massacres... The Security Council condemns all these breaches of international

³⁶⁶ UN Security Council, Res. 1181, 13 July 1998, § 1.

³⁶⁷ UN Security Council, Res. 1265, 17 September 1999, § 2.

³⁶⁸ UN Security Council, Res. 1296, 19 April 2000, § 2.

³⁶⁹ UN Security Council, Statement by the President, UN Doc. S/24744, 30 October 1992.

³⁷⁰ UN Security Council, Statement by the President, UN Doc. S/25361, 3 March 1993, p. 1.

³⁷¹ UN Security Council, Statement by the President, UN Doc. S/25918, 9 June 1993.

³⁷² UN Security Council, Statement by the President, UN Doc. S/26661, 18 October 1993.

³⁷³ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/16, 7 April 1994, p. 1.

humanitarian law in Rwanda, particularly those perpetrated against the civilian population, and recalls that persons who instigate or participate in such acts are individually responsible.³⁷⁴

368. In 1995, in a statement by its President, the UN Security Council condemned “any shelling of civilian targets” in and around the Republic of Croatia and requested that “no military action be taken against civilians”.³⁷⁵

369. In 1997, in a statement by its President regarding the DRC, the UN Security Council expressed its particular concern at “reports that refugees in the east of the country are being systematically killed” and called for “an immediate end to all violence against refugees in the country”.³⁷⁶

370. In 1997, in a statement by its President on the protection of humanitarian assistance to refugees and others in conflict situations, the UN Security Council expressed its “grave concern at the recent increase in attacks or use of force in conflict situations against refugees and other civilians, in violation of . . . international humanitarian law” and reiterated its “condemnation of such acts”.³⁷⁷

371. In 1997, in a statement by its President following the military coup d'état in Sierra Leone, the UN Security Council strongly condemned “the violence which has been inflicted on both local and expatriate communities”.³⁷⁸ In another statement by its President a few weeks later, the Security Council expressed its deep concern about “the continuing crisis in Sierra Leone and its negative humanitarian consequences on the civilian population including refugees and internally displaced persons and in particular, the atrocities committed against Sierra Leone’s citizens [and] foreign nationals”.³⁷⁹ In a further statement by its President on the same issue, the Security Council condemned “the continuing violence and threats of violence by the junta towards the civilian population [and] foreign nationals” and called for “an end to such acts of violence”.³⁸⁰

372. In 1997, in a statement by its President, the UN Security Council stated that “the Security Council notes with deep concern the reports about mass killings of prisoners of war and civilians in Afghanistan and

³⁷⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/21, 30 April 1994, p. 1.

³⁷⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

³⁷⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.

³⁷⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/34, 19 June 1997, p. 1.

³⁷⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/29, 27 May 1997.

³⁷⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/36, 11 July 1997, p. 1.

³⁸⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/42, 6 August 1997, p. 2.

supports the Secretary-General's intention to continue to investigate fully such reports".³⁸¹

373. In 1998, in a statement by its President on the situation in Sierra Leone, the UN Security Council condemned "as gross violations of international humanitarian law the recent atrocities carried out against the civilian population" and called for "an immediate end to all violence against civilians".³⁸²

374. In 1998, in a statement by its President, the UN Security Council expressed its deep concern at "reports of mass killings of civilians in northern Afghanistan" and demanded that "the Taliban fully respect international humanitarian law and human rights".³⁸³

375. In 1998, in a statement by its President, the UN Security Council condemned "the attacks or use of force in conflict situations against refugees and other civilians, in violation of the relevant rules of international law, including those of international humanitarian law".³⁸⁴

376. In 1999, in a statement by its President, the UN Security Council strongly condemned "the deliberate targeting by combatants of civilians in armed conflict" and demanded that all concerned "put an end to such violations of international humanitarian and human rights law".³⁸⁵

377. In 2001, in a statement by its President on the situation in Burundi, the UN Security Council condemned "the deliberate targeting of the civilian population by the armed groups" and called upon all parties "to abide by international humanitarian law and in particular to refrain from any further attacks or any military action that endangers the civilian population".³⁸⁶

378. In a resolution adopted in 1938 on the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations stated that "the intentional bombing of civilian populations is illegal".³⁸⁷

379. In Resolution 2444 (XXIII), adopted in 1968, the UN General Assembly affirmed Resolution XXVIII of the 20th International Conference of the Red Cross and the basic humanitarian principle applicable in all armed conflicts laid down therein that "it is prohibited to launch attacks against the civilian population as such".³⁸⁸

³⁸¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/55, 16 December 1997, p. 2.

³⁸² UN Security Council, Statement by the President, UN Doc. S/PRST/1998/13, 20 May 1998, p. 1.

³⁸³ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/27, 15 September 1998, p. 1.

³⁸⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/30, 29 September 1998, p. 1.

³⁸⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1999/6, 12 February 1999, p. 2.

³⁸⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/2001/6, 2 March 2001, p. 1.

³⁸⁷ League of Nations, Assembly, Resolution adopted on 30 September 1938, §I(1), *Official Journal*, Special Supplement No. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15–17.

³⁸⁸ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(b).

380. In Resolution 2675 (XXV), adopted in 1970, the UN General Assembly reiterated that “civilian populations as such should not be the object of military operations”.³⁸⁹

381. In Resolution 3318 (XXIX), adopted in 1974, the UN General Assembly issued a declaration on the protection of women and children in emergency and armed conflict which stated that “attacks and bombings on the civilian population, inflicting incalculable suffering, especially on women and children, who are the most vulnerable members of the population, shall be prohibited, and such acts shall be condemned”.³⁹⁰

382. In a resolution adopted in 1994, the UN General Assembly condemned “the use of military force against civilian populations” in Bosnia and Herzegovina.³⁹¹

383. In a resolution adopted in 1996 on the situation of human rights in Sudan, the UN General Assembly called upon the parties to the hostilities “to halt the use of weapons against the civilian population”.³⁹²

384. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly strongly condemned “indiscriminate and widespread attacks on civilians”.³⁹³

385. In three resolutions adopted between 1987 and 1989 concerning the situation of human rights in southern Lebanon, the UN Commission on Human Rights condemned Israel for repeated violations of human rights and mentioned, *inter alia*, bombardments of the civilian population.³⁹⁴

386. In numerous resolutions adopted between 1990 and 1996, the UN Commission on Human Rights asked all parties to the Afghan conflict to implement the relevant norms of IHL found in the Geneva Conventions and the two Additional Protocols and to cease all use of weaponry against the civilian population.³⁹⁵ In another resolution in 1998, the Commission noted with deep concern the reports of mass killings and atrocities committed by combatants against the civilian population. It urged the Afghan parties to respect IHL fully and in particular to protect civilians and to halt the use of weapons against the civilian population.³⁹⁶

387. In three resolutions adopted between 1992 and 1995 concerning the situation of human rights in the territory of the former Yugoslavia, the UN

³⁸⁹ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 4.

³⁹⁰ UN General Assembly, Res. 3318 (XXIX), 14 December 1974, § 1.

³⁹¹ UN General Assembly, Res. 49/196, 23 December 1994, § 7.

³⁹² UN General Assembly, Res. 51/112, 12 December 1996, § 9.

³⁹³ UN General Assembly, Res. 53/164, 9 December 1998, § 8.

³⁹⁴ UN Commission on Human Rights, Res. 1987/54, 11 March 1987, § 1; Res. 1988/66, 10 March 1988, § 1; Res. 1989/65, 8 March 1989, § 1.

³⁹⁵ UN Commission on Human Rights, Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6; Res. 1993/66, 10 March 1993, § 6; Res. 1994/84, 9 March 1994, § 8; Res. 1995/74, 8 March 1995, § 6; Res. 1996/75, 23 April 1996, § 4.

³⁹⁶ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, §§ 2(d) and 5(c).

Commission on Human Rights condemned “the use of military force against civilian populations”.³⁹⁷

388. In a resolution adopted in 1992, the UN Commission on Human Rights declared itself shattered by reports describing the violations of human rights in the former Yugoslavia and particularly in Bosnia and Herzegovina, including “deliberate attacks against non-combatants”.³⁹⁸

389. In a resolution adopted in 1994 concerning the situation of human rights in Bosnia and Herzegovina, the UN Commission on Human Rights condemned the use of force against defenceless civilians.³⁹⁹

390. In two resolutions adopted in 1994 and 1995 concerning the situation of human rights in the former Yugoslavia, the UN Commission on Human Rights denounced “continued deliberate and unlawful attacks and use of military force against civilians and other protected persons by all sides”.⁴⁰⁰

391. In several resolutions adopted between 1993 and 1998 concerning the situation of human rights in Sudan, the UN Commission on Human Rights called upon the parties to the hostilities “to halt the use of weapons . . . against the civilian population”.⁴⁰¹

392. In two resolutions adopted in 1994 and 1995 concerning the situation of human rights in Zaire, the UN Commission on Human Rights noted with indignation the use of force against unarmed civilians by the army and the security services.⁴⁰²

393. In a resolution adopted in 1995 concerning the conflict in Guatemala, the UN Commission on Human Rights asked all parties to enforce the norms of IHL applicable in internal armed conflicts and to avoid all acts which placed the personal security or possessions of the civilian population at risk.⁴⁰³

394. In a resolution adopted in 1996 concerning the situation of human rights in Burundi, the UN Commission on Human Rights strongly condemned “the continued violence against the civilian population, including refugees [and] displaced persons”. It also strongly condemned “the massacres of civilians that have taken place in Burundi for the past several years”.⁴⁰⁴

³⁹⁷ UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 7; Res. 1993/7, 23 February 1993, § 12; Res. 1995/89, 8 March 1995, § 5.

³⁹⁸ UN Commission on Human Rights, Res. 1992/S-1/1, 14 August 1992, preamble.

³⁹⁹ UN Commission on Human Rights, Res. 1994/75, 9 March 1994, § 1.

⁴⁰⁰ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 7; Res. 1995/89, 8 March 1995, § 6.

⁴⁰¹ UN Commission on Human Rights, Res. 1993/60, 10 March 1993, § 9; Res. 1994/79, 9 March 1994, § 10; Res. 1995/77, 8 March 1995, § 15; Res. 1996/73, 23 April 1996, § 15; Res. 1998/67, 21 April 1998, § 6.

⁴⁰² UN Commission on Human Rights, Res. 1994/87, 9 March 1994, § 2; Res. 1995/69, 8 March 1995, § 3.

⁴⁰³ UN Commission of Human Rights, Res. 1995/51, 3 March 1995, § 5.

⁴⁰⁴ UN Commission on Human Rights, Res. 1996/1, 27 March 1996, preamble and § 7.

395. In a resolution adopted in 1998 concerning the question of the violation of human rights in the occupied Arab territories, the UN Commission on Human Rights condemned, in particular:

the continuation of acts of wounding and killing such as that which took place on 10 March 1998 when Israeli occupation soldiers shot dead three Palestinian workers and wounded nine others, one of them seriously, and the subsequent opening of fire on Palestinian civilians after the incidents of the following days.⁴⁰⁵

396. In a resolution adopted in 1998 concerning the situation of human rights in Myanmar, the UN Commission on Human Rights called upon the government and all other parties to the hostilities “to halt the use of weapons against the civilian population”.⁴⁰⁶

397. In a resolution adopted in 1998, the UN Commission on Human Rights censured “the repeated Israeli aggressions” in southern Lebanon and western Bekaa, which had caused a large number of deaths and injuries among civilians.⁴⁰⁷

398. In a resolution adopted in 1998, the UN Commission on Human Rights requested that the LRA, operating in northern Uganda, cease immediately all abductions of and attacks against the civilian population, in particular women and children.⁴⁰⁸

399. In a resolution adopted in 1984, the UN Sub-Commission on Human Rights recalled the internal character of the conflict in El Salvador and held that government forces violated the Geneva Conventions by launching systematic attacks on the rural population, a non-military objective.⁴⁰⁹

400. In resolutions adopted in 1984 and 1985, the UN Sub-Commission on Human Rights expressed its deep concern at the increasingly serious and systematic violations of human rights in Guatemala, mentioning in particular acts of violence against civilians and non-combatants.⁴¹⁰

401. In a resolution adopted in 1993, the UN Sub-Commission on Human Rights deplored the continued victimisation of civilians as a result of military actions in Iraq.⁴¹¹ In a later resolution in 1996, the Sub-Commission also mentioned its concern over Iraqi military attacks on civilians in the marshland areas, which had resulted in many casualties.⁴¹²

402. In a resolution adopted in 1995, the UN Sub-Commission on Human Rights called upon the parties to the conflict in the former Yugoslavia to halt

⁴⁰⁵ UN Commission on Human Rights, Res. 1998/1, 27 March 1998, § 1.

⁴⁰⁶ UN Commission on Human Rights, Res. 1998/63, 21 April 1998, § 4(i).

⁴⁰⁷ UN Commission on Human Rights, Res. 1998/62, 21 April 1998, preamble.

⁴⁰⁸ UN Commission on Human Rights, Res. 1998/75, 22 April 1998, § 4.

⁴⁰⁹ UN Sub-Commission on Human Rights, Res. 1984/26, 30 August 1984, preamble.

⁴¹⁰ UN Sub-Commission on Human Rights, Res. 1984/23, 29 August 1984, § 1; Res. 1985/28, 30 August 1985, § 1.

⁴¹¹ UN Sub-Commission on Human Rights, Res. 1993/20, 20 August 1993, preamble.

⁴¹² UN Sub-Commission on Human Rights, Res. 1996/4, 19 August 1996, preamble.

all acts of violence directed against the civilian population, including those against fleeing refugees.⁴¹³

403. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights stated that it was alarmed by the multiple attacks on and massacres of innocent civilians in Burundi committed by the militia and armed bands of extremist groups in defiance of the principles of IHL.⁴¹⁴

404. In 1992, in a report on UNIFIL in Lebanon, the UN Secretary-General appealed to all the parties to the conflict to show proper regard for the lives of non-combatant men, women and children.⁴¹⁵

405. In 1996, in reports on UNOMIL in Liberia, the UN Secretary-General included among alleged violations of IHL an attack launched by ULIMO-J forces on ECOMOG positions in the town of Kle on 2 January 1996, in which various sources reported that the fighters intentionally fired upon local and displaced civilians.⁴¹⁶

406. In 1998, in a report on protection for humanitarian assistance to refugees and others in conflict situations, the UN Secretary-General noted that the changing pattern of conflicts in recent years had dramatically worsened the problem of compliance with international law and listed as an example that “civilian populations are being specifically targeted”.⁴¹⁷

407. In 1998, in a report on MONUA in Angola, the UN Secretary-General pointed out that the increase in military operations had resulted in a rise in the number of reported human rights violations, including “numerous attacks against the civilian population and local officials”.⁴¹⁸ In a subsequent report on the same subject, the UN Secretary-General noted that:

The civilian population has continued to bear the brunt of military operations by both sides... At such times, principles of international humanitarian law are especially important as they seek to protect the most vulnerable groups – those who are not involved in military operations – from direct or indiscriminate attack or being forced to flee.⁴¹⁹

408. In 1998, in a report on the situation in Sierra Leone, the UN Secretary-General noted that:

The main focus of human rights concerns... has been the attacks on civilians by armed, uniformed groups, which are consistently reported to be members of

⁴¹³ UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, § 1.

⁴¹⁴ UN Sub-Commission on Human Rights, Res. 1996/5, 19 August 1996, preamble.

⁴¹⁵ UN Secretary-General, Report on UNIFIL, UN Doc. S/23452, 21 January 1992, § 27; Report on UNIFIL, UN Doc. S/24341, 21 July 1992, § 30.

⁴¹⁶ UN Secretary-General, Fifteenth progress report on UNOMIL, UN Doc. S/1996/47, 23 January 1996, § 25; Sixteenth progress report on UNOMIL, UN Doc. S/1996/232, 1 April 1996, § 6.

⁴¹⁷ UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, § 12.

⁴¹⁸ UN Secretary-General, Report on MONUA, UN Doc. S/1998/838, 7 September 1998, § 16.

⁴¹⁹ UN Secretary-General, Report on MONUA, UN Doc. S/1998/931, 8 October 1998, § 17.

the rebel forces. They have systematically mutilated or severed the limbs of non-combatants around the towns of Koidu and Kabala.⁴²⁰

409. In 1998, in a report on UNOMSIL in Sierra Leone, the UN Secretary-General provided a list of human rights abuses committed in Sierra Leone and observed that there was strong evidence of systematic and widespread human rights violations against the civilian population. He referred to a survey carried out in certain areas of Sierra Leone, which indicated a large number of war-related civilian deaths and injuries, a significant percentage of which were women and children. The Secretary-General added that the killing of some 44 of the 144 paramount chiefs indicated a deliberate attempt to target them. He stated that he was “deeply concerned about the plight of innocent civilians in the country, who may still be at risk from future attacks”.⁴²¹

410. In 1998, in a report concerning the situation in Kosovo, the UN Secretary-General maintained that he was distressed by the desperate situation of the civilian population and especially by the fact that civilians had become the main targets in the conflict.⁴²²

411. In a press release issued in February 2000, the UN Secretary-General stated that he deplored the Israeli air attacks against civilian targets in Lebanon. He expressed his deep concern at the escalation of the hostilities, which had resulted in loss of life.⁴²³

412. In 2000, in a report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that:

Other serious violations of international humanitarian law falling within the jurisdiction of the Court include: (a) Attacks against the civilian population as such, or against individual civilians not taking direct part in hostilities . . . The prohibition on attacks against civilians is based on the most fundamental distinction drawn in international humanitarian law between the civilian and the military and the absolute prohibition on directing attacks against the former. Its customary international law nature is, therefore, firmly established.⁴²⁴

413. In 1992, in an interim report on the situation of human rights in Iraq, the Special Rapporteur of the UN Commission on Human Rights stated that “the most blatant violations of human rights being perpetrated by the Government are constituted by the military attacks against the civilian population”.⁴²⁵

⁴²⁰ UN Secretary-General, Fifth report on the situation in Sierra Leone, UN Doc. S/1998/486, 9 June 1998, §§ 35 and 81.

⁴²¹ UN Secretary-General, First progress report on UNOMSIL, UN Doc. S/1998/750, 12 August 1998, §§ 33, 35 and 58.

⁴²² UN Secretary-General, Report on the situation in Kosovo, UN Doc. S/1998/912, 3 October 1998, § 7.

⁴²³ UN Secretary-General, Press Release, Secretary-General deplores Israeli air attacks in Lebanon, UN Doc. SG/SM/7296, 8 February 2000.

⁴²⁴ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, §§ 15(a) and 16.

⁴²⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Iraq, Interim report, UN Doc. S/24386, 5 August 1992, § 11.

414. In various reports on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights condemned direct attacks against civilians. For example, in his third report submitted in August 1993, he denounced the various violations of laws related to the conduct of war committed against the civilian population of Sarajevo. Providing examples of these violations, he particularly condemned the arbitrary killing of civilians by sniper fire. In his conclusion, the Special Rapporteur described as a fundamental breach of the laws of war the use of the civilian population as military targets and their deliberate killing and wounding.⁴²⁶ His fifth periodic report, submitted in November 1993, also dealt with military attacks on civilians. In various sections of the report, the Special Rapporteur stated that these attacks were committed by all the parties to the conflict.⁴²⁷ In his sixth periodic report, submitted in February 1994, the Special Rapporteur reiterated his deep concern over the repeated instances of military attacks launched against civilians and particularly against the civilian populations of Sarajevo, Mostar and Tuzla.⁴²⁸ The tenth periodic report, submitted in January 1995, contained a section describing military attacks against civilians and other non-combatants and a conclusion in which the Special Rapporteur underlined that the Serb forces in Bosnia and Herzegovina were targeting civilians with alarmingly increasing frequency. He condemned these practices, requested their immediate termination and reminded those who were responsible for such acts of their culpability under international law.⁴²⁹

415. In 1993, the UN Commission on the Truth for El Salvador established that, during the internal conflict in El Salvador, the governmental armed forces viewed the civilian population in disputed areas as a "legitimate target of attack". This policy, implemented in order to deprive the guerrillas of all means of survival, resulted in massacres and the destruction of entire communities. According to the Commission, such a tactic was a clear violation of human rights. The Commission pointed out that "following much international criticism, the armed forces cut back on the use of air attacks against the civilian population".⁴³⁰ Concerning the activities of the death squads, the Commission found that:

⁴²⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Third periodic report, UN Doc. E/CN.4/1994/6, 26 August 1993, §§ 36 and 45.

⁴²⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 10, 45, 65–67, 92–96, 161–164 and 235.

⁴²⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Sixth periodic report, UN Doc. E/CN.4/1994/110, 21 February 1994, § 5.

⁴²⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Tenth periodic report, UN Doc. E/CN.4/1995/57, 16 January 1995, § 48.

⁴³⁰ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 32.

The State of El Salvador, through the activities of members of the armed forces and/or civilian officials, is responsible for having taken part in, encouraged and tolerated the operations of the death squads which illegally attacked members of the civilian population.⁴³¹

The FMLN argued that mayors were legitimate targets, but the Commission pointed out that "there is nothing to support the claim that the executed mayors were combatants according to the provisions of humanitarian law" and concluded that "the execution of mayors by FMLN was a violation of the rules of international humanitarian law and international human rights law".⁴³²

Other International Organisations

416. In a statement on Lebanon issued in September 1982, the Committee of Ministers of the Council of Europe expressed "profound shock at the massacre perpetrated in West Beirut against Palestinian civilians" and condemned "with revulsion this crime which constitutes a flagrant violation of human rights, the respect and protection of which are fundamental to the Council of Europe".⁴³³

417. In a recommendation adopted in 1991, the Parliamentary Assembly of the Council of Europe condemned the "brutal repression, of genocidal proportions" carried out by the Iraqi forces against the civilian population and in particular against Iraqi Kurds, following "large scale armed insurrection".⁴³⁴

418. In a declaration on the bombardments of Dubrovnik in 1991, the Committee of Ministers of the Council of Europe condemned the use of force against the civilian population.⁴³⁵ A few days later, in the Final Communiqué of its 89th Session, the Committee of Ministers denounced the use of force against the civilian population in the former Yugoslavia.⁴³⁶

419. In a declaration on Nagorno-Karabakh in 1992, the Committee of Ministers of the Council of Europe condemned the violence and attacks directed against the civilian population in the region.⁴³⁷

420. In a resolution adopted in 1993, the Parliamentary Assembly of the Council of Europe stated that the conflict in the former Yugoslavia was marked by "barbarous violence against civilians, in particular women and children". Such violence was held to constitute a violation of "the elementary rules and principles of the laws of war and [of] the protective provisions of humanitarian law". The Assembly urged the governments of member and non-member States

⁴³¹ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 137.

⁴³² UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 151 and 153.

⁴³³ Council of Europe, Committee of Ministers, Statement on Lebanon, 23 September 1982.

⁴³⁴ Council of Europe, Parliamentary Assembly, Rec. 1150, 24 April 1991, § 3.

⁴³⁵ Council of Europe, Committee of Ministers, Declaration on the bombardments of Dubrovnik, 13 November 1991.

⁴³⁶ Council of Europe, Committee of Ministers, Final Communiqué of the 89th Session, 26 November 1991, § 13.

⁴³⁷ Council of Europe, Committee of Ministers, Declaration on Nagorno-Karabakh, 11 March 1992.

“to undertake to protect children from the scourge of war and to condemn the barbaric practice in recent armed conflicts of using women and children as targets”.⁴³⁸

421. In a declaration on Bosnia and Herzegovina in 1994, the Committee of Ministers of the Council of Europe vigorously condemned the “massacres of civilians” in Sarajevo.⁴³⁹

422. In 1995, during a debate in the Parliamentary Assembly of the Council of Europe on the situation in Chechnya (in relation to Russia’s application for membership of the Council of Europe), a German member, speaking on behalf of the Committee on Legal Affairs and Human Rights, stated that:

The action taken by the military forces of the Russian Federation, with blanket bombing and the use of heavy weapons against the civilian population, is an extremely serious breach of human rights and a violation of [established standards of IHL]... The United Nations General Assembly has also adopted important documents that demand respect for, and protection of, the civilian population in military conflicts. None of these documents differentiates between international and internal military conflicts. The brutal action taken by the Russian military can, therefore, never be justified, whatever warped arguments are put forward.⁴⁴⁰

423. In a press release on Liberia issued in 1990, the EC voiced strong protest at the killing of civilians.⁴⁴¹

424. In a statement on Sudan in 1994, the EU condemned attacks on the civilian population.⁴⁴²

425. In a declaration on the situation in Angola in 1993, the OAU Assembly of Heads of State and Government strongly condemned UNITA for its repeated massacres of civilian populations and the destruction of social infrastructure.⁴⁴³

426. In a resolution on Burundi adopted in 1996, the OAU Council of Ministers deplored and strongly condemned “the brutal and bastardly murder of innocent people” and called upon the authorities of Burundi to ensure the safety of the people of Burundi.⁴⁴⁴

427. In a resolution adopted in 1996, the OAU Council of Ministers condemned “the constant aggression against civilians in armed conflict situations”.⁴⁴⁵ In 1998, during a debate in the Sixth Committee of the UN General Assembly, South Africa stated on behalf of the SADC that the 1998 ICC Statute “would

⁴³⁸ Council of Europe, Parliamentary Assembly, Res. 1011, 28 September 1993, §§ 2 and 7(iii).

⁴³⁹ Council of Europe, Committee of Ministers, Declaration on Bosnia and Herzegovina, 14 February 1994, § 3.

⁴⁴⁰ Council of Europe, Parliamentary Assembly, Statement by a Member from Germany, *Official Report of Debates*, 1995 Session, 7th Sitting, 2 February 1995, pp. 222–223.

⁴⁴¹ EC, Press Release on Liberia, Dublin, 26 April 1990.

⁴⁴² EU, Statement on Sudan, Brussels, 21 February 1994.

⁴⁴³ OAU, Assembly of Heads of State and Government, Declaration 2 (XXIX), 28–30 June 1993, § 5.

⁴⁴⁴ OAU, Council of Ministers, Res. 1649 (LXIV), 1–5 July 1996.

⁴⁴⁵ OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996.

also serve as a reminder that even during armed conflict the rule of law must be upheld. For example, it was unlawful...for attacks to be directed at...individuals not taking a direct part in hostilities... [This act] was a war crime and would be punished."⁴⁴⁶

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International Conferences

429. The 20th International Conference of the Red Cross in 1965 solemnly declared that "all Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:... that it is prohibited to launch attacks against the civilian populations as such".⁴⁴⁸

430. In a public statement issued on 31 October 1992, the Co-Chairmen of the International Conference on the Former Yugoslavia condemned "the continuing assaults on innocent civilians fleeing from the fighting in and around Jajce" and called upon all parties "to cease and desist from further attacks on persons displaced by the fighting".⁴⁴⁹

431. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants stated that they refused to accept that "civilian populations should become more and more frequently the principal victims of hostilities and acts of violence perpetrated in the course of armed conflicts, for example where they are intentionally targeted".⁴⁵⁰

432. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it expressed deep alarm at "acts of violence or of terror making civilians the object of attack" and strongly condemned "the systematic and massive killing of civilians in armed conflicts".⁴⁵¹

433. The Plan of Action for the years 2000-2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all

⁴⁴⁶ SADC, Statement by South Africa on behalf of the SADC before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 13.

⁴⁴⁷ SADC, Statement by South Africa on behalf of the SADC before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 13.

⁴⁴⁸ 20th International Conference of the Red Cross, Vienna, 2-9 October 1965, Res. XXVIII.

⁴⁴⁹ International Conference on the Former Yugoslavia, Statement of 31 October 1992, Report of the UN Secretary-General on the International Conference on the Former Yugoslavia, UN Doc. S/24795, 11 November 1992, § 13.

⁴⁵⁰ International Conference for the Protection of War Victims, Geneva, 30 August-1 September 1993, Final Declaration, § I(3), *ILM*, Vol. 33, 1994, p. 298.

⁴⁵¹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995, Res. II, preamble and § A(b).

the parties to an armed conflict take effective measures to ensure that “in the conduct of hostilities, every effort is made – in addition to the total ban on directing attacks against the civilian population as such or against civilians not taking a direct part in hostilities . . . – to spare the life, protect and respect the civilian population”.⁴⁵²

IV. Practice of International Judicial and Quasi-judicial Bodies

434. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ considered the prohibition on making civilians the object of attack to be one of the “cardinal principles contained in the texts constituting the fabric of humanitarian law” and also one of the “intransgressible principles of international customary law”.⁴⁵³

435. In its decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadić case* in 1995, the ICTY Appeals Chamber held that customary rules had developed to govern non-international armed conflicts. On the basis of various sources, including the behaviour of belligerent States, governments and insurgents (in the contexts of the internal conflicts in Spain, DRC, Nigeria and El Salvador), military manuals, ICRC action, UN General Assembly Resolutions 2444 (XXIII) and 2675 (XXV) and various declarations issued by regional organisations, the Appeals Chamber concluded that a customary norm existed protecting civilians from hostilities in internal conflicts, in particular the prohibition on attacks against civilians in the theatre of hostilities.⁴⁵⁴

436. In the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged with “deliberate attack on the civilian population and individual civilians” in violation of the laws or customs of war for their role in the shelling of civilian gatherings and the sniping campaign against the civilian population of Sarajevo.⁴⁵⁵ In its review of the indictment in 1996, the ICTY Trial Chamber confirmed all counts.⁴⁵⁶

437. In the *Martić case* before the ICTY in 1995, the accused was charged with “an unlawful attack against the civilian population and individual civilians of Zagreb” in violation of the laws or customs of war.⁴⁵⁷ In its review of the indictment in 1996, the ICTY Trial Chamber stated that “as regards customary law, the rule that the civilian population, as well as individuals civilians, shall

⁴⁵² 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

⁴⁵³ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 78–79.

⁴⁵⁴ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, §§ 100–127.

⁴⁵⁵ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, § 36, Count 5 and § 45, Count 10.

⁴⁵⁶ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, Section VII, Disposition.

⁴⁵⁷ ICTY, *Martić case*, Initial Indictment, 25 July 1995, §§ 15 and 17, Counts I and III.

not be the object of attack, is a fundamental rule of international humanitarian law applicable to all armed conflicts".⁴⁵⁸ The Trial Chamber upheld all counts of the indictment.⁴⁵⁹

438. In the *Blaškić case* before the ICTY in 1997, the accused was charged with "unlawful attack on civilians" in violation of the laws or customs of war.⁴⁶⁰ In its judgement in 2000, the ICTY Trial Chamber considered that "the specific provisions of Common Article 3 [of the 1949 Geneva Conventions] also satisfactorily cover the prohibition on attacks against civilians as provided for by Protocols I and II".⁴⁶¹ The Trial Chamber further stated that "the parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons or property. Targeting civilians or civilian property is an offence when not justified by military necessity."⁴⁶² The Trial Chamber found the accused guilty of "a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 51(2) of AP I: unlawful attacks on civilians".⁴⁶³

439. In the *Galić case* before the ICTY in 1998, the accused was charged with "attacks on civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949" in violation of the laws or customs of war for having conducted "a coordinated and protracted campaign of sniper attacks upon the civilian population of Sarajevo" and "a coordinated and protracted campaign of artillery and mortar shelling onto civilian areas of Sarajevo and upon its civilian population".⁴⁶⁴

440. In the *Kordić and Čerkez case* before the ICTY in 1998, the accused were charged with "unlawful attack on civilians" in violation of the laws or customs of war.⁴⁶⁵ In the decision on the joint defence motion in 1999, the ICTY Trial Chamber held that it was "indisputable" that the general prohibition of attacks against the civilian population was a generally accepted obligation and that as a consequence, "there is no possible doubt as to the customary status" of Articles 51(2) AP I and 13(2) AP II "as they reflect core principles of humanitarian law that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts".⁴⁶⁶ In its judgement in 2001, the ICTY Trial Chamber stated that:

Prohibited attacks are those launched deliberately against civilians . . . in the course of an armed conflict and are not justified by military necessity. They must have

⁴⁵⁸ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 10, see also §§ 11–14.

⁴⁵⁹ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, Section III, Disposition.

⁴⁶⁰ ICTY, *Blaškić case*, Second Amended Indictment, 25 April 1997, § 8, Count 3.

⁴⁶¹ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 170.

⁴⁶² ICTY, *Blaškić case*, Judgement, 3 March 2000, § 180.

⁴⁶³ ICTY, *Blaškić case*, Judgement, 3 March 2000, Section VI, Disposition.

⁴⁶⁴ ICTY, *Galić case*, Initial Indictment, 24 April 1998, Counts 4 and 7.

⁴⁶⁵ ICTY, *Kordić and Čerkez case*, First Amended Indictment, 30 September 1998, §§ 40 and 41, Counts 3 and 5.

⁴⁶⁶ ICTY, *Kordić and Čerkez case*, Decision on the Joint Defence Motion, 2 March 1999, § 31.

caused deaths and/or serious bodily injuries within the civilian population . . . Such attacks are in direct contravention of the prohibitions expressly recognised in international law including the relevant provisions of Additional Protocol I.⁴⁶⁷

The Tribunal found the accused guilty of “a violation of the laws or customs of war, as recognised by Article 3 [of the ICTY Statute] (unlawful attack on civilians)”.⁴⁶⁸

441. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law . . . Indeed, it is now a universally recognised principle, recently restated by the International Court of Justice [in the *Nuclear Weapons case*], that deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law.⁴⁶⁹

442. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the 1999 NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) . . . may constitute the *actus reus* for the offense of unlawful attack [as a violation of the laws and customs of war]. The *mens rea* for the offense is intention or recklessness, not simple negligence.⁴⁷⁰

443. In 1997, in the case concerning the events at La Tablada in Argentina, the IACiHR reaffirmed the obligation of the contending parties, on the basis of common Article 3 of the 1949 Geneva Conventions and customary principles applicable to all armed conflicts, not to engage in direct attacks against the civilian population or individual civilians.⁴⁷¹

V. Practice of the International Red Cross and Red Crescent Movement

444. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “civilian persons may not be attacked unless they participate directly in hostilities” and that an “attack on the civilian population or individual civilian persons” constitutes a grave breach of the law of war.⁴⁷²

⁴⁶⁷ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 328.

⁴⁶⁸ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Section V, Disposition.

⁴⁶⁹ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 521.

⁴⁷⁰ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 28.

⁴⁷¹ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 177.

⁴⁷² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 208 and 778(b).

445. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(1) of draft AP I which stated that “the civilian population as such, as well as individual civilians, shall not be made the object of attack”. All governments concerned replied favourably.⁴⁷³

446. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC called on all the parties to the conflict to “cease all attacks against the civilian population in the war-affected areas”. It also specifically requested that the Transitional Government in Salisbury “abstain from attacking civilians in the course of military operations in neighbouring countries”.⁴⁷⁴

447. In a press release issued in 1985 concerning the bombardment of civilians in the Iran–Iraq War, the President of the ICRC stated that “the bombardment of civilians is one of the very gravest violations of international humanitarian law”.⁴⁷⁵

448. In a press release issued in 1987, the ICRC made a solemn appeal to the Iranian and Iraqi governments “once again strongly urging them to put an end to the bombing and attacks on civilians”. The press release described the appeal as “the latest in a series of attempts by the ICRC to remind Iran and Iraq that the bombing and attacks on civilians constitute a grave violation of international humanitarian law and of customary law, which totally prohibit such practices”.⁴⁷⁶

449. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict: . . . It is forbidden to attack civilian persons.”⁴⁷⁷

450. In 1991, the ICRC appealed to the parties to the conflict in the former Yugoslavia “not to direct any attack against the civilian population”.⁴⁷⁸

451. On several occasions in 1992, the ICRC called on the parties to the conflict in Afghanistan not to target civilians and facilities used only by the civilian population and to spare civilian persons and objects.⁴⁷⁹

⁴⁷³ ICRC, The International Committee's Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

⁴⁷⁴ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, §§ 5 and 6, *IRRC*, No. 209, 1979, pp. 88–89.

⁴⁷⁵ ICRC, Press Release No. 1506, Bombardment of civilians in the Iran–Iraq conflict: An appeal by the President of the ICRC, 28 May 1985.

⁴⁷⁶ ICRC, Press Release No. 1532, Iran–Iraq Conflict: The ICRC Solemnly Appeals, 13 February 1987.

⁴⁷⁷ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 24.

⁴⁷⁸ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

⁴⁷⁹ ICRC, Press Release No. 1712, Afghanistan: ICRC appeal for compliance with humanitarian rules, 5 May 1992; Press Release No. 1724, Kabul: ICRC urges respect for civilians as medical facilities struggle to cope, 20 July 1992; Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

452. In a press release in 1992, the ICRC enjoined the parties to the conflict in Bosnia and Herzegovina “not to direct any attack against the civilian population”.⁴⁸⁰

453. In a communication to the press in 1993, the ICRC stated that its delegates in Bosnia and Herzegovina were once more witnessing “blatant violations of the basic principles of international humanitarian law”, citing the targeting of the civilian population as an example.⁴⁸¹

454. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia not to “attack civilians or facilities used by the civilian population”.⁴⁸²

455. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation “to refrain from attacking civilians”.⁴⁸³

456. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Georgia of their obligation “to refrain from attacking civilians”.⁴⁸⁴

457. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “attacks on civilians or civilian objects are prohibited”.⁴⁸⁵

458. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “it is prohibited to direct attacks against civilian persons”.⁴⁸⁶

459. In a press release issued in 1994 in the context of the conflict in Yemen, the ICRC stated that “attacks against civilians and civilian property are prohibited”.⁴⁸⁷

460. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of “making the civilian population or individual civilians the object of attack” be subject to the jurisdiction of the Court with

⁴⁸⁰ ICRC, Press Release No. 1705, Bosnia-Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

⁴⁸¹ ICRC, Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity, 16 June 1993.

⁴⁸² ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

⁴⁸³ ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

⁴⁸⁴ ICRC, Communication to the Press No. 93/31, Georgia: ICRC Activities in Abkhazia, 20 September 1993.

⁴⁸⁵ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

⁴⁸⁶ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

⁴⁸⁷ ICRC, Press Release No. 1773, Fighting in Yemen, 9 May 1994, see also Press Release No. 1775, Yemen: ICRC active on both sides appeals to belligerents, 12 May 1994.

respect to international armed conflicts and that the war crime of “attacks directed against the civilian population as such, or individual civilians” be subject to the jurisdiction of the Court with respect to non-international armed conflicts.⁴⁸⁸

461. In a communication to the press in 2000, the ICRC reminded both the Sri Lankan security forces and the LTTE of their obligation to comply with IHL, which provided for the protection of the civilian population against the effects of the hostilities. The ICRC called on both parties to ensure that the civilian population and civilian property were protected and respected at all times.⁴⁸⁹

462. In a communication to the press in 2000 in connection with the hostilities in the Near East, the ICRC stated that attacks directed against the civilian population were “absolutely and unconditionally prohibited” and that “the use of weapons of war against unarmed civilians cannot be authorized”.⁴⁹⁰

463. In a communication to the press in 2001 in connection with the conflict in Afghanistan, the ICRC stated that “attacks directed at civilians are prohibited”.⁴⁹¹

VI. Other Practice

464. Oppenheim states that “the immunity of non-combatants from direct attack is one of the fundamental rules of the International Law of War. It is a rule which applies with absolute cogency alike to warfare on land, at sea, and in the air.”⁴⁹²

465. In a resolution adopted at its Edinburgh Session in 1969, the Institute of International Law recalled that “existing international law prohibits all armed attacks on the civilian populations as such, as well as on non-military objects, notably dwellings or other buildings sheltering the civilian population”.⁴⁹³

466. In 1979, an armed group wrote to the ICRC to confirm its commitment to IHL and to denounce the killing and injuring of some 150,000 persons as a

⁴⁸⁸ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(b)(i) and 3(vi).

⁴⁸⁹ ICRC, Communication to the Press No. 00/13, Sri Lanka: ICRC urges both parties to respect civilians, 11 May 2000.

⁴⁹⁰ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

⁴⁹¹ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to the conflict to respect international humanitarian law, 24 October 2001.

⁴⁹² Lassa Oppenheim, *International Law. A Treatise*, Vol. II, *Disputes, War and Neutrality*, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 413, § 214*ea*.

⁴⁹³ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 4.

result of attacks on civilian objectives allegedly carried out by one of the parties to the conflict.⁴⁹⁴

467. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “neither the civilian population as such nor civilian persons shall be the object of attack”.⁴⁹⁵

468. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that:

However, although [common] Article 3 [of the 1949 Geneva Conventions] contains no provision providing explicit protection for the civilian population against attacks or their effects, Article 3’s prohibition of “violence to life and person” against “persons taking no active part in the hostilities” is broad enough to include attacks against civilians in territory controlled by an adverse party in an internal armed conflict . . . Certain general principles of the customary law of armed conflict were recognized in U.N. General Assembly Resolution 2444 (XXIII), 13 January 1969, which was adopted by unanimous vote. This resolution affirms . . . that it is prohibited to launch attacks against the civilian population as such . . . Further, the U.S. Government has expressly recognized these general principles “as declaratory of existing customary international law.” The ICRC also lists these principles among the fundamental rules of international humanitarian law applicable in *all* armed conflicts. Thus, attacks by Nicaraguan government or *contra* forces directed against *unarmed* civilians undertaken with the knowledge that no military objective was present would constitute a violation of the customary international law of armed conflict. Under this circumstance, such deaths would be regarded as civilian murders and not as unavoidable collateral civilian casualties.⁴⁹⁶ [emphasis in original]

469. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that:

Although [common] Article 3 [of the 1949 Geneva Conventions] does not, by its terms, prohibit attacks against the civilian population in non-international armed conflicts, such attacks are prohibited by the customary laws of armed conflict. United Nations General Assembly Resolution 2444, *Respect for Human Rights in Armed Conflicts* . . . adopted by unanimous vote on December 19, 1969, expressly recognized this customary principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times . . . Furthermore, the International Committee of the Red Cross has long regarded these principles as basic rules of the laws of war that apply in all armed conflicts. The United States government also has expressly recognized these principles as declaratory of existing customary international law.⁴⁹⁷

470. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi

⁴⁹⁴ ICRC archive document. ⁴⁹⁵ ICRC archive document.

⁴⁹⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 18–21.

⁴⁹⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 126.

University in Turku/Åbo, Finland in 1990, states that “attacks against persons not taking part in acts of violence shall be prohibited in all circumstances”.⁴⁹⁸

471. Rule A2 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that “the prohibition of attacks against the civilian population as such or against individual civilians is a general rule applicable in non-international armed conflicts”. The commentary on this rule notes that it is based on Article 25 HR, UN General Assembly Resolutions 2444 (XXIII) and 2675 (XXV) and Article 13(2) AP II. It adds that attacks against civilians are also incompatible with the rule on the protection of the life and person of those taking no active part in hostilities as set out in common Article 3 of the 1949 Geneva Conventions.⁴⁹⁹

472. In 1992, in a report on war crimes committed in the conflict in Bosnia and Herzegovina, Helsinki Watch stated that:

United Nations General Assembly Resolution 2444, adopted by unanimous vote on December 19, 1969, expressly recognized the customary law principle of civilian immunity and its complementary principle requiring the warring parties to distinguish civilians from combatants at all times.⁵⁰⁰

473. In 1994, officials of a separatist entity qualified the bombing of the civilian population as an isolated case and emphasised that the persons involved had been punished.⁵⁰¹

474. In 2000, in a report on the NATO bombings in the FRY, Amnesty International dealt with some cases that were selected because there was “evidence that civilians were victims of either direct or indiscriminate attacks, in violation of international humanitarian law”.⁵⁰²

475. In 2001, in a report on Israel and the occupied territories, Amnesty International stated that:

It is a basic rule of customary international law that civilians and civilian objects must never be made the targets of an attack. This rule applies in all circumstances including in the midst of full-scale armed conflict. Due to its customary nature it is binding on all parties. Israel is prohibited from attacking civilians and civilian objects. Palestinians are also prohibited from targeting Israeli civilians, including settlers who are not bearing arms, and civilian objects.⁵⁰³

⁴⁹⁸ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 5(1), *IRRC*, No. 282, 1991, p. 332.

⁴⁹⁹ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A2 and Commentary, *IRRC*, No. 278, 1990, pp. 388–389.

⁵⁰⁰ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, Vol. I, New York, August 1992, p. 203.

⁵⁰¹ ICRC archive document.

⁵⁰² Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 30.

⁵⁰³ Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, AI Index MDE 15/005/2001, London, 21 February 2001, p. 2, see also p. 29.

B. Violence Aimed at Spreading Terror among the Civilian Population

I. Treaties and Other Instruments

Treaties

476. Article 33 GC IV provides that “all measures of intimidation or of terrorism are prohibited”.

477. Article 51(2) AP I prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.⁵⁰⁴

478. Article 4(2)(d) AP II prohibits “acts of terrorism” against all persons who do not take a direct part or who have ceased to take part in hostilities. Article 4 AP II was adopted by consensus.⁵⁰⁵

479. Article 13(2) AP II prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”. Article 13 AP II was adopted by consensus.⁵⁰⁶

480. Article 3(d) of the 2002 Statute of the Special Court for Sierra Leone provides that “the Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations . . . of [AP II]. The violations shall include: . . . (d) Acts of terrorism.” Threats to commit acts of terrorism are covered by Article 3(h).

Other Instruments

481. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “systematic terror”.

482. Article 22 of the 1923 Hague Rules of Air Warfare prohibits “any air bombardment for the purpose of terrorizing the civil population or destroying or damaging private property without military character or injuring non-combatants”.

483. Article 4 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that “aerial bombardment for the purpose of terrorising the civilian population is expressly prohibited”.

484. Article 6 of the 1956 New Delhi Draft Rules states that “attacks directed against the civilian population, as such, whether with the object of terrorizing it or for any other reason, are prohibited”.

485. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(2) AP I.

⁵⁰⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

⁵⁰⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

⁵⁰⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

486. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(2) AP I.

487. Article 4(d) of the 1994 ICTR Statute provides that the Tribunal shall have jurisdiction over violations of AP II, including acts of terrorism.

488. Pursuant to Article 20(f)(iv) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “acts of terrorism” committed in non-international armed conflict constitute war crimes. The commentary states that this Article covers violations of Article 4(2)(d) AP II and should be understood as having the same meaning and scope of application.

II. National Practice

Military Manuals

489. Argentina’s Law of War Manual states that “acts which aim to terrorise the [civilian] population” are prohibited.⁵⁰⁷

490. Australia’s Defence Force Manual states that “acts or threats of violence primarily intended to spread terror among the civilian population are prohibited”.⁵⁰⁸ The manual adds that “offensive support or strike operations against the civilian population for the sole purpose of terrorising the civilian population [are] prohibited”.⁵⁰⁹

491. Belgium’s Teaching Manual for Soldiers states that it is prohibited to intimidate or terrorise the civilian population.⁵¹⁰

492. Belgium’s Law of War Manual states that aerial bombardment aimed at terrorising the civilian population is prohibited.⁵¹¹

493. Benin’s Military Manual includes a prohibition to “terrorise the civilian population through acts or threats of violence”.⁵¹²

494. Cameroon’s Instructors’ Manual prohibits terrorising the civilian population.⁵¹³

495. Canada’s LOAC Manual states that “acts or threats of violence, the primary purpose of which is to spread terror among the civilian population, are prohibited”.⁵¹⁴ The manual repeats this prohibition with respect to non-international armed conflicts in particular.⁵¹⁵

⁵⁰⁷ Argentina, *Law of War Manual* (1989), § 7.08.

⁵⁰⁸ Australia, *Defence Force Manual* (1994), § 531; see also *Commanders’ Guide* (1994), § 955(b).

⁵⁰⁹ Australia, *Defence Force Manual* (1994), § 554.

⁵¹⁰ Belgium, *Teaching Manual for Soldiers* (undated), p. 14.

⁵¹¹ Belgium, *Law of War Manual* (1983), p. 31.

⁵¹² Benin, *Military Manual* (1995), Fascicule III, p. 12.

⁵¹³ Cameroon, *Instructors’ Manual* (1992), p. 150.

⁵¹⁴ Canada, *LOAC Manual* (1999), p. 4-4, § 32, see also p. 6-4, § 40.

⁵¹⁵ Canada, *LOAC Manual* (1999), p. 17-5, § 37.

- 496.** Colombia's Basic Military Manual provides that the civilian population shall not be terrorised.⁵¹⁶
- 497.** Croatia's LOAC Compendium lists terror among the prohibited methods of warfare.⁵¹⁷
- 498.** Ecuador's Naval Manual states that "the civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts of intentional terrorization".⁵¹⁸ The manual also states that "bombardment for the sole purpose of attacking and terrorising the civilian population" constitutes a war crime.⁵¹⁹
- 499.** France's LOAC Summary Note prohibits the use of acts or threats of violence in order to spread terror among the civilian population.⁵²⁰
- 500.** Germany's Military Manual states that "measures of intimidation or of terrorism" are prohibited.⁵²¹
- 501.** Hungary's Military Manual lists "terror" among the prohibited methods of warfare.⁵²²
- 502.** Kenya's LOAC Manual states that it is forbidden "to spread terror among the civilian population through acts or threats of violence".⁵²³
- 503.** The Military Manual of the Netherlands states that "acts or threats of violence whose primary aim is to terrorise the civilian population are prohibited. As a result, so-called terror bombardment as well as any other form of terror attack is prohibited. Threatening therewith is also prohibited."⁵²⁴ The manual repeats this rule with respect to non-international armed conflicts in particular.⁵²⁵
- 504.** New Zealand's Military Manual prohibits "acts or threats of violence the primary purpose of which is to spread terror among the civilian population".⁵²⁶ The manual repeats this prohibition with respect to non-international armed conflicts in particular.⁵²⁷
- 505.** Nigeria's Manual on the Laws of War states that "terror attacks directed mainly against the civilian population are forbidden".⁵²⁸
- 506.** Russia's Military Manual considers that "the use of terror against the local population" is a prohibited method of warfare.⁵²⁹

⁵¹⁶ Colombia, *Basic Military Manual* (1995), p. 30.

⁵¹⁷ Croatia, *LOAC Compendium* (1991), p. 40. ⁵¹⁸ Ecuador, *Naval Manual* (1989), § 11.3.

⁵¹⁹ Ecuador, *Naval Manual* (1989), § 6.2.5.

⁵²⁰ France, *LOAC Summary Note* (1992), § 4.1; see also *LOAC Teaching Note* (2000), p. 2.

⁵²¹ Germany, *Military Manual* (1992), § 507; see also *IHL Manual* (1996), § 403.

⁵²² Hungary, *Military Manual* (1992), p. 64.

⁵²³ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2, § g.

⁵²⁴ Netherlands, *Military Manual* (1993), p. V-4, § 4.

⁵²⁵ Netherlands, *Military Manual* (1993), p. XI-6.

⁵²⁶ New Zealand, *Military Manual* (1992), § 517(1).

⁵²⁷ New Zealand, *Military Manual* (1992), § 1819.

⁵²⁸ Nigeria, *Manual on the Laws of War* (undated), § 20.

⁵²⁹ Russia, *Military Manual* (1990), § 5(n).

507. Spain's LOAC Manual prohibits acts or threats of violence which have as a primary objective the spreading of terror among the civilian population.⁵³⁰
508. Sweden's IHL Manual states that terror attacks are prohibited, that is, "attacks deliberately aimed at causing heavy losses and creating fear among the civilian population".⁵³¹
509. Switzerland's Basic Military Manual states that "it is prohibited to commit acts of violence or to threaten violence with the primary aim of spreading terror among the civilian population. The threat of nuclear attack against urban centres is contrary to the Additional Protocols."⁵³²
510. Togo's Military Manual prohibits acts or threats of violence which aim to terrorise the civilian population.⁵³³
511. The US Air Force Pamphlet states that "acts or threats of violence which have the primary object of spreading terror among the civilian population are prohibited".⁵³⁴
512. The US Naval Handbook states that "the civilian population as such, as well as individual civilians, may not be the object of attack or of threats or acts of intentional terrorization".⁵³⁵ The Handbook also states that carrying out a "bombardment, the sole purpose of which is to attack and terrorize the civilian population" is an example of a war crime.⁵³⁶
513. The YPA Military Manual of the SFRY (FRY) states that "it is particularly prohibited to attack the civilian population with the aim of terrorising it".⁵³⁷

National Legislation

514. Argentina's Draft Code of Military Justice punishes any soldier who carries out or orders the commission of "acts or threats of violence whose primary aim is to terrorise" the civilian population.⁵³⁸
515. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including "murder and massacres – systematic terrorism".⁵³⁹
516. Under Bangladesh's International Crimes (Tribunal) Act, the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵⁴⁰

⁵³⁰ Spain, *LOAC Manual* (1996), Vol. I, §§ 2.3.b.(3) and 3.3.b.(7).

⁵³¹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 44.

⁵³² Switzerland, *Basic Military Manual* (1987), Article 27(2) and commentary.

⁵³³ Togo, *Military Manual* (1996), Fascicule III, p. 12.

⁵³⁴ US, *Air Force Pamphlet* (1976), § 5-3(a)(1)(a).

⁵³⁵ US, *Naval Handbook* (1995), § 11.3. ⁵³⁶ US, *Naval Handbook* (1995), § 6.2.5

⁵³⁷ SFRY (FRY), *YPA Military Manual* (1988), § 67(2).

⁵³⁸ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(1) in the *Code of Military Justice as amended* (1951).

⁵³⁹ Australia, *War Crimes Act* (1945), Section 3.

⁵⁴⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

517. Under the Criminal Code of the Federation of Bosnia and Herzegovina, “the application of measures of intimidation and terror” against civilians is a war crime.⁵⁴¹ The Criminal Code of the Republika Srpska contains the same provision.⁵⁴²

518. China’s Law Governing the Trial of War Criminals provides that “planned slaughter, murder or other terrorist action” constitutes a war crime.⁵⁴³

519. Colombia’s Penal Code imposes a criminal sanction on “anyone who, during an armed conflict, carries out or orders the carrying out of . . . acts or threats of violence whose primary purpose is to terrorise the civilian population”.⁵⁴⁴

520. Under Côte d’Ivoire’s Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, “measures of terror” against the civilian population constitutes a “crime against the civilian population”.⁵⁴⁵

521. Under Croatia’s Criminal Code, “the imposition of measures of intimidation and terror” against the civilian population is a war crime.⁵⁴⁶

522. The Criminal Code as amended of the Czech Republic punishes anyone who during war “terrorises defenceless civilians with violence or the threat of violence”.⁵⁴⁷

523. Under Ethiopia’s Penal Code, it is a punishable offence to organise, order or engage in “measures of intimidation or terror” against the civilian population, in time of war, armed conflict or occupation.⁵⁴⁸

524. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Article 33 GC IV, and any “minor breach” of AP I, including violations of Article 51(2) AP I, as well as any “contravention” of AP II, including violations of Articles 4(2)(d) and 13(2) AP II, are punishable offences.⁵⁴⁹

525. Under Lithuania’s Criminal Code as amended, “the use of intimidation and terror” in time of war, armed conflict or occupation is a war crime.⁵⁵⁰

526. The Definition of War Crimes Decree of the Netherlands includes “systematic terrorism” in its list of war crimes.⁵⁵¹

527. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.⁵⁵²

⁵⁴¹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

⁵⁴² Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

⁵⁴³ China, *Law Governing the Trial of War Criminals* (1946), Article 3(1).

⁵⁴⁴ Colombia, *Penal Code* (2000), Article 144.

⁵⁴⁵ Côte d’Ivoire, *Penal Code as amended* (1981), Article 138(5).

⁵⁴⁶ Croatia, *Criminal Code* (1997), Article 158(1).

⁵⁴⁷ Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(1).

⁵⁴⁸ Ethiopia, *Penal Code* (1957), Article 282(g).

⁵⁴⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁵⁰ Lithuania, *Criminal Code as amended* (1961), Article 336.

⁵⁵¹ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁵⁵² Norway, *Military Penal Code as amended* (1902), § 108.

528. Slovakia's Criminal Code as amended punishes anyone who during war "terrorises defenceless civilians with violence or the threat of violence".⁵⁵³

529. Under Slovenia's Penal Code, the imposition of measures of "intimidation [and] terrorism" against the civilian population is a war crime.⁵⁵⁴

530. Spain's Penal Code punishes anyone who, during an armed conflict, makes the civilian population the object of "acts or threats of violence whose primary purpose is to terrorise them".⁵⁵⁵

531. Under the Penal Code as amended of the SFRY (FRY), "the taking of measures of intimidation and terror" against civilians is a war crime.⁵⁵⁶

National Case-law

532. No practice was found.

Other National Practice

533. On the basis of an interview with a retired army general, the Report on the Practice of Botswana states that the armed forces of Botswana would apply Article 13 AP II in the event of a non-international armed conflict.⁵⁵⁷

534. In a letter to the UN Secretary-General in 1991, Israel pointed out that SCUD missiles had been directed at civilians and that this method of "terror" by "intentional and unprovoked bombings" was a "flagrant breach of the norms of international law".⁵⁵⁸

535. The Report on the Practice of Lebanon refers to a 1996 report by the Ministry of Justice which stated that Israel had committed serious violations of the Geneva Conventions by terrorising civilians.⁵⁵⁹

536. At the CDDH, Mexico stated that it believed draft Article 46 AP I (now Article 51) to be so essential that it "cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis".⁵⁶⁰

537. At the CDDH, the UK voted in favour of draft Article 46 AP I (now Article 51), describing its first three paragraphs as containing a "valuable reaffirmation of existing customary rules of international law designed to protect civilians".⁵⁶¹

⁵⁵³ Slovakia, *Criminal Code as amended* (1961), Article 263(a)(1).

⁵⁵⁴ Slovenia, *Penal Code* (1994), Article 374(1).

⁵⁵⁵ Spain, *Penal Code* (1995), Article 611(1).

⁵⁵⁶ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

⁵⁵⁷ Report on the Practice of Botswana, 1998, Interview with a retired army general, Answers to additional questions on Chapter 1.4.

⁵⁵⁸ Israel, Letter dated 28 January 1991 to the UN Secretary-General, UN Doc. S/22160, 29 January 1991, p. 2.

⁵⁵⁹ Report on the Practice of Lebanon, 1998, Chapter 1.4, referring to Report by the Lebanese Ministry of Justice on possibilities for legal action against Israel, 12 April 1996.

⁵⁶⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

⁵⁶¹ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR. 41, 26 May 1977, p. 164, § 119.

538. In 1987, the Deputy Legal Adviser of the US Department of State stated that “we support the principle that the civilian population as such, as well as individual citizens, not be the object of acts or threats of violence the primary purpose of which is to spread terror among them”.⁵⁶²

539. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army pointed out that US practice was consistent with the prohibition on acts or threats of violence the main purpose of which was to spread terror among the civilian population.⁵⁶³

540. In 1994, in a document concerning human rights practices in Bosnia and Herzegovina, the US Department of State noted that the Bosnian Serb armed militia employed rape as a tool of war to terrorise and uproot populations.⁵⁶⁴

III. Practice of International Organisations and Conferences

United Nations

541. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN General Assembly condemned the “systematic terrorization and murder of non-combatants”.⁵⁶⁵

542. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly stated that it was:

gravely concerned about the systematic terrorization of ethnic Albanians, as demonstrated in the many reports, *inter alia*, of torture of ethnic Albanians, through indiscriminate and widespread shelling, mass forced displacement of civilians, summary executions and illegal detention of ethnic Albanian citizens of the Federal Republic of Yugoslavia (Serbia and Montenegro) by the police and the military.⁵⁶⁶

543. In several resolutions adopted between 1992 and 1995 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights condemned the “systematic terrorization and murder of non-combatants”.⁵⁶⁷

⁵⁶² US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

⁵⁶³ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(F), Report on US Practice, 1997, Chapter 1.4.

⁵⁶⁴ US, Department of State, *Bosnia-Herzegovina Human Rights Practice*, 1993, 31 January 1994, p. 2.

⁵⁶⁵ UN General Assembly, Res. 49/196, 23 December 1994, § 7.

⁵⁶⁶ UN General Assembly, Res. 53/164, 9 December 1998, preamble.

⁵⁶⁷ UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 7; Res. 1993/7, 23 February 1993, § 12; Res. 1994/72, 9 March 1994, § 7(b) (“murder of civilians and non-combatants”); Res. 1995/89, 8 March 1995, § 5.

544. In a resolution adopted in 1989 on the situation of human rights in El Salvador, the UN Sub-Commission on Human Rights stated that it was “alarmed by the intensification of activities to terrorize the population that are being carried out by the death squads composed of police and armed forces personnel operating in civilian clothing under the orders of senior officers”.⁵⁶⁸

545. In 2000, in a report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that “violations of...article 4 [AP II] committed in an armed conflict not of an international character have long been considered customary international law”.⁵⁶⁹

546. In 1992, in a report on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that the regular bombardment of cities such as Sarajevo or Bihac by Serb forces in Bosnia and Herzegovina was part of a tactic to terrorise the civilian population.⁵⁷⁰

547. In 2000, in a report on systematic rape, sexual slavery and slavery-like practices during armed conflict, the Special Rapporteur of the UN Sub-Commission on Human Rights stated that “the use of sexual violence is seen as an effective way to terrorize and demoralize members of the opposition, thereby forcing them to flee”.⁵⁷¹ In a subsequent report on the same subject, the UN High Commissioner for Human Rights stated that “all kinds of sexual violence, including assault, rape, abuse and torture of women and children, have been used in a more or less systematic manner to terrorize civilians and destroy the social structure, family structure and pride of the enemy”.⁵⁷²

548. In 1995, in a report on the conflict in Guatemala, the Director of MINUGUA appealed to the URNG “to desist from all acts of intimidation against individuals, since such acts contribute to feelings of defencelessness and to impunity”.⁵⁷³

Other International Organisations

549. In a report on the Kosovo conflict, covering the period from October 1998 to June 1999, the OSCE noted that:

⁵⁶⁸ UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, preamble.

⁵⁶⁹ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

⁵⁷⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. A/47/418 – S/24516, 3 September 1992, §§ 17 and 20.

⁵⁷¹ UN Sub-Commission on Human Rights, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Update to the final report, UN Doc. E/CN.4/Sub.2/2000/21, 6 June 2000, § 20.

⁵⁷² UN High Commissioner for Human Rights, Report on systematic rape, sexual slavery and slavery-like practices during armed conflicts, UN Doc. E/CN.4/Sub.2/2000/20, 27 June 2000, p. 2, § 9.

⁵⁷³ MINUGUA, Director, First report, UN Doc. A/49/856, 1 March 1995, Annex, § 195.

On the part of the Yugoslav and Serbian forces, their intent to apply mass killing as an instrument of terror, coercion or punishment against Kosovo Albanians was already in evidence in 1998, and was shockingly demonstrated by incidents in January 1999 (including the Racak mass killing) and beyond. Arbitrary killing of civilians was both a tactic in the campaign to expel Kosovo Albanians, and an objective in itself.⁵⁷⁴

International Conferences

550. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

551. In the *Đukić case* before the ICTY in 1996, the accused was charged with “shelling of civilian targets” in violation of the laws or customs of war for his role in the following acts:

From about May 1992 to about December 1995, in Sarajevo, Bosnian Serb military forces, on a widespread and systematic basis, deliberately or indiscriminately fired on civilian targets that were of no military significance in order to kill, injure, terrorise and demoralise the civilian population of Sarajevo.⁵⁷⁵

552. In the *Martić case* before the ICTY in 1995, the accused was charged with “the unlawful rocket attack against the civilian population and individual civilians of Zagreb” in violation of the laws or customs of war.⁵⁷⁶ In its review of the indictment in 1996, the ICTY Trial Chamber held that the attacks with Orkan rockets on the city of Zagreb in May 1995 were not designed to hit military targets but to terrorise the civilian population, stating that “these attacks were therefore contrary to the rules of customary and conventional international humanitarian law”.⁵⁷⁷ The Trial Chamber upheld all counts of the indictment.⁵⁷⁸

553. In the *Karadžić and Mladić case* before the ICTY in 1995, the indictment alleged that forces under the direction and control of the accused “unlawfully fired on civilian gatherings that were of no military significance in order to kill, terrorise and demoralise the Bosnian Muslim and Bosnian Croat civilian population”.⁵⁷⁹ It further alleged that throughout the siege of Sarajevo, “there has been a systematic campaign of deliberate targeting of civilians by snipers of the Bosnian Serb military and their agents. The sniping campaign has terrorised the civilian population of Sarajevo.”⁵⁸⁰ The accused were charged with “deliberate

⁵⁷⁴ OSCE, *Kosovo/Kosova, as seen as told, An analysis of the human rights findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999*, OSCE, ODIHR, Warsaw, 1999, executive summary.

⁵⁷⁵ ICTY, *Đukić case*, Initial Indictment, 29 February 1996, § 7, Count 2.

⁵⁷⁶ ICTY, *Martić case*, Initial Indictment, 25 July 1995, §§ 16 and 18, Counts II and IV.

⁵⁷⁷ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 31.

⁵⁷⁸ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, Section III, Disposition.

⁵⁷⁹ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, § 26.

⁵⁸⁰ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, § 44.

attack on the civilian population and individual civilians" in violation of the laws or customs of war for their role in these events.⁵⁸¹ In its review of the indictment in 1996, the ICTY Trial Chamber confirmed all counts.⁵⁸²

554. In the *Galić case* before the ICTY in 1998, the accused was charged with "unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949" in violation of the laws or customs of war for having conducted "a protracted campaign of shelling and sniping upon civilian areas of Sarajevo and upon the civilian population, thereby inflicting terror and mental suffering upon its civilian population".⁵⁸³

V. Practice of the International Red Cross and Red Crescent Movement

555. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "acts or threats of violence with a primary purpose to spread terror among the civilian population are prohibited".⁵⁸⁴

556. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(1) of draft API, which stated that "methods intended to spread terror among the civilian population are prohibited". All governments concerned replied favourably.⁵⁸⁵

557. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh that "acts of violence intended to spread terror among the civilian population are also prohibited".⁵⁸⁶

558. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "all acts or threats of violence the main purpose of which is to spread terror among the civilian population are also prohibited".⁵⁸⁷

559. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it expressed deep alarm at "the serious violations

⁵⁸¹ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, § 36, Count 5 and § 45, Count 10.

⁵⁸² ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, Section VII, Disposition.

⁵⁸³ ICTY, *Galić case*, Initial Indictment, 24 April 1998, Count 1.

⁵⁸⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 398.

⁵⁸⁵ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

⁵⁸⁶ ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

⁵⁸⁷ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

of international humanitarian law in internal as well as international armed conflicts constituted by acts or threats of violence the primary purpose of which is to spread terror among the civilian population".⁵⁸⁸

560. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about "the protracting internal conflict in Yugoslavia" and urged the parties to the conflict "to refrain from endangering and menacing the civilian population".⁵⁸⁹

561. In a communication to the press in 2000 concerning the violence in the Near East, the ICRC stressed that "terrorist acts are absolutely and unconditionally prohibited".⁵⁹⁰

VI. Other Practice

562. Oppenheim states that:

In the War of 1914–1918 the illegality, except by way of reprisals, of aerial bombardment directed exclusively against the civilian population for the purpose of terrorisation or otherwise seems to have been generally admitted by the belligerents, – although this fact did not actually prevent attacks on centres of civilian population in the form either of reprisals or of attack against military objectives situated therein.⁵⁹¹

563. In a resolution adopted at its Edinburgh Session in 1969, the Institute of International Law recalled that "existing international law prohibits, irrespective of the type of weapon used, any action whatsoever designed to terrorize the civilian population".⁵⁹²

564. In 1979, an armed group wrote to the ICRC to confirm its commitment to IHL and to denounce the rounding up of civilians in order to terrorise them "by methods which exclude all humanitarian principle" allegedly carried out by one of the parties to the conflict.⁵⁹³

565. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "acts or threats of violence

⁵⁸⁸ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, preamble.

⁵⁸⁹ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

⁵⁹⁰ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

⁵⁹¹ Lassa Oppenheim, *International Law. A Treatise*, Vol. II, *Disputes, War and Neutrality*, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 414, § 214*ea*.

⁵⁹² Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 6.

⁵⁹³ ICRC archive document.

the primary purpose or foreseeable effect of which is to spread terror among the population are prohibited".⁵⁹⁴

566. Rule A2 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that "acts of violence intended primarily to spread terror among the civilian population are also prohibited".⁵⁹⁵

567. In 1993, in a report on war crimes in Bosnia and Herzegovina, Helsinki Watch denounced attacks by light and heavy artillery,

which often is used indiscriminately and disproportionately in order to terrorize the local population and force it to flee from the besieged area. Even in cases where there is no armed resistance to Serbian attacks, the area is besieged solely for the purpose of displacing or terrorizing the population.⁵⁹⁶

568. In 1994, in the context of the conflict in Yemen, Human Rights Watch stated that "attacks launched with intent to spread terror among the civilian population are also forbidden. We note that the rules of war apply equally to government and rebel troops."⁵⁹⁷

569. In 1995, in its Global Report on Women's Human Rights, Human Rights Watch stated that its "investigations in the former Yugoslavia, Peru, Kashmir and Somalia reveal that rape and sexual assault of women are an integral part of conflicts, whether international or internal in scope" and found that "rape of women civilians has been deployed as a tactical weapon to terrorize civilian communities".⁵⁹⁸

C. Definition of Combatants

I. Treaties and Other Instruments

Treaties

570. Article 3 of the 1899 HR provides that "the armed forces of the belligerent parties may consist of combatants and non-combatants".

571. Article 3 of the 1907 HR provides that "the armed forces of the belligerent parties may consist of combatants and non-combatants".

572. Article 43(2) AP I provides that "members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33

⁵⁹⁴ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 6, *IRRC*, No. 282, 1991, p. 332.

⁵⁹⁵ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A2, *IRRC*, No. 278, 1990, p. 388.

⁵⁹⁶ Helsinki Watch, *War Crimes in Bosnia-Herzegovina*, Vol. II, New York, April 1993, p. 11.

⁵⁹⁷ Human Rights Watch, Letter to the Government of Yemen, New York, 19 May 1994.

⁵⁹⁸ Human Rights Watch, *The Human Rights Watch Global Report on Women's Human Rights*, New York, August 1995, p. 1.

of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities". Article 43 API was adopted by consensus.⁵⁹⁹

Other Instruments

573. No practice was found.

II. National Practice

Military Manuals

574. Argentina's Law of War Manual states that all members of the armed forces are combatants, except for medical and religious personnel.⁶⁰⁰

575. Australia's Defence Force Manual provides that "combatants comprise all organised armed forces, groups and units (except medical service and religious personnel)".⁶⁰¹

576. Belgium's Law of War Manual defines combatants as all members of organised armed forces, except medical and religious personnel.⁶⁰²

577. According to Benin's Military Manual, "members of the armed forces (except medical and religious personnel) are combatants".⁶⁰³

578. According to Cameroon's Instructors' Manual, "each member of the armed forces, except religious and medical personnel, is a combatant".⁶⁰⁴

The manual further states that outside members of the armed forces, "members of militias, volunteer corps, resistance movements... members of regular armed forces who profess allegiance to a government or an authority not recognized by the Power to which they belong" are also recognised as combatants.⁶⁰⁵

579. Canada's LOAC Manual states that "as a general rule, the term 'combatant' includes any member of the armed forces, except medical and religious personnel".⁶⁰⁶

580. Colombia's Instructors' Manual defines the term combatant as "any member of the Armed Forces, except medical and religious personnel. As members of Armed Forces, the law of war allows combatants to participate directly in an armed conflict on behalf of a belligerent State or of one of the parties to the conflict."⁶⁰⁷

⁵⁹⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

⁶⁰⁰ Argentina, *Law of War Manual* (1989), § 1.07(2).

⁶⁰¹ Australia, *Defence Force Manual* (1994), § 512; see also *Commanders' Guide* (1994), Glossary, p. xxi.

⁶⁰² Belgium, *Law of War Manual* (1983), pp. 20–21.

⁶⁰³ Benin, *Military Manual* (1995), Fascicule I, p. 12.

⁶⁰⁴ Cameroon, *Instructors' Manual* (1992), p. 17, see also p. 77.

⁶⁰⁵ Cameroon, *Instructors' Manual* (1992), p. 35, see also p. 143.

⁶⁰⁶ Canada, *LOAC Manual* (1999), p. 3-1, § 6.

⁶⁰⁷ Colombia, *Instructors' Manual* (1999), p. 16.

581. Croatia's LOAC Compendium considers that all members of the armed forces are combatants, except permanent medical or religious personnel.⁶⁰⁸

582. Croatia's Commanders' Manual states that "members of the armed forces (other than medical and religious personnel) are combatants".⁶⁰⁹

583. The Military Manual of the Dominican Republic states that:

All persons participating in military operations or activities are considered combatants [and proper targets for attack]. Those who do not participate in such actions are non-combatants. In addition to civilians, medical personnel, chaplains... are included in the category of non-combatants.⁶¹⁰

584. According to Ecuador's Naval Manual, members of the armed forces are combatants, except medical personnel and chaplains.⁶¹¹

585. France's LOAC Summary Note and LOAC Teaching Note provide that all members of the armed forces, other than medical and religious personnel, are combatants.⁶¹²

586. France's LOAC Manual defines combatants with reference to Article 4(A) GC III.⁶¹³

587. Germany's Military Manual states that:

The armed forces of a party to a conflict consist of combatants and non-combatants. Combatants are persons who may take a direct part in hostilities, i.e. participate in the use of a weapon or a weapon-system in an indispensable function. The other members of the armed forces are non-combatants.⁶¹⁴

The manual specifies that "persons who are members of the armed forces but... do not have any combat mission, such as judges, government officials and blue-collar workers, are non-combatants... Members of the medical service and religious personnel (chaplains) attached to the armed forces are also non-combatants."⁶¹⁵

588. According to Hungary's Military Manual, combatants are "any member of the armed forces except permanent medical and religious personnel".⁶¹⁶

589. Indonesia's Air Force Manual states that combatants are:

- a. Regular troops, i.e. members of the armed forces, consisting of:
 1. voluntary troops;
 2. compulsory military; and
 3. foreigners, including citizens of neutral States, who belong to a belligerent's armed forces.

⁶⁰⁸ Croatia, *LOAC Compendium* (1991), p. 6.

⁶⁰⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 2.

⁶¹⁰ Dominican Republic, *Military Manual* (1980), p. 3.

⁶¹¹ Ecuador, *Naval Manual* (1989), §§ 5.3 and 11.1.

⁶¹² France, *LOAC Summary Note* (1992), § 1.2; *LOAC Teaching Note* (2000), p. 2.

⁶¹³ France, *LOAC Manual* (2001), p. 39, see also pp. 70–71.

⁶¹⁴ Germany, *Military Manual* (1992), § 301.

⁶¹⁵ Germany, *Military Manual* (1992), §§ 313–314.

⁶¹⁶ Hungary, *Military Manual* (1992), p. 17.

- b. Militias, i.e. volunteer groups or persons who, being a part of the armed forces, should be considered as regular troops with the status of legal combatant.⁶¹⁷

590. According to Israel's Manual on the Laws of War, legal combatants are "soldiers serving in the army (regular and reserve) or in well-ordered militia forces (e.g. the SLA or the State National Guards in the United States)".⁶¹⁸

591. Italy's IHL Manual defines "lawful combatants" as:

- a. members of the Armed Forces;
- b. members of militia, of volunteer corps, of resistance movements, who belong to a Party to the conflict, operating outside or inside their own territory, even if this territory is occupied, provided they fulfil the following conditions:
 1. being under a Head responsible for his own subordinates;
 2. wear a uniform or a fixed distinctive sign recognisable from a distance;
 3. carry arms openly;
 4. abide by the laws and customs of war.⁶¹⁹

592. Italy's LOAC Elementary Rules Manual states that "all members of the Armed Forces (except medical and religious personnel) are combatants".⁶²⁰

593. Kenya's LOAC Manual states that the term combatant means "any member of the armed forces except medical personnel and religious personnel. As a member of the armed forces, he is permitted by the law of war to take a direct part in an armed conflict on behalf of a belligerent State or Party to the conflict."⁶²¹ The manual further specifies that:

Medical and religious personnel have a special status and are classified as non-combatants... Civilians accompanying the armed forces such as war correspondents, supply contractors and members of the labour units or of welfare services are not combatants.⁶²²

594. South Korea's Operational Law Manual states that members of the regular army, reserve forces, militia corps and combatant police are considered combatants, including persons who are not participating in combat but supporting military operations, except medical personnel and chaplains.⁶²³

595. Madagascar's Military Manual defines combatants as "members of the Armed Forces (other than medical and religious personnel)".⁶²⁴

596. The Military Manual of the Netherlands states that "the members of the armed forces have the status of combatant, except medical and religious personnel".⁶²⁵ The manual specifies that personnel of the burial service of the

⁶¹⁷ Indonesia, *Air Force Manual* (1990), § 21.

⁶¹⁸ Israel, *Manual on the Laws of War* (1998), p. 47. ⁶¹⁹ Italy, *IHL Manual* (1991), Vol. I, § 4.

⁶²⁰ Italy, *LOAC Elementary Rules Manual* (1991), § 2.

⁶²¹ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8.

⁶²² Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.

⁶²³ South Korea, *Operational Law Manual* (1996), p. 43.

⁶²⁴ Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 2, see also Fiche No. 2-SO, § A.

⁶²⁵ Netherlands, *Military Manual* (1993), p. III-1; see also *Military Handbook* (1995), pp. 7-36 and 7-39.

armed forces are not considered medical personnel (they have regular combatant status) and that humanist counsellors are considered religious personnel.⁶²⁶

597. New Zealand's Military Manual states that "normally only members of a belligerent State's armed forces enjoy the status of combatants".⁶²⁷

598. Russia's Military Manual defines combatants with reference to Article 43(2) AP I.⁶²⁸

599. South Africa's LOAC Manual defines combatants as "any member of the armed forces, except medical personnel and religious personnel".⁶²⁹

600. Spain's LOAC Manual defines "lawful combatants" as:

- Members of the Armed Forces of the parties to the conflict, except medical and religious personnel.
- Members of the armed forces of a party not recognised by the other party.
- Members of other militias and other units subject to military discipline, like the Guardia Civil.
- Resistance movements.⁶³⁰

601. Sweden's IHL Manual defines combatants with reference to Article 43(2) AP I.⁶³¹

602. Togo's Military Manual states that "according to international law, the members of the armed forces of a Party to the conflict, except medical and religious personnel, are combatants".⁶³²

603. The UK LOAC Manual states that:

A combatant is one who is permitted by the law of armed conflict to take a direct part in an armed conflict on behalf of a belligerent State. Combatant status is very closely related to entitlement to PW status. The following are entitled to combatant status:

- a. Members of the organized armed forces.
- b. Members of any other militias, volunteer corps or organised resistance movements.⁶³³

604. The US Air Force Pamphlet defines a combatant as "a direct participant in an armed conflict, traditionally a member of an armed force as specified in Article 4A(1) (2) and (3) [GC III]".⁶³⁴

605. The US Naval Handbook states that the term "combatants"

embraces those persons who have the right under international law to participate directly in armed conflict during hostilities. Combatants, therefore, include all

⁶²⁶ Netherlands, *Military Manual* (1993), p. VI-4.

⁶²⁷ New Zealand, *Military Manual* (1992), § 802(1).

⁶²⁸ Russia, *Military Manual* (1990), §§ 12-13.

⁶²⁹ South Africa, *LOAC Manual* (1996), § 24(a).

⁶³⁰ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(1).

⁶³¹ Sweden, *IHL Manual* (1991), Section 3.2.1.3, pp. 34-35.

⁶³² Togo, *Military Manual* (1996), Fascicule I, p. 13.

⁶³³ UK, *LOAC Manual* (1981), Section 3, p. 8, § 1.

⁶³⁴ US, *Air Force Pamphlet* (1976), § 1-2(b).

members of the regularly organized armed forces of a party to the conflict (except medical personnel, chaplains, civil defense personnel and members of the armed forces who have acquired civil defense status), as well as irregular forces who [fulfil the conditions for being considered armed forces].⁶³⁵

606. The Report on US Practice states that the discussion on the status of combatant in the US military manuals is generally consistent with Article 43 AP I.⁶³⁶

National Legislation

607. The Report on the Practice of Rwanda refers to a statement by Rwanda's Minister of Defence on 18 August 1997 in which he stated that government troops may only target enemies who carry arms and/or kill people. Hence, the report concludes that in an internal armed conflict combatants are defined as persons who carry arms and/or commit inhumane acts against the population in relation to the hostilities and that the wearing or not of a uniform has no significance in this respect.⁶³⁷

608. The Report on the Practice of Zimbabwe asserts that the incorporation of Article 43 AP I into national legislation by the 1981 Geneva Conventions Act as amended "is evidence of [Zimbabwe's] view that [it represents] customary international law".⁶³⁸

National Case-law

609. No practice was found.

Other National Practice

610. During the War in the South Atlantic, the legal adviser to the combined staff of Argentina's armed forces reportedly pointed out that due protection had to be granted to combatants "because they were members of the regular forces and, having fallen into enemy hands, were recognized as prisoners of war and were treated accordingly".⁶³⁹

611. The Report on the Practice of Argentina refers to a definition of combatants taken from a dictionary approved by the Ministry of Defence whereby all members of the armed forces who have the right to participate directly in hostilities are combatants. Medical and religious personnel are not to be considered combatants.⁶⁴⁰

612. In 1975, the Supreme Court of India held that civilian employees of the armed forces are "integral to the armed forces as it is their duty to follow or

⁶³⁵ US, *Naval Handbook* (1995), § 5.3. ⁶³⁶ Report on US Practice, 1997, Chapter 1.1.

⁶³⁷ Report on the Practice of Rwanda, 1997, Chapter 1.1, referring to Statement by the Rwandan Minister of Defence, Kigali, 18 August 1997.

⁶³⁸ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

⁶³⁹ Carlos Horacio Cerdá, *El respeto del derecho humanitario durante el desarrollo del conflicto Armado del Atlántico Sud*, Report on the Practice of Argentina, 1997, Chapter 1.1.

⁶⁴⁰ Report on the Practice of Argentina, 1997, Chapter 1.1.

accompany the armed personnel on active service or in camp or on the march". They are however "non-combatants". The Court further stated that "all persons not being members of the armed forces, but attached to or employed with or following the regular army shall be subject to the military law".⁶⁴¹

613. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq considers that whoever joins the armed forces of a belligerent State is a combatant. It adds that this covers individuals of voluntary units, including members of organised resistance movements, who follow a belligerent party, whether their activities take place inside or outside their territory. The report recalls the four conditions laid down in Article 4(A)(2) GC III and holds them to be explicit and specific criteria defining a combatant.⁶⁴²

614. The Report on the Practice of Japan states that the Japanese government understands that Japanese Self-Defence Forces (*Jieitai*) are categorised as armed forces as referred to in Article 4 GC III. Therefore, in the event that a member of the Self-Defence Forces becomes a prisoner, he/she should be treated as a POW under international law. The report specifies that only self-defence officials (*Jieikan*) who perform duties in the three Self-Defence Forces (ground, marine and air) and hold ranks possess the status of combatants.⁶⁴³

615. On the basis of an interview with a high-ranking officer, the Report on the Practice of Jordan states that:

Any soldier in the armed forces [of] a State is considered a combatant. The medical personnel and chaplains are exempted from this rule. These two categories do not have combatant status and they are not entitled to take part themselves in hostilities even if they are members [of] the armed forces.⁶⁴⁴

616. The Report on the Practice of Malaysia states that members of the armed forces may be considered as combatants. It adds that religious and medical personnel are not considered combatants even though they remain members of the armed forces.⁶⁴⁵

617. Without expressly mentioning their non-combatant status, the Report on the Practice of Russia states that members of the armed forces and military units assigned to civil defence organisations should be respected and protected if their activities comply with the relevant provisions of IHL.⁶⁴⁶

618. On the basis of replies by Rwandan army officers to a questionnaire, the Report on the Practice of Rwanda states that religious and medical military

⁶⁴¹ India, Supreme Court, *Nair case*, Judgement, 20 November 1975, §§ (b) and (c).

⁶⁴² Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.1.

⁶⁴³ Report on the Practice of Japan, 1998, Chapter 1.1, referring to Statement by a member of the Japanese government in the House of Representatives Cabinet Committee, 30 October 1986.

⁶⁴⁴ Report on the Practice of Jordan, 1997, Interview with a high-ranking officer of the Jordanian army, Chapter 1.1.

⁶⁴⁵ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.1.

⁶⁴⁶ Report on the Practice of Russia, 1997, Chapter 4.2.

personnel can neither be considered as combatants, nor as civilians. In case of detention among POWs, they must be afforded special treatment.⁶⁴⁷

619. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers that the definition of combatants contained in Article 43(2) AP I is part of customary international law.⁶⁴⁸

620. The Report on the Practice of Uruguay interprets the definition of military personnel contained in Article 63 of the 1943 Military Penal Code as amended, i.e. all persons possessing the legal status governed by the Military or Naval Organisational Laws, as implying that military personnel are combatants.⁶⁴⁹

621. The Report on the Practice of Zimbabwe considers that the definition of combatants in Article 43(2) AP I is regarded as customary by Zimbabwe in the context of an international armed conflict.⁶⁵⁰

III. Practice of International Organisations and Conferences

United Nations

622. In 1985, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights recommended that “members of all forces engaged in the conflict, those of Governments as well as of the opposition, should be recognized as combatants within the framework of international humanitarian law”.⁶⁵¹

Other International Organisations

623. No practice was found.

International Conferences

624. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

625. In its judgement on appeal in the *Tadić case* in 1999, the ICTY Appeals Chamber recalled Article 4(A)(1) and (2) GC III and noted that this provision “is primarily directed toward establishing the requirements for the status of lawful combatants”.⁶⁵²

⁶⁴⁷ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 2.7.

⁶⁴⁸ Report on the Practice of Syria, 1997, Chapter 1.1, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

⁶⁴⁹ Report on the Practice of Uruguay, 1997, Chapter 1.1.

⁶⁵⁰ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

⁶⁵¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1985/21, 19 February 1985, § 192.

⁶⁵² ICTY, *Tadić case*, Judgement on Appeal, 15 July 1999, § 92.

V. Practice of the International Red Cross and Red Crescent Movement

626. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “combatant” means any member of the armed forces, except medical personnel and religious personnel.⁶⁵³

VI. Other Practice

627. No practice was found.

D. Definition of Armed Forces

General

I. Treaties and Other Instruments

Treaties

628. Article 1 of the 1899 HR provides that:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- 1) To be commanded by a person responsible for his subordinates;
- 2) To have a fixed distinctive emblem recognizable at a distance;
- 3) To carry arms openly; and
- 4) To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army”.

629. Article 1 of the 1907 HR provides that:

The laws, rights, and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions:

- 1) To be commanded by a person responsible for his subordinates;
- 2) To have a fixed distinctive emblem recognizable at a distance;
- 3) To carry arms openly; and
- 4) To conduct their operations in accordance with the laws and customs of war.

In countries where militia or volunteer corps constitute the army, or form part of it, they are included under the denomination “army”.

630. According to Article 4(A) GC III, persons belonging to one of the following categories who have fallen into the power of the enemy are prisoners of war:

⁶⁵³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 47.

- 1) Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.
- 2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - a) that of being commanded by a person responsible for his subordinates;
 - b) that of having a fixed distinctive sign recognizable at a distance;
 - c) that of carrying arms openly;
 - d) that of conducting their operations in accordance with the laws and customs of war.
- 3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

631. Article 43(1) AP I provides that:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

Article 43 AP I was adopted by consensus.⁶⁵⁴

632. Upon accession to AP I, Argentina declared that it interpreted Articles 43(1) and 44(1) AP I

as not implying any derogation of: a) the concept of permanent regular armed forces of a Sovereign State; b) the conceptual distinction between regular armed forces, understood as being permanent army units under the authority of Governments of Sovereign States, and the resistance movements which are referred to in Article 4 of the Third Geneva Convention of 1949.⁶⁵⁵

633. Article 1(1) AP II provides that the Protocol

shall apply to all armed conflicts... which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.

Article 1 AP II was adopted by 58 votes in favour, 5 against and 29 abstentions.⁶⁵⁶

634. Upon accession to AP II, Argentina declared, with reference to Article 1 AP II, that "the term 'organized armed groups' is not to be understood as

⁶⁵⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

⁶⁵⁵ Argentina, Interpretative declarations made upon accession to AP I and AP II, 26 November 1986, § 1.

⁶⁵⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.49, 2 June 1977, pp. 69–70.

equivalent to that used in Article 43, Protocol I, to define the concept of armed forces, even if the aforementioned groups meet all the requirements set forth in the said Article 43".⁶⁵⁷

Other Instruments

635. Article 9 of the 1874 Brussels Declaration states that:

The laws, rights, and duties of war apply not only to armies but also to militia and volunteer corps fulfilling the following conditions:

- 1) that they be commanded by a person responsible for his subordinates;
- 2) that they have a fixed distinctive emblem recognizable at a distance;
- 3) that they carry arms openly; and
- 4) that they conduct their operations in accordance with the laws and customs of war.

In countries where militia constitute the army, or form part of it, they are included under the denomination "army".

636. Article 2 of the 1880 Oxford Manual provides that:

The armed force of a State includes:

1. The army properly so called, including the militia;
2. The national guards, landsturm, free corps, and other bodies which fulfil the three following conditions:
 - (a) That they are under the direction of a responsible chief;
 - (b) That they must have a uniform, or a fixed distinctive emblem recognizable at a distance, and worn by individuals composing such corps;
 - (c) That they carry arms openly.
3. The crews of men-of-war and other military boats.

II. National Practice

Military Manuals

637. Argentina's Law of War Manual defines the armed forces of a party to the conflict as all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognised by an adverse party. Such armed forces shall be subject to an internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.⁶⁵⁸

638. Australia's Defence Force Manual defines the armed forces of a party to the conflict as "all organised armed forces, groups and units . . . which are under

⁶⁵⁷ Argentina, Interpretative declarations made upon accession to AP I and AP II, 26 November 1986, § 3.

⁶⁵⁸ Argentina, *Law of War Manual* (1989), § 1.07(1).

the command of a party to a conflict and are subject to an internal disciplinary system which enforces compliance with LOAC".⁶⁵⁹

639. Belgium's Law of War Manual defines armed forces as comprising:

all members of organised armed forces, under a responsible command and an internal disciplinary system which ensures compliance with the laws and customs of war. Members of organised resistance movements are also considered to be combatants provided they:

- a) are subject to internal discipline;
- b) wear a fixed distinctive sign recognisable from a distance;
- c) carry arms openly;
- d) comply with the laws and customs of war.⁶⁶⁰

640. Burkina Faso's Disciplinary Regulations states that:

It is prohibited to consider members of the armed forces or volunteer militias, including organised resistance movements, as "regular combatants" unless they are under a responsible command, wear a distinctive sign, carry arms openly and respect the laws and customs of war.⁶⁶¹

641. Cameroon's Disciplinary Regulations states that:

Members of the Armed Forces in organised units, *francs-tireurs* detached from their regular units, commando detachments and isolated *saboteurs*, as well as voluntary militias, self-defence groups and organised resistance formations are lawful combatants on condition that those units, organisations or formations have a designated commander, that their members wear a distinctive sign, notably on their clothing, that they carry arms openly and that they respect the laws and customs of war.⁶⁶²

642. Canada's LOAC Manual states that:

Armed forces of a party to the conflict consist of all organized armed forces, groups and units that are under a command responsible to that party for the conduct of its subordinates . . . Armed forces shall be subject to an internal disciplinary system, one purpose of which is to enforce compliance with the LOAC.⁶⁶³

With respect to militias, volunteer groups and organised resistance movements, the manual states that:

10. In some cases, a party to a conflict may have armed groups fighting on its behalf that are not part of its armed forces. Such groups may be fighting behind enemy lines or in occupied territory. Partisans and resistance fighters who fought in occupied

⁶⁵⁹ Australia, *Defence Force Manual* (1994), § 512; see also *Commanders' Guide* (1994), Glossary, p. xxi.

⁶⁶⁰ Belgium, *Law of War Manual* (1983), p. 20.

⁶⁶¹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

⁶⁶² Cameroon, *Disciplinary Regulations* (1975), Article 30.

⁶⁶³ Canada, *LOAC Manual* (1999), p. 3-1, §§ 7-8.

territory in the Soviet Union and France during World War II are examples of such groups.

11. Members of militias, volunteer corps and organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, are combatants provided they:

- a. are commanded by a person responsible for his subordinates;
- b. wear a fixed distinctive sign recognizable at a distance;
- c. carry arms openly; and
- d. conduct their operations in accordance with the LOAC.

12. Militias, volunteer corps and organized resistance movements must “belong” to a party to the conflict in the sense that they are acknowledged by that party as fighting on its behalf or in its support.⁶⁶⁴

643. Congo’s Disciplinary Regulations states that:

Soldiers in combat must not consider members of the armed forces or volunteer militias, including organised resistance movements, as “combatants” unless they are under a responsible command, wear a distinctive sign, carry arms openly and respect the laws and customs of war.⁶⁶⁵

644. Croatia’s LOAC Compendium defines armed forces as “all organized units and personnel under [a] responsible command . . . [and] subject to [an] internal disciplinary system”.⁶⁶⁶

645. France’s LOAC Teaching Note states that “every member of a paramilitary force or a partisan recognisable by a fixed distinctive sign and carrying arms openly is considered as a combatant”.⁶⁶⁷

646. France’s Disciplinary Regulations as amended states that:

Soldiers in combat must not consider members of the armed forces or volunteer militias, including organised resistance movements, as combatants unless they are under a responsible command, wear a distinctive sign, carry arms openly and respect the laws and customs of war.⁶⁶⁸

647. Germany’s Military Manual states that:

The armed forces of a party to a conflict consist of all its organized armed forces, groups and units. They also include militias and voluntary corps integrated in the armed forces. The armed forces shall be:

- under a command responsible to that party for the conduct of its subordinates, and
- subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.⁶⁶⁹

⁶⁶⁴ Canada, *LOAC Manual* (1999), p. 3-2, §§ 10–12.

⁶⁶⁵ Congo, *Disciplinary Regulations* (1986), Article 32(1).

⁶⁶⁶ Croatia, *LOAC Compendium* (1991), p. 5, see also p. 6.

⁶⁶⁷ France, *LOAC Teaching Note* (2000), p. 2.

⁶⁶⁸ France, *Disciplinary Regulations as amended* (1975), Article 9 *bis* (1); see also *LOAC Manual* (2001), pp. 39 and 70–71.

⁶⁶⁹ Germany, *Military Manual* (1992), § 304.

648. Hungary's Military Manual defines armed forces as "all organized units and personnel under [a] responsible command . . . [and] subject to [an] internal disciplinary system".⁶⁷⁰

649. Indonesia's Air Force Manual states that combatants are:

- a. Regular troops, i.e. members of the armed forces, consisting of:
 1. voluntary troops;
 2. compulsory military; and
 3. foreigners, including citizens of neutral States, who belong to a belligerent's armed forces.
- b. Militias, i.e. volunteer groups or persons who, being a part of the armed forces, should be considered as regular troops with the status of legal combatant.⁶⁷¹

650. According to Israel's Manual on the Laws of War, "soldiers serving in the army (regular and reserve) or in well-ordered militia forces (e.g. the SLA or the State National Guards in the United States)" must fulfil four conditions:

1. The combatants must be led by a commander and be part of an organization with a chain of command.
2. The combatants must bear a fixed recognizable distinctive sign that can be recognized from afar.
3. The combatants must bear arms openly.
4. It is incumbent on combatants to behave in compliance with the rules and customs of war.⁶⁷²

651. Italy's IHL Manual defines armed forces with reference to Article 43(1) AP I.⁶⁷³

652. Kenya's LOAC Manual defines the armed forces of a State or of a party to the conflict as consisting of:

all organised units and personnel which are under a command responsible for the behaviour of its subordinates. The command of the armed forces must be responsible to the belligerent Party to which it belongs. The armed forces shall be subject to an internal disciplinary system which enforces compliance with the law of armed conflict. In the case of non-international armed conflict, in the sense of [AP II], the non-governmental forces or opposition forces have to fulfil two additional conditions in order to be considered "armed forces", namely:

- a. they must exercise control over a part of the State's territory;
- b. they must be able to carry out sustained and concerted military operations.⁶⁷⁴

653. According to Mali's Army Regulations,

Soldiers in combat must not consider members of the armed forces or volunteer militias, including organised resistance movements, as regular combatants unless

⁶⁷⁰ Hungary, *Military Manual* (1992), p. 16, see also p. 17.

⁶⁷¹ Indonesia, *Air Force Manual* (1990), § 21.

⁶⁷² Israel, *Manual on the Laws of War* (1998), pp. 47-48.

⁶⁷³ Italy, *IHL Manual* (1991), Vol. I, § 3.

⁶⁷⁴ Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 7-8.

they are under a responsible command, wear a distinctive sign, carry arms openly and respect the laws and customs of war.⁶⁷⁵

654. The Military Manual of the Netherlands defines armed forces with reference to Article 43(1) AP I and states that all armed forces, whether regular or irregular, have to be “organised, under a responsible command, and subject to an internal disciplinary system”.⁶⁷⁶

655. New Zealand’s Military Manual states that:

The armed forces of a party to the conflict comprise all organized armed forces, groups and units which are under a command responsible to that party, even if the latter is represented by a government or authority not recognized by the adverse Party. This requirement of organization and responsibility extends to national liberation movements and their forces. All such forces must be subject to an internal disciplinary system which is required to enforce adherence to the rules of international law relating to armed conflict.⁶⁷⁷

656. Nigeria’s Military Manual states that:

In general, the armed forces of a state and of a party to a conflict consist of all organised units and personnel which are under a command responsible for the behaviour of its subordinates and each state and belligerent party must determine the categories of persons and objects belonging to its armed forces . . . Furthermore, the armed forces shall be subject to an internal disciplinary system in order to uphold and enforce the law of war.⁶⁷⁸

657. Russia’s Military Manual defines armed forces with reference to Article 43(1) AP I.⁶⁷⁹

658. Senegal’s Disciplinary Regulations states that:

Soldiers in combat must not consider members of the armed forces or volunteer militias, including organised resistance movements, as combatants unless they are under a responsible command, wear a distinctive sign, carry arms openly and respect the rules of international law applicable in armed conflict.⁶⁸⁰

659. Spain’s LOAC Manual states that all armed forces have to be organised, have a commander responsible for the conduct of his or her subordinates and an internal disciplinary system which ensures compliance with IHL.⁶⁸¹

660. Sweden’s IHL Manual defines armed forces with reference to Article 43(1) AP I.⁶⁸²

661. Switzerland’s Basic Military Manual lists four conditions which have to be fulfilled in order for a person to enjoy POW status:

⁶⁷⁵ Mali, *Army Regulations* (1979), Article 36(1).

⁶⁷⁶ Netherlands, *Military Manual* (1993), p. III-1; see also *Military Handbook* (1995), p. 7-39.

⁶⁷⁷ New Zealand, *Military Manual* (1992), § 805(2).

⁶⁷⁸ Nigeria, *Military Manual* (1994), p. 38, § 4. ⁶⁷⁹ Russia, *Military Manual* (1990), §§ 12–13.

⁶⁸⁰ Senegal, *Basic Military Manual de Discipline* (1990), Article 34(1).

⁶⁸¹ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(1).

⁶⁸² Sweden, *IHL Manual* (1991), Section 3.2.1.3, pp. 34–35.

1. Combatants must be headed by a responsible person forming part of an organisation.
2. This organisation must have an internal disciplinary system to which the combatants are subjected and which guarantees respect for international law applicable in armed conflict.
3. During an attack or a military deployment visible to the adversary, combatants must carry their arms openly.
4. In their operations, they must abide by the laws and customs of war.⁶⁸³

662. The UK LOAC Manual defines armed forces as:

- a. Members of the organised armed forces, even if they belong to a government or authority not recognised by the adversary, if those forces:
 1. are under a commander who is responsible for the conduct of his subordinates to one of the Parties in conflict; and
 2. are subject to an internal disciplinary system which enforces compliance with the law of armed conflict.

It is customary for members of organised armed forces to wear uniform. The definition is wide enough to cover auxiliary and reserve forces.
- b. Members of any other militias, volunteer corps or organised resistance movements if:
 - (1) they are subject to a system of internal discipline; and
 - (2) they have a fixed distinctive sign; and
 - (3) they carry their arms openly; and
 - (4) they comply with the law of armed conflict.⁶⁸⁴

663. The UK Military Manual defines armed forces with reference to Article 4(A) GC III.⁶⁸⁵

664. The US Field Manual and Air Force Pamphlet define armed forces with reference to Article 4(A) GC III.⁶⁸⁶

665. The US Naval Handbook states that combatants

include all members of the regularly organized armed forces of a party to the conflict . . . as well as irregular forces who are under responsible command and subject to internal military discipline, carry their arms openly, and otherwise distinguish themselves clearly from the civilian population.⁶⁸⁷

666. The YPA Military Manual of the SFRY (FRY) states that “under the international law of war, the armed forces are bodies authorised to conduct military operations and against whom force is used in armed conflict”. The manual then lists the components of the armed forces, including the categories mentioned in Article 4(A)(1) and (2) GC III.⁶⁸⁸

⁶⁸³ Switzerland, *Basic Military Manual* (1987), Article 64.

⁶⁸⁴ UK, *LOAC Manual* (1981), Section 3, p. 8, § 1. ⁶⁸⁵ UK, *Military Manual* (1958), § 89.

⁶⁸⁶ US, *Field Manual* (1956), § 61; *Air Force Pamphlet* (1976), § 3-2.

⁶⁸⁷ US, *Naval Handbook* (1995), § 5.3.

⁶⁸⁸ SFRY (FRY), *YPA Military Manual* (1988), § 48(1) and (2).

National Legislation

667. India's Army Act defines the term "the Forces" as meaning "the regular Army, Navy and Air Force or any part of any one or more them".⁶⁸⁹

668. The Report on the Practice of Zimbabwe asserts that the incorporation of Article 43 AP I into national legislation by the 1981 Geneva Conventions Act as amended "is evidence of [Zimbabwe's] view that [it represents] customary international law".⁶⁹⁰

National Case-law

669. No practice was found.

Other National Practice

670. A report submitted to the Belgian Senate in 1991 noted that two elements were essential in the definition of armed forces: first, they must be integrated into a military organisation (that is, a hierarchical structure) subject to an internal disciplinary system; second, this organisation must operate under a command structure responsible to a party for the conduct of its subordinates. If these two conditions were fulfilled, the concept of armed forces could be extended to groups of combatants who were left behind in an occupied territory to perform acts of sabotage, to gather intelligence or to take part in guerrilla warfare. The report recalled that this was the position of the Belgian government in exile during the Second World War. From its base in London, the government adopted legislation authorising the executive power to nominate agents in charge of action or intelligence missions in a foreign country, occupied area or zone evacuated by the enemy. These agents had the status of combatants and were allowed to carry arms. The government in exile, however, was very reticent about resistance cells or individuals over whom it had no direct control.⁶⁹¹ Resistance networks operating behind enemy lines would not be protected, according to the report, if composed of civilians that were neither part of a hierarchical structure nor subject to an internal disciplinary system.⁶⁹² On the basis of the report, the Report on the Practice of Belgium concludes that the definition given in Article 43 AP I is recognised by Belgium and that the central criterion is State control over the combatants.⁶⁹³

671. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that "armed forces that

⁶⁸⁹ India, *Army Act* (1950), Section 3(xi).

⁶⁹⁰ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

⁶⁹¹ Belgium, Senate, Report, *Enquête parlementaire sur l'existence en Belgique d'un réseau de renseignements clandestin international*, 1990–1991 Session, Doc. 1117-4, 1 October 1991, §§ 19 and 20.

⁶⁹² Belgium, Senate, Report, *Enquête parlementaire sur l'existence en Belgique d'un réseau de renseignements clandestin international*, 1990–1991 Session, Doc. 1117-4, 1 October 1991, § 25.

⁶⁹³ Report on the Practice of Belgium, 1997, Chapter 1.1.

are subject to the law of war consist of all organised units and their personnel, under a command which is responsible for the conduct of its subordinates".⁶⁹⁴

672. In an explanatory memorandum submitted to the German parliament in 1990 in the context of the ratification procedure of the Additional Protocols, the German government stated that AP I contained the first treaty definition of the term "armed forces" and acknowledged that armed forces must be organised, under responsible leadership and have an internal disciplinary system.⁶⁹⁵

673. According to the Report on the Practice of Iran, military communiqués issued during the Iran–Iraq War referred to armed forces as "Combatants of Islam" or "Devoters of Armed Forces". In three of these communiqués, the armed forces are defined as personnel of the army and air force, *Gendarmerie*, Revolutionary Guards (*Sepah-e-Pasdaran*), armed tribesmen, Bassej and Jehad forces, volunteers and also the Kurdish commandos (*Kurd Pihmerg*). Some other military communiqués also thanked tribesmen and ordinary people who had taken up arms against the "Iraqi aggressors". The report specifies that, since all the military staff and armed forces were under a single command responsible to Iran, the practice and *opinio juris* of Iran are consistent with Article 43 AP I.⁶⁹⁶

674. The Report on the Practice of Japan states that the Japanese government understands that Japanese Self-Defence Forces (*Jieitai*) are categorised as armed forces as referred to in Article 4 GC III.⁶⁹⁷

675. The Report on the Practice of South Korea affirms the customary nature of Article 43 AP I.⁶⁹⁸

676. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that armed forces consisted of regular as well as irregular troops, provided they fulfilled the conditions set forth in Article 43 AP I.⁶⁹⁹

677. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers that the definition of armed forces contained in Article 43(1) AP I is part of customary international law.⁷⁰⁰

⁶⁹⁴ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 5.

⁶⁹⁵ Germany, Lower House of Parliament, Explanatory memorandum on the Additional Protocols to the Geneva Conventions, *BT-Drucksache* 11/6770, 22 March 1990, p. 110.

⁶⁹⁶ Report on the Practice of Iran, 1997, Chapter 1.1, referring to Military Communiqué No. 35, 24 September 1980, Military Communiqué No. 36, 24 September 1980, Military Communiqué No. 109, 4 October 1980, Military Communiqué No. 354, 1 January 1981 and Military Communiqué No. 477, 13 May 1981.

⁶⁹⁷ Report on the Practice of Japan, 1998, Chapter 1.1, referring to Statement by a member of the Japanese government in the House of Representatives Cabinet Committee, 30 October 1986.

⁶⁹⁸ Report on the Practice of South Korea, 1997, Chapter 1.1.

⁶⁹⁹ Netherlands, Lower House of Parliament, Explanatory memorandum on the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, pp. 18–20.

⁷⁰⁰ Report on the Practice of Syria, 1997, Chapter 1.1, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

678. The Report on the Practice of Zimbabwe considers that the definitions given in Article 43 AP I apply only in the context of an international armed conflict. It states that, for non-international armed conflicts, an attempt at a definition is found in Article 1 AP II, which refers to dissident armed forces or other organised armed groups which are under a responsible command. It adds, however, that:

This definition is subjective and difficult to implement, given that States are generally unwilling to recognize rebel groups and their structures . . . preferring to deal with them as mere “criminals or bandits”. In Zimbabwe this issue is yet to be addressed in terms of policy and military instruction. It is by no means settled and cannot be regarded as being part of customary law.⁷⁰¹

III. Practice of International Organisations and Conferences

679. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

680. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

681. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The “armed forces” of a State and of a Party to the conflict consist of all organized units and personnel which are under a command responsible for the behaviour of its subordinates . . . The command of the armed forces must be responsible to the belligerent Party to which it belongs. The armed forces shall be subject to an internal disciplinary system which enforces compliance with the law of war.⁷⁰²

682. In a note on respect for IHL in an internal armed conflict between January 1995 and February 1996, the ICRC stated that:

Whereas the ICRC recognizes that the use of auxiliary groups operating alongside the security forces is in no way contrary to international humanitarian law, it reminds the military authorities that they bear the entire responsibility for acts committed by the said groups.⁷⁰³

⁷⁰¹ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

⁷⁰² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 36, 40 and 41.

⁷⁰³ ICRC archive document.

VI. Other Practice

683. No practice was found.

Incorporation of paramilitary or armed law enforcement agencies into armed forces

I. Treaties and Other Instruments

Treaties

684. According to Article 43(3) AP I, “whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces, it shall so notify the other Parties to the conflict”. Article 43 AP I was adopted by consensus.⁷⁰⁴

685. Upon ratification of AP I, Belgium notified the High Contracting Parties of the duties assigned to the Belgian *Gendarmerie* (constabulary) in time of armed conflict. Belgium considered that this notification fully satisfied any and all requirements of Article 43 pertaining to the *Gendarmerie*. It informed the High Contracting Parties that the *Gendarmerie* was formed to maintain law and order and was, according to national legislation, a police force which was part of the armed forces within the meaning of Article 43 AP I. Consequently, members of the *Gendarmerie* had the status of combatant in time of international armed conflict.⁷⁰⁵ An Act of Parliament of 18 July 1991 has, however, put an end to this situation as it has disconnected the *Gendarmerie* from the armed forces.⁷⁰⁶

686. Upon ratification of AP I, France informed the States party to AP I that its armed forces permanently include the *Gendarmerie*.⁷⁰⁷

Other Instruments

687. No practice was found.

II. National Practice

Military Manuals

688. Argentina’s Law of War Manual provides that “whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces, it shall so notify the other Parties to the conflict”.⁷⁰⁸

689. Canada’s LOAC Manual states that “if a party to a conflict incorporates paramilitary or armed law enforcement agencies into its armed forces, it must

⁷⁰⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

⁷⁰⁵ Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 2.

⁷⁰⁶ Belgium, *Law on Demilitarisation of the Gendarmerie* (1991).

⁷⁰⁷ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 7.

⁷⁰⁸ Argentina, *Law of War Manual* (1989), § 1.07(3).

inform other parties to the conflict of this fact. These forces are then considered lawful combatants."⁷⁰⁹

690. Germany's Military Manual states that:

Whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall notify the other parties to the conflict. In the Federal Republic of Germany the Federal Border Commands including their Border Guard formations and units as well as the Federal Border Guard School shall become part of the armed forces upon the outbreak of an armed conflict.⁷¹⁰

691. The Military Manual of the Netherlands states that "a State may incorporate a paramilitary organisation or armed agency charged with police functions into its armed forces. The other parties to a conflict have to be notified thereof."⁷¹¹

692. New Zealand's Military Manual states that "if a Party to a conflict incorporates paramilitary or armed law enforcement agencies into its armed forces it must inform other parties to the conflict of this fact, so that such forces may be acknowledged as lawful combatants".⁷¹² The manual provides two examples of paramilitary agencies incorporated into the armed forces of a State, namely "the Special Auxiliary Force attached to Bishop Muzorewa's United African National Congress in Zimbabwe and which was embodied into the national army after the Bishop became Prime Minister [and] India's Border Security Force in Assam".⁷¹³ The manual also provides an example of an armed law enforcement agency incorporated into the armed forces of a State, namely:

At the time of the outbreak of World War II, the Burma Frontier Force was serving as a police force under authority of the Burma Frontier Force Act; after the fall of Burma, the Burmese Government in exile in Simla, India, passed legislation making the Force part of the Burmese Army and subject to the Burma Army Act.⁷¹⁴

693. Spain's LOAC Manual states that members of the Guardia Civil are lawful combatants.⁷¹⁵

National Legislation

694. The Report on the Practice of Germany notes that from 1965 to 1994, German border guards were granted the status of combatants. In 1994, the German parliament adopted a law that changed the status of the border guards. The reason for this change was that, as combatants, these guards could become legitimate enemy targets and they could involve local police forces as targets

⁷⁰⁹ Canada, *LOAC Manual* (1999), p. 3-2, § 14. ⁷¹⁰ Germany, *Military Manual* (1992), § 307.

⁷¹¹ Netherlands, *Military Manual* (1993), p. III-3, § 2.

⁷¹² New Zealand, *Military Manual* (1992), § 806(1).

⁷¹³ New Zealand, *Military Manual* (1992), § 806(1), footnote 25.

⁷¹⁴ New Zealand, *Military Manual* (1992), § 806(1), footnote 26.

⁷¹⁵ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(1).

when operating in joint action. In addition, even civilian objects protected by the police might become targets.⁷¹⁶

695. The Decree on the Constitution of the Integrated National Police of the Philippines provides that the Philippine Constabulary, responsible as the nucleus of the Integrated National Police for police, jail and fire services, “shall remain and continue to be a major service of the Armed Forces”. Within this framework, the Integrated National Police “shall function directly under the Department of National Defense”.⁷¹⁷

696. Pursuant to Spain’s Military Criminal Code, the Guardia Civil is an armed military body that exclusively falls under the responsibility of the Ministry of Defence, in times of siege warfare or when called upon to carry out missions of a military nature.⁷¹⁸

697. The Report on the Practice of Zimbabwe asserts that the incorporation of Article 43 AP I into national legislation by the 1981 Geneva Conventions Act as amended “is evidence of [Zimbabwe’s] view that [it represents] customary international law”.⁷¹⁹

National Case-law

698. The Report on the Practice of India refers to a decision of the Supreme Court which did not consider, for administrative purposes, civilian clerks of a special police unit (the Indo-Tibetan Border Force, which is itself part of the armed forces of India) as members of the armed forces. According to the report, however, members of this force might be treated as combatants for the purpose of the application of IHL.⁷²⁰

Other National Practice

699. The Report on the Practice of South Korea affirms the customary nature of Article 43 AP I.⁷²¹

700. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers that the rule contained in Article 43(3) AP I is part of customary international law.⁷²²

⁷¹⁶ Report on the Practice of Germany, 1997, Chapter 1.1, referring to *Federal Border Police Law* (1994), Article 4.

⁷¹⁷ Philippines, *Decree on the Constitution of the Integrated National Police* (1975), Sections 5 and 7.

⁷¹⁸ Spain, *Military Criminal Code* (1985), Article 9.

⁷¹⁹ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

⁷²⁰ Report on the Practice of India, 1997, Chapter 1.1, referring to Supreme Court, *Dobhal case*, Judgement, 16 August 1994, §§ 1–8.

⁷²¹ Report on the Practice of South Korea, 1997, Chapter 1.1.

⁷²² Report on the Practice of Syria, 1997, Chapter 1.1, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

III. Practice of International Organisations and Conferences

701. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

702. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

703. No practice was found.

VI. Other Practice

704. No practice was found.

E. Definition of Civilians*I. Treaties and Other Instruments**Treaties*

705. Article 50 AP I states that:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol.
2. The civilian population comprises all persons who are civilians.

Article 50 AP I was adopted by consensus.⁷²³

706. Article 25(1) and (2) of draft AP II submitted by the ICRC to the CDDH provided that “any person who is not a member of armed forces is considered to be a civilian” and “the civilian population comprises all persons who are civilians”.⁷²⁴ Paragraph 1 of Article 25 was amended and both paragraphs were adopted by consensus in Committee III of the CDDH.⁷²⁵ The approved proposals provided that “a civilian is anyone who is not a member of the armed forces or of an organized armed group” and “the civilian population comprises all persons who are civilians”.⁷²⁶ Eventually, however, these draft provisions were deleted in the plenary by consensus.⁷²⁷

⁷²³ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

⁷²⁴ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁷²⁵ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 290, § 121.

⁷²⁶ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 320.

⁷²⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

707. Upon ratification of the CCW, the UK made a declaration stating, *inter alia*, that the terms “civilian” and “civilian population” used in this Convention had the same meaning as in Article 50 AP I.⁷²⁸

Other Instruments

708. Article 1 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that “the phrase ‘civilian population’ within the meaning of this Convention shall include all those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment as defined in Article 2”. The term “belligerent establishment” is defined in Article 2 as “military, naval or air establishment, or barracks, arsenal, munition stores or factories, aerodromes or aeroplane workshops or ships of war, naval dockyards, forts, or fortifications for defensive or offensive purposes, or entrenchments”.

709. Article 4 of the 1956 New Delhi Draft Rules states that:

For the purpose of the present rules, the civilian population consists of all persons not belonging to one or other of the following categories:

- (a) Members of the armed forces, or of their auxiliary or complementary organizations.
- (b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting.

710. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 50 AP I.

711. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 50 AP I.

II. National Practice

Military Manuals

712. Argentina’s Law of War Manual defines a civilian as “any person who does not belong to the Armed Forces”.⁷²⁹

713. Australia’s Defence Force Manual states that a civilian is defined “in a negative fashion, namely, any person not belonging to the armed forces. The definition covers civilians collectively as well, when they are referred to as the ‘civilian population’.”⁷³⁰

⁷²⁸ UK, Declaration made upon ratification of the CCW, 13 February 1995, § a(iii).

⁷²⁹ Argentina, *Law of War Manual* (1989), § 4.02(1).

⁷³⁰ Australia, *Defence Force Manual* (1994), § 914.

714. Benin's Military Manual defines civilians as "persons who do not belong to the Armed Forces [nor] take part in a *levée en masse* (civilian populations, men, women, children, journalists, journalists on a dangerous mission)".⁷³¹
715. Cameroon's Instructors' Manual defines civilians as "persons who are neither part of the armed forces nor participating in a *levée en masse*".⁷³²
716. Canada's LOAC Manual provides that "in general, a 'civilian' is any person who is not a combatant . . . The civilian population comprises all persons who are civilians."⁷³³
717. Colombia's Instructors' Manual defines the term civilian as "any person who does not belong to the Armed Forces and who does not participate in a *levée en masse*".⁷³⁴ The manual adds that "civilians must be understood as those who do not participate directly in military hostilities (internal conflict, international conflict)".⁷³⁵
718. Croatia's LOAC Compendium states that "civilians or persons not belonging to the armed forces" are non-combatants.⁷³⁶
719. Croatia's Commanders' Manual defines civilians as those persons "who do not belong to the armed forces".⁷³⁷
720. The Military Manual of the Dominican Republic states that "all persons participating in military operations or activities are considered combatants. Those who do not participate in such actions are non-combatants . . . Civilians . . . are included in the category of non-combatants."⁷³⁸
721. Ecuador's Naval Manual provides that the notion of non-combatant applies "primarily to all individuals who are not part of the armed forces and who . . . abstain from committing hostile acts and from giving direct support to such acts. In this context, non-combatants and the civilian population, are, generally, synonymous."⁷³⁹ The manual further specifies that "the civilian population consists of all persons not serving in the armed forces, militia, or paramilitary forces and not otherwise taking a direct part in the hostilities".⁷⁴⁰
722. France's LOAC Summary Note defines civilians as "those persons who do not belong to the armed forces".⁷⁴¹
723. France's LOAC Teaching Note defines civilians as "those persons who do not belong to the armed forces or who do not participate in hostilities".⁷⁴²
724. Hungary's Military Manual states that "civilians or persons not belonging to the armed forces" are non-combatants.⁷⁴³

⁷³¹ Benin, *Military Manual* (1995), Fascicule I, p. 12.

⁷³² Cameroon, *Instructors' Manual* (1992), p. 17.

⁷³³ Canada, *LOAC Manual* (1999), p. 4-4, §§ 33 and 35.

⁷³⁴ Colombia, *Instructors' Manual* (1999), p. 16, see also p. 28.

⁷³⁵ Colombia, *Instructors' Manual* (1999), p. 16.

⁷³⁶ Croatia, *LOAC Compendium* (1991), p. 6. ⁷³⁷ Croatia, *Commanders' Manual* (1992), § 5.

⁷³⁸ Dominican Republic, *Military Manual* (1980), p. 3.

⁷³⁹ Ecuador, *Naval Manual* (1989), § 5.3, see also §§ 11.1 and 11.3.

⁷⁴⁰ Ecuador, *Naval Manual* (1989), § 11.3. ⁷⁴¹ France, *LOAC Summary Note* (1992), § 1.1.

⁷⁴² France, *LOAC Teaching Note* (2000), p. 4. ⁷⁴³ Hungary, *Military Manual* (1992), p. 17.

725. Indonesia's Air Force Manual states that "unlawful combatants are persons who participate in hostilities without authorization of the belligerent authority, including persons who are neither members of the armed forces nor of a militia".⁷⁴⁴ The Report on the Practice of Indonesia considers that this definition is compatible with the definition provided in Article 50(1) AP I.⁷⁴⁵

726. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that:

The IDF (Israel Defence Forces) accepts and applies the principle of distinction, in accordance with the accepted definition of "civilian" under customary international law, which is understood to mean any individual who is not a member of an organized army of a State, and who is not involved in hostilities.⁷⁴⁶

727. Italy's LOAC Elementary Rules Manual defines civilians as those persons "who do not belong to the armed forces".⁷⁴⁷

728. Kenya's LOAC Manual defines a civilian as "any person who does not belong to the armed forces and does not take any part in a *levée en masse*".⁷⁴⁸

729. Madagascar's Military Manual states that the term "civilian person" means "any person who does not belong to the armed forces and who does not take part in a *levée en masse*".⁷⁴⁹

730. The Military Manual of the Netherlands defines a civilian as "every person who is not a combatant" and specifies that "the civilian population comprises all civilians".⁷⁵⁰

731. South Africa's LOAC Manual defines civilians as "any person who does not belong to the armed forces and does not take part in a *levée en masse*".⁷⁵¹

732. Spain's LOAC Manual states that "the civilian population is defined by exclusion. This means that civilians are those persons who are not combatants."⁷⁵²

733. Sweden's IHL Manual states that "in international humanitarian law, civilians (non-combatants) are those who are not entitled to use weapons in defence or to injure an adversary. Persons who cannot be classified as combatants are thus to be considered as civilians."⁷⁵³

734. Togo's Military Manual defines civilians as "persons who are not members of the armed forces, volunteer corps or resistance movements, and who do not

⁷⁴⁴ Indonesia, *Air Force Manual* (1990), p. 18, § 22.

⁷⁴⁵ Report on the Practice of Indonesia, 1997, Chapter 1.1.

⁷⁴⁶ Report on the Practice of Israel, 1997, Chapter 1.1, referring to *Law of War Booklet* (1986), Chapter 1.

⁷⁴⁷ Italy, *LOAC Elementary Rules Manual* (1991), § 5.

⁷⁴⁸ Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 9–10.

⁷⁴⁹ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § B, see also Fiche No. 2-O, § 5.

⁷⁵⁰ Netherlands, *Military Manual* (1993), p. V-2.

⁷⁵¹ South Africa, *LOAC Manual* (1996), § 24(c).

⁷⁵² Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(2).

⁷⁵³ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 42.

take part in a *levée en masse*; that is to say the civilian population: men, women and children, journalists on a dangerous mission".⁷⁵⁴

735. The UK LOAC Manual states that "civilians are all persons other than those defined in paragraphs 1 to 8 above [combatants, guerrillas and commandos, spies, mercenaries, military non-combatants]".⁷⁵⁵

736. The US Air Force Pamphlet states that "civilians are all persons other than those mentioned as combatants in [Article 4(A) GC III]".⁷⁵⁶

737. The US Naval Handbook refers first to the notion of non-combatants as primarily applying to "those individuals who do not form part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts. In this context, noncombatants and, generally, the civilian population, are synonymous."⁷⁵⁷ The manual further specifies that "the civilian population consists of all persons not serving in the armed forces, militia, or paramilitary forces and not otherwise taking a direct part in the hostilities".⁷⁵⁸

738. The YPA Military Manual of the SFRY (FRY) defines a civilian as "any person who does not belong to one of the categories of persons specified in [the provisions concerning armed forces, commandos, saboteurs and parachuters]".⁷⁵⁹ The manual defines a civilian population as "the entire population of a party to the conflict which does not belong to any of the categories of armed forces".⁷⁶⁰

National Legislation

739. Spain's Penal Code contains a chapter on crimes against protected persons who are defined as "the civilian population and individual civilians protected by the Fourth Geneva Convention of 12 August 1949 or Additional Protocol I of 8 June 1977".⁷⁶¹

National Case-law

740. No practice was found.

Other National Practice

741. The Report on the Practice of Iran found no specific legal definition of civilian, but states that anyone who is not included in the category of combatant should be considered a civilian.⁷⁶²

742. The Report on the Practice of Iraq notes that the definition of civilian includes everyone who does not join the armed forces nor carry arms against one of the belligerents.⁷⁶³

⁷⁵⁴ Togo, *Military Manual* (1996), Fascicule I, p. 13.

⁷⁵⁵ UK, *LOAC Manual* (1981), Section 9, p. 10, § 9.

⁷⁵⁶ US, *Air Force Pamphlet* (1976), § 5-3, see also § 1-2.

⁷⁵⁷ US, *Naval Handbook* (1995), § 5.3, see also § 11.1.

⁷⁵⁸ US, *Naval Handbook* (1995), § 11.3.

⁷⁵⁹ SFRY (FRY), *YPA Military Manual* (1988), § 67(3).

⁷⁶⁰ SFRY (FRY), *YPA Military Manual* (1988), § 52.

⁷⁶¹ Spain, *Penal Code* (1995), Article 608(3).

⁷⁶² Report on the Practice of Iran, 1997, Chapter 1.1.

⁷⁶³ Report on the Practice of Iraq, 1998, Chapter 1.1.

743. On the basis of an interview with a high-ranking army officer, the Report on the Practice of Jordan states that “civilians are all those who do not belong to the armed forces”.⁷⁶⁴

744. The Report on the Practice of Malaysia states that there is no definition of the concept of civilian under any of Malaysia’s written laws. However, on the basis of the practice during the insurgency period as gleaned from interviews with members of the armed forces, the report claims that persons who neither carry arms nor wear a uniform can be considered civilians.⁷⁶⁵

745. The Report on the Practice of Russia notes that although there is no standard definition of civilians, a definition can be inferred *a contrario* from the definition of combatant, i.e. civilians are those who do not fall within the definition of combatant.⁷⁶⁶

746. The Report on the Practice of Rwanda refers to a declaration by Rwanda’s Minister of Defence on 18 August 1997 in which he stated that government troops may only target enemies who carry arms and/or kill people. The report thus concludes, *a contrario*, that in an internal armed conflict civilians are defined as those persons who do not carry arms nor commit inhumane acts against the population in relation to the hostilities.⁷⁶⁷

747. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers that the definition provided in Article 50 AP I is part of customary international law.⁷⁶⁸

748. The Report on the Practice of Zimbabwe considers that the definition of civilians in Article 50 AP I is regarded as customary by Zimbabwe in the context of an international armed conflict.⁷⁶⁹

III. Practice of International Organisations and Conferences

749. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

750. In the pre-trial brief in the *Tadić case* in 1996, the ICTY Prosecutor argued that the term civilian in Article 5 of the ICTY Statute (crimes against humanity) covered all non-combatants within the meaning of common Article 3 of

⁷⁶⁴ Report on the Practice of Jordan, 1997, Interview with a high-ranking officer of the Jordanian army, Chapter 1.1.

⁷⁶⁵ Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces, Chapter 1.1.

⁷⁶⁶ Report on the Practice of Russia, 1997, Chapter 1.1.

⁷⁶⁷ Report on the Practice of Rwanda, 1997, Chapter 1.1, referring to Statement by the Rwandan Minister of Defence, Kigali, 18 August 1997.

⁷⁶⁸ Report on the Practice of Syria, 1997, Chapter 1.1, referring Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

⁷⁶⁹ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

the 1949 Geneva Conventions. Reaffirming the customary nature of common Article 3, the Prosecutor specified that “it provides an authoritative definition of noncombatants or ‘protected persons’ in the broad sense of international humanitarian law”.⁷⁷⁰ In its response, the Defence agreed that the term “civilian” under Article 5 did cover all non-combatants, but argued that the concept of non-combatant was not always easy to delineate, especially when groups were not under the direct control of a central government (as was allegedly the case in Bosnia and Herzegovina).⁷⁷¹ In its judgement in 1997, the ICTY Trial Chamber stated that “determining which individuals of the targeted population qualify as civilians for purposes of crimes against humanity” was not as clear as other concepts. The Trial Chamber ruled that:

Common Article 3, the language of which reflects “elementary considerations of humanity” which are “applicable under customary international law to any armed conflict”, provides that in an armed conflict “not of an international character” Contracting States are obliged “as a minimum” to comply with the following: “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.” AP I defines civilians by the exclusion of prisoners of war and armed forces, considering a person a civilian in case of doubt. However, this definition of civilians contained in common Article 3 is not immediately applicable to crimes against humanity because it is a part of the laws or customs of war and can only be applied by analogy. The same applies to the definition contained in AP I and the Commentary, GC IV on the treatment of civilians, both of which advocate a broad interpretation of the term “civilian”. They, and in particular common Article 3, do, however, provide guidance in answering the most difficult question: specifically, whether acts taken against an individual who cannot be considered a traditional “non-combatant” because he is actively involved in the conduct of hostilities by membership in some form of resistance group can nevertheless constitute crimes against humanity if they are committed in furtherance or as part of an attack directed against a civilian population.⁷⁷²

751. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber stated that “civilians . . . are persons who are not, or no longer, members of the armed forces”.⁷⁷³

V. Practice of the International Red Cross and Red Crescent Movement

752. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that a civilian is “any person who does not belong to the armed forces and does not take part in a *levée en masse*”.⁷⁷⁴

⁷⁷⁰ ICTY, *Tadić case*, Prosecutor’s Pre-Trial Brief, 10 April 1996, p. 45.

⁷⁷¹ ICTY, *Tadić case*, Response to Prosecutor’s Pre-Trial Brief, 23 April 1996, pp. 19–20.

⁷⁷² ICTY, *Tadić case*, Judgement, 7 May 1997, § 639.

⁷⁷³ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 180.

⁷⁷⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 51.

VI. Other Practice

753. No practice was found.

F. Loss of Protection from Attack

Direct participation in hostilities

I. Treaties and Other Instruments

Treaties

754. Common Article 3 of the 1949 Geneva Conventions protects “persons taking no active part in the hostilities”, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause” against “violence to life and person, in particular murder of all kinds”.

755. Articles 51(3) AP I provides that civilians shall enjoy protection against the dangers arising from military operations “unless and for such time as they take a direct part in hostilities”. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.⁷⁷⁵

756. Article 13(3) AP II provides that civilians shall enjoy protection against the dangers arising from military operations “unless and for such time as they take a direct part in hostilities”. Article 13 AP II was adopted by consensus.⁷⁷⁶

757. Upon ratification of the CCW, the UK issued a declaration stating that “civilians shall enjoy the protection afforded by this Convention unless and for such time as they take a direct part in hostilities”.⁷⁷⁷

Other Instruments

758. Article 4 of the 1956 New Delhi Draft Rules states that:

The civilian population consists of all persons not belonging to one or other of the following categories:

- (a) Members of the armed forces, or of their auxiliary or complementary organizations.
- (b) Persons who do not belong to the forces referred to above, but nevertheless take part in the fighting.

759. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(3) AP I.

⁷⁷⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 16.

⁷⁷⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

⁷⁷⁷ UK, Declaration upon ratification of the CCW, 13 February 1995, § a(iii).

760. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(3) AP I.

761. Section 5.2 of the 1999 UN Secretary-General's Bulletin provides that civilians shall enjoy protection against the dangers arising from military operations, "unless and for such time as they take a direct part in hostilities".

II. National Practice

Military Manuals

762. Australia's Defence Force Manual states that "civilians are only protected as long as they refrain from taking a direct part in hostilities".⁷⁷⁸

763. Benin's Military Manual states that "civilian persons may only be attacked when they participate directly in hostilities".⁷⁷⁹

764. Canada's LOAC Manual states that "civilians who take a direct part in hostilities (other than a *levée en masse*) are unlawful combatants. They lose their protection as civilians and become legitimate targets for such time as they take a direct part in hostilities."⁷⁸⁰ The manual further states that "participation in hostilities by non-combatants" is a violation of customary law and recognised as a war crime by the LOAC.⁷⁸¹

765. Colombia's Instructors' Manual states that civilians lose their protection against attack "when they participate directly in the hostilities".⁷⁸² The manual adds that "civilians must be understood as those who do not participate directly in military hostilities (internal conflict, international conflict)".⁷⁸³

766. Croatia's Commanders' Manual states that "civilians may not be attacked, unless they participate directly in hostilities".⁷⁸⁴

767. The Military Manual of the Dominican Republic considers that "all persons who participate in military operations or activities are considered combatants" and thus liable to attack.⁷⁸⁵

768. Ecuador's Naval Manual states that "civilians who participate directly in hostilities . . . lose their immunity and may be attacked".⁷⁸⁶

769. France's LOAC Summary Note states that "civilians may not be attacked, unless they participate directly in hostilities".⁷⁸⁷

⁷⁷⁸ Australia, *Defence Force Manual* (1994), § 532, see also §§ 527 and 918.

⁷⁷⁹ Benin, *Military Manual* (1995), Fascicule III, p. 4.

⁷⁸⁰ Canada, *LOAC Manual* (1999), p. 3-4, § 28, see also p. 7-5, § 46 (air to land operations).

⁷⁸¹ Canada, *LOAC Manual* (1999), p. 16-4, § 21(g).

⁷⁸² Colombia, *Instructors' Manual* (1999), p. 16, see also p. 28.

⁷⁸³ Colombia, *Instructors' Manual* (1999), p. 16.

⁷⁸⁴ Croatia, *Commanders' Manual* (1992), § 10.

⁷⁸⁵ Dominican Republic, *Military Manual* (1980), p. 3.

⁷⁸⁶ Ecuador, *Naval Manual* (1989), § 11.3.

⁷⁸⁷ France, *LOAC Summary Note* (1992), § 1.3; see also *LOAC Teaching Note* (2000), p. 5.

770. Germany's Military Manual states that "civilians who do not take part in hostilities shall be respected and protected".⁷⁸⁸ The manual adds that "persons taking a direct part in hostilities are not entitled to claim the rights accorded to civilians by international humanitarian law".⁷⁸⁹

771. India's Army Training Note states that:

War is an act of extreme violence between two nations and not between people individually. The implications, therefore, are that, so long as an individual, may it be a soldier or a civilian, is directly contributing towards furtherance of the war effort, he is deemed to be at war. However, when he is not so employed, he is to be treated as a normal human being and must be afforded all protection and care due to.⁷⁹⁰

772. Indonesia's Air Force Manual states that a person who is not a member of the armed forces nor a member of a militia but participates in the hostilities is an unlawful combatant and is considered a military objective.⁷⁹¹

773. Italy's LOAC Elementary Rules Manual provides that "civilians may not participate directly in hostilities and may not be attacked, unless they take a direct part in hostilities".⁷⁹²

774. Kenya's LOAC Manual states that civilians lose their protection from attack "when they take a direct part in hostilities".⁷⁹³

775. Madagascar's Military Manual states that "civilian persons may not be attacked, unless they participate directly in hostilities".⁷⁹⁴

776. The Military Manual of the Netherlands states that "civilians enjoy no protection [against attack] if they participate directly in hostilities".⁷⁹⁵ With respect to non-international armed conflicts in particular, the manual states that "the protection of civilians ends when and for as long as they participate directly in hostilities".⁷⁹⁶

777. The Military Handbook of the Netherlands states that "it is prohibited to attack civilians who are not involved in combat".⁷⁹⁷

778. New Zealand's Military Manual provides that "civilians shall enjoy... protection [against attack] unless and for such time as they take a direct part in hostilities".⁷⁹⁸ The manual further states that "participation in hostilities by non-combatants" is a war crime recognised by the customary law of armed conflict.⁷⁹⁹

⁷⁸⁸ Germany, *Military Manual* (1992), § 502.

⁷⁸⁹ Germany, *Military Manual* (1992), § 517.

⁷⁹⁰ India, *Army Training Note* (1995), p. 3/7, § 14.

⁷⁹¹ Indonesia, *Air Force Manual* (1990), §§ 22-23.

⁷⁹² Italy, *LOAC Elementary Rules Manual* (1991), § 10.

⁷⁹³ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 10.

⁷⁹⁴ Madagascar, *Military Manual* (1994), Fiche 3-O, § 10.

⁷⁹⁵ Netherlands, *Military Manual* (1993), p. V-5.

⁷⁹⁶ Netherlands, *Military Manual* (1993), p. XI-6.

⁷⁹⁷ Netherlands, *Military Handbook* (1995), p. 7-36.

⁷⁹⁸ New Zealand, *Military Manual* (1992), § 517.

⁷⁹⁹ New Zealand, *Military Manual* (1992), § 1704(5).

779. Nigeria's Operational Code of Conduct states that "youths and school children must not be attacked unless they are engaged in open hostilities against Federal Government Forces". It further states that "male civilians who are hostile to the Federal Forces are to be dealt with firmly but fairly".⁸⁰⁰

780. According to Nigeria's Manual on the Laws of War, "participation in hostilities by civilians" is an example of a war crime.⁸⁰¹

781. South Africa's LOAC Manual states that "if persons identified as civilians engage the armed forces, then they are regarded as unlawful combatants and may be treated under law as criminals".⁸⁰²

782. Spain's LOAC Manual states that "civilians must not take a direct part in hostilities nor be the object of attack, unless they take a direct part in hostilities".⁸⁰³

783. Sweden's IHL Manual states that "protection for civilians does not apply under all circumstances – exceptions are made for the time when civilians take direct part in hostilities".⁸⁰⁴

784. Togo's Military Manual states that "civilian persons may only be attacked when they participate directly in hostilities".⁸⁰⁵

785. According to the UK Military Manual, "participation in hostilities by civilians" is an example of a punishable violation of the laws of war, or war crime, beyond the grave breaches of the Geneva Conventions.⁸⁰⁶

786. The UK LOAC Manual states that civilians "lose their protection [from attack] when they take part in hostilities".⁸⁰⁷ The manual further states that soldiers "must not attack civilians who are not actually engaged in combat".⁸⁰⁸

787. The US Air Force Pamphlet states that "civilians enjoy the protection afforded by law unless and for such time as they take a direct part in hostilities".⁸⁰⁹

788. The US Naval Handbook states that "civilians who take a direct part in hostilities . . . lose their immunity and may be attacked".⁸¹⁰

789. The YPA Military Manual of the SFRY (FRY) states that "it is permitted to directly attack only members of the armed forces and other persons – only if they directly participate in military operations".⁸¹¹

National Legislation

790. No practice was found.

⁸⁰⁰ Nigeria, *Operational Code of Conduct* (1967), § 4(b) and (j).

⁸⁰¹ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁸⁰² South Africa, *LOAC Manual* (1996), § 28(b).

⁸⁰³ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.a.(2).

⁸⁰⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 43.

⁸⁰⁵ Togo, *Military Manual* (1996), Fascicule III, p. 4.

⁸⁰⁶ UK, *Military Manual* (1958), § 626(p).

⁸⁰⁷ UK, *LOAC Manual* (1981), Section 3, p. 10, § 9.

⁸⁰⁸ UK, *LOAC Manual* (1981), Annex A, p. 44, § 8.

⁸⁰⁹ US, *Air Force Pamphlet* (1976), § 5-3. ⁸¹⁰ US, *Naval Handbook* (1995), § 11.3.

⁸¹¹ SFRY (FRY), *YPA Military Manual* (1988), § 67.

National Case-law

791. No practice was found.

Other National Practice

792. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that “the condition [for civilian immunity from attack], however, is that they do not participate directly in hostilities, which is of course a question of fact”.⁸¹²

793. With reference to Articles 248(2) and 251 of Chile’s 1925 Code of Military Justice, the Report on the Practice of Chile states that Chile takes a very broad view of what acts are considered to constitute support to military action, and as a result, lead to the loss of civilian status and protection.⁸¹³

794. In spite of the absence of Chinese regulation on this matter, the Report on the Practice of China concludes that in practice civilians lose their civilian status and protection when carrying out military missions. The report adds that the term “innocent civilian” is often used in Chinese practice, and that a civilian who participates in hostilities, being no longer “innocent”, will lose protection. In this context, the report also gives a definition of the terms “spy” and “secret service”. A spy, under Chinese practice, is a civilian or a combatant who works for the enemy during an international armed conflict. “Secret service” refers to civilians or combatants who work for the enemy in the context of an internal armed conflict. The report concludes that it can be deduced from these two terms that civilians who take part in the hostilities, including those acting as spies or in the secret service, lose their protection.⁸¹⁴

795. The Report on the Practice of Egypt notes that the immunity from attack granted to the civilian population – provided that civilians do not participate in military operations – is justified by the “dictates of humanity and the cultural and civilian heritage of all nations and peoples”.⁸¹⁵

796. On the basis of an interview with a high-ranking army officer, the Report on the Practice of Jordan states that “civilians who take [a] direct part in hostilities are no longer considered civilians and cannot claim the privileges of combatant status”.⁸¹⁶

797. According to the Report on the Practice of Kuwait, it is the *opinio juris* of Kuwait that direct participation in military operations results in the loss of the protection normally granted to civilians.⁸¹⁷

⁸¹² Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096-1, 9 January 1985, p. 10.

⁸¹³ Report on the Practice of Chile, 1997, Chapter 1.2.

⁸¹⁴ Report on the Practice of China, 1997, Chapter 1.2.

⁸¹⁵ Report on the Practice of Egypt, 1997, Chapter 1.2.

⁸¹⁶ Report on the Practice of Jordan, 1997, Interview with a high-ranking officer of the Jordanian army, Chapter 1.2.

⁸¹⁷ Report on the Practice of Kuwait, 1997, Chapter 1.2.

798. The Report on the Practice of Lebanon states that “the Commission on Human Rights of the Lebanese parliament is of the opinion that civilians lose their civilian status when they take part in military actions”.⁸¹⁸

799. On the basis of interviews with members of the armed forces, the Report on the Practice of Malaysia states that during the communist insurgency, civilians were not deprived of their protected status unless they actively participated in the insurgency.⁸¹⁹

800. At the CDDH, Mexico stated that it believed draft Article 46 AP I (now Article 51) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.⁸²⁰

801. The Report on the Practice of Nigeria states that it is the *opinio juris* of Nigeria that the rule that civilians are deprived of protection when they engage in hostilities against federal forces is part of customary international law.⁸²¹

802. The Report on the Practice of Syria notes that Syria did not make any reservations to Article 51 AP I and thus views the conditions stated in this Article as part of customary international law.⁸²²

803. At the CDDH, the UK voted in favour of draft Article 46 AP I (now Article 51), describing its first three paragraphs as containing a “valuable reaffirmation of existing customary rules of international law designed to protect civilians”.⁸²³

804. In 1987, the Deputy Legal Adviser of the US Department of State stated that “we also support the principle . . . that immunity not be extended to civilians who are taking part in hostilities”.⁸²⁴

805. In 1989, a US memorandum of law concerning the prohibition of assassination stated that “there is general agreement among law-of-war experts that civilians who participate in hostilities may be regarded as combatants”.⁸²⁵

⁸¹⁸ Report on the Practice of Lebanon, 1998, Chapter 1.2, referring to a statement of the Lebanese Parliamentary Commission on Human Rights.

⁸¹⁹ Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces, Chapter 1.2.

⁸²⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

⁸²¹ Report on the Practice of Nigeria, 1997, Chapter 1.2.

⁸²² Report on the Practice of Syria, 1997, Chapter 1.2.

⁸²³ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 119.

⁸²⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

⁸²⁵ US, Executive Order 12333 and Assassination, Memorandum prepared by the Chief of the International Law Branch, Office of the Judge Advocate General, Department of the Army, 2 November 1989, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3415–3416.

806. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that “as a general principle, the law of war prohibits . . . the direct, intentional attack of civilians not taking part in hostilities”.⁸²⁶

807. The Report on US Practice states that:

Under the practice of the United States, civilians lose immunity from direct attack if, and for so long as, they are committing hostile acts or otherwise taking a direct part in hostilities. These conditions may be met by bearing arms or by aiding the enemy with arms, ammunition, supplies, money or intelligence information or even by holding unauthorized intercourse with enemy personnel. Other acts might be considered to be taking a direct part in hostilities, depending on the intensity of the conflict and other circumstances.⁸²⁷

808. The Report on the Practice of Zimbabwe asserts that “civilians will lose their protection if they actively assist or actively become engaged in military operations . . . A lot, however, will depend on the degree of involvement.”⁸²⁸

III. Practice of International Organisations and Conferences

809. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

810. In 1997, the IACiHR considered the events that took place at La Tablada in Argentina on 23 January 1989, when 42 armed individuals launched an attack against an Argentine army barracks. The attackers alleged that the purpose of the attack was to prevent an imminent military coup d'état that was supposedly being planned there. The arrival of Argentine military personnel resulted in a skirmish of approximately 30 hours, which left 29 of the attackers and several State agents dead. The Commission, seized by surviving attackers, concluded that even if the clash was brief in duration, common Article 3 of the 1949 Geneva Conventions and other relevant rules regarding the conduct of internal conflict were applicable. The Commission stated that when civilians, such as those who attacked the base at La Tablada, assumed the role of combatants by directly taking part in fighting, whether singly or as members of a group, they thereby became legitimate military targets, but only for such time as they actively participated in the combat. As soon as they ceased their hostile acts and thus fell under the power of Argentinean State agents, they could no longer be lawfully attacked or subjected to acts of violence.⁸²⁹

⁸²⁶ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 622.

⁸²⁷ Report on US Practice, 1997, Chapter 1.2.

⁸²⁸ Report on the Practice of Zimbabwe, 1998, Chapter 1.2.

⁸²⁹ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 177–178, 189 and 328.

811. In 1999, in a report on human rights in Colombia, the IACiHR stated that it believed that it was necessary to clarify the distinction between “direct” or “active” and “indirect” participation by civilians in hostilities in order to identify those limited situations in which it was not unlawful to attack civilians. It maintained that it was generally understood in IHL that the phrase “direct participation in hostilities” meant acts which, by their nature or purpose, were intended to cause actual harm to enemy personnel and material. The Commission made clear that such participation also suggested a “direct causal relationship between the activity engaged in and harm done to the enemy at the time and place where the activity takes place”. The Commission upheld the view that:

Civilians whose activities merely support the adverse party’s war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.⁸³⁰

V. Practice of the International Red Cross and Red Crescent Movement

812. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “civilian persons may not be attacked unless they participate directly in hostilities”.⁸³¹

813. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(2) of draft AP I which stated that “civilians enjoy the protection afforded by this Article unless and for such time as they take a direct part in hostilities”. All governments concerned replied favourably.⁸³²

VI. Other Practice

814. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that “civilians, however, lose their immunity from attack for such time as they assume a combatant’s role”.⁸³³ It reiterated this view in

⁸³⁰ IACiHR, Third report on human rights in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, Chapter IV, §§ 53 and 56.

⁸³¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 208.

⁸³² ICRC, The International Committee’s Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

⁸³³ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 32.

1986 in a report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁸³⁴

815. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that “civilians, however, temporarily lose their immunity from attack whenever they assume a combatant’s role”.⁸³⁵

816. In 1994, in reply to a report on violations of human rights in Rwanda, the FPR stated that “its combatants had only killed armed civilians engaged in combat who could not be distinguished from the regular soldiers of the Rwandan army”.⁸³⁶

817. In 2001, in a report on Israel and the occupied territories, Amnesty International referred to Article 51(3) AP I, although this instrument had not been ratified by Israel, and stated that:

Palestinians engaged in armed clashes with Israeli forces are not combatants. They are civilians who lose their protected status for the duration of the armed engagement. They cannot be killed at any time other than while they are firing upon or otherwise posing an immediate threat to Israeli troops or civilians. Because they are not combatants, the fact that they participated in an armed attack at an earlier point cannot justify targeting them for death later on.⁸³⁷

Specific examples of direct participation

I. Treaties and Other Instruments

Treaties

818. During the March–April 1998 session of the Preparatory Committee for the Establishment of an International Criminal Court, a proposal was developed which encompassed “recruiting children under the age of fifteen years into armed forces or using them to participate in hostilities”. The words “using” and “participate” were explained in a footnote to provide guidance for the interpretation of the scope of this provision. This footnote read:

The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in

⁸³⁴ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, p. 98.

⁸³⁵ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 139.

⁸³⁶ Association rwandaise pour la défense des droits de la personne et des libertés publiques, *Rapport sur les droits de l’homme au Rwanda, octobre 1992–octobre 1993*, Kigali, December 1993, p. 115.

⁸³⁷ Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, AI Index MDE 15/005/2001, London, 21 February 2001, p. 29.

an officer's married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.⁸³⁸

Other Instruments

819. No practice was found.

II. National Practice

Military Manuals

820. Australia's Defence Force Manual notes that "whether or not a civilian is involved in hostilities is a difficult question which must be determined by the facts of each individual case. Civilians bearing arms and taking part in military operations are clearly taking part in hostilities."⁸³⁹

821. Belgium's Teaching Manual for Soldiers considers that "a civilian who takes up arms logically loses the protection granted to civilians and may be attacked."⁸⁴⁰

822. Ecuador's Naval Manual states that:

Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure or capture enemy personnel or destroy enemy property lose their immunity and may be attacked. Similarly, civilians serving as guards, intelligence agents or lookouts on behalf of military forces may be attacked.⁸⁴¹

823. El Salvador's Soldiers' Manual states that combatants must "never attack... women, children, the elderly or any person who does not bear arms".⁸⁴²

824. India's Army Training Note defines the term "terrorist" as:

a person who indulges in wanton killing of persons or involves in violence or in the disruption of services or means of communications essential to the community or in damaging property with a view to putting the public or any section of the public in fear, or affecting adversely the harmony between different religious, social, linguistic groups or the sovereignty and integrity of a nation.⁸⁴³

According to the Report on the Practice of India, this definition is "intended to help the armed forces to identify the 'terrorists' who may be treated as combatants if the situation can be likened to an internal conflict".⁸⁴⁴

825. According to the Military Manual of the Netherlands, taking a direct part in hostilities means that "the person involved engages in hostilities aimed at hitting enemy personnel or materiel. Examples include firing at enemy troops,

⁸³⁸ Roy S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, p. 118.

⁸³⁹ Australia, *Defence Force Manual* (1994), § 532.

⁸⁴⁰ Belgium, *Teaching Manual for Soldiers* (undated), p. 14.

⁸⁴¹ Ecuador, *Naval Manual* (1989), § 11.3. ⁸⁴² El Salvador, *Soldiers' Manual* (undated), p. 3.

⁸⁴³ India, *Army Training Note* (1995), p. 4/16, § 35.

⁸⁴⁴ Report on the Practice of India, 1998, Chapter 1.1.

throwing molotov cocktails or blowing up a bridge used for the transport of military materiel."⁸⁴⁵

826. Sweden's IHL Manual states that "protection for civilians does not apply under all circumstances – exceptions are made for the time when civilians take direct part in hostilities, which is equivalent to their taking part in armed fighting".⁸⁴⁶

827. The US Field Manual states that "persons who are not members of the armed forces . . . who bear arms or engage in other conduct hostile to the enemy thereby deprive themselves of many of the privileges attaching to the members of the civilian population".⁸⁴⁷ The manual specifies that persons who are not members of the armed forces, who commit hostile acts such as "sabotage, destruction of communications facilities, intentional misleading of troops by guides [and] liberation of prisoners of war" about or behind enemy lines may be tried and sentenced to execution or imprisonment.⁸⁴⁸

828. The US Air Force Pamphlet states that "taking a direct part in hostilities covers acts of war intended by their nature and purpose to strike at enemy personnel and material. Thus a civilian taking part in fighting, whether singly or as a member of a group, *loses* the immunity given civilians."⁸⁴⁹ (emphasis in original)

829. The US Air Force Commander's Handbook states that "anyone who personally tries to kill, injure or capture enemy persons or objects" is liable to attack. The manual adds that:

The same would be true of anyone acting as a guard for military activity, as a member of a weapon crew, or as a crewman on a military aircraft in combat . . . Civilians who collect intelligence information, or otherwise act as part of the enemy's military intelligence network, are lawful objects of attack. Members of a civilian ground observer corps who report the approach of hostile aircraft would also be taking a direct part in hostilities. The rescue of military airmen downed on land is a combatant activity that is not protected under international law. Civilians engaged in the rescue and return of enemy aircrew members are therefore subject to attack. This would include, for example, members of a civilian air auxiliary, such as the US Civil Air Patrol, who engage in military search and rescue activity in wartime. Note, however, that care of the wounded on land, and the rescue of persons downed at sea or shipwrecked, are protected activities under international law.⁸⁵⁰

830. The US Naval Handbook states that:

Civilians who take a direct part in hostilities by taking up arms or otherwise trying to kill, injure, or capture enemy persons or destroy enemy property lose their immunity and may be attacked. Similarly, civilians serving as lookouts, guards, or intelligence agents for military forces may be attacked. Direct participation may also include civilians serving as guards, intelligence agents, or lookouts on behalf of

⁸⁴⁵ Netherlands, *Military Manual* (1993), p. V-5.

⁸⁴⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 43. ⁸⁴⁷ US, *Field Manual* (1956), § 60.

⁸⁴⁸ US, *Field Manual* (1956), § 81. ⁸⁴⁹ US, *Air Force Pamphlet* (1976), § 5-3(a).

⁸⁵⁰ US, *Air Force Commander's Handbook* (1980), § 2-8.

military forces. Direct participation in hostilities must be judged on a case-by-case basis. Combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the person's behavior, location and attire, and other information available at the time.⁸⁵¹

831. The YPA Military Manual of the SFRY (FRY) states that a civilian is considered a member of the armed forces when carrying arms or "otherwise taking part in resistance to an attacker".⁸⁵² The Report on the Practice of the SFRY (FRY) considers that:

This phrase is not substantiated with examples, but it is obvious that the authors had in mind various forms of participation of civilians in military operations and its preparations. No doubt experiences of the resistance movement during World War II were taken into account.⁸⁵³

National Legislation

832. The Report on the Practice of Egypt states that according to Egypt's Military Criminal Code, "armed gangs and rebels" are considered to be "enemies".⁸⁵⁴

833. Ghana's Armed Forces Act defines "enemy" as any person engaged in armed operations against any part of the armed forces of Ghana, including armed mutineers, armed rebels, armed rioters and pirates.⁸⁵⁵

834. India's Army Act defines the term "enemy" as including "all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of any person subject to military law to act".⁸⁵⁶

835. Malaysia's Armed Forces Act defines the "enemy" as "all persons engaged in armed operations against any of His Majesty's armed forces or any force co-operating therewith and also includes armed mutineers, armed rebels, armed rioters and pirates".⁸⁵⁷

836. Pakistan's Army Act defines the "enemy" as including "all armed mutineers, armed rebels, armed rioters, pirates and any person in arms against whom it is the duty of any person subject to the Act to act".⁸⁵⁸

837. Peru's Law on Self-Defence Committees specifies that in internal armed conflicts or in situations of internal violence, certain civilian groups, termed "self-defence committees", are authorised to "develop activities of self-defence of their communities" and to offer temporary support to the armed forces and national police in "pacification" tasks. They have to be accredited by the competent military commanders and may be armed. Although the law does not

⁸⁵¹ US, *Naval Handbook* (1995), § 11.3.

⁸⁵² SFRY (FRY), *YPA Military Manual* (1988), § 48.

⁸⁵³ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.2.

⁸⁵⁴ Report on the Practice of Egypt, 1997, Chapter 1.1, referring to *Military Criminal Code* (1966), Article 85 and its explanatory memorandum.

⁸⁵⁵ Ghana, *Armed Forces Act* (1962), Article 98. ⁸⁵⁶ India, *Army Act* (1950), Section 3(x).

⁸⁵⁷ Malaysia, *Armed Forces Act* (1972), Part I, Section 2.

⁸⁵⁸ Pakistan, *Army Act* (1952), Chapter I, Section 8(8); see also *Air Force Act* (1953), Chapter I, Section 4(xvii) and *Navy Ordinance* (1961), Chapter I, Section 4(x).

specifically address the civilian or combatant status of the members of these committees, it mentions that the participation of draft-aged persons in these committees is equivalent to the accomplishment of the compulsory military service.⁸⁵⁹

National Case-law

838. Colombia's Constitutional Court, reviewing the constitutionality of the Guard and Private Security Statute in 1997, confirmed the view that:

The general protection of the civilian population against the dangers of war also implies that international humanitarian law does not authorise either of the parties to involve this population in the armed conflict, since by doing so it makes the said population into an active participant in that conflict, thereby exposing it to military attacks by the other party.⁸⁶⁰

Other National Practice

839. According to the Report on the Practice of Botswana, "civilians lose their protection when they show resistance and aggression or when there is reason to believe they are involved in hostile activities".⁸⁶¹

840. In reaction to an article in the press, the Office of the Human Rights Adviser in the Office of the President of Colombia stated that:

With respect to the concept of civilian population, there is probably a confusion in the article . . . with the notions of combatant and non-combatant. In principle, the civilian population is always considered non-combatant . . . In a non-international armed conflict, civilians can take up arms and form armed rebel groups, putting themselves outside the laws of the country. They thus become combatants which the State can attack and fight against with perfect legitimacy. As a result, such rebels are criminals and combatants at the same time.⁸⁶²

841. Colombia's Defensoría del Pueblo (Ombudsman's Office), with respect to "*convivir*", considered that:

These organisations, nurtured by the national government itself, contribute nothing to the immunity of the civilian population, since they involve citizens in the armed conflict, divesting them of their protected status and making them into legitimate targets of attack . . . In the view of the Ombudsman's Office, the operation of the *Convivir* cooperatives means that civilians participate directly in the armed conflict, thereby becoming combatants.⁸⁶³

⁸⁵⁹ Peru, *Law on Self-Defence Committees* (1991), Article 1(7).

⁸⁶⁰ Colombia, Constitutional Court, *Constitutional Case No. C-572*, Judgement, 7 November 1997.

⁸⁶¹ Report on the Practice of Botswana, 1998, Answers to additional questions on Chapter 1.2.

⁸⁶² Colombia, Presidencia de la República de Colombia, Consejería para los Derechos Humanos, *Comentarios sobre el artículo publicado en La Prensa por Pablo E. Victoria sobre el Protocolo II*, undated, § 5, reprinted in Congressional record concerning the enactment of Law 171 of 16 December 1994.

⁸⁶³ Colombia, Defensoría del Pueblo, *Cuarto informe anual del defensor del pueblo al congreso de Colombia*, Santafé de Bogotá, September 1997, pp. 48–49.

842. The Report on the Practice of Colombia states that:

In Colombia, communal guard and private security services have been created under the name "*convivir*". These services take the form of rural security cooperatives composed of individuals whom the State has authorised to bear arms, and who collaborate with the authorities by providing information to the public security forces concerning the activities of the guerrilla organisations. There is a public debate over the question of whether the members of these services should be considered civilians or combatants.⁸⁶⁴ (see below)

843. During the conflict in El Salvador, the armed forces reportedly attacked on numerous occasions what the guerrillas called "the masses", i.e. parts of the civilian population who did not use arms or resort to violence but who were believed to sympathise or collaborate with the FMLN and who lived in zones of guerrilla resistance or in conflict zones.⁸⁶⁵

844. According to the Report on the Practice of India, "any person in arms and acting against governmental authority" or "who contributes towards the furtherance of armed conflict" would fall within the definition of enemy and lose protection.⁸⁶⁶

845. According to the Report on the Practice of Iraq, civilians lose their protection from attack if they engage in military acts or in acts that directly serve the armed forces and military operations, even without taking up arms against the other party. The report adds, however, that this exception should be interpreted restrictively in order to avoid abuse.⁸⁶⁷

846. The Report on the Practice of Israel states that:

Civilians would lose their protection . . . in those cases in which they are actively involved in hostile activities against Israeli soldiers, civilians or property. The implementation of this rule in practice is not always straightforward, for a variety of reasons, which include the following:

First – many activities, which undoubtedly assist in the carrying out of hostilities, fall in an undefined "grey area" (civilian truck-drivers, [staff of] vehicle repair workshops, etc.).

Second – the military commander in the field is often required to make decisions on the basis of incomplete information, available at the time of the attack. Therefore, while it may be easier to differentiate between protected civilians and others after the event, when more facts are known, it should be understood that any test which requires perfect knowledge of the facts on the ground would fail to meet the test of reality. As an example of the above, in Lebanon many civilians commonly carry firearms. Therefore, the fact that an individual openly carries a firearm does not, in and of itself, automatically relieve him of his protected status. Nevertheless, when returning fire, it is extremely difficult (and probably unwise from a military

⁸⁶⁴ Report on the Practice of Colombia, 1998, Chapter 1.2.

⁸⁶⁵ "La cuestión de las masas", *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XLII, No. 465, July 1987, pp. 414–434.

⁸⁶⁶ Report on the Practice of India, 1997, Chapter 1.2.

⁸⁶⁷ Report on the Practice of Iraq, 1998, Chapter 1.2.

viewpoint) to differentiate between those individuals actually firing their firearms and those just carrying them.⁸⁶⁸

847. The Report on the Practice of Lebanon states that the Lebanese representative in the Israel-Lebanon Monitoring Group established pursuant to the application of the 1996 Israel-Lebanon Ceasefire Understanding considers that “civilians who co-operate in practice with the enemy in military operations and activities lose their civilian status and become military objectives liable to attack”.⁸⁶⁹

848. On the basis of interviews with members of the armed forces, the Report on the Practice of Malaysia states that during the communist insurgency civilians lost their protection if they actively participated in the insurgency. Persons who merely provided support to the enemy, on the other hand, for example those who supplied it with weapons, food or medicine, or sympathisers, for example journalists who wrote articles supportive of the communist cause, did not lose their civilian status.⁸⁷⁰ The report notes, however, that this did not mean that they were not liable to prosecution under any written laws and refers to specific legislation in this respect.⁸⁷¹

849. The Report on the Practice of the Philippines says that civilians lose their protection when they become hostile elements and contribute militarily to the insurgents’ cause. These civilians, who can serve for example as spies, couriers or lookouts, are qualified by the military as “sympathisers” or “communist terrorists” and can be the object of a direct military attack in villages influenced or infiltrated by the Communist Party of the Philippines.⁸⁷²

850. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that unarmed civilians who follow their armed forces during an international armed conflict in order to provide them with food, transport munitions or carry messages, for example, lose their status as civilians. In the context of an internal armed conflict, however, unarmed civilians who collaborate with one of the parties to the conflict always remain civilians. According to the report, this distinction is justified by the fact that in internal armed conflicts, civilians are forced to cooperate with the party that holds them in its power.⁸⁷³

851. In 1989, a US memorandum of law concerning the prohibition of assassination stated that:

⁸⁶⁸ Report on the Practice of Israel, 1997, Chapter 1.2.

⁸⁶⁹ Report on the Practice of Lebanon, 1998, Answers to additional questions on Chapter 1.2.

⁸⁷⁰ Report on the Practice of Malaysia, 1997, Chapter 1.2, Interviews with members of the Malaysian armed forces.

⁸⁷¹ Report on the Practice of Malaysia, 1997, Chapter 1.2, referring to *Revised Penal Code* (1997), Chapter VI, Sections 121–130, *Official Secrets Act* (1972), Section 3 and *Internal Security Act* (1972), Sections 57–62.

⁸⁷² Report on the Practice of the Philippines, 1997, Chapter 1.2.

⁸⁷³ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 1.2.

While there is general agreement among law-of-war experts that civilians who participate in hostilities may be regarded as combatants, there is no agreement as to the degree of participation necessary to make an individual civilian a combatant . . . There is a lack of agreement on this matter, and no existing law-of-war treaty provides clarification or assistance. Historically, however, the decision as to the level at which civilians may be regarded as combatants or “quasi-combatants” and thereby subject to attack generally has been policy rather than a legal matter. The technological revolution in warfare that has occurred over the past two centuries has resulted in a joining of segments of the civilian population with each nation’s conduct of military operations and vital support activities . . . Finally, one rule of thumb with regard to the likelihood that an individual may be subject to lawful attack is his (or her) immunity from military service if continued service in his (or her) civilian position is of greater value to a nation’s war effort than that person’s service in the military. A prime example would be civilian scientists occupying key positions in a weapons program regarded as vital to a nation’s national security or war aims. Thus, more than 90% of the World War II Project Manhattan personnel were civilians, and their participation in the U.S. atomic weapons program was of such importance as to have made them liable to legitimate attack. Similarly, the September 1944 Allied bombing raids on the German rocket sites at Peenemunde regarded the death of scientists involved in research and development at that facility to have been as important as destruction of the missiles themselves.⁸⁷⁴

852. According to the Report on the Practice of Zimbabwe, “civilians lose their protection if they actively assist or actively become engaged in military operations. This may include giving logistical and/or intelligence support. A lot, however, will depend on the degree of involvement.”⁸⁷⁵

III. Practice of International Organisations and Conferences

United Nations

853. In 1985, in a report on the situation of human rights in El Salvador, the Special Representative of the UN Commission on Human Rights stated that:

The Special Representative is actually convinced that as a result of or during fighting, the Salvadorian army produces civilian, and thus unwarranted casualties, particularly among the so-called *masas*, or groups of peasants who, while not personally involved in the fighting, coexist with the guerrillas and supply them with means of subsistence. In any event, inasmuch as the so-called *masas* take no part in combat, they must be considered civilians. The reference in article 50 of the 1977 Additional Protocol to the Third Geneva Convention of 12 August 1949, means that any persons who follow armed forces without forming an integral part of them, such as suppliers and members of work units or service units responsible for troop welfare, must be considered civilians. In the view of the Special Representative, if

⁸⁷⁴ US, Executive Order 12333 and Assassination, Memorandum prepared the Chief of the International Law Branch, Office of the Judge Advocate General, Department of the Army, 2 November 1989, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3415–3416.

⁸⁷⁵ Report on the Practice of Zimbabwe, 1998, Chapter 1.2.

the *masas* who accompany the guerrilla troops meet the conditions established in those international instruments, they cannot be considered combatants; they are civilians.⁸⁷⁶

854. In a resolution adopted in 1985, the UN Sub-Commission on Human Rights ratified the point stated by the Special Representative of the Commission on Human Rights for El Salvador that:

According to the Geneva Conventions as long as the so-called "masses" do not participate directly in combat, although they may sympathize, accompany, supply food and live in zones under the control of the insurgents, they preserve their civilian character, and therefore they must not be subjected to military attacks and forced displacement by Government forces.⁸⁷⁷

This statement was repeated in subsequent years.⁸⁷⁸

855. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights dealt with the subject of loss of civilian status in a section concerning events in the Medak area. On the basis of information gathered by field personnel revealing that civilians, including a number of elderly people, had been arbitrarily killed, the Special Rapporteur pointed out to the government that these acts were in violation of IHL and requested a full investigation to identify the perpetrators and punish them. Following preliminary inquiries, the Deputy Prime Minister and Minister of Foreign Affairs informed the Special Rapporteur that the individuals killed in the action, including the elderly, "were all killed in combat".⁸⁷⁹ In a subsequent report, the Special Rapporteur cited the findings of the preliminary investigation led by the Vice-President of Croatia, which claimed that all the persons killed were combatants, but commented that he did not consider the Vice-President's report as conclusive.⁸⁸⁰

856. The report of the UN Commission on the Truth for El Salvador in 1993 described the government's counter-insurgency policies as part of the pattern of violence employed by agents of the State and their collaborators. According to the report, inhabitants of areas where the guerrillas were active were automatically suspected of belonging to the guerrilla movement or collaborating with it and thus risked being executed. The report also depicted the pattern of violence employed by the FMLN, which considered it legitimate to physically eliminate people who were labelled military targets, such as traitors or

⁸⁷⁶ UN Commission on Human Rights, Special Representative on the Situation of Human Rights in El Salvador, Final report, UN Doc. E/CN.4/1985/18, 1 February 1985, § 140.

⁸⁷⁷ UN Sub-Commission on Human Rights, Res. 1985/18, 29 August 1985, § 3.

⁸⁷⁸ UN Sub-Commission on Human Rights, Res. 1987/18, 2 September 1987, § 3; Res. 1988/13, 1 September 1988, § 3; Res. 1989/9, 31 August 1989, § 3.

⁸⁷⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, § 105.

⁸⁸⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Sixth periodic report, UN Doc. E/CN.4/1994/110, 21 February 1994, § 83.

informers, and even political opponents. Examples of such practices included the murder of mayors, right-wing intellectuals, public officials and judges. The report added that instructions given by the FMLN General Command concerning the execution of mayors were broadly interpreted and extensively applied, in particular between 1985 and 1989, when the Ejército Revolucionario del pueblo repeatedly carried out extrajudicial executions of political leaders, which the report called "non-combatant civilians". The Commission expressly rejected the arguments of the FMLN, which tried to justify the executions on the grounds that the mayors and their officers were actively engaged in counter-insurgency activities, such as creating paramilitary forces, leading direct repressive activities against the civilian population or developing spy networks to detect FMLN members and their supporters. The movement further argued that the mayors had been listed as legitimate military targets since 1980. The Commission noted that by calling the mayors "military targets", the FMLN was trying to say that they were combatants. It held that whether the mayors might or might not be considered as "military targets" was irrelevant since "there is no evidence that any of them lost their lives as a result of any combat operation by the FMLN". The Commission emphasised that there was "no concept under international humanitarian law whereby such people could have been considered military targets".⁸⁸¹ The Commission added that "the execution of an individual, whether a combatant or a non-combatant, who is in the power of a guerrilla force and does not put up any resistance is not a combat operation".⁸⁸² The Commission considered the execution of mayors as a violation of the rules of IHL and international human rights law.⁸⁸³

857. In its report in 1993, the UN Commission on the Truth for El Salvador considered the legality of an attack by members of the Partido Revolucionario de Trabajadores centroamericanos (one of the FMLN components) on a group of US marines then serving as security guards at the US Embassy in San Salvador. The attack took place as the victims, who were off duty, in civilian clothing and unarmed, were sitting at a table outside a restaurant. Following the attack, a communiqué issued by the FMLN General Command asserted that the four marines were legitimate military targets. The Commission noted, however, that it had full evidence that the US marines were not combatants. It emphasised that:

Their function was to guard the United States Embassy and there is no indication whatsoever that they took part in combat action in El Salvador. Furthermore, international humanitarian law defines the category of "combatant" restrictively. The allegation that they were performing "intelligence functions" has not been

⁸⁸¹ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 44–45.

⁸⁸² UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 151.

⁸⁸³ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 149 and 153.

substantiated. In any event, carrying out intelligence functions does not, in itself, automatically place an individual in the category of combatant.⁸⁸⁴

Other International Organisations

858. No practice was found.

International Conferences

859. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

860. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

861. No practice was found.

VI. Other Practice

862. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that:

With respect to the internal conflict in Nicaragua, the following persons should be regarded as civilians:

1. The peaceful population not directly participating in hostilities;
2. Persons providing only indirect support to the Nicaraguan army by, *inter alia*, working in defense plants, distributing or storing military supplies in rear areas, supplying labor and food, or serving as messengers or disseminating propaganda. These persons may *not* be subject to direct individualized attack or execution since they pose no immediate threat to the adversary. However, they assume the risk of incidental death or injury arising from attacks against legitimate military targets.
Persons providing such indirect support to the *contras* are clearly subject to prosecution under domestic law for giving aid and comfort to the insurgents.
3. Persons (not members of the parties' armed forces) who do not actually take a direct part in the hostilities by trying to kill, injure or capture enemy combatants or to damage material. These civilians, however, lose their immunity from attack for such time as they assume a combatant's role. Included in this category would be armed civilian members of the self-defense groups who guard rural cooperatives, farms and plants against *contra* attack.⁸⁸⁵ [emphasis in original]

⁸⁸⁴ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 155.

⁸⁸⁵ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981-1985*, New York, March 1985, pp. 31-32.

Americas Watch reiterated this view in 1986 in its report on the use of land-mines in the conflicts in El Salvador and Nicaragua.⁸⁸⁶

863. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that:

The following persons should be considered civilians and thus not subjected to direct attack by combatants or by land mines:

- A. The peaceful population not directly participating in hostilities.
- B. i. Persons providing only indirect support to the Angolan, Cuban, or South African armed forces or UNITA by, *inter alia*, working in defense plants, distributing or storing military supplies behind conflict areas, supplying labor and food, serving as messengers, or disseminating propaganda. These persons may not be subject to direct individualized attack because they pose no immediate threat to the adversary. They assume, however, the risk of incidental death or injury arising from attacks and the use of weapons against legitimate military targets.
- ii. Persons providing indirect support to UNITA or its South African ally are clearly subject to prosecution under the domestic laws of Angola for giving aid and comfort to the enemy.
- C. Persons, other than members of the parties' armed forces, who do not actually take a direct part in the hostilities by trying to kill, injure, or capture enemy combatants or to damage material. These civilians, however, temporarily lose their immunity from attack whenever they assume a combatant's role.⁸⁸⁷

864. The Penal and Disciplinary Laws of the SPLM/A state that the following are "declared enemies of the people and therefore target of the SPLA/SPLM":

- a) The incumbent administration of Jaafer Mohammed Nimeiri, its appendages and supporting institutions.
- b) Any subsequent reactionary administration that may emerge while the revolutionary war is still being waged.
- c) Any individual or group of individuals directly or indirectly cooperating with the autocratic regime in Khartoum in order to sustain or consolidate its rule and to undermine the objectives and efforts of the People's Revolution.
- d) Any individual or group of individuals who wage counter-revolutionary war against the SPLA/SPLM or who circulate any subversive literature, verbally or in written form against the SPLA/SPLM with the intent to discredit it or turn public opinion against it.
- e) Persons acting as agents or spies for the Sudan Government.
- f) Armed bandits that operate to rob ordinary citizens, rape their women or commit any other crime against them, their movable or immovable properties or any other property of the People's revolution.
- g) Individuals or groups of people who propagate or advocate ideas, ideologies or philosophies or organize societies and organizations inside the country

⁸⁸⁶ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 97–98.

⁸⁸⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, pp. 138–139.

or abroad, that tend to uphold or perpetuate the oppression of the people or their exploitation by the Khartoum regime or by any other system of similar nature.⁸⁸⁸

Presence of combatants among the civilian population

I. Treaties and Other Instruments

Treaties

865. Article 50(3) AP I provides that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”. Article 50 AP I was adopted by consensus.⁸⁸⁹

866. Article 25(3) of draft AP II submitted by the ICRC to the CDDH provided that “the presence, within the civilian population, of individuals who do not fall within the definition of civilians does not deprive the population of its civilian character”.⁸⁹⁰ This draft provision was adopted by consensus in Committee III of the CDDH.⁸⁹¹ Eventually, however, it was deleted in the plenary by consensus.⁸⁹²

Other Instruments

867. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 50(3) AP I.

868. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 50(3) AP I.

II. National Practice

Military Manuals

869. Argentina’s Law of War Manual states that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.⁸⁹³

870. Canada’s LOAC Manual states that “the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character”.⁸⁹⁴

⁸⁸⁸ SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 29, § 1c, Report on SPLM/A Practice, 1998, Chapter 1.2.

⁸⁸⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

⁸⁹⁰ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁸⁹¹ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 290, § 121.

⁸⁹² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

⁸⁹³ Argentina, *Law of War Manual* (1989), § 4.02(1).

⁸⁹⁴ Canada, *LOAC Manual* (1999), p. 4-4, § 35.

871. Kenya's LOAC Manual states that "the presence within the civilian population of individual combatants does not deprive the population of its civilian character and of the protection accorded to it".⁸⁹⁵

872. The Military Manual of the Netherlands contains a rule identical to Article 50(3) AP I.⁸⁹⁶

873. Spain's LOAC Manual specifies that "the civilian population does not lose its civilian character by the fact that persons who are not civilians are present among the civilian population".⁸⁹⁷

874. Sweden's IHL Manual states that:

The presence of individual combatants, for example among gatherings of people, has sometimes entailed a belligerent considering himself entitled to launch an attack on the gathering, with particularly serious consequences. It is therefore laid down in Article 50 [AP I] that the presence of individual combatants within the civilian population may not deprive this population of its civilian character and thus its protection.⁸⁹⁸

875. The YPA Military Manual of the SFRY (FRY) states that "the presence among the civilian population of persons who are not civilians does not deprive that population of its civilian character".⁸⁹⁹

National Legislation

876. On the basis of Croatia's Constitution and Defence Law, the Report on the Practice of Croatia states that Article 50 AP I is directly applicable in Croatia's internal legal order.⁹⁰⁰

877. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 50(3) AP I, is a punishable offence.⁹⁰¹

878. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁹⁰²

National Case-law

879. No practice was found.

⁸⁹⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 10.

⁸⁹⁶ Netherlands, *Military Manual* (1993), p. V-2.

⁸⁹⁷ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1).

⁸⁹⁸ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 42–43.

⁸⁹⁹ SFRY (FRY), *YPA Military Manual* (1988), § 67(3).

⁹⁰⁰ Report on the Practice of Croatia, 1998, Answers to additional questions on Chapter 1, referring to *Constitution* (1990), Article 134 and *Defence Law* (1993), Article 39.

⁹⁰¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁹⁰² Norway, *Military Penal Code as amended* (1902), § 108(b).

Other National Practice

880. No practice was found.

III. Practice of International Organisations and Conferences

881. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

882. In its judgement in the *Tadić case* in 1997, the ICTY Trial Chamber stated that “it is clear that the targeted population [of a crime against humanity] must be of predominantly civilian nature. The presence of certain non-civilians in their midst does not change the character of the population.”⁹⁰³

883. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

Even if it can be proved that the Muslim population of Ahmici was not entirely civilian but comprised some armed elements, still no justification would exist for widespread and indiscriminate attacks against civilians. Indeed, even in a situation of full-scale armed conflict, certain fundamental norms still serve to unambiguously outlaw such conduct, such as rules pertaining to proportionality.⁹⁰⁴

V. Practice of the International Red Cross and Red Crescent Movement

884. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the presence within the civilian population of individuals other than civilian persons does not deprive the population of its civilian character”.⁹⁰⁵

885. In a press release issued in 1983 concerning the conflict in Lebanon, the ICRC stated that “the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people”.⁹⁰⁶

VI. Other Practice

886. No practice was found.

⁹⁰³ ICTY, *Tadić case*, Judgement, 7 May 1997, § 638, see also § 643 and *Mrkšić case*, Review of the Indictment, 3 April 1996, § 29.

⁹⁰⁴ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 513.

⁹⁰⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 53.

⁹⁰⁶ ICRC, Press Release No. 1474, Fighting in Tripoli: Appeal from the ICRC, Geneva, 4 November 1983.

Situations of doubt as to the character of a person

I. Treaties and Other Instruments

Treaties

887. Article 50(1) AP I provides that “in case of doubt whether a person is a civilian, that person shall be considered to be a civilian”. Article 50 AP I was adopted by consensus.⁹⁰⁷

888. Upon ratification of AP I, France stated that:

The rule set out in the second sentence of the first paragraph of Article 50 [AP I] cannot be interpreted as requiring a commander to take a decision which, according to the circumstances and information available to him, might not be compatible with his duty to ensure the safety of the troops under his command or to preserve his military situation, in conformity with other provisions of [AP I].⁹⁰⁸

889. Upon ratification of AP I, the UK expressed its understanding of the presumption of civilian character as only applicable

in cases of substantial doubt still remaining after the assessment [of the information from all sources which is reasonably available to military commanders at the relevant time] has been made, and not as overriding a commander’s duty to protect the safety of troops under his command or to preserve his military situation, in conformity with other provisions of [AP I].⁹⁰⁹

890. Article 25(4) of draft AP II, adopted by Committee III of the CDDH provided that “in case of doubt as to whether a person is a civilian, he or she shall be considered to be a civilian”.⁹¹⁰ This draft provision was adopted by consensus by Committee III.⁹¹¹ Eventually, however, it was deleted in the plenary by consensus.⁹¹²

Other Instruments

891. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 50(1) AP I.

892. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 50(1) AP I.

⁹⁰⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

⁹⁰⁸ France, Declarations and reservations made upon ratification of AP I, 11 April 2001, § 9.

⁹⁰⁹ UK, Declarations and reservations made upon ratification of AP I, 28 January 1998, § h.

⁹¹⁰ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 320.

⁹¹¹ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 290, § 121.

⁹¹² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

II. National Practice

Military Manuals

893. Argentina's Law of War Manual states that "in case of doubt about the qualification of a person, that person must be considered to be civilian".⁹¹³

894. Australia's Defence Force Manual states that "in cases of doubt about civilian status, the benefit of the doubt is given to the person concerned".⁹¹⁴

895. Cameroon's Instructors' Manual states that "the benefit of the doubt confers upon a person the status of civilian".⁹¹⁵

896. Canada's LOAC Manual states that "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian".⁹¹⁶

897. Colombia's Instructors' Manual states that "in case of doubt whether a person is civilian or not, that person must be considered to be civilian".⁹¹⁷

898. Croatia's LOAC Compendium states that, in case of doubt, persons have to be considered as civilians.⁹¹⁸

899. The Military Manual of the Dominican Republic states that:

All persons participating in military operations or activities are considered combatants [and proper targets for attack]. Those who do not participate in such actions are non-combatants. This distinction is not always easy to make. Uniformed, armed soldiers are easily recognisable. However, guerrillas often mix with the civilians, perform undercover operations, and dress in civilian clothes. Alertness and caution must guide you in deciding who is a combatant.⁹¹⁹

900. Hungary's Military Manual states that, in case of doubt, persons have to be considered as civilians.⁹²⁰

901. Kenya's LOAC Manual states that "in case of doubt whether a person is a civilian or not, that person shall be considered a civilian".⁹²¹

902. Madagascar's Military Manual states that "in case of doubt about the status of a person, that person shall be considered to be civilian".⁹²²

903. The Military Manual of the Netherlands states that "in case of doubt whether a person is civilian, that person is considered to be a civilian".⁹²³

904. South Africa's LOAC Manual contains a rule identical to that in Article 50(1) AP I.⁹²⁴

⁹¹³ Argentina, *Law of War Manual* (1989), § 4.02(1).

⁹¹⁴ Australia, *Defence Force Manual* (1994), § 914.

⁹¹⁵ Cameroon, *Instructors' Manual* (1992), p. 17.

⁹¹⁶ Canada, *LOAC Manual* (1999), p. 4-5, § 38.

⁹¹⁷ Colombia, *Instructors' Manual* (1999), p. 16.

⁹¹⁸ Croatia, *LOAC Compendium* (1991), p. 6.

⁹¹⁹ Dominican Republic, *Military Manual* (1980), p. 3.

⁹²⁰ Hungary, *Military Manual* (1992), p. 17.

⁹²¹ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 10.

⁹²² Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § B.

⁹²³ Netherlands, *Military Manual* (1993), p. V-2.

⁹²⁴ South Africa, *LOAC Manual* (1996), § 24(c).

905. Spain's LOAC Manual contains a rule identical to that in Article 50(1) AP I.⁹²⁵

906. Sweden's IHL Manual states that "where there is doubt whether a person is to be considered as a combatant or as a civilian, the person shall be considered as a civilian".⁹²⁶

907. According to the Report on US Practice, the US military manuals do not adopt the position that in case of doubt a person shall be considered as civilian.⁹²⁷

908. The YPA Military Manual of the SFRY (FRY) states that "in case of doubt a person shall be considered as a civilian until proven otherwise".⁹²⁸

National Legislation

909. On the basis of Croatia's Constitution and Defence Law, the Report on the Practice of Croatia states that Article 50 AP I is directly applicable in Croatia's internal legal order.⁹²⁹

910. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 50(1) AP I, is a punishable offence.⁹³⁰

911. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁹³¹

National Case-law

912. No practice was found.

Other National Practice

913. On the basis of a proposal submitted by Egypt during the CDDH, the Report on the Practice of Egypt states that "to ensure more protection for civilians, Egypt is of the opinion that in case of doubt as to whether a person is a civilian, he or she shall be deemed to be so".⁹³²

914. The Report on the Practice of Malaysia refers to the presumption of civilian character, adding that it governed the behaviour of the armed forces during the campaign against the communist insurgency.⁹³³

⁹²⁵ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1).

⁹²⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 42.

⁹²⁷ Report on US Practice, 1997, Chapter 1.1, referring to *Field Manual* (1956), § 60, *Air Force Pamphlet* (1976), § 5-3 and *Naval Handbook* (1995), § 11.3.

⁹²⁸ SFRY (FRY), *YPA Military Manual* (1988), § 67(3).

⁹²⁹ Report on Croatian Practice, 1998, Answers to additional questions on Chapter 1, referring to *Constitution* (1990), Article 134 and *Defence Law* (1993), Article 39.

⁹³⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁹³¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁹³² Report on the Practice of Egypt, 1997, Chapter 1.1, referring to Statement by Egypt at the CDDH, *Official Records*, Vol. IV, CDDH/III/33, 15 March 1974, p. 73.

⁹³³ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.1.

915. The Report on the Practice of Nigeria states that a presumption of civilian character is held in case of doubt. It adds that during the Nigerian civil war, “the Federal Forces in situations of such doubt did not off-handedly indict or take away individuals of such doubtful civilian character”. They subjected such individuals to a test, in order to determine

the degree of hardness of . . . their fingers used in handling the trigger. Those found with hardened fingers were presumed to be soldiers (combatants). Although this is an unscientific method of identification, it nonetheless shows that Nigerian practice does not *prima facie* attribute the status of combatant to individuals of doubtful civilian character.⁹³⁴

III. Practice of International Organisations and Conferences

916. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

917. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

918. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “in case of doubt whether a person is a civilian or not, that person shall be considered as a civilian”.⁹³⁵

VI. Other Practice

919. No practice was found.

⁹³⁴ Report on the Practice of Nigeria, 1997, Answers to additional questions on Chapter 1.1.

⁹³⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 52.

DISTINCTION BETWEEN CIVILIAN OBJECTS AND MILITARY OBJECTIVES

A.	General (practice relating to Rule 7)	§§ 1–315
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A. General

The principle of distinction

I. Treaties and Other Instruments

Treaties

1. Article 48 AP I provides that “in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between . . . civilian objects and military objectives”. Article 48 AP I was adopted by consensus.¹

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

2. Article 24(1) of draft AP II submitted by the ICRC to the CDDH provided that “in order to ensure respect for the civilian population, the Parties to the conflict... shall make a distinction... between civilian objects and military objectives”.² This proposal was amended and adopted by consensus in Committee III of the CDDH.³ The approved text provided that “in order to ensure respect and protection for... civilian objects, the Parties to the conflict shall at all times distinguish... between civilian objects and military objectives”.⁴ Eventually, however, it was deleted in the plenary because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁵

Other Instruments

3. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 48 AP I.

4. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 48 AP I.

5. Paragraph 39 of the 1994 San Remo Manual provides that “Parties to the conflict shall at all times distinguish between... civilian or exempt objects and military objectives”.

6. Section 5.1 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force shall make a clear distinction at all times... between civilian objects and military objectives”.

II. National Practice

Military Manuals

7. Military manuals of Argentina, Australia, Belgium, Benin, Cameroon, Canada, Croatia, France, Germany, Hungary, Israel, Netherlands, New Zealand, Nigeria, Philippines, Spain, Sweden, Switzerland, Togo and US require that a distinction be made between military objectives and civilian objects.⁶

² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 288, § 113.

⁴ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 319.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

⁶ Argentina, *Law of War Manual* (1989), § 4.01; Australia, *Defence Force Manual* (1994), §§ 210, 504 and 913; Belgium, *Law of War Manual* (1983), p. 26; Benin, *Military Manual* (1995), Fascicule III, p. 11; Cameroon, *Instructors’ Manual* (1992), p. 86; Canada, *LOAC Manual* (1999), p. 4-1, § 4, see also p. 2-2, § 12; Croatia, *LOAC Compendium* (1991), p. 37; France, *LOAC Summary Note* (1992), Part I, preamble; France, *LOAC Teaching Note* (1999), p. 2; France, *LOAC Manual* (2001), p. 13; Germany, *Military Manual* (1992), §§ 401 and 454; Hungary, *Military Manual* (1992), p. 60; Israel, *Law of War Booklet* (1986), Chapter 1; Israel, *Manual on the Laws of War* (1998), pp. 38 and 42; Netherlands, *Military Manual* (1993), p. V-1, § 2; New Zealand, *Military Manual* (1992), § 205; Nigeria, *Military Manual* (1994), p. 41, § 9 and p. 42, § 11; Philippines, *Soldier’s Rules* (1989), p. 20; Spain, *LOAC Manual* (1996), Vol. I, § 4.1; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 41; Switzerland, *Basic Military Manual* (1987), Article 25(1); Togo, *Military Manual* (1996), Fascicule III, p. 11; US, *Air Force Pamphlet* (1976), § 5-3(b).

8. Indonesia's Military Manual provides that "the targets of every military operation should be distinguished at all times".⁷
9. Sweden's IHL Manual considers that the principle of distinction as stated in Article 48 AP I is part of customary international law.⁸

National Legislation

10. The Report on the Practice of India states that India's laws and regulations applicable to internal conflicts do not explicitly mention the distinction between civilian objects and military objectives. The report indicates, however, that domestic legislation concerning terrorist activities

confer certain powers on armed forces as well as police personnel which enable them to destroy arms dumps, prepared or fortified positions or shelters from which attacks are made as well as structures used as training camps for armed volunteers or utilized as a hide-out by armed gangs or absconders, etc.⁹

11. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 48 AP I, is a punishable offence.¹⁰

12. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹¹

National Case-law

13. No practice was found.

Other National Practice

14. The Report on the Practice of Bosnia and Herzegovina provides several examples of alleged respect for and violations of the distinction between civilian and military targets.¹²

15. The Report on the Practice of Botswana asserts that the government of Botswana endorses the principle of distinction as found in Article 48 AP I.¹³

16. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt invoked the requirement to "distinguish between . . . civilian objects and military objectives".¹⁴

⁷ Indonesia, *Military Manual* (1982), § 91.

⁸ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁹ Report on the Practice of India, 1997, Chapter 1.3, referring to *Armed Forces (Special Powers) Act* (1958), *Armed Forces (Punjab and Chandigarh) Special Powers Act* (1983), Section 4(b), *Punjab Disturbed Areas Act* (1983), Section 5 and *Armed Forces (Jammu and Kashmir) Special Powers Act* (1990).

¹⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹² Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.3.

¹³ Report on the Practice of Botswana, 1998, Answers to additional questions on Chapter 1.3.

¹⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 17.

17. The Report on the Practice of Egypt states that Egypt recognises the obligation to distinguish between civilian objects and military objectives. It further notes that the principle of distinction between civilian objects and military objectives is said to be well established in Egypt's practice and *opinio juris* and is thus considered to be a customary rule of IHL.¹⁵

18. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that "all parties must at all times make a distinction between the civilian population and military objectives in order to spare the civilian population".¹⁶

19. In 1983, in a statement before the lower house of parliament, a German Minister of State pointed out that the principle of distinction between civilian objects and military objectives was one of the five basic principles of the LOAC and that it applied equally to the attacker and the attacked.¹⁷

20. In an explanatory memorandum submitted to the German parliament in 1990 in the context of the ratification procedure of the Additional Protocols, the German government expressed the opinion that the principle of distinction between civilian objects and military targets enshrined in Article 48 AP I was a well-established rule of customary law, binding on all States.¹⁸

21. The Report on the Practice of India states that "when [the armed forces] are called upon to deal with an internal conflict, they are bound to follow the principles regarding distinction between military objects and civilian objects so as to avoid indiscriminate attacks".¹⁹

22. The Report on the Practice of Indonesia states that "according to the practices of the Indonesian armed forces, the distinction between civilian and military objects is compatible with the provisions stipulated in Article 52 of Protocol I".²⁰

23. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that "some of the principles of humanitarian international law from which one can deduce the illegitimacy of the use of nuclear weapons are: . . . Distinguishing between military and civilian targets."²¹

24. The Report on the Practice of Iran states that "the *opinio juris* of Iran recognizes the distinction between military objectives and civilian objects".²²

¹⁵ Report on the Practice of Egypt, 1997, Chapter 1.3.

¹⁶ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 66.

¹⁷ Germany, Lower House of Parliament, Statement by Dr Mertes, Minister of State, 14 October 1983, *Plenarprotokoll* 10/29, p. 1927.

¹⁸ Germany, Lower House of Parliament, Explanatory memorandum on the Additional Protocols to the Geneva Conventions, *BT-Drucksache* 11/6770, 22 March 1990, p. 111.

¹⁹ Report on the Practice of India, 1997, Chapter 1.4.

²⁰ Report on the Practice of Indonesia, 1997, Chapter 1.3.

²¹ Iran, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 2; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 1.

²² Report on the Practice of Iran, 1997, Chapter 1.3.

25. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan stated that “with their colossal power and capacity for slaughter and destruction, nuclear weapons make no distinction . . . between military installations and civilian communities”.²³

26. According to the Report on the Practice of South Korea, it is South Korea’s *opinio juris* that the distinction between civilian objects and military objectives is part of customary international law.²⁴

27. The Report on the Practice of Kuwait asserts that the Iraqi army did not respect the principle of distinction between civilian objects and military targets during its withdrawal from Kuwait.²⁵

28. According to the Report on the Practice of Nigeria, it is Nigeria’s *opinio juris* that the distinction between civilian objects and military objectives is part of customary international law.²⁶

29. The Report on the Practice of Pakistan states that the distinction between civilian objects and military objectives seems to be well respected in Pakistan.²⁷

30. The Report on the Practice of Spain considers that the principle of distinction between military and non-military objectives is a fundamental principle which should be taken into consideration when planning, directing and executing a military attack.²⁸

31. In reply to a question in the House of Lords concerning the Gulf War, the UK Parliamentary Under-Secretary of State of the Ministry of Defence stated that:

The Geneva Conventions contain no provisions expressly regulating targeting in armed conflict. The Hague Regulations of 1907 and customary international law do, however, incorporate the twin principles of distinction between military and civilian objects, and of proportionality so far as the risk of collateral civilian damage from an attack on a military objective is concerned. These principles and associated rules of international law were observed at all times by coalition forces in the planning and execution of attacks against Iraq.²⁹

32. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that “the parties to an armed conflict are required to discriminate between civilians and civilian objects on the one hand and combatants and military objectives on the other and to direct their attacks only against the latter”.³⁰

²³ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, 7 November 1995, Verbatim Record CR 95/27, p. 36.

²⁴ Report on the Practice of South Korea, 1997, Chapter 1.3.

²⁵ Report on the Practice of Kuwait, 1997, Chapter 1.3.

²⁶ Report on the Practice of Nigeria, 1997, Chapter 1.3.

²⁷ Report on the Practice of Pakistan, 1998, Chapter 1.3.

²⁸ Report on the Practice of Spain, 1998, Chapter 1.3.

²⁹ UK, House of Lords, Statement by the Parliamentary Under-Secretary of State for Defence, 22 July 1991, *Hansard*, Vol. 531, Written Answers, col. 43.

³⁰ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.67.

33. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army pointed out that “the obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such”.³¹

34. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Article 48 AP I “is generally regarded as a codification of the customary practice of nations, and therefore binding on all”.³² The report further stated that “the law of war with respect to targeting, collateral damage and collateral civilian casualties is derived from the principle of discrimination; that is, the necessity for distinguishing . . . between legitimate military targets and civilian objects”.³³

35. The Report on the Practice of the SFRY (FRY) states that the “armed conflict in Croatia in which [the] YPA participated was particularly characterized by the disregard of the obligation to respect the distinction between civilian objects and military objectives”. The report considers, however, that:

In evaluating the official position of [the] FRY, it is important to point out that during October 1991 [the] Chief of General Staff of the YPA issued two orders instructing troops to strictly comply with rules of humanitarian law . . . The fact that the YPA had sent a commission of inquiry to Dubrovnik to establish the effects of [the] shelling indicates the awareness of the need to respect the distinction between civilian objects and military objectives. *Opinio juris* existed, however, the relevant rule was not respected in practice.³⁴

36. The Report on the Practice of Zimbabwe refers to the principle of distinction as set forth in Article 52 AP I and states that this principle can undoubtedly be regarded as a customary rule of IHL. The report also points out that the distinction between civilian and military objectives is more problematic in non-international armed conflicts, as guerrillas tend to mingle with the civilian population and civilian facilities, rendering the principle difficult to implement.³⁵

III. Practice of International Organisations and Conferences

37. No practice was found.

³¹ US, Letter from the Department of the Army to the legal adviser of the US armed forces deployed in the Gulf region, 11 January 1991, § 8(E), Report on US Practice, 1997, Chapter 1.4.

³² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 625.

³³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 621.

³⁴ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.3.

³⁵ Report on the Practice of Zimbabwe, 1998, Chapter 1.3.

IV. Practice of International Judicial and Quasi-judicial Bodies

38. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber held that “the parties to the conflict are obliged to attempt to distinguish between military targets and civilian . . . property”.³⁶

V. Practice of the International Red Cross and Red Crescent Movement

39. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that there is a duty to distinguish between civilian objects and military objectives.³⁷

40. In an appeal issued in 1984 in the context of the Iran–Iraq War, the ICRC stated that “in violation of the laws and customs of war, and in particular of the essential principle that military targets must be distinguished from civilian persons and objects, the Iraqi armed forces have continued to bomb Iranian civilian zones”.³⁸

41. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict: . . . a distinction must be made in all circumstances between combatants and military objectives on the one hand, and civilians and civilian objects on the other”.³⁹

42. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation “to distinguish at all times between combatants and military objectives on the one hand and civilians and civilian property on the other”.⁴⁰

43. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Georgia of their obligation “to distinguish at all times between combatants and military objectives on the one hand and civilians and civilian objects on the other”.⁴¹

44. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “a clear distinction must be made in all circumstances between civilians and civilian objects on the one hand and combatants and military objectives on the other”.⁴²

³⁶ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 180.

³⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 387.

³⁸ ICRC, Press Release No. 1480, Conflict between Iran and Iraq and breaches of international humanitarian law: a renewed ICRC appeal, 15 February 1984, *IRRC*, No. 239, 1984, pp. 113–115.

³⁹ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 24.

⁴⁰ ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

⁴¹ ICRC, Communication to the Press No. 93/31, Georgia: ICRC Activities in Abkhazia, 20 September 1993.

⁴² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

45. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “a clear distinction must be made, in all circumstances, between civilian persons who do not participate in confrontations and refrain from acts of violence and civilian objects on the one hand, and combatants and military objectives on the other”.⁴³

VI. Other Practice

46. No practice was found.

Attacks against military objectives

Note: For practice concerning the destruction of enemy property, see Chapter 16.

I. Treaties and Other Instruments

Treaties

47. The preamble to the 1868 St. Petersburg Declaration states that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.

48. Article 2 of 1907 Hague Convention (IX) allows the bombardment of “military works, military or naval establishments, depots of arms or war *matériel*, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour”.

49. Article 48 AP I provides that “in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict . . . shall direct their operations only against military objectives”. Article 48 AP I was adopted by consensus.⁴⁴

50. Article 52(2) AP I provides that “attacks shall be limited strictly to military objectives”. Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.⁴⁵

51. Upon ratification of AP I, Australia declared that “it is the understanding of Australia that the first sentence of paragraph 2 of Article 52 is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective”.⁴⁶

52. Upon ratification of AP I, Canada stated that:

It is the understanding of the Government of Canada in relation to Article 52 that . . . the first sentence of paragraph 2 of the Article is not intended to, nor does it,

⁴³ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

⁴⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

⁴⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

⁴⁶ Australia, Declarations made upon ratification of AP I, 21 June 1991, § 5.

deal with the question of incidental or collateral damage resulting from an attack directed against a military objective.⁴⁷

53. Upon ratification of AP I, France stated that “the Government of the French Republic considers that the first sentence of paragraph 2 of Article 52 does not deal with the question of collateral damage resulting from attacks directed against military objectives”.⁴⁸

54. Upon ratification of AP I, Italy declared that “the first sentence of paragraph 2 of [Article 52] prohibits only such attacks as may be directed against non-military objectives. Such a sentence does not deal with the question of collateral damage caused by attacks directed against military objectives.”⁴⁹

55. Upon ratification of AP I, New Zealand stated that “the first sentence of paragraph 2 of [Article 52] is not intended to, nor does it, deal with the question of incidental or collateral damage resulting from an attack directed against a military objective”.⁵⁰

56. Upon ratification of AP I, the UK stated that:

It is the understanding of the United Kingdom that . . . the first sentence of paragraph 2 [of Article 52] prohibits only such attacks as may be directed against non-military objectives; it does not deal with the question of collateral damage resulting from attacks directed against military objectives.⁵¹

57. Article 24(1) of draft AP II submitted by the ICRC to the CDDH provided that “in order to ensure respect for the civilian population, the parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary”.⁵² This proposal was amended and adopted by consensus in Committee III of the CDDH.⁵³ The approved text provided that “in order to ensure respect and protection for . . . civilian objects, the Parties to the conflict . . . shall direct their operations only against military objectives”.⁵⁴ Eventually, however, it was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁵⁵

Other Instruments

58. Article 24(1) of the 1923 Hague Rules of Air Warfare provides that “aerial bombardment is legitimate only when directed at a military objective”.

⁴⁷ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 8(b).

⁴⁸ France, Declarations and reservations made upon ratification of AP I, 11 April 2001, § 12.

⁴⁹ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 8.

⁵⁰ New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 4.

⁵¹ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § j.

⁵² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁵³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 288, § 113.

⁵⁴ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 319.

⁵⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

59. Article 7 of the 1956 New Delhi Draft Rules provides that “in order to limit the dangers incurred by the civilian population, attacks may only be directed against military objectives”.
60. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 52(2) AP I.
61. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 52(2) AP I.
62. Paragraph 41 of the 1994 San Remo Manual states that “attacks shall be strictly limited to military objectives”.
63. Section 5.1 of the 1999 UN Secretary-General’s Bulletin states that “military operations shall be directed only against combatants and military objectives”.

II. National Practice

Military Manuals

64. The principle that attacks must be strictly limited to military objectives is set forth in the military manuals of Australia, Belgium, Benin, Cameroon, Canada, Colombia, Croatia, Ecuador, France, Germany, Indonesia, Italy, Kenya, South Korea, Lebanon, Madagascar, Netherlands, New Zealand, Nigeria, Philippines, Romania, South Africa, Spain, Sweden, Switzerland, Togo, UK and US.⁵⁶
65. The US Air Force Pamphlet explains that:

⁵⁶ Australia, *Defence Force Manual* (1994), §§ 210, 524, 531 and 913; Belgium, *Teaching Manual for Soldiers* (undated), pp. 10 and 20; Belgium, *Law of War Manual* (1983), p. 26; Benin, *Military Manual* (1995), Fascicule I, p. 17, Fascicule II, pp. 5 and 18 and Fascicule III, p. 14; Cameroon, *Instructors’ Manual* (1992), p. 111; Canada, *LOAC Manual* (1999), p. 4-1, § 5; Canada, *Code of Conduct* (2001), Rule 1; Colombia, *Circular on Fundamental Rules of IHL* (1992), § 7; Colombia, *Instructors’ Manual* (1999), p. 17; Croatia, *Basic Rules Manual* (1993), § 7; Croatia, *Commanders’ Manual* (1992), § 9; Ecuador, *Naval Manual* (1989), § 8.1.1; France, *LOAC Manual* (2001), p. 13; Germany, *Military Manual* (1992), § 441; Indonesia, *Military Manual* (undated), § 91; Italy, *IHL Manual* (1991), Vol. I, § 12; Italy, *LOAC Elementary Rules Manual* (1991), § 9; Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15, Précis No. 3, p. 14, and Précis No. 4, p. 1; South Korea, *Military Law Manual* (1996), p. 86; Lebanon, *Teaching Manual* (undated), Article 7; Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 9, see also Fiche 4-T, § 2; Netherlands, *Military Manual* (1993), p. V-1, § 2 and p. V-5; Netherlands, *Military Handbook* (1995), pp. 7-36, 7-39 and 7-43; New Zealand, *Military Manual* (1992), §§ 515(1), 524(1)(c), 622(1) and 624(1)(c); Nigeria, *Military Manual* (1994), p. 39, § 5(b); Nigeria, *Soldiers’ Code of Conduct* (undated), § 2; Philippines, *Soldier’s Rules* (1989), § 2; Romania, *Soldiers’ Manual* (1991), p. 4; South Africa, *LOAC Manual* (1996), § 25(b); Spain, *LOAC Manual* (1996), Vol. I, §§ 2.3.(b).1, 4.1 and 4.5.(b)2; Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 41 and 52; Switzerland, *Basic Military Manual* (1987), Articles 25(1) and 28; Togo, *Military Manual* (1996), Fascicule I, p. 18, Fascicule II, pp. 5 and 18 and Fascicule III, p. 14; UK, *Military Manual* (1958), Articles 283 and 288; UK, *LOAC Manual* (1981), Section 4, p. 13, § 4(a); US, *Air Force Pamphlet* (1976), § 5-3(b); US, *Rules of Engagement for Operation Desert Storm* (1991), § 2; US, *Naval Handbook* (1995), § 8.1.1.

The requirement that attacks be limited to military objectives results from several requirements of international law. The mass annihilation of enemy people is neither humane, permissible, nor militarily necessary. The Hague Regulations prohibit destruction or seizure of enemy property "unless such destruction or seizure be imperatively demanded by the necessities of war." Destruction as an end in itself is a violation of international law, and there must be some reasonable connection between the destruction of property and the overcoming of enemy military forces. Various other prohibitions and the Hague Regulations and Hague Convention IX further support the requirement that attacks be directed only at military objectives.⁵⁷

National Legislation

66. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 48 and 52(2) AP I, is a punishable offence.⁵⁸

67. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁵⁹

National Case-law

68. No practice was found.

Other National Practice

69. The Report on the Practice of Angola asserts that military objectives were the only targets of attack during the war of independence, but that the civil war that followed independence was characterised by confusion between military objectives and civilian objects. The report provides a list of examples of alleged attacks against civilian objects.⁶⁰

70. It is reported that, during the War in the South Atlantic, both parties directed their hostile acts only against military objectives.⁶¹

71. At the CDDH, Canada stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) "prohibits only attacks that could be directed against non-military objectives. It does not deal with the result of a legitimate attack on military objectives and incidental damage that such attack may cause."⁶²

72. In a military communiqué issued during the 1973 Middle East conflict, Egypt emphasised that only military objectives could be attacked.⁶³

⁵⁷ US, *Air Force Pamphlet* (1976), § 5-3(b)(2); see also *Field Manual* (1956), § 56.

⁵⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁶⁰ Report on the Practice of Angola, 1998, Chapter 1.3.

⁶¹ Carlos Horacio Cerdá, *El respeto del Derecho Internacional Humanitario durante el Desarrollo del Conflicto Armado del Atlántico Sud*, Report on the Practice of Argentina, 1997, Chapter 1.3.

⁶² Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

⁶³ Egypt, Military Communiqué No. 2, 6 October 1973.

73. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt invoked the requirement to “direct operations only against military objectives”.⁶⁴

74. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “attacks may only be directed against military objectives”.⁶⁵

75. At the CDDH, the FRG stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) “is a restatement of the basic rule contained in Article 43 [now Article 48], namely that the Parties to a conflict shall direct their operations only against military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives.”⁶⁶

76. According to the Report on the Practice of Iran, “Iran always insisted that war must be limited to battlefronts . . . and that all targets were military objectives”.⁶⁷

77. The Report on the Practice of Kuwait notes that the choice of targets is strictly limited to military objectives. An attack on a military objective should be allowed only in case of possible gain in the field of operation.⁶⁸

78. The Report on the Practice of Malaysia notes that in practice the security forces direct their attacks only against military targets or targets of military importance.⁶⁹

79. At the CDDH, Mexico stated that it believed Article 47 AP I (now Article 52) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.⁷⁰

80. At the CDDH, the Netherlands stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) “prohibits only such attacks as may be directed against non-military objectives and consequently does not deal with the question of collateral damage caused by attacks directed against military objectives”.⁷¹

81. The Report on the Practice of Nigeria states that, during the Nigerian civil war, the Nigerian air force, in its raids against rebel enclaves, distinguished

⁶⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 17.

⁶⁵ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 66.

⁶⁶ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 188.

⁶⁷ Report on the Practice of Iran, 1997, Chapter 1.3.

⁶⁸ Report on the Practice of Kuwait, 1997, Chapter 1.5.

⁶⁹ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.3.

⁷⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

⁷¹ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 195.

between military targets and civilian objects, bombing military targets while assiduously avoiding non-military targets.⁷²

82. In 1991, in reports submitted to the UN Security Council on operations in the Gulf War, Saudi Arabia stated that its air force had carried out numerous sorties against “military targets in Iraq and Kuwait, while avoiding civilian targets”.⁷³

83. In 1993 and 1995, the government of Spain made specific statements in connection with the armed conflicts in the Gulf and Bosnia and Herzegovina, endorsing the principle that attacks must be directed only against military objectives.⁷⁴

84. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers Article 52(2) AP I to be part of customary international law.⁷⁵

85. In 1938, during a debate in the House of Commons, the UK Prime Minister Neville Chamberlain listed among rules of international law applicable to warfare on land, at sea and from the air the rule that “targets which are aimed at . . . must be legitimate military targets and must be capable of identification”.⁷⁶

86. At the CDDH, the UK stated that it did not interpret the obligation in the first sentence of Article 47(2) API (now Article 52(2)) “as dealing with the question of incidental damage caused by attacks directed against military objectives. In its view, the purpose of the first sentence of the paragraph was to prohibit only such attacks as might be directed against non-military objectives.”⁷⁷

87. A training video on IHL produced by the UK Ministry of Defence emphasises that military operations must be directed only against military objectives.⁷⁸

88. In reply to questions in the House of Lords and House of Commons concerning military operations during the Gulf War in 1991, the UK Under-Secretary of State for Defence and the Minister of State for the Armed Forces stated that

⁷² Report on the Practice of Nigeria, 1997, Chapter 1.3.

⁷³ Saudi Arabia, Report dated 30 January 1991 on the progress of operations for the liberation of Kuwait, annexed to Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22180, 31 January 1991, p. 2; Letter dated 6 February 1991 to the President of the UN Security Council, UN Doc. S/22200, 6 February 1991, p. 1.

⁷⁴ Spain, Report by the Minister of Foreign Affairs and Minister of Defence to the Congress Commission on Foreign Affairs on Action by the International Community in Iraq and Developments in Bosnia and Herzegovina, 18 January 1993, *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid, 1993, p. 240; Press Conference by the Minister of Foreign Affairs and Minister of Defence, 31 August 1995, *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid, 1995, p. 248.

⁷⁵ Report on the Practice of Syria, 1997, Chapter 1.3, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

⁷⁶ UK, House of Commons, Statement by the Prime Minister, Sir Neville Chamberlain, 21 June 1938, *Hansard*, Vol. 337, col. 937.

⁷⁷ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 169, § 153.

⁷⁸ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 1.3.

it was a policy of the allies to attack only military targets and facilities that sustained Iraq's illegal occupation of Kuwait.⁷⁹

89. In 1950, the US Secretary of State stated that "the air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader".⁸⁰

90. At a news briefing in December 1966, the US Deputy Assistant Secretary of State for Public Affairs stated, with reference to inquiries concerning reported incidents resulting from bombing in the vicinity of Hanoi on 13 and 14 December 1966, that "the only targets struck by U.S. aircraft were military ones, well outside the city proper".⁸¹

91. In December 1966, in reply to an inquiry from a member of the US House of Representatives asking for a restatement of US policy on targeting in North Vietnam, a US Deputy Assistant Secretary of Defense wrote that "United States policy is to target military targets only. There has been no deviation from this policy."⁸²

92. At the CDDH, the US stated that the first sentence of draft Article 47(2) AP I (now Article 52(2)) "prohibits only such attacks as may be directed against non-military objectives. It does not deal with the question of collateral damage caused by attacks directed against military objectives."⁸³

93. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that "the military actions initiated by the United States and other States co-operating with the Government of Kuwait... are directed strictly at military and strategic targets".⁸⁴

94. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that "the United States and other coalition forces are only attacking targets of military value in Iraq".⁸⁵

95. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Article 48 AP I "is generally regarded as a codification of the customary practice of nations, and therefore binding

⁷⁹ UK, House of Lords, Statement by the Parliamentary Under-Secretary of State for Defence, 27 February 1991, *Hansard*, Vol. 526, Written Answers, col. 52; Statement by the Minister of State for the Armed Forces, 28 February 1991, *Hansard*, Vol. 186, Written Answers, col. 611.

⁸⁰ US, Statement by the Secretary of State, Dean Acheson, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 140.

⁸¹ US, News briefing by Deputy Assistant Secretary of State for Public Affairs, Robert McCloskey, 22 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 426.

⁸² US, Letter from Deputy Assistant Secretary of Defense Goulding to US Representative Ogden Reid from New York, 30 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 428.

⁸³ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 204.

⁸⁴ US, Letter dated 17 January 1991 to the President of the UN Security Council, UN Doc. S/22090, 17 January 1991, p. 2.

⁸⁵ US, Department of State, Diplomatic Note to Iraq, Washington, 21 January 1991, annexed to Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991.

on all".⁸⁶ The report further stated that "CINCCENT [Commander-in-Chief, Central Command] conducted a theater campaign directed solely at military targets".⁸⁷

96. In 1996, in the context of an internal armed conflict, the head of the armed forces of a State confirmed in a meeting with the ICRC that specific instructions had been given to soldiers to limit attacks to military objectives.⁸⁸

III. Practice of International Organisations and Conferences

United Nations

97. In a resolution adopted in 1938 concerning the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations stated that "objectives aimed at from the air must be legitimate military targets and must be identifiable".⁸⁹

Other International Organisations

98. No practice was found.

International Conferences

99. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

100. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

101. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that they have an obligation to limit attacks strictly to military targets.⁹⁰

102. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(1) of draft AP I which

⁸⁶ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 625.

⁸⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 644.

⁸⁸ ICRC archive document.

⁸⁹ League of Nations, Assembly, Resolution adopted on 30 September 1938, § I(2), *Official Journal*, Special Supplement No. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15–17.

⁹⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 428.

stated in part that “attacks shall be strictly limited to military objectives”. All governments concerned replied favourably.⁹¹

VI. Other Practice

103. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “attacks shall be directed solely against military objectives”.⁹²

104. In 1982, in a meeting with the ICRC, an armed opposition group insisted that it had always limited its attacks to military objectives.⁹³

Attacks against civilian objects in general

Note: *For practice concerning the destruction of enemy property, see Chapter 16.*

I. Treaties and Other Instruments

Treaties

105. Article 52(1) AP I provides that “civilian objects shall not be the object of attack”. Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.⁹⁴

106. Article 2(1) of the 1980 Protocol III to the CCW states that “it is prohibited in all circumstances to make . . . civilian objects the object of attack by incendiary weapons.”

107. Article 3(7) of the 1996 Amended Protocol II to the CCW provides that “it is prohibited in all circumstances to direct [mines, booby-traps and other devices], either in offence, defence or by way of reprisals, against . . . civilian objects”.

108. Pursuant to Article 8(2)(b)(ii) of the 1998 ICC Statute, “intentionally directing attacks against civilian objects, that is, objects which are not military objectives” constitutes a war crime in international armed conflicts.

Other Instruments

109. Pursuant to Article 3(b) of the 1990 Cairo Declaration on Human Rights in Islam, it is prohibited “to destroy the enemy’s civilian buildings and installations by shelling, blasting or any other means”.

110. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia accepted to apply the fundamental principle that “civilian property must not be attacked”.

⁹¹ ICRC, *The International Committee’s Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

⁹² ICRC archive document. ⁹³ ICRC archive document.

⁹⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

111. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 52(1) AP I.

112. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 52(1) AP I.

113. Section 5.1 of the 1999 UN Secretary-General's Bulletin states that "attacks on . . . civilian objects are prohibited".

114. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(ii), "intentionally directing attacks against civilian objects, that is, objects which are not military objectives" constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

115. Military manuals of Argentina, Australia, Belgium, Benin, Cameroon, Canada, Colombia, Croatia, Ecuador, France, Germany, Italy, Kenya, Lebanon, Madagascar, Netherlands, New Zealand, Nigeria, South Africa, Spain, Togo, UK, US and SFRY (FRY) prohibit attacks against civilian objects.⁹⁵

116. Argentina's Law of War Manual provides that intentionally attacking civilian objects is a grave breach.⁹⁶

117. The US Air Force Pamphlet states that:

In addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . (4) aerial bombardment for the deliberate purpose of . . . destroying protected areas, buildings or objects.⁹⁷

⁹⁵ Argentina, *Law of War Manual* (1989), §§ 4.03 and 4.45; Australia, *Defence Force Manual* (1994), §§ 210, 503(b) and 531; Belgium, *Teaching Manual for Soldiers* (undated), p. 10; Belgium, *Law of War Manual* (1983), pp. 26 and 27; Benin, *Military Manual* (1995), Fascicule III, p. 12; Cameroon, *Instructors' Manual* (1992), p. 150; Canada, *LOAC Manual* (1999), p. 4-4, § 32; Colombia, *Circular on Fundamental Rules of IHL* (1992), § 7; Colombia, *Instructors' Manual* (1999), p. 16; Croatia, *Commanders' Manual* (1992), § 11; Ecuador, *Naval Manual* (1989), § 8.1.2; France, *LOAC Summary Note* (1992), § 1.5; France, *LOAC Manual* (2001), p. 85; Germany, *Military Manual* (1992), § 451; Italy, *IHL Manual* (1991), Vol. I, § 13; Italy, *LOAC Elementary Rules Manual* (1991), § 11; Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2; Lebanon, *Teaching Manual* (undated), Article 7; Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 11; Netherlands, *Military Manual* (1993), p. V-5; Netherlands, *Military Handbook* (1995), p. 7-43; New Zealand, *Military Manual* (1992), §§ 524(2)(b) and 624(2)(b); Nigeria, *Manual on the Laws of War* (undated), § 6; South Africa, *LOAC Manual* (1996), § 28(a); Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).b; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 53; Togo, *Military Manual* (1996), Fascicule III, p. 12; UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(a); UK, *Military Manual* (1958), § 288; US, *Air Force Pamphlet* (1976), § 5-3(a)(1)(a); US, *Rules of Engagement for Operation Desert Storm* (1991), § G; US, *Naval Handbook* (1995), § 8.1.2; SFRY (FRY), *YPA Military Manual* (1988), § 73.

⁹⁶ Argentina, *Law of War Manual* (1989), § 8.03.

⁹⁷ US, *Air Force Pamphlet* (1976), § 15-3(c)(4).

National Legislation

118. Argentina's Draft Code of Military Justice punishes any soldier who

attacks or . . . commits acts of hostilities against civilian objects of the adverse Party, causing their destruction, provided that said acts do not offer a definite military advantage in the circumstances ruling at the time, and that the said objects do not make an effective contribution to the adversary's military action.⁹⁸

119. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "attacking civilian objects" in international armed conflicts.⁹⁹

120. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in international and non-international armed conflicts, attacks against civilian objects are prohibited.¹⁰⁰

121. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, it is a war crime in international armed conflicts to intentionally direct attacks against "civilian objects, that is, objects which are not military objectives".¹⁰¹

122. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁰²

123. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁰³

124. Under Croatia's Criminal Code, it is a war crime to commit or order the commission of "an attack against . . . civilian objects".¹⁰⁴

125. The Draft Amendments to the Penal Code of El Salvador provide a prison sentence for "anyone who, during an international or non-international armed conflict, attacks civilian objects".¹⁰⁵

126. Under Estonia's Penal Code, "an attack against an object not used for military purposes" is a war crime.¹⁰⁶

127. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as

⁹⁸ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(2) in the *Code of Military Justice as amended* (1951).

⁹⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.36.

¹⁰⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.

¹⁰¹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(b) and (D)(l).

¹⁰² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁰³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁰⁴ Croatia, *Criminal Code* (1997), Article 158(1).

¹⁰⁵ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a bienes protegidos".

¹⁰⁶ Estonia, *Penal Code* (2001), § 106.

“intentionally directing attacks against civilian objects, that is, objects which are not military objectives” in international armed conflicts, is a crime.¹⁰⁷

128. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, “directs an attack by military means against civilian objects, so long as these objects are protected as such by international humanitarian law”.¹⁰⁸

129. Under Hungary’s Criminal Code as amended, a military commander who “pursues a war operation which causes serious damage to . . . goods of the civilian population” is guilty, upon conviction, of a war crime.¹⁰⁹

130. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 52(1) AP I, is a punishable offence.¹¹⁰

131. Italy’s Law of War Decree as amended states that “bombardment, the sole purpose of which is . . . to destroy or damage objects which are of no military interest,” is prohibited.¹¹¹

132. Under Mali’s Penal Code, “intentionally directing attacks against . . . civilian [objects] which are not military objectives” constitutes a war crime in international armed conflicts.¹¹²

133. Under the International Crimes Act of the Netherlands, “intentionally directing attacks against civilian objects, that is, objects that are not military objectives” is a crime, when committed in an international armed conflict.¹¹³

134. Under New Zealand’s International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(ii) of the 1998 ICC Statute.¹¹⁴

135. Nicaragua’s Draft Penal Code punishes “anyone who, in the context of an international or internal armed conflict, attacks civilian objects”.¹¹⁵

136. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.¹¹⁶

137. Slovakia’s Criminal Code as amended punishes a commander who in a military operation intentionally “causes harm to the . . . property of civilians or the civilian population”.¹¹⁷

¹⁰⁷ Georgia, *Criminal Code* (1999), Article 413(d).

¹⁰⁸ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(1).

¹⁰⁹ Hungary, *Criminal Code as amended* (1978), Section 160(a).

¹¹⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹¹¹ Italy, *Law of War Decree as amended* (1938), Article 42.

¹¹² Mali, *Penal Code* (2001), Article 31(i)(2).

¹¹³ Netherlands, *International Crimes Act* (2003), Article 5(5)(a).

¹¹⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹¹⁵ Nicaragua, *Draft Penal Code* (1999), Article 464.

¹¹⁶ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹¹⁷ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(a).

138. Spain's Penal Code punishes

anyone who, during an armed conflict, . . . attacks . . . civilian objects of the adverse party causing their destruction, provided the objects do not, in the circumstances ruling at the time, offer a definite military advantage nor make an effective contribution to the military action of the adversary.¹¹⁸

139. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ii) of the 1998 ICC Statute.¹¹⁹

140. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ii) of the 1998 ICC Statute.¹²⁰

141. Under Yemen's Military Criminal Code, "attacks on public and private civilian installations" are war crimes.¹²¹

National Case-law

142. The Report on the Practice of Colombia refers to a decision of the Council of State in 1994 which considered the guerrilla attack on the Palace of Justice as a terrorist attack directed against a civilian object.¹²²

143. In 1997, a court in Croatia sentenced 39 people, both soldiers and commanders, to prison terms ranging from 5 to 20 years on charges which included attacks on civilian property, churches, schools and a dam.¹²³

Other National Practice

144. The Report on the Practice of Belgium states that Belgium considered itself bound by the prohibition of attacks on civilian objects even before the adoption of AP I.¹²⁴

145. In a letter to the President of the UN Security Council in 1992, Croatia expressed strong protest over attacks it alleged were carried out against the civilian population and civilian facilities in the wider area of the town of SlavonSKI Brod launched by Serbs from Bosnia and Herzegovina and the UN Protected Area territories in Croatia and which it considered contrary to Articles 51 and 52 AP I.¹²⁵

146. On the basis of a military communiqué issued by Egypt during the 1973 Middle East conflict, the Report on the Practice of Egypt states that Egypt considers that civilian objects should be immune from attacks. The report also

¹¹⁸ Spain, *Penal Code* (1995), Article 613(1)(b).

¹¹⁹ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹²⁰ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹²¹ Yemen, *Military Criminal Code* (1998), Article 21(7).

¹²² Report on the Practice of Colombia, 1998, Chapter 1.3, referring to Council of State, *Administrative Case No. 9276*, Judgement, 19 August 1994.

¹²³ Croatia, District Court of Split, *RA. R. case*, Judgement, 26 May 1997.

¹²⁴ Report on the Practice of Belgium, 1997, Chapter 1.3.

¹²⁵ Croatia, Letter dated 24 August 1992 to the President of the UN Security Council, UN Doc. S/24481, 25 August 1992, p. 3.

refers to a letter from the Counsel of the Egyptian President to the US Secretary of State condemning Israeli attacks on civilian objects.¹²⁶

147. In a declaration on Yugoslavia adopted in 1991, the EC and its member States, the USSR and the US stated that they were “particularly disturbed by reports of continued attacks on civilian targets by elements of the federal armed forces and by both Serbian and Croat irregular forces”.¹²⁷

148. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “civilian property shall not be made the object of attack”.¹²⁸

149. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iranian authorities, including the Ministry of Foreign Affairs and the parliament, condemned Iraqi attacks on civilian objects, which Iran always regarded as war crimes. The report further points out that Iran always insisted that war must be limited to battlefronts and that it had no intention of attacking civilian objects. When Iraq accused Iran of bombarding civilian targets, Iranian military communiqués denied these allegations and claimed that Iranian attacks were limited to military or economic facilities. The report concludes that “in practice, civilian objects were not targeted, except [in] reprisal”.¹²⁹

150. In 1984, in reply to criticism for alleged attacks against civilian objects during the hostilities against Iran, the President of Iraq stated that “our aircraft did not bomb civilian targets in Baneh during their raid of 5 June; they bombed a camp in which a large body of Iranian forces was concentrated”.¹³⁰

151. At the CDDH, Mexico stated that it believed draft Article 47 AP I (now Article 52) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.¹³¹

152. In a communiqué issued in 1992, the Council of Ministers of Mozambique stated that it considered that:

¹²⁶ Report on the Practice of Egypt, 1997, Chapter 1.3, referring to Military Communiqué No. 63, 26 October 1973 and Letter from Hafez Ismail, Counsel to the Egyptian President, to Henry Kissinger, US Secretary of State, 11 October 1973.

¹²⁷ EC, USSR and US, Declaration on Yugoslavia, The Hague, 18 October 1991, annexed to Letter dated 21 October 1991 from the Netherlands, the USSR and the US to the UN Secretary-General, UN Doc. A/C.1/46/11, 24 October 1991.

¹²⁸ France, Etat-major de la Force d’Action Rapide, Ordres pour l’Opération Mistral, 1995, Section 6, § 66.

¹²⁹ Report on the Practice of Iran, 1997, Chapter 1.3, see also Chapter 6.5 (definition of war crimes).

¹³⁰ Iraq, Message from the President of Iraq, annexed to Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16610, 19 June 1984, p. 2.

¹³¹ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

RENAMO's behaviour, namely . . . launching offensives against civilian targets, in a deliberate strategy of conquest of territories and strategic positions . . . constitutes a grave and systematic violation that seriously jeopardizes the General Peace Agreement.¹³²

153. The Report on the Practice of Russia considers that while there are no clear-cut criteria of distinction between military objectives and civilian objects, the relevant military instructions refer to the prohibition of attacks on civilian objects and the protection of these objects.¹³³

154. The Report on the Practice of Rwanda considers the prohibition on targeting civilian objects as a required precaution in attack.¹³⁴

155. In 1992, in a note verbale addressed to the UN Secretary-General, Slovenia expressed its readiness to provide information concerning violations of IHL committed by members of the Yugoslav Army during the 10-day conflict with Slovenia, including "bombing, shooting and destroying civilian targets and private property".¹³⁵

156. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that "under the principle of distinction, an attack on a civilian population or civilian property is prohibited".¹³⁶

157. In 1996, during a debate in the UN Security Council on the situation in Lebanon, the UAE stated that arbitrary bombings of civilian regions were a violation of IHL and of GC IV and referred to an ICRC statement condemning such actions on the part of Israel.¹³⁷

158. At the CDDH, following the adoption of draft Article 47 AP I (now Article 52), the UK stated that it "welcomed the reaffirmation, in paragraph 2, of the customary law rule that civilian objects must not be the direct object of attack".¹³⁸

159. In 1996, during a debate in the UN Security Council on the situation in Lebanon, the UK stated that attacks directed at civilian targets must be put to an end.¹³⁹

160. In 1966, in reply to an inquiry from a member of the US House of Representatives asking for a restatement of US policy on targeting in North Vietnam,

¹³² Mozambique, Communiqué issued by the Council of Ministers, 20 October 1992, annexed to Letter dated 23 October 1992 to the UN Secretary-General, UN Doc. S/24724, 28 October 1992, p. 4.

¹³³ Report on the Practice of Russia, 1997, Chapter 1.3.

¹³⁴ Report on the Practice of Rwanda, 1997, Chapter 1.6.

¹³⁵ Slovenia, Note verbale dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24789, 9 November 1992, p. 2.

¹³⁶ Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 2 June 1994, p. 3.

¹³⁷ UAE, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 17.

¹³⁸ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 169, § 153.

¹³⁹ UK, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 13.

a US Deputy Assistant Secretary of Defense wrote that “no United States aircraft have been ordered to strike any civilian targets in North Vietnam at any time . . . We have no knowledge that any pilot has disobeyed his orders and deliberately attacked these or any other nonmilitary targets in North Vietnam.”¹⁴⁰

161. In 1974, at the Lucerne Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, the head of the US delegation stated that “the law of war also prohibits attacks on civilians and civilian objects as such”.¹⁴¹

162. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that “over 52,000 coalition air sorties have been carried out since hostilities began on 16 January. These sorties were not flown against any civilian or religious targets.”¹⁴²

163. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

The United States considers the obligations to protect natural, civilian, and cultural property to be customary international law . . . Cultural property, civilian objects, and natural resources are protected from intentional attack so long as they are not utilized for military purposes.¹⁴³

III. Practice of International Organisations and Conferences

United Nations

164. In a resolution on Lebanon adopted in 1996, the UN Security Council stated that it was gravely concerned by all attacks on civilian targets.¹⁴⁴

165. In a resolution adopted in 1999 on the protection of civilians in armed conflicts, the UN Security Council strongly condemned “attacks on objects protected under international law” and called on all parties “to put an end to such practices”.¹⁴⁵

166. In 1995, in a statement by its President, the UN Security Council condemned “any shelling of civilian targets” in and around Croatia.¹⁴⁶

¹⁴⁰ US, Letter from Deputy Assistant Secretary of Defense Goulding to US Representative Ogden Reid from New York, 30 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 428.

¹⁴¹ US, Statement of 25 September 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, p. 713.

¹⁴² US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1

¹⁴³ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 202.

¹⁴⁴ UN Security Council, Res. 1052, 18 April 1996, preamble.

¹⁴⁵ UN Security Council, Res. 1265, 17 September 1999, § 2.

¹⁴⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

167. In a resolution adopted in 1938 concerning the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations stated that “objectives aimed at from the air must be legitimate military objectives and must be identifiable”.¹⁴⁷

168. In a resolution adopted in 1995, the UN General Assembly condemned “the use of cluster bombs on civilian targets by Bosnian Serb and Croatian Serb forces”.¹⁴⁸

169. In a resolution adopted in 1996 on the situation of human rights in Sudan, the UN General Assembly urged the government of Sudan “to cease immediately all aerial attacks on civilian targets and other attacks that are in violation of international humanitarian law”.¹⁴⁹

170. In a resolution adopted in 1993 on the situation of human rights in the former Yugoslavia and in Bosnia and Herzegovina, the UN Commission on Human Rights condemned “attacks against non-military targets”.¹⁵⁰

171. In a resolution adopted in 1994 on the situation of human rights in Bosnia and Herzegovina, the UN Commission on Human Rights condemned the “attacks against civilian targets”.¹⁵¹

172. In a resolution adopted in 1994, the UN Commission on Human Rights called upon the government of Sudan “to explain without delay the circumstances of the recent air attacks on civilian targets in southern Sudan”.¹⁵²

173. In a resolution adopted in 1995, the UN Commission on Human Rights condemned “the use of cluster and napalm bombs against civilian targets by Bosnian and Croatian Serb forces”.¹⁵³

174. In 1996, in a report on UNIFIL in Lebanon, the UN Secretary-General noted that in the text of a partial ceasefire concluded on 27 April 1996, Israel agreed not to fire or aim any kind of weapon at civilians or civilian targets in Lebanon.¹⁵⁴

175. The prohibition of direct attacks against civilian objects was a constant preoccupation in the periodic reports on the situation of human rights in the former Yugoslavia submitted by the Special Rapporteur of the UN Commission on Human Rights. For example, in his third report in 1993, the Special Rapporteur considered the shelling of civilian objects as a feature of the situation in Bosnia and Herzegovina, citing the bombing of the central mosque in Sarajevo and of the city of Dobrinja.¹⁵⁵ In the final recommendations of his fifth periodic

¹⁴⁷ League of Nations, Assembly, Resolution adopted on 30 September 1938, § I(2), *Official Journal*, Special Supplement No. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15–17.

¹⁴⁸ UN General Assembly, Res. 50/193, 22 December 1995, § 5.

¹⁴⁹ UN General Assembly, Res. 51/112, 12 December 1996, § 8.

¹⁵⁰ UN Commission on Human Rights, Res. 1993/7, 23 February 1993, § 10.

¹⁵¹ UN Commission on Human Rights, Res. 1994/75, 9 March 1994, § 1.

¹⁵² UN Commission on Human Rights, Res. 1994/79, 9 March 1994, § 6.

¹⁵³ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 5.

¹⁵⁴ UN Secretary-General, Report on UNIFIL, UN Doc. S/1996/575, 20 July 1996, § 24.

¹⁵⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Third periodic report, UN Doc. E/CN.4/1994/6, 26 August 1993, § 37.

report, the Special Rapporteur requested that in the conduct of hostilities in the UN Protected Areas, the parties refrain from all further shelling of civilian objects.¹⁵⁶

176. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that:

The concealment of Bosnian Government forces among civilian property may have caused the attraction of fire from the Bosnian Serb Army which may have resulted in legitimate collateral damage. There is enough apparent damage to civilian objects in Sarajevo to conclude that either civilian objects have been deliberately targeted or they have been indiscriminately attacked.¹⁵⁷

Other International Organisations

177. Addressing the President of the UN Security Council as members of the Contact Group of the OIC in 1992, Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey protested against “the continued aggression of the Serbian elements who, through artillery and air attacks on civilian targets, continue to violate the principles of the Charter of the United Nations, international humanitarian law and the basic norms of civilized behaviour”.¹⁵⁸

International Conferences

178. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that:

in the conduct of hostilities, every effort is made – in addition to the total ban on directing attacks against the civilian population as such or against civilians not taking a direct part in hostilities or against civilian objects – . . . to protect civilian objects including cultural property, places of worship and diplomatic facilities.¹⁵⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

179. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that “the cardinal principles contained in the texts constituting the fabric of

¹⁵⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 10, 45, 65–67, 92–96, 161–164 and 235.

¹⁵⁷ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, Annex, § 206.

¹⁵⁸ OIC, Contact Group on Bosnia and Herzegovina, Letter dated 5 October 1992 from Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey to the President of the UN Security Council, UN Doc. S/24620, 6 October 1992, p. 1.

¹⁵⁹ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects."¹⁶⁰

180. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

The protection of civilians in time of armed conflict, whether international or internal, is the bedrock of modern humanitarian law . . . Indeed, it is now a universally recognised principle, recently restated by the International Court of Justice [in the *Nuclear Weapons case*], that deliberate attacks on civilians or civilian objects are absolutely prohibited by international humanitarian law.¹⁶¹

181. In the *Blaškić case* before the ICTY in 1997, the accused was charged with "unlawful attack on civilian objects" in violation of the laws or customs of war.¹⁶² In its judgement in 2000, the ICTY Trial Chamber held that "the parties to the conflict are obliged to attempt to distinguish between military targets and civilian persons or property. Targeting civilians or civilian property is an offence when not justified by military necessity."¹⁶³ It found the accused guilty of "a violation of the laws or customs of war under Article 3 of the Statute and recognised by Article 52(1) of Additional Protocol I: unlawful attacks on civilian objects".¹⁶⁴

182. In the *Kordić and Čerkez case* before the ICTY in 1998, the accused were charged with "unlawful attack on civilian objects" in violation of the laws or customs of war.¹⁶⁵ In an interlocutory decision in this case in 1999, the ICTY Trial Chamber held that it was "indisputable" that the prohibition of attacks on civilian objects was a generally accepted obligation and that as a consequence, "there is no possible doubt as to the customary status" of Article 52(1) AP I as it reflects a core principle of humanitarian law "that can be considered as applying to all armed conflicts, whether intended to apply to international or non-international conflicts".¹⁶⁶ In its judgement in 2001, the ICTY Trial Chamber stated that:

Prohibited attacks are those launched deliberately against . . . civilian objects in the course of an armed conflict and are not justified by military necessity. They must have caused . . . extensive damage to civilian objects. Such attacks are in direct contravention of the prohibitions expressly recognised in international law including the relevant provisions of Additional Protocol I.¹⁶⁷

¹⁶⁰ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 78.

¹⁶¹ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 521.

¹⁶² ICTY, *Blaškić case*, Second Amended Indictment, 25 April 1997, § 8, Count 4.

¹⁶³ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 180.

¹⁶⁴ ICTY, *Blaškić case*, Judgement, 3 March 2000, Section VI, Disposition.

¹⁶⁵ ICTY, *Kordić and Čerkez case*, First Amended Indictment, 30 September 1998, §§ 40 and 41, Counts 4 and 6.

¹⁶⁶ ICTY, *Kordić and Čerkez case*, Decision on the Joint Defence Motion, 2 March 1999, § 31.

¹⁶⁷ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 328.

The Tribunal found the accused guilty of “a violation of the laws or customs of war, as recognised by Article 3 [of the ICTY Statute] (unlawful attack on civilian objects)”.¹⁶⁸

183. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

Attacks which are not directed against military objectives (particularly attacks directed against the civilian population) . . . may constitute the *actus reus* for the offence of unlawful attack [as a violation of the laws and customs of war]. The *mens rea* for the offence is intention or recklessness, not simple negligence.¹⁶⁹

V. Practice of the International Red Cross and Red Crescent Movement

184. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “civilian objects may not be attacked, unless they become military objectives”.¹⁷⁰

185. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(2) of draft AP I which stated in part that “objects which are not military objectives shall not be made the object of attack, except if they are used mainly in support of the military effort”. All governments concerned replied favourably.¹⁷¹

186. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict: . . . It is forbidden to attack civilian persons or objects.”¹⁷²

187. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about “the protracting internal conflict in Yugoslavia” and urged the parties to the conflict “to save all non-military targets . . . and not to use them for military purposes”.¹⁷³

188. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation “to refrain from attacking civilians and civilian property”.¹⁷⁴

¹⁶⁸ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Section V, Disposition.

¹⁶⁹ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 28.

¹⁷⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 209.

¹⁷¹ ICRC, The International Committee's Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

¹⁷² ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 24.

¹⁷³ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

¹⁷⁴ ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

189. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Georgia of their obligation “to refrain from attacking civilians and civilian property”.¹⁷⁵

190. In a press release issued in 1994 in the context of the conflict in Yemen, the ICRC stated that “attacks against civilians and civilian property are prohibited”.¹⁷⁶

191. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “attacks on civilians or civilian objects are prohibited”.¹⁷⁷

192. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “it is prohibited to direct attacks against civilian persons or objects”.¹⁷⁸

193. In a communication to the press in 2000, the ICRC reminded both the Sri Lankan security forces and the LTTE of their obligation to comply with IHL, which provided for the protection of the civilian population against the effects of the hostilities. The ICRC called on both parties to ensure that the civilian population and civilian property were protected and respected at all times.¹⁷⁹

VI. Other Practice

194. In 1979, an armed group wrote to the ICRC to confirm its commitment to IHL and to denounce attacks against civilian objectives it claimed had been carried out by one of the parties to the conflict.¹⁸⁰

195. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “the parties to the conflict shall at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian objects”.¹⁸¹

196. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that:

The concept of general protection [in Article 13(1) AP II], however, is broad enough to cover protections which flow as necessary inferences from other provisions of

¹⁷⁵ ICRC, Communication to the Press No. 93/31, Georgia: ICRC Activities in Abkhazia, 20 September 1993.

¹⁷⁶ ICRC, Press Release No. 1773, Fighting in Yemen, 9 May 1994; see also Press Release No. 1775, Yemen: ICRC active on both sides appeals to belligerents, 12 May 1994.

¹⁷⁷ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

¹⁷⁸ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹⁷⁹ ICRC, Communication to the Press No. 00/13, Sri Lanka: ICRC urges both parties to respect civilians, 11 May 2000.

¹⁸⁰ ICRC archive document. ¹⁸¹ ICRC archive document.

Protocol II. Thus, while there is no explicit provision affording general protection for civilian objects other than the special objects covered by Arts. 14 to 16, the protection against direct attack of para. 2 also precludes attacks against civilian objects used as dwellings or otherwise occupied by civilians not then supporting the military effort. The definition of civilian objects in Art. 52(2) of Protocol I provides the basis for construing the extent of such protection of civilian objects.¹⁸²

197. In 1992, an armed opposition group requested that the ICRC put pressure on the government to stop the aerial bombardment of civilian objects.¹⁸³

198. In 2001, in a report on Israel and the occupied territories, Amnesty International stated that:

It is a basic rule of customary international law that civilians and civilian objects must never be made the targets of an attack. This rule applies in all circumstances including in the midst of full-scale armed conflict. Due to its customary nature it is binding on all parties. Israel is prohibited from attacking civilians and civilian objects. Palestinians are also prohibited from targeting Israeli civilians, including settlers who are not bearing arms, and civilian objects.¹⁸⁴

Attacks against places of civilian concentration

Note: For practice concerning attacks on open towns and non-defended localities, see Chapter 11, section C. For practice concerning attacks against buildings dedicated to religion, education, art, science or charitable purposes, see Chapter 12, section A.

I. Treaties and Other Instruments

Treaties

199. No practice was found.

Other Instruments

200. Article 6 of the 1956 New Delhi Draft Rules states that "it is also forbidden to attack dwellings, installations... which are for the exclusive use of, and occupied by, the civilian population".

II. National Practice

Military Manuals

201. Cameroon's Instructors' Manual prohibits the bombardment of residential areas.¹⁸⁵

¹⁸² Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 677.

¹⁸³ ICRC archive document.

¹⁸⁴ Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, AI Index MDE 15/005/2001, London, 21 February 2001, p. 2, see also p. 29.

¹⁸⁵ Cameroon, *Instructors' Manual* (1992), pp. 111 and 150.

202. The Military Manual of the Dominican Republic states that “under the laws of war, you are not allowed to attack villages, towns, or cities. However, when your mission requires, you are allowed to engage enemy troops, equipment, or supplies in a village, town or city”.¹⁸⁶

203. Ecuador’s Naval Manual states that “the wanton or deliberate destruction of areas of concentrated civilian habitation, including cities, towns, and villages, is prohibited”.¹⁸⁷

204. Indonesia’s Directive on Human Rights in Irian Jaya and Maluku provides that “towns, villages and residences, even if used for food-stuff and equipment stockpile, should not be attacked”.¹⁸⁸

205. Romania’s Soldiers’ Manual states that “attacks of cities [and] villages” are prohibited.¹⁸⁹

206. The US Rules of Engagement for Operation Desert Storm gives the following instruction:

Do not fire into civilian populated areas or buildings which are not defended or being used for military purposes. [S]chools . . . will not be engaged except in self-defense. Do not attack traditional civilian objects, such as houses, unless they are being used by the enemy for military purposes and neutralization assists in mission accomplishment.¹⁹⁰

207. The US Naval Handbook states that “the wanton or deliberate destruction of areas of concentrated civilian habitation, including cities, towns, and villages, is prohibited”.¹⁹¹

National Legislation

208. Azerbaijan’s Criminal Code provides that “directing attacks against . . . living places” constitutes a war crime in international and non-international armed conflicts.¹⁹²

209. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to commit or order the commission of “an attack on . . . a [civilian] settlement”.¹⁹³ The Criminal Code of the Republika Srpska contains the same provision.¹⁹⁴

210. Under Croatia’s Criminal Code, it is a war crime to commit or order the commission of “an attack against . . . [civilian] settlements”.¹⁹⁵

¹⁸⁶ Dominican Republic, *Military Manual* (1980), p. 3.

¹⁸⁷ Ecuador, *Naval Manual* (1989), § 8.5.1.1.

¹⁸⁸ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 9(b).

¹⁸⁹ Romania, *Soldiers’ Manual* (1991), p. 34.

¹⁹⁰ US, *Rules of Engagement for Operation Desert Storm* (1991), §§ B, C and G.

¹⁹¹ US, *Naval Handbook* (1995), § 8.5.1.1.

¹⁹² Azerbaijan, *Criminal Code* (1999), Article 116(7).

¹⁹³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

¹⁹⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

¹⁹⁵ Croatia, *Criminal Code* (1997), Article 158(1).

- 211.** Under Slovenia's Penal Code, it is a war crime to commit or order the commission of "an attack . . . on built-up areas".¹⁹⁶
- 212.** Uruguay's Military Penal Code as amended punishes anyone who carries out "an unjustified attack against . . . schools".¹⁹⁷
- 213.** Under the Penal Code as amended of the SFRY (FRY), it is a war crime to commit or order the commission of "an attack on . . . a [civilian] settlement".¹⁹⁸

National Case-law

- 214.** No practice was found.

Other National Practice

- 215.** In 1996, during a debate in the UN Security Council, in a brief report of alleged violations of IHL by the Taliban, Afghanistan stated that, during the 1994 failed coup, more than 3,000 rockets had rained down on the innocent civilian population of Kabul and on residential areas of the town.¹⁹⁹
- 216.** In 1992, in letters addressed to the UN Secretary-General and President of the UN Security Council respectively, Azerbaijan referred to data provided to the UN Fact-Finding Mission in the region concerning illegal actions by Armenia, including the destruction of and damage caused to residential buildings.²⁰⁰
- 217.** In 1996, during a debate in the UN Security Council, Botswana commented on the numerous violations of the fundamental human rights of the Afghan civilian population documented by international human rights organisations, listing among such violations the bombing of residential areas.²⁰¹
- 218.** In 1972, in a statement before the UNESCO General Conference, China criticised the US for having "wantonly bombarded Vietnamese cities and villages".²⁰²
- 219.** In 1993, the German Chancellor strongly criticised the "brutal siege and the shelling of the Muslim town of Srebrenica".²⁰³
- 220.** In reply to a message of 9 June 1984 from the UN Secretary-General, the President of Iran stated that:

In the course of more than three and a half years since the beginning of this war, Iraq has repeatedly attacked our residential areas in contravention of all international

¹⁹⁶ Slovenia, *Penal Code* (1994), Article 374(1).

¹⁹⁷ Uruguay, *Military Penal Code as amended* (1943), Article 58(12).

¹⁹⁸ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

¹⁹⁹ Afghanistan, Statement before the UN Security Council, UN Doc. S/PV.3648, 9 April 1996, p. 3.

²⁰⁰ Azerbaijan, Identical letters dated 11 June 1992 addressed respectively to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/24103, 16 June 1992, p. 1.

²⁰¹ Botswana, Statement before the UN Security Council, UN Doc. S/PV.3648, 9 April 1996, p. 15.

²⁰² China, Statement before the General Conference of UNESCO, 25 October 1972, *Selected Documents of the Chinese Delegation to the United Nations*, The People's Press, Beijing, 1972, p. 239.

²⁰³ Germany, Statement by the Chancellor, Helmut Kohl, 19 April 1993, *Bulletin*, No. 31, Presse- und Informationsamt der Bundesregierung, Bonn, 21 April 1993, p. 270.

and humanitarian principles . . . The Government of the Islamic Republic of Iran, however, in order to show its good faith, responds positively to your proposal on ending attacks on residential areas . . . I deem it necessary to underline that the good will shown by the Islamic Republic of Iran in response to your proposal to stop attacks on civilian areas is conditional on the total ending of the Iraqi régime's criminal acts of bombarding Iranian cities.²⁰⁴

221. In 1991, in a letter addressed to the UN Secretary-General during the Gulf War, Iran stated that:

In accordance with the same principles governing its foreign policy and consistent with the very strong and clear position adopted against bombardment of civilian areas in Iraq by allied forces, the Islamic Republic of Iran cannot remain but alarmed at numerous reports of horrifying attacks by government forces against innocent civilians.²⁰⁵

222. According to the Report on the Practice of Iran, during the Iran–Iraq War, the Iranian authorities accused Iraq on many occasions of having carried out attacks on civilian objects such as schools, houses, hospitals and refugee camps.²⁰⁶

223. In 1983, Iraq's Deputy Prime Minister and Minister for Foreign Affairs declared the readiness of Iraq "to sign a special peace treaty between Iraq and Iran, under United Nations supervision, wherein the two parties undertake not to attack towns and villages on the two sides, in spite of the continuation of the war".²⁰⁷

224. In reply to a message from the UN Secretary-General of 9 June 1984, the President of Iraq stated that:

I wish to remind you, first of all, that since the armed conflict began the Iranian side has continually resorted to the bombing of our frontier towns and villages and other civilian targets and for a long time persisted in denying it even after the facts had been verified by the United Nations mission . . . I would also like to remind you that, in June 1983, on behalf of Iraq I took the initiative of proposing the conclusion under international auspices of an agreement between Iran and Iraq under which the two parties would refrain from bombing civilian targets . . . I therefore have the pleasure to inform you that the Iraqi Government accepts your proposal on condition that Iran is committed thereby, and that you make effective arrangements as soon as possible to supervise the implementation by the two parties of their commitments.²⁰⁸

²⁰⁴ Iran, Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16609, 10 June 1984, p. 2.

²⁰⁵ Iran, Letter dated 22 March 1991 to the UN Secretary-General, UN Doc. S/22379, 23 March 1991; see also Letter dated 12 March 1992 to the President of the UN Security Council, UN Doc. S/23703, 12 March 1992.

²⁰⁶ Report on the Practice of Iran, 1997, Chapter 1.3.

²⁰⁷ Iraq, Statement by the Deputy Prime Minister and Minister for Foreign Affairs, Tarek Aziz, 25 May 1983, annexed to Letter dated 27 May 1983 to the UN Secretary-General, UN Doc. S/15804, 27 May 1983.

²⁰⁸ Iraq, Message from the President of Iraq, annexed to Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16610, 19 June 1984, p. 2.

225. The Report on the Practice of Jordan states that Islam prohibits attacks against civilians and mentions an order given by Caliph Abu Bakr (632–634 AD) proscribing the destruction of any dwelling. The report adds that, considering the time at which it was issued, this order should be highly esteemed.²⁰⁹

226. In 1996, during a debate in the UN Security Council on the situation in Lebanon, South Korea called upon both parties to the conflict to cease targeting areas populated by civilians.²¹⁰

227. In 1971, during a debate in the Third Committee of the UN General Assembly concerning respect for human rights in armed conflicts, Liberia stated that it “agreed wholeheartedly with the principle that . . . dwellings . . . should not be the object of military operations as affirmed in [principle 5] of General Assembly resolution 2675 (XXV)”.²¹¹

228. In 1993, in a declaration concerning a report on violations of human rights in Rwanda, the Rwandan government asked the FPR to cease all attacks against civilian targets such as camps for displaced persons, hospitals and schools.²¹²

229. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that an attack against civilians can be defined as an attack against purely civilian targets such as a town or a village exclusively inhabited by civilians.²¹³

230. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, Saudi Arabia stated that “the cities of the Kingdom of Saudi Arabia have been bombarded by 26 missiles, which have landed in purely civilian localities of no military value”.²¹⁴

231. In 1986, during a debate in the UN Security Council concerning the Iran–Iraq War, the UK voiced strong criticism of the recurrent bombing of civilian centres, qualifying it as a violation of international law under the Geneva Conventions.²¹⁵

232. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US denounced Iraq’s firing of surface-to-surface missiles at Saudi Arabia and Israel and stated that “particularly in regard to Israel, Iraq

²⁰⁹ Report on the Practice of Jordan, 1997, Chapter 1.4.

²¹⁰ South Korea, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 11.

²¹¹ Liberia, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1890, 1 December 1971, § 8.

²¹² Association rwandaise pour la défense des droits de la personne et des libertés publiques *Rapport sur les droits de l’homme au Rwanda, octobre 1992–octobre 1993*, Kigali, December 1993, p. 73.

²¹³ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 1.4.

²¹⁴ Saudi Arabia, Report dated 30 January 1991 on the progress of operations for the liberation of Kuwait, annexed to Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22180, 31 January 1991, p. 2.

²¹⁵ UK, Statement before the UN Security Council, UN Doc. S/PV.2666, 24 February 1986, pp. 21–22.

has targeted these missiles against civilian areas in an obvious sign of Iraqi disregard for civilian casualties".²¹⁶

III. Practice of International Organisations and Conferences

United Nations

233. In a resolution adopted in 1983 in the context of the Iran–Iraq War, the UN Security Council condemned "all violations of international humanitarian law, in particular, the provisions of the Geneva Conventions of 1949 in all their aspects, and calls for the immediate cessation of all military operations against civilian targets, including city and residential areas".²¹⁷

234. In a resolution adopted in 1986 in the context of the Iran–Iraq War, the UN Security Council deplored "the bombing of purely civilian population centres".²¹⁸ This statement was repeated in a subsequent resolution adopted in 1987.²¹⁹

235. In a resolution on Lebanon adopted in 1996, the UN Security Council condemned attacks on civilian targets, including residential areas.²²⁰

236. In a resolution on Georgia adopted in 1998, the UN Security Council condemned the deliberate destruction of houses by Abkhaz forces.²²¹

237. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council strongly condemned "attacks on objects protected under international law, including places that usually have a significant presence of children such as schools and hospitals" and called on all parties concerned "to put an end to such practices".²²²

238. In 1986, in a statement by its President in the context of the Iran–Iraq War, the UN Security Council declared that:

The members of the Security Council continue to deplore the violation of international humanitarian law and other laws of armed conflict. They express their deepening concern over the widening of the conflict through the escalation of attacks on purely civilian targets, on merchant shipping and oil installations of the littoral States.²²³

239. In 1988, in a statement by its President in the context of the Iran–Iraq War, the UN Security Council declared that:

²¹⁶ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 2; see also Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, pp. 1–2; and Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 2.

²¹⁷ UN Security Council, Res. 540, 31 October 1983, § 2.

²¹⁸ UN Security Council, Res. 582, 24 February 1986, § 2.

²¹⁹ UN Security Council, Res. 598, 20 July 1987, preamble.

²²⁰ UN Security Council, Res. 1052, 18 April 1996, preamble, § 5.

²²¹ UN Security Council, Res. 1187, 30 July 1998, § 4.

²²² UN Security Council, Res. 1261, 25 August 1999, § 2, see also § 18.

²²³ UN Security Council, Statement by the President, UN Doc. S/PV.2730, 22 December 1986, p. 3.

The members of the Security Council . . . strongly deplore the escalation of the hostilities between [Iran and Iraq], particularly against civilian targets and cities that have taken a heavy toll in human lives and caused vast material destruction, in spite of the declared readiness of the belligerent parties to cease such attacks.²²⁴

240. In 1998, in a statement by its President, the UN Security Council strongly condemned “the targeting of children in armed conflicts” and expressed its readiness “to consider appropriate responses whenever buildings or sites that usually have a significant presence of children such as, *inter alia*, schools, playgrounds, hospitals, are specifically targeted”.²²⁵

241. In Resolution 2675 (XXV) adopted in 1970, the UN General Assembly stated that:

Dwellings and other installations that are used only by civilian populations should not be the object of military operations. Places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations.²²⁶

242. In a resolution adopted in 1995 on the situation of human rights in the former Yugoslavia, the UN General Assembly condemned “the shelling of residential areas”.²²⁷

243. The UN Commission on Human Rights has repeatedly condemned attacks against villages in the conflict in southern Lebanon. In 1989, for example, the Commission condemned the bombing of villages and civilian populations and qualified such acts as a violation of human rights.²²⁸ Further resolutions referred to the bombardment of villages and civilian areas in southern Lebanon as a violation of human rights.²²⁹

244. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN Commission on Human Rights condemned “the deliberate, murderous shelling” of cities and other civilian areas.²³⁰

245. In a resolution adopted in 1994 on the human rights situation in Iraq, the UN Commission on Human Rights reiterated its deep concern about the destruction of Iraqi towns and villages.²³¹

246. In a resolution adopted in 1998 concerning the human rights situation in southern Lebanon and western Bekaa, the UN Commission on Human rights deplored “the continued Israeli violations of human rights in the occupied

²²⁴ UN Security Council, Statement by the President, UN Doc. S/PV.2798, 16 March 1988, p. 2.

²²⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998, pp. 1–2.

²²⁶ UN General Assembly, Res. 2675 (XXV), 9 December 1970, §§ 5 and 6.

²²⁷ UN General Assembly, Res. 50/193, 22 December 1995, § 6.

²²⁸ UN Commission on Human Rights, Res. 1989/65, 8 March 1989, § 1.

²²⁹ UN Commission on Human Rights, Res. 1990/54, 6 March 1990, § 1; Res. 1991/66, 6 March 1991, § 1; Res. 1992/70, 4 March 1992, § 1; Res. 1993/67, 10 March 1993, § 1; Res. 1994/83, 9 March 1994, § 1; Res. 1995/67, 7 March 1995, § 1; Res. 1998/62, 21 April 1998, § 1.

²³⁰ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 7, see also § 32.

²³¹ UN Commission on Human Rights, Res. 1994/74, 9 March 1994, preamble.

zone, demonstrated in particular by . . . the bombardment of peaceful villages and civilian areas, and other practices violating the most fundamental principles of human rights".²³²

247. In 1995, following consultations, the Chairman of the UN Commission on Human Rights issued a statement indicating the consensus of the Commission concerning the situation of human rights in Chechnya, in which the Commission especially deplored "the serious destruction of installations and infrastructure used by civilians".²³³ In a further statement in 1996, the Chairman of the Commission repeated that such wilful destruction was reprehensible and called upon the parties to desist immediately and permanently from any bombardment of civilian towns and villages.²³⁴

248. In resolutions adopted in 1988 and 1989 in the context of the situation in the Israeli-occupied territories, the UN Sub-Commission on Human Rights reaffirmed that GC IV was applicable and considered that attacking and destroying properties and homes was a war crime under international law.²³⁵

249. On 9 June 1984, in a message addressed to the Presidents of Iran and Iraq, the UN Secretary-General stated that:

Deliberate military attacks on civilian areas cannot be condoned by the international community . . . Therefore, I call upon the Governments of the Republic of Iraq and of the Islamic Republic of Iran to declare to the Secretary-General of the United Nations that each undertakes a solemn commitment to end, and in the future refrain from initiating, deliberate military attacks, by aerial bombardment, missiles, shelling or other means, on purely civilian population centres.²³⁶

250. In a statement to the UN Security Council in 1992, the UN Secretary-General reported that "heavy artillery has been used against the civilian population" during the bombardment of the area of Dobrinja, a suburb of Sarajevo close to the airport, adding that these attacks were occurring "despite an agreement . . . by the Serb side to stop shelling civilian areas".²³⁷

251. In 1996, in a report on UNIFIL in Lebanon, the UN Secretary-General referred to an agreement adopted in the summer of 1993. Although the document was not transmitted to the UN, the Secretary-General stated that, based on public statements by Israeli and Hezbollah officials, "it would appear that the Islamic Resistance agreed to refrain from targeting villages and towns in northern Israel, while IDF agreed to refrain from doing the same in Lebanon;

²³² UN Commission on Human Rights, Res. 1998/62, 21 April 1998, § 1.

²³³ UN Commission on Human Rights, Statement by the Chairman, 27 February 1995, UN Doc. E/CN.4/1995/176-E/1995/23, 7 July 1995, § 594.

²³⁴ UN Commission on Human Rights, Statement by the Chairman, 24 April 1996, UN Doc. E/CN.4/1996/177-E/1996/23, 7 July 1996, § 371.

²³⁵ UN Sub-Commission on Human Rights, Res. 1988/10, 31 August 1988, § 3; Res. 1989/4, 31 August 1989, § 3.

²³⁶ UN Secretary-General, Message dated 9 June 1984 to the Presidents of Iran and Iraq, UN Doc. S/16611, 11 June 1984.

²³⁷ UN Secretary-General, Statement to the UN Security Council, 26 June 1992, UN Doc. S/24201, 29 June 1992, p. 1.

there has been no mention of limitations concerning attacks on military targets".²³⁸

252. In 1998, in a report on the situation in Sierra Leone, the UN Secretary-General noted that the office of his Special Envoy continued to receive information about the "destruction of residential and commercial premises and property."²³⁹

253. In 1998, in a report on UNOMSIL in Sierra Leone, the UN Secretary-General mentioned that elements of the former junta continued to shell population centres such as Koidu and Daru.²⁴⁰

254. In 1993, in a report on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights condemned the parties to the conflict for the shelling of civilian objects, including residential areas, houses, apartments and schools.²⁴¹

Other International Organisations

255. In 1982, during a debate in the UN General Assembly, Denmark condemned, on behalf of the EC, the invasion of Lebanon by Israeli forces and in particular the bombardment of residential areas in Beirut.²⁴²

256. In a resolution adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe severely criticised the YPA for the repeated shelling of Dubrovnik and other Croatian cities.²⁴³

257. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the OIC Conference of Ministers of Foreign Affairs expressed its strong condemnation of the deliberate destruction of cities.²⁴⁴

International Conferences

258. In 1993, in a report submitted to the President of the UN Security Council, the Chairman of the Minsk Conference of the CSCE on Nagorno-Karabakh suggested that an official Security Council denunciation should be made of all bombardments and shelling of inhabited areas and population centres in the area of conflict.²⁴⁵

²³⁸ UN Secretary-General, Report on UNIFIL, UN Doc. S/1996/575, 20 July 1996, § 5.

²³⁹ UN Secretary-General, Fifth report on the situation in Sierra Leone, UN Doc. S/1998/486, 9 June 1998, § 37.

²⁴⁰ UN Secretary-General, First progress report on UNOMSIL, UN Doc. S/1998/750, 12 August 1998, § 33.

²⁴¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 162–164.

²⁴² EC, Statement before the UN General Assembly by Denmark on behalf of the EC, UN Doc. A/ES-7/PV.26, 19 August 1982, p. 13.

²⁴³ Council of Europe, Parliamentary Assembly, Res. 984, 30 June 1992, § 9.

²⁴⁴ OIC, Conference of Ministers of Foreign Affairs, Res. 1/5-EX, 17–18 June 1992, § 89.

²⁴⁵ CSCE, Minsk Conference on Nagorny Karabakh, Report by the Chairman to the President of the UN Security Council, UN Doc. S/26184, 28 July 1993, Annex, § 16(b).

IV. Practice of International Judicial and Quasi-judicial Bodies

259. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

260. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(2) of draft API which stated in part that “objects designed for civilian use, such as houses, dwellings, installations . . . shall not be made the object of attack, except if they are used mainly in support of the military effort”. All governments concerned replied favourably.²⁴⁶

261. In a press release issued in 1984 in the context of the Iran–Iraq War, the ICRC stated that:

In violation of the laws and customs of war, and in particular of the essential principle that military targets must be distinguished from civilian persons and objects, the Iraqi armed forces have continued to bomb Iranian civilian zones. The result was loss of human life on a large scale, and widespread destruction of strictly civilian objects.²⁴⁷

262. In a letter to the Ministry of Defence of a State in 1994, the ICRC pointed out that “the deliberate bombardment of a residential area is a serious violation of the law”.²⁴⁸

VI. Other Practice

263. In 1979, an armed opposition group wrote to the ICRC to confirm its commitment to IHL and stated in particular that it would “avoid attacks on urban areas”.²⁴⁹

264. Rule A6 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that “the general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition of attacks on dwellings and other installations which are used only by the civilian population”.²⁵⁰

²⁴⁶ ICRC, *The International Committee’s Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

²⁴⁷ ICRC, Press Release No. 1480, Conflict between Iran and Iraq and breaches of international humanitarian law: a renewed ICRC appeal, 15 February 1984, *IRRC*, No. 239, 1984, pp. 113–115.

²⁴⁸ ICRC archive document. ²⁴⁹ ICRC archive document.

²⁵⁰ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A6, *IRRC*, No. 278, 1990, p. 393.

Attacks against civilian means of transportation

I. Treaties and Other Instruments

Treaties

265. Article 3 *bis* of the 1944 Chicago Convention provides that “all States must abstain from using force against a civilian plane in flight”.

Other Instruments

266. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the destruction of merchant ships and passenger vessels without warning and without provision for the safety of passengers or crew and the destruction of fishing boats.

267. Article 33 of the 1923 Hague Rules of Air Warfare provides that “belligerent non-military aircraft, whether public or private, flying within the jurisdiction of their own state, are liable to be fired upon unless they make the nearest available landing on the approach of enemy military aircraft”.

268. Article 34 of the 1923 Hague Rules of Air Warfare provides that:

Belligerent non-military aircraft, whether public or private, are liable to be fired upon, if they fly (1) within the jurisdiction of the enemy, or (2) in the immediate vicinity thereof and outside the jurisdiction of their own state or (3) in the immediate vicinity of the military operations of the enemy by land or sea.

269. Article 6 of the 1956 New Delhi Draft Rules prohibits attacks against “installations or means of transport, which are for the exclusive use of, and occupied by, the civilian population”.

270. Paragraph 41 of the 1994 San Remo Manual states that “merchant vessels and civil aircraft are civilian objects unless they are military objectives in accordance with the principles and rules set forth in this manual”.

271. Paragraph 62 of the 1994 San Remo Manual provides that “enemy civil aircraft may only be attacked if they meet the definition of a military objective”.

272. Paragraph 63 of the 1994 San Remo Manual states that the following activities may render enemy civil aircraft military objectives:

- (a) engaging in acts of war on behalf of the enemy, e.g., laying mines, minesweeping, laying or monitoring acoustic sensors, engaging in electronic warfare, intercepting or attacking other civil aircraft, or providing targeting information to enemy forces;
- (b) acting as an auxiliary aircraft to an enemy’s armed forces, e.g., transporting troops or military cargo, or refuelling military aircraft;
- (c) being incorporated into or assisting the enemy’s intelligence-gathering system, e.g., engaging in reconnaissance, early warning, surveillance, or command, control and communications missions;

- (d) flying under the protection of accompanying enemy warships or military aircraft;
- (e) refusing an order to identify itself, divert from its track, or proceed for visit and search to a belligerent airfield that is safe for the type of aircraft involved and reasonably accessible, or operating fire control equipment that could reasonably be construed to be part of an aircraft weapon system, or on being intercepted clearly manoeuvring to attack the intercepting belligerent military aircraft;
- (f) being armed with air-to-air or air-to-surface weapons; or
- (g) otherwise making an effective contribution to military action.

II. National Practice

Military Manuals

273. Australia's *Commanders' Guide* states that "civilian vessels, aircraft, vehicles and buildings may be lawfully attacked if they contain combatant personnel, military equipment, supplies or are otherwise associated with combat activity inconsistent with their civilian status".²⁵¹

274. Australia's *Defence Force Manual* states that:

Civil aircraft in flight (including state aircraft which are not military aircraft) should not be attacked. They are presumed to be carrying civilians who may not be made the object of direct attack. If there is doubt as to the status of a civil aircraft, it should be called upon to clarify that status. If it fails to do so, or is engaged in non civil activities, such as ferrying troops, it may be attacked. Civil aircraft should avoid entering areas which have been declared combat zones by the belligerents.

Civil aircraft which have been absorbed into a belligerent's air force and are being ferried from the manufacturer to a belligerent for this purpose, may be attacked.²⁵²

275. Benin's *Military Manual* states that:

Foreign civilian aircraft may be attacked when escorted by enemy military aircraft. When flying alone they can be ordered to modify their route or to land or alight on water for inspection . . . If a foreign civilian aircraft refuses to modify its route or to land or alight on water, it may be attacked after due warning.²⁵³

276. According to Burkina Faso's *Disciplinary Regulations*, it is prohibited to attack "the crew and passengers of civil aircraft".²⁵⁴

277. According to Cameroon's *Disciplinary Regulations*, it is prohibited to attack "the crew and passengers of civil aircraft".²⁵⁵

278. Cameroon's *Instructors' Manual* states that "belligerents must . . . distinguish between military and civilian aircraft . . . As a result, only enemy

²⁵¹ Australia, *Commanders' Guide* (1994), § 951.

²⁵² Australia, *Defence Force Manual* (1994), §§ 852 and 853.

²⁵³ Benin, *Military Manual* (1995), Fascicule II, p. 8.

²⁵⁴ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

²⁵⁵ Cameroon, *Disciplinary Regulations* (1975), Article 32.

military aircraft may be attacked; civilian, private or commercial aircraft may only be intercepted."²⁵⁶

279. Canada's LOAC Manual states that civilian aircraft and vehicles are military objectives "if they contain combatants, military equipment or supplies".²⁵⁷ With respect to civil aircraft, the manual specifies that:

Civil aircraft (including state aircraft which are not military aircraft) in flight should not be attacked. They are presumed to be carrying civilians who may not be made the object of direct attack. If there is doubt as to the status of civil aircraft, it should be called upon to clarify that status. If it fails to do so, or is engaged in support of military activities, such as ferrying troops, it may be attacked. Civil aircraft should avoid entering areas which have been declared combat zones by the belligerents, since this increases the risk of their being attacked.²⁵⁸

280. According to Congo's Disciplinary Regulations, it is prohibited to attack "the crew and passengers of civil aircraft".²⁵⁹

281. Croatia's LOAC Compendium provides that "civilian aircraft escorted by enemy military aircraft" and "civilian aircraft that refuse to modify their routes, land or alight on water if so ordered and after warning" are proper targets in the air. The manual adds that "civilian aircraft that do not violate the airspace of a belligerent" are protected aircraft.²⁶⁰

282. Ecuador's Naval Manual provides that:

Civil passenger vessels at sea and civil airliners in flight are subject to capture but are exempt from destruction. Although enemy lines of communication are generally legitimate military targets in modern warfare, civilian passenger vessels at sea, and civil airliners in flight, are exempt from destruction, unless at the time of the encounter they are being utilized by the enemy for a military purpose (e.g., transporting troops or military cargo) or refuse to respond to the directions of the intercepting warship or military aircraft. Such passenger vessels in port and airliners on the ground are not protected from destruction.²⁶¹

283. According to France's Disciplinary Regulations as amended, it is prohibited to attack "the crew and passengers of civil aircraft".²⁶²

284. Germany's Military Manual provides that enemy aircraft used exclusively for the transport of civilians may neither be attacked nor seized. Their protection ends

if such [aircraft] do not comply with conditions lawfully imposed upon them, if they abuse their mission or are engaged in any other activity bringing them under

²⁵⁶ Cameroon, *Instructors' Manual* (1992), p. 113.

²⁵⁷ Canada, *LOAC Manual* (1999), p. 4-2, § 10.

²⁵⁸ Canada, *LOAC Manual* (1999), p. 7-4, § 38.

²⁵⁹ Congo, *Disciplinary Regulations* (1986), Article 32(2).

²⁶⁰ Croatia, *LOAC Compendium* (1991), p. 44.

²⁶¹ Ecuador, *Naval Manual* (1989), § 8.2.3(6).

²⁶² France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

the definition of a military objective . . . Such aircraft may be requested to land on ground or water to be searched.²⁶³

285. Hungary's Military Manual provides that "civilian aircraft escorted by enemy military aircraft" and "civilian aircraft that refuse to modify their routes, land or alight on water if so ordered and after warning" are proper targets in the air. The manual adds that "civilian aircraft that do not violate the airspace of a belligerent" are protected aircraft.²⁶⁴

286. Kenya's LOAC Manual provides that "specifically protected transport shall be allowed to pursue their assignment as long as needed. Their mission, contents and effective use may be verified by inspection (e.g. aircraft may be ordered to land for such inspection)."²⁶⁵ The manual further states that:

Subject to prohibitions and restrictions on access to national air space, foreign aircraft except enemy military aircraft may not be attacked. Foreign civilian aircraft may be attacked:

- (a) when escorted by enemy military aircraft, or
- (b) when flying alone under the conditions stated below.

Foreign civilian aircraft can be ordered to modify their route or to land or alight on water for inspection . . . If a foreign civilian aircraft refuses to modify its route or to land or alight on water, it may be attacked after due warning. The provisions of this part governing foreign civilian aircraft can be applied by analogy to neutral military aircraft.²⁶⁶

287. According to Morocco's Disciplinary Regulations, it is prohibited to attack "the crew and passengers of civil aircraft".²⁶⁷

288. New Zealand's Military Manual states that:

Civilian vessels, aircraft, vehicles and buildings may be lawfully attacked if they contain combatant personnel or military equipment or supplies or are otherwise associated with combat activity inconsistent with their civilian status and if collateral damage would not be excessive under the circumstances.²⁶⁸

The manual further states that:

Civil aircraft (including State aircraft which are not military aircraft) in flight should not be attacked. They are presumed to be carrying civilians who may not be made the object of direct attack. If there is doubt as to the status of a civil aircraft, it should be called upon to clarify that status. If it fails to do so, or is engaged in non-civil activities, such as ferrying troops, it may be attacked. Civil aircraft should avoid entering areas which have been declared combat zones by the belligerents, since this increases the risk of their being attacked.²⁶⁹

²⁶³ Germany, *Military Manual* (1992), §§ 1034–1036, see also § 463.

²⁶⁴ Hungary, *Military Manual* (1992), p. 71.

²⁶⁵ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 12.

²⁶⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 10–11.

²⁶⁷ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

²⁶⁸ New Zealand, *Military Manual* (1992), § 516(3), see also § 623(3).

²⁶⁹ New Zealand, *Military Manual* (1992), § 628(1).

289. Nigeria's Military Manual states that "the military character of the objectives and targets must be verified and precaution taken not to attack non-military objectives like merchant ships, civilian aircraft, etc."²⁷⁰ The manual further states that foreign aircraft "of no military importance shall not be captured or attacked except [when] they are of a dubious status, i.e., when it is uncertain whether it is a military objective or not. In that case, it may be stopped and searched so as to establish its status."²⁷¹ The manual also states that "specifically protected . . . transports recognised as such must be respected . . . though they could be inspected to ascertain their contents and effective use"²⁷²

290. According to Nigeria's Manual on the Laws of War, "civilian aircraft belong[ing] to the enemy flying outside their own territory, in a zone controlled by the state or close to it, or near the battle zone can be shot down only when they do not comply with landing orders"²⁷³

291. According to Senegal's Disciplinary Regulations, it is prohibited to attack "the crew and passengers of civil aircraft"²⁷⁴

292. Togo's Military Manual states that:

Foreign civilian aircraft may be attacked when escorted by enemy military aircraft. When flying alone they can be ordered to modify their route or to land or alight on water for inspection . . . If a foreign civilian aircraft refuses to modify its route or to land or alight on water, it may be attacked after due warning.²⁷⁵

293. With respect to civil aircraft, the US Air Force Pamphlet states that:

If identified as a civil aircraft, air transport in flight should not be the object of attack, unless at the time it represents a valid military objective such as when there is an immediate military threat or use. An unauthorized entry into a flight restriction zone might in some conflicts be deemed an immediate military threat. Wherever encountered, enemy civil aircraft are subject to instruction in order to verify status and preclude their involvement . . . Civil aircraft on the ground, as objects of attack, are governed by the rules of what constitutes a legitimate military objective as well as the rules and principles relative to aerial bombardment. As sources of airlift they may, under the circumstances ruling at the time, qualify as important military objectives. Civil aircraft entitled to protection include nonmilitary state aircraft and a state owned airline. The principle of law and humanity protecting civilians and civilian objects from being objects of attack as such, protects civil aircraft in flight, because civil aircraft are presumed to transport civilians. Such an aircraft is not subject to attack in the absence of a determination that it constitutes a valid military objective.²⁷⁶

294. The US Air Force Commander's Handbook states that "civilian vehicles, aircraft, vessels . . . may be the object of attack if they have combatant personnel

²⁷⁰ Nigeria, *Military Manual* (1994), p. 45, § 16(a).

²⁷¹ Nigeria, *Military Manual* (1994), p. 45, § 16(d).

²⁷² Nigeria, *Military Manual* (1994), p. 45, § 16(f).

²⁷³ Nigeria, *Manual on the Laws of War* (undated), § 20(d).

²⁷⁴ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

²⁷⁵ Togo, *Military Manual* (1996), Fascicule II, p. 8.

²⁷⁶ US, *Air Force Pamphlet* (1976), § 4-3.

in them and if collateral damage would not be excessive under the circumstances".²⁷⁷

295. The US Naval Handbook provides that:

Civil passenger vessels at sea and civil airliners in flight are subject to capture but are exempt from destruction. Although enemy lines of communication are generally legitimate military targets in modern warfare, civilian passenger vessels at sea, and civil airliners in flight, are exempt from destruction, unless at the time of the encounter they are being utilized by the enemy for a military purpose (e.g., transporting troops or military cargo) or refuse to respond to the directions of the intercepting warship or military aircraft. Such passenger vessels in port and airliners on the ground are not protected from destruction.²⁷⁸

National Legislation

296. Argentina's Draft Code of Military Justice punishes any soldier who

destroys or damages, in violation of the rules of international law applicable in armed conflict, non-military vessels or aircraft of the adverse Party or of a neutral State, without military necessity and without giving time or adopting measures to provide for the safety of the passengers and the preservation of the documentation on board.²⁷⁹

National Case-law

297. No practice was found.

Other National Practice

298. In a communiqué issued in 1973, the Belgian government condemned the deliberate destruction of a Libyan Boeing by Israeli air force units because it "condemns all violence of which innocent civilians are the victims".²⁸⁰

299. The Report on the Practice of Iran states that during the Iran-Iraq War, the Iranian authorities accused Iraq on many occasions of having carried out attacks against civilian objects, including civilian aircraft, trains and merchant ships.²⁸¹

300. The Report on the Practice of Malaysia states that no civilian aircraft may be attacked.²⁸²

301. The Report on the Practice of Peru refers to a scholar who wrote that in 1879, during a conflict against Chile, a Peruvian admiral refused, on

²⁷⁷ US, *Air Force Commander's Handbook* (1980), § 2-2.

²⁷⁸ US, *Naval Handbook* (1995), § 8.2.3(6).

²⁷⁹ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(2) in the *Code of Military Justice as amended* (1951).

²⁸⁰ Belgium, Government communiqué, 22 February 1973, *RBDI*, Vol. XI, 1975, p. 375.

²⁸¹ Report on the Practice of Iran, 1997, Chapter 1.3.

²⁸² Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.4.

humanitarian grounds, to attack an enemy vessel that he believed to be a transport ship.²⁸³

302. Following investigations by the ICAO Secretary-General into the shooting down of two civil aircraft by the Cuban air force on 24 February 1996, a debate took place on 26 July 1996 in the UN Security Council, during which Poland asserted that the principle that States must refrain from resorting to the use of weapons against civil aircraft in flight was well established in customary international law and codified in Article 3 *bis* of the 1944 Chicago Convention. According to Poland, an attack against a civilian aircraft in flight violates elementary considerations of humanity.²⁸⁴

303. Following investigations by the ICAO Secretary-General into the shooting down of two civil aircraft by the Cuban air force on 24 February 1996, a debate took place on 26 July 1996 in the UN Security Council, during which the US claimed that "Cuba violated the principle of customary law that States must refrain from resorting to the use of weapons against civil aircraft in flight – a principle that applies whether the aircraft are in national or international airspace". According to the US, an attack against a civilian aircraft in flight violates elementary considerations of humanity.²⁸⁵

III. Practice of International Organisations and Conferences

United Nations

304. In resolutions adopted in 1986 and 1987 in the context of the Iran–Iraq War, the UN Security Council deplored attacks against civilian aircraft.²⁸⁶

305. In a report on Angola in 1993, the UN Secretary-General described an incident which took place on 27 May 1993 whereby "UNITA ambushed a train . . . as a result of which up to 300 people, including women and children, died and hundreds of others were wounded. UNITA alleged that the train was ferrying troops and weapons and not civilians, as claimed." Noting that UNAVEM helicopters evacuated 57 seriously injured civilians, mostly women and children, from the site, the Secretary-General supported "the statement made by the President of the Security Council to the press on 8 June 1993 in which the Council strongly condemned the 27 May train attack and urged UNITA's leaders to make sure that its forces abide by the rules of international humanitarian law".²⁸⁷ In a subsequent resolution, the UN Security Council reiterated "its strong condemnation of the attack by UNITA forces, on 27 May 1993,

²⁸³ Report on the Practice of Peru, 1998, Chapter 1.3, referring to E. Angeles Figueroa, *El Derecho Internacional Humanitario y los Conflictos Armados*, Lima, 1992, pp. 119–120.

²⁸⁴ Poland, Statement before the UN Security Council, UN Doc. S/PV.3683, 26 July 1996, p. 19.

²⁸⁵ US, Statement before the UN Security Council, UN Doc. S/PV.3683, 26 July 1996, p. 3.

²⁸⁶ UN Security Council, Res. 582, 24 February 1986, § 2; Res. 598, 20 July 1987, preamble.

²⁸⁷ UN Secretary-General, Further report on UNAVEM II, UN Doc. S/26060, 12 July 1993, § 5.

against a train carrying civilians, and reaffirm[ed] that such criminal attacks are clear violations of international humanitarian law".²⁸⁸

306. In 1996, in a statement by its President in connection with the shooting down of two civil aircraft by the Cuban air force, the UN Security Council stated that:

The Security Council strongly deplores the shooting down by the Cuban air force of two civil aircraft on 24 February 1996, which apparently has resulted in the death of four persons.

The Security Council recalls that according to international law, as reflected in article 3 bis of the International Convention on Civil Aviation of 7 December 1944 added by the Montreal Protocol of 10 May 1984, States must refrain from the use of weapons against civil aircraft in flight and must not endanger the lives of persons on board and the safety of aircraft. States are obliged to respect international law and human rights norms in all circumstances.²⁸⁹

307. Following investigations by the ICAO Secretary-General into the shooting down of two civilian aircraft by the Cuban Air Force in 1996, the UN Security Council adopted a resolution on the conclusions of the ICAO report, in which it condemned:

the use of weapons against civil aircraft in flight as being incompatible with elementary considerations of humanity, the rules of customary international law as codified in article 3 *bis* of the Chicago Convention, and the standards and recommended practices set out in the annexes of the Convention.²⁹⁰

308. In 1993, in a report concerning the situation in Abkhazia, Georgia, the UN Secretary-General stated that he was particularly shocked by deliberate attacks on Georgian aircraft, which had resulted in heavy civilian losses.²⁹¹

Other International Organisations

309. No practice was found.

International Conferences

310. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

311. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated, concerning the "attack on a civilian passenger train at the Grdelica Gorge on 12 April 1999", that "the bridge was a legitimate military

²⁸⁸ UN Security Council, Res. 851, 15 July 1993, § 18.

²⁸⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/9, 27 February 1996.

²⁹⁰ UN Security Council, Res. 1067, 26 July 1996, § 6.

²⁹¹ UN Security Council, Report concerning the situation in Abkhazia, Georgia, UN Doc. S/26551, 7 October 1993, § 17.

objective. The passenger train was not deliberately targeted". The Committee did not refer specifically to the civilian character of the passenger train, but implied that, had the train been intentionally targeted, or had there been in the conduct of the attack against the bridge a sufficient "element of recklessness in the conduct of the pilot or weapons systems officer", an investigation could have been opened.²⁹²

V. Practice of the International Red Cross and Red Crescent Movement

312. To fulfil its role of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the following rules of IHL applicable to foreign aircraft:

Subject to prohibitions and restrictions on access to national air space, foreign aircraft, except enemy military aircraft, may not be attacked. Foreign civilian aircraft may be attacked:

- a) when escorted by enemy military aircraft;
- b) when flying alone: under the conditions stated in this chapter.

Foreign civilian aircraft can be ordered to modify their route or to land or alight on water for inspection . . . If a foreign civilian aircraft refuses to modify its route or to land or alight on water, it may be attacked after due warning.²⁹³

313. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(2) of draft AP I which stated in part that "objects designed for civilian use, such as . . . installations and means of transport . . . shall not be made the object of attack, except if they are used mainly in support of the military effort". All governments concerned replied favourably.²⁹⁴

314. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that the Patriotic Front "cease the shooting down of civilian passenger aircraft".²⁹⁵

VI. Other Practice

315. No practice was found.

²⁹² ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 62.

²⁹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 466–469.

²⁹⁴ ICRC, The International Committee's Action in the Middle East, *IRRC*, No. 152, 1973, pp. 584–585.

²⁹⁵ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, §§ 5 and 6, *IRRC*, No. 209, 1979, pp. 88–89.

B. Definition of Military Objectives

General definition

I. Treaties and Other Instruments

Treaties

316. Article 2 of 1907 Hague Convention (IX) allows the bombardment of “military works, military or naval establishments, depots of arms or war *matériel*, workshops or plant which could be utilized for the needs of the hostile fleet or army, and the ships of war in the harbour”.

317. Article 19 GC I and Article 4 Annex I GC I and Article 18 GC IV and Article 4 Annex I GC IV use the term “military objectives” without, however, defining it.

318. The 1954 Hague Convention does not define a military objective, but Article 8 provides that refuges intended to shelter movable cultural property, centres containing monuments and other immovable cultural property of very great importance may be placed under special protection, provided that they:

- a) are situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point, such as, for example, an aerodrome, broadcasting station, establishment engaged upon work of national defence, a port or railway station of relative importance or a main line of communication;
- b) are not used for military purposes.

319. Article 52(2) AP I provides that:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.²⁹⁶

320. Upon ratification of AP I, Canada, France and Spain stated that the term “military advantage” as used in Article 52(2) AP I was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.²⁹⁷

321. According to the identical definitions provided by Article 2(4) of the 1980 Protocol II to the CCW, Article 2(6) of the 1996 Amended Protocol II to the CCW and Article 1(3) of the 1980 Protocol III to the CCW:

²⁹⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

²⁹⁷ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 10; France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 10; Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, § 6.

“Military objective” means, so far as objects are concerned, any object which by its nature, location, purpose or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

322. Article 1(f) of the 1999 Second Protocol to the 1954 Hague Convention defines a military objective as:

An object which by its nature, location, purpose, or use makes an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

323. Upon signature of the 1998 ICC Statute, Egypt declared that “the military objectives referred to in article 8, paragraph 2 (b) of the Statute must be defined in the light of the principles, rules and provisions of international humanitarian law”.²⁹⁸

Other Instruments

324. Article 15 of the 1863 Lieber Code provides that:

Military necessity admits of all direct destruction of life or limb of “armed” enemies, and of other persons whose destruction is incidentally “unavoidable” in the armed contests of the war; it allows of the capturing of every armed enemy, and every enemy of importance to the hostile government, or of peculiar danger to the captor; it allows of all destruction of property, and obstruction of the ways and channels of traffic, travel, or communication, and of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

325. Article 24(1) of the 1923 Hague Rules of Air Warfare provides that “aerial bombardment is legitimate only when directed at a military objective, that is to say, an object of which the destruction or injury would constitute a distinct military advantage to the belligerent”.

326. Article 7 of the 1956 New Delhi Draft Rules provides that:

Only objectives belonging to the categories of objective which, in view of their essential characteristics, are generally acknowledged to be of military importance, may be considered as military objectives. Those categories are listed in the annex to the present rules.

However, even if they belong to one of those categories, they cannot be considered as a military objective where their total or partial destruction, in the circumstances ruling at the time, offers no military advantage.

327. Paragraph 40 of the 1994 San Remo Manual adopts the same definition of military objectives as Article 52(2) AP I.

²⁹⁸ Egypt, Declarations made upon signature of the 1988 ICC Statute, 26 December 2000, § 4(b).

II. National Practice

Military Manuals

328. Military manuals of Argentina, Australia, Belgium, Benin, Cameroon, Canada, Colombia, Croatia, France, Germany, Hungary, Italy, Kenya, Madagascar, Netherlands, New Zealand, South Africa, Spain, Sweden, Togo, UK and US use a definition identical to that of Article 52(2) AP I.²⁹⁹

329. Australia's Defence Force Manual specifies that "the objective must be measured by its effect on the whole military operation or campaign and the attack should not be viewed in isolation. Military advantage includes the security of friendly forces."³⁰⁰

330. Belgium's Regulations on the Tactical Use of Large Units states that "an objective is the final goal of an action. It is defined as either an area of land of tactical importance or as enemy elements that have to be destroyed or neutralised."³⁰¹

331. Ecuador's Naval Manual states that:

Military objectives are combatants and those objects which, by their nature, location, purpose or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking forces.³⁰²

332. Germany's Military Manual states that "the term 'military advantage' refers to the advantage which can be expected of an attack as a whole and not only of isolated or specific parts of the attack".³⁰³

333. Indonesia's Directive on Human Rights in Irian Jaya and Maluku provides that "only property which contributes to the objectives of rebels ('GPK') may be attacked".³⁰⁴

334. Italy's IHL Manual states that "the military advantage expected from an attack must be evaluated in the light of the attack as a whole and not only of

²⁹⁹ Argentina, *Law of War Manual* (1989), §§ 4.02(2) and 4.19; Australia, *Defence Force Manual* (1994), §§ 525 and 916(c); Belgium, *Law of War Manual* (1983), p. 27; Benin, *Military Manual* (1995), Fascicule I, pp. 12–13; Cameroon, *Instructors' Manual* (1992), p. 81, see also p. 17; Canada, *LOAC Manual* (1999), p. 4-1, § 8; Canada, *Code of Conduct* (2001), Rule 1, § 4; Colombia, *Instructors' Manual* (1999), pp. 16 and 17; Croatia, *LOAC Compendium* (1991), p. 7; France, *LOAC Teaching Note* (2000), p. 2; France, *LOAC Manual* (2001), p. 90; Germany, *Military Manual* (1992), § 442; Hungary, *Military Manual* (1992), p. 18; Italy, *IHL Manual* (1991), Vol. I, § 12; Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11; Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § C; Netherlands, *Military Manual* (1993), pp. V-2 and V-3; New Zealand, *Military Manual* (1992), § 516(1), see also § 623(1); South Africa, *LOAC Manual* (1996), § 24(d)(iii); Spain, *LOAC Manual* (1996), Vol. I, §§ 4.2.b and 4.2.b.(2); Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 53–54; Togo, *Military Manual* (1996), Fascicule I, pp. 13–14; UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(b)(2); US, *Air Force Pamphlet* (1976), § 5-3(b)(1).

³⁰⁰ Australia, *Defence Force Manual* (1994), § 525.

³⁰¹ Belgium, *Regulations on the Tactical Use of Large Units* (1994), § 210.

³⁰² Ecuador, *Naval Manual* (1989), § 8.1.1. ³⁰³ Germany, *Military Manual* (1992), § 444.

³⁰⁴ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 9(a).

isolated elements or parts of the attack and must be evaluated on the basis of the information available at the time".³⁰⁵

335. The Military Manual of the Netherlands notes that "the definition of 'military objectives' implies that it depends on the circumstances of the moment whether an object is a military objective. The definition leaves the necessary freedom of judgement to the commander on the spot."³⁰⁶

336. New Zealand's Military Manual specifies that:

The military advantage at the time of attack is that advantage from the military campaign or operation of which the attack is a part considered as a whole and not only from isolated or particular parts of that campaign or operation. Military advantage involves a variety of considerations including the security of the attacking forces.³⁰⁷

337. Spain's LOAC Manual states that the military advantage to be gained from an attack has to be interpreted as "that which is anticipated, in the concrete circumstances of the moment, from the attack as a whole, and not from parts thereof".³⁰⁸

338. Sweden's IHL Manual considers that:

According to the definition [of military objectives contained in Article 52(2) AP I,] it is up to the attacker to decide whether the nature, location, purpose or use of the property can admit of its being classified as a military objective and thus as a permissible object of attack. This formulation undeniably gives the military commander great latitude in deciding, but he must also take account of the unintentional damage that may occur. The proportionality rule must always enter into the assessment even though this is not directly stated in the text of Article 52.³⁰⁹

339. The US Naval Handbook states that:

Military objectives are combatants and those objects which, by their nature, location, purpose or use, effectively contribute to the enemy's war-fighting or war-sustaining capability and whose total or partial destruction, capture, or neutralization would constitute a definite military advantage to the attacker under the circumstances at the time of the attack. Military advantage may involve a variety of considerations, including the security of the attacking force.³¹⁰

340. The YPA Military Manual of the SFRY (FRY) defines military objectives as "any object which by its nature, location, purpose or use effectively contributes to military action and whose total or partial destruction offers a military advantage during the attack or in the further course of the operations".³¹¹

³⁰⁵ Italy, *IHL Manual* (1991), Vol. I, § 12. ³⁰⁶ Netherlands, *Military Manual* (1993), p. V-3.

³⁰⁷ New Zealand, *Military Manual* (1992), § 516(1), see also § 623(1).

³⁰⁸ Spain, *LOAC Manual* (1996), Vol. I, § 4.2.b.(2).

³⁰⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 54.

³¹⁰ US, *Naval Handbook* (1995), § 8.1.1. ³¹¹ SFRY (FRY), *YPA Military Manual* (1988), § 71.

National Legislation

341. Italy's Law of War Decree as amended states that "it is lawful to bombard directly enemy targets whose destruction, whether total or partial, may be to the advantage of the military operations".³¹²

342. Spain's Penal Code punishes:

anyone who, during an armed conflict . . . attacks . . . civilian objects of the adverse party causing their destruction, provided the objects do not, in the circumstances ruling at the time, offer a definite military advantage nor make an effective contribution to the military action of the adversary.³¹³

National Case-law

343. No practice was found.

Other National Practice

344. The Report on the Practice of Algeria, referring expressly to the notion of "effective contribution" to military action resulting from the nature, location, purpose or use of an object, asserts that the criteria set forth in Article 52(2) AP I were already taken into consideration during the Algerian war of independence.³¹⁴

345. The Report on the Practice of Botswana asserts that the government of Botswana endorses Article 52 AP I and no official document was found rejecting the definition of a military objective provided in Article 52(2) AP I.³¹⁵

346. The Report on the Practice of Colombia notes that the government and the Defensoría del Pueblo (Ombudsman's Office) adopt the definition of military objectives laid down in Article 52 AP I in order to draw a distinction between military objectives and civilian objects.³¹⁶

347. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran always insisted that it had no intention of attacking civilian objects, all targets being "military objectives or objects which by their nature, location, purpose or use made an effective contribution to military action".³¹⁷

348. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that the Iraqi armed forces consider that the definition of a military objective set forth in Article 52(2) AP I is part of customary international law.³¹⁸

³¹² Italy, *Law of War Decree as amended* (1938), Article 40.

³¹³ Spain, *Penal Code* (1995), Article 613(1)(b).

³¹⁴ Report on the Practice of Algeria, 1997, Chapter 1.3.

³¹⁵ Report on the Practice of Botswana, 1998, Answers to additional questions on Chapter 1.3.

³¹⁶ Report on the Practice of Colombia, 1998, Chapter 1.3, referring to Defensoría del Pueblo, *Cuarto informe anual del defensor del pueblo al congreso de Colombia*, Santafé de Bogotá, September 1997, pp. 64–65.

³¹⁷ Report on the Practice of Iran, 1997, Chapter 1.3.

³¹⁸ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.3.

349. According to the Report on the Practice of Israel, the IDF has no generally applicable definition of what constitutes a “military target”, but its practice most closely reflects the definition found in Article 52(2) AP I.³¹⁹

350. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled “International Law Providing Protection to the Environment in Times of Armed Conflict”. The memorandum stated that “the customary rule that, in so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage” provides protection for the environment in times of armed conflict.³²⁰

351. The Report on the Practice of Jordan states that the definition of a military objective set forth in Article 52(2) AP I is part of customary international law.³²¹

352. The Report on the Practice of Malaysia notes that although no written law defines the term military objective, the security forces describe military objectives as “targets of military interest” and “military targets”. While the former may include civilian objects like the runway of a civilian airport, the latter only refers to objects belonging to the military. The military character of a target will thus depend on the circumstances and the degree of strategic advantage it offers.³²²

353. At the CDDH, Mexico stated that it believed draft Article 47 AP I (now Article 52) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.³²³

354. Referring to military documents using similar wording, the Report on the Practice of the Philippines affirms the customary nature of Article 52(2) AP I.³²⁴

355. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers Article 52(2) AP I to be part of customary international law.³²⁵

³¹⁹ Report on the Practice of Israel, 1997, Answers to additional questions on Chapter 1.3.

³²⁰ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(i).

³²¹ Report on the Practice of Jordan, 1997, Chapter 1.3.

³²² Report on the Practice of Malaysia, 1997, Chapter 1.3 and answers to additional questions on Chapter 1.3.

³²³ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

³²⁴ Report on the Practice of Philippines, 1997, Chapter 1.3.

³²⁵ Report on the Practice of Syria, 1997, Chapter 1.3, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

356. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that “operations by United Kingdom forces have involved aerial attacks on Iraqi installations supporting Iraq’s capacity to sustain its illegal occupation of Kuwait”.³²⁶

357. In 1972, the General Counsel of the US Department of Defense stated that:

In the application of the laws of war, it is important that there be a general understanding in the world community as to what shall be legitimate military objectives which may be attacked by air bombardment under the limitations imposed by treaty or by customary international law. Attempts to limit the effects of attacks in an unrealistic manner, by definition or otherwise, solely to the essential war making potential of enemy States have not been successful. For example, such attempts as the 1923 Hague Rules of Air Warfare, proposed by an International Commission of Jurists, and the 1956 ICRC *Draft Rules for the Limitation of Dangers Incurred by the Civilian Population in Time of War* were not accepted by States and therefore do not reflect the laws of war either as customary international law or as adopted by treaty. [The General Counsel then refers to Articles 1 and 2 of the 1907 Hague Convention (IX) and Article 8 of the 1954 Hague Convention as reflecting customary international law.] The test applicable from the customary international law, restated in [Article 8 of] the Hague Cultural Property Convention, is that the war making potential of such facilities to a party to the conflict may outweigh their importance to the civilian economy and deny them immunity from attack. Turning to the deficiencies in the Resolutions of the Institut de Droit International [adopted at its Edinburgh Session in 1969], and with the foregoing in view, it cannot be said that Paragraph 2, which refers to legal restraints that there must be an “immediate” military advantage, reflects the law of armed conflict that has been adopted in the practices of States.³²⁷

358. In 1987, the Deputy Legal Adviser of the US Department of State stated that “the United States has no great concern over the new definition of ‘military objective’ set forth in Article 52(2) of Protocol I”.³²⁸

359. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

When objects are used concurrently for civilian and military purposes, they are liable to attack if there is a military advantage to be gained in their attack. (“Military advantage” is not restricted to tactical gains, but is linked to the full context of a

³²⁶ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22115, 21 January 1991.

³²⁷ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 123.

³²⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 436.

war strategy, in this instance, the execution of the Coalition war plan for liberation of Kuwait.)³²⁹

360. In 1992, in a review of the legality of extended range anti-armour munition, the US Department of the Air Force relied on the definition of military objectives set forth in Article 52(2) AP I.³³⁰

361. The Report on US Practice states that:

The *opinio juris* of the U.S. government recognizes the definition of military objectives in Article 52 of Additional Protocol I as customary law. United States practice gives a broad reading to this definition, and would include areas of land, objects screening other military objectives, and war-supporting economic facilities as military objectives. The foreseeable military advantage from an attack includes increasing the security of the attacking force. In any event, the anticipated military advantage need not be expected to immediately follow the success of the attack, and may be inferred from the whole military operation of which the attack is a part.³³¹

III. Practice of International Organisations and Conferences

United Nations

362. No practice was found.

Other International Organisations

363. No practice was found.

International Conferences

364. During the Diplomatic Conference on the Second Protocol to the 1954 Hague Convention, France, Israel, Turkey and US, at that time not party to API, referred to the definition of Article 52(2) AP I as an authoritative definition of a military objective. Several other States stressed that the definition of a military objective in the Second Protocol should follow the exact wording of Article 52(2) AP I, including Argentina, Denmark, Germany, Sweden, Switzerland and UK. Another group of States, including Austria, Cameroon (speaking on behalf of the African group), China, Egypt, Greece, Romania and Syria (speaking on behalf of the Arab group) agreed to rely on Article 52(2) AP I, but to tighten its definition so that cultural property could only become a military objective "by its use" and not "by its location, nature or purpose".³³²

³²⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 623.

³³⁰ US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 7.

³³¹ Report on US Practice, 1997, Chapter 1.3.

³³² Diplomatic Conference on the Second Protocol to the 1954 Hague Convention, The Hague, 15–26 March 1999 (proceedings to be published by UNESCO).

IV. Practice of International Judicial and Quasi-judicial Bodies

365. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that “the most widely accepted definition of ‘military objective’ is that of Article 52 of Additional Protocol I”.³³³ It added that:

Although the Protocol I definition of military objective is not beyond criticism, it provides the contemporary standard which must be used when attempting to determine the lawfulness of particular attacks. That being said, it must be noted once again [that] neither the USA nor France is a party to Additional Protocol I. The definition is, however, generally accepted as part of customary law.³³⁴

V. Practice of the International Red Cross and Red Crescent Movement

366. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that the following can be considered military objectives:

- a) the armed forces except medical service and religious personnel and objects;
- b) the establishments, buildings and positions where armed forces or their materiel are located (e.g. positions, barracks, stores);
- c) other objects which by their nature, location, purpose or use make an effective contribution to military action, and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offer a definite military advantage.³³⁵

367. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(1) of draft API which defined military objectives as “those objectives which are, by their nature, purpose or use, recognized to be of military interest and whose total or partial destruction, in the circumstances ruling at the time, offers a distinct and substantial military advantage”. All governments concerned replied favourably.³³⁶

VI. Other Practice

368. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law gave the following definition of a military objective:

³³³ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 35.

³³⁴ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 41.

³³⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 55.

³³⁶ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

There can be considered as military objectives only those which, by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognised military significance, such that their total or partial destruction in the actual circumstances gives a substantial, specific and immediate military advantage to those who are in a position to destroy them.³³⁷

369. In 2000, in a report on the NATO bombings in the FRY, Amnesty International, having referred to the definition of military objectives contained in Article 52(2) AP I, stated with regard to the bombing of the Serbian State radio and television (RTS) that:

Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but...justifying an attack on a civilian facility on such grounds stretches the meaning of "effective contribution to military action" and "definite military advantage" beyond the acceptable bounds of interpretation.³³⁸

Armed forces

Note: *For practice concerning attacks against combatants, see Chapter 1, section A.*

I. Treaties and Other Instruments

Treaties

370. The preamble to the 1868 St. Petersburg Declaration states that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".

Other Instruments

371. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, "military forces" are military objectives.

372. Article 5(1) of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that "aerial bombardment is prohibited unless directed at combatant forces".

373. Paragraph I(1) of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules stated that "armed forces, including auxiliary or complementary organizations, and persons who, though not belonging to the above-mentioned formations, nevertheless take part in the fighting" are military objectives considered to be of "generally recognized military importance".

³³⁷ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 2.

³³⁸ Amnesty International, *NATO/Federal Republic of Yugoslavia: "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 43.

II. National Practice

Military Manuals

374. Australia's Defence Force Manual lists among military objectives "all persons taking a direct part in hostilities, whether military or civilian".³³⁹

375. Belgium's Law of War Manual considers combatants to be military objectives.³⁴⁰

376. Benin's Military Manual considers the armed forces, with the exception of medical and religious personnel and objects, to be military objectives.³⁴¹

377. Cameroon's Instructors' Manual states that the armed forces are considered military objectives, with the exception of religious and medical personnel.³⁴²

378. Canada's LOAC Manual considers that combatants, airborne troops and unlawful combatants are "legitimate targets".³⁴³

379. According to Colombia's Instructors' Manual, combatants are military objectives.³⁴⁴

380. According to Croatia's LOAC Compendium, military objectives include the armed forces.³⁴⁵

381. The Military Manual of the Dominican Republic states that "under the laws of war, you are not allowed to attack villages, towns, or cities. However, when your mission requires, you are allowed to engage enemy troops, equipment, or supplies in a village, town or city."³⁴⁶

382. Ecuador's Naval Manual provides that combatants and troop concentrations are military objectives.³⁴⁷

383. According to France's LOAC Summary Note, combatants are military objectives.³⁴⁸

384. Germany's Military Manual provides that military objectives include, in particular, armed forces.³⁴⁹

385. According to Hungary's Military Manual, military objectives include the armed forces.³⁵⁰

386. Israel's Manual on the Laws of War states that "any soldier (male or female!) in the enemy's army is a legitimate military target for attack, whether on the battlefield or outside of it".³⁵¹

³³⁹ Australia, *Defence Force Manual* (1994), § 527(d), see also § 916(a) ("armed forces except medical and religious personnel").

³⁴⁰ Belgium, *Law of War Manual* (1983), p. 27.

³⁴¹ Benin, *Military Manual* (1995), Fascicule I, p. 12.

³⁴² Cameroon, *Instructors' Manual* (1992), p. 17.

³⁴³ Canada, *LOAC Manual* (1999), p. 4-1, § 7 and p. 4-2, §§ 12-14.

³⁴⁴ Colombia, *Instructors' Manual* (1999), p. 15.

³⁴⁵ Croatia, *LOAC Compendium* (1991), p. 7; see also *Commanders' Manual* (1992), § 4 ("combatants").

³⁴⁶ Dominican Republic, *Military Manual* (1980), p. 3.

³⁴⁷ Ecuador, *Naval Manual* (1989), § 8.1.1.

³⁴⁸ France, *LOAC Summary Note* (1992), § 1.2; see also *LOAC Teaching Note* (2000), p. 2 ("military units").

³⁴⁹ Germany, *Military Manual* (1992), § 443. ³⁵⁰ Hungary, *Military Manual* (1992), p. 18.

³⁵¹ Israel, *Manual on the Laws of War* (1998), p. 42.

387. Italy's IHL Manual provides that the armed forces are military objectives.³⁵²
388. Kenya's LOAC Manual provides that "the armed forces except medical service and religious personnel and objects" are military objectives.³⁵³
389. According to South Korea's Military Law Manual, combatants are military objectives.³⁵⁴
390. According to Madagascar's Military Manual, military objectives include "armed forces, with the exception of medical units and religious personnel and objects".³⁵⁵
391. The Military Manual of the Netherlands notes that "combatants who are part of the armed forces" are military objectives "under all circumstances".³⁵⁶
392. New Zealand's Military Manual states that combatants are military objectives.³⁵⁷
393. According to Nigeria's Military Manual and Soldiers' Code of Conduct, combatants are military objectives.³⁵⁸
394. According to the Soldier's Rules of the Philippines, enemy combatants are military objectives.³⁵⁹
395. South Africa's LOAC Manual states that military objectives include "the armed forces, with the exception of medical and religious personnel and objects".³⁶⁰
396. Spain's LOAC Manual states that "the armed forces, except medical and religious personnel" are military objectives.³⁶¹
397. Sweden's IHL Manual states that "persons participating in hostilities . . . are thereby legitimate objectives".³⁶²
398. Switzerland's Basic Military Manual considers that the armed forces are military objectives liable to attack.³⁶³
399. Togo's Military Manual considers the armed forces, with the exception of medical and religious personnel and objects, to be military objectives.³⁶⁴
400. The UK LOAC Manual states that military objectives include "concentrations of troops and individual enemy combatants".³⁶⁵

³⁵² Italy, *IHL Manual* (1991), Vol. I, § 12; see also *LOAC Elementary Rules Manual* (1991), § 4 ("combatants").

³⁵³ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11.

³⁵⁴ South Korea, *Military Law Manual* (1996), p. 86.

³⁵⁵ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § C, see also Fiche No. 2-O, § 4 and Fiche No. 4-T, § 1.

³⁵⁶ Netherlands, *Military Manual* (1993), p. V-3; see also *Military Handbook* (1995), p. 7-36 ("combatants").

³⁵⁷ New Zealand, *Military Manual* (1992), § 516(1), see also § 623(1).

³⁵⁸ Nigeria, *Military Manual* (1994), p. 39, § 5(a); *Soldiers' Code of Conduct* (undated), § 1.

³⁵⁹ Philippines, *Soldier's Rules* (1989), § 2.

³⁶⁰ South Africa, *LOAC Manual* (1996), § 24(d)(i), see also § 34.

³⁶¹ Spain, *LOAC Manual* (1996), Vol. I, § 4.2.b, see also § 4.2.b.(1).

³⁶² Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 40.

³⁶³ Switzerland, *Basic Military Manual* (1987), Article 28.

³⁶⁴ Togo, *Military Manual* (1996), Fascicule I, p. 13.

³⁶⁵ UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(b)(2).

401. The US Air Force Pamphlet considers that “troops in the field are military objectives beyond any dispute”.³⁶⁶

402. According to the US Naval Handbook, combatants and troop concentrations are military objectives.³⁶⁷

403. According to the YPA Military Manual of the SFRY (FRY), the armed forces are a military objective.³⁶⁸ The manual further specifies that “it is permitted to directly attack only members of the armed forces and other persons – only if they directly participate in military operations”.³⁶⁹

National Legislation

404. Italy’s Law of War Decree as amended provides that the armed forces are military objectives.³⁷⁰

National Case-law

405. No practice was found.

Other National Practice

406. In 1950, the US Secretary of State stated that “the air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader. These targets [include] enemy troop concentrations.”³⁷¹

407. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that attacks had been directed against Iraq’s air force and land army.³⁷²

408. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that it considered the “occupation forces in Kuwait and southern Iraq” as legitimate military targets. It also stated that it had attacked Iraq’s naval forces in the northern Gulf and specified that “these attacks have been on Iraqi units that are engaged in operations against coalition forces”.³⁷³ In another such report, the US stated that the Republican Guard remained a “high priority” target.³⁷⁴ In a subsequent report, the US reiterated that it considered “the Republican Guard and other

³⁶⁶ US, *Air Force Pamphlet* (1976), § 5-3(b)(2). ³⁶⁷ US, *Naval Handbook* (1995), § 8.1.1.

³⁶⁸ SFRY (FRY), *YPA Military Manual* (1988), § 49.

³⁶⁹ SFRY (FRY), *YPA Military Manual* (1988), § 67.

³⁷⁰ Italy, *Law of War Decree as amended* (1938), Article 40.

³⁷¹ US, Statement by the Secretary of State, Dean Acheson, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 140.

³⁷² UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

³⁷³ US, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 1.

³⁷⁴ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 1.

ground troops in the Kuwaiti theater of operations" as a legitimate target of attack.³⁷⁵

409. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that the "mainstay of Saddam's command forces, the Republican Guard units located near the Iraqi/Kuwaiti border" were considered military targets and had been attacked.³⁷⁶

410. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq's air forces, naval forces and army units, including the Republican Guard, had been included among the 12 target sets for the coalition's attacks.³⁷⁷

III. Practice of International Organisations and Conferences

411. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

412. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

413. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the armed forces except medical service and religious personnel and objects" are military objectives.³⁷⁸

VI. Other Practice

414. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed "members of the Popular Sandinista Army and militias", as well as "members of ARDE, FDN, MISURA and MISURASATA [two Indian organisations fighting against the Nicaraguan government]", as persons which "can arguably be regarded as legitimate military objectives subject to direct attack".³⁷⁹

³⁷⁵ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1

³⁷⁶ US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

³⁷⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, pp. 96–98.

³⁷⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 55.

³⁷⁹ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

415. In 1986, in a report on the use of landmines in the conflicts in El Salvador and Nicaragua, Americas Watch listed the following persons as legitimate military objectives subject to direct attack:

1. In Nicaragua
 - (a) Members of the Popular Sandinista Army and Militias
 - (b) Members of ARDE, FDN, KISAN and MISURASATA [two Indian organizations fighting against the Nicaraguan government]
2. In El Salvador
 - (a) Members of the Salvadoran combined armed forces and civil defense forces
 - (b) Members of the FMLN.³⁸⁰

416. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed “members of the armed forces and civil defense of Angola and other armed forces assisting the defense of Angola, such as the Cuban armed forces”, as well as “members of UNITA armed forces and other armed forces assisting UNITA, such as the South African Defense Force and South West Africa armed forces”, as persons which “may be regarded as legitimate military objectives subject to direct attack by combatants and mines”.³⁸¹

Places where armed forces or their materiel are located

I. Treaties and Other Instruments

Treaties

417. Article 2 of the 1907 Hague Convention (IX) allows the bombardment of “military works, military or naval establishments, depots of arms or war *matériel*”.

418. Under Article 8 of the 1954 Hague Convention, cultural property may be placed under special protection provided, *inter alia*, that it is situated “at an adequate distance . . . from any important military objective constituting a vulnerable point, such as, for example, . . . [an] establishment engaged upon work of national defence”.

Other Instruments

419. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, “military works [and] military establishments or depots” are military objectives.

420. Article 5(1) of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that “aerial bombardment is prohibited unless directed at . . . belligerent establishments”.

³⁸⁰ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99–100.

³⁸¹ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 139.

421. Paragraph I of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules stated that “the objectives belonging to the following categories are those considered to be of generally recognized military importance”, that is:

- (2) Positions, installations or constructions occupied by the [armed forces], as well as combat objectives (that is to say, those objectives which are directly contested in battle between land or sea forces including airborne forces).
- (3) Installations, constructions and other works of a military nature, such as barracks, fortifications, War Ministries (e.g. Ministries of Army, Navy, Air Force, National Defence, Supply) and other organs for the direction and administration of military operations.
- (4) Stores of arms or military supplies, such as munition dumps, stores of equipment or fuel, vehicle parks.

422. Section 5.4 of the 1999 UN Secretary-General’s Bulletin states that “military installations and equipment of peacekeeping operations, as such, shall not be considered military objectives”.

II. National Practice

Military Manuals

423. Australia’s Defence Force Manual gives “military equipment, units and bases” as examples of military objectives.³⁸²

424. Belgium’s Teaching Manual for Soldiers considers that “all objects occupied or used by enemy military forces (positions, barracks, depots, etc.)” are military objectives.³⁸³

425. Belgium’s Law of War Manual considers that “the army, its positions, provision of its supplies, its stores, workshops, arsenals, depots, defence works, . . . war buildings, etc.” are military objectives.³⁸⁴

426. Benin’s Military Manual considers “the establishments, positions and constructions where armed forces and their materiel are located (e.g. positions, barracks and depots)” as military objectives.³⁸⁵

427. Cameroon’s Instructors’ Manual considers military positions, barracks and depots as military objectives.³⁸⁶

428. Canada’s LOAC Manual considers that “military bases, warehouses . . . buildings and objects that provide administrative and logistical support for military operations are generally accepted as being military objectives”.³⁸⁷

³⁸² Australia, *Defence Force Manual* (1994), § 527(a), see also § 916(b).

³⁸³ Belgium, *Teaching Manual for Soldiers* (undated), p. 20.

³⁸⁴ Belgium, *Law of War Manual* (1983), p. 26.

³⁸⁵ Benin, *Military Manual* (1995), Fascicule I, p. 12.

³⁸⁶ Cameroon, *Instructors’ Manual* (1992), p. 17.

³⁸⁷ Canada, *LOAC Manual* (1999), p. 4-2, § 9.

- 429.** According to Croatia's LOAC Compendium and Commanders' Manual, military objectives include military establishments and positions.³⁸⁸
- 430.** According to Ecuador's Naval Manual, proper targets for naval attack include such military objectives as naval and military bases ashore; warship construction and repair facilities; military depots and warehouses; storage areas for petroleum and lubricants; and buildings and facilities that provide administrative and personnel support for military and naval operations, such as barracks, headquarters buildings, mess halls and training areas.³⁸⁹
- 431.** France's LOAC Summary Note considers military establishments, installations, and materiel and positions of tactical importance to be military objectives.³⁹⁰
- 432.** Germany's Military Manual provides that military objectives include, in particular, "buildings and objects for combat service support".³⁹¹
- 433.** According to Hungary's Military Manual, military objectives include military establishments and positions.³⁹²
- 434.** According to Italy's IHL Manual, "military quarters, military works and establishments, defence works and preparations" are military objectives.³⁹³
- 435.** According to Italy's LOAC Elementary Rules Manual, military objectives include military establishments and positions.³⁹⁴
- 436.** Kenya's LOAC Manual provides that "the establishments, buildings and positions where armed forces or their material are located (e.g. positions, barracks, stores, concentrations of troops)" are military objectives.³⁹⁵
- 437.** According to Madagascar's Military Manual, military objectives include "establishments, constructions and positions where the armed forces and their materiel are located (for example positions, army barracks, depots)".³⁹⁶
- 438.** The Military Manual of the Netherlands considers that positions of military units, such as artillery positions, constitute military objectives "under all circumstances".³⁹⁷
- 439.** New Zealand's Military Manual states that "military bases, warehouses... buildings and objects that provide administrative and logistic support for military operations are examples of objects universally regarded as military objectives".³⁹⁸

³⁸⁸ Croatia, *LOAC Compendium* (1991), p. 7; *Commanders' Manual* (1992), § 4.

³⁸⁹ Ecuador, *Naval Manual* (1989), § 8.1.1.

³⁹⁰ France, *LOAC Summary Note* (1992), Part I, § 1.2.

³⁹¹ Germany, *Military Manual* (1992), § 443.

³⁹² Hungary, *Military Manual* (1992), p. 18. ³⁹³ Italy, *IHL Manual* (1991), Vol. I, § 12.

³⁹⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 4.

³⁹⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11.

³⁹⁶ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § C, see also Fiche No. 2-O, § 4 and Fiche No. 4-T, § 1.

³⁹⁷ Netherlands, *Military Manual* (1993), p. V-3.

³⁹⁸ New Zealand, *Military Manual* (1992), § 516(2), see also § 623(2).

440. South Africa's LOAC Manual states that military objectives include "the establishments, buildings and positions where armed forces or their material are located".³⁹⁹

441. According to Spain's LOAC Manual, "establishments, constructions and positions where armed forces are located [and] establishments and installations of combat support services and logistics" are military objectives.⁴⁰⁰

442. Switzerland's Basic Military Manual lists the armed forces and "their materiel, sites and buildings occupied by them (barracks, fortresses, arsenals) . . . and establishments directly linked to the activity of the armed forces" among military objectives.⁴⁰¹

443. Togo's Military Manual considers "the establishments, positions and constructions where armed forces and their materiel are located (e.g. positions, barracks and depots)" as military objectives.⁴⁰²

444. The UK LOAC Manual states that military objectives include "buildings".⁴⁰³

445. The US Air Force Pamphlet considers that "an adversary's military encampments . . . are military objectives beyond any dispute".⁴⁰⁴

446. According to the US Naval Handbook, proper targets for naval attack include such military objectives as naval and military bases ashore; warship construction and repair facilities; military depots and warehouses; petroleum/oils/lubricants (POL) storage areas; and buildings and facilities that provide administrative and personnel support for military and naval operations, such as barracks, headquarters buildings, mess halls and training areas.⁴⁰⁵

National Legislation

447. Cuba's Military Criminal Code includes "military installations, other military objects and objects intended for use by military units or institutions" in a list of military objects.⁴⁰⁶

448. According to Italy's Law of War Decree as amended, "military quarters, military works and establishments, defence works and preparations, depots of arms and war materiel" are military objectives.⁴⁰⁷

National Case-law

449. No practice was found.

³⁹⁹ South Africa, *LOAC Manual* (1996), § 24(d)(ii).

⁴⁰⁰ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).a.

⁴⁰¹ Switzerland, *Basic Military Manual* (1987), Article 28.

⁴⁰² Togo, *Military Manual* (1995), Fascicule I, p. 13.

⁴⁰³ UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(b)(2).

⁴⁰⁴ US, *Air Force Pamphlet* (1976), § 5-3(b). ⁴⁰⁵ US, *Naval Handbook* (1995), § 8.1.1.

⁴⁰⁶ Cuba, *Military Criminal Code* (1979), Article 33(1).

⁴⁰⁷ Italy, *Law of War Decree as amended* (1938), Article 40.

Other National Practice

450. The Report on the Practice of Algeria states that tanks and munitions and ammunition stores were considered military objectives during the war of independence.⁴⁰⁸

451. In 1983, in reply to criticism of alleged attacks against civilian objects during the hostilities against Iran, the President of Iraq stated that "our aircraft did not bomb civilian targets in Baneh during their raid of 5 June; they bombed a camp in which a large body of Iranian forces was concentrated".⁴⁰⁹

452. The Report on the Practice of Lebanon states that, according to an advisor of the Lebanese Ministry of Foreign Affairs, any position used by the occupying army for military purposes is considered a military objective.⁴¹⁰

453. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK listed ammunition storage depots among the targets the Royal Air Force had attacked.⁴¹¹

454. In 1950, the US Secretary of State stated that "the air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader. These targets [include] . . . supply dumps."⁴¹²

455. In 1966, in the context of the Vietnam War, the US Department of Defense stated that "military targets include but are not limited to . . . POL facilities, barracks and supply depots. In the specific case of Nam Dinh and Phu Li, targets have been limited to . . . POL dumps."⁴¹³

456. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq's military storage and production sites had been included among the 12 target sets for the coalition's attacks.⁴¹⁴

III. Practice of International Organisations and Conferences

457. No practice was found.

⁴⁰⁸ Report on the Practice of Algeria, 1997, Chapter 1.3.

⁴⁰⁹ Iraq, Message from the President of Iraq, annexed to Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16610, 19 June 1984, p. 2.

⁴¹⁰ Report on the Practice of Lebanon, 1998, Interview with an advisor of the Lebanese Ministry of Foreign Affairs, Chapter 1.3.

⁴¹¹ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

⁴¹² US, Statement by the Secretary of State, Dean Acheson, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 140.

⁴¹³ US, Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

⁴¹⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, p. 98.

IV. Practice of International Judicial and Quasi-judicial Bodies

458. In 1997, in the case concerning the events at La Tablada in Argentina, the IAC iHR stated that a military base is a “quintessential military objective”.⁴¹⁵

V. Practice of the International Red Cross and Red Crescent Movement

459. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that military objectives include “the establishments, buildings and positions where armed forces or their material are located (e.g. positions, barracks, stores)”.⁴¹⁶

VI. Other Practice

460. In 1985, in the context of the conflict in El Salvador, the FMLN declared “those places visited by military elements, both from the army of the puppet regime as well as foreign military personnel involved in repressive and genocidal activities against the popular revolutionary movement” to be military objectives. It also considered houses or any other property leased to foreign military advisers as military objectives.⁴¹⁷

461. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed “military works, military and naval establishments, supplies, vehicles, camp sites, fortifications, and fuel depots or stores which are or could be utilized by either party to the conflict” as objects which “can arguably be regarded as legitimate military objectives subject to direct attack”.⁴¹⁸ This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁴¹⁹

462. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed “military works, military and naval establishments, supplies, vehicles, camp sites, fortifications, and fuel depots or stores that are, or could be, utilized by any party to the conflict” as objects which “may be regarded as legitimate military objectives subject to direct attack by combatants and mines”.⁴²⁰

⁴¹⁵ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 155.

⁴¹⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 55.

⁴¹⁷ Communication by the FMLN, June 1985, § 4, *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XL, Nos. 441–442, July–August 1985, p. 581.

⁴¹⁸ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

⁴¹⁹ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99–100.

⁴²⁰ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, pp. 139–140.

Weapons and weapon systems

I. Treaties and Other Instruments

Treaties

463. Article 2 of the 1907 Hague Convention (IX) allows the bombardment of “the ships of war in the harbour”.

Other Instruments

464. According to paragraph I(5) of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules, “rocket launching ramps” are military objectives considered to be of “generally recognized military importance”.

II. National Practice

Military Manuals

465. Belgium’s Law of War Manual considers that military vehicles and aircraft are military objectives.⁴²¹

466. Cameroon’s Instructors’ Manual considers that enemy warships are military objectives.⁴²²

467. Canada’s LOAC Manual considers that “military aircraft, weapons [and] ammunition are generally accepted as being military objectives”.⁴²³

468. Croatia’s LOAC Compendium states that proper targets in the air include “enemy military aircraft violating national airspace or flying over the high seas”.⁴²⁴

469. Ecuador’s Naval Manual considers that “proper targets for naval attack include such military objectives as enemy warships and military aircraft, naval and military auxiliaries . . . military vehicles, armour, artillery, ammunition stores”.⁴²⁵

470. Germany’s Military Manual provides that military objectives include, in particular, “military aircraft and warships”.⁴²⁶

471. Hungary’s Military Manual states that proper targets in the air include “enemy military aircraft violating national airspace or flying over the high seas”.⁴²⁷

472. The Military Manual of the Netherlands considers that materiel used by armed forces, such as tanks, vehicles, and aircraft, constitute military objectives “under all circumstances”.⁴²⁸

⁴²¹ Belgium, *Law of War Manual* (1983), p. 26.

⁴²² Cameroon, *Instructors’ Manual* (1992), p. 111.

⁴²³ Canada, *LOAC Manual* (1999), p. 4-2, § 9(b), see also p. 8-7, § 47 (enemy warships and military aircraft).

⁴²⁴ Croatia, *LOAC Compendium* (1991), p. 44.

⁴²⁵ Ecuador, *Naval Manual* (1989), § 8.1.1.

⁴²⁶ Germany, *Military Manual* (1992), § 443.

⁴²⁷ Hungary, *Military Manual* (1992), p. 71.

⁴²⁸ Netherlands, *Military Manual* (1993), p. V-3.

473. New Zealand's Military Manual states that "military aircraft, weapons [and] ammunition are examples of objects universally regarded as military objectives".⁴²⁹

474. Spain's Field Regulations stipulates that objects useful in war, *inter alia*, arms, munitions, machines and tanks, are objects on which an attack is lawful.⁴³⁰

475. According to Spain's LOAC Manual, "military vehicles, warships and military aircraft [and] materiel, objects and goods belonging to the armed forces and which serve no medical or religious purpose" are military objectives.⁴³¹

476. The UK LOAC Manual states that military objectives include "minefields [and] weapons".⁴³²

477. The US Air Force Pamphlet considers that an adversary's "armament, such as military aircraft, tanks, antiaircraft emplacements . . . are military objectives beyond any dispute".⁴³³

478. The US Naval Handbook specifies that "proper targets for naval attack include such military objectives as enemy warships and military aircraft, naval and military auxiliaries, . . . military vehicles, armor, artillery, ammunition stores".⁴³⁴

National Legislation

479. Cuba's Military Criminal Code includes "weapons and munitions" in a list of military objects.⁴³⁵

480. According to Italy's Law of War Decree as amended, "warships and military aircraft" are legitimate military targets.⁴³⁶

National Case-law

481. No practice was found.

Other National Practice

482. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, Kuwait stated that "Kuwait Air Force aircraft also took part in joint air operations directed primarily against ground-to-ground missile sites, missile launchers, artillery positions and concentrations of Iraqi mechanized units".⁴³⁷

483. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that it had targeted Iraq's fixed and mobile SCUD missile launchers and its chemical and biological warfare installations,

⁴²⁹ New Zealand, *Military Manual* (1992), § 516(2), see also § 623(2).

⁴³⁰ Spain, *Field Regulations* (1882), § 880. ⁴³¹ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).a.

⁴³² UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(b)(2).

⁴³³ US, *Air Force Pamphlet* (1976), § 5-3(b)(2). ⁴³⁴ US, *Naval Handbook* (1995), § 8.1.1.

⁴³⁵ Cuba, *Military Criminal Code* (1979), Article 33(1).

⁴³⁶ Italy, *Law of War Decree as amended* (1938), Article 40.

⁴³⁷ Kuwait, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22164, 28 January 1991, p. 1.

production and storage capability.⁴³⁸ In another such report, the UK stated that it had attacked “elements of the Iraqi air defence system” and specified that “the Royal Air Force [had] attacked surface-to-air missile sites, artillery positions, ammunition storage and Silkworm surface-to-surface missile sites”.⁴³⁹

484. In 1966, in the context of the Vietnam War, the US Department of Defense stated that military targets “also include those anti-aircraft and SAM sites which endanger the lives of American pilots... In the specific case of Nam Dinh and Phu Li, targets have been limited to... air defense sites.”⁴⁴⁰

485. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that military targets included “Iraqi biological and chemical warfare facilities, mobile and fixed surface-to-surface missile sites... and the air defense networks that protect these facilities” as well as “Iraqi artillery positions”.⁴⁴¹ In another such report, the US stated that “surface-to-surface missile capabilities remain as high priority targets”.⁴⁴² In the same report, the US stated that “the naval forces of the United States have also engaged Iraqi patrol and mine-laying craft in the Northern Arabian Gulf”.⁴⁴³ In a subsequent report, the US stated that allied attacks had targeted “air defence, combat aircraft in the air and on the ground, nuclear, biological and chemical storage facilities”, as well as “air defence radars and missiles in Kuwait” and “surface-to-surface missile capabilities”.⁴⁴⁴ In the same report, the US reiterated that “the naval forces of the United States and the allied coalition have continued to engage Iraqi patrol and mine-laying craft in the Northern Arabian Gulf”.⁴⁴⁵

486. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that “air defence units and radars”, “SCUD missile launchers” and “the factories where Iraq has produced chemical and biological weapons, and until recently, continued working on nuclear weapons” were considered military targets and had been attacked.⁴⁴⁶

⁴³⁸ UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

⁴³⁹ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

⁴⁴⁰ US, Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

⁴⁴¹ US, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 1.

⁴⁴² US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 1.

⁴⁴³ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 1.

⁴⁴⁴ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

⁴⁴⁵ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 2.

⁴⁴⁶ US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

487. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq's strategic integrated air defense system, its nuclear, biological and chemical weapons research, production and storage facilities and its Scud missiles, launchers, and production and storage facilities had been included among the 12 target sets for the coalition's attacks.⁴⁴⁷

III. Practice of International Organisations and Conferences

488. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

489. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

490. No practice was found.

VI. Other Practice

491. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed "weapons [and] other war materiel" as objects which "can arguably be regarded as legitimate military objectives subject to direct attack".⁴⁴⁸ This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁴⁴⁹

492. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed "weapons and other war material" as objects which "may be regarded as legitimate military objectives subject to direct attack by combatants and mines".⁴⁵⁰

Lines and means of communication

I. Treaties and Other Instruments

Treaties

493. Under Article 8 of the 1954 Hague Convention, cultural property may be placed under special protection provided, *inter alia*, that it is situated "at

⁴⁴⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, pp. 96 and 98.

⁴⁴⁸ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981-1985*, New York, March 1985, p. 33.

⁴⁴⁹ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99-100.

⁴⁵⁰ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 139.

an adequate distance . . . from any important military objective constituting a vulnerable point, such as, for example, . . . [a] broadcasting station . . . or a main line of communication".

Other Instruments

494. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, "lines of communication . . . used for military purposes" are military objectives.

495. Article 5(1) of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that "aerial bombardment is prohibited unless directed at . . . lines of communication or transportation used for military purposes".

496. Paragraph I of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules provided that "the objectives belonging to the following categories are those considered to be of generally recognized military importance: . . . (7) The installations of broadcasting and television stations; telephone and telegraph exchanges of fundamental military importance."

II. National Practice

Military Manuals

497. Australia's Defence Force Manual cites "facilities which support or enhance command and control, such as communications facilities" as military objectives.⁴⁵¹

498. Ecuador's Naval Manual considers communications and command and control (C3) facilities, as well as "lines of communication and other objects used to conduct or support military operations", as proper targets for naval attack.⁴⁵²

499. According to Italy's IHL Manual, "lines and means of communication which can be used for the needs of the armed forces" are military objectives.⁴⁵³

500. South Korea's Military Law Manual states that "transmission towers and electronic communication facilities used for military operations" can be regarded as military objectives.⁴⁵⁴

501. New Zealand's Military Manual states that "command and control points are examples of objects universally regarded as military objectives".⁴⁵⁵

502. Sweden's IHL Manual states that:

How and to what extent a given object can effectively contribute to the adversary's military operations must be decided by the commander. This need not imply that the property in question is being used by the adversary for a given operation . . . It

⁴⁵¹ Australia, *Defence Force Manual* (1994), § 527(c).

⁴⁵² Ecuador, *Naval Manual* (1989), § 8.1.1. ⁴⁵³ Italy, *IHL Manual* (1991), Vol. I, § 12.

⁴⁵⁴ South Korea, *Military Law Manual* (1996), p. 87.

⁴⁵⁵ New Zealand, *Military Manual* (1992), § 516(2), see also § 623(2).

may even be a question of means of communication . . . that indirectly contribute to the adversary's military operations.⁴⁵⁶

503. Switzerland's Basic Military Manual considers "lines of communication . . . of military importance" as military objectives.⁴⁵⁷

504. The US Air Force Pamphlet states that:

Controversy exists over whether, and the circumstances under which, other objects, such as civilian transportation and communications systems, dams and dikes can be classified properly as military objectives . . . A key factor in classification of objects as military objectives is whether they make an effective contribution to an adversary's military action so that their capture, destruction or neutralization offers a definite military advantage in the circumstances ruling at the time.⁴⁵⁸

505. The US Naval Handbook considers communications and command and control facilities, as well as "lines of communication and other objects used to conduct or support military operations", as proper targets for naval attack.⁴⁵⁹

National Legislation

506. Cuba's National Defence Act lists "communications facilities and equipment" among the objects integrated within the "Military Reserve of Facilities and Equipment of the National Economy" to guarantee the necessities of defence in wartime.⁴⁶⁰

507. According to Italy's Law of War Decree as amended, "lines and means of communication which can be used for the needs of the armed forces" are military objectives.⁴⁶¹

National Case-law

508. No practice was found.

Other National Practice

509. The Report on the Practice of Algeria states that:

Leaving aside the objects which do not really raise questions of interpretation such as tanks or weapons and munition depots, the National Liberation Army of Algeria resorted to "economic sabotage" throughout the war. Roads, bridges, railway tracks and telephone lines were preferred targets. It even happened that harvests of important French colonisers were burned or fuel depots used by the French army destroyed. . . Even the petroleum industry which had barely emerged was not spared. In fact, everything which was considered to form part of "the economic machinery of the enemy" had to be brought down.⁴⁶²

⁴⁵⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 54.

⁴⁵⁷ Switzerland, *Basic Military Manual* (1987), Article 28.

⁴⁵⁸ US, *Air Force Pamphlet* (1976), § 5-3(b)(2). ⁴⁵⁹ US, *Naval Handbook* (1995), § 8.1.1.

⁴⁶⁰ Cuba, *National Defence Act* (1994), Article 119(c).

⁴⁶¹ Italy, *Law of War Decree as amended* (1938), Article 40.

⁴⁶² Report on the Practice of Algeria, 1997, Chapter 1.3, referring to *El Moudjahid*, Vol. 1, pp. 22 and 25–26, *El Moudjahid*, Vol. 2, p. 151 and *El Moudjahid*, Vol. 3, pp. 153–154.

510. According to the Report on the Practice of Iran, radio and television stations were considered military objectives during the Iran–Iraq War.⁴⁶³

511. The Report on the Practice of Lebanon refers to a communiqué issued in 1997 by the Lebanese Ministry of Foreign Affairs which stated that “all radio stations and media installations in Lebanon are civilian targets. Israel does not have the right to attack them, regardless of their political orientation.”⁴⁶⁴

512. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that “Iraqi military command and control has been severely damaged and increasingly Iraq has moved to alternative, less effective means of communication. Iraq’s ability to sustain a war has been steadily reduced.”⁴⁶⁵

513. During the Korean War, the US reportedly attacked communication centres in North Korea.⁴⁶⁶

514. In 1950, the US Secretary of State stated that “the air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader. These targets [include] . . . communications lines.”⁴⁶⁷

515. In 1991, in reports submitted to the UN Security Council on operations in the Gulf War, the US included command and control centers among Iraq’s military targets.⁴⁶⁸

516. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that “command and control [and] communications facilities” were considered military targets and had been attacked.⁴⁶⁹

517. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq’s leadership command facilities, its telecommunications and command, control and communication nodes had been included among the 12 target sets for the coalition’s attacks.⁴⁷⁰ The report specified that:

To challenge [Saddam Hussein’s] C3 [command, control and communication], the Coalition bombed microwave relay towers, telephone exchanges, switching rooms,

⁴⁶³ Report on the Practice of Iran, 1997, Chapter 1.3.

⁴⁶⁴ Report on the Practice of Lebanon, 1998, Chapter 1.3, referring to Communiqué of the Lebanese Ministry of Foreign Affairs, 29 February 1997.

⁴⁶⁵ UK, Letter dated 28 January 1991 from the UK to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

⁴⁶⁶ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, United States Air Force, Washington, D.C., Revised edition, 1983, p. 516.

⁴⁶⁷ US, Statement by Dean Acheson, Secretary of State, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 140.

⁴⁶⁸ US, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 1; Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

⁴⁶⁹ US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

⁴⁷⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, pp. 95–96.

fiber optic nodes, and bridges that carried coaxial communications cables . . . More than half of Iraq's military landline communications passed through major switching facilities in Baghdad. Civil TV and radio facilities could be used easily for C3 backup for military purposes. The Saddam Hussein regime also controlled TV and radio and used them as the principal media for Iraqi propaganda. Thus, these installations were also struck.⁴⁷¹

In the same report, the Department of Defense stated that "microwave towers for everyday, peacetime civilian communications can constitute a vital part of a military command and control (C2) system . . . Attack of all segments of the Iraqi communications system was essential to destruction of Iraqi military C2."⁴⁷²

III. Practice of International Organisations and Conferences

518. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

519. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

The precise scope of "military-industrial infrastructure, media and other strategic targets" as referred to in the US statement and "government ministries and refineries" as referred to in the NATO statement is unclear. Whether the media constitutes a legitimate target group is a debatable issue. If the media is used to incite crimes, as in Rwanda, then it is a legitimate target. If it is merely disseminating propaganda to generate support for the war effort, it is not a legitimate target.⁴⁷³

The Committee further stated that:

The media as such is not a traditional target category. To the extent particular media components are part of the C3 (command, control and communications) network they are military objectives. If media components are not part of the C3 network then they may become military objectives depending upon their use. As a bottom line, civilians, civilian objects and civilian morale as such are not legitimate military objectives. The media does have an effect on civilian morale. If that effect is merely to foster support for the war effort, the media is not a legitimate military

⁴⁷¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, p. 96; see also James P. Coyne, Plan of Attack, *Air Force Magazine*, April 1992, pp. 40–42.

⁴⁷² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 623.

⁴⁷³ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 47.

objective. If the media is used to incite crimes, as in Rwanda, it can become a legitimate military objective. If the media is the nerve system that keeps a war-monger in power and thus perpetuates the war effort, it may fall within the definition of a legitimate military objective.⁴⁷⁴

With respect to NATO's attack against the radio and television station in Belgrade, the Committee noted that:

The attack appears to have been justified by NATO as part of a more general attack aimed at disrupting the FRY Command, Control and Communications network, the nerve centre and apparatus that keeps Milošević in power, and also as an attempt to dismantle the FRY propaganda machinery. Insofar as the attack actually was aimed at disrupting the communications network, it was legally acceptable.

If, however, the attack was made because equal time was not provided for Western news broadcasts, that is, because the station was part of the propaganda machinery, the legal basis was more debatable. Disrupting government propaganda may help to undermine the morale of the population and the armed forces, but justifying an attack on a civilian facility on such grounds alone may not meet the "effective contribution to military action" and "definite military advantage" criteria required by the Additional Protocols . . . While stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, it is unlikely that either of these purposes would offer the "concrete and direct" military advantage necessary to make them a legitimate military objective.⁴⁷⁵

V. Practice of the International Red Cross and Red Crescent Movement

520. No practice was found.

VI. Other Practice

521. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed "objects which, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as transportation and communication systems and facilities" as objects which "can arguably be regarded as legitimate military objectives subject to direct attack".⁴⁷⁶ This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁴⁷⁷

⁴⁷⁴ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 55.

⁴⁷⁵ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, §§ 75–76.

⁴⁷⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

⁴⁷⁷ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99–100.

522. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed "objects that, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as transportation and communication systems and facilities" as objects which "may be regarded as legitimate military objectives subject to direct attack by combatants and mines".⁴⁷⁸

523. In 1999, in a letter to the NATO Secretary-General concerning NATO's bombing in the FRY, Human Rights Watch stated, with respect to the argument that the Serbian State radio and television headquarters in Belgrade was a legitimate target for NATO to attack, that "while stopping such propaganda may serve to demoralize the Yugoslav population and undermine the government's political support, neither purpose offers the 'concrete and direct' military advantage necessary to make them a legitimate target".⁴⁷⁹

524. In a report on the NATO bombing in the FRY issued in 2000, Human Rights Watch stated that it considered the bombing of the Serbian State radio and television headquarters in Belgrade to be "one of the worst incidents of civilian death" with respect to target selection. It asserted that there was no evidence that the radio and television headquarters met the legal test of military necessity in target selection, as it made no direct contribution to the military effort in Kosovo, and added that in this case the purpose of the attack seemed to have been more "psychological harassment of the civilian population" than to obtain direct military effect. The report further stated that "the risks involved to the civilian population in undertaking the urban attack thus grossly outweighed any perceived military benefit".⁴⁸⁰

525. In 2000, in a report on the NATO bombings in the FRY, Amnesty International concluded that "in one instance, the attack on the headquarters of Serbian state radio and television (RTS), NATO launched a direct attack on a civilian object, killing 16 civilians. Such attack breached article 52(1) of Protocol I and therefore constitutes a war crime."⁴⁸¹

Lines and means of transportation

Note: *Practice concerning military vehicles, ships and aircraft have been included in the subsection on weapons and weapon systems above.*

⁴⁷⁸ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 140.

⁴⁷⁹ Human Rights Watch, Letter to the NATO Secretary-General, 13 May 1999.

⁴⁸⁰ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, New York, 7 February 2000, p. 7.

⁴⁸¹ Amnesty International, *NATO/Federal Republic of Yugoslavia: "Collateral Damage" or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 25.

I. Treaties and Other Instruments

Treaties

526. Under Article 8 of the 1954 Hague Convention, cultural property may be placed under special protection provided, *inter alia*, that it is situated “at an adequate distance . . . from any important military objective constituting a vulnerable point, such as, for example, an aerodrome . . . a port or railway station of relative importance or a main line of communication”.

Other Instruments

527. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, “lines of . . . transportation used for military purposes” are military objectives.

528. Article 5(1) of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that “aerial bombardment is prohibited unless directed at . . . lines of communication or transportation used for military purposes”.

529. Paragraph I of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules provided that:

The objectives belonging to the following categories are those considered to be of generally recognized military importance:

- ...
- (5) Airfields . . .
- (6) Those of the lines and means of communication (railway lines, roads, bridges, tunnels and canals) which are of fundamental military importance.

II. National Practice

Military Manuals

530. Australia’s Defence Force Manual cites “transport facilities which support military operations” and “transportation systems for military supplies, transportation centres where lines of communication converge, [and] rail yards” as examples of military objectives.⁴⁸²

531. Canada’s LOAC Manual considers that “ports and airfields are generally accepted as being military objectives”.⁴⁸³ The manual adds that “transportation systems for military supplies; transportation centres where lines of communication converge; [and] railyards may constitute military objectives depending on the circumstances”.⁴⁸⁴

⁴⁸² Australia, *Defence Force Manual* (1994), §§ 527(b) and 527(f).

⁴⁸³ Canada, *LOAC Manual* (1999), p. 4-2, § 9(a).

⁴⁸⁴ Canada, *LOAC Manual* (1999), p. 4-2, § 11(a), (b) and (c).

532. Croatia's *Commanders' Guide* includes "military means of transportation" among military objectives.⁴⁸⁵

533. Ecuador's *Naval Manual* lists airfields, bridges, railyards, docks, port facilities, harbours and embarkation points as military objectives.⁴⁸⁶

534. According to France's *LOAC Summary Note*, "military means of transportation" are military objectives.⁴⁸⁷

535. Italy's *LOAC Elementary Rules Manual* includes "military means of transportation" among military objectives.⁴⁸⁸

536. South Korea's *Military Law Manual* considers highways, railways, ports and airfields used for military operations as military objectives.⁴⁸⁹

537. Madagascar's *Military Manual* states that "military means of transportation" are military objectives.⁴⁹⁰

538. The *Military Manual of the Netherlands* states that:

Whether a road or railway constitutes a military objective depends on the military situation on the spot. The answer to the question of whether the acquisition of such an object at that moment yields a definite military advantage is decisive for the qualification of the object.⁴⁹¹

539. New Zealand's *Military Manual* states that "[military] transport, ports [and] airfields are examples of objects universally regarded as military objectives".⁴⁹² The manual further considers that "transportation systems for military supplies, transportation centres where lines of communication converge, railyards . . . may be attacked if they meet the criteria for military objectives".⁴⁹³

540. Spain's *Field Regulations* stipulates that bridges and railway equipment are legitimate objects of attack.⁴⁹⁴

541. Switzerland's *Basic Military Manual* considers "means of transportation of military importance" as military objectives.⁴⁹⁵

542. The *US Air Force Pamphlet* states that:

Controversy exists over whether, and the circumstances under which, other objects, such as civilian transportation and communications systems, dams and dikes can be classified properly as military objectives . . . A key factor in classification of objects as military objectives is whether they make an effective contribution to an adversary's military action so that their capture, destruction or neutralization offers a definite military advantage in the circumstances ruling at the time.⁴⁹⁶

⁴⁸⁵ Croatia, *Commanders' Manual* (1992), § 4.

⁴⁸⁶ Ecuador, *Naval Manual* (1989), § 8.1.1. ⁴⁸⁷ France, *LOAC Summary Note* (1992), § 1.2.

⁴⁸⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 4.

⁴⁸⁹ South Korea, *Military Law Manual* (1996), p. 87.

⁴⁹⁰ Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 4.

⁴⁹¹ Netherlands, *Military Manual* (1993), p. V-3.

⁴⁹² New Zealand, *Military Manual* (1992), § 516(2), see also § 623(2).

⁴⁹³ New Zealand, *Military Manual* (1992), § 516(4), see also § 623(4).

⁴⁹⁴ Spain, *Field Regulations* (1882), § 880.

⁴⁹⁵ Switzerland, *Basic Military Manual* (1987), Article 28.

⁴⁹⁶ US, *Air Force Pamphlet* (1976), § 5-3(b)(2).

543. The US Naval Handbook lists airfields, bridges, railyards, docks, port facilities, harbours and embarkation points as military objectives.⁴⁹⁷

National Legislation

544. Cuba's Military Criminal Code includes "means of transportation" in a list of military objects.⁴⁹⁸

545. Cuba's National Defence Act lists "means of land, air and water transport [and] airfields, ports and port installations, and plants, workshops, service centres, fuel stores and other installations intended for the exploitation, maintenance and repair of transport facilities and equipment" among the objects integrated within the "Military Reserve of Facilities and Equipment of the National Economy" to guarantee the necessities of defence in wartime.⁴⁹⁹

National Case-law

546. No practice was found.

Other National Practice

547. According to the Report on the Practice of Algeria, the destruction of railways, bridges and roads was part of a policy of "economic sabotage" conducted by the ALN during the war of independence.⁵⁰⁰

548. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that it had attacked "main Iraqi military airfields".⁵⁰¹ In a further report it stated that "airfields" and "bridges vital to the military supply effort to and from Kuwait" had been attacked.⁵⁰²

549. During the Korean War, the US Joint Chiefs of Staff informed General MacArthur that mass air operations against industrial targets in North Korea were "highly desirable". The Joint Chiefs of Staff accordingly designated, *inter alia*, the following targets: the railway yards and shops at Pyongyang, the railway yards and shops at Wonsan, the railway yards and shops and the harbour facilities at Chongjin, the railway yards at Chinnampo, the railway yards and shops and the docks and storage areas at Songjin, the railway yards at Hamhung and the railway yards at Haeju.⁵⁰³

550. In 1966, in the context of the Vietnam War, the US Secretary of Defense stated that:

⁴⁹⁷ US, *Naval Handbook* (1995), § 8.1.1.

⁴⁹⁸ Cuba, *Military Criminal Code* (1979), Article 33(1).

⁴⁹⁹ Cuba, *National Defence Act* (1994), Article 119(a) and (d).

⁵⁰⁰ Report on the Practice of Algeria, 1997, Chapter 1.3, referring to *El Moudjahid*, Vol. 1, pp. 25–26.

⁵⁰¹ UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

⁵⁰² UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

⁵⁰³ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, pp. 186–187.

We are directing the aircraft against military targets, only military targets, and those particularly associated with the lines of communication between North Vietnam and South Vietnam over which they are sending the men and equipment which are the foundation of the Viet Cong effort to subvert the Government of South Vietnam.⁵⁰⁴

551. In 1966, in the context of the Vietnam War, the US Department of Defense stated that:

U.S. policy is to target military targets only, particularly those which have a direct impact on the movement of men and supplies into South Vietnam. These targets include but are not limited to roads, railroads, bridges [and] road junctions . . . In the specific case of Nam Dinh and Phu Li, targets have been limited to railroad and highway bridges, railroad yards . . .⁵⁰⁵

552. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US included "supply lines" among Iraq's military targets.⁵⁰⁶ In another such report, the US stated that "the supply lines leading from Iraq into Kuwait" were to be targeted by coalition forces.⁵⁰⁷

553. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that "airfields" were considered military targets and had been attacked.⁵⁰⁸

554. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq's airfields, its port facilities, and its railroads and bridges had been included among the 12 target sets for the coalition's attacks.⁵⁰⁹ In the same report, the US Department of Defense stated that:

A bridge or highway vital to daily commuter and business traffic can be equally crucial to military traffic, or support for a nation's war effort. Railroads, airports, seaports and the interstate highway system in the United States have been funded by the Congress in part because of US national security concerns, for example; each proved invaluable to the movement of US military units to various ports for deployment to Southwest Asia (SWA) for Operations Desert Shield and Desert

⁵⁰⁴ US, Secretary of Defense, Statement on targeting policy in Vietnam, 2 February 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

⁵⁰⁵ US, Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

⁵⁰⁶ US, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 1.

⁵⁰⁷ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

⁵⁰⁸ US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

⁵⁰⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, pp. 96-98.

Storm. Destruction of a bridge, airport, or port facility, or interdiction of a highway can be equally important in impeding an enemy's war effort.⁵¹⁰

III. Practice of International Organisations and Conferences

555. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

556. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated, concerning the "attack on a civilian passenger train at the Grdelica Gorge on 12 April 1999", that the railway bridge on which the train was hit "was a legitimate military objective".⁵¹¹

V. Practice of the International Red Cross and Red Crescent Movement

557. No practice was found.

VI. Other Practice

558. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed "objects which, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as transportation and communication systems and facilities" as objects which "can arguably be regarded as legitimate military objectives subject to direct attack".⁵¹² This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁵¹³

559. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed "objects that, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as transportation and communication systems and facilities,

⁵¹⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 623; see also James P. Coyne, Plan of Attack, *Air Force Magazine*, April 1992, pp. 40–42.

⁵¹¹ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 62.

⁵¹² Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

⁵¹³ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99–100.

airfields, ports" as objects which "may be regarded as legitimate military objectives subject to direct attack by combatants and mines".⁵¹⁴

560. Following NATO's air campaign in the FRY in 1999, Human Rights Watch stated that:

The attacks on the Novi Sad bridge and six other bridges in which civilian deaths occurred... also were of questionable military effect. All are road bridges. Most are urban or town bridges that are not major routes of communications. Human Rights Watch questions individual target selection in the case of these bridges. U.S. military sources have told Human Rights Watch that bridges were often selected for attack for reasons other than their role in transportation (for example, they were conduits for communications cables, or because they were symbolic and psychologically lucrative, such as in the case of the bridge over the Danube in Novi Sad). The destruction of bridges that are not central to transportation arteries or have a purely psychological importance does not satisfy the criterion of making an "effective contribution to military action" or offering a "definite military advantage," the baseline tests for legitimate military targets codified in Protocol I, art. 52.⁵¹⁵

Economic installations

I. Treaties and Other Instruments

Treaties

561. Article 2 of the 1907 Hague Convention (IX) allows the bombardment of "workshops or plant which could be utilized for the needs of the hostile fleet or army".

562. Under Article 8 of the 1954 Hague Convention, cultural property may be placed under special protection provided, *inter alia*, that it is situated "at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point".

Other Instruments

563. According to Article 24(2) of the 1923 Hague Rules of Air Warfare, "factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies" are military objectives.

564. Paragraph I of the proposed annex to Article 7(2) of the 1956 New Delhi Draft Rules provided that:

The objectives belonging to the following categories are those considered to be of generally recognized military importance:

⁵¹⁴ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 140.

⁵¹⁵ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, New York, 7 February 2000, p. 11.

- ...
- (8) Industries of fundamental importance for the conduct of the war:
- (a) industries for the manufacture of armaments such as weapons, munitions, rockets, armoured vehicles, military aircraft, fighting ships, including the manufacture of accessories and all other war material;
 - (b) industries for the manufacture of supplies and material of a military character, such as transport and communications material, equipment for the armed forces;
 - (c) factories or plants constituting other production and manufacturing centres of fundamental importance for the conduct of war, such as the metallurgical, engineering and chemical industries, whose nature and purpose is essentially military;
 - (d) storage and transport installations whose basic function it is to serve the industries referred to in (a)–(c);
 - (e) installations providing energy mainly for national defence, e.g. coal, other fuels, or atomic energy, and plants producing gas or electricity mainly for military consumption.
- (9) Installations constituting experimental, research centres for experiments on and the development of weapons and war material.

II. National Practice

Military Manuals

565. Australia's Defence Force Manual gives as an example of military objectives:

power stations [and] industry which support military operations... industrial installations producing materiel for combat forces, fuel dumps and distribution centres supplying military users, industrial installations that repair and replenish lines of communication and other economic targets the destruction, capture or neutralisation of which offers a definite military advantage.⁵¹⁶

The manual adds that "economic targets that indirectly but effectively support operations are also military objectives if an attack will gain a definite military advantage".⁵¹⁷

566. Belgium's Law of War Manual states that:

The purpose of combat between belligerents is to weaken and eliminate the power of resistance of the enemy.

This resistance is provided in the first place by the armed forces of a Party to the conflict. As a result, acts of violence are in the first place directed against the military potential of the adversary (the army, its positions, provision of its supplies, its stores, workshops, arsenals, depots, defence works, vehicles, aircraft, war buildings, etc.).

But this resistance also depends on the economic power of the adversary (its war industry, its production capacity, its sources of supply, etc.); in short, its economic

⁵¹⁶ Australia, *Defence Force Manual* (1994), §§ 527(b) and 527(f).

⁵¹⁷ Australia, *Defence Force Manual* (1994), § 527(g).

potential. The breaking up of this economic potential has of course a direct influence on the armed forces' capacity to resist, so that this economic potential also becomes a war objective.⁵¹⁸

567. Canada's LOAC Manual considers that "petroleum storage areas are generally accepted as being military objectives".⁵¹⁹ The manual adds that "industrial installations producing material for armed forces; conventional power plants; and fuel dumps may constitute military objectives depending on the circumstances".⁵²⁰

568. Croatia's LOAC Compendium considers that supply and maintenance bases, namely locations where goods other than medical are produced, processed or stored, are military objectives.⁵²¹

569. Ecuador's Naval Manual states that:

Proper economic targets for naval attack include enemy lines of communication used for military purposes, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.⁵²²

570. Germany's Military Manual provides that military objectives include, in particular, "economic objectives which make an effective contribution to military action (transport facilities, industrial plants, etc.)".⁵²³

571. Hungary's Military Manual considers that supply and maintenance bases, namely locations where goods other than medical are produced, processed or stored, are military objectives.⁵²⁴

572. According to Italy's IHL Manual, "depots, workshops [and] installations... which can be used for the needs of the armed forces" are military objectives.⁵²⁵

573. New Zealand's Military Manual states that "energy installations [and] war supporting industries are examples of objects universally regarded as military objectives".⁵²⁶ The manual further states that:

Industrial installations producing materiel for combat forces, fuel dumps and distribution centres supplying military users, and industrial installations that repair and replenish lines of communication (such as conventional power plants and vehicle plants), and other economic targets may be attacked if they meet the criteria for military objectives.⁵²⁷

⁵¹⁸ Belgium, *Law of War Manual* (1983), p. 26.

⁵¹⁹ Canada, *LOAC Manual* (1999), p. 4-2, § 9(a).

⁵²⁰ Canada, *LOAC Manual* (1999), p. 4-2, § 11(d), (e) and (f).

⁵²¹ Croatia, *LOAC Compendium* (1991), p. 51.

⁵²² Ecuador, *Naval Manual* (1989), § 8.1.1. ⁵²³ Germany, *Military Manual* (1992), § 443.

⁵²⁴ Hungary, *Military Manual* (1992), p. 83. ⁵²⁵ Italy, *IHL Manual* (1991), Vol. I, § 12.

⁵²⁶ New Zealand, *Military Manual* (1992), § 516(2), see also § 623(2).

⁵²⁷ New Zealand, *Military Manual* (1992), § 516(4), see also § 623(4).

In general, the manual considers that:

Economic targets that indirectly but effectively support enemy operations may also be attacked to gain a definite military advantage. For example, an 1870 international arbitral tribunal recognized that the destruction of cotton was justified during the American Civil War since the sale of cotton provided funds for almost all Confederate arms and ammunition. Authorization to attack such targets will be reserved to higher authority.⁵²⁸

574. According to Spain's LOAC Manual, "economic-industrial objectives which make an effective and real contribution to military action" are military objectives.⁵²⁹

575. Sweden IHL Manual states that:

How and to what extent a given object can effectively contribute to the adversary's military operations must be decided by the commander. This need not imply that the property in question is being used by the adversary for a given operation... It may even be a question of... energy resources or factories that indirectly contribute to the adversary's military operations.⁵³⁰

576. Switzerland's Basic Military Manual considers "plants, factories and establishments directly linked to the activity of the armed forces" as military objectives.⁵³¹

577. The US Naval Handbook states that:

Proper economic targets for naval attack include enemy lines of communication, rail yards, bridges, rolling stock, barges, lighters, industrial installations producing war-fighting products, and power generation plants. Economic targets of the enemy that indirectly but effectively support and sustain the enemy's war-fighting capability may also be attacked.⁵³²

National Legislation

578. Cuba's National Defence Act lists among the objects integrated within the "Military Reserve of Facilities and Equipment of the National Economy" to guarantee the necessities of defence in wartime:

facilities and equipment for the handling and storage of cargo, agricultural machinery, construction machinery, and other facilities, installations and machinery intended for works of engineering [and] facilities and equipment for... automation, meteorology, topographical and geodesic systems.⁵³³

⁵²⁸ New Zealand, *Military Manual* (1992), § 516(5), see also § 623(5).

⁵²⁹ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).a.

⁵³⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 54.

⁵³¹ Switzerland, *Basic Military Manual* (1987), Article 28.

⁵³² US, *Naval Handbook* (1995), § 8.1.1.

⁵³³ Cuba, *National Defence Act* (1994), Article 119(b) and (c).

579. According to Italy's Law of War Decree as amended, "depots, workshops [and] installations . . . which can be used for the needs of the armed forces" are military objectives.⁵³⁴

National Case-law

580. No practice was found.

Other National Practice

581. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran always insisted that it had no intention of attacking civilian objects, all targets being "military objectives or objects which by their nature, location, purpose or use made an effective contribution to military action, and thus most economic objectives were regarded as military objectives". The report cites refineries, petrochemical complexes, power stations, railway stations, radio and television stations and bridges as examples of economic objectives which were targeted by the Iranian air force and concludes that "the definition of military objectives from Iran's point of view is a broad one which includes economic objectives too".⁵³⁵

582. The Report on the Practice of Lebanon refers to a statement by the General Director of the Ministry of Justice in 1997 in which he stated that he considered the bombardment of economic installations to be a war crime.⁵³⁶

583. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that Iraq's oil refining capacity had been specifically targeted with the objective of "reducing Iraq's military sustainability".⁵³⁷

584. During the Korean War, the US Joint Chiefs of Staff informed General MacArthur that mass air operations against industrial targets in North Korea were "highly desirable". The Joint Chiefs of Staff accordingly designated, *inter alia*, the following targets: the two munitions plants at Pyongyang, the three chemical plants at Hungnam, the oil refinery at Wonsan, the naval oil-storage tank farm at Rashin, the "Tong Iron Foundry" and the "Sam Yong Industrial Factory" at Chinnampo.⁵³⁸

585. In 1950, the US Secretary of State stated that "the air activity of the United Nations forces in Korea has been, and is, directed solely at military targets of the invader. These targets [include] . . . war plants."⁵³⁹

⁵³⁴ Italy, *Law of War Decree as amended* (1938), Article 40.

⁵³⁵ Report on the Practice of Iran, 1997, Chapter 1.3.

⁵³⁶ Report on the Practice of Lebanon, 1998, Chapter 6.5, referring to Statement by the General Director of the Lebanese Ministry of Justice, *al Raii al ordonia*, 23 December 1997.

⁵³⁷ UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

⁵³⁸ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, pp. 186–187, see also pp. 517–518 (discussing the North Korean metals and mining business as a target category).

⁵³⁹ US, Statement by the Secretary of State, Dean Acheson, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 140.

586. In 1966, in reply to an inquiry from a member of the House of Representatives asking for a restatement of US policy on targeting in North Vietnam, a US Deputy Assistant Secretary of Defense wrote that “the United States has not targeted such installations as textile plants, fruit-canning plants, silk factories and thread cooperatives”.⁵⁴⁰

587. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Iraq’s electricity production facilities, its oil refining and distribution facilities and its military production sites had been included among the 12 target sets for the coalition’s attacks.⁵⁴¹

588. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

Natural resources that may be of value to an enemy in his war effort are legitimate targets. The 1943 air raids on the Ploesti oil fields in Romania, and the Combined Bomber Offensive campaign against Nazi oil, were critical to allied defeat of Germany in World War II, for example . . . During Desert Storm, Coalition planners targeted Iraq’s ability to produce refined oil products (such as gasoline) that had immediate military use, but eschewed attack on its long-term crude oil production capability.⁵⁴²

589. The Report on US Practice states that:

The *opinio juris* of the U.S. government recognizes the definition of military objectives in Article 52 of Additional Protocol I as customary law. United States practice gives a broad reading to this definition, and would include . . . war-supporting economic facilities as military objectives.⁵⁴³

III. Practice of International Organisations and Conferences

United Nations

590. In a resolution adopted in 1989 on the situation of human rights and fundamental freedoms in El Salvador, the UN Commission on Human Rights expressed its concern at “the systematic destruction of the economic infrastructure as a consequence of the armed conflict” and requested that all parties put an end to “attacks on the economic infrastructure”.⁵⁴⁴

⁵⁴⁰ US, Letter from Deputy Assistant Secretary of Defense Goulding to US Representative Ogden Reid from New York, 30 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 428.

⁵⁴¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Chapter VI, The Air Campaign, pp. 96–98.

⁵⁴² US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 204.

⁵⁴³ Report on US Practice, 1997, Chapter 1.3.

⁵⁴⁴ UN Commission on Human Rights, Res. 1989/68, 8 March 1989, preamble and § 5.

Other International Organisations

591. No practice was found.

International Conferences

592. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

593. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

594. No practice was found.

VI. Other Practice

595. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed as objects which "can arguably be regarded as legitimate military objectives subject to direct attack":

objects which, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as . . . otherwise non-military industries of importance to the ability of a party to the conflict to conduct military operations, such as raw or processed coffee destined for export.⁵⁴⁵

This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁵⁴⁶

596. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed as objects which "may be regarded as legitimate military objectives subject to direct attack by combatants and mines":

objects that, while not directly connected with combat operations, effectively contribute to military operations in the circumstances ruling at the time, such as . . . otherwise nonmilitary industries of importance to the ability of a party to the conflict to conduct military operations, such as diamonds or petroleum destined for export.⁵⁴⁷

⁵⁴⁵ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

⁵⁴⁶ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 99–100.

⁵⁴⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 140.

Areas of land

I. Treaties and Other Instruments

Treaties

597. Upon ratification of AP I, Canada stated that:

A specific area of land may be a military objective if, because of its location or other reasons specified in [Article 52] as to what constitutes a military objective, its total or partial destruction, capture or neutralization in the circumstances governing at the time offers a definite military advantage.⁵⁴⁸

Similar statements were made upon signature and/or ratification of AP I by FRG, Italy, Netherlands, New Zealand, Spain and UK.⁵⁴⁹

598. In a declaration made upon ratification of AP I, France stated that:

A specific zone may be considered as a military objective if, due to its location or for any other criteria mentioned in Article 52 [AP I], its total or partial destruction, capture or neutralisation in the circumstances governing at the time offers a decisive military advantage.⁵⁵⁰

It made a similar interpretative declaration upon ratification of the 1998 ICC Statute.⁵⁵¹

599. Upon ratification of the CCW, the UK issued a declaration to the effect that "a specific area of land may be a military objective if, because of its location or other reasons [nature, purpose or use], its total or partial destruction, capture or neutralisation in the circumstances ruling at the time offers a definite military advantage".⁵⁵² Similar statements were made upon ratification of the CCW and/or acceptance of some of its Protocols by the Netherlands, Pakistan and US.⁵⁵³

Other Instruments

600. No practice was found.

⁵⁴⁸ Canada, Statements of understanding made upon ratification of AP I, 20 November 1990.

⁵⁴⁹ FRG, Declarations made upon ratification of AP I, 14 February 1991, § 7; Italy, Declarations made upon ratification of AP I, 27 February 1986, § 7; Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 7; New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 4; Spain, Declarations made upon ratification of AP I, 21 April 1989, § 7; UK, Declaration made upon signature of AP I, 12 December 1977, § f; UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § j.

⁵⁵⁰ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 12.

⁵⁵¹ France, Interpretative declarations made upon ratification of the 1988 ICC Statute, 9 June 2000, § 6.

⁵⁵² UK, Declaration made upon ratification of the CCW, 13 February 1995, § (b).

⁵⁵³ Netherlands, Declaration made upon ratification of the CCW, 18 June 1987, §§ 1 and 4; Netherlands, Declaration made upon acceptance of the 1996 Amended Protocol II to the CCW, 25 March 1999, § 3; Pakistan, Declaration made upon acceptance of the 1996 Amended Protocol II to the CCW, 9 March 1999, § 5; US, Declaration made upon acceptance of the 1996 Amended Protocol II to the CCW, 24 May 1999, § 4.

II. National Practice

Military Manuals

- 601.** Australia's Defence Force Manual includes among military objectives "areas of land which are of direct use to defending or attacking forces, eg land through which an adversary is likely to move its forces or which may be used as a forming up point preceding an attack".⁵⁵⁴
- 602.** Belgium's Regulations on Armoured Infantry Squads defines the objective of a mission as "a vital area of land to be conquered or defended".⁵⁵⁵
- 603.** Belgium's Regulations on Tank Squadrons states that the objective of a tank squadron in attack is "an area of land whose capture requires the enemy's destruction or withdrawal".⁵⁵⁶
- 604.** Belgium's Regulations on the Tactical Use of Large Units states that "an objective is the final goal of an action. It is defined as either an area of land of tactical importance or as enemy elements that have to be destroyed or neutralised."⁵⁵⁷
- 605.** Benin's Military Manual considers "an area of land of tactical importance" as a military objective.⁵⁵⁸
- 606.** According to Canada's LOAC Manual, "a specific area of land may constitute a military objective".⁵⁵⁹
- 607.** According to Croatia's Commanders' Manual, military objectives include "tactically relevant points of terrain".⁵⁶⁰
- 608.** Ecuador's Naval Manual states that "proper naval targets also include geographic targets, such as a mountain pass".⁵⁶¹
- 609.** France's LOAC Summary Note includes "areas of land of tactical importance" among military objectives.⁵⁶²
- 610.** Italy's IHL Manual states that "areas of land that would be useful to capture or deny to the enemy in order to achieve a military operation" are military objectives.⁵⁶³
- 611.** Italy's LOAC Elementary Rules Manual includes "areas of tactical importance" among military objectives.⁵⁶⁴
- 612.** Madagascar's Military Manual states that military objectives include "areas of land of tactical importance".⁵⁶⁵

⁵⁵⁴ Australia, *Defence Force Manual* (1994), § 527(h), see also § 916(b) ("areas of land which armed forces use or which have military significance such as hills and bridgeheads").

⁵⁵⁵ Belgium, *Regulations on Armoured Infantry Squads* (1972), p. 3.

⁵⁵⁶ Belgium, *Regulations on Tank Squadrons* (1982), § 537(b)(2), see also §§ 536(b)(2) and 539(b)(2).

⁵⁵⁷ Belgium, *Regulations on the Tactical Use of Large Units* (1994), § 210.

⁵⁵⁸ Benin, *Military Manual* (1995), Fascicule I, p. 13.

⁵⁵⁹ Canada, *LOAC Manual* (1999), p. 4-1, § 8. ⁵⁶⁰ Croatia, *Commanders' Manual* (1992), § 4.

⁵⁶¹ Ecuador, *Naval Manual* (1989), § 8.1.1.

⁵⁶² France, *LOAC Summary Note* (1992), Part I, § 1.2.

⁵⁶³ Italy, *IHL Manual* (1991), Vol. I, § 12.

⁵⁶⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 4.

⁵⁶⁵ Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 4.

613. The Military Manual of the Netherlands notes that the government of the Netherlands has declared that “an area of land can constitute a military objective as long as it fulfils the conditions thereof”.⁵⁶⁶

614. New Zealand’s Military Manual states that:

An area of land may be a military objective, provided that the particular area offers a definite military advantage to the defending forces or those attacking. This would include a tract of land through which the adverse Party would be likely to move its forces, or an area the occupation of which would provide the occupant with the possibility of mounting a further attack.⁵⁶⁷

615. Spain’s LOAC Manual states that “the capture or preservation of a specific area of land constitutes a military objective when it meets all the requirements laid down in Article 52 AP I and it confers a concrete military advantage taking into account the circumstances ruling at the time”.⁵⁶⁸

616. Sweden’s IHL Manual states that:

The definition [of military objectives contained in Article 52(2) AP I] is intended to apply only to property or objects. Thus for example, areas of land cannot be included; but this does not prevent an area objective if it is a matter of hindering an enemy advance by means of artillery fire or mining. Attacks on an area are permitted as long as the attack cannot be classified as indiscriminate.⁵⁶⁹

617. Togo’s Military Manual considers “an area of land of tactical importance” as a military objective.⁵⁷⁰

618. The UK LOAC Manual states that military objectives include “areas of land which either have military significance such as hills, defiles or bridgeheads or which contain military objects; or . . . minefields”.⁵⁷¹

619. The US Naval Handbook states that “proper naval targets also include geographic targets, such as a mountain pass”.⁵⁷²

National Legislation

620. The Report on the Practice of Spain notes that the fact that a particular zone may be considered a military objective provided it fulfils the requirements of Article 52(2) AP I is consistent with the possibility provided for under Spanish law of establishing zones of interest for national defence, comprising “expanses of land, sea, or airspace declared as such because they constitute or may constitute a permanent base or an effective aid to offensive action necessary for such purpose”.⁵⁷³

⁵⁶⁶ Netherlands, *Military Manual* (1993), p. V-3.

⁵⁶⁷ New Zealand, *Military Manual* (1992), § 516(6), see also § 623(6).

⁵⁶⁸ Spain, *LOAC Manual* (1996), Vol. I, § 4.4.d; see also § 2.3.b.(1).

⁵⁶⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 54.

⁵⁷⁰ Togo, *Military Manual* (1996), Fascicule I, p. 13.

⁵⁷¹ UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(b)(1).

⁵⁷² US, *Naval Handbook* (1995), § 8.1.1.

⁵⁷³ Report on the Practice of Spain, 1998, Chapter 1.3, referring to *Zones and Installations Law* (1975), Article 2.

National Case-law

621. No practice was found.

Other National Practice

622. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that “the notion of ‘military objective’ must be understood as meaning that a specific zone, as such, which by its location or other criteria enumerated in Article 52 makes an effective contribution to enemy military action, can be considered a military objective”.⁵⁷⁴

623. At the CDDH, Canada stated that:

A specific area of land may also be a military objective if, because of its location or other reasons specified in Article 47 [now Article 52 AP I], its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵⁷⁵

624. At the CDDH, the FRG stated that it had been able to vote in favour of Article 47 of draft AP I (now article 52) on the basis of the understanding that:

A specific area of land may be a military objective if, because of its location or other reasons specified in Article 47 [now Article 52 AP I], its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵⁷⁶

625. At the CDDH, the Netherlands stated that it interpreted Article 47 of draft AP I (now Article 52) to mean that:

A specific area of land may be a military objective if, because of its location or other reasons specified in Article 47 [now Article 52 AP I], its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵⁷⁷

626. At the CDDH, the UK stated that:

A specific area of land might be a military objective if, because of its location or for other reasons specified in Article 47 [now Article 52 AP I], its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offered a definite military advantage.⁵⁷⁸

627. At the CDDH, the US expressed its understanding that:

⁵⁷⁴ Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096-I, 9 January 1985, p. 10.

⁵⁷⁵ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

⁵⁷⁶ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 188.

⁵⁷⁷ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 195.

⁵⁷⁸ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 169, § 153.

A specific area of land may be a military objective if, because of its location or other reasons specified in Article 47 [now Article 52 AP I], its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.⁵⁷⁹

628. In 1992, in a review of the legality of extended range anti-armour munition, the US Department of the Air Force stated that:

An area of land can be a military objective if by its nature, location, purpose or use it makes an effective contribution to military action and its total or partial destruction, denial, capture or neutralization offers a definite military advantage, in the circumstances ruling at the time. Most areas which would be mined in war would meet this definition.⁵⁸⁰

629. The Report on US Practice states that:

The *opinio juris* of the U.S. government recognizes the definition of military objectives in Article 52 of Additional Protocol I as customary law. United States practice gives a broad reading to this definition, and would include areas of land . . . as military objectives.⁵⁸¹

III. Practice of International Organisations and Conferences

630. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

631. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

632. No practice was found.

VI. Other Practice

633. No practice was found.

Presence of civilians within or near military objectives

I. Treaties and Other Instruments

634. No practice was found.

⁵⁷⁹ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 204.

⁵⁸⁰ US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 7.

⁵⁸¹ Report on US Practice, 1997, Chapter 1.3.

II. National Practice

Military Manuals

635. Australia's Defence Force Manual states that:

The presence of noncombatants in or around a military objective does not change its nature as a military objective. Noncombatants in the vicinity of a military objective must share the danger to which the military objective is exposed.

Civilians working in a store on a military air base may not necessarily be taking . . . a direct part [in hostilities]. However, stores, depots, supply columns and military installations are clearly military objectives which may be attacked, regardless of the presence of civilian workers.

Civilians who are not directly involved in combat but are performing military tasks are not combatants. If they are killed or injured during an attack on a legitimate military objective there is no breach of LOAC provided the death or injury is not disproportionate to the direct and concrete military advantage anticipated from the attack. The presence of civilians on or near the proposed military objective (either in a voluntary capacity or as a shield) is merely one of the factors that must be considered when planning an attack.⁵⁸²

636. Canada's LOAC Manual states that:

For targeting purposes, the presence of civilians who are authorized to accompany the armed forces without actually being members thereof (such as crews of military aircraft, war correspondents, supply contractors or members of services responsible for the welfare of the armed forces) does not render a legitimate target immune from attack. Such persons run the risk of being attacked as part of a legitimate target.⁵⁸³

637. Colombia's Instructors' Manual states that "a military objective remains a military objective even if civilians are inside it. Civilians within or in the immediate vicinity of a military objective share the risk to which the objective is exposed."⁵⁸⁴

638. Croatia's LOAC Compendium considers that supply and maintenance bases are military objectives and that civilian personnel working there share the risk of attack.⁵⁸⁵

639. Ecuador's Naval Manual states that:

Deliberate use of noncombatants to shield military objectives from enemy attack is prohibited. The presence of non-combatants within or near military objectives does not preclude an attack on such objectives . . . Unlike military personnel (other than those in a specially protected status such as medical personnel and the sick and wounded) who are always subject to attack, whether on duty or in a leave capacity, civilians are immune from attack unless they are engaged in direct support of the enemy's armed forces or provide them with logistical support. Civilians who provide command, administrative or logistical support to military operations are

⁵⁸² Australia, *Defence Force Manual* (1994), §§ 526, 532 and 550.

⁵⁸³ Canada, *LOAC Manual* (1999), p. 4-4, § 34.

⁵⁸⁴ Colombia, *Instructors' Manual* (1999), p. 18.

⁵⁸⁵ Croatia, *LOAC Compendium* (1991), p. 51.

exposed to attacks while performing such duties. Similarly, civilian employees of navy shipyards, the merchant navy personnel working on ships carrying military cargo, and the workers on military fortifications can be attacked while they carry out such activities.⁵⁸⁶

640. Germany's Military Manual states that "civilians present in military objectives are not protected against attacks directed at these objectives; the presence of civilian workers in an arms production plant, for instance, will not prevent opposing armed forces from attacking this military objective".⁵⁸⁷

641. Hungary's Military Manual considers that supply and maintenance bases are military objectives and that civilian personnel working there share the risk of attack.⁵⁸⁸

642. Madagascar's Military Manual states that "a military objective remains a military objective even if civilians are present inside it".⁵⁸⁹

643. The Military Manual of the Netherlands considers that:

Acts such as the manufacturing and transport of military materiel in the hinterland certainly do not constitute a direct participation in hostilities. In addition, it has to be borne in mind that the fact that civilians are working in, for example, a weapons factory does not convert such an industrial object into a civilian object. Such a case has to be assessed in the light of the definition of a military objective.⁵⁹⁰

644. New Zealand's Military Manual states that "civilians employed in industries or other activities connected with the war effort may lose while on the job some or all of their protection as civilians but they do not, as a result, become combatants".⁵⁹¹

645. Spain's Field Regulations deals with the question of whether protection should be granted to "individuals who, forming part of a field army, are nonetheless not combatants in the strict sense of the word, such as employees and operatives of administrative and technical bodies, drivers, cleaners".⁵⁹² According to the manual, such individuals "who are not military personnel but follow armies to the battlefield are naturally exposed to the same dangers and cannot expect to be treated differently; but once their position and functions have been identified, they must be respected".⁵⁹³

646. Spain's LOAC Manual states that "indirect objectives" are objectives:

which may not be the object of a direct attack but which can suffer the consequences of an attack upon a military objective. Such is the case for civilians... who may suffer the effects of an attack upon a legitimate military objective due to:

⁵⁸⁶ Ecuador, *Naval Manual* (1989), §§ 11.2 and 11.3.

⁵⁸⁷ Germany, *Military Manual* (1992), § 445. ⁵⁸⁸ Hungary, *Military Manual* (1992), p. 83.

⁵⁸⁹ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § D.

⁵⁹⁰ Netherlands, *Military Manual* (1993), p. V-5.

⁵⁹¹ New Zealand, *Military Manual* (1992), § 802(2).

⁵⁹² Spain, *Field Regulations* (1882), Article 853.

⁵⁹³ Spain, *Field Regulations* (1882), Article 855.

- their proximity to a military objective aimed at shielding that objective against attack;
- their carrying out activities supporting military operations (units of workers, workers in arms factories, etc.).⁵⁹⁴

The manual further provides that civilian personnel who accompany and render services to the armed forces “do not have the protected status of the civilian population but are entitled to the status of prisoner of war in case of capture”.⁵⁹⁵

647. Switzerland’s Basic Military Manual considers that:

Civilians who are inside or in the immediate vicinity of military objectives run the risks to which the military objectives are exposed. For example, the presence of civilian workers inside a weapons factory does not prevent the enemy from attacking this military objective.⁵⁹⁶

648. The US Naval Handbook states that:

Deliberate use of noncombatants to shield military objectives from enemy attack is prohibited. Although the principle of proportionality underlying the concept of collateral damage and incidental injury continues to apply in such cases, the presence of non-combatants within or adjacent to a legitimate target does not preclude attack of it . . . Unlike military personnel (other than those in a specially protected status such as medical personnel and the sick and wounded) who are always subject to attack whether on duty or in a leave capacity, civilians, as a class, are not to be the object of attack. However, civilians that are engaged in direct support of the enemy’s war-fighting or war-sustaining effort are at risk of incidental injury from attack on such activities.⁵⁹⁷

National Legislation

649. No practice was found.

National Case-law

650. According to the Report on the Practice of Japan, the judgement of the Tokyo District Court in the *Shimoda case* in 1963, which concerned the dropping of the atomic bomb, can be interpreted as having denied the existence of the concept of so-called quasi-combatants, whereby civilians who do not directly partake in hostilities, but indirectly contribute to hostile acts by working in transportation, communication and industrial facilities would be regarded as military objectives.⁵⁹⁸

⁵⁹⁴ Spain, *LOAC Manual* (1996), Vol. I, § 4.4.e, see also § 2.3.b.(1).

⁵⁹⁵ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.a.(2).

⁵⁹⁶ Switzerland, *Basic Military Manual* (1987), Article 28 and commentary.

⁵⁹⁷ US, *Naval Handbook* (1995), §§ 11.2 and 11.3.

⁵⁹⁸ Report on the Practice of Japan, 1998, Chapter 1.2, referring to Tokyo District Court, *Shimoda case*, Judgement, 7 December 1963.

Other National Practice

651. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that “each person, even a civilian, who is located inside a military objective, is exposed to the consequences of the risks that objective runs”.⁵⁹⁹

652. In 1989, a US memorandum of law concerning the prohibition of assassination stated that:

Civilians who work within a military objective are at risk from attack during the times in which they are present within that objective, whether their injury or death is incidental to the attack of that military objective or results from their direct attack . . . The substitution of a civilian in a position or billet that normally would be occupied by a member of the military will not make that position immune from attack.⁶⁰⁰

653. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Civilians using those bridges or near other targets at the time of their attack were at risk of injury incidental to the legitimate attack of those targets . . . The presence of civilians will not render a target immune from attack; legitimate targets may be attacked wherever located (outside neutral territory and waters).⁶⁰¹

III. Practice of International Organisations and Conferences

654. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

655. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

656. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “a military objective remains a military objective even if civilian persons are in it. The civilian persons within

⁵⁹⁹ Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096-1, 9 January 1985, p. 10.

⁶⁰⁰ US, Executive Order 12333 and Assassination, Memorandum prepared by the Chief of the International Law Branch, Office of the Judge Advocate General, Department of the Army, 2 November 1989, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3415–3416.

⁶⁰¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, pp. 624 and 625.

such an objective or its immediate surroundings share the danger to which it is exposed."⁶⁰²

VI. Other Practice

657. Oppenheim states that:

Sections of the civilian population, like munition workers, which are closely identified with military objectives proper, may, while so identified, be legitimately exposed to air attack and to other belligerent measures aiming at the destruction of the objectives in question.⁶⁰³

658. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that:

Persons providing only indirect support to the Nicaraguan army by, *inter alia*, working in defense plants, distributing or storing military supplies in rear areas, supplying labor and food, or serving as messengers or disseminating propaganda . . . may *not* be subject to direct individualized attack or execution since they pose no immediate threat to the adversary. However, they assume the risk of incidental death or injury arising from attacks against legitimate military targets.⁶⁰⁴ [emphasis in original]

This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁶⁰⁵

659. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that:

Persons providing only indirect support to the Angolan, Cuban, or South African armed forces or UNITA by, *inter alia*, working in defense plants, distributing or storing military supplies behind conflict areas, supplying labor and food, serving as messengers, or disseminating propaganda . . . may not be subject to direct individualized attack because they pose no immediate threat to the adversary. They assume, however, the risk of incidental death or injury arising from attacks and the use of weapons against legitimate military targets.⁶⁰⁶

⁶⁰² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 56.

⁶⁰³ Lassa Oppenheim, *International Law. A Treatise*, Vol. II, Disputes, War and Neutrality, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 416, § 214ea.

⁶⁰⁴ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 32.

⁶⁰⁵ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, p. 98.

⁶⁰⁶ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 138.

C. Definition of Civilian Objects

I. Treaties and Other Instruments

Treaties

660. Article 52(1) AP I defines civilian objects as “all objects which are not military objectives”. Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.⁶⁰⁷

661. Article 2(5) of the 1980 Protocol II to the CCW and Article 2(7) of the 1996 Amended Protocol II to the CCW define civilian objects as “all objects which are not military objectives”.

662. Article 1(4) of the 1980 Protocol III to the CCW defines civilian objects as “all objects which are not military objectives”.

663. Upon signature of the 1998 ICC Statute, Egypt declared that “civilian objects [referred to in article 8, paragraph 2 (b) of the Statute] must be defined and dealt with in accordance with the provisions of [AP I] and, in particular, article 52 thereof”.⁶⁰⁸

Other Instruments

664. No practice was found.

II. National Practice

Military Manuals

665. Military manuals of Argentina, Australia, Cameroon, Canada, Colombia, Kenya, Madagascar, Netherlands, South Africa, Spain, UK and US define civilian objects as all objects which are not military objectives.⁶⁰⁹

666. Benin’s Military Manual defines civilian objects as “any object which is not a military object or which is not used for military purposes”.⁶¹⁰

667. Croatia’s Commanders’ Manual defines civilian objects as “those objects that are not used for military purposes”.⁶¹¹

668. Ecuador’s Naval Manual defines civilian objects as “all civilian property and activities other than those used to support or sustain the enemy’s war-fighting capability”.⁶¹²

⁶⁰⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

⁶⁰⁸ Egypt, Declarations made upon signature of the 1988 ICC Statute, 26 December 2000, § 4(b).

⁶⁰⁹ Argentina, *Law of War Manual* (1989), §§ 4.02(2) and 4.45; Australia, *Defence Force Manual* (1994), §§ 530 and 916; Cameroon, *Instructors’ Manual* (1992), p. 17; Canada, *LOAC Manual* (1999), p. 4-4, § 36; Colombia, *Instructors’ Manual* (1999), pp. 16-17; Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11; Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § D, see also Fiche No. 2-O, § 6 and Fiche No. 4-T, § 1; Netherlands, *Military Manual* (1993), p. V-3; South Africa, *LOAC Manual* (1996), § 24(e); Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).b; UK, *LOAC Manual* (1981), Section 4, p. 13, § 3(c); US, *Air Force Pamphlet* (1976), § 5-3(a)(1)(b).

⁶¹⁰ Benin, *Military Manual* (1995), Fascicule I, p. 13.

⁶¹¹ Croatia, *Commanders’ Manual* (1992), § 6. ⁶¹² Ecuador, *Naval Manual* (1989), § 8.1.2.

669. France's LOAC Summary Note states that "civilian objects are those objects that are not used for military purposes".⁶¹³

670. Italy's LOAC Elementary Rules Manual defines civilian objects as "those objects that are not used for military purposes".⁶¹⁴

671. Sweden IHL Manual states that:

Seen against the background of the enormous destruction of civilian property associated with the Second World War and all later conflicts, application of [Article 52 AP I] could bring about an appreciable humanizing of warfare – people would no longer need to experience the catastrophe of bombed-out homes and ruined cities. However, Article 52 cannot be expected to bring about such great changes in warfare... [An] important reason [for this] is the lack of a definition of civilian objectives.⁶¹⁵

672. Togo's Military Manual defines civilian objects as "any object which is not a military object or which is not used for military purposes".⁶¹⁶

673. The US Naval Handbook defines civilian objects as "all civilian property and activities other than those used to support or sustain the enemy's war-fighting capability".⁶¹⁷

674. The YPA Military Manual of the SFRY (FRY) defines civilian objects as "objects which are not military".⁶¹⁸

National Legislation

675. The Report on the Practice of Cuba asserts that objects not listed by the National Defence Act among the "Military Reserve of Facilities and Equipment of the National Economy" should be considered as civilian objects.⁶¹⁹

National Case-law

676. No practice was found.

Other National Practice

677. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq defines civilian objects as objects whose utilisation is confined exclusively to civilian purposes. According to the report, an object should always be considered as civilian if it does not have a major effect on military operations and is indispensable to civilians.⁶²⁰

⁶¹³ France, *LOAC Summary Note* (1992), § 1.1.

⁶¹⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 6.

⁶¹⁵ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 53.

⁶¹⁶ Togo, *Military Manual* (1996), Fascicule I, p. 14.

⁶¹⁷ US, *Naval Handbook* (1995), § 8.1.2. ⁶¹⁸ SFRY (FRY), *YPA Military Manual* (1988), § 73.

⁶¹⁹ Report on the Practice of Cuba, 1998, Chapter 1.3, referring to *National Defence Act* (1994), Article 119.

⁶²⁰ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.3.

678. The Report on the Practice of Malaysia states that no written laws in Malaysia define the concept of “civilian objects”.⁶²¹

679. At the CDDH, Mexico stated that it believed draft Article 47 AP I (now Article 52) to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.⁶²²

III. Practice of International Organisations and Conferences

680. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

681. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

682. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “civilian object means any object which is not a military objective”.⁶²³

VI. Other Practice

683. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that:

For purposes of the Nicaraguan conflict, the following should be considered civilian objects immune from direct attack:

Structures and locales, such as a house, dwelling, school, farm, village and cooperatives, which in fact are exclusively dedicated to civilian purposes and, in the circumstances prevailing [at] the time, do not make an effective contribution to military action.⁶²⁴

This view was reiterated in its 1986 report on the use of landmines in the conflicts in El Salvador and Nicaragua.⁶²⁵

684. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that “structures and locales, such as houses, churches, dwellings,

⁶²¹ Report on the Practice of Malaysia, 1997, Chapter 1.3.

⁶²² Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

⁶²³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 57.

⁶²⁴ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 32.

⁶²⁵ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, p. 99.

schools, and farm villages, that are exclusively dedicated to civilian purposes and, in the circumstances prevailing at the time, do not make an effective contribution to military action" should be considered civilian objects immune from direct attack by combatants, as well as by landmines and related devices.⁶²⁶

685. In 2000, in a report on the NATO air campaign against the FRY, Human Rights Watch used the definition of a military objective contained in Article 52(2) AP I.⁶²⁷

D. Loss of Protection from Attack

Civilian objects used for military purposes

I. *Treaties and Other Instruments*

686. No practice was found.

II. *National Practice*

Military Manuals

687. Australia's Defence Force Manual lists among military objectives "objects, normally dedicated to civilian purposes, but which are being used for military purposes, eg a school house or home which is being used temporarily as a battalion headquarters".⁶²⁸ The manual specifies that:

For this purpose, "use" does not necessarily mean occupation. For example, if enemy soldiers use a school building as shelter from attack by direct fire, then they are clearly gaining a military advantage from the school. This means the school becomes a military objective and can be attacked.⁶²⁹

The manual also considers that "civilian aircraft, vessels, vehicles and buildings which contain combatants, military equipment or supplies" are also military objectives.⁶³⁰

688. Belgium's Teaching Manual for Soldiers states that objects occupied or used by enemy military forces are military objectives "even if these objects were civilian at the outset (houses, schools or churches occupied by the enemy)".⁶³¹

⁶²⁶ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 139.

⁶²⁷ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, New York, 7 February 2000, p. 7.

⁶²⁸ Australia, *Defence Force Manual* (1994), § 527(i).

⁶²⁹ Australia, *Defence Force Manual* (1994), § 530.

⁶³⁰ Australia, *Defence Force Manual* (1994), § 527(e); see also *Commanders' Guide* (1994), § 951.

⁶³¹ Belgium, *Teaching Manual for Soldiers* (undated), pp. 20–21.

689. Cameroon's *Instructors' Manual* considers that "depending on the military situation, [civilian objects] can become military objectives (e.g. a house or bridge used for tactical purposes by the enemy)".⁶³²

690. Canada's LOAC Manual states that "where a civilian object is used for military purposes, it loses its protection as a civilian object and may become a legitimate target".⁶³³ The manual further states that "civilian vessels, aircraft, vehicles and buildings are military objectives if they contain combatants, military equipment or supplies."⁶³⁴

691. Colombia's *Instructors' Manual* states that "objects which are normally civilian can, depending on the military situation, be converted into military objectives (for example a house or a bridge used for tactical purposes by the defender and therefore liable to attack)".⁶³⁵

692. Croatia's *Commanders' Manual* states that "civilian objects must not be attacked unless they have become military objectives".⁶³⁶

693. France's LOAC Summary Note states that "civilian objects may not be attacked, unless they have become military targets".⁶³⁷

694. Israel's *Manual on the Laws of War* states that:

A situation may arise where the target changes its appearance from civilian to military or vice versa. For instance, if anti-aircraft batteries are stationed on a school roof or a sniper is positioned in a mosque's minaret, the protection imparted to the facility by its being a civilian object will be removed, and the attacking party will be allowed to hit it... A reverse situation may also occur in which an originally military objective becomes a civilian object, as for instance, a large military base that is converted to a collection point for the wounded, and is thus rendered immune to attack.⁶³⁸

695. Italy's LOAC Elementary Rules Manual states that "civilian objects must not be attacked unless they have become military objectives".⁶³⁹

696. Kenya's LOAC Manual provides that "objects which are normally civilian objects can, according to the military situation, become military objectives (e.g. house or bridge tactically used by the defender and thus a target for an attacker)".⁶⁴⁰

697. Madagascar's *Military Manual* states that "objects which are normally civilian can, depending on the military situation, become military objectives (for example, a house or bridge used for tactical purposes by the defender and thus becoming a military objective)".⁶⁴¹

⁶³² Cameroon, *Instructors' Manual* (1992), p. 17.

⁶³³ Canada, *LOAC Manual* (1999), p. 4-5, § 37.

⁶³⁴ Canada, *LOAC Manual* (1999), p. 4-2, § 10.

⁶³⁵ Colombia, *Instructors' Manual* (1999), p. 16.

⁶³⁶ Croatia, *Commanders' Manual* (1992), § 11.

⁶³⁷ France, *LOAC Summary Note* (1992), § 1.5.

⁶³⁸ Israel, *Manual on the Laws of War* (1998), p. 38.

⁶³⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 11.

⁶⁴⁰ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11.

⁶⁴¹ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § D.

698. The Military Manual of the Netherlands considers that civilian objects, such as houses and school buildings, can be used in such a way that they become military objectives, for example if they house combatants or are used as commando posts.⁶⁴²

699. The Military Handbook of the Netherlands states that “non-military buildings and other objects not used for military purposes or of no military importance” may not be attacked.⁶⁴³

700. The Aide-Mémoire for IFOR Commanders of the Netherlands prohibits attacks on “objects with a strict civilian or religious character, unless they are used for military purposes”.⁶⁴⁴

701. New Zealand’s Military Manual provides that “civilian vessels, aircraft, vehicles and buildings may be lawfully attacked if they contain combatant personnel or military equipment or supplies or are otherwise associated with combat activity inconsistent with their civilian status”.⁶⁴⁵

702. Russia’s Military Manual prohibits “the bombardment by military aircraft or warships of cities, harbours, villages and dwellings . . . provided they are not being used for military purposes”.⁶⁴⁶

703. According to Spain’s LOAC Manual, “civilian objects can become military objectives if by their location, purpose or use, they may assist the enemy, or if their capture, destruction or neutralisation offers a definite military advantage”.⁶⁴⁷

704. The US Air Force Pamphlet states that “the inherent nature of the object is not controlling since even a traditionally civilian object, such as a civilian house, can be a military objective when it is occupied and used by military forces during an armed engagement”.⁶⁴⁸

705. The US Rules of Engagement for Operation Desert Storm gives the following instruction:

Do not fire into civilian populated areas or buildings which are not defended or being used for military purposes . . . Do not attack traditional civilian objects, such as houses, unless they are being used by the enemy for military purposes and neutralization assists in mission accomplishment.⁶⁴⁹

National Legislation

706. No practice was found.

⁶⁴² Netherlands, *Military Manual* (1993), p. V-3.

⁶⁴³ Netherlands, *Military Handbook* (1995), pp. 7–36 and 7–43.

⁶⁴⁴ Netherlands, *Aide-Mémoire for IFOR Commanders* (1995), § 12.

⁶⁴⁵ New Zealand, *Military Manual* (1992), § 516(3), see also § 623(3).

⁶⁴⁶ Russia, *Military Manual* (1990), Section II, § 5(m).

⁶⁴⁷ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(1).

⁶⁴⁸ US, *Air Force Pamphlet* (1976), § 5-3(b)(2).

⁶⁴⁹ US, *Rules of Engagement for Operation Desert Storm* (1991), §§ B and G.

National Case-law

707. The Report on the Practice of Colombia refers to a decision of the Council of State which considered that when civilian means of transportation are used by combatants they become military objectives.⁶⁵⁰

Other National Practice

708. In a military communiqué issued in 1973, Egypt stated that it condemned attacks against civilian objects, unless such objects were used in military operations.⁶⁵¹

709. On the basis of interviews with members of the armed forces, the Report on the Practice of Malaysia notes that a civilian object would not be regarded as such if it was to be used to contribute to military action, such as in the production of military equipment.⁶⁵²

710. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "civilian objects are protected from direct, intentional attack unless they are used for military purposes, such as shielding military objects from attack".⁶⁵³

711. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that "cultural property, civilian objects, and natural resources are protected from intentional attack so long as they are not utilized for military purposes".⁶⁵⁴

712. In 1991, the Ministry of Defence of the SFRY issued a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", which included the following example:

Along the road to the frontier with Austria, over 100 heavy lorries were forced to stop and were used to create a barrier to block a YPA unit marching to the frontier. Drivers of the lorries were banned to leave their vehicles, whereby they became hostages, and it was quite clear that their vehicles had lost [their] status of civilian vehicles as they were used to create a barrier to military traffic. Thus, these vehicles became an object of legitimate attack. Simultaneously, the stopped military convoy was fired upon from the barricade, so that there was no choice for the army: as the lives of soldiers was endangered, the barricade had to be eliminated by force.⁶⁵⁵

⁶⁵⁰ Report on the Practice of Colombia, 1998, Chapter 1.3, referring to Council of State, *Administrative Case No. 7013*, Judgement, 13 December 1993.

⁶⁵¹ Egypt, Military Communiqué No. 18, 8 October 1973.

⁶⁵² Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces, Chapter 1.3.

⁶⁵³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 622.

⁶⁵⁴ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 202.

⁶⁵⁵ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 1(iii).

III. Practice of International Organisations and Conferences

713. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

714. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

715. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “objects which are normally civilian objects can, according to the military situation, become military objectives (e.g. house or bridge tactically used by the defender and thus a target for an attacker)”.⁶⁵⁶

716. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(2) of draft AP I which stated that “objects designed for civilian use, such as houses, dwellings, installations and means of transport, and all objects which are not military objectives, shall not be made the object of attack, except if they are used mainly in support of the military effort”. All governments concerned replied favourably.⁶⁵⁷

VI. Other Practice

717. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that:

Existing international law prohibits all armed attacks . . . on non-military objects, notably dwellings or other buildings sheltering the civilian population, so long as these are not used for military purposes to such an extent as to justify action against them under the rules regarding military objectives.⁶⁵⁸

718. In 2001, in a report on Israel and the occupied territories, Amnesty International stated that civilian objects “may be attacked while they are being used for firing upon Israeli forces. But they revert to their status as civilian objects as soon as they are no longer being used for launching attacks”.⁶⁵⁹

⁶⁵⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 58.

⁶⁵⁷ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

⁶⁵⁸ Institute of International Law, *Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction*, 9 September 1969, § 4.

⁶⁵⁹ Amnesty International, *Israel and the Occupied Territories: State Assassinations and Other Unlawful Killings*, AI Index MDE 15/005/2001, London, 21 February 2001, p. 29.

Situations of doubt as to the character of an object

I. Treaties and Other Instruments

Treaties

719. Article 52(3) AP I states that “in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used”. Article 52 AP I was adopted by 79 votes in favour, none against and 7 abstentions.⁶⁶⁰

720. Article 3(8)(a) of the 1996 Amended Protocol II to the CCW provides that “in case of doubt as to whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used”.

721. Upon signature of the 1998 ICC Statute, Egypt declared that “civilian objects [referred to in Article 8, paragraph 2(b) of the Statute] must be defined and dealt with in accordance with the provisions of [AP I] and, in particular, article 52 thereof. In case of doubt, the object shall be considered to be civilian.”⁶⁶¹

Other Instruments

722. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 52(3) AP I.

723. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the parties to the conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 52(3) AP I.

724. Paragraph 58 of the 1994 San Remo Manual provides that “in case of doubt whether a vessel or aircraft exempt from attack is being used to make an effective contribution to military action, it shall be presumed not to be so used”. The commentary on this paragraph states that “this rule, the so-called rule of doubt, imposes an obligation on a party to the conflict to gather and assess relevant information before commencing an attack”.

II. National Practice

Military Manuals

725. Argentina’s Law of War Manual provides that “in case of doubt concerning the military use of an object which is usually dedicated to civilian purposes, that object must be considered as civilian”.⁶⁶²

⁶⁶⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

⁶⁶¹ Egypt, Declarations made upon signature of the 1988 ICC Statute, 26 December 2000, § 4(b).

⁶⁶² Argentina, *Law of War Manual* (1989), § 4.45, see also § 4.02(2).

726. Australia's Defence Force Manual states that "in cases of doubt whether an object which is normally dedicated to civilian purposes, such as a church, is being used to make an effective contribution to military action, it should be presumed to be a civilian object".⁶⁶³

727. Benin's Military Manual states that "whenever there is a doubt concerning the nature of an objective, it must be considered as a civilian object".⁶⁶⁴

728. Cameroon's Instructors' Manual states that in case of doubt as to whether an object is military or civilian in character, it should be considered as a civilian object.⁶⁶⁵

729. Canada's LOAC Manual states that:

In the case of doubt as to whether an object which is normally dedicated to civilian purposes (such as a place of worship, a house or other dwelling, or a school) is being used to make an effective contribution to military action, it shall be presumed not to be so used.⁶⁶⁶

730. Colombia's Instructors' Manual states that "in case of doubt all objects which are normally dedicated to civilian purposes must be considered civilian".⁶⁶⁷

731. Croatia's LOAC Compendium affirms that in case of doubt as to whether an object is military or civilian in character, it should be considered as a civilian object.⁶⁶⁸

732. France's LOAC Manual states that "in case of doubt, an object usually affected to a civilian use must be considered as civilian and shall not be attacked".⁶⁶⁹

733. Germany's Military Manual provides that "an objective which is normally dedicated to civil purposes shall, in case of doubt, be assumed not to be used in a way to make an effective contribution to military action, and therefore be treated as a civilian object".⁶⁷⁰

734. Hungary's Military Manual affirms that in case of doubt, objects must be considered to be civilian.⁶⁷¹

735. Israel's Manual on the Laws of War states that "in cases where there is doubt as to whether a civilian object has turned into a military objective, the Additional Protocols state that one is to assume that it is not a military objective unless proven otherwise".⁶⁷²

736. Kenya's LOAC Manual states that "in case of doubt whether an object which is normally dedicated to civilian purposes (e.g. a place of worship, a

⁶⁶³ Australia, *Defence Force Manual* (1994), § 528, see also § 530 and *Commanders' Guide* (1994), § 976.

⁶⁶⁴ Benin, *Military Manual* (1995), Fascicule I, p. 13.

⁶⁶⁵ Cameroon, *Instructors' Manual* (1992), p. 17.

⁶⁶⁶ Canada, *LOAC Manual* (1999), p. 4-5, § 38.

⁶⁶⁷ Colombia, *Instructors' Manual* (1999), p. 16.

⁶⁶⁸ Croatia, *LOAC Compendium* (1991), p. 7.

⁶⁶⁹ France, *LOAC Manual* (2001), p. 90.

⁶⁷⁰ Germany, *Military Manual* (1992), § 446.

⁶⁷¹ Hungary, *Military Manual* (1992), p. 18.

⁶⁷² Israel, *Manual on the Laws of War* (1998), p. 38.

house or other dwelling, a school) is a military objective, it shall be considered as a civilian object".⁶⁷³

737. Madagascar's Military Manual states that "in case of doubt, an object which is usually dedicated to civilian purposes (such as a place of worship, school, house or other type of dwelling) will be considered as civilian".⁶⁷⁴

738. The Military Manual of the Netherlands states that "in case of doubt whether an object which usually serves civilian purposes, such as a house, a school, a church, is used for military purposes, it must be assumed to be a civilian object".⁶⁷⁵

739. New Zealand's Military Manual states that "if there is a substantial doubt concerning whether an object normally used for civilian purposes is, in the circumstances, a military objective, it shall be presumed not to be a military objective".⁶⁷⁶

740. Nigeria's Military Manual provides that when "hospital ships, coastal rescue craft, ships sailing under special agreements . . . are of a dubious status, i.e., when it is uncertain whether it is a military objective or not, in that case, it may be stopped and searched so as to establish its status".⁶⁷⁷

741. Spain's LOAC Manual states that "in case of doubt, an object which is normally dedicated to civilian purposes, such as a house, a school or a place of worship, must be considered to be a civilian object".⁶⁷⁸

742. Sweden IHL Manual states that:

During military operations it may often be difficult to establish within a short space of time whether property should be classified as a civilian object or a military objective. To avoid meaningless destruction as far as possible, a so-called dubio rule is included in Article 52 [AP I]. This states that in case of doubt whether an object which is normally dedicated to civilian purposes is being used in the adversary's military activity, it shall be presumed that it is not being so used. Among such normally civilian objects are mentioned particularly places of worship, houses and other dwellings, and schools.⁶⁷⁹

743. Togo's Military Manual states that "whenever there is a doubt concerning the nature of an objective, it must be considered as a civilian object".⁶⁸⁰

744. The US Air Force Pamphlet states that "in case of doubt whether an object which is normally dedicated to civilian purposes, such as a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used".⁶⁸¹

⁶⁷³ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 11.

⁶⁷⁴ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § D.

⁶⁷⁵ Netherlands, *Military Manual* (1993), p. V-3.

⁶⁷⁶ New Zealand, *Military Manual* (1992), § 524(3), see also §§ 516(7) and 623(7) (following the language of Article 52(3) AP I more closely).

⁶⁷⁷ Nigeria, *Military Manual* (1994), p. 45, § 16(d).

⁶⁷⁸ Spain, *LOAC Manual* (1996), Vol. I, § 4.2.b.(2), see also § 2.3.b.(1).

⁶⁷⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 55.

⁶⁸⁰ Togo, *Military Manual* (1996), Fascicule I, p. 14.

⁶⁸¹ US, *Air Force Pamphlet* (1976), § 5-3(a)(1)(b).

National Legislation

745. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 52(3) AP I, is a punishable offence.⁶⁸²

746. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁶⁸³

National Case-law

747. No practice was found.

Other National Practice

748. The Report on the Practice of Iraq states that the practice adopted by the Iraqi armed forces is that in case of doubt concerning the nature of objects, they must be considered as civilian objects.⁶⁸⁴

749. The Report on the Practice of Israel states that:

In principle, in cases of significant doubt as to whether a target is legitimate or civilian, the decision would be to refrain from attacking the target. It should be stressed that the introduction of the adjective "significant" in this context is aimed at excluding those cases in which there exists a slight possibility that the definition of the target as legitimate is mistaken. In such cases, the decision whether or not to attack rests with the commander in the field, who has to decide whether or not the possibility of mistake is significant enough to warrant not launching the attack.⁶⁸⁵

750. The Report on the Practice of Malaysia does not expressly mention the presumption in favour of the civilian character in the list of norms applicable to the country's armed forces, but it states that this principle is applied in practice since civilian property is not considered as a military objective. This principle is said to conform to the practice aimed at winning the hearts and minds of the civilian population during the communist insurgency period.⁶⁸⁶

751. At the CDDH, Mexico stated that it believed draft Article 47 AP I (now Article 52) to be so essential that it "cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis".⁶⁸⁷

752. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense commented on Article 52(3) AP I to the effect that:

⁶⁸² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁸³ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁶⁸⁴ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.3.

⁶⁸⁵ Report on the Practice of Israel, 1997, Chapter 1.3.

⁶⁸⁶ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.3.

⁶⁸⁷ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 193.

This language, which is not a codification of the customary practice of nations, causes several things to occur that are contrary to the traditional law of war. It shifts the burden for determining the precise use of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts, i.e. from defender to attacker. This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat. It also encourages a defender to ignore its obligation to separate the civilian population, individual civilians and civilian objects from military objectives, as the Government of Iraq illustrated during the Persian Gulf War.⁶⁸⁸

Noting that the US Naval Handbook does not refer to such presumption, the Report on US Practice concludes that the US government does not acknowledge the existence of a customary principle requiring a presumption of civilian character in case of doubt.⁶⁸⁹

III. Practice of International Organisations and Conferences

United Nations

753. No practice was found.

Other International Organisations

754. No practice was found.

International Conferences

755. At the CDDH, an exception to the presumption of civilian status was submitted. It provided that the presumption of civilian use for objects which are normally dedicated to civilian purposes would not apply "in contact zones where the security of the armed forces requires a derogation from this presumption". Such an exception was defended on the grounds that "infantry soldiers could not be expected to place their lives in great risk because of such a presumption and that, in fact, civilian buildings which happen to be in the front lines usually are used as part of the defensive works". The exception was criticized by other delegates on the ground that "it would unduly endanger civilian objects to permit any exceptions to the presumption".⁶⁹⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

756. No practice was found.

⁶⁸⁸ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 627.

⁶⁸⁹ Report on US Practice, 1997, Chapter 1.3.

⁶⁹⁰ CDDH, *Official Records*, Vol. XV, CDDH/III/224, Report to Committee III on the Work of the Working Group, pp. 331–332.

V. Practice of the International Red Cross and Red Crescent Movement

757. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “in case of doubt whether an object which is normally dedicated to civilian purposes (e.g. a place of worship, a house or other dwelling, a school) is a military objective, it shall be considered as a civilian object”.⁶⁹¹

VI. Other Practice

758. No practice was found.

⁶⁹¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 59, see also § 464 (ships of dubious status).

INDISCRIMINATE ATTACKS

A. Indiscriminate Attacks (practice relating to Rule 11)	§§ 1–163
B. Definition of Indiscriminate Attacks (practice relating to Rule 12)	§§ 164–282
Attacks which are not directed at a specific military objective	§§ 164–205
Attacks which cannot be directed at a specific military objective	§§ 206–250
Attacks whose effects cannot be limited as required by international humanitarian law	§§ 251–282
C. Area Bombardment (practice relating to Rule 13)	§§ 283–322

A. Indiscriminate Attacks*I. Treaties and Other Instruments**Treaties*

1. Article 51(4) AP I provides that “indiscriminate attacks are prohibited”. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.¹

2. According to Article 85(3)(b) AP I, it is a grave breach of the Protocol to launch “an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects as defined in Article 57, paragraph 2 a) iii)”. Article 85 AP I was adopted by consensus.²

3. Article 26(3) of draft AP II submitted by the ICRC to the CDDH provided that “the employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, are prohibited”.³ This provision was adopted in Committee III of the CDDH by 29 votes in favour, 15 against and 16 abstentions, while Article 26 as a whole was adopted by 44 votes in favour, none against

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

and 22 abstentions.⁴ Eventually, however, the proposal to retain this paragraph was rejected in the plenary by 30 votes in favour, 25 against and 34 abstentions.⁵

4. Article 3(3) of the 1980 Protocol II to the CCW and Article 3(8) of the 1996 Amended Protocol II to the CCW provide that “the indiscriminate use of [mines, booby-traps and other devices] is prohibited”.

Other Instruments

5. Articles 3 and 5(2) of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that:

The bombardment by whatever means of towns, ports, villages or buildings which are defended is prohibited at any time (whether at night or day) when objects of military character cannot be clearly recognized.

...

In cases where the [military] objectives above specified are so situated that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

6. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(4) AP I.

7. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(4) AP I.

8. Paragraph 42 of the 1994 San Remo Manual states that “it is forbidden to employ methods or means of warfare which: . . . b) are indiscriminate”.

9. Pursuant to Article 20(b)(ii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects” is a war crime.

10. Article 2(4) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect the right to life, especially from “indiscriminate bombardments of communities”.

11. Section 5.5 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force is prohibited from launching operations of a nature likely to strike military objectives and civilians in an indiscriminate manner”.

⁴ CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.37, 4 April 1975, pp. 390 and 391, §§ 14 and 15.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

II. National Practice

Military Manuals

12. Military manuals of Argentina, Australia, Belgium, Benin, Canada, France, Indonesia, Israel, Kenya, Netherlands, New Zealand, South Africa, Spain, Sweden, Togo and UK prohibit indiscriminate attacks.⁶

13. Argentina's Law of War Manual provides that it is a grave breach to intentionally launch an indiscriminate attack causing death or serious injury to body or health.⁷

14. Australia's Commanders' Guide and Defence Force Manual cite "launching indiscriminate attacks that affect the civilian population or civilian objects in the knowledge that such attack will cause extensive and disproportionate loss of life, injury to civilians or damage to civilian objects" as an example of acts which constitute "grave breaches or serious war crimes likely to warrant institution of criminal proceedings".⁸

15. Cameroon's Instructors' Manual prohibits "blind bombardment".⁹

16. Canada's LOAC Manual states that "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive collateral civilian damage" constitutes a grave breach.¹⁰

17. According to Ecuador's Naval Manual, "the indiscriminate destruction of cities, towns and villages" is a war crime.¹¹

18. Under Germany's Military Manual, it is prohibited:

to employ means or methods which are intended or of a nature . . . to injure military objectives, civilians, or civilian objects without distinction. The prohibition of indiscriminate warfare implies that the civilian population as such as well as individual civilians shall not be the object of attack and that they shall be spared as far as possible.¹²

The manual provides that grave breaches of IHL are in particular "launching an indiscriminate attack in the knowledge that such attack will have adverse effects on civilian life and civilian objects".¹³

⁶ Argentina, *Law of War Manual* (1989), § 4.03; Australia, *Defence Force Manual* (1994), § 921; Australia, *Commanders' Guide* (1994), § 955(d); Belgium, *Law of War Manual* (1983), p. 27; Benin, *Military Manual* (1995), Fascicule III, p. 13; Canada, *LOAC Manual* (1999), p. 4-3, § 22, see also p. 6-3, § 28, p. 7-5, § 48 and p. 8-5, § 38; France, *LOAC Manual* (2001), p. 85; Indonesia, *Military Manual* (undated), § 109; Israel, *Law of War Booklet* (1986), pp. 4-5; Kenya, *LOAC Manual* (1997), Précis No. 4, p. 3; Netherlands, *Military Manual* (1993), p. V-4; New Zealand, *Military Manual* (1992), § 517; South Africa, *Medical Services Military Manual* (undated), § 40; South Africa, *LOAC Manual* (1996), § 28(f); Spain, *LOAC Manual* (1996), Vol. I, § 4.4.c; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 45; Togo, *Military Manual* (1996), Fascicule III, p. 13; UK, *LOAC Manual* (1981), Section 4, p. 15, § 5(j).

⁷ Argentina, *Law of War Manual* (1989), § 8.03.

⁸ Australia, *Commanders' Guide* (1994), § 1305(h); *Defence Force Manual* (1994), § 1315(h).

⁹ Cameroon, *Instructors' Manual* (1992), pp. 113 and 149.

¹⁰ Canada, *LOAC Manual* (1999), p. 16-3, § 16(b). ¹¹ Ecuador, *Naval Manual* (1989), § 6.2.5.

¹² Germany, *Military Manual* (1992), §§ 401 and 404.

¹³ Germany, *Military Manual* (1992), § 1209.

19. India's Army Training Note orders troops to "avoid indiscriminate firing".¹⁴
20. India's Police Manual prohibits the use of indiscriminate force against civilian rioters and demonstrators.¹⁵
21. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "the IDF does not engage in indiscriminate attacks".¹⁶
22. Italy's IHL Manual states that "indiscriminate attacks against the civilian population or civilian objects" are war crimes.¹⁷
23. According to the Military Manual of the Netherlands, "the carrying out of indiscriminate attacks" is a grave breach.¹⁸
24. New Zealand's Military Manual states that "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a grave breach.¹⁹
25. The Report on the Practice of Nigeria interprets the prohibition of malicious destruction of property, buildings, churches and mosques provided for in Nigeria's Operational Code of Conduct as a prohibition of indiscriminate attacks.²⁰
26. Russia's Military Manual prohibits "the launching of an indiscriminate attack affecting the civilian population or civilian persons in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects".²¹
27. Under South Africa's LOAC Manual "launching an indiscriminate attack which affects the civilian population or civilian objects in the knowledge that such attack will cause loss of life, injury to civilians and damage to certain civilian objects" is a grave breach.²²
28. Spain's LOAC Manual states that "launching an indiscriminate attack affecting the civilian population or civilian objects which would be excessive in relation to the military advantage anticipated" constitutes a grave breach.²³
29. According to Switzerland's Basic Military Manual, the following constitutes a grave breach:

An attack which is launched without making any distinction [between civilians and civilian objects on the one hand and military objectives on the other hand] and which may affect the civilian population or civilian objects in the knowledge that

¹⁴ India, *Army Training Note* (1995), p. 4/24, § 17.

¹⁵ India, *Police Manual* (1986), pp. 36 and 101.

¹⁶ Report on the Practice of Israel, 1997, Chapter 1.4, referring to *Law of War Booklet* (1986), pp. 4–5.

¹⁷ Italy, *IHL Manual* (1991), Vol. I, § 85. ¹⁸ Netherlands, *Military Manual* (1993), p. IX-5.

¹⁹ New Zealand, *Military Manual* (1992), § 1703(3).

²⁰ Report on the Practice of Nigeria, 1997, Chapter 1.4, referring to *Operational Code of Conduct* (1968), §§ f–g.

²¹ Russia, *Military Manual* (1990), § 8(g). ²² South Africa, *LOAC Manual* (1996), § 37(b).

²³ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

the attack will cause loss of human life, injuries to civilians and damage to civilian objects which would be excessive in the sense of Article 57(2)(a)(iii) [AP I].²⁴

30. The US Air Force Pamphlet states that “particular weapons or methods of warfare may be prohibited because of their indiscriminate effects”.²⁵

31. Although the YPA Military Manual of the SFRY (FRY) does not expressly refer to the prohibition against indiscriminate attacks, the Report on the Practice of the SFRY (FRY) finds that a similar norm may be derived from the fundamental principle restricting the parties’ right to choose means and methods of warfare.²⁶

National Legislation

32. Argentina’s Draft Code of Military Justice punishes any soldier who “carries out or orders the commission of indiscriminate attacks”.²⁷

33. Under Armenia’s Penal Code, launching, during an armed conflict, an “indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of life to civilians or damage to civilian objects excessive in relation to the concrete and direct military advantage anticipated” constitutes a crime against the peace and security of mankind.²⁸

34. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence”.²⁹

35. The Criminal Code of Belarus provides that it is a war crime to “use means and methods of warfare which . . . strike indiscriminately” and to “launch an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects”.³⁰

36. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that it is a crime under international law to launch

an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage

²⁴ Switzerland, *Basic Military Manual* (1987), Article 193(1)(b).

²⁵ US, *Air Force Pamphlet* (1976), § 6-3(c).

²⁶ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.4, referring to *YPA Military Manual* (1988), § 65.

²⁷ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(1) in the *Code of Military Justice as amended* (1951).

²⁸ Armenia, *Penal Code* (2003), Article 390.3(2).

²⁹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

³⁰ Belarus, *Criminal Code* (1999), Article 136(1) and (11).

anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.³¹

37. The Criminal Code of the Federation of Bosnia and Herzegovina provides that it is a war crime to order “an indiscriminate attack without selecting a target, causing injury to the civilian population” or order “that civilian objects which are under specific protection of international law, non-defended localities and demilitarised zones be indiscriminately targeted” or carry out such attacks.³² The Criminal Code of the Republika Srpska contains the same provisions.³³

38. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence”.³⁴

39. China’s Law Governing the Trial of War Criminals provides that “indiscriminate destruction of property” constitutes a war crime.³⁵

40. Colombia’s Penal Code imposes a criminal sanction on “anyone who, during an armed conflict, carries out or orders the carrying out of indiscriminate attacks”.³⁶

41. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]”.³⁷

42. Croatia’s Criminal Code provides that it is a war crime to launch or order the launching of “an indiscriminate attack affecting the civilian population, causing loss of civilian life” or “an indiscriminate attack affecting civilian objects under special protection of international law, as well as non-defended localities and demilitarised zones”.³⁸

43. Cyprus’s AP I Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach”.³⁹

44. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for anyone who, in the context of an international or a non-international armed conflict, launches

³¹ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(12).

³² Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1) and (2).

³³ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1) and (2).

³⁴ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

³⁵ China, *Law Governing the Trial of War Criminals* (1946), Article 3(27).

³⁶ Colombia, *Penal Code* (2000), Article 144.

³⁷ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

³⁸ Croatia, *Criminal Code* (1997), Article 158(1) and (2).

³⁹ Cyprus, *AP I Act* (1979), Section 4(1).

an indiscriminate attack affecting the civilian population, in the knowledge that such attacks will cause death or injury among the civilian population or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated.⁴⁰

45. Under Estonia's Penal Code, "a person who uses means of warfare in a manner not allowing to discriminate between military and civilian objects and thereby causes the death of civilians, health damage to civilians, damage to civilian objects or a danger to the life, health of property of civilians" commits a war crime.⁴¹

46. Under Georgia's Criminal Code, "launching an indiscriminate attack affecting the civilian population or civilian objects, in the knowledge that it will cause loss and injury among civilians and damage to civilian objects" in an international or non-international armed conflict is a crime.⁴²

47. Indonesia's Military Penal Code provides for the punishment of military personnel who are found guilty of having carried out an indiscriminate attack.⁴³

48. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.⁴⁴ It adds that any "minor breach" of AP I, including violations of Article 51(4) AP I, is also a punishable offence.⁴⁵

49. Under Jordan's Draft Military Criminal Code, "indiscriminate attacks against civilians or civilian objects in the knowledge that such attacks will cause considerable loss of human life, injury to civilians or damage to civilian objects" in time of armed conflict are war crimes.⁴⁶

50. Under the Draft Amendments to the Code of Military Justice of Lebanon, "an indiscriminate attack against civilian populations or civilian objects in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a war crime.⁴⁷

51. Under Lithuania's Criminal Code as amended, "a military attack without choosing a specific military target or knowing it might cause loss of civilian life or the destruction of civilian objects" is a war crime.⁴⁸

52. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit:

the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.⁴⁹

⁴⁰ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque indiscriminado a personas protegidas".

⁴¹ Estonia, *Penal Code* (2001), § 96. ⁴² Georgia, *Criminal Code* (1999), Article 411(1)(b).

⁴³ Indonesia, *Military Penal Code* (1947), Article 103.

⁴⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

⁴⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁶ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(10).

⁴⁷ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(10).

⁴⁸ Lithuania, *Criminal Code as amended* (1961), Article 337.

⁴⁹ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(ii).

Likewise, “intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” is also a crime, when committed in an international armed conflict.⁵⁰

53. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence”.⁵¹

54. Nicaragua’s Draft Penal Code punishes anyone who, during an international or internal armed conflict,

launches an indiscriminate attack affecting the civilian population, in the knowledge that such attack will cause incidental loss of civilian life, injury to civilians or damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.⁵²

55. According to Niger’s Penal Code as amended, it is a war crime to launch against persons and objects protected under the 1949 Geneva Conventions or their Additional Protocols of 1977:

an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁵³

56. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.⁵⁴

57. Slovenia’s Penal Code provides that it is a war crime to order or commit “a random attack harming the civilian population” or “a random attack on civil buildings specially protected under international law, or on defenceless or demilitarised areas”.⁵⁵

58. Spain’s Penal Code punishes “anyone who, during an armed conflict, . . . carries out or orders an indiscriminate attack”.⁵⁶

⁵⁰ Netherlands, *International Crimes Act* (2003), Article 5(5)(b).

⁵¹ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

⁵² Nicaragua, *Draft Penal Code* (1999), Article 450(1).

⁵³ Niger, *Penal Code as amended* (1961), Article 208.3(12).

⁵⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁵⁵ Slovenia, *Penal Code* (1994), Article 374(1) and (2).

⁵⁶ Spain, *Penal Code* (1995), Article 611(1).

59. Under Sweden's Penal Code as amended, "initiating an indiscriminate attack knowing that such attack will cause exceptionally heavy losses or damage to civilians or to civilian property" constitutes a crime against international law.⁵⁷

60. Tajikistan's Criminal Code punishes the act of "launching an indiscriminate attack affecting the civilian population or civilian objects" in an international or internal armed conflict.⁵⁸

61. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".⁵⁹

62. The Penal Code as amended of the SFRY (FRY) provides that it is a war crime to order or commit "an indiscriminate attack affecting the civilian population" or "an indiscriminate attack on civilian facilities that are specifically protected under international law, non-defended localities and demilitarised zones".⁶⁰

63. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".⁶¹

National Case-law

64. No practice was found.

Other National Practice

65. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that "the right to self-defence is not unlimited. It is subject to fundamental principles of humanity. Self-defence is not a justification . . . for indiscriminate attacks on the civilian population. Nor is it a justification for the use of nuclear weapons."⁶²

66. The Report on the Practice of Bosnia and Herzegovina provides the following examples of alleged violations of the prohibition of indiscriminate attacks which were denounced by the authorities: indiscriminate artillery shelling of Sarajevo on 16 May 1992;⁶³ the attacks by aircraft of the Yugoslav Army in the Tuzla region, in which many residential facilities were destroyed and several civilians killed or wounded;⁶⁴ the artillery shelling in the centre of Srebrenica,

⁵⁷ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁵⁸ Tajikistan, *Criminal Code* (1998), Article 403(1).

⁵⁹ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

⁶⁰ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1) and (2).

⁶¹ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

⁶² Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, p. 52, § 47.

⁶³ Bosnia and Herzegovina, Ministry of Defence, Letter to the Headquarters of the Yugoslav Army in Belgrade, No. 02/236-1, 17 May 1992, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.4.

⁶⁴ Bosnia and Herzegovina, Ministry of Defence, Letter to the Headquarters of the Yugoslav Army in Belgrade, Number 02/333-232, 1 June 1992, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.4.

which resulted in civilian casualties,⁶⁵ and the attack by a Croatian army helicopter in the centre of Mostar, which resulted in civilian casualties.⁶⁶

67. In 1996, during a debate in the UN Security Council, Botswana stated that it was appalled by the indiscriminate killing of innocent Lebanese civilians and the destruction of their towns and villages.⁶⁷

68. The Report on the Practice of Brazil states that Brazil has ratified the Geneva Conventions and their Additional Protocols and that, under the Brazilian Constitution, treaties become part of domestic law once ratified by the Congress and published in the official journal. Therefore, the rules pertaining to indiscriminate attacks as set forth in these treaties are binding upon Brazil.⁶⁸

69. The Report on the Practice of Chile states that it can be inferred from the *opinio juris* of Chile that the prohibition against indiscriminate attacks is an integral part of customary international law.⁶⁹

70. The Report on the Practice of China states that any attack on a refugee camp will certainly be regarded by the Chinese government as an indiscriminate attack that deserves condemnation.⁷⁰

71. The Report on the Practice of Croatia maintains that it is Croatia's *opinio juris* that the rules pertaining to the prohibition of indiscriminate attacks are part of customary international law.⁷¹

72. In 1977, during a debate in the Sixth Committee of the UN General Assembly, Finland stated that Article 51 AP I, including Article 51(4) prohibiting indiscriminate attacks, contained important and timely principles that should be respected in all circumstances.⁷²

73. At the CDDH, France voted against Article 46 of draft API (now Article 51) because it considered that:

The provisions of paragraphs 4, 5 and 7 were of a type which by their very complexity would seriously hamper the conduct of defensive military operations against an invader and prejudice the exercise of the inherent right of legitimate defence recognized in Article 51 of the Charter of the United Nations.⁷³

74. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence

⁶⁵ Bosnia and Herzegovina, Appeal of the War Presidency of Srebrenica Municipality, No. 180/93, 25 January 1993, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.4.

⁶⁶ Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Information to UNPROFOR, Number 01-1/21-82, 8 February 1994, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.4.T.

⁶⁷ Botswana, Statement before the UN Security Council, UN Doc. S/PV.3653, 15 April 1996, p. 11.

⁶⁸ Report on the Practice of Brazil, 1997, Chapter 1.4.

⁶⁹ Report on the Practice of Chile, 1997, Chapter 1.4.

⁷⁰ Report on the Practice of China, 1997, Chapter 1.4.

⁷¹ Report on the Practice of Croatia, 1997, Chapter 1.4.

⁷² Finland, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/32/SR.17, 13 October 1977, § 19.

⁷³ France, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163, § 118.

or a mandate of the UN Security Council, state that “indiscriminate attacks . . . are prohibited”.⁷⁴

75. In 1996, the Monitoring Group on the Implementation of the 1996 Israel-Lebanon Ceasefire Understanding, consisting of France, Israel, Lebanon, Syria and US, issued communiqués requesting that all parties avoid arbitrary or indiscriminate attacks on inhabited areas, which directly or indirectly endangered civilian life or integrity.⁷⁵

76. In 1993, in response to a question in parliament about the situation in Sudan, the German government stated that “during military operations, instances occur over and over again which violate the international law of war [such as] . . . the indiscriminate bombing of villages”.⁷⁶

77. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that “the very purpose of international humanitarian law is to forbid indiscriminate attacks and demand protection of civilians”.⁷⁷

78. The Report on the Practice of India states that:

When [the armed forces] are called upon to deal with an internal conflict, they are bound to follow the principles regarding distinction between military objects and civilian objects so as to avoid indiscriminate attacks. The armed forces are instructed that when they provide assistance to civil authorities in dealing with internal conflicts, they must avoid indiscriminate use of force . . . The regulations addressed to armed police contain elaborate provisions aimed at avoiding indiscriminate attacks.⁷⁸

79. In 1992, in a letter to the UN Secretary-General, Iran expressed “alarm at the indiscriminate attacks by Iraqi forces against innocent Iraqi civilians” in the southern marshlands of Iraq.⁷⁹

80. In a message sent to the UN Secretary-General in 1984, the President of Iraq stated that “the indiscriminate Iranian bombardment of civilian targets crowded with inhabitants is a major aspect of its ceaseless aggression against Iraq”.⁸⁰

81. The Report on the Practice of Iraq states that Iraq “inclines towards intensifying the refusal of [indiscriminate] attacks in order to avoid harming civilians”, regardless of whether “such attacks . . . might serve a military purpose”. The report interprets this as meaning “the banning of any kind of attacks directed on the civilians”, regardless of the nature of the intended military target.⁸¹

⁷⁴ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 66.

⁷⁵ Monitoring Group on the Implementation of the 1996 Israel-Lebanon Ceasefire Understanding, Communiqué, 22 September 1996; Communiqué, 14–18 October 1996.

⁷⁶ Germany, Reply by the government to a question in the Lower House of Parliament, Menschenrechtslage im Sudan, *BT-Drucksache* 12/6513, 28 December 1993, p. 3.

⁷⁷ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

⁷⁸ Report on the Practice of India, 1997, Chapter 1.4.

⁷⁹ Iran, Letter dated 10 August 1992 to the UN Secretary-General, UN Doc. S/24414, 11 August 1992.

⁸⁰ Iraq, Message from the President of Iraq, annexed to Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16610, 19 June 1984, p. 2.

⁸¹ Report on the Practice of Iraq, 1998, Chapter 1.4.

The report also cites the text of a military communiqué issued by the General Command of the Iraqi armed forces during the Iran–Iraq War stating that “the enemy has reached a maximum degree of nervousness and loss of balance that lead it to commit repeated infringements and random bombardment without any distinction”.⁸²

82. The Report on the Practice of Jordan states that there have been no reports of indiscriminate attacks conducted by the armed forces of Jordan.⁸³

83. In 1992, in a letter to the President of the UN Security Council, Malaysia relayed its deep concern over the deterioration of the situation in Bosnia and Herzegovina and in particular the continuous indiscriminate bombardments of civilian populated areas.⁸⁴

84. The Report on the Practice of Malaysia refers to the general prohibition of indiscriminate attacks.⁸⁵ It also notes that during the communist insurgency, the security forces were prohibited from launching indiscriminate attacks against civilians.⁸⁶

85. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico invoked “the principle by which the civilian population enjoys general protection and the prohibition to carry out indiscriminate attacks”.⁸⁷

86. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated, with reference to customary international law, that “it is prohibited to use indiscriminate methods and means of warfare which do not distinguish between combatants and civilians and other non-combatants”.⁸⁸

87. According to the Report on the Practice of Nigeria, it is Nigeria’s *opinio juris* that the prohibition of indiscriminate attacks is part of customary international law.⁸⁹

88. According to the Report on the Practice of Pakistan, it is Pakistan’s *opinio juris* that indiscriminate attacks against civilians are prohibited.⁹⁰

89. At the CDDH, Poland stated that Article 46 of draft AP I (now Article 51) “had a special function since it contained the most important provisions of the Protocol, such as the prohibition of indiscriminate attacks that made no distinction between military personnel and civilians”.⁹¹

⁸² Iraq, Military Communiqué No. 23, 25 September 1980, Report on the Practice of Iraq, 1998, Chapter 1.4.

⁸³ Report on the Practice of Jordan, 1997, Chapter 1.4.

⁸⁴ Malaysia, Letter dated 10 August 1992 to the President of the UN Security Council, UN Doc. S/24400, 10 August 1992.

⁸⁵ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.4.

⁸⁶ Report on the Practice of Malaysia, 1997, Chapter 1.4.

⁸⁷ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 77(d).

⁸⁸ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 71.

⁸⁹ Report on the Practice of Nigeria, 1997, Chapter 1.4.

⁹⁰ Report on the Practice of Pakistan, 1998, Chapter 1.4.

⁹¹ Poland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 166, § 129.

90. The Report on the Practice of Rwanda states that indiscriminate attacks are prohibited according to the practice and the *opinio juris* of Rwanda and considers that this prohibition is a norm of customary international law binding on all States.⁹²

91. In 1992, in a note verbale addressed to the UN Secretary-General, Slovenia expressed its readiness to provide information concerning violations of IHL committed by members of the Yugoslav army during the 10-day conflict with Slovenia, including the “indiscriminate use of weapons”.⁹³

92. In its five-volume report on “gross violations of human rights” committed between 1960 and 1993, the South African Truth and Reconciliation Commission noted that the killing of more than 600 people in a 1978 attack by the SADF on the SWAPO base/refugee camp at Kassinga in Angola constituted a breach of IHL. It stated that:

There is little evidence that the SADF took sufficient precautions to spare those civilians whom they knew were resident at Kassinga in large numbers. The fact that the operational orders for *Reindeer* included the instruction that “women and children must, where possible, not be shot” is evidence of the SADF’s prior knowledge of the presence of civilians. However, this apparent intention to spare their lives was rendered meaningless by the SADF’s decision to use fragmentation bombs in the initial air assault as such weapons kill and maim indiscriminately. Their use, therefore, in the face of knowledge of the presence of civilians, amounts to an indiscriminate and illegitimate use of force and a violation of Protocol I to the Geneva Conventions of 1949. The foreseeable killing of civilians at Kassinga was therefore a breach of humanitarian law.⁹⁴

93. At the CDDH, Sweden stated that “Article 46 [now Article 51 AP I] might be considered as one of fundamental value for the whole Protocol. This article was elaborated during long negotiations in 1975 and was adopted in the same year by consensus in Committee III.”⁹⁵

94. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria asserts that Syria considers Article 51(4) AP I to be part of customary international law.⁹⁶

95. On 21 January 1991, in the context of the Gulf War, the UK Minister of Foreign Affairs summoned the Iraqi Ambassador to discuss Iraq’s obligations under international law. According to a statement by an FCO spokesperson after the meeting, the Minister had “expressed concern at the indiscriminate targeting of civilian sites by Iraqi SCUD missiles”.⁹⁷

⁹² Report on the Practice of Rwanda, 1997, Chapter 1.4.

⁹³ Slovenia, Note verbale dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24789, 9 November 1992, p. 2.

⁹⁴ South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 2, pp. 52–55, §§ 44–45.

⁹⁵ Sweden, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 198.

⁹⁶ Report on the Practice of Syria, 1997, Chapter 1.4, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

⁹⁷ UK, Statement by FCO spokesperson, 21 January 1991, *BYIL*, Vol. 62, 1991, p. 680.

96. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK accused Iraq of having had “no compunction about launching indiscriminate missile attacks directed at civilians”.⁹⁸

97. In 1991, during a debate in the UN Security Council concerning the Gulf War, the UK reiterated its condemnation of the indiscriminate firing of missiles at civilian population centres.⁹⁹

98. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that “Iraqi war crimes...included... indiscriminate attacks in the launching of Scud missiles against cities rather than specific military objectives, in violation of customary international law”.¹⁰⁰

99. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the US stated that “it is unlawful to conduct any indiscriminate attack”.¹⁰¹

100. On the basis of two accounts of events during the conflict in Croatia, the Report on the Practice of the SFRY (FRY) states that:

There are many examples... of indiscriminate attacks of individual and collective character which both parties to the armed conflict in Croatia in 1991 and 1992 were pointing at. The mixed nature of this conflict, being both internal and international, contributed to this as well. Both parties referred to these incidents as violations of international humanitarian law. The fact that the parties did not question this norm [prohibiting indiscriminate attacks] when speaking about the behavior of the opposite side is a clear indication of their *opinio juris* and a confirmation that such attacks were considered prohibited.¹⁰²

101. The Report on the Practice of Zimbabwe considers that the question of indiscriminate attacks is problematic since much depends on the objective in question, on necessity and on the military advantage to be gained. According to the report, the principle of proportionality, however, remains applicable.¹⁰³

III. Practice of International Organisations and Conferences

United Nations

102. In a resolution on Kosovo adopted in 1998, the UN Security Council expressed its grave concern at “the excessive and indiscriminate use of force by

⁹⁸ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, pp. 1–2.

⁹⁹ UK, Statement before the UN Security Council, UN Doc. S/PV.2977, 14 February 1991, § 72.

¹⁰⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, pp. 632–633.

¹⁰¹ US, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 27.

¹⁰² Report on the Practice of the SFRY (FRY), 1997, Chapter 1.4, referring to Vesna Bosanac, The Tragedy of the Civilian Population of the Commune of Vukovar during 1991 – a Testimony, in Zvonimir Šeparović (ed.), *Documenta Croatica, Croatian History and Identity and the War against Croatia*, p. 114, and Miodrag Starcevic and Nikola Petkovic (eds.), *Croatia '91 – Violence and Crime against the Law*, pp. 67–69.

¹⁰³ Report on the Practice of Zimbabwe, 1998, Chapter 1.4.

Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties".¹⁰⁴

103. In 1994, in a statement by its President, the UN Security Council strongly condemned "the indiscriminate shelling by the Bosnian Serb party of the civilian population of Maglaj, which has resulted in heavy casualties, loss of life and material destruction".¹⁰⁵

104. In a resolution adopted in 1938 concerning the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations stated that "any attack on legitimate military objectives must be carried out in such a way that civilian populations in the neighbourhood are not bombed through negligence".¹⁰⁶

105. In a resolution adopted in 1971 on territories under Portuguese administration, the UN General Assembly condemned the indiscriminate bombing of civilians.¹⁰⁷

106. In a resolution on Afghanistan adopted in 1985, the UN General Assembly expressed its deep concern "at the severe consequences for the civilian population of indiscriminate bombardments and military operations aimed primarily at the villages and the agricultural structure".¹⁰⁸

107. In resolutions on the situation of human rights in the former Yugoslavia adopted in 1993 and 1994, the UN General Assembly condemned "the indiscriminate shelling" of cities and civilian areas.¹⁰⁹ In a further resolution on the same subject adopted in 1995, the General Assembly condemned "the indiscriminate shelling of civilians" in certain safe areas.¹¹⁰

108. In a resolution adopted in 1996 on the situation of human rights in Sudan, the UN General Assembly expressed concern about "continuing deliberate and indiscriminate aerial bombardments by the Government of the Sudan of civilian targets in southern Sudan, in clear violation of international humanitarian law" and urged the government "to cease immediately all . . . attacks that are in violation of international humanitarian law".¹¹¹

109. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly strongly condemned "indiscriminate and widespread attacks on civilians".¹¹²

110. In a resolution adopted in 2000 on the situation of human rights in Sudan, the UN General Assembly expressed its deep concern at continuing serious

¹⁰⁴ UN Security Council, Res. 1199, 23 September 1998, preamble.

¹⁰⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 1.

¹⁰⁶ League of Nations, Assembly, Resolution adopted on 30 September 1938, § I(3), *Official Journal*, Special Supplement No. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15–17.

¹⁰⁷ UN General Assembly, Res. 2795 (XXVI), 10 December 1971, § 4.

¹⁰⁸ UN General Assembly, Res. 40/137, 13 December 1985, § 4.

¹⁰⁹ UN General Assembly, Res. 48/153, 20 December 1993, § 6; Res. 49/196, 23 December 1994, § 7.

¹¹⁰ UN General Assembly, Res. 50/193, 22 December 1995, § 5.

¹¹¹ UN General Assembly, Res. 51/112, 12 December 1996, preamble and § 8.

¹¹² UN General Assembly, Res. 53/164, 9 December 1998, § 8.

violations of IHL by all parties, in particular “the indiscriminate aerial bombardments seriously and recurrently affecting civilian populations and installations, particularly bombings of schools and hospitals”.¹¹³

111. In a resolution on Afghanistan adopted in 1987, the UN Commission on Human Rights expressed its grave concern over the methods of warfare employed contrary to IHL and in particular the severe consequences caused to civilians by indiscriminate bombardments.¹¹⁴ In a further resolution in 1995 in the same context, the Commission noted with deep concern that the civilian population was still the target of indiscriminate military attacks.¹¹⁵

112. In two resolutions on the human rights situation in the former Yugoslavia adopted in 1992 and 1993, the UN Commission on Human Rights condemned “the indiscriminate shelling of cities and civilian areas”.¹¹⁶

113. In a resolution adopted in 1994 on the human rights situation in Bosnia and Herzegovina, the UN Commission on Human Rights strongly condemned “the indiscriminate shelling of civilian populations, particularly in Sarajevo, and in the other declared safe areas of Tuzla, Bihac, Goražde, Srebrenica and Žepa, as well as Mostar and other endangered areas in central Bosnia and elsewhere”.¹¹⁷ In another resolution on the former Yugoslavia in 1995, the Commission condemned “the indiscriminate shelling and besieging of cities and civilian areas”.¹¹⁸

114. In a resolution adopted in 1995 on the situation of human rights in Sudan, the UN Commission on Human Rights expressed its deep concern “about continued reports of indiscriminate bombing of civilian targets, including camps for displaced persons, in southern Sudan” and called upon the government of Sudan “to cease immediately the deliberate and indiscriminate aerial bombardment of civilian targets”.¹¹⁹ The latter demand was reiterated in subsequent resolutions in 1996, 1997 and 1998.¹²⁰

115. In a resolution adopted in 1998 on the situation of human rights in Burundi, the UN Commission on Human Rights urged “all parties to the conflict to end the cycle of violence and killing, notably the indiscriminate violence against the civilian population”.¹²¹

116. In a resolution on Chechnya adopted in 2000, the UN Commission on Human Rights expressed its grave concern about “reports indicating disproportionate and indiscriminate use of Russian military force” and called upon all

¹¹³ UN General Assembly, Res. 55/116, 4 December 2000, § 2(a)(iv).

¹¹⁴ UN Commission on Human Rights, Res. 1987/58, 11 March 1987, §§ 3–4.

¹¹⁵ UN Commission on Human Rights, Res. 1995/74, 8 March 1995, preamble.

¹¹⁶ UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 7; Res. 1993/7, 23 February 1993, § 12.

¹¹⁷ UN Commission on Human Rights, Res. 1994/75, 9 March 1994, § 1.

¹¹⁸ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 5.

¹¹⁹ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, preamble and § 16.

¹²⁰ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 12; Res. 1997/59, 15 April 1997, § 15; Res. 1998/67, 21 April 1998, § 15.

¹²¹ UN Commission on Human Rights, Res. 1998/82, 24 April 1998, § 7.

parties to the conflict “to take immediate steps to halt . . . the indiscriminate use of force”.¹²²

117. In January 1990, in a report on UNIFIL in Lebanon, the UN Secretary-General stated that “indiscriminate fire from DFF positions has on several occasions resulted in fatal injuries to civilians in the UNIFIL area of operation”.¹²³

118. In July 1990, in a report on UNIFIL in Lebanon, the UN Secretary-General stated that “indiscriminate fire has also been directed at villages from IDF/DFF positions when the latter have come under attack from armed elements”.¹²⁴ This statement was repeated in January 1991.¹²⁵

119. In January 1992, in a report on UNIFIL in Lebanon, the UN Secretary-General stated that “IDF/DFF increasingly reacted to attacks by firing indiscriminately into nearby villages, especially after sustaining casualties”.¹²⁶

120. In 1997, in a report on the situation in Somalia, the UN Secretary-General commented on disturbing violations of human rights and IHL, citing as an example the indiscriminate use of force against and the killing of civilians in Mogadishu.¹²⁷

121. In 1998, in a report on MONUA in Angola, the UN Secretary-General stated that:

Over the past few months, indiscriminate as well as summary killings . . . have been reported in the course of attacks targeting entire villages . . . At such times, principles of humanitarian law are especially important as they seek to protect the most vulnerable groups – those who are not involved in military operations – from direct or indiscriminate attack or being forced to flee.¹²⁸

122. In 1994, in a report on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that “although a number of Bosnian Serb attacks on Sarajevo occur in response to firing by forces of the army of Bosnia and Herzegovina from positions situated close to highly sensitive civilian locations, most attacks would appear to be indiscriminate”.¹²⁹

123. In its 1993 report, the UN Commission on the Truth for El Salvador noted that the violence in rural areas in 1980 and 1981 was extremely indiscriminate. It stated that the violence was slightly more discriminate in urban areas and

¹²² UN Commission on Human Rights, Res. 2000/58, 25 April 2000, preamble and § 2.

¹²³ UN Secretary-General, Report on UNIFIL, UN Doc. S/21102, 25 January 1990, § 15.

¹²⁴ UN Secretary-General, Report on UNIFIL, UN Doc. S/21406, 24 July 1990, § 15.

¹²⁵ UN Secretary-General, Report on UNIFIL, UN Doc. S/22129, 23 January 1991, § 16.

¹²⁶ UN Secretary-General, Report on UNIFIL, UN Doc. S/23452, 21 January 1992, § 19.

¹²⁷ UN Secretary-General, Report on the situation in Somalia, UN Doc. S/1997/135, 17 February 1997, § 32.

¹²⁸ UN Secretary-General, Report on MONUA, UN Doc. S/1998/931, 8 October 1998, § 17.

¹²⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Sixth periodic report, UN Doc. E/CN.4/1994/110, 21 February 1994, §§ 59–61.

also in rural zones after 1983.¹³⁰ Describing incidents which took place in El Junquillo canton, where soldiers and members of the civil defence unit attacked a population composed exclusively of women, young children and old people, the Commission found the attack to be indiscriminate.¹³¹

124. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated, with respect to its investigation into the attack on Dubrovnik, that:

There is evidence that the Dubrovnik authorities, (aided by UNESCO observers), appear to have been scrupulous about keeping weapons out of the Old Town, that the besieging forces could see virtually everything that was going on in the Old Town, and that the Old Town was clearly subject to indiscriminate, and possibly even deliberate, targeting. Therefore, this conclusion will also be the subject of a recommendation for further investigation with a view to prosecution.¹³²

Other International Organisations

125. In a declaration adopted in March 1992, the Committee of Ministers of the Council of Europe expressed its deep concern over reports of "indiscriminate killings and outrages" committed during the conflict in Nagorno-Karabakh.¹³³

126. In a declaration on Bosnia and Herzegovina adopted in February 1994, the Committee of Ministers of the Council of Europe demanded the immediate cessation of the indiscriminate shelling of Sarajevo, which had been declared a safe area by the UN Security Council.¹³⁴

127. In 1995, in a resolution concerning Russia's request for membership in the light of the situation in Chechnya, the Parliamentary Assembly of the Council of Europe unreservedly condemned "the indiscriminate and disproportionate use of force by the Russian military, in particular against the civilian population".¹³⁵

128. In a declaration adopted in 1991 on the situation in Yugoslavia, the EC Ministers of Foreign Affairs expressed alarm at "reports that the Yugoslav National Army (JNA), having resorted to a disproportionate and indiscriminate use of force, has shown itself to be no longer a neutral and disciplined institution".¹³⁶

¹³⁰ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 44.

¹³¹ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 67.

¹³² UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex XI.A, UN Doc. S/1994/674/Add.2 (Vol. V), 28 December 1994, § 76.

¹³³ Council of Europe, Committee of Ministers, Declaration on Nagorno-Karabakh, 11 March 1992, § 1.

¹³⁴ Council of Europe, Committee of Ministers, Declaration on Bosnia and Herzegovina, 14 February 1994, § 3.

¹³⁵ Council of Europe, Parliamentary Assembly, Res. 1055, 2 February 1995, § 2.

¹³⁶ EC, Declaration on Yugoslavia, Haarzuilens, 6 October 1991, annexed to Letter dated 7 October 1991 from the Netherlands to the UN Secretary-General, UN Doc. A/46/533, 7 October 1991.

129. In July 1992, following the bombardments of the city of Goražde and other cities in Bosnia and Herzegovina by Serb forces, the EC issued a statement to the effect that “these brutal and indiscriminate attacks upon defenceless civilians are wholly contrary to the basic humanitarian precepts of international law”.¹³⁷ In another declaration on Yugoslavia dated 21 July 1992, the EC denounced attacks on unarmed civilians in similar terms.¹³⁸

130. In 1998, the EU Council of Ministers issued a regulation stating that “the Government of the Federal Republic of Yugoslavia has not stopped the use of indiscriminate violence and brutal repression against its own citizens, which constitute serious violations of human rights and international humanitarian law”.¹³⁹

131. In 2000, the conclusions of the Presidency of the European Council reaffirmed the need for Russia, in regard to Chechnya, to abide by its commitments, in particular to put an end to the indiscriminate use of military force.¹⁴⁰

International Conferences

132. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the protection of the civilian population against the dangers of indiscriminate warfare, in which it stated that “indiscriminate warfare constitutes a danger to the civilian population and the future of civilization”. The resolution urged the ICRC to pursue the development of IHL “with particular reference to the need for protecting the civilian population against the sufferings caused by indiscriminate warfare”.¹⁴¹

133. The 25th International Conference of the Red Cross in 1986 adopted a resolution in which it deplored “the indiscriminate attacks inflicted on civilian populations . . . in violation of the laws and customs of war”.¹⁴²

IV. Practice of International Judicial and Quasi-judicial Bodies

134. In its decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadić case* in 1995, the ICTY Appeals Chamber held that rules of customary international law have developed that regulate non-international armed conflict. To reach this conclusion the Tribunal referred to various sources including, *inter alia*, the behaviour of belligerent States, governments and insurgents, the action of the ICRC, UN General Assembly Resolutions 2444 (XXIII)

¹³⁷ EC, Statement on the bombardment of Goražde, annexed to Letter dated 15 July 1992 from Belgium, France and UK to the President of the UN Security Council, UN Doc. S/24299, 16 July 1992.

¹³⁸ EC, Declaration on Yugoslavia, annexed to Letter dated 21 July 1992 from Belgium, France and UK to the President of the UN Security Council, UN Doc. S/24328, 21 July 1992.

¹³⁹ EU, Council of Ministers, Council Regulation EC No. 1901/98, 7 September 1998.

¹⁴⁰ European Council, SN 100/00, Presidency Conclusions, Lisbon, 23–24 March 2000, p. 16, § 56.

¹⁴¹ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

¹⁴² 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, preamble.

of 1968 and 2675 (XXV) of 1970, military manuals and declarations issued by regional organisations. The Appeals Chamber stated that these rules covered areas such as the protection of civilians against the effects of hostilities, in particular protection against indiscriminate attacks.¹⁴³

135. In its review of the indictments in the *Karadžić and Mladić case* in 1996, the ICTY Trial Chamber stated that “throughout the conflict, the strategy of Bosnian Serb forces consisted in indiscriminately targeting civilians. Such was the case during the entire siege of Sarajevo, and at times in the safe areas of Srebrenica, Žepa, Goražde, Bihac and Tuzla.”¹⁴⁴

136. In an interlocutory decision in the *Kordić and Čerkez case* in 1999, the ICTY Trial Chamber held that it was “indisputable” that the prohibition of indiscriminate attacks was a generally accepted obligation.¹⁴⁵

137. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that “attacks, even when they are directed against legitimate military targets, are unlawful if conducted using indiscriminate means or methods of warfare, or in such a way as to cause indiscriminate damage to civilians”.¹⁴⁶

V. Practice of the International Red Cross and Red Crescent Movement

138. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the attack may only be directed at a specific military objective. The military objective must be identified as such and clearly designated and assigned. The attack shall be limited to the assigned military objective.”¹⁴⁷ They teach, furthermore, that an “indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive civilian casualties and damage” constitutes a grave breach of the law of war.¹⁴⁸

139. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(3) of draft AP I, which stated that “the employment of . . . any methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, are prohibited”. All governments concerned replied favourably.¹⁴⁹

¹⁴³ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, §§ 100–127.

¹⁴⁴ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, § 18.

¹⁴⁵ ICTY, *Kordić and Čerkez case*, Decision on the Joint Defence Motion, 2 March 1999, § 31.

¹⁴⁶ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

¹⁴⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 428.

¹⁴⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 778(c).

¹⁴⁹ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

140. In a press release issued in 1978 concerning the conflict in Lebanon, the ICRC urgently appealed to the belligerents “to cease forthwith the indiscriminate shelling of the civilian population”.¹⁵⁰

141. In an appeal issued in 1983 concerning the Iran–Iraq War, the ICRC pointed to grave violations of IHL committed by both countries, including “indiscriminate bombardment of towns and villages”.¹⁵¹

142. In a press release issued in 1983 concerning the conflict in Lebanon, the ICRC stated that:

In the camps of *Nahr el Bared* and *Bedaoui*, and in certain sectors of the city of Tripoli, civilians are at the mercy of indiscriminate shelling... The ICRC insists that the presence of armed elements among the civilian population does not justify the indiscriminate shelling of women, children and old people.¹⁵²

143. At its Rio de Janeiro Session in 1987, the Council of Delegates adopted a resolution on the formal commitment by the Movement to obtain the full implementation of the Geneva Conventions in which it requested the ICRC “to take all necessary steps to enable it to protect and assist civilian victims of indiscriminate attacks”.¹⁵³

144. In a press release issued in 1988 with respect to the Iran–Iraq War, the ICRC recalled that it had already denounced the indiscriminate bombing of civilians on several occasions and stated that it had again approached the two belligerents in order to insist that “all necessary measures be taken to ensure that civilians are no longer subjected to indiscriminate attack”.¹⁵⁴

145. In a communication to the press issued in 1989 in the context of the conflict in Lebanon, the ICRC stated that:

The ICRC once again earnestly appeals to the parties concerned to end immediately the indiscriminate shelling of civilians and civilian property, which is an unacceptable violation of the most elementary humanitarian rules, and urges them to do everything in their power to ensure that these rules are henceforth duly respected.¹⁵⁵

146. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict:... It is forbidden... to launch indiscriminate attacks.”¹⁵⁶

¹⁵⁰ ICRC, Press Release No. 1341, Lebanon: ICRC appeals for truce, 2 October 1978.

¹⁵¹ ICRC, Conflict between Iraq and Iran: ICRC Appeal, *IRRC*, No. 235, 1983, p. 221.

¹⁵² ICRC, Press Release No. 1474, Fighting in Tripoli: appeal from the ICRC, 4 November 1983.

¹⁵³ International Red Cross and Red Crescent Movement, Council of Delegates, Rio de Janeiro, 27 November 1987, Res. 5, § 2.

¹⁵⁴ ICRC, Press Release No. 1563, Iran/Iraq conflict: civilian population affected by bombing, 10 March 1988.

¹⁵⁵ ICRC, Communication to the Press No. 89/8, ICRC appeal against shelling in Lebanon, 28 July 1989.

¹⁵⁶ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 24.

147. On several occasions in 1992, the ICRC called on the parties to the conflict in Afghanistan not to launch indiscriminate attacks.¹⁵⁷

148. In 1992, the ICRC considered the shelling of a city indiscriminate because it was without pattern and there was no indication of any attempt to spare the civilian population.¹⁵⁸

149. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “not to launch indiscriminate attacks”.¹⁵⁹

150. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation “to refrain from indiscriminate attacks”.¹⁶⁰

151. In a press release issued in 1994 in the context of the conflict in Yemen, the ICRC stated that indiscriminate attacks were prohibited.¹⁶¹

152. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “all attacks directed indiscriminately at military and civilian objectives . . . are prohibited”.¹⁶²

153. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “attacks which indiscriminately strike military and civilian objectives . . . are prohibited”.¹⁶³

154. In a press release issued in 1995, the ICRC called upon all the parties involved in Turkey’s military operations in northern Iraq “to refrain from launching any indiscriminate attack that may endanger the civilian population”.¹⁶⁴

155. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following war crime, when committed in an international armed conflict, be subject to the jurisdiction of the Court:

¹⁵⁷ ICRC, Press Release No. 1712, Afghanistan: ICRC Appeal for Compliance with Humanitarian Rules, 5 May 1992; Press Release No. 1724, Kabul: ICRC urges respect for civilians as medical facilities struggle to cope, 20 July 1992; Press Release No. 1726, Afghanistan: New ICRC Appeal for Compliance with Humanitarian Rules, 14 August 1992.

¹⁵⁸ ICRC archive document.

¹⁵⁹ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹⁶⁰ ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

¹⁶¹ ICRC, Press Release No. 1773, Fighting in Yemen, 9 May 1994; see also Press Release No. 1775, Yemen: ICRC active on both sides appeals to belligerents, 12 May 1994.

¹⁶² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

¹⁶³ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹⁶⁴ ICRC, Press Release No. 1797, ICRC calls for compliance with international humanitarian law in Turkey and Northern Iraq, 22 March 1995.

launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated.¹⁶⁵

156. In a communication to the press in 2000, the ICRC reminded all those involved in the violence in the Near East that indiscriminate attacks were “absolutely and unconditionally prohibited”.¹⁶⁶

157. In a communication to the press in 2001 in connection with the conflict in Afghanistan, the ICRC stated that indiscriminate attacks were prohibited.¹⁶⁷

VI. Other Practice

158. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that:

The deletion of the prohibition against indiscriminate attacks in the simplified Protocol II suggests that para. 2 [of Article 13] be examined carefully to determine whether it covers any type of indiscriminate attacks covered by paras. 4 and 5 of Art. 51 of Protocol I. It is certainly arguable that attacks against densely populated places which are not directed at military objectives, those which cannot be so directed, and the area bombardments prohibited by para. 5(a) of Art. 51 are inferentially included within the prohibition against making the civilian population the object of attack. Their deletion may be said to be part of the simplification of the text.¹⁶⁸

159. Oppenheim states that “International Law protects non-combatants from indiscriminate bombardment from the air; recourse to such bombardment constitutes a war crime”.¹⁶⁹

160. Rule A1 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that “the obligation to distinguish between combatants and civilians is a general rule applicable in non-international armed conflicts. It prohibits indiscriminate attacks.”¹⁷⁰

161. The Report on the Practice of Rwanda notes that in April 1994, during the conflict in Rwanda, the FPR confirmed that future attacks against military

¹⁶⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(ii).

¹⁶⁶ ICRC, Communication to the Press No. 00/42, ICRC Appeal to All Involved in Violence in the Near East, 21 November 2000.

¹⁶⁷ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to the conflict to respect international humanitarian law, 24 October 2001.

¹⁶⁸ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 677.

¹⁶⁹ Lassa Oppenheim, *International Law. A Treatise*, Vol. II, Disputes, War and Neutrality, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 416, § 214*ea*.

¹⁷⁰ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A1, *IRRC*, No. 278, 1990, p. 387.

positions in Kigali where the civilian population was being used as a human shield would be avoided. According to the report, the reason invoked was that FPR soldiers did not want to strike at military objectives and at civilians without distinction.¹⁷¹

162. In 1994, in the context of the conflict in Yemen, Human Rights Watch urged the government of Yemen “to pay closest attention to the requirements of the rules of war, in particular to the prohibition on indiscriminate attacks in areas of civilian concentration . . . We note that the rules of war apply equally to government and rebel troops.”¹⁷²

163. A report by the Memorial Human Rights Center documenting Russia’s operation in the Chechen village of Samashki in April 1995 alleged that Russian forces had attacked the village indiscriminately. The report stated that ICRC representatives had

evaluated the general number of deaths in the village and the large proportion of civilians among them. The ICRC gave a series of interviews on the topic in which they protested violations of common laws of warfare by MVD soldiers, i.e. “indiscriminate attacks” during military operations.¹⁷³

B. Definition of Indiscriminate Attacks

Note: *For practice concerning attacks in violation of the principle of proportionality, see Chapter 4.*

Attacks which are not directed at a specific military objective

I. Treaties and Other Instruments

Treaties

164. According to Article 51(4)(a) AP I, attacks “which are not directed at a specific military objective” and consequently “are of a nature to strike military objectives and civilians or civilian objects without distinction” are indiscriminate. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.¹⁷⁴

165. Article 3(3)(a) of the 1980 Protocol II to the CCW defines the indiscriminate use of mines, booby-traps and other devices as any placement of such weapons “which is not on, or directed at, a military objective”.

¹⁷¹ Report on the Practice of Rwanda, 1997, Chapter 1.4, referring to Statement of the FPR, *Ingabo*, No. 027, Kanama, 1997, pp. 17–18.

¹⁷² Human Rights Watch, Letter to the Government of Yemen, New York, 19 May 1994.

¹⁷³ Memorial Human Rights Center, *By All Available Means: the Russian Federation Ministry of Internal Affairs Operation in the Village of Samashki: April 7–8, 1995*, Moscow, 1996, § 9.3, reprinted in Marco Sassoli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1415.

¹⁷⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

166. Article 3(8)(a) of the 1996 Amended Protocol II to the CCW defines the indiscriminate use of mines, booby-traps and other devices as any placement of such weapons “which is not on, or directed against, a military objective”.

Other Instruments

167. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(4)(a) AP I.

168. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(4)(a) AP I.

169. Paragraph 42(b)(i) of the 1994 San Remo Manual states that “it is forbidden to employ methods or means of warfare which are indiscriminate in that they are not . . . directed against a specific military objective”.

II. National Practice

Military Manuals

170. Military manuals of Australia, Belgium, Canada, Germany, Netherlands, New Zealand, Spain and Sweden consider attacks which are not directed at a specific military objective to be indiscriminate.¹⁷⁵

171. Benin’s Military Manual defines indiscriminate attacks as “attacks which are not directed at military objectives and which will probably strike at military objectives and civilian objects without distinction”.¹⁷⁶

172. Ecuador’s Naval Manual states that “any weapon may serve an unlawful purpose when it is directed against noncombatants and other protected persons and objects”.¹⁷⁷

173. Israel’s Manual on the Laws of War states that “in any attack it is imperative to verify that the attack will be directed against a specific military target”.¹⁷⁸

174. Kenya’s LOAC Manual defines indiscriminate attacks as “attacks which are not directed at a specific military objective and which are likely to strike at military objectives and civilian objects without distinction”.¹⁷⁹

175. The Report on the Practice of Nigeria states that “Nigeria’s notion of indiscriminate attacks are those attacks or firepower directed against non-military

¹⁷⁵ Australia, *Defence Force Manual* (1994), § 502(b)(1); Australia, *Commanders’ Guide* (1994), § 956(a); Belgium, *Law of War Manual* (1983), p. 27; Canada, *LOAC Manual* (1999), p. 4-3, § 22(a); Germany, *Military Manual* (1992), § 455; Netherlands, *Military Manual* (1993), p. V-4; New Zealand, *Military Manual* (1992), § 517; Spain, *LOAC Manual* (1996), Vol. I, § 4.4.c; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 45.

¹⁷⁶ Benin, *Military Manual* (1995), Fascicule III, p. 13.

¹⁷⁷ Ecuador, *Naval Manual* (1989), § 9.1.

¹⁷⁸ Israel, *Manual on the Laws of War* (1998), p. 37.

¹⁷⁹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 3.

objectives as found in paragraphs (f) and (g) of the [Operational Code of Conduct]".¹⁸⁰

176. South Africa's Medical Services Military Manual states that "indiscriminate attacks . . . do not take into consideration the basic distinction of protection between military and civilian objectives".¹⁸¹

177. Togo's Military Manual defines indiscriminate attacks as "attacks which are not directed at military objectives and which will probably strike at military objectives and civilian objects without distinction".¹⁸²

178. The UK LOAC Manual defines indiscriminate attacks as "attacks which are not directed at a military objective and which are likely to strike at military objectives and civilian objects without distinction".¹⁸³

179. The US Air Force Pamphlet states that:

The extent to which a weapon discriminates between military objectives and protected persons and objects depends usually on the manner in which the weapon is employed rather than on the design qualities of the weapon itself. Where a weapon is designed so that it can be used against military objectives, its employment in a different manner, such as against the civilian population, does not make the weapon itself unlawful.¹⁸⁴

180. The US Naval Handbook states that "any weapon may be set to an unlawful purpose when it is directed against noncombatants and other protected persons and objects".¹⁸⁵

National Legislation

181. Under the Draft Amendments to the Penal Code of El Salvador, indiscriminate attacks are defined as including attacks "which are not directed against a specific military objective".¹⁸⁶

182. Nicaragua's Draft Penal Code defines indiscriminate attacks as including attacks "which are not directed against a specific military objective".¹⁸⁷

National Case-law

183. No practice was found.

Other National Practice

184. The Report on the Practice of Colombia notes that the government describes direct attacks on civilians as indiscriminate attacks. Reports describing

¹⁸⁰ Report on the Practice of Nigeria, 1997, Chapter 1.4, referring to *Operational Code of Conduct* (1968), §§ f–g.

¹⁸¹ South Africa, *Medical Services Military Manual* (undated), § 40.

¹⁸² Togo, *Military Manual* (1996), Fascicule III, p. 13.

¹⁸³ UK, *LOAC Manual* (1981), Section 4, p. 15, § 5(j).

¹⁸⁴ US, *Air Force Pamphlet* (1976), § 6-3(c). ¹⁸⁵ US, *Naval Handbook* (1995), § 9.1.

¹⁸⁶ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque indiscriminado a personas protegidas".

¹⁸⁷ Nicaragua, *Draft Penal Code* (1999), Article 450(2).

the aerial shelling of houses in a conflict zone and bombardments that directly and exclusively affect the civilian population forcing it to move are provided as examples of indiscriminate attacks.¹⁸⁸

185. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that indiscriminate attacks are generally defined as including “those that are not directed at any single military objective”.¹⁸⁹

186. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled “International Law Providing Protection to the Environment in Times of Armed Conflict”. The memorandum stated that:

It is a war crime to employ acts of violence not directed at specific military objectives, to employ a method or means of combat which cannot be directed at a specific military objective, or to employ a means or method of combat the effects of which cannot be limited as required by the law of armed conflict.¹⁹⁰

187. The Report on the Practice of Jordan cites as an example of indiscriminate attacks those which are not directed at a specific military objective.¹⁹¹

188. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico stated that “in accordance with international humanitarian law, indiscriminate attacks are those that can reach both military targets and civilians”.¹⁹²

189. The Report on the Practice of Nigeria states that it is the *opinio juris* of Nigeria that “the prohibition of direct attacks on civilians and the adherence to the notion of abolition of indiscriminate attacks are part of customary international law”.¹⁹³

190. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda defines indiscriminate attacks as those which are carried out without making a distinction between military and civilian objectives. As examples of indiscriminate attacks, the report cites attacks on enemy positions located in an area inhabited by civilians and the shooting into a crowd because an enemy is hidden somewhere in the middle of it.¹⁹⁴

¹⁸⁸ Report on the Practice of Colombia, 1998, Chapter 1.4, referring to Defensoría del Pueblo, *Informe de Comisión Municipio de Miraflores*, Queja 9500280, pp. 7 and 15 and Defensoría del Pueblo, *Cuarto informe anual del defensor del pueblo al congreso de Colombia*, Santafé de Bogotá, September 1997, p. 43.

¹⁸⁹ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

¹⁹⁰ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(g).

¹⁹¹ Report on the Practice of Jordan, 1997, Chapter 1.4.

¹⁹² Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 77(d).

¹⁹³ Report on the Practice of Nigeria, 1997, Chapter 1.4.

¹⁹⁴ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 1.4.

191. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK criticised Iraq for launching indiscriminate missile attacks against civilians.¹⁹⁵

192. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US denounced the continued indiscriminate launching of surface-to-surface missiles at civilian targets.¹⁹⁶

193. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense accused Iraq of “indiscriminate Scud missile attacks”.¹⁹⁷

194. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the US stated that “it is unlawful to conduct any indiscriminate attack, including those employing weapons that are not . . . directed at a military objective”.¹⁹⁸

195. In submitting the 1996 Amended Protocol II to the CCW to Congress for advice and consent to ratification, the US President stated that the prohibition of indiscriminate use of mines, booby-traps and other devices as defined in Article 3(8)(a) of the Protocol “is already a feature of customary international law that is applicable to all weapons”.¹⁹⁹

196. According to the Report on US Practice, it is the *opinio juris* of the US that indiscriminate attacks include attacks which are not directed at a military objective.²⁰⁰

III. Practice of International Organisations and Conferences

United Nations

197. In 1990, in a report on UNIFIL in Lebanon, the UN Secretary-General described the following incident:

A further serious incident occurred at dawn on 21 December 1989, when the DFF compound in Al Qantarrah in the Finnish battalion sector directed tank, mortar and heavy machine-gun fire indiscriminately in all directions in response to the firing of an anti-tank round by unidentified armed elements . . . The incident was strongly protested to IDF.²⁰¹

¹⁹⁵ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, pp. 1–2.

¹⁹⁶ US, Letter dated 5 March 1991 to the President of the UN Security Council, UN Doc. S/22341, 8 March 1991, p. 1.

¹⁹⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 635.

¹⁹⁸ US, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 27.

¹⁹⁹ US, Message from the US President Transmitting the Protocols to the CCW to Congress for Advice and Consent to Ratification, Treaty Doc. 105-1, Washington, D.C., 7 January 1997, Analysis of Article 3(8).

²⁰⁰ Report on US Practice, 1997, Chapter 1.4.

²⁰¹ UN Secretary-General, Report on UNIFIL, UN Doc. S/21102, 25 January 1990, § 22.

198. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that:

The concealment of Bosnian Government forces among civilian property may have caused the attraction of fire from the Bosnian Serb Army which may have resulted in legitimate collateral damage. There is enough apparent damage to civilian objects in Sarajevo to conclude that either civilian objects have been deliberately targeted or they have been indiscriminately attacked.²⁰²

Other International Organisations

199. No practice was found.

International Conferences

200. A report on the work of Committee III of the CDDH stated that:

The main problem was that of defining the term “indiscriminate attacks”. There was general agreement that a proper definition would include the act of not directing an attack at a military objective, the use of means or methods of combat which cannot be directed at a specific military objective, and the use of means or methods of combat the effects of which cannot be limited as required by the protocol.²⁰³

IV. Practice of International Judicial and Quasi-judicial Bodies

201. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

Attacks which are not directed against a military objective (particularly attacks directed against the civilian population) . . . may constitute the *actus reus* for the offence of unlawful attack [as a violation of the laws and customs of war]. The *mens rea* for the offence is intention or recklessness, not simple negligence.²⁰⁴

V. Practice of the International Red Cross and Red Crescent Movement

202. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the attack may only be directed at a specific military objective. The military objective must be identified as

²⁰² UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, Annex, § 206.

²⁰³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Second Session, Report of Committee III, 3 February–18 April 1975, p. 274, § 55.

²⁰⁴ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 28.

such and clearly designated and assigned. The attack shall be limited to the assigned military objective."²⁰⁵

VI. Other Practice

203. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed the following kinds of attacks among those that "are prohibited by applicable international law rules":

4. Direct attacks against individual or groups of unarmed civilians where no legitimate military objective, such as enemy combatants or war materiel, is present. Such attacks are indiscriminate.
5. Direct attacks against towns, villages, dwellings or buildings dedicated to civilian purposes where no military objective is present. Such attacks are also indiscriminate.²⁰⁶

204. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed the following kinds of attacks and uses of landmines among those that "should be prohibited in the conduct of hostilities":

- A. Direct attacks, by ground or air, and direct use of weapons against individuals or groups of unarmed civilians where no legitimate military objectives, such as enemy combatants or war material, are present. Such attacks and uses of these weapons are indiscriminate.
- B. Direct attacks, by ground or air, and direct weapons use against civilian objects dedicated to civilian purposes, such as towns, villages, dwellings, buildings, agricultural areas for the production of civilian foodstuffs, and drinking water sources, where no military objective is present. This type of attack and weapons use is similarly indiscriminate.²⁰⁷

205. The Commentary on Rule A1 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, defines indiscriminate attacks as "attacks launched at or affecting the civilian population without discrimination".²⁰⁸

Attacks which cannot be directed at a specific military objective

Note: For practice concerning weapons that are by nature indiscriminate, see Chapter 20, section B.

²⁰⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 428.

²⁰⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 34.

²⁰⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 140.

²⁰⁸ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Commentary on Rule A1, *IRRC*, No. 278, 1990, p. 388.

*I. Treaties and Other Instruments**Treaties*

206. According to Article 51(4)(b) AP I, attacks “which employ a method or means of combat which cannot be directed at a specific military objective” and consequently “are of a nature to strike military objectives and civilians or civilian objects without distinction” are indiscriminate. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.²⁰⁹

207. Article 3(3)(b) of the 1980 Protocol II to the CCW and Article 3(8)(b) of the 1996 Amended Protocol II to the CCW define the indiscriminate use of mines, booby-traps and other devices as any placement of such weapons “which employs a method or means of delivery which cannot be directed at a specific military objective”.

Other Instruments

208. Article 14 of the 1956 New Delhi Draft Rules states that:

Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects – resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

209. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(4)(b) AP I.

210. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(4)(b) AP I.

211. Paragraph 42(b)(i) of the 1994 San Remo Manual states that “it is forbidden to employ methods or means of warfare which are indiscriminate in that they ... cannot be directed against a specific military objective”.

*II. National Practice**Military Manuals*

212. Military manuals of Australia, Belgium, Canada, Germany, Netherlands, New Zealand, Spain and Sweden state that attacks which employ a method or means of combat which cannot be directed at a specific military objective are indiscriminate.²¹⁰

²⁰⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

²¹⁰ Australia, *Defence Force Manual* (1994), § 502(b)(2); Australia, *Commanders' Guide* (1994), § 956(b); Belgium, *Law of War Manual* (1983), p. 27; Canada, *LOAC Manual* (1999), p. 4–3, § 22(b), see also p. 5–2, § 11; Germany, *Soldiers' Manual* (1991), p. 5; Germany, *Military Manual*

213. Ecuador's Naval Manual states that "the use of weapons which by their nature are incapable of being directed specifically against military objectives, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect".²¹¹ The manual further specifies that:

Weapons that are incapable of being controlled in the sense that they can be directed at a military target are forbidden as being indiscriminate in their effect . . . A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained.²¹²

214. Israel's Manual on the Laws of War states that "in any attacks it is imperative to verify that the attack will be carried out employing weapons that can be aimed at the military target".²¹³

215. The US Air Force Pamphlet states that:

The existing law of armed conflict does not prohibit the use of weapons whose destructive force cannot strictly be confined to the specific military objective. Weapons are not unlawful simply because their use may cause incidental casualties to civilians and destruction of civilian objects. Nevertheless, particular weapons or methods of warfare may be prohibited because of their indiscriminate effects . . . Indiscriminate weapons are those incapable of being controlled, through design or function, and thus they can not, with any degree of certainty, be directed at military objectives.²¹⁴

216. The US Air Force Commander's Handbook states that:

Weapons that are incapable of being controlled enough to direct them against a military objective . . . are forbidden. A weapon is not unlawful simply because its use may cause incidental or collateral casualties to civilians, as long as those casualties are not foreseeably excessive in light of the expected military advantage.²¹⁵

217. The US Naval Handbook states that "weapons which by their nature are incapable of being directed specifically against military objectives, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect".²¹⁶ The Handbook further specifies that:

Weapons that are incapable of being controlled (i.e., directed at a military target) are forbidden as being indiscriminate in their effect . . . A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained.²¹⁷

(1992), § 455; Netherlands, *Military Manual* (1993), p. V-4; New Zealand, *Military Manual* (1992), § 517, see also § 509(4); Spain, *LOAC Manual* (1996), Vol. I, § 4.4.c; Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 45.

²¹¹ Ecuador, *Naval Manual* (1989), § 9.1. ²¹² Ecuador, *Naval Manual* (1989), § 9.1.2.

²¹³ Israel, *Manual on the Laws of War* (1998), p. 37, see also pp. 11-12.

²¹⁴ US, *Air Force Pamphlet* (1976), § 6-3(c).

²¹⁵ US, *Air Force Commander's Handbook* (1980), § 6-2(b).

²¹⁶ US, *Naval Handbook* (1995), § 9.1. ²¹⁷ US, *Naval Handbook* (1995), § 9.1.2.

National Legislation

218. The Draft Amendments to the Penal Code of El Salvador define indiscriminate attacks as including attacks “in which methods or means of warfare are used which cannot be directed against a specific military objective”.²¹⁸

219. Nicaragua’s Draft Penal Code defines indiscriminate attacks as including attacks “in which methods or means of warfare are used which cannot be directed against a specific military objective”.²¹⁹

National Case-law

220. No practice was found.

Other National Practice

221. At the CDDH, Canada stated that:

The definition of indiscriminate attack contained in paragraph 4 of Article 46 [now Article 51] is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. It is our view that this definition takes account of the circumstances, as evidenced by the examples listed in paragraph 5 to determine the legitimacy of the use of means of combat.²²⁰

222. At the CDDH, the FRG stated that:

The definition of indiscriminate attacks contained in paragraph 4 of Article 46 [now Article 51 AP I] is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. Rather, the definition is intended to take account of the fact that the legality of the use of means of combat depends upon circumstances, as shown by the examples listed in paragraph 5. Consequently the definition does not prohibit as indiscriminate any specific weapon.²²¹

223. At the CDDH, the GDR stated that:

The prohibition of indiscriminate attacks or of attacks which employed methods or means of combat that could not be directed at a specific military objective was of the utmost importance, since it re-established the priority of humanitarian principles over the uncontrolled development and barbarous use of highly sophisticated weapons and means of warfare, which from the outset disregarded the fundamental rights of the human being.²²²

224. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that indiscriminate attacks were generally defined as

²¹⁸ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Ataque indiscriminado a personas protegidas”.

²¹⁹ Nicaragua, *Draft Penal Code* (1999), Article 450(2).

²²⁰ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

²²¹ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 187–188.

²²² GDR, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 167, § 136, see also p. 187.

including “those which employ methods or means of combat which cannot be directed at a specific military objective”.²²³

225. During the discussion on the armistice following the Gulf War, Iraq argued that high-altitude bombing by US B-52s made it impossible to distinguish between civilian and military targets.²²⁴

226. At the CDDH, Italy stated that:

There was nothing in paragraph 4 [of Article 46, now Article 51] to show that certain methods or means of combat were prohibited in all circumstances by the Protocol except where an explicit prohibition was established by international rules in force for the State concerned with regard to certain weapons or methods.²²⁵

227. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled “International Law Providing Protection to the Environment in Times of Armed Conflict”, which provided that:

It is a war crime to employ acts of violence not directed at specific military objectives, to employ a method or means of combat which cannot be directed at a specific military objective, or to employ a means or method of combat the effects of which cannot be limited as required by the law of armed conflict.²²⁶

228. At the CDDH, Mexico stated that “the protection of the civilian population and civilian objects must be universally recognized, even at the cost of restricting the use of means and methods of warfare, the effects of which cannot be confined to specific military targets”. Mexico believed Articles 46 and 47 AP I (now Articles 51 and 52) to be so essential that they “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.²²⁷

229. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico stated that “in accordance with international humanitarian law, indiscriminate attacks are those that can reach both military targets and civilians”.²²⁸

230. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Nauru invoked the rule of international law that prohibits

²²³ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

²²⁴ Iraq, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 23.

²²⁵ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 122.

²²⁶ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(g).

²²⁷ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 192–193.

²²⁸ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 77(d); see also Written statement submitted to the ICJ, *Nuclear Weapons case*, 9 June 1994, § 25.

the use of weapons which “cannot distinguish between civilian objects and military objectives”.²²⁹

231. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, Sri Lanka stated that “the unacceptability of the use of weapons that fail to discriminate between military and civilian personnel is firmly established as a fundamental principle of international humanitarian law”.²³⁰

232. At the CDDH, the UK stated that it considered that:

The definition of indiscriminate attacks given in [Article 51(4) AP I] was not intended to mean that there were means of combat the use of which would constitute an indiscriminate attack in all circumstances. The paragraph did not in itself prohibit the use of any specific weapon, but it took account of the fact that the lawful use of means of combat depended on the circumstances.²³¹

233. In 1992, a legal review by the US Department of the Air Force of the legality of extended range anti-armour munition stated that:

International law also forbids the use of weapons or means of warfare which are “indiscriminate.” A weapon is indiscriminate if it cannot be directed at a military objective or if, under the circumstances, it produces excessive civilian casualties in relation to the concrete and direct military advantage anticipated.²³²

234. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

Finally, with the poor track record of compliance with the law of war by some nations, the United States has a responsibility to protect against threats that may inflict serious collateral damage to our own interests and allies. These threats can arise from any nation that does not have the capability or desire to respect the law of war. One example is Iraq’s indiscriminate use of SCUDs during the Iran–Iraq War and the Gulf War. These highly inaccurate theater ballistic missiles can cause extensive collateral damage well out of proportion to military results.²³³

235. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the US stated that “it is unlawful to conduct any indiscriminate attack, including those employing weapons that . . . cannot be directed at a military objective”.²³⁴

236. In submitting the 1996 Amended Protocol II to the CCW to Congress for advice and consent to ratification, the US President stated that the prohibition

²²⁹ Nauru, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 15 June 1995, pp. 19–20.

²³⁰ Sri Lanka, Written statement submitted to the ICJ, *Nuclear Weapons case*, undated, p. 2.

²³¹ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 119.

²³² US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 4.

²³³ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

²³⁴ US, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 27; Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 23.

of indiscriminate use of mines, booby-traps and other devices as defined in Article 3(8)(b) of the Protocol “is already a feature of customary international law that is applicable to all weapons”.²³⁵

237. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray in 1998, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that:

A weapon must be discriminating, or capable of being controlled (i.e., it can be directed against intended targets). Those weapons which cannot be employed in a manner which distinguishes between lawful combatants and noncombatants violate these principles. Indiscriminate weapons are prohibited by customary international law and treaty law.²³⁶

238. According to the Report on US Practice, it is the *opinio juris* of the US that indiscriminate attacks include attacks that employ methods or means of warfare that cannot be directed at a military objective.²³⁷

III. Practice of International Organisations and Conferences

United Nations

239. No practice was found.

Other International Organisations

240. No practice was found.

International Conferences

241. A report on the work of Committee III of the CDDH stated that:

The main problem was that of defining the term “indiscriminate attacks”. There was general agreement that a proper definition would include the act of not directing an attack at a military objective, the use of means or methods of combat which cannot be directed at a specific military objective, and the use of means or methods of combat the effects of which cannot be limited as required by the Protocol. Many but not all of those who commented were of the view that the definition was not intended to mean that there are means or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather, it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol,

²³⁵ US, Message from the President Transmitting the Protocols to the CCW to Congress for Advice and Consent to Ratification, Treaty Doc. 105-1, Washington, D.C., 7 January 1997, Analysis of Article 3(8).

²³⁶ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 5.

²³⁷ Report on US Practice, 1997, Chapter 1.4.

in which event their use in those circumstances would involve an indiscriminate attack.²³⁸

242. The 24th International Conference of the Red Cross in 1981 adopted a resolution on disarmament, weapons of mass destruction and respect for non-combatants in which it urged parties to armed conflicts “not to use methods and means of warfare that cannot be directed against specific military targets and whose effects cannot be limited”.²³⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

243. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets . . . In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians . . . Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.²⁴⁰

244. In her dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Higgins stated that:

Very important also . . . is the requirement of humanitarian law that weapons may not be used which are incapable of discriminating between civilian and military targets.

The requirement that a weapon be capable of differentiating between military and civilian targets is not a general principle of humanitarian law specified in the 1899, 1907 or 1949 law, but flows from the basic rule that civilians may not be the target of attack . . . It may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral damage occurs.²⁴¹

245. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Guillaume stated that indiscriminate weapons were “blind weapons

²³⁸ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Second session, Report of Committee III, 3 February–18 April 1975, p. 274, § 55.

²³⁹ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XIII, § 1.

²⁴⁰ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 78–79.

²⁴¹ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Higgins, 8 July 1996, §§ 23–24.

which are incapable of distinguishing between civilian targets and military targets".²⁴²

246. In its review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber had to determine whether the use of cluster bombs was prohibited in an armed conflict. Noting that no formal provision forbade the use of such bombs, the Trial Chamber recalled that the choice of weapons and their use were clearly delimited by IHL. Among the relevant norms of customary law, the Court referred to Article 51(4)(b) AP I, which forbade indiscriminate attacks involving the use of a means or method of combat that could not be directed against a specific military objective.²⁴³

V. Practice of the International Red Cross and Red Crescent Movement

247. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "belligerent Parties and their armed forces shall abstain from using weapons which, because of their lack of precision or their effects, affect civilian persons and combatants without distinction".²⁴⁴

VI. Other Practice

248. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that "existing international law prohibits the use of all weapons which, by their very nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations".²⁴⁵

249. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed the "use of 'blind' weapons that cannot be directed with any reasonable assurance against a specific military objective" among actions which were "prohibited by applicable international law rules".²⁴⁶

250. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed the "use of 'blind' weapons that cannot be directed with any reasonable assurance against a specific military objective" among prohibited practices.²⁴⁷

²⁴² ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Guillaume, 8 July 1996, § 5.

²⁴³ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 18.

²⁴⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 912(b).

²⁴⁵ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 7.

²⁴⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 34.

²⁴⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

Attacks whose effects cannot be limited as required by international humanitarian law

Note: For practice concerning weapons that are by nature indiscriminate, see Chapter 20, section B.

I. Treaties and Other Instruments

Treaties

251. According to Article 51(4)(c) AP I, attacks “which employ a method or means of combat the effects of which cannot be limited as required by this Protocol” and consequently “are of a nature to strike military objectives and civilians or civilian objects without distinction” are indiscriminate. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.²⁴⁸

Other Instruments

252. Article 14 of the 1956 New Delhi Draft Rules states that:

Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects – resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

253. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(4)(c) AP I.

254. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(4)(c) AP I.

255. Paragraph 42(b)(ii) of the 1994 San Remo Manual provides that “it is forbidden to employ methods or means of warfare which are indiscriminate in that their effects cannot be limited as required by international law as reflected in this document”.

II. National Practice

Military Manuals

256. Military manuals of Australia, Belgium, Canada, Germany, Netherlands, New Zealand, Spain and Sweden state that attacks which employ a method or means of combat the effects of which cannot be limited as required by IHL are indiscriminate.²⁴⁹

²⁴⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

²⁴⁹ Australia, *Defence Force Manual* (1994), § 502(b)(3) (“the effect of which cannot be limited, as required by LOAC); Australia, *Commanders’ Guide* (1994), § 956(c) (“the effects of which

257. Israel's Manual on the Laws of War states that "in any attack it is imperative to verify that the attack will not employ means of warfare whose impact cannot be controlled".²⁵⁰

258. The US Air Force Pamphlet states that:

Some weapons, though capable of being directed only at military objectives, may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage. Biological warfare is a universally agreed illustration of such an indiscriminate weapon. Uncontrollable effects, in this context, may include injury to the civilian population of other states as well as injury to an enemy's civilian population. Uncontrollable refers to effects which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated. International law does not require that a weapon's effects be strictly confined to the military objectives against which it is directed, but it does restrict weapons whose foreseeable effects result in unlawful disproportionate injury to civilians or damage to civilian objects.²⁵¹

259. The YPA Military Manual of the SFRY (FRY) prohibits "blind weapons" the effects of which "cannot be controlled during their use".²⁵²

National Legislation

260. The Draft Amendments to the Penal Code of El Salvador define indiscriminate attacks as including attacks in which methods or means of warfare are used "whose effects cannot be limited as required by international humanitarian law".²⁵³

261. Nicaragua's Draft Penal Code defines indiscriminate attacks as including attacks in which methods and means of warfare are used "whose effects cannot be limited as required by international humanitarian law".²⁵⁴

National Case-law

262. No practice was found.

cannot be limited as required by LOAC"); Belgium, *Law of War Manual* (1983), p. 28 ("which cannot be limited as required by the First Protocol"); Canada, *LOAC Manual* (1999), p. 4-3, § 22(c) ("the effects of which cannot be limited as required by the LOAC"), see also p. 5-2, § 11; Germany, *Military Manual* (1992), § 455 ("whose intended effects cannot be limited to the military objective"); Netherlands, *Military Manual* (1993), p. V-4 ("which cannot be limited as required by Additional Protocol I"); New Zealand, *Military Manual* (1992), § 517 ("which cannot be limited as required by this Protocol"), see also § 509(4) ("the effects of which cannot be limited"); Spain, *LOAC Manual* (1996), Vol. I, § 4.4.c ("whose effects cannot be limited"); Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 45 ("which cannot be limited as required by Additional Protocol I").

²⁵⁰ Israel, *Manual on the Laws of War* (1998), p. 37, see also pp. 11-12.

²⁵¹ US, *Air Force Pamphlet* (1976), § 6-3(c).

²⁵² SFRY (FRY), *YPA Military Manual* (1988), § 102.

²⁵³ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque indiscriminado a personas protegidas".

²⁵⁴ Nicaragua, *Draft Penal Code* (1999), Article 450(2).

Other National Practice

263. At the CDDH, Canada stated that:

The definition of indiscriminate attack contained in paragraph 4 of Article 46 [now Article 51] is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. It is our view that this definition takes account of the circumstances, as evidenced by the examples listed in paragraph 5 to determine the legitimacy of the use of means of combat.²⁵⁵

264. At the CDDH, the FRG stated that:

The definition of indiscriminate attacks contained in paragraph 4 of Article 46 [now Article 51 AP I] is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. Rather, the definition is intended to take account of the fact that the legality of the use of means of combat depends upon circumstances, as shown by the examples listed in paragraph 5. Consequently the definition does not prohibit as indiscriminate any specific weapon.²⁵⁶

265. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that indiscriminate attacks are generally defined as including “those with effects which cannot be limited”.²⁵⁷

266. At the CDDH, Italy stated that:

There was nothing in paragraph 4 [of Article 46, now Article 51] to show that certain methods or means of combat were prohibited in all circumstances by the Protocol except where an explicit prohibition was established by international rules in force for the State concerned with regard to certain weapons or methods.²⁵⁸

267. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled “International Law Providing Protection to the Environment in Times of Armed Conflict”, which provided that:

It is a war crime to employ acts of violence not directed at specific military objectives, to employ a method or means of combat which cannot be directed at a specific military objective, or to employ a means or method of combat the effects of which cannot be limited as required by the law of armed conflict.²⁵⁹

²⁵⁵ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

²⁵⁶ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 187–188.

²⁵⁷ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

²⁵⁸ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 122.

²⁵⁹ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(g).

268. At the CDDH, Mexico stated that “the protection of the civilian population and civilian objects must be universally recognized, even at the cost of restricting the use of means and methods of warfare, the effects of which cannot be confined to specific military targets”. Mexico believed Article 51 AP I to be so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.²⁶⁰

269. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico stated that “in accordance with international humanitarian law, indiscriminate attacks are those that can reach both military targets and civilians”.²⁶¹

270. At the CDDH, the UK considered that:

The definition of indiscriminate attacks given in [Article 51(4) AP I] was not intended to mean that there were means of combat the use of which would constitute an indiscriminate attack in all circumstances. The paragraph did not in itself prohibit the use of any specific weapon, but it took account of the fact that the lawful use of means of combat depended on the circumstances.²⁶²

271. In 1972, the General Counsel of the US Department of Defense stated that:

Existing laws of armed conflict do not prohibit the use of weapons whose destructive force cannot be limited to a specific military objective. The use of such weapons is not proscribed when their use is necessarily required against a military target of sufficient importance to outweigh inevitable, but regrettable, incidental casualties to civilians and destruction of civilian objects. . . . I would like to reiterate that it is recognized by all states that they may not lawfully use their weapons against civilian population[s] or civilians as such, but there is no rule of international law that restrains them from using weapons against enemy armed forces or military targets. The correct rule of international law which has applied in the past and continued to apply to the conduct of our military operations in Southeast Asia is that “the loss of life and damage to property must not be out of proportion to the military advantage to be gained”.²⁶³

272. According to the Report on US Practice, at the 1974 Lucerne Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, the US

rejected any effort to label weapons indiscriminate merely because they were likely to affect civilians as well as military objectives. The correct rule was that the

²⁶⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 192–193.

²⁶¹ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 77(d).

²⁶² UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 119.

²⁶³ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 124.

law of war prohibits attacks which entail a high risk of civilian casualties clearly disproportionate to the military advantage sought.²⁶⁴

273. Course material from the US Army War College states that:

The Law of War does not ban the use of weapons when their effects cannot be strictly confined to the specific military objective. But this rule is true only so long as the rule of proportionality is not violated. However, a weapon which is incapable of being controlled, and thus will cause incidental damage without any reasonable likelihood of gaining a military advantage, is illegal.²⁶⁵

274. In 1992, a legal review by the US Department of the Air Force of the legality of extended range anti-armour munition stated that:

International law also forbids the use of weapons or means of warfare which are "indiscriminate." A weapon is indiscriminate if it cannot be directed at a military objective or if, under the circumstances, it produces excessive civilian casualties in relation to the concrete and direct military advantage anticipated.²⁶⁶

275. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

Finally, with the poor track record of compliance with the law of war by some nations, the United States has a responsibility to protect against threats that may inflict serious collateral damage to our own interests and allies. These threats can arise from any nation that does not have the capability or desire to respect the law of war. One example is Iraq's indiscriminate use of SCUDs during the Iran-Iraq War and the Gulf War. These highly inaccurate theater ballistic missiles can cause extensive collateral damage well out of proportion to military results.²⁶⁷

III. Practice of International Organisations and Conferences

United Nations

276. No practice was found.

Other International Organisations

277. No practice was found.

²⁶⁴ Report on US Practice, 1997, Chapter 1.4; Statement of 25 September 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, p. 713.

²⁶⁵ US Army War College Selected Readings, Advanced Course, *Law for the Joint Warfighter*, Volume II, Second edition, 1989, p. 170.

²⁶⁶ US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 4.

²⁶⁷ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

International Conferences

278. A report on the work of Committee III of the CDDH stated that:

The main problem was that of defining the term “indiscriminate attacks”. There was general agreement that a proper definition would include the act of not directing an attack at a military objective, the use of means or methods of combat which cannot be directed at a specific military objective, and the use of means or methods of combat the effects of which cannot be limited as required by the Protocol. Many but not all of those who commented were of the view that the definition was not intended to mean that there are means or methods of combat whose use would involve an indiscriminate attack in all circumstances. Rather, it was intended to take account of the fact that means or methods of combat which can be used perfectly legitimately in some situations could, in other circumstances, have effects that would be contrary to some limitations contained in the Protocol, in which event their use in those circumstances would involve an indiscriminate attack.²⁶⁸

279. The 24th International Conference of the Red Cross in 1981 adopted a resolution on disarmament, weapons of mass destruction and respect for non-combatants in which it urged parties to armed conflicts “not to use methods and means of warfare that cannot be directed against specific military targets and whose effects cannot be limited”.²⁶⁹

IV. Practice of International judicial and Quasi-judicial Bodies

280. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

281. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “belligerent Parties and their armed forces shall abstain from using weapons whose harmful effects go beyond the control, in time or place, of those employing them”.²⁷⁰

VI. Other Practice

282. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that:

Existing international law prohibits the use of all weapons which, by their very nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use

²⁶⁸ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Second session, Report of Committee III, 3 February–18 April 1975, p. 274, § 55.

²⁶⁹ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XIII, § 1.

²⁷⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 912(c).

of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons) as well as of "blind" weapons.²⁷¹

C. Area Bombardment

I. Treaties and Other Instruments

Treaties

283. Article 51(5)(a) AP I considers as indiscriminate:

an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians and civilian objects.

Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.²⁷²

284. Article 26(3)(a) of draft AP II submitted by the ICRC to the CDDH provided that it was forbidden "to attack without distinction, as one single objective, by bombardment or any other method, a zone containing several military objectives, which are situated in populated areas and are at some distance from each other".²⁷³ Committee III of the CDDH amended this proposal and adopted the amended proposal, by 25 votes in favour, 13 against and 24 abstentions, while Article 26 as a whole was adopted by Committee III by 44 votes in favour, none against and 22 abstentions.²⁷⁴ The adopted text provided that:

An attack by bombardment by any methods or means which treats as a single military objective a number of clearly separate and distinct military objectives located in a city, town, village, or other area containing a concentration of civilians or civilian objects is to be considered as indiscriminate.²⁷⁵

Eventually, however, the proposal to retain this paragraph was rejected in the plenary by 30 votes in favour, 25 against and 34 abstentions.²⁷⁶

285. Article 3(9) of the 1996 Amended Protocol II to the CCW provides that "several clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians and civilian objects are not to be treated as a single military objective".

²⁷¹ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 7.

²⁷² CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

²⁷³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

²⁷⁴ CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.37, 4 April 1975, pp. 390 and 391, §§ 14 and 15.

²⁷⁵ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 321.

²⁷⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

Other Instruments

286. Article 24(3) of the 1923 Hague Rules of Air Warfare provides that:

The bombardment of cities, towns, villages, dwellings or buildings not in the immediate neighbourhood of the operations of land forces is prohibited. In cases where [military objectives] are so situated, that they cannot be bombarded without the indiscriminate bombardment of the civilian population, the aircraft must abstain from bombardment.

287. Article 10 of the 1956 New Delhi Draft Rules provides that “it is forbidden to attack without distinction, as a single objective, an area including several military objectives at a distance from one another where elements of the civilian population, or dwellings, are situated in between the said military objectives”.

288. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(5)(a) AP I.

289. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(5)(a) AP I.

*II. National Practice**Military Manuals*

290. Australia’s Commanders’ Guide states that “indiscriminate attacks [include] those which . . . employ any methods or means which treat, as a single military object, a number of clearly separated military objectives in an area where there is a concentration of civilians”.²⁷⁷

291. Australia’s Defence Force Manual states that:

An example of an indiscriminate attack would be to bomb a city, town, village or area as though it were a single military objective when it contains a number of separate and distinct military objectives mixed in with a similar concentration of civilians and civilian objects.²⁷⁸

292. Belgium’s Law of War Manual prohibits “bombardment which treats as a single military objective a certain number of military objectives clearly separated and distinct and located in an area containing a similar concentration of civilian persons and objects”.²⁷⁹

293. Benin’s Military Manual provides that “carpet bombings are an example of indiscriminate attack” and are, as such, prohibited.²⁸⁰

²⁷⁷ Australia, *Commanders’ Guide* (1994), § 956(d).

²⁷⁸ Australia, *Defence Force Manual* (1994), § 502(b)(3).

²⁷⁹ Belgium, *Law of War Manual* (1983), p. 28.

²⁸⁰ Benin, *Military Manual* (1995), Fascicule III, p. 13.

294. Canada's LOAC Manual gives the following as an example of an indiscriminate attack and, as such, prohibited:

An attack by bombardment by any methods or means which treats as a single legitimate target a number of clearly separated and distinct legitimate targets located in a city, town, village or other area containing a similar concentration of civilians or civilian objects.²⁸¹

295. Croatia's Commanders' Manual provides that "distinct objectives and targets within or in close vicinity to civilian objects shall be attacked separately".²⁸²

296. Germany's Military Manual states that, when "a number of clearly separated and distinct military objectives located in a built-up area are attacked as if they were one single military objective", it constitutes an indiscriminate attack and is, as such, prohibited.²⁸³

297. Israel's Manual on the Laws of War provides that "it is forbidden to regard an area with mixed military objectives and civilian objects as a single target area".²⁸⁴

298. Italy's LOAC Elementary Rules Manual stipulates that "distinct objectives within or in close vicinity to civilian objects shall be attacked separately".²⁸⁵

299. Kenya's LOAC Manual provides that "area bombardment is an example of an indiscriminate attack" and is, as such, prohibited.²⁸⁶

300. Madagascar's Military Manual states that "distinct objectives, aims and targets within or in close vicinity to civilian objects shall be attacked separately".²⁸⁷

301. The Military Manual of the Netherlands provides that "attacks (by bombardment) which treat as a single military objective a number of clearly separated and distinct military objectives located in a city, village or area containing a concentration of civilians or civilian objects" are an example of indiscriminate attacks and, as such, prohibited.²⁸⁸

302. New Zealand's Military Manual states that "an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects" is an indiscriminate attack and, as such, prohibited.²⁸⁹

²⁸¹ Canada, *LOAC Manual* (1999), p. 4-3, §§ 22 and 23(a), see also p. 6-3, § 28 (land warfare) and pp. 8-5/8-6, § 38 (naval warfare).

²⁸² Croatia, *Commanders' Manual* (1992), § 51.

²⁸³ Germany, *Military Manual* (1992), §§ 454 and 456.

²⁸⁴ Israel, *Manual on the Laws of War* (1998), p. 38.

²⁸⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 51.

²⁸⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 3.

²⁸⁷ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 22.

²⁸⁸ Netherlands, *Military Manual* (1993), p. V-4.

²⁸⁹ New Zealand, *Military Manual* (1992), § 517(1)(5)(a) (land warfare) and § 630(1)(5)(a) (air warfare).

303. Under Spain's LOAC Manual, an attack launched while "considering as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a concentration of civilians and civilian objects" is an indiscriminate attack and, as such prohibited.²⁹⁰

304. Sweden's IHL Manual states that:

If the military objectives are located in a densely-populated area which has been evacuated only to a limited extent if at all, area bombardment may not be employed since this would be a breach of the basic rule prohibiting indiscriminate attack. Moreover, area bombardment would most probably lead to excessive injury and losses, and would thus be a breach of the proportionality rule.²⁹¹

305. Switzerland's Basic Military Manual notes that "area bombardments are prohibited".²⁹²

306. Togo's Military Manual provides that "carpet bombings are an example of indiscriminate attack" and, as such, prohibited.²⁹³

307. The UK LOAC Manual stipulates that "area bombardment is an example of an indiscriminate attack" and is, as such, prohibited.²⁹⁴

308. The US Air Force Pamphlet quotes Article 24(3) of the 1923 Hague Rules of Air Warfare, specifying, however, that "they do not represent existing customary law as a total code".²⁹⁵ It also restates the opinion of a legal scholar concerning target area bombing:

Any legal justification of target-area bombing must be based on two factors. The first must be the fact that the area is so preponderantly used for war industry as to impress that character on the whole of the neighborhood, making it essentially an indivisible whole. The second factor must be that the area is so heavily defended from air attack that the selection of specific targets within the area is impracticable.

In such circumstances, the whole area might be regarded as a defended place from the standpoint of attack from the air, and its status, for that purpose, is assimilated to that of a defended place attacked by land troops. In the latter case, the attacking force may attack the whole of the defended area in order to overcome the defense, and incurs no responsibility for unavoidable damage to civilians and nonmilitary property caused by the seeking-out of military objectives in the bombardment. Legal justification for target-area bombing would appear to rest upon analogous reasoning.²⁹⁶

The Pamphlet states, however, that "in fact, the use of target area bombing in populated areas has always been controversial".²⁹⁷

²⁹⁰ Spain, *LOAC Manual* (1996), Vol. I, § 4.4.d.

²⁹¹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 47.

²⁹² Switzerland, *Basic Military Manual* (1987), Article 29, commentary.

²⁹³ Togo, *Military Manual* (1996), Fascicule III, p. 13.

²⁹⁴ UK, *LOAC Manual* (1981), Section 4, p. 15, § 5(j).

²⁹⁵ US, *Air Force Pamphlet* (1976), § 5-2(c).

²⁹⁶ US, *Air Force Pamphlet* (1976), § 5-2(d), referring to Morris Greenspan, *The Modern Law of Land Warfare*, University of California Press, Berkeley, 1959, p. 336.

²⁹⁷ US, *Air Force Pamphlet* (1976), § 5-2(d), footnote 9, referring to James M. Spaight, *Air Power and War Rights*, Longmans, Green and Co., London/New York/Toronto, Third edition, 1947,

National Legislation

309. No practice was found.

National Case-law

310. No practice was found.

Other National Practice

311. At the CDDH, Canada stated that it supported the comments made by the US (see below).²⁹⁸

312. At the CDDH, Egypt stated that it supported the comments made by the US (see below).²⁹⁹

313. On the basis of an interview with an advisor of the Lebanese Ministry of Foreign Affairs, the Report on the Practice of Lebanon defines indiscriminate attacks as all bombardments which target an entire zone instead of a precise location.³⁰⁰

314. At the CDDH, the UAE stated that it fully agreed with the remarks made by Egypt (see above).³⁰¹

315. During the CDDH, the US delegation stated that the words “clearly separated” referred:

not only to a separation of two or more military objectives, which could be observed or which were usually separated, but to include the element of a significant distance. Moreover, that distance should be at least sufficiently large to permit the individual military objectives to be attacked separately.³⁰²

III. Practice of International Organisations and Conferences

United Nations

316. No practice was found.

Other International Organisations

317. No practice was found.

International Conferences

318. According to the Report of Committee III of the CDDH, the phrase “bombardment by any methods or means” in Article 51(5)(a) AP I referred to “all

p. 272 and Julius Stone, *Legal Controls of International Conflict*, Garland Publishing, New York/London, 1973, p. 627.

²⁹⁸ Canada, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 308, § 58.

²⁹⁹ Egypt, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 308, § 56.

³⁰⁰ Report on the Practice of Lebanon, 1998, Interview with an advisor of the Lebanese Ministry of Foreign Affairs, Chapter 1.4.

³⁰¹ UAE, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 308, § 61.

³⁰² US, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 307, § 50.

attacks by fire, and the use of any type of projectile except for direct fire by small arms".³⁰³ The term "concentration of civilians" in the same Article meant "such a concentration as to be similar to a city, town, or village. Thus, a refugee camp or a column of refugees moving along a road would be examples of such a similar concentration."³⁰⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

319. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

320. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "an attack is prohibited which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilian persons or civilian objects".³⁰⁵

321. In an appeal launched in 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 47(3)(a) of draft AP I, which stated that "it is forbidden to attack without distinction, as one single objective, by bombardment or any other method, a zone containing several military objectives, which are situated in populated areas, and are at some distance from each other". All governments concerned replied favourably.³⁰⁶

VI. Other Practice

322. No practice was found.

³⁰³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Second session, Report of Committee III, 3 February–18 April 1975, p. 275, § 56.

³⁰⁴ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, Fourth session, Report of Committee III, 17 March–10 June 1977, p. 455, § 28.

³⁰⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 428.

³⁰⁶ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

PROPORTIONALITY IN ATTACK

Proportionality in Attack (practice relating to Rule 14)	§§ 1–223
General	§§ 1–160
Determination of the anticipated military advantage	§§ 161–192
Information required for judging proportionality in attack	§§ 193–223

Proportionality in Attack**General**

Note: For practice concerning precautions to be taken in attack in order to avoid disproportionate attacks, see Chapter 5, sections D and E. For practice concerning the limitation of destruction of enemy property to what is required by the mission, see Chapter 16, section B.

*I. Treaties and Other Instruments**Treaties*

1. Article 51(5)(b) AP I prohibits “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.¹
2. Under Article 85(3)(b) AP I, “launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, as defined in Article 57, paragraph 2 a) iii) is a grave breach. Article 85 AP I was adopted by consensus.²
3. Article 26(3)(b) of draft AP II submitted by the ICRC to the CDDH provided that it was forbidden “to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

advantage anticipated".³ This provision was deleted from the proposal adopted by Committee III of the CDDH.⁴

4. Article 3(3)(c) of the 1980 Protocol II to the CCW and Article 3(8)(c) of the 1996 Amended Protocol II to the CCW prohibit any placement of mines, booby-traps and other devices "which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".

5. Pursuant to Article 8(2)(b)(iv) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts:

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Other Instruments

6. Article 15 of the 1863 Lieber Code states that "military necessity admits of all direct destruction of life or limb of 'armed' enemies, and of other persons whose destruction is incidentally 'unavoidable' in the armed contests of the war".

7. Article 24(4) of the 1923 Hague Rules of Air Warfare states that:

In the immediate neighbourhood of the operations of land forces, the bombardment of cities, towns, villages, dwellings or buildings is legitimate provided that there exists a reasonable presumption that the military concentration is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population.

8. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(5)(b) AP I.

9. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 51(5)(b) AP I.

10. Paragraph 46(d) of the 1994 San Remo Manual provides that "an attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole".

11. Pursuant to Article 20(b)(ii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such

³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁴ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 321.

attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a war crime.

12. Section 5.5 of the 1999 UN Secretary-General's Bulletin provides that:

The United Nations force is prohibited from launching operations . . . that may be expected to cause incidental loss of life among the civilian population or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated.

13. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iv), the following constitutes a war crime in international armed conflicts:

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.

II. National Practice

Military Manuals

14. Australia's Defence Force Manual states that:

Collateral damage may be the result of military attacks. This fact is recognised by LOAC and, accordingly, it is not unlawful to cause such injury and damage. The principle of proportionality dictates that the results of such action must not be excessive in light of the military advantage anticipated from the attack.⁵

The manual further states, in the specific context of siege warfare, that "if there are noncombatants in the locality, the anticipated collateral damage must not be excessive in relation to the concrete and direct military advantage expected to result from the bombardment".⁶ Both the Defence Force Manual and the Commanders' Guide list "launching indiscriminate attacks that affect the civilian population or civilian objects in the knowledge that such attack will cause extensive and disproportionate loss of life, injury to civilians or damage to civilian objects" as an example of acts which constitute "grave breaches or serious war crimes likely to warrant institution of criminal proceedings".⁷

15. Belgium's Law of War Manual states that:

An attack against a military objective must not be launched when it is to be expected that such an attack will cause incidental loss or damage to civilians and civilian objects which would be excessive in relation to the concrete and direct military advantage expected.⁸

⁵ Australia, *Defence Force Manual* (1994), § 535.

⁶ Australia, *Defence Force Manual* (1994), § 733.

⁷ Australia, *Commanders' Guide* (1994), § 1305(h); *Defence Force Manual* (1994), § 1315(h).

⁸ Belgium, *Law of War Manual* (1983), p. 26, see also p. 28.

16. Benin's Military Manual requires respect for the principle of proportionality. According to the manual, "a military action is proportionate if it does not cause loss or damage to civilians which is excessive in relation to the expected overall result. This rule cannot justify unlimited destruction or attacks against civilians and civilian objects as such".⁹ The manual also states that "the principle of proportionality requires that needless suffering and damage be avoided. Pursuant to this principle, all forms of violence which are not indispensable to gain superiority over an enemy are prohibited."¹⁰

17. Cameroon's Instructors' Manual states that "the rule of proportionality prohibits the launching of attacks which will cause loss or damage to civilians and civilian objects which is excessive in relation to the military advantage anticipated".¹¹

18. According to Canada's LOAC Manual,

The fact that an attack on a legitimate target may cause civilian casualties or damage to civilian objects does not necessarily make the attack unlawful under the LOAC. However, such collateral civilian damage must not be disproportionate to the concrete and direct military advantage anticipated from the attack.

The proportionality test is as follows: Is the attack expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof ("collateral civilian damage") which would be excessive in relation to the concrete and direct military advantage anticipated? If the answer is "yes", the attack must be cancelled or suspended. The proportionality test must be used in the selection of any target.¹²

The manual also states that "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive collateral civilian damage" constitutes a grave breach.¹³

19. Canada's Code of Conduct explains that the principle of proportionality "imposes a duty to ensure that the collateral civilian damage created is not excessive in relation to the concrete and direct military advantage anticipated".¹⁴

20. Colombia's Instructors' Manual prohibits the disproportionate use of force. The manual states that "in time of war, the principle of proportionality must be observed. This principle means that the degree of force, the weapons used and the actions taken must be proportionate to the seriousness of the situation."¹⁵

21. Croatia's LOAC Compendium considers a military action to be proportionate "when it does not cause collateral civilian casualties and excessive damage in relation to the expected military advantage of the operation".¹⁶

⁹ Benin, *Military Manual* (1995), Fascicule III, p. 14, see also Fascicule II, p. 6.

¹⁰ Benin, *Military Manual* (1995), Fascicule III, p. 11.

¹¹ Cameroon, *Instructors' Manual* (1992), p. 83, see also p. 149.

¹² Canada, *LOAC Manual* (1999), pp. 4-2 and 4-3, §§ 17 and 18, see also p. 2-2, § 15, p. 6-3, § 29, p. 7-5, § 47 and p. 8-6, § 40.

¹³ Canada, *LOAC Manual* (1999), p. 16-3, § 16(b).

¹⁴ Canada, *Code of Conduct* (2001), Rule 2, § 1.

¹⁵ Colombia, *Instructors' Manual* (1999), p. 19, see also p. 20.

¹⁶ Croatia, *LOAC Compendium* (1991), p. 38.

22. Ecuador's Naval Manual states that, "loss of civilian life, injury to civilians or damage to civilian objects, incidental to an attack upon a legitimate military objective, are not illegal. Such injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack."¹⁷ The manual further specifies that "a weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained".¹⁸

23. France's LOAC Teaching Note provides that the action of both commanders and combatants must be guided by respect for the fundamental principle of proportionality.¹⁹

24. France's LOAC Manual states that the principle of proportionality requires that no attack must be launched,

which may be expected to cause incidental loss of civilian lives, injuries to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. The application of this principle raises the question of the balance between the means used and the desired military effect. The application of the principle of proportionality does not exclude that collateral damage may be suffered by the civilian population or civilian objects provided they are not excessive in relation to the concrete and direct military advantage anticipated.²⁰

25. Germany's Military Manual states that "attacks on military objects shall not cause any loss of civilian life that would be excessive in relation to the concrete and direct military advantage anticipated".²¹

26. According to Germany's IHL Manual, "attacks against the civilian population, including launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attacks will cause excessive loss of life, injury to civilians or damage to civilian objects" are war crimes.²²

27. Hungary's Military Manual considers a military action to be proportionate "when it does not cause collateral civilian casualties and excessive damage in relation to the expected military advantage of the operation".²³

28. Indonesia's Directive on Human Rights in Irian Jaya and Maluku states that "the use of force should be proportionate, meaning there should be a balance between military necessity and humanity. Force must only be used in accordance with the objectives of the task or the achievement of the target."²⁴

29. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "the IDF would not attack a target in cases in which it is

¹⁷ Ecuador, *Naval Manual* (1989), § 8.1.2.1.

¹⁸ Ecuador, *Naval Manual* (1989), § 9.1.2.

¹⁹ France, *LOAC Teaching Note* (2000), p. 2.

²⁰ France, *LOAC Manual* (2001), pp. 13–14.

²¹ Germany, *Military Manual* (1992), § 509.

²² Germany, *IHL Manual* (1996), § 404.

²³ Hungary, *Military Manual* (1992), p. 62.

²⁴ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 7(d) and (e).

expected that the attack would cause civilian loss, injury or damage excessive in relation to the military advantage anticipated".²⁵

30. Israel's Manual on the Laws of War states that:

Even when it is not possible to isolate the civilians from an assault and there is no other recourse but to attack, this does not constitute a green light to inflict unbridled harm on civilians. The commander is required to refrain from an attack that is expected to inflict harm on the civilian population that is disproportionate to the expected military gain.²⁶

31. Kenya's LOAC Manual states that one of the main principles which places constraints on the conduct of hostilities is "the principle of proportionality which calls for the avoidance of unnecessary suffering and damage and therefore prohibits all forms of violence not indispensable for the overpowering of the enemy".²⁷

32. Madagascar's Military Manual states that "the rule of proportionality must be respected so that civilian losses are not excessive in relation to the expected military advantage".²⁸

33. The Military Manual of the Netherlands states that:

During an attack on a military objective, the collateral damage (loss of civilian life and damage to civilian objects) may not be excessive in relation to the military advantage anticipated from the attack. In every combat action, therefore, the commander must assess whether the action is to take place in the proximity of civilians or civilian objects.²⁹

34. New Zealand's Military Manual states that "as a general rule, an attack is not to be carried out if it would result in collateral civilian casualties clearly disproportionate to the expected military advantage".³⁰ The manual considers that:

The principle of proportionality establishes a link between the concepts of military necessity and humanity. This means that the commander is not allowed to cause damage to non-combatants which is disproportionate to military need . . . It involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other. That is, there must be an acceptable relation between the legitimate destructive effect and the undesirable collateral effects.³¹

The manual also states that "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will

²⁵ Report on the Practice of Israel, 1997, Chapter 1.5, referring to *Law of War Booklet* (1986), pp. 4–5.

²⁶ Israel, *Manual on the Laws of War* (1998), p. 40.

²⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 1, see also Précis No. 4, p. 9.

²⁸ Madagascar, *Military Manual* (1994), Fiche No. 5-SO, § A.

²⁹ Netherlands, *Military Manual* (1993), p. V-5.

³⁰ New Zealand, *Military Manual* (1992), §§ 517(2) and 630(2).

³¹ New Zealand, *Military Manual* (1992), § 207.

cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a grave breach.³²

35. According to Nigeria's Military Manual,

Every commander has . . . to respect the rule of proportionality, i.e. the use of proportional military force so as to avoid causing incidental civilian casualties and damage which is excessive in relation to the value of the expected result of the whole operation.³³

36. Nigeria's Manual on the Laws of War states that "in any case of attack or bombardment of a defended locality, the killing and destruction must be proportionate to the military advantage sought".³⁴

37. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that "when the use of armed force is inevitable, strict controls must be exercised to insure that only reasonable force necessary for mission accomplishment shall be taken".³⁵

38. South Africa's LOAC Manual lists the principle of proportionality among the general principles of the LOAC. It states that "the loss of life and damage to property caused by military action must not be disproportionate to the military advantage to be gained".³⁶ The manual further emphasises that "the law of war does not prohibit effective military action. Its purpose is to prevent unnecessary suffering and damage which would afford no military advantage or which is disproportionate to the military advantage obtained."³⁷

39. Spain's LOAC Manual states that:

The principle of proportionality seeks to limit the damage caused by military operations. It is based on a recognition of the fact that it is difficult to limit the effects of modern means and methods of warfare exclusively to military objectives and that it is likely that they will cause collateral damage to civilians and civilian objects.³⁸

The manual specifies, however, that:

An attack is prohibited if, during the planning phase, the available information makes it foreseeable that the damage to the civilian population and/or to civilian objects which the attack will cause is excessive in relation to the military advantage anticipated from the attack as a whole.³⁹

The manual further states that "launching an indiscriminate attack affecting the civilian population or civilian objects which would be excessive in relation to the military advantage anticipated" constitutes a grave breach.⁴⁰

³² New Zealand, *Military Manual* (1992), § 1703(3).

³³ Nigeria, *Military Manual* (1994), p. 42, § 11.

³⁴ Nigeria, *Manual on the Laws of War* (undated), § 13.

³⁵ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a)(2).

³⁶ South Africa, *LOAC Manual* (1996), § 8(c).

³⁷ South Africa, *LOAC Manual* (1996), § 16.

³⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.5.

³⁹ Spain, *LOAC Manual* (1996), Vol. I, § 2.5.a, see also § 4.3.

⁴⁰ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

40. Sweden's IHL Manual considers that the principle of proportionality as contained in Article 51(5)(b) AP I reflects customary international law.⁴¹

41. Switzerland's Basic Military Manual states that "if the military advantage is not proportionate to the damage [suffered by the civilian population], [commanders] must cancel an attack".⁴² The manual further states that "an attack which is launched without making any distinction [between civilians and civilian objects on the one hand and military objectives on the other hand] and which may affect the civilian population or civilian objects in the knowledge that the attack will cause loss of human life, injuries to civilians and damage to civilian objects which would be excessive in the sense of Article 57(2)(a)(iii) [AP I]" constitutes a grave breach.⁴³

42. Togo's Military Manual requires respect for the principle of proportionality. According to the manual, "a military action is proportionate if it does not cause loss or damage to civilians which is excessive in relation to the expected overall result. This rule cannot justify unlimited destruction or attacks against civilians and civilian objects as such."⁴⁴ The manual also states that "the principle of proportionality requires that needless suffering and damage be avoided. Pursuant to this principle, all forms of violence which are not indispensable to gain superiority over an enemy are prohibited."⁴⁵

43. The UK Military Manual states that "in defended towns and localities modern methods of bombardment will inevitably destroy many buildings and sites which are not military objectives. Such destruction, if incidental to the bombardment of military objectives, is not unlawful."⁴⁶

44. The US Field Manual states, in the context of sieges and bombardments, that "loss of life and damage to property must not be out of proportion to the military advantage to be gained".⁴⁷

45. The US Air Force Pamphlet states that:

Complementing the principle of necessity and implicitly contained within it is the principle of humanity which forbids the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military purposes. This principle of humanity results in a specific prohibition against unnecessary suffering, a requirement of proportionality and a variety of more specific rules examined later. The principle of humanity also confirms the basic immunity of civilian populations and civilians from being objects of attack during armed conflict. This immunity of the civilian population does not preclude unavoidable incidental civilian casualties which may occur during the course of attacks against military objectives, and which are not excessive in relation to the concrete and direct military advantage anticipated.⁴⁸

⁴¹ Sweden, *IHL Manual* (1991), Section 3.2.3, p. 19.

⁴² Switzerland, *Basic Military Manual* (1987), Article 29(1).

⁴³ Switzerland, *Basic Military Manual* (1987), Article 193(1)(b).

⁴⁴ Togo, *Military Manual* (1996), Fascicule III, p. 14, see also Fascicule II, p. 6.

⁴⁵ Togo, *Military Manual* (1996), Fascicule III, p. 11.

⁴⁶ UK, *Military Manual* (1958), § 288. ⁴⁷ US, *Field Manual* (1956), § 41.

⁴⁸ US, *Air Force Pamphlet* (1976), § 1-3(a).

46. The US Air Force Commander's Handbook states that "a weapon is not unlawful simply because its use may cause incidental or collateral casualties to civilians, as long as those casualties are not foreseeably excessive in light of the expected military advantage".⁴⁹

47. The US Instructor's Guide states that:

In attacking a military target, the amount of suffering or destruction must be held to the minimum necessary to accomplish the mission. Any excessive destruction or suffering not required to accomplish the objective is illegal as a violation of the law of war.⁵⁰

48. The US Naval Handbook states that:

It is not unlawful to cause incidental injury to civilians or collateral damage to civilian objects, during an attack upon a legitimate military objective. Incidental injury or collateral damage must not, however, be excessive in light of the military advantage anticipated by the attack.⁵¹

The manual further specifies that "a weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained".⁵²

National Legislation

49. Argentina's Draft Code of Military Justice punishes any soldier who carries out or orders the commission of "excessive" attacks.⁵³

50. Under Armenia's Penal Code, launching, during an armed conflict, an "indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of life to civilians or damage to civilian objects excessive in relation to the concrete and direct military advantage anticipated" constitutes a crime against the peace and security of mankind.⁵⁴

51. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".⁵⁵

52. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including launching an attack which causes "excessive incidental death, injury or damage" in international armed conflicts.⁵⁶

⁴⁹ US, *Air Force Commander's Handbook* (1980), § 6-2(b).

⁵⁰ US, *Instructor's Guide* (1985), p. 6. ⁵¹ US, *Naval Handbook* (1995), § 8.1.2.1.

⁵² US, *Naval Handbook* (1995), § 9.1.2.

⁵³ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(1) in the *Code of Military Justice as amended* (1951).

⁵⁴ Armenia, *Penal Code* (2003), Article 390.3(2).

⁵⁵ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

⁵⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.38.

53. The Criminal Code of Belarus provides that it is a war crime “to launch an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects”.⁵⁷

54. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that it is a crime under international law to launch:

an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁵⁸

55. The Report on the Practice of Brazil considers that the provision in Brazil’s Military Penal Code which punishes the excessive execution of an order is relevant in the context of the principle of proportionality.⁵⁹

56. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” is a war crime in international armed conflicts.⁶⁰

57. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence”.⁶¹

58. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.⁶²

59. Colombia’s Penal Code imposes a criminal sanction on “anyone who, during an armed conflict, carries out or orders the carrying out of . . . excessive attacks”.⁶³

⁵⁷ Belarus, *Criminal Code* (1999), Article 136(11).

⁵⁸ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(12).

⁵⁹ Report on the Practice of Brazil, 1997, Chapter 1.5, referring to *Military Penal Code* (1969), Article 38(2).

⁶⁰ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(d).

⁶¹ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

⁶² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁶³ Colombia, *Penal Code* (2000), Article 144, see also Article 154.

60. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁶⁴

61. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]"⁶⁵

62. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".⁶⁶

63. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for anyone who, in the context of an international or a non-international armed conflict, launches:

an indiscriminate attack affecting the civilian population, in the knowledge that such attack will cause death or injury among the civilian population or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated.⁶⁷

64. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code is a crime, such as "intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" in international armed conflicts.⁶⁸

65. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "carries out an attack by military means and definitely anticipates that the attack will cause death or injury to civilians or damage to civilian objects on a scale out of proportion to the concrete and direct overall military advantage anticipated".⁶⁹

66. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.⁷⁰ It adds that any "minor breach" of AP I, including violations of Article 51(5)(b) AP I, is also a punishable offence.⁷¹

67. Under the Draft Amendments to the Code of Military Justice of Lebanon, "an indiscriminate attack against civilian populations or civilian objects in

⁶⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁶⁵ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

⁶⁶ Cyprus, *AP I Act* (1979), Section 4(1).

⁶⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque indiscriminado a personas protegidas".

⁶⁸ Georgia, *Criminal Code* (1999), Article 413(d).

⁶⁹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(3).

⁷⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

⁷¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a war crime.⁷²

68. Under Mali's Penal Code, the following constitutes a war crime in international armed conflicts:

intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated.⁷³

69. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit

the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects.⁷⁴

Likewise, "intentionally launching an attack in the knowledge that such an attack will cause incidental loss of life or injury to civilians or damage to civilian objects . . . which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is also a crime, when committed in an international armed conflict.⁷⁵

70. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".⁷⁶

71. Under New Zealand's International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.⁷⁷

72. Nicaragua's Draft Penal Code punishes anyone who, during an international or internal armed conflict,

launches an indiscriminate attack affecting the civilian population, in the knowledge that such attack will cause incidental loss of civilian life, injury to civilians or damage to civilian objects, which would be excessive in relation to the concrete and direct military advantage anticipated.⁷⁸

73. According to Niger's Penal Code as amended, it is a war crime to launch against persons and objects protected under the 1949 Geneva Conventions or their Additional Protocols of 1977:

⁷² Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(10).

⁷³ Mali, *Penal Code* (2001), Article 31(i)(4).

⁷⁴ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(ii).

⁷⁵ Netherlands, *International Crimes Act* (2003), Article 5(5)(b).

⁷⁶ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

⁷⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁷⁸ Nicaragua, *Draft Penal Code* (1999), Article 450(1).

an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁷⁹

74. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁸⁰

75. Spain's Penal Code punishes "anyone who, during an armed conflict, . . . carries out or orders an . . . excessive attack".⁸¹

76. Under Sweden's Penal Code, "initiating an indiscriminate attack knowing that such attack will cause exceptionally heavy losses or damage to civilians or to civilian property" constitutes a crime against international law.⁸²

77. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.⁸³

78. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".⁸⁴

79. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.⁸⁵

80. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".⁸⁶

National Case-law

81. The Report on the Practice of Argentina states that in a case concerning armed operations against insurgents in 1985, "the National Court of Appeals referred to the principle of proportionality, which it considered to be a customary norm based on its repeated doctrinal approbation".⁸⁷

⁷⁹ Niger, *Penal Code as amended* (1961), Article 208.3(12).

⁸⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁸¹ Spain, *Penal Code* (1995), Article 611(1).

⁸² Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁸³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁸⁴ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

⁸⁵ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁸⁶ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

⁸⁷ Report on the Practice of Argentina, 1997, Chapter 1.5, referring to National Court of Appeals, *Military Junta Case*, Judgement, 9 December 1985.

Other National Practice

82. In a press release issued in 1991, an Australian Senator asserted that Article 51(5)(b) AP I would bar Australian ships from providing “naval gunfire support” (NGS) to an amphibian landing in Kuwait and from engaging batteries located in a heavily populated port. According to the Senator, it would prove very difficult for an Australian naval commander to determine whether a shore bombardment would or would not injure civilians or damage civilian property to an extent that would be excessive in relation to the direct military advantage.⁸⁸

In response to these statements, ACOPS recalled first that Australia was not yet legally bound by AP I and that even if it had been, such action would not be in breach of Article 51(5)(b). On the basis of the US and Australian Rules of Engagement and given the very high targeting standards shown by the US authorities, ACOPS deemed that both the Australian government and the warship commanders “can confidently expect that NGS targeting tasks and associated co-ordinates have been rigorously scrutinised to ensure a lawful balance between incidental civilian losses and the anticipated concrete and direct military advantage”. ACOPS also differed with the Senator’s opinion because even if, in retrospect, it should emerge that excessive civilian casualties resulted from such an operation, the Australian warship commanders would not incur personal responsibility for a grave breach of AP I since such a grave breach can only result “from a ‘wilful’ decision, i.e. deliberate disregard for consequences whilst having full knowledge”.⁸⁹

83. The Report on the Practice of Bosnia and Herzegovina states that “during the aggression against the Republic of Bosnia and Herzegovina the aggressor didn’t respect the principle of proportionality in attack, but systematically violated it during the whole time of the aggression” and provides a number of examples in this respect.⁹⁰

84. The Report on the Practice of Botswana recalls that Article 51(5)(b) AP I provides for the principle of proportionality, but it argues that its essence is not well defined because there are no clear criteria concerning the distinction between indiscriminate and disproportionate attacks.⁹¹

85. The Report on the Practice of Brazil states that the principle of proportionality binds Brazil, since Brazil has ratified the Geneva Conventions and its Additional Protocols, and according to the Constitution of Brazil, international treaties are automatically applicable once ratified and published in the official journal.⁹²

⁸⁸ Australia, Media Release by the Shadow Minister for Defence, Protocol One: A Problem for Naval Operations in the Gulf, 20 February 1991.

⁸⁹ Australia, Media Release by the Shadow Minister for Defence, Protocol One and RAN Gulf Operations, 25 February 1991.

⁹⁰ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.5.

⁹¹ Report on the Practice of Botswana, 1998, Chapter 1.5.

⁹² Report on the Practice of Brazil, 1997, Chapter 1.5.

86. The Report on the Practice of Cuba states that the principle of proportionality has been applied “in relation to armaments and the means of combat, taking into account the humanitarian principle enshrined in Cuban military doctrine”. The report cites the actions resulting from the Bay of Pigs invasion as an illustration of this point.⁹³

87. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that the use of nuclear weapons cannot at all be legal because they “are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.⁹⁴

88. The Report on the Practice of Egypt states that “Egypt is of the opinion that the principle of proportionality must be respected [at] all times and in any circumstance”.⁹⁵

89. At the CDDH, France voted against Article 46 of draft AP I (now Article 51) because it considered that:

The provisions of paragraphs 4, 5 and 7 were of a type which by their very complexity would seriously hamper the conduct of defensive military operations against an invader and prejudice the exercise of the inherent right of legitimate defence recognized in Article 51 of the Charter of the United Nations.⁹⁶

90. At the CDDH, the GDR stated that it considered that:

Protection of the civilian population could not be improved if the concept of proportionality was retained. To permit attacks against the civilian population and civilian objects if such attacks had military advantages was tantamount to making civilian protection dependent on subjective decisions taken by a single person, namely, the military commander.⁹⁷

91. In 1983, in reply to a question in parliament about the principle of proportionality in attack, the German government declared that the principle contained in Article 51(5) AP I required decisions on a case-by-case basis and that no abstract calculations were possible.⁹⁸

92. In 1996, the German government reminded the Turkish government to respect the principle of proportionality during hostilities in northern Iraq.⁹⁹

⁹³ Report on the Practice of Cuba, 1998, Chapter 1.5.

⁹⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 18, see also § 35(B)(2) and (3).

⁹⁵ Report on the Practice of Egypt, 1997, Chapter 1.5.

⁹⁶ France, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163, § 118.

⁹⁷ GDR, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 18 March 1974, p. 56, § 48.

⁹⁸ Germany, Reply by the government to a question in the Lower House of Parliament, *Kriegsvölkerrechtliche Grundsätze, BT-Drucksache 10/445*, 5 October 1983, pp. 11–12.

⁹⁹ Germany, Reply by the government to a question in the Lower House of Parliament, *Lage der kurdischen Flüchtlinge im Nordirak, BT-Drucksache 13/5451*, 27 August 1996, pp. 7–8.

93. At the CDDH, Hungary stated that:

The debate had shown that opinion in the [Third] Committee was divided on the principle of proportionality . . . [A] rule well established in international law should be reflected in practice and should produce the intended effects. Yet the number of civilians victims had increased alarmingly over the past few years: accordingly, either the rule was not well established and hence not binding; or it existed and could not be applied in armed conflicts; or it existed and was applied, but the results of its application provided the best argument against it. The [proposed] amendments . . . improved the ICRC text and maintained the rule of proportionality, but did not provide a satisfactory solution of the problem.¹⁰⁰

94. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that:

The relationship between military advantage and the collateral damage involved also determines the legality of use of a weapon or a method of warfare employed. If the collateral damage is excessive in relation to the military advantage, the attack is forbidden.¹⁰¹

95. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that “some of the principles of humanitarian international law from which one can deduce the illegitimacy of the use of nuclear weapons are: . . . The existence of proportionality between military advantages gained and the used weapons and methods.”¹⁰²

96. On the basis of a press conference and a statement by the President of Iraq, the Report on the Practice of Iraq considers that the armed forces must act with only the degree of force necessary to achieve the specific military objective. The aim is to give due regard to humanitarian requirements and to lessen civilian suffering.¹⁰³

97. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled “International Law Providing Protection to the Environment in Times of Armed Conflict”, which stated that “the customary rule that prohibits attacks which reasonably may be expected at the time to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete

¹⁰⁰ Hungary, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.8, 19 March 1974, p. 68, § 80.

¹⁰¹ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

¹⁰² Iran, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 2; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, pp. 1–2.

¹⁰³ Report on the Practice of Iraq, 1998, Chapter 1.5, referring to Press Conference of the President, 10 November 1980, *Encyclopedia of the Iraqi-Iranian War*, Vol. I, p. 318 and Statement by the Iraqi President during preliminary discussions with the Committee of Good Offices, 2 March 1984, *Encyclopedia of the Iraqi-Iranian War*, Vol. III, p. 54.

and direct military advantage anticipated, are prohibited” provides protection for the environment in times of armed conflict.¹⁰⁴

98. According to the Report on the Practice of South Korea, it is South Korea’s *opinio juris* that the principle of proportionality in attack is a requirement of international law.¹⁰⁵

99. The Report on the Practice of Kuwait affirms that numerous statements by Kuwait highlight the importance of the principle of proportionality in attack.¹⁰⁶ The report specifies that there is an obvious violation of the principle of proportionality if no military advantage could be expected from the destruction of an object. This point was illustrated by the country’s vigorous protests over violations of the principle of proportionality committed by the Iraqi armed forces in setting oil wells and other facilities on fire without any hope of gaining a military advantage. The report notes that it is the *opinio juris* of Kuwait that the principle of proportionality must be respected, and that objects whose destruction provide no military advantage should be spared.¹⁰⁷

100. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Malaysia quoted with approval the US statement in the same case (see below).¹⁰⁸

101. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that “the general principles of international humanitarian law in armed conflict also apply to the use of nuclear weapons . . . in particular . . . the prohibition on attacking military targets if this would cause disproportionate harm to the civilian population”.¹⁰⁹

102. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated that:

Discrimination between combatants and those who are not directly involved in armed conflict is a fundamental principle of international humanitarian law. While it is prohibited to actually target civilians and civilian objects, there is no absolute protection from collateral damage. The application of the principle requires an assessment of whether the civilian casualties are out of proportion to the legitimate military advantage achieved and whether collateral damage is so widespread as to amount to an indiscriminate attack.¹¹⁰

¹⁰⁴ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(h).

¹⁰⁵ Report on the Practice of South Korea, 1997, Chapter 1.5.

¹⁰⁶ Report on the Practice of Kuwait, 1997, Chapter 1.5.

¹⁰⁷ Report on the Practice of Kuwait, 1997, Chapter 1.5.

¹⁰⁸ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, p. 22.

¹⁰⁹ Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 32; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 6 June 1994, § 39.

¹¹⁰ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 71.

103. According to the Report on the Practice of Nigeria, it is Nigeria's *opinio juris* that the rule of proportionality forms part of customary international law.¹¹¹ The report also notes that the principle of proportionality was violated by the Nigerian air force on numerous occasions during the civil war. Senior military officials and aircraft pilots were reported to have regretted such violations.¹¹²

104. The Report on the Practice of Pakistan affirms that the practice of Pakistan is consistent with the principle of proportionality.¹¹³

105. At the CDDH, Poland stated that:

The rule of proportionality as expressed in the ICRC text would give military commanders the practically unlimited right to decide to launch an attack if they considered that there would be a military advantage. Civilian suffering and military advantage were two values that could not conceivably be compared.¹¹⁴

106. At the CDDH, Romania stated that it had always opposed the "rule of proportionality" and considered that:

It amounted to legal acceptance of the fact that one part of the civilian population was to be deliberately sacrificed to real or assumed military advantages and it gave military commanders the power to weigh their military advantage against the probable losses among the civilian population during an attack against the enemy. Military leaders would tend to consider military advantage to be more important than the incidental loss. The principle of proportionality was therefore a subjective principle which could give rise to serious violations.¹¹⁵

107. The Report on the Practice of Russia considers the principle of proportionality the "weakest point of IHL" because

IHL itself does not clearly enough define the criteria of respecting the balance between the requirements of humanism and military necessity. This issue is not treated in any of the available documents. It remains the exclusive domain of commanders at the helm of military operations . . . Armed conflicts on the territory of the former USSR demonstrate that conflicting parties do not observe in their acts the limitations set forth in IHL. We are sorry to say that we do not know of any occurrence when a party to a conflict complained of the non-respect of the principle of proportionality by the parties. In all probability, this principle is in reality opposed by a practice based on the assumption that the aim to gain military superiority over the enemy can justify any means of warfare, which, in fact, often means the violation of the principle of proportionality. In this connection, we can point out that the large-scale military operations of the federal troops in Chechnya were at

¹¹¹ Report on the Practice of Nigeria, 1997, Chapter 1.5.

¹¹² Report on the Practice of Nigeria, 1997, Chapter 1.5, referring to *The War in the Air*, New Nigerian War Souvenir Edition, 12 January 1970.

¹¹³ Report on the Practice of Pakistan, 1998, Chapter 1.5.

¹¹⁴ Poland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.8, 19 March 1974, p. 61, § 13.

¹¹⁵ Romania, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1974, p. 305, § 42; see also Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 18 March 1974, p. 57, § 55.

the beginning contrary to the principle of proportionality. In the armed forces of the CIS countries there are neither provisions defining the terms of the respect of the principle of proportionality nor provisions envisaging prosecution of individuals who violate this principle.¹¹⁶

108. On 22 April 1995, between 200 and 300 people died in a camp for internally displaced persons in Kibeho in Rwanda. The Rwandan President stated that these deaths were the result of:

the same machetes of those who committed the genocide and the massacres. Others were killed during shootings in self-defence by the governmental armed forces and by MINUAR in response to attacks launched by the *Interahamwe* militia located in the camp of Kibeho.¹¹⁷

An international commission investigating the events of Kibeho considered that by using automatic guns and heavier weapons, such as grenades and rocket-launchers, against persons who carried guns and traditional weapons, such as machetes and stones, the Rwandan army had acted disproportionately.¹¹⁸ Since no official statement denied this alleged violation of the principle of proportionality in attack, the Report on the Practice of Rwanda concludes that Rwandan practice implicitly confirms the existence of such a norm.¹¹⁹

109. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that “the principles of proportionality and humanity are obviously violated” by the use of nuclear weapons.¹²⁰

110. On the basis of statements by the Spanish Minister of Foreign Affairs and Minister of Defence, the Report on the Practice of Spain states that “the Spanish government has, in general, advocated respect for the principle of proportionality during the conflict in Chechnya, the Turkish attacks on the Kurds in northern Iraq and the conflict in Bosnia and Herzegovina”.¹²¹

111. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that “in the case of an attack on a military target,

¹¹⁶ Report on the Practice of Russia, 1997, Chapter 1.5.

¹¹⁷ Rwanda, Declaration by the President concerning the decision to close the IDP camps of Gikongoro, Kigali, 24 April 1995, p. 2, Report on the Practice of Rwanda, 1997, Chapter 1.5.

¹¹⁸ Rapport de la Commission Internationale d'Enquête Indépendante sur les événements de Kibeho, April 1995, pp. 9–10, Report on the Practice of Rwanda, 1997, Chapter 1.5.

¹¹⁹ Report on the Practice of Rwanda, 1997, Chapter 1.5.

¹²⁰ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 3.103; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.94.

¹²¹ Report on the Practice of Spain, 1998, Chapter 1.5, referring to Statement by Javier Solana Madariaga, Minister of Foreign Affairs, before the Commission of Foreign Affairs of the House of Representatives, 28 February 1995, *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid, 1995, p. 353, Statement by Javier Solana Madariaga, Minister of Foreign Affairs, before the Commission of Foreign Affairs of the House of Representatives, 7 June 1995, *Actividades, Textos y Documentos de la Política Exterior Española*, Madrid, 1995, p. 473 and Statement by García Vargas, Minister of Defence, before the Defence Commission of the House of Representatives, *Boletín Oficial de las Cortes Generales – Congreso*, V Legislatura, Comisiones, No. 513, 6 June 1995, p. 15649.

disproportionately substantial damage may not be inflicted on the civilian population or on civilian property".¹²²

112. At the CDDH, Syria stated that it "could not accept the theory of some kind of "proportionality" between military advantages and losses and destruction of the civilian population and civilian objects, or that the attacking force should pronounce on the matter".¹²³

113. On the basis of a statement by the Syrian Minister of Foreign Affairs before the UN General Assembly in 1997, the Report on the Practice of Syria concludes that Syria considers Article 51(5)(b) AP I to be a norm of customary international law.¹²⁴

114. At the CDDH, the UK stated that the principle of proportionality as defined in Article 51(5)(b) AP I was "a useful codification of a concept that was rapidly becoming accepted by all States as an important principle of international law relating to armed conflict".¹²⁵

115. In 1991, in reply to a question in the House of Lords concerning the Gulf War, the UK Parliamentary Under-Secretary of State for Defence stated that:

The Geneva Conventions contain no provisions expressly regulating targeting in armed conflict. The Hague Regulations of 1907 and customary international law do, however, incorporate the twin principles of distinction between military and civilian objects, and of proportionality so far as the risk of collateral civilian damage from an attack on a military objective is concerned. These principles and associated rules of international law were observed at all times by coalition forces in the planning and execution of attacks against Iraq.¹²⁶

116. In 1993, the UK government stated that:

The Rules of Engagement under which BRITFOR are operating in Bosnia allow them to return fire in self defence if the source can be identified; in doing so, they must attempt to minimise collateral damage and be mindful of the principle of proportionality.¹²⁷

117. In 1993, in reply to questions in the Foreign Affairs Committee of the House of Commons about the launching of "around 40 Cruise missiles by the Americans which resulted in the killing of innocent civilians in places like the Al Rashid Hotel", the UK Minister of Foreign Affairs stated that:

¹²² Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 2 June 1994, p. 3.

¹²³ Syria, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.6, 15 March 1974, p. 48, § 38.

¹²⁴ Report on the Practice of Syria, 1997, Chapter 1.5, referring to Statement by the Syrian Minister of Foreign Affairs before the UN General Assembly, 1 October 1997.

¹²⁵ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR. 41, 26 May 1977, p. 164, § 120.

¹²⁶ UK, House of Lords, Statement by the Parliamentary Under-Secretary of State for Defence, 22 July 1991, *Hansard*, Vol. 531, Written Answers, col. 43.

¹²⁷ UK, House of Commons, Defence Committee, Sixth Special Report: Government Reply to the Fourth Report from the Defence Committee, Session 1992–1993, p. X.

I do not believe the action was disproportionate. You know what it was aimed against; it was aimed against a plant that the Iraqis had themselves admitted was producing material for their nuclear programme . . . It seemed to me a proportionate target. It looks and sounds as if . . . one of the Cruise missiles went astray and killed innocent civilians in the Al Rashid Hotel. That clearly is to be deplored but I do not think the action as a whole can be regarded as disproportionate.¹²⁸

118. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

The principle of proportionality requires that even a military objective should not be attacked if to do so would cause collateral civilian casualties or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated from the attack.¹²⁹

119. In 1972, the General Counsel of the US Department of Defense stated that:

I would like to reiterate that it is recognized by all states that they may not lawfully use their weapons against civilian population[s] or civilians as such, but there is no rule of international law that restrains them from using weapons against enemy armed forces or military targets. The correct rule of international law which has applied in the past and continued to apply to the conduct of our military operations in Southeast Asia is that "the loss of life and damage to property must not be out of proportion to the military advantage to be gained". A review of the operating authorities and rules of engagements for all of our forces in Southeast Asia, in air as well as ground and sea operations, by my office reveals that not only are such operations in conformity with this basic rule, but that in addition, extensive constraints are imposed to avoid if at all possible the infliction of casualties on noncombatants and the destruction of property other than that related to the military operations in carrying out military objectives.¹³⁰

120. In 1974, at the Lucerne Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, the head of the US delegation stated that:

The law of war also prohibits attacks which, though directed at lawful military targets, entail a high risk of incidental civilian casualties or damage to civilian objects which is disproportionate to the military advantage sought to be secured by the attack.¹³¹

¹²⁸ UK, Statement by the Secretary of State, Minutes of Evidence taken before the Foreign Affairs Committee, 28 January 1993, Vol. II, p. 146.

¹²⁹ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.67.

¹³⁰ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 124.

¹³¹ US, Statement of 25 September 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, p. 713.

121. In 1987, the Deputy Legal Adviser of the US Department of State stated that “we support the principle . . . that attacks not be carried out that would clearly result in collateral civilian casualties disproportionate to the expected military advantage”.¹³²

122. In 1991, in reaction to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

The concept of “incidental loss of life excessive in relation to the military advantage anticipated” generally is measured against an overall campaign. While it is difficult to weigh the possibility of collateral civilian casualties on a target-by-target basis, minimization of collateral civilian casualties is a continuing responsibility at all levels of the targeting process. Combat is a give-and-take between attacker and defender, and collateral civilian casualties are likely to occur notwithstanding the best efforts of either party. What is prohibited is wanton disregard for possible collateral civilian casualties.¹³³

123. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

While the prohibition contained in Article 23(g) [HR] generally refers to intentional destruction or injury, it also precludes collateral damage of civilian objects or injury to noncombatant civilians that is clearly disproportionate to the military advantage gained in the attack of military objectives, as discussed below. As previously indicated, Hague IV was found to be customary international law in the course of war crimes trials following World War II, and continues to be so regarded.

An uncodified but similar provision is the principle of proportionality. It prohibits military action in which the negative effects (such as collateral civilian casualties) clearly outweigh the military gain. This balancing may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives. CENTCOM [Central Command] conducted its campaign with a focus on minimizing collateral civilian casualties and damage to civilian objects. Some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological and religious sites, to civilian objects.¹³⁴

124. In 1992, a legal review by the US Department of the Air Force of the legality of extended range anti-armour munition stated that, while legal as such, this munition “should, however, only be used in concentrations of civilians if the military necessity for such use is great, and the expected collateral

¹³² US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

¹³³ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(F), Report on US Practice, 1997, Chapter 1.5.

¹³⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 622.

civilian casualties would not be excessive in relation to the expected military advantage".¹³⁵

125. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that cultural property, civilian objects, and natural resources are protected from:

collateral damage that is clearly disproportionate to the military advantage to be gained in the attack of military objectives. The law of war acknowledges the unfortunate inevitability of collateral damage when military objectives and civilian objects (including cultural property and natural resources) are commingled.¹³⁶

126. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO)* case in 1994, the US stated that:

It is unlawful to carry out any attack that may reasonably be expected to cause collateral damage or injury to civilians or civilian objects that would be excessive in relation to the military advantage anticipated from the attack. Whether an attack with nuclear weapons would be disproportionate depends entirely on the circumstances, including the importance of destroying the objective, the character, size and likely effects of the device, and the magnitude of the risk to civilians.¹³⁷

127. The Report on US Practice states that "United States practice recognizes the principle of proportionality as part of the customary law of non-nuclear war".¹³⁸

128. According to the Report on the Practice of the SFRY (FRY), no doubt can be raised about the existence of an *opinio juris* in favour of the principle of proportionality. The report alleges that serious violations of the principle of proportionality did occur during the conflict in Croatia, for example, during hostilities in Vukovar and Dubrovnik where artillery was massively used, and notes that the press regularly covered this issue in 1991.¹³⁹

129. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Zimbabwe fully shared the analysis by other states that "the threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that . . . are disproportionate".¹⁴⁰

¹³⁵ US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 9, see also §§ 4, 5 and 8.

¹³⁶ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 202.

¹³⁷ US, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 27; see also Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 23.

¹³⁸ Report on US Practice, 1997, Chapter 1.5.

¹³⁹ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.5.

¹⁴⁰ Zimbabwe, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/35, p. 27.

130. The Report on the Practice of Zimbabwe considers that the principle of proportionality is a norm of customary international law but states that its application is difficult to gauge under war conditions.¹⁴¹

III. Practice of International Organisations and Conferences

United Nations

131. In a resolution on Cyprus adopted in 1996, the UN Security Council deplored:

the violent incidents of 11 and 14 August, 8 September and 15 October 1996 [in Cyprus], which resulted in the tragic deaths of three Greek Cypriot civilians and one member of the Turkish Cypriot Security Forces, as well as injuries to civilians and UNFICYP personnel, in particular the unnecessary and disproportionate use of force by the Turkish/Turkish Cypriot side.¹⁴²

132. In a resolution adopted in 1998, the UN Security Council condemned “the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo”.¹⁴³ Later that year, in another resolution in the same context, the Security Council expressed its grave concern at “the excessive and indiscriminate use of force by Serbian security forces and the Yugoslav Army which have resulted in numerous civilian casualties”.¹⁴⁴

133. In a resolution adopted in 2000 on events in Jerusalem and other areas throughout the territories occupied by Israel, the UN Security Council condemned “acts of violence, especially the excessive use of force against Palestinians, resulting in injury and loss of human life”.¹⁴⁵

134. In a resolution adopted in 2000, the UN Commission on Human Rights expressed its grave concern about “reports indicating disproportionate and indiscriminate use of Russian military force” in Chechnya and underlined “the need to respect the principle of proportionality”.¹⁴⁶

135. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), stated that:

There have been incidents in the past where substantial civilian casualties have been caused and substantial military advantage gained by a particular military action. In those cases, one might attempt to quantify both military advantage and civilian losses and apply the somewhat subjective rule of proportionality. As a general statement, however, the rule of proportionality is not relevant to the sniping activities of the Bosnia Serb Army forces, and it is of questionable relevance to

¹⁴¹ Report on the Practice of Zimbabwe, 1998, Chapter 1.5.

¹⁴² UN Security Council, Res. 1092, 23 December 1996, § 2.

¹⁴³ UN Security Council, Res. 1160, 31 March 1998, preamble.

¹⁴⁴ UN Security Council, Res. 1199, 23 September 1998, preamble.

¹⁴⁵ UN Security Council, Res. 1322, 7 October 2000, § 2.

¹⁴⁶ UN Commission on Human Rights, Res. 2000/58, 25 April 2000, preamble.

many of the artillery bombardments. The Bosnian Serb Army forces are deliberately targeting the civilian population of Sarajevo, either as a measure of retaliation or to weaken their political resolve. Attacking the civilian population is a war crime.¹⁴⁷

Other International Organisations

136. In a resolution adopted in 1995 concerning Russia's request for membership in the light of the situation in Chechnya, the Parliamentary Assembly of the Council of Europe unreservedly condemned "the indiscriminate and disproportionate use of force by the Russian military, in particular against the civilian population".¹⁴⁸

137. In a declaration adopted in 1991, the EC Ministers of Foreign Affairs expressed alarm at "reports that the Yugoslav National Army (JNA), having resorted to a disproportionate and indiscriminate use of force, has shown itself to be no longer a neutral and disciplined institution".¹⁴⁹

International Conferences

138. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

139. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ held that:

States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.¹⁵⁰

The Court did not elaborate further on the general principle of proportionality in the conduct of hostilities but rather focused on the application of this principle in the context of the use of force in the framework of the right of self-defence as defined in Article 51 of the UN Charter.¹⁵¹

140. In her dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Higgins stated that "even a legitimate military target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack".¹⁵²

141. In its review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber referred, among the relevant norms of customary law, to Article

¹⁴⁷ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, Annex, § 207.

¹⁴⁸ Council of Europe, Parliamentary Assembly, Res. 1055, 2 February 1995, § 2.

¹⁴⁹ EC, Declaration on Yugoslavia, Haarzuilens, 6 October 1991, annexed to Letter dated 7 October 1991 from the Netherlands to the UN Secretary-General, UN Doc. A/46/533, 7 October 1991.

¹⁵⁰ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 30.

¹⁵¹ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 41.

¹⁵² ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Higgins, 8 July 1996, § 20.

51(5)(b) AP I and held that, even when directed against a legitimate military target, “attacks must not cause damage and harm to the civilian population disproportionate in relation to the concrete and direct military advantage anticipated”.¹⁵³

142. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that the principle of proportionality required that “any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack”.¹⁵⁴

143. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that “civilians present within or near military objectives must . . . be taken into account in the proportionality equation”.¹⁵⁵ The Committee suggested that:

The determination of relative values [of military advantage and injury to non-combatants] must be that of the “reasonable military commander”. Although there will be room for argument in close cases, there will be many cases where reasonable military commanders will agree that the injury to non-combatants or the damage to civilian objects was clearly disproportionate to the military advantage gained.¹⁵⁶

According to the Committee, “attacks which cause disproportionate civilian casualties or civilian property damage may constitute the *actus reus* for the offence of unlawful attack [as a violation of the laws and customs of war]. The *mens rea* for the offence is intention or recklessness, not simple negligence.”¹⁵⁷

144. In a report on Colombia in 1999, the IACiHR noted that the legitimacy of a military target did not provide unlimited license to attack it. According to the report, the rule of proportionality prohibited “an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.¹⁵⁸ The Commission added that the principle of proportionality required that foreseeable injury to civilians and damage to civilian objects should not be disproportionate or excessive to the anticipated concrete and direct military advantage.¹⁵⁹

¹⁵³ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, p. 7, § 18.

¹⁵⁴ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

¹⁵⁵ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 51.

¹⁵⁶ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 50.

¹⁵⁷ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 28.

¹⁵⁸ IACiHR, Third report on the human rights situation in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev.1, 26 February 1999, § 77.

¹⁵⁹ IACiHR, Third report on the human rights situation in Colombia, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev.1, 26 February 1999, § 79.

V. *Practice of the International Red Cross and Red Crescent Movement*

145. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The rule of proportionality shall be respected. An action is proportionate when it does not cause incidental civilian casualties and damage which is excessive in relation to the value of the expected result of the whole military operation. The rule of proportionality cannot be used to justify unlimited destruction or attacks on civilian persons and objects as such.¹⁶⁰

ICRC delegates teach, furthermore, that an “indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive civilian casualties and damage” constitutes a grave breach of the law of war.¹⁶¹

146. In an appeal launched in 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 46(3)(b) of draft AP I which stated that “it is forbidden to launch attacks which may be expected to entail incidental losses among the civilian population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated”. All governments concerned replied favourably.¹⁶²

147. At the CDDH, the ICRC stated that Article 51(5)(b) did not contain an exception to the prohibition of attacks against civilians, “but, as the word ‘incidental’ showed, was intended to cover a different situation”.¹⁶³ It further stated that:

Since the First World War there had been many vain attempts at codifying the immunity of the civilian population. The 1922/23 project would have required combatants to abstain from bombing when it might affect the civilian population, but a good text was useless if it went unsigned, unratified and unimplemented. The Red Cross was conscious of the fact that the rule of proportionality contained a subjective element, and was thus liable to abuse. The aim was, however, to avoid or in any case restrict the incidental effects of attacks directed against military objectives.¹⁶⁴

148. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context

¹⁶⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 389.

¹⁶¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 778(c).

¹⁶² ICRC, *The International Committee’s Action in the Middle East, IRRC*, No. 152, 1973, pp. 584–585.

¹⁶³ ICRC, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.5, 14 March 1974, p. 37, § 11.

¹⁶⁴ ICRC, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.5, 14 March 1974, p. 37, § 12.

of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict: . . . attacks that would cause incidental loss of life or damage which would be excessive in relation to the direct military advantage anticipated are prohibited”.¹⁶⁵

149. In a report on a mission in 1991, the ICRC described attacks launched in a district as disproportionate, the targets being mostly public buildings where numerous civilians could have been located.¹⁶⁶

150. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “not to launch military operations that may cause incidental civilian casualties or damage to civilian objects disproportionate to the direct military advantage anticipated”.¹⁶⁷

151. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “all attacks . . . which may be expected to cause incidental loss of civilian life, injury to civilians or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated are prohibited”.¹⁶⁸

152. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “attacks . . . which may be expected to cause incidental losses of human life among the civilian population or damage to civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated are prohibited”.¹⁶⁹

153. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following war crime be subject to the jurisdiction of the Court:

launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated.¹⁷⁰

VI. Other Practice

154. According to Oppenheim, civilians “do not enjoy absolute immunity”. He adds that:

¹⁶⁵ ICRC, Memorandum on the Applicability of International Humanitarian Law, Geneva, 14 December 1990, § II, *IRRC*, No. 280, 1991, pp. 24–25.

¹⁶⁶ ICRC archive document.

¹⁶⁷ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹⁶⁸ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

¹⁶⁹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹⁷⁰ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(ii).

Their presence will not render military objectives immune from attack for the mere reason that it is impossible to bombard them without causing injury to the non-combatants. But . . . it is of the essence that a just balance be maintained between the military advantage and the injury to non-combatants. The restrictions imposed by customary International Law upon the sinking of merchant-vessels are one of the many examples of the principle that noxious, though otherwise lawful, action must be desisted from when its object cannot be obtained without causing disproportionate injury to legally recognised rights.¹⁷¹

155. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that:

The same argument [that the prohibition of indiscriminate is inferentially included in Article 13 AP II within the prohibition against making the civilian population the object of attack and that the deletion of this prohibition may be said to be part of the simplification of the text] cannot be made with respect to attacks which may be expected to cause disproportionate civilian losses; Committee III [of the CDDH] had rejected that provision before the simplification process had been manifested. Nevertheless, . . . the principle of proportionality is inherent in the principle of humanity which was explicitly made applicable to Protocol II under the fourth clause of the Preamble. Thus, the principle of proportionality cannot be ignored in applying Protocol II.¹⁷²

156. In 1986, in a report on the use of landmines in the conflicts in El Salvador and Nicaragua, Americas Watch stated that:

The principle of humanity, which both complements and inherently limits the doctrine of military necessity, is defined in the U.S. Air Force's *Pamphlet on the Conduct of Armed Conflict and Air Operations* as resulting "...in a specific prohibition against unnecessary suffering and a requirement of proportionality..." . . . These customary principles of the laws of war constitute legal obligation[s] for the warring parties to the internal armed conflicts in El Salvador and Nicaragua.¹⁷³

157. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that "another fundamental principle of customary humanitarian law is the principle of humanity, which both complements and inherently limits the doctrine of military necessity". The report cited the US Air Force Pamphlet with approval where the latter provides that "this principle of humanity results in a specific prohibition of unnecessary suffering and a requirement of proportionality".¹⁷⁴

¹⁷¹ Lassa Oppenheim, *International Law. A Treatise*, Vol. II, Disputes, War and Neutrality, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 415, § 214*ea*.

¹⁷² Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, pp. 677–678.

¹⁷³ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 77–78.

¹⁷⁴ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 127, citing US, *Air Force Pamphlet* (1976), § 1-3(a).

158. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990 states that “whenever the use of force is unavoidable, it shall be in proportion to the seriousness of the offence or the objective to be achieved”.¹⁷⁵

159. In 1994, in the context of the conflict in Yemen, Human Rights Watch urged the government of Yemen:

to play closest attention to the requirements of the rules of war, in particular . . . to the rule of proportionality. Under that rule, even attacks on legitimate military targets such as enemy forces or tanks may be prohibited if such attacks would cause loss of civilian life, injury to civilians, or damage to civilian objects that would be excessive in relation to the concrete and direct military advantage anticipated. . . We note that the rules of war apply equally to government and rebel troops.¹⁷⁶

160. In a report on the NATO bombings in the FRY issued in 2000, Amnesty International stated that:

In other words, NATO deliberately attacked a civilian object [the Serbian state radio and television headquarters], killing 16 civilians, for the purpose of disrupting Serbian television broadcasts in the middle of the night for approximately three hours. It is hard to see how this can be consistent with the rule of proportionality.¹⁷⁷

Determination of the anticipated military advantage

I. Treaties and Other Instruments

Treaties

161. Upon ratification of AP I, Australia and New Zealand stated that references to the “military advantage” were intended to mean “the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack” and maintained that the term “military advantage” involved a number of considerations, including the security of the attacking forces. They also stated that the expression “concrete and direct military advantage anticipated” meant “a *bona fide* expectation that the attack will make a relevant and proportional contribution to the objective of the military attack involved”.¹⁷⁸

162. Upon ratification of AP I, Belgium, Canada, France, Germany, Italy, Netherlands, Spain and UK stated that the term “military advantage” as used

¹⁷⁵ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 5(2), *IRRC*, No. 282, 1991, p. 332.

¹⁷⁶ Human Rights Watch, Letter to the Government of Yemen, New York, 19 May 1994.

¹⁷⁷ Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 45.

¹⁷⁸ Australia, Declarations made upon ratification of AP I, 21 June 1991, § 4; New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 3.

in the proportionality test of Articles 51 and 57 AP I was understood to refer to the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack.¹⁷⁹

163. Article 8(2)(b)(iv) of the 1998 ICC Statute provides that incidental loss of civilian life or injury to civilians must not be clearly excessive “in relation to the concrete and direct *overall* military advantage anticipated”. (emphasis added)

164. Upon signature of the 1998 ICC Statute, Egypt declared that:

The term “the concrete and direct overall military advantage anticipated” used in article 8, paragraph 2 (b) (iv), must be interpreted in the light of the relevant provisions of [AP I]. The term must also be interpreted as referring to the advantage anticipated by the perpetrator at the time when the crime was committed. No justification may be adduced for the nature of any crime which may cause incidental damage in violation of the law applicable in armed conflicts. The overall military advantage must not be used as a basis on which to justify the ultimate goal of the war or any other strategic goals. The advantage anticipated must be proportionate to the damage inflicted.¹⁸⁰

165. Upon ratification of the 1998 ICC Statute, France declared that “the term ‘military advantage’ in article 8, paragraph 2 (b) (iv), refers to the advantage anticipated from the attack as a whole and not from isolated or specific elements thereof”.¹⁸¹

Other Instruments

166. An explanatory footnote in the 2000 ICC Elements of Crimes (footnote 36) states that:

The expression “concrete and direct overall military advantage” refers to a military advantage that is foreseeable by the perpetrator at the relevant time. Such advantage may or may not be temporally or geographically related to the object of the attack. The fact that this crime admits the possibility of lawful incidental injury and collateral damage does not in any way justify any violation of the law applicable in armed conflict. It does not address justifications for war or other rules related to *jus ad bellum*. It reflects the proportionality requirement inherent in determining the legality of any military activity undertaken in the context of an armed conflict.

¹⁷⁹ Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 5; Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 10; France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 10; Germany, Declarations made upon ratification of AP I, 14 February 1992, § 5; Italy, Declarations made upon ratification, 27 February 1986, § 6; Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 5; Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, § 6; UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § i; see also UK, Declarations made upon signature of API, 12 December 1977, § e and Declarations made upon ratification of Amended Protocol II to the CCW, 13 February 1995.

¹⁸⁰ Egypt, Declarations made upon signature of the 1998 ICC Statute, 26 December 2000, § 4(c).

¹⁸¹ France, Interpretative declarations made upon ratification of the 1998 ICC Statute, 9 June 2000, § 5.

II. National Practice

Military Manuals

167. Australia's Defence Force Manual refers to the declaration made by Australia upon ratification of API to the effect that references to military advantage in Articles 51(5)(b) and 57 AP I mean "the advantage anticipated from the attack as a whole and not only from isolated or particular parts of the attack" and that "military advantage involves a number of considerations, including the security of the attacking forces".¹⁸²

168. Belgium's Law of War Manual states that, when deciding whether or not to launch an attack, "the commander must consider the advantage of the attack as a whole (and not the advantages of specific or separate parts of the attack)".¹⁸³

169. Canada's LOAC Manual states that:

The military advantage at the time of the attack is that advantage anticipated from the military campaign or operation of which the attack is part, considered as a whole, and not only from isolated or particular parts of that campaign or operation. A concrete and direct military advantage exists if the commander has an honest and reasonable expectation that the attack will make a relevant contribution to the success of the overall operation. Military advantage may include a variety of considerations including the security of the attacking forces.¹⁸⁴

170. Germany's Military Manual states that "the term 'military advantage' refers to the advantage which can be expected of an attack as a whole and not only of isolated or specific parts of the attack".¹⁸⁵

171. New Zealand's Military Manual states that:

In deciding whether the principle of proportionality is being respected, the standard of measurement is the contribution to the military purpose of an attack or operation considered as a whole, as compared with other consequences of the action, such as the effect upon civilians or civilian objects.¹⁸⁶

172. According to Nigeria's Military Manual, the principle of proportionality requires that "incidental civilian casualties and damage which is excessive in relation to the value of the expected result of the *whole* operation" must be avoided.¹⁸⁷ (emphasis added)

173. Spain's LOAC Manual states that "an attack is prohibited if . . . the damage to the civilian population and/or to civilian objects which the attack will cause is excessive in relation to the military advantage anticipated from the attack *as a whole*".¹⁸⁸ (emphasis added)

174. The US Naval Handbook states that the term military advantage "refers to the advantage anticipated from the military operation of which the attack

¹⁸² Australia, *Defence Force Manual* (1994), §§ 510 and 511.

¹⁸³ Belgium, *Law of War Manual* (1983), p. 29.

¹⁸⁴ Canada, *LOAC Manual* (1999), p. 4-3, §§ 20 and 21, see also p. 2-3, § 16.

¹⁸⁵ Germany, *Military Manual* (1992), § 444.

¹⁸⁶ New Zealand, *Military Manual* (1992), § 207.

¹⁸⁷ Nigeria, *Military Manual* (1994), p. 42, § 11.

¹⁸⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.5.a, see also § 4.3.

is a part, taken as a whole, and not from isolated or particular parts of that operation".¹⁸⁹

National Legislation

175. No practice was found.

National Case-law

176. No practice was found.

Other National Practice

177. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that "the military advantage must be assessed in the light of the attack considered as a whole".¹⁹⁰

178. At the CDDH, Canada stated that in its view the expression "military advantage anticipated" was intended to refer to "the advantage anticipated from the attack considered as a whole, and not only from isolated or particular parts of that attack".¹⁹¹

179. At the CDDH, the FRG stated that in its view the expression "military advantage anticipated" was intended to refer to "the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of that attack".¹⁹²

180. At the CDDH, Italy stated that "as to the evaluation of the military advantage expected from an attack . . . that expected advantage should be seen in relation to the attack as a whole, and not in relation to each action regarded separately".¹⁹³

181. At the CDDH, the Netherlands stated that in its view the expression "military advantage anticipated" was intended to refer to "the advantage anticipated from the attack considered as a whole and not only from isolated or particular phases of that attack".¹⁹⁴

182. At the CDDH, the UK stated that in its view the expression "military advantage anticipated" was intended to refer to "the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack".¹⁹⁵

¹⁸⁹ US, *Naval Handbook* (1995), § 8.1.2.1.

¹⁹⁰ Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984–1985 Session, Doc. 1096-1, 9 January 1985, p. 11.

¹⁹¹ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

¹⁹² FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 188; Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 226.

¹⁹³ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 231.

¹⁹⁴ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168, § 141 and p. 195.

¹⁹⁵ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 120.

183. At the CDDH, the US stated that in its view the expression “military advantage anticipated” was intended to refer to “the advantage anticipated from the attack considered as a whole and not only from isolated or particular parts of the attack”.¹⁹⁶

184. In 1991, in reaction to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army pointed out that:

The concept of “incidental loss of life excessive in relation to the military advantage anticipated” generally is measured against an overall campaign. While it is difficult to weigh the possibility of collateral civilian casualties on a target-by-target basis, minimization of collateral civilian casualties is a continuing responsibility at all levels of the targeting process.¹⁹⁷

185. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that the balancing of collateral damage against military gain “may be done on a target-by-target basis, as frequently was the case during Operation Desert Storm, but also may be weighed in overall terms against campaign objectives”.¹⁹⁸

186. The Report on US Practice states that:

United States practice recognizes the principle of proportionality as part of the customary law of non-nuclear war. In applying this principle, it is necessary to consider military advantage not only on an immediate or target-by-target basis, but also in light of the military objectives of an entire campaign or operation.¹⁹⁹

III. Practice of International Organisations and Conferences

187. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

188. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

189. The ICRC Commentary on the Additional Protocols considers that “the expression ‘concrete and direct’ was intended to show that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded”.²⁰⁰

¹⁹⁶ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 241.

¹⁹⁷ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(F).

¹⁹⁸ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 622.

¹⁹⁹ Report on US Practice, 1997, Chapter 1.5.

²⁰⁰ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 2209.

190. In 1999, in a paper relating to the crimes listed in Article 8(2)(b) of the 1998 ICC Statute, and submitted to the Working Group on Elements of Crimes of the Preparatory Commission for the ICC, the ICRC reiterated its position that:

The addition of the words “clearly” and “overall” in the definition of collateral damage [in Article 8(2)(b)(iv) of the 1998 ICC Statute] is not reflected in any existing legal source. Therefore, the addition must be understood as not changing existing law.²⁰¹

191. At the Rome Conference on the Establishment of an International Criminal Court in 1998, the ICRC stated that:

The addition of the words “clearly” and “overall” in [the] provision relating to proportionality in attacks must be understood as not changing existing law. The word “overall” could give the impression that an extra unspecified element has been added to a formulation that was carefully negotiated during the 1974–1977 Diplomatic Conference that led to [AP I] and this formulation is generally recognized as reflecting customary law. The intention of this additional word appears to be to indicate that a particular target can have an important military advantage that can be felt over a lengthy period of time and affect military action in areas other than the vicinity of the target itself. As this meaning is included in the existing wording of AP I, the inclusion of the word “overall” is redundant.²⁰²

VI. Other Practice

192. No practice was found.

Information required for judging proportionality in attack

I. Treaties and Other Instruments

Treaties

193. Upon accession to AP I, Algeria stated that “to judge any decision, the circumstances, the means and the information available at the time the decision was made are determinant factors and elements in assessing the nature of the said decision”.²⁰³

194. Upon ratification of AP I, Australia stated that:

In relation to Articles 51 to 58 inclusive it is the understanding of Australia that military commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time.²⁰⁴

²⁰¹ ICRC, Paper relating to the crimes listed in article 8, paragraph 2 (b) (i), (ii), (iii), (iv), (v), (vi), (ix), (xi) and (xiii) of the Statute of the ICC, annexed to UN Doc. PCNICC/1999/WGEC/INF.2/Add.1, 30 July 1999, p. 29.

²⁰² ICRC, Statement at the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, 8 July 1998, UN Doc. A/CONF.183/INF/10, 13 July 1998, p. 1, § 2.

²⁰³ Algeria, Interpretative declarations made upon accession to AP I, 16 August 1989, § 2.

²⁰⁴ Australia, Declarations made upon ratification of AP I, 21 June 1991, § 3.

195. Upon ratification of AP I, Austria stated that “Article 57, paragraph 2, of Protocol I will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative”.²⁰⁵ It further stated that:

For the purposes of judging any decision taken by a military commander, Articles 85 and 86 of Protocol I will be applied on the understanding that military imperatives, the reasonable possibility of recognizing them and the information actually available at the time that decision was taken, are determinative.²⁰⁶

196. Upon ratification of AP I, Belgium stated that:

With respect to Part IV, Section I, of the Protocol, the Belgian Government wishes to emphasize that, whenever a military commander is required to take a decision affecting the protection of civilians or civilian objects or objects assimilated therewith, the only information on which that decision can possibly be taken is such relevant information as is then available and that it has been feasible from him to obtain for that purpose.²⁰⁷

197. Upon ratification of AP I, Canada stated that:

It is the understanding of the Government of Canada that, in relation to Articles 48, 51 to 60 inclusive, 62 and 67, military commanders and others responsible for planning, deciding upon or executing attacks have to reach decisions on the basis of their assessment of the information reasonably available to them at the relevant time and that such decisions cannot be judged on the basis of information which has subsequently come to light.²⁰⁸

198. Upon ratification of AP I, Egypt stated that “military commanders planning or executing attacks make their decisions on the basis of their assessment of all kinds of information available to them at the time of the military operations”.²⁰⁹

199. Upon ratification of AP I, Germany stated that:

It is the understanding of the Federal Republic of Germany that in the application of the provisions of Part IV, Section I, of Additional Protocol I, to military commanders and others responsible for planning, deciding upon or executing attacks, the decision taken by the person responsible has to be judged on the basis of all information available to him at the relevant time, and not on the basis of hindsight.²¹⁰

200. Upon ratification of AP I, Ireland stated that:

In relation to Article 51 to 58 inclusive, it is the understanding of Ireland that military commanders and others responsible for planning, deciding upon, or executing

²⁰⁵ Austria, Reservations made upon ratification of AP I, 13 August 1982, § 1.

²⁰⁶ Austria, Reservations made upon ratification of AP I, 13 August 1982, § 4.

²⁰⁷ Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 3.

²⁰⁸ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 7.

²⁰⁹ Egypt, Declaration made upon ratification of AP I, 9 October 1992.

²¹⁰ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 4.

attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.²¹¹

201. Upon ratification of AP I, Italy declared that:

In relation to Articles 51 to 58 inclusive, the Italian Government understands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.²¹²

202. Upon ratification of AP I, the Netherlands declared with regard to Articles 51 to 58 AP I inclusive that:

It is the understanding of the Government of the Kingdom of the Netherlands that military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time.²¹³

203. Upon ratification of AP I, New Zealand stated that:

In relation to Article 51 to 58 inclusive, it the understanding of the Government of New Zealand that military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is reasonably available to them at the relevant time.²¹⁴

204. Upon ratification of AP I, Spain declared with regard to Articles 51 to 58 AP I inclusive that:

It is the understanding [of the Spanish government] that the decision made by military commanders, or others with the legal capacity to plan or execute attacks which may have repercussions on civilians or civilian objects or similar objects, shall not necessarily be based on anything more than the relevant information available at the relevant time and which it has been possible to obtain to that effect.²¹⁵

205. Upon signing AP I, the UK stated that "military commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time".²¹⁶ It repeated this statement upon ratification of AP I.²¹⁷

Other Instruments

206. No practice was found.

²¹¹ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 9.

²¹² Italy, Declarations made upon ratification of AP I, 27 February 1986, § 5.

²¹³ Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 6.

²¹⁴ New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 2.

²¹⁵ Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, § 5.

²¹⁶ UK, Declarations made upon signature of AP I, 12 December 1977, § d.

²¹⁷ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § c.

II. National Practice

Military Manuals

207. Australia's Defence Force Manual refers to the declaration made by Australia upon ratification of AP I to the effect that "ADF commanders will, by necessity, have to reach decisions on the basis of their assessment of the information available to them at the relevant time".²¹⁸

208. Belgium's Law of War Manual states that:

It will not always be easy for a commander to evaluate this situation [whether an attack will be disproportionate] with precision. On the one hand, he must take into account the elements *which are available to him*, related to the military necessity necessary to justify an attack, and on the other hand, he must take into account the elements *which are available to him*, related to the possible loss of human life and damage to civilian objects.²¹⁹ [emphasis in original]

209. Canada's LOAC Manual notes that decisions must be based on an honest and reasonable expectation made by the responsible commanders "that the attack will make a relevant contribution to the success of the overall operation", based on the information reasonably available to them at the relevant time, and taking fully into account the urgent and difficult circumstances under which such decisions must usually be made.²²⁰

210. Ecuador's Naval Manual states that "the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an objective and reasonable estimate of the available information".²²¹

211. The US Naval Handbook states that "the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him".²²²

National Legislation

212. No practice was found.

National Case-law

213. No practice was found.

Other National Practice

214. In an explanatory memorandum submitted to the Belgian parliament in 1985 in the context of the ratification procedure of the Additional Protocols, the Belgian government stated that "the military advantage must be assessed . . . in the light of what a military commander can foresee on the basis of the available and relevant information which is available at the time of the assessment".²²³

²¹⁸ Australia, *Defence Force Manual* (1994), § 511.

²¹⁹ Belgium, *Law of War Manual* (1983), p. 29. ²²⁰ Canada, *LOAC Manual* (1999), pp. 4-2/4-3.

²²¹ Ecuador, *Naval Manual* (1989), § 8.1.2.1. ²²² US, *Naval Handbook* (1995), § 8.1.2.1.

²²³ Belgium, House of Representatives, Explanatory memorandum on a draft bill for the approval of the Additional Protocols, 1984-1985 Session, Doc. 1096-1, 9 January 1985, p. 11.

215. At the CDDH, Canada stated that “commanders and others responsible for planning, deciding upon or executing necessary attacks, have to reach decisions on the basis of their assessment of whatever information from all sources may be available to them at the relevant time”.²²⁴

216. At the CDDH, the FRG stated that “commanders and others responsible for planning, deciding upon or executing an attack necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time”.²²⁵

217. At the CDDH, the Netherlands stated that “commanders and others responsible for planning, deciding upon or executing attacks necessarily had to reach decisions on the basis of their assessment of the information from all sources which was available to them at the relevant time”.²²⁶

218. At the CDDH, the UK stated that “military commanders and others responsible for planning, initiating or executing attacks necessarily had to reach decisions on the basis of their assessment of the information from all sources which was available to them at the relevant time”.²²⁷

219. At the CDDH, the US stated that “commanders and others responsible for planning, deciding upon or executing attacks necessarily have to reach decisions on the basis of their assessment of the information from all sources which is available to them at the relevant time”.²²⁸

III. Practice of International Organisations and Conferences

220. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

221. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

222. No practice was found.

VI. Other Practice

223. No practice was found.

²²⁴ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 178.

²²⁵ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, Vol. VI, p. 226.

²²⁶ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 205, § 1.

²²⁷ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 121.

²²⁸ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 241.

PRECAUTIONS IN ATTACK

A. General (practice relating to Rule 15)	§§ 1–206
Constant care to spare the civilian population, civilians and civilian objects	§§ 1–62
Avoidance or minimisation of incidental damage	§§ 63–146
Feasibility of precautions in attack	§§ 147–181
Information required for deciding upon precautions in attack	§§ 182–206
B. Target Verification (practice relating to Rule 16)	§§ 207–264
C. Choice of Means and Methods of Warfare (practice relating to Rule 17)	§§ 265–324
D. Assessment of the Effects of Attacks (practice relating to Rule 18)	§§ 325–366
E. Control during the Execution of Attacks (practice relating to Rule 19)	§§ 367–419
F. Advance Warning (practice relating to Rule 20)	§§ 420–501
G. Target Selection (practice relating to Rule 21)	§§ 502–542

A. General

Constant care to spare the civilian population, civilians and civilian objects

Note: *For practice concerning measures to spare cultural and religious objects, see Chapter 12.*

I. Treaties and Other Instruments

Treaties

1. Article 57(1) AP I states that “in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects”. Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.¹

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

2. Article 13(1) AP II provides that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”. Article 13 AP II was adopted by consensus.²

3. Article 24(2) of draft AP II submitted by the ICRC to the CDDH provided that “constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects. This rule shall, in particular, apply to the planning, deciding or launching of an attack.”³ This provision was adopted in Committee III of the CDDH by 50 votes in favour, none against and 11 abstentions.⁴ Eventually, however, it was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁵

Other Instruments

4. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

5. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

II. National Practice

Military Manuals

6. Australia’s Defence Force Manual states that “in the conduct of military operations, constant care must be taken to spare the civilian population and civilian objects to the maximum extent possible”.⁶

7. Belgium’s Law of War Manual states that “when preparing attacks, care shall be taken to spare the civilian population and civilian objects”.⁷

8. Benin’s Military Manual states that “constant care shall be taken to spare the civilian population and civilian objects”.⁸

9. Cameroon’s Instructors’ Manual considers that “a commander must take constant care to spare civilians and civilian objects”.⁹

10. Canada’s LOAC Manual states that “civilians are entitled to protection from the dangers arising from military operations. In conducting operations care should always be taken to spare civilians and civilian objects.”¹⁰

11. Croatia’s Commanders’ Guide states that “constant care shall be taken to spare the civilian population, civilian persons and civilian objects”.¹¹

² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁴ CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.37, 4 April 1975, p. 390, § 13.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

⁶ Australia, *Defence Force Manual* (1994), § 556.

⁷ Belgium, *Law of War Manual* (1983), p. 28.

⁸ Benin, *Military Manual* (1995), Fascicule III, p. 11.

⁹ Cameroon, *Instructors’ Manual* (1992), p. 95.

¹⁰ Canada, *LOAC Manual* (1999), p. 4-2, § 15.

¹¹ Croatia, *Commanders’ Guide* (1992), § 43.

12. Ecuador's Naval Manual states that "all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible from the ravages of war".¹²
13. France's LOAC Manual states that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects".¹³
14. Germany's Military Manual states that "the civilian population as such as well as individual civilians . . . shall be spared as far as possible".¹⁴
15. Hungary's Military Manual requires that "all possible measures must be taken to spare civilian persons and objects [and] specifically protected persons and objects".¹⁵
16. Israel's Manual on the Laws of War states that there is an "obligation to refrain from harming civilians insofar as possible".¹⁶
17. Italy's LOAC Elementary Rules Manual states that "constant care shall be taken to spare the civilian population, civilian persons and civilian objects".¹⁷
18. Madagascar's Military Manual states that "constant care shall be taken to spare the civilian population as well as civilian objects".¹⁸
19. The Military Manual of the Netherlands states that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects".¹⁹
20. The Military Handbook of the Netherlands states that "the civilian population which does not participate in hostilities must be spared".²⁰
21. New Zealand's Military Manual states that "in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects".²¹
22. Nigeria's Military Manual lists as one of the basic principles in the conduct of operations, every commander's duty "to spare the civilian population, civilian persons and civilian objects". The manual adds that "when planning action that could endanger civilian persons and objects therefore, care and precaution must be emphasised and exercised in the conduct of the war".²²
23. Nigeria's Military Manual and Soldiers' Code of Conduct state that "civilian persons and objects must be spared".²³
24. Romania's Soldiers' Manual states that combatants must "spare civilians and their property".²⁴

¹² Ecuador, *Naval Manual* (1989), § 8.1.

¹³ France, *LOAC Manual* (2001), p. 98; see also *LOAC Teaching Note* (2000), p. 4.

¹⁴ Germany, *Military Manual* (1992), § 404. ¹⁵ Hungary, *Military Manual* (1992), p. 45.

¹⁶ Israel, *Manual on the Laws of War* (1998), p. 42.

¹⁷ Italy, *LOAC Elementary Rules Manual* (1991), § 43.

¹⁸ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 11.

¹⁹ Netherlands, *Military Manual* (1993), p. V-10.

²⁰ Netherlands, *Military Handbook* (1995), p. 7-43, § 6.

²¹ New Zealand, *Military Manual* (1992), § 518(1).

²² Nigeria, *Military Manual* (1994), p. 42, § 11.

²³ Nigeria, *Military Manual* (1994), p. 39, § 5(c); *Soldiers' Code of Conduct* (undated), § 3.

²⁴ Romania, *Soldiers' Manual* (1991), p. 4.

25. Spain's LOAC Manual states that "constant care shall be taken to spare the civilian population, civilian persons and civilian objects".²⁵
26. Sweden's IHL Manual states that the precautions in attack "have come about only to protect the civilian population, individual civilians and civilian property in connection with military operations, and particularly when planning, deciding upon and executing attacks".²⁶
27. Togo's Military Manual states that "constant care shall be taken to spare the civilian population and civilian objects".²⁷
28. The US Air Force Pamphlet states that "in conducting military operations, constant care must be taken to spare the civilian population, civilians, and civilian objects".²⁸
29. The US Naval Handbook states that "all reasonable precautions must be taken to ensure that only military objectives are targeted so that civilians and civilian objects are spared as much as possible from the ravages of war".²⁹

National Legislation

30. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 57(1) AP I, as well as any "contravention" of AP II, including violations of Article 13(1) AP II, are punishable offences.³⁰
31. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".³¹

National Case-law

32. No practice was found.

Other National Practice

33. The Report on the Practice of Algeria states that during the war of independence the ALN always tried to avoid hostilities in towns in order to spare needless casualties among the civilian population.³²
34. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal "to spare [the] civilian population from all attacks".³³

²⁵ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1), see also § 2.3.b.(2).

²⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 68.

²⁷ Togo, *Military Manual* (1996), Fascicule III, p. 11.

²⁸ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(a). ²⁹ US, *Naval Handbook* (1995), § 8.1.

³⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

³² Report on the Practice of Algeria, 1997, Chapter 1.5, referring to *El Moudjahid*, Vol. 1, p. 440.

³³ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

35. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.³⁴
36. In 1971, during a debate in the Third Committee of the UN General Assembly concerning respect for human rights in armed conflicts, Liberia stated that it “agreed wholeheartedly with the principle that, in the conduct of military operations, every effort should be made to spare civilian populations... as affirmed in [principle 3] of General Assembly resolution 2675 (XXV)”.³⁵
37. According to the Report on the Practice of Malaysia, the obligation to take constant care to spare the civilian population and civilian objects in the conduct of military operations forms part of Malaysian practice.³⁶
38. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.³⁷
39. In its consideration of the legality of the 1978 attack by the SADF on the SWAPO base/refugee camp at Kassinga in Angola, the South African Truth and Reconciliation Commission stated that “international humanitarian law stipulates that a distinction must at all times be made between persons taking part in hostilities and civilians, with the latter being spared as much as possible”.³⁸
40. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.³⁹
41. In 1938, during a debate in the House of Commons, the UK Prime Minister listed among rules of international law applicable to warfare on land, at sea and from the air the rule that “reasonable care must be taken in attacking these military objectives so that by carelessness a civilian population in the neighbourhood is not bombed”.⁴⁰
42. In 1972, the General Counsel of the US Department of Defense stated that the US regarded the principle contained in UN General Assembly Resolution 2444 (XXIII) of 1968 that “a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to

³⁴ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

³⁵ Liberia, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1890, 1 December 1971, § 8.

³⁶ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.6.

³⁷ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

³⁸ South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 2, pp. 52–55, §§ 44–45.

³⁹ Report on the Practice of Syria, 1997, Chapter 1.6.

⁴⁰ UK, House of Commons, Statement by the Prime Minister, Sir Neville Chamberlain, 21 June 1938, *Hansard*, Vol. 337, cols. 937–938.

the effect that the civilians be spared as much as possible . . . as declaratory of existing customary international law".⁴¹

43. According to the Report on US Practice, it is the *opinio juris* of the US that a "distinction must be made between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible".⁴²

44. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe's law and practice.⁴³

III. Practice of International Organisations and Conferences

United Nations

45. UN General Assembly Resolution 2444 (XXIII), adopted in 1968, affirmed Resolution XXVIII of the 20th International Conference of the Red Cross in 1965 and the basic humanitarian principle applicable in all armed conflicts laid down therein that "distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible".⁴⁴

46. UN General Assembly Resolution 2675 (XXV), adopted in 1970, states that "in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations".⁴⁵

Other International Organisations

47. No practice was found.

International Conferences

48. The 20th International Conference of the Red Cross in 1965 adopted a resolution on protection of civilian populations against the dangers of indiscriminate warfare in which it solemnly declared that:

All Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles: . . . that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.⁴⁶

⁴¹ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 122.

⁴² Report on US Practice, 1997, Chapter 1.4.

⁴³ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

⁴⁴ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(c).

⁴⁵ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 3.

⁴⁶ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

IV. *Practice of International Judicial and Quasi-judicial Bodies*

49. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol. The Trial Chamber also noted that in the case of attacks on military objectives causing damage to civilians, “international law contains a general principle prescribing that reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured through carelessness”.⁴⁷ With reference to the Martens Clause, the Chamber held that:

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.⁴⁸

V. *Practice of the International Red Cross and Red Crescent Movement*

50. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “constant care shall be taken to spare the civilian population, civilian persons and civilian objects”.⁴⁹

51. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(1) of draft AP I, which stated that “constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects”. All governments concerned replied favourably.⁵⁰

52. The ICRC Commentary on the Additional Protocols considers that the obligation to take constant care to spare the civilian population, civilians and civilian objects

appropriately supplements the basic rule [of distinction] . . . It is quite clear that by respecting this obligation the Parties to the conflict will spare the civilian population, civilians and civilian objects . . . This is only an enunciation of a general principle which is already recognized in customary law.⁵¹

⁴⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

⁴⁸ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

⁴⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 388.

⁵⁰ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

⁵¹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 2191.

53. In a press release issued in 1991 in the context of the Gulf War, the ICRC insisted that “all necessary precautions be taken by those conducting the hostilities to spare civilians”.⁵²

54. On several occasions, the ICRC has reminded the parties to the conflicts in Nagorno-Karabakh, Afghanistan and Chechnya of their obligation to take all possible measures to spare the civilian population and civilian facilities.⁵³

55. In a press release issued in 1992 during the conflict in Tajikistan, the ICRC urged the parties “to take every possible precaution to spare civilians”.⁵⁴

56. In a press release issued in 1994 in the context of the conflict in Yemen, the ICRC called upon all combatants “to spare the civilian population”.⁵⁵

57. In a communication to the press issued in 1999 concerning NATO’s intervention in the FRY, the ICRC stated that “those conducting hostilities must take all necessary precautions to spare civilians”.⁵⁶

58. In 1999, in a statement following the start of NATO operations against the FRY, the ICRC noted that:

Thousands of Serb and Romany families also face an uncertain future, having fled their homes in Kosovo out of fear of airstrikes or retaliation. Among the essential principles of international humanitarian law are the requirements that civilians be spared violence.⁵⁷

59. In a communication to the press in 2000, the ICRC appealed to Israel and Lebanon to ensure that in the conduct of military operations constant care was taken to spare the civilian population, civilians and civilian objects.⁵⁸

60. In a communication to the press in 2000, during the conflict between Ethiopia and Eritrea, the ICRC stated that “the belligerents are also duty bound to take all necessary steps to safeguard the civilian population from the dangers of military operations”.⁵⁹

61. In a communication to the press in 2000, the ICRC reminded all those involved in the violence in the Near East that “armed and security forces must

⁵² ICRC, Press Release No. 1658, Gulf War: ICRC reminds States of their obligations, 17 January 1991, *IRRC*, No. 280, 1991, p. 26.

⁵³ ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian rules, 12 March 1992; Press Release No. 1764, Afghanistan: ICRC calls for respect for the civilian population, 8 February 1994; Press Release No. 1793, Chechnya: The ICRC urges respect for humanitarian rules, 28 November 1994.

⁵⁴ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 25 November 1992.

⁵⁵ ICRC, Press Release No. 1773, Fighting in Yemen, 9 May 1994.

⁵⁶ ICRC, Communication to the Press No. 99/15, Nato intervention in Yugoslavia: ICRC reminds States of their obligations, 24 March 1999, *IRRC*, No. 834, 1999, p. 408.

⁵⁷ ICRC, Statement: The Balkan conflict and respect for international humanitarian law, 26 April 1999, *IRRC*, No. 834, 1999, p. 410.

⁵⁸ ICRC, Communication to the Press No. 00/10, Lebanon and Northern Israel: ICRC appeals for civilians to be spared and respect for civilian infrastructure, 5 May 2000.

⁵⁹ ICRC, Communication to the Press No. 00/14, Eritrea/Ethiopia: ICRC urges respect for humanitarian law, 12 May 2000.

spare and protect all civilians who are not or are no longer taking part in the clashes, in particular children, women and the elderly".⁶⁰

VI. Other Practice

62. The Head of Foreign Affairs of an armed opposition group told the ICRC in 1995 that his group was conscious of the necessity to respect and to spare the civilian population during an armed conflict.⁶¹

Avoidance or minimisation of incidental damage

I. Treaties and Other Instruments

Treaties

63. Article 2(3) of the 1907 Hague Convention (IX) provides that:

If for military reasons immediate action [against naval or military objects located within an undefended town or port] is necessary, and no delay can be allowed the enemy, . . . [the commander of a naval force] shall take all due measures in order that the town may suffer as little harm as possible.

64. Article 57(4) AP I provides that:

In the conduct of military operations at sea or in the air, each Party to the conflict shall, in conformity with its rights and duties under the rules of international law applicable in armed conflict, take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects.

Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.⁶²

65. Article 13(1) AP II provides that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations". Article 13 AP II was adopted by consensus.⁶³

Other Instruments

66. Article 9 of the 1956 New Delhi Draft Rules states that:

All possible precautions shall be taken, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to ensure that no losses or damage are caused to the civilian population in the vicinity of the objective, or to its dwellings, or that such losses or damage are at least reduced to a minimum.

⁶⁰ ICRC, Communication to the Press No. 00/42, ICRC Appeal to All Involved in Violence in the Near East, 21 November 2000.

⁶¹ ICRC archive document.

⁶² CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

⁶³ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

67. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

68. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

69. Paragraph 36 of the 1994 CSCE Code of Conduct states that “the armed forces will take due care to avoid injury to civilians or their property”.

70. Section 5.3 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force shall take all feasible precautions to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians or damage to civilian property”.

II. National Practice

Military Manuals

71. Australia’s Defence Force Manual asserts that:

All reasonable precautions must be taken to avoid injury, loss or damage to civilians and civilian objects and locations. It is therefore important to obtain accurate intelligence before mounting an attack. While LOAC recognises that civilian casualties are unavoidable at times, a failure to take all reasonable precautions to minimise such damage may lead to a breach of those laws. The same principles apply to the risk of damage or injury to any other protected persons, places and objects.⁶⁴

72. Belgium’s Law of War Manual provides that “everything possible must be done to avoid incidental damage to civilian objects and loss of civilian life”.⁶⁵

73. Benin’s Military Manual states that “precautions must be taken when planning military operations in order to avoid civilian losses and damage to civilian objects or to minimise such losses and damage when they are unavoidable”.⁶⁶

74. Canada’s Code of Conduct requires that the operations of Canadian forces be “conducted in such a way that damage to civilians and their property is minimized”.⁶⁷

75. Croatia’s LOAC Compendium requires that all precautionary measures be taken to avoid or minimise injury to civilians and damage to civilian objects.⁶⁸

76. Croatia’s Commanders’ Manual states that “the commander shall consider all precautions in order to avoid and, at least, to minimise civilian casualties and damage to civilian objects”.⁶⁹

77. Ecuador’s Naval Manual requires naval commanders to “take all reasonable precautions, taking into account military and humanitarian considerations, to

⁶⁴ Australia, *Defence Force Manual* (1994), § 548, see also § 846.

⁶⁵ Belgium, *Law of War Manual* (1983), p. 28.

⁶⁶ Benin, *Military Manual* (1995), Fascicule III, p. 8, see also Fascicule II, p. 6.

⁶⁷ Canada, *Code of Conduct* (2001), Rule 2, § 4.

⁶⁸ Croatia, *LOAC Compendium* (1991), p. 30.

⁶⁹ Croatia, *Commanders’ Manual* (1992), § 35.

keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force".⁷⁰

78. France's LOAC Teaching Note provides that "all precautions must be taken in order to avoid or minimise incidental injury and collateral damage".⁷¹

79. Germany's Military Manual requires that "when launching an attack on a military objective, all feasible precautions shall be taken to avoiding, and in any event to minimizing, incidental losses of civilian life, injury to civilians and damage to civilian objects".⁷²

80. Hungary's Military Manual requires the taking of "precautions to minimise civilian casualties and damages".⁷³

81. Italy's LOAC Elementary Rules Manual states that "the commander shall consider all precautions in order to avoid and, at least, to minimise civilian casualties and damage to civilian objects".⁷⁴

82. Kenya's LOAC Manual states that "all possible precautionary measures must be taken to reduce the 'collateral' [damage] as much as possible".⁷⁵

83. Madagascar's Military Manual states that "the commander must examine all the precautions to be taken in order to avoid or, at least to minimise, civilian losses and damage to civilian objects".⁷⁶

84. The Military Handbook of the Netherlands states that "collateral damage to civilian objects must be avoided as far as possible".⁷⁷

85. New Zealand's Military Manual states that:

An attack on a military objective may not be considered indiscriminate, disproportionate or otherwise unlawful simply because there is a risk of collateral injury to civilians or civilian objects. Civilian casualties or damage incidental to attacks on legitimate military objectives are therefore not unlawful. Such injuries and damage, however, should not be disproportionate (that is, clearly excessive in relation to the concrete and direct military advantage anticipated from the attack) and every feasible precaution must be taken to minimise them.⁷⁸

86. According to Nigeria's Military Manual, "precaution shall be taken to minimise civilian casualties and damage".⁷⁹

87. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that:

Actions during security/police operations will be guided by these rules [of behavior for soldiers/police during security/police operations] in order . . . to reduce the destruction that may be inflicted against lives and properties . . . Members of the AFP and PNP shall exercise the utmost restraint and caution in the use of armed force

⁷⁰ Ecuador, *Naval Manual* (1989), § 8.1.2.1.

⁷¹ France, *LOAC Teaching Note* (2000), p. 2. ⁷² Germany, *Military Manual* (1992), § 510.

⁷³ Hungary, *Military Manual* (1992), p. 50, see also p. 54.

⁷⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 35.

⁷⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 3.

⁷⁶ Madagascar, *Military Manual* (1994), Fiche No. 5-O, § 35, see also Fiche No. 9-SO, § A and Fiche No. 2-T, § 27.

⁷⁷ Netherlands, *Military Handbook* (1995), p. 7-43, § 7.

⁷⁸ New Zealand, *Military Manual* (1992), §§ 515(2) and 622(2).

⁷⁹ Nigeria, *Military Manual* (1994), p. 45, § 16(b).

to implement policies . . . Members of the AFP and PNP shall inhibit themselves from unnecessary military/police actions that could cause destruction to private and public properties.⁸⁰

88. Spain's LOAC Manual states that "the commander shall consider all precautions in order to avoid and, at least, to minimise civilian casualties and damage to civilian objects".⁸¹

89. According to Switzerland's Basic Military Manual, "during every attack, commanding officers at the battalion or group level, and those of higher ranks, shall see to it that the civilian population . . . does not suffer any damage".⁸²

90. Togo's Military Manual states that "precautions must be taken when planning military operations in order to avoid civilian losses and damage to civilian objects or to minimise such losses and damage when they are unavoidable".⁸³

91. The UK LOAC Manual states that "care must be taken to avoid incidental loss or damage to civilians or civilian objects".⁸⁴

92. The US Rules of Engagement for the Vietnam War stated that "while the goal is maximum effectiveness in combat operations, every effort must be made to avoid civilian casualties, minimize the destruction of private property, and conserve diminishing resources".⁸⁵

93. The US Rules of Engagement for Operation Desert Storm required soldiers to avoid harming civilians and civilian property "unless necessary to save US lives".⁸⁶

94. The US Naval Handbook requires naval commanders to "take all reasonable precautions, taking into account military and humanitarian considerations, to keep civilian casualties and damage to the minimum consistent with mission accomplishment and the security of the force".⁸⁷

National Legislation

95. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 57(4) AP I, as well as any "contravention" of AP II, including violations of Article 13(2) AP II, are punishable offences.⁸⁸

96. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁸⁹

⁸⁰ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a).

⁸¹ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.d.(2).

⁸² Switzerland, *Basic Military Manual* (1987), Article 29(1).

⁸³ Togo, *Military Manual* (1996), Fascicule III, p. 8, see also Fascicule II, p. 6.

⁸⁴ UK, *LOAC Manual* (1981), Section 4, p. 13, § 4(b).

⁸⁵ US, *Rules of Engagement for the Vietnam War* (1971), § 3(a).

⁸⁶ US, *Rules of Engagement for Operation Desert Storm* (1991), §§ B and G.

⁸⁷ US, *Naval Handbook* (1995), § 8.1.2.1.

⁸⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁸⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

National Case-law

97. No practice was found.

Other National Practice

98. The Report on the Practice of Colombia refers to an opinion of the Attorney General given before the House of Representatives and an attestation by the Cabinet to the effect that attacks on installations must be made in conditions of maximum safety for civilians. This obligation includes the duty to halt any action that might present a serious danger to civilian lives and physical integrity and the obligation to take all possible measures to preserve civilian lives and physical integrity.⁹⁰

99. In 1991, in a letter to the UN Secretary-General concerning the Gulf War, Costa Rica commended "the precautions taken by the forces of the United States of America and its allies aimed at attacking as far as possible only military targets and causing the least possible suffering to the civilian population".⁹¹

100. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.⁹²

101. In a briefing in 1982, the Israeli Ministry of Foreign Affairs declared that Israeli forces had taken all precautions to concentrate military operations against only "terrorist" targets to diminish incidental loss of civilian life. In the same briefing, Israeli officials stated that their forces had taken all necessary and possible precautions to protect individual civilians, the civilian population and civilian objects from the danger of military operations.⁹³

102. According to the Report on the Practice of Israel, "during the pre-attack planning phases, the IDF incorporates all feasible precautions to ensure, as far as possible, that incidental civilian loss, injury or damage is minimized".⁹⁴

103. The Report on the Practice of Jordan considers that "it is normal that the military command[er] in charge should take in an attack all feasible precautions to avoid causing injury, loss or damage to the civilian population".⁹⁵

104. On the basis of interviews with members of the armed forces and the Ministry of Home Affairs, the Report on the Practice of Malaysia states that in any planned attack during the communist insurgency, "the Security Forces

⁹⁰ Report on the Practice of Colombia, 1998, Chapter 1.6, referring to Cundinamarca Administrative Court, *Case No. 4010*, Opinion of the Attorney General given before the House of Representatives, pp. 33, 35 and 36 and Cundinamarca Administrative Court, *Case No. 4010*, Attestation by the Cabinet, 6 November 1985, Record of evidence, pp. 13–14.

⁹¹ Costa Rica, Letter dated 17 January 1991 to the UN Secretary-General, UN Doc. S/22101, 17 January 1991, p. 2.

⁹² Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

⁹³ Israel, Ministry of Foreign Affairs, Department of Information, Briefing No. 342/18.7.82/3.10.108, 18 July 1982.

⁹⁴ Report on the Practice of Israel, 1997, Chapter 1.6.

⁹⁵ Report on the Practice of Jordan, 1997, Chapter 1.6.

would always determine the position of the enemy to avoid or minimise civilian casualties".⁹⁶ The report further states that "in practice, the Armed Forces, whenever possible, will not cause collateral damage to civilian objects".⁹⁷

105. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.⁹⁸

106. In 1991, in a report on military operations to liberate Kuwait submitted to the UN Security Council, Saudi Arabia specified that the Royal Saudi Forces only targeted military objectives and avoided "civilian targets and populated areas, in order not to inflict harm on civilians and civilian installations".⁹⁹

107. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.¹⁰⁰

108. In 1991, in two reports submitted to the UN Security Council on operations in the Gulf War, the UK made assurances that the instructions issued to UK pilots were to avoid causing civilian casualties as far as possible.¹⁰¹ In a subsequent report, the UK reiterated that "pilots have clear instructions to minimize civilian casualties" and stated that "on a number of occasions, attacks have not been pressed home because pilots were not completely satisfied they could meet these conditions".¹⁰²

109. In 1991, in reply to a question in the House of Lords concerning the use of conventional weapons against nuclear facilities, chemical weapons plants and dumps, and petrochemical enterprises situated in towns or cities, the UK Minister of State, FCO, stated that "international law requires that, in planning an attack on any military objective, account is taken of certain principles. These include the [principle] that civilian losses, whether of life or property, should be avoided or minimised so far as practicable."¹⁰³

110. In 1991, during a debate in the UN Security Council concerning the Gulf War, the UK deplored civilian casualties but reiterated that coalition forces had been strictly instructed to strive to keep such casualties to a minimum.¹⁰⁴

⁹⁶ Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces and Ministry of Home Affairs, Chapter 1.4.

⁹⁷ Report on the Practice of Malaysia, 1997, Chapter 1.3.

⁹⁸ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

⁹⁹ Saudi Arabia, Report on military operations to liberate Kuwait, annexed to Letter dated 21 February 1991 to the President of the UN Security Council, UN Doc. S/22259, 23 February 1991, p. 2.

¹⁰⁰ Report on the Practice of Syria, 1997, Chapter 1.6.

¹⁰¹ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22115, 21 January 1991, p. 1; Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

¹⁰² UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

¹⁰³ UK, House of Lords, Statement by the Minister of State, FCO, 4 February 1991, *Hansard*, Vol. 525, Written Answers, col. 37.

¹⁰⁴ UK, Statement before the UN Security Council, UN Doc. S/PV.2977, 14 February 1991.

111. In 1991, in reply to a question in the House of Lords concerning military operations during the Gulf War, the UK Parliamentary Under-Secretary of State of the Ministry of Defence wrote that:

It is Allied policy . . . to make every possible effort to minimise civilian casualties. This is entirely in accordance with the rules of war and the Geneva Convention. The extraordinary measures that Allied air forces have taken to avoid causing civilian casualties demonstrate clearly that Allied military commanders are working strictly within this policy.¹⁰⁵

112. It is reported that in 1952, during the Korean War, a US General gave the instruction “to attack specific military targets at Pyongyang and to make every effort to avoid needless civilian casualties”.¹⁰⁶

113. In 1966, in the context of the Vietnam War, the US Department of Defense stated that “all possible care is taken to avoid civilian casualties”.¹⁰⁷

114. On 30 December 1966, in reply to an inquiry from a member of the US House of Representatives requesting a restatement of US policy on targeting in North Vietnam, a US Deputy Assistant Secretary of Defense wrote that “all reasonable care is taken to avoid civilian casualties”.¹⁰⁸

115. In 1972, the General Counsel of the US Department of Defense stated that:

A review of the operating authorities and rules of engagements for all of our forces in Southeast Asia, in air as well as ground and sea operations, by my office reveals that not only are such operations in conformity with this basic rule [that the loss of life and damage to property must not be out of proportion to the military advantage to be gained], but that in addition, extensive constraints are imposed to avoid if at all possible the infliction of casualties on noncombatants and the destruction of property other than that related to the military operations in carrying out military objectives.¹⁰⁹

116. In 1986, in the context of US attacks on Libyan targets, the US stated that:

The United States exercised great care in restricting its military response to terrorist-related targets. It took every possible precaution to avoid civilian casualties and to limit collateral damage . . . In carrying out this action, the United States

¹⁰⁵ UK, House of Lords, Statement by the Parliamentary Under-Secretary of State for Defence, 27 February 1991, *Hansard*, Vol. 526, Written Answers, col. 52.

¹⁰⁶ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, p. 515.

¹⁰⁷ US, Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

¹⁰⁸ US, Letter from Deputy Assistant Secretary of Defense Goulding to US Representative Ogden Reid from New York, 30 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 428.

¹⁰⁹ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, pp. 122–124.

took every possible precaution to avoid civilian casualties and to limit collateral damage.¹¹⁰

117. In 1987, the Deputy Legal Adviser of the US Department of State stated that “we support the principle that all practicable precautions, taking into account military and humanitarian considerations, be taken in the conduct of military operations to minimize incidental death, injury, and damage to civilians and civilian objects”.¹¹¹

118. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

The obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such. An attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population, consistent with mission accomplishment and allowable risk to the attacking force.¹¹²

119. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that “the military actions initiated by the United States and other States co-operating with the Government of Kuwait... are directed strictly at military and strategic targets and every effort has been made to minimize civilian casualties”.¹¹³ In another such report, the US stressed that “allied aircraft involved in these attacks are taking every precaution to avoid civilian casualties. These pilots are in fact placing themselves in greater danger in order to minimize collateral damage and civilian casualties.”¹¹⁴ In a subsequent report, the US reiterated that “coalition forces have taken every precaution to minimize collateral damage to civilian facilities”.¹¹⁵

120. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that “hostilities must be conducted in a manner so as to minimize injury to civilians”.¹¹⁶

121. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

¹¹⁰ US, Letter dated 14 April 1986 to the President of the UN Security Council, UN Doc. S/17990, 14 April 1986.

¹¹¹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 426–427.

¹¹² US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, § 8(E), Report on US Practice, 1997, Chapter 1.6.

¹¹³ US, Letter dated 17 January 1991 to the President of the UN Security Council, UN Doc. S/22090, 17 January 1991, p. 2.

¹¹⁴ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 1.

¹¹⁵ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

¹¹⁶ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, p. 2.

An attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population or damage to civilian objects, consistent with mission accomplishment and allowable risk to the attacking forces. . . . As correctly stated in Article 51(8) of Protocol I, a nation confronted with callous actions by its opponent (such as the use of "human shields") is not released from its obligation to exercise reasonable precaution to minimize collateral injury to the civilian population or damage to civilian objects. This obligation was recognized by Coalition forces in the conduct of their operations. . . . As frequently noted during the conduct of the conflict, exceptional care was devoted to minimize collateral damage to civilian population and property.¹¹⁷

122. In 1992, a legal review by the US Department of the Air Force of the legality of extended range anti-armour munition stated that, while legal as such, "care should also be taken [when using such munition] to ensure that the possibility of collateral civilian casualties is minimized, and that it is always used with a neutralizing mechanism".¹¹⁸

123. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

The obligation to take reasonable measures to minimize damage to natural resources and cultural property is shared by both an attacker and a defender. A number of steps can be taken by an attacker in order to minimize collateral damage to natural resources or cultural property. . . . [During the Gulf War,] the U.S. and its Coalition partners in Desert Storm recognized that they were fighting in the "cradle of civilization" and took extraordinary measures to minimize damage to cultural property. . . . Other steps were taken to minimize collateral damage. Although intelligence collection involves utilization of very scarce resources, these resources were used to look for cultural property in order to properly identify it. Target intelligence officers identified the numerous pieces of cultural property or cultural property sites in Iraq; a "no-strike" target list was prepared, placing known cultural property off limits from attack, as well as some otherwise legitimate targets if attack on the latter might place nearby cultural property at risk of damage.¹¹⁹

124. In 1998, when announcing the missile attacks against targets in Afghanistan and Sudan, the US President stated that "every possible effort to minimize the loss of innocent life" had been made. The Chairman of the Joint Chiefs of Staff noted that the attacks were carried out at night time in order to minimize the incidental loss of civilian life and the President's National Security Adviser stated that the government had verified that no night shift was at work at the chemical plant bombed in Sudan. The Defense Secretary stressed that the possibility of an airborne plume of toxic chemicals from the

¹¹⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, pp. 625, 627 and 644.

¹¹⁸ US, Department of the Air Force, The Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 9.

¹¹⁹ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, pp. 203–205.

Sudanese plant had been taken into account in an effort to minimise civilian casualties.¹²⁰

125. The Report on US Practice states that:

The *opinio juris* of the United States is that measures to minimize civilian casualties and damage must be undertaken to the extent that military necessities permit under the circumstances ruling at the time. The measures might include warnings, care in selecting targets, weapons and methods of attack and, especially against targets in inhabited areas, breaking off attacks that may not be sufficiently accurate.¹²¹

126. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe's law and practice.¹²²

III. Practice of International Organisations and Conferences

United Nations

127. UN General Assembly Resolution 2675 (XXV), adopted in 1970, states that "in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations".¹²³

128. In a resolution adopted in 1987, the UN Commission on Human Rights called on the government of El Salvador and the insurgent forces to take all measures to avoid civilian deaths and injuries when conducting military operations, including when landmines were used.¹²⁴

Other International Organisations

129. In a resolution concerning the Gulf War adopted in 1991, the Parliamentary Assembly of the Council of Europe expressed its full support for the coalition's action and commended the instructions given to minimise civilian casualties.¹²⁵

130. During its air campaign against the FRY in 1999, NATO frequently stated that it had taken every possible precaution to prevent collateral damage to civilians and civilian objects.¹²⁶

¹²⁰ US, Presidential Address, 20 August 1998; Press Conference by Secretary of Defense, 20 August 1998, *YIHL*, Vol. 2, 1999, p. 423.

¹²¹ Report on US Practice, 1997, Chapter 1.6.

¹²² Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

¹²³ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 3.

¹²⁴ UN Commission on Human Rights, Res. 1987/51, 11 March 1987, § 4.

¹²⁵ Council of Europe, Parliamentary Assembly, Res. 954, 29 January 1991, § 3.

¹²⁶ NATO, Press Conferences of 25–27 and 29–31 March 1999, 3, 7–9, 15, 16, 20, 27, 29 and 30 April 1999, 2, 9, 15, 16, 21 and 26 May 1999 and 1 June 1999.

International Conferences

131. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it called upon parties to conflict “to take all feasible precautions to avoid, in their military operations, all acts liable to destroy or damage water sources and systems of water supply, purification and distribution solely or primarily used by civilians”.¹²⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

132. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.¹²⁸ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.¹²⁹

133. In 1997, in its report concerning the events at La Tablada in Argentina, the IACiHR referred to the obligation to take precautions to avoid or minimise incidental damage. The case dealt with an attack by some 40 persons on military barracks of the armed forces of Argentina and the subsequent counter-attack. The Commission found that common Article 3 of the 1949 Geneva Conventions and other rules relevant to the conduct of internal hostilities were applicable. The Commission stated that customary law imposes an obligation to take precautions to avoid or minimise loss of civilian life and damage to civilian property that may occur as a consequence of attacks on military targets.¹³⁰

V. Practice of the International Red Cross and Red Crescent Movement

134. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Constant care shall be taken to spare the civilian population, civilian persons and civilian objects. The purpose of such care is primarily to avoid and in any event

¹²⁷ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § F(b).

¹²⁸ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

¹²⁹ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

¹³⁰ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 177.

to minimize civilian casualties and damages (e.g. consideration of populated areas, possibilities of shelter, movements of civilian persons, important civilian objects, different danger according to time of the day).¹³¹

135. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following general rules are recognized as binding on any party to an armed conflict: . . . all feasible precautions must be taken to avoid loss of civilian life or damage to civilian objects”.¹³²

136. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “to take all feasible precautions to avoid civilian casualties or damage to civilian objects”.¹³³

137. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “all feasible precautions shall be taken to avoid injuries, loss and damage to the civilian population”.¹³⁴

138. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “all feasible precautions shall be taken to avoid injury or losses inflicted on the civilian population and damage to civilian objects”.¹³⁵

139. In 1995, the ICRC asked a State to ensure that civilians would not be affected by the military operations it was engaged in by taking all necessary precautions to that end.¹³⁶

140. In a statement following NATO’s air strikes against the FRY in 1999, the ICRC stated that “it is an obligation under international humanitarian law to avoid civilian casualties as far as possible”.¹³⁷

141. In a communication to the press issued in 2001 after two bombs were dropped on an ICRC compound in Kabul, the ICRC stated that “international humanitarian law obliges the parties to the conflict . . . to take all the precautions needed to avoid harming civilians”.¹³⁸

142. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC stated that “in the course of military operations,

¹³¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 388, see also § 457.

¹³² ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, pp. 24–25.

¹³³ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹³⁴ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 503.

¹³⁵ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹³⁶ ICRC archive document.

¹³⁷ ICRC, Statement: The Balkan conflict and respect for international humanitarian law, 26 April 1999, *IRRC*, No. 834, 1999, pp. 408–411.

¹³⁸ ICRC, Communication to the Press No. 01/43, Afghanistan: ICRC warehouse bombed in Kabul, 16 October 2001.

all parties are obliged to take every feasible precaution to avoid civilian casualties and damage to civilian infrastructure".¹³⁹

VI. *Other Practice*

143. In 1992, in the context of the conflict in Rwanda, the FPR stated that its tactics aimed specifically at minimising human losses.¹⁴⁰

144. Rule A8 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IIHL, provides that:

The general rule to distinguish between combatants and civilians and the prohibition of attacks against the civilian population as such or against individual civilians implies, in order to be effective, that all feasible precautions have to be taken to avoid injury, loss or damage to the civilian population.

The commentary on this rule quotes UN General Assembly Resolution 2675 (XXV) of 1970 and considers that compliance with common Article 3 of the 1949 Geneva Conventions requires, by inference, that precautions in attack be taken. As to which specific precautions have to be taken in non-international armed conflict, the commentary notes that Article 57 AP I provides useful guidance on this matter.¹⁴¹

145. In its comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General in 1995, the IIHL stated that "any declaration on minimum humanitarian standards should be based on principles... of *jus cogens*, expressing basic humanitarian consideration[s] which are recognized to be universally binding". According to the IIHL, this includes the principle that "all precautionary measures that are feasible in case of attack should be undertaken, so as to avoid unnecessary injury, loss or damage".¹⁴²

146. In its report on the NATO bombings in the FRY issued in 2000, Amnesty International concluded that it believed that "in the course of Operation Allied Force, civilian deaths could have been significantly reduced if NATO forces had fully adhered to the laws of war". The report added that in several cases, "including the attacks on displaced civilians in Djakovica and Koriša, insufficient precautions were taken to minimize civilian casualties". The report further considered that:

¹³⁹ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to the conflict to respect international humanitarian law, 24 October 2001.

¹⁴⁰ FPR, Communiqué de presse, Brussels, 28 February 1992.

¹⁴¹ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A8 and Commentary, *IRRC*, No. 278, 1990, pp. 394–395.

¹⁴² IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 13, reprinted in UN Doc. E/CN.4/1996/80, Report of the Secretary-General prepared pursuant to Commission resolution 1995/29, 28 November 1995, pp. 8–9.

Aspects of the Rules of Engagement, specifically the requirement that NATO aircraft fly above 15,000 feet, made full adherence to international humanitarian law virtually impossible. According to NATO officials, changes were made to the Rules of Engagement, including lifting the 15,000 feet rule, following the 14 April 1999 attack near Djakovica and the 30 May 1999 bombing of Varvarin Bridge. These changes were a recognition that existing precautions did not afford sufficient protection to civilians.¹⁴³

Feasibility of precautions in attack

Note: For practice concerning the feasibility of precautions to be taken in the use of booby-traps, see Chapter 28. For practice concerning the feasibility of precautions in the use of landmines, see Chapter 29. For practice concerning the feasibility of precautions in the use of incendiary weapons, see Chapter 30.

I. Treaties and Other Instruments

Treaties

147. Upon accession to AP I, Algeria stated that the term “feasible” must be interpreted as referring to “precautions and measures which are feasible in view of the circumstances and the information and means available at the time”.¹⁴⁴

148. Upon ratification of AP I, Belgium declared that, “in view of the travaux préparatoires . . . ‘feasible precautions’ [are] those that can be taken in the circumstances prevailing at the moment, which include military considerations as much as humanitarian ones”.¹⁴⁵

149. Upon ratification of AP I, Canada stated that “the word ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁴⁶

150. Upon ratification of AP I, France stated that it considered that the term “feasible” as used in API meant “that which can be realised or which is possible in practice, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁴⁷

151. Upon ratification of AP I, Germany stated that it understood the word “feasible” to mean “that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁴⁸

¹⁴³ Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings: Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 25.

¹⁴⁴ Algeria, Interpretative declarations made upon accession to AP I, 16 August 1989, § 1.

¹⁴⁵ Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 3.

¹⁴⁶ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 5.

¹⁴⁷ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 3.

¹⁴⁸ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 2.

152. Upon ratification of AP I, Ireland stated that “the word ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances at the time, including humanitarian and military considerations”.¹⁴⁹

153. Upon ratification of AP I, Italy declared that “the word ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁵⁰

154. Upon ratification of AP I, the Netherlands declared that “the word ‘feasible’ is to be understood as practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁵¹

155. Upon ratification of AP I, Spain interpreted the term “feasible” as meaning that “the matter in question is feasible or possible in practice, taking into account all the circumstances prevailing at the time, including humanitarian and military aspects”.¹⁵²

156. In its declaration made upon signature and in a reservation made upon ratification of AP I, Switzerland specified that Article 57(2) applied only to the ranks of commanding officers at the battalion or group level and those of higher ranks.¹⁵³

157. Upon signature of AP I, the UK stated that “the word ‘feasible’ means that which is practicable or practically possible, taking into account all circumstances at the time including those relevant to the success of military operations”.¹⁵⁴

158. Upon ratification of AP I, the UK stated that it understood the term “feasible” as used in the Protocol to mean “that which is practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations”.¹⁵⁵ The UK further stated that the obligation mentioned in Article 57(2)(b) AP I only applied to “those who have the authority and practical possibility to cancel or suspend the attack”.¹⁵⁶

Other Instruments

159. No practice was found.

¹⁴⁹ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 6.

¹⁵⁰ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 2.

¹⁵¹ Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 2.

¹⁵² Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, § 3.

¹⁵³ Switzerland, Declaration made upon signature of AP I, 12 December 1977, § 1; Reservations made upon ratification of AP I, 17 February 1982, § 1.

¹⁵⁴ UK, Declarations made upon signature of AP I, 12 December 1977, § b.

¹⁵⁵ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § b.

¹⁵⁶ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § o.

*II. National Practice**Military Manuals*

160. Argentina's Law of War Manual states that "feasible precautions are those which are practicable or practically possible taking into account all circumstances prevailing at the time, including humanitarian and military considerations".¹⁵⁷

161. Australia's Defence Force Manual defines feasible precautions as "precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations".¹⁵⁸

162. Canada's LOAC Manual, with respect to the standard of care to be applied to target verification, precautions in the choice of means and methods of attack and the assessment of the effects of an attack, states that:

Commanders, planners and staff officers will not be held to a standard of perfection in reaching their decisions.

Commanders, planners and staff officers are required to take all "feasible" steps to verify that potential targets are legitimate targets. However, such decisions will be based on the "circumstances ruling at the time". Consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements are usually made.

The test for determining whether the required standard of care has been met is an objective one: Did the commander, planner or staff officer do what a reasonable person would have done in the circumstances?¹⁵⁹

163. The Military Manual of the Netherlands states that:

The extent to which commanders and their staff can be held accountable for compliance with these rules [on precautions in attack] is determined by three factors: freedom of choice of means and methods, availability of information [and] available time. The higher the level [of command] the stricter the required compliance is.¹⁶⁰

164. New Zealand's Military Manual emphasises that the obligation to verify targets, to choose means and methods of attack in order to avoid, and in any event to minimise, civilian losses and damage to civilian objects and the obligation to refrain from deciding to launch an attack which may be expected to cause disproportionate collateral damage is incumbent upon "those who plan or decide upon an attack". The manual considers that:

This obligation presupposes that the measures are to be taken by a level which possesses a formalised planning process and a substantial degree of discretion

¹⁵⁷ Argentina, *Law of War Manual* (1989), § 4.20.

¹⁵⁸ Australia, *Defence Force Manual* (1994), p. xxiv.

¹⁵⁹ Canada, *LOAC Manual* (1999), pp. 4-3/4-4, §§ 25-27.

¹⁶⁰ Netherlands, *Military Manual* (1993), p. V-11.

concerning methods by which medium-term objectives are to be attained. It is unlikely that the proper level would normally be below a divisional or equivalent level of headquarters.¹⁶¹

With respect to the notion of “feasible” precautions, the manual specifies that “feasible” means “that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of the military operations”.¹⁶²

National Legislation

165. No practice was found.

National Case-law

166. No practice was found.

Other National Practice

167. At the CDDH, Austria considered that the precautions envisaged in Article 57 AP I

could only be taken at a higher level of military command, in other words by the high command. Junior military personnel could not be expected to take all the precautions prescribed, particularly that of ensuring respect for the principle of proportionality during an attack.¹⁶³

168. At the CDDH, Canada stated that the word “feasible” when used in AP I, for example, in Article 57 and 58, “refers to what is practicable or practically possible, taking into account all circumstances existing at the relevant time, including those circumstances relevant to the success of military operations”.¹⁶⁴

169. At the CDDH, the FRG stated that the word “feasible” in Article 57 AP I should be interpreted “as meaning what is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations”.¹⁶⁵

170. At the CDDH, India explained its vote on Article 57 AP I as follows:

India voted in favour of this article on the clear understanding that it will apply in accordance with the limits of capability, practical possibility and feasibility of each Party to the conflict. As the capability of Parties to a conflict to make distinction will depend upon the means and methods available to each Party generally or in particular situations, this article does not require a Party to undertake to do something which is not within its means or methods or its capability. In its practical application, a Party would be required to do whatever is practical and possible.¹⁶⁶

¹⁶¹ New Zealand, *Military Manual* (1992), § 518(2).

¹⁶² New Zealand, *Military Manual* (1992), § 518(4).

¹⁶³ Austria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 212, § 46.

¹⁶⁴ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 224.

¹⁶⁵ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 226.

¹⁶⁶ India, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 228.

171. At the CDDH, Italy stated that the term “feasible” in Article 57 AP I “indicates that the obligations it imposes are conditional on the actual circumstances really allowing the proposed precautions to be taken, on the basis of the available information and the imperative needs of national defence”.¹⁶⁷

172. At the CDDH, the Netherlands stated that “the word ‘feasible’ when used in Protocol I, for example in Articles 50 and 51 [57 and 58], should in any particular case be interpreted as referring to that which was practicable or practically possible, taking into account all circumstances at the time”.¹⁶⁸

173. At the CDDH, the representative of Switzerland was critical of the wording of Article 57 AP I because it lacked clarity, specifically the words “those who plan or decide upon an attack” in the chapeau of Article 57(2). He stated that this

ambiguous wording might well place a burden or responsibility on junior military personnel which ought normally to be borne by those of higher rank. The obligations set out in [Article 57 AP I] could concern the high commands only – the higher grades of the military hierarchy, and it was thus that Switzerland would interpret that provision.¹⁶⁹

174. At the CDDH, Turkey stated that the word “feasible” in Article 57 AP I should be interpreted as “related to what was practicable, taking into account all the circumstances at the time and those relevant to the success of military operations”.¹⁷⁰

175. At the CDDH, the US stated that:

The word “feasible” when used in draft Protocol I, for example in Articles 50 and 51 [57 and 58], refers to that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.¹⁷¹

III. Practice of International Organisations and Conferences

United Nations

176. No practice was found.

Other International Organisations

177. No practice was found.

¹⁶⁷ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 231.

¹⁶⁸ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214, § 61.

¹⁶⁹ Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 212, § 43.

¹⁷⁰ Turkey, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211, § 41.

¹⁷¹ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 241.

International Conferences

178. The Rapporteur of the Working Group at the CDDH reported that:

Certain words [in draft Article 50 (57) API] created problems, particularly the choice between “feasible” and “reasonable” . . . The Rapporteur understands “feasible”, which was the term chosen by the Working Group, to mean that which is practicable, or practically possible. “Reasonable” struck many representatives as too subjective a term.¹⁷²

IV. Practice of International Judicial and Quasi-judicial Bodies

179. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

The obligation to do everything feasible is high but not absolute . . . Both the commander and the aircrew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used. Further, a determination that inadequate efforts have been made to distinguish between military objectives and civilians or civilian objects should not necessarily focus exclusively on a specific incident. If precautionary measures have worked adequately in a very high percentage of cases then the fact they have not worked well in a small number of cases does not necessarily mean they are generally inadequate.¹⁷³

V. Practice of the International Red Cross and Red Crescent Movement

180. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that:

The commander shall take all feasible precautions. “Feasible precautions” are those precautions which are practicable, taking into account the tactical situation (that is all circumstances ruling at the time, including humanitarian and military considerations).¹⁷⁴

VI. Other Practice

181. No practice was found.

¹⁷² CDDH, *Official Records*, Vol. XV, CDDH/III/264/Rev.1, Report to Committee III on the Work of the Working Group submitted by the Rapporteur, 13 March 1975, p. 353.

¹⁷³ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 29.

¹⁷⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 365.

Information required for deciding upon precautions in attack

I. Treaties and Other Instruments

Treaties

182. Upon ratification (or signature) of AP I by Algeria, Australia, Belgium, Canada, Egypt, Germany, Ireland, Italy, Netherlands, New Zealand, Spain and UK made statements to the effect that military commanders and others responsible for planning, deciding upon, or executing attacks necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time. These statements are quoted in Chapter 4 and are not repeated here.

183. Upon ratification of AP I, Austria stated that “Article 57, paragraph 2, of Protocol I will be applied on the understanding that, with respect to any decision taken by a military commander, the information actually available at the time of the decision is determinative”.¹⁷⁵ It further stated that:

For the purposes of judging any decision taken by a military commander, Articles 85 and 86 of Protocol I will be applied on the understanding that military imperatives, the reasonable possibility of recognizing them and the information actually available at the time that decision was taken, are determinative.¹⁷⁶

Other Instruments

184. Paragraph 46(a) of the 1994 San Remo Manual states that “those who plan, decide upon or execute an attack must take all feasible measures to gather information which will assist in determining whether or not objects which are not military objectives are present in an area of attack”.

II. National Practice

Military Manuals

185. Australia’s Defence Force Manual states that:

All reasonable precautions must be taken to avoid injury, loss or damage to civilians and civilian objects and locations. It is therefore important to obtain accurate intelligence before mounting an attack . . . Accordingly, the best possible intelligence is required concerning:

- a. concentrations of civilians;
- b. civilians who may be in the vicinity of military objectives;
- c. the nature of built-up areas such as towns, communities, shelters, etc.;
- d. the existence and nature of important civilian objects and specifically protected objects; and
- e. the environment.¹⁷⁷

¹⁷⁵ Austria, Reservations made upon ratification of AP I, 13 August 1982, § 1.

¹⁷⁶ Austria, Reservations made upon ratification of AP I, 13 August 1982, § 4.

¹⁷⁷ Australia, *Defence Force Manual* (1994), §§ 548 and 549.

The manual also refers to the declarations made by Australia upon ratification of AP I to the effect that “military commanders and others responsible for planning, deciding upon, or executing attacks, necessarily have to reach their decisions on the basis of their assessment of the information from all sources, which is available to them at the relevant time”.¹⁷⁸

186. Benin’s Military Manual states that “military commanders must inform themselves about concentrations of civilian persons, important civilian objects and specially protected facilities, the natural environment and the civilian environment of military objectives”.¹⁷⁹

187. Canada’s LOAC Manual states that:

Decisions will be based on the “circumstances ruling at the time”. Consideration must be paid to the honest judgement of responsible commanders, based on the information reasonably available to them at the relevant time, taking fully into account the urgent and difficult circumstances under which such judgements are usually made.¹⁸⁰

188. Croatia’s Commanders’ Manual requires that “the commander shall keep himself informed on concentrations of civilian persons, important civilian objects and specifically protected establishments”.¹⁸¹

189. Ecuador’s Naval Manual states that:

The commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.¹⁸²

190. France’s LOAC Summary Note states that:

Commanders are responsible for the consequences for civilians of the military actions they take. They must, prior to any action, obtain a maximum of information concerning the nature and the location of protected objects (medical units, cultural objects, installations containing dangerous forces) and concerning any concentration of civilians.¹⁸³

191. Italy’s LOAC Elementary Rules Manual requires that “the commander shall keep himself informed on concentrations of civilian persons, important civilian objects and specifically protected establishments”.¹⁸⁴

192. Madagascar’s Military Manual states that “the commander must seek information concerning concentrations of civilian persons, important civilian objects and specifically protected establishments”.¹⁸⁵

¹⁷⁸ Australia, *Defence Force Manual* (1994), Chapter 5, Annex A.

¹⁷⁹ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹⁸⁰ Canada, *LOAC Manual* (1999), pp. 4-3/4-4, § 26.

¹⁸¹ Croatia, *Commanders’ Manual* (1992), § 44, see also § 31.

¹⁸² Ecuador, *Naval Manual* (1989), § 8.1.2.1.

¹⁸³ France, *LOAC Summary Note* (1992), § 5.2.

¹⁸⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 44, see also § 31.

¹⁸⁵ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 12, see also Fiche No. 5-O, § 31.

193. New Zealand's Military Manual, with respect to the standard by which to judge the duty to take all feasible precautions, specifies that "any subsequent evaluation of conduct must focus on all the circumstances, including humanitarian and military considerations, as they appeared to decision makers at the time, rather than against an absolute standard".¹⁸⁶

194. Nigeria's Military Manual provides that "the commander, through his intelligence network shall get information on the circumstance of the military relevancy of the zone, specifically protected zones or objects in his area of operations".¹⁸⁷

195. Spain's LOAC Manual states that:

Information is one of the basic pillars on which a commander must base his decisions. A commander needs information about the presence of protected persons and objects in the zone of operation, the nature and location of medical establishments, the location of cultural and religious objects, nuclear power plants, concentrations of civilian persons, movements of populations, etc.¹⁸⁸

196. Sweden's IHL Manual states that the obligations to take precautions in attack "apply only as far as available resources for collection and processing of information permit". The manual adds that "a planning commander must, to be able to decide upon an attack, have access to the best possible information about the objective. The decision should be based upon the information available to the commander at the time of deciding."¹⁸⁹

197. Togo's Military Manual states that "military commanders must inform themselves about concentrations of civilian persons, important civilian objects and specially protected facilities, the natural environment and the civilian environment of military objectives".¹⁹⁰

198. The US Naval Handbook states that:

The commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.¹⁹¹

National Legislation

199. No practice was found.

National Case-law

200. No practice was found.

¹⁸⁶ New Zealand, *Military Manual* (1992), § 518(4).

¹⁸⁷ Nigeria, *Military Manual* (1994), p. 43, § 14.

¹⁸⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(5), see also § 5.3.b.

¹⁸⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 70–71.

¹⁹⁰ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹⁹¹ US, *Naval Handbook* (1995), § 8.1.2.1.

Other National Practice

201. In an explanatory memorandum submitted to the German parliament in 1990 in the context of the ratification procedure of the Additional Protocols, the German government stated that:

Article 57 [AP I] contains high requirements for military commanders. They can only evaluate the situation on the basis of facts at their disposal during the planning and execution of an attack. Military commanders cannot be held responsible on the basis of facts they did not know, and could not have known, and which became only clear afterwards.¹⁹²

202. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

In reviewing an incident such as the attack of the Al-'Amariyah bunker, the law of war recognizes the difficulty of decision making amid the confusion of war. Leaders and commanders necessarily have to make decisions on the basis of their assessment of the information reasonably available to them at the time, rather than what is determined in hindsight.¹⁹³

III. Practice of International Organisations and Conferences

203. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

204. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations.¹⁹⁴

V. Practice of the International Red Cross and Red Crescent Movement

205. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

¹⁹² Germany, Lower House of Parliament, Explanatory memorandum on the Additional Protocols to the Geneva Conventions, *BT-Drucksache* 11/6770, 22 March 1990, p. 113.

¹⁹³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 626.

¹⁹⁴ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 29.

To fulfil his mission, the commander needs appropriate information about the enemy and the environment. To comply with the law of war, information must include:

- a) concentrations of civilian persons;
- b) civilian surroundings of military objectives;
- c) nature of built up areas (towns, villages, shelters, etc.);
- d) existence and nature of important civilian objects, particularly of specifically protected objects;
- e) natural environment.¹⁹⁵

VI. Other Practice

206. In its report on the NATO bombings in the FRY issued in 2000, Amnesty International, after commenting on the lack of precautions taken by NATO, concluded that “the apparent preeminence given by NATO to intelligence in the planning phase rather than throughout the conduct of an attack, and serious mistakes in intelligence gathering, seem to have led to unlawful deaths”.¹⁹⁶

B. Target Verification

I. Treaties and Other Instruments

Treaties

207. Article 57(2)(a) AP I provides that, with respect to attacks, the following precautions shall be taken:

Those who plan or decide upon an attack shall:

- i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them.

Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.¹⁹⁷

208. Article 7 of the 1999 Second Protocol to the 1954 Hague Convention states that:

Without prejudice to other precautions required by international humanitarian law in the conduct of military operations, each Party to the conflict shall:

- a) do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention.

¹⁹⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 436, see also § 459.

¹⁹⁶ Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 26.

¹⁹⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

Other Instruments

209. Article 8 of the 1956 New Delhi Draft Rules states that “the person responsible for ordering or launching an attack shall, first of all: (a) make sure that the objective, or objectives, to be attacked are military objectives within the meaning of the present rules, and are duly identified”.

210. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

211. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

212. Paragraph 46(b) of the 1994 San Remo Manual provides that “in the light of the information available to them, those who plan, decide upon, or execute an attack shall do everything feasible to ensure that attacks are limited to military objectives”.

*II. National Practice**Military Manuals*

213. Argentina’s Law of War Manual states that “those who plan or decide upon an attack shall, as far as possible, verify that the objectives to be attacked are not civilians, nor civilian objects, nor subject to special protection”.¹⁹⁸

214. Australia’s Defence Force Manual states that “everything feasible [must be done] to verify that objects being attacked are military objectives”.¹⁹⁹

215. Belgium’s Teaching Manual for Soldiers considers that an object can be attacked only when it can reasonably be considered to be a military objective and states that armed forces should not shoot first and check later.²⁰⁰

216. Benin’s Military Manual states that “all necessary measures must be taken to verify that the target to be destroyed is a military objective”.²⁰¹

217. Cameroon’s Instructors’ Manual requires that “those who plan or decide upon an attack do everything that is practically possible to verify that the targets to be attacked are military objectives”.²⁰²

218. Canada’s LOAC Manual states that “commanders, planners and staff officers have . . . to do everything feasible to verify that the objectives to be attacked are in fact legitimate targets and are not entitled to special protection under the LOAC”.²⁰³

¹⁹⁸ Argentina, *Law of War Manual* (1989), § 4.07(1).

¹⁹⁹ Australia, *Defence Force Manual* (1994), § 556(d); see also *Commanders’ Guide* (1994), § 957(a).

²⁰⁰ Belgium, *Teaching Manual for Soldiers* (undated), p. 21.

²⁰¹ Benin, *Military Manual* (1995), Fascicule III, p. 11, see also Fascicule II, p. 6.

²⁰² Cameroon, *Instructors’ Manual* (1992), p. 82, see also p. 110 (naval warfare) and 113 (air warfare).

²⁰³ Canada, *LOAC Manual* (1999), p. 4-3, § 24(a).

- 219.** Croatia's LOAC Compendium imposes a duty to "verify the military character of objectives and targets".²⁰⁴
- 220.** Croatia's Commanders' Manual requires that "the military character of the objective shall be verified by reconnaissance and target identification".²⁰⁵
- 221.** Ecuador's Naval Manual states that "all reasonable precautions must be taken to ensure that only military objectives are targeted".²⁰⁶
- 222.** France's LOAC Manual provides that those who plan or decide upon an attack must "verify that the objectives to be attacked are neither civilians nor civilian objects".²⁰⁷
- 223.** Germany's Military Manual states that "before engaging an objective, every responsible military leader shall verify the military nature of the objective to be attacked".²⁰⁸
- 224.** Hungary's Military Manual imposes a duty to "verify the military character of objectives and targets".²⁰⁹
- 225.** Israel's Manual on the Laws of War states that "in any attack it is imperative to verify that the attack will be directed against a specific military target".²¹⁰
- 226.** Italy's LOAC Elementary Rules Manual requires that "the military character of the objective shall be verified by reconnaissance and target identification".²¹¹
- 227.** Kenya's LOAC Manual requires that "everything feasible must be done to verify that the assigned target is a military objective".²¹²
- 228.** Madagascar's Military Manual requires that "the military character of an objective or target must be verified by reconnaissance and target identification".²¹³
- 229.** The Military Manual of the Netherlands states that "during the selection of targets and the preparation of attacks, it must be verified that the objectives to be attacked are neither civilians nor civilian objects but are military objectives".²¹⁴
- 230.** New Zealand's Military Manual states that "those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives".²¹⁵

²⁰⁴ Croatia, *LOAC Compendium* (1991), p. 43.

²⁰⁵ Croatia, *Commanders' Manual* (1992), § 50, see also § 66.

²⁰⁶ Ecuador, *Naval Manual* (1989), § 8.1.

²⁰⁷ France, *LOAC Manual* (2001), p. 98.

²⁰⁸ Germany, *Military Manual* (1992), § 457.

²⁰⁹ Hungary, *Military Manual* (1992), p. 69.

²¹⁰ Israel, *Manual on the Laws of War* (1998), p. 37.

²¹¹ Italy, *LOAC Elementary Rules Manual* (1991), § 52, see also § 66.

²¹² Kenya, *LOAC Manual* (1997), Précis No. 4, p. 1.

²¹³ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 23.

²¹⁴ Netherlands, *Military Manual* (1993), p. V-11.

²¹⁵ New Zealand, *Military Manual* (1992), § 518(1).

231. Nigeria's Military Manual states that "in the conduct of their attack, members of the armed forces shall only direct their attack at military objectives which must have been identified as such, clearly designated and assigned".²¹⁶ The manual specifies that "the military character of the objectives and targets must be verified and precaution taken not to attack non-military objectives like merchant ships, civilian aircraft etc".²¹⁷

232. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that "preparation fires may be delivered only against confirmed hostile positions prior to an attack or offensive action subject to the approval/direction of the brigade/equivalent level commander".²¹⁸

233. Spain's LOAC Manual requires that "the military character of the objective shall be verified by reconnaissance and target identification".²¹⁹

234. Sweden's IHL Manual states that "the responsible commander shall verify that the attack is really directed against a military objective and not against [a] civilian population or civilian objects".²²⁰

235. According to Switzerland's Basic Military Manual, "only specific and duly identified military objectives may be attacked".²²¹

236. Togo's Military Manual states that "all necessary measures must be taken to verify that the target to be destroyed is a military objective".²²²

237. The UK LOAC Manual states that "everything feasible must be done to verify that the target is a military objective".²²³

238. The US Rules of Engagement for the Vietnam War stated that "all possible means will be employed to limit the risk to the lives and property of friendly forces and civilians. In this respect, a target must be clearly identified as hostile prior to making a decision to place fire on it."²²⁴

239. The US Air Force Pamphlet states that:

Those who plan or decide upon an attack must do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and not subject to special protection but are military objectives and that it is permissible to attack them.²²⁵

240. The US Naval Handbook states that "all reasonable precautions must be taken to ensure that only military objectives are targeted".²²⁶

241. The YPA Military Manual of the SFRY (FRY) states that "it is permitted to directly attack and bombard only military objectives. Before undertaking

²¹⁶ Nigeria, *Military Manual* (1994), p. 43, § 14.

²¹⁷ Nigeria, *Military Manual* (1994), p. 45, § 16(a).

²¹⁸ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(c)(3).

²¹⁹ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(2), see also §§ 10.8.f.(1) and 2.3.b.(1).

²²⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 70.

²²¹ Switzerland, *Basic Military Manual* (1987), Article 28.

²²² Togo, *Military Manual* (1996), Fascicule III, p. 11, see also Fascicule II, p. 6.

²²³ UK, *LOAC Manual* (1981), Section 4, p. 13, § 4(a).

²²⁴ US, *Rules of Engagement for the Vietnam War* (1971), § 6(a).

²²⁵ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(b)(i)(a). ²²⁶ US, *Naval Handbook* (1995), § 8.1.

an attack, it is necessary to determine whether the objective to be attacked is identified as a military objective."²²⁷

National Legislation

242. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of API, including violations of Article 57(2)(a)(i) AP I, is a punishable offence.²²⁸

243. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²²⁹

National Case-law

244. No practice was found.

Other National Practice

245. The Report on the Practice of Egypt considers target verification to be an absolute obligation.²³⁰

246. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.²³¹

247. The Report on the Practice of Iran notes, with respect to the Iran–Iraq War, that "Iranian authorities claimed that they did take all feasible precautions to verify that the objectives to be attacked were neither civilians nor civilian objects".²³²

248. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq lists, among the precautions required in attack, the duty to ascertain the purely military nature of a target before taking any action against it.²³³

249. According to the Report on the Practice of Israel, "in principle, the IDF recognizes a general obligation to verify the military nature of a target during pre-attack planning phases".²³⁴

250. The Report on the Practice of Jordan notes that a booklet on the LOAC prepared by the ICRC is used by military commanders. The booklet gives a

²²⁷ SFRY (FRY), *YPA Military Manual* (1988), § 72(1).

²²⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²²⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

²³⁰ Report on the Practice of Egypt, 1997, Chapter 1.6.

²³¹ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

²³² Report on the Practice of Iran, 1997, Chapter 1.6.

²³³ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.6.

²³⁴ Report on the Practice of Israel, 1997, Answers to additional questions on Chapter 1.6.

list of principles to apply in military action, among which is the obligation to verify the military nature of an objective prior to the attack.²³⁵

251. According to the Report on the Practice of Malaysia, the obligation to verify that targets are indeed military objectives forms part of Malaysian practice.²³⁶

252. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.²³⁷

253. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.²³⁸

254. In a report submitted to the UN Security Council on operations in the Gulf War, the UK asserted that UK commanders were briefed on the “locations and significance of sites of religious and cultural importance in Iraq” and that operations would take this information into account.²³⁹

255. The Report on US Practice refers to an instance recorded during the Vietnam War in the early 1970s when a possible storage facility for air defence missiles, which would normally have been a high-priority target, was removed from the target list because it was “in a heavily populated area on the edge of Hanoi and the intelligence which indicated that it might be a storage facility was somewhat speculative”.²⁴⁰

256. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates API into Zimbabwe’s law and practice.²⁴¹

III. Practice of International Organisations and Conferences

United Nations

257. No practice was found.

Other International Organisations

258. During the air campaign against the FRY in 1999, NATO stated on various occasions that the targets attacked were exclusively military. According to

²³⁵ Report on the Practice of Jordan, 1997, Answers to additional questions on Chapter 1.6.

²³⁶ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.6.

²³⁷ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

²³⁸ Report on the Practice of Syria, 1997, Chapter 1.6.

²³⁹ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22115, 21 January 1991, p. 1; see also Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

²⁴⁰ Report on US Practice, 1997, Chapter 1.6, referring to James R. McCarthy and George B. Allison, *Linebacker II: A View From the Rock*, US Air Force Southeast Asia Monograph Series, Volume VI, Monograph 8, 1979, pp. 97–98.

²⁴¹ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

NATO, the targets were carefully selected and continuously assessed to avoid collateral damage.²⁴²

International Conferences

259. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

260. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.²⁴³ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.²⁴⁴

261. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

In determining whether or not the mens rea requirement [intention or recklessness, for the offence of unlawful attack under Article 3 of the ICTY Statute] has been met, it should be borne in mind that commanders deciding on an attack have duties:

- a) to do everything practicable to verify that the objectives to be attacked are military objectives.²⁴⁵

Regarding the 15,000 feet minimum flying altitude adopted by NATO for part of the campaign, the Committee stated that "NATO air commanders have a duty to take practicable measures to distinguish military objectives from civilians and civilian objectives".²⁴⁶

²⁴² NATO, Press Conferences of 25 and 26 March 1999, 3 and 9 April 1999, 15 and 21 May 1999.

²⁴³ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

²⁴⁴ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

²⁴⁵ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 28.

²⁴⁶ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 56.

V. Practice of the International Red Cross and Red Crescent Movement

262. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the following rules:

The attack may only be directed at a specific military objective. The military objective must be identified as such and clearly designated and assigned. The attack shall be limited to the assigned military objective. The precautions to be taken in targeting are equivalent to those to be respected in the choice of a military objective.

In combat action the military character of the objectives and targets must be verified.²⁴⁷

263. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(1)(a) of draft AP I, which stated in part that “those who plan or decide upon an attack shall ensure that the objectives to be attacked are duly identified as military objectives” (Proposal I). All governments concerned replied favourably.²⁴⁸

VI. Other Practice

264. No practice was found.

C. Choice of Means and Methods of Warfare

Note: For practice concerning precautions to be taken in the use of booby-traps, see Chapter 28. For practice concerning precautions to be taken in the use of landmines, see Chapter 29. For practice concerning precautions to be taken in the use of incendiary weapons, see Chapter 30.

I. Treaties and Other Instruments

Treaties

265. Article 57(2)(a)(ii) API provides that, with respect to attacks, the following precautions shall be taken:

Those who plan or decide upon an attack shall . . . take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.

²⁴⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 428, 434 and 454.

²⁴⁸ ICRC, *The International Committee's Action in the Middle East, IRRIC*, No. 152, 1973, pp. 584–585.

Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.²⁴⁹

266. Article 7 of the 1999 Second Protocol to the 1954 Hague Convention states that:

Without prejudice to other precautions required by international humanitarian law in the conduct of military operations, each Party to the conflict shall:

- ...
- (b) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention.

Other Instruments

267. Article 9 of the 1956 New Delhi Draft Rules states that:

All possible precautions shall be taken, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to ensure that no losses or damage are caused to the civilian population in the vicinity of the objective, or to its dwellings, or that such losses or damage are at least reduced to a minimum.

In particular, in towns and other places with a large civilian population, which are not in the vicinity of military or naval operations, the attack shall be conducted with the greatest degree of precision. It must not cause losses or destruction beyond the immediate surroundings of the objective attacked.

268. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

269. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

270. Paragraph 46(c) of the 1994 San Remo Manual provides that those who plan, decide upon or execute an attack shall “take all feasible precautions in the choice of methods and means in order to avoid or minimize collateral casualties or damage”.

II. National Practice

Military Manuals

271. Argentina’s Law of War Manual states that:

Those who plan or decide upon an attack shall, as far as possible, take all precautions in the choice of means and methods of attack in order to minimize the loss of civilian life, injury to civilians and damage to civilian objects which the attack may incidentally cause.²⁵⁰

²⁴⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

²⁵⁰ Argentina, *Law of War Manual* (1989), § 4.07(1).

272. Australia's Defence Force Manual specifies that "all feasible precautions [must be taken], in the choice of means and methods of attack, to minimise collateral damage".²⁵¹ With respect to precision guided weapons, the manual specifies that:

The existence of precision guided weapons...in a military inventory does not mean that they must necessarily be used in preference to conventional weapons even though the latter may cause collateral damage. In many cases, conventional weapons may be used to bomb legitimate military targets without violating LOAC requirements. It is a command decision as to which weapon to use; this decision will be guided by the basic principles of LOAC: military necessity, unnecessary suffering and proportionality.²⁵²

273. Benin's Military Manual states that "precautions must be taken in the choice of weapons and methods of combat in order to avoid civilian losses and damage to civilian objects".²⁵³ The manual specifies that "the direction and the moment of an attack must be chosen so as to reduce civilian losses and damage to civilian objects as much as possible".²⁵⁴

274. Cameroon's Instructors' Manual considers that:

The general rule [to spare civilians and civilian objects] implies the duty to choose and to use means of combat with a view to avoiding civilian losses and damage to civilian objects or with a view to minimising civilian losses and damage to civilian objects which are unavoidable.²⁵⁵

275. Canada's LOAC Manual states that "commanders, planners and staff officers have . . . to take all feasible precautions in the choice of means and methods of attack to avoid, and in any event to minimize, collateral civilian damage".²⁵⁶

276. Croatia's Commanders' Manual requires that "to restrict civilian casualties and damages, the means of combat and weapons shall be adapted to the target".²⁵⁷

277. Croatia's LOAC Compendium states that "where there are tactically equivalent alternatives, the directions, time, objectives and targets of attack shall be chosen so as to cause the least damage to persons and objects".²⁵⁸

278. Ecuador's Naval Manual requires that:

The commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission

²⁵¹ Australia, *Defence Force Manual* (1994), § 556(e); see also *Commanders' Guide* (1994), § 957(b).

²⁵² Australia, *Defence Force Manual* (1994), § 834; see also *Commanders' Guide* (1994), §§ 317 and 1024.

²⁵³ Benin, *Military Manual* (1995), Fascicule III, p. 11.

²⁵⁴ Benin, *Military Manual* (1995), Fascicule III, p. 14.

²⁵⁵ Cameroon, *Instructors' Manual* (1992), p. 95.

²⁵⁶ Canada, *LOAC Manual* (1999), p. 4-3, § 24(b).

²⁵⁷ Croatia, *Commanders' Manual* (1992), § 53, see also § 45.

²⁵⁸ Croatia, *LOAC Compendium* (1991), p. 41.

successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.²⁵⁹

279. France's LOAC Manual provides that those who plan or decide upon an attack shall "take all precautions which are practically possible in the choice of means and methods of attack with a view to avoiding, and in any event to minimising, loss of civilian life".²⁶⁰

280. Germany's Military Manual states that "before engaging an objective, every responsible military leader shall . . . choose means and methods minimizing incidental injury and damage to civilian life and objects".²⁶¹

281. Hungary's Military Manual states that "where there are tactically equivalent alternatives, the directions, time, objectives and targets of attack shall be chosen so as to cause the least damage to persons and objects".²⁶²

282. Israel's Manual on the Laws of War states that "one should plan the means of attack in a way that will prevent, or at least reduce, the injury to the civilian population".²⁶³

283. Italy's LOAC Elementary Rules Manual requires that "to restrict civilian casualties and damages, the means of combat and weapons shall be adapted to the target".²⁶⁴

284. Kenya's LOAC Manual states that "in the choice of weapons or methods of combat, care must be taken to avoid incidental loss or damage to civilians or civilian objects".²⁶⁵ The manual specifies that:

The direction and the moment of the attack shall be chosen so as to limit civilian casualties and damage (e.g. attack of factory after normal working hours).

The precautions to be taken in targeting for particular weapons and fire units are equivalent to those to be respected in the choice of a military objective. The tactical result expected (e.g. destruction, neutralization) and the destructive power of the ammunition used (quantity, ballistic data, precision, point or area covered, possible effects on the environment) should especially be taken into account.²⁶⁶

285. Madagascar's Military Manual states that "in order to minimise civilian losses and damage to civilian objects, means of combat and weapons shall be appropriate to the objective".²⁶⁷

286. The Military Manual of the Netherlands requires that "precautionary measures be taken in the choice of means and methods of attack in order to

²⁵⁹ Ecuador, *Naval Manual* (1989), § 8.1.2.1.

²⁶⁰ France, *LOAC Manual* (2001), p. 89; see also *LOAC Teaching Note* (2000), p. 2 and *LOAC Summary Note* (1992), § 5.2.

²⁶¹ Germany, *Military Manual* (1992), § 457.

²⁶² Hungary, *Military Manual* (1992), p. 66, see also p. 54.

²⁶³ Israel, *Manual on the Laws of War* (1998), p. 39.

²⁶⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 53, see also § 45.

²⁶⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 1.

²⁶⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 8.

²⁶⁷ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 24.

ensure that collateral damage (loss of civilian life and damage to civilian objects) is reduced to the maximum extent possible".²⁶⁸

287. New Zealand's Military Manual states that:

Those who plan or decide upon an attack shall . . . take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.²⁶⁹

288. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that:

The use of aerial/naval and artillery/mortar fires for interdiction and harassment especially when the fire missions are unobserved and near populated areas and when civilian casualties/material damages are likely to be incurred is strictly prohibited . . . Air strikes may be used under judicious circumstances. Targets shall be carefully evaluated by the close air support commander for approval by the Area Commander. During an actual engagement where the security of an AFP/PNP unit or critical installation/facility is threatened and time is of the essence, the commander of the engaged unit, on his own authority, may selectively apply available fire support means to defend his unit or position, however exercising utmost care to prevent or minimize civilian casualties/material damage.²⁷⁰

289. Spain's LOAC Manual requires that "means and methods of attack must be chosen in order to minimise collateral damage to the civilian population and to civilian objects".²⁷¹

290. Sweden's IHL Manual states that, after target verification, "the next step is for the attacker to select weapons and methods of attack such that unintentional civilian losses and damage to civilian property may be avoided as far as possible".²⁷²

291. Togo's Military Manual states that "precautions must be taken in the choice of weapons and methods of combat in order to avoid civilian losses and damage to civilian objects".²⁷³ The manual specifies that "the direction and the moment of an attack must be chosen so as to reduce civilian losses and damage to civilian objects as much as possible".²⁷⁴

292. The UK LOAC Manual states that "in the choice of weapons or methods of combat, care must be taken to avoid incidental loss or damage to civilians or civilian objects".²⁷⁵

²⁶⁸ Netherlands, *Military Manual* (1993), p. V-11.

²⁶⁹ New Zealand, *Military Manual* (1992), § 518(1).

²⁷⁰ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(c).

²⁷¹ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(2).

²⁷² Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 71.

²⁷³ Togo, *Military Manual* (1996), Fascicule III, p. 11.

²⁷⁴ Togo, *Military Manual* (1996), Fascicule III, p. 14.

²⁷⁵ UK, *LOAC Manual* (1981), Section 4, p. 13, § 4(b).

293. The US Air Force Pamphlet states that:

Those who plan or decide upon an attack must take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians, and damage to civilian objects.²⁷⁶

294. The US Naval Handbook requires that:

The commander must decide, in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available, to reduce civilian casualties and damage.²⁷⁷

295. The YPA Military Manual of the SFRY (FRY) states that a means of attack proportionate to the importance of the objective should be selected if a civilian population is in the immediate vicinity.²⁷⁸

National Legislation

296. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 57(2)(a)(ii) AP I, is a punishable offence.²⁷⁹

297. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁸⁰

National Case-law

298. No practice was found.

Other National Practice

299. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.²⁸¹

300. The Report on the Practice of Iran states, with reference to the Iran-Iraq War, that "Iran claimed that . . . the time of the attack was chosen in a way that the least casualties to civilians would be inflicted. In Iran's view, low damage for Iraqi civilians was the proof of this claim."²⁸²

²⁷⁶ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(b)(i)(b).

²⁷⁷ US, *Naval Handbook* (1995), § 8.1.2.1.

²⁷⁸ SFRY (FRY), *YPA Military Manual* (1988), § 72(2).

²⁷⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁸⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁸¹ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

²⁸² Report on the Practice of Iran, 1997, Chapter 1.6.

301. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that it appears from the practice of the Iraqi armed forces during the Iran–Iraq War that “each target has its own special weapon”.²⁸³

302. The Report on the Practice of Israel states that:

During the pre-attack planning phases, the IDF incorporates all feasible precautions in order to ensure, as far as possible, that incidental civilian loss, injury or damage is minimized. These measures include: detailed and continuous assessment of all available information in relation to the target; use of best available ammunition or weapon systems which enable minimizing incidental damage; and timing of the attack to minimize, as far as possible, incidental damage.²⁸⁴

303. The Report on the Practice of Japan refers to a statement made by Japan at the CDDH to the effect that “those who planned an attack by incendiary weapons were required to weigh carefully beforehand whether some other means of attack could be used in order to minimize civilian casualties”.²⁸⁵

304. According to the Report on the Practice of Malaysia, the obligation to choose means and methods of warfare with a view to avoiding or minimizing incidental loss of civilian life and damage to civilian objects forms part of Malaysian practice.²⁸⁶

305. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.²⁸⁷

306. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.²⁸⁸

307. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that “attacks have been directed exclusively at military objectives, using precision weapons wherever possible, particularly in areas where there may be civilians near the targets”.²⁸⁹

308. In 1991, during a debate in the UN Security Council on the Gulf War, the UK stated that all targets were carefully selected and that precision weapons were used wherever possible.²⁹⁰

309. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that:

²⁸³ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.5.

²⁸⁴ Report on the Practice of Israel, 1997, Chapter 1.6, see also Chapter 1.3.

²⁸⁵ Report on the Practice of Japan, 1998, Chapter 1.6, referring to Statement by Japan at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.27, 19 May 1976, p. 279, § 24.

²⁸⁶ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.6.

²⁸⁷ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

²⁸⁸ Report on the Practice of Syria, 1997, Chapter 1.6.

²⁸⁹ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

²⁹⁰ UK, Statement before the UN Security Council, UN Doc. S/PV.2977, 16 February 1991.

Iraq, on the other hand, has chosen to launch a highly inaccurate weapon – the SCUD missile – at major population centers, with no certainty about where the SCUDs will land. In contrast, we have carefully chosen our targets and we've bombed them with precision.²⁹¹

310. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Coalition forces took several steps to minimize the risk of injury to noncombatants. To the degree possible and consistent with allowable risk to aircraft and aircrews, aircraft and munitions were selected so that attacks on targets within populated areas would provide the greatest possible accuracy and the least risk to civilian objects and the civilian population . . . One reason for the maneuver plan adopted for the ground campaign was that it avoided populated areas, where Coalition and Iraqi civilian casualties and damage to civilian objects necessarily would have been high. This was a factor in deciding against an amphibious assault into Kuwait City . . . Iraqi units remaining in Kuwait City would cause the Coalition to engage in military operations in urban terrain, a form of fighting that is costly to attacker, defender, innocent civilians, and civilian objects. The decision was made to permit Iraqi forces to leave Kuwait City and engage them in the unpopulated area to the north.²⁹²

311. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

A number of steps can be taken by an attacker in order to minimize collateral damage to natural resources or cultural property. Many of these come in the design and development of weapons, weapon systems, and target intelligence, target acquisition, or weapons delivery systems. Each of these systems is enhanced by the quality of training provided [to] personnel responsible for their operation. U.S. efforts to develop, acquire, and utilize weapon systems such as the F-117 aircraft, the laser-guided bomb, and the Tomahawk missile are illustrative of the degree to which the armed services have sought precision in their military operations in order to minimize collateral damage . . . To the degree possible and consistent with allowable risks to aircraft and aircrews, [during the Gulf War] aircraft and munitions were selected so that attacks on targets in proximity to cultural objects would provide the greatest possible accuracy and the least risk of collateral damage to the cultural property.²⁹³

312. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates API into Zimbabwe's law and practice.²⁹⁴

²⁹¹ US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

²⁹² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, pp. 622 and 643.

²⁹³ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, pp. 203 and 205.

²⁹⁴ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

III. Practice of International Organisations and Conferences

United Nations

313. No practice was found.

Other International Organisations

314. During the air campaign against the FRY in 1999, NATO expressly stated that it looked specifically at the weapon to be used against a specific target:

Once we've done that [target identification] we then look at the sort of weapons that we use. We try and make sure that we use a specific weapon which is specialised and is the best possible weapon to use against that specific target.²⁹⁵

315. With respect to the air campaign against the FRY in 1999, the Secretary-General of NATO declared that "international law and public opinion" required the use of precision weapons.²⁹⁶

International Conferences

316. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

317. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.²⁹⁷ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.²⁹⁸

318. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

The military worth of the target would need to be considered in relation to the circumstances prevailing at the time. If there is a choice of weapons or methods of

²⁹⁵ NATO, Press Conference by Nato Spokesperson Jamie Shea and Air Commodore David Wilby, Brussels, 3 April 1999, p. 11.

²⁹⁶ Vago Muradian, Robertson: "Europe Must Spend More Wisely to Achieve Gains", *Defense Daily*, 8 December 1999, p. 6, cited in Stuart W. Belt, Missiles over Kosovo: Emergence, *Lex Lata, of a Customary Norm Requiring the Use of Precision Munition in Urban Areas*, *Naval Law Review*, Vol. 47, 2000, p. 165.

²⁹⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

²⁹⁸ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

attack available, a commander should select those which are most likely to avoid, or at least minimize, incidental damage. In doing so, however, he is entitled to take account of factors such as stocks of different weapons and likely future demands, the timeliness of attack and risks to his own forces. In determining whether or not the *mens rea* requirement [intention or recklessness, for the offence of unlawful attack under Article 3 of the ICTY Statute] has been met, it should be borne in mind that commanders deciding on an attack have duties:

- ...
- b) to take all practicable precautions in the choice of methods and means of warfare with a view to avoiding or, in any event to minimizing, incidental civilian casualties or civilian property damage.²⁹⁹

319. In its judgement in *Ergi v. Turkey* in 1998, the ECtHR held that:

The responsibility of the State is not confined to circumstances where there is significant evidence that misdirected fire from agents of the State has killed a civilian. It may also be engaged where they fail to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.³⁰⁰

V. Practice of the International Red Cross and Red Crescent Movement

320. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the following rules:

The means of combat shall be chosen and used so as to:

- a) avoid civilian casualties and damage;
- b) minimize in any event unavoidable casualties and damage.

The direction and the moment of the attack shall be chosen so as to limit civilian casualties and damage (e.g. attack of factory after normal working hours).

Targets for particular weapons and fire units shall be determined and assigned with the same precautions as to military objectives, specially taking into account the tactical result expected (e.g. destruction, neutralization) and the destructive power of the ammunition used (quantity, ballistic data, precision, point or area covering, possible effects on the environment).³⁰¹

321. In an appeal launched in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(2) of draft API, which stated that “all necessary precautions shall be taken in the choice of

²⁹⁹ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, §§ 21 and 28.

³⁰⁰ ECtHR, *Ergi v. Turkey*, Judgement, 28 July 1998, § 79, see also § 80.

³⁰¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 393, 432 and 433.

weapons and methods of attack so as not to cause losses in civilian lives and damage to civilian objects in the immediate vicinity of military objectives to be attacked". All governments concerned replied favourably.³⁰²

VI. Other Practice

322. In 1994, in a letter to the government of Yemen, Human Rights Watch stated that "the rules of war also require that you take all feasible precautions in the choice of tactics and weapons with a view to avoiding or minimizing such civilian losses".³⁰³

323. In 1994, officials from a separatist entity stated to the ICRC that it had ordered its troops not to bombard targets located within 500 metres of civilian dwellings.³⁰⁴

324. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda refers to the practice of the FPR of avoiding, on occasion, the use of heavy weaponry during the fighting in Kigali in order to spare homes.³⁰⁵

D. Assessment of the Effects of Attacks

Note: *For practice concerning disproportionate attacks, see Chapter 4.*

I. Treaties and Other Instruments

Treaties

325. Article 57(2)(a)(iii) AP I provides that, with respect to attacks, the following precautions shall be taken:

Those who plan or decide upon an attack shall . . . refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.³⁰⁶

326. Article 7 of the 1999 Second Protocol to the 1954 Hague Convention states that:

³⁰² ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

³⁰³ Human Rights Watch, Letter to the government of Yemen, New York, 19 May 1994.

³⁰⁴ ICRC archive document.

³⁰⁵ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 1.6.

³⁰⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

Without prejudice to other precautions required by international humanitarian law in the conduct of military operations, each Party to the conflict shall:

- ...
- (c) refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.

Other Instruments

327. Article 8(b) of the 1956 New Delhi Draft Rules states that:

The person responsible for ordering or launching an attack shall, first of all:

- ...
- (b) take into account the loss and destruction which the attack, even if carried out with the precautions prescribed under Article 9, is liable to inflict upon the civilian population. He is required to refrain from the attack if, after due consideration, it is apparent that the loss and destruction would be disproportionate to the military advantage anticipated.

328. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

329. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

330. Paragraph 46(d) of the 1994 San Remo Manual provides that “an attack shall not be launched if it may be expected to cause collateral casualties or damage which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole”.

II. National Practice

Military Manuals

331. Argentina’s Law of War Manual states that:

Those who plan or decide upon an attack shall, as far as possible, abstain from deciding to launch an attack . . . if it becomes apparent that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³⁰⁷

332. Australia’s Defence Force Manual states that those responsible for deciding upon an attack must refrain from “launching any attack which may be

³⁰⁷ Argentina, *Law of War Manual* (1989), § 4.07(1).

expected to cause collateral injury, or collateral damage, which would be excessive in relation to the concrete and direct military advantage anticipated".³⁰⁸

333. Belgium's Law of War Manual states that "everything possible must be done to avoid incidental damage to civilian objects and loss of civilian life: when this damage and this loss appears to be excessive in relation to the anticipated military advantage, the attack must not take place".³⁰⁹

334. Benin's Military Manual states that "precautions must be taken in order to minimise civilian losses and damage to civilian objects. These precautions include respect for the rules of proportionality."³¹⁰

335. Cameroon's Instructors' Manual considers that "the principle of proportionality rests on the prohibition to launch attacks which will cause losses to civilian populations and damage to civilian objects which are excessive in relation to the anticipated military advantage".³¹¹

336. Canada's LOAC Manual states that:

Commanders, planners and staff officers have... to refrain from launching any attack which may be expected to cause collateral civilian damage which would be excessive in relation to the concrete and direct military advantage anticipated (proportionality test).³¹²

337. Ecuador's Naval Manual requires that:

Naval commanders must take all reasonable precautions... In each instance, the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him.³¹³

338. France's LOAC Manual provides that:

Those who plan or decide upon an attack shall... refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³¹⁴

339. Germany's Military Manual requires that:

Before engaging an objective, every responsible military leader shall... refrain from launching any attack which may be expected to cause incidental injury and damage to civilian life and objects which would be excessive in relation to the concrete and direct military advantage anticipated.³¹⁵

³⁰⁸ Australia, *Defence Force Manual* (1994), § 556(f); see also *Commanders' Guide* (1994), § 957(c).

³⁰⁹ Belgium, *Law of War Manual* (1983), p. 28.

³¹⁰ Benin, *Military Manual* (1995), Fascicule II, p. 6.

³¹¹ Cameroon, *Instructors' Manual* (1992), p. 83.

³¹² Canada, *LOAC Manual* (1999), p. 4-3, § 24.

³¹³ Ecuador, *Naval Manual* (1989), § 8.1.2.1.

³¹⁴ France, *LOAC Manual* (2001), p. 49, see also p. 89.

³¹⁵ Germany, *Military Manual* (1992), § 457.

340. Israel's Manual on the Laws of War states that "the commander is required to refrain from an attack that is expected to inflict harm on the civilian population that is disproportionate to the expected military gain".³¹⁶

341. The Military Manual of the Netherlands states that "during the selection of targets and the preparation of attacks, an attack must be renounced if it can be expected that it may cause damage which is excessive in relation to the anticipated military advantage".³¹⁷

342. New Zealand's Military Manual states that:

Those who plan or decide upon an attack shall . . . refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³¹⁸

343. According to Nigeria's Military Manual, "precaution shall be taken to minimise civilian casualties and damage and the precaution comprises the respect for the rule of proportionality (civilian casualties not being excessive in relation to the military advantage anticipated)".³¹⁹

344. Spain's LOAC Manual requires that:

It shall not be decided to launch an attack when, from the information available at the time of the decision, it may be expected to cause damage to civilian persons and/or objects which would be excessive in relation to the concrete and direct military advantage anticipated from the attack as a whole and not only from isolated parts thereof.³²⁰

345. Sweden's IHL Manual states that:

If the attack may be expected to entail such large losses in human life, injury to civilians or damage to civilian property, or a combination of these, that they may be judged excessive in relation to the anticipated concrete and direct advantage, the commander shall refrain from attacking.³²¹

346. Togo's Military Manual states that "precautions must be taken in order to minimise civilian losses and damage to civilian objects. These precautions include respect for the rules of proportionality."³²²

347. The US Air Force Pamphlet states that:

Those who plan or decide upon an attack must refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³²³

³¹⁶ Israel, *Manual on the Laws of War* (1998), p. 40.

³¹⁷ Netherlands, *Military Manual* (1993), p. V-11.

³¹⁸ New Zealand, *Military Manual* (1992), § 518(1).

³¹⁹ Nigeria, *Military Manual* (1994), p. 45, § 16(b).

³²⁰ Spain, *LOAC Manual* (1996), Vol. I, § 2.5.b.

³²¹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 71.

³²² Togo, *Military Manual* (1996), Fascicule II, p. 6.

³²³ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(b)(i)(c).

348. The US Naval Handbook requires that:

Naval commanders must take all reasonable precautions... In each instance, the commander must determine whether incidental injuries and collateral damage would be excessive, on the basis of an honest and reasonable estimate of the facts available to him.³²⁴

349. The YPA Military Manual of the SFRY (FRY) states that "an attack undertaken with disproportionate means on a military objective of lesser importance in an urban settlement, which would lead to big casualties among the civilian population, is contrary to the international law of war".³²⁵

National Legislation

350. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 57(2)(a)(iii) AP I, is a punishable offence.³²⁶

351. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the two additional protocols to [the Geneva] Conventions... is liable to imprisonment".³²⁷

National Case-law

352. No practice was found.

Other National Practice

353. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.³²⁸

354. According to the Report on the Practice of Iraq, the target should not induce the use of excessive force because the possible harm to civilians or undue damage to their possessions might exceed the specific military purpose. On the basis of a press conference given by the President of Iraq in 1980, the report considers that this means acting with only the degree of force necessary to achieve the specific military objective. The aim is to give due regard to humanitarian requirements and to lessen civilian suffering.³²⁹

³²⁴ US, *Naval Handbook* (1995), § 8.1.2.1.

³²⁵ SFRY (FRY), *YPA Military Manual* (1988), § 72(2).

³²⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³²⁷ Norway, *Military Penal Code as amended* (1902), § 108(b).

³²⁸ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

³²⁹ Report on the Practice of Iraq, 1998, Chapter 1.5, referring to Press Conference of the President, 10 November 1980, *Encyclopedia of the Iraqi-Iranian War*, Vol. I, p. 318.

355. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.³³⁰

356. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.³³¹

357. In 1991, in reply to a question in the House of Lords concerning the use of conventional weapons against nuclear facilities, chemical weapons plants and dumps, and petrochemical enterprises situated in towns or cities, the UK Minister of State, FCO, stated that:

International law requires that, in planning an attack on any military objective, account is taken of certain principles. These include the [principle] . . . that an attack should not be launched if it can be expected to cause civilian losses which would be disproportionate to the military advantage expected from the attack as a whole.³³²

358. In 1991, in response to a question in the Defence Committee of the UK House of Commons on whether or not there were occasions during the Gulf War when he decided that it would not be appropriate for the Royal Air Force to attack a particular target, Air Vice Marshal Wratten stated that:

Yes, there were such occasions. In particular, when we were experiencing collateral damage, such as it was, and some of the targets were in locations where with any weapon system malfunction severe collateral damage would have resulted inevitably, then there were one or two occasions that I chose not to go against those targets, but they were very few and far between and they were not – and this is the most important issue – in my judgment and in the judgment of the Americans of a critical nature, that is to say, they were not fundamental to the timely achievement of the victory. Had that been the case, then regrettably, irrespective of what collateral damage might have resulted, one would have been responsible and had a responsibility for accepting those targets and for going against them.³³³

359. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that “some targets were specifically avoided because the value of destruction of each target was outweighed by the potential risk to nearby civilians or, as in the case of certain archaeological and religious sites, to civilian objects”.³³⁴

360. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of

³³⁰ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

³³¹ Report on the Practice of Syria, 1997, Chapter 1.6.

³³² UK, House of Lords, Statement by the Minister of State, FCO, 4 February 1991, *Hansard*, Vol. 525, Written Answers, col. 37.

³³³ UK, Statement of Air Vice Marshall Wratten, Minutes of Evidence taken before the Defence Committee, 22 May 1991, p. 38, § 274.

³³⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, *The Role of the Law of War, ILM*, Vol. 31, 1992, p. 622.

its adoption of the Geneva Conventions Amendment Act, which incorporates AP I into Zimbabwe's law and practice.³³⁵

III. Practice of International Organisations and Conferences

361. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

362. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.³³⁶ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.³³⁷

363. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

In determining whether or not the *mens rea* requirement [intention or recklessness, for the offence of unlawful attack under Article 3 of the ICTY Statute] has been met, it should be borne in mind that commanders deciding on an attack have duties:

- ...
- c) to refrain from launching attacks which may be expected to cause disproportionate civilian casualties or civilian property damage.³³⁸

V. Practice of the International Red Cross and Red Crescent Movement

364. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

When planning actions that could endanger civilian persons and objects, the same extent of care and precautions which are to be taken in the conduct of operations

³³⁵ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

³³⁶ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

³³⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

³³⁸ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, §§ 21 and 28.

must be also taken at this stage. The precautions comprise respect for the rule of proportionality.³³⁹

365. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(1)(a) of draft AP I, which stated in part that:

Those who plan or decide upon an attack shall ensure that the objectives to be attacked . . . may be attacked without incidental losses in civilian lives and damage to civilian objects in their vicinity being caused or that at all events those losses or damage are not disproportionate to the direct and substantial military advantage anticipated. [Proposal I]

All governments concerned replied favourably.³⁴⁰

VI. Other Practice

366. Following NATO's air campaign in the FRY in 1999, Human Rights Watch criticised NATO's decision to attack the Novi Sad bridge and six other bridges in which civilian deaths occurred. According to Human Rights Watch, these bridges were road bridges and most were urban or town bridges that were not major routes of communications. As a result, "the risk in terms of civilian casualties in attacking urban bridges, or in attacking during daylight hours, is 'excessive in relation to the concrete and direct military advantage anticipated,' the standard of proportionality codified in Protocol I, art. 57".³⁴¹

E. Control during the Execution of Attacks

I. Treaties and Other Instruments

Treaties

367. Article 57(2)(b) AP I provides that, with respect to attacks, the following precautions shall be taken:

An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

³³⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 390 and 458.

³⁴⁰ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

³⁴¹ Human Rights Watch, *Civilian Deaths in the NATO Air Campaign*, New York, 7 February 2000, p. 11.

Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.³⁴²

368. Article 7 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

Without prejudice to other precautions required by international humanitarian law in the conduct of military operations, each Party to the conflict shall:

- ...
- (d) cancel or suspend an attack if it becomes apparent:
 - (i) that the objective is cultural property protected under Article 4 of the Convention;
 - (ii) that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.

Other Instruments

369. Article 9 of the 1956 New Delhi Draft Rules states that:

All possible precautions shall be taken, both in the choice of the weapons and methods to be used, and in the carrying out of an attack, to ensure that no losses or damage are caused to the civilian population in the vicinity of the objective, or to its dwellings, or that such losses or damage are at least reduced to a minimum.

In particular, in towns and other places with a large civilian population, which are not in the vicinity of military or naval operations, the attack shall be conducted with the greatest degree of precision. It must not cause losses or destruction beyond the immediate surroundings of the objective attacked.

The person responsible for carrying out the attack must abandon or break off the operation if he perceives that the conditions set forth above cannot be respected.

370. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

371. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

372. Paragraph 46(d) of the 1994 San Remo Manual provides that "an attack shall be cancelled or suspended as soon as it becomes apparent that the collateral casualties or damage would be excessive".

II. National Practice

Military Manuals

373. Argentina's Law of War Manual states that:

Those who plan or decide upon an attack shall, as far as possible, . . . suspend or cancel an attack if it becomes apparent that the attack may be expected to cause

³⁴² CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³⁴³

374. Australia's Commanders' Guide provides that "an attack must be cancelled or suspended if it becomes apparent that the target is not a legitimate military objective and excessive collateral damage would occur in relation to the direct military advantage".³⁴⁴

375. Australia's Defence Force Manual provides an example of the obligation to cancel an attack when the object is not a military objective or is subject to special protection:

For example, aircrew may be ordered to bomb what the mission planner believes to be a command and control centre. If, in the course of the mission, the command and control centre is displaying an unbriefed symbol of protection, eg Red Cross symbol, then aircrew must refrain from completing their attack. The Red Cross symbol indicates the facility is a protected installation and is immune from attack unless intelligence, or higher authority, determines that the facility has lost its protected status because the emblem is being misused.³⁴⁵

376. According to Belgium's Law of War Manual, an attack must be cancelled "if the military advantage is inferior to the damage".³⁴⁶

377. Benin's Military Manual states that "an attack shall be cancelled or suspended if it becomes apparent that the objective, aim or target is not military".³⁴⁷

378. Cameroon's Instructors' Manual requires that:

An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³⁴⁸

379. Canada's LOAC Manual provides that:

An attack must be cancelled or suspended if it becomes apparent that the objective is not a legitimate target, or that the attack may be expected to cause collateral civilian damage which would be excessive in relation to the concrete and direct military advantage anticipated.³⁴⁹

³⁴³ Argentina, *Law of War Manual* (1989), § 4.07(1).

³⁴⁴ Australia, *Commanders' Guide* (1994), § 957(d).

³⁴⁵ Australia, *Defence Force Manual* (1994), § 832.

³⁴⁶ Belgium, *Law of War Manual* (1983), p. 29.

³⁴⁷ Benin, *Military Manual* (1995), Fascicule III, p. 14.

³⁴⁸ Cameroon, *Instructors' Manual* (1992), p. 83.

³⁴⁹ Canada, *LOAC Manual* (1999), p. 4-4, § 28, see also p. 4-3, § 18 (proportionality test) and p. 7-5, § 50 (air to land operations).

380. Colombia's Basic Military Manual states that "an attack shall be suspended or cancelled if it appears that it will cause superfluous damage to civilians and civilian objects regarding the expected military advantage."³⁵⁰

381. Croatia's Commanders' Manual requires that "if in the course of an attack the target or the objective appears not to be military, the commander shall deviate or cancel the attack".³⁵¹

382. France's LOAC Manual states that "the law of armed conflict obliges commanders to take precautionary measures in the preparation *and execution* of attacks in order to limit their effects and to make sure they have no indiscriminate effects".³⁵² (emphasis added)

383. Germany's Military Manual provides that "an attack shall be suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause excessive incidental loss of civilian life or damage".³⁵³

384. Hungary's Military Manual requires that "during operations, adjustments shall be made according to the tactical situation".³⁵⁴

385. Italy's LOAC Elementary Rules Manual requires that "if in the course of an attack the target or the objective appears not to be military, the commander shall deviate or cancel the attack".³⁵⁵

386. Kenya's LOAC Manual provides that "the attack shall be deviated or cancelled if the objective or target appears not to be military".³⁵⁶ The manual further specifies that "if the resulting loss or damage of a military operation would be excessive in relation to the concrete and direct military advantage excepted, the operation must be cancelled or suspended".³⁵⁷

387. Madagascar's Military Manual states that "a commander must suspend or cancel an attack if, in the course of the attack, it becomes apparent that the target or objective is not a military one".³⁵⁸

388. The Military Manual of the Netherlands states that:

Once an attack has been launched the issue of cancellation or suspension may arise. In principle, the same rules apply as to the refraining from deciding to launch an attack in the preparation phase.

The extent to which commanders and their possible staff will be held accountable to comply with these rules depends on three factors:

- Freedom of choice of means and methods.
- Availability of information.
- Available time.

³⁵⁰ Colombia, *Basic Military Manual* (1995), p. 47.

³⁵¹ Croatia, *Commanders' Manual* (1992), § 56.

³⁵² France, *LOAC Manual* (2001), p. 28. ³⁵³ Germany, *Military Manual* (1992), § 457.

³⁵⁴ Hungary, *Military Manual* (1992), p. 58.

³⁵⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 56.

³⁵⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 9.

³⁵⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 1.

³⁵⁸ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 27.

The higher the level [of command] the stricter the application of these rules can be required.³⁵⁹

389. New Zealand's Military Manual states that:

An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³⁶⁰

The manual considers, however, that:

In practice, it is extremely difficult to stop an attack. The obligation does not extend below the levels of commanders who have the authority and practical possibility to do so; say a commander of a battalion group. The obligation is in any event subject to the knowledge principle . . . which means that its application will be rare.³⁶¹

390. Spain's LOAC Manual states that "if in the course of an attack the objective appears not to be military, the commander shall deviate or cancel the attack".³⁶² The manual further states that:

An attack must be suspended or cancelled when, from the information available at the time of the execution of the attack, it may be expected to cause damage to civilian persons and/or objects which would be excessive in relation to the military advantage anticipated from the attack as a whole.³⁶³

391. Sweden's IHL Manual states that:

Even after a decision to attack has been made by a senior commander, the attack can be cancelled or suspended . . . in the following cases:

- a. the objective proves not to be a military one, or to be entitled to special protection. An example of this is where military vehicles are being used as ambulances.
- b. If it can be expected that the attack will cause such large unintentional civilian losses and damage that these would be excessive in relation to the anticipated and direct military advantage. In this case, the proportionality rule must thus be reapplied at a later stage. The feasibility of doing this depends to a large degree on the type of attack involved. For example, to require an assessment according to the proportionality rule from an individual aircraft pilot is probably unrealistic.³⁶⁴

³⁵⁹ Netherlands, *Military Manual* (1993), p. V-11.

³⁶⁰ New Zealand, *Military Manual* (1992), § 518(1).

³⁶¹ New Zealand, *Military Manual* (1992), § 518(5).

³⁶² Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(2).

³⁶³ Spain, *LOAC Manual* (1996), Vol. I, § 2.5.c.

³⁶⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 72.

392. Switzerland's Basic Military Manual states that "if the military advantage is disproportionate to the damage, [commanding officers at the battalion or group level, and those of higher ranks,] must cancel or suspend the attack".³⁶⁵

393. Togo's Military Manual states that "an attack shall be cancelled or suspended if it becomes apparent that the objective, aim or target is not military".³⁶⁶

394. The UK LOAC Manual states that "if the resulting loss or damage would be excessive in relation to the concrete and direct military advantage expected, the operation must be cancelled or suspended".³⁶⁷

395. The US Air Force Pamphlet states that:

An attack must be cancelled or suspended if it becomes apparent that the objective is not a military one, or that it is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated.³⁶⁸

National Legislation

396. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 57(2)(b) AP I, is a punishable offence.³⁶⁹

397. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".³⁷⁰

National Case-law

398. No practice was found.

Other National Practice

399. The Report on the Practice of Egypt states that a planned attack must be suspended or terminated if it becomes clear that in spite of the precautions taken, the loss inflicted upon civilians or protected objects would be disproportionate to the foreseen military advantage.³⁷¹

400. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.³⁷²

³⁶⁵ Switzerland, *Basic Military Manual* (1987), Article 29(2).

³⁶⁶ Togo, *Military Manual* (1996), Fascicule III, p. 14.

³⁶⁷ UK, *LOAC Manual* (1981), Section 4, p. 13, § 4(b).

³⁶⁸ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(b)(ii).

³⁶⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁷⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

³⁷¹ Report on the Practice of Egypt, 1997, Chapter 1.6.

³⁷² Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

401. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that during the Iran–Iraq War, Iraqi pilots refrained from striking listed targets that appeared to be civilian objects. These pilots were not held responsible for the apparent failure to follow their orders.³⁷³

402. According to the Report on the Practice of Israel, "in principle, the IDF will endeavour to suspend or cancel an attack if it becomes apparent that the objective is not of a military nature or will result in excessive incidental loss of civilian life".³⁷⁴

403. The Report on the Practice of Jordan notes that a booklet on the LOAC prepared by the ICRC is used by military commanders. The booklet refers to the obligation to suspend or cancel an attack if the objective is not of a military nature.³⁷⁵

404. According to the Report on the Practice of Malaysia, the obligation to cancel or suspend an attack under the circumstances indicated in Article 57(2)(b) AP I forms part of Malaysian practice.³⁷⁶

405. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.³⁷⁷

406. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.³⁷⁸

407. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that on a number of occasions attacks had not been "pressed home" because pilots were not completely satisfied that the order to avoid damage to sites of religious or cultural significance would be met.³⁷⁹

408. The Report on US Practice notes that "during the 12-day bombardment campaign of 1972, the crews of B-52 heavy bombers took a number of steps to minimize civilian casualties in the heavily-populated Hanoi and Haiphong areas".³⁸⁰ A published account of these events states that:

The instructions to the RNs [radar navigators] were that if they were not 100 percent sure of their aiming point, "then don't drop; bring the bombs back" ... We had been briefed not to make any evasive maneuvers on the bomb run so that the radar navigator would be positive he was aiming at the right target. If he was not

³⁷³ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.6.

³⁷⁴ Report on the Practice of Israel, 1997, Answers to additional questions on Chapter 1.6.

³⁷⁵ Report on the Practice of Jordan, 1997, Chapter 1.6.

³⁷⁶ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.6.

³⁷⁷ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

³⁷⁸ Report on the Practice of Syria, 1997, Chapter 1.6.

³⁷⁹ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

³⁸⁰ Report on US Practice, 1997, Chapter 1.6.

absolutely sure he had the right target, we were to withhold our bombs and then jettison them into the ocean on our way back to Guam. We did not want to hit anything but military targets. Precision bombing was the object of our mission. The crews were briefed this way and they followed their instructions.³⁸¹

409. In 1991, during a news briefing concerning the Gulf War, the US Secretary of Defense stated that “the pilots of the allied air forces have operated in accordance with clear instructions to launch weapons only when they are certain they’ve selected the right targets under correct conditions”.³⁸²

410. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Where required, attacking aircraft were accompanied by support mission aircraft to minimize attacking aircraft aircrew distraction from their assigned mission. Aircrews attacking targets in populated areas were directed not to expend their munitions if they lacked positive identification of their targets. When this occurred, aircrews dropped their bombs on alternate targets or returned to base with their weapons.³⁸³

411. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that “aircrews attacking targets in proximity to cultural property were directed not to expend their munitions if they lacked positive identification of their targets”.³⁸⁴

412. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe’s law and practice.³⁸⁵

III. Practice of International Organisations and Conferences

United Nations

413. No practice was found.

Other International Organisations

414. During the NATO air campaign against the FRY in 1999, NATO stated that when pilots could not be certain of hitting a certain target with accuracy,

³⁸¹ James R. McCarthy and George B. Allison, *Linebacker II: A View From the Rock*, US Air Force Southeast Asia Monograph Series, Volume VI, Monograph 8, 1979, pp. 46–47, 50 and 59–64.

³⁸² US, News Briefing by the US Secretary of Defense and the Chairman of the Joint Chiefs of Staff, Washington, 23 January 1991, annexed to Letter dated 25 January 1991 to the President of the UN Security Council, UN Doc. S/22168, 29 January 1991, p. 3.

³⁸³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 622.

³⁸⁴ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 205.

³⁸⁵ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

they were instructed not even to attempt to do so, in order to avoid collateral damage.³⁸⁶

International Conferences

415. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

416. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.³⁸⁷ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.³⁸⁸

V. Practice of the International Red Cross and Red Crescent Movement

417. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(1)(b) of draft AP I, which stated that:

Those who launch an attack shall, if possible, cancel or suspend it if it becomes apparent that the objective is not a military one or that incidental losses in civilian lives and damage to civilian objects would be disproportionate to the direct and substantial advantage anticipated.

All governments concerned replied favourably.³⁸⁹

418. In a statement following NATO's air strikes against the FRY in 1999, the ICRC recalled that:

According to international humanitarian law, the parties to the conflict must take every feasible precaution when carrying out attacks. This includes aborting missions if it becomes clear that the objective is not military in nature or that the attack

³⁸⁶ NATO, Press Conference, 27 March 1999.

³⁸⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

³⁸⁸ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

³⁸⁹ ICRC, *The International Committee's Action in the Middle East, IRRC*, No. 152, 1973, pp. 584–585.

may be expected to cause incidental loss of civilian life that would be excessive in relation to the military advantage anticipated.³⁹⁰

VI. Other Practice

419. In its report on the NATO bombings of the FRY issued in 2000, Amnesty International concluded that “civilian deaths could have been significantly reduced if NATO forces had fully adhered to the laws of war. NATO did not always meet its legal obligations in selecting targets and in choosing means and methods of attack.” For instance, the report stated, in certain attacks, “including the Grdelica railroad bridge, the automobile bridge in Lužane, and Varvarin bridge, NATO forces failed to suspend their attack after it was evident that they had struck civilians, in contravention of Article 57(2)(b) of Protocol I”.³⁹¹

F. Advance Warning

Note: *For practice concerning warnings when using booby-traps, see Chapter 28. For practice concerning warnings when using landmines, see Chapter 29.*

I. Treaties and Other Instruments

Treaties

420. Article 26 of the 1899 HR provides that “the commander of an attacking force, before commencing a bombardment, except in the case of an assault, should do all he can to warn the authorities”.

421. Article 26 of the 1907 HR provides that “the officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities”.

422. According to Article 6 of the 1907 Hague Convention (IX), “if the military situation permits, the commander of the attacking naval force, before commencing the bombardment, must do his utmost to warn the authorities”.

423. Article 57(2)(c) AP I provides that, with respect to attacks, the following precautions shall be taken: “effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit”. Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.³⁹²

³⁹⁰ ICRC, Statement: The Balkan conflict and respect for international humanitarian law, 26 April 1999, *IRRC*, No. 834, 1999, p. 410.

³⁹¹ Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 25.

³⁹² CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

Other Instruments

424. Article 19 of the 1863 Lieber Code states that “commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the noncombatants, and especially the women and children, may be removed before the bombardment commences”.

425. Article 16 of the 1874 Brussels Declaration states that “if a town or fortress, agglomeration of dwellings, or village, is defended, the officer in command of an attacking force must, before commencing a bombardment, except in assault, do all in his power to warn the authorities”.

426. Article 33 of the 1880 Oxford Manual states that “the commander of an attacking force, save in cases of open assault, shall, before undertaking a bombardment, make every due effort to give notice thereof to the local authorities”.

427. Article 8(c) of the 1956 New Delhi Draft Rules states that the person responsible for ordering or launching an attack shall, first of all, “whenever the circumstances allow, warn the civilian population in jeopardy, to enable it to take shelter”.

428. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

429. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

*II. National Practice**Military Manuals*

430. Argentina’s Law of War Manual states that “those who plan or decide upon an attack shall, as far as possible, . . . give an effective advance warning of attacks which may affect the civilian population, unless circumstances do not permit”.³⁹³

431. Australia’s Defence Force Manual requires that:

When a planned attack is likely to affect the civilian population, those making the attack are required to give, if practicable, effective advance warning of the attack to the authorities or civilian population. This requirement must obviously be applied in a commonsense manner in light of all other factors. If the proposed action is likely to be seriously compromised by a warning then there is no requirement to provide any warning.³⁹⁴

432. Belgium’s Law of War Manual states that “the civilian population shall be given advance warning before an attack (or bombardment), unless surprise is a crucial element for the success of the attack”.³⁹⁵

³⁹³ Argentina, *Law of War Manual* (1989), § 4.07(1); see also *Law of War Manual* (1969), § 1.012.

³⁹⁴ Australia, *Defence Force Manual* (1994), § 551, see also §§ 425, 733 and 924.

³⁹⁵ Belgium, *Law of War Manual* (1983), p. 29.

433. Benin's Military Manual states that "if the tactical situation allows for it, a timely warning must be given in case of attacks which may affect the civilian population".³⁹⁶

434. Cameroon's Instructors' Manual requires that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit".³⁹⁷

435. Canada' LOAC Manual states that:

An effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit such a warning to be given. For tactical reasons, an attacking force may not give a warning in order to maintain the element of surprise.³⁹⁸

436. Croatia's Commanders' Manual requires that "when the mission permits, appropriate warning shall be given to civilian populations endangered by the direction of attack or by their proximity to military objectives".³⁹⁹

437. Ecuador's Naval Manual states that:

When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity. Such warnings are not required, however, if mission accomplishment requires the element of surprise or the security of the attacking forces would be otherwise compromised.⁴⁰⁰

The manual specifies that "warnings may be general rather than specific lest the bombarding force or the success of its mission be placed in jeopardy".⁴⁰¹

438. France's LOAC Summary Note states that "if the military mission allows for it, appropriate warning must be given to the civilian population to give it time to seek shelter".⁴⁰²

439. Germany's Military Manual states that "before engaging an objective, every responsible military leader shall give the civilian population advance warning of attacks which may affect it, unless circumstances do not permit".⁴⁰³

440. Italy's IHL Manual provides that "except in case of military necessity, the commander of an attacking force, before commencing bombardment, must do his utmost to warn the local authorities".⁴⁰⁴

441. Italy's LOAC Elementary Rules Manual requires that "when the mission permits, appropriate warning shall be given to civilian populations endangered by the direction of attack or by their proximity to military objectives".⁴⁰⁵

³⁹⁶ Benin, *Military Manual* (1995), Fascicule III, p. 11, see also Fascicule III, p. 14 and Fascicule II, p. 7.

³⁹⁷ Cameroon, *Instructors' Manual* (1992), p. 82.

³⁹⁸ Canada, *LOAC Manual* (1999), p. 4-4, § 29.

³⁹⁹ Croatia, *Commanders' Manual* (1992), § 54, see also § 67.

⁴⁰⁰ Ecuador, *Naval Manual* (1989), § 11.2, see also § 8.5.2.

⁴⁰¹ Ecuador, *Naval Manual* (1995), § 8.5.2.

⁴⁰² France, *LOAC Summary Note* (1992), § 1.4.

⁴⁰³ Germany, *Military Manual* (1992), § 457, see also §§ 414, 447 and 453.

⁴⁰⁴ Italy, *IHL Manual* (1991), Vol. I, § 18.

⁴⁰⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 54, see also § 67.

442. Kenya's LOAC Manual provides that:

When the tactical situation permits, effective advance warning shall be given of attacks which may affect the civilian population (e.g. infantry fire to encourage civilian persons to seek shelter, discharge of leaflets from aircraft). The advance warning given shall allow the defender to take safeguard measures and to give appropriate information.⁴⁰⁶

443. Madagascar's Military Manual states that "whenever the mission allows for it, an appropriate warning must be given to the civilian population put in danger by the direction of an attack or by the objectives and targets which have been chosen".⁴⁰⁷

444. The Military Manual of the Netherlands states that "whenever circumstances permit, advance warning must be given of an attack which may affect the civilian population".⁴⁰⁸

445. The Aide-Mémoire for IFOR Commanders of the Netherlands states that:

A warning must be given before opening fire if operational circumstances permit. A few examples of situations in which it is permitted to open fire without warning are:

- a. if you or someone in your immediate vicinity are the subject of an armed attack; or
- b. if warning enhances the risk of death or serious injury for you or any other person.⁴⁰⁹

446. New Zealand's Military Manual states that "effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit".⁴¹⁰

447. Nigeria's Military Manual provides that "where the tactical situation permits, effective advance warning shall be given of attacks which may affect [the] civilian population. This could be done by warning shots or discharge of leaflets from an aircraft."⁴¹¹

448. South Africa's LOAC Manual recalls that "in terms of Article 57 [AP I] there is a general requirement to provide a warning before an attack if civilians are present. An exception to the rule is if surprise is a key element of attack."⁴¹²

449. Spain's LOAC Manual requires that "whenever circumstances permit, warning must be given of any attack that may affect the civilian population".⁴¹³

⁴⁰⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 8, see also Précis No. 4, p. 2.

⁴⁰⁷ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 25, see also Fiche No. 7-O, § 12, Fiche No. 5-SO, § B and Fiche No. 9-SO, § C.

⁴⁰⁸ Netherlands, *Military Manual* (1993), p. V-12.

⁴⁰⁹ Netherlands, *Aide-Mémoire for IFOR Commanders* (1995), § 5.

⁴¹⁰ New Zealand, *Military Manual* (1992), § 518(1).

⁴¹¹ Nigeria, *Military Manual* (1994), p. 44, § 14, see also p. 45, § 16(c) and *Manual on the Laws of War* (undated), § 13.

⁴¹² South Africa, *LOAC Manual* (1996), § 28(g).

⁴¹³ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(2), see also § 10.8.e.(2) and f.(1)

450. Sweden's IHL Manual states that "should it be impossible to suspend or cancel the attack, excessive losses among the civilian population may possibly be avoided by giving the civilian population advance warning".⁴¹⁴

451. According to Switzerland's Basic Military Manual, "during every attack, commanding officers at the battalion or group level, and those of higher ranks, shall take care that the civilian population is warned if possible".⁴¹⁵

452. Togo's Military Manual states that "if the tactical situation allows for it, a timely warning must be given in case of attacks which may affect the civilian population".⁴¹⁶

453. The UK Military Manual states that:

If military exigencies permit, and unless surprise is considered to be an essential element of success, the commander of an attacking force must do all in his power to warn the authorities of a defended place before commencing a bombardment. There is, however, no obligation to give notice of an intended assault. Should there be no civilians left in the area, no such notice is required.⁴¹⁷

454. The UK LOAC Manual states that "effective advance warning must be given of attacks which may affect the civilian population, unless circumstances do not permit".⁴¹⁸

455. The US Field Manual requires that "the officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, do all in his power to warn the authorities".⁴¹⁹

456. The US Air Force Pamphlet states that "effective advance warning shall be given of attacks which may affect the civilian population unless circumstances do not permit".⁴²⁰ The Pamphlet specifies that:

The practice of states recognizes that warnings need not always be given. General warnings are more frequently given than specific warnings, lest the attacking force or the success of its mission be jeopardized. Warnings are relevant to the protection of the civilian population and need not be given when they are unlikely to be affected by the attack.⁴²¹

457. The US Naval Handbook states that:

When circumstances permit, advance warning should be given of attacks that might endanger noncombatants in the vicinity. Such warnings are not required, however, if mission accomplishment requires the element of surprise or the security of the attacking forces would be otherwise compromised.⁴²²

⁴¹⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 72.

⁴¹⁵ Switzerland, *Basic Military Manual* (1987), Article 29(1).

⁴¹⁶ Togo, *Military Manual* (1996), Fascicule III, p. 11, see also Fascicule III, p. 14 and Fascicule II, p. 7.

⁴¹⁷ UK, *Military Manual* (1958), § 291; see also *LOAC Manual* (1981), Section 4, pp. 13–14, § 4(c).

⁴¹⁸ UK, *LOAC Manual* (1981), Section 4, pp. 13–14, § 4(c).

⁴¹⁹ US, *Field Manual* (1956), § 43. ⁴²⁰ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(b)(iii).

⁴²¹ US, *Air Force Pamphlet* (1976), § 5-3(c)(2)(d).

⁴²² US, *Naval Handbook* (1995), § 11.2, see also § 8.5.2.

The Handbook specifies that “warnings may be general rather than specific lest the bombarding force or the success of its mission be placed in jeopardy”.⁴²³

458. The YPA Military Manual of the SFRY (FRY) states that:

When allowed by military necessity, the commander of units bombarding a defended place in which there are civilians or attacking military objectives putting the civilian population at risk should previously inform the population of the impending bombardment or attack so that it can evacuate. The competent commander shall be freed from this obligation if the bombardment undertaken is aimed at supporting units attacking a defended place in order to capture it, if information on the impending bombardment would jeopardise the military operation in question.⁴²⁴

National Legislation

459. The Report on the Practice of India refers to several pieces of legislation which provide that warning must be given before use of force for the maintenance of public order.⁴²⁵

460. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 57(2)(c) AP I, is a punishable offence.⁴²⁶

461. Italy’s Law of War Decree as amended states that “except in case of military necessity, the commander of an attacking force, before commencing bombardment, must do his utmost to warn the local authorities”.⁴²⁷

462. Italy’s Wartime Military Penal Code punishes a commander who “omits, except where so required by military necessity, to take all possible steps to inform enemy authorities before commencing bombardment”.⁴²⁸

463. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.⁴²⁹

National Case-law

464. No practice was found.

Other National Practice

465. The Report on the Practice of China includes an example of a warning issued by the PLA in order to protect local residents living on islands near the front.⁴³⁰

⁴²³ US, *Naval Handbook* (1995), § 8.5.2.

⁴²⁴ SFRY (FRY), *YPA Military Manual* (1988), § 80.

⁴²⁵ Report on the Practice of India, 1997, Chapter 1.6, referring to *Armed Forces (Special Powers) Act* (1958), *Punjab Disturbed Areas Act* (1983), *Armed Forces (Punjab and Chandigarh) Special Powers Act* (1983) and *Armed Forces (Jammu and Kashmir) Special Powers Act* (1990).

⁴²⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴²⁷ Italy, *Law of War Decree as amended* (1938), Article 50.

⁴²⁸ Italy, *Wartime Military Penal Code* (1941), Article 178.

⁴²⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁴³⁰ Report on the Practice of China, 1997, Chapter 1.6.

466. The Report on the Practice of Egypt finds that warnings do not discharge the attacker from taking all necessary precautions towards the civilian population.⁴³¹

467. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “an individual warning must be given prior to any attack against a civilian ship or aircraft approaching or entering an exclusive or similar zone, to the extent that the tactical situation permits”.⁴³²

468. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 AP I.⁴³³

469. According to the Report on the Practice of Iran, during the Iran–Iraq War:

The Iranian authorities have followed a steady practice of warning the civilian population of the cities before attacking. In this regard, before each bombardment, statements of the war information center or military communiqués were issued which asked the civilian population to leave the cities. Usually the name of the cities to be attacked were listed, and the civilians were asked to take refuge to four holy cities of Karbala, Najaf, Kazemineh and Samera.⁴³⁴

The report concludes that “the *opinio juris* of Iran is supportive of precautions in attack, and in practice the warnings can be considered as application of these precautions”.⁴³⁵

470. The Report on the Practice of Iraq states that the issuing of prior public warnings to civilian populations has become established practice. It cites the examples of a general warning given by the President of Iraq to Iranian citizens, warnings issued by the General Command of the Iraqi armed forces to ships not to approach the zones of military operation in the Gulf and warning raids by Iraqi planes over Iranian cities.⁴³⁶

471. In a briefing in 1982, the Israeli Ministry of Foreign Affairs declared that all precautions had been taken by Israeli forces by giving an effective advance warning through the distribution of leaflets and appeals to the civilian

⁴³¹ Report on the Practice of Egypt, 1997, Chapter 1.6.

⁴³² France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 5.

⁴³³ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

⁴³⁴ Report on the Practice of Iran, 1997, Chapter 1.6.

⁴³⁵ Report on the Practice of Iran, 1997, Chapter 1.6.

⁴³⁶ Report on the Practice of Iraq, 1998, Chapter 1.6, referring to Press Conference by the Iraqi President, 10 November 1980, *Encyclopedia of the Iraqi–Iranian War*, Vol. I, p. 318, Military Communiqué No. 692, 29 April 1982, Military Communiqué No. 730, 2 June 1982, Military Communiqué No. 743, 7 June 1982, Military Communiqué No. 779, 17 July 1982, Military Communiqué No. 910, 21 November 1982, Speech of the President at the Iraqi Digla Secondary School in Kuwait, 6 February 1984 and Military Communiqué No. 1603, 29 September 1984.

population via radio and loudspeakers so that they could leave the operational zone temporarily.⁴³⁷

472. On 13 October 2000, Israeli helicopters carried out an air-strike on a Palestinian police station in Rammallah in retaliation for the killing of two Israeli soldiers the previous day. After the attack, a senior IDF officer said that the military had made every effort to avoid casualties, warning the Palestinian police to evacuate their posts three hours before the strike. Warning shots were also fired minutes before the actual attack to warn off those who had not understood the earlier message.⁴³⁸

473. The Report on the Practice of Israel states that:

The issue of "effective advance warning" is somewhat complicated. Unfortunately, due to current practices in the region, in which attacking forces are shielded within civilian populated localities (especially as regards the activities of the terrorist organizations in Lebanon), Israel is forced, quite often, to return fire at targets situated in close vicinity to civilians. Obviously, issuing advance warning of such counter fire is unfeasible from both military and logical perspectives (not only is time of an essence in such cases, but the civilian population is already all too aware of the fact that hostilities are taking place in their immediate area) . . . Nevertheless, Israel and the IDF have, on several occasions in the past, made public advance warnings to the civilian population in Lebanon of impending hostilities. Such instances include the 1982 operation "Peace for Galilee", during which the IDF dropped leaflets over cities in the vicinity of which hostilities were expected, thereby enabling those elements of the population uninvolved in the conflict to vacate the area beforehand. Similar practices were adopted by Israel in other Lebanese-related operations over the years . . . Israel has found that the use of advance warnings to the civilian population is feasible only prior to the commencement of hostilities in a general area, or in cases in which the elements of surprise or speed of response play no significant part.⁴³⁹

474. The Report on the Practice of Jordan notes that a booklet on LOAC prepared by the ICRC is used by military commanders. The booklet refers to the obligation to give an effective advance warning prior to an attack.⁴⁴⁰

475. On the basis of interviews with members of the armed forces and the Ministry of Home Affairs, the Report on the Practice of Malaysia states that:

There are no written laws which require precautions to be taken in attack. However, during the communist insurgency, the imposition of curfews and announcements by the Department of Information to inform civilians to remain indoors or not

⁴³⁷ Israel, Ministry of Foreign Affairs, Department of Information, Briefing 342/18.7.82/3.10.108, 18 July 1982.

⁴³⁸ Israel, Press briefing by the Director-General of Science, Culture and Sports, Coordinator of Information Policy and the Head of the IDF Operation Branch, Jerusalem, 13 October 2000; Suzanne Goldenberg, "Israel launches rocket attacks after frantic mob murders soldiers", *The Guardian*, 13 October 2000.

⁴³⁹ Report on the Practice of Israel, 1997, Chapter 1.6.

⁴⁴⁰ Report on the Practice of Jordan, 1997, Chapter 1.6.

to enter certain areas during certain periods served as an indirect warning to the civilian population.⁴⁴¹

476. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.⁴⁴²

477. It has been reported that, during the conflict in Chechnya, Russia dropped leaflets throughout Grozny, ordering all Chechens to leave the city within five days. The leaflets stated that “those who remain will be viewed as terrorists and bandits. They will be destroyed by artillery and aviation. There will be no more talks. All those who do not leave the city will be destroyed.” A Russian general told reporters that the leaflets were a humanitarian warning meant to protect civilians, not an ultimatum.⁴⁴³

478. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.⁴⁴⁴

479. It is reported that, during the war in the South Atlantic, UK forces gave prior notice of their intention to bomb Goose Green and specified that such notice was given in accordance with the relevant laws.⁴⁴⁵

480. During the Second World War, before the atomic bomb was dropped on Hiroshima, the US reportedly warned Japanese authorities that certain towns could be heavily bombed and that civilians should be evacuated. Similar warnings were reportedly issued in the European theatre of war.⁴⁴⁶

481. It is reported that, during the Korean War, US forces planned that “several days prior to the attack planes would drop leaflets over Pyongyang warning civilians to stay away from military installations of any kind”.⁴⁴⁷

482. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US supported the requirement that “effective advance warning be given of attacks which may affect the civilian population, unless circumstances do not permit”.⁴⁴⁸

⁴⁴¹ Report on the Practice of Malaysia, 1997, Interviews with members of the Malaysian armed forces and Ministry of Home Affairs, Chapter 1.6.

⁴⁴² Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

⁴⁴³ Stephanie Kriner, “Weak and Hungry Chechens Forced to Flee Grozny”, DisasterRelief.org, 7 December 1999; see also *SIPRI Yearbook 2000*, Oxford University Press, 2000, pp. 176–177.

⁴⁴⁴ Report on the Practice of Syria, 1997, Chapter 1.6.

⁴⁴⁵ *War in the Falklands: the Campaign in Pictures*, Sunday Express Magazine Team, London, 1982, Report on UK Practice, 1997, Chapter 1.6.

⁴⁴⁶ Leslie C. Green, *The Contemporary Law of Armed Conflict*, Melland Schill Monographs in International Law, Manchester University Press, Manchester, 1993, p. 148.

⁴⁴⁷ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, p. 516, see also p. 518.

⁴⁴⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

483. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

A warning need not be specific; it may be a blanket warning, delivered by leaflets and/or radio, advising the civilian population of an enemy nation to avoid remaining in proximity to military objectives. The “unless circumstances do not permit” recognizes the importance of the element of surprise. Where surprise is important to mission accomplishment and allowable risk to friendly forces, a warning is not required.⁴⁴⁹

484. In 1995, an opinion of a US army legal adviser on the legality of silencers/suppressors stated that:

There is no law of war requirement that a combatant must be “warned” before he or she is subject to the application of lawful, lethal force . . . [The opinion then cites Article 26 of the 1907 HR and refers to Article 6 of the 1907 Hague Convention (IX).] Article 57, paragraph 2(c) of Protocol I Additional to the 1949 Geneva Conventions of 8 June 1977 contains a more relaxed but similar requirement, updating the two 1907 provisions while reconciling the slight difference between them. Although not a party to this treaty, the United States regards this provision as a re-codification of customary international law. The warning requirement cited above was for the purpose of enabling the civilian population to take appropriate steps to protect themselves from the collateral effects of attack of military objectives, or otherwise from the effects of war; it is not an obligation to warn combatants of their imminent attack. The exception to the warning requirement, relieving a commander from the obligation in cases of assault (stated more generally as “unless circumstances do not permit” in the 1977 Additional Protocol I) recognizes the legitimate use of the fundamental military element of surprise in the attack of enemy military forces in order to reduce risk to the attacking force and to increase its chance for successful accomplishment of its mission.⁴⁵⁰

485. The Report on US Practice states that:

In U.S. practice, bombardment warnings have often been general in their terms, e.g. advising civilians to avoid war-supporting industries, in order not to alert the air defense forces of an impending attack on a specific target. Such was the case in the Korean War.⁴⁵¹

486. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe’s law and practice.⁴⁵²

⁴⁴⁹ US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, § 8(I), Report on US Practice, 1997, Chapter 1.6.

⁴⁵⁰ US, Legality of Silencers/Suppressors, Memorandum for Chief, Operational Law, Headquarters, 101st Airborne Division (Air Assault), 9 June 1995, pp. 6–7.

⁴⁵¹ Report on US Practice, 1997, Chapter 1.6.

⁴⁵² Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

487. During a non-international armed conflict in 1981, the ICRC noted that one of the armed forces involved apparently warned the population of an imminent aerial attack by dropping leaflets.⁴⁵³

488. In a meeting with the ICRC in 1996, the head of the armed forces of a State involved in a non-international armed conflict stated that shots were usually preceded by warnings.⁴⁵⁴

III. Practice of International Organisations and Conferences

United Nations

489. In 1996, in a report on UNIFIL in Lebanon, the UN Secretary-General stated that:

In the early morning of 11 April [1996], Israeli aircraft and artillery began an intensive bombardment of southern Lebanon as well as targets in the Beirut area and in the Bekaa valley... In the first few days of the operation, Israeli air force and artillery attacked selected targets, including the homes of persons suspected to be affiliated with Hizbullah. At the same time, an IDF-controlled radio station in southern Lebanon broadcast threats of further bombardments, set deadlines for the inhabitants to leave and stated that once the deadline had passed IDF would regard all who remained as legitimate targets. By 13 April, some 90 towns and villages, including Tyre and villages north of the Litani river, had thus been placed under threat. As a result of these threats and the Israeli bombardment, about a quarter of the inhabitants, more than 100,000, left UNIFIL's area of operation and Tyre. Around 5,000 persons sought refuge inside UNIFIL positions and at its logistic base in Tyre. Given the large number of inhabitants who remained behind, IDF did not in fact treat the whole area as a free-fire zone.⁴⁵⁵

Other International Organisations

490. No practice was found.

International Conferences

491. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

492. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.⁴⁵⁶ With reference to the Martens Clause, the Trial Chamber held that:

⁴⁵³ ICRC archive document. ⁴⁵⁴ ICRC archive document.

⁴⁵⁵ UN Secretary-General, Report on UNIFIL, UN Doc. S/1996/575, 20 July 1996, §§ 10–13.

⁴⁵⁶ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.⁴⁵⁷

493. In its final report to the ICTY Prosecutor in 2000, the Committee Established to Review NATO's Bombing Campaign Against the Federal Republic of Yugoslavia stated, with respect to the attack on the Serbian radio and television building in Belgrade, that:

Although NATO alleged that it had made "every possible effort to avoid civilian casualties and collateral damage", some doubts have been expressed as to the specificity of the warning given to civilians by NATO of its intended strike, and whether the notice would have constituted "effective warning . . . of attacks which may affect the civilian population, unless circumstances do not permit" as required by Article 57(2) of Additional Protocol I. Evidence on this point is somewhat contradictory. On the one hand, NATO officials in Brussels are alleged to have told Amnesty International that they did not give a specific warning as it would have endangered the pilots. On this view, it is possible that casualties among civilians working at the RTS may have been heightened because of NATO's apparent failure to provide clear advance warning of the attack, as required by Article 57(2). On the other hand, foreign media representatives were apparently forewarned of the attack. As Western journalists were reportedly warned by their employers to stay away from the television station before the attack, it would also appear that some Yugoslav officials may have expected that the building was about to be struck . . . Although knowledge on the part of Yugoslav officials of the impending attack would not divest NATO of its obligation to forewarn civilians under Article 57(2), it may nevertheless imply that the Yugoslav authorities may be partially responsible for the civilian casualties resulting from the attack and may suggest that the advance notice given by NATO may have in fact been sufficient under the circumstances.⁴⁵⁸

V. Practice of the International Red Cross and Red Crescent Movement

494. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "when the tactical situation permits, effective advance warning shall be given of attacks which may affect the civilian population (e.g. infantry fire to encourage civilian persons to seek shelter, discharge of leaflets from aircraft)".⁴⁵⁹

495. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(1)(c) of draft AP I,

⁴⁵⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

⁴⁵⁸ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 77.

⁴⁵⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 436, see also § 459.

which stated in part that “whenever circumstances so permit, advance warning shall be given of attacks which may affect the civilian population”. All governments concerned replied favourably.⁴⁶⁰

VI. Other Practice

496. In 1985, in the context of the conflict in El Salvador, the FMLN warned all social sectors of the country that they should avoid “those places visited by military elements, both from the army of the puppet regime as well as foreign military personnel involved in repressive and genocidal activities against the popular revolutionary movement”, for these places would be considered military objectives. The FMLN also warned owners of property who leased it to foreign military advisers that their property would be considered military objectives.⁴⁶¹

497. In February 1993, the FPR in Rwanda reportedly warned the civilian population of Kidaho of an imminent assault, asking them to leave the town.⁴⁶²

498. With respect to UNOSOM’s military operations of 17 July 1993 in Somalia, MSF stated that:

The military operations did not confine themselves within the zone ordered evacuated by the United Nations. The NGO’s, but not the civilian population, were given warning to evacuate the outskirts surrounding the delineated sector. The fighting spread to the peripheries of the area where no orders had been given to evacuate: consequently, the civilian population north of Afgoi road was caught in the fighting.⁴⁶³

499. According to the Report on SPLM/A Practice, the SPLM/A has persistently warned civilians to evacuate the towns on which a siege or an attack is intended. During the 1984–1991 military operations, Radio SPLA issued warnings to the civilian populations living in villages in southern Sudan.⁴⁶⁴

500. In 1988, an armed opposition group asserted that, before launching an attack on a city, the civilian population would be invited to leave the city through predetermined exit points, but added that “those who won’t leave before the attack, will be responsible for their own fate”.⁴⁶⁵

501. In its report on the NATO bombing campaign against the FRY issued in 2000, Amnesty International stated that:

⁴⁶⁰ ICRC, *The International Committee’s Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

⁴⁶¹ Communication by the FMLN, June 1985, § 4, *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XL, Nos. 441–442, July–August 1985, p. 581.

⁴⁶² Association rwandaise pour la défense des droits de la personne et des libertés publiques, *Rapport sur les droits de l’homme au Rwanda, octobre 1992–octobre 1993*, Kigali, December 1993, p. 114.

⁴⁶³ MSF, *Communication on the violations of humanitarian law in Somalia during UNOSOM operations*, 20 July 1993, p. 2.

⁴⁶⁴ Report on SPLM/A Practice, 1998, Chapter 1.6. ⁴⁶⁵ ICRC archive document.

However, there was no warning from NATO that a specific attack on RTS [Serbian state radio and television] headquarters was imminent. NATO officials in Brussels told Amnesty International that they did not give a specific warning as it would have endangered the pilots.⁴⁶⁶

G. Target Selection

I. Treaties and Other Instruments

Treaties

502. Article 57(3) AP I states that “when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects”. Article 57 AP I was adopted by 90 votes in favour, none against and 4 abstentions.⁴⁶⁷

Other Instruments

503. Article 8(a) of the 1956 New Delhi Draft Rules states that “when the military advantage to be gained leaves the choice open between several objectives, [the person responsible for ordering or launching an attack] is required to select the one, an attack on which involves least danger for the civilian population”.

504. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 57 AP I.

505. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 57 AP I.

II. National Practice

Military Manuals

506. Australia’s Defence Force Manual states that:

Objects and axes of attack should be chosen to minimise collateral damage wherever possible. Where a similar military advantage may be gained by attacking any one of several military objectives, the attack should be made against the objective which is likely to cause the least collateral damage. The same principle applies to choosing axes of advance or attack where more than one practicable and reasonable axis is available.⁴⁶⁸

⁴⁶⁶ Amnesty International, *NATO/Federal Republic of Yugoslavia: “Collateral Damage” or Unlawful Killings? Violations of the Laws of War by NATO during Operation Allied Force*, AI Index EUR 70/18/00, London, June 2000, p. 47.

⁴⁶⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 211.

⁴⁶⁸ Australia, *Defence Force Manual* (1994), § 552; see also *Commanders’ Guide* (1994), § 957(f).

507. Benin's Military Manual requires that "the military commander must choose the solution that represents the least danger for civilians and civilian objects".⁴⁶⁹

508. Canada's LOAC Manual states that:

The proportionality test must be used in the selection of any target. Proportionality and multiple targets: Where a choice is possible between several legitimate targets for obtaining a similar military advantage, the target to be selected shall be the one on which an attack would be expected to cause the least civilian casualties and damage to civilian objects.⁴⁷⁰

509. Croatia's LOAC Compendium gives the following instruction: "when your mission affords alternative objectives and targets, choose the course likely to cause minimum civilian casualties and damage".⁴⁷¹

510. Croatia's Commanders' Manual requires that "within tactically equivalent alternatives, the directions, objectives and targets of attack shall be chosen so as to cause the least civilian damage".⁴⁷²

511. France's LOAC Summary Note states that "the commander must select the tactical solution which will cause the least civilian losses and damage to civilian objects".⁴⁷³

512. Germany's Military Manual states that:

Before engaging an objective, every responsible military leader shall, when a choice is possible between several military objectives of equal importance, engage that objective the attack on which may be expected to cause the least incidental injury or damage.⁴⁷⁴

513. Hungary's Military Manual gives the following instruction: "When your mission affords alternative objectives and targets, choose the course likely to cause minimum civilian casualties and damage."⁴⁷⁵

514. Italy's LOAC Elementary Rules Manual requires that "within tactically equivalent alternatives, the directions, objectives and targets of attack shall be chosen so as to cause the least civilian damage".⁴⁷⁶

515. Kenya's LOAC Manual requires that "when a choice is possible between several military objectives for attaining a similar military advantage, the objective to be selected shall be that objective, the attack on which would cause the least danger to civilian persons and objects".⁴⁷⁷

516. Madagascar's Military Manual requires that "the military commander must choose the solution which will cause the least civilian losses and

⁴⁶⁹ Benin, *Military Manual* (1995), Fascicule III, p. 10.

⁴⁷⁰ Canada, *LOAC Manual* (1999), p. 4-3, §§ 18 and 19, see also p. 7-5, § 49 (air to land operations).

⁴⁷¹ Croatia, *LOAC Compendium* (1991), p. 43, see also p. 41.

⁴⁷² Croatia, *Commanders' Manual* (1992), § 50, see also § 66.

⁴⁷³ France, *LOAC Summary Note* (1992), § 5.2. ⁴⁷⁴ Germany, *Military Manual* (1992), § 457.

⁴⁷⁵ Hungary, *Military Manual* (1992), p. 69, see also p. 66.

⁴⁷⁶ Italy, *LOAC Elementary Rules Manual* (1991), § 50, see also § 66.

⁴⁷⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 8.

damage to civilian objects".⁴⁷⁸ In this respect, the manual specifies that "among tactically equivalent alternatives, the direction, objective, aim and target of an attack must be chosen in order to cause the least civilian damage possible".⁴⁷⁹

517. The Military Manual of the Netherlands states that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects".⁴⁸⁰

518. New Zealand's Military Manual states that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects".⁴⁸¹

519. Nigeria's Military Manual provides that "where there is a choice as to which of the general targets can be attacked, the objective to be selected shall be that which would cause the least danger to civilian persons and objects".⁴⁸²

520. Spain's LOAC Manual requires that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects".⁴⁸³

521. Sweden's IHL Manual considers that:

In certain circumstances it is possible to reduce the risk to the civilian population and to civilian property if the military commander selects a different objective, from which he can achieve about the same military advantage as from the prime objective. In many situations, however, it is impossible to denote an alternative objective, for which reason the rule concerning second-line objectives has been given the reservation mentioned by way of introduction: "when a choice is possible".⁴⁸⁴

522. Togo's Military Manual requires that "the military commander must choose the solution that represents the least danger for civilians and civilian objects".⁴⁸⁵

523. The US Air Force Pamphlet states that "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that which may be expected to cause the least danger to civilian lives and to civilian objects".⁴⁸⁶

524. The YPA Military Manual of the SFRY (FRY) provides that if there is a choice between several military objectives for obtaining the same military advantage, military commanders must select the one which represents the least

⁴⁷⁸ Madagascar, *Military Manual* (1994), Fiche No. 5-O, § 39.

⁴⁷⁹ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 21.

⁴⁸⁰ Netherlands, *Military Manual* (1993), p. V-11.

⁴⁸¹ New Zealand, *Military Manual* (1992), § 518(1).

⁴⁸² Nigeria, *Military Manual* (1994), pp. 43-44, § 14.

⁴⁸³ Spain, *LOAC Manual* (1996), Vol. I, § 4.4.b, see also §§ 2.3.b.(1), 10.8.e.(2) and 10.8.f.(1).

⁴⁸⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 72.

⁴⁸⁵ Togo, *Military Manual* (1996), Fascicule III, p. 10.

⁴⁸⁶ US, *Air Force Pamphlet* (1976), § 5-3(c)(1)(c).

potential risk for the civilian population, “provided this does not particularly increase the danger to members of the armed forces undertaking the attack”.⁴⁸⁷

National Legislation

525. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of API, including violations of Article 57(3) API, is a punishable offence.⁴⁸⁸

526. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.⁴⁸⁹

National Case-law

527. No practice was found.

Other National Practice

528. On the basis of an interview with a senior officer of the armed forces, the Report on the Practice of Indonesia states that the Indonesian armed forces normally observe the precautions listed in Article 57 API.⁴⁹⁰

529. The Report on the Practice of Iran states, with reference to the Iran–Iraq War, that “Iran claimed that targets . . . [were] chosen in a way that the least casualties to civilians would be inflicted. In Iran’s view, low damage for Iraqi civilians was the proof of this claim.”⁴⁹¹

530. According to the Report on the Practice of Israel, “in principle, when a choice is possible between several military objectives for obtaining a similar military advantage, the IDF will select the military target representing the least potential risk for the civilian population”.⁴⁹²

531. The Report on the Practice of Jordan notes that a booklet on the LOAC prepared by the ICRC is used by military commanders. The booklet refers to the obligation to choose a target in the light of the obligation to minimise damage to civilians or civilian objects.⁴⁹³

532. According to the Report on the Practice of Malaysia, the obligation to select, if a choice is available, the target representing the least potential risk for the civilian population forms part of Malaysian practice.⁴⁹⁴

⁴⁸⁷ SFRY (FRY), *YPA Military Manual* (1988), § 72(3).

⁴⁸⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁸⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁴⁹⁰ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the Indonesian armed forces, Chapter 1.6.

⁴⁹¹ Report on the Practice of Iran, 1997, Chapter 1.6.

⁴⁹² Report on the Practice of Israel, 1997, Answers to additional questions on Chapter 1.6.

⁴⁹³ Report on the Practice of Jordan, 1997, Chapter 1.6.

⁴⁹⁴ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.6.

533. According to the government of the Netherlands, commanders have to take all the precautionary measures required by Article 57 AP I when carrying out an attack.⁴⁹⁵

534. The Report on the Practice of Syria asserts that Syria considers Article 57 AP I to be part of customary international law.⁴⁹⁶

535. On 16 April 1986, in the context of US attacks on Libyan targets, the US President stated that “these targets were carefully chosen, both for their direct linkage to Libyan support of terrorist activities and for the purpose of minimizing collateral damage and injury to innocent civilians”.⁴⁹⁷

536. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

The language of Article 57(3) of Protocol I . . . is not part of customary law. The provision applies “when a choice is possible . . .;” it is not mandatory. An attacker may comply with it if it is possible to do so, subject to mission accomplishment and allowable risk, or he may determine that it is impossible to make such a determination.⁴⁹⁸

537. The Report on the Practice of Zimbabwe states that the provisions of Article 57 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act, which incorporates API into Zimbabwe’s law and practice.⁴⁹⁹

III. Practice of International Organisations and Conferences

538. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

539. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that Article 57 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.⁵⁰⁰ With reference to the Martens Clause, the Trial Chamber held that:

⁴⁹⁵ Netherlands, Lower House of Parliament, Memorandum in response to the report on the ratification of the Additional Protocols, 1985–1986 Session, Doc. 18 277 (R 1247), No. 6, 16 December 1985, p. 7, § 17.

⁴⁹⁶ Report on the Practice of Syria, 1997, Chapter 1.6.

⁴⁹⁷ US, Identical letters dated 16 April 1986 from the US President to the Speaker of the House and the President of the Senate concerning US airstrikes against Libya on 14 April 1986, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, p. 3405.

⁴⁹⁸ US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, § 8(H), Report on US Practice, 1997, Chapter 1.6.

⁴⁹⁹ Report on the Practice of Zimbabwe, 1998, Chapter 1.6.

⁵⁰⁰ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

The prescriptions of . . . [Article 57] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.⁵⁰¹

V. Practice of the International Red Cross and Red Crescent Movement

540. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which would cause the least danger to civilian persons and objects.

...

To reduce civilian casualties and damage, equivalent alternative objectives and targets shall be selected whenever the mission given permits.⁵⁰²

541. In an appeal issued in October 1973, the ICRC urged all the belligerents in the conflict in the Middle East (Egypt, Iraq, Israel and Syria) to observe forthwith, in particular, the provisions of, *inter alia*, Article 50(3) of draft API, which stated that "when a choice is possible between several objectives, for obtaining a similar military advantage, the objective to be selected shall be that which will occasion the least danger to civilian lives and to civilian objects". All governments concerned replied favourably.⁵⁰³

VI. Other Practice

542. No practice was found.

⁵⁰¹ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

⁵⁰² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 429 and 456.

⁵⁰³ ICRC, *The International Committee's Action in the Middle East*, *IRRC*, No. 152, 1973, pp. 584–585.

PRECAUTIONS AGAINST THE EFFECTS OF ATTACKS

A. General (practice relating to Rule 22)	§§ 1–69
Precautions to protect the civilian population, civilians and civilian objects	§§ 1–48
Feasibility of precautions against the effects of attacks	§§ 49–68
Information required for deciding upon precautions against the effects of attacks	§ 69
B. Location of Military Objectives outside Densely Populated Areas (practice relating to Rule 23)	§§ 70–132
C. Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives (practice relating to Rule 24)	§§ 133–184

A. General

Precautions to protect the civilian population, civilians and civilian objects

Note: Practice concerning the duty to take feasible precautions to spare the civilian population and to avoid injury to civilians and damage to civilian objects – which could apply to operations in offence and/or defence – has been included in Chapter 5 and is not repeated here. This section contains practice on specific precautions against the effects of attacks not mentioned in sections B and C, as well as practice referring to such precautions in general without further specification. Although some practice on civil defence has been included, this subject is not dealt with exhaustively.

I. Treaties and Other Instruments

Treaties

1. Article 58(c) API states that the Parties to the conflict shall, to the maximum extent feasible, “take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations”. Article 58 AP I was adopted by 80 votes in favour, none against and 8 abstentions.¹

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214.

2. Article 13(1) AP II provides that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations”. Article 13 AP II was adopted by consensus.²

3. Article 24(2) of draft AP II submitted by the ICRC to the CDDH provided that “constant care shall be taken, when conducting military operations, to spare the civilian population, civilians and civilian objects”.³ This provision was adopted in Committee III of the CDDH by 50 votes in favour, none against and 11 abstentions.⁴ Eventually, however, it was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁵

Other Instruments

4. Article 11 of the 1956 New Delhi Draft Rules states that “the Parties to the conflict shall, so far as possible, take all necessary steps to protect the civilian population subject to their authority from the dangers to which they would be exposed in attack”.

5. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 58 AP I.

6. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 58 AP I.

7. Paragraph 36 of the 1994 CSCE Code of Conduct states that “the armed forces will take due care to avoid injury to civilians or their property”.

8. Section 5.4 of the 1999 UN Secretary-General’s Bulletin states that “in its area of operation, the United Nations force shall . . . take all necessary precautions to protect the civilian population, individual civilians and civilian objects against the dangers resulting from military operations”.

II. National Practice

Military Manuals

9. Argentina’s Law of War Manual states that “the parties to the conflict shall, to the extent possible, take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations”.⁶

10. The Report on the Practice of Belgium states that “no practice was found concerning the protection of the civilian population against the effects of

² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 134.

³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

⁴ CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.37, 4 April 1975, p. 390, § 13.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135.

⁶ Argentina, *Law of War Manual* (1989), § 4.07(2).

attacks in the Belgian military regulations" and refers to two internal regulations that "reveal a lack of concern for this issue".⁷

11. Cameroon's Instructors' Manual provides that "in all military operations, whether in offence or defence, . . . areas of civilian habitation, civilian populations [and] . . . civilian objects must be protected".⁸

12. Canada's LOAC Manual states that:

To protect civilians, the parties to a conflict shall, to the maximum extent feasible . . . take other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations.⁹

13. Croatia's Commanders' Manual states that:

To restrict civilian casualties and damage, the means of combat and weapons shall be adapted to the environment of the defence position . . . When the mission permits, appropriate information and warning shall be given of defence measures endangering civilian persons, so that they can behave accordingly in the event of combat action.¹⁰

14. Germany's Military Manual states that "civil defence tasks are particularly warning . . . construction of shelters, and other measures to restore and maintain order".¹¹

15. Italy's LOAC Elementary Rules Manual states that:

To restrict civilian casualties and damage, the means of combat and weapons shall be adapted to the environment of the defence position . . . When the mission permits, appropriate information and warning shall be given of defence measures endangering civilian persons, so that they can behave accordingly in the event of combat action.¹²

16. Kenya's LOAC Manual states that "when the tactical situations permits, defence measures which may affect civilian persons shall be announced by effective advance warning".¹³

17. Madagascar's Military Manual provides that in the conduct of all military operations, "constant care must be taken to spare the civilian population, as well as civilian objects".¹⁴ The manual further specifies that:

In order to limit civilian casualties and damage, the means of combat and weapons shall be adapted to the environment of the defence position . . . When the mission

⁷ Report on the Practice of Belgium, 1997, Chapter 1.7, referring to *Regulations on Anti-tank Squads* (1986) and *Regulations on Light Infantryment* (1991).

⁸ Cameroon, *Instructors' Manual* (1992), p. 150, § 532(2).

⁹ Canada, *LOAC Manual* (1999), p. 4-4, § 30(c).

¹⁰ Croatia, *Commanders' Manual* (1992), §§ 58 and 61.

¹¹ Germany, *Military Manual* (1992), § 520.

¹² Italy, *LOAC Elementary Rules Manual* (1991), § 61.

¹³ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 9.

¹⁴ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 11.

permits, information and effective warning must be given concerning defence measures which expose civilians to danger so that they can behave correctly during combat action.¹⁵

18. The Military Manual of the Netherlands provides that the parties to the conflict shall

endeavour to take other precautions to protect the civilian population, individual civilians and civilian objects against the dangers resulting from military operations... Such other precautions include, for example, the construction of shelter facilities and the mobilisation of civil defence organisations.¹⁶

19. New Zealand's Military Manual states that "the Parties to the conflict shall, to the maximum extent feasible, . . . take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations".¹⁷

20. Nigeria's Military Manual states that "similar to attack is the fact that defence measures which may affect civilian persons shall be announced in advance".¹⁸

21. Russia's Military Manual requires that commanders, in peacetime, "envisage all possible measures to protect the civilian population".¹⁹

22. Spain's LOAC Manual requires that "all necessary precautions be taken in order to protect civilians and civilian objects from the effects of attacks".²⁰

23. Sweden's IHL Manual refers to the obligation enshrined in Article 58(c) AP I to "take other precautionary measures for protecting the civilian population, civilian persons and civilian property". It notes that "these can include a number of different measures such as the erection of shelters, distribution of information and warnings, direction of traffic, guarding of civilian property and so on".²¹

24. Switzerland's Basic Military Manual specifies that "to the extent possible, that is, as far as the interests of Swiss national defence allow, . . . other measures of protection of the civilian population must be taken".²²

25. The US Air Force Pamphlet states that:

As a corollary to the principle of general civilian immunity, the parties to a conflict should, to the maximum extent feasible, take necessary precautions to protect the civilian population, individual civilians, and civilian objects under their authority against the dangers resulting from military operations.²³

¹⁵ Madagascar, *Military Manual* (1994), Fiche No. 6-O, §§ 32 and 35.

¹⁶ Netherlands, *Military Manual* (1993), p. V-12, § 10.

¹⁷ New Zealand, *Military Manual* (1992), § 519(1)(c).

¹⁸ Nigeria, *Military Manual* (1994), p. 44, § 15.

¹⁹ Russia, *Military Manual* (1990), § 14(a).

²⁰ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.a.(2).

²¹ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 74.

²² Switzerland, *Basic Military Manual* (1987), Article 29(3).

²³ US, *Air Force Pamphlet* (1976), § 5-4(a).

National Legislation

26. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 58(c) AP I, as well as any "contravention" of AP II, including violations of Article 13(1) AP II, are punishable offences.²⁴

27. According to the Report on the Practice of Kuwait, great attention has been paid to the issue of precautions in Kuwait after the invasion by Iraq and this task has been given to the civil defence authorities. The report notes that, pursuant to Kuwait's Civil Defence Decree, this task includes the following measures: alerting the civilian population in case of aerial bombardment, preparation of public shelters and preparation and execution of evacuation plans.²⁵

28. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁶

National Case-law

29. No practice was found.

Other National Practice

30. The Report on the Practice of Algeria states that, owing to the particular nature of the Algerian war of independence, no precise information could be found regarding the behaviour of Algerian combatants with respect to precautions against the effects of attacks. The report testifies, however, to their willingness to protect the civilian population "against the effects of attacks by the colonial army".²⁷

31. The Report on the Practice of Germany states that the precautions required against the effects of attacks have to be taken mainly by the civil defence. It quotes a representative of the Ministry of Internal Affairs, who said at an ICRC expert meeting in Geneva that Germany had an integrated system of assistance to cover both peacetime disaster control and civil defence in case of armed conflict.²⁸

32. The Report on the Practice of Indonesia states that members of the Indonesian armed forces should take all necessary precautions to protect the civilian population and civilian objects against the dangers resulting from hostilities.²⁹

33. The Report on the Practice of Iran notes that, following the escalation of the "war of the cities" during the Iran-Iraq War, "serious measures were adopted

²⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁵ Report on the Practice of Kuwait, 1997, Chapter 1.6 and 1.7, referring to *Civil Defence Decree* (1979), Article 2.

²⁶ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁷ Report on the Practice of Algeria, 1997, Chapter 1.7, referring to *El Moudjahid*, Vol. 1, p. 89.

²⁸ Report on the Practice of Germany, 1997, Chapter 1.7.

²⁹ Report on the Practice of Indonesia, 1997, Chapter 1.7.

by the authorities to protect the civilians", including: construction of shelters in public places; educating civilians through mass media about the precautions they should take during bombardments; the establishment of facilities for the civilians who fled the cities under attack; and the formation of units to deal with the effects of attacks with weapons of mass destruction on cities.³⁰

34. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq cites the following examples of precautionary measures taken in Iraqi territory: providing civilians with devices for their protection from the consequences of certain weapons; early warning of the civilian population of imminent enemy military operations; and identification of civilian objects and antiquities.³¹

35. The Report on the Practice of Kuwait states that it is the *opinio juris* of Kuwait that "all States have a duty to adopt measures to eliminate/minimise the effects of war in order to protect humanity", including exceptional measures to protect civilians and to ensure the continuity of public services during the exceptional situation of war.³²

36. The Report on the Practice of Malaysia notes that the security forces act in conformity with international norms on protecting the civilian population against the dangers resulting from security operations, whether in an international or non-international armed conflict.³³

37. According to the Report on the Practice of Nigeria, although no practice exists regarding precautions against the effects of attacks, the duty to take such precautions is a part of customary international law.³⁴

38. According to the Report on the Practice of Rwanda, it is the *opinio juris* of Rwanda that precautions must be taken to protect civilians against the effects of attacks.³⁵

39. The Report on the Practice of Syria asserts that Syria considers Article 58 AP I to be part of customary international law.³⁶

40. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that "the obligation to take reasonable measures to minimize damage to natural resources and cultural property is shared by both an attacker and a defender . . . The defender has certain responsibilities as well."³⁷

³⁰ Report on the Practice of Iran, 1997, Chapter 1.7.

³¹ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.7.

³² Report on the Practice of Kuwait, 1997, Chapter 1.6 and 1.7.

³³ Report on the Practice of Malaysia, 1997, Chapter 1.7.

³⁴ Report on the Practice of Nigeria, 1997, Chapter 1.7.

³⁵ Report on the Practice of Rwanda, 1997, Chapter 1.7.

³⁶ Report on the Practice of Syria, 1997, Chapter 1.7.

³⁷ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

41. The Report on the Practice of Zimbabwe states that the provisions of Article 58 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe's law and practice.³⁸

III. Practice of International Organisations and Conferences

United Nations

42. General Assembly Resolution 2444 (XXIII), adopted in 1968, affirmed Resolution XXVIII of the 20th International Conference of the Red Cross and the basic humanitarian principle applicable in all armed conflicts laid down therein that "distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible".³⁹

43. General Assembly Resolution 2675 (XXV), adopted in 1970, states that "in the conduct of military operations, every effort should be made to spare civilian populations from the ravages of war, and all necessary precautions should be taken to avoid injury, loss or damage to civilian populations".⁴⁰

Other International Organisations

44. No practice was found.

International Conferences

45. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the protection of civilian populations against the dangers of indiscriminate warfare in which it solemnly declared that:

All Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles: . . . that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.⁴¹

IV. Practice of International Judicial and Quasi-judicial Bodies

46. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber noted that Article 58 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who

³⁸ Report on the Practice of Zimbabwe, 1998, Chapter 1.7.

³⁹ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(c).

⁴⁰ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 3.

⁴¹ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

had not ratified the Protocol.⁴² With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 58] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.⁴³

V. Practice of the International Red Cross and Red Crescent Movement

47. No practice was found.

VI. Other Practice

48. According to the Report on SPLM/A Practice, the SPLM/A instructed the civilian population to dig trenches and shelters against aerial bombardments by the government of Sudan.⁴⁴

Feasibility of precautions against the effects of attacks

I. Treaties and Other Instruments

Treaties

49. Upon ratification (or signature) of AP I by Algeria, Belgium, Canada, France, Germany, Ireland, Italy, Netherlands, Spain and UK made statements to the effect that feasible precautions are those which are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. These are quoted in Chapter 5, Section A, and are not repeated here.

50. Upon ratification of AP I, Austria stated that “in view of the fact that Article 58 of Protocol I contains the expression ‘to the maximum extent feasible’, subparagraphs (a) and (b) will be applied subject to the requirements of national defence”.⁴⁵

51. Upon ratification of AP I, Switzerland stated that “considering that [Article 58 AP I] contains the expression ‘to the maximum extent feasible’, paragraphs (a) and (b) will be applied subject to the defence requirements of the national territory”.⁴⁶

Other Instruments

52. No practice was found.

⁴² ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

⁴³ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

⁴⁴ Report on SPLM/A Practice, 1998, Chapter 1.7.

⁴⁵ Austria, Reservations made upon ratification of AP I, 13 August 1982.

⁴⁶ Switzerland, Reservations made upon ratification of AP I, 17 February 1982, § 2.

*II. National Practice**Military Manuals*

53. Switzerland's Basic Military Manual specifies that precautions against the effects of attacks should be taken in order to protect civilians "to the extent possible, that is, as far as the interests of national defence allow".⁴⁷ It later states that "in case of doubt, the constraints of national defence prevail".⁴⁸

National Legislation

54. No practice was found.

National Case-law

55. No practice was found.

Other National Practice

56. At the CDDH, Cameroon considered that the obligations under Article 58 AP I "are not absolute, since they are to be fulfilled only 'to the maximum extent feasible', for no one is obliged to do the impossible".⁴⁹

57. At the CDDH, Canada stated that the word "feasible" when used in AP I, for example, in Article 57 and 58, "refers to what is practicable or practically possible, taking into account all circumstances existing at the relevant time, including those circumstances relevant to the success of military operations".⁵⁰

58. At the CDDH, the FRG stated that its understanding of the word "feasible" in Article 58 AP I was that it referred to "that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations".⁵¹

59. At the CDDH, Italy stated that:

The words "to the maximum extent feasible" at the beginning of [Article 58 AP I], however, clearly show the real aim of this rule: this is not a question of absolute obligations, but, on the contrary, of precepts that should be followed if, and to the extent that, the particular circumstances permit.⁵²

60. At the CDDH, the Netherlands stated that "the word 'feasible' when used in Protocol I, for example in Articles 50 and 51 [now Articles 57 and 58], should in any particular case be interpreted as referring to that which was

⁴⁷ Switzerland, *Basic Military Manual* (1987), Article 29(3).

⁴⁸ Switzerland, *Basic Military Manual* (1987), Article 151(3).

⁴⁹ Cameroon, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 239.

⁵⁰ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 224.

⁵¹ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 226.

⁵² Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 232.

practicable or practically possible, taking into account all circumstances at the time".⁵³

61. At the CDDH, the UK:

expressed keen satisfaction at the adoption of [Article 58], which was designed to lend added strength to the protection already extended to civilian persons and objects of a civilian character by preceding articles. Nevertheless, in an armed conflict such protection could never be absolute; and that was reflected in the article through the expression "to the maximum extent feasible". According to the interpretation placed upon it by [the UK], the word "feasible", wherever it was employed in the Protocol, related to what was workable or practicable, taking into account all the circumstances at a given moment, and especially those which had a bearing on the success of military operations.⁵⁴

62. At the CDDH, the US stated that:

The word "feasible" when used in draft Protocol I, for example in Articles 50 and 51 [now Articles 57 and 58], refers to that which is practicable or practically possible, taking into account all circumstances at the time, including those relevant to the success of military operations.⁵⁵

III. Practice of International Organisations and Conferences

United Nations

63. No practice was found.

Other International Organisations

64. No practice was found.

International Conferences

65. The Rapporteur of the Working Group at the CDDH reported that:

Agreement [on draft Article 51 AP I (now Article 59)] was reached fairly quickly on this draft after it was revised to have the phrase "to the maximum extent feasible" modify all subparagraphs. This revision reflected the concern of a number of representatives that small and crowded countries would find it difficult to separate civilians and civilian objects from military objectives. Other representatives pointed out that even large countries would find such separation difficult or impossible to arrange, in many cases.⁵⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

66. No practice was found.

⁵³ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214, § 61.

⁵⁴ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214, §§ 58–59.

⁵⁵ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 241.

⁵⁶ CDDH, *Official Records*, Vol. XV, CDDH/III/264/Rev.1, Report to Committee III on the Work of the Working Group submitted by the Rapporteur, 13 March 1975, p. 353.

V. Practice of the International Red Cross and Red Crescent Movement

67. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the commander shall take all feasible precautions. ‘Feasible precautions’ are those precautions which are practicable, taking into account the tactical situation (that is all circumstances ruling at the time, including humanitarian and military considerations).”⁵⁷

VI. Other Practice

68. No practice was found.

Information required for deciding upon precautions against the effects of attacks

69. In general, the practice in Chapter 5, Section A, concerning the information required to take decisions on precautions in attack is relevant *mutatis mutandis* to precautions against the effects of attacks and is not repeated here.

B. Location of Military Objectives outside Densely Populated Areas

Note: For practice on the removal of military objectives from the vicinity of medical units, see Chapter 7, section D. For practice on the use of human shields, see Chapter 32, section J.

I. Treaties and Other Instruments

Treaties

70. Article 58(b) AP I states that the parties to the conflict shall, to the maximum extent feasible, “avoid locating military objectives within or near densely populated areas”. Article 58 AP I was adopted by 80 votes in favour, none against and 8 abstentions.⁵⁸

71. Article 3 of the 1996 Israel-Lebanon Ceasefire Understanding states that the two parties commit to ensuring that “civilian populated areas and industrial and electrical installations will not be used as launching grounds for attacks”.

72. Article 8 of the 1999 Second Protocol to the 1954 Hague Convention provides that “the Parties to the conflict shall, to the maximum extent feasible: . . . b) avoid locating military objectives near cultural property”.

Other Instruments

73. Article 11 of the 1956 New Delhi Draft Rules states that “the Parties to the conflict shall, so far as possible, avoid the permanent presence of armed forces,

⁵⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 365.

⁵⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214.

military material, mobile military establishments or installations, in towns or other places with a large civilian population”.

74. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 58 AP I.

75. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 58 AP I.

76. Section 5.4 of the 1999 UN Secretary-General’s Bulletin states that “in its area of operation, the United Nations force shall avoid, to the extent feasible, locating military objectives within or near densely populated areas”. It specifies, however, that “military installations and equipment of peacekeeping operations, as such, shall not be considered military objectives”.

II. National Practice

Military Manuals

77. Argentina’s Law of War Manual states that “the parties to the conflict shall, to the extent possible, avoid locating military objectives within or near densely populated areas”.⁵⁹

78. Australia’s Defence Force Manual states that:

Defences and defensive positions should also be sited, if practicable, to avoid or minimise collateral damage. Ideally, all military objectives, including defensive positions, should be sited outside heavily populated areas. As in offensive operations, where a location or object may be equally successfully defended from any one of several defensive positions, LOAC requires that the defence should be conducted from the position which would cause the least danger to civilians and civilian objects.⁶⁰

The manual requires commanders to refrain from “locating military objectives within or near densely-populated areas”.⁶¹

79. Benin’s Military Manual states that “the belligerents must avoid locating their military installations in the vicinity of the civilian population”.⁶² The manual further specifies that:

Defence shall be organised, as far as possible, outside inhabited areas... When a choice is possible between several defence positions for obtaining an equivalent military advantage, the position to be selected shall be that which would cause less danger to civilian persons and objects... Military units, except medical units, shall move or stay preferably outside populated areas, when their presence, even temporary, could endanger civilian persons and objects. Even a temporary military presence can create a dangerous situation for the civilian areas and persons. Units

⁵⁹ Argentina, *Law of War Manual* (1989), § 4.07(2).

⁶⁰ Australia, *Defence Force Manual* (1994), § 553.

⁶¹ Australia, *Defence Force Manual* (1994), § 556(b).

⁶² Benin, *Military Manual* (1995), Fascicule III, p. 12.

located in or close to populated areas shall be so deployed as to create the least possible danger to civilian areas.⁶³

80. Canada's LOAC Manual states that "to protect civilians, the parties to a conflict shall, to the maximum extent feasible . . . avoid locating legitimate targets within or near densely populated areas".⁶⁴

81. Croatia's LOAC Compendium states that "where there are tactically equivalent alternatives, the defence position shall be chosen so as to cause the least danger to civilian persons and objects. Movements and/or halts of military units near civilian objects shall be limited to a minimum."⁶⁵

82. Croatia's Commanders' Manual states that:

57. Within tactically equivalent alternatives, the defence position shall be chosen so as to expose civilian persons and objects to the least danger.

...

63. Movement and stay during movement near civilian objects shall be restricted to the minimum duration possible.

64. The location of combat units shall be chosen so as to avoid the close vicinity of military objectives and civilian persons and objects.

65. In case of unavoidable close vicinity of military objectives and civilian persons and objects, the following principles shall guide the commander:

- a) in the vicinity of important concentrations of civilian persons and objects only smaller military objectives shall be placed;
- b) larger military objectives are to be placed in the vicinity of less important concentrations of civilian persons and of smaller civilian objects.⁶⁶

83. Ecuador's Naval Manual states that "any party to an armed conflict must separate military activities and installations from areas of noncombatant concentration".⁶⁷

84. Hungary's Military Manual states that "where there are tactically equivalent alternatives, the defence position shall be chosen so as to cause the least danger to civilian persons and objects. Movements and/or halts of military units near civilian objects must be limited to a minimum."⁶⁸

85. Israel's Manual on the Laws of War prohibits "mingling military targets among civilian objects, as for instance, a military force located within a village or a squad of soldiers fleeing into a civilian structure".⁶⁹

86. Italy's LOAC Elementary Rules Manual states that:

57. Within tactically equivalent alternatives, the defence position shall be chosen so as to expose civilian persons and objects to the least danger.

...

63. Movement and stay during movement near civilian objects shall be restricted to the minimum duration possible.

⁶³ Benin, *Military Manual* (1995), Fascicule III, p. 15.

⁶⁴ Canada, *LOAC Manual* (1999), p. 4-4, § 30(b). ⁶⁵ Croatia, *LOAC Compendium* (1991), p. 42.

⁶⁶ Croatia, *Commanders' Manual* (1992), §§ 57 and 63-65.

⁶⁷ Ecuador, *Naval Manual* (1989), § 11.2. ⁶⁸ Hungary, *Military Manual* (1992), pp. 67-68.

⁶⁹ Israel, *Manual on the Laws of War* (1998), p. 38.

64. The location of combat units shall be chosen so as to avoid the close vicinity of military objectives and civilian persons and objects.
65. In case of unavoidable close vicinity of military objectives and civilian persons and objects, the following principles shall guide the commander:
 - a) in the vicinity of important concentrations of civilian persons and objects only smaller military objectives shall be placed;
 - b) larger military objectives are to be placed in the vicinity of less important concentrations of civilian persons and of smaller civilian objects.⁷⁰

87. Kenya's LOAC Manual states that "the belligerents should avoid locating their military installations near the civilian population".⁷¹ The manual further specifies that:

Defence shall be organized primarily outside populated areas . . . When a choice is possible between several defence positions for obtaining a similar military advantage, the position to be selected shall be that which would cause the least danger to civilian persons and objects, if attacked . . . Military units, except medical units, shall move or stay preferably outside populated areas, when their presence, even temporary, could endanger civilian persons and objects. Movements which have to pass through or close to populated areas shall be executed rapidly. Interruptions of movements (e.g. regular stops after given periods of time, occasional stops) shall, when the tactical situation permits, take place outside populated areas or at least in less densely populated areas. Even a temporary military presence can create a dangerous situation for the civilian areas and persons. Units located in or close to populated areas shall be so deployed as to create the least possible danger to civilian areas (e.g. at least physical separation; appropriate distance between militarily used houses and other buildings). For a longer presence in civilian areas, additional danger reducing measures shall be taken by the competent commander (e.g. clear and, where necessary, marked limit of unit's location, restricted and regulated access to the location, relevant instructions to members of the unit and appropriate information to the civilian population.⁷²

88. Madagascar's Military Manual states that:

31. Among tactically equivalent defence positions, that position must be chosen which exposes civilian persons and objects the least to danger.
- ...
41. Movements (and stops during movements) in the vicinity of civilian objects shall be limited to the minimum.
42. The placement of combat units must be chosen in order to avoid proximity between military objectives and civilian objects.
43. In case of inevitable proximity between military objectives and civilian persons and objects, the commander must be guided by the following principles:
 - a) only small military objectives may be placed in the vicinity of important concentrations of civilian persons and objects;
 - b) larger military objectives must be placed in the vicinity of smaller concentrations of civilian persons and objects.⁷³

⁷⁰ Italy, *LOAC Elementary Rules Manual* (1991), §§ 57 and 63–65.

⁷¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

⁷² Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 9–10.

⁷³ Madagascar, *Military Manual* (1994), Fiche No. 6-O, §§ 31 and 41–43.

89. The Military Manual of the Netherlands provides that one of the precautions against the effects of attacks consists of:

avoiding the placement of military objectives in or near densely populated areas . . . Although the physical separation of civilians and civilian objects from military objectives is an obvious measure for the protection of the population, it is nevertheless a measure that will often encounter great difficulties in densely populated areas. It is essential that the civilian population is not used as a human shield for military operations.⁷⁴

90. New Zealand's Military Manual states that "the Parties to the conflict shall, to the maximum extent feasible, . . . avoid locating military objectives within or near densely populated areas".⁷⁵

91. Nigeria's Military Manual states that:

As regards the conduct of defence, it shall be organised primarily outside populated areas . . . Similar to when conducting an attack, where a choice is possible between general defence positions, the position to be selected shall be that which would cause the least danger to civilian persons and objects . . . Movements and locations presupposes that military units, except medical units, shall move or stay preferably outside populated areas if their presence would endanger civilian persons and objects. Movements which have to pass through populated area[s] shall be executed rapidly. Where it becomes expedient to locate military units temporarily near populated areas, such units shall be deployed so as to create the least possible danger to civilian areas. For longer lasting military locations, additional danger reducing measures shall be taken by the competent commander.⁷⁶

92. Russia's Military Manual requires that commanders, in peacetime, "avoid deploying military objects in or near densely populated areas".⁷⁷

93. Spain's LOAC Manual lists among the required precautionary measures to be taken in defence the duty to "do everything possible to organise defence outside densely populated areas".⁷⁸ The manual further specifies that armed forces must "to the extent possible . . . avoid locating military objectives within densely populated areas".⁷⁹

94. Sweden's IHL Manual refers to the obligation enshrined in Article 58(b) API to "avoid locating military objectives within or near densely populated areas" and notes that "the expression 'endeavour' is not used in this case, which gives the rule greater force than that of Article 58(a)".⁸⁰

95. Switzerland's Basic Military Manual specifies that "to the extent possible, that is, as far as the interests of Swiss national defence allow, no military objective shall be placed within or in the vicinity of densely populated areas".⁸¹

⁷⁴ Netherlands, *Military Manual* (1993), p. V-12, § 10.

⁷⁵ New Zealand, *Military Manual* (1992), § 519(1)(b).

⁷⁶ Nigeria, *Military Manual* (1994), p. 44, § 15.

⁷⁷ Russia, *Military Manual* (1990), § 14(a).

⁷⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(4).

⁷⁹ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.a.(2).

⁸⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 74.

⁸¹ Switzerland, *Basic Military Manual* (1987), Article 29(3), see also Article 151(2)(b) and (3).

96. Togo's Military Manual states that "the belligerents must avoid locating their military installations in the vicinity of the civilian population".⁸² The manual further specifies that:

Defence shall be organised, as far as possible, outside inhabited areas... When a choice is possible between several defence positions for obtaining an equivalent military advantage, the position to be selected shall be that which would cause less danger to civilian persons and objects... Military units, except medical units, shall move or stay preferably outside populated areas, when their presence, even temporary, could endanger civilian persons and objects. Even a temporary military presence can create a dangerous situation for the civilian areas and persons. Units located in or close to populated areas shall be so deployed as to create the least possible danger to civilian areas.⁸³

97. The UK LOAC Manual provides that "the belligerents should endeavour to avoid siting their military installations near the civilian population".⁸⁴

98. The US Air Force Pamphlet states that:

As a corollary to the principle of general civilian immunity, the parties to a conflict should, to the maximum extent feasible, take necessary precautions to protect the civilian population, individual civilians, and civilian objects under their authority against the dangers resulting from military operations. Accordingly, they should endeavor... to avoid locating military objectives within or near densely populated areas. It is incumbent upon states, desiring to make protection of their own civilian population fully effective, to take appropriate measures to segregate and separate their military activities from the civilian population and civilian objects. Substantial military advantages may in fact be acquired by such separation.⁸⁵

With respect to the result of failure to separate military activities from civilian areas, the Pamphlet specifies that:

The failure of states to segregate and separate their own military activities, and particularly to avoid placing military objectives in or near populated areas and to remove such objects from populated areas, significantly and substantially weakens effective protection for their own population. A party to a conflict which places its own citizens in positions of danger by failing to carry out the separation of military activities from civilian activities necessarily accepts, under international law, the results of otherwise lawful attacks upon valid military objectives in their territory.⁸⁶

National Legislation

99. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 58(b) AP I, is a punishable offence.⁸⁷

⁸² Togo, *Military Manual* (1996), Fascicule III, p. 12.

⁸³ Togo, *Military Manual* (1996), Fascicule III, p. 15.

⁸⁴ UK, *LOAC Manual* (1981), Section 4, p. 14, § 4(d).

⁸⁵ US, *Air Force Pamphlet* (1976), § 5-4(a). ⁸⁶ US, *Air Force Pamphlet* (1976), § 5-4(b).

⁸⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

100. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁸⁸

National Case-law

101. No practice was found.

Other National Practice

102. On the basis of an interview with a retired army general, the Report on the Practice of Botswana states that it is Botswana's practice to separate military camps from civilian areas.⁸⁹

103. The Report on the Practice of Colombia states that if the location of police units may generate danger for the civilian population, their redeployment is considered advisable.⁹⁰

104. According to the Report on the Practice of Egypt, Egypt considers that parties to a conflict are required to take precautions against the effects of attack, in particular to refrain from placing military objectives within or near populated areas.⁹¹

105. In 1996, the Monitoring Group on the Implementation of the 1996 Israel-Lebanon Ceasefire Understanding, consisting of France, Israel, Lebanon, Syria and the US, pleaded with combatants to respect the precautionary measure of separating military objectives from densely populated areas, re-emphasising that artillery fired from populated areas endangered civilians. The Monitoring Group also asked combatants to take all necessary precautions during military operations launched from the vicinity of populated areas.⁹²

106. The Report on the Practice of Iran notes that "in many Iranian cities, especially in Tehran, due to [the] expansion of city limits [over] the years, some garrisons are now located in the center of the cities".⁹³

107. In a message to the UN Secretary-General in 1984, the President of Iraq stated that "both parties should refrain from placing military concentrations in or near towns so that there will be no intermingling between during military operations".⁹⁴

⁸⁸ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁸⁹ Report on the Practice of Botswana, 1998, Interview with a retired army general, Answers to additional questions on Chapter 1.1.

⁹⁰ Report on the Practice of Colombia, 1998, Chapter 1.7.

⁹¹ Report on the Practice of Egypt, 1997, Chapter 1.7.

⁹² Monitoring Group on the Implementation of the 1996 Israel-Lebanon Ceasefire Understanding, Fourth and fifth meetings, 22–25 September and 14–18 October 1996.

⁹³ Report on the Practice of Iran, 1997, Chapter 1.7.

⁹⁴ Iraq, Message from the President of Iraq, annexed to Letter dated 10 June 1984 to the UN Secretary-General, UN Doc. S/16610, 19 June 1984, p. 2.

108. In 1992, in a letter to the UN Secretary-General, Israel stated that:

Operating with cruel indifference to the fate of innocent Lebanese civilians, Hizbollah and other terrorist organizations continue to use civilian centres as bases of operation. Therein lies the true cause of the suffering of the civilian population of southern Lebanon.⁹⁵

109. According to the Report on the Practice of Israel, “the IDF endeavours, to the maximum extent possible, not to place military objectives within or in the vicinity of densely populated civilian areas”. The report remarks, however, that demographic changes have sometimes caused certain long-standing military bases to end up in mainly civilian areas. The IDF General Headquarter in Tel Aviv is cited as an example.⁹⁶

110. The Report on the Practice of Jordan refers to the existence of “a legal obligation under Jordanian practice prohibiting the location of military objectives in densely populated areas”.⁹⁷ The report considers it “regrettable that military installations are sometimes located in the vicinity of densely populated areas”.⁹⁸

111. At the CDDH, in the explanation of its vote on Article 51 of draft AP I (now Article 58), South Korea stated with respect to sub-paragraph (b) that:

This provision does not constitute a restriction on a State’s military installations on its own territory. We consider that military facilities necessary for a country’s national defence should be decided on the basis of the actual needs and other considerations of that particular country. An attempt to regulate a country’s requirements and the fulfilment of those requirements in this connexion would not conform to actualities.⁹⁹

112. The Report on the Practice of Kuwait states that, with the growth of populations and the development of towns, the Kuwaiti authorities find themselves obliged to remove military sites from urban agglomerations.¹⁰⁰

113. The Report on the Practice of Lebanon notes that, according to an advisor of the Ministry of Foreign Affairs, it is forbidden for resistance movements to maintain a military presence in populated areas. It is also prohibited to use such areas as the starting point of a military operation. The advisor thought that the same principles should also apply to Israel, whose military forces should remain outside the towns and villages.¹⁰¹

⁹⁵ Israel, Letter dated 27 January 1992 to the UN Secretary-General, UN Doc. S/23479, 27 January 1992, p. 2.

⁹⁶ Report on the Practice of Israel, 1997, Chapter 1.7.

⁹⁷ Report on the Practice of Jordan, 1997, Answers to additional questions on Chapter 1.7.

⁹⁸ Report on the Practice of Jordan, 1997, Chapter 1.7.

⁹⁹ South Korea, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 234–235.

¹⁰⁰ Report on the Practice of Kuwait, 1997, Chapter 1.7.

¹⁰¹ Report on the Practice of Lebanon, 1998, Interview with an advisor of the Lebanese Ministry of Foreign Affairs, Chapter 1.7.

114. The Report on the Practice of Malaysia considers that permanent and operational military camps may not be located within or near densely populated areas. The report notes, however, that at present, owing to the development of surrounding areas, many permanent and operational military camps are situated within or near densely populated areas.¹⁰²

115. The Report on the Practice of Syria asserts that Syria considers Article 58 AP I to be part of customary international law.¹⁰³

116. In reply to a question in the House of Lords with respect to the 1991 Gulf War, a UK government spokesman stated that:

The noble Lord asked if the bombing of civilians was not contrary to the Geneva Convention. The answer to that is no. We attacked targets accepted as legitimate in international law. Iraq's stationing of military targets in civilian areas was contrary to the rules of war.¹⁰⁴

117. In 1966, in the context of the Vietnam War, the US Department of Defense stated that:

It is impossible to avoid all damage to civilian areas, especially when the North Vietnamese deliberately emplace their air defense sites, their dispersed POL, their radar and other military facilities in the midst of populated areas, and, indeed, sometimes on the roofs of government buildings.¹⁰⁵

118. In 1966, in reply to an inquiry from a member of the US House of Representatives asking for a restatement of US policy on targeting in North Vietnam, a US Deputy Assistant Secretary of Defense wrote that "it is impossible to avoid all damage to civilian areas, particularly in view of the concerted effort of the North Vietnamese to emplace anti-aircraft and critical military targets among the civilian population".¹⁰⁶

119. In 1972, the General Counsel of the US Department of Defense stated that:

The principle [contained in paragraph 1(c) of UN General Assembly Resolution 2444 (XXIII) of 1969 that a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible] addresses primarily the Party exercising control over members of the civilian population. This principle recognizes the interdependence of the civilian community with the overall war effort of a modern society. But its application enjoins the party controlling the population to use its

¹⁰² Report on the Practice of Malaysia, 1997, Chapter 1.7.

¹⁰³ Report on the Practice of Syria, 1997, Chapter 1.7.

¹⁰⁴ UK, House of Lords, Statement by a government spokesman, 6 March 1991, *Hansard*, Vol. 526, col. 1485.

¹⁰⁵ US, Department of Defense, Statement on targeting policy in Vietnam, 26 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 427.

¹⁰⁶ US, Letter from Deputy Assistant Secretary of Defense Goulding to US Representative Ogdan Reid from New York, 30 December 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 428.

best efforts to distinguish or separate its military forces and war making activities from members of the civilian population to the maximum extent feasible so that civilian casualties and damage to civilian objects incidental to attacks on military objectives, will be minimized as much as possible.¹⁰⁷

120. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

The obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such . . . A defender must exercise reasonable precaution to separate the civilian population and civilian objects from military objectives.¹⁰⁸

121. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US denounced Iraq for having “intentionally placed civilians at risk through its behaviour”. The report cited the following examples of such behaviour:

- (a) The Iraqi Government moved significant amounts of military weapons and equipment into civilian areas with the deliberate purpose of using innocent civilians and their homes as shields against attacks on legitimate military targets;
- (b) Iraqi fighter and bomber aircraft were dispersed into villages near the military airfields where they were parked between civilian houses and even placed immediately adjacent to important archaeological sites and historic treasures;
- (c) Coalition aircraft were fired upon by anti-aircraft weapons in residential neighbourhoods in various cities. In Baghdad, anti-aircraft sites were located on hotel roofs;
- (d) In one case, military engineering equipment used to traverse rivers, including mobile bridge sections, was located in several villages near an important crossing point. The Iraqis parked each vehicle adjacent to a civilian house.¹⁰⁹

122. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Historically, and from a common sense standpoint, the party controlling the civilian population has the opportunity and responsibility to minimize the risk to the civilian population through the separation of military objects from the civilian population . . . The defending party must exercise reasonable precautions to separate the civilian population and civilian objects from military objectives, and avoid placing military objectives in the midst of the civilian population.¹¹⁰

¹⁰⁷ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 123.

¹⁰⁸ US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, § 8(E), Report on US Practice, 1997, Chapter 1.7.

¹⁰⁹ US, Letter dated 5 March 1991 to the President of the UN Security Council, UN Doc. S/22341, 8 March 1991, pp. 2–3.

¹¹⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 625.

123. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

The obligation to take reasonable measures to minimize damage to natural resources and cultural property is shared by both an attacker and a defender... The defender has certain responsibilities as well, not the least of which is to take all reasonable measures to separate military objectives from civilian objects and the civilian population. Regrettably, in conflicts such as the Korean and Vietnam Wars, as well as the 1991 Persian Gulf War, the armed forces of the United States have faced opponents who have elected to use their civilian populations and civilian objects to shield military objectives from attack. Notwithstanding such actions, U.S. forces have taken reasonable measures to minimize collateral injury to civilians and damage to civilian objects while conducting their military operations, often at increased risk to U.S. personnel.¹¹¹

124. The Report on US Practice states that “it is the *opinio juris* of the United States that parties to a conflict should, to the maximum extent feasible, segregate and separate their military activities from the civilian population to protect the latter”.¹¹²

125. The Report on the Practice of Zimbabwe states that the provisions of Article 58 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates API into Zimbabwe’s law and practice.¹¹³

III. Practice of International Organisations and Conferences

United Nations

126. In 1991, in a special report on UNIFIL in Lebanon, the UN Secretary-General stated that:

Most of the above-described hostilities have taken place near IDF/DFP positions that are close to population centres and in areas where UNIFIL’s deployment overlaps the Israeli-Controlled Area (ICA). In order to reduce hostilities, to avoid further hardship to the civilian population and to prevent additional UNIFIL casualties, I have proposed to the Government of Israel that it withdraw IDF/DFP personnel from the most affected positions, which would then be taken over by UNIFIL. I am convinced that, as in the case of Tallet Huqban in October 1987 (S/19445), such a move would have a beneficial effect.¹¹⁴

The Secretary-General resubmitted his proposal to the Israeli government in 1992.¹¹⁵

¹¹¹ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

¹¹² Report on US Practice, 1997, Chapter 1.7.

¹¹³ Report on the Practice of Zimbabwe, 1998, Chapter 1.7.

¹¹⁴ UN Secretary-General, Special report on UNIFIL, UN Doc. S/23255, 29 November 1991, § 9.

¹¹⁵ UN Secretary-General, Report on UNIFIL, UN Doc. S/24341, 21 July 1992, § 31.

Other International Organisations

127. No practice was found.

International Conferences

128. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

129. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber noted that Article 58 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.¹¹⁶ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 58] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.¹¹⁷

V. Practice of the International Red Cross and Red Crescent Movement

130. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

439. Defence shall be organized primarily outside populated areas . . .

440. When a choice is possible between several defence positions for obtaining a similar military advantage, the position to be selected shall be that the defence of which would cause the least danger to civilian persons and objects.

...

446. When the tactical situation permits, defence measures which may affect civilian persons shall be announced by effective advance warning (e.g. for evacuation of specific houses or areas, for removal and shelter).

...

448. Military units, except medical units, shall move or stay preferably outside populated areas, when their presence, even temporary, could endanger civilian persons and objects.

449. Movements which have to pass through or close to populated areas shall be executed rapidly . . .

450. Interruptions of movement (e.g. regular stops after given periods of time, occasional stops) shall, when the tactical situation permits, take place outside populated areas or at least in less densely populated areas.

451. Even a temporary military presence can create a dangerous situation for the civilian areas and persons. Units located in or close to populated areas shall be so

¹¹⁶ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

¹¹⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

deployed as to create the least possible danger to civilian areas (e.g. at least clear physical separation: appropriate distance between militarily used houses and other buildings).

452. For longer lasting locations in civilian areas, additional danger-reducing measures shall be taken by the competent commander (e.g. clear and where necessary marked limit of unit's location, restricted and regulated access to location, instructions to members of the unit and appropriate information to the civilian population).¹¹⁸

131. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that the Patriotic Front "clearly separate civilian establishments, particularly refugee camps, from military installations".¹¹⁹

VI. Other Practice

132. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that "the provisions of the preceding paragraphs do not affect the application of the existing rules of international law which prohibit the exposure of civilian populations and of non-military objects to the destructive effects of military means".¹²⁰

C. Removal of Civilians and Civilian Objects from the Vicinity of Military Objectives

Note: For practice concerning the evacuation of the civilian population for security reasons, see Chapter 38, section A.

I. Treaties and Other Instruments

Treaties

133. Article 58(a) AP I states that the Parties to the conflict shall, to the maximum extent feasible, "without prejudice to Article 49 of the Fourth Convention, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives". Article 58 AP I was adopted by 80 votes in favour, none against and 8 abstentions.¹²¹

¹¹⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 439, 440, 446, 448–452.

¹¹⁹ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 7, *IRRC*, No. 209, 1979, p. 89.

¹²⁰ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 5.

¹²¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 214.

134. Article 8 of the 1999 Second Protocol to the 1954 Hague Convention provides that “the Parties to the conflict shall, to the maximum extent feasible: a) remove movable cultural property from the vicinity of military objectives or provide for adequate *in situ* protection”.

Other Instruments

135. Article 11 of the 1956 New Delhi Draft Rules states that:

The parties to the conflict shall, so far as possible, take all necessary steps to protect the civilian population subject to their authority from the dangers to which they would be exposed in attack – in particular by removing them from the vicinity of military objectives and from threatened areas. However, the rights conferred upon the population in the event of transfer or evacuation under Article 49 of the Fourth Geneva Convention of 12 August 1949 are expressly reserved.

136. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 58 AP I.

137. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 58 AP I.

II. National Practice

Military Manuals

138. Argentina’s Law of War Manual states that “the parties to the conflict shall, to the extent possible, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives”.¹²²

139. Australia’s Defence Force Manual requires commanders to remove civilians and civilian objects under their control “from the vicinity of military objectives”.¹²³

140. Benin’s Military Manual states that “civilians must be evacuated from zones located in proximity to military objectives”.¹²⁴ The manual repeats this rule and gives some further specifications to the effect that: “civilian persons and objects must be separated from military objectives as far as possible... Civilian persons removed from the vicinity of military objectives shall be taken preferably to locations they know and which present no danger for them.”¹²⁵

141. Cameroon’s Instructors’ Manual provides that:

On the approach of the enemy or of combat towards zones of civilian habitation, the civilian population must be evacuated towards zones free of combat. The means and

¹²² Argentina, *Law of War Manual* (1989), § 4.07(2).

¹²³ Australia, *Defence Force Manual* (1994), § 556(a).

¹²⁴ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹²⁵ Benin, *Military Manual* (1995), Fascicule III, p. 15.

organisation of this evacuation are the responsibility of the national civilian and military authorities. All persons must be evacuated, with priority given to women and children.¹²⁶

142. According to Canada's LOAC Manual, "to protect civilians, the parties to a conflict shall, to the maximum extent feasible endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of legitimate targets".¹²⁷

143. Croatia's Commanders' Manual states that "endangered civilian persons and objects shall be removed from military objectives".¹²⁸

144. Ecuador's Naval Manual states that "any party to an armed conflict must remove civilians and other noncombatants under its control from the vicinity of targets of likely enemy attacks".¹²⁹

145. France's LOAC Summary Note states that "civilians and civilian objects must be kept away from the dangers [resulting from military operations] and, if necessary, be removed from the vicinity of military objectives".¹³⁰ The manual specifies that "the commander organises the cooperation with the civilian authorities and sets the priorities, in particular with respect to the precautionary measures to be taken for the protection of civilian populations".¹³¹

146. Israel's Manual on the Laws of War states that "one should try and remove the civilian population from military targets".¹³²

147. Italy's LOAC Elementary Rules Manual states that "endangered civilian persons and objects shall be removed from military objectives".¹³³

148. Kenya's LOAC Manual states that "civilians should be removed from the vicinity of military objectives as far as possible".¹³⁴ The manual later repeats this rule and gives some additional specifications:

Civilian persons and objects shall be removed from military objectives. To that end, commanders shall seek the co-operation of the civilian authorities... Civilian persons removed from the vicinity of military objectives shall be taken preferably to locations they know and which present no danger for them. Civilian objects shall be removed primarily to locations outside the vicinity of military objectives.¹³⁵

149. Madagascar's Military Manual provides that "civilian persons and objects shall be removed from military objectives".¹³⁶

150. The Military Manual of the Netherlands provides that one of the precautions against the effects of attacks consists of:

¹²⁶ Cameroon, *Instructors' Manual* (1992), p. 67, § 242(1).

¹²⁷ Canada, *LOAC Manual* (1999), p. 4-4, § 30(a).

¹²⁸ Croatia, *Commanders' Manual* (1992), § 59.

¹²⁹ Ecuador, *Naval Manual* (1989), § 11.2.

¹³⁰ France, *LOAC Summary Note* (1992), § 1.4.

¹³¹ France, *LOAC Summary Note* (1992), § 5.2.

¹³² Israel, *Manual on the Laws of War* (1998), p. 39.

¹³³ Italy, *LOAC Elementary Rules Manual* (1991), § 59.

¹³⁴ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

¹³⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 9.

¹³⁶ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 33.

trying to evacuate the civilian population, individual civilians and civilian objects from the vicinity of military objectives . . . Although the physical separation of civilians and civilian objects from military objectives is an obvious measure for the protection of the population, it is nevertheless a measure that will often encounter great difficulties in densely populated areas. It is essential that the civilian population is not used as a human shield for military operations.¹³⁷

151. New Zealand's Military Manual states that "the Parties to the conflict shall, to the maximum extent feasible, endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives".¹³⁸

152. Nigeria's Military Manual considers that one of the aims and objectives of the Geneva Conventions is "to evacuate and prevent that civilians and civilian objects in conflict zones are attacked".¹³⁹ The manual further specifies that "commander[s] shall seek the cooperation of civilians so as to remove them from [the vicinity of] military objectives".¹⁴⁰

153. Spain's LOAC Manual lists among the required precautionary measures to be taken in defence the duty "to remove, as far as possible, civilian persons or objects under military control from the vicinity of military objectives".¹⁴¹

154. Sweden's IHL Manual states that "the parties to the conflict shall endeavour to move the civilian population, civilian persons and civilian objects from the vicinity of military objectives".¹⁴²

155. Switzerland's Basic Military Manual provides that "to the extent possible, that is, as far as the interests of Swiss national defence allow, . . . civilians close to military objectives will be removed".¹⁴³

156. Togo's Military Manual states that "civilians must be evacuated from zones located in proximity to military objectives".¹⁴⁴ The manual repeats this rule and gives some further specifications to the effect that "civilian persons and objects must be separated from military objectives as far as possible . . . Civilian persons removed from the vicinity of military objectives shall be taken preferably to locations they know and which present no danger for them."¹⁴⁵

157. The UK LOAC Manual provides that "civilians should be removed from the vicinity of military objectives so far as possible".¹⁴⁶

158. The US Air Force Pamphlet states that:

As a corollary to the principle of general civilian immunity, the parties to a conflict should, to the maximum extent feasible, take necessary precautions to protect the

¹³⁷ Netherlands, *Military Manual* (1993), p. V-12, § 10.

¹³⁸ New Zealand, *Military Manual* (1992), § 519(1)(a).

¹³⁹ Nigeria, *Military Manual* (1994), p. 6, § 6(d).

¹⁴⁰ Nigeria, *Military Manual* (1994), p. 44, § 15.

¹⁴¹ Spain, *LOAC Manual* (1996), Vol. I, §§ 2.3.b.(4) and 4.5.a.(2).

¹⁴² Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 73.

¹⁴³ Switzerland, *Basic Military Manual* (1987), Article 29(3), see also Article 151(2)(a) and (3).

¹⁴⁴ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹⁴⁵ Togo, *Military Manual* (1996), Fascicule III, p. 15.

¹⁴⁶ UK, *LOAC Manual* (1981), Section 4, p. 14, § 4(d).

civilian population, individual civilians, and civilian objects under their authority against the dangers resulting from military operations. Accordingly, they should endeavor to remove civilians from the proximity of military objectives . . . It is incumbent upon states, desiring to make protection of their own civilian population fully effective, to take appropriate measures to segregate and separate their military activities from the civilian population and civilian objects. Substantial military advantages may in fact be acquired by such separation.¹⁴⁷

159. The US Naval Handbook states that “a party to an armed conflict has an affirmative duty to remove civilians under its control as well as the wounded, sick, shipwrecked, and prisoners of war from the vicinity of targets of likely enemy attacks”.¹⁴⁸

National Legislation

160. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 58(a) AP I, is a punishable offence.¹⁴⁹

161. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.¹⁵⁰

National Case-law

162. No practice was found.

Other National Practice

163. According to the Report on the Practice of Egypt, Egypt considers that parties to a conflict are required to take precautions against the effects of attack, in particular the removal of the civilian population and civilian objects from the vicinity of military objectives.¹⁵¹

164. On the basis of the reply by Iraq’s Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that “the Iraqi Armed Forces undertook, in numerous instances, to evacuate the civilian population living inside the occupied territories, in order to safeguard them in the instances where counter attacks were expected to take place by the Iranian forces”. With respect to measures taken inside Iraqi territory, the report cites the following examples: construction of shelters and keeping civilians away from the areas of military operations.¹⁵²

165. The Report on the Practice of Jordan refers to the legal obligation to remove endangered civilian persons and objects from the vicinity of military

¹⁴⁷ US, *Air Force Pamphlet* (1976), § 5-4(a). ¹⁴⁸ US, *Naval Handbook* (1995), § 11.2.

¹⁴⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁵⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁵¹ Report on the Practice of Egypt, 1997, Chapter 1.7.

¹⁵² Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 1.7.

targets. It gives the example of the evacuation of civilians from a dangerous zone (though not a military objective) when in 1968, Jordan ordered the evacuation of civilians who had fled the West Bank in 1967 and lived in areas between Jordan and Israel. The evacuation was aimed at protecting the civilians from intensive military operations.¹⁵³

166. The Report on the Practice of Kuwait states that in practice Kuwait has made every possible effort to remove the civilian population from the vicinity of military objectives. During the “crisis” in February 1998, the Kuwaiti authorities deemed the border area a possible theatre of military operations and evacuated civilians from the vicinity.¹⁵⁴

167. The Report on the Practice of Malaysia refers to the obligation to remove all civilians from the vicinity of military objectives.¹⁵⁵

168. The Report on the Practice of Syria asserts that Syria considers Article 58 AP I to be part of customary international law.¹⁵⁶

169. In 1972, the General Counsel of the US Department of Defense stated that:

The principle [contained in paragraph 1(c) of UN General Assembly Resolution 2444 (XXIII) of 1969 that a distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the civilians be spared as much as possible] addresses primarily the Party exercising control over members of the civilian population. This principle recognizes the interdependence of the civilian community with the overall war effort of a modern society. But its application enjoins the party controlling the population to use its best efforts to distinguish or separate its military forces and war making activities from members of the civilian population to the maximum extent feasible so that civilian casualties and damage to civilian objects incidental to attacks on military objectives, will be minimized as much as possible.¹⁵⁷

170. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

The obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such. An attacker must exercise reasonable precautions to minimize incidental or collateral injury to the civilian population, consistent with mission accomplishment and allowable risk to the attacking force. A defender must exercise reasonable precaution to separate the civilian population and civilian objects from military objectives. Civilians must exercise reasonable precaution to remove themselves from the vicinity of military objectives or military operations.

¹⁵³ Report on the Practice of Jordan, 1997, Chapter 1.7.

¹⁵⁴ Report on the Practice of Kuwait, 1997, Answers to additional questions on Chapter 1.7.

¹⁵⁵ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.7.

¹⁵⁶ Report on the Practice of Syria, 1997, Chapter 1.7.

¹⁵⁷ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 123.

The force that has control over the civilians has an obligation to place them in a safe place.¹⁵⁸

171. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Historically, and from a common sense standpoint, the party controlling the civilian population has the opportunity and responsibility to minimize the risk to the civilian population through the separation of military objects from the civilian population, evacuation of the civilian population from near immovable military objects, and development of air raid precautions . . . The defending party must exercise reasonable precautions to separate the civilian population and civilian objects from military objectives, and avoid placing military objectives in the midst of the civilian population.¹⁵⁹

In the report, the Department of Defense accused Iraq of having violated its obligations:

Iraqi authorities elected not to move civilians away from objects they knew were legitimate military targets, thereby placing those civilians at risk of injury incidental to Coalition attacks against these targets, notwithstanding the efforts by the Coalition to minimize risk to innocent civilians . . . The Government of Iraq elected not to take routine air-raid precautions to protect its civilian population. Civilians were not evacuated in any significant numbers from Baghdad, nor were they removed from proximity to legitimate military targets. There were air raid shelters for less than 1 percent of the civilian population of Baghdad . . . The Government of Iraq was aware of its law of war obligations. In the month preceding the Coalition air campaign, for example, a civil defense exercise was conducted, during which more than one million civilians were evacuated from Baghdad. No government evacuation program was undertaken during the Coalition air campaign.¹⁶⁰

172. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

The obligation to take reasonable measures to minimize damage to natural resources and cultural property is shared by both an attacker and a defender . . . The defender has certain responsibilities as well, not the least of which is to take all reasonable measures to separate military objectives from civilian objects and the civilian population. Regrettably, in conflicts such as the Korean and Vietnam Wars, as well as the 1991 Persian Gulf War, the armed forces of the United States have faced opponents who have elected to use their civilian populations and civilian objects to shield military objectives from attack. Notwithstanding such actions, U.S. forces have taken reasonable measures to minimize collateral injury to civilians

¹⁵⁸ US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, § 8(E), Report on US Practice, 1997, Chapter 1.7.

¹⁵⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 625.

¹⁶⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, pp. 623 and 625–626.

and damage to civilian objects while conducting their military operations, often at increased risk to U.S. personnel.¹⁶¹

173. The Report on US Practice states that:

It is the *opinio juris* of the United States that parties to a conflict should, to the maximum extent feasible, segregate and separate their military activities from the civilian population to protect the latter. Alternatively, where feasible, it may be necessary to remove civilians from the vicinity of military operations in order to protect them from the effects of attacks.¹⁶²

174. The Report on the Practice of Zimbabwe states that the provisions of Article 58 AP I would be regarded as customary by Zimbabwe because of its adoption of the Geneva Conventions Amendment Act which incorporates AP I into Zimbabwe's law and practice.¹⁶³

III. Practice of International Organisations and Conferences

175. No practice was found.

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176. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber noted that Article 58 AP I was now part of customary international law, not only because it specified and fleshed out general pre-existing norms, but also because it did not appear to be contested by any State, including those who had not ratified the Protocol.¹⁶⁴ With reference to the Martens Clause, the Trial Chamber held that:

The prescriptions of . . . [Article 58] (and of the corresponding customary rules) must be interpreted so as to construe as narrowly as possible the discretionary power to attack belligerents and, by the same token, so as to expand the protection accorded to civilians.¹⁶⁵

V. Practice of the International Red Cross and Red Crescent Movement

177. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

¹⁶¹ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

¹⁶² Report on US Practice, 1997, Chapter 1.7.

¹⁶³ Report on the Practice of Zimbabwe, 1998, Chapter 1.7.

¹⁶⁴ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 524.

¹⁶⁵ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 525.

Civilian persons and objects shall be removed from military objectives. To that purpose commanders shall seek the cooperation of the civilian authorities. . . . The removal of civilian persons from the vicinity of military objectives shall take place preferably to locations they know and which present no danger for them. The removal of civilian objects shall take place primarily to locations outside the vicinity of military objectives. . . . When the tactical situation permits, effective advance warning shall be given (e.g. for the removal and/or shelter of civilian persons).¹⁶⁶

178. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that the Patriotic Front “clearly separate civilian establishments, particularly refugee camps, from military installations”.¹⁶⁷

179. In 1993, the ICRC noted that a government involved in an armed conflict had helped to evacuate the civilians of a town under enemy shelling.¹⁶⁸

180. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that:

All feasible precautions shall be taken to avoid injuries, loss and damage to the civilian population; . . . civilians must, in particular, be kept out of dangers resulting from military operations and . . . their evacuation shall be organized or facilitated, wherever required and insofar as the security situation permits.¹⁶⁹

181. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that:

All feasible precautions shall be taken to avoid injury or losses inflicted on the civilian population and damage to civilian objects; civilians must, in particular, be kept away from dangers resulting from military operations and their evacuation must be organized or facilitated where safety conditions so require or permit.¹⁷⁰

182. In a legal analysis in 1996, the ICRC considered that the forced settlement by a government of its nationals in an occupied territory could be considered a violation of the obligation to spare civilians from the effects of attacks, a principle of customary law contained in Articles 51 and 58 AP I according to the analysis, as the areas concerned were likely to be the subject of attacks by enemy forces.¹⁷¹

¹⁶⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 439, 443, 444 and 449.

¹⁶⁷ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 7, *IRRC*, No. 209, 1979, p. 89.

¹⁶⁸ ICRC archive document.

¹⁶⁹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, pp. 503–504.

¹⁷⁰ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹⁷¹ ICRC archive document.

VI. Other Practice

183. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that “the provisions of the preceding paragraphs do not affect the application of the existing rules of international law which prohibit the exposure of civilian populations and of non-military objects to the destructive effects of military means”.¹⁷²

184. According to the Report on SPLM/A Practice, the SPLM/A has on many occasions successfully warned and removed the civilian population to safe places when attacks by the Sudanese government were imminent. For example, in March 1993, it instructed a considerable number of minors to move away from the town of Pochalla.¹⁷³ In addition, according to the same report, it has been SPLM/A practice to establish camps for refugees and displaced civilian populations away from army encampments and barracks.¹⁷⁴

¹⁷² Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 5.

¹⁷³ Report on SPLM/A Practice, 1998, Chapter 1.7.

¹⁷⁴ Report on SPLM/A Practice, 1998, Chapter 1.7.

PART II

**SPECIFICALLY PROTECTED PERSONS
AND OBJECTS**

**MEDICAL AND RELIGIOUS PERSONNEL
AND OBJECTS**

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A. Medical Personnel

Respect for and protection of medical personnel

I. Treaties and Other Instruments

Treaties

1. Article 2 of the 1864 GC provides that:

Hospital and ambulance personnel, including the quarter-master's staff, the medical, administrative and transport services... shall have the benefit of the same neutrality [as military hospitals and ambulances] when on duty, and while there remain any wounded to be brought in or assisted.

2. Article 9 of the 1906 GC provides that:

The personnel charged exclusively with the removal, transportation, and treatment of the sick and wounded, as well as with the administration of sanitary formations and establishments . . . shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war.

3. Article 10 of the 1906 GC provides that:

The personnel of volunteer aid societies, duly recognized and authorized by their own governments, who are employed in the sanitary formations and establishments of armies, are assimilated to the personnel contemplated in the preceding article, upon condition that the said personnel shall be subject to military laws and regulations. Each state shall make known to the other, either in time of peace or at the opening, or during the progress of hostilities, and in any case before actual employment, the names of the societies which it has authorized to render assistance, under its responsibility, in the official sanitary service of its armies.

4. Article 9 of the 1929 GC provides that:

The personnel engaged exclusively in the collection, transport and treatment of the wounded and sick, and in the administration of medical formations and establishments, . . . shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war. Soldiers specially trained to be employed, in case of necessity, as auxiliary nurses or stretcher-bearers for the collection, transport and treatment of the wounded and sick, and furnished with a proof of identity, shall enjoy the same treatment as the permanent medical personnel if they are taken prisoners while carrying out these functions.

5. Article 10 of the 1929 GC provides that:

The personnel of Voluntary Aid Societies, duly recognized and authorized by their Government, who may be employed on the same duties as those of the personnel mentioned in the first paragraph of Article 9, are placed on the same footing as the personnel contemplated in that paragraph, provided that the personnel of such societies are subject to military law and regulations. Each High Contracting Party shall notify to the other, either in time of peace or at the commencement of or during the course of hostilities, but in every case before actually employing them, the names of the societies which it has authorized, under its responsibility, to render assistance to the regular medical service of its armed forces.

6. Article 24 GC I provides that:

Medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments . . . shall be respected and protected in all circumstances.

7. Article 25 GC I provides that:

Members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick shall likewise be respected and protected if they are carrying out these duties at the time when they come into contact with the enemy or fall into his hands.

8. Article 26 GC I provides that:

The staff of National Red Cross Societies and that of other Voluntary Aid Societies, duly recognized and authorized by their Governments, who may be employed on the same duties as the personnel named in Article 24, are placed on the same footing as the personnel named in the said Article, provided that the staff of such societies are subject to military laws and regulations.

Each High Contracting Party shall notify to the other, either in time of peace or at the commencement of or during the course of hostilities, but in any case before actually employing them, the names of the societies which it has authorized, under its responsibility, to render assistance to the regular medical service of its armed forces.

9. Article 36 GC II provides that “medical and hospital personnel of hospital ships and their crews shall be respected and protected”.

10. Article 20, first paragraph, GC IV provides that:

Persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases, shall be respected and protected.

11. Article 8(c) AP I defines medical personnel as “those persons assigned, by a Party to the conflict, exclusively to . . . medical purposes . . . or to the administration of medical units or to the operation or administration of medical transports”. It adds that “such assignments may be either permanent or temporary”. The definition covers both military and civilian medical personnel. Article 8(c)(ii) requires that personnel of aid societies be duly recognised and authorised by a party to the conflict. Article 8 AP I was adopted by consensus.¹

12. Article 15(1) AP I provides that “civilian medical personnel shall be respected and protected”. Article 15 AP I was adopted by consensus.²

13. Article 9(1) AP II provides that “medical . . . personnel shall be respected and protected and shall be granted all available help for the performance of their duties”. Article 9 AP II was adopted by consensus.³

14. Article 11(f) of draft AP II submitted by the ICRC to the CDDH provided that:

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 68.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

³ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 112.

“medical personnel” means:

- (i) the medical personnel of the parties to the conflict, whether military or civilian, permanent or temporary, exclusively engaged in the operation or administration of medical units and means of medical transport, including their crews, and assigned *inter alia* to the search for, removal, treatment or transport of the wounded and sick;
- (ii) the civil defence medical personnel referred to in Article 30 and the medical personnel of the National Red Cross (Red Crescent, Red Lion and Sun) Societies referred to in Article 35.⁴

This proposal was amended and adopted by consensus in Committee II of the CDDH. The adopted text provided that:

“Medical personnel” means those persons assigned exclusively to the medical purposes enumerated in sub-paragraph (c) [the search for, collection, transportation, diagnosis or treatment – including first aid treatment – of the wounded, sick and shipwrecked, and for the prevention of disease] and also those persons assigned exclusively to the administration of medical units or to the operation or administration of medical transports. Such assignments may be either permanent or temporary. The term shall include:

- (i) medical personnel of a Party to the conflict, whether military or civilian, including those assigned to medical tasks of civil defence;
- (ii) medical personnel of Red Cross (Red Crescent, Red Lion and Sun) organizations recognized and authorized by a Party to the conflict;
- (iii) medical personnel of other aid societies recognized and authorized by a Party to the conflict and located within the territory of the High Contracting Party in whose territory an armed conflict is taking place.⁵

Eventually, however, Article 11(f) of draft AP II was deleted by consensus in the plenary.⁶

15. Upon signature of AP I and AP II, the US declared that “it is the understanding of the United States of America that the terms used in Part III of [AP II] which are the same as the terms defined in Article 8 [AP I] shall so far as relevant be construed in the same sense as those definitions”.⁷

Other Instruments

16. Article 13 of the 1880 Oxford Manual provides that:

Persons employed in hospitals and ambulances – including the staff for superintendence, medical service, administration and transport of wounded, as well as . . . the members and agents of relief associations which are duly authorized to assist the regular sanitary staff – are considered as neutral while so employed, and so long as there remain any wounded to bring in or to succour.

⁴ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 37.

⁵ CDDH, *Official Records*, Vol. XIII, CDDH/406/Rev.1, 17 March–10 June 1977, pp. 241 and 242.

⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109.

⁷ US, Declaration made upon signature of AP I and AP II, 12 December 1977, § B.

17. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia reminded all the parties to the conflicts in Bosnia and Herzegovina and in Croatia that “all Red Cross personnel and medical personnel assisting civilian populations and persons hors de combat must be granted the necessary freedom of movement to achieve their tasks”.

18. Section 9.4 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall in all circumstances respect and protect medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick”.

II. National Practice

Military Manuals

19. Argentina’s Law of War Manual (1969) restates Articles 24–26 GC I.⁸

20. Argentina’s Law of War Manual (1989) defines medical personnel with reference to Articles 24–25 GC I and Article 8 API.⁹ It states that “medical personnel, whether civilian or military, permanent or temporary, shall be protected and respected in all circumstances”. With respect to non-international armed conflicts in particular, the manual states that medical personnel “shall be respected, protected and assisted in the performance of their duties in favour of all wounded and sick without any discrimination”.¹⁰

21. Australia’s Commanders’ Guide provides that “civilian medical personnel are deemed to be protected persons under the Geneva Conventions . . . Military medical personnel . . . are also entitled to general protection under the Geneva Conventions.”¹¹

22. Australia’s Defence Force Manual states that “military and civilian medical personnel are protected persons”.¹² The manual defines medical personnel as follows:

Medical personnel are those persons, military or civilian, assigned exclusively to medical tasks or to the administration of medical units or the operation or administration of medical transports. Such assignment may be permanent or temporary. In addition to doctors, dentists, nurses, medical orderlies and hospital administrators attached to the forces of military and civilian establishments, medical personnel include:

- a. personnel of national Red Cross and other voluntary aid societies recognised and authorised by a party to the conflict;
- b. medical personnel attached to civil defence units; and

⁸ Argentina, *Law of War Manual* (1969), §§ 3.008–3.010.

⁹ Argentina, *Law of War Manual* (1989), § 2.10.

¹⁰ Argentina, *Law of War Manual* (1989), §§ 2.11 and 7.06.

¹¹ Australia, *Commanders’ Guide* (1994), §§ 614–615.

¹² Australia, *Defence Force Manual* (1994), § 963.

- c. any persons made available for humanitarian purposes by a neutral state, a recognised and authorised aid society of such a state, or an impartial international humanitarian organisation.¹³

23. Belgium's Law of War Manual defines medical personnel with reference to Articles 24–25 GC I and Article 8 AP I. The manual states that permanent medical personnel “shall be respected and protected at all times: they may not be made the object of attack but may not participate in hostilities either”. According to the manual, temporary medical personnel “enjoy the same protection only when they perform medical functions”.¹⁴

24. Belgium's Teaching Manual for Soldiers states that:

The protection accorded to the wounded would be illusory if the civilian and military medical services which are specifically set up to treat them could be attacked. Hence, medical services, identified by the Red Cross (or Red Crescent in certain countries), are not considered combatants or military objectives even if they wear the enemy uniform or bear its insignia. Enemy medical personnel... may not be attacked.¹⁵

25. Benin's Military Manual lists military and civilian medical personnel as specially protected persons.¹⁶ It states that “specially protected persons may not take a direct part in hostilities and must not be attacked. They shall be allowed to carry out their tasks as long as the tactical situation permits.”¹⁷ It further states that military medical personnel must be respected.¹⁸

26. Bosnia and Herzegovina's Military Instructions provides that “it is prohibited to intentionally attack military medical personnel”.¹⁹

27. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, soldiers in combat must respect medical personnel.²⁰

28. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, each soldier must respect medical personnel, “provided they wear the distinctive emblem and carry the special identity card defined by the Geneva Conventions”.²¹

29. Cameroon's Instructors' Manual considers both military and civilian medical personnel as specially protected persons.²²

30. Canada's LOAC Manual defines medical personnel as follows:

“Medical personnel” are those persons, military or civilian, assigned exclusively to medical purposes or to the administration of medical units, or the operation

¹³ Australia, *Defence Force Manual* (1994), § 521.

¹⁴ Belgium, *Law of War Manual* (1983), pp. 47–48.

¹⁵ Belgium, *Teaching Manual for Soldiers* (undated), p. 17, see also p. 8.

¹⁶ Benin, *Military Manual* (1995), Fascicule I, p. 13.

¹⁷ Benin, *Military Manual* (1995), Fascicule III, p. 5, see also Fascicule II, p. 8.

¹⁸ Benin, *Military Manual* (1995), Fascicule II, p. 16.

¹⁹ Bosnia and Herzegovina, *Military Instructions* (1992), Item 15, § 3.

²⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

²¹ Cameroon, *Disciplinary Regulations* (1975), Article 31.

²² Cameroon, *Instructors' Manual* (1992), p. 18, §§ 220–221.

or administration of medical transports. Such assignment may be permanent or temporary. In addition to doctors, dentists, nurses, medical orderlies, and hospital administrators, "medical personnel" includes personnel of national Red Cross and other voluntary aid societies recognized and authorized by a party to the conflict. The term also includes medical personnel attached to civil defence units, any persons made available for humanitarian purposes by a neutral state, a recognized and authorized aid society of such a state, or an impartial international humanitarian organization.²³

The manual states that "medical . . . personnel, both military and civilian, have protected status and thus shall not be attacked."²⁴ It further states that "humanitarian aid societies, such as the Red Cross or Red Crescent Societies, who on their own initiative, collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas, shall not be made the object of attack".²⁵ With respect to non-international armed conflicts in particular, the manual states that "medical . . . personnel are to be respected and protected at all times [and] receive all available aid to enable them to fulfil their duties".²⁶

31. Canada's Code of Conduct states that:

There are two categories of medical personnel: permanent and temporary. Permanent medical personnel include doctors, nurses and medical assistants who are engaged exclusively in the collection, transport or treatment of the sick or wounded, or in the prevention of disease; staff exclusively engaged in the administration of medical units and establishments; and chaplains attached to the armed forces. These people shall be respected and protected. They must not be attacked. . . . If captured, permanent medical personnel and chaplains, although detained, will continue to care for their sick and wounded. If there is no such medical requirement, they are to be released and returned to their own forces. Temporary medical personnel may be employed on a part-time basis as hospital orderlies or temporary stretcher bearers in the search for and collection, transport and treatment of the sick and wounded. Part-time medical personnel are protected when they are carrying out those duties and shall not be the object of attack Captured temporary medical personnel who are detained may be employed on medical duties. Unlike permanent medical personnel, temporary medical personnel do not have to be released to their side even if there is no medical requirement for their services.

...

Under the Law of Armed Conflict, the International Committee of the Red Cross (ICRC) has a special role and status. The ICRC may undertake to care for the wounded and sick. The ICRC is an independent humanitarian institution. As a neutral intermediary in the event of armed conflict it endeavours, on its own initiative or on the basis of the Geneva Conventions, to bring protection and assistance to the victims of armed conflict. Members of the ICRC wear the distinctive emblem. As such, they must be protected at all times.

...

NGOs such as CARE and Médecins Sans Frontières (Doctors Without Borders) might wear other recognizable symbols. The symbols used by CARE, MSF and other

²³ Canada, *LOAC Manual* (1999), p. 9-3, § 27.

²⁴ Canada, *LOAC Manual* (1999), p. 4-5, § 41.

²⁵ Canada, *LOAC Manual* (1999), p. 4-6, § 53.

²⁶ Canada, *LOAC Manual* (1999), p. 17-4, § 34.

NGOs do not benefit from international legal protection, although their work in favour of the victims of armed conflict must be respected. Upon recognition that they are providing care to the sick and wounded, NGOs are also to be respected.²⁷

32. Colombia's Circular on Fundamental Rules of IHL states that the protection due to the wounded and sick "also covers, as such, medical personnel".²⁸

33. Colombia's Basic Military Manual states that it is prohibited "to attack . . . medical and aid personnel".²⁹

34. Congo's Disciplinary Regulations provides that medical personnel must be respected.³⁰

35. Croatia's Commanders' Manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked. They shall be allowed to perform their tasks, when the tactical situation permits." Such persons include military and civilian medical personnel.³¹

36. Croatia's Soldiers' Manual instructs soldiers to respect medical personnel.³²

37. The Military Manual of the Dominican Republic instructs soldiers not to attack medical personnel, but to protect them.³³

38. Ecuador's Naval Manual states that "medical personnel, including medical and dental officers, technicians and corpsmen, nurses, and medical service personnel, have special protected status when engaged exclusively in medical duties and may not be attacked".³⁴ The manual qualifies "deliberate attack upon . . . medical personnel" as a war crime.³⁵

39. El Salvador's Soldiers' Manual provides that "doctors, nurses and other medical . . . personnel who serve in hospitals or work for the Red Cross . . . shall be specially protected because they relieve, aid and comfort all victims without distinction between friend and foe".³⁶

40. France's Disciplinary Regulations as amended provides that soldiers in combat must respect and protect medical personnel.³⁷

41. France's LOAC Summary Note provides that "the specific immunity granted to certain persons and objects by the law of war [including the personnel of military and civilian medical services] must be strictly observed . . . They may not be attacked."³⁸

²⁷ Canada, *Code of Conduct* (2001), Rule 10, §§ 2–3, 7 and 9.

²⁸ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.

²⁹ Colombia, *Basic Military Manual* (1995), p. 29, § 2.a.

³⁰ Congo, *Disciplinary Regulations* (1986), Article 32.

³¹ Croatia, *Commanders' Manual* (1992), §§ 7 and 12.

³² Croatia, *Soldiers' Manual* (1992), pp. 2 and 3.

³³ Dominican Republic, *Military Manual* (1980), p. 4.

³⁴ Ecuador, *Naval Manual* (1989), § 11.5. ³⁵ Ecuador, *Naval Manual* (1989), § 6.2.5.

³⁶ El Salvador, *Soldiers' Manual* (undated), p. 12.

³⁷ France, *Disciplinary Regulations as amended* (1975), Article 9 bis.

³⁸ France, *LOAC Summary Note* (1992), §§ 2.2 and 2.3.

42. France's LOAC Manual states that "the law of armed of conflicts provides special protection for the following persons: . . . medical personnel attached to armed forces [and] civilian medical personnel".³⁹

43. Germany's Military Manual defines military medical personnel with reference to the relevant provisions of the Geneva Conventions and AP I.⁴⁰ The manual provides that "civilian and military medical personnel are entitled to special protection. They shall neither be made the object of attack nor prevented from exercising their functions."⁴¹ The manual considers offences such as "wilful killing, mutilation, torture or inhumane treatment, including biological experiments, wilfully causing great suffering, serious injury to body or health" committed against medical personnel, to be grave breaches of IHL.⁴²

44. Hungary's Military Manual instructs soldiers to respect and protect permanent medical personnel.⁴³

45. Indonesia's Field Manual restates the rules on medical personnel found in Articles 24–26 GC I.⁴⁴

46. Indonesia's Air Force Manual provides that "a non-combatant is not a lawful military target in warfare. They consist of: a. members of the armed forces with special status such as . . . medical personnel."⁴⁵

47. Israel's Manual on the Laws of War states that:

It is prohibited to interfere with the administration of medical aid . . . In fact, this prohibition also covers the attack on medical personnel, paramedics and doctors in the battlefield itself. According to the Geneva Convention, medical teams are not part of the armed conflict. They are marked with distinctive identification signs, they do not carry arms, they do not cause injury and it is forbidden to harm them. It is prohibited to shoot a paramedic in the battlefield or to take him prisoner. The medical team is also restricted in that it does not take part in the hostilities, does not carry any weapons and is committed to administering medical aid also to the enemy's wounded. In actuality, this provision is not observed in the wars and confrontations waged in the Middle East, at least not in regard to medical teams in the field. They are not immune to harm, they are not identified by special identification symbols, they bear arms and take part in the fighting. This situation also exists in many other armies around the world, including the American army.⁴⁶

48. Italy's LOAC Elementary Rules Manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked", including military and civilian medical personnel.⁴⁷

49. Kenya's LOAC Manual states that:

Medical personnel are those exclusively assigned to medical units and engaged in the search for, or the collection, transport or treatment of the wounded and sick, or

³⁹ France, *LOAC Manual* (2001), pp. 95–96.

⁴⁰ Germany, *Military Manual* (1992), § 625.

⁴¹ Germany, *Military Manual* (1992), § 624.

⁴² Germany, *Military Manual* (1992), § 1209.

⁴³ Hungary, *Military Manual* (1992), p. 19.

⁴⁴ Indonesia, *Field Manual* (1979), §§ 6–8.

⁴⁵ Indonesia, *Air Force Manual* (1990), § 24(a).

⁴⁶ Israel, *Manual on the Laws of War* (1998), pp. 32–33.

⁴⁷ Italy, *LOAC Elementary Rules Manual* (1991), §§ 7 and 12.

in the prevention of disease. They are to be respected, protected and not attacked. Military medical personnel who are captured during an international armed conflict are not prisoners of war. They may be "retained" for the sole purpose of providing medical care for POWs of their own forces. . . . Military medical personnel who may have medical duties to perform on a temporary basis, e.g. stretcher bearers, may not be attacked while performing medical duties. On capture, they become POWs but are to be employed on medical duties if the need arises.⁴⁸

50. South Korea's Operational Law Manual states that military medical personnel must be protected.⁴⁹

51. Lebanon's Teaching Manual provides for respect for medical personnel, without distinguishing between military and civilian personnel.⁵⁰

52. Madagascar's Military Manual defines medical personnel as "those exclusively assigned to medical units and medical transports" whether military or civilian. Their tasks consist in "the search for, collection, transportation, diagnosis or treatment of the wounded, sick, and shipwrecked, or the prevention of disease".⁵¹ The manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked. They shall be allowed to perform their tasks, when the tactical situation permits." Such persons include military and civilian medical personnel.⁵²

53. Mali's Army Regulations provides that, according to the laws and customs of war, soldiers in combat must respect medical personnel.⁵³

54. Morocco's Disciplinary Regulations provides that, according to the laws and customs of war, soldiers in combat must respect medical personnel.⁵⁴

55. The Military Manual of the Netherlands defines medical personnel with reference to Article 25 GC I and Article 8 AP I.⁵⁵ It states that "medical personnel . . . must be respected and protected".⁵⁶ With respect to non-international armed conflicts in particular, the manual states that "medical personnel . . . must be respected and protected and must receive aid to fulfil their tasks".⁵⁷

56. The Military Handbook of the Netherlands states that:

Medical personnel engaged temporarily or permanently in the care of the wounded and the sick must be able to fulfil their humanitarian tasks under all circumstances. Persons in charge of the administration and operation of medical units and material (for example administrative personnel, cooks and drivers) belong to the medical personnel. This personnel may not be attacked.⁵⁸

⁴⁸ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 9.

⁴⁹ South Korea, *Operational Law Manual* (1996), p. 133.

⁵⁰ Lebanon, *Teaching Manual* (1997), p. 77.

⁵¹ Madagascar, *Military Manual* (1994), Fiche No. 3-SO, §§ B and C.

⁵² Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 7 and Fiche No. 3-O, § 12.

⁵³ Mali, *Army Regulations* (1979), Article 36.

⁵⁴ Morocco, *Disciplinary Regulations* (1974), Article 25(1).

⁵⁵ Netherlands, *Military Manual* (1993), p. VI-4.

⁵⁶ Netherlands, *Military Manual* (1993), p. VI-4.

⁵⁷ Netherlands, *Military Manual* (1993), pp. XI-5 and XI-6.

⁵⁸ Netherlands, *Military Handbook* (1995), p. 7-40.

57. New Zealand's Military Manual provides that:

Medical personnel are those persons, military or civilian, assigned exclusively to medical purposes or to the administration of medical units or the operation or administration of medical transports, and such assignment may be permanent or temporary. In addition to doctors, dentists, nurses, medical orderlies, hospital administrators and the like, attached to the forces or military and civilian establishments, there are included the personnel of national Red Cross and other voluntary aid societies recognised and authorized by a Party to the conflict, medical personnel attached to civil defence units, and any persons made available for humanitarian purposes by a neutral State, a recognised and authorised aid society of such State, or an impartial international humanitarian organisation.

...

Protection and respect must be extended to persons regularly and solely engaged in the operation and administration of civilian hospitals. Included in this category are persons engaged in the search for, removal, transport and care of wounded and sick civilians, the infirm, and maternity cases.

Other persons engaged in the operation and administration of civilian hospitals are entitled to protection... while employed on their duties.⁵⁹

With respect to non-international armed conflict in particular, the manual states that "medical... personnel are to be respected and protected at all times, receiving all available aid to enable them to fulfil their duties".⁶⁰

58. Nicaragua's Military Manual states, with respect to international armed conflicts, that assistance to the wounded, sick and shipwrecked includes a requirement of "protection of permanent [medical] personnel assigned to the search, collection, transportation or treatment of the wounded and sick, the prevention of disease or the administration of [medical] units and establishments", as well as "respect for and protection of temporary [medical] personnel" and "respect for and protection of regular personnel of civilian hospitals".⁶¹

59. Nigeria's Manual on the Laws of War states that "medical personnel engaged exclusively in the search and collection of the wounded and sick and the prevention of disease, the staff engaged in the administration of hospitals and medical units... are also entitled to protection".⁶²

60. Nigeria's Military Manual provides that "specifically protected persons... recognised as such must be respected. Specifically protected persons are to be allowed to fulfil their activity unless the tactical situation does not permit".⁶³

61. Nigeria's Soldiers' Code of Conduct states that "medical personnel must be respected".⁶⁴

62. Nigeria's Operational Code of Conduct states that "hospital staff and patients should not be tampered with or molested".⁶⁵

⁵⁹ New Zealand, *Military Manual* (1992), §§ 1005(1) and 1109(3) and (4).

⁶⁰ New Zealand, *Military Manual* (1992), § 1818(2).

⁶¹ Nicaragua, *Military Manual* (1996), Article 14(4), (6) and (37).

⁶² Nigeria, *Manual on the Laws of War* (undated), § 33.

⁶³ Nigeria, *Military Manual* (1994), p. 45, § (f).

⁶⁴ Nigeria, *Soldiers' Code of Conduct* (undated), § 7.

⁶⁵ Nigeria, *Operational Code of Conduct* (1967), § 4(d).

63. Romania's *Soldiers' Manual* provides for respect for medical personnel.⁶⁶
64. Russia's *Military Manual* states that attacks against medical personnel are a prohibited method of warfare.⁶⁷
65. Senegal's *Disciplinary Regulations* provides that soldiers in combat must respect and protect medical personnel.⁶⁸
66. South Africa's *LOAC Manual* provides that:

Medical . . . personnel of the parties to a conflict, whether military or civilian, are to be respected and protected. This protection is not a personal privilege but rather a natural consequence of the rules designed to ensure respect and protection for the victims of armed conflict. Protection is accorded to medical personnel to facilitate the humanitarian tasks assigned to them; the protection is therefore limited to those circumstances in which they are carrying out these tasks exclusively.

The manual points to the distinction between permanent and auxiliary medical personnel and restates Articles 24–25 GC I.⁶⁹

67. Spain's *LOAC Manual* defines medical personnel with reference to Article 8 AP I.⁷⁰ The manual states, with reference to the relevant provisions of the Geneva Conventions and both Additional Protocols, that "respect and protection" of medical personnel include the duty not to attack medical personnel, and the duty to defend, assist and support such personnel when needed. The manual further explains that:

It must be underlined that the protection of medical personnel is not a personal privilege but rather a corollary of the respect and protection due to the wounded and sick, who must be treated humanely in all circumstances. This means that the protection of medical personnel is not permanent but is only granted when such personnel are carrying out their humanitarian tasks. Medical personnel lose the special protection to which they are entitled if they commit acts of hostility. Such behaviour might even constitute perfidy if in so doing they take advantage of their medical position and the distinctive emblems.⁷¹

68. Sweden's *IHL Manual* considers that Article 15 AP I on the protection of medical personnel has the status of customary law.⁷²

69. Switzerland's *Basic Military Manual* states that "medical . . . personnel must be respected and protected in all circumstances. They may not be attacked or prevented from carrying out their duties." It defines medical personnel as including persons specially and exclusively assigned to the care of the wounded and sick, such as doctors, nurses and stretcher-bearers; administrative staff of medical units and establishments such as hospital administrators, drivers and cooks; chaplains and temporary medical personnel.⁷³

⁶⁶ Romania, *Soldiers' Manual* (1991), p. 32. ⁶⁷ Russia, *Military Manual* (1990), § 5(g).

⁶⁸ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

⁶⁹ South Africa, *LOAC Manual* (1996), §§ 46–47.

⁷⁰ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(1).

⁷¹ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

⁷² Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

⁷³ Switzerland, *Basic Military Manual* (1987), Article 78(1) and commentary.

70. Togo's Military Manual lists military and civilian medical personnel as specially protected persons.⁷⁴ It states that "specially protected persons may not take a direct part in hostilities and must not be attacked. They shall be allowed to carry out their tasks as long as the tactical situation permits".⁷⁵ It further states that military medical personnel must be respected.⁷⁶

71. The UK Military Manual restates Articles 24–26 GC I.⁷⁷ It specifies that the duty to respect and protect means that medical personnel "must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions. The pure accidental killing or wounding of protected personnel when in or near the area of combat is not a legitimate cause for complaint."⁷⁸ The manual also restates Article 20 GC IV.⁷⁹

72. The UK LOAC Manual states that "medical personnel are those exclusively assigned to medical units. They are to be respected, protected and not attacked."⁸⁰

73. The US Field Manual grants respect and protection to both permanent and temporary medical personnel as provided for in Articles 24–25 GC I. The manual states that:

The respect and protection accorded personnel by Articles 19, 24, and 25 [GC I] mean that they must not knowingly be attacked, fired upon, or unnecessarily prevented from discharging their proper functions. The accidental killing or wounding of such personnel, due to their presence among or in proximity to combatant elements actually engaged, by fire directed at the latter, gives no just cause for complaint.⁸¹

Protection is also granted to the personnel of aid societies by reference to Article 26 GC I.⁸²

74. The US Air Force Pamphlet refers to the protection of medical personnel as set out in GC I.⁸³ It further states that "in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: (1) deliberate attack on . . . medical . . . personnel".⁸⁴

75. The US Air Force Commander's Handbook provides that medical personnel, civilian or military, "should not be deliberately attacked, fired upon, or unnecessarily prevented from performing their medical duties. The same protection should also be given to any civilian or group of civilians trying to aid the sick and wounded after combat".⁸⁵

⁷⁴ Togo, *Military Manual* (1996), Fascicule I, p. 14.

⁷⁵ Togo, *Military Manual* (1996), Fascicule III, p. 5, see also Fascicule II, p. 8.

⁷⁶ Togo, *Military Manual* (1996), Fascicule II, p. 16.

⁷⁷ UK, *Military Manual* (1958), §§ 346–347 and 350.

⁷⁸ UK, *Military Manual* (1958), § 346, footnote 1. ⁷⁹ UK, *Military Manual* (1958), § 32.

⁸⁰ UK, *LOAC Manual* (1981), Section 6, p. 23, § 9(a).

⁸¹ US, *Field Manual* (1956), §§ 225–226. ⁸² US, *Field Manual* (1956), § 227.

⁸³ US, *Air Force Pamphlet* (1976), § 12-2(b). ⁸⁴ US, *Air Force Pamphlet* (1976), § 15-3(c)(1).

⁸⁵ US, *Air Force Commander's Handbook* (1980), § 3-2.

76. The US Naval Handbook states that “medical personnel, including medical and dental officers, technicians and corpsmen, nurses, and medical service personnel, have special protected status when engaged exclusively in medical duties and may not be attacked”.⁸⁶ The manual qualifies “deliberate attack upon . . . medical personnel” as a war crime.⁸⁷

77. The Annotated Supplement to the US Naval Handbook notes that “the United States supports the principle in [Article 15 AP I] that civilian medical . . . personnel be respected and protected and not be made the objects of attack”.⁸⁸

78. The YPA Military Manual of the SFRY (FRY) restates Articles 24–26 GC I and extends the protection of military medical personnel to civilian medical personnel.⁸⁹

National Legislation

79. Argentina’s Draft Code of Military Justice punishes any soldier who “uses violence against medical personnel, . . . against members of medical units or against members of aid societies”.⁹⁰

80. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁹¹

81. Under the Criminal Code of the Federation of Bosnia and Herzegovina, “murder, torture [or] inhuman treatment” of medical personnel are considered to be war crimes.⁹² The Criminal Code of the Republika Srpska contains the same provision.⁹³

82. Colombia’s Emblem Decree lists as persons who must be protected:

medical, paramedical and aid society personnel, members of the International Red Cross and Red Crescent Movement and persons who, permanently or temporarily, provide humanitarian services and transports of medicine, food and humanitarian aid in situations of armed conflict or natural disaster.⁹⁴

83. Under Colombia’s Penal Code, it is a punishable act to “hinder or prevent, at the occasion of and during armed conflict, medical, health and aid personnel . . . from carrying out the medical and humanitarian tasks assigned to them by the norms of International Humanitarian Law”.⁹⁵

⁸⁶ US, *Naval Handbook* (1995), § 11.5. ⁸⁷ US, *Naval Handbook* (1995), § 6.2.5.

⁸⁸ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.5, footnote 31.

⁸⁹ SFRY (FRY), *YPA Military Manual* (1988), §§ 175–178 and 195, see also § 82 (conduct of hostilities).

⁹⁰ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(3) in the *Code of Military Justice as amended* (1951).

⁹¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁹² Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 155.

⁹³ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 434.

⁹⁴ Colombia, *Emblem Decree* (1998), Article 10.

⁹⁵ Colombia, *Penal Code* (2000), Article 153.

84. Under Croatia's Criminal Code, "the killing, torture or inhuman treatment" of medical personnel is a war crime.⁹⁶
85. Under El Salvador's Code of Military Justice, medical personnel must be respected.⁹⁷
86. The Draft Amendments to the Penal Code of El Salvador punish "anyone who, during an international or non-international conflict, attacks protected persons", defined as including medical personnel.⁹⁸
87. Under Estonia's Penal Code, "a person who kills, tortures, causes health damage to or takes hostage a member of a medical unit properly identified, or any other person attending to the sick or wounded persons" commits a war crime.⁹⁹
88. Under Ethiopia's Penal Code, "the killing, torture or inhuman treatment or other acts entailing direct suffering or physical or mental injury to . . . members of the medical or first-aid services" is punishable as a war crime.¹⁰⁰
89. Georgia's Criminal Code provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or internal armed conflict . . . against medical . . . personnel".¹⁰¹
90. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 24–26 GC I, 36 GC II and 20 GC IV, and of AP I, including violations of Article 15(1) AP I, as well as any "contravention" of AP II, including violations of Article 9(1) AP II, are punishable offences.¹⁰²
91. Italy's Law of War Decree as amended states that military medical personnel must be respected and protected "provided they are not committing acts of hostility".¹⁰³
92. Lithuania's Criminal Code as amended prohibits attacks against medical and civilian defence personnel, military or civilian hospitals, health centres, vehicles transporting the wounded and sick, and personnel of the ICRC or National Red Cross and Red Crescent Societies if protected by the distinctive emblems.¹⁰⁴
93. Nicaragua's Military Penal Code provides for the punishment of any soldier who "exercises violence against the personnel of medical . . . services, be they enemy or neutral, members of aid organizations and personnel affected to the services of [medical establishments]", provided that the protection due is not misused for hostile purposes.¹⁰⁵

⁹⁶ Croatia, *Criminal Code* (1997), Article 159.

⁹⁷ El Salvador, *Code of Military Justice* (1934), Article 69.

⁹⁸ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a personas protegidas".

⁹⁹ Estonia, *Penal Code* (2001), § 102. ¹⁰⁰ Ethiopia, *Penal Code* (1957), Article 283(a).

¹⁰¹ Georgia, *Criminal Code* (1999), Article 411(2).

¹⁰² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁰³ Italy, *Law of War Decree as amended* (1938), Article 95.

¹⁰⁴ Lithuania, *Criminal Code as amended* (1961), Article 337.

¹⁰⁵ Nicaragua, *Military Penal Code* (1996), Article 57(2).

94. Nicaragua's Draft Penal Code punishes "anyone who, during an international or non-international conflict, attacks protected persons", defined as including medical personnel.¹⁰⁶

95. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".¹⁰⁷

96. Poland's Penal Code provides for the protection of medical personnel, including the medical personnel of authorised aid societies.¹⁰⁸

97. Romania's Penal Code provides for the punishment of anyone who "subjects to inhuman treatment... members of civil medical personnel... or subjects such persons to medical or scientific experiments".¹⁰⁹

98. Under Slovenia's Penal Code, "slaughter, torture [or] inhuman treatment" of medical personnel is a war crime.¹¹⁰

99. Spain's Military Criminal Code provides for the punishment of any soldier who "exercises violence against the personnel of medical... services, be they enemy or neutral, members of aid organizations and personnel affected to the services of [medical establishments]", provided that the protection due is not misused for hostile purposes.¹¹¹

100. Spain's Penal Code provides for the punishment of "anyone who should... exercise violence on health... personnel, or members of medical missions or rescue teams".¹¹²

101. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, against... medical... personnel".¹¹³

102. Ukraine's Criminal Code states that medical personnel are to be respected.¹¹⁴

103. Venezuela's Code of Military Justice as amended provides for the punishment of "those who carry out serious attacks against members of... medical services, be they enemy or neutral".¹¹⁵

104. Venezuela's Code of Military Justice as amended prohibits attacks on Red Cross and medical personnel.¹¹⁶

¹⁰⁶ Nicaragua, *Draft Penal Code* (1999), Article 449.

¹⁰⁷ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁰⁸ Poland, *Penal Code* (1997), Article 123(1)(2).

¹⁰⁹ Romania, *Penal Code* (1968), Article 358.

¹¹⁰ Slovenia, *Penal Code* (1994), Article 375.

¹¹¹ Spain, *Military Criminal Code* (1985), Article 77(4).

¹¹² Spain, *Penal Code* (1995), Article 612(2).

¹¹³ Tajikistan, *Criminal Code* (1998), Article 403(2).

¹¹⁴ Ukraine, *Criminal Code* (2001), Article 414.

¹¹⁵ Venezuela, *Code of Military Justice as amended* (1998), Article 474(3).

¹¹⁶ Venezuela, *Code of Military Justice as amended* (1998), Article 474.

105. Under the Penal Code as amended of the SFRY (FRY), “murder, torture [or] inhuman treatment” of medical personnel is a war crime.¹¹⁷

National Case-law

106. No practice was found.

Other National Practice

107. The Report on the Practice of Algeria notes that no instances of attacks against medical personnel or objects by the ALN were reported during Algeria’s war of independence.¹¹⁸

108. According to the Report on the Practice of Chile, it is Chile’s *opinio juris* that the prohibition of attacks on medical personnel and objects is part of customary international law.¹¹⁹

109. In 1972, in a statement before the General Conference of UNESCO concerning US attacks in Vietnam, China criticised the US because it allegedly had “wantonly bombarded Vietnamese cities and villages, seriously destroyed many schools and cultural and sanitary facilities [and] killed a large number of teachers, students, patients and medical personnel”.¹²⁰

110. According to the Report on the Practice of China, it is China’s *opinio juris* that medical personnel shall be respected and protected.¹²¹

111. Under the instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, medical personnel shall be protected.¹²²

112. At the CDDH, the FRG stated that it could not agree that “the definitions of Article 8 [AP I] could apply to the Geneva Conventions, but they should apply to the whole of [AP I], and not only to part II”.¹²³ The FRG also explained that the distinction between local and foreign non-Red Cross relief organisations was “to avoid the situation of an obscure private group from outside the country establishing itself as an aid society within the territory and then being recognized by the rebels”.¹²⁴

¹¹⁷ SFRY (FRY), *Penal Code as amended* (1976), Article 143.

¹¹⁸ Report on the Practice of Algeria, 1997, Chapter 2.7.

¹¹⁹ Report on the Practice of Chile, 1997, Chapter 2.7.

¹²⁰ China, Statement before the General Conference of UNESCO, 25 October 1972, *Selected Documents of the Chinese Delegation to the United Nations*, The People’s Press, Beijing, 1972, p. 239.

¹²¹ Report on the Practice of China, 1997, Chapter 2.7.

¹²² France, État-major de la Force d’Action Rapide, *Ordres pour l’Opération Mistral*, 1995, Section 6, § 62.

¹²³ FRG, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.4, 12 March 1974, p. 26, § 10.

¹²⁴ FRG, Statement at the CDDH, *Official Records*, Vol. XII, CDDH/II/SR.80, p. 270, § 16.

113. In a declaration in 1993, the German Federal Minister of Foreign Affairs condemned the killing of a German soldier belonging to UNTAC's medical personnel in Cambodia as a "cruel act of violence".¹²⁵

114. The Report on the Practice of Germany notes that the German Federal Armed Forces may incorporate medical staff into combat units, if they are needed, especially for special missions.¹²⁶

115. According to the Report on the Practice of the Iran, Iran accused Iraq on several occasions of attacking Iranian Red Crescent personnel during the Iran–Iraq war. Iran claimed that Iraq had violated IHL by committing these acts.¹²⁷

116. The Report on the Practice of Iraq refers to the protection afforded to medical personnel by the Geneva Conventions.¹²⁸ On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the report also states that the protection of relief personnel is "an absolute principle, without any restriction".¹²⁹

117. According to the Report on the Practice of Israel, the IDF does not have a policy of targeting the medical personnel of its adversaries. The report adds that the implementation of this policy is subject to such personnel being clearly recognisable and not participating in hostile activities. It further states that:

The IDF . . . has chosen to incorporate its front-line medical staff in its combat units. As a result, when participating in combat missions, front-line Israeli military medical personnel would not carry distinguishing marks and do not expect to be granted protected status in combat situations.¹³⁰

118. During the Iraqi occupation of Kuwait in 1990, Kuwait stated in a letter to the UN Secretary-General that "on the pretext that the staff had been lax in attending to the injured Iraqis, a number of the hospital staff were arrested, tortured and then executed". These acts were described as violations of "the most basic of human rights" and of GC IV.¹³¹

119. At the International Conference for the Protection of War Victims in 1993, Kuwait stated that "persons committing acts against [medical personnel] must be considered as war criminals".¹³²

120. According to the Report on the Practice of Kuwait, attacks against medical personnel are an offence under Kuwaiti law.¹³³

121. At the CDDH, New Zealand, supported by Austria, stated that the definitions provided by AP I could not be applied to the Geneva Conventions

¹²⁵ Germany, Declaration by the Federal Minister of Foreign Affairs, *Süddeutsche Zeitung*, 15 October 1993.

¹²⁶ Report on the Practice of Germany, 1997, Answers to additional questions on Chapter 2.7.

¹²⁷ Report on the Practice of Iran, 1997, Chapter 2.7.

¹²⁸ Report on the Practice of Iraq, 1998, Chapter 2.7.

¹²⁹ Report on the Practice of Iraq, 1998, Chapter 4.2.

¹³⁰ Report on the Practice of Israel, 1997, Chapter 2.7, referring to *Law of War Booklet* (1986), p. 7.

¹³¹ Kuwait, Letter dated 16 September 1990 to the UN Secretary-General, UN Doc. S/21777, 17 September 1990, p. 1.

¹³² Kuwait, Statement at the International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993.

¹³³ Report on the Practice of Kuwait, 1997, Chapter 2.7.

and considered that Committee II of the CDDH “was not competent to take a decision affecting the 1949 Geneva conventions”.¹³⁴

122. According to the Report on the Practice of Nigeria, it is Nigeria’s *opinio juris* that the prohibition of attacks on medical personnel and objects is part of customary international law.¹³⁵

123. An agreement, concluded in 1990 between several Philippine governmental departments, the National Police, and a group of NGOs involved in the delivery of medical services, provides for the protection of health workers from harassment and human rights violations. The preamble to the agreement states that the parties are adhering to generally accepted principles of IHL and human rights law.¹³⁶

124. The Report on the Practice of the Philippines notes that medical personnel are given protection when they are delivering health services.¹³⁷

125. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that “military medical personnel must be protected”.¹³⁸ Medical personnel of aid societies were not specifically mentioned, but in reply to the question regarding the improper use of uniforms, an officer stated that the use of the “uniforms” of humanitarian organisations was prohibited since it endangered their staff.¹³⁹

126. A training video on IHL produced by the UK Ministry of Defence emphasises the duty to respect, and not to attack, medical personnel.¹⁴⁰

127. According to the Report on UK Practice, there is no practice of incorporating medical staff in combat units in the UK’s armed forces.¹⁴¹

128. At the CDDH, the US stated that Committee II of the CDDH “was not competent to take a decision to apply to the 1949 Geneva Conventions the terms defined in Article 8”.¹⁴²

129. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President expressed the view that “the obligations in Additional Protocol II are no more than a restatement of the rules of conduct

¹³⁴ New Zealand, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.4, 12 March 1974, p. 25, § 5.

¹³⁵ Report on the Practice of Nigeria, 1997, Chapter 2.7.

¹³⁶ Philippines, Memorandum of Agreement on the Delivery of Health Services between the Departments of Foreign Affairs, Justice, Local Government, National Defense and Health and the Philippines Alliance of Human Rights Advocates (PAHRA), the Free Legal Assistance Group (FLAG) and the Medical Action Group (MAG), 10 December 1990, preamble.

¹³⁷ Report on the Practice of the Philippines, 1997, Chapter 2.7.

¹³⁸ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire Chapter 2.7.

¹³⁹ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 2.7.

¹⁴⁰ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.7.

¹⁴¹ Report on UK Practice, 1997, Chapter 2.7.

¹⁴² US, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.4, 12 March 1974, p. 25, § 4.

with which US military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency".¹⁴³

130. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that medical and religious personnel must be respected and protected" as provided in Article 15 AP I.¹⁴⁴

131. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that medical personnel must be respected and protected at all times.¹⁴⁵

132. In 1996, the US Department of State qualified the killing of six ICRC medical aid workers in Chechnya as a "barbaric act" and condemned it "in the strongest possible terms".¹⁴⁶

133. In 1998, the Office of General Counsel of the US Department of Defence issued a memorandum on the subject of whether radio operators assigned to an air force medical unit could be issued with identification cards bearing the red cross and documenting their status as personnel "exclusively engaged in supporting a medical unit or establishment in performance of its medical mission" under Article 24 GC I. The memorandum concluded that "the administrative staff category would appear to be broad enough to cover radio operators, so long as they are exclusively engaged in supporting a medical unit or establishment in the performance of its medical mission".¹⁴⁷

134. According to the Report on US Practice, it is the *opinio juris* of the US that medical personnel are not to be knowingly attacked or unnecessarily prevented from performing their duties in either international or non-international armed conflicts. It adds that "customary practice has proceeded little beyond the specific rules of the Geneva Conventions, with a few exceptions". The report notes that there is no practice of incorporating medical staff in combat units in the armed forces.¹⁴⁸

135. In 1993, during a debate in the UN Security Council on the situation in the former Yugoslavia, Venezuela stated that those who had committed war crimes and crimes against humanity, including "attacks upon . . . medical personnel", had to be brought to justice.¹⁴⁹

¹⁴³ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

¹⁴⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 423-424.

¹⁴⁵ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

¹⁴⁶ US, Department of State, Daily Press Briefing, 17 December 1996.

¹⁴⁷ US, Department of Defence, Office of General Counsel, Memorandum for Defence Resources Activity, Subject: Geneva Convention Cards for Medical Personnel, 4 August 1998, *YIHL*, Vol. 2, 1999, p. 422.

¹⁴⁸ Report on US Practice, 1997, Chapter 2.7.

¹⁴⁹ Venezuela, Statement before the UN Security Council, UN Doc. S/PV.3269, 24 August 1993, p. 44.

136. Order No. 579 issued in 1991 by the YPA Chief of Staff instructs YPA units to “apply all means to prevent any attempt of . . . mistreatment of . . . religious and medical personnel”.¹⁵⁰

137. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY (FRY) included as an example, the arrest of medical teams even though they were wearing the red cross emblem.¹⁵¹

138. The Report on the Practice of Zimbabwe states that the rule on the protection of medical personnel from attack is part of customary international law. In particular, it points out the customary status of Articles 15 and 16 AP I.¹⁵²

139. In 1991, in a letter to the ICRC, the President of a State denounced attacks against medical personnel by the opposing forces.¹⁵³

III. Practice of International Organisations and Conferences

United Nations

140. In a resolution adopted in 1984 on the situation of human rights in El Salvador, the UN General Assembly urged the government and the insurgent forces “to agree as early as possible to respect the medical personnel . . . as required by the Geneva Conventions”.¹⁵⁴

141. In a resolution adopted in 1985 on the situation of human rights in El Salvador, the UN General Assembly expressed its deep concern “at the fact that serious and numerous violations of human rights continue to take place in El Salvador owing above all to non-fulfilment of the humanitarian rules of war” and therefore recommended that the UN Special Representative for El Salvador “continue to observe and to inform the General Assembly and the Commission on Human Rights of the extent to which the contending parties are respecting those rules, particularly as regards humanitarian treatment and respect for . . . health personnel . . . of either party”.¹⁵⁵ This recommendation was reiterated in a subsequent resolution adopted in 1986.¹⁵⁶

142. In a resolution adopted in 1987 on the situation on human rights in El Salvador, the UN Commission on Human Rights requested that the UN Special Representative for El Salvador “continue to observe and inform the General Assembly and the Commission of the extent to which the contending parties are respecting the humanitarian rules of war, particularly as regards respect for . . . health personnel”.¹⁵⁷

¹⁵⁰ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

¹⁵¹ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 1(iii).

¹⁵² Report on the Practice of Zimbabwe, 1998, Chapter 2.7. ¹⁵³ ICRC archive document.

¹⁵⁴ UN General Assembly, Res. 39/119, 14 December 1984, § 9.

¹⁵⁵ UN General Assembly, Res. 40/139, 13 December 1985, § 3.

¹⁵⁶ UN General Assembly, Res. 41/157, 4 December 1986, § 4.

¹⁵⁷ UN Commission on Human Rights, Res. 1987/51, 11 March 1987, § 5.

143. In a resolution adopted in 1985 on the situation in El Salvador, the UN Sub-Commission on Human Rights recommended that the UN Special Representative for El Salvador “inform the Commission on whether both parties accept their obligation to respect the Geneva Conventions and to what extent they are truly observing them, specially in those aspects which refer to the protection of . . . the medical personnel of both parties”.¹⁵⁸

144. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) linked attacks on medical personnel to “ethnic cleansing”, regarding them as a coercive means to remove the population from certain areas.¹⁵⁹

145. In 1994, in its final report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994) treated the cases of attacks on medical personnel no differently from attacks on civilians. It mostly referred to common Article 3 of the 1949 Geneva Conventions (acknowledging its customary status) and AP II.¹⁶⁰

146. In 1995, in a report on the conflict in Guatemala, the Director of MINUGUA recommended to the URNG that it “should issue precise instructions to its combatants to refrain from . . . endangering ambulances and duly identified health workers who assist such wounded persons”.¹⁶¹

147. In its report in 1993, the UN Commission on the Truth for El Salvador held that the summary execution of a Spanish doctor who had entered El Salvador to work as a doctor for the FMLN was a flagrant violation of IHL and human rights law. No indication was given as to what were the doctor’s activities, and the Commission made no mention of the special protected status of medical personnel.¹⁶² The Commission described the summary execution of a French nurse working in an FMLN hospital by a unit of the Salvadoran Air Force as a deliberate attack on medical personnel in violation of IHL.¹⁶³

Other International Organisations

148. In a resolution adopted in 1988 on the protection of humanitarian medical missions, the Parliamentary Assembly of the Council of Europe called on all States to respect “the right of medical personnel to be protected during their missions”. It recalled that the Additional Protocols afforded protection to medical personnel intervening in conflicts of a non-international nature. The

¹⁵⁸ UN Sub-Commission on Human Rights, Res. 1985/18, 29 August 1985, § 4.

¹⁵⁹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 133–134.

¹⁶⁰ UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Final report, UN Doc. S/1994/1405, 9 December 1994, §§ 73–92.

¹⁶¹ MINUGUA, Director, First report, UN Doc. A/49/856, 1 March 1995, Annex, § 194.

¹⁶² UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 89–92.

¹⁶³ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 87–89.

Parliamentary Assembly further emphasised that the protected status applied only to medical personnel working under the aegis of the ICRC or to personnel employed by a State and that the application of these texts did not always cover cases of internal conflicts not recognised by the legal government.¹⁶⁴

149. Following the killing of six ICRC medical aid workers in Chechnya in December 1996, the OSCE Chairman stated that he was “horrified to learn of the atrocious crime which claimed the lives of six International Red Cross aid workers as they were sleeping” and strongly condemned “this act of violence . . . and terrorism”.¹⁶⁵

International Conferences

150. At the CDDH, the Working Group on the Protection of Medical Personnel considered in its report that the term “medical personnel” as used in AP II should include all the categories of personnel listed in Article 8(c) AP I.¹⁶⁶ However, the definition developed for AP II by Committee II, which took into account the specific aspects of non-international armed conflicts, provided that medical personnel included, *inter alia*, “medical personnel of other aid societies [other than Red Cross or Red Crescent organisations] recognised and authorised by a Party to the conflict and located within the territory of the High Contracting Party in whose territory an armed conflict is taking place”.¹⁶⁷ In this respect, the Drafting Committee stated that:

It had been necessary to specify that aid societies other than Red Cross organizations must be located within the territory of the High Contracting Party in whose territory the armed conflict was taking place in order to avoid the situation of an obscure private group from outside the country establishing itself as an aid society within the territory and being recognized by the rebels.¹⁶⁸

151. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to “make every effort” to protect medical personnel.¹⁶⁹

152. In a resolution on health and war adopted in 1995, the Conference of African Ministers of Health invited OAU member States “to do everything possible to protect medical personnel against pressure, threats and attempts on their lives”.¹⁷⁰

¹⁶⁴ Council of Europe, Parliamentary Assembly, Res. 904 (1988), 30 June 1988, § 14 and Annex, § 1.

¹⁶⁵ OSCE, Chairman in Office, Press Release 86/96, 17 December 1996.

¹⁶⁶ CDDH, *Official Records*, Vol. XIII, CDDH/II/269, 3 February–18 April 1975, p. 217.

¹⁶⁷ CDDH, *Official Records*, Vol. XIII, CDDH/235/Rev.1, Report of Committee II, 21 April–11 June 1976, p. 304.

¹⁶⁸ CDDH, *Official Records*, Vol. XII, CDDH/II/SR.80, 4 June 1976, p. 270, § 16.

¹⁶⁹ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II (9), *ILM*, Vol. 33, 1994, p. 301.

¹⁷⁰ Conference of African Ministers of Health, Cairo, 26–28 April 1995, Res. 14 (V), § 5(c).

IV. Practice of International Judicial and Quasi-judicial Bodies

153. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

154. The ICRC Commentary on the Additional Protocols, in the light of the fact that AP II provides no definition of medical personnel, states that “we should therefore refer, both for medical personnel and for religious personnel, to the definitions of these terms given in Article 8 (Terminology) of Protocol I”. The Commentary further specifies that:

4666. The term “Red Cross organizations” was used in order to cover not only the assistance available on the government side, but also groups or sections of the Red Cross on the other side which already existed, and even improvised organizations which might be set up during the conflict.

4667. Such was the intention of the negotiators, and this interpretation remains in the absence of definitions in the Protocol. It is supported not only by the above-mentioned work of the Conference, but also by Article 18 (Relief societies and relief actions), paragraph 1, which uses the term “Red Cross organizations” in this sense. As regards relief societies, it was considered necessary to specify that relief societies other than Red Cross organizations should be located within the territory of the Contracting Party where the armed conflict was taking place, to avoid private groups from outside the country establishing themselves by claiming the status of a relief society and then being recognized by the insurgents.

4668. In the absence of precise definition, the term “medical personnel” covers both permanent and temporary categories. The term “permanent medical personnel” means medical personnel exclusively assigned to medical purposes for an unspecified length of time, while “temporary medical personnel” are personnel exclusively assigned to medical purposes for limited periods.

4669. In both cases such assignment must be exclusive. It should be noted that such status is based on the functions carried out, and not on qualifications.¹⁷¹

155. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

64. “Medical personnel” means personnel assigned exclusively to medical activities, to the administration of medical establishments and to medical transportation.

...

78. The law of war grants the same status to civilian and military medical services... The provisions governing military medical personnel... apply equally to the corresponding categories of the civilian medical service.¹⁷²

¹⁷¹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 4663 and 4666–4669.

¹⁷² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 64 and 78.

Delegates also teach that:

474. Specifically protected personnel . . . recognized as such must be respected.

475. Specifically protected personnel shall be allowed to fulfil their activity, unless the tactical situation does not permit . . . Their mission and genuine activity may be verified. Armed enemy personnel may be disarmed.¹⁷³

156. In 1978, in a letter to a National Society, the ICRC stated that civilian and military medical personnel, both permanent and temporary, “must be respected and protected in all circumstances”.¹⁷⁴

157. In a press release in 1978 the ICRC urgently appealed to the belligerents in Lebanon “to take measures immediately to ensure that hospitals and medical personnel may continue their work unimpeded and in safety”.¹⁷⁵

158. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the parties to respect and protect medical personnel at all times.¹⁷⁶

159. In 1991, the Croatian Red Cross denounced attacks against medical personnel by the Yugoslav army.¹⁷⁷

160. In a press release in 1992, the ICRC urged the parties to the conflict in Nagorno-Karabakh to ensure that medical personnel were respected and protected.¹⁷⁸

161. In a press release in 1992, the ICRC enjoined the parties to the conflict in Afghanistan “to respect medical personnel”.¹⁷⁹

162. In a press release in 1992, the ICRC urged the parties to the conflict in Tajikistan “to make certain that medical personnel . . . are respected and protected”.¹⁸⁰

163. In a communication to the press in 1993, the ICRC appealed to the belligerents in the conflict in Georgia “to respect hospitals and medical personnel in all circumstances”.¹⁸¹

164. In 1994, in a letter to the authorities of a separatist entity, the ICRC recalled that medical personnel enjoy special protection under IHL and must therefore be respected in all circumstances.¹⁸²

¹⁷³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 474–475.

¹⁷⁴ ICRC archive document.

¹⁷⁵ ICRC, Press Release No. 1341, Lebanon: ICRC appeals for truce, 2 October 1978.

¹⁷⁶ ICRC, Press Release No. 1658, Gulf War: ICRC reminds States of their obligations, 17 January 1991.

¹⁷⁷ Croatian Red Cross, Protest against repeated violations of the Geneva Conventions and Humanitarian Law in Vukovar, 22 November 1991.

¹⁷⁸ ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.

¹⁷⁹ ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; see also Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992 and Press Release No. 1764, Afghanistan: ICRC calls for respect for the civilian population, 8 February 1994.

¹⁸⁰ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

¹⁸¹ ICRC, Communication to the Press No. 93/32, Conflict in Georgia: ICRC action, 22 September 1993.

¹⁸² ICRC archive document.

165. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that “protection must be extended to health personnel in general and, in particular, to Mexican Red Cross personnel. . . Health personnel as well as Mexican Red Cross personnel must be deemed to be neutral and must therefore not be attacked.”¹⁸³

166. In a press release in 1994, the ICRC appealed to the parties to the internal armed conflict in Yemen to respect and facilitate the work of first-aiders from the Yemeni Red Crescent Society and of ICRC delegates.¹⁸⁴

167. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that medical personnel “shall be protected and respected”.¹⁸⁵

168. In a press release in 1994, the ICRC urged the parties to the conflict in Chechnya “to ensure that medical personnel. . . are respected and protected”.¹⁸⁶

169. In a press release in 1995, the ICRC expressed concern about an attack on a hospital in Burundi, which it regarded as a grave breach of IHL, and reminded the belligerents that all medical personnel must be respected.¹⁸⁷

170. In a press release in 2000, following allegations that the Palestine Red Crescent Society had been targeted in shooting incidents, the ICRC stated that “any attacks. . . on those medical personnel. . . indeed constitute a grave violation of International Humanitarian Law”.¹⁸⁸

171. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that:

Members of the medical services must be respected and protected. They must be allowed to circulate unharmed so that they can discharge their humanitarian duties. All those who take part in the confrontations must respect the medical services, whether deployed by the armed forces, civilian facilities, the Palestine Red Crescent Society or the Magen David Adom in Israel.¹⁸⁹

172. In a communication to the press in 2001, the ICRC, deeply concerned by the situation in Afghanistan, urged the warring parties to “ensure the safety of medical personnel”.¹⁹⁰

¹⁸³ Mexican Red Cross, Declaración de Cruz Roja Mexicana en torno a los acontecimientos que se han presentado en el Chiapas a partir del 1o. enero de 1994, 3 January 1994, § 2(C).

¹⁸⁴ ICRC, Press Release No. 1773, Fighting in Yemen, 9 May 1994.

¹⁸⁵ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504

¹⁸⁶ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994; see also Communication to the Press No. 96/10, Chechen conflict: ICRC appeal, 8 March 1996 and Communication to the Press No. 96/27, Russian Federation/Chechnya: ICRC calls on Federal Authorities to extend ultimatum, 21 August 1996.

¹⁸⁷ ICRC, Press Release No. 50, Burundi: Grenade lands in hospital room, 13 December 1995.

¹⁸⁸ ICRC, Press Release, Israel and the Occupied Territories: Respect for medical personnel, ICRC Tel Aviv, 1 November 2000.

¹⁸⁹ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in the violence in the Near East, 21 November 2000.

¹⁹⁰ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

VI. Other Practice

173. In 1980, an armed opposition group agreed to be bound by the obligation to protect medical personnel and objects displaying the red cross emblem.¹⁹¹ In 1983, it told the ICRC that it had issued orders to its combatants not to direct attacks against religious and medical personnel and objects.¹⁹² It described the kidnappings of a priest and a doctor as “errors”.¹⁹³

174. In several reports on violations of the laws of war and on human rights in Nicaragua between 1985 and 1988, Americas Watch noted attacks against medical personnel by the armed opposition.¹⁹⁴ In one such report, it mentioned an incident in which civilian medical personnel were kidnapped by the *contras*. Two of them were taken over to Honduras and held and maltreated for several days. Miskito Indians were tried and convicted as accomplices in the kidnapping. They were later granted an amnesty.¹⁹⁵ In the same report, Americas Watch also stated that doctors who worked in the countryside had been targeted for abduction and that several foreign physicians had been murdered.¹⁹⁶

175. In 1988, in the context of the conflict in Angola, UNITA expressed concern about the premeditated targeting of medical personnel by governmental forces. It deplored the fact that the Geneva Conventions had no validity in guerrilla warfare.¹⁹⁷

176. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that the targeting of medical personnel was unlawful.¹⁹⁸

177. In a report in 1989, Medical Action Group (MAG), a Philippine NGO, reported threats, harassment and physical abuse of health workers.¹⁹⁹

178. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “medical . . . personnel shall be respected and protected and shall be granted all available help for the performance of their duties”.²⁰⁰

179. Rule A5 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990

¹⁹¹ ICRC archive document. ¹⁹² ICRC archive document. ¹⁹³ ICRC archive documents.

¹⁹⁴ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 81–83; *Human Rights in Nicaragua: 1985–1986*, New York, March 1986, p. 105; *Human Rights in Nicaragua: August 1987–August 1988*, New York, August 1988, pp. 94–95.

¹⁹⁵ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 74.

¹⁹⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 80–82.

¹⁹⁷ “Comments of a UNITA official”, *Allgemeine Zeitung*, 21 March 1988.

¹⁹⁸ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, pp. 147–148.

¹⁹⁹ Aurora A. Parong, *Total War: A Threat to People’s Health and Lives*, Medical Action Group (MAG), Philippines, 1989, p. 4, § 5.

²⁰⁰ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 14(1), *IRRC*, No. 282, 1991, p. 335.

by the Council of the IHL, provides that “the obligation to respect and protect medical . . . personnel . . . in the conduct of military operations is a general rule applicable in non-international armed conflicts”.²⁰¹

Equipment of medical personnel with light individual weapons

I. Treaties and Other Instruments

Treaties

180. Article 8(1) of the 1906 GC lists among the conditions not depriving mobile sanitary formations and fixed establishments of the protection guaranteed by Article 6 of the Convention the fact “that the personnel of a formation or establishment is armed and uses its arms in self defense or in defense of its sick and wounded”.

181. Article 8(1) of the 1929 GC lists among the conditions not depriving mobile medical formations and fixed establishments of the protection guaranteed by Article 6 of the Convention the fact “that the personnel of the formation or establishment is armed, and that they use the arms in their own defence or in that of the sick and wounded in charge”.

182. Article 22(1) GC I lists among the conditions not depriving fixed establishments and mobile medical units of the protection guaranteed by Article 19 GC I the fact “that the personnel of the unit or establishment are armed, and that they use the arms in their own defence, or in that of the wounded and sick in their charge”.

183. Under Article 13(2)(a) AP I, the fact that “the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge” shall not be considered as an act harmful to the enemy, depriving a medical unit of its protected status. Article 13 AP I was adopted by consensus.²⁰²

184. Article 17(2) and (3)(a) of draft AP II adopted by consensus in Committee II of the CDDH provided that:

2. The protection to which medical units and transports are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the adverse Party.
- ...
3. The following shall not be considered as harmful acts:
 - (a) that the personnel of the unit or the transport are equipped with light individual weapons for their own defence or for that of the wounded and sick for whom they are responsible.²⁰³

²⁰¹ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A5, *IRRC*, No. 278, 1990, p. 391.

²⁰² CDDH, *Official Records*, Vol. VI, CDDH/SR. 37, 24 May 1977, p. 70.

²⁰³ CDDH, *Official Records*, Vol. XIII, CDDH/221/Rev.1, 3 February–18 April 1975, p. 130, § 170 and p. 197.

Eventually, however, subparagraph (3) was deleted from Article 17 of draft APII, which was then adopted by consensus in the plenary meeting of the CDDH.²⁰⁴

Other Instruments

185. No practice was found.

II. National Practice

Military Manuals

186. Argentina's Law of War Manual lists among the conditions not depriving fixed establishments and mobile medical units of their protection "the fact that the personnel of the unit or establishment are armed and use their arms in their own defence or in that of the wounded and sick in their charge".²⁰⁵

187. Australia's Commanders' Guide provides that military medical personnel lose their protection "if they engage in acts harmful to the enemy . . . Protection will not be lost if medical members act in self-defence. Defensive weapons such as side-arms may be carried."²⁰⁶

188. Australia's Defence Force Manual states that medical personnel "are protected so long as they do not participate in hostilities. The carriage of light individual weapons for self-defence or for defence of wounded or sick in their care is not considered participation."²⁰⁷

189. Belgium's Law of War Manual states that "medical personnel may carry arms but only to defend themselves or the patients in their charge".²⁰⁸

190. Belgium's Teaching Manual for Soldiers provides that "the prohibition to attack hospitals remains applicable even if . . . its personnel carry light individual weapons for their own defence or for the defence of the wounded in their charge, the establishment or material".²⁰⁹

191. Benin's Military Manual states that "the use of weapons by medical personnel and by sentries of military medical establishments and transports is subject to regulation (e.g. in case of self-defence)".²¹⁰

192. Cameroon's Instructors' Manual states that "the weapons carried by medical personnel must be of such a nature as to avoid any confusion with combatants".²¹¹

193. Canada's LOAC Manual lists among the conditions not depriving medical units of their protection the fact "that the personnel of the medical unit are armed for their own defence or that of the wounded and sick in their charge".²¹²

²⁰⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 113.

²⁰⁵ Argentina, *Law of War Manual* (1969), § 3.007.

²⁰⁶ Australia, *Commanders' Guide* (1994), § 615.

²⁰⁷ Australia, *Defence Force Manual* (1994), § 521, see also §§ 911 and 964.

²⁰⁸ Belgium, *Law of War Manual* (1983), p. 48.

²⁰⁹ Belgium, *Teaching Manual for Soldiers* (undated), pp. 18–19.

²¹⁰ Benin, *Military Manual* (1995), Fascicule II, p. 16.

²¹¹ Cameroon, *Instructors' Manual* (1992), p. 87, § 142.

²¹² Canada, *LOAC Manual* (1999), p. 4-9, § 91(a).

194. Canada's Code of Conduct provides that "personnel of a medical unit or establishment may be armed with small arms and may use those arms in defence of themselves or of the wounded and sick under their charge".²¹³

195. Ecuador's Naval Manual provides that:

Possession of small arms for self-protection, for the protection of the wounded and sick, and for protection from marauders and others violating the law of armed conflict does not disqualify medical personnel from protected status. Medical personnel may not use such arms against enemy forces acting in conformity with the law of armed conflict.²¹⁴

196. France's LOAC Summary Note provides that personnel of military and civilian medical service "may not take a direct part in hostilities [and] they may only be equipped with individual arms for their own protection".²¹⁵

197. Germany's Military Manual provides that "medical personnel may be equipped with individual weapons for the protection of the wounded, sick and shipwrecked in their charge as well as for their own protection. Individual weapons are pistols, submachine guns and rifles".²¹⁶

198. Kenya's LOAC Manual states that "medical personnel may carry and use small arms for their self-defence and for the defence of the wounded and sick in their care".²¹⁷

199. The Military Manual of the Netherlands provides that:

Medical personnel may be armed with pistols, sub-machine guns and rifles, but not with machine guns or other weapons that have to be handled by more than one person, or with weapons that are meant for use against material objects, such as missile launchers and other anti-tank weapons, nor with fragmentation hand grenades and the like.²¹⁸

200. The Military Handbook of the Netherlands states that "medical personnel may not in any way take part in hostilities, but they may be armed. They may, however, only use these weapons to defend themselves or the wounded and sick in their care and not, for example, to prevent being captured by the enemy".²¹⁹

201. Nigeria's Manual on the Laws of War states that the protection of medical establishments is not forfeited "merely because medical personnel are armed for self-defence".²²⁰

202. South Africa's LOAC Manual provides that "medical personnel must abstain from all acts of hostility or they lose their protection. They are authorised

²¹³ Canada, *Code of Conduct* (2001), Rule 10, § 6.

²¹⁴ Ecuador, *Naval Manual* (1989), § 11.5. ²¹⁵ France, *LOAC Summary Note* (1992), § 2.3.

²¹⁶ Germany, *Military Manual* (1992), § 631, see also §§ 315 and 619.

²¹⁷ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 9.

²¹⁸ Netherlands, *Military Manual* (1993), p. VI-5.

²¹⁹ Netherlands, *Military Handbook* (1995), pp. 7-40/7-41.

²²⁰ Nigeria, *Manual on the Laws of War* (undated), § 36.

to carry only light arms and have the right to use them only for their own defence or for that of the wounded or sick for whom they are responsible."²²¹

203. Spain's LOAC Manual states that military medical personnel "may carry arms for self-defence and for the defence of the wounded, sick and shipwrecked. They may not use them to avoid being taken prisoner. Using these arms in combat will terminate the protection to which they are entitled."²²²

204. Switzerland's Basic Military Manual states that "medical personnel may be armed with light weapons for its own defence".²²³

205. Togo's Military Manual states that "the use of weapons by medical personnel and by sentries of military medical establishments and transports is subject to regulation (e.g. in case of self-defence)".²²⁴

206. The UK Military Manual lists among the conditions not depriving hospitals and mobile medical units of their protection the fact that "the personnel are armed, and use their arms for their own defence or for the defence of the wounded and sick".²²⁵

207. The UK LOAC Manual provides that "medical personnel may carry and use small arms for their self-defence and for the defence of the wounded and sick in their care".²²⁶

208. The US Field Manual states that:

Although medical personnel may carry arms for self-defence, they may not employ such arms against enemy forces acting in conformity with the law of war. These arms are for their personal defense and for the protection of the wounded and sick under their charge against marauders and other persons violating the law of war.²²⁷

209. The US Air Force Commander's Handbook states that "medical personnel are permitted to carry arms solely to protect themselves and their patients against unlawful attack".²²⁸

210. The US Naval Handbook states that:

Possession of small arms for self-protection, for the protection of the wounded and sick, and for protection from marauders and others violating the law of armed conflict does not disqualify medical personnel from protected status. Medical personnel may not use such arms against enemy forces acting in conformity with the law of armed conflict.²²⁹

211. The Annotated Supplement to the US Naval Handbook notes that "there was no agreement at the [CDDH] as to what "light individual weapons" for

²²¹ South Africa, *LOAC Manual* (1996), § 48.

²²² Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1)(b), see also § 9.6.b.(2).

²²³ Switzerland, *Basic Military Manual* (1987), Article 78(2), see also Article 83, commentary.

²²⁴ Togo, *Military Manual* (1996), Fascicule II, p. 16. ²²⁵ UK, *Military Manual* (1958), § 352.

²²⁶ UK, *LOAC Manual* (1981), Section 6, p. 23, § 9(b). ²²⁷ US, *Field Manual* (1956), § 223(b).

²²⁸ US, *Air Force Commander's Handbook* (1980), § 3-2(d).

²²⁹ US, *Naval Handbook* (1995), § 11.5.

self-defence and for the defence of patients meant, although a number of military experts agreed with the British proposal (see *infra*).²³⁰

212. The YPA Military Manual of the SFRY (FRY) provides that military medical personnel may carry light weapons for their self-defence. Such personnel is authorised to engage in armed resistance against enemy armed forces directly and deliberately attacking, in spite of warning, and against marauders.²³¹

National Legislation

213. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²³²

214. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 19 GCI and 22 GC II, and of AP I, including violations of Article 13(2)(a) AP I, are punishable offences.²³³

215. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".²³⁴

216. Sweden's Total Defence Ordinance relating to IHL provides that "those assigned in war time to the armed forces health and medical services may only carry light personal arms".²³⁵

National Case-law

217. No practice was found.

Other National Practice

218. At the CDDH, Hungary stated that "the proposal that civilian medical units should be armed was a new one which his delegation was not prepared to endorse fully at that stage, although it did not wish to exclude it completely".²³⁶

219. According to the Report on the Practice of India, "medical and religious personnel are also authorised to wear their personal arms for their individual safety".²³⁷

²³⁰ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.5, footnote 32.

²³¹ SFRY (FRY), *YPA Military Manual* (1988), §§ 171–172.

²³² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²³³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²³⁴ Norway, *Military Penal Code as amended* (1902), § 108.

²³⁵ Sweden, *Total Defence Ordinance relating to IHL* (1990), Section 10, p. 181.

²³⁶ Hungary, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/SR.14, 7 March 1974, p. 128, § 67.

²³⁷ Report on the Practice of India, 1997, Answers to additional questions on Chapter 2.7.

220. The Report on the Practice of Kuwait states that medical personnel is authorised to defend itself.²³⁸

221. On the basis of an interview with an officer of the armed forces, the Report on the Practice of the Philippines, members of the medical corps are not allowed to carry arms, except when in garrison, "because they become the target of the enemy".²³⁹

222. In a plenary meeting of the CDDH, the representative of the USSR stated that he:

thought the deletion of paragraph 3 [of Article 17 of draft AP II] would enormously complicate matters for medical personnel in actual combat conditions. If, for instance, an army doctor disarmed a wounded soldier and failed to throw away the weapon, would he thereby forfeit his right to protection? He appealed to the representative of Pakistan to restore paragraph 3.²⁴⁰

223. The Report on UK Practice refers to a letter from an army lawyer who, after consultation with the medical-legal department, confirmed that medical personnel may carry a weapon for the purposes of self-defence and defence of their patients only. He also noted that, during the Gulf War, a certain commander of a field hospital would not allow any weapons at all within the hospital confines, even for self-defence.²⁴¹

224. At the CDDH, the US "agreed that the carrying of arms by civilian medical personnel . . . should not be considered as harmful, but in occupied territories or in areas in which fighting was taking place, the right of the party in control of the area to disarm such personnel should be reserved".²⁴²

225. According to the Report on US Practice, it is the *opinio juris* of the US that "[medical] personnel and medical vehicles may be armed, but in international armed conflicts, they may use their weapons only in self-defence and in defence of their patients against marauders and against those enemy forces that do not respect their protected status".²⁴³

III. Practice of International Organisations and Conferences

226. No practice was found.

²³⁸ Report on the Practice of Kuwait, 1997, Chapter 2.7.

²³⁹ Report on the Practice of the Philippines, 1997, Interview with an officer of the armed forces, Chapter 2.7.

²⁴⁰ USSR, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 113, § 45.

²⁴¹ Report on UK Practice, 1997, Letter from an army lawyer, 3 March 1998, Chapter 2.7.

²⁴² US, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/SR.14, 7 March 1974, p. 128, § 66.

²⁴³ Report on US Practice, 1997, Chapter 2.7.

IV. Practice of International Judicial and Quasi-judicial Bodies

227. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

228. The ICRC's Commentary on the Additional Protocols, on the interpretation of the expression "light individual weapons", states that:

This expression was not defined, but it appears from the discussions in Committee II... that it refers to weapons which are generally carried and used by a single individual. Thus not only hand weapons such as pistols are permitted, but also rifles or even sub-machine guns. On the other hand, machine guns and any other heavy arms which cannot easily be transported by an individual and which have to be operated by a number of people are prohibited. Thus it is evident that the level of acceptance is quite high. However, this is the case above all to prevent the unit's right to protection from being suppressed too easily.²⁴⁴

229. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "medical personnel may be armed with light individual weapons for their own protection or for that of the wounded and sick in their charge".²⁴⁵

VI. Other Practice

230. No practice was found.

B. Medical Activities**Respect for medical ethics***I. Treaties and Other Instruments**Treaties*

231. Article 18, third paragraph, GC I provides that "no one may ever be molested or convicted for having nursed the wounded or sick".

232. Article 16 AP I provides that:

1. Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to medical ethics or to other medical rules designed for the benefit of the wounded and sick or to the provisions of the

²⁴⁴ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 563.

²⁴⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 76.

Conventions or of this Protocol, or to refrain from performing acts or carrying out work required by those rules and provisions.

Article 16 AP I was adopted by consensus.²⁴⁶

233. Article 10 AP II provides that:

1. Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.
2. Persons engaged in medical activities shall neither be compelled to perform acts or to carry out work contrary to, nor be compelled to refrain from acts required by, the rules of medical ethics or other rules designed for the benefit of the wounded and sick, or this Protocol.

Article 10 AP II was adopted by consensus.²⁴⁷

Other Instruments

234. No practice was found.

II. National Practice

Military Manuals

235. Argentina's Law of War Manual provides, with respect to non-international armed conflicts in particular, that:

No one shall be punished for having carried out a medical activity in conformity with medical ethics, whatever the circumstances or beneficiaries of this activity. No one shall be compelled to perform acts contrary to medical ethics or to refrain from acts required by medical ethics.²⁴⁸

236. Australia's Defence Force Manual provides that:

Medical personnel, military or civilian, cannot be compelled to give preferential treatment to any sick or wounded person, except on medical grounds, nor may they be compelled to carry out any act incompatible with their humanitarian mission or medical ethics. No person may be punished for carrying out medical activities in accordance with medical ethics, regardless of the nationality or status of the person treated.²⁴⁹

237. Canada's LOAC Manual states that:

Medical personnel cannot be required to provide preferential treatment to any sick or wounded person except on medical grounds. They may not be compelled to carry out any act incompatible with their humanitarian mission or medical ethics. Furthermore, no one may be punished for carrying out their medical activities in

²⁴⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

²⁴⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 112.

²⁴⁸ Argentina, *Law of War Manual* (1989), § 7.06.

²⁴⁹ Australia, *Defence Force Manual* (1994), § 967.

accordance with medical ethics, regardless of the nationality or status of the person treated".²⁵⁰

With respect to non-international armed conflict in particular, the manual states that:

34. In accordance with general medical practice, medical personnel may not be required to give priority to any person except for medical reasons. . . . [They] may not be compelled to perform any action incompatible with their humanitarian mission.
35. Medical aid is to be offered to all without distinction. Persons may not be punished for carrying out any medical activities compatible with their own medical ethics. Medical personnel may not be compelled to perform acts contrary to, or refrain from acts, required by their medical ethics or other rules for the protection of the sick, wounded or shipwrecked.²⁵¹

238. The Military Manual of the Netherlands restates the prohibition to violate medical ethics found in Article 16 AP I.²⁵² With respect to non-international armed conflicts in particular, the manual states that:

[Medical personnel] may not be compelled to perform tasks which are incompatible with their humanitarian mission. Medical personnel may not be required to give priority to any person, except on medical grounds. Nobody may be punished for having carried out medical acts which are compatible with medical ethics, regardless of the persons who benefited from those acts.²⁵³

239. New Zealand's Military Manual provides that:

Medical personnel, military or civilian, cannot be required to afford preferential treatment to any sick or wounded person, except on medical grounds; nor may they be compelled to carry out any act incompatible with their humanitarian mission or medical ethics. No person may be punished for carrying out his medical activities in accordance with medical ethics, regardless of the nationality or status of the person treated.²⁵⁴

With respect to non-international armed conflicts in particular, the manual states that "in accordance with general medical practice, medical personnel may not be required to give priority to any person except for medical reasons. . . . They may not be compelled to perform any action incompatible with their humanitarian mission."²⁵⁵

240. Senegal's IHL Manual states that:

No one shall be punished for having carried out a humanitarian act in conformity with medical ethics.

²⁵⁰ Canada, *LOAC Manual* (1999), p. 9-3, § 29.

²⁵¹ Canada, *LOAC Manual* (1999), p. 17-4, §§ 34-35.

²⁵² Netherlands, *Military Manual* (1993), p. VI-4.

²⁵³ Netherlands, *Military Manual* (1993), p. XI-6.

²⁵⁴ New Zealand, *Military Manual* (1992), § 1005(2).

²⁵⁵ New Zealand, *Military Manual* (1992), § 1818(2).

Persons engaged in medical activities shall not be compelled:

1. to perform acts or to carry out work contrary to medical ethics; or
2. to refrain from performing acts or from carrying out work required by medical ethics.²⁵⁶

241. Spain's LOAC Manual provides, with reference to Articles 16 AP I and 10 AP II, that IHL imposes a duty on medical personnel "to respect the principles of medical ethics".²⁵⁷

242. The YPA Military Manual of the SFRY (FRY) states that:

No person may be punished for the performance of any medical duty compatible with medical ethics, regardless of the person benefiting therefrom. Medical personnel shall not be compelled to perform acts contrary to medical ethics or to refrain from performing acts dictated by medical ethics.²⁵⁸

National Legislation

243. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁵⁹

244. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 18 GC I, and of AP I, including violations of Article 16 AP I, as well as any "contravention" of AP II, including violations of Article 10 AP II, are punishable offences.²⁶⁰

245. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".²⁶¹

National Case-law

246. In the *Levy case* in 1968, the US Army Board of Review held that medical ethics could not excuse disobedience to the orders of a superior. An army doctor had pleaded that the order to train Green Berets paramedics was contrary to medical ethics, which forbade training unqualified personnel to perform treatment which should be done by a physician.²⁶²

²⁵⁶ Senegal, *IHL Manual* (1999), p. 17.

²⁵⁷ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2), see also § 9.6.b.(2).

²⁵⁸ SFRY (FRY), *YPA Military Manual* (1988), § 197.

²⁵⁹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁶⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁶¹ Norway, *Military Penal Code as amended* (1902), § 108.

²⁶² US, United States Army Board of Review, *Levy case*, Judgement, 29 August 1968.

Other National Practice

247. The Report on UK Practice refers to a letter from an army lawyer in which it is stated that any interference with medical ethics by military authorities would be very unlikely. Medical personnel are members of their relevant professional bodies, and there would be a strong response if the Ministry of Defence or a commander were seeking to override medical ethics.²⁶³

248. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President recommended a reservation to Article 10 AP II to preclude the possibility that it might affect the administration of discipline of US military personnel.²⁶⁴

249. In its Country Report on Human Rights Practices for 1996, the US Department of State noted, in the section on Turkey and under the heading "Use of Excessive Force and Violations of Humanitarian Law in Internal Conflicts", that the provisions of the Turkish Penal Code and Anti-Terror Law prohibiting assistance to illegal organisations or armed groups were used extensively to prosecute health professionals who provided care to individuals suspected of being members of terrorist organisations.²⁶⁵ Commenting on this, the Report on US Practice states the principle that "during internal armed conflict, medical personnel should not be punished solely for treating the wounded".²⁶⁶

*III. Practice of International Organisations and Conferences**United Nations*

250. In a resolution adopted in 1989 on the situation of human rights in El Salvador, the UN General Assembly considered that under AP II "no one may be punished for carrying out medical activities compatible with medical ethics, regardless of the circumstances and the beneficiaries of such activities" and requested that "medical and health personnel shall under no circumstances be penalized for carrying out their activities".²⁶⁷

251. In a resolution adopted in 1990 on the situation of human rights in El Salvador, the UN Commission on Human Rights requested the parties to the conflict "in no circumstances to penalize medical and health personnel for carrying out their activities".²⁶⁸

252. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights reminded the government of El Salvador that "under no circumstances may it punish the health personnel for carrying out their medical activities".²⁶⁹

²⁶³ Report on UK Practice, 1997, Letter from an army lawyer, 24 February 1998, Chapter 2.7.

²⁶⁴ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

²⁶⁵ US, Department of State, Country Reports on Human Rights Practices for 1996: Turkey, US Government Printing Office, Washington, D.C., 1997, p. 1163.

²⁶⁶ Report on US Practice, 1997, Chapter 5.7.

²⁶⁷ UN General Assembly, Res. 44/165, 15 December 1989, preamble and § 5.

²⁶⁸ UN Commission on Human Rights, Res. 1990/77, 7 March 1990, § 10.

²⁶⁹ UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, § 4.

Other International Organisations

253. In a resolution adopted in 1988 on the protection of humanitarian medical missions, the Parliamentary Assembly of the Council of Europe stated that “[medical personnel] may not be punished or molested for having engaged in medical activity, whoever the beneficiaries of such care may be”. The Assembly also expressed the wish that the UN draw up a charter for the protection of medical missions. The proposed charter would include, *inter alia*, the following provisions: medical personnel may not be punished for having engaged in medical activity; medical personnel must scrupulously respect the rules of medical ethics and may not refrain from performing acts required by these rules; and the assistance must be based purely on medical criteria of a humanitarian kind.²⁷⁰

International Conferences

254. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

255. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

256. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

No person shall be punished for performing medical activities compatible with medical ethics.

Persons engaged in medical activities shall not be compelled:

- a) to perform acts or to carry out work contrary to medical ethics; or
- b) to refrain from performing acts or from carrying out work required by medical ethics.²⁷¹

VI. Other Practice

257. Pursuant to the WMA’s Rules Governing the Care of the Sick and Wounded, Particularly in Time of Conflict established in 1983, “the fulfilment of medical duties and responsibilities shall in no circumstance be considered an offence”.²⁷²

258. In 1990, in a report on the FMLN offensive in El Salvador in November 1989, the Instituto de Derechos Humanos de la Universidad Centroamericano stated that:

²⁷⁰ Council of Europe, Parliamentary Assembly, Res. 904, 30 June 1988, Appendix.

²⁷¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 217.

²⁷² WMA, Rules Governing the Care of the Sick and Wounded, Particularly in Time of Conflict, amended by the 35th World Medical Assembly, 1983, § B(3), quoted in Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 201, § 656, footnote 12.

Twelve members of the Lutheran Church, the majority of whom worked in medical assistance, were arrested and accused, among others, of providing medical assistance to the FMLN. Five workers of a clinic of the parish of Saint Francis of Assisi in Mejicanos were arrested by soldiers from the first infantry brigade; one of them is still disappeared. These facts constitute serious violations of Article 10 [AP II] which guarantees respect for medical personnel.²⁷³

259. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that:

Medical and religious personnel . . . shall not be compelled to carry out tasks which are not compatible with their humanitarian missions. Under no circumstances shall any person be punished for having carried out medical activities compatible with the principles of medical ethics, regardless of the person benefiting there from.²⁷⁴

260. In 1994, in a report on medical practice in the context of internal armed conflict, the Peruvian Medical Federation for Human Rights detailed several instances in which doctors had been punished for providing medical assistance to members of the Sendero Luminoso (Shining Path) or to the MRTA. The report stated that:

A review of the opinions and judgments handed down in cases where charges of terrorism against physicians were based solely on the performance of a medical act reveals that the legal reasoning used by judges and public prosecutors is based on interpretation of the medical act as an act of collaboration with the terrorist organisation.

The report concluded that:

We must be firm in our position: the medical act, i.e. care given by the physician to the wounded or sick without distinction whatsoever, in observance of his professional principles and duties to protect human life, can in no way be considered an act of collaboration with subversives.²⁷⁵

²⁷³ Instituto de Derechos Humanos de la Universidad Centroamericana, "Los derechos humanos y la ofensiva del 11 de noviembre de 1989", *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XLV, Nos. 495–496, January–February 1990, p. 65; see also IDHUCA, Instituto de Derechos Humanos, Universidad Centroamericana José Simeón Cañas, *Los Derechos Humanos en El Salvador en 1990*, San Salvador, 1991, pp. 68–69.

²⁷⁴ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 14, *IRRC*, No. 282, 1991, p. 335.

²⁷⁵ Federación Médica Peruana Asociación Pro Derechos Humanos, *Medical Practice in the Context of Internal Armed Conflict*, August 1994, quoted in Marco Sassòli and Antoine A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 1376–1382.

Respect for medical secrecy

I. Treaties and Other Instruments

Treaties

261. Article 16(3) AP I provides that:

No person engaged in medical activities shall be compelled to give to anyone belonging either to an adverse Party, or to his own Party except as required by the law of the latter Party, any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or to their families. Regulations for the compulsory notification of communicable diseases shall, however, be respected.

Article 16 AP I was adopted by consensus.²⁷⁶

262. Article 10 AP II provides that:

3. The professional obligations of persons engaged in medical activities regarding information which they may acquire concerning the wounded and sick under their care shall, subject to national law, be respected.
4. Subject to national law, no person engaged in medical activities may be penalized in any way for refusing or failing to give information concerning the wounded and sick who are, or who have been, under his care.

Article 10 AP II was adopted by consensus.²⁷⁷

Other Instruments

263. No practice was found.

II. National Practice

Military Manuals

264. Canada's LOAC Manual states, with respect to non-international armed conflict in particular, that "the professional obligations of medical personnel regarding information they acquire concerning the wounded and sick under their care must be respected, subject to the requirements of national law".²⁷⁸

265. Spain's LOAC Manual states, with reference to Articles 16 AP I and 10 AP II, that medical personnel have the following right:

Prohibition on being compelled to provide information concerning the wounded and sick in their care. This rule is absolute with respect to the relationship between medical personnel and enemy wounded or sick, but when the wounded or the sick are of their own side, they are subject to national law. A general exception is related to the compulsory provision of information regarding communicable diseases.²⁷⁹

²⁷⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

²⁷⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 112.

²⁷⁸ Canada, *LOAC Manual* (1999), p. 17-4, § 36.

²⁷⁹ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2), see also § 9.6.b.(2).

266. The YPA Military Manual of the SFRY (FRY) notes that “Yugoslav regulations establish an obligation for medical personnel to provide to competent authorities data on wounded, sick and shipwrecked to whom they have provided assistance”.²⁸⁰

National Legislation

267. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of AP I, including violations of Article 16(3) AP I, as well as any “contravention” of AP II, including violations of Article 10 AP II, are punishable offences.²⁸¹

268. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.²⁸²

National Case-law

269. No practice was found.

Other National Practice

270. At the CDDH, Cuba stated that “the performer of a medical action was free to decide whether or not to give information to a third party”.²⁸³

271. At the CDDH, Denmark stated that “the principle of non-denunciation of the wounded and sick had already been established in 1959 by the WMA, the International Committee of Military Medicine and Pharmacy and the ICRC”.²⁸⁴

272. At the CDDH, Denmark supported the view of the Netherlands (see *infra*), stating that “the provision of information by medical personnel should not be made compulsory to the detriment of underground movements”.²⁸⁵

273. At the CDDH, France stated that “physicians, who were also citizens, were deeply distressed by the obligation to report wounds caused by firearms in time of war. That did not apply to the obligation to report communicable diseases.”²⁸⁶

274. In the discussion at the CDDH on a proposal by Brazil, which purported to add “wounds by firearms, or other evidence related to a criminal offence” as a further exception, the Netherlands stated that “physicians should not be

²⁸⁰ SFRY (FRY), *YPA Military Manual* (1988), § 197.

²⁸¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁸² Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁸³ Cuba, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.16, 10 February 1975, p. 152, § 65.

²⁸⁴ Denmark, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.39, 20 March 1975, p. 422, § 21.

²⁸⁵ Denmark, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.16, 10 February 1975, p. 152, § 63.

²⁸⁶ France, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.16, 10 February 1975, p. 151, § 55.

obliged to denounce a member of a resistance movement who had wounded a member of the occupying forces".²⁸⁷

275. At the CDDH, Norway stated it "deeply regretted" the inclusion in Article 10 AP II of the words 'subject to national law' because it was unacceptable "that an international legal norm of the importance of [AP II] should be made subject to the national law of any country". It added that "it was unlikely that Norway would be able to ratify [AP II] if the words 'subject to national law' were maintained".²⁸⁸ Notwithstanding this statement, Norway ratified the two Additional Protocols in 1981 without making any reservation or declaration.

276. An Executive Order of the Philippines of 1987 provides that all medical practitioners must report to the authorities any person treated by them for wounds that are subject to the provisions of the Criminal Code relative to physical injuries, including those they suspect to belong to the insurgent forces.²⁸⁹

277. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President recommended a reservation to Article 10 AP II to make clear that military medical personnel could be required to disclose otherwise confidential information to appropriate authorities.²⁹⁰

III. Practice of International Organisations and Conferences

United Nations

278. No practice was found.

Other International Organisations

279. In a resolution adopted in 1988 on the protection of humanitarian medical missions, the Parliamentary Assembly of the Council of Europe stated that "no member of a medical staff may be compelled to provide information concerning the persons to whom he has given assistance with the exception of information concerning contagious diseases".²⁹¹

International Conferences

280. The Third International Congress on the Neutrality of Medicine in 1968 recommended that the principle of non-denunciation should be categorically recognised.²⁹²

²⁸⁷ Netherlands, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.16, 10 February 1975, p. 152, § 59.

²⁸⁸ Norway, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.46, 4 April 1975, p. 513, § 2

²⁸⁹ Philippines, *Executive Order 212*, 1987.

²⁹⁰ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

²⁹¹ Council of Europe, Parliamentary Assembly, Res. 904 (1988), 30 June 1988, Appendix XVI, § 3.

²⁹² Third International Congress on the Neutrality of Medicine, Medical-Legal Commission, Monaco, 17-20 April 1968, *Annales de Droit international médical*, No. 18, December 1968, pp. 74-76.

IV. Practice of International Judicial and Quasi-judicial Bodies

281. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

282. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

No person engaged in medical activities (e.g. doctor, nurse) shall be compelled to give to anyone any information concerning the wounded and sick who are, or who have been, under his care, if such information would, in his opinion, prove harmful to the patients concerned or their families. However, information must be given when required:

- a) by the law of the Party to which the person engaged in medical activities belongs;
- b) by regulations for the compulsory notification of communicable diseases.²⁹³

VI. Other Practice

283. A report on Medical Secrecy during Armed Conflict prepared for the Fifty-third Conference of the International Law Association in 1968 recommended the following:

The Geneva Conventions should be complemented by a provision to the effect that the parties to the conflict must strictly respect medical secrecy and may not require medical and para-medical personnel, military or civilian, to denounce their patients – combatants from the adverse party.

The Conference endorsed this recommendation in a resolution adopted unanimously.²⁹⁴

284. The WMA's Regulations in Time of Armed Conflict established in 1983 state that "medical confidentiality must be preserved by the physician in the practice of his profession".²⁹⁵

285. The WMA's Rules Governing the Care of the Sick and Wounded, Particularly in Time of Conflict state that "the fulfilment of medical duties and responsibilities shall in no circumstance be considered an offence. The physician must never be prosecuted for observing professional confidentiality."²⁹⁶

²⁹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 218.

²⁹⁴ International Law Association, Report of the Fifty-third Conference, Buenos Aires, 25–31 August, 1968, pp. 548 and 573.

²⁹⁵ WMA, Regulations in Time of Armed Conflicts, amended by the 35th World Medical Assembly, 1983, § 5, quoted in Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, pp. 200–201, § 656, footnote 11.

²⁹⁶ WMA, Rules Governing the Care of the Sick and Wounded, Particularly in Time of Conflict, amended by the 35th World Medical Assembly, 1983, § B(3), quoted in Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, p. 201, § 656, footnote 12.

286. In a report in 1989, the Medical Action Group (MAG), a Philippine NGO, noted that a health worker was ordered to report all her treatment activities to the military or the *vigilantes*.²⁹⁷

C. Religious Personnel

I. Treaties and Other Instruments

Treaties

287. Article 2 of the 1864 GC provides that “chaplains shall have the benefit of the same neutrality [as military hospitals and ambulances] when on duty, and while there remain any wounded to be brought in or assisted”.

288. Article 9 of the 1906 GC provides that “chaplains attached to armies shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be considered as prisoners of war.”

289. Article 9 of the 1929 GC provides that “chaplains attached to armies shall be respected and protected under all circumstances. If they fall into the hands of the enemy they shall not be treated as prisoners of war.”

290. Article 24 GC I provides that “chaplains attached to the armed forces, shall be respected and protected in all circumstances”.

291. Article 36 GC II provides that “the religious... personnel of hospital ships... shall be respected and protected”.

292. According to Article 8(d) AP I:

“religious personnel” means military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:

- (i) to the armed forces of a Party to the conflict;
- (ii) to medical units or medical transports of a Party to the conflict;
- (iii) to medical units or medical transports described in Article 9, paragraph 2; or
- (iv) to civil defence organizations of a Party to the conflict.

Article 8 AP I was adopted by consensus.²⁹⁸

293. Article 15(5) AP I provides that “civilian religious personnel shall be respected and protected”. Article 15 AP I was adopted by consensus.²⁹⁹

294. In an explanatory memorandum on the ratification of the Additional Protocols, the government of the Netherlands made a declaration to the effect that “humanist counsellors” were entitled to the same protection as religious personnel.³⁰⁰

²⁹⁷ Aurora A. Parong, *Total War: A Threat to People's Health and Lives*, Medical Action Group (MAG), Philippines, 1989, p. 3, Point 3.

²⁹⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 68.

²⁹⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

³⁰⁰ Netherlands, Lower House of Parliament, Explanatory memorandum on the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, p. 14.

295. Article 9(1) AP II provides that “religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties”. Article 9 AP II was adopted by consensus.³⁰¹

296. Upon signature of AP I and AP II, the US declared that “it is the understanding of the United States of America that the terms used in Part III of [AP II] which are the same as the terms defined in Article 8 [AP I] shall so far as relevant be construed in the same sense as those definitions”.³⁰²

Other Instruments

297. Article 13 of the 1880 Oxford Manual provides that “chaplains . . . which are duly authorized to assist the regular sanitary staff – are considered as neutral while so employed, and so long as there remain any wounded to bring in or to succour”.

298. Section 9.4 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall in all circumstances respect and protect . . . religious personnel”.

II. National Practice

Military Manuals

299. Argentina’s Law of War Manual (1969) states that “chaplains attached to the armed forces, shall be respected and protected in all circumstances”.³⁰³

300. Argentina’s Law of War Manual (1989), with reference to the relevant provisions of the Geneva Conventions and both Additional Protocols, provides that “the protective norms are applicable to civilian and military religious personnel”.³⁰⁴

301. Australia’s Commanders’ Guide states that “protected status is afforded to civilian and military religious personnel while engaged solely in meeting spiritual needs”.³⁰⁵

302. Australia’s Defence Force Manual states that:

Religious personnel are defined as those military or civilian personnel, who are exclusively engaged in their ministry and who are permanently or temporarily attached to one of the protagonists, their medical units or transports, or to a civil defence . . . Like medical personnel, chaplains may not be attacked but must be protected and respected. As with medical personnel, religious personnel do not become PW, unless their retention is required for the spiritual welfare of PW. They must be repatriated as early as possible.³⁰⁶

³⁰¹ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 112.

³⁰² US, Declaration made upon signature of AP I and AP II, 12 December 1977, § B.

³⁰³ Argentina, *Law of War Manual* (1969), § 3.008.

³⁰⁴ Argentina, *Law of War Manual* (1989), § 2.16.

³⁰⁵ Australia, *Commanders’ Guide* (1994), § 618.

³⁰⁶ Australia, *Defence Force Manual* (1994), § 983, see also §§ 522, 708 and 902.

303. Belgium's Law of War Manual states that "religious personnel enjoy the same protection as [permanent] medical personnel".³⁰⁷

304. Belgium's Teaching Manual for Soldiers provides that chaplains attached to the armed forces "do not participate in combat and, as a result, may not be attacked".³⁰⁸

305. Benin's Military Manual lists military and civilian religious personnel as specially protected persons.³⁰⁹ It states that "specially protected persons may not take a direct part in hostilities and must not be attacked. They shall be allowed to carry out their tasks as long as the tactical situation permits."³¹⁰

306. Cameroon's Instructors' Manual considers both military and civilian religious personnel as specially protected persons.³¹¹

307. Canada's LOAC Manual states that "religious personnel, both military and civilian, have protected status and thus shall not be attacked".³¹² With respect to non-international armed conflict in particular, the manual states that "religious personnel are to be respected and protected at all times [and] receive all available aid to enable them to fulfil their duties".³¹³

308. Croatia's Commanders' Manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked. They shall be allowed to perform their tasks, when the tactical situation permits." Such persons include military religious personnel and religious personnel attached to the civilian medical service or to the civil defence service.³¹⁴

309. Ecuador's Naval Manual states that "chaplains attached to the armed forces are entitled to the same protection as medical personnel".³¹⁵

310. El Salvador's Soldiers' Manual provides that "religious personnel who serve in hospitals or work for the Red Cross... shall be specially protected because they relieve, aid and comfort all victims without distinction between friend and foe".³¹⁶

311. France's LOAC Summary Note provides that "the specific immunity granted to certain persons and objects by the law of war [including military religious personnel and religious personnel of civilian medical units or civil defence] must be strictly observed... They may not be attacked."³¹⁷

³⁰⁷ Belgium, *Law of War Manual* (1983), p. 48.

³⁰⁸ Belgium, *Teaching Manual for Soldiers* (undated), p. 8.

³⁰⁹ Benin, *Military Manual* (1995), Fascicule I, p. 13.

³¹⁰ Benin, *Military Manual* (1995), Fascicule III, p. 5, see also Fascicule II, p. 8.

³¹¹ Cameroon, *Instructors' Manual* (1992), p. 19, § 222.

³¹² Canada, *LOAC Manual* (1999), p. 4-5, § 41, see also p. 9-3, § 28.

³¹³ Canada, *LOAC Manual* (1999), p. 17-4, § 34.

³¹⁴ Croatia, *Commanders' Manual* (1992), §§ 7 and 12.

³¹⁵ Ecuador, *Naval Manual* (1989), § 11.5.

³¹⁶ El Salvador, *Soldiers' Manual* (undated), p. 12.

³¹⁷ France, *LOAC Summary Note* (1992), §§ 2.2 and 2.3.

312. France's LOAC Manual states that "the law of armed of conflicts provides special protection for the following persons: . . . religious personnel attached to armed forces [and] civilian religious personnel".³¹⁸

313. Germany's Military Manual states that:

801. Chaplains are ministers of faith assigned to the armed forces of a state to provide spiritual care to the persons in their charge.

811. Chaplains shall be respected and protected in all circumstances. This shall apply:

- at any time throughout the duration of an armed conflict;
- at any place; and
- in any case in which chaplains are retained by the adversary, be it temporarily or for a prolonged period of time.

812. Chaplains as such are entitled to the protection provided by international law. Direct participation in rendering assistance to the victims of war (wounded, sick, shipwrecked, prisoners of war, protected civilians) is not required.

813. Unlike medical supplies, the articles used for religious purposes are not explicitly protected by international law. It is, however, in keeping with the tenor of the Geneva Conventions to respect the material required for religious purposes and not use it for alien ends.

...

816. Any attack directed against chaplains and any infringement of their rights constitutes a grave breach of international law, which shall be liable to criminal prosecution.

817. The fact that chaplains may be armed, and that they may use the arms in their own defence, or in that of the wounded, sick and shipwrecked shall not deprive them of the protection accorded to them by international law. They may use the arms only to repel attacks violating international law, but not to prevent capture.

818. The protection accorded to chaplains shall cease if they use their arms for any other purpose than that of self-protection and defending protected persons.

819. The only arms which may be used are weapons suited for self-defence and emergency aid (individual weapons).

820. In the Federal Republic of Germany chaplains are not armed.³¹⁹

314. Hungary's Military Manual states that "religious personnel have the same status as permanent medical personnel".³²⁰

315. Indonesia's Field Manual restates the rule on religious personnel found in Article 24 GC I.³²¹

316. Indonesia's Air Force Manual provides that "a non-combatant is not a lawful military target in warfare. They consist of: a. members of the armed forces with special status such as chaplains."³²²

³¹⁸ France, *LOAC Manual* (2001), pp. 95–96.

³¹⁹ Germany, *Military Manual* (1992), §§ 801, 811–813 and 816–820, see also § 315 ("chaplains are allowed to bear and use small arms").

³²⁰ Hungary, *Military Manual* (1992), p. 19. ³²¹ Indonesia, *Field Manual* (1979), § 6(c).

³²² Indonesia, *Air Force Manual* (1990), § 24(a).

317. Israel's Manual on the Laws of War states that "a provision similar to that applying to medical personnel exists also with regard to chaplains. They too do not take part in the hostilities, they may not be harmed and may not be taken prisoner."³²³

318. Italy's LOAC Elementary Rules Manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked", including military religious personnel and religious personnel attached to the civilian medical service or to the civil defence service.³²⁴

319. Kenya's LOAC Manual states that the protection afforded to military medical personnel also applies to military religious personnel.³²⁵

320. South Korea's Operational Law Manual states that military religious personnel must be protected.³²⁶

321. Madagascar's Military Manual states that "specifically protected persons may not participate directly in hostilities and may not be attacked. They shall be allowed to perform their tasks, when the tactical situation permits." Such persons include military religious personnel and religious personnel attached to the civilian medical service or to the civil defence service.³²⁷

322. The Military Manual of the Netherlands states that "religious personnel must be respected and protected" and stresses that, according to the Netherlands, "humanist counsellors belong to religious personnel".³²⁸ With respect to non-international armed conflicts in particular, the manual states that "religious personnel must be respected and protected and must receive aid to fulfil their tasks".³²⁹

323. The Military Handbook of the Netherlands provides that "religious personnel enjoy the same protection as medical personnel".³³⁰

324. New Zealand's Military Manual states, with respect to non-international armed conflicts in particular, that "religious personnel are to be respected and protected at all times, receiving all available aid to enable them to fulfil their duties".³³¹

325. Nicaragua's Military Manual states, with respect to international armed conflicts, that assistance to the wounded, sick and shipwrecked includes a requirement of "respect for and protection of chaplains in all circumstances".³³²

326. Nigeria's Military Manual provides that "specifically protected persons... recognised as such must be respected. Specifically protected persons

³²³ Israel, *Manual on the Laws of War* (1998), p. 33.

³²⁴ Italy, *LOAC Elementary Rules Manual* (1991), §§ 7 and 12.

³²⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

³²⁶ South Korea, *Operational Law Manual* (1996), p. 133.

³²⁷ Madagascar, *Military Manual* (1994), p. 75, § 6.

³²⁸ Netherlands, *Military Manual* (1993), p. VI-4.

³²⁹ Netherlands, *Military Manual* (1993), pp. XI-5 and XI-6.

³³⁰ Netherlands, *Military Handbook* (1995), p. 7-41.

³³¹ New Zealand, *Military Manual* (1992), § 1818(2).

³³² Nicaragua, *Military Manual* (1996), Article 14(5).

are to be allowed to fulfil their activity unless the tactical situation does not permit".³³³

327. Nigeria's *Manual on the Laws of War* provides that "military chaplains accompanying armed forces are also entitled to protection".³³⁴

328. South Africa's *LOAC Manual* provides that "religious personnel of the parties to a conflict, whether military or civilian, are to be respected and protected".³³⁵

329. Spain's *LOAC Manual* provides, with reference to Article 15 AP I, that "religious personnel, whether civilian or military, are governed by the same rules as medical personnel".³³⁶

330. Switzerland's *Basic Military Manual* states that "religious personnel must be respected and protected in all circumstances. They may not be attacked or prevented from carrying out their duties."³³⁷

331. Togo's *Military Manual* lists military and civilian religious personnel as specially protected persons.³³⁸ It states that "specially protected persons may not take a direct part in hostilities and must not be attacked. They shall be allowed to carry out their tasks as long as the tactical situation permits".³³⁹

332. The UK *Military Manual* states that "chaplains attached to armed forces enjoy all the privileges of the permanent medical personnel".³⁴⁰

333. The UK *LOAC Manual* provides that "chaplains attached to the armed forces have protected status and may not be attacked... They may not be armed."³⁴¹

334. The US *Field Manual* restates Article 24 GC I.³⁴²

335. The US *Naval Handbook* states that "chaplains attached to the armed forces are entitled to respect and protection".³⁴³

336. The *Annotated Supplement to the US Naval Handbook* notes that "the United States supports the principle in [Article 15 AP I] that civilian... religious personnel be respected and protected and not be made the objects of attack".³⁴⁴

337. The YPA *Military Manual of the SFRY (FRY)* provides that "military chaplains attached to the armed forces are equated to permanent medical personnel in terms of protection".³⁴⁵

³³³ Nigeria, *Military Manual* (1994), p. 45, § (f).

³³⁴ Nigeria, *Manual on the Laws of War* (undated), § 33.

³³⁵ South Africa, *LOAC Manual* (1996), § 46.

³³⁶ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1)(b).

³³⁷ Switzerland, *Basic Military Manual* (1987), Article 78(1).

³³⁸ Togo, *Military Manual* (1996), Fascicule I, p. 14.

³³⁹ Togo, *Military Manual* (1996), Fascicule III, p. 5, see also Fascicule II, p. 8.

³⁴⁰ UK, *Military Manual* (1958), § 346, footnote 1.

³⁴¹ UK, *LOAC Manual* (1981), Section 6, p. 24, § 13.

³⁴² US, *Field Manual* (1956), § 67.

³⁴³ US, *Naval Handbook* (1995), § 11.5.

³⁴⁴ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.5, footnote 31.

³⁴⁵ SFRY (FRY), *YPA Military Manual* (1988), § 177.

National Legislation

338. Argentina's Draft Code of Military Justice punishes any soldier who "uses violence against . . . religious personnel".³⁴⁶

339. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁴⁷

340. Under Croatia's Criminal Code, "killing, torture or inhuman treatment" of religious personnel is a war crime.³⁴⁸

341. The Draft Amendments to the Penal Code of El Salvador punish "anyone who, during an international or non-international conflict, attacks protected persons", defined as including religious personnel.³⁴⁹

342. Under Estonia's Penal Code, "a person who kills, tortures, causes health damage to or takes hostage . . . a minister of religion" commits a war crime.³⁵⁰

343. Georgia's Criminal Code provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or internal armed conflict . . . against . . . religious personnel".³⁵¹

344. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 24 GC I and 36 GC II, and of AP I, including violations of Article 15 AP I, as well as any "contravention" of AP II, including violations of Article 9 AP II, are punishable offences.³⁵²

345. Italy's Law of War Decree as amended provides that chaplains attached to the armed forces must be respected and protected "provided they are not committing acts of hostility".³⁵³

346. Nicaragua's Military Penal Code provides for the punishment of any soldier who "exercises violence against the personnel of . . . religious services, be they enemy or neutral, members of aid organizations and personnel affected to the services of [religious establishments]", provided that the protection due is not misused for hostile purposes.³⁵⁴

347. Nicaragua's Draft Penal Code punishes "anyone who, during an international or non-international conflict, attacks protected persons", defined as including religious personnel.³⁵⁵

348. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

³⁴⁶ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(3) in the *Code of Military Justice as amended* (1951).

³⁴⁷ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁴⁸ Croatia, *Criminal Code* (1997), Article 159.

³⁴⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a personas protegidas".

³⁵⁰ Estonia, *Penal Code* (2001), § 102. ³⁵¹ Georgia, *Criminal Code* (1999), Article 411(2).

³⁵² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁵³ Italy, *Law of War Decree as amended* (1938), Article 95.

³⁵⁴ Nicaragua, *Military Penal Code* (1996), Article 57(2).

³⁵⁵ Nicaragua, *Draft Penal Code* (1999), Article 449.

protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".³⁵⁶

349. Under Poland's Penal Code, religious personnel are protected.³⁵⁷

350. Under Slovenia's Penal Code, "slaughter, torture [or] inhuman treatment" of religious personnel is a war crime.³⁵⁸

351. Spain's Military Criminal Code provides for the punishment of any soldier who "exercises violence against the personnel of . . . religious services, be they enemy or neutral, members of aid organizations and personnel affected to the services of [religious establishments]", provided that the protection due is not misused for hostile purposes.³⁵⁹

352. Spain's Penal Code provides for the punishment of "anyone who should . . . exercise violence on . . . religious personnel".³⁶⁰

353. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, against . . . religious personnel".³⁶¹

354. Under the Penal Code as amended of the SFRY (FRY), "murder, torture [or] inhuman treatment" of religious personnel is a war crime.³⁶²

National Case-law

355. No practice was found.

Other National Practice

356. According to the Report on the Practice of China, "China is of the opinion that . . . religious personnel . . . shall be respected and protected from attacks".³⁶³

357. The Report on the Practice of Iraq refers to the protection afforded to religious personnel by the Geneva Conventions.³⁶⁴

358. According to the Report on the Practice of Israel, the IDF does not have a policy of targeting the religious personnel of its adversaries. The report adds that the implementation of this policy is subject to such personnel being clearly recognisable and not participating in hostile activities.³⁶⁵

359. At the CDDH, the Netherlands proposed an amendment to include a new paragraph in Article 15 of draft AP I to the effect that "persons, attached to civilian medical units, who are giving not religious but other spiritual help,

³⁵⁶ Norway, *Military Penal Code as amended* (1902), § 108.

³⁵⁷ Poland, *Penal Code* (1997), Article 123(1). ³⁵⁸ Slovenia, *Penal Code* (1994), Article 375.

³⁵⁹ Spain, *Military Criminal Code* (1985), Article 77(4).

³⁶⁰ Spain, *Penal Code* (1995), Article 612(2).

³⁶¹ Tajikistan, *Criminal Code* (1998), Article 403(2).

³⁶² SFRY (FRY), *Penal Code as amended* (1976), Article 143.

³⁶³ Report on the Practice of China, 1997, Chapter 2.7.

³⁶⁴ Report on the Practice of Iraq, 1998, Chapter 2.7.

³⁶⁵ Report on the Practice of Israel, 1997, Chapter 2.7, referring to *Law of War Booklet* (1986), p. 7.

shall be protected and respected".³⁶⁶ The proposal was rejected by 13 votes in favour, 6 against and 29 abstentions.³⁶⁷

360. Based on replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that military religious personnel must be protected. According to the report, no distinction is made between international and non-international conflicts.³⁶⁸

361. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that medical and religious personnel must be respected and protected" as provided in Article 15 AP I.³⁶⁹

362. According to the Report on US Practice, it is the *opinio juris* of the US that medical and religious personnel are not to be knowingly attacked or unnecessarily prevented from performing their duties in either international or non-international armed conflicts.³⁷⁰

363. Order No. 579 issued in 1991 by the YPA Chief of Staff instructs YPA units to "apply all means to prevent any attempt of . . . mistreatment of . . . religious and medical personnel".³⁷¹

364. According to the Report on the Practice of Zimbabwe, Zimbabwe regards the protection of religious personnel from attack as being a rule of customary international law.³⁷²

III. Practice of International Organisations and Conferences

United Nations

365. No practice was found.

Other International Organisations

366. In 1980, in a draft resolution included in a report on the situation in Bolivia, the Parliamentary Assembly of the Council of Europe stated that it was appalled by the inhuman treatment inflicted by the military government on certain ecclesiastical figures.³⁷³

³⁶⁶ Netherlands, Proposal of amendment to Article 15 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/II/216, 13 February 1975, p. 74.

³⁶⁷ CDDH, *Official Records*, Vol. XI, CDDH/II/SR.19, 13 February 1975, p. 184, § 65.

³⁶⁸ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 2.7.

³⁶⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

³⁷⁰ Report on US Practice, 1997, Chapter 2.7.

³⁷¹ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

³⁷² Report on the Practice of Zimbabwe, 1998, Chapter 2.7.

³⁷³ Council of Europe, Parliamentary Assembly, Report on the situation in Bolivia (General policy of the Council of Europe), Draft resolution, Doc. 4620, 29 September 1980, § 5.

International Conferences

367. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to “make every effort” to protect religious personnel.³⁷⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

368. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

369. In the light of the fact that AP II provides no definition of medical personnel, the ICRC Commentary on the Additional Protocols states that “we should therefore refer, both for medical personnel and for religious personnel, to the definitions of these terms given in Article 8 (Terminology) of Protocol I”.³⁷⁵

370. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

81. “Religious personnel” means military or civilian persons, such as chaplains engaged exclusively in their ministry and attached:

- a) to the armed forces;
- b) to civilian medical service;
- c) to civil defence.

The attachment of religious personnel can be temporary.

82. The law of war grants the same status to military and civilian religious personnel . . .

83. The provisions governing medical personnel also apply to religious personnel.

...

474. Specifically protected personnel . . . recognized as such must be respected.

475. Specifically protected personnel shall be allowed to fulfil their activity, unless the tactical situation does not permit . . . Their mission and genuine activity may be verified. Armed enemy personnel may be disarmed.³⁷⁶

371. At the CDDH, the ICRC stated that:

As in certain armies burial was carried out by religious personnel, and since their performance of that duty was in accordance with the Geneva Conventions, that personnel must be covered and protected by the Conventions and the Protocols, in the same way as any other medical and religious personnel.³⁷⁷

³⁷⁴ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II (9), *ILM*, Vol. 33, 1994, p. 301.

³⁷⁵ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4663.

³⁷⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 81–83 and 474–475.

³⁷⁷ ICRC, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.16, 6 February 1975, pp. 120–121, § 14.

372. In 1978, in a letter to a National Society, the ICRC stated that religious personnel attached to the armed forces are among those persons which “must be respected and protected in all circumstances”.³⁷⁸

373. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “religious personnel . . . shall be protected and respected”.³⁷⁹

VI. Other Practice

374. In 1980, an armed opposition group agreed to be bound by the obligation to protect medical personnel and objects displaying the red cross emblem.³⁸⁰ In 1983, it told the ICRC that it had issued orders to its forces not to direct attacks against religious and medical personnel and objects.³⁸¹ It described the kidnappings of a priest and a doctor as “errors”.³⁸²

375. Rule A5 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that “the obligation to respect and protect . . . religious personnel . . . in the conduct of military operations is a general rule applicable in non-international armed conflicts”.³⁸³

376. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “religious personnel shall be respected and protected and shall be granted all available help for the performance of their duties”.³⁸⁴

D. Medical Units

Respect for and protection of medical units

I. Treaties and Other Instruments

Treaties

377. Article 27 of the 1899 HR provides that:

In sieges and bombardments all necessary steps should be taken to spare as far as possible . . . hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes. The besieged should

³⁷⁸ ICRC archive document.

³⁷⁹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

³⁸⁰ ICRC archive document. ³⁸¹ ICRC archive document. ³⁸² ICRC archive document.

³⁸³ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A5, *IRRC*, No. 278, 1990, p. 391.

³⁸⁴ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 14(1), *IRRC*, No. 282, 1991, p. 335.

indicate these buildings or places by some particular and visible signs, which should previously be notified to the assailants.

378. Article 27 of the 1907 HR provides that:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, ... hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes. It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

379. Article 19 GC I provides that:

Fixed establishments and mobile medical units of the Medical Service may in no circumstances be attacked, but shall at all times be respected and protected by the Parties to the conflict. Should they fall into the hands of the adverse Party, their personnel shall be free to pursue their duties, as long as the capturing Power has not itself ensured the necessary care of the wounded and sick found in such establishments and units.

The responsible authorities shall ensure that the said medical establishments and units are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety.

380. Article 18 GC IV states that:

Civilian hospitals organized to give care to the wounded and sick, the infirm and maternity cases, may in no circumstances be the object of attack but shall at all times be respected and protected by the Parties to the conflict.

...

In view of the dangers to which hospitals may be exposed by being close to military objectives, it is recommended that such hospitals be situated as far as possible from such objectives.

381. Article 12 AP I provides that:

1. Medical units shall be respected and protected at all times and shall not be the object of attack.
2. Paragraph 1 shall apply to civilian medical units, provided that they:
 - a) belong to one of the Parties to the conflict;
 - b) are recognized and authorised by the competent authority of one of the Parties to the conflict; or
 - c) are authorized in conformity with Article 9, paragraph 2, of this Protocol or Article 27 of the First [Geneva] Convention.
3. The parties to the conflict are invited to notify each other of the location of their medical units. The absence of such notification shall not exempt any of the Parties from the obligation to comply with the provisions of paragraph 1.
4. Under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety.

Article 12 AP I was adopted by consensus.³⁸⁵

382. Under Article 11(1) AP II, “medical units and transports shall be respected and protected at all times and shall not be the object of attack”. Article 11 AP II was adopted by consensus.³⁸⁶

383. Upon signature of AP I and AP II, the US declared that “it is the understanding of the United States of America that the terms used in Part III of [AP II] which are the same as the terms defined in Article 8 [AP I] shall so far as relevant be construed in the same sense as those definitions”.³⁸⁷

384. Pursuant to Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute, “intentionally directing attacks against . . . hospitals and places where the sick and the wounded are collected, provided they are not military objectives” constitutes a war crime in both international and non-international armed conflicts.

Other Instruments

385. Article 17 of the 1874 Brussels Declaration provides that:

In such cases [of bombardment of a defended town or fortress, agglomeration of dwellings, or village] all necessary steps must be taken to spare, as far as possible, . . . hospitals, and places where the sick and wounded are collected provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand.

386. Article 34 of the 1880 Oxford Manual provides that:

In case of bombardment all necessary steps must be taken to spare, if it can be done, . . . hospitals and places where the sick and wounded are gathered on the condition that they are not being utilized at the time, directly or indirectly, for defense.

It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand.

387. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “deliberate bombardment of hospitals”.

388. Article 25 of the 1923 Hague Rules of Air Warfare provides that:

In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible . . . hospitals and other places where the sick and wounded are collected, provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft . . .

³⁸⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.

³⁸⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 113.

³⁸⁷ US, Declaration made upon signature of AP I and AP II, 12 December 1977, § B.

A belligerent who desires to secure by night the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible.

389. Paragraph 2.2 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “hospitals and other medical units . . . may in no circumstances be attacked, they shall at all times be respected and protected. They may not be used to shield combatants, military objectives or operations from attack”.

390. Section 9.3 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall not attack medical establishments or mobile medical units. These shall at all times be respected and protected.”

391. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(ix) and (e)(iv), “intentionally directing attacks against . . . hospitals and places where the sick and the wounded are collected, provided they are not military objectives” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

392. Argentina’s Law of War Manual (1969) restates Article 27 of the 1907 HR, Article 19 GC I and Article 18 GC IV.³⁸⁸

393. Argentina’s Law of War Manual (1989) states that “civilian and military medical units shall be respected and protected in all circumstances and may not be made the object of attack”.³⁸⁹ This rule is repeated with respect to non-international armed conflicts.³⁹⁰

394. Australia’s Commanders’ Guide provides that “civilian medical facilities . . . are not to be made the target of attack or unnecessarily destroyed. Military medical . . . facilities and equipment are also entitled to general protection under the Geneva Conventions.”³⁹¹

395. Australia’s Defence Force Manual states that “medical facilities on land . . . must be respected and protected at all times and must not be attacked . . . Medical units are establishments, whether military or civilian, organised for medical purposes, and may be fixed or mobile, permanent or temporary.”³⁹²

³⁸⁸ Argentina, *Law of War Manual* (1969), §§ 1.010, 3.007 and 4.004(1).

³⁸⁹ Argentina, *Law of War Manual* (1989), § 2.11, see also § 2.03.

³⁹⁰ Argentina, *Law of War Manual* (1989), § 7.07.

³⁹¹ Australia, *Commanders’ Guide* (1994), §§ 614–615.

³⁹² Australia, *Defence Force Manual* (1994), §§ 972–973, see also §§ 538 and 964.

396. Belgium's Law of War Manual provides that "medical units and material may not be made the object of attack under any circumstances, even when located near military buildings".³⁹³

397. Belgium's Teaching Manual for Soldiers states that:

The protection accorded to the wounded would be illusory if the civilian and military medical services which are specifically set up to treat them could be attacked. Hence, medical services, identified by the Red Cross (or Red Crescent in certain countries), are not considered combatants or military objectives even if they wear the enemy uniform or bear its insignia. Enemy medical . . . establishments and units may not be attacked.³⁹⁴

398. Benin's Military Manual lists the military and civilian medical services as specially protected objects.³⁹⁵ It states that "specially protected establishments shall remain untouched and no [armed] person may enter them. Their content and actual use may be checked through an inspection."³⁹⁶

399. Bosnia and Herzegovina's Military Instructions provides that "permanent medical facilities and mobile units of the medical services of armed forces must not be attacked, but have to be respected and protected".³⁹⁷

400. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, soldiers in combat must respect hospitals and places where the wounded and sick, civilian or military, are collected, as well as medical units, buildings and material.³⁹⁸

401. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, each soldier must respect medical units and establishments, as well as places where the wounded and sick, civilian or military, are collected.³⁹⁹

402. Canada's LOAC Manual provides that:

87. Medical units and establishments shall be respected, protected and shall not be the object of attack.
88. "Medical units" means establishments and other units, *whether military or civilian*, organized for medical duties. The term "medical units" is intended to have a broad meaning and includes:
 - a. hospitals and other similar units;
 - b. blood transfusion centres;
 - c. preventive medicine centres and institutes;
 - d. medical depots; and
 - e. the medical and pharmaceutical stores of such units.
89. Medical units may be fixed or mobile, permanent or temporary.⁴⁰⁰ [emphasis in original]

³⁹³ Belgium, *Law of War Manual* (1983), p. 48.

³⁹⁴ Belgium, *Teaching Manual for Soldiers* (undated), p. 17, see also p. 8.

³⁹⁵ Benin, *Military Manual* (1995), Fascicule I, p. 13.

³⁹⁶ Benin, *Military Manual* (1995), Fascicule II, p. 8.

³⁹⁷ Bosnia and Herzegovina, *Military Instructions* (1992), Item 15, § 1.

³⁹⁸ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

³⁹⁹ Cameroon, *Disciplinary Regulations* (1975), Article 31.

⁴⁰⁰ Canada, *LOAC Manual* (1999), p. 4-9, §§ 87-89, see also p. 9-4, §§ 35-36.

The manual further provides that “attacking a privileged or protected building” constitutes a war crime.⁴⁰¹ With respect to non-international armed conflicts in particular, the manual states that “medical units . . . are to be respected and protected at all times and not be made the object of attack”.⁴⁰²

403. Canada’s Code of Conduct provides that “fixed and mobile medical units and establishments shall not be attacked. . . . Such establishments and units should, if possible, be situated so that attacks against military objectives will not endanger them.”⁴⁰³

404. Colombia’s Circular on Fundamental Rules of IHL states that the protection due to the wounded and sick “also covers, as such, . . . medical establishments”.⁴⁰⁴

405. Colombia’s Basic Military Manual states that “attacks, misappropriation and destruction” of medical units constitutes a “grave breach”.⁴⁰⁵

406. Congo’s Disciplinary Regulations provides that hospitals, places where the wounded and sick, whether civilian or military, are collected and medical units, buildings and material must be respected.⁴⁰⁶

407. Croatia’s Commanders’ Manual states that “specifically protected objects may not become military objectives and may not be attacked”, including units of the military and civilian medical service.⁴⁰⁷

408. Croatia’s Soldiers’ Manual instructs soldiers to respect medical objects.⁴⁰⁸

409. The Military Manual of the Dominican Republic instructs soldiers not to attack medical establishments and field hospitals, but to protect them.⁴⁰⁹

410. Ecuador’s Naval Manual states that:

Medical establishments and units (both mobile and fixed), . . . and medical equipment and stores may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such manner that attacks against military targets in the vicinity do not imperil their safety.⁴¹⁰

The manual qualifies “deliberate attack upon medical establishments” as a war crime.⁴¹¹

411. France’s Disciplinary Regulations as amended provides that soldiers in combat must respect and protect hospitals and places where the wounded and sick, civilian or military, are collected, as well as medical units, buildings and materials.⁴¹²

⁴⁰¹ Canada, *LOAC Manual* (1999), p. 16-4, § 21(d).

⁴⁰² Canada, *LOAC Manual* (1999), p. 17-4, § 34.

⁴⁰³ Canada, *Code of Conduct* (2001), Rule 10, § 4.

⁴⁰⁴ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.

⁴⁰⁵ Colombia, *Basic Military Manual* (1995), p. 26, § 4, see also p. 29, § 2(a).

⁴⁰⁶ Congo, *Disciplinary Regulations* (1986), Article 32.

⁴⁰⁷ Croatia, *Commanders’ Manual* (1992), §§ 7 and 13, see also § 31 (search for information).

⁴⁰⁸ Croatia, *Soldiers’ Manual* (1992), pp. 2–3.

⁴⁰⁹ Dominican Republic, *Military Manual* (1980), p. 4.

⁴¹⁰ Ecuador, *Naval Manual* (1989), § 8.5.1.4. ⁴¹¹ Ecuador, *Naval Manual* (1989), § 6.2.5.

⁴¹² France, *Disciplinary Regulations as amended* (1975), Article 9 bis (1).

412. France's LOAC Summary Note provides that "the specific immunity granted to certain persons and objects by the law of war [including the material of military and civilian medical services] must be strictly observed . . . They may not be attacked."⁴¹³

413. France's LOAC Manual, with reference to Article 12 AP I, includes medical units among objects which are specifically protected by the law of armed conflict.⁴¹⁴

414. Germany's Military Manual provides that:

Fixed medical establishments . . . and mobile medical units of the medical service shall under no circumstances be attacked. Their unhampered employment shall be ensured at all times. As far as possible, medical establishments and units shall be sited or employed at an adequate distance to military objectives.⁴¹⁵

415. Germany's IHL Manual states that:

Fixed medical establishments . . . and mobile medical units of the medical service shall under no circumstance be attacked. Their unhampered employment shall be ensured at all times. As far as possible, medical establishments and units shall be sited or employed at an adequate distance to military objectives.⁴¹⁶

416. Hungary's Military Manual instructs soldiers to respect and protect medical establishments and equipment.⁴¹⁷

417. According to the Report on the Practice of Israel, Israel's Law of War Booklet grants protection to medical facilities as long as they are clearly recognisable as such and are not used for hostile activities.⁴¹⁸

418. Israel's Manual on the Laws of War states that:

The wounded are regarded as persons who have stopped taking part in the fighting and they shall not be harmed. Hence, it is prohibited to interfere with the administration of medical aid. This prohibition includes the ban on striking hospitals and medical facilities, whether civilian or military, as well as wounded-collection sites, medical warehouses, ambulances and so forth . . . In any event, it is absolutely forbidden to attack the enemy's medical facilities, military included, or the enemy's wounded.⁴¹⁹

419. Italy's IHL Manual states that "mobile medical units [and] fixed establishments of the medical service . . . must be respected and protected".⁴²⁰ It qualifies "attacks on medical units . . . which must be respected and protected at all times" as war crimes.⁴²¹

⁴¹³ France, *LOAC Summary Note* (1992), §§ 2.2 and 2.3.

⁴¹⁴ France, *LOAC Manual* (2001), p. 30.

⁴¹⁵ Germany, *Military Manual* (1992), § 612, see also § 616 (property of aid societies).

⁴¹⁶ Germany, *IHL Manual* (1996), § 503. ⁴¹⁷ Hungary, *Military Manual* (1992), p. 19.

⁴¹⁸ Report on the Practice of Israel, 1997, Chapter 2.7, referring to *Law of War Booklet* (1986), p. 7.

⁴¹⁹ Israel, *Manual on the Laws of War* (1998), p. 32.

⁴²⁰ Italy, *IHL Manual* (1991), Vol. I, § 14. ⁴²¹ Italy, *IHL Manual* (1991), Vol. I, § 85.

420. Italy's LOAC Elementary Rules Manual states that "specifically protected objects may not become military objectives and may not be attacked", including units of the military and civilian medical services.⁴²²

421. Kenya's LOAC Manual states that "protection from attack is given to fixed and mobile medical units . . . Medical units can be military or civilian and includes medical depots and pharmaceutical stores, as well as hospitals and treatment centres".⁴²³

422. South Korea's Operational Law Manual states that military medical facilities shall be protected.⁴²⁴

423. Lebanon's Army Regulations instructs combatants "to refrain from causing damage to hospitals and places where the sick and the wounded, civilian and military, are collected".⁴²⁵

424. Lebanon's Teaching Manual provides for respect for medical units.⁴²⁶

425. Madagascar's Military Manual states that "specifically protected objects may not become military objectives and may not be attacked", including units of the military and civilian medical services.⁴²⁷

426. Mali's Army Regulations provides that, under the laws and customs of war, soldiers in combat must respect hospitals and places where the wounded and sick, civilian or military, are collected, as well as medical units, buildings and material.⁴²⁸

427. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, soldiers in combat must respect hospitals and places where the wounded and sick, civilian or military, are collected, as well as medical units, buildings and material.⁴²⁹

428. The Military Manual of the Netherlands states that:

Medical units must be respected and protected. They may not be attacked. Medical units may not be used under any circumstances to shield military objectives against attacks. The parties to the conflict must ensure, as far as possible, that medical units are located in such a way that attacks on military objectives do not endanger their safety.⁴³⁰

With respect to non-international armed conflicts in particular, the manual states that "medical units . . . must be respected and protected. They may not be attacked."⁴³¹

⁴²² Italy, *LOAC Elementary Rules Manual* (1991), §§ 7 and 13, see also § 31 (search for information).

⁴²³ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 9.

⁴²⁴ South Korea, *Operational Law Manual* (1996), p. 133.

⁴²⁵ Lebanon, *Army Regulations* (1971), p. 7. ⁴²⁶ Lebanon, *Teaching Manual* (1997), p. 77.

⁴²⁷ Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 7 and Fiche No. 3-O, § 13, see also Fiche No. 3-SO, § h and Fiche No. 2-T, § 27.

⁴²⁸ Mali, *Army Regulations* (1979), Article 36.

⁴²⁹ Morocco, *Disciplinary Regulations* (1974), Article 25(1).

⁴³⁰ Netherlands, *Military Manual* (1993), p. VI-5.

⁴³¹ Netherlands, *Military Manual* (1993), p. XI-6.

429. The Military Handbook of the Netherlands provides that “medical units (medical establishments, hospitals and first-aid posts) may not be attacked”.⁴³²

430. New Zealand’s Military Manual states that:

Medical establishments on land . . . must be respected and protected at all times and must not be attacked . . .

Medical units are establishments, whether military or civilian, organised for medical purposes, and may be fixed or mobile, permanent or temporary.

...

It is forbidden to attack civilian hospitals.⁴³³

The manual further states that “attacking a privileged or protected building” is a war crime recognised by the customary law of armed conflict.⁴³⁴ With respect to non-international armed conflicts in particular, the manual states that “medical units . . . are to be respected at all times and not made the object of attack”.⁴³⁵

431. Nicaragua’s Military Manual states, with respect to international armed conflicts, that assistance to the wounded, sick and shipwrecked includes a requirement of “respect for and protection of medical establishments and units” and “protection of civilian hospitals”.⁴³⁶

432. Nigeria’s Operational Code of Conduct provides that “hospitals . . . should not be tampered with or molested”.⁴³⁷

433. Nigeria’s Military Manual provides that “specifically protected . . . establishments . . . recognised as such must be respected. . . Specifically protected establishments shall not be touched or entered, though they could be inspected to ascertain their contents and effective use”.⁴³⁸

434. Nigeria’s Manual on the Laws of War provides that “medical units and establishments are not to be attacked by the belligerents and must at all times be respected and protected. . . Medical units and establishments must be located, if possible, in such places that attacks on military targets would not endanger their safety”.⁴³⁹ The manual qualifies “the bombardment of hospitals and other privileged buildings” as a war crime.⁴⁴⁰

435. Romania’s Soldiers’ Manual requires respect for medical units.⁴⁴¹

436. Russia’s Military Manual states that “attack, bombardment or destruction of medical facilities” is a prohibited method of warfare.⁴⁴² It further lists among the responsibilities of commanders in peacetime “to ensure that medical units,

⁴³² Netherlands, *Military Handbook* (1995), p. 7-40.

⁴³³ New Zealand, *Military Manual* (1992), §§ 1007(1) and (2) and 1109(1).

⁴³⁴ New Zealand, *Military Manual* (1992), 1703(5).

⁴³⁵ New Zealand, *Military Manual* (1992), § 1818(2).

⁴³⁶ Nicaragua, *Military Manual* (1996), Article 14(2) and (36).

⁴³⁷ Nigeria, *Operational Code of Conduct* (1967), § 4(d).

⁴³⁸ Nigeria, *Military Manual* (1994), p. 45, § (f).

⁴³⁹ Nigeria, *Manual on the Laws of War* (undated), § 36.

⁴⁴⁰ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁴⁴¹ Romania, *Soldiers’ Manual* (1991), p. 32. ⁴⁴² Russia, *Military Manual* (1990), § 5(g).

establishments and facilities are located in such a way that their security will not be jeopardised during attacks against military objectives".⁴⁴³

437. Senegal's Disciplinary Regulations provides that soldiers in combat must respect and protect hospitals and places where the wounded and sick, civilian or military, are collected, as well as medical units, buildings and material.⁴⁴⁴

438. Senegal's IHL Manual states that "medical establishments (hospitals) must be protected and armed persons may not enter them. Their content and actual use may be checked through an inspection ordered by the person responsible for the maintenance of order."⁴⁴⁵

439. South Africa's LOAC Manual defines medical units in accordance with Article 8 AP I and states that "medical units shall at all times be respected and protected".⁴⁴⁶

440. Spain's LOAC Manual defines medical units in accordance with Article 8 AP I.⁴⁴⁷ The manual provides that "medical units must be respected and protected in all circumstances".⁴⁴⁸

441. Sweden's IHL Manual considers that Article 12 AP I on the protection of medical units has the status of customary law.⁴⁴⁹

442. Switzerland's Basic Military Manual provides that "military and civilian hospitals marked with the red cross emblem" must be respected and protected.⁴⁵⁰ The manual further provides that medical establishments and units of the medical service "shall be respected and protected. They shall not be attacked, nor harmed in any way, nor their functioning be impeded, even if they do not momentarily hold any wounded or sick".⁴⁵¹ The manual also states that "to the maximum extent possible, medical establishments shall be located at a safe distance from military objectives".⁴⁵² The manual qualifies the "intentional destruction of hospitals" as a war crime.⁴⁵³

443. Togo's Military Manual lists the military and civilian medical services as specially protected objects.⁴⁵⁴ It states that "specially protected establishments shall remain untouched and no [armed] person may enter them. Their content and actual use may be checked through an inspection."⁴⁵⁵

444. The UK Military Manual restates Article 27 of the 1907 HR.⁴⁵⁶ The manual notes, however, that:

⁴⁴³ Russia, *Military Manual* (1990), § 14.

⁴⁴⁴ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

⁴⁴⁵ Senegal, *IHL Manual* (1999), p. 17.

⁴⁴⁶ South Africa, *LOAC Manual* (1996), §§ 57–59.

⁴⁴⁷ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2)(b).

⁴⁴⁸ Spain, *LOAC Manual* (1996), Vol. I, §§ 9.2.b.(2).

⁴⁴⁹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

⁴⁵⁰ Switzerland, *Basic Military Manual* (1987), Article 30(a).

⁴⁵¹ Switzerland, *Basic Military Manual* (1987), Article 82.

⁴⁵² Switzerland, *Basic Military Manual* (1987), Article 84.

⁴⁵³ Switzerland, *Basic Military Manual* (1987), Article 192, commentary.

⁴⁵⁴ Togo, *Military Manual* (1996), Fascicule I, p. 14.

⁴⁵⁵ Togo, *Military Manual* (1996), Fascicule II, p. 8.

⁴⁵⁶ UK, *Military Manual* (1958), §§ 290 and 300.

Accusations have frequently been made that the rule concerning immunity of hospitals has been deliberately disregarded during a siege. The complaints were often due to the fact that buildings used for medical purposes were scattered over the town and that they were thus liable to be struck by chance of erratic shots. It is therefore desirable that the sick and wounded should, if possible, be concentrated in one quarter, remote from the defences and the defending troops, or by arrangement with the besieger, in neutralised grounds.⁴⁵⁷

The manual further states that “it is forbidden to attack civilian hospitals”.⁴⁵⁸ It also states that “fixed medical establishments (hospitals) and mobile units of the medical service many in no circumstances be attacked. They must at all times be respected and protected.”⁴⁵⁹ The manual states that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . (o) bombardment of hospitals and other privileged buildings”.⁴⁶⁰

445. The UK LOAC Manual provides that “protection from attack is given to fixed and mobile medical units . . . Medical units can be military or civilian and include medical depots and pharmaceutical stores as well as hospitals and treatment centres.”⁴⁶¹

446. The US Field Manual restates Article 19 GC I.⁴⁶²

447. The US Air Force Pamphlet refers to the protection of medical units as set out in GC I.⁴⁶³ The manual further provides that “in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: (1) deliberate attack on . . . medical establishments [and] units”.⁴⁶⁴

448. The US Air Force Commander’s Handbook provides that hospitals and aid stations “should not be deliberately attacked, fired upon, or unnecessarily prevented from performing their medical duties”.⁴⁶⁵

449. The US Instructor’s Guide states that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . firing on facilities which are undefended and without military significance such as . . . hospitals”.⁴⁶⁶

450. The US Rules of Engagement for Operation Desert Storm state that “hospitals will be given special protection”.⁴⁶⁷

451. The US Naval Handbook states that:

Medical establishments and units (both mobile and fixed), . . . and medical equipment and stores may not be deliberately bombarded. Belligerents are required to

⁴⁵⁷ UK, *Military Manual* (1958), § 304.

⁴⁵⁸ UK, *Military Manual* (1958), § 30. ⁴⁵⁹ UK, *Military Manual* (1958), § 351.

⁴⁶⁰ UK, *Military Manual* (1958), § 626(o). ⁴⁶¹ UK, *LOAC Manual* (1981), Section 6, p. 23, § 8.

⁴⁶² US, *Field Manual* (1956), § 220(a). ⁴⁶³ US, *Air Force Pamphlet* (1976), § 12-2(b).

⁴⁶⁴ US, *Air Force Pamphlet* (1976), § 15-3(c)(1).

⁴⁶⁵ US, *Air Force Commander’s Handbook* (1980), § 3-2.

⁴⁶⁶ US, *Instructor’s Guide* (1985), p. 13.

⁴⁶⁷ US, *Rules of Engagement for Operation Desert Storm* (1991), § D.

ensure that such medical facilities are, as far as possible, situated in such manner that attacks against military targets in the vicinity do not imperil their safety.⁴⁶⁸

The manual qualifies “deliberate attack upon medical facilities” as a war crime.⁴⁶⁹

452. The YPA Military Manual of the SFRY (FRY) restates Article 19 GC I and extends the protection of military medical units to civilian medical establishments.⁴⁷⁰

National Legislation

453. Argentina’s Code of Military Justice as amended punishes “whoever attacks, without any necessity, hospitals . . . which are marked by the appropriate distinctive signs”.⁴⁷¹

454. Argentina’s Draft Code of Military Justice punishes any soldier who “wilfully violates the protection due to medical units . . . which are properly marked”.⁴⁷²

455. Australia’s War Crimes Act considers “any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]” as a war crime, including the deliberate bombardment of hospitals.⁴⁷³

456. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “attacking protected objects . . . [which] are not military objectives, [including] . . . hospitals or places where the sick and wounded are collected” in both international and non-international armed conflicts.⁴⁷⁴

457. Azerbaijan’s Criminal Code provides that “directing attacks . . . against hospitals, which are easily seen and distinguishable, and against places where the sick and wounded are collected, without any military necessity” constitutes a war crime in international and non-international armed conflicts.⁴⁷⁵

458. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁴⁷⁶

459. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order that “an attack be launched against objects specifically

⁴⁶⁸ US, *Naval Handbook* (1995), § 8.5.1.4. ⁴⁶⁹ US, *Naval Handbook* (1995), § 6.2.5.

⁴⁷⁰ SFRY (FRY), *YPA Military Manual* (1988), §§ 169 and 195, see also § 82 (conduct of hostilities).

⁴⁷¹ Argentina, *Code of Military Justice as amended* (1951), Article 746(2).

⁴⁷² Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(2) in the *Code of Military Justice as amended* (1951).

⁴⁷³ Australia, *War Crimes Act* (1945), Section 3.

⁴⁷⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.46 and 268.80.

⁴⁷⁵ Azerbaijan, *Criminal Code* (1999), Article 116(8).

⁴⁷⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

protected by international law" or to carry out such an attack.⁴⁷⁷ The Criminal Code of the Republika Srpska contains the same provision.⁴⁷⁸

460. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "intentionally directing attacks against... hospitals and places where the sick and wounded are collected, provided they are not military objectives" is a war crime in both international and non-international armed conflicts.⁴⁷⁹

461. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁴⁸⁰

462. Chile's Code of Military Justice provides for a prison sentence for "anyone who, contrary to instructions received, unnecessarily and maliciously attacks hospitals or poorhouses which are marked with signs employed for that purpose".⁴⁸¹

463. China's Law Governing the Trial of War Criminals provides that "deliberate bombing of hospitals" constitutes a war crime.⁴⁸²

464. Colombia's Military Penal Code provides a prison sentence for "anyone who during military service and without proper cause... attacks hospitals or poorhouses which are properly marked".⁴⁸³

465. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.⁴⁸⁴

466. Under Croatia's Criminal Code, "the launching of an attack against objects under special protection of international law" is a war crime.⁴⁸⁵

467. Under Cuba's Penal Code, failure to respect the protected status under international law of establishments and other facilities organised for the wounded and the sick is an offence.⁴⁸⁶

468. The Code of Military Justice of the Dominican Republic provides for the punishment of any soldier who, "without necessity, attacks hospitals... which are recognizable by the signs established for such cases".⁴⁸⁷

469. El Salvador's Code of Military Justice provides for the protection of medical establishments and units.⁴⁸⁸

⁴⁷⁷ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

⁴⁷⁸ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

⁴⁷⁹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(i) and (D)(d).

⁴⁸⁰ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁴⁸¹ Chile, *Code of Military Justice* (1925), Article 261.

⁴⁸² China, *Law Governing the Trial of War Criminals* (1946), Article 3(10).

⁴⁸³ Colombia, *Military Penal Code* (1999), Article 174.

⁴⁸⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁴⁸⁵ Croatia, *Criminal Code* (1997), Article 158(2). ⁴⁸⁶ Cuba, *Penal Code* (1987), Article 123.

⁴⁸⁷ Dominican Republic, *Code of Military Justice* (1953), Article 201(2).

⁴⁸⁸ El Salvador, *Code of Military Justice* (1934), Article 69.

470. The Draft Amendments to the Penal Code of El Salvador punishes “anyone who, in the context of an international or non-international armed conflict, attacks or destroys...field hospitals or hospitals, without having taken adequate measures of protection and without imperative military necessity”.⁴⁸⁹

471. Under Estonia’s Penal Code, “an attack against...a medical institution or unit” is a war crime.⁴⁹⁰

472. Ethiopia’s Penal Code punishes anyone for “crimes against the wounded, sick or shipwrecked” who organises, orders or engages in “the destruction, rendering unserviceable or appropriation of supplies, installations or stores belonging to the medical or first-aid services, in a manner which is unlawful, arbitrary or disproportionate to the requirements of strict military necessity”.⁴⁹¹

473. Georgia’s Criminal Code provides for the punishment of “wilful breaches of norms of international humanitarian law committed in an international or internal armed conflict...against...medical units”.⁴⁹²

474. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, “carries out an attack against...medical units and transport designated with the distinctive emblems of the Geneva Conventions...in conformity with international humanitarian law”.⁴⁹³

475. Guatemala’s Penal Code criminalises violations of the duties under international law in respect of hospitals or other places sheltering the wounded and sick.⁴⁹⁴

476. Under Iraq’s Military Penal Code, attacks on medical units are an offence.⁴⁹⁵

477. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 19 GC I and 18 GC IV, and of AP I, including violations of Article 12 AP I, as well as any “contravention” of AP II, including violations of Article 11(1) AP II, are punishable offences.⁴⁹⁶

478. Italy’s Law of War Decree as amended states that the establishments and material of the military medical service must be “respected and protected”.⁴⁹⁷

479. Lithuania’s Criminal Code as amended prohibits attacks against military or civilian hospitals and health centres.⁴⁹⁸

⁴⁸⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Destrucción de bienes e instalaciones de carácter sanitario”.

⁴⁹⁰ Estonia, *Penal Code* (2001), § 106. ⁴⁹¹ Ethiopia, *Penal Code* (1957), Article 283(b).

⁴⁹² Georgia, *Criminal Code* (1999), Article 411(2).

⁴⁹³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

⁴⁹⁴ Guatemala, *Penal Code* (1973), Article 378.

⁴⁹⁵ Iraq, *Military Penal Code* (1940), Article 115(b).

⁴⁹⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁹⁷ Italy, *Law of War Decree as amended* (1938), Article 95.

⁴⁹⁸ Lithuania, *Criminal Code as amended* (1961), Article 337.

480. Mexico's Code of Military Justice as amended punishes anyone who attacks hospitals without any military necessity.⁴⁹⁹

481. The Definition of War Crimes Decree of the Netherlands qualifies the "deliberate bombardment of hospitals" as a war crime.⁵⁰⁰

482. Under the International Crimes Act of the Netherlands, "intentionally directing attacks against . . . hospitals and places where the sick and wounded are collected, provided they are not military objectives" is a crime, whether committed in an international or a non-international armed conflict.⁵⁰¹

483. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.⁵⁰²

484. Nicaragua's Military Penal Code provides for the punishment of any soldier who "knowingly violates the protection due to medical establishments, medical mobile units, . . . and medical material . . . which are recognizable by the established signs or the character of which can unequivocally be distinguished from a distance", provided that the protection due is not misused for hostile purposes.⁵⁰³

485. Nicaragua's Draft Penal Code punishes anyone who, during an international or internal armed conflict, "without having previously taken appropriate measures of protection and without any justification based on imperative military necessity, attacks or destroys . . . field and other hospitals . . . or property and installations of a medical character which are duly marked with the conventional signs of the red cross or the red crescent".⁵⁰⁴

486. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁵⁰⁵

487. Peru's Code of Military Justice provides for the punishment of soldiers who, in times of armed conflict, "without any necessity attack hospitals recognizable by the emblems established to that end".⁵⁰⁶

488. The Articles of War of the Philippines prohibits and punishes attacks on medical buildings.⁵⁰⁷

489. Poland's Penal Code provides for the punishment of "any person who, during hostilities, attacks . . . a hospital".⁵⁰⁸

⁴⁹⁹ Mexico, *Code of Military Justice as amended* (1933), Article 209.

⁵⁰⁰ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁵⁰¹ Netherlands, *International Crimes Act* (2003), Articles 5(5)(p) and 6(3)(d).

⁵⁰² New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁵⁰³ Nicaragua, *Military Penal Code* (1996), Article 57(1).

⁵⁰⁴ Nicaragua, *Draft Penal Code* (1999), Article 468.

⁵⁰⁵ Norway, *Military Penal Code as amended* (1902), § 108.

⁵⁰⁶ Peru, *Code of Military Justice* (1980), Article 95(2).

⁵⁰⁷ Philippines, *Articles of War* (1938), Article 79.

⁵⁰⁸ Poland, *Penal Code* (1997), Article 122(1).

490. Under Portugal's Penal Code, "whoever, in violation of international humanitarian law, in a situation of war, armed conflict or occupation, destroys or damages establishments used for humanitarian purposes, without any justification based on military necessity" shall be punished.⁵⁰⁹

491. Romania's Penal Code provides for the punishment of:

the total or partial destruction of objects marked with the regular distinctive emblem, such as:

- a) buildings [and/or] any construction . . . that serves as hospitals,
- ...
- c) medical equipment warehouses.⁵¹⁰

492. Under Slovenia's Penal Code, "an attack on buildings specially protected under international law" is a war crime.⁵¹¹

493. Spain's Military Criminal Code provides for the punishment of any soldier who "knowingly violates the protection due to medical establishments, mobile medical units, . . . and medical material . . . which are recognizable by the established signs or the character of which can unequivocally be distinguished from a distance", provided that the protection due is not misused for hostile purposes.⁵¹²

494. Sweden's Penal Code as amended provides that:

A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for a crime against international law to imprisonment for at most four years. Serious violations shall be understood to include:

- ...
- (5) initiating an attack against establishments or installations which enjoy special protection under international law.⁵¹³

495. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, against . . . medical units".⁵¹⁴

496. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.⁵¹⁵

497. Ukraine's Criminal Code provides for the protection of medical establishments and units.⁵¹⁶

⁵⁰⁹ Poland, *Penal Code* (1997), Article 122(1).

⁵¹⁰ Romania, *Penal Code* (1968), Article 359.

⁵¹¹ Slovenia, *Penal Code* (1994), Article 374(2).

⁵¹² Spain, *Military Criminal Code* (1985), Article 77(3).

⁵¹³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁵¹⁴ Tajikistan, *Criminal Code* (1998), Article 403(2).

⁵¹⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁵¹⁶ Ukraine, *Criminal Code* (2001), Article 414.

498. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.⁵¹⁷

499. Under the US War Crimes Act as amended, violations of Article 27 of the 1907 HR are war crimes.⁵¹⁸

500. Uruguay's Military Penal Code as amended punishes military personnel, *equiparados* and even persons unconnected with the armed forces "for unjustified attacks on hospitals and asylums".⁵¹⁹

501. Venezuela's Code of Military Justice as amended provides for the punishment of "burning, destroying or attacking hospitals on land and on sea".⁵²⁰

502. Under the Penal Code as amended of the SFRY (FRY), "the launching of an attack on facilities that are specifically protected under international law" is a war crime.⁵²¹

National Case-law

503. No practice was found.

Other National Practice

504. According to the Report on the Practice of Angola, few violations of the rules found in AP I and AP II affording protection to the wounded and the sick were recorded in the conflict in Angola between 1975 and 1992. However, after the 1992 election and the resumption of hostilities, attacks on medical installations were more frequent. On the basis of eye-witness accounts, the report provides the following examples: the UNITA hospital in Luanda was attacked by government forces and the hospitals of Capanda and Lualaba were attacked by UNITA in 1992.⁵²²

505. In 1993, during a debate in the UN Security Council on the situation in the former Yugoslavia, Argentina stated that "the deliberate attacks on . . . hospitals" could not go on with impunity.⁵²³

506. In 1994, during a debate in the UN Security Council on the situation in the former Yugoslavia, Canada stated that:

The crimes committed in Gorazde and elsewhere in Bosnia must not go unpunished. Those responsible for deliberate attacks on . . . hospitals . . . in violation of all the norms of international law, must be made to answer for their actions before the International Tribunal created for the purpose.⁵²⁴

⁵¹⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁵¹⁸ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

⁵¹⁹ Uruguay, *Military Penal Code as amended* (1943), Article 58(12).

⁵²⁰ Venezuela, *Code of Military Justice as amended* (1998), Article 474(1).

⁵²¹ SFRY (FRY), *Penal Code as amended* (1976), Article 143.

⁵²² Report on the Practice of Angola, 1998, Chapter 2.1.

⁵²³ Argentina, Statement before the UN Security Council, UN Doc. S/PV.3203, 20 April 1993, p. 57.

⁵²⁴ Canada, Statement before the UN Security Council, UN Doc. S/PV.3370, 27 April 1994, p. 29.

507. At the International Conference of the Red Cross in 1952, China denounced the bombardment of hospitals during the Korean War.⁵²⁵

508. In 1972, in a statement before the General Conference of UNESCO concerning US attacks in Vietnam, China criticised the US because it allegedly had “wantonly bombarded Vietnamese cities and villages, seriously destroyed many schools and cultural and sanitary facilities, killed a large number of teachers, students, patients and medical personnel”.⁵²⁶

509. According to the Report on the Practice of China, “China is of the opinion that . . . medical objects shall be respected and protected from attacks”.⁵²⁷

510. In a note submitted to the ICRC in 1967, Egypt accused Israel of “bombardment of hospitals and ambulances in spite of the distinct markings on them” in violation of Article 19 GC I and Articles 18 and 21 GC IV and condemned it as a “flagrant violation of the elementary principle of humanity, and a serious breach of the laws of war and the Geneva Conventions of 1949”.⁵²⁸

511. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt declared that “according to the First and Second Geneva Conventions of 1949, it is prohibited to attack military establishments and mobile medical units of the Medical Service . . . in any circumstances”.⁵²⁹ In a further statement, it stated that it was prohibited to attack civilian hospitals.⁵³⁰

512. In 1994, during a debate in the UN Security Council on the situation in the former Yugoslavia, Finland stated that:

Even though there might have been provocations by the Bosnian Government forces, the merciless onslaught by the Serb forces against the safe area [of Gorazde] – with the deliberate targeting of hospitals . . . – cannot be justified. On the contrary, it must be strongly condemned. The Serbs must realize that what they are doing is a blatant violation of basic humanitarian law, and those responsible for these atrocities will be held personally accountable.⁵³¹

513. In 1994, during a debate in the UN Security Council concerning the situation in Rwanda, France stated that the international community was faced with a “humanitarian catastrophe” to which it “could not fail to react”, and referred in particular to the fact that hospitals had not been spared by attacks.⁵³²

⁵²⁵ China, Statement of 30 July 1952 at the 18th International Conference of the Red Cross, Toronto, 26 July–7 August 1952, reprinted in *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, Vol. 2, pp. 82–83.

⁵²⁶ China, Statement before the General Conference of UNESCO, 25 October 1972, *Selected Documents of the Chinese Delegation to the United Nations*, The People's Press, Beijing, 1972, p. 239.

⁵²⁷ Report on the Practice of China, 1997, Chapter 2.7.

⁵²⁸ Egypt, Note to the International Committee of the Red Cross, 7 July 1967, annexed to Letter dated 17 July 1967 to the UN Secretary-General, UN Doc. S/8064, 17 July 1967, § 2(a).

⁵²⁹ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, June 1995, p. 13, § 21.

⁵³⁰ Egypt, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons case*, September 1995, p. 21, § 50.

⁵³¹ Finland, Statement before the UN Security Council, UN Doc. S/PV.3367, 21 April 1994, p. 34.

⁵³² France, Statement before the UN Security Council, UN Doc. S/PV.3377, 16 May 1994, p. 11.

514. Under the instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, medical units shall be protected.⁵³³

515. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Hungary stated that “it goes without saying that the international community cannot disregard the responsibility of those who violate international humanitarian law, who order attacks on . . . hospitals . . . to mention only a few examples of criminal atrocities”.⁵³⁴

516. According to the Report on the Practice of Iran, the Iranian authorities condemned attacks by Iraqi troops on civilian objects such as hospitals during the Iran–Iraq War.⁵³⁵ The report notes in particular that, during the “war of the cities”, hospitals were targeted on many occasions, and that Iran condemned such attacks, regarding them as being contrary to international conventions.⁵³⁶

517. In 1987, in a letter to the UN Secretary-General, Iraq complained of the bombardment by Iran of the hospital of the town of Dohuk which it deemed “in complete contradiction to the fundamental principles of humanitarian international law”. Iraq stated that “the international community long ago decided that hospitals and other medical centres were objectives against which any military activity whatsoever was prohibited”.⁵³⁷

518. According to the Report on the Practice of Israel, the IDF does not have a policy of targeting the medical facilities of its adversaries. The report adds that the implementation of this policy is subject to such facilities being clearly recognisable and not used for hostile activities.⁵³⁸

519. During the conflict in Jordan in 1970, Jordanian armed forces reportedly attacked hospitals harbouring rebels. The allegation was denied. According to the Report on the Practice of Jordan, Jordan’s position was that the conflict was governed by national law rather than by international law.⁵³⁹ It further states that according to Jordanian practice, medical units are generally not placed near military objectives.⁵⁴⁰

520. According to the Report on the Practice of Nigeria, Nigerian practice recognises the protection of medical objects from attack. The report states that

⁵³³ France, État-major de la Force d’Action Rapide, Ordres pour l’Opération Mistral, 1995, Section 6, § 62.

⁵³⁴ Hungary, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 32.

⁵³⁵ Report on the Practice of Iran, 1997, Chapter 1.3.

⁵³⁶ Report on the Practice of Iran, 1997, Chapter 4.2.

⁵³⁷ Iraq, Letter dated 19 November 1987 to the UN Secretary-General, UN Doc. S/19282, 19 November 1987.

⁵³⁸ Report on the Practice of Israel, 1997, Chapter 2.7, referring to *Law of War Booklet* (1986), p. 7.

⁵³⁹ Report on the Practice of Jordan, 1997, Chapter 1.4.

⁵⁴⁰ Report on the Practice of Jordan, 1997, Chapter 2.7.

"Nigerian *opinio juris* . . . that the protection from attack of medical objects is a part of customary international law".⁵⁴¹

521. In 1980, during a debate in the UN Security Council concerning an attack on UNIFIL headquarters in southern Lebanon, Norway strongly condemned "the deliberate shelling on the United Nations field hospital, which under international law enjoys special protection. The fact that that hospital serves the civilian population as well makes the matter even more serious."⁵⁴²

522. In response to the Report of the International Commission of Inquiry on Human Rights Violations in Rwanda, the Rwandan government demanded that the forces opposing the RPF put an end to attacks on civilian objects, including hospitals.⁵⁴³

523. In 1980, during a debate in the UN Security Council concerning an attack on UNIFIL headquarters in southern Lebanon, Saudi Arabia stated that it considered the shelling of the UNIFIL hospital "most abhorrent".⁵⁴⁴

524. At the CDDH, the UK welcomed "the humanitarian advances made in such fields as . . . the extension of protection to a wider group of medical units".⁵⁴⁵

525. In 1980, during a debate in the UN Security Council concerning an attack on UNIFIL headquarters in southern Lebanon, the US stated that "on 12 April UNIFIL headquarters and the hospital at Naqoura were heavily shelled by militia artillery . . . These attacks must be brought to an end, once and for all."⁵⁴⁶

526. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President expressed the view that the obligations in AP II were "no more than a restatement of the rules of conduct with which US military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency".⁵⁴⁷

527. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we also support the principle that medical units, including properly authorized civilian medical units, be respected and protected at all times and not be the object of attacks".⁵⁴⁸

⁵⁴¹ Report on the Practice of Nigeria, 1997, Chapter 2.7.

⁵⁴² Norway, Statement before the UN Security Council, UN Doc. S/PV.2215, 15 April 1980, § 7.

⁵⁴³ Rwanda, President of the Republic, Statement by The Government of Rwanda concerning the Final Report of the International Commission of Inquiry on Human Rights Violations in Rwanda since 1 October 1990, Kigali, 7 April 1993.

⁵⁴⁴ Saudi Arabia, Statement before the UN Security Council, UN Doc. S/PV.2218, 24 April 1980, § 46.

⁵⁴⁵ UK, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.58, 9 June 1977, p. 302, § 114.

⁵⁴⁶ US, Statement before the UN Security Council, UN Doc. S/PV.2218, 24 April 1980, § 77.

⁵⁴⁷ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

⁵⁴⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols

528. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Contrary to the admonishment against such conduct contained in [GC I and GC IV] and certain principles of customary law codified in AP I, the Government of Iraq placed military assets (personnel, weapons, and equipment)...next to protected objects (mosques, medical facilities, ...) in an effort to protect them from attack. For this purpose, military supplies were stored in mosques...and hospitals in Iraq and Kuwait.⁵⁴⁹

529. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that medical facilities and hospital ships must be respected and protected at all times.⁵⁵⁰

530. In 1993, during a debate in the UN Security Council on the situation in the former Yugoslavia, Venezuela stated that those who had committed war crimes and crimes against humanity, including "attacks upon hospitals", had to be brought to justice.⁵⁵¹

531. The Report on the Practice of Zimbabwe regards the rule on the protection of medical objects as being part of customary international law.⁵⁵²

532. In 1994, during a non-international armed conflict, the government of a State issued orders to its troops to remove military equipment from the immediate vicinity of hospitals.⁵⁵³ In a letter to the ICRC in 1994, the Chief of Staff of the State's armed forces recalled his commitment not to place military objectives near hospitals or medical facilities and agreed not to place military weapons within a 500-metre perimeter around the ICRC hospital. He specified, however, that if the hospital was attacked by the armed opposition group, he would be obliged to deploy armed forces in the area and that, therefore, the obligation applied only as long as circumstances permitted.⁵⁵⁴

III. Practice of International Organisations and Conferences

United Nations

533. In a resolution adopted in 1980, the UN Security Council condemned "the deliberate shelling of the headquarters of [UNIFIL] and more particularly the field hospital, which enjoys special protection under international law".⁵⁵⁵

Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

⁵⁴⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 624.

⁵⁵⁰ US, Department of State, Diplomatic note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

⁵⁵¹ Venezuela, Statement before the UN Security Council, UN Doc. S/PV.3269, 24 August 1993, p. 44.

⁵⁵² Report on the Practice of Zimbabwe, 1998, Chapter 2.7. ⁵⁵³ ICRC archive document.

⁵⁵⁴ ICRC archive document. ⁵⁵⁵ UN Security Council, Res. 467, 21 April 1980, § 3.

534. In a resolution adopted in 1992, the UN Security Council expressed “grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including . . . deliberate attacks on . . . hospitals”. The Council strongly condemned such violations and demanded that “all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law”.⁵⁵⁶

535. In a resolution adopted in 1992 on the situation in Somalia, the UN Security Council expressed its “grave alarm at the continuing reports of widespread violations of international humanitarian law, including deliberate attacks on medical and relief facilities” and condemned all these violations.⁵⁵⁷

536. In a resolution adopted in 1999, the UN Security Council strongly condemned “attacks on objects protected under international law” and called on all parties “to put an end to such practices”.⁵⁵⁸

537. In a resolution adopted in 1984 on the situation of human rights in El Salvador, the UN General Assembly urged the government and the insurgent forces “to agree as early as possible to respect . . . all military hospitals, as required by the Geneva Conventions”.⁵⁵⁹

538. In a resolution adopted in 1985 on the situation of human rights in El Salvador, the UN General Assembly expressed its deep concern “at the fact that serious and numerous violations of human rights continue to take place in El Salvador owing above all to non-fulfilment of the humanitarian rules of war”. It therefore recommended that the Special Representative for El Salvador “continue to observe and to inform the General Assembly and the Commission on Human Rights of the extent to which the contending parties are respecting those rules, particularly as regards humanitarian treatment and respect for . . . military hospitals of either party”.⁵⁶⁰ This recommendation was reiterated in a subsequent resolution in 1986.⁵⁶¹

539. In a resolution adopted in 1983, the UN Commission on Human Rights deplored an attack by occupying troops in Kampuchea against border encampments, including a hospital, as a violation of fundamental principles of humanitarianism and of the UN Charter.⁵⁶²

540. In a resolution adopted in 1987 on the situation on human rights in El Salvador, the UN Commission on Human Rights requested that the Special Representative for El Salvador “continue to observe and inform the General Assembly and the Commission of the extent to which the contending parties

⁵⁵⁶ UN Security Council, Res. 771, 13 August 1992, preamble and §§ 2 and 3.

⁵⁵⁷ UN Security Council, Res. 794, 3 December 1992, preamble and § 5.

⁵⁵⁸ UN Security Council, Res. 1265, 17 September 1999, § 2.

⁵⁵⁹ UN General Assembly, Res. 39/119, 14 December 1984, § 9.

⁵⁶⁰ UN General Assembly, Res. 40/139, 13 December 1985, § 3.

⁵⁶¹ UN General Assembly, Res. 41/157, 4 December 1986, § 4.

⁵⁶² UN Commission on Human Rights, Res. 1983/5, 15 February 1983, § 2.

are respecting the humanitarian rules of war, particularly as regards respect for . . . military hospitals of either side”.⁵⁶³

541. In a resolution adopted in 1985 on the situation in El Salvador, the UN Sub-Commission on Human Rights recommended that the Special Representative for El Salvador “inform the Commission on whether both parties accept their obligation to respect the Geneva Conventions and to what extent they are truly observing them, specially in those aspects which refer to the protection of . . . military hospitals”.⁵⁶⁴

542. In a resolution adopted in 1992, the UN Commission on Human Rights stated that it was “appalled at the continuing reports of widespread, massive and grave violations of human rights within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina”, including reports of deliberate attacks on hospitals.⁵⁶⁵

543. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights expressed regret that “the Government of El Salvador . . . has attacked military hospitals”.⁵⁶⁶

544. In 1992, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights concluded that hospitals had been deliberately attacked, even though the red cross emblem was clearly visible or the building was itself clearly visible from the positions held by the Bosnian Serbs.⁵⁶⁷ In another report in 1993, he stated that such attacks constituted a fundamental violation of the laws of war.⁵⁶⁸ In a further report in 1994, the Special Rapporteur noted that attacks on Goražde included numerous and clear violations of human rights and IHL, including the deliberate targeting of highly vulnerable targets such as hospitals.⁵⁶⁹

545. In its report in 1993, the UN Commission on the Truth for El Salvador regarded an attack on an FMLN mobile hospital by a unit of the Salvadoran Air Force as a violation of IHL.⁵⁷⁰

546. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution

⁵⁶³ UN Commission on Human Rights, Res. 1987/51, 11 March 1987, § 5.

⁵⁶⁴ UN Sub-Commission on Human Rights, Res. 1985/18, 29 August 1985, § 4.

⁵⁶⁵ UN Commission on Human Rights, Res. 1992/S-1/1, 14 August 1992, preamble.

⁵⁶⁶ UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, preamble.

⁵⁶⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1992/S-1/9, 28 August 1992, § 17.

⁵⁶⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Third periodic report, UN Doc. E/CN.4/1994/6, 26 August 1993, § 25; see also Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 162–164.

⁵⁶⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Seventh periodic report, UN Doc. E/CN.4/1995/4, 10 June 1994, §§ 8–11.

⁵⁷⁰ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 87–89.

780 (1992) stated that one of the most frequently targeted sites was the Kosovo hospital in Sarajevo. The Commission regarded the attacks against and destruction of protected targets, such as hospitals, as evidence of a consistent and repeated pattern of grave breaches of the Geneva Conventions and other violations of IHL.⁵⁷¹ The Commission noted that attacks against hospitals and locations marked with the red cross or red crescent emblem were used as a coercive means to remove the population from strategic areas and were linked to practices of ethnic cleansing.⁵⁷²

547. In 1994, the Special Committee to investigate Israeli practices affecting the human rights of the Palestinian people and other Arabs in the occupied territories, referring to eye-witnesses, reported the incursion by the Israeli army into a Red Crescent hospital. According to the information, rocket launchers were put on the roof of the building and windows were used to fire from. The Special Committee also reported raids on hospitals.⁵⁷³

Other International Organisations

548. In 1985, a report on a draft resolution of the Parliamentary Assembly of the Council of Europe on the situation in Afghanistan stated that it had been noted in a report of the Special Rapporteur of the UN Commission on Human Rights that Soviet forces systematically bombed civilian hospitals. The report regarded these incidents as "violations of human rights".⁵⁷⁴

549. In 1996, in its opinion on Russia's application for membership, the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe stated that "the recent attack on the Kislyar Hospital in Dagestan, even though it ended relatively peacefully, was an act of terrorism on the Chechen side, which has to be condemned most strongly".⁵⁷⁵

550. In a statement issued in 1990 concerning Liberia, the 12 EC member States called on the parties, "in conformity with international law and the most basic humanitarian principles, to safeguard from violence... places of refuge such as... hospitals, where defenceless civilians sought shelter".⁵⁷⁶

⁵⁷¹ UN Commission of Experts Established pursuant to Security Council Resolution Res. 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 189–194.

⁵⁷² UN Commission of Experts Established pursuant to Security Council Resolution Res. 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 133–34.

⁵⁷³ Special Committee to investigate Israeli practices affecting the human rights of the Palestinian people and other Arabs of the occupied territories established pursuant to UN General Assembly Res. 2443 (XXIII), 26th report covering the period from 27 August 1993 to 26 August 1994, UN Doc. A/49/511, 18 October 1994, §§ 316–317 and 728.

⁵⁷⁴ Council of Europe, Parliamentary Assembly, Report on the deteriorating situation in Afghanistan, Doc. 5495, 15 November 1985, §§ 16–17 and Appendix I.

⁵⁷⁵ Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Opinion on Russia's application for membership of the Council of Europe, Doc. 7463, 18 January 1996, § 50.

⁵⁷⁶ EC, Statement 90/294 concerning Liberia, *European Political Cooperation Documentation Bulletin*, Vol. 6, 1990, p. 295.

International Conferences

551. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to “make every effort” to protect medical objects and installations.⁵⁷⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

552. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

553. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

65. “Medical establishment” means any establishment assigned exclusively to medical purposes. The term comprises in particular “hospitals, similar units of any size, blood transfusion centres, preventive medicine centres and institutes, medical transportation locations, medical depots and the medical and pharmaceutical stores of such establishments.

...

78. The law of war grants the same status to civilian and military medical services...the provisions governing military medical...establishments...apply equally to the corresponding categories of the civilian medical service.⁵⁷⁸

Delegates also teach that:

Specifically protected...establishments...recognized as such must be respected.

...

Specifically protected establishments shall remain untouched and shall not be entered. Their contents and effective use may be verified by inspection.⁵⁷⁹

554. In 1978, in a letter to a National Society, the ICRC indicated that civilian and military medical units, including civilian and military hospitals, first-aid posts and infirmaries, and collecting-points for the wounded are among those objects which “must be respected and protected in all circumstances”.⁵⁸⁰

555. In a press release in 1978, the ICRC urgently appealed to the belligerents in Lebanon “to take measures immediately to ensure that hospitals and medical personnel may continue their work unimpeded and in safety”.⁵⁸¹

⁵⁷⁷ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II (9), *ILM*, Vol. 33, 1994, p. 301.

⁵⁷⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 65 and 78.

⁵⁷⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 474 and 476.

⁵⁸⁰ ICRC archive document.

⁵⁸¹ ICRC, Press Release No. 1341, Lebanon: ICRC appeals for truce, 2 October 1978.

556. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the parties to the conflict to respect and protect medical establishments at all times.⁵⁸²

557. In a joint statement adopted in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about “the protracting internal conflict in Yugoslavia” and urged the parties to the conflict “to refrain from armed actions against . . . sanitary establishments”.⁵⁸³

558. On several occasions in 1991, the Croatian Red Cross denounced attacks on medical objects by the Yugoslav army.⁵⁸⁴

559. In a press release in 1992, the ICRC reminded the parties to the conflict in Nagorno-Karabakh of their obligation to respect and protect medical establishments.⁵⁸⁵

560. In a press release in 1992, the ICRC enjoined the parties to the conflict in Afghanistan “to respect medical personnel and establishments”.⁵⁸⁶

561. In a press release in 1992, the ICRC appealed to all parties to the conflict in Bosnia and Herzegovina to instruct all combatants in the field to respect medical establishments.⁵⁸⁷

562. In a press release in 1992, the ICRC urged the parties to the conflict in Tajikistan “to make certain that medical . . . establishments are respected and protected”.⁵⁸⁸

563. In a press release in 1993 issued in the context of the conflict in Afghanistan, the ICRC stated that:

Four rockets were fired at the Karte Seh surgical hospital in Kabul of 16 April. The International Committee of the Red Cross (ICRC) strongly condemns this and any other attack on the civilian population or medical facilities. Last Friday's attack, which was launched during visiting hours, killed three people and injured 44. The injured, most of whom were relatives of patients, were treated on the spot. Following the attack, the ICRC immediately contacted the parties concerned and reminded them of their obligation under international humanitarian law to spare civilians and civilian property, in particular all medical facilities.⁵⁸⁹

⁵⁸² ICRC, Press Release No. 1658, Gulf War: ICRC reminds States of their obligations, 17 January 1991.

⁵⁸³ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

⁵⁸⁴ Croatian Red Cross, Protest against violation of IHL rules, 24 September 1991; Appeal to stop attacks on hospitals and medical personnel by the Yugoslav forces, 22 November 1991.

⁵⁸⁵ ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.

⁵⁸⁶ ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; see also Press Release No. 1724, Kabul: ICRC urges respect for civilians as medical facilities struggle to cope, 20 July 1992 and Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

⁵⁸⁷ ICRC, Press Release No. 1725, Bosnia and Herzegovina: ICRC issues solemn appeal to all parties to conflict, 13 August 1992.

⁵⁸⁸ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

⁵⁸⁹ ICRC, Press Release No. 1745, ICRC protests attack on Kabul hospital, 19 April 1993.

564. In a communication to the press in 1993, the ICRC stated that it had appealed to all parties to the conflict in Georgia “to respect hospitals and medical personnel in all circumstances”.⁵⁹⁰

565. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that “protection must be extended to health personnel in general and, in particular, to Mexican Red Cross personnel as well as their equipment [and] installations”.⁵⁹¹

566. In 1994, in a Memorandum on the Respect for International Humanitarian Law in Angola, the ICRC stated that “hospitals, ambulances and other medical units... shall be protected and respected... Hospitals and medical units... shall not be the object of attack.”⁵⁹²

567. In a press release in 1994, the ICRC reminded the parties to the conflict in Afghanistan that medical establishments “are entitled to special protection and must be respected in all circumstances”.⁵⁹³

568. In a press release issued in 1994 in the context of the conflict in Bosnia and Herzegovina, the ICRC stated that “special protection must be given to Bihac hospital, where more than a thousand casualties are being cared for at present. This means that... no attacks must be directed against the hospital itself or the hospital compound.”⁵⁹⁴

569. In a press release in 1994, the ICRC enjoined the parties to the conflict in Chechnya “to ensure that medical... establishments... are respected and protected”.⁵⁹⁵

570. In a press release in 1995, the ICRC expressed concern about an attack on a hospital in Burundi, which it regarded as a grave breach of IHL, and reminded the belligerents that all medical units must be respected.⁵⁹⁶

571. In a communication to the press in 1996, the ICRC called on the parties to the conflict in Afghanistan “to avoid damage to any structure sheltering wounded or displaced people”.⁵⁹⁷

⁵⁹⁰ ICRC, Communication to the Press No. 93/32, Conflict in Georgia: ICRC action, 22 September 1993.

⁵⁹¹ Mexican Red Cross, Declaración de la Cruz Roja Mexicana en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1° enero de 1994, 3 January 1994, § 2(C).

⁵⁹² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

⁵⁹³ ICRC, Press Release No. 1764, Afghanistan: ICRC calls for respect for the civilian population, 8 February 1994; see also Press Release No. 1783, Afghanistan: ICRC urges respect for the civilian population, 16 August 1994.

⁵⁹⁴ ICRC, Press Release No. 1792, Bihac: Urgent ICRC Appeal, 26 November 1994.

⁵⁹⁵ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994; see also Communication to the Press No. 96/10, Chechen conflict: ICRC appeal, 8 March 1996 and Communication to the Press No. 96/27, Russian Federation/Chechnya: ICRC calls on Federal Authorities to extend ultimatum, 21 August 1996.

⁵⁹⁶ ICRC, Press Release No. 50, Burundi: Grenade lands in hospital room, 13 December 1995.

⁵⁹⁷ ICRC, Communication to the Press No. 96/29, Afghanistan: civilian population trapped in fighting, 26 September 1996.

572. In a press release in 2000, following allegations that the Palestine Red Crescent Society had been targeted in shooting incidents, the ICRC stated that “any attacks . . . on medical installations . . . indeed constitute a grave violation of IHL”.⁵⁹⁸

573. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC called “on all those involved in the violence to respect . . . hospitals and other medical establishments”.⁵⁹⁹

VI. Other Practice

574. In 1980, an armed opposition group agreed to be bound by the obligation to protect medical personnel and objects displaying the red cross emblem.⁶⁰⁰ In 1983, it told the ICRC that it had issued orders to its combatants not to direct attacks against religious and medical personnel and objects.⁶⁰¹

575. Witness for Peace, an NGO that attempted to document abuses by the *contras* during the conflict in Nicaragua, reported several attacks on health facilities between 1987 and 1988. In 1988, in a report on human rights in Nicaragua, Americas Watch denounced these incidents, “because health workers, including those assisting the forces in the conflict, are the object of special protection under international humanitarian law”.⁶⁰² In a previous report in 1986, Americas Watch had already denounced the destruction of a health centre and the theft of medicine by *contras*, commenting that it was unclear whether the building was destroyed intentionally or not, as it was next to other defended buildings that the rebels were trying to take. The report concluded, however, that “even if the destruction of the health center was involuntary, the theft of medicine and the mistreatment of the health workers constitute violations of medical neutrality”.⁶⁰³

576. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that the targeting of medical objects was unlawful.⁶⁰⁴

577. Rule A5 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IIHL, provides that “the obligation to respect and protect . . . medical units . . . in the conduct of military operations is a general rule applicable in non-international armed conflicts”.⁶⁰⁵

⁵⁹⁸ ICRC, Press Release, Israel and Occupied Territories: Respect for medical personnel, ICRC Tel Aviv, 1 November 2000.

⁵⁹⁹ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

⁶⁰⁰ ICRC archive document. ⁶⁰¹ ICRC archive document.

⁶⁰² Americas Watch, *Human Rights in Nicaragua: August 1987–August 1988*, New York, August 1988, pp. 124–125.

⁶⁰³ Americas Watch, *Human Rights in Nicaragua: 1985–1986*, New York, March 1986, pp. 108–109.

⁶⁰⁴ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, pp. 147–148.

⁶⁰⁵ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A5, *IRRC*, No. 278, 1990, p. 391.

578. In 1991, an armed opposition group denied allegations that a hospital had been shelled. It stated that it had been ordered not to shell the compound in which the field hospital was located at any time and reiterated its intention not only to spare the facility, but to facilitate its supply of food and medicine.⁶⁰⁶

579. In 1993, a faction of an armed opposition group insisted that it had issued orders to its troops not to fire in the vicinity of hospitals and not to enter hospitals with weapons.⁶⁰⁷

580. In 1993, the Minister of Health of a separatist entity complained of a flight breaking the sound barrier over a hospital marked with the red cross, which caused damage, and of the shelling of a hospital.⁶⁰⁸

581. In 1994, in a letter to the ICRC, an armed opposition group reminded the ICRC of the necessity of evacuating its medical facility. The letter pointed out that an officer of a UN peacekeeping mission operating in the country had acknowledged that it was not possible to ensure the security of a medical unit situated so close to a military camp. The officer had added that the belligerents' obligations amounted to refraining from deliberate attacks on the unit only. The ICRC should thus choose a site that was not as close to military installations.⁶⁰⁹

582. An officer of a UN peacekeeping force complained about the shelling of an ICRC hospital by an armed opposition group in 1994. He emphasised that there was no military advantage to be gained from shelling positions near the ICRC hospital, as there was nothing of significant military importance nearby, that any mistake on the part of the gunners was likely to have international repercussions, and that the patients that were killed were non-combatants.⁶¹⁰

583. In a communication to the press in 1994, MSF stated that the government of Afghanistan had insisted that the attack that damaged the ICRC hospital had in no way been directed at it and that no party to the conflict would deliberately target a facility displaying the red cross emblem. MSF denounced, however, the indiscriminate shelling of hospitals in Kabul. It considered the incidents to be grave violations of the law of war and the right of the victims to safe health care.⁶¹¹

Loss of protection from attack

I. Treaties and Other Instruments

Treaties

584. Article 27 of the 1899 HR provides that:

In sieges and bombardments all necessary steps should be taken to spare as far as possible . . . hospitals, and places where the sick and wounded are collected, provided they are not used at the same time for military purposes.

⁶⁰⁶ ICRC archive document. ⁶⁰⁷ ICRC archive document.

⁶⁰⁸ ICRC archive documents. ⁶⁰⁹ ICRC archive document. ⁶¹⁰ ICRC archive document.

⁶¹¹ MSF-Switzerland, Communication to the Press concerning attacks on hospitals facilities in Afghanistan, 6 January 1994.

585. Article 27 of the 1907 HR provides that:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments, hospitals, and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.

586. Article 21 GC I provides that:

The protection to which fixed establishments and mobile medical units of the Medical Service are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after a due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.

587. Article 22 GC I provides that:

The following conditions shall not be considered as depriving a medical unit or establishment of the protection guaranteed by Article 19:

1. That the personnel of the unit or establishment are armed, and that they use the arms in their own defence, or in that of the wounded and sick in their charge.
2. That in the absence of armed orderlies, the unit or establishment is protected by a picket or by sentries or by an escort.
3. That small arms and ammunition taken from the wounded and sick and not yet handed to the proper service, are found in the unit or establishment.
4. That personnel and material of the veterinary service are found in the unit or establishment, without forming an integral part thereof.
5. That the humanitarian activities of medical units and establishments or of their personnel extend to the care of civilian wounded or sick.

588. Article 19 GC IV provides that:

The protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties, acts harmful to the enemy. Protection may, however, cease only after due warning has been given, naming, in all appropriate cases, a reasonable time limit and after such warning has remained unheeded.

The fact that sick or wounded members of the armed forces are nursed in these hospitals, or the presence of small arms and ammunition taken from such combatants and not yet been handed to the proper service, shall not be considered to be acts harmful to the enemy.

589. Article 13 AP I provides that:

1. The protection to which civilian medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

2. The following shall not be considered as acts harmful to the enemy:
 - a. that the personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge;
 - b. that the unit is guarded by a picket or by sentries or by an escort;
 - c. that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the units;
 - d. that members of the armed forces or other combatants are in the unit for medical reasons.

Article 13 AP I was adopted by consensus.⁶¹²

590. Article 11(2) AP II provides that:

The protection to which medical units and transports are entitled shall not cease unless they are used to commit hostile acts, outside their humanitarian function. Protection may, however, cease only after a warning has been given, setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

Article 11 AP II was adopted by consensus.⁶¹³

Other Instruments

591. Article 37 of the 1880 Oxford Manual states that “the neutrality of ambulances and hospitals ceases if they are guarded by a military force; this does not preclude the presence of police guard”.

592. Paragraph 2.2 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that the protection of hospitals and other medical units, including medical transportation, shall not cease “unless they are used to commit military acts. However, the protection may only cease after due warning and a reasonable time limit to cease military activities.”

593. Section 9.3 of the 1999 UN Secretary-General’s Bulletin provides that the United Nations force shall at all times respect and protect medical establishments or mobile medical units, “unless they are used, outside their humanitarian functions, to attack or otherwise commit harmful acts against the United Nations force”.

II. National Practice

Military Manuals

594. Argentina’s Law of War Manual (1969) restates Articles 21–22 GC I and 19 GC IV.⁶¹⁴

595. Argentina’s Law of War Manual (1989) states that:

⁶¹² CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

⁶¹³ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 113.

⁶¹⁴ Argentina, *Law of War Manual* (1969), §§ 3.007 and 4.004(2).

The protection of medical units ceases only when they are used to commit acts hostile to the enemy, for example, the accommodation of healthy soldiers and the installation of observation posts, etc. The protection ceases only after a warning, setting a reasonable time-limit, has remained unheeded.⁶¹⁵

596. Australia's Commanders' Guide provides that:

Military medical personnel, facilities and equipment are also entitled to general protection under the Geneva Conventions. However, they may lose this protection if they engage in acts harmful to the enemy. Before the protection of medical personnel and facilities is lost, a warning will normally be provided and reasonable time allowed to permit cessation of improper activities. In extreme cases, overriding military necessity may preclude such a warning.⁶¹⁶

597. Australia's Defence Force Manual states that:

Military medical personnel, facilities and equipment are also entitled to general protection. However, they may lose this protection if they engage in acts harmful to the enemy. Before the protection of medical personnel and facilities is lost, a warning will normally be provided and reasonable time allowed to permit cessation of improper activities. In extreme cases, overriding military necessity may preclude such a warning.⁶¹⁷

598. Belgium's Teaching Manual for Soldiers provides that:

The prohibition to attack hospitals remains applicable even if it is guarded by sentries or its personnel carry light individual weapons for their own defence or for the defence of the wounded in their charge, the establishment or material. In order to ensure that friendly medical units enjoy the same protection, their use in support of combat operations (medical personnel taking part in hostilities, ambulances transporting weapons or combatants, armed troops housed in a hospital, etc.) should be avoided.⁶¹⁸

599. Bosnia and Herzegovina's Military Instructions provides that:

Medical facilities and units lose their right to protection when they offer resistance in order not to fall under the enemy's authority. They are allowed to put up armed and other kinds of resistance to the adversary, which, in spite of the warnings, attacks them deliberately or directly.⁶¹⁹

600. Cameroon's Disciplinary Regulations provides that the protection of medical units and establishments, as well as places where the wounded and sick, civilian or military, are collected, is contingent on their not being used for military purposes.⁶²⁰

⁶¹⁵ Argentina, *Law of War Manual* (1989), § 2.12.

⁶¹⁶ Australia, *Commanders' Guide* (1994), § 615.

⁶¹⁷ Australia, *Defence Force Manual* (1994), § 964, see also § 972.

⁶¹⁸ Belgium, *Teaching Manual for Soldiers* (undated), pp. 18–19.

⁶¹⁹ Bosnia and Herzegovina, *Military Instructions* (1992), Item 15, § 2.

⁶²⁰ Cameroon, *Disciplinary Regulations* (1975), Article 31.

601. Canada's LOAC Manual provides that:

90. The protection to which medical units are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy. Protection may only cease, however, after a warning has been given and after such warning has remained unheeded.
91. The following are not considered "acts harmful to the enemy" and do not deprive medical units of protection:
 - a. that the personnel of the medical unit are armed for their own defence or that of the wounded and sick in their charge;
 - b. that the medical unit is protected by a picket, sentries or escort;
 - c. that small arms and ammunition taken from the wounded and sick, and not yet handed to the proper service, are found in the medical unit;
 - d. that personnel and material of the military veterinary service are found in the medical unit, without forming an integral part thereof; and
 - e. that the humanitarian activities of medical units or of their personnel extend to the care of both civilian and military wounded and sick.⁶²¹

The manual further provides that "use of a privileged building for improper purposes" constitutes a war crime.⁶²² With respect to non-international armed conflicts in particular, the manual states that the protection of medical units and transports "shall only cease if they commit hostile acts outside their humanitarian function. In such circumstances, a warning must be given, and protection only ceases if such warning remains unheeded."⁶²³

602. Canada's Code of Conduct provides that:

The protection provided to medical establishments and units shall only cease if they are used for purposes outside their humanitarian duties which are harmful to your forces. Even then, the protection shall cease only after due warning, and after a reasonable time period thereafter if the warning goes unheeded.⁶²⁴

603. Ecuador's Naval Manual states that "if medical facilities are used for military purposes inconsistent with their humanitarian mission, and if appropriate warnings that continuation of such use will result in loss of protected status are unheeded, the facilities become subject to attack".⁶²⁵

604. France's LOAC Summary Note states that "the immunity of specifically protected objects may only be lifted under certain conditions and under the personal responsibility of the commander. Military necessity justifies only those measures which are indispensable for the accomplishment of the mission."⁶²⁶

605. Germany's Military Manual provides that:

613. [Fixed medical establishments, vehicles and mobile medical units of the medical service] shall not be used to commit acts harmful to the enemy.

...

⁶²¹ Canada, *LOAC Manual* (1999), p. 4-9, §§ 90-91, see also p. 9-4, § 35.

⁶²² Canada, *LOAC Manual* (1999), p. 16-4, § 21(c).

⁶²³ Canada, *LOAC Manual* (1999), p. 17-4, § 34.

⁶²⁴ Canada, *Code of Conduct* (2001), Rule 10, § 4, see also § 6.

⁶²⁵ Ecuador, *Naval Manual* (1989), § 8.5.1.4.

⁶²⁶ France, *LOAC Summary Note* (1992), § 2.4.

618. Medical establishments which contrary to their intended purpose are used to carry out acts harmful to the enemy may lose their protection after prior warning has been given.

619. To this effect, the following acts shall not be considered as hostile acts:

- that medical personnel use arms for their own protection, and that of the wounded and sick;
- that medical personnel and medical establishments are protected by sentries or an escort;
- that medical personnel are employed as sentries for the protection of their own medical establishments; and
- that war material taken from the wounded and sick is retained.⁶²⁷

606. Germany's IHL Manual states that fixed medical establishments, vehicles and mobile medical units of the medical service "shall not be used to commit, outside their humanitarian function, acts harmful to the enemy".⁶²⁸

607. Kenya's LOAC Manual states that medical units and medical transports may not be attacked but specifies that "they must not take part in hostilities. If they do, their protection might be forfeited."⁶²⁹

608. The Military Manual of the Netherlands restates the rules on loss of protection of medical units found in Article 13 AP I.⁶³⁰ With respect to non-international armed conflicts in particular, the manual states that the protection of medical units and transports "ceases when they are used, outside their humanitarian function, to commit hostile acts. But even then a warning must be given."⁶³¹

609. The Military Handbook of the Netherlands provides that "medical units may not be used to commit acts, outside their humanitarian function, which can be detrimental for the enemy (for example housing healthy soldiers or regular units)".⁶³²

610. New Zealand's Military Manual provides that the immunity granted to medical units and transports "ceases once they are used for purposes hostile to the adverse Party and outside their humanitarian purpose".⁶³³ The manual further states that:

Civilian hospitals continue to enjoy protection so long as they are not made use of to commit acts harmful to the enemy. In the event of such misuse, however, the hospitals remain protected until due warning, with a reasonable time limit, has been given and remained unheeded.⁶³⁴

⁶²⁷ Germany, *Military Manual* (1992), §§ 613 and 618–619.

⁶²⁸ Germany, *IHL Manual* (1996), § 503.

⁶²⁹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 9.

⁶³⁰ Netherlands, *Military Manual* (1993), p. VI-5.

⁶³¹ Netherlands, *Military Manual* (1993), p. XI-6.

⁶³² Netherlands, *Military Handbook* (1995), p. 7-40.

⁶³³ New Zealand, *Military Manual* (1992), § 1007(1).

⁶³⁴ New Zealand, *Military Manual* (1992), § 1109(2).

The manual further states that “use of a privileged building for improper purposes” is a war crime recognised by the customary law of armed conflict.⁶³⁵ With respect to non-international armed conflict in particular, the manual states that the protection of medical units and transports “shall cease only if they commit hostile acts outside their humanitarian function. In such circumstances, a warning must be given with, whenever appropriate, a time limit, and protection only ceases if the time limit is unheeded.”⁶³⁶

611. Nigeria’s Manual on the Laws of War provides that:

Medical establishments are not entitled to protection when not used for humanitarian purposes; however, protection may be withdrawn only after the warning. Protection is not forfeited merely because medical personnel are armed for self-defence or when there are sentries who guard the medical establishments or when the activities of the unit include treatment of civilian wounded and sick.⁶³⁷

The manual qualifies “improper use of a privileged building for military purposes” as a war crime.⁶³⁸

612. South Africa’s LOAC Manual provides that:

55. The obligation to respect the means of medical transport does not cease unless they are used to commit acts injurious to the enemy (e.g. transporting able-bodied soldiers or weapons).

...

59. A medical unit must not be defended against the enemy in the event of penetration by the enemy into the territory where it is located. Such defence would constitute a hostile act, causing the unit to forfeit its right to protection. Weapons emplacements alongside or near medical units may also cause a loss of the right to protection. Other examples are locating an observation post in the unit and storing ammunition in the unit. Emphasis is placed on medical personnel being neutral. Medical personnel should ensure that nothing and no one within the unit may be considered as harmful to the enemy and thus endanger the protection of the unit.⁶³⁹

613. Spain’s LOAC Manual states that “the protection of medical units ceases only when they are used to commit acts hostile to the enemy and after a warning setting a reasonable time-limit to stop the hostile activity has remained unheeded”. It refers to the acts enumerated in Article 22 GC I as those not considered hostile to the enemy.⁶⁴⁰

614. Switzerland’s Basic Military Manual provides that:

The protection afforded to medical establishments, vehicles, aircraft and units may only be terminated if they are used to commit acts harmful to the enemy. The protection may only be terminated after a warning and a reasonable delay. Examples of

⁶³⁵ New Zealand, *Military Manual* (1992), 1704(5).

⁶³⁶ New Zealand, *Military Manual* (1992), § 1818(2).

⁶³⁷ Nigeria, *Manual on the Laws of War* (undated), § 36.

⁶³⁸ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁶³⁹ South Africa, *LOAC Manual* (1996), §§ 55 and 59.

⁶⁴⁰ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.b.(4).

violations: installation of an observation post on a hospital roof or a firing position in a medical post, collecting able-bodied troops in a field hospital, using an ambulance to transport munitions. Examples of acts which do not terminate protection: the presence of armed guards in front of a hospital, of weapons and munitions taken from the wounded inside an ambulance, the fact that the personnel of the unit or establishment are armed and that they use their arms for their own defence or the defence of the wounded and the sick, the presence of civilian wounded and sick.⁶⁴¹

615. The UK Military Manual restates the rules on loss of protection of medical units and civilian hospitals set out in Articles 21–22 GC I and Article 19 GC IV respectively.⁶⁴² The manual further states that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . (h) improper use of a privileged building for military purposes”.⁶⁴³

616. The UK LOAC Manual states that medical units and transports “must not take part in hostilities and if they do it may result in protection being forfeited”.⁶⁴⁴

617. The US Field Manual restates Articles 21–22 GC I and notes that:

The presence of such arms and ammunition in a medical unit or establishment is not of itself cause for denying the protection to be accorded to such organisations under [GC I]. However, such arms and ammunition should be turned in as soon as practicable and, in any event, are subject to confiscation.⁶⁴⁵

The manual further states that “in addition to the ‘grave breaches’ of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war (“war crimes”): . . . h. Improper use of privileged buildings for military purposes.”⁶⁴⁶

618. The US Air Force Pamphlet provides that “in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . (7) wilful and improper use of privileged buildings or localities for military purposes”.⁶⁴⁷

619. The US Air Force Commander’s Handbook states:

Hospitals . . . lose their special status under the Geneva Conventions if they commit, or are used to commit, acts harmful to the enemy outside their humanitarian functions.

For example, using a hospital as an observation post, or to store nonmedical military supplies, or firing at the enemy from an ambulance, would deprive the hospital and the ambulance of protected status. . . Both the Geneva Conventions and the rules of engagement may impose additional restrictions on actually attacking medical activities that are improperly used. Thus, hospitals and mobile medical units

⁶⁴¹ Switzerland, *Basic Military Manual* (1987), Article 83.

⁶⁴² UK, *Military Manual* (1958), §§ 31 and 352. ⁶⁴³ UK, *Military Manual* (1958), § 626(h).

⁶⁴⁴ UK, *LOAC Manual* (1981), Section 6, p. 23, § 8.

⁶⁴⁵ US, *Field Manual* (1956), §§ 222–223.

⁶⁴⁶ US, *Field Manual* (1956), § 504(h). ⁶⁴⁷ US, *Air Force Pamphlet* (1976), § 15-3(c)(7).

may not be attacked until after a warning has been given setting, in proper cases, a reasonable time limit to correct past abuses.⁶⁴⁸

620. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . improperly using privileged buildings for military purposes".⁶⁴⁹

621. The US Rules of Engagement for Operation Desert Storm state "do not engage hospitals unless the enemy uses the hospital to commits acts harmful to US forces, and then only after giving a warning and allowing a reasonable time to expire before engaging, if the tactical situation permits".⁶⁵⁰

622. The US Naval Handbook states that "if medical facilities are used for military purposes inconsistent with their humanitarian mission, and if appropriate warnings that continuation of such use will result in loss of protected status are unheeded, the facilities become subject to attack".⁶⁵¹

623. The YPA Military Manual of the SFRY (FRY) restates Articles 21–22 GC I.⁶⁵²

National Legislation

624. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁶⁵³

625. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 21–22 GC I and 19 GC IV, and of AP I, including violations of Article 13 AP I, as well as any "contravention" of AP II, including violations of Article 11(2) AP II, are punishable offences.⁶⁵⁴

626. Italy's Law of War Decree as amended provides that the protection of military medical services is contingent on the condition that "under no circumstances they may be used for purposes other than those intended".⁶⁵⁵

627. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁶⁵⁶

⁶⁴⁸ US, *Air Force Commander's Handbook* (1980), § 3-2(d).

⁶⁴⁹ US, *Instructor's Guide* (1985), p. 13.

⁶⁵⁰ US, *Rules of Engagement for Operation Desert Storm* (1991), § D.

⁶⁵¹ US, *Naval Handbook* (1995), § 8.5.1.4.

⁶⁵² SFRY (FRY), *YPA Military Manual* (1988), §§ 170–171.

⁶⁵³ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁶⁵⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁵⁵ Italy, *Law of war Decree as amended* (1938), Article 45.

⁶⁵⁶ Norway, *Military Penal Code as amended* (1902), § 108.

National Case-law

628. No practice was found.

Other National Practice

629. The Report on the Practice of the Republika Srpska notes that attacks on medical objects during the conflict in Bosnia and Herzegovina were often abusively justified on the grounds that these objects were allegedly used for military purposes.⁶⁵⁷

630. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President expressed the view that the obligations in APII are “no more than a restatement of the rules of conduct with which US military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency”.⁶⁵⁸

631. Order No. 579 issued in 1991 by the YPA Chief of Staff provides that:

Any attack on . . . protected objects (. . . medical facilities, etc.) is strictly prohibited, except when these objects are used to launch attacks on YPA units. In such cases, the commanding officer in charge shall, before opening fire, warn the opposing side in an appropriate manner to stop fire and vacate the objects in question.⁶⁵⁹

632. In the context of an internal armed conflict, the government considered that the use of a hospital as a cover for military operations allowed the armed forces to treat it as a military objective in accordance with Article 52(2) API. Apparently the same position was adopted by the armed opposition group after the hospital’s purpose was modified to suit military aims.⁶⁶⁰ In 1993, the governmental reacted to a note verbale from the ICRC regarding the shelling of a hospital by governmental forces by explaining that the hospital was used as a cover for military operations and that the army would cease “reprisals” when these activities were halted.⁶⁶¹

*III. Practice of International Organisations and Conferences**United Nations*

633. In 1994, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported the deliberate targeting of the Goražde hospital. He noted allegations that the hospital was in fact a “military command centre” and that there were machine-gun emplacements on the roof and mortar launching equipment on the ground. According to international observers, these allegations were

⁶⁵⁷ Report on the Practice of Republika Srpska, 1997, Chapter 2.7.

⁶⁵⁸ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

⁶⁵⁹ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 3.

⁶⁶⁰ ICRC archive documents. ⁶⁶¹ ICRC archive document.

entirely unfounded and the hospital served no military function during the offensive.⁶⁶²

634. In 1994, in a report on the situation of human rights in Rwanda, the Special Rapporteur of the UN Commission on Human Rights noted that a shell had hit an ICRC hospital. Commenting on the FPR's justification of its action on the grounds that members of the FAR were sheltering behind the hospital in order to attack, the Special Rapporteur said that such an attitude could not but demoralise the survivors.⁶⁶³

Other International Organisations

635. No practice was found.

International Conferences

636. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

637. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

638. In its Commentary on the First Geneva Convention, the ICRC prepared a more precise definition of "acts harmful to the enemy", they being "acts the purpose or effect of which is to harm the adverse Party, by facilitating or impeding military operations".⁶⁶⁴ The Commentary on Article 21 GC I gives as examples: "The use of a hospital as a shelter for able-bodied combatants or fugitives, as an arms or ammunition dump, or as a military observation post; another would be the deliberate siting of a medical unit in a position where it would impede an enemy attack."⁶⁶⁵

639. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The protection to which specifically protected persons and objects are entitled shall not cease unless they are used to commit acts harmful to the enemy. Protection may cease only after due warning has been given, and after such warning has remained unheeded. A reasonable time-limit shall be set.⁶⁶⁶

⁶⁶² UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Seventh periodic report, UN Doc. E/CN.4/1995/4, 10 June 1994, § 9.

⁶⁶³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Rwanda, Report, UN Doc. E/CN.4/1995/7, 24 June 1994, § 31.

⁶⁶⁴ Jean S. Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, p. 200.

⁶⁶⁵ Jean S. Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, pp. 200–201.

⁶⁶⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 224.

640. Following incidents in a hospital compound in 1990, the ICRC delegation requested that an armed opposition group respect the security regulations that had been agreed upon, that is, that no armed persons be allowed into the hospital compound and no vehicles gain admittance, other than those of the hospital, the local Red Cross and the ICRC.⁶⁶⁷

641. In 1993, the ICRC asked an armed opposition group to remove bunkers placed in front of a hospital.⁶⁶⁸

642. In a communication to the press in 1994, the ICRC requested that the parties to the internal conflict in Mexico remove all military units from the vicinity of first-aid posts.⁶⁶⁹

643. In 1994, in a Memorandum on the Respect for International Humanitarian Law in Angola, the ICRC stated that “hospitals and medical units and means of transport shall not be the object of attack; they shall be used exclusively to give or to facilitate care and shall not be used to prepare or commit hostile acts”.⁶⁷⁰

644. In a press release issued in 1994 in the context of the conflict in Bosnia and Herzegovina, the ICRC stated that special protection should be given to the Bihac hospital, which meant, *inter alia*, that the buildings and compound “must serve exclusively to provide medical care and must not be used to prepare for or engage in military acts [and] no arms must be deployed either inside the hospital, the hospital compound or in the immediate surroundings”.⁶⁷¹

VI. Other Practice

645. In 1982, in a meeting with the ICRC, an armed opposition group stated that if a governmental base were attacked, it could not guarantee respect for the emblem, given past abuse. The transport in ambulances of political personalities accompanied by armed guards and of soldiers and munitions was cited. The armed opposition group also argued that in the case of attack, soldiers would seek refuge in Red Cross buildings and there was no means to prevent such abuse.⁶⁷² At a later date, the armed opposition group told ICRC representatives that it would be impossible to spare an ICRC building from attack if it were located in an opponent’s stronghold, since combatants would inevitably seek refuge there.⁶⁷³

646. In 1985, an armed opposition group ordered its troops not to park military vehicles near warehouses, hospitals and other locations bearing the red cross emblem.⁶⁷⁴

⁶⁶⁷ ICRC archive document. ⁶⁶⁸ ICRC archive document.

⁶⁶⁹ ICRC, Communication to the Press No. 94/5, Mexico: ICRC ready to restore medical services in conflictual areas of Chiapas state, 5 February 1994.

⁶⁷⁰ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504

⁶⁷¹ ICRC, Press Release No. 1792, Bihac: Urgent ICRC Appeal, 26 November 1994.

⁶⁷² ICRC archive document. ⁶⁷³ ICRC archive document. ⁶⁷⁴ ICRC archive document.

647. In a report on the FMLN offensive in El Salvador in November 1989, the Instituto de Derechos Humanos de la Universidad Centroamericana stated that:

Available reports, on the other hand, indicate that the FMLN is responsible for the partial destruction of the regional hospital of Zacatecoluca. According to reports from the FMLN, the army had put an observation post on the roof of the building, thus converting it into a military objective.⁶⁷⁵

648. Peacekeeping forces raised the matter of the shelling of a hospital with the authorities of a party involved in a non-international armed conflict in 1993. The latter consistently replied that the opposing forces fired mortars from the vicinity of the hospital. Upon conclusive proof that it was so, a military observer expressed the view that “the crime of using the hospital as a screen to fire weapons is as inhumane and disgusting as actually firing on the hospital”.⁶⁷⁶

649. In 1993, during the conflict in Somalia, MSF denounced an attack on its compound by UNOSOM II as a violation of the principle of immunity of medical installations and personnel. MSF stated that:

The armed forces were aware of the nature and identity of the building. According to the latest reports available to MSF, this attack was generated by the suspect presence of a microphone boom at the back of a vehicle parked in front of the building. This microphone boom was apparently mistaken for a weapon. The nature of the retaliation appears out of all proportion to the nature of the threat.⁶⁷⁷

E. Medical Transports

Respect for and protection of medical transports

I. Treaties and Other Instruments

Treaties

650. Article 35 GC I provides that:

Transports of wounded and sick or of medical equipment shall be respected and protected in the same way as mobile medical units.

Should such transports or vehicles fall into the hands of the adverse Party, they shall be subject to the laws of war, on condition that the Party to the conflict who captures them shall in all cases ensure the care of the wounded and sick they contain.

The civilian personnel and all means of transport obtained by requisition shall be subject to the general rules of international law.

⁶⁷⁵ Instituto de Derechos Humanos de la Universidad Centroamericana, “Los derechos humanos y la ofensiva del 11 de noviembre de 1989”, *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XLV, Nos. 495–496, January–February 1990, p. 65.

⁶⁷⁶ ICRC archive document.

⁶⁷⁷ MSF, Communication on the violations of humanitarian law in Somalia during UNOSOM operations, 21 July 1993, § 1(a).

651. Article 21 GC IV provides that:

Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying wounded and sick civilians, the infirm and maternity cases, shall be respected and protected in the same manner as the hospitals provided for in Article 18, and shall be marked, with the consent of the State, by the display of the distinctive emblem provided for in Article 38 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949.

652. Article 21 AP I provides that “medical vehicles shall be respected and protected in the same way as mobile medical units under the Conventions and this Protocol”. Article 21 AP I was adopted by consensus.⁶⁷⁸

653. Article 11(1) AP II provides that “medical . . . transports shall be respected and protected at all times and shall not be the object of attack”. Article 11 AP II was adopted by consensus.⁶⁷⁹

654. Upon signature of AP I and AP II, the US declared that “It is the understanding of the United States of America that the terms used in Part III of [AP II] which are the same as the terms defined in Article 8 [AP I] shall so far as relevant be construed in the same sense as those definitions”.⁶⁸⁰

Other Instruments

655. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “attack on and destruction of hospital ships”.

656. Article 25 of the 1923 Hague Rules of Air Warfare provides that “in bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible . . . hospital ships . . . provided [they] are not at the time used for military purposes”.

657. Paragraph 2.2 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “medical transportation may in no circumstances be attacked, they shall at all times be respected and protected. They may not be used to shield combatants, military objectives or operations from attack.”

658. Paragraph 47(a), (b) and (c)(ii) of the 1994 San Remo Manual includes hospital ships, small craft used for coastal rescue operations and other medical transports, as well as vessels engaged in humanitarian missions, among the classes of enemy vessels exempt from attack. Paragraph 48 of the manual lists the conditions of exemption as follows: such vessels must be “innocently employed in their normal role”; they must “submit to identification and inspection when

⁶⁷⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.38, 24 May 1977, p. 85.

⁶⁷⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 113.

⁶⁸⁰ US, Declaration made upon signature of AP I and AP II, 12 December 1977, § B.

required"; and they must not "intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required".

659. Section 9.5 of the 1999 UN Secretary-General's Bulletin provides that "the United Nations force shall respect and protect transports of wounded and sick or medical equipment in the same way as mobile medical units".

II. National Practice

Military Manuals

660. Argentina's Law of War Manual (1969) restates Articles 35 GC I and 21 GC IV.⁶⁸¹

661. Argentina's Law of War Manual (1989) states, with respect to non-international armed conflicts in particular, that "medical means of transportation shall be respected and protected and may not be made the object of attack, provided they are not being used to commit hostile acts."⁶⁸²

662. Australia's Commanders' Guide provides that "civilian medical . . . transports and supplies are not to be made the target of attack or unnecessarily destroyed. Military medical . . . facilities and equipment are also entitled to general protection under the Geneva Conventions."⁶⁸³

663. Australia's Defence Force Manual provides that "civilian medical . . . transports and supplies are not to be made the target of attack or unnecessarily destroyed. Military medical . . . facilities and equipment are also entitled to general protection."⁶⁸⁴ The manual defines medical transports as "any means of transportation, military or civilian, permanent or temporary, assigned exclusively to medical transportation and under control of a competent authority of a party to the conflict".⁶⁸⁵

664. Belgium's Law of War Manual states that "transport over land of the wounded and sick and medical material enjoys the same protection as medical units and material: it may not be made the object of attack".⁶⁸⁶

665. Belgium's Teaching Manual for Soldiers states that:

The protection accorded to the wounded would be illusory if the civilian and military medical services which are specifically set up to treat them could be attacked. Hence, medical services, identified by the Red Cross (or Red Crescent in certain countries), are not considered combatants or military objectives even if they wear the enemy uniform or bear its insignia. Enemy medical transports . . . may not be attacked.⁶⁸⁷

⁶⁸¹ Argentina, *Law of War Manual* (1969), §§ 3.016 and 4.006.

⁶⁸² Argentina, *Law of War Manual* (1989), § 7.07.

⁶⁸³ Australia, *Commanders' Guide* (1994), §§ 614–615.

⁶⁸⁴ Australia, *Defence Force Manual* (1994), § 963, see also § 902.

⁶⁸⁵ Australia, *Defence Force Manual* (1994), §§ 902 and 963.

⁶⁸⁶ Belgium, *Law of War Manual* (1983), p. 48.

⁶⁸⁷ Belgium, *Teaching Manual for Soldiers* (undated), p. 17, see also p. 8.

666. Benin's Military Manual lists the military and civilian medical service as specially protected objects.⁶⁸⁸ It states that "specially protected means of transport shall be authorised to carry out their mission as long as necessary. Their mission, content and actual use may be checked through an inspection."⁶⁸⁹

667. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, soldiers in combat must respect medical transports.⁶⁹⁰

668. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, each soldier must respect medical transports.⁶⁹¹

669. Cameroon's Instructors' Manual provides that medical transports exclusively used to transport wounded, sick and shipwrecked and medical material enjoy the protection granted thereto by the laws of war.⁶⁹²

670. Canada's LOAC Manual states that:

92. Medical transports of all types (land, sea, air) are protected and must not be attacked.

93. Medical transports should not be armed (i.e. crew-served weapons) because of the danger that they be mistaken as fighting vehicles. Medical personnel in the medical transports can, however, retain their personal weapons.⁶⁹³

The manual qualifies "attacking a properly marked hospital ship" as a war crime.⁶⁹⁴ With respect to non-international armed conflicts in particular, the manual states that "medical . . . transports are to be respected and protected at all times and not be made the object of attack".⁶⁹⁵

671. Canada's Code of Conduct states that:

Opposing forces transports for the wounded and sick, or of medical equipment, shall be respected as soon as they are identified as such and protected in the same manner as mobile medical units . . . As a general rule medical transports should not have any weapons "mounted" on them to avoid being mistaken for fighting vehicles.⁶⁹⁶

672. Colombia's Circular on Fundamental Rules of IHL states that the protection due to the wounded and sick "also covers, as such, . . . medical transports".⁶⁹⁷

673. Colombia's Basic Military Manual states that "attacks, misappropriation and destruction" of medical transports constitutes a "grave breach".⁶⁹⁸

674. Congo's Disciplinary Regulations provides that medical transports must be respected.⁶⁹⁹

⁶⁸⁸ Benin, *Military Manual* (1995), Fascicule I, p. 13.

⁶⁸⁹ Benin, *Military Manual* (1995), Fascicule II, p. 9.

⁶⁹⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 35.

⁶⁹¹ Cameroon, *Disciplinary Regulations* (1975), Article 31.

⁶⁹² Cameroon, *Instructors' Manual* (1992), p. 68, § 243.1.

⁶⁹³ Canada, *LOAC Manual* (1999), p. 4-9, §§ 92-93, see also p. 9-4, §§ 35-36.

⁶⁹⁴ Canada, *LOAC Manual* (1999), p. 16-4, § 21(e).

⁶⁹⁵ Canada, *LOAC Manual* (1999), p. 17-4, § 34.

⁶⁹⁶ Canada, *Code of Conduct* (2001), Rule 10, §§ 5-6.

⁶⁹⁷ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.

⁶⁹⁸ Colombia, *Basic Military Manual* (1995), p. 26, § 4.

⁶⁹⁹ Congo, *Disciplinary Regulations* (1986), Article 32.

- 675.** Croatia's *Commanders' Manual* provides that "medical transports may not be used to collect or transmit intelligence data".⁷⁰⁰
- 676.** Croatia's *Soldiers' Manual* instructs soldiers to respect hospital ships displaying the distinctive emblem.⁷⁰¹
- 677.** The *Military Manual* of the Dominican Republic instructs soldiers not to attack medical vehicles, whether on land or in the air.⁷⁰²
- 678.** Ecuador's *Naval Manual* states that "medical vehicles . . . may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such manner that attacks against military targets in the vicinity do not imperil their safety."⁷⁰³ The manual qualifies "deliberate attack upon hospitals ships . . . [and] medical vehicles" as a war crime.⁷⁰⁴
- 679.** France's *Disciplinary Regulations as amended* provides that soldiers in combat must respect and protect medical transports.⁷⁰⁵
- 680.** France's *LOAC Summary Note* states that "medical transports must not be used to collect military information".⁷⁰⁶
- 681.** France's *LOAC Manual*, with reference to Article 12 AP I, includes medical means of transportation among objects which are specifically protected by the law of armed conflict.⁷⁰⁷
- 682.** Germany's *Military Manual* states that "any transport of wounded, sick and medical equipment shall be respected and protected".⁷⁰⁸
- 683.** Germany's *IHL Manual* provides that medical vehicles "shall under no circumstance be attacked. Their unhampered employment shall be ensured at all times."⁷⁰⁹
- 684.** Hungary's *Military Manual* instructs soldiers to respect and protect medical transports, whether by land, sea or air.⁷¹⁰
- 685.** Italy's *LOAC Elementary Rules Manual* provides that "medical transports may not be used to collect or transmit intelligence data".⁷¹¹
- 686.** Kenya's *LOAC Manual* states that "protection from attack is given to . . . medical transports, e.g. ambulances".⁷¹²
- 687.** Lebanon's *Teaching Manual* provides for respect for and protection of medical transports.⁷¹³
- 688.** Mali's *Army Regulations* provides that, according to the laws and customs of war, soldiers in combat must respect medical transports.⁷¹⁴

⁷⁰⁰ Croatia, *Commanders' Manual* (1992), § 34.

⁷⁰¹ Croatia, *Soldiers' Manual* (1992), pp. 2 and 3.

⁷⁰² Dominican Republic, *Military Manual* (1980), p. 4.

⁷⁰³ Ecuador, *Naval Manual* (1989), § 8.5.1.4. ⁷⁰⁴ Ecuador, *Naval Manual* (1989), § 6.2.5.

⁷⁰⁵ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (1).

⁷⁰⁶ France, *LOAC Summary Note* (1992), § 2.3. ⁷⁰⁷ France, *LOAC Manual* (2001), p. 30.

⁷⁰⁸ Germany, *Military Manual* (1992), § 617.

⁷⁰⁹ Germany, *IHL Manual* (1996), § 503. ⁷¹⁰ Hungary, *Military Manual* (1992), p. 19.

⁷¹¹ Italy, *LOAC Elementary Rules Manual* (1991), § 34.

⁷¹² Kenya, *LOAC Manual* (1997), Précis No. 3, p. 9.

⁷¹³ Lebanon, *Teaching Manual* (1997), p. 77.

⁷¹⁴ Mali, *Army Regulations* (1979), Article 36.

689. Morocco's Disciplinary Regulations provides that, according to the laws and customs of war, soldiers in combat must respect medical transports.⁷¹⁵

690. The Military Manual of the Netherlands states that "medical transport and medical means of transportation (vehicles, ships and aircraft) must be respected and protected".⁷¹⁶ The manual repeats this rule with respect to non-international armed conflicts.⁷¹⁷

691. The Military Handbook of the Netherlands provides that "medical transports may not be attacked... Medical transports, whether on water, on land or in the air, must also be respected. Such transport may not, however, be used as normal military transport."⁷¹⁸

692. New Zealand's Military Manual states that:

Hospital ships... must be respected and protected at all times and must not be attacked ...

Medical transports are any means of transportation, military or civilian, permanent or temporary, assigned exclusively to medical transportation and under control of a competent authority of a party to the conflict.

...

Convoys of vehicles or hospital trains on land, and specially provided vessels at sea, conveying wounded and sick civilians, the infirm, and maternity cases must be protected and respected in the same way as civilian hospitals.⁷¹⁹

The manual further states that "attacking a properly marked hospital ship" constitutes a war crime recognised by the customary law of armed conflict.⁷²⁰

With respect to non-international armed conflicts in particular, it states that "medical... transports are to be respected at all times and not made the object of attack".⁷²¹

693. Nicaragua's Military Manual states, with respect to international armed conflicts, that assistance to the wounded, sick and shipwrecked includes a requirement of "respect for and protection of means of transportation for the wounded and sick or medical material" and "respect for and protection of transportation over land or sea of civilian wounded and sick".⁷²²

694. Nigeria's Manual on the Laws of War provides that "convoys of wounded or medical equipment must be respected and protected as mobile medical units".⁷²³

695. Nigeria's Military Manual provides that "specifically protected... transports recognised as such must be respected... Specifically protected

⁷¹⁵ Morocco, *Disciplinary Regulations* (1974), Article 25(1).

⁷¹⁶ Netherlands, *Military Manual* (1993), p. VI-6.

⁷¹⁷ Netherlands, *Military Manual* (1993), p. XI-6.

⁷¹⁸ Netherlands, *Military Handbook* (1995), pp. 7-40 and 7-41.

⁷¹⁹ New Zealand, *Military Manual* (1992), §§ 1007(1) and (2) and 1110(1).

⁷²⁰ New Zealand, *Military Manual* (1992), § 1704(5).

⁷²¹ New Zealand, *Military Manual* (1992), § 1818(2).

⁷²² Nicaragua, *Military Manual* (1996), Article 14(7) and (38).

⁷²³ Nigeria, *Manual on the Laws of War* (undated), § 36.

[transports] shall not be touched or entered, though they could be inspected to ascertain their contents and effective use".⁷²⁴

696. Romania's Soldiers' Manual requires respect for medical vehicles and transports.⁷²⁵

697. Russia's Military Manual states that "attack, bombardment or destruction of . . . medical transports" is a prohibited method of warfare.⁷²⁶

698. Senegal's Disciplinary Regulations provides that soldiers in combat must respect and protect medical transports.⁷²⁷

699. Senegal's IHL Manual states that "medical means of transport (ambulances) shall be authorised to perform their function as long as necessary. Their mission, content and actual use may be verified by inspection."⁷²⁸

700. South Africa's LOAC Manual provides that:

53. All means of medical transport, whether permanent or temporary, must be *assigned exclusively* to medical purposes in order to be entitled to protection. A convoy carrying both wounded and able-bodied soldiers or arms would lose the right to protection to the detriment of the wounded. (*Note: the presence of light arms which have just been taken from the wounded and not yet turned over to the proper authority is permitted.*)

54. The term "respect" for the means of medical transport indicates that they may not be attacked or damaged, nor may their passage be obstructed; put positively, they must be permitted to carry out their assigned tasks.⁷²⁹ [emphasis in original]

701. Spain's LOAC Manual defines medical transports in accordance with Article 8 AP I.⁷³⁰ With reference to Article 21 AP I, the manual states that medical transports over land "in general, enjoy the same protection and are subject to the same regulation as mobile medical units".⁷³¹

702. Sweden's IHL Manual considers that Article 21 AP I on the protection of medical vehicles has the status of customary law.⁷³²

703. Switzerland's Basic Military Manual provides that "transports of wounded and sick civilians, disabled, elderly, children and expectant mothers, by convoys and hospital trains, shall be respected and protected in the same way as hospitals".⁷³³ It further provides that medical vehicles "shall be respected and protected. They shall not be attacked, nor harmed in any way, nor their functioning be impeded, even if they do not momentarily hold any wounded or sick".⁷³⁴

⁷²⁴ Nigeria, *Military Manual* (1994), p. 45, § (f). ⁷²⁵ Romania, *Soldiers' Manual* (1991), p. 32.

⁷²⁶ Russia, *Military Manual* (1990), § 5(g).

⁷²⁷ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

⁷²⁸ Senegal, *IHL Manual* (1999), p. 17. ⁷²⁹ South Africa, *LOAC Manual* (1996), §§ 53–54.

⁷³⁰ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.c.(1), see also § 4.5.b.(2)(b).

⁷³¹ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.c.(2), see also § 4.5.b.(2)(b).

⁷³² Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

⁷³³ Switzerland, *Basic Military Manual* (1987), Article 37.

⁷³⁴ Switzerland, *Basic Military Manual* (1987), Article 82.

704. Togo's Military Manual lists the military and civilian medical service as specially protected objects.⁷³⁵ It states that "specially protected means of transport shall be authorised to carry out their mission as long as necessary. Their mission, content and actual use may be checked through an inspection."⁷³⁶

705. The UK Military Manual provides that "vehicles equipped for the transport of wounded and sick, as well as their medical equipment, must be respected and protected in the same way as mobile medical units".⁷³⁷ The manual further states that "convoys of vehicles or hospital trains on land, and specially provided vessels at sea, conveying wounded and sick civilians, the infirm, and maternity cases must be protected and respected in the same way as civilian hospitals".⁷³⁸

706. The UK LOAC Manual provides that "protection from attack is given . . . to medical transport, e.g. ambulances".⁷³⁹

707. The US Field Manual restates Article 35 GC I and Article 21 GC IV.⁷⁴⁰

708. The US Air Force Pamphlet states that "in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: (1) deliberate attack on . . . hospital ships".⁷⁴¹

709. The US Air Force Commander's Handbook provides that ambulances and hospital ships "should not be deliberately attacked, fired upon, or unnecessarily prevented from performing their medical duties".⁷⁴² It further stresses that medical transports lose their special immunity if they are used to commit "acts harmful to the enemy outside their humanitarian functions". In this respect, the manual gives the example of "firing at the enemy from an ambulance".⁷⁴³

710. The US Naval Handbook states that "medical vehicles . . . may not be deliberately bombarded. Belligerents are required to ensure that such medical facilities are, as far as possible, situated in such manner that attacks against military targets in the vicinity do not imperil their safety."⁷⁴⁴ The manual qualifies "deliberate attack upon hospital ships . . . [and] medical vehicles" as a war crime.⁷⁴⁵

711. The YPA Military Manual of the SFRY (FRY) restates Article 19 GC I and extends the protection of military medical transports to civilian medical transports.⁷⁴⁶

⁷³⁵ Togo, *Military Manual* (1996), Fascicule I, p. 14.

⁷³⁶ Togo, *Military Manual* (1996), Fascicule II, p. 9.

⁷³⁷ UK, *Military Manual* (1958), § 356. ⁷³⁸ UK, *Military Manual* (1958), § 33.

⁷³⁹ UK, *LOAC Manual* (1981), Section 6, p. 23, § 8(a).

⁷⁴⁰ US, *Field Manual* (1956), §§ 236 and 260. ⁷⁴¹ US, *Air Force Pamphlet* (1976), § 15-3(c)(1).

⁷⁴² US, *Air Force Commander's Handbook* (1980), § 3-2.

⁷⁴³ US, *Air Force Commander's Handbook* (1980), § 3-2(d).

⁷⁴⁴ US, *Naval Handbook* (1995), § 8.5.1.4. ⁷⁴⁵ US, *Naval Handbook* (1995), § 6.2.5.

⁷⁴⁶ SFRY (FRY), *YPA Military Manual* (1988), §§ 184, 195 and 198, see also § 82 (conduct of hostilities).

National Legislation

712. Argentina's Draft Code of Military Justice punishes any soldier who "wilfully violates the protection due to . . . medical transports . . . which are properly marked".⁷⁴⁷

713. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁷⁴⁸

714. Colombia's Emblem Decree provides that "all Colombian authorities and persons must protect . . . transports of medicine, food and humanitarian aid in situations of armed conflict or natural disaster".⁷⁴⁹

715. The Draft Amendments to the Penal Code of El Salvador punishes "anyone who, in the context of an international or non-international armed conflict, attacks or destroys ambulances and medical transports, without having taken adequate measures of protection and without imperative military necessity".⁷⁵⁰

716. Under Estonia's Penal Code, "an attack against . . . a hospital ship or aircraft, or any other means of transport used for transportation of non-combatants" is a war crime.⁷⁵¹

717. Georgia's Criminal Code provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or internal armed conflict . . . against . . . medical transports".⁷⁵²

718. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international or non-international armed conflict, . . . carries out an attack against . . . medical units and transport designated with the distinctive emblems of the Geneva Conventions . . . in conformity with international humanitarian law, shall be liable to imprisonment for not less than three years. In less serious cases, particularly where the attack is not carried out with military means, the period of imprisonment shall be for not less than one year.⁷⁵³

719. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 35 GC I and 21 GC IV, and of AP I, including violations of Article 21 AP I, as well as any "contravention" of AP II, including violations of Article 11 AP II, are punishable offences.⁷⁵⁴

720. Italy's Law of War Decree as amended states that the means of transportation of the military medical service must be "respected and protected".⁷⁵⁵

⁷⁴⁷ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(2) in the *Code of Military Justice as amended* (1951).

⁷⁴⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁷⁴⁹ Colombia, *Emblem Decree* (1998), Article 10.

⁷⁵⁰ El Salvador, *Draft Amendments to the Penal Code* (1998), p. 19.

⁷⁵¹ Estonia, *Penal Code* (2001), § 106. ⁷⁵² Georgia, *Criminal Code* (1999), Article 411(2).

⁷⁵³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

⁷⁵⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁷⁵⁵ Italy, *Law of War Decree as amended* (1938), Article 95.

721. Lithuania's Criminal Code as amended provides for the protection of medical transports.⁷⁵⁶

722. Nicaragua's Military Penal Code provides for the punishment of any soldier who "knowingly violates the protection due to...medical transports... which are recognizable by the established signs or the character of which can unequivocally be distinguished from a distance", provided that the protection due is not misused for hostile purposes.⁷⁵⁷

723. Nicaragua's Draft Penal Code punishes any person who, during an international or internal armed conflict, "without having previously taken appropriate measures of protection and without any justification based on imperative military necessity, attacks or destroys ambulances and medical transports... [and] medical convoys".⁷⁵⁸

724. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".⁷⁵⁹

725. Romania's Penal Code provides for the punishment of:

The total or partial destruction of objects marked with the regular distinctive emblem, such as:

- a) ... hospital ships,
- b) means of transport of any kind assigned to a medical service or the Red Cross or the organisations assimilated therewith which serve to transport the wounded, sick, or medical material [and/or] material of the Red Cross or of organisations assimilated therewith.⁷⁶⁰

726. Spain's Military Criminal Code provides for the punishment of any soldier who "knowingly violates the protection due to... medical transports... which are recognizable by the established signs or the character of which can unequivocally be distinguished from a distance", provided that the protection due is not misused for hostile purposes.⁷⁶¹

727. Under Spain's Penal Code, wilful violations of the protected status of medical transports are war crimes.⁷⁶²

728. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, against... medical transports".⁷⁶³

⁷⁵⁶ Lithuania, *Criminal Code as amended* (1961), Article 337.

⁷⁵⁷ Nicaragua, *Military Penal Code* (1996), Article 57(1).

⁷⁵⁸ Nicaragua, *Draft Penal Code* (1999), Article 468.

⁷⁵⁹ Norway, *Military Penal Code as amended* (1902), § 108.

⁷⁶⁰ Romania, *Penal Code* (1968), Article 359.

⁷⁶¹ Spain, *Military Criminal Code* (1985), Article 77(3).

⁷⁶² Spain, *Penal Code* (1995), Article 612. ⁷⁶³ Tajikistan, *Criminal Code* (1998), Article 403(2).

729. Venezuela's Code of Military Justice as amended provides for the punishment of "those who should . . . attack . . . convoys of sick and wounded".⁷⁶⁴

National Case-law

730. In the *Dover Castle case* in 1921, a German court acquitted the commander of a German submarine of sinking a hospital ship and killing six members of its crew in violation of the customs and laws of war. The Court found that the commander had sunk the ship in execution of orders and could not, therefore, be held responsible for the ensuing violations of the law.⁷⁶⁵

Other National Practice

731. In 1993, during a debate in the UN Security Council on the situation in the former Yugoslavia, Argentina stated that "the deliberate attacks on . . . ambulances" could not go on with impunity.⁷⁶⁶

732. In a note submitted to the ICRC in 1967, Egypt accused Israel of "bombardment of hospitals and ambulances in spite of the distinct markings of them" in violation of Article 19 GC I and Articles 18 and 21 GC IV and condemned it as a "flagrant violation of the elementary principle of humanity, and a serious breach of the laws of war and the Geneva Conventions of 1949".⁷⁶⁷

733. In its written comments submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that it was "prohibited to attack convoys of vehicles, hospital trains, hospital ships, aircraft exclusively employed for the removal of wounded and sick civilians, or the transport of medical personnel and equipment".⁷⁶⁸

734. Under the instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, medical transports and material shall be protected.⁷⁶⁹

735. In 1944, the German hospital ship the *Tübingen* was bombed and sunk by the British air force. Following the sinking, the German government issued the following official protest:

On 18 November 1944 at 0745 hours near Pola the German hospital ship *Tübingen* was attacked by two double-engine British bombers with machine guns and bombs so that it sank, although the course of the hospital ship had been communicated to the British government well in advance of its voyage to Saloniki and back for the

⁷⁶⁴ Venezuela, *Code of Military Justice as amended* (1998), Article 474(1).

⁷⁶⁵ Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921, p. 429.

⁷⁶⁶ Argentina, Statement before the UN Security Council, UN Doc. S/PV.3203, 20 April 1993, p. 57.

⁷⁶⁷ Egypt, Note to the International Committee of the Red Cross, 7 July 1967, annexed to Letter dated 17 July 1967 to the UN Secretary-General, UN Doc. S/8064, 17 July 1967, § 2(a).

⁷⁶⁸ Egypt, Written comments on other written statements before the ICJ, *Nuclear Weapons case*, September 1995, p. 21, § 50.

⁷⁶⁹ France, État-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 62.

purpose of transporting wounded German soldiers. Numerous members of the crew were thereby killed and wounded. The German government emphatically protests the serious violations of international law committed by the sinking of the hospital ship *Tübingen*.⁷⁷⁰

736. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Hungary stated that “it goes without saying that the international community cannot disregard the responsibility of those who violate international humanitarian law, who order attacks on . . . ambulances . . . to mention only a few examples of criminal atrocities”.⁷⁷¹

737. According to the Report on the Practice of the Iran, Iran accused Iraq on several occasions of attacking Iranian Red Crescent vehicles during the Iran–Iraq war. Iran claimed that Iraq had violated IHL by committing these acts.⁷⁷²

738. In 1972, during a debate in the UN Security Council on the situation in the Middle East, the representative of Lebanon stated that the Lebanese Red Cross had reported that its ambulances, cars and volunteers had been attacked by Israeli forces.⁷⁷³ In a subsequent debate in 1984, Lebanon complained that an ambulance attendant of the Lebanese Red Cross had been detained while he and a colleague were transporting a wounded man to the hospital in a car belonging to the Red Cross.⁷⁷⁴

739. The UK reacted to the sinking of the *Tübingen* during the Second World War by ordering an inquiry, in the course of which it was determined that, through a chain of errors on the part of the UK pilots and a misunderstanding in the wireless transmission, the order was actually given to attack the hospital ship. The UK government expressed its regret at the sinking of the ship, stating that:

In the circumstances described, they cannot refrain from remarking that had the *Tübingen* been properly illuminated at the time of sighting in accordance with international practice, the leader of the section would have had no difficulty in identifying her as a hospital ship and the incident would thus have been avoided.⁷⁷⁵

740. At the CDDH, the UK welcomed “the humanitarian advances made in such fields as medical aircraft, the extension of protection to a wider group of medical units and transports and the improved provisions on relief”.⁷⁷⁶

⁷⁷⁰ Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau, 1939–1945*, University of Nebraska Press, Lincoln, 1989, pp. 261–266.

⁷⁷¹ Hungary, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 32.

⁷⁷² Report on the Practice of Iran, 1997, Chapter 2.7.

⁷⁷³ Lebanon, Statement before the UN Security Council, UN Doc. S/PV.2376, 8 June 1982, p. 2.

⁷⁷⁴ Lebanon, Statement before the UN Security Council, UN Doc. S/PV.2552, 29 August 1984, § 26.

⁷⁷⁵ Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau, 1939–1945*, University of Nebraska Press, Lincoln, 1989, pp. 261–266.

⁷⁷⁶ UK, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR. 58, 9 June 1977, p. 302, § 114.

741. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President expressed the view that the obligations in AP II were “no more than a restatement of the rules of conduct with which US military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency”.⁷⁷⁷

742. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY (FRY) included the following example: “Fire has been opened on medical vehicles in spite of their Red Cross signs.”⁷⁷⁸

III. Practice of International Organisations and Conferences

United Nations

743. In a resolution adopted in 1992, the UN Security Council expressed “grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including . . . deliberate attacks on . . . ambulances”. The Council strongly condemned such violations and demanded that “all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law”.⁷⁷⁹

744. In a resolution adopted in 1992, the UN Commission on Human Rights stated that it was “appalled at the continuing reports of widespread, massive and grave violations of human rights within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina”, including reports of deliberate attacks on ambulances.⁷⁸⁰

745. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported that, in March 1993, a group of UN relief workers escorted by two armoured personnel carriers from the UK Battalion of UNPROFOR were allowed to enter Konjevic Polje. The aim was to evacuate wounded persons who urgently required treatment and who had been identified on an earlier visit. However, Serb forces refused to allow UNHCR to bring in ambulances or trucks. A crowd of at least 2,000 civilians gathered around the two UNPROFOR vehicles. Both the crowd and the vehicles were deliberately shelled by the Serb forces. One of the carriers was destroyed by an almost direct hit just moments

⁷⁷⁷ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 10.

⁷⁷⁸ SFRY (FRY), Minister of Defence, Examples of violations of the rules of international law committed by the so-called Armed Forces of Slovenia, July 1991, § 1(iii).

⁷⁷⁹ UN Security Council, Res. 771, 13 August 1992, preamble and §§ 2 and 3.

⁷⁸⁰ UN Commission on Human Rights, Res. 1992/S-1/1, 14 August 1992, preamble.

after its occupants had moved to the other carrier.⁷⁸¹ In a later report, the Special Rapporteur noted, in a section entitled "Human rights violations", direct attacks on a UNHCR driver in a clearly marked armoured vehicle.⁷⁸²

746. In 1995, in the context of the conflict in Guatemala, MINUGUA examined the case of an attack on a duly identified ambulance of the volunteer fire brigade that was evacuating a wounded soldier. The URNG command denied responsibility. MINUGUA acknowledged that the proximity of fighting made it difficult to judge whether the shot was intentional. The Director of MINUGUA recommended to the URNG that it "should issue precise instructions to its combatants to refrain from . . . endangering ambulances and duly identified health workers who assist such wounded persons".⁷⁸³

747. In 1996, in report on the situation of human rights in the Sudan under the title "Human rights violations – Abuses by parties to the conflict other than the Government of Sudan", the Special Rapporteur of the UN Commission on Human Rights noted that OLS had reported that, despite security assurances from local authorities, a UNICEF ambulance had been ambushed and one of the wounded persons it was transporting had been killed.⁷⁸⁴

Other International Organisations

748. No practice was found.

International Conferences

749. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to "make every effort" to protect medical means of transport.⁷⁸⁵

IV. Practice of International Judicial and Quasi-judicial Bodies

750. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

751. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

⁷⁸¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1994/3, 5 May 1993, §§ 21–22.

⁷⁸² UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 67 and 96.

⁷⁸³ MINUGUA, Director, First report, UN Doc. A/49/856, 1 March 1995, Annex, §§ 130 and 194.

⁷⁸⁴ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 78.

⁷⁸⁵ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II (9), *ILM*, Vol. 33, 1994, p. 301.

67. "Medical transport" means any means of transportation assigned exclusively to conveyance by land, water or air of the wounded, sick, shipwrecked, of medical and religious personnel, or of medical material.
- ...
68. The law of war grants the same status to civilian and military medical services... The provisions governing military medical... transports apply equally to the corresponding categories of the civilian medical service.⁷⁸⁶

Delegates also teach that "specifically protected... transports recognized as such must be respected".⁷⁸⁷

752. In 1978, in a letter to a National Society, the ICRC stated that civilian and military means of transportation, including ambulances, medical convoys and trains, hospital ships and other medical craft, lifeboats and other rescue craft "must be respected and protected in all circumstances".⁷⁸⁸

753. In 1990, following an attack on its vehicles in the context of an internal conflict, the ICRC reiterated to governmental authorities that persons and objects displaying the distinctive emblem should be respected. It requested an investigation into the incident and demanded that the government issue clear instructions regarding the obligation to respect "with the utmost rigour" the red cross and red crescent emblems.⁷⁸⁹

754. In 1991, in the context of an armed conflict, the ICRC reported attacks on medical objects marked by the red cross.⁷⁹⁰ In particular, following an attack on its medical ship by two patrolling ships of a party to the conflict, the ICRC sent a letter to the Permanent Mission of the State, in which it recalled the obligation not to attack medical transports.⁷⁹¹

755. In a press release in 1992, the ICRC enjoined the parties to the conflict in Chechnya "to ensure that medical... vehicles are respected and protected".⁷⁹²

756. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that "protection must be extended to health personnel in general and, in particular, to Mexican Red Cross personnel as well as their... transport facilities".⁷⁹³

757. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "ambulances and other medical units and

⁷⁸⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 67 and 78.

⁷⁸⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 474.

⁷⁸⁸ ICRC archive document. ⁷⁸⁹ ICRC archive document.

⁷⁹⁰ ICRC archive documents. ⁷⁹¹ ICRC archive document.

⁷⁹² ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994; see also Communication to the Press No. 96/10, Chechen conflict: ICRC appeal, 8 March 1996 and Communication to the Press No. 96/27, Russian Federation/Chechnya: ICRC calls on Federal Authorities to extend ultimatum, 21 August 1996.

⁷⁹³ Mexican Red Cross, Declaración de la Cruz Roja Mexicana en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1° enero de 1994, 3 January 1994, § 2[C].

means of transport shall be protected and respected . . . Medical units and means of transport shall not be the object of attack."⁷⁹⁴

758. In a press release issued in 2000 following allegations that the Palestine Red Crescent Society had been targeted in shooting incidents, the ICRC stated that "any attacks . . . on ambulances . . . indeed constitute a grave violation of IHL."⁷⁹⁵

759. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that:

Ambulances . . . of the medical services must be respected and protected. They must be allowed to circulate unharmed so that they can discharge their humanitarian duties. All those who take part in the confrontations must respect the medical services, whether deployed by the armed forces, civilian facilities, the Palestine Red Crescent Society or the Magen David Adom in Israel. To date, dozens of Palestine Red Crescent ambulances and many of its staff have come under fire while conducting their medical activities in the occupied territories. Ambulances belonging to the Magen David Adom have also been attacked. The ICRC once again calls on all those involved in the violence to respect . . . ambulances [and] other medical transports.⁷⁹⁶

VI. *Other Practice*

760. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch, noted, with respect to attacks against vehicles of the Ministry of Health, that the vehicles were escorted by military vehicles. It stated that "although in such circumstances, the relevant law gives any clearly marked medical vehicle immunity from attack, that immunity is set alongside the risk that it may become a collateral casualty during a legitimate attack on the military vehicles with it".⁷⁹⁷

761. In a report on the FMLN offensive in El Salvador in November 1989, the Instituto de Derechos Humanos de la Universidad Centroamericana stated that "three ambulances of the Salvadoran Red Cross in San Salvador and three others inside the country were machine-gunned".⁷⁹⁸

762. Rule A5 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in

⁷⁹⁴ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

⁷⁹⁵ ICRC, Press Release, Israel and Occupied Territories: Respect for medical personnel, ICRC Tel Aviv, 1 November 2000.

⁷⁹⁶ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

⁷⁹⁷ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 82–83.

⁷⁹⁸ Instituto de Derechos Humanos de la Universidad Centroamericana (UCA), "Los derechos humanos y la ofensiva del 11 de noviembre de 1989", *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XLV, Nos. 495–496, January–February 1990, p. 64.

1990 by the Council of the IHL, provides that “the obligation to respect and protect . . . medical . . . transports in the conduct of military operations is a general rule applicable in non-international armed conflicts”.⁷⁹⁹

763. In 1993, in the context of the conflict in Rwanda, the MRND vigorously condemned an attack on a Red Cross ambulance. It appealed to all political forces in Rwanda to condemn such acts.⁸⁰⁰

764. In 1994, an armed opposition group assured the ICRC that anti-tank mines would be deactivated for ICRC convoys. It later undertook to inform the ICRC systematically of mined locations.⁸⁰¹

765. In 1995, a representative of an armed opposition group told an ICRC delegate that medical vehicles would not be respected if they transported soldiers. He added that wounded soldiers would be respected only when dispossessed of all military attributes, including uniform. Reference was made to an earlier incident, but it is not clear from the document if the transported soldiers were wounded at the time or not.⁸⁰²

766. In 1995, a representative of an armed opposition group told an ICRC delegate that governmental forces sometimes used vehicles of foreign NGOs to transport troops. These vehicles were then considered to be potential targets. He added that if Red Cross vehicles were used in the same way, it was clear that they would also be targeted.⁸⁰³

Loss of protection of medical transports from attack

767. Specific practice concerning loss of protection from attack of medical transports has been included in the subsection on respect for and protection of medical transports. In addition, general practice concerning loss of protection from attack of medical units and medical transports is contained in the subsection on loss of protection of medical units and is not repeated here.

Respect for and protection of medical aircraft

I. Treaties and Other Instruments

Treaties

768. Article 36 GC I provides that:

Medical aircraft, that is to say, aircraft exclusively employed for the removal of wounded and sick and for the transport of medical personnel and equipment, shall not be attacked, but shall be respected by the belligerents, while flying at

⁷⁹⁹ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A5, *IRRC*, No. 278, 1990, p. 391.

⁸⁰⁰ MRND, Official Declaration, 7 July 1993. ⁸⁰¹ ICRC archive documents.

⁸⁰² ICRC archive document. ⁸⁰³ ICRC archive document.

heights, times and on routes specifically agreed upon between the belligerents concerned.

...

Unless agreed otherwise, flights over enemy or enemy-occupied territory are prohibited.

Medical aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

In the event of an involuntary landing in enemy or enemy-occupied territory, the wounded and sick, as well as the crew of the aircraft shall be prisoners of war. The medical personnel shall be treated according to Article 24 and the Articles following.

769. Article 22 GC IV provides that:

Aircraft exclusively employed for the removal of wounded and sick civilians, the infirm and maternity cases or for the transport of medical personnel and equipment, shall not be attacked, but shall be respected while flying at heights, times and on routes specifically agreed upon between all the Parties to the conflict concerned. . . . Unless agreed otherwise, flights over enemy or enemy occupied territory are prohibited. Such aircraft shall obey every summons to land. In the event of a landing thus imposed, the aircraft with its occupants may continue its flight after examination, if any.

770. Article 25 AP I provides that:

In and over land areas physically controlled by friendly forces, or in and over sea areas not physically controlled by an adverse Party, the respect and protection of medical aircraft of a Party to the conflict is not dependent on any agreement with an adverse Party. For greater safety, however, a Party to the conflict operating its medical aircraft in these areas may notify the adverse Party, as provided in Article 29, in particular when such aircraft are making flights bringing them within range of surface-to-air weapons systems of the adverse Party.

Article 25 AP I was adopted by consensus.⁸⁰⁴

771. Article 26 AP I provides that:

1. In and over those parts of the contact zone which are physically controlled by friendly forces and in and over those areas the physical control of which is not clearly established, protection for medical aircraft can be fully effective only by prior agreement between the competent military authorities of the Parties to the conflict, as provided for in Article 29. Although, in the absence of such an agreement, medical aircraft operate at their own risk, they shall nevertheless be respected after they have been recognized as such.
2. "Contact zone" means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.

Articles 26 AP I was adopted by consensus.⁸⁰⁵

⁸⁰⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.38, 24 May 1977, p. 89.

⁸⁰⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 94.

772. Article 27 AP I provides that:

1. The medical aircraft of a Party to the conflict shall continue to be protected while flying over land or sea areas physically controlled by an adverse Party, provided that prior agreement to such flights has been obtained from the competent authority of that adverse Party.
2. A medical aircraft which flies over an area physically controlled by an adverse Party without, or in deviation from the terms of, an agreement provided for in paragraph 1, either through navigational error or because of an emergency affecting the safety of the flight, shall make every effort to identify itself and to inform the adverse Party of the circumstances. As soon as such medical aircraft has been recognized by the adverse Party, that Party shall make all reasonable efforts to give the order to land or to alight on water, referred to in Article 30, paragraph 1, or to take other measures to safeguard its own interests, and, in either case, to allow the aircraft time for compliance, before resorting to an attack against the aircraft.

Article 27 AP I was adopted by consensus.⁸⁰⁶

773. Article 28 AP I provides that:

1. The Parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse Party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.
2. Medical aircraft shall not be used to collect or transmit intelligence data and shall not carry any equipment intended for such purposes. They are prohibited from carrying any persons or cargo not included within the definition in Article 8, sub-paragraph f). The carrying on board of the personal effects of the occupants or of equipment intended solely to facilitate navigation, communication or identification shall not be considered as prohibited.
3. Medical aircraft shall not carry any armament except small arms and ammunition taken from the wounded, sick and shipwrecked on board and not yet handed to the proper service, and such light individual weapons as may be necessary to enable the medical personnel on board to defend themselves and the wounded, sick and shipwrecked in their charge.

Article 28 AP I was adopted by consensus.⁸⁰⁷

774. Upon ratification of AP I, France stated that:

Given the practical need to use non-dedicated aircraft for medical evacuation missions, the Government of the Republic of France does not interpret paragraph 2 of Article 28 as precluding the presence on board of communication equipment and encryption material or the use thereof solely to facilitate navigation, identification or communication in support of a medical transportation mission as defined in Article 8.⁸⁰⁸

⁸⁰⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 95.

⁸⁰⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 97.

⁸⁰⁸ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 5.

775. Upon ratification of AP I, the UK declared with respect to Article 28(2) that:

Given the practical need to make use of non-dedicated aircraft for medical evacuation purposes, the United Kingdom does not interpret this paragraph as precluding the presence on board of communication equipment and encryption materials or the use thereof solely to facilitate navigation, identification or communication in support of medical transportation as defined in Article 8 (f).⁸⁰⁹

Other Instruments

776. Paragraph 53(a) of the 1994 San Remo Manual provides that medical aircraft are exempt from attack. Paragraph 54 lists the following conditions of exemption:

Medical aircraft are exempt from attack only if they:

- (a) have been recognised as such;
- (b) are acting in compliance with an agreement . . .
- (c) fly in areas under the control of own or friendly forces; or
- (d) fly outside the area of armed conflict.

In other instances, medical aircraft operate at their own risk.

777. Paragraph 178 of the 1994 San Remo Manual states that:

Medical aircraft shall not be used to commit acts harmful to the enemy. They shall not carry any equipment intended for the collection or transmission of intelligence data. They shall not be armed, except for small arms for self-defence, and shall only carry medical personnel and equipment.

II. National Practice

Military Manuals

778. Argentina's Law of War Manual restates Articles 36 GC I and 22 GC IV.⁸¹⁰

779. Australia's Defence Force Manual states that:

972. . . . Medical aircraft must be respect and protected at all times and must not be attacked. Their immunity ceases once they are used for purposes hostile to the adverse party and outside their humanitarian purpose.

. . .

977. Medical aircraft may fly over land physically controlled by their own or friendly forces, and over sea areas not under enemy control. However, it is advisable that the enemy be informed if such flights are likely to bring the aircraft within range of enemy surface-to-air weapon systems.

978. In accordance with LOAC, flight of such aircraft over enemy or enemy-occupied territory is forbidden without prior agreement. In the absence of such agreement, medical aircraft operating in parts of the zone controlled by friendly forces, and over areas the control of which is doubtful, do so at their own risk, but once they are recognised as medical aircraft they must be respected.

⁸⁰⁹ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (e).

⁸¹⁰ Argentina, *Law of War Manual* (1969), §§ 3.017 and 4.006.

979. Provided prior agreement has been obtained from the enemy, medical aircraft belonging to a combatant remain protected while flying over land or sea areas under the physical control of the enemy. If it deviates for any reason from the terms of such an agreement, the aircraft shall take immediate steps to identify itself. Upon being recognised as a medical aircraft, the adverse party may order it to land, or take such other steps to safeguard its own interests, and must allow time for compliance before attacking the aircraft.

980. Known medical aircraft are entitled to protection while performing medical functions... Medical aircraft must not be used in order to gain any military advantage and while carrying out flights in accordance with the two preceding paragraphs, shall not, without prior agreement, be used to search for the wounded, sick and shipwrecked.⁸¹¹

780. Belgium's Law of War Manual states that:

Medical aircraft are immune from attack during the flights agreed upon beforehand between belligerents. They may not fly over enemy controlled or occupied territory without authorisation. They must obey each order to land... No authorisation is necessary to fly over territory controlled by one's own forces. Medical aircraft are still protected above contact zones, but the risk of sustaining damage are bigger in the absence of an agreement.⁸¹²

781. Canada's LOAC Manual states that "medical aircraft, correctly identified and exclusively used as such, are immune from attack".⁸¹³ The manual further states that:

41. Medical aircraft are free to fly over land physically controlled by their own or friendly forces, and over sea areas not under enemy control. It is advisable, however, that the adverse party be informed if such flights are likely to bring the aircraft within range of surface-to-air weapon systems of the adverse party.
42. Flight of medical aircraft over enemy or enemy-occupied territory is forbidden without prior agreement. In the absence of such agreement, medical aircraft operating in parts of the contact zone controlled by friendly forces, and over areas the control of which is doubtful, do so at their own risk. "Contact zone" means any area on land where the forward elements of opposing forces are in contact with each other, especially where they are exposed to direct fire from the ground.
43. Provided prior agreement has been obtained from the adverse party, medical aircraft belonging to a combatant remain protected while flying over land or sea areas under the physical control of the adverse party. If the aircraft lags or deviates for any reason from the terms of the agreement, the aircraft shall take immediate steps to identify itself. Upon being recognized as a medical aircraft, the adverse party may order it to land, or take such other steps to safeguard its own interests, but must allow time for compliance before attacking the aircraft.

⁸¹¹ Australia, *Defence Force Manual* (1994), §§ 972 and 977-980.

⁸¹² Belgium, *Law of War Manual* (1983), p. 49.

⁸¹³ Canada, *LOAC Manual* (1999), p. 7-5, § 43.

44. Medical aircraft must not be used in order to gain any military advantage. While carrying out flights, medical aircraft shall not, without prior agreement, be used to search for the wounded, sick and shipwrecked.⁸¹⁴

The manual qualifies “attacking a properly marked . . . medical aircraft” as a war crime.⁸¹⁵

782. Croatia’s Commanders’ Manual provides that “medical transports may not be used to collect or transmit intelligence data”.⁸¹⁶

783. Croatia’s Soldiers’ Manual instructs soldiers to respect medical aircraft displaying the distinctive emblem.⁸¹⁷

784. The Military Manual of the Dominican Republic directs soldiers not to attack medical aircraft.⁸¹⁸

785. Ecuador’s Naval Manual qualifies “deliberate attack upon . . . medical aircraft” as a war crime.⁸¹⁹

786. France’s LOAC Summary Note states that “medical transports must not be used to collect military information”.⁸²⁰

787. Germany’s Military Manual states that “the parties to the conflict are prohibited from using their medical aircraft to attempt to acquire any military advantage over an adverse party. The presence of medical aircraft shall not be used in an attempt to render military objectives immune from attack.”⁸²¹

788. Hungary’s Military Manual states that “medical aircraft flying over the high seas, on specified routes, according to an agreement or identified as such” must be protected.⁸²²

789. Indonesia’s Air Force Manual states that medical aircraft must not be attacked, provided they fly on routes, heights and at times agreed between belligerents. The manual further states that medical aircraft lose their immunity if they are used for purposes other than the transportation of the wounded, medical personnel or medical equipment.⁸²³ The manual also states that no immunity is provided to medical aircraft which enter a war zone or enemy controlled territory without prior authorisation or without agreement between the parties to the conflict or when they ignore instructions given by the parties to the conflict.⁸²⁴

790. Italy’s LOAC Elementary Rules Manual provides that “medical transports may not be used to collect or transmit intelligence data”.⁸²⁵

791. Italy’s IHL Manual provides that “medical aircraft attached to the military [medical] service must be respected and protected”.⁸²⁶

⁸¹⁴ Canada, *LOAC Manual* (1999), p. 9-4, §§ 41–47 and p. 11-3, § 22.

⁸¹⁵ Canada, *LOAC Manual* (1999), p. 16-4, § 21(e).

⁸¹⁶ Croatia, *Commanders’ Manual* (1992), § 34.

⁸¹⁷ Croatia, *Soldiers’ Manual* (1992), pp. 2 and 3.

⁸¹⁸ Dominican Republic, *Military Manual* (1980), p. 4.

⁸¹⁹ Ecuador, *Naval Manual* (1989), § 6.2.5. ⁸²⁰ France, *LOAC Summary Note* (1992), § 2.3.

⁸²¹ Germany, *Military Manual* (1992), § 620. ⁸²² Hungary, *Military Manual* (1992), p. 71.

⁸²³ Indonesia, *Air Force Manual* (1990), § 36. ⁸²⁴ Indonesia, *Air Force Manual* (1990), § 46.

⁸²⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 34.

⁸²⁶ Italy, *IHL Manual* (1991), Vol. I, § 14.

792. Lebanon's Teaching Manual provides for respect for aircraft displaying the distinctive emblem.⁸²⁷

793. The Military Manual of the Netherlands restates the rules governing medical aircraft found in Article 25–28 AP I.⁸²⁸

794. New Zealand's Military Manual states that "medical aircraft, correctly identified and exclusively used as such, are for the main part immune from attack".⁸²⁹ It further states that "medical aircraft must be respected and protected at all times and must not be attacked. Their immunity ceases once they are used for purposes hostile to the adverse Party and outside their humanitarian purposes."⁸³⁰ The manual restates the rules governing medical aircraft found in Articles 25–28 AP I.⁸³¹ In addition, the manual specifies that:

Aircraft used exclusively for the removal of wounded and sick civilians, the infirm and maternity cases, or for the transport of medical personnel and equipment must not be attacked when flying at heights, times and on routes specifically agreed upon between all the belligerents concerned... In the absence of agreement to the contrary, flights over enemy or enemy-occupied territory are prohibited. Such aircraft must obey every order to land, but, after landing and examination, may continue their flight.⁸³²

According to the manual, "attacking a properly marked... medical aircraft" constitutes a war crime recognised by the customary law of armed conflict.⁸³³

795. Nicaragua's Military Manual states, with respect to international armed conflicts, that assistance to the wounded, sick and shipwrecked includes a requirement of "respect for medical aircraft assigned to the evacuation of the wounded and the sick and the transportation of medical personnel and equipment" and "respect for aircraft used to transfer civilian wounded and sick, disabled and elderly or to transport medical personnel or material".⁸³⁴

796. Russia's Military Manual states that "attack, bombardment or destruction of... medical aircraft displaying the distinctive emblems" is a prohibited method of warfare.⁸³⁵

797. South Africa's LOAC Manual provides that "medical transport by air must also be respected, even in the absence of any overflying rights, after they have been recognised as medical aircraft".⁸³⁶

798. Spain's LOAC Manual restates the rules governing medical aircraft found in Articles 25–27 AP I.⁸³⁷

⁸²⁷ Lebanon, *Teaching Manual* (1997), p. 77.

⁸²⁸ Netherlands, *Military Manual* (1993), pp. VI-6 and VI-7.

⁸²⁹ New Zealand, *Military Manual* (1992), § 629.1.

⁸³⁰ New Zealand, *Military Manual* (1992), § 1007(1).

⁸³¹ New Zealand, *Military Manual* (1992), § 1009(1)–(5).

⁸³² New Zealand, *Military Manual* (1992), § 1110(2).

⁸³³ New Zealand, *Military Manual* (1992), § 1704(5).

⁸³⁴ Nicaragua, *Military Manual* (1996), Article 14(8) and (39).

⁸³⁵ Russia, *Military Manual* (1990), § 5(g). ⁸³⁶ South Africa, *LOAC Manual* (1996), § 54.

⁸³⁷ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.c.(3).

799. Sweden's IHL Manual states that Articles 25–27 AP I on the protection of medical aircraft have the status of customary law.⁸³⁸

800. Switzerland's Basic Military Manual provides that:

Art. 91. Medical aircraft (airplanes, helicopters, etc.) exclusively used for the transport of the wounded and sick shall be respected and protected . . . The time, height and route of the flight, as well as the means of identification, must be agreed upon beforehand between the belligerents.

Art. 92. Unless there is an agreement to the contrary, flights over enemy territory are prohibited. Medical aircraft must obey each order to land. After inspection, they may continue their flight with their passengers.⁸³⁹

801. The UK Military Manual restates the rules on medical aircraft found in Articles 36 GC I and 22 GC IV.⁸⁴⁰

802. The UK LOAC Manual provides that:

Helicopters are increasingly used for the evacuation of the wounded. Medical aircraft are protected in the same way as other medical transports, but, having regard to the range of anti-aircraft missiles, the problems of identification are greater. Overflight of enemy-held territory without prior agreement will mean loss of protection. Medical aircraft must obey summonses for inspection. Protocol I contains detailed new rules on medical aircraft and provides for light and radio recognition signals.⁸⁴¹

803. The US Field Manual restates Article 36 GC I and states that:

It is not necessary that the aircraft should have been specially built and equipped for medical purposes. There is no objection to converting ordinary aircraft into medical aircraft or to using former medical aircraft for other purposes, provided the distinctive markings are removed.⁸⁴²

804. The US Air Force Pamphlet states that:

Generally, a medical aircraft, (identified as such) should not be attacked unless under the circumstances at the time it represents an immediate military threat and other methods of control are not available. For example, this might occur when it approaches enemy territory or a combat zone without permission and disregards instructions, or initiates an attack. Attacks might also occur when the aircraft is not identified as a medical aircraft because of lack of agreement as to the height, time and route.⁸⁴³

It further provides that "in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving

⁸³⁸ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

⁸³⁹ Switzerland, *Basic Military Manual* (1987), Articles 91–92.

⁸⁴⁰ UK, *Military Manual* (1958), §§ 34 and 358–359.

⁸⁴¹ UK, *LOAC Manual* (1981), Section 6, p. 24, § 12.

⁸⁴² US, *Field Manual* (1956), § 237. ⁸⁴³ US, *Air Force Pamphlet* (1976), § 4-2(f).

individual criminal responsibility: (1) deliberate attack on protected medical aircraft".⁸⁴⁴

805. The US Air Force Commander's Handbook provides that:

Medical aircraft, recognized as such, should not be deliberately attacked or fired on. Medical aircraft are not permitted to fly over territory controlled by the enemy, without the enemy's prior agreement. Medical aircraft must comply with requests to land for inspection. Medical aircraft complying with such a request must be allowed to continue their flight, with all personnel on board, if inspection does not reveal that the aircraft has engaged in acts harmful to the enemy or otherwise violated the Geneva Conventions of 1949.⁸⁴⁵

806. The US Naval Handbook qualifies "deliberate attack upon . . . medical aircraft" as a war crime.⁸⁴⁶

807. The YPA Military Manual of the SFRY (FRY) restates the rules on medical aircraft set out in Articles 25–28 AP I.⁸⁴⁷

National Legislation

808. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁸⁴⁸

809. Under Estonia's Penal Code, "an attack against . . . a medical aircraft" is a war crime.⁸⁴⁹

810. Greece's Military Penal Code provides for the protection of medical aircraft.⁸⁵⁰

811. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 36 GC I, and of AP I, including violations of Articles 25–27 AP I, is a punishable offence.⁸⁵¹

812. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁸⁵²

National Case-law

813. No practice was found.

⁸⁴⁴ US, *Air Force Pamphlet* (1976), § 15-3(c)(1).

⁸⁴⁵ US, *Air Force Commander's Handbook* (1980), § 3-2(c).

⁸⁴⁶ US, *Naval Handbook* (1995), § 6.2.5.

⁸⁴⁷ SFRY (FRY), *YPA Military Manual* (1988), §§ 317–321.

⁸⁴⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁸⁴⁹ Estonia, *Penal Code* (2001), § 106. ⁸⁵⁰ Greece, *Military Penal Code* (1995), Article 156.

⁸⁵¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁸⁵² Norway, *Military Penal Code as amended* (1902), § 108.

Other National Practice

814. At the CDDH, during a debate in Committee II on Article 32 of draft AP I (“Neutral or other States not parties to the conflict”), Egypt stated that “to attack a medical aircraft is a serious matter and it would be better to take all other possible action first”.⁸⁵³

815. At the CDDH, commenting on Article 27 of draft AP I, Egypt stated that “for the protection of medical aircraft, prior agreement is absolutely necessary for aircraft to fly over contact or similar zones”.⁸⁵⁴

816. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, refer to Articles 25 and 27 AP I.⁸⁵⁵

817. At the CDDH, Japan stated that “flying over enemy occupied areas was still prohibited . . . if [it] occurred by force of urgent necessity, in the absence of an agreement, that constituted a violation of the Protocol”.⁸⁵⁶

818. It is reported that in the Vietnam War, US army medical evacuation helicopters marked with the red cross emblem suffered a high loss rate from enemy fire, with the result that some medical evacuation units armed their helicopters with machine guns.⁸⁵⁷

819. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that known medical aircraft be respected and protected when performing their humanitarian functions”. He added: “that is a rather general statement of what is reflected in many, but not all, aspects of the detailed rules in Articles 24 through 31, which include some of the more useful innovations in the Protocol”.⁸⁵⁸

820. The Report on US Practice notes that US practice suggests that if enemy forces do not respect the protected status of medical units, the right of self-defence may justify the use of force.⁸⁵⁹

821. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY (FRY) included the following example: “Fire

⁸⁵³ Egypt, Statement at the CDDH, *Official Records*, Vol. XII, CDDH/II/SR. 58, 27 April 1976, p. 34, § 30.

⁸⁵⁴ Egypt, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 114.

⁸⁵⁵ France, Etat-major de la Force d’Action Rapide, *Ordres pour l’Opération Mistral*, 1995, Section 6, § 62.

⁸⁵⁶ Japan, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.47, 5 April 1975, pp. 528–529, § 22.

⁸⁵⁷ Peter Dorland and James Nanney, *Dust Off: Army Aeromedical Evacuation in Vietnam*, Center of Military History, United States Army, Washington D.C., 1982, p. 85.

⁸⁵⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423–424.

⁸⁵⁹ Report on US Practice, 1997, Chapter 2.7.

has been opened on medical and helicopters and planes in spite of their Red Cross signs.”⁸⁶⁰

III. Practice of International Organisations and Conferences

United Nations

822. In 1996, in a report on the situation of human rights in the Sudan, in a section entitled “Human rights violations – Abuses by parties to the conflict other than the Government of Sudan”, the Special Rapporteur of the UN Commission on Human Rights reported that an ICRC plane was shot at and hit when preparing for landing. Following the incident, the ICRC delegation was advised by its headquarters not to fly to certain areas.⁸⁶¹

Other International Organisations

823. No practice was found.

International Conferences

824. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

825. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

826. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rules set out in Articles 25–28 AP I.⁸⁶²

827. In 1978, in a letter to a National Society, the ICRC indicated that medical aircraft are among those objects which “must be respected and protected in all circumstances”.⁸⁶³

828. In 1990, the ICRC protested to a government official responsible for humanitarian aid about the bombardment of one of its planes. It considered that the attack was a grave violation of the duty to respect the red cross emblem and of the security agreement concluded with the government concerned.⁸⁶⁴

829. In a press release issued in 1993 in the context of the conflict in Angola, the ICRC denounced the destruction of one of its planes at Uige airport while

⁸⁶⁰ SFRY (FRY), Minister of Defence, Examples of violations of the rules of international law committed by the so-called Armed Forces of Slovenia, July 1991, § 1(iii).

⁸⁶¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 78.

⁸⁶² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 628–632.

⁸⁶³ ICRC archive document. ⁸⁶⁴ ICRC archive document.

waiting to evacuate 21 foreigners held by UNITA. It called on the parties to comply with IHL and regarded the attack as a serious breach of the principles of IHL concerning respect for the red cross emblem.⁸⁶⁵

VI. Other Practice

830. In 1983, in a letter to the ICRC, the Secretary-General of an armed opposition group justified an attack on an ICRC aircraft on the grounds that his soldiers were “nervous and suspicious of the presence of any aircraft in the region”. In a later letter in 1985, he stated that the armed opposition group would respect the ICRC but did not regard it as “neutral” and considered the protection through the emblem alone as insufficient.⁸⁶⁶

Loss of protection of medical aircraft from attack

831. Specific practice concerning loss of protection of medical aircraft from attack has been included in the subsection on respect for and protection of medical aircraft. In addition, general practice concerning loss of protection of medical units and medical transports from attack is contained in the subsection on loss of protection of medical units and is not repeated here.

F. Persons and Objects Displaying the Distinctive Emblem

I. Treaties and Other Instruments

Treaties

832. Pursuant to Article 8(2)(b)(xxiv) and (e)(ii) of the 1998 ICC Statute, “intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law” constitutes a war crime in both international and non-international armed conflicts.

Other Instruments

833. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “breach of . . . rules relating to the Red Cross”.

834. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia stated that “the Red Cross emblem must be respected”.

⁸⁶⁵ ICRC, Press Release No. 1737, Angola: Solemn ICRC Appeal, 10 February 1993.

⁸⁶⁶ ICRC archive documents.

835. Paragraph 10 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “the parties shall repress . . . any attack on persons or property under [the] protection [of the red cross emblem]”.

836. Paragraph 3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “the Red Cross emblem shall be respected”.

837. In paragraph II (7) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina the ICRC requested the parties to “enforce respect for the red cross emblem”.

838. Section 9.7 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall in all circumstances respect the Red Cross and Red Crescent emblems”.

839. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxiv) and (e)(ii), “intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

840. Australia’s Defence Force Manual provides that “firing upon . . . the Red Cross symbol” constitutes a grave breach or a serious war crime likely to warrant institution of criminal proceedings.⁸⁶⁷

841. Benin’s Military Manual instructs soldiers to “respect and protect persons and objects displaying the red cross [or] red crescent emblem”.⁸⁶⁸

842. Cameroon’s Disciplinary Regulations provides that, under the laws and customs of war, each soldier must respect “the emblems of the Red Cross and of national Red Cross societies which are protective signs as such”.⁸⁶⁹

843. Canada’s LOAC Manual states, with respect to non-international armed conflicts in particular, that “medical and religious personnel, together with medical units and transports shall, under the direction of the competent authority concerned, display the distinctive emblem of the Red Cross or Red Crescent which emblem is to be respected at all times”.⁸⁷⁰

⁸⁶⁷ Australia, *Defence Force Manual* (1994), § 1315(q); see also *Commanders’ Guide* (1994), § 1305(q).

⁸⁶⁸ Benin, *Military Manual* (1995), Fascicule II, pp. 18–19.

⁸⁶⁹ Cameroon, *Disciplinary Regulations* (1975), Article 31.

⁸⁷⁰ Canada, *LOAC Manual* (1999), p. 17-4, § 33.

844. Canada's Code of Conduct states that "international law provides special protection to personnel and facilities displaying the Red Cross or Red Crescent . . . Medical personnel and their medical facilities/buildings and transport displaying the distinctive emblem must not be attacked."⁸⁷¹

845. Colombia's Circular on Fundamental Rules of IHL provides that "the emblem of the red cross (red crescent, red lion and sun) is the sign of that protection [of medical personnel, units and transports] and must be respected".⁸⁷²

846. France's LOAC Summary Note states that "the specific immunity granted to certain persons and objects by the law of war must be strictly observed. Specifically protected persons and objects can be identified by the display of the emblem of the red cross, red crescent or red lion and sun."⁸⁷³ The manual qualifies "attacks against marked property" as a war crime.⁸⁷⁴

847. France's LOAC Manual provides that the red cross and red crescent emblems "indicate that the persons, material and installations which display them have a special protected status and may not be made the object of attack or violence".⁸⁷⁵

848. Germany's Military Manual provides that:

The distinctive emblem of medical and religious personnel as well as that of medical establishments (including hospital ships), medical transports, medical material and hospital zones is the red cross on a white ground. Countries which wish to use the red crescent in place of the red cross shall be free to do so. The two distinctive emblems have no religious significance; they must be equally respected in all places, and at all times.⁸⁷⁶

849. Hungary's Military Manual includes persons and objects displaying the red cross or red crescent emblem among specifically protected persons objects.⁸⁷⁷

850. Indonesia's Air Force Manual requires respect for persons and objects displaying the distinctive emblem.⁸⁷⁸

851. Italy's LOAC Elementary Rules Manual provides that, during military operations, persons and objects displaying the distinctive emblems must be respected.⁸⁷⁹

852. Kenya's LOAC Manual instructs soldiers to "respect all persons and objects bearing the emblem of the Red Cross [or] Red Crescent".⁸⁸⁰

853. Lebanon's Teaching Manual provides for respect for hospitals, ships and medical aircraft displaying the red cross or red crescent emblem.⁸⁸¹

⁸⁷¹ Canada, *Code of Conduct* (2001), Rule 10, § 1.

⁸⁷² Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.

⁸⁷³ France, *LOAC Summary Note* (1992), § 2.2.

⁸⁷⁴ France, *LOAC Summary Note* (1992), § 3.4. ⁸⁷⁵ France, *LOAC Manual* (2001), p. 61.

⁸⁷⁶ Germany, *Military Manual* (1992), § 637. ⁸⁷⁷ Hungary, *Military Manual* (1992), p. 44.

⁸⁷⁸ Indonesia, *Air Force Manual* (1990), § 54.

⁸⁷⁹ Italy, *LOAC Elementary Rules Manual* (1991), p. 30.

⁸⁸⁰ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 14.

⁸⁸¹ Lebanon, *Teaching Manual* (1997), p. 77.

854. Madagascar's Military Manual instructs soldiers to "respect persons and objects displaying the distinctive emblem" of the medical service and religious personnel, whether military or civilian.⁸⁸²

855. Nigeria's Soldiers' Code of Conduct states that "signs which protect the wounded, sick, medical, Red Cross/Crescent personnel, ambulances and Red Cross/Crescent relief transports, hospitals, first aid posts, etc. must be identified and respected".⁸⁸³

856. The Philippines' Rules for Combatants provides that "it is forbidden to attack the persons, vehicles and installations which are protected by the Red Cross sign".⁸⁸⁴

857. The Soldier's Rules of the Philippines instructs soldiers to "respect all persons and objects bearing the emblem of the Red Cross, Red Crescent [or] Red Lion and Sun".⁸⁸⁵

858. Romania's Soldiers' Manual prohibits attacks against buildings displaying the emblem.⁸⁸⁶

859. Senegal's IHL Manual states that "the emblem of the red cross and red crescent ensures the protection of medical personnel, units and transports".⁸⁸⁷

860. Switzerland's Basic Military Manual provides that:

The distinctive emblem (red cross, red crescent) serves to indicate, under control of the military authority, the establishments, units, personnel, vehicles and material. It must not be used for other purposes. The emblem indicates that those who wear it must be respected and protected.⁸⁸⁸

The manual further refers to Article 111 of the Military Criminal Code (see *infra*) which qualifies "acts of hostility against persons protected by the red cross" and "destruction of objects protected by the red cross" as war crimes.⁸⁸⁹

861. Togo's Military Manual instructs soldiers to "respect and protect persons and objects displaying the red cross [or] red crescent emblem".⁸⁹⁰

862. The UK LOAC Manual provides that "persons, units or establishments displaying either sign [red cross or red crescent] are protected from attack".⁸⁹¹

863. The US Soldier's Manual instructs members of armed forces not to fire on persons and objects displaying the red cross or red crescent emblem.⁸⁹²

National Legislation

864. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including

⁸⁸² Madagascar, *Military Manual* (1994), Fiche No. 4-T, § 24.

⁸⁸³ Nigeria, *Soldiers' Code of Conduct* (undated), § 5.

⁸⁸⁴ Philippines, *Rules of Combatants* (1989), § 2. ⁸⁸⁵ Philippines, *Soldier's Rules* (1989), § 10.

⁸⁸⁶ Romania, *Soldiers' Manual* (1991), p. 19. ⁸⁸⁷ Senegal, *IHL Manual* (1999), p. 16.

⁸⁸⁸ Switzerland, *Basic Military Manual* (1987), Article 94.

⁸⁸⁹ Switzerland, *Basic Military Manual* (1987), Article 200(c) and (d).

⁸⁹⁰ Togo, *Military Manual* (1996), Fascicule II, p. 19.

⁸⁹¹ UK, *LOAC Manual* (1981), Section 4, p. 16, § 9. ⁸⁹² US, *Soldier's Manual* (1984), p. 7.

“attacking persons or objects using the distinctive emblems of the Geneva Conventions” in both international and non-international armed conflicts.⁸⁹³

865. Azerbaijan’s Criminal Code provides that “directing attacks... against personnel, buildings, installations and transports, using the distinctive emblems of the red cross and red crescent” constitutes a war crime in international and non-international armed conflicts.⁸⁹⁴

866. The Criminal Code of Belarus provides that it is a war crime to “attack personnel, buildings, objects, units and means of transport displaying the protective emblem of the Red Cross or Red Crescent”.⁸⁹⁵

867. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law” is a war crime in both international and non-international armed conflicts.⁸⁹⁶

868. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.⁸⁹⁷

869. Under Colombia’s Penal Code, it is a punishable act to attack or destroy, without imperative military necessity:

ambulances or means of medical transport, field hospitals or fixed hospitals, depots of aid material, medical convoys, goods destined for relief and aid of protected persons, ... medical goods and installations properly marked with the distinctive emblems of the Red Cross or Red Crescent.⁸⁹⁸

870. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.⁸⁹⁹

871. Under Denmark’s Military Criminal Code as amended, failure to respect the distinctive signs reserved for people and materials bringing assistance to the sick and wounded is an offence.⁹⁰⁰

872. The Draft Amendments to the Penal Code of El Salvador punishes anyone who, in the context of an international or non-international armed conflict, “attacks or destroys... medical objects and installations properly marked with the emblem of the Red Cross or Red Crescent, without having taken adequate measures of protection and without imperative military necessity”.⁹⁰¹

⁸⁹³ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.66 and 268.78.

⁸⁹⁴ Azerbaijan, *Criminal Code* (1999), Article 116(3).

⁸⁹⁵ Belarus, *Criminal Code* (1999), Article 136.

⁸⁹⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(w) and (D)(b).

⁸⁹⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁸⁹⁸ Colombia, *Penal Code* (2000), Article 155.

⁸⁹⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁹⁰⁰ Denmark, *Military Criminal Code as amended* (1978), Article 25.

⁹⁰¹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Destrucción de bienes e instalaciones de carácter sanitario”.

873. Under Estonia's Penal Code, "a person who kills, tortures, causes health damage to or takes hostage a member of a medical unit properly identified, or any other person attending to the sick or wounded persons... [as well as] a representative of a humanitarian organisation performing his/her duties in a war zone" commits a war crime.⁹⁰²

874. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international or non-international armed conflict, ... carries out an attack against personnel, buildings, material or medical units and transport designated with the distinctive emblems of the Geneva Conventions ... in conformity with international humanitarian law, shall be liable to imprisonment for not less than three years. In less serious cases, particularly where the attack is not carried out with military means, the period of imprisonment shall be for not less than one year.⁹⁰³

875. Under the International Crimes Act of the Netherlands, "intentionally directing attacks against buildings, material, medical units and transports, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law" is a crime, whether committed in an international or a non-international armed conflict.⁹⁰⁴

876. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xxiv) and (e)(ii) of the 1998 ICC Statute.⁹⁰⁵

877. Under Nicaragua's Military Penal Code, failure to respect the red cross emblem is considered an offence against the laws and customs of war.⁹⁰⁶

878. Nicaragua's Draft Penal Code punishes anyone who, during an international or internal armed conflict, "without having previously taken appropriate measures of protection and without any justification based on imperative military necessity, attacks or destroys... objects or installations of medical character properly marked with the conventional signs of the red cross or red crescent".⁹⁰⁷

879. Under Peru's Code of Military Justice, it is an offence to knowingly open fire upon personnel of the Red Cross displaying the distinctive emblem in a situation of combat, on the battlefield or during military operations.⁹⁰⁸

880. Romania's Penal Code provides for the punishment of anyone who "subjects to inhuman treatment... members of... the Red Cross or any other organisation assimilated with it... or subjects such persons to medical or scientific experiments".⁹⁰⁹ It further provides for the punishment of:

⁹⁰² Estonia, *Penal Code* (2001), § 102.

⁹⁰³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

⁹⁰⁴ Netherlands, *International Crimes Act* (2003), Articles 5(5)(n) and 6(3)(b).

⁹⁰⁵ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁹⁰⁶ Nicaragua, *Military Penal Code* (1996), Articles 48–49.

⁹⁰⁷ Nicaragua, *Draft Penal Code* (1999), Article 468.

⁹⁰⁸ Peru, *Code of Military Justice* (1980), Article 96.

⁹⁰⁹ Romania, *Penal Code* (1968), Article 358.

The total or partial destruction of objects marked with the regular distinctive emblem, such as:

- a) buildings . . .
- b) means of transport of any kind assigned to . . . the Red Cross or the organisations assimilated therewith which serve to transport . . . material of the Red Cross or of organisations assimilated therewith.⁹¹⁰

881. Spain's Penal Code provides for the punishment of "anyone who, in the event of armed conflict, should . . . knowingly violate the protection due to medical units and medical transports . . . which are duly identified with signs or the appropriate distinctive signals".⁹¹¹

882. Sweden's Penal Code as amended provides that:

A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for crime against international law to imprisonment for at most four years. Serious violations shall be understood to include:

- ...
- (5) initiating an attack against establishments or installations which enjoy special protection under international law.⁹¹²

883. Under Switzerland's Military Criminal Code as amended, the commission of hostile acts against persons or objects placed under the protection of the distinctive emblems, or impeding the carrying out of their functions is punishable by imprisonment.⁹¹³

884. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxiv) and (e)(ii) of the 1998 ICC Statute.⁹¹⁴

885. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxiv) and (e)(ii) of the 1998 ICC Statute.⁹¹⁵

886. Venezuela's Code of Military Justice as amended provides for the punishment of "those who carry out serious attacks against members of the Red Cross".⁹¹⁶

National Case-law

887. No practice was found.

⁹¹⁰ Romania, *Penal Code* (1968), Article 359. ⁹¹¹ Spain, *Penal Code* (1995), Article 612(1).

⁹¹² Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁹¹³ Switzerland, *Military Criminal Code as amended* (1927), Article 111.

⁹¹⁴ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁹¹⁵ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁹¹⁶ Venezuela, *Code of Military Justice as amended* (1998), Article 474(3).

Other National Practice

888. In 1992, in the context of the conflict in Bosnia and Herzegovina, the Presidency of the Republika Srpska issued a statement calling on “local authorities and the most influential of Serbian people” to respect the red cross emblem “which ought to be used by medical personnel, hospitals and medical transports only”.⁹¹⁷ On another occasion, the Presidency ordered all combatants to “take all measures to respect the Red Cross emblem”.⁹¹⁸

889. Under the instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, the red cross emblem must be respected in all circumstances.⁹¹⁹

890. A note issued by the Kuwaiti Ministry of Defence in 1994 recognised the principle whereby persons and objects displaying the distinctive emblem must be respected.⁹²⁰

891. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY (FRY) included the following example: “Fire has been opened on medical vehicles and helicopters and planes, in spite of their Red Cross signs, medical teams were arrested.”⁹²¹

892. In an order to Yugoslav army units in 1991, the Federal Executive Council of the SFRY requested that “all the participants in the armed conflicts in the territory of Yugoslavia . . . respect and protect the Red Cross sign so as to ensure the safety of all those performing their humanitarian duties under this sign”.⁹²²

893. In 1993 and 1994, in meetings with the ICRC, the Minister of Defence of a State guaranteed that the armed forces would respect any installation displaying the distinctive emblem. It insisted that incidents in which ICRC personnel and objects had been targeted were the work of uncontrolled elements and that strict orders had been issued.⁹²³

894. In 1996, an ICRC document noted several incidents in which ICRC buildings and vehicles displaying the distinctive emblem had been attacked by government forces.⁹²⁴

⁹¹⁷ Bosnia and Herzegovina, Republika Srpska, Appeal by the Presidency, 15 June 1992.

⁹¹⁸ Bosnia and Herzegovina, Republika Srpska, Order issued by the Presidency, 22 August 1992.

⁹¹⁹ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 62.

⁹²⁰ Report on the Practice of Kuwait, 1997, Chapter 2.5, referring to Note by the Ministry of Defence concerning the emblems, 15 October 1994.

⁹²¹ SFRY (FRY), Minister of Defence, Examples of violations of the rules of IHL committed by the so-called Armed Forces of Slovenia, 10 July 1991, § 2(iii).

⁹²² SFRY (FRY), Federal Executive Council, Secretariat for Information, Statement regarding the need for respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia, Belgrade, 31 October 1991.

⁹²³ ICRC archive documents. ⁹²⁴ ICRC archive document.

*III. Practice of International Organisations and Conferences**United Nations*

895. No practice was found.

Other International Organisations

896. In 1981, in a report on refugees from El Salvador, the Rapporteur of the Parliamentary Assembly of the Council of Europe noted that it had become necessary to launch a large-scale information campaign about the tasks of the Red Cross, because the red cross emblem was frequently being ignored and Red Cross convoys were being fired upon. She proposed that a special appeal should be made to the government of El Salvador and to right- and left-wing extremist groups to, *inter alia*, respect the red cross emblem.⁹²⁵

897. In a resolution adopted in 1994 on respect for international humanitarian law and support for humanitarian action in armed conflicts, the Council of Ministers of the OAU urged all member States and warring parties "to respect the Red Cross, Red Crescent and other humanitarian organization emblems".⁹²⁶

898. In a resolution adopted in 1994 on respect for international humanitarian law, the OAS urged all member States "to do their utmost to guarantee the security of personnel engaged in humanitarian activities, ... in particular by respecting the Red Cross emblem".⁹²⁷

899. In 1994, respect for the red cross and red crescent emblems was included as part of confidence-building measures proposed by the OSCE in the conflict in Nagorno-Karabakh.⁹²⁸

International Conferences

900. At the 1992 Helsinki Summit of Heads of State or Government, CSCE participating States reaffirmed their commitment to respect the protective emblems of the red cross and red crescent.⁹²⁹

901. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to "make every effort to ... increase respect for the emblems of the red cross and red crescent".⁹³⁰

902. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference called on "all States to make every effort to protect agents from belligerents as

⁹²⁵ Council of Europe, Parliamentary Assembly, Rapporteur on Refugees from El Salvador, Report, Doc. 4698, Report on refugees from El Salvador, 30 January 1981, pp. 9 and 12; *Official Report of Debates*, 33rd Session, Vol. 1, 1–7 sittings, 11–15 May 1991, p. 203.

⁹²⁶ OAU, Council of Ministers, Res. 1526 (LX), 11 June 1994, § 4.

⁹²⁷ OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 3.

⁹²⁸ OSCE, Confidence-building measures for possible application in the conflict in and around Nagorno-Karabakh (revised), annexed to Letter dated 9 June 1994 from Sweden to the President of the UN Security Council, UN Doc. S/1994/687, 9 June 1994, § 2.

⁹²⁹ CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 51.

⁹³⁰ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II (9), *ILM*, Vol. 33, 1994, p. 301.

well as common criminals and ensure the immunity which should be guaranteed by the emblems of the Red Cross and Red Crescent".⁹³¹

903. In a resolution on health and war adopted in 1995, the Conference of African Ministers of Health invited the OAU member States "to guarantee the immunity of the emblems of the Red Cross and Red Crescent".⁹³²

IV. Practice of International Judicial and Quasi-judicial Bodies

904. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

905. In a press release issued in 1978 concerning fighting in East Beirut, the ICRC expressed its indignation "at the non-respect of the Red Cross emblem which should be observed for the protection of the medical personnel, units and vehicles which, from the outset, have been repeatedly under attack".⁹³³

906. In 1979, the ICRC appealed to all parties to the conflict in Rhodesia/Zimbabwe to "respect the protective emblem of the Red Cross and thus allow those carry it in the accomplishment of their humanitarian task to work in safety".⁹³⁴

907. In 1980, a National Red Cross Society sent a letter of protest to the army Chief of Staff of a State following an incident in which one of its trucks displaying the distinctive emblem was requisitioned by governmental soldiers and used to transport goods looted in nearby villages, while the driver and other Red Cross employees were detained and forced to accompany the soldiers in their looting.⁹³⁵ Two years later similar violations occurred, when searches conducted by governmental army soldiers in the local Red Cross premises were reported. The head of the delegation of the Federation of Red Cross and Red Crescent Societies asked them to leave, the place being under the protection of the red cross emblem, but later a grenade was thrown into the compound. The head of the Federation delegation made a verbal protest to the Defence Secretary of State. The ICRC delegation proposed making a formal protest to the Ministries of Health and Defence regarding the violation of a place protected by the red cross emblem.⁹³⁶

908. In a press release issued in 1987 after two ambulances clearly marked with the red cross and red crescent emblems suffered direct hits from helicopter gun

⁹³¹ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, § 2(h).

⁹³² Conference of African Ministers of Health, Cairo, 26–28 April 1995, Res. 14 (V), § 5(c).

⁹³³ ICRC, Press Release No. 1333b, Fighting in East Beirut – ICRC Appeal, 7 July 1978.

⁹³⁴ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 5, *IRRC*, No. 209, 1979, p. 88.

⁹³⁵ ICRC archive document. ⁹³⁶ ICRC archive document.

fire in southern Lebanon, the ICRC appealed to the parties concerned to respect everywhere and at all times the emblems of the red cross and red crescent "which protect those who provide assistance to all victims of the Lebanese conflict".⁹³⁷

909. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the Red Cross and Red Crescent emblems must be respected in all circumstances. Medical and religious personnel, ambulances, hospitals and other medical units and means of transport and respected accordingly."⁹³⁸

910. In 1991, the ICRC appealed to the parties to the conflict in the former Yugoslavia "to respect and ensure respect for the Red Cross emblem so as to guarantee the safety of those engaged in humanitarian activities under its protection".⁹³⁹

911. In a joint statement adopted in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about "the protracting internal conflict in Yugoslavia" and urged the parties to the conflict "to do their utmost to ensure respect for the Red Cross sign".⁹⁴⁰

912. In a press release in 1992, the ICRC enjoined the parties to the conflict in Bosnia and Herzegovina "to respect and ensure respect for the Red Cross emblem so as to guarantee the safety of medical personnel and Red Cross workers carrying out their humanitarian mandate".⁹⁴¹

913. In a press release in 1992, the ICRC enjoined the parties to the conflict in Afghanistan "to respect and ensure respect for the Red Cross or Red Crescent emblem so as to guarantee the safety of all those engaged in humanitarian activities under its protection".⁹⁴²

914. In 1992, the ICRC appealed to all parties to the conflict in Bosnia and Herzegovina to "instruct all combatants in the field to respect . . . the Red Cross emblem".⁹⁴³

915. In a press release in 1992, the ICRC urged the parties to the conflict in Tajikistan "to respect and ensure respect for the Red Cross or Red Crescent

⁹³⁷ ICRC, Press Release, ICRC Beirut, 23 December 1987.

⁹³⁸ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § III, *IRRC*, No. 280, 1991, p. 25.

⁹³⁹ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

⁹⁴⁰ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

⁹⁴¹ ICRC, Press Release No. 1705, Bosnia-Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

⁹⁴² ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; see also Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

⁹⁴³ ICRC, Bosnia-Herzegovina: Solemn appeal to all parties to the conflict, *IRRC*, No. 290, 1992, p. 493.

emblem, so as to guarantee the safety of medical staff and workers carrying out their humanitarian tasks under its protection".⁹⁴⁴

916. In a press release in 1992, the ICRC enjoined the parties to the conflict in Chechnya "to respect both the Red Cross and the Red Crescent emblems, so as to guarantee the safety of medical personnel and relief workers carrying out humanitarian tasks under their protection".⁹⁴⁵

917. In a communication to the press issued in 1993 following the destruction of its delegation in Huambo (Angola), the ICRC appealed to the parties to comply with the rules of IHL concerning the red cross emblem.⁹⁴⁶

918. In 1993, the Brazilian Red Cross condemned the destruction of the ICRC delegation in Huambo (Angola).⁹⁴⁷

919. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia "to respect the Red Cross or Red Crescent emblem and not to abuse it, so as to guarantee the safety of the victims it is meant to protect and of all those engaged in humanitarian activities under this emblem".⁹⁴⁸

920. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that "protection must be extended to health personnel in general and, in particular, to Mexican Red Cross personnel as well as their equipment, installations and transport facilities which are duly identified with the red cross on a white background".⁹⁴⁹

921. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "medical and religious personnel, hospitals, ambulances and other medical units and means of transport shall be protected and respected; the red cross emblem, which is the symbol of that protection, must be respected in all circumstances".⁹⁵⁰

922. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "medical and religious personnel, ambulances, hospitals and other medical units and means of transport shall be protected

⁹⁴⁴ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

⁹⁴⁵ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.

⁹⁴⁶ ICRC, Communication to the Press No. 93/24, Conflict in Angola: ICRC Appeals for respect for civilians – Its Huambo delegation destroyed, 4 August 1993.

⁹⁴⁷ Brazilian Red Cross, Communication to the Press, 17 August 1993.

⁹⁴⁸ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

⁹⁴⁹ Mexican Red Cross, *Declaración de Cruz Roja Mexicana en torno a los acontecimientos que se han presentado en el Chiapas a partir del 1o. de enero de 1994*, 3 January 1994, § 2(C).

⁹⁵⁰ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

and respected, the emblem of the Red Cross, which is the symbol of that protection must be respected in all circumstances".⁹⁵¹

923. In a press release in 1995, the ICRC appealed to all the parties involved in Turkey's military operations in northern Iraq "to respect the Red Cross and Red Crescent emblems".⁹⁵²

924. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC listed attacks against buildings, material, medical units and transports, and personnel entitled to use, in conformity with international law, the distinctive emblems of the red cross and red crescent, as serious violations of IHL applicable in international and non-international armed conflicts to be subject to the jurisdiction of the ICC.⁹⁵³

925. In a communication to the press issued in 2000 following two separate incidents in Colombia in which wounded combatants being evacuated by the ICRC were seized and summarily executed by men belonging to opposition forces, the ICRC stated that these acts constituted serious violations of IHL and called on all the warring parties to respect the red cross emblem.⁹⁵⁴

926. In a communication to the press issued in 2001 following the killing of six ICRC staff members by unidentified assailants in the DRC, the ICRC condemned "in the strongest terms this attack and the flouting of the red cross emblem".⁹⁵⁵

927. In 2001, following the bombing of an ICRC compound by US aircraft in Kabul, the ICRC recalled that "international humanitarian law obliges the parties to conflict to respect the red cross and red crescent emblems".⁹⁵⁶

928. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC reminded all the parties involved – the Taliban, the Northern Alliance, and the US-led coalition – of their obligation to respect the red cross and red crescent emblems.⁹⁵⁷

⁹⁵¹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

⁹⁵² ICRC, Press Release No. 1797, ICRC calls for compliance with international humanitarian law in Turkey and Northern Iraq, 22 March 1995.

⁹⁵³ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 2(I).

⁹⁵⁴ ICRC, Communication to the Press No. 00/36, Colombia: ICRC condemns grave breaches of international humanitarian law, suspends medical evacuations of wounded combatants, 3 October 2000.

⁹⁵⁵ ICRC, Communication to the Press No. 01/14, Six ICRC staff killed in Democratic Republic of the Congo, 27 April 2001.

⁹⁵⁶ ICRC, Communication to the Press No. 01/43, ICRC warehouses bombed in Kabul, 16 October 2001.

⁹⁵⁷ ICRC Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

VI. Other Practice

929. In 1980, an armed opposition group agreed to be bound by the obligation to protect medical personnel and objects displaying the red cross emblem.⁹⁵⁸

930. In 1983, a representative of an armed opposition group assured ICRC representatives that it would fully respect persons and vehicles displaying the emblem.⁹⁵⁹

931. In 1985, in a meeting with the ICRC, a representative of an armed opposition group stated that the group respected the emblem and that instructions had been given to the troops to that effect. However, he considered that the National Red Cross Society was only a governmental organisation and was not neutral.⁹⁶⁰ In a subsequent meeting, another representative stated that the display of the emblem was not sufficient to ensure the protection of Red Cross vehicles.⁹⁶¹

932. According to eye-witness statements collected by the ICRC in 1992, a camp for displaced persons protected by the red cross emblem was attacked by an armed opposition group. The ICRC delegates noted that there were no military installations nearby and that the camp was clearly indicated and well known in the region.⁹⁶²

933. In 1992, in a meeting with the ICRC, an armed opposition group agreed to respect the emblem.⁹⁶³

934. In 1995, a representative of an armed opposition group assured the ICRC that the red cross emblem was well known and respected by all, as long as Red Cross vehicles were not used to transport troops.⁹⁶⁴

⁹⁵⁸ ICRC archive document.

⁹⁶¹ ICRC archive document.

⁹⁶⁴ ICRC archive document.

⁹⁵⁹ ICRC archive document.

⁹⁶² ICRC archive document.

⁹⁶⁰ ICRC archive document.

⁹⁶³ ICRC archive document.

HUMANITARIAN RELIEF PERSONNEL AND OBJECTS

A. Safety of Humanitarian Relief Personnel (practice relating to Rule 31)	§§ 1–281
General	§§ 1–138
Attacks on the safety of humanitarian relief personnel	§§ 139–281
B. Safety of Humanitarian Relief Objects (practice relating to Rule 32)	§§ 282–370

A. Safety of Humanitarian Relief Personnel

General

I. Treaties and Other Instruments

Treaties

1. Article III(57)(c) of the 1953 Panmunjon Armistice Agreement provides that “the Commander of each side shall cooperate fully with the joint Red Cross teams in the performance of their functions, and undertakes to insure the security of the personnel of the joint Red Cross teams in the area under his military control”.

2. Article 17(2) AP I allows the parties to a conflict to appeal to aid societies such as National Red Cross and Red Crescent Societies “to collect and care for the wounded, sick and shipwrecked, and to search for the dead and report their location”. It adds that the parties “shall grant both protection and the necessary facilities to those who respond to this appeal”. Article 17 AP I was adopted by consensus.¹

3. Article 71 AP I provides that:

1. Where necessary, relief personnel may form part of the assistance provided in any relief action, in particular for the transportation and distribution of relief consignments; the participation of such personnel shall be subject to the approval of the Party in whose territory they will carry out their duties.
2. Such personnel shall be respected and protected.

Article 71 AP I was adopted by consensus.²

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

4. Article 7(2) of the 1994 Convention on the Safety of UN Personnel provides that “States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel”.

Other Instruments

5. Paragraph 2(d) of the 1992 Agreement No. 2 on the Implementation of the Agreement of 22 May 1992 between the Parties to the Conflict in Bosnia and Herzegovina states that “each party undertakes to provide security guarantees to the ICRC in the accomplishment of its humanitarian activities”.

6. In paragraph II(9) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina, the ICRC requested the parties to “ensure respect for ICRC personnel, local ICRC staff and the personnel of other humanitarian organizations involved in the implementation of this plan”.

7. In paragraph 2 of the 1992 Bahir Dar Agreement, the various Somali organisations attending the meeting on humanitarian issues convened by the Standing Committee on Somalia pledged to guarantee the security of relief personnel.

8. In the 1995 Agreement on Ground Rules for Operation Lifeline Sudan, intended to “improve the delivery of humanitarian assistance to and protection of civilians in need”, the SPLM/A expressed its support for “the following humanitarian conventions and their principles, namely . . . the Geneva Conventions of 1949 and the Protocols Additional to the Geneva Conventions”.

9. Section 9.9 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character and conducted without any adverse distinction, and shall respect personnel . . . involved in such operations”.

10. In paragraph 1 of the 1999 Agreement on the Protection and Provision of Humanitarian Assistance in the Sudan, the parties agreed to inform the UN of any possible security risks to humanitarian personnel, while recognising the right of the organisation to decide on all security issues relating to its personnel as well as to the personnel of NGOs for whom it provided security coverage.

11. In paragraph 67 of the 2000 Cairo Declaration, participating States committed themselves to ensuring the security of relief workers.

II. National Practice

Military Manuals

12. Argentina’s Law of War Manual provides that personnel involved in relief actions shall be respected and protected.³

13. Australia’s Defence Force Manual states that:

³ Argentina, *Law of War Manual* (1989), § 4.11.

In addition to the special immunity granted to civilian and military medical services there is a number of civilian bodies which are given special protection. These include the International Committee of the Red Cross (ICRC), the Red Cross and Red Crescent Societies . . . [and] personnel involved in relief operations.⁴

14. Canada's Code of Conduct provides that "members of the ICRC wearing the distinctive emblem must be protected at all times".⁵ It further states that:

NGOs such as CARE and *Médecins Sans Frontières* might wear other recognizable symbols. The symbols used by CARE, MSF and other NGOs do not benefit from international legal protection, although their work in favour of the victims of armed conflict must be respected. Upon recognition that they are providing care to the sick and wounded, NGOs are also to be respected.⁶

15. France's LOAC Manual states that "the law of armed conflict provides special protection for . . . relief personnel".⁷

16. The Military Manual of the Netherlands states that "personnel engaged in relief activities must be respected and protected. Only in case of imperative military necessity may their activities be limited."⁸

17. Sweden's IHL Manual states that the rules on the recognition of the role of aid organisations under Article 17 AP I and on the protection of personnel in relief actions under Article 71(2) AP I have the status of customary international law.⁹

18. The YPA Military Manual of the SFRY (FRY) provides that relief personnel are entitled to protection in the performance of their task of "civil protection" and shall not be made the object of attack.¹⁰ The Report on the Practice of the SFRY (FRY) states that the wording "civil protection" also covers humanitarian assistance.¹¹

National Legislation

19. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 17(2) and 71 AP I, is a punishable offence.¹²

20. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹³

⁴ Australia, *Defence Force Manual* (1994), § 925.

⁵ Canada, *Code of Conduct* (2001), Rule 10, § 7.

⁶ Canada, *Code of Conduct* (2001), Rule 10, § 9.

⁷ France, *LOAC Manual* (2001), p. 95. ⁸ Netherlands, *Military Manual* (1993), p. VIII-4, § 3.

⁹ Sweden, *IHL Manual* (1991), Section 2.2.3, pp. 18-19.

¹⁰ SFRY (FRY), *YPA Military Manual* (1988), §§ 277-278.

¹¹ Report on the Practice of SFRY (FRY), 1997, Chapter 4.2.

¹² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹³ Norway, *Military Penal Code as amended* (1902), § 108(b).

21. The Act on Child Protection of the Philippines contains an article on “children in situations of armed conflicts” which states that “the safety and protection of those who provide [emergency relief] services . . . shall be ensured”.¹⁴

National Case-law

22. No practice was found.

Other National Practice

23. In 2000, during a debate in the UN Security Council on the protection of UN and associated personnel and humanitarian personnel in conflict zones, Australia recalled the duty of States to provide physical protection and assistance to UN and humanitarian personnel.¹⁵

24. According to the Report on the Practice of Egypt, “because of the importance of relief personnel and objects for the survival of the civilian population, Egypt believes that their protection is a *sine qua non conditio*”.¹⁶

25. In 1997, during a debate in the UN General Assembly, Germany called upon all parties to the conflict in Afghanistan to ensure the safety of UN and other international humanitarian personnel.¹⁷

26. In 1998, during a debate in the UN General Assembly, Germany deeply deplored “the hostility, particularly among the Taliban, towards the community of international aid workers in Afghanistan” and emphasised that “safety and security [of humanitarian relief personnel] is a non-negotiable issue and a prerequisite for the delivery of humanitarian assistance”.¹⁸

27. According to the Report on the Practice of India, relief personnel enjoy the same protection as medical and religious personnel.¹⁹

28. At the First Periodical Meeting on International Humanitarian Law in 1998, the Iraqi representative requested that “urgent measures be taken to protect relief personnel”.²⁰

29. On the basis of the reply by Iraq’s Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that:

Protection of relief personnel is an absolute principle, without any restriction, for they must be allowed to perform their activities without impediment, even if the matter necessitates the request for holding a temporary armistice to make room

¹⁴ Philippines, *Act on Child Protection* (1992), Article X, Section 22(d).

¹⁵ Australia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 6.

¹⁶ Report on the Practice of Egypt, 1997, Chapter 4.2.

¹⁷ Germany, Statement before the UN General Assembly, UN Doc. A/52/PV.74, 16 December 1997, p. 2.

¹⁸ Germany, Statement before the UN General Assembly, UN Doc. A/53/PV.84, 9 December 1998, p. 3.

¹⁹ Report on the Practice of India, 1997, Chapter 4.2.

²⁰ Iraq, Statement at the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998.

for them to carry out their humanitarian roles. The personnel include staff of the International and National Red Cross and Red Crescent.²¹

30. According to the Report on the Practice of Jordan, Jordan has “always assumed the safety of those who are engaged in humanitarian action”.²²

31. According to the Report on the Practice of Kuwait, it is the *opinio juris* of Kuwait that humanitarian relief personnel must be protected from the effects of military operations.²³

32. On the basis of an interview with a legal advisor of the Ministry of Defence, the Report on the Practice of the Netherlands notes that during the negotiations on the 1980 Protocol II to the CCW, one of the more important issues for the Netherlands was “the protection of humanitarian personnel, ICRC delegates in particular, and military personnel assisting in humanitarian relief operations”. It adds that “the Netherlands would have preferred more protective provisions than are now included in the text”.²⁴

33. According to the Report on the Practice of Nigeria, it is the *opinio juris* of Nigeria that the protection of relief personnel is part of customary international law.²⁵

34. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that humanitarian personnel are protected in Rwanda; if necessary, they receive special protection from the Rwandan armed forces. The report notes that there is no practice in Rwanda which could be considered contrary to the principle of the protection of humanitarian personnel. According to the report, it is the *opinio juris* of Rwanda that the principle of the protection of humanitarian personnel is an obligation binding upon all States under customary international law.²⁶

35. In 2000, during a debate in the UN Security Council on the protection of UN and associated personnel and humanitarian personnel in conflict zones, Slovenia referred to States’ primary responsibility to ensure the safety and security of such personnel.²⁷

36. In 2000, during a debate in the UN Security Council on the protection of UN and associated personnel and humanitarian personnel in conflict zones, South Africa stated that “the primary responsibility for the protection of United Nations and humanitarian personnel lies with the host Government”. However,

²¹ Report on the Practice of Iraq, 1998, Reply by the Iraqi Ministry of Defence to a questionnaire, July 1997, Chapter 4.2.

²² Report on the Practice of Jordan, 1997, Chapter 4.2.

²³ Report on the Practice of Kuwait, 1997, Chapter 4.2.

²⁴ Report on the Practice of Netherlands, 1997, Interview with a legal advisor of the Ministry of Defence, 28 July 1997, Chapter 4.2.

²⁵ Report on the Practice of Nigeria, 1997, Chapter 4.2.

²⁶ Report on the Practice of Rwanda, 1997, Replies by Rwandan army officers to a questionnaire, Chapter 4.2.

²⁷ Slovenia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 8.

he added that “non-state parties should similarly protect such personnel, in line with the provisions of international humanitarian law”.²⁸

37. At the First Periodical Meeting on International Humanitarian Law in 1998, Switzerland presented a working paper on the topic of respect for and security of the personnel of humanitarian organisations in which it recommended that “States intensify their efforts in the dissemination of international humanitarian law, especially within their armed and security forces...by emphasising respect for and the protection of humanitarian action and personnel”.²⁹

38. The Report on UK Practice states that “as regards protection of relief personnel and objects, the UK has, both in words and in action, demonstrated support for this principle, as in Iraq, and in the former Yugoslavia”.³⁰

39. According to the Report on the Practice of Zimbabwe, “Zimbabwe regards the relevant provisions of the Geneva Conventions guaranteeing the activities of relief personnel as part of international customary law”.³¹

40. In 1996, a State made assurances that it guaranteed the security of ICRC personnel, but insisted it could not do so in the area controlled by the opposition.³²

III. Practice of International Organisations and Conferences

United Nations

41. In a resolution adopted in 1992, the UN Security Council urged all parties to the conflict in Somalia “to take all the necessary measures to ensure the safety of personnel sent to provide humanitarian assistance, to assist them in their tasks and to ensure full respect for the rules and principles of international law regarding the protection of civilian populations”.³³ This demand was reiterated in 1993.³⁴

42. In a resolution adopted in 1992, in the context of the conflict in Somalia, the UN Security Council called upon “all parties, movements and factions, in Mogadishu in particular, and in Somalia in general, to respect fully the security and safety of humanitarian organizations”.³⁵ This call was reiterated in a subsequent resolution in the same year.³⁶

²⁸ South Africa, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 4.

²⁹ Switzerland, Working Paper on Respect for and Security of the Personnel of Humanitarian Organisations, First Periodical Meeting on International Humanitarian Law, Doc. RPDH1/RP, Geneva, 19–23 January 1998, p. 1, § 3.

³⁰ Report on UK Practice, 1997, Chapter 4.2.

³¹ Report on the Practice of Zimbabwe, 1998, Chapter 4.2.

³² ICRC archive document.

³³ UN Security Council, Res. 733, 23 January 1992, § 8.

³⁴ UN Security Council, Res. 814, 26 March 1993, § 9.

³⁵ UN Security Council, Res. 746, 17 March 1992, § 8.

³⁶ UN Security Council, Res. 751, 24 April 1992, § 14.

43. In a resolution adopted in 1992, the UN Security Council demanded that all parties to the conflict in Bosnia and Herzegovina cooperate fully with international humanitarian agencies and take all necessary steps to ensure the safety of their personnel.³⁷ This demand was reiterated the same year.³⁸
44. In a resolution adopted in 1993, the UN Security Council demanded that “all parties guarantee the safety . . . of all other United Nations personnel as well as members of humanitarian organizations”.³⁹ The same year, the Council declared that “full respect for the safety of the personnel engaged in these [humanitarian] operations” in Bosnia and Herzegovina should be observed.⁴⁰
45. In a resolution adopted in 1993 concerning the conflict in Angola, the UN Security Council reiterated “its appeal to both parties to take all necessary measures to ensure the security of UNAVEM II personnel as well as of the personnel involved in humanitarian relief operations”.⁴¹
46. In a resolution adopted in 1993 on security and safety of UN forces and personnel, the UN Security Council urged States and parties to a conflict “to cooperate closely with the United Nations to ensure the security and safety of United Nations forces and personnel”.⁴²
47. In a resolution adopted in 1994 in the context of the conflict in Somalia, the UN Security Council emphasised the importance it attached to “the safety and security of United Nations and other personnel engaged in humanitarian relief . . . throughout Somalia”.⁴³ This statement was repeated in subsequent resolutions later that year.⁴⁴
48. In a resolution adopted in 1994, the UN Security Council demanded that “all parties in Rwanda strictly respect the persons and premises of the United Nations and other organizations serving in Rwanda”.⁴⁵ This demand was reiterated in a subsequent resolution a few weeks later.⁴⁶
49. In a resolution on Somalia adopted in 1994, the UN Security Council underlined “the responsibility of the Somali parties for the security and safety of [international] personnel”.⁴⁷
50. In a resolution adopted in 1994 in the context of the conflict in Angola, the UN Security Council demanded that “both parties grant security clearances and guarantees for relief deliveries to all locations and refrain from any action which could jeopardize the safety of relief personnel”.⁴⁸

³⁷ UN Security Council, Res. 758, 8 June 1992, § 7.

³⁸ UN Security Council, Res. 770, 13 August 1992, § 6; Res. 787, 16 November 1992, § 18.

³⁹ UN Security Council, Res. 819, 16 April 1993, preamble and § 10.

⁴⁰ UN Security Council, Res. 824, 6 May 1993, § 4 (b).

⁴¹ UN Security Council, Res. 851, 15 July 1993, § 20.

⁴² UN Security Council, Res. 868, 29 September 1993, § 3, see also §§ 4–6.

⁴³ UN Security Council, Res. 897, 4 February 1994, preamble.

⁴⁴ UN Security Council, Res. 923, 31 May 1994, preamble; Res. 954, 4 November 1994, preamble.

⁴⁵ UN Security Council, Res. 918, 17 May 1994, § 11.

⁴⁶ UN Security Council, Res. 925, 8 June 1994, § 11.

⁴⁷ UN Security Council, Res. 946, 30 September 1994, preamble.

⁴⁸ UN Security Council, Res. 952, 27 October 1994, § 7.

51. In a resolution adopted in 1994 on the situation in Somalia, the UN Security Council emphasised “the responsibility of the Somali parties for the security and safety of . . . personnel engaged in humanitarian activities”.⁴⁹

52. In a resolution adopted in 1995 on the situation in Liberia, the UN Security Council demanded that “all factions in Liberia strictly respect the status of personnel of the ECOWAS Monitoring Group and UNOMIL and those of organizations and personnel delivering humanitarian assistance throughout Liberia”.⁵⁰ This demand was reiterated in two further resolutions adopted the same year.⁵¹

53. In a resolution adopted in 1995 in the context of the conflict in Bosnia and Herzegovina, the UN Security Council demanded that all parties fully respect the safety of UNPROFOR personnel and others engaged in the delivery of humanitarian assistance.⁵²

54. In a resolution adopted in 1996, the UN Security Council underlined “the responsibility of the authorities in Burundi for the security of international personnel”.⁵³

55. In a resolution adopted in 1996, the UN Security Council demanded that “all factions in Liberia strictly respect the status of ECOMOG and UNOMIL personnel, as well as organizations and agencies delivering humanitarian assistance throughout Liberia”.⁵⁴ This demand was reiterated in two further resolutions adopted the same year.⁵⁵

56. In a resolution adopted in 1996, the UN Security Council demanded that “all parties to the conflict and others concerned in Angola take all necessary measures to ensure the safety of United Nations and other international personnel and premises and to guarantee the safety . . . of humanitarian supplies throughout the country”.⁵⁶ This demand was reiterated in a subsequent resolution later the same year.⁵⁷

57. In a resolution adopted in 1996, the UN Security Council demanded that the parties to the conflict in Bosnia and Herzegovina respect the security and freedom of movement of SFOR and other international personnel.⁵⁸

58. In a resolution adopted in 1997 on the implementation of the Lusaka Peace Accords in Angola, the UN Security Council demanded that the government of Angola “ensure the safety of MONUA and other international personnel”.⁵⁹

⁴⁹ UN Security Council, Res. 954, 4 November 1994, § 7.

⁵⁰ UN Security Council, Res. 985, 13 April 1995, § 6.

⁵¹ UN Security Council, Res. 1001, 30 June 1995, § 13; Res. 1014, 15 September 1995, § 13.

⁵² UN Security Council, Res. 998, 16 June 1995, § 1.

⁵³ UN Security Council, Res. 1040, 29 January 1996, preamble.

⁵⁴ UN Security Council, Res. 1041, 29 January 1996, § 6.

⁵⁵ UN Security Council, Res. 1059, 31 May 1996, § 7; Res. 1071, 30 August 1996, § 10.

⁵⁶ UN Security Council, Res. 1075, 11 October 1996, § 18.

⁵⁷ UN Security Council, Res. 1087, 11 December 1996, § 16.

⁵⁸ UN Security Council, Res. 1088, 12 December 1996, § 23.

⁵⁹ UN Security Council, Res. 1127, 28 August 1997, § 14.

59. In a resolution adopted in 1998, the UN Security Council called upon the Angolan government and UNITA "to guarantee unconditionally the safety [and] security . . . of all United Nations personnel and international personnel".⁶⁰

60. In a resolution adopted in 1998, the UN Security Council demanded that "all Afghan factions and, in particular the Taliban, do everything possible to assure the safety . . . of the United Nations and other international and humanitarian personnel".⁶¹

61. In a resolution adopted in 1998, the UN Security Council demanded that:

the Government of Angola and in particular UNITA guarantee unconditionally the safety and freedom of movement of the Special Representative of the UN Secretary-General and all United Nations and international humanitarian personnel, including those providing humanitarian assistance.⁶²

62. In a resolution adopted in 1998 on the situation in Kosovo, the UN Security Council reminded the FRY that "it has the primary responsibility for . . . the safety and security of all international and non-governmental humanitarian personnel in the Federal Republic of Yugoslavia".⁶³ This reminder was repeated in a subsequent resolution in 1999.⁶⁴

63. In a resolution adopted in 1999, the UN Security Council underscored the importance of "the safety [and] security . . . of United Nations and associated personnel to the alleviation of the impact of armed conflict on children".⁶⁵

64. In a resolution adopted in 1999, the UN Security Council emphasised "the need for combatants to ensure the safety [and] security . . . of United Nations and associated personnel, as well as personnel of international humanitarian organizations".⁶⁶

65. In a resolution adopted in 2000, the UN Security Council, without reference to any particular conflict, called upon all parties concerned, including non-State parties, "to ensure the safety, security and freedom of movement of United Nations and associated personnel, as well as personnel of humanitarian organizations".⁶⁷

66. In 1993, in a statement by its President, the UN Security Council reiterated its demand that "States and other parties to various conflicts take all possible steps to ensure the safety and security of United Nations . . . personnel".⁶⁸

67. In 1993, in a statement by its President following accounts of "an attack to which an humanitarian convoy under the protection of UNPROFOR was subjected on 25 October 1993 in central Bosnia", the UN Security Council called

⁶⁰ UN Security Council, Res. 1173, 12 June 1998, § 9.

⁶¹ UN Security Council, Res. 1193, 28 August 1998, § 7.

⁶² UN Security Council, Res. 1195, 15 September 1998, § 9.

⁶³ UN Security Council, Res. 1199, 23 September 1998, § 10.

⁶⁴ UN Security Council, Res. 1203, 4 October 1998, § 8.

⁶⁵ UN Security Council, Res. 1261, 25 August 1999, § 12.

⁶⁶ UN Security Council, Res. 1265, 17 September 1999, § 8.

⁶⁷ UN Security Council, Res. 1296, 19 April 2000, § 12.

⁶⁸ UN Security Council, Statement by the President, UN Doc. S/25493, 31 March 1993, p. 2.

upon all parties to the conflict in the former Yugoslavia "to guarantee . . . the security of the personnel responsible" for humanitarian assistance.⁶⁹

68. In 1994, in a statement by its President concerning the conflict in Bosnia and Herzegovina, the UN Security Council demanded that "all parties ensure the safety and security of . . . United Nations personnel and those of non-governmental organizations".⁷⁰

69. In 1994, in a statement by its President concerning the situation in Rwanda, the UN Security Council urged all parties and factions to respect the "safety and security of . . . United Nations personnel".⁷¹

70. In 1994, in a statement by its President, the UN Security Council underlined "the responsibility of the Somali parties for the security and safety" of international personnel, including the staff of non-governmental organisations.⁷²

71. In 1995, in a statement by its President concerning the situation in Croatia, the UN Security Council reminded the parties, and in particular the Croatian government, "that they have an obligation to respect United Nations personnel [and] to ensure their safety . . . at all times".⁷³

72. In 1996, in two statements by its President, the UN Security Council underlined "the responsibility of all parties in Somalia for ensuring the safety and security of humanitarian and other international personnel".⁷⁴

73. In 1996, in a statement by its President, the UN Security Council stressed that "the authorities in Burundi are responsible for the security of personnel of international humanitarian organizations" and called upon the government of Burundi "to provide adequate security to food convoys and humanitarian personnel".⁷⁵

74. In 1996, in a statement by its President, the UN Security Council called upon the parties to the conflict in Tajikistan "to ensure the safety . . . of the personnel of the United Nations and other international organizations".⁷⁶ The Security Council reiterated its call in another statement by its President two months later.⁷⁷

⁶⁹ UN Security Council, Statement by the President, UN Doc. S/26661, 28 October 1993, p. 1.

⁷⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 1.

⁷¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/16, 7 April 1994, p. 1.

⁷² UN Security Council, Statement by the President, UN Doc. S/PRST/1994/46, 25 August 1994, p. 2.

⁷³ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

⁷⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/4, 24 January 1996; Statement by the President, UN Doc. S/PRST/1996/47, 20 December 1996.

⁷⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/1, 5 January 1996, pp. 1–2.

⁷⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/14, 29 March 1996, p. 2.

⁷⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/25, 21 May 1996, p. 2.

75. In 1996, in a statement by its President, the UN Security Council reminded all parties to the conflict in Liberia of their responsibility "to ensure the safety of United Nations and other international personnel".⁷⁸

76. In 1996, in a statement by its President concerning, the UN Security Council demanded that all parties to the conflict in Afghanistan "fulfil their obligations and commitments regarding the safety of the United Nations personnel and other international personnel in Afghanistan".⁷⁹

77. In 1996, in a statement by its President, the UN Security Council stressed that the international community's ability to assist in the conflict in Georgia depended on "the full cooperation of the parties, especially the fulfilment of their obligations regarding the safety . . . of international personnel".⁸⁰

78. In 1996, in a statement by its President, the UN Security Council called on all parties in the Great Lakes region "to ensure the security . . . of all international humanitarian personnel".⁸¹

79. In 1997, in a statement by its President with respect to the situation in the Great Lakes region, the UN Security Council demanded that the parties ensure "the security . . . of all United Nations and humanitarian personnel".⁸²

80. In 1997, in a statement by its President, the UN Security Council called upon the parties "to ensure the safety . . . of the personnel of the United Nations . . . and other international personnel in Tajikistan".⁸³

81. In 1997, in a statement by its President, the UN Security Council called upon the Somali factions "to ensure the safety . . . of all humanitarian personnel".⁸⁴

82. In 1997, in a statement by its President, the UN Security Council emphasised "the unacceptability of any acts endangering the safety and security of United Nations and associated personnel, as well as personnel of international humanitarian organizations".⁸⁵

83. In 1997, in a statement by its President concerning the situation in the Great Lakes region, the UN Security Council called upon the ADFL in the strongest terms "to guarantee the safety of humanitarian relief workers . . . in the areas which the ADFL control".⁸⁶

⁷⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/16, 9 April 1996, p. 1.

⁷⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/40, 28 September 1996, p. 1.

⁸⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/43, 22 October 1996, p. 2.

⁸¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/44, 1 November 1996, p. 1.

⁸² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/5, 7 February 1997, p. 1.

⁸³ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/6, 7 February 1997, p. 2.

⁸⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/8, 27 February 1997.

⁸⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/13, 12 March 1997, p. 1.

⁸⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/22, 24 April 1997, p. 1.

84. In 1997, in a statement by its President following the military coup d'état in Sierra Leone, the UN Security Council recalled the obligations of all concerned "to ensure the protection of United Nations and other international personnel in the country".⁸⁷

85. In 1997, in a statement by its President in the context of the conflict in the DRC, the UN Security Council called for "safety for humanitarian relief workers".⁸⁸

86. In 1997, in a statement by its President following a debate on the protection of humanitarian assistance to refugees and others in conflict situations, the UN Security Council called upon all parties concerned "to ensure the safety and security of [UN and associated] personnel as well as personnel of humanitarian organizations" and encouraged all States "to consider ways and means to strengthen the protection of such personnel".⁸⁹

87. In 1997, in a statement by its President concerning the conflict in Angola, the UN Security Council called upon UNITA in particular "to ensure... the safety... of international humanitarian organizations".⁹⁰

88. In 1998, in a statement by its President concerning the conflict in Afghanistan, the UN Security Council expressed its deep concern about "the deteriorating security conditions for United Nations and humanitarian personnel" and called upon all Afghan factions, in particular the Taliban, "to take necessary steps to assure their safety".⁹¹

89. In 1998, in a statement by its President, the UN Security Council expressed concern "for the safety of all humanitarian personnel working in Sierra Leone" and called on all parties concerned "to facilitate the work of humanitarian agencies".⁹²

90. In 1998, in a statement by its President, the UN Security Council demanded that the Angolan government and in particular UNITA "guarantee unconditionally the safety... of all United Nations and other international personnel".⁹³

91. In 1998, in a statement by its President, the UN Security Council urged all Afghan factions "to cooperate fully with the United Nations Special Mission to Afghanistan and international humanitarian organizations" and called upon them, in particular the Taliban, "to take all necessary steps to ensure the safety... of such personnel".⁹⁴ This demand was reiterated later in the year.⁹⁵

⁸⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/29, 27 May 1997.

⁸⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.

⁸⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/34, 19 June 1997, p. 2.

⁹⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/39, 23 July 1997, p. 1.

⁹¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998, p. 2.

⁹² UN Security Council, Statement by the President, UN Doc. S/PRST/1998/13, 20 May 1998, p. 2.

⁹³ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/14, 22 May 1998, p. 1.

⁹⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998, p. 2.

⁹⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/24, 6 August 1998, p. 2.

92. In 1998, in a statement by its President, the UN Security Council urged all parties to the conflict in the DRC “to guarantee the safety and security of United Nations and humanitarian personnel”.⁹⁶

93. In 1998, in a statement by its President, the UN Security Council recalled its “condemnation of the murders of members of the United Nations Special Mission to Afghanistan and the personnel of humanitarian agencies in areas controlled by the Taliban” and demanded that the Taliban “ensure the safety and security of all international personnel”.⁹⁷

94. In a resolution adopted in 1992 on the conflict in the former Yugoslavia, the UN General Assembly demanded that “all parties to the conflict ensure complete safety and freedom of movement for the International Committee of the Red Cross and otherwise facilitate such access”.⁹⁸

95. In a resolution adopted in 1994, the UN General Assembly emphasised that it was “the duty of all parties to the conflict in Sudan to protect relief workers”.⁹⁹

96. In a resolution adopted in 1995, the UN General Assembly strongly urged all parties to the conflict in Afghanistan “to take all necessary measures to ensure the safety of all personnel of humanitarian organizations”.¹⁰⁰

97. In a resolution adopted in 1995 on the situation in Rwanda, the UN General Assembly acknowledged “the responsibility of the Government of Rwanda for the safety and security of all personnel attached to the United Nations Mission for Rwanda . . . and humanitarian organizations” and called upon the government of Rwanda “to take all necessary measures to ensure the safety and security of all personnel attached to the United Nations Assistance Mission for Rwanda . . . and humanitarian organizations”.¹⁰¹

98. In a resolution adopted in 1996, the UN General Assembly called upon “all parties, movements and factions in Somalia to respect fully the safety and security of personnel of the United Nations and its specialized agencies and of non-governmental organizations”.¹⁰²

99. In a resolution adopted in 1996 on the situation of human rights in Afghanistan, the UN General Assembly strongly urged “all parties to the conflict to take all necessary measures to ensure the safety of all personnel of humanitarian organizations . . . in Afghanistan”.¹⁰³

100. In a resolution adopted in 1996 on the 1994 Convention on the Safety of UN Personnel, the UN General Assembly expressed the need “to promote and

⁹⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, p. 2.

⁹⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/27, 15 September 1998, p. 1.

⁹⁸ UN General Assembly, Res. 46/242, 25 August 1992, § 9.

⁹⁹ UN General Assembly, Res. 49/198, 23 December 1994, preamble.

¹⁰⁰ UN General Assembly, Res. 50/189, 22 December 1995, § 9.

¹⁰¹ UN General Assembly, Res. 50/200, 22 December 1995, preamble and § 5.

¹⁰² UN General Assembly, Res. 51/30 G, 13 December 1996, § 8.

¹⁰³ UN General Assembly, Res. 51/108, 12 December 1996, § 9.

protect the safety and security of the personnel who act on behalf of the United Nations".¹⁰⁴

101. In a resolution adopted in 1997 on the situation of human rights in Afghanistan, the UN General Assembly demanded that "all Afghan parties fulfil their obligations and commitments regarding the safety of all personnel of . . . the United Nations and other international organizations".¹⁰⁵

102. In a resolution adopted in 1997 on the safety and security of humanitarian personnel, the UN General Assembly called upon "all Governments and parties in countries where humanitarian personnel are operating to take all possible measures to ensure that the lives and well-being of humanitarian personnel are respected and protected".¹⁰⁶

103. In a resolution adopted in 1998, the UN General Assembly, referring to the situation in Kosovo, called upon the government of the FRY (Serbia and Montenegro) and all others concerned to ensure the safety and security of humanitarian personnel.¹⁰⁷

104. In a resolution adopted in 1999 on the safety and security of humanitarian personnel and protection of UN personnel, the UN General Assembly recalled that:

Primary responsibility under international law for the security and protection of humanitarian personnel and United Nations and its associated personnel lies with the Government hosting a United Nations operation conducted under the Charter of the United Nations or its agreements with relevant organizations.

It urged all other parties involved in armed conflicts "to ensure the security and protection of all humanitarian personnel and United Nations and its associated personnel".¹⁰⁸ The General Assembly further urged all States "to take the necessary measures to ensure the full and effective implementation of the relevant principles and rules of international humanitarian law, as well as relevant provisions of human rights law related to the safety and security of humanitarian personnel and United Nations personnel" and "to take the necessary measures to ensure the safety and security of humanitarian personnel and United Nations and its associated personnel".¹⁰⁹

105. In a resolution adopted in 2000 on the situation of human rights in the Sudan, the UN General Assembly expressed its deep concern at continuing serious violations of IHL by all parties, in particular "the conditions imposed by SPLA/M on humanitarian organizations working in the southern Sudan, which have seriously affected their safety and led to the withdrawal of many of them".¹¹⁰

¹⁰⁴ UN General Assembly, Res. 51/137, 13 December 1996, § 3.

¹⁰⁵ UN General Assembly, Res. 52/145, 12 December 1997, § 9.

¹⁰⁶ UN General Assembly, Res. 52/167, 16 December 1997, § 4.

¹⁰⁷ UN General Assembly, Res. 53/164, 9 December 1998, § 24.

¹⁰⁸ UN General Assembly, Res. 54/192, 17 December 1999, preamble.

¹⁰⁹ UN General Assembly, Res. 54/192, 17 December 1999, §§ 1 and 2.

¹¹⁰ UN General Assembly, Res. 55/116, 4 December 2000, § 2(a)(vi).

106. In a resolution adopted in 2001 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed its deep concern at continuing serious violations of IHL by all parties to the conflict, in particular “the conditions, in contravention of humanitarian principles, imposed by the Sudanese People’s Liberation Army on humanitarian organizations working in southern Sudan, which have seriously affected their safety”.¹¹¹

107. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights called upon the Burundian authorities “to ensure the security... of foreigners present in Burundian territory, including those who are providing humanitarian or other assistance to Burundi”.¹¹²

Other International Organisations

108. In a resolution adopted in 1989, the Parliamentary Assembly of the Council of Europe stated that it was “preoccupied by the increase in breaches in the security of delegates of the ICRC”.¹¹³

109. In a declaration by the Presidency in 1998 with respect to the situation in Sierra Leone, the EU urged ECOMOG “to ensure that international humanitarian law is upheld and to ensure the security of those engaged in providing such relief”.¹¹⁴

110. In a declaration by the Presidency in 1998, the EU called upon all parties to the conflict in Sudan “to respect and guarantee the security of all personnel of aid organizations and relief flights and their crews”.¹¹⁵

111. In a statement by the Presidency in 1999 on the occasion of the 50th anniversary of the Geneva Conventions, the EU stated that during armed conflicts, the security of humanitarian personnel was frequently not respected.¹¹⁶

112. In 1994, the North Atlantic Council demanded “strict respect for the safety of UNPROFOR and other UN relief agency personnel throughout Bosnia-Herzegovina”.¹¹⁷

113. In a resolution adopted in 1994, the OAU Council of Ministers urged member States and warring parties to ensure the safety of relief personnel.¹¹⁸

114. In a resolution adopted in 1996, the OAU Council of Ministers urged member States “to take all necessary steps to ensure that the personnel of humanitarian organizations are protected and respected by all, in conformity with international law especially international humanitarian law”.¹¹⁹

¹¹¹ UN Commission on Human Rights, Res. 2001/18, 20 April 2001, § 2(a)(vii).

¹¹² UN Sub-Commission on Human Rights, Res. 1996/41, 19 August 1996, § 6.

¹¹³ Council of Europe, Parliamentary Assembly, Res. 921, 6 July 1989, § 8.

¹¹⁴ EU, Declaration on the situation in Sierra Leone by the Presidency on behalf of the EU, 20 February 1998, § 2.

¹¹⁵ EU, Declaration on Sudan by the Presidency on behalf of the EU, 14 August 1998, § 11.

¹¹⁶ EU, Statement by the Presidency on behalf of the EU at the 50th anniversary of the Four Geneva Conventions, 12 August 1999, § 5.

¹¹⁷ North Atlantic Council, Decision taken at the meeting of 9 February 1994, annexed to Council of Europe, Report to the Parliamentary Assembly on the situation in Bosnia-Herzegovina, Doc. No. 7065, 12 April 1994, Appendix I, § 12.

¹¹⁸ OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 5.

¹¹⁹ OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996, § 10.

115. In a resolution adopted in 1996, the OAU Council of Ministers called upon the authorities of Burundi “to take necessary measures to ensure the safety of . . . the personnel of international organizations, IGOs, NGOs, who currently risk their lives to render humanitarian assistance”.¹²⁰

116. In a decision adopted in 1997, the OAU Council of Ministers called upon “the Member States concerned to create conditions of peace and security in order to ensure . . . the safety of relief workers”.¹²¹

117. In a resolution adopted in 1994, the OAS General Assembly urged all member States “to do their utmost to guarantee the security of personnel engaged in humanitarian activities, so as to ensure protection and assistance for all victims”.¹²²

International Conferences

118. In a public statement issued on 31 October 1992, the International Conference on the Former Yugoslavia asked all parties to the conflict to avoid harming UNHCR and other international humanitarian workers in Travnik and called upon all political and military leaders to issue instructions to prevent the further endangerment of these relief workers.¹²³

119. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 demanded that “measures be taken at the national, regional and international levels to allow assistance and relief personnel to carry out in all safety their mandate in favour of the victims of an armed conflict”. It further urged “all States to make every effort to . . . take the appropriate measures to enhance respect for [the] safety, security and integrity [of humanitarian organisations], in conformity with applicable rules of international humanitarian law”.¹²⁴

120. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 called for “safe and timely access for [humanitarian] assistance”.¹²⁵

121. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on principles and action in international humanitarian assistance and protection calling on States “to fully respect humanitarian operations and the personnel engaged therein in all circumstances”.¹²⁶

122. In 1999, the 102nd Inter-Parliamentary Conference in Berlin adopted a resolution on the occasion of the 50th anniversary of the Geneva Conventions

¹²⁰ OAU, Council of Ministers, Res. 1649 (LXIV), 1–5 July 1996, § 4.

¹²¹ OAU, Council of Ministers, Dec. 362 (LXVI) Rev.1, 28–31 May 1997, § d.

¹²² OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 3.

¹²³ International Conference on the Former Yugoslavia, Statement, 31 October 1992, reprinted in Report of the UN Secretary-General on the International Conference on the Former Yugoslavia, UN Doc. S/24795, 11 November 1992, § 11.

¹²⁴ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, §§ I (7) and II (8), *ILM*, Vol. 33, 1994, pp. 299 and 301.

¹²⁵ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/24, 12 July 1993, § I(29).

¹²⁶ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. IV, § 2(d).

concerning the contribution of parliaments to ensuring respect for and promoting IHL. The resolution called upon States “to strengthen safety and security requirements for humanitarian personnel, including locally recruited staff”.¹²⁷

123. The Plan of Action for the years 2000–2003 adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999 states that “humanitarian personnel will be respected and protected at all times”.¹²⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

124. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

125. In 1992, the ICRC appealed to all parties to the conflict in Bosnia and Herzegovina to “take the action necessary to ensure that ICRC delegates can work effectively and rapidly in adequate conditions of security”.¹²⁹

126. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “to facilitate relief operations . . . and to respect the personnel, vehicles and premises involved”.¹³⁰

127. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “the personnel, vehicles and premises of relief agencies shall be protected”.¹³¹

128. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “relief operations aimed at the civilian population which are exclusively humanitarian, impartial and non-discriminatory shall be facilitated and respected. The personnel, vehicles and premises of relief agencies shall be protected.”¹³²

129. At its Seville Session in 1997, the Council of Delegates adopted a resolution on peace, international humanitarian law and human rights in which it reaffirmed that “humanitarian law also extends protection to the relief work

¹²⁷ 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the fiftieth anniversary of the Geneva Conventions, § 3.

¹²⁸ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 2.4, § 12.

¹²⁹ ICRC, Bosnia-Herzegovina: Solemn appeal to all parties to the conflict, *IRRC*, No. 290, 1992, p. 493.

¹³⁰ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹³¹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § IV, *IRRC*, No. 320, 1997, p. 505

¹³² ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § IV, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

of impartial and humanitarian organizations” and further reaffirmed “the obligation, under international humanitarian law, of parties to armed conflicts to respect and protect relief work and in particular personnel engaged in relief operations”.¹³³

130. In a preparatory document for the First Periodical Meeting on International Humanitarian Law in 1998, the ICRC emphasised that “generally speaking, the relief operations provided for under international humanitarian law cannot be carried out unless the security of the humanitarian personnel involved is guaranteed. Their safety is therefore directly linked to respect for the law.”¹³⁴

131. In a communication to the press issued in 2000 following two separate incidents in Colombia in which wounded combatants being evacuated by the ICRC were seized and summarily executed by men belonging to opposition forces, the ICRC called on all the warring parties to respect individuals engaged in humanitarian work for the victims of the conflict.¹³⁵

132. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC reminded all the parties involved – the Taliban, the Northern Alliance and the US-led coalition – of their obligation to “ensure the safety of medical and humanitarian personnel”.¹³⁶

VI. Other Practice

133. In 1982, in a meeting with the ICRC, an armed opposition group declared that it would respect ICRC operations and the lives of ICRC delegates.¹³⁷

134. In a resolution adopted in 1991, the Politico-Military High Command of the SPLM/A stated that “all international and local relief, rehabilitation and development assistance and efforts shall be organized and processed through the Sudan Relief and Rehabilitation Association (SRRA) which shall remain an autonomous humanitarian organization”.¹³⁸

135. The SRRA Model Agreement, concluded by the SPLM/A with various international NGOs and agencies in the context of the conflict in southern

¹³³ International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 8, Part 5, preamble and § 3.

¹³⁴ ICRC, Respect for and protection of the personnel of humanitarian organizations, Preparatory document for the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998, p. 19.

¹³⁵ ICRC, Communication to the Press No. 00/36, Colombia: ICRC condemns grave breaches of international humanitarian law, suspends medical evacuations of wounded combatants, 3 October 2000.

¹³⁶ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

¹³⁷ ICRC archive document.

¹³⁸ SPLM/A, PMHC Resolution No. 10: Relief assistance, 9 September 1991, § 3, Report on SPLM/A Practice, 1998, Chapter 4.1

Sudan, is aimed at protecting relief personnel and facilitating the delivery of humanitarian relief.¹³⁹

136. In 1994, the SPLM/A concluded an agreement with Operation Lifeline Sudan (OLS), which sought to determine possible corridors for the delivery of relief supplies and humanitarian assistance to war-affected areas. The agreement recognised that “the delivery of humanitarian assistance should be as far as possible practical, safe and cost effective”.¹⁴⁰

137. In 1994, an armed opposition group committed itself to ensuring that the security of ICRC installations, personnel, equipment and activities within its territory were guaranteed in accordance with the provisions of the Geneva Conventions.¹⁴¹

138. At the International Symposium on Water in Armed Conflicts held in Montreux (Switzerland) in 1994, the group of international experts present agreed to “aim for absolute protection of water supplies and systems, and to extend legal protection to include engineers attempting to restore water supplies in times of armed conflict”.¹⁴²

Attacks on the safety of humanitarian relief personnel

I. Treaties and Other Instruments

Treaties

139. Article 7 of the 1994 Convention on the Safety of UN Personnel provides that:

1. United Nations and associated personnel . . . shall not be made the object of attack or of any action that prevents them from discharging their mandate.
2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9.

140. Article 8 of the 1994 Convention on the Safety of UN Personnel provides that:

Except as otherwise provided in an applicable status-of-forces agreement, if United Nations or associated personnel are captured or detained in the course of the performance of their duties and their identification has been established, they shall not be subjected to interrogation and they shall be promptly released and returned to United Nations or other appropriate authorities. Pending their release such

¹³⁹ Report on SPLM/A Practice, 1998, Chapter 4.1, referring to SRRA Model Agreement, § 5.

¹⁴⁰ Agreement on Operation Lifeline Sudan (OLS) corridors for relief supplies and humanitarian assistance to war-affected areas, 23 March 1994.

¹⁴¹ ICRC archive documents.

¹⁴² International Symposium on Water in Armed Conflicts, Montreux, November 1994, *ICRC News*, 24 November 1994, quoted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 458–459.

personnel shall be treated in accordance with universally recognized standards of human rights and the principles and spirit of the Geneva Conventions of 1949.

141. Article 9(1)(a) of the 1994 Convention on the Safety of UN Personnel provides that the intentional commission of “murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel” shall be made by each State party a crime under its national law.

142. Pursuant to Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute, “intentionally directing attacks against personnel . . . involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to civilians . . . under the international law of armed conflict” constitutes a war crime in both international and non-international armed conflicts.

143. Article 4(b) of the 2002 Statute of the Special Court for Sierra Leone provides that:

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

...

- (b) Intentionally directing attacks against personnel . . . involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

Other Instruments

144. Article 19(a) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “murder, kidnapping or other attack upon the person or liberty” of UN and associated personnel involved in a UN operation constitutes a crime against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale with a view to preventing or impeding that operation from fulfilling its mandate. The commentary on the Article emphasises that:

Attacks against United Nations and associated personnel constitute violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community . . . Attacks against such personnel are in effect directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace and security . . . The international community has a special responsibility to ensure the effective prosecution and punishment of the individuals who are responsible for criminal attacks against United Nations and associated personnel.

145. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iii) and (e)(iii), “intentionally directing attacks against personnel . . . involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to civilians . . . under the international law of armed conflict” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

146. Canada's LOAC Manual provides that:

Humanitarian aid societies, such as the Red Cross or Red Crescent Societies, who on their own initiative, collect and care for the wounded, sick and shipwrecked, even in invaded or occupied areas, shall not be made the object of attack. Personnel participating in relief actions shall not be made the object of attack.¹⁴³

National Legislation

147. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "attacking personnel . . . involved in a humanitarian assistance . . . mission" in international and non-international armed conflicts.¹⁴⁴

148. Azerbaijan's Criminal Code provides that "directing attacks against personnel recruited . . . to provide humanitarian assistance" constitutes a war crime in international and non-international armed conflicts.¹⁴⁵

149. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "intentionally directing attacks against personnel . . . involved in a humanitarian assistance mission . . . as long as they are entitled to the protection given to civilians . . . under the international law of armed conflict" constitutes a war crime in both international and non-international armed conflicts.¹⁴⁶

150. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁴⁷

151. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.¹⁴⁸

152. Under Estonia's Penal Code, "a person who kills, tortures, causes health damage . . . to a representative of a humanitarian organisation performing his/her duties in a war zone" commits a war crime.¹⁴⁹

153. Under Ethiopia's Penal Code, anyone who "indulges in hostile acts against or threats or insults to persons belonging to the International Red Cross or to corresponding humanitarian relief organizations (the Red Crescent, the Red Lion and Sun) or to the representatives of those organizations" commits a punishable offence.¹⁵⁰

¹⁴³ Canada, *LOAC Manual* (1999), §§ 53 and 54.

¹⁴⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.37 and 268.79.

¹⁴⁵ Azerbaijan, *Criminal Code* (1999), Article 116(3).

¹⁴⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(c) and (D)(c).

¹⁴⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁴⁸ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁴⁹ Estonia, *Penal Code* (2001), § 102 ¹⁵⁰ Ethiopia, *Penal Code* (1957), Article 293(a).

154. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international or non-international armed conflict, carries out an attack against personnel . . . involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, shall be liable to imprisonment for not less than three years. In less serious cases, particularly where the attack is not carried out with military means, the period of imprisonment shall be for not less than one year.¹⁵¹

155. Under the International Crimes Act of the Netherlands, "intentionally directing attacks against personnel . . . involved in humanitarian assistance . . . , as long as they are entitled to the protection given to civilians . . . under the international law of armed conflict" is a crime, whether committed in an international or a non-international armed conflict.¹⁵²

156. New Zealand's Crimes (Internationally Protected Persons and Hostages) Amendment Act gives New Zealand's courts extraterritorial jurisdiction over attacks against UN and associated personnel, their property and vehicles, which are criminalised by the Act.¹⁵³

157. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.¹⁵⁴

158. The Act on Child Protection of the Philippines contains an article on "children in situations of armed conflicts" which provides that those who provide emergency relief services "shall not be subjected to undue harassment in the performance of their work".¹⁵⁵

159. Under Portugal's Penal Code, killing, torturing, treating inhumanely or causing serious injury to the body or health of members of humanitarian organisations in time of war, armed conflict or occupation is a war crime.¹⁵⁶

160. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.¹⁵⁷

161. The UK UN Personnel Act, which gives effect to certain provisions of the 1994 Convention on the Safety of UN Personnel, provides that:

If a person does outside the United Kingdom any act to or in relation to a UN worker which, if he had done it in any part of the United Kingdom, would have made him guilty of any of the offences mentioned in subsection (2) [*inter alia* murder, manslaughter, culpable homicide, rape, assault causing injury, kidnapping,

¹⁵¹ Germany, *Law Introducing the International Crimes Code* (2002), § 11.1(1).

¹⁵² Netherlands, *International Crimes Act* (2003), Articles 5(5)(o) and 6(3)(c).

¹⁵³ New Zealand, *Crimes (Internationally Protected Persons and Hostages) Amendment Act* (1998).

¹⁵⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁵⁵ Philippines, *Act on Child Protection* (1992), Article X, Section 22(d).

¹⁵⁶ Portugal, *Penal Code* (1996), Article 241.

¹⁵⁷ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

abduction and false imprisonment], he shall in that part of the United Kingdom be guilty of that offence.¹⁵⁸

162. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.¹⁵⁹

National Case-law

163. No practice was found.

Other National Practice

164. In a debate in the Senate in 1995, the Australian government stated that attacks on UN and associated personnel would not be tolerated.¹⁶⁰

165. In an appeal issued in 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina stated “we shall make efforts to provide, as soon as possible, conditions for operations of the Red Cross and other humanitarian organizations and, in particular, to ensure respect for their representatives, vehicles and supplies and their safe work”.¹⁶¹

166. In 1996, in response to a letter written jointly by the Special Rapporteurs of the UN Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions and for Burundi following a deliberate attack on a vehicle carrying ICRC delegates, the President and the Prime Minister of Burundi wrote that they deplored the incident and indicated that they had requested an independent inquiry to identify the perpetrators.¹⁶²

167. According to the Report on the Practice of Ethiopia, NGOs operating in Ethiopia have reported being harassed.¹⁶³ In addition, it has been reported that “the Ethiopian air force had bombed relief convoys” and that “the EPLF, too, attacked food convoys, claiming that the regime was using them to ship weapons to its troops”.¹⁶⁴

168. At the First Periodical Meeting on International Humanitarian Law in 1998, the representative of Ethiopia “deplored and condemned” attacks against relief workers.¹⁶⁵

¹⁵⁸ UK, *UN Personnel Act* (1997), Section 1(1).

¹⁵⁹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁶⁰ Australia, Government statement, 13 November 1995, *Senate Debates*, Vol. 176, p. 2760, Recommendation 7.

¹⁶¹ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

¹⁶² UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1997/60/Add.1, 23 December 1996, § 87.

¹⁶³ Report on the Practice of Ethiopia, 1998, Chapter 4.1.

¹⁶⁴ Thomas P. Ofcansky and LaVerle Berry (eds.), *Ethiopia: A Country Study*, Government Printing Office, Washington D.C., Fourth edition, 1993, p. 328.

¹⁶⁵ Ethiopia, Statement at the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998.

169. In 1991, during a debate in the German parliament, a member of parliament strongly protested about threats to relief personnel in southern Sudan. His protest was shared by all parties in the parliament.¹⁶⁶

170. At the First Periodical Meeting on International Humanitarian Law in 1998, the representative of India insisted on the punishment of those who attacked humanitarian personnel. He considered this issue to be of “high priority” for his delegation.¹⁶⁷

171. According to the Report on the Practice of Iran, it is the *opinio juris* of Iran that relief personnel are “immune from attack”.¹⁶⁸

172. The Report on the Practice of Israel states that:

It is the IDF's policy to cooperate with international humanitarian agencies and organizations, both in time of peace and in time of war. In times of hostilities, members of such agencies and organizations would naturally not be the subject of any attack or capture, and would be allowed to continue to execute their mandate, inasmuch as their activities do not directly conflict with military operations.¹⁶⁹

173. In a memorandum submitted to the International Conference for the Protection of War Victims in 1993, Kuwait stated that it considered attacks against humanitarian personnel to be a war crime.¹⁷⁰

174. According to the Report on the Practice of Malaysia, in 1983, the Malaysian government condemned an attack by Vietnamese troops on an international relief encampment in Nong-Chan near the Thai-Kampuchean border.¹⁷¹

175. In 1996, following the killing of six ICRC medical aid workers in Chechnya, the Russian government condemned the murders and ordered the police to investigate the crime. The Chechen Prime Minister stated that his government “would do everything possible to see that the murderers are severely punished as soon as possible”.¹⁷²

176. At the First Periodical Meeting on International Humanitarian Law in 1998, Switzerland presented a working paper on the topic of respect for and security of the personnel of humanitarian organisations, in which it recommended that:

¹⁶⁶ Germany, Lower House of Parliament, Statement by Dr. Werner Schuster, Member of Parliament, 21 June 1991, *Plenarprotokoll* 12/35, p. 2966.

¹⁶⁷ India, Statement at the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998.

¹⁶⁸ Report on the Practice of Iran, 1997, Chapter 4.2.

¹⁶⁹ Report on the Practice of Israel, 1997, Chapter 4.2.

¹⁷⁰ Kuwait, Remarks and proposals of the Kuwaiti Ministry of Justice concerning the Draft Declaration, International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993.

¹⁷¹ Report on the Practice of Malaysia, 1997, Chapter 4.2.

¹⁷² Brian Humphreys, “Chechen Peace Hit by Provocations”, *Christian Science Monitor*, 20 December 1996.

States intensify their efforts in the dissemination of international humanitarian law, especially within their armed and security forces . . . by emphasising respect for and the protection of humanitarian action and personnel . . . The proposed dissemination recalls the rule according to which it is forbidden to attack humanitarian organisations.¹⁷³

The paper also proposed that “national legislation give effect, as widely as possible, to the rules according to which an order to attack a humanitarian organisation does not exonerate anyone from responsibility” and recommended that:

States adopt necessary provisions, especially on the criminal and administrative levels, with a view to pronouncing appropriate sanctions against all those who will have participated, directly or indirectly, in an attack against a humanitarian organisation . . . States on whose territory attacks have taken place initiate without any delay impartial and efficient enquiry procedures . . . States take necessary measures against those who have prepared, participated in or in any other way facilitated an attack against a humanitarian organisation.¹⁷⁴

177. At the First Periodical Meeting on International Humanitarian Law in 1998, the representative of Turkey referred to attacks against humanitarian organisations as “terrorism of modern times”.¹⁷⁵

178. In 1992, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, the UK stated that attacks on ICRC personnel were contrary to all the provisions of IHL.¹⁷⁶

179. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US included among “deliberate attacks on non-combatants” a report that “snipers fired all day at United Nations personnel as they distributed food to people in Sarajevo”.¹⁷⁷

180. During a press briefing on 17 December 1996, an official spokesperson for the US Department of State characterised the killing of six ICRC medical aid workers in Chechnya as “a barbarous act” and condemned it in the strongest possible terms.¹⁷⁸

¹⁷³ Switzerland, Working Paper on Respect for and Security of the Personnel of Humanitarian Organisations, First Periodical Meeting on International Humanitarian Law, Doc. RPDIH1/RP, Geneva, 19–23 January 1998, p. 1, § 3.

¹⁷⁴ Switzerland, Working Paper on Respect for and Security of the Personnel of Humanitarian Organisations, First Periodical Meeting on International Humanitarian Law, Doc. RPDIH1/RP, Geneva, 19–23 January 1998, p. 1, §§ I-2 and I-5.

¹⁷⁵ Turkey, Statement at the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998.

¹⁷⁶ UK, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 36.

¹⁷⁷ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, p. 8.

¹⁷⁸ US, Department of State Daily Press Briefing, 17 December 1996.

181. According to the Report on US Practice, it is the *opinio juris* of the US that “unjustified attacks on international relief workers are also violations of international humanitarian law”.¹⁷⁹

182. At the First Periodical Meeting on International Humanitarian Law in 1998, the representative of Venezuela requested that those who “commit crimes” by attacking relief workers be punished.¹⁸⁰

183. In 1993, in a meeting with the ICRC, a governmental official insisted that incidents in which ICRC personnel and objects were targeted were the work of “uncontrolled elements” and that “strict orders had been issued to respect the ICRC”.¹⁸¹

184. In 1994, a State considered itself responsible for any wrongful act committed by its forces towards ICRC personnel and objects. It undertook to open an inquiry into any problems or security incidents that occurred.¹⁸²

III. Practice of International Organisations and Conferences

United Nations

185. In a resolution adopted in 1992, the UN Security Council deplored “the incident of 18 May 1992 which caused the death of a member of the ICRC team in Bosnia and Herzegovina”.¹⁸³

186. In a resolution adopted in 1993, the UN Security Council condemned repeated attacks carried out by UNITA against UN personnel providing humanitarian assistance and reaffirmed that “such attacks are clear violations of international humanitarian law”.¹⁸⁴

187. In a resolution adopted in 1994 with respect to the conflict in Somalia, the UN Security Council condemned “violence and armed attacks against persons engaged in humanitarian . . . efforts” and demanded that “all Somali parties refrain from any acts of intimidation or violence against personnel engaged in humanitarian . . . work in Somalia”.¹⁸⁵ These statements were reiterated in a subsequent resolution later that year.¹⁸⁶

188. In a resolution adopted in 1994 in the context of the conflict in the former Yugoslavia, the UN Security Council condemned all attacks against humanitarian relief workers in Gorade.¹⁸⁷

189. In a resolution adopted in 1994, the UN Security Council demanded that “all parties in Rwanda strictly respect the persons and premises of the

¹⁷⁹ Report on US Practice, 1997, Chapter 4.2.

¹⁸⁰ Venezuela, Statement at the First Periodical Meeting on International Humanitarian Law, Geneva, 19–23 January 1998.

¹⁸¹ ICRC archive document.

¹⁸² ICRC archive document. ¹⁸² UN Security Council, Res. 757, 30 May 1992, § 10.

¹⁸⁴ UN Security Council, Res. 864, 15 September 1993, § 13.

¹⁸⁵ UN Security Council, Res. 897, 4 February 1994, preamble and § 8.

¹⁸⁶ UN Security Council, Res. 923, 31 May 1994, preamble and § 5.

¹⁸⁷ UN Security Council, Res. 913, 22 April 1994, preamble.

United Nations and other organizations serving in Rwanda, and refrain from any acts of intimidation or violence against personnel engaged in humanitarian . . . work".¹⁸⁸ These demands were reiterated in a subsequent resolution a few weeks later.¹⁸⁹

190. In a resolution adopted in 1994 authorising the creation of a multinational force in Haiti, the UN Security Council demanded that "no acts of intimidation or violence be directed against personnel engaged in humanitarian or peace-keeping work".¹⁹⁰

191. In a resolution adopted in 1994 in the context of the conflict in Angola, the UN Security Council expressed its grave concern over "the disappearance of humanitarian relief workers on 27 August 1994" and demanded "their immediate release by the responsible parties".¹⁹¹ The latter demand was reiterated in a subsequent resolution.¹⁹²

192. In a resolution adopted in 1994, the UN Security Council strongly condemned "the attacks and harassment" against international personnel serving in Somalia.¹⁹³

193. In a resolution adopted in 1994, the UN Security Council condemned "the detention and maltreatment of . . . humanitarian relief workers and other international personnel" and demanded that all factions in Liberia "strictly respect the status of . . . humanitarian relief agencies working in Liberia, refrain from any acts of violence, abuse or intimidation against them".¹⁹⁴

194. In a resolution adopted in 1994 on the situation in Somalia, the UN Security Council strongly demanded that all parties in Somalia "refrain from any acts of intimidation or violence" against personnel engaged in humanitarian activities.¹⁹⁵

195. In a resolution adopted in 1996 on the situation in Burundi, the UN Security Council condemned "in the strongest terms all acts of violence perpetrated against . . . international humanitarian personnel".¹⁹⁶

196. In a resolution adopted in 1996 in the context of the conflict in Liberia, the UN Security Council condemned "all attacks against and intimidation of personnel of . . . the international organizations and agencies delivering humanitarian assistance".¹⁹⁷

197. In a resolution adopted in 1996, the UN Security Council condemned "the attacks on the United Nations personnel in the Taliban-held territories of Afghanistan, including the killing of the two Afghan staff-members of the

¹⁸⁸ UN Security Council, Res. 918, 17 May 1994, § 11.

¹⁸⁹ UN Security Council, Res. 925, 8 June 1994, § 11.

¹⁹⁰ UN Security Council, Res. 940, 31 July 1994, § 15.

¹⁹¹ UN Security Council, Res. 945, 29 September 1994, § 11.

¹⁹² UN Security Council, Res. 952, 27 October 1994, § 8.

¹⁹³ UN Security Council, Res. 946, 30 September 1994, preamble.

¹⁹⁴ UN Security Council, Res. 950, 21 October 1994, §§ 7 and 8.

¹⁹⁵ UN Security Council, Res. 954, 4 November 1994, § 7.

¹⁹⁶ UN Security Council, Res. 1049, 5 March 1996, § 2.

¹⁹⁷ UN Security Council, Res. 1071, 30 August 1996, § 8; Res. 1083, 27 November 1996, § 7.

World Food Programme and of the United Nations High Commissioner for Refugees in Jalalabad".¹⁹⁸

198. In a resolution adopted in 1999, the UN Security Council condemned "attacks and the use of force against United Nations and associated personnel, as well as personnel of international humanitarian organizations".¹⁹⁹

199. In 1993, in a statement by its President, the UN Security Council expressed the view that "attacks and other acts of violence, whether actual or threatened, including obstruction or detention of persons, against United Nations . . . personnel are wholly unacceptable".²⁰⁰

200. In 1994, in a statement by its President concerning the conflict in Bosnia and Herzegovina, the UN Security Council condemned "recent attacks against the personnel of . . . UNHCR and other humanitarian organizations".²⁰¹ It reiterated this condemnation in a further statement by its President a few months later.²⁰²

201. In 1994, in a statement by its President in connection with the situation in Haiti, the UN Security Council stated that it would "hold responsible any authorities or individuals in Haiti who endanger the personal security and safety of all personnel involved in such [humanitarian] assistance".²⁰³

202. In 1994, in a statement by its President, the UN Security Council deplored "attacks and harassment directed against . . . international personnel serving in Somalia".²⁰⁴

203. In 1996, in a statement by its President, the UN Security Council expressed its grave concern at "attacks on personnel of international humanitarian organizations" in Burundi.²⁰⁵

204. In 1996, in a statement by its President in the context of the conflict in Somalia, the UN Security Council condemned "the harassment, beatings, abduction and killings of personnel of international humanitarian organizations".²⁰⁶

205. In 1996, in a statement by its President, the UN Security Council condemned "the incident on 3 April 1996 which resulted in the death of two UN-AVEM III personnel, the wounding of a third, and the death of a humanitarian

¹⁹⁸ UN Security Council, Res. 1193, 28 August 1998, § 6.

¹⁹⁹ UN Security Council, Res. 1265, 17 September 1999, § 9.

²⁰⁰ UN Security Council, Statement by the President, UN Doc. S/25493, 31 March 1993, p. 1.

²⁰¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/1, 7 January 1994, p. 1.

²⁰² UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 2.

²⁰³ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/2, 10 January 1994.

²⁰⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/46, 25 August 1994, p. 1.

²⁰⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/1, 5 January 1996, p. 1.

²⁰⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/4, 24 January 1996, p. 1.

assistance official" and reiterated the importance it attached to "the safety and security of UNAVEM III and humanitarian assistance personnel".²⁰⁷

206. In 1997, in a statement by its President, the UN Security Council strongly condemned "the attacks on and kidnapping of international personnel, in particular UNMOT, UNHCR and ICRC, and others".²⁰⁸

207. In 1997, in a statement by its President, the UN Security Council expressed its

grave concern at the recent increase in attacks and the use of force against United Nations and other personnel associated with United Nations operations, as well as personnel of international humanitarian organizations, including murder, physical and psychological threats, hostage taking, shooting at vehicles and aircraft, mine-laying, looting of assets and other hostile acts.²⁰⁹

208. In 1997, in a statement by its President following the military coup d'état in Sierra Leone, the UN Security Council strongly condemned "the violence which has been inflicted on both local and expatriate communities, in particular United Nations and other international personnel serving in the country".²¹⁰

209. In 1997, in a statement by its President following a debate on the protection of humanitarian assistance to refugees and others in conflict situations, the UN Security Council expressed its grave concern at "all attacks or use of force against United Nations and other personnel associated with United Nations operations, as well as personnel of humanitarian organizations, in violation of the relevant rules of international law, including those of international humanitarian law".²¹¹

210. In 1997, in a statement by its President in the context of the conflict in Angola, the UN Security Council condemned "the mistreatment of the personnel of the United Nations and international humanitarian organizations in areas under UNITA control".²¹²

211. In 1998, in a statement by its President the UN Security Council strongly condemned "the armed attack in Angola on 19 May 1998 against personnel from the United Nations and the Angolan National Police, in which one person was killed and three people were seriously injured".²¹³

212. In 1998, in a statement by its President in the context of the conflict in Afghanistan, the UN Security Council stated that it was "concerned at recent reports of harassment of humanitarian organizations and at the unilateral decision by the Taliban to relocate humanitarian organizations' offices in Kabul".

²⁰⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/19, 24 April 1996.

²⁰⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/6, 7 February 1997.

²⁰⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/13, 12 March 1997, p. 1.

²¹⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/29, 27 May 1997.

²¹¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/34, 19 June 1997.

²¹² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/39, 23 July 1997, p. 1.

²¹³ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/14, 22 May 1998, p. 1.

It called upon all factions "to facilitate the work of humanitarian agencies to the greatest extent possible".²¹⁴

213. In 1998, in a statement by its President, the UN Security Council condemned "the killing of the two Afghan staff members of the World Food Programme and of the United Nations High Commissioner for Refugees in Jalalabad".²¹⁵

214. In 1998, in a statement by its President, the UN Security Council condemned "all attacks or use of force against United Nations and other personnel associated with United Nations operations as well as personnel of humanitarian organizations, in violation of international law, including international humanitarian law".²¹⁶

215. In 1999, in a statement by its President, the UN Security Council expressed its special concern about "attacks on humanitarian workers, in violation of the rules of international law".²¹⁷

216. In 2000, in a statement by its President, the UN Security Council expressed its grave concern at "continued attacks against United Nations and associated personnel, and humanitarian personnel, which are in violation of international law including international humanitarian law" and strongly condemned "the acts of murder and various forms of physical and psychological violence, including abduction, hostage-taking, kidnapping, harassment and illegal arrest and detention to which such personnel have been subjected".²¹⁸

217. In 2000, in a statement by its President, the UN Security Council reiterated its call for combatants "to ensure the safety [and] security . . . of United Nations and associated personnel and humanitarian personnel".²¹⁹

218. In 2001, in a statement by its President in connection with the deaths of six ICRC staff members in the DRC, the UN Security Council expressed "profound sympathy to the Governments and peoples of Colombia, the Democratic Republic of the Congo and Switzerland" and strongly condemned "the wanton killing of those humanitarian workers".²²⁰

219. In a resolution adopted in 1994, in the context of the conflict in Bosnia and Herzegovina, the UN General Assembly condemned "the attacks on and continuous harassment of the United Nations Protection Force and on personnel working with the Office of United Nations High Commissioner for

²¹⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998, p. 2.

²¹⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/24, 6 August 1998, p. 2.

²¹⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/30, 29 September 1998.

²¹⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1999/6, 12 February 1999, p. 1.

²¹⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/2000/4, 11 February 2000, pp. 1 and 2.

²¹⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/2000/7, 13 March 2000, p. 2.

²²⁰ UN Security Council, Statement by the President, UN Doc. S/PV.4315, 27 April 2001, p. 1.

Refugees and other humanitarian organizations, most of which are perpetrated by Bosnian Serb forces".²²¹

220. In a resolution on Sudan adopted in 1994, the UN General Assembly stated that it was "disturbed by the continuing failure of Sudan to provide a full impartial investigation of the killings of Sudanese nationals employed by foreign relief organizations and foreign Governments".²²² In a further resolution on Sudan in 1995, the General Assembly reiterated its call upon the government of Sudan "to ensure a full, thorough and prompt investigation by an independent judicial inquiry commission of the killings of Sudanese nationals employed by foreign relief organizations".²²³

221. In a resolution adopted in 1994, the UN General Assembly condemned "in the strongest terms the killing of personnel attached to humanitarian organizations operating in Rwanda".²²⁴ The condemnation was reiterated in 1995.²²⁵

222. In a resolution adopted in 1996 on assistance for the rehabilitation and reconstruction of Liberia, the UN General Assembly deplored "all attacks against and intimidation of personnel of the United Nations, its specialized agencies [and] non-governmental organizations".²²⁶

223. In a resolution adopted in 1995 in the context of the conflict in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN General Assembly condemned "all attacks on personnel working with the Office of the United Nations High Commissioner for Refugees and other humanitarian organizations by parties to the conflict".²²⁷

224. In a resolution adopted in 1996, the UN General Assembly expressed concern about "continuing deliberate and indiscriminate aerial bombardments by the Government of the Sudan of civilian targets in southern Sudan, in clear violation of international humanitarian law, which . . . resulted in casualties to civilians, including relief workers".²²⁸

225. In a resolution adopted in 1996 on the Convention on the Safety of UN and Associated Personnel, the UN General Assembly expressed grave concern about the "continuing attacks and acts of violence against United Nations and associated personnel that have caused death or serious injury" and noted that "only a small number of States have become parties to the Convention". It further expressed the need "to promote and protect the safety and security of the personnel who act on behalf of the United Nations, attacks against whom are unjustifiable and unacceptable".²²⁹

²²¹ UN General Assembly, Res. 49/196, 23 December 1994, § 15.

²²² UN General Assembly, Res. 49/198, 23 December 1994, preamble.

²²³ UN General Assembly, Res. 50/197, 22 December 1995, § 9.

²²⁴ UN General Assembly, Res. 49/206, 23 December 1994, § 3.

²²⁵ UN General Assembly, Res. 50/200, 22 December 1995, § 4.

²²⁶ UN General Assembly, Res. 51/30 B, 5 December 1996, § 4.

²²⁷ UN General Assembly, Res. 50/193, 22 December 1995, § 14.

²²⁸ UN General Assembly, Res. 51/112, 12 December 1996, preamble.

²²⁹ UN General Assembly, Res. 51/137, 13 December 1996, preamble.

226. In a resolution adopted in 1997 on the safety and security of humanitarian personnel, the UN General Assembly deplored “the rising toll of casualties among humanitarian personnel in complex emergencies, in particular armed conflicts” and strongly condemned “any act or failure to act which obstructs or prevents humanitarian personnel from discharging their humanitarian functions, or which entails their being subjected to threats, the use of force or physical attack frequently resulting in injury or death”.²³⁰ The General Assembly further urged all States:

to ensure that any threat or act of violence committed against humanitarian personnel on their territory is fully investigated and to take all appropriate measures, in accordance with international law and national legislation, to ensure that the perpetrators of such acts are prosecuted.²³¹

227. In a resolution adopted in 1998, the UN General Assembly strongly condemned “the acts of physical violence and harassment to which those participating in humanitarian operations are too frequently exposed”.²³²

228. In a resolution adopted in 1998, the UN General Assembly deplored the killing of humanitarian aid workers in Kosovo.²³³

229. In a resolution adopted in 2000 on the safety and security of humanitarian personnel and the protection of UN personnel, the UN General Assembly strongly condemned “the acts of murder and other forms of physical violence, abduction, hostage-taking, kidnapping, harassment and illegal arrest and detention to which those participating in humanitarian operations are increasingly exposed” as well as “any act or failure to act . . . which entails [humanitarian and UN personnel] being subjected to threats, the use of force or physical attack frequently resulting in injury or death”. It affirmed “the need to hold accountable those who commit such acts”.²³⁴ The General Assembly further urged all States:

to ensure that any threat or act of violence committed against humanitarian personnel on their territory is fully investigated and to take appropriate measures, in accordance with international law and national legislation, to ensure that the perpetrators of such acts are prosecuted . . . to provide adequate and prompt information in the event of arrest or detention of humanitarian personnel or United Nations personnel [and] to take the necessary measures to ensure the speedy release of United Nations and other personnel carrying out activities in fulfilment of the mandate of a United Nations operation who have been arrested or detained in violation of their immunity, in accordance with the relevant conventions referred to in the present resolution and applicable international humanitarian law.²³⁵

²³⁰ UN General Assembly, Res. 52/167, 16 December 1997, § 2.

²³¹ UN General Assembly, Res. 52/167, 16 December 1997, § 6.

²³² UN General Assembly, Res. 53/87, 7 December 1998, preamble.

²³³ UN General Assembly, Res. 53/164, 9 December 1998, p. 3, § 11.

²³⁴ UN General Assembly, Res. 54/192, 17 December 1999, preamble and § 4.

²³⁵ UN General Assembly, Res. 54/192, 17 December 1999, §§ 6 and 7.

230. In a resolution adopted in 2000 on the situation of human rights in the Sudan, the UN General Assembly condemned “the murder of four Sudanese relief workers in April 1999 while in the custody of the Sudanese People’s Liberation Army/Movement (SPLA/M)” and expressed its deep concern at continuing serious violations of IHL by all parties, in particular “the difficulties encountered by United Nations and humanitarian staff in carrying out their mandate because of harassment, indiscriminate aerial bombings and the reopening of hostilities”.²³⁶

231. In resolutions adopted between 1991 and 1995, the UN Commission on Human Rights has repeatedly urged all the parties to the conflict in Afghanistan “to undertake all necessary measures to ensure the safety of all personnel of humanitarian organizations”.²³⁷

232. In resolutions adopted in 1994 and 1995, the UN Commission on Human Rights deplored the repeated attacks against UN personnel and the personnel of other humanitarian organisations and NGOs in Somalia.²³⁸

233. In a resolution adopted in 1994 on the human rights situation in the former Yugoslavia, the UN Commission on Human Rights condemned “the use of military force against relief operations”.²³⁹

234. In a resolution adopted in 1994 on the situation of human rights in the Sudan, the UN Commission on Human Rights called upon the government of Sudan “to ensure a full, thorough and prompt investigation by the independent judicial inquiry commission of the killings of Sudanese employees of foreign relief organizations, to bring to justice those responsible for the killings and to provide just compensation to the families of the victims”.²⁴⁰ Similar appeals were made in subsequent resolutions in 1995, 1996 and 1997.²⁴¹

235. In a resolution adopted in 1995 on the human rights situation in the former Yugoslavia, the UN Commission on Human Rights condemned “attacks on and continued harassment of . . . personnel working with the Office of the United Nations High Commissioner for Refugees and other humanitarian organizations, which have caused injuries and the death of those who seek to protect civilians and to deliver humanitarian assistance”. It demanded that all parties “ensure that all persons under their control cease all such attacks and acts of harassment”.²⁴²

236. In a resolution adopted in 1995 on the situation of human rights in Rwanda, the UN Commission on Human Rights condemned “in the strongest

²³⁶ UN General Assembly, Res. 55/116, 4 December 2000, preamble and § 2(a)(vii).

²³⁷ UN Commission on Human Rights, Res. 1991/78, 6 March 1991, § 12; Res. 1992/68, 4 March 1992, § 22; Res. 1994/84, 9 March 1994, § 19; Res. 1995/74, 8 March 1995, § 13.

²³⁸ UN Commission on Human Rights, Res. 1994/60, 4 March 1994, preamble and § 3; Res. 1995/56, 3 March 1995, preamble.

²³⁹ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 7(d).

²⁴⁰ UN Commission on Human Rights, Res. 1994/79, 9 March 1994, § 11.

²⁴¹ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 17; Res. 1996/73, 23 April 1996, § 16; Res. 1997/59, 15 April 1997, § 17.

²⁴² UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 17.

terms the kidnapping and killing . . . of personnel attached to humanitarian organizations operating in the country . . . all of which constitute blatant violations of international humanitarian law".²⁴³

237. In a resolution adopted in 1996 with respect to the conflict in Burundi, the UN Commission on Human Rights strongly condemned "the continued violence against the civilian population, including . . . international humanitarian aid workers".²⁴⁴ In 1997, again with reference to Burundi, the Commission strongly condemned "the murder of three ICRC delegates and urged the government of Burundi to bring the culprits to justice".²⁴⁵

238. In a resolution adopted in 1996, the UN Commission on Human Rights declared that it was "deeply concerned about continued acts of indiscriminate and deliberate aerial bombardment by the Government of the Sudan of civilian targets in southern Sudan, including humanitarian relief operations, in clear violation of international humanitarian law". It called upon the Sudanese government "to cease immediately the deliberate and indiscriminate aerial bombardment of civilian targets and relief operations".²⁴⁶

239. In a resolution adopted in 1997 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed its deep concern at "arrest of foreign relief workers without charge".²⁴⁷

240. In a resolution adopted in 1996 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed its deep concern about "continued acts of indiscriminate and deliberate aerial bombardment by the Government of the Sudan of civilian targets in southern Sudan, including humanitarian relief operations, in clear violation of international humanitarian law". It called upon the government of Sudan "to cease immediately the deliberate and indiscriminate aerial bombardment of . . . relief operations".²⁴⁸ The latter demand was reiterated in subsequent resolutions in 1997 and 1998.²⁴⁹

241. In a resolution adopted in 1996, the UN Commission on Human Rights stated that "the Burundian authorities are responsible for ensuring the safety of humanitarian and other aid workers" and appealed to "the authorities of Burundi to strengthen measures to guarantee the security and protection of the staff of international, governmental and non-governmental organizations so as to facilitate their work".²⁵⁰

242. In a resolution on Afghanistan adopted in 1998, the UN Commission on Human Rights condemned "actions by all parties that constitute interference with the delivery of humanitarian assistance to the civilian population of

²⁴³ UN Commission on Human Rights, Res. 1995/91, 8 March 1995, § 3.

²⁴⁴ UN Commission on Human Rights, Res. 1996/1, 27 March 1996, preamble.

²⁴⁵ UN Commission on Human Rights, Res. 1997/77, 18 April 1997, § 9.

²⁴⁶ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble.

²⁴⁷ UN Commission on Human Rights, Res. 1997/59, 15 April 1997, § 4.

²⁴⁸ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble and § 12.

²⁴⁹ UN Commission on Human Rights, Res. 1997/59, 15 April 1997, § 15; Res. 1998/67, 21 April 1998, § 15.

²⁵⁰ UN Commission on Human Rights, Res. 1996/1, 27 March 1996, preamble.

Afghanistan and which jeopardize the safety of humanitarian personnel". It urged all the Afghan parties "to fulfil their obligations and commitments regarding the safety of all personnel of diplomatic missions, the United Nations and other international organizations, as well as of their premises in Afghanistan".²⁵¹

243. In a resolution adopted in 2001 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed its deep concern at continuing serious violations of IHL by all parties to the conflict, in particular "the difficulties encountered by United Nations and humanitarian staff in carrying out their mandate because of harassment, indiscriminate aerial bombings and the reopening of hostilities".²⁵²

244. In 1997, in a progress report on UNOMIL, the UN Secretary-General included among apparent or alleged human rights violations in Liberia, "the harassment and detention of members of the international humanitarian community by ULIMO-J fighters at Vonzula, Grand Cape Mount County, resulting in the suspension of humanitarian assistance to the area on 20 December 1996".²⁵³

245. In 1995, a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights expressed his concern at the escalation of violence against international humanitarian workers in Burundi and referred to the 1994 Convention on the Safety of UN Personnel.²⁵⁴

246. In 1996, in a report on a mission to Burundi, the Special Rapporteur of the UN Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions mentioned a deliberate attack on a vehicle carrying ICRC delegates, following which he, jointly with the Special Rapporteur on the human rights situation in Burundi, had addressed a letter to the President and the Prime Minister of Burundi expressing their "extreme disgust at that act".²⁵⁵

247. In 1997, following the murder of three ICRC delegates in Burundi, the Special Rapporteur of the UN Commission on Human Rights for Burundi stated that he would not be satisfied "unless those responsible for this heinous crime are prosecuted and appropriately punished".²⁵⁶

248. In 1997, in a report on the situation of human rights in the Sudan, the Special Rapporteur of the Commission on Human Rights described the following incident:

²⁵¹ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 5(c) and (e).

²⁵² UN Commission on Human Rights, Res. 2001/18, 20 April 2001, § 2(a)(vii).

²⁵³ UN Secretary-General, Twenty-first progress report on UNOMIL, UN Doc. S/1997/90, 29 January 1997, § 30.

²⁵⁴ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report on the mission to Burundi from 19 to 29 April 1995, UN Doc. E/CN.4/1996/4/Add.1, 24 July 1995, § 85.

²⁵⁵ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1997/60/Add.1, 23 December 1996, §§ 85–86.

²⁵⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Second report, UN Doc. E/CN.4/1997/12, 10 February 1997, § 97.

On 1 November 1996, members of another dissident SPLA group led by commander Kerubino Kwanyan Bol . . . seized an aircraft of the International Committee of the Red Cross which had landed by mistake at Wunrock airstrip and kidnapped three Red Cross workers and five SPLA-Mainstream soldiers who were returning from an ICRC hospital in Lokichokio, Kenya. Commander Kerubino accused the ICRC of transporting enemy soldiers, arms and ammunition into Southern Sudan, a charge denied as completely baseless by the ICRC. After more than five weeks of detention Kerubino agreed to release the Red Cross workers . . . The Special Rapporteur is not aware of any attempt by anyone to raise legal questions regarding the responsibility of commander Kerubino and his men for the kidnapping, which is a violation of Sudanese national legislation and a serious breach of international humanitarian law.²⁵⁷

249. The Code of Conduct for Humanitarian Assistance in Sierra Leone, annexed to the 1999 United Nations Inter-Agency Consolidated Appeal for Sierra Leone, contains certain guiding principles for States and non-State entities. The principles provide, *inter alia*, that:

Every effort should be made to ensure security and protection of UN, NGO and associated personnel engaged in humanitarian assistance activities. Protagonists shall be held directly accountable to the UN and the international community for attacks on UN and NGO staff and others connected with the UN and NGO humanitarian operations.²⁵⁸

250. The Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, annexed to the 2000 United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo, state that “the relevant authorities are responsible for creating conditions conducive to the implementing of humanitarian activities. This must cover the security of local and international staff as well as all assets.”²⁵⁹

Other International Organisations

251. In a resolution adopted in 1989, the Parliamentary Assembly of the Council of Europe declared that it was “preoccupied by the increase in breaches in the security of delegates of the ICRC, its installations and means of transport, and by the recent taking of ICRC delegates in Lebanon as hostages in the accomplishment of their mission”.²⁶⁰

252. In a resolution adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe strongly condemned

²⁵⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Report, 3 February 1997, § 27.

²⁵⁸ OCHA, United Nations Inter-Agency Consolidated Appeal for Sierra Leone (January–December 1999), December 1998, Annex I, Code of Conduct for Humanitarian Assistance in Sierra Leone, p. 88.

²⁵⁹ OCHA, United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo (January–December 2000), November 1999, Annex II, Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, p. 68, § 2.

²⁶⁰ Council of Europe, Parliamentary Assembly, Res. 921, 6 July 1989, § 8.

"attacks on convoys and personnel of international humanitarian organizations trying to bring relief to the afflicted population in Sarajevo and other places in Bosnia-Herzegovina" and demanded that "violators of humanitarian law are held personally accountable for these violations".²⁶¹

253. In a recommendation adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe expressed "its admiration for the courage and dedication of UNPROFOR and the personnel of humanitarian organizations" and condemned all attacks on these persons.²⁶²

254. In a declaration by the Presidency in 1998 on the situation in Sierra Leone, the EU urged ECOMOG "to ensure that international humanitarian law is upheld and to ensure the security of those engaged in providing such relief".²⁶³

255. In a resolution adopted in 1994 on respect for international humanitarian law and support for humanitarian action in armed conflict, the OAU Council of Ministers condemned "the attacks and killings of the staff of humanitarian organizations".²⁶⁴

256. In a resolution adopted in 1996 on the situation in Burundi, the OAU Council of Ministers strongly condemned "the brutal and bastardly murder of... humanitarian aid-workers".²⁶⁵

257. In a resolution adopted in 1996 on international humanitarian law, water and armed conflicts in Africa, the OAU Council of Ministers condemned "in the strongest possible terms the attacks and killings, including incitements to acts of violence and threats against the personnel of organizations that are exclusively humanitarian, neutral and impartial".²⁶⁶

258. In a press release issued on December 1996 on the killing of six ICRC medical aid workers in Chechnya, the Chairman-in-Office of the OSCE stated that he was "horrified to learn of the atrocious crime which claimed the lives of six International Red Cross aid workers... in Novye Atagi" and "strongly condemned this act of violence... and terrorism". He urged the competent authorities to clarify the circumstances of the act and to bring those responsible to justice.²⁶⁷

International Conferences

259. In 1992, the Committee of Senior Officials of the CSCE debated the situation in Bosnia and Herzegovina and condemned "attacks on international relief staff and on UNPROFOR".²⁶⁸

²⁶¹ Council of Europe, Parliamentary Assembly, Res. 984, 30 June 1992, § 8.

²⁶² Council of Europe, Parliamentary Assembly, Rec. 1198, 5 November 1992, § 8.

²⁶³ EU, Declaration on the situation in Sierra Leone by the Presidency on behalf of the EU, 20 February 1998, § 2.

²⁶⁴ OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 5.

²⁶⁵ OAU, Council of Ministers, Res. 1649 (LXIV), 1–5 July 1996, § 4.

²⁶⁶ OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996, § 10.

²⁶⁷ OSCE, Chairman-in-Office, Press Release No. 86/96, 17 December 1996, §§ 1 and 2.

²⁶⁸ CSCE, Decisions of the Committee of Senior Officials, September 1992, *Helsinki Monitor*, 1993, p. 92, § 4.

260. In a resolution on Bosnia and Herzegovina adopted in 1992, the 88th Inter-Parliamentary Conference in Stockholm strongly condemned “the escalation of violence by armed attacks against humanitarian . . . personnel” and insisted that “such attacks cease immediately”.²⁶⁹

261. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference in Canberra expressed regret that “the international relief and protection effort during armed conflicts . . . is encountering serious difficulties and dangers, including . . . attacks against humanitarian personnel”.²⁷⁰

262. In a resolution adopted in 1994, the Parliamentary Assembly of the CSCE condemned attacks against personnel of UNPROFOR and humanitarian organisations in Bosnia and Herzegovina.²⁷¹

263. In a resolution adopted in 1999 on the occasion of the 50th anniversary of the Geneva Conventions, the 102nd Inter-Parliamentary Conference in Berlin urged States “to halt arms transfers to parties that target relief workers [and] undermine humanitarian assistance”.²⁷²

264. The Plan of Action for the years 2000–2003 adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999 states that “threats to, and attacks on, [humanitarian] personnel will be duly investigated and those alleged to have committed such attacks will be brought to justice under due process of law”.²⁷³

IV. Practice of International Judicial and Quasi-judicial Bodies

265. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

266. Following the murder of two ICRC expatriates and one local staff member in May 1978 in Zimbabwe, the ICRC asked the highest authorities of the parties to the conflict to investigate the case and demanded that immediate measures be taken to ensure respect for the red cross emblem and the security of ICRC delegates.²⁷⁴

²⁶⁹ 88th Inter-Parliamentary Conference, Stockholm, 7–12 September 1992, Resolution on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, § 5.

²⁷⁰ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble.

²⁷¹ CSCE, Parliamentary Assembly, Vienna Declaration, Chapter IV: Resolution on the former Yugoslavia, Doc. PA (94) 7, 8 July 1994, § 10.

²⁷² 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the fiftieth anniversary of the Geneva Conventions, § 16.

²⁷³ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 2.4, § 12.

²⁷⁴ Death of four members of ICRC delegations, *IRRC*, No. 204, 1978, pp. 166–167.

267. In the context of an internal conflict, the kidnapping of an ICRC medical worker was reported. In its communications with the armed opposition group responsible for this act, the ICRC reminded the group that it must respect the Geneva Conventions and the fundamental rules of IHL, because the commitment it made in 1980 was still applicable.²⁷⁵

268. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on armed protection of humanitarian assistance in which it expressed its deep concern about “the hazardous and dangerous conditions under which humanitarian assistance has had to be carried out in various disaster areas in recent years”.²⁷⁶

269. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on principles of humanitarian assistance in which it reminded States, in particular,

of the basis for and the nature of humanitarian assistance, as established by international humanitarian law, the Fundamental Principles and the Statutes of the International Red Cross and Red Crescent Movement:

- ...
- b) *with respect to States*: the duty – which is in the first instance theirs – to assist people who are placed *de jure* or *de facto* under their authority and, should they fail to discharge this duty, the obligation to authorize humanitarian organizations to provide such assistance, to grant such organizations access to the victims and to protect their action.²⁷⁷ [emphasis in original]

270. At its Seville Session in 1997, the Council of Delegates adopted a resolution on peace, international humanitarian law and human rights in which it expressed alarm at “the ever-more frequent threats to the safety and security of Red Cross and Red Crescent personnel and of the staff of other humanitarian organizations, in particular through intentional and often fatal violent attacks”.²⁷⁸

271. In a communication to the press issued in April 2001 following the killing of six ICRC staff members by unidentified assailants in the DRC, the ICRC condemned “in the strongest terms this attack and the flouting of the red cross emblem”.²⁷⁹

²⁷⁵ ICRC archive documents.

²⁷⁶ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 5, preamble.

²⁷⁷ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 11, § 1(b).

²⁷⁸ International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 8, Part 5, preamble.

²⁷⁹ ICRC, Communication to the Press No. 01/14, Six ICRC staff killed in Democratic Republic of the Congo, 27 April 2001.

VI. Other Practice

272. In the context of an internal conflict, an armed opposition group undertook not to attack ICRC personnel, vehicles and planes.²⁸⁰

273. In meetings with the ICRC in 1981 and 1982, an armed opposition group agreed to respect ICRC personnel and vehicles.²⁸¹

274. In 1985, in a meeting with the ICRC, the UN Secretary-General of an armed opposition group stated that the attacks on ICRC personnel and relief objects which had been committed by the forces of the group had taken place solely because ICRC personnel were located close to a combat area. With respect to an attack on an ICRC plane, the Secretary-General justified the attack on the grounds that his forces were "nervous and suspicious of any aircraft present in the region".²⁸²

275. In meetings with the ICRC in 1988 and 1989, several factions involved in an internal armed conflict stated that they had instructed their combatants not to attack ICRC personnel.²⁸³

276. In 1992, the government of a separatist entity guaranteed the safe conduct of ICRC personnel within the territory under its control.²⁸⁴

277. In 1992, an armed opposition group agreed to respect ICRC operations and the lives of ICRC delegates.²⁸⁵

278. In 1994, in a meeting with ICRC representatives, an official of an armed opposition group guaranteed the security of ICRC personnel in the territory it controlled.²⁸⁶

279. In 1994, in a letter addressed to the ICRC, an armed opposition group agreed to guarantee the safety of ICRC personnel and to instruct its forces not to attack ICRC personnel. It also pledged to respect Red Cross and Red Crescent installations and vehicles. Accordingly, it condemned the looting of an ICRC convoy and assured the ICRC of its continuing efforts to ensure the security of ICRC personnel and objects and to recover any lost property.²⁸⁷

280. In 1996, UNITA, a party to the conflict in Angola, committed itself to ensuring that relief personnel and objects would be spared from attack.²⁸⁸

281. In 1997, a military commander of an armed opposition group told ICRC representatives that he "would never attack the Red Cross". A leader of the same group also assured the ICRC that its combatants would respect Red Cross personnel in all circumstances.²⁸⁹

²⁸⁰ ICRC archive documents.

²⁸² ICRC archive document.

²⁸⁴ ICRC archive documents.

²⁸⁶ ICRC archive document

²⁸⁸ UNITA, Statement on the humanitarian situation in Angola, Bailundo, 1 January 1996.

²⁸⁹ ICRC archive document.

²⁸¹ ICRC archive documents.

²⁸³ ICRC archive documents.

²⁸⁵ ICRC archive document.

²⁸⁷ ICRC archive document.

B. Safety of Humanitarian Relief Objects

I. Treaties and Other Instruments

Treaties

282. Article 70(4) AP I provides that “the Parties to the conflict shall protect relief consignments and facilitate their rapid distribution”. Article 70 AP I was adopted by consensus.²⁹⁰

283. Article 7 of the 1994 Convention on the Safety of UN Personnel provides that:

1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.
2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in article 9.

284. Article 9(1)(a) of the 1994 Convention on the Safety of UN Personnel provides that the intentional commission of “a violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty” shall be made by each State Party a crime under its national law.

285. Pursuant to Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute, “intentionally directing attacks against . . . installations, material, units or vehicles involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to . . . civilian objects under the international law of armed conflict” constitutes a war crime in both international and non-international conflicts.

286. Article 4(b) of the 2002 Statute of the Special Court for Sierra Leone provides that:

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

...

- (b) Intentionally directing attacks against . . . installations, material, units or vehicles involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

Other Instruments

287. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “destruction of relief ships”.

²⁹⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

288. In paragraph 2 of the 1992 Bahir Dar Agreement, the various Somali organisations attending the meeting on humanitarian issues convened by the Standing Committee on Somalia pledged to guarantee the security of relief objects.

289. Article 19(b) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “violent attack upon the official premises, the private accommodations or the means of transportation” of any UN and associated personnel involved in a UN operation likely to endanger his or her person constitutes a crime against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale with a view to preventing or impeding that operation from fulfilling its mandate.

290. Section 9.9 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character and conducted without any adverse distinction, and shall respect . . . vehicles and premises involved in such operations”.

291. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iii) and (e)(iii), “intentionally directing attacks against . . . installations, material, units or vehicles involved in a humanitarian assistance . . . mission . . . as long as they are entitled to the protection given to . . . civilian objects under the international law of armed conflict” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

292. Kenya’s LOAC Manual provides that “the Parties to the conflict shall protect relief consignments and facilitate their rapid distribution”.²⁹¹

293. The US Field Manual notes that, in case of occupation, if the occupied territory is inadequately supplied, “all Contracting Parties shall permit the free passage of [relief] consignments and shall guarantee their protection”.²⁹²

National Legislation

294. Australia’s War Crimes Act considers “any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]” as a war crime, including the destruction of relief ships.²⁹³

295. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including

²⁹¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.

²⁹² US, *Field Manual* (1956), § 388.

²⁹³ Australia, *War Crimes Act* (1945), Section 3.

“attacking...objects involved in a humanitarian assistance...mission” in international and non-international armed conflicts.²⁹⁴

296. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order that “an attack be launched against objects specifically protected by international law” or to carry out such an attack.²⁹⁵ The Criminal Code of the Republika Srpska contains the same provision.²⁹⁶

297. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “intentionally directing attacks against...installations, material, units or vehicles involved in a humanitarian assistance mission...as long as they are entitled to the protection given to...civilian objects under the international law of armed conflict” constitutes a war crime in both international and non-international armed conflicts.²⁹⁷

298. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.²⁹⁸

299. China’s Law Governing the Trial of War Criminals provides that “destroying...relief ships” constitutes a war crime.²⁹⁹

300. Under Colombia’s Penal Code, attacking objects necessary for the assistance and relief of the civilian population is a punishable offence.³⁰⁰

301. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.³⁰¹

302. Under Croatia’s Criminal Code, “the launching of an attack against objects under special protection of international law” is a war crime.³⁰²

303. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for:

anyone who, in the context of an international or non-international armed conflict, attacks or destroys...storage of relief supplies, medical convoys, goods destined for the relief and assistance to the civilian population and other protected persons, without having taken adequate measures of protection and without imperative military necessity.³⁰³

304. Under Ethiopia’s Penal Code, anyone who “intentionally destroys or damages in the course of hostilities material, installations or depots” belonging to

²⁹⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.37 and 268.79.

²⁹⁵ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

²⁹⁶ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

²⁹⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(c) and (D)(c).

²⁹⁸ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²⁹⁹ China, *Law Governing the Trial of War Criminals* (1946), Article 3(9).

³⁰⁰ Colombia, *Penal Code* (2000), Article 26.

³⁰¹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁰² Croatia, *Criminal Code* (1997), Article 158(2).

³⁰³ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Destrucción de bienes e instalaciones de carácter sanitario”.

the ICRC or to corresponding humanitarian relief organisations (the Red Crescent, the Red Lion and Sun) commits a punishable offence.³⁰⁴

305. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international or non-international armed conflict, ... carries out an attack against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law, shall be liable to imprisonment for not less than three years. In less serious cases, particularly where the attack is not carried out with military means, the period of imprisonment shall be for not less than one year.³⁰⁵

306. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 70(4) AP I, is a punishable offence.³⁰⁶

307. The Definition of War Crimes Decree of the Netherlands includes "destruction of relief ships" in its list of war crimes.³⁰⁷

308. Under the International Crimes Act of the Netherlands, "intentionally directing attacks against ... installations, material, units or vehicles involved in humanitarian assistance ... , as long as they are entitled to the protection given to ... civilian objects under the international law of armed conflict" is a crime, whether committed in an international or a non-international armed conflict.³⁰⁸

309. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.³⁰⁹

310. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the two additional protocols to [the Geneva] Conventions ... is liable to imprisonment".³¹⁰

311. Portugal's Penal Code considers attacks on objects necessary for the assistance and relief of the civilian population as a punishable offence.³¹¹

312. Under Slovenia's Penal Code, "an attack on buildings specially protected under international law" is a war crime.³¹²

313. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.³¹³

³⁰⁴ Ethiopia, *Penal Code* (1957), Article 293(b).

³⁰⁵ Germany, *Law Introducing the International Crimes Code* (2002), § 11.1(1).

³⁰⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁰⁷ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

³⁰⁸ Netherlands, *International Crimes Act* (2003), Articles 5(5)(o) and 6(3)(c).

³⁰⁹ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³¹⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

³¹¹ Portugal, *Penal Code* (1996), Article 241. ³¹² Slovenia, *Penal Code* (1994), Article 374(2).

³¹³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

314. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.³¹⁴

315. Under the Penal Code as amended of the SFRY (FRY), “the launching of an attack on facilities that are specifically protected under international law” is a war crime.³¹⁵

National Case-law

316. No practice was found.

Other National Practice

317. In an appeal issued in 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina stated “we shall make efforts to provide, as soon as possible, conditions for operations of the Red Cross and other humanitarian organizations and, in particular, to ensure respect for their representatives, vehicles and supplies and their safe work”.³¹⁶

318. The Report on the Practice of Brazil refers to an ICRC booklet compiled by the ICRC delegation in Brazil and used for the instruction of the Brazilian armed forces. The booklet highlights the duty of armed forces to respect relief objects.³¹⁷

319. According to the Report on the Practice of Egypt, “because of the importance of relief personnel and objects for the survival of the civilian population, Egypt believes that their protection is a *sine qua non conditio*”.³¹⁸

320. It was reported in the context of the conflict in Ethiopia, that “the Ethiopian air force had bombed relief convoys” and that “the EPLF, too, attacked food convoys, claiming that the regime was using them to ship weapons to its troops”.³¹⁹

321. In 1991, during a parliamentary debate on the situation in Sudan, a member of the German parliament said that the bombing of Red Cross and UN supply depots by governmental forces in southern Sudan was proof of “completely perverse behaviour”. His protest was shared by all parliamentary parties.³²⁰

322. According to the Report on the Practice of Iran, it is the *opinio juris* of Iran that relief objects are “immune from attack”.³²¹

³¹⁴ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

³¹⁵ SFRY (FRY), *Penal Code as amended* (1976), Article 143.

³¹⁶ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

³¹⁷ Report on the Practice of Brazil, 1997, Chapter 4.2.

³¹⁸ Report on the Practice of Egypt, 1997, Chapter 4.2.

³¹⁹ Thomas P. Ofcansky and LaVerle Berry (eds.), *Ethiopia: A Country Study*, Government Printing Office, Washington D.C., Fourth edition, 1993, p. 328.

³²⁰ Germany, Lower House of Parliament, Statement by Dr. Werner Schuster, Member of Parliament, 21 June 1991, *Plenarprotokoll* 12/35, p. 2966.

³²¹ Report on the Practice of Iran, 1997, Chapter 4.2.

323. According to the Report on the Practice of Kuwait, it is the *opinio juris* of Kuwait that humanitarian relief objects must be protected.³²²

324. According to the Report on the Practice of Nigeria, during the conflict in Biafra, the Nigerian Commissioner for Information maintained that “Nigeria would continue to stand by its promise to the ICRC to keep some ‘corridors of mercy’ safe from military activities so that relief supplies could at all times be channelled to Biafra through these corridors”. As no practice deviated from this, the report concludes that the *opinio juris* of Nigeria is that the protection of relief objects is part of customary international law.³²³

325. The Report on UK Practice states that “as regards protection of relief personnel and objects, the UK has, both in words and in action, demonstrated support for this principle, as in Iraq, and in the former Yugoslavia”.³²⁴

326. In 1992, in a report submitted pursuant to paragraph 5 of Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US included among “deliberate attacks on non-combatants” reports that “a convoy of United Nations trucks carrying aid supplies to Bosnian civilians was mortared” and that a “G-222 aircraft, which was carrying five tons of blankets to Sarajevo on a United Nations relief mission, was shot down by up to three ground-to-air missiles”.³²⁵ In another such report, the US referred to a report that “an International Committee of the Red Cross (ICRC) convoy carrying food and medical relief on 18 May was attacked as it entered Sarajevo, despite the security guarantees obtained from the parties concerned”.³²⁶

327. According to the Report on US Practice, it is the *opinio juris* of the US that “buildings used for relief and other charitable purposes are not subject to bombardment”.³²⁷

328. In 1993, in a meeting with ICRC representatives, a government official insisted that incidents in which ICRC personnel and objects were targeted were the work of “uncontrolled elements” and that “strict orders had been issued to respect the ICRC”.³²⁸

III. Practice of International Organisations and Conferences

United Nations

329. In a resolution adopted in 1994, the UN Security Council demanded that “all parties in Rwanda strictly respect the . . . premises of the United Nations

³²² Report on the Practice of Kuwait, 1997, Chapter 4.2.

³²³ Report on the Practice of Nigeria, 1997, Chapter 4.2.

³²⁴ Report on UK Practice, 1997, Chapter 4.2.

³²⁵ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, p. 8.

³²⁶ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November, p. 19.

³²⁷ Report on US Practice, 1997, Chapter 4.2.

³²⁸ ICRC archive document.

and other organizations serving in Rwanda".³²⁹ This demand was reiterated in a subsequent resolution.³³⁰

330. In a resolution adopted in 1994 on the conflict in Liberia, the UN Security Council demanded that all factions "return forthwith" equipment seized from humanitarian relief agencies.³³¹

331. In a resolution adopted in 1996, the UN Security Council condemned the looting of equipment, supplies and personal property of international organisations and agencies delivering humanitarian assistance in Liberia and called for "the immediate return of looted property".³³² It reiterated this statement in a resolution later the same year.³³³

332. In a resolution adopted in 1996, the UN Security Council demanded that "all parties and others concerned in Angola take all necessary measures to ensure the safety of United Nations and other international . . . premises and to guarantee the safety . . . of humanitarian supplies throughout the country".³³⁴ This demand was reiterated in a subsequent resolution later in the same year.³³⁵

333. In a resolution adopted in 1996 in the context of the conflict in Liberia, the UN Security Council condemned "the looting of . . . equipment, supplies, and personal property" of personnel of international organizations and agencies delivering humanitarian assistance.³³⁶

334. In a resolution adopted in 1999, the UN Security Council strongly condemned "attacks on objects protected under international law" and called on all parties "to put an end to such practices".³³⁷

335. In 1994, in a statement by its President on the situation in Rwanda, the UN Security Council called upon all parties "to ensure the safe passage for humanitarian assistance".³³⁸

336. In 1994, in a statement by its President concerning the conflict in Bosnia and Herzegovina, the UN Security Council noted with particular concern "reports of the recurrent obstruction and looting of humanitarian aid convoys destined for the civilian population of Maglaj".³³⁹

337. In 1997, in a statement by its President following the military coup d'état in Sierra Leone, the UN Security Council called for "an end to the looting of premises and equipment belonging to the United Nations and international aid agencies".³⁴⁰

³²⁹ UN Security Council, Res. 918, 17 May 1994, § 11.

³³⁰ UN Security Council, Res. 925, 8 June 1994, § 11.

³³¹ UN Security Council, Res. 950, 21 October 1994, § 8.

³³² UN Security Council, Res. 1059, 31 May 1996, § 6.

³³³ UN Security Council, Res. 1071, 30 August 1996, § 8.

³³⁴ UN Security Council, Res. 1075, 11 October 1996, § 18.

³³⁵ UN Security Council, Res. 1087, 11 December 1996, § 16.

³³⁶ UN Security Council, Res. 1083, 27 November 1996, § 7.

³³⁷ UN Security Council, Res. 1265, 17 September 1999, § 2.

³³⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/21, 30 April 1994, p. 2.

³³⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994.

³⁴⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/29, 27 May 1997.

338. In 1997, in a statement by its President, the UN Security Council expressed its deep concern about “the deteriorating humanitarian situation in Sierra Leone, and at the continued looting and commandeering of relief supplies of international agencies”.³⁴¹

339. In 1997, in a statement by its President concerning the situation in Afghanistan, the UN Security Council expressed “serious concern over the looting of United Nations premises and food supplies” and urged all parties “to prevent their recurrence”.³⁴²

340. In 2000, in statement by its President, the UN Security Council strongly condemned “acts of destruction and looting” of the property of UN and associated personnel and of humanitarian personnel.³⁴³

341. In a resolution adopted in 1996 in the context of the conflict in Liberia, the UN General Assembly deplored “the looting of . . . equipment, supplies and personal property” of the UN, its specialised agencies and NGOs.³⁴⁴

342. In a resolution adopted in 1996 on the situation of human rights in Afghanistan, the UN General Assembly demanded that “all Afghan parties fulfil their obligations and commitments regarding the safety of United Nations personnel and other international personnel as well as their premises in Afghanistan”.³⁴⁵ This demand was reiterated in a subsequent resolution in 1997.³⁴⁶

343. In a resolution adopted in 1999 on the safety and security of humanitarian personnel and protection of UN personnel, the UN General Assembly strongly condemned “acts of destruction and looting” of the property of those participating in humanitarian operations.³⁴⁷ The General Assembly urged all States “to take the necessary measures . . . to respect and ensure respect for the inviolability of United Nations premises”.³⁴⁸

344. In a resolution adopted in 2000 on the situation of human rights in the Sudan, the UN General Assembly urged the SPLM/A “not to misappropriate humanitarian assistance”.³⁴⁹

345. In a resolution adopted in 1995 on the situation of human rights in Sudan, the UN Commission on Human Rights expressed its outrage at “the use of military force by all parties to the conflict to disrupt or attack relief efforts

³⁴¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/42, 6 August 1997, § 7.

³⁴² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/55, 16 December 1997, p. 2.

³⁴³ UN Security Council, Statement by the President, UN Doc. S/PRST/2000/4, 11 February 2000, p. 2.

³⁴⁴ UN General Assembly, Res. 51/30 B, 5 December 1996, § 4.

³⁴⁵ UN General Assembly, Res. 51/108, 12 December 1996, § 8.

³⁴⁶ UN General Assembly, Res. 52/145, 12 December 1997, § 9.

³⁴⁷ UN General Assembly, Res. 54/192, 17 December 1999, preamble.

³⁴⁸ UN General Assembly, Res. 54/192, 17 December 1999, § 2.

³⁴⁹ UN General Assembly, Res. 55/116, 4 December 2000, § 3[g].

aimed at assisting civilian populations” and called for “an end to such practices and for those responsible for such actions to be brought to justice”.³⁵⁰

346. In 1992, in a report on the situation in Somalia, the UN Secretary-General noted that the two main factions of the United Somali Congress had agreed that a number of sites in Mogadishu, namely the port, airports, hospitals, NGO locations and routes to and from food and non-food distribution points be declared “corridors and zones of peace”. He added that the “corridors of peace” for the safe passage of relief workers and supplies were “of paramount importance”.³⁵¹

347. The Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, annexed to the 2000 United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo, state that:

The relevant authorities are responsible for creating conditions conducive to the implementing of humanitarian activities. This must cover the security of local and international staff as well as all assets. The restitution of requisitioned assets is an essential indication of the goodwill of the authorities. Agencies look to the local authorities to take responsibility for ensuring the return of assets wherever possible.³⁵²

Other International Organisations

348. In a resolution adopted in 1989 on the activities of the International Committee of the Red Cross, the Parliamentary Assembly of the Council of Europe stated that it was “preoccupied by the increase in breaches in the security of delegates of the ICRC, its installations and means of transport”.³⁵³

349. In a resolution adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe strongly condemned attacks on convoys and personnel of international organisations bringing relief to the population in Bosnia and Herzegovina and demanded that “violators of humanitarian law [be] held personally accountable for these violations”.³⁵⁴

350. In a declaration by the Presidency in 1998, the EU called upon all parties to the conflict in Sudan “to respect and guarantee the security of all . . . relief flights and their crews and other means of humanitarian transport and supply depots”.³⁵⁵

³⁵⁰ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 18.

³⁵¹ UN Secretary-General, Report on the situation in Somalia, UN Doc. S/23829/add.1, 21 April 1992, Addendum, Consolidated inter-agency 90-day Plan of Action for Emergency Humanitarian Assistance to Somalia, §§ 59 and 96.

³⁵² UNOCHA, United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of Congo (January–December 2000), November 1999, Annex II, Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of Congo, § 2.

³⁵³ Council of Europe, Parliamentary Assembly, Res. 921, 6 July 1989, § 8.

³⁵⁴ Council of Europe, Parliamentary Assembly, Res. 984, 30 June 1992, § 8.

³⁵⁵ EU, Declaration on Sudan by the Presidency on behalf of the EU, 14 August 1998, § 11.

International Conferences

351. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to “make every effort” to protect relief goods and convoys as defined in international humanitarian law.³⁵⁶

352. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference in Canberra expressed regret that “the international relief and protection effort during armed conflicts . . . is encountering serious difficulties and dangers, including . . . attacks against humanitarian personnel, food supplies and relief”.³⁵⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

353. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

354. In the context of an internal conflict, attacks by the forces of an armed opposition group on ICRC warehouses were reported, as was the destruction of the premises of the ICRC delegation. In all its communications, the ICRC reminded the armed opposition group that it must respect the Geneva Conventions and the fundamental rules of IHL, because the commitment it made in 1980 was still applicable.³⁵⁸

355. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about “the protracting internal conflict in Yugoslavia” and urged the parties to the conflict “to refrain from armed actions against relief convoys”.³⁵⁹

356. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “to facilitate relief operations . . . and to respect the personnel, vehicles and premises involved”.³⁶⁰

357. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “the personnel, vehicles and premises of relief agencies shall be protected”.³⁶¹

358. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the

³⁵⁶ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(9), *ILM*, Vol. 33, 1994, p. 301.

³⁵⁷ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble.

³⁵⁸ ICRC archive documents.

³⁵⁹ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

³⁶⁰ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

³⁶¹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § IV, *IRRC*, No. 320, 1997, p. 505.

Great Lakes region, the ICRC stated that "relief operations aimed at the civilian population which are exclusively humanitarian, impartial and non-discriminatory shall be facilitated and respected. The personnel, vehicles and premises of relief agencies shall be protected."³⁶²

VI. Other Practice

359. In a resolution adopted at its Edinburgh Session in 1969, the Institute of International Law stated that "those objects which, by their nature or use, serve primarily humanitarian or peaceful purposes" cannot be considered as military objectives.³⁶³

360. In 1981 and 1982, an armed opposition group agreed to respect ICRC personnel and vehicles.³⁶⁴

361. In 1982 and 1984, an armed opposition group undertook not to attack ICRC personnel, vehicles and planes.³⁶⁵

362. In 1985, in a meeting with ICRC representatives, the UN Secretary-General of an armed opposition group stated that the attacks on ICRC personnel and relief objects which had been undertaken by the forces of the armed group had taken place solely because ICRC personnel were located close to a combat area. With respect to an attack on an ICRC plane, the Secretary-General justified it on the grounds that his forces were "nervous and suspicious of any aircraft present in the region".³⁶⁶

363. In 1988, in a meeting with the ICRC, an armed opposition group agreed to respect ICRC personnel and objects in the course of an internal conflict.³⁶⁷

364. In 1992, an armed opposition group agreed to respect ICRC personnel and vehicles.³⁶⁸

365. The Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the IHL in 1993, state that "humanitarian assistance can, if appropriate, be made available by way of 'humanitarian corridors', which should be respected and protected by the competent authorities of the parties involved and if necessary by the United Nations authority".³⁶⁹

366. In 1994, in a letter addressed to the ICRC, an armed opposition group pledged to respect Red Cross and Red Crescent installations and vehicles. It condemned the looting of an ICRC convoy and assured the ICRC of its continuing

³⁶² ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Operation Turquoise, 23 June 1994, § IV, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

³⁶³ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-Military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 3(b).

³⁶⁴ ICRC archive documents.

³⁶⁵ ICRC archive documents. ³⁶⁶ ICRC archive document.

³⁶⁷ ICRC archive document. ³⁶⁸ ICRC archive document.

³⁶⁹ IHL, Guiding Principles on the Right to Humanitarian Assistance, Principle 10, *IRRC*, No. 297, 1993, p. 524.

efforts to ensure the security of ICRC personnel and objects and to recover any lost property.³⁷⁰

367. In 1994, in a meeting with the ICRC, a military leader of an armed opposition group committed the group to ensuring that the security of ICRC installations, personnel, equipment and activities within its territory were guaranteed in accordance with the provisions of the Geneva Conventions.³⁷¹

368. In 1994, in a meeting with the ICRC, an armed opposition group undertook to guarantee the security of ICRC installations, personnel, equipment and activities in the territory under its control in accordance with the Geneva Conventions.³⁷²

369. At the International Symposium on Water in Armed Conflicts held in Montreux (Switzerland) in 1994, the group of international experts present agreed to “aim for absolute protection of water supplies and systems”.³⁷³

370. In 1996, during the conflict in Angola, UNITA committed itself to ensuring that relief personnel and objects would be spared from attack.³⁷⁴

³⁷⁰ ICRC archive document. ³⁷¹ ICRC archive documents. ³⁷² ICRC archive document.

³⁷³ International Symposium on Water in Armed Conflicts, Montreux, November 1994, *ICRC News*, 24 November 1994, quoted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 458–459.

³⁷⁴ UNITA, Statement on the humanitarian situation in Angola, Bailundo, 1 January 1996.

PERSONNEL AND OBJECTS INVOLVED IN A PEACEKEEPING MISSION

Personnel and Objects Involved in a Peacekeeping Mission
(practice relating to Rule 33)

§§ 1–127

Personnel and Objects Involved in a Peacekeeping Mission

I. Treaties and Other Instruments

Treaties

1. The preamble to the 1994 Convention on the Safety of UN Personnel states that:

The States Parties to this Convention [are] deeply concerned over the growing number of deaths and injuries resulting from deliberate attacks against United Nations and associated personnel and [bear] in mind that attacks against, or other mistreatment of, personnel who act on behalf of the United Nations are unjustifiable and unacceptable, by whomsoever committed.

2. According to Article 1(a)(i) of the 1994 Convention on the Safety of UN Personnel, the Convention applies to “persons engaged or deployed by the Secretary-General of the United Nations as members of the military, police or civilian components of a United Nations operation”. Article 2(2) states that:

This Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

3. Article 7 of the 1994 Convention on the Safety of UN Personnel states that:

1. United Nations and associated personnel, their equipment and premises shall not be made the object of attack or of any action that prevents them from discharging their mandate.
2. States Parties shall take all appropriate measures to ensure the safety and security of United Nations and associated personnel. In particular, States Parties shall take all appropriate steps to protect United Nations and associated personnel who are deployed in their territory from the crimes set out in Article 9 [murder, kidnapping or other attack].

4. Pursuant to Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute, the following constitutes a war crime in both international and non-international armed conflicts:

intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

5. Article 4(b) of the 2002 Statute of the Special Court for Sierra Leone provides that:

The Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law:

- ...
- (b) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

Other Instruments

6. Article 19 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that:

- 1. The following crimes constitute crimes against the peace and security of mankind when committed intentionally and in a systematic manner or on a large scale against United Nations and associated personnel involved in a United Nations operation with a view to preventing or impeding that operation from fulfilling its mandate:
 - (a) Murder, kidnapping or other attack upon the person or liberty of any such personnel;
 - (b) Violent attack upon the official premises, the private accommodations or the means of transportation of any such personnel likely to endanger his or her person or liberty.
- 2. This article shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international conflict applies.

7. The commentary on Article 19(2) of the 1996 Draft Code of Crimes against the Peace and Security of Mankind states that:

Attacks against United Nations and associated personnel constitute violent crimes of exceptionally serious gravity which have serious consequences not only for the victims, but also for the international community . . . Attacks against such personnel are in effect directed against the international community and strike at the very heart of the international legal system established for the purpose of maintaining international peace and security . . . The international community has a special

responsibility to ensure the effective prosecution and punishment of the individuals who are responsible for criminal attacks against United Nations and associated personnel.

8. Paragraph 1 of the 1999 UN Secretary-General's Bulletin provides that:

1.1 The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.

1.2 The promulgation of this bulletin does not affect the protected status of members of peacekeeping operations under the 1994 Convention on the Safety of United Nations and Associated Personnel or their status as non-combatants, as long as they are entitled to the protection given to civilians under the international law of armed conflict.

9. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iii) and (e)(iii), the following constitutes a war crime in both international and non-international armed conflicts:

intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.

II. National Practice

Military Manuals

10. Cameroon's Instructors' Manual states that:

It is prohibited for belligerents to open fire on interposition forces and on their materiel, [as] these forces' mission is not to fight one or the other party to the conflict (except in case of self-defence) but to interpose themselves between such parties in order to ensure respect for a cease-fire.¹

11. Germany's Military Manual states that:

When a United Nations' force or mission performs functions of peacekeeping, observation or similar functions, each party to the conflict shall, if requested . . . take such measures as may be necessary to protect the force or mission while carrying out its duties . . . The protection of the force or mission shall always be ensured.²

¹ Cameroon, *Instructors' Manual* (1992), p. 110.

² Germany, *Military Manual* (1992), § 418.

12. New Zealand's Military Manual states that:

1. United Nations Forces are usually engaged in peacekeeping operations. On such occasions they have no combat function, although they may defend themselves if attacked. Their duty is to supervise or observe a situation between contestants, even combatants, and report back. Sometimes, their duty is to seek to interpose themselves between such forces with the intention that their presence under authority of a United Nations resolution and wearing United Nations insignia will protect them from attack, and thus create a cordon sanitaire between the antagonists.
...
2. When participating in peacekeeping operations, United Nations Forces are not present in State territory in any hostile capacity and are not engaged in any sort of armed conflict. In fact, their principal purpose is to prevent any such conflict not only as it would affect themselves but also as it affects the parties they are seeking to separate and keep apart. As a result, since their activities do not amount to participation in an armed conflict, the Geneva Conventions of 1949 concerning the wounded, sick and shipwrecked, or prisoner of war do not govern their activities or protect them.
3. Since the IV GC operates to protect any non-combatant in the hands of a Party to a conflict, members of a United Nations Peacekeeping Force falling into the hands of a Party to a conflict would be covered by this Convention. It is difficult, however, to consider such personnel, who are members of the armed forces of the States providing contingents to the Force and who are wearing uniform and United Nations insignia, as civilians as that term is normally understood.³

13. Nigeria's Military Manual states that:

UN peace keeping Force should remain impartial, objective and neutral. Whenever it is perceived to be a party to a conflict, this does not exclude the applicability of International Humanitarian Law to UN Peace Keeping Force when it engages in defensive or combat mission in pursuance of their mandate.⁴

14. Spain's LOAC Manual states that UN forces "must be respected [and] must not be made the object of attack".⁵

National Legislation

15. Australia's ICC (Consequential Amendments) Act incorporates into the Criminal Code the war crimes defined in the 1998 ICC Statute, including "attacking personnel or objects involved in a humanitarian assistance or peacekeeping mission" in international and non-international armed conflicts.⁶

16. Azerbaijan's Criminal Code provides that "directing attacks against personnel recruited to carry out peacekeeping missions" constitutes a war crime in international and non-international armed conflicts.⁷

³ New Zealand, *Military Manual* (1992), § 1904. ⁴ Nigeria, *Military Manual* (1994), p. 23, § 6.

⁵ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.a.(9).

⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.37 and 268.79.

⁷ Azerbaijan, *Criminal Code* (1999), Article 116(3).

17. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, the following constitutes a war crime in both international and non-international armed conflicts:

intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.⁸

18. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁹

19. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.¹⁰

20. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, is a crime in both international and non-international armed conflicts, including

intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.¹¹

21. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict,

directs an attack against personnel, installations, material, units or vehicles involved in a . . . peace-keeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under international humanitarian law.¹²

22. Under Mali's Penal Code, the following constitutes a war crime in international armed conflicts:

intentionally directing attacks against personnel, installations, material, units or vehicles involved in a . . . peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.¹³

⁸ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(c) and (D)(c).

⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁰ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹¹ Georgia, *Criminal Code* (1999), Article 413(d).

¹² Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(1)(1).

¹³ Mali, *Penal Code* (2001), Article 31(i)(3).

23. Under the International Crimes Act of the Netherlands, the following is a crime, whether committed in an international or a non-international armed conflict:

intentionally directing attacks against personnel, installations, material, units and vehicles involved in . . . peace missions in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict.¹⁴

24. New Zealand's Crimes (Internationally Protected Persons and Hostages) Amendment Act implementing the 1994 Convention on the Safety of UN Personnel gives the courts of New Zealand extraterritorial jurisdiction over attacks against such personnel, their property and vehicles, which are criminalised by the Act.¹⁵

25. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.¹⁶

26. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.¹⁷

27. The UK UN Personnel Act provides that:

If a person does outside the UK, any act to or in relation to a UN worker which, if he had done it in any part of the UK, would have made him guilty of [murder, manslaughter, culpable homicide, rape, assault causing injury, kidnapping, abduction or false imprisonment], he shall in that part of the UK be guilty of that offence.¹⁸

The Act contains a similar provision for the prosecution of threats of attacks against UN workers, within or outside the UK; attacks against UN vehicles and premises committed outside the UK; and threats of attacks against UN vehicles and premises, within or outside the UK.¹⁹ Within the framework of this Act, members of the military component of a UN operation engaged or deployed by the UN Secretary-General are UN workers.²⁰

28. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iii) and (e)(iii) of the 1998 ICC Statute.²¹

¹⁴ Netherlands, *International Crimes Act* (2003), Articles 5(5)(o) and 6(3)(c).

¹⁵ New Zealand, *Crimes (Internationally Protected Persons and Hostages) Amendment Act* (1998), Sections 3 and 4.

¹⁶ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁷ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁸ UK, *UN Personnel Act* (1997), Article 1.

¹⁹ UK, *UN Personnel Act* (1997), Articles 2 and 3.

²⁰ UK, *UN Personnel Act* (1997), Article 4(1)(a).

²¹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

National Case-law

29. In its judgement in the *Violations of IHL in Somalia and Rwanda case* in 1997, a Belgian Military Court decided that the members of the UNOSOM II mission could not be considered as “combatants” since their primary task was not to fight against any of the factions, nor could they fall into the category of an “occupying force”.²²

30. In its judgement in the *Brocklebank case* in 1996, the Court Martial Appeal Court of Canada held that no armed conflict existed in Somalia at the relevant time, nor were the Canadian forces to be considered as a party to the conflict as they were engaged in a peacekeeping mission.²³

Other National Practice

31. During a debate in the UN General Assembly following the shelling of the UN compound at Qana on 18 April 1996, Australia stated that all attacks against UN peacekeepers were totally unacceptable and contrary to the norms of international law.²⁴

32. On 16 May 1967, the General Commander of the Egyptian armed forces sent a message to the Commander of UNEF stating that “our forces have massed in Sinai on our eastern borders, and to safeguard the safety of the UNEF troops stationed in the observation posts on our borders, I request that you order the immediate withdrawal of these troops”.²⁵

33. In 1994, during a debate in the UN Security Council, Finland condemned attacks against UNPROFOR.²⁶

34. In 1995, during a debate in the UN Security Council, Germany condemned attacks against UNPROFOR.²⁷

35. In 1996, in a report on UNOMIL, the UN Secretary-General noted that Liberia’s Council of State “condemned ULIMO-J for its attacks against ECOMOG”.²⁸

36. The Report on the Practice of Malaysia states that members of the Malaysian armed forces are trained to respect peacekeeping forces.²⁹

37. In 1995, during a debate in the UN Security Council, Russia condemned attacks against UNPROFOR.³⁰

²² Belgium, Military Court, *Violations of IHL in Somalia and Rwanda case*, Judgement, 17 December 1997.

²³ Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996.

²⁴ Australia, Statement before the UN General Assembly, UN Doc. A/50/PV.116, 25 April 1996, p. 6.

²⁵ Egypt, Message from the Minister of Foreign Affairs of the United Arab Republic to the UN Secretary-General, 18 May 1967, Report on the Practice of Egypt, 1997, Chapter 1.1; see also UN Secretary-General, Special Report on UNEF, UN Doc. A/6669, 18 May 1967, § 2.

²⁶ Finland, Statement before the UN Security Council, UN Doc. S/PV.3367, 21 April 1994, p. 34.

²⁷ Germany, Statement before the UN Security Council, UN Doc. S/PV.3553, 12 July 1995, p. 11.

²⁸ UN Secretary-General, Sixteenth progress report on UNOMIL, UN Doc. S/1996/232, 1 April 1996, § 6.

²⁹ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.4.

³⁰ Russia, Statement before the UN Security Council, UN Doc. S/PV.3553, 12 July 1995, p. 9.

38. In 1991, in an appeal addressed to the President of the UN Security Council, the Ministry of Foreign Affairs of Ukraine stated that:

Shooting at the UNPROFOR military personnel is a gross violation of the principles and norms of international law and may be considered by the Governments of States, contributing their military contingents to the United Nations peace-keeping forces, as hostile actions against their citizens. The Government of Ukraine strongly demands that the sides in conflict, in particular the Governments of Bosnia and Herzegovina, as well as of Serbia undertake all necessary steps for immediate and unconditional cessation of hostile actions against the United Nations peace-keeping forces, the Ukrainian battalion among them in the Sarajevo sector.³¹

39. In 1995, during a debate in the UN Security Council, the UK condemned attacks against UNPROFOR.³²

40. In 1996, during a debate in the UN Security Council concerning the situation in Liberia, the UK expressed deep regret at the loss of life among ECOMOG forces and outrage that peacekeeping forces were subjected to attacks.³³

41. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US noted that "five members of the United Nations Protection Force (UNPROFOR) contingent in Sarajevo had been killed by combatants".³⁴

42. In 1995, during a debate in the UN Security Council, the US condemned attacks against UNPROFOR.³⁵

III. Practice of International Organisations and Conferences

United Nations

43. In a resolution adopted in 1978, the UN Security Council demanded "full respect for the United Nations Force from all parties in Lebanon".³⁶

44. In a resolution on UNIFIL in Lebanon adopted in 1980, the UN Security Council condemned "acts that have led to loss of life among the personnel of the Force and the United Nations Truce Supervision Organization, their harassment and abuse, the disruption of communication, as well as the destruction of property and material".³⁷

³¹ Ukraine, Appeal of the Ministry of Foreign Affairs to the President of the UN Security Council, annexed to Letter dated 10 August 1992 to the President of the UN Security Council, UN Doc. S/24403, 10 August 1992, p. 2.

³² UK, Statement before the UN Security Council, UN Doc. S/PV.3553, 12 July 1995, p. 11.

³³ UK, Statement before the UN Security Council, UN Doc. S/PV.3621, 25 January 1996, p. 19.

³⁴ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, p. 19.

³⁵ US, Statement before the UN Security Council, UN Doc. S/PV.3553, 12 July 1995, p. 11.

³⁶ UN Security Council, Res. 427, 3 May 1978, § 4.

³⁷ UN Security Council, Res. 467, 24 April 1980, § 2.

45. In a resolution adopted in 1986, the UN Security Council condemned attacks committed against UNIFIL in Lebanon, referring to such acts as a “criminal action”.³⁸

46. In a resolution adopted in 1992 in the context of events in the former Yugoslavia, the UN Security Council expressed its deep concern that “those United Nations Protection Force personnel remaining in Sarajevo have been subjected to deliberate mortar and small-arms fire, and that the United Nations Military Observers deployed in the Mostar region have had to be withdrawn”.³⁹

47. In two resolutions adopted in 1992 and 1993, the UN Security Council condemned “armed attacks against the peace-keeping forces of ECOWAS in Liberia” and called upon the parties to the conflict to ensure their safety.⁴⁰

48. In a resolution adopted in 1992, the UN Security Council stated that it was dismayed by “attacks on the Pakistani contingent in Mogadishu of the United Nations Operation in Somalia”.⁴¹

49. In a resolution adopted in 1993 in the context of the conflict in Croatia, the UN Security Council strongly condemned attacks by the Croatian forces “against UNPROFOR in the conduct of its duty of protecting civilians in the United Nations Protected Areas” and demanded “their immediate cessation”.⁴²

50. In a resolution on Angola adopted in 1993, the UN Security Council condemned “attacks against UNAVEM II personnel in Angola” and demanded that “the Government and UNITA take all necessary measures to ensure their safety and security”.⁴³

51. In a resolution on Bosnia and Herzegovina adopted in 1993, the UN Security Council strongly condemned “the actions taken by Bosnian Serb paramilitary units against UNPROFOR, in particular, their refusal to guarantee the safety and freedom of movement of UNPROFOR personnel” and demanded that “all parties guarantee the safety and full freedom of movement of UNPROFOR and of all other United Nations personnel”.⁴⁴

52. In a resolution on Somalia adopted in 1993, the UN Security Council stated that it regarded the armed attacks launched by forces apparently belonging to the United Somali Congress against the personnel of UNOSOM II in June 1993 as “criminal attacks”.⁴⁵

53. In a resolution on Somalia adopted in 1993, the UN Security Council condemned “all attacks on UNOSOM II personnel” and reaffirmed that “those who have committed or ordered the commission of such criminal acts will be held individually responsible for them”.⁴⁶

³⁸ UN Security Council, Res. 587, 23 September 1986, §§ 1 and 2.

³⁹ UN Security Council, Res. 757, 30 May 1992, preamble.

⁴⁰ UN Security Council, Res. 788, 19 November 1992, § 4; Res. 813, 26 March 1993, § 6.

⁴¹ UN Security Council, Res. 794, 3 December 1992, preamble.

⁴² UN Security Council, Res. 802, 25 January 1993, § 2.

⁴³ UN Security Council, Res. 804, 29 January 1993, § 12.

⁴⁴ UN Security Council, Res. 819, 16 April 1993, preamble and § 10.

⁴⁵ UN Security Council, Res. 837, 6 June 1993, preamble.

⁴⁶ UN Security Council, Res. 865, 22 September 1993, § 3.

54. In a resolution adopted in 1993 on security and safety of UN forces and personnel, the UN Security Council urged States and parties to a conflict “to cooperate closely with the United Nations to ensure the security and safety of United Nations forces and personnel”.⁴⁷

55. In a resolution on Somalia adopted in 1994, the UN Security Council condemned “violence and armed attacks against persons engaged in... peace-keeping efforts” and re-emphasised the importance it attached to “the safety and security of United Nations and other personnel engaged in... peace-keeping throughout Somalia”.⁴⁸ The Council also demanded that “all Somali parties refrain from any acts of intimidation or violence against personnel engaged in... peace-keeping work in Somalia”.⁴⁹ These statements were repeated in two other resolutions on the same subject adopted later the same year.⁵⁰

56. In a resolution on Rwanda adopted in 1994, the UN Security Council strongly condemned “the attacks against UNAMIR and other United Nations personnel leading to the deaths of and injury to several UNAMIR personnel” and called upon all concerned “to put an end to these acts of violence and to respect fully international humanitarian law”.⁵¹

57. In a resolution adopted in 1994 in the context of the conflict in Bosnia and Herzegovina, the UN Security Council condemned “the harassment and the detention of UNPROFOR personnel by the Bosnian Serb forces and all obstacles to UNPROFOR’s freedom of movement”.⁵²

58. In a resolution adopted in 1994, the UN Security Council demanded “that all parties in Rwanda strictly respect the persons and premises of the United Nations and other organizations serving in Rwanda, and refrain from any acts of intimidation or violence against personnel engaged in... peace-keeping work”.⁵³ The Council reiterated this demand in a subsequent resolution.⁵⁴

59. In a resolution adopted in 1994 authorising the creation of a multinational force in Haiti, the UN Security Council demanded that “no acts of intimidation or violence be directed against personnel engaged in humanitarian or peace-keeping work”.⁵⁵

60. In a resolution on Somalia adopted in 1994, the UN Security Council strongly condemned “the attacks and harassment against UNOSOM II”.⁵⁶

61. In a resolution on Liberia adopted in 1994, the UN Security Council condemned “the detention and maltreatment of UNOMIL observers [and]

⁴⁷ UN Security Council, Res. 868, 29 September 1993, § 3.

⁴⁸ UN Security Council, Res. 897, 4 February 1994, preamble.

⁴⁹ UN Security Council, Res. 897, 4 February 1994, § 8.

⁵⁰ UN Security Council, Res. 923, 31 May 1994, preamble and § 5; Res. 954, 4 November 1994, preamble and § 7.

⁵¹ UN Security Council, Res. 912, 21 April 1994, § 5.

⁵² UN Security Council, Res. 913, 22 April 1994, preamble.

⁵³ UN Security Council, Res. 918, 17 May 1994, § 11.

⁵⁴ UN Security Council, Res. 925, 8 June 1994, § 11.

⁵⁵ UN Security Council, Res. 940, 31 July 1994, § 15.

⁵⁶ UN Security Council, Res. 946, 30 September 1994, preamble, § 4.

ECOMOG soldiers" and demanded that "all factions in Liberia strictly respect the status of ECOMOG and UNOMIL personnel, and . . . refrain from any acts of violence, abuse or intimidation against them and return forthwith equipment seized from them".⁵⁷

62. In a resolution adopted in 1995, the UN Security Council stated that it was "gravely preoccupied at the recent attacks on the United Nations Protection Force (UNPROFOR) personnel in the Republic of Bosnia and Herzegovina and at the fatalities resulting therefrom" and condemned "in the strongest terms such unacceptable acts directed at members of peace-keeping forces". The Council demanded that "all parties and others concerned refrain from any act of intimidation or violence against UNPROFOR and its personnel".⁵⁸

63. In a resolution adopted in 1995 on extension of the mandate of the UN Observer Mission in Georgia and the settlement of the conflict in Abkhazia, the UN Security Council called upon the parties "to improve their cooperation with UNOMIG and the CIS peace-keeping force" and "to honour their commitments with regard to the security and freedom of movement of all United Nations and CIS personnel".⁵⁹ In a resolution adopted in the same context in 1996, the UN Security Council reiterated these demands.⁶⁰

64. In a resolution adopted in 1995 on withdrawal of the Croatian government troops from the zone of separation in Croatia and full deployment of the UN Confidence Restoration Operation in Croatia, the UN Security Council condemned "in the strongest terms all unacceptable acts which were directed at the personnel of the United Nations peace-keeping forces" and stated it was determined "to obtain strict respect of the status of such personnel in the Republic of Croatia as provided for in the Agreement between the United Nations and the Government of the Republic of Croatia signed on 15 May 1995". It further reaffirmed "its determination to ensure the security and freedom of movement of the personnel of United Nations peace-keeping operations in the territory of the former Yugoslavia".⁶¹

65. In a resolution adopted in 1995, the UN Security Council demanded that "the Bosnian Serb forces release immediately and unconditionally all remaining detained UNPROFOR personnel" and that "all parties fully respect the safety of UNPROFOR personnel".⁶²

66. In a resolution adopted in 1995, the UN Security Council condemned "the offensive by the Bosnian Serb forces against the safe area of Srebrenica, and in particular the detention by the Bosnian Serb forces of UNPROFOR personnel". It also condemned "all attacks on UNPROFOR personnel".⁶³

⁵⁷ UN Security Council, Res. 950, 21 October 1994, §§ 7 and 8.

⁵⁸ UN Security Council, Res. 987, 19 April 1995, preamble and § 1.

⁵⁹ UN Security Council, Res. 993, 12 May 1995, § 8.

⁶⁰ UN Security Council, Res. 1036, 12 January 1996, § 8.

⁶¹ UN Security Council, Res. 994, 17 May 1995, preamble.

⁶² UN Security Council, Res. 998, 16 June 1995, § 1.

⁶³ UN Security Council, Res. 1004, 12 July 1995, preamble.

67. In a resolution adopted in 1995 in the context of the conflict in Croatia, the UN Security Council condemned in the strongest terms “the unacceptable acts by Croatian Government forces against personnel of the United Nations peace-keeping forces, including those which have resulted in the death of a Danish member of those forces and two Czech members”. It reaffirmed “its determination to ensure the security and freedom of movement of the personnel of the United Nations peace-keeping operations in the territory of the former Yugoslavia”. The Council also demanded that “the Government of the Republic of Croatia fully respect the status of United Nations personnel, refrain from any attacks against them, bring to justice those responsible for any such attacks, and ensure the safety and freedom of movement of United Nations personnel at all times”.⁶⁴

68. In a resolution on Liberia adopted in 1995, the UN Security Council demanded that “all factions in Liberia strictly respect the status of ECOMOG and UNOMIL personnel, as well as organizations and agencies delivering humanitarian assistance throughout Liberia”.⁶⁵

69. In a resolution adopted in 1995 in the context of the conflict in Bosnia and Herzegovina, the UN Security Council called upon “the parties to ensure the safety and security of UNPROFOR and confirmed that UNPROFOR will continue to enjoy all existing privileges and immunities, including during the period of withdrawal”.⁶⁶

70. In a resolution adopted in 1996 in the context of the conflict in Liberia, the UN Security Council expressed its grave concern about the attacks against personnel of ECOMOG and civilians and demanded “that such hostile acts cease forthwith”.⁶⁷

71. In a resolution adopted in 1996 in the context of the conflict in Liberia, the UN Security Council condemned “all attacks against personnel of ECOMOG [and] UNOMIL”.⁶⁸ This condemnation was reiterated several times the same year.⁶⁹

72. In two resolutions adopted in 1997 and 1998 in the context of the conflict in the Middle East, the UN Security Council condemned “all acts of violence committed in particular against [UNIFIL]” and urged the parties “to put an end to them”.⁷⁰

73. In a resolution adopted in 1997 in the context of the conflict in Tajikistan, the UN Security Council stated that it was deeply concerned “over continuing attacks on the personnel of the United Nations, the Collective Peace-keeping Forces of the Commonwealth of Independent States (CIS) and other

⁶⁴ UN Security Council, Res. 1009, 10 August 1995, preamble and § 6.

⁶⁵ UN Security Council, Res. 1014, 15 September 1995, § 13.

⁶⁶ UN Security Council, Res. 1031, 15 December 1995, § 37.

⁶⁷ UN Security Council, Res. 1041, 29 January 1996, preamble and § 4.

⁶⁸ UN Security Council, Res. 1059, 31 May 1996, § 6.

⁶⁹ UN Security Council, Res. 1071, 30 August 1996, § 8; Res. 1083, 27 November 1996, § 7.

⁷⁰ UN Security Council, Res. 1095, 28 January 1997, § 4; Res. 1122, 29 July 1997, § 4.

international personnel in Tajikistan". As a result, the Council strongly condemned "the acts of mistreatment against UNMOT and other international personnel" and urgently called upon the parties "to cooperate in bringing the perpetrators to justice, to ensure the safety and freedom of movement of the personnel of the United Nations, the CIS peacekeeping forces and other international personnel".⁷¹

74. In a resolution on Angola adopted in 1997, the UN Security Council expressed "its concern about the . . . attacks by UNITA on UNAVEM III posts and personnel".⁷²

75. In a resolution on Angola adopted in 1998, the UN Security Council condemned

the attacks by members of UNITA on MONUA personnel and on Angolan national authorities, and demanded that UNITA immediately stop such attacks, cooperate fully with MONUA and guarantee unconditionally the safety and freedom of movement of MONUA and other international personnel.⁷³

76. In a resolution on Angola adopted in 1998, the UN Security Council reiterated its condemnation of "the attacks by members of UNITA on the personnel of the United Nations Observer Mission in Angola, international personnel and Angolan national authorities, including the police", demanded that "UNITA immediately stop such attacks", and urged "MONUA to investigate promptly the recent attack in N'gove".⁷⁴

77. In two resolutions on Angola adopted in 1998, the UN Security Council demanded that UNITA stop "any attacks by its members on the personnel of MONUA, international personnel, the authorities of the GURN, including the police, and the civilian population" and called upon the GURN and in particular UNITA to "guarantee unconditionally the safety and the freedom of movement of all United Nations and international personnel".⁷⁵

78. In a resolution adopted in 1998 in the context of the conflict in Georgia, the UN Security Council condemned "the acts of violence against the personnel of UNOMIG" and "the attacks by armed groups, operating in the Gali region from the Georgian side of the Inguri River, against the CIS peacekeeping force". It demanded that "the parties, in particular the Georgian authorities, take determined measures to put a stop to such acts which subvert the peace process".⁷⁶

79. In a resolution adopted in 1998 in the context of the conflict in Tajikistan, the UN Security Council strongly condemned "the murder of four members of UNMOT". The Council acknowledged "the efforts of the Government of

⁷¹ UN Security Council, Res. 1099, 14 March 1997, preamble and § 4.

⁷² UN Security Council, Res. 1118, 30 June 1997, preamble.

⁷³ UN Security Council, Res. 1157, 20 March 1998, § 9.

⁷⁴ UN Security Council, Res. 1164, 29 April 1998, § 4.

⁷⁵ UN Security Council, Res. 1173, 12 June 1998, § 5; Res. 1180, 29 June 1998, § 5.

⁷⁶ UN Security Council, Res. 1187, 30 July 1998, § 11.

Tajikistan to enhance the protection of international personnel” and called upon the parties “to cooperate further in ensuring the safety and freedom of movement of the personnel of the United Nations, the CIS Peacekeeping Forces and other international personnel”.⁷⁷

80. In a resolution adopted in 2000, the UN Security Council condemned “in the strongest terms the . . . detention of the personnel of UNAMSIL [by the RUF] in Sierra Leone”.⁷⁸

81. In 1992, in a statement by its President, the UN Security Council condemned “the recent cowardly attack on UNPROFOR positions in Sarajevo resulting in loss of life and injuries among the Ukrainian servicemen” and reiterated its demand that “all parties and others concerned take the necessary measures to secure the safety of UNPROFOR personnel”.⁷⁹

82. In 1993, in a statement by its President, the UN Security Council expressed the view that “attacks and other acts of violence, whether actual or threatened, including obstruction or detention of persons, against United Nations forces . . . are wholly unacceptable” and reiterated its demand that “States and other parties to various conflicts take all possible steps to ensure the safety and security of United Nations forces”.⁸⁰

83. In 1993, in a statement by its President adopted after having heard “accounts of attacks against UNPROFOR by armed persons bearing uniforms of the Bosnian Government forces”, the UN Security Council stated that “the members of the Council unreservedly condemn these acts of violence”.⁸¹

84. In 1994, in a statement by its President, the UN Security Council condemned “attacks against the personnel of the United Nations Protection Force (UNPROFOR)”.⁸²

85. In 1994, in a statement by its President concerning the situation in Rwanda, the UN Security Council condemned the killing of at least 10 Belgian peacekeepers, as well as the reported kidnapping of others, as “horrific attacks” and urged “respect for safety and security of . . . UNAMIR and other United Nations personnel”.⁸³

86. In 1994, in a statement by its President, the UN Security Council expressed its deep concern at “recent incidents in the Republic of Bosnia and Herzegovina affecting the safety and freedom of movement of UNPROFOR personnel” and stated that “these incidents constitute clear violations of the Security Council’s

⁷⁷ UN Security Council, Res. 1206, 12 November 1998, §§ 6 and 7.

⁷⁸ UN Security Council, Res. 1313, 4 August 2000, preamble.

⁷⁹ UN Security Council, Statement by the President, UN Doc. S/24379, 4 August 1992.

⁸⁰ UN Security Council, Statement by the President, UN Doc. S/25493, 31 March 1993, pp. 1 and 2.

⁸¹ UN Security Council, Statement by the President, UN Doc. S/26661, 28 October 1993.

⁸² UN Security Council, Statement by the President, UN Doc. S/PRST/1994/1, 7 January 1994, p. 1; see also Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 2.

⁸³ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/16, 7 April 1994, p. 1.

resolutions, which bind the parties". The Council condemned such incidents and warned "those responsible of the serious consequences of their actions".⁸⁴

87. In 1994, in a statement by its President in the context of the conflict in Somalia, the UN Security Council stated that it was "appalled by the killing near Baidoa on 22 August of seven Indian soldiers and the wounding of nine more serving with UNOSOM-II" and strongly condemned this "premeditated attack on United Nations peace-keepers".⁸⁵

88. In 1994, in a statement by its President, the UN Security Council strongly condemned "the deliberate attack on Bangladeshi United Nations peace-keepers on 12 December 1994 in Velika Kladusa, in the region of Bihac in the Republic of Bosnia and Herzegovina". The Council stated it was "outraged at this incident of direct attack on UNPROFOR personnel" and demanded that "such attacks do not recur". It further warned "the perpetrators of the attack that their heinous act of violence carries corresponding individual responsibility".⁸⁶

89. In 1995, in a statement by its President following the fatal shooting of a French peacekeeper by a sniper in Sarajevo, the UN Security Council condemned "in the strongest terms such acts directed at peace-keepers who are serving the cause of peace in the Republic of Bosnia and Herzegovina" and reiterated that such attacks "should not remain unpunished".⁸⁷

90. In 1995, in a statement by its President, the UN Security Council strongly condemned "attacks by Croatian Government forces on personnel of the United Nations peace-keeping forces which have resulted in casualties, including the death of one member of the peace-keeping forces" and demanded that "such attacks cease immediately and that all detained personnel be released".⁸⁸

91. In 1996, in a statement by its President in the context of the conflict in Angola, the UN Security Council condemned "the incident on 3 April 1996 which resulted in the death of two UNAVEM III personnel [and] the wounding of a third" and reiterated "the importance it attaches to the safety and security of UNAVEM III".⁸⁹

92. In 1997, in a statement by its President in the context of the conflict in Croatia, the UN Security Council condemned "the incident that occurred at Vukovar on 31 January 1997 and that resulted in the death of an UNTAES peacekeeper and injuries to other UNTAES personnel".⁹⁰

⁸⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/19, 14 April 1994.

⁸⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/46, 25 August 1994, p. 1.

⁸⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/79, 13 December 1994.

⁸⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/19, 14 April 1995.

⁸⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

⁸⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/19, 24 April 1996, p. 2.

⁹⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/4, 31 January 1997, p. 3.

93. In 1997, in a statement by its President, the UN Security Council strongly condemned attacks on and the kidnapping of UNMOT personnel in Tajikistan.⁹¹

94. In 1997, in a statement by its President in the context of the conflict in Georgia, the UN Security Council reminded the parties of their obligation “to ensure the safety and freedom of movement of UNOMIG and the CIS peacekeeping force”.⁹²

95. In 1997, in a statement by its President, the UN Security Council condemned “the harassment of United Nations Observer Mission in Angola (MONUA) personnel in the exercise of their functions” in areas under UNITA control.⁹³

96. In 1998, in a statement by its President, the UN Security Council strongly condemned “the confirmed attacks by members of UNITA on the personnel of the United Nations Observer Mission in Angola (MONUA)”.⁹⁴

97. In 1998, in a statement by its President in the context of the conflict in Georgia, the UN Security Council strongly condemned “the deliberate acts of violence against the personnel of the United Nations Observer Mission in Georgia (UNOMIG) and of the Collective Peacekeeping Forces of the Commonwealth of Independent States” and demanded that “both sides take determined and prompt measures to put a stop to such acts”.⁹⁵

98. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the UN General Assembly condemned attacks against UNPROFOR in Sarajevo resulting in loss of life and injury to UNPROFOR personnel.⁹⁶

99. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN General Assembly reiterated its condemnation of attacks against UNPROFOR.⁹⁷

100. In a resolution adopted in 1995, the UN General Assembly condemned “all attacks on the United Nations Peace Forces” in the conflict in the former Yugoslavia.⁹⁸

101. In a resolution adopted in 1993 on the situation of human rights in the former Yugoslavia, the UN Commission on Human Rights condemned “the attacks on the United Nations Protection Force, which have resulted in casualties and deaths of United Nations personnel”.⁹⁹

⁹¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/6, 7 February 1997.

⁹² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/25, 8 May 1997, p. 2.

⁹³ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/39, 23 July 1997, p. 1.

⁹⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/14, 22 May 1998, p. 1.

⁹⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/34, 25 November 1998, p. 2.

⁹⁶ UN General Assembly, Res. 47/121, 18 December 1992, preamble.

⁹⁷ UN General Assembly, Res. 49/196, 23 December 1994, § 15.

⁹⁸ UN General Assembly, Res. 50/193, 22 December 1995, § 14.

⁹⁹ UN Commission on Human Rights, Res. 1993/7, 23 February 1993, § 15.

102. In a resolution adopted in 1994, the UN Commission on Human Rights condemned continued attacks and other acts of violence committed against UN personnel, in particular contingents belonging to UNOSOM II in Somalia.¹⁰⁰

103. In a resolution adopted in 1994 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights condemned "the attacks on and continuous harassment of the United Nations Protection Force".¹⁰¹

104. In a resolution adopted in 1995 on the situation of human rights in the former Yugoslavia, the UN Commission on Human Rights condemned "attacks on and continued harassment of the United Nations Protection Force".¹⁰²

105. In a resolution adopted in 1995 on the situation of human rights in Rwanda, the UN Commission on Human Rights condemned "in the strongest terms the kidnapping and killing of military peacekeeping personnel . . . all of which constitute blatant violations of international humanitarian law".¹⁰³

106. In January 1992, in a report on UNIFIL in Lebanon, the UN Secretary-General reported "a substantial increase in the number of firings by IDF/DFP at or close to UNIFIL positions" and stated that "these incidents were vigorously protested to the Israeli military authorities".¹⁰⁴ In July 1992, in another report on the same subject, the UN Secretary-General reported "175 instances of firing by IDF/DFP at or close to UNIFIL positions" and stated that "deliberate firing at UNIFIL positions had been the subject of frequent protests to the Israeli authorities".¹⁰⁵

107. In 1992, in report concerning UNPROFOR, the UN Secretary-General referred to fire originating from "small arms" directed at peacekeeping personnel in the UN Protected Area. Attacks conducted by drunk YPA or Croatian army soldiers also triggered official complaints.¹⁰⁶

108. In 1992, in a report on the implementation of UN Security Council Resolution 783 (1992), the UN Secretary-General characterised as a "disturbing development" the increase in attacks on UNTAC personnel and helicopters in Cambodia.¹⁰⁷

109. After an on-site investigation into the shelling of the UN compound at Qana on 18 April 1996, the UN Secretary-General's Military Adviser reported that:

Israeli officers stated that the Israeli forces were not aware at the time of the shelling that a large number of Lebanese civilians had taken refuge in the Qana compound. I did not pursue this question since I considered it irrelevant because the United

¹⁰⁰ UN Commission on Human Rights, Res. 1994/60, 4 March 1994, § 3.

¹⁰¹ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 12.

¹⁰² UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 17.

¹⁰³ UN Commission on Human Rights, Res. 1995/91, 8 March 1995, § 3.

¹⁰⁴ UN Secretary-General, Report on UNIFIL, UN Doc. S/23452, 21 January 1992, § 20.

¹⁰⁵ UN Secretary-General, Report on UNIFIL, UN Doc. S/24341, 21 July 1992, § 24.

¹⁰⁶ UN Secretary-General, Further report pursuant to Security Council resolution 749 (1992), UN Doc. S/23844, 24 April 1992, § 13.

¹⁰⁷ UN Secretary-General, Report on the implementation of Security Council resolution 783 (1992), UN Doc. S/24800, 15 November 1992, § 15.

Nations compound was not a legitimate target, whether or not civilians were in it. The Israeli officers emphasized that it was not Israeli policy to target civilians or the United Nations.¹⁰⁸

110. In a letter submitting the Military Adviser's report to the UN Security Council in 1996, the UN Secretary-General stated that he viewed "with utmost gravity the shelling of the [compound at Qana], as [he] would hostilities directed against any United Nations peace-keeping position".¹⁰⁹

111. In 1996, in a report on UNIFIL in Lebanon, the UN Secretary-General expressed his "regret that the UN once again had cause to call upon the parties . . . to respect the non-combatant status of . . . UN peacekeepers".¹¹⁰

112. In 1996, in a report on the situation in Tajikistan, the UN Secretary-General condemned an attack aimed at two members of the CIS peacekeeping force.¹¹¹

113. In 1997, in a report concerning the situation in Abkhazia, Georgia, the UN Secretary-General reported that "mine-laying and attacks on the CIS peacekeeping force and the Abkhaz authorities also continued during the reporting period" and that "the CIS force, in conjunction with UNOMIG, again used the quadripartite meetings to protest against such actions".¹¹² In a further such report in 1998, the UN Secretary-General condemned "attacks against peacekeepers of the United Nations and the CIS".¹¹³

114. In 1998, in a report on UNIFIL in Lebanon, the UN Secretary-General reported that UNIFIL had "at times encountered hostile reactions by both armed elements and IDF/DFP" and stated that "UNIFIL strongly protested [these] incidents".¹¹⁴

115. In 1998, in an interim report on the situation in Tajikistan, the UN Secretary-General described the murder of four unarmed members of UNMOT involved in a peace mission in Tajikistan and stated he could not find words strong enough to condemn such an act.¹¹⁵

116. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that:

¹⁰⁸ UN Secretary-General, Report dated 1 May 1996 of the Secretary-General's Military Adviser concerning the shelling of the UN compound at Qana on 18 April 1996, UN Doc. S/1996/337, 7 May 1996, §§ 7–8.

¹⁰⁹ UN Secretary-General, Letter dated 7 May 1996 to the President of the UN Security Council, UN Doc. S/1996/337, 7 May 1996, p. 1.

¹¹⁰ UN Secretary-General, Report on UNIFIL, UN Doc. S/1996/575, 20 July 1996, § 40.

¹¹¹ UN Secretary-General, Report on the situation in Tajikistan, UN Doc. S/1996/1010, 5 December 1996, § 11.

¹¹² UN Secretary-General, Report on the situation in Abkhazia, Georgia, UN Doc. S/1997/47, 20 January 1997, § 22.

¹¹³ UN Secretary-General, Report on the situation in Abkhazia, Georgia, UN Doc. S/1998/647, 14 July 1998, § 40.

¹¹⁴ UN Secretary-General, Report on UNIFIL, UN Doc. S/1998/652, 16 July 1998, § 8.

¹¹⁵ UN Secretary-General, Interim report on the situation in Tajikistan, UN Doc. S/1998/754, 13 August 1998, §§ 10 and 25.

Other serious violations of international humanitarian law falling within the jurisdiction of the Court include:

- ...
- (b) Attacks against peacekeeping personnel involved in a humanitarian assistance or a peacekeeping mission, as long as they are entitled to the protection given to civilians under the international law of armed conflict... Attacks against peacekeeping personnel, to the extent that they are entitled to protection recognized under international law to civilians in armed conflict, do not represent a new crime. Although established for the first time as an international crime in the Statute of the International Criminal Court, it was not viewed at the time of the adoption of the Rome Statute as adding to the already existing customary international law crime of attacks against civilians and persons hors de combat. Based on the distinction between peacekeepers as civilians and peacekeepers turned combatants, the crime defined in article 4 of the Statute of the Special Court is a specification of a targeted group within the generally protected group of civilians which because of its humanitarian or peacekeeping mission deserves special protection.¹¹⁶

117. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that if

individuals attacked or authorized attacks on United Nations forces... they would be committing a grave breach of article 85, paragraph 3(a), of Protocol I by making the civilian population or individual civilians the object of attack. In the Sarajevo context, United Nations peace-keepers are non-combatants and entitled to be treated as civilians.¹¹⁷

Other International Organisations

118. In a communiqué issued in 1992, ECOWAS “unreservedly condemned the unprovoked and premeditated aggression by the NPFL against ECOMOG forces in Liberia, and expressed full support for the defensive action taken by ECOMOG”.¹¹⁸

119. In 1994, during a debate in the UN Security Council, the EU condemned attacks against UNPROFOR.¹¹⁹

120. In 1992, the OIC Conference of Ministers of Foreign Affairs adopted a resolution in which it condemned attacks against UNPROFOR.¹²⁰

¹¹⁶ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, §§ 15(b) and 16.

¹¹⁷ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final Report, UN Doc. S/1994/674, 27 May 1994, § 204.

¹¹⁸ ECOWAS, Final communiqué of the first Summit Meeting of the Committee of Nine of ECOWAS on the Liberian Crisis, Abuja, 7 November 1992, annexed to Letter dated 13 November 1992 from Benin to the President of the UN Security Council, UN Doc. S/24812, 16 November 1992, § 9.

¹¹⁹ EU, Statement before the UN Security Council, UN Doc. S/PV.3367, 21 April 1994, p. 13.

¹²⁰ OIC, Conference of Ministers of Foreign Affairs, Res. 1/6-EX, 1–2 December 1992.

121. In 1994, during a debate in the UN Security Council, the OIC condemned attacks against UNPROFOR.¹²¹

International Conferences

122. In 1992, the 88th Inter-Parliamentary Conference in Stockholm adopted a resolution on Bosnia and Herzegovina strongly condemning “the escalation of violence by armed attacks against . . . peace-keeping personnel” and insisting “that such attacks cease immediately”.¹²²

123. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 demanded that “the members of peace-keeping forces be permitted to fulfil their mandate without hindrance and that their physical integrity be respected”.¹²³

124. In 1993, the 90th Inter-Parliamentary Conference in Canberra adopted a resolution deploring “the lack of protection for peace-keepers and peace-makers under current humanitarian law”.¹²⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

125. In the first indictment in the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged with their role in the “taking of civilians, that is UN peacekeepers, as hostages”.¹²⁵

V. Practice of the International Red Cross and Red Crescent Movement

126. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “a United Nations Force engaged to separate opposing armed forces is not a Party to the conflict . . . Located between opposing armed forces and not being a Party to the conflict, the United Nations Force has no enemy. Its situation is analogous to that of the armed forces of a neutral State.”¹²⁶

VI. Other Practice

127. No practice was found.

¹²¹ OIC, Statement before the UN Security Council, UN Doc. S/PV.3367, 21 April 1994, p. 25.

¹²² 88th Inter-Parliamentary Conference, Stockholm, 7–12 September 1992, Resolution on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, § 5.

¹²³ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(7), *ILM*, Vol. 33, 1994, p. 299.

¹²⁴ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble.

¹²⁵ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, § 48.

¹²⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 248.

JOURNALISTS

Journalists (practice relating to Rule 34)

§§ 1–60

Journalists

Note: *This chapter deals with civilian journalists; the case of war correspondents accredited to the armed forces, as provided for in Article 13 of the 1907 HR and Article 4(A)(4) GC III, is only addressed incidentally.*

I. Treaties and Other Instruments

Treaties

1. Article 79 AP I provides that:

1. Journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1.
2. They shall be protected as such under the Conventions and this Protocol, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in 4 A 4) of the Third Convention.
3. They may obtain an identity card . . . This card, which shall be issued by the government of the State of which the journalist is a national or in whose territory he resides or in which the news medium employing him is located, shall attest to his status as a journalist.

Article 79 AP I was adopted by consensus.¹

Other Instruments

2. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “all civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I”.
3. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “all civilians shall be treated in accordance with Articles 72 to 79 of Additional Protocol I”.

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 256.

II. National Practice

Military Manuals

4. Argentina's Law of War Manual states that "journalists engaged in dangerous professional missions in areas of armed conflict are considered to be civilians and must be protected as such".²

5. Australia's Defence Force Manual states that:

Civilian journalists engaged in dangerous professional missions in areas of armed conflict... are to be afforded the protection that normally applies to civilians. Granting of this protection is subject to the journalists not engaging in conduct that is inconsistent with their civilian status... Protection does not extend to war correspondents who are members of the military forces of a nation. War correspondents are detained as PW upon capture whereas civilian journalists are deemed protected persons and would not normally be detained.³

6. Benin's Military Manual cites journalists and journalists on dangerous mission as examples of civilians.⁴

7. Cameroon's Instructors' Manual provides that "journalists carrying out an assignment in a zone of hostilities fall into the category of [civilians]".⁵

8. Canada's LOAC Manual states that "journalists engaged in dangerous professional missions in areas of armed conflict shall be considered civilians. As such, they are non-combatants and may not be attacked. Should a journalist be detained, such journalist's status will be that of a civilian."⁶

9. France's LOAC Manual quotes Article 4(A)(4) GC III and Article 79(1) AP I and adds that "in case of capture, journalists enjoy either the status of prisoners of war or that of civilian persons and the rights and protections attached thereto, depending on whether they are war correspondents or not. They must be able to prove their status."⁷

10. Germany's Military Manual states that:

Journalists engaged in dangerous professional missions in areas of armed conflict are protected as civilians, provided that they take no action adversely affecting their status as civilians, and without prejudice to the right of war correspondents accredited to the armed forces to the status of persons accompanying the armed forces without actually being members thereof. Journalists may obtain an identity card which attests to their status.⁸

11. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "journalists and other members of the press would never

² Argentina, *Law of War Manual* (1989), § 4.10.

³ Australia, *Defence Force Manual* (1994), § 915; see also *Commanders' Guide* (1994), § 623.

⁴ Benin, *Military Manual* (1995), Fascicule I, p. 12.

⁵ Cameroon, *Instructors' Manual* (1992), p. 17.

⁶ Canada, *LOAC Manual* (1999), p. 3-3, § 23, see also p. 4-7, § 61.

⁷ France, *LOAC Manual* (2001), p. 75. ⁸ Germany, *Military Manual* (1992), § 515.

be intentionally targeted by the IDF. Obviously, such protection would be lost if these individuals actually participated in hostile activities.”⁹

12. Madagascar’s Military Manual states that “journalists engaged in a dangerous mission are civilians”.¹⁰

13. The Military Manual of the Netherlands states that:

Journalists engaged in “free newsgathering” must be considered as civilians. They must be protected as such provided they take no action adversely affecting this status . . . The humanitarian law of war does not prohibit armed forces in whose area of operations journalists are active to impose restrictions on journalists. Journalists are not the same as persons accredited to the armed forces as war correspondents.¹¹

14. New Zealand’s Military Manual states that “journalists engaged in dangerous professional missions in areas of armed conflict are regarded as civilians. They are protected as such under the Conventions and AP I so long as they take no action adversely affecting their status as civilians.”¹² The manual considers that Article 79 AP I

is a new provision and such journalists enjoy no special protection in relation to States which are not bound by AP I. In regard to such States, they may well be taken for spies if they are found in areas of armed conflict while equipped with, eg, cameras. Such journalists must be furnished with proper identity cards. Also, they must not be confused with war correspondents accredited to armed forces in the field.¹³

15. Nigeria’s Military Manual provides that “journalists engaged in dangerous professional missions in [an] area of armed conflict shall be considered as civilians within the meaning of Article 50, paragraph 1 [AP I]”.¹⁴ The manual further states that:

Journalists now turn victims of circumstance. A case in point is the brutal killing of two Nigerian journalists from Guardian Newspaper and Champion by Charles Taylor’s faction in Liberia. It is common news and knowledge that journalists in most of these international armed conflicts are arrested, detained, intimidated and above all killed. This therefore is a failure of the provision of the Geneva Conventions.¹⁵

16. Spain’s LOAC Manual states that journalists and war correspondents on mission in an area of armed conflict are civilians and may not be attacked.¹⁶

17. Togo’s Military Manual cites journalists on dangerous mission as an example of civilians.¹⁷

⁹ Report on the Practice of Israel, 1997, Chapter 1.1, referring to *Law of War Booklet* (1986), p. 14.

¹⁰ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § B.

¹¹ Netherlands, *Military Manual* (1993), pp. VIII-3/VIII-4.

¹² New Zealand, *Military Manual* (1992), § 1138.

¹³ New Zealand, *Military Manual* (1992), § 1138, footnote 94.

¹⁴ Nigeria, *Military Manual* (1994), p. 8, § 9(d).

¹⁵ Nigeria, *Military Manual* (1994), p. 32, § 9.

¹⁶ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1).

¹⁷ Togo, *Military Manual* (1996), Fascicule I, p. 13.

National Legislation

18. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 79 AP I, is a punishable offence.¹⁸

19. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁹

National Case-law

20. In its judgement in the *Situation in Chechnya case* in 1995, Russia's Constitutional Court held that several orders and decrees issued by the Russian government in 1994 which deprived journalists working in the conflict zone of their accreditation were unconstitutional.²⁰

Other National Practice

21. The Report on the Practice of Botswana states that journalists must not be attacked.²¹

22. In 1971, during a debate in the Third Committee of the UN General Assembly, Brazil stated with respect to the protection of journalists that overwhelming support was to be found in the international community both for the basic principle that a distinction should be made between the treatment accorded to combatants and non-combatants and for the consequent adoption of measures to ensure the personal safety of journalists in areas of armed conflict.²²

23. In 1973, during a debate in the Third Committee of the UN General Assembly, the FRG stated that, since the protection of journalists during armed conflict was part of IHL, the provisions relating to the protection of civilians were also applicable in principle to journalists, unless they belonged to the armed forces.²³

24. On the basis of an interview with a high-ranking officer, the Report on the Practice of Jordan notes that no attacks by Jordanian armed forces against journalists covering armed conflict have been reported.²⁴

25. The Report on the Practice of South Korea mentions a case before a military tribunal in 1952, in which journalists who participated in subversive activities and killed civilians were considered to be war criminals. On this basis, the

¹⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁰ Russia, Constitutional Court, *Situation in Chechnya case*, Judgement, 31 July 1995.

²¹ Report on the Practice of Botswana, 1998, Chapter 1.1.

²² Brazil, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1890, 1 December 1971, § 4.

²³ FRG, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1991, 10 October 1973, § 31.

²⁴ Report on the Practice of Jordan, 1997, Interview with a high-ranking army officer, Chapter 1.1.

report infers that journalists who are not participating in hostilities shall be protected.²⁵

26. According to the Report on the Practice of Nigeria, Nigeria's practice in relation to journalists is that they should not be arrested, detained, intimidated or killed in armed conflicts.²⁶

27. Based on replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that journalists must not be attacked. When detained, they must be released as soon as their status as journalists has been established.²⁷

28. In 1987, the Deputy Legal Adviser of the US Department of State stated that "we also support the principle that journalists be protected as civilians under the Conventions, provided they take no action adversely affecting such status".²⁸

29. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US included the killing of a television producer and the wounding of a camerawoman by sniper fire in Sarajevo among "deliberate attacks on non-combatants".²⁹

30. The Report on the Practice of Zimbabwe states that "persons such as journalists are certainly civilians not combatants. They should not be attacked. This point qualifies for customary rule status."³⁰

31. In 1991, a State condemned attacks on journalists, which it alleged were committed by the armed forces of the adversary.³¹

III. Practice of International Organisations and Conferences

United Nations

32. In several resolutions adopted between 1970 and 1975, the UN General Assembly expressed the belief that an international convention was needed to protect journalists engaged in dangerous missions in areas of armed conflict.

²⁵ Report on the Practice of South Korea, 1998, Chapter 1.1, referring to Document of a Military Tribunal, 28 April 1952.

²⁶ Report on the Practice of Nigeria, 1997, Chapter 1.1.

²⁷ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 1.1.

²⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

²⁹ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, p. 19.

³⁰ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

³¹ ICRC archive document.

The rationale for such a convention was not only that journalists should be protected on humanitarian grounds, but also to enable them to receive and impart information fully and objectively in keeping with the purposes and principles of the 1945 UN Charter and the 1948 UDHR concerning freedom of information.³²

33. In a resolution adopted in 1996 on the situation of human rights in Afghanistan, the UN General Assembly strongly urged “all parties to the conflict to take all necessary measures to ensure the safety of . . . representatives of the media in Afghanistan”.³³

34. In a resolution adopted in 1998 on the human rights situation in Kosovo, the UN General Assembly called upon the authorities of the FRY (Serbia and Montenegro), as well as armed Albanian groups, to refrain from any harassment and intimidation of journalists.³⁴

35. In 1993, the UN Commission on Human Rights appointed a Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression. The mandate of the Rapporteur included the gathering of all relevant information on discrimination, threats or use of violence and harassment, including persecution and intimidation, against professionals in the field of information seeking to exercise or to promote the exercise of the right to freedom of opinion and expression.³⁵

36. In a resolution adopted in 1995, the UN Commission on Human Rights deplored continued attacks, acts of reprisal, abductions and other acts of violence committed against representatives of the international media in Somalia, sometimes resulting in serious injury or death.³⁶

37. In a resolution adopted in 1996 on the situation of human rights in Burundi, the UN Commission on Human Rights condemned the murder of journalists.³⁷

38. In a resolution adopted in 1999, the UN Commission on Human Rights recalled the 1995 Johannesburg Principles and expressed its concern at the widespread violence directed at persons exercising the right to freedom of opinion and expression. The Commission also expressed its concern that such violations “are facilitated and aggravated by several factors”, including “abuse of states of emergency, exercise of the powers specific to states of emergency without formal declaration and too vague a definition of offences against State security”.³⁸

³² UN General Assembly, Res. 2673 (XXV), 9 December 1970; Res. 2854 (XXVI), 20 December 1971, § 1; Res. 3058 (XXVIII), 2 November 1973, § 1; Res. 3500 (XXX), 15 December 1975, § 1.

³³ UN General Assembly, Res. 51/108, 12 December 1996, § 9.

³⁴ UN General Assembly, Res. 53/164, 9 December 1998, § 19.

³⁵ UN Commission on Human Rights, Res. 1993/45, 5 March 1993.

³⁶ UN Commission on Human Rights, Res. 1995/56, 3 March 1995, preamble.

³⁷ UN Commission on Human Rights, Res. 1996/1, 27 March 1996, § 11.

³⁸ UN Commission on Human Rights, Res. 1999/36, 26 April 1999, preamble and §§ 3–4.

39. In a resolution unanimously adopted in 1997 on condemnation of violence against journalists, the UNESCO General Conference invited the Director-General of the organisation “to condemn assassination and any physical violence against journalists as a crime against society”.³⁹

40. The Practical Guide for Journalists, edited by UNESCO and Reporters Sans Frontières states that:

The most serious infringements of press freedom are those aimed specifically at journalists and their families:

- (a) Extrajudicial or arbitrary killings, attempted killings of this nature, murder threats and kidnappings . . .
- (b) Cruel, inhuman or degrading treatment or punishment, and torture . . .
- (c) Illegal arrest or detention . . .
- (d) Attacks and threats carried out because people have used their right to freedom of opinion, freedom of expression or freedom of association.⁴⁰

41. In its report in 1993, the UN Commission on the Truth for El Salvador described the ambush of four Dutch journalists accompanied by five or six members of the FMLN by a patrol of the Salvadoran armed forces. They were on their way to territory under FMLN control to interview members of the guerrilla. On the basis of the available evidence, the Commission concluded that the ambush was set up deliberately to surprise and kill the journalists and their escort. The Commission considered these murders to be in violation of “international human rights laws and international humanitarian law, which stipulates that civilians shall not be the object of attacks”.⁴¹

Other International Organisations

42. In a recommendation adopted in 1996 on the protection of journalists in situations of conflict or tension, the Committee of Ministers of the Council of Europe reaffirmed the importance of Article 79 AP I “which provides that journalists shall be considered as civilians and shall be protected as such” and considered that “this obligation also applies with respect to non-international armed conflicts”.⁴²

43. In a recommendation adopted in 1998 on the crisis in Kosovo, the Parliamentary Assembly of the Council of Europe stated that it deplored the violence used by the police against the independent local media and foreign journalists covering events in Kosovo and the threats of legal prosecutions.⁴³

³⁹ UNESCO, 29th General Conference, 21 October–12 November 1997, Res. 29, 12 November 1997, § 1(a).

⁴⁰ UNESCO and Reporters Sans Frontières, *Practical Guide for Journalists*, Paris, 1998, pp. 66–67.

⁴¹ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 75.

⁴² Council of Europe, Committee of Ministers, Recommendation R (96) 4 on the Protection of Journalists in Situations of Conflict and Tension, 3 May 1996, § 1, preamble.

⁴³ Council of Europe, Parliamentary Assembly, Rec. 1368, 22 April 1998, § 5.

44. In a written declaration in 1998 on the freedom of the press in the FRY, the Parliamentary Assembly of the Council of Europe noted that “the Yugoslav authorities are restricting the free movement of journalists, particularly foreign journalists,” and that “certain journalists have been subjected to defamation campaigns and even physical violence”.⁴⁴

45. In a resolution on Kosovo adopted in 1998, the European Parliament called on the Council of Ministers “to protest in the strongest terms possible to the Belgrade government about . . . threats by the Yugoslav authorities to treat the independent media in the region as enemies serving foreign powers and NATO agents”.⁴⁵

46. In a resolution on Chechnya adopted in 2000, the European Parliament, “taking into account the denial of full and unhindered access to the region for journalists”, urged “the Russian authorities to ensure that Russian and international journalists in the region can work without constraint”.⁴⁶

47. In a resolution adopted in 1998, the OAS General Assembly vehemently condemned assaults upon freedom of the press and crimes against journalists, without expressly excluding situations of armed conflict.⁴⁷

48. In 2001, in the Recommendations on Free Media in South-Eastern Europe: Protection of Journalists and their Role in Reconciliation, Promoting Interethnic Peace and Preventing Conflicts, the OSCE Representative on Freedom of the Media proposed that governments at all levels provide adequate protection to media professionals against attack and other forms of harassment and take measures to ensure that any such attacks were investigated and those responsible prosecuted.⁴⁸

International Conferences

49. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference in Canberra deplored “the growing number of journalists and other media agents killed, wounded or abducted on the battlefield” and called on “all States to ensure that journalists engaged in dangerous professional missions in areas of armed conflict benefit from the measures of protection set out in Article 79 [AP I]”.⁴⁹

⁴⁴ Council of Europe, Parliamentary Assembly, Written Declaration No. 284, Violation of the freedom of information and the freedom of the press in the Federal Republic of Yugoslavia, Doc. 8224, 5 October 1998, §§ 2–3.

⁴⁵ European Parliament, Resolution on the situation in Kosovo, 8 October 1998, § 9.

⁴⁶ European Parliament, Resolution on violations of human rights and humanitarian law in Chechnya, 16 March 2000, §§ H and 12.

⁴⁷ OAS, General Assembly, Res. 1550 (XXVIII-O/98), 2 June 1998, § 1.

⁴⁸ OSCE, Representative on Freedom of the Media, Recommendations on Free Media in South-Eastern Europe: Protection of Journalists and their Role in Reconciliation, Promoting Interethnic Peace and Preventing Conflicts, Zagreb, 28 February–2 March 2001.

⁴⁹ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble and § 2(k).

50. In 2000, the OSCE Representative on Freedom of the Media and the German Ministry of Foreign Affairs organised a round table on the protection of journalists in conflict areas. The declaration issued at the end of the meeting stressed that the OSCE participating States committed themselves to protect journalists, particularly in case of armed conflict, and that the UN also expressed its strong support for measures to protect journalists. It further stated that more should be done to investigate murders of journalists. Concerning a distinctive sign for journalists, the declaration stressed that this was an issue for journalists themselves to decide.⁵⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

51. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

52. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “journalists engaged on dangerous professional missions in areas of armed conflict are civilian persons”.⁵¹

VI. Other Practice

53. In a resolution on Angola adopted at its 22nd World Congress in 1995, the International Federation of Journalists called on the Angolan government and UNITA “to respect the fundamental and universal professional rights of Angolan journalists”. It urged both parties “to stop harassing, interfering with, detaining and murdering journalists working under the most difficult conditions trying to inform the world about the 20 years of civil war that killed and maimed thousands of innocent people and devastated the country”.⁵²

54. In a resolution on the safety of journalists adopted at its 23rd World Congress in 1998, the International Federation of Journalists stated that “more must be done to provide practical assistance to journalists on dangerous assignments and to journalists living and working in areas of conflict”.⁵³

55. In a resolution on the violation of journalists’ rights in India adopted at its 23rd World Congress in 1998, the International Federation of Journalists noted

⁵⁰ Round table with media professionals, officials from OSCE participating States, the UN and the Council of Europe on the protection of journalists in conflict areas, Berlin, 6 November 2000, Declaration.

⁵¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 54.

⁵² International Federation of Journalists, 22nd World Congress, Santander, 1–4 May 1995, Resolution on Angola.

⁵³ International Federation of Journalists, 23rd World Congress, Recife, 3–7 May 1998, Resolution on the Safety of Journalists.

with serious concern “continued violation of the journalists’ right to report the truth in situations of armed conflict between a) the state and insurgents, b) between ethnic groups and c) between terrorists and their agents”. It further stated that “journalists are often caught in cross-fire between these sides and are subject to all kinds of harassment, threats and even their physical elimination and thus are prevented by both sides to perform their journalistic work freely”.⁵⁴

56. In 1998, the International Federation of Journalists urged the UN Commission on Human Rights “to reiterate the importance of freedom of expression and to defend the right of journalists to exercise their profession free from corruption, harassment and fear”.⁵⁵

57. In 2000, in a statement before the UN Commission on Human Rights, the International Federation of Journalists stated that:

In 1999, murders [of journalists] took place in Chechnya, Colombia, East Timor, Federal Republic of Yugoslavia, India, Nigeria, Pakistan, Peru, Russia, Sierra Leone, Sri Lanka and Turkey. We do not believe that all these murders were carried out by agents of the state. However, most of these killings will remain unsolved, and some of the investigations will be directly or indirectly hindered by agents of the state. As long as the international community gives in to the continued killing of journalists, and the de facto amnesty granted to their killers, there can be no press freedom, no right to life. No respect for any human rights.

During 1999, more than 80 journalists and media staff were killed or murdered making it one of the worst years on record. Most of the victims were cut down in waves of violence in the Balkans, Russia and Sierra Leone. The 1999 Report reveals that 25 journalists and media workers died in the Federal Republic of Yugoslavia, of which 16 were victims of the NATO bombing of the Radio Television Serbia building in Belgrade in April.⁵⁶

58. In a press release in 2000, Article 19, an NGO campaigning for respect for the right to freedom of expression, denounced:

the disregard for the right to freedom of expression by the Yugoslav authorities in imposing the heaviest sentence ever on a journalist... for publishing articles denouncing the atrocities committed in Kosovo... despite the fact that this right is guaranteed by Article 19 of the ICCPR.

The organisation stated that it was “particularly concerned about the fact that a civilian was tried by a military court behind closed doors”.⁵⁷

⁵⁴ International Federation of Journalists, 23rd World Congress, Recife, 3–7 May 1998, Resolution on the Violation of Journalists’ Rights in India.

⁵⁵ International Federation of Journalists, Written statement submitted to the UN Commission on Human Rights, 16 March–24 April 1998.

⁵⁶ International Federation of Journalists, Statement before the UN Commission on Human Rights, 20 March–28 April 2000; see also Written statement submitted to the UN Commission on Human Rights, 20 March–24 April 1998.

⁵⁷ Article 19, Press Release, Article 19 condemns conviction of investigative journalist, 27 July 2000.

59. According to the Committee to Protect Journalists, press coverage of armed conflict continues to provoke the hostility of governments and rebel factions alike and to claim the lives of reporters. In its annual survey on attacks on journalists in 2000, the Committee reported and denounced numerous cases of attacks, murder, unjustified imprisonment and intimidation carried out against journalists covering armed conflict.⁵⁸

60. According to Reporters Sans Frontières, armed conflict remains one of the main topics for which journalists are prosecuted or put under pressure. In its Annual Report 2001, the organisation reported and denounced numerous cases of attacks, murder, unjustified imprisonment and intimidation carried out against journalists covering armed conflict.⁵⁹

⁵⁸ Committee to Protect Journalists, *Attacks on the Press 2000*, New York, 2001.

⁵⁹ Reporters Sans Frontières, *Annual Report 2001: Press Freedom Worldwide*, Paris, 2001.

PROTECTED ZONES

A. Hospital and Safety Zones and Neutralised Zones (practice relating to Rule 35)	§§ 1–61
B. Demilitarised Zones (practice relating to Rule 36)	§§ 62–184
Establishment of demilitarised zones	§§ 62–102
Attacks on demilitarised zones	§§ 103–184
C. Open Towns and Non-Defended Localities (practice relating to Rule 37)	§§ 185–347
Establishment of open towns	§§ 185–201
Establishment of non-defended localities	§§ 202–226
Attacks on open towns and non-defended localities	§§ 227–347

A. Hospital and Safety Zones and Neutralised Zones*I. Treaties and Other Instruments**Treaties***1. Article 23 GC I provides that:**

In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties to the conflict, may establish in their own territory and, if the need arises, in occupied areas, hospital zones and localities so organized as to protect the wounded and sick from the effects of war, as well as the personnel entrusted with the organization and administration of these zones and localities and with the care of the persons therein assembled.

Upon the outbreak and during the course of hostilities, the Parties concerned may conclude agreements on mutual recognition of the hospital zones and localities they have created. They may for this purpose implement the provisions of the Draft Agreement annexed to the present Convention, with such amendments as they may consider necessary.

2. Article 14, first paragraph, GC IV provides for the establishment of “hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children under seven”.

3. Article 15 GC IV provides that:

Any Party to the conflict may, either direct or through a neutral State or some humanitarian organization, propose to the adverse Party to establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

- a) wounded and sick combatants or non-combatants;
- b) civilian persons who take no part in hostilities, and who, while they reside in the zones, perform no work of a military character.

When the Parties concerned have agreed upon the geographical position, administration, food supply and supervision of the proposed neutralized zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict. The agreement shall fix the beginning and the duration of the neutralization of the zone.

Other Instruments

4. On the basis of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, neutralised zones were established under ICRC supervision at the Franciscan Monastery and the New Hospital in Dubrovnik.

5. Articles 1, 2(1) and 4(1) of the 1991 Agreement between Croatia and the SFRY on a Protected Zone around the Hospital of Osijek declared the area around the Osijek hospital a protected zone placed under ICRC supervision according to the principles of Articles 23 GC I and 14–15 GC IV. The Agreement restricted access to the zone to the following categories of persons: sick and wounded civilian and military personnel; family members visiting patients recovering in the hospital; persons over 65 years of age, children under 15, expectant mothers and mothers of children under seven; and the hospital's medical and administrative personnel. Under Article 2(4) of the Agreement, "Parties to the agreement shall take every measure to ensure free entrance to and exit from the protected zone for the ICRC delegates and the local staff". Under Article 13, "the competent authorities . . . will . . . give all necessary collaboration to the ICRC and the staff in charge of administering the protected zone".

II. National Practice

Military Manuals

6. Argentina's Law of War Manual (1969) contains a provision regarding the establishment of hospital and safety zones in order to shelter from the effects of war the wounded, sick, disabled and aged, as well as children under 15 years old, pregnant women and mothers of children under 7 years of age. The manual makes reference to Article 14 GC IV.¹

¹ Argentina, *Law of War Manual* (1969), § 4.004.

7. Argentina's Law of War Manual (1989) provides for the possibility of setting up hospital and safety zones and refers to Article 14 GC IV. It further envisages, with reference to Article 15 GC IV, the possibility of creating neutralised zones in combat areas to shelter persons not, or no longer, taking part in military activities.²

8. Australia's Defence Force Manual states that "hospital and safety zones are established for the protection from the effects of war of the wounded, sick and aged persons, children under 15 years, expectant mothers and mothers of children under seven years . . . by agreement between the parties".³ The manual adds that:

Neutralised zones may be established in regions where fighting is taking place to shelter wounded and sick combatants or noncombatants and civilian persons who take no part in hostilities and who perform no work of a military character. The zones are set up by written agreement.⁴

9. Cameroon's Disciplinary Regulations provides that each soldier must respect "hospital zones and localities".⁵

10. Canada's LOAC Manual describes hospital and safety zones and neutralised zones as areas that are entitled to protection from attack under the laws of armed conflict.⁶ It states that "such zones also protect those personnel responsible for organizing and administrating the zones as well as those caring for the wounded and sick". Furthermore, the manual states that "hospital zones should be located in sparsely populated areas away from legitimate targets".⁷ The manual provides that hospital and safety zones can be established either in time of peace or after the outbreak of hostilities, and even in occupied areas if necessary.⁸ As regards neutralised zones, the manual states that:

Any party to a conflict may, either directly or through a neutral State or some humanitarian organization, propose to the adverse party to establish, in the regions where the fighting is taking place, neutralized zones intended to shelter from the effects of the conflict the following persons, without distinction: wounded and sick combatants or non-combatants, and civilian persons who take no part in hostilities and who, while they reside in the zones, perform no work of a military character.⁹

The manual further states that any agreement setting up a neutralised zone "should provide details of the location, administration, provisioning and supervision of the proposed neutralized zone as well as fix its beginning and duration".¹⁰

² Argentina, *Law of War Manual* (1989), § 4.05.

³ Australia, *Defence Force Manual* (1994), § 940; see also *Commanders' Guide* (1994), § 940.

⁴ Australia, *Defence Force Manual* (1994), § 941; see also *Commanders' Guide* (1994), § 941.

⁵ Cameroon, *Disciplinary Regulations* (1975), Article 31.

⁶ Canada, *LOAC Manual* (1999), pp. 4-10 and 4-11, §§ 102, 106 and 108.

⁷ Canada, *LOAC Manual* (1999), p. 11-2, § 14.

⁸ Canada, *LOAC Manual* (1999), p. 4-10, §§ 103-104.

⁹ Canada, *LOAC Manual* (1999), p. 4-10, § 107.

¹⁰ Canada, *LOAC Manual* (1999), p. 11-2, § 14.

11. Ecuador's Naval Manual states that "when established by agreement between belligerents, hospital zones and neutralized zones are immune from bombardment in accordance with the terms of the agreement concerned".¹¹

12. France's LOAC Teaching Note includes safety zones and neutralised zones among the areas specially protected by IHL. It states that these zones are established by agreement and may not be attacked.¹²

13. France's LOAC Manual notes that the laws of armed conflict afford a special protection to certain areas, among which are safety zones and neutralised zones. It states that safety zones are established by agreement between the belligerents in order to shelter wounded, sick, disabled or aged persons, children, expectant mothers and mothers of children under the age of seven; neutralised zones are set up by written agreement between the belligerents with the aim of sheltering the wounded and sick, as well as the civilian population located therein. The manual prohibits attacks against both types of zones.¹³

14. Germany's Military Manual provides that "hospital and safety zones and localities shall be established on mutual agreement so as to protect wounded, sick and aged persons, children, expectant mothers and mothers of children under seven from any attack".¹⁴ The manual further provides that grave breaches of IHL are in particular "launching attacks against... neutralized zones".¹⁵

15. Hungary's Military Manual instructs soldiers to respect hospital zones and localities. More generally, it provides that protected zones shall be respected and shall be taken over without combat.¹⁶ The manual also stresses the possibility of non-hostile contacts with the enemy, *inter alia*, for the creation of neutralised zones.¹⁷

16. Italy's LOAC Elementary Rules Manual states that "where protected zones or localities (hospital zones...) have been agreed upon, the competent commanders shall issue instructions for action and behaviour near and towards such zones or localities".¹⁸ The manual also provides that "protected zones shall be respected".¹⁹

17. Italy's IHL Manual qualifies "attacks on... hospital and safety zones which must be respected and protected at all times" as a war crime.²⁰

18. Kenya's LOAC Manual states that:

Hospital and safety zones may be set up in peacetime to contain hospitals, shelters for the wounded and sick, the old and infants, children under 15 years of age,

¹¹ Ecuador, *Naval Manual* (1989), § 8.5.1.3.

¹² France, *LOAC Teaching Note* (2000), p. 5.

¹³ France, *LOAC Manual* (2001), pp. 125–126.

¹⁴ Germany, *Military Manual* (1992), § 512, see also § 463.

¹⁵ Germany, *Military Manual* (1992), § 1209.

¹⁶ Hungary, *Military Manual* (1992), pp. 19 and 72.

¹⁷ Hungary, *Military Manual* (1992), p. 79.

¹⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 47.

¹⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 70.

²⁰ Italy, *IHL Manual* (1991), Vol. I, § 85.

expectant mothers and mothers with children under 7 years of age. Upon the outbreak and during the course of hostilities, the parties concerned may conclude agreements on mutual recognition of the zones and localities they have created.²¹

The manual further states that:

As an emergency measure, the commanders of the Parties to the conflict may establish, in the regions where fighting is taking place, neutralized zones intended to shelter from the effects of war the following persons, without distinction:

- (a) wounded and sick combatants or non-combatants;
- (b) civilian persons who take no part in hostilities and who, while they reside in the zones, perform no work of a military character.

To effect such a zone, a written agreement shall be concluded and signed by the representatives of the Parties to the conflict.²²

19. Madagascar's Military Manual states that the establishment of safety zones and protected zones is concluded by an agreement and that these zones should be respected.²³

20. The Military Manual of the Netherlands states that the protection offered to hospital and safety zones concerns "the wounded and sick, disabled and aged persons, children under 15 years, expectant mothers and mothers with children under 7 years" and specifies that "the rules governing hospital or safety zones must be laid down in an agreement between the parties to the conflict".²⁴ The manual also underlines the possibility for the parties to set up neutralised zones through a written agreement for the protection of "the wounded and sick, whether military or civilian, and civilians who neither take part in the hostilities nor carry out work of a military character".²⁵

21. New Zealand's Military Manual provides that:

A State may declare during peacetime that, in the event of armed conflict, a particular area shall be a safety or hospital zone for the protection of wounded, sick, the aged, expectant mothers and children. On the outbreak of hostilities, the combatants may agree to recognize such areas and zones as being immune from attack and outside the area of hostilities. After the commencement of the conflict, safety and hospital zones may be established in occupied territory as well.²⁶

In a section on "General measures for the protection of civilians", the manual reaffirms the possibility of setting up hospital and safety zones, stating that:

In time of peace or after the outbreak of hostilities, belligerents may establish such zones and localities . . . for the protection from the effects of war of wounded, sick and aged persons, children under fifteen, expectant mothers and mothers of children

²¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 6.

²² Kenya, *LOAC Manual* (1997), Précis No. 4, p. 7.

²³ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 16 and Fiche No. 7-O, § 15.

²⁴ Netherlands, *Military Manual* (1993), p. V-17, § 15.

²⁵ Netherlands, *Military Manual* (1993), pp. V-17/V-18, § 16.

²⁶ New Zealand, *Military Manual* (1992), § 412(2).

under seven. Agreements may be concluded between the belligerents concerning mutual recognition of the zones and localities so created. To facilitate the institution and recognition of hospital and safety zones and localities recourse may be had to the good offices of the Protecting Powers and the International Committee of the Red Cross.²⁷

Concerning the establishment of neutralised zones, the manual states that an agreement is required. It adds that:

In the area of operations a neutralised zone may be set up for the protection of wounded and sick or other persons *hors de combat* as well as non-combatants taking no part in the hostilities or in activities of a military character. The area of the zone and its agreed duration should be detailed in the agreement.²⁸

22. Nigeria's Military Manual states that "preplanned protected zones are established by agreement between belligerent parties".²⁹

23. Senegal's IHL Manual provides for the possibility of establishing neutralised zones by agreement in order to provide protection, without discrimination, for the wounded and sick as well as for persons not taking a direct part in military operations and, while residing in the zone, not performing any activity connected with such operations.³⁰

24. Spain's LOAC Manual refers to Articles 23 GC I and 14 GC IV concerning hospital and safety zones and to Article 15 GC IV concerning neutralised zones.³¹ The manual states that hospital and safety zones, which are intended to shelter from the effects of war the wounded and sick, the old, children under 15 years of age, expectant mothers and mothers with children under 7 years of age, may be established by agreement between the parties to a conflict, and prohibits attacks on such areas. Equally prohibited are attacks against neutralised zones, which may be established by agreement in order to protect wounded and sick combatants and non-combatants, as well as civilians not taking any part in hostilities.³² The manual also stresses that, while hospital and safety zones can be set up in areas located outside the combat zone, neutralised zones are established in the regions where hostilities are taking place.³³

25. Sweden's IHL Manual provides for the possibility in peacetime of declaring, by special agreement, a given part of a State's territory a neutralised area. It explains that this means that "no acts of war whatsoever may be directed against or take place within that area. This restriction is intended to apply for the full duration of the conflict." It adds that:

²⁷ New Zealand, *Military Manual* (1992), § 1106.

²⁸ New Zealand, *Military Manual* (1992), § 412(3).

²⁹ Nigeria, *Military Manual* (1994), p. 43, § 14.

³⁰ Senegal, *IHL Manual* (1999), p. 20.

³¹ Spain, *LOAC Manual* (1996), Vol. I, §§ 1.3.e.(3)-(4) and 7.3.b.(5).

³² Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(3)(b).

³³ Spain, *LOAC Manual* (1996), Vol. I, § 9.5.(a)-(b).

It is also possible for the parties to reach an agreement during a conflict that all acts of war shall cease temporarily within a given part of a conflict area. Such agreements are commonly made to afford protection to civilian populations, and specially to such exposed groups as children, old people, and the sick and the wounded.³⁴

The manual is guided by the rules embodied in Articles 23 GC I and 14–15 GC IV.³⁵

26. Switzerland's Military Manual states that it is forbidden for any troop member to enter hospital and safety zones and neutralised zones.³⁶

27. Switzerland's Basic Military Manual refers to Article 23 GC I and provides that "the belligerent parties may at any time establish, by agreement, hospital zones and localities in order to shelter the wounded and sick, military or civilian, together with the necessary personnel, from the effects of war".³⁷

28. The UK Military Manual provides for the possibility of establishing, by agreement between the parties before or after the outbreak of hostilities, hospital and safety zones and localities, either in occupied territory or in the territory of a belligerent.³⁸ It further allows any belligerent to propose to the opposing belligerent, either directly or through a neutral State or a humanitarian organisation, the establishment of neutralised zones in the area of combat, "to shelter from the effects of war wounded or sick combatants or non-combatants and civilian persons who take no part in the hostilities and who perform no work of a military character".³⁹

29. The UK LOAC Manual provides that "safety zones may be set up to contain hospitals, shelters for the wounded and sick, the old and infirm, children under 15 years of age, expectant mothers and mothers with children under 7 years of age".⁴⁰

30. The US Field Manual restates Articles 23 GC I and 14–15 GC IV and specifies that these agreements setting up hospital and safety zones and neutralised zones "may be concluded either by the governments concerned or by subordinate military commanders".⁴¹

31. The US Air Force Pamphlet states that:

The Geneva Conventions of 1949 provide for protected or safety zones established by agreement between the parties to the conflict. Safety zones established under the Geneva Conventions of 1949, or by other agreement among parties to a conflict, are immune from bombardment in accordance with the terms of the agreement.⁴²

32. The US Air Force Commander's Handbook, in a section entitled "Neutralized and Demilitarized Zones", provides that:

³⁴ Sweden, *IHL Manual* (1991), Section 3.4.1, p. 84.

³⁵ Sweden, *IHL Manual* (1991), Section 3.4.2, p. 84.

³⁶ Switzerland, *Military Manual* (1984), p. 18.

³⁷ Switzerland, *Basic Military Manual* (1987), Article 86.

³⁸ UK, *Military Manual* (1958), §§ 26 and 363.

³⁹ UK, *Military Manual* (1958), § 27. ⁴⁰ UK, *LOAC Manual* (1981), Section 9, p. 34, § 2.

⁴¹ US, *Field Manual* (1956), §§ 224 and 253. ⁴² US, *Air Force Pamphlet* (1976), § 5-5(b).

By agreement, the parties to a conflict may establish certain zones where civilians, the sick and wounded, or other noncombatants may gather to be safe from attack. A party to conflict cannot establish such a zone by itself; neutralized zones need only be respected if established by agreement between the parties, either in oral or written, or by parallel declarations. Such an agreement may be concluded either before or during hostilities.

United States forces need not respect such a zone unless the United States has agreed to respect it. Even in an unrecognized zone, of course, only legitimate military objectives . . . may be attacked.⁴³

33. The US Naval Handbook states that “when established by agreement between the belligerents, hospital zones and neutralized zones are immune from bombardment in accordance with the terms of the agreement concerned”.⁴⁴

34. The YPA Military Manual of the SFRY (FRY) contains provisions regarding the establishment of and respect for hospital and safety zones and neutralised zones, which mirror the relevant provisions of the Geneva Conventions.⁴⁵

National Legislation

35. Argentina’s Draft Code of Military Justice punishes any soldier who “willfully violates the protection due to . . . hospital and safety zones and neutralised zones . . . which are properly marked”.⁴⁶

36. Under Colombia’s Penal Code, it is a war crime to attack or destroy, without imperative military necessity, “hospital zones . . . properly marked with the distinctive emblems of the red cross or red crescent”.⁴⁷

37. Italy’s Law of War Decree as amended provides that “a royal decree can establish rules to guarantee, on the basis of reciprocity, respect for and protection of towns or localities used exclusively by the medical services or for the protection of the civilian population”.⁴⁸

38. Under the Draft Amendments to the Penal Code of El Salvador, “anyone who, in the context of an international or non-international armed conflict, attacks or destroys . . . hospital zones, without having taken adequate measures of protection and without imperative military necessity” is punishable by imprisonment.⁴⁹

39. Nicaragua’s Draft Penal Code states that “whoever, in the circumstances of an international or internal armed conflict, without having previously taken appropriate measures of protection and without any justification based on

⁴³ US, *Air Force Commander’s Handbook* (1980), § 3-6(b).

⁴⁴ US, *Naval Handbook* (1995), § 8.5.1.5; see also § 8.6.2.2 (protected places and objects).

⁴⁵ SFRY (FRY), *YPA Military Manual* (1988), §§ 83–84.

⁴⁶ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(2) in the *Code of Military Justice as amended* (1951).

⁴⁷ Colombia, *Penal Code* (2000), Article 155.

⁴⁸ Italy, *Law of War Decree as amended* (1938), Article 46.

⁴⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Destrucción de bienes e instalaciones de carácter sanitario”.

imperative military necessity, attacks or destroys sanitary . . . zones" commits a punishable "offence against international law".⁵⁰

40. Poland's Penal Code provides for the punishment of "any person who, during hostilities, attacks a . . . neutralized zone".⁵¹

41. Spain's Penal Code provides for the punishment of "anyone who, in the event of armed conflict, should . . . knowingly violate the protection due to . . . health and security areas [and/or] neutralised areas . . . which are duly identified with signs or the appropriate distinctive signals".⁵²

National Case-law

42. No practice was found.

Other National Practice

43. According to the Report on the Practice of Egypt, "Egypt thinks that protection of . . . demilitarized zones . . . consists in refraining from launching attacks against . . . these areas", which implies that "attacks against such places are prohibited".⁵³

44. According to the Report on the Practice of France, France has consistently upheld the general principle of protection of safety zones, the principle implying that it is prohibited to launch attacks or bombardments against these zones. The report notes that France was the initiator of the concept of safety zones.⁵⁴

45. During the war in the South Atlantic, at the UK's suggestion, and without any special agreement in writing, the parties to the conflict established a neutral zone at sea. This zone, called the Red Cross Box, with a diameter of approximately 20 nautical miles, was located on the high seas to the north of the islands. Without hampering military operations, it enabled hospital ships to hold position and exchange British and Argentine wounded.⁵⁵

46. According to the Report on the Practice of the SFRY (FRY), "the *opinio iuris* and the customary nature of rules relevant to the establishment of neutralised zones in the FRY is absolutely clear".⁵⁶

III. Practice of International Organisations and Conferences

United Nations

47. In 1970, the UN General Assembly, "bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all

⁵⁰ Nicaragua, *Draft Penal Code* (1999), Article 468.

⁵¹ Poland, *Penal Code* (1997), Article 122(1).

⁵² Spain, *Penal Code* (1995), Article 612(1).

⁵³ Report on the Practice of Egypt, 1997, Chapter 1.8.

⁵⁴ Report on the Practice of France, 1998, Chapter 1.8.

⁵⁵ Sylvie S. Junod, *Protection of the Victims of Armed Conflict: Falkland-Malvinas Islands* (1982): *International Humanitarian Law and Humanitarian Action*, ICRC, Geneva, 2nd edition, December 1985, pp. 23–24, and 26.

⁵⁶ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.8.

types", adopted Resolution 2675 (XXV) in which it stated that "places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations".⁵⁷

Other International Organisations

48. In 1995, the Council of Europe's Commission of Inquiry for the conflict in Chechnya commented on UN General Assembly Resolution 2675 (XXV) relative to the protection of civilian medical establishments, saying that it did not make any distinction between international and non-international conflicts. The Commission recalled the Geneva Conventions and the UN General Assembly resolutions on the protection of civilian populations in times of armed conflict, and emphasised that one of the basic principles of the protection of civilian populations was that "places or areas designated for the sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations".⁵⁸

International Conferences

49. The 25th International Conference of the Red Cross in 1986 adopted a resolution on the protection of the civilian population in armed conflicts which "encourages an expanded use of protective zones in all armed conflicts".⁵⁹

50. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that:

an attempt is made whenever possible to enhance the safety of protected persons, and in the framework of international humanitarian law or the United Nations Charter, to create a humanitarian space through the establishment of safety zones, humanitarian corridors, and other forms of special protection for civilian populations and other persons protected under international humanitarian law.⁶⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

51. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

52. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "preplanned protected zones

⁵⁷ UN General Assembly, Res. 2675 (XXV), 9 December 1970, preamble and § 7.

⁵⁸ Council of Europe, Commission of Inquiry for the conflict in Chechnya, Opinion, Doc. 7231, 2 February 1995, pp. 3–4.

⁵⁹ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VIII, § 5.

⁶⁰ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(h).

are established by agreement between belligerent Parties . . . [including] hospital zones and localities". They specify that "this term includes in practice also the 'safety zones and localities'".⁶¹

53. During Bangladesh's war of independence, three neutralised zones were established in a college, a hospital and the Sheraton Hotel. These zones, all administered by the ICRC, were respected.⁶²

54. During the Vietnam War in 1975, the headquarters of the Vietnamese Red Cross and a neighbouring building in Saigon were declared neutralised zones by the ICRC. They gave shelter to the wounded and sick, the disabled, orphans and lost children.⁶³

55. In 1975, in Nicosia (Cyprus), more than 2,000 civilians found shelter in three neutralised zones administered by the ICRC.⁶⁴

56. In 1975, the ICRC had a neutralised zone set up in Phnom Penh (Cambodia) during the final battle for the city. Around 2,000 foreign nationals were allowed to take refuge in Le Phnom hotel, where the agreed zone was located and respected.⁶⁵

57. In 1990, the ICRC issued a press release concerning the creation of a hospital zone around the premises of the Jaffna Hospital in Sri Lanka. The ICRC communicated the rules concerning the establishment of the hospital zone to both the Sri Lankan government and the LTTE and stated that they were to be implemented as of 6 November 1990. The rules were as follows:

The premises of Jaffna Hospital are placed under ICRC protection. They will be regarded by the Parties as a *Hospital zone*:

- the compound will be clearly marked with red crosses for easy identification from the ground and the air;
- no armed personnel will be allowed within the compound;
- no military vehicle will be stationed at the entrance of the hospital compound;
- no vehicle other than those of the hospital, the Sri Lanka Red Cross and the ICRC will be admitted into the compound.

⁶¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 418 and footnote.

⁶² Yves Sandoz, "The Establishment of Safety Zones for Persons Displaced Within Their Country of Origin", in Najeeb Al-Nauimi and Richard Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law*, Martinus Nijhoff, The Hague, 1995, p. 909.

⁶³ Yves Sandoz, "The Establishment of Safety Zones for Persons Displaced Within Their Country of Origin", in Najeeb Al-Nauimi and Richard Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law*, Martinus Nijhoff, The Hague, 1995, p. 910.

⁶⁴ Yves Sandoz, "The Establishment of Safety Zones for Persons Displaced Within Their Country of Origin", in Najeeb Al-Nauimi and Richard Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law*, Martinus Nijhoff, The Hague, 1995, pp. 909-910.

⁶⁵ Yves Sandoz, "The Establishment of Safety Zones for Persons Displaced Within Their Country of Origin", in Najeeb Al-Nauimi and Richard Meese (eds.), *International Legal Issues Arising Under the United Nations Decade of International Law*, Martinus Nijhoff, The Hague, 1995, pp. 910-911.

Around the Hospital, a safety area is established. The rules governing this safety area (which includes the hospital compound) are:

- the area will be clearly marked in such a way that it can be easily identified both from the ground and from the air;
- the area will remain void of any military or political installation;
- no military action will be undertaken either from or against the safety area;
- no military base, installation or position of any kind will be established or maintained within the area;
- no military personnel will be stationed and no military equipment will be stored at any time within the said area;
- no weapon will be activated from outside the safety area against persons or buildings within the safety area.

In cases of severe or persistent violation of these rules, the ICRC may unilaterally withdraw its protection of the hospital.⁶⁶

58. In 1992, in a position paper on the establishment of protected zones for endangered civilians in Bosnia and Herzegovina, the ICRC outlined the conditions that would need to be met in order for such zones to be established in the region. These conditions were:

- The protected zone(s) must meet appropriate hygiene standards.
- The protected zone(s) must be in an area where the necessary protection may be assumed.
- The international responsibility for such zone(s) must be clearly established.
- The parties concerned must give their agreement to the concept and to the location of the protected zone(s).
- Duly mandated international troops, such as UNPROFOR, must assure the internal and external security of this zone(s), as well as for part of the logistics.
- International organizations must help with the entire installation of the zone(s) – housing, shelter, heating, sanitation – and with the logistics. In addition, the organizations involved must take responsibility for the food deliveries, the cooking and the medical services.

The ICRC is willing and ready to offer its services to help with the establishment and running of such zones.⁶⁷

59. During the conflict in the former Yugoslavia, the ICRC organised meetings between the parties to the conflict with a view, *inter alia*, to establishing protected zones to afford special protection for the sick and wounded and other particularly vulnerable groups of non-combatants. As a result of the talks, the hospital and the Franciscan convent in Dubrovnik and the Osijek hospital were declared protected zones between mid-December 1991 and early January 1992. The parties agreed to place such zones under ICRC supervision.⁶⁸

⁶⁶ ICRC, Press Release, ICRC Colombo, 6 November 1990.

⁶⁷ ICRC, Position Paper on the Establishment of Protected Zones for Endangered Civilians in Bosnia-Herzegovina, 30 October 1992, quoted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 1127–1129.

⁶⁸ ICRC, Communication to the Press No. 92/1, Conflict in Yugoslavia. Review of ICRC activities, 2 January 1992.

60. In a communication to the press issued in 1992, the ICRC condemned a number of incidents that had occurred within the protected zone of Osijek hospital and strongly urged the parties to the conflict to take all necessary measures to ensure respect for the protected zone, which could not be the object of attack in any circumstances.⁶⁹

VI. Other Practice

61. No practice was found.

B. Demilitarised Zones

Establishment of demilitarised zones

I. Treaties and Other Instruments

Treaties

62. Under paragraph D of the 1949 Karachi Agreement, India and Pakistan agreed that "no troops shall be stationed from south of Minimarg to the cease-fire line".

63. Article I(6) and (10) of the 1953 Panmunjom Armistice Agreement stipulates that neither side shall execute any hostile act within, from, or against the established demilitarised zone and that the total number of military personnel from each side allowed to enter the zone cannot exceed 1,000 persons at one time under any circumstance.

64. The 1974 Disengagement Agreement between Israel and Syria created a demilitarised zone on the Syrian side of the Golan Heights. This agreement is subject to international supervision.

65. Article 60 AP I provides that:

2. The agreement [to establish a demilitarized zone] shall be an express agreement, may be concluded verbally or in writing, either directly or through a Protecting Power or any impartial humanitarian organization, and may consist of reciprocal and concordant declarations. The agreement may be concluded in peacetime, as well as after the outbreak of hostilities, and should define and describe, as precisely as possible, the limits of the demilitarized zone and, if necessary, lay down the methods of supervision.
3. The subject of such an agreement shall normally be any zone which fulfils the following conditions:
 - a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
 - b) no hostile use shall be made of fixed military installations or establishments;

⁶⁹ ICRC, Communication to the Press No. 92/7, Yugoslavia: Dialogue continues as plenipotentiaries meet in Geneva, 27 March 1992; Press Release No. 1710, Yugoslavia: New attack on Osijek hospital, 24 April 1992.

- c) no acts of hostility shall be committed by the authorities or by the population; and
- d) any activity linked to the military effort must have ceased.

The Parties to the conflict shall agree upon the interpretation to be given to the conditions laid down in sub-paragraph d) and upon persons to be admitted to the demilitarized zone other than those mentioned in paragraph 4.

- 4. The presence, in this zone, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 3.

Article 60 AP I was adopted by consensus.⁷⁰

66. The 1979 Peace Treaty between Israel and Egypt created a demilitarised zone in the Sinai, subject to international supervision. Egyptian civilian police are allowed to operate in the demilitarised zone set up pursuant to the agreement.

Other Instruments

67. Article 3 of the 1993 Agreement on Demilitarisation of Srebrenica and Žepa provided that every military or paramilitary unit should either withdraw from the demilitarised zones or hand over their weapons. Under Article 5, ammunition, mines, explosives and combat supplies in the demilitarised zones were to be handed over to UNPROFOR, under whose control the demilitarised zones were placed.

II. National Practice

Military Manuals

68. Argentina's Law of War Manual provides for the possibility of establishing demilitarised zones and refers to the conditions set out for this purpose in Article 60 AP I.⁷¹

69. Australia's Defence Force Manual states that:

Demilitarised zones are areas in which, by express agreement between the parties to the conflict, military operations are not conducted. The aim of these zones is common to that of non-defended localities. The differences between the two areas relate to how they are established and their situation. A non-defended locality may be created by unilateral declaration, whereas a demilitarised zone is created by express agreement between the parties. From the commander's point of view, protection granted to each zone is identical. Therefore, as long as sufficient notice is given of the zones and they are adequately marked, they are protected from attack.⁷²

70. Cameroon's Instructors' Manual, while defining demilitarised zones as zones where all military activities have ceased, states that conditions regarding

⁷⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 215.

⁷¹ Argentina, *Law of War Manual* (1989), § 4.06.

⁷² Australia, *Defence Force Manual* (1994), § 737.

demilitarised zones are established by an express agreement between the belligerents.⁷³

71. Canada's LOAC Manual requires an agreement between the parties to a conflict in order to establish a demilitarised zone. According to the manual, the conditions that must normally be satisfied by a demilitarised zone are the same as those listed in Article 60(3) AP I.⁷⁴

72. Croatia's LOAC Compendium states that the following are not allowed in a demilitarised zone: a) the presence of combatants; b) the presence of mobile weapons; c) the presence of mobile military equipment; d) any act of hostility; and e) any activity related to the conduct of military operations.⁷⁵

73. Germany's Military Manual states that:

The prerequisites for establishing [a demilitarized zone] are equal to those applying to non-defended localities (Article 59 para. 2, 60 para. 3 AP I). Demilitarized zones are created by an agreement concluded between the parties to the conflict either in peacetime or in case of conflict. It is prohibited for each party to the conflict to attack or occupy such zones (Article 60 para 1 AP I).⁷⁶

74. Hungary's Military Manual states that the establishment of a demilitarised zone requires that there are "no combatants; no mobile weapons; no mobile military equipment; no hostile acts; no activity linked to the military effort".⁷⁷

75. Kenya's LOAC Manual, in a section entitled "Demilitarized Zones" states that:

These specific protected zones which are open to all non-combatants are regulated by an express agreement concluded verbally or in writing between the two Parties to the conflict. Such an agreement may be concluded in peacetime as well as after the outbreak of hostilities.

The conditions to be fulfilled by both demilitarized zones and non-defended localities are the same in practice. They are:

- a) that all combatants as well as mobile weapons and mobile military equipment must be evacuated;
- b) that no hostile use shall be made of fixed military installations or establishments;
- c) that no acts of hostility shall be committed by the authorities or by the population; and
- d) that any activity linked to the military effort must cease.⁷⁸

76. Madagascar's Military Manual provides that the term "demilitarised zone" means a zone from which all combatants as well as all mobile weapons and military material have been evacuated, and in which fixed military establishments are not used for harmful purposes, no hostile act can be committed by

⁷³ Cameroon, *Instructors' Manual* (1992), p. 20, § 227.

⁷⁴ Canada, *LOAC Manual* (1999), p. 4-11, §§ 115-116.

⁷⁵ Croatia, *LOAC Compendium* (1991), p. 11.

⁷⁶ Germany, *Military Manual* (1992), § 461.

⁷⁷ Hungary, *Military Manual* (1992), p. 23.

⁷⁸ Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 6-7.

the authorities and the population, and all activities linked to the military effort have ceased. It states that demilitarised zones are created by agreement between the parties concerned.⁷⁹

77. The Military Manual of the Netherlands describes the establishment of demilitarised zones on the basis of Article 60 AP I.⁸⁰

78. New Zealand's Military Manual provides that "the parties to a conflict may agree that a particular area shall constitute a demilitarised zone, in which case military operations may only be carried on in that area to the extent permitted by the agreement". With respect to the rules and the procedure to be adopted in relation to the establishment of demilitarised zones, the manual refers to Article 60 AP I. It also notes that agreements establishing the zones may be oral or in writing, may be arranged either directly or through the medium of a protecting power or any impartial humanitarian organisation or may also arise by way of reciprocal and concordant declarations.⁸¹

79. Nigeria's Military Manual notes that preplanned protected zones, including demilitarised zones, are established by agreement between belligerent parties or can be internationally recognised.⁸²

80. Spain's LOAC Manual notes that demilitarised zones are areas established by an agreement between the belligerents and designed to protect especially vulnerable sectors of the population from the effects of war. The manual refers to Article 60 AP I.⁸³

81. Sweden's IHL Manual refers to Article 60 AP I as embodying "new provisions" on demilitarised zones. It stresses that, unlike non-defended localities, demilitarised zones cannot be established merely through a unilateral declaration; an agreement between the parties, made either before or during a conflict, is necessary. The manual adds that:

Article 60 does not only imply prohibition of the setting-up of fixed defence establishments within [a demilitarised area]... [I]t is also prohibited to undertake military operations within the zone – always provided that the parties do not decide otherwise. A demilitarised zone shall not be open to occupation by the adversary, as in the case with non-defended localities.

The manual recalls that "the conditions required for a [demilitarised] area are the same as for non-defended localities", with the only difference that the condition relating to activity supporting military operations "has been extended to apply to any activity connected with the military".⁸⁴

82. Switzerland's Basic Military Manual states, with reference to Article 60 AP I, that demilitarised zones can be established by military commanders of

⁷⁹ Madagascar, *Military Manual* (1994), Fiche No. 3-SO, § I.

⁸⁰ Netherlands, *Military Manual* (1993), p. V-16/V-17, § 14.

⁸¹ New Zealand, *Military Manual* (1992), § 412(4).

⁸² Nigeria, *Military Manual* (1994), p. 43, § 14.

⁸³ Spain, *LOAC Manual* (1996), Vol. I, §§ 1.3.e.(2) and 7.3.b.(5).

⁸⁴ Sweden, *IHL Manual* (1991), Section 3.4.3, pp. 87–88.

the parties to the conflict.⁸⁵ It points out that demilitarised zones, as well as non-defended localities, may be established through specific reciprocal declarations and that a unilateral declaration is not sufficient to create them.⁸⁶ The conditions for the setting-up of a demilitarised zone are the same as for non-defended localities, namely: all combatants as well as mobile weapons and military equipment must be evacuated; no hostile use shall be made of fixed military installations or establishments; no acts of hostility shall be committed by the authorities or by the population; any activity in support of the military effort must cease; and the zone must be marked by distinctive signs.⁸⁷

83. The US Air Force Pamphlet states that “both the 1923 Draft Hague Rules [of Air Warfare] and the 1949 Geneva Conventions recognize the right of states, by agreement, to create safety zones or demilitarized zones”.⁸⁸

84. The US Air Force Commander’s Handbook, in a section entitled “Neutralized and Demilitarized Zones”, provides that:

By agreement, the parties to a conflict may establish certain zones where civilians, the sick and wounded, or other noncombatants may gather to be safe from attack.

A party to conflict cannot establish such a zone by itself; neutralized zones need only be respected if established by agreement between the parties, either in oral or written, or by parallel declarations. Such an agreement may be concluded either before or during hostilities.

United States forces need not respect such a zone unless the United States has agreed to respect it. Even in an unrecognized zone, of course, only legitimate military objectives . . . may be attacked.⁸⁹

85. The YPA Military Manual of the SFRY (FRY) contains provisions regarding the establishment of demilitarised zones, which mirror the conditions prescribed by AP I.⁹⁰

National Legislation

86. The Draft Amendments to the Penal Code of El Salvador define demilitarised zones in accordance with Article 60(3) AP I.⁹¹

87. Nicaragua’s Draft Penal Code defines demilitarised zones in accordance with Article 60(3) AP I.⁹²

National Case-law

88. No practice was found.

⁸⁵ Switzerland, *Basic Military Manual* (1987), Article 12(2).

⁸⁶ Switzerland, *Basic Military Manual* (1987), Article 32(2) and (4).

⁸⁷ Switzerland, *Basic Military Manual* (1987), Article 32(2).

⁸⁸ US, *Air Force Pamphlet* (1976), § 5-4(c).

⁸⁹ US, *Air Force Commander’s Handbook* (1980), § 3-6(b).

⁹⁰ SFRY (FRY), *YPA Military Manual* (1988), § 78.

⁹¹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Ataque a zonas desmilitarizadas”.

⁹² Nicaragua, *Draft Penal Code* (1999), Article 467(2).

Other National Practice

89. The Report on the Practice of Colombia notes that the government has ordered the demilitarisation of certain regions of the country in order to enable a constructive dialogue to be developed concerning the demobilisation and reintegration of armed opposition groups. Another purpose of these zones is to carry out humanitarian operations, such as the release of persons deprived of freedom.⁹³

90. According to the Report on the Practice of Kuwait, the Kuwaiti government considers that military troops or their materiel are barred from entering the demilitarised zone in northern Kuwait. This protection is ensured by representatives of the Ministry of the Interior, who are not allowed to enter the area with high-calibre weapons. Allegations of violations by the Iraqi party must be transmitted to UNIKOM for appropriate action.⁹⁴

91. The Act Establishing the Demilitarized Zone, annexed to the 1990 Effective and Definitive Cease-fire Agreement between the Government of the Republic of Nicaragua and the Nicaraguan Resistance, provides that "in the demilitarized zone, there shall be no artillery, no offensive troops of any kind, no militia and no paramilitary or security forces" and that "the police of the villages situated within the demilitarized zone shall be disarmed".⁹⁵

92. The Report on US Practice considers that US *opinio juris* generally conforms to the rules and conditions prescribed in Article 60 AP I.⁹⁶

93. According to the Report on the Practice of the SFRY (FRY), "the *opinio iuris* and the customary nature of rules relevant to the establishment of demilitarised zones in the FRY is absolutely clear".⁹⁷

*III. Practice of International Organisations and Conferences**United Nations*

94. In 1994, in a statement by its President concerning the conflict in Croatia, the UN Security Council denounced the continuing violation of the demilitarised status of Prevlaka. Referring, *inter alia*, to the movement of heavy weapons and of Croatian special police and the entry of a navy missile boat of the SFRY into the demilitarised zone, the Security Council underlined its concern in this regard and called upon the parties to cease such violations.⁹⁸

⁹³ Report on the Practice of Colombia, 1998, Chapter 1.8.

⁹⁴ Report on the Practice of Kuwait, 1997, Chapter 1.8.

⁹⁵ Nicaragua, Act Establishing the Demilitarized Zone, Effective and Definitive Cease-fire Agreement between the Government of the Republic of Nicaragua and the Nicaraguan Resistance, annexed to Note verbale dated 23 April to the UN Secretary-General, UN Doc. A/44/941-S/21272, 25 April 1990, Annex II, pp. 8–9, §§ 2 and 4.

⁹⁶ Report on US Practice, 1997, Chapter 1.8.

⁹⁷ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.8.

⁹⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/23, 25 April 1997.

95. In a report in 1990, the UN Secretary-General referred to complaints made to ONUCA by leaders of the Nicaraguan resistance concerning the continued presence of armed civilians and militia personnel in some of the demilitarised zones.⁹⁹

96. In a report concerning UNIKOM in 1997, the UN Secretary-General denounced a number of violations in the demilitarised zone on the Iraq–Kuwait border. He noted that 10 of the 14 ground violations were related to the presence of military and armed personnel in this zone. Insofar as air violations were concerned, they involved overflights by aircraft of types used by the coalition forces.¹⁰⁰

97. In a 1998 report regarding UNCRO in Croatia, whose mandate included the demilitarisation of the Prevlaka peninsula, the UN Secretary-General considered the presence of Yugoslav troops in the north-western part of the demilitarised zone as the most significant long-standing violation in this area.¹⁰¹

Other International Organisations

98. No practice was found.

International Conferences

99. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

100. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

101. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “preplanned protected zones are established by agreement between belligerent Parties...[including]... demilitarized zones”.¹⁰²

VI. Other Practice

102. No practice was found.

⁹⁹ UN Secretary-General, Report on ONUCA, UN Doc. S/21341, 4 June 1990, § 2.

¹⁰⁰ UN Secretary-General, Report on UNIKOM, UN Doc. S/1997/255, 26 March 1997, § 4.

¹⁰¹ UN Secretary-General, Report on the UN Observer Mission in Prevlaka, UN Doc. S/1998/578, 26 June 1998, § 5.

¹⁰² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 418.

Attacks on demilitarised zones

I. Treaties and Other Instruments

Treaties

103. Article I(6) of the 1953 Panmunjon Armistice Agreement provides that “neither side shall execute any hostile act . . . against the demilitarised zone”.

104. Article 60(1) AP I provides that “it is prohibited for the Parties to the conflict to extend their military operations to zones on which they have conferred by agreement the status of demilitarized zone, if such extension is contrary to the terms of this agreement”.

105. Article 60(7) AP I provides that:

If one of the Parties to the conflict commits a material breach of the provisions of paragraphs 3 or 6 [concerning the conditions to be fulfilled by a zone to be established as a demilitarized zone and the prohibition to use the zone for purposes related to the conduct of military operations], the other Party shall be released from its obligations under the agreement conferring upon the zone the status of demilitarized zone. In such an eventuality, the zone loses its status but shall continue to enjoy the protection provided by the other provisions of this Protocol and the other rules of international law applicable in armed conflict.

Article 60 AP I was adopted by consensus.¹⁰³

106. Under Article 85(3)(d) AP I, “making . . . demilitarized zones the object of attack” is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.¹⁰⁴

Other Instruments

107. Pursuant to Article 20(e)(iii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “attack, or bombardment, by whatever means, of . . . demilitarized zones” is a war crime.

II. National Practice

Military Manuals

108. Argentina’s Law of War Manual prohibits attacks on demilitarised zones by any means whatsoever and states that the prohibition of such attacks subsists only as long as such zones comply with the conditions set out in Article 60 AP I.¹⁰⁵ It further qualifies attacks against demilitarised zones as grave breaches of IHL.¹⁰⁶

¹⁰³ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 215.

¹⁰⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹⁰⁵ Argentina, *Law of War Manual* (1989), § 4.06.

¹⁰⁶ Argentina, *Law of War Manual* (1989), § 8.03.

109. Australia's Defence Force Manual states that "generally, demilitarised zones are protected from attack".¹⁰⁷ It further provides that "making... demilitarised zones the object of attack" constitutes a grave breach or a serious war crime likely to warrant institution of criminal proceedings.¹⁰⁸

110. Benin's Military Manual prohibits attacks on demilitarised zones.¹⁰⁹

111. Cameroon's Instructors' Manual mentions the duty to avoid hostilities from the air over demilitarised zones and emphasises that, while these zones cannot be made the object of an attack, it is also prohibited to launch an attack from a demilitarised zone.¹¹⁰

112. Canada's LOAC Manual states that "it is prohibited for parties to a conflict to conduct military operations in or to attack an area that they have agreed to treat as a demilitarized zone".¹¹¹ It further states that an area loses its status as a demilitarised zone if used "for purposes related to the conduct of military operations where it has agreed not to do so".¹¹² The manual considers that "making... demilitarized zones the object of attack" constitutes a grave breach of AP I.¹¹³

113. Croatia's Commanders' Manual imposes a duty to issue appropriate instructions when military activities are conducted near demilitarised zones, in order to ensure the protection of such zones.¹¹⁴

114. Ecuador's Naval Manual provides that demilitarised zones established by agreement must not be attacked.¹¹⁵

115. In prohibiting attacks against demilitarised areas, France's LOAC Manual is guided by Article 60(1) AP I.¹¹⁶

116. Germany's Military Manual provides that "it is prohibited for each party to the conflict to attack or occupy [demilitarized] zones".¹¹⁷ It points out that, if one of the parties to the conflict breaches the provisions concerning the conditions for the establishment of demilitarised zones, the zone in question will lose its special protection".¹¹⁸ The manual further provides that grave breaches of IHL are in particular "launching attacks against... demilitarized zones".¹¹⁹

117. Hungary's Military Manual states that "commanders shall issue orders and/or instructions to regulate behaviour in the vicinity of protected zones".¹²⁰

¹⁰⁷ Australia, *Defence Force Manual* (1994), § 943, see also § 737 and *Commanders' Guide* (1994), § 928.

¹⁰⁸ Australia, *Defence Force Manual* (1994), § 1315(k); see also *Commander's Guide* (1994), § 1305(k).

¹⁰⁹ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹¹⁰ Cameroon, *Instructors' Manual* (1992), p. 113, § 423(1).

¹¹¹ Canada, *LOAC Manual* (1999), p. 4-11, § 115.

¹¹² Canada, *LOAC Manual* (1999), p. 4-11, § 118(b).

¹¹³ Canada, *LOAC Manual* (1999), p. 16-3, § 16(d).

¹¹⁴ Croatia, *Commanders' Manual* (1992), Article 48.

¹¹⁵ Ecuador, *Naval Manual* (1989), § 8.5.1.3. ¹¹⁶ France, *LOAC Manual* (2001), p. 125.

¹¹⁷ Germany, *Military Manual* (1992), § 461.

¹¹⁸ Germany, *Military Manual* (1992), § 462.

¹¹⁹ Germany, *Military Manual* (1992), § 1209.

¹²⁰ Hungary, *Military Manual* (1992), p. 65.

It further states that such zones “shall be respected and be taken over without combat”.¹²¹

118. Italy’s LOAC Elementary Rules Manual states that “where protected zones or localities (. . . demilitarised zones . . .) have been agreed upon, the competent commanders shall issue instructions for action and behaviour near and towards such zones or localities”.¹²² The manual also provides that “protected zones shall be respected”.¹²³

119. Italy’s IHL Manual qualifies “indiscriminate attacks against . . . demilitarised zones” as war crimes.¹²⁴

120. According to Kenya’s LOAC Manual, demilitarised zones are protected from “attack and military operations”.¹²⁵

121. The Military Manual of the Netherlands states that “the parties to the conflict are prohibited from extending their military operations to demilitarised zones” and provides that “attacking . . . demilitarised zones” in violation of IHL constitutes a grave breach.¹²⁶

122. New Zealand’s Military Manual states that:

Any material breach of [the conditions for a zone to be established as a demilitarised zone] releases the other Party from its obligations under the agreement and the zone loses its special status. It shall, however, continue to enjoy the normal protection provided by the customary and treaty law of armed conflict.¹²⁷

The manual further states that “making . . . demilitarized zones the object of attack” constitutes a grave breach of AP I.¹²⁸

123. Nigeria’s Military Manual states that “preplanned protected zones are established by agreement between belligerent parties . . . [including] demilitarised zones”.¹²⁹

124. South Africa’s LOAC Manual qualifies attacks against demilitarised zones as grave breaches of AP I.¹³⁰

125. According to Spain’s LOAC Manual, demilitarised zones are areas in which military operations may not be carried out and against which attacks are prohibited. The manual refers to Article 60 AP I.¹³¹ The manual further states that “launching an attack against demilitarised zones” constitutes a war crime.¹³²

126. Switzerland’s Basic Military Manual prohibits attacks on demilitarised zones by any means.¹³³ It considers that demilitarised zones lose their protected

¹²¹ Hungary, *Military Manual* (1992), p. 72.

¹²² Italy, *LOAC Elementary Rules Manual* (1991), § 47.

¹²³ Italy, *LOAC Elementary Rules Manual* (1991), § 70.

¹²⁴ Italy, *IHL Manual* (1991), Vol. I, § 85.

¹²⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 13.

¹²⁶ Netherlands, *Military Manual* (1993), p. V-16, § 14 and p. IX-5.

¹²⁷ New Zealand, *Military Manual* (1992), § 412(5).

¹²⁸ New Zealand, *Military Manual* (1992), § 1703(3)(d).

¹²⁹ Nigeria, *Military Manual* (1994), p. 43, § 14. ¹³⁰ South Africa, *LOAC Manual* (1996), § 41.

¹³¹ Spain, *LOAC Manual* (1996), Vol. I, §§ 4.5.b.(3)(b) and 7.3.b.(5).

¹³² Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

¹³³ Switzerland, *Basic Military Manual* (1987), Article 32(1).

status as soon as they are improperly used for military purposes.¹³⁴ The manual further provides that “launching an attack against . . . demilitarised zones” constitutes a grave breach of AP I.¹³⁵

127. Togo’s Military Manual prohibits attacks on demilitarised zones.¹³⁶

128. The US Air Force Pamphlet states that:

Doubtless the creation of [safety or demilitarized] zones would be one of the most effective measures to enhance protection of one’s own civilian population, and if the conditions required to make a zone were fulfilled and maintained, virtually all civilian casualties would be avoided in this zone”.¹³⁷

129. The US Air Force Commander’s Handbook, in a section entitled “Neutralized and Demilitarized Zones”, provides that:

By agreement, the parties to a conflict may establish certain zones where civilians, the sick and wounded, or other noncombatants may gather to be safe from attack.

A party to conflict cannot establish such a zone by itself; neutralized zones need only be respected if established by agreement between the parties, either in oral or written, or by parallel declarations. Such an agreement may be concluded either before or during hostilities.

United States forces need not respect such a zone unless the United States has agreed to respect it. Even in an unrecognized zone, of course, only legitimate military objectives . . . may be attacked.¹³⁸

130. The US Naval Handbook provides that “an agreed demilitarized zone is also exempt from bombardment”.¹³⁹

131. The YPA Military Manual of the SFRY (FRY) prohibits attacks against demilitarised zones.¹⁴⁰

National Legislation

132. Argentina’s Draft Code of Military Justice punishes any soldier who “wilfully violates the protection due to . . . demilitarised zones which are properly marked”.¹⁴¹

133. Under Armenia’s Penal Code, “targeting . . . demilitarised zones” during an armed conflict constitutes a crime against the peace and security of mankind.¹⁴²

¹³⁴ Switzerland, *Basic Military Manual* (1987), Article 32(4).

¹³⁵ Switzerland, *Basic Military Manual* (1987), Article 193(1)(d).

¹³⁶ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹³⁷ US, *Air Force Pamphlet* (1976), § 5-4(c).

¹³⁸ US, *Air Force Commander’s Handbook* (1980), § 3-6(b).

¹³⁹ US, *Naval Handbook* (1995), § 8.5.1.3; see also § 8.6.2.2 (protected places and objects).

¹⁴⁰ SFRY (FRY), *YPA Military Manual* (1988), § 78.

¹⁴¹ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(2) in the *Code of Military Justice as amended* (1951).

¹⁴² Armenia, *Penal Code* (2003), Article 390.3(4).

134. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁴³

135. Australia's ICC (Consequential Amendments) Act incorporates in the list of war crimes of the Criminal Code grave breaches of AP I, including "attacking . . . demilitarised zones".¹⁴⁴

136. Azerbaijan's Criminal Code provides that "directing attacks against . . . demilitarised zones" constitutes a war crime in international and non-international armed conflicts.¹⁴⁵

137. The Criminal Code of Belarus provides that it is a war crime to "direct attacks against demilitarised zones".¹⁴⁶

138. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "making demilitarised zones the object of attack" constitutes a crime under international law.¹⁴⁷

139. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order that "demilitarised zones be indiscriminately targeted" or to carry out such targeting.¹⁴⁸ The Criminal Code of the Republika Srpska contains the same provision.¹⁴⁹

140. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹⁵⁰

141. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".¹⁵¹

142. Under Croatia's Criminal Code, "indiscriminate attacks affecting . . . demilitarised zones" are war crimes.¹⁵²

143. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹⁵³

144. The Czech Republic's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law

¹⁴³ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁴⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.98.

¹⁴⁵ Azerbaijan, *Criminal Code* (1999), Article 116(7).

¹⁴⁶ Belarus, *Criminal Code* (1999), Article 136(2).

¹⁴⁷ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(14).

¹⁴⁸ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

¹⁴⁹ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

¹⁵⁰ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁵¹ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁵² Croatia, *Criminal Code* (1993), Article 120(2).

¹⁵³ Cyprus, *AP I Act* (1979), Section 4(1).

on means and methods of warfare, intentionally: ... (b) leads an attack against a ... demilitarised zone".¹⁵⁴

145. Under the Draft Amendments to the Penal Code of El Salvador, "anyone who, in the context of an international or non-international armed conflict, attacks demilitarised zones" is punishable by imprisonment.¹⁵⁵

146. Under Estonia's Penal Code, "an attack against ... a demilitarised zone" is a war crime.¹⁵⁶

147. Under Georgia's Criminal Code, "making ... demilitarised zones the object of attack" in an international or non-international armed conflict is a punishable crime.¹⁵⁷

148. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, "in connection with an international armed conflict or with an armed conflict not of an international character, ... directs an attack by military means against ... demilitarised zones".¹⁵⁸

149. Under Hungary's Criminal Code as amended, "a military commander who, in violation of the rules of international law concerning warfare, ... takes offensive against ... a weapon-free zone" commits a war crime.¹⁵⁹

150. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁶⁰ It adds that any "minor breach" of AP I, including violations of Article 60 AP I, is also a punishable offence.¹⁶¹

151. Under Jordan's Draft Military Criminal Code, "attacks against ... demilitarised zones" are considered war crimes.¹⁶²

152. Under the Draft Amendments to the Code of Military Justice of Lebanon, "attacks against ... demilitarised zones" are considered war crimes, provided that they are committed intentionally and cause death or serious injury to body or health.¹⁶³

153. Under Lithuania's Criminal Code as amended, "a military attack against ... a demilitarised zone" constitutes a war crime.¹⁶⁴

154. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit "the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: ... making ... demilitarised zones the object of attack".¹⁶⁵

¹⁵⁴ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(b).

¹⁵⁵ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a zonas desmilitarizadas".

¹⁵⁶ Estonia, *Penal Code* (2001), § 106.

¹⁵⁷ Georgia, *Criminal Code* (1999), Article 411(1)(d).

¹⁵⁸ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

¹⁵⁹ Hungary, *Criminal Code as amended* (1978), Section 160(b).

¹⁶⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁶¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁶² Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(12).

¹⁶³ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(12).

¹⁶⁴ Lithuania, *Criminal Code as amended* (1961), Article 337.

¹⁶⁵ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(iv).

155. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁶⁶

156. Nicaragua's Draft Penal Code states that "whoever, in the circumstances of an international or internal armed conflict, without having previously taken appropriate measures of protection and without any justification based on imperative military necessity, attacks or destroys . . . demilitarised zones" commits a punishable "offence against international law".¹⁶⁷

157. According to Niger's Penal Code as amended, "putting under attack . . . demilitarised zones" is a war crime.¹⁶⁸

158. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁶⁹

159. Slovakia's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (b) leads an attack against a . . . demilitarised zone".¹⁷⁰

160. Under Slovenia's Penal Code, "a random attack . . . on demilitarised areas" is a war crime.¹⁷¹

161. Spain's Penal Code provides for the punishment of "anyone who, in the event of armed conflict, should . . . knowingly violate the protection due to . . . demilitarised zones . . . which are duly identified with signs or the appropriate distinctive signals".¹⁷²

162. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, i.e. . . . making . . . demilitarised zones the object of attack".¹⁷³

163. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".¹⁷⁴

¹⁶⁶ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁶⁷ Nicaragua, *Draft Penal Code* (1999), Article 468.

¹⁶⁸ Niger, *Penal Code as amended* (1961), Article 208.3(14).

¹⁶⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁷⁰ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(b).

¹⁷¹ Slovenia, *Penal Code* (1994), Article 374(2).

¹⁷² Spain, *Penal Code* (1995), Article 612(1).

¹⁷³ Tajikistan, *Criminal Code* (1998), Article 403(1).

¹⁷⁴ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

164. Yemen's Military Criminal Code, in a part on war crimes, provides for the punishment of "unjustified attacks against demilitarised zones".¹⁷⁵

165. The Penal Code as amended of the SFRY (FRY) provides for the punishment of "any person who may order the following in violation of the rules of international law during armed conflict or occupation: . . . indiscriminate attacks on . . . demilitarised zones".¹⁷⁶

166. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".¹⁷⁷

National Case-law

167. No practice was found.

Other National Practice

168. The Report on the Practice of Angola notes that Article 60 AP I prohibits attacks against demilitarised zones.¹⁷⁸

169. In a letter dated 6 March 1994 addressed to the UNPROFOR Command, the Commander-in-chief of the Headquarters of Bosnian Armed Forces denounced the killing and imprisonment of civilians in the demilitarised zones of Srebrenica and Žepa. The UN forces were requested to re-establish the previous positions of the lines, which had been shifted by the adverse party in the attempt to take over the demilitarised zone, and to deploy observers in the zones.¹⁷⁹

170. The Report on the Practice of Botswana states that demilitarised zones established by agreement between the belligerents shall not be attacked.¹⁸⁰

171. According to the Report on the Practice of Egypt, "Egypt thinks that protection of . . . demilitarized zones . . . consists in refraining from launching attacks against . . . these areas", which implies that "attacks against such places are prohibited".¹⁸¹

172. The Report on the Practice of Iran notes that Iran objected on several occasions to the bombardment of demilitarised zones by Iraqi forces during the Iran–Iraq War, but adds that no other relevant practice could be found in this regard and that, therefore, no conclusion can be drawn from Iranian practice concerning the prohibition on the targeting of demilitarised zones.¹⁸²

173. In 1996, in a letter to the President of the UN Security Council, North Korea transmitted a statement concerning the situation in the area of the military

¹⁷⁵ Yemen, *Military Criminal Code* (1998), Article 21(8).

¹⁷⁶ SFRY (FRY), *Penal Code as amended* (1976), Article 142(2).

¹⁷⁷ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

¹⁷⁸ Report on the Practice of Angola, 1998, Chapter 5.

¹⁷⁹ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.8.

¹⁸⁰ Report on the Practice of Botswana, 1998, Chapter 1.8.

¹⁸¹ Report on the Practice of Egypt, 1997, Chapter 1.8.

¹⁸² Report on the Practice of Iran, 1997, Chapter 1.8.

demarcation line. In the statement, claiming that the South Korean military authorities had disregarded the armistice agreement, the spokesperson of the Panmunjom Mission of the Korean People's Army drew up a list of alleged violations of the demilitarised zone. He declared, *inter alia*, that South Korea had introduced tanks, various kinds of artillery pieces and heavy weapons, as well as a large number of armed military personnel, into the zone, and had even built large military facilities there. According to the spokesperson, the area's status did not correspond to the real meaning of a demilitarised zone since it had been armed and turned into a new attack position. The spokesperson thus stated that the Korean People's Army did not consider itself any longer bound by the article of the armistice agreement concerning the demilitarised zone, and announced that since the status of this zone could not be maintained any longer, "self-defensive measures" would be considered.¹⁸³

174. The Report on the Practice of Nigeria states that it is Nigeria's *opinio juris* that the protection of demilitarised zones is part of customary international law.¹⁸⁴

175. The Report on the Practice of Pakistan notes that a demilitarised zone was created under the 1949 Karachi Agreement. The report emphasises that Pakistan has been respecting the said zone and has periodically reported violations of it by India to the UN Observer Group. The report, referring to a statement by a spokesperson of Pakistan's Foreign Office made in 1997, also underlines that Pakistan has formally opposed any suggestion of terminating UNMOGIP.¹⁸⁵

176. The Report on the Practice of Rwanda notes that, although no practice was found regarding demilitarised zones, the President of the Military Tribunal confirmed that such zones would be protected according to the modalities agreed upon by the belligerents.¹⁸⁶

177. The Report on the Practice of Syria asserts that Syria considers Article 60 AP I to be part of customary international law.¹⁸⁷

178. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that attacks shall not be made against appropriately declared or agreed demilitarized zones".¹⁸⁸

¹⁸³ North Korea, Letter dated 5 April 1996 to the President of the UN Security Council, UN Doc. S/1996/253, 5 April 1996.

¹⁸⁴ Report on the Practice of Nigeria, 1997, Chapter 1.8.

¹⁸⁵ Report on the Practice of Pakistan, 1998, Chapter 1.8, referring to Statement by the Foreign Office spokesperson, 24 April 1997.

¹⁸⁶ Report on the Practice of Rwanda, 1997, Chapter 1.8, referring to an interview with the President of Rwanda's Military Tribunal, 23 October 1997.

¹⁸⁷ Report on the Practice of Syria, 1997, Chapter 1.8.

¹⁸⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

179. The Report on US Practice considers that US *opinio juris* generally conforms to the rules and conditions prescribed in Article 60 AP I.¹⁸⁹

III. Practice of International Organisations and Conferences

180. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

181. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

182. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that an attack against a demilitarised zone constitutes a grave breach of the law of war.¹⁹⁰

183. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Court, the ICRC proposed that “making demilitarized zones the objects of attack”, when committed in an international armed conflict, be subjected to the jurisdiction of the Court.¹⁹¹

VI. Other Practice

184. No practice was found.

C. Open Towns and Non-Defended Localities

Establishment of open towns

I. Treaties and Other Instruments

Treaties

185. No practice was found.

Other Instruments

186. Article 16 of the 1956 New Delhi Draft Rules states that “when a locality is declared to be an “open town”, the adverse party shall be duly notified. The latter is bound to reply, and if it agrees to recognize the locality in question as an open town, shall cease from all attacks on the said town, and refrain from

¹⁸⁹ Report on US Practice, 1997, Chapter 1.8.

¹⁹⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 418.

¹⁹¹ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(iv).

any military operation the sole object of which is its occupation." It goes on to say that:

When, on the outbreak or in the course of hostilities, a locality is declared to be an "open town" the adverse Party shall be duly notified. The latter is bound to reply, and if it agrees to recognize the locality in question as an open town, shall cease all attacks on the said town, and refrain from any military operation the sole object of which is its occupation.

In the absence of any special conditions which may, in any particular case, be agreed upon with the adverse Party, a locality, in order to be declared an "open town", must satisfy the following conditions:

- (a) it must not be defended or contain any armed force;
- (b) it must discontinue all relations with any national or allied armed forces;
- (c) it must stop all activities of a military nature or for a military purpose in those of its installations or industries which might be regarded as military objectives;
- (d) it must stop all military transit through the town.

The adverse Party may make the recognition of the status of "open town" conditional upon verification of the fulfilment of the conditions stipulated above. All attacks shall be suspended during the institution and operation of the investigatory measures.

The presence in the locality of civil defence services, or of the services responsible for maintaining public order, shall not be considered as contrary to the conditions laid down in paragraph 2. If the locality is situated in occupied territory, this provision applies also to the military occupation forces essential for the maintenance of public law and order.

When an "open town" passes into other hands, the new authorities are bound, if they cannot maintain its status, to inform the civilian population accordingly.

II. National Practice

Military Manuals

187. Argentina's Law of War Manual provides for the possibility of establishing undefended areas and refers to the conditions set out for this purpose in Article 60 AP I.¹⁹²

188. Belgium's Law of War Manual states that "an area is considered as an 'undefended area' or as an 'open town' when it is undefended to the point that it can be taken without a single shot or without any losses (e.g. due to the presence of mines)". It adds that the presence of wounded military personnel and weapons does not change the status of the area as an open town or undefended area. The manual points out two procedures to obtain the status of "open town", namely, a unilateral declaration or an agreement between the belligerents.¹⁹³

189. Bosnia and Herzegovina's Military Instructions provides that:

¹⁹² Argentina, *Law of War Manual* (1989), § 4.06.

¹⁹³ Belgium, *Law of War Manual* (1983), p. 30.

In order to ensure full protection of such place [an open town], it is necessary that the other side to the conflict also recognises the status of the city and to reach an agreement on the necessary preconditions in that regard. These preconditions are usually related to the following: the places should not be defended and no armed forces should be deployed in it; no military units should cross its territory for the purpose of transporting military material; no activities of military importance should be undertaken in industrial plants; and there should be no liaison with local armed forces and allied armed forces.¹⁹⁴

190. France's LOAC Manual defines as an open town "any inhabited area located in the combat zone or in its proximity, which is open to enemy occupation in order to avoid fighting and destruction". It lists the following four conditions that must be fulfilled in order for a town to be considered an open town: all combatants as well as mobile weapons and military material must be evacuated; no hostile use shall be made of fixed military installations and establishments; the authorities and the population shall abstain from committing any act of hostility; no activities in support of military operations shall be undertaken. The manual gives Paris in 1940 and Rome in 1943 as examples of open towns during the Second World War.¹⁹⁵

191. Switzerland's Basic Military Manual notes that during the Second World War localities that were declared to be open were understood to be undefended should the enemy reach their periphery. It also points out different conditions that need to be fulfilled to obtain the status of "undefended areas".¹⁹⁶

192. The UK Military Manual defines an open or undefended town as:

A town which is so completely undefended from within or without that the enemy may enter and take possession of it without fighting or incurring casualties. It follows that no town located behind the immediate front line can be deemed open or undefended, since the attacker must fight his way to it. Any town behind the enemy front line is thus a defended town and is open to ground or other bombardment, subject to the conditions imposed on all bombardment, namely, that as far as possible, the latter must be limited to military objectives... A town in the front line with no means of defence, not defended from the outside and into which the enemy may enter and of which he may take possession at any time without fighting or incurring casualties, e.g., from crossing unmarked minefields, is undefended even if it contains munitions factories.¹⁹⁷

The manual goes on to say that, *prima facie*, a fortified place is considered as defended, unless there are visible signs of surrender. However, a locality need not be fortified to be deemed "defended", and it may be held thus if a military force is occupying it or marching through it. It states that a town should be considered to be defended (and thus liable to bombardment) even if defended posts are detached and located at a distance from the city:

¹⁹⁴ Bosnia and Herzegovina, *Military Instructions* (1992), § 6.

¹⁹⁵ France, *LOAC Manual* (2001), p. 124.

¹⁹⁶ Switzerland, *Basic Military Manual* (1987), Article 32.

¹⁹⁷ UK, *Military Manual* (1958), § 290.

The town and defended posts form an indivisible whole, inasmuch as the town may contain workshops and provide supplies which are invaluable to the defence and may serve to shelter the troops holding the defence points when they are not on duty.¹⁹⁸

193. The YPA Military Manual of the SFRY (FRY) provides that the establishment of an open town requires agreement between the parties and restates the conditions contained in Article 16 of the 1956 New Delhi Draft Rules.¹⁹⁹

National Legislation

194. No practice was found.

National Case-law

195. In the *Priebke case* in 1996, Italy's Military Tribunal of Rome examined the status of Rome as an "open town" in 1944. The Tribunal concluded that the city did not enjoy such status, arguing that neither a unilateral declaration nor the voluntary behaviour of one of the parties was sufficient to establish an obligation upon the other party. Only after acceptance was obtained from the other party (or parties), i.e., when an agreement was reached, could the status of open town become legally binding for the belligerents.²⁰⁰

Other National Practice

196. In February 1994, in the context of the internal conflict in the Chiapas in Mexico, two villages – San Miguel, in the municipality of Ocosingo, and Guadalupe el Tepeyac, in the municipality of Las Margaritas – were established as free villages with the aim of creating areas of *détente* and to support the civilian population in the conflict zone. The Mexican army would provide facilities for the movement and transit of people, food and medical care to each of these villages.²⁰¹

197. According to the Report on the Practice of the SFRY (FRY), "the *opinio iuris* and the customary nature of rules relevant to the establishment of these zones [open towns and undefended places] in FRY is absolutely clear".²⁰²

III. Practice of International Organisations and Conferences

198. No practice was found.

¹⁹⁸ UK, *Military Manual* (1958), § 289.

¹⁹⁹ SFRY (FRY), *YPA Military Manual* (1988), § 81.

²⁰⁰ Italy, Military Tribunal of Rome, *Priebke case*, Judgement No. 385, 1 August 1996.

²⁰¹ Mexico, Commissioner for Peace and Reconciliation in the State of Chiapas, Press Conference, 1 February 1994, § 2.

²⁰² Report on the Practice of the SFRY (FRY), 1997, Chapter 1.8.

IV. Practice of International Judicial and Quasi-judicial Bodies

199. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

200. No practice was found.

VI. Other Practice

201. No practice was found.

Establishment of non-defended localities

I. Treaties and Other Instruments

Treaties

202. Article 59(2) AP I provides that:

The appropriate authorities of a Party to the conflict may declare as a non-defended locality any inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse Party. Such a locality shall fulfil the following conditions:

- a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
- b) no hostile use shall be made of fixed military installations or establishments;
- c) no acts of hostility shall be committed by the authorities or by the population; and
- d) no activities in support of military operations shall be undertaken.

Article 59(3) specifies that “the presence, in this [non-defended] locality, of persons specially protected under the Conventions and this Protocol, and of police forces retained for the sole purpose of maintaining law and order, is not contrary to the conditions laid down in paragraph 2”. Article 59(5) provides for the possibility for parties to a conflict to agree on the establishment of non-defended localities under other conditions. It states that:

The Parties to the conflict may agree on the establishment of non-defended localities even if such localities do not fulfil the conditions laid down in paragraph 2. The agreement should define and describe, as precisely as possible, the limits of the non-defended locality; if necessary, it may lay down the methods of supervision.

Article 59 AP I was adopted by consensus.²⁰³

²⁰³ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 215.

Other Instruments

203. Articles 10 and 11 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provide that:

Art. 10. For the purpose of better enabling a State to obtain protection for the non-belligerent part of its civil population, a State may, if it thinks fit, declare a specified part or parts of its territory to be a "safety zone" or "safety zones" and, subject to the conditions following, such safety zones shall enjoy immunity from attack or bombardment by whatsoever means, and shall not form the legitimate object of any act of war.

Art. 11. A safety zone shall consist of either:

- (a) a camp specially erected for that purpose and so situated as to ensure that there is no defended town, port, village or building within "x" kilometres of any part of such camp, or
- (b) an undefended town, port, village or building as defined in Article 2 [a town, port, village or isolated building shall be considered undefended provided that not only (a) no combatant troops, but also (b) no military, naval or air establishment, or barracks, arsenal, munition stores or factories, aerodromes or aeroplane workshops or ships of war, naval dockyards, forts, or fortifications for defensive or offensive purposes, or entrenchments (in this Convention referred to as "belligerent establishments") exist within its boundaries or within a radius of "x" kilometres from such boundaries].

*II. National Practice**Military Manuals*

204. Argentina's Law of War Manual provides for the possibility of establishing non-defended localities and refers to the conditions set out for this purpose in Article 59 AP I.²⁰⁴

205. Australia's Defence Force Manual states that:

727. A non-defended locality is any inhabited or uninhabited place near or in a zone where opposing armed forces are in contact and which has been declared by parties to the conflict as open for occupation by a party to the conflict. In order to be considered a non-defended locality, the following conditions must be fulfilled:

- (a) all combatants, weapons and military equipment must have been evacuated or neutralised;
- (b) no hostile use is made of fixed military installations or establishments;
- (c) no acts of hostility are to be committed by the authorities or the population; and
- (d) no activities in support of military operations shall be undertaken.

728. The presence in this locality of protected persons and police forces retained for the sole purpose of maintaining law and order, does not change the character of a non-defended locality.

729. A non-defended locality may be declared by a party to the conflict. That declaration must describe the geographical limits of the locality and be addressed to the relevant party to the conflict which must acknowledge its receipt and from

²⁰⁴ Argentina, *Law of War Manual* (1989), § 4.06.

that time treat the locality as a non-defended locality unless the conditions for establishment of the locality are not met.²⁰⁵

206. Canada's LOAC Manual provides that "any inhabited place near or in a zone where armed forces are in contact" may be declared by a party to a conflict as a non-defended locality and, thereby, become open for occupation by the adverse party. The conditions that, under the manual, must be normally satisfied by a non-defended locality are the same as those listed in Article 59(2) AP I.²⁰⁶ The manual also provides for the possibility for the parties to a conflict to agree to establish a non-defended locality even when the said conditions are not all satisfied.²⁰⁷

207. France's LOAC Manual is guided by Article 59 AP I as regards the conditions that must be fulfilled in order for an area to be declared a non-defended locality.²⁰⁸

208. Germany's Military Manual provides that:

A locality shall be considered as non-defended if it has been declared so by its competent authorities, if it is open for occupation and fulfils the following conditions: all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated; no hostile use shall be made of fixed military installations and establishments; no acts of hostility shall be committed by the authorities or by the population; and no activities in support of military operations shall be undertaken.²⁰⁹

The manual refers to Article 59(2) AP I. It adds that "a locality shall not on suspicion be deemed non-defended unless the behaviour of the adversary substantiates such a supposition".²¹⁰ It goes on to say that, if one of the parties to the conflict breaches the provisions concerning the conditions for the establishment of non-defended localities, the locality in question will lose its special protection, even if the protection of the civilian population and civilian objects continue to be applicable.²¹¹

209. Kenya's LOAC Manual, in a section entitled "Non-Defended Localities", states that:

Such areas are improvised protected zones from which military objectives and activities have been removed, and which:

- are situated near or in a zone where combat is taking place; and
- are open for occupation by the enemy.

They can be established through a unilateral declaration and notification thereof given to the enemy Party. However, for greater safety, formal agreements should

²⁰⁵ Australia, *Defence Force Manual* (1994), §§ 727-729; see also *Commanders' Guide* (1994), § 921.

²⁰⁶ Canada, *LOAC Manual* (1999), p. 4-11, §§ 110-111.

²⁰⁷ Canada, *LOAC Manual* (1999), p. 4-11, § 112. ²⁰⁸ France, *LOAC Manual* (2001), p. 31.

²⁰⁹ Germany, *Military Manual* (1992), § 459.

²¹⁰ Germany, *Military Manual* (1992), § 460.

²¹¹ Germany, *Military Manual* (1992), § 462.

be passed between the two Parties (under customary law and Hague regulations undefended localities that can be occupied, cannot be bombarded even if there is no notification).

According to the manual, the conditions to be fulfilled by non-defended localities are the same as for demilitarised zones (see *supra*).²¹²

210. The Military Manual of the Netherlands provides that:

The authorities of a party to the conflict may declare as a non-defended locality any inhabited place near a zone where armed operations are launched. It is thus a unilateral declaration. Such a locality shall fulfil the following conditions:

- (a) all combatants, as well as mobile weapons and mobile military equipment, must have been evacuated;
- (b) no hostile use shall be made of fixed military installations or establishments;
- (c) no acts of hostility shall be committed by the authorities or by the population; and
- (d) no activities in support of military operations shall be undertaken.

The declaration shall be addressed to the adverse party and shall define the limits of the non-defended locality. The parties to the conflict may also decide by an agreement on the establishment of non-defended localities even if such localities do not fulfil the above-mentioned conditions.

A locality loses its status as a non-defended locality when it ceases to fulfil the conditions required or the conditions of the agreement concluded between the parties.²¹³

211. New Zealand's Military Manual defines an "undefended place" as:

one from which all combatants, as well as mobile weapons and mobile military equipment, have been removed; where no hostile use is made of fixed military installations or establishments; where no hostile acts are committed by the authorities or the population; and where no activities in support of military operations are undertaken.

The manual specifies that such requirements "relate to places behind enemy lines, for if the place is in a combat zone and open to occupation by enemy forces, the problem does not arise".²¹⁴ Furthermore, the manual notes that, while "under customary law, the adverse Party had to agree to treat a place as undefended, by AP I the appropriate authorities of a Party to the conflict may declare as undefended any inhabited place near or in a zone where the armed forces of the Parties are in contact, rendering it open for occupation by the adverse Party".²¹⁵ Referring to the possibility, under Article 59(5) AP I, that the parties to a conflict agree to treat as undefended any place which does not

²¹² Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 6–7.

²¹³ Netherlands, *Military Manual* (1993), p. V-15, § 13.

²¹⁴ New Zealand, *Military Manual* (1992), p. 4-15, § 412(6).

²¹⁵ New Zealand, *Military Manual* (1992), p. 4-16, § 412(7).

fulfil the conditions laid down in AP I, the manual states that “this provision merely confirms the position under customary law”.²¹⁶

212. Sweden’s IHL Manual states that “the chief rule relating to non-defended localities” embodied in Article 59 AP I has the status of customary law.²¹⁷ With respect to the setting-up of a non-defended locality, the manual recalls that it “shall not be preceded by negotiation between the parties, but it is based solely on a declaration issued by the defender”. The manual then states that:

For the locality to receive protection, all military resistance must cease immediately. All combatants, together with mobile weapons and moveable material must be withdrawn. Fixed military installations and establishments such as fortifications may not be used against the other party . . . No hostile acts may be committed either by the authorities or by the local population, nor may any activities be undertaken in support of the withdrawing party’s military operations.²¹⁸

According to the manual, “the above conditions imply that the locality is left open to occupation by the adversary”.²¹⁹

213. Switzerland’s Basic Military Manual states that:

Through reciprocal specific declarations, the Parties to the conflict can designate non-defended localities or demilitarised zones (the latter already in peacetime). These localities or zones have to fulfil the following conditions:

- a. all combatants, as well as mobile weapons and military equipment, must be evacuated;
- b. no hostile use shall be made of fixed military installations or establishments;
- c. no acts of hostility shall be committed by the authorities or by the population;
- d. any activity in support of the military effort must cease;
- e. the localities/zones must be marked by a distinctive sign.

Police forces may be maintained in these localities and zone for the purpose of maintaining law and order.

Non-defended localities/zones must not be abused for military purposes, for they will lose their protected status.²²⁰

214. The US Air Force Pamphlet states that:

A party to a conflict may declare, as undefended, inhabited localities which are near or in areas where land forces are in contact when the localities are open for occupation by an adverse party. Bombardment in such a locality would be unlawful, if the following conditions were met and maintained: (1) no armed forces or other combatants present, (2) no mobile weapons or mobile military equipment present, (2) no hostile use of fixed military establishments or installations, (4) no acts of warfare by the authorities or the population, and (5) no activities in support of military operations.²²¹

²¹⁶ New Zealand, *Military Manual* (1992), p. 4-16, § 412(7), footnote 62.

²¹⁷ Sweden, *IHL Manual* (1991), Section 2.2.3.

²¹⁸ Sweden, *IHL Manual* (1991), Section 3.4.3, p. 86.

²¹⁹ Sweden, *IHL Manual* (1991), Section 3.4.3, p. 87.

²²⁰ Switzerland, *Basic Military Manual* (1987), Article 32, see also Article 12(2).

²²¹ US, *Air Force Pamphlet* (1976), § 5-3(e).

215. The YPA Military Manual of the SFRY (FRY) contains provisions regarding the establishment of undefended areas, which mirror the conditions prescribed by AP I.²²²

National Legislation

216. The Draft Amendments to the Penal Code of El Salvador define non-defended localities in accordance with Article 59(2) AP I.²²³

217. Nicaragua's Draft Penal Code defines non-defended localities in accordance with Article 59(2) AP I.²²⁴

National Case-law

218. No practice was found.

Other National Practice

219. The Report on the Practice of Israel notes that during the Arab-Israeli conflict, no use was made of the concept of "non-defended localities" and that, as a consequence, Israel and the IDF have no experience of this concept.²²⁵

220. According to the Report on the Practice of Japan, the Japanese government explained to the Diet in 1984 that "authorities which may declare non-defended localities and may open them to enemy occupation are States party to a conflict or authorities responsible for the defense of the localities in question". They are "generally speaking, States or military authorities", but "a local government is not excluded from those authorities if it possesses command authority and has the power to promise an opponent not to defend itself".²²⁶

221. The Report on the Practice of Syria asserts that Syria considers Article 59 AP I to be part of customary international law.²²⁷

222. According to the Report on the Practice of the SFRY (FRY), "the *opinio iuris* and the customary nature of rules relevant to the establishment of these zones [open towns and undefended places] in FRY is absolutely clear".²²⁸

III. Practice of International Organisations and Conferences

223. No practice was found.

²²² SFRY (FRY), *YPA Military Manual* (1988), § 77.

²²³ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a localidades no defendidas".

²²⁴ Nicaragua, *Draft Penal Code* (1999), Article 466(2).

²²⁵ Report on the Practice of Israel, 1997, Chapter 1.8.

²²⁶ Japan, Explanation by the Government at the House of Councillors Standing Committee on Foreign Affairs, 31 July 1984, *Minutes of the House of Councillors Standing Committee on Foreign Affairs*, No. 13, pp. 3–5, Report on the Practice of Japan, 1998, Chapter 1.8.

²²⁷ Report on the Practice of Syria, 1997, Chapter 1.8.

²²⁸ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.8.

IV. Practice of International Judicial and Quasi-judicial Bodies

224. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

225. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that non-defended localities are “improvised protected zones . . . from which military objectives and activities have been taken out and which: a) are situated near or in a zone where armed forces are in contact; and b) are open for occupation by the enemy”.²²⁹

VI. Other Practice

226. No practice was found.

Attacks on open towns and non-defended localities*I. Treaties and Other Instruments**Treaties*

227. Article 25 of the 1899 HR provides that “the attack or bombardment of towns, villages, habitations or buildings which are not defended, is prohibited”.

228. Article 25 of the 1907 HR provides that “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited”.

229. Article 1(1) of the 1907 Hague Convention (IX) prohibits “the bombardment by naval forces of undefended ports, towns, villages, dwellings or buildings”.

230. Article 59(1) AP I provides that “it is prohibited for the Parties to the conflict to attack, by any means whatsoever, non-defended localities”. Article 59(7) provides that “a locality loses its status as a non-defended locality when it ceases to fulfil the conditions laid down in paragraph 2 or in the agreement referred to in paragraph 5”. Article 59 AP I was adopted by consensus.²³⁰

231. Under Article 85(3)(d) AP I, “making non-defended localities . . . the object of attack” is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.²³¹

232. Pursuant to Article 8(2)(b)(v) of the 1998 ICC Statute, “attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are

²²⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 419.

²³⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 215.

²³¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

undefended and which are not military objectives" constitutes a war crime in international armed conflicts.

Other Instruments

233. Article 15 of the 1874 Brussels Declaration states that "fortified places are alone liable to be besieged. Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor bombarded."

234. Article 32(c) of the 1880 Oxford Manual states that it is forbidden "to attack and to bombard undefended places".

235. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the "deliberate bombardment of undefended places".

236. Article 2 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that "the bombardment by whatever means of towns, ports, villages or buildings which are undefended is prohibited in all circumstances".

237. In paragraph 3 of the 1993 Franco-German Declaration on the War in Bosnia and Herzegovina, France and Germany stated that they "considered the establishment of safe areas necessary for the protection of the Bosnian civilian population" in the former Yugoslavia.

238. According to Article 3 of the 1993 ICTY Statute, among the violations of the laws or customs of war in respect to which the Tribunal is competent *ratione materiae*, is "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings, or buildings".

239. Under Article 20(e) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, "attack, or bombardment, by whatever means, of undefended towns, villages, dwellings or buildings" is a war crime.

240. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(v), "attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives" constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

241. Argentina's Law of War Manual (1969) states that "it is prohibited to attack or bombard undefended cities, localities, dwellings or buildings".²³²

²³² Argentina, *Law of War Manual* (1969), § 1.011.

242. Argentina's Law of War Manual (1989) states that it is prohibited to "attack, by whatever means, non-defended localities".²³³ It further qualifies attacks against non-defended localities as grave breaches of IHL.²³⁴

243. Australia's Defence Force Manual states that "towns, villages, dwellings or buildings which are undefended are also protected from attack".²³⁵ With respect to non-defended localities, the manual states that "military objectives within a non-defended locality, from which hostile acts are being conducted, can be attacked, subject to weapon and targeting considerations . . . Otherwise, non-defended localities cannot be attacked."²³⁶ The manual further provides that "making non-defended localities . . . the object of attack" constitutes a grave breach or a serious war crime likely to warrant institution of criminal proceedings.²³⁷

244. Belgium's Teaching Manual for Soldiers contains a slide illustrating the prohibition of bombardment of a village in which no combatants or military objects are located.²³⁸

245. Bosnia and Herzegovina's Military Instructions provides that "it is prohibited to attack a place which has been declared an 'open city'".²³⁹

246. Canada's LOAC Manual states that "it is prohibited for parties to a conflict to attack, by any means whatsoever, non-defended localities".²⁴⁰ Under the manual, a non-defended locality loses its status when it ceases to fulfil the conditions described by the manual (which are the same as those listed in Article 59 AP I) or in an agreement between adverse parties to establish that non-defended locality.²⁴¹ The manual further provides that "making non-defended localities . . . the object of attack" constitutes a grave breach of AP I.²⁴²

247. Croatia's Commanders' Manual states that it is a commander's duty to give relevant instructions concerning the protection of undefended areas when military activities are conducted in the vicinity of such areas.²⁴³

248. Croatia's LOAC Compendium qualifies "unlawful attacks on . . . undefended localities" as war crimes.²⁴⁴

249. Ecuador's Naval Manual states that "belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate entry by their own or allied forces. A city or town behind enemy lines is, by definition,

²³³ Argentina, *Law of War Manual* (1989), § 4.06.

²³⁴ Argentina, *Law of War Manual* (1989), § 8.03.

²³⁵ Australia, *Defence Force Manual* (1994), § 534, see also § 732 (siege warfare).

²³⁶ Australia, *Defence Force Manual* (1994), §§ 726 and 732.

²³⁷ Australia, *Defence Force Manual* (1994), § 1315(k); see also *Commanders' Guide* (1994), § 1305(k).

²³⁸ Belgium, *Manual for Soldiers* (undated), p. 86 and slide 7/2.

²³⁹ Bosnia and Herzegovina, *Military Instructions* (1992), § 6.

²⁴⁰ Canada, *LOAC Manual* (1999), p. 4-11, § 109.

²⁴¹ Canada, *LOAC Manual* (1999), p. 4-11, § 114.

²⁴² Canada, *LOAC Manual* (1999), p. 16-3, § 16(d).

²⁴³ Croatia, *Commanders' Manual* (1992), § 48.

²⁴⁴ Croatia, *LOAC Compendium* (1991), p. 56.

neither undefended nor open, and military targets therein may be destroyed or bombarded."²⁴⁵

250. France's LOAC Teaching Note includes non-defended localities among the zones that are specially protected by IHL. It states that, while occupation of non-defended localities is permitted, attacks against such localities are prohibited, provided they are completely demilitarised.²⁴⁶

251. France's LOAC Manual includes undefended localities in the list of specially protected objects and states that it is prohibited for the parties to a conflict to attack them by any means whatsoever.²⁴⁷ The manual also prohibits attacks on open towns.²⁴⁸

252. Germany's Military Manual prohibits "the attack or bombardment of non-defended localities".²⁴⁹ The manual further provides that grave breaches of IHL are in particular "launching attacks against non-defended localities".²⁵⁰

253. Hungary's Military Manual qualifies "unlawful attacks on . . . undefended localities" as war crimes.²⁵¹

254. Indonesia's Air Force Manual states that:

The bombardment of undefended towns, villages and buildings is prohibited if:

- (a) there are no armed forces or combatants in these areas;
- (b) there are no weapons or other mobile equipment;
- (c) there are no installations or permanent military equipment in order to achieve a military purpose;
- (d) there is no act of war by the authority or its inhabitants;
- (e) there is no activity which supports military operations.²⁵²

255. Italy's IHL Manual qualifies "indiscriminate attacks against . . . non-defended localities" as war crimes.²⁵³

256. Italy's LOAC Elementary Rules Manual states that "where protected zones or localities (. . . non-defended localities) have been agreed upon, the competent commanders shall issue instructions for action and behaviour near and towards such zones or localities".²⁵⁴ The manual also provides that "protected zones shall be respected".²⁵⁵

257. Kenya's LOAC Manual provides that it is forbidden "to attack or bombard undefended towns, villages, dwellings or buildings".²⁵⁶

258. South Korea's Military Regulation 187 qualifies "attacks against non-defended localities" as war crimes.²⁵⁷

²⁴⁵ Ecuador, *Naval Manual* (1989), § 8.5.1.3. ²⁴⁶ France, *LOAC Teaching Note* (2000), p. 5.

²⁴⁷ France, *LOAC Manual* (2001), p. 31. ²⁴⁸ France, *LOAC Manual* (2001), p. 124.

²⁴⁹ Germany, *Military Manual* (1992), § 458.

²⁵⁰ Germany, *Military Manual* (1992), § 1209.

²⁵¹ Hungary, *Military Manual* (1992), p. 90.

²⁵² Indonesia, *Air Force Manual* (1990), § 59. ²⁵³ Italy, *IHL Manual* (1991), Vol. I, § 85.

²⁵⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 47.

²⁵⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 70.

²⁵⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2, see also p. 6.

²⁵⁷ South Korea, *Military Regulation 187* (1991), Article 4(2).

- 259.** South Korea's Operational Law Manual states that attacks on undefended cities, towns, houses and buildings are prohibited.²⁵⁸
- 260.** According to the Military Manual of the Netherlands, "parties to a conflict may not attack undefended areas and this is a result of the 'open town doctrine'".²⁵⁹ The manual further states that "attacking... undefended areas" in violation of IHL constitutes a grave breach.²⁶⁰
- 261.** The Military Handbook of the Netherlands prohibits attacks on "undefended cities, villages and buildings".²⁶¹
- 262.** New Zealand's Military Manual recalls that "the law of armed conflict forbids attack by any means of undefended places".²⁶² It provides that "a locality which ceases to fulfil the conditions laid down for it to qualify as an undefended place, loses its status, but remains protected by the other rules of armed conflict relating to bombardment, attack, means and methods of combat, and the like".²⁶³ The manual further states that "making non-defended localities... the object of attack" constitutes a grave breach of AP I.²⁶⁴
- 263.** According to Nigeria's Manual on the Laws of War, "firing on undefended localities" is a war crime.²⁶⁵
- 264.** Russia's Military Manual states that "the bombardment by military aircraft or vessels of cities, ports, villages, dwellings or buildings... which are undefended and not used for military purposes" is a prohibited method of warfare.²⁶⁶
- 265.** South Africa's LOAC Manual states that "it is prohibited to attack or bombard, by whatever means, undefended towns, villages, dwellings or buildings. A facility which is occupied by medical units alone is not regarded as defended."²⁶⁷ The manual further states that "firing on localities which are undefended and without military significance" constitute a grave breach of IHL.²⁶⁸
- 266.** Spain's LOAC Manual prohibits attacks against open towns and non-defended localities.²⁶⁹ The manual further states that "launching an attack against... non-defended localities" constitutes a war crime.²⁷⁰
- 267.** Sweden's IHL Manual refers to Article 59 AP I and states that the chief rule relating to non-defended localities has the status of customary law.²⁷¹

²⁵⁸ South Korea, *Operational Law Manual* (1996), pp. 131–132.

²⁵⁹ Netherlands, *Military Manual* (1993), p. V-15, § 13.

²⁶⁰ Netherlands, *Military Manual* (1993), p. IX-5.

²⁶¹ Netherlands, *Military Handbook* (1995), p. 7-36.

²⁶² New Zealand, *Military Manual* (1992), § 412(6).

²⁶³ New Zealand, *Military Manual* (1992), § 412(8).

²⁶⁴ New Zealand, *Military Manual* (1992), 1703(3)(d).

²⁶⁵ Nigeria, *Manual on the Laws of War* (undated), § 6.

²⁶⁶ Russia, *Military Manual* (1990), § 5(n). ²⁶⁷ South Africa, *LOAC Manual* (1996), § 28(e).

²⁶⁸ South Africa, *LOAC Manual* (1996), § 38(b).

²⁶⁹ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(3)(b).

²⁷⁰ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

²⁷¹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

268. Switzerland's Basic Military Manual states that "it is prohibited to attack or bombard, by whatever means, undefended cities, villages, housing areas or buildings".²⁷² It further provides that "launching an attack against non-defended localities" constitutes a grave breach of AP I.²⁷³

269. The UK Military Manual states, with reference to Article 25 of the 1907 HR, that the distinction between "defended" and "undefended" localities still exists and is not invalidated by the considerable destructive power of modern artillery and guided missiles. It clearly states the prohibition of any attack against undefended localities.²⁷⁴ The manual further states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . (c) firing on undefended localities".²⁷⁵

270. The UK LOAC Manual states that it is forbidden "to attack or bombard undefended towns, villages, dwellings or buildings".²⁷⁶

271. The US Field Manual reproduces Article 25 of the 1907 HR and states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes')": . . . d. Firing on localities which are undefended and without military significance."²⁷⁷

272. The US Air Force Pamphlet reproduces Article 25 of the 1907 HR and states that:

Cities behind enemy lines and not open to occupation may contain military objectives. The application of this undefended rule to aerial warfare, where the object of the attack was not to occupy the city but to achieve some specific military advantage by destroying a particular military objective, caused disagreements in the past. In the US view, it has been recognized by the practice of nations that any place behind enemy lines is a defended place because it is not open to unopposed occupation. Thus, although such a city is incapable of defending itself against aircraft, nonetheless if it is in enemy held territory and not open to occupation, military objectives in the city can be attacked.²⁷⁸

273. The US Air Force Commander's Handbook states that:

Towns, villages, cities, refugee camps, and other areas containing a concentration of civilians should not be bombarded if they are undefended and open to occupation or capture by friendly ground forces in the vicinity. Any military objectives that might exist in these towns (for example, military supplies) can be seized or destroyed by the ground forces.²⁷⁹

²⁷² Switzerland, *Basic Military Manual* (1987), Article 32(1).

²⁷³ Switzerland, *Basic Military Manual* (1987), Article 193(1)(d).

²⁷⁴ UK, *Military Manual* (1958), § 290. ²⁷⁵ UK, *Military Manual* (1958), § 626(c).

²⁷⁶ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(c).

²⁷⁷ US, *Field Manual* (1956), §§ 39 and 504(d).

²⁷⁸ US, *Air Force Pamphlet* (1976), § 5-3(e).

²⁷⁹ US, *Air Force Commander's Handbook* (1980), § 3-6(a).

274. The US Instructor's Guide states that "the attack or shelling by any means whatsoever of undefended towns, villages, dwellings, or buildings is prohibited. This means that military targets can be attacked wherever they are located, but a town with no military targets must be spared."²⁸⁰ The manual also provides that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . firing on facilities which are undefended and without military significance"²⁸¹

275. The US Rules of Engagement for Operation Desert Storm prohibits firing at civilian populated areas or buildings which are not defended nor are being used for military purposes.²⁸²

276. The US Naval Handbook states that:

Belligerents are forbidden to bombard a city or town that is undefended and that is open to immediate entry by their own or allied forces. A city or town behind enemy lines is, by definition, neither undefended nor open, and military targets therein may be destroyed or bombarded.²⁸³

277. The YPA Military Manual of the SFRY (FRY) prohibits attacks against open towns and non-defended localities.²⁸⁴

National Legislation

278. Argentina's Draft Code of Military Justice punishes any soldier who "wilfully violates the protection due to . . . non-defended localities . . . which are properly marked"²⁸⁵

279. Under Armenia's Penal Code, "targeting undefended areas" during an armed conflict constitutes a crime against the peace and security of mankind.²⁸⁶

280. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including the deliberate bombardment of undefended places.²⁸⁷

281. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence"²⁸⁸

282. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "attacking undefended places" in international armed conflicts.²⁸⁹

²⁸⁰ US, *Instructor's Guide* (1985), p. 6. ²⁸¹ US, *Instructor's Guide* (1985), p. 13.

²⁸² US, *Rules of Engagement for Operation Desert Storm* (1991), § B.

²⁸³ US, *Naval Handbook* (1995), § 8.5.1.3, see also § 8.6.2.2 (protected places and objects).

²⁸⁴ SFRY (FRY), *YPA Military Manual* (1988), §§ 77 and 81.

²⁸⁵ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(2) in the *Code of Military Justice as amended* (1951).

²⁸⁶ Armenia, *Penal Code* (2003), Article 390.3(4).

²⁸⁷ Australia, *War Crimes Act* (1945), Section 3.

²⁸⁸ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

²⁸⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.39, see also § 268.98 (grave breach of AP I).

283. Azerbaijan's Criminal Code provides that "directing attacks against non-defended localities" constitutes a war crime in international and non-international armed conflicts.²⁹⁰

284. The Criminal Code of Belarus provides that it is a war crime to "direct attack against non-defended localities".²⁹¹

285. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "making non-defended localities . . . the object of attack" constitutes a crime under international law.²⁹²

286. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order that "non-defended localities . . . be indiscriminately targeted" or to carry out such targeting.²⁹³ The Criminal Code of the Republika Srpska contains the same provision.²⁹⁴

287. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives" constitutes a war crime in international armed conflicts.²⁹⁵

288. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".²⁹⁶

289. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.²⁹⁷

290. China's Law Governing the Trial of War Criminals provides that "deliberate bombing of non-defended areas" constitutes a war crime.²⁹⁸

291. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.²⁹⁹

292. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".³⁰⁰

²⁹⁰ Azerbaijan, *Criminal Code* (1999), Article 116(7).

²⁹¹ Belarus, *Criminal Code* (1999), Article 136(7).

²⁹² Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(14).

²⁹³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

²⁹⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

²⁹⁵ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(e).

²⁹⁶ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

²⁹⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²⁹⁸ China, *Law Governing the Trial of War Criminals* (1946), Article 3(27).

²⁹⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁰⁰ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

293. Under Croatia's Criminal Code, "indiscriminate attacks affecting . . . non-defended localities" are war crimes.³⁰¹

294. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".³⁰²

295. The Czech Republic's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (b) leads an attack against a defenceless place".³⁰³

296. Under the Draft Amendments to the Penal Code of El Salvador, "anyone who, in the context of an international or non-international armed conflict, attacks a non-defended locality" is punishable by imprisonment.³⁰⁴

297. Under Estonia's Penal Code, "an attack against . . . a settlement or structure without military protection" is a war crime.³⁰⁵

298. Under Georgia's Criminal Code, "making non-defended localities . . . the object of attack" in an international or non-international armed conflict is a punishable crime.³⁰⁶

299. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, "in connection with an international armed conflict or with an armed conflict not of an international character, . . . directs an attack by military means against . . . undefended towns, villages, dwellings or buildings".³⁰⁷

300. Under Hungary's Criminal Code as amended, "a military commander who, in violation of the rules of international law concerning warfare, . . . takes offensive against . . . a weapon-free zone" commits a war crime.³⁰⁸

301. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.³⁰⁹ It adds that any "minor breach" of AP I, including violations of Article 59(1) AP I, is also a punishable offence.³¹⁰

302. Under Jordan's Draft Military Criminal Code, "attacks against positions which have no means of defence" are considered war crimes.³¹¹

303. Under the Draft Amendments to the Code of Military Justice of Lebanon, "attacks against non-defended areas" are considered war crimes, provided that

³⁰¹ Croatia, *Criminal Code* (1993), Article 120(2).

³⁰² Cyprus, *AP I Act* (1979), Section 4(1).

³⁰³ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(b).

³⁰⁴ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a localidades non defendidas".

³⁰⁵ Estonia, *Penal Code* (2001), § 106.

³⁰⁶ Georgia, *Criminal Code* (1999), Article 411(1)(d).

³⁰⁷ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

³⁰⁸ Hungary, *Criminal Code as amended* (1978), Section 160(b).

³⁰⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

³¹⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³¹¹ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(12).

they are committed intentionally and cause death or serious injury to body or health.³¹²

304. Under Lithuania's Criminal Code as amended, "a military attack against an undefended settlement" constitutes a war crime.³¹³

305. Under Mali's Penal Code, "attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are not defended and which do not constitute military objectives" constitutes a war crime in international armed conflict.³¹⁴

306. Under the Definition of War Crimes Decree of the Netherlands, the "deliberate bombardment of undefended places" constitutes a war crime.³¹⁵

307. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit "the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . making non-defended localities . . . the object of attack".³¹⁶ Likewise, "attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives" constitutes a crime, when committed in time of international armed conflict.³¹⁷

308. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".³¹⁸

309. Under New Zealand's International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(v) of the 1998 ICC Statute.³¹⁹

310. Nicaragua's Draft Penal Code provides for a prison sentence for anyone who, in the context of an international or non-international armed conflict, "carries out an attack against non-defended localities".³²⁰

311. According to Niger's Penal Code as amended, "putting under attack non-defended localities" is a war crime.³²¹

312. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".³²²

313. Poland's Penal Code provides for the punishment of "any person who, during hostilities, attacks a non-defended locality or object".³²³

³¹² Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(12).

³¹³ Lithuania, *Criminal Code as amended* (1961), Article 337.

³¹⁴ Mali, *Penal Code* (2001), Article 31(i)(6).

³¹⁵ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

³¹⁶ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(iv).

³¹⁷ Netherlands, *International Crimes Act* (2003), Article 5(5)(c).

³¹⁸ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

³¹⁹ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³²⁰ Nicaragua, *Draft Penal Code* (1999), Article 466.

³²¹ Niger, *Penal Code as amended* (1961), Article 208.3(14).

³²² Norway, *Military Penal Code as amended* (1902), § 108(b).

³²³ Poland, *Penal Code* (1997), Article 122(1).

314. Slovakia's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (b) leads an attack against an unprotected place".³²⁴

315. Under Slovenia's Penal Code, "a random attack on . . . non-defended areas" is a war crime.³²⁵

316. Spain's Penal Code provides for the punishment of "anyone who, in the event of armed conflict, should . . . knowingly violate the protection due to . . . undefended areas . . . which are duly identified with signs or the appropriate distinctive signals".³²⁶

317. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, i.e. . . . making non-defended areas . . . the object of attack".³²⁷

318. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(v) of the 1998 ICC Statute.³²⁸

319. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".³²⁹

320. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(v) of the 1998 ICC Statute.³³⁰

321. Under the US War Crimes Act as amended, violations of Article 25 of the 1907 HR are war crimes.³³¹

322. Venezuela's Code of Military Justice as amended provides for the punishment of "those who should bomb inhabited places which are not fortified, which are not occupied by enemy forces and which do not oppose resistance".³³²

323. Under the Penal Code as amended of the SFRY (FRY), "indiscriminate attacks on . . . non-defended localities" are a war crime.³³³ In a footnote related to the "use of prohibited means of combat", the Code further provides that "the following methods of combat are banned under international law: . . . bombing

³²⁴ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(b).

³²⁵ Slovenia, *Penal Code* (1994), Article 374(2).

³²⁶ Spain, *Penal Code* (1995), Article 612(1).

³²⁷ Tajikistan, *Criminal Code* (1998), Article 403(1).

³²⁸ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

³²⁹ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

³³⁰ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

³³¹ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

³³² Venezuela, *Code of Military Justice as amended* (1998), Article 474(10).

³³³ SFRY (FRY), *Penal Code as amended* (1976), Article 142(2).

and other forms of attacks on non-defended towns, villages and other localities and buildings".³³⁴

324. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".³³⁵

National Case-law

325. In the *Perišić and Others case* in 1997 in a trial *in absentia* before a Croatian district court, several persons were convicted of ordering the shelling of the city of Zadar and its surroundings on the basis of Article 25 of the 1907 HR, common Article 3 of the 1949 Geneva Conventions and Articles 13–14 AP II, as incorporated in Article 120 of Croatia's Criminal Code.³³⁶

326. In its judgement in the *Shimoda case* in 1963, Japan's District Court of Tokyo stated that "dropping an atomic bomb on undefended towns should . . . be deemed the same as blind bombing, if it is not an attack on defended towns. Such an act should be recognized as violating international law at that time."³³⁷

Other National Practice

327. The Report on the Practice of Angola recalls Article 59 AP I and the prohibition on waging hostilities against undefended areas.³³⁸

328. The Report on the Practice of Bosnia and Herzegovina states that "it is forbidden to attack a place which has been declared an 'open city'".³³⁹

329. The Report on the Practice of Botswana states that, in general, non-defended localities should not be attacked and cites Article 59 AP I.³⁴⁰

330. During the Korean War, the Chinese government blamed US forces for the bombardment of undefended areas. In a statement before the 18th International Conference of the Red Cross in Toronto in 1952, the head of the Chinese delegation denounced the fact that "undefended cities and villages were wantonly bombarded" and "a large number of peaceful civilians killed".³⁴¹

331. The Report on the Practice of China states that an occupying power shall not damage or destroy a city and its facilities in case of enemy withdrawal from the occupied territory, the reason being that the city is then, in fact, undefended.³⁴²

³³⁴ SFRY (FRY), *Penal Code as amended* (1976), Commentary on Article 148(1)(a).

³³⁵ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

³³⁶ Croatia, District Court of Zadar, *Perišić and Others case*, Judgement, 24 April 1997.

³³⁷ Japan, District Court of Tokyo, *Shimoda case*, Judgement, 7 December 1963.

³³⁸ Report on the Practice of Angola, 1998, Chapter 5.

³³⁹ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.8.

³⁴⁰ Report on the Practice of Botswana, 1998, Chapter 1.8.

³⁴¹ China, Statement of 30 July 1952 at the 18th International Conference of the Red Cross, Toronto, 26 July–7 August 1952, reprinted in *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, Vol. 2, pp. 82–83.

³⁴² Report on the Practice of China, 1997, Chapter 1.8.

332. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt declared that “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended is prohibited”.³⁴³

333. According to the Report on the Practice of Egypt, “Egypt thinks that protection of open towns [and] undefended areas . . . consists in refraining from launching attacks against . . . these areas”, which implies that “attacks against such places are prohibited”.³⁴⁴

334. The Report on the Practice of France states that attacks against protected zones are prohibited.³⁴⁵

335. The Report on the Practice of India states that “in cases of internal conflict there will be rare occasions when special protection is necessary for open towns or undefended areas”.³⁴⁶

336. The Report on the Practice of Iran notes that, Iran objected on several occasions to the bombardment of undefended areas by Iraqi armed forces during the Iran–Iraq War.³⁴⁷

337. According to the Report on the Practice of Iraq, all official documents, including military communiqués and political speeches, issued during the Iran–Iraq War confirm that open cities were not subjected to strikes of any kind.³⁴⁸

338. The Report on the Practice of Nigeria states that it is Nigeria’s *opinio juris* that the protection of undefended areas is part of customary international law.³⁴⁹

339. The Report on the Practice of Rwanda notes that no practice could be found concerning undefended areas. However, referring to an interview held with the President of the Military Tribunal, it also states that such zones would be protected according to the modalities of the agreement concluded between the belligerents.³⁵⁰

340. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that attacks shall not be made against appropriately declared or agreed non-defended localities”.³⁵¹

³⁴³ Egypt, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons case*, September 1995, p. 21, § 50.

³⁴⁴ Report on the Practice of Egypt, 1997, Chapter 1.8.

³⁴⁵ Report on the Practice of France, 1999, Chapter 1.8.

³⁴⁶ Report on the Practice of India, 1997, Chapter 1.8.

³⁴⁷ Report on the Practice of Iran, 1997, Chapter 1.8.

³⁴⁸ Report on the Practice of Iraq, 1998, Chapter 1.8.

³⁴⁹ Report on the Practice of Nigeria, 1997, Chapter 1.8.

³⁵⁰ Report on the Practice of Rwanda, 1997, Chapter 1.8, referring to an interview with the President of Rwanda’s Military Tribunal, 23 October 1997.

³⁵¹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

341. According to the Report on US Practice, the *opinio juris* of the US concerning open towns and undefended areas generally follows the conditions and rules prescribed in Articles 59 and 60 AP I.³⁵²

342. According to the Report on the Practice of Zimbabwe, non-defended areas are not to be attacked, but they may be occupied.³⁵³

III. Practice of International Organisations and Conferences

343. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

344. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

345. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that non-defended localities are "improvised protected zones" and that an attack against a non-defended locality constitutes a grave breach of the law of war.³⁵⁴

346. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Court, the ICRC proposed that the following war crime, when committed in an international armed conflict, be subject to the jurisdiction of the Court: "making non-defended localities the objects of attack".³⁵⁵

VI. Other Practice

347. No practice was found.

³⁵² Report on US Practice, 1997, Chapter 1.8.

³⁵³ Report on the Practice of Zimbabwe, 1998, Chapter 1.8.

³⁵⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 419 and 420.

³⁵⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 1(b)(iv).

CULTURAL PROPERTY

A. Attacks against Cultural Property (practice relating to Rule 38)	§§ 1–281
B. Use of Cultural Property for Military Purposes (practice relating to Rule 39)	§§ 282–354
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A. Attacks against Cultural Property

I. *Treaties and Other Instruments*

Treaties

1. Article 27 of the 1899 HR provides that:

In sieges and bombardments all necessary steps should be taken to spare as far as possible edifices devoted to religion, art, science, and charity . . . provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

2. Article 27 of the 1907 HR provides that:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science, or charitable purposes, historic monuments . . . provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings or places by distinctive and visible signs, which shall be notified to the enemy beforehand.

3. Article 5 of the 1907 Hague Convention (IX) provides that:

In bombardments by naval forces all the necessary measures must be taken by the commander to spare as far as possible sacred edifices, buildings used for artistic,

scientific or charitable purposes, . . . on the understanding that they are not used at the same time for military purposes.

It is the duty of the inhabitants to indicate such monuments, edifices or places by visible signs, which shall consist of large, stiff rectangular panels divided diagonally into two coloured triangular portions, the upper portion black, the lower portion white.

4. Article 1 of the 1935 Roerich Pact provides that:

The historic monuments, museums, scientific, artistic, educational and cultural institutions shall be considered as neutral and as such respected and protected by belligerents.

...

The same respect and protection shall be accorded to the historic monuments, museums, scientific, artistic, educational and cultural institutions in time of peace as well as in war.

5. Article 5 of the 1935 Roerich Pact provides that “the monuments and institutions mentioned in Article 1 [historic monuments, museums, scientific, artistic, educational and cultural institutions] shall cease to enjoy the privileges recognised in the present Treaty in case they are made use of for military purposes”.

6. Article 1 of the 1954 Hague Convention defines cultural property, for the purposes of the Convention, irrespective of origin or ownership, as:

- (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;
- (b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);
- (c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as “centres containing monuments”.

7. Article 4 of the 1954 Hague Convention provides that:

- 1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties . . . by refraining from any act of hostility directed against such property.
- 2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

8. Article 19(1) of the 1954 Hague Convention provides that:

In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

9. Article 28 of the 1954 Hague Convention provides that:

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

10. Article 53 AP I provides that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- a) to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.

Article 53 AP I was adopted by consensus.¹

11. Article 85(4)(d) AP I considers the following a grave breach of the Protocol:

making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organization, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph *b*), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives.

Article 85 AP I was adopted by consensus.²

12. Upon ratification of AP I, Canada stated that:

It is the understanding of the Government of Canada in relation to Article 53 that:

- a. such protection as is afforded by the Article will be lost during such time as the protected property is used for military purposes; and
- b. the prohibitions contained in sub-paragraphs (a) and (b) of this Article can only be waived when military necessity imperatively requires such a waiver.³

13. Upon ratification of AP I, France declared that “if property protected under Article 53 AP I is used for military purposes, it loses the protection which it could enjoy according to the provisions of the Protocol”.⁴

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 206.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

³ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 9.

⁴ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 13.

14. Upon ratification of AP I, Ireland stated that “it is the understanding of Ireland in relation to the protection of cultural objects in Article 53 that if the objects protected by this Article are unlawfully used for military purposes they will thereby lose protection from attacks directed against such unlawful military use”.⁵

15. Upon ratification of AP I, Italy stated that “if and so long as the objectives protected by Article 53 are unlawfully used for military purposes, they will thereby lose protection”.⁶

16. Upon ratification of AP I, the Netherlands stated, with respect to Article 53 AP I, that “it is the understanding of the Government of the Kingdom of the Netherlands that if and for as long as the objects and places protected by this Article, in violation of paragraph (b), are used in support of the military effort, they will thereby lose such protection”.⁷

17. Upon signature and upon ratification of AP I, the UK stated, in relation to Article 53 AP I, that “if the objects protected by this Article are unlawfully used for military purposes they will thereby lose protection from attacks directed against such unlawful military uses”.⁸

18. Article 16 AP II provides that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited to commit any acts of hostility directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, and to use them in support of the military effort.

Article 16 AP II was adopted by 35 votes in favour, 15 against and 32 abstentions.⁹

19. Pursuant to Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute, “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, [or] historic monuments . . . provided they are not military objectives” constitutes a war crime in both international and non-international conflicts.

20. Article 1(b) of the 1999 Second Protocol to the 1954 Hague Convention adopts the same definition as Article 1 of the 1954 Hague Convention.

21. Article 6 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

With the goal of ensuring respect for cultural property in accordance with Article 4 of the [1954 Hague] Convention:

⁵ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 10.

⁶ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 9.

⁷ Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 8.

⁸ UK, Declarations made upon signature of AP I, 12 December 1977, § g; Reservations and declarations made upon ratification of AP I, 28 January 1998, § k.

⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 143.

- (a) a waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the Convention may only be invoked to direct an act of hostility against cultural property when and for as long as:
 - (i) that cultural property has, by its function, been made into a military objective; and
 - (ii) there is no feasible alternative available to obtain a similar military advantage to that offered by directing an act of hostility against that objective;
- ...
- (c) the decision to invoke imperative military necessity shall only be taken by an officer commanding a force the equivalent of a battalion in size or larger, or a force smaller in size where circumstances do not permit otherwise;
- (d) in case of an attack based on a decision taken in accordance with sub-paragraph (a), an effective advance warning shall be given whenever circumstances permit.

22. Article 7 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

Without prejudice to other precautions required by international humanitarian law in the conduct of military operations, each Party to the conflict shall:

- (a) do everything feasible to verify that the objectives to be attacked are not cultural property protected under Article 4 of the Convention;
- (b) take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental damage to cultural property protected under Article 4 of the Convention;
- (c) refrain from deciding to launch any attack which may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated; and
- (d) cancel or suspend an attack if it becomes apparent:
 - (i) that the objective is cultural property protected under Article 4 of the Convention;
 - (ii) that the attack may be expected to cause incidental damage to cultural property protected under Article 4 of the Convention which would be excessive in relation to the concrete and direct military advantage anticipated.

23. Article 15 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
 - ...
 - (c) extensive destruction or appropriation of cultural property protected under the Convention and this Protocol;
 - (d) making cultural property protected under the Convention and this Protocol the object of attack.
- (2) Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties.

24. Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention states that “this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties”.

Other Instruments

25. Article 35 of the 1863 Lieber Code provides that:

Classical works of art, libraries, scientific collections, or precious instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury, even when they are contained in fortified places whilst besieged or bombarded.

26. Article 17 of the 1874 Brussels Declaration provides that:

In such cases [of bombardment of a defended town or fortress, agglomeration of dwellings, or village] all necessary steps must be taken to spare, as far as possible, buildings dedicated to art, science, or charitable purposes, hospitals . . . provided they are not being used at the time for military purposes.

It is the duty of the besieged to indicate the presence of such buildings by distinctive and visible signs to be communicated to the enemy beforehand.

27. Article 34 of the 1880 Oxford Manual provides that:

In case of bombardment all necessary steps must be taken to spare, if it can be done, buildings dedicated to religion, art, science and charitable purposes . . . on the condition that they are not being utilized at the time, directly or indirectly, for defense.

It is the duty of the besieged to indicate the presence of such buildings by visible signs notified to the assailant beforehand.

28. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “wanton destruction of religious, charitable, educational and historic buildings and monuments”.

29. Article 25 of the 1923 Hague Rules of Air Warfare provides that:

In bombardment by aircraft, all necessary steps must be taken by the commander to spare as far as possible buildings dedicated to public worship, art, science, or charitable purposes, historic monuments . . . provided such buildings, objects or places are not at the time used for military purposes. Such buildings, objects and places must by day be indicated by marks visible to aircraft . . .

A belligerent who desires to secure by night the protection for the hospitals and other privileged buildings above mentioned must take the necessary measures to render the special signs referred to sufficiently visible.

30. Article 26 of the 1923 Hague Rules of Air Warfare provides that:

The following special rules are adopted for the purpose of enabling States to obtain more efficient protection for important historic monuments situated within their

territory, provided that they are willing to refrain from the use of such monuments and a surrounding zone for military purposes, and to accept a special regime for their inspection.

- (1) A State shall be entitled, if it sees fit, to establish a zone of protection round such monuments situated in its territory. Such zones shall, in time of war, enjoy immunity from bombardment.
- (2) The monuments round which a zone is to be established shall be notified to other Powers in peace time through the diplomatic channel; the notification shall also indicate the limits of the zones. The notification may not be withdrawn in time of war.
- (3) The zone of protection may include, in addition to the area actually occupied by the monument or group of monuments, an outer zone, not exceeding 500 metres in width, measured from the circumference of the said area.
- (4) Marks clearly visible from aircraft either by day or by night will be employed for the purpose of ensuring the identification by belligerent airmen of the limits of the zones.

31. Pursuant to Article 22(2)(f) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, “wilful attacks on property of exceptional religious, historical or cultural value” constitute exceptionally serious war crimes.

32. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that hostilities shall be conducted in accordance with Article 53 AP I.

33. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that hostilities shall be conducted in accordance with Article 53 AP I.

34. Article 3(d) of the 1993 ICTY Statute includes among the violations of the laws or customs of war in respect of which the Tribunal has jurisdiction “seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science”.

35. Article 1(2) of the 1997 Revised Lauswolt Document states that “it is prohibited to commit any acts of hostility directed against cultural property”.

36. Article 12(1) of the 1997 Revised Lauswolt Document provides that:

All the provisions of this instrument, the provisions of the Convention and its 1954 Protocol which relate to safeguarding of, and respect for, cultural property shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the States Parties.

37. Section 6.6 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force is prohibited from attacking monuments of art, architecture or history, archaeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples”.

38. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes.

According to Section 6(1)(b)(ix) and (e)(iv), “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, [or] historic monuments . . . provided they are not military objectives” constitutes a war crime in both international and non-international conflicts.

II. National Practice

Military Manuals

39. Argentina’s Law of War Manual (1969) provides that:

In the event of bombardment, assault or siege, all necessary precautions shall be adopted, as far as possible, to respect buildings devoted to worship, the arts, the sciences and to charity, as well as historic monuments, provided such buildings and monuments, which must display special, visible signs, are not used for military purposes.¹⁰

The manual further states, with respect to combat operations, that “the destruction of enemy property shall be permissible as far as required by military operations and subject to the limitations imposed by the requirement of respect for artistic, scientific and historical property”.¹¹

40. Argentina’s Law of War Manual defines cultural property in accordance with Article 1 of the 1954 Hague Convention.¹² It states that “it is absolutely prohibited to commit hostile acts against cultural property”.¹³ The manual further qualifies “attacks directed against clearly recognised cultural property” as a grave breach.¹⁴ With respect to non-international armed conflicts in particular, the manual states that “cultural objects and places of worship which constitute the cultural or spiritual heritage of peoples enjoy special protection; they may not be attacked”.¹⁵

41. Australia’s Commanders’ Guide states that:

Additional Protocol I and specific cultural property conventions generally prohibit attacks against historical, religious and cultural objects and buildings. However, this protection may be lost if the facility is used for military purposes, e.g. a museum or church that contains an enemy sniper may be attacked to neutralise the threat. Care must be taken to ensure that only reasonable force is used.¹⁶

The manual further states that:

960. LOAC provides that buildings dedicated to religion, art, science or charitable purposes, and historic monuments are immune from attack so long as they are not being used for military purposes and are marked with distinctive and visible signs and notified to the adverse party.

¹⁰ Argentina, *Law of War Manual* (1969), § 1.010.

¹¹ Argentina, *Law of War Manual* (1969), § 1.018.

¹² Argentina, *Law of War Manual* (1989), § 4.43.

¹³ Argentina, *Law of War Manual* (1989), § 4.44.

¹⁴ Argentina, *Law of War Manual* (1989), § 8.03.

¹⁵ Argentina, *Law of War Manual* (1989), § 7.09.

¹⁶ Australia, *Commanders’ Guide* (1994), § 409.

961. LOAC also extends immunity to cultural property of great importance to cultural heritage. This is irrespective of origin, ownership or whether the property is movable or immovable. LOAC requires such property to be protected, safeguarded and respected and not made the object of reprisals. Such protection is not absolute and is lost if cultural property is used for military purposes.¹⁷

42. Australia's Defence Force Manual states that:

926. LOAC provides for the specific protection of cultural objects and places of worship, which supplements the general protection given to civilian objects. Buildings dedicated to religion, science or charitable purposes, and historic monuments, are given immunity from attack as far as possible, so long as they are not being used for military purposes. Such places are to be marked with distinctive and visible signs which must be notified to the other party.

927. Cultural property is also protected. Cultural property includes movable and immovable objects of great importance to the cultural heritage of people, whether their state is involved in the conflict or not, such as historical monuments, archaeological sites, books, manuscripts or scientific papers and the buildings or other places in which such objects are housed. Obligations are placed upon all parties to respect cultural property . . . by refraining from any act of hostility directed against such property. These obligations may be waived where military necessity requires such waiver, as in the case where the object is used for military purposes.

928. Historic monuments, places of worship and works of art, which constitute the cultural and spiritual heritage of peoples, are protected from acts of hostility.¹⁸

43. Belgium's Law of War Manual states that "an adversary must abstain for all acts of hostility towards" cultural property under general protection but is "liberated of its obligations if the State, in whose territory the cultural property is located, uses it for military purposes".¹⁹

44. Belgium's Teaching Manual for Soldiers states that "certain objects and buildings must not be attacked. Unless an order to the contrary has been given, they must be avoided. This concerns buildings with a high cultural value (churches, museums, libraries, etc.) and the persons who guard them."²⁰

45. Benin's Military Manual states that:

Marked cultural property whose immunity has been lifted for reasons of military necessity must, nevertheless, be respected to the extent permitted by the tactical situation. If not already done, the distinctive emblems used to mark the protected property whose immunity has been lifted must be removed.²¹

46. Bosnia and Herzegovina's Military Instructions provides that "it is prohibited to expose cultural facilities to military activities and undertake any kind of hostile actions which may result in their damage or destruction".²²

47. Burkina Faso's Disciplinary Regulations provides that, according to the customs of war, soldiers in combat must "spare buildings dedicated to religion,

¹⁷ Australia, *Commanders' Guide* (1994), §§ 960–961.

¹⁸ Australia, *Defence Force Manual* (1994), §§ 926–928, see also §§ 540–542.

¹⁹ Belgium, *Law of War Manual* (1983), p. 29.

²⁰ Belgium, *Teaching Manual for Soldiers* (undated), p. 8, see also p. 22 and slides 6b/1 and 6b/4.

²¹ Benin, *Military Manual* (1995), Fascicule II, p. 8.

²² Bosnia and Herzegovina, *Military Instructions* (1992), Item 9, § 1.

art, science or charitable purpose, and historic monuments, provided they are not being used for military purposes".²³

48. Cameroon's *Instructors' Manual* distinguishes between "cultural property and places worship . . . which represent a high cultural value or which have an important religious dedication whose immunity may not be withdrawn . . . and which require no special marking" on the one hand, and "marked cultural property" on the other hand.²⁴

49. Cameroon's *Disciplinary Regulations* provides that each soldier must "spare buildings dedicated to religion, art, science or charitable purposes, and historic monuments . . . provided they are not being used for military purposes".²⁵

50. Canada's *LOAC Manual* states that:

63. The following actions are prohibited:
 - a. to commit any acts of hostility directed against the historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- ...
64. Care must be taken to avoid locating military personnel and material in or near protected cultural objects and places of worship.
65. Cultural objects and places of worship should be marked with the international sign [of the blue shield]. However, the absence of such a sign does not deprive such objects of protection.
66. Not all cultural objects and places of worship are protected as cultural or religious property by the LOAC. Only those cultural objects and places of worship which constitute the "cultural or spiritual heritage of peoples" are so protected. Therefore, a small village church may not be protected by the cultural protection provisions of the LOAC, but a major cathedral (e.g., Vatican) is likely entitled to protection. However, the fact that an object is not a cultural object does not mean that it is not a "civilian object". It would be entitled to protection under that status.
67. It is recognized that it may be difficult to distinguish between cultural objects and places of worship which are protected and those which are not protected. However, cultural objects and places of worship which are not protected nevertheless remain civilian objects and are protected as such.
68. Cultural objects and places of worship being used by the adverse party in support of its military effort may become legitimate targets.
69. Whether you attack cultural objects and places of worship which have become legitimate targets will depend on your mission. If so, the principle of proportionality is particularly important, as the location or object should not be damaged any more than what the mission requires.
70. Where possible, the opposing force should be warned to stop using a cultural object or place of worship for military purposes before an attack is launched.²⁶

²³ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

²⁴ Cameroon, *Instructors' Manual* (1992), p. 19, § 224.

²⁵ Cameroon, *Disciplinary Regulations* (1975), Article 31.

²⁶ Canada, *LOAC Manual* (1999), p. 4-7, §§ 63-70, see also p. 6-4, § 39.

The manual defines as a grave breach of AP I:

attacks against clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples, where there is no evidence of prior use of such objects in support of the adverse party's military effort and where such places are not located in the immediate proximity of legitimate targets.²⁷

With respect to non-international armed conflicts in particular, the manual states that "it is forbidden to commit any hostile acts directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples".²⁸

51. Canada's Code of Conduct provides that:

1. As a general rule, buildings or property dedicated to cultural or religious purposes may not be attacked . . .
2. . . . Thus every attempt should be made to avoid unnecessary desecration or destruction of cultural objects and places of worship.
3. The identification of religious locations and objects is usually obvious. Churches, mosques and synagogues, cemeteries and other places of religious significance such as monasteries and temples are protected. The proper identification of cultural objects may not be as readily apparent. Cultural property is property of great importance to the cultural heritage of a people such as monuments of architecture, art or history, whether religious or not, archaeological sites, archives, buildings, manuscripts, works of art, large libraries, etc. These objects are protected.
4. Some cultural and religious locations may be marked with a distinctive blue and white sign . . . However, not all religious and cultural property is marked with such a sign. Religious and cultural property should be respected whether or not it is marked with a sign. Thus a church or mosque should be protected even though the distinctive sign for cultural property may not be displayed on the exterior of the church.
5. Cultural and religious property should not be targeted . . . If cultural or religious property is used for a military purpose, it loses its protection. Thus, care must be taken to avoid locating military personnel and material in or near these locations. If the opposing force is using a religious or cultural site for military purposes it becomes a legitimate target. Whether you attack this legitimate target will depend on your mission. If so, the principle of proportionality is particularly important as the location or object should not be damaged any more than what the mission requires. For example, the destruction of all or a portion of a church steeple may or may not be justified if it is being used by a sniper. The decision to attack would be based on the level of threat that the sniper presents and the military mission. The tactical method selected for the attack should not place CF personnel under undue risk yet should cause the least possible damage to the church. Where possible, the opposing force must be warned to stop using a cultural or religious site for a military purpose before an attack.²⁹

²⁷ Canada, *LOAC Manual* (1999), p. 16-3, § 17(d), see also p. 16-4, § 21(d) ("attacking a privileged or protected building").

²⁸ Canada, *LOAC Manual* (1999), p. 17-5, § 40.

²⁹ Canada, *Code of Conduct* (2001), Rule 9, §§ 1-5.

52. Colombia's Basic Military Manual considers that "abstaining from attacks against objects . . . which are part of its culture" is a way to protect the civilian population.³⁰ It defines cultural property as "all the objects that are the expression of a people's culture and that, because of their importance, must be protected against the effects of hostilities (monuments of architecture, archaeological sites, works of art, manuscripts, museums, archives, libraries, etc.)."³¹

53. Congo's Disciplinary Regulations provides that "buildings dedicated to religion, art, science or charitable purposes, and historic monuments must be spared, provided they are not being used by the enemy for military purposes".³²

54. According to Croatia's LOAC Compendium, acts of hostility against cultural objects are prohibited. However, cultural objects under general protection lose their immunity in cases of imperative military necessity. The existence of such necessity must be established by the local commander.³³ The Compendium further qualifies "unlawful attacks on cultural objects" as war crimes.³⁴

55. Croatia's Commanders' Manual states that:

13. Specifically protected objects . . . may not be attacked.

14. The immunity of a marked cultural object may be withdrawn in case of imperative military necessity.

...

55. [In attack] the immunity of a marked cultural object shall only be withdrawn when the fulfilment of the mission absolutely so requires. Advance warning shall give time for safeguard measures and information on withdrawal of immunity.

...

69. Marked cultural objects whose immunity has been withdrawn shall still be respected to the extent the fulfilment of the mission permits.³⁵

56. The Military Manual of the Dominican Republic instructs soldiers as follows:

You may not attack certain types of property. You are required to take as much care as possible not to damage or destroy buildings dedicated to cultural or humanitarian purposes or their contents. Examples are buildings dedicated to religion, art, science, or charitable purposes; historical monuments; hospital and places where the sick and wounded are collected and cared for; and schools and orphanages for children. These places are considered protected property as long as they are not being used at the time by the enemy for military operations or purposes.³⁶

57. Ecuador's Naval Manual provides that "buildings devoted to religion, the arts, or charitable purposes, historic monuments and other religious, cultural

³⁰ Colombia, *Basic Military Manual* (1995), p. 22, § 2, see also p. 29, § 2(a).

³¹ Colombia, *Basic Military Manual* (1995), pp. 25–26, § 3.

³² Congo, *Disciplinary Regulations* (1986), Article 32.

³³ Croatia, *LOAC Compendium* (1991), p. 10.

³⁴ Croatia, *LOAC Compendium* (1991), p. 56.

³⁵ Croatia, *Commanders' Manual* (1992), §§ 13–14, 55 and 69.

³⁶ Dominican Republic, *Military Manual* (1980), p. 4.

or charitable facilities should not be bombarded, provided they are not used for military purposes".³⁷

58. France's Disciplinary Regulations as amended provides that soldiers in combat must "spare buildings dedicated to religion, art, science or charitable purposes, and historic monuments, provided they are not being used for military purposes".³⁸

59. France's LOAC Summary Note provides that "the specific immunity granted to certain persons and objects by the law of war [including marked cultural property] must be strictly observed. . . They may not be attacked."³⁹ The manual specifies that "the immunity of specifically protected objects may only be lifted under certain conditions and under the personal responsibility of the commander. Military necessity justifies only those measures which are indispensable for the accomplishment of the mission."⁴⁰ The manual qualifies "attacks against marked property" as a war crime.⁴¹

60. France's LOAC Teaching Note states that "the law of armed conflict grants specific protection to certain specially marked installations and zones", including certain works and installations containing dangerous forces.⁴² It further states that:

In general, cultural property (religious building, place of worship, monument, museum, important work of art . . .) is protected. Its immunity may be lifted only in case of imperative military necessity and according to an order received from higher authority. In such a case, prior warning must be given to allow the civilian population to seek refuge or to evacuate the combat area. The means of combat must be proportionate in order to limit, as much as possible, damage to such cultural property.⁴³

61. France's LOAC Manual restates the definition of cultural property set out in Article 1 of the 1954 Hague Convention.⁴⁴ It further states that:

The protection enjoyed by such property may be lifted only if military necessity so demands or if such property is used for military purposes by the enemy. Only a commander of a division or larger unit has the authority to lift the immunity. This measure must be notified to the adverse party sufficient time in advance.⁴⁵

62. Germany's Military Manual provides that:

901. The term "cultural property" means, irrespective of origin or ownership, movable or immovable objects of great importance to the cultural heritage of all peoples (e.g. monuments of architecture, art or history, be they of secular or religious nature, archaeological sites and collections).

³⁷ Ecuador, *Naval Manual* (1989), § 8.5.1.6, see also § 8.6.2.2 (protected objects).

³⁸ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (1).

³⁹ France, *LOAC Summary Note* (1992), §§ 2.2–2.3.

⁴⁰ France, *LOAC Summary Note* (1992), § 2.4.

⁴¹ France, *LOAC Summary Note* (1992), § 3.4.

⁴² France, *LOAC Teaching Note* (2000), p. 5. ⁴³ France, *LOAC Teaching Note* (2000), p. 6.

⁴⁴ France, *LOAC Manual* (2001), p. 29. ⁴⁵ France, *LOAC Manual* (2001), p. 30.

902. Apart from this actual cultural property, a number of indirect cultural objects shall also be protected. These indirect cultural objects include:

- buildings for preserving or exhibiting cultural property (museums, archives etc.);
- refuges intended to shelter cultural objects; and
- centres containing monuments, i.e. centres containing a large amount of cultural property.

Protected cultural objects in the Federal Republic of Germany are documented in regional Lists of Cultural Objects which are available with the territorial command authorities.

903. . . . Any acts of hostility directed against cultural property shall be avoided.

904. In addition, civilian objects, such as churches, theatres, universities, museums, orphanages, homes for the elderly and other objects, shall also be spared as far as possible, even if they are of no historical or artistic value.

905. General protection shall be granted to all cultural objects and does not require any entry in a special register. Cultural property placed under general protection shall neither be attacked nor otherwise damaged . . .

906. An exception to this rule shall be permissible only in cases of imperative military necessity. The decision is to be taken by the competent military commander. Cultural property which the enemy uses for military purposes shall also be spared as far as possible.⁴⁶

The manual further provides that grave breaches of IHL are in particular “extensive destruction of cultural property and places of worship”.⁴⁷

63. Germany’s IHL Manual states that “movable or immovable property of great importance to the cultural heritage of every people (e.g. architectural, artistic or historical monuments, places of worship, libraries) shall neither be attacked nor damaged in any other way”.⁴⁸

64. Hungary’s Military Manual provides that cultural property comprises both religious and secular cultural objects representing the cultural or spiritual heritage of peoples. Their protection may only be withdrawn in case of “imperative military necessity” under the authority of a commander.⁴⁹ The manual qualifies “unlawful attacks on cultural objects” as war crimes.⁵⁰

65. Indonesia’s Air Force Manual provides that “places of worship, cultural objects and places used for humanitarian purposes must not be attacked nor made the target of air bombardment, unless they are used for military purposes and that there is no obvious sign of such objects”.⁵¹ It does not refer to any specific level of protection for cultural property, but states that “it is prohibited to destroy cultural objects and places of worship”.⁵²

66. With reference to Israel’s Law of War Booklet, the Report on the Practice of Israel states that “the IDF does not intentionally target historic monuments, works of art or places of worship”. It further points out that “the policy may

⁴⁶ Germany, *Military Manual* (1992), §§ 901–906, see also § 463.

⁴⁷ Germany, *Military Manual* (1992), § 1209. ⁴⁸ Germany, *IHL Manual* (1996), § 701.

⁴⁹ Hungary, *Military Manual* (1992), p. 21. ⁵⁰ Hungary, *Military Manual* (1992), p. 90.

⁵¹ Indonesia, *Air Force Manual* (1990), § 60(c).

⁵² Indonesia, *Air Force Manual* (1990), § 127(e).

not apply in cases of such structures being used for hostile purposes or in cases in which military necessity imperatively requires otherwise".⁵³

67. Israel's Manual on the Laws of War states, in a section entitled "places of prayer and cultural property":

These are buildings dedicated to religion, art, science or similar property that form a part of the spiritual heritage of a people. Though one could maintain that the existence of such edifices has an impact on the military morale of the adversary's side, they are not considered a legitimate target.

A provision imposing the obligation to spare such buildings in the course of war, inasmuch as possible, appeared for the first time in the Hague Conventions. The massive destruction of cultural property during World War II (ancient bridges, cathedrals) resulted in the laws of war devoting a convention, following the war, to define the ban on attacking or damaging cultural property, known as the 1954 Hague Convention Cultural Property. IDF soldiers are obligated to comply with this convention whenever it is likely to be relevant, by virtue of GHQ Regulation 33.0133. It clearly follows from here, that an attack on mosques or churches, which pose no direct danger to our armed forces, is prohibited.⁵⁴

68. Italy's LOAC Elementary Rules Manual states that:

13. Specifically protected objects . . . may not be attacked.
14. The immunity of a marked cultural object may be withdrawn in case of imperative military necessity.
- ...
55. [In attack] the immunity of a marked cultural object shall only be withdrawn when the fulfilment of the mission absolutely so requires. Advance warning shall give time for safeguard measures and information on withdrawal of immunity.
- ...
69. Marked cultural objects whose immunity has been withdrawn shall still be respected to the extent the fulfilment of the mission permits.⁵⁵

69. Italy's IHL Manual states that "cultural property and places of worship are entitled to protection in all circumstances provided they are not illicitly used for military purposes".⁵⁶ The manual qualifies "indiscriminate attacks against . . . cultural property" as war crimes.⁵⁷

70. Kenya's LOAC Manual states that:

Objects representing a high cultural value, or with an important religious dedication independent of any cultural value, such as historical monuments, works of art and places of worship which constitute the cultural or spiritual heritage of peoples, enjoy full protection. Their immunity may not be withdrawn, contrary to that of marked cultural objects. Their value is generally self-evident and does not require special identification means.

⁵³ Report on the Practice of Israel, 1997, Chapter 4.3, referring to *Law of War Booklet* (1986), p. 6.

⁵⁴ Israel, *Manual on the Laws of War* (1998), pp. 33–34.

⁵⁵ Italy, *LOAC Elementary Rules Manual* (1991), §§ 13–14, 55 and 69.

⁵⁶ Italy, *IHL Manual* (1991), Vol. I, § 12.

⁵⁷ Italy, *IHL Manual* (1991), Vol. I, § 85.

Other objects representing a cultural value as such, independently of their religious or secular character, may come under:

- (a) general protection; or
- (b) special protection.⁵⁸

The manual further states that "certain property and buildings must not be attacked except when an order to the contrary has been given. This comprises buildings of cultural value (temples, museums, libraries, etc.) and the persons who look after them".⁵⁹ It specifies that "in attack, withdrawal of immunity of cultural objects marked with distinctive protective signs (in the exceptional case of unavoidable military necessity) shall, when the tactical situation permits, be limited in time and restricted to the less important parts of the object."⁶⁰

71. South Korea's Military Law Manual provides that special attention shall be paid to cultural property during armed conflicts.⁶¹

72. South Korea's Operational Law Manual provides that marked cultural properties shall be respected as long as possible.⁶²

73. Madagascar's Military Manual states that "historic monuments, works of art and places of worship which constitute the cultural or spiritual heritage of peoples enjoy full protection. Their immunity may not be withdrawn, contrary to that of marked cultural objects".⁶³ With respect to marked cultural property, defined in accordance with Article 1 of the 1954 Hague Convention, the manual states that "the immunity of marked cultural property may be withdrawn in case of imperative military necessity".⁶⁴

74. Mali's Army Regulations provides that, according to the laws and customs of war, soldiers in combat must "spare buildings dedicated to religion, art, science or charitable purposes, and historic monuments, provided they are not being used for military purposes".⁶⁵

75. Morocco's Disciplinary Regulations provides that, according to the laws and customs of war, soldiers in combat must "spare buildings dedicated to religion, art, science or charitable purposes, and historical monuments, provided they are not being used for military purposes".⁶⁶

76. The Military Manual of the Netherlands restates the definition of cultural property provided for in Article 1 of the 1954 Hague Convention. The manual states that respect for cultural objects implies that "no acts of hostility may be committed against them" but that an exception can be made "in case military

⁵⁸ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 12.

⁵⁹ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

⁶⁰ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 8.

⁶¹ South Korea, *Military Law Manual* (1996), p. 87.

⁶² South Korea, *Operational Law Manual* (1996), p. 134.

⁶³ Madagascar, *Military Manual* (1994), Fiche No. 3-SO, § F.

⁶⁴ Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 14 and Fiche No. 3-SO, § G, see also Fiche No. 6-O, §§ 26 and 36, Fiche No. 7-O, § 14.

⁶⁵ Mali, *Army Regulations* (1979), Article 36.

⁶⁶ Morocco, *Disciplinary Regulations* (1974), Article 25(1).

necessity requires such an exception. Hence, the protection is not at all absolute".⁶⁷ It further provides that "attacking marked historic monuments, works of art or places of worship which are protected" in violation of IHL constitutes a grave breach.⁶⁸ With respect to non-international armed conflicts in particular, the manual states that "acts of hostility against historic monuments, works of art and places of worship are prohibited".⁶⁹ It recalls that, according to Article 19 of the 1954 Hague Convention, the provisions of that Convention on respect for cultural property apply, as a minimum, in non-international armed conflicts.⁷⁰

77. The Military Handbook of the Netherlands states that it is prohibited to attack "buildings that are used for worship, museums, historical monuments and other important cultural objects, unless they are used by the enemy for military purposes".⁷¹ The manual further states that "cultural property, such as historical monuments, places of worship and museums may not be attacked, damaged or destroyed".⁷²

78. The IFOR Instructions of the Netherlands provides that "it is also prohibited to attack property with a strictly civilian or religious character, unless this property is used for military purposes".⁷³

79. New Zealand's Military Manual restates Article 27 of the 1907 HR and refers to Article 5 of the 1907 Hague Convention (IX). It then quotes the definition of cultural property found in Article 1 of the 1954 Hague Convention and points out that "the protection of cultural property is not, however, absolute. If cultural property is used for military purposes, an opposing belligerent is released from the obligation to ensure immunity so long as the particular violation persists." The manual further states that for many of the parties to the 1907 HR, the 1907 Hague Convention (IX) and the 1954 Hague Convention, "their protection and obligations are overlaid by the protection and obligations of [Article 53] AP I". With respect to this overlap, the manual notes that:

At the time API was being negotiated it was clear, therefore, that not all historical, cultural and religious establishments are protected by this article; only such places as the Blue Mosque, the Coliseum, St. Paul's Cathedral, the Dome of the Rock, and the like. The special protection is confined to a limited class of objects which, because of their recognised importance, constitute a part of the cultural heritage of mankind. This approach may be regarded as culturally narrow today and could well result in a move to widen the protection.⁷⁴

⁶⁷ Netherlands, *Military Manual* (1993), p. V-6, § 5.

⁶⁸ Netherlands, *Military Manual* (1993), p. IX-6.

⁶⁹ Netherlands, *Military Manual* (1993), p. XI-7.

⁷⁰ Netherlands, *Military Manual* (1993), p. XI-1, § 1.

⁷¹ Netherlands, *Military Handbook* (1995), p. 7-36.

⁷² Netherlands, *Military Handbook* (1995), p. 7-43.

⁷³ Netherlands, *IFOR Instructions* (1995), § 12.

⁷⁴ New Zealand, *Military Manual* (1992), § 520 and footnote 78, see also § 632.

The manual further qualifies the following act as a grave breach of AP I:

making the clearly-recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been accorded by special arrangement, the object of attack causing extensive destruction thereof, where there is no evidence of prior use of such objects in support of the adverse Party's military effort, and when such places are not located in the immediate proximity of military objectives.⁷⁵

With respect to non-international armed conflicts in particular, the manual restates Article 16 AP II.⁷⁶

80. Nigeria's Operational Code of Conduct provides that, during military operations, all officers and men of the armed forces shall observe the rules whereby "no property, building, etc. will be destroyed maliciously".⁷⁷

81. Nigeria's Manual on the Laws of War states that "in an attack, steps must be taken to spare, as far as possible, buildings dedicated to public worship, art, science or charitable purposes and historic monuments".⁷⁸ The manual qualifies "bombardment of . . . privileged buildings" as a war crime.⁷⁹

82. The Soldier's Rules of the Philippines instructs soldiers to respect all objects bearing "emblems designating cultural property".⁸⁰

83. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that members of the armed forces and the national police shall respect all objects bearing "emblems designating cultural property".⁸¹

84. Russia's Military Manual states that "the bombardment by military aircraft or vessels of historic monuments [and] churches . . . which are undefended and not used for military purposes" and "the destruction of cultural property, historical monuments, places of worship, and other buildings which represent the cultural or spiritual heritage of a people" are prohibited methods of warfare.⁸²

85. Senegal's Disciplinary Regulations provides that soldiers in combat must "spare buildings dedicated to religion, art, science or charitable purposes, and historic monuments, provided they are not being used for military purposes".⁸³

86. South Africa's LOAC Manual states that "attacking clearly recognised historic monuments, works of art or places of worship and causing extensive damage where these objects have not been used in support of the military effort" constitutes a grave breach of IHL.⁸⁴

⁷⁵ New Zealand, *Military Manual* (1992), § 1703(4)(d), see also § 1703(5) ("attacking a privileged or protected building").

⁷⁶ New Zealand, *Military Manual* (1992), § 1822.

⁷⁷ Nigeria, *Operational Code of Conduct* (1967), § 4(f).

⁷⁸ Nigeria, *Manual on the Laws of War* (undated), § 13.

⁷⁹ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁸⁰ Philippines, *Soldier's Rules* (1989), § 10.

⁸¹ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a)(5).

⁸² Russia, *Military Manual* (1990), § 5(n) and (s).

⁸³ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

⁸⁴ South Africa, *LOAC Manual* (1996), § 38(a).

87. Spain's LOAC Manual defines cultural objects in accordance with Article 1 of the 1954 Hague Convention.⁸⁵ The manual states that "the immunity of cultural property under general protection may only be lifted in case of imperative military necessity".⁸⁶ It also states that "historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples may not be the object of acts of hostility. They may not be attacked, destroyed or damaged".⁸⁷ The manual further states that "launching an attack against cultural property which is not located in the vicinity of military objectives which causes extensive damage to such property" constitutes a war crime.⁸⁸

88. Sweden's Military Manual states that it is forbidden to wilfully destroy cultural property such as museum collections, churches, historical monuments and other cultural sites.⁸⁹

89. Sweden's IHL Manual states that:

Since the Second World War, great interest has been devoted to creating protection in international law for cultural values. According to the 1954 Hague Convention on the protection of cultural values, the parties shall respect cultural objects of different kinds so that these may receive protection as far as possible – exceptions are made if military necessity can be claimed. By cultural values are understood according to the Convention both fixed and movable property of great importance for a people's cultural and spiritual heritage. As such are considered buildings of historical or religious importance, collections of historically important buildings, museums and libraries, works of art, books and scientific collections. The Convention also contains precise rules for the marking of buildings, historic monuments, etc., and provisions covering the storage of movable cultural objects in special shelters. . . . A condition is that none of these cultural values may be used for military purposes. If this should happen, the adversary is no longer obliged to extend protection to these objects.

During the [CDDH] it was again wished to introduce rules for protecting cultural objects. Initially, it was not clear whether the protection should include all or only certain cultural objects in a country waging war. Some states wished the provisions of the cultural convention to be supplemented so that all objects of this nature would receive specific safeguards. Other states, however, reacted strongly against including all churches and historic buildings, etc. in the protected category. A rule like this would have been very difficult to follow in practice, which would probably have meant the protection being weakened. The final solution was that *only those cultural values that were considered to belong to a people's "cultural and spiritual heritage" would be included in this special protection.*

The new provision in Additional Protocol I (AP I Art. 53) could be seen as a replacement for the 1954 Cultural Convention, which, however, is not at all the intention. The Additional Protocol article is only intended to be a confirmation of the rules existing in a much more precise form in the 1954 Convention. A further reason for introducing Article 53 was that many states had not ratified the 1954 Convention.

⁸⁵ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.d.(1).

⁸⁶ Spain, *LOAC Manual* (1996), Vol. I, § 2.4.b.(2), see also § 7.3.b.(2).

⁸⁷ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2)(b), see also § 7.3.b.(2).

⁸⁸ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1). ⁸⁹ Sweden, *Military Manual* (1976), p. 30.

All civilian objects enjoying special protection according to Articles 53–56 also have general protection according to Article 52, but this is clearly stated in the Protocol text only in the case of the places used for religious purposes. . . . As Article 53 aims at giving these objects protection equivalent to that of hospitals, the intention has obviously been that no such object shall be used for military purposes of any kind. If such an object should be so used, there is no longer any requirement upon the adversary to respect the safeguard.

This is not, however, the same as saying that an attack may be launched against, for example, a cathedral or national museum without further ado. The party contemplating such an attack must first judge whether the object can, according to the criteria of Article 52:2, make an effective contribution to its adversary's military operations; and above all whether their total or partial destruction would afford a clear military advantage. The commander who is to make these assessments should also bear in mind that a wilful attack on the object in question may later be judged to be a grave breach of international humanitarian law (AP I Art. 85:4).

In Article 53 [AP I] it is not only prohibited to attack the protected objects but to commit any kind of "hostile act" whatsoever against them, and this is a more far-reaching commitment. This can in fact also be taken to imply prohibition of intentional destruction instigated by one's own authorities. Burnt earth tactics, which are a permitted method of combat, may thus not include destruction of one's own cultural objects, which are safeguarded according to Article 53. It follows both from Article 53 and from the interpretation of some Western states that only the most important objects of a historical, cultural or religious nature may enjoy the protection of the article. In practice, therefore each party to Additional Protocol I must select which objects it considers shall enjoy this qualified protection. Additional Protocol I does not, however, state how this selection is to be made. One suitable way would be to select the objects using the criteria given in the Cultural Convention of 1954.⁹⁰ [emphasis in original]

90. Switzerland's Teaching Manual states that the immunity enjoyed by cultural property under general protection "may be lifted, in case of imperative military necessity, by a responsible commander".⁹¹

91. Switzerland's Basic Military Manual states that:

Art. 52. Cultural property consists of movable and immovable property of great importance for the cultural heritage.

Art. 53. In the event of armed conflict, the cultural property, movable or immovable, located in the territory of a Party to the conflict must be respected and safeguarded.

Art. 54. The obligation to respect may only be derogated from in case military necessity imperatively so demands.⁹²

The manual qualifies the following act as a grave breach of AP I:

making the clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example, within the framework of a competent international organisation, the object of attack, causing

⁹⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 56–58.

⁹¹ Switzerland, *Teaching Manual* (1986), p. 88.

⁹² Switzerland, *Basic Military Manual* (1987), Articles 52–54, see also Article 30(b).

as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, sub-paragraph *b*), and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives.⁹³

92. Togo's Military Manual states that:

Marked cultural property whose immunity has been lifted for reasons of military necessity must, nevertheless, be respected to the extent permitted by the tactical situation. If not already done, the distinctive emblems used to mark the protected property whose immunity has been lifted must be removed.⁹⁴

93. The UK Military Manual, while distinguishing between undefended and defended towns, states that a defended town is open to bombardment, subject to the limitations deriving from the principle of distinction, namely, "churches and monuments duly marked by signs . . . must not be deliberately attacked if they are not used for military purposes".⁹⁵ The manual further states that:

300. Although the bombardment of the private and public buildings of a defended town or fortress is lawful, all necessary steps must be taken to spare, as far as possible, buildings dedicated to public worship, art, science, or charitable purposes, historic monuments.

301. It is the duty of the besieged to indicate such buildings or places by distinctive and visible signs which must be notified to the enemy beforehand.

...

303. Buildings for which inviolability is thus claimed must not be used at the same time for military purposes, for instance, as offices and quarters for signalling stations or observation posts. If this condition is violated, the besieger is justified in disregarding the [protective] sign . . . Thus the bombardment of Strasbourg Cathedral in 1870 was generally held to have been justified for the reason that an artillery observation post was established in its tower. A similar position arose when the Abbey of Monte Cassino was shelled and bombed by the Allies in 1943. It was alleged that the Germans used the Abbey as an observation post and store for military rations and ammunition.⁹⁶

94. The UK LOAC Manual states that:

In sieges, bombardments or attacks precautions must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, important works of art . . . provided they are not being used for military purposes. Buildings of this sort should be distinctively marked, clearly identifying them as places to be spared. If a cathedral, museum or similar building is used for some military purpose then it may become a proper military target and there may be no alternative but to destroy it.⁹⁷

The manual further states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions . . . the following are examples of punishable

⁹³ Switzerland, *Basic Military Manual* (1987), Article 193(2)(d).

⁹⁴ Togo, *Military Manual* (1996), Fascicule II, p. 8. ⁹⁵ UK, *Military Manual* (1958), § 290.

⁹⁶ UK, *Military Manual* (1958), §§ 300–301 and 303, and footnote 2.

⁹⁷ UK, *LOAC Manual* (1981), Section 4, p. 15 § 7.

violations of the laws of war, or war crimes: . . . (o) bombardment of . . . privileged buildings”⁹⁸

95. The US Field Manual reproduces Article 27 of the 1907 HR.⁹⁹ It also recalls that the US is party to the Roerich Pact, “which accords a neutralized and protected status to historic monuments, museums, scientific, artistic, educational and cultural institutions in the event of war”.¹⁰⁰

96. The US Rules of Engagement for the Vietnam War stated that:

- (1) The enemy has shown by his actions that he takes advantage of areas or places normally considered as nonmilitary target areas. These areas are typified by those of religious background or historical value to the Vietnamese. When it is found that the enemy has sheltered himself or has installed defensive positions in such places or in public buildings and dwellings, the responsible senior brigade or higher commander in the area may order an attack to insure prompt destruction of the enemy. The responsible commander must identify positive enemy hostile acts either in the execution or preparation. Weapons and forces used will be those which will insure prompt defeat of enemy forces with minimum damage to structures in the area.

The exception to this policy is the palace compound in the Hue Citadel. For this specific area, commanders will employ massive quantities of CS agents and will take all other possible actions to avoid damage to the compound.¹⁰¹

97. The US Air Force Pamphlet provides that:

Buildings devoted to religion, art, or charitable purposes as well as historical monuments may not be made the object of aerial bombardment. Protection is based on their not being used for military purposes . . . When used by the enemy for military purposes, such buildings may be attacked if they are, under the circumstances, valid military objectives. Lawful military objectives located near protected buildings are not immune from aerial attack by reason of such location but, insofar as possible, necessary precautions must be taken to spare such protected buildings along with other civilian objects.¹⁰²

98. The US Air Force Commander’s Handbook states that:

During military operations, reasonable measures should be taken to avoid damaging religious and cultural buildings, such as churches, temples, mosques, synagogues, museums, charitable institutions, historic monuments, archaeological sites, and works of art. These structures may lawfully be attacked if the enemy uses them for military purposes, though even then, the rules of engagement may place additional restrictions on US military operations. During World War II, for example, the Japanese city of Kyoto was never subjected to bombing because of the many historic and cultural monuments in the city.¹⁰³

⁹⁸ UK, *Military Manual* (1958), § 626(o).

⁹⁹ US, *Field Manual* (1956), § 45. ¹⁰⁰ US, *Field Manual* (1956), § 57.

¹⁰¹ US, *Rules of Engagement for the Vietnam War* (1971), § 6(c).

¹⁰² US, *Air Force Pamphlet* (1976), § 5-5(c).

¹⁰³ US, *Air Force Commander’s Handbook* (1980), § 3-5(a).

99. The US Soldier's Manual instructs soldiers as follows:

Don't attack protected property. You are required to take as much care as possible not to damage or destroy buildings dedicated to cultural or humanitarian purposes or their contents. Examples are buildings dedicated to religion, art, science, or charitable purposes; historical monuments; hospital and places where the sick and wounded are collected and cared for; and schools and orphanages for children. These places are considered protected property as long as they are not being used at the time by the enemy for military operations or purposes.¹⁰⁴

100. The US Instructor's Guide states that:

And remember that in attacks and shellings all necessary measures must be taken to spare, as far as possible, nonmilitary facilities to include buildings dedicated to religion, art, science, or charitable purposes. The same applies to historic monuments and hospitals, provided these buildings and places are not being used for military purposes.¹⁰⁵

The manual further states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . firing on facilities which are undefended and without military significance such as churches".¹⁰⁶

101. The US Rules of Engagement for Operation Desert Storm state that "churches, shrines, schools, museums, national monuments, and any other historical or cultural sites will not be engaged except in self-defense".¹⁰⁷

102. The US Naval Handbook provides that "buildings devoted to religion, the arts, or charitable purposes; historic monuments; and other religious, cultural or charitable facilities should not be bombarded, provided they are not used for military purposes".¹⁰⁸

103. The Annotated Supplement to the US Naval Handbook states that "while the United States is not a Party to the 1954 Hague Convention, it considers it to reflect customary law".¹⁰⁹

104. The YPA Military Manual of the SFRY (FRY) prohibits the exposure of cultural property to combat actions and hostile acts which could destroy or damage the cultural property and obliges officers to assist in the preservation of cultural property on the basis of information received from the enemy. It permits attacks on cultural property "in case of military need", but places this exemption under the limitation that the "authority to make such a decision rests with high officers, division commanders and higher ranks". It further states that cultural property used for military purposes is deprived of its immunity, regardless of proper marking, as long as such a situation lasts.¹¹⁰

¹⁰⁴ US, *Soldier's Manual* (1984), p. 9. ¹⁰⁵ US, *Instructor's Guide* (1985), p. 7.

¹⁰⁶ US, *Instructor's Guide* (1985), p. 13.

¹⁰⁷ US, *Rules of Engagement for Operation Desert Storm* (1991), § C.

¹⁰⁸ US, *Naval Handbook* (1995), § 8.5.1.6, see also § 8.6.2.2 (protected objects).

¹⁰⁹ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.5.1.6, footnote 122.

¹¹⁰ SFRY (FRY), *YPA Military Manual* (1988), §§ 86–87.

National Legislation

105. Argentina's Code of Military Justice as amended punishes "whoever attacks, without any necessity, . . . poorhouses, places of worship, monasteries, schools . . . which are marked by the appropriate distinctive signs" or "whoever destroys places of worship, monasteries, libraries, museums, archives or important works of art, unless required by the military operations".¹¹¹

106. Argentina's Draft Code of Military Justice punishes any soldier who "attacks . . . or carries out acts of hostility against clearly recognisable cultural property or places of worship, which constitute the cultural or spiritual heritage of peoples and which have been granted protection by special agreements, causing extensive destruction, provided they are not located near military objectives nor used in support of the enemy's military effort".¹¹²

107. Under Armenia's Penal Code, it is a crime against the peace and security of mankind to make, during an armed conflict,

the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been granted, the object of attack, causing as a result extensive destruction thereof, when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives and where there is no evidence of the use of such historic monuments, works of art and places of worship by the enemy for military purposes.¹¹³

108. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".¹¹⁴

109. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "attacking protected objects . . . that are not military objectives [including] buildings dedicated to religion, education, art, science or charitable purposes [and] historic monuments" in international and non-international armed conflicts.¹¹⁵

110. Azerbaijan's Criminal Code provides that "directing attacks against specially protected historic, religious, educational, scientific [or] charitable . . . [buildings and] monuments, which are easily seen and distinguishable . . . without any military necessity" constitutes a war crime in international and non-international armed conflicts.¹¹⁶

¹¹¹ Argentina, *Code of Military Justice as amended* (1951), Articles 746(2) and 746(3) respectively.

¹¹² Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(1) in the *Code of Military Justice as amended* (1951).

¹¹³ Armenia, *Penal Code* (2003), Article 390.4(4).

¹¹⁴ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹¹⁵ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.46 and 268.80, see also § 268.101 (grave breaches of AP I).

¹¹⁶ Azerbaijan, *Criminal Code* (1999), Article 116(8).

111. The Criminal Code of Belarus provides that it is a war crime to “direct attacks, without any military necessity, against historic monuments, works of art or places of worship which are clearly recognised and enjoy special protection”.¹¹⁷

112. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that it is a crime under international law to direct attacks against:

clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, where there is no evidence of the adverse party having violated the prohibition of using such objects in support of the military effort, and where such objects are not located in the immediate proximity of military objectives.¹¹⁸

113. The Criminal Code of the Federation of Bosnia and Herzegovina, in a part dealing with “Criminal offences against humanity and international law”, provides that:

- (1) Whoever, in violation of the rules of international law at the time of war or armed conflict, destroys cultural or historical monuments, buildings or establishments devoted to science, art, education or humanitarian purposes, shall be punished . . .
- (2) If a clearly distinguishable object, which has been under special protection of international law as the people’s cultural and spiritual heritage, has been destroyed by an act defined in paragraph 1 of this Code, the perpetrator shall be punished [more severely].¹¹⁹

The Criminal Code of the Republika Srpska contains a similar provision.¹²⁰

114. Bulgaria’s Penal Code as amended provides that it is a “crime against the laws and customs of waging war” to destroy, damage or make unfit, in violation of the rules of international law for waging war, “cultural or historical monuments and objects, works of art, buildings and equipment intended for cultural, scientific or other humanitarian purposes”.¹²¹

115. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes [or] historic monuments . . . provided they are not military objectives” is a war crime in both international and non-international conflicts.¹²²

¹¹⁷ Belarus, *Criminal Code* (1999), Article 136(8).

¹¹⁸ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(20).

¹¹⁹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 164.

¹²⁰ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 443.

¹²¹ Bulgaria, *Penal Code as amended* (1968), Article 414(1).

¹²² Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(i) and (D)(d).

116. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹²³

117. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹²⁴

118. Chile's Code of Military Justice provides for a prison sentence for "anyone who, contrary to instructions received, unnecessarily and maliciously . . . destroys places of worship, libraries, museums, archives or remarkable works of art".¹²⁵

119. China's Law Governing the Trial of War Criminals provides that "destroying religious, charitable, educational, historical constructions or memorials" constitutes a war crime.¹²⁶

120. Colombia's Military Penal Code punishes "anyone who during military service and without proper cause, destroys buildings, places of worship, archives, monuments or other public property".¹²⁷

121. Colombia's Penal Code provides for the punishment of

whoever, at the occasion of and during armed conflict, attacks or destroys, without any justification based on imperative military necessity, and without previously taking adequate and opportune measures of protection, historical monuments, works of art, educational institutions or places of worship, constituting the cultural or spiritual heritage of peoples, which are duly marked with the conventional signs.¹²⁸

122. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.¹²⁹

123. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".¹³⁰

124. According to Croatia's Criminal Code, it is a war crime to destroy "cultural objects or facilities dedicated to science, art, education or those established for humanitarian purposes".¹³¹ It provides a heavier penalty if "a clearly recognizable facility is destroyed which belongs to the cultural and spiritual

¹²³ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹²⁴ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹²⁵ Chile, *Code of Military Justice* (1925), Article 261(2).

¹²⁶ China, *Law Governing the Trial of War Criminals* (1946), Article 3(27).

¹²⁷ Colombia, *Military Penal Code* (1999), Article 174.

¹²⁸ Colombia, *Penal Code* (2000), Article 156.

¹²⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹³⁰ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹³¹ Croatia, *Criminal Code* (1997), Article 167(1).

heritage of the people and which is under special protection of international law".¹³²

125. Cuba's Penal Code provides for the punishment of "anyone who intentionally destroys, damages or renders useless an object declared to be part of the cultural heritage or a national or local monument".¹³³

126. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹³⁴

127. The Czech Republic's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (d) destroys or damages . . . a monument internationally-recognized as being of cultural importance".¹³⁵

128. The Code of Military Justice of the Dominican Republic provides for the punishment of any soldier who, "without necessity, attacks . . . places of worship . . . which are recognisable by the signs established for such cases".¹³⁶

129. The Draft Amendments to the Penal Code of El Salvador punish anyone who, during an international or a non-international armed conflict, attacks or destroys "clearly recognised cultural property or places of worship; works of art which constitute the cultural and spiritual heritage of peoples; and/or which have been granted protection pursuant to special agreements". It defines cultural property in accordance with Article 1 of the 1954 Hague Convention.¹³⁷

130. Under Estonia's Penal Code, "the destruction [or] damaging . . . of cultural monuments, churches, or other structures or objects of religious significance, works of art or science, archives of cultural value, libraries, museums or scientific collections, which are not being used for military purposes" is a war crime.¹³⁸

131. Under Georgia's Criminal Code, "destruction or damage of historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples" in an international or non-international armed conflict is a punishable crime.¹³⁹

132. Germany's Law Introducing the International Crimes Code provides for the punishment of:

whoever in connection with an international armed conflict or with an armed conflict not of an international character . . . directs an attack by military means against . . . buildings dedicated to religion, education, art, science or charitable purposes [or] historic monuments.¹⁴⁰

¹³² Croatia, *Criminal Code* (1997), Article 167(2). ¹³³ Cuba, *Penal Code* (1987), Article 243.

¹³⁴ Cyprus, *AP I Act* (1979), Section 4(1).

¹³⁵ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(d).

¹³⁶ Dominican Republic, *Code of Military Justice* (1953), Article 201(2).

¹³⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Destrucción de bienes culturales".

¹³⁸ Estonia, *Penal Code* (2001), § 107. ¹³⁹ Georgia, *Criminal Code* (1999), Article 411(1)(j).

¹⁴⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

133. Under Hungary's Criminal Code as amended, "a military commander who, in violation of the rules of international law concerning warfare, carries out military operations which result in heavy damage to . . . internationally protected cultural property" commits a war crime.¹⁴¹

134. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁴² It adds that any "minor breach" of AP I, including violations of Article 53 AP I, as well as any "contravention" of AP II, including violations of Article 16 AP II, are also punishable offences.¹⁴³

135. Italy's Wartime Military Penal Code punishes a commander who "omits to adopt measures provided for by the laws or by international conventions regarding respect for: . . . historical monuments and buildings intended for science, art, charity or for practising religion, provided that they are not at the same time used for military purposes and that they are marked by means of the distinctive signs foreseen by the international conventions, or in any case previously communicated to the enemy, and easily recognisable even from a great distance and at high altitude".¹⁴⁴ The Code further provides for the punishment of anyone who, in enemy territory and without military necessity, "sets fire to or destroys or seriously damages historical monuments, works of art or science, i.e., monuments dedicated to religion, charity, education, arts or science belonging to the enemy State".¹⁴⁵

136. Under Jordan's Antiquities Law, it is prohibited "to destroy, disfigure or cause any harm to antiquities".¹⁴⁶

137. Under Jordan's Draft Military Criminal Code, "attacks directed against historical monuments, places of worship and clearly recognized works of art, provided that they are not used for military purposes or situated in the immediate vicinity of military objects," are considered war crimes.¹⁴⁷

138. Kyrgyzstan's Criminal Code provides for the punishment of anyone who "intentionally destroys historical and cultural monuments".¹⁴⁸

139. Latvia's Criminal Code provides for the punishment of "intentional destruction of objects classified as cultural or national heritage".¹⁴⁹

140. Under the Draft Amendments to the Code of Military Justice of Lebanon, "attacks against historical monuments, places of worship and clearly recognized works of art, provided that they are not used for military purposes or situated in the immediate vicinity of military objectives," are considered war

¹⁴¹ Hungary, *Criminal Code as amended* (1978), Section 160(a).

¹⁴² Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁴³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁴⁴ Italy, *Wartime Military Penal Code* (1941), Article 179(1).

¹⁴⁵ Italy, *Wartime Military Penal Code* (1941), Article 187.

¹⁴⁶ Jordan, *Antiquities Law* (1966), Article 9.

¹⁴⁷ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(18).

¹⁴⁸ Kyrgyzstan, *Criminal Code* (1997), Article 172.

¹⁴⁹ Latvia, *Criminal Code* (1998), Section 79.

crimes if they are committed intentionally in violation of the Geneva Conventions and AP I.¹⁵⁰

141. Under Lithuania's Criminal Code as amended, the "destruction of historical monuments, cultural or religious objects, protected under international or state internal legal acts, which cannot be justified as military necessity . . . [and] which has caused extensive damage" constitutes a war crime.¹⁵¹

142. Under Mali's Penal Code, "deliberate attacks against buildings dedicated to religion, education, arts, science or charitable activities, provided that such buildings are not used for military purposes," constitute a war crime in international armed conflicts.¹⁵²

143. Mexico's Code of Military Justice as amended provides for the punishment of a soldier who, without any imperative military necessity so demanding, "destroys libraries, museums, archives, aqueducts and important works of art".¹⁵³

144. Under the Definition of War Crimes Decree of the Netherlands, the "wanton destruction of religious, charitable, educational and historic buildings and monuments" constitutes a war crime.¹⁵⁴

145. Under the International Crimes Act of the Netherlands, the following shall be guilty of a crime:

Anyone who commits, in the case of an international armed conflict, one of the grave breaches of the Additional Protocol (I), . . . namely:

...

(d) the following acts if committed intentionally and in violation of the Geneva Conventions and Additional Protocol (I): . . .

(iv) making clearly recognised historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement, for example within the framework of a competent international organisation, the object of attack, causing as a result extensive destruction thereof, where there is no evidence of the violation by the adverse Party of Article 53, subparagraph (b), of Additional Protocol (I) and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives . . .

...

Anyone who, in the case of an international armed conflict, intentionally and unlawfully commits one of the following acts . . . :

(a) making the object of attack cultural property that is under enhanced protection as referred to in articles 10 and 11 of the [1999 Second Protocol to the 1954 Hague Convention]; . . .

(d) making cultural property that is under protection as referred to in (c) [under the protection of the 1954 Hague Convention or of the 1999 Second Protocol thereto] the object of attack . . .

¹⁵⁰ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(18).

¹⁵¹ Lithuania, *Criminal Code as amended* (1961), Article 339.

¹⁵² Mali, *Penal Code* (2001), Article 31(i)(9).

¹⁵³ Mexico, *Code of Military Justice as amended* (1933), Article 209.

¹⁵⁴ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

...

Anyone who, in the case of an international armed conflict, commits one of the following acts:

...

(p) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, . . . provided they are not military objectives . . .

...

Anyone who, in the case of an armed conflict not of an international character, commits one of the following acts: . . .

(d) intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, . . . provided they are not military objectives.¹⁵⁵

146. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁵⁶

147. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.¹⁵⁷

148. Nicaragua's Military Penal Code punishes a soldier who:

destroys or damages, without military necessity, the documentary and bibliographic heritage, architectural monuments and places of historical or environmental importance, movable property of historical, artistic, scientific or technical value, archaeological sites, property of ethnographical value and natural sites, gardens and parks of historical-artistic or anthropological value and, in general, all those which are part of the historical heritage.¹⁵⁸

149. Nicaragua's Draft Penal Code punishes anyone who, during an international or a non-international armed conflict, attacks or destroys "clearly recognised cultural property or places of worship; works of art which constitute the cultural and spiritual heritage of peoples; and/or which have been granted protection pursuant to special agreements". It defines cultural property in accordance with Article 1 of the 1954 Hague Convention.¹⁵⁹

150. Niger's Penal Code as amended contains a list of war crimes committed against persons and objects protected under the 1949 Geneva Conventions and their Additional Protocols of 1977, including:

attacks against historical monuments, works of art or places of worship clearly recognized [as such] which constitute the cultural or spiritual heritage of peoples being accorded a special protection by a particular arrangement if there exists

¹⁵⁵ Netherlands, *International Crimes Act* (2003), Articles 5(2)(d)(iv), 5(4)(a) and (d), 5(5)(p) and 6(3)(d).

¹⁵⁶ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁵⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁵⁸ Nicaragua, *Military Penal Code* (1996), Article 61.

¹⁵⁹ Nicaragua, *Draft Penal Code* (1999), Article 469.

no evidence that the adversary has violated the prohibition to use such property as a support of his military efforts and if these objects are not situated in the immediate vicinity of military objects.¹⁶⁰

151. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁶¹

152. The Military Penal Code of Paraguay provides for the punishment of anyone "who destroys or damages public monuments [and/or] objects of science and works of art held in public or private collections".¹⁶²

153. Peru's Code of Military Justice provides for the punishment of soldiers who, in time of armed conflict, "without any necessity, attack . . . places of worship or convents . . . which are recognisable by the proper emblems" or who "destroy, on allied or enemy territory, libraries, archives . . . or works of art without being compelled to do so by the necessities of war".¹⁶³

154. Poland's Penal Code provides for the punishment of "any person who, in violation of international law, destroys [or] damages . . . cultural property in occupied or controlled territory or in the combat area" and provides for a harsher punishment "if the offence is directed against cultural property of particular importance".¹⁶⁴

155. Romania's Penal Code provides for the punishment of:

destruction of any kind, without military necessity, of monuments or constructions that have artistic, historic or archaeological value, of museums, important libraries, archives of historic or scientific value, works of art, manuscripts, valuable books, scientific collections or important book collections, archives, reproductions of the above items and in general of any cultural heritage of peoples.¹⁶⁵

156. Russia's Criminal Code provides for the punishment of "destruction of or damage to cultural and historical monuments . . . as well as objects or documents having historical or cultural value".¹⁶⁶ It provides a heavier penalty for "the same acts committed against particularly valuable objects or monuments of all-Russian significance".¹⁶⁷

157. Slovakia's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (d) destroys or damages . . . an internationally recognized cultural monument".¹⁶⁸

158. According to Slovenia's Penal Code, it is a war crime to destroy "cultural or historical monuments and buildings, institutions dedicated to scientific,

¹⁶⁰ Niger, *Penal Code as amended* (1961), Article 208.3(20).

¹⁶¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁶² Paraguay, *Military Penal Code as amended* (1980), Article 284.

¹⁶³ Peru, *Code of Military Justice* (1980), Article 95(2) and (3).

¹⁶⁴ Poland, *Penal Code* (1997), Article 125. ¹⁶⁵ Romania, *Penal Code* (1968), Article 360.

¹⁶⁶ Russia, *Criminal Code* (1996), Article 243(1).

¹⁶⁷ Russia, *Criminal Code* (1996), Article 243(2).

¹⁶⁸ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(d).

cultural, education or humanitarian purposes".¹⁶⁹ It provides a heavier penalty in case of destruction of "an entity specially protected by international law as a site of national, cultural, spiritual or natural heritage".¹⁷⁰

159. Spain's Military Criminal Code punishes a soldier who:

destroys or damages, without military necessity, the documentary and bibliographic heritage, architectural monuments and places of historical or environmental importance, movable property of historical, artistic, scientific or technical value, archaeological sites, property of ethnographical value and natural sites, gardens and parks of historical-artistic or anthropological value and, in general, all those which are part of the historical heritage.¹⁷¹

160. Spain's Penal Code provides for the punishment of:

anyone who, in the event of armed conflict, should . . . attack or subject to . . . hostile acts the cultural property or religious sites which are recognised as clearly being part of the cultural or spiritual heritage of the people or which have been specifically protected by special agreements, causing extensive destruction, whenever this property is not located in the immediate vicinity of military objectives and is not used to support the military effort of the adversary.

...

Should the cultural assets in question be under special protection or the acts be of the utmost gravity, the higher penalty may be imposed.¹⁷²

161. Under Sweden's Penal Code as amended, "arbitrarily destroying and extensively damaging property which enjoys special protection under international law" constitutes a crime against international law.¹⁷³

162. Switzerland's Military Criminal Code as amended punishes anyone who "unlawfully destroys or damages cultural property or material placed under the protection of the distinctive sign of cultural property".¹⁷⁴

163. Switzerland's Law on the Protection of Cultural Property states that protection includes respect for cultural property, which means, *inter alia*, "to renounce acts which could expose these objects to destruction or deterioration".¹⁷⁵

164. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of:

wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, i.e. . . . the destruction of or damage to historical monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples.¹⁷⁶

¹⁶⁹ Slovenia, *Penal Code* (1994), Article 384(1).

¹⁷⁰ Slovenia, *Penal Code* (1994), Article 384(2).

¹⁷¹ Spain, *Military Criminal Code* (1985), Article 77(7).

¹⁷² Spain, *Penal Code* (1995), Article 613(1)(a) and (2).

¹⁷³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(7).

¹⁷⁴ Switzerland, *Military Criminal Code as amended* (1927), Article 111.

¹⁷⁵ Switzerland, *Law on the Protection of Cultural Property* (1966), Article 2(3).

¹⁷⁶ Tajikistan, *Criminal Code* (1998), Article 403(1).

165. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.¹⁷⁷

166. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".¹⁷⁸

167. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(ix) and (e)(iv) of the 1998 ICC Statute.¹⁷⁹

168. Under the US War Crimes Act as amended, violations of Article 27 of the 1907 HR are war crimes.¹⁸⁰

169. Uruguay's Military Penal Code as amended punishes military personnel, *equiparados* and even persons unconnected with the armed forces "for unjustified attacks on . . . places of worship, convents, museums, libraries, archives, monuments and in general any establishment or structure intended for the purposes of culture, art, religious worship or charity".¹⁸¹

170. Venezuela's Code of Military Justice as amended provides for the punishment of "those who, in the absence of military necessity, should destroy, in enemy or allied territory, places of worship, libraries or museums, archives, aqueducts and other works of art, as well as communication, telecommunication or other such installations".¹⁸²

171. The Penal Code as amended of the SFRY (FRY) punishes anyone who "in violation of international law applicable to war or armed conflict, destroys cultural or historic monuments and buildings, or scientific, art, educational or humanitarian institutions" and provides a heavier penalty "if a clearly discernible object from paragraph 1 of this article is destroyed and it represents the cultural and spiritual heritage of that people under special protection of international law".¹⁸³

172. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".¹⁸⁴

National Case-law

173. No practice was found.

¹⁷⁷ Trinidad and Tobago, *Draft ICC Act (1999)*, Section 5(1)(a).

¹⁷⁸ UK, *Geneva Conventions Act as amended (1957)*, Section 1(1).

¹⁷⁹ UK, *ICC Act (2001)*, Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁸⁰ US, *War Crimes Act as amended (1996)*, Section 2441(c)(2).

¹⁸¹ Uruguay, *Military Penal Code as amended (1943)*, Article 58(12).

¹⁸² Venezuela, *Code of Military Justice as amended (1998)*, Article 474(16).

¹⁸³ SFRY (FRY), *Penal Code as amended (1976)*, Article 151.

¹⁸⁴ Zimbabwe, *Geneva Conventions Act as amended (1981)*, Section 3(1).

Other National Practice

174. The Report on the Practice of Algeria asserts the “principle of inviolability of places of worship”.¹⁸⁵

175. At the CDDH, Australia stated that had Article 47 *bis* of draft AP I (now Article 53) been put to a vote, it would have abstained “because the article contains a prohibition against reprisals” even though it supported “proposals for rules to prohibit acts of hostility directed against historic monuments or works of art which constitute the cultural or spiritual heritage of peoples”.¹⁸⁶

176. A report submitted by the Australian government to the UNESCO Secretariat in 1994 emphasised that “all ADF personnel, prior to departure for services overseas, are briefed ‘on the necessity to respect [differences in culture] which would include respect for the cultural heritage of other peoples’”.¹⁸⁷

177. In a statement at a meeting of EU experts in 1998, Austria maintained that “it is this ‘formula’ [military necessity] which last but not least has led to the fact that a large number of reluctant States resolved to vote for the convention and to ratify it”.¹⁸⁸

178. In a fact sheet on military necessity prepared for the 1998 Vienna expert meeting on the revision of the 1954 Hague Convention, Austria stated that:

1. ... In modern IHL, military necessity does not function as a general waiver to the limitations imposed by IHL on the parties to an armed conflict, but can only be invoked in cases where conventional law explicitly so provides. In order to emphasize the exceptional character of this concept, it is often further qualified by narrowing terms.
 - 2.1 While the arguments against the inclusion of a waiver clause based on military necessity in the text of the 1954 Hague Convention were mainly based on the fear that this would be regarded as a retrograde step in relation to previous international law and would diminish the protection, the arguments for the inclusion of such a waiver were manifold and superseded the former. For the inclusion of a waiver clause based on military necessity spoke the need to make the Convention militarily applicable, the recognition of humanitarian reasons (to allow for the primacy of the protection of human lives over that of objects), the desire to make the Convention acceptable to as many States as possible, and the intent to be in line with existing IHL, in particular with the Geneva Conventions of 1949. The compromise finally negotiated allows for the recognition of military necessity only by way of exception and solely in relation to specific obligations.
 - 2.2 ... The 1954 Hague Convention does not define what constitutes imperative military necessity. It is therefore up to each State Party to interpret these terms along the rules of interpretation applicable to international treaties.

¹⁸⁵ Report on the Practice of Algeria, 1998, Chapter 4.3.

¹⁸⁶ Australia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 219–220.

¹⁸⁷ Australia, Report to UNESCO on Measures to Implement the Convention for the Protection of Cultural Property in the Event of Armed Conflict and Associated Regulations, 1994, § 2.

¹⁸⁸ Austria, Statement at the Expert Meeting of the 15 EU Member States on the 1954 Hague Convention, Houthem St. Gerlach, February 1998, p. 2, § 5, ad. 1.

According to the wording of the waiver clause, and in light of the object and purpose of the Convention as well as the drafting history, it must be interpreted restrictively. It definitely goes beyond mere considerations of military convenience and involves a certain level of command to assess the situation and to decide on the application of the waiver.

...

The waiver clause currently contained in Art. 4 para. 2 of the Convention serves an important protective function. Without this clause, the protection of cultural property would automatically be lost when a party to the armed conflict uses the object for military purposes... As a consequence of its – unlawful – use the formerly protected cultural property would change its status and become a legitimate military target.

The existing waiver clause, however, ensures the protection of cultural property from damage or destruction even if the cultural property concerned or its surroundings are used for military purposes, since the obligation to respect cultural property, in particular the obligation to refrain from any act of hostility directed against such property, may only be waived in cases where military necessity imperatively requires such a waiver. Thus, according to Art. 4 para. 2 of the Convention, cultural property used in violation of the Convention must not be attacked without imperative military necessity to do so.

As it is formulated now, the waiver clause contained in Art. 4 para. 2 of the Convention reflects a proper balance between the military needs, on the one hand, and the need for the protection of cultural property against damage or destruction during armed conflict, on the other, and should, therefore, be retained. To further improve the protective function of the waiver clause, a common understanding of the States Parties as to the interpretation of its terms seems to be useful.

...

- 3.1 In addition to that, one might consider to introduce the following elements into the waiver clause or the protection regime in relation to cultural property under “normal” protection:
- compulsory warnings;
 - a minimum time for the other party to redress the situation;
 - a certain command level where the decision on the waiver has to be taken;
 - certain requirements with regard to an attack on the property concerned in case of imperative military necessity:
 - precautions in attack;
 - no alternative means reasonably available;
 - the limitation of means and methods to those which are strictly necessary to counter the threat posed.¹⁸⁹

179. In 1998, at the Vienna expert meeting on the revision of the 1954 Hague Convention, Argentina stressed “the desirability of including the notion of military necessity” in the 1997 Revised Lauswolt Document, “provided, however, that this notion be defined precisely to avoid abuses”.¹⁹⁰

¹⁸⁹ Austria, Fact Sheet on Military Necessity submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998, §§ 1–3.

¹⁹⁰ Argentina, Comments submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998.

180. At the CDDH, Canada noted that Article 47 *bis* of draft AP I (now Article 53)

was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 [HR] protecting a variety of cultural and religious objects. Rather, the article establishes a special protection for a limited class of objects which because of their recognised importance constitute a part of the cultural heritage of mankind. We were happy to note that the Article was made “without prejudice” to the provisions of the [1954 Hague Convention] thereby implicitly recognizing the exceptions provided for in the Convention.¹⁹¹

181. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Cape Verde condemned “the widespread use of violence in Croatia and in Bosnia and Herzegovina”, including the destruction of “cultural and historical landmarks”.¹⁹²

182. The Report on the Practice of Chile states that it is Chile’s *opinio juris* that “the general principle of protecting cultural and religious objects is an integral part of customary international law”.¹⁹³

183. At the 18th International Conference of the Red Cross in Toronto in 1952, China levelled the accusation at the US that “in Korea, . . . cultural, religious and charitable installations were wilfully destroyed”.¹⁹⁴

184. Colombia’s National Plan for the Dissemination of IHL states that the immunity of the spiritual and cultural heritage is absolute, and that the destruction of religious and cultural objects can neither serve any military need whatsoever nor provide any military advantage.¹⁹⁵

185. In 1991, during the conflict in the former Yugoslavia, Croatia reported and condemned the destruction of and damage to cultural, historical and religious monuments by the Yugoslav army.¹⁹⁶

186. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that “in bombardments all necessary precautions must be taken to spare buildings dedicated to religion, art, science, or charitable purposes [and] historic monuments”.¹⁹⁷

¹⁹¹ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 224.

¹⁹² Cape Verde, Statement before the UN Security Council, UN Doc. S/PV.3082, 30 May 1992, § 6.

¹⁹³ Report on the Practice of Chile, 1997, Chapter 4.3.

¹⁹⁴ China, Statement of 30 July 1952 at the 18th International Conference of the Red Cross, Toronto, 26 July–7 August 1952, reprinted in *Documents on Foreign Affairs of the People’s Republic of China*, World Knowledge Press, Beijing, Vol. 2, pp. 82–83.

¹⁹⁵ Colombia, Presidency, Office of the High Commission for Peace, National Plan for the Dissemination of IHL, 1994, p. 7.

¹⁹⁶ Croatia, Ministry of Information, Report on the War against Croatia, August 1991, pp. 1–2; Ministry of Education and Culture, Report on cultural monuments, historic centres and sites damaged and destroyed during the war in Croatia, Institute for Protection of Cultural Monuments, 30 October 1991.

¹⁹⁷ Egypt, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 50.

187. The Report on the Practice of Ethiopia reasserts the commitment of “states and governments of the Horn of Africa not to attack any objects of cultural value”.¹⁹⁸

188. At the CDDH, Finland explained its voted against Article 20 *bis* of draft AP II (now Article 16) as follows:

Our negative vote is not to be taken as an indication of a negative stand as regards the safeguarding of cultural property from the ravages of war in general. It is an indication of our strong feeling that the inclusion of a provision protecting cultural property in Protocol II, which lacks general rules on the methods and means of combat . . . which have been deleted, unbalances the protective humanitarian character of the Protocol.¹⁹⁹

189. In a position paper on the 1997 Revised Lauswolt Document, France expressed the view that “military necessity may be admitted only where an express provision allows recourse to it”. It concluded that the wording of Articles 4(2) and 11(2) of the 1954 Hague Convention should be maintained.²⁰⁰ This view was repeated in a position paper submitted in 1998 to the Vienna expert meeting on the revision of the 1954 Hague Convention, at which France referred to the principle whereby it was not permitted to use more violence than absolutely necessary.²⁰¹

190. In 1998, in a working document submitted to the Vienna expert meeting on the revision of the 1954 Hague Convention, France stated that:

1. The Convention for the protection of cultural property in the event of armed conflict, signed at The Hague on 14 May 1954, mentions the concept of military necessity in respect of all cultural property . . .
2. Although such provisions gave rise to much debate during the preparation of the text of the Convention, they are not new. The idea of military necessity is a classic part of the law of armed conflict. [reference to Article 23(g) 1907 HR and Article 53 GC IV]
3. If the idea of military necessity is expressly recognised in the law of war as well as in humanitarian law, it is not because it represents an attack on the general principle of limitation which should govern the behaviour of States during armed conflicts, but rather because it is an additional safety measure for the implementation of this principle of limitation. The recourse to military necessity is never arbitrary: military necessity only makes sense in conformity with the customary principles of international humanitarian law and of the law of war, in the context of the application in good faith of the international obligations which bind states.

¹⁹⁸ Report on the Practice of Ethiopia, 1998, Chapter 4.3.

¹⁹⁹ Finland, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, pp. 156–157.

²⁰⁰ France, Observations on the Revised Lauswolt Document, UNESCO Doc. DLT.97/CONF.208/2, October 1997, § 1.

²⁰¹ France, Position paper submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998, § 2.

4. It is therefore wrong to think that military necessity represents a threat to cultural property: its implementation is closely constrained by four cumulative conditions:
 - military necessity is controlled, since the rule of law should include such an exception;
 - as for all exceptions, the application of military necessity should be limited in time;
 - military necessity can only justify means which are indispensable to achieve the aim;
 - the means of implementing military necessity must be legal.
5. It can be seen that these four conditions must be respected in all cases of the implementation of military necessity, either for property under general protection or for property under special protection. These conditions are linked to the customary principles of humanitarian law and of the law of war, and not to various levels of protection by which the property is covered.²⁰²

191. During the intergovernmental meeting on the revision of the 1954 Hague Convention in The Hague in 1999, the French delegation stressed that the protection from attack enjoyed by cultural property can be lifted only in case of military necessity.²⁰³

192. The Report on the Practice of France states that “the French authorities condemn all acts that are likely to seriously damage cultural and religious property, whether in the context of international or non-international armed conflicts”.²⁰⁴

193. At the CDDH, the FRG stated that:

Article 47 *bis* [of draft AP I (now Article 53)] establishes a special protection for a limited class of objects which, in the particular circumstances, constitute a part of the cultural or spiritual heritage of mankind. Such objects remain protected whether or not they have been restored. The illegal use of these objects for military purposes, however, will cause them to lose the protection provided for in Article 47 *bis* as a result of attacks which are to be directed against such military uses. In such a case the protected object becomes a military objective. . . . Article 47 *bis* was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 [HR] protecting a variety of cultural and religious objects. . . . Article 47 *bis* is limited to [AP I] and does not affect any obligations under the [1954 Hague Convention].²⁰⁵

194. In a debate in the German parliament in 1991 on the situation in the city of Dubrovnik, a member of parliament labelled attacks on Dubrovnik as “acts of barbarism”. This view was shared by a large majority of members of parliament.²⁰⁶

²⁰² France, Working document on military necessity submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998, §§ 1–5.

²⁰³ France, Statement at the Diplomatic Conference on the Second Protocol to the 1954 Hague Convention, The Hague, 15–26 March 1999.

²⁰⁴ Report on the Practice of France, 1998, Chapter 4.3.

²⁰⁵ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 225 and 226.

²⁰⁶ Germany, Lower House of Parliament, Statement by a Member of Parliament, Dr. Christopher Zöpel, 17 October 1991, *Plenarprotokoll* 12/50, p. 4092.

195. In 1996, during a debate in the UN General Assembly, Germany called upon the parties to the conflict in Afghanistan “to preserve the cultural heritage of their country”.²⁰⁷

196. In 1997, in its position paper concerning a revision of the 1954 Hague Convention (Revised Lauswolt Document), Germany stated that “the definition of cultural property in Article 1 of the Convention should form the basis of the new legal instrument” because the non-exhaustive list contained in Article 1 had been “accepted by the international community” and the incorporation of definitions from other instruments was “inadvisable”. Germany further stated that:

The principle of military necessity as a core element of international humanitarian law cannot be dispensed with... The idea that, in certain cases and under certain circumstances, military necessity would take priority over the humanitarian protection of civilian objects... today is an integral part of Customary International Law... Military necessity does not take precedence over the law, but is subject to it. Including the concept of military necessity in the formulation of legal regulations takes account of the fact that international humanitarian law is very often necessarily a compromise between military and humanitarian requirements.²⁰⁸

197. In 1998, at the Vienna expert meeting on the revision of the 1954 Hague Convention, Hungary expressed its disapproval of the possible inclusion of the notion of “military necessity” in the Revised Lauswolt Document.²⁰⁹

198. At the CDDH, India explained its voted against Article 20 *bis* of draft AP II (now Article 16) as follows: “The Indian delegation objects strongly to the reference to any international convention, to which only sovereign States can be Parties, in Protocol II, which will apply to internal armed conflicts.”²¹⁰

199. The Report on the Practice of India states that in India “there are no specific regulations aimed at protecting cultural objects. Nevertheless, the general protection available under the law for protection of public property of all types, can be extended to cultural objects as well.”²¹¹ The report further points out that the protection ordinarily granted to religious objects is not afforded if such objects are used for terrorist activities. India used armed force in the past against such objects that could not be treated as civilian objects, for example during the military offensive against the Golden Temple in Amritsar in 1984.²¹²

200. At the CDDH, Indonesia voted against Article 20 *bis* of draft AP II (now Article 16) but explained that this “should not be interpreted as meaning that

²⁰⁷ Germany, Statement before the UN General Assembly, UN Doc. A/51/PV.84, 13 December 1996, p. 7.

²⁰⁸ Germany, Position paper concerning a revision of the 1954 Hague Convention, 1997, pp. 2–3.

²⁰⁹ Hungary, Comments submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998.

²¹⁰ India, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 159.

²¹¹ Report on the Practice of India, 1997, Chapter 2.7.

²¹² Report on the Practice of India, 1997, Chapter 1.3.

[the Indonesian] Government is against the principles contained in this article that historic monuments or works of art should be protected".²¹³

201. According to the Report on the Practice of Iran, Iran accused Iraq of bombarding cultural and historical property on many occasions during the Iran–Iraq War, including museums, ancient hills and places, mosques and schools, while Iran committed itself vis-à-vis UNESCO not to attack such property and accorded “special protection” to four holy cities in Iraq. The report concludes that Iran’s *opinio juris* is that cultural property is immune from attack.²¹⁴ The report further states that an attack on a historic building can be considered a war crime.²¹⁵

202. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Iran qualified the destruction of cultural property in times of armed conflict as a violation of human rights and deplored “gross violations of the human rights of the people of Bosnia and Herzegovina, including . . . wanton destruction of historical monuments, houses of worship and property”.²¹⁶

203. The Report on the Practice of Iraq states that there exists an outright prohibition on attacks on cultural property “for any reason”.²¹⁷

204. Israel’s IDF General Staff Order 33.0133 of 1982 requires all IDF soldiers “to act, with regard to ‘Cultural Property’ situated within the State of Israel or any other country, in accordance with the provisions of the [1954 Hague] Convention”. It provides, in particular, that IDF soldiers shall abstain from attacking or causing damage to historic monuments, works of art or places of worship.²¹⁸ However, according to the Report on the Practice of Israel, the prohibition not to target cultural property as contained in the Order does not apply to cases in which cultural property is used for “hostile purposes”.²¹⁹

205. In 1998, at the Vienna expert meeting on the revision of the 1954 Hague Convention, Israel advocated the inclusion of an additional paragraph in draft Article 1 of the Revised Lauswolt Document, which would provide that “the provisions of this instrument shall not prejudice or derogate from accepted customary principles of the laws of war, including, *inter alia*, the principles of proportionality, distinction and military necessity”.²²⁰

206. The Report on the Practice of Japan notes that Japan is not a party to the 1954 Hague Convention because of some problems connected to domestic

²¹³ Indonesia, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 159.

²¹⁴ Report on the Practice of Iran, 1997, Chapter 4.3.

²¹⁵ Report on the Practice of Iran, 1997, Chapter 6.5.

²¹⁶ Iran, Statement before the UN Security Council, UN Doc. S/PV.3136, 16 November 1992, § 68.

²¹⁷ Report on the Practice of Iraq, 1998, Chapter 4.3.

²¹⁸ Israel, IDF General Staff Order 33.0133, Discipline-Conduct in Accordance with International Conventions to which Israel is a Party, 20 July 1982, § 9.

²¹⁹ Report on the Practice of Israel, 1997, Chapter 4.3.

²²⁰ Israel, Comments submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998.

measures for the implementation of this Convention. It recalls, however, that Japan was among the countries at the CDDH which proposed adding a clause to the draft AP II concerning the protection of cultural property and chapels.²²¹

207. The Report on the Practice of Jordan notes that Islamic law lays down the principle of the inviolability of places of worship and states that Jordan has always respected this principle and has always protested against any violations of this principle by its adversaries.²²²

208. In 1981, in a memorandum submitted to the UN Secretary-General, the Lebanese Department of Foreign Affairs accepted the “application of international decisions concerning the conservation of the historical character of the city of Tyre and especially of the archaeological sites”.²²³

209. In 1993, during a debate in the UN Security Council, Libya requested that the people of Bosnia and Herzegovina “be supported and assisted in the exercise of its right of self-defence against . . . the destruction of its places of worship”.²²⁴

210. At the CDDH, the Netherlands stated that:

Article 47 *bis* [of draft AP I (now Article 53)] provided special protection for a limited category of objects which by virtue of their generally recognised importance constituted part of the cultural or spiritual heritage of mankind . . . The illegitimate use of those historical objects for military purposes would deprive them of the protection afforded by Article 47 *bis*.²²⁵

211. At the CDDH, the Netherlands explained its abstention on the vote on Article 20 *bis* of draft AP II (now Article 16) as follows:

Article 20 *bis* unconditionally prohibits, in an internal conflict, any acts of hostility directed against historic monuments or works of art, which constitute the cultural heritage of peoples. The article does not provide for any possible derogation from the prohibition it contains . . . We note that the very well-balanced system of the [1954 Hague Convention], through its Article 19 that provides the rule to be applied in internal conflicts, contains a possibility of derogation where imperative reasons of military necessity so require. [The Netherlands] would have preferred a possibility of derogation to be explicitly contained in Article 20 *bis*. It is our understanding, however, that a derogation for imperative reasons of military necessity is indeed implied in Article 20 *bis* by virtue of the clear reference to the [1954] Hague Convention. It goes without saying that cessation of immunity from attack during such time as the cultural object is used by adversary armed forces is an example of such military necessity.²²⁶

²²¹ Report on the Practice of Japan, 1998, Chapter 4.3.

²²² Report on the Practice of Jordan, 1997, Chapter 4.3.

²²³ Lebanon, Department of Foreign Affairs, Memorandum, annexed to Letter dated 13 July 1981 to the UN Secretary-General, UN Doc. S/14586, 14 July 1981.

²²⁴ Libya, Statement before the UN Security Council, UN Doc. S/PV.3247, 29 June 1993, § 101.

²²⁵ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 207–208.

²²⁶ Netherlands, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, pp. 161–162, see also Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, pp. 126–127, §§ 11–13.

212. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that cultural objects and places of worship “enjoy the general protection of civilian objects, as specified in Article 52 of Protocol I”.²²⁷

213. In 1998, at the Vienna expert meeting on the revision of the 1954 Hague Convention, the Netherlands stated that “as was the case in 1954, the Netherlands believes military necessity is a vital element to be included in a revised Convention”. It stressed that “although used as an exception to certain rules set forth in humanitarian law instruments, military necessity is not a tool by which military commanders conveniently dismiss the laws of armed conflict when it would be useful or advantageous to do so”. Concerning the notion of “imperative military necessity”, the Netherlands relied upon the definition that “an imperative necessity presupposes that the military objective cannot be reached in any other manner” and that it “requires a careful evaluation of the items which could be affected”. It went on to say that “although such considerations are inherent in the definition of military necessity, the emphasis placed on the requirement that the necessity must be ‘imperative’ further seeks to limit the likelihood that a military commander will invoke this exception to the protection”.²²⁸

214. At the CDDH, Norway explained that it would vote against Article 20 *bis* of draft AP II (now Article 16) because:

Some of the most essential guarantees for the protection of basic human rights had been deleted from draft Protocol II. Their conscience as human beings prevented the members of [the Norwegian] delegation from supporting the adoption of measures according more favourable treatment to cultural objects than to human beings. Their attitude did not relate in any way to the aims of Article 20 *bis* and [the Norwegian] delegation had accordingly voted for the Article in Committee.²²⁹

215. In 1994, during a debate in the UN Security Council, Pakistan considered the destruction of mosques and other Islamic structures in the former Yugoslavia as “inhuman behaviour”.²³⁰

216. According to the Report on the Practice of Russia, the destruction of cultural property, historic monuments or places of worship that constitute a part of the cultural or spiritual heritage of a people, is a prohibited method of warfare.²³¹

²²⁷ Netherlands, Lower House of Parliament, Explanatory memorandum to the ratification of the Additional Protocols of 12 December 1977 to the Geneva Conventions, 1983–1984 Session, Doc. 18277 (R 1247), No. 3, p. 28.

²²⁸ Netherlands, Comments submitted to the Expert Meeting on the revision of the 1954 Hague Convention, Vienna, 11–13 May 1998.

²²⁹ Norway, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, pp. 125–126, § 4.

²³⁰ Pakistan, Statement before the UN Security Council, UN Doc. S/PV.3370, 27 April 1994, p. 427.

²³¹ Report on the Practice of Russia, 1997, Chapter 1.6.

217. According to the Report on the Practice of Rwanda, most cultural and religious objects were not damaged by the belligerents during the non-international armed conflict which took place before 1994. Any damage which did occur was found to have been caused unintentionally. The report maintains, however, that during the “genocide in 1994”, cultural and religious objects were no longer respected.²³²

218. In 1998, at the Vienna expert meeting on the revision of the 1954 Hague Convention, Ukraine expressed the view that:

The irrelevance of entering the word “military necessity” when drafting the document is accounted for by the following reasons: military doctrine of Ukraine is of a defensive nature: the Constitution of Ukraine doesn’t define it; the internal legislation of Ukraine regarding the protection of national monuments doesn’t define it.²³³

219. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, the UAE stated that “there has been massive arbitrary destruction of historic, religious and archaeological sites regardless of the enormous international efforts made and the role of the United Nations Protection Force”.²³⁴

220. At the CDDH, the UK delegation declared that:

We note particularly the use of the expression “spiritual heritage” [in Article 47 *bis* of draft AP I (now Article 53)], which qualifies the reference to places of worship and makes it obvious that the protection given by this article extends only to those places of worship which do constitute such spiritual heritage. Many holy places are thus covered, but it is clear to [the UK] delegation that the article is not intended to apply to all places of worship without exception. Secondly, [the UK] delegation does not understand this article as being intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 [HR], which protect a variety of cultural and religious objects. Rather, this article establishes a special protection for a limited class of objects, which, because of their recognized importance, constitute a part of the heritage of mankind. It is the understanding of [the UK] delegation that if these objects are unlawfully used for military purposes, they will thereby lose effective protection as a result of attacks directed against such unlawful military uses”.²³⁵

221. At the CDDH, the UK explained its vote against Article 20 *bis* of Draft AP II (now Article 16 AP II) as follows:

In the case of Article 20 *bis*, we considered that to retain a provision on the protection of cultural objects and places of worship which did not appear in the simplified draft, when so many provisions for the protection of human victims of armed conflict had been deleted, would be a distortion of what should be the true aims of the

²³² Report on the Practice of Rwanda, 1997, Chapter 4.3.

²³³ Ukraine, Position paper submitted to the Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998, § C.

²³⁴ UAE, Statement before the UN Security Council, UN Doc. S/PV.3137, 16 November 1992, § 88.

²³⁵ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 238.

Protocol . . . Our negative vote should not be taken as indicating any lack of sympathy with the aim of the article. It is to be seen as an expression of our conviction that a proper balance should be found in the contents of the Protocol as a whole, a balance which in general seemed to us to have been struck in the simplified draft of Pakistan.²³⁶

222. In 1991, during a debate in the UN Security Council concerning the Gulf War, the UK asserted its compliance with the principle of avoiding damage to sites of religious and cultural significance.²³⁷

223. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that "British commanders have also been briefed on the locations and significance of sites of religious and cultural importance in Iraq, and operations will take account of this".²³⁸

224. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that "the entire campaign has been conducted against military infrastructure with the express directions to avoid causing civilian casualties as far as possible, and with specific briefing to avoid sites of cultural and historic significance".²³⁹

225. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK government stated that:

Pilots have clear instructions to minimize civilian casualties and to avoid damage to sites of religious and cultural significance. Indeed, on a number of occasions, attacks have not been pressed home because pilots were not completely satisfied they could meet these conditions.²⁴⁰

226. On 26 May 1944, General Eisenhower, Supreme Allied Commander in Europe, preparing to invade Europe, issued the following order concerning the preservation of historical monuments:

1. Shortly we will be fighting our way across the Continent of Europe in battles designed to preserve our civilization. Inevitably, in the path of our advance will be found historical monuments and cultural centers which symbolize to the world all that we are fighting to preserve.
2. It is the responsibility of every commander to protect and respect these symbols whenever possible.
3. In some circumstances the success of the military operation may be prejudiced in our reluctance to destroy these revered objects. Then, as at Cassino, where the enemy relied on our emotional attachments to shield his defense, the lives of our men are paramount. So, where military necessity dictates, commanders

²³⁶ UK, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 163.

²³⁷ UK, Statement before the UN Security Council, UN Doc. S/PV.2977, 14 February 1991, § 72.

²³⁸ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22215, 21 January 1991.

²³⁹ UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 1.

²⁴⁰ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991, p. 1.

may order the required action even though it involves destruction of some honored site.

4. But there are many circumstances in which damage and destruction are not necessary and cannot be justified. In such cases, through the exercise of restraint and discipline, commanders will preserve centers and objects of historical and cultural significance. Civil Affairs Staffs at higher echelons will advise commanders of the locations of historical monuments of this type, both in advance of the front lines and in occupied areas. This information, together with the necessary instructions, will be passed down through command channels to all echelons.²⁴¹

227. At the CDDH, the US stated that:

It is the understanding of the United States that [Article 47 *bis* of draft AP I (now Article 53)] was not intended to replace the existing customary law prohibitions reflected in Article 27 of the 1907 [HR] protecting a variety of cultural and religious objects. Rather the article establishes a special protection for a limited class of objects which because of their recognized importance constitute a part of the special heritage of mankind. Other monuments, works of art or places of worship which are not so recognized, none the less represent objects normally dedicated for civilian purposes and are therefore presumptively protected as civilian objects in accordance with the provisions of Article 47 [of draft AP I (now Article 52)].

We note that the use of these objects in support of the military effort is a violation of this article. Should they be used in support of the military effort it is our clear understanding that these objects will lose the special protection under this article.²⁴²

228. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President, commenting on Article 16, stated that:

To avoid confusion, US ratification should be subject to an understanding confirming that the special protection granted by this article is only required for a limited class of objects that, because of their recognized importance, constitute a part of the cultural or spiritual heritage of peoples, and that such objects will lose their protection if they are used in support of the military effort.²⁴³

229. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that “despite false reports by Iraqi authorities there is no evidence of damage caused by coalition forces to the four main Shiah holy sites in Iraq”.²⁴⁴

²⁴¹ US, Memorandum from General Dwight D. Eisenhower, 26 May 1944, reprinted in US, *Annotated Supplement to the Naval Handbook* (1997), § 8.5.1.6, footnote 122.

²⁴² US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 240–241.

²⁴³ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 16.

²⁴⁴ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 1.

230. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that the coalition air sorties were not flown against "religious targets".²⁴⁵

231. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Whether in territory Coalition forces occupied or in parts of Iraq still under Iraqi control, US and Coalition operations in Iraq were carefully attuned to the fact those operations were being conducted in an area encompassing "the cradle of civilization", near many archeological sites of great cultural significance. Coalition operations were conducted in a way that balanced maximum possible protection for those cultural sites against protection of Coalition lives and accomplishment of the assigned mission.

While Article 4(1) of the 1954 Hague Convention provides specific protection for cultural property, Article 4(2) permits waiver of that protection where military necessity makes such a waiver imperative; such "imperative military necessity" can occur when an enemy uses cultural property and its immediate surroundings to protect legitimate military targets in violation of Article 4(1). Coalition forces continued to respect Iraqi cultural property, even where Iraqi forces used such property to shield military targets from attack. However, some indirect damage may have occurred to some Iraqi cultural property due to the concussive effect of munitions directed against Iraqi targets some distance away from the cultural sites.²⁴⁶

The report further stated that "cultural and civilian objects are protected from direct, intentional attack unless they are used for military purposes, such as shielding military objects from attack".²⁴⁷

232. In 1992, during a debate in the Sixth Committee of the UN General Assembly, the US noted that "the coalition forces in the Gulf conflict, desiring to spare the historic temples at Ur, had not bombed them even though MiG aircraft had been stationed there".²⁴⁸

233. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that "the United States considers the obligations to protect natural, civilian, and cultural property to be customary international law . . . Cultural property, civilian objects, and natural resources are protected from intentional attack so long as they are not utilized for military purposes."²⁴⁹ The report further states that:

²⁴⁵ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

²⁴⁶ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 621.

²⁴⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 622.

²⁴⁸ US, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.9, 6 October 1992, p. 11, § 51.

²⁴⁹ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 202, see also p. 204.

Other steps were taken to minimize collateral damage. Although intelligence collection involves utilization of very scarce resources, these resources were used to look for cultural property in order to properly identify it. Target intelligence officers identified the numerous pieces of cultural property or cultural property sites in Iraq; a "no-strike" target list was prepared, placing known cultural property off limits from attack, as well as some otherwise legitimate targets if attack of the latter might place nearby cultural property at risk of damage. Target folders were annotated regarding near-by cultural property, and large-format maps were utilized with "non-targets" such as cultural property highlighted. In examining large-format photographs of targets, each was reviewed and compared with other known data to locate and identify cultural property.

To the degree possible and consistent with allowable risk to aircraft and aircrews, aircraft and munitions were selected so that attacks on targets in proximity to cultural objects would provide the greatest possible accuracy and the least risk of collateral damage to the cultural property . . . Aircrews attacking targets in proximity to cultural property were directed not to expend their munitions if they lacked positive identification of their targets.²⁵⁰

234. In 1999, in submitting the 1954 Hague Convention and its 1999 Second Protocol to the US Senate for advice and consent to ratification, the US President noted that "United States policy and the conduct of operations are entirely consistent with the Convention's provisions". The letter also stated that:

In conformity with the customary practice of nations, the protection of cultural property is not absolute. If cultural property is used for military purposes, or in the event of imperative military necessity, the protection afforded by the Convention is waived, in accordance with the Convention's terms.²⁵¹

235. The Report on US Practice states that "it is the *opinio juris* of the United States that cultural and religious objects should be respected to the extent permitted by military necessity".²⁵²

236. In Order No. 579 issued in 1991, the YPA Chief of Staff stated that:

Any attack on cultural and other protected objects (churches, historical monuments, . . .) is strictly prohibited, except when these objects are used to launch attacks on YPA units. In such cases, the commanding officer in charge shall, before opening fire, warn the opposing side in an appropriate manner to stop fire and vacate the objects in question.²⁵³

237. In 1992, during the conflict in the former Yugoslavia, the SFRY denounced the destruction of churches, icons and religious books by Croatia.²⁵⁴

²⁵⁰ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 205.

²⁵¹ US, White House, Submission of the Hague Convention on Cultural Property to the Senate, Presidential Message, Congressional Record, 6 January 1999, pp. S35-S36, reprinted in *YIHL*, Vol. 2, 1999, p. 422.

²⁵² Report on US Practice, 1997, Chapter 4.3.

²⁵³ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 3.

²⁵⁴ SFRY, Memorandum on Genocide in Croatia, 3 February 1992, p. 3.

238. In 1992, during a debate in the UN Security Council, the SFRY (FRY) qualified the destruction of “historical monuments representing the landmarks of Serbian civilization” in Bosnia and Herzegovina as “flagrant violations of human rights and breaches of humanitarian law”.²⁵⁵

239. In 1993, during a debate in the UN Security Council, the SFRY (FRY) strongly opposed “the shelling of cities, especially Sarajevo, and the destruction of villages, infrastructure, churches and cultural monuments”.²⁵⁶

240. The Report on the Practice of the SFRY (FRY) describes the armed conflict in Croatia as being characterised by the mass destruction of cultural, historical and religious objects and by violations of existing norms by both sides. According to the report, the YPA Chief of General Staff insisted that attacks on cultural and other protected property such as churches and historical monuments were prohibited. Furthermore, the report asserts the SFRY’s view that Article 16 AP II already enjoys customary law status. It maintains that, for this reason, the parties to the conflict between the SFRY and Croatia did not deal with the question of cultural property in their agreements on the application of IHL as they deemed it to be superfluous.²⁵⁷

241. According to the Report on the Practice of Zimbabwe, Zimbabwe believes that “an armed conflict should not be allowed to destroy the people’s heritage”.²⁵⁸

242. In 1993, during a conflict, a government justified the destruction of a church on the grounds that it was being used by an armed opposition group for storing weapons.²⁵⁹

III. Practice of International Organisations and Conferences

United Nations

243. In a resolution adopted in 1979, the UN Security Council took note of:

the efforts of the Government of Lebanon to obtain international recognition for the protection of the archaeological and cultural sites and monuments in the city of Tyre in accordance with international law and the Convention of The Hague of 1954, under which such cities, sites and monuments are considered to be a heritage of interest to all mankind.²⁶⁰

244. In a resolution adopted in 1999 on the protection of civilians in armed conflicts, the UN Security Council strongly condemned “attacks on objects protected under international law” and called on all parties “to put an end to such practices”.²⁶¹

²⁵⁵ SFRY, Statement before the UN Security Council, UN Doc. S/PV.3082, 16 November 1992, § 71.

²⁵⁶ SFRY, Statement before the UN Security Council, UN Doc. S/PV.3203, 20 April 1993, § 28.

²⁵⁷ Report on the Practice of the SFRY (FRY), 1997, Chapter 4.3.

²⁵⁸ Report on the Practice of Zimbabwe, 1998, Chapter 4.3. ²⁵⁹ ICRC archive document.

²⁶⁰ UN Security Council, Res. 459, 19 December 1979, § 5.

²⁶¹ UN Security Council, Res. 1265, 17 September 1999, § 2.

245. In a resolution adopted in 1992, the UN General Assembly expressed alarm that:

although the conflict in Bosnia and Herzegovina is not a religious conflict, it has been characterized by the systematic destruction and profanation of mosques, churches and other places of worship, as well as other sites of cultural heritage, in particular areas currently or previously under Serbian control.²⁶²

Similar concerns were expressed in 1994 and 1995.²⁶³

246. In a resolution adopted in 1996, the UN General Assembly stated that “the General Assembly, recognizing the importance of the protection of cultural property in the event of armed conflict, takes note of the efforts under way to facilitate the implementation of existing international instruments in this field”.²⁶⁴

247. In numerous resolutions adopted between 1977 and 1989, the UN Commission on Human Rights, referring mainly to GC IV, human rights instruments and “other relevant conventions and regulations”, condemned Israel for certain policies and practices in the occupied territories.²⁶⁵ According to the Commission, these policies included “the arming of settlers in the occupied territories to strike at Muslim and Christian religious and holy places”.²⁶⁶ In 1989, the Commission condemned Israel “for its attacks against holy places, such as mosques and churches, and its attempt to occupy Al Aqsa Mosque and to destroy it, as well as for obstructing the freedom of worship and religious practices”.²⁶⁷ In a resolution adopted in 1986, the UN Commission on Human Rights qualified the damage to cultural property in southern Lebanon as a violation of international human rights and strongly condemned Israel “for its human rights violations such as . . . the desecration of places of worship”.²⁶⁸

248. In a resolution on the situation of human rights in the territory of the former Yugoslavia adopted in 1994, the UN Commission on Human Rights denounced “the intentional destruction of mosques, churches and other places of worship”.²⁶⁹

²⁶² UN General Assembly, Res. 47/147, 18 December 1992, preamble.

²⁶³ UN General Assembly, Res. 49/196, 23 December 1994, preamble; Res. 50/193, 22 December 1995, preamble.

²⁶⁴ UN General Assembly, Res. 51/157, 16 December 1996, § 5.

²⁶⁵ UN Commission on Human Rights, Res. 1 (XXXIII), 15 February 1977, § 4; Res. 1 (XXXIV), 14 February 1978, § 4; Res. 1 (XXXV), 21 February 1979, § 3; Res. 1 (XXXVI), 13 February 1980, § 3; Res. 1 (XXXVII), 11 February 1981, § 7; Res. 1982/1, 11 February 1982, § 5; Res. 1983/1, 15 February 1983, § 5; Res. 1984/1, 20 February 1984, §§ 6–7; Res. 1985/1, 19 February 1985, §§ 6–8; Res. 1986/1, 20 February 1986, §§ 6–8; Res. 1987/2, 19 February 1987, §§ 6–8; Res. 1988/1, 15 February 1988, §§ 3–10; Res. 1989/2, 17 February 1989, § 4.

²⁶⁶ UN Commission on Human Rights, Res. 1984/1, § 7(d); Res. 1985/1, 19 February 1985, § 8(d); Res. 1986/1, 20 February 1986, § 8(d); Res. 1987/2, 19 February 1987, § 8(c) and (d); Res. 1988/1, 15 February 1988, § 7.

²⁶⁷ UN Commission on Human Rights, Res. 1989/2, 17 February 1989, § 4(d).

²⁶⁸ UN Commission on Human Rights, Res. 1986/43, 12 March 1986, § 1.

²⁶⁹ UN Commission of Human Rights, Res. 1994/72, 9 March 1994, § 7(e).

249. In a resolution adopted in 1998, the UN Commission on Human Rights expressed its deep concern over reports of the destruction and looting of the cultural and historical heritage of Afghanistan and urged the parties to protect and safeguard such heritage.²⁷⁰

250. In a resolution adopted in 1993, the UNESCO General Conference reaffirmed that "(a) the object and purpose of the 1954 Hague Convention are still valid and realistic" and "(b) the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of customary international law".²⁷¹

251. In a resolution adopted in 1993, the UNESCO General Conference expressed grave concern at the "destruction of the cultural, historical and religious heritage of the Republic of Bosnia and Herzegovina (including mosques, churches and synagogues, schools and libraries, archives and cultural and educational buildings) under the abhorrent policy of 'ethnic cleansing'".²⁷²

252. In a joint declaration issued in 1991 on the situation in the former Yugoslavia, the Director-General of UNESCO and the UN Secretary-General launched a solemn appeal to all parties "to respect the principles enshrined in the Convention for the Protection of Cultural Property in the Event of Armed Conflict and in the Convention concerning the Protection of the World Cultural and Natural Heritage".²⁷³

253. In a press release issued in 1992 in the context of the conflict in Bosnia and Herzegovina, the Director-General of UNESCO declared that, under international law, attacks against the cultural and spiritual heritage of peoples constituted grave breaches that must be vigorously condemned and repressed.²⁷⁴

In a subsequent press release issued in 1997 in the same context, the Director-General described attacks on cultural and religious monuments as "criminal acts".²⁷⁵

254. In 1993, in his Report on the Reinforcement of UNESCO's Action for the Protection of the World Cultural and Natural Heritage, the UNESCO Director-General stated with respect to the scope of the 1954 Hague Convention that:

Although it was considered highly desirable that an international legal instrument which also protected the natural heritage should be developed, it was agreed that the scope of the 1954 Convention – because of its very distinctive character – should not be extended to include the natural heritage. The protection regime laid down for cultural property in the 1954 Convention did not meet the requirements of an adequate protection regime for the natural heritage.²⁷⁶

²⁷⁰ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, §§ 2(g) and 5(h).

²⁷¹ UNESCO, General Conference, Res. 3.5, 13 November 1993, preamble.

²⁷² UNESCO, General Conference, Res. 4.8, 13 November 1993, § 1.

²⁷³ Director-General of UNESCO and UN Secretary-General, Joint declaration on the situation in the former Yugoslavia, 24 October 1991, *UNESCO Courier*, January 1992, p. 50.

²⁷⁴ UNESCO, Press Release, Bosnia-Herzegovina: Appeal by the Director-General of UNESCO, 21 May 1992.

²⁷⁵ UNESCO, Press Release No. 97-98, 17 June 1997.

²⁷⁶ Director-General of UNESCO, Report on the Reinforcement of UNESCO's Action for the Protection of the World Cultural and Natural Heritage, UNESCO Doc. 142 EX/15, 18 August 1993, p. 2, § 6.1.

255. In its Commentary on the Revised Lauswolt Document in 1997, UNESCO stated that the main point of discussion of the meeting of governmental experts on Article 1 of the 1954 Hague Convention was the inclusion of the notion of military necessity. The Commentary justified the wording in Article 12(1) by the need “to clarify that it is intended to increase the protection of cultural property, over that provided by Article 19 of the Hague Convention which mentions only ‘respect’”.²⁷⁷

256. In 1994, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights defined the destruction of the historic Ottoman bridge in Mostar, registered with UNESCO as a monument of major cultural importance, as a violation of IHL.²⁷⁸

257. In 1997, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights recommended that “priority should be given to domestic and international efforts to preserve and protect the cultural patrimony of Afghanistan”.²⁷⁹

Other International Organisations

258. In 1993, in a report on the destruction by war of the cultural heritage in Croatia and Bosnia and Herzegovina, the Committee on Culture and Education of the Parliamentary Assembly of the Council of Europe described the conflicts in Croatia and Bosnia and Herzegovina as “a tragedy for the peoples of these countries and for all Europe”. It stated that these conflicts “have led to a major cultural catastrophe for all the communities of the war zone . . . and also for our European heritage” and that “the phrase ethnic cleansing . . . goes hand in hand with another kind of cleansing – cultural cleansing”.²⁸⁰ In another report on the same topic issued the following year, the Committee noted that, in response to the international reactions to the destruction of the Mostar Bridge by HVO forces, the Herzegovinan Chief of Staff had distributed a brochure describing international provisions concerning IHL, war crimes, cultural heritage and prisoners of war, and promised the severest punishment to members of the armed forces who did not respect the laws of war.²⁸¹

259. In a recommendation adopted in 1994 on the cultural situation in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe stated

²⁷⁷ UNESCO, Commentary on the Revised Lauswolt Document, October 1997, pp. 3 and 16.

²⁷⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 20 February 1994, §§ 46 and 69.

²⁷⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Final report, UN Doc. E/CN.4/1997/59, 20 February 1997, § 131.

²⁸⁰ Council of Europe, Parliamentary Assembly, Committee on Culture and Education, Information report on war damage to the cultural heritage in Croatia and Bosnia Herzegovina, Doc. 6756, 2 February 1993, §§ 1 and 5.

²⁸¹ Council of Europe, Parliamentary Assembly, Committee on Culture and Education, Fourth information report on war damage to the cultural heritage in Croatia and Bosnia Herzegovina, Doc. 6999, 19 January 1994, p. 23.

that “the cultural dimension is, however, constantly exploited by all sides as a means of fuelling the conflict, as a target for intervention, and as a weapon”. It stated that “one priority is that intergovernmental bodies in the area . . . should recognise and pay attention to the cultural dimension”.²⁸²

260. In a statement on the desecration and destruction of the Charar-i-Sharif shrine and mosque complex in 1995, the OIC Contact Group on Jammu and Kashmir strongly condemned “attacks against [the] religious and cultural heritage” of the people concerned and deplored the fact that “the desecration of the holy places of Muslims in India had become a pattern over the years”.²⁸³

261. In a resolution adopted in 1997 on the situation in Bosnia and Herzegovina, the OIC strongly condemned the deliberate destruction of historical, religious and cultural property.²⁸⁴

262. During a conflict, a regional organisation noted “the systematic and wilful destruction of churches and cultural monuments”.²⁸⁵

International Conferences

263. The draft report of Committee III of the CDDH requested that:

the new article be inserted in Part IV, in order to deal with the protection of cultural property along the lines of Article 47 *bis* [Article 53] of Protocol I. The text . . . conforms in general to the wording of Article 47 *bis* [Article 53], but without any reference to “reprisals”, which is a term that apparently will not be used in Protocol II.

The draft report further held that “the reference to the Hague Convention of 1954 . . . is intended to point in particular to Article 19 of that convention, which deals with non-international armed conflicts”.²⁸⁶

264. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to “make every effort to . . . reaffirm and ensure respect for the rules of international humanitarian law applicable during armed conflicts protecting cultural property [and] places of worship . . . and continue to examine the opportunity of strengthening them”.²⁸⁷

265. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “in the

²⁸² Council of Europe, Parliamentary Assembly, Rec. 1239, 14 April 1994, §§ 4 and 9.

²⁸³ OIC, Contact Group on Jammu and Kashmir, Statement on the desecration and destruction of the Charar-i-Sharif shrine and mosque complex, New York, 15 May 1995, annexed to Letter dated 16 May 1995 from Morocco to the President of the UN Security Council, UN Doc. S/1995/392, 16 May 1995, §§ 2–3.

²⁸⁴ OIC, Res. 1/5-EX, 26 September 1997, § 8. ²⁸⁵ ICRC archive document.

²⁸⁶ CDDH, *Official Records*, Vol. XI, CDDH/III/353, Report of Committee III, 21 April–11 June 1976, p. 437, Article 20 *bis*.

²⁸⁷ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(10), *ILM*, Vol. 33, 1994, p. 301.

conduct of hostilities, every effort is made – in addition to the total ban on directing attacks . . . – . . . to protect civilian objects including cultural property, places of worship and diplomatic facilities”.²⁸⁸

266. In a resolution adopted in 2000 on the destruction and desecration of the Islamic historical and cultural relics and shrines in the occupied Azeri territories resulting from the Republic of Armenia’s aggression against the Republic of Azerbaijan, the Islamic Summit Conference noted “the tremendous losses” inflicted by Armenia in the Azeri territories. According to the resolution, these included “complete or partial demolition of rare antiquities and places of Islamic civilization, history and architecture, such as mosques and other sanctuaries, mausoleums and tombs, archaeological sites, museums, libraries, artifact exhibition halls, government theatres and conservatories”, as well as the “destruction of a large number of precious property and millions of books and historic manuscripts and luminaries”. It strongly condemned such “barbaric acts”.²⁸⁹

267. In its Final Declaration, the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, deeply concerned about the number and expansion of conflicts in Africa, denounced the destruction of movable and immovable property of importance to the cultural or spiritual heritage of Africa which seriously violates the rules of IHL.²⁹⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

268. In the *Tadić case* in 1995, the ICTY Appeals Chamber held that “it cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as . . . protection of civilian objects, in particular cultural property.”²⁹¹ The Appeals Chamber explicitly stated that Article 19 of the 1954 Hague Convention, which provides for the application of the provisions of the Convention relating to respect for cultural property “as a minimum” in non-international armed conflicts, constituted a treaty rule which had “gradually become part of customary law”.²⁹²

269. In its review of the indictment in the *Karadžić and Mladić case* in 1996, the ICTY Trial Chamber noted that among the counts included in the first indictment was also “the destruction of sacred sites (count 6)”, an offence which

²⁸⁸ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

²⁸⁹ Islamic Summit Conference, Ninth Session, Doha, November 2000, Res. 25/8-C (IS), preamble and § 1.

²⁹⁰ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Final Declaration, Niamey, 18–20 February 2002, preamble.

²⁹¹ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 127.

²⁹² ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 98.

lay within the scope of the Tribunal's jurisdiction, for it could be characterised as a violation of the laws or customs of war.²⁹³ As to the evidence produced with respect to this count, the Trial Chamber pointed out that "according to estimates provided at hearing by an expert witness . . . a total of 1,123 mosques, 504 Catholic churches and five synagogues were destroyed or damaged [by Bosnian Serb forces], for the most part, in the absence of military activity or after the cessation thereof". It further noted that "aside from churches and mosques, other religious and cultural symbols like cemeteries and monasteries were targets of the attacks".²⁹⁴

270. In its Judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber, with reference to destruction or wilful damage to institutions dedicated to religion or education, stated that:

The damage or destruction must have been committed intentionally to institutions which may clearly be identified as dedicated to religion or education and which were not being used for military purposes at the time of the acts. In addition, the institutions must not have been in the immediate vicinity of military objectives.²⁹⁵

The Trial Chamber found the accused guilty of violating "the laws or customs of war under Article 3(d) of the Statute" for the following acts: "destruction or wilful damage done to institutions dedicated to religion or education (count 14)".²⁹⁶

271. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber stated that "educational institutions are undoubtedly immovable property of great importance to the cultural heritage of peoples in that they are without exception centres of learning, arts, and sciences, with their valuable collections of books and works of art and science".²⁹⁷ With reference to the 1954 Hague Convention, the Trial Chamber argued that "there is little difference between the conditions for the according of general protection and those for the provision of special protection" and stated that "the fundamental principle is that protection of whatever type will be lost if cultural property, including educational institutions, is used for military purposes, and this principle is consistent with the custom codified in Article 27 of the Hague Regulations".²⁹⁸ The Trial Chamber found the accused both guilty of violating "the laws or customs of war, as recognised by Article 3(d) (destruction or wilful damage done to institutions dedicated to religion or education) and pursuant to Article 7(1) of the Statute of the International Tribunal".²⁹⁹

²⁹³ ICTY, *Karadžić and Mladić case*, Review of the Indictment, 11 July 1996, § 6.

²⁹⁴ ICTY, *Karadžić and Mladić case*, Review of the Indictment, 11 July 1996, § 15.

²⁹⁵ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 185.

²⁹⁶ ICTY, *Blaškić case*, Judgement, 3 March 2000, p. 267.

²⁹⁷ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 360.

²⁹⁸ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 362.

²⁹⁹ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, p. 308, Counts 43 and 44.

V. Practice of the International Red Cross and Red Crescent Movement

272. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

96. [Article 53 AP I] applies to: a) objects representing a high cultural value as such; b) objects with an important religious dedication independent of any cultural value.
97. Historic monuments, works of art and places of worship which constitute the cultural or spiritual heritage of peoples enjoy full protection. Their immunity may not be withdrawn, contrary to that of marked cultural objects. Their value is generally self-evident and does not require special identification means.
98. [Article 1 of the 1954 Hague Convention] applies to objects representing a cultural value as such, independently of their religious or secular character.
99. "Cultural object under general protection" means an object of great importance to the cultural heritage of every people, such as:
 - a) monument of architecture, art or history; archaeological sites: groups of buildings which as a whole are of historic or artistic interest;
 - b) buildings whose main purpose is to preserve movable cultural objects such as museums, large libraries, depositories of archives, shelters of cultural objects;
 - c) centres containing a large amount of immovable cultural objects.

...
 225. The immunity of a cultural object under general protection may be withdrawn only in case of imperative military necessity. The competences for establishing this military necessity must be regulated.³⁰⁰

Delegates further stress that, an "unlawful attack of clearly-recognized cultural objects" constitutes a grave breach of the law of war.³⁰¹

273. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about "the protracting internal conflict in Yugoslavia" and urged the parties to the conflict "to save all... cultural objects".³⁰²

274. In 1991, in the context of the conflict in the former Yugoslavia, the Slovene Red Cross condemned the destruction of cultural, historical and religious monuments.³⁰³

275. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of most grave breaches of AP I, listed the following as a war crime to be subject to the jurisdiction of the ICC:

³⁰⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 96–99 and 225.

³⁰¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 778(d).

³⁰² Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

³⁰³ Slovene Red Cross, Protest and Appeal, 22 September 1991, § 1.

making the clearly-recognized historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples and to which special protection has been given by special arrangement . . . the object of attack, causing as a result thereof, where there is no evidence of the use by the adverse Party of such objects in support of the military effort, and when such historic monuments, works of art and places of worship are not located in the immediate proximity of military objectives, when committed wilfully and in violation of international humanitarian law.³⁰⁴

The ICRC also included attacks directed against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples in a list of serious violations of IHL applicable in non-international armed conflicts.³⁰⁵

VI. Other Practice

276. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that “those objects which, by their nature or use, serve primarily humanitarian or peaceful purposes such as religious or cultural needs” cannot be considered as military objectives.³⁰⁶

277. In a mission report in 1983, the ICRC noted that an armed opposition group had issued orders to its forces not to direct attacks against churches.³⁰⁷

278. The Report on SPLM/A Practice states, with reference to the 1983 SPLM/A Manifesto and a resolution on human rights and civil liberties adopted in 1991 by the Politico-Military High Command of the SPLM/A, that “cultural objects which include religious monuments, buildings such as mosques and churches and various icons are respected by the SPLM/A”.³⁰⁸

279. In 1989, in a report on violations of the laws of war in Angola, Africa Watch considered that cultural property as defined by the 1954 Hague Convention must be considered as civilian objects.³⁰⁹

280. In 1993, following the bombing of a church by governmental forces during an internal conflict, the parish priest sent a letter to the ICRC, on behalf of his parishioners, in which he expressed their “vehement protest against this unprovoked and totally inhumane act, which destroyed a place of worship and

³⁰⁴ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 1 (c)(iv).

³⁰⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 3 (x).

³⁰⁶ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-Military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 3(b).

³⁰⁷ ICRC archive document.

³⁰⁸ Report on SPLM/A Practice, 1998, Chapter 4.2, referring to SPLM/A, Manifesto, July 1983, Article 24(C) and PMHC Resolution No. 15: Human Rights and Civil Liberties, 11 September 1991, § 15.2.

³⁰⁹ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, pp. 144–147.

killed the worshipping devotees". He argued that the action was "totally indefensible", given that the church was easy to locate and identify and that there was no military camp in its surroundings.³¹⁰

281. At the 1998 Vienna expert meeting on the revision of the 1954 Hague Convention, the ICA pointed out that since the Second World War, archives and libraries have suffered major losses mainly in the context of non-international conflicts, in particular in Bosnia and Herzegovina, Cambodia and Liberia.³¹¹

B. Use of Cultural Property for Military Purposes

I. Treaties and Other Instruments

Treaties

282. Article 4 of the 1954 Hague Convention provides that:

1. The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict . . .
2. The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

283. Article 19(1) of the 1954 Hague Convention provides that:

In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

284. Article 53 AP I provides that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

- ...
- (b) to use such objects [historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples] in support of the military effort.

Article 53 AP I was adopted by consensus.³¹²

285. Upon ratification of AP I, Canada stated that "it is the understanding of the Government of Canada in relation to Article 53 that . . . the prohibitions

³¹⁰ ICRC archive document.

³¹¹ ICA, Expert Meeting on the Revision of the 1954 Hague Convention, Vienna, 11–13 May 1998, Summary of comments received from States Parties to the Hague Convention, the ICRC and the ICA, pp. 6 and 7.

³¹² CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 206.

contained in sub-paragraphs (a) and (b) of this Article can only be waived when military necessity imperatively requires such a waiver".³¹³

286. Upon ratification of AP I, Ireland stated that "it is the understanding of Ireland in relation to the protection of cultural objects in Article 53 that if the objects protected by this Article are *unlawfully used for military purposes* they will thereby lose protection from attacks directed against such unlawful military use".³¹⁴ (emphasis added)

287. Upon ratification of AP I, Italy stated that "if and so long as the objectives protected by Article 53 are *unlawfully used for military purposes*, they will thereby lose protection".³¹⁵ (emphasis added)

288. Upon ratification of AP I, the Netherlands stated, with respect to Article 53 AP I, that "it is the understanding of the Government of the Kingdom of the Netherlands that if and for as long as the objects and places protected by this Article, *in violation of paragraph (b), are used in support of the military effort*, they will thereby lose such protection".³¹⁶ (emphasis added)

289. Upon signature and upon ratification of AP I, the UK stated, in relation to Article 53 AP I, that "if the objects protected by this Article are *unlawfully used for military purposes* they will thereby lose protection from attacks directed against such unlawful military uses".³¹⁷ (emphasis added)

290. Article 16 AP II provides that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, it is prohibited... to use [historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples] in support of the military effort.

Article 16 AP II was adopted by 35 votes in favour, 15 against and 32 abstentions.³¹⁸

291. Article 6(b) of the 1999 Second Protocol to the 1954 Hague Convention provides that:

A waiver on the basis of imperative military necessity pursuant to Article 4 paragraph 2 of the [1954 Hague] Convention may only be invoked to use cultural property for purposes which are likely to expose it to destruction or damage when and for as long as no choice is possible between such use of the cultural property and another feasible method for obtaining a similar military advantage.

³¹³ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 9.

³¹⁴ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 10.

³¹⁵ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 9.

³¹⁶ Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 8.

³¹⁷ UK, Declarations made upon signature of AP I, 12 December 1977, § g; Reservations and declarations made upon ratification of AP I, 28 January 1998, § k.

³¹⁸ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 143.

292. Article 8 of the 1999 Second Protocol to the 1954 Hague Convention provides that “the Parties to the conflict shall, to the maximum extent feasible . . . avoid locating military objectives near cultural property”.

293. Article 21 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

Without prejudice to Article 28 of the [1954 Hague] Convention, each Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

- (a) any use of cultural property in violation of the Convention or this Protocol.

294. Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention states that “this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties”.

Other Instruments

295. Article 26 of the 1923 Hague Rules of Air Warfare establishes special rules aimed at enabling States “to obtain more efficient protection for important historic monuments situated within their territory”. In particular, States may establish a zone of protection round such monuments, which shall enjoy immunity from bombardment in time of war. This faculty is subject to the condition that States “must abstain from using the monuments and the surrounding zones for military purposes, or for the benefit in any way whatever of its military organization, or from committing within such monument or zone any act with a military purpose in view”. A special regime of inspection is also envisaged for the purpose of ensuring that such condition is not violated.

296. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that hostilities shall be conducted in accordance with Article 53 AP I.

297. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that hostilities shall be conducted in accordance with Article 53 AP I.

298. Article 1 of the 1997 Revised Lauswolt Document provides that:

1. In order to ensure respect for cultural property, that property should not be used for purposes which are likely to expose it to destruction or damage in the event of armed conflict.
2. It is prohibited . . . to use [cultural] property in support of [the] military effort.

299. Article 12(1) of the 1997 Revised Lauswolt Document provides that:

All the provisions of this instrument, the provisions of the Convention and its 1954 Protocol which relate to safeguarding of, and respect for, cultural property shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the States Parties.

300. Section 6.6 of the 1999 UN Secretary-General's Bulletin provides that "in its area of operation, the United Nations force shall not use such cultural property or their immediate surroundings for purposes which might expose them to destruction or damage".

II. National Practice

Military Manuals

301. Argentina's Law of War Manual states that "it is absolutely prohibited . . . to use [cultural property] in support of the war effort".³¹⁹ The manual restates this prohibition with respect to non-international armed conflicts in particular.³²⁰

302. Australia's Defence Force Manual states that "obligations are placed upon all parties to respect cultural property by not exposing it to destruction or damage in the event of armed conflict". The manual further specifies that "historic monuments, places of worship and works of art, which constitute the cultural and spiritual heritage of peoples . . . must not be used in support of any military effort."³²¹

303. Canada's LOAC Manual states that it is prohibited to use historic monuments, works of art of places of worship which constitute the cultural or spiritual heritage of peoples "in support of the military effort".³²² It further provides that "use of a privileged building for improper purposes" constitutes a war crime.³²³ The manual restates this prohibition with respect to non-international armed conflicts in particular.³²⁴

304. Canada's Code of Conduct states that "cultural and religious property should . . . not be used for military purposes".³²⁵

305. Croatia's Commanders' Manual states that:

13. Specifically protected objects may not become military objectives . . .
14. The immunity of a marked cultural object may be withdrawn in case of imperative military necessity.
- ...
62. [In defence] the immunity of a marked cultural object shall only be withdrawn when the fulfilment of the mission absolutely so requires. The withdrawal shall only take place to the extent necessary. Advance warning and removal of distinctive signs shall make the situation clear to the enemy.³²⁶

³¹⁹ Argentina, *Law of War Manual* (1989), § 4.44.

³²⁰ Argentina, *Law of War Manual* (1989), § 7.09.

³²¹ Australia, *Defence Force Manual* (1994), § 928.

³²² Canada, *LOAC Manual* (1999), p. 4-7, § 63(b).

³²³ Canada, *LOAC Manual* (1999), p. 16-4, § 21(c).

³²⁴ Canada, *LOAC Manual* (1999), p. 17-5, § 40.

³²⁵ Canada, *Code of Conduct* (2001), Rule 9, § 5.

³²⁶ Croatia, *Commanders' Manual* (1992), §§ 13-14 and 62.

306. Germany's Military Manual provides that:

903. Cultural property shall neither directly nor indirectly be used in support of military efforts.

...

905. ... It is also prohibited to expose cultural property, its immediate surroundings and the appliances in use for its protection to the danger of destruction or damage by using them for other purposes than originally intended.

906. An exception to this rule shall be permissible only in cases of imperative military necessity. The decision is to be taken by the competent military commander

...

907. The parties to the conflict shall take sufficient precautions to prevent cultural property from being used for military purposes. Example: On 19 June 1944 all military installations were removed from Florence by order of the German authorities so as to prevent this abundant city of art from becoming a theatre of war. The broad avenues surrounding the city of Florence on its former fortifications were regarded as a boundary which was not to be crossed by military transport.³²⁷

307. Germany's IHL Manual states that "it is prohibited to use [movable or immovable property of great importance to the cultural heritage of every people] in support of the military effort".³²⁸

308. Israel's Manual on the Laws of War provides that:

On the other hand, the protection of cultural property is accompanied by an express prohibition to use such property for assisting warfare activities (stationing a sniper on a museum roof, and so on), and once such use has been made, the other side is allowed to do anything required to neutralize the danger, even at the expense of damaging the cultural property. This particular rule in the laws of war was violated by Iraq during the Gulf War, by concealing its warplanes inside the ancient ruins of Nineveh. The Americans refrained from attacking the archaeological ruins, although the laws of war permit this.³²⁹

309. Italy's LOAC Elementary Rules Manual states that:

13. Specifically protected objects may not become military objectives...
14. The immunity of a marked cultural object may be withdrawn in case of imperative military necessity.

...

62. [In defence] the immunity of a marked cultural object shall only be withdrawn when the fulfilment of the mission absolutely so requires. The withdrawal shall only take place to the extent necessary. Advance warning and removal of distinctive signs shall make the situation clear to the enemy.³³⁰

310. Italy's IHL Manual states that "cultural property and places of worship are entitled to protection in all circumstances provided they are not illicitly used for military purposes".³³¹

³²⁷ Germany, *Military Manual* (1992), §§ 903 and 905–907.

³²⁸ Germany, *IHL Manual* (1996), § 701. ³²⁹ Israel, *Manual on the Laws of War* (1998), p. 34.

³³⁰ Croatia, *Commanders' Manual* (1992), §§ 13–14 and 62.

³³¹ Italy, *IHL Manual* (1991), Vol. I, § 12.

311. Kenya's LOAC Manual states that "in defence, withdrawal of immunity of cultural objects marked with distinctive protective signs (in the exceptional case of unavoidable military necessity) shall, when the tactical situation permits, be limited in time and restricted to the less important parts of the object".³³²

312. The Military Manual of the Netherlands states that respect for cultural objects implies that "the objects may not be used in case of armed conflict" but that an exception can be made "in case military necessity requires such an exception. Hence, the protection is not at all absolute."³³³ With respect to non-international armed conflicts in particular, the manual states that historic monuments, works of art and places of worship "may not be used in support of the military effort" and recalls Article 19 of the 1954 Hague Convention.³³⁴

313. The Military Handbook of the Netherlands stresses that cultural property "may not be used for military purposes, except in case of imperative military necessity".³³⁵

314. New Zealand's Military Manual states that for parties to AP I it is prohibited to use historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples "in support of the military effort".³³⁶ The manual further states that "use of a privileged building for improper purposes" is a war crime recognised by the customary law of armed conflict.³³⁷

315. Nigeria's Manual on the Laws of War qualifies "the improper use of a privileged building for military purposes" as a war crime.³³⁸

316. Nigeria's Military Manual emphasises that "marked cultural objects must be protected" in the conduct of defence.³³⁹

317. Russia's Military Manual states that using cultural property, historical monuments, places of worship, and other buildings which represent the cultural or spiritual heritage of a people "in order to gain a military advantage" is a prohibited method of warfare.³⁴⁰

318. South Africa's LOAC Manual protects buildings dedicated to religion and cultural objects such as historic monuments. It provides that "misuse of protected places [buildings dedicated to religion and cultural objects such as historic monuments] for military purposes may make them the subject of an armed attack".³⁴¹

³³² Kenya, *LOAC Manual* (1997), Précis No. 4, p. 9.

³³³ Netherlands, *Military Manual* (1993), p. V-6, § 5.

³³⁴ Netherlands, *Military Manual* (1993), p. XI-7.

³³⁵ Netherlands, *Military Handbook* (1995), p. 7-43.

³³⁶ New Zealand, *Military Manual* (1992), § 520(4), see also § 632(4).

³³⁷ New Zealand, *Military Manual* (1992), 1703(5).

³³⁸ Nigeria, *Manual on the Laws of War* (undated), § 6.

³³⁹ Nigeria, *Military Manual* (1994), p. 44, § 15.

³⁴⁰ Russia, *Military Manual* (1990), § 5(s).

³⁴¹ South Africa, *LOAC Manual* (1996), § 29(b)(i).

319. Spain's LOAC Manual states that combatants must remember that it is prohibited "to use property which constitutes the cultural or spiritual heritage of peoples, whether public or private, in support of the military effort".³⁴²

320. Sweden's IHL Manual points out that:

A condition [for their protection under the 1954 Hague Convention] is that none of these cultural values may be used for military purposes. If this should happen, the adversary is no longer obliged to extend protection to these objects . . . A question of great practical importance is whether the formulation of Additional Protocol admits any possibility of using the object named in Article 53 for military purposes. This does not need to involve such sensational steps as establishing headquarters or ammunition dumps in museum or churches – it would more normally concern using the objects as observation posts. As Article 53 aims at giving these objects protection equivalent to that of hospitals, the intention has obviously been that no such object shall be used for military purpose of any kind. If such an object should be so used, there is no longer any requirement upon the adversary to respect the safeguard.³⁴³

321. Switzerland's Military Manual provides that marked cultural property "must not be used for military purposes. In certain well-defined circumstances, the protection may be lifted by a responsible commander."³⁴⁴

322. Switzerland's Basic Military Manual states that respect for cultural property implies that it is prohibited "to use this property, the appliances in use for its protection and its immediate surroundings for purposes which are likely to expose it to destruction or damage. The obligation to respect may only be derogated from in case military necessity imperatively so demands."³⁴⁵

323. The UK Military Manual states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . (h) improper use of a privileged building for military purposes".³⁴⁶

324. The US Field Manual stresses that "in the practice of the United States, religious buildings, shrines, and consecrated places employed for worship are used only for aid stations, medical installations, or for the housing of wounded personnel awaiting evacuation, provided in each case that a situation of emergency requires such use".³⁴⁷ The manual further states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes')": . . . h. Improper use of privileged buildings for military purposes."³⁴⁸

325. The US Air Force Pamphlet states that "in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of

³⁴² Spain, *LOAC Manual* (1996), Vol. I, § 7.3.b.(2).

³⁴³ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 56–58.

³⁴⁴ Switzerland, *Military Manual* (1984), p. 19.

³⁴⁵ Switzerland, *Basic Military Manual* (1987), Article 53, commentary and Article 54.

³⁴⁶ UK, *Military Manual* (1958), § 626(h).

³⁴⁷ US, *Field Manual* (1956), § 405(c). ³⁴⁸ US, *Field Manual* (1956), § 504(h).

situations involving individual criminal responsibility: . . . (7) wilful and improper use of privileged buildings or localities for military purposes".³⁴⁹

326. The US Air Force Commander's Handbook states that "if possible, US forces should avoid using cultural property for military purposes, or to support the military effort".³⁵⁰

327. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . improperly using privileged buildings for military purposes such as a church steeple as an observation post".³⁵¹

328. The US Rules of Engagement for Operation Desert Storm states that "churches, shrines, schools, museums, national monuments, and any other historical or cultural sites will not be engaged except in self-defence".³⁵²

329. The Annotated Supplement to the US Naval Handbook states that "while the United States is not a Party to the 1954 Hague Convention, it considers it to reflect customary law".³⁵³

330. The YPA Military Manual of the SFRY (FRY) provides that cultural property and its immediate vicinity must not be used directly or indirectly by armed forces for purposes which could provoke enemy attack.³⁵⁴

National Legislation

331. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 53 AP I, as well as any "contravention" of AP II, including violations of Article 16 AP II, are punishable offences.³⁵⁵

332. Under the International Crimes Act of the Netherlands, "using cultural property that is under enhanced protection as referred to in [Articles 10 and 11 of the 1999 Second Protocol to the 1954 Hague Convention] or the immediate vicinity of such property in support of military action" is a crime, when committed in an international armed conflict.³⁵⁶

333. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".³⁵⁷

National Case-law

334. No practice was found.

³⁴⁹ US, *Air Force Pamphlet* (1976), § 15-3(c)(7).

³⁵⁰ US, *Air Force Commander's Handbook* (1980), § 3-5(a).

³⁵¹ US, *Instructor's Guide* (1985), p. 13.

³⁵² US, *Rules of Engagement for Operation Desert Storm* (1991), § D.

³⁵³ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.5.1.6, footnote 122.

³⁵⁴ SFRY (FRY), *YPA Military Manual* (1988), § 88.

³⁵⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁵⁶ Netherlands, *International Crimes Act* (2003), Article 5(4)(b).

³⁵⁷ Norway, *Military Penal Code as amended* (1902), § 108 (b).

Other National Practice

335. At the CDDH, Australia stated that had Article 47 *bis* of draft AP I (now Article 53) been put to a vote, it would have abstained “because the article contains a prohibition against reprisals” even though it agreed “with the prohibition against using these historic monuments in support of the military effort”.³⁵⁸

336. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that “cultural and religious objects . . . should not be used in support of the military effort”.³⁵⁹

337. At the CDDH, the FRG stated that, with respect to Article 47 *bis* of draft AP I (now Article 53), that “*the illegal use of these objects for military purposes, however, will cause them to lose the protection provided for in Article 47 bis as a result of attacks which are to be directed against such military uses*”.³⁶⁰ (emphasis added)

338. According to the Report on the Practice of India, “the protection that is ordinarily available to religious objects is not available if such objects are used for terrorist activities”. The report adds that “in 1984, a number of religious places in Punjab including the famous Golden Temple at Amritsar were identified as terrorist bases and military action taken against them”.³⁶¹

339. According to the Report on the Practice of Israel, it is an IDF policy not to establish military bases or positions in the vicinity of cultural property”.³⁶²

340. At the CDDH, the Netherlands stated, with respect to Article 47 *bis* of draft AP I (now Article 53), that “*the illegitimate use of those historical objects for military purposes would deprive them of the protection afforded by Article 47 bis*”.³⁶³ (emphasis added)

341. According to the Report on the Practice of Russia, the use of cultural property, historic monuments or places of worship that constitute a part of the cultural or spiritual heritage of a people in support of the military effort is a prohibited method of warfare.³⁶⁴

342. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that Rwanda’s armed forces avoid establishing military installations in proximity to cultural and religious objects and turning these objects into military bases.³⁶⁵

³⁵⁸ Australia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 219–220.

³⁵⁹ Egypt, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons case*, September 1995, p. 21, § 50.

³⁶⁰ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 225 and 226.

³⁶¹ Report on the Practice of India, 1997, Chapter 1.3

³⁶² Report on the Practice of Israel, 1997, Chapter 1.7.

³⁶³ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 207–208.

³⁶⁴ Report on the Practice of Russia, 1997, Chapter 1.6.

³⁶⁵ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 4.3.

343. At the CDDH, the UK declared, with respect to Article 47 *bis* of draft AP I (now Article 53), that “if these objects are *unlawfully used for military purposes*, they will thereby lose effective protection as a result of attacks directed against such unlawful military uses”.³⁶⁶ (emphasis added)

344. At the CDDH, the US stated, with respect to Article 47 *bis* of draft AP I (now Article 53), that “the use of these objects in support of the military effort is a violation of this article”.³⁶⁷

345. In 1992, in its final report to Congress on the conduct of hostilities in the Gulf War, the US Department of Defense stated that contrary to the 1954 Hague Convention and

certain principles of customary law codified in [AP I], the Government of Iraq placed military assets (personnel, weapons, and equipment) in civilian populated areas and next to protected objects (mosques, medical facilities, and cultural sites) in an effort to protect them from attack.³⁶⁸

The report further described how Iraq had used “cultural property to protect legitimate targets from attack”:

A classic example was the positioning of two fighter aircraft adjacent to the ancient temple of Ur... While the law of war permits the attack of the two fighter aircraft, with Iraq bearing responsibility for any damage to the temple, Commander-in-Chief, Central Command (CINCCENT) elected not to attack the aircraft on the basis of respect for cultural property and the belief that positioning of the aircraft adjacent to Ur (without servicing equipment or a runway nearby) effectively had placed each out of action, thereby limiting the value of their destruction by Coalition air forces when weighed against the risk of damage to the temple. Other cultural property similarly remained on the Coalition no-attack list, despite Iraqi placement of valuable military equipment in or near those sites.³⁶⁹

346. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

The US and its Coalition partners in Desert Storm recognized that they were fighting in the “cradle of civilization” and took extraordinary measures to minimize damage to cultural property. Regrettably, these precautionary steps were met by Iraqi use of cultural property within its control to shield military objects from attack. A classical example is the positioning of two MiG-21 fighter aircraft at the entrance of the ancient temple of Ur. Although the law of war permitted their attack, and although each could have been destroyed utilizing precision-guided munitions, US commanders recognized that the aircraft for all intents and purposes

³⁶⁶ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 238.

³⁶⁷ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, pp. 240–241.

³⁶⁸ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 624.

³⁶⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 626.

were incapable of military operations from their position, and elected against their attack for fear of collateral damage to the temple.³⁷⁰

III. Practice of International Organisations and Conferences

United Nations

347. In a resolution adopted in 1993, the UNESCO General Conference reaffirmed that "(a) the object and purpose of the 1954 Hague Convention are still valid and realistic" and "(b) the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of customary international law".³⁷¹

348. In a joint declaration issued in 1991 on the situation in the former Yugoslavia, the Director-General of UNESCO and the UN Secretary-General launched a solemn appeal to all parties "to respect the principles enshrined in the Convention for the Protection of Cultural Property in the Event of Armed Conflict and in the Convention concerning the Protection of the World Cultural and Natural Heritage".³⁷²

Other International Organisations

349. In a press release issued in 2001 following allegations that the historic Arabati Baba Teke Dervish Monastery and the area next to the Painted Mosque in Tetovo were being used as a base for military operations by the ethnic Albanian armed groups operating in Macedonia, the OSCE Spillover Monitoring Mission to Skopje expressed its "great concern" about "the misuse of religious and cultural monuments for military reasons, which is not acceptable according to international law".³⁷³

International Conferences

350. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

351. In the *Tadić* case in 1995, the ICTY Appeals Chamber held that "it cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as . . . protection of civilian objects, in particular cultural property."³⁷⁴ The Appeals Chamber explicitly stated that Article 19 of the

³⁷⁰ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 204.

³⁷¹ UNESCO, General Conference, Res. 3.5, 13 November 1993, preamble.

³⁷² Director-General of UNESCO and UN Secretary-General, Joint declaration on the situation in the former Yugoslavia, 24 October 1991, *UNESCO Courier*, January 1992, p. 50.

³⁷³ OSCE Spillover Monitoring Mission to Skopje, Press Release, OSCE Skopje Mission concerned about misuse of religious and cultural sites, 7 August 2001.

³⁷⁴ ICTY, *Tadić* case, Interlocutory Appeal, 2 October 1995, § 127.

1954 Hague Convention, which provides for the application of the provisions of the Convention relating to respect for cultural property “as a minimum” in non-international armed conflicts, constituted a treaty rule which had “gradually become part of customary law”.³⁷⁵

V. Practice of the International Red Cross and Red Crescent Movement

352. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that they must distinguish between “historic monuments, works of art and places of worship which constitute the cultural or spiritual heritage of peoples” on the one hand, which enjoy full protection and whose immunity from use for military purposes may not be withdrawn, and “objects of great importance to the cultural heritage of every people” on the other hand, which may not be used for military purposes in principle but whose immunity from such use may be withdrawn in case of imperative military necessity.³⁷⁶

353. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about “the protracting internal conflict in Yugoslavia” and urged the parties to the conflict “not to use [cultural objects] for military purposes”.³⁷⁷

VI. Other Practice

354. No practice was found.

C. Respect for Cultural Property

Note: For practice concerning the destruction of cultural property in general, see section A of this chapter.

I. Treaties and Other Instruments

Treaties

355. Article 56 of the 1899 HR provides that:

The property of the communes, that of religious, charitable, and educational institutions, and those of arts and science, even when State property, shall be treated as private property.

All seizure of, and destruction, or intentional damage done to such institutions, to historical monuments, works of art or science, is prohibited, and should be made the subject of proceedings.

³⁷⁵ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 98.

³⁷⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 97, 219 and 225.

³⁷⁷ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

356. Article 56 of the 1907 HR provides that:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.

357. Article 4(3) of the 1954 Hague Convention provides that:

The High Contracting Parties further undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They shall refrain from requisitioning movable cultural property situated in the territory of another High Contracting Party.

358. Article 19(1) of the 1954 Hague Convention provides that:

In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

359. Article 15 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

1. Any person commits an offence within the meaning of this Protocol if that person intentionally and in violation of the Convention or this Protocol commits any of the following acts:
 - ...
 - (e) theft, pillage or misappropriation of, or acts of vandalism directed against cultural property protected under the Convention.
2. Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties.

Other Instruments

360. Article 34 of the 1863 Lieber Code provides that:

As a general rule, the property belonging to churches, to hospitals, or other establishments of an exclusively charitable character, to establishments of education, or foundations for the promotion of knowledge, whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of a scientific character – such property is not to be considered public property in the sense of paragraph 31; but it may be taxed or used when the public service may require it.

361. Article 36 of the 1863 Lieber Code provides that:

If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering

state or nation may order them to be seized or removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated or wantonly destroyed or injured.

362. Article 8 of the 1874 Brussels Declaration provides that:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences even when State property, shall be treated as private property.

All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science should be made the subject of legal proceedings by the competent authorities.

363. Article 53 of the 1880 Oxford Manual provides that:

The property of municipalities, and that of institutions devoted to religion, charity, education, art and science, cannot be seized.

All destruction or wilful damage to institutions of this character, historic monuments, archives, works of art, or science, is formally forbidden, save when urgently demanded by military necessity.

364. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including "wanton destruction of religious, charitable, educational and historic buildings and monuments".

365. In the 1943 London Declaration, the Allied governments expressed their intention:

to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled. Accordingly, the governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealing with, property, rights and interests of any description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

366. Article 3(d) of the 1993 ICTY Statute includes among the violations of the laws or customs of war in respect to which the Tribunal has jurisdiction "seizure of, destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science".

367. Pursuant to Article 20(e)(iv) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “seizure of, destruction of or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and sciences” is a war crime.

368. Article 1(3) of the 1997 Revised Lauswolt Document states that “any form of theft, pillage or misappropriation of, any act of vandalism directed against, any illicit transaction in, or any other breach of integrity of cultural property is prohibited”.

369. Article 12(1) of the 1997 Revised Lauswolt Document provides that:

All the provisions of this instrument, the provisions of the Convention and its 1954 Protocol which relate to safeguarding of, and respect for, cultural property shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the States Parties.

370. Section 6.6 of the 1999 UN Secretary-General’s Bulletin states that “theft, pillage, misappropriation and any act of vandalism directed against cultural property is strictly prohibited”.

II. National Practice

Military Manuals

371. Argentina’s Law of War Manual provides that:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property.

All seizure of, destruction or wilful damage done to institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.³⁷⁸

372. Australia’s Defence Force Manual states that:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, is treated as private property and any seizure or destruction of that property is prohibited. If that property is located in any area which is subject to seizure or bombardment, then it must be secured against all avoidable damage and injury.³⁷⁹

373. Canada’s LOAC Manual provides, with respect to occupied territory, that:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, shall be treated as private property even when owned by the state. All seizure or destruction of, or wilful damage to, institutions of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.³⁸⁰

³⁷⁸ Argentina, *Law of War Manual* (1969), § 5.016.

³⁷⁹ Australia, *Defence Force Manual* (1994), § 741.

³⁸⁰ Canada, *LOAC Manual* (1999), p. 12-9, § 82.

374. Canada's Code of Conduct provides that soldiers must do their best to ensure that buildings and property dedicated to cultural or religious purposes "are not stolen, damaged or destroyed . . . Thus, every attempt should be made to avoid unnecessary desecration or destruction of cultural objects and places of worship."³⁸¹

375. Germany's Military Manual states that:

559. The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences shall be treated as private property.

...

561. It is prohibited to requisition, destroy or damage cultural property.

...

908. Any acts of theft, pillage, misappropriation, confiscation or vandalism directed against cultural property are prohibited.

...

919. The protection of cultural property also extends to a period of occupation. This implies that a party which keeps a territory occupied shall be bound to prohibit, prevent and, if necessary, put a stop to any theft, pillage, confiscation or other misappropriation of, and any acts of vandalism directed against cultural property.

920. It is prohibited to seize, or wilfully destroy or damage institutions dedicated to religion, charity and education, the arts and sciences; the same shall apply to historic monuments and other works of art and science.³⁸²

The manual further provides that grave breaches of IHL are in particular "extensive destruction of cultural property and places of worship".³⁸³

376. Germany's IHL Manual states that "it is prohibited to confiscate, requisition or misappropriate [movable or immovable property of great importance to the cultural heritage of every people]".³⁸⁴

377. Israel's Manual on the Laws of War states that "the Geneva Conventions contain provisions banning the looting of . . . cultural property. Looting is regarded as a despicable act that tarnishes both the soldier and the IDF, leaving a serious moral blot."³⁸⁵

378. Italy's IHL Manual states that:

The property of provinces and municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when property of the State or of other public entities in the occupied territory, shall be treated as private property.

The occupying military authority shall take all necessary measures to prohibit and punish any seizure of, destruction or wilful damage done to such property.³⁸⁶

The manual further states that an occupying power has the duty "to abstain from pillaging the cultural property" in the occupied territory.³⁸⁷

³⁸¹ Canada. *Code of Conduct* (2001), Rule 9, §§ 1 and 2.

³⁸² Germany, *Military Manual* (1992), §§ 559, 561, 908 and 919–920.

³⁸³ Germany, *Military Manual* (1992), § 1209. ³⁸⁴ Germany, *IHL Manual* (1996), § 701.

³⁸⁵ Israel, *Manual on the Laws of War* (1998), p. 62, see also p. 35.

³⁸⁶ Italy, *IHL Manual* (1991), Vol. I, § 46.

³⁸⁷ Italy, *IHL Manual* (1991), Vol. I, § 48(5).

379. The Military Manual of the Netherlands provides that “theft, pillage and destruction of cultural property are also prohibited”.³⁸⁸ It recalls that, according to Article 19 of the 1954 Hague Convention, the provisions of that Convention on respect for cultural property apply, as a minimum, in non-international armed conflicts.³⁸⁹

380. The Military Handbook of the Netherlands states that “cultural property may not be stolen, plundered or exposed to vandalism. It may not be requisitioned either.”³⁹⁰

381. New Zealand’s Military Manual provides, with reference to occupied areas, that:

The property of municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when State property, shall be treated as private property. All seizure or destruction of, or wilful damage to, property of this character, historic monuments, works of art and science, is forbidden, and should be made the subject of legal proceedings.³⁹¹

382. Nigeria’s Operational Code of Conduct states that during military operations, all officers and men of the armed forces shall observe the rules whereby “no property, building, etc. will be destroyed maliciously” and “churches and mosques must not be desecrated”.³⁹²

383. Nigeria’s Manual on the Laws of War states that “real property belonging to local government such as hospitals and buildings dedicated to public worship, charity, education, religion, science and art should be treated as private property . . . Destruction or damage of such buildings is forbidden.”³⁹³

384. Sweden’s Military Manual states that it is forbidden to pillage or seize cultural property such as museum collections, churches, historic monuments and other cultural sites.³⁹⁴

385. Switzerland’s Basic Military Manual states that respect for cultural property implies that it is prohibited “to use, steal, pillage or misappropriate cultural property”. The manual further states that “the property of municipalities, institutions dedicated to religion, charity and education, the arts and sciences, even when State property, must be treated as private property”.³⁹⁵

386. The UK Military Manual provides that:

611. Property belonging to local, that is, provincial, county, municipal and parochial, authorities, . . . as well as the property of institutions dedicated to public worship, charity, education, science and art – such as churches, chapels, synagogues, mosques, almshouses, hospitals, schools, museums, libraries, and the like – even

³⁸⁸ Netherlands, *Military Manual* (1993), p. V-6, § 5.

³⁸⁹ Netherlands, *Military Manual* (1993), p. XI-1, § 1.

³⁹⁰ Netherlands, *Military Handbook* (1995), p. 7-43.

³⁹¹ New Zealand, *Military Manual* (1992), § 1343.

³⁹² Nigeria, *Operational Code of Conduct* (1967), § 4(f)–(g).

³⁹³ Nigeria, *Manual on the Laws of War* (undated), § 27.

³⁹⁴ Sweden, *Military Manual* (1976), p. 30.

³⁹⁵ Switzerland, *Basic Military Manual* (1987), Articles 53, commentary, and 169.

when state property, must be treated as private property. Troops, sick and wounded, horses, and stores may therefore be housed in buildings of that nature, but such use is justified only by military necessity. Any seizure or destruction of, or wilful damage to, the property of such institutions, or to historic monuments or works of science and art, is forbidden, as is, generally, any destruction of property which is not required by imperative military necessity. Thus, it would not be improper to place sick and wounded in a church if no accommodation could immediately be found elsewhere, but a consecrated building should not be used for the purpose of barracks, stables, or stores, unless it is absolutely necessary... In 1870, the German occupation authorities housed 9,000 French prisoners of war in the Cathedral of Orleans.

...

613. Other movable public property, not susceptible of use for military operations, as well as that belonging to the institutions mentioned above, which is to be treated as private property must be respected and cannot be appropriated, for instance, crown jewels, pictures, collections of works of art, and archives. However, papers connected with the war may be seized, even when forming part of archives.³⁹⁶

387. The US Field Manual reproduces Article 56 of the 1907 HR and states that the property included in this rule "may be requisitioned in case of necessity for quartering the troops and the sick and wounded, storage of supplies and material, housing of vehicles and equipment, and generally as prescribed for private property".³⁹⁷

388. The Annotated Supplement to the US Naval Handbook states that "while the United States is not a Party to the 1954 Hague Convention, it considers it to reflect customary law".³⁹⁸

National Legislation

389. Bulgaria's Penal Code as amended, in a part dealing with "crimes against the laws and customs of waging war", provides for the punishment of "any person who steals, unlawfully appropriates or conceals [cultural or historical monuments and objects, works of art, buildings and equipment intended for cultural, scientific or other humanitarian purposes], or imposes contribution or confiscation with respect to such objects".³⁹⁹

390. China's Law Governing the Trial of War Criminals provides that "plundering of historical, artistic or other cultural treasures" constitutes a war crime.⁴⁰⁰

391. The Draft Amendments to the Penal Code of El Salvador punishes anyone who, during an international or a non-international armed conflict, seizes, loots or vandalises "clearly recognised cultural property or places of worship; works of art which constitute the cultural and spiritual heritage of peoples; and/or which have been granted protection pursuant to special agreements".

³⁹⁶ UK, *Military Manual* (1956), §§ 611, and footnote 4, and 613.

³⁹⁷ US, *Field Manual* (1956), § 405.

³⁹⁸ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.5.1.6, footnote 122.

³⁹⁹ Bulgaria, *Penal Code as amended* (1968), Article 414(2).

⁴⁰⁰ China, *Law Governing the Trial of War Criminals* (1946), Article 3(37).

It defines cultural property in accordance with Article 1 of the 1954 Hague Convention.⁴⁰¹

392. Under Estonia's Penal Code, "damaging or illegal appropriation of cultural monuments, churches, or other structures or objects of religious significance, works of art or science, archives of cultural value, libraries, museums or scientific collections, which are not being used for military purposes" is a war crime.⁴⁰²

393. Italy's Law of War Decree as amended provides that:

The property of provinces and municipalities, that of institutions dedicated to religion, charity and education, the arts and sciences, even when property of the State or of other public entities in the occupied territory, shall be treated as private property.

The occupying military authority shall take all necessary measures to prohibit and punish any seizure of, destruction or wilful damage done to such property.⁴⁰³

394. Under Lithuania's Criminal Code as amended, the "plundering of national treasures in occupied or annexed territory" constitutes a war crime.⁴⁰⁴

395. Luxembourg's Law on the Repression of War Crimes provides for the punishment of "the taking . . . by any means, from the territory of Luxembourg, of objects of whatever nature".⁴⁰⁵

396. Under the International Crimes Act of the Netherlands, "destroying or appropriating on a large scale cultural property that is under the protection of [the 1954 Hague Convention and the 1999 Second Protocol thereto]", as well as "theft, pillaging or appropriation of – or acts of vandalism directed against – cultural property under the protection of the [1954 Hague Convention]", are crimes, when committed in an international armed conflict.⁴⁰⁶

397. Nicaragua's Military Penal Code punishes a soldier who commits "any act of pillage or appropriation of . . . cultural property, as well as any act of vandalism against such property and the requisitioning of those located in territory under military occupation".⁴⁰⁷

398. Nicaragua's Draft Penal Code punishes anyone who, during an international or a non-international armed conflict, "seizes, loots or vandalises clearly recognised cultural property or places of worship; works of art which constitute the cultural and spiritual heritage of peoples; and/or which have been granted protection pursuant to special agreements". It defines cultural property in accordance with Article 1 of the 1954 Hague Convention.⁴⁰⁸

⁴⁰¹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Destrucción de bienes culturales".

⁴⁰² Estonia, *Penal Code* (2001), § 107.

⁴⁰³ Italy, *Law of War Decree as amended* (1938), Article 61.

⁴⁰⁴ Lithuania, *Criminal Code as amended* (1961), Article 339.

⁴⁰⁵ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(6).

⁴⁰⁶ Netherlands, *International Crimes Act* (2003), Article 5(4)(c) and (e).

⁴⁰⁷ Nicaragua, *Military Penal Code* (1996), Article 61.

⁴⁰⁸ Nicaragua, *Draft Penal Code* (1999), Article 469.

399. Poland's Penal Code provides for the punishment of "any person who, in violation of international law, . . . damages or pillages cultural property in occupied or controlled territory or in the combat area" and provides for a harsher punishment "if the offence is directed against cultural property of particular importance".⁴⁰⁹

400. Portugal's Penal Code provides for the punishment of whoever

in times of war, armed conflict or occupation and violating the norms or principles of general or common international law, destroys or damages, without military necessity, cultural or historical monuments or establishments affected to science, arts, culture [and] religion.⁴¹⁰

401. Romania's Penal Code provides for the punishment of "robbery or appropriation of any kind of . . . cultural heritage from territories under military occupation".⁴¹¹

402. Spain's Military Criminal Code punishes a soldier who commits "any act of pillage or appropriation of . . . cultural property, as well as any act of vandalism against such property and the requisitioning of those located in territory under military occupation".⁴¹²

403. Switzerland's Law on the Protection of Cultural Property states that protection includes respect for cultural property, which means, *inter alia*, "to prohibit, prevent and put a stop to any form of theft, pillage or misappropriation, and any acts of vandalism; [and] to refrain from the requisitioning of movable cultural property".⁴¹³

404. Under Ukraine's Criminal Code, "pillage of national treasures in occupied territories" is a punishable "crime against peace, security of mankind and international legal order".⁴¹⁴

National Case-law

405. In the *Lingenfelder case* in 1947, the accused was charged with destruction of public monuments. It was shown that in May 1941 the accused, acting upon orders of a German official, used four horses to pull down the monument erected by the inhabitants of Arry, Moselle to fellow citizens who died during the First World War, destroyed the marble slabs bearing the names of the dead, and broke the statue of Joan of Arc. In its judgement, the French Permanent Military Tribunal at Metz held that these acts constituted violations of the laws and customs of war and were punishable war crimes. The accused was convicted under the terms of Article 257 of the French Penal Code which covers in French municipal law the acts prohibited under Article 56 of the 1907 HR.⁴¹⁵

⁴⁰⁹ Poland, *Penal Code* (1997), Article 125.

⁴¹⁰ Portugal, *Penal Code* (1996), Article 242. ⁴¹¹ Romania, *Penal Code* (1968), Article 360.

⁴¹² Spain, *Military Criminal Code* (1985), Article 77(7).

⁴¹³ Switzerland, *Law on the Protection of Cultural Property* (1966), Article 2(3).

⁴¹⁴ Ukraine, *Criminal Code* (2001), Article 438.

⁴¹⁵ France, Permanent Military Tribunal at Metz, *Lingenfelder case*, Judgement, 11 March 1947.

406. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes and crimes against humanity against civilians in that they participated in atrocities such as plunder of public and private property. The Tribunal found that, on 17 September 1940, Keitel issued an order to the military commander in occupied France providing for the illegal seizure of property and its transfer to Germany. The order provided that the Reichsminister "is entitled to transport to Germany cultural goods which appear valuable to him and to safeguard them there. The Führer has reserved for himself the decision as to their use."⁴¹⁶

407. In its judgement in the *Weizsaecker* case in 1949, the US Military Tribunal at Nuremberg referred to Article 56 of the 1907 HR and ruled that all seizure of, destruction or wilful damage done to institutions of religious or charitable character, historic monuments, works of art and science was forbidden and should be the subject of legal proceedings.⁴¹⁷

Other National Practice

408. In 1992, in a letter to the President of the UN Security Council and to the UN Secretary-General, Azerbaijan referred to data provided to the UN fact-finding mission in the region concerning illegal actions by Armenia and included the damage caused to and destruction of places of worship.⁴¹⁸

409. The Report on the Practice of Bosnia and Herzegovina notes that members of the forces of the Republic of Bosnia and Herzegovina "did not commit any criminal acts of endangering cultural and religious facilities" during the conflict in the former Yugoslavia. It gives as an example the order issued by the Commander-in-chief on 17 December 1993 allowing Catholic priests unimpeded passage to visit the Franciscan monastery in Fojnica. The report further recalls another order issued by the same commander on 30 June 1994 that the facility in Guca Gora be emptied, secured and prepared to be handed over to Catholic priests.⁴¹⁹

410. In 1973, in a statement on the return of plundered works of art, China stated that:

The precious cultural heritage of the Chinese people also suffered from plunder and destruction by imperialists and colonialists. In the past 100 years, starting from 1840, troops of the imperialist powers invaded China many times, and each time the cultural heritage of the Chinese people suffered tremendously. They took away what they could, smashed those items which they could not take as a whole and then took away the pieces, destroyed and burned what they eventually could not take away. Apart from the large scale plunder and destruction by the invading

⁴¹⁶ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial)* case, Judgement, 28 October 1948.

⁴¹⁷ US, Military Tribunal at Nuremberg, *Weizsaecker* case, Judgement, 14 April 1949.

⁴¹⁸ Azerbaijan, Letters dated 11 June 1992 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/24103, 16 June 1992, p. 1.

⁴¹⁹ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 4.3.

troops, China's historical relics and art treasures were also stolen by adventurers of different kinds by fair or foul means.⁴²⁰

411. In 1977, in a statement on human rights in the Israeli-occupied territories, China stated that the Israeli Authority had "rudely interfered with the religious beliefs of the Arab people, had of lot of old buildings in Jerusalem pulled down and the occupants moved elsewhere, and damaged the precious Arab and Muslim historical relics".⁴²¹

412. In 1991, in a letter to the UN Secretary-General, Iran expressed alarm at the "reported desecration of holy shrines".⁴²²

413. According to the Report on the Practice of Rwanda, cultural property is protected by Rwanda's armed forces and the pillage of cultural and religious goods is prohibited.⁴²³

414. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "cultural... property was confiscated [and] pillage was widespread" in violation of the 1954 Hague Convention.⁴²⁴ The report further stated that "Iraqi war crimes were widespread and premeditated. They include... looting of cultural property."⁴²⁵

415. According to the Report on the Practice of Zimbabwe, the protection afforded to private property by Section 16 of the Constitution would extend to cultural property within national territory.⁴²⁶

416. During an internal conflict, acts of pillage were carried out by the armed forces of a State against churches in the run-up to elections.⁴²⁷

III. Practice of International Organisations and Conferences

United Nations

417. In a resolution adopted in 1992, the UN General Assembly expressed alarm that:

although the conflict in Bosnia and Herzegovina is not a religious conflict, it has been characterized by the systematic destruction and profanation of mosques,

⁴²⁰ China, Statement on the Issue of Return of Plundered Works of Art to its Country, by Comrade Wang Runsheng, 18 December 1973, *Selected Documents of the Chinese Delegation to the United Nations*, The People's Press, Beijing, 1973, pp. 56–57.

⁴²¹ China, Statement on the Issue of Human Rights in Israeli Occupied Territories, by Zhou Nan, Chinese Representative, 18 November 1977, *Selected Documents of the Chinese Delegation to the United Nations*, The People's Press, Beijing, 1977, pp. 92–93.

⁴²² Iran, Letter dated 22 March 1991 to the UN Secretary-General, UN Doc. S/22379, 22 March 1991, p. 1.

⁴²³ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, 1997, Chapter 4.3.

⁴²⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 620.

⁴²⁵ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

⁴²⁶ Report on the Practice of Zimbabwe, 1998, Chapter 4.3.

⁴²⁷ ICRC archive document.

churches and other places of worship, as well as other sites of cultural heritage, in particular areas currently or previously under Serbian control.⁴²⁸

Similar concerns were expressed in 1994 and 1995.⁴²⁹

418. In a resolution adopted in 1998, the UN Commission on Human Rights expressed its deep concern over reports of the destruction and looting of the cultural and historical heritage of Afghanistan and urged the parties to protect and safeguard such heritage.⁴³⁰

419. In a resolution adopted in 1993, the UNESCO General Conference reaffirmed that "(a) the object and purpose of the 1954 Hague Convention are still valid and realistic" and "(b) the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of customary international law".⁴³¹

420. In a joint declaration issued in 1991 on the situation in the former Yugoslavia, the Director-General of UNESCO and the UN Secretary-General launched a solemn appeal to all parties "to respect the principles enshrined in the Convention for the Protection of Cultural Property in the Event of Armed Conflict and in the Convention concerning the Protection of the World Cultural and Natural Heritage".⁴³²

421. In a press release issued in February 2001 following press reports of the deliberate destruction by the Taliban of more than a dozen ancient statues in the Afghan National Museum in Kabul and of an order by the supreme Taliban leader to destroy all statues in Afghanistan which, as human representations, were viewed as unIslamic, UNESCO strongly appealed to those directly concerned to stop the destruction of the cultural heritage of the peoples of Afghanistan.⁴³³

422. In a press release issued in March 2001, the Director-General of UNESCO condemned the Taliban's destruction of the Buddhas of Bamiyan and described it as a "crime against culture". He stated that "it is abominable to witness the cold and calculated destruction of cultural properties which were the heritage of the Afghan people, and, indeed, of the whole of humanity".⁴³⁴

423. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that "massive violations of human rights and international humanitarian law" were committed "deliberately to achieve ethnically homogeneous areas" through a "variety of methods used in ethnic cleansing", including

⁴²⁸ UN General Assembly, Res. 47/147, 18 December 1992, preamble.

⁴²⁹ UN General Assembly, Res. 49/196, 23 December 1994, preamble, Res. 50/193, 22 December 1995, preamble.

⁴³⁰ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, §§ 2(g) and 5(h).

⁴³¹ UNESCO, General Conference, Res. 3.5, 13 November 1993, preamble.

⁴³² Director-General of UNESCO and the UN Secretary-General, Joint declaration on the situation in the former Yugoslavia, 24 October 1991, *UNESCO Courier*, January 1992, p. 50.

⁴³³ UNESCO, Press Release No. 2001-27, 26 February 2001.

⁴³⁴ UNESCO, Press Release No. 2001-38, 12 March 2001.

the "destruction of mosques".⁴³⁵ The Special Rapporteur deplored the fact that "Ukrainians in the Banja Luka region were reportedly subjected to psychological pressure which included the blowing up of the Ukrainian church in Prnjavor, the destruction of the old church in Dubrava and of a village church near Omarska".⁴³⁶ He added that "although the conflict... is not regarded as a religious one, it has been characterised by the systematic destruction and profanation of mosques, Catholic churches and other places of worship".⁴³⁷ In another report the same year, under the heading "Other violations of human rights and humanitarian law", the Special Rapporteur noted deliberate damage to or destruction of church buildings.⁴³⁸

424. In 1997, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights stated that "acts of looting of the Afghan cultural heritage constitute a clear violation of the laws of war". Reference was not made to the 1954 Hague Convention, but "the trafficking of such artifacts" was qualified as "a legal violation of the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property" and of the "domestic laws of the countries concerned". The report further declared that "the tacit approval by Governments and museums of such practices [looting and illegal trafficking] may amount to 'cultural genocide' or to 'genocide of the cultural rights' of the Afghan people".⁴³⁹

Other International Organisations

425. In 1993, in a report on the destruction by war of the cultural heritage in Croatia and Bosnia and Herzegovina, the Committee on Culture and Education of the Parliamentary Assembly of the Council of Europe stated that the conflicts in Croatia and Bosnia and Herzegovina "have led to a major cultural catastrophe for all the communities of the war zone... and also for our European heritage", basing this statement in part on the fact that "churches and mosques are annihilated".⁴⁴⁰

426. In a resolution adopted in 1983, the Council of the League of Arab States condemned Israel for its "robbing of archaeological and cultural properties" and "violating the sanctity of places of worship".⁴⁴¹

⁴³⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1993/50, 10 February 1993, §§ 16–17.

⁴³⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1993/50, 10 February 1993, § 23.

⁴³⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1993/50, 10 February 1993, § 106.

⁴³⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 46 and 69.

⁴³⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Final report, UN Doc. E/CN.4/1997/59, 20 February 1997, §§ 117 and 131.

⁴⁴⁰ Council of Europe, Parliamentary Assembly, Committee on Culture and Education, Information report on the destruction of the cultural heritage of Croatia and Bosnia and Herzegovina, Doc. 6756, 2 February 1993, §§ 1, 3 and 5.

⁴⁴¹ League of Arab States, Council, Res. 4237, 31 March 1983, § 1(b).

International Conferences

427. In a resolution adopted in 2000 on the destruction and desecration of the Islamic historical and cultural relics and shrines in the occupied Azeri territories resulting from the Republic of Armenia's aggression against the Republic of Azerbaijan, the Islamic Summit Conference, referring to the 1954 Hague Convention, condemned "the mass and barbaric demolition of mosques and other Islamic shrines in Azerbaijan by Armenia" and stated that "governments are bound to ban theft and looting of whatever type, acts of illegal violations of cultural values . . . as well as savage prejudice to the above values. They are committed to prevent such acts or reverse their effects where necessary."⁴⁴²

IV. Practice of International Judicial and Quasi-judicial Bodies

428. In the *Tadić* case in 1995, the ICTY Appeals Chamber held that "it cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as . . . protection of civilian objects, in particular cultural property."⁴⁴³ The Appeals Chamber explicitly stated that Article 19 of the 1954 Hague Convention, which provides for the application of the provisions of the Convention relating to respect for cultural property "as a minimum" in non-international armed conflicts, constituted a treaty rule which had "gradually become part of customary law".⁴⁴⁴

V. Practice of the International Red Cross and Red Crescent Movement

429. No practice was found.

VI. Other Practice

430. No practice was found.

D. Export and Return of Cultural Property in Occupied Territory**Export of cultural property from occupied territory***I. Treaties and Other Instruments**Treaties*

431. Paragraph 1 of the 1954 Hague Protocol provides that:

Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article

⁴⁴² Islamic Summit Conference, Ninth Session, Doha, 12–13 November 2000, Res. 25/8-C (IS), preamble and §§ 1 and 3.

⁴⁴³ ICTY, *Tadić* case, Interlocutory Appeal, 2 October 1995, § 127.

⁴⁴⁴ ICTY, *Tadić* case, Interlocutory Appeal, 2 October 1995, § 98.

1 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, signed at The Hague on 14 May 1954.

432. Paragraph 2 of the 1954 Hague Protocol provides that:

Each High Contracting Party undertakes to take into its custody cultural property imported into its territory either directly or indirectly from any occupied territory. This shall either be effected automatically upon the importation of the property or, failing this, at the request of the authorities of that territory.

433. Article 11 of the 1970 Convention on the Illicit Trade in Cultural Property provides that “the export and transfer of ownership of cultural property under compulsion arising directly or indirectly from the occupation of a country by a foreign power shall be regarded as illicit”.

434. Article 9(1) of the 1999 Second Protocol to the 1954 Hague Convention, which refers to the protection of cultural property in occupied territory, stipulates that:

Without prejudice to the provisions of Articles 4 and 5 of the Convention, a Party in occupation of the whole or part of the territory of another Party shall prohibit and prevent in relation to the occupied territory:

(a) any illicit export, other removal or transfer of ownership of cultural property.

435. Article 21 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

Each Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

...

(b) any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol.

Other Instruments

436. Article 36 of the 1863 Lieber Code provides that:

If such works of art, libraries, collections, or instruments belonging to a hostile nation or government, can be removed without injury, the ruler of the conquering state or nation may order them to be seized or removed for the benefit of the said nation. The ultimate ownership is to be settled by the ensuing treaty of peace.

In no case shall they be sold or given away, if captured by the armies of the United States, nor shall they ever be privately appropriated or wantonly destroyed or injured.

437. In the 1943 London Declaration, the Allied governments expressed their intention:

to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled. Accordingly, the governments making this Declaration and the French National Committee reserve all their rights to declare invalid any transfers of, or dealing with, property, rights and interests of any

description whatsoever which are, or have been, situated in the territories which have come under the occupation or control, direct or indirect, of the Governments with which they are at war, or which belong, or have belonged, to persons (including juridical persons) resident in such territories. This warning applies whether such transfers or dealings have taken the form of open looting or plunder, or of transactions apparently legal in form, even when they purport to be voluntarily effected.

438. Article 1(4) of the 1997 Revised Lauswolt Document provides that “without limiting the provisions of the 1954 Protocol, it is prohibited to export or otherwise illicitly remove cultural property from occupied territory or from a part of the territory of a State Party”.

439. Article 12(1) of the 1997 Revised Lauswolt Document provides that:

All the provisions of this instrument, the provisions of the Convention and its 1954 Protocol which relate to safeguarding of, and respect for, cultural property shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the States Parties.

II. National Practice

Military Manuals

440. Germany’s Military Manual states that “each party to the conflict shall be bound to prevent the exportation of cultural property from a territory occupied by it during an international armed conflict”.⁴⁴⁵

National Legislation

441. Luxembourg’s Law on the Repression of War Crimes provides for the punishment of “the exportation, by any means, from the territory of Luxembourg, of objects of whatever nature”.⁴⁴⁶

National Case-law

442. In 1970, two antiquity dealers in East Jerusalem were charged in the Military Court of Hebron under Jordanian law with exporting antiquities into “foreign territory” (i.e., from Hebron, in Judaea, to East Jerusalem) without obtaining an export licence.⁴⁴⁷

Other National Practice

443. It has been reported that, during the Gulf War, large amounts of cultural property, including almost the entire contents of the Kuwait National Museum, were removed to Baghdad. After the Gulf War, Iraq stated that thousands of objects had been stolen from its provincial museums during the period of the

⁴⁴⁵ Germany, *Military Manual* (1992), § 922.

⁴⁴⁶ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(6).

⁴⁴⁷ Case referred to in Shoshana Berman, “Antiquities in Israel in a Maze of Controversy”, *Case Western Reserve Journal of International Law*, Vol. 19, 1987, pp. 356–360.

military intervention and its immediate aftermath. Four volumes listing this catalogued material have been drawn up by the Iraqi authorities and deposited with UNESCO.⁴⁴⁸

III. Practice of International Organisations and Conferences

United Nations

444. In a resolution adopted in 1993, the UNESCO General Conference reaffirmed that “the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of customary international law”.⁴⁴⁹

Other International Organisations

445. No practice was found.

International Conferences

446. In a resolution adopted in 2000 on the destruction and desecration of the Islamic historical and cultural relics and shrines in the occupied Azeri territories resulting from the Republic of Armenia’s aggression against the Republic of Azerbaijan, the Islamic Summit Conference, referring to the 1954 Hague Convention, noted that “where an armed conflict erupts, the states undertake to prevent the smuggling of valuable cultural items from the territories under occupation”.⁴⁵⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

447. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

448. No practice was found.

VI. Other Practice

449. No practice was found.

⁴⁴⁸ Lyndel V. Prott, “The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954”, *Humanitäres Völkerrecht – Informationsschriften*, No. 4/1993, pp. 192–193.

⁴⁴⁹ UNESCO, General Conference, Res. 3.5, 13 November 1993, preamble.

⁴⁵⁰ Islamic Summit Conference, Ninth Session, Doha, 12–13 November 2000, Res. 25/8-C (IS), § 3.

Return of cultural property exported or taken from occupied territory

I. Treaties and Other Instruments

Treaties

450. Article 12 of the 1947 Treaty of Peace between the Allied and Associated Powers and Italy provides that:

Italy shall restore to Yugoslavia all objects of artistic, historical, scientific, educational or religious character . . . which, as the result of the Italian occupation, were removed between 4 November 1918 and 2 March 1924 from the territories ceded to Yugoslavia under the treaties signed in Rapallo on 12 November 1920 and in Rome on 27 January 1924.

451. Under Article 37 of the 1947 Treaty of Peace between the Allied and Associated Powers and Italy, Italy was obliged to “restore all works of art, religious objects, archives and objects of historical value belonging to Ethiopia or its nationals and removed from Ethiopia to Italy since 3 October 1935”.

452. Article 1, paragraph 1, of Chapter Five (“External Restitution”) of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

Upon the entry into force of the present Convention, the Federal Republic [of Germany] shall establish, staff and equip an administrative agency which shall . . . search for, recover, and restitute jewellery, silverware and antique furniture . . . and cultural property, if such articles or cultural property were, during the occupation of any territory, removed therefrom by the forces or authorities of Germany or its Allies or their individual members (whether or not pursuant to orders) after acquisition by duress (with or without violence), by larceny, by requisitioning or by other forms of dispossession by force.

453. The 1954 Hague Protocol provides that:

3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.
4. The High Contracting Party whose obligation was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph.

454. Upon ratification of the 1954 Hague Protocol, Norway entered a reservation whereby “restitution of cultural property in accordance with the provisions of Sections I and II of the Protocol could not be required more than twenty years

from the date on which the property in question had come into the possession of a holder acting in good faith". In 1979, Norway withdrew this reservation.⁴⁵¹

455. Article 2(2) of the 1970 Convention on the Illicit Trade in Cultural Property provides that:

The States Parties undertake to oppose [the illicit import, export and transfer of ownership of cultural property] with the means at their disposal, and particularly by removing their causes, putting a stop to current practices, and by helping to make the necessary reparations.

Other Instruments

456. No practice was found.

II. National Practice

Military Manuals

457. Germany's Military Manual states that:

Each party to the conflict shall be bound to prevent the exportation of cultural property from a territory occupied by it during an international armed conflict. If, in spite of this prohibition, cultural property should nevertheless be transferred from the occupied territory into the territory of another party, the latter shall be bound to place such property under its protection. This shall be effected either immediately upon the importation of the property or, failing this, at a later date, at the request of the authorities of the occupied territory concerned.⁴⁵²

National Legislation

458. Russia's Law on Removed Cultural Property declares federal property of the Russian Federation:

all cultural values located in the territory of the Russian Federation that were brought [as a result of the Second World War] into the USSR by way of exercise of its right to compensatory restitution . . . pursuant to orders of the Soviet Army Military Command, the Soviet Military Administration in Germany or instructions of other competent bodies in the USSR.⁴⁵³

By the term "cultural values" is meant "any property of a religious or secular nature which has historic, artistic, scientific or any other cultural importance", either owned by the State or privately.⁴⁵⁴ However, the following types of properties may be claimed under the law: a) the cultural values plundered by Germany or its allies that were the national property of the former Soviet republics; b) the property of religious organisations or private charities which,

⁴⁵¹ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth and UNESCO Publishing, Hants and Paris, 1996, p. 345.

⁴⁵² Germany, *Military Manual* (1992), § 922.

⁴⁵³ Russia, *Law on Removed Cultural Property* (1997), Article 6.

⁴⁵⁴ Russia, *Law on Removed Cultural Property* (1997), Article 4.

being used exclusively for religious or charitable aims, did not serve the interest of militarism and/or Fascism; c) the cultural values previously owned by victims of Nazi/Fascist persecutions; d) all other removed cultural values located in Russia and originating from territories of States, other than the former Soviet republics, that were occupied during the war by Germany or its allies; and e) family relics.⁴⁵⁵

National Case-law

459. In its decision in 1999 concerning verification of the constitutionality of the Law on Removed Cultural Property, Russia's Constitutional Court ruled that cultural property legally transferred from the territory of former enemy States had become the property of the Russian Federation. The Court upheld the constitutionality of the Law insofar as it dealt with "the rights of Russia to cultural property imported into Russia from former enemy states [Germany and its allies] by way of compensatory restitution". In the Court's opinion:

The obligation of former enemy states to compensate their victims in the form of common restitution and compensatory restitution is based on the well-established principle of international law recognised well before World War II, concerning international legal responsibility of an aggressor state.⁴⁵⁶

Other National Practice

460. In 1991, the German government declared that it "fully accepts the fact that cultural property has to be returned after the end of hostilities". Germany has returned cultural property in all cases in which the cultural goods were found and could be identified. In other cases, Germany has paid compensation to the original owner countries.⁴⁵⁷

461. In 1997, the German government reiterated the principles contained in a general declaration made in 1984, whereby "thefts and destruction of cultural property by the Nazi regime as well as the removal of cultural property by the Soviet Union during and after the Second World War were breaches of international law". Furthermore, it pointed out that the basic principles of the protection of cultural property are not only binding upon the vanquished but also upon the victor.⁴⁵⁸

462. In 1998, during a parliamentary debate concerning a dispute between Germany and Russia over a Russian parliamentary draft law to nationalise formerly German cultural property confiscated by the Soviet Union during the

⁴⁵⁵ Russia, *Law on Removed Cultural Property* (1997), Articles 7–12.

⁴⁵⁶ Russia, Constitutional Court, *Law on Removed Cultural Property case*, 20 July 1999.

⁴⁵⁷ Germany, Lower House of Parliament, Statement by a Member of Parliament, Dr. Werner Schuster, 21 June 1991, *Plenarprotokoll* 12/35, p. 2966.

⁴⁵⁸ Germany, Lower House of Parliament, Answer by the government to a question in Parliament, *BT-Drucksache* 13/8111, 27 June 1997, p. 7.

occupation of Germany after the Second World War, a representative of the German government stated that:

The theft of cultural property committed by the German Nationalist-Socialist regime during the Second World War, as well as the transporting of cultural objects from Germany to Russia by the Soviet Union after the Second World War, represent violations of international law.⁴⁵⁹

463. It was reported that during the Gulf War, large amounts of cultural property, including almost the entire contents of the Kuwait National Museum, were removed to Baghdad but later returned.⁴⁶⁰

464. In 1991, in identical letters to the UN Secretary-General and the President of the UN Security Council, the Minister of Foreign Affairs of Iraq stated that "the Iraqi Government has decided to return the following property seized by the Iraqi authorities after 2 August 1990: . . . 3. Museum objects."⁴⁶¹

465. In a letter to a number of the Ministers of Foreign Affairs of the member States of the UN Security Council in 1991, the Minister of Foreign Affairs of Iraq stated that:

Mr. J. Richard Foran, Assistant Secretary-General and official responsible for coordinating the return of [Kuwaiti] property, visited Iraq twice during the month of May 1991. The competent Iraqi authorities expressed their readiness to hand over the Kuwaiti property of which Iraq had already notified the Secretariat of the United Nations . . . Mr. Foran also undertook a wide-ranging field visit and saw for himself the . . . museum antiquities and books that will be returned to Kuwait immediately [after] an agreement is reached establishing a location for the handing over, it being understood that it is this property whose handing over Mr. Foran has determined should have priority at the present stage. The same procedures will doubtless be applied to other Kuwaiti property.⁴⁶²

466. In a letter to the UN Secretary-General in September 1994, Iraq claimed that it had returned all the Kuwaiti property in its possession, "having nothing else whatsoever to return".⁴⁶³

467. In 1995, in a letter to the President of the UN Security Council, Kuwait stated that it attached "the utmost importance to the return by Iraq of all the

⁴⁵⁹ Germany, Lower House of Parliament, Statement by the Government, *Plenarprotokoll* 13/221, 4 March 1998.

⁴⁶⁰ Lyndel V. Prott, "The Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict (The Hague Convention) 1954", *Humanitäres Völkerrecht – Informationsschriften*, No. 4/1993, pp. 192–193.

⁴⁶¹ Iraq, Identical letters dated 5 March 1991 from the Minister of Foreign Affairs to the UN Secretary-General and the President of the UN Security Council, annexed to Identical letters dated 5 March 1991 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/22330, 5 March 1991, p. 2.

⁴⁶² Iraq, Letter dated 8 June 1991 from the Minister of Foreign Affairs to a number of Ministers of Foreign Affairs of the States members of the UN Security Council, annexed to Letter dated 16 August 1991 addressed to the President of the UN Security Council, UN Doc. S/22957, 16 August 1991, Annex II, § 4.

⁴⁶³ Iraq, Letter dated 26 September 1994 to the UN Secretary-General, UN Doc. S/1994/1099, 27 September 1994, p. 1.

official documents looted by Iraqi forces from the Office of the Amir, the Office of the Crown Prince, the Cabinet Office and the Ministry of Foreign Affairs. No price can compensate for such documents."⁴⁶⁴

468. In 1997, during a debate in the UN General Assembly, Kuwait reiterated the allegation that Iraqi soldiers had robbed and looted Kuwaiti cultural property during the Gulf War, including manuscripts and historical documents, adding that many treasures which had been returned had been damaged. He then appealed to the international community to urge the return of Kuwait's cultural property.⁴⁶⁵ In response, Iraq declared that all the cultural property taken out of Kuwait by Iraq had either been returned or would be in the future.⁴⁶⁶

469. During the diplomatic conference which led to the adoption of the 1954 Hague Convention, Norway proposed that "restitution cannot, however, be required later than twenty years after the object has got into the hands of the present holder, this holder having acted in good faith in acquiring it". The proposal was not adopted by the conference.⁴⁶⁷

470. In March 2001, Russia and Belgium reached an agreement on the return to Belgium of the military archives stolen by the Nazis during the Second World War and then taken to Moscow by Soviet forces. The Russian authorities accepted to return the archives to Belgium, provided that they be compensated for the cost of having maintained them.⁴⁶⁸

471. In 1999, during a debate in the UN General Assembly, the UAE called on Iraq to return Kuwaiti cultural property.⁴⁶⁹

III. Practice of International Organisations and Conferences

United Nations

472. In 1991, the UN Security Council adopted Resolution 686, in which, acting under Chapter VII of the UN Charter, it demanded that Iraq "immediately begin to return all Kuwaiti property seized by Iraq, the return to be completed in the shortest possible period".⁴⁷⁰ The same demand was implicitly reiterated

⁴⁶⁴ Kuwait, Letter dated 6 March 1995 to the President of the UN Security Council, UN Doc. S/1995/184, 7 March 1995, p. 2; see also UN Secretary-General, Report on the return of Kuwaiti property seized by Iraq, UN Doc. S/1996/1042, 16 December 1996, p. 1 and Second report pursuant to paragraph 14 of resolution 1284 (1999), UN Doc. S/2000/575, 14 June 2000, §§ 17(a).

⁴⁶⁵ Kuwait, Statement before the UN General Assembly, UN Doc. A/52/PV.55, 25 November 1997, p. 15.

⁴⁶⁶ Iraq, Statement before the UN General Assembly, UN Doc. A/52/PV.55, 25 November 1997, p. 20.

⁴⁶⁷ Jiri Toman, *The Protection of Cultural Property in the Event of Armed Conflict*, Dartmouth and UNESCO Publishing, Hants and Paris, 1996, p. 345.

⁴⁶⁸ Ch. Laporte, "Les archives belges quittent Moscou", *Le Soir*, 24 March 2001.

⁴⁶⁹ UAE, Statement before the UN General Assembly, UN Doc. A/54/PV.7, 21 September 1999, p. 36.

⁴⁷⁰ UN Security Council, Res. 686, 2 March 1991, § 2(d).

the same year in Resolution 687, in which the Security Council requested that the UN Secretary-General report on the steps taken to facilitate the return of all Kuwaiti property seized by Iraq.⁴⁷¹

473. In a resolution adopted in 1999, the UN Security Council, recalling Resolutions 686 and 687 of 1991, noted "with regret" that Iraq had still not complied fully with its obligation to return in the shortest possible time all Kuwaiti property it had seized, and requested that the UN Secretary-General "report every six months on the return of all Kuwaiti property, including archives, seized by Iraq".⁴⁷²

474. In a resolution adopted in 1991, the UN General Assembly strongly condemned Israel's pillaging of archaeological and cultural property in the occupied territories. It also condemned Israel's attack against the Sharia Islamic Court in occupied Jerusalem on 18 November 1991, during which Israeli forces had taken away important documents and papers, and demanded that "Israel, the occupying power, return immediately all documents and papers that were taken away from the Sharia Islamic Court in occupied Jerusalem, to the officials of the said Court".⁴⁷³

475. In a resolution adopted in 1993, the UNESCO General Conference reaffirmed that "the fundamental principles of protecting and preserving cultural property in the event of armed conflict could be considered part of customary international law".⁴⁷⁴

476. In 1992, in a report on compliance by Iraq with obligations placed upon it under certain UN Security Council resolutions, the UN Secretary-General noted that:

The return of the property has commenced and, to date, properties of the Central Bank of Kuwait, the Central Library of Kuwait, the National Museum of Kuwait, the Kuwait News Agency . . . have been returned. A number of additional items are ready for return and the process is continuing. In addition, Kuwait has submitted lists of properties from other ministries, corporations and individuals that are being pursued. The Iraqi and Kuwaiti officials involved with the return of property have extended maximum cooperation to the United Nations to facilitate the return.⁴⁷⁵

477. In 2000, in a report on the return of Kuwaiti property from Iraq, the UN Secretary-General confirmed that, although Iraq had returned a substantial quantity of property since the end of the Gulf War, there remained "many items which Iraq is under obligation to return to Kuwait". In this respect, he

⁴⁷¹ UN Security Council, Res. 687, 3 April 1991, § 15.

⁴⁷² UN Security Council, Res. 1284, 17 December 1999, preamble and § 14.

⁴⁷³ UN General Assembly, Res. 46/47, 9 December 1991, Part A, §§ 8(h) and 25–26.

⁴⁷⁴ UNESCO, General Conference, Res. 3.5, 13 November 1993, preamble.

⁴⁷⁵ UN Secretary-General, Further report on the status of compliance by Iraq with the obligations placed upon it under certain of the Security-Council resolutions relating to the situation between Iraq and Kuwait, UN Doc. S/23687, 7 March 1992; see also "Kuwait's Art Comes Home", *The Washington Post*, 17 February 1992.

stressed that “priority should be given to the return by Iraq of the Kuwaiti archives . . . and museum items”.⁴⁷⁶

Other International Organisations

478. No practice was found.

International Conferences

479. In a resolution adopted in 2000 on the destruction and desecration of the Islamic historical and cultural relics and shrines in the occupied Azeri territories resulting from the Republic of Armenia’s aggression against the Republic of Azerbaijan, the Islamic Summit Conference recalled that the 1954 Hague Convention “prohibits the confiscation of cultural assets moved to the territories of other countries”.⁴⁷⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

480. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

481. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “cultural objects transferred during the war shall be returned to the belligerent Party in whose territory they were previously situated”.⁴⁷⁸

VI. Other Practice

482. No practice was found.

⁴⁷⁶ UN Secretary-General, Second report pursuant to paragraph 14 of resolution 1284 (1999), UN Doc. S/2000/575, 14 June 2000, §§ 17(a) and 20.

⁴⁷⁷ Islamic Summit Conference, Ninth Session, Doha, 12–13 November 2000, Res. 25/8-C (IS), § 3.

⁴⁷⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 259.

WORKS AND INSTALLATIONS CONTAINING DANGEROUS FORCES

Works and Installations Containing Dangerous Forces (practice relating to Rule 42)	§§ 1–153
Attacks against works and installations containing dangerous forces and against military objectives located in their vicinity	§§ 1–128
Placement of military objectives near works and installations containing dangerous forces	§§ 129–153

Works and Installations Containing Dangerous Forces

Attacks against works and installations containing dangerous forces and against military objectives located in their vicinity

Note: For practice concerning attacks against economic installations such as oil installations and chemical plants, see Chapter 2, section B.

I. Treaties and Other Instruments

Treaties

1. Article 56 AP I provides that:

1. Works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.
2. The special protection against attack provided for in paragraph 1 shall cease:
 - (a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
 - (b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
 - (c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

3. In all cases, the civilian population and individual civilians shall remain entitled to all the protection accorded them by international law, including the protection of the precautionary measures provided for in Article 57. If the protection ceases and any of the works, installations or military objectives mentioned in paragraph 1 is attacked, all practical precautions shall be taken to avoid the release of the dangerous forces.

4. The High Contracting Parties and the Parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces.

Article 56 AP I was adopted by consensus.¹

2. Article 85(3)(c) AP I provides that “launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects” is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.²

3. Upon ratification of AP I, the UK stated with respect to Articles 56 and 85(3)(c) AP I that:

The United Kingdom cannot undertake to grant absolute protection to installations which may contribute to the opposing Party's war effort, or to the defenders of such installations, but will take all due precautions in military operations at or near the installations referred to in paragraph 1 of Article 56 in the light of the known facts, including any special marking which the installation may carry, to avoid severe collateral losses among the civilian population; direct attacks on such installations will be launched only on authorisation at a high level of command.³

4. Upon ratification of AP I, France declared that:

The Government of the French Republic cannot guarantee absolute protection to works and installations containing dangerous forces, which may contribute to the opposing Party's war effort, or to the defenders of such installations, but will take all necessary precautions, pursuant to Articles 56, 57(2)(a)(iii) and 85(3)(c) [AP I], to avoid severe collateral losses among the civilian population, including during possible direct attacks against such works and installations.⁴

5. Article 15 AP II provides that:

Works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

Article 15 AP II was adopted by consensus.⁵

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 25 May 1977, p. 209.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

³ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § n.

⁴ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 15.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 138.

*Other Instruments***6.** Article 17 of the 1956 New Delhi Draft Rules provides that:

In order to safeguard the civilian population from the dangers that might result from the destruction of engineering works or installations – such as hydro-electric dams, nuclear power stations or dikes – through the releasing of natural or artificial forces, the States or Parties concerned are invited:

- (a) to agree, in time of peace, on a special procedure to ensure in all circumstances the general immunity of such works where intended essentially for peaceful purposes:
- (b) to agree, in time of war, to confer special immunity, possibly on the basis of the stipulations of Article 16, on works and installations which have not, or no longer have, any connexion with the conduct of military operations.

The preceding stipulations shall not, in any way, release the Parties to the conflict from the obligation to take the precautions required by the general provisions of the present rules, under Articles 8 to 11 in particular.

7. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY states that hostilities shall be conducted in compliance with Article 56 AP I.

8. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina states that hostilities shall be conducted in compliance with Article 56 AP I.

9. According to Article 20(b)(iii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects” is a war crime.

10. Section 6.8 of the 1999 UN Secretary-General’s Bulletin states that:

The United Nations force shall not make installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, the object of military operations if such operations may cause the release of dangerous forces and consequent severe losses among the civilian population.

*II. National Practice**Military Manuals***11.** Argentina’s Law of War Manual states that:

Works and installations containing dangerous forces (dams, dykes, nuclear stations or nuclear power plants) must not be attacked, even if they are military objectives, if such attack may cause the release of those forces and cause severe losses among the civilian population. Other military objectives located at or in the vicinity of these works must not be attacked either if such an attack may cause the release of those dangerous forces. This protection will only cease if these objects are being

used as a regular, significant and direct support to military operations, and if such attack is the only feasible way to terminate such support.⁶

The manual qualifies “attacks against works and installations containing dangerous forces in the knowledge that such attacks will cause loss of life, injury to civilians or damage to civilian objects which are excessive in relation to the concrete and direct military advantage anticipated” as grave breaches of IHL.⁷ With respect to non-international armed conflicts, the manual restates the absolute prohibition of attacks against works and installations containing dangerous forces as found in Article 15 AP II.⁸

12. Australia’s Defence Force Manual provides that:

933. The works and installations containing dangerous forces are specifically limited to dams, dykes and nuclear electrical generating stations. Even where these objects are military objectives, they shall not be attacked if such attack may cause the release of dangerous forces and consequently severe losses amongst the civilian population. The purpose of this rule against such attacks is to avoid excess damage or loss to the civilian population.

934. Military objectives at or in the vicinity of an installation mentioned in paragraph 933 are also immune from attack if the attack might directly cause the release of dangerous forces from that installation in question and subsequent severe losses upon the civilian population.

935. The release of the dangerous forces must have a consequent severe loss among the civilian population. This is an absolute standard rather than the relative one set by the rule of proportionality. If massive civilian losses are foreseeable, the attack would be prohibited regardless of the anticipated military advantage.

936. Loss of Protection. In the case of a dyke or dam, the protection afforded ceases if three special conditions are evident. These are that:

- a. it is used for other than its normal function;
- b. it is used in regular, significant and direct support of military operations; and
- c. an attack is the only feasible way to terminate such support.

937. In relation to nuclear electrical generating stations and other military objectives located in the vicinity, only the conditions in paragraph 936.b and c. apply.⁹

The manual further provides that “launching unlawful attacks against installations containing dangerous forces” constitutes a grave breach or a serious war crime likely to warrant institution of criminal proceedings.¹⁰

13. Belgium’s Teaching Manual for Soldiers states that “certain objects and buildings must not be attacked. Unless an order to the contrary has been given, they must be avoided. This concerns... certain installations which contain particularly dangerous forces (dams, dykes and nuclear power stations).”¹¹

⁶ Argentina, *Law of War Manual* (1989), § 4.04.

⁷ Argentina, *Law of War Manual* (1989), § 8.03.

⁸ Argentina, *Law of War Manual* (1989), § 7.09.

⁹ Australia, *Defence Force Manual* (1994), §§ 933–937, see also § 544 (“any such attack would be approved at the highest command level”) and *Commanders’ Guide* (1994) §§ 408, 631 and 962.

¹⁰ Australia, *Defence Force Manual* (1994), § 1315(j); see also *Commanders’ Guide* (1994), § 1305(j).

¹¹ Belgium, *Teaching Manual for Soldiers* (undated), p. 8, see also p. 22 and slide 6b/2.

14. Belgium's Law of War Manual prohibits the use of "means and methods of warfare . . . that may cause the release of forces which may cause severe losses among the civilian population". The manual specifically prohibits "attacks against dams, dykes and nuclear power stations whose destruction may release dangerous forces, unless these works and installations are used for other than their normal function and provide an important and direct support to military operations".¹²

15. Benin's Military Manual states that it is prohibited:

to attack dykes, nuclear power plants and dams, if such attack would release dangerous forces which may cause severe losses among the civilian population, unless these works have been used in direct support of military operations or for military purposes and an attack on these objectives is the only way to terminate such use.¹³

16. Cameroon's Instructors' Manual defines installations containing dangerous forces as "dams, dykes and nuclear power stations whose destruction may lead to severe losses among the civilian population" and states that they lose their protection against attack "when they are used as tactical support by the belligerents".¹⁴

17. Canada's LOAC Manual states that:

72. Dams, dykes and nuclear electrical generating stations shall not be attacked, even when they are legitimate targets, if such an attack might cause the release of dangerous forces and consequent severe losses among the civilian population.
73. Other legitimate targets located at or in the vicinity of dams, dykes and nuclear electrical generating stations shall not be attacked if such an attack may cause the release of dangerous forces from those works or installations and consequent severe losses among the civilian population.
74. The protection that the LOAC provides to dams, dykes, nuclear electrical generating stations, and other legitimate targets in the vicinity of those installations is not absolute. The protection ceases in the following circumstances:
 - a. for a dam or dyke, only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support;
 - b. for a nuclear electrical generating station, only if it provides electric power in regular, significant and direct support of military operations and only if such attack is the only feasible way to terminate such support; and
 - c. for other legitimate targets located at or in the vicinity of these works or installations, only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.¹⁵

It also states that "launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive

¹² Belgium, *Law of War Manual* (1983), pp. 27–28.

¹³ Benin, *Military Manual* (1995), Fascicule III, p. 13.

¹⁴ Cameroon, *Instructors' Manual* (1992), p. 20, § 226.

¹⁵ Canada, *LOAC Manual* (1999), p. 4–8, §§ 72–74.

collateral civilian damage" constitutes a grave breach of AP I.¹⁶ With respect to non-international armed conflicts, the manual restates the absolute prohibition of attacks against works and installations containing dangerous forces as found in Article 15 AP II.¹⁷

18. Colombia's Basic Military Manual considers that "abstaining from attacks against works and installations . . . containing dangerous forces" is a way to protect the civilian population.¹⁸

19. Croatia's Commanders' Manual states that "specifically protected objects may not become military objectives and may not be attacked", including works and installations containing dangerous forces such as dams, dykes and nuclear power plants.¹⁹

20. Ecuador's Naval Manual provides that "dams, dikes, levees, and other installations, which if breached or destroyed would release flood waters or other forces dangerous to the civilian, should not be bombarded if the potential for harm to noncombatants would be excessive in relation to the military advantage to be gained by bombardment".²⁰

21. France's LOAC Summary Note provides that "the specific immunity granted to certain persons and objects by the law of war [including works and installations containing dangerous forces] must be strictly observed . . . They may not be attacked."²¹ It specifies that "the immunity of specifically protected objects may only be lifted under certain conditions and under the personal responsibility of the commander. Military necessity justifies only those measures which are indispensable for the accomplishment of the mission."²² "Attacks against works and installations containing forces which are dangerous for the civilian population" are qualified as a war crime.²³

22. France's LOAC Teaching Note states that "the law of armed conflict grants specific protection to certain specially marked installations and zones", including certain works and installations containing dangerous forces.²⁴ It further states that "dams, dykes and nuclear electrical generating stations are considered to be installations containing dangerous forces and must not be attacked in any circumstances".²⁵

23. France's LOAC Manual, with reference to Articles 56 AP I and 15 AP II, includes works and installations containing dangerous forces among objects which are specifically protected by the law of armed conflict.²⁶ The manual further restates the prohibition on attacking dams, dykes and nuclear power

¹⁶ Canada, *LOAC Manual* (1999), p. 16-3, § 16(c).

¹⁷ Canada, *LOAC Manual* (1999), p. 17-5, § 39.

¹⁸ Colombia, *Basic Military Manual* (1995), p. 22, § 2, see also p. 29, § 2(a).

¹⁹ Croatia, *Commanders' Manual* (1992), §§ 7 and 13, see also § 31 (search for information).

²⁰ Ecuador, *Naval Manual* (1989), § 8.5.1.7.

²¹ France, *LOAC Summary Note* (1992), §§ 2.2-2.3.

²² France, *LOAC Summary Note* (1992), § 2.4.

²³ France, *LOAC Summary Note* (1992), § 3.4.

²⁴ France, *LOAC Teaching Note* (2000), p. 5. ²⁵ France, *LOAC Teaching Note* (2000), p. 6.

²⁶ France, *LOAC Manual* (2001), p. 31.

plants, and the exceptions thereto, as found in Article 56 AP I and stresses that "a decision to attack such works and installations belongs to the commander whose criminal responsibility is engaged in case the action undertaken is illegal".²⁷

24. Germany's Military Manual states that:

464. Works and installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.

465. This protection shall cease if these works are used in regular, significant and direct support of military operations and such attack shall be the only feasible way to terminate such use. This shall also apply to other military objectives located at or in the vicinity of these works and installations.

466. Regular, significant and direct support of military operations comprises, for instance, the manufacture of weapons, ammunition and defence materiel. The mere possibility of use by armed forces is not subject to these provisions.

467. The decision to launch an attack shall be taken on the basis of all information available at the time of action.

...

469. The parties to the conflict shall remain obliged to take all precautions to protect dangerous works from the effects of attack (e.g. shutting down nuclear electrical generating stations).²⁸

The manual further provides that grave breaches of IHL are in particular "launching an attack against works or installations containing dangerous forces (dams, dykes and nuclear electrical generating stations), expecting that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects".²⁹

25. Hungary's Military Manual states that the destruction of works and installations containing dangerous forces "may release forces that could cause severe losses among the civilian population".³⁰

26. Israel's Manual on the Laws of War states that:

One of the additions in the Additional Protocols to the Geneva Conventions (which, as already stated, is not binding on the State of Israel but nevertheless widely accepted as a binding provision) is the prohibition of striking installations which hold back dangerous forces. This refers to installations that might indeed afford the enemy military or strategic benefit, but if damaged would incur such severe environmental damage to the civilian population that it was decided to prohibit their destruction. The section mentions dams, embankments (for protection against floods) and nuclear power stations for generating electricity. It is clear in each of these examples that destruction will indeed reduce the infrastructure of the enemy state (for example, damage to its power supply), however, it will lead to the unleashing of destructive forces, such as the huge flooding of a river or nuclear fallout resulting

²⁷ France, *LOAC Manual* (2001), p. 69.

²⁸ Germany, *Military Manual* (1992), §§ 464–467 and 469.

²⁹ Germany, *Military Manual* (1992), § 1209. ³⁰ Hungary, *Military Manual* (1992), p. 22.

in tens of thousands of civilian victims, and therefore it is forbidden. In addition, it is imperative to refrain from attacking military targets within such installations or in close proximity to them, if such an attack results in the unleashing of such forces.³¹

27. Italy's LOAC Elementary Rules Manual provides that "specifically protected objects may not become military objectives and may not be attacked", include works and installations containing dangerous forces such as dams, dykes and nuclear power plants.³²

28. Italy's IHL Manual qualifies "attacks... against installations containing dangerous forces" as war crimes.³³

29. Kenya's LOAC Manual defines a work or installation containing dangerous forces as "a dam, a dyke or nuclear power plant whose attack and consequent destruction may cause the release of dangerous forces and thereby severe losses among the civilian population".³⁴ The manual states that "certain property and buildings must also not be attacked except where an order to the contrary has been given. This comprises... certain installations which contain particularly dangerous forces (dams, dykes and nuclear power plants)."³⁵

30. South Korea's Operational Law Manual states that attacks against dams, dykes and nuclear power plants are prohibited.³⁶

31. Madagascar's Military Manual states that "specifically protected objects may not become military objectives and may not be attacked", including works and installations containing dangerous forces such as dams, dykes and nuclear power plants.³⁷

32. The Military Manual of the Netherlands restates the content of Article 56 AP I and specifies that:

The normal function of a dyke is to hold back water or to be prepared for that function. When a dyke is used only to this effect it cannot lose its function, even if it carries a road and has a traffic function and even if that road is occasionally used for military traffic. Protection only ceases if the last two conditions are also fulfilled: significant support for military operations and no other means to terminate such support [than attack].³⁸

The manual further states that "attacking... dams, dykes and nuclear power plants" in violation of IHL constitutes a grave breach.³⁹ With respect to

³¹ Israel, *Manual on the Laws of War* (1998), pp. 35–36.

³² Italy, *LOAC Elementary Rules Manual* (1991), §§ 7 and 13, see also § 31 (search for information).

³³ Italy, *IHL Manual* (1991), Vol. I, § 85.

³⁴ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 12.

³⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

³⁶ South Korea, *Operational Law Manual* (1996), p. 42.

³⁷ Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 7 and Fiche No. 3-O, § 13, see also Fiche No. 3-SO, § H, Fiche No. 2-T, § 27 and Fiche No. 4-T, § 24.

³⁸ Netherlands, *Military Manual* (1993), p. V-9/V-10, § 8.

³⁹ Netherlands, *Military Manual* (1993), p. IX-5.

non-international armed conflicts in particular, the manual restates the content of Article 15 AP II.⁴⁰

33. The Military Handbook of the Netherlands states that “in principle, dams, dykes and nuclear power plants (works and installations containing dangerous forces) must not be made the object of attack”.⁴¹

34. New Zealand’s Military Manual provides that:

1. Even though they may be military objectives, works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, are not to be attacked if the result of such an attack would be the release of dangerous forces and consequent severe losses among the civilian population. Any other military objective at or in the vicinity of such an installation is also immune from attack if the attack might cause the release of dangerous forces from the works or installations in question and consequent severe losses among the civilian population.
2. The protection afforded to such installations ceases in the case of dykes, dams and all such installations and nearby military objectives “only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support” and, in the case of dykes and dams, only if they are also being used for other than their normal function.

...

- 5 Although parties not accepting AP I are free to disregard this particular protective requirement, AP I, confirming customary law, authorizes Parties to agree between themselves on the provision of any additional protection that they might wish to afford such works and installations.⁴²

The manual qualifies “launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause injury to civilians or damage to civilian objects” as a grave breach of AP I.⁴³ With respect to non-international armed conflicts, the manual states that:

Reflecting the new approach to technological advances and the dangers that may be inherent in them, it is forbidden to attack certain works or installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, even if they may be regarded as military objectives, if such an attack might cause the release of dangerous forces and consequent severe losses among the civilian population.⁴⁴

35. Russia’s Military Manual states that is prohibited “to launch an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects”.⁴⁵

⁴⁰ Netherlands, *Military Manual* (1993), p. XI-7, § 6.

⁴¹ Netherlands, *Military Handbook* (1995), p. 7-44.

⁴² New Zealand, *Military Manual* (1992), § 521, see also § 633 (air to land operations).

⁴³ New Zealand, *Military Manual* (1992), § 1703(3)(c).

⁴⁴ New Zealand, *Military Manual* (1992), § 1821. ⁴⁵ Russia, *Military Manual* (1990), § 8(h).

36. South Africa's LOAC Manual provides that "the LOAC grants particular protection to the following categories of persons and targets which are termed 'protected targets' . . . Protected places include the following: . . . installations containing dangerous forces (e.g. dams and nuclear electrical power stations)."⁴⁶

37. Spain's LOAC Manual states that:

Dams, dykes and nuclear electrical generating stations must not be the object of attack, even when they are military objectives, if such attack may cause severe losses to the civilian population. Nevertheless, this protection ceases if they are being used in regular, significant and direct support to military operations.⁴⁷

The manual further states that "launching an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a war crime.⁴⁸

38. Switzerland's Military Manual states that "works and installations containing dangerous forces, such as dams, dykes and nuclear power stations, must not be attacked if such attack may release dangerous forces and cause severe losses among the civilian population".⁴⁹

39. Switzerland's Basic Military Manual states that "installations whose destruction could cause severe losses among the civilian population, because such destruction could release dangerous forces, such as dykes, dams and nuclear power stations, must not be attacked".⁵⁰ It further provides that "an attack against works or installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects" constitutes a grave breach of AP I.⁵¹

40. Togo's Military Manual states that it is prohibited:

to attack dykes, nuclear power plants and dams, if such attack would release dangerous forces which may cause severe losses among the civilian population, unless these works have been used in direct support of military operations or for military purposes and an attack on these objectives is the only way to terminate such use.⁵²

41. The UK LOAC Manual states that it is prohibited "to attack dykes, nuclear power stations or dams if to do so would cause the release of dangerous forces and consequent severe losses among the civilian population, unless they are used in direct support of military operations or for military purposes".⁵³

⁴⁶ South Africa, *LOAC Manual* (1996), § 29(b)(ii), see also § 22.

⁴⁷ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(2), see also §§ 1.3.d.(2), 4.5.b.(2)(b) and 7.3.b.(4).

⁴⁸ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

⁴⁹ Switzerland, *Military Manual* (1984), p. 21.

⁵⁰ Switzerland, *Basic Military Manual* (1987), Article 31(1).

⁵¹ Switzerland, *Basic Military Manual* (1987), Article 193(1)(c).

⁵² Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁵³ UK, *LOAC Manual* (1981), Section 4, p. 15, § 5(i).

42. The US Air Force Pamphlet states that:

In view of the general immunity of the civilian population and civilian objects and the requirement of precautions to minimize injury or damage to them, many states have urged a rule absolutely prohibiting attacks upon works and installations containing "dangerous forces", such as water held by a dam or radioactive material from a nuclear generating station, if the attack would release such dangerous forces. The United States has not accepted that such a rule, prohibiting attacks on works and installations containing dangerous forces, exists absolutely if, under the circumstances at the time, they are lawful military objectives. Of course their destruction must not cause excessive injury to civilians or civilian objects. Under some circumstances attacks on objects such as dams, dykes and nuclear electrical generating stations may result in distinct and substantial military advantage depending upon the military uses of such objects. Injury to civilians may be nonexistent or at least not excessive in relation to the military advantage anticipated. However, there are clearly special concerns that destruction of such objects may unleash forces causing widespread havoc and injury far beyond any military advantage secured or anticipated. Target selection of such objects is accordingly a matter of national decision at appropriate high policy levels.⁵⁴

43. The US Air Force Commander's Handbook states that:

Protocol I to the 1949 Geneva Conventions restricts attack against dams, dikes, and nuclear power stations, if "severe" civilian losses might result from flooding or radioactivity. While the United States is not yet a party to this protocol, such attacks may be politically sensitive. Consult the Staff Judge Advocate for the exact status and provisions of Protocol I and the exceptions to its rules (see also paragraph 3-8 [collateral damage]...).⁵⁵

44. The US Naval Handbook states that:

Dams, dikes, levees, and other installations, which if breached or destroyed would release flood waters or other forces dangerous to the civilian population, should not be bombarded if the potential for harm to noncombatants would be excessive in relation to the military advantage to be gained by bombardment. Conversely, installations containing such dangerous forces that are used by belligerents to shield or support military activities are not so protected.⁵⁶

45. The Annotated Supplement to the US Naval Handbook specifies that:

Attacks on [works and installations containing dangerous forces] are, of course, subject to the rule of proportionality . . . The practice of nations has previously indicated great restraint in the attacks of dams and dikes, the breach of which would cause such severe civilian losses . . . See, however, the U.K. destruction of the Ruhr dams during WW II . . . For an example of U.S. application of this principle in the Vietnam conflict, see President Nixon's news conference of 27 July 1972.⁵⁷

⁵⁴ US, *Air Force Pamphlet* (1976), § 5-3(d).

⁵⁵ US, *Air Force Commander's Handbook* (1980), § 2-3(c).

⁵⁶ US, *Naval Handbook* (1995), § 8.5.1.7, see also § 8.1.2.

⁵⁷ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.5.1.7, footnote 125.

46. The YPA Military Manual of the SFRY (FRY) restates the content of Article 56 AP I.⁵⁸

National Legislation

47. Argentina's Draft Code of Military Justice punishes any soldier who:

attacks . . . or carries out acts of hostility against works and installations containing dangerous forces when such attacks may cause the release of dangerous forces and consequent severe losses among the civilian population, unless such works and installations are being used in significant and direct support of military operations and if such attacks are the only feasible way to terminate such support.⁵⁹

48. Under Armenia's Penal Code, launching, during an armed conflict, an "attack against works or installations containing dangerous forces in the knowledge that such attack will cause loss of life to civilians or damage to civilian objects excessive in relation to the concrete and direct military advantage anticipated" constitutes a crime against the peace and security of mankind.⁶⁰

49. Australia's ICC (Consequential Amendments) Act incorporates in the list of war crimes in the Criminal Code grave breaches of AP I, including "attacks against works and installations containing dangerous forces resulting in excessive loss of life or injury to civilians".⁶¹

50. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".⁶²

51. Azerbaijan's Criminal Code provides that "directing attacks against installations which may cause severe damage to civilian objects or severe losses among the civilian population" constitutes a war crime in international and non-international armed conflicts.⁶³

52. The Criminal Code of Belarus provides that it is a war crime to "launch an attack against works and installations containing dangerous forces, in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilians".⁶⁴

53. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that it is a crime under international law to launch:

an attack against works or installations containing dangerous forces, in the knowledge that such attack will cause loss of human life, injury to civilians or damage to civilian objects, which would be excessive in relation to the concrete and direct

⁵⁸ SFRY (FRY), *YPA Military Manual* (1988), § 76.

⁵⁹ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(4) in the *Code of Military Justice as amended* (1951).

⁶⁰ Armenia, *Penal Code* (2003), Article 390.3(3).

⁶¹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.97.

⁶² Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

⁶³ Azerbaijan, *Criminal Code* (1999), Article 116(12).

⁶⁴ Belarus, *Criminal Code* (1999), Article 136(12).

military advantage anticipated, without prejudice to the criminal nature of an attack whose harmful effects, even where proportionate to the military advantage anticipated, would be inconsistent with the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.⁶⁵

54. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order that "an attack be launched against... objects and facilities with dangerous power, such as dams, embankments and nuclear power stations" or to carry out such an attack.⁶⁶ The Criminal Code of the Republika Srpska contains the same provision.⁶⁷

55. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I]... is guilty of an indictable offence".⁶⁸

56. Colombia's Penal Code, under the heading "Attacks against works and installations containing dangerous forces", provides for the punishment of anyone "who, at the occasion and during armed conflict, without any justification based on imperative military necessity, attacks dams, dykes, electrical or nuclear power stations or other installations containing dangerous forces, which are clearly marked with the conventional signs". The Code provides for even harsher punishment in case such attack should lead to important losses or damage.⁶⁹

57. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach... of [AP I]".⁷⁰

58. Under Croatia's Criminal Code, "the launching of an attack... against works and installations containing dangerous forces, such as dams, dykes and nuclear electrical generating stations" is a war crime.⁷¹

59. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".⁷²

60. The Czech Republic's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: ... (c) destroys or damages a

⁶⁵ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(13).

⁶⁶ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

⁶⁷ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

⁶⁸ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

⁶⁹ Colombia, *Penal Code* (2000), Article 157.

⁷⁰ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

⁷¹ Croatia, *Criminal Code* (1997), Article 158(2). ⁷² Cyprus, *AP I Act* (1979), Section 4(1).

water dam, a nuclear power plant or a similar facility containing dangerous forces".⁷³

61. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for "anyone who, in the context of an international or a non-international armed conflict, attacks works or installations containing dangerous forces, knowing that such attack will cause death or injury among the civilian population or damage to civilian objects". Works and installations containing dangerous forces are defined as "works and installations which, upon the release of their forces, cause severe losses among the civilian population, such as dams, dikes and nuclear electrical generating stations, among others".⁷⁴

62. Under Estonia's Penal Code, "attacking structures or installations containing dangerous forces" is a war crime.⁷⁵

63. Georgia's Criminal Code provides that "wilful breaches of norms of humanitarian law committed in an international or internal armed conflict, *i.e.* . . . (c) launching an attack against works and installations containing dangerous forces, in the knowledge that it will cause loss among civilians and damage of civilian objects" are punishable crimes against IHL.⁷⁶

64. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, "in connection with an international armed conflict or with an armed conflict not of an international character, . . . directs an attack by military means against . . . works and installations containing dangerous forces".⁷⁷

65. Under Hungary's Criminal Code as amended, "a military commander who, in violation of the rules of international law concerning warfare, carries out military operations which result in heavy damage to . . . facilities containing dangerous forces" commits a war crime.⁷⁸

66. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.⁷⁹ It adds that any "minor breach" of AP I, including violations of Article 56 AP I, as well as any "contravention" of AP II, including violations of Article 15 AP II, are also punishable offences.⁸⁰

67. Under Jordan's Draft Military Criminal Code, "attacks against works and installations containing dangerous forces in the knowledge that such attacks will cause widespread loss of life or injury among the civilian population and damage to civilian property" are considered war crimes.⁸¹

⁷³ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(c).

⁷⁴ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a instalaciones que contengan fuerzas peligrosas".

⁷⁵ Estonia, *Penal Code* (2001), § 95. ⁷⁶ Georgia, *Criminal Code* (1999), Article 411(1)(c).

⁷⁷ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(2).

⁷⁸ Hungary, *Criminal Code as amended* (1978), Section 160(a).

⁷⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

⁸⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁸¹ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(11).

68. Under the Draft Amendments to the Code of Military Justice of Lebanon, “attacks against works or installations containing dangerous forces, committed with the knowledge that such attacks will cause excessive loss of lives or injuries to civilians or damage to civilian objects” are considered war crimes, provided that they are committed intentionally and cause death or serious injury to body or health.⁸²

69. Under Lithuania’s Criminal Code as amended, “a military attack against an object posing a great threat to the environment and people – a nuclear plant, a dam, a storage facility of hazardous substances or other similar object – knowing that it might have extremely grave consequences” constitutes a war crime.⁸³

70. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit

the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . launching an attack against works or installations containing dangerous forces, in the knowledge that such an attack will cause excessive loss of life, injury to civilians or damage to civilian objects.⁸⁴

71. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence”.⁸⁵

72. Nicaragua’s Draft Penal Code punishes “anyone who, in the context of an international or a non-international armed conflict, attacks works or installations containing dangerous forces, knowing that such attack will cause death or injury among the civilian population or damage to civilian objects”. Works and installations containing dangerous forces are defined as “works and installations which, upon the release of their forces, cause severe losses among the civilian population, such as dams, dykes and nuclear electrical generating stations, among others”.⁸⁶

73. Niger’s Penal Code as amended contains a list of war crimes committed against persons and objects protected under the 1949 Geneva Conventions or their Additional Protocols of 1977, including “attacks against works and installations containing dangerous forces knowing that this attack will cause loss of human lives, injuries to civilians or damages to civilian objects which would be excessive with regard to the concrete or direct military advantage expected”.⁸⁷

74. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the

⁸² Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(11).

⁸³ Lithuania, *Criminal Code as amended* (1961), Article 337.

⁸⁴ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(iii).

⁸⁵ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

⁸⁶ Nicaragua, *Draft Penal Code* (1999), Article 465.

⁸⁷ Niger, *Penal Code as amended* (1961), Article 208.3(13).

protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁸⁸

75. Slovakia's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (c) destroys or damages a dam, a nuclear power plant or a similar facility containing dangerous forces".⁸⁹

76. Under Slovenia's Penal Code, "an attack . . . on buildings and facilities, an attack on which would be particularly dangerous, such as dams, levees and nuclear power plants" is a war crime.⁹⁰

77. Spain's Penal Code provides for the punishment of:

anyone who, in the event of armed conflict, should . . . attack . . . those installations that contain dangerous forces when such actions may produce the liberation of these forces and cause, as a result, considerable losses among the civilian population, except in the case that such installations are regularly used in direct support of military operations and that such attacks are the only feasible means of ending such support.⁹¹

78. Sweden's Penal Code as amended provides that:

A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for crime against international law to imprisonment for at most four years. Serious violations shall be understood to include:

...

(5) initiating an attack against establishments or installations which enjoy special protection under international law.⁹²

79. Tajikistan's Criminal Code, in the section on "Serious violations of international humanitarian law", provides for the punishment of "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict, i.e. . . . launching an attack against works and installations containing dangerous forces".⁹³

80. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".⁹⁴

81. According to the Penal Code as amended of the SFRY (FRY), "the launching of an attack on . . . facilities and installations containing dangerous forces

⁸⁸ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁸⁹ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(c).

⁹⁰ Slovenia, *Penal Code* (1994), Article 374(2).

⁹¹ Spain, *Penal Code* (1995), Article 613(1)(d).

⁹² Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁹³ Tajikistan, *Criminal Code* (1998), Article 403(1).

⁹⁴ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

including dams, dykes and nuclear electrical generating stations" is a war crime.⁹⁵

82. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".⁹⁶

National Case-law

83. No practice was found.

Other National Practice

84. According to the Report on the Practice of Angola, during the civil war in Angola both governmental forces and UNITA have violated Article 15 AP II by treating dams as military targets.⁹⁷

85. According to the Report on the Practice of Botswana, Botswana will comply with Article 56 AP I in the event of an armed conflict.⁹⁸ The report further recalls that Botswana has ratified AP II and states, on the basis of an interview with a retired army general, that the armed forces of Botswana would comply with the obligations under Article 15 AP II if the situation arose.⁹⁹

86. The Report on the Practice of Brazil states that Brazil has ratified AP I and AP II and, therefore, "the protection afforded by the Protocols to certain works and installations is binding for Brazil".¹⁰⁰

87. According to the Report on the Practice of China, any attack intended to destroy the banks or dams of a river with the aim of using the dangerous forces contained therein to gain a military advantage should be condemned. The report recounts how, in 1938, the Nationalist government decided to bomb a dam on the Yellow River to use the water to halt Japanese offensives. Although the Japanese troops were forced to retreat, the floods caused many casualties and severe damage among civilians. The Communist government subsequently condemned this method of warfare.¹⁰¹

88. In reaction to an article in the press, the Office of the Human Rights Adviser of the Presidency of the Colombian Republic stated that:

In the example of the dam cited by the author of the article in *La Prensa*, it is very clear that government troops may attack it in order to dislodge the guerrillas. However, the crux of the matter is how this should be done to ensure that the attack, which is otherwise lawful, does not cause superfluous injury or unnecessary suffering. Obviously, it would not occur to any sensible military officer to bomb

⁹⁵ SFRY (FRY), *Penal Code as amended* (1976), Article 142(2).

⁹⁶ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

⁹⁷ Report on the Practice of Angola, 1998, Chapter 1.9.

⁹⁸ Report on the Practice of Botswana, 1998, Chapter 1.9.

⁹⁹ Report on the Practice of Botswana, 1998, Interview with a retired army general, Answers to additional questions on Chapter 1.9.

¹⁰⁰ Report on the Practice of Brazil, 1997, Chapter 1.9.

¹⁰¹ Report on the Practice of China, 1997, Chapter 1.9.

the position with high-power explosives which would destroy the dam wall and cause a deluge that would sweep away the inhabitants of the basin of the tributary feeding the dam.¹⁰²

89. According to the Report on the Practice of Egypt, Egypt believes that works and installations containing dangerous forces, such as dams, dykes and power stations, are protected as long as they are used for peaceful purposes.¹⁰³

90. According to the Report on the Practice of El Salvador, El Salvador deems itself bound by AP II, and specifically by the prohibition on attacks targeting dams, dykes and nuclear electrical generating stations, even when these structures are military objectives. In the case of non-international armed conflicts, the report, on the basis of Article 15 AP II, mentions the two main requirements for the prohibition of attacks on works or installations containing dangerous forces, namely the release of dangerous forces and the consequent severe losses among the civilian population.¹⁰⁴

91. In 1977, during a debate in the Sixth Committee of the UN General Assembly, Finland noted that Article 56 AP I contained important and timely principles that should be respected under all circumstances. However, it found the text tangled with ambiguities owing to concessions made to military requirements.¹⁰⁵

92. In 1981, in reply to a question in parliament on the legal status of nuclear power plants, the German government stated that these plants were only used for peaceful purposes in Germany and therefore enjoyed the status of civilian objects and were protected as such. The government stated that this protection was underlined in Article 56 AP I.¹⁰⁶

93. The Report on the Practice of Germany states that:

Official correspondence among the responsible ministries reveals that nuclear power plants are seen to be protected under customary international law, insofar as:

- nuclear power plants are civilian objects
- no party to an armed conflict has an unlimited right in its choice of means of warfare
- every attack has to be seen in the light of the proportionality principle and this principle also has to be applied in cases where the nuclear power plant is used for military purposes.¹⁰⁷

¹⁰² Colombia, Presidency, Office of the Human Rights Adviser, Comments on the article published in *La Prensa* by Pablo E. Victoria on AP II, undated, § 5, reprinted in Congressional record concerning the enactment of Law 171 of 16 December 1994.

¹⁰³ Report on the Practice of Egypt, 1997, Chapter 1.9.

¹⁰⁴ Report on the Practice of El Salvador, 1997, Chapter 1.9.

¹⁰⁵ Finland, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.17, 13 October 1977, § 19.

¹⁰⁶ Germany, Lower House of Parliament, Answer by the government to a written question, *BT-Drucksache* 9/327, 10 April 1981, p. 3.

¹⁰⁷ Report on the Practice of Germany, 1997, Chapter 1.9 (source not quoted).

94. According to the Report on the Practice of Indonesia, Indonesia considers that installations containing dangerous forces cannot be attacked as long as they are not used for military purposes.¹⁰⁸

95. The Report on the Practice of Iran refers to a military communiqué according to which the Iranian Air Force had bombarded the power station of Ducan dam in reprisal for Iraqi attacks on Iranian economic installations.¹⁰⁹ The report notes that, in response to Iraqi and foreign press reports, Iran denied that it had attacked a nuclear plant in Iraq during the Iran–Iraq War. Instead, Iran objected to Iraqi attacks on the Bushehr nuclear plant. According to the report, Iran considers the protection of nuclear plants to be part of customary international law and attacks on buildings containing nuclear energy to be war crimes.¹¹⁰

96. In 1996, in a letter to the UN Secretary-General, Iraq reported that “a number of United States warplanes dropped 10 heat flares in the Saddam Dam area of Ninawa Governorate in northern Iraq” and requested the Secretary-General “to intervene with the Government of the United States with a view to halting these acts of aggression against Iraqi civilian installations committed in violation of the Charter of the United Nations and international law”.¹¹¹

97. According to the Report on the Practice of Iraq, “the duty to refrain from striking installations containing dangerous forces is considered an important principle, as great dangers may result as a consequence of striking them”.¹¹² The report refers to a letter from the President of Iraq to the World Association for Peace and Life against Nuclear War in 1983 which stated that “Iraq believes that an attack directed against peaceful nuclear installations by conventional weapons is tantamount to an attack by nuclear weapons, as the consequences of such an attack lead to the danger of exposure to radiation”.¹¹³

98. According to the Report on the Practice of Israel, decisions concerning attacks on installations containing dangerous forces are mainly based on whether the installations serve a direct or indirect military advantage and on the principle of proportionality. The report points out that Israel has not concluded any bilateral or multilateral agreements with neighbouring States concerning works and installations containing dangerous forces, although one possible exception could be paragraph 3 of the “Grapes of Wrath Understanding” of 26 June 1996, which prohibits attacks against “civilian populated areas, industrial and electrical installations”. The report further notes that the potential result of an attack on such works or installations on a civilian population or object

¹⁰⁸ Report on the Practice of Indonesia, 1997, Chapter 1.9.

¹⁰⁹ Report on the Practice of Iran, 1997, Chapter 1.9, referring to Military Communiqué No. 2234; see also Military Communiqué No. 3268.

¹¹⁰ Report on the Practice of Iran, 1997, Chapters 1.9 and 6.5.

¹¹¹ Iraq, Letter dated 14 August 1996 to the UN Secretary-General, UN Doc. S/1996/657, 14 August 1996.

¹¹² Report on the Practice of Iraq, 1998, Chapter 1.9.

¹¹³ Report on the Practice of Iraq, 1998, Chapter 1.9, referring to Letter dated 26 June 1983 from the President of the Republic of Iraq to the World Association for Peace and Life against Nuclear War.

will be factored in from the pre-attack planning phase. The attack will not be launched if the damage, loss or injury to civilians is expected to be excessive in relation to the possible military advantage.¹¹⁴

99. The Report on the Practice of Japan notes that “there are no laws and regulations, judicial precedent nor explanation at the Diet” with respect to the protection of works and installations containing dangerous forces.¹¹⁵

100. The Report on the Practice of Jordan finds no evidence of attacks by Jordan on works and installations containing dangerous forces and concludes that a prohibition on doing so exists.¹¹⁶

101. The Report on the Practice of Pakistan notes that Pakistan condemned the Israeli attack on a nuclear reactor near Baghdad. The report further points out that, in response to rumours that India was planning an attack on Pakistan’s nuclear facilities, the Pakistani government took “a very stern position” on this subject. It also notes that, during the wars of 1965 and 1971, the Pakistani armed forces “refrained from striking against installations containing dangerous forces”. The report concludes, therefore, that Pakistan’s *opinio juris* favours “the protection of installations containing dangerous forces during conflict”.¹¹⁷

102. In 1986, in reply to a question in the House of Lords, the UK Minister of State for Defence Procurement declared that “existing laws of war already impose restrictions on attacks on [nuclear] installations which would pose a particular threat to civilian populations and require a balance to be struck between the military advantage and the danger of collateral damage to the civilian population”.¹¹⁸

103. In 1991, in reply to a question in the House of Lords concerning “the position in international law relating to the use of ‘conventional’ weapons against (a) nuclear facilities, (b) chemical weapons plants and dumps, and (c) petrochemical enterprises situated in towns or cities, when such use may release radioactivity, toxic chemicals, or firestorms, on a scale comparable to the use of nuclear, chemical, and other weapons deemed to be weapons of mass destruction,” the UK Minister of State, FCO, stated that:

International law requires that, in planning an attack on any military objective, account is taken of certain principles. These include the principles that civilian losses, whether of life or property, should be avoided or minimised so far as practicable, and that an attack should not be launched if it can be expected to cause civilian losses which would be disproportionate to the military advantage expected from the attack as a whole.¹¹⁹

¹¹⁴ Report on the Practice of Israel, 1997, Chapter 1.9.

¹¹⁵ Report on the Practice of Japan, 1998, Chapter 1.9.

¹¹⁶ Report on the Practice of Jordan, 1997, Chapter 1.9.

¹¹⁷ Report on the Practice of Pakistan, 1998, Chapter 1.9.

¹¹⁸ UK, House of Lords, Statement by the Minister of State for Defence Procurement, *Hansard*, 10 June 1986, Vol. 476, col. 112.

¹¹⁹ UK, House of Lords, Statement of the Minister of State, FCO, *Hansard*, 4 February 1991, Vol. 525, Written Answers, col. 37.

104. In 1993, in reply to a question in the House of Lords as to whether the bombing of nuclear facilities in Iraq was concordant with international law, the UK Minister of State, FCO, wrote that “the then Prime Minister condemned the Israeli bombing of Iraqi nuclear facilities as a grave breach of international law”.¹²⁰

105. In 1991, the UK Secretary of State for Defence, responding to questions in the Defence Committee concerning the UK’s participation in bombing nuclear reactors during the Gulf War, declared that the attack was undertaken “with the very greatest care and after the most detailed planning to minimise the risk of any contamination or the risk of any radiation spreading outside the site”. He went on to say that he was “not aware of any evidence that there was a risk of any contamination outside the site which would tend to suggest that those were very precise and very carefully planned attacks”.¹²¹

106. It is reported that during the Korean War, the US air force regularly targeted dams in order to flood transport routes and other communications lines.¹²²

107. It is reported that during the Vietnam War in 1972, the US planned to attack a hydroelectric plant at Lang Chi, which was estimated to supply up to 75 per cent of Hanoi’s industrial and defence needs. If the dam at the site were breached, as many as 23,000 civilians could have died in the resultant flooding. The US President’s military advisers estimated that if laser-guided bombs were used, there was a 90 per cent chance of the mission being accomplished without breaching the dam. On that basis, the US President authorised the attack, which destroyed the electricity generating plant without breaching the dam.¹²³

108. In 1987, the Deputy Legal Adviser of the US Department of State stated that “we do not support the provisions of Article 56 of AP I, concerning dams, dykes, and nuclear power stations . . . nor do we consider them to be customary law”.¹²⁴ With respect to the apparent inconsistency between the US rejection of the provisions in Article 56 of AP I and the simultaneous acceptance of Article 15 of AP II, he stated that:

The United States military based its objections on a pragmatic, real-world estimation of the difference between the two situations. The military perceives that in international conflicts, many situations may arise where it is important to attack

¹²⁰ UK, House of Lords, Reply of the Minister of State, FCO, *Hansard*, 31 March 1993, Vol. 544, Written Answers, col. 53.

¹²¹ UK, Statement by Secretary of Defence before the Defence Committee, Minutes of evidence, 6 March 1991, Report on UK Practice, 1997, Chapter 1.9.

¹²² Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, United States Air Force, Washington, D.C., Revised edition, 1983, pp. 668–669.

¹²³ W. Hays Parks, “Air War and the Law of War”, *The Air Force Law Review*, Vol. 32, 1990, pp. 168–169.

¹²⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross–Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

and destroy parts of an electric power grid, such as a nuclear or hydroelectric generating station. In internal conflicts, on the other hand, such a significant real-world need will not exist. Preserving the military option in international conflicts where such facilities are more likely to become an object of military attack, therefore, is very important.¹²⁵

Lastly, the Deputy Legal Adviser stressed that:

All other rules of war designed for the protection of civilian populations, such as the rule of proportionality and the rule of reasonable precautions and advanced warning, govern these attacks [against works and installations containing dangerous forces]. The United States maintains the position that it cannot accept the almost total prohibition on such attacks contained in article 56. In any case, in situations where the United States military targets a part of the power grid connected to a hydroelectric or nuclear facility, the United States would have to consider the possible effects on the civilian population and strive to obtain its military objective in ways that would not inflict drastic effects on that population.¹²⁶

109. In 1987, the Legal Adviser of the US Department of State stated that:

Article 56 of Protocol I is designed to protect dams, dikes, and nuclear power plants against attacks that could result in "severe" civilian losses. As its negotiating history indicates, this article would protect objects that would be considered legitimate military objectives under customary international law. Attacks on such military objectives would be prohibited if "severe" civilian casualties might result from flooding or release of radiation. The negotiating history throws little light on what level of civilian losses would be "severe". It is clear, however, that under this article, civilian losses are not to be balanced against the military value of the target. If severe losses would result, then the attack is forbidden, no matter how important the target. It also appears that article 56 forbids any attack that raises the possibility of severe civilian losses, even though considerable care is taken to avoid them.

Paragraph 2 of article 56 provides for the termination of protection, but only in limited circumstances. If it is once conceded that a particular dam, dike, or nuclear power station is entitled to protection under article 56, that protection can only end if it is used "in regular, significant, and direct support of military operations". In the case of nuclear power plants, this support must be in the form of "electric power". The negotiating history refers to electric power for "production of arms, ammunition, and military equipment" as removing a power plant's protection, but not "production of civilian goods which may also be used by the armed forces". The Diplomatic Conference thus neglected the nature of modern integrated power grids, where it is impossible to say that electricity from a particular plant goes to

¹²⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 434.

¹²⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 434.

a particular customer. It is also unreasonable for article 56 to terminate the protection of nuclear power plants only on the basis of the use of their electric power. Under this provision, a nuclear power plant that is being used to produce plutonium for nuclear weapons purposes would not lose its protection.¹²⁷

110. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that:

While the U.S. shares the concern expressed in Article 56 of Protocol I regarding carrying out an attack against a target that may result in release of 'dangerous forces', targeting decisions regarding the attack of such facilities are policy decisions that must be made based upon all relevant factors. . . . The U.S. does not recognize a protected status for enemy air and ground defenses placed in proximity to structures containing such 'dangerous forces'.¹²⁸

111. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that nuclear storage facilities were considered to be a legitimate military target.¹²⁹

112. During the Gulf War, the US air force struck research reactors that were under IAEA safeguards. US officials declared that the US was not bound by any obligation prohibiting attacks on nuclear research facilities.¹³⁰ A press release referred to official statements recalling that the US had signed but not ratified AP I and, as a result, had made no commitments not to attack nuclear facilities.¹³¹

113. According to the Report on US Practice, the US does not apply special restrictions on attacks against works or installations containing dangerous forces. The report states that "it is the *opinio juris* of the United States that attacks are governed by the same legal criteria as attacks against any other military targets. In non-international armed conflicts, the United States regards Article 15 of Additional Protocol II as establishing an appropriate standard."¹³²

114. The Report on the Practice of the SFRY (FRY) states that:

It does not appear that the question of violations of norms relevant to protection of works and installations containing dangerous forces had been raised during armed conflicts in Slovenia and Croatia involving YPA. There was no information on such incidents, nor was the issue a matter of dispute between the parties concerned.

¹²⁷ US, Remarks of Judge Abraham D. Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 468-469.

¹²⁸ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(Q), Report on US Practice, 1997, Chapter 1.9.

¹²⁹ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 1.

¹³⁰ Report on US Practice, 1997, Chapter 1.9.

¹³¹ Report on US Practice, 1997, Chapter 1.9.

¹³² Report on US Practice, 1997, Chapter 1.9.

The report concludes that the existence of an *opinio juris* in favour of protection from attacks of works or installations containing dangerous forces is "obvious".¹³³

115. The Report on the Practice of Zimbabwe considers the prohibition on attacks against works and installations containing dangerous forces to be part of customary international law.¹³⁴

III. Practice of International Organisations and Conferences

United Nations

116. In a resolution adopted in 1983 on armed Israeli aggression against Iraqi nuclear installations, the UN General Assembly noted that "serious radiological effects would result from an armed attack with conventional weapons on a nuclear installation, which could also lead to the initiation of radiological warfare". The General Assembly considered that "any threat to attack and destroy nuclear facilities in Iraq and in other countries constitutes a violation of the Charter of the United Nations" and reiterated its demand that "Israel withdraw forthwith its threat to attack and destroy nuclear facilities in Iraq and other countries". The General Assembly also reaffirmed "its call for the continuation of the consideration, at the international level, of legal measures to prohibit armed attacks against nuclear facilities, and threats thereof, as a contribution to promoting and ensuring the safe development of nuclear energy for peaceful purposes".¹³⁵

117. In a resolution on Israeli nuclear armament adopted in 1983, the UN General Assembly reiterated "its condemnation of the Israeli threat, in violation of the Charter of the United Nations, to repeat its armed attack on peaceful nuclear facilities in Iraq and in other countries".¹³⁶

118. In several resolutions between 1987 and 1990, the IAEA stated that it considered an attack against nuclear installations used for pacific ends to be contrary to international law.¹³⁷

Other International Organisations

119. No practice was found.

International Conferences

120. In his report to Committee III of the CDDH, the rapporteur of the working group which elaborated Article 49 of draft AP I (now Article 56) stated that:

¹³³ Report on the Practice of the SFRY (FRY), 1997, Chapter 1.9.

¹³⁴ Report on the Practice of Zimbabwe, 1998, Chapter 1.8.

¹³⁵ UN General Assembly, Res. 38/9, 10 November 1983, preamble and §§ 3, 4 and 6.

¹³⁶ UN General Assembly, Res. 38/69, 15 December 1983, § 4.

¹³⁷ IAEA, Res. GC/XXXI/RES/475, 25 September 1987, preamble; Res. GC/XXIX/RES/444, 27 September 1985, § 2; Res. GC/XXXIV/RES/533, 21 September 1990, § 3.

The rapporteur wishes to emphasize that article 49 provides a special protection to these objects and objectives which, although important, is only one of a number of layers of protection. First, if a dam, dyke, or nuclear power station does not qualify as a legitimate military objective under article 47, it is a civilian object and cannot be attacked. Second, if it does qualify as a military objective or if it has military objectives in its vicinity, it receives special protection under this article. Third, if, pursuant to the terms of this article, it may be attacked or a military objective in its vicinity may be attacked, such attack is still subject to all the other relevant rules of this Protocol and general international law; in particular, the dam, dyke, or nuclear power plant or other military objective could not be attacked if such attack would be likely to cause civilian losses excessive in relation to the anticipated military advantage, as provided in article 50. In the case of a dam or dyke, for example, where a great many people would be killed and much damage done by its destruction, immunity would exist unless the military reasons for destruction in a particular case were of an extraordinarily vital sort.

...

Additionally, it must always be recognized that an attack is not justified unless the military reasons for the destruction in a particular case are of such extraordinary and vital interest as to outweigh the severe losses which may be anticipated. Nevertheless, it should be noted that some representatives remain concerned about the problems that may arise from the use of dykes for roadways.

...

In the view of the Rapporteur, the second sentence of paragraph 3 is one of the most important contributions of this article. Even when attack on one of these objects is justified under all the applicable rules, this provision requires the combatants to take "all practical precautions" to avoid releasing the dangerous forces. Given the array of arms available to modern armies, this requirement should provide real protection against the catastrophic release of these forces. Finally, it should be noted that some representatives requested the inclusion in this article of special protection for oil rigs, petroleum storage facilities, and oil refineries. It was agreed that these were not objects containing dangerous forces within the meaning of this article and that, if these objects are to be given any special protection by the Protocol, it should be done by another article, perhaps by a special article for that purpose.¹³⁸

121. Article 56 AP I is limited to three specific types of works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations. At the CDDH, 14 Arab States submitted an amendment to replace the word "namely" in Article 49(1) of draft AP I (now Article 56(1)) by the words "such as".¹³⁹ This amendment was not accepted by the working group which elaborated Article 49 of draft AP I (now Article 56) because, as the rapporteur of the working group stated, "it was only when a decision was taken to limit the special protection of the article to dams, dykes, nuclear

¹³⁸ CDDH, Report to the Third Committee on the work of the working group submitted by the Rapporteur, *Official Records*, Vol. XV, CDDH/III/264, 13 March 1975, pp. 350-352.

¹³⁹ CDDH, Proposed amendment to Article 49 of Draft Protocol I submitted by Egypt, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Qatar, Sudan, Syria, UAE, Democratic Yemen and Yemen, *Official Records*, Vol. III, CDDH/III/76 and Add. 1, 21 March 1974, p. 224.

power stations, and other military objectives in the vicinity of these objects that it was possible to produce a generally acceptable text".¹⁴⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

122. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

123. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that works and installations containing dangerous forces are specifically protected objects which may not be attacked except "a) if it provides regular, significant and direct support of military operations; b) if that support is other than its normal function; c) and if an attack against that work or installation is the only way to terminate such support".¹⁴¹ Furthermore, "attacks of works or installations containing dangerous forces in the knowledge that such attack will cause excessive civilian damage" constitutes a grave breach of the law of war.¹⁴²

124. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC invited:

States which are not party to [the] 1977 [Additional] Protocol I to respect, in the event of armed conflict, the following articles of the Protocol, which stem from the basic principle of civilian immunity from attack: . . . Article 56: protection of works and installations containing dangerous forces.¹⁴³

125. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC reminded the parties that "installations containing dangerous forces, such as dams and dykes, shall not be made the object of attack, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population".¹⁴⁴

126. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of most grave breaches of AP I,

¹⁴⁰ CDDH, Report to the Third Committee on the work of the working group submitted by the Rapporteur, *Official Records*, Vol. XV, CDDH/III/264, 13 March 1975, p. 350.

¹⁴¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 107, 219 and 227.

¹⁴² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 778(f).

¹⁴³ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 25.

¹⁴⁴ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

listed, *inter alia*, the following as a war crime to be subject to the jurisdiction of the Court:

Launching an attack against works and installations containing dangerous forces in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated, when committed wilfully, and causing death or serious injury to body or health.¹⁴⁵

127. In 1997, in a statement before the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC noted that certain war crimes committed in international armed conflict were not included in the list of war crimes in the draft ICC Statute and reiterated that most of the provisions of AP I on grave breaches reflected customary law.¹⁴⁶

VI. Other Practice

128. In 1991, a senior military officer of an armed opposition group confirmed to the ICRC that he had ordered the placing of loads of explosives on a dam.¹⁴⁷ In subsequent contacts with the ICRC, the armed opposition group threatened to destroy the dam.¹⁴⁸

Placement of military objectives near works and installations containing dangerous forces

I. Treaties and Other Instruments

Treaties

129. Article 56(5) AP I states that:

The Parties to the conflict shall endeavour to avoid locating military objectives in the vicinity of [works or installations containing dangerous forces]. Nevertheless, installations erected for the sole purpose of defending the protected works or installations from attack are permissible and shall not themselves be made the object of attack, provided that they are not used in hostilities except for defensive actions necessary to respond to attacks against the protected works or installations and that their armament is limited to weapons capable only of repelling hostile action against the protected works or installations.

Article 56 AP I was adopted by consensus.¹⁴⁹

¹⁴⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 1(b)(iii).

¹⁴⁶ ICRC, Statement before the Preparatory Committee for the Establishment of an International Criminal Court, 8 December 1997.

¹⁴⁷ ICRC archive document. ¹⁴⁸ ICRC archive document.

¹⁴⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 209.

Other Instruments

130. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY states that hostilities shall be conducted in compliance with Article 56 AP I.

131. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina states that hostilities shall be conducted in compliance with Article 56 AP I.

*II. National Practice**Military Manuals*

132. Australia's Commanders' Guide provides that:

While parties to a conflict are required to avoid locating military objectives in the vicinity of such protected works and installations, they are nevertheless permitted to erect such emplacements as may be necessary for the defence of the protected installations. These emplacements shall be immune from attack provided they are not used in hostilities except in defence of the protected works and installations. Armament must be limited to weapons capable only of repelling hostile attacks against the protected works or installations in question.¹⁵⁰

133. Australia's Defence Force Manual provides that:

Defensive weapons systems may be erected to protect works or installations from attack. These systems may only be used for the limited purpose for which they are intended. The erection of such defence facilities is not without danger and could lead to the work or installation losing its protection.¹⁵¹

134. Cameroon's Instructors' Manual states that installations containing dangerous forces "may be protected by weapons destined to ensure their defence in case of attack".¹⁵²

135. Canada's LOAC Manual provides that "the parties to a conflict should avoid locating legitimate targets in the vicinity of dams, dykes and nuclear electrical generation stations. Weapons co-located for the sole purpose of defending such installations are permissible."¹⁵³

136. Germany's Military Manual states that "military objectives shall not be located in the vicinity of works and installations containing dangerous forces unless it is necessary for the defence of these works".¹⁵⁴

137. Kenya's LOAC Manual provides that "the defensive armament of a work or installation containing dangerous forces must be limited to weapons capable of repelling hostile action against that work or installation".¹⁵⁵

¹⁵⁰ Australia, *Commanders' Guide* (1994), § 963.

¹⁵¹ Australia, *Defence Force Manual* (1994), § 938.

¹⁵² Cameroon, *Instructors' Manual* (1992), p. 20, § 226.

¹⁵³ Canada, *LOAC Manual* (1999), p. 4-8, § 75.

¹⁵⁴ Germany, *Military Manual* (1992), § 468.

¹⁵⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 13.

138. Madagascar's Military Manual states that "defences erected for the sole purpose of defending works or installations containing dangerous forces against attack are permissible".¹⁵⁶

139. The Military Manual of the Netherlands restates the content of Article 56(5) AP I.¹⁵⁷

140. New Zealand's Military Manual provides that:

While parties to a conflict are required to avoid locating military objectives in the vicinity of such protected works or installations [containing dangerous forces], they are nevertheless permitted to erect such emplacements as may be necessary for the defence of the protected installations. These emplacements shall be immune from attack, provided they are not used in hostilities except in defence of the protected work or installations. Their armament must be limited to weapons capable only of repelling hostile attacks against the protected works or installations in question.¹⁵⁸

141. Spain's LOAC Manual provides that "installations and armaments that are necessary to defend [works or installations containing dangerous forces] are permissible, provided they are not used in the hostilities".¹⁵⁹

142. The YPA Military Manual of the SFRY (FRY) restates the content of Article 56(5) AP I.¹⁶⁰

National Legislation

143. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 56(5) AP I, is a punishable offence.¹⁶¹

144. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁶²

National Case-law

145. No practice was found.

Other National Practice

146. In 1983, questions were raised in the German parliament concerning the planned construction of an ammunition depot 7 kilometres from a nuclear power plant. The government responded that these plants were granted the status of civilian objects under international law and were to be protected as

¹⁵⁶ Madagascar, *Military Manual* (1994), Fiche No. 3-SO, § H.

¹⁵⁷ Netherlands, *Military Manual* (1993), p. V-10, § 8.

¹⁵⁸ New Zealand, *Military Manual* (1992), §§ 521.4 and 633.4.

¹⁵⁹ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2)(b).

¹⁶⁰ SFRY (FRY), *YPA Military Manual* (1988), § 76.

¹⁶¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁶² Norway, *Military Penal Code as amended* (1902), § 108(b).

such. The distance between the depot and the plant was construed as being in compliance with international law.¹⁶³

147. According to the Report on the Practice of Israel, the IDF, as a policy, does not establish military bases or positions in the vicinity of works or installations containing dangerous forces. The report considers that structures necessary for the protection of a facility constitute an exception to the prohibition on locating military bases or positions in the vicinity of works or installations containing dangerous forces.¹⁶⁴

148. The Report on the Practice of the Netherlands notes that no internal legislation has been adopted to implement the required separation between military structures and protected works and installations.¹⁶⁵

149. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that “military objectives may not be placed in proximity to structures containing ‘dangerous forces’ in order to shield those military objectives from attack”.¹⁶⁶

III. Practice of International Organisations and Conferences

150. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

151. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

152. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Defences erected for the sole purpose of defending a work or installation containing dangerous forces from attack are permitted. The defensive armament of a work or installation containing dangerous forces must be limited to weapons only capable of repelling hostile action against that work or installation.¹⁶⁷

VI. Other Practice

153. No practice was found.

¹⁶³ Germany, Lower House of Parliament, Answer by the government to a written question, *BT-Drucksache* 10/101, 27 May 1983, p. 14.

¹⁶⁴ Report on the Practice of Israel, 1997, Chapter 1.7.

¹⁶⁵ Report on the Practice of the Netherlands, 1997, Chapter 1.9.

¹⁶⁶ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(Q), Report on US Practice, 1997, Chapter 1.9.

¹⁶⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 110 and 111.

THE NATURAL ENVIRONMENT

A. Application of the General Rules on the Conduct of Hostilities to the Natural Environment (practice relating to Rule 43)	§§ 1–70
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A. Application of the General Rules on the Conduct of Hostilities to the Natural Environment

Note: For practice concerning the general rules on the conduct of hostilities, see Part I. For practice concerning the destruction of property, see Chapter 16. For practice concerning attacks of forests or other kinds of plant cover by incendiary weapons, see Chapter 30, section A.

I. Treaties and Other Instruments
Treaties

1. Pursuant to Article 8(2)(b)(iv) of the 1998 ICC Statute, “intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” constitutes a war crime in international armed conflicts.
2. Upon ratification of the 1998 ICC Statute, France declared that “the risk of damage to the natural environment as a result of methods and means of warfare, as envisaged in article 8, paragraph 2 (b) (iv), must be weighed objectively on the basis of the information available at the time of its assessment”.¹

¹ France, Interpretative declarations made upon ratification of the ICC Statute, 9 June 2000, § 7.

*Other Instruments***3.** Paragraph 39.6 of the 1992 Agenda 21 provides that:

Measures in accordance with international law should be considered to address, in times of armed conflict, large-scale destruction of the environment that cannot be justified under international law. The General Assembly and its Sixth Committee are the appropriate forums to deal with this subject. The specific competence and role of the International Committee of the Red Cross should be taken into account.

4. Paragraph 44 of the 1994 San Remo Manual provides that:

Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law. Damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited.

5. The 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that:

(4) In addition to the specific rules set out below, the general principles of international law applicable in armed conflict – such as the principle of distinction and the principle of proportionality – provide protection to the environment. In particular, only military objectives may be attacked and no methods or means of warfare which cause excessive damage shall be employed. Precautions shall be taken in military operations as required by international law.

...

(6) Parties to a non-international armed conflict are encouraged to apply the same rules that provide protection to the environment in international armed conflict and, accordingly, States are urged to incorporate such rules in their military manuals and instructions on the laws of war in a way that does not discriminate on the basis of how the conflict is characterized.

...

(8) Destruction of the environment not justified by military necessity violates international humanitarian law. Under certain circumstances, such destruction is punishable as a grave breach of international humanitarian law.

(9) The general prohibition on destroying civilian objects, unless such destruction is justified by military necessity, also protects the environment.

6. Paragraph 13(c) of the 1994 San Remo Manual defines as “collateral casualties” or “collateral damage”, *inter alia*, “damage to or the destruction of the natural environment”.**7.** The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iv), “intentionally launching an attack in the knowledge that such attack will cause...widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the

concrete and direct overall military advantage anticipated” constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

8. Australia’s Defence Force Manual states that:

The natural environment is not a legitimate object of attack. Destruction of the environment, not justified by military necessity, is punishable as a violation of international law . . . The general prohibition on destroying civilian objects, unless justified by military necessity, also protects the environment.²

9. According to Belgium’s Regulations on the Tactical Use of Large Units, restrictions on the use of weapons can result from “the obligation to respect the rules of the laws of war relative to the conduct of hostilities. These rules concern, *inter alia*, the choice of means and methods of warfare, the protection of the civilian population, civilian objects and the environment.”³

10. Italy’s IHL Manual defines “attacks against the natural environment” as war crimes.⁴

11. The US Naval Handbook provides that, “the commander has an affirmative obligation to avoid unnecessary damage to the environment”.⁵

National Legislation

12. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including launching an attack in the knowledge that such attack will cause “widespread, long-term and severe damage to the natural environment . . . of such an extent as to be excessive in relation to the concrete and direct military advantage anticipated” in international armed conflicts.⁶

13. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” is a war crime in international armed conflicts.⁷

14. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according

² Australia, *Defence Force Manual* (1994), § 545(a) and (c).

³ Belgium, *Regulations on the Tactical Use of Large Units* (1994), Article 208(c)(2).

⁴ Italy, *IHL Manual* (1991), Vol. I, § 85. ⁵ US, *Naval Handbook* (1995), § 8.1.3.

⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.38(2).

⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(d).

to customary international law" and, as such, indictable offences under the Act.⁸

15. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.⁹

16. The Czech Republic's Criminal Code as amended, in a part entitled "Crimes against humanity", provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: ... (d) destroys or damages ... a place internationally-recognized with regard to the protection of nature".¹⁰

17. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute which is not explicitly mentioned in the Code, such as "intentionally launching an attack in the knowledge that such attack will cause ... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" in international armed conflict, is a crime.¹¹

18. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international armed conflict, carries out an attack with military means which may be expected to cause widespread, long-term and severe damage to the natural environment which could be excessive in relation to the overall concrete and direct military advantage anticipated, shall be liable to imprisonment for not less than three years.¹²

19. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 35(3) and 55(1) AP I, is a punishable offence.¹³

20. Under the International Crimes Act of the Netherlands, "intentionally launching an attack in the knowledge that such an attack will cause ... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is a crime, when committed in an international armed conflict.¹⁴

21. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.¹⁵

22. Nicaragua's Military Penal Code punishes a soldier who "destroys or damages, without military necessity, ... places of historical or environmental

⁸ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁰ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(d).

¹¹ Georgia, *Criminal Code* (1999), Article 413(d).

¹² Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(3).

¹³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁴ Netherlands, *International Crimes Act* (2003), Article 5(5)(b).

¹⁵ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

importance . . . and natural sites, gardens and parks of historical-artistic or anthropological value and, in general, all those which are part of the historical heritage".¹⁶

23. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁷

24. Slovakia's Criminal Code as amended provides for the punishment of "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: . . . (d) destroys or damages . . . an internationally recognized . . . natural site".¹⁸

25. Spain's Military Criminal Code punishes a soldier who:

destroys or damages, without military necessity, . . . places of historical or environmental importance . . . and natural sites, gardens and parks of historical-artistic or anthropological value and, in general, all those which are part of the historical heritage.¹⁹

26. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.²⁰

27. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.²¹

National Case-law

28. No practice was found.

Other National Practice

29. In 1992, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in times of armed conflict, Argentina recommended that:

Belligerents engaged in an armed conflict, whether international or non-international, should always bear in mind that the protection of the environment affects the well-being of humanity as a whole. They should therefore use those means which are least apt to cause damage to the environment, damage for which they would be responsible.²²

30. In 1991, during a debate in the UN General Assembly on the environmental impact of the Gulf War, Australia insisted that "what had been done in Kuwait

¹⁶ Nicaragua, *Military Penal Code* (1996), Article 61.

¹⁷ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁸ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(d).

¹⁹ Spain, *Military Criminal Code* (1985), Article 77(7).

²⁰ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²¹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²² Argentina, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.8, 1 October 1992, § 23.

was clearly illegal under the customary rules of warfare and the traditional concepts of proportionality and military necessity".²³

31. In a briefing note in 1992, the Australian Department of Foreign Affairs and Trade stated that the Gulf War had underlined "the continuing need for the extension of principles of humanitarian law in cases of armed conflict", and referred to "the environmental devastation caused by the deliberate creation of oil slicks by Iraqi forces".²⁴

32. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that "in recent times the issue of the protection of the environment in armed conflict has been a particular international concern" and referred to a number of international treaties, including the relevant provisions of the 1976 ENMOD Convention, AP I and the 1993 CWC. It stated that these instruments provided "cumulative evidence that weapons having . . . potentially disastrous effects on the environment, and on civilians and civilian targets, are no longer compatible with the dictates of public conscience" reflected in the general principles of humanity. Australia added that "consideration of lethal effects of radiation over time provides a link between the principle which provides for the protection of civilian populations and the principle which provides for protection of the environment".²⁵

33. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the protection of the environment in armed conflict, Austria stated, with respect to the damage caused by Iraq to the environment, that:

There could be no doubt whatsoever that those deliberate acts of environmental destruction flagrantly violated existing international law and could not, even in the most remote sense, be justified by military necessity . . . There could be no doubt as to the illegality of the acts committed by Iraq, entailing international responsibility of that State as well as personal criminal liability of those responsible for those acts.²⁶

34. In 1992, during a debate in the UN General Assembly on the environmental impact of the Gulf War, Austria stated that it was a "shortcoming" of the present legal regime that "the principle of proportionality between the military necessity of an action and its possible detrimental effects on the environment was usually applied in favour of military necessity".²⁷

35. In 1992, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in times of armed conflict, Brazil stated

²³ Australia, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.20, 22 October 1991, § 7.

²⁴ Australia, Department of Foreign Affairs and Trade, DFAT-92/013031 Pt 8, 13 February 1991, p. 2, § 5.

²⁵ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, p. 47, § 31.

²⁶ Austria, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.19, 22 October 1991, § 5.

²⁷ Austria, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.8, 1 October 1992, § 37.

that "a principle of customary international law which, in general terms, protected the environment in times of armed conflict had been recognised implicitly in paragraph 39.6 of Agenda 21 of UNEP".²⁸

36. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the protection of the environment in armed conflict, Canada stated:

An important conclusion reached at the international conference of experts held at Ottawa [from 9–12 July 1991] was that the customary laws of war, in reflecting the dictates of public conscience, now included a requirement to avoid unnecessary damage to the environment . . . In effect, the practice of States, generally accepted environmental principles and public consciousness about the environment had combined with the traditional armed conflict rules on the protection of civilians and their property to produce a customary rule of armed conflict prohibiting the infliction of unnecessary damage on the environment in wartime.²⁹

37. In 1992, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in times of armed conflict, Canada reiterated the conclusions of the Ottawa conference and referred to the rule of proportionality as "the need to strike a balance between the protection of the environment and the needs of war" and further concluded that, under the principle of distinction, "the environment as such should not form the object of direct attack".³⁰

38. At the Conference on Environmental Protection and the Law of War held in London in 1992, Canada, with reference to the Martens Clause, identified a "requirement to avoid unjustifiable damage to the environment".³¹

39. In 1996, a study of Colombia's Presidential Council for Human Rights, conducted in cooperation with the Colombian Red Cross and the Jorge Tadeo Lozano University, asserted that "the principle of proportionality . . . [is] also directly applicable to the ecological heritage of the human race".³²

40. In 1992, in a letter to the President of the UN Security Council, Croatia stated that "unprovoked, indiscriminate and savage attacks may result in an economic and ecological catastrophe which could happen if oil facilities on both sides of the river are destroyed".³³

41. In 1991, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in armed conflict, Iran stated that:

²⁸ Brazil, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.9, 6 October 1992, § 12.

²⁹ Canada, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, §§ 13–14.

³⁰ Canada, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.8, 1 October 1992, § 20.

³¹ Canada, Statement at the Conference on Environmental Protection and the Law of War, London, 3 June 1992.

³² Colombia, Presidential Council for Human Rights in cooperation with the Colombian Red Cross and the Jorge Tadeo Lozano University, *Academic Study on National Measures of Application of International Humanitarian Law*, Bogotá, September 1996, p. 67.

³³ Croatia, Letter dated 24 August 1992 to the President of the UN Security Council, UN Doc. S/24481, 24 August 1992, p. 2.

Referring to the law of armed conflict, . . . both customary law and treaty law prohibited belligerent parties from inflicting either direct or indirect damage on the environment.

The principle of proportionality, which was enshrined in customary law, set important limits on warfare whereby damage not necessary to the achievement of a definite military advantage was prohibited. Another principle of customary law, whereby military operations not directed against military targets were prohibited, had been incorporated in the preamble of the 1868 Declaration of St. Petersburg to the effect of prohibiting the use of certain practices in wartime and in article 35.1 of [AP I]. Lastly, the [1907 HR] prohibited the destruction of non-military enemy property unless imperatively demanded by the necessities of war . . . The Fourth Geneva Convention contained two provisions intended to ensure indirect protection of the environment in the context of protecting property rights in occupied territories. Thus, for example, an occupying Power which destroyed industrial installations in an occupied territory, causing damage to the environment, would be in violation of the Fourth Geneva Convention unless such destruction was justified by military necessity. If such destruction was extensive, it constituted a grave breach of the Convention and even a war crime.³⁴

42. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Iran argued that:

As far as the law of armed conflict is concerned, both the customary rules and the provisions of treaty law prohibit belligerent parties, directly or indirectly, from inflicting unnecessary damage on the environment. Parties to the armed conflict are obliged, in accordance with well-established rules of customary law pertaining to armed conflict, to protect the environment in time of armed conflict.³⁵

43. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan expressed the view that, "in terms of international law concerning warfare, . . . the destruction of [the] natural environment [is] prohibited".³⁶

44. Prior to the adoption of UN General Assembly Resolution 47/37 in 1992 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum to the Sixth Committee of the UN General Assembly entitled "International Law Providing Protection to the Environment in Times of Armed Conflict". In it, they stated that "the customary rule that prohibits attacks which reasonably may be expected at the time to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, are prohibited" provides protection for the environment in times of armed conflict.³⁷

³⁴ Iran, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, §§ 27–28.

³⁵ Iran, Oral pleadings before the ICJ, *Nuclear Weapons case*, 6 November 1995, Verbatim Record CR 95/26, p. 34, § 59.

³⁶ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, 7 November 1995, Verbatim Record CR 95/27, p. 37.

³⁷ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(h).

45. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands referred to the environmental damage caused by the use of nuclear weapons, remarking that such damage "should not be regarded as necessary to the achievement of military objectives".³⁸

46. In 1994, Romania's Ministry of Defence pointed out that "the education and instruction process was intended especially for the study and implementation of the types of military decisions that would provide a balance between the desired military advantage and its potentially negative impact on the environment".³⁹

47. In 1992, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in times of armed conflict, Russia insisted that "premeditated and indiscriminate destruction of the environment in times of armed conflict constituted not merely an evil but a crime", adding that "such acts were clearly violations of the norms of international law and could not be justified even as reprisals".⁴⁰

48. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the environmental impact of the Gulf War, Sweden expressed the view that the destruction of the environment caused by Iraqi forces was taking place "on an unprecedented scale" and considered that it constituted "unacceptable forms of warfare in the future".⁴¹

49. In a briefing note in 1991, the UK Foreign and Commonwealth Office declared that Iraq's attacks on Kuwaiti oil fields were "a deliberate crime against the planet".⁴²

50. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the protection of the environment in armed conflict, the US stated that:

The deliberate release of oil into the Gulf and the burning of Kuwaiti oil wells had constituted a serious violation of the prohibition of the destruction of property unless required by military necessity contained in [GC IV and the 1907 HR]. Those acts had also been a violation of the prohibitions under customary international law against any military operation which was not directed against a legitimate military target or which could be expected to cause incidental death, injury or damage to civilians that was clearly excessive in relation to the direct military advantage of the operation. In the situation under consideration, the oil well destruction had taken

³⁸ Marshall Islands, Oral pleadings before the ICJ, *Nuclear Weapons case*, 14 November 1995, Verbatim Record CR 95/32, p. 22.

³⁹ UN Secretary-General, Report on the United Nations Decade of International Law, UN Doc. A/49/323, 19 August 1994, § 32.

⁴⁰ Russia, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.9, 6 October 1992, p. 4, § 16.

⁴¹ Sweden, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.20, 22 October 1991, § 21.

⁴² UK, Foreign and Commonwealth Office, Briefing Note: Oil Pollution in the Gulf, June 1991, reprinted in Marc Weller (ed.), *Iraq and Kuwait: The Hostilities and Their Aftermath*, Grotius Publications, Cambridge, 1993, p. 338.

place at a time when it had been clear to Iraq that the war had ended . . . Those violations of international law had definite legal consequences, as [GC IV] acknowledged in stipulating that the destruction of property not justified by military necessity was a grave breach and that persons committing such breaches incurred criminal liability . . . Iraq's actions did not demonstrate that existing international law was inadequate, but, rather, that the problem involved compliance with existing law, and no new rule or conventions were needed.⁴³

51. In 1992, during the debate in the Sixth Committee of the UN General Assembly on protection of the environment in time of armed conflict, the US said that "in time of war some collateral damage to the environment . . . is inevitable".⁴⁴

52. In 1992, in its final report to Congress on the conduct of hostilities in the Gulf War, the US Department of Defence considered that the destruction of oil well heads and the release of crude oil into the Gulf by Iraq violated Article 23(g) of the 1907 HR and Article 147 GC IV. It further stated that:

As the first Kuwaiti oil wells were ignited by Iraqi forces, there was public speculation the fires and smoke were intended to impair Coalition forces' ability to conduct both air and ground operations, primarily by obscuring visual and electro-optical sensing devices. Review of Iraqi actions makes it clear the oil well destruction had no military purpose, but was simply punitive destruction at its worst. For example, oil well fires to create obscurants could have been accomplished simply through the opening of valves; instead, Iraqi forces set explosive charges on many wells to ensure the greatest possible destruction and maximum difficulty in stopping each fire. Likewise, the Ar-Rumaylah oil field spreads across the Iraq-Kuwait border. Had the purpose of the fires been to create an obscurant, oil wells in that field on each side of the border undoubtedly would have been set ablaze; Iraqi destruction was limited to oil wells on the Kuwaiti side only. As with the release of oil into the Persian Gulf, this aspect of Iraq's wanton destruction of Kuwaiti property had little effect on Coalition offensive combat operations. In fact, the oil well fires had a greater adverse effect on Iraqi military forces.⁴⁵

53. In 1993, in a report to Congress on international policies and procedures regarding the protection of natural and cultural resources during times of war, the US Department of Defence stated that:

The United States considers the obligations to protect natural, civilian, and cultural property to customary international law . . . Natural resources are protected from intentional attack so long as they are not utilized for military purposes . . . The United States recognizes that protection of natural resources, as well as protection of the environment, is important even in times of armed conflict. Natural resources are finite, and reasonable measures must be taken to protect against their unnecessary

⁴³ US, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, §§ 37-40.

⁴⁴ US, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.9, 6 October 1992, § 55.

⁴⁵ US, Department of Defence, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, pp. 636-637.

destruction . . . What is prohibited is unnecessary destruction, that is destruction of natural resources that has no or limited military value.⁴⁶

54. According to the Report on US Practice, it is the *opinio juris* of the US that “collateral environmental damage caused by otherwise lawful military operations should be assessed for its proportionality to the expected military value of such operations”.⁴⁷

III. Practice of International Organisations and Conferences

United Nations

55. In a resolution adopted in 1992 on the protection of the environment in times of armed conflict, the UN General Assembly expressed “deep concern about environmental damage and depletion of natural resources, including the destruction of hundreds of oil-well heads and the release and waste of crude oil into the sea, during recent conflicts” and noted that “existing provisions of international law prohibit such acts”. The General Assembly stressed that “destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law” and urged States “to take all measures to ensure compliance with the existing international law applicable to the protection of the environment in times of armed conflict”.⁴⁸

56. In a resolution adopted in 1994 on the United Nations Decade on International Law, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict. The General Assembly invited:

all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.⁴⁹

57. The programme of activities for the final term (1997–1999) of the UN Decade of International Law, adopted by the UN General Assembly in 1996, states that:

In connection with training of military personnel, States are encouraged to foster the teaching and dissemination of the principles governing the protection of the environment in times of armed conflict and should consider the possibility of

⁴⁶ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, pp. 202–204.

⁴⁷ Report on US Practice, 1997, Chapter 4.5.

⁴⁸ UN General Assembly, Res. 47/37, 25 November 1992, preamble and § 1.

⁴⁹ UN General Assembly, Res. 49/50, 9 December 1994, § 11.

making use of the guidelines for military manuals and instructions prepared by the International Committee of the Red Cross.⁵⁰

Other International Organisations

58. In the context of NATO's campaign against the FRY, following NATO's air strikes on the industrial complex in Pancevo on 18 April 1999, which resulted in the emission of chemical substances into the air and water, a NATO spokesperson argued that the industrial site was to be considered as a "strategic target", as it was "a key installation" that provided petrol and other resources to support the Yugoslav army. The official said that the environmental damage caused by the attack was taken into consideration, explaining that "when targeting is done we take into account all possible collateral damage, be it environmental, human or to the civilian infrastructure".⁵¹

59. At a press conference held at NATO Headquarters in Brussels on 20 April 1999 during NATO's military operations against the FRY, a General, asked to comment on NATO's bombing of a chemical factory in Baric, which caused threats to the environment, declared that "every single target is chosen having great consideration for possible collateral damage". He then argued that "the fact that a chemical factory has been hit does not mean that this process has been disregarded in this instance".⁵²

International Conferences

60. In 1992, in a report submitted to the UN Secretary-General on the protection of the environment in time of armed conflict, the ICRC described the outcome of an expert meeting it organised on this subject in Geneva from 27 to 29 April 1992, stating that:

The participants stressed the need to take environmental protection into account when assessing the military advantages to be expected from an operation. They reaffirmed the importance and relevance with regard to environmental protection of the accepted principles concerning the conduct of hostilities. These include:

- (a) The prohibition of actions causing damage that is not warranted by military necessity;
- (b) The obligation, when possible, to choose the least harmful means of reaching a military objective;
- (c) The obligation to respect proportionality between the military advantage expected and the incidental damage to the environment.⁵³

⁵⁰ UN General Assembly, Res. 51/157, 16 December 1996, Annex, § 19.

⁵¹ Chris Hedges, "Serbian Town Bombed by NATO Fears Effects of Toxic Chemicals", *New York Times*, 14 July 1999.

⁵² NATO, Press Conference by Jamie Shea and Brigadier General Giuseppe Marani, NATO Headquarters, Brussels, 20 April 1999.

⁵³ ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/47/328, 31 July 1992, § 54.

61. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to make every effort to:

Reaffirm and ensure respect for the rules of international humanitarian law applicable during armed conflicts protecting . . . the natural environment, either against attacks on the environment as such or against wanton destruction causing serious environmental damage; and continue to examine the opportunity of strengthening them.⁵⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

62. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ did not directly deal with the issue of the precise extent to which environmental treaties applied during armed conflict, but stated in general terms that:

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principle of necessity.⁵⁵

The ICJ noted that this approach was supported by Principle 24 of the 1992 Rio Declaration, and also cited with approval UN General Assembly Resolution 47/37, which stated that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing law".⁵⁶ More generally, the Court found that international environmental law "indicates important factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict".⁵⁷

63. In its Final Report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia remarked that Articles 35(3) and 55 AP I had "a very high threshold of application" which made it very difficult to assess whether environmental damage had exceeded the threshold of AP I. For this reason, in the Committee's view, the environmental impact of the NATO bombing campaign was "best considered from the underlying principles of the law of armed conflicts such as necessity and proportionality". As to the application of the principle of proportionality, the Committee stressed that:

⁵⁴ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(10), *ILM*, Vol. 33, 1994, p. 301.

⁵⁵ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 30.

⁵⁶ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 32.

⁵⁷ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 33.

- 18 ... Even when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to... natural environment with a consequential adverse effect on the civilian population. Indeed, military objectives should not be targeted if the attack is likely to cause collateral environmental damage which would be excessive in relation to the direct military advantage which the attack is expected to produce.
- ...
- 22 ... In order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate. At a minimum, actions resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose, would be questionable. The targeting by NATO of Serbian petro-chemical industries may well have served a clear and important military purpose.
- 23 The above considerations also suggest that the requisite *mens rea* on the part of a commander would be actual or constructive knowledge as to the grave environmental effects of a military attack; a standard which would be difficult to establish for the purposes of prosecution and which may provide an insufficient basis to prosecute military commanders inflicting environmental harm in the (mistaken) belief that such conduct was warranted by military necessity... In addition, the notion of "excessive" environmental destruction is imprecise and the actual environmental impact, both present and long term, of the NATO bombing campaign is at present unknown and difficult to measure.
- 24 In order to fully evaluate such matters, it would be necessary to know the extent of the knowledge possessed by NATO as to the nature of Serbian military-industrial targets (and thus, the likelihood of environmental damage flowing from their destruction), the extent to which NATO could reasonably have anticipated such environmental damage (for instance, could NATO have reasonably expected that toxic chemicals of the sort allegedly released into the environment by the bombing campaign would be stored alongside that military target?) and whether NATO could reasonably have resorted to other (and less environmentally damaging) methods for achieving its military objective of disabling the Serbian military-industrial infrastructure.⁵⁸

V. Practice of the International Red Cross and Red Crescent Movement

64. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "to fulfil his mission, the commander needs appropriate information about the enemy and the environment. To comply with the law of war, information must include: ... e) natural environment."⁵⁹

⁵⁸ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 14 June 2000, §§ 15, 18 and 22–24.

⁵⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 391.

65. In an appeal issued in 1991 in the context of the Gulf War, the ICRC reminded the belligerents that “weapons having indiscriminate effects and those likely to cause disproportionate suffering and damage to the environment are prohibited”.⁶⁰

66. In 1992, in a report submitted to the UN Secretary-General on the protection of the environment in time of armed conflict, the ICRC stated that:

5. Since its inception, international humanitarian law has set limits on the right of belligerents to cause suffering and injury to people and to wreak destruction on objects, including objects belonging to the natural environment, and has traditionally been concerned with limiting the use of certain kinds of weapons or means of warfare which continue to damage even after the war is over, or which may injure people or property of States which are completely uninvolved in the conflict.
6. [reference to the 1868 St. Petersburg Declaration]
7. [reference to Article 35(1) AP I]
8. The concept of proportionality also sets important limits on warfare: the only acts of war permitted are those that are proportional to the lawful objective of a military operation and actually necessary to achieve that objective.
9. These fundamental rules are now part of customary international law, which is binding on the whole community of nations. They are also applicable to the protection of the environment against acts of warfare.⁶¹

67. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in times of armed conflict, the ICRC stated that “because [AP I], as at present, interpreted, does not necessarily cover all cases of damage to the environment and because not all States are party to it, the earlier conventional and customary rules, especially those of The Hague (1907) and Geneva (1949), continue to be very important”.⁶² With respect to the issue of the protection of the environment in non-international armed conflict, the report further states that:

Although neither article 3 common to the 1949 Geneva Conventions nor [AP II] established a specific protection for the environment in times of non-international armed conflict, the environment is none the less protected by general rules of international humanitarian law [indiscriminate means and methods of warfare, proportionality, wanton destruction of property]. Among them, it is worth mentioning articles 14 and 15 of Protocol II of 1977, and provisions of the World Heritage Convention of 1972. The latter, applicable in all armed conflicts, could play an

⁶⁰ ICRC, Press Release No. 1659, Middle East Conflict: ICRC appeals to belligerents, 1 February 1991, *IRRC*, No. 280, 1991, p. 27.

⁶¹ ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/47/328, 31 July 1992, §§ 5–9.

⁶² ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 34.

important role; greater efforts should therefore be made to ensure its full implementation.⁶³

VI. Other Practice

68. Rogers stated that:

Environmental concerns certainly affected allied military planning [during the Gulf War]. It is reported that the allies decided not to attack four Iraqi super-tankers inside the Gulf which were contravening UN Security Council Resolution 665 because of the environmental consequences of so doing.⁶⁴

69. During a meeting of the IIHL held in 1993 as part of the process which resulted in the drafting of the 1994 San Remo Manual, a special rapporteur on the protection of the environment in armed conflict stated that the new wording of paragraph 44.5 of the manual stating that "damage to or destruction of the natural environment not justified by military necessity and carried out wantonly is prohibited" was a

response to the concern expressed by a number of participants . . . that, within the limits of the principle of military necessity, the draft should outlaw the use of the marine environment as an instrument of warfare or as a direct target or object of attack during an armed conflict at sea.⁶⁵

70. In 1995, the IUCN Commission on Environmental Law, in cooperation with the International Council of Environmental Law, issued the Draft International Covenant on Environment and Development, which was intended to stimulate consideration of a global instrument on environmental conservation and sustainable development. Article 32(2) provides that "Parties shall co-operate to further develop and implement rules and measures to protect the environment during international armed conflict and establish rules and measures to protect the environment during non-international armed conflict". The commentary on this draft provision notes that "paragraph 2 aims at the further development of the law on this subject, both to deal with international armed conflict and non-international armed conflict. In the latter case, there is a particularly glaring dearth of law which must be remedied."⁶⁶

⁶³ ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 95.

⁶⁴ A. P. V. Rogers, *Law on the Battlefield*, Manchester University Press, Manchester, 1996, p. 120.

⁶⁵ Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, p. 119, Explanation, § 44.5.

⁶⁶ IUCN, Commission on Environmental Law, Draft International Covenant on Environment and Development, Bonn, March 1995, Article 32(2) and commentary.

B. Due Regard for the Natural Environment in Military Operations

General

I. Treaties and Other Instruments

Treaties

71. Principle 3 of the 1992 Convention on Biodiversity states that:

States have, in accordance with the Charter of the United Nations and the principles of international law, . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

Other Instruments

72. Principle 21 of the 1972 Stockholm Declaration on the Human Environment provides that:

States have, in accordance with the Charter of the United Nations and the principles of international law, . . . the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

73. Principle 5 of the 1982 World Charter for Nature provides that "nature shall be secured against degradation caused by warfare or other hostile activities".

74. Principle 20 of the 1982 World Charter for Nature provides that "military activities damaging to nature shall be avoided".

75. Principle 2 of the 1992 Rio Declaration provides that:

States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.

76. Principle 24 of the 1992 Rio Declaration provides that "warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary."

77. The 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that:

- (5) International environmental agreements and relevant rules of customary law may continue to be applicable in times of armed conflict to the extent that they are not inconsistent with the applicable law of armed conflict. Obligations concerning the protection of the environment that are binding on

States not party to an armed conflict (e.g. neighbouring States) and that relate to areas beyond the limits of national jurisdiction (e.g. the high seas) are not affected by the existence of the armed conflict to the extent that those obligations are not inconsistent with the applicable law of armed conflict.

...

- (11) Care shall be taken in warfare to protect and preserve the natural environment.

78. The 1994 San Remo Manual provides that:

35. ...Due regard shall also be given to the protection and preservation of the marine environment [of the exclusive economic zone and the continental shelf].

...

44. Methods and means of warfare should be employed with due regard for the natural environment taking into account the relevant rules of international law.

II. National Practice

Military Manuals

79. Australia's Defence Force Manual states that "those responsible for planning and conducting military operations have a duty to ensure that the natural environment is protected".⁶⁷

80. South Korea's Operational Law Manual prohibits the use of weapons damaging the natural environment.⁶⁸

81. The US Naval Handbook provides that "methods and means of warfare should be employed with due regard to the protection and preservation of the natural environment".⁶⁹

National Legislation

82. No practice was found.

National Case-law

83. No practice was found.

Other National Practice

84. At the Meeting on Human Environment in 1972, China condemned the US for causing "unprecedented damage to the human environment" in South Vietnam through the use of "chemical toxic and poisonous gas". It also accused the US of destroying "large areas of rich farming land with craters", poisoning

⁶⁷ Australia, *Defence Force Manual* (1994), § 545.

⁶⁸ South Korea, *Operational Law Manual* (1996), p. 129.

⁶⁹ US, *Naval Handbook* (1995), § 8.1.3.

“rivers and other water resources”, destroying forests and crops and threatening “some of the species with extinction”.⁷⁰

85. In 1997, Colombia’s Defensoría del Pueblo (Ombudsman’s Office) denounced guerrilla attacks on oil pipelines as a violation of IHL insofar as oil spills inflicted damage on the environment, which affected both natural water sources and the productivity of the land.⁷¹

86. The Report on the Practice of Colombia states that it is Colombia’s *opinio juris* that “the parties to the conflict must protect the environment, endeavouring to prevent the damage to the natural environment caused by war operations”.⁷²

87. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Costa Rica stated that:

Due to the length of the State practice and continued State expression of maintenance and protection of the environment, the Human Right to Environment may be considered a part of customary international law. Whether it is recognized as a full legal right, it is clear that the Human Right to the Environment would be violate[d] by the threat or use of nuclear weapons.⁷³

88. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that it considered the principle whereby every State must ensure that activities within its jurisdiction or under its control do not cause damage to the environment to be a “general rule”. Referring to the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration, in which this rule was stated, Egypt argued that they “must be seen as declaratory of evolving normative regulation for the protection of the environment”.⁷⁴

89. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, France denied the existence in contemporary international law, either as *lex lata* or as *lex ferenda*, of a customary principle concerning the protection of the environment in time of armed conflict. It also indicated its view that in general none of the multilateral environmental agreements were applicable in times of armed conflict.⁷⁵

90. In December 1991, during a parliamentary debate on the consequences of the Gulf War, a member of the German parliament stated that:

⁷⁰ China, Address to the Meeting on Human Environment, 10 June 1972, *Selected Documents of the Chinese Delegation to the United Nations, 1972*, World Knowledge Press, Beijing, pp. 257–258.

⁷¹ Colombia, Defensoría del Pueblo, *En defensa del pueblo acusado: Impactos de la violencia de oleoductos en Colombia*, 1997, p. 33, §§ 2–4.

⁷² Report on the Practice of Colombia, 1998, Chapter 4.4.

⁷³ Costa Rica, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, July 1995, pp. 8–9.

⁷⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 70.

⁷⁵ France, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 27; see also Oral pleadings before the ICJ, *Nuclear Weapons case*, 2 November 1995, Verbatim Record CR 95/24, § 45.

The immediate improvement of international law providing protection from environment-destructive warfare is necessary. This implies... the ratification of the 1977 Additional Protocols to the Geneva Conventions without reservations by all NATO partners, including the Federal Republic of Germany [and] a general priority to be given to the fight against ecological damage over military secrecy in the case of armed conflict... In addition, a review is required of the existing priority of military necessity for specific acts of warfare to be legitimate over ecological needs – a very central point; furthermore, the general prohibition of the use of environmental destruction as a weapon is necessary.⁷⁶

This view was supported by another parliamentary group; the other parliamentary groups neither supported nor rejected it.⁷⁷ During the same debate, a member of the parliamentary group which had supported the first speaker stated that in the view of her group, “it is inevitable to take steps in order to give more effectiveness and respect to international law in force and to enable also the UN to prevent and punish warfare against the environment as well as violations of international conventions for the protection of the environment”.⁷⁸

91. In 1991, the German President, commenting on the effect on the environment of Iraqi means and methods of warfare, stated that “we are witnesses to an unprecedented disregard for the natural environment”.⁷⁹ The German Chancellor considered this particular type of warfare as falling within possible “crimes against the environment”.⁸⁰

92. In 1991, during a debate in the Sixth Committee of the UN General Assembly on protection of the environment in armed conflict, Iran stated that:

Turning to the law on the protection of the environment, ... the general principles of customary international law clearly contained specific rules on the protection of the environment. One such rule was the obligation of States not to damage or endanger the environment beyond their jurisdiction, a rule which had been enshrined in numerous international and regional agreements.

With regard to the application of environmental law in time of war, ... the relationship between a party to the conflict and a neutral State was essentially governed by the law in time of peace and, consequently, belligerent parties had an obligation to respect environmental law vis-à-vis non-belligerent States. There was no universally accepted rule concerning the application of international law on the protection of the environment to belligerent parties, and some argued that the relationship was governed by the law of armed conflict, which meant that with the outbreak of war, the application of rules on the protection of the environment

⁷⁶ Germany, Lower House of Parliament, Statement by a Member of Parliament, Dr. Klaus Kübler, 5 December 1991, *Plenarprotokoll* 12/64, p. 5509.

⁷⁷ Germany, Lower House of Parliament, Proposal by the Alliance 90/The Greens, Nationale und internationale Konsequenzen der ökologischen Auswirkungen des Golf-krieges, *BT-Drucksache* 12/779, 17 June 1991, p. 5528.

⁷⁸ Germany, Lower House of Parliament, Statement by a Member of Parliament, Birgit Homburger, 5 December 1991, *Plenarprotokoll* 12/64, p. 5528.

⁷⁹ Germany, Statement by the President, Richard von Weizsäcker, 29 January 1991, *Bulletin*, No. 7, Presse- und Informationsamt der Bundesregierung, Bonn, 30 January 1991, p. 57.

⁸⁰ Germany, Statement by the Chancellor, Helmut Kohl, 9 April 1991, *Bulletin*, No. 35, Presse- und Informationsamt der Bundesregierung, Bonn, 12 April 1991, p. 255.

was suspended. However, others argued that in such cases, under treaty law and customary law, international legal rules protecting the environment were neither suspended [n]or terminated, since the law of armed conflict itself tended to protect the environment in time of war.⁸¹

93. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that:

[The] prohibition of the use of nuclear weapons, due to their huge destructive and modifying effects, could also be understood from the rules of international law relating to the environment. First of all, reference can be made to Principle 21 of [the] 1972 Stockholm Declaration on Human Environment which, as a customary rule, stipulated that States are responsible for any acts in their territory having adverse effects on the environment of other States. The same idea is also reflected in Principle [2] of [the] Rio Declaration of 1992. It can be argued that, while States are prevented from such conducts in their own territory, they are duly bound to refrain from any such acts against other States.

...

The progressive development of international environmental law in recent years has resulted in the adoption of a series of treaties, such as:

- Vienna Convention for the Protection of the Ozone Layer (1985)
- United Nations Framework Convention on Climate Change (1992)
- Convention on Biological Diversity (1992)

which is indicative of the awareness of [the] international community and the emergence of an *opinio juris* concerning the preservation of the environment. Therefore, the use of nuclear weapons, having the most destructive effects on the environment, is a great concern of [the] international society.⁸²

94. The Report on the Practice of Iran states that the Iranian government holds Iraq responsible for attacking oil tankers in the Gulf and polluting the sea during the Iran–Iraq War. Iran also denounced Iraq for using chemical weapons, which resulted in the pollution of the air, water, soil and consequent effects on the ecosystem. The report adds that it is Iran's *opinio juris* that "the environment must be protected against pollution during armed conflict".⁸³

95. The Report on the Practice of Kuwait states that it is Kuwait's *opinio juris* that States shall not resort to military operations that entail consequences for the environment. When such consequences occur, the report considers that Chapter VII of the UN Charter should be applied.⁸⁴

96. A training document for the Lebanese army regards "offences against the environment" as "a 'conventional' war crime" and includes them in the list of acts considered to amount to war crimes.⁸⁵

⁸¹ Iran, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, §§ 30–31.

⁸² Iran, Written statement submitted to the ICJ *Nuclear Weapons case*, 19 June 1995, pp. 4–5, § c.

⁸³ Report on the Practice of Iran, 1997, Chapter 4.4.

⁸⁴ Report on the Practice of Kuwait, 1997, Chapter 4.4.

⁸⁵ Lebanon, Training document, *L'Etat de droit et les opérations disciplinées*, 1996, p. 8–4 and p. 12–11.

97. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Malaysia expressed the view that “the principle of environmental safety is now recognised as part of international humanitarian law”.⁸⁶

98. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Mexico stated that “the threat or use of nuclear arms in an armed conflict would constitute a breach of principles of international environmental law generally accepted”.⁸⁷

99. In 1991, in a letter to the President of the Dutch parliament concerning the environmental aspects of the Gulf War, the Ministers of Foreign Affairs, of Development Cooperation and of Defence of the Netherlands stated that they considered the intentional draining of oil and setting alight of hundreds of oil wells by Iraq in Kuwait to be “serious crimes against the environment”.⁸⁸

100. At the First Review Conference of States Parties to the CCW in 1995, Peru stressed the need to establish rules determining the liability of States for damage caused to the environment by the use of certain conventional weapons that may be deemed to be excessively injurious or to have indiscriminate effects.⁸⁹

101. The Report on the Practice of the Philippines states that “there are no specific rules which categorically state that the environment should be spared and protected during armed conflicts”. It refers to some information provided by NGOs, according to which, in most cases, the forest serves as a shield for civilians fleeing bombing, shelling and gun battles between combatants, resulting in damage to the area and the resources contained therein.⁹⁰

102. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Qatar referred to the emergence within the international community “of an *opinio juris* concerning the preservation of the environment”.⁹¹

103. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands argued that “the use of nuclear weapons violates international law for the protection of human health, the environment and fundamental human rights”.⁹² In its oral pleadings, the Solomon Islands reiterated the argument whereby multilateral environmental agreements applied also in times of war, unless expressly provided otherwise.⁹³

⁸⁶ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons case*, undated, p. 10.

⁸⁷ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, pp. 10–11, §§ 35–41.

⁸⁸ Netherlands, Lower House of Parliament, Letter from the Ministers of Foreign Affairs, of Development Cooperation and of Defence concerning the environmental aspects of the Gulf War, 1990–1991 Session, Doc. 21664, No. 68.

⁸⁹ Peru, Statement at the First Review Conference of States Parties to the CCW (First Session), Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF.I/SR 5, 3 October 1995, §§ 67–69.

⁹⁰ Report on the Practice of the Philippines, 1997, Chapter 4.4.

⁹¹ Qatar, Oral pleadings before the ICJ, *Nuclear Weapons case*, 10 November 1995, Verbatim Record CR 95/29, §§ 28–29.

⁹² Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, Section B.

⁹³ Solomon Islands, Oral pleadings before the ICJ, *Nuclear Weapons case*, 14 November 1995, Verbatim Record CR 95/32, § 22.

104. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, Sri Lanka stated that “the protection of the environment in times of armed conflict has . . . emerged as an established principle of international law”.⁹⁴

105. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK condemned Iraq for inflicting environmental damage by causing oil spills and oil fires in Kuwait, and underlined the substantial contribution made by his government to the international effort in response to this damage.⁹⁵

106. According to the Report on UK Practice, during the Rio Summit on Environment and Development in 1992, the UK Minister of State for the Armed Forces supported the principle that “States should respect international law providing protection for the environment in times of armed conflict”.⁹⁶

107. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that the argument “that the general provisions in environmental treaties have the effect of outlawing the use of nuclear weapons” cannot be sustained because:

These treaties . . . make no reference to nuclear weapons. Their principal purpose is the protection of the environment in times of peace. Warfare in general, and nuclear warfare in particular, are not mentioned in their texts and were scarcely alluded to in the negotiations which led to their adoption.⁹⁷

108. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US refuted the possibility of inferring a principle of “environmental security” from existing international environmental treaties, which would form part of the law of war, being that none of these treaties refers to such a principle, nor was any of them negotiated “with any idea that it [the treaty] was to be applicable in armed conflict”.⁹⁸ The US went on to state that “even if these treaties were meant to apply in armed conflict . . . the language of none of them prohibits or limits the actions of States in any manner that would reasonably apply to the use of weapons”. With reference to the 1972 Stockholm Declaration on the Human Environment, the US maintained that “nothing in the Declaration purports to ban the use of nuclear weapons in armed conflict”.⁹⁹ Lastly,

⁹⁴ Sri Lanka, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 3.

⁹⁵ UK, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22218, 13 February 1991; see also Letter dated 23 April 1991 to the President of the UN Security Council, UN Doc. S/22522, 23 April 1991.

⁹⁶ Report on UK Practice, 1997, Chapter 4.4.

⁹⁷ UK, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/34, p. 42.

⁹⁸ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp. 34–35; see also Written comments on the submissions of other States submitted to the ICJ, *Nuclear Weapons (WHO) case*, 20 June 1995, pp. 10–19 and Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/34, pp. 64–66.

⁹⁹ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 39.

the US stated that, although Principles 1, 2 and 25 of the 1992 Rio Declaration had been relied upon to maintain that “the threat or use of nuclear weapons in an armed conflict would constitute a breach of generally accepted principles of international environmental law, . . . none of these principles addresses armed conflict or the use of nuclear weapons”.¹⁰⁰

109. In 1991, during a debate in Sixth Committee of the UN General Assembly on the environmental impact of the Gulf War, Yemen stated that “the damage caused to the environment as a result of the war had emphasised the importance of adherence to the legal norms on the prohibition on causing damage to the environment in times of armed conflict, norms which had been incorporated in a number of international conventions in the field of humanitarian law”, referring in particular to AP I and the 1976 ENMOD Convention.¹⁰¹

110. The Report on the Practice of Zimbabwe recalls Zimbabwe’s adoption of the 1992 Rio Principles as evidence that environmental protection during armed conflict forms an important component of Zimbabwe’s view of IHL. It also refers to “various pieces of legislation” dealing with environmental protection and setting up standards to be observed at all times, “whether or not there is armed conflict”, as evidence of Zimbabwe’s view that the environment should be protected even in times of armed conflict.¹⁰²

III. Practice of International Organisations and Conferences

United Nations

111. In a resolution adopted in 1991, the UN Security Council reaffirmed Iraq’s responsibility “under international law for any direct loss, damage including environmental damage and the depletion of natural resources or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait”.¹⁰³

112. In a resolution adopted in 1992, the UN General Assembly stated that it was “aware of the disastrous situation caused in Kuwait and neighbouring areas by the torching and destruction of hundreds of its oil wells and of the other environmental consequences on the atmosphere, land and marine life”. It recalled Security Council Resolution 687, section E, in which Iraq’s international responsibility for environmental damage caused during Kuwait’s occupation had been asserted. The General Assembly further stated that it was:

profoundly concerned at the deterioration in the environment as a consequence of the damage, especially the threat posed to the health and well-being of the people of Kuwait and the people of the region, and the adverse impact on the economic

¹⁰⁰ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 41.

¹⁰¹ Yemen, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.20, 22 October 1991, § 30.

¹⁰² Report on the Practice of Zimbabwe, 1998, Chapter 4.4.

¹⁰³ UN Security Council, Res. 687, 3 April 1991, § 16.

activities of Kuwait and other countries of the region, including the effects on livestock, agriculture and fishing, as well as on wildlife.¹⁰⁴

113. In a resolution adopted in 1994 on the United Nations Decade on International Law, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict. The General Assembly invited:

all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.¹⁰⁵

114. The programme of activities for the final term (1997–1999) of the UN Decade of International Law, adopted by the UN General Assembly in 1996, states that:

In connection with training of military personnel, States are encouraged to foster the teaching and dissemination of the principles governing the protection of the environment in times of armed conflict and should consider the possibility of making use of the guidelines for military manuals and instructions prepared by the International Committee of the Red Cross.¹⁰⁶

115. In a resolution adopted in 2001, the UN General Assembly considered that “damage to the environment in times of armed conflict impairs ecosystems and natural resources long beyond the period of conflict, and often extends beyond the limits of national territories and the present generation”. It therefore declared “6 November each year as the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict”.¹⁰⁷

116. In 1991, with regard to the environmental consequences of the Gulf War, the Governing Council of the UNCC expressed “its concern about the environmental damage that occurred during the armed conflict in the Gulf area, which resulted in the pollution of the waters of the area by oil, air pollution from burning oil wells and other environmental damage to the surrounding areas”.¹⁰⁸

Other International Organisations

117. In 2001, in a report on the environmental impact of the war in the FRY on south-east Europe, the Committee on the Environment, Regional Planning and Local Authorities of the Parliamentary Assembly of the Council of Europe

¹⁰⁴ UN General Assembly, Res. 46/216, 20 December 1991, preamble; see also Res. 47/151, 18 December 1992, preamble.

¹⁰⁵ UN General Assembly, Res. 49/50, 9 December 1994, § 11.

¹⁰⁶ UN General Assembly, Res. 51/157, 16 December 1996, Annex, § 19.

¹⁰⁷ UN General Assembly, Res. 56/4, 5 November 2001, preamble and § 1.

¹⁰⁸ UNCC, Governing Council, Decision 16/11, 31 May 1991, § A.

noted that the military operations conducted by NATO against the FRY during the 1999 Kosovo crisis had caused serious damage to the country's natural environment and that the damage had extended to several other countries of south-east Europe. The report stated that "the military operations violated the rights of Yugoslav citizens and people in neighbouring countries, first and foremost the right to a healthy environment".¹⁰⁹

International Conferences

118. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

119. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ made reference to the *Nuclear Tests case (Request for an Examination of the Situation)*, in which it held that its order in that case was "without prejudice to the obligations of States to respect and protect the natural environment". The Court stated that "although that statement was made in the context of nuclear testing, it naturally also applies to the actual use of nuclear weapons in armed conflict".¹¹⁰

120. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that:

The Court recognizes that the environment is under daily threat and . . . also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.¹¹¹

121. In its judgement in the *Gabcikovo-Nagymaros Project case* in 1997, the ICJ considered whether protection of the environment amounted to an "essential interest" of a State that could be invoked in order to justify, by way of "necessity", actions that were not in conformity with that State's international obligations. The Court, stressing that a state of necessity could only be invoked in exceptional circumstances, answered in the affirmative. It quoted the ILC in this regard, which stated that a state of necessity could include "a grave danger to . . . the ecological preservation of all or some of [the] territory [of a State]" and that "it is primarily in the last two decades that safeguarding the ecological balance has come to be considered an 'essential interest' of all States". The

¹⁰⁹ Council of Europe, Parliamentary Assembly, Committee on the Environment, Regional Planning and Local Authorities, Report on the Environmental Impact of the War in Yugoslavia on South-East Europe, Doc. 8925, 10 January 2001, § 59.

¹¹⁰ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 32.

¹¹¹ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 29.

Court then quoted paragraph 29 of its advisory opinion in the *Nuclear Weapons case* in order to show that it had recently stressed “the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind”.¹¹²

V. Practice of the International Red Cross and Red Crescent Movement

122. In 1992, in a report submitted to the UN Secretary-General on the protection of the environment in time of armed conflict, the ICRC stated that “in addition to the rules of law pertaining to warfare, general (peacetime) provisions on the protection of the environment may continue to be applicable. This holds true in particular for the relations between a belligerent State and third States.”¹¹³

VI. Other Practice

123. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that:

- (1) A state is obligated to take such measures as may be necessary, to the extent practicable under the circumstances, to ensure that activities within its jurisdiction or control
 - (a) conform to generally accepted international rules and standards for the prevention, reduction, and control of injury to the environment of another state or of areas beyond the limits of national jurisdiction; and
 - (b) are conducted so as not to cause significant injury to the environment of another state or of areas beyond the limits of national jurisdiction.
- (2) A state is responsible to all other states
 - (a) for any violation of its obligations under Subsection 1(a), and
 - (b) for any significant injury, resulting from such violation, to the environment of areas beyond the limits of national jurisdiction.
- (3) A state is responsible for any significant injury, resulting from a violation of its obligations under Subsection (1), to the environment of another state or to its property, or to persons or property within that state’s territory or under its jurisdiction or control.¹¹⁴

124. In a resolution adopted in 1991, the Politico-Military High Command of the SPLM/A stated that “the SPLM/SPLA shall do everything to halt the

¹¹² ICJ, *Gabcikovo-Nagymaros Project case*, Judgement, 25 September 1997, §§ 50–53.

¹¹³ ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/47/328, 31 July 1992, § 11.

¹¹⁴ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 601.

destruction of our wildlife resources and to protect and develop them for us and for posterity".¹¹⁵

125. In 1995, the IUCN Commission on Environmental Law, in cooperation with the International Council of Environmental Law, issued the Draft International Covenant on Environment and Development, which was intended to stimulate consideration of a global instrument on environmental conservation and sustainable development. Article 32(1) provides that:

Parties shall protect the environment during periods of armed conflict. In particular, Parties shall:

- (a) observe, outside areas of armed conflict, all international environmental rules by which they are bound in times of peace;
- (b) take care to protect the environment against avoidable harm in areas of armed conflict.¹¹⁶

The precautionary principle

I. Treaties and Other Instruments

Treaties

126. Paragraph 9 of the preamble to the 1992 Convention on Biodiversity states that "where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimize such a threat".

Other Instruments

127. Principle 15 of the 1992 Rio Declaration states that:

In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

II. National Practice

Military Manuals

128. No practice was found.

National Legislation

129. No practice was found.

¹¹⁵ SPLM/A, PMHC Resolution No. 17: Wild Life and the Environment, 11 September 1991, § 17.1, Report on SPLM/A Practice, 1998, Chapter 4.3.

¹¹⁶ IUCN, Commission on Environmental Law, Draft International Covenant on Environment and Development, Bonn, March 1995, Article 32(1).

National Case-law

130. No practice was found.

Other National Practice

131. In its written statement submitted to the ICJ in the *Nuclear Tests case (Request for an Examination of the Situation)* in 1995, France argued that it was uncertain whether the precautionary principle had become a binding rule of international law. It went on to state that France does carry out an analysis of the impact of its activities on the environment, and described all the measures it took to ensure that the tests would not have a negative effect. It described these measures as being precautions that were in keeping with its obligations under international environmental law and therefore France did exercise sufficient diligence. However, it denied that the precautionary principle could have the effect of shifting the burden of proof as New Zealand asserted.¹¹⁷

132. In its written statement submitted to the ICJ in the *Nuclear Tests case (Request for an Examination of the Situation)*, New Zealand argued, in its request for an examination of the situation, that, under customary international law, a State is under an obligation to carry out an environmental impact assessment "in relation to any activity which is likely to cause significant damage to the environment, particularly where such effects are likely to be transboundary in nature".¹¹⁸ New Zealand also referred to the "precautionary principle" as a "very widely accepted and operative principle of international law" and which has the effect that "in situations that may possibly be significantly environmentally threatening, the burden is placed upon the party seeking to carry out the conduct that could give rise to environmental damage to prove that that conduct will not lead to such a result".¹¹⁹ New Zealand indicated that France had accepted this rule because it was contained in French law No. 95-101 of 1995 in the following terms:

The precautionary principle, according to which the absence of certainty, having regard to scientific and technical knowledge at the time, should not hold up the adoption of effective and proportionate measures with a view to avoiding a risk of serious and irreversible damage to the environment at an economically acceptable cost.¹²⁰

¹¹⁷ France, Written statement submitted to the ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, 12 September 1995, Verbatim Record CR 95/20, pp. 56-62.

¹¹⁸ New Zealand, Written statement submitted to the ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, undated, § 89.

¹¹⁹ New Zealand, Written statement submitted to the ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, undated, § 105.

¹²⁰ New Zealand, Written statement submitted to the ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, undated, § 107.

III. Practice of International Organisations and Conferences

United Nations

133. The meeting of the UN Economic Commission for Europe (ECE) in 1990 issued the Bergen ECE Ministerial Declaration on Sustainable Development. Article 7 of this Declaration formulated the precautionary principle in these terms:

In order to achieve sustainable development, policies must be based on the precautionary principle. Environmental measures must anticipate, prevent and attack the causes of environmental degradation. Where there are threats of serious or irreversible damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.¹²¹

134. On 14 August 2000, KFOR troops assisted UNMIK and UNMIK-Police in taking control of a lead-smelting plant in Zvecan, part of the Trepca mining complex in northern Kosovo. As a justification for the military action, the Special Representative of the UN Secretary-General for Kosovo explained that the Zvecan plant had been producing unacceptable levels of air pollution and therefore presented a serious threat to public health.¹²² In a press conference at the UN Headquarters, the chargé d'affaires a.i. of the Permanent Mission of the FRY to the UN said that the government of the FRY rejected the Special Representative's claim that KFOR was acting to prevent lead pollution. He maintained that daily air measurements corresponded to Yugoslav government regulations, adding that, even if high air pollution had been the problem, "it was not sufficient to justify such a crude use of military force".¹²³

135. In its report in 1996, the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, which was established by UNEP in 1994 within the purview of the Montevideo Programme II, provided a practical contribution to the work of the UNCC, *inter alia*, by recommending the criteria for evaluating "environmental damage". The Working Group examined four kinds of damages in respect of which claims for compensation were allowed:

- a) Abatement and prevention of environmental damage (including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters);

¹²¹ UN Economic Commission for Europe, Bergen ECE Ministerial Declaration on Sustainable Development, 15 May 1990, Article 7.

¹²² KFOR, Acting KFOR Spokesman, News Update, COMKFOR's Zvecan Smelter Plant Closure Statement, Pristina, 14 August 2000, see website www.kforonline.com/news/updates/nu_14aug00.htm.

¹²³ FRY, Press Conference by the Permanent Mission of FRY to the UN, New York, 22 August 2000.

- b) Reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment;
- c) Reasonable monitoring and assessment of the environmental damage for the purpose of evaluating and abating harm and restoring the environment; and
- d) Reasonable monitoring of public health and performing medical screening for the purposes of investigation and combating increased health risks as a result of the environmental damage.¹²⁴

As to the first type of damages, the Working Group concluded that “the methodology for determining the amount of compensation would be the costs actually incurred in taking such measures [to abate or prevent environmental damage]”. It added that, although not expressly mentioned, “it would . . . be appropriate to infer a limitation on compensation to measures which themselves are reasonable, and to costs that are reasonable in amount”, while “in the light of the precautionary principle some latitude would be warranted in relation to costs incurred in an emergency situation requiring a prompt response in the face of limited information”.¹²⁵ As to the other type of damages, reference was also made by the Working Group to the precautionary principle as an element to be taken into due account for determining the “reasonableness” of the activities in question.¹²⁶

136. In June 2001, within the framework of the activities of the UNCC, the “F4” Panel of Commissioners submitted its first report to the Governing Council dealing with claims for losses resulting from environmental damage and the depletion of natural resources. The report addressed only the first instalment of “F4” claims, which included claims submitted by the governments of Iran, Kuwait, Saudi Arabia, Syria and Turkey for compensation for expenses resulting from monitoring and assessment activities undertaken or to be undertaken by the claimants to identify and evaluate environmental damage suffered as a result of Iraq’s invasion and occupation of Kuwait (“monitoring and assessment claims”). In particular, these activities related to damage from air pollution and oil pollution caused by the ignition of hundreds of oil wells and by the release of millions of barrels of oil into the sea by Iraqi forces in Kuwait.¹²⁷ In deciding whether expenses incurred for monitoring and assessment activities were compensable, the Panel declared that it had considered “whether there was evidence that the activity proposed or undertaken could produce information

¹²⁴ UNEP, Report of the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, adopted at the Third Meeting of the Working Group, London, 17 May 1996.

¹²⁵ UNEP, Report of the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, adopted at the Third Meeting of the Working Group, London, 17 May 1996, §§ 61 and 62.

¹²⁶ UNEP, Report of the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, adopted at the Third Meeting of the Working Group, London, 17 May 1996, §§ 65 and 73.

¹²⁷ UNCC, Governing Council, Report and Recommendations made by the Panel of Commissioners concerning the first instalment of F4 claims, UN Doc. S/AC.26/2001/16, 22 June 2001, p. 9, §§ 13–14.

that might be helpful in identifying environmental damage and depletion of natural resources, or that could offer a useful basis for taking preventive or remedial measures".¹²⁸

Other International Organisations

137. No practice was found.

International Conferences

138. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it called upon parties to conflict "to take all feasible precautions to avoid, in their military operations, all acts liable to destroy or damage water sources".¹²⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

139. The ICJ's order in the *Nuclear Tests case (Request for an Examination of the Situation)* in 1995 turned on procedural aspects and did not consider the merits of the arguments relating to the need for a prior assessment and the application of the precautionary principle. The order only made a reference in the most general terms to "obligations of States to respect and protect the natural environment, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment".¹³⁰

140. In his dissenting opinion in the *Nuclear Tests case (Request for an Examination of the Situation)* in 1995, Judge Weeramantry referred to the precautionary principle as one "which is gaining increasing support as part of the international law of the environment" and the principle requiring an environmental impact assessment as "gathering strength and international acceptance".¹³¹

141. In his dissenting opinion in the *Nuclear Tests case (Request for an Examination of the Situation)* in 1995, Judge Palmer stated that "as the law now stands it is a matter of legal duty to first establish before undertaking an activity that the activity does not involve any unacceptable risk to the environment". He added that "the norm involved in the precautionary principle has developed rapidly and may now be a principle of customary international law relating to the environment".¹³²

¹²⁸ UNCC, Governing Council, UN Doc. S/AC.26/2001/16, Report and Recommendations made by the Panel of Commissioners concerning the first instalment of F4 claims, 22 June 2001, p. 15, § 35.s

¹²⁹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § F(b).

¹³⁰ ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, Order, 22 September 1995, § 64.

¹³¹ ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, Dissenting Opinion of Judge Weeramantry, 22 September 1995, pp. 342 and 344.

¹³² ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, Dissenting Opinion of Judge Palmer, 22 September 1995, §§ 87 and 91.

V. Practice of the International Red Cross and Red Crescent Movement

142. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “targets for particular weapons and fire units shall be determined and assigned with the same precautions as to military objectives, specially taking into account the tactical result desired . . . and the destructive power of the ammunition used (. . . possible effects on the environment)”.¹³³

143. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in times of armed conflict, the ICRC stated that, with respect to the applicability of the precautionary principle to the protection of the environment in times of armed conflict:

This principle is an emerging, but generally recognized principle of international law. The object of the precautionary principle is to anticipate and prevent damage to the environment and to ensure that, where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason to postpone any measures to prevent such damage.¹³⁴

VI. Other Practice

144. No practice was found.

C. Causing Serious Damage to the Natural Environment

Widespread, long-term and severe damage

I. Treaties and Other Instruments

Treaties

145. Article 35(3) AP I provides that “it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”. Article 35 AP I was adopted by consensus.¹³⁵

146. Article 55(1) AP I provides that:

Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.

¹³³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 433.

¹³⁴ ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 91.

¹³⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 101.

Article 55 AP I was adopted by consensus.¹³⁶

147. Upon ratification of AP I, France stated that:

The Government of the French Republic considers that the risk of damaging the natural environment which results from the use of certain means or methods of warfare, as derives from the provisions of paragraphs 2 and 3 of Article 35 as well as those of Article 55, shall be examined objectively on the basis of information available at the time of its assessment.¹³⁷

148. Upon ratification of AP I, Ireland stated that:

In ensuring that care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage and taking account of the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment thereby prejudicing the health or survival of the population, Ireland declares that nuclear weapons, even if not directly governed by Additional Protocol I, remain subject to existing rules of international law as confirmed in 1996 by the International Court of Justice in its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons. Ireland will interpret and apply this Article in a way which leads to the best possible protection for the civilian population.¹³⁸

149. Upon ratification of AP I, the UK declared with respect to Articles 35(3) and 55 AP I that:

The United Kingdom understands both of these provisions to cover the employment of methods and means of warfare and that the risk of environmental damage falling within the scope of these provisions arising from such methods and means of warfare is to be assessed objectively on the basis of the information available at the time.¹³⁹

150. During the negotiations on AP II at the CDDH, environmental aspects were first addressed at the initiative of Australia, which proposed the addition of an Article 28 *bis* concerning the protection of the natural environment, stressing that "destruction of the environment should be prohibited not only in international but also in non-international conflicts".¹⁴⁰ This draft provision read as follows: "It is forbidden to employ methods and means of combat which are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment."¹⁴¹ Committee III adopted the proposal by

¹³⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 209.

¹³⁷ France, Reservations and declaration made upon ratification of AP I, 11 March 2001, § 6.

¹³⁸ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 11.

¹³⁹ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § e.

¹⁴⁰ Australia, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.20, 14 February 1975, p. 176, § 37.

¹⁴¹ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Report of Committee III, Geneva, 3 February–18 April 1975, p. 324.

49 votes in favour, 4 against and 7 abstentions.¹⁴² The provision was rejected in the plenary by 25 votes in favour, 19 against and 33 abstentions.¹⁴³

151. The preamble to the 1980 CCW recalls that “it is prohibited to employ methods and means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”.

152. Upon ratification of the 1980 CCW, France stated that:

The fourth paragraph of the preamble to the Convention on Prohibitions or Restrictions on The Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, which reproduces the provisions of Article 35, paragraph 3, of Additional Protocol I, applies only to States parties to that Protocol.¹⁴⁴

153. Upon ratification of the 1980 CCW, the US stated that:

The United States considers that the fourth paragraph of the preamble to the Convention, which refers to the substance of provisions of article 35(3) and article 55(1) of additional Protocol I to the Geneva Convention for the Protection of War Victims of August 12, 1949, applies only to States which have accepted those provisions.¹⁴⁵

154. Pursuant to Article 8(2)(b)(iv) of the 1998 ICC Statute, “intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” constitutes a war crime in international armed conflicts.

155. Upon ratification of the 1998 ICC Statute, France declared that “the risk of damage to the natural environment as a result of the use of methods and means of warfare, as envisaged in article 8, paragraph 2(b)(iv), must be weighed objectively on the basis of the information available at the time of its assessment”.¹⁴⁶

Other Instruments

156. Pursuant to Article 22(d) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, “employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment” is an exceptionally serious war crime.

¹⁴² CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, Report of Committee III, Geneva, 3 February–18 April 1975, p. 294, § 146.

¹⁴³ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 114.

¹⁴⁴ France, Reservations made upon ratification of the CCW, 4 March 1988.

¹⁴⁵ US, Statements of understanding made upon ratification of the CCW, 24 March 1995.

¹⁴⁶ France, Interpretative declarations made upon ratification of the ICC Statute, 9 June 2000, § 7.

157. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 35(3) and 55 AP I.

158. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 35(3) and 55 AP I.

159. Paragraph 11 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that “it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment and thereby prejudice the health or survival of the population”.

160. Pursuant to Article 20(g) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind the following constitutes a war crime:

in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs.

161. Section 6.3 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force is prohibited from employing methods of warfare . . . which are intended, or may be expected to cause, widespread, long-term and severe damage to the natural environment”.

162. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(iv), “intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated” constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

163. Argentina’s Law of War Manual provides that “the natural environment must be protected against widespread, long-term and severe damage”.¹⁴⁷ The manual also restates Article 35 AP I.¹⁴⁸

164. Australia’s Commanders’ Guide states that “it is prohibited to use methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment and

¹⁴⁷ Argentina, *Law of War Manual* (1989), § 4.03.

¹⁴⁸ Argentina, *Law of War Manual* (1989), § 1.04(3).

thereby jeopardise the survival or seriously prejudice the health or survival of the population".¹⁴⁹

165. Australia's Defence Force Manual states that:

Any method or means of warfare which is planned, or expected, to cause widespread, long-term and severe damage to the natural environment and thereby jeopardise the survival or seriously prejudice the health of the population is prohibited. In this context, "long-term" means continuing for decades. Means or methods which are not expected to cause such damage are permitted even if damage results.¹⁵⁰

166. Belgium's Law of War Manual prohibits the use of "methods or means of warfare . . . which cause such damage to the natural environment that they prejudice the health or survival of the population". The manual specifically prohibits "methods or means of warfare that are intended or may be expected to cause widespread, long-term and severe damage to the natural environment".¹⁵¹ With respect to weapons, the manual states that the basic principle whereby the only legitimate goal in war is to weaken the enemy's military forces would be violated if weapons or other means of warfare were used which "would cause widespread, long-term and severe damage to the natural environment".¹⁵²

167. Benin's Military Manual states that it is prohibited "to use means and methods of warfare which are likely to cause widespread, long-term and severe damage to the natural environment".¹⁵³

168. Canada's LOAC Manual states that:

83. Care shall be taken in an armed conflict to protect the natural environment against widespread, long-term and severe damage.

84. Attacks which are intended or may be expected to cause damage to the natural environment that prejudices the health or survival of the population are prohibited.¹⁵⁴

169. Colombia's Basic Military Manual states that "the use of weapons which cause unnecessary and indiscriminate, widespread, long-term and severe damage to persons and the environment" is prohibited.¹⁵⁵

170. France's LOAC Manual restates the prohibition on employing methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment set out in Article 35 AP I.¹⁵⁶

¹⁴⁹ Australia, *Commanders' Guide* (1994), § 909.

¹⁵⁰ Australia, *Defence Force Manual* (1994), § 713.

¹⁵¹ Belgium, *Law of War Manual* (1983), pp. 27–28.

¹⁵² Belgium, *Law of War Manual* (1983), p. 37.

¹⁵³ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹⁵⁴ Canada, *LOAC Manual* (1999), pp. 4-8/4-9, §§ 83–84, see also p. 6-5, § 44.

¹⁵⁵ Colombia, *Basic Military Manual* (1995), pp. 49–50.

¹⁵⁶ France, *LOAC Manual* (2001), p. 63.

171. Germany's Soldiers' Manual provides that "it is prohibited to use means or methods of warfare which are intended or of a nature . . . to cause widespread, long-term and severe damage to the natural environment".¹⁵⁷

172. Germany's Military Manual states that:

401. It is particularly prohibited to employ means or methods which are intended or of a nature . . . to cause widespread, long-term and severe damage to the natural environment.

...

403. "Widespread", "long-term" and "severe" damage to the natural environment is a major interference with human life or natural resources which considerably exceeds the battlefield damage to be regularly expected in a war. Damage to the natural environment by means of warfare (Art. 35 para 3, 55 para 1 AP I) and severe manipulation of the environment as a weapon (ENMOD) are likewise prohibited.¹⁵⁸

173. Germany's IHL Manual states that "it is prohibited to use means or methods of warfare which are intended or of a nature . . . to cause widespread, long-term and severe damage to the natural environment".¹⁵⁹

174. Italy's IHL Manual states that "it is prohibited to use means and methods of warfare, which may cause . . . widespread, long-term and severe damage to the natural environment".¹⁶⁰

175. Kenya's LOAC Manual provides that it is forbidden "to use methods of warfare which are specifically intended or may be expected to cause widespread, long-term and severe damage to the natural environment".¹⁶¹

176. The Military Manual of the Netherlands states that "it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".¹⁶² The manual explains that the part of AP I concerning the general protection of the civilian population against the effects of hostilities repeats this prohibition (in Article 55) with the proviso that "the damage to the natural environment has to be such that the health or the survival of the civilian population is endangered".¹⁶³

177. The Military Handbook of the Netherlands states that "attention must be paid to the protection of the natural environment against widespread, long-term and severe damage".¹⁶⁴

178. New Zealand's Military Manual states that:

Care shall be taken in warfare to protect the natural environment against widespread, long-term *and* severe damage. This protection includes a prohibition

¹⁵⁷ Germany, *Soldiers' Manual* (1991), p. 5.

¹⁵⁸ Germany, *Military Manual* (1992), §§ 401 and 403, see also § 1020 (naval warfare).

¹⁵⁹ Germany, *IHL Manual* (1996), § 302.

¹⁶⁰ Italy, *IHL Manual* (1991), Vol. I, § 7.

¹⁶¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 3, see also Précis No. 2, p. 2.

¹⁶² Netherlands, *Military Manual* (1993), p. IV-1, § 1.

¹⁶³ Netherlands, *Military Manual* (1993), p. V-9, § 7.

¹⁶⁴ Netherlands, *Military Handbook* (1995), p. 7-44.

of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.¹⁶⁵ [emphasis in original]

179. Russia's Military Manual states that "substances which have widespread, long-term and severe consequences on the environment" are prohibited means of warfare.¹⁶⁶

180. Spain's LOAC Manual states that:

There is a serious concern today about the protection of the natural environment which is translated in the law of war in the form of three specific prohibitions to use means and methods of warfare which would cause widespread, long-term and severe damage to the environment (Articles 35 and 55 AP I and the 1976 ENMOD Convention).¹⁶⁷

181. Sweden's IHL Manual refers to Article 55 AP I as providing that "the parties shall exercise caution so that widespread, long-term and severe damage [to the natural environment] can be avoided".¹⁶⁸

182. Switzerland's Basic Military Manual prohibits the employment of means of warfare likely to cause "serious and long-term damage to the natural environment".¹⁶⁹ It further states that "during military operations, care must be taken to protect the environment against widespread, long-term and severe damage".¹⁷⁰

183. Togo's Military Manual states that it is prohibited "to use means and methods of warfare which are likely to cause widespread, long-term and severe damage to the natural environment".¹⁷¹

184. The UK LOAC Manual states that it is forbidden "to use methods of warfare which are specifically intended to cause widespread, long-term and severe damage to the natural environment. This rule does not prohibit the use of nuclear weapons against military objectives."¹⁷² In a subsequent section, the manual states that "the following are prohibited in *international* armed conflict: . . . g. weapons (other than nuclear weapons) intended or which may be expected to cause widespread, long-term and severe damage to the natural environment".¹⁷³ (emphasis in original)

185. The US Air Force Commander's Handbook states that:

Weapons that may be expected to cause widespread, long-term, and severe damage to the natural environment are prohibited. This is a new principle, established by

¹⁶⁵ New Zealand, *Military Manual* (1992), §§ 505(1) and 614(1).

¹⁶⁶ Russia, *Military Manual* (1990), § 6(g).

¹⁶⁷ Spain, *LOAC Manual* (1996), Vol. I, §§ 1.3.d.(4) and 4.5.b.(4).

¹⁶⁸ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 62.

¹⁶⁹ Switzerland, *Basic Military Manual* (1987), Article 17.

¹⁷⁰ Switzerland, *Basic Military Manual* (1987), Article 25(3).

¹⁷¹ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹⁷² UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(h).

¹⁷³ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(g).

[AP I]. Its exact scope is not yet clear, though the United States does not regard it as applying to nuclear weapons. It is not believed that any presently employed conventional weapon would violate this rule.¹⁷⁴

186. The US Operational Law Handbook states that “the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . (i) using weapons which cause . . . prolonged damage to the natural environment”.¹⁷⁵

187. The YPA Military Manual of the SFRY (FRY) provides that “it is prohibited to use means and methods of warfare which are designed to or likely to cause massive, long-term and serious damage to the environment”.¹⁷⁶

National Legislation

188. Argentina’s Draft Code of Military Justice punishes any soldier who uses or orders, in time of armed conflict, the use of methods or means of warfare “which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment and thereby prejudice the health or survival of the population”.¹⁷⁷

189. Under Armenia’s Penal Code, “ecocide”, namely “mass destruction of flora and fauna, pollution of the atmosphere, soils and water resources, as well as other acts having caused an ecological disaster”, constitutes a crime against the peace and security of mankind.¹⁷⁸

190. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including launching an attack in the knowledge that such attack will cause “widespread, long-term and severe damage to the natural environment . . . of such an extent as to be excessive in relation to the concrete and direct military advantage anticipated” in international armed conflicts.¹⁷⁹

191. Azerbaijan’s Criminal Code provides that the use of methods and means of warfare which cause “widespread, long-term and severe damage to the natural environment” constitutes a war crime in international and non-international armed conflicts.¹⁸⁰

192. The Criminal Code of Belarus, in a part dealing with “crimes against the peace and the security of mankind and war crimes”, provides for the punishment of “ecocide”, namely “mass destruction of the fauna and flora, pollution of the atmosphere and water resources as well as any other act liable to cause an

¹⁷⁴ US, *Air Force Commander’s Handbook* (1980), § 6-2(c).

¹⁷⁵ US, *Operational Law Handbook* (1993), p. Q-182, § (i).

¹⁷⁶ SFRY (FRY), *YPA Military Manual* (1988), § 97.

¹⁷⁷ Argentina, *Draft Code of Military Justice* (1998), Article 290, introducing a new Article 874 in the *Code of Military Justice as amended* (1951).

¹⁷⁸ Armenia, *Penal Code* (2003), Article 394.

¹⁷⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.38(2).

¹⁸⁰ Azerbaijan, *Criminal Code* (1999), Article 116.0.2.

ecological disaster".¹⁸¹ It also provides for the punishment of "wilfully causing widespread, long-term and serious damage to the natural environment".¹⁸²

193. Under the Criminal Code of the Federation of Bosnia and Herzegovina, it is a war crime to order or commit "long-lasting and large-scale environmental devastation which may be detrimental to the health or survival of the population".¹⁸³ The Criminal Code of the Republika Srpska contains the same provision.¹⁸⁴

194. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "intentionally launching an attack in the knowledge that such attack will cause . . . widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is a war crime in international armed conflicts.¹⁸⁵

195. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁸⁶

196. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, uses methods or means of warfare which are intended to cause widespread, long-term and severe damage to the natural environment".¹⁸⁷

197. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes set out in Article 8 of the 1998 ICC Statute.¹⁸⁸

198. Croatia's Criminal Code, in a part dealing with "war crimes against the civilian population", provides for the punishment of:

whoever, in violation of the rules of international law in times of war, armed conflict or occupation, orders . . . long-term and widespread damage to the natural environment which can prejudice the health or survival of the population. Such punishment shall also be imposed on whoever commits [such] acts.¹⁸⁹

199. Under the Draft Amendments to the Penal Code of El Salvador, "anyone who, in the context of an international or a non-international armed conflict, causes widespread, long-term and severe damage to natural resources and the natural environment" is punishable.¹⁹⁰

¹⁸¹ Belarus, *Criminal Code* (1999), Article 131.

¹⁸² Belarus, *Criminal Code* (1999), Article 136(2).

¹⁸³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(2).

¹⁸⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(2).

¹⁸⁵ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(d).

¹⁸⁶ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁸⁷ Colombia, *Penal Code* (2000), Article 164.

¹⁸⁸ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁸⁹ Croatia, *Criminal Code* (1997), Article 158(2).

¹⁹⁰ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Destrucción del Medio Ambiente".

200. Under Estonia's Penal Code, "a person who knowingly affects the environment as a method of warfare, if major damage is thereby caused to the environment", commits a war crime.¹⁹¹

201. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute which is not explicitly mentioned in the Code, such as "intentionally launching an attack in the knowledge that such attack will cause... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" in international armed conflict, is a crime.¹⁹²

202. Germany's Law Introducing the International Crimes Code provides that:

Anyone who, in connection with an international armed conflict, carries out an attack with military means which may be expected to cause widespread, long-term and severe damage to the natural environment which could be excessive in relation to the overall concrete and direct military advantage anticipated, shall be liable to imprisonment for not less than three years.¹⁹³

203. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 35(3) and 55(1) AP I, is a punishable offence.¹⁹⁴

204. Under Kazakhstan's Criminal Code, "ecocide", namely "mass destruction of the fauna or flora, pollution of the atmosphere, agricultural or water resources, as well as other acts which have caused or are capable of causing an ecological catastrophe", constitutes a crime against the peace and security of mankind.¹⁹⁵

205. Under Kyrgyzstan's Criminal Code, "ecocide", namely "mass destruction of the flora and fauna, poisoning of the atmosphere or water resources, as well as other acts capable of causing an ecological catastrophe", is punishable by deprivation of liberty.¹⁹⁶

206. Mali's Penal Code punishes as a war crime the "the launching of a deliberate attack knowing that it will cause widespread, long-term and severe damage to the natural environment".¹⁹⁷

207. Under Moldova's Penal Code, "ecocide", namely "the deliberate and massive destruction of the fauna and flora, the pollution of the atmosphere or poisoning of water resources, as well as other acts capable of causing an ecological catastrophe", is punishable by deprivation of liberty.¹⁹⁸

208. Under the International Crimes Act of the Netherlands, "intentionally launching an attack in the knowledge that such an attack will cause... widespread, long-term and severe damage to the natural environment which

¹⁹¹ Estonia, *Penal Code* (2001), § 104.

¹⁹² Georgia, *Criminal Code* (1999), Article 413(d).

¹⁹³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(3).

¹⁹⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁹⁵ Kazakhstan, *Penal Code* (1997), Article 161.

¹⁹⁶ Kyrgyzstan, *Criminal Code* (1997), Article 374.

¹⁹⁷ Mali, *Penal Code* (2001), Article 31(4).

¹⁹⁸ Moldova, *Penal Code* (2002), Article 136.

would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is a crime, when committed in an international armed conflict.¹⁹⁹

209. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.²⁰⁰

210. Nicaragua's Draft Penal Code punishes "anyone who, in the context of an international or a non-international armed conflict, causes widespread, long-term and severe damage to natural resources and the natural environment".²⁰¹

211. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁰²

212. Under Russia's Criminal Code, "ecocide", namely "massive destruction of the fauna and flora, contamination of the atmosphere or water resources, as well as other acts capable of causing an ecological catastrophe", constitutes a crime against the peace and security of mankind.²⁰³

213. Under Slovenia's Penal Code, "infliction of long-term and large-scale damage to the environment, which may endanger the health or survival of the population" is a war crime.²⁰⁴

214. Spain's Penal Code provides for the punishment of:

anyone who, during armed conflict, uses methods or means of combat, or orders them to be used, which are . . . conceived to cause, or with good reason are expected to cause, extensive, permanent and severe damage to the natural environment, endangering the health or the survival of the population.²⁰⁵

215. Under Tajikistan's Criminal Code, "ecocide", namely "mass extermination of flora or fauna, poisoning the atmosphere or water resources, as well as other acts capable of causing an ecological catastrophe", constitutes a crime against the peace and security of mankind.²⁰⁶

216. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.²⁰⁷

217. Under Ukraine's Criminal Code, "ecocide", namely "mass destruction of flora and fauna, poisoning of air or water resources, and any other acts that may cause an ecological disaster", constitutes a criminal offence.²⁰⁸

¹⁹⁹ Netherlands, *International Crimes Act* (2003), Article 5(5)(b).

²⁰⁰ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²⁰¹ Nicaragua, *Draft Penal Code* (1999), Article 470.

²⁰² Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁰³ Russia, *Criminal Code* (1996), Article 358.

²⁰⁴ Slovenia, *Penal Code* (1994), Article 374(2).

²⁰⁵ Spain, *Penal Code* (1995), Article 610.

²⁰⁶ Tajikistan, *Criminal Code* (1998), Article 400.

²⁰⁷ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²⁰⁸ Ukraine, *Criminal Code* (2001), Article 441.

218. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(iv) of the 1998 ICC Statute.²⁰⁹

219. Under Vietnam's Penal Code, "ecocide, destroying the natural environment", whether committed in time of peace or war, constitutes a crime against humanity.²¹⁰

220. The Penal Code as amended of the SFRY (FRY), in a part dealing with "war crimes against civilians", provides for the punishment of:

any person who may order the following in violation of the rules of international law during armed conflict or occupation: . . . long-term and widespread damage to the natural environment which may harm the health or survival of the population, or any person who may commit [such] acts.²¹¹

National Case-law

221. No practice was found.

Other National Practice

222. At the CDDH, Australia stated that the adoption of Article 48 *bis* of draft AP I (now Article 55) "might well fill a gap in humanitarian law applicable in armed conflicts".²¹²

223. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that "in recent times the issue of the protection of the environment in armed conflict has been a particular international concern" and referred to a number of international treaties including the relevant provisions of the 1976 ENMOD Convention, AP I and the 1993 CWC. It stated that these instruments provided "cumulative evidence that weapons having . . . potentially disastrous effects on the environment, and on civilians and civilian targets, are no longer compatible with the dictates of public conscience reflected in general principles of humanity".²¹³

224. In 1992, in identical letters to the UN Secretary-General and the President of the UN Security Council, Bosnia and Herzegovina stated that "in Tuzla, the aggressor has attacked a major chemical facility, which could cause a massive ecological catastrophe encompassing much of southern Europe. Stocks of chlorine there are 128 times larger than they were in Bhopal, India, before the disaster."²¹⁴

²⁰⁹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²¹⁰ Vietnam, *Penal Code* (1990), Article 278.

²¹¹ SFRY (FRY), *Penal Code* (1995), Article 142(2).

²¹² Australia, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/SR.20, 14 February 1975, p. 171, § 2.

²¹³ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/22, 30 October 1995, § 31.

²¹⁴ Bosnia and Herzegovina, Identical letters dated 6 June 1992 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/24081, 10 June 1992, p. 2.

225. In 1993, in a letter to the President of the UN Security Council, Bosnia and Herzegovina stated that:

On 1 December, at 2115, from the direction of Korenita Strana near the town of Koraj, Serbian forces fired two "Volkov" rockets in the direction of the chemical plant complex [in Tuzla]. One rocket landed within the fenced-in area of the complex. Fortunately, this rocket did not hit the storage tanks holding the chlorine and other chemicals, and a major humanitarian and ecological disaster did not occur... As per the request of the Mayor of Tuzla, we ask that the Security Council send a team of international experts to Tuzla to assess the potential humanitarian and ecological consequences if the chemical plant is hit by artillery.²¹⁵

226. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Ecuador stated that:

The effects of the use of nuclear weapons will, in all cases, have devastating effects on the environment. Consequently, it is contrary to the humanitarian conditions that prohibit the destruction of the environment, which is the only guarantee of the survival of the human species, and of the whole chain of life of the planet.²¹⁶

227. At the CDDH, Egypt held the position that "any substantial deterioration of the environment in wartime must be forbidden".²¹⁷

228. At the CDDH, the FRG declared that it joined in the consensus on Article 33 of draft Protocol I (now Article 35 AP I) "with the understanding that... paragraph 3 of this article is an important new contribution to the protection of the natural environment in times of international armed conflict".²¹⁸

229. In 1988, a member of the German parliament pointed out that the rules in the Additional Protocols referring to the protection of the environment were indeed new norms. He suggested that this opinion was shared by all parliamentary groups and no protest was raised.²¹⁹

230. The memorandum annexed to Germany's declaration of ratification of the Additional Protocols referred to the rules on the protection of the environment as "new norms".²²⁰

231. In 1991, the German Minister for Family and Education accused Saddam Hussein of "fighting not according to the methods of international humanitarian law, but... of terrorism", referring, *inter alia*, to the "massive destruction of

²¹⁵ Bosnia and Herzegovina, Letter dated 3 December 1993 to the President of the UN Security Council, UN Doc. S/26870, 13 December 1993, p. 2.

²¹⁶ Equator, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 3.

²¹⁷ Egypt, Statement at the CDDH, *Official Records*, Vol. III, CDDH/III/SR.22, 24 February 1975, p. 156.

²¹⁸ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 115.

²¹⁹ Germany, Lower House of Parliament, Statement by Member of Parliament, Günter Verheugen, 10 November 1988, *Plenarprotokoll* 11/106, p. 7344, § (C).

²²⁰ Germany, Lower House of Parliament, Memorandum annexed to the declaration of ratification of AP I, 14 February 1991, *BT-Drucksache* 11/6770, p. 112.

the environment by Iraqi forces".²²¹ The German Minister for the Environment accused Saddam Hussein of "brutal terrorism . . . against the environment".²²²

232. In its counter memorial submitted to the ICJ in the *Nuclear Weapons (WHO) case*, India stated that "the customary as well as conventional law of war prohibits the use of methods and means of warfare that may cause widespread, long-term and severe damage to the environment".²²³

233. According to the Report on the Practice of India, although Indian military and police regulations do not explicitly refer to the protection of the natural environment in times of internal conflict, the obligation to maintain public order can be interpreted as including the prevention of a serious threat to the natural environment. Furthermore, the report maintains that such an approach would be in line with an extensive interpretation of the right to life and personal freedom under Article 21 of the Indian Constitution and the relevant jurisprudence of the Indian Supreme Court.²²⁴

234. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the exploitation of the environment as a weapon in times of armed conflict, Iran cited "various provisions of Additional Protocol I (1977) to the Geneva Conventions which related to the protection of the environment and led to the conclusion that that instrument clearly prohibited attacks on the environment and the use of the environment as a tool of warfare".²²⁵

235. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated, with respect to Article 35 AP I, that "no doubt, this prohibition applies to nuclear weapons for their enormous destructive and long term effect on the environment".²²⁶

236. According to the Report on the Practice of Iran, following the bombardment of Iranian oil wells in the Gulf during the Iran–Iraq War, Iran's ambassador to Kuwait announced that "Iraq had violated Articles 35 and 37 [AP I]".²²⁷

237. In 1991, in a letter to the UN Secretary-General, Iraq affirmed that it was willing "to do everything to protect the environment and natural resources and not to exploit them as a weapon in times of armed conflict" and drew attention to the "appalling environmental damage caused by coalition forces in Kuwait

²²¹ Germany, Statement by the Federal Minister for Family Affairs and Senior Citizens, Hannelore Rönch, 5 February 1991, *Bulletin*, No. 18, Presse- und Informationsamt der Bundesregierung, Bonn, 19 February 1991, p. 124.

²²² Germany, Lower House of Parliament, Statement by the Federal Minister for the Environment, Protection of Nature and Nuclear Safety, Dr. Klaus Töpfer, 31 January 1991, *Plenarprotokoll* 12/6, p. 191.

²²³ India, Counter memorial submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 12, § d (vi).

²²⁴ Report on the Practice of India, 1997, Chapter 4.4.

²²⁵ Iran, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, § 29.

²²⁶ Iran, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 4, § c. On the applicability of AP I to nuclear weapons, see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 2.

²²⁷ Report on the Practice of Iran, 1997, Chapter 4.4.

and Iraq".²²⁸ A similar statement was made in 1991 during a debate in the Sixth Committee of the UN General Assembly on the environmental impact of the Gulf War.²²⁹

238. According to the Report on the Practice of Iraq, "it is not permissible to violate the existing environmental system" and "to use it as a means of oppression". The report concludes that "the violation of this principle is considered a war crime".²³⁰

239. At the CDDH, Ireland referred to the adoption of Article 48 *bis* of draft AP I (now Article 55) as an "event in the history of international humanitarian law".²³¹

240. At the CDDH, Ireland, which was one of the countries that voted in favour of Article 20 of draft AP II, explained that it was "particularly concerned" to retain paragraph 3 of this article "because of the development of methods of warfare capable of causing widespread, long-term and severe damage to the natural environment and the danger that such methods may be used by one side even in a non-international armed conflict".²³²

241. The Report on the Practice of Israel states that the "Israel Defence Force does not utilise or condone the use of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".²³³

242. At the CDDH, while expressing its readiness to join in a consensus on the adoption of Article 48 *bis* of draft AP I (now Article 55), Italy stated that this article "marked a big step forward in the protection of the natural environment in the event of international armed conflict".²³⁴

243. In 1991, in a note verbale to UN Secretary-General, Jordan requested the inclusion of the item "exploitation of the environment as a weapon in times of armed conflict and the taking of practical measures to prevent such exploitation" in the provisional agenda of the 46th Session of the UN General Assembly.²³⁵ In an explanatory memorandum supporting its request Jordan stated that:

In a world where all humanity is ecologically vulnerable, it has become evident that warfare is no longer a tenable policy option for civilized nations. It is common

²²⁸ Iraq, Letter dated 12 August 1991 to the UN Secretary-General, UN Doc. A/46/358-S/22931, 13 August 1991, p. 1.

²²⁹ Iraq, Statement before the Sixth Committee of UN General Assembly, UN Doc. A/C.6/46/SR.20, 22 October 1991, § 42.

²³⁰ Report on the Practice of Iraq, 1998, Chapter 4.4.

²³¹ Ireland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.38, 10 April 1975, p. 412, § 52.

²³² Ireland, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 120.

²³³ Report on the Practice of Israel, 1997, Chapter 4.4.

²³⁴ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208, § 20.

²³⁵ Jordan, Note verbale dated 5 July 1991 to the UN Secretary-General, UN Doc. A/46/141, 8 July 1991.

knowledge that the recent military conflict in the Gulf had an impact of tragic proportions on both the people of the region and the environment. Scientists have calculated that it will take decades to recover from the environmental damage resultant from the confrontation. This emphasizes the urgent necessity to prevent any further exploitation of the environment as a means of indiscriminate destruction. The environment must be taken into consideration from the initial stages of conflict decision-making by both politicians and military decision makers. In our approach to the next millennium, it is evident that closer cooperation between all nations is essential if we are to avoid further environmental destruction and conflict. All should realize that environmental degradation is not limited to the confines of any one nation State.²³⁶

244. In 1992, in a memorandum annexed to a letter to the Chairman of the Sixth Committee of the UN General Assembly, Jordan and the US noted that for those States party to AP I, the following principles of international law provide additional protection for the environment in times of armed conflict: "a) Article 55 of AP I requires States parties to take care in warfare to protect the natural environment against widespread, long-term and severe damage".²³⁷

245. In 1991, in a letter to the UN Secretary-General in 1991, Kuwait expressed support for Jordan's request to include the item "exploitation of the environment as a weapon in times of armed conflict and the taking of practical measures to prevent such exploitation" in the provisional agenda of the 46th Session of the UN General Assembly because of its "substantial concern and interest in protecting the environment and natural resources, which are the property of the entire mankind, and preventing their use as a weapon of terrorism as we witnessed during the war of Kuwait's liberation".²³⁸

246. In 1998, during a lecture given at the Centre of Near and Middle East Studies of the London School of Oriental and African Studies, the Chairman of the Kuwaiti Public Authority on Environment accused Iraq of having caused "the greatest premeditated environmental catastrophe ever experienced in the history of mankind". He expressed concern about the adverse effects of "Iraqi crimes against the marine environment in Kuwait".²³⁹

247. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Lesotho stated that "any use of nuclear weapons, even in self-defence, would violate international humanitarian law, including the Hague and Geneva Conventions, which prohibit as practices of war, . . . causing long-term or severe damage to the environment".²⁴⁰

²³⁶ Jordan, Explanatory memorandum, annexed to Note verbale dated 5 July 1991 to the UN Secretary-General, UN Doc. A/46/141, 8 July 1991, p. 2, § 1.

²³⁷ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 2(a).

²³⁸ Kuwait, Letter dated 12 July 1991 to the UN Secretary-General, UN Doc. A/45/1035-S/22787, 15 July 1991, p. 1.

²³⁹ "Kuwait Environmental Disaster Worst Ever Experienced", *Kuwait Times*, 21 October 1998.

²⁴⁰ Lesotho, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

248. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands was of the view that “any use of nuclear weapons violates laws of war including the Geneva and Hague Conventions and the United Nations Charter. Such laws prohibit . . . the causing of long-term damage to the environment.”²⁴¹

249. In its response to submissions of other States to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Nauru stated that “it is also a violation of customary international law . . . to use weapons that cause severe damage to the environment”.²⁴²

250. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated that:

Protection of the global environment is now a major concern of the international community, with widespread support for progressive development of international treaty law in this area. The condemnation of the large-scale environmental damage wreaked upon Kuwait by Iraqi forces during the “Gulf War” in 1991 was in part a reflection of this concern. It would be a matter for consideration by the Court whether the avoidance of widespread, long-term and severe damage to the environment during war could yet be regarded as itself a rule of customary law.²⁴³

251. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, New Zealand invoked a principle of IHL whereby “parties to a conflict must not use methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment”.²⁴⁴

252. At the CDDH, Portugal, which was one of the countries that voted in favour of Article 20 of draft AP II, explained that it regarded “the article as a fundamental humanitarian provision the adoption of which will not imperil the authority of the State”.²⁴⁵

253. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1993, Rwanda stated that a State which uses nuclear weapons endangers human health and the environment and violates its obligations under IHL.²⁴⁶

254. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Samoa stated that it considered that “the use of nuclear

²⁴¹ Marshall Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 22 June 1995, p. 4.

²⁴² Nauru, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons (WHO) case*, 15 June 1995, Part 1, p. 11.

²⁴³ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 73.

²⁴⁴ New Zealand, Oral pleadings before the ICJ, *Nuclear Weapons case*, 9 November 1995, Verbatim Record CR 95/28, p. 27.

²⁴⁵ Portugal, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 123.

²⁴⁶ Rwanda, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 8 December 1993, p. 2.

weapons by a State in war or other armed conflict would be a violation of international customary law and conventions, including the Hague Conventions and the Geneva Conventions", adding that "such law and conventions prohibit the use of weapons . . . which cause widespread, long-term and severe damage to the environment".²⁴⁷

255. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Samoa, while arguing that the question as to whether the threat or use of nuclear weapons was permitted under international law should be answered in the negative, referred to the nuclear tests in the Pacific and to their "significant and long term effects on the health of Pacific people and the environment", adding that it had "a large stake in safeguarding its environment, and the survival of the planet".²⁴⁸

256. At the CDDH, Saudi Arabia, which was one of the countries that voted against Article 20 of draft AP II, stated that "since the legitimate party to an internal conflict is the *de jure* State . . . we consider that the article was merely a repetition in contradiction with draft Protocol II". It also stated that in Islamic society war's sole aim is to repel aggressors without exposing . . . the environment to danger."²⁴⁹

257. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands maintained that:

The extraordinary power of nuclear weapons and the enormity of their effects on human health and the environment necessarily means that their use violates, directly or indirectly, those rules of the international law of armed conflict which prohibit:

- the use of weapons that render death inevitable;
- the use of weapons which have indiscriminate effects;
- any behaviour which might violate this law.

...

Additionally, international law now also regulates the methods and means of warfare with the aim of ensuring appropriate protection for the environment. It establishes, in particular, an absolute prohibition on the use of weapons which will cause "widespread, long-term and severe damage to the environment". [Articles 35(3) and 55 AP I are quoted] There can be little doubt that any use of nuclear weapons would cause "widespread, long-term and severe damage" to the environment, engendering a violation of Articles 35(3) and 55 [AP I] and the customary obligation reflected therein.²⁵⁰

²⁴⁷ Samoa, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 16 September 1994, p. 3.

²⁴⁸ Samoa, Written statement submitted to the ICJ, *Nuclear Weapons case*, 15 June 1995, p. 1.

²⁴⁹ Saudi Arabia, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 123.

²⁵⁰ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, §§ 3.63 and 3.78.

In its oral pleadings, the Solomon Islands further invoked “the existence of a customary norm prohibiting significant environmental damage in war”.²⁵¹

258. At the CDDH, while expressing satisfaction at the adoption of the two Additional Protocols, Sweden pointed out that “there were now for the first time explicit rules against . . . environmental warfare”.²⁵²

259. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that “in accordance with an established basic principle, expressed, for example, in the Declaration made by the 1972 UN Conference on the Human Environment, there are impediments to the use of weapons which cause extensive, long-term and serious damage to the environment”.²⁵³

260. In 1981, Switzerland’s Federal Council qualified Articles 35(3) and 55 AP I as stating a “new prohibition”.²⁵⁴

261. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Ukraine stated that it was “deeply convinced that, in view of the health and environmental effects, the use of nuclear weapons by a State in war or other armed conflict would be a breach of its obligation under international law”.²⁵⁵

262. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

Articles 35(3) and 55 of Additional Protocol I are broader in scope than the [1976 ENMOD] Convention, in that they are applicable to the incidental effects on the environment of the use of weapons. They were, however, innovative provisions when included in Additional Protocol I, as was made clear in a statement by the Federal Republic of Germany on the adoption of what became Article 35 of the Protocol [see *infra*]. As new rules, the provisions of Articles 35(3) and 55 are subject to the understanding . . . that the new provisions created by Additional Protocol I do not apply to the use of nuclear weapons. The view that the environmental provisions of Protocol I are new rules and thus inapplicable to the use of nuclear weapons is confirmed by a number of commentators.²⁵⁶

263. In 1987, the Deputy Legal Adviser of the US Department of State stated that:

²⁵¹ Solomon Islands, Oral pleadings before the ICJ, *Nuclear Weapons case*, 14 November 1995, Verbatim Record CR 95/32, § 19.

²⁵² Sweden, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.58, 9 June 1977, p. 307, § 133.

²⁵³ Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 5; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 5 (extracts from the Report of the Swedish Parliamentary Standing Committee on Foreign Affairs).

²⁵⁴ Switzerland, Federal Council, Message concernant les Protocoles Additionnels aux Conventions de Genève, 18 February 1981, p. 38, § 211.411.

²⁵⁵ Ukraine, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 16 May 1994, p. 1.

²⁵⁶ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.77.

We, however, consider that another principle in article 35, which also appears later in the Protocol, namely that the prohibition of methods or means of warfare intended or expected to cause widespread, long-term and severe damage to the environment, is too broad and ambiguous and is not a part of customary law.

...

The United States, however, considers the rule on the protection of the environment contained in article 55 of Protocol I as too broad and too ambiguous for effective use in military operations. . . . Means and methods of warfare that have such a severe effect on the natural environment so as to endanger the civilian population may be inconsistent with the other general principles, such as the rule of proportionality.²⁵⁷

264. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that "U.S. practice does not involve methods of warfare that would constitute widespread, long-term and severe damage to the environment".²⁵⁸

265. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that:

In a development with potential devastating consequences for the environment of the Gulf, we would like to report that a vast oil slick occurred in the northern Gulf this week. Iraqi occupation forces created this slick by opening the Sea Island terminal pipelines and an oiling buoy on approximately 19 January, allowing oil to flow directly into the northern Gulf. We have evidence that Iraqi forces simultaneously emptied five oil tankers moored at piers at the Mina al-Ahmadi oil field. As of 28 January the resulting oil slick was at least 35 miles long and 10 miles wide. This is the largest oil slick in history.

On 26 January after full consultation with oil and environmental experts and the Governments of Kuwait and Saudi Arabia, United States aircraft destroyed two manifold areas used for pumping oil along pipelines. We believe this action has halted the discharge of oil into the Gulf. At the request of the Government of Saudi Arabia, the United States dispatched expert personnel and specific equipment to help contain the slick and minimize its environmental impact. Several other countries have also sent teams to provide assistance.²⁵⁹

266. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that "Iraqi authorities have deliberately caused serious damage to the natural environment of the region".²⁶⁰

²⁵⁷ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 424 and 436.

²⁵⁸ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(P), Report on US Practice, 1997, Chapter 4.4.

²⁵⁹ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, pp. 2-3.

²⁶⁰ US, Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 2.

267. In 1992, in its final report to Congress on the conduct of hostilities in the Gulf War, the US Department of Defence declared, with particular reference to the applicability of Articles 35 and 55 AP I, that:

Even had Protocol I been in force, there were questions as to whether the Iraqi actions would have violated its environmental provisions. During that treaty's negotiation, there was general agreement that one of its criteria for determining whether a violation had taken place ("long term") was measured in decades. It is not clear the damage Iraq caused, while severe in a layman's sense of the term, would meet the technical-legal use of that term in Protocol I. The prohibitions on damage to the environment contained in Protocol I were not intended to prohibit battlefield damage caused by conventional operations and, in all likelihood, would not apply to Iraq's actions in the Persian Gulf War.²⁶¹

268. In 1994, in a memorandum on a depleted uranium tank round, the US Department of the Army stated that Article 35(3) and 55 AP I "do not codify customary international law, but nonetheless are obligations the United States has respected in its conduct of military operations since promulgation of the 1977 Additional Protocol I".²⁶²

269. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated, with respect to the prohibition on the use of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment" as embodied in Articles 35(3) and 55 AP I, that "this is one of the new rules established by [AP I] that . . . do not apply to nuclear weapons".²⁶³

270. At the CDDH, the SFRY stated that "biological and ecological warfare, as developed more particularly in Vietnam, should be placed under the ban of the new body of international humanitarian law".²⁶⁴ This view was supported by Hungary and North Vietnam.²⁶⁵

271. In 1999, following the NATO bombing of the petrochemical complex in Pancevo in the FRY, the Yugoslav Federal Minister for Development, Science and Environment warned "the European and the world-wide public of the danger which will, with repeated attacks on such industrial complexes, affect lives and health of people and cause environment pollution".²⁶⁶ On the occasion of

²⁶¹ US, Department of Defence, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, pp. 636–637.

²⁶² US, Department of the Army, Memorandum on M829A2 Cartridge, 120mm, APFSDS-T, 27 December 1994, p. 5.

²⁶³ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp. 29–30, § 8; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, pp. 30–31, § 8.

²⁶⁴ SFRY (FRY), Statement at the CDDH, *Official Records*, Vol. V, CDDH/SR.11, 5 March 1975, p. 105, § 22.

²⁶⁵ CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 139, § 55 (Hungary); *Official Records*, Vol. XIV, CDDH/III/SR.17, 11 February 1975, p. 143, § 10 (North Vietnam).

²⁶⁶ FRY, Appeal by the Federal Minister for Development, Science and Environment to Ministers for Environment Protection, 17 April 1999.

World Day of the Planet Earth, on 22 April 1999, the Yugoslav Federal Minister for Development, Science and Environment launched an appeal to stop NATO's bombing campaign against the FRY, which he stated had already provoked an "environmental catastrophe". In particular, the Minister referred to attacks by NATO forces on national parks and nature reserves harbouring protected species of flora and fauna, as well as on chemical, oil and pharmaceutical plants.²⁶⁷ Another appeal by the Ministry dated 30 April 1999 aimed at informing the international community of the effects on the environment of NATO's military operations against the FRY, accused NATO forces of bombing civilian industrial facilities, including the petrochemical complex in Pancevo and the refinery in Novi Sad, thereby causing the spillage of harmful chemical substances which posed a "serious threat to human health in general and to ecological systems locally and in the broader Balkan and European regions". According to the Ministry, "the nineteen countries of NATO are committing an 'ecocide' as it were against the population and environment of Yugoslavia".²⁶⁸ The accusations were reiterated in a subsequent appeal dated 25 May 1999, which provided information on the actual and potential environmental impacts of NATO's attacks on the FRY.²⁶⁹ In a further appeal to the international community issued on 3 June 1999, the Yugoslav Federal Minister for Development, Science and Environment denounced daily attacks on chemical and electrical power plants by NATO forces, which he said had resulted in the emission of large quantities of dangerous substances "with negative consequences for people, plants and animals". The Minister maintained that "the NATO aggression on Yugoslavia contains essential elements of ecocide", adding that "man's right to safe and healthy environment is endangered by the NATO aggression". He also referred to the violation by NATO of "humanitarian law provisions, especially the Geneva Conventions with the related Protocols", as well as of "international agreement provisions in the field of environment" and "the basic proclaimed principles of environmental protection".²⁷⁰ In a letter to the UNEP Executive Director, the Minister for Development, Science and Environment of the FRY stressed "the environmental consequences inflicted by the NATO aggression on the Federal Republic of Yugoslavia". After accusing NATO of targeting on a daily basis "national parks, nature reservations, monuments of cultural and natural heritage, rare and protected plants and animal species, among which are those of international importance", the Minister stated that "NATO by its aggression is causing ecocide in the environment of the Federal

²⁶⁷ FRY, Federal Ministry for Development, Science and the Environment, Appeal for stopping NATO aggression against the Federal Republic of Yugoslavia, 22 April 1999.

²⁶⁸ FRY, Appeal by the Federal Ministry for Development, Science and the Environment, Information about the Effects of the NATO Aggression on the Environment in the Federal Republic of Yugoslavia, 30 April 1999.

²⁶⁹ FRY, Appeal by the Federal Ministry for Development, Science and the Environment, Preliminary Information on Actual and Potential Environmental Impacts of the NATO Aggression in the Federal Republic of Yugoslavia, 25 May 1999.

²⁷⁰ FRY, Appeal by Minister of the Federal Government, 3 June 1999.

Republic of Yugoslavia and wider, in the whole Balkans and considerable part of Europe. The real ecological catastrophe is going on in the heart of Europe with unforeseeable time and space range."²⁷¹

272. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Zimbabwe stated that it fully shared the analysis by other States that "the threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that . . . cause long term and severe damage to the environment".²⁷²

III. Practice of International Organisations and Conferences

United Nations

273. In a resolution adopted in 1994 on the United Nations Decade on International Law, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict. The General Assembly invited:

all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.²⁷³

274. The programme of activities for the final term (1997–1999) of the UN Decade of International Law, adopted by the UN General Assembly in 1996, states that:

In connection with training of military personnel, States are encouraged to foster the teaching and dissemination of the principles governing the protection of the environment in times of armed conflict and should consider the possibility of making use of the guidelines for military manuals and instructions prepared by the International Committee of the Red Cross.²⁷⁴

275. In a decision in 1991, UNEP's Governing Council stated that, with regard to the environmental effects of warfare, it was aware of the general prohibition on employing methods or means of warfare that were intended, or could be expected, to cause widespread, long-term or severe damage to the natural environment, laid down in AP I and the 1976 ENMOD Convention.²⁷⁵ It recommended that:

²⁷¹ FRY, Letter from the Federal Ministry for Development, Science and Environment to the UNEP Executive Director, undated.

²⁷² Zimbabwe, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/35, p. 27.

²⁷³ UN General Assembly, Res. 49/50, 9 December 1994, § 11.

²⁷⁴ UN General Assembly, Res. 51/157, 16 December 1996, Annex, § 19.

²⁷⁵ UNEP, Governing Council, Decision 16/11, 31 May 1991, preamble.

Governments consider identifying weapons, hostile devices and ways of using such techniques that would cause particularly serious effects on the environment and consider efforts in appropriate forums to strengthen international law prohibiting such weapons, hostile devices and ways of using such techniques.²⁷⁶

Other International Organisations

276. In a resolution adopted in 1991, the Parliamentary Assembly of the Council of Europe condemned "the disgraceful attack on the environment represented by Iraq's fouling of the Gulf with oil, with catastrophic effects which can be considered a crime against humanity".²⁷⁷

277. In 2001, in a report on the environmental impact of the war in the FRY on south-east Europe, the Committee on the Environment, Regional Planning and Local Authorities of the Parliamentary Assembly of the Council of Europe noted that the military operations conducted by NATO against the FRY during the 1999 Kosovo crisis had caused serious damage to the country's natural environment and that the damage had extended to several other countries of south-east Europe. It argued that, since it was "highly predictable" that NATO's military action "would have grave environmental consequences", and such consequences had been "fairly evident right from the start of the air strikes", "the militarily inflicted environmental damage can be presumed to have been deliberate".²⁷⁸ It therefore concluded that "the military operations violated the environmental-protection rule laid down in the First Additional Protocol to the Geneva Convention. In particular, bombing environmentally hazardous installations is a flagrant breach of that protocol."²⁷⁹ Following this report, the Parliamentary Assembly of the Council of Europe adopted a recommendation, in which it noted with concern "the serious environmental impact of military operations over the Federal Republic of Yugoslavia between 25 March and 5 June 1999".²⁸⁰ It stated that:

As was the case for operations in Bosnia and Chechnya, states involved in these operations disregarded the international rules set out in Articles 55 and 56 of Protocol I (1977) to the Geneva Conventions of 1949 intended to limit environmental damage in armed conflict. In the Assembly's view, these rules should be strengthened and enforced in order to prevent or at least lessen such violations of fundamental human rights in any future conflict.²⁸¹

²⁷⁶ UNEP, Governing Council, Decision 16/11, 31 May 1991, § 2.

²⁷⁷ Council of Europe, Parliamentary Assembly, Res. 954, 29 January 1991, § 6.

²⁷⁸ Council of Europe, Parliamentary Assembly, Committee on the Environment, Regional Planning and Local Authorities, Report on the Environmental Impact of the War in Yugoslavia on South-East Europe, Doc. 8925, 10 January 2001, § 60.

²⁷⁹ Council of Europe, Parliamentary Assembly, Committee on the Environment, Regional Planning and Local Authorities, Report on the Environmental Impact of the War in Yugoslavia on South-East Europe, Doc. 8925, 10 January 2001, § 61.

²⁸⁰ Council of Europe, Parliamentary Assembly, Rec. 1495, 24 January 2001, § 1.

²⁸¹ Council of Europe, Parliamentary Assembly, Rec. 1495, 24 January 2001, § 2.

278. In a declaration adopted in 1991 on the environmental situation in the Gulf, the OECD Ministers of the Environment condemned Iraq's burning of oil fields and discharging of oil into the Gulf as a violation of international law and a crime against the environment, and urged Iraq to cease to resort to environmental destruction as a weapon.²⁸²

International Conferences

279. At the CDDH, the concluding report of the Working Group which drafted Articles 33(3) and 48 *bis* of draft AP I (now Articles 35(3) and 55 respectively) stated that it was "the first occasion on which an attempt has been made to provide in express terms for the protection of the environment in time of war". It stated that, therefore, "it is not surprising that the question should have given a great deal of difficulty to the Working Group".²⁸³

280. In a decision adopted in 1992, the CSCE Committee of Senior Officials drew attention to the human and environmental catastrophe which could result from continued shelling of the city of Tuzla, which is home to one of the largest chemical complexes in the Balkans. This plant contained large and potentially hazardous chemicals. Fire or explosion could result in a serious threat to the human health and to the environment.²⁸⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

281. In his dissenting opinion in the *Nuclear Tests case (Request for an Examination of the Situation)* in 1995, Judge Koroma stated that "under contemporary international law, there is probably a duty not to cause gross or serious damage which can reasonably be avoided, together with a duty not to permit the escape of dangerous substances".²⁸⁵

282. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ held that Articles 35(3) and 55 AP I:

provide additional protection for the environment. Taken together these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such

²⁸² OECD, Communiqué SG/Press (91), Déclaration des Ministres de l'Environnement sur la situation écologique dans le Golfe, 30 January 1991, quoted in Paul Fautoux, "L'utilisation de l'environnement comme instrument de guerre au Koweït occupé", in Brigitte Stern (ed.), *Les aspects juridiques de la crise et de la guerre du Golfe*, Montchrestien, Paris, 1991, p. 234.

²⁸³ CDDH, *Official Records*, Vol. XV, CDDH/III/275, Report to Committee III on the work of the Working Group submitted by the Rapporteur, Geneva, 3 February–18 April 1975, p. 358.

²⁸⁴ CSCE, Committee of Senior Officials, 12th Session, Prague, 8–10 June 1992, Decision, annexed to Letter dated 11 June 1992 from Czechoslovakia to the UN Secretary-General, UN Doc. A/47/269-S/24093, 12 June 1992, § 6.

²⁸⁵ ICJ, *Nuclear Tests case (Request for an Examination of the Situation)*, Dissenting Opinion of Judge Koroma, 22 September 1995, p. 378.

damage... These are powerful constraints for all the States having subscribed to these provisions.²⁸⁶

283. In its Final Report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that:

14. The NATO bombing campaign did cause some damage to the environment. For instance, attacks on industrial facilities such as chemical plants and oil installations were reported to have caused the release of pollutants, although the exact extent of this is presently unknown. The basic legal provisions applicable to the protection of the environment in armed conflict are [Articles 35(3) and 55 AP I].
15. Neither the USA nor France has ratified Additional Protocol I. Article 55 may, nevertheless, reflect current customary law (see however the 1996 Advisory Opinion on the Legality of Nuclear Weapons, where the International Court of Justice appeared to suggest that it does not (ICJ Rep. (1996), 242, para. 31)). In any case, Articles 35(3) and 55 have a very high threshold of application. Their conditions for application are extremely stringent and their scope and contents imprecise. For instance, it is generally assumed that Articles 35(3) and 55 only cover very significant damage. The adjectives "widespread, long-term, and severe" used in [AP I] are joined by the word "and", meaning that it is a triple, cumulative standard that needs to be fulfilled. Consequently, it would appear extremely difficult to develop a *prima facie* case upon the basis of these provisions, even assuming they were applicable. For instance, it is thought that the notion of "long-term" damage in [AP I] would need to be measured in years rather than months, and that as such, ordinary battlefield damage of the kind caused to France in World War I would not be covered. The great difficulty of assessing whether environmental damage exceeded the threshold of [AP I] has also led to criticism by ecologists. This may partly explain the disagreement as to whether any of the damage caused by the oil spills and fires in the 1990/91 Gulf War technically crossed the threshold of [AP I].²⁸⁷

V. Practice of the International Red Cross and Red Crescent Movement

284. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "it is prohibited to use weapons of a nature to cause... b) widespread, long-term and severe damage to the natural environment".²⁸⁸

285. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC invited States not party to AP I to respect, in the

²⁸⁶ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 31.

²⁸⁷ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, 14 June 2000, §§ 14–15.

²⁸⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 394.

event of armed conflict, Article 55 AP I because its content stemmed “from the basic principle of civilian immunity from attack”.²⁸⁹

286. In 1993, in a report submitted to the UN Secretary-General on the protection of the environment in times of armed conflict, the ICRC stated, regarding the threshold set by Articles 35(3) and 55 AP I, that:

The question as to what constitutes “wide-spread, long-term and severe” damage and what is acceptable damage to the environment is open to interpretation. There are substantial grounds, including from the *travaux préparatoires* of [AP I], for interpreting “long-term” to refer to decades rather than months. On the other hand, it is not easy to know in advance exactly what the scope and duration of some environmentally damaging acts will be; and there is a need to limit as far as possible environmental damage even in cases where it is not certain to meet a strict interpretation of the criteria of “widespread, long-term and severe”.²⁹⁰

287. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of the grave breaches of the Geneva Conventions, considered that “wilfully causing widespread, long-term and severe damage to the natural environment” in international or non-international armed conflicts was a war crime to be subject to the jurisdiction of the ICC.²⁹¹

VI. Other Practice

288. During a meeting of the IIHL held in 1993 as part of the process which resulted in the drafting of the 1994 San Remo Manual, a special rapporteur on the protection of the environment in armed conflict emphasised that “the experience of the Gulf War (1991) showed very clearly that there was at least an emerging rule forbidding the use of the marine environment as an instrument of warfare”.²⁹²

289. In 1995, the IUCN Commission on Environmental Law, in cooperation with the International Council of Environmental Law, issued the Draft International Covenant on Environment and Development, which was intended to stimulate consideration of a global instrument on environmental conservation and sustainable development. Article 32(1) provides that:

²⁸⁹ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 25.

²⁹⁰ ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 34.

²⁹¹ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, §§ 2(ii) and 3(viii).

²⁹² Louise Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, Cambridge, 1995, p. 119, Explanation, § 44.4.

Parties shall protect the environment during periods of armed conflict. In particular, Parties shall:

- ...
- (c) not employ or threaten to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term, or severe harm to the environment and ensure that such means and methods of warfare are not developed, produced, tested, or transferred; and
 - (d) not use the destruction or modification of the environment as a means of warfare or reprisal.²⁹³

Environmental modification techniques

Note: For practice concerning the prohibition of herbicides under the 1976 ENMOD Convention, see Chapter 24, section C.

I. Treaties and Other Instruments

Treaties

290. Article I of the 1976 ENMOD Convention provides that:

1. Each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.
2. Each State Party to this Convention undertakes not to assist, encourage or induce any State, group of States or international organization to engage in activities contrary to the provisions of paragraph 1 of this article.

291. The understanding relating to Article I of the 1976 ENMOD Convention submitted, together with the text of the draft convention, by the Conference of the Committee on Disarmament to the UN General Assembly states that:

It is the understanding of the Committee that, for the purpose of this Convention, the terms "widespread", "long-lasting" and "severe" shall be interpreted as follows:

- (a) "widespread": encompassing an area on the scale of several hundred square kilometres;
- (b) "long-lasting": lasting for a period of months, or approximately a season;
- (c) "severe": involving serious or significant disruption or harm to human life, natural and economic resources or other assets.²⁹⁴

292. Article II of the 1976 ENMOD Convention provides that:

As used in article I, the term "environmental modification techniques" refers to any technique for changing – through the deliberate manipulation of natural processes –

²⁹³ IUCN, Commission on Environmental Law, Draft International Covenant on Environment and Development, Bonn, March 1995, Article 32(1).

²⁹⁴ Conference of the Committee on Disarmament, Understanding relating to Article I of the 1976 ENMOD Convention, UN Doc. A/31/27, 1976, pp. 91–92.

the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

293. The understanding relating to Article II of the 1976 ENMOD Convention submitted, together with the text of the draft convention, by the Conference of the Committee on Disarmament to the UN General Assembly states that:

It is the understanding of the Committee that the following examples are illustrative of phenomena that could be caused by the use of environmental modification techniques as defined in article II of the Convention: earthquakes; tsunamis; an upset in the ecological balance of a region; changes in weather patterns (clouds, precipitation, cyclones of various types and tornadic storms); changes in climate patterns; changes in ocean currents; changes in the state of the ozone layer; and changes in the state of the ionosphere.

It is further understood that all the phenomena listed above, when produced by military or any other hostile use of environmental modification techniques, would result, or could reasonably be expected to result, in widespread, long-lasting or severe destruction, damage or injury. Thus, military or any other hostile use of environmental modification techniques as defined in article II, so as to cause those phenomena as a means of destruction, damage or injury to another State Party, would be prohibited.

It is recognized, moreover, that the list of examples set out above is not exhaustive. Other phenomena which could result from the use of environmental modification techniques as defined in article II could also be appropriately included. The absence of such phenomena from the list does not in any way imply that the undertaking contained in article I would not be applicable to those phenomena, provided the criteria set out in that article were met.²⁹⁵

Other Instruments

294. Paragraph 12 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that:

The military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party is prohibited. The term "environmental modification techniques" refers to any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

II. National Practice

Military Manuals

295. Australia's Defence Force Manual prohibits environmental modification techniques.²⁹⁶ It adds that:

²⁹⁵ Conference of the Committee on Disarmament, Understanding relating to Article II of the 1976 ENMOD Convention, UN Doc. A/31/27, 1976, pp. 91–92.

²⁹⁶ Australia, *Defence Force Manual* (1994), § 409.

Australia, as a signatory to the [1976 ENMOD Convention], has undertaken not to engage in any military or hostile use of environmental modification techniques which would have widespread, long lasting or severe effects as the means of destruction, damage or injury to any other state which is a party to the Convention.²⁹⁷

296. Canada's LOAC Manual states that "environmental techniques having widespread, long-lasting or severe effects are prohibited".²⁹⁸ It further states that:

45. In addition, Canada as a party to the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD Convention) has undertaken not to engage in any military or hostile use of environmental modification techniques as the means of destruction, damage or injury to any other state which is party to the Convention.
46. An "environmental modification technique" is any technique for changing, through the deliberate manipulation of natural processes, the dynamics, composition or structure of the earth which would have widespread, long-term or severe effects.²⁹⁹

297. France's LOAC Manual states that:

The Stockholm Convention of 10 December 1976 (ENMOD), which has not been signed by France, prohibits the use of environmental techniques for military or any other hostile purposes. France has not adhered to this convention because it is of the opinion that it contains vague provisions which render its application uncertain, particularly with respect to nuclear dissuasion.³⁰⁰

298. Germany's Military Manual states that:

401. It is particularly prohibited to employ means or methods which are intended or of a nature . . . to cause widespread, long-term and severe damage to the natural environment.

...

403. "Widespread", "long-term" and "severe" damage to the natural environment is a major interference with human life or natural resources which considerably exceeds the battlefield damage to be regularly expected in a war. Damage to the natural environment by means of warfare (Art. 35 para 3, 55 para 1 AP I) and severe manipulation of the environment as a weapon (ENMOD) are likewise prohibited.³⁰¹

299. Indonesia's Military Manual states that "it is prohibited to use environment modification as a means of warfare."³⁰²

300. Israel's Manual on the Laws of War states that:

Besides conventional and non-conventional arms, there is another category of arms – those that have an impact on the natural environment. The 1970's saw a

²⁹⁷ Australia, *Defence Force Manual* (1994), §§ 714 and 545(e).

²⁹⁸ Canada, *LOAC Manual* (1999), p. 5-3, § 22.

²⁹⁹ Canada, *LOAC Manual* (1999), p. 6-5, §§ 45-46.

³⁰⁰ France, *LOAC Manual* (2001), p. 63.

³⁰¹ Germany, *Military Manual* (1992), §§ 401 and 403, see also § 1020 (naval warfare).

³⁰² Indonesia, *Military Manual* (1982), § 134.

growing deep awareness for environmental protection, rousing in its wake an aversion to the United States' conduct during the Vietnam War, in which it destroyed forests and crops by chemical means (more than 54% of the forests in South Vietnam were destroyed), and even tested means for altering the weather in Indochina (bringing down rain so as to create mud and flooding in North Vietnam). In 1977 a convention was signed banning the use of environment-modifying technologies for war purposes, if such use has "large-scale, long-term or severe effects on another country that is a party to the Convention". The Convention (which Israel has not signed) defines the modification of the natural environment as "any change – through the intervention of natural processes – to the dynamics, composition or structure of the Earth".

The Gulf War:

During the Gulf War, Iraq flagrantly violated the Convention on the prohibition against modifying the environment during the military occupation of Kuwait (both countries signed the convention). Immediately following the outbreak of hostilities in the Gulf War, the Iraqis opened Kuwait's marine oil pipes, flooding the Persian Gulf with oil slicks. In addition, the Iraqi army set ablaze more than 700 oil wells when retreating. The resulting damage to the natural environment and the death of thousands of cormorants in oil puddles (without giving Iraq any military advantage whatsoever) was irreparable.³⁰³

301. Referring to South Korea's Military Law Manual, the Report on the Practice of South Korea states that the 1976 ENMOD Convention applies only to contracting parties.³⁰⁴ With respect to the Operational Law Manual, the report states that "it is a principle not to use weapons injuring the natural environment".³⁰⁵

302. New Zealand's Military Manual states that:

Parties to the [ENMOD] Convention have undertaken not to engage in any military or hostile use of environmental modification techniques which would have widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other States Party to the Convention.

"Environmental modification techniques" are defined by ENMOD as any technique for changing, through the deliberate manipulation of natural processes, the dynamics, composition or structure of the earth, including its biota, lithosphere, hydrosphere and atmosphere or outer space. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.³⁰⁶ [emphasis in original]

³⁰³ Israel, *Manual on the Laws of War* (1998), p. 17.

³⁰⁴ Report on the Practice of South Korea, 1997, Chapter 4.4, referring to *Military Law Manual* (1996).

³⁰⁵ Report on the Practice of South Korea, 1997, Chapter 4.4, referring to *Operational Law Manual* (1996), p. 129.

³⁰⁶ New Zealand, *Military Manual* (1992), §§ 505(2)-(3) and 614(2)-(3).

303. Russia's Military Manual states that "substances which have widespread, long-term and severe consequences on the environment" are prohibited means of warfare, referring in particular to the 1976 ENMOD Convention.³⁰⁷

304. Spain's LOAC Manual includes among prohibited methods of warfare all military or other hostile uses of environmental modification techniques having widespread, long-term or severe effects, which are adopted as a means of destruction, damage, or injury to any other State.³⁰⁸

National Legislation

305. No practice was found.

National Case-law

306. No practice was found.

Other National Practice

307. In 1992, in its opening statement, Australia, presiding the Second ENMOD Review Conference, questioned

whether the protection afforded by the Convention should be restricted to the States parties and whether activities such as deliberate "low-tech" environmental damage came within its purview. The absence so far of any accusations that the provisions of the Convention had been violated could be interpreted as meaning that its scope was so narrow that it had little practical application.³⁰⁹

308. In its memorandum annexed to the ratification instrument of the 1976 ENMOD Convention, the German government declared that the terms "widespread", "long-term" and "severe" were necessary to clarify the extent of the prohibition. It also underlined that only those significant cases of environmental damage or cases of deliberate attack on the environment should be covered by the relevant prohibitions.³¹⁰ As to the non-inclusion of a norm protecting the environment from the harmful effects caused by attacks against dams, dykes or nuclear power plants, the same memorandum stressed that the fact that such a norm was not included did not imply that these attacks were lawful under international law.³¹¹

309. In 1991, in a note verbale to UN Secretary-General, Jordan requested the inclusion of the item "exploitation of the environment as a weapon in times of

³⁰⁷ Russia, *Military Manual* (1990), § 6(g).

³⁰⁸ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.(b).6.

³⁰⁹ Australia, Statement at the Second ENMOD Review Conference, Geneva, 14–21 September 1992, *United Nations Disarmament Yearbook*, Vol. 17, 1993, p. 229.

³¹⁰ Germany, Lower House of Parliament, Denkschrift zur ENMOD Konvention, 6 September 1982, *BT-Drucksache* 9/1952, p. 12.

³¹¹ Germany, Lower House of Parliament, Denkschrift zur ENMOD Konvention, 6 September 1982, *BT-Drucksache* 9/1952, p. 13.

armed conflict and the taking of practical measures to prevent such exploitation" in the provisional agenda of the 46th Session of the UN General Assembly.³¹² In an explanatory memorandum supporting its request Jordan stated that:

The existing 1977 [ENMOD Convention] was revealed as being painfully inadequate during the Gulf conflict. We find that the terms of the existing convention are so broad and vague as to be virtually impossible to enforce. We also find no provision for a mechanism capable of the investigation and settlement of any future disputes under the Convention. Furthermore, the Convention does not provide for advanced environmental scientific data to be made available to all States at the initial stages of crisis prevention.³¹³

310. In 1992, in a memorandum annexed to a letter to the Chairman of the Sixth Committee of the UN General Assembly, Jordan and the US noted that for those States party to the 1976 ENMOD Convention, the following principles of international law provide additional protection for the environment in times of armed conflict:

- e) The 1977 Convention (ENMOD) prohibits States parties from engaging in military or any other hostile use of environmental modification techniques (i.e., any techniques for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of earth, its biota, lithosphere, hydrosphere and atmosphere, or of outer space) having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party.³¹⁴

311. In its written comments submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, responding to the UK and US submissions whereby the 1976 ENMOD Convention would not prohibit the use of nuclear weapons, being that such use is not intended to deliberately manipulate the natural environment, Malaysia stated that:

It is a general principle of law that the foreseeable consequences of an act are interpreted as an intention to bring them about. It is disingenuous, therefore, in view of what scientists have described as the enormously damaging environmental and climatic consequences of a nuclear exchange to assert that these would be mere "unintended side-effects".³¹⁵

312. In its response to submissions of other States to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Nauru stated that:

³¹² Jordan, Note verbale dated 5 July 1991 to the UN Secretary-General, UN Doc. A/46/141, 8 July 1991.

³¹³ Jordan, Explanatory memorandum, annexed to Note verbale dated 5 July 1991 to the UN Secretary-General, UN Doc. A/46/141, 8 July 1991, p. 2, § 2.

³¹⁴ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 2(e).

³¹⁵ Malaysia, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, p. 28.

It is a general principle of law that the foreseeable consequences of an act are interpreted as an intention to bring them about. It is disingenuous, therefore, in view of what scientists have described as the enormously damaging environmental and climatic consequences of a nuclear exchange to assert that these would be mere “unintended side effects”.³¹⁶

313. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that:

The [1976 ENMOD] Convention signals widespread recognition of the need to limit the use of the environment as a weapon of war, without diminishing in any way the customary and treaty obligations establishing clear norms for the protection of the environment which must be followed in times of war and armed conflict. As supplemented by the more detailed and emphatic obligations of [AP I], it is submitted that [the 1976] ENMOD [Convention] now reflects the customary obligation not to cause “widespread, long-lasting or severe” harm to the environment.³¹⁷

314. In 1992, during a debate in the Sixth Committee of the UN General Assembly on the protection of the environment in times of armed conflict, Ukraine qualified the release of large quantities of oil into the sea and the setting alight of numerous well heads as a “clear illustration of the hostile use of environmental modification techniques in contravention of international law”.³¹⁸

315. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

The [1976 ENMOD] Convention was designed to deal with the deliberate manipulation of the environment as a method of war . . . While the use of a nuclear weapon may have considerable effects on the environment, it is unlikely that it would be used for the deliberate manipulation of natural processes. The effect on the environment would normally be a side-effect of the use of a nuclear weapon, just as it would in the case of use of other weapons.³¹⁹

316. In 1992, in a statement at the Second ENMOD Review Conference, the US expressed the view that:

The [1976 ENMOD] Convention is not an Environmental Protection Treaty; it is not a treaty to prohibit damage to the environment resulting from armed conflict. Rather, the [1976 ENMOD] Convention fills a special, but important niche

³¹⁶ Nauru, Written comments on other written statements submitted to the ICJ, *Nuclear Weapons (WHO) case*, 15 June 1995, Part 2, p. 28.

³¹⁷ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 3.79; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, §§ 4.1–4.46.

³¹⁸ Ukraine, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.9, 6 October 1992, p. 8, § 35.

³¹⁹ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.7513–3.116.

reflecting the international community's consensus that the environment itself should not be used as an instrument of war.³²⁰

III. Practice of International Organisations and Conferences

United Nations

317. In a resolution adopted in 1994 on the United Nations Decade on International Law, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict. The General Assembly invited:

all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.³²¹

318. The programme of activities for the final term (1997–1999) of the UN Decade of International Law, adopted by the UN General Assembly in 1996, states that:

In connection with training of military personnel, States are encouraged to foster the teaching and dissemination of the principles governing the protection of the environment in times of armed conflict and should consider the possibility of making use of the guidelines for military manuals and instructions prepared by the International Committee of the Red Cross.³²²

319. In a decision in 1991, UNEP's Governing Council stated that, with regard to the environmental effects of warfare, it was aware of the general prohibition on employing methods or means of warfare that were intended, or could be expected, to cause widespread, long-term or severe damage to the natural environment, laid down in AP I and the 1976 ENMOD Convention.³²³ It recommended that:

Governments consider identifying weapons, hostile devices and ways of using such techniques that would cause particularly serious effects on the environment and consider efforts in appropriate forums to strengthen international law prohibiting such weapons, hostile devices and ways of using such techniques.³²⁴

Other International Organisations

320. No practice was found.

³²⁰ US, Statement of 15 September 1992 at the Second ENMOD Review Conference, Geneva, 14–21 September 1992.

³²¹ UN General Assembly, Res. 49/50, 9 December 1994, § 11.

³²² UN General Assembly, Res. 51/157, 16 December 1996, Annex, § 19.

³²³ UNEP, Governing Council, Decision 16/11, 31 May 1991, preamble.

³²⁴ UNEP, Governing Council, Decision 16/11, 31 May 1991, § 2.

International Conferences

321. A report on the discussion concerning laser weapons which took place at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects in Lucerne in 1974 states that:

Geophysical warfare 270. The expert who put forward the subject of geophysical warfare for consideration stated that it included such activities as the modification of weather or climate and the causing of earthquakes. He stated that man already possessed the ability to bring about on a limited scale certain geophysical changes for which military applications were conceivable. In his view these would inevitably be indiscriminate, and could give rise to unforeseeable environmental changes of prolonged duration.

271. Another expert made the observation that any attempt to divert or release forces of nature would require an input of energy equivalent to, or greater than, the amount of energy or force diverted or released.

Environmental warfare

272. The expert who put forward the subject of environmental warfare for consideration meant it to include the modification of the natural environment for the purpose of denying an enemy access to an area, or reducing the availability of natural cover for concealment, or of denying or preventing the growth of food or other crops. He observed that certain of the potential means of environmental warfare, such a chemical-warfare agent, did not fall within the category of conventional weapons. He also stated that environmental warfare, in his understanding of the term, was closely linked with geophysical warfare; other experts preferred to treat the two subjects as one.

273. The view was expressed by one expert that environmental warfare, like geophysical warfare, was by its nature indiscriminate. A distinction might be drawn between intentional and unintentional environmental warfare, the latter denoting the environmental impact of large-scale employment of conventional weapons.

274. One expert drew the attention of the Conference to the draft convention on environmental warfare recently submitted by his government to the General Assembly of the United Nations, the scope of the convention also including geophysical means of warfare. He expressed the opinion that the importance of the convention, which, if agreed internationally, would in his view greatly promote the cause of disarmament, lay in its attempt to prevent, at an early stage, the introduction of a novel and threatening warfare technique. Several experts supported this proposal and this opinion.

...

Evaluation

277. Some experts were of the opinion that, because the effects of potential future weapons could have important humanitarian implications, it was necessary to keep a close watch in order to develop any prohibitions or limitations that might seem necessary before the weapon in question had become widely accepted.³²⁵

³²⁵ Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 24 September–18 October 1974, Report, ICRC, Geneva, 1975, §§ 270–274 and 277.

IV. Practice of the International Judicial and Quasi-judicial Bodies

322. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

323. No practice was found.

VI. Other Practice

324. In 1995, the IUCN Commission on Environmental Law, in cooperation with the International Council of Environmental Law, issued the Draft International Covenant on Environment and Development, which was intended to stimulate consideration of a global instrument on environmental conservation and sustainable development. Article 32(1) provides that:

Parties shall protect the environment during periods of armed conflict. In particular, Parties shall:

...

- (c) not employ or threaten to employ methods or means of warfare which are intended or may be expected to cause widespread, long-term, or severe harm to the environment and ensure that such means and methods of warfare are not developed, produced, tested, or transferred; and
- (d) not use the destruction or modification of the environment as a means of warfare or reprisal.³²⁶

³²⁶ IUCN, Commission on Environmental Law, Draft International Covenant on Environment and Development, Bonn, March 1995, Article 32(1).

PART III

SPECIFIC METHODS OF WARFARE

DENIAL OF QUARTER

A. Orders or Threats that No Quarter Will Be Given (practice relating to Rule 46)	§§ 1–118
B. Attacks against Persons Hors de Combat (practice relating to Rule 47)	§§ 119–420
General	§§ 119–212
Specific categories of persons hors de combat	§§ 213–394
Quarter under unusual circumstances of combat	§§ 395–420
C. Attacks against Persons Parachuting from an Aircraft in Distress (practice relating to Rule 48)	§§ 421–490

Note: For practice concerning the treatment of persons hors de combat, see Part V. For specific practice concerning protection of the life of persons hors de combat, see Chapter 32, section C.

A. Orders or Threats that No Quarter Will Be Given
I. Treaties and Other Instruments
Treaties

1. Article 23(d) of the 1899 HR provides that “it is especially prohibited . . . to declare that no quarter will be given”.
2. Article 23(d) of the 1907 HR provides that “it is especially forbidden . . . to declare that no quarter will be given”.
3. Article 40 AP I provides that “it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis”. Article 38 of draft AP I (now Article 40) submitted by the ICRC to the CDDH included the prohibition “to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis” in the article concerning the safeguarding of the enemy *hors de combat*.¹ In view of its importance, the prohibition was the subject of a separate article on the basis of a proposal by Afghanistan, supported by Algeria, Belarus, Belgium, UK,

¹ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 13.

USSR, Venezuela and SFRY.² This separate article (now Article 40 AP I) was adopted by consensus.³

4. Article 4(1) AP II provides that “it is prohibited to order that there shall be no survivors”. Article 4 AP II was adopted by consensus.⁴

5. Article 22 of draft AP II submitted by the ICRC to the CDDH provided that “it is forbidden to order that there shall be no survivors, to threaten an adversary therewith and to conduct hostilities on such basis”.⁵ It was adopted by consensus in Committee III of the CDDH.⁶ Eventually, however, the prohibition to order that there shall be no survivors was placed, and adopted, in another article and the rest of draft Article 22 was deleted by consensus in the plenary.⁷

6. Pursuant to Article 8(2)(b)(xii) and (e)(x) of the 1998 ICC Statute, “declaring that no quarter will be given” is a war crime in both international and non-international armed conflicts.

Other Instruments

7. Article 60 of the 1863 Lieber Code provides that “it is against the usage of modern war to resolve, in hatred and revenge, to give no quarter. No body of troops has the right to declare that it will not give . . . quarter.”

8. Article 13(d) of the 1874 Brussels Declaration states that “the declaration that no quarter will be given” is especially forbidden.

9. Article 9(b) of the 1880 Oxford Manual provides that “it is forbidden . . . to declare in advance that quarter will not be given, even by those who do not ask it for themselves”.

10. Article 17(3) of the 1913 Oxford Manual of Naval War provides that “it is . . . forbidden . . . to declare that no quarter will be given”.

11. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “directions to give no quarter”.

12. Paragraph 43 of the 1994 San Remo Manual provides that “it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis”.

13. Paragraph 6.5 of the 1999 UN Secretary-General’s Bulletin provides that “it is forbidden to order that there shall be no survivors”.

² CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.29, 7 March 1975, p. 277, § 38 (Afghanistan), p. 279, § 51 (Algeria), p. 280, § 54 (Belarus), p. 282, § 64 (Belgium), p. 284, § 73 (UK), p. 283, § 66 (USSR), p. 280, § 55 (Venezuela) and p. 284, § 71 (SFRY).

³ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

⁵ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁶ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 108, § 6.

⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 128.

14. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xii) and (e)(x), “declaring that no quarter will be given” is a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

15. Argentina’s Law of War Manual (1969) provides that all declarations that no quarter shall be given are prohibited.⁸

16. Argentina’s Law of War Manual (1989) states that “it is prohibited . . . to order that there shall be no survivors, to threaten the adversary therewith or to conduct hostilities on this basis”.⁹

17. Australia’s Commanders’ Guide emphasises that “it is expressly forbidden to announce or implement a plan under which no prisoners are taken”.¹⁰ It further states that “it is prohibited to order that no prisoners will be taken, threaten an enemy that such an order will be given or conduct hostilities on the basis that no prisoners will be taken. Ambiguous orders, such as, ‘take that objective at any cost’ should be avoided.”¹¹

18. Australia’s Defence Force Manual provides that “it is prohibited to order that no prisoners will be taken, threaten an enemy that such an order will be given or conduct hostilities on the basis that no prisoners will be taken. Ambiguous orders, such as, ‘take that objective at any cost’ should be avoided.”¹²

19. Belgium’s Law of War Manual states that “declaring that no quarter will be given is forbidden”.¹³

20. Belgium’s Teaching Manual for Officers provides that it is forbidden “for military commanders to conduct hostilities on the basis that there shall be ‘no quarter’, *i.e.* no survivors at the end of combat. The threat to use this method of combat is also prohibited.”¹⁴

21. Benin’s Military Manual states that it is prohibited “to order that there shall be no survivors, to threaten the enemy therewith or to conduct operations on such a basis”.¹⁵

22. Burkina Faso’s Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited “to declare that no quarter will be given”.¹⁶

⁸ Argentina, *Law of War Manual* (1969), § 1.005.

⁹ Argentina, *Law of War Manual* (1989), § 1.06(4).

¹⁰ Australia, *Commanders’ Guide* (1994), § 416.

¹¹ Australia, *Commanders’ Guide* (1994), § 905.

¹² Australia, *Defence Force Manual* (1994), § 706 (land warfare), see also § 835 (air warfare).

¹³ Belgium, *Law of War Manual* (1983), p. 33.

¹⁴ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

¹⁵ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹⁶ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

23. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to declare that no quarter will be given".¹⁷

24. Cameroon's Instructors' Manual provides that:

It is prohibited to order that there shall be no survivors, to threaten the adversary therewith or to conduct hostilities on such a basis. Such a prohibition has existed since the establishment . . . of Christian morality, through the doctrine of International Humanitarian Law, to the recent international diplomatic conferences.¹⁸

25. Under Canada's LOAC Manual, "it is prohibited to deny quarter. In other words, it is unlawful to order, imply or encourage that no prisoners will be taken; to threaten an adversary party that such an order will be given; or to conduct hostilities on the basis that no prisoners will be taken."¹⁹ The manual also considers that "declaring that no quarter will be given" is a war crime.²⁰ It further states that "Article 4(1) of AP II extends to non-international armed conflicts the principle of customary international law that it is prohibited to order that there shall be no survivors".²¹

26. Canada's Code of Conduct provides that "it is unlawful . . . to order that no PWs or detainees will be taken. It is also illegal as well as operationally unsound to make threats to opposing forces that no PWs or detainees will be taken."²²

27. Colombia's Basic Military Manual states that it is prohibited to order that there shall be no survivors.²³

28. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to declare that no quarter will be given".²⁴

29. France's Disciplinary Regulations as amended provides that, under international conventions, it is prohibited "to declare that no quarter will be given".²⁵

30. France's LOAC Summary Note states that "it is prohibited to order that there shall be no survivors or prisoners and to threaten the enemy therewith".²⁶

31. France's LOAC Teaching Note states that "it is prohibited to order that there shall be no survivors".²⁷

32. France's LOAC Manual provides that "it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis".²⁸

33. Germany's Military Manual states that "it is prohibited to order that there shall be no survivors. It is also prohibited to threaten an adversary therewith or to conduct military operations on this basis."²⁹

¹⁷ Cameroon, *Disciplinary Regulations* (1975), Article 32.

¹⁸ Cameroon, *Instructors' Manual* (1992), p. 63, § 233, see also p. 30, § 132 and p. 149, § 531.

¹⁹ Canada, *LOAC Manual* (1999), p. 6-2, § 15 (land warfare), see also p. 7-3, § 20 (air warfare).

²⁰ Canada, *LOAC Manual* (1999), p. 16-3, § 20(d).

²¹ Canada, *LOAC Manual* (1999), p. 17-3, § 20.

²² Canada, *Code of Conduct* (2001), Rule 5, § 2.

²³ Colombia, *Basic Military Manual* (1995), p. 49.

²⁴ Congo, *Disciplinary Regulations* (1986), Article 32(2).

²⁵ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

²⁶ France, *LOAC Summary Note* (1992), § 4.5. ²⁷ France, *LOAC Teaching Note* (2000), p. 2.

²⁸ France, *LOAC Manual* (2001), p. 103. ²⁹ Germany, *Military Manual* (1992), § 450.

34. Italy's IHL Manual provides that it is prohibited "to declare that no quarter will be given".³⁰
35. Kenya's LOAC Manual states that "it is forbidden... to order that there will be no survivors, to threaten the enemy therewith or to conduct operations on this basis".³¹
36. Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to declare that no quarter will be given".³²
37. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to declare that no quarter will be given".³³
38. The Military Manual of the Netherlands states that "it is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis".³⁴ With respect to non-international armed conflicts, the manual also states that "it is prohibited to order that there shall be no survivors".³⁵
39. New Zealand's Military Manual states that "it is prohibited to order that no prisoners will be taken, to threaten an adverse party that such an order will be given, or to conduct hostilities on the basis that no prisoners will be taken".³⁶ The manual also provides that "declaring that no quarter will be given" is a war crime.³⁷ It further states that "Article 4(1) of AP II extends to non-international armed conflicts the principle of customary international law that it is prohibited to order that there shall be no survivors".³⁸
40. Nigeria's Military Manual provides that it is prohibited "to declare that no quarter will be given".³⁹
41. Nigeria's Manual on the Laws of War considers that "informing soldiers of the enemy that they will not be protected unless they surrender immediately" is an "illegitimate tactic".⁴⁰
42. Nigeria's Soldiers' Code of Conduct states that it is "prohibited... to declare that no mercy will be shown".⁴¹
43. Russia's Military Manual states that "ordering that there shall be no survivors, threatening the adversary therewith or conducting the hostilities according to this decision" is a prohibited method of warfare.⁴²
44. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to declare that no quarter will be given".⁴³

³⁰ Italy, *IHL Manual* (1991), Vol. I, § 8. ³¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

³² Mali, *Army Regulations* (1979), Article 36.

³³ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

³⁴ Netherlands, *Military Manual* (1993), p. IV-4.

³⁵ Netherlands, *Military Manual* (1993), p. XI-4.

³⁶ New Zealand, *Military Manual* (1992), § 503(1) (land warfare), see also § 612(1) (air warfare).

³⁷ New Zealand, *Military Manual* (1992), § 1704(2)(d).

³⁸ New Zealand, *Military Manual* (1992), § 1811.

³⁹ Nigeria, *Military Manual* (1994), p. 40, § 5(1)(vii).

⁴⁰ Nigeria, *Manual on the Laws of War* (undated), § 14(a)(4).

⁴¹ Nigeria, *Soldiers' Code of Conduct* (undated), § 12(g).

⁴² Russia, *Military Manual* (1990), § 5(p).

⁴³ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

45. South Africa's LOAC Manual states that "it is a war crime to order troops to 'take no prisoners'".⁴⁴
46. Spain's LOAC Manual states that it is prohibited to order that there will be no survivors, to threaten the enemy therewith or to conduct operations on this basis.⁴⁵
47. Sweden's IHL Manual considers that the prohibition on ordering that no quarter shall be granted as contained in Article 40 AP I is part of customary international law.⁴⁶
48. Switzerland's Basic Military Manual provides that "it is prohibited to declare that no quarter will be given".⁴⁷
49. Togo's Military Manual states that it is prohibited "to order that there shall be no survivors, to threaten the enemy therewith or to conduct operations on such a basis".⁴⁸
50. The UK Military Manual stipulates that "it is forbidden to declare that no quarter will be given".⁴⁹
51. The UK LOAC Manual provides that "it is forbidden . . . to declare that no quarter will be given".⁵⁰
52. The US Field Manual provides that "it is especially forbidden . . . to declare that no quarter will be given".⁵¹
53. The YPA Military Manual of the SFRY (FRY) states that "it is prohibited to order that there shall be no survivors or detainees, to threaten an adversary therewith or to conduct hostilities on this basis".⁵²

National Legislation

54. Under Armenia's Penal Code, giving, during an armed conflict, the "order . . . not to spare anyone's life" constitutes a crime against the peace and security of mankind.⁵³
55. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including directions to give no quarter.⁵⁴
56. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including declaring or ordering that there are to be no survivors with the intention of threatening an adversary or conducting hostilities on this basis, both in international and non-international armed conflicts.⁵⁵

⁴⁴ South Africa, *LOAC Manual* (1996), § 30, note 2.

⁴⁵ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(3), see also §§ 3.3.b.(5) and 7.3.a.(6).

⁴⁶ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁴⁷ Switzerland, *Basic Military Manual* (1987), Article 20.

⁴⁸ Togo, *Military Manual* (1996), Fascicule III, p. 12.

⁴⁹ UK, *Military Manual* (1958), § 117.

⁵⁰ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(c).

⁵¹ US, *Field Manual* (1956), § 28.

⁵² SFRY (FRY), *YPA Military Manual* (1988), § 103.

⁵³ Armenia, *Penal Code* (2003), Article 391(3).

⁵⁴ Australia, *War Crimes Act* (1945), Section 3.

⁵⁵ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.50 and 268.91.

57. Under the Criminal Code of the Federation of Bosnia and Herzegovina, whoever “orders that there be no surviving enemy soldiers in a fight, or whoever fights against the enemy on such basis” commits a war crime.⁵⁶ The Criminal Code of the Republika Srpska contains the same provision.⁵⁷

58. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “declaring that there shall be no quarter” constitutes a war crime in both international and non-international armed conflicts.⁵⁸

59. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.⁵⁹

60. China’s Law Governing the Trial of War Criminals provides that “ordering wholesale slaughter” constitutes a war crime.⁶⁰

61. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁶¹

62. Under Croatia’s Criminal Code, whoever “orders that in a battle there shall be no surviving members of the enemy or whoever engages in a battle against the enemy with the same objective” commits a war crime.⁶²

63. Under Ethiopia’s Penal Code, it is a punishable offence to order to kill or wound enemies who have surrendered or laid down their arms or, for any other reason, are incapable of defending or have ceased to defend themselves.⁶³

64. Under Georgia’s Criminal Code, any war crime provided for by the 1998 ICC Statute which is not explicitly mentioned in the Code, such as “declaring that no quarter will be given” in an international or non-international armed conflict, is a crime.⁶⁴

65. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, “orders or threatens, as a commander, that no quarter will be given”.⁶⁵

66. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of AP I, including violations of Article 40 AP I, as well as any “contravention” of AP II, including violations of Article 4(1) AP II, are punishable offences.⁶⁶

⁵⁶ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 158(3).

⁵⁷ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 438(3).

⁵⁸ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(l) and (D)(j).

⁵⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁶⁰ China, *Law Governing the Trial of War Criminals* (1946), Article 3(14).

⁶¹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁶² Croatia, *Criminal Code* (1997), Article 161(3).

⁶³ Ethiopia, *Penal Code* (1957), Article 287(a) and (d).

⁶⁴ Georgia, *Criminal Code* (1999), Article 413(d).

⁶⁵ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(6).

⁶⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

67. Italy's Law of War Decree as amended provides that it is prohibited "to declare that no quarter will be given".⁶⁷
68. Under Lithuania's Criminal Code as amended, the "order to kill . . . persons who have surrendered by giving up their arms or having no means to put up resistance, the wounded, sick persons or the crew of a sinking ship" during an international armed conflict or occupation is a war crime.⁶⁸
69. Under Mali's Penal Code, "declaring that there shall be no quarter" is a war crime in international armed conflicts.⁶⁹
70. The Definition of War Crimes Decree of the Netherlands includes "directions to give no quarter" in its list of war crimes.⁷⁰
71. Under the International Crimes Act of the Netherlands, "declaring that no quarter will be given" constitutes a crime, whether in time of international or non-international armed conflict.⁷¹
72. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xii) and (e)(x) of the 1998 ICC Statute.⁷²
73. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁷³
74. Under Slovenia's Penal Code, "whoever orders . . . that there be no survivors among the aggressor's soldiers, or . . . whoever wages war against the aggressor on this basis" commits a war crime.⁷⁴
75. Spain's Royal Ordinance for the Armed Forces provides that it is prohibited to declare that a war will be waged without quarter.⁷⁵
76. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxi) and (e)(x) of the 1998 ICC Statute.⁷⁶
77. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxi) and (e)(x) of the 1998 ICC Statute.⁷⁷
78. Under the US War Crimes Act as amended, violations of Article 23(d) of the 1907 HR are war crimes.⁷⁸
79. Under the Penal Code as amended of the SFRY (FRY), "a person who orders . . . that no enemy troops should survive combat or who fights the enemy

⁶⁷ Italy, *Law of War Decree as amended* (1938), Article 35.

⁶⁸ Lithuania, *Criminal Code as amended* (1961), Article 333.

⁶⁹ Mali, *Penal Code* (2001), Article 31(i)(12).

⁷⁰ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁷¹ Netherlands, *International Crimes Act* (2003), Articles 5(5)(s) and 6(3)(g).

⁷² New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁷³ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁷⁴ Slovenia, *Penal Code* (1994), Article 377(2).

⁷⁵ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

⁷⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁷⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁷⁸ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

for that purpose" commits a war crime.⁷⁹ The commentary on the Penal Code specifies that "in the case of an armed conflict, it is irrelevant for this act whether it is international in nature or whether it is a civil war".⁸⁰

National Case-law

80. The *Sergeant W. case* before Belgium's Court-Martial of Brussels in 1966 concerned the murder of an unarmed Congolese woman by a senior member of the Belgian staff who had been sent to provide assistance to the army in the Congo (DRC). In his defence, the accused argued that he had been ordered by his commanding officer (Major O.) to "shoot all suspect elements on sight" in the zone forbidden to civilians and that he had shot the woman on the basis that he had interpreted this order as meaning that he should "take no prisoners and to 'kill' everything we come across in here". The Court found that:

As interpreted by the accused in practice – viz. the right or even the obligation to kill an unarmed person in his power – the order was patently illegal. Executing or causing to be executed without prior due trial a suspect person or even a rebel fallen into the hands of the members of his battalion was obviously outside the competence of Major O., and such an execution was a manifest example of voluntary manslaughter. The illegal nature of the order thus interpreted was not in doubt and the accused had to refuse to carry it out . . . The act perpetrated by the accused constitutes not only murder within the meaning of Articles 43 and 44 of the Congolese Criminal Code and Articles 392 and 393 of the Belgian Criminal Code, but is also a flagrant violation of the laws and customs of war and the laws of humanity.⁸¹

81. In the *Abbaye Ardenne case* in 1945, the Canadian Military Court at Aurich convicted a German commander of having incited and counselled his troops to deny quarter to Allied troops.⁸²

82. In a case concerning conscientious objection in 1992, Colombia's Constitutional Court considered that a superior's order that would cause "death outside combat" would clearly lead to a violation of human rights and of the Constitution and as such could be disobeyed.⁸³

83. In 1995, in its examination of the constitutionality of AP II, Colombia's Constitutional Court considered that Article 4 AP II, including the prohibition on ordering that there shall be no survivors, perfectly met constitutional standards. The Constitution contained provisions on the protection of human life and dignity.⁸⁴

84. In 1995, in its examination of the constitutionality of a military regulation which provided that subordinates were obliged to obey a superior's order

⁷⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 146(3).

⁸⁰ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 146.

⁸¹ Belgium, Court-Martial of Brussels, *Sergeant W. case*, Judgement, 18 May 1966.

⁸² Canada, Military Court at Aurich, *Abbaye Ardenne case*, Judgement, 28 December 1945.

⁸³ Colombia, Constitutional Court, *Constitutional Case No. T-409*, Judgement, 8 June 1992.

⁸⁴ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

that they considered unlawful if the order was confirmed in writing, Colombia's Constitutional Court stated that an order that would cause death outside combat would clearly be a violation of human rights and of the Constitution.⁸⁵

85. In the *Stenger and Cruisus case* before Germany's Leipzig Court after the First World War, one of the accused was charged with having issued an order that:

No prisoners are to be taken from to-day onwards; all prisoners, wounded or not, are to be killed

...

All the prisoners are to be massacred; the wounded, armed or not, are to be massacred; even men captured in large organised units are to be massacred. No enemy must remain alive behind us.

The other accused was charged with having passed on the order. The first accused was acquitted because it could not be proved that he had actually given the order in question. As to the second accused, the Court held that:

[He] acted in the mistaken idea that General Stenger, at the time of the discussion near the chapel, issued the order to shoot the wounded. He was not conscious of the illegality of such an order, and therefore considered that he might pass on the supposed order to his company, and indeed must do so.

So pronounced a misconception of the real facts seems only comprehensible in view of the mental condition of the accused... But this merely explains the error of the accused; it does not excuse it... Had he applied the attention which was to be expected from him, what was immediately clear to many of his men would not have escaped him, namely, that the indiscriminate killing of all wounded was a monstrous war measure, in no way to be justified.⁸⁶

86. In the *Peleus case* before the UK Military Court at Hamburg in 1945, the commander of a German submarine was charged with ordering the killing of survivors of a sunken Greek merchant vessel. He was found guilty and the Judge Advocate ruled that it must have been obvious to the most rudimentary intelligence that it was not a lawful command.⁸⁷

87. In the *Von Falkenhorst case* before the UK Military Court at Brunswick in 1946, the accused, Commander-in-Chief of the German armed forces in Norway, was found guilty of having incited, in two orders of October 1942 and June 1943, members of the forces under his command not to accept quarter or to give quarter to Allied soldiers, sailors and airmen taking part in commando operations. Furthermore he had ordered that, in the event of the capture of any Allied soldiers, sailors or airmen taking part in such operations, they should be killed after capture.⁸⁸

88. In the *Wickman case* before the UK Military Court at Hamburg in 1946, the accused was found guilty of "committing a war crime... in that he... in

⁸⁵ Colombia, Constitutional Court, *Constitutional Case No. C-578*, Judgement, 4 December 1995.

⁸⁶ Germany, Leipzig Court, *Stenger and Cruisus case*, Judgement, 1921.

⁸⁷ UK, Military Court at Hamburg, *Peleus case*, 20 October 1945.

⁸⁸ UK, Military Court at Brunswick, *Von Falkenhorst case*, Judgement, 2 August 1946.

violation of the laws and usages of war gave orders to [his] platoon that no prisoners were to be taken and that any prisoners taken were to be shot".⁸⁹

89. In the *Von Ruchteschell* case before the UK Military Court at Hamburg in 1947, the accused was charged, *inter alia*, of having ordered that survivors on life-rafts be fired at. He was found not guilty of this charge.⁹⁰

90. In the *Le Paradis* case before the UK Court at Hamburg-Altona in 1949, a German officer was convicted of the killing by his troops, on his orders, of members of a UK regiment which had surrendered.⁹¹

91. In the *Thiele* case before the US Military Commission at Augsburg in 1945, the accused, a German army lieutenant, was convicted of having ordered the killing of an American prisoner of war.⁹²

92. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes against enemy belligerents and prisoners of war for having unlawfully directed that certain enemy troops be refused quarter and that certain captured members of the military forces of nations at war with Germany be summarily executed. In its judgement, the Tribunal stated that "in the course of the war, many Allied soldiers who had surrendered to the Germans were shot immediately, often as a matter of deliberate, calculated policy". It added that "the murder of Commandos or captured airmen . . . were the result of direct orders circulated through the highest official channels". It also referred to Hitler's order of 18 October 1942 whereby no quarter should be granted to members of Allied commando units, stating that "this order was criminal on its face. It simply directed the slaughter of these 'sabotage' troops."⁹³

Other National Practice

93. In its oral pleadings before the ICJ in the *Nuclear Weapons* case in 1995, Australia stated that the "right to self-defence is not unlimited . . . Self-defence is not a justification . . . for ordering that there shall be no enemy survivors in combat."⁹⁴

94. At some point during the Chinese civil war, the PLA headquarters made an announcement stating that the PLA would not kill any officers or soldiers

⁸⁹ UK, Military Court at Hamburg, *Wickman* case, Judgement, 26 November 1946.

⁹⁰ UK, Military Court at Hamburg, *Von Ruchteschell* case, Judgement, 21 May 1947.

⁹¹ UK, Court No. 5 of the Curiohaus, Hamburg-Altona, *Le Paradis* case, 25 October 1948; see also cases cited in Lassa Oppenheim, *International Law. A Treatise*, Vol. II, *Disputes, War and Neutrality*, Longmans, Green and Co., London/New York/Toronto, Seventh edition, Hersch Lauterpacht (ed.), 1952, §§ 69 and 109; Eric David, *Principes de droit des conflits armés*, Bruylant, Brussels, Second edition, 1999, § 2.167; Christopher Greenwood, *The Customary Law Status of the 1977 Geneva Protocols*, in Astrid J. M. Delissen and Gerard J. Tanja (eds.), *Humanitarian Law of Armed Conflict: Challenges Ahead. Essays in Honour of Frits Kalshoven*, Martinus Nijhoff, Dordrecht, 1991, p. 106.

⁹² US, Military Commission at Augsburg, *Thiele* case, Judgement, 13 June 1945.

⁹³ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial)* case, Judgement, 28 October 1948.

⁹⁴ Australia, Oral pleadings before the ICJ, *Nuclear Weapons* case, 30 October 1995, Verbatim Record CR 95/22, p. 52.

of the Nationalist Army who laid down arms. According to the Report on the Practice of China, the policy was implemented in practice.⁹⁵

95. According to the Report on the Practice of Israel, the IDF does not conduct a policy of “no quarter”.⁹⁶

96. In 1990, in a letter addressed to the UN Secretary-General in the context of the Gulf War, Kuwait condemned the instructions given and measures taken by the Iraqi authorities, *inter alia*, “the execution of every Kuwaiti military man should he fail to surrender to Iraqi forces”. These were qualified as “savage practices”.⁹⁷

97. In 1995, during a debate in the House of Lords in 1995, the UK Minister of State, Home Office, criticised the Geneva Conventions (Amendment) Bill introduced by a private member for categorising as grave breaches certain acts not treated as such in API, including threatening an adversary that there shall be no survivors.⁹⁸

98. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that no order be given that there shall be no survivors nor an adversary be threatened with such an order or hostilities be conducted on that basis”.⁹⁹

99. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US commented that its practice was consistent with the prohibition on ordering that there shall be no survivors.¹⁰⁰

100. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Article 23(d) of the 1907 HR “prohibits the denial of quarter, that is the refusal to accept an enemy’s surrender”.¹⁰¹

101. In 1989, the military attaché of the embassy of State X commented that no order to kill prisoners was in force as such in State Y, but the practice seemed to be not to take prisoners, with the exception of important personalities.¹⁰²

102. In 1994, an ICRC delegate, summarising the military situation in a State, emphasised the position reiterated by an officer of the armed forces that there were no prisoners, and that there would not be any.¹⁰³

⁹⁵ China, Announcement of the People’s Liberation Army, 10 October 1947, *Selected Works of Mao Zedong*, Vol. 4, The People’s Press, p. 1238; Report on the Practice of China, 1997, Chapter 2.1.

⁹⁶ Report on the Practice of Israel, 1997, Chapter 2.1.

⁹⁷ Kuwait, Letter dated 24 September 1990 to the UN Secretary-General, UN Doc. S/21815, 24 September 1990.

⁹⁸ UK, House of Lords, Statement by the Minister of State, Home Office, *Hansard*, 25 May 1995, Vol. 564, cols. 1083–1084.

⁹⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

¹⁰⁰ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(J), Report on US Practice, 1997, Chapter 2.8.

¹⁰¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 641.

¹⁰² ICRC archive document. ¹⁰³ ICRC archive document.

III. Practice of International Organisations and Conferences

United Nations

103. In 1993, the UN Commission on the Truth for El Salvador examined, *inter alia*, a case concerning the killing of two soldiers wounded after a US helicopter was shot down by an FMLN patrol. The survivors of the crash had been left on the scene, but shortly afterwards, a member of the patrol was sent back and killed the two wounded men. According to the Commission's report,

The Commission considers that there is sufficient proof that United States soldiers... who survived the shooting down of the helicopter... but were wounded and defenceless, were executed in violation of international humanitarian law...

The Commission has likewise found no evidence that the executions were ordered by higher levels of command, or that they were carried out in accordance with an ERP or FMLN policy of killing prisoners. FMLN acknowledged the criminal nature of the incident and detained and tried the accused.¹⁰⁴

Other International Organisations

104. No practice was found.

International Conferences

105. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

106. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

107. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that "it is prohibited to order that there will be no survivors, to threaten the enemy therewith or to conduct operations on this basis".¹⁰⁵

108. In a report submitted to the 21st International Conference of the Red Cross in 1969, the ICRC considered that the rule prohibiting the declaration that no quarter will be given was implicit in the Geneva Conventions. It stated, however, that the Conventions focused on the protection of combatants once they had fallen into enemy hands, whereas the prohibition of denial of quarter applied from the time the intention to surrender had been declared.¹⁰⁶

¹⁰⁴ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 167–169.

¹⁰⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 399.

¹⁰⁶ ICRC, Report on the Reaffirmation and Development of Laws and Customs Applicable in Armed Conflicts, May 1969, submitted to the 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, p. 78.

109. The ICRC Commentary on Article 40 AP I states that “any order of ‘liquidation’ is prohibited, whether it concerns commandos, political or any other kind of commissars, irregular troops or so-called irregular troops, saboteurs, parachutists, mercenaries or persons to be considered as mercenaries, or other cases”.¹⁰⁷

110. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “no order shall ever be given that there should be no survivors”.¹⁰⁸

111. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “it is prohibited to order that there shall be no survivors”.¹⁰⁹

112. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that “to declare that there shall be no survivors” be listed as a war crime in both international and non-international armed conflicts, subject to the jurisdiction of the Court.¹¹⁰

113. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC stated that “the rules governing armed conflict must be respected at all times and in all circumstances. The ICRC stresses that these rules . . . prohibit orders that there should be no survivors.”¹¹¹

VI. Other Practice

114. In 1977, in a meeting with the ICRC, an armed opposition group denounced the practice by troops of a State of systematically killing all combatants, even those wounded or who had laid down their arms.¹¹²

115. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that “the following . . . are prohibited by applicable international law rules: 1. Orders to combatants that there shall be no survivors, such threats to combatants or direction to conduct hostilities on this basis.”¹¹³

¹⁰⁷ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1595.

¹⁰⁸ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

¹⁰⁹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

¹¹⁰ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(vii) and 3(xv).

¹¹¹ ICRC, Communication to the Press No. 01/58, Afghanistan: ICRC calls on all parties to comply with international humanitarian law, 23 November 2001.

¹¹² ICRC archive document.

¹¹³ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

116. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that “applicable international law rules prohibit the following kinds of practices... A. Orders to combatants that there shall be no survivors, such threats to combatants or direction to conduct hostilities on this basis.”¹¹⁴

117. In 1995, in a meeting with the ICRC, the representative of an armed opposition group accused government troops of not taking prisoners and of killing all captured combatants.¹¹⁵

118. According to an ICRC mission report in 1995, the leader of an armed opposition group explained that if captured combatants were nationals of the same State they were obliged to join the opposition forces; if, however, they were foreigners, they were executed. Soldiers had allegedly been given instructions not to grant quarter.¹¹⁶

B. Attacks against Persons *Hors de Combat*

General

I. Treaties and Other Instruments

Treaties

119. Article 41(1) AP I provides that “a person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack”. Article 41 was adopted by consensus.¹¹⁷

120. Under Article 85(3)(e) AP I, “making a person the object of attack in the knowledge that he is *hors de combat*” is a grave breach of AP I. Article 85 API was adopted by consensus.¹¹⁸

121. Article 7(1) of draft AP II submitted by the ICRC to the CDDH provided that “it is forbidden to kill, injure, ill-treat or torture an adversary *hors de combat*”.¹¹⁹ This proposal was amended and adopted by consensus in Committee III of the CDDH.¹²⁰ The text adopted provided that “a person who is recognized or should, under the circumstances, be recognized to be *hors de combat*, shall not be made the object of attack”.¹²¹ Eventually, however, it was rejected in the plenary by 22 votes in favour, 15 against and 42 abstentions.¹²²

¹¹⁴ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

¹¹⁵ ICRC archive document. ¹¹⁶ ICRC archive document.

¹¹⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 104.

¹¹⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹¹⁹ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 35.

¹²⁰ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 108, § 7.

¹²¹ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 420.

¹²² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 129.

Other Instruments

122. Article 60 of the 1863 Lieber Code stipulates that “it is against the usage of modern war to resolve, in hatred and revenge, to give no quarter”.

123. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 41 AP I.

124. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 41 AP I.

125. Pursuant to Article 20(b)(iv) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “making a person the object of attack in the knowledge that he is hors de combat” is a war crime.

*II. National Practice**Military Manuals*

126. Argentina’s Law of War Manual forbids the refusal to give quarter.¹²³ It also states that “it is prohibited . . . to make an enemy *hors de combat* the object of attack”.¹²⁴ It further states that “attacks against persons recognised as *hors de combat*” are a grave breach of AP I and a war crime.¹²⁵

127. Australia’s Commanders’ Guide provides that “a person who is recognised or who, in the circumstances, should be recognised to be hors de combat shall not be made the object of attack”.¹²⁶ It also states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . denying an enemy the right to surrender”.¹²⁷

128. Australia’s Defence Force Manual provides that “soldiers who are ‘out of combat’ and civilians are to be treated in the same manner and cannot be made the object of attack”.¹²⁸ It also stresses that the “LOAC forbids the killing or wounding of an enemy who . . . is . . . ‘hors de combat’”.¹²⁹ The manual further states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . denying an enemy the right to surrender”.¹³⁰

129. Belgium’s Teaching Manual for Officers provides that “any adversary *hors de combat* may no longer be made the object of attack”.¹³¹

¹²³ Argentina, *Law of War Manual* (1989), § 1.06(4).

¹²⁴ Argentina, *Law of War Manual* (1989), § 1.06(5).

¹²⁵ Argentina, *Law of War Manual* (1989), § 8.03.

¹²⁶ Australia, *Commanders’ Guide* (1994), § 906.

¹²⁷ Australia, *Commanders’ Guide* (1994), § 1305(o).

¹²⁸ Australia, *Defence Force Manual* (1994), § 707.

¹²⁹ Australia, *Defence Force Manual* (1994), § 836.

¹³⁰ Australia, *Defence Force Manual* (1994), § 1315(o).

¹³¹ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

130. Belgium's Teaching Manual for Soldiers states that enemy combatants who are no longer taking part in combat "may be neutralised and captured. To kill them would not bring any additional advantage in combat."¹³²

131. Benin's Military Manual states that "it is prohibited to kill or injure an adversary . . . who is *hors de combat*".¹³³ It also states that "any person recognised or who should be recognised as being no longer able to participate in combat shall not be attacked".¹³⁴

132. Cameroon's Instructors' Manual provides that "the enemy *hors de combat* is defined as a combatant who, physically or morally, cannot continue to fight. The main rule to be observed at this moment is not to kill him but to preserve his life, provided he does not manifest any hostile intentions."¹³⁵

133. Canada's LOAC Manual states that "it is prohibited to deny quarter".¹³⁶ It also states that "a combatant who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be attacked".¹³⁷ It further states that "making a person the object of attack knowing he is *hors de combat*" is a grave breach of AP I and a war crime.¹³⁸

134. Canada's Code of Conduct provides that "the 'denial of quarter' is prohibited".¹³⁹

135. Colombia's Circular on the Fundamental Rules of IHL states that "it is prohibited to kill or injure an adversary who . . . is *hors de combat*".¹⁴⁰

136. Colombia's Directive on IHL considers an "attack against a person *hors de combat*" as a punishable offence.¹⁴¹

137. Croatia's LOAC Compendium states that the denial of quarter is a prohibited method of warfare.¹⁴² It further states that "attacks on persons 'hors de combat'" are a grave breach and a war crime.¹⁴³

138. Croatia's Commanders' Manual provides that "a combatant who is recognised (or should be recognised) as being out of combat may not be attacked".¹⁴⁴

139. Under Croatia's Instructions on Basic Rules of IHL, it is prohibited to kill or injure members of the enemy armed forces who are *hors de combat*.¹⁴⁵

¹³² Belgium, *Teaching Manual for Soldiers* (undated), p. 15.

¹³³ Benin, *Military Manual* (1995), Fascicule II, p. 4, see also p. 18.

¹³⁴ Benin, *Military Manual* (1995), Fascicule II, p. 9.

¹³⁵ Cameroon, *Instructors' Manual* (1992), p. 63, § 233.2.

¹³⁶ Canada, *LOAC Manual* (1999), p. 6-2, § 15 and p. 7-3, § 20.

¹³⁷ Canada, *LOAC Manual* (1999), p. 3-3, § 18, see also p. 4-5, § 42, p. 6-2, § 16 and p. 7-3, § 21.

¹³⁸ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(e).

¹³⁹ Canada, *Code of Conduct* (2001), Rule 5, § 2.

¹⁴⁰ Colombia, *Circular on the Fundamental Rules of IHL* (1992), § 2.

¹⁴¹ Colombia, *Directive on IHL* (1993), Section III(D).

¹⁴² Croatia, *LOAC Compendium* (1991), p. 40.

¹⁴³ Croatia, *LOAC Compendium* (1991), p. 56.

¹⁴⁴ Croatia, *Commanders' Manual* (1992), § 72.

¹⁴⁵ Croatia, *Instructions on Basic Rules of IHL* (1993), § 1.

140. Ecuador's Naval Manual states that "the following acts constitute war crimes: . . . denial of quarter (i.e., denial of the offer not to kill the defeated enemy)".¹⁴⁶

141. France's LOAC Summary Note states that "it is prohibited to kill or injure an adversary who . . . is *hors de combat*".¹⁴⁷

142. France's LOAC Teaching Note provides that "it is prohibited to attack . . . an adversary . . . who is *hors de combat*".¹⁴⁸

143. France's LOAC Manual states that "a person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack".¹⁴⁹

144. Hungary's Military Manual states that the denial of quarter is a prohibited method of warfare.¹⁵⁰ It further states that "attacks on persons '*hors de combat*'" are a grave breach of the law of war and a war crime.¹⁵¹

145. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "the protection of those persons who are *hors de combat* is a basic tenet in the IDF, and IDF soldiers are required not to make any such individual the subject of attack".¹⁵²

146. Israel's Manual on the Laws of War states that:

The laws of war do set clear bars to the possibility of harming combatants when the combatant is found "outside the frame of hostilities", as when he asks to surrender, or when he is wounded in a way that does not allow him to take an active part in the fighting. In such situations it is absolutely prohibited to harm the combatant.¹⁵³

147. Italy's IHL Manual provides that grave breaches of international conventions and protocols, including "attacks against persons *hors de combat*", are considered as war crimes.¹⁵⁴

148. Italy's LOAC Elementary Rules Manual provides that "a combatant who is recognised (or should be recognised) as being out of combat may not be attacked".¹⁵⁵

149. Under Kenya's LOAC Manual, "the enemy combatant who is no longer in a position to fight is no longer to be attacked, and is protected".¹⁵⁶ It further instructs: "Do not fight enemies who are *out of combat*."¹⁵⁷

150. Madagascar's Military Manual states that "a combatant who is recognised (or should be recognised) to be *hors de combat* shall not be attacked".¹⁵⁸

¹⁴⁶ Ecuador, *Naval Manual* (1989), § 6.2.5(4). ¹⁴⁷ France, *LOAC Summary Note* (1992), § 2.1.

¹⁴⁸ France, *LOAC Teaching Note* (2000), p. 2.

¹⁴⁹ France, *LOAC Manual* (2001), pp. 104 and 105.

¹⁵⁰ Hungary, *Military Manual* (1992), p. 64. ¹⁵¹ Hungary, *Military Manual* (1992), p. 90.

¹⁵² Report on the Practice of Israel, 1997, Chapter 2.1, referring to *Law of War Booklet* (1986), p. 13.

¹⁵³ Israel, *Manual on the Laws of War* (1998), p. 42. ¹⁵⁴ Italy, *IHL Manual* (1991), Vol. I, § 85.

¹⁵⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 72.

¹⁵⁶ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

¹⁵⁷ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 14.

¹⁵⁸ Madagascar, *Military Manual* (1994), Fiche No. 7-O. § 17, see also Fiche No. 9-SO, § A and Fiche No. 5-T, § 4.

151. The Military Manual of the Netherlands provides that any person placed *hors de combat* may not be attacked.¹⁵⁹ In addition, “attacks against . . . a person who is recognised to be *hors de combat*” are a grave breach of AP I.¹⁶⁰

152. Under New Zealand’s Military Manual, “a person who is recognised as, or who in the circumstances should be recognised as, *hors de combat* shall not be made the object of attack”.¹⁶¹ Furthermore, the manual states that “making a person the object of attack knowing he is *hors de combat*” is a grave breach of AP I and a war crime. The manual explains that “this has always been a war crime under customary law”.¹⁶²

153. The Soldier’s Rules of the Philippines instructs: “Do not fight enemies who are ‘out of combat’ . . . Disarm them and hand them over to your superior.”¹⁶³

154. Romania’s Soldiers’ Manual orders combatants not to attack, kill or injure an enemy *hors de combat*.¹⁶⁴

155. Russia’s Military Manual provides that “attacks against persons *hors de combat*” are a prohibited method of warfare.¹⁶⁵

156. South Africa’s LOAC Manual notes that “making a person who is ‘out of combat’ . . . the object of attack knowing that that person is out of combat” is a grave breach of AP I and a war crime.¹⁶⁶

157. Spain’s LOAC Manual prohibits attacks against persons *hors de combat*.¹⁶⁷ It also states that it is a grave breach of AP I and a war crime “to make a person the object of attack knowing that he is *hors de combat*”.¹⁶⁸

158. Sweden’s IHL Manual considers that the safeguard of an enemy *hors de combat* as contained in Article 41 API is part of customary international law.¹⁶⁹ It states that “Article 40 of Additional Protocol I treats quarter – an archaic concept which is equivalent to showing mercy to an enemy who has been placed *hors de combat*”.¹⁷⁰ The manual adds that:

Persons *hors de combat* may not be attacked, but shall enjoy the protection of international humanitarian law provided they abstain from any hostile act and do not attempt to escape.

In practice it can often be very hard to determine when this situation has arisen. If it is established that a person is *hors de combat*, he may not be subjected to attack, but he is not protected against the secondary effects of an attack on nearby

¹⁵⁹ Netherlands, *Military Manual* (1993), p. IV-3.

¹⁶⁰ Netherlands, *Military Manual* (1993), p. IX-5.

¹⁶¹ New Zealand, *Military Manual* (1992), § 503(2) (land warfare), see also § 612(2) (air warfare).

¹⁶² New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(e), including footnote 17.

¹⁶³ Philippines, *Soldier’s Rules* (1989), § 4.

¹⁶⁴ Romania, *Soldiers’ Manual* (1991), pp. 4, 5 and 32.

¹⁶⁵ Russia, *Military Manual* (1990), § 5(i).

¹⁶⁶ South Africa, *LOAC Manual* (1996), §§ 37(c) and 41.

¹⁶⁷ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.c.(3), 4.5.b.(1)b), 10.6.a and 10.8.f.(1).

¹⁶⁸ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

¹⁶⁹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

¹⁷⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.2, p. 32.

objectives. It should also be noted that the mere presence of persons *hors de combat* does not imply that the place/object where they happen to be shall receive immunity.¹⁷¹

159. Under Switzerland's Basic Military Manual, "attacks directed against a person, in the knowledge that this person is *hors de combat*," are grave breaches of API.¹⁷²

160. Togo's Military Manual states that "it is prohibited to kill or injure an adversary . . . who is *hors de combat*".¹⁷³ It further states that "any person recognised or who should be recognised as being no longer able to participate in combat shall not be attacked".¹⁷⁴

161. The US Air Force Pamphlet states that "the law of armed conflicts clearly forbids the killing or wounding of an enemy who . . . is . . . *hors de combat*".¹⁷⁵ The Pamphlet goes on to say that "in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . deliberate refusal of quarter".¹⁷⁶

162. The US Naval Handbook provides that "the following acts are representative war crimes: . . . denial of quarter (i.e., killing or wounding an enemy *hors de combat* . . .)".¹⁷⁷

National Legislation

163. Under Armenia's Penal Code, an "assault on a person who has clearly ceased to participate in military actions", during an armed conflict, constitutes a crime against the peace and security of mankind.¹⁷⁸

164. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁷⁹

165. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "killing or injuring a person who is *hors de combat*" in international armed conflicts.¹⁸⁰

166. The Criminal Code of Belarus provides that it is a war crime to "attack a person in the knowledge that he is *hors de combat*".¹⁸¹

167. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "making

¹⁷¹ Sweden, *IHL Manual* (1991), Section 3.2.1.2, p. 33.

¹⁷² Switzerland, *Basic Military Manual* (1987), Article 193(1)(e).

¹⁷³ Togo, *Military Manual* (1996), Fascicule II, p. 4, see also p. 18.

¹⁷⁴ Togo, *Military Manual* (1996), Fascicule II, p. 9.

¹⁷⁵ US, *Air Force Pamphlet* (1976), § 4-2(d). ¹⁷⁶ US, *Air Force Pamphlet* (1976), § 15-3(c)(3).

¹⁷⁷ US, *Naval Handbook* (1995), § 6.2.5(4).

¹⁷⁸ Armenia, *Penal Code* (2003), Article 390.3(5).

¹⁷⁹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁸⁰ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.40.

¹⁸¹ Belarus, *Criminal Code* (1999), Article 136(13).

a person the object of attack in the knowledge that he/she is *hors de combat*" constitutes a crime under international law.¹⁸²

168. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "an attack against . . . persons unable to fight" is a war crime.¹⁸³ The Criminal Code of the Republika Srpska contains the same provision.¹⁸⁴

169. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹⁸⁵

170. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, refuses to give quarter or attacks persons *hors de combat*.¹⁸⁶

171. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]."¹⁸⁷

172. Under Croatia's Criminal Code, "an attack against . . . those *hors de combat*" is a war crime.¹⁸⁸

173. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹⁸⁹

174. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for "anyone who, during an international or non-international armed conflict, knowing of the existence of unequivocal acts of surrender from the adversary, continues to attack persons *hors de combat*, with the aim of leaving no survivors".¹⁹⁰

175. Under Georgia's Criminal Code, "making a person the object of attack in the knowledge that he is *hors de combat*", whether in an international or a non-international armed conflict, is a crime.¹⁹¹

176. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "wounds a member of the opposing armed forces or a combatant of the adverse party after the latter . . . is . . . placed *hors de combat*".¹⁹²

¹⁸² Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(15).

¹⁸³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

¹⁸⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

¹⁸⁵ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁸⁶ Colombia, *Penal Code* (2000), Article 145.

¹⁸⁷ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁸⁸ Croatia, *Criminal Code* (1997), Article 158(1).

¹⁸⁹ Cyprus, *AP I Act* (1979), Section 4(1).

¹⁹⁰ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataques contra actos inequívocos de rendición".

¹⁹¹ Georgia, *Criminal Code* (1999), Article 411(1)(e).

¹⁹² Germany, *Law Introducing the International Crimes Code* (2002), Article 1(8)(2).

177. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁹³ It adds that "any minor breach" of AP I, including violations of Article 41(1) AP I, is also a punishable offence.¹⁹⁴

178. Under Jordan's Draft Military Criminal Code, "attacks against persons *hors de combat*" in time of armed conflict are war crimes.¹⁹⁵

179. Under the Draft Amendments to the Code of Military Justice of Lebanon, "an attack against a person *hors de combat*" constitutes a war crime.¹⁹⁶

180. Moldova's Penal Code punishes "grave breaches of international humanitarian law committed during international and non-international armed conflicts".¹⁹⁷

181. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit "the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . making a person the object of attack in the knowledge that he is *hors de combat*".¹⁹⁸

182. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁹⁹

183. Nicaragua's Draft Penal Code punishes "anyone who, during an international or internal armed conflict, knowing of the existence of unequivocal acts of surrender from the adversary, continues to attack persons *hors de combat*, with the aim of leaving no survivors".²⁰⁰

184. According to Niger's Penal Code as amended, "making a person the object of an attack knowing that he/she is *hors de combat*" is a war crime, when such person is protected under the 1949 Geneva Conventions or their Additional Protocols of 1977.²⁰¹

185. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁰²

186. Under Slovenia's Penal Code, "an attack . . . on persons unable to fight" is a war crime.²⁰³

¹⁹³ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁹⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁹⁵ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(13).

¹⁹⁶ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(13).

¹⁹⁷ Moldova, *Penal Code* (2002), Article 391.

¹⁹⁸ Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(v).

¹⁹⁹ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

²⁰⁰ Nicaragua, *Draft Penal Code* (1999), Article 451.

²⁰¹ Niger, *Penal Code as amended* (1961), Article 208.3(15).

²⁰² Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁰³ Slovenia, *Penal Code* (1994), Article 374(1).

187. Tajikistan's Criminal Code punishes the act of "making a person the object of attack in the knowledge that he is *hors de combat*" in an international or internal armed conflict.²⁰⁴

188. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".²⁰⁵

189. Under Yemen's Military Criminal Code, "attacks against . . . persons *hors de combat*" are war crimes.²⁰⁶

190. Under the Penal Code as amended of the SFRY (FRY), "an attack on . . . persons placed *hors de combat*" is a war crime.²⁰⁷

191. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".²⁰⁸

National Case-law

192. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes against enemy belligerents and prisoners of war in that they refused to give quarter to prisoners of war and members of armed forces of nations then at war with the Third Reich. The Tribunal stated that "when Allied airmen were forced to land in Germany, they were sometimes killed at once by the civilian population. The police were instructed not to interfere with these killings, and the Ministry of Justice was informed that no one should be prosecuted for taking part in them."²⁰⁹

Other National Practice

193. According to the Report on the Practice of Algeria, the duty to give quarter has been a long-standing practice of Algeria.²¹⁰ During the Algerian war of independence, the ten rules of the ALN stipulated that Islamic teachings and international laws must be observed "in the destruction of enemy forces".²¹¹

194. At the CDDH, the Chilean delegation stated that it had abstained from the vote on draft Article 21 AP II (which was deleted in the final text) because it found the wording too vague. However, it agreed that the safeguarding of the

²⁰⁴ Tajikistan, *Criminal Code* (1998), Article 403(1).

²⁰⁵ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

²⁰⁶ Yemen, *Military Criminal Code* (1998), Article 21(6).

²⁰⁷ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

²⁰⁸ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

²⁰⁹ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 28 October 1948.

²¹⁰ Report on the Practice of Algeria, 1997, Chapter 2.1.

²¹¹ *El Moudjahid*, Les dix commandements de l'A.L.N., Vol. 1, p. 16, Report on the Practice of Algeria, 1997, Chapter 2.1.

enemy *hors de combat* as established in AP I should also be included in the Additional Protocol relative to non-international conflicts.²¹²

195. According to the Report on the Practice of Egypt, it has been a long-standing practice of Egypt to give quarter. The report notes that granting quarter has been practised by Egypt as far back as 1468 B.C.²¹³

196. According to the Report on the Practice of Egypt, during the Middle East conflict in 1973, Egypt issued military communiqués with instructions to respect the duty to give quarter.²¹⁴

197. According to the Report on the Practice of Germany, the right to be given quarter is for the benefit of every person.²¹⁵

198. According to the Report on the Practice of Indonesia, quarter must be granted to every person taking part in hostilities, whether they are saboteurs, spies, mercenaries or illegal combatants.²¹⁶

199. The Report on the Practice of Iraq notes that, during the Iran–Iraq War, several Iraqi military communiqués were issued with the aim of ensuring the safety of enemy combatants unwilling to fight and their evacuation to rear positions.²¹⁷

200. According to the Report on the Practice of Jordan, Islamic principles dictate that a combatant who is recognised as *hors de combat* may not be attacked. The report mentions an order of Caliph Abu Bakr, dating from the 7th century, which proscribed the killing of non-combatants.²¹⁸

201. During the debates at the CDDH, Syria emphasised that “a person *hors de combat* must in any case abstain from any hostile act and make no attempt to escape”.²¹⁹

III. Practice of International Organisations and Conferences

United Nations

202. In 1997, in a report on a mission to Zaire (DRC), the Special Rapporteur of the UN Commission on Human Rights pointed out that there had been reports indicating that rebel forces, the ADFL, members of the former FAR and *interahamwe* killed rather than took prisoners. Bodies of Zairean soldiers were

²¹² Chile, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.59, 17 May 1977, p. 217, § 47.

²¹³ Report on the Practice of Egypt, 1997, Chapter 2.1. (The report referred to the Battle of Magedou (1468 B.C.) and the Battle of Mansourah (1249 B.C.). It considered these battles to be part of international conflicts.)

²¹⁴ Report on the Practice of Egypt, 1997, Chapter 2.1, referring to Military Communiqué No. 34, 13 October 1973 and Military Communiqué No. 46, 18 October 1973.

²¹⁵ Report on the Practice of Germany, 1997, Answers to additional questions on Chapter 2.1.

²¹⁶ Report on the Practice of Indonesia, 1997, Answers to additional questions on Chapter 2.1.

²¹⁷ Report on the Practice of Iraq, 1998, Chapter 2.1, referring to Military Communiqué No. 973, 27 December 1982, Military Communiqué No. 975, 24 January 1983 and Military Communiqué No. 1902, 21 July 1985.

²¹⁸ Report on the Practice of Jordan, 1997, Chapter 2.1. (The order was sent to the leader of the Muslim army fighting against the Romans in Greater Syria.)

²¹⁹ Syria, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, p. 89, § 22.

also found showing no signs that they had died in battle.²²⁰ The rebel authorities justified the alleged incidents on the ground that a war was going on and claimed that the allegations were a smear campaign. The Special Rapporteur “pointed out that the arguments put forward [by rebel authorities] were unacceptable: many of the alleged incidents could not be justified even in time of war, since war too, is subject to regulations and there are limits to what is permissible in combat”.²²¹

Other International Organisations

203. No practice was found.

International Conferences

204. Committee III of the CDDH stated with regard to the wording of Article 41(1) AP I that it:

changed the prohibition contained in the ICRC draft (and, indeed, all the amendments) from “kill or injure” to “make the object of attack”. This change was designed to make clear that what was forbidden was the deliberate attack against persons *hors de combat*, not merely killing or injuring them as the incidental consequence of attacks not aimed at them *per se*.²²²

IV. Practice of International Judicial and Quasi-judicial Bodies

205. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

206. The ICRC Commentary on the Additional Protocols states that:

A man who is in the power of his adversary may be tempted to resume combat if the occasion arises . . . Yet another, who has lost consciousness, may come to and show an intent to resume combat. It is self-evident that in these different situations, and in any other similar situations, the safeguard ceases. Any hostile act gives the adversary the right to take countermeasures until the perpetrator of the hostile act is recognized, or in the circumstances, should be recognized, to be “*hors de combat*” once again.

...

When troops, after surrendering, destroy installations in their possession or their own military equipment, this can be considered to be a hostile act. The same applies in principle if soldiers “*hors de combat*” attempt to communicate with the Party

²²⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Third Report, UN Doc. E/CN.4/1997/6, 28 January 1997, §§ 198, 199 and 207.

²²¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report on the mission carried out at the request of the High Commissioner for Human Rights between 25 and 29 March 1997 to the area occupied by rebels in eastern Zaire, UN Doc. E/CN.4/1997/6/Add.2, 2 April 1997, §§ 39 and 42.

²²² CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 384, § 23.

to the conflict to which they belong, unless this concerns the wounded and sick who require assistance from this Party's medical service.²²³

207. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "a person who is recognized or who, in the circumstances, should be recognized as being no longer able to participate in combat, shall not be attacked".²²⁴ Furthermore, an "attack of a person known as being hors de combat" constitutes a grave breach of the law of war.²²⁵

208. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included "making a person the object of attack in the knowledge that he/she is *hors de combat*", when committed in an international armed conflict, in the list of war crimes to be subject to the jurisdiction of the Court.²²⁶

VI. Other Practice

209. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "it is forbidden to kill or injure an enemy . . . who is *hors de combat*".²²⁷

210. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf explain that:

Paragraph 1 [of Article 41 AP I] protects *hors de combat* personnel from attacks directed at them. It does not protect them against the unintended collateral injury resulting from attacks on legitimate military objectives which might be in their vicinity. The accidental killing or wounding of such persons due to their presence among, or in proximity to, combatants actually engaged, by fire directed against the latter, gives no just cause for complaint, but any anticipated collateral casualties of *hors de combat* persons should not be excessive in relation to the military advantage anticipated.²²⁸

211. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that "the following . . . are prohibited by applicable international law rules: . . . Attacks against combatants who . . . are placed *hors de combat*."²²⁹

²²³ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1621–1622.

²²⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 487.

²²⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 778(a).

²²⁶ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(v).

²²⁷ ICRC archive document.

²²⁸ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 220.

²²⁹ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

212. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that “applicable international law rules prohibit the following kinds of practices . . . Attacks against combatants who . . . are placed *hors de combat*.”²³⁰

Specific categories of persons *hors de combat*

Note: For practice concerning the use of the white flag of truce, see Chapter 18, section B and Chapter 19, section A.

I. Treaties and Other Instruments

Treaties

213. Article 23(c) of the 1899 HR provides that it is especially prohibited “to kill or wound an enemy who, having laid down arms, or having no longer means of defence, has surrendered at discretion”.

214. Article 23(c) of the 1907 HR provides that it is especially forbidden “to kill or wound an enemy who, having laid down his arms, or having no longer means of defence, has surrendered at discretion”.

215. Article 41 AP I provides that:

1. A person who is recognized or who, in the circumstances, should be recognized to be *hors de combat* shall not be made the object of attack.
2. A person is *hors de combat* if:
 - a) he is in the power of an adverse Party;
 - b) he clearly expresses an intention to surrender;
 - c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;
 provided that in any of these cases he abstains from any hostile act and does not attempt to escape.

Article 41 AP I was adopted by consensus.²³¹

216. Article 7(1) of draft AP II submitted by the ICRC to the CDDH provided that:

It is forbidden to kill, injure, ill-treat or torture an adversary *hors de combat*. An adversary *hors de combat* is one who, having laid down his arms, no longer has any means of defence or has surrendered. These conditions are considered to have been fulfilled, in particular, in the case of an adversary who:

- a) is unable to express himself, or
- b) has surrendered or has clearly expressed an intention to surrender
- c) and abstains from any hostile act and does not attempt to escape.²³²

This proposal was amended and adopted by consensus in Committee III of the CDDH.²³³ The text adopted provided that:

²³⁰ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

²³¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 104.

²³² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 35.

²³³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 108, § 7.

1. A person who is recognized or should, under the circumstances, be recognized to be *hors de combat* shall not be made the object of attack.
2. A person is *hors de combat* if:
 - a) he is in the power of an adverse party; or
 - b) he clearly expresses an intention to surrender; or
 - c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and he is therefore incapable of defending himself; and in any case, provided that he abstains from any hostile act and does not attempt to escape.²³⁴

Eventually, however, this draft article was rejected in the plenary by 22 votes in favour, 15 against and 42 abstentions.²³⁵

217. Under Article 8(2)(b)(vi) of the 1998 ICC Statute, “killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion” is a war crime in international armed conflicts.

Other Instruments

218. Article 71 of the 1863 Lieber Code provides that “whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy . . . shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed”.

219. Article 13(c) of the 1874 Brussels Declaration states that “murder of an enemy who, having laid down his arms or having no longer means of defence, has surrendered at discretion” is “especially forbidden”.

220. Article 9(b) of the 1880 Oxford Manual provides that “it is forbidden . . . to injure or kill an enemy who has surrendered at discretion or is disabled”.

221. Article 17(1) of the 1913 Oxford Manual of Naval War states that it is forbidden “to kill or to wound an enemy who, having laid down his arms or having no longer means of defence, has surrendered at discretion”.

222. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vi), “killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

223. Argentina’s Law of War Manual (1969) states that “it is prohibited to kill or injure an enemy who has laid down his arms or who is defenceless and has surrendered”.²³⁶

²³⁴ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 420.

²³⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 129.

²³⁶ Argentina, *Law of War Manual* (1969), § 1.006.

224. Argentina's Law of War Manual (1989) prohibits:

making an enemy *hors de combat* the object of an attack, understood as any person who:

- 1) is in the power of his enemy.
- 2) clearly expresses his intention to surrender.
- 3) is incapable of defending himself.

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.²³⁷

225. Australia's Commanders' Guide states that:

Military members who abandon a sinking ship should not be attacked unless they show hostile intent or are armed and so close to shore as to be capable of completing their military mission. If their conduct suggests a desire to surrender, this must be accepted.

Protected from the moment of their surrender or capture, PW and PW camps must not be made the object of attack . . .

...

An enemy who indicates a desire to surrender should not be attacked . . .

...

Combatants become protected when incapacitated, sick, wounded or shipwrecked to the extent that they are incapable of fighting.²³⁸

The manual also states that:

A person who is recognised or who, in the circumstances, should be recognised to be *hors de combat* shall not be made the object of attack. A person is *hors de combat* if he:

- a. is in the power of an enemy;
- b. clearly expresses an intention to surrender;
- c. or has been rendered unconscious or is otherwise incapacitated,

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.²³⁹

The manual further provides that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . making PW or the sick and wounded the object of attack; . . . denying an enemy the right to surrender".²⁴⁰

226. Australia's Defence Force Manual states that:

Combatants who are unable to continue hostile action and refrain from attempting to do so must be treated in the same fashion as noncombatants. Prisoners of war, military personnel who are surrendering or attempting to surrender, and those who are wounded or sick must not be attacked. The basic principle is that any person who

²³⁷ Argentina, *Law of War Manual* (1989), § 1.06(5).

²³⁸ Australia, *Commanders' Guide* (1994), §§ 413, 414, 416 and 621.

²³⁹ Australia, *Commanders' Guide* (1994), § 906.

²⁴⁰ Australia, *Commanders' Guide* (1994), § 1305(i) and (o).

is hors de combat, whether by choice or circumstance, is entitled to be treated as a noncombatant provided they refrain from any further participation in hostilities.

... A person is *hors de combat* if that person:

- a. is under the control of an enemy;
- b. clearly expresses an intention to surrender, or has been rendered unconscious, or is otherwise incapacitated; and
- c. abstains from any hostile act and does not attempt to escape.²⁴¹

The manual also states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: ... making PW or the sick and wounded the object of attack; ... denying an enemy the right to surrender".²⁴²

227. Under Belgium's Field Regulations, "it is forbidden to mistreat... an enemy, who having laid down his arms, has surrendered at discretion".²⁴³

228. Belgium's Law of War Manual provides that "it is prohibited to kill or injure an adversary who, having laid down his arms or having no longer means of defence, has surrendered 'at discretion', i.e. unconditionally".²⁴⁴

229. Belgium's Teaching Manual for Officers stipulates that "any adversary *hors de combat* may no longer be made the object of attack. This is the case of combatants who surrender, who are wounded or sick [or] of shipwrecked."²⁴⁵

230. Belgium's Teaching Manual for Soldiers states that surrendering soldiers may not be fired at. It explains that "the intention to surrender may be expressed in different ways: laid down arms, raised hand, white flag". The manual also provides that "the shipwrecked do not constitute any longer a military threat. [Wounded and shipwrecked] combatants obviously lose their protection and may be attacked if they themselves open fire... For the same reasons of humanity, the wounded and sick must be spared."²⁴⁶

231. Benin's Military Manual states that "it is prohibited to kill or injure an adversary who surrenders".²⁴⁷ The manual also provides that "any person recognised, or who should be recognised, as not being able to participate any longer in combat shall not be attacked (for example: in case of surrender, wounds, ... shipwreck ...)". It specifies that an intention to surrender must be clearly expressed and gives a few examples, such as raising hands, laying down arms and waving a white flag.²⁴⁸

232. The Instructions to the Muslim Fighter issued by the ARBiH in Bosnia and Herzegovina in 1993 state that it is "left to the military command's discretion

²⁴¹ Australia, *Defence Force Manual* (1994), §§ 518 and 707, see also §§ 519 and 836 (prohibition to kill or wound an enemy who surrenders in air warfare) and § 839 (prohibition to fire upon shipwrecked personnel in air warfare).

²⁴² Australia, *Defence Force Manual* (1994), § 1315(i) and (o).

²⁴³ Belgium, *Field Regulations* (1964), § 23. ²⁴⁴ Belgium, *Law of War Manual* (1983), p. 33.

²⁴⁵ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

²⁴⁶ Belgium, *Teaching Manual for Soldiers* (undated), pp. 15 and 16.

²⁴⁷ Benin, *Military Manual* (1995), Fascicule II, p. 4, see also Fascicule I, p. 16 and Fascicule II, p. 18.

²⁴⁸ Benin, *Military Manual* (1995), Fascicule II, p. 9.

to decide whether it is more useful or in the general interest to free, exchange or liquidate enemy prisoners of war".²⁴⁹

233. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".²⁵⁰

234. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".²⁵¹

235. Cameroon's Instructors' Manual states that "all combatants who are unable to fight must be spared".²⁵² It further notes that:

An enemy *hors de combat* may:

- raise his arm as an indication of surrender
- lay down his weapon
- display the white flag of parlementaires.²⁵³

In addition, the manual specifies that "captured enemy combatants are prisoners of war and shall not be attacked".²⁵⁴

236. Canada's LOAC Manual provides that:

It is prohibited to attack a combatant who is, or should be recognized as being, *hors de combat* (out of combat).

A combatant is *hors de combat* if that person:

- a. is in the power of an adverse Party (i.e., a prisoner);
- b. clearly expresses an intention to surrender; or
- c. has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of self defence;

provided that in any of these cases this person abstains from any hostile act and does not attempt to escape.²⁵⁵

The manual also states that "killing or wounding an enemy who, having laid down his arms or no longer having a means of defence, has surrendered" constitutes a war crime.²⁵⁶ Likewise, "firing upon shipwrecked personnel" is a war crime "recognized by the LOAC".²⁵⁷

237. Canada's Code of Conduct instructs: "Do not attack those who surrender."²⁵⁸ It adds that "it is unlawful to refuse to accept someone's surrender. . . . Anyone who wishes to surrender must clearly show an intention to do

²⁴⁹ Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.

²⁵⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

²⁵¹ Cameroon, *Disciplinary Regulations* (1975), Article 32.

²⁵² Cameroon, *Instructors' Manual* (1992), p. 30, § 132.

²⁵³ Cameroon, *Instructors' Manual* (1992), p. 32, § 132.22.

²⁵⁴ Cameroon, *Instructors' Manual* (1992), p. 96, § II.

²⁵⁵ Canada, *LOAC Manual* (1999), p. 6-2, §§ 16 and 17 (land warfare), see also pp. 3-2 and 3-3, §§ 17 and 18, p. 4-5, §§ 42 and 43 and p. 7-3, §§ 21 and 22 (air warfare).

²⁵⁶ Canada, *LOAC Manual* (1999), p. 16-3, § 20(c).

²⁵⁷ Canada, *LOAC Manual* (1999), pp. 16-3 and 16-4, § 21(f).

²⁵⁸ Canada, *Code of Conduct* (2001), Rule 5.

so (e.g., hands up, throwing away his weapon, or showing a white flag).²⁵⁹ The manual further provides that “members of opposing forces who have been rendered unconscious or are otherwise incapacitated by wounds or sickness, and therefore are incapable of defending themselves, shall not be made the object of attack provided that they abstain from any hostile act”.²⁶⁰

238. Colombia’s Circular on the Fundamental Rules of IHL states that “it is prohibited to kill or injure an adversary who surrenders”.²⁶¹

239. Congo’s Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited “to fire at, injure or kill an enemy who surrenders or who is captured”, as well as “to refuse an unconditional surrender”.²⁶²

240. Croatia’s LOAC Compendium and Soldiers’ Manual instruct soldiers to spare captured enemy combatants.²⁶³

241. Croatia’s Commanders’ Manual states that “a combatant who is recognised (or should be recognised) as being out of combat (surrendering, wounded, shipwrecked in water . . .) may not be attacked. The intent to surrender can be shown with a white flag.”²⁶⁴

242. Under Croatia’s Instructions on Basic Rules of IHL, it is prohibited to kill or injure members of the enemy armed forces who have surrendered.²⁶⁵

243. The Military Manual of the Dominican Republic forbids attacks against non-combatants, including soldiers who surrender or who are sick, wounded or captured.²⁶⁶ It further states that:

The enemy soldier may reach the point where he would rather surrender than fight. He may signal to you with a white flag, by emerging from his position with arms raised or by yelling to cease fire. The manner he expresses his wish to surrender may vary, but you must give him the opportunity to surrender once he has manifested it. It is illegal to fire at an enemy who has laid down his arms as a sign of surrender.²⁶⁷

244. Ecuador’s Naval Manual states that:

Members of the armed forces incapable of participating in combat due to injury or illness may not be the object of attack.

...

Shipwrecked persons, whether military or civilian, may not be the object of attack.

...

Combatants cease to be subject to attack when they have individually laid down their arms to surrender, when they are no longer capable of resistance or when the unit in which they are serving or embarked has surrendered or has been captured.²⁶⁸

²⁵⁹ Canada, *Code of Conduct* (2001), Rule 5, §§ 2 and 3.

²⁶⁰ Canada, *Code of Conduct* (2001), Rule 7, § 2.

²⁶¹ Colombia, *Circular on the Fundamental Rules of IHL* (1992), § 2.

²⁶² Congo, *Disciplinary Regulations* (1986), Article 32(2).

²⁶³ Croatia, *LOAC Compendium* (1991), p. 46; *Soldiers’ Manual* (1992), p. 4.

²⁶⁴ Croatia, *Commanders’ Manual* (1992), § 72.

²⁶⁵ Croatia, *Instructions on Basic Rules of IHL* (1993), § 1.

²⁶⁶ Dominican Republic, *Military Manual* (1980), p. 3.

²⁶⁷ Dominican Republic, *Military Manual* (1980), pp. 6–7.

²⁶⁸ Ecuador, *Naval Manual* (1989), §§ 11.4, 11.6 and 11.8, see also § 8.2.1.

The manual also states that:

The following acts constitute war crimes:

- ...
3. Offences against the sick and wounded, including killing, wounding, or mistreating enemy forces disabled by sickness or wounds.
 4. ...offences against combatants who have laid down their arms and surrendered.
 5. Offences against the survivors of ships and aircraft lost at sea, including killing, wounding, or mistreating the shipwrecked, and failing to provide for the safety of survivors as military circumstances permit.²⁶⁹

245. El Salvador's Soldiers' Manual states that "a person wounded or sick is *hors de combat*".²⁷⁰ It also instructs: "Do not kill... enemies who have laid down their arms and surrendered."²⁷¹

246. France's Disciplinary Regulations as amended states that, under international conventions, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".²⁷²

247. France's LOAC Summary Note provides that "it is prohibited to kill or wound an adversary who surrenders".²⁷³

248. France's LOAC Teaching Note provides that "it is prohibited to attack, kill or wound an adversary who surrenders". It adds that "prisoners shall be spared".²⁷⁴

249. France's LOAC Manual incorporates the content of Article 41 AP I. The manual adds that "any intention to surrender must be clearly expressed: by raising hands, throwing down weapons or waving a white flag".²⁷⁵

250. Germany's Military Manual states that "an enemy who, having laid down his arms, or having no longer means of defence, surrenders or is otherwise unable to fight or to defend himself shall no longer be made the object of attack".²⁷⁶ It further states that "grave breaches of international humanitarian law are in particular: ... launching attacks against defenceless persons".²⁷⁷

251. Germany's Soldiers' Manual contains the rule: "Never fight against an opponent who has laid down arms or has surrendered."²⁷⁸

²⁶⁹ Ecuador, *Naval Manual* (1989), § 6.2.5(3)-(5).

²⁷⁰ El Salvador, *Soldiers' Manual* (undated), p. 7.

²⁷¹ El Salvador, *Soldiers' Manual* (undated), p. 8.

²⁷² France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

²⁷³ France, *LOAC Summary Note* (1992), § 2.1.

²⁷⁴ France, *LOAC Teaching Note* (2000), p. 2.

²⁷⁵ France, *LOAC Manual* (2001), p. 105, see also p. 104.

²⁷⁶ Germany, *Military Manual* (1992), § 705.

²⁷⁷ Germany, *Military Manual* (1992), § 1209.

²⁷⁸ Germany, *Soldiers' Manual* (1996), § 604, picture 601, pp. 33-34.

252. Indonesia's Air Force Manual states that "it is prohibited to kill or injure the enemy who has surrendered".²⁷⁹ It further states that:

It is prohibited to attack:

- a. Enemy ships which are obviously intending to surrender;
- b. Shipwrecked crew, including the crew of military air craft of the adverse party.²⁸⁰

253. Israel's Manual on the Laws of War provides that:

The laws of war do set clear bars to the possibility of harming combatants when the combatant is found "outside the frame of hostilities", as when he asks to surrender, or when he is wounded in a way that does not allow him to take an active part in the fighting. In such situations, it is absolutely prohibited to harm the combatant.

...

When is a combatant regarded as leaving the sphere of hostilities? While storming at zero distance, must a combatant hold his fire against a combatant raising his hands, but still holding his weapon? This is a difficult question to answer, especially under combat conditions. At any rate, there are several criteria that can guide us: Does the combatant show clear intent to surrender using universally accepted signs, such as raising his hands? Is the soldier seeking to surrender liable to jeopardize our forces or is the range considered not dangerous? Did the surrenderer lay down his arms?²⁸¹

254. Italy's IHL Manual states that it is prohibited to use violence "to kill or injure an enemy... when he, having laid down arms or having no longer means of defence, has surrendered at discretion". It also forbids "firing at the shipwrecked".²⁸²

255. Italy's LOAC Elementary Rules Manual states that "a combatant who is recognised (or should be recognised) as being out of combat may not be attacked (surrendering, wounded, shipwrecked in water...). The intent to surrender can be shown with a white flag."²⁸³ Furthermore, one of the rules to be observed when confronted with enemy combatants who surrender is "to spare them".²⁸⁴

256. Kenya's LOAC Manual states that "the enemy combatant who is no longer in a position to fight is no longer to be attacked... This is the case for combatants who surrender, for the injured, ... for the shipwrecked."²⁸⁵ The manual further insists that:

It is forbidden to kill or wound someone who has surrendered having laid down his arms or who no longer has any means of defence...

²⁷⁹ Indonesia, *Air Force Manual* (1990), § 15(b)3.

²⁸⁰ Indonesia, *Air Force Manual* (1990), § 15(b)3.

²⁸¹ Israel, *Manual on the Laws of War* (1998), pp. 42 and 45.

²⁸² Italy, *IHL Manual* (1991), Vol. I, § 8(2) and (3).

²⁸³ Italy, *LOAC Elementary Rules Manual* (1991), § 72.

²⁸⁴ Italy, *LOAC Elementary Rules Manual* (1991), p. 29.

²⁸⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

Any intention to surrender must be clearly expressed; raising arms, throwing away one's weapons or waving a white flag, etc. . . .

Combatants who are captured (with or without having surrendered) shall no longer be attacked. Their protective status starts from the moment of capture, and applies only to captured combatants who then abstain from any hostile act and do not attempt to escape.²⁸⁶

257. South Korea's Military Law Manual states that combatants who are disabled shall not be attacked.²⁸⁷

258. South Korea's Operational Law Manual states that combatants who are unwilling to fight or express their intention to surrender shall not be attacked.²⁸⁸

259. Lebanon's Army Regulations and Field Manual prohibit attacks against persons intending to surrender, and against the wounded, sick, shipwrecked and prisoners.²⁸⁹

260. Madagascar's Military Manual provides that "a combatant who is recognised (or should be recognised) as being *hors de combat* shall not be attacked (surrendering, wounded, shipwrecked . . .). The intent to surrender can be shown with a white flag."²⁹⁰ The manual adds that "captured enemy combatants, whether having surrendered or not, are prisoners of war and shall no longer be attacked".²⁹¹

261. Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".²⁹²

262. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".²⁹³

263. The Military Manual of the Netherlands states that:

It is prohibited to attack an adversary who has laid down his arms or has surrendered.

In addition, an adversary who has indicated his intention to surrender may not be attacked.

May not be attacked either an adversary who is unconscious or who is otherwise placed *hors de combat* by wounds or sickness, and who is no longer capable of defending himself. In general, any person who is in the power of an adverse party may not be attacked.

A combatant who has just become prisoner of war and uses violence or escapes ceases to be *hors de combat* and may again be the target of attack.²⁹⁴

²⁸⁶ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 6 and 7, see also Précis No. 2, p. 15 and Précis No. 3, p. 14.

²⁸⁷ South Korea, *Military Law Manual* (1996), p. 86.

²⁸⁸ South Korea, *Operational Law Manual* (1996), p. 43.

²⁸⁹ Lebanon, *Army Regulations* (1971), § 17; *Field Manual* (1996), §§ 7 and 8(a), (e) and (f).

²⁹⁰ Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 17, see also Fiche No. 5-T, § 4.

²⁹¹ Madagascar, *Military Manual* (1994), Fiche No. 6-SO, § A.

²⁹² Mali, *Army Regulations* (1979), Article 36.

²⁹³ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

²⁹⁴ Netherlands, *Military Manual* (1993), pp. IV-3 and IV-4.

264. The Military Handbook of the Netherlands states that “it is prohibited to attack . . . combatants who are no longer fighting because of wounds or sickness and who have surrendered”.²⁹⁵ It adds that “wounded and sick soldiers who have laid down their arms have to be spared and protected, whatever party they belong to”.²⁹⁶

265. The IFOR Instructions of the Netherlands provides that “members of enemy troops who want to surrender may not be maltreated”.²⁹⁷

266. New Zealand’s Military Manual provides that:

A person who is recognised as, or who in the circumstances should be recognised as, hors de combat shall not be made the object of attack. A person is hors de combat if:

- a) he is in the power of an adverse Party;
 - b) he clearly expresses an intention to surrender; or
 - c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and is therefore incapable of defending himself;
- provided that in any of these cases he abstains from any hostile act and does not attempt to escape.²⁹⁸

The manual further states that “killing or wounding an enemy who, having laid down his arms or no longer having a means of defence, has accordingly surrendered” is a war crime.²⁹⁹ Likewise, “among other war crimes recognised by the customary law of armed conflict are . . . firing upon shipwrecked personnel”.³⁰⁰

267. Nigeria’s Operational Code of Conduct states that “soldiers who surrender will not be killed”.³⁰¹

268. Under Nigeria’s Military Manual, it is prohibited “to kill or wound an enemy who, having laid down his arms, or having no longer any means of defence, has surrendered at discretion”.³⁰²

269. Nigeria’s Manual on the Laws of War considers “killing or injuring an enemy who has laid down his weapons” as an “illegitimate tactic”.³⁰³

270. Under Nigeria’s Soldiers’ Code of Conduct, it is prohibited “to kill or wound an enemy who, having laid down his arms, or having no longer any means of defence has surrendered at discretion”.³⁰⁴

²⁹⁵ Netherlands, *Military Handbook* (1995), p. 7-36.

²⁹⁶ Netherlands, *Military Handbook* (1995), p. 7-40.

²⁹⁷ Netherlands, *IFOR Instructions* (1995), § 4.

²⁹⁸ New Zealand, *Military Manual* (1992), § 503(2) (land warfare), see also § 612(2) (air warfare).

²⁹⁹ New Zealand, *Military Manual* (1992), § 1704(2)(c).

³⁰⁰ New Zealand, *Military Manual* (1992), § 1704(5).

³⁰¹ Nigeria, *Operational Code of Conduct* (1967), § 4(e).

³⁰² Nigeria, *Military Manual* (1994), p. 39, § 5(1)(iii).

³⁰³ Nigeria, *Manual on the Laws of War* (undated), § 14(a)(5).

³⁰⁴ Nigeria, *Soldiers’ Code of Conduct* (undated), § 12(d).

271. Peru's Human Rights Charter of the Security Forces states that it is prohibited to kill defenceless persons and adds that "the life of captured, surrendered and wounded persons must be respected".³⁰⁵

272. The Soldier's Rules of the Philippines instructs: "Do not fight enemies...who surrender. Disarm them and hand them over to your superior."³⁰⁶

273. The Rules for Combatants of the Philippines provides that "it is forbidden to attack... a wounded enemy combatant; an enemy combatant who surrenders...".³⁰⁷

274. Romania's Soldiers' Manual instructs combatants that the "killing or injuring of an adversary who surrenders... is prohibited".³⁰⁸

275. Russia's Military Manual provides that it is prohibited "to kill or injure enemy persons who have laid down their arms, who have no means of defending themselves, who have surrendered".³⁰⁹

276. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy who surrenders or who is captured", as well as "to refuse an unconditional surrender".³¹⁰

277. South Africa's LOAC Manual states that "making a person...who is wounded or has surrendered... the object of attack knowing that that person is out of combat" constitutes a grave breach of API and a war crime.³¹¹ It explains that "surrender may be by any means that communicates the intention to give up".³¹²

278. Spain's LOAC Manual provides that:

It is prohibited to attack an enemy who is *hors de combat*:

- a) because he is in the power of an adverse party;
- b) because he clearly expresses his intention to surrender;
- c) because he is unconscious or is otherwise incapacitated by wounds or sickness, and is therefore incapable of defending himself.

In any of these cases, he always abstains from any hostile act and does not attempt to escape. Otherwise, the prohibition [to attack him] disappears.³¹³

279. Sweden's IHL Manual notes that:

The [1907 HR] and [the 1949] Geneva Conventions include rules intended to afford protection to combatants in situations where they have laid down their arms or are no longer capable of defending themselves... or where combatants have become sick, are wounded, shipwrecked or captured. These fundamental rules have not

³⁰⁵ Peru, *Human Rights Charter of the Security Forces* (1991), pp. 6 and 7.

³⁰⁶ Philippines, *Soldier's Rules* (1989), § 4.

³⁰⁷ Philippines, *Rules for Combatants* (1989), § 3.

³⁰⁸ Romania, *Soldiers' Manual* (1991), p. 32, see also p. 5.

³⁰⁹ Russia, *Military Manual* (1990), § 5(h).

³¹⁰ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

³¹¹ South Africa, *LOAC Manual* (1996), §§ 37(c) and 41.

³¹² South Africa, *LOAC Manual* (1996), § 30, note 1.

³¹³ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(3), see also §§ 4.5.b.(1)b), 10.6.a and 10.8.f.(1).

always been applied in combat situations, and for this reason it has been considered necessary to reaffirm certain of the older provisions to assert their fundamental importance . . .

Personnel attempting to save themselves from a sinking vessel shall according to international humanitarian law be considered as distressed, and may not be attacked.³¹⁴

280. Switzerland's Basic Military Manual provides that "it is prohibited to kill or wound an enemy who, having laid down his arms or having no longer means of defence, has surrendered". Furthermore, "a person who surrenders must clearly indicate his intention by his behaviour; he must no longer attempt to fight or escape".³¹⁵ The manual adds that "the life of an individual who surrenders must be spared. During the Second World War, and subsequent conflicts, this rule has been frequently violated."³¹⁶ It further provides that it is prohibited to finish off or exterminate the wounded and sick.³¹⁷ The manual also notes that "prisoners of war are protected persons" and that "captivity starts as soon as a member of the armed forces falls into enemy hands".³¹⁸ In addition, "to finish off the wounded", "to machine-gun the shipwrecked" and "to kill or injure an enemy who is surrendering" constitute war crimes under the manual.³¹⁹

281. Togo's Military Manual states that "it is prohibited to kill or injure an adversary who surrenders".³²⁰ The manual also provides that "any person recognised, or who should be recognised, as not being able to participate any longer in combat shall not be attacked (for example: in case of surrender, wounds, . . . shipwreck . . .)". It specifies that an intention to surrender must be clearly expressed and gives a few examples, such as raising hands, laying down arms and waving a white flag.³²¹

282. Uganda's Code of Conduct orders troops to "never kill . . . any captured prisoners, as the guns should only be reserved for armed enemies or opponents".³²²

283. The UK Military Manual provides that:

It is forbidden to kill or wound an enemy who, having laid down his arms, or having no longer the means of defence, has surrendered at discretion, *i.e.*, unconditionally . . . A combatant is entitled to commit acts of violence up to the moment of his surrender without losing the benefits of quarter.³²³

³¹⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.2, pp. 32 and 33.

³¹⁵ Switzerland, *Basic Military Manual* (1987), Article 19, including commentary.

³¹⁶ Switzerland, *Basic Military Manual* (1987), Article 20, commentary.

³¹⁷ Switzerland, *Basic Military Manual* (1987), Article 69, commentary.

³¹⁸ Switzerland, *Basic Military Manual* (1987), Articles 96(2) and 109.

³¹⁹ Switzerland, *Basic Military Manual* (1987), Articles 192, commentary and 200(2)(e).

³²⁰ Togo, *Military Manual* (1996), Fascicule II, p. 4, see also Fascicule I, p. 17 and Fascicule II, p. 18.

³²¹ Togo, *Military Manual* (1996), Fascicule II, p. 9.

³²² Uganda, *Code of Conduct* (1986), § A.4. ³²³ UK, *Military Manual* (1958), § 119.

The manual also states that “even if a capitulation is unconditional, the victor has nowadays no longer the power of life and death over his prisoners, and is not absolved from observing the laws of war towards them”.³²⁴

284. The UK LOAC Manual provides that it is forbidden “to kill or wound someone who has surrendered, having laid down his arms, or who no longer has any means of defence”.³²⁵ It also states that “shipwrecked persons may not be made the object of attack”.³²⁶

285. The US Field Manual provides that “it is especially forbidden . . . to kill or wound an enemy who, having laid down his arms, or having no longer means of defense, has surrendered at discretion”.³²⁷

286. The US Air Force Pamphlet provides that “the law of armed conflict clearly forbids the killing or wounding of an enemy who, in good faith, surrenders”.³²⁸ Furthermore, “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . deliberate attack on . . . shipwrecked survivors”.³²⁹

287. The US Soldier’s Manual forbids attacks against non-combatants, including soldiers who surrender or who are sick, wounded or captured.³³⁰ It further states that:

Enemy soldiers may reach the point where they would rather surrender than fight. They may signal to you by waving a white flag, by crawling from their positions with arms raised, or by yelling at you to stop firing so that they can give up. The way they signal their desire to surrender may vary, but you must allow them to give up once you receive the signal. It is illegal to fire on enemy soldiers who have thrown down their weapons and offered to surrender.³³¹

288. The US Health Service Manual notes that the meaning of the words “wounded and sick” is a matter of common sense and good faith. It adds that “it is the act of falling or laying down of arms which constitutes the claim to protection. Only the soldier who is himself seeking to kill may be killed.”³³²

289. The US Rules of Engagement for Operation Desert Storm instructs: “Do not engage anyone who has surrendered, is out of battle due to sickness or wounds, [or] is shipwrecked.”³³³

290. The US Operational Law Handbook prohibits the “killing or wounding of enemy who have surrendered or are incapacitated and incapable of resistance”.³³⁴

³²⁴ UK, *Military Manual* (1958), § 476.

³²⁵ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(b), see also Annex A, p. 44, § 12 and p. 47, § 10(f).

³²⁶ UK, *LOAC Manual* (1981), Section 7, p. 26, § 2. ³²⁷ US, *Field Manual* (1956), § 29.

³²⁸ US, *Air Force Pamphlet* (1976), § 4-2(d). ³²⁹ US, *Air Force Pamphlet* (1976), § 15-3(c)(1).

³³⁰ US, *Soldier’s Manual* (1984), p. 5. ³³¹ US, *Soldier’s Manual* (1984), p. 13.

³³² US, *Health Service Manual* (1991), p. A-2.

³³³ US, *Rules of Engagement for Operation Desert Storm* (1991), § A.

³³⁴ US, *Operational Law Handbook* (1993), p. Q-182(h).

291. The US Naval Handbook provides that:

Members of the armed forces incapable of participating in combat due to injury or illness may not be the object of attack . . .

Similarly, shipwrecked persons, whether military or civilian, may not be the object of attack.

...

Combatants cease to be subject to attack when they have individually laid down their arms to surrender . . . or when the unit in which they are serving or embarked has surrendered . . . However, the law of armed conflict does not precisely define when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or individual combatant) and an ability to accept on the part of the opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon – an attempt to surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.³³⁵

The Handbook also states that:

The following acts are representative war crimes:

...

3. Offenses against the sick and wounded, including killing, wounding, or mistreating enemy forces disabled by sickness or wounds
4. . . . offenses against combatants who have laid down their arms and surrendered
5. Offenses against the survivors of ships and aircraft lost at sea, including killing, wounding, or mistreating the shipwrecked; and failing to provide for the safety of survivors as military circumstances permit.³³⁶

292. The YPA Military Manual of the SFRY (FRY) states that “the armed forces are an instrument of force and [may be] the direct object of attack. It is permitted to kill, wound or disable their members in combat, except when they surrender or when due to wounds or sickness they are disabled for combat.”³³⁷ The manual prohibits killing or injuring members of the armed forces as of the moment of surrender.³³⁸

National Legislation

293. Azerbaijan’s Criminal Code provides that “directing attacks against a person who . . . having laid down his arms, or having no longer means of defence, has surrendered at discretion” constitutes a war crime in international and non-international armed conflicts.³³⁹

294. Under the Criminal Code of the Federation of Bosnia and Herzegovina, whoever “kills or wounds an enemy who has laid down arms or unconditionally

³³⁵ US, *Naval Handbook* (1995), §§ 11.4 and 11.7, see also § 8.2.1.

³³⁶ US, *Naval Handbook* (1995), § 6.2.5(3)–(5).

³³⁷ SFRY (FRY), *YPA Military Manual* (1988), § 49.

³³⁸ SFRY (FRY), *YPA Military Manual* (1988), § 68.

³³⁹ Azerbaijan, *Criminal Code* (1999), Article 116(13).

surrendered or has no means of defence" commits a war crime.³⁴⁰ The Criminal Code of the Republika Srpska contains the same provision.³⁴¹

295. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "killing or injuring a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion" constitutes a war crime in international armed conflicts.³⁴²

296. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.³⁴³

297. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, commits acts aimed at leaving no survivors or at killing the wounded and sick.³⁴⁴

298. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.³⁴⁵

299. Under Croatia's Criminal Code, whoever "kills or wounds an enemy who has laid down arms, or has surrendered at discretion, or has no longer any means of defence" commits a war crime.³⁴⁶

300. Egypt's Military Criminal Code punishes anyone who commits violence against a person incapacitated by wounds or sickness if that person is incapable of defending himself.³⁴⁷

301. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for "anyone who, during an international or non-international armed conflict, attacks protected persons". Protected persons are defined as including, *inter alia*, the wounded, sick and shipwrecked, combatants who have laid down their arms, prisoners of war and persons detained during an internal conflict.³⁴⁸ In addition, "anyone who, during an international or non-international armed conflict, knowing of the existence of unequivocal acts of surrender by the adversary, continues to attack persons *hors de combat*, with the aim of leaving no survivors [or] of killing the wounded and sick" is punishable.³⁴⁹

³⁴⁰ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 158(1).

³⁴¹ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 438(1).

³⁴² Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(f).

³⁴³ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

³⁴⁴ Colombia, *Penal Code* (2000), Article 145.

³⁴⁵ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁴⁶ Croatia, *Criminal Code* (1997), Article 161(1).

³⁴⁷ Egypt, *Military Criminal Code* (1966), Article 137.

³⁴⁸ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a personas protegidas".

³⁴⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataques contra actos inequívocos de rendición".

302. Under Estonia's Penal Code, "a person who kills... enemy combatants after they have laid down their arms and are placed *hors de combat* by sickness, wounds or another reason" commits a war crime.³⁵⁰

303. Ethiopia's Penal Code punishes "whosoever, in time of war... kills or wounds an enemy who has surrendered or laid down his arms, or for any other reason is incapable of defending, or has ceased to defend, himself"³⁵¹

304. Under Georgia's Criminal Code, the wilful killing or wounding of "persons who... have no means of defence, as well as... wounded and sick" in international or non-international armed conflicts is a crime.³⁵² Furthermore, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "killing or wounding a combatant who, having laid down his arms... has surrendered at discretion" in international armed conflicts, is a crime.³⁵³

305. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "wounds a member of the opposing armed forces or a combatant of the adverse party after the latter has surrendered unconditionally".³⁵⁴

306. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 41 AP I, is a punishable offence.³⁵⁵

307. Italy's Law of War Decree as amended provides that it is prohibited to use violence "to kill or injure an enemy... when he, having laid down arms and having no longer means of defence, has surrendered at discretion". It also forbids "firing at the shipwrecked".³⁵⁶

308. Under Lithuania's Criminal Code as amended, "killing... persons who have surrendered by giving up their arms or having no means to put up resistance, the wounded, sick persons or the crew of a sinking ship" during an international armed conflict or occupation is a war crime.³⁵⁷

309. Under Mali's Penal Code, "killing or injuring a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion" is a war crime in international armed conflicts.³⁵⁸

310. The International Crimes Act of the Netherlands provides that the following constitutes a crime, when committed in time of international armed conflict:

killing or wounding a combatant who is in the power of the adverse party, who has clearly indicated he wished to surrender, or who is unconscious or otherwise *hors de combat* as a result of wounds or sickness and is therefore unable to defend

³⁵⁰ Estonia, *Penal Code* (2001), § 101. ³⁵¹ Ethiopia, *Penal Code* (1957), Article 287(a).

³⁵² Georgia, *Criminal Code* (1999), Article 411(2)(a).

³⁵³ Georgia, *Criminal Code* (1999), Article 413(d).

³⁵⁴ Germany, *Law Introducing the International Crimes Code* (2002), Article 1(8)(2).

³⁵⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁵⁶ Italy, *Law of War Decree as amended* (1938), Article 35(2) and (3).

³⁵⁷ Lithuania, *Criminal Code as amended* (1961), Article 333, see also Article 337.

³⁵⁸ Mali, *Penal Code* (2001), Article 31(i)(6).

himself, provided that he refrains in all these cases from any hostile act and does not attempt to escape.³⁵⁹

311. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vi) of the 1998 ICC Statute.³⁶⁰

312. Nicaragua's Military Penal Code punishes any soldier "who maltreats an enemy who . . . is defenceless".³⁶¹

313. Nicaragua's Draft Penal Code punishes "anyone who, during an international or internal armed conflict, attacks protected persons", defined as including the wounded, sick and shipwrecked, combatants who have laid down their arms, prisoners of war and persons detained during an internal conflict.³⁶² It also punishes "anyone who, during an international or internal armed conflict, knowing of the existence of unequivocal acts of surrender by the adversary, continues to attack persons *hors de combat*, with the aim of leaving no survivors [or] of killing the wounded and sick".³⁶³

314. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".³⁶⁴

315. Peru's Code of Military Justice punishes the persons "who finish off . . . the surrendered or wounded enemy who does not put up resistance".³⁶⁵

316. Poland's Penal Code punishes anyone who "kills . . . persons who, having laid down their arms or having no longer means of defence, have surrendered at discretion".³⁶⁶

317. Under Slovenia's Penal Code, whoever "kills or wounds an enemy who has laid down arms or surrendered unconditionally or who is defenceless" commits a war crime.³⁶⁷

318. Spain's Royal Ordinance for the Armed Forces states that "the combatant shall not refuse the unconditional surrender of the enemy".³⁶⁸

319. Spain's Military Criminal Code punishes any soldier "who mistreats an enemy who has surrendered or who has no longer means of defending himself".³⁶⁹

320. Under Sweden's Penal Code as amended, "attacks . . . on persons who are injured or disabled" are "crimes against international law".³⁷⁰

³⁵⁹ Netherlands, *International Crimes Act* (2003), Article 5(3)(e).

³⁶⁰ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³⁶¹ Nicaragua, *Military Penal Code* (1996), Article 53.

³⁶² Nicaragua, *Draft Penal Code* (1999), Article 449.

³⁶³ Nicaragua, *Draft Penal Code* (1999), Article 451.

³⁶⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

³⁶⁵ Peru, *Code of Military Justice* (1980), Article 94.

³⁶⁶ Poland, *Penal Code* (1997), Article 123(1)(1).

³⁶⁷ Slovenia, *Penal Code* (1994), Article 379(1).

³⁶⁸ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

³⁶⁹ Spain, *Military Criminal Code* (1985), Article 69.

³⁷⁰ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(3).

321. Switzerland's Military Criminal Code as amended punishes "anyone who kills or injures an enemy who has surrendered or who has otherwise ceased to defend himself" in time of armed conflict.³⁷¹

322. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vi) of the 1998 ICC Statute.³⁷²

323. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vi) of the 1998 ICC Statute.³⁷³

324. Under the US War Crimes Act as amended, violations of Article 23(c) of the 1907 HR are war crimes.³⁷⁴

325. According to Venezuela's Code of Military Justice as amended, it is a crime against international law to "make a serious attempt on the life of those who surrender".³⁷⁵

326. Under the Penal Code as amended of the SFRY (FRY), "a person who kills . . . the enemy who has laid down his arms or has surrendered unconditionally or has no means of defence" commits a war crime.³⁷⁶ The commentary on the Penal Code specifies that "in the case of an armed conflict, it is irrelevant for this act whether it is international in nature or whether it is a civil war".³⁷⁷

National Case-law

327. In its judgement in the *Military Junta case* in 1985, Argentina's National Court of Appeals established that, in a situation of internal violence, "the combatants incapacitated by sickness or wounds shall not be killed and shall be given quarter".³⁷⁸

328. In its judgement in the *Stenger and Cruisus case* after the First World War, Germany's Leipzig Court specified that an order to shoot down men who were abusing the privileges of captured or wounded men

would not have been contrary to international principles, for the protection afforded by the regulations for land warfare does not extend to such wounded who take up arms again and renew the fight. Such men have by doing so forfeited the claim for mercy granted to them by the laws of warfare.³⁷⁹

329. In the *Llandovery Castle case* in 1921, Germany's Reichsgericht found the accused, two crew officers, guilty of having fired upon enemies in lifeboats in violation of the laws and customs of war after their hospital ship had been sunk. The prosecutor emphasised that "in war at sea the killing of ship-wrecked persons who have taken refuge in lifeboats is forbidden". The Court rejected

³⁷¹ Switzerland, *Military Criminal Code as amended* (1927), Article 112.

³⁷² Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

³⁷³ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

³⁷⁴ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

³⁷⁵ Venezuela, *Code of Military Justice as amended* (1998), Article 474(2).

³⁷⁶ SFRY (FRY), *Penal Code as amended* (1976), Article 146(1).

³⁷⁷ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 146.

³⁷⁸ Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.

³⁷⁹ Germany, Leipzig Court, *Stenger and Cruisus case*, Judgement, 1921.

the accused's defence of superior orders on the ground that the rule prohibiting firing on lifeboats was "simple and universally known".³⁸⁰

330. In 1968, in a Nigerian case referred to by the ICTY Appeals Chamber in the interlocutory appeal in the *Tadić case*, "a Nigerian Lieutenant was court-martialled, sentenced to death and executed by a firing squad at Port-Harcourt for killing a rebel Biafran soldier who had surrendered to Federal troops near Aba".³⁸¹

331. The *Peleus case* before the UK Military Court at Hamburg in 1945 concerned the sinking, during the Second World War, of a Greek steamship by a German U-boat on the high seas and the subsequent killing of shipwrecked members of the crew of the Greek boat. Four members of the crew of the German U-boat were accused of having violated the laws and usages of war by firing and throwing grenades on the survivors of the sunken ship. The Court held that there was no case of justifiable recourse to the plea of necessity when the accused killed by machine-gun fire survivors of a sunken ship, in order to destroy every trace of sinking and thus make the pursuit of the submarine improbable. In summing up, the Judge Advocate underlined that it was a fundamental usage of war that the killing of unarmed enemies was forbidden as a result of the experience of civilised nations through many centuries. He also stated that to fire so as to kill helpless survivors of a torpedoed ship was a grave breach of the law of nations. He added that the right to punish the perpetrators of such an act had clearly been recognised for many years. The accused were found guilty of the war crimes charged.³⁸²

332. In the *Renoth case* before the UK Military Court at Elten in 1946, the accused, two German policemen and two German customs officials, were accused of committing a war crime for their involvement in the killing of an Allied airman whose plane had crashed on German soil. After he had emerged from his aircraft unhurt, the pilot was arrested by Renoth, then attacked and beaten, before Renoth shot him. All the accused were found guilty.³⁸³

333. In the *Von Ruchteschell case* before the UK Military Court at Hamburg in 1947, the accused was charged, *inter alia*, of having continued to fire on a British merchant vessel after the latter had indicated surrender. He was found guilty on that count. The central question concerned the ways of indicating surrender. The Court noted that, even if the accused did not receive a signal of surrender, he could still be convicted because he "deliberately or recklessly avoided any question of surrender by making it impossible for the ship to make a signal", which constituted a violation of the customary rules of sea warfare.³⁸⁴

³⁸⁰ Germany, Reichsgericht, *Llandoverly Castle case*, Judgement, 16 July 1921.

³⁸¹ Nigeria, Case of 3 September 1968 cited in *Daily Times – Nigeria*, 3 September 1968, p. 1; *Daily Times – Nigeria*, 4 September 1968, p. 1; referred to in ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 106.

³⁸² UK, Military Court at Hamburg, *Peleus case*, Judgement, 20 October 1945.

³⁸³ UK, Military Court at Elten, *Renoth case*, Judgement, 10 January 1946.

³⁸⁴ UK, Military Court at Hamburg, *Von Ruchteschell case*, Judgement, 21 May 1947.

334. In the *Dostler case* before the US Military Commission at Rome in 1945, the accused, the commander of a German army corps, was found guilty of having ordered the shooting of 15 American prisoners of war in violation of the 1907 HR and of long-established laws and customs of war. The accused relied on the defence of superior orders based, *inter alia*, on the *Führer's* order of 18 October 1942. This order provided that enemy soldiers participating in commando operations should be given no quarter, but added that these provisions did not apply to enemy soldiers who surrendered and to those who were captured in actual combat within the limits of normal combat activities (offensives, large-scale air or seaborne landings), nor did they apply to enemy troops captured during naval engagements.³⁸⁵

Other National Practice

335. In 1958, during the Algerian war of independence, in an armed clash between the ALN and French soldiers, the commander of the ALN battalion gave the order to spare enemy soldiers who wanted to surrender. The four French soldiers who surrendered were the only ones to survive the attack.³⁸⁶

336. In a speech at the Stockholm International Peace Research Institute in 1995, the Australian Minister of Foreign Affairs referred to the UNTAC Rules of Engagement, which specifies that "attacks on soldiers who have laid down their arms" are a criminal act.³⁸⁷

337. In a case against the State relative to the takeover of the Palacio de Justicia by guerrillas in 1985, a Colombian administrative court cited a document of the Colombian Ministry of Defence stating that a commander should "respect the life of the enemy who offers to surrender".³⁸⁸

338. Cuban practice during the 1960s was reported in several sources. One commentator described witnessing "the surrender of hundreds of *Batistianos* from a small-town garrison":

They were gathered within a hollow square of rebel Tommy-gunners and harangued by Raul Castro: "We hope that you will stay with us and fight against the master who so ill-used you. If you decide to refuse this invitation – and I am not going to repeat it – you will be delivered to the Cuban Red Cross tomorrow. Once you are under Batista's orders again, we hope that you will not take arms against us. But, if you do, remember this: we took you this time. We can take you again. And when

³⁸⁵ US, Military Commission at Rome, *Dostler case*, Judgement, 12 October 1945.

³⁸⁶ *El Moudjahid*, L'opération militaire du 11 janvier 1958, Vol. 1, pp. 298–299, Report on the Practice of Algeria, 1997, Chapter 2.1.

³⁸⁷ Australia, Minister of Foreign Affairs, Keynote Address entitled "The Use of Force in Peace Operations", SIPRI and Australian Department of Foreign Affairs and Trade Seminar, Stockholm, 10 April 1995, cited in Sarah Roberts (ed.), *Australian Practice in International Law 1995*, *Australian Yearbook of International Law*, 1996, Vol. 17, p. 769.

³⁸⁸ Colombia, Cundinamarca Administrative Court, *Case No. 4010*, Opinion of the Minister of Defence given before the House of Representatives, "Las fuerzas armadas de Colombia y la defensa de las instituciones democráticas", Record of evidence.

we do, we will not frighten or torture or kill you . . . If you are captured a second time or even a third . . . we will again return you exactly as we are doing now.³⁸⁹

339. According to a statement by the Egyptian Minister of War in 1984 in the context of the conflict with Israel, persons are “really” *hors de combat* when they are incapacitated or unable to endanger the life of others. Furthermore, when an Israeli soldier raised his hands, “he was taken as a prisoner of war”.³⁹⁰

340. Referring to India’s Army Act, the Report on the Practice of India states that any violation of the “duty not to attack someone who is incapable or unwilling to fight” may constitute “disgraceful conduct of a cruel, indecent or unnatural kind”.³⁹¹

341. The Report on the Practice of Iraq refers to a speech made by the Iraqi President in 1980 in which he called on the Iraqi armed forces to spare those incapacitated by wounds, sickness or unconsciousness.³⁹²

342. The Report on the Practice of Israel comments that:

It should nevertheless be understood that during combat operations, it is often impossible to ascertain exactly at which point an opposing soldier becomes incapacitated, as opposed to merely taking cover, hiding, or “playing dead” in order to open fire at a later stage. Therefore, the practical implementation of this rule requires the commanders in the field to make best-judgment decisions as to whether or not that person continues to pose a threat to friendly forces.³⁹³

343. In 1993, an international commission of inquiry on human rights violations in Rwanda mandated by four NGOs reported the killing by the FAR of 150 combatants of the FPR after they had laid down their arms.³⁹⁴ According to the Report on the Practice of Rwanda, when the Rwandan government reacted to the report in April 1993, it did not condemn or deplore these acts nor did it express any intention of bringing those responsible to justice.³⁹⁵

344. In 1982, in reply to a question in the House of Commons, the UK Prime Minister stated that, following the sinking of an Argentine cruiser by a UK warship during the war in the South Atlantic, another UK warship returning to

³⁸⁹ D. Chapelle, How Castro Won, in T. N. Greene (ed.), *The Guerrilla – And How to Fight Him: Selections from the Marine Corps Gazette*, Frederick A. Praeger, New York, 1962, p. 233; also cited in Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 1977.

³⁹⁰ Egypt, Statement by the Minister of War, 1984, Report on the Practice of Egypt, 1997, Chapter 2.1 and Answers to additional questions on Chapter 2.1.

³⁹¹ Report on the Practice of India, 1997, Chapter 2.1, referring to the *Army Act* (1950), Section 46.

³⁹² Iraq, Speech by the President of Iraq, 28 September 1980, Report on the Practice of Iraq, 1998, Chapter 2.1.

³⁹³ Report on the Practice of Israel, 1997, Chapter 2.1.

³⁹⁴ International Commission of Inquiry on Human Rights Violations in Rwanda, Rapport final de la Commission internationale d’enquête sur les violations des droits de l’homme au Rwanda depuis le 1er octobre 1990, in *Rapport sur les droits de l’homme au Rwanda, octobre 1992–octobre 1993*, Association rwandaise pour la défense des droits de la personne et des libertés publiques, Kigali, December 1993, p. 64.

³⁹⁵ Report on the Practice of Rwanda, 1997, Chapter 2.1.

the area where the sinking had occurred was instructed not to attack warships engaged in rescuing the survivors.³⁹⁶

345. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that “it is forbidden to kill or wound anyone who has laid down arms”.³⁹⁷

346. In 1991, before the UK Parliamentary Defence Committee, the officer commanding the UK forces in the Gulf War confirmed that the rules of engagement were modified in order to minimise casualties when it was realised that the Iraqis were seeking to surrender (the initial rules of engagement were to destroy the enemy). The plan was adjusted to encourage surrender rather than resistance.³⁹⁸

347. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that all the wounded, sick, and shipwrecked . . . not be made the object of attacks”.³⁹⁹

348. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US pointed out that its practice was consistent with the prohibition to attack those who had surrendered, as well as defenceless combatants, such as the wounded, sick and shipwrecked.⁴⁰⁰

349. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

The law of war obligates a party to a conflict to accept the surrender of enemy personnel and thereafter treat them in accordance with the provisions of the 1949 Geneva Conventions for the Protection of War Victims . . .

However, there is a gap in the law of war in defining precisely when surrender takes effect or how it may be accomplished in practical terms. Surrender involves an offer by the surrendering party (a unit or an individual soldier) and an ability to accept on the part of his opponent. The latter may not refuse an offer of surrender when communicated, but that communication must be made at a time when it can be received and properly acted upon – an attempt at surrender in the midst of a hard-fought battle is neither easily communicated nor received. The issue is one of reasonableness.

A combatant force involved in an armed conflict is not obliged to offer its opponent an opportunity to surrender before carrying out an attack . . . In the process [of military operations], Coalition forces continued to accept legitimate Iraqi offers of surrender in a manner consistent with the law of war. The large number of Iraqi

³⁹⁶ UK, Letter of the Prime Minister in reply to a question asked in the House of Commons on the subject of the Falkland Islands situation, 1982, *BYIL*, Vol. 55, 1984, p. 595, § 13.

³⁹⁷ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.1.

³⁹⁸ UK, Minutes of Evidence taken before the Parliamentary Defence Committee, 8 May 1991, *Defence Committee's Tenth Report*, 1991, § 86.

³⁹⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

⁴⁰⁰ US, Letter from the Department of the Army to the legal adviser of the US armed forces deployed in the Gulf region, 11 January 1991, § 8(J), Report on US Practice, 1997, Chapter 2.8.

prisoners of war is evidence of Coalition compliance with its law of war obligations with regard to surrendering forces.⁴⁰¹

The report also referred to two incidents during the Gulf War in which there had been allegations that quarter had been denied. The first incident involved an armoured assault on an entrenched position where tanks equipped with earthmoving plough blades were used to breach the trench line and then turned to fill in the trenches and the bunkers. The Department of Defense defended this tactic as consistent with the law of war. It noted that:

In the course of the breaching operations, the Iraqi defenders were given the opportunity to surrender, as indicated by the large number of EPWs [enemy prisoners of war] taken by the division. However, soldiers must make their intent to surrender clear and unequivocal, and do so rapidly. Fighting from fortified emplacements is not a manifestation of an intent to surrender, and a soldier who fights until the very last possible moment assumes certain risks. His opponent either may not see his surrender, may not recognize his actions as an attempt to surrender in the heat and confusion of battle, or may find it difficult (if not impossible) to halt an onrushing assault to accept a soldier's last-minute effort at surrender.⁴⁰²

The second incident concerned the attack on Iraqi forces while they were retreating from Kuwait City. The Department of Defense again defended the attack as consistent with the law of war. It noted that:

The law of war permits the attack of enemy combatants and enemy equipment at any time, wherever located, whether advancing, retreating or standing still. Retreat does not prevent further attack . . .

In the case at hand, neither the composition, degree of unit cohesiveness, nor intent of the Iraqi military forces engaged was known at the time of the attack. At no time did any element within the formation offer to surrender. CENTCOM [Central Command] was under no law of war obligation to offer the Iraqi forces an opportunity to surrender before the attack.⁴⁰³

350. The Report on US Practice states that:

The *opinio juris* of the United States is that quarter must not be refused to an enemy who communicates an offer to surrender under circumstances permitting that offer to be understood and acted upon by U.S. forces. A combatant who appears merely incapable or unwilling to fight, e.g., because he has lost his weapon or is retreating from the battle, but who has not communicated an offer to surrender, is still subject to attack. (Persons hors de combat due to wounds, sickness or shipwreck must of course be respected in all circumstances, in accordance with the First and Second Geneva Conventions of 1949).⁴⁰⁴

⁴⁰¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 641.

⁴⁰² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 642 and 643.

⁴⁰³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 643 and 644.

⁴⁰⁴ Report on US Practice, 1997, Chapter 2.1.

351. Order No. 579 issued in 1991 by the YPA Chief of Staff of the SFRY (FRY) provides that YPA units shall “apply all means to prevent any . . . mistreatment of . . . persons who surrender or hoist the white flag in order to surrender”.⁴⁰⁵

352. In 1994, in a meeting with the ICRC, officials of a State admitted that their soldiers killed all enemies, including wounded combatants.⁴⁰⁶

353. In 1997, it was reported that the army of a State executed 125 members of an armed opposition group who had been handed over by the army of another State. The State justified the act on the grounds that the prisoners had tried to escape. According to an ICRC note, the army could not explain how no one had survived.⁴⁰⁷

III. Practice of International Organisations and Conferences

United Nations

354. In 1998, in a statement by its President regarding the situation in the DRC, the UN Security Council condemned “the killing or wounding of combatants who have laid down their weapons”.⁴⁰⁸

355. In a resolution adopted in 1980 in the context of the conflict in Kampuchea (Cambodia), the UN Commission on Human Rights urged the parties to “spare the lives of those enemy combatants who surrender or are captured”.⁴⁰⁹

356. In 1970, in a report on respect for human rights in armed conflict, the UN Secretary-General stated that the clarification of the rule prohibiting the killing or wounding of an enemy who surrenders should be made on the basis of the following principles:

- a) It should be prohibited to kill or harm a combatant who has obviously laid down his arms or who has obviously no longer any weapons, without need for any expression of surrender on his part. Only such force as is strictly necessary in the circumstances to capture him should be applied.
- b) In the case of a combatant who has still some weapons or whenever, as frequently happens, it cannot be ascertained whether he has weapons, an expression of surrender should be required.⁴¹⁰

357. In 1992, in a report on the situation of human rights in Guatemala, the Independent Expert of the UN Commission on Human Rights reported that military sources had announced the death of three persons during an armed confrontation. The Expert mentioned he had access to photographs showing that the victims were given a “*coup de grâce*”. He also referred to the case of a commander officially killed in an armed confrontation, but who, according to

⁴⁰⁵ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

⁴⁰⁶ ICRC archive document. ⁴⁰⁷ ICRC archive document.

⁴⁰⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, p. 1.

⁴⁰⁹ UN Commission on Human Rights, Res. 29 (XXXVI), 11 March 1980, § 5.

⁴¹⁰ UN Secretary-General, Report on respect for human rights in armed conflict, UN Doc. A/8052, 18 September 1970, § 107.

the URNG, was captured alive. The Expert asked the authorities to respect his life and physical integrity.⁴¹¹

358. In 1993, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights noted, with reference to the territories occupied by Israel, that he had received a number of reports indicating that "Palestinians were killed by members of the Israeli military after they had come out of the attacked houses and at a time when they did not pose any threat to the lives of the soldiers, some of them even after they had surrendered without showing any resistance".⁴¹² In the section of the same report relative to Turkey, the Special Rapporteur referred to a communication concerning eight security officers who were charged with the manslaughter of a group of people they were attempting to capture. The Rapporteur did not say if the people in question were civilians or alleged members of the armed opposition. However, in his conclusion, the Rapporteur listed Turkey as a country where there was a conflict and called for the application of IHL.⁴¹³

359. In 1991, in a report on El Salvador, the Director of the Human Rights Division of ONUSAL described its investigation into a complaint brought by the FMLN Command concerning a combatant wounded in an armed skirmish who had allegedly been killed by members of the Salvadoran armed forces. ONUSAL could not corroborate the facts but stated that the case concerned the situation of a person *hors de combat* who should "in all circumstances be treated humanely".⁴¹⁴

360. In 1993, the UN Commission on the Truth for El Salvador examined, *inter alia*, a case concerning the killing of two soldiers wounded after a US helicopter was shot down by an FMLN patrol. The survivors of the crash had been left on the scene, but shortly afterwards, a member of the patrol was sent back and killed the two wounded men. According to the report,

FMLN... began by denying that any wounded men had been executed... [Then,] it admitted that the wounded men had been executed and... announced that [the perpetrators] would be tried for the offence.

...

The Commission considers that there is sufficient proof that United States soldiers... who survived the shooting down of the helicopter... but were wounded and defenceless, were executed in violation of international humanitarian law...

...

FMLN acknowledged the criminal nature of the incident and detained and tried the accused.⁴¹⁵

⁴¹¹ UN Commission on Human Rights, Independent Expert on the Situation of Human Rights in Guatemala, Report, UN Doc. E/CN.4/1993/10, 18 December 1992, §§ 65–66.

⁴¹² UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1994/7, 7 December 1993, § 381.

⁴¹³ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1994/7, 7 December 1993, §§ 595, 604, 610 and 706.

⁴¹⁴ ONUSAL, Director of the Human Rights Division, Report, UN Doc. A/46/658-S/23222, 15 November 1991, Annex, p. 18, §§ 52–53.

⁴¹⁵ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, pp. 167–169.

361. In 1993 and 1994, the UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and other Arabs of the Occupied Territories reported accounts of surrendered persons being fired at, as well as of a number of cases in which unarmed persons or those who had surrendered had been killed.⁴¹⁶

Other International Organisations

362. In 1985, in an explanatory memorandum on a draft resolution on the situation in Afghanistan, the Parliamentary Assembly of the Council of Europe noted that “captured combatants have been systematically put to death”. It referred to these incidents as “violations of human rights”.⁴¹⁷

363. In 1998, during a debate in the Sixth Committee of the UN General Assembly, South Africa stated on behalf of the SADC that the 1998 ICC Statute “would also serve as a reminder that even during armed conflict the rule of law must be upheld. For example, it was unlawful . . . for a combatant who had surrendered, having laid down his arms, to be killed or wounded . . . [This act] was a war crime and would be punished.”⁴¹⁸

International Conferences

364. The Final Declaration of the International Conference for the Protection of War Victims in 1993 stated that the participants refused to accept that the “wounded are shown no mercy”.⁴¹⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

365. In the interlocutory appeal in the *Tadić case* in 1995, the ICTY Appeals Chamber referred to instructions given to the PLA by the leader of the Chinese Communist Party not to “kill or humiliate any of Chiang Kai-Shek’s army officers and men who lay down their arms” as an illustration of the extension of some general principles of the laws of warfare to internal armed conflicts.⁴²⁰

366. In 1982, in a communication received by the IACiHR, it was alleged that Bolivian regiments:

attacked Caracoles with guns, mortars, tanks and light warplanes. The miners defended themselves . . . most of the miners were killed. Some of the survivors fled

⁴¹⁶ UN Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and other Arabs of the Occupied Territories, Twenty-fifth report, UN Doc. A/48/557, 1 November 1993, § 874; Twenty-sixth report, UN Doc. A/49/511, 18 October 1994, § 142.

⁴¹⁷ Council of Europe, Parliamentary Assembly, Report on the deteriorating situation in Afghanistan, Doc. 5495, 15 November 1985, Chapter II, §§ 16 and 17.

⁴¹⁸ SADC, Statement by South Africa on behalf of the SADC before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 13.

⁴¹⁹ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1).

⁴²⁰ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 102.

to the hills and others fled to the houses in Villa Carmen. The soldiers pursued them and finished them off in their homes. They took others and tortured them and bayoneted many of them. They also cut the throats of the wounded.

The Commission pointed out to the Bolivian government that these incidents constituted serious violations of the 1969 ACHR (right to life, right to humane treatment, right to personal liberty) and of common Article 3 of the 1949 Geneva Conventions.⁴²¹

367. In 1991, the IACiHR reported the case of the killing of two soldiers wounded after a US helicopter was shot down by an FMLN patrol in El Salvador. According to information obtained by the Commission,

The pilot of the helicopter . . . was killed, while the other two occupants . . . survived but were seriously injured. While the FMLN group sent the people from the village for help, the two surviving servicemen were killed, summarily executed by an FMLN combatant. The FMLN has admitted to what happened and has said that those responsible have been charged with committing a war crime by violating the FMLN's code of conduct and the Geneva Conventions. The FMLN has said that the trial of the accused will be open and independent observers will participate.⁴²²

368. In 1997, in the case before the IACiHR concerning the events at La Tablada in Argentina, the perpetrators of the initial attack on the Argentine military barracks alleged that, after the fighting ceased, agents of the State participated in the summary executions and torture of some of the captured attackers.⁴²³ In its report, the Commission stated that the violent clash between the attackers and the armed forces "triggered application of the provisions of Common Article 3 [of the 1949 Geneva Conventions], as well as other rules relevant to the conduct of internal hostilities".⁴²⁴ The IACiHR emphasised that:

The persons who participated in the attack on the military base were legitimate military targets only *for such time as they actively participated in the fighting*. Those who surrendered, were captured or wounded and ceased their hostile acts, fell effectively within the power of Argentine state agents, who could no longer lawfully attack or subject them to other acts of violence. Instead, they were absolutely entitled to the non-derogable guarantees of humane treatment set forth in both Common Article 3 of the Geneva Conventions and Article 5 of the [1969 ACHR]. The intentional mistreatment, much less summary execution, of such wounded or captured persons would be a particularly serious violation of both instruments.⁴²⁵ [emphasis in original]

The Commission found that the Argentine State was responsible for violations of the right to life and of the right to physical integrity protected by Articles 4

⁴²¹ IACiHR, *Case 7481 (Bolivia)*, Resolution, 8 March 1982, pp. 36–40.

⁴²² IACiHR, *Annual Report 1990–1991*, Doc. OEA/Ser.L/V/II.79.rev.1 Doc. 12, 22 February 1991, p. 442.

⁴²³ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 3.

⁴²⁴ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 156.

⁴²⁵ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 189.

and 5 of the 1969 ACHR.⁴²⁶ Furthermore, the perpetrators of the initial attack alleged, *inter alia*, that “the Argentine military deliberately ignored the attempt of the attackers to surrender”.⁴²⁷ They added that “some parts of the barracks were reduced to rubble, without any acceptance of the attackers’ surrender or even any attempt to engage them in dialogue”.⁴²⁸ The petitioners produced a videotape which depicted attempted surrender. The Commission considered that:

The tape is . . . notable for what it does not show. In fact, it does not identify the precise time or day of the putative surrender attempt. Nor does it show what was happening at the same time in other parts of the base where other attackers were located. If these persons, for whatever reasons, continued to fire or commit hostile acts, the Argentine military might not unreasonably have believed that the white flag was an attempt to deceive or divert them.⁴²⁹

The Commission found that the evidence was incomplete and stated that it “must conclude that the killing or wounding of the attackers which occurred prior to the cessation of combat on January 24, 1989 were legitimately combat related and, thus, did not constitute violations of the [1969 ACHR] or applicable humanitarian law rules”.⁴³⁰ (emphasis in original)

V. Practice of the International Red Cross and Red Crescent Movement

369. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

A person who is recognized or who, in the circumstances, should be recognized as being no longer able to participate in combat, shall not be attacked (e.g. surrendering, wounded, . . . shipwrecked in water).

Any intention to surrender must be clearly expressed: raising one’s arms, throwing away one’s weapons, bearing a white flag, etc.

...

Combatants who are captured (with or without surrender) are prisoners of war and shall no longer be attacked. . .

Treatment as prisoner of war applies only to captured combatants who then abstain from any hostile act and do not attempt to escape.⁴³¹

370. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC appealed to all the parties to “spare the lives of those

⁴²⁶ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 244–247 and 379–380.

⁴²⁷ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 182.

⁴²⁸ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 9.

⁴²⁹ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 184.

⁴³⁰ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 185–188.

⁴³¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 487, 488 and 496.

who surrender". It also specifically requested that the Patriotic Front "cease the killing of captured enemy combatants".⁴³²

371. In an appeal issued in 1983 concerning the Iran–Iraq War, the ICRC pointed to grave violations of IHL committed by both countries, including "summary execution of captive soldiers".⁴³³

372. In 1989, the ICRC transmitted to the governmental forces of a State allegations of misconduct of some of the members of its armed forces. A first incident involved a soldier who had shown a clear intention to shoot a wounded combatant and was prevented from doing so by an ICRC delegate. A second incident involved the killing of a wounded combatant brought to hospital. The ICRC delegate considered the incidents as clear violations both of IHL and of the regulations of the government forces.⁴³⁴

373. In an appeal issued in 1991, the ICRC enjoined the parties to the conflict in the former Yugoslavia "to spare the lives of those who surrender".⁴³⁵

374. In a press release issued in 1992, the ICRC urged the parties to the conflict in Bosnia and Herzegovina "to spare the lives of those who surrender".⁴³⁶

375. On several occasions in 1992, the ICRC enjoined the parties to the conflict in Afghanistan to spare the lives of those who surrendered.⁴³⁷

376. In a press release issued in 1992, the ICRC urged all the parties involved in the conflict in Tajikistan "to spare the lives of people who surrender".⁴³⁸

377. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "captured combatants and persons who have laid down their arms no longer represent any danger and must be respected; they shall be handed over to the immediate hierarchical superior; killing such persons constitutes a crime and is absolutely forbidden".⁴³⁹

378. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "combatants and other persons who are captured, and those who have laid down their arms... shall be handed over

⁴³² ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, §§ 5 and 7, *IRRC*, No. 209, 1979, pp. 88–89.

⁴³³ ICRC, Conflict between Iraq and Iran: ICRC Appeal, *IRRC*, No. 235, 1983, p. 221.

⁴³⁴ ICRC archive document.

⁴³⁵ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

⁴³⁶ ICRC, Press Release No. 1705, Bosnia and Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

⁴³⁷ ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; Press Release No. 1724, Kabul: ICRC urges respect for civilians as medical facilities struggle to cope, 20 July 1992; Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

⁴³⁸ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

⁴³⁹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

to their immediate military superior and shall not, in particular, be killed or ill-treated".⁴⁴⁰

379. In a press release issued in 1994 regarding the situation in Bihac (Bosnia and Herzegovina), the ICRC recalled that "the lives of all people who surrendered must be spared".⁴⁴¹

380. In a press release issued in 1994, the ICRC urged the parties involved in the conflict in Chechnya "to spare the lives of people who surrender".⁴⁴²

381. In a communication to the press issued in 2000 in the context of the conflict in Colombia, the ICRC condemned two separate incidents in which "wounded combatants being evacuated by its delegates were seized and summarily executed by men belonging to enemy forces. These acts... constitute grave breaches of international humanitarian law."⁴⁴³

382. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC stated that "a fighter who clearly indicates his intention to surrender to an enemy is no longer a legitimate target and is entitled to the protection afforded him by the law".⁴⁴⁴

VI. Other Practice

383. In 1977, in a meeting with the ICRC, an armed opposition group denounced the practice by troops of a State of systematically killing all combatants, even those had been wounded or who were no longer fighting.⁴⁴⁵

384. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "it is forbidden to kill or injure an enemy who surrenders".⁴⁴⁶

385. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that "under customary rules, protection from attack begins when the individual has ceased to fight, when his unit has surrendered, or when he is no longer capable of resistance either because he has been overpowered or is weaponless".⁴⁴⁷

⁴⁴⁰ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

⁴⁴¹ ICRC, Press Release No. 1792, Bihac: urgent appeal, 26 November 1994.

⁴⁴² ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.

⁴⁴³ ICRC, Communication to the Press No. 00/36, Colombia: ICRC condemns grave breaches of international humanitarian law, suspends medical evacuations of wounded combatants, 3 October 2000.

⁴⁴⁴ ICRC, Communication to the Press No. 01/58, Afghanistan: ICRC calls on all parties to comply with international humanitarian law, 23 November 2001.

⁴⁴⁵ ICRC archive document. ⁴⁴⁶ ICRC archive document.

⁴⁴⁷ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, pp. 219–220, citing William E. S. Flory, *Prisoners of War: A Study in the Development of International Law*, American Council of Public Affairs, Washington, 1942, p. 39.

386. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that “the following . . . are prohibited by applicable international law rules: . . . Attacks against combatants who are captured [or] surrender.”⁴⁴⁸ The report mentioned a number of instances in which the *contras* executed combatants who had surrendered. Some witnesses confirmed that members of the militia who had resisted attacks by the *contras* and then surrendered were not hurt, but others described murders of military prisoners who had been captured unarmed.⁴⁴⁹ Americas Watch further found that “in combination, the *contra* forces have systematically violated the applicable laws of war throughout the conflict. They . . . have murdered those placed *hors de combat* by their wounds.”⁴⁵⁰ The report noted that “the insurgents have only rarely taken prisoners in combat. They claim to disarm and release them on the spot. In regard to the FDN [one of the *contra* groups], however, credible testimony indicates that, at least on some occasions, their forces have actually ‘finished off’ wounded opponents.”⁴⁵¹ Representatives of the insurgent organisations claimed that governmental forces also executed the wounded on the spot, but according to the report, these claims could not be substantiated. However, the report mentioned instances of abuse of prisoners.⁴⁵² The conflict was regarded as non-international and it was considered that the parties were “bound to abide by the provisions of Article 3 common to the Geneva Conventions of 1949 and by customary international law rules applicable to internal armed conflicts”.⁴⁵³

387. In 1985, in a meeting with the ICRC, an armed opposition group declared its intention to respect the fundamental rules of IHL and expressed the wish to demonstrate its ability to take prisoners.⁴⁵⁴

388. In 1986, in a report on human rights in Nicaragua, Americas Watch underlined that “in several years of armed struggle, neither the FDN [one of the *contra* groups] nor its predecessor organizations took prisoners. A recently published book explicitly describes the FDN practice of murdering enemy soldiers placed *hors de combat*.”⁴⁵⁵ The report also noted abuses by the governmental forces, including killings, disappearances and mistreatment of prisoners, apparently aimed at individuals suspected of aiding the *contras*. The report stated that,

⁴⁴⁸ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 33.

⁴⁴⁹ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 42.

⁴⁵⁰ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 6.

⁴⁵¹ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 41.

⁴⁵² Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 56 and 57.

⁴⁵³ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 4.

⁴⁵⁴ ICRC archive document.

⁴⁵⁵ Americas Watch, *Human Rights in Nicaragua: 1985–1986*, New York, March 1986, p. 102.

“in addition to violating other human rights norms, they constitute violations of the laws of war”.⁴⁵⁶

389. In 1987, in a meeting with the ICRC, an armed opposition group admitted that, in response to the violence and aggression of governmental troops, it often gave no quarter to prisoners.⁴⁵⁷

390. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that “applicable international law rules prohibit . . . [a]ttacks against combatants who are captured [or] surrender”.⁴⁵⁸

391. In 1990, an extract from a document from the Rwandan Press Agency mentioned that Ugandan journalists were permitted to visit prisoners of war in Kigali, evidencing the fact that, in some cases, FAR soldiers did give quarter to those who surrendered. The journalists reported that many of the 17 prisoners were young, since they were the ones most likely to surrender when confronted by the FAR.⁴⁵⁹

392. In a resolution adopted in 1991, the Politico-Military High Command of the SPLM/A stated that “whenever an enemy soldier is disarmed or unarmed, his or her life will be spared, protected and respected as a prisoner of war (POW) under the Geneva Conventions”.⁴⁶⁰

393. In 1994, in a meeting with the ICRC, officials of an entity denied that wounded enemy combatants were not spared. The low number of captured combatants was attributed to the military tactics used and the defensive nature of the position of the entity’s forces.⁴⁶¹

394. In 1995, in a meeting with the ICRC, the representative of an armed opposition group accused government troops of not taking prisoners and of killing all captured combatants.⁴⁶²

Quarter under unusual circumstances of combat

I. Treaties and Other Instruments

Treaties

395. Article 41(3) AP I provides that “when persons entitled to protection as prisoners of war have fallen into the power of an adverse Party under unusual conditions of combat which prevent their evacuation . . . they shall be released and all feasible precautions shall be taken to ensure their safety”. Article 41 AP I was adopted by consensus.⁴⁶³

⁴⁵⁶ Americas Watch, *Human Rights in Nicaragua: 1985–1986*, New York, March 1986, p. 67.

⁴⁵⁷ ICRC archive document.

⁴⁵⁸ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

⁴⁵⁹ Agence Rwandaise de Presse, Bulletin No. 003847, 1 December 1990, pp. 1–2.

⁴⁶⁰ SPLM/A, PMHC Resolution No. 15: Human Rights and Civil Liberties, 11 September 1991, § 15.3, Report on SPLM/A Practice, 1998, Chapter 2.1.

⁴⁶¹ ICRC archive document. ⁴⁶² ICRC archive document.

⁴⁶³ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 104.

396. Upon ratification (or signature) of AP I Algeria, Belgium, Canada, France, Germany, Ireland, Italy, Netherlands, Spain and UK made statements to the effect that feasible precautions are those which are practicable or practically possible, taking into account all circumstances ruling at the time, including humanitarian and military considerations. These are set out in Chapter 5, Section A, and are not repeated here.

Other Instruments

397. Article 60 of the 1863 Lieber Code provides that “a commander is permitted to direct his troops to give no quarter, in great straits, when his own salvation makes it *impossible* to cumber himself with prisoners”. (emphasis in original)

II. National Practice

Military Manuals

398. The Instructions to the Muslim Fighter issued by the ARBiH in Bosnia and Herzegovina in 1993 state that it is “left to the military command’s discretion to decide whether it is more useful or in the general interest to free, exchange or liquidate enemy prisoners of war”.⁴⁶⁴

399. Canada’s LOAC Manual states that:

Where persons entitled to protection as prisoners of war (PWs) have fallen into the power of an adverse party under unusual conditions of combat that prevent their evacuation as provided for in [GC III], they shall be released and all feasible precautions shall be taken to ensure their safety.

...

The “unusual conditions of combat” may include, for example, the capture of a PW by a long-range patrol that does not have the ability to properly evacuate the PW. In such circumstances, there would be an obligation to release the PW and take all feasible precautions to ensure his safety. Such precautions might include providing the PW with sufficient food and water or other aids to assist in rejoining unit lines.⁴⁶⁵

400. France’s LOAC Manual states that, “when the capturing unit is not able to evacuate its prisoners or to keep them until the evacuation is possible, the unit must free them while guaranteeing its own and the prisoners’ security”.⁴⁶⁶

401. Israel’s Manual on the Laws of War states that:

Considerations such as the delay involved in guarding prisoners of war as opposed to the attainment of an objective, or even the allocation of manpower for transferring them to the rear line, do not permit the harming of prisoners who surrendered

⁴⁶⁴ Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.

⁴⁶⁵ Canada, *LOAC Manual* (1999), p. 6-3, §§ 18 and 19.

⁴⁶⁶ France, *LOAC Manual* (2001), p. 102.

and were disarmed. It is hard to imagine a military mission so urgent as to render impossible the evacuation of prisoners to the rear or even binding them until additional forces arrive and which justifies their murder.⁴⁶⁷

402. Kenya's LOAC Manual states that, when the capturing unit, such as a small patrol operating in isolation, is not in a position to evacuate prisoners, "that unit shall release them and take precautions: a) for its own safety . . . ; and b) for the released's safety (e.g. giving them water and food, the means to signal their location, and subsequently providing information about their location to rescue teams)".⁴⁶⁸

403. The Military Manual of the Netherlands provides that, when a person falls into the hands of the adversary under exceptional circumstances preventing his evacuation as a prisoner of war, this person must be released. This situation can occur, for instance, for a long-range post.⁴⁶⁹

404. Spain's LOAC Manual states that when the conditions of combat make it impossible to treat prisoners of war properly and to evacuate them (e.g. isolated special operations, small units, mass capture which exceeds the possibility of the unit in question), the prisoners must be released and all feasible precautions must be taken to ensure their safety.⁴⁷⁰

405. Switzerland's Basic Military Manual provides that "if a commando raids an enemy post and captures soldiers by surprise without being able to take them along with it in its retreat, it shall not have the right to kill or injure them. It may disarm them, but it shall free them."⁴⁷¹

406. The UK Military Manual provides that:

A commander may not put his prisoners of war to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears that they will regain their liberty through the impending success of the forces to which they belong. It is unlawful for a commander to kill prisoners of war on grounds of self-preservation. This principle admits of no exception, even in the case of airborne or so-called commando operations . . .

Whether a commander may release prisoners of war in the circumstances stated in the text is not clear . . . If such a release be made, it would seem clear that the commander should supply the prisoners with that modicum of food, water and weapons as would give them a chance of survival.⁴⁷²

407. The US Field Manual states that:

A commander may not put his prisoners to death because their presence retards his movements or diminishes his power of resistance by necessitating a large guard, or by reason of their consuming supplies, or because it appears certain that they

⁴⁶⁷ Israel, *Manual on the Laws of War* (1998), p. 45.

⁴⁶⁸ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 8.

⁴⁶⁹ Netherlands, *Military Manual* (1993), p. IV-4.

⁴⁷⁰ Spain, *LOAC Manual* (1996), Vol. I, § 7.4.c.

⁴⁷¹ Switzerland, *Basic Military Manual* (1987), Article 109, commentary.

⁴⁷² UK, *Military Manual* (1958), § 137, including footnote 1.

will regain their liberty through the impending success of their forces. It is likewise unlawful for a commander to kill prisoners on grounds of self-preservation, even in the case of airborne or commando operations.⁴⁷³

National Legislation

408. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 41(3) AP I, is a punishable offence.⁴⁷⁴

409. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁴⁷⁵

National Case-law

410. In the *Griffen case* in 1968, a US Army Board of Review confirmed the sentence of unpremeditated murder for having executed a Vietnamese prisoner, following a "manifestly illegal" order to do so. The accused declared that "he felt that the security of the platoon would have been violated if the prisoner were kept, since their operations had already been observed by another suspect". The Board of Review cited paragraph 85 of the US Field Manual prohibiting the killing of prisoners of war. It added that the "killing of a docile prisoner taken during military operations is not justifiable homicide".⁴⁷⁶

Other National Practice

411. The Report on UK Practice cites a former director of the UK Army Legal Services who stated that UK soldiers were not required to risk their own lives in granting quarter. He added that it may not be practicable to accept surrender of one group of enemy soldiers while under fire from another enemy position. Capture was to take place when circumstances permitted.⁴⁷⁷

III. Practice of International Organisations and Conferences

United Nations

412. No practice was found.

Other International Organisations

413. No practice was found.

⁴⁷³ US, *Field Manual* (1956), § 85.

⁴⁷⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁷⁵ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁴⁷⁶ US, Army Board of Review, *Griffen case*, Judgement, 2 July 1968.

⁴⁷⁷ Report on UK Practice, 1997, Notes on a meeting with a former Director of Army Legal Services, 19 June 1997, Chapter 2.1.

International Conferences

414. The Report of Committee III of the CDDH stated that:

Paragraph 3 [of Article 41 AP I] dealing with the release of prisoners who could not be evacuated proved quite difficult. The phrase “unusual conditions of combat” was intended to reflect the fact that that circumstance would be abnormal. What, in fact, most representatives referred to was the situation of the long distance patrol which is not equipped to detain and evacuate prisoners. The requirement that all “feasible precautions” be taken to ensure the safety of released prisoners was intended to emphasize that the detaining power, even in those extraordinary circumstances, was expected to take all measures that were practicable in the light of the combat situation. In the case of the long distance patrol, it need not render itself ineffective by handing the bulk of its supplies over to the released prisoners, but it should do all that it reasonably can do, in view of all the circumstances, to ensure their safety.⁴⁷⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

415. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

416. No practice was found.

VI. Other Practice

417. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf mention Articles 19 and 20 GC III (which require the prompt and humane evacuation of prisoners of war from the combat zone to places out of the danger area) and underline that “in certain types of operations, particularly airborne operations, commando raids, and long range reconnaissance patrols, compliance with these articles is clearly impractical, and there has been dispute as to what is required in such cases”.⁴⁷⁹

418. In 1985, in a meeting with the ICRC, an armed opposition group declared that it would keep prisoners only if their detention could be assured and the security of its combatants was not compromised. If not, it would execute them. However, the commander in chief of the group agreed to reconsider his position if keeping captured combatants alive proved beneficial to the resistance.⁴⁸⁰

419. In 1985, in a meeting with the ICRC, an armed opposition group explained its change of policy from immediate execution of captured combatants to giving them a choice between joining the movement or being transferred to party

⁴⁷⁸ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 384, § 24.

⁴⁷⁹ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, pp. 223 and 224.

⁴⁸⁰ ICRC archive document.

authorities. It stressed, however, that it was impossible for the resistance group, for security reasons, to detain prisoners, even for a short while.⁴⁸¹

420. In 1987, in a meeting with the ICRC, an armed opposition group admitted that “prisoners are released or executed due to the difficulties of detention”.⁴⁸²

C. Attacks against Persons Parachuting from an Aircraft in Distress

I. Treaties and Other Instruments

Treaties

421. Article 42 AP I provides that:

1. No person parachuting from an aircraft in distress shall be made the object of attack during his descent.
2. Upon reaching the ground in territory controlled by an adverse Party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.
3. Airborne troops are not protected by this Article.

Article 42 AP I was adopted by 71 votes in favour, 12 against and 11 abstentions.⁴⁸³

422. Article 39(1) of draft AP I (now Article 42) submitted by the ICRC to the CDDH provided that “the occupants of aircraft in distress shall never be attacked when they are obviously *hors de combat*, whether or not they have abandoned the aircraft in distress”.⁴⁸⁴ At the CDDH, an amendment submitted by 16 Arab States aimed at inserting at the end of draft Article 39(1) AP I (now Article 42) the proviso: “. . . unless it is apparent that he will land in territory controlled by the Party to which he belongs or by an ally of that Party”.⁴⁸⁵ The disagreements on draft Article 39 AP I arose because some representatives considered that parachutists landing on territory controlled by their own party could not be considered *hors de combat*, while others believed that airmen should be immune from attacks in all circumstances.⁴⁸⁶ For example, Egyptian stated that:

As far as military interests were concerned, a pilot was of great value and worth hundreds of ordinary combatants; in many cases of combat, the number of pilots would determine the outcome of hostilities. A combatant of such military value was therefore, in terms of law, a legitimate target of attack, the only exception being

⁴⁸¹ ICRC archive document. ⁴⁸² ICRC archive document.

⁴⁸³ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 110.

⁴⁸⁴ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 13.

⁴⁸⁵ CDDH, *Official Records*, Vol. III, CDDH/414, 24 May 1977, p. 173 (amendment proposed by Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Qatar, Saudi Arabia, Somalia, Sudan, Syria, Tunisia, UAE and Yemen).

⁴⁸⁶ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1636.

if he had been disabled by wounds or sickness or was in a position to surrender as a prisoner of war.⁴⁸⁷

In the plenary, the ICRC made a statement calling for the rejection of the draft amendment. It declared, *inter alia*, that:

Whether an airman landed in friendly or hostile territory, whether he rejoined his unit or was taken prisoner, should remain secondary considerations . . .

If there had been occasions when, in exceptional circumstances, airmen in distress had been fired on, such was not the rule which prevailed in international practice. All national manuals on the conduct of hostilities said that airmen parachuting from an aircraft to save their lives were not to be fired on. The ICRC would be dismayed to see a provision making it lawful to kill an unarmed enemy who was not himself in a position to kill introduced into law which had hitherto been purely humanitarian.⁴⁸⁸

The ICRC statement was supported by Austria, Belgium, Canada, FRG, GDR, Sweden, Switzerland, UK and US, while Iraq, Libya and Syria voiced opposing views.⁴⁸⁹ The draft amendment was eventually rejected in the plenary by 47 votes in favour, 23 against and 26 abstentions.⁴⁹⁰

Other Instruments

423. Article 20 of the 1923 Hague Rules of Air Warfare provides that “in the event of an aircraft being disabled, the persons trying to escape by means of parachutes must not be attacked during their descent”.

II. National Practice

Military Manuals

424. Argentina’s Law of War Manual (1969) provides that “it is prohibited to open fire at persons who descend by parachute from aircraft in technical emergency. This prohibition, however, does not apply to members of airborne units and to any other parachutist descending on enemy territory on hostile mission.”⁴⁹¹

425. Argentina’s Law of War Manual (1989) states that “it is prohibited . . . to attack persons bailing out with parachutes from an aircraft in distress . . . When reaching the ground, they must be offered the opportunity to surrender before

⁴⁸⁷ Egypt, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.48, 1 June 1976, p. 104, § 13.

⁴⁸⁸ ICRC, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 107, §§ 89–90.

⁴⁸⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, pp. 108 and 109, § 98 (Austria), p. 109, § 99 (Belgium), p. 109, § 102 (Canada), p. 108, § 92 (FRG), p. 107, § 91 (GDR), p. 108, §§ 96 and 97 (Iraq), p. 109, § 103 (Libya) p. 108, § 93 (Sweden), p. 109, § 104 (Switzerland), p. 106, § 82 (Syria), p. 108, § 94 (UK) and p. 108, § 95 (US).

⁴⁹⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 110.

⁴⁹¹ Argentina, *Law of War Manual* (1969), § 1.009.

being attacked, unless they commit hostile acts. This rule does not apply to airborne troops."⁴⁹²

426. Australia's Commanders' Guide provides that "parachutists are defined as those who abandon a disabled aircraft. Parachutists are not legitimate military targets . . . It is appreciated that it may be difficult to distinguish a parachutist from a paratrooper, especially while in the air."⁴⁹³ It also states that:

Aircrew who have baled out of a damaged aircraft are to be considered as *hors de combat* and should not be attacked during their descent. However, should the parachutist land in enemy territory he must be given an opportunity to surrender before being made the object of an attack unless it is apparent that he is engaged in a hostile act. If he lands within territory occupied by his own national authority, he is liable to be attacked by the enemy, like any other combatant, unless wounded and, therefore, protected by LOAC.

...

The ban on shooting down those descending by parachute does not extend to the dropping of agents or paratroops.⁴⁹⁴

427. Australia's Defence Force Manual states that "aircrew descending by parachute from a disabled aircraft are immune from attack. If such personnel land in enemy territory they must be given an opportunity to surrender before being made the object of an attack, unless it is apparent that they are engaging in some hostile act."⁴⁹⁵ The manual adds that:

If the crew of a disabled aircraft lands by parachute in territory occupied by their own forces or under the control of their own national authority, they may be attacked in the same way as any other combatant, unless wounded, in which case they are protected. If in a raft or similar craft at sea after parachuting, they are to be treated as if shipwrecked and may not be attacked.

Paratroopers and other airborne troops may be attacked, even during their descent. If the carrying aircraft has been disabled it may be difficult to distinguish between members of the crew abandoning such aircraft who are immune from attack, and the airborne troops who are not so protected.⁴⁹⁶

428. Belgium's Teaching Manual for Officers provides that:

No person parachuting from an aircraft in distress shall be made the object of an attack during the descent by parachute.

While landing, he shall have the opportunity to indicate his intention to surrender. However, if he attempts to escape or commits a hostile act, he may be attacked. Airborne troops are never protected, even if the aircraft is in distress.⁴⁹⁷

429. Belgium's Teaching Manual for Soldiers provides that:

⁴⁹² Argentina, *Law of War Manual* (1989), § 1.06(6).

⁴⁹³ Australia, *Commanders' Guide* (1994), § 412.

⁴⁹⁴ Australia, *Commanders' Guide* (1994), §§ 964 and 965 (land warfare), see also §§ 412, 621, 705 and 1033 (air warfare).

⁴⁹⁵ Australia, *Defence Force Manual* (1994), § 847, see also § 708.

⁴⁹⁶ Australia, *Defence Force Manual* (1994), §§ 849–850.

⁴⁹⁷ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 35.

Pilots and aircrew who parachute from an aircraft in distress . . . are not to be attacked during their descent . . . They may be attacked during their descent and/or once they have reached the ground only if they themselves open fire or attempt to escape. Airborne troops, however, constitute a combatant unit as soon as they get out of the aircraft and may be made the object of an attack during their descent by parachute as well as on the ground.⁴⁹⁸

430. Benin's Military Manual provides that "a person parachuting from an aircraft in distress and who does not commit hostile acts shall not be attacked . . . However, the members of enemy paratroops descending by parachute are legitimate military targets."⁴⁹⁹

431. Burkina Faso's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵⁰⁰

432. Cameroon's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵⁰¹

433. Cameroon's Instructors' Manual provides that the crew of an aircraft in distress shall not be attacked during their descent by parachute or on the ground, unless they commit hostile acts.⁵⁰² It adds, however, that "airborne troops in combat formation may be attacked during their descent".⁵⁰³

434. Canada's LOAC Manual affirms that aircraft may not "fire upon shipwrecked personnel, including those who may have parachuted into the sea or otherwise come from downed aircraft, unless they carry out acts inconsistent with their status as 'hors de combat'".⁵⁰⁴ The manual also states that:

34. Aircrew descending by parachute from a disabled aircraft are immune from attack. If such personnel land in enemy territory they must be given an opportunity to surrender before being made the object of an attack, unless it is apparent that they are engaging in some hostile act.
35. If personnel from a disabled aircraft do not surrender on being called upon to do so, they may be attacked in the same way as any other combatant. If a member of the crew of a disabled aircraft lands by parachute in the territory occupied by his own forces or under the control of his own national authority, he may be attacked by the enemy in the same way as any other combatant, unless he is *hors de combat* (out of combat), in which case he is protected.
36. Paratroops and other airborne troops may be attacked even during their descent.⁵⁰⁵

⁴⁹⁸ Belgium, *Teaching Manual for Soldiers* (undated), p. 16.

⁴⁹⁹ Benin, *Military Manual* (1995), Fascicule II, p. 9.

⁵⁰⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁵⁰¹ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁵⁰² Cameroon, *Instructors' Manual* (1992), p. 32, § 24 and p. 63, § 233, see also p. 149, § 531.

⁵⁰³ Cameroon, *Instructors' Manual* (1992), p. 32, § 24, see also p. 63, § 233.

⁵⁰⁴ Canada, *LOAC Manual* (1999), p. 7-3, § 24.

⁵⁰⁵ Canada, *LOAC Manual* (1999), p. 7-4, §§ 34-36.

435. Congo's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵⁰⁶

436. Croatia's Commanders' Manual states that "a combatant who is recognised (or should be recognised) as being out of combat (... descending by parachute in distress) may not be attacked".⁵⁰⁷

437. The Military Manual of the Dominican Republic provides that:

Individuals parachuting from a burning or disabled aircraft are considered helpless until they reach the ground. You should not fire on them while they are in the air. If they use their weapons or do not surrender upon landing, they must be considered combatants.

On the other hand, paratroopers who are jumping from an airplane to fight against you are targets and you may fire at them while they are still in the air.⁵⁰⁸

438. Ecuador's Naval Manual states that:

Parachutists descending from aircraft *hors de combat* may not be attacked while in the air and, unless they land in a territory controlled by their own forces or launch an attack during their descent, they must be provided an opportunity to surrender upon reaching the ground. Airborne troops, special warfare infiltrators, and intelligence agents parachuting into combat areas or behind enemy lines are not so protected and may be attacked in the air as well as on the ground. Such personnel may not be attacked, however, if they clearly indicate in a timely manner their intention to surrender.⁵⁰⁹

439. France's Disciplinary Regulations as amended states that, under international conventions, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵¹⁰

440. France's LOAC Teaching Note states that "it is prohibited to fire at a person parachuting after having evacuated an aircraft in distress until he lands, unless he uses his weapon. It is, however, allowed to fire at airborne troops still in the air or at all combatants who use their parachute as a means of combat."⁵¹¹

441. France's LOAC Manual provides that "it is . . . prohibited to attack a person parachuting from an aircraft in distress . . . This provision, however, does not apply to airborne troops when they parachute."⁵¹² The manual adds that a person parachuting from an aircraft in distress, "when reaching the ground, . . . may be captured or surrender and thus benefits from the status of prisoner of war.

⁵⁰⁶ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁵⁰⁷ Croatia, *Commanders' Manual* (1992), § 72.

⁵⁰⁸ Dominican Republic, *Military Manual* (1980), p. 5.

⁵⁰⁹ Ecuador, *Naval Manual* (1989), § 11.7.

⁵¹⁰ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁵¹¹ France, *LOAC Teaching Note* (2000), p. 3.

⁵¹² France, *LOAC Manual* (2001), p. 104, see also p. 105.

However, if [the person] resumes combat, he does not benefit from any particular protection, and the enemy may again use arms against him."⁵¹³

442. Germany's Military Manual provides that the armed forces are military objectives, "including paratroops in descent but not crew members parachuting from an aircraft in distress".⁵¹⁴

443. Indonesia's Military Manual specifies that:

Persons who are parachuting in distress should not be attacked. Unless he/she enters into combat, once he/she has landed, he/she should be given the opportunity to surrender. However, during combat, parachuting troops are lawful targets, though they are still in the process of parachuting.⁵¹⁵

444. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "IDF internal regulations and practice prohibit firing upon enemy airmen parachuting from their aircraft in distress (as opposed to offensive para-drop operations)".⁵¹⁶

445. Israel's Manual on the Laws of War states that "it is allowed to fire upon paratrooper forces even when they are still in mid-air".⁵¹⁷

446. Italy's IHL Manual prohibits firing at the crew of an aircraft in distress.⁵¹⁸ It adds that, in other cases, "it is lawful to open fire at enemy soldiers who . . . descend by parachute, isolated or in a group".⁵¹⁹ It also defines intentional homicide and mistreatment of persons parachuting in distress as a war crime.⁵²⁰

447. Italy's LOAC Elementary Rules Manual states that "a combatant who is recognised (or should be recognised) as being out of combat may not be attacked (. . . descending by parachute in distress) may not be attacked".⁵²¹

448. Kenya's LOAC Manual provides that:

A person having parachuted from an aircraft in distress shall [be] given an opportunity to surrender before being attacked, unless he engages himself in a hostile act. This rule prohibits shooting at persons who are escaping from disabled aircraft. On the other hand, members of hostile airborne forces descending by parachute are legitimate military targets.⁵²²

449. Lebanon's Army Regulations and Field Manual provide that it is prohibited to fire at those who parachute in emergency, unless they participate in ongoing operations.⁵²³

⁵¹³ France, *LOAC Manual* (2001), p. 105. ⁵¹⁴ Germany, *Military Manual* (1992), § 442.

⁵¹⁵ Indonesia, *Military Manual* (1982), § 106.

⁵¹⁶ Report on the Practice of Israel, 1997, Chapter 2.1, referring to *Law of War Booklet* (1986), p. 10.

⁵¹⁷ Israel, *Manual on the Laws of War* (1998), p. 43.

⁵¹⁸ Italy, *IHL Manual* (1991), Vol. I, § 8(3). ⁵¹⁹ Italy, *IHL Manual* (1991), Vol. I, § 10.

⁵²⁰ Italy, *IHL Manual* (1991), Vol. I, § 84.

⁵²¹ Italy, *LOAC Elementary Rules Manual* (1991), § 72.

⁵²² Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 6–7, see also Précis No. 2, p. 15.

⁵²³ Lebanon, *Army Regulations* (1971), § 17; *Field Manual* (1996), § 7.

450. Madagascar's Military Manual provides that "a combatant who is recognised (or should be recognised) to be *hors de combat* shall not be attacked (... person descending in distress by parachute)".⁵²⁴

451. Mali's Army Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵²⁵

452. Morocco's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵²⁶

453. The Military Manual of the Netherlands provides that:

No person parachuting from an aircraft in distress shall be made the object of attack during his descent. Upon reaching the ground, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack. An opportunity to surrender must not be given if it is apparent that he is engaging in a hostile act.

Airborne troops are obviously not protected this way.⁵²⁷

454. New Zealand's Military Manual states that:

It is generally considered to be a rule of customary law that aircrew who have bailed out of a damaged aircraft are to be considered as *hors de combat* and immune from attack. By AP I Art. 42, this is made part of treaty law so that such persons are protected during their descent. Should such a person land in the territory of an adverse Party, he must be given an opportunity to surrender before being made the object of an attack, unless it is apparent that he is engaged in a hostile act. If he lands within his own lines or in territory occupied by his own national authority, he is liable to immediate attack like any other combatant, unless he is wounded and so protected by the I GC.

The ban on shooting down those descending by parachute does not extend to the dropping of agents or parachute troops.⁵²⁸

The manual adds that "airmen abandoning aircraft in distress may not be attacked during their descent. Any such attack would, therefore, be a war crime."⁵²⁹

455. Under Nigeria's Manual on the Laws of War, "shooting at survivors of an enemy aircraft that has been hit" is an "illegitimate tactic", while "shooting at enemy paratroopers" is a "legitimate tactic".⁵³⁰

⁵²⁴ Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 17.

⁵²⁵ Mali, *Army Regulations* (1979), Article 36.

⁵²⁶ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁵²⁷ Netherlands, *Military Manual* (1993), p. IV-4.

⁵²⁸ New Zealand, *Military Manual* (1992), § 522.

⁵²⁹ New Zealand, *Military Manual* (1992), § 1704(2)(c), footnote 34.

⁵³⁰ Nigeria, *Manual on the Laws of War* (undated), § 14.

456. Russia's Military Manual provides that "the attack of . . . persons parachuting from an aircraft in distress (with the exception of paratroopers)" is a prohibited method of warfare.⁵³¹

457. Senegal's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to fire at the crew and passengers of civilian or military aircraft parachuting from an aircraft in distress, except when they participate in an airborne operation".⁵³²

458. South Africa's LOAC Manual states that:

Parachutists are presumed to be on military mission and may therefore be targeted during descent. An exception to this presumption is where the parachutists are the crew of a disabled aircraft; they are presumed to be out of combat and may not be targeted unless they show an intent to resist.⁵³³

459. Spain's LOAC Manual provides that persons baling out of an aircraft in distress by parachute may not be attacked during their descent. Furthermore, such persons, "when reaching the ground, shall have the opportunity to surrender before being attacked, unless it is apparent that they are engaged in a hostile act".⁵³⁴ The manual adds that "it is lawful to attack paratroops during their descent".⁵³⁵

460. Sweden's IHL Manual notes that:

Proposals were presented at the [CDDH] to the effect that it should be permitted to employ armed force against a distressed airman expected to land in territory controlled by the enemy. Apart from the practical difficulties in determining whether a distressed parachutist will land on one side of the combat area or on the other, a rule with this content would have highly inhuman effects. These considerations resulted in the proposal being rejected.

During the negotiations [on AP I] it was pointed out that persons seeking to save themselves by parachuting are incapable of any use of weapons during their descent: their sole interest is probably in saving their lives. The situation can of course change when they have reached the ground. This is the background against which Article 42 [AP I] provides protection for distressed persons leaving aircraft in emergency situations. If after landing the person chooses to continue his military resistance, it again becomes permissible to attack him. To avoid the possibility of abuse, it is particularly stated that airborne troops are not protected by the . . . rule.⁵³⁶

461. Switzerland's Basic Military Manual states that:

If the occupants of an aircraft in distress bale out by parachute to save their lives, it is not legitimate to attack them from the ground or from an aircraft during their

⁵³¹ Russia, *Military Manual* (1990), § 5(i).

⁵³² Senegal, *Disciplinary Regulations* (1990), Article 34(2).

⁵³³ South Africa, *LOAC Manual* (1996), § 33.

⁵³⁴ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(1)b), see also § 10.8.f.(1).

⁵³⁵ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.a.(6).

⁵³⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.2, pp. 33–34.

descent. As soon as those persons reach the ground, they may be captured. If they resist or show hostile intent, they may be placed *hors de combat*.

Paratroopers may be placed *hors de combat* even before they reach the ground, whether they parachute alone or in massive groups.⁵³⁷

462. Togo's Military Manual provides that "a person parachuting from an aircraft in distress and who does not commit hostile acts shall not be attacked . . . However, the members of enemy paratroops descending by parachute are legitimate military targets."⁵³⁸

463. The UK Military Manual specifies that:

It is lawful to fire on airborne troops and others engaged, or who appear to be engaged, on hostile missions whilst such persons are descending from aircraft, in particular over territory in control of the opposing forces, whether or not that aircraft has been disabled. It is, on the other hand, unlawful to fire at other persons descending by parachute from disabled aircraft.⁵³⁹

464. The UK LOAC Manual states that the duty to give quarter "prohibits shooting at persons who are escaping from disabled aircraft. On the other hand, members of hostile airborne forces descending by parachute are legitimate military targets."⁵⁴⁰

465. The US Field Manual provides that:

The law of war does not prohibit firing upon paratroops or other persons who are or appear to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute from a disabled aircraft may not be fired upon.⁵⁴¹

466. The US Air Force Pamphlet states that:

When an aircraft is disabled and the occupants escape by parachutes, they should not be attacked in their descent . . . However, persons descending from an aircraft for hostile purposes, such as paratroops or those who appear to be bound upon hostile missions, are not protected. Any person descending from a disabled aircraft who continues to resist may be attacked. Downed enemy airmen from aircraft in distress are subject to immediate capture and can be attacked if they continue to resist or escape or are behind their own lines. Otherwise they should be afforded a reasonable opportunity to surrender.

...

If downed in their own territory, they remain lawful targets, as combatants, unless rendered *hors de combat* by sickness, wounds or other causes . . . If downed in the attacker's territory and subject to capture, the advantages of capture outweigh any minimal advantage secured by attack.⁵⁴²

⁵³⁷ Switzerland, *Basic Military Manual* (1987), Articles 49 and 50.

⁵³⁸ Togo, *Military Manual* (1996), Fascicule II, p. 9.

⁵³⁹ UK, *Military Manual* (1958), § 119, footnote 1(b).

⁵⁴⁰ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(b).

⁵⁴¹ US, *Field Manual* (1956), § 30.

⁵⁴² US, *Air Force Pamphlet* (1976), § 4-2(e), including footnote 14.

467. The US Soldier's Manual provides that:

Individuals parachuting from a burning or disabled aircraft are considered helpless until they reach the ground. You should not fire on them while they are in the air. If they use their weapons or do not surrender upon landing, they must be considered combatants. Paratroopers, on the other hand, are jumping from an airplane to fight. They are targets and you may fire at them while they are still in the air.⁵⁴³

468. The US Rules of Engagement for Operation Desert Storm instruct: "Do not engage anyone who . . . is an aircrew member descending by parachute from a disabled aircraft."⁵⁴⁴

469. The US Naval Handbook states that:

Parachutists descending from disabled aircraft may not be attacked while in the air unless they engage in combatant acts while descending. Upon reaching the ground, such parachutists must be provided an opportunity to surrender. Airborne troops, special warfare infiltrators, and intelligence agents parachuting into combat areas or behind enemy lines are not so protected and may be attacked in the air as well as on the ground. Such personnel may not be attacked, however, if they clearly indicate in a timely manner their intention to surrender.⁵⁴⁵

470. The Annotated Supplement to the US Naval Handbook states that Article 42(1) and (2) AP I codifies the customary rule set out in Article 20 of Part II of the 1923 Hague Rules of Air Warfare. It adds that:

Firing a weapon is clearly a combatant act.

A downed airman, who aware of the presence of enemy armed forces, attempts to evade capture, will probably be considered as engaging in a hostile act and, therefore, subject to attack from the ground or from the air. However, mere movement in the direction of one's own lines does not, by itself, constitute an act of hostilities.⁵⁴⁶

471. The YPA Military Manual of the SFRY (FRY) prohibits attacking persons parachuting from an enemy aircraft in distress and refraining from hostile acts, but specifies that this prohibition "does not apply to airborne invasion, not even when some of the aircraft are damaged before reaching the target area of invasion".⁵⁴⁷

National Legislation

472. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 42 AP I, is a punishable offence.⁵⁴⁸

⁵⁴³ US, *Soldier's Manual* (1984), p. 6.

⁵⁴⁴ US, *Rules of Engagement for Operation Desert Storm* (1991), § A.

⁵⁴⁵ US, *Naval Handbook* (1995), § 11.6.

⁵⁴⁶ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.6, footnotes 39 and 40.

⁵⁴⁷ SFRY (FRY), *YPA Military Manual* (1988), § 69.

⁵⁴⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

473. Italy's Law of War Decree as amended prohibits firing at the crew of an aircraft in distress.⁵⁴⁹ It further provides that, in other cases, "it is lawful to open fire at enemy soldiers who . . . descend by parachute, isolated or in group".⁵⁵⁰

474. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁵⁵¹

National Case-law

475. In the *Dostler case* before the US Military Commission at Rome in 1945, the accused, the commander of a German army corps, was found guilty of having ordered the shooting of 15 American prisoners of war in violation of the 1907 HR and of long-established laws and customs of war. The accused relied on the defence of superior orders based, *inter alia*, on the *Führer's* order of 18 October 1942. This order provided that enemy soldiers participating in commando operations should be given no quarter, but added that these provisions did not apply to aviators who had baled out to save their lives during aerial combat.⁵⁵²

Other National Practice

476. According to the Report on the Practice of Egypt, it is the traditional practice of Egypt to spare persons parachuting in distress. The report notably cites military communiqués issued during the 1973 Middle East War.⁵⁵³ However, during the debates at the CDDH, the Egyptian delegation stated that an "airman who attempted to escape capture should not be protected".⁵⁵⁴

477. The Report on the Practice of Iran cites an Iranian military communiqué of 1980 in which Iran denied allegations by Iraq that "angry mobs ha[d] killed parachuting Iraqis". It asserted that pilots were under the control of the army and well treated.⁵⁵⁵

478. According to the Report on the Practice of Iraq, during the Iran–Iraq War, Iraq issued several military communiqués in which it held Iran responsible for sparing the lives and ensuring the safety of Iraqi pilots parachuting from aircraft in distress.⁵⁵⁶ On the basis of the reply by the Ministry of Defence to a

⁵⁴⁹ Italy, *Law of War Decree as amended* (1938), Article 35(3).

⁵⁵⁰ Italy, *Law of War Decree as amended* (1938), Article 38.

⁵⁵¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁵⁵² US, Military Commission at Rome, *Dostler case*, Judgement, 12 October 1945.

⁵⁵³ Report on the Practice of Egypt, 1997, Chapter 5.1, referring to Military Communiqué No. 34, 13 October 1973 and Military Communiqué No. 46, 18 October 1973.

⁵⁵⁴ Egypt, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, p. 87, § 12.

⁵⁵⁵ Report on the Practice of Iran, 1997, Chapter 2.1, referring to Military Communiqué, 29 September 1980.

⁵⁵⁶ Report on the Practice of Iraq, 1998, Chapter 5.1, referring to Military Communiqué No. 541, 3 December 1981, Military Communiqué No. 683, 1982, Military Communiqué No. 996, 1 February 1983 and Military Communiqué No. 1383, 2 January 1984.

questionnaire, the report also notes that, during the Iran–Iraq War, members of the opposing forces who were *hors de combat*, including pilots parachuting from aircraft in distress, were well treated, without distinction based on military rank or category.⁵⁵⁷

479. The Report on the Practice of Pakistan notes that Indian pilots who parachuted in distress were taken as prisoners of war in the 1965 and 1971 conflicts.⁵⁵⁸

480. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Article 42 AP I, affirmed that “we support the principle that persons, other than airborne troops, parachuting from an aircraft in distress, not be made the object of attack”.⁵⁵⁹

481. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US pointed out that its practice was consistent with the prohibition to attack a pilot parachuting from an aircraft in distress and that the protection applied to all air crew rather than to the pilot only.⁵⁶⁰

III. Practice of International Organisations and Conferences

United Nations

482. No practice was found.

Other International Organisations

483. No practice was found.

International Conferences

484. The Rapporteur of Committee III of the CDDH commented that “the Committee decided not to try to define what constituted a hostile act, but there was considerable support for the view that an airman who was aware of the presence of enemy armed forces and tried to escape was engaging in a hostile act”.⁵⁶¹

IV. Practice of International Judicial and Quasi-judicial Bodies

485. No practice was found.

⁵⁵⁷ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.1.

⁵⁵⁸ Report on the Practice of Pakistan, 1998, Chapter 2.1.

⁵⁵⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

⁵⁶⁰ US, Letter from the Department of the Army to the legal adviser of the US armed forces deployed in the Gulf region, 11 January 1991, § 8(J), Report on US Practice, 1997, Chapter 2.8.

⁵⁶¹ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 386, § 30.

V. Practice of the International Red Cross and Red Crescent Movement

486. The ICRC Commentary on the Additional Protocols states that:

This article [42 AP I] is entirely new. The Hague Regulations of 1907, produced at a time when air warfare did not exist, was obviously not concerned with this problem. However, military manuals already contained prohibitions on firing on airmen in distress, in this way confirming its customary law character.⁵⁶²

The Commentary also states that Article 42(2) AP I

goes further than Article 41 (*Safeguard of an enemy hors de combat*), viz., with regard to the question of surrender. The intent to surrender is assumed to exist in an airman whose aircraft has been brought down, and any attack should be suspended until the person concerned has had an opportunity of making this intention known.

...

A priori, fire must therefore not be opened on the ground against persons who have parachuted from an aircraft in distress, whether they land in or behind the enemy lines. These airmen are presumed to have the intention of surrendering, and all possible measures should be taken to enable this surrender to take place under appropriate conditions.⁵⁶³

487. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

A person who is recognized or who, in the circumstances, should be recognized as being no longer able to participate in combat, shall not be attacked (e.g. . . . descending by parachute from an aircraft in distress).

...

A person having parachuted from an aircraft in distress shall be given an opportunity to surrender before being attacked, unless he appears to engage in a hostile act.⁵⁶⁴

488. In a report submitted to the 21st International Conference of the Red Cross in 1969, the ICRC stated that an "airman in distress, cut off, and not employing any weapon should be respected" and that upon landing, the parachutist should be treated as a prisoner of war.⁵⁶⁵

489. Article 36 of draft AP I submitted by the ICRC at the CE (1972) provided that "the occupants of aircraft in distress who parachute to save their lives, or who are compelled to make a forced landing, shall not be attacked during their

⁵⁶² Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1637.

⁵⁶³ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1644 and 1648.

⁵⁶⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 487 and 489.

⁵⁶⁵ ICRC, Report on the Reaffirmation and Development of Laws and Customs Applicable in Armed Conflicts, May 1969, submitted to the 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, p. 77.

descent or landing unless their attitude is hostile".⁵⁶⁶ The ICRC Commentary on Article 36 of draft AP I stated that:

This article is entirely new. In the era of The Hague, there was no "vertical" dimension to military operations. Consequently, a proposal, which reflects the customs which have grown up since the appearance of air warfare, was formally submitted to the first session of the Conference of Government Experts and at which the situation of airmen in distress was compared to that of the shipwrecked.⁵⁶⁷

VI. Other Practice

490. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that:

Article 42 [AP I] codifies a custom which began among some fighter pilots during World War I who considered it to be unchivalrous and inhumane to attack an adversary while he is parachuting to earth from a disabled observation balloon. The custom was further developed during World War II when the use of parachutes by aviators in fixed wing aircraft became routine. The principle of this custom extended to aircraft, was expressed in Art. 20 of the Hague Air Warfare Rules of 1922/1923, which never went into force. It was also expressed in several military law of war manuals and by important publicists.⁵⁶⁸

⁵⁶⁶ ICRC, Draft Instruments submitted to the Second Session of the Conference of Government Experts, 3 May–3 June 1972, *Report on the Work of the Conference*, Vol. II, Geneva, July 1972, p. 6.

⁵⁶⁷ ICRC, Commentary on draft Article 36 submitted to the Second Session of the Conference of Government Experts, 3 May–3 June 1972, *Commentary*, Vol. II, Part One, Geneva, January 1972, p. 70.

⁵⁶⁸ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 226.

DESTRUCTION AND SEIZURE OF PROPERTY

A. War Booty (practice relating to Rule 49)	§§ 1–49
B. Seizure and Destruction of Property in Case of Military Necessity (practice relating to Rule 50)	§§ 50–243
C. Public and Private Property in Occupied Territory (practice relating to Rule 51)	§§ 244–458
Movable public property in occupied territory	§§ 244–281
Immovable public property in occupied territory	§§ 282–315
Private property in occupied territory	§§ 316–458
D. Pillage (practice relating to Rule 52)	§§ 459–799
General	§§ 459–760
Pillage committed by civilians	§§ 761–799

A. War Booty*I. Treaties and Other Instruments**Treaties*

1. Article 4 of the 1899 HR provides with regard to prisoners of war that “all their personal belongings, except arms, horses, and military papers, remain their property”.
2. Article 4 of the 1907 HR provides with regard to prisoners of war that “all their personal belongings, except arms, horses, and military papers, remain their property”.
3. Article 18, first paragraph, GC III provides that:

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment . . . Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.

Other Instruments

4. According to Article 45 of the 1863 Lieber Code, “all captures and booty belong, according to the modern law of war, primarily to the government of the captor”.

II. National Practice

Military Manuals

5. Argentina's Law of War Manual states, in a paragraph on war booty, that "all movable public property captured or found on the battlefield becomes the property of the capturing state . . . The victorious armed forces may only take possession of privately owned weapons and military documents if the latter are found or seized on the battlefield."¹

6. Australia's Commanders' Guide states that "all enemy military equipment captured or found on a battlefield is known as booty and becomes the property of the capturing State. Booty includes all articles captured with prisoners of war and not included under the term 'personal effects'."² Regarding prisoners of war, the manual states that "the enemy is entitled to confiscate any military documents and equipment".³ It adds that "the practice of military forces converting captured enemy war equipment for their own use is recognised by LOAC. Prior to using captured equipment, enemy designations must be replaced with appropriate ADF markings."⁴

7. Australia's Defence Force Manual states that "all enemy military equipment captured or found on a battlefield is known as booty and becomes the property of the capturing State. Booty includes all articles captured with prisoners of war and not included under the term 'personal effects'."⁵ The manual also provides that:

PW must be allowed to retain:

- a. all their personal property, except vehicles, arms, and other military equipment or documents;
- b. protective equipment, such as helmets or respirators;
- c. clothing or articles used for feeding, even though the property of the government of the PW;
- d. badges of nationality or rank and decorations; and
- e. articles of sentimental value.⁶

8. Belgium's Law of War Manual states that all objects of personal use must be retained by prisoners of war.⁷

9. Belgium's Teaching Manual for Soldiers states that the equipment that is not necessary for the prisoner of war's clothing, food and security, arms and all military documents are to be considered as "war booty" and brought to the superiors.⁸

¹ Argentina, *Law of War Manual* (1969), § 1.020.

² Australia, *Commanders' Guide* (1994), § 967.

³ Australia, *Commanders' Guide* (1994), § 712.

⁴ Australia, *Commanders' Guide* (1994), § 1040.

⁵ Australia, *Defence Force Manual* (1994), § 742, see also § 1224.

⁶ Australia, *Defence Force Manual* (1994), § 1023.

⁷ Belgium, *Law of War Manual* (1983), p. 45.

⁸ Belgium, *Teaching Manual for Soldiers* (undated), p. 20.

10. Benin's Military Manual states that "captured enemy military property (with the exceptions of the means of identification, medical and religious objects, ...) become war booty that can be used without restriction. It belongs to the capturing unit and not to individual combatants."⁹

11. The Instructions to the Muslim Fighter issued by the ARBiH in Bosnia and Herzegovina in 1993 contain the following commentary:

(b) War Booty:

... [I]t is clear that a fifth of war booty shall fall to the State treasury, and the other four-fifths belongs to the soldiers. However, in situations where the soldiers receive pay and in which the State has assumed the obligation to care for the soldiers and their families, ... all war booty shall be placed at the disposal of the State... Because of this the most proper way for the State to dispose of war booty is through its army officers.¹⁰

12. Cameroon's Instructors' Manual states that "captured military objects are war booty. War booty is not regulated by the law of war. It may be utilised without restriction."¹¹

13. Canada's LOAC Manual provides that "all enemy public movable property captured or found on a battlefield is known as 'booty' and becomes the property of the capturing state. Booty includes all articles captured with PWs other than their personal property."¹² It further states that "PWs must be allowed to retain all their personal property, except vehicles, arms, and other military equipment or documents". Protective equipment, clothing, articles used for feeding, badges of nationality or rank, as well as articles of sentimental value, must be left in their possession.¹³ The manual also states that "all property, other than personal property, taken from PWs is known as booty".¹⁴

14. Canada's Code of Conduct provides that "it is prohibited to return to Canada with weapons or ammunition as 'war trophies'. CF personnel who attempt to return to Canada with such items may also run afoul of Canadian criminal and customs laws."¹⁵ With regard to the surrendered enemy, the manual states that:

Disarming includes the search for and the taking away of equipment and documents of military value (e.g., weapons, ammunition, maps, orders, code books, etc.). The following material must remain with the PW or detainee:

⁹ Benin, *Military Manual* (1995), Fascicule II, p. 13.

¹⁰ Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.

¹¹ Cameroon, *Instructors' Manual* (1992), p. 45, § 163.5, see also p. 96.

¹² Canada, *LOAC Manual* (1999), p. 6-5, § 48, see also p. 12-8, § 67.

¹³ Canada, *LOAC Manual* (1999), p. 10-3, § 27.

¹⁴ Canada, *LOAC Manual* (1999), p. 10-4, § 29.

¹⁵ Canada, *Code of Conduct* (2001), Rule 3, § 12.

a. identification documents/discs;
 b. clothing, items for personal use, or items used for feeding; and
 c. items for personal protection (i.e., helmet, gas mask, flak jacket, etc.) . . .
 Only an officer may order the removal of sums of money and valuables for safe-keeping. If such action is taken, a receipt must be issued and the details recorded in a special register.¹⁶

15. The Military Manual of the Dominican Republic states that:

After you have secured, silenced and segregated captives, you may search for items of military value only (weapons, maps or military documents).

It is a violation of the law of war to take from captives objects such as gas masks, mosquito nets or parkas, or objects of no military value, such as jewellery, photos or medals.¹⁷

16. France's LOAC Manual incorporates the content of Article 18 GC III. It adds that:

Captured enemy military objects (with the exceptions of means of identification, cultural property, medical and religious objects and those necessary for the feeding, clothing and protection of captured enemy personnel) *de facto* become war booty (e.g. arms, combat transports and vehicles). They may be used without restriction, and there exists a well established custom according to which all public property which may be used for military operations (arms, ammunitions, military material, etc.) which is captured must not be given back to the adversary.¹⁸

17. Germany's Military Manual states that:

Movable government property which may be used for military purposes shall become spoils of war . . . Upon seizure it shall, without any compensation, become the property of the occupying state. Such property includes, for instance, means of transport, weapons, and food supplies . . . The latter shall not be requisitioned unless the requirements of the civilian population have been taken into account . . . The requirements of the civilian population shall be satisfied first.¹⁹

The manual further states that:

Prisoners of war shall be disarmed and searched. Their military equipment and military documents shall be taken away from them . . .

Prisoners of war shall keep all effects and articles of personal use, their metal helmets and NBC protective equipment as well as all effects and articles used for their clothing and feeding . . . Prisoners of war shall keep their badges of rank and nationality, their decorations and articles of personal or sentimental value.²⁰

¹⁶ Canada, *Code of Conduct* (2001), Rule 5, § 5 and Rule 6, § 5.

¹⁷ Dominican Republic, *Military Manual* (1980), p. 8.

¹⁸ France, *LOAC Manual* (2001), p. 48.

¹⁹ Germany, *Military Manual* (1992), § 556, see also § 448 (downed aircraft becoming spoils of war) and § 1021 (seizure of military aircraft).

²⁰ Germany, *Military Manual* (1992), §§ 706 and 707.

18. Hungary's Military Manual states that "captured enemy military property becomes war booty and the property of the captor".²¹

19. Israel's Manual on the Laws of War states that "it is prohibited to take away prisoners' personal effects and especially their identity papers, as well as the self-defense equipment (except weapons) issued to them by their army (gas masks, plastic sheets, steel helmets)".²² It also provides that:

Over the years, the weapons arsenal of the IDF has grown as a result of capturing spoils courtesy of the Arab armies. Some of them, such as the RPG and Kalashnikov, the T-54, 'Ziel' trucks and 130 mm guns were even introduced into operational use in the IDF.

Other interesting items include an Iraqi MIG 21 plane, whose pilot defected to Israel, and guns captured in the Yom Kippur War and subsequently directed against the Egyptians. The crowning achievement was the case involving the capture of an Egyptian radar coach in the War of Attrition, brought intact to Israel.

One must distinguish between looting and taking spoils of war. Seized weapons, facilities, and property belonging to the enemy's army or state become the property of the seizing state.²³

20. Kenya's LOAC Manual states, with regard to captured enemy combatants and military objects, that:

Disarming comprises the search for and the taking away of equipment and documents of military value (e.g. ammunition, maps, orders, telecommunication material and codes). Such equipment and documents become war booty.

A POW is entitled to keep his identity card and identity disc, his personal property, decorations, badges of rank, articles of sentimental value and military clothing and protective equipment such as steel helmet, gas mask and NBC clothing . . .

Captured enemy military objects (except means of identification, medical and religious objects and those necessary for clothing, feeding and the protection of captured personnel) become war booty (e.g. objects of military value taken from captured enemy military personnel, other military material such as weapons, transport, store goods). War booty may be used without restriction. It belongs to the capturing Party, not to individual combatants.²⁴

21. Madagascar's Military Manual states that "captured enemy military objects become war booty. War booty may be used without restriction. It belongs to the capturing power and not to individual combatants."²⁵

22. The Military Manual of the Netherlands provides that:

Military material (weapons and ammunition in the first place) and other goods destined for military use (including stored goods) may be captured [as well as] goods of military significance which have been taken from prisoners. Medical goods and goods necessary to feed, clothe and otherwise protect prisoners do not constitute

²¹ Hungary, *Military Manual* (1992), p. 78, see also p. 88.

²² Israel, *Manual on the Laws of War* (1998), p. 52.

²³ Israel, *Manual on the Laws of War* (1998), p. 63.

²⁴ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 7 and 8.

²⁵ Madagascar, *Military Manual* (1994), Fiche No. 6-SO, § D.

booty. Captured goods belong to the party to the armed conflict which has captured them and not to individual combatants. Captured goods may be used without restriction.²⁶

The manual further provides that “appropriation of personal property of prisoners of war” is an “ordinary breach” of the law of war.²⁷

23. New Zealand’s *Military Manual* states that “all enemy public movable property captured or found on the battlefield is known as ‘booty’ and becomes the property of the capturing state. Booty includes all articles captured with prisoners of war and not included under the term ‘personal effects’.”²⁸ Furthermore, all personal property, effects and articles of personal use, except vehicles, arms, military equipment and documents, must be left in the possession of prisoners of war. They are also entitled to keep protective gear such as helmets and gas masks, articles used for clothing or feeding, badges of nationality or rank, articles of sentimental value and identity documents.²⁹

24. Nigeria’s *Manual on the Laws of War* provides that “all articles of personal use and items such as gas masks and steel helmets given to the prisoners of war for self-protection, excluding military equipment and military documents, must be left in their possession”.³⁰

25. Spain’s *LOAC Manual* states that enemy military objects may be captured and requisitioned. Captured enemy military objects become the property of the captor State and not of individual combatants.³¹

26. Togo’s *Military Manual* states that “captured enemy military property (with the exceptions of the means of identification, medical and religious objects, . . .) become war booty that can be used without restriction. It belongs to the capturing unit and not to individual combatants.”³²

27. The UK *Military Manual* specifies that “all articles captured with prisoners of war and not included under the term ‘personal effects’ are known as ‘booty’ and become the property of the enemy government and not of the individuals or unit capturing them”.³³ It also provides that:

Public enemy property found or captured on a battlefield becomes, as a general rule, the property of the opposing belligerent. Private enemy property on the battlefield is not (as it was in former times) in every case booty. Arms and ammunition and military equipment and papers are booty, even if they are the property of individuals, but cash, jewellery, and other private articles of value are not.³⁴

²⁶ Netherlands, *Military Manual* (1993), p. IV-5.

²⁷ Netherlands, *Military Manual* (1993), p. IX-6.

²⁸ New Zealand, *Military Manual* (1992), § 526, see also §§ 715 and 920(3) (capture of enemy military aircraft and auxiliaries outside neutral jurisdiction) and § 1334.

²⁹ New Zealand, *Military Manual* (1992), § 527, see also § 920(1).

³⁰ Nigeria, *Manual on the Laws of War* (undated), § 39.

³¹ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.b.(3).

³² Togo, *Military Manual* (1996), Fascicule II, p. 13.

³³ UK, *Military Manual* (1958), § 142. ³⁴ UK, *Military Manual* (1958), § 615.

28. The UK LOAC Manual states that:

PWs should be searched and disarmed and their military papers and equipment removed.

... A PW is entitled to keep his identity card, his personal property, decorations, badges of rank, articles of sentimental value and military clothing and protective equipment such as steel helmets, gas masks and NBC clothing.³⁵

29. The US Field Manual, in a paragraph entitled "Booty of war", provides that:

All enemy public movable property captured or found on a battlefield becomes the property of the capturing State... Enemy private movable property, other than arms, military papers, horses, and the like captured or found on a battlefield, may be appropriated only to the extent that such taking is permissible in occupied areas.³⁶

Concerning the property of prisoners, the manual specifies that:

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regular military equipment.³⁷

30. The US Soldier's Manual states that:

After you have secured, silenced, and segregated captives, you may search them for items of military or intelligence value only, such as weapons, maps, or military documents. Do not take protective items, such as gas masks, mosquito nets, or parkas; or personal items of no military value such as jewelry, photos, or medals from captured or detained personnel.³⁸

31. The US Instructor's Guide provides that:

[Prisoners of war] are entitled to retain most of [their] personal property. The conventions provide that all effects and articles of personal use, except arms, military equipment, and military documents, must remain in the possession of the prisoner unless he could use them to harm himself or others. Articles issued for the prisoner's personal protection, such as gas masks and metal helmets, may also be retained by him.³⁹

32. The US Rules of Engagement for Operation Desert Storm states that "the taking of war trophies [is] prohibited".⁴⁰

³⁵ UK, *LOAC Manual* (1981), Section 8, p. 29, §§ 10 and 11.

³⁶ US, *Field Manual* (1956), § 59(a) and (b), see also § 396.

³⁷ US, *Field Manual* (1956), § 94, see also § 59(c).

³⁸ US, *Soldier's Manual* (1984), p. 19. ³⁹ US, *Instructor's Guide* (1985), p. 11.

⁴⁰ US, *Rules of Engagement for Operation Desert Storm* (1991), Point F.

National Legislation

33. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴¹

34. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 18 GC III, is a punishable offence.⁴²

35. Italy's Law of War Decree provides that enemy military aircraft are subject to capture and confiscation.⁴³

36. Mexico's Code of Military Justice as amended punishes "anyone who improperly appropriates objects belonging to the booty of war".⁴⁴

37. Norway's Military Penal Code as amended punishes any "combatant who arbitrarily (in his own self-interest) seeks to take booty", as well as "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949".⁴⁵

38. The Articles of War of the Philippines states that:

Any person subject to military law who buys, sells, trades, or in any way deals in or disposes of captured or abandoned property, whereby he shall receive or expect any profit, benefit, or advantage to himself or to any other person directly or indirectly connected with himself or who fails whenever such property comes into his possession or custody or within his control to give notice thereof to the proper authority and to turn over such property to the proper authority without delay, shall, on conviction thereof, be punished by fine or imprisonment.⁴⁶

National Case-law

39. In the *Al-Nawar case* before Israel's High Court in 1985, Judge Shamgar held that:

All movable State property captured on the battlefield may be appropriated by the capturing belligerent State as booty of war, this includes arms and ammunition, depots of merchandise, machines, instruments and even cash.

All private property actually used for hostile purposes found on the battlefield or in a combat zone may be appropriated by a belligerent State as booty of war.⁴⁷

40. The Report on UK Practice refers to a letter from a UK army lawyer which noted that UK courts-martial were held following the Gulf War for the smuggling of AK-47s.⁴⁸

⁴¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴³ Italy, *Law of War Decree* (1938), Article 239.

⁴⁴ Mexico, *Code of Military Justice as amended* (1933), Article 336(I).

⁴⁵ Norway, *Military Penal Code as amended* (1902), §§ 106 and 108(a).

⁴⁶ Philippines, *Articles of War* (1938), Article 81.

⁴⁷ Israel, High Court, *Al-Nawar case*, Judgement, 11 August 1985.

⁴⁸ Report on UK Practice, 1997, Letter from an army lawyer, 24 February 1998, Answers to additional questions on Chapter 2.3.

41. In the *Morrison case* in 1974, the US Court of Claims denied a claim of a former soldier who had discovered \$50,000 in an area abandoned by the enemy. The Court held that the soldier had taken possession of the money solely as an agent of the US and had no legal basis to claim its return.⁴⁹

42. Smith reported that, in the *Le Havre Currency case*, a German military garrison commander had the authority to draw upon the local branch of the Bank of France for funds, the normal limit being 100,000,000 francs a month. When the town was cut off by the Allied advance, the commander persuaded the bank manager to grant a large overdraft. It is doubtful whether the manager had much of an option in the matter, but there was at least formal consent and a receipt was given. Under this arrangement, a sum of 300,000,000 francs was withdrawn. When surrender became imminent, a sum of 195,000,000 francs was returned to the bank, and the remainder, some 37,250,000 francs was packed in bags for return. Le Havre was captured by assault before this money was in fact returned to the bank and the bags were found in a tunnel. Further sums amounting to over 15,000,000 francs were found in various safes. It was ruled that the captured currency was booty of war, and not the property of the bank. Whether the transaction may be regarded as a money contribution or as an overdraft, in either case its legal result was to create a debt due by the German government to the Bank of France. The actual money became the property of the Reich as soon as it was handed over to the German authorities and it remained German State property until it was returned to the bank. The fact that the commander intended to return the money and had begun to do so did not change this.⁵⁰

43. Smith reported that, in the *Cigars Captured in Hapert case*, a German firm delivered to a Dutch manufacturer a large quantity of leaf tobacco to be made into cigars for the German forces. No payment for the leaf tobacco was made by the manufacturer. When the factory was overrun, some 2,000,000 cigars were found ready for dispatch and enough leaf tobacco remained for 5,000,000 more. In this case, both the manufactured cigars and the leaf tobacco were clearly booty of war. The legal position of the manufacturer was that of a workman who had been employed to work upon German materials for German use.⁵¹

44. Smith reported that during the Second World War, the Germans frequently supplied seed to Dutch farmers to raise crops for consumption by the German army or civilian population. It was ruled that in no circumstances could growing crops be treated as booty of war. Only crops that had been requisitioned by the Germans could be seized as booty of war.⁵²

Other National Practice

45. The Report on UK Practice refers to a letter from a UK army lawyer which noted that:

⁴⁹ US, Court of Claims, *Morrison case*, Judgement, 20 February 1974.

⁵⁰ H. A. Smith, *Booty of War*, *BYIL*, Vol. XXIII, 1946, pp. 232–234.

⁵¹ H. A. Smith, *Booty of War*, *BYIL*, Vol. XXIII, 1946, pp. 232–234.

⁵² H. A. Smith, *Booty of War*, *BYIL*, Vol. XXIII, 1946, pp. 232–234.

The current view seems to be that units may lawfully seize enemy property *on the battlefield* and retain it as booty, but individuals doing the same run the risk of being charged with looting. Retention by units and formations of booty is subject to approval by Government whereas appropriation of property by individuals on the battlefield is strictly illegal.⁵³ [emphasis in original]

III. Practice of International Organisations and Conferences

46. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

47. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

48. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Captured enemy military objects (except means of identification, medical and religious objects and those necessary for clothing, feeding and the protection of captured personnel) become war booty (e.g. objects of military value taken from captured enemy military personnel, other military material such as weapons, transports, store goods).

War booty may be used without restriction. It belongs to the capturing party, not to individual combatants.⁵⁴

VI. Other Practice

49. No practice was found.

B. Seizure and Destruction of Property in Case of Military Necessity

I. Treaties and Other Instruments

Treaties

50. Under Article 23(g) of the 1899 HR, it is especially prohibited “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”.

51. Under Article 23(g) of the 1907 HR, it is especially forbidden “to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”.

⁵³ Report on UK Practice, 1997, Letter from an army lawyer, 24 February 1998, Answers to additional questions on Chapter 2.3.

⁵⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 526.

52. Article 6(b) of the 1945 IMT Charter (Nuremberg) lists “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” as a war crime.

53. Articles 50 GC I, 51 GC II and 147 GC IV provide that “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” are grave breaches.

54. Article 53 GC IV stipulates that:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.

55. Under Article 8(2)(a)(iv) of the 1998 ICC Statute, “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is a war crime in international armed conflicts. Under Article 8(2)(b)(xiii), “destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war” is also a war crime in international armed conflicts.

56. Under Article 8(2)(e)(xii) of the 1998 ICC Statute, “destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict” is a war crime in non-international armed conflicts.

Other Instruments

57. Article 15 of the 1863 Lieber Code states that “military necessity . . . allows of all destruction of property”.

58. Article 16 of the 1863 Lieber Code states that “military necessity . . . does not admit . . . of the wanton devastation of a district”.

59. Article 44 of the 1863 Lieber Code provides that “all destruction of property not commanded by the authorized officer . . . are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.”

60. Article 13(g) of the 1874 Brussels Declaration prohibits “any destruction or seizure of the enemy’s property that is not imperatively demanded by the necessity of war”.

61. Article 18 of the 1913 Oxford Manual of Naval War provides that “it is forbidden to destroy enemy property, except in the cases where such destruction is imperatively required by the necessities of war”.

62. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “confiscation of property” and “wanton devastation and destruction of property”.

63. Article II(1)(b) of the 1945 Allied Control Council Law No. 10 listed the “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” as a war crime.

64. Principle VI(b) of the 1950 Nuremberg Principles adopted by the ILC provides that “wanton destruction of cities, towns, or villages, or devastation not justified by military necessity” is a war crime.

65. Pursuant to Article 22(2)(e) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, “large-scale destruction of civilian property” is an “exceptionally serious war crime”.

66. Article 2(d) of the 1993 ICTY Statute gives the Tribunal jurisdiction over grave breaches of the Geneva Conventions, including “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”. Article 3(b) also gives also the Tribunal jurisdiction over violations of the laws and customs of war, including “wanton destruction of cities, towns or villages, or devastation not justified by military necessity”.

67. Article 20(a)(iv) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is a war crime. In addition, Article 20(e)(ii) defines “wanton destruction of cities, towns or villages, or devastation not justified by military necessity” as a war crime.

68. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(iv), “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly” is a war crime in international armed conflicts. According to Section 6(1)(b)(xiii), “destroying or seizing the enemy’s property unless such destruction or seizure be imperatively demanded by the necessities of war” is also a war crime in international armed conflicts.

69. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(e)(xii), “destroying or seizing the property of an adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict” is a war crime in non-international armed conflicts.

II. National Practice

Military Manuals

70. Argentina’s Law of War Manual (1969) states that “the destruction of enemy property shall be permissible, as required by military operations”.⁵⁵ It adds that it is prohibited “to appropriate immovable enemy property, except when the

⁵⁵ Argentina, *Law of War Manual* (1969), § 1.018.

appropriation is strictly necessary for reasons of military necessity".⁵⁶ With regard to occupied territory, the manual provides that:

Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations.⁵⁷

71. Argentina's Law of War Manual (1989) provides that "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" are grave breaches of the Geneva Conventions and war crimes.⁵⁸

72. Australia's Commanders' Guide states that "the destruction or seizure of civilian property, whether it belongs to private individuals or the State, is forbidden unless the damage or seizure is imperative for military purposes".⁵⁹ It further states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . extensive destruction and appropriation of property which is not justified by military necessity and which is carried out unlawfully and wantonly".⁶⁰

73. Australia's Defence Force Manual states that "the destruction or seizure of civilian property, whether it belongs to private individuals or to the state, to other public authorities or to social or cooperative organisations, is permitted if imperative for military purposes. Otherwise such action is forbidden."⁶¹ As a general rule, "it is forbidden to destroy or requisition enemy property unless it is militarily necessary to do so".⁶² The manual further states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . extensive destruction and appropriation of property which is not justified by military necessity and which is carried out unlawfully and wantonly".⁶³

74. Belgium's Law of War Manual provides that "extensive destruction or appropriation of property not justified by military necessity and carried out unlawfully and wantonly" is a grave breach of the Geneva Conventions and a war crime.⁶⁴

75. Belgium's Teaching Manual for Soldiers states that "civilian property is, in principle, not to be destroyed except as strictly necessary to the execution of the mission".⁶⁵

⁵⁶ Argentina, *Law of War Manual* (1969), § 1.019.

⁵⁷ Argentina, *Law of War Manual* (1969), § 5.013.

⁵⁸ Argentina, *Law of War Manual* (1989), § 8.03.

⁵⁹ Australia, *Commanders' Guide* (1994), § 966.

⁶⁰ Australia, *Commanders' Guide* (1994), § 1305(c).

⁶¹ Australia, *Defence Force Manual* (1994), § 740.

⁶² Australia, *Defence Force Manual* (1994), § 923.

⁶³ Australia, *Defence Force Manual* (1994), § 1315(c).

⁶⁴ Belgium, *Law of War Manual* (1983), p. 55.

⁶⁵ Belgium, *Teaching Manual for Soldiers* (undated), p. 7, see also p. 21.

76. Benin's Military Manual provides that "destruction not motivated by military necessity is . . . prohibited".⁶⁶ It further emphasises that "the combatant must . . . limit destruction according to the necessities of the mission".⁶⁷

77. Cameroon's Instructors' Manual provides that the destruction or seizure of property is prohibited except in case of imperative military necessity.⁶⁸

78. Canada's LOAC Manual states that "the destruction or seizure of enemy property, whether it belongs to private individuals or to the state, is forbidden unless the damage or seizure is imperatively demanded by the necessities of war".⁶⁹ It also provides that, in occupied territory:

Destruction is the partial or total damage of property. Property of any type of ownership may be damaged when such is necessary to, or results from, military operations either during or preparatory to combat. Destruction is forbidden except where there is some reasonable connection between the destruction of the property and the overcoming of the enemy forces.⁷⁰

The manual further states that "destroying or seizing enemy property, unless imperatively demanded by the necessities of war," constitutes a war crime.⁷¹ It also states that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," are grave breaches of the Geneva Conventions and war crimes.⁷²

79. Canada's Code of Conduct provides for respect for civilian property. It states that:

Military necessity may sometimes require the destruction of some civilian property in order to conduct operations. This destruction should not be done needlessly. The wanton destruction, theft or confiscation of civilian property is prohibited and is an offence under the Code of Service Discipline.⁷³

80. Under Colombia's Directive on IHL, "extensive destruction and appropriation of property, when not justified by military necessity and executed unlawfully and wantonly," is a punishable offence.⁷⁴

81. Croatia's Commanders' Manual provides that "destruction not required by the mission . . . is prohibited".⁷⁵

82. The Military Manual of the Dominican Republic instructs soldiers as follows:

The laws [of war] require that you do not cause more destruction than necessary to accomplish your mission . . . Don't destroy an entire town or village to stop sniper

⁶⁶ Benin, *Military Manual* (1995), Fascicule III, p. 4.

⁶⁷ Benin, *Military Manual* (1996), Fascicule I, p. 17, see also Fascicule II, p. 18.

⁶⁸ Cameroon, *Instructors' Manual* (1992), p. 90, § 223.

⁶⁹ Canada, *LOAC Manual* (1999), p. 6-5, § 47.

⁷⁰ Canada, *LOAC Manual* (1999), p. 12-8, § 68.

⁷¹ Canada, *LOAC Manual* (1999), p. 16-3, § 20(g).

⁷² Canada, *LOAC Manual* (1999), p. 16-2, §§ 8(a) and 12.

⁷³ Canada, *Code of Conduct* (2001), Rule 4, § 5.

⁷⁴ Colombia, *Directive on IHL* (1993), Section III(D).

⁷⁵ Croatia, *Commanders' Manual* (1992), § 18.

fire from a single building. Use only that firepower necessary to neutralise the sniper.⁷⁶

The manual also provides that “unnecessary destruction of property [is a violation] of the law of war for which you can be prosecuted”.⁷⁷

83. Ecuador’s Naval Manual provides that “the following acts constitute war crimes: . . . wanton destruction of cities, towns, and villages [and] devastation not justified by the requirements of military operations”.⁷⁸

84. France’s Disciplinary Regulations as amended states that, under international conventions, “any wanton destruction” is prohibited.⁷⁹

85. France’s LOAC Summary Note provides that “destructions not required by the mission . . . are forbidden”.⁸⁰ It adds that “extensive destruction and appropriation of property not justified by military necessities and carried out unlawfully and wantonly” are grave breaches of the law of war and war crimes.⁸¹

86. France’s LOAC Teaching Note provides that “destruction not required by the mission is forbidden”.⁸² It further states that “extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly” are grave breaches of the law of armed conflict and war crimes.⁸³

87. France’s LOAC Manual states that “extensive destruction or appropriation of property, not justified by military necessity, and carried out unlawfully and wantonly” is a war crime for which there is no statute of limitation under the 1998 ICC Statute.⁸⁴

88. Germany’s Military Manual states that “the Hague Regulations . . . prohibit the destruction or seizure of enemy property, ‘unless such destruction or seizure be imperatively demanded by the necessity of war’”.⁸⁵ The manual further states that “grave breaches of international humanitarian law are in particular: . . . destruction or appropriation of goods, carried out unlawfully and wantonly without any military necessity”.⁸⁶

89. Indonesia’s Directive on Human Rights in Irian Jaya and Maluku gives the following instructions: “Do not be involved in or permit the unnecessary destruction of property” and “Do not destroy anything which is not related closely to the primary objective of the operation”.⁸⁷

90. Israel’s Manual on the Laws of War states that “unnecessary destruction of enemy property is forbidden . . . The only restriction is to refrain from destroying property senselessly, where there is no military justification.”⁸⁸

⁷⁶ Dominican Republic, *Military Manual* (1980), pp. 3–4.

⁷⁷ Dominican Republic, *Military Manual* (1980), p. 9.

⁷⁸ Ecuador, *Naval Manual* (1989), § 6.2.5(6).

⁷⁹ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁸⁰ France, *LOAC Summary Note* (1992), § 1.7.

⁸¹ France, *LOAC Summary Note* (1992), § 3.4.

⁸³ France, *LOAC Teaching Note* (2000), p. 7.

⁸⁵ Germany, *Military Manual* (1992), § 132.

⁸⁷ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 9.

⁸⁸ Israel, *Manual on the Laws of War* (1998), p. 62.

⁸² France, *LOAC Teaching Note* (2000), p. 2.

⁸⁴ France, *LOAC Manual* (2001), p. 45.

⁸⁶ Germany, *Military Manual* (1992), § 1209.

91. Italy's IHL Manual states that "it is specifically prohibited . . . to destroy or seize enemy property, unless it is imperatively demanded by the necessities of war".⁸⁹ The manual further states that "purposeless destruction of houses and devastation not justified by military necessity" constitute war crimes.⁹⁰ It also states that the occupying State has the obligation "not to destroy movable and immovable property belonging to private persons, to the occupied State and other public organisations or cooperatives . . . except in case of absolute military necessity".⁹¹

92. Italy's LOAC Elementary Rules Manual provides that "superfluous destruction . . . is prohibited".⁹² It also instructs troops, as a rule for behaviour in action, to "restrict destruction to what your mission requires".⁹³

93. Kenya's LOAC Manual provides that "civilian property is not to be destroyed except when this is strictly necessary for the execution of the mission".⁹⁴ It also states that "it is forbidden to destroy or requisition enemy property unless it is militarily necessary to do so".⁹⁵

94. Under South Korea's Military Regulation 187, meaningless destruction is a war crime.⁹⁶

95. Lebanon's Army Regulations and Field Manual prohibit destruction which is not rendered necessary by military operations.⁹⁷

96. Madagascar's Military Manual states that destruction which is not required by the mission is prohibited.⁹⁸

97. The Military Manual of the Netherlands considers that "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" is a grave breach of the Geneva Conventions.⁹⁹ It adds that "the damaging of a civilian object without necessity" is an "ordinary breach" of the law of war.¹⁰⁰

98. New Zealand's Military Manual provides that "the destruction or seizure of enemy property, whether it belongs to private individuals or to the State, is forbidden unless the damage or seizure is imperatively demanded by the necessities of war".¹⁰¹ The manual further states that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," is a grave breach of the Geneva Conventions and a war crime.¹⁰² It also states that "destroying or seizing enemy property, unless

⁸⁹ Italy, *IHL Manual* (1991), Vol. I, § 8(8).

⁹⁰ Italy, *IHL Manual* (1991), Vol. I, § 84.

⁹¹ Italy, *IHL Manual* (1991), Vol. I, § 48(12).

⁹² Italy, *LOAC Elementary Rules Manual* (1991), § 18.

⁹³ Italy, *LOAC Elementary Rules Manual* (1991), § 29.

⁹⁴ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

⁹⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 3.

⁹⁶ South Korea, *Military Regulation 187* (1991), Article 4.2.

⁹⁷ Lebanon, *Army Regulations* (1971), § 17; *Field Manual* (1996), § 8.

⁹⁸ Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 18.

⁹⁹ Netherlands, *Military Manual* (1993), pp. IX-4 and IX-5.

¹⁰⁰ Netherlands, *Military Manual* (1993), p. IX-6.

¹⁰¹ New Zealand, *Military Manual* (1992), § 525.

¹⁰² New Zealand, *Military Manual* (1992), §§ 1701(1) and 1702(1).

imperatively demanded by the necessities of war" constitutes a war crime.¹⁰³ In addition, in the case of occupied territory, the manual states that:

Destruction of property may be partial or total. Property of any type of ownership may be damaged, when this is necessary to, or results from, military operations either during or preparatory to combat. Destruction is forbidden except where there is some reasonable connection between the destruction of the property and the overcoming of the enemy forces.¹⁰⁴

99. Nigeria's Operational Code of Conduct gives the following directive: "No property, building, etc. will be destroyed maliciously".¹⁰⁵

100. Nigeria's Military Manual states that "destruction should be limited to what a particular mission requires".¹⁰⁶ It adds that it is prohibited "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessity of war".¹⁰⁷

101. Nigeria's Manual on the Laws of War states that "as a rule, extensive destruction of property on enemy territory, whether it is the property of the state or the property of individuals, is forbidden. Destruction is permitted only in case of military necessity."¹⁰⁸ The manual also states that grave breaches of the Geneva Conventions are considered serious war crimes, including "extensive destruction and confiscation of property not justified by military necessity".¹⁰⁹

102. Nigeria's Soldiers' Code of Conduct states that "destruction should be limited to what the particular mission requires".¹¹⁰ It is also prohibited "to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".¹¹¹

103. Peru's Human Rights Charter of the Security Forces provides that it is forbidden to cause more destruction than is required by the mission.¹¹²

104. The Soldier's Rules of the Philippines instructs soldiers: "Destroy no more than your mission requires."¹¹³

105. Romania's Soldiers' Manual instructs combatants: "Limit destruction to what is required by your mission."¹¹⁴

106. Russia's Military Manual provides that "destruction or seizure of enemy property, unless such actions are required by military necessity," are prohibited methods of warfare.¹¹⁵

¹⁰³ New Zealand, *Military Manual* (1992), § 1704(2)(g).

¹⁰⁴ New Zealand, *Military Manual* (1992), § 1335.

¹⁰⁵ Nigeria, *Operational Code of Conduct* (1967), § 4(f).

¹⁰⁶ Nigeria, *Military Manual* (1994), p. 39, § 5(d).

¹⁰⁷ Nigeria, *Military Manual* (1994), p. 40, § 5(l)(vi).

¹⁰⁸ Nigeria, *Manual on the Laws of War* (undated), § 29.

¹⁰⁹ Nigeria, *Manual on the Laws of War* (undated), § 6.

¹¹⁰ Nigeria, *Soldiers' Code of Conduct* (undated), § 4.

¹¹¹ Nigeria, *Soldiers' Code of Conduct* (undated), § 12(c).

¹¹² Peru, *Human Rights Charter of the Security Forces* (1991), p. 11.

¹¹³ Philippines, *Soldier's Rules* (1989), § 3.

¹¹⁴ Romania, *Soldiers' Manual* (1991), p. 4.

¹¹⁵ Russia, *Military Manual* (1990), § 5(j).

107. Senegal's Disciplinary Regulations states that, under the laws and customs of war, "any wanton destruction" is forbidden.¹¹⁶

108. South Africa's LOAC Manual states that soldiers must "restrict destruction to that required by the mission".¹¹⁷ It also considers "purposeless destruction" and "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," to be grave breaches of the Geneva Conventions and war crimes.¹¹⁸

109. Spain's LOAC Manual provides that "destruction and appropriation of civilian property, which are not justified by military necessity or by combat operations, are prohibited".¹¹⁹ It further states that "destruction not required by the mission is prohibited".¹²⁰ The manual also considers the "extensive destruction and appropriation of property not justified by military necessity" to be grave breaches and war crimes.¹²¹

110. Sweden's IHL Manual states that "according to [the 1907 HR], it is prohibited to destroy or confiscate an enemy's belongings so long as this is not absolutely necessary as a consequence of the demands of war".¹²² It adds that, "in most cases, property of importance for the adversary's military operations can be eliminated by destruction or confiscation (= capture)".¹²³ The manual also regards "illegal, extensive and arbitrary destruction and appropriation of property where this is not justified by military necessity" as a grave breach of the Geneva Conventions.¹²⁴

111. Switzerland's Basic Military Manual provides that "it is prohibited to destroy or seize enemy property except in cases where such destruction and seizure are imperatively demanded by the necessities of war".¹²⁵ It adds that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," is a grave breach of the Geneva Conventions and a war crime.¹²⁶

112. Togo's Military Manual provides that "destruction not motivated by military necessity is...prohibited".¹²⁷ It further emphasises that "the combatant must...limit destruction according to the necessities of the mission".¹²⁸

113. The UK Military Manual recalls that "the destruction or seizure of enemy property, whether it belongs to private individuals or to the State, is forbidden

¹¹⁶ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

¹¹⁷ South Africa, *LOAC Manual* (1996), § 25(d).

¹¹⁸ South Africa, *LOAC Manual* (1996), §§ 39(h), 40 and 41.

¹¹⁹ Spain, *LOAC Manual* (1996), Vol. I, § 2.4.b.(1).

¹²⁰ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.b.

¹²¹ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

¹²² Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 52.

¹²³ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 54 and 55.

¹²⁴ Sweden, *IHL Manual* (1991), Section 4.2, p. 93.

¹²⁵ Switzerland, *Basic Military Manual* (1987), Article 21.

¹²⁶ Switzerland, *Basic Military Manual* (1987), Article 192(d).

¹²⁷ Togo, *Military Manual* (1996), Fascicule III, p. 4.

¹²⁸ Togo, *Military Manual* (1996), Fascicule I, p. 18, see also Fascicule II, p. 18.

unless the damage or seizure is imperatively demanded by the necessities of war".¹²⁹ It also provides that "once a defended locality has surrendered, only such further damage is permitted as is demanded by the exigencies of war, for example, the removal of the fortifications, demolition of military buildings, destruction of stores, and measures for clearing the foreground".¹³⁰ In addition, "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly" constitute grave breaches of the Geneva Conventions and war crimes.¹³¹

114. The UK LOAC Manual provides that "it is forbidden to destroy or requisition enemy property unless it is militarily necessary to do so".¹³² It also contains a rule for non-commissioned officers, stating that "enemy property is not to be taken, damaged or destroyed unless there is a military need to do so".¹³³ With respect to occupied territory, the manual states that "the destruction of property is forbidden except where absolutely necessitated by military operations".¹³⁴

115. The US Field Manual provides that:

The measure of permissible devastation is found in the strict necessities of war. Devastation as an end in itself or as a separate measure of war is not sanctioned by the law of war. There must be some reasonably close connection between the destruction of property and the overcoming of the enemy's army. Thus the rule requiring respect for private property is not violated through damage resulting from operations, movements, or combat activity of the army; that is, real estate may be used for marches, camp sites, construction of field fortifications, etc. Buildings may be destroyed for sanitary purposes or used for shelter for troops, the wounded and sick and vehicles and for reconnaissance, cover, and defense. Fences, woods, crops, buildings, etc., may be demolished, cut down, and removed to clear a field of fire, to clear the ground for landing field, or to furnish building materials or fuel if imperatively needed for the army.¹³⁵

The manual also states that "it is especially forbidden to destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war".¹³⁶ It further states that "extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly," is a grave breach of GC I, II and IV and a war crime.¹³⁷ Likewise, the manual states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . purposeless destruction".¹³⁸

¹²⁹ UK, *Military Manual* (1958), § 588, see also § 616.

¹³⁰ UK, *Military Manual* (1958), § 287. ¹³¹ UK, *Military Manual* (1958), § 625(c) and (d).

¹³² UK, *LOAC Manual* (1981), Section 4, p. 15, § 6.

¹³³ UK, *LOAC Manual* (1981), Annex A, p. 46, § 8.

¹³⁴ UK, *LOAC Manual* (1981), Section 9, p. 35, § 12. ¹³⁵ US, *Field Manual* (1956), § 56.

¹³⁶ US, *Field Manual* (1956), § 58, see also § 393 (prohibition of destruction of real or personal private or public property in occupied territory, except when rendered absolutely necessary by military operations).

¹³⁷ US, *Field Manual* (1956), § 502. ¹³⁸ US, *Field Manual* (1956), § 504(j).

116. The US Air Force Pamphlet incorporates the content of Article 23(g) of the 1907 HR, i.e., that “it is especially forbidden . . . to destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of war”.¹³⁹ It further states that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . wilful and wanton destruction and devastation not justified by military necessity”.¹⁴⁰

117. The US Soldier’s Manual gives the following instructions: “Don’t cause destruction beyond the requirement of your mission. Don’t destroy an entire town or village to stop sniper fire from a single building . . . Limit destruction only to that necessary to accomplish your mission. Avoid unnecessary . . . damage to property.”¹⁴¹ The manual further provides that “unnecessary destruction of property [is a violation] of the law of war for which you can be prosecuted”.¹⁴²

118. The US Instructor’s Guide provides that:

The Hague and the Geneva Conventions and the customary law of war require that American soldiers –

Not inflict unnecessary destruction . . . in accomplishing the military mission.

...

The customary law of war and [the 1907 HR] . . . established definite rules which prohibit the destruction or the seizure of enemy property unless necessary . . .

Any excessive destruction . . . not required to accomplish the objective is illegal as a violation of the law of war . . .

[C]ause no greater destruction of enemy property than necessary to accomplish the military mission.¹⁴³

119. The US Rules of Engagement for Operation Desert Storm reminds troops to “restrict destruction to what your mission requires”.¹⁴⁴

120. The US Naval Handbook considers that “the following acts are representative war crimes: . . . Wanton destruction of cities, towns, and villages or devastation not justified by the requirements of military operations.”¹⁴⁵

National Legislation

121. Argentina’s Draft Code of Military Justice punishes any soldier who “destroys, damages or appropriates, without any military necessity, something which does not belong to him”.¹⁴⁶

122. Under Armenia’s Penal Code, the “wilful destruction or appropriation of property, not justified by military necessity, and carried out unlawfully”,

¹³⁹ US, *Air Force Pamphlet* (1976), § 5-2(b)(1), see also § 14–6(b) (citing Article 53 GC IV which is “comparable to Article 23(g) [of the 1907] HR”).

¹⁴⁰ US, *Air Force Pamphlet* (1976), § 15-3(c)(5).

¹⁴¹ US, *Soldier’s Manual* (1984), p. 8. ¹⁴² US, *Soldier’s Manual* (1984), p. 20.

¹⁴³ US, *Instructor’s Guide* (1985), pp. 4–7.

¹⁴⁴ US, *Rules of Engagement for Operation Desert Storm* (1991), § 4.

¹⁴⁵ US, *Naval Handbook* (1995), § 6.2.5(6).

¹⁴⁶ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(5) in the *Code of Military Justice as amended* (1951).

during an armed conflict, constitutes a crime against the peace and security of mankind.¹⁴⁷

123. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including confiscation of property and wanton devastation and destruction of property.¹⁴⁸

124. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".¹⁴⁹

125. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in Article 8(2)(a)(iv), (b)(xiii) and (e)(xii) of the 1998 ICC Statute.¹⁵⁰

126. Azerbaijan's Criminal Code (1999) provides that "destroying property unless such destruction is imperatively demanded by war necessity; . . . destroying of [civilian] property, illegal seizure of property under the pretext of military need" constitute war crimes in international and non-international armed conflicts.¹⁵¹

127. Bangladesh's International Crimes (Tribunal) Act states that the "wanton destruction of cities, towns or villages or devastation not justified by military necessity" is a war crime. It adds that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹⁵²

128. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".¹⁵³

129. The Criminal Code of Belarus provides that "the destruction and appropriation of property not justified by military necessity, executed on a large scale, unlawfully and wantonly," is a war crime.¹⁵⁴

130. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "extensive destruction and appropriation of property not justified by military necessity as permitted by international law and carried out unlawfully and wantonly" constitutes a crime under international law.¹⁵⁵

¹⁴⁷ Armenia, *Penal Code* (2003), Article 390.2(6).

¹⁴⁸ Australia, *War Crimes Act* (1945), Section 3.

¹⁴⁹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁵⁰ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §268.29, 268.51 and 268.94.

¹⁵¹ Azerbaijan, *Criminal Code* (1999), Article 116(6) and (11).

¹⁵² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d) and (e).

¹⁵³ Barbados, *Geneva Conventions Act* (1980), Section 3(2).

¹⁵⁴ Belarus, *Criminal Code* (1999), Article 136(6).

¹⁵⁵ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(8).

131. Under the Criminal Code of the Federation of Bosnia and Herzegovina, “property confiscation, . . . [and] illegal and wilful destruction and appropriation of property on a large scale and not justified by military needs” are war crimes.¹⁵⁶ The Criminal Code of the Republika Srpska contains the same provision.¹⁵⁷

132. Botswana’s Geneva Conventions Act punishes “any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions”.¹⁵⁸

133. Bulgaria’s Penal Code as amended provides that “a person who, in violation of the rules of international law for waging war . . . unlawfully or arbitrarily perpetrates or orders the perpetration of destruction or appropriation of property on a large scale” commits a war crime.¹⁵⁹

134. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “the extensive destruction and appropriation of property, not justified by military necessity, and carried out unlawfully and wantonly” constitutes a war crime in international armed conflicts.¹⁶⁰ It also adds that “destroying or seizing enemy property, except in case where such destruction or seizure would be imperatively demanded by the necessities of war,” is a war crime in both international and non-international armed conflicts.¹⁶¹

135. Cambodia’s Law on the Khmer Rouge Trial provides that “the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979”.¹⁶²

136. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] . . . is guilty of an indictable offence”.¹⁶³

137. Canada’s National Defence Act punishes “every person who . . . without orders from the person’s superior officer, improperly destroys or damages any property”.¹⁶⁴

138. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes

¹⁵⁶ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

¹⁵⁷ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

¹⁵⁸ Botswana, *Geneva Conventions Act* (1970), Section 3(1).

¹⁵⁹ Bulgaria, *Penal Code as amended* (1968), Article 412(f).

¹⁶⁰ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(d).

¹⁶¹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(m) and (D)(l).

¹⁶² Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

¹⁶³ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁶⁴ Canada, *National Defence Act* (1985), Section 77(d).

according to customary international law” and, as such, indictable offences under the Act.¹⁶⁵

139. Chile’s Code of Military Justice provides for a prison sentence for “anyone who, contrary to instructions received and uncompelled by the operations of war, destroys lines of communication, telegraphic or other links” and for “military personnel who, failing in the obedience they owe to their superiors, burn or destroy buildings or other property”.¹⁶⁶

140. China’s Law Governing the Trial of War Criminals provides that “indiscriminate destruction of property” constitutes a war crime.¹⁶⁷

141. The DRC Code of Military Justice as amended, which applies in times of war or in an area where a state of siege or a state of emergency has been proclaimed, punishes any “abusive or illegal requisition, confiscation or spoliation”.¹⁶⁸

142. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁶⁹

143. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions”.¹⁷⁰

144. Under Croatia’s Criminal Code, “the confiscation of property [and] the unlawful and wanton destruction or large-scale appropriation of property not justified by military necessity” are war crimes.¹⁷¹

145. Cuba’s Military Criminal Code punishes “anyone who, in an area of military operations, . . . unlawfully destroys . . . property under the pretext of military necessity”.¹⁷²

146. Cyprus’s Geneva Conventions Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions”.¹⁷³

147. The Czech Republic’s Criminal Code as amended punishes “whoever in a theatre of war, on the battlefield or in places affected by military operations . . . arbitrarily destroys another person’s property or takes it under the pretext of military necessity”.¹⁷⁴

¹⁶⁵ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁶⁶ Chile, *Code of Military Justice* (1925), Articles 261(2) and 262.

¹⁶⁷ China, *Law Governing the Trial of War Criminals* (1946), Article 3(27).

¹⁶⁸ DRC, *Code of Military Justice as amended* (1972), Article 525.

¹⁶⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁷⁰ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁷¹ Croatia, *Criminal Code* (1997), Article 158(1).

¹⁷² Cuba, *Military Criminal Code* (1979), Article 44(1).

¹⁷³ Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

¹⁷⁴ Czech Republic, *Criminal Code as amended* (1961), Article 264(b).

148. Egypt's Military Criminal Code prohibits wilful destruction of property without the authorisation of an officer.¹⁷⁵

149. El Salvador's Code of Military Justice punishes any "soldier who, in time of international or civil war, burns or destroys ships, aircraft, buildings or other property, when not required by the operations of war".¹⁷⁶

150. Under El Salvador's Penal Code, "wanton destruction of cities or villages, or devastation not justified by military necessity" during an international or a civil war is a crime.¹⁷⁷

151. Under Estonia's Penal Code, "a person belonging to the armed forces or participating in acts of war who destroys or illegally appropriates property on a large scale in a war zone or an occupied territory, whereas such act is not required by military necessity," commits a war crime.¹⁷⁸

152. Under Ethiopia's Penal Code, it is a war crime to organise, order or engage, in time of war, armed conflict or occupation, in "the confiscation of estates, the destruction or appropriation of property" of the civilian population, in violation of the rules of IHL.¹⁷⁹

153. Gambia's Armed Forces Act punishes "every person subject to this Act who . . . without orders from his superior officer, improperly destroys or damages any property".¹⁸⁰

154. Under Georgia's Criminal Code, "extensive destruction or appropriation of property, not justified by military necessity and carried out wantonly," in an international or non-international armed conflict is a crime.¹⁸¹ Furthermore, under the Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war" in international or non-international armed conflicts, is also a crime.¹⁸²

155. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "unless this is imperatively demanded by the necessities of the armed conflict, . . . extensively destroys, appropriates or seizes property of the adverse party contrary to international law, such property being in the hands of the perpetrator's party".¹⁸³

156. Ghana's Armed Forces Act punishes "every person subject to the Code of Service Discipline who . . . without orders from his superior officer, improperly destroys or damages any property".¹⁸⁴

¹⁷⁵ Egypt, *Military Criminal Code* (1966), Article 141.

¹⁷⁶ El Salvador, *Code of Military Justice* (1934), Article 68.

¹⁷⁷ El Salvador, *Penal Code* (1997), Article 362.

¹⁷⁸ Estonia, *Penal Code* (2001), § 108.

¹⁷⁹ Ethiopia, *Penal Code* (1957), Article 282(h).

¹⁸⁰ Gambia, *Armed Forces Act* (1985), Section 40(d).

¹⁸¹ Georgia, *Criminal Code* (1999), Article 411(2)(h).

¹⁸² Georgia, *Criminal Code* (1999), Article 413(d).

¹⁸³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 9(1).

¹⁸⁴ Ghana, *Armed Forces Act* (1962), Section 18(d).

157. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".¹⁸⁵

158. Iraq's Military Penal Code punishes "every person who, while unnecessitated by war, damages or destroys movable or immovable property, cuts down trees, destroys agricultural crops, or orders to commit such acts".¹⁸⁶

159. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions are punishable offences.¹⁸⁷ It adds that any "minor breach" of the Geneva Conventions, including violations of Article 53 GC IV, is also a punishable offence.¹⁸⁸

160. Israel's Nazis and Nazi Collaborators (Punishment) Law punishes persons who have committed war crimes, including "wanton destruction of cities, towns or villages . . . and devastation not justified by military necessity".¹⁸⁹

161. Under Italy's Law of War Decree, it is prohibited "to destroy or seize enemy property, unless it is imperatively demanded by the necessities of war".¹⁹⁰

162. Italy's Wartime Military Penal Code punishes "anyone who, in enemy territory, without being constrained by the necessity of military operations, sets fire to a house, an edifice, or through any other means destroys them".¹⁹¹

163. Jordan's Military Criminal Code punishes "any member [of the armed forces] . . . who intentionally destroys or damages any property without having received the order of his superior officer to do so".¹⁹²

164. Under Jordan's Draft Military Criminal Code, "the destruction or seizure of property, not justified by military necessity and executed in an unlawful and wanton manner", in time of armed conflict is a war crime.¹⁹³

165. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".¹⁹⁴

166. Under Latvia's Criminal Code, "the unjustified destruction of cities and other entities" is a war crime.¹⁹⁵

167. Under the Draft Amendments to the Code of Military Justice of Lebanon, "extensive destruction or appropriation of property not justified by military necessity [and carried out] unlawfully and wantonly" constitutes a war crime.¹⁹⁶

¹⁸⁵ India, *Geneva Conventions Act* (1960), Section 3(1).

¹⁸⁶ Iraq, *Military Penal Code* (1940), Article 113.

¹⁸⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁸⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁸⁹ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1.

¹⁹⁰ Italy, *Law of War Decree* (1938), Article 35(8).

¹⁹¹ Italy, *Wartime Military Penal Code* (1941), Article 187.

¹⁹² Jordan, *Military Criminal Code* (1952), Article 12(2).

¹⁹³ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(8).

¹⁹⁴ Kenya, *Geneva Conventions Act* (1968), Section 3(1).

¹⁹⁵ Latvia, *Criminal Code* (1998), Section 74.

¹⁹⁶ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(8).

168. Under Lithuania's Criminal Code as amended, "confiscation of property, or its extensive appropriation or destruction, unjustified by military necessity" in time of war, armed conflict or occupation is a war crime.¹⁹⁷

169. Under Luxembourg's Law on the Repression of War Crimes, "excessive or unlawful requisitions, confiscations or expropriations" committed in time of war are war crimes.¹⁹⁸

170. Luxembourg's Law on the Punishment of Grave Breaches punishes grave breaches of the Geneva Conventions, including "the extensive destruction or appropriation of property, not justified by military necessity and carried out unlawfully and wantonly" as crimes under international law.¹⁹⁹

171. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".²⁰⁰

172. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".²⁰¹

173. Malaysia's Armed Forces Act punishes "every person subject to service law under this Act who . . . without orders from his superior officer wilfully destroys or damages any property".²⁰²

174. Under Mali's Penal Code, "the extensive destruction, and appropriation, of property, not justified by military necessity and carried out unlawfully and wantonly", constitutes a war crime.²⁰³ In addition, "destroying or seizing enemy property, except when those destructions or seizures are imperatively demanded by the necessities of war" also constitutes a war crime in international armed conflicts.²⁰⁴

175. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".²⁰⁵

176. Mexico's Code of Military Justice as amended punishes "anyone who, without being absolutely required by war operations, burns buildings [or] devastates crops".²⁰⁶ It also punishes "anyone who, taking advantage of his own authority or the authority of the armed forces, maliciously and arbitrarily destroys . . . goods or other objects belonging to another person, when it is not required by military operations". The Code further punishes the

¹⁹⁷ Lithuania, *Criminal Code as amended* (1961), Article 336.

¹⁹⁸ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(6).

¹⁹⁹ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(9).

²⁰⁰ Malawi, *Geneva Conventions Act* (1967), Section 4(1).

²⁰¹ Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

²⁰² Malaysia, *Armed Forces Act* (1972), Section 46(c).

²⁰³ Mali, *Penal Code* (2001), Article 31(d).

²⁰⁴ Mali, *Penal Code* (2001), Article 31(i)(13).

²⁰⁵ Mauritius, *Geneva Conventions Act* (1970), Section 3(1).

²⁰⁶ Mexico, *Code of Military Justice as amended* (1933), Article 209.

“devastation of farms, plantations, agricultural lands, forests or public roads of communication”.²⁰⁷

177. Moldova’s Penal Code punishes “destruction or illegal appropriation of property, under the pretext of war necessity, committed against the population of the area of military operations”.²⁰⁸

178. Mozambique’s Military Criminal Law punishes “anyone who... appropriates or destroys without interest or necessity the property of another”.²⁰⁹

179. The Definition of War Crimes Decree of the Netherlands includes “confiscation of property” and “wanton devastation and destruction of property” in its list of war crimes.²¹⁰

180. Under the International Crimes Act of the Netherlands, it is a crime to commit “in the case of an international armed conflict, one of the grave breaches of the Geneva Conventions”, including “extensive intentional and unlawful destruction and appropriation of goods without military necessity”.²¹¹ Furthermore, “destroying or seizing property of the adversary unless such destruction or seizure be imperatively demanded by the necessities of the conflict” is a crime, whether committed in an international or a non-international armed conflict.²¹²

181. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions... is guilty of an indictable offence”.²¹³

182. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(a)(iv), (b)(xiii) and (e)(xii) of the 1998 ICC Statute.²¹⁴

183. Nicaragua’s Military Penal Law punishes “anyone who, during military operations, ... destroys or illegally occupies property under the pretext of military necessity”.²¹⁵

184. Nicaragua’s Military Penal Code punishes any “soldier who... without being required by the necessities of war, burns, destroys or seriously damages buildings, ships, aircraft or other non-military enemy property”.²¹⁶ It also punishes any soldier who “unlawfully and without necessity requisitions buildings or movable property located in enemy territory”.²¹⁷

²⁰⁷ Mexico, *Code of Military Justice as amended* (1933), Article 334.

²⁰⁸ Moldova, *Penal Code* (2002), Article 390.

²⁰⁹ Mozambique, *Military Criminal Law* (1987), Article 83(c).

²¹⁰ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

²¹¹ Netherlands, *International Crimes Act* (2003), Article 5(1)(d).

²¹² Netherlands, *International Crimes Act* (2003), Articles 5(5)(t) and 6(3)(h).

²¹³ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

²¹⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²¹⁵ Nicaragua, *Military Penal Law* (1980), Article 82.

²¹⁶ Nicaragua, *Military Penal Code* (1996), Article 59.

²¹⁷ Nicaragua, *Military Penal Code* (1996), Article 60(1).

185. According to Niger's Penal Code as amended, "the extensive destruction and appropriation of property, not justified by military necessity as allowed by international law, and carried out unlawfully and wantonly" are war crimes, when such property is protected under the 1949 Geneva Conventions or their Additional Protocols of 1977.²¹⁸

186. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".²¹⁹

187. Norway's Military Penal Code as amended punishes "anyone who, without necessity, destroys or damages foreign property", as well as "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949".²²⁰

188. Norway's Act on the Punishment of Foreign War Criminals states that "confiscation of property, requisitioning, imposition of contributions, illegal imposition of fines, and any other form of economic gain illegally acquired by force or threat, are deemed to be crimes against the Civil Criminal Code".²²¹

189. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".²²²

190. Paraguay's Military Penal Code punishes any soldier who, in time of war, "in a foreign country, without superior order and without being obliged by the necessity of defence, wilfully sets fire to a house or other buildings", as well as any soldier who destroys or damages such objects.²²³ The Code further provides for a prison sentence for any soldier who, "without authorisation or necessity, and in a foreign country, exacts war contributions of any kind".²²⁴

191. Peru's Code of Military Justice provides that it is a punishable offence for a soldier "to destroy without necessity buildings or other property" in time of war.²²⁵

192. Under the War Crimes Trial Executive Order of the Philippines, applicable to acts committed during the Second World War, "wanton destruction of cities, towns or villages [and] devastation not justified by military necessity" are war crimes.²²⁶

²¹⁸ Niger, *Penal Code* as amended (1961), Article 208.3(8).

²¹⁹ Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

²²⁰ Norway, *Military Penal Code as amended* (1902), §§ 103 and 108(a).

²²¹ Norway, *Act on the Punishment of Foreign War Criminals* (1946), Article 2.

²²² Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

²²³ Paraguay, *Military Penal Code* (1980), Articles 282 and 283.

²²⁴ Paraguay, *Military Penal Code* (1980), Article 294.

²²⁵ Peru, *Code of Military Justice* (1980), Article 95(4).

²²⁶ Philippines, *War Crimes Trial Executive Order* (1947), § II(b)(2).

193. Under Portugal's Penal Code, "unjustified appropriation or destruction of property of high value", in time of war, armed conflict or occupation, constitutes a war crime.²²⁷

194. Romania's Penal Code punishes "partial or total destruction or appropriation under any form, unjustified by military necessity and committed on a large scale, of any . . . goods".²²⁸

195. Russia's Decree on the Punishment of War Criminals states that the "German fascist invaders are guilty of . . . barbaric destruction of thousands of towns and villages".²²⁹

196. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".²³⁰

197. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".²³¹

198. Slovakia's Criminal Code as amended punishes "whoever in a theatre of war, on the battlefield or in places affected by military operations . . . arbitrarily destroys another person's property or takes it under the pretext of military necessity".²³²

199. Under Slovenia's Penal Code, "confiscation of property, . . . unlawful and arbitrary destruction or large-scale appropriation of property not justified by military needs" are war crimes.²³³

200. Spain's Military Criminal Code punishes any soldier who "burns, destroys or severely damages buildings, ships, aircraft or any other enemy property not of a military character, without being required by the necessities of war".²³⁴

201. Spain's Penal Code punishes "anyone who, during an armed conflict, . . . destroys, damages or appropriates, without military necessity, belongings from another person [or] forces someone to surrender such belongings".²³⁵

202. Sri Lanka's Army Act as amended punishes "every person subject to military law who while on active service . . . without orders from his superior officer wilfully destroys or damages any property".²³⁶

²²⁷ Portugal, *Penal Code* (1996), Article 241(1)(h).

²²⁸ Romania, *Penal Code* (1968), Article 359.

²²⁹ Russia, *Decree on the Punishment of War Criminals* (1965), preamble.

²³⁰ Seychelles, *Geneva Conventions Act* (1985), Section 3(1).

²³¹ Singapore, *Geneva Conventions Act* (1973), Section 3(1).

²³² Slovakia, *Criminal Code as amended* (1961), Article 264(b), see also Article 262(2)(a).

²³³ Slovenia, *Penal Code* (1994), Article 374(1).

²³⁴ Spain, *Military Criminal Code* (1985), Article 73.

²³⁵ Spain, *Penal Code* (1995), Article 613(1)(e).

²³⁶ Sri Lanka, *Army Act as amended* (1949), Section 96(b).

203. Sri Lanka's Air Force Act as amended punishes "every person subject to this Act who while on active service . . . without orders from his superior officer wilfully destroys or damages any property".²³⁷

204. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit . . . a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".²³⁸

205. Tajikistan's Criminal Code punishes "extensive destruction and appropriation of property, not justified by military necessity and carried out wantonly," in an international or internal armed conflict, against civilians or the civilian population in the occupied territory or in the combat zone.²³⁹

206. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(iv), (b)(xiii) and (e)(xii) of the 1998 ICC Statute.²⁴⁰

207. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".²⁴¹

208. Uganda's National Resistance Army Statute punishes any "person subject to military law who . . . without orders from his superior officer, improperly destroys or damages any property".²⁴²

209. Under Ukraine's Criminal Code, "unlawful destruction or taking of property under the pretext of military necessity" is a war crime.²⁴³

210. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".²⁴⁴

211. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(iv), (b)(xiii) and (e)(xii) of the 1998 ICC Statute.²⁴⁵

212. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as "wanton destruction of cities, towns or villages" and "devastation, destruction or damage of public or private property not justified by military necessity".²⁴⁶

²³⁷ Sri Lanka, *Air Force Act as amended* (1950), Section 96(b).

²³⁸ Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1)(a).

²³⁹ Tajikistan, *Criminal Code* (1998), Article 403(2)(h).

²⁴⁰ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²⁴¹ Uganda, *Geneva Conventions Act* (1964), Section 1(1).

²⁴² Uganda, *National Resistance Army Statute* (1992), Section 35(c).

²⁴³ Ukraine, *Criminal Code* (2001), Article 433(1).

²⁴⁴ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

²⁴⁵ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²⁴⁶ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

213. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as “wanton destruction of cities, towns or villages; or devastation not justified by military necessity”.²⁴⁷

214. Under the US War Crimes Act as amended, grave breaches of the Geneva Conventions, as well as violations of Article 23(g) of the 1907 HR, are war crimes.²⁴⁸

215. Uzbekistan’s Criminal Code punishes “the meaningless destruction of towns and inhabited places”.²⁴⁹

216. Vanuatu’s Geneva Conventions Act provides that “any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu”.²⁵⁰

217. Venezuela’s Code of Military Justice as amended punishes soldiers who “failing the obedience they owe to their superiors, burn or destroy buildings or other property”.²⁵¹

218. Vietnam’s Penal Code punishes “anyone who exceeds the limits of military necessity in performing a mission and thereby causes serious damage to property of the State, of social organisations or of citizens”.²⁵²

219. Under the Penal Code as amended of the SFRY (FRY), “property confiscation, . . . extensive unlawful and wanton destruction and appropriation of property not justified by military necessity” are war crimes.²⁵³

220. Zimbabwe’s Geneva Conventions Act as amended punishes “any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions”.²⁵⁴

National Case-law

221. In the *Holstein case* before a French Military Tribunal in 1947, some of the accused, members of various German units, were found guilty of war crimes for having destroyed by arson inhabited buildings. The Tribunal found that there was no necessity to set the houses on fire, as required by Article 23(g) of the 1907 HR. The acts of arson committed were thus not justified by the laws and customs of war.²⁵⁵

²⁴⁷ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).

²⁴⁸ US, *War Crimes Act as amended* (1996), § 2441(c)(1) and (2).

²⁴⁹ Uzbekistan, *Criminal Code* (1994), Article 152.

²⁵⁰ Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).

²⁵¹ Venezuela, *Code of Military Justice as amended* (1998), Article 474(17).

²⁵² Vietnam, *Penal Code* (1990), Article 274.

²⁵³ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

²⁵⁴ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

²⁵⁵ France, Permanent Military Tribunal at Dijon, *Holstein case*, Judgement, 3 February 1947.

222. In the *General Devastation case* before a German court in 1947, a German officer who gave the order that on the approach of the Soviet army any valuable machinery in mills appropriated by Germany in occupied territories was to be destroyed was found guilty of a war crime when one of the factories in question was destroyed by fire. The court stated that "his conduct may be regarded as a war crime in the meaning of Article II(I)(b) of [the 1945 Allied] Control Council Law No. 10. In that paragraph acts of devastation which are not justified by military necessity, are described as war crimes."²⁵⁶

223. In the *Al-Nawar case* before Israel's High Court in 1985, Judge Shamgar held that Article 23(g) of the 1907 HR "does not accord protection to property used for hostile purposes. Such property enjoys protection from arbitrary destruction, but it is still subject to the enemy's right of appropriation as booty."²⁵⁷

224. In its judgement in the *Wingten case* in 1949, the Special Court of Cassation of the Netherlands found the accused, a member of the German security forces in occupied Netherlands, guilty of the war crime of "devastation not justified by military necessity" as contained in Article 6(b) of the 1945 IMT Charter, for the arson of several houses near Amsterdam.²⁵⁸

225. In the *List (Hostages Trial) case* before the US Military Tribunal at Nuremberg in 1948, the accused, high-ranking officers in the German army, were charged with war crimes, *inter alia*, for wanton destruction of cities, towns and villages and other acts of devastation for which there was no military necessity. In its judgement, the Tribunal stated that:

Military necessity has been invoked by the defendants as justifying . . . the destruction of villages and towns in the occupied territory. Military necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations . . . The destruction of property to be lawful must be imperatively demanded by the necessities of war. Destruction as an end in itself is a violation of International Law. There must be some reasonable connection between the destruction of property and the overcoming of the enemy forces. It is lawful to destroy railways, lines of communication or any other property that might be utilised by the enemy. Private homes and churches even may be destroyed if necessary for military operations. It does not admit of wanton devastation of a district or the wilful infliction of suffering upon its inhabitants for the sake of suffering alone.

With regard to the destruction ordered by one of the accused, the Tribunal held that:

There is evidence in the record that there was no military necessity for this destruction and devastation. An examination of the facts in retrospect can well sustain this

²⁵⁶ Germany, Oberlandsgericht of Dresden, *General Devastation case*, Judgement, 21 March 1947. (Although it appeared that the fire in the factory was accidental, the accused was found guilty of aiding and abetting the factory's destruction.)

²⁵⁷ Israel, High Court, *Al-Nawar case*, Judgement, 11 August 1985.

²⁵⁸ Netherlands, Special Court of Cassation, *Wingten case*, Judgement, 6 July 1949.

conclusion. But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgement, after giving consideration to all factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. After giving careful consideration to all the evidence on the subject, we are convinced that the defendant cannot be held criminally responsible although when viewed in retrospect, the danger did not actually exist.

...

The Hague Regulations prohibited "The destruction or seizure of enemy property except in cases where this destruction or seizure is urgently required by the necessities of war." ... The Hague Regulations are mandatory provisions of International Law. The prohibitions therein contained control and are superior to military necessities of the most urgent nature except where the Regulations themselves specifically provide the contrary. The destruction of public and private property by retreating military forces which would give aid and comfort to the enemy, may constitute a situation coming within the exceptions contained in Article 23(g). We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finnmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgment on the basis of the conditions prevailing at the time. The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered with his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision to carry out the "scorched earth" policy in Finnmark as a precautionary measure against an attack by superior forces. It is our considered opinion that the conditions as they appeared to the defendant at the time were sufficient, upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgment but he was guilty of no criminal act. We find the defendant not guilty on this portion of the charge.²⁵⁹

226. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes and crimes against humanity against civilians in that they participated in atrocities such as wanton destruction of cities, towns and villages and devastation not justified by military necessity. The Tribunal stated that "most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations". The Tribunal found that:

The devastation prohibited by the [1907 HR] and the usages of war is that not warranted by military necessity. This rule is clear enough but the factual determination as to what constitutes military necessity is difficult. Defendants in this case were in many instances in retreat under arduous conditions wherein their commands were in serious danger of being cut off. Under such circumstances, a commander must

²⁵⁹ US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948.

necessarily make quick decisions to meet the particular situation of his command. A great deal of latitude must be accorded to him under such circumstances. What constitutes devastation beyond military necessity in these situations requires detailed proof of an operational and tactical nature. We do not feel that in this case the proof is ample to establish the guilt of any defendant herein on this charge.²⁶⁰

Other National Practice

227. According to the Report on the Practice of China, in the context of the Sino-Japanese War (1937–1945), the Chinese population suffered greatly from the Japanese policy of devastation. The Japanese armed forces “destroyed the materials . . . , set houses on fire, destroyed the farming facilities, took away [livestock], burned the grain and damaged green crops in the fields”.²⁶¹

228. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt restated the prohibition contained in Article 23(g) of the 1907 HR “to destroy . . . the enemy’s property, unless such destruction . . . be imperatively demanded by the necessities of war”.²⁶²

229. According to the Report on the Practice of Iran, on several occasions during the Iran–Iraq War, Iran denounced the devastation of cities and residential areas as a war crime, notably in 1985 at the Disarmament Conference, as well as in various diplomatic correspondence.²⁶³

230. In a memorandum entitled “International Law Providing Protection to the Environment in Times of Armed Conflict” submitted to the Sixth Committee of the UN General Assembly in 1992 prior to the adoption of Resolution 47/37, Jordan and the US stated, *inter alia*, that “it is a grave breach of international humanitarian law, and is a war crime, as set out in article 147 of the Fourth Geneva Convention of 1949, to extensively destroy and appropriate property when not justified by military necessity and carried out unlawfully and wantonly”.²⁶⁴

231. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

On their departure, Iraqi forces set off previously placed explosive charges on Kuwait’s oil wells, a vengeful act of wanton destruction . . .

As a general principle, the law of war prohibits the intentional destruction of civilian objects not imperatively required by military necessity.

...

Specific Iraqi war crimes include: . . .

²⁶⁰ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 28 October 1948.

²⁶¹ Report on the Practice of China, 1997, Chapter 4.1, referring to Deng Xiaoping, The Economic Construction of the Area of Taihang Mountain, 2 July 1943, *Selected Works of Deng Xiaoping*, Vol. I, The People’s Press, p. 78.

²⁶² Egypt, Written statement before the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 11, § 17.

²⁶³ Report on the Practice of Iran, 1997, Chapter 6.5.

²⁶⁴ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 1(e).

- Unnecessary destruction of Kuwaiti private and public property, in violation of Article 23(g), [1907 HR] . . .
- In its indiscriminate Scud missile attacks, unnecessary destruction of Saudi Arabian and Israeli property, in violation of Article 23(g) [1907 HR].
- In its intentional release of oil into the Persian Gulf and its sabotage of the Al-Burqan and Ar-Rumaylah oil fields in Kuwait, unnecessary destruction in violation of Articles 23(g) . . . [1907 HR and] 53 and 147, GC [IV].²⁶⁵

232. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US mentioned several acts of wanton devastation and destruction of property.²⁶⁶

III. Practice of International Organisations and Conferences

United Nations

233. No practice was found.

Other International Organisations

234. No practice was found.

International Conferences

235. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th international Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “strict orders are given to prevent all serious violations of international humanitarian law, including . . . wanton property destruction . . . and threats to carry out such actions”.²⁶⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

236. In the *Nikolić case* before the ICTY in 1994, the accused was charged with grave breaches of the Geneva Conventions for having participated, “during a period of armed conflict or occupation, in the extensive appropriation of property not justified by military necessity and carried out unlawfully and wantonly, including but not limited to private property of persons detained at Sušica Camp”.²⁶⁸ In the review of the indictment in 1995, the ICTY held that there were “reasonable grounds for believing that the appropriations were

²⁶⁵ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 620, 622, 634 and 635, see also p. 633.

²⁶⁶ US, Former Yugoslavia: Grave breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, pp. 8 and 9.

²⁶⁷ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

²⁶⁸ ICTY, *Nikolić case*, Initial Indictment, 4 November 1994, § 21.1.

not justified by military necessity and were carried out unlawfully and wantonly". It further considered that the acts could also be regarded as characterising persecution on religious grounds. The Tribunal considered the conflict was international and that the victims were persons protected under the Geneva Conventions.²⁶⁹

237. In the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged, based on their responsibility as commanders, with grave breaches of the Geneva Conventions, for having "individually and in concert with others planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the extensive, wanton and unlawful destruction of Bosnian Muslim and Bosnian Croat property, not justified by military necessity". The indictment added that "the purpose of this unlawful destruction was to ensure that the inhabitants could not and would not return to their homes and communities". The accused were also charged with grave breaches of the Geneva Conventions because Bosnian Serb military and police personnel, as well as other agents of the Bosnian Serb administration, under their direction had allegedly "systematically and wantonly appropriated and looted the real and personal property of Bosnian Muslim and Bosnian Croat civilians. The appropriation of property was extensive and not justified by military necessity." Both counts constituted violations of Article 2(d) of the 1993 ICTY Statute.²⁷⁰ In the review of the indictments in 1996, the ICTY considered that the conflict was international and that the victims were protected by the Geneva Conventions and confirmed the counts of the indictments. The facts were described as follows:

In the cities and villages of Bosnia and Herzegovina which had come under their command, the Bosnian Serb military personnel and police, along with other agents of the Bosnian Serb administration, committed various sorts of arbitrary large-scale appropriation of real and moveable property belonging to Bosnian Muslim and Bosnian Croat civilians. Prior to their forced transfer, many detainees in the internment camps were forced to sign official Bosnian Serb documents by which they "voluntarily" gave up their titles of ownership and their possessions to the Bosnian Serb administration...

Elsewhere, in order to rule out any possibility of return by the dispossessed, Bosnian forces systematically destroyed buildings.²⁷¹

238. In the *Rajić case* before the ICTY in 1995, the accused was charged with grave breaches of the Geneva Conventions for the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, as recognised by Article 2(d) of the 1993 ICTY Statute, and of violations of the laws and customs of war for the wanton destruction of a village not justified by military necessity, as recognised by Article 3(b) of the

²⁶⁹ ICTY, *Nikolić case*, Review of the Indictment, 20 October 1995, §§ 22 and 30.

²⁷⁰ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, §§ 27, 29 and 41, see also §§ 42–43.

²⁷¹ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 1, 6, 14, 87–89 and Disposition.

Statute.²⁷² In the review of the indictment in 1996, the ICTY Trial Chamber stated that it was satisfied that there were grounds to confirm all counts of the indictment.²⁷³

239. In the *Blaškić case* before the ICTY in 1997, the accused was charged with violations of the laws and customs of war (devastation not justified by military necessity), for “wanton destruction not justified by military necessity in . . . cities, towns and villages”, in violation of Article 3(b) of the 1993 ICTY Statute. He was also charged with grave breaches of the Geneva Conventions (extensive destruction of property), for having, in violation of Article 2(d) of the Statute, “planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the wanton and extensive destruction, devastation . . . of Bosnian Muslim dwellings, buildings, businesses, civilian personal property and livestock”.²⁷⁴ The accused was found guilty on both counts.²⁷⁵ In its judgement in 2000, the ICTY stated, in relation to these counts of the indictment, that:

An Occupying Power is prohibited from destroying movable and non-movable property except where such destruction is made absolutely necessary by military operations. To constitute a grave breach, the destruction unjustified by military necessity must be extensive, unlawful and wanton. The notion of “extensive” is evaluated according to the facts of the case – a single act, such as the destruction of a hospital, may suffice to characterise an offence under this count.

...

Similar to the grave breach constituting part of Article 2(d) of the Statute, the devastation of property is prohibited except where it may be justified by military necessity. So as to be punishable, the devastation must have been perpetrated intentionally or have been the foreseeable consequence of the acts of the accused.²⁷⁶

240. In the *Kordić and Čerkez case* before the ICTY in 1998, the accused were charged with grave breaches of the Geneva Conventions (extensive destruction of property), in violation of Article 2(d) of the 1993 ICTY Statute, as well as violations of the laws or customs of war (wanton destruction not justified by military necessity), in violation of Article 3(b) of the Statute, for having “caused, planned, instigated, ordered or committed, or aided and abetted the planning, preparation or execution of, the unlawful, wanton and extensive destruction [and] devastation . . . of Bosnian Muslim dwellings, buildings, businesses, civilian personal property and livestock, which was not justified by military necessity”.²⁷⁷ In its judgement in 2001, the ICTY held that:

²⁷² ICTY, *Rajić case*, Initial Indictment, 23 August 1995, §§ 12 and 13.

²⁷³ ICTY, *Rajić case*, Review of the Indictment, 13 September 1996, §§ 57 and 72.

²⁷⁴ ICTY, *Blaškić case*, Second Amended Indictment, 25 April 1997, §§ 8 and 10.

²⁷⁵ ICTY, *Blaškić case*, Judgement, 3 March 2000, Part VI (Disposition).

²⁷⁶ ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 157 and 183.

²⁷⁷ ICTY, *Kordić and Čerkez case*, First Amended Indictment, 30 September 1998, §§ 55 and 56, see also §§ 34, 37 and 39 (count of persecution as a crime against humanity, *inter alia*, through wanton and extensive destruction of Bosnian Muslim civilian property, with no military justification); see also *Kordić and Čerkez case*, Initial Indictment, 10 November 1995, § 32 (count of persecution as a crime against humanity, *inter alia*, through system-

The crime of extensive destruction of property as a grave breach comprises the following elements, either:

- (i) Where the property destroyed is of a type accorded general protection under the Geneva Conventions of 1949, regardless of whether or not it is situated in occupied territory; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction; or
- (ii) Where the property destroyed is accorded protection under the Geneva Conventions, on account of its location in occupied territory; and the destruction occurs on a large scale; and
- (iii) the destruction is not justified by military necessity; and the perpetrator acted with the intent to destroy the property in question or in reckless disregard of the likelihood of its destruction.²⁷⁸

When considering wanton destruction not justified by military necessity, the Tribunal held that it “has already been criminalised under customary international law”.²⁷⁹ The Tribunal also stated that:

While property situated on enemy territory is not protected under the Geneva Conventions, and is therefore not included in the crime of extensive destruction of property listed as a grave breach of the Geneva Conventions, the destruction of such property is criminalised under Article 3 of the [ICTY] Statute.²⁸⁰

Both accused were found guilty, *inter alia*, of violations of the laws and customs of war, as recognised by Article 3(b) (wanton destruction not justified by military necessity) of the ICTY Statute, but not guilty of extensive destruction of property not justified by military necessity, as recognised by Article 2(d) of the Statute.²⁸¹

V. Practice of the International Red Cross and Crescent Movement

241. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that destruction and seizure of property “without military necessity” are prohibited.²⁸² Delegates also teach that “when not justified by military necessity and carried out unlawfully and wantonly, . . . extensive destruction of property [and] extensive appropriation of property” constitute grave breaches of the law of war.²⁸³

242. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC

atic and wanton destruction of Bosnian Muslim homes, personal property, livestock and businesses of Bosnian Muslims) and § 38 (counts of extensive destruction of property and wanton devastation not justified by military necessity).

²⁷⁸ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 341.

²⁷⁹ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 205.

²⁸⁰ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 347.

²⁸¹ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Part V (Disposition).

²⁸² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 206 and 207.

²⁸³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 777.

included “extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.²⁸⁴

VI. Other Practice

243. No practice was found.

C. Public and Private Property in Occupied Territory

Movable public property in occupied territory

I. Treaties and Other Instruments

Treaties

244. Article 53 of the 1899 HR provides that “an army of occupation can only take possession of the cash, funds, and property liable to requisition belonging strictly to the State, depots of arms, means of transport, stores and supplies, and, generally, movable property of the State which may be used for military operations”.

245. Article 53 of the 1907 HR provides that “an army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations”.

Other Instruments

246. Article 31 of the 1863 Lieber Code provides that “a victorious army appropriates all public money, seizes all public movable property until further direction by its government”.

247. Article 6 of the 1874 Brussels Declaration provides that:

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and generally, all movable property belonging to the State which may be used for the operations of the war.

248. The 1880 Oxford Manual provides that:

Although the occupant replaces the enemy State in the government of the invaded territory, his power is not absolute. So long as the fate of this territory remains in suspense – that is, until peace – the occupant is not free to dispose of what still

²⁸⁴ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(a)(viii).

belongs to the enemy and is not of use in military operation. Hence the following rules:

Art. 50. The occupant can only take possession of cash, funds and realizable or negotiable securities which are strictly the property of the State, depots of arms, supplies, and, in general, movable property of the State of such character as to be useful in military operations.

Art. 51. Means of transportation (railways, boats, & c.), as well as land telegraphs and landing-cables, can only be appropriated to the use of the occupant. Their destruction is forbidden, unless it be demanded by military necessity. They are restored when peace is made in the condition in which they then are.

249. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including "confiscation of property".

250. The 1943 Inter-Allied Declaration against Acts of Dispossession provides that "it is important to leave no doubt whatsoever of their [the authors of the Declaration] resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked".

II. National Practice

Military Manuals

251. Argentina's Law of War Manual provides that "an army of occupation can only take possession of cash, funds, and realizable securities which are the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations".²⁸⁵

252. Australia's Defence Force Manual states that, in occupied areas, "confiscation is the taking of enemy public movable property without the obligation to compensate the state to which it belongs. All enemy public movable property which may be useable for the operations of war may be confiscated."²⁸⁶

253. Canada's LOAC Manual states that "confiscation is the taking of enemy public movable property without the obligation to compensate the state to which it belongs. All enemy public movable property which may be usable for military operations may be confiscated."²⁸⁷

254. France's LOAC Manual incorporates the content of Article 53 of the 1907 HR.²⁸⁸

255. Germany's Military Manual provides that:

Movable government property which may be used for military purposes shall become spoils of war... Upon seizure it shall, without any compensation, become

²⁸⁵ Argentina, *Law of War Manual* (1969), § 5.014(2).

²⁸⁶ Australia, *Defence Force Manual* (1994), § 1225.

²⁸⁷ Canada, *LOAC Manual* (1999), p. 12-8, § 69.

²⁸⁸ France, *LOAC Manual* (2001), pp. 35-36.

the property of the occupying State. Such property includes, for instance, means of transport, weapons, and food supplies . . . The latter shall not be requisitioned unless the requirements of the civilian population have been taken into account . . . The requirements of the civilian population shall be satisfied first.²⁸⁹

256. Italy's IHL Manual states that, in occupied territory, "cash, funds, realisable securities, depots of arms, means of transportation, stores and in general all movable property belonging to the enemy public administration become the property of the occupying State".²⁹⁰

257. New Zealand's Military Manual provides that, in occupied territory, "confiscation is the taking of enemy public movable property without the obligation to compensate the State to which it belongs. All enemy public movable property which may be usable for the operations of war may be confiscated."²⁹¹

258. Nigeria's Manual on the Laws of War states that:

Movable property in an occupied territory belonging to the enemy state may be seized only if it is useful to the conduct of war. Vehicles, signal equipment, weapons and other equipment required for immediate military use may also be seized . . .

...

All movable property, belonging to the enemy state, seized in the battlefield, becomes property of the opposing belligerent. The rules relating to the seizure of private movable property in occupied territories are also applicable to such property seized in the battlefield.²⁹²

259. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that "members of the AFP and PNP shall inhibit themselves from unnecessary military/police actions that could cause destruction to . . . public properties".²⁹³

260. Switzerland's Basic Military Manual provides that, in occupied territory, "property belonging to the State or public authorities, to social or cooperative organisations, shall not be destroyed, except where such destruction is rendered absolutely necessary by military operations".²⁹⁴

261. The UK Military Manual states, regarding public property, that:

The occupation army is only allowed to seize cash funds and negotiable securities which are strictly State property, stores of arms, means of transport, stores of supplies, and generally, all movable property of the State which can be used for military operations.

...

Other movable public property, not susceptible of use for military operations, as well as that belonging to the institutions mentioned above, which is to be treated as private property must be respected and cannot be appropriated, for instance,

²⁸⁹ Germany, *Military Manual* (1992), § 556.

²⁹⁰ Italy, *IHL Manual* (1991), Vol. I, § 42, see also § 49(9).

²⁹¹ New Zealand, *Military Manual* (1992), § 1336.

²⁹² Nigeria, *Manual on the Laws of War* (undated), §§ 27–28.

²⁹³ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), 2a(4).

²⁹⁴ Switzerland, *Basic Military Manual* (1987), Article 169.

crown jewels, pictures, collections of works of art, and archives. However, papers connected with the war may be seized, even when forming part of archives.

...

Where there is any doubt whether the property found in the possession of the enemy is public or private, as may frequently occur in the case of bank deposits, stores and supplies obtained from contractors, it should be considered to be public property unless and until its private character is clearly shown.²⁹⁵

262. The US Field Manual provides in the case of occupied territory that:

Valid capture or seizure of property requires both an intent to take such action and a physical act of capture or seizure. The mere presence within occupied territory of property which is subject to appropriation under international law does not operate to vest title thereto in the occupant.

...

An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for operations of war.

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval laws, depots of arms, and, generally, all kinds of ammunition of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made.

...

All movable property belonging to the State susceptible of military use may be taken possession of and utilized for the benefit of the occupant's government. Under modern conditions of warfare, a large proportion of State property may be regarded as capable of being used for military purposes. However, movable property which is *not* susceptible of military use must be respected and cannot be appropriated.²⁹⁶ [emphasis in original]

National Legislation

263. Colombia's Military Penal Code provides for a prison sentence for "anyone who during military service and without proper cause, destroys... public property".²⁹⁷

264. Italy's Law of War Decree states that, in occupied territory, "cash, funds, realisable securities, depots of arms, means of transportation, stores and in general all movable property belonging to the enemy public administration, which may be used for war operations, become the property of the [occupying] State".²⁹⁸ Regarding property in enemy territory, the Decree provides that "arms, ammunition, foodstuffs and any other object belonging to the enemy State are subject to confiscation when directly usable for military purposes".²⁹⁹

²⁹⁵ UK, *Military Manual* (1958), §§ 612–614.

²⁹⁶ US, *Field Manual* (1956), §§ 395, 403 and 404.

²⁹⁷ Colombia, *Military Penal Code* (1999), Article 174.

²⁹⁸ Italy, *Law of War Decree* (1938), Article 60.

²⁹⁹ Italy, *Law of War Decree* (1938), Article 292.

265. The Articles of War of the Philippines states that:

All public property taken from the enemy is the property of the Government of the Philippines and shall be secured for the service thereof, and any person subject to military law who neglects to secure such property or is guilty of wrongful appropriation thereof shall be punished as a court-martial may direct.³⁰⁰

266. Under the US Uniform Code of Military Justice, members of the armed forces “shall secure all public property taken from the enemy for the service of the United States, and shall give notice and turn over to the proper authority without delay all captured or abandoned property in their possession, custody or control”.³⁰¹

267. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, “any person who . . . ordered or committed arson, destruction . . . of . . . public property [or] . . . any transport, . . . or other material, . . . or any public property” committed war crimes.³⁰²

National Case-law

268. In the *Flick case* before the US Military Tribunal at Nuremberg in 1947, the accused, the principal proprietor of a large group of German industrial enterprises (and four officials of the same group), which included coal and iron mines and steel producing plants, was charged with war crimes, *inter alia*, for offences against property in the countries and territories occupied by Germany. Flick was found guilty on this count of the indictment. In its judgement, the Tribunal quoted, *inter alia*, Article 53 of the 1907 HR. It also found that:

The only exception to the public property rule that the occupying power, or its agents, is limited by the rules of usufruct is the right to “take possession of” certain types of public property under Article 53 [of the 1907 HR]. But the exception applied only with respect to certain named properties and “all moveable property belonging to the State which may be used for military operations”, and thus is not applicable to such properties as means of production.³⁰³

269. In the *Krupp case* before the US Military Tribunal at Nuremberg in 1948, the accused, officials of the Krupp industrial enterprises occupying high positions in political, financial, industrial and economic circles in Germany, were charged with war crimes, *inter alia*, for the destruction and removal of property, and the seizure of machinery, equipment, raw materials and other property. The Tribunal quoted Article 53 of the 1907 HR. It also stated that it “fully concurs with the Judgement of the I.M.T. that the [1907 Hague Convention (IV)], to which Germany was a party, had by 1939 become customary law and

³⁰⁰ Philippines, *Articles of War* (1938), Article 80.

³⁰¹ US, *Uniform Code of Military Justice* (1950), Article 103(a).

³⁰² SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3) and (13).

³⁰³ US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947.

was, therefore, binding on Germany not only as Treaty Law but also as Customary".³⁰⁴

270. In the *Krauch (I. G. Farben Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, officials of I.G. Farben Industrie A.G., were charged, *inter alia*, with war crimes for offences against property in countries and territories which came under the belligerent occupation of Germany. The charges were regarded as violations of, *inter alia*, Article 53 of the 1907 HR. Some of the accused were convicted on this count. The Tribunal held that:

The foregoing provisions of the Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy. They admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations set forth in the articles.

...

The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly where a private individual or a juristic person becomes a party to unlawful confiscation of public... property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to confiscation constitutes conduct in violation of the Hague Regulations.

...

[I]t is illustrative of the view that offences against property of the character described in the [1943 Inter-Allied Declaration against Acts of Dispossession] were considered by the signatory powers to constitute action in violation of existing international law.³⁰⁵

271. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes and crimes against humanity against civilians in that they participated in atrocities such as wanton destruction of cities, towns and villages and devastation not justified by military necessity. The Tribunal stated that "most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations". It notably mentioned Article 53 of the 1907 HR.³⁰⁶

Other National Practice

272. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that strict measures should be taken to protect cities that fall under the control of armed forces, including measures to protect and ensure the safety of public property.³⁰⁷

³⁰⁴ US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948.

³⁰⁵ US, Military Tribunal in Nuremberg, *Krauch (I. G. Farben Trial)* case, Judgement, 29 July 1948.

³⁰⁶ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial)* case, Judgement, 28 October 1948.

³⁰⁷ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.3.

273. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

In violation of [the 1907 HR]...public (municipal and national) property was confiscated... (Confiscation of private property is prohibited under any circumstance, as is the confiscation of municipal public property. Confiscation of movable national public property is prohibited without military need and cash compensation...).³⁰⁸

III. Practice of International Organisations and Conferences

United Nations

274. In 1996, in a report on the situation of human rights in Somalia, the Independent Expert of the UN Commission on Human Rights described, in a section entitled "Civil war and violations of human rights", the practices of the different Somali factions, including the fact that the winning faction would engage in destruction of public property.³⁰⁹

Other International Organisations

275. In the Final Communiqué of its 36th Session in 1990, the GCC Ministerial Council emphasised that "public... establishments and property must be safeguarded in accordance with the noble stipulations of Islamic law". It insisted that "the Iraqi authorities must ensure the protection of all public... establishments and all movable... property in the State of Kuwait".³¹⁰

276. In the Final Communiqué of its 11th Session in 1990, the GCC Supreme Council demanded that "the Iraqi régime... must safeguard... public installations and property in accordance with Islamic law, the provisions of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War and the international humanitarian covenants and conventions".³¹¹

277. In a resolution adopted in 1990, the Council of the League of Arab States, with reference to Islamic law, GC IV, the 1948 UDHR and international covenants and conventions relating to the protection of human rights, decided "to insist that the Iraqi authorities must ensure the protection of all public... establishments and all movable... property in the State of Kuwait,

³⁰⁸ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 620.

³⁰⁹ UN Commission on Human Rights, Independent Expert on Assistance to Somalia in the Field of Human Rights, Report on the situation of human rights in Somalia, UN Doc. E/CN.4/1996/14/Add.1, 10 April 1996, § 10.

³¹⁰ GCC, Ministerial Council, 36th Session, Jeddah, 5–6 September 1990, Final Communiqué, annexed to Letter dated 6 September 1990 from Oman to the UN Secretary-General, UN Doc. S/21719, 6 September 1990, p. 3, preamble and § 3.

³¹¹ GCC, Supreme Council, 11th Session, Doha, 22–25 December 1990, Final Communiqué, annexed to Note verbale dated 26 December 1990 from Qatar to the UN Secretary-General, UN Doc. A/45/908, 27 December 1990, p. 3.

and to regard any measures incompatible with such a commitment as null and void".³¹²

International Conferences

278. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

279. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

280. No practice was found.

VI. Other Practice

281. No practice was found.

Immovable public property in occupied territory

I. Treaties and Other Instruments

Treaties

282. Article 55 of the 1899 HR provides that:

The occupying State shall only be regarded as administrator and usufructuary of the public buildings, real property, forests and agricultural works belonging to the hostile State, and situated in the occupied country. It must protect the capital of these properties, and administer it according to the rules of usufruct.

283. Article 55 of the 1907 HR provides that:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

Other Instruments

284. Article 31 of the 1863 Lieber Code provides that "a victorious army . . . sequesters for its own benefit or of that of its government all the revenues of real property belonging to the hostile government or nation. The title

³¹² League of Arab States, Council, Res. 5038, 31 August 1990, annexed to Letter dated 31 August 1990 from Qatar to the UN Secretary-General, UN Doc. S/21693, 31 August 1990, p. 4. (Libya opposed the resolution and Algeria, Iraq, Jordan, Mauritania, Palestine, Sudan, Tunisia and Yemen did not participate in the work of the session.)

to such real property remains in abeyance during military occupation, and until the conquest is made complete.”

285. Article 7 of the 1874 Brussels Declaration provides that:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

286. The 1880 Oxford Manual provides that:

Although the occupant replaces the enemy State in the government of the invaded territory, his power is not absolute. So long as the fate of this territory remains in suspense – that is, until peace – the occupant is not free to dispose of what still belongs to the enemy and is not of use in military operation. Hence the following rules:

...

Art. 52. The occupant can only act in the capacity of provisional administrator in respect to real property, such as buildings, forests, agricultural establishments, belonging to the enemy State (Article 6). It must safeguard the capital of these properties and see to their maintenance.

287. The 1943 Inter-Allied Declaration against Acts of Dispossession provides that “it is important to leave no doubt whatsoever of their [the authors of the Declaration] resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked”.

II. National Practice

Military Manuals

288. Argentina’s Law of War Manual provides that:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied territory. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.³¹³

289. Australia’s Defence Force Manual states that, in occupied areas, “enemy public immovable property may be administered and used but it may not be confiscated”.³¹⁴

290. Canada’s LOAC Manual provides that, in occupied territory:

Enemy public immovable property may be administered and used but it may not be confiscated.

...

Real property belonging to the State which is essentially of a civil or non-military character, such as public buildings and offices, land, forests, parks, farms, and mines,

³¹³ Argentina, *Law of War Manual* (1969), § 5.014(1).

³¹⁴ Australia, *Defence Force Manual* (1994), § 1225.

may not be damaged unless their destruction is imperatively demanded by the exigencies of war. The occupant becomes the administrator of the property and is liable to use the property, but must not exercise its rights in such a wasteful or negligent way as will decrease its value. The occupant has no right of disposal or sale.

Public real property which is of an essentially military nature such as airfields and arsenals remain at the absolute disposal of the occupant.³¹⁵

291. Germany's Military Manual provides that "immovable government property may only be requisitioned but not confiscated . . . The title to this property shall not pass to the occupying state. Upon termination of the war, the items and real estate seized shall be restored."³¹⁶

292. Italy's IHL Manual states that "all immovable property and factories located in occupied territory and belonging to the enemy public administration pass into the possession of the occupying State which, however, becomes only the administrator and usufructuary"³¹⁷

293. New Zealand's Military Manual provides that, in the case of occupied territory:

Enemy public immovable property may be administered and used but it may not be confiscated.

...

Real property belonging to the State which is essentially of a civil or non-military character, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged unless its destruction is imperatively demanded by the exigencies of war. The Occupying Power becomes the administrator and usufructuary of the property and must not exercise its rights in such a wasteful or negligent way as will decrease the property's value. A usufructuary has no right of disposal or sale.

The Occupying Power may, however, let or utilize public land and buildings, sell the crops on public land, cut and sell timber and work the mines but he must not make a contract or lease extending beyond the conclusion of the war and the cutting or mining must not exceed what is necessary or usual. It must not constitute abusive exploitation.

Public real property which is of an essentially military nature such as airfields and arsenals remain at the absolute disposal of the Occupying Power.³¹⁸

294. Nigeria's Manual on the Laws of War provides that:

Real property of military character belonging to the enemy State, such as fortifications, dockyards, railways and bridges, remains at the absolute disposal of the occupant until the end of the war. Such property may be destroyed if absolutely necessary for military operations.

³¹⁵ Canada, *LOAC Manual* (1999), p. 12-8, § 69 and p. 12-9, §§ 80 and 81.

³¹⁶ Germany, *Military Manual* (1992), § 557.

³¹⁷ Italy, *IHL Manual* (1991), Vol. I, § 42.

³¹⁸ New Zealand, *Military Manual* (1992), §§ 1336 and 1341.

Real property of a non-military character belonging to the enemy state such as public buildings, forests, parks and mines should not be damaged or destroyed unless it is imperatively demanded by the exigencies of war.

...

The temporary use of real property for military purposes during a combat operation is justified, although such use may diminish the value of the property.³¹⁹

295. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that “members of the AFP and PNP shall inhibit themselves from unnecessary military/police actions that could cause destruction to . . . public properties”.³²⁰

296. Switzerland’s Basic Military Manual provides that “the occupying State shall only be considered as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the enemy State, and situated in the occupied territory”.³²¹

297. The UK Military Manual provides that, once a defended locality has surrendered, “it is not permissible to burn public buildings . . . in such a place merely because it was defended”.³²² It also states that:

Real property belonging to the State which is of a military character, such as strong points, arsenals, dockyards, magazines, barracks and stores, as well as railways, canals, bridges, piers, and wharves, airfields and their installations, remains at the absolute disposal of the Occupant until the end of the war. Such buildings may, however, be damaged or destroyed only when such acts are rendered absolutely necessary by military operations . . .

Real property belonging to the State which is essentially of a civil or non-military character, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged unless their destruction is imperatively demanded by the exigencies of war. The Occupant becomes the administrator and usufructuary of the property, but he must not exercise his rights in such a wasteful or negligent way as will decrease its value. He has no right of disposal or sale.

...

The Occupant may, however, let or utilize public land and buildings, sell the crops on public land, cut and sell timber and work the mines. But he must not make a contract or lease extending beyond the conclusion of the war, and the cutting or mining must not exceed what is necessary or usual. It must not constitute abusive exploitation.³²³

298. The US Field Manual provides that, in the case of occupied territory:

Valid capture or seizure of property requires both an intent to take such action and a physical act of capture or seizure. The mere presence within occupied territory of property which is subject to appropriation under international law does not operate to vest title thereto in the occupant.

...

³¹⁹ Nigeria, *Manual on the Laws of War* (undated), §§ 27 and 28.

³²⁰ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), 2a(4).

³²¹ Switzerland, *Basic Military Manual* (1987), Article 169.

³²² UK, *Military Manual* (1958), § 287. ³²³ UK, *Military Manual* (1958), §§ 608–610.

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.

...

Real property of a State which is of direct military use, such as forts, arsenals, dockyards, magazines, barracks, railways, bridges, piers, wharves, airfields, and other military facilities, remains in the hands of the occupant until the close of the war, and may be destroyed or damaged, if deemed necessary to military operations.

...

Real property of the enemy State which is essentially of a non-military nature, such as public buildings and offices, land, forests, parks, farms, and mines, may not be damaged or destroyed unless such destruction is rendered absolutely necessary by military operations. . . . The occupant does not have the right of sale or unqualified use of such property. As administrator, or usufructuary, he should not exercise his rights in such a wasteful and negligent manner as seriously to impair its value. He may, however, lease or utilize public lands or buildings, sell the crops, cut and sell timber, and work the mines. The term of a lease or contract should not extend beyond the conclusion of the war.³²⁴

National Legislation

299. Colombia's Military Penal Code provides for a prison sentence for "anyone who, during military service and without proper cause, destroys . . . public property".³²⁵

300. Italy's Law of War Decree states that, in occupied territory "the [occupying] State may only be the administrator and usufructuary of immovable property and factories located in occupied territory and belonging to the enemy public administration".³²⁶

301. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who . . . ordered or committed arson, destruction . . . of . . . public property [or] . . . any . . . building or . . . any water supply system, public warehouse or any public property" committed war crimes.³²⁷

National Case-law

302. In the *Greiser case* before Poland's Supreme National Tribunal in 1946, the accused, a governor and *gauleiter* of the Nazi party for provinces incorporated in the German Reich, was charged with war crimes for having incited, assisted

³²⁴ US, *Field Manual* (1956), §§ 395 and 400–402.

³²⁵ Colombia, *Military Penal Code* (1999), Article 174.

³²⁶ Italy, *Law of War Decree* (1938), Article 59.

³²⁷ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3) and (13).

in the commission of, and committed, *inter alia*, acts of illegal seizure of public property in violation of Article 55 of the 1907 HR. Notably, the accused was indicted for having taken part in "extortion and appropriation . . . of all public property in the territories in question".³²⁸

303. In the *Flick case* before the US Military Tribunal at Nuremberg in 1947, the accused, the principal proprietor of a large group of German industrial enterprises (and four officials of the same group), which included coal and iron mines and steel producing plants, was charged with war crimes, *inter alia*, for offences against property in the countries and territories occupied by Germany. Flick was found guilty on this count of the indictment. The Tribunal quoted, *inter alia*, Article 55 of the 1907 HR. With reference to the plants located in Ukraine and Latvia and regarded as State property, the Tribunal found that:

The Dnjepr Stahl plant had been used for armament production by the Russians. The other was devoted principally to production of railroad cars and equipment. No single one of the Hague Regulations . . . is exactly in point, but adopting the method used by the I.M.T., we deduce from all of them, considered as a whole, the principle that State-owned property of this character may be seized and operated for the benefit of the belligerent occupant for the duration of the occupancy. The attempt of the German Government to seize them as the property of the Reich of course was not effective. Title was not acquired nor could it be conveyed by the German Government. The occupant, however, had a usufructuary privilege. Property which the Government itself could have operated for its benefit could also legally be operated by a trustee. We regard as immaterial Flick's purpose ultimately to acquire title. To covet is a sin under the Decalogue but not a violation of the Hague Regulations nor a war crime.

...

The conclusion follows that, wherever the occupying power acts or holds itself out as owner of the public property owned by the occupied country, Article 55 [of the 1907 HR] is violated. The same applies if the occupying power or its agents who took possession of public buildings or factories or plants, assert ownership, remove equipment of machinery, and ship it to their own country, or make any other use of the property which is incompatible with usufruct.³²⁹

304. In the *Krupp case* before the US Military Tribunal at Nuremberg in 1948, the accused, officials of the Krupp industrial enterprises occupying high positions in political, financial, industrial and economic circles in Germany, were charged with war crimes, *inter alia*, for the destruction and removal of property, and the seizure of machinery, equipment, raw materials and other property. The Tribunal quoted Article 55 of the 1907 HR. It also stated that it "fully concurs with the Judgement of the I.M.T. that the [1907 Hague Convention (IV)], to which Germany was a party, had by 1939 become customary law and was,

³²⁸ Poland, Supreme National Tribunal, *Greiser case*, Judgement, 7 July 1946.

³²⁹ US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947.

therefore, binding on Germany not only as Treaty Law but also as Customary Law".³³⁰

305. In the *Krauch (I. G. Farben Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, officials of I.G. Farben Industrie A.G., were charged, *inter alia*, with war crimes for offences against property in countries and territories which came under the belligerent occupation of Germany. The charges were regarded as violations of, *inter alia*, Article 55 of the 1907 HR. Some of the accused were convicted on this count. The Tribunal held that:

The foregoing provisions of the Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy. They admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations set forth in the articles.

...
[I]t is illustrative of the view that offences against property of the character described in the [1943 Inter-Allied Declaration against Acts of Dispossession] were considered by the signatory powers to constitute action in violation of existing international law.³³¹

Other National Practice

306. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that strict measures should be taken to protect cities that fall under the control of armed forces, including measures to protect and ensure the safety of public property.³³²

307. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

In violation of [the 1907 HR]... public (municipal and national) property was confiscated... [I]mmovable national public property may be temporarily confiscated under the concept of usufruct – the right to use another's property so long as it is not damaged.

...
Specific Iraqi war crimes include:

- ...
 - Illegal confiscation/inadequate safeguarding of Kuwaiti public property, in violation of Article 55 [of the 1907 HR]...
 - In its intentional release of oil into the Persian Gulf and its sabotage of the Al-Burqan and Ar-Rumaylah oil fields in Kuwait, unnecessary destruction in violation of [Article] 55 [of the 1907 HR].³³³

³³⁰ US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948.

³³¹ US, Military Tribunal in Nuremberg, *Krauch (I. G. Farben Trial)* case, Judgement, 29 July 1948.

³³² Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.3.

³³³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 620, 634 and 635, see also p. 633.

III. Practice of International Organisations and Conferences

United Nations

308. No practice was found.

Other International Organisations

309. In the Final Communiqué of its 36th Session in 1990, the GCC Ministerial Council emphasised that “public . . . establishments and property must be safeguarded in accordance with the noble stipulations of Islamic law”. It insisted that “the Iraqi authorities must ensure the protection of all public . . . establishments and all . . . immovable property in the State of Kuwait”.³³⁴

310. In the Final Communiqué of its 11th Session in 1990, the GCC Supreme Council demanded that “the Iraqi régime . . . must safeguard . . . public installations and property in accordance with Islamic law, the provisions of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War and the international humanitarian covenants and conventions”.³³⁵

311. In a resolution adopted in 1990, the Council of the League of Arab States, with reference to Islamic law, GC IV, the 1948 UDHR and international covenants and conventions relating to the protection of human rights, decided “to insist that Iraqi authorities must ensure the protection of all public . . . establishments and all . . . immovable property in the State of Kuwait, and to regard any measures incompatible with such a commitment as null and void”.³³⁶

International Conferences

312. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

313. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

314. No practice was found.

³³⁴ GCC, Ministerial Council, 36th Session, Jeddah, 5–6 September 1990, Final Communiqué, annexed to Letter dated 6 September 1990 from Oman to the UN Secretary-General, UN Doc. S/21719, 6 September 1990, p. 3, preamble and § 3.

³³⁵ GCC, Supreme Council, 11th Session, Doha, 22–25 December 1990, Final Communiqué, annexed to Note verbale dated 26 December 1990 from Qatar to the UN Secretary-General, UN Doc. A/45/908, 27 December 1990, p. 3.

³³⁶ League of Arab States, Council, Res. 5038, 31 August 1990, annexed to Letter dated 31 August 1990 from Qatar to the UN Secretary-General, UN Doc. S/21693, 31 August 1990, p. 4. (Libya opposed the resolution and Algeria, Iraq, Jordan, Mauritania, Palestine, Sudan, Tunisia and Yemen did not participate in the work of the session.)

VI. Other Practice

315. No practice was found.

Private property in occupied territory*I. Treaties and Other Instruments**Treaties*

316. The 1899 HR provides, in the case of occupied territories, that:

Art. 46....[P]rivate property...must be respected. Private property cannot be confiscated.

...

Art. 52. Neither requisitions in kind nor services can be demanded from communes or inhabitants except for the necessities of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.

These requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

The contributions in kind shall, as far as possible, be paid for in ready money; if not, their receipt shall be acknowledged.

Art. 53....Railway plant, land telegraphs, telephones, steamers and other ships, apart from cases governed by maritime law, as well as depots of arms and, generally, all kinds of munitions of war, even though belonging to companies or to private persons, are likewise material which may serve for military operations, but they must be restored at the conclusion of peace, and indemnities paid for them.

317. The 1907 HR provides, in the case of occupied territories, that:

Art. 46....[P]rivate property...must be respected. Private property cannot be confiscated.

...

Art. 52. Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

Art. 53....All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but they must be restored and compensation fixed when peace is made.

318. Article 55, second paragraph, GC IV provides that:

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

Other Instruments

319. Article 22 of the 1863 Lieber Code provides that:

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

320. Article 37 of the 1863 Lieber Code states that “the United States acknowledge and protect, in hostile countries occupied by them, . . . strictly private property . . . This rule does not interfere with the right of the victorious invader . . . to appropriate property, especially houses, lands, boats or ships, and churches, for temporary and military uses.”

321. Article 38 of the 1863 Lieber Code provides that “private property . . . can be seized only by way of military necessity, for the support or other benefit of the army or of the United States. If the owner has not fled, the commanding officer will cause receipts to be given, which may serve the spoliated owner to obtain indemnity.”

322. The 1874 Brussels Declaration provides that:

Art. 6. Railway plant, land telegraphs, steamers and other ships, apart from cases governed by maritime law, as well as depots of arms and, generally, all kinds of war material, even if belonging to companies or to private persons, are likewise material which may serve for military operations and which cannot be left by the army of occupation at the disposal of the enemy. Railway plant, land telegraphs, as well as steamers and other ships above mentioned shall be restored and compensation fixed when peace is made.

...

Art. 38. . . . [P]roperty of persons . . . must be respected. Private property cannot be confiscated.

...

Art. 40. As private property should be respected, the enemy will demand from communes or inhabitants only such payments and services as are connected with the generally recognized necessities of war, in proportion to the resources of the country, and not implying, with regard to the inhabitants, the obligation of taking part in operations of war against their country.

...

Art. 42. Requisitions shall be made only with the authorization of the commander in the territory occupied. For every requisition indemnity shall be granted or a receipt delivered.

323. The 1880 Oxford Manual provides, with respect to private property, that:

If the powers of the occupant are limited with respect to the property of the enemy State, with greater reason are they limited with respect to the property of individuals.

Art. 54. Private property, whether belonging to individuals or corporations, must be respected, and can be confiscated only under the limitations contained in the following articles.

Art. 55. Means of transportation (railways, boats, & c.), telegraphs, depots of arms and munitions of war, although belonging to companies or to individuals, may be seized by the occupant, but must be restored, if possible, and compensation fixed when peace is made.

Art. 56. Impositions in kind (requisitions) demanded from communes or inhabitants should be in proportion to the necessities of war as generally recognized, and in proportion to the resources of the country.

Requisitions can only be made on the authority of the commander in the locality occupied.

...

Art. 60. Requisitioned articles, when they are not paid for in cash, and war contributions are evidenced by receipts. Measures should be taken to assure the "bona fide" character and regularity of these receipts.

324. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including "exaction of illegitimate or of exorbitant contributions and requisitions".

325. The 1943 Inter-Allied Declaration against Acts of Dispossession provides that "it is important to leave no doubt whatsoever of their [the authors of the Declaration] resolution not to accept or tolerate the misdeeds of their enemies in the field of property, however these may be cloaked".

326. Article 3(7) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines prohibits at any time and in any place whatsoever "the destruction of the lives and property of the civilian population".

II. National Practice

Military Manuals

327. With regard to occupied territory, Argentina's Law of War Manual provides that:

All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may also

be confiscated, even if they belong to private individuals, but they must be restored and compensation fixed when peace is made.

...

Private property cannot be confiscated.

...

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation.

They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

Such requisitions and services shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall as far as possible be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible...

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.³³⁷

328. Australia's Commanders' Guide states that:

In rare cases, privately-owned civilian property may be requisitioned by a military force whether on a battlefield or while exercising the power granted to it as an occupier. Requisition is only lawful if the property is essential to the success of military operations, the taking does not cause unnecessary hardship or deprivation, and adequate and reasonable compensation is paid.³³⁸

329. Australia's Defence Force Manual states that, in occupied areas:

Private property may not be confiscated.

...

The seizure of private movable property is governed by Article 53 [of the 1907 HR]. By this rule all appliances adapted for the transmission of news or for the transport of persons or goods by land, sea or air, except where naval law governs, stores of arms and in general every kind of war material, even if they belong to private individuals, may be seized, but they must be restored and the indemnity fixed when peace is made.

These objects may be seized by, but they do not become the property of, the occupying power. The seizure operates merely as a transfer of the possession of the object to the occupying power while ownership remains with the private owner. In so far as the objects seized are capable of physical restoration, they must be restored at the conclusion of peace, and in so far as they have been consumed or have been destroyed or have perished, a cash indemnity must be paid when peace is made.

...

Requisition may be made of all commodities necessary for the maintenance of the occupying army such as: food and fuel supplies, liquor and tobacco, cloth for uniforms, leather for boots, and the like. The taking of such articles is forbidden unless

³³⁷ Argentina, *Law of War Manual* (1969), §§ 5.014(2)–5.015 and 5.018.

³³⁸ Australia, *Commanders' Guide* (1994), § 610, see also § 1041.

they are actually required for the needs of the occupying forces. Goods or medical supplies available in the occupied territory are subject to requisition because they are needed for the forces of occupation and for administrative personnel. They may be requisitioned only after the requirements of the civilian population have been taken into account. In every case, the articles taken must be duly requisitioned, and be in proportion to the resources of the country.

Articles requisitioned should be paid for in ready money, but if this is not possible a receipt must be given for them and payment of the amount due must be made as soon as possible. Articles properly requisitioned become the property of the occupying power and pass out of the ownership of their former owner.

The prices to be paid for requisitioned supplies may be fixed by the commander of the occupying force. The prices of commodities on sale may also be regulated.

The right to billet troops on the inhabitants follows from the rights to requisition.³³⁹

330. Benin's Military Manual requires that soldiers "respect, and avoid causing damage to or stealing," civilian property.³⁴⁰

331. Burkina Faso's Disciplinary Regulations states that, under the laws and customs of war, "wanton destruction . . . in particular of private property" is forbidden.³⁴¹

332. Cameroon's Disciplinary Regulations states that, under the laws and customs of war, "any wanton destruction . . . in particular of private property" is forbidden.³⁴²

333. Canada's LOAC Manual states that "enemy private movable property, other than arms and military papers captured or found on a battlefield, may be appropriated only to the extent such taking is permissible in an occupied area".³⁴³ It further provides that, in occupied territory:

Private property may not be confiscated.

...

The seizure of private movable property is governed by the [1907 HR]. All appliances adapted for the transmission of news or for the transport of persons or goods by land, sea or air, stores of arms and in general every kind of war material, even if they belong to private individuals, may be seized. If seized, however, they must be restored and the indemnity fixed when peace is made.

These objects may be seized by, but they do not become the property of, the occupant. The seizure merely acts as a transfer of the possession of the object to the occupant while the ownership remains in the private owner.

Insofar as the objects seized are capable of physical restoration they must be restored at the conclusion of peace, and insofar as they have been consumed or have been destroyed or have perished a cash indemnity must be paid when peace is made.

No provision in the [1907 HR] obliges the belligerent who effects the seizure to give a receipt, or to carry out the seizure in any formal manner, but the fact of

³³⁹ Australia, *Defence Force Manual* (1994), §§ 1225–1231.

³⁴⁰ Benin, *Military Manual* (1995), Fascicule I, p. 16.

³⁴¹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

³⁴² Cameroon, *Disciplinary Regulations* (1975), Article 32.

³⁴³ Canada, *LOAC Manual* (1999), p. 6-5, § 49.

seizure should obviously be established in some way, if only to give the owner an opportunity of claiming the compensation expressly provided for.

Requisition may be made of all commodities necessary for the maintenance of the occupying army. This includes: food and supplies, liquor and tobacco, cloth for uniforms, leather for boots, and the like. The taking of such articles is forbidden unless they are actually required for the needs of the occupying army. Even if food-stuffs, goods or medical supplies available in the occupied territory are subject to requisition because they are needed for the forces of occupation and for administrative personnel, they may be requisitioned only after the requirements of the civilian population have been taken into account. In any case, the articles taken must be duly requisitioned, and the amount taken must be in proportion to the resources of the country.

Articles requisitioned should be paid for in ready money, but if this is not possible a receipt must be given and payment of the amount due must be made as soon as possible. Articles properly requisitioned become the property of the occupant and pass out of the ownership of their former owner.

Requisitions of supplies may be made in bulk, that is, a community may be called upon to supply certain quantities, or a return may be called for from inhabitants giving the amount in their possession of which a proportion may then be requisitioned, or the householders may be requisitioned to feed or partly feed the soldiers quartered on them. In fact, any way that is convenient may be employed provided that the above-mentioned rules and the provisions of [GC IV] are observed.

The right to billet troops on the inhabitants follows from the right to requisition.³⁴⁴

334. Canada's Code of Conduct states that:

[Respecting civilian property] is one important difference between a disciplined professional force and a band of marauders. Respect for the property rights of civilians, including civilians in the territory of the opposing force, requires discipline. If you do not obey this rule, the civilian population may turn against you. The mission may thus be jeopardised and the conflict prolonged.

You must make every effort to avoid alienating the local civilian population. Reckless destruction of civilian property and disregard for personal ownership rights will place the overall military mission at risk as well as damage the reputation of Canada and its soldiers . . .

The CF may purchase or requisition property and services from the local population but only for the use of our forces. Requisitioned material should always be paid for in cash, or a receipt should be provided which then should be honoured as soon as possible. Where requisitioning is authorized, appropriate procedures will be established and published.³⁴⁵

335. Under Colombia's Basic Military Manual, it is forbidden "to seize . . . personal property" of non-combatants.³⁴⁶

336. According to Colombia's Instructors' Manual, the instructor must recall the theme of respect for civilian property, livestock, money and movable and immovable objects. It emphasises that, during the conflict in Colombia, the

³⁴⁴ Canada, *LOAC Manual* (1999), pp. 12-8 and 12-9, §§ 69-77.

³⁴⁵ Canada, *Code of Conduct* (2001), Rule 4, §§ 4-6.

³⁴⁶ Colombia, *Basic Military Manual* (1995), p. 29.

property of the civilian population has not been properly respected. Livestock have been killed, houses destroyed and crops devastated, all acts that military personnel must not commit.³⁴⁷

337. Colombia's *Soldiers' Manual* orders troops to respect civilian property.³⁴⁸

338. Congo's *Disciplinary Regulations* states that, under the laws and customs of war, "any wanton destruction . . . in particular of private property" is forbidden.³⁴⁹

339. The *Military Manual* of the Dominican Republic instructs troops: "Do not start fires in civilians' homes or buildings or burn their property unless the necessities of war urgently require it. When searching dwellings in enemy towns or villages, do not take nonmilitary items."³⁵⁰

340. El Salvador's *Human Rights Charter of the Armed Forces* orders troops to "respect the property of others".³⁵¹ It also instructs as follows: "Do not steal, do not cause damage or destroy what is not yours."³⁵² It further states that "all acts against property shall be denounced".³⁵³

341. France's *LOAC Manual* incorporates the content of Articles 52 and 53 of the 1907 HR.³⁵⁴

342. Germany's *Military Manual* provides that:

A local commander may demand contributions in kind and services (requisitions) from the population and the authorities of the occupied territory to satisfy the needs of the occupational forces . . . The requisitions shall be in proportion to the capabilities of the country . . .

Requisitions shall, on principle, be paid for in cash. If this is not possible, a receipt shall be given. Payment shall be effected as soon as possible . . .

...

Movable private property which may be used for military purposes . . . may only be requisitioned but not confiscated . . . The title to this property shall not pass to the occupying state. Upon termination of the war, the items and real estate seized shall be restored.

All private property shall be protected from permanent seizure . . . – except for commodities designed for consumption.³⁵⁵

343. Hungary's *Military Manual* states that civilian property in occupied territory must be respected.³⁵⁶

344. Indonesia's *Directive on Human Rights in Irian Jaya and Maluku* provides that "appropriation . . . of the property of the population is a criminal offence".³⁵⁷

³⁴⁷ Colombia, *Instructors' Manual* (1999), pp. 30 and 31.

³⁴⁸ Colombia, *Soldiers' Manual* (1999), p. 26.

³⁴⁹ Congo, *Disciplinary Regulations* (1986), Article 32(2).

³⁵⁰ Dominican Republic, *Military Manual* (1980), p. 10.

³⁵¹ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 3, see also p. 9.

³⁵² El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 9, see also pp. 10 and 18.

³⁵³ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 16.

³⁵⁴ France, *LOAC Manual* (2001), pp. 35–36 and 109.

³⁵⁵ Germany, *Military Manual* (1992), §§ 554–555 and 557–558.

³⁵⁶ Hungary, *Military Manual* (1992), p. 97.

³⁵⁷ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 9(e).

345. Israel's Manual on the Laws of War states that:

Private property that does not belong to the state is immune to seizure and conversion to booty. Nevertheless, a military commander is allowed to seize also private property if this serves an important military need. For example, a commander may commandeer a civilian vehicle to evacuate wounded urgently or take possession of a house porch if this is necessary for carrying out surveillance.³⁵⁸

346. Italy's IHL Manual states that, in occupied territory:

Private property is respected and not subject to confiscation. The inhabitants of the occupied territory keep their property rights and the possession of their goods, with all the rights inherent thereto.

However, the occupying military authority may seize all kinds of arms and ammunitions, as well as all means of communication and transportation, including ships and aircraft, belonging to private persons, which may be used for war operations, provided that they be restored or compensated when peace is made.

...

The powers exercised by an occupying State, through the military Authority, in an occupied territory are the following:

...

(11) requisition private property in accordance with appropriate procedure and in proportion to the resources of the country.³⁵⁹

347. Mali's Army Regulations provides that, under the laws and customs of war, "any wanton destruction...in particular of private property" is forbidden.³⁶⁰

348. Morocco's Disciplinary Regulations states that, under the laws and customs of war, "any wanton destruction...in particular of private property" is forbidden.³⁶¹

349. New Zealand's Military Manual provides that "enemy private movable property, other [than] arms and military papers captured or found on a battlefield may be appropriated only to the extent such taking is permissible in an occupied area".³⁶² It further states that, in occupied territory:

If property is of mixed ownership, that is partly owned by the State and partly owned by private persons, then, if the Occupying Power appropriates the property for its own benefit, the private owners should be compensated for their portion of the property.

...

Private property may not be confiscated.

...

The seizure of private movable property is governed by Art. 53 [of the 1907 HR]. By this rule, all appliances adapted for the transmission of news or for the transport of persons or goods by land, sea or air, except where naval law governs, stores or arms

³⁵⁸ Israel, *Manual on the Laws of War* (1998), p. 63.

³⁵⁹ Italy, *IHL Manual* (1991), Vol. I, §§ 43 and 49(11), see also § 49(9).

³⁶⁰ Mali, *Army Regulations* (1979), Article 36.

³⁶¹ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

³⁶² New Zealand, *Military Manual* (1992), § 528.

(in general, every kind of war material, even if it belongs to private individuals), may be seized, but they must be restored and the compensation fixed when peace is made.

These objects may be seized by, but do not become the property of, the Occupying Power. The seizure operated merely as a transfer of the possession of the object to the Occupying Power while the ownership remains in the private owner. Insofar as the objects seized are capable of physical restoration they must be restored at the conclusion of peace and insofar as they have been consumed or have been destroyed or have perished, a cash indemnity must be paid when peace is made. Within this rule fall: cables, telegraph and telephone plant; television, telecommunications and radio equipment; horses, motorcars, bicycles, carts and carriages; railways and railway plant, tramways; ships in port, river and canal craft; aircraft of all descriptions, except ambulance aircraft; sporting weapons; and all kinds of property which could serve as war material.

No provision in [the 1907] HR obliges the belligerent who effects the seizure to give a receipt or to carry out the seizure in any formal manner, but the fact of seizure should obviously be established in some way, if only to give the owner an opportunity of claiming the compensation expressly provided for.

...

Requisition may be made of all commodities necessary for the maintenance of the occupying army. Within this category fall such things as: food and fuel supplies, liquor and tobacco, cloth for uniforms, leather for boots, and the like. The taking of such articles is forbidden unless they are actually required for the needs of the occupying army. Even if foodstuffs, goods or medical supplies available in the occupied territory are subject to requisition because they are needed for the forces of occupation and for administrative personnel, they may be requisitioned only after the requirements of the civilian population have been taken into account. In any case, the articles taken must be duly requisitioned and the amount taken must be in proportion to the resources of the country.

Articles requisitioned should be paid for in ready money but, if this is not possible, a receipt must be given for them and payment of the amount due must be made as soon as possible. Articles properly requisitioned become the property of the Occupying Power and pass out of the ownership of their former owner. As payment for these articles is made either at the time of requisition or becomes due at that time and is made later, a requisition may, in effect, be a compulsory sale on the order of the Occupying Power.

Requisition can only be demanded on the authority of the commander in the locality occupied. It is not necessary, however, that his order for the requisition should be produced, as the articles taken must be paid for or a receipt given. The assistance of the local authorities of the invaded territory may be invoked to obtain the supplies. When it is impossible to obtain this assistance, special parties under an officer should be detailed to collect what is required. Except in case of emergency, no one under the rank of commissioned officer is, by the regulations of practically all armies, permitted to requisition.

Requisitions of supplies may be made in bulk, that is, a community may be called upon to supply certain quantities, or a return may be called for from inhabitants giving the amounts in their possession of which a proportion may then be requisitioned, or the householders may be requisitioned to feed or partly feed the soldiers quartered on them. In fact, any way that is convenient may be employed provided that the above mentioned rules and the provisions of [GC IV] are observed.

The right to billet troops on the inhabitants follows from the right to requisition. The prices to be paid for requisitioned supplies may be fixed by the commander of the occupying force. The prices of commodities on sale may also be regulated.³⁶³

350. Nigeria's Military Manual provides that "[civilian] property [shall be] safeguarded against theft and damage".³⁶⁴

351. Nigeria's Manual on the Laws of War states that:

Vehicles, signal equipment, weapons and other equipment required for immediate military use may also be seized (but if they belong to private individuals they will be restored when peace is established or indemnity would be for them).

...

Private property should be respected. It must not be confiscated... even if found in an occupied territory. In war it is difficult to avoid damage to private property as practically every military operation, movement or combat occasions such damage but unnecessary damage to the property of civilians must definitely be avoided.

Food, liquor and clothes of private individuals should not be requisitioned; but if they are required by the occupying army they can be taken and paid for in cash. If immediate payment is not possible a receipt must be given for them and payment of the amount due must be made as soon as possible.

...

The temporary use of real property for military purposes during a combat operation is justified, although such use may diminish the value of the property. For example, in addition to the necessary use of grounds during combat for marching, encampment and building strong-points, the citizens can be forced to accommodate in their houses soldiers, the sick and the wounded or keep army vehicles. Buildings may be used for observation posts, shelter, defence, etc... If necessary, houses and fences may be destroyed to prepare a field of fire or to supply material for bridges, fuel, etc., needs essential to the army. When private property is used for accommodation of troops the owners and occupants should be given substitute accommodation. When military necessity requires the evacuation of the occupants they should be given an early warning and enable to carry with them their necessaries.

When houses of missing persons are being used they should be taken care of in their absence. [T]heir absence does not authorise... damage and a note should be left if anything is taken in case of military necessity.³⁶⁵

352. Nigeria's Soldiers' Code of Conduct provides that "civilian property shall be safeguarded against theft and damage".³⁶⁶

353. Peru's Human Rights Charter of the Security Forces instructs troops: "Do not to steal or destroy what is not yours."³⁶⁷ It states that the property of others must be respected.³⁶⁸ It also states that all acts committed against property must be denounced.³⁶⁹

³⁶³ New Zealand, *Military Manual* (1992), §§ 1333 and 1336-1338.

³⁶⁴ Nigeria, *Military Manual* (1994), p. 39, § 5(k).

³⁶⁵ Nigeria, *Manual on the Laws of War* (undated), §§ 27-28.

³⁶⁶ Nigeria, *Soldiers' Code of Conduct* (undated), § 11.

³⁶⁷ Peru, *Human Rights Charter of the Security Forces* (1991), p. 10.

³⁶⁸ Peru, *Human Rights Charter of the Security Forces* (1991), p. 27.

³⁶⁹ Peru, *Human Rights Charter of the Security Forces* (1991), p. 21.

354. The Soldier's Rules of the Philippines instructs troops: "Respect other people's property."³⁷⁰

355. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that "members of the AFP and PNP shall inhibit themselves from unnecessary military/police actions that could cause destruction to private . . . properties"³⁷¹

356. Romania's Soldiers' Manual instructs soldiers to respect private property, not to damage or seize it.³⁷²

357. South Africa's LOAC Manual states that soldiers must "respect civilians and their property"³⁷³

358. Switzerland's Basic Military Manual states that, in occupied territory, "foodstuffs, articles or medical supplies may in principle not be requisitioned. In exceptional circumstances, the occupying Power may requisition such objects against indemnity, provided that they are used to satisfy directly the needs of the occupying forces and administration."³⁷⁴ Furthermore, the manual states that "private property may not be confiscated. The destruction of movable or immovable property belonging individually or collectively to private persons is prohibited, except if imperative military reasons exist."³⁷⁵

359. Togo's Military Manual requires that soldiers "respect, and avoid causing damage to or stealing," civilian property.³⁷⁶

360. Uganda's Code of Conduct instructs troops to "never take anything in the form of money or property from any member of the public" and "to pay promptly for anything you take in cash"³⁷⁷

361. Uganda's Operational Code of Conduct provides that "the offence of undermining relationship with the civilian population shall include . . . trespassing on civilian property; . . . failing to pay for goods purchased"³⁷⁸

362. The UK Military Manual states that, once a defended locality has surrendered, "it is not permissible to burn . . . private houses in such a place merely because it was defended"³⁷⁹ The manual provides that:

Private property must be respected. It must not be confiscated . . . even if found in a captured town or other place. This prohibition embodied in the [1907 HR] did not constitute a new rule . . . The rule that private property must be respected admits, however, of exceptions necessitated by the exigencies of war. In the first instance practically every operation, movement or combat occasions damage to private property. Further, the right of an army to requisition and to make use of

³⁷⁰ Philippines, *Soldier's Rules* (1989), § 11.

³⁷¹ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), 2a(4).

³⁷² Romania, *Soldiers' Manual* (1991), p. 16.

³⁷³ South Africa, *LOAC Manual* (1996), § 25(c).

³⁷⁴ Switzerland, *Basic Military Manual* (1987), Article 163(1) and (2).

³⁷⁵ Switzerland, *Basic Military Manual* (1987), Article 168.

³⁷⁶ Togo, *Military Manual* (1996), Fascicule I, p. 17.

³⁷⁷ Uganda, *Code of Conduct* (1986), § A(2) and (3).

³⁷⁸ Uganda, *Operational Code of Conduct* (1986), § 12(c) and (e).

³⁷⁹ UK, *Military Manual* (1958), § 287.

certain property is fully admitted. What is clearly forbidden is the destruction by the Occupant of private property unless military operations render such destruction absolutely necessary and all extensive destruction and appropriation of private property not justified by military necessity, and carried out unlawfully and wantonly. Requisitions in kind must be in proportion to the resources of the country and limited to the needs of the Occupation army. Seizure is limited to certain types of property set out in [Article 53 of the 1907 HR] which must be restored at the peace and indemnities paid.

...

Generally, therefore, no damage may be done that is not required by military operations. Any destruction of property whether belonging to private individuals, to the State or to social or co-operative organisations, is prohibited and "except when such destruction is rendered absolutely necessary by military operations".

...

Land and buildings belonging to private individuals or commercial undertakings may not be appropriated or alienated, nor may they be used, let or hired for private or public profit.

...

The temporary use of land or buildings for the needs of the army is justified, even though such use may impair its value... Buildings may be used for purposes of observation, reconnaissance, cover, defence, *etc.*, and, if necessary, houses, fences and woods may be demolished, cut down, or removed to clear a field of fire or to provide material for bridges, fuel, *etc.*, imperatively needed by the occupying army.

...

The owner of property may claim neither rent for its use nor compensation for damage caused by the necessities of war. If time allows, however, a note of the use or damage should be kept, or given to the owner, so that in the event of funds being provided by either belligerent at the close of hostilities to compensate the inhabitants, there may be evidence to assist the assessors.

When troops are quartered in private dwellings some rooms should be left to the inhabitants; the latter should not be driven into the streets and left without shelter. If for military reasons, whether for operational purposes or to protect men and animals from the weather, it is imperative to remove the inhabitants, efforts should be made to give them notice and provide them with facilities for taking essential baggage with them.

When use is made of unoccupied buildings, care should be taken of the structure and internal fixtures and fittings. The fact that the owners are away does not authorise... damage. A note should be left if anything is taken. There is, however, no obligation to protect abandoned property.

...

The seizure of private movable property is governed by [Article 53 of the 1907 HR]. By this rule, all appliances adapted for the transmission of news or for the transport of persons or goods by land, sea or air, except where naval law governs, stores of arms and in general every kind of war material, even if they belong to private individuals, may be seized, but they must be restored and the indemnity fixed when peace is made. These objects may be seized by, but they do not become the property of, the Occupant. The seizure operates merely as a transfer of the possession of the objects to the Occupant while the ownership remains in the private owner. Insofar as the objects seized are capable of physical restoration they must be restored at the conclusion of peace, and insofar as they have been consumed or have been destroyed

or have perished a cash indemnity must be paid when peace is made. Within this rule fall: cables, telegraph, and telephone plant; television, telecommunications and radio equipment; horses, motorcars, bicycles, carts, carriages, railways and railway plant, tramways, ships in port, river and canal craft, aircraft of all descriptions, except ambulance aircraft, sporting weapons, and all kinds of property which could serve as war material. No provision in the [1907 HR] obliges the belligerent who effects the seizure to give a receipt, or to carry out the seizure in any formal manner, but the fact of seizure should obviously be established in some way, if only to give the owner an opportunity of claiming the compensation expressly provided for.

...

Under [Article 52 of the 1907 HR] requisition may be made of all commodities necessary for the maintenance of the occupying army. Within this category fall such things as: foods and fuel supplies, liquor and tobacco, cloth for uniforms, leather for boots, and the like. The taking of such articles is forbidden unless they are actually required for the needs of the occupying army. Moreover, [GC IV] lays down expressly that even if foodstuffs, goods or medical supplies available in the occupied territory are subject to requisition because they are needed for the forces of occupation and for administrative personnel, they may be requisitioned only after the requirements of the civilian population have been taken into account. In any case, the articles taken must be duly requisitioned, and the amount taken must be in proportion to the resources of the country.

...

Articles requisitioned should be paid for in ready money, but if this is not possible a receipt must be given for them and payment of the amount due must be made as soon as possible.

Articles properly requisitioned under [Article 52 of the 1907 HR] become the property of the Occupant and pass out of the ownership of their former owner. As payment for these articles is made either at the time of requisition or becomes due at that time and is made later, a requisition under this [Article] is, in effect, a compulsory sale on the order of the Occupant.

...

Requisitions can only be demanded within the limits of the [1907 HR] and [GC IV] on the authority of the commander in the locality occupied. However, it is not necessary that his order for the requisition should be produced, as the articles taken must be paid for or a receipt given. The assistance of the local authorities of the invaded territory may be invoked to obtain the supplies. When it is impossible to obtain this assistance special parties under an officer should be detailed to collect what is required. Except in cases of emergency, no one under the rank of commissioned officer is, by the regulations of practically all armies, permitted to requisition.

...

Requisitions of supplies may be made in bulk, that is, a community may be called upon to supply certain quantities, or a return may be called for from inhabitants giving the amounts in their possession of which a proportion may then be requisitioned, or the householders may be requisitioned to feed or partly feed the soldiers quartered on them. In fact, any way that is convenient may be employed provided that the above-mentioned rules and the provisions of [GC IV] are observed.

...

The right to billet troops on the inhabitants follows from the right to requisition. The prices to be paid for requisitioned supplies may be fixed by the commander of the occupying force. The prices of commodities on sale may also be regulated. Supplies in the hands of private inhabitants may not be destroyed except where such destruction is rendered absolutely necessary by military operations.³⁸⁰

363. The US Field Manual provides, in the case of occupied territory, that:

If property which is appropriated by the occupant is beneficially owned in part by the State and in part by private interests, the occupation authorities should compensate the private owners to the extent of their interest. Such compensation should bear the same relationship to the full compensation which would be paid if the property were entirely privately owned as their interest bears to the total value of the property concerned. The occupant may take what measures it deems necessary to assure that no portion of the compensation paid on account of private interests accrues to the State.

If it is unknown whether certain property is public or private, it should be treated as public property until its ownership is ascertained.

...

Valid capture or seizure of property requires both an intent to take such action and a physical act of capture or seizure. The mere presence within occupied territory of property which is subject to appropriation under international law does not operate to vest title thereto in the occupant.

...

Private property cannot be confiscated...

The foregoing prohibition extends not only to outright taking in violation of the law of war but also to any acts which, through the use of threats, intimidation, or pressure or by actual exploitation of the power of the occupant, permanently or temporarily deprive the owner of the use of his property without his consent or without authority under international law.

...

Immovable private enemy property may under no circumstances be seized. It may, however, be requisitioned.

...

If private property is seized in conformity with the preceding paragraph, a receipt therefor should be given the owner or a record made of the nature and quantity of the property and the name of the owner or person in possession in order that restoration and compensation may be made at the conclusion of the war.

...

The rule stated in the foregoing paragraph includes everything susceptible of direct military use, such as cables, telephone and telegraph plants, radio, television, and telecommunications equipment, motor vehicles, railways, railway plants, port facilities, ships in port, barges and other watercraft, airfields, aircraft, depots of arms, whether military or sporting, documents connected with the war, all varieties of military equipment, including that in the hands of manufacturers, component parts of or material suitable only for use in the foregoing, and in general all kinds of war material.

The destruction of the foregoing property and all damage to the same is justifiable only if it is rendered absolutely necessary by military operations.

³⁸⁰ UK, *Military Manual* (1958), §§ 589–595 and 597–604.

...

Submarine cables connecting an occupied territory with a neutral territory shall not be seized or destroyed except in the case of absolute necessity. They must likewise be restored and compensation fixed when peace is made . . .

The foregoing provision applies only to activities on land and does not deal with seizure or destruction of cables in the open sea.

...

Requisitions in kind and services shall not be demanded from municipalities or inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in operations of war against their country.

Such requisitions and service shall only be demanded on the authority of the commander in the locality occupied.

Contributions in kind shall, as far as possible, be paid for in cash; if not, a receipt shall be given and the payment of the amount due shall be made as soon as possible.

. . . Practically everything may be requisitioned under this article that is necessary for the maintenance of the army, such as fuel, food, clothing, building materials, machinery, tools, vehicles, furnishings for quarters, etc. Billeting of troops in occupied areas is also authorized.

...

The Occupying Power may not requisition foodstuffs, articles or medical supplies available in the occupied territory, except for use by the occupation forces and administration personnel, and then only if the requirements of the civilian population have been taken into account. Subject to the provisions of other international Conventions, the Occupying Power shall make arrangements to ensure that fair value is paid for any requisitioned goods.

...

Requisitions must be made under the authority of the commander in the locality. No prescribed method is fixed, but if practicable requisitions should be accomplished through the local authorities by systematic collection in bulk. They may be made direct by detachments if local authorities fail or if circumstances preclude resort to such authorities.

...

The prices of articles and services requisitioned will be fixed by agreement if possible, otherwise by military authority. Receipts should be taken up and compensation paid promptly.³⁸¹

364. The US Air Force Pamphlet, analysing the situation in occupied territories, recalls that "Article 46 [of the 1907] HR confirms that private property ' . . . must be respected' and that 'Private property cannot be confiscated'".³⁸² It adds that "foodstuffs, articles or medical supplies may be requisitioned for the use of occupation forces and administrative personnel, but only if the requirements of the civilian population have been taken into account".³⁸³

365. The US Soldier's Manual instructs troops: "Do not start fires in civilians' homes or buildings or burn their property unless the necessities of war urgently

³⁸¹ US, *Field Manual* (1956), §§ 394(b) and (c), 395, 406–407, 409–413 and 415–416.

³⁸² US, *Air Force Pamphlet* (1976), § 14-6(a). ³⁸³ US, *Air Force Pamphlet* (1976), § 14-6(b).

require it. When searching dwellings in enemy towns and villages, do not take nonmilitary items."³⁸⁴

366. The US Instructor's Guide provides that:

Under the law of war, seizing and destroying certain enemy property is a crime. Assume, for example, that you are conducting a search in a built-up area. As you go from one building to another, you discover only a few weapons. But in one home you see some interesting art objects – hand-carved figures, for instance – and you decide to take one. Taking the hand-carved figure would be a crime which violates the law of war and the Uniform Code of Military Justice. You have no right to take such property. If, during that same search, you deliberately smash dishes, burn books, and scatter clothing, you would also violate the law of war by destroying property when it was not necessary, and you could be prosecuted for these crimes.³⁸⁵

The Guide also emphasises that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . purposelessly burning homes"³⁸⁶

367. Under the US Rules of Engagement for Operation Desert Storm, troops are ordered to:

Treat all civilians and their property with respect and dignity. Before using privately owned property, check to see if publicly owned property can substitute. No requisitioning of civilian property, including vehicles, without permission of a company level commander and without giving a receipt. If an ordering officer can contract the property, then do not requisition it.³⁸⁷

National Legislation

368. Argentina's Law on National Defence and Decree on the Law on National Defence permit requisitions in times of emergency or extreme gravity. An indemnity must be paid.³⁸⁸

369. Under Argentina's Constitution, no armed or security forces may make requisitions or require assistance of any kind.³⁸⁹

370. Argentina's Draft Code of Military Justice punishes any soldier who "requisitions unlawfully and without necessity buildings or movable objects in occupied territory"³⁹⁰

371. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in international and non-international

³⁸⁴ US, *Soldier's Manual* (1984), p. 23.

³⁸⁵ US, *Instructor's Guide* (1985), pp. 5 and 6.

³⁸⁶ US, *Instructor's Guide* (1985), p. 13.

³⁸⁷ US, *Rules of Engagement for Operation Desert Storm* (1991), § H.

³⁸⁸ Argentina, *Law on National Defence* (1966), Articles 36 and 37; *Decree on the Law on National Defence* (1967), Articles 45 and 75.

³⁸⁹ Argentina, *Constitution* (1994), Article 17.

³⁹⁰ Argentina, *Draft Code of Military Justice* (1998), Article 295, introducing a new Article 879(1) in the *Code of Military Justice as amended* (1951).

armed conflicts, the destruction or annihilation of civilian movable or immovable property which is not necessary for military operations is prohibited.³⁹¹

372. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁹²

373. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "the taking of an illegal and disproportionate contribution or requisition" is a war crime.³⁹³ The Criminal Code of the Republika Srpska contains the same provision.³⁹⁴

374. Bulgaria's Penal Code as amended states that "a person who... appropriates, damages, destroys or unlawfully takes away property belonging to the population located in the region of military operations" commits a crime.³⁹⁵

375. Canada's National Defence Act punishes "every person who... commits any offence against the property... of any inhabitant or resident of a country in which he is serving".³⁹⁶

376. Chile's Code of Military Justice provides that "any individual working for the Army, whether military or not, who abusively orders or commits requisitions, or who does not give receipts after lawful requisitions" commits a punishable offence.³⁹⁷

377. China's Law Governing the Trial of War Criminals provides that "unlawful extortion or demanding of contributions or requisitions", "confiscation of property", as well as "taking money or property by force or extortion", constitute war crimes.³⁹⁸

378. Colombia's Military Penal Code provides for a prison sentence for "anyone who, without any justification, orders or commits requisitions", as well as for "anyone who requisitions without fulfilling the required formalities and without special circumstances obliging him to do so".³⁹⁹

379. Under Croatia's Criminal Code, "unlawful and disproportionately large contributions and requisitions" are war crimes.⁴⁰⁰

380. Czechoslovakia's Decree No. 16 on the Punishment of Nazi Criminals as amended punishes offences against property during the period of imminent danger to the Republic and cloaked in the form of judicial or official acts.⁴⁰¹

³⁹¹ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 17(7).

³⁹² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁹³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

³⁹⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

³⁹⁵ Bulgaria, *Penal Code as amended* (1968), Article 404.

³⁹⁶ Canada, *National Defence Act* (1985), Section 77(f).

³⁹⁷ Chile, *Code of Military Justice* (1925), Article 329.

³⁹⁸ China, *Law Governing the Trial of War Criminals* (1946), Article 3(25), (33) and (36).

³⁹⁹ Colombia, *Military Penal Code* (1999), Articles 176 and 177.

⁴⁰⁰ Croatia, *Criminal Code* (1997), Article 158(1).

⁴⁰¹ Czechoslovakia, *Decree No. 16 on the Punishment of Nazi Criminals as amended* (1945), Sections 8 and 9.

381. The Czech Republic's Criminal Code as amended punishes a commander who intentionally "causes harm by a military operation to civil inhabitants or to their . . . property".⁴⁰²

382. Estonia's Criminal Code as amended provides for the punishment of unlawful destruction and requisitions of property.⁴⁰³

383. Gambia's Armed Forces Act punishes "every person subject to this Act who . . . commits any offence against the property . . . of any inhabitant or resident of a country in which he is serving".⁴⁰⁴

384. Ghana's Armed Forces Act punishes "every person subject to the Code of Service Discipline who . . . commits any offence against the property . . . of any inhabitant or resident of a country in which he is serving".⁴⁰⁵

385. Hungary's Criminal Code as amended provides that "a military commander who, violating the rules of international law of warfare . . . pursues a war operation which causes serious damage to . . . the goods of the civilian population" commits a war crime.⁴⁰⁶

386. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 55 GC IV, is a punishable offence.⁴⁰⁷

387. Italy's Law of War Decree states that, in occupied territory:

Private property is not subject to confiscation.

...

The occupying military authority may seize all kinds of arms and ammunitions, as well as all means of communication and transportation, including ships and aircraft, belonging to private persons, which may be used for war operations, provided that they be restored or compensated when peace is made.

...

Requisitions in kind and services may be demanded from the local authorities and population only to satisfy the needs of the occupying forces.

They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.

The contributions in kind shall, as far as possible, be paid for in ready money; if not, the requisitions shall be acknowledged through the giving of a receipt and payment of the amount due must be made as soon as possible.

Requisitions cannot be demanded without the authority of the local commander of the occupying force.⁴⁰⁸

Regarding property in enemy territory, the Decree states that "property belonging to an enemy national may be requisitioned against indemnity".⁴⁰⁹

⁴⁰² Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(a).

⁴⁰³ Estonia, *Criminal Code as amended* (1992), Section 61/2.

⁴⁰⁴ Gambia, *Armed Forces Act* (1985), Section 40(f).

⁴⁰⁵ Ghana, *Armed Forces Act* (1962), Section 18(f).

⁴⁰⁶ Hungary, *Criminal Code as amended* (1978), Section 160(a).

⁴⁰⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁰⁸ Italy, *Law of War Decree* (1938), Articles 58, 60 and 62.

⁴⁰⁹ Italy, *Law of War Decree* (1938), Article 294.

388. Italy's Wartime Military Penal Code punishes any soldier who in enemy territory, and without authorisation or necessity, imposes excessive requisitions or war contributions.⁴¹⁰

389. Under Lithuania's Criminal Code as amended, "imposing unlawful and excessively large indemnities and requisitions" in time of war, armed conflict or occupation is a war crime.⁴¹¹

390. Malta's Armed Forces Act as amended punishes "any person subject to military law who, in any country or territory outside Malta, commits any offence against the . . . property of any member of the civilian population".⁴¹²

391. Moldova's Penal Code punishes "unlawful requisition of private property, committed against the civilian population in the area of military operations".⁴¹³

392. Under Mozambique's Military Criminal Law, it is prohibited to abuse one's military position, or the fear caused by the war, to impose excessive war contributions or to appropriate money or any movable property of the population, as well as to destroy or damage goods and other objects of the civilian population.⁴¹⁴

393. Myanmar's Defence Service Act punishes "any person subject to this Act who commits . . . any offence against the property or person of any inhabitant of, or resident in the country in which he is serving".⁴¹⁵

394. The Extraordinary Penal Law Decree as amended of the Netherlands punishes whoever

during the time of [the Second World War] intentionally makes or threatens to make use of the power, opportunity or means, offered him by the enemy or by the fact of the enemy occupation, unlawfully to injure another in his possessions or unlawfully benefit himself or another.⁴¹⁶

395. The Definition of War Crimes Decree of the Netherlands includes "exaction of illegitimate or of exorbitant contributions and requisitions" in its list of war crimes.⁴¹⁷

396. Norway's Military Penal Code as amended punishes any combatant "who, with the purpose of acquiring for himself or others unwarranted gain in violation of the law, . . . increases rightful requisitions or . . . refuses to issue receipt for confiscated or requisitioned property", as well as "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949".⁴¹⁸

⁴¹⁰ Italy, *Wartime Military Penal Code* (1941), Article 224.

⁴¹¹ Lithuania, *Criminal Code as amended* (1961), Article 336.

⁴¹² Malta, *Armed Forces Act as amended* (1970), Section 68.

⁴¹³ Moldova, *Penal Code* (1961), Article 268.

⁴¹⁴ Mozambique, *Military Criminal Law* (1987), Articles 87 and 88.

⁴¹⁵ Myanmar, *Defence Service Act* (1959), Section 66(f).

⁴¹⁶ Netherlands, *Extraordinary Penal Law Decree as amended* (1943), Article 27.

⁴¹⁷ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁴¹⁸ Norway, *Military Penal Code as amended* (1902), §§ 100(2) and (3) and 108(a).

397. Under Paraguay's Penal Code, the deliberate destruction of private property in time of war, armed conflict or military occupation is a war crime.⁴¹⁹

398. Under Slovenia's Penal Code, the "imposition of unlawful and excessive contributions [or] requisitions" is a war crime.⁴²⁰

399. Spain's Military Criminal Code punishes any soldier who "requisitions unduly or unnecessarily buildings or movable objects in occupied territory".⁴²¹

400. Uganda's National Resistance Army Statute punishes any "person subject to military law who . . . commits any offence against the property . . . of any inhabitant or resident of a country in which he is serving".⁴²²

401. The UK Army Act as amended punishes "any person subject to military law who, in any country or territory outside the United Kingdom, commits any offence against the . . . property of any member of the civil population".⁴²³

402. The UK Air Force Act as amended punishes "any person subject to air-force law who, in any country or territory outside the United Kingdom, commits any offence against the . . . property of any member of the civil population".⁴²⁴

403. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who . . . ordered or committed arson, destruction . . . of private . . . property" committed war crimes.⁴²⁵

404. Under the Penal Code as amended of the SFRY (FRY), "taking unlawful and disproportionately high contributions and requisitions" is a war crime.⁴²⁶

National Case-law

405. In the *Bijelić case* in 1997, a Bosnian Serb was convicted by a Bosnian court, *inter alia*, of unlawful seizure of property. The trial was supported by the ICTY.⁴²⁷

406. In the *Takashi Sakai case* in 1946, a Chinese Military Tribunal found the accused, a Japanese military commander in China during the Second World War, guilty, *inter alia*, of "inciting or permitting his subordinates . . . to cause destruction of property", notably 700 houses which were set on fire. The Tribunal said that, in so doing, "he had violated the [1907 HR] . . . These offences are war crimes and crimes against humanity." It found that Article 46 of the 1907 HR had been violated.⁴²⁸

⁴¹⁹ Paraguay, *Penal Code* (1997), Article 320(7).

⁴²⁰ Slovenia, *Penal Code* (1994), Article 374(1).

⁴²¹ Spain, *Military Criminal Code* (1985), Article 74(1).

⁴²² Uganda, *National Resistance Army Statute* (1992), Section 35(e).

⁴²³ UK, *Army Act as amended* (1955), Section 63.

⁴²⁴ UK, *Air Force Act as amended* (1955), Section 63.

⁴²⁵ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

⁴²⁶ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

⁴²⁷ Bosnia and Herzegovina, Cantonal Court of Bihac, *Bijelić case*, Judgement, 30 April 1997.

⁴²⁸ China, War Crimes Military Tribunal of the Ministry of National Defence at Nanking, *Takashi Sakai case*, Judgement, 29 August 1946.

407. During the First World War, France adopted a law to extend the jurisdiction of its courts to offences committed in invaded territory and on this basis a number of German officers and soldiers were convicted by courts-martial, *inter alia*, for arson.⁴²⁹

408. In the *Szabados case* before a French Military Tribunal in 1946, the accused, a former German non-commissioned officer of the 19th Police Regiment stationed in occupied France, was charged with, and found guilty of, *inter alia*, arson and wanton destruction of inhabited buildings. The accused ordered the inhabitants of several houses in Ugine, regarded as harbouring "terrorists", to leave the premises, whereupon three houses were set on fire. He personally threw hand-grenades into the houses. He also took part in the destruction by dynamite of a block of three more houses which it was found difficult to set on fire. The wanton destruction of inhabited houses by fire and explosive was regarded by the court as being a crime under Article 434 of the French Penal Code.⁴³⁰

409. In the *Rust case* before a French Military Tribunal in 1948, the accused, a German *Obersturmführer*, was charged, *inter alia*, with "abusive and illegal requisitioning" of French property, a case which, according to the prosecution, amounted to pillage in time of war, under Article 221 of the French Code of Military Justice and Article 2(8) of the 1944 Ordinance on Repression of War Crimes. Without giving reasons therefor, the Tribunal, however, made alterations in respect of the offences and found the accused guilty of "abusing powers conferred upon him for the purpose of requisitioning . . . vehicles by refusing to deliver receipts for such requisitions". The accused was under an obligation to pay, or deliver receipts in lieu of immediate payment, for the requisition.⁴³¹

410. In its judgement in the *Roechling case* in 1948, the General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany held that the accused, the proprietor of a German industrial trust and Reich Commissioner for the iron industry of the departments of Moselle and Meurthe-et-Moselle, was guilty of war crimes, *inter alia*, for the exploitation and removal of important plant from metallurgical undertakings in occupied territories and for unlawful seizure of raw materials and commodities in those countries. The Court found that the foregoing actions amounted to a fraudulent seizure of private property belonging to the inhabitants of occupied countries, in violation of the 1907 HR.⁴³²

⁴²⁹ J. Rampon, *La justice militaire en France et le droit international humanitaire*, Mémoire de DEA, Faculté de Droit, Université de Montpellier I, 1997–1998, p. 30, referring to cases of the Conseil de Guerre de Rennes, 26 February 1915 and of the Conseil de Guerre de Toulouse, 16 July 1916.

⁴³⁰ France, Permanent Military Tribunal at Clermont-Ferrand, *Szabados case*, Judgement, 23 June 1946.

⁴³¹ France, Permanent Military Tribunal at Metz, *Rust case*, Judgement, 5 March 1948.

⁴³² France, General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany, *Roechling case*, Judgement, 30 June 1948.

411. In the *Jorgić case* in 1997, Germany's Higher Regional Court at Düsseldorf found the accused guilty of genocide committed in the context of the conflict in the former Yugoslavia. In 1999, the Federal Supreme Court confirmed the judgement of first instance in most parts. Both courts referred to the taking of property, such as money and furniture, and to the destruction and arson of buildings and private houses as part of the general background in which the genocide took place.⁴³³

412. In the *Ayub case* in 1979, Israel's High Court heard a petition from several Arab landowners whose lands in Al-Bireh and Tubas had been requisitioned in 1970 and 1975 pursuant to orders issued by the military commander of the region. The orders stated that the military commander deemed the requisition to be necessary for military and security purposes. At the initiative of the Israeli civilian government, Jewish settlements were established on the requisitioned lands in 1978, whereupon the Arab landowners petitioned the High Court of Justice for an injunction against the requisition orders and for the return of their lands. In considering the petition, the Court held that:

The 1907 Hague Convention is generally regarded as customary international law, whereas provisions of the 1949 Fourth Geneva Convention remain conventional in their nature. Consequently the petitioners may rely in this Court on the 1907 Hague Convention – which thus forms part of Israeli internal law – but not on provisions of the 1949 Fourth Geneva Convention . . . It therefore remained for the Court to decide whether the requisition of the petitioners' lands violates, inter alia, Articles 23 and 46 of the Hague Regulations prohibiting confiscation of private property. It was proven to the Court that the lands in question were seized only to be used and that rental was offered to the petitioners, who retained their ownership of the lands. This kind of seizure – namely requisition – is lawful under Article 52 of the Hague Regulations . . . The Court also adopts von Glahn's view regarding the question of how to deal with land which the occupant army does not really need for its own purposes but which must not be left in the possession of the owners lest it serve the interests of the enemy.⁴³⁴

413. In the *Sakhwil case* in 1979, a petition was filed with Israel's High Court by two Arab women from the West Bank. The women asked the Court to issue an injunction preventing the respondent from sealing off or demolishing or expropriating the houses in which they and their families resided. One of the rooms of the second petitioner had indeed been ordered to be sealed off. The Court, taking cognisance of the purpose for which the room had served (shelter for a member of the Al-Fatah organisation and hiding place for a sack of explosives), "found the argument on the illegality of the respondent's order to be groundless". The Court stated that the room could be lawfully sealed pursuant to Regulation 119(1) of the Defence (Emergency) Regulations of 1945, which constituted Jordanian legislation that had remained in force since the

⁴³³ Germany, Higher Regional Court at Düsseldorf, *Jorgić case*, Judgement, 26 September 1997; Federal Supreme Court, *Jorgić case*, Judgement, 30 April 1999.

⁴³⁴ Israel, High Court, *Ayub case*, Judgement, 15 March 1979.

period of the British Mandate. According to the Court, Regulation 119 permitted destruction of private property in certain circumstances. The Court added that "there is no contradiction between the provisions of that Convention [GC IV]... and the use of the authority vested in the respondent by legislation which was in force at the time". Consequently, the petition was rejected.⁴³⁵

414. In the *Al-Nawar case* before Israel's High Court in 1985, Judge Shamgar held that Article 46(2) of the 1907 HR "does not extend to property 'actually in use by the hostile army'".⁴³⁶

415. In its judgement in the *Religious Organisation Hokekyoji case* in 1956, a Japanese District Court emphasised that occupying armed forces must observe the 1907 HR, notably the fact that, in accordance with Article 46, "private property cannot be confiscated".⁴³⁷

416. In its judgement in the *Takada case* in 1959, a Japanese District Court stated that "there is no doubt that the principle of the respect for private property is an established custom of international law".⁴³⁸

417. In its judgement in the *Suikosha case* in 1966, a Japanese District Court considered that the prohibition of confiscation of private property as contained in Article 46 of the 1907 HR was part of customary international law.⁴³⁹

418. In its judgement on appeal in the *Esau case* in 1949, the Special Court of Cassation of the Netherlands considered that the removal of scientific instruments and gold from factories in the Netherlands was unlawful unless the property fell within one of the categories of goods which the occupant was exceptionally entitled to seize from private individuals by virtue of Article 53 of the 1907 HR. The Court held that the term "munitions of war" used in Article 53 should not be extended to materials and apparatus such as boring machines, lathes, lamps, tubes and gold, but they could be for technical or scientific reasons. Accordingly, the Court concluded that, with the exception of the short wave transmitter, none of the goods could be deemed to be excepted from the general inviolability of private property in war.⁴⁴⁰

419. In the *Fiebig case* before the Special Criminal Court at The Hague in the Netherlands in 1949, the accused, a delegate of the Minister of the Reich for Armaments and Munitions, was charged with, and convicted of, illegal requisitions. In its judgement, the Court emphasised that the requisitions were not covered by Article 23(g) of the 1907 HR and that they constituted a violation of Article 52 of the 1907 HR. Clearly, according to the Court, Article 23(g) could not be construed as authorising the systematic removal of Dutch property to Germany and the emptying of numbers of factories, warehouses and private

⁴³⁵ Israel, High Court, *Sakhwil case*, Judgement, 6 November 1979.

⁴³⁶ Israel, High Court, *Al-Nawar case*, Judgement, 11 August 1985.

⁴³⁷ Japan, District Court of Chiba, *Religious Organisation Hokekyoji case*, Judgement, 10 April 1956.

⁴³⁸ Japan, District Court of Tokyo, *Takada case*, Judgement, 28 January 1959.

⁴³⁹ Japan, District Court of Tokyo, *Suikosha case*, Judgement, 28 February 1966.

⁴⁴⁰ Netherlands, Special Court of Cassation, *Esau case*, Judgement on Appeal, 21 February 1949.

houses. Article 52 was violated because most of the removed commodities did not serve the necessities of the occupying army but supported the general war effort of Germany. Furthermore, no authorisation of requisition was granted by the military commander. In addition, the requisitioned property did not fall within the category of private property susceptible of seizure in accordance with Article 53 of the 1907 HR.⁴⁴¹

420. In the *Greiser case* before Poland's Supreme National Tribunal in 1946, the accused, a governor and *gauleiter* of the Nazi party for provinces incorporated in the German Reich, was charged for war crimes for having incited, assisted in the commission of, and committed, *inter alia*, acts of systematic and illegal deprivation of the Polish population of its private property, in contravention of Articles 46, 52 and 55 of the 1907 HR. Notably, the accused was charged with having taken part in "extortion and appropriation of the movables of Polish citizens, ... in the territories in question ... either by seizure, confiscation or by simply depriving of them persons being deported".⁴⁴²

421. In the *Flick case* before the US Military Tribunal at Nuremberg in 1947, the accused, the principal proprietor of a large group of German industrial enterprises (and four officials of the same group), which included coal and iron mines and steel producing plants, was charged with war crimes, *inter alia*, for offences against property in the countries and territories occupied by Germany. Flick was found guilty on this count of the indictment. The Tribunal quoted, *inter alia*, Articles 46, 52 and 53 of the 1907 HR. In respect of the seizure and management of private property, the Tribunal affirmed that:

The seizure of Rombach [a plant in occupied Alsace] in the first instance may be defended upon the ground of military necessity. The possibility of its use by the French, the absence of responsible management and the need for finding work for the idle population are all factors that the German authorities may have taken into consideration. Military necessity is a broad term. Its interpretation involves the exercise of some discretion. If after seizure the German authorities had treated their possession as conservatory for the rightful owners' interests, little fault could be found with the subsequent conduct of those in possession.

...

But some time after the seizure the Reich Government in the person of Goering, Plenipotentiary for the Four Year Plan, manifested the intention that it should be operated as the property of the Reich. This is clearly shown by the quoted statement in the contract which Flick signed. It was, no doubt, Goering's intention to exploit it to the fullest extent for the German war effort. We do not believe that this intent was shared by Flick. Certainly what was done by his company in the course of its management falls far short of such exploitation. Flick's expectation of ownership caused him to plough back into the physical property the profits of operation. This policy ultimately resulted to the advantage of the owners. In all of this we find no exploitation either for Flick's present personal advantage or to fulfil the aims of Goering.

⁴⁴¹ Netherlands, Special Criminal Court at The Hague, *Fiebig case*, Judgement, 28 June 1949.

⁴⁴² Poland, Supreme National Tribunal, *Greiser case*, Judgement, 7 July 1946.

...

While the original seizure may not have been unlawful, its subsequent detention from the rightful owners was wrongful. For this and other damage they may be compensated.

...

In this case, Flick's acts and conduct contributed to a violation of [Article 46 of the 1907 HR] that is, that private property must be respected. Of this there can be no doubt. But his acts were not within his knowledge intended to contribute to a programme of "systematic plunder" conceived by the Hitler regime and for which many of the major war criminals have been punished. If they added anything to this programme of spoliation, it was in a very small degree.⁴⁴³

422. In the *Krupp case* before the US Military Tribunal at Nuremberg in 1948, the accused, officials of the Krupp industrial enterprises occupying high positions in political, financial, industrial and economic circles in Germany, were charged with war crimes, *inter alia*, for the destruction and removal of property, and the seizure of machinery, equipment, raw materials and other property. The Tribunal quoted Articles 46 and 52 of the 1907 HR. It also stated that it "fully concurs with the Judgement of the I.M.T. that the [1907 Hague Convention (IV)], to which Germany was a party, had by 1939 become customary law and was, therefore, binding on Germany not only as Treaty Law but also as Customary Law". The Tribunal further stated that Articles 46 and 52 of the 1907 HR

are clear and unequivocal. Their essence is: if, as a result of war action, a belligerent occupies territory of the adversary, he does not, thereby, acquire the right to dispose of property in that territory, except according to the strict rules laid down in the Regulations. The economy of the belligerently occupied territory is to be kept intact, except for the carefully defined permissions given to the occupying authority – permissions which all refer to the army of occupation. Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner.

...

When discriminatory laws are passed which affect the property rights of private individuals, subsequent transactions based on those laws and involving such property will in themselves constitute violations of Article 46 of the Hague Regulations.

...

Another erroneous contention put forward by the Defence is that the laws and customs of war do not prohibit the seizure and exploitation of property in belligerently occupied territory so long as no definite transfer of title was accomplished. The Hague Regulations are very clear on this point. Article 46 stipulates that "private property . . . must be respected." However, if, for example, a factory is being taken over in a manner which prevents the rightful owner from using it and deprives him from lawfully exercising his prerogative as owner, it cannot be said that his property "is respected" under Article 46 as it must be.

⁴⁴³ US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947.

...

The general rule contained in Article 46 is further developed in Articles 52 and 53. Article 52 speaks of the "requisitions in kind and services" which may be demanded from municipalities or inhabitants, and it provides that such requisitions and services "shall not be demanded except for the needs of the Army of Occupation." As all authorities are agreed, the requisitions and services which are here contemplated and which alone are permissible, must refer to the needs of the Army of Occupation. It has never been contended that the Krupp firm belonged to the Army of Occupation. For this reason alone, the "requisitions in kind" by or on behalf of the Krupp firm were illegal. All authorities are again in agreement that the requisitions in kind and services referred to in Article 52, concern such matters as billets for the occupying troops and the occupation authorities, garages for their vehicles, stables for their horses, urgently needed equipment and supplies for the proper functioning of the occupation authorities, food for the Army of Occupation, and the like.⁴⁴⁴

423. In the *Krauch (I. G. Farben Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, officials of I.G. Farben Industrie A.G., were charged, *inter alia*, with war crimes for offences against property in countries and territories which came under the belligerent occupation of Germany. The charges were regarded as violations of, *inter alia*, Articles 46, 52 and 53 of the 1907 HR. Some of the accused were found guilty of this count. The Tribunal held that:

The foregoing provisions of the Hague Regulations are broadly aimed at preserving the inviolability of property rights to both public and private property during military occupancy. They admit of exceptions of expropriation, use, and requisition, all of which are subject to well-defined limitations set forth in the articles. Where private individuals, including juristic persons, proceed to exploit the military occupancy by acquiring private property against the will and consent of the former owner, such action, not being expressly justified by any applicable provision of the Hague Regulations, is in violation of international law.

...

The payment of a price or other adequate consideration does not, under such circumstances, relieve the act of its unlawful character. Similarly where a private individual or a juristic person becomes a party to unlawful confiscation of... private property by planning and executing a well-defined design to acquire such property permanently, acquisition under such circumstances subsequent to confiscation constitutes conduct in violation of the Hague Regulations.

...

[I]t is illustrative of the view that offences against property of the character described in the [1943 Inter-Allied Declaration against Acts of Dispossession] were considered by the signatory powers to constitute action in violation of existing international law.

...

[W]ith respect to private property, these provisions relate to plunder, confiscation, and requisition which, in turn, imply action in relation to property committed against the will and without the consent of the owner... If, in fact, there is no

⁴⁴⁴ US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948.

coercion present in an agreement relating to the purchase of industrial enterprises or interests equivalent thereto, even during time of military occupancy, and if, in fact, the owner's consent is voluntarily given, we do not find such action to be violation of the Hague Regulations . . . On the other hand, when action by the owner is not voluntary because his consent is obtained by threats, intimidation, pressure, or by exploiting the position and power of the military occupant under circumstances indicating that the owner is being induced to part with his property against his will, it is clearly a violation of the Hague Regulations.⁴⁴⁵

424. In the *Von Leeb (The High Command Trial)* case before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes and crimes against humanity against civilians in that they participated in atrocities such as wanton destruction of cities, towns and villages and devastation not justified by military necessity. The Tribunal stated that "most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations". It notably mentioned Articles 46 and 52 of the 1907 HR. The Tribunal found that the accused gave orders to seize or destroy foodstuffs and other property, such as cattle and horses, but the evidence did not show that these measures were not warranted by military necessity. The Tribunal emphasised that military necessity "does [not] justify the seizure of property or goods beyond that which is necessary for the use of the army of occupation".⁴⁴⁶

425. In its judgement in the *John Schultz case* in 1952, the US Court of Military Appeals listed arson as a crime "universally recognized as properly punishable under the law of war".⁴⁴⁷

Other National Practice

426. Working documents for the German army state that an army of occupation is allowed to appropriate goods from the civilian population if this is necessary to satisfy the needs of the army.⁴⁴⁸

427. In 1995, during a debate in the UN Security Council concerning the situation in the former Yugoslavia, Honduras condemned the practice of "ethnic cleansing", *inter alia*, "through . . . confiscation of property and destruction of homes, we have seen in Bosnian and Croatian territory the systematic elimination of one ethnic group by another. All of these acts deserve the condemnation and repudiation of the international community."⁴⁴⁹

⁴⁴⁵ US, Military Tribunal in Nuremberg, *Krauch (I. G. Farben Trial) case*, Judgement, 29 July 1948.

⁴⁴⁶ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 28 October 1948.

⁴⁴⁷ US, Court of Military Appeals, *John Schultz case*, Judgement, 5 August 1952.

⁴⁴⁸ Germany, *Materialien zur Weiterbildung in Kriegsvölkerrecht: Kampfführung und Schutz der Zivilbevölkerung*, Zentrum Innere Führung, Koblenz, 1988, p. 36.

⁴⁴⁹ Honduras, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 6.

428. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that strict measures should be taken to protect cities that fall under the control of armed forces, including measures to protect and ensure the safety of private property.⁴⁵⁰

429. In 1990, in a letter to the UN Secretary-General, Kuwait accused the Iraqi occupation forces of burning and destroying homes.⁴⁵¹

430. In 1995, during a debate in the UN Security Council concerning the situation in the former Yugoslavia, Russia declared that "the continuing large-scale violations of the rights of the Serbian population in the former Sectors West, North and South – including burnings... of homes... – are causing serious concern".⁴⁵²

431. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "in violation of [the 1907 HR]... private... property was confiscated... (Confiscation of private property is prohibited under any circumstance...)"⁴⁵³

III. Practice of International Organisations and Conferences

United Nations

432. In a resolution adopted in 1990 following Iraq's invasion of Kuwait, the UN Security Council condemned "the treatment by Iraqi forces of Kuwaiti nationals, including... mistreatment of... property in Kuwait in violation of international law".⁴⁵⁴

433. In a resolution adopted in 1995 on violations of international humanitarian law in the former Yugoslavia, the UN Security Council expressed its deep concern "at reports... of serious violations of international humanitarian law... including burning of houses".⁴⁵⁵

434. In 1995, in a statement by its President regarding the situation in Croatia, the UN Security Council stated that it was "concerned by the reports of human rights violations including the burning of houses" and demanded that the government of Croatia "immediately investigate all such reports and take appropriate measures to put an end to such acts".⁴⁵⁶

435. In January 1996, in a statement by its President regarding the situation in Croatia, the UN Security Council strongly condemned "the violations

⁴⁵⁰ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.3.

⁴⁵¹ Kuwait, Letter dated 8 September 1990 to the UN Secretary-General, UN Doc. S/21730, 9 September 1990.

⁴⁵² Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8.

⁴⁵³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 620.

⁴⁵⁴ UN Security Council, Res. 670, 25 September 1990, preamble.

⁴⁵⁵ UN Security Council, Res. 1019, 9 November 1995, preamble.

⁴⁵⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/44, 7 September 1995, p. 1.

of international humanitarian law and human rights in the former sectors North and South in the Republic of Croatia, ... including systematic and widespread ... arson and other forms of destruction of property". The Council further urged the government of Croatia "to make every effort to arrest all perpetrators and bring them promptly to trial".⁴⁵⁷

436. In December 1996, in a statement by its President regarding the situation in Croatia, the UN Security Council deplored "the continued failure by the Government of Croatia to safeguard effectively ... property rights [of Croatian Serb refugees], especially the situation where many of those Serbs who have returned to the former sectors have been unable to regain possession of their properties".⁴⁵⁸

437. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly condemned "violations of human rights and international humanitarian law, including ... the burning ... of houses".⁴⁵⁹

438. In a resolution adopted in 1993, the UN Commission on Human Rights condemned "the ongoing Israeli violations of human rights in southern Lebanon consisting, in particular, in ... the demolition of ... homes [of civilians and] the confiscation of their property".⁴⁶⁰

439. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights condemned:

in the strongest terms all violations of human rights and international humanitarian law during the conflict, in particular in areas which were under the control of the self-proclaimed Bosnian and Croatian Serb authorities, in particular massive and systematic violations, including, *inter alia*, ... burning ... of houses, shelling of residential areas ...⁴⁶¹

440. In a resolution adopted in 1998 on the situation of human rights in southern Lebanon and western Bekaa, the UN Commission on Human Rights deplored "the destruction of ... dwellings [of Lebanese citizens], the confiscation of their property ...". It called upon Israel "to put an immediate end to such practices".⁴⁶²

441. In a resolution adopted in 2000 on the situation in Chechnya, the UN Commission on Human Rights deplored "the suffering inflicted on the civilian population by all parties, including the serious and systematic destruction of installations and infrastructure, contrary to international humanitarian law".⁴⁶³

⁴⁵⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/2, 8 January 1996, p. 1.

⁴⁵⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/48, 20 December 1996, p. 1.

⁴⁵⁹ UN General Assembly, Res. 50/193, 22 December 1995, § 6.

⁴⁶⁰ UN Commission on Human Rights, Res. 1993/67, 10 March 1993, § 1.

⁴⁶¹ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.

⁴⁶² UN Commission on Human Rights, Res. 1998/62, 21 April 1998, § 1.

⁴⁶³ UN Commission on Human Rights, Res. 2000/58, 25 April 2000, preamble.

442. In 1995, in a report concerning the conflict in the former Yugoslavia, the UN Secretary-General noted that UNCRO continued to document serious violations of the human rights of the Croatian Serbs who had remained in the sectors reconquered by the Croatian army, including the burning of houses.⁴⁶⁴

443. In 1996, in a report on UNOMIL in Liberia, the UN Secretary-General reported that his "Special Representative has, on several occasions, . . . exhorted Liberian faction leaders to exert proper command and control over their combatants so that the . . . property of civilians can be protected and human rights abuses stopped".⁴⁶⁵

444. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General reported that:

Since the end of November 1995, the incidence of human rights violations, including acts of . . . arson . . . committed in the former Sectors West, North and South has continued to decline . . . The Government of Croatia eventually responded with a series of measures intended to protect its citizens' human rights, and these initiatives seem to have begun to have a positive effect.⁴⁶⁶

445. In 1998, in a report on the situation in Sierra Leone, the UN Secretary-General noted that:

From all parts of the country there are reports of . . . destruction of residential and commercial premises and property. It will remain important to document these actions with a view to tackling issues of impunity and as an element in the process of promoting reconciliation and healing of society.⁴⁶⁷

446. In 1996, in a report on the situation of human rights in the Sudan, the Special Rapporteur of the UN Commission on Human Rights listed as "grave violations of human rights" the indiscriminate killing of civilians during raids by the army and by the PDF, which were regularly accompanied by the burning of houses.⁴⁶⁸

447. In 1996, in a report on the situation of human rights in Somalia, the Independent Expert of the UN Commission on Human Rights described, in a section entitled "Civil war and violations of human rights", the practices of the different Somali factions, including the fact that the winning faction would engage in destruction of private property.⁴⁶⁹

⁴⁶⁴ UN Secretary-General, Report pursuant to Security Council Resolutions 981 (1995), 982 (1995) and 983 (1995), UN Doc. S/1995/987, 23 November 1995, § 7.

⁴⁶⁵ UN Secretary-General, Fifteenth progress report on UNOMIL, UN Doc. S/1996/47, 23 January 1996, § 28.

⁴⁶⁶ UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council Resolution 1019 (1995), UN Doc. S/1996/109, 14 February 1996, § 6.

⁴⁶⁷ UN Secretary-General, Fifth report on the situation in Sierra Leone, UN Doc. S/1998/486, 9 June 1998, § 37.

⁴⁶⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 96(a).

⁴⁶⁹ UN Commission on Human Rights, Independent Expert on Assistance to Somalia in the Field of Human Rights, Report, UN Doc. E/CN.4/1996/14/Add.1, 10 April 1996, § 10.

Other International Organisations

448. In the Final Communiqué of its 10th Session in 1989, the GCC Supreme Council appealed for “an end to the Israelis’ oppressive measures, including . . . the demolishing of houses, which run counter to the principles of human rights and international norms and conventions”.⁴⁷⁰

449. In the Final Communiqué of its 36th Session in 1990, the GCC Ministerial Council emphasised that “civilians in the Kuwaiti territory under Iraqi occupation must be respected and the integrity of their lives and property ensured” and that “private establishments and property must be safeguarded in accordance with the noble stipulations of Islamic law”. It insisted that “the Iraqi authorities must ensure the protection of all . . . private establishments and all movable and immovable property in the State of Kuwait”.⁴⁷¹

450. In the Final Communiqué of its 11th Session in 1990, the GCC Supreme Council demanded that:

The Iraqi régime must respect the status of civilians and ensure the safety of their lives and property and must safeguard private . . . installations and property in accordance with Islamic law, the provisions of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War and the international humanitarian covenants and conventions.⁴⁷²

451. In a resolution adopted in 1990, the Council of the League of Arab States, with reference to Islamic law, GC IV, the 1948 UDHR and international covenants and conventions relating to the protection of human rights, decided “to insist that the Iraqi authorities must ensure the protection of all . . . private establishments and all movable and immovable property in the State of Kuwait, and to regard any measures incompatible with such a commitment as null and void”. In another resolution adopted the same day, the Council decided “to urge the Iraqi authorities to meet their established international obligations towards third-country nationals by . . . ensuring the safety of their . . . property” and “to hold the Republic of Iraq fully responsible for any damage . . . to their property as a result of a breach on the part of the Iraqi authorities of their international obligations in this respect”.⁴⁷³

⁴⁷⁰ GCC, Supreme Council, 10th Session, Muscat, 18–21 December 1989, Final Communiqué, annexed to Letter dated 29 December 1989 from Oman to the UN Secretary-General, UN Doc. A/45/73-S/21065, 2 January 1990, p. 4.

⁴⁷¹ GCC, Ministerial Council, 36th Session, Jeddah, 5–6 September 1990, Final Communiqué, annexed to Letter dated 6 September 1990 from Oman to the UN Secretary-General, UN Doc. S/21719, 6 September 1990, p. 3, preamble and § 3.

⁴⁷² GCC, Supreme Council, 11th Session, Doha, 22–25 December 1990, annexed to Note verbale dated 26 December 1990 from Qatar to the UN Secretary-General, UN Doc. A/45/908, 27 December 1990, p. 3.

⁴⁷³ League of Arab States, Council, Res. 5038, 31 August 1990, annexed to Letter dated 31 August 1990 from Qatar to the UN Secretary-General, UN Doc. S/21693, 31 August 1990, p. 4, Res. 5039, 31 August 1990, annexed to Letter dated 31 August 1990 from Qatar to the UN Secretary-General, UN Doc. S/21693, 31 August 1990, p. 7. (Libya opposed the resolutions and Algeria, Iraq, Jordan, Mauritania, Palestine, Sudan, Tunisia and Yemen did not participate in the work of the session.)

International Conferences

452. The 25th International Conference of the Red Cross in 1986 adopted a resolution on respect for IHL in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions in which it deplored “the destruction of civilian housing in violation of the laws and customs of war”.⁴⁷⁴

453. In a resolution adopted in 1993 on respect for IHL and support for humanitarian action in armed conflicts, the 90th Inter-Parliamentary Conference condemned the destruction of civilian houses and property.⁴⁷⁵

454. In 1996, in a report submitted to the UN Security Council on the activities of the International Conference on the Former Yugoslavia, the Co-Chairmen of the Steering Committee stated with respect to the remaining Serb population in the Krajina that “human rights violations, including burning . . . of abandoned property . . . were brought to the attention of the Croatian Government at the highest levels on a number of occasions, together with the serious criticisms from the international community”.⁴⁷⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

455. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

456. In a communication to the press issued in 1993 on the situation in Bosnia and Herzegovina, the ICRC denounced “blatant violations of the basic principles of international humanitarian law”, including the fact that “civilian property, particularly houses, is destroyed and burned by the combatants”.⁴⁷⁷

457. In a communication to the press in 2001, the ICRC reminded the parties to the conflict in Afghanistan of “the requirement that persons not taking part in hostilities must be treated with humanity in all circumstances: . . . their property must be respected”.⁴⁷⁸

VI. Other Practice

458. In 1979, an armed opposition group wrote to the ICRC to confirm its commitment to IHL and to denounce “the arson and destruction of 300,000 homes”.⁴⁷⁹

⁴⁷⁴ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, preamble.

⁴⁷⁵ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, preamble.

⁴⁷⁶ International Conference on the Former Yugoslavia, Co-Chairmen of the Steering Committee, Final biannual report, UN Doc. S/1996/4, 2 January 1996, Annex, § 10.

⁴⁷⁷ ICRC, Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity, Geneva, 16 June 1993.

⁴⁷⁸ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to the conflict to respect international humanitarian law, 24 October 2001.

⁴⁷⁹ ICRC archive documents.

D. Pillage

General

Note: *For practice concerning pillage of cultural property, see Chapter 12, section C. For practice concerning protection of the wounded, sick and shipwrecked against pillage, see Chapter 34, section C. For practice concerning protection of the dead against despoliation, see Chapter 35, section B. For practice concerning pillage of the personal belongings of persons deprived of their liberty, see Chapter 37, section E.*

I. Treaties and Other Instruments

Treaties

- 459.** Article 28 of the 1899 HR provides that “the pillage of a town or place, even when taken by assault, is prohibited”.
- 460.** Article 47 of the 1899 HR, under the section entitled “On military authority over hostile territory”, provides that “pillage is formally prohibited”.
- 461.** Article 28 of the 1907 HR provides that “the pillage of a town or place, even when taken by assault, is prohibited”.
- 462.** Article 47 of the 1907 HR, under the section entitled “On military authority over the territory of the hostile State”, provides that “pillage is formally forbidden”.
- 463.** Article 7 of the 1907 Hague Convention (IX) provides that “a town or place, even when taken by storm, may not be pillaged”.
- 464.** According to Article 21 of the 1907 Hague Convention (X), its signatory parties “undertake to enact or to propose to their legislatures . . . the measures necessary for checking in time of war individual acts of pillage”.
- 465.** Article 6(b) of the 1945 IMT Charter (Nuremberg) includes “plunder of public or private property” in its list of war crimes, for which there must be individual responsibility.
- 466.** Article 33, second paragraph, GC IV provides that “pillage is prohibited”.
- 467.** Article 4(2)(g) AP II prohibits acts of pillage against “all persons who do not take a direct part or who have ceased to take part in hostilities”. Article 4 AP II was adopted by consensus.⁴⁸⁰
- 468.** Pursuant to Article 8(2)(b)(xvi) and (e)(v) of the 1998 ICC Statute, “pillaging a town or place, even when taken by assault” is a war crime in both international and non-international armed conflicts.
- 469.** Article 3 of the 2002 Statute of the Special Court for Sierra Leone gives the Court jurisdiction over serious violations of common Article 3 of the 1949 Geneva Conventions and of AP II, including pillage.

⁴⁸⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

Other Instruments

470. Article 44 of the 1863 Lieber Code provides that “all robbery, all pillage or sacking, even after taking a place by main force . . . are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense”.

471. Article 18 of the 1874 Brussels Declaration states that “a town taken by assault ought not to be given over to pillage by the victorious troops”.

472. Article 39 of the 1874 Brussels Declaration formally forbids pillage.

473. Article 32 of the 1880 Oxford Manual states that “it is forbidden . . . to pillage, even towns taken by assault”.

474. Article 18 of the 1913 Oxford Manual of Naval War prohibits pillage.

475. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “pillage”.

476. The 1943 Inter-Allied Declaration against Acts of Dispossession affirms the determination of its authors

to combat and defeat the plundering by the enemy Powers of the territories which have been overrun or brought under enemy control. The systematic spoliation of occupied or controlled territory has followed immediately upon each fresh aggression. This has taken every sort of form, from open looting to the most cunningly camouflaged financial penetration, and it has extended to every sort of property – from works of art to stocks of commodities, from bullion and bank-notes to stocks and shares in business and financial undertakings. But the object is always the same – to seize everything of value that can be put to the aggressors’ profit and then to bring the whole economy of the subjugated countries under control so that they must slave to enrich and strengthen their oppressors . . .

[T]hey intend to do their utmost to defeat the methods of dispossession practised by the Governments with which they are at war against the countries and peoples who have been so wantonly assaulted and despoiled . . .

The wording of the Declaration . . . clearly covers all forms of looting to which the enemy has resorted. It applies, e.g. to the stealing or forced purchase of works of art just as much as to the theft or forced transfer of bearer bonds.

477. Article II(1)(b) of the 1945 Allied Control Council Law No. 10 includes “plunder of public or private property” in its list of war crimes, for which there must be individual responsibility.

478. Principle VI(b) of the 1950 Nuremberg Principles adopted by the ILC provides that “plunder of public or private property” is a war crime.

479. Under Rule 4 of the 1950 UN Command Rules and Regulations, Military Commissions of the UN Command had jurisdiction over offences such as plunder of public and private property.

480. Article 3(e) of the 1993 ICTY Statute gives the Tribunal jurisdiction over violations of the laws and customs of war, expressly including “plunder of public and private property”.

481. In Article 2(c) of the 1994 Agreement on a Temporary Cease-fire on the Tajik-Afghan Border, the concept of “cessation of hostilities” was said to include the prevention of pillage of the civilian population and servicemen.

482. Article 4(f) of the 1994 ICTR Statute gives the Tribunal jurisdiction over, *inter alia*, violations of common Article 3 of the 1949 Geneva Conventions and AP II, expressly including pillage.

483. Pursuant to Article 20(e)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “plunder of public and private property”, in violation of the laws and customs of war, is considered a war crime. Article 20(f)(vi) provides that pillage committed in violation of IHL applicable in armed conflict not of an international character is also regarded as a war crime.

484. Under Section 7.1 and 7.2 of the 1999 UN Secretary-General’s Bulletin, pillage of civilians and persons *hors de combat* is prohibited “at any time and in any place”.

485. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xvi) and (e)(v), “pillaging a town or place, even when taken by assault” is a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

486. Argentina’s Law of War Manual (1969) states that “the pillage of towns and localities, even those taken by assault, is prohibited”.⁴⁸¹ Pillage is also forbidden in occupied territories.⁴⁸²

487. Argentina’s Law of War Manual (1989) provides that pillage is “strictly prohibited”.⁴⁸³

488. Australia’s Commanders’ Guide states that “theft or looting of civilian property by armed combatants is prohibited”.⁴⁸⁴ It also provides that “pillage, the violent acquisition of property for private purposes, is prohibited”.⁴⁸⁵ It further states that “stealing or looting private property is not sanctioned by international law and members who engage in it can expect to face criminal prosecution”.⁴⁸⁶

⁴⁸¹ Argentina, *Law of War Manual* (1969), § 1.013.

⁴⁸² Argentina, *Law of War Manual* (1969), § 4.012.

⁴⁸³ Argentina, *Law of War Manual* (1989), § 4.29.

⁴⁸⁴ Australia, *Commanders’ Guide* (1994), § 610.

⁴⁸⁵ Australia, *Commanders’ Guide* (1994), § 970.

⁴⁸⁶ Australia, *Commanders’ Guide* (1994), § 1040.

489. Australia's Defence Force Manual provides that "pillage, the violent acquisition of property for private purposes, is prohibited".⁴⁸⁷ It adds that "pillage is . . . forbidden, even if the town or place concerned is taken by assault".⁴⁸⁸ It also notes that pillage is prohibited in both one's own territory and occupied territory.⁴⁸⁹ In the case of occupation, the manual specifically states that:

Pillage is prohibited. Pillage is the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually armed forces, for private purposes . . . A military personnel is not allowed to become a thief or a bandit merely because of involvement in a war. The rule against pillage is directed against all private acts of lawlessness committed against enemy property.⁴⁹⁰

490. Belgium's Law of War Manual states that "it is prohibited to pillage a town or a locality, even taken by assault".⁴⁹¹

491. Belgium's Teaching Manual for Soldiers provides that "pillage and theft of [civilian] property are prohibited".⁴⁹²

492. Benin's Military Manual prohibits pillage, "even if the town or location concerned is taken by assault".⁴⁹³

493. Burkina Faso's Disciplinary Regulations states that, under the laws and customs of war, pillage, in particular of civilian property, is forbidden.⁴⁹⁴

494. Cameroon's Disciplinary Regulations states that, under the laws and customs of war, pillage, in particular of civilian property, is forbidden.⁴⁹⁵

495. Under Cameroon's Instructors' Manual, one of the "rules for behaviour in combat" is to respect civilian property and not to steal it.⁴⁹⁶

496. Canada's LOAC Manual provides that "pillage, the violent acquisition of property for private purposes, is prohibited. Pillage is theft, and therefore is an offence under the *Code of Service Discipline*."⁴⁹⁷ In respect of civilians, the manual states that pillage is expressly prohibited in the territories of the parties to the conflict and in occupied territories.⁴⁹⁸ In addition, it states that "the pillage of a town, . . . even when taken by assault, is prohibited".⁴⁹⁹ The manual specifically emphasises that, in occupied territory:

Pillage is prohibited. Pillage is the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually soldiers, for private

⁴⁸⁷ Australia, *Defence Force Manual* (1994), § 743.

⁴⁸⁸ Australia, *Defence Force Manual* (1994), § 923.

⁴⁸⁹ Australia, *Defence Force Manual* (1994), § 953.

⁴⁹⁰ Australia, *Defence Force Manual* (1994), § 1224.

⁴⁹¹ Belgium, *Law of War Manual* (1983), p. 29.

⁴⁹² Belgium, *Teaching Manual for Soldiers* (undated), p. 7, see also p. 10.

⁴⁹³ Benin, *Military Manual* (1995), Fascicule III, p. 12, see also Fascicule II, p. 19 and Fascicule III, p. 4.

⁴⁹⁴ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁴⁹⁵ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁴⁹⁶ Cameroon, *Instructors' Manual* (1992), p. 151.

⁴⁹⁷ Canada, *LOAC Manual* (1999), Glossary, p. GL-15 and p. 6-5, § 50.

⁴⁹⁸ Canada, *LOAC Manual* (1999), p. 11-4, § 33(c).

⁴⁹⁹ Canada, *LOAC Manual* (1999), p. 6-3, § 31.

purposes... Soldiers are not allowed to become thieves or bandits on their own account merely because they are involved in an armed conflict. The rule against pillage is directed against all private acts of lawlessness committed against enemy property.⁵⁰⁰

The manual lists "looting or gathering trophies" as a war crime "recognized by the LOAC".⁵⁰¹ It also specifically states that, in the course of non-international armed conflicts, pillage is prohibited "at any time and anywhere".⁵⁰²

497. Canada's Code of Conduct provides that "looting is prohibited".⁵⁰³ It adds that:

A battlefield and destroyed civilian areas offer attractive objects for the curiosity seeker. No matter how tempting such objects may be, the taking of souvenirs is prohibited. Looting is theft; it is a serious offence and it may also have direct operational consequences.

...

The taking of personal war trophies is also prohibited. Not only is looting illegal, there is also a significant operational risk that such property may be booby-trapped. An isolated act of theft may impede your mission by turning the local population against you.

...

The Law of Armed Conflict does permit the seizure and use of property belonging to the opposing forces under certain circumstances. However, the taking and use of such property must only be done where properly authorized... Property may never be taken for the personal benefit of individual CF personnel.⁵⁰⁴

498. China's PLA Rules of Discipline instructs: "Do not take a single needle or piece of thread from the masses – Turn in everything captured."⁵⁰⁵

499. Colombia's Basic Military Manual provides that it is prohibited "to steal personal property" of non-combatants, as well as "to plunder the property and belongings" of the civilian population.⁵⁰⁶

500. Colombia's Instructors' Manual recalls that theft is prohibited.⁵⁰⁷

501. Congo's Disciplinary Regulations states that, under the laws and customs of war, pillage, in particular of civilian property, is forbidden.⁵⁰⁸

502. Croatia's Soldiers' Manual instructs soldiers to protect the property of civilians and not to steal it.⁵⁰⁹

503. Croatia's Commanders' Manual prohibits pillage.⁵¹⁰

⁵⁰⁰ Canada, *LOAC Manual* (1999), p. 12-8, § 67.

⁵⁰¹ Canada, *LOAC Manual* (1999), pp. 16-3 and 16-4, § 21(b).

⁵⁰² Canada, *LOAC Manual* (1999), p. 17-3, § 21(f).

⁵⁰³ Canada, *Code of Conduct* (2001), Rule 8.

⁵⁰⁴ Canada, *Code of Conduct* (2001), Rule 8, §§ 1-3.

⁵⁰⁵ China, *PLA Rules of Discipline* (1947), Rules 2 and 3.

⁵⁰⁶ Colombia, *Basic Military Manual* (1995), pp. 29 and 30.

⁵⁰⁷ Colombia, *Instructors' Manual* (1999), p. 30.

⁵⁰⁸ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁵⁰⁹ Croatia, *Soldiers' Manual* (1992), p. 5.

⁵¹⁰ Croatia, *Commanders' Manual* (1992), § 18.

504. The Military Manual of the Dominican Republic states that:

When searching dwellings in enemy towns or villages, do not take non-military items. Theft is a violation of the laws of war . . . Stealing private property will make civilians more likely to fight you or to support the enemy forces. You do not want to have to fight both the enemy armed forces and civilians.⁵¹¹

505. Ecuador's Naval Manual states that "the following acts constitute war crimes: . . . plunder and pillage of public or private property".⁵¹²

506. El Salvador's Human Rights Charter of the Armed Forces states that pillage and stealing are violations of human rights.⁵¹³

507. France's Disciplinary Regulations as amended provides that, under international conventions, pillage is prohibited.⁵¹⁴

508. France's LOAC Summary Note prohibits pillage.⁵¹⁵

509. France's LOAC Teaching Note provides that "pillage is prohibited".⁵¹⁶

510. France's LOAC Manual provides that pillage is a prohibited method of warfare.⁵¹⁷ It also states that "pillage constitutes an act of spoliation by which one or several military personnel appropriate objects for a personal or private use, without the consent of the owner of those objects. Pillage constitutes a war crime." It stresses that war trophies or souvenirs might be qualified as theft when the owner does not consent to the appropriation.⁵¹⁸ The manual further states that pillage is a crime for which there is no statute of limitation under the 1998 ICC Statute.⁵¹⁹

511. Germany's Military Manual provides for a general prohibition of pillage under the heading "Protection of the civilian population".⁵²⁰ It also prohibits pillage in occupied territories.⁵²¹

512. Germany's IHL Manual prohibits plunder.⁵²²

513. Indonesia's Air Force Manual provides that "it is prohibited to . . . pillage any property of the enemy".⁵²³

514. Indonesia's Directive on Human Rights in Irian Jaya and Maluku states that the "appropriation and theft of the property of the population is a criminal offence".⁵²⁴

⁵¹¹ Dominican Republic, *Military Manual* (1980), p. 10.

⁵¹² Ecuador, *Naval Manual* (1989), § 6.2.5(8).

⁵¹³ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 18, see also p. 9.

⁵¹⁴ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁵¹⁵ France, *LOAC Summary Note* (1992), § 1.7.

⁵¹⁶ France, *LOAC Teaching Note* (2000), p. 2.

⁵¹⁷ France, *LOAC Manual* (2001), p. 85.

⁵¹⁸ France, *LOAC Manual* (2001), p. 36, see also p. 85.

⁵¹⁹ France, *LOAC Manual* (2001), p. 45.

⁵²⁰ Germany, *Military Manual* (1992), § 507.

⁵²¹ Germany, *Military Manual* (1992), § 536.

⁵²² Germany, *IHL Manual* (1996), § 405.

⁵²³ Indonesia, *Air Force Manual* (1990), § 15(b)(7).

⁵²⁴ Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 9.

515. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "IDF regulations . . . strictly prohibit any act of pillage or looting".⁵²⁵

516. Israel's Manual on the Laws of War states that:

Looting is the theft of enemy property (private or public) by individual soldiers for private purposes . . .

Today, at any rate, looting is absolutely prohibited. The Hague Conventions forbid looting in the course of battle as well as in occupied territory . . . Looting is regarded as a despicable act that tarnishes both the soldier and the IDF, leaving a serious moral blot . . . During the Galilee War, there were unfortunately cases of looting of civilians in Lebanon including a case where even officers – a major and captain – were demoted to the rank of private and [received] a long prison term.⁵²⁶

517. Italy's IHL Manual provides that "it is prohibited . . . to pillage a locality, even when taken by assault".⁵²⁷ It is also a duty of an occupying State "to prevent pillage".⁵²⁸ The manual further considers "plunder of public or private property" as a war crime.⁵²⁹

518. Italy's LOAC Elementary Rules Manual prohibits pillage.⁵³⁰ It also notes that civilian property must be respected and shall not be stolen.⁵³¹

519. Kenya's LOAC Manual orders troops to "respect other people's property. Looting is prohibited."⁵³² Likewise, it states that "it is forbidden . . . to commit pillage, even if the town or place concerned is taken by assault".⁵³³

520. South Korea's Military Regulation 187 provides that theft is a war crime.⁵³⁴

521. South Korea's Military Law Manual states that commanders are responsible for acts of pillage committed by soldiers.⁵³⁵

522. Madagascar's Military Manual prohibits pillage.⁵³⁶

523. Mali's Army Regulations provides that, under the laws and customs of war, pillage, in particular of private property, is forbidden.⁵³⁷

524. Morocco's Disciplinary Regulations states that, under the laws and customs of war, pillage, in particular of civilian property, is forbidden.⁵³⁸

525. The Military Manual of the Netherlands states that "pillage is the taking of goods belonging to civilians during an armed conflict. It is a form of theft.

⁵²⁵ Report on the Practice of Israel, 1997, Chapter 2.3, referring to *Law of War Booklet* (1986), p. 19.

⁵²⁶ Israel, *Manual on the Laws of War* (1998), pp. 62–63.

⁵²⁷ Italy, *IHL Manual* (1991), Vol. I, § 8(7).

⁵²⁸ Italy, *IHL Manual* (1991), Vol. I, § 48(6).

⁵²⁹ Italy, *IHL Manual* (1991), Vol. I, § 84.

⁵³⁰ Italy, *LOAC Elementary Rules Manual* (1991), § 18.

⁵³¹ Italy, *LOAC Elementary Rules Manual* (1991), p. 29.

⁵³² Kenya, *LOAC Manual* (1997), Précis No. 3, p. 14.

⁵³³ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

⁵³⁴ South Korea, *Military Regulation 187* (1991), Article 4.2.

⁵³⁵ South Korea, *Military Law Manual* (1996), p. 89.

⁵³⁶ Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 18.

⁵³⁷ Mali, *Army Regulations* (1979), Article 36.

⁵³⁸ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

Pillage is prohibited.⁵³⁹ The manual also specifically states that, in the course of non-international armed conflicts, pillage is prohibited at any time and anywhere.⁵⁴⁰

526. The Military Handbook of the Netherlands provides that “pillage, the taking of property of civilians, is prohibited”.⁵⁴¹

527. New Zealand’s Military Manual states that “pillage, the violent acquisition of property for private purposes, is prohibited”.⁵⁴² The manual also provides that, in occupied territory:

Pillage is prohibited. Pillage is the seizure or destruction of enemy private or public property or money by representatives of a belligerent, usually soldiers, for private purposes. A soldier may under certain circumstances seize enemy property but, once such property has been seized, it belongs to the State which he is serving. He is not allowed to become a thief or a bandit merely because he is involved in a war. The rule against pillage is directed against all private acts of lawlessness committed against enemy property.⁵⁴³

The manual also states that pillage is a war crime.⁵⁴⁴ Likewise, “among other war crimes recognised by the customary law of armed conflict are . . . looting or gathering trophies”.⁵⁴⁵ The manual also specifically states that, in the course of non-international armed conflicts, pillage is prohibited at any time and anywhere.⁵⁴⁶

528. Nigeria’s Operational Code of Conduct gives troops, *inter alia*, the following instruction: “No looting of any kind. (A good soldier will never loot.)”⁵⁴⁷

529. Nigeria’s Military Manual provides that civilian property shall be safeguarded, *inter alia*, against theft.⁵⁴⁸

530. Nigeria’s Manual on the Laws of War states that “looting is most damaging to morale and destructive to discipline. Looting is absolutely prohibited.”⁵⁴⁹ It also considers pillage to be a war crime.⁵⁵⁰ It further states that:

Private property should be respected. It must not be . . . pillaged even if found in an occupied territory . . . Real property belonging to local government such as hospitals and buildings dedicated to public worship, charity, education, religion, science and art should be treated as private property.⁵⁵¹

⁵³⁹ Netherlands, *Military Manual* (1993), p. IV-5.

⁵⁴⁰ Netherlands, *Military Manual* (1993), p. XI-4.

⁵⁴¹ Netherlands, *Military Handbook* (1995), p. 7-43, see also pp. 7-36 and 7-40.

⁵⁴² New Zealand, *Military Manual* (1992), § 529, see also § 1116.

⁵⁴³ New Zealand, *Military Manual* (1992), § 1334.

⁵⁴⁴ New Zealand, *Military Manual* (1992), § 1704(4).

⁵⁴⁵ New Zealand, *Military Manual* (1992), § 1704(5).

⁵⁴⁶ New Zealand, *Military Manual* (1992), § 1812.

⁵⁴⁷ Nigeria, *Operational Code of Conduct* (1967), § 4(h).

⁵⁴⁸ Nigeria, *Military Manual* (1994), p. 39, § 5(k).

⁵⁴⁹ Nigeria, *Manual on the Laws of War* (undated), § 30.

⁵⁵⁰ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁵⁵¹ Nigeria, *Manual on the Laws of War* (undated), § 27.

The manual also provides that the absence of persons from their house does not authorise pillage and damage.⁵⁵²

531. Nigeria's Soldiers' Code of Conduct states that "civilian property shall be safeguarded against theft".⁵⁵³

532. Peru's Human Rights Charter of the Security Forces instructs army and police forces to respect private property.⁵⁵⁴ It emphasises that theft is to be punished. It states that "if you steal, you damage your prestige and the prestige of the Armed Forces".⁵⁵⁵ Theft and plunder are considered to be "violations of human rights".⁵⁵⁶

533. The Military Directive to Commanders of the Philippines tries "to protect troops from false charges of looting", by requesting civil relations groups to immediately conduct a survey of the residents after the operation, and make proper documentation, including witnesses' statements, material and photographs.⁵⁵⁷

534. The Soldier's Rules of the Philippines instructs troops: "Respect other people's property. Looting is prohibited."⁵⁵⁸

535. Russia's Military Manual provides that allowing a town or an area to be pillaged is a prohibited method of warfare.⁵⁵⁹

536. Senegal's Disciplinary Regulations states that, under the laws and customs of war, pillage is forbidden.⁵⁶⁰

537. Senegal's IHL Manual specifies that "every individual is entitled to respect for the minimum universal rules . . . which prohibit . . . pillage".⁵⁶¹

538. South Africa's LOAC Manual provides that pillage and stealing of civilian property is forbidden.⁵⁶² It also states that pillage is a grave breach of the Geneva Conventions and a war crime.⁵⁶³

539. Spain's LOAC Manual states that "pillage and plunder of conquered populations or localities are especially forbidden".⁵⁶⁴

540. Sweden's IHL Manual states that "pillage in connection with the capture of a town or locality is prohibited".⁵⁶⁵

541. Switzerland's Basic Military Manual states that all forms of pillage are prohibited. It refers to Articles 28 of the 1907 HR and 33 GC IV.⁵⁶⁶ It further defines pillage as a war crime.⁵⁶⁷

⁵⁵² Nigeria, *Manual on the Laws of War* (undated), § 28.

⁵⁵³ Nigeria, *Soldiers' Code of Conduct* (undated), § 11.

⁵⁵⁴ Peru, *Human Rights Charter of the Security Forces* (1991), p. 27.

⁵⁵⁵ Peru, *Human Rights Charter of the Security Forces* (1991), p. 11.

⁵⁵⁶ Peru, *Human Rights Charter of the Security Forces* (1991), p. 25.

⁵⁵⁷ Philippines, *Military Directive to Commanders* (1988), p. 30, § 4(i).

⁵⁵⁸ Philippines, *Soldier's Rules* (1989), § 11.

⁵⁵⁹ Russia, *Military Manual* (1990), § 5(f).

⁵⁶⁰ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

⁵⁶¹ Senegal, *IHL Manual* (1999), p. 23.

⁵⁶² South Africa, *LOAC Manual* (1996), § 28(f).

⁵⁶³ South Africa, *LOAC Manual* (1996), §§ 39(h) and 41.

⁵⁶⁴ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.b.(2), see also §§ 10.6.a.(11) and 10.8.b.

⁵⁶⁵ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 52.

⁵⁶⁶ Switzerland, *Basic Military Manual* (1987), Article 34, see also Articles 21 and 147(c).

⁵⁶⁷ Switzerland, *Basic Military Manual* (1987), Article 200(2)(i).

542. Togo's Military Manual prohibits pillage, "even if the town or location concerned is taken by assault".⁵⁶⁸

543. Under Uganda's Code of Conduct, "theft of property" is a punishable offence.⁵⁶⁹

544. Uganda's Operational Code of Conduct provides that "the offence of undermining relationship with the civilian population shall include . . . stealing civilian property or food".⁵⁷⁰ It further states that "the offence of personal interests endangering operational efficiency shall include . . . capturing from the enemy goods for personal use instead of capturing materials needed to help the war effort of the movement; failing to report and hand in goods captured from the enemy".⁵⁷¹

545. The UK Military Manual states that pillage is prohibited whether in the territory of the parties to a conflict or in occupied territory.⁵⁷² It also provides that "pillage of a town, even when it has been taken by assault, is forbidden".⁵⁷³

In connection with the requirements for the granting of irregular combatants of the rights of the armed forces, the manual stipulates that "irregular troops should have been warned against the employment of . . . pillage".⁵⁷⁴ The manual also considers that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . pillage".⁵⁷⁵ In respect of enemy private property, the manual further provides that:

Private property must be respected. It must not be . . . pillaged, even if found in a captured town or other place. This prohibition embodied in the Hague Rules [1907 HR] did not constitute a new rule. However, it has for a long time past been embodied in the regulations of every civilised army, for nothing is more demoralising to troops or more subversive of discipline than plundering. Theft and robbery are as punishable in war as in peace, and the soldier in an enemy country must observe the same respect for property as in his garrison at home.⁵⁷⁶

546. The UK LOAC Manual provides that "it is forbidden . . . to commit pillage, even if the town or place concerned is taken by assault".⁵⁷⁷ The manual lists the "Rules for soldiers", including the following: "I must not – . . . take enemy property for my personal use."⁵⁷⁸ As a "rule for non-commissioned officers", looting is also prohibited.⁵⁷⁹

547. The US Field Manual provides that "the pillage of a town or place, even when taken by assault, is prohibited".⁵⁸⁰ Pillage is also prohibited in the

⁵⁶⁸ Togo, *Military Manual* (1996), Fascicule III, p. 12, see also Fascicule II, p. 19 and Fascicule III, p. 4.

⁵⁶⁹ Uganda, *Code of Conduct* (1986), § B(11).

⁵⁷⁰ Uganda, *Operational Code of Conduct* (1986), § 12(b).

⁵⁷¹ Uganda, *Operational Code of Conduct* (1986), § 18(c).

⁵⁷² UK, *Military Manual* (1958), § 42. ⁵⁷³ UK, *Military Manual* (1958), § 306.

⁵⁷⁴ UK, *Military Manual* (1958), § 95. ⁵⁷⁵ UK, *Military Manual* (1958), § 626(j).

⁵⁷⁶ UK, *Military Manual* (1958), § 589.

⁵⁷⁷ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(d).

⁵⁷⁸ UK, *LOAC Manual* (1981), Annex A, p. 44, § 6.

⁵⁷⁹ UK, *LOAC Manual* (1981), Annex A, p. 46, § 8. ⁵⁸⁰ US, *Field Manual* (1956), § 47.

territory of the parties to a conflict as well as in occupied territory.⁵⁸¹ The manual further states that “a member of the armed forces who before or in the presence of the enemy quits his place of duty to plunder or pillage is guilty of the offense of misbehavior before the enemy”.⁵⁸² It also provides that “in addition to the ‘grave breaches’ of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war (‘war crimes’): . . . pillage”.⁵⁸³

548. The US Air Force Pamphlet, analysing the situations in both national and occupied territories, recalls that “Article 33 [GC IV] prohibits . . . pillage (also prohibited in Art. 47 [of the 1907] HR)”.⁵⁸⁴ It also provides that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . Plunder or pillage of public or private property.”⁵⁸⁵

549. The US Soldier’s Manual states that:

When searching dwellings in enemy towns or villages, do not take nonmilitary items. Theft is a violation of the laws of war and US law. Stealing private property will make civilians more likely to fight you or to support the enemy forces. You do not want to have to fight both the enemy armed forces and civilians.⁵⁸⁶

550. Under the US Instructor’s Guide, pillage means “to loot, to deprive of money or property by violence”.⁵⁸⁷ It also states that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . pillaging”.⁵⁸⁸

551. The US Rules of Engagement for Operation Desert Storm prohibits looting.⁵⁸⁹

552. The US Naval Handbook states that “the following acts are representative war crimes: . . . plunder and pillage of public or private property”.⁵⁹⁰

553. Under the YPA Military Manual of the SFRY (FRY), “it is prohibited to pillage enemy property under any circumstances”. The manual considers any unlawful appropriation of private property as pillage.⁵⁹¹

National Legislation

554. Albania’s Military Penal Code punishes “stealing on the battlefield”.⁵⁹²

555. Algeria’s Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁵⁹³

556. Argentina’s Draft Code of Military Justice punishes any soldier who “commits any . . . act of pillage”.⁵⁹⁴

⁵⁸¹ US, *Field Manual* (1956), § 272. ⁵⁸² US, *Field Manual* (1956), § 397.

⁵⁸³ US, *Field Manual* (1956), § 504(j). ⁵⁸⁴ US, *Air Force Pamphlet* (1976), § 14-4.

⁵⁸⁵ US, *Air Force Pamphlet* (1976), § 15-3(c)(8). ⁵⁸⁶ US, *Soldier’s Manual* (1984), p. 23.

⁵⁸⁷ US, *Instructor’s Guide* (1985), p. 28. ⁵⁸⁸ US, *Instructor’s Guide* (1985), p. 13.

⁵⁸⁹ US, *Rules of Engagement for Operation Desert Storm* (1991), § F.

⁵⁹⁰ US, *Naval Handbook* (1995), § 6.2.5(8).

⁵⁹¹ SFRY (FRY), *YPA Military Manual* (1988), § 92.

⁵⁹² Albania, *Military Penal Code* (1995), Article 92.

⁵⁹³ Algeria, *Code of Military Justice* (1971), Article 286.

⁵⁹⁴ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(5) in the *Code of Military Justice as amended* (1951).

557. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including pillage and wholesale looting.⁵⁹⁵

558. Australia's Defence Force Discipline Act, in an article on looting, punishes any

person, being a defence member or a defence civilian, who, in the course of operations against the enemy, . . . takes any property left exposed or unprotected in consequence of such operations . . . or . . . takes any vehicle, equipment or stores captured from or abandoned by the enemy in those operations.⁵⁹⁶

559. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "pillaging" in international and non-international armed conflicts.⁵⁹⁷

560. Azerbaijan's Criminal Code (1960) prohibits pillage.⁵⁹⁸

561. Azerbaijan's Criminal Code (1999) prohibits robbery as a war crime.⁵⁹⁹

562. Bangladesh's International Crimes (Tribunal) Act provides that "plunder of public and private property" is a war crime. It adds that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁶⁰⁰

563. Under the Criminal Code of the Federation of Bosnia and Herzegovina, pillage is a war crime.⁶⁰¹ The Criminal Code of the Republika Srpska contains the same provision.⁶⁰²

564. Under Brazil's Military Penal Code, pillage committed during military operations or in occupied territory is a crime.⁶⁰³

565. Bulgaria's Penal Code as amended provides that any "person who robs, steals . . . property belonging to a population located in the region of military operations" commits a crime.⁶⁰⁴

566. Burkina Faso's Code of Military Justice punishes pillage or damage to commodities, goods or belongings committed by soldiers as a group.⁶⁰⁵

567. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "the pillage of a town or a locality, even when taken by assault" constitutes a war crime in both international and non-international armed conflicts.⁶⁰⁶

⁵⁹⁵ Australia, *War Crimes Act* (1945), Section 3.

⁵⁹⁶ Australia, *Defence Force Discipline Act* (1982), Section 48(1).

⁵⁹⁷ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.54 and 268.81.

⁵⁹⁸ Azerbaijan, *Criminal Code* (1960), Article 261.

⁵⁹⁹ Azerbaijan, *Criminal Code* (1999), Article 116(11).

⁶⁰⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d) and (e).

⁶⁰¹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

⁶⁰² Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

⁶⁰³ Brazil, *Military Penal Code* (1969), Article 406.

⁶⁰⁴ Bulgaria, *Penal Code as amended* (1968), Article 404.

⁶⁰⁵ Burkina Faso, *Code of Military Justice* (1994), Article 193.

⁶⁰⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(p) and (D)(e).

568. Cameroon's Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶⁰⁷

569. Canada's National Defence Act punishes:

every person who...breaks into any house or other place in search of plunder...steals any money or property that has been left exposed or unprotected in consequence of warlike operations, or...takes otherwise than for the public service any money or property abandoned by the enemy.⁶⁰⁸

570. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁶⁰⁹

571. Chad's Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶¹⁰

572. Chile's Code of Military Justice provides for a prison sentence for "military personnel who, failing the obedience they owe to their superiors, ... pillage the inhabitants of the territories where they are in service".⁶¹¹

573. China's Law Governing the Trial of War Criminals provides that "robbing" constitutes a war crime.⁶¹²

574. China's Criminal Code as amended provides that "during armed conflicts and in the area of military operations...looting the property of innocent civilians" is a punishable offence.⁶¹³

575. Colombia's Military Penal Code provides for a prison sentence for "anyone who, in combat operation, appropriates movable property, without any justification, for his own profit or the profit of a third person".⁶¹⁴

576. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, despoils...a protected person".⁶¹⁵

577. Under the DRC Code of Military Justice as amended, pillage committed in time of war is a punishable offence.⁶¹⁶

578. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁶¹⁷

⁶⁰⁷ Cameroon, *Code of Military Justice* (1928), Article 221.

⁶⁰⁸ Canada, *National Defence Act* (1985), Section 77(e), (h) and (i).

⁶⁰⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁶¹⁰ Chad, *Code of Military Justice* (1962), Article 67.

⁶¹¹ Chile, *Code of Military Justice* (1925), Article 262.

⁶¹² China, *Law Governing the Trial of War Criminals* (1946), Article 3(24).

⁶¹³ China, *Criminal Code as amended* (1997), Article 446.

⁶¹⁴ Colombia, *Military Penal Code* (1999), Article 175.

⁶¹⁵ Colombia, *Penal Code* (2000), Article 151.

⁶¹⁶ DRC, *Code of Military Justice as amended* (1972), Article 436, see also Article 435.

⁶¹⁷ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4, see also Article 8.

579. Côte d'Ivoire's Penal Code as amended punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶¹⁸

580. Croatia's Criminal Code considers "the looting of the population's property" as a war crime.⁶¹⁹

581. The Czech Republic's Criminal Code as amended punishes "whoever in a theatre of war, on the battlefield or in places affected by military operations . . . seizes another person's belongings, taking advantage of such person's distress".⁶²⁰

582. Ecuador's National Civil Police Penal Code punishes "members of the National Civil Police who . . . give a [surrendered] place . . . to plunder [or] pillage".⁶²¹

583. Under Egypt's Military Criminal Code, pillage of military property and attacks on a house for the purpose of pillaging it are prohibited.⁶²²

584. El Salvador's Code of Military Justice punishes any "soldier who, in time of international or civil war, . . . pillage the inhabitants".⁶²³

585. Under El Salvador's Penal Code, "plunder of private or public property" during an international or a civil war is a crime.⁶²⁴

586. Estonia's Criminal Code as amended provides for the punishment of pillage.⁶²⁵

587. Under Ethiopia's Penal Code, it is a punishable offence to organise, order or engage in "looting, . . . pillage, economic spoliation or the unlawful destruction or removal of property on pretext of military necessity".⁶²⁶

588. France's Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶²⁷

589. Gambia's Armed Forces Act punishes:

every person subject to this Act who . . . breaks into any house or other place in search of plunder; . . . steals any money or property that has been left exposed or unprotected in consequence of war-like operations; or . . . takes otherwise than for the service of The Gambia, any money or property abandoned by the enemy.⁶²⁸

590. Under Georgia's Criminal Code, "pillage, *i.e.* seizure in a combat situation . . . of the private property of civilians left in the region of hostilities," in an international or a non-international armed conflict, is a crime.⁶²⁹

⁶¹⁸ Côte d'Ivoire, *Penal Code as amended* (1981), Article 464.

⁶¹⁹ Croatia, *Criminal Code* (1997), Article 158(1).

⁶²⁰ Czech Republic, *Criminal Code as amended* (1961), Article 264(a).

⁶²¹ Ecuador, *National Civil Police Penal Code* (1960), Article 117(1).

⁶²² Egypt, *Military Criminal Code* (1966), Articles 140 and 141.

⁶²³ El Salvador, *Code of Military Justice* (1934), Article 68.

⁶²⁴ El Salvador, *Penal Code* (1997), Article 362.

⁶²⁵ Estonia, *Criminal Code as amended* (1992), Section 61/2.

⁶²⁶ Ethiopia, *Penal Code* (1957), Article 285.

⁶²⁷ France, *Code of Military Justice* (1982), Article 427.

⁶²⁸ Gambia, *Armed Forces Act* (1985), Section 40(e), (h) and (i).

⁶²⁹ Georgia, *Criminal Code* (1999), Article 413(a).

591. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "pillages . . . property of the adverse party".⁶³⁰

592. Ghana's Armed Forces Act punishes:

every person subject to the Code of Service Discipline who –

- ...
 - (e) breaks into any house or other place in search of plunder,
 - ...
 - (h) steals any money or property that has been left exposed or unprotected in consequence of warlike operations, or
 - (i) takes otherwise than for the service of the Republic of Ghana any money or property abandoned by the enemy.⁶³¹

593. Guinea's Criminal Code punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶³²

594. Under Hungary's Criminal Code as amended, "the person who loots civilian goods in an operational or occupied territory" is, upon conviction, guilty of a war crime.⁶³³

595. Under India's Army Act, "any person subject to this Act who . . . breaks into any house or other place in search of plunder . . . shall, on conviction by court-martial, [be punished]".⁶³⁴ The Act also criminalises offences against the property or person of any inhabitant of, or resident in, the country in which a soldier is serving.⁶³⁵

596. Under Indonesia's Penal Code, theft committed on the occasion of "riots, insurgencies or war" is a punishable offence.⁶³⁶

597. Indonesia's Military Penal Code punishes:

- Anyone who commits theft by misusing his/her official position . . .
- Any military personnel who commits theft in the area under his/her authority . . .
- Any member of the armed forces who is being prepared for warfare and commits theft or threatens to abuse his/her authority or opportunity and official facilities . . .
- Any person subject to military court authority who is being prepared for warfare, or who accompanying with the approval of the military authority, commits theft by abusing his/her authority, opportunity or official facilities.⁶³⁷

598. Iraq's Military Penal Code states that:

Every person who, taking advantage of war panic or misusing military prestige, takes possession of other persons' property without any justification, or seizes such

⁶³⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 9(1).

⁶³¹ Ghana, *Armed Forces Act* (1962), Section 18(e), (h) and (i).

⁶³² Guinea, *Criminal Code* (1998), Article 569.

⁶³³ Hungary, *Criminal Code as amended* (1978), Section 159(1).

⁶³⁴ India, *Army Act* (1950), Section 36.

⁶³⁵ India, *Army Act* (1950), Section 64.

⁶³⁶ Indonesia, *Penal Code* (1946), § 363.

⁶³⁷ Indonesia, *Military Penal Code* (1947), Articles 140–142(1).

property by force, collects money or goods without being duly authorised to do so, or misuses his official position in making military requisitions for his own benefit shall be considered looter and shall be punished.⁶³⁸

599. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 33 GC IV, as well as any "contravention" of AP II, including violations of Article 4(2)(g) AP II, are punishable offences.⁶³⁹

600. Israel's Nazis and Nazi Collaborators (Punishment) Law punishes persons who have committed war crimes, including "plunder of public or private property".⁶⁴⁰

601. Israel's Military Justice Law states that "a soldier who loots or breaks into a house or another place in order to loot is liable to imprisonment".⁶⁴¹

602. Italy's Law of War Decree states that "it is prohibited... to pillage a locality, even when taken by assault".⁶⁴²

603. Italy's Wartime Military Penal Code punishes anyone who commits "pillage in a town or any other place, even taken by assault".⁶⁴³

604. Jordan's Military Criminal Code states that pillage by a member of the armed forces is a punishable offence.⁶⁴⁴ This also applies to attacking a house with a view to pillaging it.⁶⁴⁵

605. Kazakhstan's Penal Code provides that "pillage of national property in occupied territories" is a crime against the peace and security of mankind.⁶⁴⁶

606. Kenya's Armed Forces Act punishes anyone who steals property left exposed or unprotected, or steals enemy equipment for personal use.⁶⁴⁷

607. Under South Korea's Military Criminal Code, "a person who... takes the goods and effects of the inhabitants in the combat or occupied area" commits a punishable offence.⁶⁴⁸

608. Under Latvia's Criminal Code, "robbery... of civilians... of the occupied territory" is a war crime.⁶⁴⁹

609. Under Luxembourg's Law on the Repression of War Crimes, pillage committed in time of war is a war crime.⁶⁵⁰

610. Malaysia's Armed Forces Act provides that:

⁶³⁸ Iraq, *Military Penal Code* (1940), Article 112(1).

⁶³⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁴⁰ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1.

⁶⁴¹ Israel, *Military Justice Law* (1955), Article 74.

⁶⁴² Italy, *Law of War Decree* (1938), Article 35(7).

⁶⁴³ Italy, *Wartime Military Penal Code* (1941), Article 186.

⁶⁴⁴ Jordan, *Military Criminal Code* (1952), Article 12(1).

⁶⁴⁵ Jordan, *Military Criminal Code* (1952), Article 13(1).

⁶⁴⁶ Kazakhstan, *Penal Code* (1997), Article 159(1).

⁶⁴⁷ Kenya, *Armed Forces Act* (1968), Section 23.

⁶⁴⁸ South Korea, *Military Criminal Code* (1962), Article 82.

⁶⁴⁹ Latvia, *Criminal Code* (1998), Section 74.

⁶⁵⁰ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(6).

Every person subject to service law under this Act who –

- ...
 (b) breaks into any house or other place in search of plunder; or
 ...
 (d) steals any property which has been left exposed or unprotected in consequence of warlike operations; or
 (e) takes otherwise than for the public service any vehicle, equipment or stores abandoned by the enemy,
 shall be guilty of looting and liable on conviction by court-martial to imprisonment or any less punishment provided by this Act.⁶⁵¹

611. Mali's Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶⁵²

612. Under Mali's Penal Code, "the pillage of a town or locality, even when taken by assault," is a war crime in international armed conflicts.⁶⁵³

613. Mexico's Code of Military Justice as amended punishes "anyone who, without being absolutely required by war operations, . . . plunders towns and villages".⁶⁵⁴ It also punishes "anyone who, taking advantage of his position in the army or in the armed forces or of the fears created by war, and for the purpose of illegitimate appropriation, seizes objects belonging to the local population", as well as anyone who "operates forced requisitions to appropriate goods for oneself, on the pretext of public interest".⁶⁵⁵

614. Moldova's Penal Code punishes "robbery . . . committed against the population of the area of military operations".⁶⁵⁶

615. Morocco's Code of Military Justice punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶⁵⁷

616. Mozambique's Military Criminal Law provides that "anyone who, in time of war, pillages . . . goods or any other objects" commits a punishable offence.⁶⁵⁸

617. Myanmar's Defence Service Act punishes any person who "breaks into any house or other place in search of plunder".⁶⁵⁹

618. The Definition of War Crimes Decree of the Netherlands includes "pillage" in its list of war crimes.⁶⁶⁰

619. Under the Military Criminal Code as amended of the Netherlands, the soldier "who abuses, in time of war, the power, opportunities or means given to him as a soldier for committing theft may be punished for pillage".⁶⁶¹

⁶⁵¹ Malaysia, *Armed Forces Act* (1972), Section 46(b), (d) and (e).

⁶⁵² Mali, *Code of Military Justice* (1995), Article 133.

⁶⁵³ Mali, *Penal Code* (2001), Article 31(i)(16).

⁶⁵⁴ Mexico, *Code of Military Justice as amended* (1933), Article 209, see also Article 334.

⁶⁵⁵ Mexico, *Code of Military Justice as amended* (1933), Articles 325 and 326.

⁶⁵⁶ Moldova, *Penal Code* (2002), Article 390.

⁶⁵⁷ Morocco, *Code of Military Justice* (1956), Article 169.

⁶⁵⁸ Mozambique, *Military Criminal Code* (1987), Article 88.

⁶⁵⁹ Myanmar, *Defence Service Act* (1959), Section 35(b).

⁶⁶⁰ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁶⁶¹ Netherlands, *Military Criminal Code as amended* (1964), Article 156.

620. Under the International Crimes Act of the Netherlands, “pillaging a town or place, even when taken by assault” is a crime, whether committed in an international or a non-international armed conflict.⁶⁶²

621. New Zealand’s Armed Forces Discipline Act provides that:

Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who –

- ...
- (b) Steals any property which has been left unexposed or unprotected in consequence of any such war or operations as are mentioned in paragraph (a) of this section; or
 - (c) Appropriates, otherwise than on behalf of Her Majesty the Queen in right of New Zealand, any supplies of any description whatsoever captured from or abandoned by the enemy.⁶⁶³

622. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xvi) and (e)(v) of the 1998 ICC Statute.⁶⁶⁴

623. Nicaragua’s Military Penal Code punishes any “soldier who plunders the inhabitants of enemy towns and territories”.⁶⁶⁵ More generally, it punishes:

the soldier who, during an international or civil war, commits serious violations of international conventions ratified by Nicaragua concerning the use of warlike weapons, the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners and other norms of war...⁶⁶⁶

624. Under Nigeria’s Armed Forces Decree 105 as amended, looting is a punishable offence. A person is guilty of looting who:

- (b) steals any property which has been left exposed or unprotected in consequence of the operations as are mentioned in paragraph (a) of this section [warlike operations]; or
- (c) takes, otherwise than for the public service, any vehicle, equipment or stores abandoned by the enemy.⁶⁶⁷

625. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment”.⁶⁶⁸

⁶⁶² Netherlands, *International Crimes Act* (2003), Articles 5(5)(q) and 6(3)(e).

⁶⁶³ New Zealand, *Armed Forces Discipline Act* (1971), Section 31(b) and (c).

⁶⁶⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁶⁶⁵ Nicaragua, *Military Penal Code* (1996), Article 59.

⁶⁶⁶ Nicaragua, *Military Penal Code* (1996), Article 47.

⁶⁶⁷ Nigeria, *Armed Forces Decree 105 as amended* (1993), Section 51(b) and (c).

⁶⁶⁸ Norway, *Military Penal Code as amended* (1902), § 108.

626. Paraguay's Military Penal Code punishes plunder in time of war.⁶⁶⁹ It further provides that "the person guilty of pillage shall be punished by a prison sentence".⁶⁷⁰

627. Under Paraguay's Penal Code, "looting of private property", in time of war, armed conflict or military occupation, is a war crime.⁶⁷¹

628. Under Peru's Code of Military Justice, it is a punishable violation of international law "to plunder the inhabitants" in time of war.⁶⁷² The Code also punishes "the soldiers who, in time of war or of public calamity, of shipwreck or of aerial accident, commit acts of plunder or of pillage".⁶⁷³

629. Under the Articles of War of the Philippines, it is an offence to abandon one's post to plunder or pillage.⁶⁷⁴

630. Under the War Crimes Trial Executive Order of the Philippines, applicable to acts committed during the Second World War, "plunder of public and private property" is a war crime.⁶⁷⁵

631. Under Russia's Criminal Code, "plunder of the national property in occupied territory" is a crime against the peace and security of mankind.⁶⁷⁶

632. Senegal's Penal Code as amended punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶⁷⁷

633. Singapore's Armed Forces Act as amended provides that:

Every person subject to military law who –

...

(b) steals any property which has been left exposed or unprotected in consequence of any such operations as are mentioned in paragraph (a) [warlike operations]; or

(c) takes, otherwise than for the purposes of the Singapore Armed Forces, any aircraft, vessel, arms, vehicle, equipment or stores abandoned by the enemy,

shall be guilty of looting and shall be liable on conviction by a subordinate military court to imprisonment...⁶⁷⁸

634. Slovakia's Criminal Code as amended punishes "whoever in a theatre of war, on the battlefield or in places affected by military operations... seizes another person's belongings, taking advantage of such person's distress".⁶⁷⁹

635. Under Slovenia's Penal Code, pillage of the civilian population is a war crime.⁶⁸⁰

⁶⁶⁹ Paraguay, *Military Penal Code* (1980), Article 292.

⁶⁷⁰ Paraguay, *Military Penal Code* (1980), Article 295.

⁶⁷¹ Paraguay, *Penal Code* (1997), Article 320(7).

⁶⁷² Peru, *Code of Military Justice* (1980), Article 95(4).

⁶⁷³ Peru, *Code of Military Justice* (1980), Article 138(2).

⁶⁷⁴ Philippines, *Articles of War* (1938), Article 76.

⁶⁷⁵ Philippines, *War Crimes Trial Executive Order* (1947), § II(b)(2).

⁶⁷⁶ Russia, *Criminal Code* (1996), Article 356(1).

⁶⁷⁷ Senegal, *Penal Code as amended* (1965), Article 412.

⁶⁷⁸ Singapore, *Armed Forces Act as amended* (1972), Section 18(b) and (c).

⁶⁷⁹ Slovakia, *Criminal Code as amended* (1961), Article 264(a).

⁶⁸⁰ Slovenia, *Penal Code* (1994), Article 374(1).

636. Spain's Royal Ordinance for the Armed Forces instructs commanders not to permit plunder or pillage.⁶⁸¹

637. Spain's Military Criminal Code punishes any soldier "who pillages the inhabitants of enemy towns".⁶⁸²

638. Spain's Penal Code punishes "anyone who, during an armed conflict, . . . commits any . . . acts of pillage".⁶⁸³

639. Sri Lanka's Army Act as amended punishes "every person subject to military law who . . . leaves the ranks or his post without the orders of his commanding officer in order to go in search of plunder, or . . . breaks into any house or other place in search of plunder".⁶⁸⁴

640. Sri Lanka's Air Force Act as amended punishes "every person subject to this Act who . . . leaves the ranks or his post without the orders of his commanding officer in order to go in search of plunder, or . . . breaks into any house or other place in search of plunder".⁶⁸⁵

641. Sri Lanka's Navy Act as amended punishes "every person subject to naval law who strips off the clothes of, or in any way pillages, . . . any person on board a vessel taken as prize".⁶⁸⁶

642. Switzerland's Military Criminal Code as amended punishes "anyone who, in time of war or military service, commits an act of pillage". It is also a punishable offence to allow subordinates to pillage or not to intervene to stop acts of pillage.⁶⁸⁷

643. Tajikistan's Criminal Code punishes "pillage, i.e. seizure in a combat situation . . . of the private property left in the region of hostilities".⁶⁸⁸

644. Togo's Code of Military Justice prohibits pillage.⁶⁸⁹

645. Trinidad and Tobago's Defence Act as amended provides that:

Any person subject to military law who –

...

- (b) steals any property which has been left exposed or unprotected in consequence of warlike operations; or
- (c) takes otherwise than for the public service any vehicles, equipment or stores abandoned by the enemy,

is guilty of looting and, on conviction by court-martial, liable to imprisonment or less punishment.⁶⁹⁰

⁶⁸¹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 139.

⁶⁸² Spain, *Military Criminal Code* (1985), Article 73.

⁶⁸³ Spain, *Penal Code* (1995), Article 613(1)(e).

⁶⁸⁴ Sri Lanka, *Army Act as amended* (1949), Section 97(2)(a) and (d).

⁶⁸⁵ Sri Lanka, *Air Force Act as amended* (1949), Section 97(2)(a) and (d).

⁶⁸⁶ Sri Lanka, *Navy Act as amended* (1950), Section 98.

⁶⁸⁷ Switzerland, *Military Criminal Code as amended* (1927), Article 139(1).

⁶⁸⁸ Tajikistan, *Criminal Code* (1998), Article 405.

⁶⁸⁹ Togo, *Code of Military Justice* (1981), Article 106.

⁶⁹⁰ Trinidad and Tobago, *Defence Act as amended* (1962), Section 40(b) and (c).

646. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xvi) and (e)(v) of the 1998 ICC Statute.⁶⁹¹

647. Tunisia's Code of Military Justice as amended punishes pillage and damage to commodities, goods or belongings committed by soldiers as a group.⁶⁹²

648. Uganda's National Resistance Army Statute punishes any:

person subject to military law who –

- ...
- (d) breaks into any house or other place in search of plunder; ...
- (g) steals any money or property which has been left exposed or unprotected in consequence of war-like operations; or
- (h) takes otherwise than for the service of the Republic of Uganda any money or property abandoned by the enemy.⁶⁹³

649. Pursuant to Ukraine's Criminal Code, "pillage committed in respect of the local population in an operational zone" is a war crime.⁶⁹⁴

650. The UK Army Act as amended provides that:

Any person subject to military law who –

- ...
- (b) steals any property which has been left exposed or unprotected in consequence of any such operations as are mentioned in paragraph (a) above [warlike operations], or
- (c) takes otherwise than for the public service any vehicle, equipment or stores abandoned by the enemy,

shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.⁶⁹⁵

651. The UK Air Force Act as amended states that:

Any person subject to air-force law who –

- ...
- (b) steals any property which has been left exposed or unprotected in consequence of any such operations as are mentioned in paragraph (a) above [warlike operations], or
- (c) takes otherwise than for the public service any vehicle, equipment or stores abandoned by the enemy,

shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.⁶⁹⁶

⁶⁹¹ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁶⁹² Tunisia, *Code of Military Justice as amended* (1957), Article 103.

⁶⁹³ Uganda, *National Resistance Army Statute* (1992), Section 35(d), (g) and (h).

⁶⁹⁴ Ukraine, *Criminal Code* (2001), Article 433(2).

⁶⁹⁵ UK, *Army Act as amended* (1955), Section 30(b) and (c).

⁶⁹⁶ UK, *Air Force Act as amended* (1955), Section 30(b) and (c).

- 652.** Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xvi) and (e)(v) of the 1998 ICC Statute.⁶⁹⁷
- 653.** The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as “plunder of public or private property”.⁶⁹⁸
- 654.** The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as “plunder of public or private property”.⁶⁹⁹
- 655.** Under the US Uniform Code of Military Justice, abandoning one’s place of duty to plunder or pillage and engaging in looting or pillaging are punishable offences.⁷⁰⁰
- 656.** Under the US War Crimes Act as amended, violations of Article 28 of the 1907 HR are war crimes.⁷⁰¹
- 657.** Uzbekistan’s Criminal Code punishes “the plundering of property”.⁷⁰²
- 658.** Venezuela’s Code of Military Justice as amended punishes soldiers who “failing the obedience they owe to their superiors, . . . pillage the population of towns and villages”.⁷⁰³
- 659.** Vietnam’s Penal Code punishes “anyone who, during combat or while cleaning up a battlefield, steals or destroys war booty”.⁷⁰⁴ It also punishes “anyone who, in time of war, . . . has pillaged property”.⁷⁰⁵
- 660.** Under Yemen’s Military Criminal Code (1996), attacking houses or places with the intent to pillage is an offence. The provision is applicable at all times, whether during international or internal conflicts or in peacetime.⁷⁰⁶
- 661.** Under Yemen’s Military Criminal Code (1998), “looting . . . of property” is a war crime.⁷⁰⁷
- 662.** The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, “any person who . . . ordered or committed . . . the looting of private or public property” committed a war crime.⁷⁰⁸

⁶⁹⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁶⁹⁸ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

⁶⁹⁹ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).

⁷⁰⁰ US, *Uniform Code of Military Justice* (1950), Articles 99 and 103.

⁷⁰¹ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

⁷⁰² Uzbekistan, *Criminal Code* (1994), Article 152.

⁷⁰³ Venezuela, *Code of Military Justice as amended* (1998), Article 474(17), see also Article 474(2).

⁷⁰⁴ Vietnam, *Penal Code* (1990), Article 272(1).

⁷⁰⁵ Vietnam, *Penal Code* (1990), Article 279.

⁷⁰⁶ Yemen, *Military Criminal Code* (1996), Article 25.

⁷⁰⁷ Yemen, *Military Criminal Code* (1998), Article 21(6).

⁷⁰⁸ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

663. Under the Penal Code as amended of the SFRY (FRY), “plunder of the population’s property” is a war crime against the civilian population.⁷⁰⁹

664. Zambia’s Defence Act as amended provides that:

Any person subject to military law under this Act who –

...

(b) steals any property which has been left exposed or unprotected in consequence of warlike operations; or

(c) takes otherwise than for the public service any vehicle, equipment or stores abandoned by the enemy;

shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.⁷¹⁰

665. Zimbabwe’s Defence Act as amended provides that:

Any member [of the Defence Forces] who –

...

(b) steals any property which has been left exposed or unprotected in consequence of warlike operations; or

(c) takes otherwise than for the services of the Defence Forces or any other Military Forces any vehicle, equipment or stores abandoned by the enemy;

shall be guilty of the offence of looting and liable to imprisonment or any less punishment.⁷¹¹

National Case-law

666. In its judgement in the *Military Junta case* in 1985, Argentina’s National Court of Appeals applied the 1907 HR to acts of pillage committed in the context of internal violence. It resorted to the provisions of the Penal Code relating to theft to determine the sanction.⁷¹²

667. In the *Takashi Sakai case* in 1946, a Chinese Military Tribunal found the accused, a Japanese military commander in China during the Second World War, guilty, *inter alia*, of “inciting or permitting his subordinates to . . . plunder . . . civilians”, notably rice, poultry and other foods. The Tribunal said that, in so doing, “he had violated the [1907 HR] . . . These offences are war crimes and crimes against humanity.” It found that Articles 28 and 47 of the 1907 HR had been violated.⁷¹³

668. During the First World War, France adopted a law to extend its jurisdiction to offences committed in invaded territory. On this basis, some German officers and soldiers were convicted by courts-martial of acts of pillage.⁷¹⁴

⁷⁰⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

⁷¹⁰ Zambia, *Defence Act as amended* (1964), Section 35(b) and (c).

⁷¹¹ Zimbabwe, *Defence Act as amended* (1972), First Schedule, Section 11(b) and (c).

⁷¹² Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.

⁷¹³ China, War Crimes Military Tribunal of the Ministry of National Defence at Nanking, *Takashi Sakai case*, Judgement, 29 August 1946.

⁷¹⁴ J. Rampon, *La justice militaire en France et le droit international humanitaire*, Mémoire de DEA, Faculté de Droit, Université de Montpellier I, 1997–1998, p. 30, referring to cases of the

669. In the *Szabados case* before a French Military Tribunal in 1946, the accused, a former German non-commissioned officer of the 19th Police Regiment stationed in occupied France, was charged with, and found guilty of, *inter alia*, the count of pillage in time of war. The Tribunal found the looting of personal belongings and other property of civilians evicted from their homes prior to their destruction to be a violation of Article 440 of the French Penal Code, which dealt with pillage.⁷¹⁵

670. In the *Holstein case* before a French Military Tribunal in 1947, some of the accused, members of various German units, were found guilty of war crimes for having committed acts of looting and pillage, prohibited under the French Code of Military Justice.⁷¹⁶

671. In the *Bauer case* before a French Military Tribunal in 1947, a German *gendarme* was found guilty of war crimes for having stolen a sewing machine and other objects, which he took to Germany during the retreat from France. He was also found guilty of war crimes for having received stolen goods, when removing and using furniture which his predecessor in the *gendarmerie* post had stolen from a French inhabitant to whom the accused knew it belonged.⁷¹⁷

672. In the *Buch case* before a French Military Tribunal in 1947, the accused, a paymaster during the occupation of France, was found guilty of a war crime for having received stolen goods. The German *Kommandantur* at Saint-Die had seized silverware which a French doctor had left behind in crates before leaving the locality. The goods were sold at an auction by the *Kommandantur* and part of it bought by the accused.⁷¹⁸

673. In the *Jorgić case* before Germany's Higher Regional Court at Düsseldorf in 1997, the accused was convicted of genocide committed in the context of the conflict in the former Yugoslavia. In 1999, the Federal Supreme Court confirmed the judgement of first instance in most parts. Both courts referred to acts of plunder as part of the general background in which the genocide took place.⁷¹⁹

674. The Report on the Practice of Israel states that any claim of looting would be immediately investigated and all necessary measures taken. The report refers to IDF military court-martial cases in which soldiers were convicted of looting.⁷²⁰

Conseil de Guerre de Rennes, 26 February 1915 and of the Conseil de Guerre de Toulouse, 16 July 1916.

⁷¹⁵ France, Permanent Military Tribunal at Clermont-Ferrand, *Szabados case*, Judgement, 23 June 1946.

⁷¹⁶ France, Permanent Military Tribunal at Dijon, *Holstein case*, Judgement, 3 February 1947.

⁷¹⁷ France, Permanent Military Tribunal at Metz, *Bauer case*, Judgement, 10 June 1947.

⁷¹⁸ France, Permanent Military Tribunal at Metz, *Buch case*, Judgement, 2 December 1947.

⁷¹⁹ Germany, Higher Regional Court at Düsseldorf, *Jorgić case*, Judgement, 26 September 1997; Federal Supreme Court, *Jorgić case*, Judgement, 30 April 1999.

⁷²⁰ Report on the Practice of Israel, 1997, Chapter 2.3, referring to Appeal 217/82, *The Chief Military Prosecutor v. Sergeant Ofer Perzig*; Appeal 290/82, *Kablan Valid v. The Chief Military Prosecutor*; Appeal 36/82, *Corporal Prosper Buhadana v. The Chief Military Prosecutor*.

675. In the *Esau case* in 1948, the Special Criminal Court at Hertogenbosch in the Netherlands acquitted the chief commissioner of Germany's high frequency research council of charges of plunder of public and private property for ordering the removal of scientific instruments and gold from factories in the Netherlands. The Court held that the accused had only ordered the removal of property which he considered would be of assistance to the German war effort, in accordance with Article 53 of the 1907 HR. On appeal by the prosecutor in 1949, the Special Court of Cassation of the Netherlands quashed the lower court's decision, holding that the relevant law of the Netherlands adopted the same definition of war crimes as Article 6(b) of the 1945 IMT Charter (Nuremberg) and included "plunder of public and private property, wanton destruction of cities . . . or devastation not justified by military necessity". According to the Court, the requirement that the acts not be justified by military necessity did not apply to plunder as this was prohibited by international law. Accordingly, the removal of the property in question was unlawful unless the property fell within one of the categories of goods which the occupant was exceptionally entitled to seize from private individuals by virtue of Article 53(2) of the 1907 HR. Considering the property in question, the Court concluded that, with the exception of the short wave transmitter, none of the goods could be deemed to be excepted from the general inviolability of private property in war.⁷²¹

676. In the *Fiebig case* before the Special Criminal Court at The Hague in the Netherlands in 1949, the accused, a delegate of the Minister of the Reich for Armaments and Munitions, was found guilty of war crimes for participating in the economic spoliation of the Netherlands and the removal of stocks of food. As to the contention of state of necessity raised by the accused, the Court held that, even if there was a so-called "war necessity" for Germany to plunder occupied countries, this was no excuse for a method of plunder which was contrary to the laws of war, in the very circumstances envisaged by the treaty which prohibited it. It also underlined that the fact that spoliation of occupied territory was a systematic government policy of Germany made it *a fortiori* a prohibited act and a war crime.⁷²²

677. In the *Pohl case* before the US Military Tribunal at Nuremberg in 1947, the accused, top ranking officials of the SS, were charged with taking part in the commission of plunder of public and private property. They were found guilty, *inter alia*, of the looting of property of Jewish civilians in eastern occupied territories.⁷²³

678. In the *Von Leeb (The High Command Trial) case* before the US Military Tribunal at Nuremberg in 1948, the accused, former high-ranking officers in the German army and navy, were charged, *inter alia*, with war crimes and crimes

⁷²¹ Netherlands, Special Criminal Court at Hertogenbosch, *Esau case*, Judgement, 27 April 1948; Special Court of Cassation, *Esau case*, Judgement, 21 February 1949.

⁷²² Netherlands, Special Criminal Court at The Hague, *Fiebig case*, Judgement, 28 June 1949.

⁷²³ US, Military Tribunal at Nuremberg, *Pohl case*, Judgement, 3 November 1947.

against humanity against civilians in that they participated in atrocities such as plunder of public and private property. The evidence showed that the looting and spoliation which had been carried out in the various occupied countries were not the acts of individuals, but were carried out by the German government and the Wehrmacht for the needs of both. It was carried out on a larger scale than was possible by the army, as shown by the evidence, and seemed to have been sometimes based upon the idea that in looting, the individual was not depriving the victim of the property, but was depriving the Reich and the Wehrmacht. However, the evidence failed to show any specific criminal responsibility on the part of the accused in connection with charges of plunder and spoliation. Furthermore, the Tribunal stated that "most of the prohibitions of both the Hague and Geneva Conventions, considered in substance, are clearly an expression of the accepted views of civilized nations". It notably mentioned Article 47 of the 1907 HR. The Tribunal added that military necessity "does [not] justify the seizure of property or goods beyond that which is necessary for the use of the army of occupation. Looting and spoliation are none the less criminal in that they were conducted, not by individuals, but by the army and the State."⁷²⁴

679. In its judgement in the *John Schultz case* in 1952, the US Court of Military Appeals listed robbery, larceny and burglary as crimes "universally recognized as properly punishable under the law of war".⁷²⁵

Other National Practice

680. In 1989, during a debate in the UN Security Council relating to alleged Pakistani aggression and interference in Afghanistan's affairs, the representative of Afghanistan mentioned an article in the *Wall Street Journal* revealing, *inter alia*, "the looting... and other grave crimes", which the representative alleged Pakistani officers had been involved in.⁷²⁶

681. According to the Report on the Practice of Algeria, pillage is prohibited under Islamic law. It adds that the first combatants to fight against French occupation in the 19th century followed Islamic teachings on this point.⁷²⁷

682. The Report on the Practice of Angola mentions several instances of pillage during the war of independence and during the ensuing internal conflict, in particular between 1992 and 1994. The report does not specify, however, who the perpetrators were (civilians, rebel movements or government troops).⁷²⁸

⁷²⁴ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 28 October 1948.

⁷²⁵ US, Court of Military Appeals, *John Schultz case*, Judgement, 5 August 1952.

⁷²⁶ Afghanistan, Statement before the UN Security Council, UN Doc. S/PV.2852, 11 April 1989, p. 8.

⁷²⁷ Report on the Practice of Algeria, 1997, Chapter 2.3.

⁷²⁸ Report on the Practice of Angola, 1998, Chapter 2.3, referring to Branko Lazitch, *Angola 1974-1978: un échec du communisme en Afrique, Est & Ouest*, Paris, 1988, p. 39.

683. In 1990, during a debate in the UN Security Council relating to the Iraqi invasion of Kuwait, Bahrain stated that it considered the pillage and plunder of private homes and businesses to be “completely at variance with the norms of international law and the Universal Declaration of Human Rights” and “at odds with the principles and precepts of the Islamic *Sharia*”. In the eyes of the *Sharia*, he said, the invasion was all the worse because it was accompanied, *inter alia*, by pillage and theft.⁷²⁹

684. In the context of the Sino-Japanese War (1937–1945), the Chinese Communist Party condemned looting by Japanese troops. According to the Report on the Practice of China, these acts of looting are considered as part of a deliberate “barbarous policy” of the Japanese authorities.⁷³⁰

685. The Report on the Practice of Colombia refers to a draft internal working paper of the Colombian government which stated that pillage and plunder are prohibited by IHL.⁷³¹

686. In 1990, during a debate in the UN Security Council relating to the Iraqi invasion of Kuwait, Finland condemned acts of pillage committed by Iraq.⁷³²

687. In 1999, during the conflict in Kosovo, the French President criticised acts of the Serbian authorities in Kosovo, including pillage, and demanded that these acts cease.⁷³³

688. In 1991, the majority of political parties in the German parliament vigorously condemned violations of human rights and “other crimes” committed during the civil war in Sudan. Pillage was among the “crimes” mentioned.⁷³⁴

689. In 1995, during a debate in the UN Security Council concerning the situation in the former Yugoslavia, the German representative expressed his concern about reports of looting in the Krajina region. He urged the Croatian government to do its utmost to stop these acts.⁷³⁵

⁷²⁹ Bahrain, Statement before the UN Security Council, UN Doc. S/PV.2960, 27 November 1990, pp. 21–23.

⁷³⁰ Report on the Practice of China, 1997, Chapter 2.3, referring to Mao Zedong, Talking with a journalist of the Xinhua News Agency on the new international situation, 1 September 1939, *Selected Works by Mao Zedong*, The People’s Press, Vol. 2, p. 586; see also Chapter 4.1, referring to Deng Xiaoping, The Economic Construction of the Area of Taihang Mountain, 2 July 1943, *Selected Works of Deng Xiaoping*, Vol. I, The People’s Press, p. 78, which describes the plunder by Japanese troops of basic necessities and foodstuffs.

⁷³¹ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled “El Derecho Internacional Humanitario”, § 2(m).

⁷³² Finland, Statement before the UN Security Council, UN Doc. S/PV.2960, 27 November 1990, p. 31.

⁷³³ France, Speech by the President, AFP, Paris, 21 April 1999.

⁷³⁴ Germany, Lower House of Parliament, Proposal by the CDU/CSU and FDP, Entwicklungspolitische Chancen in Umbruchsituationen nutzen – entwicklungspolitische Herausforderungen und den Beispielen Äthiopien einschließlich Eritrea, Somalia, Sudan und Angola, *BT-Drucksache* 12/1814, 11 December 1991, p. 4, § 3.1.

⁷³⁵ Germany, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 3.

690. During the Iran–Iraq War, Iran claimed that inhabitants of the cities captured by Iraq were robbed. According to the Report on the Practice of Iran, only two Iraqi towns were taken by Iran during the conflict and there were no reports of pillage.⁷³⁶

691. In 1990, in a letter to the UN Secretary-General, Kuwait denounced “practices which are an affront to mankind and which violate all the values of Islam and of civilization, the principles of human rights and the relevant Geneva Conventions . . . [including] looting of all public and private facilities . . . [and] theft of public and private vehicles and their removal to Iraq”.⁷³⁷

692. In 1990, in a letter to the UN Secretary-General, Kuwait mentioned violations “of all international laws” by Iraq:

We wish to draw attention to a phenomenon which has no precedent in history, namely, the Iraqi occupation authorities’ organized operation for the purpose of looting and plundering Kuwait. It is impossible to compare this operation to any similar incidents or to provide an exact account thereof because it is in effect an operation designed to achieve nothing less than the complete removal of all Kuwait’s assets, including property belonging to the State, to public and private institutions and to individuals, as well as the contents of houses, factories, stores, hospitals, academic institutions and to universities.⁷³⁸

693. In 1990, following the Iraqi invasion of Kuwait, the Sheikh of Kuwait denounced in the UN General Assembly the “systematic armed looting and destruction of State assets and individual property”.⁷³⁹

694. In 1996, a newspaper reported the investigation by the Nigerian authorities of officers serving with ECOMOG who had allegedly brought back cars and building materials from Liberia. Preliminary investigation did not reveal the looting of property but the “authorities were concerned about the moral aspects of personnel buying items that might have been offered at very cheap prices by persons rattled or distressed by the effects of war”.⁷⁴⁰

695. In 1990, during a debate in the UN Security Council relating to the Iraqi invasion of Kuwait, Qatar condemned acts of pillage committed by Iraq.⁷⁴¹

696. In response to a report by the Memorial Human Rights Center documenting Russia’s operation in the Chechen village of Samashki in April 1995, which alleged that the Russian forces had looted homes and taken television sets, cattle and other private property from the village, members of the Russian

⁷³⁶ Report on the Practice of Iran, 1997, Chapter 2.3.

⁷³⁷ Kuwait, Letter dated 5 August 1990 to the UN Secretary-General, UN Doc. S/21439, 5 August 1990.

⁷³⁸ Kuwait, Letter dated 2 September 1990 to the UN Secretary-General, UN Doc. S/21694, 3 September 1990.

⁷³⁹ Kuwait, Statement before the UN General Assembly, UN Doc. A/45/PV.10, 3 October 1990, p. 191.

⁷⁴⁰ ECOMOG’s Code of Conduct for review, says Chijuka, *The Post Express*, 25 July 1996, p. 3.

⁷⁴¹ Qatar, Statement before the UN Security Council, UN Doc. S/PV.2960, 27 November 1990, p. 23.

forces who testified in open hearings before a Russian Parliamentary Committee in May 1995 “vigorously denied” these allegations.⁷⁴²

697. In 1995, during a debate in the UN Security Council concerning the situation in the former Yugoslavia, Russia declared that “the continuing large-scale violations of the rights of the Serbian population in the former Sectors West, North and South – including . . . the looting of homes . . . – are causing serious concern”.⁷⁴³

698. In 1993, reacting to the report of pillage of civilian property by combatants of the FPR, the Rwandan government asked the FPR to refrain from acts of pillage of civilian property.⁷⁴⁴

699. In 1992, in a note verbale addressed to the UN Secretary-General, Slovenia expressed its readiness to provide information concerning violations of IHL committed by members of the Yugoslav army during the 10-day conflict with Slovenia, including “looting”.⁷⁴⁵

700. In 1993, during a debate in the UN Security Council concerning the situation in Croatia, Spain referred to the conclusions of the Provisional Report of the Security Council’s Commission of Experts, according to which grave offences and other violations of IHL had been committed in the former Yugoslavia, including looting of civilian property.⁷⁴⁶

701. In 1990, during a debate in the UN Security Council relating to the Iraqi invasion of Kuwait, the UK condemned acts of pillage committed by Iraq.⁷⁴⁷

702. A training video on IHL produced by the UK Ministry of Defence states unequivocally that “pillage is forbidden”.⁷⁴⁸

703. The Report on UK Practice refers to a letter from a UK army lawyer which noted that:

The current view seems to be that units may lawfully seize enemy property *on the battlefield* and retain it as booty, but individuals doing the same run the risk of being charged with looting. Retention by units and formations of booty is subject

⁷⁴² Memorial Human Rights Center, *By All Available Means: the Russian Federation Ministry of Internal Affairs Operation in the Village of Samashki: April 7–8, 1995*, Moscow, 1996, § 13, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1416.

⁷⁴³ Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8.

⁷⁴⁴ Rwanda, Déclaration du Gouvernement Rwandais relative au Rapport final de la Commission internationale d’enquête sur les violations des droits de l’homme au Rwanda, in *Rapport sur les droits de l’homme au Rwanda, octobre 1992–octobre 1993*, Association rwandaise pour la défense des droits de la personne et des libertés publiques, Kigali, December 1993, p. 73.

⁷⁴⁵ Slovenia, Note verbale dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24789, 9 November 1992, p. 2.

⁷⁴⁶ Spain, Statement before the UN Security Council, UN Doc. S/PV.3175, 22 February 1993, p. 21.

⁷⁴⁷ UK, Statement before the UN Security Council, UN Doc. S/PV.2962, 28 November 1990, pp. 3–6.

⁷⁴⁸ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.3.

to approval by Government whereas appropriation of property by individuals on the battlefield is strictly illegal.⁷⁴⁹ [emphasis in original]

704. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense condemned the following Iraqi war crimes: “looting of civilian property in violation of [the 1907 HR]”, “pillage, in violation of Article 47 [of the 1907 HR]” and “pillage of Kuwaiti civilian hospitals, in violation of Articles 55, 56, 57, and 147, GC [IV]”.⁷⁵⁰

705. Order No. 579 issued in 1991 by the YPA Chief of Staff of the SFRY (FRY) states that YPA units must “apply all means to prevent any attempt of pillage”.⁷⁵¹

706. According to the Report on the Practice of the SFRY (FRY), in the context of the conflict in Croatia, the local press regularly reported pillage of private property, which allegedly occurred on a massive scale and was perpetrated by regular and paramilitary forces of both sides – Croatian troops and the YPA.⁷⁵²

707. In 1991, the Medical Headquarters of a State denounced the theft, by the army of a State, of the property of its national food industries and the plunder of houses of its nationals and nationals of another State.⁷⁵³

708. In 1991, the ICRC noted systematic pillage by a State, which responded that the pillage arose from a lack of discipline rather than from a deliberate policy.⁷⁵⁴

709. In 1991, an official of a State rejected an ICRC request to protect the civilian population from pillage by government troops. He replied that as long as they provided a hiding place for rebels, the army would burn the fields if necessary. However, this behaviour was not representative of the general opinion of the military personnel met by the ICRC in this context.⁷⁵⁵

III. Practice of International Organisations and Conferences

United Nations

710. In a resolution on Rwanda adopted in 1994, the UN Security Council stated that it was “deeply concerned by . . . looting, banditry and the breakdown of law and order, particularly in Kigali”.⁷⁵⁶

711. In a resolution adopted in 1995 on violations of international humanitarian law in the former Yugoslavia, the UN Security Council stated that it was

⁷⁴⁹ Report on UK Practice, 1997, Letter from an army lawyer, 24 February 1998, Answers to additional questions on Chapter 2.3.

⁷⁵⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 632 and 635.

⁷⁵¹ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

⁷⁵² Report on the Practice of the SFRY (FRY), 1997, Chapter 2.3, referring to newspaper articles in *Politika* and *Borba*.

⁷⁵³ ICRC archive document. ⁷⁵⁴ ICRC archive documents.

⁷⁵⁵ ICRC archive document. ⁷⁵⁶ UN Security Council, Res. 912, 21 April 1994, § 4.

“deeply concerned at reports . . . of serious violations of international humanitarian law . . . including . . . looting of property”.⁷⁵⁷

712. In a resolution adopted in 1995 on violations of international humanitarian law and of human rights in the territory of the former Yugoslavia, the UN Security Council condemned “the widespread looting and destruction of houses and other property, in particular by HVO forces in the area of Mrkonjic Grad and šipovo” and demanded that “all sides immediately stop such action, investigate them and make sure that those who violated the law be held individually responsible in respect of such acts”.⁷⁵⁸

713. In 1995, in a statement by its President concerning the situation in Croatia, the UN Security Council stated that it was “concerned by the reports of human rights violations including . . . looting of property” and demanded that the government of Croatia “immediately investigate all such reports and take appropriate measures to put an end to such acts”.⁷⁵⁹

714. In January 1996, in a statement by its President concerning the situation in Croatia, the UN Security Council strongly condemned “the violations of international humanitarian law and human rights in the former sectors North and South in the Republic of Croatia . . . including systematic and widespread looting”. It stated that measures must be taken by the government of Croatia to stop all such acts and bring the perpetrators to trial.⁷⁶⁰

715. In December 1996, in a statement by its President concerning the situation in Croatia, the UN Security Council expressed “its concern at continued acts of . . . looting”.⁷⁶¹

716. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly condemned “violations of human rights and international humanitarian law, including . . . the . . . looting of houses”.⁷⁶²

717. In a resolution adopted in 1994, the UN Commission on Human Rights expressed concern at pillage in Georgia, including Abkhazia, and condemned such acts committed by troops or armed groups.⁷⁶³

718. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights condemned

in the strongest terms all violations of human rights and international humanitarian law during the conflict, in particular in areas which were under the control of the

⁷⁵⁷ UN Security Council, Res. 1019, 9 November 1995, preamble.

⁷⁵⁸ UN Security Council, Res. 1034, 21 December 1995, § 15.

⁷⁵⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/44, 7 September 1995, p. 1.

⁷⁶⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/2, 8 January 1996, p. 1.

⁷⁶¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/48, 20 December 1996, p. 1.

⁷⁶² UN General Assembly, Res. 50/193, 22 December 1995, § 6.

⁷⁶³ UN Commission on Human Rights, Res. 1994/59, 4 March 1994, § 1.

self-proclaimed Bosnian and Croatian Serb authorities, in particular massive and systematic violations, including, *inter alia*, . . . looting of houses.

It reaffirmed that "all persons who plan, commit or authorize such acts will be held personally responsible and accountable".⁷⁶⁴

719. In a resolution adopted in 1997 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights called upon the government of Croatia "to prevent . . . looting . . . against Croatian Serbs".⁷⁶⁵

720. In 1995, in a report concerning the conflict in the former Yugoslavia, the UN Secretary-General reported that UNCRO continued to document serious violations of the human rights of the Croatian Serbs who had remained in the sectors reconquered by the Croatian army, including looting of property.⁷⁶⁶

721. In 1995, in a report on the situation in Tajikistan, the UN Secretary-General reported that, following the 1994 Agreement on a Temporary Cease-fire on the Tajik-Afghan Border, "UNMOT received reports that armed groups were robbing villagers of their food and livestock. UNMOT has not been able to determine who carried out these acts, which are banned by the Tehran Agreement."⁷⁶⁷

722. In 1996, in a report on UNAVEM III in Angola, the UN Secretary-General reported that "UNAVEM III CIVPOL teams and United Nations human rights experts, who are now deployed to all six regions, indicate that . . . looting, extortion . . . and other criminal acts continue unabated in many parts of the country".⁷⁶⁸

723. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General reported that:

Since the end of November 1995, the incidence of human rights violations, including acts of . . . looting, committed in the former Sectors West, North and South has continued to decline . . . The vast scale of looting observed last summer and autumn has depleted the area of valuable personal property and thus the incidence of theft has greatly diminished . . . The Government of Croatia eventually responded with a series of measures intended to protect its citizens' human rights, and these initiatives seem to have begun to have a positive effect.⁷⁶⁹

According to the report, the Croatian government had provided figures concerning criminal proceedings undertaken against the authors of these acts, but "no

⁷⁶⁴ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.

⁷⁶⁵ UN Commission on Human Rights, Res. 1997/57, 15 April 1997, § 27.

⁷⁶⁶ UN Secretary-General, Report pursuant to Security Council Resolutions 981 (1995), 982 (1995) and 983 (1995), UN Doc. S/1995/987, 23 November 1995, § 7.

⁷⁶⁷ UN Secretary-General, Report on the situation in Tajikistan, UN Doc. S/1995/1024, 8 December 1995, § 15.

⁷⁶⁸ UN Secretary-General, Report on UNAVEM III, UN Doc. S/1996/75, 31 January 1996, § 25, see also § 10.

⁷⁶⁹ UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council Resolution 1019 (1995), UN Doc. S/1996/109, 14 February 1996, § 6.

information has been provided... on whether any convictions have resulted from criminal proceedings for looting, grand larceny or robbery".⁷⁷⁰

724. In 1998, in a report on the situation in Sierra Leone, the UN Secretary-General reported that:

From all parts of the country there are reports of... the looting... of residential and commercial premises and property. It will remain important to document these actions with a view to tackling issues of impunity and as an element in the process of promoting reconciliation and healing of society.⁷⁷¹

725. In 1992, in a report on the situation of human rights in Kuwait under Iraqi occupation, the Special Rapporteur of the UN Commission on Human Rights noted, in a section entitled "Prohibition of the destruction, dismantling and pillaging of infrastructure and private property", numerous cases of pillage of private property by Iraqi occupation forces. The legal framework which the Rapporteur considered applicable was Articles 16(2), 33(2) and (3) and 53 GC IV. He concluded that these acts "violated the guarantees of the Fourth Geneva Convention because they were not necessitated by military considerations nor were they otherwise admissible under international law".⁷⁷²

726. In 1993, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights reported that he "was told... that looting is still taking place on a massive scale", especially in some areas of Kabul.⁷⁷³

727. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights regarded the routine looting of the homes of Muslim families by Bosnian Croat and Bosnian Serb forces as violations of human rights.⁷⁷⁴

728. In 1994, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights reported that "the money market located in the Saray Shah Zada area of the city [Kabul]... was... looted and set on fire".⁷⁷⁵

729. In 1994, in a report on the situation of human rights in the Sudan, the Special Rapporteur of the UN Commission on Human Rights reported that

⁷⁷⁰ UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council Resolution 1019 (1995), UN Doc. S/1996/109, 14 February 1996, § 16.

⁷⁷¹ UN Secretary-General, Fifth report on the situation in Sierra Leone, UN Doc. S/1998/486, 9 June 1998, § 37.

⁷⁷² UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Kuwait under Iraqi Occupation, Report, UN Doc. E/CN.4/1992/26, 16 January 1992, §§ 224–235.

⁷⁷³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Final report, UN Doc. E/CN.4/1993/42, 18 February 1993, §§ 19 and 27.

⁷⁷⁴ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 56, 82 and 147.

⁷⁷⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Final report, UN Doc. E/CN.4/1994/53, 14 February 1994, § 17.

he had received numerous complaints of looting by members of the SPLA. He considered that the applicable legal framework was common Article 3 of the 1949 Geneva Conventions, the Additional Protocols and the customary law principle of civilian immunity expressly recognised by General Assembly Resolution 2444 (XXIII) of 19 December 1968.⁷⁷⁶ In 1995, following a description of several cases of looting committed by SPLA soldiers, the Special Rapporteur pointed out that the SPLA was responsible for violations of human rights committed by its local commanders. Although it was not proved that these actions were committed on orders, the Rapporteur maintained that the senior leadership should have taken the necessary measures to prevent future violations by investigating the cases brought to its attention and by holding the perpetrators responsible.⁷⁷⁷ In 1996, the Special Rapporteur listed as “grave violations of human rights” the indiscriminate killing of civilians during raids by the army and by the PDF, which were regularly accompanied by looting, for example of cattle.⁷⁷⁸ Later the same year, he again noted cases of looting of civilians by the SPLA and PDF, which he said had been constantly reported over the past years.⁷⁷⁹

730. In 1995, in a report on the situation of human rights in the region of Banja Luka in northern Bosnia and Herzegovina, the Special Rapporteur of the UN Commission on Human Rights described the systematic pillage of the Muslim population, as part of the policy of “ethnic cleansing”. The Special Rapporteur pointed out that many elements showed that *de facto* authorities were personally and directly responsible for the massive violations of human rights, for example, by the fact that the authorities had not taken the most elementary measures to protect the population.⁷⁸⁰

731. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported that many acts of pillage had occurred while the Croatian army was advancing in western Slavonia. He concluded that the Croatian authorities were responsible for violations of human rights and IHL during and after the military operations.⁷⁸¹

732. In 1996, in a report on the situation of human rights in Somalia, the Independent Expert of the UN Commission on Human Rights described, in a

⁷⁷⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim report, UN Doc. A/49/539, 19 October 1994, §§ 43 and 59–60.

⁷⁷⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim report, UN Doc. A/50/569, 16 October 1995, §§ 65–67 and 73.

⁷⁷⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 96(a).

⁷⁷⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim report, UN Doc. A/51/490, 14 October 1996, § 10.

⁷⁸⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report on the situation in the region of Banja Luka, northern Bosnia and Herzegovina, UN Doc. E/CN.4/1996/3, 21 April 1995, §§ 7–9 and 31.

⁷⁸¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1996/6, 5 July 1995, §§ 17 and 51.

section entitled “Civil war and violations of human rights”, the practices of the different Somali factions, including the fact that the winning faction would engage in looting.⁷⁸²

733. In 1997, in a report on the situation of human rights in Zaire (DRC), the Special Rapporteur of the UN Commission on Human Rights reported that before abandoning a town to the rebels, the FAZ engaged in looting. He noted that the new authorities in certain towns had punished abuses committed by members of the rebel forces against civilians.⁷⁸³

734. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) placed “looting, theft and robbery of personal property” within the practices of “ethnic cleansing”, as part of a systematic and planned general policy. It noted that acts of looting were committed by persons from all segments of the Serb population: soldiers, militias, special forces, police and civilians. These acts were described as violations of IHL and crimes against humanity.⁷⁸⁴

Other International Organisations

735. In 1995, in a statement concerning Chechnya delivered before the OSCE Permanent Council on behalf of the EU, France stated that “everything must be done to preserve houses in localities evacuated so that inhabitants would be in a position to return in safety when they wished to do so”.⁷⁸⁵

736. In the Final Communiqué of its 13th Extraordinary Session in 1990, the GCC Ministerial Council stated that it “respectfully salutes the steadfast people of Kuwait who, in confronting the Iraqi occupation, defy all manner of . . . plundering of their property”.⁷⁸⁶

International Conferences

737. In 1996, in a report submitted to the UN Security Council on the activities of the International Conference on the Former Yugoslavia, the Co-Chairmen of the Steering Committee stated with respect to the remaining Serb population in the Krajina that “human rights violations, including . . . looting of abandoned property . . . were brought to the attention of the Croatian Government at the

⁷⁸² UN Commission on Human Rights, Independent Expert on Assistance to Somalia in the Field of Human Rights, Report, UN Doc. E/CN.4/1996/14/Add.1, 10 April 1996, § 10.

⁷⁸³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6, 28 January 1997, §§ 186–187.

⁷⁸⁴ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, Annex, §§ 134, 142 and 180.

⁷⁸⁵ EU, Statement by France on behalf of the EU on the situation in Chechnya before the OSCE Permanent Council, 6 June 1995, *Politique étrangère de la France*, June 1995, p. 103.

⁷⁸⁶ GCC, Ministerial Council, 13th Extraordinary Session, Riyadh, 28–29 October 1990, Final Communiqué, annexed to Letter dated 30 October 1990 from Oman to the UN Secretary-General, UN Doc. A/45/694-S/21915, 30 October 1990, p. 3.

highest levels on a number of occasions, together with the serious criticism from the international community".⁷⁸⁷

738. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "strict orders are given to prevent all serious violations of international humanitarian law, including . . . looting . . . and threats to carry out such actions".⁷⁸⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

739. In the *Nikolić case* before the ICTY in 1994, the accused was charged, *inter alia*, with violations of the laws and customs of war for having participated "during a period of armed conflict in the plunder of private property of persons detained at Sušica Camp".⁷⁸⁹ In the review of the indictment in 1995, the ICTY considered that the acts could also be regarded as characterising persecution on religious grounds. The Tribunal considered the conflict was international and that the victims were persons protected under the Geneva Conventions.⁷⁹⁰

740. In the *Jelisić case* before the ICTY in 1995, the accused was charged, *inter alia*, with violations of the laws and customs of war (plunder of private property) for having "participated in the plunder of money, watches and other valuable property belonging to persons detained at Luka camp".⁷⁹¹ In its judgement in 1999, the ICTY convicted the accused of the plunder of private property under Article 3(e) of the 1993 ICTY Statute. It found that plunder was the "fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto". The Tribunal also held that "the individual acts of plunder perpetrated by people motivated by greed might entail individual criminal responsibility on the part of their perpetrators". The Tribunal confirmed the guilt of the accused on the charge of plunder.⁷⁹²

741. In the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged, *inter alia*, with violations of the laws or customs of war, for plunder of public or private property, in violation of Article 3(e) of the 1993 ICTY Statute. Allegedly, Bosnian Serb military and police personnel and other agents of the Bosnian Serb administration, under the direction and control of the accused "systematically . . . looted the real and personal property of Bosnian

⁷⁸⁷ International Conference on the Former Yugoslavia, Co-Chairmen of the Steering Committee, Final biannual report, UN Doc. S/1996/4, 2 January 1996, Annex, § 10.

⁷⁸⁸ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

⁷⁸⁹ ICTY, *Nikolić case*, Initial Indictment, 4 November 1994, § 21.2.

⁷⁹⁰ ICTY, *Nikolić case*, Review of the Indictment, 20 October 1995, §§ 22 and 30.

⁷⁹¹ ICTY, *Jelisić case*, Initial Indictment, 21 July 1995, § 42.

⁷⁹² ICTY, *Jelisić case*, Judgement, 14 December 1999, §§ 48–49 and Part VI (Disposition).

Muslim and Bosnian Croat civilians".⁷⁹³ In the review of the indictments in 1996, the ICTY considered that the conflict was international and that the victims were protected by the Geneva Conventions and confirmed the counts of the indictments.⁷⁹⁴

742. In the *Delalić case* before the ICTY in 1996, the accused were charged, *inter alia*, with violations of the laws and customs of war (plunder of private property) for having "participated in the plunder of money, watches and other valuable property belonging to persons detained at Čelebići camp".⁷⁹⁵ This count was eventually dismissed.⁷⁹⁶ However, in its judgement in 1998, the ICTY affirmed that it "is in no doubt that the prohibition on plunder is . . . firmly rooted in customary international law".⁷⁹⁷ It further stated that:

The prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory. Contrary to the submissions of the Defence, the fact that it was acts of the latter category which were made the subject of prosecutions before the International Military Tribunal at Nürnberg and in the subsequent proceedings before the Nürnberg Military Tribunals does not demonstrate the absence of individual criminal liability under international law for individual acts of pillage committed by perpetrators motivated by personal greed. In contrast, when seen in a historical perspective, it is clear that the prohibition against pillage was directed precisely against violations of the latter kind. Consistent with this view, isolated instances of theft of personal property of modest value were treated as war crimes in a number of trials before French Military Tribunals following the Second World War.

...

In this context, it must be observed that the offence of the unlawful appropriation of public and private property in armed conflict has varyingly been termed "pillaging", "plunder" and "spoliation" . . . [Plunder] should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as "pillaging".⁷⁹⁸

743. In the *Blaškić case* before the ICTY in 1997, the accused was charged, *inter alia*, on the count of violations of the laws and customs of war (plunder of public or private property) for having "planned, instigated, ordered or otherwise aided and abetted in the planning, preparation or execution of the . . . plunder of Bosnian Muslim dwellings, buildings, businesses, civilian personal property

⁷⁹³ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, §§ 27–28 and 42–43.

⁷⁹⁴ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 1, 6, 87–89 and Disposition.

⁷⁹⁵ ICTY, *Delalić case*, Initial Indictment, 21 March 1996, § 37.

⁷⁹⁶ ICTY, *Delalić case*, Judgement, 16 November 1998, Part VI (Judgement).

⁷⁹⁷ ICTY, *Delalić case*, Judgement, 16 November 1998, § 315.

⁷⁹⁸ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 590 and 591.

and livestock".⁷⁹⁹ He was convicted by the Tribunal on this count. The Tribunal also stated that:

The prohibition on the wanton appropriation of enemy public or private property extends to both isolated acts of plunder for private interest and to the "organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory". Plunder "should be understood to embrace all forms of unlawful appropriation of property in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'".⁸⁰⁰

744. In the *Kordić and Čerkez case* before the ICTY in 1998, the accused were charged, *inter alia*, on the count of violation of the laws or customs of war for having "caused, planned, instigated, ordered or committed, or aided and abetted the planning, preparation or execution of, the . . . plunder of Bosnian Muslim dwellings, buildings, businesses, civilian personal property and livestock".⁸⁰¹ They were both found guilty on this count.⁸⁰² According to the Tribunal in its judgement in 2001, plundering had "already been criminalised under customary international law".⁸⁰³

745. In 1989, the IACiHR reported cases of looting and burning of rural communities in El Salvador. The Salvadoran government was found responsible for the violation of the provisions on the right to life and the right to humane treatment of the 1969 ACHR.⁸⁰⁴

746. The IACiHR reported the pillage and burning of all the homes of a village perpetrated in 1993 in Peru by forces of the Sendero Luminoso ("Shining Path") rebel movement. The Commission described these acts as "assaults and criminal activities".⁸⁰⁵

V. Practice of the International Red Cross and Red Crescent Movement

747. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "pillage is prohibited".⁸⁰⁶

748. In 1995, the ICRC reported to the military authorities allegations of pillage by the government forces of a State.⁸⁰⁷

⁷⁹⁹ ICTY, *Blaškić case*, Second Amended Indictment, 25 April 1997, § 10.

⁸⁰⁰ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 184 and Part VI (Disposition).

⁸⁰¹ ICTY, *Kordić and Čerkez case*, First Amended Indictment, 30 September 1998, §§ 55 and 56, see also §§ 34, 37 and 39 (count of persecution as a crime against humanity, *inter alia*, through the plundering of Bosnian Muslim civilian property); see further *Kordić and Čerkez case*, Initial Indictment, 10 November 1995, § 23 (count of persecution as a crime against humanity, *inter alia*, through the plundering of homes and personal property).

⁸⁰² ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Part V (Disposition).

⁸⁰³ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 205, see also § 351.

⁸⁰⁴ IACiHR, *Case 6718 (El Salvador)*, Report, 4 October 1983, §§ 1 and 2.

⁸⁰⁵ IACiHR, *Annual Report 1993*, Doc. OEA/Ser.L/V/II.85 Doc. 8 rev., 11 February 1994, p. 481.

⁸⁰⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 205.

⁸⁰⁷ ICRC archive document.

749. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included pillage, when committed in an international or non-international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.⁸⁰⁸

750. In 1997, the ICRC reported looting by the armed forces of a State in government-controlled areas. It stated that "pillage has become systematic and much more vicious. What is not pillaged is destroyed or burnt."⁸⁰⁹

VI. Other Practice

751. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "the following acts are and shall remain prohibited: . . . e) pillage; . . . g) threats and incitement to commit any of the foregoing acts".⁸¹⁰

752. According to an ICRC report, in 1992, officials of a separatist entity issued orders to their armed forces prohibiting pillage and setting fire to civilian homes, but these orders were not followed by their soldiers.⁸¹¹

753. In 1992, the Supreme Soviet of the Republic of Abkhazia denounced marauding and robbery by Georgian troops and considered Georgian leaders responsible for it. It further considered that Georgia was obliged to compensate the Republic of Abkhazia and each citizen in particular for the damage.⁸¹²

754. In 1993, officials of an entity involved in an armed conflict recognised that acts of pillage were committed on the territory under its control and considered that those responsible were criminals who should be prosecuted.⁸¹³

755. In 1993, the International Commission of Inquiry on Human Rights Violations in Rwanda, mandated by four non-governmental organisations, reported the pillage of civilian property by combatants of the FPR.⁸¹⁴

⁸⁰⁸ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(viii) and 3(xvi).

⁸⁰⁹ ICRC archive document.

⁸¹⁰ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Truku/Åbo, 30 November–2 December 1990, Article 3(2), *IRRC*, No. 282, 1991, p. 331.

⁸¹¹ ICRC archive document.

⁸¹² Appeal of the Press-Service of the Supreme Soviet of the Republic of Abkhazia to the International Organizations of Red Cross, International Organizations of Public Health Service and to the Medical Community of the States of CIS, No. 10–81, 19 August 1992; Supreme Council of Abkhazia, Statement of the Press-Service of the Supreme Soviet of Abkhazia, No. 10–86, August 1992.

⁸¹³ ICRC archive document.

⁸¹⁴ International Commission of Inquiry on Human Rights Violations in Rwanda, *Rapport final de la Commission internationale d'enquête sur les violations des droits de l'homme au Rwanda depuis le 1er octobre 1990*, in *Rapport sur les droits de l'homme au Rwanda, octobre 1992–octobre 1993*, Association rwandaise pour la défense des droits de la personne et des libertés publiques, Kigali, December 1993, p. 64.

756. Looting by members of the armed forces was reported by fact-finding missions undertaken by non-governmental organisations in the Philippines.⁸¹⁵

757. According to the Report on the Practice of the Republika Srpska, in the context of the conflict in Bosnia and Herzegovina, members of the Bosnian Serb Army were convicted of robbery by military courts. For example, four members of the Bosnian Serb Army were sentenced to imprisonment for breaking in and robbing non-Serb civilians by the Court of First Instance in Banja Luka in 1994. The report notes that the accused were charged with the offence of robbery, not looting, since looting was not a separate criminal offence under the applicable penal law.⁸¹⁶

758. The SPLM Human Rights Charter states that "all persons have the right to have property respected. Looted property shall be returned to its owners or compensation determined by a competent court shall be paid."⁸¹⁷ However, according to the Report on SPLM/A Practice, although the SPLM/A proclaimed that it did not condone pillage, looting by its combatants has been widespread. The report notes that "the practice of the SPLM/A soldiers during combat since the beginning of the war has shown no discrimination between what are genuine war booties and personal properties of the defeated enemy". It adds that many operations have failed because soldiers were engaging in pillage instead of first conquering the objective.⁸¹⁸

759. According to the Report on the Practice of the Philippines, the NPA (a Philippine insurgent group) adopted China's PLA Rules of Discipline as its own rules. These state: "Do not take even a single needle or thread from the masses. Turn in everything captured."⁸¹⁹

760. Pillage following attacks on villages by RENAMO in Mozambique was described by one author as systematic.⁸²⁰

Pillage committed by civilians

I. Treaties and Other Instruments

761. No practice was found.

⁸¹⁵ Philippine Alliance of Human Rights Advocates, Report on Human Rights in the Philippines to the 52nd Session of the UN Commission on Human Rights, 1996, p. 19; Aurora A. Parong, *Total War: A Threat to People's Health and Lives*, Report of the Medical Action Group (MAG), 1989, pp. 2-3; E. Monde-Cruz, *The Human Cost of Armed Conflict: an account of international fact finding mission on internal refugees*, *Justice and Peace Review*, Special issue, 1990, p. 28.

⁸¹⁶ Report on the Practice of the Republika Srpska, 1997, Chapter 2.3.

⁸¹⁷ SPLM, Human Rights Charter, May 1996, § 7.

⁸¹⁸ Report on SPLM/A Practice, 1998, Chapter 2.3.

⁸¹⁹ Report on the Practice of the Philippines, 1997, Chapter 1.1, referring to *Basic Rules of the New People's Army*, Principle 4, Point 3.

⁸²⁰ Robert Gersony, *Summary of Mozambican Refugee Accounts of Principally Conflict-Related Experience in Mozambique*, Consultant to the Bureau for Refugee Programs, US Department of State, Washington D.C., April 1988, pp. 29-32.

II. National Practice

Military Manuals

762. Uganda's Operational Code of Conduct provides that "stealing civilian property or food" is an "offence undermining relationship with the civilian population". According to the manual, although this offence may be committed by soldiers, "any civilian aiding and abetting any National Resistance Army member to commit any of the above offences [including stealing] will be charged with the same offences".⁸²¹

763. The UK Military Manual considers that:

A special class of war crime is that sometimes known as "marauding". This consists of ranging over battlefields and following advancing or retreating armies in quest of loot, robbing . . . stragglers and wounded and plundering the dead – all acts done not as a means of carrying on the war but for private gain. Nevertheless, such acts are treated as violations of the law of war. Those who commit them, whether civilians who have never been lawful combatants, or persons who have belonged to a military unit, an organised resistance movement or a *levée en masse*, and have deserted and so ceased to be lawful combatants, are liable to be punished as war criminals. They may be tried and sentenced by the courts of either belligerent.⁸²²

National Legislation

764. Under Algeria's Code of Military Justice, it is a punishable offence for a military or civilian person to steal from wounded, sick, shipwrecked or dead persons in the area of operation.⁸²³

765. Burkina Faso's Code of Military Justice provides that plunder of a wounded, sick, shipwrecked or dead person, in the area of military operations of military units, is a punishable offence that can be committed by "any individual, whether military or not".⁸²⁴

766. Chile's Code of Military Justice punishes any "civilian . . . who plunders dead soldiers or auxiliary personnel on the battlefield of their money, jewellery or other objects, in order to appropriate them".⁸²⁵

767. The Czech Republic's Criminal Code as amended, in an article entitled "Plunder in a Theatre of War", punishes:

Whoever in a theatre of war, on the battlefield or in places affected by military operations:

- (a) seizes another person's belongings, taking advantage of such person's distress;
- (b) arbitrarily destroys another person's property or takes it under the pretext of military necessity; or
- (c) robs the fallen.⁸²⁶ [emphasis added]

⁸²¹ Uganda, *Operational Code of Conduct* (1986), § 12(b) and (g).

⁸²² UK, *Military Manual* (1958), § 636.

⁸²³ Algeria, *Code of Military Justice* (1971), Article 287.

⁸²⁴ Burkina Faso, *Code of Military Justice* (1994), Article 194.

⁸²⁵ Chile, *Code of Military Justice* (1925), Article 365.

⁸²⁶ Czech Republic, *Criminal Code as amended* (1961), Article 264.

768. Under France's Ordinance on Repression of War Crimes, "the removal or export by any means from French territory of goods of any nature, including movable property and money" is likened to pillage. It is applicable to any perpetrator of the offence.⁸²⁷

769. France's Code of Military Justice punishes "any individual, military or not, who, in the area of operation of a force or a unit, . . . plunders a wounded, sick, shipwrecked or dead person".⁸²⁸

770. Under Germany's Penal Code, pillage by civilians would be covered under the provisions relative to theft.⁸²⁹

771. Under Indonesia's Penal Code, theft committed on the occasion of "riots, insurgencies or war" is a punishable offence.⁸³⁰

772. Israel's Military Justice Law, which prohibits looting, applies to soldiers but also to "a person employed in the service of the Army, or a person employed in an undertaking which serves the Army and which the Minister of Defence has defined, by order, as a military service, . . . a person employed on a mission on behalf of the Army", "even though they may not be soldiers".⁸³¹

773. Under Moldova's Penal Code, civilians may engage their criminal responsibility for having committed the crime of robbery of the population in the area of military operations.⁸³²

774. Under the International Crimes Act of the Netherlands, "anyone" who pillages a town or place, even when taken by assault, commits a crime, whether in time of international or non-international armed conflict.⁸³³

775. Under Rwanda's Penal Code, pillage by civilians is a punishable offence.⁸³⁴

776. Spain's Penal Code states that anyone who commits pillage is guilty of a punishable offence.⁸³⁵

777. Switzerland's Military Criminal Code as amended prohibits pillage and is applicable to civilians in time of war.⁸³⁶

778. The commentary on the Penal Code as amended of the SFRY (FRY) states that the act of unlawfully seizing belongings from the killed or the wounded in a theatre of war "can be committed . . . by any . . . person".⁸³⁷ (emphasis added)

National Case-law

779. In the *Bommer case* before a French Military Tribunal in 1947, the parents of a German family were charged with, and convicted of, theft and re-

⁸²⁷ France, *Ordinance on Repression of War Crimes* (1944), Article 2(8).

⁸²⁸ France, *Code of Military Justice* (1982), Article 428.

⁸²⁹ Germany, *Penal Code* (1998), Articles 242, 243 and 246.

⁸³⁰ Indonesia, *Penal Code* (1946), § 363.

⁸³¹ Israel, *Military Justice Law* (1955), Articles 8 and 74.

⁸³² Moldova, *Penal Code* (2002), Articles 390 and 393.

⁸³³ Netherlands, *International Crimes Act* (2003), Articles 5(5)(q) and 6(3)(e).

⁸³⁴ Rwanda, *Penal Code* (1977), Articles 168 and 170.

⁸³⁵ Spain, *Penal Code* (1995), Article 613.

⁸³⁶ Switzerland, *Military Criminal Code as amended* (1927), Articles 4(2) and 139.

⁸³⁷ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 147.

ceiving stolen goods belonging to French citizens. Two of the daughters were charged with, and convicted of, the second count of the indictment only. The Tribunal considered the offences of theft under Article 379 of the French Penal Code – referred to therein as “fraudulent removal of property” – and receiving stolen goods under Article 460 of the Code – referred to as “knowingly receiving things taken, misappropriated or obtained by means of a crime or delict” – as war crimes.⁸³⁸

780. In the *Lingenfelder case* before a French Military Tribunal in 1947, the accused, a German settler in France, was charged with pillage for the removal of horses and vehicles belonging to the owner of a French farm. Without giving reasons for such finding, the Tribunal came to the conclusion that it did not amount to pillage.⁸³⁹

781. In the *Baus case* before a French Military Tribunal in 1947, the accused, a land superintendent in occupied France, was found guilty of a war crime for theft under the terms of the French Penal Code and for pillage under the 1944 Ordinance on Repression of War Crimes. He took with him during the retreat to Germany the property of the owners of the farms that he was managing.⁸⁴⁰

782. In the *Benz case* before a French Military Tribunal in 1947, the accused, a couple of German settlers, were found guilty of theft and receiving stolen goods, which the Tribunal considered to be war crimes. On their return to Germany at the end of the Second World War, they took with them movable property belonging to French inhabitants.⁸⁴¹

783. In the *Neber case* before a French Military Tribunal in 1948, the accused, a German settler in France (Lorraine), was found guilty of a war crime for having received crockery stolen by her nephew from a French woman, which she took with her when returning to Germany towards the end of the war.⁸⁴²

784. In its judgement in the *Roechling case* in 1948, the General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany held that the accused, the proprietor of a German industrial trust and Reich Commissioner for the iron industry of the departments of Moselle and Meurthe-et-Moselle, was guilty of war crimes, *inter alia*, for participation in the economic pillage of occupied countries.⁸⁴³

785. In the *Greiser case* before Poland's Supreme National Tribunal in 1946, the accused, a governor and *gauleiter* of the Nazi party for provinces incorporated in the German Reich, was charged with war crimes for having taken part in “widespread robberies and thefts . . . of the movables of Polish citizens, and of all public property”.⁸⁴⁴

⁸³⁸ France, Permanent Military Tribunal at Metz, *Bommer case*, Judgement, 19 February 1947.

⁸³⁹ France, Permanent Military Tribunal at Metz, *Lingenfelder case*, Judgement, 11 March 1947.

⁸⁴⁰ France, Permanent Military Tribunal at Metz, *Baus case*, Judgement, 21 August 1947.

⁸⁴¹ France, Permanent Military Tribunal at Metz, *Benz case*, Judgement, 4 November 1947.

⁸⁴² France, Permanent Military Tribunal at Metz, *Neber case*, Judgement, 6 April 1948.

⁸⁴³ France, General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany, *Roechling case*, Judgement, 30 June 1948.

⁸⁴⁴ Poland, Supreme National Tribunal, *Greiser case*, Judgement, 7 July 1946.

786. In the *Flick case* before the US Military Tribunal at Nuremberg in 1947, the accused, the principal proprietor of a large group of German industrial enterprises (and four officials of the same group), which included coal and iron mines and steel producing plants, was charged with war crimes, *inter alia*, for the plunder of public and private property, and spoliation, in the countries and territories occupied by Germany. Flick was found guilty of this count of indictment. The Tribunal stated that “no defendant is shown by the evidence to have been responsible for any act of pillage as that word is commonly understood”, but it, however, quoted Article 47 of the 1907 HR as one of the articles relevant *in casu*.⁸⁴⁵

787. In the *Krupp case* before the US Military Tribunal at Nuremberg in 1948, six of the accused, officials of the Krupp industrial enterprises occupying high positions in political, financial, industrial and economic circles in Germany, were found guilty of war crimes for, *inter alia*, the plunder and spoliation of public and private property in the territories occupied by Germany. The Tribunal quoted Article 47 of the 1907 HR as pertinent *in casu*. It also stated that it “fully concurs with the Judgement of the I.M.T. that the [1907 Hague Convention (IV)], to which Germany was a party, had by 1939 become customary law and was, therefore, binding on Germany not only as Treaty Law but also as Customary Law”. The Tribunal further stated that:

Spoliation of private property . . . is forbidden under two aspects; firstly, the individual private owner of property must not be deprived of it; secondly, the economic subsistence of the belligerently occupied territory must not be taken over by the occupant or put to the service of his war effort – always with the proviso that there are exemptions from this rule which are strictly limited to the needs of the army of occupation in so far as such needs do not exceed the economic strength of the occupied territory.⁸⁴⁶

788. In the *Krauch (I. G. Farben Trial) case* before the US Military Tribunal at Nuremberg in 1948, the accused, officials of I.G. Farben Industrie A.G., were charged, *inter alia*, with war crimes for unlawfully, wilfully and knowingly ordering, abetting and taking a consenting part in the plunder of public and private property, exploitation and spoliation of property in countries and territories which came under the belligerent occupation of Germany. The charges were regarded as violations of Articles 46 to 56 of the 1907 HR. Some of the accused were convicted on this count. The Tribunal held that “the offence of plunder of public and private property must be considered a well-recognised crime under international law”. It added that:

The Hague Regulations do not specifically employ the term “spoliation”, but we do not consider this matter to be one of legal significance. As employed in the Indictment, the term is used interchangeably with the words “plunder” and “exploitation”. It may therefore be properly considered that the term “spoliation”,

⁸⁴⁵ US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947.

⁸⁴⁶ US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948.

which has been admittedly adopted as a term of convenience by the Prosecution, applies to the widespread and systematised acts of dispossession and acquisition of property in violation of the rights of the owners which took place in territories under the belligerent occupation or control of Nazi Germany during World War II. We consider that "spoliation" is synonymous with the word "plunder" as employed in Control Council Law No. 10, and that it embraces offences against property in violation of the laws and customs of war of the general type charged in the Indictment.

...

[I]t is illustrative of the view that offences against property of the character described in the [1943 Inter-Allied Declaration against Acts of Dispossession] were considered by the signatory powers to constitute action in violation of existing international law.

...

In our view, the offences against property defined in the Hague Regulations are broad in their phraseology and do not admit of any distinction between "plunder" in the restricted sense of acquisition of physical properties, which are the subject matter of the crime, the plunder or spoliation resulting from acquisition of intangible property such as is involved in the acquisition of stock ownership, or of acquisition of ownership or control through any other means, even though apparently legal in form.⁸⁴⁷

Other National Practice

789. According to the Report on the Practice of India, acts of pillage committed by a civilian in relation to a foreign national may amount to extortion or robbery and are, as such, "punishable under the law of the land".⁸⁴⁸

790. According to the Report on the Practice of Jordan, the prohibition of pillage is also applicable to civilians.⁸⁴⁹

III. Practice of International Organisations and Conferences

United Nations

791. In 1992, in a report on the situation of human rights in Kuwait under Iraqi occupation, the Special Rapporteur of the UN Commission on Human Rights, in a section entitled "Prohibition of the destruction, dismantling and pillaging of infrastructure and private property", reported cases of pillage of private property by the civilian population residing in Kuwait. The legal framework considered applicable by the Rapporteur included Article 33 GC IV.⁸⁵⁰

⁸⁴⁷ US, Military Tribunal in Nuremberg, *Krauch (I. G. Farben Trial) case*, Judgement, 29 July 1948.

⁸⁴⁸ Report on the Practice of India, 1997, Answers to additional questions on Chapter 2.3.

⁸⁴⁹ Report on the Practice of Jordan, 1997, Chapter 2.3.

⁸⁵⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Kuwait under Iraqi Occupation, Report, UN Doc. E/CN.4/1992/26, 16 January 1992, §§ 224–235.

792. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that, after the fall and evacuation of Srebrenica, “there were a number of reports of widespread looting of Muslim homes by Bosnian Serb forces and Serb civilians following the evacuation. People reportedly came from nearby towns and villages to take goods and livestock.”⁸⁵¹

793. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) placed “looting, theft and robbery of personal property” within the practices of “ethnic cleansing” and as part of a systematic and planned general policy. It noted that acts of pillage were committed by persons from all segments of the Serb population, including civilians.⁸⁵²

Other International Organisations

794. No practice was found.

International Conferences

795. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

796. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

797. No practice was found.

VI. Other Practice

798. In 1993, the International Commission of Inquiry on Human Rights Violations in Rwanda, mandated by four non-governmental organisations, reported that the Rwandan authorities had encouraged civilians to commit acts of pillage.⁸⁵³

⁸⁵¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Final periodic report, UN Doc. E/CN.4/1996/9, 22 August 1995, § 9.

⁸⁵² UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, Annex, §§ 134 and 142, see also § 180.

⁸⁵³ International Commission of Inquiry on Human Rights Violations in Rwanda, Rapport final de la Commission internationale d'enquête sur les violations des droits de l'homme au Rwanda depuis le 1er octobre 1990, in *Rapport sur les droits de l'homme au Rwanda, octobre 1992–octobre 1993*, Association rwandaise pour la défense des droits de la personne et des libertés publiques, Kigali, December 1993, pp. 20–21.

799. In 1993, in meetings with the ICRC, officials of an entity involved in an armed conflict condemned acts of pillage committed by civilians, but justified them by the low number of soldiers available to secure the area and the State's inability to compensate them for the losses caused by similar acts by troops of the State. An official of the entity also stated that he had promoted the broadcasting of messages calling on civilians to refrain from acts of pillage on local television and radio.⁸⁵⁴

⁸⁵⁴ ICRC archive documents.

**STARVATION AND ACCESS TO
HUMANITARIAN RELIEF**

A. Starvation as a Method of Warfare (practice relating to Rule 53)	§§ 1–187
General	§§ 1–129
Sieges that cause starvation	§§ 130–158
Blockades and embargoes that cause starvation	§§ 159–187
B. Attacks against Objects Indispensable to the Survival of the Civilian Population (practice relating to Rule 54)	§§ 188–360
General	§§ 188–307
Attacks against objects used to sustain or support the adverse party	§§ 308–332
Attacks in case of military necessity	§§ 333–360
C. Access for Humanitarian Relief to Civilians in Need (practice relating to Rule 55)	§§ 361–724
General	§§ 361–563
Impediment of humanitarian relief	§§ 564–655
Access for humanitarian relief via third States	§§ 656–677
Right of the civilian population in need to receive humanitarian relief	§§ 678–724
D. Freedom of Movement of Humanitarian Relief Personnel (practice relating to Rule 56)	§§ 725–778

A. Starvation as a Method of Warfare

Note: For practice concerning the provision of basic necessities to persons deprived of their liberty, see Chapter 37, section A.

General

I. Treaties and Other Instruments

Treaties

1. Article 54(1) API provides that “starvation of civilians as a method of warfare is prohibited”. Article 54 AP I was adopted by consensus.¹

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208.

2. Article 14 AP II provides that “starvation of civilians as a method of combat is prohibited”. Article 14 AP II was adopted by consensus.²
3. Pursuant to Article 8(2)(b)(xxv) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts: “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.

Other Instruments

4. Article 17 of the 1863 Lieber Code states that “it is lawful to starve the hostile belligerent, armed or unarmed, so that it leads to the speedier subjection of the enemy”.
5. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including “deliberate starvation of civilians”.
6. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 54(1) AP I.
7. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 54(1) AP I.
8. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxv), the following constitutes a war crime in international armed conflicts: “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.

II. National Practice

Military Manuals

9. Under Argentina’s Law of War Manual, it is “prohibited to starve the civilian population of the adversary”.³ In addition, starvation of civilians as a method of combat is specifically prohibited in non-international armed conflicts.⁴
10. Australia’s Commanders’ Guide notes that AP I “prohibits starvation of civilians as a method of warfare... Military operations involving collateral

² CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 137.

³ Argentina, *Law of War Manual* (1989), § 4.03.

⁴ Argentina, *Law of War Manual* (1989), § 7.08.

deprivation are not unlawful as long as the object is not to starve the civilian population."⁵

11. Australia's Defence Force Manual states that "starvation of civilians as a method of warfare is prohibited... This includes starving civilians or causing them to move away."⁶

12. Belgium's Law of War Manual states that "starvation as a method of warfare against civilians" is prohibited.⁷

13. Under Benin's Military Manual, it is prohibited "to starve civilians as a method of warfare".⁸

14. Canada's LOAC Manual states that "starvation of civilians as a method of warfare is prohibited".⁹ It also states that "starvation of civilians as a method of combat is forbidden" in non-international armed conflicts.¹⁰

15. Colombia's Basic Military Manual states that it is prohibited to use starvation of the civilian population as a method of combat "in all armed conflicts".¹¹

16. Under Croatia's LOAC Compendium, starvation is a prohibited method of warfare.¹²

17. Under France's LOAC Summary Note, "it is prohibited to use starvation as a method of warfare against civilian persons".¹³

18. France's LOAC Manual states that "it is prohibited to use starvation against civilians as a method of warfare".¹⁴ It further states that the recourse to starvation as a method of warfare may constitute a war crime.¹⁵

19. Germany's Military Manual provides that "grave breaches of international humanitarian law are in particular: . . . starvation of civilians by destroying, removing or rendering useless objects indispensable to the survival of the civilian population".¹⁶

20. Under Hungary's Military Manual, starvation is a prohibited method of warfare.¹⁷

21. Indonesia's Military Manual notes that starvation of civilians as a method of warfare is prohibited.¹⁸

22. Israel's Manual on the Laws of War states that conducting a scorched earth policy "with a view to inflicting starvation or suffering on the civilian population . . . is forbidden".¹⁹

⁵ Australia, *Commanders' Guide* (1994), § 907.

⁶ Australia, *Defence Force Manual* (1994), § 709, see also §§ 533, 923(c) and 930.

⁷ Belgium, *Law of War Manual* (1983), p. 28.

⁸ Benin, *Military Manual* (1995), Fascicule III, p. 12.

⁹ Canada, *LOAC Manual* (1999), p. 6-4, § 41 (land warfare) and p. 7-3, § 25 (air warfare).

¹⁰ Canada, *LOAC Manual* (1999), p. 17-5, § 38.

¹¹ Colombia, *Basic Military Manual* (1995), p. 49.

¹² Croatia, *LOAC Compendium* (1991), p. 40.

¹³ France, *LOAC Summary Note* (1992), § 4.2.

¹⁴ France, *LOAC Manual* (2001), p. 30, see also p. 85.

¹⁵ France, *LOAC Manual* (2001), p. 85. ¹⁶ Germany, *Military Manual* (1992), § 1209.

¹⁷ Hungary, *Military Manual* (1992), p. 64.

¹⁸ Indonesia, *Military Manual* (1982), p. 56, § 127(c).

¹⁹ Israel, *Manual on the Laws of War* (1998), p. 35.

23. Under Kenya's LOAC Manual, "it is forbidden... to starve civilians as a method of warfare".²⁰
24. South Korea's Operational Law Manual prohibits the starvation of the civilian population.²¹
25. Under Madagascar's Military Manual, "it is prohibited to starve the civilian population of the adversary".²²
26. The Military Manual of the Netherlands provides that "starvation of civilians is prohibited", regardless of the motive.²³ In addition, starvation of civilians is specifically prohibited in non-international armed conflicts.²⁴
27. New Zealand's Military Manual provides that "starvation of civilians as a method of warfare is prohibited".²⁵ It also states that "AP I Art. 54 expands the customary protection as follows: 1. Starvation of civilians as a method of warfare is prohibited."²⁶ It further stresses that "AP II forbids starvation as a method of combat".²⁷
28. Under Nigeria's Military Manual, starvation of the civilian population is prohibited.²⁸
29. Under Russia's Military Manual, the "use of starvation among the civilian population" is a prohibited method of warfare.²⁹
30. Under Spain's LOAC Manual, "it is prohibited... to starve civilian persons as a method of warfare".³⁰
31. Sweden's IHL Manual considers that the "prohibition of starvation of the civilian population if the intention is to kill and not primarily to force a capitulation", as defined in Article 54 AP I, is part of customary international law.³¹ It adds that:

It is... established that, up to 1977, international law contained no express prohibition of starvation as a method of warfare. With this in mind, the new Article 54 of Additional Protocol I must be seen as an important milestone in the development of international humanitarian law. This Article provides an explicit prohibition against using starvation of civilian populations as a method of warfare.³²

32. Switzerland's Basic Military Manual states with regard to civilians who are in the power of the troops at the time of combat that "it is prohibited to starve the civilian population by removing or rendering supplies useless, or by impeding relief actions in favour of the population in need".³³

²⁰ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

²¹ South Korea, *Operational Law Manual* (1996), p. 42.

²² Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 27.

²³ Netherlands, *Military Manual* (1993), p. V-7.

²⁴ Netherlands, *Military Manual* (1993), p. XI-6.

²⁵ New Zealand, *Military Manual* (1992), § 613(1).

²⁶ New Zealand, *Military Manual* (1992), § 504(2).

²⁷ New Zealand, *Military Manual* (1992), § 1820.

²⁸ Nigeria, *Military Manual* (1994), p. 42, § 11.

²⁹ Russia, *Military Manual* (1990), § 5(r).

³⁰ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(7).

³¹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

³² Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 59.

³³ Switzerland, *Basic Military Manual* (1987), Article 147(b).

33. Under Togo's Military Manual, it is prohibited "to starve civilians as a method of warfare".³⁴
34. The UK LOAC Manual provides that "it is forbidden . . . to starve civilians as a method of warfare".³⁵
35. The Annotated Supplement to the US Naval Handbook states that "Art. 54(1) [AP I] would create a new prohibition on the starvation of civilians as a method of warfare . . . which the United States believes should be observed and in due course recognized as customary law".³⁶
36. The YPA Military Manual of the SFRY (FRY) prohibits the starvation of the civilian population as a method of warfare.³⁷

National Legislation

37. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including deliberate starvation of civilians.³⁸
38. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "starvation as a method of warfare" in international armed conflicts.³⁹
39. Azerbaijan's Criminal Code provides that "starvation of civilians as a method of warfare" constitutes a war crime in international and non-international armed conflicts.⁴⁰
40. The Criminal Code of Belarus provides that "the use of starvation among the civilian population as a method of warfare" is a war crime.⁴¹
41. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "starvation of the population" is a war crime.⁴² The Criminal Code of the Republika Srpska contains the same provision.⁴³
42. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "deliberately starving civilians as a method of warfare" constitutes a war crime in international armed conflicts.⁴⁴
43. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁴⁵

³⁴ Togo, *Military Manual* (1996), Fascicule III, p. 12.

³⁵ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(f).

³⁶ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.1.2, footnote 15.

³⁷ SFRY (FRY), *YPA Military Manual* (1988), § 107.

³⁸ Australia, *War Crimes Act* (1945), Section 3.

³⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.67.

⁴⁰ Azerbaijan, *Criminal Code* (1999), Article 116(4).

⁴¹ Belarus, *Criminal Code* (1999), Article 136(4).

⁴² Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

⁴³ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

⁴⁴ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(x).

⁴⁵ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

44. China's Law Governing the Trial of War Criminals provides that "malicious killing of non-combatants by starvation" constitutes a war crime.⁴⁶
45. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁴⁷
46. Under Côte d'Ivoire's Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, the "intentional reduction to starvation, destitution or ruination" of the civilian population constitutes a "crime against the civilian population".⁴⁸
47. Under Croatia's Criminal Code, the imposition of "starvation of the population" is a war crime.⁴⁹
48. Under Ethiopia's Penal Code, it is a war crime to organise, order or engage in "wilful reduction to starvation" of the civilian population, in time of war, armed conflict or occupation.⁵⁰
49. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "intentionally using starvation of civilians as a method of warfare" in international armed conflicts, is a crime.⁵¹
50. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "uses starvation of civilians as a method of warfare".⁵²
51. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 54(1) AP I, as well as any "contravention" of AP II, including violations of Article 14 AP II, are punishable offences.⁵³
52. Under Lithuania's Criminal Code as amended, "causing the threat of death from famine" in time of war, armed conflict or occupation is a war crime.⁵⁴
53. Under Mali's Penal Code, "deliberately starving civilians as a method of warfare" is a war crime in international armed conflicts.⁵⁵
54. The Definition of War Crimes Decree of the Netherlands includes "deliberate starvation of civilians" in its list of war crimes.⁵⁶
55. Under the International Crimes Act of the Netherlands, "intentionally using starvation of civilians as a method of warfare" is a crime, when committed in an international armed conflict.⁵⁷

⁴⁶ China, *Law Governing the Trial of War Criminals* (1946), Article 3(3).

⁴⁷ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁴⁸ Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(2).

⁴⁹ Croatia, *Criminal Code* (1997), Article 158(1).

⁵⁰ Ethiopia, *Penal Code* (1957), Article 282(b).

⁵¹ Georgia, *Criminal Code* (1999), Article 413(d).

⁵² Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(5).

⁵³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁴ Lithuania, *Criminal Code as amended* (1961), Article 336.

⁵⁵ Mali, *Penal Code* (2001), Article 31(i)(25).

⁵⁶ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁵⁷ Netherlands, *International Crimes Act* (2003), Article 5(5)(l).

56. Under New Zealand's International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁵⁸

57. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁵⁹

58. Under Slovenia's Penal Code, "exposure to starvation" is a war crime against the civilian population.⁶⁰

59. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁶¹

60. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁶²

61. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who caused the intentional starvation of the population" committed a war crime.⁶³

62. Under the Penal Code as amended of the SFRY (FRY), "starvation of the population" is a war crime against the civilian population.⁶⁴

National Case-law

63. In the *Perišić and Others case* before a Croatian district court in 1997, after a trial *in absentia*, several persons were convicted of ordering the shelling of the city of Zadar and its surroundings. The judgement was based, *inter alia*, on Article 14 AP II, as incorporated in Article 120(1) of Croatia's Criminal Code of 1993.⁶⁵

64. In its judgement in the *Eichmann case* in 1961, the District Court of Jerusalem held that starvation caused serious bodily or mental harm and, therefore, amounted to a violation of Israel's Crime of Genocide (Prevention and Punishment) Law.⁶⁶

Other National Practice

65. The Report on the Practice of Angola, with reference to a Human Rights Watch report, notes that starvation was used by both the governmental forces and UNITA as a method of warfare during the conflict in Angola.⁶⁷

⁵⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁵⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁶⁰ Slovenia, *Penal Code* (1994), Article 374(1).

⁶¹ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁶² UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁶³ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

⁶⁴ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

⁶⁵ Croatia, District Court of Zadar, *Perišić and Others case*, Judgement, 24 April 1997.

⁶⁶ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.

⁶⁷ Report on the Practice of Angola, 1998, Chapter 4.1, referring to Human Rights Watch, *Angola: Arms Trade and Violations of the Laws of War since the 1992 Elections*, New York, November 1994, pp. 74–76.

66. In 1992, during a debate in the UN Security Council, Austria condemned the use of starvation in the conflict in the former Yugoslavia, stating that “the most dreadful violations of human rights are being perpetrated . . . and people are continuing to starve”.⁶⁸

67. In 1969, in a statement before the UN General Assembly, the Belgian Minister of Foreign Affairs condemned methods of warfare that led to the starvation of civilians in the context of the Nigerian civil war.⁶⁹

68. At the CDDH, Belgium qualified draft Article 48 AP I (now Article 54) as “a step forward in the development of humanitarian law”.⁷⁰

69. The Report on the Practice of Belgium states that Belgium demonstrated support for the prohibition of starvation in international and non-international armed conflicts even before the adoption of the Additional Protocols in 1977.⁷¹

70. In 1990, in the UN Sanctions Committee on Iraq, China declared that “everyone agreed” that the inhabitants of Iraq and Kuwait “must not be left to starve”.⁷²

71. The Report on the Practice of China states that the “Chinese Government supports the protection of the civilian population against starvation” both in international and non-international armed conflicts.⁷³

72. In 1994, in reply to a questionnaire from the House of Representatives, Colombia’s Ministry of Foreign Affairs quoted Article 14 AP II. It added that “what this Article prohibits is the starvation of civilians”.⁷⁴

73. The Report on the Practice of Colombia refers to a draft internal working paper in which the Colombian government stated that it was prohibited “to make the civilian population suffer from hunger or thirst”.⁷⁵

74. In 1990, in the UN Sanctions Committee on Iraq, Côte d’Ivoire stated that “no one wanted a famine in the area. Citizens should not be made to pay for the misdeeds of their Governments.”⁷⁶

75. In 1990, in the UN Sanctions Committee on Iraq, Cuba stressed that its government “could never accept any definition which would allow the supply

⁶⁸ Austria, Statement before the UN Security Council, UN Doc. S/PV.3134, 13 November 1992, pp. 44–45.

⁶⁹ Belgium, Statement by the Minister of Foreign Affairs before the UN General Assembly, UN Doc. A/PV.1765, 25 September 1969, §§ 132–133.

⁷⁰ Belgium, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 307, § 53.

⁷¹ Report on the Practice of Belgium, 1997, Chapter 4.1.

⁷² China, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 5.

⁷³ Report on the Practice of China, 1997, Chapter 4.1.

⁷⁴ Colombia, Presidency of the Republic, Office of the High Commissioner for Peace, National Plan for the Dissemination of IHL, Reply of the Ministry of Foreign Affairs to Questionnaire No. 012 of Commission II of the House of Representatives, 7 October 1994, p. 6.

⁷⁵ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled “El Derecho Internacional Humanitario”, § 2(h).

⁷⁶ Côte d’Ivoire, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 5.

of foodstuffs only to avert famine. Such an approach would be in direct violation of the international instruments which prohibited the use of hunger as a means of warfare."⁷⁷

76. In 1992, in a letter addressed to the President of the UN Security Council, Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey deplored "a situation where perhaps one tenth of the population of Bosnia and Herzegovina will perish as a result of starvation, exposure and disease".⁷⁸

77. In 1990, in the UN Sanctions Committee on Iraq, Finland stated that Security Council Resolution 661 "must not be interpreted so strictly that famine would result. The shipment of foodstuffs must be resumed when humanitarian circumstances require."⁷⁹

78. At the CDDH, the representative of France stated that "all Article 27 [now Article 14 AP II] contained was a purely humanitarian provision, which no one should oppose... His delegation would vote for the article, whose importance was borne out by many examples in history."⁸⁰

79. In 1991, during a debate in the German parliament on the situation in Sudan, several speakers from various parties condemned the use of starvation.⁸¹

80. In 1993, during a parliamentary debate, the German Minister for Economic Cooperation and Development denounced the use of starvation by the parties to the conflict in Sudan.⁸²

81. In 1993, during a parliamentary debate on the situation in Bosnia and Herzegovina, a member of the German parliament, supported by a Minister of State, qualified the starvation of a part of the population of Srebrenica as a "genocidal act".⁸³

82. In 1993, the German Chancellor expressed the view that the use of starvation in armed conflict was "a violation of human dignity".⁸⁴

83. At the 26th International Conference of the Red Cross and Red Crescent in 1995, Germany stated that the "deliberate and systematic starvation of the civilian population has been used repeatedly and has to be condemned".⁸⁵

⁷⁷ Cuba, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.2, 22 August 1990, p. 6.

⁷⁸ Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey, Letter dated 5 October 1992 to the President of the UN Security Council, UN Doc. S/24620, 6 October 1992.

⁷⁹ Finland, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 4.

⁸⁰ France, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 137, § 86.

⁸¹ Germany, Parliamentary debate, 21 June 1991, *Plenarprotokoll* 12/35, pp. 2963, 2965, 2966 and 2973.

⁸² Germany, Lower House of Parliament, Statement by the Minister for Economic Cooperation and Development, 14 January 1993, *Plenarprotokoll* 12/131, p. 11315.

⁸³ Germany, Lower House of Parliament, Statement by a Member of Parliament, 22 April 1993, *Plenarprotokoll* 12/152, p. 13075.

⁸⁴ Germany, Statement by the Chancellor, Helmut Kohl, Berlin, 24 May 1993, *Bulletin*, No. 45, Presse- und Informationsamt der Bundesregierung, Bonn, 29 May 1993, p. 488.

⁸⁵ Germany, Statement at the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995.

84. At the Moscow Conference on Global Humanitarian Challenges in 1997, the German Minister of Interior Affairs held the use of starvation as a weapon to be “a breach of international law”.⁸⁶

85. In 1997, during an open debate in the UN Security Council, Germany expressed concern about behaviour the consequences of which ranged “from brutal death by starvation . . . to massive displacements of whole populations striving for survival”.⁸⁷

86. At the CDDH, in response to Pakistan’s proposed amendment to delete Article 27 of draft AP II (now Article 14), the representative of the Holy See declared that:

He was watching with increasing concern the dismantling, article by article, of draft Protocol II . . . It was all the more serious in that the deleted articles were perhaps among the most significant and valuable from the standpoint of humanitarian law . . . Now that the Conference was being called on to decide whether or not to delete Article 27 [now Article 14], which was essentially concerned with food and water supplies for the civilian population, the delegation of the Holy See, as well as others, had to face a problem of conscience, for the protection of the civilian population was one of the aims, possibly even the main aim, of the two Additional Protocols. Since, as had often been stated, the civilian population was the main victim in modern conflicts, how could Article 27, which was indispensable to its survival, be light-heartedly deleted?

The Holy See called upon Pakistan to withdraw its amendment and suggested in the alternative a roll-call vote on Article 27.⁸⁸

87. At the CDDH, Iraq stated that Article 27 of draft AP II (now Article 14) “was of great humanitarian value, and there was certainly a place for it in Protocol II”.⁸⁹

88. According to the Report on the Practice of Israel, “the IDF does not condone or practice starvation of the civilian population as a method of warfare”.⁹⁰

89. According to the Report on the Practice of Jordan, “Islamic law proscribes starvation as a method of warfare”.⁹¹

90. The Report on the Practice of South Korea states that the “protection of [the] civilian population against starvation can be regarded as an established rule of customary international law in [the] Republic of Korea”.⁹²

91. The Report on the Practice of Kuwait explains that it is the *opinio juris* of Kuwait that, during an armed conflict, the civilian population be

⁸⁶ Germany, Statement by the Minister of Interior Affairs on the occasion of the CEP-Symposium, Moscow Conference on Global Humanitarian Challenges, April 1997, § 4.

⁸⁷ Germany, Statement before the UN Security Council, UN Doc. S/PV.3778 (Resumption 1), 21 May 1997, p. 18.

⁸⁸ Holy See, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, pp. 135–136, §§ 79 and 83.

⁸⁹ Iraq, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 137, § 88.

⁹⁰ Report on the Practice of Israel, 1997, Chapter 4.1.

⁹¹ Report on the Practice of Jordan, 1997, Chapter 4.1.

⁹² Report on the Practice of South Korea, 1997, Chapter 4.1.

able to maintain its “normal life” or at least “a minimum of normal life” and this includes the prohibition of the use of starvation as a method of warfare.⁹³

92. In 1990, in the UN Sanctions Committee on Iraq, Malaysia stated that “famine must not be used as a weapon to implement” Security Council Resolution 661 (1990).⁹⁴

93. According to the Report on the Practice of Malaysia, “starvation was never employed as a method of warfare” by Malaysia’s armed forces during the conflict against the communist opposition.⁹⁵

94. According to the Report on the Practice of Nigeria, the government was accused of using starvation as a method of warfare during the Nigerian civil war (1966–1970).⁹⁶ The government denied the allegations.⁹⁷ According to the report, this denial confirms that Nigerian practice recognises the protection of the civilian population against starvation. The report considers that Nigeria’s *opinio juris* is that the protection of the civilian population against starvation is part of customary international law.⁹⁸

95. At the CDDH, Pakistan proposed deleting Article 27 of draft AP II (now Article 14) because the prohibition of starvation of civilians as a method of warfare should not be included in a protocol for non-international armed conflicts.⁹⁹

96. In 1991, a circular from the Office of the President of the Philippines stipulated that “only in cases of tactical operations may control of the movement of non-combatants and the delivery of goods and services be imposed for safety reasons, provided that in no case should such control lead to the starvation of civilians”.¹⁰⁰

97. On the basis of the replies by Rwandan army officers to a questionnaire, the Report on the Practice of Rwanda emphasises that the use of starvation as a method of warfare is regarded as a war crime in Rwanda.¹⁰¹ The report concludes that the prohibition on using starvation as a method of warfare is regarded by Rwanda as part of customary international law.¹⁰²

⁹³ Report on the Practice of Kuwait, 1997, Chapter 4.1.

⁹⁴ Malaysia, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 6.

⁹⁵ Report on the Practice of Malaysia, 1997, Chapter 4.1.

⁹⁶ Report on the Practice of Nigeria, 1997, Chapter 4.1, referring to *The Observer*, Biafra offers truce to help peace talks, 4 August 1968.

⁹⁷ Report on the Practice of Nigeria, 1997, Chapter 4.1, referring to Press Release of the Federal Ministry of Information, Lagos, 11 July 1968.

⁹⁸ Report on the Practice of Nigeria, 1997, Chapter 4.1.

⁹⁹ Pakistan, Statement at the CDDH, *Official Records*, Vol. IV, CDDH/427, 31 May 1975, p. 87, § 78.

¹⁰⁰ Philippines, Office of the President, Memorandum Circular No. 139 Prescribing the Guidelines for the Implementation of Memorandum Order No. 398, 26 September 1991, § 3.

¹⁰¹ Report on the Practice of Rwanda, 1997, Replies from Rwandan army officers to a questionnaire, Chapter 4.1.

¹⁰² Report on the Practice of Rwanda, 1997, Chapter 4.1.

98. At the CDDH, the Swedish delegate appealed “urgently to all delegations, particularly those of the Western and Others Group, to consider [Article 27 of draft AP II (now Article 14)] carefully and to adopt it”.¹⁰³

99. In 1990, in the UN Sanctions Committee on Iraq, the UK considered that “no one favoured allowing the inhabitants of Kuwait and Iraq to starve”.¹⁰⁴

100. According to the Report on UK Practice, the UK supports the protection of civilians against starvation and the condemnation of starvation of civilians as a tactic in armed conflict.¹⁰⁵

101. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that starvation of civilians not be used as a method of warfare”.¹⁰⁶

102. In 1987, the Legal Adviser of the US Department of State, referring, *inter alia*, to the protection of the civilian population against deliberate starvation as contained in AP II, stated that “for the most part, the obligations contained in Protocol II are no more than a restatement of the rules of conduct with which the United States military forces would almost certainly comply as a matter of national policy, constitutional and legal protections, and common decency”.¹⁰⁷

103. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that “U.S. practice does not involve methods of warfare that have as their intention the starvation of the enemy civilian population”.¹⁰⁸

104. According to the Report on US Practice, it is the *opinio juris* of the US that the starvation of civilians as a method of warfare is prohibited.¹⁰⁹

105. At the CDDH, the representative of the USSR declared that he “wholeheartedly supported” the Holy See’s position not to delete Article 27 of draft AP II (now Article 14), “for it was one of the most humane provisions in the entire field of humanitarian law”.¹¹⁰

¹⁰³ Sweden, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 137, § 85.

¹⁰⁴ UK, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 5.

¹⁰⁵ Report on UK Practice, 1997, Chapter 4.1.

¹⁰⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

¹⁰⁷ US, Remarks of Judge Abraham Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 461 and 462.

¹⁰⁸ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(O), Report on US Practice, 1997, Chapter 4.1.

¹⁰⁹ Report on US Practice, 1997, Chapter 4.1.

¹¹⁰ USSR, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 136, § 84.

106. In 1990, in the UN Sanctions Committee on Iraq, the USSR stated that “foodstuffs should be supplied to Iraq on the basis of humanitarian considerations, without waiting for a disaster to occur”.¹¹¹

107. In 1990, in the UN Sanctions Committee on Iraq, Yemen declared that “hunger . . . must be prevented on humanitarian grounds”.¹¹² It added that “on humanitarian grounds the Iraqi and Kuwaiti peoples must not be allowed to face the prospect of famine. They must be able to obtain the necessary foodstuffs, such as cereals, cooking oil and milk for children.”¹¹³

108. In 1974, in a communication to the ICRC, the President of a State accused the army of another State of having confiscated food and water destined for the civilian population, thereby causing starvation.¹¹⁴

109. In 1980, a State’s ambassador to the UN informed the ICRC that another State had used starvation as a method of warfare against it.¹¹⁵

110. In 1990, in a meeting with the ICRC, the President of a State confirmed the acceptance of his government that in principle humanitarian aid should be distributed to the civilian population in all parts of the country, including in territories not under its control. It thus relinquished the use of starvation as a possible weapon in situations of dispute.¹¹⁶

III. Practice of International Organisations and Conferences

United Nations

111. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General took “the deliberate starvation of the civilian population in Somalia” as an example of how “in modern warfare, particularly internal conflicts, civilians are often targeted as part of a political strategy”.¹¹⁷

112. In 1995, a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stressed that “Sarajevo has been the scene of some of the gravest violations of human rights in the course of this conflict . . . The humanitarian situation has also been extremely serious, with acute food shortages and problems with utilities which have frequently been used as a weapon of war”.¹¹⁸

¹¹¹ USSR, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 4.

¹¹² Yemen, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.2, 22 August 1990, p. 6.

¹¹³ Yemen, Statement before the UN Security Council Committee Established by Resolution 661 (1990) concerning the Situation between Iraq and Kuwait, UN Doc. S/AC.25/SR.5, 12 September 1990, p. 3, see also p. 6.

¹¹⁴ ICRC archive document. ¹¹⁵ ICRC archive document. ¹¹⁶ ICRC archive document.

¹¹⁷ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 14.

¹¹⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. S/1995/933-A/50/727, 7 November 1995, § 54.

113. In 1994, in its interim report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Paragraph 1 of Security Council Resolution 935 (1994) determined that massive and systematic violations of several provisions of AP II had been perpetrated, including violations of Article 14 AP II.¹¹⁹

Other International Organisations

114. In a resolution on health and war adopted in 1995, the OAU Conference of African Ministers of Health called upon member States to “ban . . . the use of famine as a method of war against civilians”.¹²⁰

115. In 1998, in a statement before the Sixth Committee of the UN General Assembly, South Africa declared on behalf of the SADC that the 1998 ICC Statute “would also serve as a reminder that even during armed conflict the rule of law must be upheld. For example, it was unlawful . . . for the starvation of civilians to be intentionally used as a method of warfare. [This act was] a war crime and would be punished.”¹²¹

International Conferences

116. The report of the CDDH Working Group responsible for the elaboration of draft Article 48 AP I (now Article 54) stated that draft Article 48 “reflected the almost unanimous view of the Working Group, which considered it one of the most important articles of humanitarian law relating to the protection of the civilian population”.¹²²

117. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants declared that they refused to accept that “civilians [are] starved as a method of warfare”.¹²³

118. In 1995, the 26th International Conference of the Red Cross and Red Crescent adopted a resolution on the protection of the civilian population in period of armed conflict in which it strongly condemned “attempts to starve civilian populations in armed conflicts” and stressed “the prohibition on using starvation of civilians as a method of warfare”.¹²⁴

119. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that “States stress the provisions of international humanitarian law prohibiting the use of starvation of civilians as a method of warfare”.¹²⁵

¹¹⁹ UN Commission of Experts Established pursuant to Paragraph 1 of Security Council Resolution 935 (1994), Interim report, UN Doc. S/1994/1125, 4 October 1994, Annex, § 107.

¹²⁰ OAU, Conference of African Ministers of Health, 26–28 April 1995, Res. 14 (V), § 5(b).

¹²¹ SADC, Statement by South Africa on behalf of the SADC before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 13.

¹²² CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.31, 14 March 1975, p. 300, § 8.

¹²³ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1), *ILM*, Vol. 33, 1994, p. 298.

¹²⁴ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § E(a) and (b).

¹²⁵ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 2.

IV. Practice of International Judicial and Quasi-judicial Bodies

120. In the *Application of Genocide Convention case (Provisional Measures)* before the ICJ in 1993, the government of Bosnia and Herzegovina requested that “Yugoslavia (Serbia and Montenegro) and its agents . . . desist immediately . . . from the starvation of the civilian population in Bosnia and Herzegovina”.¹²⁶

V. Practice of the International Red Cross and Red Crescent Movement

121. The ICRC Commentary on the Additional Protocols emphasises that the statement of the general principle not to use starvation as a method of warfare “is innovative and a significant progress of the law”.¹²⁷

122. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “starvation as a method of warfare against civilian persons is prohibited”.¹²⁸

123. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on humanitarian assistance in situations of armed conflict in which it called upon all parties to armed conflicts and, where applicable, any High Contracting Party “to respect and ensure respect for the rules of international humanitarian law . . . that prohibit the use of starvation of civilians as a method of combat”.¹²⁹

124. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict in which it reminded “the authorities concerned and the armed forces under their command of their obligation to apply international humanitarian law, in particular . . . the prohibition of starvation of civilians as a method of combat”.¹³⁰

125. In a communication to the press issued in 1993 in the context of the conflict in Liberia, the ICRC expressed concern about “over 110,000 people living in the area between Kakata and Totota, in central Liberia, [who] are threatened by starvation”.¹³¹

126. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “starvation of civilians”, when committed in an international or a

¹²⁶ ICJ, *Application of Genocide Convention case (Provisional Measures)*, 8 April 1993, § 2(q).

¹²⁷ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 2091.

¹²⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 396.

¹²⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 12, § a.

¹³⁰ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 13, § 1.

¹³¹ ICRC, Communication to the Press No. 93/22, Liberia: ICRC Concerned about 110,000 People Facing Starvation, 22 July 1993.

non-international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹³²

VI. *Other Practice*

127. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that, “by prohibiting starvation of civilians as a method of warfare, Art. 54 [AP I] establishes a substantial new principle of international law applicable in armed conflict”.¹³³

128. In an article in 1986, Ambassador Aldrich, head of the US delegation to the CDDH, stated that Article 54 AP I ranked among those provisions “most warmly welcomed by the United States in 1977”.¹³⁴

129. The SPLM/A Penal and Disciplinary Laws provide that members of the SPLM/A “shall ensure that citizens [under their control] . . . produce sufficient food for themselves”. In addition, it severely punishes “any member of the [SPLA] or affiliated organizations who compels citizens to surrender food materials”.¹³⁵ According to the Report on SPLM/A Practice, there have been several incidents in which the SPLM/A has nevertheless used starvation as a method of warfare. The SPLM/A diverted UN food supplies destined for the civilian population in southern Sudan. It also drove away virtually all livestock from some communities in southern Sudan (Gajack Nuer in 1984, Murle in 1985 and Bar Dinka in 1991), thus causing widespread starvation among those tribes or ethnic groups.¹³⁶

Sieges that cause starvation

I. *Treaties and Other Instruments*

Treaties

130. Article 32 GC IV provides that:

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

¹³² ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(iv) and 3(xi).

¹³³ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflict*, Martinus Nijhoff, The Hague, 1982, p. 336.

¹³⁴ George H. Aldrich, “Progressive Development of the Laws of War: A Reply to Criticisms of the 1977 Geneva Protocol I”, *Virginia Journal of International Law*, 1986, Vol. 26, p. 699.

¹³⁵ SPLM/A, Penal and Disciplinary Laws, 4 July 1984, §§ 54(3) and 68, Report on SPLM/A Practice, 1998, Chapter 4.1.

¹³⁶ Report on SPLM/A Practice, 1998, Chapter 4.1.

The obligation of High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

Such consignments shall be forwarded as rapidly as possible, and the Power which permits their free passage shall have the right to prescribe the technical arrangements under which such passage is allowed.

Other Instruments

131. Article 18 of the 1863 Lieber Code provides that “when a commander of a besieged place expels the noncombatants, in order to lessen the number of those who consume his stock of provisions, it is lawful, though an extreme measure, to drive them back, so as to hasten on the surrender”.

II. National Practice

Military Manuals

132. Argentina’s Law of War Manual, in a chapter dealing, *inter alia*, with siege warfare, provides that “belligerent forces must to try and conclude agreements which facilitate . . . the free passage of . . . essential foodstuffs and clothing”.¹³⁷

133. Australia’s Commanders’ Guide, in a section on siege warfare, provides that, in such a situation, “provision is . . . made for the passage . . . of essential foodstuffs, clothing, tonics intended for children under 15, expectant mothers and maternity cases”.¹³⁸

134. Australia’s Defence Force Manual, in a section on siege warfare, states that “the opposing parties are required to try and conclude local agreements . . . for the passage . . . of essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity cases”.¹³⁹

135. Canada’s LOAC Manual, in a section on siege warfare, stresses that “if circumstances permit, . . . the parties should . . . permit passage to these [besieged]

¹³⁷ Argentina, *Law of War Manual* (1969), § 1.014.

¹³⁸ Australia, *Commanders’ Guide* (1994), § 926.

¹³⁹ Australia, *Defence Force Manual* (1994), § 735.

areas of . . . essential foodstuffs, clothing, and tonics intended for children under the age of 15, expectant mothers, and maternity cases".¹⁴⁰

136. France's LOAC Manual, under the definition of siege, states that "the starvation of civilian populations as a method of warfare is prohibited".¹⁴¹

137. Israel's Manual on the Laws of War states that:

Siege as a method of warfare vis-a-vis a military objective is an absolutely legal method even if it involves the starvation of the besieged or preventing the transfer of medications in order to achieve surrender.

A question arises in the case of a military siege of an inhabited city. Until recently there were no rules relating to this method of warfare, and it was allowed to exploit the suffering of the local population in order to subdue the enemy. Following the Second World War, a provision was set in the Additional Protocols of 1977, forbidding the starvation of a civilian population in war. This provision clearly implies that the city's inhabitants must be allowed to leave the city during a siege.¹⁴²

138. New Zealand's Military Manual notes that siege is not prohibited "even if it causes some collateral deprivation to the civilian population, so long as starvation is not the specific purpose".¹⁴³ In a section on siege warfare, the manual further provides that, in such a situation, "provision is . . . made in [Article 23 GC IV] for the passage . . . of essential foodstuffs, clothing, and tonics intended for children under 15, expectant mothers and maternity cases".¹⁴⁴

139. The US Field Manual, in a chapter dealing, *inter alia*, with siege warfare, states that, in such a situation, "provision is . . . made in Article 23 [GC IV] for the passage . . . of essential foodstuffs, clothing, and tonics intended for children under 15, expectant mothers, and maternity cases".¹⁴⁵

National Legislation

140. No practice was found.

National Case-law

141. No practice was found.

Other National Practice

142. In 1992, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, Albania stated that:

¹⁴⁰ Canada, *LOAC Manual* (1999), p. 6-4, § 35(e).

¹⁴¹ France, *LOAC Manual* (2001), p. 117.

¹⁴² Israel, *Manual on the Laws of War* (1998), p. 59.

¹⁴³ New Zealand, *Military Manual* (1992), § 504(2), footnote 9.

¹⁴⁴ New Zealand, *Military Manual* (1992), § 508(3). ¹⁴⁵ US, *Field Manual* (1956), § 44.

Many cities in Bosnia and Herzegovina have been besieged for several months, and their population is under constant artillery fire and left without food, electricity, water supply and medicine. All this will certainly leave a scar on the population for several generations, and the evil is beyond remedy.¹⁴⁶

143. In 1995, in a statement before the UN General Assembly on Germany's appreciation of UN achievements, the German Foreign Minister praised the efforts of peacekeepers "who keep the beleaguered people from starving".¹⁴⁷

144. In 1993, during a debate in the UN Security Council on the establishment of a no-fly zone in Bosnia and Herzegovina, Pakistan declared that "we have witnessed with mounting horror and revulsion... the use of siege and the cutting off of supplies of food and other essentials to civilian population centres".¹⁴⁸

III. Practice of International Organisations and Conferences

United Nations

145. In a resolution adopted in June 1992 on deployment of additional elements of UNPROFOR in Bosnia and Herzegovina, the UN Security Council underlined "the urgency of quick delivery of humanitarian assistance to [besieged] Sarajevo and its environs".¹⁴⁹

146. In a resolution adopted in July 1992 on deployment of additional elements of UNPROFOR in Bosnia and Herzegovina, the UN Security Council stated that it was "deeply disturbed by the situation which now prevails in [besieged] Sarajevo" and deplored the continuation of the fighting "which is rendering difficult the provision of humanitarian aid in Sarajevo".¹⁵⁰

147. In a resolution adopted in 1993 on a comprehensive political settlement of the situation in Bosnia and Herzegovina, the UN Security Council expressed its "concern" about the continuing siege of Sarajevo and strongly condemned "the disruption of public utilities (including water, electricity, fuel and communications)".¹⁵¹

148. In 1994, in a statement by its President, the UN Security Council strongly criticised the situation of the besieged town of Maglaj in Bosnia and Herzegovina, stating that it:

¹⁴⁶ Albania, Statement before the UN Security Council, UN Doc. S/PV.3136, 16 November 1992, § 50.

¹⁴⁷ Germany, Statement before the UN General Assembly, UN Doc. A/50/PV.8, 27 September 1995, pp. 4 and 5.

¹⁴⁸ Pakistan, Statement before the UN Security Council, UN Doc. S/PV.3191, 31 March 1993, § 30.

¹⁴⁹ UN Security Council, Res. 761, 29 June 1992, preamble.

¹⁵⁰ UN Security Council, Res. 764, 13 July 1992, preamble.

¹⁵¹ UN Security Council, Res. 859, 24 August 1993, preamble.

deplors the rapidly deteriorating situation in the Maglaj area and the threat it poses to the survival of the remaining civilian population. It notes that this intolerable situation has been perpetuated by the intensity of the nine-month siege of the town.

...

The Council also demands that the siege of Maglaj be ended immediately.¹⁵²

149. In a resolution adopted in 1993 on the situation in Bosnia and Herzegovina, the UN General Assembly expressed its concern about "the continuing siege of Sarajevo and other Bosnian cities and of 'safe areas' which endangers the well-being and safety of their inhabitants". It demanded that "the Bosnian Serb party lift forthwith the siege of Sarajevo and other 'safe areas', as well as other besieged Bosnian towns".¹⁵³ The call upon the Bosnian Serb party to lift the siege of Sarajevo was repeated in a resolution on the same topic adopted in 1994.¹⁵⁴ The siege of Sarajevo and other Bosnian towns was condemned again a few weeks later.¹⁵⁵

150. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights demanded "immediate, firm and resolute action by the international community to stop all human rights violations, including... strangulation of cities in Bosnia".¹⁵⁶

151. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stressed that "Sarajevo has been the scene of some of the gravest violations of human rights in the course of this conflict... The humanitarian situation has also been extremely serious, with acute food shortages and problems with utilities which have frequently been used as a weapon of war."¹⁵⁷

Other International Organisations

152. In 1992, in a report on the crisis in the former Yugoslavia, the rapporteur of the Parliamentary Assembly of the Council of Europe declared that "the siege and the systematic shelling of Sarajevo... are actions unanimously condemned by the international community".¹⁵⁸

¹⁵² UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 1.

¹⁵³ UN General Assembly, Res. 48/88, 20 December 1993, § 6.

¹⁵⁴ UN General Assembly, Res. 49/10, 3 November 1994, § 4.

¹⁵⁵ UN General Assembly, Res. 49/196, 23 December 1994, § 7.

¹⁵⁶ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 5.

¹⁵⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. S/1995/933-A/50/727, 7 November 1995, Annex, § 54.

¹⁵⁸ Council of Europe, Parliamentary Assembly, Report on the crisis in the former Yugoslavia, Doc. 6639, 29 June 1992, § II 9.

153. In 1994, in a plenary session of the UN General Assembly on the situation in Bosnia and Herzegovina, the EU expressed its concern about “the situation in Sarajevo and the danger of its strangulation”.¹⁵⁹

154. In 1994, the Presidential Committee of the WEU adopted a declaration on the situation in the former Yugoslavia and called for an immediate end to the siege of Sarajevo.¹⁶⁰

International Conferences

155. In a Special Declaration on Bosnia and Herzegovina, the World Conference on Human Rights in 1993 urged the world community and all international bodies, in particular the UN Security Council, “to take forceful and decisive steps for effective measures of peace-making in the Republic of Bosnia and Herzegovina with a view to . . . extending immediate humanitarian help for the relief of persons in besieged towns and cities as well as other victims”.¹⁶¹

IV. Practice of International Judicial and Quasi-judicial Bodies

156. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

157. No practice was found.

VI. Other Practice

158. According to the Report on SPLM/A Practice, one of the popular practices employed by the SPLM/A against the Sudanese government is to besiege garrison towns held by the Sudanese army. The report points out that the main strategy is to force the government army of the garrison to surrender, but that the civilian population living in these garrisons and towns is also greatly affected.¹⁶²

Blockades and embargoes that cause starvation

I. Treaties and Other Instruments

Treaties

159. No practice was found.

¹⁵⁹ EU, Statement by Germany on behalf of the EU before the UN General Assembly, UN Doc. A/49/PV.50, 3 November 1994, p. 19.

¹⁶⁰ WEU, Presidential Committee, Declaration on the situation in the former Yugoslavia, PRCO Doc 1413, 26 April 1994.

¹⁶¹ World Conference on Human Rights, Vienna, 14–25 June 1993, Special Declaration on Bosnia and Herzegovina, § 7, UN Doc. A/CONF.157/24 (Part I), 13 October 1993, Chapter IV.B, § 47.

¹⁶² Report on SPLM/A Practice, 1998, Chapter 4.1.

Other Instruments

160. The 1994 San Remo Manual states that:

102. The declaration or establishment of a blockade is prohibited if:

- a) it has the sole purpose of starving the civilian population or denying it other objects essential for its survival.

...

103. If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies.

*II. National Practice**Military Manuals*

161. Australia's Commanders' Guide provides that "in so far as the purpose of a blockade is to deprive the enemy population of foodstuffs, so as to starve them in the hope that they would apply pressure to their government to seek peace, it would now appear to be illegal in accordance with Article 54(1) [AP I]".¹⁶³

162. Australia's Defence Force Manual states that:

The declaration or establishment of a blockade is prohibited if:

- a. it has the sole purpose of starving the civilian population or denying it other objects indispensable for its survival.

...

If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies ...¹⁶⁴

163. Canada's LOAC Manual provides that:

The declaration or establishment of a blockade is prohibited if:

- a. it has the sole purpose of starving the civilian population or denying it other objects essential for its survival;

...

If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies ...¹⁶⁵

164. Ecuador's Naval Manual states that "neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population ... should be authorized to pass through the blockade cordon".¹⁶⁶

¹⁶³ Australia, *Commanders' Guide* (1994), § 850, footnote 5.

¹⁶⁴ Australia, *Defence Force Manual* (1994), §§ 665 and 666.

¹⁶⁵ Canada, *LOAC Manual* (1999), p. 8-9, §§ 67 and 68.

¹⁶⁶ Ecuador, *Naval Manual* (1989), § 7.7.3.

165. France's LOAC Manual states that when carrying out a blockade, there is an obligation "to allow free passage for relief indispensable to the survival of the civilian population".¹⁶⁷

166. Germany's Military Manual, in a section on blockades, states that "starvation of the civilian population as a method of warfare is prohibited".¹⁶⁸

167. New Zealand's Military Manual states that blockade is not prohibited "even if it causes some collateral deprivation to the civilian population, so long as starvation is not the specific purpose".¹⁶⁹

168. Sweden's IHL Manual states that:

Certain states have maintained that the prohibition against starvation shall apply without exception which would also mean its application against blockade in naval warfare. Other states have claimed that this method of warfare is the province of the international law of naval warfare, which, according to Article 49:3, shall not be affected by the new rules of Additional Protocol I. There is thus no consensus that the prohibition of starvation shall be considered to include maritime blockade.¹⁷⁰

169. The US Naval Handbook states that "neutral vessels and aircraft engaged in the carriage of qualifying relief supplies for the civilian population . . . should be authorized to pass through the blockade cordon".¹⁷¹

National Legislation

170. No practice was found.

National Case-law

171. No practice was found.

Other National Practice

172. According to the Report on the Practice of Iraq, refraining from the use of embargoes on food and medicine as a weapon by one of the conflicting parties is a fixed and established principle which has been applied by the Iraqi armed forces in armed conflicts.¹⁷²

173. In 1973, a Deputy Legal Adviser of the US Department of State expressed the hope that:

new rules can . . . be developed to reduce or eliminate the possibility that starvation will result from blockade, perhaps by requiring the passage of food supplies provided only that distribution is made solely to civilians and is supervised by the ICRC or some other appropriate external body.¹⁷³

¹⁶⁷ France, *LOAC Manual* (2001), p. 33.

¹⁶⁸ Germany, *Military Manual* (1992), § 1051.

¹⁶⁹ New Zealand, *Military Manual* (1992), § 504(2), footnote 9.

¹⁷⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 59 and 60.

¹⁷¹ US, *Naval Handbook* (1995), § 7.7.3.

¹⁷² Report on the Practice of Iraq, 1998, Chapter 4.1.

¹⁷³ US, Address by George H. Aldrich, Deputy Legal Adviser of the Department of State, 13 April 1973, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law*, 1973, Department of State Publication 8756, Washington, D.C., 1974, pp. 503–504.

*III. Practice of International Organisations and Conferences**United Nations*

174. In 1996, in a statement by its President concerning the conflict in Afghanistan, the UN Security Council declared that it was particularly concerned about “the blockade of [Kabul], which has prevented the delivery of foodstuffs, fuel and other humanitarian items to its population”.¹⁷⁴

175. In 1998, in a statement by its President concerning the conflict in Afghanistan, the UN Security Council stated that:

The Security Council is also concerned with the sharp deterioration of the humanitarian situation in several areas in Central and Northern Afghanistan, which is caused by the Taliban-imposed blockade of the Bamyan region remaining in place despite appeals by the United Nations and several of its Member States to lift it, as well as by the lack of supplies coming in from the northern route owing to insecurity and looting.¹⁷⁵

176. In resolutions adopted in 1994 and 1995 on the situation of human rights in Iraq, the UN Commission on Human Rights expressed its “special alarm at all internal embargoes which permit essentially no exceptions for humanitarian needs and which prevent the equitable enjoyment of basic foodstuffs and medical supplies, and calls upon Iraq, which has the sole responsibility in this regard, to remove them”.¹⁷⁶

177. In a resolution adopted in 1995 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights expressed its concern about “the serious deterioration of the health and nutritional situation from which the majority of citizens with limited income suffer as victims of the international embargo”. The Sub-Commission was also deeply concerned by “the internal embargo maintained by the Government against the Kurdish population in the north of Iraq and the Arab Shiah population in the southern marshlands”. It called upon the government “to cease its internal embargo . . . and to re-establish the electricity supply to both regions”.¹⁷⁷

178. In a resolution adopted in 1996 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights expressed its concern about “the serious deterioration of the health and nutritional situation from which the majority of citizens with limited income suffer as victims of the international embargo”. The Sub-Commission further called upon the Iraqi government “to cease its internal embargo against the north and the Shiah populations in the south, areas which are both still under siege, and to re-establish the electricity supply to both regions”.¹⁷⁸

¹⁷⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/6, 15 February 1996, p. 1.

¹⁷⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998, p. 2.

¹⁷⁶ UN Commission on Human Rights, Res. 1994/74, 9 March 1994, § 9; Res. 1995/76, 8 March 1995, § 10.

¹⁷⁷ UN Sub-Commission on Human Rights, Res. 1995/3, 18 August 1995, preamble and § 6.

¹⁷⁸ UN Sub-Commission on Human Rights, Res. 1996/5, 19 August 1996, preamble and § 4.

179. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights included in the recommendations that “blockades of cities and enclaves should be ended immediately and humanitarian corridors opened”.¹⁷⁹

180. In 1996, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights included a section on violations of the right to life during armed conflicts. In the report, he expressed his alarm that “many thousands of people not participating in armed confrontations have lost their lives as direct victims of conflicts . . . or indirectly as a consequence of blocking of the flow of water, food and medical supplies”.¹⁸⁰

Other International Organisations

181. In a resolution adopted in 1994 on the humanitarian situation and needs of the displaced Iraqi Kurdish population, the Parliamentary Assembly of the Council of Europe called upon the Iraqi government to “put an immediate end to . . . its embargo on the supplies to the region”.¹⁸¹

182. In 1990, ECOWAS sent a peacekeeping contingent, ECOMOG, to Liberia. The NPFL fought against ECOMOG and controlled a considerable part of Liberia. In order to compel the NPFL to surrender, ECOWAS imposed a blockade on all parts of Liberia under the control of the NPFL.¹⁸² It cut off food supplies to the NPFL, arguing that relief convoys were used by the NPFL to smuggle arms and ammunition into Liberia.¹⁸³ Although this allegation was denied and the blockade was claimed to have caused considerable deprivation and hardship to the civilian population, ECOWAS maintained this siege until the Cotonou Agreement on Liberia was concluded in 1993.¹⁸⁴

183. In a resolution adopted in 1994 on the Palestinian cause and the Arab-Israeli conflict, the OIC Conference of Ministers of Foreign Affairs strongly condemned Israeli practices in the occupied territories. Among the practices condemned was the blockade of Al-Qods Al-Sharif.¹⁸⁵

International Conferences

184. No practice was found.

¹⁷⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, § 94(b).

¹⁸⁰ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1997/60, 24 December 1996, § 40.

¹⁸¹ Council of Europe, Parliamentary Assembly, Res. 1022, 27 January 1994, § 6.

¹⁸² Kofi Oteng Kufuor, “Starvation as a method of warfare in the Liberian conflict”, *NILR*, Vol. 41, 1994, p. 317.

¹⁸³ ECOWAS, Comments reported in *Africa Research Bulletin* (Political Series), Vol. 30, No. 5, 1993, p. 11015.

¹⁸⁴ Kofi Oteng Kufuor, “Starvation as a method of warfare in the Liberian conflict”, *NILR*, Vol. 41, 1994, p. 317.

¹⁸⁵ OIC, Conference of Ministers of Foreign Affairs, Res. 1/7-P (IS), 13–15 December 1994.

IV. Practice of International Judicial and Quasi-judicial Bodies

185. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

186. No practice was found.

VI. Other Practice

187. No practice was found.

B. Attacks against Objects Indispensable to the Survival of the Civilian Population**General***I. Treaties and Other Instruments**Treaties*

188. Article 54(2) AP I provides that:

It is prohibited to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

Article 54 AP I was adopted by consensus.¹⁸⁶

189. Upon ratification of AP I, France stated that it:

considers that paragraph 2, Article 54 does not prohibit attacks carried out for a specific purpose, with the exception of those which aim at depriving the civilian population of objects indispensable to its survival and of those targeting objects which, although used by the adverse party, are not used solely for the sustenance of members of the armed forces.¹⁸⁷

190. Upon ratification of AP I, the UK stated that it “understands that paragraph 2 [of Article 54] has no application to attacks that are carried out for a specific purpose other than denying sustenance to the civilian population or the adverse party”.¹⁸⁸

¹⁸⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208.

¹⁸⁷ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 14.

¹⁸⁸ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § 1.

191. Article 14 AP II provides that it is

prohibited to attack, destroy, remove or render useless, for that purpose [starvation of civilians], objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works.

Article 14 AP II was adopted by consensus.¹⁸⁹

192. Article 8(2)(b)(xxv) of the 1998 ICC Statute provides that “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival” is a war crime in international armed conflicts.

Other Instruments

193. Article 3(b) of the 1990 Cairo Declaration on Human Rights in Islam deals with the protection of civilians in times of armed conflict and provides that “it is prohibited to fell trees, to damage crops or livestock, and to destroy the enemy’s civilian buildings and installations by shelling, blasting or any other means”.

194. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 54(2) AP I.

195. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 54(2) AP I.

196. Section 6.7 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force is prohibited from attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population, such as foodstuff, crops, livestock and drinking-water installations and supplies”.

197. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxv), “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

198. Argentina’s Law of War Manual states that, in the course of armed conflicts not of an international character, “objects indispensable to the survival of the civilian population enjoy special protection”.¹⁹⁰

¹⁸⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 137.

¹⁹⁰ Argentina, *Law of War Manual* (1989), § 7.09.

199. Australia's Commanders' Guide states that:

It is prohibited to destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works. Military operations involving collateral deprivation are not unlawful as long as the object is not to starve the civilian population.¹⁹¹

200. Australia's Defence Force Manual provides that:

Objects indispensable to the survival of the civilian population cannot be attacked, destroyed, removed or rendered useless for the specific purpose of denying them for their sustenance value to the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works. This includes starving civilians or causing them to move away.¹⁹²

The manual adds that the destruction of such objects is prohibited, "whatever the motive of such destruction".¹⁹³ It further stresses that the prohibition of attacking objects indispensable to the survival of the civilian population "relates to attacks made for the specific purpose of denying these items to the civilian population. Collateral damage to foodstuffs is not a violation of these rules as long as the intention was to gain a military advantage by attacking a military objective."¹⁹⁴

201. Under Belgium's Law of War Manual, it is prohibited to attack, destroy or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, drinking water and drinking water installations.¹⁹⁵

202. Benin's Military Manual provides that "the following prohibitions shall be respected: . . . to direct attacks at objects indispensable to the survival of the civilian population, such as: foodstuffs, crops, livestock and reserves of drinking water".¹⁹⁶

203. Canada's LOAC Manual provides that:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population whatever the motive.

...

The following are examples of "objects indispensable to the survival of the civilian population":

- a. foodstuffs;
- b. agricultural areas for the production of foodstuffs;
- c. crops;

¹⁹¹ Australia, *Commanders' Guide* (1994), § 907, see also § 410.

¹⁹² Australia, *Defence Force Manual* (1994), § 709, see also § 533, 929 and 930.

¹⁹³ Australia, *Defence Force Manual* (1994), § 930.

¹⁹⁴ Australia, *Defence Force Manual* (1994), § 533.

¹⁹⁵ Belgium, *Law of War Manual* (1983), p. 28.

¹⁹⁶ Benin, *Military Manual* (1995), Fascicule III, p. 12.

- d. livestock;
- e. drinking water installations and supplies; and
- f. irrigation works.¹⁹⁷

With regard to methods prohibited in non-international armed conflicts, the manual also stipulates that “it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population whatever the motive”.¹⁹⁸

204. Colombia’s Basic Military Manual provides that the parties to a conflict must “abstain from attacking those objects and installations that . . . are indispensable for the well-being and survival [of the civilian population]”.¹⁹⁹ It also states that objects indispensable to the survival of the civilian population, such as crops and the areas where they are produced, livestock, drinking water installations and irrigation works, are protected objects.²⁰⁰ In a chapter entitled “Provisions of IHL applicable in Colombia”, the manual states that “in all armed conflicts”, it is prohibited to attack objects indispensable to the survival of the civilian population as a method of combat.²⁰¹

205. Ecuador’s Naval Manual prohibits the “intentional destruction of food, crops, livestock, drinking water and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use”.²⁰²

206. France’s LOAC Summary Note provides that “it is prohibited . . . to attack, destroy, remove or render useless objects indispensable to the survival of the population (foodstuffs, livestock, crops, drinking water, etc.)”.²⁰³

207. France’s LOAC Teaching Note states that “objects indispensable to the survival of the population must absolutely be preserved (crops, livestock, foodstuffs, drinking water . . .)”.²⁰⁴

208. France’s LOAC Manual incorporates the content of Article 54(2) AP I.²⁰⁵

209. Germany’s Soldiers’ Manual provides that “the objects indispensable to the survival of the civilian population (e.g. drinking water installations) may not be destroyed”.²⁰⁶

210. Germany’s Military Manual provides that “it is . . . prohibited to attack . . . objects indispensable to the civilian population, e.g. production of foodstuffs, clothing, drinking water installations, with the aim to prevent the civilian

¹⁹⁷ Canada, *LOAC Manual* (1999), p. 4-8, §§ 78 and 79, see also p. 6-4, § 41 (land warfare) and p. 7-3, § 25 (air warfare).

¹⁹⁸ Canada, *LOAC Manual* (1999), p. 17-5, § 38.

¹⁹⁹ Colombia, *Basic Military Manual* (1995), p. 22, see also p. 29.

²⁰⁰ Colombia, *Basic Military Manual* (1995), p. 25.

²⁰¹ Colombia, *Basic Military Manual* (1995), p. 49.

²⁰² Ecuador, *Naval Manual* (1989), § 8.1.2.

²⁰³ France, *LOAC Summary Note* (1992), § 4.2.

²⁰⁴ France, *LOAC Teaching Note* (2000), p. 6.

²⁰⁵ France, *LOAC Manual* (2001), pp. 30 and 31.

²⁰⁶ Germany, *Soldiers’ Manual* (1991), p. 4.

population from being supplied".²⁰⁷ The manual further states that "grave breaches of international humanitarian law are in particular: . . . starvation of civilians by destroying, removing or rendering useless objects indispensable to the survival of the civilian population (e.g. foodstuffs, means for the production of foodstuffs, drinking water installations and supplies, irrigation works)".²⁰⁸

211. India's Police Manual provides that "the Central or State Government may, if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to . . . *the maintenance of supplies and services essential to the community* it is necessary so to do, make an order directing that such person be detained".²⁰⁹ (emphasis in original)

212. Indonesia's Military Manual states that it is prohibited to attack foodstuffs, agricultural areas, crops, livestock, drinking water installations and supplies, including irrigation works.²¹⁰

213. Israel's Manual on the Laws of War states that "it is prohibited to attack targets essential to the continued survival of the civilian population".²¹¹

214. Kenya's LOAC Manual provides that "it is forbidden . . . to direct attacks at objects indispensable for the survival of the civilian population such as foodstuff, crops, livestock and drinking water".²¹²

215. Under Madagascar's Military Manual, it is prohibited to destroy objects indispensable to the survival of the civilian population.²¹³

216. Under the Military Manual of the Netherlands, it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population whatever the motive. It includes in the category of objects indispensable to the survival of the civilian population, foodstuffs, agricultural areas, crops, drinking water installations, irrigation works and other supplies.²¹⁴ In addition, the manual specifically prohibits "attack, destruction, removal and rendering useless of objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas, crops, livestock, drinking water installations and irrigation works" in non-international armed conflicts.²¹⁵

217. Under the Military Handbook of Netherlands, it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population. It includes in the category of objects indispensable to the survival of the civilian population, foodstuffs, agricultural areas, crops, drinking water installations, irrigation works and other supplies.²¹⁶

²⁰⁷ Germany, *Military Manual* (1992), § 463.

²⁰⁸ Germany, *Military Manual* (1992), § 1209.

²⁰⁹ India, *Police Manual* (1986), p. 24.

²¹⁰ Indonesia, *Military Manual* (1982), p. 56, § 127(c).

²¹¹ Israel, *Manual on the Laws of War* (1998), p. 35.

²¹² Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 2 and 3.

²¹³ Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 27.

²¹⁴ Netherlands, *Military Manual* (1993), p. V-7.

²¹⁵ Netherlands, *Military Manual* (1993), p. XI-6.

²¹⁶ Netherlands, *Military Handbook* (1995), p. 7-44.

218. New Zealand's Military Manual states that:

AP I Art. 54 expands the customary protection as follows: . . .

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

...

This prohibition does not, however, extend to attacks carried out for *some specific purpose other than* that of denying sustenance to the civilian population.²¹⁷ [emphasis in original]

The manual also states that:

AP II forbids starvation as a method of combat: it is prohibited for that purpose to attack, destroy, remove or render useless for that purpose objects considered indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas, livestock, drinking water installations, irrigation works, and the like.

...

In other words, deprivation of food and other materials necessary to sustain the population cannot be used by a government as a method of pressure against civilians supporting rebels.²¹⁸

219. Nigeria's Military Manual provides that "attack, destruction, removal of objects indispensable to the survival of the civilian population is prohibited".²¹⁹

220. South Africa's LOAC Manual provides that "objects which are essential to the survival of the civilian population (such as livestock, irrigation works and water supply) must not be attacked".²²⁰

221. Spain's LOAC Manual states that it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population "with the intent to starve the civilian population".²²¹ It also gives as examples of such objects, foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and reserves, irrigation works, etc.²²²

222. Sweden's IHL Manual states that:

Article 54:2 [AP I] . . . prohibits attack on such property as is essential for the survival of a civilian population for the purpose of depriving the civilian population

²¹⁷ New Zealand, *Military Manual* (1992), § 504(2) (land warfare), including footnote 9, see also § 613(2) (air warfare).

²¹⁸ New Zealand, *Military Manual* (1992), § 1820, including footnote 75.

²¹⁹ Nigeria, *Military Manual* (1994), p. 42, § 11.

²²⁰ South Africa, *LOAC Manual* (1996), § 28(c).

²²¹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(4), see also § 4.5.b.(2).

²²² Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2), see also §§ 1.3.d.(3) and 3.3.c.(4).

or the adversary of vital necessities, in order to starve them out or compel them to leave an area, or for any other reason. It is equally forbidden to remove such property or render it useless. The property which shall receive protection in the first instance is foodstuffs and agricultural areas, crops, cattle, plant and reservoirs for drinking water and irrigation works. This list is incomplete, and further objects could be added. It may be pertinent to list also civilian dwellings in cold areas, which considerably increase the scope of the article. Yet it is less probable that such an extension would gain general approval. Moreover, civilian dwellings have protection in Article 52, even though this is far from sufficient.

The prohibition in Article 54:2 [AP I] applies only to attack, removal or incapacitation performed for the purpose given – thus the article offers no protection against unintentional injury or losses arising from an attack that has other purposes. Attack on a hostile force deployed in the neighbourhood of a community may thus for example lead to damage to a nearby grain store without these secondary effects involving a breach of Article 54.²²³

223. Switzerland's Basic Military Manual states that "objects vital to the civilian population, such as drinking water, foodstuffs, crops and livestock as well as agricultural areas, must not be rendered useless".²²⁴

224. Togo's Military Manual provides that "the following prohibitions shall be respected: . . . to direct attacks at objects indispensable to the survival of the civilian population, such as: foodstuffs, crops, livestock and reserves of drinking water".²²⁵

225. The UK LOAC Manual provides that "it is forbidden . . . to direct attacks at objects indispensable to the survival of the civilian population such as foodstuffs, crops, livestock and drinking water".²²⁶

226. The US Naval Handbook prohibits the "intentional destruction of food, crops, livestock, drinking water and other objects indispensable to the survival of the civilian population, for the specific purpose of denying the civilian population of their use".²²⁷

227. The Annotated Supplement to the US Naval Handbook provides that the rule prohibiting the intentional destruction of objects indispensable to the survival of the civilian population for the specific purpose of denying the civilian population of their use is a "customary rule . . . accepted by the United States . . . and is codified in [AP I], art. 54(2)".²²⁸

228. Under the YPA Military Manual of the SFRY (FRY), it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, with the intent to deprive the population of those objects, regardless of the motive (in order to starve the population, to force it to move or for any other motive). The manual gives the following examples

²²³ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 60.

²²⁴ Switzerland, *Basic Military Manual* (1987), Article 35.

²²⁵ Togo, *Military Manual* (1996), Fascicule III, p. 12.

²²⁶ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(g).

²²⁷ US, *Naval Handbook* (1995), § 8.1.2.

²²⁸ US, *Annotated Supplement to the Naval Handbook* (1997), § 8.1.2, footnote 15.

of objects indispensable to the survival of the civilian population: agricultural areas, places of food production, crops, livestock, drinking water installations, reservoirs for drinking water and irrigation works.²²⁹

National Legislation

229. Argentina's Draft Code of Military Justice punishes any soldier who "attacks, destroys, removes or renders useless objects indispensable to the survival of the civilian population".²³⁰ It also considers as a punishable offence the fact of depriving protected persons of indispensable food or necessary medical assistance.²³¹

230. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "any intentional deprivation of civilians of objects indispensable to their survival" in international armed conflicts.²³²

231. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "the fact of deliberately starving civilians as a method of warfare, by depriving them of objects indispensable to their survival" constitutes a war crime in international armed conflicts.²³³

232. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.²³⁴

233. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, attacks, renders useless, damages, removes or appropriates objects or elements indispensable to the survival of the civilian population".²³⁵

234. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.²³⁶

235. The Czech Republic's Criminal Code as amended punishes any "person who in wartime . . . destroys or seriously disrupts a source of the necessities of life for civilians in an occupied area or contact zone".²³⁷

236. The Draft Amendments to the Penal Code of El Salvador provide for a prison sentence for "anyone who, during an international or non-international

²²⁹ SFRY (FRY), *YPA Military Manual* (1988), § 74.

²³⁰ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(3) in the *Code of Military Justice as amended* (1951).

²³¹ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).

²³² Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.67(1)(a)(i).

²³³ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(x).

²³⁴ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²³⁵ Colombia, *Penal Code* (2000), Article 160, see also Article 154.

²³⁶ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

²³⁷ Czech Republic, *Criminal Code as amended* (1961), Article 263a(2)(a).

armed conflict, attacks . . . objects indispensable to the survival of the civilian population".²³⁸

237. Under Estonia's Penal Code, "a person who . . . destroys or renders useless food or water supplies, sown crops or domestic animals indispensable to the survival of the civilian population" commits a war crime.²³⁹

238. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival" in international armed conflicts, is a crime.²⁴⁰

239. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "uses starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival".²⁴¹

240. Iraq's Military Penal Code punishes anyone who destroys or wrecks, without necessity, "moveable or immovable property, cuts down trees, destroys agricultural crops or orders to commit such acts".²⁴²

241. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 54(2) AP I, as well as any "contravention" of AP II, including violations of Article 14 AP II, are punishable offences.²⁴³

242. Under Mali's Penal Code, "deliberately starving civilians as a method of warfare, by depriving them of objects indispensable to their survival" is a war crime in international armed conflicts.²⁴⁴

243. Mexico's Code of Military Justice as amended punishes anyone who "makes requisition of foodstuffs".²⁴⁵ It also punishes "anyone who, taking advantage of his own authority or the authority of the armed forces, maliciously and arbitrarily destroys foodstuffs, when it is not required by military operations".²⁴⁶

244. The Definition of War Crimes Decree of the Netherlands considers as a war crime the "intentional withholding of medical supplies from civilians".²⁴⁷

245. Under the International Crimes Act of the Netherlands, "intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival" is a crime, when committed in an international armed conflict.²⁴⁸

²³⁸ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Ataque a bienes protegidos".

²³⁹ Estonia, *Penal Code* (2001), § 95.

²⁴⁰ Georgia, *Criminal Code* (1999), Article 413(d).

²⁴¹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(5).

²⁴² Iraq, *Military Penal Code* (1940), Article 113.

²⁴³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁴⁴ Mali, *Penal Code* (2001), Article 31(i)(25).

²⁴⁵ Mexico, *Code of Military Justice as amended* (1933), Article 215.

²⁴⁶ Mexico, *Code of Military Justice as amended* (1933), Article 334.

²⁴⁷ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

²⁴⁸ Netherlands, *International Crimes Act* (2003), Article 5(5)(1).

246. Under New Zealand's International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.²⁴⁹

247. Nicaragua's Draft Penal Code punishes "anyone who, during an international or internal armed conflict, attacks... objects indispensable to the survival of the civilian population".²⁵⁰

248. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the two additional protocols to [the Geneva] Conventions... is liable to imprisonment".²⁵¹

249. Peru's Code of Military Justice imposes penalties on members of the armed forces who destroy or endanger public services vital to the survival of the population, such as water supplies.²⁵²

250. Slovakia's Criminal Code as amended punishes any "person who in wartime... destroys or seriously disrupts a source of the necessities of life for civilians in an occupied area or contact zone".²⁵³

251. Spain's Penal Code punishes "anyone who, during an armed conflict, ... attacks, destroys, removes or renders useless objects indispensable to the survival of the civilian population".²⁵⁴

252. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.²⁵⁵

253. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.²⁵⁶

254. Vietnam's Penal Code punishes "anyone who, in time of peace or in time of war, ... destroys vital resources".²⁵⁷

National Case-law

255. In the *Perišić and Others case* before a Croatian district court in 1997, after a trial *in absentia*, several persons were convicted of ordering the shelling of the city of Zadar and its surroundings, *inter alia*, on the basis of Article 14 AP II, as incorporated in Article 120(1) of Croatia's Criminal Code of 1993.²⁵⁸

Other National Practice

256. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia declared that:

²⁴⁹ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²⁵⁰ Nicaragua, *Draft Penal Code* (1999), Article 464.

²⁵¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁵² Peru, *Code of Military Justice* (1980), Article 95(3).

²⁵³ Slovakia, *Criminal Code as amended* (1961), Article 263a(2)(a).

²⁵⁴ Spain, *Penal Code* (1995), Article 613(1)(c), see also Article 612(3).

²⁵⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²⁵⁶ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²⁵⁷ Vietnam, *Penal Code* (1990), Article 278.

²⁵⁸ Croatia, District Court of Zadar, *Perišić and Others case*, Judgement, 24 April 1997.

Another area of the law in which there have been significant recent developments is that of the protection of the civilian population in times of armed conflict. A significant step further was taken as recently as 1977, with the adoption of the Additional Protocol I to the Geneva Conventions. Australia, together with the bulk of the international community, believes that the essential terms of the Protocol should be regarded as reflecting customary international law . . .

Article 54, paragraph 2, provides that a Party may not

“attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party”.²⁵⁹

257. In 1992, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, Austria declared that the “withholding of food and essential humanitarian goods is a central element in the policy of ‘ethnic cleansing’ against the non-Serbian population”.²⁶⁰

258. At the CDDH, Belgium sponsored a draft article on the prohibition of starvation which contained the rule that it is “forbidden to attack, destroy, remove or render useless, crops, drinking water supplies, irrigation works, livestock, foodstuffs or food producing areas for the purpose of denying them to the enemy or the civilian population”.²⁶¹

259. In 1994, in reply to a questionnaire from the House of Representatives, Colombia’s Ministry of Foreign Affairs quoted Article 14 AP II.²⁶²

260. The Report on the Practice of Colombia refers to a draft internal working paper in which the Colombian government stated that it was prohibited “to make the civilian population suffer from hunger or thirst and to attack, destroy, remove or render useless objects for this purpose”.²⁶³

261. According to the Report on the Practice of Egypt, “attacks against . . . objects indispensable to the survival of the civilian population are . . . prohibited” in Egypt.²⁶⁴

262. At the 26th International Conference of the Red Cross and Red Crescent in 1995, Germany stated that “the deprivation of resources necessary for survival, such as water, [has] been used repeatedly and [has] to be condemned”.²⁶⁵

²⁵⁹ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, p. 46.

²⁶⁰ Austria, Statement before the UN Security Council, UN Doc. S/PV. 3114, 14 September 1992, p. 109.

²⁶¹ Belgium, Proposal of amendment to Article 48 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/67, 19 March 1974, p. 218.

²⁶² Colombia, Presidency of the Republic, Office of the High Commissioner for Peace, National Plan for the Dissemination of IHL, Reply of the Ministry of Foreign Affairs to Questionnaire No. 012 of Commission II of the House of Representatives, 7 October 1994, p. 6.

²⁶³ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled “El Derecho Internacional Humanitario”, § 2(h).

²⁶⁴ Report on the Practice of Egypt, 1997, Chapter 4.1.

²⁶⁵ Germany, Statement at the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995.

263. According to the Report on the Practice of Israel, “the IDF does not practice or condone the attack, destruction, removal or the rendering useless of objects indispensable to the survival of the civilian population of the enemy, for the specific purpose of denying them for their sustenance value to the enemy or its civilian population”.²⁶⁶

264. According to the Report on the Practice of Jordan, “Islamic law proscribes . . . the attack on objects that are indispensable to the survival of the civilian population”.²⁶⁷

265. In 1990, in a letter addressed to the UN Secretary-General, Kuwait denounced Iraqi “practices, which are an affront to mankind and which violate all the values of Islam and of civilization, the principles of human rights and the relevant Geneva Conventions . . . [including] [c]learing of warehouses and co-operative societies of foodstuffs with a view to causing starvation among citizens”.²⁶⁸

266. The Report on the Practice of Malaysia states that Malaysia’s security forces, during the conflict against the communist opposition, left unharmed objects indispensable to the survival of the civilian population, such as cattle and water sources or supply.²⁶⁹

267. The Guidelines on Evacuations adopted in 1991 by the Presidential Human Rights Committee of the Philippines provides that:

The military is prohibited to attack, destroy, remove or render useless objects indispensable for the survival of the civilian population, such as foodstuffs, agricultural means for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works (Protocol II, Art. 14).²⁷⁰

268. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda notes that it is a crime to attack objects indispensable to the survival of the civilian population, stating that it violates the principle of distinction between civilian objects and military objectives.²⁷¹

269. At the CDDH, the UK sponsored a draft article on the prohibition of starvation which contained the rule that it is “forbidden to attack, destroy, remove or render useless, crops, drinking water supplies, irrigation works, livestock, foodstuffs or food producing areas for the purpose of denying them to the enemy or the civilian population”.²⁷² The UK favoured an exhaustive list of objects

²⁶⁶ Report on the Practice of Israel, 1997, Chapter 4.1.

²⁶⁷ Report on the Practice of Jordan, 1997, Chapter 4.1.

²⁶⁸ Kuwait, Letter dated 5 August 1990 to the UN Secretary-General, UN Doc. S/21439, 5 August 1990.

²⁶⁹ Report on the Practice of Malaysia, 1997, Chapter 4.1.

²⁷⁰ Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 2.

²⁷¹ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 4.1.

²⁷² UK, Proposal of amendment to Article 48 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/67, 19 March 1974, p. 218, § 2.

considered indispensable to the survival of the civilian population instead of an illustrative list "to achieve greater clarity".²⁷³

270. During the Korean War, the Commanding General of the US Far East Air Force refused to bomb dams in North Korea since he was "concerned over the political impact of destroying food crops" which would have resulted from such attacks.²⁷⁴

271. In 1992, during a debated in the UN Security Council on the situation in Bosnia and Herzegovina, Venezuela declared that:

Nor must we forget that the United Nations Convention on the Prevention and Punishment of the Crime of Genocide clearly states that genocide means inflicting on a group of human beings conditions of life calculated to bring about its physical destruction in whole or in part. Article 54 of the 1977 Additional Protocol I to the Geneva Conventions also prohibits the destruction of infrastructure basic to life, such as electricity, drinking water, sewage and other public services. Such are the acts today being perpetrated in the Republic of Bosnia and Herzegovina.²⁷⁵

272. In 1991, a State denounced the destruction of waterways and electrical transmission as violations of international law.²⁷⁶

273. In a letter to the ICRC in 1991, a State strongly criticised the intention of another State to destroy vital facilities in a third State.²⁷⁷

III. Practice of International Organisations and Conferences

United Nations

274. In 1993, in a statement by its President regarding the situation in Sarajevo, the UN Security Council stated that "it demands an end to the disruption of public utilities (including water, electricity, fuel and communications) by the Bosnian Serb party".²⁷⁸

275. In 1998, in a statement by its President regarding the situation in the DRC, the UN Security Council recalled "the unacceptability of the destruction or rendering useless of objects indispensable to the survival of the civilian population, and in particular of using cuts in the electricity and water supply as a weapon against the population".²⁷⁹

276. In a resolution adopted in 1990, the UN Commission on Human Rights expressed its "deepest concern at the worsening of the armed conflict in El

²⁷³ UK, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 19 March 1974, p. 139, § 56, see also Statement at the CDDH, *Official Records*, Vol. IV, CDDH/III/SR.17, 19 March 1974, p. 148, § 31.

²⁷⁴ Robert F. Futrell, *The United States Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, p. 667.

²⁷⁵ Venezuela, Statement before the UN Security Council, UN Doc. S/PV. 3119, 6 October 1992, p. 9.

²⁷⁶ ICRC archive document.

²⁷⁷ ICRC archive document.

²⁷⁸ UN Security Council, Statement by the President, UN Doc. S/26134, 22 July 1993, p. 1.

²⁷⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, p. 1.

Salvador". It also expressed its "serious concern at the systematic attacks on the economic infrastructure which severely impaired the present and future enjoyment of important economic, social and cultural rights by the Salvadorian people" and requested that the parties to the conflict "guarantee respect for humanitarian standards applicable to non-international armed conflicts such as that in El Salvador".²⁸⁰

277. In a resolution adopted in 1993 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights expressed its deep concern about "the programme undertaken by the Iraqi Government to drain the southern marshlands". It also called upon the Iraqi government to stop "all draining schemes and destruction of the marshes" in southern Iraq.²⁸¹

278. In a resolution adopted in 1995 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights expressed its concern about "economic policy decisions depriving part of the national territory of supplies of medicines and foodstuffs", as well as about "information that the population continues to flee the marshlands region . . . because of . . . the programme conducted by the Iraqi Government to drain the southern marshlands, which ha[s] led to a mass exodus". The Sub-Commission called upon the Iraqi government immediately "to cease all draining schemes and destruction of the marshes".²⁸²

279. In a resolution adopted in 1996 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights expressed its concern about "economic policy decisions depriving part of the national territory of supplies of medicines and foodstuffs".²⁸³

280. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights denounced the destruction of water-treatment stations in Bosnia and Herzegovina, which had exposed the civilian population to dehydration and disease.²⁸⁴

281. In 1998, the UN High Commissioner for Human Rights and the UN Under-Secretary-General for Humanitarian Affairs issued a joint statement on the situation in the DRC in which they expressed their concern that:

The humanitarian situation on the ground is steadily deteriorating, in particular in Kinshasa where electricity and water supplies have been disrupted sporadically over recent days . . . The United Nations and its agencies call on those who instigated these acts to immediately restore all vital basic services, in particular power supply and drinking-water to the capital, and to refrain from wilfully endangering the lives of thousands of innocent men, women and children.²⁸⁵

²⁸⁰ UN Commission on Human Rights, Res. 1990/77, 7 March 1990, §§ 4 and 10.

²⁸¹ UN Sub-Commission on Human Rights, Res. 1993/20, 20 August 1993, preamble and § 2.

²⁸² UN Sub-Commission on Human Rights, Res. 1995/3, 18 August 1995, preamble and § 2.

²⁸³ UN Sub-Commission on Human Rights, Res. 1996/5, 19 August 1996, preamble.

²⁸⁴ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Press Release HR/3462, 30 July 1993, § 6.

²⁸⁵ UN High Commissioner for Human Rights and UN Under-Secretary-General for Humanitarian Affairs, Press Release on the situation in the Democratic Republic of the Congo, 21 August 1998, §§ 4 and 5.

282. In 1994, in its interim report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Paragraph 1 of Security Council Resolution 935 (1994) determined that certain provisions of AP II, including Article 14, were violated in Rwanda “on a systematic, widespread and flagrant basis”.²⁸⁶

Other International Organisations

283. In a press statement issued in 1998 on the situation in the DRC, the EU Presidency condemned “acts of violence against civilians and any actions having a direct impact on the population, like . . . activities causing unnecessary suffering, as for instance the interruption of the provision of electricity that has severe humanitarian . . . consequences”.²⁸⁷

284. In a resolution on health and war adopted in 1995, the OAU Conference of African Ministers of Health called upon member States to ban “the destruction or putting out of use the indispensable goods for the survival of the civilian population, such as food, livestock, drinking water installations and reservoirs and irrigation infrastructures”.²⁸⁸

285. In 1991, the observers of an organisation qualified the systematic destruction of villages and hospitals by the armed forces of a separatist entity as contraventions of Article 14 AP II.²⁸⁹

International Conferences

286. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of the civilian population in period of armed conflict in which it stressed “the prohibition on attacking, destroying, removing or rendering useless any objects indispensable to the survival of the civilian population” and further stressed that “water is a vital resource for victims of armed conflict and the civilian population and is indispensable to their survival”.²⁹⁰

287. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that “States stress the provisions of international humanitarian law . . . on attacking, destroying, removing or rendering useless, for that purpose, objects indispensable to the survival of the civilian population”.²⁹¹

²⁸⁶ UN Commission of Experts Established pursuant to Paragraph 1 of Security Council Resolution 935 (1994), Interim report, UN Doc. S/1994/1125, 4 October 1994, Annex, § 107.

²⁸⁷ EU, Press Statement by the Presidency on the situation in the Democratic Republic of the Congo, 27 August 1998.

²⁸⁸ OAU, Conference of African Ministers of Health, 26–28 April 1995, Res. 14(V), § 5(b).

²⁸⁹ ICRC archive document.

²⁹⁰ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, §§ E(b) and F(a).

²⁹¹ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 2.

IV. Practice of International Judicial and Quasi-judicial Bodies

288. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

289. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population (e.g. foodstuffs, agricultural areas producing foodstuffs, crops, livestock, drinking water installations and supplies, irrigation works) for the specific purpose of starvation.²⁹²

290. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested the Transitional Government in Salisbury to “stop the destruction and confiscation by its armed forces of goods (food stocks, cattle) that are essential for the survival of the civilian population in the war-affected areas”.²⁹³

291. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that:

The ICRC invites States which are not party to 1977 Protocol I to respect, in the event of armed conflict, the following articles of the Protocol, which stem from the basic principle of civilian immunity from attack:

- Article 54: protection of objects indispensable to the survival of the civilian population.²⁹⁴

292. In an appeal issued in 1991, the Croatian Red Cross and other Croatian organisations qualified the destruction of waterways and electrical transmission during the conflict in the former Yugoslavia as violations of the Geneva Conventions.²⁹⁵

293. In an appeal issued in 1991, the ICRC enjoined the parties to the conflict in Yugoslavia “not to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population”.²⁹⁶

²⁹² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 396.

²⁹³ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 6, *IRRC*, No. 209, 1979, p. 88.

²⁹⁴ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 25.

²⁹⁵ Croatian Red Cross, Bishop's conference Caritas, Medical section of the “Matica hrvatska” central national cultural association, Almae matris Croatiae alumni and the Croatian society for victimology, Appeal to all international health and humanitarian organisations, S.O.S. for people oppressed in Croatia, 18 July 1991.

²⁹⁶ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

294. In an appeal issued in 1991, a Red Cross Society denounced the destruction of the only bakery in a town affected by a conflict.²⁹⁷

295. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict. In it, it reminded the authorities concerned and the armed forces under their command of their “obligation to apply international humanitarian law, in particular the following humanitarian principles . . . the prohibition on attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population”.²⁹⁸

296. In a press release issued in 1992, the ICRC enjoined the parties to the conflict in Bosnia and Herzegovina “not to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population”.²⁹⁹

297. In two press releases issued in 1992, the ICRC enjoined the parties to the conflict in Afghanistan not to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population.³⁰⁰

298. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “it is prohibited to attack, destroy or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock, drinking water installations and supplies”.³⁰¹

299. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “objects indispensable to the survival of the civilian population, such as foodstuffs, crops, livestock and drinking water installations and supplies, must not be attacked, destroyed or rendered useless”.³⁰²

VI. *Other Practice*

300. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that “neither the civilian population nor any of the objects expressly protected by conventions or agreements can be considered

²⁹⁷ ICRC archive document.

²⁹⁸ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 13, § 1.

²⁹⁹ ICRC, Press Release No. 1705, Bosnia and Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

³⁰⁰ ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

³⁰¹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

³⁰² ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

as military objectives, nor yet . . . under whatsoever circumstances the means indispensable for the survival of the civilian population".³⁰³

301. In 1979, an armed group wrote to the ICRC to confirm its commitment to IHL and to denounce the extermination and destruction of numerous cattle and farms in the course of a conflict.³⁰⁴

302. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "deliberate deprivation of access to necessary food, drinking water and medicine" is prohibited.³⁰⁵

303. Rule A7 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IIHL, provides that "the general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population".³⁰⁶

304. In 1995, a separatist entity denounced to a UN force the destruction of inhabited places, industrial facilities, food and water stocks in the course of a conflict as a method of warfare against civilians.³⁰⁷

305. In 1995, the IIHL stated that any declaration on minimum humanitarian standards should be based on "principles . . . of *jus cogens*, expressing basic humanitarian consideration[s] which are recognized to be universally binding". According to the IIHL, this includes the principle that "it is prohibited to attack, destroy, remove or render useless objects indispensable for the survival of the civilian population".³⁰⁸

306. In 1996, an armed opposition group denounced to the ICRC the driving away of cattle and removal of food supplies by the governmental forces.³⁰⁹

307. The Report on SPLM/A Practice notes that the SPLM/A, when attacking government garrisons and other positions, does not spare objects indispensable to the survival of the civilian population. The report cites examples such as the indiscriminate bombing of Juba and other towns in southern Sudan.³¹⁰

³⁰³ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 3.

³⁰⁴ ICRC archive document.

³⁰⁵ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(f), *IRRC*, No. 282, 1991, p. 331.

³⁰⁶ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A7, *IRRC*, No. 278, 1990, p. 393.

³⁰⁷ ICRC archive document.

³⁰⁸ IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 15, reprinted in the Report of the Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, pp. 8 and 10.

³⁰⁹ ICRC archive document.

³¹⁰ Report on SPLM/A Practice, 1998, Chapter 4.1.

Attacks against objects used to sustain or support the adverse party

I. Treaties and Other Instruments

Treaties

308. Article 54(3) AP I provides that the prohibition contained in Article 54(2) AP I to attack, destroy, remove, or render useless objects indispensable to the survival of the civilian population does not apply if the objects indispensable to the survival of the civilian population are used by an adverse party:

- a) as sustenance solely for the members of its armed forces; or
- b) if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.

Article 54 AP I was adopted by consensus.³¹¹

309. In its reservation made upon ratification of the 1996 Amended Protocol II to the CCW, the US stated that “the United States reserves the right to use other devices . . . to destroy any stock of food or drink that is judged likely to be used by an enemy military force, if due precautions are taken for the safety of the civilian population”.³¹²

Other Instruments

310. Article 15 of the 1863 Lieber Code states that “military necessity . . . allows . . . of all withholding of sustenance or means of life from the enemy; of the appropriation of whatever an enemy’s country affords necessary for the subsistence and safety of the army”.

311. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 54(3) AP I.

312. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 54(3) AP I.

II. National Practice

Military Manuals

313. Australia’s Defence Force Manual states that:

Foodstuffs and agricultural areas producing them, crops, livestock and supplies of drinking water intended for the sole use of the armed forces may be attacked and destroyed. Extreme care will need to be exercised when making some objectives a

³¹¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208.

³¹² US, Reservation made upon acceptance of Amended Protocol II to the CCW, 24 May 1999, § I.

military target, eg drinking water installations, as such objects are hardly likely to be used solely for the benefit of armed forces.

When objects are used for a purpose other than sustenance of members of the armed forces and such use is in direct support of military action, attack on such objects is lawful unless that action can be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.³¹³

314. Belgium's Law of War Manual states that there is a prohibition to attack, destroy or render useless objects indispensable to the survival of the civilian population, "except if these objects are used by the adversary solely for the sustenance of its armed forces, or if that is not the case, if they serve nonetheless in direct support of military action".³¹⁴

315. Canada's LOAC Manual states that:

Objects indispensable to the survival of the civilian population may be attacked if they are used by an adverse party:

- a. as sustenance solely for the member[s] of its armed forces; or
- b. in direct support of military action, provided that actions against these objects do not leave the civilian population with such inadequate food or water so as to cause its starvation or force its movement.³¹⁵

316. Israel's Manual on the Laws of War states that "it is allowed, of course, to attack the enemy army's means of support or targets forming the foundation for the direct support of the enemy army, provided that the attack does not leave the civilian population with insufficient means to ward off its starvation".³¹⁶

317. The Military Manual of the Netherlands provides that objects indispensable to the survival of the civilian population are not protected if these objects are used as sustenance only for the members of the opposing armed forces or, if not as sustenance, then in direct support of military action of the adverse party.³¹⁷

318. New Zealand's Military Manual provides that the prohibition to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population

shall not apply to such of the objects covered by it as are used by an adverse Party:

- a. as sustenance solely for the members of its armed forces; or
- b. if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.³¹⁸

³¹³ Australia, *Defence Force Manual* (1994), §§ 710 and 711, see also § 931.

³¹⁴ Belgium, *Law of War Manual* (1983), p. 28.

³¹⁵ Canada, *LOAC Manual* (1999), p. 4-8, § 80.

³¹⁶ Israel, *Manual on the Laws of War* (1998), p. 35.

³¹⁷ Netherlands, *Military Manual* (1993), p. V-8.

³¹⁸ New Zealand, *Military Manual* (1992), §§ 504(3) (land warfare) and 613(3) (air warfare).

319. Spain's LOAC Manual provides that the prohibition of attacks against objects indispensable to the survival of the civilian population does not apply if the adverse party uses such objects as sustenance solely for the members of its armed forces or in direct support of military action. However, any attack against such objects must not leave the civilian population without adequate food or water such as would cause it to starve or force it to move.³¹⁹

320. Sweden's IHL Manual states that:

It is permitted to attack stocks of foodstuffs, water reservoirs, etc. which are *in the hands of the adversary's armed forces*. In practice, however, it would probably be very hard to determine whether a food transport or store was intended *only* for the armed forces or also for the civilian population. Also, military food transports may in some cases be intended for protected groups such as prisoners-of-war or civilians in the hands of one of the belligerents.

... Attacks may also be made on *objects being used by the adverse party in direct support of his military operations*. This exception may apply mainly when enemy units are for example using a cornfield for advance, or some other object for concealing military units.

The text uses the expression "military action" as opposed to the often-used expression "military operations" which is a broader concept. Thus the exception applies only if the attack entails a *direct* advantage in a given tactical situation. As against this, it is not permitted to attack an irrigation works, for example, with the excuse that this may be an advantage in a future operation, i.e. an indirect advantage.³²⁰ [emphasis in original]

321. The YPA Military Manual of the SFRY (FRY) provides that objects used solely by the armed forces or for immediate assistance to military operations are not included in the protection of objects indispensable to the survival of the civilian population.³²¹

National Legislation

322. Argentina's Draft Code of Military Justice punishes any soldier who "attacks, destroys, removes or renders useless objects indispensable to the survival of the civilian population, unless the adverse party uses such objects in direct support of military action or as means of sustenance exclusively for members of the armed forces".³²²

323. Spain's Penal Code punishes "anyone who, during an armed conflict, ... attacks, destroys, removes or renders useless objects indispensable to the survival of the civilian population, unless the adverse Party uses the said objects in direct support of military action or as means of sustenance exclusively for members of its Armed Forces".³²³

³¹⁹ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.c.(4) and 4.5.b.(2)b).

³²⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, pp. 60-61.

³²¹ SFRY (FRY), *YPA Military Manual* (1988), § 74.

³²² Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(3) in the *Code of Military Justice as amended* (1951).

³²³ Spain, *Penal Code* (1995), Article 613(1)(c).

National Case-law

324. No practice was found.

Other National Practice

325. In 1994, in reply to a questionnaire from the House of Representatives, Colombia's Ministry of Foreign Affairs quoted Article 14 AP II. It added that:

What this article prohibits is the starvation of civilians. Therefore if one of the parties considers that an agricultural area with its crops, its livestock and its supply of clean water is supporting the military effort of the adverse party, or if it simply serves to feed the civilian population which is suspected of collaborating with the adverse party, that party can claim that it is meeting the objective of Article 14, that is, not starving the population, by moving the population concerned to another place.³²⁴

326. The Report on the Practice of Malaysia mentions the destruction by Malaysian forces of food supplies belonging to the enemy during the conflict against the communist opposition. These methods did not, according to the report, cause starvation of the civilian population.³²⁵

327. In 1973, a Deputy Legal Adviser of the US Department of State declared that "the generally accepted rule today is that crops and food supplies may be destroyed if they are intended solely for the use of armed forces".³²⁶

328. According to the Report on US Practice, it is the *opinio juris* of the US that foodstuffs and crops may be destroyed if it can be determined that they are destined for enemy armed forces.³²⁷

III. Practice of International Organisations and Conferences

329. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

330. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

331. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

³²⁴ Colombia, Presidency of the Republic, Office of the High Commissioner for Peace, National Plan for the Dissemination of IHL, Reply of the Ministry of Foreign Affairs to Questionnaire No. 012 of Commission II of the House of Representatives, 7 October 1994, p. 6.

³²⁵ Report on the Practice of Malaysia, 1997, Chapter 4.1.

³²⁶ US, Address by George H. Aldrich, Deputy Legal Adviser of the Department of State, 13 April 1973, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law*, 1973, Department of State Publication 8756, Washington, D.C., 1974, pp. 503-504.

³²⁷ Report on US Practice, 1997, Chapter 4.1.

Objects indispensable to the survival of the civilian population are excluded from protection, if: a) they are used solely for sustenance of the armed forces; or b) they are used in direct support of military action (but the civilian population may not be thus reduced to starvation or forced to move).³²⁸

VI. *Other Practice*

332. No practice was found.

Attacks in case of military necessity

I. Treaties and Other Instruments

Treaties

333. Article 54(5) AP I provides that:

In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 [to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population] may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

Article 54 AP I was adopted by consensus.³²⁹

Other Instruments

334. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 54(5) AP I.

335. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 54(5) AP I.

II. National Practice

Military Manuals

336. Australia's Commanders' Guide provides that "the ADF may not embark on a scorched earth policy within Australia or its territories unless under their control at the time of devastation and driven by imperative military necessity. It is still permitted, for example, to destroy a wheat-field to deny concealment to enemy forces."³³⁰

³²⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 397.

³²⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208.

³³⁰ Australia, *Commanders' Guide* (1994), § 908.

337. Australia's Defence Force Manual states that:

It is permissible to destroy objects which are indispensable to the survival of the civilian population in the course of ordinary military operations only if it is militarily imperative to do so, for example to destroy a wheat field to deny concealment to enemy forces, because this is a tactical measure and does not amount to a scorched earth policy. The ADF may embark on a scorched earth policy in territory under Australian control where imperative military necessity requires it to do so to protect Australian national territory from invasion.³³¹

338. Canada's LOAC Manual states that:

Where a party to a conflict is defending its national territory against invasion, it may destroy objects indispensable to the survival of the civilian population with intent to deny their use by the enemy if:

- a. the objects are within national territory of and under the control of the party; and
- b. their destruction is required by imperative military necessity.

...

Where such an extreme measure is taken, the destruction of objects indispensable to the survival of the civilian population should not leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.³³²

339. Colombia's Basic Military Manual, in a chapter entitled "Provisions of IHL applicable in Colombia", states that "in all armed conflicts" it is prohibited to order a scorched earth policy as a method of combat.³³³

340. Germany's Military Manual provides that "any deviations from this prohibition [attacking objects indispensable for the survival of the civilian population] shall be permissible only on friendly territory if required by imperative military necessity".³³⁴

341. Israel's Manual on the Laws of War states that:

Conducting a war by the "scorched earth" method, meaning the deliberate destruction of food products, agricultural areas, sanitation facilities, etc. with a view to inflicting starvation or suffering on the civilian population – is forbidden . . .

An exception to the "scorched earth" prohibition is the implementation of such a policy on one's own territory, as opposed to enemy territory. On the nation's sovereign territory, the local army is allowed to retreat leaving behind "scorched earth", so as not to provide sustenance for the advancing enemy forces, even at the cost of hurting the population identifying with it.³³⁵

342. The Military Manual of the Netherlands provides that, for any party to the conflict defending its national territory, the destruction of or the fact of rendering useless objects indispensable to the survival of the civilian population "may be made . . . within such territory under its own control where required by

³³¹ Australia, *Defence Force Manual* (1994), § 712, see also § 931(c).

³³² Canada, *LOAC Manual* (1999), pp. 6-4 and 6-5, §§ 42 and 43, see also p. 4-8, § 82.

³³³ Colombia, *Basic Military Manual* (1995), p. 49.

³³⁴ Germany, *Military Manual* (1992), § 463.

³³⁵ Israel, *Manual on the Laws of War* (1998), p. 35.

imperative military necessity". It adds that the flooding of parts of one's own territory is not forbidden by the rules prohibiting the destruction of objects indispensable to the survival of the civilian population.³³⁶

343. New Zealand's Military Manual states that:

In recognition of the vital requirements of any Party to the conflict in the defence of its national territory against invasion, derogation from the prohibitions contained in paragraph 2 [prohibition to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population] may be made by a Party to the conflict within such territory under its own control where required by imperative military necessity.

...

As a result of this provision, Parties may no longer embark on a scorched earth policy with the intention of starving civilians, even in their national territory, unless that part of the territory is under their control at the time of devastation: scorched earth is no longer available as an offensive policy. It is still permissible to destroy objects indispensable to the survival of the civilian population in the course of ordinary operations if it is militarily necessary for other reasons, for example, to destroy a wheat field to deny concealment to enemy forces.³³⁷

344. Spain's LOAC Manual provides that the prohibition of attacks against objects indispensable to the survival of the civilian population does not apply where derogation of the prohibition is required by imperative military necessity.³³⁸ It allows one derogation from the prohibition of attacks against objects indispensable to the survival of the civilian population if the defence of the national territory against the danger of an invasion imperatively so demands.³³⁹

345. Sweden's IHL Manual states that:

Another question addressed in Article 54 [AP I] is the possibility for one party faced with an approaching hostile attack to resort to widespread destruction within a given area – the method usually termed "burnt earth tactics". Such steps are permitted under 54:5 where they are required by overriding military necessity and concern only *one party's national territory*. However, this latter addition implies important limitations. Thus it is not allowed to attack, for example by aerial bombardment, an area occupied by the adversary if the purpose is to impede the civilian population's supply of indispensable necessities.³⁴⁰ [emphasis in original]

346. Switzerland's Basic Military Manual states that "it is prohibited to employ scorched earth tactics".³⁴¹

347. The YPA Military Manual of the SFRY (FRY) provides an exception to the prohibition of attacks against objects indispensable to the survival of the

³³⁶ Netherlands, *Military Manual* (1993), p. V-8.

³³⁷ New Zealand, *Military Manual* (1992), § 504(5), including footnote 10.

³³⁸ Spain, *LOAC Manual* (1996), Vol. I, § 4.5.b.(2).b).

³³⁹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(4).

³⁴⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 61.

³⁴¹ Switzerland, *Basic Military Manual* (1987), Article 35, commentary.

civilian population in times of enemy invasion of the national territory, if required by reason of military necessity.³⁴²

National Legislation

348. No practice was found.

National Case-law

349. No practice was found.

Other National Practice

350. At the CDDH, Sweden remarked, with reference to the possible exceptions to the prohibition of attacks against objects indispensable to the survival of the civilian population, that it considered a scorched earth policy used to stop an enemy invasion on a party's own territory to be permissible. The Swedish delegate described this strategy as "a deep-rooted practice which should be taken into account".³⁴³

351. In 1973, a Deputy Legal Adviser of the US Department of State declared that "the generally accepted rule today is that crops and food supplies may be destroyed . . . if their destruction is required by military necessity and is not disproportionate to the military advantage gained".³⁴⁴

352. According to the Report on US Practice, the *opinio juris* of the US recognises the legality of attacks against objects indispensable to the survival of the civilian population when required by military necessity.³⁴⁵

III. Practice of International Organisations and Conferences

United Nations

353. In 1996, the Independent Expert of the UN Commission on Human Rights for Somalia described the practices of the different factions, such as the practice of a faction on the verge of losing control of a territory of operating a "scorched earth" policy.³⁴⁶

Other International Organisations

354. No practice was found.

³⁴² SFRY (FRY), *YPA Military Manual* (1988), § 74.

³⁴³ Sweden, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.17, 11 February 1975, p. 145, § 19.

³⁴⁴ US, Address by George H. Aldrich, Deputy Legal Adviser of the Department of State, 13 April 1973, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1973*, Department of State Publication 8756, Washington, D.C., 1974, pp. 503–504.

³⁴⁵ Report on US Practice, 1997, Chapter 4.1.

³⁴⁶ UN Commission on Human Rights, Independent Expert on Assistance to Somalia in the Field of Human Rights, Report, UN Doc. E/CN.4/1996/14/Add.1, 10 April 1996, § 10.

International Conferences

355. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

356. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

357. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “objects indispensable to the survival of the civilian population are excluded from protection, if: . . . c) the military defence of the national territory against invasion imperatively so requires”.³⁴⁷

VI. Other Practice

358. In 1983, an official of an entity denounced to the ICRC the use of a scorched earth policy by a State.³⁴⁸

359. In 1995, in its comments on the Declaration of Minimum Humanitarian Standards, the IIHL stated that the scorched earth policy was a “practice which causes great suffering to the population . . . affecting both individuals and the basic rights of groups”.³⁴⁹

360. In 1997, the ICRC reported the scorched earth policy applied by the armed forces of a State in government-controlled areas.³⁵⁰

C. Access for Humanitarian Relief to Civilians in Need**General**

Note: For practice concerning the provision of basic necessities to displaced persons, see Chapter 38, section C.

*I. Treaties and Other Instruments**Treaties*

361. Article 23 GC IV provides that:

³⁴⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 397.

³⁴⁸ ICRC archive document.

³⁴⁹ IIHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 15, reprinted in the Report of the Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, p. 10.

³⁵⁰ ICRC archive document.

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores . . . intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the previous paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.

362. Article 70 AP I provides that:

- (2) The Parties to the conflict and each High Contracting Party shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party.
- (3) The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments, equipment and personnel in accordance with paragraph 2:
 - (a) shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted;
 - (b) may make such permission conditional on the distribution of this assistance being made under the local supervision of a Protecting Power;
 - (c) shall, in no way whatsoever, divert relief consignments from the purpose for which they are intended nor delay their forwarding, except in cases of urgent necessity in the interest of the civilian population concerned.

Article 70 AP I was adopted by consensus.³⁵¹

363. Article 33 of draft AP II submitted by the ICRC to the CDDH, provided that:

1. If the civilian population is inadequately supplied, in particular, with foodstuffs, clothing, medical and hospital stores and means of shelter, the parties to the conflict shall agree to and facilitate, to the fullest possible extent, those relief actions which are exclusively humanitarian and impartial in character and conducted without any adverse distinction . . .

³⁵¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

2. The parties to the conflict and any High Contracting Party through whose territory supplies must pass shall grant free passage when relief actions are carried out in accordance with the conditions stated in paragraph 1.
3. When prescribing the technical methods relating to assistance or transit, the parties to the conflict and any High Contracting Party shall endeavour to facilitate and accelerate the entry, transport, distribution, or passage of relief.
4. The parties and any High Contracting Party may set as condition that the entry, transport, distribution, or passage of relief be executed under the supervision of an impartial humanitarian body.
5. The parties to the conflict and any High Contracting Party shall in no way whatsoever divert relief consignments from the purpose for which they are intended or delay the forwarding of such consignments.³⁵²

This proposal was amended and adopted by consensus in Committee II of the CDDH.³⁵³ The relevant part of the approved text provided that:

3. The Parties to the conflict and each High Contracting Party through whose territory these relief supplies will pass shall facilitate rapid and unimpeded passage of all relief consignments provided in accordance with the conditions stated in paragraph 2.
4. The Parties to the conflict and each High Contracting Party which allows the passage of relief consignments in accordance with paragraph 3:
 - (a) shall have the right to prescribe the technical arrangements including the right of search under which such passage is allowed;
 - (b) may make such permission conditional on the satisfactory assurance that such relief consignments will be used for the purpose for which they are intended;
 - (c) shall in no way whatsoever divert relief consignments from the purpose for which they are intended or delay their forwarding, except in cases of urgent necessity, in the interest of the civilian population concerned.³⁵⁴

Eventually, however, this paragraph was not included in the final draft article that was voted upon in the plenary session.

364. Paragraph 4 of the 1995 Agreement between the Government of Croatia and UNCRO stipulates that:

Full access by UNCRO and by humanitarian organizations, particularly UNHCR and the ICRC, to the civilian population, for the purpose of providing for the humanitarian needs of the civilian population, will be assured by the authorities of Croatia, to the extent allowed by objective security considerations.

365. Pursuant to Article 7(1)(b) of the 1998 ICC Statute, “extermination” constitutes a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population”. Article 7(2)(b) defines extermination as including “the intentional infliction of conditions of

³⁵² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 43.

³⁵³ CDDH, *Official Records*, Vol. XIII, CDDH/406/Rev.1, 17 March–10 June 1977, p. 385, § 96.

³⁵⁴ CDDH, *Official Records*, Vol. XIII, CDDH/406/Rev.1, 17 March–10 June 1977, p. 424.

life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.

366. Under Article 2(b) of the 2002 Statute of the Special Court for Sierra Leone, extermination “as part of a widespread or systematic attack against any civilian population” constitutes a crime against humanity.

Other Instruments

367. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia reminded all fighting units of their obligation to provide “unconditional support for the action of the ICRC in favour of the victims”.

368. Paragraph 9 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that:

The Parties shall allow the free passage of all consignments of medicines and medical supplies, essential foodstuffs and clothing which are destined exclusively for the other party’s civilian population . . .

The Parties shall consent and cooperate with operations to provide the civilian population with exclusively humanitarian, impartial and non-discriminatory assistance. All facilities will be given in particular to the ICRC.

369. Paragraph 2.6 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina states that:

The Parties shall allow the free passage of all consignments of medicines and medical supplies, essential foodstuffs and clothing which are destined exclusively to the civilian population.

They shall consent to and cooperate with operations to provide the civilian population with exclusively humanitarian, impartial and non-discriminatory assistance. All facilities will be given in particular to the ICRC.

370. In paragraph 2 of the 1992 Bahir Dar Agreement, several parties to the conflict in Somalia agreed to cooperate in creating an atmosphere of peace for the free distribution of relief supplies to reach all needy people throughout the country and “to ensure that all ports, airports and land routes and distribution centres be open for the movement and distribution of relief supplies”.

371. Paragraph I of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina considered that “failure to give the ICRC access to certain areas where humanitarian needs have been identified and to besieged towns” was an illustration of the insecurity reigning in this country.

372. Paragraph 103 of the 1994 San Remo Manual states that “if the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies”.

373. Paragraph 3 of the 1994 Agreement on a Cease-fire in the Republic of Yemen states that “the International Committee of Red Cross and other humanitarian organizations will be granted a possibility to unimpededly deliver humanitarian relief, primarily medicine, water and food supplies to the areas affected as a result of the conflict”.

374. Pursuant to Article 18(b) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, extermination, “when committed in a systematic manner or on a large scale and instigated or directed by a Government or by any organization or group”, constitutes a crime against humanity.

375. According to Principle 25 of the 1998 Guiding Principles on Internal Displacement, while the primary duty and responsibility for providing humanitarian assistance to IDPs rests with national authorities:

international humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced. Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance . . .

The authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

376. Section 9.9 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force shall facilitate the work of relief operations which are humanitarian and impartial in character”.

377. In paragraph 1 of the 1999 Agreement on the Protection and Provision of Humanitarian Assistance in the Sudan, the parties agreed that:

All humanitarian agencies accredited by the United Nations for humanitarian work in the Sudan shall have free and unimpeded access to all war-affected populations in need of assistance and to all war-affected populations for the purposes of assessing whether or not they are in need of humanitarian assistance.

The parties further bound themselves to facilitate, “to the best of their abilities”, access for all humanitarian agencies accredited by the UN for humanitarian work in the Sudan. In paragraph 2, the parties agreed:

to guarantee that all humanitarian assistance targeted and intended for beneficiaries in areas under their respective control will be delivered to those beneficiaries and will not be taxed, diverted or in any other way removed from the intended recipient or given to any other persons or groups.

378. In the 2000 Cairo Plan of Action, the heads of government of African States and the EU urged States, during armed conflicts, to “secure rapid and unimpeded access to the civilian population”.

379. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including crimes against humanity. According to Section 5(1)(b), “extermination” constitutes a crime

against humanity “when committed as part of a widespread or systematic attack directed against any civilian population”. Section 5(2)(a) defines extermination as including “the intentional infliction of conditions of life, *inter alia*, the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population”.

II. National Practice

Military Manuals

380. Argentina’s Law of War Manual (1969) provides that:

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores . . . intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the previous paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided or produced by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.

The Power which allows the passage of the consignments indicated in the first paragraph of this Article may make such permission conditional on the distribution to the persons benefited thereby being made under the local supervision of the Protecting Powers.³⁵⁵

381. Argentina’s Law of War Manual (1989) stipulates that the parties shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another contracting party, even if the latter is its adversary. It also provides for the obligation to permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under 15, expectant mothers and maternity cases.³⁵⁶

382. Australia’s Commanders’ Guide states in relation to blockades that “there is a duty to consider, in good faith, requests for relief operations, but no duty to agree thereto. Any obligation upon a Party to permit a relief operation is dependent on the agreement of the State in control, given at an appropriate time.”³⁵⁷

³⁵⁵ Argentina, *Law of War Manual* (1969), § 4.006(3).

³⁵⁶ Argentina, *Law of War Manual* (1989), § 4.11.

³⁵⁷ Australia, *Commanders’ Guide* (1994), § 850, footnote 6.

383. Australia's Defence Force Manual provides that "the free passage of medical and hospital stores, essential foodstuffs, clothing, bedding... which are intended for civilians, including those of an enemy, must be allowed".³⁵⁸ In situations of occupation, the manual states that:

The occupying power is under an obligation to allow free passage of all consignments of medical and hospital stores... as well as of essential foodstuffs, clothing and medical supplies intended for children under 15 years of age, expectant mothers and maternity cases, although it may require that distribution of such supplies be under the supervision of the Protecting Power.³⁵⁹

Regarding a situation of blockade, the manual states that:

If the civilian population of the blockaded territory is inadequately provided with food and other objects essential for its survival, the blockading party must provide for free passage of such foodstuffs and other essential supplies, subject to:

- a. the right to prescribe the technical arrangements, including search, under which such passage is permitted; and
- b. the condition that the distribution of such supplies shall be made under the local supervision of a Protecting Power or a humanitarian organisation which offers guarantees of impartiality.³⁶⁰

384. Canada's LOAC Manual states that, in case of siege warfare, "the parties to a conflict are obliged to facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel".³⁶¹ The manual also provides that:

Belligerents must allow the free passage of all consignments of medical and hospital stores and articles necessary for religious worship intended for civilians, including those of an opposing belligerent. This includes all consignments of essential foodstuffs, clothing and tonics intended for children under 15, and expectant and nursing mothers. This obligation is subject to the condition that the belligerent concerned is satisfied that there are no serious grounds for fearing: that the consignments may be diverted from their destination, that control may not be effective, or that the consignments may be of definite advantage to the military effort or economy of the enemy by permitting him to substitute them for goods which he would otherwise have to provide or produce himself.³⁶²

According to the manual, the same obligation to allow free passage of relief consignments intended for civilians in occupied territories applies to the occupying power.³⁶³ It also states that, "within the limits of military or security

³⁵⁸ Australia, *Defence Force Manual* (1994), § 948.

³⁵⁹ Australia, *Defence Force Manual* (1994), § 1216.

³⁶⁰ Australia, *Defence Force Manual* (1994), § 666.

³⁶¹ Canada, *LOAC Manual* (1999), p. 6-4, § 36.

³⁶² Canada, *LOAC Manual* (1999), p. 11-3, § 23, see also p. 8-9, § 68 (obligation to allow free access to objects indispensable to the survival of the civilian population in case the population of a blockaded territory is inadequately supplied therewith).

³⁶³ Canada, *LOAC Manual* (1999), p. 12-4, § 32.

considerations, the belligerents must provide [the ICRC, the local National Red Cross (or equivalent) Society or any other organization that may assist protected persons] with all necessary facilities for giving assistance".³⁶⁴

385. Colombia's Basic Military Manual states the duty to allow relief organizations, such as the Red Cross, to perform humanitarian activities in favour of non-combatants and civilians.³⁶⁵

386. Germany's Military Manual provides that:

If the civilian population of a party to the conflict is inadequately supplied with indispensable goods, relief actions by neutral States or humanitarian organisations shall be permitted. Every State and in particular the adversary, is obliged to grant such relief actions free transit, subject to its right of control.³⁶⁶

It further states that "the occupying power shall agree to relief actions conducted by other States or by humanitarian organisations".³⁶⁷

387. Italy's IHL Manual states that an occupying power has the obligation to accept the despatch of relief materials (foodstuffs, medicines, clothing) by other States or impartial humanitarian organisations, especially if the occupied population is inadequately supplied.³⁶⁸

388. Kenya's LOAC Manual states that:

Parties to the conflict shall allow and facilitate rapid and unimpeded passage of all relief consignments and equipment meant for the civilian population, and the personnel accompanying such relief supplies, even if such assistance is for the civilians of the adverse Party. The parties shall have the right to prescribe the technical arrangements, including search, under which such passage is permitted.

The Parties to the conflict shall protect relief consignments and facilitate their rapid distribution.³⁶⁹

389. The Military Manual of the Netherlands provides that "the parties to the conflict have to give free passage to relief personnel and facilitate the provision of relief. The State giving free passage to relief personnel can make conditions regarding the implementation of the relief action."³⁷⁰

390. New Zealand's Military Manual provides that:

Belligerents must allow the free passage of all consignments of medical and hospital stores and articles necessary for religious worship intended for civilians, including those of an opposing belligerent and all consignments of essential foodstuffs, clothing and tonics intended for children under 15, and expectant and nursing mothers. This obligation is subject to the condition that the belligerent concerned is satisfied that there are no serious grounds for fearing that:

³⁶⁴ Canada, *LOAC Manual* (1999), p. 11-4, § 31.

³⁶⁵ Colombia, *Basic Military Manual* (1995), pp. 21, 22, 30 and 42.

³⁶⁶ Germany, *Military Manual* (1992), § 503.

³⁶⁷ Germany, *Military Manual* (1992), § 569.

³⁶⁸ Italy, *IHL Manual* (1991), Vol. I, § 48(15).

³⁶⁹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.

³⁷⁰ Netherlands, *Military Manual* (1993), p. VIII-4.

- a. the consignments may be diverted from their destination;
- b. control may not be effective; or
- c. the consignments may be of definite advantage to the military effort or economy of the enemy by permitting him to substitute them for goods which he would otherwise have to provide or produce himself.³⁷¹

According to the manual, the occupying power is under the same obligation to allow free passage of relief consignments intended for civilians in occupied territories.³⁷² It also states that, "within the limits of military or security considerations [the ICRC, the local national Red Cross (or equivalent) society or any other organisation that may assist protected persons] must be granted by belligerents all necessary facilities for giving assistance".³⁷³

391. Russia's Military Manual states that the military commander must "give all facilities to the International Committee of the Red Cross and the National Society of Red Cross (Red Crescent) in order for them to carry out their functions on behalf of the victims of armed conflicts".³⁷⁴

392. Sweden's IHL Manual states that:

According to Article 70 of Additional Protocol I to the 1949 Geneva Conventions, relief actions of a humanitarian and impartial character, which do not subject one party or the other to discriminatory treatment, shall "be undertaken, subject to the agreement of the Parties concerned in such relief actions". It is also stated that such offers of relief "shall not be regarded as interference in the armed conflict or as unfriendly acts". No objections can be raised to such relief actions from the point of view of neutrality law.³⁷⁵

393. Switzerland's Basic Military Manual states that "the personnel of accepted humanitarian organisations, relief consignments and equipment must benefit from all necessary facilities, notably free passage," in order to assist civilians who are in a territory temporarily occupied by foreign troops.³⁷⁶

394. The UK Military Manual provides that:

Belligerents must allow the free passage of all consignments of medical and hospital stores and articles necessary for religious worship intended for civilians, including those of an opposing belligerent, and all consignments of essential foodstuffs, clothing and tonics intended for children under 15, and expectant and nursing mothers. This obligation is subject to the condition that the belligerent concerned is satisfied that there are no serious grounds for fearing: that the consignments may be diverted from their destination, that control may not be effective, or that the consignments may be of definite advantage to the military effort or economy of the enemy by permitting him to substitute them for goods which he would otherwise have to provide or produce himself.³⁷⁷

³⁷¹ New Zealand, *Military Manual* (1992), § 1111(1).

³⁷² New Zealand, *Military Manual* (1992), § 1318.

³⁷³ New Zealand, *Military Manual* (1992), § 1115.

³⁷⁴ Russia, *Military Manual* (1990), § 14(b).

³⁷⁵ Sweden, *IHL Manual* (1991), Section 5.7, p. 114.

³⁷⁶ Switzerland, *Basic Military Manual* (1987), Article 155(2).

³⁷⁷ UK, *Military Manual* (1958), § 35.

The manual further states that “if the whole or part of the population of occupied territory suffers from shortage of supplies, the Occupant must agree to relief schemes by all the means at his disposal. The schemes in question will consist in particular of the provision of consignments of foodstuffs, medical supplies and clothing”.³⁷⁸ The manual also stipulates that “within the limits of military or security considerations these organisations [the ICRC, the local national Red Cross (or equivalent) society or any other organization that may assist protected persons] must be granted by the belligerent all necessary facilities for giving assistance”.³⁷⁹

395. The UK LOAC Manual states, with regard to civilians in enemy hands, that “the free passage of medical and hospital stores . . . is guaranteed as well as essential food and clothes for children, expectant mothers and maternity cases”.³⁸⁰

396. The US Field Manual provides that:

Each High Contracting Party shall allow the free passage of all consignments of medical and hospital stores and objects necessary for religious worship intended only for civilians of another High Contracting Party, even if the latter is its adversary. It shall likewise permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases.

The obligation of a High Contracting Party to allow the free passage of the consignments indicated in the preceding paragraph is subject to the condition that this Party is satisfied that there are no serious reasons for fearing:

- (a) that the consignments may be diverted from their destination,
- (b) that the control may not be effective, or
- (c) that a definite advantage may accrue to the military efforts or economy of the enemy through the substitution of the above-mentioned consignments for goods which would otherwise be provided by the enemy or through the release of such material, services or facilities as would otherwise be required for the production of such goods.³⁸¹

With regard to occupying powers, the manual states that:

If the whole or part of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the . . . population, and shall facilitate them by all the means at its disposal.

Such schemes . . . shall consist, in particular, of the provision of the consignments of foodstuffs, medical supplies and clothing.³⁸²

The manual also provides that the ICRC, the National Red Cross (or equivalent) Society or any other organization that may assist protected persons “shall be granted all facilities for [assisting protected persons] by the authorities, within the bounds set by military or security considerations”.³⁸³

³⁷⁸ UK, *Military Manual* (1958), § 541.

³⁷⁹ UK, *Military Manual* (1958), § 40.

³⁸⁰ UK, *LOAC Manual* (1981), Section 9, p. 34, § 5.

³⁸¹ US, *Field Manual* (1956), § 262.

³⁸² US, *Field Manual* (1956), § 388.

³⁸³ US, *Field Manual* (1956), § 269.

National Legislation

397. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes against humanity defined in the 1998 ICC Statute, including "intentionally inflicting conditions of life (such as the deprivation of access to food or medicine) intended to bring about the destruction of part of a population".³⁸⁴

398. Azerbaijan's Criminal Code provides that "extermination of the population, in whole or in part", constitutes a crime against humanity.³⁸⁵

399. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁸⁶

400. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that, in accordance with the 1998 ICC Statute, extermination constitutes a crime against humanity and a crime under international law.³⁸⁷

401. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, extermination constitutes a crime against humanity, when committed as part of a widespread or systematic attack directed against any civilian population.³⁸⁸

402. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed crimes against humanity during the period from 17 April 1975 to 6 January 1979", including extermination "committed as part of a widespread or systematic attack directed against any civilian population, on national, political, ethnical, racial or religious grounds".³⁸⁹

403. Canada's Crimes against Humanity and War Crimes Act provides that the crimes against humanity defined in Article 7 of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.³⁹⁰

404. In accordance with Article 7 of the 1998 ICC Statute, Congo's Genocide, War Crimes and Crimes against Humanity Act defines "extermination" as a crime against humanity, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".³⁹¹

³⁸⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.9(2).

³⁸⁵ Azerbaijan, *Criminal Code* (1999), Article 105.

³⁸⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁸⁷ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(2)|2).

³⁸⁸ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 3(b).

³⁸⁹ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 5.

³⁹⁰ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

³⁹¹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6(b).

405. The Czech Republic's Criminal Code as amended punishes any "person who in wartime . . . wilfully fails to provide the necessary assistance" to the survival of the population.³⁹²

406. Under Ethiopia's Penal Code, it is a punishable offence to organise, order or engage in "measures to prevent the . . . continued survival" of the members of a national, ethnic, racial, religious or political group, or its progeny.³⁹³

407. Germany's Law Introducing the International Crimes Code punishes anyone who, as part of a widespread or systematic attack directed against any civilian population, "inflicts, with the intent of destroying a population in whole or in part, conditions of life on that population or on parts thereof, being conditions calculated to bring about its physical destruction in whole or in part".³⁹⁴

408. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 23 GC IV, and of API, including violations of Article 70(2) API, are punishable offences.³⁹⁵

409. Israel's Nazis and Nazi Collaborators (Punishment) Law punishes persons who have committed a crime against humanity, including "extermination [of] . . . any civilian population".³⁹⁶

410. Under Mali's Penal Code, extermination is a crime against humanity, "when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".³⁹⁷

411. Under New Zealand's International Crimes and ICC Act, crimes against humanity include the crimes defined in Article 7(1)(b) and (2)(b) of the 1998 ICC Statute.³⁹⁸

412. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".³⁹⁹

413. Slovakia's Criminal Code as amended punishes any "person who in wartime . . . wilfully fails to provide the necessary assistance" to the survival of the population.⁴⁰⁰

414. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(b) and (2)(b) of the 1998 ICC Statute.⁴⁰¹

³⁹² Czech Republic, *Criminal Code as amended* (1961), Article 263a(2)(a).

³⁹³ Ethiopia, *Penal Code* (1957), Article 281(b).

³⁹⁴ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 7(1)(2).

³⁹⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁹⁶ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1.

³⁹⁷ Mali, *Penal Code* (2001), Article 29(b).

³⁹⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 10(2).

³⁹⁹ Norway, *Military Penal Code as amended* (1902), § 108.

⁴⁰⁰ Slovakia, *Criminal Code as amended* (1961), Article 263a(2)(a).

⁴⁰¹ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

415. Under the UK ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(b) and (2)(b) of the 1998 ICC Statute.⁴⁰²

416. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as “extermination . . . committed against any civilian population”.⁴⁰³

417. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as “extermination . . . committed against any civilian population”.⁴⁰⁴

418. Vietnam’s Penal Code punishes “anyone who, in time of peace or in time of war, commits acts resulting in mass extermination of the population of an area”.⁴⁰⁵

National Case-law

419. No practice was found.

Other National Practice

420. In an appeal in 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina declared that “we shall make efforts to provide, as soon as possible, conditions for operations of the Red Cross and of other humanitarian organizations”.⁴⁰⁶

421. The Report on the Practice of Colombia refers to a draft internal working paper in which the Colombian government stated that “the accomplishment of the functions of humanitarian organisations shall be facilitated”.⁴⁰⁷

422. In the context of the conflict in Ethiopia, it has been reported that food was used as a weapon:

[At the time of the 1984–1985 famine in northern Ethiopia, and] to make matters worse, Mengistu refused to allow food to be distributed in areas where inhabitants were sympathetic to the EPLF, TPLF, or other antigovernment groups, a strategy that resulted in the deaths of tens of thousands. When a new famine emerged in late 1989, threatening the lives of 2 million to 5 million people, Mengistu again used food as a weapon by banning the movement of relief supplies along the main road north

⁴⁰² UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁴⁰³ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

⁴⁰⁴ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).

⁴⁰⁵ Vietnam, *Penal Code* (1990), Article 278.

⁴⁰⁶ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

⁴⁰⁷ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled “El Derecho Internacional Humanitario”, § 8.

from Addis Ababa to Tigray and also along the road from Mitsiwa into Eritrea and south into Tigray. As a result, food relief vehicles had to travel overland from Port Sudan, the major Red Sea port of Sudan, through guerrilla territory into northern Ethiopia. After an international outcry against his policy, Mengistu reversed his decision, but international relief agencies were unable to move significant amounts of food aid into Eritrea and Tigray via Ethiopian ports.⁴⁰⁸

It was further reported that “to combat new famine threats, in early 1991 the EPLF and the Ethiopian Government agreed on a joint and equal distribution of UN famine relief supplies”.⁴⁰⁹ According to the Report on the Practice of Ethiopia, “this and similar practices tend to indicate that, however recent, the right to humanitarian relief is gaining respect” in Ethiopia.⁴¹⁰

423. In April 1999, the German Minister of Foreign Affairs called upon the President of the FRY to guarantee that humanitarian assistance could reach Kosovo and those who were on the verge of starvation.⁴¹¹

424. According to the Report on the Practice of Israel, it is the policy of Israel “to cooperate with all international humanitarian agencies and organisations, both in time of peace and in time of war”.⁴¹²

425. The Report on the Practice of Jordan refers to an order issued in 1970 by the General Military Commander of the Jordanian armed forces which “accepted the international relief operations for population under opposition control”.⁴¹³ The report adds that free passage of essential goods intended for the civilian population of the adverse party was also allowed.⁴¹⁴

426. According to the Report on the Practice of Kuwait, it is the *opinio juris* of Kuwait that a State that is unable to guarantee the protection of the civilian population against starvation has to facilitate the distribution of external humanitarian aid.⁴¹⁵

427. In an explanatory memorandum submitted to parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands, commenting on Article 70 AP I, regretted that “it did not seem possible to oblige parties to the conflict to allow aid for the civilian population through without the parties explicit consent”.⁴¹⁶

428. In a letter to the lower house of parliament concerning the crisis in the Great Lakes region in 1996, the Minister for Development Cooperation of the

⁴⁰⁸ Thomas P. Ofcansky and LaVerle Berry (eds.), *Ethiopia: A Country Study*, Government Printing Office, Washington D.C., Fourth edition, 1993, p. 328, see also p. 305.

⁴⁰⁹ Amnesty International, *Ethiopia: End of an Era of Brutal Repression*, London, May 1991, p. 43.

⁴¹⁰ Report on the Practice of Ethiopia, 1998, Chapter 4.1.

⁴¹¹ Germany, Federal Foreign Office, Press Release, Statement by the Minister of Foreign Affairs on humanitarian assistance to Kosovo, 6 April 1999, *YIHL*, Vol. 2, 1999, p. 366.

⁴¹² Report on the Practice of Israel, 1997, Chapter 4.2.

⁴¹³ Report on the Practice of Jordan, 1997, Chapter 4.1, referring to Military Order issued by the General Military Commander of the Jordanian armed forces, September 1970.

⁴¹⁴ Report on the Practice of Jordan, 1997, Chapter 4.1.

⁴¹⁵ Report on the Practice of Kuwait, 1997, Chapter 4.1.

⁴¹⁶ Netherlands, Lower House of Parliament, Explanatory memorandum on the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, p. 35.

Netherlands argued in favour of the establishment of humanitarian corridors in Kivu in order to facilitate the distribution of food.⁴¹⁷

429. In 1968, during the conflict in Biafra, the Nigerian Commissioner for Information and Labour insisted that Nigeria “would continue to stand by its promise to the International Committee of the Red Cross to keep some ‘corridors of mercy’ safe from military activities so that relief supplies could at any time be channelled through these corridors”.⁴¹⁸

430. In 2000, during a debate in the UN Security Council on the protection of humanitarian personnel in conflict areas, Norway stated that it welcomed the call of the Security Council for safe and unhindered access for humanitarian personnel to civilians in armed conflict.⁴¹⁹

431. The Guidelines on Evacuations adopted in 1991 by the Presidential Human Rights Committee of the Philippines provided that “medicines and relief goods, whether coming from the government or non-government organizations, shall be given to the evacuees without delay”.⁴²⁰

432. A circular from the Office of the President of the Philippines issued in 1991 stipulates that “only in cases of tactical operations may control of the movement of non-combatants and the delivery of goods and services be imposed for safety reasons, provided that in no case should such control lead to the starvation of civilians”.⁴²¹

433. On the basis of an interview with an army officer, the Report on the Practice of Rwanda emphasises that humanitarian corridors are places used by humanitarian personnel, *inter alia*, to ensure access to the victims of hostilities so as to provide them with relief.⁴²²

434. In submitting AP II to the Senate for advice and consent to ratification, the US President, commenting on Article 18 AP II, stated that “the parties to a conflict have a duty not to refuse passage of relief supplies for arbitrary reasons”.⁴²³

435. In 1987, the Deputy Legal Adviser of the US Department of State stated that:

We support the principle...subject to the requirements of imperative military necessity, that impartial relief actions necessary for the survival of the civilian population be permitted and encouraged ...

⁴¹⁷ Netherlands, Lower House of Parliament, Letter from the Minister for Development Cooperation on the crisis in the Great Lakes region, 1996–1997 Session, Doc. 25 098, No. 2.

⁴¹⁸ Nigeria, Federal Ministry of Information, Press Release No. F 1290, Lagos, 11 July 1968, Report on the Practice of Nigeria, 1997, Chapter 4.2.

⁴¹⁹ Norway, Statement before the UN Security Council, UN Doc. S/PV/4110, 9 February 2000, p. 10.

⁴²⁰ Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 6.

⁴²¹ Philippines, Office of the President, Memorandum Circular No. 139 Prescribing the Guidelines for the Implementation of Memorandum Order No. 398, 26 September 1991, § 3.

⁴²² Report on the Practice of Rwanda, 1997, Interview with an army officer, Chapter 1.8.

⁴²³ US, Message from the US President Transmitting AP II to the Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 18.

We support the principle... that the ICRC and the relevant Red Cross or Red Crescent organizations be granted all necessary facilities and access to enable them to carry out their humanitarian functions.⁴²⁴

436. According to the Report on US Practice, it is the *opinio juris* of the US that:

Special agreements are necessary in order for relief personnel and vehicles to pass through military lines or receive special protection. It is a violation of international humanitarian law to deny conclusion of such agreements for arbitrary reasons...

Some conditions which the US government would not regard as arbitrary may be inferred from legislation dealing with relief shipments from the United States to regions of conflict. These include adequate procedures to ensure that the relief actually reaches the persons for whom it is intended, and any condition necessary to ensure the safety of the armed forces in combat.⁴²⁵

437. In 1991, in a "Statement regarding the need for the respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia", the Federal Executive Council of the SFRY (FRY) requested that all the parties "extend full support and assistance to the humanitarian relief operations of the Red Cross and particularly the International Red Cross Committee".⁴²⁶

438. In 1992, the Ministry of Defence of the SFRY (FRY) issued a special order to its armed forces to signify their "duty to enable ICRC delegates to carry out their humanitarian functions, ... in accordance with the Geneva Conventions". The order added that the armed forces must provide "the conditions for undisturbed performing of ICRC humanitarian functions".⁴²⁷

439. In 1992, a State "offered to allow passage, if need be, through all its territory to permit the distribution of humanitarian aid" to another State.⁴²⁸

III. Practice of International Organisations and Conferences

United Nations

440. In a resolution adopted in 1991 on repression of the Iraqi civilian population, including Kurds in Iraq, the UN Security Council insisted that "Iraq allow immediate access by international humanitarian organisations to all those in need of assistance in all parts of Iraq and make available all necessary facilities for their operations".⁴²⁹

⁴²⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 426 and 428.

⁴²⁵ Report on US Practice, 1997, Chapter 4.2.

⁴²⁶ SFRY (FRY), Federal Executive Council, Statement regarding the need for the respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia, Belgrade, 31 October 1991.

⁴²⁷ SFRY (FRY), Federal Ministry of Defence, Department for Civil Defence, Order (International Committee of the Red Cross – Mission in Belgrade), 20 January 1992, §§ 1 and 9.

⁴²⁸ ICRC archive document. ⁴²⁹ UN Security Council, Res. 688, 5 April 1991, § 1.

441. In a resolution adopted in 1991 on the import of petroleum and petroleum products originating in Iraq, the UN Security Council reaffirmed “the importance which the Council attaches to Iraq’s allowing unhindered access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and making available all necessary facilities for their operation”.⁴³⁰

442. In a resolution on Bosnia and Herzegovina adopted in 1992, the UN Security Council called upon all parties to the conflict “to ensure that conditions are established for the effective and unhindered delivery of humanitarian assistance”.⁴³¹

443. In a resolution on Bosnia and Herzegovina adopted in 1992, the UN Security Council, “dismayed that conditions have not yet been established for the effective and unhindered delivery of humanitarian assistance”, demanded that “all parties and others concerned create immediately the necessary conditions for unimpeded delivery of humanitarian supplies to Sarajevo and other destinations in Bosnia and Herzegovina”.⁴³²

444. In a resolution on Somalia adopted in 1992, the UN Security Council demanded that all parties, movements and factions in Somalia “take all measures necessary to facilitate the efforts of the United Nations, its specialized agencies and humanitarian organizations to provide urgent humanitarian assistance to the affected population in Somalia”.⁴³³

445. In a resolution adopted in 1993 on the conflict between Armenia and Azerbaijan, the UN Security Council called for “unimpeded access for international humanitarian relief efforts in the region, in particular in all areas affected by the conflict, in order to alleviate the increased suffering of the civilian population”.⁴³⁴

446. In a resolution adopted in 1993 on the treatment of certain towns and surroundings in Bosnia and Herzegovina as safe areas, the UN Security Council declared that “full respect by all parties of the rights of the United Nations Protection Force (UNPROFOR) and the international humanitarian agencies to free and unimpeded access to all safe areas in the Republic of Bosnia and Herzegovina” should be observed.⁴³⁵

447. In a resolution on Angola adopted in 1993, the UN Security Council declared that it had taken note of statements by UNITA that it would “cooperate in ensuring the unimpeded delivery of humanitarian assistance to all Angolans” and demanded that UNITA act accordingly.⁴³⁶

448. In a resolution adopted in 1993 concerning the conflict between Armenia and Azerbaijan, the UN Security Council called for “unimpeded access for international humanitarian relief efforts in the region, in particular in all areas

⁴³⁰ UN Security Council, Res. 706, 15 August 1991, preamble.

⁴³¹ UN Security Council, Res. 752, 15 May 1992, § 8.

⁴³² UN Security Council, Res. 757, 30 May 1992, preamble and § 17.

⁴³³ UN Security Council, Res. 794, 3 December 1992, § 2.

⁴³⁴ UN Security Council, Res. 822, 30 April 1993, § 3.

⁴³⁵ UN Security Council, Res. 824, 6 May 1993, § 4(b).

⁴³⁶ UN Security Council, Res. 851, 15 July 1993, § 15.

affected by the conflict, in order to alleviate the increased suffering of the civilian population".⁴³⁷

449. In a resolution adopted in 1993 concerning the conflict between Armenia and Azerbaijan, the UN Security Council called for "unimpeded access for international humanitarian relief efforts in all areas affected by the conflict".⁴³⁸

450. In a resolution adopted in 1993 concerning the conflict in Georgia, the UN Security Council called for "unimpeded access for international humanitarian assistance in the region".⁴³⁹

451. In a resolution adopted in 1994 on extension of the mandate and increase of the personnel of the UN Protection Force, the UN Security Council demanded that "the Bosnian Serb party . . . remove all obstacles to free access [to besieged Maglaj]", condemned all such obstacles and called upon all parties to show restraint.⁴⁴⁰

452. In a resolution adopted in 1994 on an immediate and durable cease-fire in Yemen, the UN Security Council expressed its deep concern about the humanitarian situation in Yemen and urged all concerned "to provide humanitarian access and facilitate the distribution of relief supplies to those in need".⁴⁴¹

453. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council demanded that "all parties allow unimpeded access for humanitarian assistance to all parts of the Republic of Bosnia and Herzegovina and, in particular, to the safe areas".⁴⁴²

454. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council demanded that:

all parties allow unimpeded access for the United Nations High Commissioner for Refugees and other international humanitarian agencies to the safe area of Srebrenica in order to alleviate the plight of the civilian population, and in particular that they cooperate on the restoration of utilities.⁴⁴³

455. In a resolution adopted in 1995 in the context of the conflict in Croatia, the UN Security Council requested that the Croatian government "in conformity with internationally recognised standards . . . allow access to [the local Serb] population by international humanitarian organisations".⁴⁴⁴

456. In a resolution adopted in 1995 in the context of the conflict in former Yugoslavia, the UN Security Council reiterated "its strong support for the efforts of the International Committee of the Red Cross (ICRC) in seeking access to displaced persons . . . and [condemned] in the strongest possible terms the failure of the Bosnian Serb party to comply with their commitments in respect of such access". It reaffirmed its demand that "the Bosnian Serb party

⁴³⁷ UN Security Council, Res. 853, 29 July 1993, § 11.

⁴³⁸ UN Security Council, Res. 874, 14 October 1993, § 9.

⁴³⁹ UN Security Council, Res. 876, 19 October 1993, § 7.

⁴⁴⁰ UN Security Council, Res. 908, 31 March 1994, § 22.

⁴⁴¹ UN Security Council, Res. 931, 29 June 1994, § 7.

⁴⁴² UN Security Council, Res. 998, 16 June 1995, § 4.

⁴⁴³ UN Security Council, Res. 1004, 12 July 1995, § 5.

⁴⁴⁴ UN Security Council, Res. 1009, 10 August 1995, § 2.

give immediate and unimpeded access to representatives of the United Nations High Commissioner for Refugees, the ICRC and other international agencies to persons displaced . . .”⁴⁴⁵

457. In a resolution on UNOMIL adopted in 1996, the UN Security Council demanded that the factions in the conflict in Liberia facilitate the delivery of humanitarian assistance.⁴⁴⁶ This demand was reiterated in a subsequent resolution later that year.⁴⁴⁷

458. In a resolution adopted in 1996 on the situation in the Great Lakes region, the UN Security Council called upon all those concerned in the region “to facilitate the delivery of international humanitarian assistance to those in need”.⁴⁴⁸

459. In a resolution adopted in 1996 on the situation in Liberia, the UN Security Council demanded that the factions “facilitate . . . the safe delivery of humanitarian assistance”.⁴⁴⁹

460. In a resolution adopted in 1998 on the imposition of an arms embargo against Yugoslavia, the UN Security Council underlined the necessity for the government of the FRY to allow “access to Kosovo by humanitarian organizations”.⁴⁵⁰

461. In a resolution adopted in 1998 on the situation in Kosovo, the UN Security Council demanded that the FRY “allow free and unimpeded access for humanitarian organizations and supplies to Kosovo”. It also noted the commitment of the President of the FRY “to ensure full and unimpeded access for humanitarian organizations, the ICRC and the UNHCR, and delivery of humanitarian supplies”.⁴⁵¹

462. In a resolution adopted in 1998, the UN Security Council called on the government of Angola and in particular UNITA “to cooperate fully with international humanitarian organizations in the delivery of emergency relief assistance to affected populations”.⁴⁵²

463. In a resolution adopted in 1999 on relief assistance in the territory of the FRY, the UN Security Council called for “access for United Nations and all other humanitarian personnel operating in Kosovo and other parts of the Federal Republic of Yugoslavia”.⁴⁵³

464. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council called upon all parties to armed conflicts “to ensure the full, safe and unhindered access of humanitarian personnel and the delivery of humanitarian assistance to all children affected by armed conflict”.⁴⁵⁴

⁴⁴⁵ UN Security Council, Res. 1019, 9 November 1995, preamble and § 2.

⁴⁴⁶ UN Security Council, Res. 1059, 31 May 1996, § 7.

⁴⁴⁷ UN Security Council, Res. 1071, 30 August 1996, § 10.

⁴⁴⁸ UN Security Council, Res. 1078, 9 November 1996, § A-5.

⁴⁴⁹ UN Security Council, Res. 1083, 27 November 1996, § 8.

⁴⁵⁰ UN Security Council, Res. 1160, 31 March 1998, § 16(c).

⁴⁵¹ UN Security Council, Res. 1199, 23 September 1998, §§ 4(c) and 5(d).

⁴⁵² UN Security Council, Res. 1213, 3 December 1998, § 7.

⁴⁵³ UN Security Council, Res. 1239, 14 May 1999, § 3.

⁴⁵⁴ UN Security Council, Res. 1261, 25 August 1999, § 11.

465. In a resolution adopted in 1999 on the establishment of a multinational peace force in East Timor, the UN Security Council emphasised “the importance of allowing full, safe and unimpeded access by humanitarian organizations” and called upon all parties “to ensure . . . the effective delivery of humanitarian aid”.⁴⁵⁵

466. In a resolution adopted in 1999 on protection of civilians in armed conflicts, the UN Security Council expressed its concern “at the denial of safe and unimpeded access to people in need” and underlined “the importance of safe and unhindered access of humanitarian personnel to civilians in armed conflict”.⁴⁵⁶

467. In a resolution on East Timor adopted in 1999, the UN Security Council called upon all parties “to ensure . . . the effective delivery of humanitarian aid”.⁴⁵⁷

468. In a resolution on the DRC adopted in 2000, the UN Security Council expressed “its deep concern at the limited access of humanitarian workers to refugees and internally displaced persons in some areas”. It also called on all parties “to ensure the safe and unhindered access of relief personnel to all those in need” and “to cooperate with the International Committee of the Red Cross to enable it to carry out its mandate”.⁴⁵⁸

469. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council underlined “the importance of safe and unimpeded access of humanitarian personnel to civilians in armed conflicts” and called upon “all parties concerned . . . to cooperate fully with the United Nations Humanitarian Coordinator and United Nations agencies in providing such access”.⁴⁵⁹

470. In a resolution adopted in 2000 on the protection of children in situations of armed conflict, the UN Security Council called upon all parties to armed conflict “to ensure the full, safe and unhindered access of humanitarian personnel and the delivery of humanitarian assistance to all children affected by armed conflict”.⁴⁶⁰

471. In a resolution adopted in 2000 on measures against the Taliban in Afghanistan, the UN Security Council reaffirmed “the necessity for sanctions to . . . be structured in a way that will not impede, thwart or delay the work of international humanitarian organizations or governmental relief agencies providing humanitarian assistance to the civilian population in the country”. It also called upon the Taliban “to ensure the safe and unhindered access of relief personnel and aid to all those in need in the territory under their control”.⁴⁶¹

⁴⁵⁵ UN Security Council, Res. 1264, 15 September 1999, § 2.

⁴⁵⁶ UN Security Council, Res. 1265, 17 September 1999, preamble and § 7.

⁴⁵⁷ UN Security Council, Res. 1272, 25 October 1999, § 10.

⁴⁵⁸ UN Security Council, Res. 1291, 24 February 2000, preamble and §§ 12 and 13.

⁴⁵⁹ UN Security Council, Res. 1296, 19 April 2000, § 8, see also § 15.

⁴⁶⁰ UN Security Council, Res. 1314, 11 August 2000, § 7.

⁴⁶¹ UN Security Council, Res. 1333, 19 December 2000, preamble and § 13.

472. In 1993, in a statement by its President regarding the conflict in Bosnia and Herzegovina, the UN Security Council reiterated "its demand that the parties and all others concerned allow immediate and unimpeded access to humanitarian relief supplies".⁴⁶²

473. In 1993, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reiterated "its demand that the Bosnian parties grant immediate and unimpeded access for humanitarian convoys and fully comply with the Security Council's decisions in this regard".⁴⁶³

474. In 1993, in a statement by its President, the UN Security Council demanded that "all concerned allow the unimpeded access of humanitarian relief supplies throughout the Republic of Bosnia and Herzegovina, especially humanitarian access to the besieged cities of eastern Bosnia".⁴⁶⁴

475. In 1993, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council stated that:

Recognising the imperative need to alleviate, with the utmost urgency, the sufferings of the population in and around Srebrenica, who are in desperate need of food, medicine, clothes and shelter, the Council demands that the Bosnian Serb party . . . allow all such [humanitarian] convoys unhindered access to the town of Srebrenica and other parts in the Republic of Bosnia and Herzegovina.⁴⁶⁵

476. In 1993, in a statement by its President issued following accounts of "an attack to which a humanitarian convoy under the protection of UNPROFOR was subjected on 25 October 1993 in central Bosnia", the UN Security Council called upon all parties to the conflict in the former Yugoslavia "to guarantee the unimpeded access of humanitarian assistance".⁴⁶⁶

477. In 1993, in a statement by its President in connection with the situation in Bosnia and Herzegovina, the UN Security Council reiterated "its demand to all parties and others concerned to guarantee unimpeded access for humanitarian assistance".⁴⁶⁷

478. In 1994, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reiterated "its demand that there be unimpeded access of humanitarian relief assistance to their intended destinations". It further reiterated "the demand that all parties ensure . . . unimpeded access [by UN and NGO personnel] throughout the Republic of Bosnia and Herzegovina".⁴⁶⁸

479. In 1994, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council demanded that "the Bosnian Serb

⁴⁶² UN Security Council, Statement by the President, UN Doc. S/25302, 17 February 1993, p. 1.

⁴⁶³ UN Security Council, Statement by the President, UN Doc. S/25334, 25 February 1993, p. 2.

⁴⁶⁴ UN Security Council, Statement by the President, UN Doc. S/25361, 3 March 1993, pp. 1 and 2.

⁴⁶⁵ UN Security Council, Statement by the President, UN Doc. S/25520, 3 April 1993, p. 1.

⁴⁶⁶ UN Security Council, Statement by the President, UN Doc. S/26661, 28 October 1993, p. 1.

⁴⁶⁷ UN Security Council, Statement by the President, UN Doc. S/26716, 9 November 1993, p. 1.

⁴⁶⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/1, 7 January 1994, pp. 1 and 2.

party and the Bosnian Croat party allow forthwith and without conditions passage to all humanitarian convoys [to the besieged town of Maglaj]".⁴⁶⁹

480. In 1995, in a statement by its President, the UN Security Council called on the parties to the conflict in Croatia "to cooperate fully with UNCRO, the United Nations High Commissioner for Refugees and the International Committee of the Red Cross in ensuring access and protection to the local civilian population as appropriate".⁴⁷⁰

481. In 1996, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council called on all parties in the region "to allow humanitarian agencies and non-governmental organizations to deliver humanitarian assistance to those in need".⁴⁷¹

482. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council urged all parties "to allow humanitarian agencies and organizations access to deliver humanitarian assistance to those in need".⁴⁷²

483. In 1997, in a statement by its President the UN Security Council called upon the factions in Somalia "to facilitate the delivery of humanitarian relief to the Somali people, including through the opening of the airport and harbour of Mogadishu".⁴⁷³

484. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council strongly urged the parties, and in particular the ADFL, "to ensure unrestricted and safe access by United Nations agencies and other humanitarian organizations to guarantee the provision of humanitarian assistance to, and the safety of, all refugees, displaced persons and other affected civilian inhabitants".⁴⁷⁴

485. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council expressed its dismay at "the continued lack of access being afforded by the Alliance of Democratic Forces for the Liberation of Congo/Zaire (ADFL) to United Nations and other humanitarian relief agencies". It further called in the strongest terms upon the ADFL "to ensure unrestricted and safe access by all humanitarian relief agencies so as to allow the immediate provision of humanitarian aid to those affected".⁴⁷⁵

⁴⁶⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 1.

⁴⁷⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

⁴⁷¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/44, 1 November 1996, p. 1.

⁴⁷² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/5, 7 February 1997, p. 1.

⁴⁷³ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/8, 27 February 1997, p. 2.

⁴⁷⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/19, 4 April 1997.

⁴⁷⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/22, 24 April 1997, p. 1.

486. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council noted “the commitment by the leader of the ADFL to allow United Nations and other humanitarian agencies access to refugees in eastern Zaire [DRC] in order to provide humanitarian assistance”.⁴⁷⁶

487. In 1997, in a statement by its President in the context of the conflict in the DRC, the UN Security Council called for “access . . . for humanitarian relief workers”.⁴⁷⁷

488. In 1997, in a statement by its President following a debate on the protection of humanitarian assistance to refugees and others in conflict situations, the UN Security Council called upon all parties concerned “to guarantee the unimpeded and safe access of United Nations and other humanitarian personnel to those in need”.⁴⁷⁸

489. In 1997, in a statement by its President in the context of the situation in Afghanistan, the UN Security Council expressed serious concern over “deliberate restrictions placed on the access of humanitarian organizations to some parts of the country and on other humanitarian operations” and urged all parties “to prevent their recurrence”.⁴⁷⁹

490. In 1998, in a statement by its President regarding the situation in Afghanistan, the UN Security Council strongly urged the Taliban “to let humanitarian agencies attend to the needs of the population”.⁴⁸⁰

491. In 1998, in a statement by its President, the UN Security Council called for “safe and unhindered access for humanitarian agencies to all those in need in the Democratic Republic of the Congo”.⁴⁸¹

492. In 1999, in a statement by its President, the UN Security Council called upon all parties involved in armed conflict “to guarantee the unimpeded and safe access of United Nations and other humanitarian personnel to those in need”.⁴⁸²

493. In 2000, in a statement by its President in connection with the question of the protection of UN, associated and humanitarian personnel in conflict zones, the UN Security Council underlined “the importance of unhindered access to populations in need” and declared that it would “continue to stress in its

⁴⁷⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/24, 30 April 1997, p. 1.

⁴⁷⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.

⁴⁷⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/34, 19 June 1997, p. 1.

⁴⁷⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/55, 16 December 1997, p. 2.

⁴⁸⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998, p. 2.

⁴⁸¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, p. 2.

⁴⁸² UN Security Council, Statement by the President, UN Doc. S/PRST/1999/6, 12 February 1999, p. 1.

resolutions the imperative for humanitarian assistance missions and personnel to have safe and unimpeded access to civilian populations".⁴⁸³

494. In 2000, in a statement by its President, the UN Security Council reiterated its call to all parties to a conflict to "ensure safe and unimpeded access in accordance with international law by humanitarian personnel to [war-affected] civilians".⁴⁸⁴

495. In 2001, in a statement by its President regarding the situation in Burundi, the UN Security Council stressed "the importance of providing urgent humanitarian assistance to civilians displaced by the hostilities" and called upon "all parties to guarantee safe and unhindered access by humanitarian personnel to those in need".⁴⁸⁵

496. In a resolution adopted in 1990 on the situation of human rights in occupied Kuwait, the UN General Assembly demanded that Iraq give "access to Kuwait to representatives of humanitarian organisations, especially the ICRC... to alleviate the suffering of the civilian population".⁴⁸⁶

497. In 1991, the UN General Assembly adopted a resolution on the strengthening of the coordination of humanitarian emergency assistance of the United Nations. A list of guiding principles annexed to the resolution provides that "States whose populations are in need of humanitarian assistance are called upon to facilitate the work of these organizations in implementing humanitarian assistance, in particular the supply of food, medicines, shelter and health care, for which access to victims is essential".⁴⁸⁷

498. In a resolution adopted in 1993 on the situation in Bosnia and Herzegovina, the UN General Assembly demanded that all parties concerned "facilitate the unhindered flow of humanitarian assistance, including the provision of water, electricity, fuel and communication... particularly to the safe areas".⁴⁸⁸

499. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN General Assembly noted that many of the past recommendations of the Special Rapporteur had not been fully implemented and urged the parties, all States and relevant organisations to give immediate consideration to them, including "the opening of humanitarian relief corridors to prevent the death and deprivation of the civilian population and to open Tuzla airport to relief deliveries".⁴⁸⁹

500. In a resolution adopted in 1994 on the situation of human rights in the Sudan, the UN General Assembly expressed its concern that "access by

⁴⁸³ UN Security Council, Statement by the President, UN Doc. S/PRST/2000/4, 11 February 2000, p. 2.

⁴⁸⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/2000/7, 13 March 2000, p. 2.

⁴⁸⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/2001/6, 2 March 2001, p. 1.

⁴⁸⁶ UN General Assembly, Res. 45/170, 18 December 1990, § 5.

⁴⁸⁷ UN General Assembly, Res. 46/182, 19 December 1991, Annex, § 6.

⁴⁸⁸ UN General Assembly, Res. 48/88, 20 December 1993, § 12.

⁴⁸⁹ UN General Assembly, Res. 49/196, 23 December 1994, § 30(a).

the civilian population to humanitarian assistance continues to be impeded, which represents a threat to human life and constitutes an offence to human dignity".⁴⁹⁰

501. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly called upon all parties in Kosovo to "ensure . . . unrestricted access within Kosovo of . . . personnel [belonging to the OSCE Kosovo Verification Mission]". It strongly condemned the denial of appropriate access by NGOs to Kosovo and called upon the FRY authorities "to take all measures necessary to eliminate these unacceptable practices forthwith" and recalled "the commitment to allow unhindered access to humanitarian organizations". The General Assembly further called upon the FRY authorities "to grant access to . . . Kosovo for all humanitarian aid workers". Lastly, it called upon the government of the FRY and all others concerned "to guarantee the unrestricted access of humanitarian organizations and the United Nations High Commissioner for Human Rights to Kosovo, and to allow the unhindered delivery of relief items".⁴⁹¹

502. In a resolution adopted in 1999 on the safety and security of humanitarian personnel and protection of United Nations personnel, the UN General Assembly called upon:

all Governments and parties in complex humanitarian emergencies, in particular in armed conflicts and in post-conflicts situations, in countries where humanitarian personnel are operating, in conformity with the relevant provisions of international law and national laws, to cooperate fully with the United Nations and other humanitarian agencies and organizations and to ensure the safe and unhindered access of humanitarian personnel in order to allow them to perform efficiently their tasks of assisting the affected civilian population, including refugees and internally displaced persons.⁴⁹²

503. In a resolution adopted in 2000 on a new international humanitarian order, the UN General Assembly called upon "all Governments and parties involved in complex humanitarian emergencies to ensure the safe and unhindered access of humanitarian personnel so as to allow them to perform efficiently their task of assisting the affected civilian populations".⁴⁹³

504. In a resolution adopted in 2000, the UN General Assembly urged all parties to the continuing conflict in the Sudan "to grant full, safe and unhindered access to international agencies and humanitarian organizations so as to facilitate by all means possible the delivery of humanitarian assistance, in conformity with international humanitarian law, to all civilians in need of protection and assistance".⁴⁹⁴

⁴⁹⁰ UN General Assembly, Res. 49/198, 23 December 1994, preamble.

⁴⁹¹ UN General Assembly, Res. 53/164, 9 December 1998, §§ 3, 10, 17 and 24.

⁴⁹² UN General Assembly, Res. 54/192, 17 December 1999, § 3.

⁴⁹³ UN General Assembly, Res. 55/73, 4 December 2000, § 4.

⁴⁹⁴ UN General Assembly, Res. 55/116, 4 December 2000, § 3(f).

505. In a resolution adopted in 1992 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights welcomed the proposal of its Special Rapporteur to open humanitarian relief corridors in order to prevent the imminent deaths of tens of thousands of people in the besieged cities.⁴⁹⁵

506. In a resolution adopted in 1993 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights urged all States and relevant organizations immediately to give serious consideration to “the call for the opening of humanitarian relief corridors to prevent the imminent death of tens of thousands of persons in besieged cities”.⁴⁹⁶

507. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights urged all States and relevant organisations to give immediate consideration to the Special Rapporteur’s call “for the opening of humanitarian relief corridors to prevent death and deprivation of the civilian population, and to open Tuzla airport to relief deliveries”.⁴⁹⁷

508. In a resolution adopted in 1995 on the situation of human rights in the Sudan, the UN Commission called upon the government of Sudan and all parties to the conflict

to permit international agencies, humanitarian organizations and donor governments to deliver humanitarian assistance to the civilian population and to cooperate with initiatives of the Department of Humanitarian affairs of the United Nations Secretariat and Operation Lifeline Sudan to deliver humanitarian assistance to all persons in need.⁴⁹⁸

509. In two resolutions adopted in 1997 and 1998 on the situation of human rights in the Sudan, the UN Commission on Human Rights called upon the government of Sudan and all parties to the conflict “to permit international agencies, humanitarian organizations and donor Governments to deliver humanitarian assistance to all war affected civilians”.⁴⁹⁹

510. In a resolution adopted in 1999 on the situation of human rights in East Timor, the UN Commission on Human Rights called upon the government of Indonesia “to ensure immediate access by humanitarian agencies to displaced persons, both in East Timor as well as West Timor and other parts of the Indonesian territory, and . . . to continue to allow the deployment of emergency humanitarian assistance”.⁵⁰⁰

⁴⁹⁵ UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 15.

⁴⁹⁶ UN Commission on Human Rights, Res. 1993/7, 23 February 1993, § 31(a).

⁴⁹⁷ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 35(a).

⁴⁹⁸ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 3.

⁴⁹⁹ UN Commission on Human Rights, Res. 1997/59, 15 April 1997, § 18; Res. 1998/67, 21 April 1998, § 3.

⁵⁰⁰ UN Commission on Human Rights, Res. 1999/S-4/1, 27 September 1999, § 5(e) and (f).

511. In a resolution adopted in 2000 on the situation in the Republic of Chechnya, the UN Commission on Human Rights urged the government of the Russian Federation:

to allow international humanitarian organizations, notably the Office of the United Nations High Commissioner for Refugees and the International Committee of the Red Cross, free and secure access to areas of internally displaced and war affected populations in the Republic of Chechnya and neighbouring republics, in accordance with international humanitarian law, to facilitate . . . the delivery of humanitarian aid to the victims in the region.⁵⁰¹

512. In a resolution adopted in 1995 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights appealed “to the international community, to the organizations of the United Nations system and to the Government of Iraq to facilitate the delivery and distribution of medicines and foodstuffs to the population of the various parts of the country”.⁵⁰²

513. In a resolution adopted in 1996 on the situation of human rights in Iraq, the UN Sub-Commission on Human Rights demanded that “the Government of Iraq immediately withdraw its military forces surrounding the marshlands regions in the south to allow access for the distribution by the United Nations of humanitarian supplies in this region”.⁵⁰³

514. In 1992, in a report on the situation in Somalia, the UN Secretary-General noted that the two main factions of the United Somali Congress had agreed that a number of sites in Mogadishu, namely the port, airports, hospitals, NGO locations and routes to and from food and non-food distribution points be declared “corridors and zones of peace”. Furthermore, he stated that “‘corridors of peace’ for the safe passage of relief workers and supplies and ‘zones of peace’ to enable target groups to receive assistance are of paramount importance”.⁵⁰⁴

515. In 1998, in a report on protection for humanitarian assistance to refugees and others in conflict situations, the UN Secretary-General stated that:

States have primary responsibility for ensuring that refugees, displaced persons and other vulnerable populations in conflict situations benefit from the necessary assistance and protection and that United Nations and other humanitarian organizations have safe and unimpeded access to these groups. However, States themselves often deny humanitarian access and defend their actions by appealing to the principle of national sovereignty in matters deemed essentially within their domestic jurisdiction. While full respect must be shown for the sovereignty, independence and territorial integrity of the States concerned, where States are unable or unwilling to meet their responsibilities towards refugees and others in conflict situations, the international community should ensure that victims receive the assistance and protection they need to safeguard their lives. Such action should not be regarded as

⁵⁰¹ UN Commission on Human Rights, Res. 2000/58, 25 April 2000, § 9.

⁵⁰² UN Sub-Commission on Human Rights, Res. 1995/3, 18 August 1995, § 4.

⁵⁰³ UN Sub-Commission on Human Rights, Res. 1996/5, 19 August 1996, § 3.

⁵⁰⁴ UN Secretary-General, Report on the situation in Somalia, Addendum: Consolidated Inter-Agency 90-day Plan of Action for Emergency Humanitarian Assistance to Somalia, UN Doc. S/23829/Add.1, 21 April 1992, §§ 59 and 96.

interference in the armed conflict or as an unfriendly act so long as it is undertaken in an impartial and non-coercive manner.⁵⁰⁵

516. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General stated that:

It is the obligation of States to ensure that affected populations have access to the assistance they require for their survival. If a State is unable to fulfil its obligation, the international community has a responsibility to ensure that humanitarian aid is provided. The rapid deployment of humanitarian assistance operations is critical when responding to the needs of civilians affected by armed conflict. Effective and timely humanitarian action requires unhindered access to those in need. Thus, humanitarian organizations are involved on a daily basis in negotiations with the parties to conflicts to obtain and maintain safe access to civilians in need, as well as guarantees of security for humanitarian personnel. In order to fulfil this task, humanitarian actors must be able to maintain a dialogue with relevant non-state actors without thereby lending them any political legitimacy.⁵⁰⁶

517. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General stated that:

In many conflicts, safe and unhindered access to vulnerable civilian populations is granted only sporadically, and is often subject to conditions, delayed, or even bluntly denied. The consequences for those populations are often devastating: entire communities are deprived of even basic assistance and protection.

...

Where Governments are prevented from reaching civilians because they are under the control of armed groups, they must allow impartial actors to carry out their humanitarian task.

In the report, the Secretary-General urged "the [Security] Council to actively engage the parties to each conflict in a dialogue aimed at sustaining safe access for humanitarian operations, and to demonstrate its willingness to act where such access is denied".⁵⁰⁷

518. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that "humanitarian organizations are providing aid under very difficult conditions. The problem of access is particularly acute. Some places have been inaccessible to aid convoys owing to snow or bad roads; others have been made inaccessible by the refusal of the parties to the conflict to allow convoys to pass."⁵⁰⁸

519. In 1997, in a report on a mission to the area occupied by rebels in eastern Zaire, the Special Rapporteur of the UN Commission on Human Rights

⁵⁰⁵ UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, § 16.

⁵⁰⁶ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 51.

⁵⁰⁷ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, §§ 14 and 20 and Recommendation 4.

⁵⁰⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1993/50, 10 February 1993, § 114.

denounced the fact that “UNHCR was unable to reach the [Lula refugee] camp because the [ADFL] refused to grant it access, on the usual grounds that it was a military threat”.⁵⁰⁹

520. In 1999, in a report on the human rights situation in East Timor, the UN High Commissioner for Human Rights held that “the Indonesian authorities must facilitate the immediate access of aid agencies to those in need . . . Air-drops must be deployed to assist the displaced.”⁵¹⁰

521. The Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, annexed to the 2000 United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo, while referring explicitly to the Code of Conduct of the Red Cross and Red Crescent Movement and NGOs in Disaster Relief, consider unimpeded access to affected populations to be of fundamental importance in order to ensure humanitarian assistance. The Principles, which are addressed to the international humanitarian community as well as to the political and military authorities, state that “Parties to the conflict should ensure unimpeded access for assessment, delivery and monitoring of humanitarian aid to potential beneficiaries. The assistance to affected areas should be provided in the most efficient manner and by the most accessible routes.”⁵¹¹

Other International Organisations

522. In a resolution on Sudan adopted in 1997, the APC-EU Joint Assembly condemned “the obstruction of humanitarian assistance to the people of Nuba Mountains and other areas by the Government of Sudan” and requested that the United Nations “challenge the Government of Sudan to ensure immediate and free access for humanitarian organizations and Operation Lifeline Sudan”.⁵¹²

523. In 1994, during a debate in the UN General Assembly on the situation in Bosnia and Herzegovina, the EU requested “free and unimpeded delivery of humanitarian supplies and the re-opening of Tuzla airport”.⁵¹³

524. In a Common Position adopted in 1998, the Council of the EU stated that the authorities of the FRY must grant access in Kosovo to the ICRC and other humanitarian organisations.⁵¹⁴

⁵⁰⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report on the mission carried out at the request of the High Commissioner for Human Rights between 25 and 29 March 1997 to the area occupied by rebels in eastern Zaire, UN Doc. E/CN.4/1997/6/Add.2, 2 April 1997, § 36.

⁵¹⁰ UN High Commissioner for Human Rights, Report on the human rights situation in East Timor, UN Doc. E/CN.4/S-4/CRP.1, 17 September 1999, § 51.

⁵¹¹ UN Office for the Coordination of Humanitarian Affairs, United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of Congo (January–December 2000), November 1999, Annex II, Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, p. 67, §§ 1 and 2.

⁵¹² APC-EU, Joint Assembly, Resolution on Sudan, 20 March 1997, § 3.

⁵¹³ EU, Statement of Germany on behalf of the EU before the UN General Assembly, UN Doc. A/49/PV.50, 3 November 1994, p. 19.

⁵¹⁴ EU, Council of the EU, Common Position, 19 March 1998, preamble.

525. In a declaration on Kosovo in 1998, the Council of the EU called upon the FRY President “to facilitate . . . unimpeded access for humanitarian organisations”.⁵¹⁵

526. In a resolution on Kosovo adopted in 1998, the European Parliament emphasised “the need for free and unrestricted access for international humanitarian organisations, such as the UNHCR and ICRC” to Kosovo.⁵¹⁶

527. In a resolution on Chechnya adopted in 1995, the Permanent Council of the OSCE called upon all parties to the conflict to ensure “full respect for international humanitarian law in the region of the Chechen crisis” and “free access to all areas of the region of the Chechen crisis for ICRC and UNHCR and all other humanitarian organisations active in the region”.⁵¹⁷

International Conferences

528. The 24th International Conference of the Red Cross in 1981 adopted a resolution on respect for international humanitarian law and humanitarian principles and support for the activities of the International Committee of the Red Cross in which it made a solemn appeal for “the ICRC be granted all the facilities necessary to discharge the humanitarian mandate confided to it by the international community”.⁵¹⁸

529. In 1992, at the Helsinki Summit of Heads of State or Government, CSCE participating States reaffirmed their commitment to “exhort all efforts to ensure access to the areas concerned” for the ICRC, Red Cross and Red Crescent Societies and UN organisations.⁵¹⁹

530. In a resolution on Bosnia and Herzegovina adopted in 1992, the 88th Inter-Parliamentary Conference in Stockholm insisted that “access be ensured for humanitarian assistance to all those in need”.⁵²⁰

531. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants urged all States to make every effort:

to provide the necessary support to the humanitarian organizations entrusted with granting protection and assistance to the victims of armed conflicts and . . . facilitate speedy and effective relief operations by granting to those humanitarian organizations access to the affected areas . . . in conformity with applicable rules of international humanitarian law.⁵²¹

⁵¹⁵ EU, Council of the EU, Declaration on Kosovo, 15 June 1998.

⁵¹⁶ European Parliament, Resolution on Kosovo, 16 July 1998, preamble, § I; Resolution on the situation in Kosovo, 8 October 1998, preamble, § K.

⁵¹⁷ OSCE, Permanent Council, Resolution on Chechnya, 3 February 1995, §§ 6 and 10.

⁵¹⁸ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. VI.

⁵¹⁹ CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 51.

⁵²⁰ 88th Inter-Parliamentary Conference, Stockholm, 7–12 September 1992, Resolution on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, § 4.

⁵²¹ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(8), *ILM*, Vol. 33, 1994, p. 301.

532. In a resolution adopted in 1993 on respect for international humanitarian law and support for humanitarian action in armed conflicts, the 90th Inter-Parliamentary Conference in Canberra welcomed “the fact that the United Nations has recently reaffirmed the concept of humanitarian assistance, including relief for civilian populations and the idea of establishing security corridors to ensure the free access of this relief to the victims”. It also called on “all States to understand the meaning of humanitarian action so as to avoid hindering it, to ensure rapid and effective relief operations by guaranteeing safe access to the regions affected”.⁵²²

533. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it emphasised “the importance for humanitarian organisations to have unimpeded access in times of armed conflict to civilian populations in need, in accordance with the applicable rules of international humanitarian law”. The Conference further stressed the obligation of all parties to a conflict “to accept, under the conditions prescribed by international humanitarian law, impartial humanitarian relief operations for the civilian population when it lacks supplies essential to its survival”.⁵²³

534. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the principles and action in international humanitarian assistance and protection in which it called upon States “to permit relief operations of a strictly humanitarian character for the benefit of the most vulnerable groups within the civilian population, when required by international humanitarian law” in situations where economic sanctions were imposed.⁵²⁴

535. In a meeting in 1999, the Foreign Ministers of the G-8 adopted, as a general principle on the political solution of the Kosovo crisis, the “unimpeded access to Kosovo by humanitarian aid organizations”.⁵²⁵

536. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that:

every possible effort is made to provide the civilian population with all essential goods and services for its survival; [and that] rapid and unimpeded access to the civilian population is given to impartial humanitarian organizations in accordance with international humanitarian law in order that they can provide assistance and protection to the population.

⁵²² 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble and § 2(i).

⁵²³ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, §§ A(i) and E(b).

⁵²⁴ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. IV, § F(2).

⁵²⁵ G-8, Statement by the Chairman on the conclusion of the meeting of the Foreign Ministers, Petersberg Centre, 6 May 1999, annexed to UN Security Council, Res. 1244, 10 June 1999, Annex 1.

It further proposed that:

conditions of security are guaranteed in order that the ICRC, in accordance with international humanitarian law, has access to, and can remain present in, all situations of armed conflict to protect the victims thereof and, in cooperation with National Societies and the International Federation, to provide them with the necessary assistance.⁵²⁶

537. The Final Declaration adopted in 2002 by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict stressed that “we... undertake to act in order to offer humanitarian organizations unimpeded access in time of armed conflict to civilian populations in need and to facilitate the free flow of relief materials”.⁵²⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

538. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

539. The ICRC Commentary on the Additional Protocols, in analysing Article 18(2) AP II, notes that:

The fact that consent is required does not mean that the decision is left to the discretion of the parties. If the survival of the population is threatened and a humanitarian organization fulfilling the required conditions of impartiality and non-discrimination is able to remedy this situation, relief actions must take place. In fact, they are the only way of combating starvation when local resources have been exhausted. The authorities responsible for safeguarding the population in the whole of the territory of the State cannot refuse such relief without good grounds. Such a refusal would be equivalent to a violation of the rule prohibiting the use of starvation as a method of combat as the population would be left deliberately to die of hunger without any measures being taken.⁵²⁸

540. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that the Transitional Government of Salisbury “permit continued material and medical relief assistance, by the ICRC and other humanitarian organizations, to the civilian population in need as a consequence of the hostilities, and allow the ICRC to resume its

⁵²⁶ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, §§ 1(g) and 4.

⁵²⁷ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, § 14.

⁵²⁸ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4885.

relief distribution in those areas where they have been forbidden by the security forces".⁵²⁹

541. In a press release issued in 1984 concerning the victims of the Afghan conflict, the ICRC stated that:

In spite of repeated offers of services to the Afghan government and representations to the government of the USSR, the ICRC has only on two occasions – during brief missions in 1980 and 1982 – been authorized to act inside Afghanistan. Consequently, the ICRC has to date been able to carry out very few of the assistance and protection activities urgently needed by the numerous victims of the conflict on Afghan territory.⁵³⁰

542. The ICRC Annual Report for 1986 details the difficulties faced by the organisation in its operations in southern Sudan. The report recounts how "time and again, assistance operations ready to be implemented had to be cancelled at the last minute, on account of opposition to ICRC intervention expressed by one or other of the parties to the conflict".⁵³¹

543. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on humanitarian assistance in situations of armed conflict in which it called upon all parties to armed conflicts and, where applicable, any High Contracting Party

to allow free passage of medicines and medical equipment, foodstuffs, clothing and other supplies essential to the survival of the civilian population of another Contracting Party, even if the latter is its adversary, it being understood that they are entitled to ensure that the consignments are not diverted from their destination.⁵³²

544. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict, in which it reminded the authorities concerned and the armed forces under their command of "their obligation to apply international humanitarian law, in particular . . . the obligation to allow humanitarian and impartial relief operations for the civilian population when supplies essential for its survival are lacking".⁵³³

545. In a press release issued in 1992, the ICRC appealed to all the parties to the conflict in Bosnia and Herzegovina "to allow the safe and secure passage of humanitarian aid".⁵³⁴

⁵²⁹ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 6, *IRRC*, No. 209, 1979, p. 89.

⁵³⁰ ICRC, Press Release No. 1488, Victims of the Afghan conflict: Position of the ICRC, 20 May 1984.

⁵³¹ ICRC, *Annual Report 1986*, Geneva, 1987, pp. 24–27.

⁵³² International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 12, § b.

⁵³³ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 13, § 1.

⁵³⁴ ICRC, Press Release, ICRC denies allegations, ICRC Belgrade, 22 May 1992.

546. In a press release issued in 1992, the ICRC urgently called on all the parties involved in the conflict in Tajikistan “to facilitate the work of its delegates [on] behalf of all the victims to the conflict”.⁵³⁵

547. In a press release issued in 1993 on the situation in eastern Bosnia and Herzegovina, the ICRC called on all parties “to facilitate ICRC access to all the victims”.⁵³⁶

548. In an appeal issued in 1993 on the situation in central Bosnia and Herzegovina, the ICRC stated that it trusted the parties to “continue to grant its representatives free access to the civilian population in order to assist all victims affected by the fightings throughout Central Bosnia”.⁵³⁷

549. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “to facilitate relief operations for . . . the civilian population”.⁵³⁸

550. In a communication to the press issued in 1993 concerning the situation in Liberia, the ICRC stated that “the announcement made during the peace negotiations in Geneva that the parties agreed to let humanitarian aid reach all those in need is encouraging for the ICRC, which insists on immediate implementation of the agreement”.⁵³⁹

551. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on principles of humanitarian assistance in which it noted that States had

the duty – which is in the first instance theirs – to assist people who are placed *de jure* or *de facto* under their authority and, should they fail to discharge this duty, the obligation to authorize humanitarian organizations to provide such assistance, to grant such organizations access to the victims and to protect their action.⁵⁴⁰

552. In 1994, in the context of an internal conflict, the ICRC urged the creation of a neutral humanitarian area through which it could reach all needy persons in combat zones.⁵⁴¹

553. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that:

The parties to the conflict have a duty to ensure the provision of supplies essential to the survival of the civilian population in the territory under their

⁵³⁵ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

⁵³⁶ ICRC, Press Release No. 1744, Eastern Bosnia: ICRC unable to assist conflict victims, 17 April 1993.

⁵³⁷ ICRC, Press Release, ICRC Appeal for respect for international humanitarian law in central Bosnia, ICRC Zagreb, 20 April 1993.

⁵³⁸ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

⁵³⁹ ICRC, Communication to the Press No. 93/22, Liberia: ICRC Concerned about 110,000 People Facing Starvation, 22 July 1993.

⁵⁴⁰ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 11, § 1(b).

⁵⁴¹ ICRC archive document.

control . . . [I]f the civilian population is not adequately provided for, relief actions which are exclusively humanitarian and impartial in character and conducted without any adverse distinction, such as those undertaken by the ICRC, shall be authorized, facilitated and respected.⁵⁴²

554. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "relief operations aimed at the civilian population which are exclusively humanitarian, impartial and non-discriminatory shall be facilitated and respected".⁵⁴³

555. In a press release issued in 1994, the ICRC urgently called on all the parties involved in the conflict in Chechnya "to facilitate its delegates' humanitarian work".⁵⁴⁴

556. In a communication to the press issued in 1997 in connection with the conflict in Zaire (DRC), the ICRC requested that the ADFL grant its delegates unrestricted access to victims of the armed conflict. It further demanded that all concerned provide "immediate access to these people in desperate need of help".⁵⁴⁵

557. In a communication to the press issued in 2001 on the situation in Afghanistan, the ICRC stated that:

The warring parties have the duty to ensure that the basic needs of the civilian population in the territory under their control are met as far as possible and to allow the passage of essential relief supplies intended for civilians. They must authorize and facilitate impartial humanitarian relief operations.⁵⁴⁶

VI. Other Practice

558. In a resolution adopted at its Wiesbaden Session in 1975, the Institute of International Law stated that "in cases where the territory controlled by one party can be reached only by crossing the territory controlled by the other party . . . free passage over such territory should be granted to any relief consignment, at least insofar as is provided for in Article 23 [GC IV]".⁵⁴⁷

⁵⁴² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § IV, *IRRC*, No. 320, 1997, p. 505.

⁵⁴³ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § IV, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

⁵⁴⁴ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.

⁵⁴⁵ ICRC, Communication to the Press No. 97/08, Zaire: ICRC demands access to conflict victims, 2 April 1997.

⁵⁴⁶ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

⁵⁴⁷ Institute of International Law, Wiesbaden Session, Resolution III, The Principle of Non-Intervention in Civil Wars, 14 August 1975, Article 4.2.

559. In a resolution adopted at its Santiago de Compostela Session in 1989, the International Law Institute stated that “States should not arbitrarily reject assistance”.⁵⁴⁸

560. Principles 5, 6 and 12 of the Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the IHL in 1993, state that:

National authorities, national and international organizations whose statutory mandates provide for the possibility of rendering humanitarian assistance, such as the ICRC, UNHCR, other organizations of the UN system, and professional humanitarian organizations, have the right to offer such assistance when the conditions laid down in the present Principles are fulfilled. This offer should not be regarded as an unfriendly act or as interference in a State’s internal affairs. The authorities of the States concerned, in the exercise of their sovereign right, should extend their cooperation concerning the offer of humanitarian assistance to their populations.

...

For the implementation of the right to humanitarian assistance it is essential to ensure the access of victims to potential donors, and access of qualified national and international organizations, States and other donors to the victims when their offer of humanitarian assistance is accepted.

...

In order to verify whether the relief operation or assistance rendered is in conformity with the relevant rules and declared objectives, the authorities concerned may exercise the necessary control, on condition that such control does not unduly delay the providing of humanitarian assistance.⁵⁴⁹

561. In 1994, in a meeting with the ICRC, the leader of an armed opposition group agreed to allow the ICRC “continued access even when it restricted it to any government personnel be they military or civilian”.⁵⁵⁰

562. A report by the Memorial Human Rights Center documenting Russia’s operation in the Chechen village of Samashki in April 1995 alleged that the Russian forces had impeded access by humanitarian aid personnel to the village, thereby depriving the wounded of essential medical care. The report stated that:

Over the course of several days, the ICRC (which was based in Nazran) attempted to drive to the village, but Russian troops did not allow them to pass . . . ITAR-TASS reported that an EMERCOM convoy from Ingushetia with volunteer doctors was stopped at the checkpoint near Samashki and not allowed to pass through to the village. Médecins sans Frontières representatives were also not allowed through during that time.⁵⁵¹

⁵⁴⁸ Institute of International Law, Santiago de Compostela Session, Resolution III, The Protection of Human Rights and the Principle of Non-intervention in Internal Affairs of States, 13 September 1989, Article 5.

⁵⁴⁹ IHL, Guiding Principles on the Right to Humanitarian Assistance, Principles 5, 6 and 12, *IRRC*, No. 297, 1993, pp. 522–523 and 525.

⁵⁵⁰ ICRC archive document.

⁵⁵¹ Memorial Human Rights Center, *By All Available Means: the Russian Federation Ministry of Internal Affairs Operation in the Village of Samashki: April 7–8, 1995*, Moscow, 1996, § 10, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1415.

563. In 1996, in a statement on the humanitarian situation in Angola, UNITA stated that “all of the UNITA political, military and administrative authorities, and its militants, in areas under its control, have been directed to provide full cooperation and facilities to humanitarian organizations . . . in order to best carry out their activities”.⁵⁵²

Impediment of humanitarian relief

I. Treaties and Other Instruments

Treaties

564. Pursuant to Article 8(2)(b)(xxv) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts: “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.

Other Instruments

565. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxv), the following constitutes a war crime in international armed conflicts: “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions”.

II. National Practice

Military Manuals

566. Germany’s Military Manual states that, in the case of blockade, “it is . . . prohibited to hinder relief shipments for the civilian population”.⁵⁵³

567. Switzerland’s Basic Military Manual states that “it is prohibited to starve the civilian population . . . by impeding relief actions in favour of the population in need”.⁵⁵⁴

568. The UK Military Manual provides that:

The Occupant must not in any way whatsoever divert relief consignments from their intended purpose except in cases of urgent necessity and then only in the interest of the population of the occupied territory as a whole and with the consent

⁵⁵² UNITA, General Secretariat & General Staff, Statement on the Humanitarian Situation in Angola, Bailundo, 1 January 1996, § 5.

⁵⁵³ Germany, *Military Manual* (1992), § 1051.

⁵⁵⁴ Switzerland, *Basic Military Manual* (1987), Article 147(b).

of the Protecting Power . . . The Occupant must facilitate the rapid distribution of these consignments.⁵⁵⁵

National Legislation

569. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "the wilful impeding of relief supplies for civilians" in international armed conflicts.⁵⁵⁶

570. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵⁵⁷

571. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "deliberately starving civilians as a method of warfare . . . by intentionally impeding the sending of relief provided for in the Geneva Conventions" constitutes a war crime in international armed conflicts.⁵⁵⁸

572. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁵⁵⁹

573. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, obstructs or impedes . . . the realisation of medical and humanitarian tasks which, according to the rules of international humanitarian law, can and must take place".⁵⁶⁰

574. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁵⁶¹

575. Under the Draft Amendments to the Penal Code of El Salvador, a prison sentence may be imposed on "anyone who [during an international or internal armed conflict] obstructs or impedes the medical, sanitary or relief personnel . . . in the realisation of their . . . humanitarian tasks which, in accordance with the rules of international humanitarian law, may or shall be conducted".⁵⁶²

576. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, is a crime,

⁵⁵⁵ UK, *Military Manual* (1958), § 541.

⁵⁵⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.67(1)(a)(ii).

⁵⁵⁷ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁵⁵⁸ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(x).

⁵⁵⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁵⁶⁰ Colombia, *Penal Code* (2000), Article 153.

⁵⁶¹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁵⁶² El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Omission y obstaculización de medidas de socorro y asistencia humanitaria".

including “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions” in international armed conflicts.⁵⁶³

577. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, “impedes relief supplies, in contravention of international humanitarian law”.⁵⁶⁴

578. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Article 23 GCIV, and of AP I, including violations of Article 70(3) AP I, is a punishable offence.⁵⁶⁵

579. Under Mali’s Penal Code, “deliberately starving civilians as a method of warfare, by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions” is a war crime in international armed conflicts.⁵⁶⁶

580. Under the International Crimes Act of the Netherlands, “intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to their survival, including wilfully impeding relief supplies as provided for under the Geneva Conventions” is a crime, when committed in an international armed conflict.⁵⁶⁷

581. Under New Zealand’s International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁵⁶⁸

582. Nicaragua’s Draft Penal Code punishes “anyone who [during an international or internal armed conflict] obstructs or impedes the medical, sanitary or relief personnel . . . in the realisation of their . . . humanitarian tasks which, in accordance with the rules of international humanitarian law, may or shall be conducted”.⁵⁶⁹

583. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.⁵⁷⁰

584. The Act on Child Protection of the Philippines contains an article on “children in situations of armed conflicts” which states that “delivery of basic social services such as . . . emergency relief services shall be kept unhampered”.⁵⁷¹

⁵⁶³ Georgia, *Criminal Code* (1999), Article 413(d).

⁵⁶⁴ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(5).

⁵⁶⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁶⁶ Mali, *Penal Code* (2001), Article 31(i)(25).

⁵⁶⁷ Netherlands, *International Crimes Act* (2003), Article 5(5)(1).

⁵⁶⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁵⁶⁹ Nicaragua, *Draft Penal Code* (1999), Article 463.

⁵⁷⁰ Norway, *Military Penal Code as amended* (1902), § 108.

⁵⁷¹ Philippines, *Act on Child Protection* (1992), Article X, Section 22(c).

585. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁵⁷²

586. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxv) of the 1998 ICC Statute.⁵⁷³

National Case-law

587. No practice was found.

Other National Practice

588. In the *Application of Genocide Convention case (Provisional Measures)* in 1993, Bosnia and Herzegovina requested that the ICJ indicate provisional measures against the FRY, stating that:

Yugoslavia (Serbia and Montenegro) and its agents and surrogates are under an obligation to cease and desist immediately from its breaches of the foregoing legal obligations, and is under a particular duty to cease and desist immediately: . . .

- from the interruption of, interference with, or harassment of humanitarian relief supplies to the citizens of Bosnia and Herzegovina by the international community.⁵⁷⁴

589. In 1992, during a debate in the UN Security Council, China condemned the hampering of the delivery of humanitarian aid in Bosnia and Herzegovina and declared that it was “deeply concerned with and disturbed by such a situation”.⁵⁷⁵

590. In 1992, in a letter addressed to the President of the UN Security Council, Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey stated that “the unhindered delivery of humanitarian relief to all parts of Bosnia and Herzegovina, including the population of Sarajevo, should get under way immediately. To this end . . . effective measures must be taken to stop anyone from hindering the delivery of humanitarian assistance.”⁵⁷⁶

591. In 1994, in a statement in the lower house of parliament, a German Minister of State, in line with the other members of the EU, condemned the hampering of humanitarian aid in Sudan.⁵⁷⁷

592. In 1996, during a debate in the UN General Assembly, Germany called upon all parties to the conflict in Afghanistan not to hamper humanitarian aid.⁵⁷⁸

⁵⁷² Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁵⁷³ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁵⁷⁴ ICJ, *Application of Genocide Convention case (Provisional Measures)*, 8 April 1993, § 2(q).

⁵⁷⁵ China, Statement before the UN Security Council, UN Doc. S/PV.3082, 30 May 1992, p. 8.

⁵⁷⁶ Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey, Letter dated 5 October 1992 to the President of the UN Security Council, UN Doc. S/24620, 6 October 1992, § (a).

⁵⁷⁷ Germany, Lower House of Parliament, Statement by a Minister of State, 3 March 1994, *Plenarprotokoll* 12/213, p. 18469.

⁵⁷⁸ Germany, Statement before the UN General Assembly, UN Doc. A/51/PV.84, 13 December 1996, p. 7.

593. In 1993, during a debate in the UN Security Council, the UK representative stated that “the United Kingdom Government has been horrified at the continued evidence of massive breaches of international humanitarian law and human rights in the former Yugoslavia . . . [including] the deliberate obstruction of humanitarian relief convoys”.⁵⁷⁹

III. Practice of International Organisations and Conferences

United Nations

594. In a resolution on Bosnia and Herzegovina adopted in 1992, the UN Security Council demanded that “all parties and others concerned create immediately the necessary conditions for unimpeded delivery of humanitarian supplies to Sarajevo and other destinations in Bosnia and Herzegovina”.⁵⁸⁰

595. In a resolution on Bosnia and Herzegovina adopted in 1992, the UN Security Council underlined “the urgency of quick delivery of humanitarian assistance to Sarajevo and its environs”. It further stressed that, if the delivery of humanitarian assistance was hampered, it did not “exclude other measures to deliver humanitarian aid to Sarajevo and its environs”.⁵⁸¹

596. In a resolution adopted in 1992 on humanitarian assistance to Sarajevo and other parts of Bosnia and Herzegovina, the UN Security Council expressed its dismay at the “continuation of conditions that impede the delivery of humanitarian supplies to destinations within Bosnia and Herzegovina and the consequent suffering of the people of that country”.⁵⁸²

597. In a resolution adopted in 1992, the UN Security Council expressed “grave alarm at continuing reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia including . . . impeding the delivery of food and medical supplies to the civilian population”.⁵⁸³

598. In a resolution adopted in 1992, the UN Security Council condemned “all violations of international humanitarian law, including . . . the deliberate impeding of the delivery of food and medical supplies to the civilian population of the Republic of Bosnia and Herzegovina” and reaffirmed that “those that commit or order the commission of such acts will be held individually responsible in respect of such acts”.⁵⁸⁴

599. In a resolution adopted in 1992, the UN Security Council determined that “the magnitude of the human tragedy caused by the conflict in Somalia, further exacerbated by the obstacles being created to the distribution of humanitarian assistance, constitutes a threat to international peace and security”. It also strongly condemned “all violations of international humanitarian law

⁵⁷⁹ UK, Statement before the UN Security Council, UN Doc. S/PV.3217, 25 May 1993, p. 17.

⁵⁸⁰ UN Security Council, Res. 758, 8 June 1992, § 8.

⁵⁸¹ UN Security Council, Res. 761, 29 June 1992, preamble and § 4.

⁵⁸² UN Security Council, Res. 770, 13 August 1992, preamble.

⁵⁸³ UN Security Council, Res. 771, 13 August 1992, preamble.

⁵⁸⁴ UN Security Council, Res. 787, 16 November 1992, § 7.

occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population" and affirmed that "those who commit or order the commission of such acts will be held individually responsible in respect of such acts".⁵⁸⁵

600. In a resolution adopted in 1993 regarding the situation in Bosnia and Herzegovina, the UN Security Council reiterated its condemnation of "the obstruction, primarily by the Bosnian Serb party, of the delivery of humanitarian assistance".⁵⁸⁶

601. In a resolution adopted in 1994 in the context of the conflict in Angola, the UN Security Council condemned "any action, including laying of landmines, which threatens the unimpeded delivery of humanitarian assistance to all in need in Angola".⁵⁸⁷ This condemnation was reiterated in a subsequent resolution.⁵⁸⁸

602. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council declared itself "gravely concerned that the regular obstruction of deliveries of humanitarian assistance, and the denial of the use of Sarajevo airport, by the Bosnian Serb side threaten the ability of the United Nations in Bosnia and Herzegovina to carry out its mandate".⁵⁸⁹

603. In a resolution on Sierra Leone adopted in 1997, the UN Security Council called upon the junta "to cease all interference with the delivery of humanitarian assistance to the people of Sierra Leone".⁵⁹⁰

604. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council urged all Afghan factions and, in particular the Taliban, "to facilitate the work of the international humanitarian organizations and to ensure unimpeded access and adequate conditions for the delivery of aid by such organizations to all in need of it".⁵⁹¹

605. In 1992, in a statement by its President in the context of the conflict in Bosnia and Herzegovina, the UN Security Council demanded "the immediate cessation of attacks and all actions aimed at impeding the distribution of humanitarian assistance and at forcing the inhabitants of Sarajevo to leave the city".⁵⁹²

606. In January 1993, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed:

its demand that all parties and others concerned, in particular Serb paramilitary units, cease and desist forthwith from all violations of international humanitarian law being committed in the territory of Bosnia and Herzegovina, including in particular the deliberate interference with humanitarian convoys. The Council warns the

⁵⁸⁵ UN Security Council, Res. 794, 3 December 1992, preamble and § 5.

⁵⁸⁶ UN Security Council, Res. 836, 4 June 1993, preamble.

⁵⁸⁷ UN Security Council, Res. 945, 29 September 1994, § 10.

⁵⁸⁸ UN Security Council, Res. 952, 27 October 1994, § 7.

⁵⁸⁹ UN Security Council, Res. 998, 16 June 1995, preamble.

⁵⁹⁰ UN Security Council, Res. 1132, 8 October 1997, § 2.

⁵⁹¹ UN Security Council, Res. 1193, 28 August 1998, § 9.

⁵⁹² UN Security Council, Statement by the President, UN Doc. S/24932, 9 December 1992.

parties concerned of serious consequences, in accordance with relevant resolutions of the Security Council, if they continue to impede the delivery of humanitarian relief assistance.⁵⁹³

607. In February 1993, in a statement by its President regarding the conflict in Bosnia and Herzegovina, the UN Security Council noted with deep concern that, "notwithstanding the Council's demand in that statement [of 25 January 1993], relief efforts continue to be impeded". It further condemned "the blocking of humanitarian convoys and the impeding of relief supplies, which place at risk the civilian population of the Republic of Bosnia and Herzegovina".⁵⁹⁴

608. In February 1993, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council expressed its concern that:

in spite of its repeated demands, relief efforts continue to be impeded by Serb paramilitary units, especially in the eastern part of the country, namely in the enclaves of Srebrenica, Cerska, Goražde and Žepa . . .

It regards the blockade of relief efforts as a serious impediment to a negotiated settlement . . .

The deliberate impeding of the delivery of food and humanitarian relief essential for the survival of the civilian population in Bosnia and Herzegovina constitutes a violation of the Geneva Conventions of 1949 and the Council is committed to ensuring that individuals responsible for such acts are brought to justice.

The Security Council added that it strongly condemned "once again the blocking of humanitarian convoys that has impeded the delivery of humanitarian supplies".⁵⁹⁵

609. In April 1993, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council stated that it was:

shocked by and extremely alarmed at the dire and worsening humanitarian situation which has developed in Srebrenica . . . following the unacceptable decision of the Bosnian Serb party not to permit any further humanitarian aid to be delivered to that town . . .

Recognizing the imperative need to alleviate, with the utmost urgency, the sufferings of the population in and around Srebrenica, who are in desperate need of food, medicine, clothes and shelter, the Council demands that the Bosnian Serb party cease and desist forthwith from all violations of international humanitarian law, including in particular the deliberate interference with humanitarian convoys.

The Council added that the blocking of UN humanitarian relief efforts was directly related to the practice of "ethnic cleansing".⁵⁹⁶

610. In July 1993, in a statement by its President regarding the situation in Sarajevo in Bosnia and Herzegovina, the UN Security Council demanded "an

⁵⁹³ UN Security Council, Statement by the President, UN Doc. S/25162, 25 January 1993, p. 1.

⁵⁹⁴ UN Security Council, Statement by the President, UN Doc. S/25302, 17 February 1993, p. 1.

⁵⁹⁵ UN Security Council, Statement by the President, UN Doc. S/25334, 25 February 1993, pp. 1 and 2.

⁵⁹⁶ UN Security Council, Statement by the President, UN Doc. S/25520, 3 April 1993, p. 1.

end... to the blocking of, and interference with, the delivery of humanitarian relief by both the Bosnian Serb and the Bosnian Croat parties".⁵⁹⁷

611. In 1994, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council deplored "the failure of the parties to honour the agreements they have signed... to permit the delivery of humanitarian assistance". It also strongly deplored "the abhorrent practice of deliberate obstruction of humanitarian relief convoys by any party". The Council demanded that "all parties fully abide by their commitments in this regard and facilitate timely delivery of humanitarian aid".⁵⁹⁸

612. In 1994, in a statement by its President regarding the situation in Haiti, the UN Security Council stated that it:

attaches great importance to humanitarian assistance in Haiti, including the unimpeded delivery and distribution of fuel used for humanitarian purposes. It will hold responsible any authorities and individuals in Haiti who might in any way interfere with the delivery and distribution of humanitarian assistance under the overall responsibility of PAHO or who fail in their responsibility to ensure that this delivery and distribution benefits the intended recipients: those in need of humanitarian assistance.⁵⁹⁹

613. In 1994, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council noted with particular concern "reports of the recurrent obstruction and looting of humanitarian aid convoys destined for the civilian population of Maglaj, including the most recent incident which took place on 10 March 1994, in which six trucks were prevented from reaching the town".⁶⁰⁰

614. In 1994, in a statement by its President regarding the situation in Rwanda, the UN Security Council condemned:

the ongoing interference by [the former Rwandan leaders and former government forces and militias] and individuals in the provision of humanitarian relief, and is deeply concerned that this interference has already led to the withdrawal of some non-governmental agencies responsible for the distribution of relief supplies within the [refugee] camps.⁶⁰¹

615. In 1996, in a statement by its President in the context of the conflict in Somalia, the UN Security Council considered:

the uninterrupted delivery of humanitarian assistance to be a crucial factor in the overall security and stability of Somalia. In this respect, the closure of Mogadishu

⁵⁹⁷ UN Security Council, Statement by the President, UN Doc. S/26134, 22 July 1993, p. 1.

⁵⁹⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/1, 7 January 1994, p. 1.

⁵⁹⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/2, 10 January 1994, p. 1.

⁶⁰⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/11, 14 March 1994, p. 1.

⁶⁰¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/75, 30 November 1994, p. 1.

main seaport and other transportation facilities severely aggravates the present situation and poses a potential major impediment to future emergency deliveries. The Council calls upon the Somali parties and factions to open those facilities unconditionally.⁶⁰²

616. In 1996, in a statement by its President regarding the situation in Afghanistan, the UN Security Council called on the parties involved “to end the hostilities forthwith and not to obstruct the delivery of humanitarian aid and other needed supplies to the innocent civilians of the city”.⁶⁰³

617. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council expressed its dismay at “acts of violence which have hampered the delivery of humanitarian assistance”.⁶⁰⁴

618. In 1997, in a statement by its President regarding the situation in the Great Lakes region, the UN Security Council expressed “concern at reports of obstruction of humanitarian assistance efforts”, but noted that “humanitarian access has improved recently”.⁶⁰⁵

619. In 1997, in a statement by its President regarding the situation in Sierra Leone, the UN Security Council called upon the military junta “to cease all interference with the delivery of humanitarian assistance to the people of Sierra Leone”.⁶⁰⁶

620. In July 1998, in a statement by its President regarding the situation in Afghanistan, the UN Security Council called upon all Afghan factions “to lift unconditionally any blockade of humanitarian relief supplies”.⁶⁰⁷

621. In August 1998, in a statement by its President regarding the situation in Afghanistan, the UN Security Council called upon all Afghan parties and, in particular, the Taliban, “to take the necessary steps to secure the uninterrupted supply of humanitarian aid to all in need of it and in this connection not to create impediments to the activities of the United Nations humanitarian agencies and international humanitarian organizations”.⁶⁰⁸

622. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the UN General Assembly expressed “grave alarm at continuing reports of widespread violations of international humanitarian law...including...

⁶⁰² UN Security Council, Statement by the President, UN Doc. S/PRST/1996/4, 24 January 1996, p. 2.

⁶⁰³ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/6, 15 February 1996, p. 1.

⁶⁰⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/22, 24 April 1997, p. 1.

⁶⁰⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/24, 30 April 1997, p. 1.

⁶⁰⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/42, 6 August 1997, p. 2.

⁶⁰⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998, p. 2.

⁶⁰⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/24, 6 August 1998, p. 2.

impeding the delivery of food and medical supplies to the civilian population".⁶⁰⁹

623. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN General Assembly condemned "all deliberate impedance of the delivery of food, medical and other supplies essential for the civilian population, which constitutes a serious violation of international humanitarian law and international human rights law" and demanded that "all parties ensure that all persons under their control cease such acts".⁶¹⁰ This condemnation and demand were repeated in a subsequent resolution in 1995.⁶¹¹

624. In a resolution adopted in 1997 on the situation of human rights in the Sudan, the UN General Assembly expressed "its outrage at the use by all parties to the conflict of military force to disrupt . . . relief efforts" and called for "those responsible for such actions to be brought to justice".⁶¹²

625. In a resolution adopted in 1997 on the situation of human rights in Afghanistan, the UN General Assembly requested "all the parties in Afghanistan to lift the restrictions imposed on the international aid community and allow the free transit of food and medical supplies to all populations of the country".⁶¹³

626. In a resolution adopted in 1983, the UN Commission on Human Rights called upon all parties to the conflict in El Salvador "to co-operate fully and not to interfere with the activities of humanitarian organisations dedicated to alleviating the suffering of the civilian population wherever these organisations operate in El Salvador".⁶¹⁴

627. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights stated that it considered that "the deliberate impeding of delivery of food, medical and other supplies essential for the civilian population could constitute a serious violation of international humanitarian law".⁶¹⁵

628. In a resolution adopted in 1994 on the situation of human rights in Bosnia and Herzegovina, the UN Commission on Human Rights strongly condemned "the strategy of strangulation of populations by obstructing food supplies and other essentials to the civilian populations".⁶¹⁶

629. In a resolution adopted in 1995 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed "its outrage at the use of military force by all parties to the conflict to disrupt . . . relief efforts aimed

⁶⁰⁹ UN General Assembly, Res. 46/242, 25 August 1992, § 9.

⁶¹⁰ UN General Assembly, Res. 49/196, 23 December 1994, § 14.

⁶¹¹ UN General Assembly, Res. 50/193, 22 December 1995, § 13.

⁶¹² UN General Assembly, Res. 52/140, 12 December 1997, § 2.

⁶¹³ UN General Assembly, Res. 52/145, 12 December 1997, § 16.

⁶¹⁴ UN Commission on Human Rights, Res. 1983/29, 8 March 1983 § 10.

⁶¹⁵ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 11.

⁶¹⁶ UN Commission on Human Rights, Res. 1994/75, 9 March 1994, § 1.

at assisting civilian populations" and called for "an end to such practices and for those responsible for such actions to be brought to justice".⁶¹⁷

630. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights condemned "all deliberate and arbitrary impeding of the delivery of food, medical and other supplies essential for the civilian population . . . which can constitute a serious violation of international humanitarian law".⁶¹⁸

631. In a resolution adopted in 1996 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed deep concern that "access of international relief organizations to civilian populations critically at risk . . . continues to be severely impeded, violating international humanitarian law . . . and representing a threat to human life that constitutes an offence to human dignity".⁶¹⁹

632. In a resolution adopted in 1998 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed "its outrage at the use by all parties to the conflict of military force to disrupt . . . relief efforts".⁶²⁰

633. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General complained about the "failure of warring parties to admit the delivery of certain food items because they are perceived as jeopardizing the objectives of their war effort". He also noted that "in times of conflict, many Governments often constitute the major impediment to any meaningful humanitarian assistance and protection".⁶²¹

634. In 1998, in an analytical report on "Minimum standards of humanity", the UN Secretary-General drew attention to the fact that civilians "die from starvation or disease, when relief supplies are arbitrarily withheld from them".⁶²²

635. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that "the humanitarian nature of aid convoys is being respected less and less and all parties to the conflict are creating obstacles to the delivery of humanitarian aid to those in need".⁶²³

636. In 1997, in a report on the situation of human rights in Zaire (DRC), the Special Rapporteur of the UN Commission on Human Rights denounced the fact that:

Humanitarian assistance has been impeded by all parties to the conflict. In the area controlled by AFDL [ADFL], ICRC complained on 10 December of encountering

⁶¹⁷ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 18.

⁶¹⁸ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 17.

⁶¹⁹ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble.

⁶²⁰ UN Commission on Human Rights, Res. 1998/67, 21 April 1998, § 3.

⁶²¹ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, §§ 17 and 47.

⁶²² UN Secretary-General, Analytical report submitted pursuant to UN Commission on Human Rights resolution 1997/21, UN Doc. E/CN.4/1998/87, 5 January 1998, § 27.

⁶²³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1993/50, 10 February 1993, § 117.

difficulties when entering the [refugee] camps, a complaint echoed by humanitarian NGOs. In the areas controlled by the Zairian Government, humanitarian action was generally accepted, although under the constant threat of closing the camps and expelling the refugees. Since the Air Liberia aircraft accident in July, however, access has become more difficult . . . IOM . . . was prevented from acting in Zaire on 27 September; all agencies came under suspicion.⁶²⁴

The Rapporteur added that “while it is not true to say that the agencies are permanently and systematically prevented from entering the refugee camps, it is often difficult for them to do so, leading to delays, which are extremely costly in terms of human lives”.⁶²⁵

637. The Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, annexed to the 2000 United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo, while referring explicitly to the Code of Conduct of the Red Cross and Red Crescent Movement and NGOs in Disaster Relief, consider unimpeded access to affected populations to be of fundamental importance in order to ensure humanitarian assistance. The Principles, which are addressed to the international humanitarian community as well as to the political and military authorities, state that “Parties to the conflict should ensure unimpeded access for assessment, delivery and monitoring of humanitarian aid to potential beneficiaries. The assistance to affected areas should be provided in the most efficient manner and by the most accessible routes.”⁶²⁶

Other International Organisations

638. In a resolution on Sudan adopted in 1997, the APC-EU Joint Assembly condemned “the obstruction of humanitarian assistance to the people of Nuba Mountains and other areas by the Government of Sudan”. It requested “the United Nations to challenge the Government of Sudan to ensure immediate and free access for humanitarian organizations and Operation Lifeline Sudan”.⁶²⁷

639. In a resolution on the former Yugoslavia adopted in 1994, the Parliamentary Assembly of the Council of Europe condemned the impediment of the delivery of humanitarian aid in Bosnia and Herzegovina. It considered any such impediment of humanitarian convoys by the parties to the conflict to be a “barbaric disregard for international humanitarian law”. The Assembly further

⁶²⁴ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6, 28 January 1997, § 209.

⁶²⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report on the mission carried out at the request of the High Commissioner for Human Rights between 25 and 29 March 1997 to the area occupied by rebels in eastern Zaire, UN Doc. E/CN.4/1997/6/Add.2, 2 April 1997, § 35.

⁶²⁶ UN Office for the Coordination of Humanitarian Affairs, United Nations Inter-Agency Consolidated Appeal for the Democratic Republic of the Congo (January–December 2000), November 1999, Annex II, Principles of Engagement for Emergency Humanitarian Assistance in the Democratic Republic of the Congo, §§ 1 and 2, p. 67.

⁶²⁷ APC-EU, Joint Assembly, Resolution on Sudan, 20 March 1997, § 3.

demanded that "all parties to the conflict in the area of the former Yugoslavia allow the unimpeded delivery of humanitarian aid, in accordance with their own past commitments and the requirements of international humanitarian law".⁶²⁸

640. In a declaration on Bosnia and Herzegovina adopted in 1994, the Committee of Ministers of the Council of Europe requested "all parties involved in the conflict to allow unimpeded delivery of humanitarian aid".⁶²⁹

641. In a declaration before the Permanent Council of the OSCE in 1995, the Presidency of the EU insisted that all facilities be given so as to allow the unimpeded and rapid delivery of medical and humanitarian aid in Chechnya.⁶³⁰

642. In a resolution adopted in 1995 on human rights in Chechnya, the European Parliament insisted that "humanitarian aid dispatched to relieve the people concerned must be allowed to reach them as fast as possible without being diverted... and that there should be no obstacle to distribution by non-governmental organizations".⁶³¹

643. In 1998, in a declaration on the situation in Afghanistan, the Presidency of the EU described the food blockade on central Afghanistan as "a matter of grief".⁶³²

644. In a declaration on the situation in Angola adopted in 1993, the OAU Assembly of Heads of State and Government urged UNITA "not to impede or hinder the delivery of humanitarian assistance to the civilian population affected by the war".⁶³³

645. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the OIC Conference of Ministers of Foreign Affairs held the Serb leaders, those in Belgrade, as well as those in the Republic of Bosnia and Herzegovina responsible for the refusal to allow the delivery of assistance and supplies to populations affected by famine which it considered constituted a serious violation of IHL.⁶³⁴

646. In a resolution adopted in 1995, the Permanent Council of the OSCE called for the unhindered delivery of humanitarian aid to all groups of the civilian population affected by conflict in Chechnya.⁶³⁵

647. In 1993, the Parliamentary Assembly of the WEU debated the WEU mission to the Adriatic Sea to observe the implementation of the sanctions imposed on Serbia and Montenegro. The Rapporteur on the situation in the former

⁶²⁸ Council of Europe, Parliamentary Assembly, Res. 1019, 25 January 1994, §§ 4 and 9(v).

⁶²⁹ Council of Europe, Committee of Ministers, Declaration on Bosnia and Herzegovina, 14 February 1994, § 6.

⁶³⁰ EU, Statement by the Presidency of the EU before the Permanent Council of the OSCE, 2 February 1995, § 2.

⁶³¹ European Parliament, Resolution on human rights in Chechnya, 16 March 1995, § 4.

⁶³² EU, Presidency, Declaration on behalf of the EU on the situation in Afghanistan, 16 April 1998.

⁶³³ OAU, Assembly of Heads of State and Government, Declaration 2 (XXIX), 28-30 June 1993, § 9.

⁶³⁴ OIC, Conference of Ministers of Foreign Affairs, 17-18 June 1992, Res. 1/5-EX, § 15.

⁶³⁵ OSCE, Permanent Council, Resolution on Chechnya, 3 February 1995.

Yugoslavia denounced the enormous suffering of the civilian population caused by the conflict. He particularly criticised the Bosnian Croats for blocking humanitarian convoys destined for Sarajevo.⁶³⁶

International Conferences

648. At its meeting in Stockholm in 1992, the CSCE Ministerial Council adopted a decision on regional issues, notably the former Yugoslavia, in which it emphasised that “interference in humanitarian relief missions is an international crime for which the individuals responsible will be held personally accountable”.⁶³⁷

649. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference in Canberra expressed regret that “the international relief and protection effort during armed conflicts . . . is encountering serious difficulties and dangers, including . . . the blockade of humanitarian action, . . . the refusal of parties to the conflict to transport food supplies to the victims or to allow the relief organizations access to prisoners of war and imprisoned civilians”.⁶³⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

650. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

651. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “the parties to the conflict have a duty to ensure the provision of supplies essential to the survival of the civilian population in the territory under their control and to allow unimpeded passage of assistance for the civilian population in territories under the control of the adverse party”.⁶³⁹

VI. Other Practice

652. In 1992, in a meeting with the ICRC, a representative of a separatist entity stated that the army of the State had systematically blocked food supplies.⁶⁴⁰

⁶³⁶ WEU, Parliamentary Assembly, Report and debate on the mission to the Adriatic Sea, Statement of the Rapporteur, *BT-Drucksache* 12/6737, 2 February 1994, p. 35.

⁶³⁷ CSCE, Ministerial Council, Third Meeting, Stockholm, 14–15 December 1992, Decisions: 1. Regional Issues (Former Yugoslavia), § 18.

⁶³⁸ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble.

⁶³⁹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § IV, *IRRC*, No. 320, 1997, p. 505.

⁶⁴⁰ ICRC archive document.

653. In 1994, during the conflict in Afghanistan, according to a press agency, the Hezb-i-Islami faction blocked all humanitarian convoys heading for enemy-controlled territory. The Hezb-i-Islami justified these actions based on allegations that previous convoys had benefited the opposing military factions. Furthermore, it insisted that it had opened three markets in areas under its control to ensure the sustenance of the civilian population.⁶⁴¹

654. In 1996, in a communication to the ICRC, officials of an entity involved in a non-international armed conflict accused the government of a State of having blocked humanitarian aid in the course of the conflict.⁶⁴²

655. In 1997, the *Washington Post* reported that rebel forces from Zaire (DRC) were preventing humanitarian assistance from reaching tens of thousands of Rwandan refugees near the northern town of Kisangani. The report stated that “at one point, rebels requisitioned 60,000 liters of fuel from the aid agencies that was to be used to help transport the refugees. The rebels generally say the war effort warrants such actions.”⁶⁴³

Access for humanitarian relief via third States

I. Treaties and Other Instruments

Treaties

656. Article 70(2) AP I provides that:

The Parties to the conflict *and each High Contracting Party* shall allow and facilitate rapid and unimpeded passage of all relief consignments, equipment and personnel provided in accordance with this Section, even if such assistance is destined for the civilian population of the adverse Party”. [emphasis added]

Article 70 AP I was adopted by consensus.⁶⁴⁴

657. Article 33(2) of draft AP II submitted by the ICRC to the CDDH provided that “the parties to the conflict *and any High Contracting Party* through whose territory supplies must pass shall grant free passage when relief actions are carried out in accordance with the conditions stated in paragraph 1”.⁶⁴⁵ (emphasis added) This proposal was amended and adopted by consensus in Committee II of the CDDH.⁶⁴⁶ The approved text provided that “the Parties to the conflict *and each High Contracting Party* through whose territory these relief supplies will pass shall facilitate rapid and unimpeded passage of all relief consignments provided in accordance with the conditions stated in paragraph 2”.⁶⁴⁷ (emphasis

⁶⁴¹ AFP, Press information, Islamabad, 15 February 1994. ⁶⁴² ICRC archive document.

⁶⁴³ Cindy Shiner, Rebels Prevent Relief Workers From Aiding Rwandan Refugees, Ethnic Tensions, Resentment Flaring Into Violence, *The Washington Post*, 23 April 1997.

⁶⁴⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

⁶⁴⁵ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 43.

⁶⁴⁶ CDDH, *Official Records*, Vol. XIII, CDDH/406/Rev.1, 17 March–10 June 1977, p. 385, § 96.

⁶⁴⁷ CDDH, *Official Records*, Vol. XIII, CDDH/406/Rev.1, 17 March–10 June 1977, p. 424.

added) Eventually, however, this paragraph was not included in the final draft article that was voted upon in the plenary session.

Other Instruments

658. No practice was found.

II. National Practice

Military Manuals

659. Sweden's IHL Manual states that:

During armed conflicts between states, other states, including neutrals, sometimes provide an affected civilian population with humanitarian aid. Depending upon the nature or development of the conflict, this aid may be channelled to the civilian population of one party only, where acute need of civilian relief has arisen.⁶⁴⁸

660. The UK Military Manual states that:

If the whole or part of the population of occupied territory suffers from shortage of supplies, the Occupant must agree to relief schemes being instituted on their behalf and must facilitate such schemes by all the means at his disposal. The schemes in question will consist in particular of the provision of the consignments of foodstuffs, medical supplies and clothing. . . All parties to [GC IV] must permit the free passage of such consignments and must guarantee their protection.⁶⁴⁹

661. The US Field Manual provides that:

If the whole or part of the population of an occupied territory is inadequately supplied, the Occupying Power shall agree to relief schemes on behalf of the said population, and shall facilitate them by all the means at its disposal.

Such schemes, which may be undertaken . . . by States shall consist, in particular, of the provision of consignments of foodstuffs, medical supplies and clothing.

All Contracting Parties shall permit the free passage of these consignments and shall guarantee their protection.⁶⁵⁰

National Legislation

662. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 70(2) AP I, is a punishable offence.⁶⁵¹

663. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁶⁵²

⁶⁴⁸ Sweden, *IHL Manual* (1991), Section 5.7, p. 114.

⁶⁴⁹ UK, *Military Manual* (1958), § 541. ⁶⁵⁰ US, *Field Manual* (1956), § 388.

⁶⁵¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁵² Norway, *Military Penal Code as amended* (1902), § 108(b).

National Case-law

664. No practice was found.

Other National Practice

665. No practice was found.

*III. Practice of International Organisations and Conferences**United Nations*

666. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council called upon "all parties concerned, including neighbouring states, to cooperate fully with the United Nations Humanitarian Coordinator and United Nations agencies in providing... access" of humanitarian personnel.⁶⁵³

667. In 1994, a statement by its President regarding the situation in Rwanda, the UN Security Council called upon "all States to assist the Office of the United Nations High Commissioner for Refugees (UNHCR) and other humanitarian and relief agencies operating in the area in meeting the urgent humanitarian needs in Rwanda and its bordering States". The Council also called on "States bordering Rwanda... to facilitate transfer of goods and supplies to meet the needs of the displaced persons within Rwanda".⁶⁵⁴

668. In 1991, the UN General Assembly adopted a resolution on the strengthening of the coordination of humanitarian emergency assistance of the United Nations. The guiding principles on humanitarian assistance annexed to the resolution emphasise, *inter alia*, that "States in proximity to emergencies are urged to participate closely with the affected countries in international efforts, with a view to facilitating, to the extent possible, the transit of humanitarian assistance".⁶⁵⁵

669. In a decision adopted in 1996 on the humanitarian situation in Iraq, the UN Sub-Commission on Human Rights appealed to the "international community as a whole and to all Governments, including that of Iraq, to facilitate the supply of food and medicine to the civilian population".⁶⁵⁶

670. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General urged "neighbouring Member States to ensure access for humanitarian assistance".⁶⁵⁷

671. The Code of Conduct for Humanitarian Assistance in Sierra Leone, annexed to the 1999 United Nations Inter-Agency Consolidated Appeal for Sierra

⁶⁵³ UN Security Council, Res. 1296, 19 April 2000, § 8.

⁶⁵⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/21, 30 April 1994, p. 2.

⁶⁵⁵ UN General Assembly, Res. 46/182, 19 December 1991, Annex, § 7.

⁶⁵⁶ UN Sub-Commission on Human Rights, Decision on the humanitarian situation in Iraq, UN Doc. E/CN.4/Sub.2/DEC/1996/107, 25 November 1996.

⁶⁵⁷ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 51, Recommendation 19.

Leone, contains certain guiding principles for States and non-State entities. One of these principles provides that "States in proximity to emergencies are urged to participate closely with affected countries in international efforts with a view to facilitating, to the extent possible, the transit of humanitarian assistance and humanitarian personnel".⁶⁵⁸

Other International Organisations

672. In a declaration on Yugoslavia in 1992, the EC called upon all parties to the conflict and other States "to facilitate the provision of humanitarian assistance...including through the establishment of humanitarian corridors".⁶⁵⁹

673. In a resolution adopted in 1993 on the situation in Angola, the OAU Assembly of Heads of State and Government called on "the OAU Member States and the international community to provide urgent humanitarian aid in order to mitigate the sufferings of the people in this country".⁶⁶⁰

International Conferences

674. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

675. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

676. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on humanitarian assistance in situations of armed conflict, in which it called upon all parties to armed conflicts and, where applicable, any High Contracting Party "to agree to and cooperate in relief actions which are exclusively humanitarian, impartial and non-discriminatory in character, within the meaning of the Fundamental Principles of the International Red Cross and Red Crescent Movement".⁶⁶¹

VI. Other Practice

677. In a resolution adopted at its Wiesbaden Session in 1975, the Institute of International Law stated that "in cases where the territory controlled by

⁶⁵⁸ UN Office for the Coordination of Humanitarian Affairs, United Nations Inter-Agency Consolidated Appeal for Sierra Leone (January–December 1999), December 1998, Annex I, Code of Conduct for Humanitarian Assistance in Sierra Leone, p. 88.

⁶⁵⁹ EC, Declaration on Yugoslavia, 20 July 1992, § 4.

⁶⁶⁰ OAU, Assembly of Heads of State and Government, Declaration 2 (XXIX), 28–30 June 1993, § 9.

⁶⁶¹ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 12, § c.

one party can be reached only by crossing . . . the territory of a third State, free passage over such territory should be granted to any relief consignment, at least insofar as is provided for in Article 23 [GC IV]".⁶⁶²

Right of the civilian population in need to receive humanitarian relief

I. Treaties and Other Instruments

Treaties

678. Article 30, first paragraph, GC IV provides that:

Protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them.

679. Article 70(1) AP I provides that:

If the civilian population of any territory under the control of a Party to the conflict, other than occupied territory, is not adequately provided with the supplies mentioned in Article 69, relief actions which are humanitarian and impartial in character and conducted without any adverse distinction shall be undertaken, subject to the agreement of the Parties concerned in such relief actions . . . In the distribution of relief consignments, priority shall be given to those persons, such as children, expectant mothers, maternity cases and nursing mothers, who, under the Fourth Convention or under this Protocol, are to be accorded privileged treatment or special protection.

Article 70 AP I was adopted by consensus.⁶⁶³

680. Article 18(2) AP II provides that:

If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.

Article 18 AP II was adopted by consensus.⁶⁶⁴

Other Instruments

681. Under Paragraph 5 of the 1992 Recommendation by the Parties to the Conflict in Bosnia and Herzegovina on the Tragic Situation of Civilians, "persons temporarily transferred to areas other than their areas of origin should benefit,

⁶⁶² Institute of International Law, Wiesbaden Session, Resolution III, The Principle of Non-Intervention in Civil Wars, 14 August 1975, Article 4(2).

⁶⁶³ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

⁶⁶⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 150.

as vulnerable groups, from international assistance, *inter alia*, in conformity with its mandate, by the ICRC”.

II. National Practice

Military Manuals

682. Argentina’s Law of War Manual states that, if the civilian population of any territory under the control of a party to the conflict, other than occupied territory, is insufficiently provided with supplies (such as foodstuffs, medical supplies, means of shelter and other supplies essential to the survival of the civilian population), relief actions of a humanitarian and impartial character shall be undertaken, subject to the agreement of the parties concerned.⁶⁶⁵

683. Canada’s LOAC Manual provides that “every opportunity must be given to protected persons to apply to the Protecting Powers, the ICRC, the local National Red Cross (or equivalent) society or any other organization that may assist them”.⁶⁶⁶

684. Germany’s Military Manual states that “civilians may at any time seek help from a protecting power, the International Committee of the Red Cross (ICRC) or any other aid society”.⁶⁶⁷

685. The Military Manual of the Netherlands provides that “if the civilian population of a certain area is not equipped with elementary necessities, relief actions have to be undertaken”.⁶⁶⁸

686. New Zealand’s Military Manual provides that “every opportunity must be given to protected persons to apply for help from the Protecting Powers, the International Committee of the Red Cross, the local national Red Cross (or equivalent) society or any other organisation that may assist them”.⁶⁶⁹

687. Nicaragua’s Military Manual states that “the civilian population has the right to receive the relief they need”.⁶⁷⁰

688. Switzerland’s Basic Military Manual provides that, in a territory temporarily occupied by foreign troops, “civilians shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the national Red Cross Society of the country where they may be, as well as to any organization that might assist them”.⁶⁷¹

689. The UK Military Manual provides that “every opportunity must be given to protected persons to apply to the Protecting Powers, the International

⁶⁶⁵ Argentina, *Law of War Manual* (1989), § 4.11.

⁶⁶⁶ Canada, *LOAC Manual* (1999), p. 11-4, § 31.

⁶⁶⁷ Germany, *Military Manual* (1992), § 516.

⁶⁶⁸ Netherlands, *Military Manual* (1993), p. VIII-4.

⁶⁶⁹ New Zealand, *Military Manual* (1992), § 1115.

⁶⁷⁰ Nicaragua, *Military Manual* (1996), Article 14(33).

⁶⁷¹ Switzerland, *Basic Military Manual* (1987), Article 155(1).

Committee of the Red Cross, the local national Red Cross (or equivalent) society or any other organisation that may assist them".⁶⁷²

690. The US Field Manual provides that "protected persons shall have every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them".⁶⁷³

691. The US Air Force Pamphlet stresses that "Article 30 [GC IV] seeks to put teeth into the Geneva protections by requiring the parties to give protected persons every facility for making application to the Protecting Powers, the International Committee of the Red Cross, the National Red Cross (Red Crescent, Red Lion and Sun) Society of the country where they may be, as well as to any organization that might assist them".⁶⁷⁴

National Legislation

692. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁶⁷⁵

693. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 30 GC IV, and of AP I, including violations of Article 70(1) AP I, as well as any "contravention" of AP II, including violations of Article 18(2) AP II, are punishable offences.⁶⁷⁶

694. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".⁶⁷⁷

National Case-law

695. No practice was found.

Other National Practice

696. The Report on the Practice of Colombia refers to a draft internal working paper in which the Colombian government stated that "the parties in conflict

⁶⁷² UK, *Military Manual* (1958), § 40.

⁶⁷³ US, *Field Manual* (1956), § 269. ⁶⁷⁴ US, *Air Force Pamphlet* (1976), § 14-4.

⁶⁷⁵ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁶⁷⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁷⁷ Norway, *Military Penal Code as amended* (1902), § 108.

must guarantee the right to protection and humanitarian assistance of the victims of political violence".⁶⁷⁸

697. In the context of the conflict in Ethiopia, it has been reported that "to combat new famine threats, in early 1991 the EPLF and the Ethiopian Government agreed on a joint and equal distribution of UN famine relief supplies".⁶⁷⁹ According to the Report on the Practice of Ethiopia, "this and similar practices tend to indicate that, however recent, the right to humanitarian relief is gaining respect" in Ethiopia.⁶⁸⁰

698. In 1993, during a parliamentary debate on the conflict in Bosnia and Herzegovina, a German Minister of State stated that existing IHL granted a right to the civilian population to receive humanitarian aid. Therefore, obtaining the consent of the occupying or besieging forces to grant transit of humanitarian goods was legally unnecessary.⁶⁸¹

699. In 1997, during an open debate in the UN Security Council, Germany declared that "we have witnessed . . . a worrisome development whereby civilian populations are denied humanitarian assistance by the Powers in control of the territory, in clear breach of the norms of international humanitarian and human rights law". The consequences of these actions were said to range from massive displacement to death by starvation.⁶⁸²

700. In 1990, in a meeting with the ICRC, but only after it had used starvation as a weapon against territories not under its control, did the government of a State agree that in principle humanitarian aid should be distributed to the civilian population in all parts of the country. It thus relinquished the use of starvation as a possible weapon in situations of dispute.⁶⁸³

III. Practice of International Organisations and Conferences

United Nations

701. In a resolution adopted in 1993 on the treatment of certain towns and surroundings in Bosnia and Herzegovina as safe areas, the UN Security Council condemned all violations of IHL in Bosnia and Herzegovina, in particular, "the denial or the obstruction of access of civilians to humanitarian aid and services such as medical assistance and basic utilities".⁶⁸⁴

702. In 1998, in a statement by its President considering the question of children and armed conflict, the UN Security Council expressed "its readiness

⁶⁷⁸ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled "El Derecho Internacional Humanitario", § 8.

⁶⁷⁹ Amnesty International, *Ethiopia: End of an Era of Brutal Repression*, London, May 1991, p. 43.

⁶⁸⁰ Report on the Practice of Ethiopia, 1998, Chapter 4.1.

⁶⁸¹ Germany, Lower House of Parliament, Statement by a Minister of State, 22 April 1993, *Plenarprotokoll* 12/152, p. 13074, § C.

⁶⁸² Germany, Statement before the UN Security Council, UN Doc. S/PV.3778 (Resumption 1), 21 May 1997, p. 18.

⁶⁸³ ICRC archive document.

⁶⁸⁴ UN Security Council, Res. 824, 6 May 1993, preamble.

to consider, when appropriate, means to assist with the effective provision and protection of humanitarian aid and assistance to civilian population in distress, in particular women and children".⁶⁸⁵

703. In a resolution adopted in 1970 on basic principles for the protection of civilian populations in armed conflicts, the UN General Assembly stated that "the provision of international relief to civilian population is in conformity with the humanitarian principles of the Charter of the United Nations, the Universal Declaration of Human Rights and other international instruments in the field of human rights".⁶⁸⁶

704. In the United Nations Millennium Declaration adopted by the UN General Assembly in 2000, the heads of State and government declared that they would:

spare no effort to ensure that children and all civilian populations that suffer disproportionately the consequences of natural disasters, genocide, armed conflicts and other humanitarian emergencies are given every assistance and protection so that they can resume normal life as soon as possible.⁶⁸⁷

705. In a resolution adopted in 1995 on the situation of human rights in the Sudan, the UN Commission on Human Rights was "deeply concerned that access by the civilian population to humanitarian assistance, despite some improvements, continues to be impeded, violating international humanitarian law and representing a threat to human life that constitutes an offence to human dignity".⁶⁸⁸

706. In 1996, in a report on emergency assistance to Sudan, the UN Secretary-General stated that the two main southern factions, the SPLM/A and the SSIA, had endorsed new rules on cooperation with OLS. These rules contained specific references to respect for and the upholding, *inter alia*, of a set of principles governing humanitarian aid, including "the right to offer and receive assistance". In his concluding observations, the Secretary-General condemned the fact that the conflict in Sudan had affected the lives of millions of Sudanese, stating that:

Under such circumstances any attempt to diminish the capacity of the international community to respond to conditions of suffering and hardship among the civilian population in the Sudan can only give rise to the most adamant expressions of concern as a violation of recognised humanitarian principles, most importantly, the right of civilian populations to receive humanitarian assistance in times of war.⁶⁸⁹

⁶⁸⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998, pp. 1 and 2.

⁶⁸⁶ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 8.

⁶⁸⁷ UN General Assembly, Res. 55/2, 8 September 2000, § 26.

⁶⁸⁸ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, preamble.

⁶⁸⁹ UN Secretary-General, Report on emergency assistance to Sudan, UN Doc. A/51/326, 4 September 1996, §§ 71 and 93.

707. In 1998, in a report on protection for humanitarian assistance to refugees and others in conflict situations, the UN Secretary-General stated that:

Under international law, refugees, displaced persons and other victims of conflict have a right to international protection and assistance where this is not available from their national authorities. However, if this right is to have any meaning for the intended beneficiaries, then the beneficiaries must have effective access to the providers of that protection and assistance. Access to humanitarian assistance and protection, or humanitarian access, is therefore an essential subsidiary or ancillary right that gives meaning and effect to the core rights of protection and assistance. Humanitarian access is, *inter alia*, a right of refugees, displaced persons and other civilians in conflict situations and should not be seen as a concession to be granted to humanitarian organizations on an arbitrary basis.⁶⁹⁰

708. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General stated that:

It is the obligation of States to ensure that affected populations have access to the assistance they require for their survival. If a State is unable to fulfil its obligation, the international community has a responsibility to ensure that humanitarian aid is provided. The rapid deployment of humanitarian assistance operations is critical when responding to the needs of civilians affected by armed conflict.

The Secretary-General also called on neighbouring States “to bring any issues that might threaten the right of civilians to assistance to the attention of the Security Council as a matter affecting peace and security”.⁶⁹¹

709. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General stated that “under international law, displaced persons and other victims of conflict are entitled to international protection and assistance where this is not available from national authorities”.⁶⁹²

Other International Organisations

710. No practice was found.

International Conferences

711. The Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in 1993, reaffirmed “the right of the victims to be assisted by humanitarian organizations, as set forth in the Geneva Conventions of 1949 and other relevant instruments of international humanitarian law”.⁶⁹³

⁶⁹⁰ UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, § 15.

⁶⁹¹ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 51 and recommendation 19.

⁶⁹² UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 17.

⁶⁹³ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(29).

712. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants declared that they refused to accept that “victims [are] denied elementary humanitarian assistance”.⁶⁹⁴

713. In 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it strongly reasserted “the right of a civilian population in need to benefit from impartial humanitarian relief actions in accordance with international humanitarian law”.⁶⁹⁵

714. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the principles and action in international humanitarian assistance and protection in which it took note of Resolution 11 of the Council of Delegates held in 1993 in Birmingham which, *inter alia*, reminded States of “the victims’ right to receive humanitarian assistance”.⁶⁹⁶

715. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “every possible effort is made to provide the civilian population with all essential goods and services for its survival”.⁶⁹⁷

716. The Final Declaration adopted in 2002 by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict emphasised that “we agree that all civilians in need are to benefit from impartial humanitarian relief actions”.⁶⁹⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

717. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

718. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on humanitarian assistance in situations of armed conflict which recalled that “the principle of humanity and the rules of international humanitarian law recognize the victims’ right to receive protection and assistance in all circumstances”.⁶⁹⁹

⁶⁹⁴ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1), *ILM*, Vol. 33, 1994, p. 298.

⁶⁹⁵ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § A(h).

⁶⁹⁶ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. IV, preamble.

⁶⁹⁷ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(g).

⁶⁹⁸ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, § 14.

⁶⁹⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 12, preamble.

719. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on principles of humanitarian assistance in which it noted that victims have the “right to be recognized as victims and to receive assistance”, while States have

the duty – which is in the first instance theirs – to assist people who are placed *de jure* or *de facto* under their authority and, should they fail to discharge this duty, the obligation to authorize humanitarian organizations to provide such assistance, to grant such organizations access to the victims and to protect their action.⁷⁰⁰

720. The Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief states that “the right to receive humanitarian assistance, and to offer it, is a fundamental humanitarian principle which should be enjoyed by all citizens of all countries”.⁷⁰¹

721. In a communication to the press issued in 1997 concerning the conflict in Zaire (DRC), the ICRC requested that the ADFL grant its delegates unrestricted access to victims of the armed conflict. The ICRC appealed to all concerned to “respect the victims’ right to assistance and protection”.⁷⁰²

VI. Other Practice

722. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “deliberate deprivation of access to necessary food, drinking water and medicine” is prohibited.⁷⁰³

723. The Guiding Principles on the Right to Humanitarian Assistance, adopted by the Council of the IHL in 1993, state that:

Every human being has the right to humanitarian assistance in order to ensure respect for the human rights to life, health, protection against cruel and degrading treatment and other human rights which are essential to survival, well-being and protection in public emergencies.

The right to humanitarian assistance implies the right to request and to receive such assistance, as well as to participate in its practical implementation.⁷⁰⁴

724. In 1995, the IHL stated that any declaration on minimum humanitarian standards should be based on “principles . . . of *jus cogens*, expressing basic

⁷⁰⁰ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 11, § 1(b).

⁷⁰¹ Code of Conduct for the International Red Cross and Red Crescent Movement and Non-Governmental Organisations (NGOs) in Disaster Relief, *IRRC*, No. 310, 1996, Annex VI.

⁷⁰² ICRC, Communication to the Press No. 97/08, Zaire: ICRC Demands Access to Conflict Victims, 2 April 1997.

⁷⁰³ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(f), *IRRC*, No. 282, 1991, p. 331.

⁷⁰⁴ IHL, Guiding Principles on the Right to Humanitarian Assistance, Principles 1 and 2, *IRRC*, No. 297, 1993, pp. 521–522.

humanitarian consideration[s] which are recognized to be universally binding". According to the IHL, this includes the principle that "the population and individuals have the right to receive humanitarian assistance when suffering undue hardship owing to the lack of supplies essential for their survival, when this is the result of the conflict or violence deployed in the area".⁷⁰⁵

D. Freedom of Movement of Humanitarian Relief Personnel

I. Treaties and Other Instruments

Treaties

725. Article 71(3) and (4) AP I provides that:

Each party in receipt of relief consignments shall, to the fullest extent practicable, assist the relief personnel . . . carrying out their relief mission. Only in case of imperative military necessity may the activities of the relief personnel be limited or their movements temporarily restricted.

Under no circumstances may relief personnel exceed the terms of their mission under this Protocol. In particular they shall take account of the security requirements of the Party in whose territory they are carrying out their duties. The mission of any personnel who do not respect these conditions may be terminated.

Article 71 AP I was adopted by consensus.⁷⁰⁶

Other Instruments

726. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia reminded all fighting units of their obligation to apply the fundamental principle according to which "all Red Cross personnel and medical personnel assisting civilian populations and persons *hors combat* must be granted the necessary freedom of movement to achieve their tasks".

727. Paragraph 19 of the 1994 CSCE Code of Conduct provides that the participating States "will cooperate in support of humanitarian assistance to alleviate suffering among the civilian population, including facilitating the movement of personnel and resources dedicated to such tasks".

II. National Practice

Military Manuals

728. Spain's LOAC Manual states that limitations on the activities and movement of relief personnel are possible only in case of imperative military necessity.⁷⁰⁷

⁷⁰⁵ IHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 21, reprinted in UN Doc. E/CN.4/1996/80, Report of the Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, 28 November 1995, pp. 8 and 11.

⁷⁰⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

⁷⁰⁷ Spain, *LOAC Manual* (1996), Vol. I, § 2.4.(c).5.

National Legislation

729. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 71(3) and (4) AP I, is a punishable offence.⁷⁰⁸

730. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁷⁰⁹

National Case-law

731. No practice was found.

Other National Practice

732. In 1991, in a "Statement regarding the need for the respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia", the Federal Executive Council of the SFRY (FRY) insisted on "the need to ensure freedom of movement for all Red Cross representatives and medical personnel who are assisting the civilian population behind the front lines".⁷¹⁰

733. In 1992, following an attack on an ICRC convoy carrying medical supplies in Sarajevo in May 1992, which led to the death of an ICRC delegate, the Presidency of the Republika Srpska of Bosnia and Herzegovina ordered all combatants to provide secure conditions and the freedom of movement necessary to personnel from the ICRC and other humanitarian organisations.⁷¹¹

III. Practice of International Organisations and Conferences

United Nations

734. In a resolution adopted in 1992 on humanitarian assistance to Somalia, the UN Security Council called upon "all parties, movements and factions, in Mogadishu in particular, and in Somalia in general, to . . . guarantee [the] complete freedom of movement [of humanitarian organizations] in and around Mogadishu and other parts of Somalia".⁷¹²

735. In a resolution adopted in 1992 on the establishment of a UN Operation in Somalia, the UN Security Council reiterated its call for the guarantee of

⁷⁰⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁷⁰⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁷¹⁰ SFRY (FRY), Federal Executive Council, Statement regarding the need for the respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia, Belgrade, 31 October 1991.

⁷¹¹ Bosnia and Herzegovina, Republika Srpska, Order issued by the President, 22 August 1992; Order issued by the President, 3 April 1994; see also Appeal by the Presidency, Pale, 7 June 1992.

⁷¹² UN Security Council, Res. 746, 17 March 1992, § 8.

"complete freedom of movement [of personnel of humanitarian organizations] in and around Mogadishu and other parts of Somalia".⁷¹³

736. In a resolution on Bosnia and Herzegovina adopted in 1993, the UN Security Council demanded that "all parties guarantee the . . . full freedom of movement of . . . members of humanitarian organizations".⁷¹⁴

737. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council demanded that all parties ensure the complete freedom of movement of UNPROFOR personnel and others engaged in the delivery of humanitarian assistance.⁷¹⁵

738. In a resolution on Angola adopted in 1996, the UN Security Council demanded that "all parties to the conflict and others concerned in Angola take all necessary measures . . . to guarantee the . . . freedom of movement of humanitarian supplies throughout the country".⁷¹⁶

739. In a resolution adopted in 1996 on the situation in the Great Lakes region, the UN Security Council called upon all those concerned in the region "to ensure . . . the . . . freedom of movement of all international humanitarian personnel".⁷¹⁷

740. In a resolution adopted in 1996 on the situation in the Great Lakes region, the UN Security Council called upon all concerned in the region "to cooperate fully with . . . humanitarian agencies and to ensure the . . . freedom of movement of their personnel".⁷¹⁸

741. In a resolution on Liberia adopted in 1996, the UN Security Council demanded that the factions "facilitate the freedom of movement of . . . international organizations and agencies" delivering humanitarian assistance.⁷¹⁹

742. In a resolution on Bosnia and Herzegovina adopted in 1996, the UN Security Council demanded that "the parties respect the . . . freedom of movement of SFOR and other international personnel".⁷²⁰

743. In a resolution on Angola adopted in 1998, the UN Security Council called upon the Government of Unity and National Reconciliation, and in particular UNITA, "to guarantee unconditionally the . . . freedom of movement of all United Nations and international personnel".⁷²¹ The Security Council reiterated this call in a subsequent resolution adopted a few weeks later.⁷²²

744. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council demanded that "all Afghan factions and, in particular the

⁷¹³ UN Security Council, Res. 751, 24 April 1992, § 14.

⁷¹⁴ UN Security Council, Res. 819, 16 April 1993, § 10.

⁷¹⁵ UN Security Council, Res. 998, 16 June 1995, § 1.

⁷¹⁶ UN Security Council, Res. 1075, 11 October 1996, § 18.

⁷¹⁷ UN Security Council, Res. 1078, 9 November 1996, § A-5.

⁷¹⁸ UN Security Council, Res. 1080, 15 November 1996, § 6.

⁷¹⁹ UN Security Council, Res. 1083, 27 November 1996, § 8.

⁷²⁰ UN Security Council, Res. 1088, 12 December 1996, § 23.

⁷²¹ UN Security Council, Res. 1173, 12 June 1998, § 9.

⁷²² UN Security Council, Res. 1180, 29 June 1998, § 5.

Taliban, do everything possible to assure the... freedom of movement of the personnel of the United Nations and other international and humanitarian personnel".⁷²³

745. In a resolution adopted in 1998 on the situation in Angola, the UN Security Council demanded that "the Government of Angola and UNITA guarantee unconditionally the... freedom of movement of... all United Nations and international humanitarian personnel, including those providing assistance, throughout the territory of Angola".⁷²⁴

746. In a resolution adopted in 1998, the UN Security Council called on the government of Angola and in particular UNITA "to guarantee unconditionally the... freedom of movement of all international humanitarian personnel".⁷²⁵

747. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council underscored "the importance of the... freedom of movement of United Nations and associated personnel to the alleviation of the impact of armed conflict on children".⁷²⁶

748. In a resolution adopted in 1999 on protection of civilians in armed conflicts, the UN Security Council emphasised "the need for combatants to ensure the... freedom of movement of... personnel of international humanitarian organizations".⁷²⁷

749. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council reiterated "its call to all parties concerned, including non-State parties, to ensure the... freedom of movement of... personnel of humanitarian organizations".⁷²⁸

750. In a resolution on Afghanistan adopted in 2000, the UN Security Council stressed that the Taliban "must provide guarantees for the... freedom of movement for... humanitarian relief personnel".⁷²⁹

751. In 1995, in a statement by its President in the context of the situation in Croatia, the UN Security Council reminded the parties, and in particular the Croatian government, "that they have an obligation to respect United Nations personnel [and] to ensure their... freedom of movement at all times".⁷³⁰

752. In 1996, in a statement by its President, the UN Security Council called upon the parties to the conflict in Tajikistan "to ensure the... freedom of movement of the personnel of the United Nations and other international organizations".⁷³¹

⁷²³ UN Security Council, Res. 1193, 28 August 1998, § 7.

⁷²⁴ UN Security Council, Res. 1202, 15 October 1998, § 10.

⁷²⁵ UN Security Council, Res. 1213, 3 December 1998, § 7.

⁷²⁶ UN Security Council, Res. 1261, 25 August 1999, § 12.

⁷²⁷ UN Security Council, Res. 1265, 17 September 1999, § 8.

⁷²⁸ UN Security Council, Res. 1296, 19 April 2000, § 12.

⁷²⁹ UN Security Council, Res. 1333, 19 December 2000, § 13.

⁷³⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995, p. 1.

⁷³¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/14, 29 March 1996, p. 2.

753. In 1996, in a statement by its President regarding the situation in Tajikistan, the UN Security Council expressed "its concern at the restrictions placed upon UNMOT by the parties" and called upon them, in particular the government of Tajikistan, "to ensure the . . . freedom of movement of the personnel of the United Nations and other international organizations".⁷³²

754. In 1996, in a statement by its President, the UN Security Council stressed that the international community's ability to assist in the conflict in Georgia depended on "the full cooperation of the parties, especially the fulfilment of their obligations regarding the . . . freedom of movement of international personnel".⁷³³

755. In 1996, in a statement by its President, the UN Security Council called on all parties in the Great Lakes region "to ensure the . . . freedom of movement of all international humanitarian personnel".⁷³⁴

756. In 1997, in a statement by its President with respect to the situation in the Great Lakes Region, the UN Security Council demanded that the parties ensure the "freedom of movement of all . . . humanitarian personnel".⁷³⁵

757. In 1997, in a statement by its President, the UN Security Council called upon the parties "to ensure . . . the freedom of movement of the personnel of the United Nations . . . and other international personnel in Tajikistan".⁷³⁶

758. In 1997, in a statement by its President regarding the situation in Somalia, the UN Security Council called upon the Somali factions "to ensure the . . . freedom of movement of all humanitarian personnel".⁷³⁷

759. In 1997, in a statement by its President in the context of the conflict in Angola, the UN Security Council called upon UNITA in particular "to ensure the freedom of movement . . . of international humanitarian organizations".⁷³⁸

760. In 1998, in a statement by its President regarding the situation in Angola, the UN Security Council demanded that the Angolan government, and in particular UNITA, "guarantee unconditionally the . . . freedom of movement of all . . . international personnel".⁷³⁹

⁷³² UN Security Council, Statement by the President, UN Doc. S/PRST/1996/25, 21 May 1996, p. 2.

⁷³³ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/43, 22 October 1996, p. 2.

⁷³⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/44, 1 November 1996, p. 1.

⁷³⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/5, 7 February 1997, p. 1.

⁷³⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/6, 7 February 1997, p. 2.

⁷³⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/8, 27 February 1997, p. 2.

⁷³⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/39, 23 July 1997, p. 1.

⁷³⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/14, 22 May 1998, p. 1.

761. In July 1998, in a statement by its President, the UN Security Council urged all Afghan factions “to cooperate fully with . . . international humanitarian organizations” and called upon them, in particular the Taliban, “to take all necessary steps to ensure the . . . freedom of movement of such personnel”.⁷⁴⁰

762. In August 1998, in a statement by its President, the UN Security Council urged all Afghan factions “to cooperate fully with . . . international humanitarian organizations” and called upon them, in particular the Taliban, “to take the necessary steps to assure the . . . freedom of movement of such personnel”.⁷⁴¹

763. In 2000, in a statement by its President in the context of a debate on the humanitarian aspects of maintaining peace and security, the UN Security Council reiterated its call for combatants “to ensure the . . . freedom of movement of . . . humanitarian personnel”.⁷⁴²

764. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the UN General Assembly demanded that “all parties to the conflict ensure complete . . . freedom of movement for the International Committee of the Red Cross”.⁷⁴³

765. In a resolution adopted in 1996, the UN General Assembly called upon all parties, movements and factions in Somalia to guarantee the “complete freedom of movement” of personnel of the United Nations and its specialized agencies and of non-governmental organizations throughout Somalia.⁷⁴⁴

766. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly called upon all parties to ensure freedom of movement within Kosovo of personnel belonging to the OSCE Kosovo Verification Mission. It also called upon the FRY authorities “to grant . . . free and unaccompanied movement within Kosovo for all humanitarian aid workers”.⁷⁴⁵

767. In a resolution adopted in 1999 on the safety and security of humanitarian personnel and protection of United Nations personnel, the UN General Assembly strongly condemned “any act or failure to act which obstructs or prevents humanitarian personnel and United Nations personnel from discharging their humanitarian functions”.⁷⁴⁶

768. In a resolution adopted in 1999 on the situation of human rights in East Timor, the UN Commission on Human Rights called upon the government of Indonesia “to guarantee . . . the free movement of international personnel”.⁷⁴⁷

⁷⁴⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998, p. 2.

⁷⁴¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/24, 6 August 1998, p. 2.

⁷⁴² UN Security Council, Statement by the President, UN Doc. S/PRST/2000/7, 13 March 2000, p. 2.

⁷⁴³ UN General Assembly, Res. 46/242, 25 August 1992, § 9.

⁷⁴⁴ UN General Assembly, Res. 51/30 G, 13 December 1996, § 8.

⁷⁴⁵ UN General Assembly, Res. 53/164, 9 December 1998, §§ 3 and 17.

⁷⁴⁶ UN General Assembly, Res. 54/192, 17 December 1999, § 4.

⁷⁴⁷ UN Commission on Human Rights, Res. 1999/S-4/1, 27 September 1999, § 5(e).

Other International Organisations

769. No practice was found.

International Conferences

770. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

771. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

772. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC appealed to all the parties to "allow the freedom of movement necessary to all Red Cross personnel seeking to bring relief to the civilian population in the war-affected areas".⁷⁴⁸

773. In an appeal issued in 1991, the ICRC enjoined the parties to the conflict in Yugoslavia "to allow all Red Cross staff and medical personnel the freedom of movement they need to assist the civilian population".⁷⁴⁹

774. In a press release issued in 1992, the ICRC enjoined the parties to the conflict in Bosnia and Herzegovina "to allow all Red Cross staff and medical personnel the freedom of movement they need to assist the civilian population".⁷⁵⁰

775. In two press releases issued in 1992, the ICRC enjoined the parties to the conflict in Afghanistan to allow all Red Cross and Red Crescent staff and other medical personnel the freedom of movement they needed to assist the civilian population.⁷⁵¹

776. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "all Red Cross personnel and medical personnel assisting the civilian population and persons *hors de combat* shall be allowed whatever freedom of movement they require".⁷⁵²

777. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "the freedom of movement necessary for all

⁷⁴⁸ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 5, *IRRC*, No. 209, 1979, p. 88.

⁷⁴⁹ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

⁷⁵⁰ ICRC, Press Release No. 1705, Bosnia and Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

⁷⁵¹ ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992; Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

⁷⁵² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

Red Cross personnel and medical personnel called upon to assist the civilian population and persons *hors de combat* shall be safeguarded".⁷⁵³

VI. Other Practice

778. No practice was found.

⁷⁵³ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § III, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, p. 1309.

DECEPTION

A. Ruses of War (practice relating to Rule 57)	§§ 1–66
B. Improper Use of the White Flag of Truce (practice relating to Rule 58)	§§ 67–167
C. Improper Use of the Distinctive Emblems of the Geneva Conventions (practice relating to Rule 59)	§§ 168–464
D. Improper Use of the United Nations Emblem or Uniform (practice relating to Rule 60)	§§ 465–549
E. Improper Use of Other Internationally Recognised Emblems (practice relating to Rule 61)	§§ 550–626
F. Improper Use of Flags or Military Emblems, Insignia or Uniforms of the Adversary (practice relating to Rule 62)	§§ 627–741
G. Use of Flags or Military Emblems, Insignia or Uniforms of Neutral or Other States Not Party to the Conflict (practice relating to Rule 63)	§§ 742–784
H. Conclusion of an Agreement to Suspend Combat with the Intention of Attacking by Surprise the Adversary Relying on It (practice relating to Rule 64)	§§ 785–846
I. Perfidy (practice relating to Rule 65)	§§ 847–1545
General	§§ 847–924
Killing, injuring or capturing an adversary by resort to perfidy	§§ 925–999
Simulation of being disabled by injuries or sickness	§§ 1000–1044
Simulation of surrender	§§ 1045–1129
Simulation of an intention to negotiate under the white flag of truce	§§ 1130–1218
Simulation of protected status by using the distinctive emblems of the Geneva Conventions	§§ 1219–1324
Simulation of protected status by using the United Nations emblem or uniform	§§ 1325–1397
Simulation of protected status by using other internationally recognised emblems	§§ 1398–1451
Simulation of civilian status	§§ 1452–1505
Simulation of protected status by using flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict	§§ 1506–1545

A. Ruses of War

I. Treaties and Other Instruments

Treaties

1. Article 24 of the 1899 HR provides that “ruses of war and the employment of methods necessary to obtain information about the enemy and the country are considered permissible”.
2. Article 24 of the 1907 HR provides that “ruses of war and the employment of methods necessary for obtaining information about the enemy and the country are considered permissible”.
3. Article 37(2) AP I states that:

Ruses of war are not prohibited. Such ruses are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no Rule of international law applicable in armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.

Article 37 AP I was adopted by consensus.¹

4. Article 21(2) of draft AP II submitted by the ICRC to the CDDH provided that “ruses of war, that is to say, those acts which, without inviting the confidence of the adversary, are intended to mislead him or to induce him to act recklessly, such as camouflage, traps, mock operations and misinformation, are not perfidious acts”.² This Article 21 was amended and adopted in Committee III of the CDDH by 21 votes in favour, 15 against and 41 abstentions.³ The approved text provided that “ruses are not prohibited”.⁴ Eventually, however, it was deleted by consensus in the plenary.⁵

Other Instruments

5. Article 15 of the 1863 Lieber Code states that “military necessity... allows... of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist”. Article 16 adds that “military necessity... admits of deception, but disclaims acts of perfidy”. Furthermore, Article 101 describes deception as a “just and necessary means of hostility”.
6. Article 14 of the 1874 Brussels Declaration provides that “ruses of war and the employment of methods necessary for obtaining information about the enemy and the country... are considered permissible”.

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.59, 10 May 1977, p. 213, § 20.

⁴ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 128.

7. Article 15 of the 1913 Oxford Manual of Naval War states that “ruses of war are considered permissible”.
8. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 37 AP I.
9. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 37 AP I.
10. Paragraph 110 of the 1994 San Remo Manual states that “ruses of war are permitted”.

II. National Practice

Military Manuals

11. Argentina’s Law of War Manual (1969) provides that “stratagems or ruses of war and the employment of methods necessary for obtaining information about the enemy and the country are considered as lawful”.⁶ It also states that “the observation of the principle of good faith must be constant and inalterable in dealings with the enemy. Consequently, the use of ruses and stratagems of war shall be legitimate as long as they do not imply the recourse to treachery or perfidy.”⁷
12. Argentina’s Law of War Manual (1989) states that stratagems are “acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law and which are not perfidious”. It gives examples of stratagems, such as camouflage, mock operations and false information.⁸
13. Australia’s Commanders’ Guide provides that “ruses of war are lawful methods of deception that, over time, have been accepted as legitimate methods of fighting. Examples of ruses are: a. camouflage . . . b. decoys . . . c. false signals . . . d. surprise and ambush, and e. diversionary tactics.”⁹ It also states that “ruses of war are used to obtain an advantage by misleading the enemy. They are permissible provided they are free from any suspicion of treachery or perfidy and do not violate any expressed or tacit agreement.”¹⁰
14. Australia’s Defence Force Manual states that:

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the enemy country are permissible. Ruses of war are used to obtain an advantage by misleading the enemy. They are permissible provided they are free from any suspicion of treachery or perfidy. Legitimate ruses include

⁶ Argentina, *Law of War Manual* (1969), § 1.016.

⁷ Argentina, *Law of War Manual* (1969), § 1.017.

⁸ Argentina, *Law of War Manual* (1989), § 1.05(3).

⁹ Australia, *Commanders’ Guide* (1994), § 508.

¹⁰ Australia, *Commanders’ Guide* (1994), § 901 (land warfare), see also § 826 (naval warfare).

surprises, ambushes, camouflage, decoys, mock operations and misinformation. Psychological operations are also permitted.¹¹

15. Belgium's Law of War Manual states that "ruses of war are acts which, without constituting a violation of a recognised rule, are intended to mislead an adversary or to induce him to act recklessly". It gives examples of ruses of war, such as surprise attacks, ambushes, feigning attacks, simulating quiet or inactivity, creating an impression of a stronger force than actually exists, making use of the enemy's code, transmitting false messages and using an informal cease-fire intended to collect the wounded to execute unobserved movements.¹²

16. Belgium's Teaching Manual for Officers provides that ruses of war are authorised.¹³

17. Benin's Military Manual states that "in order to conceal his intentions and actions from the enemy to induce him to react in a way detrimental to his interests, a military commander is permitted to use ruse . . . A ruse of war aims to: mislead the enemy [and] to induce the enemy to act recklessly."¹⁴

18. Cameroon's Instructors' Manual provides that ruses of war and stratagems are different from perfidy. They are lawful deceptions.¹⁵

19. Canada's Rules of Engagement for Operation Deliverance provides that:

Commanders are authorized to use military deception to protect against attack and to enhance the security and effectiveness of Canadian forces. Commanders may employ any deception means available to deny potentially hostile forces the ability to accurately locate, identify, track, and target Canadian or Coalition forces except as constrained or otherwise prohibited by international law or agreement, directive or these ROE.¹⁶

20. Canada's LOAC Manual states that:

Ruses of war are measures taken to obtain advantage of the enemy by confusing or misleading them.

Ruses of war are more formally defined as acts which are intended to mislead an adversary or to induce that adversary to act recklessly. Ruses must not infringe any rule of the LOAC. Ruses are lawful if they are not treacherous, perfidious and do not violate any express or tacit agreement.

The following are examples of ruses which are lawful:

- a. surprises;
- b. ambushes;
- c. feigning attacks, retreats or flights;
- d. simulating quiet and inactivity;
- e. giving large strong points to a small force;

¹¹ Australia, *Defence Force Manual* (1994), § 702.

¹² Belgium, *Law of War Manual* (1983), p. 32.

¹³ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

¹⁴ Benin, *Military Manual* (1995), Fascicule III, p. 13.

¹⁵ Cameroon, *Instructors' Manual* (1992), p. 30, § 131 and p. 89, § 222.

¹⁶ Canada, *Rules of Engagement for Operation Deliverance* (1992), § 27.

- f. constructing works, bridges etc. which it is not intended to use;
- g. transmitting bogus signal messages and sending bogus dispatches and newspapers with a view to their being intercepted by the enemy;
- h. making use of the enemy's signals, watchwords, wireless code signs, tuning calls and words of command;
- i. conducting a false military exercise on the wireless on a frequency easily intercepted while substantial troop movements are taking place elsewhere;
- j. pretending to communicate with troops or reinforcements that do not exist;
- k. moving landmarks;
- l. constructing dummy airfields and aircraft;
- m. putting up dummy guns or dummy tanks;
- n. laying dummy mines;
- o. removing badges from uniforms;
- p. clothing the men of a single unit in the uniforms of several different units to induce the enemy to believe that they face a large force; or
- q. giving false ground signals to enable airborne personnel or supplies to be dropped in a hostile area or to induce aircraft to land in a hostile area.¹⁷

In the context of air warfare, the manual also gives camouflage, decoys and fake radio signals as examples of legitimate ruses.¹⁸

21. Canada's Code of Conduct states that "ruses such as camouflage and other similar deceptions are not prohibited and as such are legitimate".¹⁹

22. Croatia's Commanders' Manual provides that "deception measures such as camouflage, decoys, mock operations are permitted".²⁰

23. Ecuador's Naval Manual states that:

The law of armed conflicts permits deceiving the enemy through stratagems and ruses of war intended to mislead him, to deter him from taking action, or to induce him to act recklessly, provided the ruses do not violate rules of international law applicable to armed conflict.

...

Stratagems and ruses of war permitted in armed conflict include such deceptions as camouflage, deceptive lighting, dummy ships and other armament, decoys, simulated forces, feigned attacks and withdrawals, ambushes, false intelligence information, electronic deceptions, and utilisation of enemy codes, passwords, and countersigns.²¹

24. France's LOAC Summary Note provides that "if ruse of war is authorised, perfidy is prohibited".²²

25. France's LOAC Manual incorporates the content of Article 24 of the 1907 HR.²³ It defines "lawful deception: the ruse of war or stratagem is a non-perfidious act but aimed at deceiving the enemy or inducing him to act

¹⁷ Canada, *LOAC Manual* (1999), pp. 6-1 and 6-2, §§ 5-7 (land warfare), see also p. 7-2, §§ 14 and 15 (air warfare) and p. 8-10, §§ 75-77 (naval warfare).

¹⁸ Canada, *LOAC Manual* (1999), p. 7-2, § 15.

¹⁹ Canada, *Code of Conduct* (2001), Rule 10, § 10.

²⁰ Croatia, *Commanders' Manual* (1992), § 46.

²¹ Ecuador, *Naval Manual* (1989), §§ 12.1 and 12.1.1.

²² France, *LOAC Summary Note* (1992), § 4.4. ²³ France, *LOAC Manual* (2001), p. 114.

recklessly".²⁴ It gives the examples of camouflage, decoy, feint, simulated demonstration or operation, disinformation, false information and technical ruses.²⁵ It also incorporates the content of Article 37(2) API.²⁶

26. Germany's Military Manual provides that "ruses of war and the employment of measures necessary for obtaining information about the adverse party and the country are considered permissible... Ruses of war include e.g. the use of enemy signals, passwords, signs, decoys, etc.; not, however, espionage."²⁷

27. Hungary's Military Manual lists camouflage, decoys, mock operations and misinformation as examples of deception.²⁸

28. Indonesia's Military Manual provides that "ruses of war... are allowed in armed conflict, such as camouflage, decoys, mock operations and intentional use of misinformation concerning military operations".²⁹

29. Israel's Manual on the Laws of War states that:

Surprise, stratagem, artifice are some of the most fundamental principles of war, giving the army a tactical advantage, and sometimes even a strategic one. The prohibition in the chapter on methods of warfare does not come to deny the armies the use of the element of surprise or to demand that each side be "transparent" to its enemy.

...

There is no prohibition on the use of camouflage, stratagems, ambushes and deceptions that are not perfidious means, i.e. where there is no situation of trust between the parties by virtue of the law of war, which is violated by one of the parties. Thus, for example, camouflaging a combatant to appear like objects in the natural surroundings (as opposed to the human surroundings) is permitted (such as painting the face black, adding leaves to helmet, and so forth). Interfering with the enemy's communication network and conducting psychological warfare are permissible... One may deceive the enemy with regard to the size of one's force or its intentions, as was done in the Yom Kippur War by the "Zvika Force". It is also allowed to conduct maneuvers of deception, flanking, dummy units and weapons, and the like. The law of war does not come to bar any party from exploiting tactical or strategic advantages or the enemy's naivete.³⁰

30. Italy's IHL Manual states that "stratagems of war and the employment of methods necessary for obtaining information about the enemy are considered lawful".³¹

31. Italy's LOAC Elementary Rules Manual states that "measures of deception, such as camouflage, decoys, mock operations and misinformation, are permitted".³²

²⁴ France, *LOAC Manual* (2001), p. 47, see also p. 114.

²⁵ France, *LOAC Manual* (2001), pp. 47 and 114, see also p. 115.

²⁶ France, *LOAC Manual* (2001), p. 123.

²⁷ Germany, *Military Manual* (1992), § 471, see also § 1018 (naval warfare).

²⁸ Hungary, *Military Manual* (1992), p. 63. ²⁹ Indonesia, *Military Manual* (1982), § 103.

³⁰ Israel, *Manual on the Laws of War* (1998), pp. 56 and 58.

³¹ Italy, *IHL Manual* (1991), Vol. I, § 9. ³² Italy, *LOAC Elementary Rules Manual* (1991), § 46.

32. Kenya's LOAC Manual states that "ruses of war... are permitted. They are acts intended to mislead an enemy but not inviting his confidence. Ruses of war include the use of camouflage, decoys, mock operations and misinformation."³³

33. South Korea's Military Law Manual states that ruses of war such as camouflage, decoys and misinformation are permitted. It adds that the dissemination of misinformation during some landing operations is also lawful.³⁴

34. Madagascar's Military Manual provides that "measures of deception, such as camouflage, decoys, mock operations and disinformation, are permitted".³⁵

35. The Military Manual of the Netherlands states that:

Ruses of war may be used... Ruses of war are defined as behaviour which is intended to mislead an enemy or to induce him to act recklessly, but which do not violate any rules of the humanitarian law of war. Such behaviour is not treacherous because it does not inspire the confidence of the adversary with respect to protection under the humanitarian law of war. Examples of ruses of war are the use of camouflage, ambushes, fake positions, mock operations, misleading messages and incorrect information.³⁶

36. The Military Handbook of the Netherlands provides that "ruses are permitted. For example: ambushes, feint, sending of mock messages, use of enemy watchwords and codes, mock positions and constructions, camouflage."³⁷

37. New Zealand's Military Manual states that:

Ruses of war are measures taken to gain advantage over the enemy by mystifying or misleading him. They are permitted provided they are free from any suspicion of treachery or perfidy and do not violate any expressed or tacit agreement...

Legitimate ruses include: surprises; ambushes; feigning attacks, retreats or flights; simulating quiet and inactivity; giving large strongpoints to a small force; constructing works, bridges, etc., which it is not intended to use; transmitting bogus signal messages, and sending bogus despatches and newspapers with a view to their being intercepted by the enemy; making use of the enemy's signals, watchwords, wireless code signs and tuning calls, and words of command; conducting a false military exercise on the wireless on a frequency easily interrupted while substantial troop movements are taking place on the ground; pretending to communicate with troops or reinforcements which do not exist; moving landmarks; constructing dummy airfields and aircraft; putting up dummy guns or dummy tanks; laying dummy mines; removing badges from uniforms; clothing the men of a single unit in the uniforms of several different units so that prisoners and dead may give the idea of a large force; giving false ground signals to enable airborne personnel or supplies to be dropped in a hostile area, or to induce aircraft to land in a hostile area.

³³ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

³⁴ South Korea, *Military Law Manual* (1996), p. 88.

³⁵ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

³⁶ Netherlands, *Military Manual* (1993), pp. IV-1 and IV-2.

³⁷ Netherlands, *Military Handbook* (1995), p. 7-40, see also p. 7-36.

... [I]t would not be unlawful for a few men to call upon an enemy force to surrender on the ground that it was surrounded or to threaten bombardment although no guns are actually in place.³⁸

38. Nigeria's Military Manual states that:

A commander in his desire to fulfil his mission shall not mask his intentions and action from the enemy so as to induce the enemy to react in a manner prejudicial to his interests. Thus, to be consistent with the law of war, deceptions shall follow the distinction between permitted ruses and prohibited perjury [perfidy]... [Ruse] of war is considered to be a permissible method of warfare. These are acts intended to mislead an adversary or induce him to act recklessly but they infringe no rule of international law and are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. Examples of ruses of war are camouflage, decoys, mock operations, misinformation, surprises, ambushes and small scale raids.³⁹

39. Nigeria's Manual on the Laws of War states that "stratagems and ruses of war are measures to obtain advantage over the enemy by misleading or mystifying him. Such tactics are permissible provided they do not involve treachery." It gives examples of "legitimate tactics", such as surprises, ambushes, feigning attacks, retreats, flights and false movement of units, making use of the enemy code and password, giving false information to the enemy, employing spies and agents, moving landmarks, using dummies and psychological warfare.⁴⁰

40. South Africa's LOAC Manual states that:

Certain ruses of war, intended to mislead an adversary or to induce it to act recklessly, do not contravene international law. Examples given in [API] are camouflage, decoy, mock operations and disinformation. Others are surprise, ambush, psychological operations and deception by communication or movement.⁴¹

41. Spain's Field Regulations states that "the laws of war permit: ambushes, surprises, night attacks, simulated movements, false retreats to ambush, intimidation and provision of false information".⁴²

42. Spain's LOAC Manual states that stratagems are permitted.⁴³ It adds that, in order to fulfil his mission, the commander may dissimulate his intentions and actions to the enemy in order to mislead him, to induce him to act recklessly or to react against his own interests. However, stratagems must neither infringe any rule of international law applicable in armed conflicts, nor be perfidious.⁴⁴ It gives the following examples of stratagems: decoys, mock operations, misinformation, camouflage and disinformation.⁴⁵

³⁸ New Zealand, *Military Manual* (1992), §§ 502(1), 502(2) and 502(3) (land warfare), see also § 611(1) (air warfare) and § 713(1) (naval warfare).

³⁹ Nigeria, *Military Manual* (1994), pp. 42 and 43.

⁴⁰ Nigeria, *Manual on the Laws of War* (undated), § 14.

⁴¹ South Africa, *LOAC Manual* (1996), § 34(a). ⁴² Spain, *Field Regulations* (1882), § 863.

⁴³ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.a.(1), 5.3.c, 7.3.a.(6) and 10.8.e.(1).

⁴⁴ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.a.(1) and 5.3.c, see also §§ 2.3.b.(2) and 7.3.a.(6).

⁴⁵ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.a.(1), 5.3.c, 7.3.a.(6) and 10.8.e.(1).

43. Sweden's IHL Manual states that:

In certain circumstances, ruses of war may become almost tantamount to perfidy. Here the important difference is that ruses of war are not based on betrayal of the adversary's confidence. Instead, the intention of a ruse is to mislead the adversary, which can lead to incorrect deployment of his forces or to reckless actions which, for example, prematurely reveal his forces, intended tactics or assault objectives. The [1907 HR] states that it is permitted to use ruses of war, and the same authority is given in AP I, Article 37:2. Typical examples of ruses are giving false information on the size of one's own forces, position and intentions, or hiding one's combat forces with camouflage, or misleading the adversary by means of mock objectives and mock operations.⁴⁶

44. Switzerland's Basic Military Manual provides that:

Ruses of war and the employment of methods necessary for obtaining information about the enemy and the country are lawful.

...

Examples of lawful ruses: surprises; ambushes; feigning attacks or retreats; constructing installations which it is not intended to use; constructing dummy airfields; putting up dummy guns or dummy tanks; giving large strong points to a small force; transmitting false information through newspapers or radio; making use of the enemy's watchwords, wireless code signs and tuning calls to transmit false instructions; pretending to communicate with troops or reinforcements which do not exist; moving landmarks; removing from uniforms the badges indicating the grade, unit, nationality or speciality; giving the men of a single unit badges of several different units so that the enemy thinks that he is facing a bigger force; inciting enemy soldiers to rebellion, mutiny or desertion, possibly taking with them arms and means of transportation such as aircraft; and inducing the enemy population to revolt against its government, etc.⁴⁷

45. Togo's Military Manual states that "in order to conceal his intentions and actions from the enemy to induce him to react in a way detrimental to his interests, a military commander is permitted to use ruse . . . A ruse of war aims to: mislead the enemy [and] to induce the enemy to act recklessly."⁴⁸

46. According to the UK Military Manual, "ruses of war are the measures taken to obtain advantage of the enemy by mystifying or misleading him. They are permissible provided they are free from any suspicion of treachery or perfidy and do not violate any express or tacit agreement."⁴⁹ It notes that "according to the debate which took place at the [Hague] Conference . . . [Article 24 of the 1907 HR] must not be taken to imply that every ruse is permissible. A ruse ceases to be permissible if it contravenes any generally accepted rule."⁵⁰ "Legitimate ruses" include:

⁴⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 30.

⁴⁷ Switzerland, *Basic Military Manual* (1987), Article 38, including commentary.

⁴⁸ Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁴⁹ UK, *Military Manual* (1958), § 307. ⁵⁰ UK, *Military Manual* (1958), § 307, footnote 1.

Surprises; ambushes; feigning attacks, retreats or flights; simulating quiet and inactivity; giving large strong points to a small force; constructing works, bridges, etc., which it is not intended to use; transmitting bogus signal messages, and sending bogus despatches and newspapers with a view to their being intercepted by the enemy; making use of the enemy's signals, watchwords, wireless code signs and tuning calls, and words of command; conducting a false military exercise on the wireless on a frequency easily interrupted while substantial troop movements are taking place on the ground; pretending to communicate with troops or reinforcements which do not exist; moving landmarks; constructing dummy airfields and aircraft; putting up dummy guns or dummy tanks; laying dummy mines; removing badges from uniforms; clothing the men of a single unit in the uniform of several different units so that prisoners and dead may give the idea of a large force; giving false ground signals to enable airborne personnel or supplies to be dropped in a hostile area, or to induce aircraft to land in a hostile area.⁵¹

The manual also states that "a capitulation . . . may not . . . be annulled because one of the parties has been induced to agree to it by ruse".⁵²

47. The UK LOAC Manual states that "ruses of war . . . are permitted. They are acts intended to mislead an enemy but not inviting his confidence."⁵³ They include the use of camouflage, decoys, mock operations, dummy installations, misleading messages and misinformation.⁵⁴

48. The US Field Manual states that:

Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible.

...

Absolute good faith with the enemy must be observed as a rule of conduct; but this does not prevent measures such as using spies and secret agents, encouraging defection or insurrection among the enemy civilian population, corrupting enemy civilians or soldiers by bribes, or inducing the enemy's soldiers to desert, surrender, or rebel. In general, a belligerent may resort to those measures for mystifying or misleading the enemy against which the enemy ought to take measures to protect himself.

...

Ruses of war are legitimate so long as they do not involve treachery or perfidy on the part of the belligerent resorting to them. They are, however, forbidden if they contravene any generally accepted rule.

The line of demarcation between legitimate ruses and forbidden acts of perfidy is sometimes indistinct . . . [I]t is a perfectly proper ruse to summon a force to surrender on the ground that it is surrounded and thereby induce such surrender with a small force.

...

Among legitimate ruses may be counted surprises; ambushes; feigning attacks, retreats or flights; simulating quiet and inactivity; use of small forces to simulate large

⁵¹ UK, *Military Manual* (1958), § 312. ⁵² UK, *Military Manual* (1958), § 484.

⁵³ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a).

⁵⁴ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a) and Annex A, p. 46, § 4.

units; transmitting false or misleading radio or telephone messages; deception of the enemy by bogus orders purporting to have been issued by the enemy commanders; making use of the enemy's signals and passwords; pretending to communicate with troops or reinforcements which have no existence; deceptive supply movements; deliberate planting of false information; use of spies and secret agents; moving landmarks; putting up dummy guns and vehicles or laying dummy mines; erection of dummy installations and airfields; removing unit identifications from uniforms; use of signal deceptive measures; and psychological warfare activities.⁵⁵

49. The US Air Force Pamphlet states that:

Ruses of war which have customarily been accepted as lawful, such as the use of camouflage, traps, mock operations and misinformation, are not perfidy. Ruses of war involve misinformation, deceit or other steps to mislead the enemy under circumstances where there is no obligation to speak the truth.

...

Article 24 of the 1907 Hague Regulations confirms the general rule that ruses of war not constituting perfidy are lawful. Among the permissible ruses are surprises, ambushes, feigning attacks, retreats, or flights; simulation of quiet and inactivity; use of small forces to simulate large units; transmission of false or misleading radio or telephone messages (not involving protection under international law such as internationally recognized signals of distress); deception by bogus orders purported to have been issued by the enemy commander; use of the enemy's signals and passwords; feigned communication with troops or reinforcements which have no existence; and resort to deceptive supply movements. Also included are the deliberate planting of false information, moving of landmarks, putting up dummy guns and vehicles, laying of dummy mines, erection of dummy installations and airfields, removal of unit identifications from uniforms, and use of signal deceptive measures.

...

The following examples provide guidelines for lawful ruses:

- (1) The use of aircraft decoys. Slower or older aircraft may be used as decoys to lure hostile aircraft into combat with faster and newer aircraft held in reserve. The use of aircraft decoys to attract ground fire in order to identify ground targets for attack by more sophisticated aircraft is also permissible.
- (2) Staging air combats. Another lawful ruse is the staging of air combat between two properly marked friendly aircraft with the object of inducing an enemy aircraft into entering the combat in aid of a supposed comrade.
- (3) Imitation of enemy signals. No objection can be made to the use by friendly forces of the signals or codes of an adversary. The signals or codes used by enemy aircraft or by enemy ground installations in contact with their aircraft may properly be employed by friendly forces to deceive or mislead an adversary. However, misuse of distress signals or distinctive signals internationally recognized as reserved for the exclusive use of medical aircraft would be perfidious.
- (4) Use of flares and fires. The lighting of large fires away from the true target area for the purpose of misleading enemy aircraft into believing that the large fires represent damage from prior attacks and thus leading them to the wrong

⁵⁵ US, *Field Manual* (1956), §§ 48–51.

target is a lawful ruse. The target marking flares of the enemy may also be used to mark false targets. However, it is an unlawful ruse to fire false target flare indicators over residential areas of a city or town which are not otherwise valid military objectives.

- (5) Camouflage use. The use of camouflage is a lawful ruse for misleading and deceiving enemy combatants. The camouflage of a flying aircraft must not conceal national markings of the aircraft, and the camouflage must not take the form of the national markings of the enemy or that of objects protected under international law.
- (6) Operational ruses. The ruse of the "switched raid" is a proper method of aerial warfare in which aircraft set a course, ostensibly for a particular target, and then, at a given moment, alter course in order to strike another military objective instead. This method was utilized successfully in World War II to deceive enemy fighter interceptor aircraft.⁵⁶

50. The US Naval Handbook states that:

The law of armed conflicts permits deceiving the enemy through stratagems and ruses of war intended to mislead him, to deter him from taking action, or to induce him to act recklessly, provided the ruses do not violate rules of international law applicable to armed conflict.

...

Stratagems and ruses of war permitted in armed conflict include such deceptions as camouflage, deceptive lighting, dummy ships and other armament, decoys, simulated forces, feigned attacks and withdrawals, ambushes, false intelligence information, electronic deceptions, and utilization of enemy codes, passwords, and countersigns.⁵⁷

51. The YPA Military Manual of the SFRY (FRY) states that ruses of war are lawful methods of conducting warfare which are used to deceive the enemy and achieve some advantage in battle or in the conduct of the war in general. It gives the following non-exhaustive list of ruses: all types of misinformation; simulation of large attacks, retreats, flights or panic, and any other type of simulation except vicious and perfidious ones; falsification of enemy commands; deceiving the enemy about the strength of one's own forces and reserves; putting up dummy forts, positions, aircraft, take-off strips and minefields; use of make-believe signals, enemy watchwords, code signs and passwords; use of enemy uniforms without badges, removal of badges of ranks, units or services from one's own uniform; and anything else that could deceive the enemy in order to achieve some advantage or which could in any other way have a psychological impact on the enemy.⁵⁸

⁵⁶ US, *Air Force Pamphlet* (1976), §§ 8-3(b), 8-4(a) and (b).

⁵⁷ US, *Naval Handbook* (1995), §§ 12.1 and 12.1.1.

⁵⁸ SFRY (FRY), *YPA Military Manual* (1988), § 108.

National Legislation

52. Italy's Law of War Decree as amended provides that "stratagems of war and the employment of methods necessary for obtaining information about the enemy are considered lawful".⁵⁹

National Case-law

53. According to a ruling of Colombia's Constitutional Court in 1997, the use of military tactics and stratagems must be in conformity with constitutional standards. However, it had in mind the protection of civilians rather than stratagems as a method of warfare.⁶⁰

Other National Practice

54. The Report on the Practice of Algeria recalls the old Islamic principle whereby "la guerre est ruse" (war is ruse). The report notes that Algerian fighters during the war of independence predominantly used methods of war such as surprise attacks, ambushes, camouflage, misinformation and mock operations.⁶¹

55. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that ruses of war are permitted as long as they do not contravene religious and moral rules or local and international traditions.⁶²

56. According to the Report on the Practice of Malaysia, members of security forces who were interviewed indicated that, in practice, deception such as camouflage would be used in conducting operations.⁶³

57. As an example of a ruse of war, a commentator recalled that, during the War in the South Atlantic, the UK announced the establishment of a "maritime exclusion zone". The impression was given that a UK nuclear submarine was on station in the area. There were later complaints that misleading information had been released, when it was discovered that the vessel was in Scotland. Since the exclusion zone was not a formal blockade (it only applied to enemy naval vessels), which must be enforceable to be binding, it could be considered as a mere warning to Argentine naval forces. The commentator stated that "this was a perfectly valid and successful piece of 'disinformation'".⁶⁴

⁵⁹ Italy, *Law of War Decree as amended* (1938), Article 36.

⁶⁰ Colombia, Constitutional Court, *Constitutional Case No. T-303*, Judgement, 20 June 1997.

⁶¹ Report on the Practice of Algeria, 1997, Chapter 2.4.

⁶² Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.4.

⁶³ Report on the Practice of Malaysia, 1997, Chapter 2.4.

⁶⁴ Howard S. Levie, "The Falklands Crisis and the Laws of War", in Alberto R. Coll and Anthony C. Arend (eds.), *The Falklands War: Lessons for Strategy, Diplomacy and International Law*, George Allen & Unwin, Boston, 1985, p. 65.

58. A training video on IHL produced by the UK Ministry of Defence states that ruses are permitted but underlines that it is difficult to differentiate ruses of war and treachery.⁶⁵

59. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Under the law of war, deception includes those measures designed to mislead the enemy by manipulation, distortion, or falsification of evidence to induce him to react in a manner prejudicial to his interests. Ruses are deception of the enemy by legitimate means, and are specifically allowed by Article 24, [1907 HR], and [AP I]

...

Coalition actions that convinced Iraqi military leaders that the ground campaign to liberate Kuwait would be focused in eastern Kuwait, and would include an amphibious assault, are examples of legitimate ruses...

There were few examples of perfidious practices during the Persian Gulf War. The most publicized were those associated with the battle of Ras Al-Khafji, which began on 29 January. As that battle began, Iraqi tanks entered Ras Al-Khafji with their turrets reversed, turning their guns forward only at the moment action began between Iraqi and Coalition forces. While there was some media speculation that this was an act of perfidy, it was not; a reversed turret is not a recognized indication of surrender *per se*. Some tactical confusion may have occurred, since Coalition ground forces were operating under a defensive posture at that time, and were to engage Iraqi forces only upon clear indication of hostile intent, or some hostile act.⁶⁶

III. Practice of International Organisations and Conferences

United Nations

60. No practice was found.

Other International Organisations

61. No practice was found.

International Conferences

62. The report of the Second Commission to the Hague Peace Conference in 1907 included an explanatory note stating that Article 24 of the 1907 HR aimed "only to say that ruses of war and methods of obtaining information are not prohibited as such. They would cease to be 'permissible' in case of infraction of a recognised imperative rule to the contrary."⁶⁷

⁶⁵ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

⁶⁶ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 631–632.

⁶⁷ Howard S. Levie, *The Code of International Armed Conflict*, Oceana Publications, London, 1985, Vol. 1, Chapter 3.5, Section 35.1, p. 118.

IV. Practice of International Judicial and Quasi-judicial Bodies

63. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

64. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

To be consistent with the law of war, deception shall follow the distinction between permitted ruses and prohibited perfidy.

“Ruse of war” or “stratagem” means any act not amounting to perfidy but intended:

- a) to mislead the enemy; or
- b) to induce the enemy to act recklessly.

Ruses of war are permitted.

Examples of ruses of war:

- a) camouflage (natural, paints, nets, smoke);
- b) displays (decoys, feint);
- c) demonstrations, mock operations;
- d) disinformation, misinformation;
- e) technical (electronic, communications).⁶⁸

VI. Other Practice

65. In their commentary on the 1977 Additional Protocols, Bothe, Partsch and Solf state that “ruses of war have always been permitted”. They give as examples of such ruses:

the use of spies and secret agents, encouraging defection or insurrection among enemy civilians, corrupting enemy civilians or soldiers by bribes, or encouraging the enemy’s combatants to desert, surrender or rebel (but not selectively to assassinate a particular individual), . . . surprise attacks, ambushes, simulating quiet and inactivity, use of small units to simulate large forces, transmitting false or misleading messages, making use of the enemy’s signals, pretending to communicate with troops or reinforcements which do not exist, moving landmarks and route markers, putting up dummy weapons and the laying of dummy mines.⁶⁹

66. Commenting on Article 37(2) API, Oeter states that “deceiving the enemy about the military situation . . . has belonged to the common arsenal of warfare since time immemorial”. He adds that:

Camouflaging one’s own defence positions and using them for ambushes, setting up surprise attacks from such camouflaged positions, simulating operations of retreat,

⁶⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 400–402.

⁶⁹ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, pp. 202 and 207.

as well as simulating operations of attack, using dummy weapons, transmitting misleading messages, *inter alia*, by using the adversary's radio wavelengths, passwords, and codes, infiltrating the enemy's command chain in order to channel wrong orders, moving landmarks and route markers, giving members of one military unit the signs of other units to persuade the enemy that one's force is larger than it really is – all these are established elements of traditional tactics.⁷⁰

B. Improper Use of the White Flag of Truce

Note: *For practice concerning the simulation of surrender and concerning the simulation of an intention to negotiate under the white flag of truce as acts considered perfidious, see infra section I of this chapter. For practice concerning the use of the white flag of truce by parlementaires, see Chapter 19, section A.*

I. Treaties and Other Instruments

Treaties

67. Article 23(f) of the 1899 HR provides that “it is especially prohibited . . . to make improper use of a flag of truce”.

68. Article 23(f) of the 1907 HR provides that “it is especially forbidden . . . to make improper use of a flag of truce”.

69. Article 38(1) AP I provides that “it is . . . prohibited to misuse deliberately in an armed conflict . . . the flag of truce”. Article 38 AP I was adopted by consensus.⁷¹

70. Article 23(2) of draft AP II submitted by the ICRC to the CDDH provided that “it is forbidden to make improper use of the flag of truce”.⁷² This proposal was amended and adopted by consensus in Committee III of the CDDH.⁷³ The approved text provided that it was “forbidden to misuse deliberately in armed conflict other internationally recognized protective emblems . . . including the flag of truce”.⁷⁴ Eventually, however, it was deleted by consensus in the plenary.⁷⁵

71. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use of a flag of truce . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

72. Article 114 of the 1863 Lieber Code provides that “if it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining

⁷⁰ Stefan Oeter, *Methods and Means of Combat*, Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, pp. 199–200, § 471.

⁷¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁷² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁷³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 109, § 8.

⁷⁴ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 421.

⁷⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 129.

military knowledge the bearer of the flag thus abusing his sacred character is deemed a spy".

73. Article 117 of the 1863 Lieber Code considers it "an act of bad faith, of infamy or fiendishness to deceive the enemy by flags of protection".

74. Article 13(f) of the 1874 Brussels Declaration especially forbids "making improper use of a flag of truce".

75. Article 8(d) of the 1880 Oxford Manual provides that "it is forbidden... to make improper use... of the flag of truce".

76. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including "misuse of flags".

77. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 38 AP I.

78. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 38 AP I.

79. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6 (1)(b)(vii), "making improper use of a flag of truce... resulting in death or serious personal injury" is a war crime in international armed conflicts.

II. National Practice

Military Manuals

80. Argentina's Law of War Manual (1969) provides that the improper use of the flag of parlementaires is a breach of good faith. It states, however, that the use said to be "improper" applies only in combat operations.⁷⁶

81. Argentina's Law of War Manual (1989) states that "it is prohibited... to deliberately abuse... internationally recognised protective emblems, signs or signals, including the flag of parlementaires".⁷⁷

82. Australia's Commanders' Guide provides that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... misusing or abusing... any... protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled".⁷⁸

83. Australia's Defence Force Manual provides that "deliberate misuse of... protective symbols and emblems, signs and signals, including the flag

⁷⁶ Argentina, *Law of War Manual* (1969), § 1.017.

⁷⁷ Argentina, *Law of War Manual* (1989), § 1.06(1).

⁷⁸ Australia, *Commanders' Guide* (1994), § 1305(1).

of truce...is...prohibited".⁷⁹ It further states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:...misusing or abusing...any...protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled".⁸⁰

84. Belgium's Teaching Manual for Officers specifies that "it is prohibited to abuse the protective signs provided for by the [Geneva] Conventions and [AP I]. Example: camouflaging arms and ammunition in a vehicle or a building flying...the white flag."⁸¹

85. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly the flag of parlementaires".⁸²

86. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly the flag of parlementaires".⁸³

87. Cameroon's Instructors' Manual states that the improper use of distinctive signs and signals is an unlawful deception.⁸⁴

88. Canada's LOAC Manual provides that "it is prohibited...to deliberately misuse...internationally recognized protective emblems, signs or signals including the flag of truce".⁸⁵ It further states that "improperly using a flag of truce" constitutes a war crime.⁸⁶

89. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use [improperly] the flag of parlementaires".⁸⁷

90. Ecuador's Naval Manual emphasises that "use of the white flag to gain a military advantage over the enemy is unlawful".⁸⁸ It specifies that "protective signs and symbols may be used only to identify personnel, objects, and activities entitled to protected status which they designate. Any other use is forbidden by international law."⁸⁹ The manual also states that "the following acts constitute war crimes:...misuse [and] abuse...of flags of truce".⁹⁰

91. France's Disciplinary Regulations as amended provides that, under international conventions, it is prohibited "to use improperly the flag of parlementaires".⁹¹

92. France's LOAC Manual states that "it is prohibited...to use improperly...the white flag".⁹²

⁷⁹ Australia, *Defence Force Manual* (1994), § 704.

⁸⁰ Australia, *Defence Force Manual* (1994), § 1315(1).

⁸¹ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

⁸² Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁸³ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁸⁴ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

⁸⁵ Canada, *LOAC Manual* (1999), p. 6-2, § 11(b).

⁸⁶ Canada, *LOAC Manual* (1999), p. 16-3, § 20(f).

⁸⁷ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁸⁸ Ecuador, *Naval Manual* (1989), § 12.2. ⁸⁹ Ecuador, *Naval Manual* (1989), § 11.10.5.

⁹⁰ Ecuador, *Naval Manual* (1989), § 6.2.5(11).

⁹¹ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁹² France, *LOAC Manual* (2001), p. 47.

93. Germany's Military Manual provides that "it is prohibited to make improper use of a flag of truce".⁹³
94. Italy's IHL Manual states that it is prohibited "to use improperly... the flag of parlementaires".⁹⁴ The manual further states that grave breaches of international conventions and protocols, including "the improper... use of international protective signs", constitute war crimes.⁹⁵
95. Under South Korea's Military Regulation 187, illegal use of the white flag is a war crime.⁹⁶
96. Lebanon's Army Regulations prohibits combatants from unlawfully using the white flag.⁹⁷
97. Madagascar's Military Manual states that the abuse of the white flag is prohibited.⁹⁸
98. Mali's Army Regulations stipulates that, under the laws and customs of war, it is prohibited "to use improperly the flag of parlementaires".⁹⁹
99. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly the flag of parlementaires".¹⁰⁰
100. The Military Manual of the Netherlands states that "it is prohibited to misuse the flag of parlementaires".¹⁰¹ The manual further stresses that "the misuse of... recognised protective signs" is a grave breach of AP I.¹⁰²
101. The Military Handbook of the Netherlands stipulates that it is prohibited "to misuse the white flag".¹⁰³
102. New Zealand's Military Manual emphasises that "improper use of protective symbols... is prohibited".¹⁰⁴ It includes the white flag among the "protective symbols".¹⁰⁵ It further states that "improperly using a flag of truce" is a war crime.¹⁰⁶
103. Nigeria's Military Manual notes that it is prohibited "to make improper use of flag of truce".¹⁰⁷
104. Nigeria's Manual on the Laws of War provides that "improper use of the flag of truce" is an "illegitimate tactic".¹⁰⁸ It further states that the "abuse of... a white flag" is a war crime.¹⁰⁹

⁹³ Germany, *Military Manual* (1992), § 473.

⁹⁴ Italy, *IHL Manual* (1991), Vol. I, § 9(2). ⁹⁵ Italy, *IHL Manual* (1991), Vol. I, § 85.

⁹⁶ South Korea, *Military Regulation 187* (1991), Article 4.2.

⁹⁷ Lebanon, *Army Regulations* (1971), § 17.

⁹⁸ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

⁹⁹ Mali, *Army Regulations* (1979), Article 36.

¹⁰⁰ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

¹⁰¹ Netherlands, *Military Manual* (1993), p. IV-3.

¹⁰² Netherlands, *Military Manual* (1993), p. IX-5.

¹⁰³ Netherlands, *Military Handbook* (1995), p. 7-40.

¹⁰⁴ New Zealand, *Military Manual* (1992), § 502.7.

¹⁰⁵ New Zealand, *Military Manual* (1992), Annex B, § B42.

¹⁰⁶ New Zealand, *Military Manual* (1992), § 1704.2.f.

¹⁰⁷ Nigeria, *Military Manual* (1994), p. 40, § 5(1)(v).

¹⁰⁸ Nigeria, *Manual on the Laws of War* (undated), § 14.

¹⁰⁹ Nigeria, *Manual on the Laws of War* (undated), § 6.

105. Nigeria's Soldiers' Code of Conduct states that it is prohibited "to make improper use of flag of truce".¹¹⁰

106. Under Russia's Military Manual, the improper use of international signals and flags is a prohibited method of warfare.¹¹¹

107. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly the flag of parlementaires".¹¹²

108. South Africa's LOAC Manual defines the "abuse of . . . a flag of truce" as a grave breach of the law of war and a war crime.¹¹³

109. Spain's LOAC Manual provides that the improper use – to identify persons and objects not protected – of the white flag is a prohibited deception.¹¹⁴ It also states that the white flag may not be used for other than its intended purpose.¹¹⁵

110. Sweden's IHL Manual considers that the prohibition of improper use of recognised emblems, as contained in Article 38 AP I, is part of customary international law.¹¹⁶ It adds that "in land combat it is not unusual for one of the parties to attempt to win a tactical advantage by concealing the character of his own forces prior to attack, in order to mislead or surprise the adversary . . . A flag of truce may not, however, be used for such purposes."¹¹⁷

111. The UK Military Manual provides that "improper use of a flag of truce or of signals of surrender is forbidden. The flag must not be used merely to gain time to effect a retreat or bring up reinforcements."¹¹⁸ In connection with the requirements for granting the status of combatant, the manual notes in particular that irregular troops should be warned against improper conduct with flags of truce.¹¹⁹ It further emphasises that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . abuse of . . . a flag of truce".¹²⁰

112. The UK LOAC Manual provides that "it is forbidden . . . to make improper use in combat of a flag of truce".¹²¹

113. The US Field Manual states that "it is especially forbidden to make improper use of a flag of truce".¹²² It also provides that "flags of truce must not be used surreptitiously to obtain military information or merely to obtain time to effect a retreat or secure reinforcements or to feign a surrender in order to surprise an enemy".¹²³ The manual specifies that:

¹¹⁰ Nigeria, *Soldiers' Code of Conduct* (undated), § 12(f).

¹¹¹ Russia, *Military Manual* (1990), § 5(c).

¹¹² Senegal, *Disciplinary Regulations* (1990), Article 34(2).

¹¹³ South Africa, *LOAC Manual* (1996), §§ 39(e) and 41.

¹¹⁴ Spain, *LOAC Manual* (1996), Vol. I, § 5.3.c, see also § 10.8.e.(1).

¹¹⁵ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(2).

¹¹⁶ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

¹¹⁷ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 30.

¹¹⁸ UK, *Military Manual* (1958), § 318. ¹¹⁹ UK, *Military Manual* (1958), § 95.

¹²⁰ UK, *Military Manual* (1958), § 626(d).

¹²¹ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2d.

¹²² US, *Field Manual* (1956), § 52. ¹²³ US, *Field Manual* (1956), § 53.

It is an abuse of the flag of truce, forbidden as an improper ruse under Article 23 (f) [of the 1907] HR, for an enemy not to halt and cease firing while the parlementaire sent by him is advancing and being received by the other party; likewise, if the flag of truce is made use of for the purpose of inducing the enemy to believe that a parlementaire is going to be sent when no such intention exists.¹²⁴

The manual further notes that “in addition to the ‘grave breaches’ of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war (‘war crimes’): . . . abuse of . . . the flag of truce”.¹²⁵

114. The US Air Force Pamphlet provides that “it is . . . forbidden to make improper use of the flag of truce”.¹²⁶ It further states that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . deliberate . . . abuse of the flag of truce”.¹²⁷

115. The US Instructor’s Guide states that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . abusing . . . the flag of truce”.¹²⁸

116. The US Naval Handbook emphasises that “use of the white flag to gain a military advantage over the enemy is unlawful”.¹²⁹ It specifies that “protective signs and symbols may be used only to identify personnel, objects, and activities entitled to protected status which they designate. Any other use is forbidden by international law.”¹³⁰ The Handbook also states that “the following acts are representative war crimes: . . . misuse [and] abuse . . . [of] flags of truce”.¹³¹

117. The YPA Military Manual of the SFRY (FRY) provides that “it is forbidden to use, during combat, in order to mislead the enemy . . . the flag of parlementaires and the white flag in general”.¹³²

National Legislation

118. Algeria’s Code of Military Justice punishes:

any individual, whether military or not, who, in time of war, in an area of operations . . . in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined by international conventions for the respect of persons, objects and places protected by these conventions.¹³³

119. Argentina’s Draft Code of Military Justice punishes any soldier who “uses improperly . . . the flag of parlementaires or of surrender”.¹³⁴

120. Australia’s War Crimes Act considers “any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate

¹²⁴ US, *Field Manual* (1956), § 467. ¹²⁵ US, *Field Manual* (1956), § 504(e).

¹²⁶ US, *Air Force Pamphlet* (1976), §§ 8-2(a) and 8-3(c).

¹²⁷ US, *Air Force Pamphlet* (1976), § 15-3(c)(3). ¹²⁸ US, *Instructor’s Guide* (1985), p. 13.

¹²⁹ US, *Naval Handbook* (1995), § 12.2. ¹³⁰ US, *Naval Handbook* (1995), § 11.9.6.

¹³¹ US, *Naval Handbook* (1995), § 6.2.5(11).

¹³² SFRY (FRY), *YPA Military Manual* (1988), § 105(1).

¹³³ Algeria, *Code of Military Justice* (1971), Article 299.

¹³⁴ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(7) in the *Code of Military Justice as amended* (1951).

war crimes committed by enemy subjects]” as a war crime, including misuse of flags of truce.¹³⁵

121. Australia’s Geneva Conventions Act as amended provides that:

A person shall not, without the consent in writing of the Minister or of a person authorized in writing by the Minister to give consents . . . use for any purpose whatsoever any of the following:

...

such . . . emblems, identity cards, signs, signals, insignia or uniforms as are prescribed for the purpose of giving effect to [AP I].¹³⁶

122. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “improper use of a flag of truce” in international armed conflicts.¹³⁷

123. Azerbaijan’s Criminal Code provides that “the misuse of the white flag . . . which as a result caused death or serious injury to body of a victim” constitutes a war crime in international and non-international armed conflicts.¹³⁸

124. The Criminal Code of Belarus provides that it is a war crime to “use intentionally, during hostilities, in violation of international treaties, . . . signs protected by international law”.¹³⁹

125. Under the Criminal Code of the Federation of Bosnia and Herzegovina, “whoever misuses or carries without authorisation . . . any . . . international symbols recognised as the protection of certain objects from military operations” commits a war crime.¹⁴⁰ The Criminal Code of the Republika Srpska contains the same provision.¹⁴¹

126. Burkina Faso’s Code of Military Justice punishes the improper use, in violation of the laws and customs of war, of the distinctive insignia and emblems for the protection of persons, objects and locations as defined in international conventions, in time of war and in an area of military operations.¹⁴²

127. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, “using improperly the flag of parlementaires” constitutes a war crime in international armed conflicts.¹⁴³

128. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.¹⁴⁴

¹³⁵ Australia, *War Crimes Act* (1945), Section 3.

¹³⁶ Australia, *Geneva Conventions Act as amended* (1957), Section 15(1)(f).

¹³⁷ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.41.

¹³⁸ Azerbaijan, *Criminal Code* (1999), Article 119(2).

¹³⁹ Belarus, *Criminal Code* (1999), Article 138.

¹⁴⁰ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 166(1).

¹⁴¹ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 445(1).

¹⁴² Burkina Faso, *Code of Military Justice* (1994), Article 205.

¹⁴³ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(g).

¹⁴⁴ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

129. China's Law Governing the Trial of War Criminals provides that "indiscriminate use of the Armistice Flags" constitutes a war crime.¹⁴⁵

130. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁴⁶

131. The DRC Code of Military Justice as amended punishes "any individual, whether military or not, who, in time of war . . . improperly uses the distinctive signs and emblems defined by international conventions to ensure respect for the persons, objects and places protected under these conventions".¹⁴⁷

132. Côte d'Ivoire's Penal Code as amended punishes "anyone who, in an area of military operations, uses, in violation of the laws and customs of war, the distinctive insignia and emblems, defined by international conventions, to ensure respect for protected persons, objects and places".¹⁴⁸

133. Under Croatia's Criminal Code, "whoever misuses or carries without authorisation . . . recognised international signs used to mark objects for the purpose of protection against military operations" commits a war crime.¹⁴⁹

134. Under Estonia's Penal Code, "exploitative abuse . . . of the flag of truce" is a war crime.¹⁵⁰

135. France's Code of Military Justice punishes:

any individual, military or not, who, in time of war, in the area of operations of a force or unit, in violation of the laws and customs of war, uses improperly the distinctive signs and emblems defined by international conventions to ensure the respect for persons, objects and places protected by those conventions.¹⁵¹

136. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "making improper use of a flag of truce, . . . resulting in death or serious personal injury" in international armed conflicts, is a crime.¹⁵²

137. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "makes improper use . . . of the flag of truce . . . thereby causing a person's death or serious injury".¹⁵³

138. Guinea's Criminal Code punishes "anyone [who], in an area of military operations and in violation of the laws and customs of war, uses distinctive insignia and emblems defined in international conventions to ensure respect for protected persons, objects and places".¹⁵⁴

¹⁴⁵ China, *Law Governing the Trial of War Criminals* (1946), Article 3(31).

¹⁴⁶ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁴⁷ DRC, *Code of Military Justice as amended* (1972), Article 455.

¹⁴⁸ Côte d'Ivoire, *Penal Code as amended* (1981), Article 473.

¹⁴⁹ Croatia, *Criminal Code* (1997), Article 168(1). ¹⁵⁰ Estonia, *Penal Code* (2001), § 105.

¹⁵¹ France, *Code of Military Justice* (1982), Article 439.

¹⁵² Georgia, *Criminal Code* (1999), Article 413(d).

¹⁵³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

¹⁵⁴ Guinea, *Criminal Code* (1998), Article 579.

139. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 38(1) AP I, is a punishable offence.¹⁵⁵

140. Italy's Law of War Decree as amended provides that it is prohibited "to use improperly the flag of parlementaires".¹⁵⁶

141. Italy's Wartime Military Penal Code punishes anyone who "uses improperly . . . the flag of parlementaires".¹⁵⁷

142. Mali's Code of Military Justice punishes:

any individual . . . who, in time of war, in the area of operations of a military force and in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined in international conventions to ensure respect for persons, objects and places protected by these conventions.¹⁵⁸

143. Under Mali's Penal Code, "using the flag of parlementaires . . . and, thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.¹⁵⁹

144. The Definition of War Crimes Decree of the Netherlands includes "misuse of flags of truce" in its list of war crimes.¹⁶⁰

145. Under the International Crimes Act of the Netherlands, "making improper use of a flag of truce, . . . resulting in death or serious personal injury", is a crime, when committed in an international armed conflict.¹⁶¹

146. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁶²

147. Nicaragua's Military Penal Code punishes any soldier who, in time of war and in an area of military operations, "unlawfully displays the flag of parlementaires".¹⁶³

148. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁶⁴

149. Poland's Penal Code punishes "any person who, during hostilities, uses . . . any . . . sign protected by international law", in violation thereof.¹⁶⁵

¹⁵⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁵⁶ Italy, *Law of War Decree as amended* (1938), Article 36(1).

¹⁵⁷ Italy, *Wartime Military Penal Code* (1941), Article 180(4).

¹⁵⁸ Mali, *Code of Military Justice* (1995), Article 145.

¹⁵⁹ Mali, *Penal Code* (2001), Article 31(i)(7).

¹⁶⁰ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

¹⁶¹ Netherlands, *International Crimes Act* (2003), Article 5(3)(f).

¹⁶² New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁶³ Nicaragua, *Military Penal Code* (1996), Article 50(1).

¹⁶⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁶⁵ Poland, *Penal Code* (1997), Article 126(2).

- 150.** Under Slovenia's Penal Code, "whoever abuses or carries without authorisation . . . internationally recognised symbols used for the protection . . . against military operations" commits a war crime.¹⁶⁶
- 151.** Spain's Military Criminal Code punishes any soldier who "displays improperly the flag of parlementaires".¹⁶⁷
- 152.** Spain's Penal Code punishes "anyone who, during an armed conflict, . . . uses improperly . . . the flag of parlementaires or of surrender".¹⁶⁸
- 153.** Under Sweden's Penal Code as amended, "misuse of . . . the flag of parlementaires" constitutes a crime against international law.¹⁶⁹
- 154.** Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁷⁰
- 155.** Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁷¹
- 156.** Under the US War Crimes Act as amended, violations of Article 23(f) of the 1907 HR are war crimes.¹⁷²
- 157.** Under the Penal Code as amended of the SFRY (FRY), the use of a prohibited method of combat is a war crime.¹⁷³ The commentary specifies that "the following methods of combat are banned under international law: . . . abuse of the flag of parlementaires, . . . the white flag".¹⁷⁴

National Case-law

- 158.** No practice was found.

Other National Practice

- 159.** A training video on IHL produced by the UK Ministry of Defence illustrates the rule that the false use of emblems is forbidden.¹⁷⁵
- 160.** In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that . . . internationally recognized protective emblems . . . not be improperly used".¹⁷⁶

¹⁶⁶ Slovenia, *Penal Code* (1994), Article 386(1).

¹⁶⁷ Spain, *Military Criminal Code* (1985), Article 75(1).

¹⁶⁸ Spain, *Penal Code* (1995), Article 612(6).

¹⁶⁹ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

¹⁷⁰ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁷¹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁷² US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

¹⁷³ SFRY(FRY), *Penal Code as amended* (1976), Article 148(1).

¹⁷⁴ SFRY(FRY), *Penal Code as amended* (1976), commentary on Article 148(1), see also Article 153(1).

¹⁷⁵ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

¹⁷⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

*III. Practice of International Organisations and Conferences**United Nations*

161. In 1970, in a report on respect for human rights in armed conflicts, the UN Secretary-General stated that “as was felt by the experts convened by the International Committee of the Red Cross in 1969, the prohibition of the improper use of the white flag . . . contained in article 23(f) [of the 1907 HR], should be strongly reaffirmed”.¹⁷⁷

Other International Organisations

162. No practice was found.

International Conferences

163. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

164. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

165. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “it is prohibited to make improper use (that is to mark other persons and objects than those entitled to) of . . . the white flag (flag of truce)”.¹⁷⁸

166. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “improper use of a flag of truce”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹⁷⁹

VI. Other Practice

167. No practice was found.

C. Improper Use of the Distinctive Emblems of the Geneva Conventions

Note: *For practice concerning the simulation of protected status by using the distinctive emblems of the Geneva Conventions as an act considered perfidious, see infra section I of this chapter.*

¹⁷⁷ UN Secretary-General, Report on respect for human rights in armed conflicts, UN Doc. A/8052, 2 March 1970, § 102.

¹⁷⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 407(e).

¹⁷⁹ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 2(x).

*I. Treaties and Other Instruments**Treaties*

168. Article 23(f) of the 1899 HR provides that “it is especially prohibited . . . to make improper use of . . . the distinctive badges of the [1864] Geneva Convention”.

169. The 1906 GC provides that:

Art. 27. The signatory powers whose legislation may not now be adequate engage to take or recommend to their legislatures such measures as may be necessary to prevent the use, by private persons or by societies other than those upon which this convention confers the right thereto, of the emblem or name of the Red Cross or Geneva Cross, particularly for commercial purposes by means of trade-marks or commercial labels . . .

Art. 28. In the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies, as well as to punish, as usurpations of military insignia, the wrongful use of the flag and brassard of the Red Cross by military persons or private individuals not protected by the present convention.

170. Article 23(f) of the 1907 HR provides that “it is especially forbidden . . . to make improper use of . . . the distinctive badges of the [1864] Geneva Convention”.

171. Article 24 of the 1929 GC provides that:

The emblem of the red cross on a white ground and the words “Red Cross” or “Geneva Cross” shall not be used either in time of peace or in time of war, except to protect or to indicate the medical formations and establishments and the personnel and material protected by the Convention.

172. Article 28 of the 1929 GC provides that:

The Governments of the High Contracting Parties whose legislation is not at present adequate for the purpose, shall adopt or propose to their legislatures the measures necessary to prevent at all times:

- (a) The use of the emblem or designation “Red Cross” or “Geneva Cross” by private individuals or associations, firms or companies, other than those entitled thereto under the present Convention, as well as the use of any sign or designation constituting an imitation, for commercial or any other purposes;
- (b) By reason of the compliment paid to Switzerland by the adoption of the reversed Federal colours, the use by private individuals or associations, firms or companies of the arms of the Swiss Confederation or marks constituting an imitation, whether as trademarks or as parts of such marks, for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment.

173. Article 39 GC I provides that “under the direction of the competent military authority, the emblem [of the Red Cross, Red Crescent or Red Lion and

Sun] shall be displayed on the flags, armlets and on all equipment employed in the Medical Service”.

174. Article 44 GC I provides that:

With the exception of the cases mentioned in the following paragraphs of the present Article, the emblem of the red cross on a white ground and the words “Red Cross” or “Geneva Cross” may not be employed, either in time of peace or in time of war, except to indicate or to protect the medical units and establishments, the personnel and material protected by the present Convention and other Conventions dealing with similar matters. The same shall apply to [the red crescent or red lion and sun on white ground] in respect of the countries which use them. The National Red Cross Societies and other societies designated in Article 26 shall have the right to use the distinctive emblem conferring the protection of the Convention only within the framework of the present paragraph.

Furthermore, National Red Cross (Red Crescent, Red Lion and Sun) Societies may, in time of peace, in accordance with their national legislation, make use of the name and emblem of the Red Cross for their other activities which are in conformity with the principles laid down by the International Red Cross Conferences. When those activities are carried out in time of war, the conditions for the use of the emblem shall be such that it cannot be considered as conferring the protection of the Convention; the emblem shall be comparatively small in size and may not be placed on armlets or on the roofs of buildings.

The international Red Cross organizations and their duly authorized personnel shall be permitted to make use, at all times, of the emblem of the red cross on a white ground.

As an exceptional measure, in conformity with national legislation and with the express permission of one of the National Red Cross (Red Crescent, Red Lion and Sun) Societies, the emblem of the Convention may be employed in time of peace to identify vehicles used as ambulances and to mark the position of aid stations exclusively assigned to the purpose of giving free treatment to the wounded or sick.

175. Article 53 GC I provides that:

The use by individuals, societies, firms or companies either public or private, other than those entitled thereto under the present Convention, of the emblem or the designation “Red Cross” or “Geneva Cross” or any sign or designation constituting an imitation thereof, whatever the object of such use, and irrespective of the date of its adoption, shall be prohibited at all times.

By reason of the tribute paid to Switzerland by the adoption of the reversed Federal colours, and of the confusion which may arise between the arms of Switzerland and the distinctive emblem of the Convention, the use by private individuals, societies or firms, of the arms of the Swiss Confederation, or of marks constituting an imitation thereof, whether as trademarks or commercial marks, or as parts of such marks, or for a purpose contrary to commercial honesty, or in circumstances capable of wounding Swiss national sentiment, shall be prohibited at all times.

176. Article 54 GC I provides that “the High Contracting Parties shall, if their legislation is not already adequate, take measures necessary for the prevention and repression, at all times, of the abuses referred to under Article 53”.

177. Article 41, first paragraph, GC II provides that “under the direction of the competent military authority, the emblem of the red cross on a white ground shall be displayed on the flags, armlets and on all equipment employed in the Medical Service”.

178. Article 44 GC II provides that:

The distinguishing signs referred to in Article 43 [red cross, red crescent or red lion and sun on a white ground] can only be used, whether in time of peace or war, for indicating or protecting the ships therein mentioned, except as may be provided in any other international Convention or by agreement between all the Parties to the conflict concerned.

179. Under Article 45 GC II, “the High Contracting Parties shall, if their legislation is not already adequate, take the measures necessary for the prevention and repression, at all times, of any abuse of the distinctive signs provided for under Article 43 [red cross, red crescent or red lion and sun on a white ground]”.

180. According to the 1949 Geneva Conventions, the following are entitled to use the distinctive emblems:

- medical personnel exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces (Articles 24 and 40 GC I);
- the staff of National Red Cross Societies and that of other voluntary aid societies, duly recognised and authorised by their governments, who may be employed on the same duties as the personnel named in Article 24 (Articles 26, 40 and 44 GC I);
- the medical personnel and units of a recognised Society of a neutral country with the previous consent of its own government and the authorisation of the party to the conflict concerned (Articles 27 and 40 GC I);
- members of the armed forces specially trained for employment, should the need arise, as hospital orderlies, nurses or auxiliary stretcher-bearers, in the search for or the collection, transport or treatment of the wounded and sick, but only while carrying out medical duties (Articles 25 and 41 GC I);
- such medical units and establishments as are entitled to be respected under GC I, and only with the consent of the military authorities (Article 42 GC I);
- the international Red Cross organisations and their duly authorised personnel, at all times (Article 44 GC I);
- vehicles used as ambulances and aid stations exclusively assigned to the purpose of giving free treatment to the wounded or sick, as an exceptional measure in time of peace, in conformity with national legislation and with the express permission of one of the National Red Cross (Red Crescent, Red Lion and Sun) Societies (Article 44 GC I);
- the religious, medical and hospital personnel of hospital ships and their crews (Articles 36 and 42 GC II);
- the religious, medical and hospital personnel assigned to the medical or spiritual care of the persons designated in Articles 12 and 13 (wounded, sick and shipwrecked) (Articles 37 and 42 GC II);

- military hospital ships, that is to say, ships built or equipped by the powers specially and solely with a view to assisting the wounded, sick and shipwrecked, to treating them and to transporting them (Articles 22 and 43 GC II);
- hospital ships utilised by National Red Cross Societies, by officially recognised relief societies or by private persons (Articles 24 and 43 GC II);
- hospital ships utilised by National Red Cross Societies, officially recognised relief societies, or private persons of neutral countries (Articles 25 and 43 GC II);
- small craft employed by the State or by the officially recognised lifeboat institutions for coastal rescue operations (Articles 27 and 43 GC II);
- lifeboats of hospital ships, coastal lifeboats and all small craft used by the medical service (Article 43 GC II);
- civilian hospitals, if so authorised by the State (Article 18 GC IV);
- persons regularly and solely engaged in the operation and administration of civilian hospitals, including the personnel engaged in the search for, removal and transporting of and caring for wounded and sick civilians, the infirm and maternity cases, as well as other personnel who are engaged in the operation and administration of civilian hospitals, while they are employed on such duties (Article 20 GC IV).

181. Article 18(8) AP I provides that “the provisions of the Conventions and of this Protocol relating to the supervision of the use of the distinctive emblem and to the prevention and repression of any misuse thereof shall be applicable to distinctive signals”. These distinctive signals are defined in Annex I AP I for the identification of medical units and transports. Article 18 AP I was adopted by consensus.¹⁸⁰

182. Article 38(1) AP I provides that “it is prohibited to make improper use of the distinctive emblem of the red cross, red crescent or red lion and sun”. Article 38 was adopted by consensus.¹⁸¹

183. According to AP I, the following are entitled to use the distinctive emblems:

- medical personnel, meaning those persons assigned (permanently or temporarily), by a party to the conflict, exclusively to the medical purposes (the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease) or to the administration of medical units or to the operation or administration of medical transports. The terms include:
 - (a) medical personnel of a party to the conflict, whether military or civilian, including those described in GC I and II, and those assigned to civil defence organisations;
 - (b) medical personnel of National Red Cross (Red Crescent, Red Lion and Sun) Societies and other national voluntary aid societies duly recognised and authorised by a party to the conflict;
 - (c) medical personnel or medical units or medical transports described in Article 9(2) (permanent medical units and transports, other than hospital

¹⁸⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

¹⁸¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

ships, and their personnel made available to a party to the conflict for humanitarian purposes: (a) by a neutral or other State which is not party to that conflict; (b) by a recognised and authorised aid society of such a State; (c) by an impartial international humanitarian organisation) (Article 8 AP I);

- religious personnel, meaning military or civilian persons, such as chaplains, who are exclusively engaged in the work of their ministry and attached:
 - (a) to the armed forces of a party to the conflict;
 - (b) to medical units or medical transports of a party to the conflict;
 - (c) to medical units or medical transports described in Article 9(2); or
 - (d) to civil defence organisations of a party to the conflict (Article 8 AP I);
- medical units (fixed or mobile, permanent or temporary), meaning establishments and other units, whether military or civilian, organised for medical purposes, namely the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units (Article 8 AP I);
- medical transports, meaning any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a party to the conflict (Article 8 AP I);
- civilian medical personnel and civilian religious personnel in occupied territory and in areas where fighting is taking place or is likely to take place (Article 18(3) AP I);
- hospital ships and coastal rescue craft carrying civilian wounded, sick and shipwrecked who do not belong to one of the categories mentioned in Article 13 GC II (Articles 18(4) and 22 AP I);
- medical ships and craft other than those referred to in Article 22 AP I and Article 38 GC II (Article 23(1) AP I).

184. Article 12 AP II provides that:

Under the direction of the competent authority concerned, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, and on medical transports. It shall be respected in all circumstances. It shall not be used improperly.

Article 12 AP II was adopted by consensus.¹⁸²

185. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use... of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury” is a war crime in international armed conflicts.

¹⁸² CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 114.

Other Instruments

186. Article 117 of the 1863 Lieber Code considers it “an act of bad faith, of infamy or fiendishness to deceive the enemy by flags of protection”.

187. Article 13(f) of the 1874 Brussels Declaration provides that “making improper use of . . . the distinctive badges of the [1864] Geneva Convention” is especially prohibited.

188. Article 8(d) of the 1880 Oxford Manual provides that “it is forbidden . . . to make improper use . . . of the protective signs prescribed by the [1864] Geneva Convention”.

189. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia called for respect for the red cross emblem. They stated that “it may be used only to designate sanitary troops or buildings as well as persons and vehicles belonging to this service”.

190. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 38(1) AP I. Paragraph 10 provides that “the parties shall repress any misuse of the [red cross] emblem”.

191. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 38(1) AP I. In paragraph 3, the parties undertook “to use the [red cross] emblem only to identify medical units and personnel and to comply with the other rules of international humanitarian law relating to the use of the Red Cross emblem and shall repress any misuse of the emblem”.

192. Paragraph I(4) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina considers that “misuse of the red cross emblem” is one of “the main obstacles to humanitarian activities”.

193. Paragraph 110(f) of the 1994 San Remo Manual provides that “warships and auxiliary vessels are prohibited . . . at all times from actively simulating the status of vessels entitled to be identified by the emblem of the red cross or red crescent”.

194. Section 9.7 of the 1999 UN Secretary-General’s Bulletin provides that the distinctive “emblems may not be employed except to indicate or to protect medical units and medical establishments, personnel and material. Any misuse of the Red Cross and Red Crescent emblems is prohibited.”

195. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use . . . of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury” is a war crime in international armed conflicts.

*II. National Practice**Military Manuals*

196. Under Argentina's Law of War Manual (1969), the improper use of the distinctive emblems is an act violating the principle of good faith. The use is considered as "improper" only in combat operations.¹⁸³ The manual also states that the distinctive emblems "shall not be used . . . whether in time of peace or in time of war, for other purposes than indicating or protecting medical units and establishments, the personnel and material protected by the [Geneva Conventions]".¹⁸⁴

197. Argentina's Law of War Manual (1989) provides that "it is prohibited . . . to make improper use of the sign of the Red Cross".¹⁸⁵ It further states that "the distinctive sign of [GC I] and [AP I] can only be used for medical units and for medical and religious personnel whose protection is provided for in the Convention and Protocol, with the consent of the competent authority".¹⁸⁶

198. Australia's Commanders' Guide provides that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . misusing or abusing the Red Cross symbol . . . for the purpose of gaining protection to which the user would otherwise not be entitled".¹⁸⁷

199. Australia's Defence Force Manual provides that "it is prohibited to improperly use the distinctive emblem of the Red Cross or Red Crescent".¹⁸⁸ It also states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . misusing or abusing the Red Cross symbol . . . for the purpose of gaining protection to which the user would otherwise not be entitled".¹⁸⁹

200. Belgium's Law of War Manual provides that "the abuse of the emblem of the Red Cross is strictly prohibited. One may not, therefore, display the emblem of the Red Cross on vehicles that transport troops, ammunition [or] foodstuffs to the frontline . . . One may not use the emblem of the Red Cross to protect observation posts or military depots."¹⁹⁰

201. Belgium's Teaching Manual for Officers stipulates that "it is prohibited to abuse the protective signs provided for by the [1949 Geneva] Conventions and [AP I]. Example: camouflaging arms and ammunition in a vehicle or a building displaying the protective sign of the red cross."¹⁹¹

¹⁸³ Argentina, *Law of War Manual* (1969), § 1.017.

¹⁸⁴ Argentina, *Law of War Manual* (1969), § 3.018(7).

¹⁸⁵ Argentina, *Law of War Manual* (1989), § 1.06(1).

¹⁸⁶ Argentina, *Law of War Manual* (1989), § 6.09.

¹⁸⁷ Australia, *Commanders' Guide* (1994), § 1305(1).

¹⁸⁸ Australia, *Defence Force Manual* (1994), § 704.

¹⁸⁹ Australia, *Defence Force Manual* (1994), § 1315(1).

¹⁹⁰ Belgium, *Law of War Manual* (1983), p. 33.

¹⁹¹ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

202. Burkina Faso's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".¹⁹²

203. Cameroon's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".¹⁹³

204. Cameroon's Instructors' Manual states that the improper use of the distinctive signs and signals is an unlawful deception.¹⁹⁴

205. Canada's LOAC Manual provides that "it is prohibited to make improper use of the distinctive emblem of the Red Cross or Red Crescent".¹⁹⁵ Furthermore, "improperly using . . . the distinctive emblems of the Geneva Conventions" constitutes a war crime.¹⁹⁶ The manual also provides that, in a non-international armed conflict, "the distinctive emblem of the Red Cross or Red Crescent . . . must not be used improperly".¹⁹⁷

206. Canada's Code of Conduct provides that "false and improper use of the Red Cross/Red Crescent emblem is prohibited".¹⁹⁸

207. Colombia's Instructors' Manual states that it is a punishable offence "to use improperly insignia, flags and emblems of the Red Cross".¹⁹⁹

208. Congo's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".²⁰⁰

209. The Military Manual of the Dominican Republic states that:

It is a serious breach of the laws of war when soldiers use these signs [red cross, red crescent, red lion and sun, and red star of David] to protect or hide military activities. Do not mark your position or yourself with a medical service emblem unless you have been designated to perform only medical duties. Your life may depend on the proper use of the Red Cross symbol.²⁰¹

210. Ecuador's Naval Manual, in a chapter entitled "Misuse of protective signs, signals and symbols", considers it illegal to use transports marked with the red cross or red crescent to carry armed combatants, weapons or ammunition with which to attack or elude enemy forces.²⁰² It specifies that "protective signs and symbols may be used only to identify personnel, objects, and activities entitled to the protected status which they designate. Any other use is forbidden by

¹⁹² Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹⁹³ Cameroon, *Disciplinary Regulations* (1975), Article 32.

¹⁹⁴ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

¹⁹⁵ Canada, *LOAC Manual* (1999), p. 6-2, § 10.

¹⁹⁶ Canada, *LOAC Manual* (1999), p. 16-3, § 20(f).

¹⁹⁷ Canada, *LOAC Manual* (1999), p. 17-4, § 33.

¹⁹⁸ Canada, *Code of Conduct* (2001), Rule 10, § 10.

¹⁹⁹ Colombia, *Instructors' Manual* (1999), p. 31.

²⁰⁰ Congo, *Disciplinary Regulations* (1986), Article 32(2).

²⁰¹ Dominican Republic, *Military Manual* (1980), p. 5.

²⁰² Ecuador, *Naval Manual* (1989), § 12.2.

international law."²⁰³ The manual further provides that "the following acts constitute war crimes: . . . misuse, abuse . . . of the Red Cross emblem, and of similar protective emblems and signs".²⁰⁴

211. France's Disciplinary Regulations as amended states that it is prohibited "to use improperly . . . the distinctive signs provided for in international conventions".²⁰⁵

212. France's LOAC Manual states that "it is prohibited . . . to use improperly the symbol of medical services".²⁰⁶

213. Germany's Military Manual provides that "it is prohibited to make improper use . . . of special internationally acknowledged protective emblems, e.g. the red cross or the red crescent".²⁰⁷ It also states that the distinctive emblem "shall only be used for the intended purposes".²⁰⁸ Furthermore:

According to § 125 of the Administrative Offences Act . . . the misuse of the emblem of the Red Cross or of the heraldic emblem of Switzerland constitutes an administrative offence which is liable to a fine . . .

The abuse of distinctive emblems and names which, according to the rules of international law, are equal in status to the Red Cross may also be prosecuted.²⁰⁹

214. Indonesia's Military Manual emphasises that "it is prohibited to use the Red Cross emblem improperly".²¹⁰

215. Italy's IHL Manual provides that it is prohibited "to use improperly . . . the distinctive signs of the Red Cross and Red Crescent [or] of other authorised relief societies".²¹¹ It also states that grave breaches of international conventions and protocols, including "the improper . . . use of international protective signs", constitute war crimes.²¹²

216. Japan's Self-Defence Force Notification provides that the commander of a unit should prevent the use of the red cross emblem by persons not entitled to use it.²¹³

217. South Korea's Military Regulation 187 considers the illegal use of the red cross emblem as a war crime.²¹⁴

218. South Korea's Military Law Manual prohibits the improper use of the red cross emblem.²¹⁵

219. Lebanon's Army Regulations prohibits the unlawful use of the distinctive signs provided for in international agreements.²¹⁶

²⁰³ Ecuador, *Naval Manual* (1989), § 11.10.5.

²⁰⁴ Ecuador, *Naval Manual* (1989), § 6.2.5(11).

²⁰⁵ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

²⁰⁶ France, *LOAC Manual* (2001), p. 47.

²⁰⁷ Germany, *Military Manual* (1992), § 473, see also § 1019 (naval warfare).

²⁰⁸ Germany, *Military Manual* (1992), § 638.

²⁰⁹ Germany, *Military Manual* (1992), §§ 1211 and 1212.

²¹⁰ Indonesia, *Military Manual* (1982), § 104.

²¹¹ Italy, *IHL Manual* (1991), Vol. I, § 9(2). ²¹² Italy, *IHL Manual* (1991), Vol. I, § 85.

²¹³ Japan, *Self-Defence Force Notification* (1965), Article 11.

²¹⁴ South Korea, *Military Regulation 187* (1991), Article 4.2.

²¹⁵ South Korea, *Military Law Manual* (1996), p. 88.

²¹⁶ Lebanon, *Army Regulations* (1971), § 17.

- 220.** Madagascar's Military Manual prohibits the abuse of distinctive signs.²¹⁷
- 221.** Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".²¹⁸
- 222.** Morocco's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".²¹⁹
- 223.** The Military Manual of the Netherlands provides that "it is forbidden to make improper use of the recognised emblems of the Red Cross and Red Crescent".²²⁰ It adds that "the misuse of the emblem of the Red Cross (the Red Crescent)" is a grave breach of AP I.²²¹
- 224.** The Military Handbook of the Netherlands states that it is prohibited "to misuse . . . the red cross emblem".²²² It adds that "misuse of the red cross is a war crime".²²³
- 225.** New Zealand's Military Manual provides that "improper use of protective symbols . . . is prohibited".²²⁴ The red cross, red crescent, red lion and sun and red shield of David are regarded as "protective symbols".²²⁵ It further states that "improperly using . . . the distinctive emblems of the Geneva Conventions" is a war crime.²²⁶ In the case of naval warfare, the manual states that "flags or markings . . . of the Red Cross or Red Crescent may not be used as part of a ruse of war".²²⁷ It further provides that, in a non-international armed conflict, "the distinctive emblem of the Red Cross or Red Crescent . . . must not be used improperly".²²⁸
- 226.** Nigeria's Manual on the Laws of War states that the "misuse of the Red Cross or any equivalent emblem" is a war crime.²²⁹
- 227.** Russia's Military Manual provides that it is a prohibited method of warfare "to use improperly distinctive emblems".²³⁰
- 228.** Senegal's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".²³¹

²¹⁷ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

²¹⁸ Mali, *Army Regulations* (1979), Article 36.

²¹⁹ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

²²⁰ Netherlands, *Military Manual* (1993), p. IV-3.

²²¹ Netherlands, *Military Manual* (1993), p. IX-5.

²²² Netherlands, *Military Handbook* (1995), pp. 7-36 and 7-40.

²²³ Netherlands, *Military Handbook* (1995), p. 7-41.

²²⁴ New Zealand, *Military Manual* (1992), § 502(7).

²²⁵ New Zealand, *Military Manual* (1992), Annex B, § B31.

²²⁶ New Zealand, *Military Manual* (1992), § 1704(2)(f).

²²⁷ New Zealand, *Military Manual* (1992), § 713(3).

²²⁸ New Zealand, *Military Manual* (1992), § 1818(1).

²²⁹ Nigeria, *Manual on the Laws of War* (undated), § 6.

²³⁰ Russia, *Military Manual* (1990), § 5(c).

²³¹ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

229. Spain's Field Regulations provides that it is "indecent and repulsive" to protect or shield troops or military equipment or materials under a red cross emblem.²³²

230. Spain's LOAC Manual emphasises that it is prohibited "to make improper use of the emblems of the Red Cross or of the protective signs of medical units or personnel".²³³ It states that use of the protection provided for by the law of war is an unlawful method of deception. It gives the example of using an ambulance to transport ammunition.²³⁴ The manual further states that the distinctive sign of the red cross or equivalent and the distinctive signs and signals of the medical service may be used only for their intended purpose.²³⁵ It also provides that it is an unlawful deception "to use improperly, i.e., to indicate persons and objects not protected, the distinctive signs and signals of the medical service".²³⁶

231. Sweden's IHL Manual considers that the "prohibition of improper use of recognized emblems", as contained in Article 38 AP I, is part of customary international law.²³⁷ The manual also states that:

In land combat it is not unusual for one of the parties to attempt to win a tactical advantage by concealing the character of his own forces prior to attack, in order to mislead or surprise the adversary. The distinctive emblem of the Red Cross or similar organisation . . . may not, however, be used for such purposes. In IV Hague Convention it is forbidden to use these emblems improperly. The expression improperly is not defined but follows indirectly from the Geneva Convention articles (GC I Art. 44, GC II Art. 41) relative to permitted use.²³⁸

232. Switzerland's Basic Military Manual states that "the distinctive sign (Red Cross, Red Crescent) shall serve, under the control of the military authority, to indicate medical establishments, units, personnel, vehicles and material. They shall not be used for other purposes."²³⁹ The manual also states that the "abuse of the emblem or protection of the Red Cross" is a war crime.²⁴⁰

233. The UK Military Manual provides that the "use of the emblem of a red cross (red crescent, red lion and sun) on a white ground is authorised in order to indicate military hospitals and other military medical establishments as well as, subject to the authorisation of the Government, civilian hospitals and hospital trains". The emblem must not be used for other purposes.²⁴¹ It further states that:

Improper use of the Red Cross emblem is forbidden. The flag with the distinctive emblem must not be used to cover vehicles used for the transport of ammunition

²³² Spain, *Field Regulations* (1882), Article 864.

²³³ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.c, see also § 10.8.e.(1).

²³⁴ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(3).

²³⁵ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(2).

²³⁶ Spain, *LOAC Manual* (1996), Vol. I, § 5.3.c.

²³⁷ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

²³⁸ Sweden, *IHL Manual* (1991), Section 3.2.1.1, p. 30.

²³⁹ Switzerland, *Basic Military Manual* (1987), Article 93.

²⁴⁰ Switzerland, *Basic Military Manual* (1987), Article 200(2)(b).

²⁴¹ UK, *Military Manual* (1958), § 302, see also § 377.

and non-medical stores. A hospital train must not be used to facilitate the escape of combatants. It is forbidden to fire from a tent, building or vehicle flying the flag with the distinctive emblem. A hospital or other building protected by the flying of the flag with the distinctive emblem . . . must not be used as an observation post or military office or store.²⁴²

The manual also considers that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . misuse of the Red Cross or equivalent emblems”.²⁴³

234. The UK LOAC Manual provides that “it is forbidden . . . to make improper use in combat of . . . the Red Cross or Red Crescent emblems”.²⁴⁴

235. The US Field Manual incorporates the content of Article 44 GC I.²⁴⁵ It provides that “it is especially forbidden . . . to make improper use of . . . the distinctive badges of the [1864] Geneva Convention”.²⁴⁶ It adds that:

The use of the emblem of the Red Cross and other equivalent insignia must be limited to the indication or protection of medical units and establishments, the personnel and material protected by [GC I] and other similar conventions. The following are examples of the improper use of the emblem: using a hospital or other building accorded such protection as an observation post or military office or depot; firing from a building or tent displaying the emblem of the Red Cross; using a hospital train or airplane to facilitate the escape of combatants; displaying the emblem on vehicles containing ammunition or other nonmedical stores; and in general using it for cloaking acts of hostility.²⁴⁷

The manual also states that “in addition to ‘grave breaches’ of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war (‘war crimes’): misuse of the Red Cross emblem”.²⁴⁸

236. The US Air Force Pamphlet incorporates the content of Article 23(f) of the 1907 HR.²⁴⁹ It also provides that “it is forbidden to make use of the distinctive emblem of the red cross (red crescent, red lion and sun) . . . other than as provided for in international agreements establishing these emblems”.²⁵⁰ The Pamphlet adds that:

The following are examples of improper use of the medical emblems: (i) using a hospital or other building marked with a red cross or equivalent insignia as an observation post, military office or depot; (ii) using distinctive signs, emblems or signals for cloaking acts of hostilities, such as firing from a building or other protected installation or means of medical transport; (iii) using protected means of medical transport, such as hospitals, trains or airplanes, to facilitate the escape of able-bodied combatants; (iv) displaying protective emblems on vehicles, trains,

²⁴² UK, *Military Manual* (1958), § 317. ²⁴³ UK, *Military Manual* (1958), § 626(e).

²⁴⁴ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2d.

²⁴⁵ US, *Field Manual* (1956), § 244. ²⁴⁶ US, *Field Manual* (1956), § 52.

²⁴⁷ US, *Field Manual* (1956), § 55. ²⁴⁸ US, *Field Manual* (1956), § 504(f).

²⁴⁹ US, *Air Force Pamphlet* (1976), § 8-2.

²⁵⁰ US, *Air Force Pamphlet* (1976), § 8-3(c), see also §§ 8-6(b) and 12-2(d).

ships, airplanes, or other modes of transportation or other buildings containing ammunition or other military non-medical supplies.²⁵¹

The Pamphlet further states that “in addition to grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . wilful misuse of the Red Cross or a similar protective emblem”.²⁵²

237. The US Soldier’s Manual states that:

It is a serious breach of the laws of war when soldiers use these signs [red cross, red crescent and red shield of David] to protect or hide military activities. Do not mark your position or yourself with a medical service emblem unless you have been designated to perform only medical duties. Your life may depend on the proper use of the Red Cross symbol.²⁵³

238. The US Naval Handbook, in a chapter entitled “Misuse of protective signs, signals and symbols”, states that it is illegal to use transports marked with the red cross or red crescent to carry armed combatants, weapons or ammunition with which to attack or elude enemy forces.²⁵⁴ It further states that “protective signs and symbols may be used only to identify personnel, objects, and activities entitled to the protected status which they designate. Any other use is forbidden by international law.”²⁵⁵ The manual also states that “the following acts are representative war crimes: . . . misuse, abuse . . . [of] the Red Cross device, and similar protective emblems”.²⁵⁶

239. The YPA Military Manual of the SFRY (FRY) provides that “it is forbidden to use, during combat, in order to mislead the enemy, . . . internationally recognised signs”, including the red cross emblem.²⁵⁷ It adds that “its misuse is a criminal act.”²⁵⁸

National Legislation

240. Albania’s Emblem Law punishes “the use for any purpose of the Red Cross emblem and name by physical or legal persons in violation of this Law”. This also applies to the red crescent emblem and name.²⁵⁹

241. Algeria’s Code of Military Justice punishes:

any individual, whether military or not, who, in time of war, in an area of operations . . . in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined by international conventions for the respect of persons, objects and places protected by these conventions.²⁶⁰

²⁵¹ US, *Air Force Pamphlet* (1976), § 8-6(b). ²⁵² US, *Air Force Pamphlet* (1976), § 15-3(c)(2).

²⁵³ US, *Soldier’s Manual* (1984), p. 7. ²⁵⁴ US, *Naval Handbook* (1995), § 12.2.

²⁵⁵ US, *Naval Handbook* (1995), § 11.9.6. ²⁵⁶ US, *Naval Handbook* (1995), § 6.2.5(11).

²⁵⁷ SFRY (FRY), *YPA Military Manual* (1988), § 105(3).

²⁵⁸ SFRY (FRY), *YPA Military Manual* (1988), § 191.

²⁵⁹ Albania, *Emblem Law* (1994), Articles 7 and 9.

²⁶⁰ Algeria, *Code of Military Justice* (1971), Article 299.

242. The Red Cross Society Act of Antigua and Barbuda states that:

It shall not be lawful for any person other than those authorised under the provisions of the [1949 Geneva] Conventions to use for any purpose whatever the emblem of the red cross on white ground, or any colourable imitation thereof, or the words 'Red Cross' or the arms of the Swiss Confederation.²⁶¹

243. Argentina's Emblem Law punishes "(1) Any person who, without proper authorisation, wears the armlet of the Red Cross. (2) Any person who improperly uses the name of the Argentine Red Cross Society or uses its emblems or insignia for any unlawful purpose."²⁶²

244. Argentina's Draft Code of Military Justice punishes any soldier who "uses improperly . . . the protective or distinctive signs established and recognised in international treaties to which the Argentine Republic is a party, especially the distinctive signs of the red cross and red crescent".²⁶³

245. Under Armenia's Penal Code, "the use during military actions of the emblems and distinctive signs of the red cross or red crescent . . . in breach of international treaties and international law" constitutes a crime against the peace and security of mankind.²⁶⁴

246. Armenia's Emblem Law states that:

On the territory of the Republic of Armenia, the following are prohibited for physical and legal persons:

- the use of the emblem, as a protective or indicative device, as well as a distinctive signal which would be contrary to the present law, to the [1949 Geneva] conventions, to [AP I and AP II] . . .
- the use of the names [Red Cross/Red Crescent] in the social name of legal persons, trademarks, as well as for any purpose in contradiction with the principles of the international movement of the Red Cross and Red Crescent;
- the representation of any sign, including a white cross on a red ground, that can create confusion, by assimilation with the protective emblem.²⁶⁵

247. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including breach of rules relating to the red cross.²⁶⁶

248. Australia's Geneva Conventions Act as amended provides that "subject to this section, a person shall not, without the consent in writing of the Minister or of a person authorized in writing by the Minister to give consents under this section, use for any purpose whatsoever" the emblems of the red cross, red

²⁶¹ Antigua and Barbuda, *Red Cross Society Act* (1983), Section 8(2).

²⁶² Argentina, *Emblem Law* (1893), Article 1.

²⁶³ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(5) in the *Code of Military Justice as amended* (1951).

²⁶⁴ Armenia, *Penal Code* (2003), Article 397.

²⁶⁵ Armenia, *Emblem Law* (2002), Article 19.

²⁶⁶ Australia, *War Crimes Act* (1945), Section 3.

crescent, red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations “Red Cross” or “Geneva Cross”, “Red Crescent” and “Red Lion and Sun”, as well as a design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.²⁶⁷

249. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “improper use of the distinctive emblems of the Geneva Conventions” in international armed conflicts.²⁶⁸

250. Austria’s Red Cross Protection Law provides that:

It is prohibited to use:

- a) the emblem of the red cross on a white ground and the words “Red Cross” or “Geneva Cross”,
- b) the emblem of the red crescent on a white ground, the emblem of the red lion and sun on a white ground, the words “Red Crescent” or “Red Lion and Sun” or
- c) emblems and designations which are an imitation of the emblem of the red cross on a white ground or of the words “Red Cross” or “Geneva Cross”

in violation of the provisions of the [1949] Geneva Conventions.²⁶⁹

251. Azerbaijan’s Criminal Code provides that “the misuse of the distinctive signs of the red cross or the red crescent in the territory of military operations by persons not entitled to use them” constitutes a war crime in international and non-international armed conflicts.²⁷⁰

252. The Red Cross Society Act of the Bahamas provides that “no person other than the Society or a person so authorized under the [1949 Geneva] Conventions shall, without the authority of the Council [of the Society], use for any purpose whatever” the emblems of the red cross, red crescent and red lion and sun on a white ground, as well as the designations “Red Cross” or “Geneva Cross”, “Red Crescent” and “Red Lion and Sun”.²⁷¹

253. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.²⁷²

254. Bangladesh’s Draft Emblems Protection Act provides that “subject to the provisions of this section, it shall not be lawful for any person, without the consent in writing of the Minister for Defence or a person authorized in writing by the Minister to give consents under this section, to use or display for any purpose whatsoever” the emblems of the red cross, red crescent and red lion and

²⁶⁷ Australia, *Geneva Conventions Act as amended* (1957), Section 15(1)(a)–(e).

²⁶⁸ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.44.

²⁶⁹ Austria, *Red Cross Protection Law* (1962), § 4.

²⁷⁰ Azerbaijan, *Criminal Code* (1999), Article 119(1).

²⁷¹ Bahamas, *Red Cross Society Act* (1975), Section 8.

²⁷² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

sun on a white ground, the heraldic emblem of Switzerland, the designations “Red Cross” or “Geneva Cross”, “Red Crescent” and “Red Lion and Sun”, as well as a design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.²⁷³

255. The Geneva Conventions Act of Barbados provides that “no person shall, without the authority of the Defence Board, use” the emblems of the red cross, red crescent and red lion and sun on a white ground, as well as the designations “Red Cross” or “Geneva Cross”, “Red Crescent” and “Red Lion and Sun”.²⁷⁴

256. The Criminal Code of Belarus provides that it is a war crime to “use intentionally, during hostilities, in violation of international treaties, the emblems of the Red Cross [or] Red Crescent”.²⁷⁵

257. The Law on the Emblem of Belarus provides that:

In the territory of the Republic of Belarus legal and physical persons are prohibited to use:

- the emblem [red cross/red crescent] as a protective or distinctive sign as well as distinctive signals in contradiction to the present Law, the [1949 Geneva] Conventions, [AP I and AP II] and Regulations on the Use of the Emblem;
- the designations in the names of legal persons, in trademarks (service marks) as well as for purposes incompatible with the principles of the International Red Cross and Red Crescent Movement;
- representations of any signs, including that of the white cross on a red ground, that can be mistakenly identified with the emblem used as a protective sign.²⁷⁶

258. Belgium’s Law on the Protection of the Emblem punishes “without prejudice to other penal provisions, anyone who, in violation of international conventions that regulate their use, uses the designations “Red Cross”, “Geneva Cross”, “Red Crescent”, or “Red Lion and Sun”, or their corresponding signs and emblems”.²⁷⁷

259. Belize’s Red Cross Society Act states that:

It shall not be lawful for any persons other than those authorised under the provisions of the [1949 Geneva] Conventions to use for any purpose whatever the emblem of the Red Cross on white ground, or any colourable imitation thereof, or the words “Red Cross” or the arms of the Swiss Confederation.²⁷⁸

260. Bolivia’s Emblem Law punishes any “person who, wilfully and without being entitled to do so, has made use of the Emblem of the Red Cross, of the Red Crescent, of a distinctive signal or of any other sign or signal which is an imitation thereof or which can create confusion”.²⁷⁹

²⁷³ Bangladesh, *Draft Emblems Protection Act* (1998), Section 3(a)–(d) and (h).

²⁷⁴ Barbados, *Geneva Conventions Act* (1980), Section 9(1).

²⁷⁵ Belarus, *Criminal Code* (1999), Article 138.

²⁷⁶ Belarus, *Law on the Emblem* (2000), Article 18.

²⁷⁷ Belgium, *Law on the Protection of the Emblem* (1956), Article 1.

²⁷⁸ Belize, *Red Cross Society Act* (1983), Section 8.

²⁷⁹ Bolivia, *Emblem Law* (2002), Article 11.

261. Bosnia and Herzegovina's Emblem Decree punishes the wearing or use of the red cross emblem in wartime without being entitled to do so.²⁸⁰

262. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "whoever misuses or carries without authorisation... the emblem or flag of the Red Cross, or symbols corresponding to them" commits a war crime.²⁸¹ The Criminal Code of the Republika Srpska contains the same provision.²⁸²

263. Botswana's Red Cross Society Act provides that "it shall not be lawful for any person other than the Society or such persons as may be authorized thereto under the [1949] Geneva Conventions to use for the purpose of his trade or business, or for any other purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, any design being a colourable imitation of those emblems, as well as the words "Red Cross", "Geneva Cross" or translation thereof.²⁸³

264. Brunei's Red Crescent Society Act provides that:

It shall not be lawful for any person, other than the [Red Crescent Society] and its staff, officials and members, to use for the purpose of his trade or business, or for any other purpose whatsoever, in Brunei without the authority of the Minister, the emblem of a red crescent on a white background... and the words "Bulan Sabit Merah" or in English "Red Crescent".²⁸⁴

265. Bulgaria's Penal Code as amended provides that "a person who, without having such right, bears the emblem of the Red Cross or of the Red Crescent, or who abuses a flag or a sign of the Red Cross or of the Red Crescent or the colour determined for the transport vehicles for medical evacuation" commits a war crime.²⁸⁵

266. Bulgaria's Red Cross Society Law provides that "in case of war, the use of the emblem shall be restricted in accordance with the provisions of the Geneva Conventions of 12 August 1949, and the Additional Protocols of 8 June 1977... The misuse of the emblem set up by the Geneva Conventions... and the name of the Red Cross shall be punished."²⁸⁶

267. Burkina Faso's Code of Military Justice punishes the improper use, in violation of the laws and customs of war, of the distinctive insignia and emblems for the protection of persons, objects and locations as defined in international conventions, in time of war and in an area of military operations.²⁸⁷

268. Burundi's Red Cross Decree punishes "any person who, without being entitled to do so... uses the emblem or the denomination of the 'Red Cross' or 'Geneva Cross', or equivalent emblems or denominations that may cause

²⁸⁰ Bosnia and Herzegovina, *Emblem Decree* (1992), Article 16.

²⁸¹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 166(1).

²⁸² Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 445(1).

²⁸³ Botswana, *Red Cross Society Act* (1968), Section 10.

²⁸⁴ Brunei, *Red Crescent Society Act* (1983), Article 13.

²⁸⁵ Bulgaria, *Penal Code as amended* (1968), Article 413.

²⁸⁶ Bulgaria, *Red Cross Society Law* (1995), Articles 8 and 9.

²⁸⁷ Burkina Faso, *Code of Military Justice* (1994), Article 205.

confusion, . . . for any . . . purpose".²⁸⁸ It also punishes "any person who, in time of war, uses, without being entitled to do so, the armlet or the flag of the Red Cross".²⁸⁹

269. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "using improperly . . . the distinctive signs provided for by the [1949] Geneva Conventions" constitutes a war crime in international armed conflicts.²⁹⁰

270. Cameroon's Emblem Law provides that "any use of the emblem or name 'Red Cross' by a physical or legal person other than those having the right to do so by virtue of the Geneva Conventions of 12 August 1949, of their Additional Protocols I and II of 8 June 1977 and of the present law is strictly forbidden".²⁹¹

271. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.²⁹²

272. Chad's Code of Military Justice punishes "any individual who, in the area of operations of a military force, publicly employs, without being entitled to do so, the armlet, flag or emblem of the red cross, or equivalent armlets, flags or emblems".²⁹³

273. Chile's Code of Military Justice provides that a person "who, in time of war and in the area of operations of a land military force, uses without being entitled to do so, the insignia, flags or emblems of the Red Cross" commits a punishable offence against international law.²⁹⁴

274. Chile's Emblem Law as amended states that:

Article 1. The emblem of the Red Cross on a white ground and the expressions "Red Cross" or "Geneva Cross" may be used, in peace time or in time of war, only as provided for by the Geneva Conventions of 12 August 1949 and their Additional Protocols of 1977.

...

Article 4. The use of any sign or denomination which constitutes an imitation of the emblem of the red cross on a white ground or of the names Red Cross or Geneva Cross, as well as the use of similar emblems or words which can create confusion, for commercial or any other purpose, is prohibited.²⁹⁵

275. China's Red Cross Society Law states that "the sign shall be used in conformity with the relevant provisions of the [1949] Geneva Conventions and their Additional Protocols . . . Abuse of the sign of the Red Cross is prohibited."²⁹⁶

²⁸⁸ Burundi, *Red Cross Decree* (1912), Article 2.

²⁸⁹ Burundi, *Red Cross Decree* (1912), Article 3.

²⁹⁰ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(g).

²⁹¹ Cameroon, *Emblem Law* (1997), Article 14(1).

²⁹² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²⁹³ Chad, *Code of Military Justice* (1962), Article 87.

²⁹⁴ Chile, *Code of Military Justice* (1925), Article 264.

²⁹⁵ Chile, *Emblem Law as amended* (1939), Articles 1 and 4.

²⁹⁶ China, *Red Cross Society Law* (1993), Articles 16 and 19.

276. China's Emblem Regulations provide that:

Use of the red cross emblem by any organisations or individuals other than those mentioned in the present Regulations [medical establishments of the armed forces, the Chinese Red Cross Society, as well as foreign and domestic voluntary relief organisations and international Red Cross institutions with the approval of the State Council or the Central Military Commission] shall be forbidden.²⁹⁷

277. Colombia's Emblem Decree provides that "all national authorities shall ensure, in all circumstances, strict respect for the norms concerning the proper use of the emblem of the Red Cross and the denomination 'Red Cross' and the distinctive signals".²⁹⁸

278. The DRC Red Cross Decree punishes "any person who, without being entitled to do so... uses the emblem or the denomination of the 'Red Cross' or 'Geneva Cross', or equivalent emblems or denominations that may cause confusion, ... for any ... purpose".²⁹⁹ It also punishes "any person who, in time of war, uses, without being entitled to do so, the armlet or the flag of the Red Cross".³⁰⁰

279. The DRC Code of Military Justice as amended punishes "any individual, whether military or not, who, in time of war ... improperly uses the distinctive signs and emblems defined by international conventions to ensure respect for the persons, objects and places protected under these conventions".³⁰¹

280. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.³⁰²

281. The Geneva Conventions and Additional Protocols Act of the Cook Islands provides that "no person may, without the authority of the Minister or a person authorised by the Minister in writing to give consent under this section, use for any purpose" the emblems of the red cross, red crescent, red lion and sun on a white ground, the heraldic emblem of Switzerland, the distinctive signals of identification for medical units and transports, the designations "Red Cross" or "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any emblem, designation, or signal, so nearly resembling any of those emblems, designations, or signals as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems, designations, or signals.³⁰³

282. Costa Rica's Emblem Law punishes "any person who uses without authorisation the emblem of the Red Cross, the distinctive signals, the denomination Red Cross or imitation which can create confusion".³⁰⁴

²⁹⁷ China, *Emblem Regulations* (1996), Article 3.

²⁹⁸ Colombia, *Emblem Decree* (1998), Article 11.

²⁹⁹ DRC, *Red Cross Decree* (1912), Article 2. ³⁰⁰ DRC, *Red Cross Decree* (1912), Article 3.

³⁰¹ DRC, *Code of Military Justice as amended* (1972), Article 455.

³⁰² Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁰³ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 10(1).

³⁰⁴ Costa Rica, *Emblem Law* (2000), Article 7.

283. Côte d'Ivoire's Penal Code as amended punishes "anyone who, in an area of military operations, uses, in violation of the laws and customs of war, the distinctive insignia and emblems, defined by international conventions, to ensure respect for protected persons, objects and places".³⁰⁵

284. Croatia's Emblem Law punishes any legal person "using the red cross emblem and name, while according to the [1949 Geneva Conventions] and on the basis of this Law, [it] does not have right to do so".³⁰⁶

285. Under Croatia's Criminal Code, "whoever misuses or carries without authorisation the flag or emblem of . . . the International Red Cross" commits a war crime.³⁰⁷

286. Cuba's Emblem Decree provides that "unlawful use of the insignia of the Red Cross . . . shall be judged and condemned in accordance with military penal law".³⁰⁸

287. Cuba's Military Criminal Code punishes "anyone who, in areas of military operations, uses unlawfully the Red Cross insignia, flags or symbols".³⁰⁹

288. Cyprus's Geneva Conventions Act provides that "the use for any purpose of the distinctive emblem which is used in the Republic under the provisions of the Geneva Conventions, without the Council of Ministers' permission, is prohibited".³¹⁰

289. Cyprus's API Act provides that "the use for any purpose of the distinctive emblem or signal which is used in the Republic, under the provisions of this Protocol, without the Council of Ministers' permission, is prohibited".³¹¹

290. The Czech Republic's Criminal Code as amended punishes any person who "misuses the insignia of the Red Cross, or other signs or colours recognised in international law as designating medical institutions or vehicles used for medical assistance or evacuation".³¹²

291. The Czech Republic's Emblem and Red Cross Society Act punishes "anyone who misuses the emblem or the name [red cross on a white ground and the words 'Red Cross' or 'Geneva Cross'] . . . or anyone who assists in such misuse, . . . in case this act was perpetrated at times to which the [1949] Geneva Conventions apply".³¹³

292. Denmark's Military Criminal Code as amended punishes "any person who, in time of war, abuses . . . any badge or designation that is reserved for personnel, institutions and material designed to give assistance to wounded or sick persons".³¹⁴

³⁰⁵ Côte d'Ivoire, *Penal Code as amended* (1981), Article 473.

³⁰⁶ Croatia, *Emblem Law* (1993), Article 18.

³⁰⁷ Croatia, *Criminal Code* (1997), Article 168(1). ³⁰⁸ Cuba, *Emblem Decree* (1910), § 6.

³⁰⁹ Cuba, *Military Criminal Code* (1979), Article 45.

³¹⁰ Cyprus, *Geneva Conventions Act* (1966), Section 6. ³¹¹ Cyprus, *API Act* (1979), Section 6.

³¹² Czech Republic, *Criminal Code as amended* (1961), Article 265(1).

³¹³ Czech Republic, *Emblem and Red Cross Society Act* (1992), § 2.

³¹⁴ Denmark, *Military Criminal Code as amended* (1978), Article 25.

293. Denmark's Penal Code punishes "anyone who uses unlawfully, and willfully or negligently . . . the distinctive signs and designations reserved for persons, institutions and material assigned to give assistance to the wounded and sick in wartime".³¹⁵

294. Ecuador's Emblem Regulation provides that "the name and emblem of the Red Cross shall be efficiently protected against any abuse".³¹⁶

295. Egypt's Emblem Law provides that:

It is prohibited for persons other than the medical section of the Army or establishments or units attached thereto, or other societies so authorised, to use, in time of peace or in time of war, under any form and for any purpose, the Red Crescent and Red Cross emblems as well as their names.³¹⁷

296. El Salvador's Emblem Law provides that:

The emblems of the red cross and red crescent, as well as the names "Red Cross", "Geneva Cross" and "Red Crescent", shall only be used for the purposes defined in the Geneva Conventions of 1949 and their Additional Protocols of 1977, i.e., for personnel, transportation units, materials and establishments belonging to the medical services of the armed forces, to the chaplains assigned to the [armed forces], . . . to the National Red Cross Society, . . . to the International Committee of the Red Cross and to the International Federation of Red Cross and Red Crescent Societies.³¹⁸

It also punishes "anyone who, without the corresponding authorisation, makes use of the emblem of the red cross, red crescent, or of the names "Red Cross", "Geneva Cross" or "Red Crescent", or of any other sign or word which is an imitation thereof or which can create confusion with those emblems and names".³¹⁹

297. Under Estonia's Penal Code, "exploitative abuse of the emblem or name of the red cross, red crescent or red lion and sun" is a war crime.³²⁰

298. Under Ethiopia's Penal Code, it is a punishable offence to wear without authorisation the emblems or insignia of the red cross, red crescent or red lion and sun.³²¹

299. Finland's Emblem Act provides that:

The distinctive emblem of the Red Cross, the terms "Red Cross" or "Geneva Cross" . . . shall not be used in cases other than those provided for in this Act . . . Signs, pictures or terms which resemble the emblems, signs or terms referred to in § 1 to such a degree that confusion may arise shall not be used.³²²

The Act punishes "whosoever makes use of the emblems, signs, pictures or terms referred to in §§ 1 and 2 in . . . unauthorised activity".³²³

³¹⁵ Denmark, *Penal Code* (1978), Article 132.

³¹⁶ Ecuador, *Emblem Regulation* (1972), Article 9.

³¹⁷ Egypt, *Emblem Law* (1940), Article 1(1).

³¹⁹ El Salvador, *Emblem Law* (2000), Article 15.

³²¹ Ethiopia, *Penal Code* (1957), Article 294(a).

³²² Finland, *Emblem Act* (1979), §§ 1 and 2.

³¹⁸ El Salvador, *Emblem Law* (2000), Article 1.

³²⁰ Estonia, *Penal Code* (2001), § 105.

³²³ Finland, *Emblem Act* (1979), § 6.

300. Finland's Revised Penal Code provides that "a person who in an act of war... abuses an international symbol designated for the protection of the wounded or the sick... shall be sentenced for a war crime".³²⁴

301. France's Emblem Law provides that:

The use, either by private individuals or by societies or associations other than [medical services of the armed forces and societies officially authorised to give assistance], of the said emblems or denominations [red cross, "Red Cross" or "Geneva Cross"], as well as of any signs or denominations constituting an imitation thereof, regardless of the purpose... of the use, is prohibited at all times.³²⁵

302. France's Code of Military Justice punishes:

any individual, military or not, who, in time of war, in the area of operations of a force or unit, in violation of the laws and customs of war, uses improperly the distinctive signs and emblems defined by international conventions to ensure the respect for persons, objects and places protected by those conventions.³²⁶

303. Georgia's Criminal Code (1960) punishes the "illegal use of the Red Cross and Red Crescent distinctive signs as well as their titles".³²⁷ It also punishes the "use of Red Cross and Red Crescent signs in the zones of military operation by persons having no such right, as well as misuse in wartime of flags or signs of the Red Cross and Red Crescent or of the distinctive colours of sanitary evacuation transport".³²⁸

304. Under Georgia's Criminal Code (1999), any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "making improper use... of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury" in international armed conflicts, is a crime.³²⁹

305. Germany's Law on Administrative Offences provides that:

- (1) Whoever uses the distinctive emblem of the red cross on a white ground or the denomination "Red Cross" or "Geneva Cross" without authorisation, acts irregularly.
- (2) Whoever uses the heraldic emblem of the Swiss Confederation without authorisation, also acts irregularly.
- (3) Emblems, denominations and heraldic signs which are as similar as to be mistaken with those mentioned in paragraphs (1) and (2) stand on an equal footing.
- (4) Paragraphs (1) and (3) apply by analogy to such emblems or denominations which, according to international law, stand on the same footing as the emblem of the red cross on a white ground or the denomination "Red Cross".³³⁰

³²⁴ Finland, *Revised Penal Code* (1995), Chapter 11, Section 1(1)(2).

³²⁵ France, *Emblem Law* (1939), Article 1.

³²⁶ France, *Code of Military Justice* (1982), Article 439.

³²⁷ Georgia, *Criminal Code* (1960), Article 224.

³²⁸ Georgia, *Criminal Code* (1960), Article 283.

³²⁹ Georgia, *Criminal Code* (1999), Article 413(d).

³³⁰ Germany, *Law on Administrative Offences* (1968), § 125.

306. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "makes improper use of the distinctive emblems of the Geneva Conventions . . . thereby causing a person's death or serious injury".³³¹

307. Ghana's Red Cross Emblem Decree punishes violations of its provisions, including: "Except as otherwise provided in this Decree, no person shall after the expiry of six months from the commencement of this Decree, use any of the Red Cross Emblems . . . [red cross, red crescent and red lion and sun] for any purpose whatsoever."³³²

308. Greece's Emblem Law punishes any "soldier who makes an illegal use of the sign of the red cross on a white ground or of the designation 'Red Cross' in time of war".³³³ It also punishes any civilian who commits the same acts.³³⁴

309. Greece's Military Penal Code punishes any military person who, in time of war and in the operation zones, publicly wears a badge or armlet or carries the flag with the red cross emblem without being entitled to do so.³³⁵

310. Grenada's Red Cross Society Law as amended provides that:

It shall not be lawful for any person other than those authorised under section 5 of this Law [Grenada Red Cross Society] or under the provisions of the [1949] Geneva Conventions to use for any purpose whatever the emblem of the red cross on a white ground mentioned in section 5 of this Law or the emblems of the red crescent or red lion on a white ground or any colourable imitations thereof or the words "Red Cross".³³⁶

311. Guatemala's Emblem Law provides that "the emblem of the Red Cross, as well as the denominations 'Red Cross' and 'Geneva Cross' may only be used for the purposes provided for in the Geneva Conventions of 1949 and their additional protocols of [1977]".³³⁷ It punishes "any person who, without authorisation, makes use of the emblem of the red cross or the names previously mentioned in this law, or of any other imitation that can create confusion".³³⁸

312. Guinea's Emblem Law provides that "nobody shall make use of the emblem and name of the Red Cross without having been authorised to do so by the provisions of the present law and the [1949] Geneva Conventions".³³⁹ It punishes "anyone who wears or uses in time of war the emblem of the Red Cross as a protective sign without belonging to the category of persons mentioned in article 8 paragraph 1 of the present law [personnel of public health organisations]".³⁴⁰

³³¹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

³³² Ghana, *Red Cross Emblem Decree* (1973), Sections 1 and 7.

³³³ Greece, *Emblem Law* (1914), Article 5. ³³⁴ Greece, *Emblem Law* (1914), Article 6.

³³⁵ Greece, *Military Penal Code* (1995), Article 68(2).

³³⁶ Grenada, *Red Cross Society Law as amended* (1981), Section 9(1).

³³⁷ Guatemala, *Emblem Law* (1997), Article 2.

³³⁸ Guatemala, *Emblem Law* (1997), Article 11.

³³⁹ Guinea, *Emblem Law* (1995), Article 4.

³⁴⁰ Guinea, *Emblem Law* (1995), Article 11.

313. Guinea's Criminal Code punishes "anyone [who], in an area of military operations and in violation of the laws and customs of war, uses distinctive insignia and emblems defined in international conventions to ensure respect for protected persons, objects and places".³⁴¹

314. Guyana's Red Cross Society Act punishes:

any person not being a member of the [National Red Cross] Society who – . . . wears or displays the emblem of the red cross on an article of clothing, badge, paper, or in any other way whatsoever, or any insignia coloured in imitation thereof in such a way as to be likely to deceive those to whom it is visible, for the purpose of inducing the belief that he is a member of, or an agent for the Society, or that he has been recognised by the Society as possessing any qualification for administering first aid or other treatment for the relief of sickness.³⁴²

315. The Emblem Law of Honduras provides that:

The emblem of the International Red Cross consisting of a red cross on a white ground, as well as the words "Red Cross" and "Geneva Cross", shall only be used to protect and identify the personnel and materials protected by the Geneva Conventions, number I and II of 12 August 1949, such as the establishments, units, personnel, material, vehicles, ships, hospitals and ambulances of the Medical and Relief Service of the Armed Forces of Honduras, of the Honduras Red Cross and of other relief societies duly recognised and officially authorised to provide assistance to the Medical Service of the Armed Forces, as well as the chaplains and doctors who offer their professional services to the [Armed Forces]. The emblem and the name of the Red Cross shall not be used otherwise, with the exception of the cases mentioned in Articles 2 and 5 of the present Law [*inter alia*, civilian hospitals, their personnel, medical zones and localities, transports of wounded and sick civilians].³⁴³

316. Under Hungary's Criminal Code as amended, "whoever in war-time misuses the sign of the red cross (red crescent, red lion and sun) or other signs serving a similar purpose and recognised internationally" is guilty, upon conviction, of a war crime.³⁴⁴

317. Hungary's Red Cross Society Act as amended provides that:

- (3) The sign and emblem [of the red cross on a white ground] respectively together with the designation . . . may only be used, in times of peace or war, beside the Red Cross, by health formations and institutions specified in international treaties and may only be used for the protection [or] designation of the staff and equipment of the previously mentioned . . .
- (5) Use of the emblem apart from the ways specified in paragraphs (3) and (4) constitutes . . . a summary offence.³⁴⁵

³⁴¹ Guinea, *Criminal Code* (1998), Article 579.

³⁴² Guyana, *Red Cross Society Act* (1967), Section 9(b).

³⁴³ Honduras, *Emblem Law* (1971), Article 1.

³⁴⁴ Hungary, *Criminal Code as amended* (1978), Article 164.

³⁴⁵ Hungary, *Red Cross Society Act as amended* (1993), § 5(3) and (5).

318. India's Geneva Conventions Act provides that "no person shall, without the approval of the Central Government, use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.³⁴⁶

319. Indonesia's Penal Code punishes anyone who uses, without being entitled to do so, a mark of distinction which is assigned to a certain society or to the personnel of the health service of armed forces.³⁴⁷

320. Ireland's Red Cross Act as amended provides that "it shall not be lawful for any person to use for . . . any . . . purpose whatsoever, without the consent of the Minister of Defence," the emblems of the red cross, red crescent and red lion and sun on a white ground, or any emblems closely resembling such heraldic emblems, as well as the words "Cros Dearg", "Cros na Geinébhe", "Red Cross" or "Geneva Cross" or any words closely resembling these words.³⁴⁸

321. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 44, 53 and 54 GC I and 44 and 45 GC II, and of AP I, including violations of Articles 18(8) and 38(1) AP I, as well as any "contravention" of AP II, including violations of Article 12 AP II, are punishable offences.³⁴⁹

322. Israel's Red Shield of David Law provides that:

- (a) No person shall make any use of the emblem of the [Red Shield of David in Israel] Society or an emblem so similar to it as to be misleading or an emblem containing the words "*Magen David Adom*", whether for the purpose of a business or trade or for any other purpose, except by permission of the Society.
- (b) No person shall make any use of any emblem recognised by the [1949] Geneva Conventions as a distinctive emblem of the medical services of the armed forces, unless he is authorised by these Conventions or by permission of the Minister of Health to use it.
- (c) A person contravening the provisions of this section is liable to imprisonment.³⁵⁰

323. Italy's Law of War Decree as amended emphasises that it is prohibited "to use improperly . . . the distinctive signs of the Red Cross, of the other authorised relief societies, of hospital ships and of medical aircraft".³⁵¹

324. Italy's Law concerning the Unlawful Use of the Emblem punishes "anyone who, without authorisation of the Government, adopts, as emblem, the red

³⁴⁶ India, *Geneva Conventions Act* (1960), Section 12.

³⁴⁷ Indonesia, *Penal Code* (1946), Article 508.

³⁴⁸ Ireland, *Red Cross Act as amended* (1938), Section 4(1) and (1A).

³⁴⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁵⁰ Israel, *Red Shield of David Law* (1950), Section 7.

³⁵¹ Italy, *Law of War Decree as amended* (1938), Article 36(1).

cross on a white ground, or makes use of the designation 'Red Cross' or 'Geneva Cross'".³⁵²

325. Italy's Wartime Military Penal Code punishes anyone who "uses improperly . . . the distinctive sign of the Red Cross".³⁵³

326. Japan's Emblem Law provides that the emblem of the red cross (and equivalent) should not be used without permission.³⁵⁴ Anyone who violates this provision may be sentenced to imprisonment.³⁵⁵

327. Jordan's Red Crescent Society Law punishes "anyone who uses the sign or emblem [red crescent/red cross] without authorisation".³⁵⁶

328. Jordan's Draft Emblem Law punishes:

without prejudice to the use of the emblem by persons and institutions under this Law in conformity with its provisions, any person who commits any of the following acts

...

- a. the intentional use of the emblem of the red crescent or red cross;
- b. the intentional use of the words "red crescent" or "red cross";
- c. the use of any sign, word or design so resembling the emblem of the red crescent or red cross or their names as to create confusion;
- d. the imitation of one or the other emblems and names protected.³⁵⁷

329. Kazakhstan's Penal Code punishes the "illegal use of the emblem and identifying symbols of the Red Cross/Red Crescent as well as illegal use of the name of the Red Cross/Red Crescent".³⁵⁸

330. South Korea's Red Cross Society Act as amended provides that "the use by individuals, societies, firms or companies other than the Red Cross Society, medical institutions of the armed forces or those entitled by the Red Cross Society, of the Red Cross or equivalent emblems . . . shall be prohibited at all times".³⁵⁹

331. Kyrgyzstan's Emblem Law provides that:

Anyone who, intentionally and without being entitled to do so, makes use of the emblem of the red crescent or red cross, of a distinctive signal, or of any other sign or signal constituting an imitation thereof or being capable of causing confusion shall be held responsible in conformity with the legislation of the Kyrgyz Republic.³⁶⁰

332. Latvia's Draft Red Cross Society Law provides that "during armed conflicts, Red Cross symbols should be used in accordance with international agreements . . . In case of breach of the order about the use of Red Cross symbols,

³⁵² Italy, *Law concerning the Unlawful Use of the Emblem* (1912), Article 1.

³⁵³ Italy, *Wartime Military Penal Code* (1941), Article 180(2).

³⁵⁴ Japan, *Emblem Law* (1947), Article 1.

³⁵⁵ Japan, *Emblem Law* (1947), Article 4.

³⁵⁶ Jordan, *Red Crescent Society Law* (1969), Article 5(b).

³⁵⁷ Jordan, *Draft Emblem Law* (1997), Article 14(A).

³⁵⁸ Kazakhstan, *Penal Code* (1997), Article 291.

³⁵⁹ South Korea, *Red Cross Society Act as amended* (1949), Article 25.

³⁶⁰ Kyrgyzstan, *Emblem Law* (2000), Article 10.

regulated by this Law, the offenders should be called to liability according to the legislation".³⁶¹

333. Lebanon's Code of Military Justice punishes "any person who, [in time of war] publicly and without being entitled to do so, uses in combat areas the emblem, flag or symbol of the red cross, or equivalent emblems, flags or symbols".³⁶²

334. Lesotho's Red Cross Society Act provides that:

It is unlawful for any person other than a person authorised under section seven [the personnel of the Red Cross Society] or under the provisions of the [1949 Geneva Conventions] to use for any purpose whatsoever the emblems... [red cross, red crescent, red lion and sun] or the words "Red Cross".³⁶³

335. Liechtenstein's Emblem Law states that:

The sign of the red cross on a white ground and the words "Red Cross" or "Geneva Cross" may, without prejudice to the cases mentioned in the following articles, only be used, in times of peace and war, in order to mark the personnel and material protected by [GC I and GC II], namely, the personnel, units, transports, installations and medical material of the medical service of the armed forces, including the voluntary medical services of the Red Cross of Liechtenstein, as well as the chaplains assigned to the armed forces.

...

Whoever uses, intentionally and in violation of the rules of this law, ... the sign of the red cross on a white ground or the words "Red Cross" or "Geneva Cross" or any other sign or word which could create confusion ... will be punished.³⁶⁴

336. Under Lithuania's Criminal Code as amended, "unlawful use of the Red Cross, the Red Crescent, sign ... in time of war or during an international armed conflict" is a war crime.³⁶⁵

337. Luxembourg's Emblem Law punishes "those who, without valid authorisation, carry the emblem of the Red Cross".³⁶⁶

338. Malawi's Red Cross Society Act states that "no person, other than a person so authorized under the [1949 Geneva Conventions], shall use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, and the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.³⁶⁷

³⁶¹ Latvia, *Draft Red Cross Society Law* (1998), Article 15.

³⁶² Lebanon, *Code of Military Justice* (1968), Article 146.

³⁶³ Lesotho, *Red Cross Society Act* (1967), Section 12(1).

³⁶⁴ Liechtenstein, *Emblem Law* (1957), Articles 1 and 8.

³⁶⁵ Lithuania, *Criminal Code as amended* (1961), Article 344.

³⁶⁶ Luxembourg, *Emblem Law* (1914), Article 1.

³⁶⁷ Malawi, *Red Cross Society Act* (1968), Section 8(1).

339. Malaysia's Geneva Conventions Act provides that "it shall not be lawful for any person to use for the purpose of his trade or business, or for any other purpose whatsoever, in the Federation without the authority of the Minister", the emblem of the red cross on a white ground and the words "Red Cross" or "Geneva Cross", the heraldic emblem of Switzerland, as well as any design being a colourable imitation of those emblems or any words so nearly resembling the words "Red Cross" or "Geneva Cross" as to be capable of being understood as referring to the said emblem.³⁶⁸

340. Mali's Code of Military Justice punishes:

any individual . . . who, in time of war, in the area of operations of a military force and in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined in international conventions to ensure respect for persons, objects and places protected by these conventions.³⁶⁹

341. Under Mali's Penal Code, "using . . . the distinctive signs provided for by the Geneva Conventions and, thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.³⁷⁰

342. Malta's Red Cross Society Act provides that:

- (a) It shall not be lawful for any person other than the [Red Cross] Society or any other person authorised under the provisions of the [1949 Geneva Conventions, AP I and AP II] to use for any purpose whatever the emblem of the Red Cross, the Red Crescent or any distinctive emblem as is referred to in Article 38 of [GC I], any colourable imitation thereof, or words "Red Cross" or "Red Crescent" in any language.
- (b) Any person who contravenes the provisions of paragraph (a) of this subsection shall be guilty of [a punishable] offence.³⁷¹

343. The Geneva Conventions Act of Mauritius provides that, "subject to this section, no person shall, without the authority of the Minister, use" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.³⁷²

344. Moldova's Penal Code (1961) punishes:

the unlawful wearing and abuse of the signs of the red cross and red crescent in areas of military operations by persons not entitled to wear them, as well as the

³⁶⁸ Malaysia, *Geneva Conventions Act* (1962), Sections 8 and 9.

³⁶⁹ Mali, *Code of Military Justice* (1995), Article 145.

³⁷⁰ Mali, *Penal Code* (2001), Article 31(i)(7).

³⁷¹ Malta, *Red Cross Society Act* (1992), Section 4(2).

³⁷² Mauritius, *Geneva Conventions Act* (1970), Section 8.

abuse in time of war of the flags or signs of the red cross and red crescent and the emblem of the ambulances and vehicles of sanitary evacuation.³⁷³

345. Moldova's Penal Code (2002) punishes "the use by unauthorised persons of the red cross emblem and of the name 'Red Cross', as well as the insignia which may be confused with the red cross emblem, if such an act causes grave consequences".³⁷⁴

346. Moldova's Emblem Law punishes "the use of the emblem of the red cross, of the words 'Red Cross', by individuals and legal persons not entitled to such use, as well as the use of signs which can be identified with the emblem of the red cross".³⁷⁵

347. Monaco's Emblem Law prohibits the use of the red cross emblem by a person, society or association other than those authorised under the Geneva Conventions. Any breach of this provision shall be punished.³⁷⁶

348. Morocco's Emblem Law prohibits:

- a) the use, either by private individuals or by societies or associations other than [medical services of the armed forces and authorised voluntary relief societies], of the emblem of the Red Crescent and of the words "Red Crescent";
- b) the use of any sign and designation constituting an imitation thereof.³⁷⁷

349. Morocco's Code of Military Justice punishes "any individual who, in time of war, in the area of operations of a military field unit, publicly employs, without being entitled to do so, the armlet, the flag or emblem of the Red Crescent or Red Cross, or equivalent armlets, flags or emblems".³⁷⁸

350. Under the Penal Code as amended of the Netherlands, the use without prior authorisation of the red cross emblem, the words "Red Cross" or "Geneva Cross" or of other recognised protective emblems or terminology is a criminal offence.³⁷⁹

351. Under the International Crimes Act of the Netherlands, "making improper use . . . of the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury", is a crime, when committed in an international armed conflict.³⁸⁰

352. New Zealand's Geneva Conventions Act as amended provides that, "subject to the provisions of this section, it shall not be lawful for any person, without the authority of the Minister of Defence or a person authorised by him in writing to give consent under this section, to use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as

³⁷³ Moldova, *Penal Code* (1961), Article 270, see also Article 217.

³⁷⁴ Moldova, *Penal Code* (2002) Article 363. ³⁷⁵ Moldova, *Emblem Law* (1999), Article 16.

³⁷⁶ Monaco, *Emblem Law* (1953), Articles 1 and 2.

³⁷⁷ Morocco, *Emblem Law* (1958), Article 2.

³⁷⁸ Morocco, *Code of Military Justice* (1956), Article 189.

³⁷⁹ Netherlands, *Penal Code as amended* (1881), Article 435(c).

³⁸⁰ Netherlands, *International Crimes Act* (2003), Article 5(3)(f).

any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.³⁸¹

353. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.³⁸²

354. Nicaragua's Military Penal Law punishes "anyone who, in the area of military operations, unlawfully uses symbols of the Red Cross".³⁸³

355. Nicaragua's Military Penal Code punishes any soldier who, in time of war and in an area of military operations, "unlawfully displays . . . the insignia, flags or emblems of the Red Cross".³⁸⁴

356. Nicaragua's Emblem Law provides that "the emblem of the Red Cross, as well as the denominations 'Red Cross' and 'Geneva Cross', may only be used for the purposes defined under the Geneva Conventions of 1949 and their Additional Protocols of 1977".³⁸⁵

357. Nigeria's Geneva Conventions Act states that "subject to the provisions of this section, it shall not be lawful for any person, without the authority of the Minister of the Federation charged with responsibility for matters relating to defence, to use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations. It is also prohibited to use, without the authority of the Minister of the Federation charged with responsibility for matters relating to trade, for any purpose whatsoever the heraldic emblem of Switzerland or any other design so nearly resembling that design as to be capable of being mistaken for that heraldic emblem.³⁸⁶

358. Nigeria's Revised Red Cross Society Act punishes:

any person who falsely and fraudulently . . . wears or displays the emblem of the Red Cross on any article of clothing, badge, piece of paper, or in any other way whatsoever, or any insignia coloured in imitation thereof in such a way as to be likely to deceive those to whom it is visible, for the purpose of inducing the belief that he is a member of, or an agent for, the [Nigerian Red Cross] Society.³⁸⁷

359. Norway's Penal Code provides that it is a punishable offence to use "without authority publicly or for an unlawful purpose . . . any badge or designation which by international agreement binding on Norway is designed for use in connection with aid to the wounded and sick . . . in war".³⁸⁸

³⁸¹ New Zealand, *Geneva Conventions Act as amended* (1958), Section 8.

³⁸² New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³⁸³ Nicaragua, *Military Penal Law* (1980), Article 83.

³⁸⁴ Nicaragua, *Military Penal Code* (1996), Article 50(1).

³⁸⁵ Nicaragua, *Emblem Law* (2002), Article 2.

³⁸⁶ Nigeria, *Geneva Conventions Act* (1960), Section 10(1) and (3).

³⁸⁷ Nigeria, *Revised Red Cross Society Act* (1990), Section 8(b).

³⁸⁸ Norway, *Penal Code* (1902), § 328(4)(b).

360. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".³⁸⁹

361. Panama's Emblem Law provides that:

The emblem of the Red Cross, as well as its denominations, shall only be used for the purposes provided for in the Geneva Conventions of 1949 and the[ir] Additional Protocols.

...

Any person, whether physical or legal, who, without being entitled to do so, makes use of the emblem of the Red Cross or Red Crescent, of the words *Red Cross* or *Red Crescent*, of a distinctive sign, denomination or signal which constitutes an imitation thereof or which can create confusion... shall be punished.³⁹⁰

362. Papua New Guinea's Geneva Conventions Act punishes any "person who, without the consent of the Minister, uses for any purpose" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as a design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or understood as referring to, any of those emblems or designations.³⁹¹

363. Under Paraguay's Emblem Law, any person who improperly uses the emblem of the red cross in time of war, with a view to commit acts of banditry, shall be subject to military and criminal laws.³⁹²

364. The Red Cross Society Decree of the Philippines states that:

The use of the emblem of the red Greek cross on a white ground is reserved exclusively to the Philippine National Red Cross, medical services of the Armed Forces of the Philippines, and such other medical facilities or other institutions as may be authorized by the Philippine National Red Cross... It shall be unlawful for any other person or entity to use the words Red Cross or Geneva Cross or to use the emblem of the red Greek cross on a white ground or any designation, sign, or insignia constituting an imitation thereof for any purpose whatsoever.³⁹³

365. Poland's Red Cross Society Law provides that:

The sign or the name of the Red Cross as an emblem or distinctive and protective sign may be used in situations and in accordance with the principles determined in international conventions.

³⁸⁹ Norway, *Military Penal Code as amended* (1902), § 108.

³⁹⁰ Panama, *Emblem Law* (2001), Articles 2 and 12.

³⁹¹ Papua New Guinea, *Geneva Conventions Act* (1976), Section 13.

³⁹² Paraguay, *Emblem Law* (1928), Article 5.

³⁹³ Philippines, *Red Cross Society Decree* (1979), Section 15.

- ...
1. It shall be prohibited to use, in contravention of Art. 13, the sign or the name "Red Cross" or "Geneva Cross", as well as any signs or names constituting their imitations.
 2. The prohibition contained in point (1) applies also to the use of signs and names of the "Red Crescent" and "Red Lion and Sun".³⁹⁴

366. Poland's Penal Code punishes "any person who, during hostilities, uses the sign of the Red Cross or of the Red Crescent in violation of international law".³⁹⁵

367. Romania's Penal Code punishes "the unlawful use, in time of war and in relation to military operations, of the emblem or name of the 'Red Cross', or of equivalent signs and names".³⁹⁶

368. Under Russia's Draft Law on the Red Cross Society and Emblem, "illegal use of the name and the emblem of the Red Cross entails responsibility provided for by the legislation of the Russian Federation".³⁹⁷

369. Rwanda's Red Cross Decree punishes "any person who, without being entitled to do so, . . . uses the emblem or the denomination of the 'Red Cross' or 'Geneva Cross', or equivalent emblems or denominations that may create confusion, . . . for any . . . purpose".³⁹⁸ It also punishes "any person who, in time of war, uses, without being entitled to do so, the armlet or the flag of the Red Cross".³⁹⁹

370. The Red Cross Society Act of Saint Kitts and Nevis provides that:

It shall not be lawful for any person other than those authorised . . . under the [1949 Geneva Conventions, AP I and AP II] to use for any purpose whatever the emblem of the red cross on white ground, or any colourable imitation thereof, or the words "Red Cross", or the arms of the Swiss Confederation.⁴⁰⁰

371. Samoa's Emblem Act states that "no person or body other than the Red Cross Society may use the term Red Cross or its distinctive emblem for any purpose or activity".⁴⁰¹

372. The Geneva Conventions Act of the Seychelles provides that, "subject to this section, no person shall, without the authority of the Minister, use for any purpose" the emblems of the red cross and red crescent on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross" and "Red Crescent", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for,

³⁹⁴ Poland, *Red Cross Society Law* (1964), Articles 13 and 14.

³⁹⁵ Poland, *Penal Code* (1997), Article 126(1).

³⁹⁶ Romania, *Penal Code* (1968), Article 351, see also Article 294.

³⁹⁷ Russia, *Draft Law on the Red Cross Society and Emblem* (1998), Article 7.

³⁹⁸ Rwanda, *Red Cross Decree* (1912), Article 2.

³⁹⁹ Rwanda, *Red Cross Decree* (1912), Article 3.

⁴⁰⁰ Saint Kitts and Nevis, *Red Cross Society Act* (1985), Section 9.

⁴⁰¹ Samoa, *Emblem Act* (1993), Section 3(1).

or, as the case may be, understood as referring to, one of those emblems or designations.⁴⁰²

373. Singapore's Geneva Conventions Act provides that "no person shall use for any purpose whatsoever in Singapore, without the authority of the Minister," the emblem of the red cross on a white ground, the heraldic emblem of Switzerland, the words "Red Cross" and "Geneva Cross", as well as any design being a colourable imitation of those emblems or any words so nearly resembling the words "Red Cross" or "Geneva Cross" as to be capable of being understood as referring to the said emblem.⁴⁰³

374. Singapore's Red Cross Society Act considers that:

No person other than the [Singapore Red Cross] Society and any person so authorised by the Minister shall use –

- (a) the heraldic emblem of the red cross on a white ground formed by reversing the Federal Colours of Switzerland; or
- (b) the words "Red Cross" or "Geneva Cross".⁴⁰⁴

375. Slovakia's Criminal Code as amended punishes any person who "misuses the insignia of the Red Cross, or other signs or colours recognised in international law as designating medical institutions or vehicles used for medical assistance or evacuation".⁴⁰⁵

376. Slovakia's Law on the Red Cross Society and Emblem states that:

In accordance with the [1949] Geneva Conventions and their Additional Protocols, the conclusions of the international conferences of the Red Cross and Red Crescent and rules of the International Committee of the Red Cross . . . for the use of the Red Cross sign and name by National Societies during peace time and war time, the sign and name of the Red Cross may only be used by:

- a) the military health service for indication and protection of the health units and institutes of staff and material protected by the Geneva Conventions, their Additional Protocols and other international conventions regulating similar affairs by which the Slovak Republic is bound;
- b) the Slovak Red Cross, its institutes and staff in their activity pursuant to letter a) and during peace time, and under the conditions stipulated by the Geneva Conventions and their Additional Protocols;
- c) the international organisations of the Red Cross and their staff under the conditions stipulated by the Geneva Conventions and their Additional Protocols;
- d) the operators of the vehicles intended as ambulances and the operators of rescue stations exclusively intended for free treatment of the wounded or sick; for indication of these ambulances and rescue stations during peace time only with the express approval of the Slovak Red Cross.⁴⁰⁶

⁴⁰² Seychelles, *Geneva Conventions Act* (1985), Section 9.

⁴⁰³ Singapore, *Geneva Conventions Act* (1973), Sections 8 and 9.

⁴⁰⁴ Singapore, *Red Cross Society Act* (1973), Section 10(1).

⁴⁰⁵ Slovakia, *Criminal Code as amended* (1961), Article 265(1).

⁴⁰⁶ Slovakia, *Law on the Red Cross Society and Emblem* (1994), Section 4(1).

It also punishes any person who unlawfully uses the sign or name of the red cross “during the time of events to which the Geneva Conventions and their Additional Protocols relate”.⁴⁰⁷

377. Slovenia’s Red Cross Society Law states that:

The Red Cross symbol on a white background and the name of the Red Cross may only be used in the manner specified by the [1949] Geneva Conventions, this Law and the regulations issued for the execution thereof.

...

All natural persons and legal entities, except those permitted by this Law, shall be permanently prohibited from using:

- the Red Cross symbol on a white background or the name of the Red Cross or the Geneva Cross, or
- the Red Crescent symbol on a white background or the name of the Red Crescent,
- as well as any symbol or name imitating the symbol or name under the first and second items, irrespective of the purpose of their use and the time of their adoption.⁴⁰⁸

378. Under Slovenia’s Penal Code, “whoever abuses or carries without authorisation . . . the emblems or flag of the Red Cross” commits a war crime.⁴⁰⁹

379. South Africa’s Geneva Conventions Notice provides that “it is an offence . . . to use the said emblem of the ‘Red Cross’ or ‘Geneva Cross’ for the purpose of trade or business or for any other purpose whatsoever without the authority of His Excellency the Governor-General-in-Council”.⁴¹⁰

380. Spain’s Military Criminal Code punishes any soldier who “displays improperly . . . the distinctive signs of the Geneva Conventions”.⁴¹¹

381. Spain’s Penal Code punishes “anyone who, during an armed conflict . . . uses improperly . . . the protective or distinctive signs, emblems or signals established and recognised under international treaties to which Spain is a party, in particular the distinctive signs of the Red Cross and the Red Crescent”.⁴¹²

382. Sri Lanka’s Draft Geneva Conventions Act provides that, “subject to the provisions of this section and section 14, it shall not be lawful for any person, without the consent in writing of the Minister of Defence or a person authorized in writing by the Minister to give consents under this section, to use or display for any purpose whatsoever” the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations “Red Cross”, “Geneva Cross”, “Red Crescent” and “Red Lion and Sun”, as well as a design or wording so nearly resembling any of those emblems

⁴⁰⁷ Slovakia, *Law on the Red Cross Society and Emblem* (1994), Section 5(1).

⁴⁰⁸ Slovenia, *Red Cross Society Law* (1993), Articles 21 and 22.

⁴⁰⁹ Slovenia, *Penal Code* (1994), Article 386(1).

⁴¹⁰ South Africa, *Geneva Conventions Notice* (1915), § 4.

⁴¹¹ Spain, *Military Criminal Code* (1985), Article 75(1).

⁴¹² Spain, *Penal Code* (1995), Article 612(4).

or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.⁴¹³

383. Sweden's Emblems and Signs Act as amended provides that:

The Red Cross emblem, consisting of a red cross on a white background, or the name "Red Cross" or "Geneva Cross", may not be publicly used other than as a distinctive emblem of military medical services or for military religious personnel or in such cases as specified in Section 2.

...

The international Red Cross organizations are entitled to use the distinctive emblem and name as specified in Section 1. The same shall apply to foreign national associations, which in their own country have the right publicly to use the emblem or the name.

Having obtained the permission of the Government, the Swedish Red Cross and other Swedish associations, whose purpose it is to provide assistance in military medical services in wartime, may use the aforesaid emblem and name. The distinctive emblem specified above may, with the permission of the Government, be used as a distinctive emblem for civilian medical services in wartime and for rescue services along the coasts.⁴¹⁴

384. Under Sweden's Penal Code as amended, misuse of insignia referred to in the Emblems and Signs Act as amended, including the red cross, constitutes a crime against international law.⁴¹⁵

385. Switzerland's Emblem Law provides that:

The emblem of the red cross on white ground and the words "red cross" or "Geneva cross" shall, with the exception of the cases provided for in the following articles, be used, whether in time of peace or in time of war, only to designate the personnel and material protected by [GC I and GC II], meaning the personnel, units, transports, establishments and material of the medical service of the armed forces, including voluntary sanitary relief of the Swiss Red Cross, as well as the chaplains attached to the armed forces.

...

Anyone who, intentionally and in violation of the provisions of the present law... has made use of the emblem of the red cross on a white ground or of the words "red cross" or "Geneva cross", or of any other sign or word capable of creating confusion [commits a punishable offence].⁴¹⁶

386. Tajikistan's Criminal Code punishes the "illegal use of emblems and distinctive signs of the red cross and red crescent, as well as red cross and red crescent names".⁴¹⁷

387. Tajikistan's Emblem Law provides that:

Any use of the emblems, appellations "Red Cross" and "Red Crescent" and distinctive signals by legal and natural persons within the territory of the Republic of

⁴¹³ Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 12(1).

⁴¹⁴ Sweden, *Emblems and Signs Act as amended* (1953), Sections 1 and 2.

⁴¹⁵ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

⁴¹⁶ Switzerland, *Emblem Law* (1954), Articles 1 and 8(1).

⁴¹⁷ Tajikistan, *Criminal Code* (1998), Article 333.

Tajikistan, which goes against the Law, the [1949] Geneva Conventions and Additional Protocols, as well as the Rules on the use of the Red Cross or Red Crescent emblems by National Societies, is prohibited.

Those found guilty of breaching or improperly following the Law are liable to prosecution in accordance with the legislation of the Republic of Tajikistan.⁴¹⁸

388. Tanzania's Red Cross Society Act punishes:

Any person who, falsely or with intent to deceive or defraud, –

...

wears or displays the emblem of the Red Cross or any colourable imitation thereof for the purpose of inducing the belief that he is a member of or an agent for the [Red Cross] Society or that he has been recognized by the Society as possessing any qualification for administering first-aid or other treatment for injury or sickness.⁴¹⁹

389. Thailand's Red Cross Act provides that:

Whoever, without being entitled according to the [1949 Geneva] Conventions or this Act, uses the Red Cross emblem or the Red Cross name shall be punished with imprisonment . . .

...

Whoever uses any emblem or wording imitating the Red Cross emblem or the Red Cross name, or resembling such emblem or name as may be inferred that it is so done in order to deceive the public, shall be punished with imprisonment . . .

...

Sections 9 [and] 10 . . . shall apply to the emblem of the red crescent on a white ground or of the red lion and sun on a white ground, and to the name "red crescent" or "red lion and sun", *mutatis mutandis*.⁴²⁰

390. Togo's Code of Military Justice punishes "any individual who, [in time of war] in the area of operations, uses publicly and without being entitled to do so the armlet, flag or emblem of the Red Cross, or equivalent armlets, flags or emblems".⁴²¹

391. Togo's Emblem Law punishes:

whoever, without being entitled to do so, makes use of the emblem of the Red Cross or Red Crescent, of the words "Red Cross" or "Red Crescent", of a distinctive signal or of any other sign, denomination or signal constituting an imitation thereof or capable of creating confusion, whatever the purpose of this use.⁴²²

392. Under Tonga's Red Cross Society Act, "it shall not be lawful for any person other than those authorised under section 5 of this Act or under the provisions of

⁴¹⁸ Tajikistan, *Emblem Law* (2001), Article 17.

⁴¹⁹ Tanzania, *Red Cross Society Act* (1962), Section 7(b).

⁴²⁰ Thailand, *Red Cross Act* (1956), Sections 9, 10 and 12.

⁴²¹ Togo, *Code of Military Justice* (1981), Article 122.

⁴²² Togo, *Emblem Law* (1999), Article 15.

the . . . [1949] Geneva Conventions to use for any purpose whatever the emblem of the red cross on a white ground".⁴²³

393. Trinidad and Tobago's Red Cross Society Act punishes:

Any person not being a member of the [Red Cross] Society who –

...

wears or displays the emblem of the Red Cross on an article of clothing, badge, paper, or in any other way whatsoever, or any insignia coloured in imitation thereof in such a way as to be likely to deceive those to whom it is visible, for the purpose of inducing the belief that he is a member of, or agent for the Society, or that he has been recognised by the Society as possessing any qualification for administering first aid or other treatment for the relief of sickness.⁴²⁴

394. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁴²⁵

395. Tunisia's Code of Military Justice as amended punishes "any individual who, in the area of operations of a military force . . . publicly uses, without being entitled to do so, the armlet, flag or emblem of the Red Crescent or Red Cross, or equivalent armlets, flags or emblems".⁴²⁶

396. Turkmenistan's Emblem Law provides that:

Anyone who, wilfully and without entitlement, has used the red crescent or red cross emblem, the designation "Red Crescent" or "Red Cross", a distinctive signal or any other sign, designation or signal which constitutes an imitation thereof or which might lead to confusion, shall be held responsible in accordance with the legislation of Turkmenistan.⁴²⁷

397. Under Uganda's Emblems Order, the emblems of the red cross or red crescent and the designations "Red Cross" or "Red Crescent" shall be for the exclusive use of:

1. The Uganda Red Cross Society.
2. The International Committee of the Red Cross (I.C.R.C.).
3. The International Federation of Red Cross and Red Crescent Societies.
4. The Medical personnel of the Armed Forces and religious personnel attached to the Armed Forces.⁴²⁸

398. Ukraine's Emblem Law provides that:

The use of the emblem of the red cross or red crescent, or red cross and red crescent, of the names "Red Cross" or "Red Crescent", or "Red Cross and Red Crescent", of the distinctive sign or any other sign, name or signal constituting an imitation thereof . . . or capable of creating confusion, regardless of the purpose of such use, in violation of the provisions of the present law . . . are prohibited.

⁴²³ Tonga, *Red Cross Society Act* (1972), Section 9(1).

⁴²⁴ Trinidad and Tobago, *Red Cross Society Act* (1963), Section 8(b).

⁴²⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁴²⁶ Tunisia, *Code of Military Justice as amended* (1957), Article 127.

⁴²⁷ Turkmenistan, *Emblem Law* (2001), Article 14.

⁴²⁸ Uganda, *Emblems Order* (1993), Section 2 and Schedule.

...

Persons having committed a breach of the Ukrainian legislation of the use and symbolic of the Red Cross and Red Crescent are liable to punishment in conformity with Ukrainian legislation.⁴²⁹

399. Ukraine's Draft Red Cross Society Law states that:

In time of war (armed conflict), only the following are entitled to use the emblem:

- a) the Red Cross Society . . . its personnel and volunteers, on vehicles used by the medical public service, its transports, its installations . . .
- b) the medical service of the Armed Forces of Ukraine;
- c) the medical establishments of Ukraine directly assisting wounded, sick and victims;
- d) the other persons entitled by the Geneva Conventions of 1949 . . . and their first Additional Protocol.⁴³⁰

400. Pursuant to Ukraine's Criminal Code, the "carrying the Red Cross or Red Crescent symbols in an operational zone by persons not entitled to do so, as well as misuse of flags or signs of the Red Cross and Red Crescent or the colours attributed to medical vehicles in state of martial law" constitutes a war crime.⁴³¹

401. The UK Geneva Conventions Act as amended provides that, "subject to the provisions of this section, it shall not be lawful for any person, without the authority of the Secretary of State, to use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems or designations.⁴³²

402. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁴³³

403. The US Criminal Statute on the Protection of the Emblem as amended states that the following are guilty of a criminal offence:

Whoever wears or displays the sign of the Red Cross or any insignia colored in imitation thereof for the fraudulent purpose of inducing the belief that he is a member of or an agent for the American National Red Cross; or

⁴²⁹ Ukraine, *Emblem Law* (1999), Articles 15 and 17.

⁴³⁰ Ukraine, *Draft Red Cross Society Law* (1999), Article 49.

⁴³¹ Ukraine, *Criminal Code* (2001), Article 435, see also Article 445.

⁴³² UK, *Geneva Conventions Act as amended* (1957), Section 6.

⁴³³ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

Whoever, whether a corporation, association or person, other than the American National Red Cross and its duly authorized employees and agents and the sanitary and hospital authorities of the armed forces of the United States, uses the emblem of the Greek red cross on a white ground, or any sign or insignia made or colored in imitation thereof or the words "Red Cross" or "Geneva Cross" or any combination of these words.⁴³⁴

404. Under the US War Crimes Act as amended, violations of Article 23(f) of the 1907 HR are war crimes.⁴³⁵

405. Uruguay's Emblem Decree states that "the red cross and red crescent emblems, as well as the words 'Red Cross, 'Geneva Cross' and 'Red Crescent' may only be used for the purposes provided for in the Geneva Conventions of 1949 and their Additional Protocols of 1977".⁴³⁶

406. Vanuatu's Geneva Conventions Act provides that "no person shall, without the consent in writing of the Minister, use for any purpose whatsoever" the emblems of the red cross, red crescent and red lion and sun on a white ground, the designations "Red Cross", "Geneva Cross", "Red Crescent" and "Red Lion and Sun", as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for, or as the case may be, understood as referring to, one of those emblems or designations.⁴³⁷

407. Venezuela's Emblem Law provides that:

The emblem of the Red Cross on a white ground and the words "Red Cross" may not be used, in time of peace or in time of war, except to protect and designate the personnel and material of medical formations and of establishments of the Medical Service of the Army, Navy and Air Force, as well as of voluntary relief societies duly recognised by the National Red Cross Society and officially authorised to offer its assistance.

...

The use of any sign or denomination constituting an imitation of the emblem or the words "Red Cross" is prohibited.

Likewise, the use for any purpose... of similar emblems or words which could create confusion is prohibited.⁴³⁸

It further stipulates that all violations of those provisions must be punished.⁴³⁹

408. Yemen's Emblem Law punishes:

any person who uses intentionally and without entitlement the emblem of the red crescent or red cross, or their denominations, or any other distinctive emblem or any other sign or denomination constituting an imitation thereof or which provokes confusion, whatever the purpose of the use".⁴⁴⁰

⁴³⁴ US, *Criminal Statute on the Protection of the Emblem as amended* (1905), Section 706.

⁴³⁵ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

⁴³⁶ Uruguay, *Emblem Decree* (1992), Article 1.

⁴³⁷ Vanuatu, *Geneva Conventions Act* (1982), Section 11.

⁴³⁸ Venezuela, *Emblem Law* (1965), Articles 1 and 4.

⁴³⁹ Venezuela, *Emblem Law* (1965), Article 5. ⁴⁴⁰ Yemen, *Emblem Law* (1999), Article 10.

409. Under the Penal Code as amended of the SFRY (FRY), “those who misuse or carry without permission . . . the Red Cross flag or corresponding emblems” commit a war crime.⁴⁴¹ The commentary on the Code states that:

The unauthorised carrying of an international emblem exists, for example, when a Red Cross emblem is carried by a person who is not a member of the medical corps (members of combat units) or, when such an emblem is placed, in general, on persons or objects not provided by international law regulations . . .

The misuse of international emblem is committed, as a rule, during a war or an armed conflict . . .

The aggravated form of this criminal act . . . exists when the misuse or unauthorised use of international emblems is committed in the war operations zone.⁴⁴²

410. The FRY Emblem Law prohibits the wearing or use of the emblem of the red cross as a protective sign, during war, imminent danger of war or state of emergency, without being entitled to do so.⁴⁴³

411. Zambia’s Red Cross Society Act states that “no person other than the [Red Cross] Society or a person so authorised under the [1949 Geneva] Conventions shall, without the authority of the Council, use for any purpose whatsoever” the emblems of the red cross, red crescent and red lion and sun on a white ground, as well as the designations “Red Cross”, “Geneva Cross”, “Red Crescent” and “Red Lion and Sun”.⁴⁴⁴

412. Zimbabwe’s Geneva Conventions Act as amended provides that, “subject to the provisions of this section and of section 7 of the Zimbabwe Red Cross Society Act, 1981, no person shall, without the authority in writing of the Minister of Health, use for any purpose whatsoever” the emblems of the red cross, red crescent and red lion and sun on a white ground, the heraldic emblem of Switzerland, the designations “Red Cross”, “Geneva Cross”, “Red Crescent” and “Red Lion and Sun”, as well as any design or wording so nearly resembling any of those emblems or designations as to be capable of being mistaken for or, as the case may be, understood as referring to one of those emblems or designations.⁴⁴⁵

National Case-law

413. In 1997, Colombia’s Council of State considered that the use of a medical vehicle for military operations was prohibited under IHL. The vehicles had been used to transport troops. The Council referred to the 1949 Geneva Conventions and to both Additional Protocols.⁴⁴⁶

⁴⁴¹ SFRY (FRY), *Penal Code as amended* (1976), Article 153(1), see also commentary on Article 148.

⁴⁴² SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 153.

⁴⁴³ FRY, *Emblem Law* (1996), Article 13.

⁴⁴⁴ Zambia, *Red Cross Society Act* (1966), Section 6(1).

⁴⁴⁵ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 8.

⁴⁴⁶ Colombia, Council of State, *Administrative Case No. 11369*, Judgement, 6 February 1997.

414. In its judgement in the *Emblem case* in 1994, Germany's Federal Supreme Court stated that there was an essential common interest in the protection of the emblems against unauthorised use.⁴⁴⁷

415. In its judgement in the *Red Cross Emblem case* in 1979, the Supreme Court of the Netherlands held that the aim of the provision of the Criminal Code of the Netherlands prohibiting the use without prior authorisation of the distinctive emblems was to prevent unauthorised persons from using the emblems.⁴⁴⁸

Other National Practice

416. The Report on the Practice of Angola notes that, according to witnesses, vehicles, uniforms and the red cross emblem were used by UNITA forces when fleeing from attacks by governmental troops. It adds that, given the numerous reports of theft of vehicles of humanitarian organisations, incidents involving the improper use of the emblems had probably occurred many times during the conflict.⁴⁴⁹

417. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal "to respect the Red Cross emblem which ought to be used by medical personnel, hospitals and medical transports only".⁴⁵⁰

418. According to the Report on the Practice of China, it is China's opinion that unauthorised use of the ICRC emblem is not acceptable.⁴⁵¹

419. In a press release issued in 1996, Colombia's Ministry of Foreign Affairs expressed concern about the alleged misuse of the emblem. It reiterated its commitment to respect the relevant provisions of the 1949 Geneva Conventions and their Additional Protocols.⁴⁵²

420. In a 1996 study, Colombia's Presidential Council for Human Rights underlined the importance for a newly developed manual for the armed forces to include provisions such as the following: "Penal or disciplinary sanctions shall be established [and] imposed on members of the public forces for the improper use of the emblem of the Red Cross".⁴⁵³

421. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that "any unlawful use of [the red cross or red crescent] is prohibited and must be punished".⁴⁵⁴

⁴⁴⁷ Germany, Federal Supreme Court, *Emblem case*, Judgement, 23 June 1994.

⁴⁴⁸ Netherlands, Supreme Court, *Red Cross Emblem case*, Judgement, 15 May 1979.

⁴⁴⁹ Report on the Practice of Angola, 1998, Chapter 2.5.

⁴⁵⁰ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

⁴⁵¹ Report on the Practice of China, 1997, Chapter 2.5.

⁴⁵² Colombia, Ministry of Foreign Affairs, Press Release, 26 August 1996.

⁴⁵³ Colombia, Presidential Council for Human Rights, *Investigación académica sobre medidas nacionales de aplicación del Derecho Internacional Humanitario*, 1996, p. 55, Report on the Practice of Colombia, 1998, Chapter 2.8.

⁴⁵⁴ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, § 62.

422. Official documents of the German military authorities stress that military buses bearing the distinctive emblem may – even in peace time – only be used for medical purposes. That is to say, transports of soldiers in such buses may only be undertaken if the transport has a “medical component”. All other transports are forbidden. According to the Report on the Practice of Germany, one document states that, before discarding vehicles displaying the emblem, the emblem must be made invisible or erased to prevent any misuse of the discarded vehicle.⁴⁵⁵

423. On the basis of the reply by Iraq’s Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that improper use of the distinctive emblems is prohibited under international law.⁴⁵⁶

424. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that the false use of emblems is forbidden.⁴⁵⁷

425. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle . . . that internationally recognized protective emblems, such as the red cross, not be improperly used”.⁴⁵⁸

426. According to the Report on the Practice of the SFRY (FRY), the 1991 Hague Statement on Respect for Humanitarian Principles extended the prohibition of improper use of the distinctive emblem to internal conflicts and can thus be considered as the *opinio juris* of the six republics of the former Yugoslavia on the applicability of the rule in internal armed conflicts. According to the report, during the armed conflicts in Slovenia and Croatia, which involved the YPA, the distinctive emblem was flagrantly misused. The YPA did not deny these practices and actually admitted two such cases during the conflict in Slovenia. The first case involved the transport of YPA personnel released from prison in Slovenia carrying their personal weapons with them. The second case involved the transport of members of the SFRY Presidency to Slovenia for negotiations with the Slovenian authorities.⁴⁵⁹

427. In 1979, in a meeting with ICRC delegates, the Minister of Health of a State considered that the abuse of the emblem was a very serious matter and asked to be given the necessary documents to enable it to publish the relevant provisions in governmental documents.⁴⁶⁰

⁴⁵⁵ Report on the Practice of Germany, 1997, Chapter 2.5. (The report does not quote any source.)

⁴⁵⁶ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.5.

⁴⁵⁷ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

⁴⁵⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

⁴⁵⁹ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.5.

⁴⁶⁰ ICRC archive document.

428. In 1991, a State gave the ICRC assurances that measures would be taken to ensure that abuses of the distinctive emblems committed during the conflict would not be repeated.⁴⁶¹

429. In 1991, the Minister of Health of a State denounced the transport of military personnel and weapons by the army of another State in vehicles and helicopters marked with the distinctive emblem.⁴⁶²

III. Practice of International Organisations and Conferences

United Nations

430. In 1970, in a report on respect for human rights in armed conflicts, the UN Secretary-General stated that "as was felt by the experts convened by the International Committee of the Red Cross in 1969, the prohibition of the improper use . . . of the Red Cross emblem, contained in article 23(f) [of the 1907 HR], should be strongly reaffirmed".⁴⁶³

Other International Organisations

431. In 1981, in a report on refugees from El Salvador, the Parliamentary Assembly of the Council of Europe recalled that the ICRC had mounted a campaign in El Salvador to promote the application of IHL after it had noted a number of violations, including misuse of the red cross emblem.⁴⁶⁴

432. In a resolution adopted in 1988 on the protection of humanitarian medical missions, the Parliamentary Assembly of the Council of Europe urged medical missions to refrain from using the red cross emblem for non-medical activities, whether in international or non-international armed conflicts.⁴⁶⁵

433. In 1997, an incident occurred involving misuse of the distinctive emblem, when SFOR soldiers used a package marked with a red cross to gain entry to a hospital to arrest a person indicted by the ICTY.⁴⁶⁶ The SFOR spokesman initially denied that the soldiers had abused the symbol of the red cross, but later admitted that the soldiers had carried a parcel with the red cross label. He indicated, however, that the soldiers had not gained access to the hospital "in disguise or by subterfuge" and that they were armed and dressed as SFOR soldiers. He added that the ICRC was not involved in the operation.⁴⁶⁷

⁴⁶¹ ICRC archive document. ⁴⁶² ICRC archive document.

⁴⁶³ UN Secretary-General, Report on respect for human rights in armed conflicts, UN Doc. A/8052, 2 March 1970, § 102.

⁴⁶⁴ Council of Europe, Parliamentary Assembly, Report on refugees from El Salvador, Doc. 4698, 7 April 1981, p. 10.

⁴⁶⁵ Council of Europe, Parliamentary Assembly, Res. 904, 30 June 1988, § 9.

⁴⁶⁶ *The Independent*, Press clippings on the arrest of persons accused of war crimes, London, 11 July 1997.

⁴⁶⁷ NATO, Transcript: Joint Press Conference at the Coalition Press Information Centre Holiday Inn, Sarajevo, 11 July 1997; Joint Press Conference, 14 July 1997.

International Conferences

434. The 23rd International Conference of the Red Cross in 1977 adopted a resolution on misuse of the emblem of the red cross inviting States parties to the 1949 Geneva Conventions to “enforce effectively the existing national legislation repressing the abuses of the emblem of the red cross, red crescent, red lion and sun, to enact such legislation wherever it does not exist at present and to provide for punishment by way of adequate sentences for offenders”.⁴⁶⁸

435. In 1992, at the Helsinki Summit of Heads of State or Government, CSCE participating States reaffirmed their commitment to prevent misuse of the protective emblems of the red cross and red crescent.⁴⁶⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

436. In a report in 1979, the IACiHR considered that the Nicaraguan government was responsible for the improper use of the red cross emblem. The Commission had been informed that:

Public Health and the Vélez Páiz Hospital in Managua [had] ambulances that [had] a painted Red Cross emblem, and that in the barrio OPEN No. 3, government ambulances with the Red Cross were used to transport soldiers, thus creating suspicion and confusion in the population with respect to the Red Cross.⁴⁷⁰

V. Practice of the International Red Cross and Red Crescent Movement

437. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “it is prohibited to make improper use (that is to mark other persons and objects than those entitled to) of . . . the distinctive signs and signals of [the] medical service”.⁴⁷¹

438. In 1978, the ICRC indicated to a Red Crescent Society the criteria governing the use of the distinctive emblems by quoting Articles 18 and 20 GC IV.⁴⁷²

439. In 1979, the ICRC sent a note to a State following a report by one of its delegates that all religious organisations were routinely using the distinctive emblem and that vehicles transporting soldiers and weapons displayed the emblem. It asked for measures to be taken to put an end to this situation.⁴⁷³ In connection with the same conflict, the ICRC recalled the basic rules concerning the use of the distinctive emblem. It stated that, as a protective sign, the

⁴⁶⁸ 23rd International Conference of the Red Cross, Bucharest, 15–21 October 1977, Res. XI.

⁴⁶⁹ CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 51.

⁴⁷⁰ IACiHR, Report on the situation of human rights in Nicaragua, Doc. OEA/Ser.L/V/II.45 Doc. 16 rev. 1, 17 November 1979, pp. 43 and 77.

⁴⁷¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 407[a].

⁴⁷² ICRC archive document. ⁴⁷³ ICRC archive document.

red cross could only be displayed by military medical personnel and units, by civilian medical personnel and units provided they were recognised and authorised by the proper authority, and by ICRC delegates, vehicles and buildings. Any other use was forbidden.⁴⁷⁴

440. In 1979, the Secretary-General of a National Red Cross Society told the ICRC that the killing of two doctors had convinced the other doctors working in governmental hospitals that the only way to be efficiently protected was to display large red crosses on their vehicles. The Secretary-General added that to put an end to the practice would jeopardise medical activities. The ICRC agreed to tolerate the practice until a normal situation was re-established, and as long as it remained within the bounds of medical activities.⁴⁷⁵

441. In 1981, the ICRC raised the issue of improper use of the emblem in a meeting with the Health Ministry of a State. Vehicles displaying the emblem were allegedly used to transport soldiers and weapons. The Minister replied that the matter would be raised before the Cabinet.⁴⁷⁶

442. In 1985, in the context of a non-international armed conflict, an incident involving a plane from Aviation sans Frontières displaying the emblem was reported. The ICRC made representations to the organisation's head office.⁴⁷⁷

443. In 1987, in response to press reports of the use of a helicopter displaying the distinctive emblem by the *contras* in Nicaragua to transport military equipment, the ICRC issued a communiqué recalling that:

The red cross emblem must be used in conflicts by medical services of armed forces exclusively to protect the wounded and sick and those caring for them. Any other use of the emblem not only violates the rules in force, but above all can result in the wounded and sick being deprived of the humanitarian aid they are entitled to.⁴⁷⁸

444. In a press release in 1991, the ICRC urged the parties to the conflict in Yugoslavia to comply with the rules relative to the use of the red cross and red crescent emblems and to repress any misuse.⁴⁷⁹

445. In 1991, the ICRC reminded the parties to a conflict that "in times of armed conflict, only duly authorised military medical services, transports and civilian hospitals and their personnel have the right to use the protective emblem". It also held that the National Societies could display the emblems to identify their activities conducted in accordance with the fundamental principles of the Red Cross and Red Crescent Movement and that Red Cross international organisations, such as the ICRC, could display the emblem at all times for all their activities. Furthermore, the ICRC emphasised that "any unauthorised use of the red cross is a violation of international humanitarian law".⁴⁸⁰

⁴⁷⁴ ICRC archive document.

⁴⁷⁵ ICRC archive document.

⁴⁷⁶ ICRC archive document.

⁴⁷⁷ ICRC archive document.

⁴⁷⁸ ICRC, Communication to the Press No. 87/19/MMR, Use of the Red Cross Emblem, 17 June 1987.

⁴⁷⁹ ICRC, Press Release No. 1673, ICRC appeals for respect for international humanitarian law in Yugoslavia, 2 July 1991.

⁴⁸⁰ ICRC archive document.

446. In 1991, the Croatian Red Cross denounced the transport of military personnel and weapons by the YPA in vehicles and helicopters marked with the distinctive emblem.⁴⁸¹

447. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the use of the emblem by National Societies in which it invited “National Societies to assist their governments in meeting their obligations under the Geneva Conventions with regard to the emblem, in particular to prevent its misuse”.⁴⁸²

448. In a press release issued in 1992 in the context of the conflict in Bosnia and Herzegovina, the ICRC reminded all parties to the conflict that “the abuse of the emblem is a breach of International Humanitarian Law”.⁴⁸³

449. In 1992, the ICRC notified the Ministry of Defence of a State that its armed forces had taken vehicles displaying the emblem to transport armed troops. The ICRC emphasised that such acts jeopardised the appearance of neutrality of the ICRC and made those vehicles military objects.⁴⁸⁴

450. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia not to abuse the red cross or red crescent emblem.⁴⁸⁵

451. In 1993, the ICRC notified the Ministry of Defence of a State of the use of the red cross emblem slightly modified by an armed opposition group in a campaign against cholera. It added that it was trying to persuade very urgently officials of the armed opposition group to stop using the emblem.⁴⁸⁶

452. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “all improper use of the red cross emblem is prohibited and must be punished”.⁴⁸⁷

453. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “any abuse of the emblem of the Red Cross is prohibited and shall be punished”.⁴⁸⁸

454. In 1996, in a meeting with an armed opposition group, the ICRC highlighted the improper use of the emblem, whereby ambulances displaying the emblem were used by armed officials of the said group. The ICRC delegation

⁴⁸¹ Croatian Red Cross, Appeal, 16 September 1991.

⁴⁸² International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 5, § 4.

⁴⁸³ ICRC, Press Release, ICRC denies allegations, ICRC Belgrade, 22 May 1992.

⁴⁸⁴ ICRC archive document.

⁴⁸⁵ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

⁴⁸⁶ ICRC archive document.

⁴⁸⁷ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § III, *IRRC*, No. 320, 1997, p. 504.

⁴⁸⁸ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § III, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

asked them to cover the emblems if they were not willing to give the vehicles back. They promised to do so.⁴⁸⁹

455. In 1996, following allegations that a Red Cross ambulance had transported tear gas grenades, the Colombian Red Cross denied that it owned the vehicle and recalled that the use of Red Cross vehicles to transport arms or armed troops was forbidden.⁴⁹⁰

456. The 1996 ICRC Model Law concerning the Use and Protection of the Emblem of the Red Cross or Red Crescent provides that:

Anyone who, wilfully and without entitlement, has made use of the emblem of the red cross or red crescent, the words "Red Cross" or "Red Crescent", a distinctive signal or any other sign, designation or signal which constitutes an imitation thereof or which might lead to confusion, irrespective of the aim of such use;

anyone who, in particular, has displayed the said emblem or words on signs, posters, announcements, leaflets or commercial documents, or has affixed them to goods or packaging, or has sold, offered for sale or placed in circulation goods thus marked;

shall be punished by imprisonment for a period of . . . (days or months) and/or by payment of a fine of . . . (amount in local currency).

If the offence is committed in the management of a corporate body (commercial firm, association, etc.), the punishment shall apply to the persons who committed the offence or ordered the offence to be committed.⁴⁹¹

457. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included the "improper use of . . . the distinctive emblems of the Geneva Conventions", when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.⁴⁹²

458. In 1997, the ICRC expressed concern about misuse of the distinctive emblem following an incident in which SFOR soldiers used a package marked with the red cross to gain entry to a hospital to arrest a person indicted by the ICTY.⁴⁹³ The ICRC stated that it objected "to any organisation using the Red Cross in a manner which jeopardizes the neutrality and independence of the Red Cross movement".⁴⁹⁴ After SFOR admitted the use of the emblem, the ICRC reiterated its concerns and urged SFOR to "ensure all necessary measures to prevent any further such misrepresentation from occurring".⁴⁹⁵

459. On the basis of a letter from the British Red Cross, the Report on UK Practice notes that, since 1988, four cases have been initiated in the UK

⁴⁸⁹ ICRC archive document.

⁴⁹⁰ Colombian Red Cross, Press Release, 24 August 1996.

⁴⁹¹ ICRC, Model Law concerning the Use and Protection of the Emblem of the Red Cross or Red Crescent, Article 10, *IRRC*, No. 313, 1996, p. 492.

⁴⁹² ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 2(x).

⁴⁹³ *The Independent*, Press clippings on the arrest of persons accused of war crimes, London, 11 July 1997.

⁴⁹⁴ ICRC, Information to the Press, ICRC Sarajevo, 11 July 1997.

⁴⁹⁵ ICRC, Information to the Press, ICRC Sarajevo, 12 July 1997.

“regarding the use of designs resembling the red cross emblem” and stresses that “unauthorised use of such emblems is prohibited at all times within UK territory, regardless of the nature of a particular conflict”.⁴⁹⁶

460. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC emphasised that “any misuse of the emblems protecting the medical services is a violation of international humanitarian law and puts the personnel working under those emblems at risk”. The ICRC called on all persons involved in violence “to refrain from misuse of the protective emblems and . . . on all the authorities concerned to prevent or repress such practices”.⁴⁹⁷

VI. Other Practice

461. In 1982, in a meeting with the ICRC, an armed opposition group denounced abuses of the red cross emblem by governmental forces.⁴⁹⁸

462. In 1983, during a conversation with the ICRC, a representative of the army of a State emphasised that the operational units of the army had been informed to take pictures and fully document any abuse of the red cross emblem by an armed opposition group.⁴⁹⁹

463. In 1993, according to an ICRC note, an officer assigned to a peacekeeping operation, in a meeting with an ambassador, indicated that an armed opposition group used, *inter alia*, the red cross emblem to protect its vehicles. Up to that time, only the emblem of MSF had been improperly used.⁵⁰⁰

464. The Report on SPLM/A Practice notes that no instances have been found in which the SPLA has used the distinctive emblem improperly. It concluded that “without evidence to the contrary, the practice of the SPLM/A is that it does not engage in the improper use of the protective emblem”.⁵⁰¹

D. Improper Use of the United Nations Emblem or Uniform

Note: For practice concerning the simulation of protected status by using the United Nations emblem or uniform as an act considered perfidious, see infra section I of this chapter.

I. Treaties and Other Instruments

Treaties

465. Article 38(2) API provides that “it is prohibited to make use of the distinctive emblem of the United Nations, except as authorized by that Organization”. Article 38 AP I was adopted by consensus.⁵⁰²

⁴⁹⁶ Report on UK Practice, 1997, Letter from the British Red Cross, 8 October 1997, Chapter 2.5.

⁴⁹⁷ ICRC, Communication to the Press No. 00/42, Appeal to all involved in violence in the Near East, 21 November 2000.

⁴⁹⁸ ICRC archive document. ⁴⁹⁹ ICRC archive document. ⁵⁰⁰ ICRC archive document.

⁵⁰¹ Report on SPLM/A Practice, 1998, Chapter 2.5.

⁵⁰² CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

466. Committee III of the CDDH adopted by consensus Article 23(2) of draft AP II.⁵⁰³ The approved text provided that “it is forbidden to make use of the distinctive emblem of the United Nations, except as authorized by that organization”.⁵⁰⁴ Eventually, however, it was deleted by consensus in the plenary.⁵⁰⁵

467. Article 3 of the 1994 Convention on the Safety of UN Personnel provides that:

The military and police components of a United Nations operation and their vehicles, vessels and aircraft shall bear distinctive identification. Other personnel, vehicles, vessels and aircraft involved in the United Nations operation shall be appropriately identified unless otherwise decided by the Secretary-General of the United Nations.

468. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use...of the flag or the military insignia or uniforms...of the United Nations...resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

469. According to paragraph 6 of the 1952 UN Flag Code, “the flag may be used in military operations only upon express authorization to that effect by a competent organ of the United Nations”. Paragraph 11 provides that “any violation of this Flag Code may be punished in accordance with the law of the country in which such violation takes place”.

470. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 38 AP I.

471. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 38 AP I.

472. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use...of the flag or the military insignia or uniforms...of the United Nations...resulting in death or serious personal injury” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

473. Argentina’s Law of War Manual states that “it is prohibited...to make use of the emblem of the United Nations, unless authorised [to do so]”.⁵⁰⁶

⁵⁰³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 109, § 8.

⁵⁰⁴ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 421.

⁵⁰⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 129.

⁵⁰⁶ Argentina, *Law of War Manual* (1989), § 1.06(2).

474. Australia's Commanders' Guide notes that "improper use... of the distinctive emblem of the United Nations is prohibited".⁵⁰⁷ It stresses that "the United Nations symbol... is strictly protected and must not be abused".⁵⁰⁸ The Guide also states that "the following are examples of grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... misusing or abusing... any... protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled".⁵⁰⁹

475. Australia's Defence Force Manual provides that "use of the distinctive emblem of the UN is prohibited except when authorised by the UN".⁵¹⁰ It also states that "the following are examples of grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... misusing or abusing... any... protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled".⁵¹¹

476. Belgium's Teaching Manual for Officers states that "it is prohibited to abuse the protective signs provided for by the [Geneva] Conventions and [AP I]... It is equally prohibited to make use of the sign of the UN except when authorised by this organisation."⁵¹²

477. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly... the distinctive insignia recognised by international conventions".⁵¹³

478. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly... the distinctive insignia recognised by international conventions".⁵¹⁴

479. Cameroon's Instructors' Manual states that "using fraudulently the emblems and uniforms... of the UN except in specified cases" is an unlawful deception.⁵¹⁵

480. Canada's LOAC Manual states that "it is prohibited... to make use of the distinctive emblem of the United Nations, except as authorized by the organization".⁵¹⁶

481. Colombia's Instructors' Manual states that it is a punishable offence "to use improperly insignia, flags and emblems... of organisations accepted by humanitarian law".⁵¹⁷

⁵⁰⁷ Australia, *Commanders' Guide* (1994), § 903.

⁵⁰⁸ Australia, *Commanders' Guide* (1994), § 513.

⁵⁰⁹ Australia, *Commanders' Guide* (1994), § 1305(l).

⁵¹⁰ Australia, *Defence Force Manual* (1994), § 704.

⁵¹¹ Australia, *Defence Force Manual* (1994), § 1315(l).

⁵¹² Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

⁵¹³ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁵¹⁴ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁵¹⁵ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

⁵¹⁶ Canada, *LOAC Manual* (1999), p. 6-2, § 11(c), see also p. 8-10, § 79(d) (prohibition of warships and auxiliary vessels actively simulating the status of vessels protected by the United Nations flag).

⁵¹⁷ Colombia, *Instructors' Manual* (1999), p. 31.

482. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁵¹⁸

483. Ecuador's Naval Manual states that "the flag of the United Nations and the letters 'UN' may not be used in armed conflict for any purpose without the authorisation of the United Nations".⁵¹⁹

484. France's Disciplinary Regulations as amended states that it is prohibited "to use improperly . . . the distinctive signs provided for in international conventions".⁵²⁰

485. France's LOAC Manual prohibits the use of the flags, emblems or uniforms of the UN.⁵²¹

486. Germany's Military Manual states that "it is prohibited to make improper use . . . of a special internationally acknowledged protective emblem".⁵²²

487. Italy's IHL Manual states that it is prohibited "to use improperly . . . the emblem of the United Nations".⁵²³ It also states that grave breaches of international conventions and protocols, including "the improper . . . use of international protective signs", constitute war crimes.⁵²⁴

488. Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁵²⁵

489. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁵²⁶

490. The Military Manual of the Netherlands provides that it is "prohibited to misuse . . . the emblem of the United Nations".⁵²⁷ It further states that "the misuse of . . . recognised protective signs (UN for example)" is a grave breach of AP I.⁵²⁸

491. New Zealand's Military Manual provides that "improper use of protective symbols including that of the United Nations is prohibited".⁵²⁹

492. Under Russia's Military Manual, improper use of international signals and flags is a prohibited method of warfare.⁵³⁰

493. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁵³¹

⁵¹⁸ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁵¹⁹ Ecuador, *Naval Manual* (1989), § 12.4.

⁵²⁰ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁵²¹ France, *LOAC Manual* (2001), p. 47. ⁵²² Germany, *Military Manual* (1992), § 473.

⁵²³ Italy, *IHL Manual* (1991), Vol. I, § 9(2). ⁵²⁴ Italy, *IHL Manual* (1991), Vol. I, § 85.

⁵²⁵ Mali, *Army Regulations* (1979), Article 36.

⁵²⁶ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁵²⁷ Netherlands, *Military Manual* (1993), p. IV-3.

⁵²⁸ Netherlands, *Military Manual* (1993), p. IX-5.

⁵²⁹ New Zealand, *Military Manual* (1992), § 502(7), see also § 713(3) (prohibition of the use of flags or markings of the UN as part of a ruse of war in naval warfare).

⁵³⁰ Russia, *Military Manual* (1990), § 5(c).

⁵³¹ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

494. Spain's LOAC Manual provides that it is prohibited "to use the distinctive emblem of the UN, except in cases where this Organisation authorises it".⁵³² It further states that it is forbidden "to make improper use of the emblems of the United Nations".⁵³³

495. Sweden's IHL Manual considers that the "prohibition of improper use of recognized emblems", as contained in Article 38 AP I, is part of customary international law.⁵³⁴

496. The US Air Force Pamphlet provides that it is "forbidden to make improper use of . . . the distinctive sign of the United Nations".⁵³⁵ It further insists that "prohibitions concerning improper use of its [the UN] distinctive signs, emblems and signals should be observed".⁵³⁶

497. The US Naval Handbook states that "the flag of the United Nations and the letters 'UN' may not be used in armed conflict for any purpose without the authorization of the United Nations".⁵³⁷

498. The YPA Military Manual of the SFRY (FRY) provides that "it is forbidden to use, during combat, in order to mislead the enemy, . . . internationally recognised emblems", *inter alia*, the UN emblem.⁵³⁸

National Legislation

499. Algeria's Code of Military Justice punishes:

any individual, whether military or not, who, in time of war, in an area of operations . . . in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined by international conventions for the respect of persons, objects and places protected by these conventions.⁵³⁹

500. Argentina's Draft Code of Military Justice punishes any soldier who "uses improperly . . . the flag, uniform, insignia or distinctive emblem . . . of the United Nations".⁵⁴⁰

501. Under Armenia's Penal Code, "the use during military actions of . . . the flags of international organisations . . . in breach of international treaties and international law" constitutes a crime against the peace and security of mankind.⁵⁴¹

502. Australia's Geneva Conventions Act as amended provides that:

A person shall not, without the consent in writing of the Minister or of a person authorized in writing by the Minister to give consents . . . use for any purpose whatsoever any of the following: . . .

⁵³² Spain, *LOAC Manual* (1996), Vol. I, § 5.3.c, see also § 3.3.c.(2).

⁵³³ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.c.

⁵³⁴ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁵³⁵ US, *Air Force Pamphlet* (1976), § 8-3(c).

⁵³⁶ US, *Air Force Pamphlet* (1976), § 8-6(b). ⁵³⁷ US, *Naval Handbook* (1995), § 12.4.

⁵³⁸ SFRY (FRY), *YPA Military Manual* (1988), § 105(3).

⁵³⁹ Algeria, *Code of Military Justice* (1971), Article 299.

⁵⁴⁰ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(6) in the *Code of Military Justice as amended* (1951).

⁵⁴¹ Armenia, *Penal Code* (2003), Article 397.

such... emblems, identity cards, signs, signals, insignia or uniforms as are prescribed for the purpose of giving effect to [AP I].⁵⁴²

503. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "improper use of a flag, insignia or uniform of the United Nations" in international armed conflicts.⁵⁴³

504. Azerbaijan's Criminal Code provides that "the misuse of... the flag, sign or clothes of the United Nations, ... which as a result caused death or serious injury to body of a victim", constitutes a war crime in international and non-international armed conflicts.⁵⁴⁴

505. The Criminal Code of Belarus provides that it is a war crime to "use intentionally, during hostilities, in violation of international treaties, ... the flag or sign of an international organisation".⁵⁴⁵

506. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "whoever misuses or carries without authorisation the flag or emblem of the Organisation of the United Nations" commits a war crime.⁵⁴⁶ The Criminal Code of the Republika Srpska contains the same provision.⁵⁴⁷

507. Burkina Faso's Code of Military Justice punishes the improper use, in violation of the laws and customs of war, of the distinctive insignia and emblems for the protection of persons, objects and locations as defined in international conventions, in time of war and in an area of military operations.⁵⁴⁸

508. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "using improperly ... the flag or military insignia and uniform ... of the United Nations Organisation" constitutes a war crime in international armed conflicts.⁵⁴⁹

509. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁵⁵⁰

510. The DRC Code of Military Justice as amended punishes "any individual, whether military or not, who, in time of war ... improperly uses the distinctive signs and emblems defined by international conventions to ensure respect for the persons, objects and places protected under these conventions".⁵⁵¹

⁵⁴² Australia, *Geneva Conventions Act as amended* (1957), Section 15(1)(f).

⁵⁴³ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.43.

⁵⁴⁴ Azerbaijan, *Criminal Code* (1999), Article 119(2).

⁵⁴⁵ Belarus, *Criminal Code* (1999), Article 138.

⁵⁴⁶ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 166(1).

⁵⁴⁷ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 445(1).

⁵⁴⁸ Burkina Faso, *Code of Military Justice* (1994), Article 205.

⁵⁴⁹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(g).

⁵⁵⁰ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁵⁵¹ DRC, *Code of Military Justice as amended* (1972), Article 455.

511. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁵⁵²

512. Côte d'Ivoire's Penal Code as amended punishes "any individual who, in an area of military operations, uses, in violation of the laws and customs of war, the distinctive insignia and emblems, defined by international conventions, to ensure respect for protected persons, objects and places".⁵⁵³

513. Under Croatia's Criminal Code, "whoever misuses or carries without authorisation the flag or emblem of the United Nations" commits a war crime.⁵⁵⁴

514. The Czech Republic's Criminal Code as amended punishes any "person who, in time of war, misuses the flag of the United Nations Organisation".⁵⁵⁵

515. Denmark's Penal Code punishes "anyone who uses unlawfully, and wilfully or negligently... the distinctive signs and names of international organisations".⁵⁵⁶

516. France's Code of Military Justice punishes:

any individual, military or not, who, in time of war, in the area of operations of a force or unit, in violation of the laws and customs of war, uses improperly the distinctive signs and emblems defined by international conventions to ensure respect for persons, objects and places protected by those conventions.⁵⁵⁷

517. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "making improper use... of the flag or of the military insignia and uniform... of the United Nations, ... resulting in death or serious personal injury" in international armed conflicts, is a crime.⁵⁵⁸

518. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "makes improper use... of the flag... or of the uniform... of the United Nations, thereby causing a person's death or serious injury".⁵⁵⁹

519. Guinea's Criminal Code punishes "anyone [who], in an area of military operations and in violation of the laws and customs of war, uses distinctive insignia and emblems defined in international conventions to ensure respect for protected persons, objects and places".⁵⁶⁰

520. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 38(2) AP I, is a punishable offence.⁵⁶¹

⁵⁵² Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁵⁵³ Côte d'Ivoire, *Penal Code as amended* (1981), Article 473.

⁵⁵⁴ Croatia, *Criminal Code* (1997), Article 168(1).

⁵⁵⁵ Czech Republic, *Criminal Code as amended* (1961), Article 265(2).

⁵⁵⁶ Denmark, *Penal Code* (1978), Article 132.

⁵⁵⁷ France, *Code of Military Justice* (1982), Article 439.

⁵⁵⁸ Georgia, *Criminal Code* (1999), Article 413(d).

⁵⁵⁹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

⁵⁶⁰ Guinea, *Criminal Code* (1998), Article 579.

⁵⁶¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

521. Italy's Wartime Military Penal Code punishes anyone who "uses improperly . . . the international distinctive signs of protection".⁵⁶²

522. Under Lithuania's Criminal Code as amended, "unlawful use of . . . the emblem of the United Nations, . . . in time of war, or during an international armed conflict" is a war crime.⁵⁶³

523. Mali's Code of Military Justice punishes:

any individual . . . who, in time of war, in the area of operations of a military force and in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined in international conventions to ensure respect for persons, objects and places protected by these conventions.⁵⁶⁴

524. Under Mali's Penal Code, "using . . . the flag or military insignia or uniform . . . of the United Nations Organisation . . . and, thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.⁵⁶⁵

525. Under the International Crimes Act of the Netherlands, "making improper use . . . of the flag or of the military insignia and uniform . . . of the United Nations, . . . resulting in death or serious personal injury", is a crime, when committed in an international armed conflict.⁵⁶⁶

526. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁵⁶⁷

527. Norway's Penal Code provides that it is a punishable offence to use:

without authority publicly or for an unlawful purpose . . . any designation recognized or commonly used in Norway or abroad of an international organisation or any insignia or seal used by an international organisation if Norway is a member of the said organisation or has by international agreement undertaken to give protection against such use.⁵⁶⁸

528. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁵⁶⁹

529. Poland's Penal Code punishes "any person who, during hostilities, uses . . . flags . . . of an international organisation . . . in violation of international law".⁵⁷⁰

530. Slovakia's Criminal Code as amended punishes any "person who, in time of war, misuses the flag of the United Nations Organisation".⁵⁷¹

⁵⁶² Italy, *Wartime Military Penal Code* (1941), Article 180(3).

⁵⁶³ Lithuania, *Criminal Code as amended* (1961), Article 344.

⁵⁶⁴ Mali, *Code of Military Justice* (1995), Article 145.

⁵⁶⁵ Mali, *Penal Code* (2001), Article 31(i)(7).

⁵⁶⁶ Netherlands, *International Crimes Act* (2003), Article 5(3)(f).

⁵⁶⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁵⁶⁸ Norway, *Penal Code* (1902), § 328(4)(b).

⁵⁶⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁵⁷⁰ Poland, *Penal Code* (1997), Article 126(2).

⁵⁷¹ Slovakia, *Criminal Code as amended* (1961), Article 265(2).

531. Under Slovenia's Penal Code, "whoever abuses or carries without authorisation the flag or emblem of the United Nations Organisation" commits a war crime.⁵⁷²

532. Spain's Penal Code punishes "anyone who, during an armed conflict... uses improperly... the flag, uniform, insignia or distinctive emblem... of the United Nations".⁵⁷³

533. Under Sweden's Penal Code as amended, "misuse of the insignia of the United Nations" constitutes a crime against international law.⁵⁷⁴

534. Switzerland's Law on the Protection of the UN Names and Emblems provides that:

1. It is prohibited, except as authorised by the Secretary-General of the Organisation of the United Nations, to use the following signs, belonging to the said organisation
...
 - a. The name of the organisation (in every language);
 - b. Its acronyms (in official Swiss languages and in English);
 - c. Its arms, flags and other emblems.
2. The prohibition applies similarly to imitations of the signs referred to in paragraph (1).
...

Anyone who, intentionally and in violation of the provisions of the present law, has made use of the names, acronyms, arms, flags and other emblems of intergovernmental organisations referred to in article 1... or of any other signs constituting imitation thereof, ... [commits a punishable offence].⁵⁷⁵

535. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁵⁷⁶

536. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁵⁷⁷

537. Under the Penal Code as amended of the SFRY (FRY), "those who misuse or carry without permission the flag or emblem of the United Nations Organisation" commit a war crime.⁵⁷⁸ The Commentary on the Code specifies that "the misuse of international emblems is committed, as a rule, during a war or an armed conflict... The aggravated form of this criminal act... exists when the misuse or unauthorised use of international emblems is committed in the war operations zone."⁵⁷⁹

⁵⁷² Slovenia, *Penal Code* (1994), Article 386(1).

⁵⁷³ Spain, *Penal Code* (1995), Article 612(5).

⁵⁷⁴ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

⁵⁷⁵ Switzerland, *Law on the Protection of the UN Names and Emblems* (1961), Articles 1 and 7(1).

⁵⁷⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁵⁷⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁵⁷⁸ SFRY (FRY), *Penal Code as amended* (1976), Article 153(1).

⁵⁷⁹ SFRY (FRY), *Penal Code as amended* (1976), Commentary on Article 153.

National Case-law

538. No practice was found.

Other National Practice

539. According to the Report on the Practice of Indonesia, although it is not specifically mentioned in Indonesia's Military Manual, senior officers of the Indonesian armed forces consider that the use of UN peacekeeping uniforms would come within the prohibition of the use of uniforms of neutral States or other States not parties to the conflict.⁵⁸⁰

540. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that the false use of emblems is forbidden.⁵⁸¹

541. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle... that internationally recognized protective emblems... not be improperly used".⁵⁸²

*III. Practice of International Organisations and Conferences**United Nations*

542. In a resolution adopted in 1946 on the official seal and emblem of the UN, the UN General Assembly provided that member States:

should take such legislative or other appropriate measures as are necessary to prevent the use, without authorization by the Secretary-General of the United Nations, and in particular for commercial purposes by means of trade marks or commercial labels, of the emblem... of the United Nations.⁵⁸³

543. In 1995, in a report concerning the former Yugoslavia, the UN Secretary-General reported, on the basis of information gathered by UNPROFOR, the alleged use of UN uniforms by Bosnian Serbs.⁵⁸⁴

544. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported the use of UNPROFOR uniforms by Bosnian Serb soldiers at the fall of Srebrenica. They had allegedly pretended to be local UNPROFOR staff

⁵⁸⁰ Report on the Practice of Indonesia, 1997, Interviews with senior officers of the armed forces, Chapter 2.6, referring to *Military Manual* (1982), § 104.

⁵⁸¹ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

⁵⁸² US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

⁵⁸³ UN General Assembly, Res. 92 (I), 7 December 1946, § (a).

⁵⁸⁴ UN Secretary-General, Report submitted pursuant to Security Council Resolution 1010 (1995), UN Doc. S/1995/755, 30 August 1995, § 11.

and urged people fleeing from Srebrenica to go to particular locations, possibly into traps.⁵⁸⁵

Other International Organisations

545. No practice was found.

International Conferences

546. In 1992, at the Helsinki Summit of Heads of State or Government, CSCE participating States reaffirmed their commitment to prevent the misuse of the UN emblem.⁵⁸⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

547. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

548. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “it is prohibited to use the distinctive emblem of the United Nations, except as authorized by that Organization”.⁵⁸⁷

VI. Other Practice

549. In 1993, according to an ICRC note, an officer assigned to a peacekeeping operation, in a meeting with an ambassador, indicated that an armed opposition group used, *inter alia*, the UN emblem to protect its vehicles. Up to that time, only the emblem of MSF had been improperly used.⁵⁸⁸

E. Improper Use of Other Internationally Recognised Emblems

Note: *For practice concerning the simulation of protected status by using other internationally recognised emblems as an act considered perfidious, see infra section I of this chapter.*

⁵⁸⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Final periodic report, UN Doc. E/CN.4/1996/9, 22 August 1995, § 35.

⁵⁸⁶ CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 51.

⁵⁸⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 406.

⁵⁸⁸ ICRC archive document.

I. Treaties and Other Instruments

Treaties

550. Article 17 of the 1954 Hague Convention provides that:

1. The distinctive emblem repeated three times may be used only as a means of identification of:
 - (a) immovable cultural property under special protection;
 - (b) the transport of cultural property under the conditions provided for in Articles 12 and 13;
 - (c) improvised refuges, under the conditions provided for in the Regulations for the execution of the Convention.
2. The distinctive emblem may be used alone only as a means of identification of:
 - (a) cultural property not under special protection;
 - (b) the persons responsible for the duties of control in accordance with the Regulations for the execution of the Convention;
 - (c) the personnel engaged in the protection of cultural property;
 - (d) the identity cards mentioned in the Regulations for the execution of the Convention.
3. During an armed conflict, the use of the distinctive emblem in any other cases than those mentioned in the preceding paragraphs of the present Article, and the use for any purpose whatever of a sign resembling the distinctive emblem, shall be forbidden.

551. Under Article 38(1) AP I, "it is... prohibited to misuse deliberately in an armed conflict... internationally recognized protective emblems, signs or signals, including... the protective emblem of cultural property". Article 38 AP I was adopted by consensus.⁵⁸⁹

552. Article 66(8) AP I provides that "the High Contracting Parties and the Parties to the conflict shall take the measures necessary to supervise the display of the international distinctive sign of civil defence and to prevent and repress any misuse thereof". Article 66 AP I was adopted by consensus.⁵⁹⁰

553. Upon ratification of AP I, Canada stated that:

In situations where the Medical Service of the armed forces of a party to an armed conflict is identified by another emblem than the emblems referred to in Article 38 of the First Geneva Convention of August 12, 1949, ... when notified, ... misuse of such an emblem should be considered as misuse of emblems referred to in Article 38 of the First Geneva Convention and Protocol I.⁵⁹¹

554. Article 23 of draft AP II submitted by the ICRC to the CDDH provided that "it is forbidden to make use... of the protective emblem of cultural property for purposes other than those provided for in the Convention establishing [this] sign".⁵⁹² This proposal was amended and adopted by consensus in Committee

⁵⁸⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁵⁹⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 243.

⁵⁹¹ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 4.

⁵⁹² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

III of the CDDH.⁵⁹³ The approved text provided that it was “forbidden to misuse deliberately in armed conflict other internationally recognized protective emblems... including... whenever applicable, the protective emblem of cultural property”.⁵⁹⁴ Eventually, however, it was deleted by consensus in the plenary.⁵⁹⁵

Other Instruments

555. No practice was found.

II. National Practice

Military Manuals

556. Argentina’s Law of War Manual prohibits the deliberate abuse of internationally recognised protective emblems, including the emblem of cultural property.⁵⁹⁶

557. Australia’s Commanders’ Guide provides that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... misusing or abusing... any... protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled”.⁵⁹⁷

558. Australia’s Defence Force Manual prohibits the “deliberate misuse of... protective symbols and emblems... including the protective emblem of cultural property”.⁵⁹⁸ It also provides that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... misusing or abusing... any... protected emblem for the purpose of gaining protection to which the user would not otherwise be entitled”.⁵⁹⁹

559. Belgium’s Teaching Manual for Officers stipulates that “it is prohibited to abuse the protective signs provided for by the [Geneva] Conventions and [AP I]. Example: camouflaging arms and ammunition in a vehicle or a building displaying the protective sign... of cultural property [or] of civil defence”.⁶⁰⁰

560. Burkina Faso’s Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited “to use improperly... the distinctive insignia recognised by international conventions”.⁶⁰¹

⁵⁹³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 109, § 8.

⁵⁹⁴ CDDH, *Official Records*, Vol. XV, CDDH/236/Rev.1, 21 April–11 June 1976, p. 421.

⁵⁹⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 129.

⁵⁹⁶ Argentina, *Law of War Manual* (1989), § 1.06(1).

⁵⁹⁷ Australia, *Commanders’ Guide* (1994), § 1305(1).

⁵⁹⁸ Australia, *Defence Force Manual* (1994), § 704.

⁵⁹⁹ Australia, *Defence Force Manual* (1994), § 1315(1).

⁶⁰⁰ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

⁶⁰¹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

561. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁶⁰²

562. Cameroon's Instructors' Manual states that improper use of distinctive signs and signals is an unlawful deception.⁶⁰³

563. Canada's LOAC Manual states that it is prohibited "to make improper use of the . . . emblems, signs or signals provided for by the *Geneva Conventions* or *Additional Protocols* [and] to deliberately misuse . . . internationally recognized protective emblems, signs or signals including . . . the protective emblem of cultural property".⁶⁰⁴

564. Colombia's Instructors' Manual states that it is a punishable offence "to use improperly insignia, flags and emblems . . . of organisations accepted by humanitarian law".⁶⁰⁵

565. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the distinctive insignia recognised by international conventions".⁶⁰⁶

566. Ecuador's Naval Manual states that "protective signs and symbols may be used only to identify personnel, objects, and activities entitled to protected status which they designate. Any other use is forbidden by international law."⁶⁰⁷

567. France's Disciplinary Regulations as amended states that it is prohibited "to use improperly . . . the distinctive signs provided for in international conventions".⁶⁰⁸

568. France's LOAC Manual prohibits the improper use of the symbols of civil defence, cultural property, works and installations containing dangerous forces and other recognised symbols.⁶⁰⁹

569. Germany's Military Manual states that "it is prohibited to make improper use . . . of special internationally acknowledged protective emblems".⁶¹⁰ It also states that "during an international armed conflict, the use of the distinctive emblem for any other purpose than that of the protection of cultural property is forbidden".⁶¹¹

570. Under Italy's IHL Manual, misuse of the distinctive signs of civil defence, cultural property and installations containing dangerous forces is prohibited.⁶¹² The manual also states that grave breaches of international conventions and

⁶⁰² Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁶⁰³ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

⁶⁰⁴ Canada, *LOAC Manual* (1999), p. 6-2, § 11(a) and (b), see also p. 8-10, § 79(g) (prohibition of warships and auxiliary vessels actively simulating the status of vessels engaged in transporting cultural property under special protection).

⁶⁰⁵ Colombia, *Instructors' Manual* (1999), p. 31.

⁶⁰⁶ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁶⁰⁷ Ecuador, *Naval Manual* (1989), § 11.10.5.

⁶⁰⁸ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁶⁰⁹ France, *LOAC Manual* (2001), p. 47. ⁶¹⁰ Germany, *Military Manual* (1992), § 473.

⁶¹¹ Germany, *Military Manual* (1992), § 932. ⁶¹² Italy, *IHL Manual* (1991), Vol. I, § 9(2).

protocols, including “the improper . . . use of international protective signs”, are considered war crimes.⁶¹³

571. Lebanon’s Army Regulations prohibits the unlawful use of the distinctive signs provided for in international agreements.⁶¹⁴

572. Mali’s Army Regulations provides that, under the laws and customs of war, it is prohibited “to use improperly . . . the distinctive insignia recognised by international conventions”.⁶¹⁵

573. Morocco’s Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited “to use improperly . . . the distinctive insignia recognised by international conventions”.⁶¹⁶

574. The Military Manual of the Netherlands provides that:

It is . . . forbidden to make improper use of . . . emblems and signals which are mentioned in treaties on the law of war. This concerns, *inter alia*, the signs for civil defence and cultural property. The signals are light signals and electronic communication and identification as regulated in Annex I to Additional Protocol I.⁶¹⁷

The manual further states that “the misuse of . . . recognised protective signs” is a grave breach of AP I.⁶¹⁸

575. New Zealand’s Military Manual provides that “improper use of protective symbols . . . is prohibited”. In its list of protective symbols, the manual includes: symbols for civil defence, cultural property, installations containing dangerous forces, demilitarised zones and non-defended localities, internment camps, hospitals and safety zones and prisoner-of-war camps.⁶¹⁹

576. Russia’s Military Manual regards the improper use of international signals and flags as a prohibited method of warfare.⁶²⁰

577. Senegal’s Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited “to use improperly . . . the distinctive insignia recognised by international conventions”.⁶²¹

578. Spain’s LOAC Manual provides that the emblems for civil defence, cultural property and installations containing dangerous forces, as well as other internationally recognised emblems, signs or signals, can only be used for their intended purpose.⁶²²

579. Sweden’s IHL Manual considers that the “prohibition of improper use of recognized emblems”, as contained in Article 38 AP I, is part of customary international law.⁶²³

⁶¹³ Italy, *IHL Manual* (1991), Vol. I, § 85. ⁶¹⁴ Lebanon, *Army Regulations* (1971), § 17.

⁶¹⁵ Mali, *Army Regulations* (1979), Article 36.

⁶¹⁶ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁶¹⁷ Netherlands, *Military Manual* (1993), p. IV-3.

⁶¹⁸ Netherlands, *Military Manual* (1993), p. IX-5.

⁶¹⁹ New Zealand, *Military Manual* (1992), §§ 502(7) and Annex B.

⁶²⁰ Russia, *Military Manual* (1990), § 5(c).

⁶²¹ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

⁶²² Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.b.(2) and 5.3.c.

⁶²³ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

580. The US Air Force Pamphlet provides that "it is forbidden to make use of... the protective signs for safety zones other than as provided for in international agreements establishing these [signs]... It is also prohibited to make improper use of... the protective emblem of cultural property."⁶²⁴

581. The US Naval Handbook states that "protective signs and symbols may be used only to identify personnel, objects, and activities entitled to protected status which they designate. Any other use is forbidden by international law."⁶²⁵ The Handbook lists the protective emblem for cultural property among emblems not to be misused.⁶²⁶

582. The YPA Military Manual of the SFRY (FRY) provides that "it is forbidden to use, during combat, in order to mislead the enemy, ... internationally recognised signs", *inter alia*, the sign of protected cultural property.⁶²⁷

National Legislation

583. Algeria's Code of Military Justice punishes:

any individual, whether military or not, who, in time of war, in an area of operations... in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined by international conventions for the respect of persons, objects and places protected by these conventions".⁶²⁸

584. Argentina's Draft Code of Military Justice punishes any soldier who "uses improperly... the protective or distinctive signs established and recognised in international treaties to which the Argentine Republic is a party".⁶²⁹

585. Argentina's Law on Civil Defence in Buenos Aires "prohibits in the whole territory of the city of Buenos Aires the use of the denominations, symbols, distinctive signs... officially used for civil defence, for purposes other than those intended, or when it may create confusion as to its real significance".⁶³⁰

586. Under Armenia's Penal Code, "the use during military actions of... the signs designed to identify cultural property or of other protective signs... in breach of international treaties and international law" constitutes a crime against the peace and security of mankind.⁶³¹

587. Australia's Geneva Conventions Act as amended provides that:

A person shall not, without the consent in writing of the Minister or of a person authorized in writing by the Minister to give consents... use for any purpose whatsoever any of the following:

⁶²⁴ US, *Air Force Pamphlet* (1976), §§ 8-3(c) and 8-6(b).

⁶²⁵ US, *Naval Handbook* (1995), § 11.9.6.

⁶²⁶ US, *Naval Handbook* (1995), §§ 11.9.4 and 12.2.

⁶²⁷ SFRY (FRY), *YPA Military Manual* (1988), § 105(3).

⁶²⁸ Algeria, *Code of Military Justice* (1971), Article 299.

⁶²⁹ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(5) in the *Code of Military Justice as amended* (1951).

⁶³⁰ Argentina, *Law on Civil Defence in Buenos Aires* (1981), Article 15.

⁶³¹ Armenia, *Penal Code* (2003), Article 397.

...
such... emblems, identity cards, signs, signals, insignia or uniforms as are prescribed for the purpose of giving effect to [AP I].⁶³²

588. Bangladesh's Draft Emblems Protection Act provides that:

Subject to the provisions of this section, it shall not be lawful for any person, without the consent in writing of the Minister for Defence or a person authorized in writing by the Minister to give consents under this section, to use or display for any purpose whatsoever any of the following:

- ...
- (e) the sign of an equilateral blue triangle on, and completely surrounded by, an orange ground, being the international distinctive sign of civil defence;

...

 - (g) the sign consisting of a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius, being the international special sign for works and installations containing dangerous forces;
 - (h) a design, wording or signal so nearly resembling any of the emblems, designations, signs or signals specified in paragraph... (e)... or (g) as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems, designations, signs or signals;
 - (i) such other emblems, identity cards, identification cards, signs, signals, insignia or uniforms as are prescribed for the purpose of giving effect to the [1949 Geneva] Conventions or Protocols.⁶³³

589. The Criminal Code of Belarus provides that it is a war crime to "use intentionally, during hostilities, in violation of international treaties, ... the protective signs of cultural property or other signs protected under international law".⁶³⁴

590. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "whoever misuses or carries without authorisation... any... international symbols recognised as the protection of certain objects from military operations" commits a war crime.⁶³⁵ The Criminal Code of the Republika Srpska contains the same provision.⁶³⁶

591. Burkina Faso's Code of Military Justice punishes... the improper use, in violation of the laws and customs of war, of the distinctive insignia and emblems for the protection of persons, objects and locations as defined in international conventions, in time of war and in an area of military operations.⁶³⁷

592. The DRC Code of Military Justice as amended punishes "any individual, whether military or not, who, in time of war... improperly uses the distinctive signs and emblems defined by international conventions to

⁶³² Australia, *Geneva Conventions Act as amended* (1957), Section 15(1)(f).

⁶³³ Bangladesh, *Draft Emblems Protection Act* (1998), Section 3.

⁶³⁴ Belarus, *Criminal Code* (1999), Article 138.

⁶³⁵ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 166(1).

⁶³⁶ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 445(1).

⁶³⁷ Burkina Faso, *Code of Military Justice* (1994), Article 205.

ensure respect for the persons, objects and places protected under these conventions".⁶³⁸

593. The Geneva Conventions and Additional Protocols Act of the Cook Islands provides that:

No person may, without the authority of the Minister or a person authorised by the Minister in writing to give consent under this section, use for any purpose any of the following:

- (a) The sign of an equilateral blue triangle on, and completely surrounded by, an orange ground (which is the international distinctive sign of civil defence);
- ...
- (f) The sign of a group of three bright orange circles of equal size, placed on the same axis, the distance between each circle being one radius (which is the international special sign for works and installations containing dangerous forces);
- (g) Any emblem, designation, or signal, so nearly resembling any of the emblems, designations, or signals, specified in paragraphs [(e) and] (g) as to be capable of being mistaken for, or, as the case may be, understood as referring to, one of those emblems, designations, or signals.⁶³⁹

594. Côte d'Ivoire's Penal Code as amended punishes "anyone who, in an area of military operations, uses, in violation of the laws and customs of war, the distinctive insignia and emblems, defined by international conventions, to ensure respect for protected persons, objects and places".⁶⁴⁰

595. Under Croatia's Criminal Code, "whoever misuses or carries without authorisation... recognised international signs used to mark objects for the purpose of protection against military operations" commits a war crime.⁶⁴¹

596. Denmark's Rescue Preparedness Act punishes "any person who, during crisis or in times of war, deliberately abuses... the signs which, according to an international agreement ratified by Denmark, have been reserved for the tasks attended to by the rescue preparedness [i.e. civil defence] in Denmark".⁶⁴²

597. Under Estonia's Penal Code, "exploitative abuse... of the distinctive signs of a structure containing a prisoner-of-war camp, a cultural monument, civil defence object or dangerous forces" is a war crime.⁶⁴³

598. Finland's Emblem Act provides that:

The international distinctive sign of civil defence shall not be used in cases other than those provided for in this Act...

The international distinctive sign of civil defence... is to be utilized as provided for in the Protocols Additional to the Geneva Conventions...

...

Signs, pictures or terms which resemble the emblems, signs or terms referred to in § 1 to such a degree that confusion may arise, shall not be used.⁶⁴⁴

⁶³⁸ DRC, *Code of Military Justice as amended* (1972), Article 455.

⁶³⁹ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 10(1).

⁶⁴⁰ Côte d'Ivoire, *Penal Code as amended* (1981), Article 473.

⁶⁴¹ Croatia, *Criminal Code* (1997), Article 168(1).

⁶⁴² Denmark, *Rescue Preparedness Act* (1992), Article 68.

⁶⁴³ Estonia, *Penal Code* (2001), § 105. ⁶⁴⁴ Finland, *Emblem Act* (1979), §§ 1 and 2.

The Act further punishes “whosoever makes use of the emblems, signs, pictures or terms referred to in §§ 1 and 2 in . . . unauthorised activity”.⁶⁴⁵

599. France’s Code of Military Justice punishes:

any individual, military or not, who, in time of war, in the area of operations of a force or unit, in violation of the laws and customs of war, uses improperly the distinctive signs and emblems defined by international conventions to ensure respect for persons, objects and places protected by those conventions.⁶⁴⁶

600. Guinea’s Criminal Code punishes “anyone [who], in an area of military operations and in violation of the laws and customs of war, uses distinctive insignia and emblems defined in international conventions to ensure respect for protected persons, objects and places”.⁶⁴⁷

601. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Articles 38(1) and 66(8) AP I, is a punishable offence.⁶⁴⁸

602. Italy’s Wartime Military Penal Code punishes anyone who “uses improperly . . . the international distinctive signs of protection”.⁶⁴⁹

603. Mali’s Code of Military Justice punishes:

any individual . . . who, in time of war, in the area of operations of a military force and in violation of the laws and customs of war, improperly uses the distinctive signs and emblems defined in international conventions to ensure respect for persons, objects and places protected by these conventions.⁶⁵⁰

604. Norway’s Penal Code provides that it is a punishable offence to use “without authority publicly or for an unlawful purpose . . . any badge or designation which by international agreement binding on Norway is designed for use in connection with . . . the protection of cultural values in war”.⁶⁵¹

605. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.⁶⁵²

606. Poland’s Penal Code punishes “any person who, during hostilities, uses the protective sign of cultural property or any other sign protected by international law”, in violation thereof.⁶⁵³

607. Under Slovenia’s Penal Code, “whoever abuses or carries without authorisation . . . internationally recognised symbols used for the protection . . . against military operations” commits a war crime.⁶⁵⁴

⁶⁴⁵ Finland, *Emblem Act* (1979), § 6.

⁶⁴⁶ France, *Code of Military Justice* (1982), Article 439.

⁶⁴⁷ Guinea, *Criminal Code* (1998), Article 579.

⁶⁴⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁴⁹ Italy, *Wartime Military Penal Code* (1941), Article 180(3).

⁶⁵⁰ Mali, *Code of Military Justice* (1995), Article 145.

⁶⁵¹ Norway, *Penal Code* (1902), § 328(4)(b).

⁶⁵² Norway, *Military Penal Code as amended* (1902), § 108(b).

⁶⁵³ Poland, *Penal Code* (1997), Article 126(2).

⁶⁵⁴ Slovenia, *Penal Code* (1994), Article 386(1).

608. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses improperly the protective or distinctive signs, emblems or signals established and recognised under international treaties to which Spain is a party".⁶⁵⁵

609. Under Sweden's Emblems and Signs Act as amended, "the international distinctive sign of civil defence . . . may not be used without the permission of the Government or a competent agency authorised by the Government".⁶⁵⁶

610. Under Sweden's Penal Code as amended, misuse of the insignia referred to in the Emblems and Signs Act as amended, including the sign of civil defence, and misuse of "other internationally recognised insignia" are crimes against international law.⁶⁵⁷

611. Switzerland's Law on the Protection of the UN Names and Emblems provides that:

1. It is prohibited to use the following signs, communicated to Switzerland through the International Bureau for the Protection of Industrial Property and belonging to the specialised agencies of the United Nations or to other inter-governmental organisations linked to the United Nations:
 - a. The name of these organisations (in official Swiss languages and in English);
 - b. Their acronyms (in official Swiss languages and in English);
 - c. Their arms, flags and other emblems.
2. The prohibition applies similarly to imitations of the signs referred to in paragraph (1).

...

Anyone who, intentionally and in violation of the provisions of the present law, has made use of the names, acronyms, arms, flags and other emblems of inter-governmental organisations referred to in article . . . 2 . . . or of any other signs constituting imitation thereof, . . . [commits a punishable offence].⁶⁵⁸

612. Switzerland's Law on the Protection of Cultural Property notes that "the sign of cultural property as a protective sign and the denomination 'cultural property sign' may be used only for the purpose of protecting cultural property".⁶⁵⁹ It punishes "whoever, intentionally and without being entitled to do so, in order to obtain protection of public international law or another advantage, uses the sign of cultural property or the denomination 'cultural property sign' or any other sign capable of causing confusion".⁶⁶⁰

613. The UK Geneva Conventions Act as amended provides that:

Subject to the provisions of this section, it shall not be lawful for any person, without the authority of the Secretary of State, to use for any purpose whatsoever any of the following emblems or designations, that is to say –

⁶⁵⁵ Spain, *Penal Code* (1995), Article 612(4).

⁶⁵⁶ Sweden, *Emblems and Signs Act as amended* (1953), Section 4.

⁶⁵⁷ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

⁶⁵⁸ Switzerland, *Law on the Protection of the UN Names and Emblems* (1961), Articles 2 and 7(1).

⁶⁵⁹ Switzerland, *Law on the Protection of Cultural Property* (1966), Article 19.

⁶⁶⁰ Switzerland, *Law on the Protection of Cultural Property* (1966), Article 27.

...
 (d) the sign of an equilateral blue triangle on, and completely surrounded by, an orange ground, being the international distinctive sign of civil defence...⁶⁶¹

614. Under the Penal Code as amended of the SFRY (FRY), “those who misuse or carry without permission... recognised international emblems which are used to mark certain objects in order to protect them from military operations” commit a war crime.⁶⁶² The commentary on the Code states that “the misuse of international emblems is committed, as a rule, during a war or an armed conflict... The aggravated form of this criminal act... exists when the misuse or unauthorised use of international emblems is committed in the war operations zone.”⁶⁶³

615. Zimbabwe’s Geneva Conventions Act as amended provides that:

Subject to the provisions of this section and of section 7 of the Zimbabwe Red Cross Society Act, 1981, no person shall, without the authority in writing of the Minister of Health, use for any purpose whatsoever any of the following emblems or designations –

...
 (d) the sign of an equilateral blue triangle on and completely surrounded by an orange ground, being the international distinctive sign of civil defence.⁶⁶⁴

National Case-law

616. No practice was found.

Other National Practice

617. At the final plenary meeting of the CDDH, Israel declared that:

With regard to Article 36 of draft additional Protocol I [now Article 38 AP I], the delegation of Israel wishes to declare that it attaches special importance to the second sentence of paragraph 1. This sentence forbids the misuse of any other protective emblem which has been recognized by States or has been used with the knowledge of the other Party.⁶⁶⁵

618. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that the false use of emblems is forbidden.⁶⁶⁶

619. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle... that internationally recognized protective emblems... not be improperly used”.⁶⁶⁷

⁶⁶¹ UK, *Geneva Conventions Act as amended* (1957), Section 6(1)(d).

⁶⁶² SFRY (FRY), *Penal Code as amended* (1976), Article 153(1).

⁶⁶³ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 153.

⁶⁶⁴ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 8(1)(d).

⁶⁶⁵ Israel, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 116.

⁶⁶⁶ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

⁶⁶⁷ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols

*III. Practice of International Organisations and Conferences**United Nations*

620. No practice was found.

Other International Organisations

621. No practice was found.

International Conferences

622. In a meeting of independent experts organised by the ICDO and the ICRC in 1997, "the importance was strongly emphasised of adopting appropriate national legislation to regulate use of the civil defence emblem and impose penalties for incorrect use and for misuse. It was agreed that the States party to [AP I] should be reminded of that obligation."⁶⁶⁸ Furthermore, "the problem that civil defence activities were wider than those entitled to protection had been raised and care must be exercised to ensure that in wartime the emblem was borne only in the performance of activities entitled to protection under Protocol I".⁶⁶⁹ According to a survey conducted by the ICDO and the ICRC, 63 per cent of States party to AP I that replied had a law forbidding the abusive use of the civil defence emblem (the number of replies was not indicated).⁶⁷⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

623. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

624. According to the ICRC Commentary on the Additional Protocols, "Israel claims that the prohibition of deliberately misusing internationally recognized protective emblems, signs or signals in armed conflicts also applies to the red shield of David".⁶⁷¹

625. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

⁶⁶⁸ Stéphane Jeannot (ed.), *Civil Defence 1977–1997. From Law to Practice*, Report of a Meeting of Experts on Civil Defence, ICDO and ICRC, Geneva, 1997, pp. 17 and 18.

⁶⁶⁹ Stéphane Jeannot (ed.), *Civil Defence 1977–1997. From Law to Practice*, Report of a Meeting of Experts on Civil Defence, ICDO and ICRC, Geneva, 1997, p. 64.

⁶⁷⁰ Stéphane Jeannot (ed.), *Civil Defence 1977–1997. From Law to Practice*, Report of a Meeting of Experts on Civil Defence, ICDO and ICRC, Geneva, 1997, p. 76.

⁶⁷¹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1557, footnote 40.

It is prohibited to make improper use (that is to mark other persons and objects than those entitled to) of:

- ...
- (b) the distinctive sign of civil defence;
- (c) the distinctive sign of cultural objects;
- (d) the distinctive sign of works and installations containing dangerous forces;
- ...
- (f) other internationally recognized distinctive signs and signals (e.g. ad hoc signs for demilitarized zones, for non-defended localities, ad hoc signals for civil defence).⁶⁷²

VI. *Other Practice*

626. No practice was found.

F. Improper Use of Flags or Military Emblems, Insignia or Uniforms of the Adversary

I. Treaties and Other Instruments

Treaties

627. Article 23(f) of the 1899 HR provides that “it is especially prohibited . . . to make improper use of . . . the national flag or military ensigns and uniform of the enemy”.

628. Article 23(f) of the 1907 HR provides that “it is especially forbidden . . . to make improper use . . . of the national flag or of the military insignia and uniform of the enemy”.

629. Article 93, second paragraph, GC III provides that:

Offences committed by prisoners of war with the sole intention of facilitating their escape and which do not entail any violence against life or limb, such as offences against public property, theft without intention of self-enrichment, the drawing up or use of false papers, the wearing of civilian clothing, shall occasion disciplinary punishment only.

630. Article 39(2) AP I provides that “it is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military operations”. Article 39 AP I was adopted by consensus.⁶⁷³

631. Canada made a reservation upon ratification of AP I, stating that it “does not intend to be bound by the prohibitions contained in paragraph 2 of Article

⁶⁷² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 407(b), (c), (d) and (f).

⁶⁷³ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

39 to make use of military emblems, insignia or uniforms of adverse parties in order to shield, favour, protect or impede military operations.⁶⁷⁴

632. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “when carried out in order to commit or resume hostilities, . . . the use in combat of the enemy’s distinctive military emblems” was considered as perfidy.⁶⁷⁵ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.⁶⁷⁶

633. Pursuant to Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use . . . of the flag or of the military insignia and uniform of the enemy . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

634. Article 63 of the 1863 Lieber Code states that those fighting in the uniform of their enemy can expect no quarter. Article 65 states that the “use of the enemy’s national standard, flag, or other emblem of nationality, for the purpose of deceiving the enemy in battle, is an act of perfidy by which [troops] lose all claim to the protection of the laws of war”.

635. Article 13(f) of the 1874 Brussels Declaration provides that “making improper use . . . of the national flag or of the military insignia and uniform of the enemy” is “especially forbidden”.

636. Article 8(d) of the 1880 Oxford Manual provides that “it is forbidden . . . to make improper use of the national flag, military insignia or uniform of the enemy”.

637. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 39(2) AP I.

638. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 39(2) AP I.

639. According to paragraph 110 of the 1994 San Remo Manual, “warships and auxiliary vessels . . . are prohibited from launching an attack whilst flying a false flag”.

640. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use . . . of the flag or of the military insignia and uniform of the enemy . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

⁶⁷⁴ Canada, Reservations and statements of understanding made upon ratification, 20 November 1990, § 2.

⁶⁷⁵ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁶⁷⁶ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977.

II. National Practice

Military Manuals

641. Argentina's Law of War Manual (1969) states that it is an act violating the principle of good faith "to make an improper use of the enemy's national flag, . . . uniforms and/or military insignia". It considers such use "improper" when it occurs during combat operations.⁶⁷⁷

642. Argentina's Law of War Manual (1989) provides that "it is prohibited . . . to use the flags, emblems, insignia or military uniforms of the enemy during the execution of military operations".⁶⁷⁸

643. Australia's Commanders' Guide provides that "it is . . . prohibited to use the flags or military emblems, insignia or uniforms of the enemy while engaging in attacks or in order to shield, favour, protect or impede military operations".⁶⁷⁹ It also provides that "it is illegal to use in battle emblems, markings or clothing of . . . [the] enemy".⁶⁸⁰ The manual further states that "according to custom, it is permissible for a belligerent warship to use false colours and disguise her outward appearance in order to deceive an enemy, provided that prior to going into action the warship shows her true colours".⁶⁸¹

644. Australia's Defence Force Manual provides that "it is . . . prohibited to use the flags or military emblems, insignia or uniforms of the enemy while engaging in attacks or in order to shield, favour, protect or impede military operations. Enemy uniforms may otherwise be worn."⁶⁸² The manual also states that "warships and auxiliary vessels may fly a false flag up until the moment of launching an attack but are prohibited from launching an attack whilst flying a false flag".⁶⁸³

645. Belgium's Law of War Manual provides that:

The [1907 HR] prohibits to use "*improperly*" the national flag, or the military insignia and uniform of the enemy.

The word "*improperly*" must be stressed. It follows that opening fire or participating in an attack while wearing the enemy uniform doubtlessly constitutes an act of perfidy. It is also the case when opening fire from a captured enemy combat vehicle with its insignia.

However, infiltrating enemy lines in order to create panic to the point that the adversary starts firing on its own soldiers believing that they are disguised enemies or operating behind enemy lines wearing enemy uniform in order to collect information or commit acts of sabotage is not considered as using "*improperly*" enemy uniform . . .

⁶⁷⁷ Argentina, *Law of War Manual* (1969), § 1.017.

⁶⁷⁸ Argentina, *Law of War Manual* (1989), § 1.06(3).

⁶⁷⁹ Australia, *Commanders' Guide* (1994), § 904.

⁶⁸⁰ Australia, *Commanders' Guide* (1994), § 507.

⁶⁸¹ Australia, *Commanders' Guide* (1994), § 826.

⁶⁸² Australia, *Defence Force Manual* (1994), § 705.

⁶⁸³ Australia, *Defence Force Manual* (1994), § 635.

It is a recognised practice that warships may, without contravening the law of war, fly the enemy flag, as a ruse, on the condition that at the moment of opening fire the warship shows her true colours . . .

It is prohibited for belligerents to display false markings, especially enemy markings, on their military aircraft.⁶⁸⁴ [emphasis in original]

646. Belgium's Teaching Manual for Officers provides that "the use of flags, symbols, insignia and uniforms of the enemy is prohibited during attacks or to shield, favour, protect or impede a military operation".⁶⁸⁵

647. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the national flag of the enemy".⁶⁸⁶

648. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the national flag of the enemy".⁶⁸⁷

649. Cameroon's Instructors' Manual states that "using fraudulently the emblems and uniforms of enemy States" is an unlawful deception.⁶⁸⁸

650. Canada's LOAC Manual provides that:

It is prohibited to make use of the flags or military emblems, insignia or uniforms of *adverse parties while engaging in attacks*.

When depositing its ratification of Additional Protocol I, Canada reserved the right to make use of the flags or military emblems, insignia or uniforms of adverse parties *to shield, favour, protect or impede military operations*. Any decision to do so should only be carried out with national level approval.⁶⁸⁹ [emphasis in original]

The manual also states that "it is not unlawful to use captured enemy aircraft. However, the enemy's markings must be removed."⁶⁹⁰ It considers it an act of perfidy in air warfare if a hostile act is committed while "using false markings on military aircraft such as the markings of . . . enemy aircraft".⁶⁹¹ In respect of naval warfare, the manual states that "warships and auxiliary vessels are prohibited from opening fire while flying a false flag".⁶⁹² It also states that "improperly using . . . the national flag or military insignia and uniform of the enemy" constitutes a war crime.⁶⁹³

651. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the national flag of the enemy".⁶⁹⁴

⁶⁸⁴ Belgium, *Law of War Manual* (1983), pp. 32 and 33.

⁶⁸⁵ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

⁶⁸⁶ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁶⁸⁷ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁶⁸⁸ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

⁶⁸⁹ Canada, *LOAC Manual* (1999), p. 6-2, §§ 13 and 14.

⁶⁹⁰ Canada, *LOAC Manual* (1999), p. 7-3, § 19.

⁶⁹¹ Canada, *LOAC Manual* (1999), p. 7-2 § 18(a).

⁶⁹² Canada, *LOAC Manual* (1999), p. 8-10, § 78.

⁶⁹³ Canada, *LOAC Manual* (1999), p. 16-3, § 20(f).

⁶⁹⁴ Congo, *Disciplinary Regulations* (1986), Article 32(2).

652. Croatia's *Commanders' Manual* states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . use of enemy uniform or flag".⁶⁹⁵

653. Ecuador's *Naval Manual* provides that:

At sea. Naval surface and subsurface forces may fly enemy colours and display enemy markings to deceive the enemy. Warships must, however, display their true colours prior to an actual armed engagement.

In the air. The use in combat of enemy markings by belligerent military aircraft is forbidden.

On land. The law of land warfare does not prohibit the use by belligerent land forces of enemy flags, insignia, or uniforms to deceive the enemy either before or following an armed engagement. Combatants risk severe punishment, however, if they are captured while displaying enemy colours or insignia or wearing enemy uniforms in combat.

Similarly, combatants caught behind enemy lines wearing the uniform of their adversaries are not entitled to prisoner-of-war status or protection and, historically, have been subjected to severe punishment. It is permissible, however, for downed aircrews and escaping prisoners of war to use enemy uniforms to evade capture, so long as they do not attack enemy forces, collect military intelligence, or engage in similar military operations while so attired. As a general rule, enemy markings should be removed from captured enemy equipment before it is used in combat.⁶⁹⁶

654. France's *Disciplinary Regulations as amended* states that it is prohibited "to use improperly . . . the national flag of the enemy".⁶⁹⁷

655. France's *LOAC Summary Note* provides that "perfidy is prohibited. It is prohibited . . . to use the uniform or emblem of the enemy."⁶⁹⁸

656. France's *LOAC Teaching Note* provides that "perfidy is prohibited, notably . . . the use of the uniform or emblem of the adversary".⁶⁹⁹

657. France's *LOAC Manual* states that "it is normally prohibited to use the flags, emblems or uniforms of enemy States in combat with the view to dissimulate, favour or impede military operations. However, it is traditionally permitted for warships to hoist false flags as long as they are not engaged in combat."⁷⁰⁰

658. Germany's *Military Manual* provides that "it is prohibited to make improper use of . . . enemy . . . national flags, military insignia and uniforms".⁷⁰¹ It further states that "ruses of war are permissible also in naval warfare. Unlike land and aerial warfare, naval warfare permits the use of false flags or military emblems . . . Before opening fire, however, the true flag shall always be displayed."⁷⁰²

⁶⁹⁵ Croatia, *Commanders' Manual* (1992), § 46.

⁶⁹⁶ Ecuador, *Naval Manual* (1989), § 12.5.

⁶⁹⁷ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁶⁹⁸ France, *LOAC Summary Note* (1992), § 4.4.

⁶⁹⁹ France, *LOAC Teaching Note* (2000), p. 3.

⁷⁰⁰ France, *LOAC Manual* (2001), p. 47, see also p. 115.

⁷⁰¹ Germany, *Military Manual* (1992), § 473. ⁷⁰² Germany, *Military Manual* (1992), § 1018.

659. Hungary's Military Manual regards it as an act of perfidy to feign protected status by using enemy uniforms or flag.⁷⁰³
660. Indonesia's Military Manual provides that "it is . . . prohibited to use the flags, emblems, and badges of the enemy".⁷⁰⁴
661. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the unlawful use of uniforms is prohibited.⁷⁰⁵
662. Israel's Manual on the Laws of War provides that "it is forbidden to make inappropriate use of the enemy's flag, uniform and emblems". "Inappropriate use" is qualified as a perfidious act.⁷⁰⁶
663. Under Italy's IHL Manual, it is prohibited "to use flags, insignia or military uniforms other than the country's own".⁷⁰⁷
664. Italy's LOAC Elementary Rules Manual provides that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . use of enemy uniform or flag".⁷⁰⁸
665. Under South Korea's Military Law Manual, improper use of enemy uniforms is forbidden.⁷⁰⁹
666. Lebanon's Army Regulations prohibits the unlawful use of the enemy flag.⁷¹⁰
667. Madagascar's Military Manual prohibits the use of enemy uniforms in general.⁷¹¹
668. Mali's Army Regulations states that, under the laws and customs of war, it is prohibited "to use improperly . . . the national emblem of the enemy".⁷¹²
669. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the national emblem of the enemy".⁷¹³
670. The Military Manual of the Netherlands provides that "it is . . . prohibited to make use of the flag, military emblems, insignia or uniforms of the adverse party".⁷¹⁴
671. The Military Handbook of the Netherlands states that it is prohibited "to use insignia and uniforms of the adverse party".⁷¹⁵
672. New Zealand's Military Manual states that "it is prohibited to make use of the flags or military emblems, insignia or uniforms of adverse Parties while engaging in attacks or in order to shield, favour, protect or impede military

⁷⁰³ Hungary, *Military Manual* (1992), p. 63. ⁷⁰⁴ Indonesia, *Military Manual* (1982), § 104.

⁷⁰⁵ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

⁷⁰⁶ Israel, *Manual on the Laws of War* (1998), p. 56.

⁷⁰⁷ Italy, *IHL Manual* (1991) Vol. I, § 9(1).

⁷⁰⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

⁷⁰⁹ South Korea, *Military Law Manual* (1996), p. 88.

⁷¹⁰ Lebanon, *Army Regulations* (1971), § 17.

⁷¹¹ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

⁷¹² Mali, *Army Regulations* (1979), Article 36.

⁷¹³ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁷¹⁴ Netherlands, *Military Manual* (1993), p. IV-3.

⁷¹⁵ Netherlands, *Military Handbook* (1995), p. 7-40.

operations".⁷¹⁶ In respect of naval warfare, it provides that "according to custom, it is permissible for a belligerent warship to use false colours and to disguise her outward appearance in other ways in order to deceive an enemy, provided that prior to going into action the warship shows her true colours. Aircraft are not, however, entitled to use false markings."⁷¹⁷ The manual also specifies that "the use of false markings on military aircraft such as the markings of . . . enemy aircraft is the prime example of perfidious conduct in air warfare and is prohibited".⁷¹⁸ It further states that "improperly using . . . the national flag or military insignia and uniform of the enemy" is a war crime.⁷¹⁹

673. Nigeria's Manual on the Laws of War states that the "use . . . of enemy uniform by troops engaged in a battle" is a war crime.⁷²⁰

674. Nigeria's Soldiers' Code of Conduct provides that it is prohibited "to make improper use of the national flag or of the military insignia and uniform of the enemy".⁷²¹

675. Under Romania's Soldiers' Manual, the "use of enemy's uniforms and insignia" is an act of perfidy.⁷²²

676. Under Russia's Military Manual, the improper use of national signals and flags is a prohibited method of warfare.⁷²³

677. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use improperly . . . the national emblem of the enemy".⁷²⁴

678. South Africa's LOAC Manual provides that "it is prohibited to use the insignia or uniforms of the enemy while engaging in attacks or in order to shield, favour, protect or impede military operations . . . All insignia on enemy equipment must be removed before the equipment may be utilised by own forces."⁷²⁵

679. Spain's LOAC Manual provides that the use of enemy flags, emblems, insignia and military uniforms while engaging in attack or in order to shield, favour, protect or impede military operations is prohibited.⁷²⁶ It also states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . use of enemy uniform or flag".⁷²⁷

680. Sweden's IHL Manual considers that the "prohibition of improper use of . . . emblems of nationality", as contained in Article 39 AP I, is part of

⁷¹⁶ New Zealand, *Military Manual* (1992), § 502(8).

⁷¹⁷ New Zealand, *Military Manual* (1992), § 713(1), see also § 713(3).

⁷¹⁸ New Zealand, *Military Manual* (1992), § 611(2).

⁷¹⁹ New Zealand, *Military Manual* (1992), § 1704(2)(f).

⁷²⁰ Nigeria, *Manual on the Laws of War* (undated), § 6(6).

⁷²¹ Nigeria, *Soldiers' Code of Conduct* (undated), § 12(f).

⁷²² Romania, *Soldiers' Manual* (1991), p. 35.

⁷²³ Russia, *Military Manual* (1990), § 5(c).

⁷²⁴ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

⁷²⁵ South Africa, *LOAC Manual* (1996), § 34(b).

⁷²⁶ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.c.(1) and 5.3.c.

⁷²⁷ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

customary international law.⁷²⁸ It stresses that Article 39(2) AP I “constitutes a valuable clarification of international humanitarian law, and one which is also significant for Swedish defence”. The manual explains that:

The prohibition of improper use has been interpreted to mean that enemy uniform may not be used in connection with or during combat, and this has led to great uncertainty in application.

During the 1974–1977 diplomatic conference, certain of the great powers wished to retain the possibility of appearing in enemy uniforms, while most of the smaller states claimed that this possibility should be excluded or minimized. The conference accepted the view of the smaller states here. The rule in Article 39:2 [AP I] can be interpreted to mean that enemy uniform may be used only as personal protection, for example under extreme weather conditions, and may never be used in connection with any type of military operation. Where prisoners of war make use of enemy uniforms in connection with escape attempts, this may not be seen as an infringement of Article 39.⁷²⁹

681. Switzerland’s Basic Military Manual provides that “it is notably forbidden . . . to abuse a protected status by using . . . emblems or uniforms of the adverse nation”. It regards this behaviour as a perfidious act.⁷³⁰ It further stresses that “it is prohibited to use improperly the military insignia or uniform of the enemy”. It gives the example of the prohibition of attacking the enemy while wearing its uniform.⁷³¹

682. The UK Military Manual describes as treachery calling out “Do not fire, we are friends”, and then firing, noting that this “device is often accompanied by the use of enemy uniforms”.⁷³² It also states that “if, owing to shortage of clothing, it becomes necessary to utilise apparel captured from the enemy, the badges should be removed before the articles are worn”.⁷³³ It further states that:

The employment of the national flag, military insignia or uniform of the enemy for the purpose of ruse is not forbidden, but the [1907 HR] prohibit their improper use, leaving unsettled what use is proper and what use is not. However, their employment is forbidden during a combat, that is, the opening of fire whilst in the guise of the enemy. But there is no unanimity as to whether the uniform of the enemy may be worn and his flag displayed for the purpose of approach or withdrawal. Use of enemy uniform for the purpose of and in connection with sabotage is in the same category as spying.⁷³⁴

Furthermore, the manual states that “in addition to ‘grave breaches’ of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . use . . . of enemy uniform by troops engaged in a battle”.⁷³⁵ Lastly, it states that “although no such opportunities of closing

⁷²⁸ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁷²⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 31.

⁷³⁰ Switzerland, *Basic Military Manual* (1987), Article 39.

⁷³¹ Switzerland, *Basic Military Manual* (1987), Article 40, including commentary.

⁷³² UK, *Military Manual* (1958), § 311, footnote 1. ⁷³³ UK, *Military Manual* (1958), § 322.

⁷³⁴ UK, *Military Manual* (1958), § 320.

⁷³⁵ UK, *Military Manual* (1958), § 626(f).

with the enemy by exhibiting his flag are possible in land warfare as in the case of naval warfare, national flags might be used to mislead the enemy".⁷³⁶

683. The UK LOAC Manual provides that "it is forbidden . . . to make improper use in combat . . . of the enemy's national flag or uniform".⁷³⁷

684. The US Field Manual states that "it is especially forbidden to make improper use . . . of the national flag, or military insignia and uniform of the enemy".⁷³⁸ According to the manual,

In practice, it has been authorized to make use of national flags, insignia, and uniforms as a ruse. The foregoing rule (*HR, art. 23, par. (f)*) does not prohibit such employment, but does prohibit their *improper use*. It is certainly forbidden to employ them during combat, but their use at other times is not forbidden.⁷³⁹ [emphasis in original]

The manual also states that:

Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces.⁷⁴⁰

685. The US Air Force Pamphlet incorporates the content of Article 23(f) of the 1907 HR and adds that the prohibited improper use of the enemy's flags, military insignia, national markings and uniforms "involves use in actual attacks".⁷⁴¹ It further provides that:

Members of the armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces lose their right to be treated as prisoners of war whenever they deliberately conceal their status in order to pass behind the military lines of the enemy for the purpose of gathering military information or for the purpose of waging war by destruction of life or property. Putting on civilian clothes or the uniform of the enemy are examples of concealment of the status of a member of the armed forces. Ground forces engaged in actual combat, in contrast to ground forces preparing for combat, are required to wear their own uniform or distinctive national insignia.

...

While combatant airmen are not absolutely required to wear a uniform or distinctive national insignia while flying in combat, improper use of the military insignia or uniform of the enemy is forbidden. Consequently, airmen should not wear the uniform or national insignia of the enemy while engaging in combat operations. Military aircraft, as entities of combat in aerial warfare, are also required to be marked with appropriate signs of their nationality and military character.⁷⁴²

⁷³⁶ UK, *Military Manual* (1958), § 321.] ⁷³⁷ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2d.

⁷³⁸ US, *Field Manual* (1956), § 52. ⁷³⁹ US, *Field Manual* (1956), § 54.

⁷⁴⁰ US, *Field Manual* (1956), § 74.

⁷⁴¹ US, *Air Force Pamphlet* (1976), §§ 8-2 and 8-6(c), see also § 8-3(d).

⁷⁴² US, *Air Force Pamphlet* (1976), §§ 7-2 and 7-4.

686. The US Naval Handbook states that:

At Sea. Naval surface and subsurface forces may fly enemy colors and display enemy markings to deceive the enemy. Warships must, however, display their true colors prior to an actual armed engagement.

In the Air. The use in combat of enemy markings by belligerent military aircraft is forbidden.

On Land. The law of land warfare does not prohibit the use by belligerent land forces of enemy flags, insignia, or uniforms to deceive the enemy either before or following an armed engagement. Combatants risk severe punishment, however, if they are captured while displaying enemy colors or insignia or wearing enemy uniforms in combat.

Similarly, combatants caught behind enemy lines wearing the uniform of their adversaries are not entitled to prisoner-of-war status or protection and, historically, have been subjected to severe punishment. It is permissible, however, for downed aircrews and escaping prisoners of war to use enemy uniforms to evade capture, so long as they do not attack enemy forces, collect military intelligence, or engage in similar military operations while so attired. As a general rule, enemy markings should be removed from captured enemy equipment before it is used in combat.⁷⁴³

687. The YPA Military Manual of the SFRY (FRY) provides that “it is forbidden to use, during combat, in order to mislead the enemy, . . . enemy military insignia (military flags, emblems or badges)”.⁷⁴⁴

National Legislation

688. Algeria’s Code of Military Justice punishes the unauthorised use of the insignia of foreign armed forces.⁷⁴⁵

689. Argentina’s Draft Code of Military Justice punishes any soldier who

uses improperly, or in a perfidious manner, the flag, uniform, insignia or distinctive emblem . . . of adverse parties, during attacks or to cover, favour, protect or impede military operations, except in cases expressly provided for in international treaties to which the Argentine Republic is a party.⁷⁴⁶

690. Under Armenia’s Penal Code, “the use during military actions of . . . the flag or insignia of the enemy . . . in breach of international treaties and international law” constitutes a crime against the peace and security of mankind.⁷⁴⁷

691. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “improper use of a flag, insignia or uniform of the adverse party . . . while

⁷⁴³ US, *Naval Handbook* (1995), § 12.5.

⁷⁴⁴ SFRY (FRY), *YPA Military Manual* (1988), § 105(2).

⁷⁴⁵ Algeria, *Code of Military Justice* (1971), Article 298.

⁷⁴⁶ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(6) in the *Code of Military Justice as amended* (1951).

⁷⁴⁷ Armenia, *Penal Code* (2003), Article 397.

engaged in an attack or in order to shield, favour, protect or impede military operations" in international armed conflicts.⁷⁴⁸

692. The Criminal Code of Belarus provides that it is a war crime to "use intentionally, during hostilities, in violation of international treaties, . . . the national flag or distinctive signs of an adverse Power".⁷⁴⁹

693. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "using improperly . . . the flag or military insignia and uniform of the enemy" constitutes a war crime in international armed conflicts.⁷⁵⁰

694. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁷⁵¹

695. Under Colombia's Penal Code, the use of enemy uniforms with the intent to injure or kill an adversary is a punishable offence.⁷⁵²

696. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁷⁵³

697. Egypt's Military Criminal Code punishes any enemy soldier who, disguised in a friendly uniform, enters a military camp, defended position or institution.⁷⁵⁴

698. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "making improper use . . . of the flag or of the military insignia and uniform of the enemy . . . resulting in death or serious personal injury" in international armed conflicts, is a crime.⁷⁵⁵

699. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "makes improper use . . . of the flag or of the military insignia or of the uniform of the enemy . . . thereby causing a person's death or serious injury".⁷⁵⁶

700. Greece's Military Penal Code prohibits the misuse of military uniforms or emblems.⁷⁵⁷

701. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 39(2) AP I, is a punishable offence.⁷⁵⁸

⁷⁴⁸ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.42.

⁷⁴⁹ Belarus, *Criminal Code* (1999), Article 138.

⁷⁵⁰ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(g).

⁷⁵¹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁷⁵² Colombia, *Penal Code* (2000), Article 143.

⁷⁵³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁷⁵⁴ Egypt, *Military Criminal Code* (1966), Article 133.

⁷⁵⁵ Georgia, *Criminal Code* (1999), Article 413(d).

⁷⁵⁶ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

⁷⁵⁷ Greece, *Military Penal Code* (1995), Article 68.

⁷⁵⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

702. Under Italy's Law of War Decree as amended, it is prohibited "to use flags, insignia or military uniforms other than the country's own".⁷⁵⁹ It further provides that "warships may not enter into hostilities without a flag or with a flag other than the country's own".⁷⁶⁰

703. Italy's Wartime Military Penal Code punishes anyone who "uses improperly the flag, insignia or military uniforms other than the country's own".⁷⁶¹

704. Under Mali's Penal Code, "using...the flag or military insignia and uniform of the enemy...and, thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.⁷⁶²

705. Under the International Crimes Act of the Netherlands, "making improper use...of the flag or of the military insignia and uniform of the enemy,...resulting in death of serious personal injury", is a crime, when committed in an international armed conflict.⁷⁶³

706. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁷⁶⁴

707. Nicaragua's Military Penal Code punishes any soldier who, in time of war and in an area of military operations, "unlawfully displays...enemy flags or emblems".⁷⁶⁵

708. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the two additional protocols to [the Geneva] Conventions...is liable to imprisonment".⁷⁶⁶

709. According to the Report on the Practice of Pakistan, Pakistan's Official Secrets Act and Public Order Ordinance punish the unauthorised use of the uniforms or insignia of the armed forces.⁷⁶⁷

710. Poland's Penal Code punishes "any person who, during hostilities, uses...flags or military emblems of an enemy...State...in violation of international law".⁷⁶⁸

711. Spain's Royal Ordinance for the Armed Forces states that "the combatant...shall not display treacherously...the enemy flag".⁷⁶⁹

712. Spain's Military Criminal Code punishes any soldier who "displays improperly...enemy flags and emblems".⁷⁷⁰

⁷⁵⁹ Italy, *Law of War Decree as amended* (1938), Article 36(2).

⁷⁶⁰ Italy, *Law of War Decree as amended* (1938), Article 138.

⁷⁶¹ Italy, *Wartime Military Penal Code* (1941), Article 180.

⁷⁶² Mali, *Penal Code* (2001), Article 31(i)(7).

⁷⁶³ Netherlands, *International Crimes Act* (2003), Article 5(3)(f).

⁷⁶⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁷⁶⁵ Nicaragua, *Military Penal Code* (1996), Article 50(1).

⁷⁶⁶ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁷⁶⁷ Report on the Practice of Pakistan, 1998, Chapter 2.6, referring to *Official Secrets Act* (1923), Section 6 and *Public Order Ordinance* (1958), Section 3.

⁷⁶⁸ Poland, *Penal Code* (1997), Article 126(2).

⁷⁶⁹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

⁷⁷⁰ Spain, *Military Criminal Code* (1985), Article 75(1).

713. Spain's Penal Code punishes "anyone who, during an armed conflict... uses improperly or in a perfidious manner the flag, uniform, insignia or distinctive emblem... of adverse Parties, during attacks or to cover, favour, protect or impede military operations".⁷⁷¹

714. Syria's Penal Code punishes the wearing by any person of an official uniform or insignia of a foreign State.⁷⁷²

715. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁷⁷³

716. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.⁷⁷⁴

717. Under the US War Crimes Act as amended, violations of Article 23(f) of the 1907 HR are war crimes.⁷⁷⁵

718. Under the Penal Code as amended of the SFRY (FRY), the use of a prohibited method of combat is a war crime.⁷⁷⁶ The commentary on the Code provides that "the following methods of combat are banned under international law:... abuse of... enemy uniforms or enemy army or state flag".⁷⁷⁷

National Case-law

719. In the *Skorzeny case* before the US General Military Court of the US Zone of Germany in 1947, the accused, German officers, were charged with participating in the improper use of American uniforms by entering into combat disguised therewith and treacherously firing upon and killing members of the US armed forces. The Court did not consider it improper for German officers to wear enemy uniforms while trying to occupy enemy military objectives. There was no evidence that they had used their weapons while so disguised, so the accusation of war crime was rejected. All the accused were acquitted and the Court did not give reasons for its decision.⁷⁷⁸

Other National Practice

720. During the Chinese civil war, the Chinese Communist Party denounced the use of Red Army uniforms by Nationalist soldiers. The uniforms were used while committing reprehensible acts to discredit the Red Army. According to the Report on the Practice of China, soldiers captured while wearing the Red Army uniform were still treated as prisoners of war.⁷⁷⁹

⁷⁷¹ Spain, *Penal Code* (1995), Article 612(5).

⁷⁷² Syria, *Penal Code* (1949), § 381.

⁷⁷³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁷⁷⁴ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁷⁷⁵ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

⁷⁷⁶ SFRY(FRY), *Penal Code as amended* (1976), Article 148(1).

⁷⁷⁷ SFRY(FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

⁷⁷⁸ US, General Military Court of the US Zone of Germany, *Skorzeny case*, Judgement, 9 September 1947.

⁷⁷⁹ Report on the Practice of China, 1997, Chapter 2.6. (No source or document is cited.)

721. The Report on the Practice of Germany provides that:

An official document of 1978 states that the improper use of uniforms can be seen as an act of perfidy. It continues by stating that there would be no breach in the case of wearing a uniform which is incomplete. International law contains no rules on the composition of uniforms. The important element is a certain designation or identification in order to comply with the principle of distinction. This designation does not necessarily have to be a uniform in the traditional sense.⁷⁸⁰

722. According to the Report on the Practice of India, there are no provisions in the Indian Army Regulations which would permit the use of enemy uniforms either in combat or other circumstances.⁷⁸¹

723. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq concludes that a combatant wearing an enemy uniform to create confusion and disorder among its ranks would lose any protection under international law.⁷⁸²

724. According to the Report on the Practice of Jordan, there is no Jordanian provision prohibiting the use of enemy uniforms.⁷⁸³

725. According to the Report on the Practice of South Korea, in the context of the North Korean Submarine Infiltration case, a report of the Intelligence Analysis Division of the Korean Ministry of Reunification pointed out that North Korean military personnel wearing South Korean military uniform lost their prisoner-of-war status. In the same context, a spokesman for the South Korean Ministry of Defence condemned the use of South Korean military uniforms by North Korean military personnel.⁷⁸⁴

726. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that "treason . . . is prohibited" and "the improper use of uniforms is considered an act of treason" as well as a crime.⁷⁸⁵

727. In 1996, in its oral pleadings before the ECtHR in the case of *Akdivar and Others v. Turkey*, Turkey complained that the PKK very often used uniforms of soldiers belonging to the Turkish army who had been killed, so as to conceal the identities of the actual perpetrators of attacks.⁷⁸⁶

728. It was reported that, during the December 1944 Battle of the Bulge, the US army executed 18 German soldiers apprehended in US uniforms on charges of spying.⁷⁸⁷

⁷⁸⁰ Report on the Practice of Germany, 1997, Chapter 2.6. (No source or document is cited.)

⁷⁸¹ Report on the Practice of India, 1997, Answers to additional questions on Chapter 2.6.

⁷⁸² Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.6.

⁷⁸³ Report on the Practice of Jordan, 1997, Chapter 2.6.

⁷⁸⁴ Report on the Practice of South Korea, 1997, Chapter 2.6.

⁷⁸⁵ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, 1997, Chapter 2.6.

⁷⁸⁶ Turkey, Oral pleadings before the ECtHR, *Akdivar and Others v. Turkey*, Verbatim Record, 25 April 1996, p. 3.

⁷⁸⁷ W. Hays Parks, "Air War and the Law of War", *The Air Force Law Review*, Vol. 32, 1990, p. 77, footnote 259; Peter Rowe, "The Use of Special Forces and the Laws of War. Wearing the

729. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we do not support the prohibition in article 39 [AP I] of the use of enemy emblems and uniforms during military operations”.⁷⁸⁸

730. According to the Report on US Practice, the *Skorzeny case* is the leading authority for the US armed forces. It adds that it is the *opinio juris* of the US that the use of enemy uniforms is a lawful ruse of war as long as they are not used in actual combat.⁷⁸⁹

731. The Report on the Practice of the SFRY (FRY) mentions the use of YPA insignia by Croatian soldiers when entering a Serb village. Civilians who went out to greet them were killed. No official statement on or reaction to the incident is provided by the report.⁷⁹⁰ The report also notes that misuse or improper use of uniforms on the part of paramilitary formations and armed forces occurred at the beginning of the conflicts in Slovenia and Croatia. According to the report, it appears that the issue was not of primary importance and, therefore, cases of violations were not systematically recorded, although they undoubtedly existed and were committed by all parties to the conflict.⁷⁹¹

732. The Report on the Practice of Zimbabwe states that “improper use of uniforms could be regarded as a legitimate ruse of war and is not necessarily perfidious”. No documents or sources are mentioned.⁷⁹²

III. Practice of International Organisations and Conferences

733. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

734. In its report in *Chrysostomos and Papachrysostomou v. Turkey* in 1993, the ECiHR noted the admitted practice that Turkish soldiers and Turkish Cypriot soldiers were wearing the same camouflage uniforms. It considered that the practice constituted “a deliberate tactic of disguise aimed at preventing the public from distinguishing between actions by Turkish soldiers and actions by Turkish Cypriot soldiers”. The Commission did not condemn the practice as such, but it considered that it had to take it into account when

Uniform of the Enemy or Civilian Clothes and of Spying and Assassination”, *Revue de Droit Militaire et de Droit de la Guerre*, Vol. 33, 1994, p. 217.

⁷⁸⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

⁷⁸⁹ Report on US Practice, 1997, Chapter 2.6.

⁷⁹⁰ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.4, referring to Miodrag Starcevic and Nikola Petkovic, *Croatia '91—Violence and Crime Against the Law*, Belgrade, 1991, pp. 34–35.

⁷⁹¹ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.6.

⁷⁹² Report on the Practice of Zimbabwe, 1998, Chapter 2.6.

determining the responsibility of Turkey. In fact, recalling the practice, it found that the applicants' arrest was imputable to Turkey.⁷⁹³

V. *Practice of the International Red Cross and Red Crescent Movement*

735. The ICRC Commentary on the Additional Protocols states that:

The prohibition formulated in Article 39 [AP I], "while engaging in attacks or in order to shield, favour, protect or impede military operations", includes the preparatory stage to the attack... It means that every possible exception should always be examined on its merits, a point that legal experts had stressed throughout... Under the provisions of the Hague Regulations [1907 HR], there is no doubt whatsoever that wearing an enemy uniform is not prohibited in this case [in order to conceal, facilitate or protect escape].⁷⁹⁴

736. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "it is prohibited to use the flags, emblems or uniforms of the enemy: a) while engaging in combat action; b) in order to shield, favour or impede military operations".⁷⁹⁵

737. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included the "improper use... of the national flag or of the military insignia and uniform of the enemy", when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.⁷⁹⁶

VI. *Other Practice*

738. In 1986, in a report on human rights in Nicaragua, Americas Watch noted that, in some incidents involving attacks against non-combatants, "some of the *contras*... are said to wear red and black kerchiefs, traditionally worn by the *Sandinistas*, as a way of deceiving people about their true identity". It also reported that some of the forces of the FDN, when they launched an attack on a certain city, "entered the town surreptitiously wearing uniforms resembling those worn by Nicaraguan Army troops".⁷⁹⁷

739. In 1991, a Minister of a State transmitted to the ICRC allegations of use of army uniforms by irregular forces when ICRC delegates or EC observers were approaching.⁷⁹⁸

⁷⁹³ ECiHR, *Chrysostomos and Papachrysostomou v. Turkey*, Report, 8 July 1993, §§ 94–102.

⁷⁹⁴ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1575 and 1576.

⁷⁹⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 403.

⁷⁹⁶ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 2(x).

⁷⁹⁷ Americas Watch, *Human Rights in Nicaragua: 1985–1986*, New York, March 1986, pp. 89 and 106.

⁷⁹⁸ ICRC archive document.

740. Parks has established a list of examples of conflicts since the Second World War in which the wearing of enemy uniforms was practised: France in Algeria (1958–1962); North Vietnam in South Vietnam (1968); US in Southeast Asia (1965–1972); Soviet Union in Southeast Asia (1971–1972); Israel in the Middle East (1967, 1973); Rhodesia in Zambia and Mozambique (1970s); Israel in Uganda (1976); Mozambique in South Africa (1978); North Korea in South Korea (June 1983); Sendero Luminoso (“Shining Path”) in Peru (1984); Chad in Libya (1985); FMLN in El Salvador (1985–1988); and Sandinistas in Nicaragua (1986).⁷⁹⁹

741. The Report on SPLM/A Practice notes that the SPLA successfully deceived a high-ranking commander of the governmental forces into landing at a rendez-vous secured by SPLA forces. The officer was lured in part by SPLA combatants wearing governmental uniforms. In another instance, a SPLA contingent captured a town “without firing a shot” by entering the town under the guise of friendly troops bringing supplies and salaries.⁸⁰⁰

G. Use of Flags or Military Emblems, Insignia or Uniforms of Neutral or Other States Not Party to the Conflict

Note: *For practice concerning the use of flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict as an act considered perfidious, see infra section I of this chapter.*

I. Treaties and Other Instruments

Treaties

742. Under Article 39(1) AP I, “it is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict”. Article 39 AP I was adopted by consensus.⁸⁰¹

Other Instruments

743. Paragraph 109 of the 1994 San Remo Manual provides that “military and auxiliary aircraft are prohibited at all times from feigning...neutral status”.

II. National Practice

Military Manuals

744. Australia’s Commanders’ Guide states that “it is prohibited to use flags, military emblems, insignia or uniforms of neutral or other States not party to the conflict”.⁸⁰² It further specifies that:

⁷⁹⁹ W. Hays Parks, *Air War and the Law of War*, *The Air Force Law Review*, Vol. 32, 1990, p. 77, footnote 259.

⁸⁰⁰ Report on SPLM/A Practice, 1998, Chapter 2.6.

⁸⁰¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁸⁰² Australia, *Commanders’ Guide* (1994), § 904.

The clothing of neutral nations must never be worn by the forces of a belligerent. Nor should flags, symbols and military markings of a neutral nation be used by a belligerent. While naval ships may use such markings in operations that do not involve actual combat, no similar rule applies to military aircraft or land operations.⁸⁰³

745. Australia's Defence Force Manual provides that "in armed conflict, it is prohibited to use flags, military emblems, insignia or uniforms of neutral or other nations not party to the conflict".⁸⁰⁴

746. Belgium's Teaching Manual for Officers stipulates that the use of flags, symbols, insignia and uniforms of neutral or other States not parties to the conflict is prohibited "in all circumstances".⁸⁰⁵

747. Cameroon's Instructors' Manual states that "using fraudulently the emblems and uniforms of neutral States" is an unlawful deception.⁸⁰⁶

748. Canada's LOAC Manual states that "it is prohibited to make use in armed conflict of flags or military emblems, insignia or uniforms of *neutral or other states not parties to the conflict*".⁸⁰⁷ (emphasis in original)

749. Ecuador's Naval Manual states that:

At Sea. Under the customary international law of naval warfare, it is permissible for a belligerent warship to fly false colours and disguise its outward appearance in other ways in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a warship. However, it is unlawful for a warship to go into action without first showing her true colours. Use of neutral flags, insignia, or uniforms during an actual armed engagement at sea is, therefore, forbidden.

In the Air. Use in combat of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited.

On Land. The law of armed conflict applicable to land warfare has no rule of law analogous to that which permits belligerent warships to display neutral colours.

Belligerents engaged in armed conflict on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy.⁸⁰⁸

750. France's LOAC Manual provides that "it is prohibited to use the flags, emblems or uniforms of neutral States".⁸⁰⁹

751. Germany's Military Manual states that "it is prohibited to make improper use of . . . neutral national flags, military insignia and uniforms".⁸¹⁰

752. Indonesia's Military Manual states that "it is . . . prohibited to use . . . the military uniforms of neutral States or other States which are not parties to the conflict".⁸¹¹

⁸⁰³ Australia, *Commanders' Guide* (1994), § 510.

⁸⁰⁴ Australia, *Defence Force Manual* (1994), § 705.

⁸⁰⁵ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

⁸⁰⁶ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.2 and p. 89, § 222.

⁸⁰⁷ Canada, *LOAC Manual* (1999), p. 6-2, § 12.

⁸⁰⁸ Ecuador, *Naval Manual* (1989), § 12.3. ⁸⁰⁹ France, *LOAC Manual* (2001), p. 47.

⁸¹⁰ Germany, *Military Manual* (1992), § 473.

753. Under Italy's IHL Manual, it is prohibited, without qualification, "to use any flag, insignia or military uniforms other than the country's own".⁸¹²

754. The Military Manual of the Netherlands states that "in an armed conflict, it is prohibited to make use of the flags, military emblems, uniforms and insignia of States which are not parties to the conflict".⁸¹³

755. The Military Handbook of the Netherlands provides that it is prohibited "to use insignia and uniforms . . . of neutral States".⁸¹⁴

756. New Zealand's Military Manual states that "it is prohibited to make use in an armed conflict of the flags or military emblems, insignia or uniforms of neutral or other States not Parties to the conflict".⁸¹⁵ In respect of naval warfare, the manual stipulates that "flags or markings of neutral . . . ships may be used prior to going into action".⁸¹⁶

757. Russia's Military Manual considers that the improper use of national signals and flags is a prohibited method of warfare.⁸¹⁷

758. Spain's LOAC Manual prohibits the use of flags, emblems or uniforms of neutral States.⁸¹⁸

759. Sweden's IHL Manual considers that the "prohibition of improper use of . . . emblems of nationality", as contained in Article 39 AP I, is part of customary international law.⁸¹⁹ It also notes that, during the CDDH:

There was a consensus in favour of introducing a rule forbidding this type of abuse on the part of belligerents. It should be noted that Article 39:1 [AP I] prohibits any form of use in armed conflict. The rule relates not only to the uniforms etc. of neutral states, but also to those belonging to states that – without being neutral – are not parties to the conflict. By this are meant states that have the status of non-belligerents.⁸²⁰

760. The US Air Force Pamphlet specifies that "military aircraft may not bear . . . markings of neutral aircraft while engaging in combat".⁸²¹

761. The US Naval Handbook states that:

At Sea. Under the customary international law of naval warfare, it is permissible for a belligerent warship to fly false colors and disguise its outward appearance in other ways in order to deceive the enemy into believing the vessel is of neutral nationality or is other than a warship. However, it is unlawful for a warship to go into action without first showing her true colors. Use of neutral flags, insignia, or uniforms during an actual armed engagement at sea is, therefore, forbidden.

In the Air. Use in combat of false or deceptive markings to disguise belligerent military aircraft as being of neutral nationality is prohibited.

⁸¹¹ Indonesia, *Military Manual* (1982), § 104. ⁸¹² Italy, *IHL Manual* (1991), Vol. I, § 9(1).

⁸¹³ Netherlands, *Military Manual* (1993), p. IV-3.

⁸¹⁴ Netherlands, *Military Handbook* (1995), p. 7-40.

⁸¹⁵ New Zealand, *Military Manual* (1992), § 502(8).

⁸¹⁶ New Zealand, *Military Manual* (1992), § 713(3).

⁸¹⁷ Russia, *Military Manual* (1990), § 5(c).

⁸¹⁸ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.b.(3) and 5.3.c.

⁸¹⁹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁸²⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, pp. 31 and 32.

⁸²¹ US, *Air Force Pamphlet* (1976), § 7-4.

On Land. The law of armed conflict applicable to land warfare has no rule of law analogous to that which permits belligerent warships to display neutral colors. Belligerents engaged in armed conflict on land are not permitted to use the flags, insignia, or uniforms of a neutral nation to deceive the enemy.⁸²²

National Legislation

762. Algeria's Code of Military Justice punishes the unauthorised use of the insignia of foreign armed forces.⁸²³

763. Argentina's Draft Code of Military Justice punishes any soldier who "uses improperly . . . the flag, uniform, insignia or distinctive emblem . . . of neutral States . . . or of other States which are not parties to the conflict".⁸²⁴

764. Under Armenia's Penal Code, "the use during military actions of . . . the flag or insignia of . . . a neutral State . . . in breach of international treaties and international law" constitutes a crime against the peace and security of mankind.⁸²⁵

765. Australia's Geneva Conventions Act as amended provides that:

A person shall not, without the consent in writing of the Minister or of a person authorized in writing by the Minister to give consents . . . use for any purpose whatsoever any of the following:

...
(f) such . . . emblems, identity cards, signs, signals, insignia or uniforms as are prescribed for the purpose of giving effect to [AP I].⁸²⁶

766. The Criminal Code of Belarus provides that it is a war crime to "use intentionally, during hostilities, in violation of international treaties, . . . the national flag or distinctive signs . . . of a neutral State".⁸²⁷

767. The Czech Republic's Criminal Code as amended punishes any "person who, in time of war, misuses . . . the flag . . . or military emblem, or the insignia or uniform of a neutral country or another country . . . which is not a party to the conflict".⁸²⁸

768. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 39(1) AP I, is a punishable offence.⁸²⁹

769. Under Italy's Law of War Decree as amended, it is prohibited, without qualification, "to use any flag, insignia or military uniforms other than the country's own".⁸³⁰

⁸²² US, *Naval Handbook* (1995), § 12.3.

⁸²³ Algeria, *Code of Military Justice* (1971), Article 298.

⁸²⁴ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(6) in the *Code of Military Justice as amended* (1951).

⁸²⁵ Armenia, *Penal Code* (2003), Article 397.

⁸²⁶ Australia, *Geneva Conventions Act as amended* (1957), Section 15(1)(f).

⁸²⁷ Belarus, *Criminal Code* (1999), Article 138.

⁸²⁸ Czech Republic, *Criminal Code as amended* (1961), Article 265(2).

⁸²⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁸³⁰ Italy, *Law of War Decree as amended* (1938), Article 36(2).

770. Italy's Wartime Military Penal Code punishes anyone who uses improperly the flag, insignia or military uniforms of a State other than his/her own.⁸³¹

771. Nicaragua's Military Penal Code punishes any soldier who, in time of war and in an area of military operations, "unlawfully displays . . . the flags or emblems . . . of neutral [States]".⁸³²

772. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁸³³

773. Under the Diplomatic Immunities Act of the Philippines, it is a punishable offence "with intent to deceive or mislead, within the jurisdiction of the Republic, [to] wear any naval, military, police, or other official uniform, decoration or regalia of any foreign State, nation or government with which the Republic of the Philippines is at peace".⁸³⁴

774. Poland's Penal Code punishes "any person who, during hostilities, uses . . . flags or military emblems of a . . . neutral State . . . in violation of international law".⁸³⁵

775. Slovakia's Criminal Code as amended punishes any "person who, in time of war, misuses . . . the flag . . . or military emblem, or the insignia or uniform of a neutral country or another country . . . which is not a party to the conflict".⁸³⁶

776. Spain's Military Criminal Code punishes any soldier who "displays improperly . . . neutral flags and emblems".⁸³⁷

777. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses improperly . . . the flag, uniform, insignia or distinctive emblem . . . of neutral States . . . or States that are not parties to the conflict".⁸³⁸

778. Under Syria's Penal Code, the wearing by any person of an official uniform or insignia of the Syrian State or of a foreign State is a punishable offence.⁸³⁹

National Case-law

779. No practice was found.

Other National Practice

780. No practice was found.

⁸³¹ Italy, *Wartime Military Penal Code* (1941), Article 180.

⁸³² Nicaragua, *Military Penal Code* (1996), Article 50(1).

⁸³³ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁸³⁴ Philippines, *Diplomatic Immunities Act* (1946), Section 3.

⁸³⁵ Poland, *Penal Code* (1997), Article 126(2).

⁸³⁶ Slovakia, *Criminal Code as amended* (1961), Article 265(2).

⁸³⁷ Spain, *Military Criminal Code* (1985), Article 75(1).

⁸³⁸ Spain, *Penal Code* (1995), Article 612(5). ⁸³⁹ Syria, *Penal Code* (1949), § 381.

III. Practice of International Organisations and Conferences

781. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

782. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

783. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “it is prohibited to use the flags, emblems or uniforms of neutral States”.⁸⁴⁰

VI. Other Practice

784. No practice was found.

H. Conclusion of an Agreement to Suspend Combat with the Intention of Attacking by Surprise the Adversary Relying on It

*I. Treaties and Other Instruments**Treaties*

785. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “when carried out in order to commit or resume hostilities, . . . the feigning of a cease-fire” was considered as perfidy.⁸⁴¹ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.⁸⁴²

Other Instruments

786. Article 15 of the 1863 Lieber Code states that:

Military necessity admits . . . of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

⁸⁴⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 405.

⁸⁴¹ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁸⁴² CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

II. National Practice

Military Manuals

787. Belgium's Law of War Manual states that "the denunciation of an armistice for doubtful motives in order to surprise the adversary without giving him the time to prepare could be considered as an act of perfidy".⁸⁴³

788. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁴⁴

789. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁴⁵

790. Canada's LOAC Manual states that:

Any agreement made by belligerent commanders must be adhered to, and any breach of its conditions would involve international responsibility if ordered by a government, and personal liability, (which might amount to a war crime) if committed by an individual on his or her own authority . . .

Between combatants, the most common purpose of such agreements is to arrange for an armistice or truce, whether for a specific purpose or more generally.⁸⁴⁶

791. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁴⁷

792. France's Disciplinary Regulations as amended provides that, under ratified international conventions, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁴⁸

793. Germany's Military Manual gives as an example of an act of perfidy the conclusion of a "humanitarian agreement to suspend combat with the intention of attacking by surprise the enemy relying on it".⁸⁴⁹ It also states that "during an armistice, it is . . . definitely forbidden to move the forces in contact with the enemy forward or to employ reconnaissance patrols".⁸⁵⁰

794. Italy's IHL Manual provides that in case of a violation of an armistice, the local commander can react as circumstances require. Only the supreme commander, with the consent of the government, can denounce an armistice or order the resumption of hostilities.⁸⁵¹ Hostile acts committed by individuals on

⁸⁴³ Belgium, *Law of War Manual* (1983), p. 42.

⁸⁴⁴ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁸⁴⁵ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁸⁴⁶ Canada, *LOAC Manual* (1999), p. 14-2, §§ 12 and 13.

⁸⁴⁷ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁸⁴⁸ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁸⁴⁹ Germany, *Military Manual* (1992), § 472.

⁸⁵⁰ Germany, *Military Manual* (1992), § 237.

⁸⁵¹ Italy, *IHL Manual* (1991), Vol. I, § 77.

their own initiative are not considered as violations of the armistice agreement, but punishment and indemnity can be demanded.⁸⁵²

795. Under South Korea's Military Regulation 187, acts committed in violation of the terms of a capitulation agreement constitute a war crime.⁸⁵³

796. Mali's Army Regulations states that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁵⁴

797. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁵⁵

798. The Military Handbook of the Netherlands provides that it is prohibited "to violate an agreement concluded with the adverse party (for example concerning a cease-fire to search for and collect the wounded and dead)".⁸⁵⁶

799. New Zealand's Military Manual provides that:

Any agreement made by belligerent commanders must be scrupulously adhered to and a breach of its conditions would involve international responsibility and liability for compensation, if ordered by a government, or personal liability which might amount to a war crime, if committed by an individual on his own authority.⁸⁵⁷

The manual also states that "in general, it is contrary to modern practice to attempt to obtain advantage of the enemy by deliberate lying, for instance, by declaring that an armistice has been agreed upon when in fact that is not the case".⁸⁵⁸ In addition, "violation of the terms of an armistice by an individual acting on his own initiative entitles the injured party to demand the punishment of the offender. If the party injured captures the offender, it may try him for a war crime."⁸⁵⁹

800. Nigeria's Manual on the Laws of War states that "informing the enemy that there is an armistice in order to make him leave his position" is an "illegitimate tactic".⁸⁶⁰ It also states that "violation of surrender terms" is a war crime.⁸⁶¹

801. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to fire at, injure or kill an enemy . . . with whom a suspension of combat has been concluded".⁸⁶²

⁸⁵² Italy, *IHL Manual* (1991), Vol. I, § 79.

⁸⁵³ South Korea, *Military Regulation 187* (1991), Article 4.2.

⁸⁵⁴ Mali, *Army Regulations* (1979), Article 36.

⁸⁵⁵ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁸⁵⁶ Netherlands, *Military Handbook* (1995), p. 7-40.

⁸⁵⁷ New Zealand, *Military Manual* (1992), § 407(1).

⁸⁵⁸ New Zealand, *Military Manual* (1992), § 502(3).

⁸⁵⁹ New Zealand, *Military Manual* (1992), § 1704(3).

⁸⁶⁰ Nigeria, *Manual on the Laws of War* (undated), § 14.

⁸⁶¹ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁸⁶² Senegal, *Disciplinary Regulations* (1990), Article 34(2).

802. Switzerland's Basic Military Manual states that the violation of an armistice is prohibited and the "carrying out of hostilities after the conclusion of an armistice or the violation of its provisions" are war crimes.⁸⁶³

803. The UK Military Manual emphasises that "good faith, as expressed in the observance of promises, is essential in war, for without it hostilities could not be terminated with any degree of safety short of the total destruction of one of the contending parties".⁸⁶⁴ It also states that "in general, it is contrary to modern practice to attempt to obtain advantage of the enemy by deliberate lying, for instance, by declaring that an armistice has been agreed upon when in fact that is not the case".⁸⁶⁵ The manual further specifies that "to demand a suspension of arms and then to break it by surprise, or to violate a safe conduct or any other agreement, in order to obtain an advantage, is an act of perfidy and as such forbidden".⁸⁶⁶ It also provides that "it would be perfidy to denounce an armistice for a motive or under a pretext more or less specious and to surprise the enemy without giving him time to put himself on his guard".⁸⁶⁷ Lastly, the manual states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . violation of surrender terms".⁸⁶⁸

804. The US Field Manual provides that "to broadcast to the enemy that an armistice has been agreed upon when such is not the case would be treacherous".⁸⁶⁹ The manual also states that:

It would be an outrageous act of perfidy for either party, without warning, to resume hostilities during the period of an armistice, with or without a formal denunciation thereof, except in case of urgency and upon convincing proof of intentional and serious violation of its terms by the other party.⁸⁷⁰

The manual further states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . violation of surrender terms".⁸⁷¹

805. The US Air Force Pamphlet states that "the feigning of a cease-fire" is an example of perfidy.⁸⁷² The Pamphlet adds that "a false broadcast to the enemy that an armistice has been agreed upon has been widely recognized to be treacherous. [This] language . . . expresses the customary and conventional law in this area."⁸⁷³

806. The US Instructor's Guide provides that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . violating surrender terms".⁸⁷⁴

⁸⁶³ Switzerland, *Basic Military Manual* (1987), Articles 194(2) and 200(2)(g).

⁸⁶⁴ UK, *Military Manual* (1958), § 308. ⁸⁶⁵ UK, *Military Manual* (1958), § 314.

⁸⁶⁶ UK, *Military Manual* (1958), § 316. ⁸⁶⁷ UK, *Military Manual* (1958), § 459.

⁸⁶⁸ UK, *Military Manual* (1958), § 626(n). ⁸⁶⁹ US, *Field Manual* (1956), § 50.

⁸⁷⁰ US, *Field Manual* (1956), § 493. ⁸⁷¹ US, *Field Manual* (1956), § 504(n).

⁸⁷² US, *Air Force Pamphlet* (1976), § 8-3(a).

⁸⁷³ US, *Air Force Pamphlet* (1976), § 8-6(a).

⁸⁷⁴ US, *Instructor's Guide* (1985), pp. 13 and 14.

National Legislation

807. Argentina's Penal Code punishes any person "who violates treaties concluded with foreign nations, truces and armistice agreements between the Republic and an enemy power".⁸⁷⁵

808. Argentina's Code of Military Justice as amended punishes any soldier "who continues hostilities after having received the official notice that peace, a truce or an armistice has been concluded".⁸⁷⁶

809. Argentina's Draft Code of Military Justice punishes any soldier "who violates a suspension of arms, armistice, capitulation or other agreement with the enemy".⁸⁷⁷

810. Azerbaijan's Criminal Code provides that "violations of temporary armistice agreements or agreements about the stopping of military actions with the aim of removing, exchanging or transporting the dead and wounded" constitute war crimes in international and non-international armed conflicts.⁸⁷⁸

811. The Criminal Code of Belarus provides that any "violation of truces, agreements on the suspension of hostilities or local arrangements concluded for the removal, exchange or transport of the wounded and dead left on the battlefield" is a war crime.⁸⁷⁹

812. Bolivia's Penal Code as amended provides that "anyone who violates treaties, truce or armistice concluded between the Nation and the enemy or between belligerent forces" commits a "crime against international law".⁸⁸⁰

813. Chile's Code of Military Justice punishes "anyone who, without justification, continues hostilities after having received the official information that peace, armistice or truce has been agreed with the enemy, violates any of these agreements or a capitulation".⁸⁸¹

814. Costa Rica's Penal Code as amended punishes any person "who violates the truce or armistice agreed with between the nation and an enemy country or belligerent forces".⁸⁸²

815. Ecuador's National Civil Police Penal Code punishes the members of the National Civil Police "who breach or violate a treaty, truce or armistice".⁸⁸³

816. Ecuador's Penal Code punishes "anyone who violates a truce or armistice concluded with the enemy, after it has been formally rendered public".⁸⁸⁴

⁸⁷⁵ Argentina, *Penal Code* (1984), Article 220.

⁸⁷⁶ Argentina, *Code of Military Justice as amended* (1951), Article 741.

⁸⁷⁷ Argentina, *Draft Code of Military Justice* (1998), Article 294, introducing a new Article 878 in the *Code of Military Justice as amended* (1951).

⁸⁷⁸ Azerbaijan, *Criminal Code* (1999), Article 116(9).

⁸⁷⁹ Belarus, *Criminal Code* (1999), Article 136(9).

⁸⁸⁰ Bolivia, *Penal Code as amended* (1972), Article 137.

⁸⁸¹ Chile, *Code of Military Justice as amended* (1951), Article 260.

⁸⁸² Costa Rica, *Penal Code as amended* (1970), Article 283.

⁸⁸³ Ecuador, *National Civil Police Penal Code* (1960), Article 117(6).

⁸⁸⁴ Ecuador, *Penal Code* (1971), Article 123.

817. El Salvador's Code of Military Justice punishes any "soldier who... violates a truce, armistice, capitulation or other agreement concluded with the enemy".⁸⁸⁵

818. Ethiopia's Penal Code punishes "whosoever, having been officially informed of an armistice or peace treaty duly concluded, contrary to orders given continues hostilities, or in any other way knowingly infringes one of the agreed conditions".⁸⁸⁶

819. Guatemala's Penal Code punishes "anyone who violates a truce or armistice concluded between Guatemala and a foreign power or between their belligerent forces".⁸⁸⁷

820. Under Hungary's Criminal Code as amended, "the person who infringes the conditions of armistice" is guilty, upon conviction, of a war crime.⁸⁸⁸

821. Italy's Law of War Decree as amended provides that in case of a violation of an armistice, the local commander can react as circumstances require. Only the supreme commander can denounce an armistice or order to resume hostilities.⁸⁸⁹ Hostile acts committed by individuals on their own initiative are not considered as violations of the armistice agreement, but punishment and indemnity can be demanded.⁸⁹⁰

822. Italy's Wartime Military Penal Code punishes any commander who, without justification, commits hostile acts against the enemy during a truce or an armistice, except in case of necessity.⁸⁹¹

823. Mexico's Code of Military Justice as amended punishes "anyone who, without justification... violates a truce, armistice, capitulation or other agreement concluded with the enemy, if, because of his conduct, hostilities are restarted".⁸⁹²

824. Under the Definition of War Crimes Decree of the Netherlands, the "commission, contrary to the conditions of a truce, of hostile acts or the incitement thereto" constitutes a war crime.⁸⁹³

825. Nicaragua's Military Penal Code punishes any "soldier who, without justification and after official notification, violates peace, armistice, truce or capitulation agreements".⁸⁹⁴

826. Peru's Code of Military Justice punishes any soldier who "violates an armistice, a truce,... a capitulation or any other legitimate agreement

⁸⁸⁵ El Salvador, *Code of Military Justice* (1934), Article 67.

⁸⁸⁶ Ethiopia, *Penal Code* (1957), Article 289.

⁸⁸⁷ Guatemala, *Penal Code* (1973), Article 373.

⁸⁸⁸ Hungary, *Criminal Code as amended* (1978), Section 162(1).

⁸⁸⁹ Italy, *Law of War Decree as amended* (1938), Article 81.

⁸⁹⁰ Italy, *Law of War Decree as amended* (1938), Article 82.

⁸⁹¹ Italy, *Wartime Military Penal Code* (1941), Article 170.

⁸⁹² Mexico, *Code of Military Justice as amended* (1933), Article 208(II).

⁸⁹³ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁸⁹⁴ Nicaragua, *Military Penal Code* (1996), Article 49.

concluded with another nation, or prolongs the hostilities after having received official notice of peace, truce or armistice".⁸⁹⁵

827. Peru's Penal Code punishes any person who violates a truce or armistice.⁸⁹⁶

828. Spain's Military Criminal Code punishes any soldier "who violates a suspension of arms, an armistice, a capitulation or another agreement concluded with the enemy".⁸⁹⁷

829. Spain's Penal Code punishes "anyone who violates a truce or an armistice concluded between the Spanish Nation and the enemy or between their belligerent forces".⁸⁹⁸

830. Switzerland's Military Criminal Code as amended punishes "anyone who continues hostilities, after having official knowledge of the conclusion of an armistice or of peace, [and] anyone who, in any other way, violates the conditions of an officially known armistice".⁸⁹⁹

831. Venezuela's Code of Military Justice as amended punishes "those who violate . . . truces or armistices".⁹⁰⁰

832. Venezuela's Revised Penal Code punishes "nationals and foreigners who, during a war between Venezuela and another Nation, violate a truce or armistice".⁹⁰¹

National Case-law

833. No practice was found.

Other National Practice

834. According to the Report on the Practice of China, the conduct of the Nationalist Government after a truce agreement was concluded with the Chinese Communist Party in January 1946 was perfidious. At the time, Mao Zedong reported that "Chiang Kai-Shek used [the] agreement as a disguise with a view to arranging a large scale military offensive".⁹⁰²

835. In 1984, during the Iran–Iraq War, the two belligerents concluded an agreement under the auspices of the UN Secretary-General not to attack cities and villages.⁹⁰³ However, Iraq alleged in a letter to the UN Secretary-General that Iran was using the agreement to concentrate armed forces in border towns.⁹⁰⁴

⁸⁹⁵ Peru, *Code of Military Justice* (1980), Article 91(2).

⁸⁹⁶ Peru, *Penal Code as amended* (1991), Article 340.

⁸⁹⁷ Spain, *Military Criminal Code* (1985), Article 72. ⁸⁹⁸ Spain, *Penal Code* (1995), Article 593.

⁸⁹⁹ Switzerland, *Military Criminal Code as amended* (1927), Article 113.

⁹⁰⁰ Venezuela, *Code of Military Justice as amended* (1998), Article 474(7).

⁹⁰¹ Venezuela, *Revised Penal Code* (2000), Article 156(1).

⁹⁰² Report on the Practice of China, 1997, Chapter 2.4, referring to Mao Zedong, To Shatter the Offensives of Jiang Jieshi by Way of Self-defence, 20 July 1946, *Selected Works of Mao Zedong*, Vol. 4, The People's Press, p. 1189.

⁹⁰³ UN Secretary-General, Note verbale dated 26 June 1984 addressed to Member States and Observer States that are States parties to the Geneva Conventions of 1949, UN Doc. S/16648, 26 June 1994.

⁹⁰⁴ Iraq, Letter dated 28 June 1984 to the UN Secretary-General, UN Doc. S/16649, 28 June 1984.

836. According to the Report on the Practice of Iraq, in a military communiqué issued during the Iran–Iraq War, Iraq stated that it regarded as perfidious an attack on its defensive line after the Iranian armed forces had announced that their military operations had come to an end.⁹⁰⁵

837. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY stated that “members of the so-called armed forces of Slovenia have used [each agreed upon cease-fire] to attack the Yugoslav People’s Army units, by bringing their own units in a more advantageous position, thus performing similar faithless procedures”.⁹⁰⁶

838. In 1995, the Minister of Foreign Affairs of the SFRY denounced the violation of an agreement whereby Serb troops, after handing over their heavy weapons, were to be allowed free passage by the Croatian army but were attacked instead.⁹⁰⁷

839. According to the Report on the Practice of the SFRY (FRY), during the conflict in the former Yugoslavia, the YPA cited attacks against its soldiers during an armistice as examples of perfidious conduct.⁹⁰⁸

840. In 1992, an ICRC report noted that a State denounced violations of a cease-fire agreed upon with another State.⁹⁰⁹

III. Practice of International Organisations and Conferences

United Nations

841. In 1984, with regard to the Iran–Iraq War, the UN Secretary-General stated that he was “deeply concerned that allegations have been made that civilian population centres are being used for concentration of military forces. If this were indeed the case, such actions would constitute a violation of the spirit of my appeal and of basic standards of warfare that the international community expects to be observed.”⁹¹⁰

Other International Organisations

842. No practice was found.

International Conferences

843. No practice was found.

⁹⁰⁵ Report on the Practice of Iraq, 1998, Chapter 2.4, referring to Military communiqué, 1 March 1987.

⁹⁰⁶ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 5.

⁹⁰⁷ SFRY (FRY), Appeal by the Yugoslav Federal Minister of Foreign Affairs, 7 August 1995.

⁹⁰⁸ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.4, referring to *The Truth about the Armed Conflict in Slovenia*, Narodna armija, Belgrade, 1991, p. 60.

⁹⁰⁹ ICRC archive document.

⁹¹⁰ UN Secretary-General, Messages dated 29 June 1984 to the President of Iran and to the President of Iraq, UN Doc. S/16663, 6 July 1984, p. 1.

IV. Practice of International Judicial and Quasi-judicial Bodies

844. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

845. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included the “violation of armistices, suspensions of fire or local arrangements concluded for the removal, exchange and transport of the wounded and the dead left on the battlefield”, when committed in international and non-international armed conflicts, in its list of war crimes to be subject to the jurisdiction of the Court.⁹¹¹

VI. Other Practice

846. No practice was found.

I. Perfidy

General

I. Treaties and Other Instruments

Treaties

847. Article 37(1) AP I provides that “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, shall constitute perfidy”. Article 37 AP I was adopted by consensus.⁹¹²

848. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “acts inviting the confidence of the adversary with intent to betray that confidence are deemed to constitute perfidy”.⁹¹³ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.⁹¹⁴

Other Instruments

849. Article 15 of the 1863 Lieber Code provides that:

Military necessity admits . . . of such deception as does not involve the breaking of good faith either positively pledged, regarding agreements entered into during

⁹¹¹ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(ix) and 3(xvii).

⁹¹² CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁹¹³ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁹¹⁴ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

the war, or supposed by the modern law of war to exist. Men who take up arms against one another in public war do not cease on this account to be moral beings, responsible to one another and to God.

850. Article 16 of the 1863 Lieber Code provides that “military necessity . . . admits of deception, but disclaims acts of perfidy”.

851. Article 4 of the 1880 Oxford Manual states that belligerents “are to abstain especially . . . from all perfidious . . . acts”.

852. Article 15 of the 1913 Oxford Manual of Naval War states that “methods . . . which involve treachery are forbidden”.

853. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 37 AP I.

854. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 37 AP I.

855. Paragraph 111 of the 1994 San Remo Manual states that “perfidy is prohibited. Acts inviting the confidence of an adversary to lead it to believe that it is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, constitute perfidy.”

II. National Practice

Military Manuals

856. Argentina’s Law of War Manual (1969) provides that “the use of ruses and stratagems of war shall be legitimate as long as they do not imply the recourse to treason or to perfidy”, which are violations of the principle of good faith.⁹¹⁵

857. Argentina’s Law of War Manual (1989) states that:

Those acts are perfidious, which, relying on the good faith of an adversary with the intention to betray him, lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law . . .

The prohibition of employing perfidious methods does not include stratagems.⁹¹⁶

858. Australia’s Commanders’ Guide provides that:

Acts which constitute perfidy are those inviting the confidence of an adversary, leading him to believe that he is entitled or obliged to accord protection under the rules of international law, with an intent to betray that confidence. Perfidious conduct is outlawed by LOAC and therefore, either a person who engages or a commander who orders or acquiesces in perfidious conduct may be prosecuted.⁹¹⁷

⁹¹⁵ Argentina, *Law of War Manual* (1969), § 1.017.

⁹¹⁶ Argentina, *Law of War Manual* (1989), § 1.05(2) and (3).

⁹¹⁷ Australia, *Commanders’ Guide* (1994), § 502, see also § 826 (naval warfare) and § 902 (land warfare).

859. Australia's Defence Force Manual states that:

Perfidy is forbidden. Acts which constitute perfidy are those inviting the confidence of an adversary, thus leading that adversary to believe that there is an entitlement, or an obligation, to accord protection provided under LOAC, with an intent to betray that confidence.⁹¹⁸

860. Belgium's Law of War Manual states that "perfidious acts are acts which abuse the confidence of the adversary so that he thinks he is facing a friend or a situation protected by the law of war".⁹¹⁹

861. Belgium's Teaching Manual for Officers provides that acts of perfidy are prohibited. It describes perfidy as "ruses aimed at neutralising the enemy (capturing, injuring or killing him) by leading him to believe that he has an obligation to respect a rule of humanitarian law".⁹²⁰

862. Belgium's Teaching Manual for Soldiers defines perfidy as "any act intended to deceive or abuse the enemy's confidence by inviting him to afford humanitarian protection and to respect a humanitarian rule".⁹²¹

863. Benin's Military Manual states that "it is prohibited to use perfidy" and adds that "perfidy . . . consists of committing a hostile act under the cover of a legal protection".⁹²²

864. Cameroon's Instructors' Manual stresses that "perfidy is condemned . . . by the Law of War".⁹²³ It describes perfidy "claiming an international protection with an intent to betray the enemy".⁹²⁴ It also provides the same definition of perfidy as contained in Article 37(1) AP I.⁹²⁵

865. Canada's LOAC Manual states that:

Acts inviting the confidence of adversaries and leading them to believe that they are entitled to protection or are obliged to grant protection under the LOAC, *with intent to betray that confidence*, constitute perfidy. In other words, perfidy consists of committing a hostile act under the cover of a legal protection.⁹²⁶ [emphasis in original]

866. Canada's Code of Conduct provides that "perfidy is a war crime".⁹²⁷

867. Under Colombia's Instructors' Manual, the instructor must explain what perfidy is, i.e., "conduct which is prohibited by International Humanitarian Law".⁹²⁸

⁹¹⁸ Australia, *Defence Force Manual* (1994), § 703.

⁹¹⁹ Belgium, *Law of War Manual* (1983), p. 32.

⁹²⁰ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 34.

⁹²¹ Belgium, *Teaching Manual for Soldiers* (undated), p. 19, footnote (1).

⁹²² Benin, *Military Manual* (1995), Fascicule III, p. 13.

⁹²³ Cameroon, *Instructors' Manual* (1992), p. 149, § 531.1.

⁹²⁴ Cameroon, *Instructors' Manual* (1992), p. 30, § 131 and p. 89, § 222.

⁹²⁵ Cameroon, *Instructors' Manual* (1992), p. 63, § 234.

⁹²⁶ Canada, *LOAC Manual* (1999), p. 6-2, § 8 (land warfare), p. 7-2, § 16 (air warfare) and pp. 8-10 and 8-11, § 80 (naval warfare).

⁹²⁷ Canada, *Code of Conduct* (2001), Rule 10, § 10.

⁹²⁸ Colombia, *Instructors' Manual* (1999), p. 31.

868. Croatia's LOAC Compendium lists perfidy as a prohibited method of warfare.⁹²⁹

869. Croatia's Commanders' Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy".⁹³⁰

870. Ecuador's Naval Manual states that:

The use of unlawful deceptions is called "perfidy". Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence.⁹³¹

871. France's LOAC Summary Note prohibits perfidy. It does not define "perfidy" as such, but states that "it is forbidden to feign a protected status to invite the confidence of the enemy".⁹³²

872. France's LOAC Teaching Note prohibits the recourse to perfidy.⁹³³

873. France's LOAC Manual stresses that "contrary to ruses of war, treachery is prohibited by the law of armed conflicts when it leads to the use of perfidious means, *i.e.* inviting the good faith of the adversary to lead him to believe that he is entitled to receive, or the obligation to accord, the protection provided for by the law of armed conflict".⁹³⁴ It considers that perfidy is a prohibited method of warfare.⁹³⁵ It also incorporates the definition of perfidy contained in Article 37 AP I.⁹³⁶ According to the manual, "there are two elements which constitute perfidy: a fraudulent intention to kill, injure or capture an enemy, and a will to invite his good faith. When a perfidious act causes the death or serious physical injury to the adversary, it constitutes a war crime."⁹³⁷

874. Germany's Soldiers' Manual defines perfidious acts as those "by which the adversary is induced to believe that there is a situation affording protection under public international law, so that he may be attacked by surprise".⁹³⁸

875. Germany's Military Manual provides that "perfidy is prohibited. The term 'perfidy' refers to acts misleading the adverse party to believe that there is a situation affording protection under international law."⁹³⁹

876. Hungary's Military Manual considers perfidy as a "prohibited method" of warfare.⁹⁴⁰ It states that perfidy is "to falsely claim protected status, thereby inviting the confidence of the enemy".⁹⁴¹

877. Israel's Manual on the Laws of War states that:

⁹²⁹ Croatia, *LOAC Compendium* (1991), p. 40.

⁹³⁰ Croatia, *Commanders' Manual* (1992), § 46.

⁹³¹ Ecuador, *Naval Manual* (1989), § 12.1.2.

⁹³² France, *LOAC Summary Note* (1992), § 4.4.

⁹³³ France, *LOAC Teaching Note* (2000), p. 3.

⁹³⁴ France, *LOAC Manual* (2001), p. 123. ⁹³⁵ France, *LOAC Manual* (2001), p. 85.

⁹³⁶ France, *LOAC Manual* (2001), p. 123, see also p. 93.

⁹³⁷ France, *LOAC Manual* (2001), p. 94, see also p. 85.

⁹³⁸ Germany, *Soldiers' Manual* (1991), p. 2.

⁹³⁹ Germany, *Military Manual* (1992), § 472, see also § 1018 (naval warfare).

⁹⁴⁰ Hungary, *Military Manual* (1992), p. 64. ⁹⁴¹ Hungary, *Military Manual* (1992), p. 63.

The distinction between stratagem (which is allowed) and perfidious or treacherous means is that the latter are defined as acts designed to cause the enemy to think that it is entitled to the protection extended by the law of war, or to create a situation in which the enemy is obliged to trust the adversary with the intent of betraying that trust.⁹⁴²

878. Under Italy's LOAC Elementary Rules Manual, "it is prohibited to feign a protected status by inviting the confidence of the enemy".⁹⁴³

879. Kenya's LOAC Manual defines perfidy as "tricking an enemy into believing that he is entitled to, or is required to be given, protection under international law, with intent to betray that confidence".⁹⁴⁴

880. South Korea's Military Law Manual provides that resort to perfidy is prohibited.⁹⁴⁵

881. South Korea's Operational Law Manual states that perfidy against humanitarian principles is not permitted.⁹⁴⁶

882. Madagascar's Military Manual provides that "it is prohibited to feign a protected status thereby inviting the confidence of the enemy".⁹⁴⁷

883. The Military Manual of the Netherlands provides that:

Treacherous behaviour (also known as perfidy) is . . . prohibited . . . Treacherous behaviour consists of acts which are intended to deceive the enemy in order for him to believe that he is faced with a situation which is protected by the humanitarian law of war . . . Treacherous means misusing the protection given by the law of war.⁹⁴⁸

884. Under the Military Handbook of the Netherlands, "treachery means misusing the protection provided by the law of war".⁹⁴⁹ It is a prohibited method of warfare "to perform treacherous acts".⁹⁵⁰

885. New Zealand's Military Manual provides that:

Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, shall constitute perfidy . . . The definition of perfidy codifies customary law.⁹⁵¹

886. Nigeria's Military Manual states that:

A commander in his desire to fulfil his mission shall not mask his intentions and action from the enemy so as to induce the enemy to react in a manner prejudicial

⁹⁴² Israel, *Manual on the Laws of War* (1998), p. 56.

⁹⁴³ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

⁹⁴⁴ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

⁹⁴⁵ South Korea, *Military Law Manual* (1996), p. 88.

⁹⁴⁶ South Korea, *Operational Law Manual* (1996), p. 135.

⁹⁴⁷ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

⁹⁴⁸ Netherlands, *Military Manual* (1993), pp. IV-1 and IV-2.

⁹⁴⁹ Netherlands, *Military Handbook* (1995), p. 7-36.

⁹⁵⁰ Netherlands, *Military Handbook* (1995), p. 7-40.

⁹⁵¹ New Zealand, *Military Manual* (1992), § 502(5), including footnote 2 (land warfare), see also § 713(2) (naval warfare) and § 611(2) (air warfare).

to his interests. Thus, to be consistent with the law of war, deceptions shall follow the distinction between permitted ruses and prohibited perfidy [perfidy].⁹⁵²

887. Nigeria's Manual on the Laws of War provides that stratagems and ruses of war "are permissible provided they do not involve treachery".⁹⁵³

888. Russia's Military Manual considers that perfidy is a prohibited method of warfare.⁹⁵⁴

889. South Africa's LOAC Manual provides that "it is not permissible to attempt to deceive the enemy by abusing the LOAC or misusing the various protections it affords . . . Such actions are referred to as 'perfidy' and constitute grave breaches of the LOAC."⁹⁵⁵

890. South Africa's Medical Services Military Manual prohibits perfidy.⁹⁵⁶

891. Spain's Field Regulations provides that perfidy is not permitted.⁹⁵⁷

892. Spain's LOAC Manual provides the same definition of perfidy as the one contained in Article 37(1) AP I.⁹⁵⁸ It further states that "perfidy consists in committing a hostile act under the cover of a legal protection".⁹⁵⁹ The manual also states that "it is prohibited to feign a protected status by inviting the confidence of the enemy".⁹⁶⁰

893. Sweden's IHL Manual considers that the prohibition of perfidy as contained in Article 37 AP I is part of customary international law.⁹⁶¹ It states that:

Sweden and several other countries wished the [prohibition of perfidy] to be inserted in Additional Protocol II as well, since perfidy is probably equally common in internal conflicts. The majority were against this, however, the main reason being that, in conflicts of this type, particular difficulties may arise in determining exactly what may be considered perfidy.

The concept of perfidy, or perfidious conduct which is a more adequate expression, is defined as acts inviting the confidence of an adversary giving the acting party a legally protected status. This protection is abused in order to kill, injure or capture the adversary's soldiers. Perfidy thus means that one party deliberately and on false grounds invites the confidence of the other in order then to betray this confidence by acts of violence. It should be added that perfidy, as defined in Article 37 [AP I], refers to acts against persons, but does not include sabotage or the destruction of property . . .

Only where protected status is employed for killing, injuring or capturing the adversary is the act considered as perfidy . . .

⁹⁵² Nigeria, *Military Manual* (1994), p. 42.

⁹⁵³ Nigeria, *Manual on the Laws of War* (undated), § 14.

⁹⁵⁴ Russia, *Military Manual* (1990), § 5(e).

⁹⁵⁵ South Africa, *LOAC Manual* (1996), § 34(c).

⁹⁵⁶ South Africa, *Medical Services Military Manual* (undated), § 39.

⁹⁵⁷ Spain, *Field Regulations* (1882), § 862.

⁹⁵⁸ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(1), see also § 7.3.c.

⁹⁵⁹ Spain, *LOAC Manual* (1996), Vol. I, § 5.3.c.

⁹⁶⁰ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

⁹⁶¹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

Accusations of perfidy are always judged to be extremely grave, since a crime against Article 37 [AP I] shall according to the bases of Additional Protocol I be viewed as a grave breach of international humanitarian law.⁹⁶²

894. Switzerland's Basic Military Manual states that "ruses of war based on treachery and perfidy are prohibited".⁹⁶³

895. Togo's Military Manual states that "it is prohibited to use perfidy". and adds that "perfidy... consists of committing a hostile act under the cover of a legal protection".⁹⁶⁴

896. The UK Military Manual states that:

Good faith, as expressed in the observance of promises, is essential in war, for without it hostilities could not be terminated with any degree of safety short of the total destruction of one of the contending parties.

...

The borderline between legitimate ruses and forbidden treachery has varied at different times, and it is difficult to lay down hard and fast rules in the matter. Many of the doubtful cases, however, which arose at a time when, from the nature of their weapons, troops could only engage at close range, can now seldom or never occur.⁹⁶⁵

The manual also notes, in connection with the requirements to be granted the status of combatant, that irregular troops "should have been warned against the employment of treachery".⁹⁶⁶

897. The UK LOAC Manual states that treachery "means tricking an enemy into believing that he is entitled to, or required to give, protection under international law, with intent to betray that confidence".⁹⁶⁷

898. The US Field Manual states that:

The line of demarcation between legitimate ruses and forbidden acts of perfidy is sometimes indistinct... It would be an improper practice to secure an advantage of the enemy by deliberate lying or misleading conduct which involves a breach of faith, or when there is a moral obligation to speak the truth...

Treachery or perfidious conduct in war is forbidden because it destroys the basis for a restoration of peace short of the complete annihilation of one belligerent by the other.⁹⁶⁸

899. The US Air Force Pamphlet states that:

Perfidy or treachery involves acts inviting the confidence of the adversary that he is entitled to protection or is obliged to accord protection under international law, combined with intent to betray that confidence... Like ruses perfidy involves simulation, but it aims at falsely creating a situation in which the adversary, under international law, feels obliged to take action or abstain from taking action, or

⁹⁶² Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, pp. 28–30.

⁹⁶³ Switzerland, *Basic Military Manual* (1987), Article 39(1).

⁹⁶⁴ Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁹⁶⁵ UK, *Military Manual* (1958), §§ 308 and 310. ⁹⁶⁶ UK, *Military Manual* (1958), § 95.

⁹⁶⁷ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a), see also Annex A, p. 46, § 4.

⁹⁶⁸ US, *Field Manual* (1956), § 50.

because of protection under international law neglects to take precautions which are otherwise necessary . . . In addition, perfidy tends to destroy the basis for restoration of peace and causes the conflict to degenerate into savagery.⁹⁶⁹

900. The US Instructor's Guide notes that "the law of war prohibits treacherous acts".⁹⁷⁰

901. The US Naval Handbook states that:

The use of unlawful deceptions is called "perfidy". Acts of perfidy are deceptions designed to invite the confidence of the enemy to lead him to believe that he is entitled to, or is obliged to accord, protected status under the law of armed conflict, with the intent to betray that confidence.⁹⁷¹

902. The YPA Military Manual of the SFRY (FRY) prohibits perfidy and defines it as "confidence-betraying ruses".⁹⁷²

National Legislation

903. In an Article entitled "Perfidy" under the Draft Amendments to the Penal Code of El Salvador, the person "who, in time of international or internal armed conflict, simulates the status of protected person, with the view to deceive or attack the adversary" commits a crime against humanity.⁹⁷³

904. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 37(1) AP I, is a punishable offence.⁹⁷⁴

905. Kyrgyzstan's Emblem Law provides that "recourse to perfidy means inviting, with intent to deceive it, the good faith of the adversary to lead him to believe that he was entitled to receive, or obliged to accord, the protection provided for under the rules of international humanitarian law".⁹⁷⁵

906. Moldova's Emblem Law defines "perfidious use" as "acts inviting the confidence of an adversary, with intent to betray it, to lead him to believe that he was entitled to, or was obliged to accord, protection provided for under the rules of international humanitarian law".⁹⁷⁶

907. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁹⁷⁷

National Case-law

908. No practice was found.

⁹⁶⁹ US, *Air Force Pamphlet* (1976), § 8-3(a).

⁹⁷⁰ US, *Instructor's Guide* (1985), p. 8.

⁹⁷¹ US, *Naval Handbook* (1995), § 12.1.2.

⁹⁷² SFRY (FRY), *YPA Military Manual* (1988), §§ 104 and 108.

⁹⁷³ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Perfidy".

⁹⁷⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁹⁷⁵ Kyrgyzstan, *Emblem Law* (2000), Article 10.

⁹⁷⁶ Moldova, *Emblem Law* (1999), Article 17(2).

⁹⁷⁷ Norway, *Military Penal Code as amended* (1902), § 108(b).

Other National Practice

909. During the Algerian war of independence, the use by Algerian combatants of perfidious methods of warfare was prohibited. Perfidy was understood to mean methods that aggravated suffering without having a direct effect on the issue of the struggle. The Report on the Practice of Algeria notes, however, that there were instances in which acts considered to be perfidious were committed, but it concludes that such acts were rare and that they did not affect a general line of conduct of proscribing perfidy.⁹⁷⁸

910. At the CDDH, Chile stated that it had abstained from voting on draft Article 21 AP II (which was dropped in the final text) because it found the wording too vague. However, it agreed that the prohibition of perfidy as established in AP I should also be included in the protocol relative to non-international conflicts.⁹⁷⁹

911. The Report on the Practice of Colombia refers to a draft internal working paper in which the Colombian government stated that perfidy was prohibited under IHL.⁹⁸⁰

912. According to the Report on the Practice of Iraq, perfidy and treachery are absolutely prohibited.⁹⁸¹ In the reply by the Iraqi Ministry of Defence to a questionnaire, mentioned in the report, reference is made to Article 37 AP I.⁹⁸²

913. At the CDDH, Peru deplored the elimination of numerous articles and paragraphs in the final version of AP II, especially the one relating to the prohibition of perfidy.⁹⁸³

914. The Report on the Practice of the Philippines notes that officers of the Philippine armed forces make the distinction between ruses of war and acts of perfidy, adding that US military manuals are usually followed.⁹⁸⁴

915. A training video on IHL produced by the UK Ministry of Defence describes as “complicated” the difference between ruses and treachery.⁹⁸⁵

916. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that its

⁹⁷⁸ Report on the Practice of Algeria, 1997, Chapter 2.4, referring to *El Moudjahid*, Vol. 1, p. 16.

⁹⁷⁹ Chile, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.59, 10 May 1977, p. 217, § 47.

⁹⁸⁰ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled “El Derecho Internacional Humanitario”, § 5.

⁹⁸¹ Report on the Practice of Iraq, 1998, Chapter 2.4.

⁹⁸² Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.4.

⁹⁸³ Peru, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.56, 8 June 1977, p. 226, § 161.

⁹⁸⁴ Report on the Practice of the Philippines, 1997, Interview with a naval officer, 5 March 1997, Chapter 2.4.

⁹⁸⁵ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.4.

practice was consistent with the definition and prohibition of perfidy contained in Article 37 AP I.⁹⁸⁶

917. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Perfidy is prohibited by the law of war. Perfidy is defined in Article 37(1) of [AP I] as:

Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the law [of war], with intent to betray that confidence . . .

Perfidious acts are prohibited on the basis that perfidy may damage mutual respect for the law of war, may lead to unnecessary escalation of the conflict, may result in the injury or death of enemy forces legitimately attempting to surrender or discharging their humanitarian duties, or may impede the restoration of peace . . .

However, there does not appear to have been any centrally directed Iraqi policy to carry out acts of perfidy. The fundamental principles of the law of war applied to Coalition and Iraqi forces throughout the war.⁹⁸⁷

918. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the Ministry of Defence of the SFRY included the following example: "Faithless behaviour. Throughout the overall armed conflict members of the so-called armed forces of Slovenia have applied faithless and perfidious behaviour."⁹⁸⁸

III. Practice of International Organisations and Conferences

919. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

920. In the interlocutory appeal in the *Tadić case* in 1995, the ICTY referred specifically to a case of perfidy to illustrate that general principles of customary international law in areas relating to methods of warfare applicable in international armed conflicts had evolved to be applied in non-international armed conflicts as well.⁹⁸⁹

⁹⁸⁶ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(j), Report on US Practice, 1997, Chapter 2.8.

⁹⁸⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

⁹⁸⁸ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 5.

⁹⁸⁹ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 125.

V. Practice of the International Red Cross and Red Crescent Movement

921. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that perfidy consists of “committing a hostile act under the cover of a legal protection”.⁹⁹⁰

922. At the CE (1972), the ICRC stated, with regard to a certain number of articles, including the article on perfidy, that it was “anxious to maintain the same kind of arrangements with respect to international and to non-international armed conflicts”.⁹⁹¹

923. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “perfidy”, when committed in an international or a non-international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.⁹⁹²

VI. Other Practice

924. Rule A4 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IIHL, defines perfidy in the context of non-international armed conflicts as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable to non-international armed conflicts, with intent to betray that confidence”.⁹⁹³

Killing, injuring or capturing an adversary by resort to perfidy

I. Treaties and Other Instruments

Treaties

925. Article 23(b) of the 1899 HR provides that “it is especially prohibited . . . to kill or wound treacherously individuals belonging to the hostile nation or army”.

926. Article 23(b) of the 1907 HR provides that “it is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army”.

⁹⁹⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 408.

⁹⁹¹ ICRC, Statement at the CE (1972), *Report on the Work of the Conference*, Vol. I, p. 104, § 2.384.

⁹⁹² ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(vi) and 3(xiv).

⁹⁹³ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A4, *IRRC*, No. 278, pp. 390–391.

927. Article 37(1) AP I provides that “it is prohibited to kill, injure or capture an adversary by resort to perfidy”. Article 37 AP I was adopted by consensus.⁹⁹⁴

928. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “it is forbidden to kill, injure or capture an adversary by resort to perfidy”.⁹⁹⁵ This proposal was adopted in Committee III of the CDDH by 21 votes in favour, 15 against and 41 abstentions.⁹⁹⁶ Eventually, however, it was deleted by consensus in the plenary.⁹⁹⁷

929. Under Article 8(2)(b)(xi) of the 1998 ICC Statute, “killing or wounding treacherously individuals belonging to the hostile nation or army” is a war crime in international armed conflicts. Under Article 8(2)(e)(ix), “killing or wounding treacherously a combatant adversary” is a war crime in non-international armed conflicts.

Other Instruments

930. Article 101 of the 1863 Lieber Code provides that “the common law of war allows even capital punishment for clandestine or treacherous attempts to injure an enemy, because they are so dangerous, and it is difficult to guard against them”.

931. Article 13(b) of the 1874 Brussels Declaration prohibits “murder by treachery of individuals belonging to the hostile nation or army”.

932. Article 8 of the 1880 Oxford Manual prohibits the making of “treacherous attempts upon the life of an enemy; as for example by keeping assassins in pay”.

933. Article 15 of the 1913 Oxford Manual of Naval War states that “it is forbidden . . . to kill or wound treacherously individuals belonging to the opposite side”.

934. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY (FRY) requires that hostilities be conducted in accordance with Article 37 AP I.

935. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 37 AP I.

936. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xi), “killing or wounding treacherously individuals belonging to the hostile nation or army” is a war crime in international armed conflicts. Under Section 6(1)(e)(ix), “killing or wounding treacherously a combatant adversary” is a war crime in non-international armed conflicts.

⁹⁹⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

⁹⁹⁵ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

⁹⁹⁶ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.59, 10 May 1977, p. 213, § 20.

⁹⁹⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 128.

II. National Practice

Military Manuals

937. Argentina's Law of War Manual provides that "it is prohibited to employ perfidious methods to kill, injure or capture an adversary".⁹⁹⁸

938. Australia's Defence Force Manual states that:

Assassination is the sudden or secret killing by treacherous means of an individual who is not a combatant, by premeditated assault, for political or religious reasons. Assassination is unlawful. In addition, it is prohibited to put a price on the head of an enemy individual. Any offer for an enemy "dead or alive" is forbidden. If prior information of an intended assassination or other act of treachery should reach the party on whose behalf the act is committed, that party should endeavour to prevent its occurrence.

The prohibition against assassination is not to be confused with attacks on individual members of the enemy's armed forces as those persons are combatants and are legitimate military targets.⁹⁹⁹

939. Australia's Commanders' Guide states that "it is generally recognised by the international community that assassination of civilian political figures and issuance of orders that an enemy is to be taken 'dead or alive' constitutes treacherous behaviour and is, therefore, proscribed by LOAC".¹⁰⁰⁰ It further states that:

Assassination is the killing or wounding of a selected individual behind the line of battle by enemy agents or unlawful combatants, and is prohibited. In addition, the proscription, outlawing, putting a price on the head of an enemy individual or any offer for an enemy "dead or alive" is forbidden. If prior information of an intended assassination or other act of treachery should reach the party on whose behalf the act is to be committed, that party should endeavour to prevent its occurrence.

It is not forbidden to send a detachment of individual members of the armed forces to kill, by sudden attack, members or a member of the enemy armed forces.¹⁰⁰¹

940. Belgium's Law of War Manual provides that "killing or wounding by treachery is forbidden".¹⁰⁰²

941. Cameroon's Instructors' Manual states that it is prohibited "to kill, wound or capture an adversary by resort to perfidy".¹⁰⁰³

942. Canada's LOAC Manual states that "it is prohibited to kill, injure or capture adversaries by resort to perfidy".¹⁰⁰⁴ It further provides that "treacherously killing or wounding any individual belonging to the hostile nation or army" constitutes a war crime.¹⁰⁰⁵ The manual also states that:

⁹⁹⁸ Argentina, *Law of War Manual* (1989), § 1.05(1).

⁹⁹⁹ Australia, *Defence Force Manual* (1994), §§ 724 and 725.

¹⁰⁰⁰ Australia, *Commanders' Guide* (1994), § 512.

¹⁰⁰¹ Australia, *Commanders' Guide* (1994), §§ 919 and 920.

¹⁰⁰² Belgium, *Law of War Manual* (1983), p. 31.

¹⁰⁰³ Cameroon, *Instructors' Manual* (1992), p. 109, § 421.1.

¹⁰⁰⁴ Canada, *LOAC Manual* (1999), p. 6-2, § 8 (land warfare), p. 7-2, § 16 (air warfare) and p. 8-10, § 80 (naval warfare).

¹⁰⁰⁵ Canada, *LOAC Manual* (1999), p. 16-3, § 20(b).

Assassination is prohibited. Assassination means the killing or wounding of a selected non-combatant for a political or religious motive. It is not forbidden, however, to send a detachment or individual members of the armed forces to kill, by sudden attack, a person who is a combatant.

If prior information of an intended assassination should reach the party on whose behalf the act is to be committed, that party should make the utmost effort to prevent its being carried out.

It is forbidden to put a price on the head of an enemy individual or to offer a bounty for an enemy "dead of alive".¹⁰⁰⁶

943. France's LOAC Manual states that "it is prohibited to injure, kill or capture [an adversary] by resort to perfidy". This may constitute a war crime.¹⁰⁰⁷

944. Indonesia's Military Manual provides that "it is prohibited to kill or injure the enemy by perfidy".¹⁰⁰⁸

945. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that "as a basic policy, the IDF prohibits the resort to perfidy to kill, injure or capture an adversary".¹⁰⁰⁹

946. Israel's Manual on the Laws of War gives the following example of perfidy: "An attempt on the lives of enemy leaders (civilian or military) is forbidden. As a rule, it is forbidden to single out a specific person on the adversary's side and request his death (whether by dispatching an assassin or by offering an award for his liquidation)."¹⁰¹⁰

947. Italy's IHL Manual provides that is prohibited to kill or injure an enemy by treachery.¹⁰¹¹

948. Kenya's LOAC Manual states that "it is forbidden to kill or [wound] an enemy by treachery".¹⁰¹²

949. The Military Manual of the Netherlands states that "the exact formulation of the rule is that it is prohibited to kill, injure or capture an adversary in a treacherous manner".¹⁰¹³

950. The Military Handbook of the Netherlands states that "it is prohibited to kill, injure or capture by means of treachery".¹⁰¹⁴

951. New Zealand's Military Manual states that "it is prohibited to kill, injure or capture an adversary by resort to perfidy".¹⁰¹⁵ It further states that "the treacherous killing or wounding of any individual belonging to the hostile nation or army" constitutes a war crime.¹⁰¹⁶ The manual also states that:

¹⁰⁰⁶ Canada, *LOAC Manual* (1999), p. 6-3, §§ 25-27.

¹⁰⁰⁷ France, *LOAC Manual* (2001), p. 47, see also p. 85.

¹⁰⁰⁸ Indonesia, *Military Manual* (1982), § 103.

¹⁰⁰⁹ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹⁰¹⁰ Israel, *Manual on the Laws of War* (1998), p. 57.

¹⁰¹¹ Italy, *IHL Manual* (1991), Vol. I, § 8(2).

¹⁰¹² Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

¹⁰¹³ Netherlands, *Military Manual* (1993), p. IV-2.

¹⁰¹⁴ Netherlands, *Military Handbook* (1995), p. 7-36.

¹⁰¹⁵ New Zealand, *Military Manual* (1992), §§ 502(5) (land warfare) and 713(2) (naval warfare).

¹⁰¹⁶ New Zealand, *Military Manual* (1992), § 1704(2)(b).

Assassination, that is, the killing or wounding of a selected individual behind the line of battle by enemy agents or unlawful combatants is prohibited. In addition, the proscription or outlawing or the putting of a price on the head of an enemy individual or any offer for an enemy “dead or alive” is forbidden. If prior information of an intended assassination or other act of treachery should reach the Party on whose behalf the act is to be committed, that Party should endeavour to prevent its being carried out.¹⁰¹⁷

952. Under Nigeria’s Military Manual, it is forbidden “to kill or wound treacherously individuals belonging to the hostile nation’s army”.¹⁰¹⁸

953. Under Nigeria’s Soldiers’ Code of Conduct it is forbidden “to kill or wound treacherously individuals belonging to the hostile nation or army”.¹⁰¹⁹

954. Romania’s Soldiers’ Manual prohibits “the killing, wounding or capture of an adversary by acts of perfidy, committed with the intent to deceive his good faith and to make him believe that he is entitled to receive, or has the obligation to accord, the protection provided by the rules of international humanitarian law”.¹⁰²⁰

955. Russia’s Military Manual provides that “killing or wounding a person belonging to enemy troops by resort to perfidy” is a prohibited method of warfare.¹⁰²¹

956. Spain’s LOAC Manual states that “it is prohibited to kill, injure or capture an adversary by resort to perfidy. Perfidy consists in committing a hostile act under the cover of a legal protection.”¹⁰²²

957. Sweden’s IHL Manual affirms that “under the provisions of the [1907 HR] it is prohibited to kill or injure an enemy by resort to perfidy”.¹⁰²³

958. Switzerland’s Basic Military Manual provides that “it is prohibited to kill or injure by treachery individuals belonging to the enemy nation or army”. It also states that “it is not permitted to place a price on the head of an enemy military or civil leader”.¹⁰²⁴

959. The UK Military Manual states that “it is expressly forbidden by the [1907 HR] to kill or wound by treachery individuals belonging to the opposing State or army”.¹⁰²⁵ It also states that:

Assassination, the killing or wounding of a selected individual behind the line of battle by enemy agents or partisans, and the killing or wounding by treachery of individuals belonging to the opposing nation or army, are not lawful acts of war. The perpetrator of such an act has to claim to be treated as a combatant, but should

¹⁰¹⁷ New Zealand, *Military Manual* (1992), § 507.

¹⁰¹⁸ Nigeria, *Military Manual* (1994), p. 39, § 5(l)(ii).

¹⁰¹⁹ Nigeria, *Soldiers’ Code of Conduct* (undated), § 12(b).

¹⁰²⁰ Romania, *Soldiers’ Manual* (1991), pp. 34 and 35.

¹⁰²¹ Russia, *Military Manual* (1990), § 5(a).

¹⁰²² Spain, *LOAC Manual* (1996), Vol. I, § 5.3.c.

¹⁰²³ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, pp. 28 and 29.

¹⁰²⁴ Switzerland, *Basic Military Manual* (1987), Article 18, including commentary.

¹⁰²⁵ UK, *Military Manual* (1958), § 311.

be put on trial as a war criminal. If prior information of an intended assassination or other act of treachery should reach the government on whose behalf the act is to be committed, that government should endeavour to prevent its being carried out.

...

It is not forbidden to send a detachment or individual members of the armed forces to kill, by sudden attack, members or a member of the enemy armed forces.

...

In view of the prohibition of assassination, the proscription or outlawing or the putting of a price on the head of an enemy individual or any offer for an enemy "dead or alive" is forbidden.

...

The prohibition extends to offers of rewards for the killing or wounding of all enemies, or of a class of enemy persons, *e.g.*, officers . . . Offers of rewards for the capture unharmed of enemy personnel generally or of particular enemy personnel would seem to be lawful . . .

How far do the above rules apply to armed conflicts not of an international character occurring in the territory of a State, *e.g.*, a civil war or large scale armed insurrection? The acts which are prohibited in such conflicts are those set out in common Art. 3 of the 1949 [Geneva] Conventions, see paras. 7 and 8. Para (1) (a) of that article forbids "murder of all kinds" in respect of persons who do not take an active part in the hostilities and those members of armed forces who have laid down their arms or who are *hors de combat*. If a government or military commander offers rewards for all or individual armed insurgents killed or wounded by the forces engaged in quelling the insurrection, such offers are open to the same objection as those set out above in respect of hostilities between belligerents and are probably unlawful.¹⁰²⁶

960. The UK LOAC Manual provides that "it is forbidden . . . to kill or wound an enemy by treachery".¹⁰²⁷

961. The US Field Manual states that:

It is especially forbidden to kill or wound treacherously individuals belonging to the hostile nation or army . . .

[Article 23(b) of the 1907 HR] is construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy "dead or alive". It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.¹⁰²⁸

962. The US Air Force Pamphlet provides that "it is especially forbidden . . . to kill or wound treacherously individuals belonging to the hostile nation or army".¹⁰²⁹ It also states that:

Article 23(b) [of the 1907] HR . . . prohibits the killing or wounding treacherously of individuals belonging to a hostile nation or army, whether they are combatants or

¹⁰²⁶ UK, *Military Manual* (1958), § 115, including footnote 2, and § 116, including footnote 1.

¹⁰²⁷ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a), see also Annex A, p. 46, § 4.

¹⁰²⁸ US, *Field Manual* (1956), § 31. ¹⁰²⁹ US, *Air Force Pamphlet* (1976), § 8-2.

civilians. This article has been construed as prohibiting assassination, proscription, or outlawry of an enemy, or putting a price upon an enemy's head, as well as offering a reward for an enemy "dead or alive". Obviously, it does not preclude lawful attacks by lawful combatants on individual soldiers or officers of the enemy.¹⁰³⁰

963. The YPA Military Manual of the SFRY (FRY) states that "it is prohibited to kill or wound members of the enemy armed forces and enemy civilians by means of treachery".¹⁰³¹ It adds that it is prohibited to put a price on someone's head, whether State or military commander or any other person.¹⁰³²

National Legislation

964. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "treacherously killing or injuring" a person belonging to the adverse party, in international and non-international armed conflicts.¹⁰³³

965. Under the Criminal Code of the Federation of Bosnia and Herzegovina, if the killing of an enemy who has laid down arms or has surrendered at discretion, or has no longer any means of defence, is committed in an "insidious way", this constitutes an aggravating circumstance of the war crime.¹⁰³⁴ The Criminal Code of the Republika Srpska contains the same provision.¹⁰³⁵

966. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "killing or injuring treacherously individuals belonging to the enemy nation or army" constitutes a war crime in international armed conflicts, while "killing or injuring treacherously a combatant adversary" constitutes a war crime in non-international armed conflicts.¹⁰³⁶

967. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁰³⁷

968. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁰³⁸

969. Under Croatia's Criminal Code, if the killing of an enemy who has laid down arms or has surrendered at discretion, or has no longer any means of

¹⁰³⁰ US, *Air Force Pamphlet* (1976), § 8-6(d).

¹⁰³¹ SFRY (FRY), *YPA Military Manual* (1988), § 104.

¹⁰³² SFRY (FRY), *YPA Military Manual* (1988), § 106.

¹⁰³³ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.49 and 268.90.

¹⁰³⁴ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 158(2).

¹⁰³⁵ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 438(2).

¹⁰³⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(k) and (D)(i).

¹⁰³⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁰³⁸ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

defence, is committed in a “treacherous way”, this constitutes an aggravating circumstance of the war crime.¹⁰³⁹

970. Under Georgia’s Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as “killing or wounding treacherously individuals belonging to the hostile nation or army” in international armed conflicts, and “killing or wounding treacherously a combatant adversary” in non-international armed conflicts, are crimes.¹⁰⁴⁰

971. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, “treacherously kills or wounds a member of the hostile armed forces or a combatant of the adverse party”.¹⁰⁴¹

972. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 37(1) AP I, is a punishable offence.¹⁰⁴²

973. Italy’s Law of War Decree as amended states that it is prohibited to kill or injure an enemy by treachery.¹⁰⁴³

974. Under Mali’s Penal Code, “killing or wounding by treachery individuals belonging to the enemy nation or army” is a war crime in international armed conflicts.¹⁰⁴⁴

975. Under the International Crimes Act of the Netherlands, “treacherously killing or wounding individuals belonging to the hostile nation or army” is a crime, whether in time of international or non-international armed conflict.¹⁰⁴⁵

976. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Articles 8(2)(b)(xi) and 8(2)(e)(ix) of the 1998 ICC Statute.¹⁰⁴⁶

977. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.¹⁰⁴⁷

978. Under Slovenia’s Penal Code, if the killing of an enemy who has laid down arms or has surrendered at discretion, or has no longer any means of defence, is executed in a “perfidious way”, this constitutes an aggravating circumstance of the war crime.¹⁰⁴⁸

¹⁰³⁹ Croatia, *Criminal Code* (1997), Article 161(2).

¹⁰⁴⁰ Georgia, *Criminal Code* (1999), Article 413(d).

¹⁰⁴¹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(7).

¹⁰⁴² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁰⁴³ Italy, *Law of War Decree as amended* (1938), Article 35(2).

¹⁰⁴⁴ Mali, *Penal Code* (2001), Article 31(i)(11).

¹⁰⁴⁵ Netherlands, *International Crimes Act* (2003), Articles 5(3)(d) and 6(2)(d).

¹⁰⁴⁶ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁰⁴⁷ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁰⁴⁸ Slovenia, *Penal Code* (1994), Article 379(2).

979. Under Sweden's Penal Code as amended, "the killing or injuring of an opponent by means of some . . . form of treacherous behaviour" constitutes a crime against international law.¹⁰⁴⁹

980. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xi) and (e)(ix) of the 1998 ICC Statute.¹⁰⁵⁰

981. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xi) and (e)(ix) of the 1998 ICC Statute.¹⁰⁵¹

982. Under the US War Crimes Act as amended, violations of Article 23(b) of the 1907 HR are war crimes.¹⁰⁵²

983. Under the Penal Code as amended of the SFRY (FRY), if the killing of an enemy who has laid down arms or has surrendered, or has no means of defence, has been committed in a "perfidious manner", this constitutes an aggravating circumstance of the war crime.¹⁰⁵³ Generally speaking, the Code provides that the use of a prohibited method of combat is a war crime, including the "perfidious killing or wounding of members of the enemy army".¹⁰⁵⁴

National Case-law

984. No practice was found.

Other National Practice

985. According to the Report on the Practice of Iraq, perfidy and treachery are absolutely prohibited.¹⁰⁵⁵ In the reply by the Iraqi Ministry of Defence to a questionnaire, mentioned in the report, reference is made to Article 37 API.¹⁰⁵⁶

986. In its Country Reports on Human Rights Practices for 1996, in a section entitled "Use of Excessive Force and Violations of Humanitarian Law in Internal Conflicts", the US Department of State noted that, in Uganda, "newspapers reported that [a rebel leader] offered bounties for the killing of prominent Ugandan military personnel, including the Minister of State for Defence".¹⁰⁵⁷

987. The US Presidential Executive Order 12333 of 1981 provides that "no person employed by or acting on behalf of the United States Government shall engage in, or conspire to engage in, assassination".¹⁰⁵⁸

¹⁰⁴⁹ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

¹⁰⁵⁰ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁰⁵¹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁰⁵² US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

¹⁰⁵³ SFRY(FRY), *Penal Code as amended* (1976), Article 146(2).

¹⁰⁵⁴ SFRY(FRY), *Penal Code as amended* (1976), Article 148(1), including commentary.

¹⁰⁵⁵ Report on the Practice of Iraq, 1998, Chapter 2.4.

¹⁰⁵⁶ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.4.

¹⁰⁵⁷ US, Department of State, *Country Reports on Human Rights Practices for 1996*, Washington D.C., 30 January 1997.

¹⁰⁵⁸ US, Executive Order 12333, 4 December 1981, CFR, 1981 Comp. (1982), p. 213.

988. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Article 37 AP I, affirmed that “we support the principle that individual combatants not kill, injure, or capture enemy personnel by resort to perfidy”.¹⁰⁵⁹

989. In 1989, in a memorandum of law, the Office of the Judge Advocate General of the US Department of the Army concluded that:

The clandestine, low visibility or overt use of military force against legitimate targets in time of war, or against similar targets in time of peace where such individuals or groups pose an immediate threat to United States citizens or the national security of the United States, as determined by the competent authority, does not constitute assassination or conspiracy to engage in assassination, and would not be prohibited by the proscription in [Executive Order] 12333 or by international law.¹⁰⁶⁰

990. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that its practice was consistent with the prohibition of killing, injuring or capturing an adversary by resort to perfidy contained in Article 37 AP I.¹⁰⁶¹

III. Practice of International Organisations and Conferences

United Nations

991. No practice was found.

Other International Organisations

992. No practice was found.

International Conferences

993. The report of the Working Group to Committee III of the CDDH stated that:

It should be noted that article 35 [now Article 37 AP I] does not prohibit perfidy *per se*, but merely “to kill, injure or capture an adversary by resort to perfidy”. Additionally, it should be noted that, in order to be perfidy, an act must be done “with intent to betray” the confidence created. This was intended to mean that

¹⁰⁵⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

¹⁰⁶⁰ US, Department of the Army, Office of the Judge Advocate General, Memorandum of Law: Executive Order 12333 and Assassination, 2 November 1989, *The Army Lawyer*, Pamphlet 27-50-204, December 1989, p. 4.

¹⁰⁶¹ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(j), Report on US Practice, 1997, Chapter 2.8.

the requisite intent would be an intent to kill, injure or capture by means of the betrayal of confidence. Thus, acts . . . which are intended merely to save one's life would not be perfidy.¹⁰⁶²

IV. Practice of International Judicial and Quasi-judicial Bodies

994. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

995. The ICRC Commentary on the Additional Protocols states that Article 37 AP I does not replace the 1907 HR: "It is thus clear that the prohibition on the treacherous killing or wounding of individuals belonging to the nation or the army of the enemy, as formulated in Article 23(b) of the Regulations, has survived in its entirety."¹⁰⁶³ In analysing Article 37(1) AP I, the Commentary further states that "it seems evident that the attempted or unsuccessful act also falls under the scope of this prohibition [of perfidy]"¹⁰⁶⁴

996. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "it is prohibited to kill, injure or capture an enemy by resort to perfidy".¹⁰⁶⁵

VI. Other Practice

997. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch stated that "the following . . . are prohibited by applicable international law rules: . . . Assassination of civilian officials, such as judges or political leaders."¹⁰⁶⁶

998. In 1989, in a report on violations of the laws of war in Angola, Africa Watch stated that "applicable international law rules prohibit the following kinds of practices . . . Assassination of civilian officials, such as political leaders."¹⁰⁶⁷

999. Rule A4 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, provides that "the prohibition to kill, injure or

¹⁰⁶² CDDH, *Official Records*, Vol. XV, CDDH/III/338, 21 April 1976–11 June 1976, p. 426.

¹⁰⁶³ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1488.

¹⁰⁶⁴ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 1493.

¹⁰⁶⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 408.

¹⁰⁶⁶ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, pp. 33 and 34.

¹⁰⁶⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

capture an adversary by resort to perfidy is a general rule applicable in non-international armed conflicts".¹⁰⁶⁸

Simulation of being disabled by injuries or sickness

I. Treaties and Other Instruments

Treaties

1000. Article 37(1)(b) AP I lists "the feigning of an incapacitation by wounds or sickness" as an act of perfidy. Article 37 AP I was adopted by consensus.¹⁰⁶⁹

1001. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that "when carried out in order to commit or resume hostilities, . . . the feigning of a situation of distress" was considered perfidy.¹⁰⁷⁰ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.¹⁰⁷¹

Other Instruments

1002. Paragraph 111(b) of the 1994 San Remo Manual states that "perfidious acts include the launching of an attack while feigning . . . distress by, e.g., sending a distress signal or by the crew taking to life rafts".

II. National Practice

Military Manuals

1003. Argentina's Law of War Manual states that "feigning incapacitation by wounds or sickness" is an example of perfidy.¹⁰⁷²

1004. Australia's Commanders' Guide states that "acts which constitute perfidy include feigning of . . . an incapacitation by wounds or sickness".¹⁰⁷³ In a section entitled "Perfidy", it also states that "it is unlawful to falsely claim injury or distress for the purpose of escaping attack or inviting an enemy to lower their guard".¹⁰⁷⁴

1005. Australia's Defence Force Manual states that "acts which constitute perfidy include feigning of . . . an incapacitation by wounds or sickness".¹⁰⁷⁵

1006. Belgium's Law of War Manual states that "feigning being wounded and wanting to surrender and firing at an adversary willing to help" and "showing signs of distress in order to mislead the enemy" are acts of perfidy.¹⁰⁷⁶

¹⁰⁶⁸ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A4, *IRRC*, No. 278, 1990, p. 390.

¹⁰⁶⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

¹⁰⁷⁰ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

¹⁰⁷¹ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

¹⁰⁷² Argentina, *Law of War Manual* (1989), § 1.05(2)(2).

¹⁰⁷³ Australia, *Commanders' Guide* (1994), § 826(b) (naval warfare) and § 902(b) (land warfare).

¹⁰⁷⁴ Australia, *Commanders' Guide* (1994), § 503.

¹⁰⁷⁵ Australia, *Defence Force Manual* (1994), § 703(b).

¹⁰⁷⁶ Belgium, *Law of War Manual* (1983), p. 32.

1007. Belgium's Teaching Manual for Officers prohibits perfidy. For example, "feigning being dead to avoid capture is lawful, but not feigning to be wounded to kill an enemy who tries to help you".¹⁰⁷⁷

1008. Cameroon's Instructors' Manual provides that "feigning incapacitation by wounds or sickness" is an example of perfidy.¹⁰⁷⁸ Likewise, "feigning being *hors de combat*" is qualified as an act of perfidy.¹⁰⁷⁹

1009. Canada's LOAC Manual states that "the following are examples of perfidy if a hostile act is committed while: . . . feigning incapacitation by wounds or sickness".¹⁰⁸⁰

1010. Croatia's Commanders' Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . feigning . . . of incapacitation by wounds or sickness".¹⁰⁸¹

1011. Ecuador's Naval Manual states that:

It is a violation of the law of armed conflict to kill, injure or capture the enemy . . . by feigning shipwreck, sickness, [or] wounds . . . A surprise attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat . . . Such acts of perfidy are punishable war crimes.¹⁰⁸²

1012. France's LOAC Summary Note prohibits perfidy and provides that "it is forbidden . . . to feign . . . wounds or sickness".¹⁰⁸³

1013. Under Germany's Soldiers' Manual, "the feigning of being incapacitated for combat" constitutes a perfidious act.¹⁰⁸⁴

1014. Under Hungary's Military Manual, feigning incapacitation by wounds or sickness is an example of perfidy.¹⁰⁸⁵

1015. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not . . . feign incapacitation."¹⁰⁸⁶

1016. Israel's Manual on the Laws of War gives the following example of perfidy: "Pretending damage to fighting capacity through injury or illness with a view to gaining military advantage."¹⁰⁸⁷

1017. Under Italy's LOAC Elementary Rules Manual, "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . feigning . . . to be *hors de combat* because of wounds or sickness".¹⁰⁸⁸

¹⁰⁷⁷ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

¹⁰⁷⁸ Cameroon, *Instructors' Manual* (1992), p. 63, § 234.

¹⁰⁷⁹ Cameroon, *Instructors' Manual* (1992), p. 149, § 531.1.

¹⁰⁸⁰ Canada, *LOAC Manual* (1999), p. 6-2, § 9(b) (land warfare), p. 7-2, § 17(b) (air warfare) and p. 8-11, § 81(c) (naval warfare).

¹⁰⁸¹ Croatia, *Commanders' Manual* (1992), § 46.

¹⁰⁸² Ecuador, *Naval Manual* (1989), § 12.7. ¹⁰⁸³ France, *LOAC Summary Note* (1992), § 4.4.

¹⁰⁸⁴ Germany, *Soldiers' Manual* (1991), p. 2. ¹⁰⁸⁵ Hungary, *Military Manual* (1992), p. 63.

¹⁰⁸⁶ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹⁰⁸⁷ Israel, *Manual on the Laws of War* (1998), p. 57.

¹⁰⁸⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

1018. Madagascar's Military Manual states that feigning incapacitation because of wounds or sickness is prohibited.¹⁰⁸⁹

1019. The Military Manual of the Netherlands states that API "gives a number of examples of treacherous behaviour [including] feigning to be *hors de combat* by wounds or sickness".¹⁰⁹⁰

1020. The Military Handbook of the Netherlands provides that it is a prohibited method of warfare "to perform treacherous acts (for example, feigning to have been killed or to be wounded . . . and then suddenly resume fighting)".¹⁰⁹¹

1021. New Zealand's Military Manual specifies that "the feigning of an incapacitation by wounds or sickness" is an example of perfidy.¹⁰⁹² However, the manual notes that "if the motive is survival rather than hostile intent, a soldier can, without committing perfidy, feign incapacity in order to live to fight another day".¹⁰⁹³

1022. Nigeria's Military Manual gives the following example of "perjury" (perfidy): "feigning incapacitation by wounds or sickness".¹⁰⁹⁴

1023. Under Romania's Soldiers' Manual, "simulation of incapacity due to wound or sickness" is an act of perfidy.¹⁰⁹⁵

1024. South Africa's LOAC Manual provides that "it is forbidden to feign . . . injury . . . Such actions are referred to as 'perfidy' and constitute grave breaches of the LOAC."¹⁰⁹⁶

1025. Spain's LOAC Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . feigning . . . incapacitation by wounds or sickness".¹⁰⁹⁷ This is considered as an example of a perfidious act.¹⁰⁹⁸

1026. Under Sweden's IHL Manual, "the feigning of incapacitation by wounds or sickness" constitutes perfidious conduct. However, "if for example a soldier simulates injury or sickness only to avoid an adversary's attack, this is not judged as perfidy".¹⁰⁹⁹

1027. Switzerland's Basic Military Manual provides that perfidy is forbidden and that "it is notably prohibited . . . to feign incapacitation for combat by wounds or sickness".¹¹⁰⁰

1028. According to the UK Military Manual, "it would be treachery for a soldier to sham wounded or dead and then to attack enemy soldiers who approached him without hostile intent".¹¹⁰¹

¹⁰⁸⁹ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

¹⁰⁹⁰ Netherlands, *Military Manual* (1993), p. IV-2.

¹⁰⁹¹ Netherlands, *Military Handbook* (1995), p. 7-40.

¹⁰⁹² New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare).

¹⁰⁹³ New Zealand, *Military Manual* (1992), § 502(5), footnote 3.

¹⁰⁹⁴ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(c).

¹⁰⁹⁵ Romania, *Soldiers' Manual* (1991), p. 35. ¹⁰⁹⁶ South Africa, *LOAC Manual* (1996), § 34(c).

¹⁰⁹⁷ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

¹⁰⁹⁸ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.b.(1), 5.3.c and 7.3.c.

¹⁰⁹⁹ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b), p. 29.

¹¹⁰⁰ Switzerland, *Basic Military Manual* (1987), Article 39.

¹¹⁰¹ UK, *Military Manual* (1958), § 115, footnote 2, see also § 311, footnote 1.

1029. The US Air Force Pamphlet considers that:

Since situations of distress occur during times of armed conflict, as well as peace, and frequently suggest that the persons involved are *hors de combat*, feigning distress or death, wounds or sickness in order to resume hostilities constitutes perfidy in ground combat. However, a sick or wounded combatant does not commit perfidy by calling for and receiving medical aid even though he may intend immediately to resume fighting... In aerial warfare, it is forbidden to improperly use internationally recognized distress signals to lure the enemy into a false sense of security and then attack.¹¹⁰²

1030. The US Naval Handbook states that:

It is a violation of the law of armed conflict to kill, injure or capture the enemy... by feigning shipwreck, sickness, [or] wounds... A surprise attack by a person feigning shipwreck, sickness, or wounds undermines the protected status of those rendered incapable of combat... Such acts of perfidy are punishable war crimes.¹¹⁰³

1031. The YPA Military Manual of the SFRY (FRY) states that “feigning incapacitation by wounds or sickness” is an act of perfidy.¹¹⁰⁴

National Legislation

1032. Colombia’s Penal Code, in an article entitled “Perfidy”, imposes a criminal sanction on “anyone who, during an armed conflict and with intent to harm or attack the adversary, simulates the condition of a protected person”, including the wounded and sick.¹¹⁰⁵

1033. The Draft Amendments to the Penal Code of El Salvador, in an article entitled “Perfidy”, provide for a prison sentence for “anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, simulates the status of a protected person”, including the wounded and sick.¹¹⁰⁶

1034. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 37(1) AP I, is a punishable offence.¹¹⁰⁷

1035. Nicaragua’s Draft Penal Code, in an article entitled “Perfidy”, punishes “anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, simulates the status of a protected person”, including the wounded and sick.¹¹⁰⁸

¹¹⁰² US, *Air Force Pamphlet* (1976), § 8-6(a), see also § 8-3(a).

¹¹⁰³ US, *Naval Handbook* (1995), § 12.7.

¹¹⁰⁴ SFRY (FRY), *YPA Military Manual* (1988), § 104(2).

¹¹⁰⁵ Colombia, *Penal Code* (2000), Articles 135 and 143.

¹¹⁰⁶ El Salvador, *Draft Amendments to the Penal Code* (1998), Articles entitled “Perfidia” and “Ataque a personas protegidas”.

¹¹⁰⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹¹⁰⁸ Nicaragua, *Draft Penal Code* (1999), Articles 449 and 452.

1036. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹¹⁰⁹

National Case-law

1037. No practice was found.

Other National Practice

1038. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

1039. No practice was found.

Other International Organisations

1040. No practice was found.

International Conferences

1041. Commenting on Article 35 of draft API (now Article 37 AP I), a Working Group reporting to Committee III of the CDDH stated that "feigning death in order to kill an enemy once he turned his back would be perfidy".¹¹¹⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

1042. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

1043. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "to pretend being incapacitated by wounds or sickness" constitutes an act of perfidy.¹¹¹¹

VI. Other Practice

1044. No practice was found.

¹¹⁰⁹ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹¹¹⁰ CDDH, *Official Records*, Vol. XV, CDDH/III/338, 21 April–11 June 1976, p. 426.

¹¹¹¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409(c).

Simulation of surrender

Note: For practice concerning the improper use of the white flag of truce which does not amount to perfidy, see *supra* section B of this chapter.

I. Treaties and Other Instruments

Treaties

1045. Article 37(1)(a) AP I lists “the feigning . . . of a surrender” as an act of perfidy. Article 37 AP I was adopted by consensus.¹¹¹²

1046. Under Article 85(3) AP I, “the perfidious use, in violation of Article 37, . . . of . . . protective signs recognized by the Conventions or this Protocol” is a grave breach of AP I. Article 85 AP I was adopted by consensus.¹¹¹³

1047. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “when carried out in order to commit or resume hostilities, . . . the feigning . . . of a surrender” was considered as perfidy.¹¹¹⁴ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.¹¹¹⁵

1048. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use of a flag of truce, . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

1049. Article 8 of the 1880 Oxford Manual prohibits the making of “treacherous attempts upon the life of an enemy; as for example . . . by feigning to surrender”.

1050. Paragraph 111(b) of the 1994 San Remo Manual states that “perfidious acts include the launching of an attack while feigning . . . surrender”.

1051. Pursuant to Article 20(b)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “the perfidious use of . . . recognized protective signs” is a war crime.

1052. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use of a flag of truce, . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

1053. Argentina’s Law of War Manual provides that “feigning the intent . . . to surrender” is an example of perfidy.¹¹¹⁶ It also states that “the perfidious

¹¹¹² CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

¹¹¹³ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹¹¹⁴ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

¹¹¹⁵ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

¹¹¹⁶ Argentina, *Law of War Manual* (1989), § 1.05(2)(1).

use... of... recognised protective signs" is a grave breach of AP I and a war crime.¹¹¹⁷

1054. Australia's *Commanders' Guide* provides that "acts which constitute perfidy include feigning of... an intent to... surrender".¹¹¹⁸ In a section entitled "Perfidy", it states that "it is unlawful to feign surrender for the purpose of inviting an enemy to lower his guard".¹¹¹⁹ The Guide further considers that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... feigning surrender in order to obtain military advantage".¹¹²⁰

1055. Australia's *Defence Force Manual* stresses that "acts which constitute perfidy include feigning of... an intent to... surrender".¹¹²¹ It further considers that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings:... feigning surrender in order to obtain military advantage".¹¹²²

1056. Belgium's *Teaching Manual for Officers* prohibits perfidy. For example, "feigning to surrender and then opening fire at the enemy who collects you as 'prisoner of war' is an aggravated act of perfidy if the white flag, which is a protective sign, is used".¹¹²³

1057. Belgium's *Teaching Manual for Soldiers* states that "using a white flag or feigning surrender in order to attack an adversary is strictly prohibited and constitutes a grave breach of the laws of war".¹¹²⁴

1058. Cameroon's *Instructors' Manual* provides that "feigning to surrender" is an example of perfidy.¹¹²⁵

1059. Canada's *LOAC Manual* states that "the following are examples of perfidy if a hostile act is committed while:... feigning... to surrender".¹¹²⁶ It also considers that "feigning surrender of an aircraft and then firing on an unsuspecting adversary after such surrender was accepted" constitutes perfidy in air warfare.¹¹²⁷ It further identifies as a grave breach of AP I and a war crime the "perfidious use of... protective signs recognized by the Geneva Conventions or AP I".¹¹²⁸

1060. Colombia's *Directive on IHL* punishes "the perfidious use of... protective signs recognised under the law of war (the white flag... for example)".¹¹²⁹

¹¹¹⁷ Argentina, *Law of War Manual* (1989), § 8.03.

¹¹¹⁸ Australia, *Commanders' Guide* (1994), § 826(a) (naval warfare) and § 902(a) (land warfare).

¹¹¹⁹ Australia, *Commanders' Guide* (1994), § 505.

¹¹²⁰ Australia, *Commanders' Guide* (1994), § 1305(r).

¹¹²¹ Australia, *Defence Force Manual* (1994), § 703(a) (land warfare), see also § 636(b) (naval warfare) and § 910.

¹¹²² Australia, *Defence Force Manual* (1994), § 1315(r).

¹¹²³ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 33.

¹¹²⁴ Belgium, *Teaching Manual for Soldiers* (undated), p. 15.

¹¹²⁵ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.1, p. 63, § 234 and p. 90, § 222.

¹¹²⁶ Canada, *LOAC Manual* (1999), p. 6-2, § 9(a) (land warfare) and p. 7-2, § 17(a) (air warfare), see also p. 8-11, § 81(b) (naval warfare).

¹¹²⁷ Canada, *LOAC Manual* (1999), p. 7-2, § 18(b).

¹¹²⁸ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(f).

¹¹²⁹ Colombia, *Directive on IHL* (1993), Section III(D).

1061. Colombia's *Instructors' Manual* provides that "feigning surrender and then attacking is perfidy".¹¹³⁰

1062. Croatia's *LOAC Compendium* provides that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime.¹¹³¹

1063. Croatia's *Commanders' Manual* states that "it is prohibited to feign a protected status by inviting the confidence of the enemy:...feigning surrender".¹¹³²

1064. Ecuador's *Naval Manual* states that "feigning surrender in order to lure the enemy into a trap is an act of perfidy".¹¹³³ It adds that "it is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of an intent to surrender... Such [act] of perfidy [is a] punishable war [crime]."¹¹³⁴ In addition, the manual states that "the following acts constitute war crimes:... treacherous request for quarter (for example, feigning surrender in order to gain a military advantage)".¹¹³⁵

1065. France's *LOAC Summary Note* provides that "it is prohibited to feign a protected status to invite the confidence of the enemy (abuse of... the white flag)".¹¹³⁶ Furthermore, it notes that "the perfidious use of protected signs and signals" is a grave breach of the law of war and a war crime.¹¹³⁷

1066. France's *LOAC Teaching Note* states that the recourse to perfidy is prohibited, "notably the abuse of the white flag".¹¹³⁸

1067. France's *LOAC Manual* states that "using a protective sign to deceive the enemy and reach an operational goal constitutes an act of perfidy".¹¹³⁹ It specifies that "simulating surrender to deceive the enemy is an act of perfidy which is prohibited by the law of armed conflicts".¹¹⁴⁰ It further provides that "the perfidious use of any protective sign recognised by international law constitutes a war crime".¹¹⁴¹

1068. Germany's *Military Manual* states that "it is... prohibited... to feign surrender".¹¹⁴² It further provides that "grave breaches of international humanitarian law are in particular:... perfidious... use of recognized protective signs".¹¹⁴³

1069. Under Hungary's *Military Manual*, feigning surrender constitutes an example of perfidy.¹¹⁴⁴ It also states that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime.¹¹⁴⁵

¹¹³⁰ Colombia, *Instructors' Manual* (1999), p. 32.

¹¹³¹ Croatia, *LOAC Compendium* (1991), p. 56.

¹¹³² Croatia, *Commanders' Manual* (1992), § 46.

¹¹³³ Ecuador, *Naval Manual* (1989), § 12.1.2. ¹¹³⁴ Ecuador, *Naval Manual* (1989), § 12.7.

¹¹³⁵ Ecuador, *Naval Manual* (1989), § 6.2.5(12).

¹¹³⁶ France, *LOAC Summary Note* (1992), § 4.4.

¹¹³⁷ France, *LOAC Summary Note* (1992), § 3.4.

¹¹³⁸ France, *LOAC Teaching Note* (2000), p. 3. ¹¹³⁹ France, *LOAC Manual* (2001), p. 62.

¹¹⁴⁰ France, *LOAC Manual* (2001), p. 105. ¹¹⁴¹ France, *LOAC Manual* (2001), p. 118.

¹¹⁴² Germany, *Military Manual* (1992), § 1019.

¹¹⁴³ Germany, *Military Manual* (1992), § 1209.

¹¹⁴⁴ Hungary, *Military Manual* (1992), p. 63. ¹¹⁴⁵ Hungary, *Military Manual* (1992), p. 90.

1070. Indonesia's Military Manual provides that "it is prohibited to kill or injure the enemy by perfidy, such as . . . to misuse the flag of truce".¹¹⁴⁶

1071. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not feign intent to surrender."¹¹⁴⁷

1072. Israel's Manual on the Laws of War gives the following example of perfidy: "It is forbidden to use a white flag for an inappropriate purpose (posing as persons surrendering . . . with a view to gaining a military advantage)."¹¹⁴⁸

1073. Under Italy's IHL Manual, grave breaches of international conventions and protocols, including "the perfidious use . . . of international protective signs", constitute war crimes.¹¹⁴⁹

1074. Italy's LOAC Elementary Rules Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . feigning of surrender".¹¹⁵⁰

1075. Kenya's LOAC Manual notes that "the feigning of an intent to surrender . . . [is an example] of treachery".¹¹⁵¹

1076. Under Madagascar's Military Manual, feigning surrender is prohibited.¹¹⁵²

1077. The Military Manual of the Netherlands states that AP I "gives a number of examples of treacherous behaviour: . . . feigning to surrender".¹¹⁵³

1078. The Military Handbook of the Netherlands provides that it is a prohibited method of warfare "to perform treacherous acts (for example, feigning . . . to surrender and then suddenly resume fighting)".¹¹⁵⁴ It also states that "misuse of the white flag is treachery".¹¹⁵⁵

1079. New Zealand's Military Manual provides that "the feigning . . . of a surrender" is an example of perfidy.¹¹⁵⁶ It states that "another example of perfidious conduct, although rare, would be surrendering an aircraft and then firing on an unsuspecting adversary after the surrender was accepted".¹¹⁵⁷ The manual further states that "perfidious use of . . . protective signs recognised by the [Geneva] Conventions or [AP I]" constitutes a grave breach of AP I and a war crime.¹¹⁵⁸

¹¹⁴⁶ Indonesia, *Military Manual* (1982), § 103.

¹¹⁴⁷ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹¹⁴⁸ Israel, *Manual on the Laws of War* (1998), p. 56.

¹¹⁴⁹ Italy, *IHL Manual* (1991), Vol. I, § 85.

¹¹⁵⁰ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

¹¹⁵¹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

¹¹⁵² Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

¹¹⁵³ Netherlands, *Military Manual* (1993), p. IV-2.

¹¹⁵⁴ Netherlands, *Military Handbook* (1995), p. 7-40.

¹¹⁵⁵ Netherlands, *Military Handbook* (1995), p. 7-36.

¹¹⁵⁶ New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare).

¹¹⁵⁷ New Zealand, *Military Manual* (1992), § 611(2).

¹¹⁵⁸ New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(f).

1080. Nigeria's Military Manual gives the following example of "perjury" (perfidy): "feigning surrender".¹¹⁵⁹

1081. Nigeria's Manual on the Laws of War considers that "feigning submission for the purpose of misleading the enemy" is an "illegitimate tactic".¹¹⁶⁰ It adds that "treacherous request for quarter" constitutes a war crime.¹¹⁶¹

1082. Under Romania's Soldiers' Manual, feigning surrender is an act of perfidy.¹¹⁶²

1083. South Africa's LOAC Manual, in a paragraph on perfidy, provides that "it is forbidden to feign surrender".¹¹⁶³ It states that "the perfidious use of . . . the white flag" is a grave breach of API and a war crime.¹¹⁶⁴ In addition, the manual provides that "treacherous requests for mercy" are also grave breaches of the law of war and war crimes.¹¹⁶⁵

1084. Spain's LOAC Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: . . . feigning of surrender".¹¹⁶⁶ Feigning surrender is an example of a perfidious act.¹¹⁶⁷ The manual also states that it is a grave breach and a war crime "to make a perfidious use of recognised protective signs".¹¹⁶⁸

1085. Switzerland's Basic Military Manual prohibits perfidy. Thus, it states that "it is notably forbidden . . . to feign surrender".¹¹⁶⁹ It considers the "perfidious use of . . . distinctive signs recognised by the [Geneva] Conventions or [AP I], in violation of Article 37 [AP I]," as a grave breach of AP I.¹¹⁷⁰

1086. The UK Military Manual, in connection with the requirements to be granted the status of combatant, notes in particular that irregular troops "should have been warned against the employment of treachery [and] improper conduct towards flags of truce".¹¹⁷¹ The manual states that "it would be treachery for a soldier . . . to pretend that he had surrendered and afterwards to open fire upon or attack an enemy who was treating him as *hors de combat* or a prisoner".¹¹⁷² It further specifies that "surrender must not be feigned in order to take the enemy at a disadvantage when he advances to secure his prisoners".¹¹⁷³ It also stresses that "abuse of a flag of truce constitutes gross perfidy and entitles the injured party to take reprisals or to try the offenders if captured".¹¹⁷⁴

¹¹⁵⁹ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12.(b).

¹¹⁶⁰ Nigeria, *Manual on the Laws of War* (undated), § 14.

¹¹⁶¹ Nigeria, *Manual on the Laws of War* (undated), § 6.

¹¹⁶² Romania, *Soldiers' Manual* (1991), p. 35.

¹¹⁶³ South Africa, *LOAC Manual* (1996), § 34(c).

¹¹⁶⁴ South Africa, *LOAC Manual* (1996), §§ 37(d) and 41.

¹¹⁶⁵ South Africa, *LOAC Manual* (1996), §§ 39(b) and 41.

¹¹⁶⁶ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

¹¹⁶⁷ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.b.(1), 5.3.c and 7.3.c.

¹¹⁶⁸ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

¹¹⁶⁹ Switzerland, *Basic Military Manual* (1987), Article 39.

¹¹⁷⁰ Switzerland, *Basic Military Manual* (1987), Article 193(1)(f).

¹¹⁷¹ UK, *Military Manual* (1958), § 95.

¹¹⁷² UK, *Military Manual* (1958), § 115, footnote 2.

¹¹⁷³ UK, *Military Manual* (1958), § 318.

¹¹⁷⁴ UK, *Military Manual* (1958), § 417.

Moreover, the manual states that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . treacherous request for quarter”.¹¹⁷⁵

1087. The UK LOAC Manual considers that “the feigning of an intent to surrender” is an example of treachery.¹¹⁷⁶ It also states that “abuse of the white flag is treachery”.¹¹⁷⁷

1088. The US Field Manual provides that “it is improper to feign surrender so as to secure an advantage over the opposing belligerent thereby”.¹¹⁷⁸ It also stresses that “an individual or a party acts treacherously in displaying a white flag indicative of surrender as a ruse to permit attack upon the forces of the other belligerent”.¹¹⁷⁹ The manual further states that “in addition to the ‘grave breaches’ of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war (‘war crimes’): . . . treacherous request for quarter”.¹¹⁸⁰

1089. The US Air Force Pamphlet considers the feigning of surrender as a perfidious act.¹¹⁸¹ It adds that “the use of a . . . white flag in order to deceive or mislead the enemy, or for any other purpose other than to . . . surrender, has long been recognized as an act of treachery . . . [This] expresses the customary and conventional law in this area.”¹¹⁸² The Pamphlet further provides that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . treacherous request for quarter”.¹¹⁸³

1090. The US Instructor’s Guide notes that an “example of a treacherous act would be pretending to surrender in order to facilitate an attack upon an unsuspecting enemy. Such tactics are prohibited because they destroy the basis for the restoration of peace short of the complete destruction of one side or the other.”¹¹⁸⁴ It further provides that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . pretending to surrender”.¹¹⁸⁵

1091. The US Naval Handbook states that “feigning surrender in order to lure the enemy into a trap is an act of perfidy”.¹¹⁸⁶ It further provides that “it is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of an intent to surrender . . . Such [act] of perfidy [is a] punishable war

¹¹⁷⁵ UK, *Military Manual* (1958), § 626(a).

¹¹⁷⁶ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a).

¹¹⁷⁷ UK, *LOAC Manual* (1981), Annex A, p. 46, § 5.

¹¹⁷⁸ US, *Field Manual* (1956), § 50.

¹¹⁷⁹ US, *Field Manual* (1956), § 467.

¹¹⁸⁰ US, *Field Manual* (1956), § 504(b).

¹¹⁸¹ US, *Air Force Pamphlet* (1976), § 8-3(a).

¹¹⁸² US, *Air Force Pamphlet* (1976), § 8-6(a).

¹¹⁸³ US, *Air Force Pamphlet* (1976), § 15-3(c)(3).

¹¹⁸⁴ US, *Instructor’s Guide* (1985), p. 8.

¹¹⁸⁵ US, *Instructor’s Guide* (1985), p. 13.

¹¹⁸⁶ US, *Naval Handbook* (1995), § 12.1.2.

[crime]."¹¹⁸⁷ In addition, the manual states that "the following acts are representative war crimes: . . . treacherous request for quarter (i.e., feigning surrender in order to gain a military advantage)".¹¹⁸⁸

1092. The YPA Military Manual of the SFRY (FRY) states that "feigning an intention to . . . surrender" is an act of perfidy.¹¹⁸⁹

National Legislation

1093. Argentina's Draft Code of Military Justice punishes any soldier who "uses . . . in a perfidious manner, the flag . . . of surrender".¹¹⁹⁰

1094. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".¹¹⁹¹

1095. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "improper use of a flag of truce . . . in order to feign an intention to negotiate when there is no such intention on the part of the perpetrator . . . [and which] results in deaths or serious personal injury", in international armed conflicts.¹¹⁹²

1096. Azerbaijan's Criminal Code provides that "the misuse of the white flag, . . . which as a result caused death or serious injury to body of a victim," constitutes a war crime in international and non-international armed conflicts.¹¹⁹³

1097. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹¹⁹⁴

1098. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹¹⁹⁵

1099. Colombia's Penal Code, in an article entitled "Perfidy", imposes a criminal sanction on "anyone who, during an armed conflict, with intent to harm or attack the adversary, . . . uses improperly . . . the white flag . . . of surrender".¹¹⁹⁶

1100. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹¹⁹⁷

¹¹⁸⁷ US, *Naval Handbook* (1995), § 12.7.

¹¹⁸⁸ US, *Naval Handbook* (1995), § 6.2.5(12).

¹¹⁸⁹ SFRY (FRY), *YPA Military Manual* (1988), § 104(1).

¹¹⁹⁰ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(7) in the *Code of Military Justice as amended* (1951).

¹¹⁹¹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹¹⁹² Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.41.

¹¹⁹³ Azerbaijan, *Criminal Code* (1999), Article 119(2).

¹¹⁹⁴ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹¹⁹⁵ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹¹⁹⁶ Colombia, *Penal Code* (2000), Article 143.

¹¹⁹⁷ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

1101. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]”.¹¹⁹⁸

1102. Cyprus’s AP I Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach”.¹¹⁹⁹

1103. The Draft Amendments to the Penal Code of El Salvador, in an article entitled “Perfidy”, provide for a prison sentence for “anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, . . . uses protective signs such as . . . the flag . . . of surrender”.¹²⁰⁰

1104. Ethiopia’s Penal Code punishes any abuse of the white flag, with intent to prepare or to commit hostile acts.¹²⁰¹

1105. Under Georgia’s Criminal Code, “the perfidious use of . . . protective signs and signals recognised by international humanitarian law” in an international or non-international armed conflict is a crime.¹²⁰²

1106. Ireland’s Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹²⁰³ It adds that any “minor breach” of AP I, including violations of Article 37(1) AP I, is also a punishable offence.¹²⁰⁴

1107. Under Jordan’s Draft Military Criminal Code, “the perfidious use of . . . any . . . protective emblem” in time of armed conflict is a war crime.¹²⁰⁵

1108. Under the Draft Amendments to the Code of Military Justice of Lebanon, “the perfidious use of . . . any . . . protective sign provided for by the [Geneva] Conventions and [AP I]” constitutes a war crime.¹²⁰⁶

1109. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence”.¹²⁰⁷

1110. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹²⁰⁸

1111. Nicaragua’s Draft Penal Code, in an article entitled “Perfidy”, punishes “anyone who, during an international or internal armed conflict, with the

¹¹⁹⁸ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹¹⁹⁹ Cyprus, *AP I Act* (1979), Section 4(1).

¹²⁰⁰ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Perfidia”.

¹²⁰¹ Ethiopia, *Penal Code* (1957), Article 294(b).

¹²⁰² Georgia, *Criminal Code* (1999), Article 411(1)(f).

¹²⁰³ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹²⁰⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹²⁰⁵ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(14).

¹²⁰⁶ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(14).

¹²⁰⁷ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹²⁰⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

view to harm or attack the adversary, ... uses protective signs such as ... the flag ... of ... surrender".¹²⁰⁹

1112. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the two additional protocols to [the Geneva] Conventions ... is liable to imprisonment".¹²¹⁰

1113. Spain's Royal Ordinance for the Armed Forces states that "a combatant ... shall not display treacherously the white flag".¹²¹¹

1114. Spain's Penal Code punishes "anyone who, during an armed conflict, ... uses ... in a perfidious manner the flag ... of surrender".¹²¹²

1115. Tajikistan's Criminal Code punishes "the perfidious use of ... protective signs and signals recognised by international humanitarian law" in an international or internal armed conflict.¹²¹³

1116. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹²¹⁴

1117. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of ... [AP I]".¹²¹⁵

1118. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹²¹⁶

1119. Under Yemen's Military Criminal Code, the "perfidious use of ... international protective emblems provided for in international conventions" is a war crime.¹²¹⁷

1120. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of ... [AP I]".¹²¹⁸

National Case-law

1121. No practice was found.

Other National Practice

1122. At the Battle of Goose Green during the War in the South Atlantic, Argentine soldiers raised a white flag. As UK soldiers moved forward to

¹²⁰⁹ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹²¹⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹²¹¹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

¹²¹² Spain, *Penal Code* (1995), Article 612(6).

¹²¹³ Tajikistan, *Criminal Code* (1998), Article 403(1).

¹²¹⁴ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹²¹⁵ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹²¹⁶ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹²¹⁷ Yemen, *Military Criminal Code* (1998), Article 21(5).

¹²¹⁸ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

accept the surrender, they were fired on and killed from a neighbouring position, probably in the confusion.¹²¹⁹

1123. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Perfidious acts include the feigning of an intent to surrender . . .

[I]ndividual acts of perfidy did occur. On one occasion, Iraqi soldiers waved a white flag and laid down their weapons. When a Saudi Arabian patrol advanced to accept their surrender, it was fired upon by Iraqi forces hidden in buildings on either side of the street. During the same battle, an Iraqi officer approached Coalition forces with his hands in the air, indicating his intention to surrender. When near his would-be-captors, he drew a concealed pistol from his boot, fired, and was killed during the combat that followed.¹²²⁰

III. Practice of International Organisations and Conferences

1124. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1125. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

1126. According to the ICRC Commentary on the Additional Protocols, “the perfidious use . . . of emblems, signs, signals or uniforms referred to in Article 37 . . . of the Protocol [including the flag of truce], for the purpose of killing, injuring or capturing an adversary, constitutes a grave breach under [Article 85(3)(f) AP I]”.¹²²¹

1127. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that “to pretend surrender” is an act of perfidy.¹²²² Delegates also teach that “the perfidious use of the . . . distinctive signs marking specifically protected persons and

¹²¹⁹ Max Hastings and Simon Jenkins, *The Battle of the Falklands*, W. W. Norton & Company, London, 1983, p. 247; Geoffrey Best, *War and Law Since 1945*, Clarendon Press, Oxford, 1997, p. 292; Christopher Greenwood, Scope of Application of Humanitarian Law, in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, § 223; Martin Middlebrook, *Task Force: The Falklands War, 1982*, Penguin Books, 1988, pp. 269–270.

¹²²⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

¹²²¹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3499.

¹²²² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409(b).

objects...[and of] other protected signs recognized by the law of war" constitutes a grave breach of the law of war.¹²²³

1128. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included "the perfidious use of the... protective signs and signals recognized by international humanitarian law", when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹²²⁴

VI. *Other Practice*

1129. No practice was found.

Simulation of an intention to negotiate under the white flag of truce

Note: *For practice concerning the improper use of the white flag of truce which does not amount to perfidy, see supra section B of this chapter.*

I. Treaties and Other Instruments

Treaties

1130. Article 37(1)(a) AP I lists "the feigning of an intent to negotiate under a flag of truce" as an act of perfidy. Article 37 AP I was adopted by consensus.¹²²⁵

1131. Under Article 85(3) AP I, "the perfidious use, in violation of Article 37, ... of... protective signs recognized by the Conventions or this Protocol" is a grave breach of AP I. Article 85(5) adds that "without prejudice to the application of the [Geneva] Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes". Article 85 AP I was adopted by consensus.¹²²⁶

1132. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that "when carried out in order to commit or resume hostilities, ... the feigning... of a humanitarian negotiation" was considered as perfidy.¹²²⁷ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.¹²²⁸

1133. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, "making improper use of a flag of truce, ... resulting in death or serious personal injury" is a war crime in international armed conflicts.

¹²²³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779(a) and (b).

¹²²⁴ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

¹²²⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

¹²²⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹²²⁷ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

¹²²⁸ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

Other Instruments

1134. Article 114 of the 1863 Lieber Code states that:

If it be discovered, and fairly proved, that a flag of truce has been abused for surreptitiously obtaining military knowledge, the bearer of the flag thus abusing his sacred character is deemed a spy.

So sacred is the character of a flag of truce, and so necessary is its sacredness, that while its abuse is an especially heinous offense, great caution is requisite, on the other hand, in convicting the bearer of a flag of truce as a spy.

1135. Article 117 of the 1863 Lieber Code considers it “an act of bad faith, of infamy or fiendishness, to deceive the enemy by flags of protection”.

1136. Article 15 of the 1913 Oxford Manual of Naval War states that “methods . . . which involve treachery are forbidden. Thus it is forbidden . . . to make improper use of a flag of truce.”

1137. Pursuant to Article 20(b)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “the perfidious use of . . . recognized protective signs” is a war crime.

1138. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use of a flag of truce, . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

*II. National Practice**Military Manuals*

1139. Argentina’s Law of War Manual (1969) provides especially for the prohibition of the improper use of the flag of truce, which is considered a breach of good faith. It states, however, that the use said to be “improper” applies only in combat operations.¹²²⁹

1140. Argentina’s Law of War Manual (1989) gives “simulating the intent to negotiate under a flag of parlementaires” as an example of perfidy.¹²³⁰ It also states that “the perfidious use . . . of . . . recognised protective signs” is a grave breach of AP I and a war crime.¹²³¹

1141. Australia’s Commanders’ Guide states that “acts which constitute perfidy include feigning of . . . an intent to negotiate under a flag of truce”.¹²³²

1142. Australia’s Defence Force Manual provides that “acts which constitute perfidy include feigning of . . . an intent to negotiate under a flag of truce”.¹²³³

¹²²⁹ Argentina, *Law of War Manual* (1969), § 1.017.

¹²³⁰ Argentina, *Law of War Manual* (1989), § 1.05(2)(1).

¹²³¹ Argentina, *Law of War Manual* (1989), § 8.03.

¹²³² Australia, *Commanders’ Guide* (1994), § 826(a) (naval warfare) and § 902(a) (land warfare).

¹²³³ Australia, *Defence Force Manual* (1994), § 703(a), see also § 910.

1143. Belgium's Law of War Manual states that "using the white flag in order to approach and attack" is an act of perfidy.¹²³⁴

1144. Cameroon's Instructors' Manual emphasises that "feigning to negotiate under the flag of parlementaires" is a perfidious act.¹²³⁵ Furthermore, the manual states that "abuse of the flag of parlementaires to surprise the enemy" is also an act of perfidy.¹²³⁶

1145. Canada's LOAC Manual provides that "the following are examples of perfidy if a hostile act is committed while: . . . feigning an intent to negotiate under a flag of truce".¹²³⁷ It also considers that "it is an abuse of the white flag to make use of it solely for the purpose of moving troops without interference by the adverse party".¹²³⁸ The manual further states that "perfidious use of . . . protective signs recognized by the Geneva Conventions or AP I" is a grave breach of AP I and a war crime.¹²³⁹

1146. Colombia's Directive on IHL punishes "the perfidious use of . . . protective signs recognised under the law of war (the white flag of parlementaires, for example)".¹²⁴⁰

1147. Croatia's LOAC Compendium provides that the "perfidious use of distinctive protective signs" is a grave breach and a war crime.¹²⁴¹

1148. Croatia's Commanders' Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of . . . the flag of truce".¹²⁴²

1149. Ecuador's Naval Manual provides that it is unlawful to use the flag of truce to gain a military advantage over the enemy. It adds that the "misuse of protective signs, signals and symbols . . . in order to injure, kill, or capture the enemy constitutes an act of perfidy".¹²⁴³

1150. France's LOAC Summary Note prohibits perfidy and stresses that "it is forbidden to feign a protected status to invite the confidence of the enemy (abuse of . . . white flag)".¹²⁴⁴ It also states that the "perfidious use of protected signs and signals" is a grave breach of the law of war and a war crime.¹²⁴⁵

1151. France's LOAC Teaching Note provides that "the recourse to perfidy is prohibited, notably the abuse of the white flag".¹²⁴⁶

¹²³⁴ Belgium, *Law of War Manual* (1983), p. 32.

¹²³⁵ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.1 and p. 90, § 222, see also p. 63, § 234.

¹²³⁶ Cameroon, *Instructors' Manual* (1992), p. 149, § 531.1.

¹²³⁷ Canada, *LOAC Manual* (1999), p. 6-2, § 9(a) (land warfare), p. 7-2, § 17(a) (air warfare) and p. 8-11, § 81(a) (naval warfare).

¹²³⁸ Canada, *LOAC Manual* (1999), p. 14-1, § 8.

¹²³⁹ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(f).

¹²⁴⁰ Colombia, *Directive on IHL* (1993), Section III(D).

¹²⁴¹ Croatia, *LOAC Compendium* (1991), p. 56.

¹²⁴² Croatia, *Commanders' Manual* (1992), § 46.

¹²⁴³ Ecuador, *Naval Manual* (1989), § 12.2.

¹²⁴⁴ France, *LOAC Summary Note* (1992), § 4.4.

¹²⁴⁵ France, *LOAC Summary Note* (1992), § 3.4.

¹²⁴⁶ France, *LOAC Teaching Note* (2000), p. 3.

1152. France's LOAC Manual states that "using a protective sign in order to deceive the enemy and attain an operational goal constitutes an act of perfidy. In some cases, this may be a war crime. It is notably prohibited to feign an intention to negotiate under the cover of the flag of parlementaires."¹²⁴⁷ Moreover, the manual states that "the perfidious use of any protective sign provided for by international law constitutes a war crime".¹²⁴⁸

1153. Under Germany's Soldiers' Manual, "the feigning of the intention to negotiate under a flag of truce" constitutes a perfidious act.¹²⁴⁹

1154. Germany's Military Manual provides that "misusing the flag of truce constitutes perfidy and hence a violation of international law... The flag of truce is being misused, for instance, if soldiers approach an enemy position under the protection of the flag of truce in order to attack".¹²⁵⁰ The manual also states that "grave breaches of international humanitarian law are in particular: ... perfidious ... use of recognized protective signs".¹²⁵¹

1155. Hungary's Military Manual states that "to falsely claim protected status, thereby inviting the confidence of the enemy: e.g. misuse of: ... flag of truce" is an act of perfidy.¹²⁵² It further states that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime.¹²⁵³

1156. Indonesia's Military Manual provides that "it is prohibited to kill or injure the enemy by perfidy, such as ... to misuse the flag of truce".¹²⁵⁴

1157. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not feign intent to ... negotiate under a white flag."¹²⁵⁵

1158. Israel's Manual on the Laws of War gives the following example of perfidy: "It is forbidden to use a white flag for an inappropriate purpose (posing as persons ... seeking negotiations with a view to gaining a military advantage)."¹²⁵⁶

1159. Under Italy's IHL Manual, grave breaches of international conventions and protocols, including "the perfidious use... of international protective signs", constitute war crimes.¹²⁵⁷

¹²⁴⁷ France, *LOAC Manual* (2001), p. 62.

¹²⁴⁸ France, *LOAC Manual* (2001), p. 118, see also p. 115.

¹²⁴⁹ Germany, *Soldiers' Manual* (1991), p. 2.

¹²⁵⁰ Germany, *Military Manual* (1992), § 230, see also § 1019 (naval warfare).

¹²⁵¹ Germany, *Military Manual* (1992), § 1209.

¹²⁵² Hungary, *Military Manual* (1992), p. 63.

¹²⁵³ Hungary, *Military Manual* (1992), p. 90.

¹²⁵⁴ Indonesia, *Military Manual* (1982), § 103.

¹²⁵⁵ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹²⁵⁶ Israel, *Manual on the Laws of War* (1998), p. 56.

¹²⁵⁷ Italy, *IHL Manual* (1991), Vol. I, § 85.

1160. Italy's LOAC Elementary Rules Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of . . . the flag of truce".¹²⁵⁸

1161. Madagascar's Military Manual states that "it is prohibited to feign a protected status thereby inviting the confidence of the enemy", such as abuse of the white flag.¹²⁵⁹

1162. The Military Manual of the Netherlands states that API "gives a number of examples of treacherous behaviour: feigning intent to negotiate under the flag of parlementaires".¹²⁶⁰

1163. The Military Handbook of the Netherlands provides that "misuse of the white flag is treachery".¹²⁶¹

1164. New Zealand's Military Manual states that "the feigning of an intent to negotiate under a flag of truce" is an example of perfidy.¹²⁶² It also states that "perfidious use of . . . protective signs recognised by the [Geneva] Conventions or [AP I]" constitutes a grave breach of AP I and a war crime.¹²⁶³

1165. Nigeria's Military Manual gives the following example of "perjury" (perfidy): "Feigning an intent to negotiate under a flag of truce".¹²⁶⁴

1166. Nigeria's Manual on the Laws of War states that "it is forbidden to deceive the enemy by hoisting a white flag and have the enemy believe that a parlementaire is approaching them and thereby concealing an advance for attack".¹²⁶⁵

1167. Under Romania's Soldiers' Manual, "feigning an intent to negotiate under the cover of a flag" is an act of perfidy.¹²⁶⁶

1168. South Africa's LOAC Manual states that the misuse of any of the symbols of protection (including the white flag) constitutes an act of perfidy and a grave breach of the law of armed conflict.¹²⁶⁷ It also states that "perfidious use of . . . the white flag" is a grave breach of AP I and a war crime.¹²⁶⁸

1169. Spain's LOAC Manual states that "the improper use of the flag of parlementaires constitutes an act of perfidy. An abuse is committed when one takes advantage of the protection of the flag to approach the enemy and attack him by surprise."¹²⁶⁹ Likewise, "feigning the intent to negotiate under a flag of parlementaires" is regarded as an act of perfidy.¹²⁷⁰ The manual also provides that "it is prohibited to feign a protected status by inviting the confidence of the

¹²⁵⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

¹²⁵⁹ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

¹²⁶⁰ Netherlands, *Military Manual* (1993), p. IV-2.

¹²⁶¹ Netherlands, *Military Handbook* (1995), p. 7-36.

¹²⁶² New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare).

¹²⁶³ New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(f).

¹²⁶⁴ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(a).

¹²⁶⁵ Nigeria, *Manual on the Laws of War* (undated), § 24.

¹²⁶⁶ Romania, *Soldiers' Manual* (1991), p. 35.

¹²⁶⁷ South Africa, *LOAC Manual* (1996), § 34(c).

¹²⁶⁸ South Africa, *LOAC Manual* (1996), §§ 37(d) and 41.

¹²⁶⁹ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1), see also § 7.5.c.

¹²⁷⁰ Spain, *LOAC Manual* (1996), Vol. I, §§ 3.3.b.(1) and 5.3.c, see also § 7.3.c.

enemy: misuse of . . . the flag of truce".¹²⁷¹ Moreover, the manual states that it is a grave breach and a war crime "to make a perfidious use . . . of . . . recognised protective signs".¹²⁷²

1170. Sweden's IHL Manual notes that "the feigning of an intent to negotiate under a flag of truce" is defined as perfidious conduct by Article 37 AP I.¹²⁷³

1171. Switzerland's Basic Military Manual forbids perfidy. Thus, "it is notably prohibited . . . to feign a desire to negotiate by misusing the flag of parlementaires".¹²⁷⁴ As an example of "murder by treason", the manual lists firing at the enemy while approaching them under the protection of a white flag.¹²⁷⁵ It also considers the "perfidious use of . . . distinctive signs recognised by the [Geneva] Conventions or [AP I], in violation of Article 37 [AP I]," as a grave breach of AP I.¹²⁷⁶

1172. The UK Military Manual, in connection with the requirements for being granted the status of combatant, notes in particular that irregular troops "should have been warned against the employment of treachery [and] improper conduct towards flags of truce".¹²⁷⁷ It considers it a legitimate ruse "to utilise an informal suspension of arms for the purpose of collecting wounded and dead . . . to execute movements unseen by the enemy". For instance, it notes an incident during the Russo-Japanese War of 1905, in which a group of Russians under the protection of the white flag and the red cross emblem advanced towards the Japanese army and asked for a suspension of arms to collect the wounded and the dead. It then used the occasion to withdraw completely.¹²⁷⁸ The manual condemns as unlawful the use of a "white flag for the purpose of making the enemy believe that a *parlementaire* is about to be sent when there is no such intention, and to carry out operations under the protection granted by the enemy to the pretended flag of truce".¹²⁷⁹ The manual emphasises that "abuse of a flag of truce constitutes gross perfidy and entitles the injured party to take reprisals or to try the offenders if captured".¹²⁸⁰

1173. The UK LOAC Manual provides that "abuse of the white flag is treachery".¹²⁸¹

1174. The US Field Manual states that "it is . . . an abuse of a flag of truce to carry out operations under the protection accorded by the enemy to it and those accompanying it".¹²⁸²

1175. The US Air Force Pamphlet states that:

The white flag has traditionally indicated a desire to communicate with the enemy . . . It raises expectations that the particular struggle is at an end or close to an

¹²⁷¹ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

¹²⁷² Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

¹²⁷³ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹²⁷⁴ Switzerland, *Basic Military Manual* (1987), Article 39.

¹²⁷⁵ Switzerland, *Basic Military Manual* (1987), Article 18, commentary.

¹²⁷⁶ Switzerland, *Basic Military Manual* (1987), Article 193(1)(f).

¹²⁷⁷ UK, *Military Manual* (1958), § 95.

¹²⁷⁸ UK, *Military Manual* (1958), § 319, including footnote 1.

¹²⁷⁹ UK, *Military Manual* (1958), § 416. ¹²⁸⁰ UK, *Military Manual* (1958), § 417.

¹²⁸¹ UK, *LOAC Manual* (1981), Annex A, p. 46, § 5. ¹²⁸² US, *Field Manual* (1956), § 467.

end since the only proper use of the flag of truce or white flag in international law is to communicate to the enemy a desire to negotiate. Thus, the use of a flag of truce or white flag in order to deceive or mislead the enemy, or for any other purpose other than to negotiate . . . has long been recognized as an act of treachery . . . [This] expresses the customary and conventional law in this area.¹²⁸³

The Pamphlet also states that “in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . treacherous request for . . . truce”.¹²⁸⁴

1176. The US Naval Handbook provides that it is unlawful to use the flag of truce to gain a military advantage over the enemy. It adds that “misuse of protective signs, signals and symbols . . . in order to injure, kill, or capture the enemy constitutes an act of perfidy”.¹²⁸⁵

1177. The YPA Military Manual of the SFRY (FRY) states that “feigning an intention to negotiate under a flag of truce” is an act of perfidy.¹²⁸⁶

National Legislation

1178. Argentina’s Draft Code of Military Justice punishes any soldier who “uses . . . in a perfidious manner, the flag of parlementaires”.¹²⁸⁷

1179. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence”.¹²⁸⁸

1180. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “improper use of a flag of truce . . . in order to feign an intention to negotiate when there is no such intention on the part of the perpetrator . . . [and which] results in deaths or serious personal injury”, in international armed conflicts.¹²⁸⁹

1181. Azerbaijan’s Criminal Code provides that “the misuse of the white flag, . . . which as a result caused death or serious injury to body of a victim,” constitutes a war crime in international and non-international armed conflicts.¹²⁹⁰

1182. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence”.¹²⁹¹

1183. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes

¹²⁸³ US, *Air Force Pamphlet* (1976), § 8-6(a)(2), see also § 8-3(a).

¹²⁸⁴ US, *Air Force Pamphlet* (1976), § 15-3(c)(3). ¹²⁸⁵ US, *Naval Handbook* (1995), § 12.2.

¹²⁸⁶ SFRY (FRY), *YPA Military Manual* (1988), § 104(1).

¹²⁸⁷ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(7) in the *Code of Military Justice as amended* (1951).

¹²⁸⁸ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹²⁸⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.41.

¹²⁹⁰ Azerbaijan, *Criminal Code* (1999), Article 119(2).

¹²⁹¹ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

according to customary international law” and, as such, indictable offences under the Act.¹²⁹²

1184. Colombia’s Penal Code, in an article entitled “Perfidy”, imposes a criminal sanction on “anyone who, during an armed conflict, with intent to harm or attack the adversary, . . . uses improperly . . . the white flag of parlementaires”.¹²⁹³

1185. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹²⁹⁴

1186. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]”.¹²⁹⁵

1187. Cyprus’s AP I Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach”.¹²⁹⁶

1188. The Draft Amendments to the Penal Code of El Salvador, in an article entitled “Perfidy”, provide for a prison sentence for “anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, . . . uses protective signs such as . . . the flag of parlementaires or truce”.¹²⁹⁷

1189. Ethiopia’s Penal Code punishes any abuse of the white flag, with intent to prepare or to commit hostile acts.¹²⁹⁸

1190. Under Georgia’s Criminal Code, “the perfidious use of . . . protective signs and signals recognised by international humanitarian law” in an international or non-international armed conflict is a crime.¹²⁹⁹

1191. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, “makes improper use . . . of the flag of truce, . . . thereby causing a person’s death or serious injury”.¹³⁰⁰

1192. Ireland’s Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹³⁰¹ It adds that any “minor breach” of AP I, including violations of Article 37(1) AP I, is also a punishable offence.¹³⁰²

¹²⁹² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹²⁹³ Colombia, *Penal Code* (2000), Article 143.

¹²⁹⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹²⁹⁵ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹²⁹⁶ Cyprus, *AP I Act* (1979), Section 4(1).

¹²⁹⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Perfidia”.

¹²⁹⁸ Ethiopia, *Penal Code* (1957), Article 294(b).

¹²⁹⁹ Georgia, *Criminal Code* (1999), Article 411(1)(f).

¹³⁰⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

¹³⁰¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹³⁰² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

1193. Under Jordan's Draft Military Criminal Code, "the perfidious use of . . . any . . . protective emblem" in time of armed conflict is a war crime.¹³⁰³

1194. Under the Draft Amendments to the Code of Military Justice of Lebanon, "the perfidious use of . . . any . . . protective sign provided for by the [Geneva] Conventions and [AP I]" constitutes a war crime.¹³⁰⁴

1195. Under Mali's Penal Code, "using the flag of parlementaires . . . and thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.¹³⁰⁵

1196. Myanmar's Defence Services Act punishes any person who "treacherously . . . sends a flag of truce to the enemy".¹³⁰⁶

1197. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".¹³⁰⁷

1198. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹³⁰⁸

1199. Nicaragua's Draft Penal Code, in an article entitled "Perfidy", punishes "anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, . . . uses protective signs such as . . . the flag . . . of truce".¹³⁰⁹

1200. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹³¹⁰

1201. Spain's Royal Ordinance for the Armed Forces provides that "the combatant . . . shall not display treacherously the white flag".¹³¹¹

1202. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses . . . in a perfidious manner the flag of parlementaires".¹³¹²

1203. Under Sweden's Penal Code as amended, misuse of flags of parlementaires or "the killing or injuring of an opponent by means of some other form of treacherous behaviour" constitutes a crime against international law.¹³¹³

¹³⁰³ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(14).

¹³⁰⁴ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(14).

¹³⁰⁵ Mali, *Penal Code* (2001), Article 31(i)(7).

¹³⁰⁶ Myanmar, *Defence Services Act* (1959), Section 32(f).

¹³⁰⁷ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹³⁰⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹³⁰⁹ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹³¹⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹³¹¹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

¹³¹² Spain, *Penal Code* (1995), Article 612(6).

¹³¹³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

1204. Tajikistan's Criminal Code punishes "the perfidious use of . . . protective signs and signals recognised by international humanitarian law" in an international or internal armed conflict.¹³¹⁴

1205. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹³¹⁵

1206. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".¹³¹⁶

1207. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹³¹⁷

1208. Under Yemen's Military Criminal Code, the "perfidious use of . . . international protective emblems provided for in international conventions" is a war crime.¹³¹⁸

1209. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".¹³¹⁹

National Case-law

1210. No practice was found.

Other National Practice

1211. A training video on IHL produced by the UK Ministry of Defence emphasises that it constitutes treachery to fire under the cover of protection of the flag of truce.¹³²⁰

1212. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "perfidious acts include the feigning of an intent . . . to negotiate under a flag of truce".¹³²¹

III. Practice of International Organisations and Conferences

1213. No practice was found.

¹³¹⁴ Tajikistan, *Criminal Code* (1998), Article 403(1).

¹³¹⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹³¹⁶ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹³¹⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹³¹⁸ Yemen, *Military Criminal Code* (1998), Article 21(5).

¹³¹⁹ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

¹³²⁰ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.2.

¹³²¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

IV. Practice of International Judicial and Quasi-judicial Bodies

1214. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

1215. According to the ICRC Commentary on the Additional Protocols, “the perfidious use . . . of emblems, signs, signals or uniforms referred to in Article 37 . . . of the Protocol [among which the flag of truce], for the purpose of killing, injuring or capturing an adversary, constitutes a grave breach under [Article 85(3)(f) AP I]”.¹³²²

1216. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “to pretend an intent to negotiate under a flag of truce” is an act of perfidy.¹³²³ Delegates also teach that “the perfidious use of the . . . distinctive signs marking specifically protected persons and objects . . . [and of] other protected signs recognized by the law of war” constitutes a grave breach of the law of war.¹³²⁴

1217. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “the perfidious use of the . . . protective signs and signals recognized by international humanitarian law”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹³²⁵

VI. Other Practice

1218. No practice was found.

Simulation of protected status by using the distinctive emblems of the Geneva Conventions

Note: *For practice concerning the improper use of the distinctive emblems of the Geneva Conventions which does not amount to perfidy, see supra section C of this chapter.*

¹³²² Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3499.

¹³²³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409(a).

¹³²⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779(a) and (b).

¹³²⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

*I. Treaties and Other Instruments**Treaties*

1219. Article 85(3)(f) AP I makes “the perfidious use . . . of the distinctive emblem of the red cross, red crescent or red lion and sun” a grave breach of AP I. Article 85(5) adds that “without prejudice to the application of the [Geneva] Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes”. Article 85 AP I was adopted by consensus.¹³²⁶

1220. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “when carried out in order to commit or resume hostilities, . . . the feigning of a situation of distress, notably through the misuse of an internationally recognized protective sign” was considered perfidy.¹³²⁷ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.¹³²⁸

1221. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use of . . . the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

1222. Article 15 of the 1913 Oxford Manual of Naval War states that “methods . . . which involve treachery are forbidden. Thus it is forbidden . . . to make improper use . . . of distinctive badges of the medical corps.”

1223. Paragraph 110 of the 1994 San Remo Manual provides that:

Warships and auxiliary vessels . . . are prohibited . . . at all times from actively simulating the status of:

- (a) hospital ships, small coastal rescue craft or medical transports;
- (b) vessels on humanitarian missions;

...

- (f) vessels entitled to be identified by the emblem of the red cross or red crescent.

1224. Paragraph 111(a) of the 1994 San Remo Manual states that perfidious acts include the launching of an attack while feigning exempt status.

1225. Pursuant to Article 20(b)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun” is a war crime.

1226. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use of . . . the distinctive emblems of the Geneva Conventions, resulting in death or serious personal injury” is a war crime in international armed conflicts.

¹³²⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹³²⁷ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

¹³²⁸ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

II. National Practice

Note: Many national instruments ensure the protection of the emblems of the red cross, red crescent and red lion and sun at all times, while others specifically address and criminalise the perfidious use of the emblems in times of armed conflict. Only the latter materials have been included here. For legislation on the misuse, abuse or improper use of the emblems which does not amount to perfidy, see *supra* section C of this chapter.

Military Manuals

1227. Under Argentina's Law of War Manual, "the perfidious use of the sign of the Red Cross or Red Crescent" constitutes a grave breach of AP I and a war crime.¹³²⁹

1228. Australia's Commanders' Guide, in a section entitled "Perfidy", states that "protection is afforded to . . . medical personnel . . . by providing them with special identification symbols. It is unlawful for soldiers and other lawful combatants to fraudulently use protected symbols or facilities to obtain immunity from attack."¹³³⁰

1229. Australia's Defence Force Manual states that:

Warships and auxiliary vessels . . . are prohibited . . . at all times from actively simulating the status of:

- a. hospital ships, small coastal rescue craft or medical transports;
- b. vessels on humanitarian missions; . . .
- f. vessels entitled to be identified by the emblem of the Red Cross or Red Crescent.

Perfidious acts include the launching of an attack while feigning:

- a. exempt . . . status.¹³³¹

1230. Belgium's Law of War Manual states that "using the red cross emblem to cover hostile acts" is an act of perfidy.¹³³²

1231. Belgium's Teaching Manual for Soldiers provides that "the use of the sign of the Red Cross to cover military operations constitutes a perfidy which is considered as a war crime".¹³³³

1232. Cameroon's Instructors' Manual states that "using the emblems of the Red Cross or Red Crescent to transport personnel or material intended for the war effort" is considered a perfidious act.¹³³⁴ It is also the case of "abuse of the signs of the red cross or red crescent".¹³³⁵

¹³²⁹ Argentina, *Law of War Manual* (1989), § 8.03.

¹³³⁰ Australia, *Commanders' Guide* (1994), § 504.

¹³³¹ Australia, *Defence Force Manual* (1994), §§ 635 and 636.

¹³³² Belgium, *Law of War Manual* (1983), p. 32.

¹³³³ Belgium, *Teaching Manual for Soldiers* (undated), p. 19.

¹³³⁴ Cameroon, *Instructors' Manual* (1992), p. 64, § 234.

¹³³⁵ Cameroon, *Instructors' Manual* (1992), p. 149, § 531.1.

1233. Canada's LOAC Manual states that "feigning . . . non-combatant status" is a perfidious act and that medical personnel of the armed forces are non-combatants.¹³³⁶ It also provides that "using false markings on military aircraft such as the markings of . . . medical aircraft" is an act of perfidy in air warfare.¹³³⁷ The manual further provides that "perfidious use of the distinctive emblem of the Red Cross or Red Crescent" constitutes a grave breach of AP I and a war crime.¹³³⁸

1234. Canada's Code of Conduct provides that "the use of the Red Cross to shield the movement of troops or ammunitions is . . . prohibited . . . Committing a hostile act under the cover of the protection provided by the distinctive emblem would constitute perfidy."¹³³⁹

1235. Colombia's Directive on IHL punishes:

the perfidious use of signs and signals, such as the distinctive signs which designate persons or objects specifically protected (. . . delegates of the International Committee of the Red Cross or other recognised humanitarian organisations), . . . [or of] distinctive signs used for the identification of the medical service.¹³⁴⁰

1236. Colombia's Basic Military Manual states that the use of the red cross emblem to hide armaments or to deceive the adversary is "a grave breach of IHL called perfidy".¹³⁴¹

1237. Croatia's LOAC Compendium provides that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime.¹³⁴²

1238. Croatia's Commanders' Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs and signals".¹³⁴³

1239. The Military Manual of the Dominican Republic states that "it is a serious breach of the laws of war when soldiers use these signs [red cross, red crescent, red lion and sun and red star of David] to protect or hide military activities".¹³⁴⁴

1240. Ecuador's Naval Manual states that:

Misuse of protective signs, signals, and symbols . . . in order to injure, kill, or capture the enemy constitutes an act of perfidy. Such acts are prohibited because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of non-combatants and the immunity of protected structures

¹³³⁶ Canada, *LOAC Manual* (1999), p. 3-3, § 20, p. 6-2, § 9(c) (land warfare), p. 7-2, § 17(c) (air warfare) and p. 8-11, § 81(d) (naval warfare), see also p. 8-10, § 79(f) (prohibition of actively simulating the status of vessels entitled to be identified by the emblem of the red cross and red crescent).

¹³³⁷ Canada, *LOAC Manual* (1999), p. 7-2, § 18(a).

¹³³⁸ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(f).

¹³³⁹ Canada, *Code of Conduct* (2001), Rule 10, § 10.

¹³⁴⁰ Colombia, *Directive on IHL* (1993), Section III(D).

¹³⁴¹ Colombia, *Basic Military Manual* (1995), p. 26, see also p. 49.

¹³⁴² Croatia, *LOAC Compendium* (1991), p. 56.

¹³⁴³ Croatia, *Commanders' Manual* (1992), § 46.

¹³⁴⁴ Dominican Republic, *Military Manual* (1980), p. 5.

and activities. For example, using an ambulance or medical aircraft marked with the red cross or red crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is prohibited.¹³⁴⁵

1241. France's LOAC Summary Note prohibits perfidy and provides that "it is forbidden to feign a protected status to invite the confidence of the enemy (abuse of distinctive signs and signals such as the Red Cross...)." ¹³⁴⁶ It also states that the "perfidious use of protected signs and signals" is a grave breach of the law of war and a war crime. ¹³⁴⁷

1242. France's LOAC Teaching Note states that the recourse to perfidy is prohibited, "notably the abuse... of distinctive signs, such as the Red Cross". ¹³⁴⁸

1243. France's LOAC Manual states that "the use of these insignia [red cross and red crescent] to deceive the enemy with a fraudulent intent is an act of perfidy. It is prohibited and constitutes a war crime when resulting in death or serious injury". ¹³⁴⁹ It further states that the camouflage of a military activity in a relief operation, such as using an ambulance to permit the passage of combatants through enemy lines or using the red cross to lure the enemy into an ambush, is to be regarded as a war crime. ¹³⁵⁰ Generally, the manual considers that using a protective sign to deceive the enemy and reach an operational goal constitutes an act of perfidy, while "the perfidious use of any protective sign recognised by international law constitutes a war crime". ¹³⁵¹

1244. Germany's Military Manual states that "the perfidious use of the distinctive emblem [red cross or red crescent] is explicitly prohibited and constitutes a grave breach of international law". ¹³⁵²

1245. Under Hungary's Military Manual, the misuse of distinctive signs is an act of perfidy. ¹³⁵³ It also states that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime. ¹³⁵⁴

1246. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not... make unlawful use of protected emblems." ¹³⁵⁵

1247. Israel's Manual on the Laws of War gives the following examples of perfidy: "it is forbidden to pose as... Red Cross personnel or use [this]

¹³⁴⁵ Ecuador, *Naval Manual* (1989), § 12.2.

¹³⁴⁶ France, *LOAC Summary Note* (1992), § 4.4.

¹³⁴⁷ France, *LOAC Summary Note* (1992), § 3.4.

¹³⁴⁸ France, *LOAC Teaching Note* (2000), p. 3.

¹³⁴⁹ France, *LOAC Manual* (2001), p. 46.

¹³⁵⁰ France, *LOAC Manual* (2001), pp. 62 and 94.

¹³⁵¹ France, *LOAC Manual* (2001), pp. 62 and 118, see also p. 115.

¹³⁵² Germany, *Military Manual* (1992), § 640, see also § 1209.

¹³⁵³ Hungary, *Military Manual* (1992), p. 63.

¹³⁵⁴ Hungary, *Military Manual* (1992), p. 90.

¹³⁵⁵ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

organization's uniform, flag and emblem . . . It is prohibited to misuse the emblems of medical personnel (a cross, crescent or red shield of David)."¹³⁵⁶

1248. Italy's IHL Manual states that grave breaches of international conventions and protocols, including "the perfidious use . . . of international protective signs", constitute war crimes.¹³⁵⁷

1249. Italy's LOAC Elementary Rules Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs".¹³⁵⁸

1250. Kenya's LOAC Manual states that "feigning non-combatant status" is an example of treachery.¹³⁵⁹ It specifies that medical and religious personnel of the armed forces are to be regarded as non-combatants.¹³⁶⁰

1251. Madagascar's Military Manual states that "it is prohibited to feign a protected status thereby inviting the confidence of the enemy", such as the abuse of distinctive signs.¹³⁶¹

1252. The Military Manual of the Netherlands states that "treachery means misusing the protection given by the law of war, for example misusing the Red Cross . . . [AP I] gives a number of examples of treacherous behaviour: . . . feigning to possess the status of civilian or non combatant (for example medical personnel or the personnel of the Red Cross)."¹³⁶²

1253. New Zealand's Military Manual states that "the use of false markings on military aircraft such as the markings of . . . medical aircraft . . . is the prime example of perfidious conduct in air warfare and is prohibited".¹³⁶³ It also states that "perfidious use of the distinctive emblem of the red cross, crescent or lion and sun" constitutes a grave breach of AP I and a war crime.¹³⁶⁴

1254. Nigeria's Military Manual gives the following example of "perjury" (perfidy): "Making improper use of the emblem of the Red Cross or red crescent."¹³⁶⁵

1255. Under Romania's Soldiers' Manual, "feigning the status of a protected person by abusing the signs and emblems of the International Red Cross" is an act of perfidy.¹³⁶⁶

1256. South Africa's LOAC Manual states that "it is forbidden . . . to fight while under the protection of the red cross or red crescent emblem". It is considered as perfidy and a grave breach of the law of armed conflict.¹³⁶⁷ The manual

¹³⁵⁶ Israel, *Manual on the Laws of War* (1998), pp. 56 and 57.

¹³⁵⁷ Italy, *IHL Manual* (1991), Vol. I, § 85.

¹³⁵⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

¹³⁵⁹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

¹³⁶⁰ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.

¹³⁶¹ Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 14.

¹³⁶² Netherlands, *Military Manual* (1993), p. IV-2.

¹³⁶³ New Zealand, *Military Manual* (1992), § 611(2).

¹³⁶⁴ New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(f).

¹³⁶⁵ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(f).

¹³⁶⁶ Romania, *Soldiers' Manual* (1991), p. 35.

¹³⁶⁷ South Africa, *LOAC Manual* (1996), § 34(c).

also states that “perfidious use of the red cross or red crescent emblem . . . in violation of Article 37 [AP I]” is a grave breach of AP I and a war crime.¹³⁶⁸

1257. Spain’s LOAC Manual states that “it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs and signals”.¹³⁶⁹ It also states that it is a grave breach of the law of war and a war crime “to make a perfidious use of the distinctive sign of the Red Cross”.¹³⁷⁰

1258. Sweden’s IHL Manual provides that “abuse of the distinctive emblem of the International Red Cross with perfidious intent is explicitly listed as perfidy and a gross infringement of international humanitarian law”.¹³⁷¹

1259. Switzerland’s Basic Military Manual states that the “perfidious use of the distinctive sign of the Red Cross, Red Crescent . . . in violation of Article 37 AP I” constitutes a grave breach of AP I.¹³⁷²

1260. The UK Military Manual states that “abuse of the distinctive sign for the purpose of offensive military action is a violation both of [GC I], and of the laws of war in general”.¹³⁷³

1261. The UK LOAC Manual states that the “feigning of non-combatant status” is an example of treachery.¹³⁷⁴ It specifies that “medical personnel, chaplains and civilians accompanying the armed forces are non-combatants”.¹³⁷⁵

1262. The US Field Manual gives the following examples of “improper use of the emblem”:

using a hospital or other building accorded such protection as an observation post or military office or depot; firing from a building or tent displaying the emblem of the Red Cross; using a hospital train or airplane to facilitate the escape of combatants; displaying the emblem on vehicles containing ammunition or other non-medical stores; and in general cloaking acts of hostility.¹³⁷⁶

1263. The US Air Force Pamphlet provides that:

Medical aircraft cannot retain status as protected medical aircraft during any flight in which they engage in any activity other than the transportation of patients and medical personnel or medical equipment and supplies. Use of the red cross during such a mission would be perfidious and unlawful.¹³⁷⁷

The Pamphlet also states that “the feigning by combatants of civilian, non-combatant status” is a perfidious act.¹³⁷⁸ It specifies that medical and religious personnel of the armed forces are non-combatants.¹³⁷⁹

¹³⁶⁸ South Africa, *LOAC Manual* (1996), §§ 37(d) and 41.

¹³⁶⁹ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

¹³⁷⁰ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

¹³⁷¹ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹³⁷² Switzerland, *Basic Military Manual* (1987), Article 193(1)(f).

¹³⁷³ UK, *Military Manual* (1958), § 379.

¹³⁷⁴ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a).

¹³⁷⁵ UK, *LOAC Manual* (1981), Section 3, p. 10, § 8(a).

¹³⁷⁶ US, *Field Manual* (1956), § 55.

¹³⁷⁷ US, *Air Force Pamphlet* (1976), § 2-6(e).

¹³⁷⁸ US, *Air Force Pamphlet* (1976), § 8-3(a).

¹³⁷⁹ US, *Air Force Pamphlet* (1976), § 3-4(c).

1264. The US Soldier's Manual states that "it is a serious breach of the laws of war when soldiers use these signs [red cross, red crescent and red shield of David] to protect or hide military activities".¹³⁸⁰

1265. The US Instructor's Guide states that:

The law of war prohibits treacherous acts. For example, there were occasions in World War II when the Nazis improperly identified buildings as hospitals and certain areas as protected areas. They really used the buildings or areas for direct military purposes such as observation posts, troop billets, defensive positions, or ammunition storage... Such tactics are prohibited because they destroy the basis for the restoration of peace short of the complete destruction of one side or the other.¹³⁸¹

The manual also states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: ... mis-using the Red Cross emblem such as using a medical evacuation helicopter to transport combat troops".¹³⁸²

1266. The US Naval Handbook states that:

Misuse of protective signs, signals, and symbols ... in order to injure, kill, or capture the enemy constitutes an act of perfidy. Such acts are prohibited because they undermine the effectiveness of protective signs, signals, and symbols and thereby jeopardize the safety of noncombatants and the immunity of protected structures and activities. For example, using an ambulance or medical aircraft marked with the red cross or red crescent to carry armed combatants, weapons, or ammunition with which to attack or elude enemy forces is prohibited.¹³⁸³

National Legislation

1267. Argentina's Draft Code of Military Justice punishes any soldier who "uses ... in a perfidious manner, the protective or distinctive signs established and recognised in international treaties to which the Argentine Republic is a party, especially the distinctive signs of the red cross and red crescent".¹³⁸⁴

1268. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach ... of [AP I] is guilty of an indictable offence".¹³⁸⁵

1269. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including, when committed in international armed conflicts:

improper use of the distinctive emblems of the Geneva Conventions ...

[when] the perpetrator uses the emblem for combatant purposes to invite the confidence of an adversary in order to lead him or her to believe that the perpetrator

¹³⁸⁰ US, *Soldier's Manual* (1984), p. 7. ¹³⁸¹ US, *Instructor's Guide* (1985), p. 8.

¹³⁸² US, *Instructor's Guide* (1985), p. 13. ¹³⁸³ US, *Naval Handbook* (1995), § 12.2.

¹³⁸⁴ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(5) in the *Code of Military Justice as amended* (1951).

¹³⁸⁵ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

is entitled to protection, or that the adversary is obliged to accord protection to the perpetrator, with intent to betray that confidence . . .

[and when] the perpetrator's conduct results in death or serious personal injury.¹³⁸⁶

1270. Azerbaijan's Criminal Code provides that "the perfidious use in time of war of the flags and signs of the red cross and red crescent or of the colours of medical transport units" constitutes a war crime in international and non-international armed conflicts.¹³⁸⁷

1271. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "the perfidious use of the distinctive emblem of the red cross" constitutes a crime under international law.¹³⁸⁸

1272. Bolivia's Emblem Law states that:

Any person who has wilfully committed, or given the order to commit, acts which have caused the death or serious injury to the body or health of an adversary by making perfidious use of the Emblem of the Red Cross or of a distinctive signal, i.e., having invited the good faith of this adversary, with the intent to betray that good faith, to make him believe that he is entitled to receive or obliged to accord the protection provided by the rules of International Humanitarian Law, has committed a war crime.¹³⁸⁹

1273. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹³⁹⁰

1274. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹³⁹¹

1275. Colombia's Penal Code, in an article entitled "Perfidy", imposes a criminal sanction on "anyone who, during an armed conflict, with intent to harm or attack the adversary, . . . uses improperly signs of protection such as the Red Cross or the Red Crescent".¹³⁹²

1276. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹³⁹³

1277. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits,

¹³⁸⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.44.

¹³⁸⁷ Azerbaijan, *Criminal Code* (1999), Article 119(1).

¹³⁸⁸ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(16).

¹³⁸⁹ Bolivia, *Emblem Law* (2002), Article 11.

¹³⁹⁰ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹³⁹¹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹³⁹² Colombia, *Penal Code* (2000), Article 143.

¹³⁹³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".¹³⁹⁴

1278. Costa Rica's Emblem Law punishes:

any person who, inviting the good faith of the adversary with intent to make him believe that he is entitled to protection of his physical integrity or his life or that he is obliged to accord protection in conformity with International Humanitarian Law, uses, or orders to be used, perfidiously the protective emblem.¹³⁹⁵

1279. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹³⁹⁶

1280. The Draft Amendments to the Penal Code of El Salvador, in an article entitled "Perfidy", provide for a prison sentence for "anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, . . . uses protective signs such as the red cross or the red crescent".¹³⁹⁷

1281. El Salvador's Emblem Law punishes "anyone who uses the emblem for perfidious purposes, in accordance with Article 37 . . . of [the 1977] Additional Protocol I".¹³⁹⁸

1282. Ethiopia's Penal Code punishes the abuse of the emblems or insignia of the red cross, red crescent or red lion and sun, "with intent to prepare or to commit hostile acts".¹³⁹⁹

1283. Under Georgia's Criminal Code, "the perfidious use of the distinctive sign of the red cross and red crescent" in an international or non-international armed conflict is a crime.¹⁴⁰⁰

1284. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "makes improper use of the distinctive emblems of the Geneva Conventions, . . . thereby causing a person's death or serious injury".¹⁴⁰¹

1285. Guatemala's Emblem Law punishes "anyone who, inviting the good faith of the adversary, with the intent to induce him to believe that he is entitled to the protection conferred by international humanitarian law, uses the protective emblem [of the red cross] in a perfidious manner".¹⁴⁰²

¹³⁹⁴ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹³⁹⁵ Costa Rica, *Emblem Law* (2000), Article 8.

¹³⁹⁶ Cyprus, *AP I Act* (1979), Section 4(1).

¹³⁹⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Perfidia".

¹³⁹⁸ El Salvador, *Emblem Law* (2000), Article 15.

¹³⁹⁹ Ethiopia, *Penal Code* (1957), Article 294.

¹⁴⁰⁰ Georgia, *Criminal Code* (1999), Article 411(1)(f).

¹⁴⁰¹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

¹⁴⁰² Guatemala, *Emblem Law* (1997), Article 12.

1286. Ireland's Geneva Conventions Act as amended provides that grave breaches of API are punishable offences.¹⁴⁰³

1287. Jordan's Draft Emblem Law states that:

Without prejudice to the penal provisions in force, any individual who, in time of war, intentionally uses, or orders to be used, in a perfidious manner, the emblem of the red crescent or red cross, or any other distinctive emblem so as to cause death or serious injury to body or health shall be considered a war criminal and shall be imprisoned. . . . Perfidious use means to induce the adversary to believe that he is entitled to, or obliged to accord, the protection provided for under international humanitarian law.¹⁴⁰⁴

1288. Under Jordan's Draft Military Criminal Code, "the perfidious use of the distinctive emblem of the red crescent and of the red cross" in time of armed conflict is a war crime.¹⁴⁰⁵

1289. Kyrgyzstan's Emblem Law provides that:

Anyone who intentionally has committed, or ordered to be committed, acts which cause death or serious injury to body or health of an adversary by using the emblem of the red crescent or red cross or a distinctive signal by having recourse to perfidy, has committed a war crime and shall be responsible in conformity with the legislation of the Kyrgyz Republic.¹⁴⁰⁶

1290. Under the Draft Amendments to the Code of Military Justice of Lebanon, "the perfidious use of the distinctive emblem of the red crescent or red cross" constitutes a war crime.¹⁴⁰⁷

1291. Liechtenstein's Emblem Law punishes "whoever misuses the sign or the protection of the red cross for the preparation or the execution of hostilities".¹⁴⁰⁸

1292. Under Mali's Penal Code, "using . . . the distinctive signs provided for by the Geneva Conventions, and thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.¹⁴⁰⁹

1293. Moldova's Emblem Law provides that "the perfidious use of the emblem of the red cross as a protective device in time of armed conflict is considered as a war crime and shall be punished in conformity with the criminal legislation".¹⁴¹⁰

1294. Moldova's Penal Code punishes the "perfidious use of the Red Cross emblem, as well as of the distinctive signs as protective elements during an armed conflict, provided that this has caused: a) a grave injury to body or health; b) death of a person".¹⁴¹¹

¹⁴⁰³ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁴⁰⁴ Jordan, *Draft Emblem Law* (1997), Article 15.

¹⁴⁰⁵ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(14).

¹⁴⁰⁶ Kyrgyzstan, *Emblem Law* (2000), Article 10.

¹⁴⁰⁷ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(14).

¹⁴⁰⁸ Liechtenstein, *Emblem Law* (1957), Article 8.

¹⁴⁰⁹ Mali, *Penal Code* (2001), Article 31(i)(7).

¹⁴¹⁰ Moldova, *Emblem Law* (1999), Article 17(1).

¹⁴¹¹ Moldova, *Penal Code* (2002), Article 392.

1295. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit “the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . the perfidious use . . . of the distinctive emblem of the red cross or red crescent”.¹⁴¹²

1296. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence”.¹⁴¹³

1297. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁴¹⁴

1298. Nicaragua’s Draft Penal Code, in an article entitled “Perfidy”, punishes “anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, . . . uses protective signs such as the red cross or red crescent”.¹⁴¹⁵

1299. Nicaragua’s Emblem Law provides that:

Any person who, intentionally and inviting the good faith of the adversary, leading him to believe that he has the right to, or the obligation to accord, the protection provided for under the rules of international humanitarian law by using the emblem of the Red Cross or of a distinctive signal in a perfidious manner, has committed, or given the order to commit, acts which cause the death or seriously injure the body or health of an adversary, shall be punished in accordance with the criminal legislation in force.¹⁴¹⁶

1300. According to Niger’s Penal Code as amended, “using perfidiously the distinctive sign of the red cross or of the red crescent”, protected under the 1949 Geneva Conventions and their Additional Protocols of 1977, is a war crime.¹⁴¹⁷

1301. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.¹⁴¹⁸

1302. Spain’s Penal Code punishes “anyone who, during an armed conflict . . . uses . . . in a perfidious manner the protective or distinctive signs, emblems or signals established and recognised under international treaties to which Spain is a party, in particular the distinctive signs of the Red Cross and Red Crescent”.¹⁴¹⁹

¹⁴¹² Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(vi).

¹⁴¹³ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁴¹⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁴¹⁵ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹⁴¹⁶ Nicaragua, *Emblem Law* (2002), Article 12.

¹⁴¹⁷ Niger, *Penal Code as amended* (1961), Article 208.3(16).

¹⁴¹⁸ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁴¹⁹ Spain, *Penal Code* (1995), Article 612(4).

1303. Under Sweden's Penal Code as amended, the misuse of emblems of medical aid (red cross) or "the killing or injuring of an opponent by means of some other form of treacherous behaviour" constitutes a crime against international law.¹⁴²⁰

1304. Switzerland's Military Criminal Code as amended punishes "anyone who abuses the emblem or the protection of the Red Cross, Red Crescent, Red Lion and Sun... to prepare or commit hostile acts" in time of armed conflict.¹⁴²¹

1305. Tajikistan's Criminal Code punishes "the perfidious use of the distinctive sign of the red cross and red crescent" in an international or internal armed conflict.¹⁴²²

1306. Togo's Emblem Law punishes "any person who, intentionally, shall have committed, or ordered to be committed, acts which have caused death or serious injury to body or health of an adversary by using in a perfidious way, the emblem of the Red Cross or Red Crescent or a distinctive signal". It adds that "the perfidious use of the emblem constitutes a grave breach of the Geneva Conventions and their Additional Protocols and is considered as a war crime".¹⁴²³

1307. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁴²⁴

1308. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of... [AP I]".¹⁴²⁵

1309. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁴²⁶

1310. Under Yemen's Military Criminal Code, the "perfidious use of the distinctive emblem of the Yemeni Red Crescent" is a war crime.¹⁴²⁷

1311. Under Yemen's Emblem Law, "any person who has used the emblem, with perfidious intent, in time of war, so as to cause death or serious injury to body or health of any person, or has ordered such use, shall be punished by the sanction defined in the laws in force".¹⁴²⁸

1312. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of... [AP I]".¹⁴²⁹

¹⁴²⁰ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

¹⁴²¹ Switzerland, *Military Criminal Code as amended* (1927), Article 110.

¹⁴²² Tajikistan, *Criminal Code* (1998), Article 403(1).

¹⁴²³ Togo, *Emblem Law* (1999), Article 16.

¹⁴²⁴ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁴²⁵ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹⁴²⁶ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁴²⁷ Yemen, *Military Criminal Code* (1998), Article 21(5).

¹⁴²⁸ Yemen, *Emblem Law* (1999), Article 12.

¹⁴²⁹ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

National Case-law

1313. In the *Hagendorf case* before the US Intermediate Military Government Court at Dachau in 1946, the accused, a German soldier, was charged with having “wrongfully used the Red Cross emblem in a combat zone by firing a weapon at American soldiers from an enemy ambulance displaying such emblem”. The accused was found guilty.¹⁴³⁰

Other National Practice

1314. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that treachery is prohibited. According to the report, this may consist in the improper use of the signs of the red cross or red crescent. The report gives as examples of treachery the transportation of weapons and ammunition in an ambulance and the use of a hospital displaying the distinctive emblem as an ammunition dump.¹⁴³¹

1315. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that “perfidious acts include . . . the feigning of protected status through improper use of the Red Cross or Red Crescent distinctive emblem”.¹⁴³²

*III. Practice of International Organisations and Conferences**United Nations*

1316. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 789 (1992) considered that “the *Hagendorf case* . . . in which a German soldier was convicted for abusing the Red Cross emblem by firing at American soldiers from an ambulance, might constitute a useful precedent. In that case, however, the accused was captured at the time of the incident.”¹⁴³³

Other International Organisations

1317. No practice was found.

International Conferences

1318. No practice was found.

¹⁴³⁰ US, Intermediate Military Government Court at Dachau, *Hagendorf case*, Judgement, 9 August 1946.

¹⁴³¹ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 2.6.

¹⁴³² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

¹⁴³³ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex VI.B, UN Doc. S/1994/674/Add.2 [Vol. III], 28 December 1994, § 85.

IV. Practice of International Judicial and Quasi-judicial Bodies

1319. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

1320. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the perfidious use of the... distinctive signs marking specifically protected persons and objects... [and of] distinctive signals used for identification of medical service” constitutes a grave breach of the law of war.¹⁴³⁴

1321. In a press release issued in 1985, the ICRC reported that a car loaded with explosives was set off by its driver near a check-point in southern Lebanon. According to witnesses, the car was bearing the red cross emblem. The ICRC stated “the use of the protective emblem of the Red Cross for indiscriminate killing and wounding is a doubly detestable act which the International Committee of the Red Cross (ICRC) condemns”.¹⁴³⁵

1322. The 1996 ICRC Model Law concerning the Use and Protection of the Emblem of the Red Cross or Red Crescent provides that:

Anyone who has wilfully committed, or has given the order to commit, acts resulting in the death of, or causing serious injury to the body or health of, an adversary by making perfidious use of the red cross or red crescent emblem or a distinctive signal, has committed a war crime and shall be punished by imprisonment for a period of... years.

Perfidious use means appealing to the good faith of the adversary, with the intention to deceive him and make him believe that he was entitled to receive or was obliged to confer the protection provided for by the rules of international humanitarian law.¹⁴³⁶

1323. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “the perfidious use of the distinctive emblem of the red cross or red crescent”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹⁴³⁷

VI. Other Practice

1324. In 1987, an article published in the French newspaper *Le Monde* discussed an incident in which the counterrevolutionary forces in Nicaragua had

¹⁴³⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779(a) and (c).

¹⁴³⁵ ICRC, Press Release No. 1509, South Lebanon: The red cross emblem used for a bombing attack, 16 July 1985.

¹⁴³⁶ ICRC, Model Law concerning the Use and Protection of the Emblem of the Red Cross or Red Crescent, Article 11, *IRRC*, No. 313, 1996, p. 486.

¹⁴³⁷ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

allegedly used a helicopter bearing the emblem of the red cross to carry military supplies. The ICRC was reported in the article as stating that the red cross emblem may only be used by the medical services of the belligerent forces to provide protection for the wounded and sick and for the persons providing care for them. The use of a vehicle marked with the red cross emblem to transport soldiers, weapons or other military equipment was described in the article as “a grave breach of the rules of international humanitarian law”.¹⁴³⁸

Simulation of protected status by using the United Nations emblem or uniform

Note: *For practice concerning the improper use of the United Nations emblem or uniform which does not amount to perfidy, see supra section D of this chapter.*

I. Treaties and Other Instruments

Treaties

1325. Article 37(1)(d) AP I lists “the feigning of protected status by the use of signs, emblems or uniforms of the United Nations” as an act of perfidy. Article 37 AP I was adopted by consensus.¹⁴³⁹

1326. Under Article 85(3) AP I, “the perfidious use, in violation of Article 37, of . . . protective signs recognized by the Geneva Conventions or this Protocol” is a grave breach of AP I. Article 85(5) adds that “without prejudice to the application of the [Geneva] Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes”. Article 85 AP I was adopted by consensus.¹⁴⁴⁰

1327. Under Article 8(2)(b)(vii) of the 1998 ICC Statute, “making improper use . . . of the flag or of the military insignia and uniform . . . of the United Nations, . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

Other Instruments

1328. Paragraph 110(d) of the 1994 San Remo Manual provides that “warships and auxiliary vessels . . . are prohibited . . . at all times from actively simulating the status of . . . vessels protected by the United Nations flag”. Paragraph 111(a) states that “perfidious acts include the launching of an attack while feigning . . . protected United Nations status”.

1329. Pursuant to Article 20(b)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “the perfidious use of . . . recognized protective signs” is a war crime.

¹⁴³⁸ Isabelle Vichniac, *Violation of the Rules of Humanitarian Law? Red Cross Warns Against Contras' use of its Emblem for Military Purposes*, *Le Monde*, 19 June 1987.

¹⁴³⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

¹⁴⁴⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

1330. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(vii), “making improper use . . . of the flag or of the military insignia and uniform . . . of the United Nations, . . . resulting in death or serious personal injury” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

1331. Argentina’s Law of War Manual provides that it is an example of perfidy “to make use of the signs, emblems or uniforms of the United Nations . . . so as to simulate a protected status”.¹⁴⁴¹ It adds that “the perfidious use of . . . recognised protective signs” is a grave breach of AP I and a war crime.¹⁴⁴²

1332. Australia’s Commanders’ Guide stresses that “acts which constitute perfidy include feigning of . . . protected status by the use of protective symbols, signs, emblems or uniforms of the United Nations”.¹⁴⁴³

1333. Australia’s Defence Force Manual provides that “acts which . . . constitute perfidy include feigning of . . . protected status by the use of protective symbols, signs, emblems or uniforms of the United Nations”.¹⁴⁴⁴

1334. Cameroon’s Instructors’ Manual provides that “feigning having a protected status by using signs, emblems or uniforms of the United Nations” is an example of perfidy.¹⁴⁴⁵

1335. Canada’s LOAC Manual provides that “the following are examples of perfidy if a hostile act is committed while: . . . feigning protected status by the use of signs, emblems or uniforms of the United Nations”.¹⁴⁴⁶ It also considers it an act of perfidy in air warfare if a hostile act is committed while “using false markings on military aircraft such as the markings of . . . United Nations aircraft”.¹⁴⁴⁷ The manual further states that “perfidious use of . . . protective signs recognized by the Geneva Conventions or AP I” constitutes a grave breach of AP I and a war crime.¹⁴⁴⁸

1336. Colombia’s Directive on IHL considers “the perfidious use of . . . protective signs recognised under the law of war” as a punishable offence.¹⁴⁴⁹

1337. Croatia’s LOAC Compendium provides that the “perfidious use of distinctive protective signs” is a grave breach of the law of war and a war crime.¹⁴⁵⁰

¹⁴⁴¹ Argentina, *Law of War Manual* (1989), § 1.05(2)(4).

¹⁴⁴² Argentina, *Law of War Manual* (1989), § 8.03.

¹⁴⁴³ Australia, *Commanders’ Guide* (1994), § 826(d) (naval warfare) and § 902(d) (land warfare).

¹⁴⁴⁴ Australia, *Defence Force Manual* (1994), § 703(d) (land warfare), see also §§ 635(d) and 636(a) (naval warfare).

¹⁴⁴⁵ Cameroon, *Instructors’ Manual* (1992), pp. 63 and 64, § 234.

¹⁴⁴⁶ Canada, *LOAC Manual* (1999), p. 6-2, § 9(d) (land warfare), see also p. 7-2, § 17(d) (air warfare) and p. 8-11, § 81(e) (naval warfare).

¹⁴⁴⁷ Canada, *LOAC Manual* (1999), p. 7-2, § 18(a).

¹⁴⁴⁸ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(f).

¹⁴⁴⁹ Colombia, *Directive on IHL* (1993), Section III(D).

¹⁴⁵⁰ Croatia, *LOAC Compendium* (1991), p. 56.

1338. Croatia's Commanders' Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs".¹⁴⁵¹

1339. France's LOAC Summary Note prohibits perfidy, and states that "it is forbidden to feign a protected status by inviting the confidence of the enemy (abuse of distinctive signs and signals . . .)".¹⁴⁵² It also states that the "perfidious use of protected signs and signals" is a grave breach of the law of war and a war crime.¹⁴⁵³

1340. France's LOAC Manual provides that "using a protective sign to deceive the enemy and reach an operational goal constitutes an act of perfidy".¹⁴⁵⁴ It specifies that the use of UN emblems and uniforms with the view to commit hostile acts is criminalised.¹⁴⁵⁵ Generally, it considers that "the perfidious use of any protective sign recognised by international law constitutes a war crime".¹⁴⁵⁶

1341. Germany's Military Manual provides that "grave breaches of international humanitarian law are in particular: . . . perfidious . . . use of recognized protective signs".¹⁴⁵⁷

1342. Hungary's Military Manual gives as an example of perfidy "to falsely claim protected status, thereby inviting the confidence of the enemy", *inter alia*, by using the UN flag.¹⁴⁵⁸ The manual also states that the "perfidious use of distinctive protective signs" is a grave breach of the law of war and a war crime.¹⁴⁵⁹

1343. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not . . . make unlawful use of protected emblems or uniforms."¹⁴⁶⁰

1344. Israel's Manual on the Laws of War states, as an example of perfidious conduct, that "it is prohibited to pose as U.N. . . . personnel or use [UN] uniform, flag and emblems".¹⁴⁶¹

1345. Under Italy's IHL Manual, grave breaches of international conventions and protocols, including "the perfidious use . . . of international protective signs", constitute war crimes.¹⁴⁶²

1346. Italy's LOAC Elementary Rules Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs".¹⁴⁶³

¹⁴⁵¹ Croatia, *Commanders' Manual* (1992), § 46.

¹⁴⁵² France, *LOAC Summary Note* (1992), § 4.4.

¹⁴⁵³ France, *LOAC Summary Note* (1992), § 3.4.

¹⁴⁵⁴ France, *LOAC Manual* (2001), p. 62. ¹⁴⁵⁵ France, *LOAC Manual* (2001), p. 115.

¹⁴⁵⁶ France, *LOAC Manual* (2001), p. 118, see also p. 115.

¹⁴⁵⁷ Germany, *Military Manual* (1992), § 1209.

¹⁴⁵⁸ Hungary, *Military Manual* (1992), p. 63. ¹⁴⁵⁹ Hungary, *Military Manual* (1992), p. 90.

¹⁴⁶⁰ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹⁴⁶¹ Israel, *Manual on the Laws of War* (1998), p. 56.

¹⁴⁶² Italy, *IHL Manual* (1991), Vol. I, § 85.

¹⁴⁶³ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

1347. The Military Manual of the Netherlands states that AP I “gives a number of examples of treacherous behaviour: feigning to possess a protected position by using signs, emblems or uniforms of the United Nations”.¹⁴⁶⁴

1348. New Zealand’s Military Manual provides that “the following acts are examples of perfidy: . . . the feigning of protected status by the use of signs, emblems or uniforms of the United Nations”.¹⁴⁶⁵ It also states that “the use of false markings on military aircraft such as the markings of . . . United Nations aircraft . . . is the prime example of perfidious conduct in air warfare and is prohibited”.¹⁴⁶⁶ It further states that “perfidious use of . . . protective signs recognised by the [Geneva] Conventions or [AP I]” constitutes a grave breach of AP I and a war crime.¹⁴⁶⁷

1349. Nigeria’s Military Manual gives the following example of “perjury” (perfidy): “feigning protection status by the use of signs, emblems or uniforms of the UN”.¹⁴⁶⁸

1350. Under Romania’s Soldiers’ Manual, “feigning the status of a protected person by abusing the signs and emblems of . . . the UN” is an act of perfidy.¹⁴⁶⁹

1351. South Africa’s LOAC Manual provides that “grave breaches of the law of war are regarded as war crimes”.¹⁴⁷⁰

1352. Spain’s LOAC Manual considers “feigning to possess a protected status by using the signs, emblems or uniforms of the United Nations” as an example of perfidy.¹⁴⁷¹ It also states that “it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs”.¹⁴⁷² It also states that it is a grave breach of the law of war and a war crime “to make a perfidious use . . . of . . . recognised protective signs”.¹⁴⁷³

1353. Sweden’s IHL Manual emphasises that, pursuant to Article 37 AP I, “the feigning of protected . . . status . . . of a member of the armed forces . . . of the United Nations” constitutes a perfidious conduct.¹⁴⁷⁴

1354. Switzerland’s Basic Military Manual considers the “perfidious use of . . . distinctive signs recognised by the [Geneva] Conventions or [AP I], in violation of Article 37 [AP I]”, as a grave breach of AP I.¹⁴⁷⁵

1355. The YPA Military Manual of the SFRY (FRY) states that feigning protected status by using UN symbols, emblems, signs or uniforms is an act of perfidy.¹⁴⁷⁶

¹⁴⁶⁴ Netherlands, *Military Manual* (1993), p. IV-2.

¹⁴⁶⁵ New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare), see also § 1905.

¹⁴⁶⁶ New Zealand, *Military Manual* (1992), § 611(2).

¹⁴⁶⁷ New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(f).

¹⁴⁶⁸ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(e).

¹⁴⁶⁹ Romania, *Soldiers’ Manual* (1991), p. 35. ¹⁴⁷⁰ South Africa, *LOAC Manual* (1996), § 41.

¹⁴⁷¹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(1), see also § 5.3.c.

¹⁴⁷² Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

¹⁴⁷³ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

¹⁴⁷⁴ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹⁴⁷⁵ Switzerland, *Basic Military Manual* (1987), Article 193(1)(f).

¹⁴⁷⁶ SFRY (FRY), *YPA Military Manual* (1988), § 104(3).

National Legislation

1356. Argentina's Draft Code of Military Justice punishes any soldier who "uses . . . in a perfidious manner, the flag, uniform, insignia or distinctive emblem . . . of the United Nations".¹⁴⁷⁷

1357. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁴⁷⁸

1358. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "improper use of a flag, insignia or uniform of the United Nations . . . [when] the perpetrator's conduct results in death or serious personal injury", in international armed conflicts.¹⁴⁷⁹

1359. Azerbaijan's Criminal Code provides that "the misuse of . . . the flag, the sign or clothes of the United Nations, . . . which as a result caused death or serious injury to body of a victim" constitutes a war crime in international and non-international armed conflicts.¹⁴⁸⁰

1360. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".¹⁴⁸¹

1361. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁴⁸²

1362. Colombia's Penal Code, in an article entitled "Perfidy", imposes a criminal sanction on "anyone who, during an armed conflict, with intent to harm or attack the adversary, . . . uses improperly . . . the flag of the United Nations or of other intergovernmental organisations".¹⁴⁸³

1363. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁴⁸⁴

1364. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".¹⁴⁸⁵

¹⁴⁷⁷ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(6) in the *Code of Military Justice as amended* (1951).

¹⁴⁷⁸ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁴⁷⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.43.

¹⁴⁸⁰ Azerbaijan, *Criminal Code* (1999), Article 119(2).

¹⁴⁸¹ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁴⁸² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁴⁸³ Colombia, *Penal Code* (2000), Article 143.

¹⁴⁸⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁴⁸⁵ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

1365. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹⁴⁸⁶

1366. The Draft Amendments to the Penal Code of El Salvador, in an article entitled "Perfidy", provide for a prison sentence for "anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, ... uses ... the flag of the United Nations or international organisations; the flags, uniforms or insignia ... of military or police detachments of the United Nations".¹⁴⁸⁷

1367. Under Ethiopia's Penal Code, it is a punishable offence to abuse any "protective device recognized in public international law, ... with intent to prepare or to commit hostile acts".¹⁴⁸⁸

1368. Under Georgia's Criminal Code, "the perfidious use of ... protective signs and signals recognised by international humanitarian law" in an international or non-international armed conflict is a crime.¹⁴⁸⁹

1369. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "makes improper use ... of the flag ... or of the uniform ... of the United Nations, thereby causing a person's death or serious injury".¹⁴⁹⁰

1370. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁴⁹¹ It adds that any "minor breach" of AP I, including violations of Article 37(1) AP I, is also a punishable offence.¹⁴⁹²

1371. Under Jordan's Draft Military Criminal Code, "the perfidious use of ... any ... protective emblem" in time of armed conflict is a war crime.¹⁴⁹³

1372. Under the Draft Amendments to the Code of Military Justice of Lebanon, "the perfidious use of ... any ... protective sign provided for by the [Geneva] Conventions and [AP I]" constitutes a war crime.¹⁴⁹⁴

1373. Lithuania's Criminal Code as amended considers that the improper use of emblems of international organisations is a war crime.¹⁴⁹⁵

1374. Under Mali's Penal Code, "using ... the flag or military insignia or uniform ... of the United Nations Organisation, ... and thereby, causing loss of human lives or serious injuries" is a war crime in international armed conflicts.¹⁴⁹⁶

¹⁴⁸⁶ Cyprus, *AP I Act* (1979), Section 4(1).

¹⁴⁸⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Perfidia".

¹⁴⁸⁸ Ethiopia, *Penal Code* (1957), Article 294(b).

¹⁴⁸⁹ Georgia, *Criminal Code* (1999), Article 411(1)(f).

¹⁴⁹⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 10(2).

¹⁴⁹¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁴⁹² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁴⁹³ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(14).

¹⁴⁹⁴ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(14).

¹⁴⁹⁵ Lithuania, *Criminal Code as amended* (1961), Article 344.

¹⁴⁹⁶ Mali, *Penal Code* (2001), Article 31(i)(7).

1375. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".¹⁴⁹⁷

1376. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁴⁹⁸

1377. Nicaragua's Draft Penal Code, in an article entitled "Perfidy", punishes "anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, . . . uses . . . the flag of the United Nations or international organisations; . . . the flags, uniforms or insignia . . . of military or police detachments of the United Nations".¹⁴⁹⁹

1378. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁵⁰⁰

1379. Spain's Royal Ordinance for the Armed Forces states that "the combatant . . . shall not display treacherously the flag . . . of international organisations".¹⁵⁰¹

1380. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses . . . in a perfidious manner the flag, uniform, insignia or distinctive emblem . . . of the United Nations".¹⁵⁰²

1381. Under Sweden's Penal Code as amended, the misuse of the insignia of the UN or "the killing or injuring of an opponent by means of *some other form of treacherous behaviour*" constitutes a crime against international law.¹⁵⁰³ (emphasis added)

1382. Tajikistan's Criminal Code punishes "the perfidious use of . . . protective signs and signals recognised by international humanitarian law" in an international or internal armed conflict.¹⁵⁰⁴

1383. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁵⁰⁵

1384. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".¹⁵⁰⁶

¹⁴⁹⁷ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁴⁹⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁴⁹⁹ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹⁵⁰⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁵⁰¹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

¹⁵⁰² Spain, *Penal Code* (1995) Article 612(5).

¹⁵⁰³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

¹⁵⁰⁴ Tajikistan, *Criminal Code* (1998), Article 403(1).

¹⁵⁰⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁵⁰⁶ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

1385. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(vii) of the 1998 ICC Statute.¹⁵⁰⁷

1386. Under Yemen's Military Criminal Code, the "perfidious use of... international protective emblems provided for in international conventions" is a war crime.¹⁵⁰⁸

1387. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of... [AP I]".¹⁵⁰⁹

National Case-law

1388. No practice was found.

Other National Practice

1389. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

1390. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) considered that:

If it can be established that named individuals in the [Bosnian Serb army] used or authorized the use of vehicles which carried UN markings, this could be viewed as perfidious conduct and, if persons were killed or wounded as a result of this action, a grave breach of [AP I] could be established.¹⁵¹⁰

Other International Organisations

1391. No practice was found.

International Conferences

1392. At the CDDH, Committee III reported that "the misuse of United Nations signs, emblems or uniforms would be perfidious in cases where the United Nations and its personnel enjoyed a neutral protected status, but not, of course, in situations where the United Nations forces were involved as combatants in a conflict".¹⁵¹¹

¹⁵⁰⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁵⁰⁸ Yemen, *Military Criminal Code* (1998), Article 21(5).

¹⁵⁰⁹ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

¹⁵¹⁰ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex VI.B, UN Doc. S/1994/674/Add.2 (Vol. III), 28 December 1994, § 85.

¹⁵¹¹ CDDH, *Official Records*, Vol. XV, CDDH/III/236/Rev.1, 21 April–11 June 1976, p. 382, § 18.

IV. Practice of International Judicial and Quasi-judicial Bodies

1393. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

1394. According to the ICRC Commentary on the Additional Protocols, “the perfidious use . . . of emblems, signs, signals or uniforms referred to in Article 37 . . . of the Protocol [among which the UN emblem], for the purpose of killing, wounding or capturing an adversary, constitutes a grave breach under [Article 85(3)(f) AP I]”.¹⁵¹²

1395. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “to pretend having protected status by the use of flags, emblems or uniforms of the United Nations” is an act of perfidy.¹⁵¹³ Delegates also teach that “the perfidious use of the . . . distinctive signs marking specifically protected persons and objects . . . [and of] other protected signs recognized by the law of war” constitutes a grave breach of the law of war.¹⁵¹⁴

1396. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “the perfidious use of the . . . protective signs and signals recognized by international humanitarian law”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹⁵¹⁵

VI. Other Practice

1397. No practice was found.

Simulation of protected status by using other internationally recognised emblems

Note: For practice concerning the improper use of other internationally recognised emblems which does not amount to perfidy, see supra section E of this chapter.

¹⁵¹² Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3499.

¹⁵¹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409(e).

¹⁵¹⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779(a) and (b).

¹⁵¹⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

I. Treaties and Other Instruments

Treaties

1398. Under Article 85(3)(f) AP I, “the perfidious use, in violation of Article 37, of . . . protective signs recognized by the Conventions or this Protocol” is a grave breach of AP I. Article 85 AP I was adopted by consensus.¹⁵¹⁶

Other Instruments

1399. Pursuant to Article 20(b)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “the perfidious use of . . . recognized protective signs” is a war crime.

II. National Practice

Military Manuals

1400. Argentina’s Law of War Manual provides that “the perfidious use of . . . recognised protective signs” is a grave breach of AP I and a war crime.¹⁵¹⁷

1401. Australia’s Commanders’ Guide, in a section entitled “Perfidy”, states that “protection is afforded to . . . civil defence workers . . . and PW by providing them with special identification symbols. It is unlawful for soldiers and other lawful combatants to fraudulently use protected symbols . . . in order to obtain immunity from attack.”¹⁵¹⁸

1402. Canada’s LOAC Manual provides that “the perfidious use of . . . protective signs recognized by the Geneva Conventions or AP I” constitutes a grave breach of AP I and a war crime.¹⁵¹⁹

1403. Colombia’s Directive on IHL punishes “the perfidious use of . . . protective signs recognised under the law of war . . . [or of] the distinctive signs used for the identification . . . of civil defence”.¹⁵²⁰

1404. Croatia’s LOAC Compendium provides that the “perfidious use of distinctive protective signs” is a grave breach of the law of war and a war crime.¹⁵²¹

1405. Croatia’s Commanders’ Manual states that “it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs”.¹⁵²²

1406. Ecuador’s Naval Manual states that “misuse of protective signs, signals and symbols in order to injure, kill, or capture the enemy constitutes an act of perfidy”.¹⁵²³

¹⁵¹⁶ CDDH, *Official Records*, Vol. VI, CCDH/SR.44, 30 May 1977, p. 291.

¹⁵¹⁷ Argentina, *Law of War Manual* (1989), § 8.03.

¹⁵¹⁸ Australia, *Commanders’ Guide* (1994), § 504.

¹⁵¹⁹ Canada, *LOAC Manual* (1999), p. 16-2, § 8(a) and p. 16-3, § 16(f).

¹⁵²⁰ Colombia, *Directive on IHL* (1993), Section III(D).

¹⁵²¹ Croatia, *LOAC Compendium* (1991), p. 56.

¹⁵²² Croatia, *Commanders’ Manual* (1992), § 46.

¹⁵²³ Ecuador, *Naval Manual* (1989), § 12.2.

1407. France's LOAC Summary Note prohibits perfidy and states that "it is forbidden to feign a protected status by inviting the confidence of the enemy (abuse of distinctive signs and signals . . .)".¹⁵²⁴ It also states that the "perfidious use of protected signs and signals" is a grave breach of the law of war and a war crime.¹⁵²⁵

1408. France's LOAC Manual states that "using a protective sign to deceive the enemy and reach an operational goal constitutes an act of perfidy".¹⁵²⁶ It further provides that "the perfidious use of any protective sign recognised by international law constitutes a war crime".¹⁵²⁷

1409. Germany's Military Manual provides that "grave breaches of international humanitarian law are in particular: . . . the perfidious . . . use of recognized protective signs".¹⁵²⁸

1410. Hungary's Military Manual states that the "perfidious use of distinctive protective signs" is a grave breach and a war crime.¹⁵²⁹

1411. Referring to Israel's Law of War Booklet, the Report on the Practice of Israel states that the IDF "prohibits the resort to perfidy to kill, injure or capture an adversary. Therefore, the IDF does not . . . make unlawful use of protected emblems".¹⁵³⁰

1412. Italy's IHL Manual provides that grave breaches of international conventions and protocols, among which "the perfidious use . . . of symbols of international protection" constitute war crimes.¹⁵³¹

1413. Italy's LOAC Elementary Rules Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs".¹⁵³²

1414. New Zealand's Military Manual provides that "the perfidious use of . . . protective signs recognised by the [Geneva] Conventions or [AP I]" constitutes a grave breach of AP I and a war crime.¹⁵³³

1415. South Africa's LOAC Manual regards the misuse of symbols of protection (such as those of civil defence, cultural property and installations containing dangerous forces) as perfidious and as constituting a grave breach of the law of war and a war crime.¹⁵³⁴

1416. Spain's LOAC Manual states that "it is prohibited to feign a protected status by inviting the confidence of the enemy: misuse of distinctive signs".¹⁵³⁵

¹⁵²⁴ France, *LOAC Summary Note* (1992), § 4.4.

¹⁵²⁵ France, *LOAC Summary Note* (1992), § 3.4.

¹⁵²⁶ France, *LOAC Manual* (2001), p. 62.

¹⁵²⁷ France, *LOAC Manual* (2001), p. 118.

¹⁵²⁸ Germany, *Military Manual* (1992), § 1209.

¹⁵²⁹ Hungary, *Military Manual* (1992), p. 90.

¹⁵³⁰ Report on the Practice of Israel, 1997, Chapter 2.4, referring to *Law of War Booklet* (1986), p. 8.

¹⁵³¹ Italy, *IHL Manual* (1991), Vol. I, § 85.

¹⁵³² Italy, *LOAC Elementary Rules Manual* (1991), § 46.

¹⁵³³ New Zealand, *Military Manual* (1992), §§ 1701(1) and 1703(3)(f).

¹⁵³⁴ South Africa, *LOAC Manual* (1996), §§ 34(c) and 41.

¹⁵³⁵ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

It adds that it is a grave breach and a war crime “to make a perfidious use . . . of . . . recognised protective signs”.¹⁵³⁶

1417. Sweden’s IHL Manual states that “abuse of international emergency signals with perfidious intent may also be viewed as an example of perfidy”.¹⁵³⁷

1418. Switzerland’s Basic Military Manual considers the “perfidious use of . . . distinctive signs recognised by the [Geneva] Conventions or [AP I]”, as a grave breach of AP I.¹⁵³⁸

1419. The US Naval Handbook states that “misuse of protective signs, signals and symbols . . . in order to injure, kill, or capture the enemy constitutes an act of perfidy”.¹⁵³⁹

National Legislation

1420. Argentina’s Draft Code of Military Justice punishes any soldier who “uses . . . in a perfidious manner, the protective or distinctive signs established and recognised in international treaties to which the Argentine Republic is a party”.¹⁵⁴⁰

1421. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence”.¹⁵⁴¹

1422. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence”.¹⁵⁴²

1423. Colombia’s Penal Code, in an article entitled “Perfidy”, imposes a criminal sanction on “anyone who, during an armed conflict, with intent to harm or attack the adversary, . . . uses improperly . . . signs of protection provided for in international treaties ratified by Colombia”.¹⁵⁴³

1424. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]”.¹⁵⁴⁴

1425. Cyprus’s AP I Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach”.¹⁵⁴⁵

¹⁵³⁶ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

¹⁵³⁷ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹⁵³⁸ Switzerland, *Basic Military Manual* (1987), Article 193(1)(f).

¹⁵³⁹ US, *Naval Handbook* (1995), § 12.2.

¹⁵⁴⁰ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(5) in the *Code of Military Justice as amended* (1951).

¹⁵⁴¹ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁵⁴² Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁵⁴³ Colombia, *Penal Code* (2000), Article 143.

¹⁵⁴⁴ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁵⁴⁵ Cyprus, *AP I Act* (1979), Section 4(1).

1426. The Draft Amendments to the Penal Code of El Salvador, in an article entitled “Perfidy”, provide for a prison sentence for “anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, . . . uses . . . other protective signs provided for in international treaties ratified by the State of El Salvador”.¹⁵⁴⁶

1427. Ethiopia’s Penal Code punishes the abuse of any “protective device recognized in public international law, . . . with intent to prepare or to commit hostile acts”.¹⁵⁴⁷

1428. Under Georgia’s Criminal Code, “the perfidious use of . . . protective signs and signals recognised by international humanitarian law” in an international or non-international armed conflict is a crime.¹⁵⁴⁸

1429. Ireland’s Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁵⁴⁹

1430. Under Jordan’s Draft Military Criminal Code, “the perfidious use of . . . any . . . protective emblem” in time of armed conflict is a war crime.¹⁵⁵⁰

1431. Under the Draft Amendments to the Code of Military Justice of Lebanon, “the perfidious use of . . . any . . . protective sign provided for by the [Geneva] Conventions and [AP I]” constitutes a war crime.¹⁵⁵¹

1432. Under the International Crimes Act of the Netherlands, it is a crime, during an international armed conflict, to commit “the following acts, when they are committed intentionally and in violation of the relevant provisions of Additional Protocol (I) and cause death or serious injury to body or health: . . . the perfidious use . . . of . . . protective emblems recognised by the Geneva Conventions or Additional Protocol (I)”.¹⁵⁵²

1433. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence”.¹⁵⁵³

1434. Nicaragua’s Draft Penal Code, in an article entitled “Perfidy”, punishes “anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, . . . uses . . . protective signs defined in international treaties ratified by the State of Nicaragua”.¹⁵⁵⁴

1435. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.¹⁵⁵⁵

¹⁵⁴⁶ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Perfidia”.

¹⁵⁴⁷ Ethiopia, *Penal Code* (1957), Article 294(b).

¹⁵⁴⁸ Georgia, *Criminal Code* (1999), Article 411(1)(f).

¹⁵⁴⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁵⁵⁰ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(14).

¹⁵⁵¹ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(14).

¹⁵⁵² Netherlands, *International Crimes Act* (2003), Article 5(2)(c)(vi).

¹⁵⁵³ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁵⁵⁴ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹⁵⁵⁵ Norway, *Military Penal Code as amended* (1902), § 108(b).

1436. Spain's Penal Code punishes "anyone who, during an armed conflict . . . uses . . . in a perfidious manner the protective or distinctive signs, emblems or signals established and recognised under international treaties to which Spain is a party".¹⁵⁵⁶

1437. Under Sweden's Penal Code as amended, the misuse of the sign for civil defence and other internationally recognised emblems or "the killing or injuring of an opponent by means of *some other form of treacherous behaviour*" constitutes a crime against international law.¹⁵⁵⁷ (emphasis added)

1438. Switzerland's Military Criminal Code as amended punishes "anyone who abuses . . . the emblem of cultural property . . . to prepare or commit hostile acts" in time of armed conflict.¹⁵⁵⁸

1439. Tajikistan's Criminal Code punishes "the perfidious use of . . . protective signs and signals recognised by international humanitarian law" in an international or internal armed conflict.¹⁵⁵⁹

1440. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".¹⁵⁶⁰

1441. Under Yemen's Military Criminal Code, the "perfidious use of . . . international protective emblems provided for in international conventions" is a war crime.¹⁵⁶¹

1442. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".¹⁵⁶²

National Case-law

1443. No practice was found.

Other National Practice

1444. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

1445. No practice was found.

Other International Organisations

1446. No practice was found.

¹⁵⁵⁶ Spain, *Penal Code* (1995), Article 612(4).

¹⁵⁵⁷ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(2).

¹⁵⁵⁸ Switzerland, *Military Criminal Code as amended* (1927), Article 110.

¹⁵⁵⁹ Tajikistan, *Criminal Code* (1998), Article 403(1).

¹⁵⁶⁰ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹⁵⁶¹ Yemen, *Military Criminal Code* (1998), Article 21(5).

¹⁵⁶² Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

International Conferences

1447. According to the report of the Working Group to Committee III of the CDDH, Article 37 AP I “limit[s] itself to a brief list of particularly clear examples [of perfidious acts]. Examples that were debatable or involved borderline cases were avoided.”¹⁵⁶³

IV. Practice of International Judicial and Quasi-judicial Bodies

1448. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

1449. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the perfidious use of the . . . distinctive signs marking specifically protected persons and objects; . . . [of] other protected signs recognized by the law of war; . . . [and of] distinctive signals used for identification of medical service and civil defence” constitutes a grave breach of the law of war.¹⁵⁶⁴

1450. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “the perfidious use of the . . . protective signs and signals recognized by international humanitarian law”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹⁵⁶⁵

VI. Other Practice

1451. No practice was found.

Simulation of civilian status*I. Treaties and Other Instruments**Treaties*

1452. Article 37(1)(c) AP I lists “the feigning of civilian, non-combatant status” as an act of perfidy. Article 37 AP I was adopted by consensus.¹⁵⁶⁶

1453. Article 21(1) of draft AP II submitted by the ICRC to the CDDH provided that “when carried out in order to commit or resume hostilities, . . . the

¹⁵⁶³ CDDH, *Official Records*, Vol. XV, CDDH/III/338, 21 April–11 June 1976, p. 426.

¹⁵⁶⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779.

¹⁵⁶⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

¹⁵⁶⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

feigning, before an attack, of non-combatant status" was considered as perfidy.¹⁵⁶⁷ However, this proposal was deleted from draft Article 21 adopted in Committee III of the CDDH.¹⁵⁶⁸

Other Instruments

1454. Paragraph 110(c) of the 1994 San Remo Manual provides that "warships and auxiliary vessels...are prohibited...at all times from actively simulating the status of...vessels carrying civilian passengers". Paragraph 111(a) states that "perfidious acts include the launching of an attack while feigning...civilian...status".

II. National Practice

Military Manuals

1455. Argentina's Law of War Manual states that "feigning the condition of a civilian non-combatant person" is an example of perfidy.¹⁵⁶⁹

1456. Australia's Commanders' Guide, in a section entitled "Perfidy", states that "combatants wearing civilian clothing in battle...violate LOAC and diminish the enemy's ability to...distinguish civilians".¹⁵⁷⁰ The manual adds that "acts which constitute perfidy include feigning of...civilian, non-combatant status".¹⁵⁷¹

1457. Australia's Defence Force Manual states that "acts which constitute perfidy include feigning of...civilian or noncombatant status".¹⁵⁷²

1458. Belgium's Law of War Manual provides that "feigning having civilian or non-combatant status" is a perfidious act.¹⁵⁷³

1459. Cameroon's Instructors' Manual stresses that "feigning civilian or non-combatant status" is an example of perfidy.¹⁵⁷⁴

1460. Canada's LOAC Manual provides that "the following are examples of perfidy if a hostile act is committed while:...feigning civilian, non-combatant status".¹⁵⁷⁵ It also considers it an act of perfidy in air warfare if a hostile act is committed while "using false markings on military aircraft such as the markings of civil aircraft".¹⁵⁷⁶

1461. Ecuador's Naval Manual states that illegal combatants may be denied prisoner-of-war status, tried and punished. It also specifies that "it is a

¹⁵⁶⁷ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

¹⁵⁶⁸ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 502.

¹⁵⁶⁹ Argentina, *Law of War Manual* (1989), § 1.05(2)(3).

¹⁵⁷⁰ Australia, *Commanders' Guide* (1994), § 507.

¹⁵⁷¹ Australia, *Commanders' Guide* (1994), § 826(c) (naval warfare) and § 902(c) (land warfare).

¹⁵⁷² Australia, *Defence Force Manual* (1994), § 703(c) (land warfare), see also §§ 635(c) and 636(a) (naval warfare).

¹⁵⁷³ Belgium, *Law of War Manual* (1983), p. 32.

¹⁵⁷⁴ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.1, p. 63, § 234 and p. 90, § 222.

¹⁵⁷⁵ Canada, *LOAC Manual* (1999), p. 6-2, § 9(c) (land warfare), p. 7-2, § 17(c) (air warfare) and p. 8-11, § 81(d) (naval warfare).

¹⁵⁷⁶ Canada, *LOAC Manual* (1999), p. 7-2, § 18(a).

violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of . . . civilian status . . . Attacking enemy forces while posing as a civilian puts all civilians at hazard. Such acts of perfidy are punishable as war crimes."¹⁵⁷⁷

1462. France's LOAC Manual prohibits the simulation of non-combatant status.¹⁵⁷⁸

1463. Indonesia's Military Manual provides that "it is prohibited to kill or injure the enemy by perfidy, such as to pretend to be a non-combatant".¹⁵⁷⁹

1464. Israel's Manual on the Laws of War provides several examples of perfidious acts. Notably, it states that "it is forbidden to pose as non-combatant civilians. When the arena of warfare does not yield a clear picture as to who is a civilian and who is a disguised combatant, civilians will be ultimately harmed."¹⁵⁸⁰

1465. Under Italy's LOAC Elementary Rules Manual, "it is prohibited to feign to belong to a protected category to invite the confidence of the enemy".¹⁵⁸¹

1466. Kenya's LOAC Manual states that "feigning non-combatant status" is an example of treachery.¹⁵⁸²

1467. The Military Manual of the Netherlands states that API "gives a number of examples of treacherous behaviour: feigning to possess the status of civilian or noncombatant".¹⁵⁸³

1468. New Zealand's Military Manual provides that "the following acts are examples of perfidy: . . . the feigning of civilian, noncombatant status".¹⁵⁸⁴ It also states that "the use of civilian aircraft or vessels to transport military cargo would not be perfidious unless it involved an intent to betray the confidence of the enemy, in which case it would be a war crime".¹⁵⁸⁵ The manual adds that "the use of false markings on military aircraft such as the markings of civil aircraft . . . is the prime example of perfidious conduct in air warfare and is prohibited".¹⁵⁸⁶

1469. Nigeria's Military Manual gives the following example of "perjury" (perfidy): "feigning civilian or non-combatant status".¹⁵⁸⁷

1470. Nigeria's Manual on the Laws of War states that the "use of civilian clothing . . . by troops engaged in a battle" is a war crime.¹⁵⁸⁸

¹⁵⁷⁷ Ecuador, *Naval Manual* (1989), §§ 12.7 and 12.7.1.

¹⁵⁷⁸ France, *LOAC Manual* (2001), p. 115.

¹⁵⁷⁹ Indonesia, *Military Manual* (1982), § 103.

¹⁵⁸⁰ Israel, *Manual on the Laws of War* (1998), p. 57.

¹⁵⁸¹ Italy, *LOAC Elementary Rules Manual* (1991), § 46.

¹⁵⁸² Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

¹⁵⁸³ Netherlands, *Military Manual* (1993), p. IV-2.

¹⁵⁸⁴ New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare).

¹⁵⁸⁵ New Zealand, *Military Manual* (1992), § 502(6).

¹⁵⁸⁶ New Zealand, *Military Manual* (1992), § 611(2).

¹⁵⁸⁷ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(d).

¹⁵⁸⁸ Nigeria, *Manual on the Laws of War* (undated), § 6.

1471. Under Romania's *Soldiers' Manual*, "feigning civilian or non-combatant status" is an act of perfidy.¹⁵⁸⁹

1472. South Africa's *LOAC Manual* gives as an example of perfidy the prohibition "to feign civilian non-combatant status".¹⁵⁹⁰ The manual also considers the "use of civilian clothing by troops to conceal their military character during battle" to be a grave breach of the law of war and a war crime.¹⁵⁹¹

1473. Spain's *LOAC Manual* provides that simulating the status of a civilian person or non-combatant is an example of a perfidious act.¹⁵⁹²

1474. Sweden's *IHL Manual* mentions, as an example of perfidious conduct, "the feigning of protected civilian status".¹⁵⁹³

1475. The *UK Military Manual* describes as treacherous the use of false assurances followed by firing, noting that this "device is often accompanied by the use of enemy uniforms or civilian clothing".¹⁵⁹⁴ Furthermore, the manual states "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . use of civilian clothing . . . by troops engaged in battle".¹⁵⁹⁵

1476. The *UK LOAC Manual* states that the "feigning of non-combatant status" is an example of treachery.¹⁵⁹⁶

1477. According to the *US Field Manual*, the use of civilian clothing by troops to conceal their military character during battle is an act for which a combatant would lose his right to be treated as a prisoner of war.¹⁵⁹⁷ The manual also states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . use of civilian clothing by troops to conceal their military character during battle".¹⁵⁹⁸

1478. According to the *US Air Force Pamphlet*, the use of civilian clothing by troops to conceal their military character during battle is an act for which a combatant would lose his right to be treated as a prisoner of war.¹⁵⁹⁹ The Pamphlet further emphasises that "in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . intentional use of civilian clothing to conceal military identity during battle".¹⁶⁰⁰ In respect of air warfare, it states that:

¹⁵⁸⁹ Romania, *Soldiers' Manual* (1991), p. 35.

¹⁵⁹⁰ South Africa, *LOAC Manual* (1996), § 34(c).

¹⁵⁹¹ South Africa, *LOAC Manual* (1996), §§ 39(f) and 41.

¹⁵⁹² Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(1) and § 5.3.c, see also § 7.3.c.

¹⁵⁹³ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹⁵⁹⁴ UK, *Military Manual* (1958), § 311, footnote 1.

¹⁵⁹⁵ UK, *Military Manual* (1958), § 626(f).

¹⁵⁹⁶ UK, *LOAC Manual* (1981), Section 4, p. 12, § 2(a).

¹⁵⁹⁷ US, *Field Manual* (1956), § 74.

¹⁵⁹⁸ US, *Field Manual* (1956), § 504(g).

¹⁵⁹⁹ US, *Air Force Pamphlet* (1976), § 7-2.

¹⁶⁰⁰ US, *Air Force Pamphlet* (1976), § 15-3(c)(6).

Aircrew members do customarily wear uniforms because flight suits fully qualify as uniforms when they are so distinctive in character as to distinguish the wearer from the civilian population . . . In that connection, the prohibition of perfidy, such as disguising oneself as a civilian in order to engage hostilities, . . . is applicable.¹⁶⁰¹

It also provides that, generally speaking, “disguising combatants in civilian clothing in order to commit hostilities constitutes perfidy”.¹⁶⁰² This is also the case of the “feigning by combatants of civilian, noncombatant status”.¹⁶⁰³

1479. The US Instructor’s Guide notes that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . using civilian clothing to conceal military identity during battle”.¹⁶⁰⁴

1480. The US Naval Handbook states that illegal combatants may be denied prisoner-of-war status, tried and punished. It also stipulates that “it is a violation of the law of armed conflict to kill, injure, or capture the enemy by false indication of . . . civilian status . . . Attacking enemy forces while posing as a civilian puts all civilians at hazard. Such acts of perfidy are punishable as war crimes.”¹⁶⁰⁵

National Legislation

1481. Colombia’s Penal Code, in an article entitled “Perfidy”, imposes a criminal sanction on “anyone who, during an armed conflict and with intent to harm or attack the adversary, simulates the condition of a protected person”, which includes civilians.¹⁶⁰⁶

1482. The Draft Amendments to the Penal Code of El Salvador, in an article entitled “Perfidy”, provide for a prison sentence for “anyone who, during an international or non-international armed conflict, with the view to harm or attack the adversary, simulates the status of a protected person”.¹⁶⁰⁷

1483. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 37(1) AP I, is a punishable offence.¹⁶⁰⁸

1484. Nicaragua’s Draft Penal Code, in an article entitled “Perfidy”, punishes “anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, simulates the status of a protected person”.¹⁶⁰⁹

1485. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the

¹⁶⁰¹ US, *Air Force Pamphlet* (1976), § 7-3(a).

¹⁶⁰² US, *Air Force Pamphlet* (1976), § 8-6(a).

¹⁶⁰³ US, *Air Force Pamphlet* (1976), § 8-3(a).

¹⁶⁰⁴ US, *Instructor’s Guide* (1985), p. 13.

¹⁶⁰⁵ US, *Naval Handbook* (1995), §§ 12.7. and 12.7.1.

¹⁶⁰⁶ Colombia, *Penal Code* (2000), Articles 135 and 143.

¹⁶⁰⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Perfidia”.

¹⁶⁰⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁶⁰⁹ Nicaragua, *Draft Penal Code* (1999), Article 452.

protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁶¹⁰

National Case-law

1486. In 1995, in a decision concerning the constitutionality of AP II, Colombia's Constitutional Court stated that "the feigning of civilian status to injure, kill or capture an adversary constitutes an act of perfidy which is prohibited by the rules of international humanitarian law, as clearly stipulated in Article 37 of [AP I]". The Court held that, while AP II does not contain rules on perfidy in situations of non-international armed conflict:

that does not mean that it is authorized, since the treaty must be interpreted in the light of all the humanitarian principles. As stated in the Taormina Declaration, the prohibition of perfidy is one of the general rules governing the conduct of hostilities that applies in non-international armed conflicts.¹⁶¹¹

1487. In the *Swarka case* before an Israeli Military Court in 1974, the defendants had entered Israel from Egypt and launched rockets on a civilian settlement. When brought to trial, they claimed that they were entitled to POW status under Article 4 GC III, since they were soldiers in the Egyptian regular army and had committed the actions on the orders of their commander. The Prosecutor argued that they could not benefit from POW status since they wore civilian clothes when they carried out their operations. The Court observed that neither the 1907 HR nor the Geneva Conventions required that members of regular forces had to wear uniforms at the time of capture to be entitled to their protection. However, it considered that "it would be quite illogical to regard the duty of wearing uniform (in the sense of a distinctive sign) as imposed only on the quasi-military units referred to in Article 4(A)(2) [GC III] and not on soldiers of regular military forces". It concluded that the defendants were to be prosecuted as saboteurs.¹⁶¹²

1488. In 1968, the Judicial Committee of the Privy Council (UK) heard the appeals of two members of the Indonesian armed forces who had entered a non-military building in Singapore – which at the time formed part of Malaysia – wearing civilian clothes and had planted a bag containing explosives. The ensuing explosion had caused two deaths, and the accused had been convicted of murder and sentenced to death. The Privy Council held that members of armed forces who committed acts of sabotage in territory under the control of opposing forces, when dressed in civilian clothes both at the time of the acts of sabotage and when arrested, were not entitled to be treated on capture as prisoners of war under the Geneva Conventions but were subject to trial and punishment.¹⁶¹³

¹⁶¹⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁶¹¹ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

¹⁶¹² Israel, Military Court, *Swarka case*, Judgement, 1974.

¹⁶¹³ Malaysia, Judicial Committee of the Privy Council (UK), *Ali case*, Judgement, 29 July 1968.

1489. In the *Nwaoga case* before the Supreme Court of Nigeria in 1972, the appellant and two officers of the rebel Biafran army disguised in civilian clothes went to a town under the control of federal troops and killed an unarmed person. The appellant was convicted for murder. The Court held that rebels must not feign civilian status while engaging in military operations and that, in these circumstances (operation in disguise, not in the rebel army uniform but in plain clothes, thus appearing to be members of the peaceful private population), the appellant was liable to punishment under the Criminal Code since the “deliberate and intentional killing of an unarmed person living peacefully inside the Federal territory . . . is a crime against humanity, and even if committed during a civil war is in violation of the domestic law of the country, and must be punished”.¹⁶¹⁴

1490. In 1942, in the *Quirin case* in which German saboteurs had entered the US in civilian clothing, the US Supreme Court held that:

Each petitioner, in circumstances which gave him the status of an enemy belligerent, passed our military and naval lines, in civilian dress and with hostile purpose. The offense [under the laws of war] was complete when with that purpose they entered – or, having so entered, they remained upon – our territory in time of war without uniform or other appropriate means of identification.¹⁶¹⁵

Other National Practice

1491. At the CDDH, the representative of Algeria stated that the inclusion of “the disguising of combatants in civilian clothing” as an example of perfidy “seemed to be difficult to accept, since it did not take into account certain situations, particularly guerrilla operations. His delegation would therefore be inclined to endorse the Indonesian amendment . . . proposing the deletion of that paragraph.”¹⁶¹⁶ However, Algeria finally agreed upon paragraph 1(c) of Article 35 of draft AP I (now Article 37) in supporting the view of Vietnam stated below.¹⁶¹⁷

1492. According to the Report on the Practice of Algeria, the policy followed by Algerian combatants during the war of independence was summarised in the maxim “Djellaba le jour, uniforme la nuit” (“Djellaba by day, uniform by night”).¹⁶¹⁸

1493. At the CDDH, Egypt, commenting on Article 44 AP I, stated that the right of the guerrilla fighter to be considered as a lawful combatant “did not release regular combatants from their obligation to wear their uniform

¹⁶¹⁴ Nigeria, Supreme Court, *Nwaoga case*, Judgement, 3 March 1972.

¹⁶¹⁵ US, Supreme Court, *Quirin case*, Judgement, 31 July 1942, and Extended Opinion, 29 October 1942.

¹⁶¹⁶ Algeria, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.28, 4 March 1975, p. 262, § 13.

¹⁶¹⁷ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, p. 86, § 5.

¹⁶¹⁸ Report on the Practice of Algeria, 1997, Chapter 2.6, referring to *El Moudjahid*, Vol. 2, p. 381.

during military operations, failing which they would be committing an act of perfidy".¹⁶¹⁹

1494. At the CDDH, Indonesia proposed deleting paragraph 1(c) of Article 35 of draft AP I (now Article 37).¹⁶²⁰ This proposal was the expression of the fear that paragraph 1(c) could be misused to punish combatants who would otherwise be entitled to the status of prisoner of war. However, Indonesia finally agreed upon paragraph 1(c) of Article 35 of draft AP I (now Article 37) following the same reasoning as the one of Vietnam stated below.¹⁶²¹

1495. At the final plenary meeting of the CDDH, the Israeli delegation declared that "Israel regards [Article 37 AP I], and in particular its paragraph 1(c), as an essential and basic provision. It reaffirms the fundamental distinction made in customary law between combatants and non-combatants."¹⁶²²

1496. At the CDDH, the Philippines, having in mind guerrilla warfare, supported the amendments proposed by Indonesia and Vietnam to delete paragraph 1(c) of Article 35 of draft AP I (now Article 37) because "it would be basically unjust to brand the wearing of civilian clothing by a combatant as perfidy when such circumstances were brought about by the superior military strength of the aggressor".¹⁶²³ However, the Philippines finally agreed upon paragraph 1(c) following the same reasoning as the one of Vietnam stated below.¹⁶²⁴

1497. At the CDDH, Romania supported the amendments of Indonesia and Vietnam proposing the deletion of paragraph 1(c) of Article 35 of draft AP I (now Article 37), "since the act covered by the provision could not be regarded as a typical case of perfidy".¹⁶²⁵ However, Romania finally agreed upon paragraph 1(c) following the same reasoning as the one of Vietnam stated below.¹⁶²⁶

1498. US practice since the Second World War has refused prisoner-of-war treatment to enemy combatants captured in civilian clothing while not carrying their arms openly. During the Vietnam War, the US policy was to consider that all combatants captured during military operations were to be accorded prisoner-of-war status, while terrorists, spies and saboteurs were not.¹⁶²⁷

1499. In 1989, in a memorandum of law, the Judge Advocate General of the US Department of the Army stated that:

¹⁶¹⁹ Egypt, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.55, 22 April 1977, p. 160, § 28.

¹⁶²⁰ Indonesia, Proposal of amendment to Article 35 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/232, 25 February 1975, p. 164.

¹⁶²¹ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, pp. 85 and 86, § 4.

¹⁶²² Israel, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 115.

¹⁶²³ Philippines, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.28, 4 March 1975, p. 265, §§ 25 and 26.

¹⁶²⁴ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, pp. 85 and 86, § 4.

¹⁶²⁵ Romania, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.28, 4 March 1975, p. 270, § 52.

¹⁶²⁶ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, pp. 85 and 86, § 4.

¹⁶²⁷ George S. Prugh, *Law at War: Vietnam 1964-1973*, Department of the Army, Vietnam Studies, Washington D.C., 1975, p. 66.

Traditionally, soldiers have an obligation to wear uniforms to distinguish themselves from the civilian population. Law-of-war sources prior to World War II suggested that the prohibition on killing or wounding “treacherously” referred to soldiers disguising themselves as civilians in order to approach an enemy force and carry out a surprise attack. That concept was thrown into disarray during World War II by the reliance on partisans by all parties to that conflict. While frequently characterized as an assassination, the 27 May 1942 ambush of SS General Reinhard Heydrich by British SOE [Special Operations Executive]-trained Czechoslovakian partisans is representative of the practice of each party to the conflict employing organized resistance units to carry out attacks against military units and personnel of an occupying power.

Reliance upon organized partisan forces changed state practice and, accordingly, the law of war. Coordinated British and U.S. revisions of their respective post-World War II law of war manuals reflected this change. For example, the following . . . italicized . . . sentence was added to paragraph 31 [of the US Field Manual]:

[Article 23(b) of the 1907 HR] is construed as prohibiting assassination . . . *It does not, however, preclude attacks on individual soldiers or officers of the enemy whether in the zone of hostilities, occupied territory, or elsewhere.*

The annotations to [the manual] state that the [italicised] sentence was inserted “so as not to foreclose activity by resistance movements, paratroops, and other belligerents who may attack individual persons”. The deliberate decision by many nations to employ surrogate guerrilla forces in lieu of or in connection with conventional military units to fight a succession of guerrilla wars since 1945 has served to raise further doubts regarding the traditional rule.

While state practice suggests that the employment of partisans is lawful, that is, would not constitute assassination, a question remains regarding the donning of civilian clothing by conventional forces personnel for the purpose of killing enemy combatants. However, in the one known case of such practice during World War II, a British officer who successfully entered a German headquarters dressed in civilian attire and killed the commanding general was decorated rather than punished for his efforts.¹⁶²⁸ [emphasis in original]

1500. According to the Report on US Practice, the *opinio juris* of the US is that:

Customary international law does not . . . prohibit belligerents from using saboteurs, secret agents or other irregular forces feigning civilian status to attack legitimate military targets. Wear of civilian clothing during an attack, or during a spying or sabotage mission behind enemy lines, may subject combatants to punishment if captured by the enemy.¹⁶²⁹

1501. At the CDDH, Vietnam proposed deleting paragraph 1(c) of Article 35 of draft AP I (now Article 37).¹⁶³⁰ It stated that ill-armed peoples of Asia, Africa and Latin America, fighting either to defend their independence or to exercise their right of self-determination,

¹⁶²⁸ US, Department of the Army, Office of the Judge Advocate General, Memorandum of Law: Executive Order 12333 and Assassination, 2 November 1989, *The Army Lawyer*, Pamphlet 27-50-204, December 1989, p. 6.

¹⁶²⁹ Report on US Practice, 1997, Chapter 2.4.

¹⁶³⁰ Vietnam, Proposal of amendment to Article 35 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/236, 25 February 1975, p. 165.

lacked the necessary means to provide uniforms for members of their national forces or their rural and urban militia. To regard that state of affairs as perfidy would be to legislate against nations defending their right to self-determination. Logically speaking, the question was not one of perfidy, since that implied the intention to betray an adversary's good faith.¹⁶³¹

Vietnam finally agreed upon Article 35 of draft AP I, after the introduction of the saving clause under Article 44(3) AP I, whereby the wearing of civilian clothes does not amount to perfidy when combatants fulfil the conditions to be recognised as legitimate combatants (in situations where the combatant cannot distinguish themselves from the civilian population, they retain their combatant status, provided that they carry their arms openly during each military engagement, and during such time as they are visible to the adversary while they are engaged in military deployment preceding the launching of an attack in which they are to participate).¹⁶³²

III. Practice of International Organisations and Conferences

1502. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1503. In the interlocutory appeal in the *Tadić case* in 1995, the ICTY, referring to the *Nwaoga case*, stated that:

State practice shows that general principles of customary international law have evolved with regard to internal armed conflict also in areas relating to methods of warfare. In addition to what has been stated above, with regard to the ban on attacks on civilians in the theatre of hostilities, mention can be made of the prohibition of perfidy. Thus, for instance, in a case brought before Nigerian courts, the Supreme Court of Nigeria held that rebels must not feign civilian status while engaging in military operations.¹⁶³³

V. Practice of the International Red Cross and Red Crescent Movement

1504. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "to pretend being a civilian or non-combatant" is an act of perfidy.¹⁶³⁴

¹⁶³¹ Vietnam, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.28, 4 March 1975, p. 260, § 7.

¹⁶³² Vietnam, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.47, 31 May 1976, p. 86, § 5.

¹⁶³³ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 125.

¹⁶³⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409(d).

VI. Other Practice

1505. No practice was found.

Simulation of protected status by using flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict

Note: For practice concerning the use of flags or military emblems, insignia or uniforms of neutral or other States not party to the conflict which does not amount to perfidy, see *supra* section G of this chapter.

I. Treaties and Other Instruments

Treaties

1506. Article 37(1)(d) AP I lists “the feigning of protected status by the use of signs, emblems or uniforms . . . of neutral or other States not Parties to the conflict” as an act of perfidy. Article 37 AP I was adopted by consensus.¹⁶³⁵

1507. Under Article 85(3)(f) AP I, “the perfidious use, in violation of Article 37, . . . of . . . protective signs recognized by the Conventions or this Protocol” is a grave breach of AP I. Article 85(5) adds that “without prejudice to the application of the [Geneva] Conventions and of this Protocol, grave breaches of these instruments shall be regarded as war crimes”. Article 85 AP I was adopted by consensus.¹⁶³⁶

Other Instruments

1508. Paragraph 111(a) of the 1994 San Remo Manual states that “perfidious acts include the launching of an attack while feigning . . . neutral . . . status”.

II. National Practice

Military Manuals

1509. Argentina’s Law of War Manual states that “making use of signs, emblems or uniforms . . . of neutral states or other states which are not parties to the conflict, so as to simulate a protected status” is an example of perfidy.¹⁶³⁷

1510. Australia’s Commander’s Guide stresses that “acts which constitute perfidy include feigning of . . . protected status by the use of protective symbols, signs, emblems or uniforms . . . of neutral or other States not involved in the conflict”.¹⁶³⁸ In a section entitled “Perfidy”, the manual also states that “it is illegal to use in battle emblems, markings or clothing of a neutral . . .

¹⁶³⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 103.

¹⁶³⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹⁶³⁷ Argentina, *Law of War Manual* (1989), § 1.05(2)(4).

¹⁶³⁸ Australia, *Commanders’ Guide* (1994), § 826(d) (naval warfare) and § 902(d) (land warfare).

Combatants . . . pretending to be a member of a neutral nation violate LOAC and diminish the enemy's ability to identify neutrals."¹⁶³⁹

1511. Australia's Defence Force Manual provides that "acts which constitute perfidy include feigning of . . . protected status by the use of protective symbols, signs, emblems or uniforms . . . of neutral or other states not involved in the conflict".¹⁶⁴⁰

1512. Belgium's Law of War Manual states that "opening fire wearing the uniform . . . of neutral forces" is an act of perfidy.¹⁶⁴¹

1513. Cameroon's Instructors' Manual notes that "feigning to have a protected status by using signs, emblems or uniforms . . . of neutral States or States not parties to the conflict" is an example of perfidy.¹⁶⁴²

1514. Canada's LOAC Manual provides that "the following are examples of perfidy if a hostile act is committed while: . . . feigning protected status by the use of signs, emblems or uniforms . . . of neutral or other states not parties to the conflict".¹⁶⁴³

1515. France's LOAC Manual states that the use of the emblems or uniforms of third States for hostile purposes is criminalised.¹⁶⁴⁴

1516. The Military Manual of the Netherlands states that API "gives a number of examples of treacherous behaviour: feigning to possess a protected position by using signs, emblems or uniforms . . . of States which are not parties to the conflict".¹⁶⁴⁵

1517. New Zealand's Military Manual provides that "the following acts are examples of perfidy: . . . the feigning of protected status by the use of signs, emblems or uniforms . . . of neutral or other States not Parties to the conflict".¹⁶⁴⁶

1518. Nigeria's Military Manual gives the following example of "perjury" (perfidy): "feigning protection status by the use of signs, emblems or uniforms . . . of a neutral [state] or state not being a party to the conflict".¹⁶⁴⁷

1519. Under Romania's Soldiers' Manual, "feigning the status of a protected person by abusing the signs and emblems of . . . neutral States or States which are not party to the conflict" is an act of perfidy.¹⁶⁴⁸

1520. Spain's LOAC Manual provides that "simulating possession of a protected status by using signs, emblems or uniforms . . . of neutral States or other States which are not Parties to the conflict" is an example of perfidy.¹⁶⁴⁹

¹⁶³⁹ Australia, *Commanders' Guide* (1994), § 507.

¹⁶⁴⁰ Australia, *Defence Force Manual* (1994), § 703(d).

¹⁶⁴¹ Belgium, *Law of War Manual* (1983), p. 32.

¹⁶⁴² Cameroon, *Instructors' Manual* (1992), pp. 63 and 64, § 234.

¹⁶⁴³ Canada, *LOAC Manual* (1999), p. 6-2, § 9(d) (land warfare), p. 7-2, § 17(d) (air warfare) and p. 8-11, § 81(e) (naval warfare).

¹⁶⁴⁴ France, *LOAC Manual* (2001), p. 115.

¹⁶⁴⁵ Netherlands, *Military Manual* (1993), p. IV-2.

¹⁶⁴⁶ New Zealand, *Military Manual* (1992), § 502(5) (land warfare) and § 713(2) (naval warfare).

¹⁶⁴⁷ Nigeria, *Military Manual* (1994), pp. 42 and 43, § 12(e).

¹⁶⁴⁸ Romania, *Soldiers' Manual* (1991), p. 35.

¹⁶⁴⁹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.b.(1), see also § 5.3.c.

1521. Sweden's IHL Manual considers as an example of perfidious conduct "the feigning of protected status...of a member of the armed forces of a neutral state".¹⁶⁵⁰

1522. Switzerland's Basic Military Manual prohibits perfidy. Thus, "it is notably forbidden...to abuse a protected status by using signs, emblems or uniforms...of nations not involved in the conflict".¹⁶⁵¹

1523. The YPA Military Manual of the SFRY (FRY) states that feigning a protected status by the use of symbols, signs, emblems or uniforms of neutral States or other States not parties to the conflict is an act of perfidy.¹⁶⁵²

National Legislation

1524. Argentina's Draft Code of Military Justice punishes any soldier who "uses...in a perfidious manner, the flag, uniform, insignia or distinctive emblem of neutral States...or of other States which are not parties to the conflict".¹⁶⁵³

1525. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach...of [AP I] is guilty of an indictable offence".¹⁶⁵⁴

1526. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I]...is guilty of an indictable offence".¹⁶⁵⁵

1527. Colombia's Penal Code, in an article entitled "Perfidy", imposes a criminal sanction on "anyone who, during an armed conflict, with intent to harm or attack the adversary,...uses improperly...flags or uniforms of neutral States".¹⁶⁵⁶

1528. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach...of [AP I]".¹⁶⁵⁷

1529. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".¹⁶⁵⁸

1530. The Draft Amendments to the Penal Code of El Salvador, in an article entitled "Perfidy", provide for a prison sentence for "anyone who, during

¹⁶⁵⁰ Sweden, *IHL Manual* (1991), Section 3.2.1.1.b, p. 29.

¹⁶⁵¹ Switzerland, *Basic Military Manual* (1987), Article 39.

¹⁶⁵² SFRY (FRY), *YPA Military Manual* (1988), § 104(3).

¹⁶⁵³ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(6) in the *Code of Military Justice as amended* (1951).

¹⁶⁵⁴ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁶⁵⁵ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁶⁵⁶ Colombia, *Penal Code* (2000), Article 143.

¹⁶⁵⁷ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁶⁵⁸ Cyprus, *AP I Act* (1979), Section 4(1).

an international or non-international armed conflict, with the view to harm or attack the adversary, ... uses ... the flags, uniforms or insignia of neutral States".¹⁶⁵⁹

1531. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.¹⁶⁶⁰ It adds that any "minor breach" of AP I, including violations of Article 37(1) AP I, is also a punishable offence.¹⁶⁶¹

1532. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach ... of [AP I] is guilty of an indictable offence".¹⁶⁶²

1533. Nicaragua's Draft Penal Code, in an article entitled "Perfidy", punishes "anyone who, during an international or internal armed conflict, with the view to harm or attack the adversary, ... uses ... flags, uniforms or insignia of neutral countries".¹⁶⁶³

1534. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the two additional protocols to [the Geneva] Conventions ... is liable to imprisonment".¹⁶⁶⁴

1535. Spain's Penal Code punishes "anyone who, during an armed conflict ... uses ... in a perfidious manner the flag, uniform, insignia or distinctive emblem of neutral States ... or of other States which are not parties to the conflict".¹⁶⁶⁵

1536. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of ... [AP I]".¹⁶⁶⁶

1537. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of ... [AP I]".¹⁶⁶⁷

National Case-law

1538. No practice was found.

Other National Practice

1539. No practice was found.

¹⁶⁵⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Perfidia".

¹⁶⁶⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁶⁶¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁶⁶² New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁶⁶³ Nicaragua, *Draft Penal Code* (1999), Article 452.

¹⁶⁶⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁶⁶⁵ Spain, *Penal Code* (1995) Article 612(5).

¹⁶⁶⁶ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹⁶⁶⁷ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

III. Practice of International Organisations and Conferences

1540. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1541. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

1542. The ICRC Commentary on the Additional Protocols states that:

The perfidious use . . . of emblems, signs, signals or uniforms referred to in Article 37 . . . of the Protocol [among which the signs, emblems or uniforms of neutral States or other States not parties to the conflict], for the purpose of killing, injuring or capturing an adversary, constitutes a grave breach under [Article 85(3)(f) AP I].¹⁶⁶⁸

1543. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “to pretend having protected status by the use of flags, emblems or uniforms . . . of neutral States” is an act of perfidy.¹⁶⁶⁹ Delegates also teach that “the perfidious use of the . . . distinctive signs marking specifically protected persons and objects . . . [and of] other protected signs recognized by the law of war” constitutes a grave breach of the law of war.¹⁶⁷⁰

1544. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC included “the perfidious use of the . . . protective signs and signals recognized by international humanitarian law”, when committed in an international armed conflict, in its list of war crimes to be subject to the jurisdiction of the Court.¹⁶⁷¹

VI. Other Practice

1545. No practice was found.

¹⁶⁶⁸ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3499.

¹⁶⁶⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 409[e].

¹⁶⁷⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 779[a] and [b].

¹⁶⁷¹ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(b)(vi).

COMMUNICATION WITH THE ENEMY

A. Non-Hostile Contacts between the Parties to the Conflict (practice relating to Rule 66)	§§ 1–153
General	§§ 1–48
Use of the white flag of truce	§§ 49–92
Definition of parlementaires	§§ 93–122
Refusal to receive parlementaires	§§ 123–153
B. Inviolability of Parlementaires (practice relating to Rule 67)	§§ 154–233
C. Precautions while Receiving Parlementaires (practice relating to Rule 68)	§§ 234–287
General	§§ 234–260
Detention of parlementaires	§§ 261–287
D. Loss of Inviolability of Parlementaires (practice relating to Rule 69)	§§ 288–314

Note: This chapter deals with practice concerning communication on the battlefield for humanitarian or military purposes. Practice regarding political negotiations to resolve a conflict is excluded from this study.

A. Non-Hostile Contacts between the Parties to the Conflict

General

Note: For practice concerning local arrangements concluded for the evacuation of the wounded, sick and shipwrecked, see Chapter 34, section A. For practice concerning the conclusion of an agreement to suspend combat with the intention of attacking by surprise the adversary relying on it, see Chapter 18, section H.

I. Treaties and Other Instruments

Treaties

1. No practice was found.

Other Instruments

2. Under Paragraph II(2) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina, the ICRC requests that all parties accept their responsibilities and take essential measures, such as to “negotiate, organize and respect truces in areas where humanitarian activities are conducted and inform the population accordingly through the media”.

*II. National Practice**Military Manuals*

3. Argentina’s Law of War Manual provides that “the observation of the principle of good faith must be constant and unflinching in dealings with the enemy”.¹

4. Under Belgium’s Field Regulations, “it is prohibited to enter in contact with the enemy, except with deserters, the wounded and parlementaires”.²

5. Belgium’s Law of War Manual states that:

Relations between military commanders in the field of operations are necessary . . . for military or humanitarian purposes . . .

It is indispensable that, from both sides, these relations [intercourse between belligerents] be marked by the most scrupulous good faith and that no party takes any advantage from these relations that the other party does not intend to concede.³

6. Burkina Faso’s Disciplinary Regulations states that it is prohibited for a combatant “to enter in contact with the enemy”.⁴

7. Cameroon’s Disciplinary Regulations states that it is prohibited for a combatant “to enter in contact with the enemy”.⁵

8. Canada’s LOAC Manual provides that “negotiations between belligerent commanders may be conducted by intermediaries known as parlementaires. The wish to negotiate by parlementaires is frequently indicated by the raising of a white flag, but any other method of communication such as radios may be employed.”⁶

9. Congo’s Disciplinary Regulations states that it is prohibited for a combatant “to enter in contact with the enemy”.⁷

10. Croatia’s Commanders’ Manual states that:

Local interruptions of combat and other arrangements can be concluded between opposing forces. At lower levels, such arrangements can be very simple and concluded orally: voice, radio, bearer of a white flag (flag of truce). At higher levels

¹ Argentina, *Law of War Manual* (1969), § 1.017.

² Belgium, *Field Regulations* (1964), § 21.

³ Belgium, *Law of War Manual* (1983), p. 40.

⁴ Burkina Faso, *Disciplinary Regulations* (1994), Article 33(3).

⁵ Cameroon, *Disciplinary Regulations* (1975), Article 28.

⁶ Canada, *LOAC Manual* (1999), p. 14-1, § 3.

⁷ Congo, *Disciplinary Regulations* (1986), Article 30(3).

and for longer lasting interruptions of combat, written agreements shall be concluded.⁸

11. France's Disciplinary Regulations as amended states that it is prohibited for a combatant "to enter in contact with the enemy".⁹

12. Germany's Military Manual states that "a cessation of hostilities is regularly preceded by negotiations with the adversary. In the area of operations the parties to the conflict frequently use parlementaires for this purpose."¹⁰ The manual adds that:

Apart from detaching parlementaires, the parties to a conflict may also communicate with each other through the intermediary of Protecting Powers. Protecting Powers are neutral or other states not parties to the conflict which safeguard the rights and interests of a party to the conflict and those of its nationals vis-à-vis an adverse party to the conflict . . . Particularly the International Committee of the Red Cross may act as a so-called substitute . . . if the parties to the conflict cannot agree upon the designation of a Protecting Power . . .

A cease-fire is defined as a temporary interruption of military operations which is limited to a specific area and will normally be agreed upon between the local commanders. It shall regularly serve humanitarian purposes, in particular searching for and collecting the wounded and the shipwrecked, rendering first aid to these persons, and removing civilians.¹¹

13. Hungary's Military Manual stresses that non-hostile contacts with the enemy may be "direct or through an intermediary", for information, warning, summons, local arrangements or the creation of neutralised zones.¹²

14. Italy's IHL Manual notes that specific agreements to be executed on the battlefield may be concluded by parlementaires.¹³

15. Italy's LOAC Elementary Rules Manual provides that:

Local interruptions of combat and other arrangements can be concluded between opposing forces. At lower levels, such arrangements can be very simple and concluded orally: voice, radio, bearer of a white flag (flag of truce). At higher levels and for longer lasting interruptions of combat, written agreements shall be concluded.¹⁴

16. Kenya's LOAC Manual states that:

It is within the legal competence of an officer to arrange a temporary cease-fire for a specific and limited purpose, for example, to permit the collection or evacuation of the wounded. Any such action should be reported to the higher authority. Absolute good faith is required in all such dealings [the arrangement of a cease-fire] with the enemy.¹⁵

⁸ Croatia, *Commanders' Manual* (1992), § 80.

⁹ France, *Disciplinary Regulations as amended* (1975), Article 9(3).

¹⁰ Germany, *Military Manual* (1992), § 222.

¹¹ Germany, *Military Manual* (1992), §§ 231 and 232.

¹² Hungary, *Military Manual* (1992), p. 79.

¹³ Italy, *IHL Manual* (1991), Vol. I, § 51.

¹⁴ Italy, *LOAC Elementary Rules Manual* (1991), § 80.

¹⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.

17. South Korea's Operational Law Manual states that, instead of the white flag, radio communications or messages dropped from aircraft may be used to start negotiations.¹⁶

18. Lebanon's Army Regulations forbids communication by combatants with the enemy.¹⁷

19. Madagascar's Military Manual mentions non-belligerent contacts with the enemy through intermediaries such as protecting powers or the ICRC.¹⁸ It also states that:

Local cease-fires and other agreements may be concluded between the opposing forces. At inferior levels, such agreements may be very simple and concluded orally: voice, radio or bearer of a white flag (flag of parlementaires). At superior levels and for long term cease-fires, written agreements are to be concluded.¹⁹

20. The Military Handbook of the Netherlands emphasises that "only a commander may decide to negotiate with the adverse party".²⁰

21. New Zealand's Military Manual provides that:

Even between the belligerent armies direct contact may sometimes be necessary [for instance to arrange for the collection of the dead or exchange of the wounded] but relations between the belligerent forces are confined to mainly military matters. Occasionally, such relations, for example, the arrangement of a local truce or surrender, may involve political considerations but in view of radio and similar means of communication these matters tend nowadays to be taken up on an inter-government level, avoiding actual negotiations between belligerent commanders.

...

Negotiations between belligerent commanders are normally conducted, at least in the first instance, by intermediaries known as *parlementaires*. The wish to negotiate by *parlementaires* is frequently indicated by the raising of a white flag but any other method of communication, eg by radio, may be employed.

...

Any agreement made by belligerent commanders must be scrupulously adhered to... As between combatants, the most usual purpose of contact is to arrange for an armistice or truce, whether for a specific purpose or more generally. Whatever the nature of the arrangement it must be entered into and carried out in good faith.

...

Agreements between belligerents permitting activities between them which are inconsistent with belligerent status are known as cartels. Such an arrangement is voidable by either Party on proof of breach of its terms by the other.

... In addition to any other agreements that may be made between the belligerents or commanders in the field, the Geneva Conventions and API contain a number of

¹⁶ South Korea, *Operational Law Manual* (1996), p. 179.

¹⁷ Lebanon, *Army Regulations* (1971), § 15.

¹⁸ Madagascar, *Military Manual* (1994), Fiche No. 7-SO, § C.

¹⁹ Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 32, see also Fiche No. 9-SO, § C.

²⁰ Netherlands, *Military Handbook* (1995), p. 7-40.

provisions recognizing that in the special circumstances specified in these treaties agreements between belligerents may be desirable or necessary.²¹

22. Nigeria's Manual on the Laws of War states that "the conduct of war and the wish to restore peace sometimes require intercourse between the belligerents".²²

23. Spain's LOAC Manual notes that the belligerents may conclude special oral agreements on specific questions, such as agreements to allow the search for the wounded or for the flight of a medical aircraft over a small zone controlled by the enemy. Those simple low-level arrangements may be concluded by radio or by bearer of a white flag. Higher-level agreements must be concluded in writing (e.g. the establishment of demilitarised zones, or the flight of a medical aircraft over a large zone controlled by the enemy).²³ The manual adds that:

A truce is defined as a temporary interruption of military operations, limited to a specific area and usually concluded between local commanders. It shall regularly serve a humanitarian purpose, to facilitate the removal, the exchange and transport of wounded left on the battlefield, for the evacuation or exchange of wounded and sick from a besieged area, and for the passage of medical and religious personnel and medical equipment on their way to such areas.

...

In addition to parlementaires, the parties in conflict may communicate through the mediation of the Protecting Powers . . .

If the parties in conflict have not agreed upon the designation of a Protecting Power, the ICRC, or any other impartial and efficient organisation, may act as a "substitute"

...

One of the most usual missions of the military observers taking part in peacekeeping operations is to act as intermediaries between the parties to the conflict to facilitate the negotiation and implementation of local agreements.²⁴

24. Switzerland's Basic Military Manual provides that "military commanders of both sides may, within the bounds of their authority, contact each other directly in their respective operation zones".²⁵

25. The UK Military Manual states that:

It is on occasions unavoidable – and often convenient – for commanders to open direct communication with the enemy for military purposes. Furthermore, humanity and convenience may at times induce them for special reasons to relax the general prohibition of intercourse between belligerents.

...

It is essential that in such non-hostile relations the most scrupulous good faith should be observed by both parties, and that no advantage be taken which is not intended to be given by the enemy.²⁶

²¹ New Zealand, *Military Manual* (1992), §§ 405, including footnote 11, 406(1), 407(1) and (2) and 411.

²² Nigeria, *Manual on the Laws of War* (undated), § 24.

²³ Spain, *LOAC Manual* (1996), Vol. I, §§ 2.6.a and 10.8.f.(3).

²⁴ Spain, *LOAC Manual* (1996), Vol. I, §§ 2.6.b.(1) and 2.6.c.(2)–(4).

²⁵ Switzerland, *Basic Military Manual* (1987), Article 12(1).

²⁶ UK, *Military Manual* (1958), §§ 386 and 387.

The manual also provides that:

There is nothing in [Articles 32–34 of the 1907 HR] which indicates that a white flag is the only method whereby one belligerent may signify to the other its desire to open communications. In modern conditions of warfare wireless messages and loud-speakers are also used as a means of conveying the wish of one belligerent to communicate with the other.²⁷

The manual further emphasises that:

A suspension of arms is essentially a military convention of very short duration, concluded between commanders of armies, or detachments in order to arrange some local matter of urgency: most frequently to bury the dead, or to collect and succour the wounded, or, occasionally, to exchange prisoners, to permit conferences.

...

A cartel, in the wider sense of the term, is issued to signify a convention concluded between belligerents for the purpose of permitting certain kinds of non-hostile intercourse which would otherwise be prevented by the conditions of war. For instance, communication by post, trade in certain commodities, and the like, may be agreed upon by a cartel. In its strictly military sense, however, a cartel means an agreement for the exchange of prisoners of war.²⁸

26. The UK LOAC Manual states that:

It is within the legal competence of an officer to arrange for a temporary cease-fire for a specific and limited purpose, for example to permit the collection or evacuation of the wounded... Absolute good faith is required in all such dealings [the arrangement of a cease-fire] with the enemy.²⁹

27. The US Field Manual states that “absolute good faith with the enemy must be observed as a rule of conduct”.³⁰ It also provides that:

One belligerent may communicate with another directly by radio, through parlementaires, or in a conference, and indirectly through a Protecting Power, a third State other than a Protecting Power, or the International Committee of the Red Cross

...

It is absolutely essential in all nonhostile relations that the most scrupulous good faith shall be observed by both parties, and that no advantage not intended to be given by the adversary shall be taken.

...

In current practice, radio messages to the enemy and messages dropped by aircraft are becoming increasingly important as a prelude to conversations between representatives of belligerent forces.

...

In its narrower sense, a cartel is an agreement entered into by belligerents for the exchange of prisoners of war. In its broader sense, it is any convention concluded between belligerents for the purpose of arranging or regulating certain kinds of

²⁷ UK, *Military Manual* (1958), § 394, footnote 2.

²⁸ UK, *Military Manual* (1958), §§ 420 and 497.

²⁹ UK, *LOAC Manual* (1981), Section 4, p. 17, § 18.

³⁰ US, *Field Manual* (1956), § 49.

nonhostile intercourse otherwise prohibited by reason of the existence of the war. Both parties to a cartel are in honor bound to observe its provisions with the most scrupulous care, but it is voidable by either party upon definite proof that it has been intentionally violated in an important particular by the other party.³¹

National Legislation

28. Under Lebanon's Code of Military Justice, communication with the enemy by combatants is a punishable offence.³²

29. The US Uniform Code of Military Justice punishes "any person . . . who communicates or corresponds with or holds any intercourse with the enemy, either directly or indirectly".³³

National Case-law

30. No practice was found.

Other National Practice

31. According to the Report on the Practice of Colombia, government practice has been to express publicly its willingness to enter into a dialogue with opposing armed groups for humanitarian reasons or to start negotiations.³⁴ During the takeover of the embassy of the Dominican Republic by the M-19 in 1980, direct contacts were established through the mediation of the Red Cross and of one of the detained ambassadors. The hostages were ultimately released and the guerrillas were allowed to leave the country.³⁵ Likewise, during the takeover of the Palacio de Justicia in 1985, direct communications were established by phone between the leader of the armed opposition group and an officer of the national police, although without success. In the meantime, military operations were not suspended.³⁶

32. The Report on the Practice of Egypt gives armistice and cease-fire agreements with Israel as examples of negotiation with the enemy.³⁷

33. According to the Report on the Practice of Russia, Georgia appealed to "the authority of the leader of the autonomous Republic of Adzharia, who negotiated directly with the Abkhaz authorities" to obtain the release of prisoners.³⁸

³¹ US, *Field Manual* (1956), §§ 452, 453, 458 and 469.

³² Lebanon, *Code of Military Justice* (1968), Article 124(2).

³³ US, *Uniform Code of Military Justice* (1950), Article 104(2).

³⁴ Report on the Practice of Colombia, 1998, Chapter 2.2.

³⁵ Report on the Practice of Colombia, 1998, Chapter 2.2, referring to Miguel A. Afanador Ulloa, *Amnistías e indultos: la historia reciente, 1948-1992*, Administrative Department of the Public Service of Colombia, Ed. Guadalupe Ltd., Santafé de Bogotá, 1993, p. 75.

³⁶ Colombia, Cundinamarca Administrative Court, *Case No. 4010*, Intervention by the Minister of Agriculture, Cabinet record, 7 November 1985, Record of evidence; Cundinamarca Administrative Court, *Case No. 4010*, Attestation by the Cabinet, 6 November 1985, Record of evidence.

³⁷ Report on the Practice of Egypt, 1997, Chapter 2.2.

³⁸ Report on the Practice of Russia, 1997, Chapter 2.2.

34. Jordan has negotiated several temporary cease-fire agreements with the Palestinian resistance. The Report on the Practice of Jordan mentions two of them concluded in 1970.³⁹

35. According to the Report on the Practice of the Philippines, "government troops are directed to negotiate with the rebels in cases of armed confrontation".⁴⁰ The report also notes that, owing to the guerrilla nature of the conflict, negotiations between government troops and the armed opposition are usually carried out through third parties (local political and religious leaders). Cease-fires are, for example, negotiated to prevent economic disturbances or during Christian holiday celebrations.⁴¹

36. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda mentions the use of the telephone and the sending of intermediaries, such as neutral civilian emissaries with a written authorisation (the ICRC, OAU, NGOs, religious leaders, journalists or members of peace-keeping forces), as means of communication between the parties in battlefield negotiations.⁴²

37. On the basis of a meeting with an army lawyer, the Report on UK Practice comments that negotiation with the enemy "is a tricky area now" owing to the practicalities of fast-paced modern warfare.⁴³

38. According to a memorandum of a legal adviser of the US Department of State in 1975, the President, as Commander-in-Chief of the armed forces, has the constitutional authority to conclude armistices and other agreements relating to the military security of the US.⁴⁴

39. The Report on US Practice states that:

The need to seek express authority to negotiate an agreement with the enemy . . . has been reinforced by the erosion, since the end of World War II, of distinctions between political agreements, such as peace treaties, and purely military agreements, such as truces and armistices . . . [The Air Force Pamphlet] noted that the practice of concluding peace treaties had become rare, and that armistices had often become

³⁹ Report on the Practice of Jordan, 1997, Chapter 2.2, referring to Cease-fire Agreement between the Jordanian Government and the Palestinian Resistance Movement, 7 July 1970; Cairo Agreement between the Jordanian Government and the Palestinian Resistance Movement, 27 September 1970.

⁴⁰ Report on the Practice of Philippines, 1997, Chapter 2.2.

⁴¹ Report on the Practice of Philippines, 1997, Chapter 2.2, referring to Romy Elusfa, CHR Stung by AFP Rejection, *Today*, 12 April 1997; Ali G. Macabalang and Cena de Guzman, Gov't, MILF Reach Accord on Dam Dispute, *Manila Bulletin*, 30 January 1995; Farm Pact Forged with MILF Bared, *Manila Bulletin*, 10 June 1996; Aris R. Ilagan, AFP Optimistic on Truce with NPA: Holiday Ceasefire on, *Manila Bulletin*, 25 December 1993.

⁴² Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 2.2.

⁴³ Report on UK Practice, 1997, Meeting with an army lawyer, 18 July 1997, Chapter 2.2.

⁴⁴ US, Legal Adviser to the Department of State, Memorandum of Law on the authority of the US President to enter into international agreements pursuant to his independent constitutional powers, 31 October 1975, reprinted in Eleanor C. McDowell, *Digest of United States Practice in International Law, 1975*, Department of State Publication 8865, Washington, D.C., 1976, pp. 314-315.

functional substitutes for peace treaties. The term “cease fire” was increasingly used for agreements that would once have been designated armistices.

...

Modern combat conditions may also make it more difficult to communicate directly with an enemy armed force.

...

US commanders have little inherent authority to negotiate with the enemy, and unauthorized communications with the enemy may be a military offense. The practice of the United States no longer recognizes any clear category of agreements as purely military without political overtones.⁴⁵

40. The Report on the Practice of the SFRY (FRY) notes that, during the conflicts in the former Yugoslavia, there were no large military operations in Slovenia that could have triggered negotiations with the enemy on the battlefield and that “it is hardly realistic that traditional requirements of the international law of warfare would have been respected” in the conflict in Croatia. The report concludes that the *opinio juris* of the SFRY (FRY) “is, beyond any doubt, that a legal possibility exists to contact the enemy on the battlefield”.⁴⁶

41. According to the Report on the Practice of Zimbabwe, it is the opinion of the Judge Advocate General of the Defence Forces of Zimbabwe that, although there is no actual practice, “both the traditional and modern methods [of communication] are likely to be acceptable”.⁴⁷

42. In 1987, an army officer of a State asked the ICRC to act as an intermediary in order that he might enter into communication with the leader of an armed opposition group to settle questions regarding the behaviour of troops.⁴⁸

43. In 1988, negotiations between a government and an armed opposition group through governmental militiamen paved the way for the orderly withdrawal of the governmental forces and the arrival of the armed opposition group.⁴⁹

44. In 1992, the authorities of a State responded positively to a request by a civil association close to an armed opposition group for a meeting on the protection of the civilian population. The ICRC was asked to organise the meeting.⁵⁰ In 1994, the Ministry of Foreign Affairs proposed that a communication line be established between the parties by satellite phone. The phone of the armed opposition group was to be located on the ICRC premises. The ICRC emphasised that its premises should then be respected and protected, even if combatants of the armed opposition group were present.⁵¹

III. Practice of International Organisations and Conferences

45. No practice was found.

⁴⁵ Report on US Practice, 1997, Chapter 2.2. (The report notes that general armistices often include political provisions, and therefore require high-level approval.)

⁴⁶ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.2.

⁴⁷ Report on the Practice of Zimbabwe, 1998, Chapter 2.2.

⁴⁸ ICRC archive document. ⁴⁹ ICRC archive document.

⁵⁰ ICRC archive document. ⁵¹ ICRC archive document.

IV. Practice of International Judicial and Quasi-judicial Bodies

46. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

47. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Contacts between opposing armed forces can be taken at any time by the commanders concerned. They can be established by all available technical means.

...

When direct contacts between commanders or contacts through bearers of flag of truce or similar persons are not possible, commanders may also ask for cooperation from the Protecting Power or from intermediaries such as the International Committee of the Red Cross.

Commanders of opposing armed forces may conclude agreements at any time. Such agreements shall not adversely affect the situation of war victims as defined by international treaties.

Very local, short term or urgent agreements can be concluded orally (e.g. local agreements for the search of wounded after combat action, isolated overflight of a small enemy controlled area by medical aircraft).

Long lasting and large scale agreements need to be concluded in writing (e.g. neutralized zones, non-defended localities, overflight of a large enemy controlled area by medical aircraft, agreement for the evacuation of a besieged area). For such agreements, inspiration can be taken from detailed provisions foreseen by the law of war (e.g. hospital zones, demilitarized and non-defended zones and localities).⁵²

VI. Other Practice

48. No practice was found.

Use of the white flag of truce

Note: For practice concerning the carrying of the white flag of truce by a parlementaire, see the definition of a parlementaire in the following subsection. For practice concerning the use of the white flag of truce as an indication of a wish to surrender, see also Chapter 15, section B. For practice concerning the abuse, misuse or improper use of the white flag of truce, see Chapter 18, section B. For practice concerning the perfidious use of the white flag of truce, see Chapter 18, section I.

I. Treaties and Other Instruments

49. No practice was found.

⁵² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 539 and 541–544.

II. National Practice

Military Manuals

50. According to Australia's Commanders' Guide, "it is important to note that a white flag represents an expression of a desire to negotiate; it is not necessarily an indication of intent to surrender or enter into a cease-fire".⁵³

51. Australia's Defence Force Manual notes that "customary international law recognises the white flag as symbolising a request to cease-fire, negotiate, or surrender. An adversary displaying a white flag should be permitted the opportunity to surrender, or to communicate a request for cease-fire or negotiation."⁵⁴

52. Belgium's Law of War Manual expressly recognises the white flag as the flag of parlementaires.⁵⁵

53. Belgium's Teaching Manual for Soldiers recognises "the white flag of parlementaires (used for negotiation or surrender)".⁵⁶ It states that "this flag is actually recognised as the signal of a request for suspension of operations to enter into negotiations or to surrender".⁵⁷

54. Benin's Military Manual recognises the "white flag (flag of parlementaires used for negotiations and surrender)".⁵⁸

55. Cameroon's Instructors' Manual mentions "the flag of parlementaires or white flag for temporary suspension of combat".⁵⁹ The white flag is defined as the flag of parlementaires and the flag of surrendering combatants.⁶⁰

56. Canada's LOAC Manual notes that "personnel bearing a white flag are indicating a desire to negotiate or surrender".⁶¹

57. Canada's Code of Conduct stresses that "the showing of a white flag is not necessarily an expression of an intent to surrender. Furthermore, it is not necessarily applicable to all opposing forces in an area. The white flag can also mean that opposing forces wish to temporarily cease hostilities to talk or negotiate."⁶²

58. Colombia's Soldiers' Manual recognises "the white flag, which means surrender, parlementaire, negotiation and spirit of conciliation".⁶³

59. Under the Military Manual of the Dominican Republic, displaying a white flag is, *inter alia*, a manner of expressing a wish to surrender.⁶⁴

⁵³ Australia, *Commanders' Guide* (1994), § 505.

⁵⁴ Australia, *Defence Force Manual* (1994), § 910.

⁵⁵ Belgium, *Law of War Manual* (1983), Annex 2, No. 6.

⁵⁶ Belgium, *Teaching Manual for Soldiers* (undated), p. 9, see also p. 10.

⁵⁷ Belgium, *Teaching Manual for Soldiers* (undated), p. 15.

⁵⁸ Benin, *Military Manual* (1995), Fascicule I, p. 15.

⁵⁹ Cameroon, *Instructors' Manual* (1992), p. 37, § 144.2 and p. 61, § 232.2.

⁶⁰ Cameroon, *Instructors' Manual* (1992), pp. 38, 62 and 146.

⁶¹ Canada, *LOAC Manual* (1999), p. 4-5, § 45.

⁶² Canada, *Code of Conduct* (2001), Rule 5, § 3.

⁶³ Colombia, *Soldiers' Manual* (1999), p. 28.

⁶⁴ Dominican Republic, *Military Manual* (1980), p. 6.

60. Ecuador's Naval Manual emphasises that "customary international law recognizes the white flag as symbolising a request to cease-fire, negotiate, or surrender".⁶⁵
61. France's LOAC Manual recognises the "white flag or flag of parlementaires".⁶⁶
62. Germany's Soldiers' Manual recognises the white flag as the flag of parlementaires and the flag of surrendering combatants.⁶⁷
63. Germany's Military Manual states that parlementaires "make themselves known by a white flag".⁶⁸
64. Germany's IHL Manual recognises the white flag as the flag of parlementaires.⁶⁹
65. Italy's LOAC Elementary Rules Manual recognises the "white flag (flag of parlementaires used for negotiations and surrender)".⁷⁰
66. Kenya's LOAC Manual provides that "the white flag or flag of truce indicates no more than an intention to enter into negotiations with the enemy. It does not necessarily mean a wish to surrender."⁷¹
67. South Korea's Operational Law Manual stresses that it is the expression of surrender for a soldier or a unit to display a white flag. It is also generally used for initiating negotiations.⁷²
68. Madagascar's Military Manual states that the white flag is a means of contacting the enemy.⁷³
69. The Military Manual of the Netherlands provides that the white flag "indicates that the party who displays the flag wants to negotiate... In addition, the white flag is also accepted as a usual indication of surrender."⁷⁴
70. The Military Handbook of the Netherlands states that "displaying the white flag means that one wants to negotiate with the adverse party (for example about a cease-fire) or that one wants to surrender".⁷⁵
71. New Zealand's Military Manual provides that "the wish to negotiate by *parlementaires* is frequently indicated by the raising of a white flag... *Parlementaires* normally operate under a flag of truce."⁷⁶ The manual adds that the white flag is deployed:

1. When a person is authorised by one Party to enter into communications with the adverse Party; if used, the white flag should be carried by the parlementaire or an accompanying individual so as to be clearly visible.

⁶⁵ Ecuador, *Naval Manual* (1989), § 11.10.4. ⁶⁶ France, *LOAC Manual* (2001), p. 61.

⁶⁷ Germany, *Soldiers' Manual* (1991), p. 6.

⁶⁸ Germany, *Military Manual* (1992), § 223, see also Appendix 1/2.

⁶⁹ Germany, *IHL Manual* (1996), Appendix 1/2, No. 11.

⁷⁰ Italy, *LOAC Elementary Rules Manual* (1991), p. 29.

⁷¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

⁷² South Korea, *Operational Law Manual* (1996), p. 179.

⁷³ Madagascar, *Military Manual* (1994), Fiche No. 9-SO, § C.

⁷⁴ Netherlands, *Military Manual* (1993), p. IV-4.

⁷⁵ Netherlands, *Military Handbook* (1995), p. 7-40, see also p. 7-37.

⁷⁶ New Zealand, *Military Manual* (1992), § 406(1) and (2).

2. If an element of the armed forces wishes to surrender to an adverse Party a white flag, when held so as to be clearly visible, may be utilized to facilitate a peaceful surrender.⁷⁷

72. Nigeria's Manual on the Laws of War notes that:

The hoisting of a white flag means that a belligerent wishes to communicate with the enemy, either for the purpose of surrender or for some other purposes. Hoisting the white flag by a small number of soldiers usually [expresses] the wish to surrender; in the case of a large unit it is usually the expression of a wish to conduct negotiations.⁷⁸

73. The Code of Ethics of the Philippines stresses that the white flag of truce is a "worldwide custom used to signal the temporary cessation of hostilities between warring parties".⁷⁹

74. South Africa's LOAC Manual provides that "a white flag designates a truce, a request to negotiate or an indication of surrender".⁸⁰

75. Togo's Military Manual recognises the "white flag (flag of parlementaires used for negotiations and surrender)".⁸¹

76. The UK Military Manual states that:

From time immemorial a white flag has been used as a signal by an armed force which wishes to open communications with the enemy. This is the only meaning which the flag possesses in international law. The hoisting of a white flag, therefore, means in itself nothing else than one party is asked whether it will receive a communication from the other. It may indicate merely that the party which hoists it wishes to make an arrangement for the suspension of arms for some purpose; but it may also mean that the party wishes to negotiate for surrender. Everything depends on the circumstances and conditions of the particular case. For instance, in practice, the white flag has come to indicate surrender if hoisted by individual soldiers or a small party in the course of an action. Great vigilance is always necessary, for the question in every case is whether the hoisting of the white flag was authorised by the commander.⁸²

77. The UK LOAC Manual provides that "the white flag, or flag of truce, indicates no more than an intention to enter into negotiations with the enemy. It does not necessarily mean a wish to surrender."⁸³

78. The US Field Manual notes that:

In the past, the normal means of initiating negotiations between belligerents has been the display of a white flag . . .

The white flag, when used by troops, indicates a desire to communicate with the enemy. The hoisting of a white flag has no other signification in international

⁷⁷ New Zealand, *Military Manual* (1992), Annex B, § B44.

⁷⁸ Nigeria, *Manual on the Laws of War* (undated), § 24.

⁷⁹ Philippines, *Code of Ethics* (1991), Article 5, Section 2(4.5).

⁸⁰ South Africa, *LOAC Manual* (1996), § 23, see also § 37(d).

⁸¹ Togo, *Military Manual* (1996), Fascicule I, p. 16.

⁸² UK, *Military Manual* (1958), § 394.

⁸³ UK, *LOAC Manual* (1981), Section 4, p. 16, § 10.

law. It may indicate that the party hoisting it desires to open communication with a view to an armistice or a surrender. If hoisted in action by an individual soldier or a small party, it may signify merely the surrender of that soldier or party. It is essential, therefore, to determine with reasonable certainty that the flag is shown by actual authority of the enemy commander before basing important action upon that assumption.⁸⁴

79. The US Air Force Pamphlet states that:

The white flag has traditionally indicated a desire to communicate with the enemy and may indicate more particularly, depending upon the situation, a willingness to surrender. It raises expectations that the particular struggle is at an end or close to an end since the only proper use of the flag of truce or white flag is to communicate to the enemy a desire to negotiate.⁸⁵

80. The US Naval Handbook emphasises that “customary international law recognizes the white flag as symbolizing a request to cease-fire, negotiate, or surrender”.⁸⁶

81. The YPA Military Manual of the SFRY (FRY) provides that “the white flag is the sign of a parlementaire and indicates the wish of a party to the conflict to enter into contact with the other side through the intermediary of the person carrying such flag”.⁸⁷

National Legislation

82. No practice was found.

National Case-law

83. No practice was found.

Other National Practice

84. The Report on the Practice of Botswana considers the flag of truce as a traditional method to communicate with the enemy.⁸⁸

85. The Report on the Practice of China states that, “as far as communication with the enemy is concerned, China follows the traditional way of raising white flags”.⁸⁹

86. The Report on the Practice of Malaysia states that “the use of white flag is acknowledged as a sign of ceasing hostilities”.⁹⁰

⁸⁴ US, *Field Manual* (1956), § 458.

⁸⁵ US, *Air Force Pamphlet* (1976), § 8-6a.

⁸⁶ US, *Naval Handbook* (1995), § 11.9.5.

⁸⁷ SFRY (FRY), *YPA Military Manual* (1988), § 119, commentary.

⁸⁸ Report on the Practice of Botswana, 1998, Chapter 2.2.

⁸⁹ Report on the Practice of China, 1997, Chapter 2.2.

⁹⁰ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 2.2.

87. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that the flag of truce may be used to negotiate with the enemy on the battlefield.⁹¹

88. A training video produced by the UK Ministry of Defence emphasises that the white flag is protective and that it only indicates a wish to negotiate, not to surrender.⁹²

III. Practice of International Organisations and Conferences

89. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

90. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

91. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that the “white flag (flag of truce) [is] used for negotiations and surrender”.⁹³

VI. Other Practice

92. No practice was found.

Definition of parlementaires

I. Treaties and Other Instruments

Treaties

93. Article 32 of the 1899 HR states that “an individual is considered as a parlementaire who is authorized by one of the belligerents to enter into communication with the other, and who carries a white flag”.

94. Article 32 of the 1907 HR states that “a person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag”.

⁹¹ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 2.2.

⁹² UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.2.

⁹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 963.

Other Instruments

95. Article 43 of the 1874 Brussels Declaration provides that “a person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag”.

96. Article 27 of the 1880 Oxford Manual states that “a person is regarded as a parlementaire who has been authorized by one of the belligerents to enter into communication with the other, and who advances bearing a white flag”.

97. Article 45 of the 1913 Oxford Manual of Naval War provides that “a ship authorized by one of the belligerents to enter into a parley with the other and carrying a white flag is considered a cartel ship”.

*II. National Practice**Military Manuals*

98. Argentina’s Law of War Manual defines a parlementaire as “an individual authorised by one of the belligerents to enter into communication with the other and who advances bearing a white flag”.⁹⁴

99. Belgium’s Field Regulations defines a parlementaire as a person “who has been authorised by one of the belligerents to enter into communication with the other, and who advances bearing a white flag”.⁹⁵

100. Belgium’s Law of War Manual defines a parlementaire as “the person authorised by a belligerent to enter into communication with the adversary and who advances bearing a white flag (at night a white light)”.⁹⁶

101. Belgium’s Teaching Manual for Officers states that “a parlementaire is a person who advances bearing a white flag, in order to negotiate”.⁹⁷

102. Cameroon’s Disciplinary Regulations provides that “any person who advances without weapons and displaying the white flag shall be considered as a parlementaire”.⁹⁸

103. Under Canada’s LOAC Manual, parlementaires are intermediaries by whom negotiations between belligerent commanders may be conducted.⁹⁹

104. Germany’s Military Manual states that:

A cessation of hostilities is regularly preceded by negotiations with the adversary. In the area of operations the parties to the conflict frequently use parlementaires for this purpose. . . . Parlementaires are persons authorized by one party to the conflict to enter into negotiations with the adversary.¹⁰⁰

⁹⁴ Argentina, *Law of War Manual* (1969), § 6.001.

⁹⁵ Belgium, *Field Regulations* (1964), § 22.

⁹⁶ Belgium, *Law of War Manual* (1983), p. 40.

⁹⁷ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 25.

⁹⁸ Cameroon, *Disciplinary Regulations* (1975), Article 30.

⁹⁹ Canada, *LOAC Manual* (1999), p. 14-1, § 3.

¹⁰⁰ Germany, *Military Manual* (1992), §§ 222 and 223.

The manual adds that “defectors or members of friendly forces taken prisoner by the adversary have no status as parlementaires nor as persons accompanying parlementaires”.¹⁰¹

105. Italy’s IHL Manual defines a parlementaire as:

a person authorised by a military belligerent authority to enter into direct communication with the enemy; the scope of his powers is usually to conclude specific agreements to be executed on the battlefield. The parlementaire . . . must advance bearing a visible distinctive sign consisting of a white flag.¹⁰²

The manual adds that the authorisation for a parlementaire to enter into negotiations must be in writing.¹⁰³ It further emphasises the importance of the use of parlementaires in the context of peacekeeping operations, not only for the safeguard of human life, but also to prevent or rapidly put an end to possible incidents, especially those involving the use of arms.¹⁰⁴

106. The Military Manual of the Netherlands defines a parlementaire as “a person who has been authorised by one of the belligerents to enter into negotiations with the other party and who advances bearing a white flag”.¹⁰⁵

107. New Zealand’s Military Manual notes that “negotiations between belligerent commanders are normally conducted, at least in the first instance, by intermediaries known as parlementaires . . . Parlementaires normally operate under a flag of truce.”¹⁰⁶

108. Nigeria’s Manual on the Laws of War states that “the usual agents in non-hostile intercourse between belligerents are known as parlementaires. The parlementaires must carry a white flag . . . [and] an authorisation in writing signed by the sending commander.”¹⁰⁷

109. Spain’s Field Regulations provides that a parlementaire is “the official sent to the enemy with formal orders and powers to negotiate agreements, capitulations; to request suspension of arms, truce or armistice; to present claims or observations about violations of agreements”.¹⁰⁸

110. Spain’s LOAC Manual defines parlementaires as “the persons authorised by one of the parties to enter into negotiations with the adversary, and who advances bearing a white flag”.¹⁰⁹

111. Switzerland’s Basic Military Manual defines a parlementaire as a person “who is authorised by one of the belligerents to enter into communication with the other and who advances bearing a white flag”.¹¹⁰

112. The UK Military Manual emphasises that “the usual agents in the non-hostile intercourse of belligerent armies are known as *parlementaires*”.¹¹¹ It also states that:

¹⁰¹ Germany, *Military Manual* (1992), § 225. ¹⁰² Italy, *IHL Manual* (1991), Vol. I, § 51.

¹⁰³ Italy, *IHL Manual* (1991), Vol. I, § 52. ¹⁰⁴ Italy, *IHL Manual* (1991), Vol. I, § 60.

¹⁰⁵ Netherlands, *Military Manual* (1993), p. IV-4.

¹⁰⁶ New Zealand, *Military Manual* (1992), § 406(1) and (2).

¹⁰⁷ Nigeria, *Manual on the Laws of War* (undated), § 24.

¹⁰⁸ Spain, *Field Regulations* (1882), § 901. ¹⁰⁹ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1).

¹¹⁰ Switzerland, *Basic Military Manual* (1987), Article 13.

¹¹¹ UK, *Military Manual* (1958), § 389.

A person to be regarded as a *parlementaire* must be authorised by one of the belligerents to enter into communication with the other and must present himself under cover of a white flag. The authorisation [for a *parlementaire* to enter into negotiations] should be in writing and be signed by the sending commander.¹¹²

113. The US Field Manual provides that *parlementaires* are “agents employed by commanders to go in person within the enemy lines for the purpose of communicating or negotiating openly and directly with the enemy commander”.¹¹³ It states that “a person is regarded as a *parlementaire* who has been authorized by one of the belligerents to enter into communication with the other and who advances bearing a white flag”.¹¹⁴ Moreover, “*parlementaires* must be duly authorized in a written instrument signed by the commander of the forces”.¹¹⁵

114. The YPA Military Manual of the SFRY (FRY) defines a *parlementaire* as “a person who is authorised by one party to the conflict to enter into communication in its name with another party in order to negotiate a specific question or to deliver a message”.¹¹⁶ It provides that “a *parlementaire* can be escorted by other persons”, such as an interpreter.¹¹⁷ It also states that “a *parlementaire* or a person in his escort is required to carry the white flag of *parlementaires*”.¹¹⁸ In addition, “a *parlementaire* should have a written authorisation of the person in charge for making contact with the representative of the enemy side”.¹¹⁹

National Legislation

115. Italy’s Law of War Decree as amended defines a *parlementaire* as “a person authorised by military authority to enter into direct communication with the enemy. The *parlementaire* must be provided with a document proving his status and powers and must advance with a white flag.”¹²⁰

116. The commentary on the Penal Code as amended of the SFRY (FRY) states that “a *parlementaire* is a person who, under authorisation by one Party to the war or armed conflict, conveys a message to another Party”.¹²¹

National Case-law

117. No practice was found.

Other National Practice

118. No practice was found.

¹¹² UK, *Military Manual* (1958), § 393.

¹¹³ US, *Field Manual* (1956), § 459.

¹¹⁴ US, *Field Manual* (1956), § 460.

¹¹⁵ US, *Field Manual* (1956), § 462.

¹¹⁶ SFRY (FRY), *YPA Military Manual* (1988), § 116.

¹¹⁷ SFRY (FRY), *YPA Military Manual* (1988), § 118.

¹¹⁸ SFRY (FRY), *YPA Military Manual* (1988), § 119.

¹¹⁹ SFRY (FRY), *YPA Military Manual* (1988), § 123.

¹²⁰ Italy, *Law of War Decree as amended* (1938), Article 67.

¹²¹ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 149.

III. Practice of International Organisations and Conferences

119. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

120. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

121. No practice was found.

VI. Other Practice

122. No practice was found.

Refusal to receive parlementaires*I. Treaties and Other Instruments**Treaties*

123. Article 33 of the 1899 HR stipulates that “the chief to whom a parlementaire is sent is not obliged to receive him in all circumstances”.

124. Article 33 of the 1907 HR stipulates that “the commander to whom a parlementaire is sent is not in all cases obliged to receive him”.

Other Instruments

125. According to Article 44 of the 1874 Brussels Declaration, “the commander to whom a parlementaire is sent is not in all cases and under all conditions obliged to receive him . . . He may likewise declare beforehand that he will not receive parlementaires during a certain period.”

126. Article 29 of the 1880 Oxford Manual states that “the commander to whom a parlementaire is sent is not in all cases obliged to receive him”.

127. Article 45 of the 1913 Oxford Manual of Naval War provides that “the commanding officer to whom a cartel ship is sent is not obliged to receive it under all circumstances”.

*II. National Practice**Military Manuals*

128. Argentina’s Law of War Manual provides that “the commander to whom a parlementaire is sent is not obliged to receive him at all times”.¹²²

¹²² Argentina, *Law of War Manual* (1969), § 6.002.

129. Belgium's Law of War Manual provides that "the chief to whom a parlementaire is sent is not obliged to receive him in all circumstances". It also states that it is prohibited for commanders to decide *a priori* that they will not receive parlementaires.¹²³

130. Belgium's Teaching Manual for Officers states that the parlementaire "does not necessarily have to be received by the adverse party".¹²⁴

131. Canada's LOAC Manual states that "there is no obligation upon the adverse party to receive a parlementaire".¹²⁵

132. Germany's Military Manual provides that "the commander to whom a parlementaire is sent is not in all cases obliged to receive him".¹²⁶

133. Italy's IHL Manual provides that it can be declared that no parlementaires will be received for a certain period of time. Such a policy may also be adopted as a reprisal measure.¹²⁷ However, a parlementaire must be received, unless particular circumstances do not permit it.¹²⁸

134. Kenya's LOAC Manual provides that "there is no obligation to receive a flag party and it may be sent back".¹²⁹

135. The Military Manual of the Netherlands provides that "a commander to whom a parlementaire is sent is not obliged to receive him".¹³⁰

136. New Zealand's Military Manual provides that "there is no obligation upon the adverse Party to receive a *parlementaire*".¹³¹

137. Nigeria's Manual on the Laws of War provides that "the force commander (of the other side) is not obliged to receive the parlementaire".¹³²

138. Spain's Field Regulations states that a commander may refuse to receive a parlementaire only if it would result in an immediate and manifest prejudice to operations or if it appears to be a dilatory manoeuvre.¹³³

139. Spain's LOAC Manual provides that "the commander to whom a parlementaire is sent is not obliged to receive him in every case".¹³⁴

140. Switzerland's Basic Military Manual states that "the commander to whom a parlementaire is sent is not obliged to receive him".¹³⁵

141. The UK Military Manual affirms that:

The commander to whom a *parlementaire* is sent is not obliged to receive him in every case. There may be a movement in progress the success of which depends on secrecy, or owing to the state of the defences, it may be considered undesirable to allow an envoy to approach a besieged locality. In direct contrast, however, to a

¹²³ Belgium, *Law of War Manual* (1983), p. 40.

¹²⁴ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 25.

¹²⁵ Canada, *LOAC Manual* (1999), p. 14-1, § 5.

¹²⁶ Germany, *Military Manual* (1992), § 226.

¹²⁷ Italy, *IHL Manual* (1991), Vol. I, § 55.

¹²⁸ Italy, *IHL Manual* (1991), Vol. I, § 54.

¹²⁹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

¹³⁰ Netherlands, *Military Manual* (1993), p. IV-4.

¹³¹ New Zealand, *Military Manual* (1992), § 406(3).

¹³² Nigeria, *Manual on the Laws of War* (undated), § 24.

¹³³ Spain, *Field Regulations* (1882), § 903.

¹³⁴ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1).

¹³⁵ Switzerland, *Basic Military Manual* (1987), Article 14.

former rule, it is now no longer permissible – except in cases of reprisals for abuses of the flag of truce – for a belligerent to declare beforehand, even for a stated period, that he will not receive *parlementaires*.¹³⁶

142. The UK LOAC Manual provides that “there is no obligation to receive a flag party which may be sent back”.¹³⁷

143. The US Field Manual provides that “the commander to whom a parlementaire is sent is not in all cases obliged to receive him”.¹³⁸ It adds that “the present rule is that a belligerent may not declare beforehand, even for a specified period – except in case of reprisal for abuses of the flag of truce – that he will not receive parlementaires. An unnecessary repetition of visits need not be allowed.”¹³⁹

144. The YPA Military Manual of the SFRY (FRY) provides that:

The party to the conflict to which a parlementaire is sent is not obliged to receive him in any case.

It is forbidden for the parties to the conflict to announce [beforehand] that they will not receive a parlementaire . . .

It is allowed to refuse to receive a parlementaire in order for him not to see or find out something about movements or regrouping of troops or the like. It is also allowed to refuse to receive a parlementaire as a measure of reprisals, if the party that sends the parlementaire had previously abused the flag of parlementaires.¹⁴⁰

National Legislation

145. Italy's Law of War Decree as amended stipulates that “the commander of the operating force is not obliged to receive a parlementaire in all circumstances”.¹⁴¹

National Case-law

146. No practice was found.

Other National Practice

147. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

148. No practice was found.

Other International Organisations

149. No practice was found.

¹³⁶ UK, *Military Manual* (1958), § 398.

¹³⁷ UK, *LOAC Manual* (1981), Section 4, p. 16, § 10.

¹³⁸ US, *Field Manual* (1956), § 463.

¹³⁹ US, *Field Manual* (1956), § 464.

¹⁴⁰ SFRY (FRY), *YPA Military Manual* (1988), § 125.

¹⁴¹ Italy, *Law of War Decree as amended* (1938), Article 68.

International Conferences

150. The Report of the Second Commission of the 1899 Hague Peace Conference stated that Article 33 of the 1899 HR “deals with the right that every belligerent has . . . to refuse to receive a parlementaire . . . All these rules conform to the necessities and customs of war.” The Second Commission also took the position that “the principles of the law of nations do not permit a belligerent ever to declare, even for a limited time, that he will not receive flags of truce”.¹⁴² According to Levie, this would mean that, “while a commander may refuse, in a specific case, to receive a parlementaire, perhaps because he believes that it is merely an attempt to gain time, he may not state it as a general policy”.¹⁴³

IV. Practice of International Judicial and Quasi-judicial Bodies

151. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

152. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the commander is not in all circumstances obliged to receive a bearer of flag of truce or similar persons”.¹⁴⁴

VI. Other Practice

153. No practice was found.

B. Inviolability of Parlementaires*I. Treaties and Other Instruments**Treaties*

154. Article 32 of the 1899 HR provides that a parlementaire “has a right to inviolability, as well as the trumpeter, bugler, or drummer, the flag-bearer and the interpreter who may accompany him”.

155. Article 32 of the 1907 HR provides that a parlementaire “has the right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and the interpreter who may accompany him”.

¹⁴² James B. Scott (ed.), *The Reports of the Hague Conferences of 1899 and 1907*, Clarendon Press, Oxford, 1917, p. 147.

¹⁴³ Howard S. Levie (ed.), *The Code of International Armed Conflict*, Vol. I, Oceana Publications Inc., London/Rome/New York, 1986, p. 155.

¹⁴⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 540.

Other Instruments

156. Article 43 of the 1874 Brussels Declaration provides that a parlementaire “shall have a right to inviolability, as well as the trumpeter (bugler or drummer) and the flag-bearer who accompany him”.

157. Articles 27 and 28 of the 1880 Oxford Manual provide that a parlementaire “has the right to inviolability . . . He may be accompanied by a bugler or a drummer, by a colour-bearer, and, if need be, by a guide and interpreter, who also are entitled to inviolability.”

158. Article 45 of the 1913 Oxford Manual of Naval War provides that “ships called cartel ships, which act as bearers of a flag of truce, may not be seized while fulfilling their mission, even if they belong to the navy”. Article 65 deals with parlementaires and states that “the personnel of cartel ships is inviolable”.

159. Paragraphs 47 and 48 of the 1994 San Remo Manual provide that cartel vessels “are exempt from attack”, but “only if they (a) are innocently employed in their normal role; (b) submit to identification and inspection when required; and (c) do not intentionally hamper the movement of combatants and obey orders to stop or move out of the way when required”. According to Paragraphs 136 and 137, cartel vessels are also “exempt from capture”, under the same conditions as for the exemption from attack, provided that, in addition, they “do not commit acts harmful to the enemy”.

*II. National Practice**Military Manuals*

160. Argentina’s Law of War Manual provides that a parlementaire “has the right to inviolability, like the bugler, trumpeter, drummer, colour bearer and the interpreter accompanying him”.¹⁴⁵

161. Australia’s Commanders’ Guide provides that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . firing upon flags of truce”.¹⁴⁶

162. Australia’s Defence Force Manual states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . firing upon flags of truce”.¹⁴⁷ It also provides that “an adversary displaying a white flag should be permitted the opportunity . . . to communicate a request for cease-fire or negotiation”.¹⁴⁸

163. Belgium’s Law of War Manual states that “the parlementaire whose conduct is correct has the right to absolute inviolability. This applies also to those

¹⁴⁵ Argentina, *Law of War Manual* (1969), § 6.001.

¹⁴⁶ Australia, *Commanders’ Guide* (1994), § 1305(q), see also § 840 (protection of cartel ships).

¹⁴⁷ Australia, *Defence Force Manual* (1994), § 1315(q), see also § 644 (protection of cartel ships).

¹⁴⁸ Australia, *Defence Force Manual* (1994), § 910.

accompanying him (trumpeter, bugler or drummer, colour bearer, interpreter, driver).¹⁴⁹

164. Belgium's Teaching Manual for Officers emphasises that "the person of the parlementaire is inviolable".¹⁵⁰

165. Burkina Faso's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to attack or retain prisoner a parlementaire displaying the white flag".¹⁵¹

166. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, a "parlementaire enjoys an absolute immunity and it is prohibited to attack him or retain him prisoner".¹⁵²

167. Canada's LOAC Manual states that:

A parlementaire may be accompanied by other personnel agreed upon by the commanders involved . . .

The adverse party does not have to cease combat. The belligerent may not fire upon the parlementaire, white flag or party. The parlementaire and those who are in his or her party are entitled to complete inviolability, so long as they do nothing to abuse this protection, or to take advantage of their protected position.¹⁵³

Furthermore, the manual stresses that "during the withdrawal and return to the parlementaire's own lines, the parlementaire continues to enjoy inviolability and may not be attacked".¹⁵⁴ It also notes that "to fire intentionally upon the white flag carried by a parlementaire is a war crime".¹⁵⁵ Lastly, it states that "the following vessels of an adverse party shall not be attacked: . . . vessels granted safe conduct by agreement between parties to the conflict (e.g. vessels carrying PWs . . .)".¹⁵⁶

168. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to attack or retain prisoner a parlementaire displaying the white flag".¹⁵⁷

169. Ecuador's Naval Manual states that "enemy forces displaying a white flag should be permitted an opportunity . . . to communicate a request for cease-fire or negotiation".¹⁵⁸ It also states that "the following acts constitute war crimes: . . . firing on flags of truce".¹⁵⁹

¹⁴⁹ Belgium, *Law of War Manual* (1983), p. 40.

¹⁵⁰ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 25.

¹⁵¹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹⁵² Cameroon, *Disciplinary Regulations* (1975), Article 30.

¹⁵³ Canada, *LOAC Manual* (1999), p. 14-1, §§ 4 and 5.

¹⁵⁴ Canada, *LOAC Manual* (1999), p. 14-1, § 9.

¹⁵⁵ Canada, *LOAC Manual* (1999), p. 14-1, § 6.

¹⁵⁶ Canada, *LOAC Manual* (1999), p. 4-9, § 94(c), see also pp. 7-6 and 7-7, § 60(c) (air warfare) and p. 8-6, § 41(c) (naval warfare).

¹⁵⁷ Congo, *Disciplinary Regulations* (1986), Article 32(2).

¹⁵⁸ Ecuador, *Naval Manual* (1989), § 11.10.4.

¹⁵⁹ Ecuador, *Naval Manual* (1989), § 6.2.5(11), see also § 8.2.3 (protection of cartel ships).

170. France's Disciplinary Regulations as amended provides that, under international conventions, it is prohibited "to attack or retain prisoner a parlementaire displaying the white flag".¹⁶⁰

171. France's LOAC Manual emphasises that the law of armed conflict provides "special protection" for parlementaires.¹⁶¹

172. Germany's Military Manual provides that:

Parlementaires and the persons accompanying them, e.g. drivers and interpreters, have a right to inviolability . . .

When entering the territory of the adversary, parlementaires and the persons accompanying them shall not be taken prisoner or detained. The principle of inviolability shall apply until they have safely returned to friendly territory. It does not require the adverse party to completely cease fire in a sector where a parlementaire arrives.¹⁶²

173. Italy's IHL Manual provides that a person who "intends to receive a parlementaire must suspend fire locally, for the time necessary for communication and for the return of the parlementaire and the persons accompanying him to their own lines".¹⁶³ It further states that "the parlementaire recognised as such, the persons accompanying him and the related means of transportation (on land, in the air or at sea) are inviolable for the whole time necessary to the accomplishment of their mission".¹⁶⁴ The manual mentions the flag bearer, bugler, drummer and interpreter as the persons who may accompany a parlementaire.¹⁶⁵

174. Kenya's LOAC Manual states that "bearers of a white flag of truce must be respected".¹⁶⁶ It adds that "the flag may not be attacked and, on completion of [a flag party's] mission, must be allowed to return to its own lines".¹⁶⁷

175. South Korea's Military Regulation 187 provides that firing on the white flag is a war crime.¹⁶⁸

176. Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to attack or retain prisoner a parlementaire displaying the white flag".¹⁶⁹

177. The Military Manual of the Netherlands states that:

A parlementaire has the right to inviolability . . . [The white flag] indicates that the party who displays the flag wants to negotiate. This party must cease fire. The other party has no obligation to cease fire. However, the parlementaire and any person who may accompany him (e.g. an interpreter) may not be fired upon.¹⁷⁰

¹⁶⁰ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

¹⁶¹ France, *LOAC Manual* (2001), p. 95.

¹⁶² Germany, *Military Manual* (1992), §§ 223 and 224, see also § 1034 (protection of cartel ships).

¹⁶³ Italy, *IHL Manual* (1991), Vol. I, § 56. ¹⁶⁴ Italy, *IHL Manual* (1991), Vol. I, § 53.

¹⁶⁵ Italy, *IHL Manual* (1991), Vol. I, § 51.

¹⁶⁶ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15.

¹⁶⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

¹⁶⁸ South Korea, *Military Regulation 187* (1991), Article 4.2.

¹⁶⁹ Mali, *Army Regulations* (1979), Article 36.

¹⁷⁰ Netherlands, *Military Manual* (1993), p. IV-4.

178. The Military Handbook of the Netherlands emphasises that “the party which displays the [white] flag has to cease fire. The other party does not have to do so. But, the *parlementaire* and the soldiers who accompany him (for example an interpreter) may not be attacked.”¹⁷¹

179. New Zealand’s Military Manual provides that “a *parlementaire* and accompanying trumpeter, bugler, (or drummer), flag bearer and interpreter are all protected in the case of an authorized communication made under the protection of a white flag”.¹⁷² It specifies that:

The belligerent to whom a *parlementaire* is being despatched does not have to cease combat, although he may not fire upon the *parlementaire*, his flag or those with him. Since the adverse Party may continue combat, the *parlementaire* should cross during a lull in the fighting or should seek some other moment for making his journey, or travel by a route that reduces any risk to himself or those with him. The *parlementaire* and those with him are entitled to complete inviolability, so long as they do nothing to abuse this protection or to take advantage of their protected position . . .

To fire intentionally upon the white flag carried by a *parlementaire* is a war crime . . . No offence is committed if the *parlementaire* or those with him are injured accidentally, or even if the white flag he carries is fired upon inadvertently . . .

During the period that the *parlementaire* is conducting his negotiations the conflict continues and both sides are entitled to reinforce or take such other combat actions as they consider necessary . . . During his withdrawal and return to his own lines, the *parlementaire* continues to enjoy inviolability and may not be attacked.¹⁷³

180. Nigeria’s Manual on the Laws of War provides that:

The *parlementaire* must carry a white flag while advancing towards the enemy lines thus he and his party will have the privilege of immunity. Nevertheless, in order to prevent unnecessary dangers, the *parlementaire* should choose a safe and convenient route of approach to the enemy.¹⁷⁴

The manual also states that “firing on a white flag” is a war crime.¹⁷⁵

181. The Soldier’s Rules of the Philippines includes the following order: “Respect all persons and objects bearing . . . the white flag of truce.”¹⁷⁶

182. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that “members of the AFP and PNP shall respect all persons and objects bearing . . . the White Flag of Truce”.¹⁷⁷

¹⁷¹ Netherlands, *Military Handbook* (1995), p. 7-40, see also p. 7-36.

¹⁷² New Zealand, *Military Manual* (1992), Annex B, § B45, see also §§ 638 and 718 (protection of cartel ships).

¹⁷³ New Zealand, *Military Manual* (1992), § 406(3), (4) and (6), see also Annex B, §§ B44 and B45.

¹⁷⁴ Nigeria, *Manual on the Laws of War* (undated), § 24.

¹⁷⁵ Nigeria, *Manual on the Laws of War* (undated), § 6.

¹⁷⁶ Philippines, *Soldier’s Rules* (1989), § 10.

¹⁷⁷ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2a(5).

183. Under Russia's Military Manual, it is a prohibited method of warfare "to kill parlementaires and persons accompanying them".¹⁷⁸

184. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to attack or retain prisoner a parlementaire displaying the white flag".¹⁷⁹

185. Under South Africa's LOAC Manual, "firing on . . . a flag of truce" is qualified as a "grave breach" and a war crime.¹⁸⁰

186. Spain's Field Regulations states that "the person of the parlementaire is inviolable".¹⁸¹ It adds that in a combat situation, fire must not be stopped when a parlementaire approaches, until superior orders have been given to do so.¹⁸²

187. Spain's LOAC Manual provides that:

Parlementaires and persons accompanying them are inviolable. When entering an area controlled by the adverse party, the parlementaires and those accompanying them must not be taken prisoner or detained . . . and they must adopt appropriate measures for their return to take place in secure conditions. The presence of parlementaires and the beginning of negotiations is not in itself a sufficient reason to alter the course of operations.¹⁸³

188. Switzerland's Military Manual provides that "the parlementaire (negotiator) and his escort with the white flag shall not be attacked".¹⁸⁴

189. Switzerland's Basic Military Manual stipulates that the parlementaire "has the right to inviolability, as well as the persons accompanying him (interpreter, driver, pilot)".¹⁸⁵ It further states that "mistreating, insulting or retaining unlawfully an enemy parlementaire" is a war crime.¹⁸⁶

190. The UK Military Manual provides that "whilst performing their duties, and provided that their conduct is correct, [parlementaires] are entitled to complete inviolability".¹⁸⁷ It stresses that:

When a white flag is hoisted the other side need not necessarily cease fire.

...

Fire must not be directed intentionally on the person carrying the white flag or on persons near him. If, however, the persons near a flag of truce which is exhibited during an engagement are unintentionally killed or wounded, no breach of the law of war is committed. It is for the *parlementaire* to wait until there is a propitious moment, or to make a detour to avoid a dangerous zone.¹⁸⁸

The manual further states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions . . . the following are examples of punishable violations

¹⁷⁸ Russia, *Military Manual* (1990), § 5(d).

¹⁷⁹ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

¹⁸⁰ South Africa, *LOAC Manual* (1996), §§ 39(e) and 41.

¹⁸¹ Spain, *Field Regulations* (1882), § 902.

¹⁸² Spain, *Field Regulations* (1882), § 904.

¹⁸³ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1).

¹⁸⁴ Switzerland, *Military Manual* (1984), p. 18.

¹⁸⁵ Switzerland, *Basic Military Manual* (1987), Article 13.

¹⁸⁶ Switzerland, *Basic Military Manual* (1987), Article 200(2)(h).

¹⁸⁷ UK, *Military Manual* (1958), § 391, see also § 498 (protection of cartel ships).

¹⁸⁸ UK, *Military Manual* (1958), §§ 395 and 396.

of the laws of war, or war crimes: . . . firing on a flag of truce".¹⁸⁹ Furthermore, "the *parlementaire* should be permitted to retire and return with the same formalities and precautions as on his arrival".¹⁹⁰ The manual also states that:

The number of persons who may accompany the *parlementaire* to the enemy's line, unless special authorisation for additional ones is given, is limited to three; a trumpeter, bugler, or drummer, a flagbearer, and an interpreter. These are entitled to the same inviolability as the envoy himself.

...

In modern warfare the *parlementaire* will presumably be an officer in an armoured vehicle flying a white flag, accompanied by his driver, wireless and loudspeaker operator, and interpreter.¹⁹¹

191. The UK LOAC Manual states that:

The white flag, or flag of truce, indicates no more than an intention to enter into negotiations with the enemy . . . The party showing the white flag must stop firing and if so the other party must do likewise . . . The flag party may not be attacked and on completion of its mission must be allowed to return to its own lines. The [1907 HR] provide for the flag party to consist of the envoy, flag bearer, interpreter and trumpeter, bugler or drummer. In modern warfare the latter may be replaced by a radio operator and the flag party may well travel in a vehicle flying the white flag.¹⁹²

192. The US Field Manual states that:

[A *parlementaire*] has the right to inviolability, as well as the trumpeter, bugler or drummer, the flag-bearer and the interpreter who may accompany him.

...

Fire should not be intentionally directed on *parlementaires* or those accompanying them. If, however, the *parlementaires* or those near them present themselves during an engagement and are killed or wounded, it furnishes no ground for complaint. It is the duty of the *parlementaire* to select a propitious moment for displaying his flag, such as during the intervals of active operations, and to avoid the dangerous zones by making a detour.¹⁹³

The manual further states that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . firing on the flag of truce".¹⁹⁴

193. The US Air Force Pamphlet provides that "in addition to the grave breaches of the Geneva Conventions of 1949, the following acts are representative of situations involving individual criminal responsibility: . . . deliberate firing on . . . the flag of truce".¹⁹⁵

¹⁸⁹ UK, *Military Manual* (1958), § 626(d).

¹⁹⁰ UK, *Military Manual* (1958), § 411.

¹⁹¹ UK, *Military Manual* (1958), § 400, including footnote 2.

¹⁹² UK, *LOAC Manual* (1981), Section 4, p. 16, § 10.

¹⁹³ US, *Field Manual* (1956), §§ 460 and 461.

¹⁹⁴ US, *Field Manual* (1956), § 504(e). ¹⁹⁵ US, *Air Force Pamphlet* (1976), § 15-3c(3).

194. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . firing on the flag of truce".¹⁹⁶

195. The US Naval Handbook stipulates that "enemy forces displaying a white flag should be permitted an opportunity . . . to communicate a request for cease-fire or negotiation".¹⁹⁷ It adds that "the following acts are representative war crimes: . . . firing on flags of truce".¹⁹⁸

196. The YPA Military Manual of the SFRY (FRY) provides that "the party that receives a parlementaire does not need to cease fire in the direction of the parlementaire's arrival, but must not fire on the parlementaire and his escort".¹⁹⁹ It adds that "a parlementaire and the persons in his escort are entitled to total inviolability. During the execution of the duty of parlementaire, they cannot be kept as prisoners of war."²⁰⁰

National Legislation

197. Argentina's Code of Military Justice as amended punishes "anyone who offends a parlementaire in words or in deeds".²⁰¹

198. Argentina's Draft Code of Military Justice punishes any soldier who "infringes upon the inviolability of, or retains unlawfully, a parlementaire or any person who accompanies him".²⁰² The Draft Code only refers to parlementaires protected under the 1899 Hague Convention (II).²⁰³

199. Under the Criminal Code of the Federation of Bosnia and Herzegovina, whoever "insults, maltreats or detains the bearer of the flag of truce or his/her escort, or prevents them from returning, or in any other way violates their privilege of inviolability" commits a war crime.²⁰⁴ The Criminal Code of the Republika Srpska contains the same provision.²⁰⁵

200. Chile's Code of Military Justice punishes anyone "who, without any provocation, offends a parlementaire in words or in deeds".²⁰⁶

201. Under Croatia's Criminal Code, whoever "insults, maltreats or restrains an intermediary or his escort or prevents their return or in some other way infringes their inviolability" commits a war crime.²⁰⁷

¹⁹⁶ US, *Instructor's Guide* (1985), p. 13. ¹⁹⁷ US, *Naval Handbook* (1995), § 11.9.5.

¹⁹⁸ US, *Naval Handbook* (1995), § 6.2.5(11), see also § 8.2.3 (protection of cartel ships).

¹⁹⁹ SFRY (FRY), *YPA Military Manual* (1988), § 124.

²⁰⁰ SFRY (FRY), *YPA Military Manual* (1988), § 129.

²⁰¹ Argentina, *Code of Military Justice as amended* (1951), Article 746.

²⁰² Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(7) in the *Code of Military Justice as amended* (1951).

²⁰³ Argentina, *Draft Code of Military Justice* (1998), Article 288, introducing a new Article 872(5) in the *Code of Military Justice as amended* (1951).

²⁰⁴ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 161.

²⁰⁵ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 440.

²⁰⁶ Chile, *Code of Military Justice* (1925), Article 261(4).

²⁰⁷ Croatia, *Criminal Code* (1997), Article 164.

- 202.** The Code of Military Justice of the Dominican Republic punishes any soldier “who offends a parlementaire in words or in deeds”.²⁰⁸
- 203.** Ecuador’s National Civil Police Penal Code punishes any member of the National Civil Police “who attacks parlementaires or seriously offends parlementaires”.²⁰⁹
- 204.** El Salvador’s Code of Military Justice punishes any “soldier who, in time of war, . . . offends a parlementaire in words or in deeds”.²¹⁰
- 205.** Under Estonia’s Penal Code, “a person who kills, tortures or causes health damage to . . . a parlementaire or a person accompanying such person” commits a war crime.²¹¹
- 206.** Ethiopia’s Penal Code punishes “whosoever maltreats, threatens, insults or unjustifiably detains an enemy bearing a flag of truce, or an enemy negotiator, or any person accompanying him”.²¹²
- 207.** Under Hungary’s Criminal Code as amended, “the person who insults, illegally restrains the parlementaire of the enemy or his companion, or otherwise applies violence against him” is guilty, upon conviction, of a war crime.²¹³
- 208.** Italy’s Law of War Decree as amended provides that the person who “receives a parlementaire must suspend fire locally, during the communication, and give the parlementaire and all persons accompanying him the time necessary to return to their own lines”.²¹⁴ It further states that “the parlementaire, as well as the bugler or drummer, the flag bearer and the interpreter accompanying him, are inviolable for the whole time necessary to the accomplishment of their mission”.²¹⁵
- 209.** Under Mexico’s Penal Code as amended, “the violation of the immunity of a parlementaire or the immunity granted under a safe-conduct” is a punishable offence.²¹⁶
- 210.** Mexico’s Code of Military Justice as amended punishes “anyone who offends in words or in deeds the parlementaire of an enemy”.²¹⁷
- 211.** Nicaragua’s Military Penal Code punishes any soldier who “offends in words or in deeds or unlawfully retains a parlementaire, or the bugler, trumpeter, drummer, flag-bearer or interpreter accompanying him”.²¹⁸
- 212.** Peru’s Code of Military Justice provides that it is a punishable offence for a soldier “to offend a parlementaire in words or in deeds” in time of war.²¹⁹

²⁰⁸ Dominican Republic, *Code of Military Justice* (1953), Article 201(3).

²⁰⁹ Ecuador, *National Civil Police Penal Code* (1960), Article 117(7).

²¹⁰ El Salvador, *Code of Military Justice* (1934), Article 69(4).

²¹¹ Estonia, *Penal Code* (2001), § 102.

²¹² Ethiopia, *Penal Code* (1957), Article 295.

²¹³ Hungary, *Criminal Code as amended* (1978), Section 163(1).

²¹⁴ Italy, *Law of War Decree as amended* (1938), Article 69.

²¹⁵ Italy, *Law of War Decree as amended* (1938), Article 67.

²¹⁶ Mexico, *Penal Code as amended* (1931), Article 148(III).

²¹⁷ Mexico, *Code of Military Justice as amended* (1933), Article 214.

²¹⁸ Nicaragua, *Military Penal Code* (1996), Article 50(2).

²¹⁹ Peru, *Code of Military Justice* (1980), Article 95(7).

213. Under Slovenia's Penal Code, whoever "insults a parlementaire or his escort, maltreats or detains him, prevent his return or otherwise infringes upon his inviolability" commits a war crime.²²⁰

214. Spain's Royal Ordinance for the Armed Forces provides that it is prohibited to attack and retain parlementaires.²²¹

215. Spain's Military Criminal Code punishes any soldier who "offends in words or in deeds or unduly retains a parlementaire or the persons who accompany him".²²²

216. Spain's Penal Code punishes "anyone who, during an armed conflict, . . . infringes on the inviolability of, or retains unduly, a parlementaire or any person who accompanies him".²²³ The Penal Code only refers to parlementaires protected under the 1899 Hague Convention (II).²²⁴

217. Switzerland's Military Criminal Code as amended punishes "anyone who mistreats, insults or unduly detains a parlementaire or a person accompanying him" in time of armed conflict.²²⁵

218. Venezuela's Code of Military Justice as amended punishes "those who make an attempt on the lives of parlementaires or offend them".²²⁶

219. Venezuela's Revised Penal Code punishes any individual, whether a national or not, who, "during a war of Venezuela against another nation, violates . . . the principles observed by civilised peoples in time of war, such as respect for . . . the white flag [and] parlementaires".²²⁷

220. Under the Penal Code as amended of the SFRY (FRY), whoever "insults, harasses or detains a parlementaire or his escort or prevents their return, or who violates their immunity" commits a war crime.²²⁸

National Case-law

221. No practice was found.

Other National Practice

222. The Report on the Practice of China recalls the occasion during the Chinese civil war when the Chairman of the Chinese Communist Party met the leader of the Nationalist government in Chongqing (the Nationalist capital) to negotiate a truce and a settlement to the conflict. The negotiations were unsuccessful, but the Communist delegation's safety was guaranteed.²²⁹

²²⁰ Slovenia, *Penal Code* (1994), Article 381.

²²¹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 138.

²²² Spain, *Military Criminal Code* (1985), Article 75(2).

²²³ Spain, *Penal Code* (1995), Article 612(6). ²²⁴ Spain, *Penal Code* (1995), Article 608(5).

²²⁵ Switzerland, *Military Criminal Code as amended* (1927), Article 114.

²²⁶ Venezuela, *Code of Military Justice as amended* (1998), Article 474(13).

²²⁷ Venezuela, *Revised Penal Code* (2000), Article 156(1).

²²⁸ SFRY (FRY), *Penal Code as amended* (1976), Article 149.

²²⁹ Report on the Practice of China, 1997, Chapter 2.2.

223. According to the Report on the Practice of Colombia, it has been Colombia's usual practice to issue a presidential decree suspending orders for the capture of the persons designated as negotiators by armed opposition groups. For example, a decree was issued in May 1997 to suspend the orders of capture of the designated negotiators for the release of 60 soldiers captured by an armed opposition movement.²³⁰

224. According to the Report on the Practice of the Philippines, government forces are instructed to respect the white flag of truce at all times.²³¹

225. A training video produced by the UK Ministry of Defence emphasises that the white flag or flag of truce must be respected and must not be attacked.²³²

226. In 1951, in the 27th Report of the UN Command Operations in Korea to the UN Security Council, the US reported the following incidents:

On 9 August, General Nam Il, through his Liaison Officer, claimed that the United Nations Command had violated its guarantees by attacking a Communist vehicle plainly marked with white cloth and carrying a white flag. The sole guarantee ever given by United Nations Command Liaison Officer with regard to aircraft refraining from the attack of the Communists delegations' vehicles was contingent upon their being properly marked and upon prior notification being given of the time and route of their movement. The latter specification had not been complied with and United Nations aircraft did machine gun the truck. The United Nations Command cannot accept the risk of its forces entailed in refraining from attacks on any vehicles observed in rear of the battle zone except those reported by the Communist delegation as being in the service of the delegation. On 14 August, the Communists complained of a like incident. They have been informed again that the United Nations Command provides no immunity for vehicles unless the time and route of movement have been communicated to the United Nations Command.²³³

227. On the basis of the US position with regard to the incidents described in the 27th Report of the UN Command Operations in Korea to the UN Security Council in 1951, the Report on US Practice states that:

In principle, parlementaires advancing under a white flag should be respected, but in practice advance arrangements should be made to ensure respect for them. While within their own lines, they cannot rely solely on the white flag to protect them or their vehicles from air attack or other indirect fire.²³⁴

²³⁰ Report on the Practice of Colombia, 1998, Chapter 2.2, referring to Decree No. 1397, 26 May 1997.

²³¹ Report on the Practice of Philippines, 1997, Chapter 2.2.

²³² UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.2.

²³³ US, 27th Report of the UN Command Operations in Korea to the Security Council, covering the period 1–15 August 1951, annexed to Note dated 15 October 1951 to the UN Secretary-General, UN Doc. S/2377, 16 October 1951, reprinted in Marjorie M. Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, p. 398.

²³⁴ Report on US Practice, 1997, Chapter 2.2.

*III. Practice of International Organisations and Conferences**United Nations*

228. In 1991, the Special Rapporteur of the UN Commission on Human Rights for Afghanistan reported that members of an armed opposition group had placed mines on the path used by returning officials who, on their own initiative, had tried to act as intermediaries in negotiations for a cease-fire between governmental troops and opposition groups.²³⁵

Other International Organisations

229. No practice was found.

International Conferences

230. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

231. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

232. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "bearers of a white flag (flag of truce) or other persons specially ordered to enter in contact with the enemy shall be respected".²³⁶

VI. Other Practice

233. No practice was found.

C. Precautions while Receiving Parlementaires**General***I. Treaties and Other Instruments**Treaties*

234. Article 33 of the 1899 HR provides that the chief who receives a parlementaire "can take all steps necessary to prevent the parlementaire taking advantage of his mission to obtain information".

²³⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1991/31, 28 January 1991, § 67.

²³⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 540.

235. Article 33 of the 1907 HR provides that the commander who receives a *parlementaire* “may take all the necessary steps to prevent the *parlementaire* taking advantage of his mission to obtain information”.

Other Instruments

236. Article 44 of the 1874 Brussels Declaration provides that “it is lawful for [a commander] to take all the necessary steps to prevent the *parlementaire* taking advantage of his stay within the radius of the enemy’s position to the prejudice of the latter”.

237. Article 30 of the 1880 Oxford Manual provides that “the commander who receives a *parlementaire* has a right to take all the necessary steps to prevent the presence of the enemy within his lines from being prejudicial to him”.

238. Article 45 of the 1913 Oxford Manual of Naval War provides that the commanding officer to whom a cartel ship is sent “can take all measures necessary to prevent the cartel ship from profiting by its mission to obtain information”.

II. National Practice

Military Manuals

239. Argentina’s Law of War Manual provides that a commander “may adopt all necessary measures to prevent the *parlementaire* from taking advantage of his mission to collect information”.²³⁷

240. Belgium’s Field Regulations states that “all precautions must be taken to avoid *parlementaires* obtaining information”.²³⁸

241. Belgium’s Law of War Manual provides that the commander may “take measures (e.g. blindfolding) to prevent the *parlementaire* from taking advantage of his mission to collect information”.²³⁹

242. Canada’s LOAC Manual notes that:

The belligerent to whom a *parlementaire* is proceeding may take all steps necessary to protect the safety of the belligerent’s position, and prevent the *parlementaire* from taking advantage of the visit to secure information. The adverse party may therefore prescribe the route to be taken by the *parlementaire*, employ blindfolds, limit the size of the party, or take similar action.²⁴⁰

243. Germany’s Military Manual provides that “it is permissible to take all necessary precautions (e.g. blindfolding) to prevent the *parlementaire* from taking advantage of his mission to obtain information”.²⁴¹

244. Italy’s IHL Manual provides that “the commander who receives [a *parlementaire*] shall take all required precautions to prevent him from acquiring

²³⁷ Argentina, *Law of War Manual* (1969), § 6.002.

²³⁹ Belgium, *Law of War Manual* (1983), p. 41.

²⁴¹ Germany, *Military Manual* (1992), § 227.

²³⁸ Belgium, *Field Regulations* (1964), § 22.

²⁴⁰ Canada, *LOAC Manual* (1999), p. 14-1, § 7.

information of military character". Measures to prevent the presence of a parlementaire from being prejudicial can include blindfolding.²⁴²

245. New Zealand's Military Manual states that:

The belligerent to whom a *parlementaire* is proceeding may take all steps necessary to protect the safety of his position or unit and to prevent the *parlementaire* from taking advantage of his visit to secure information. The adverse Party may prescribe the route to be taken by the *parlementaire* or may bind his eyes, may limit the size of the party or take similar action.²⁴³

246. Nigeria's Manual on the Laws of War provides that "the force commander (of the other side) . . . may take security measures to prevent the parlementaire from abusing his privileges for spying".²⁴⁴

247. Spain's LOAC Manual states that "the commander to whom a parlementaire is sent . . . may take, in all cases, the measures necessary to prevent the parlementaire from taking advantage of his mission to obtain information".²⁴⁵

248. Switzerland's Basic Military Manual provides that "the commander to whom a parlementaire is sent . . . may take all measures necessary to prevent the parlementaire from taking advantage of his mission to obtain information".²⁴⁶

249. The UK Military Manual states that:

All measures necessary to prevent the *parlementaire* from taking advantage of his mission to obtain information are allowable. Care should be taken to prevent him and his attendants from communication with anyone except the persons nominated to receive him. If permission is given for the *parlementaire* to enter the position for the purpose of negotiation, or if the officer in command of the position or post, or any superior officer, thinks it desirable for any special reason to send him to the rear, he should be blindfolded, and taken to the destination by a circuitous route.²⁴⁷

250. The US Field Manual provides that "the commander to whom a parlementaire is sent . . . may take all the necessary steps to prevent the parlementaire taking advantage of his mission to obtain information".²⁴⁸

251. The YPA Military Manual of the SFRY (FRY) provides that:

A party that receives a parlementaire must define the time and the place where he will be received. Those conditions must not be humiliating for the parlementaire

...

When the parlementaire is received, he is escorted to the commander in charge of receiving him. On this occasion, all measures should be taken so that the parlementaire does not make any contact with an unauthorised person or sees or finds out

²⁴² Italy, *IHL Manual* (1991), Vol. I, § 57.

²⁴³ New Zealand, *Military Manual* (1992), § 406(5).

²⁴⁴ Nigeria, *Manual on the Laws of War* (undated), § 24.

²⁴⁵ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1).

²⁴⁶ Switzerland, *Basic Military Manual* (1987), Article 14.

²⁴⁷ UK, *Military Manual* (1958), § 410. ²⁴⁸ US, *Field Manual* (1956), § 463.

things that are military secrets . . . If military interest requires so, the parlementaire may be blindfolded while escorted.²⁴⁹

National Legislation

252. Italy's Law of War Decree as amended states that "the commander who receives the parlementaire shall take all necessary measures to prevent him from acquiring information of military character".²⁵⁰

National Case-law

253. No practice was found.

Other National Practice

254. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

255. No practice was found.

Other International Organisations

256. No practice was found.

International Conferences

257. The Report of the Second Commission of the 1899 Hague Peace Conference stated that Article 33 of the 1899 HR "deals with the right that every belligerent has . . . to take measures necessary in order to prevent [a parlementaire] from profiting by his mission to get information . . . All these rules conform to the necessities and customs of war."²⁵¹

IV. Practice of International Judicial and Quasi-judicial Bodies

258. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

259. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that a commander "may impose safety measures (e.g. blindfolding)" with regard to a parlementaire.²⁵²

²⁴⁹ SFRY (FRY), *YPA Military Manual* (1988), §§ 127 and 128.

²⁵⁰ Italy, *Law of War Decree as amended* (1938), Article 71.

²⁵¹ James B. Scott (ed.), *The Reports of the Hague Conferences of 1899 and 1907*, Clarendon Press, Oxford, 1917, p. 147.

²⁵² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 540.

VI. *Other Practice*

260. No practice was found.

Detention of parlementaires

I. Treaties and Other Instruments

Treaties

261. Article 33 of the 1899 HR provides that “in case of abuse [a chief to whom a parlementaire is sent] has the right to detain the parlementaire temporarily”.

262. Article 33 of the 1907 HR provides that, “in case of abuse [a commander to whom a parlementaire is sent] has the right to detain the parlementaire temporarily”.

Other Instruments

263. Article 44 of the 1874 Brussels Declaration states that “if the parlementaire has rendered himself guilty of . . . an abuse of confidence [taking advantage of his stay within the radius of the enemy’s position to the prejudice of the latter], [the commander] has the right to detain him temporarily”.

264. Article 31 of the 1880 Oxford Manual provides that “if a parlementaire abuses the trust reposed in him he may be temporarily detained”.

265. Article 45 of the 1913 Oxford Manual of Naval War provides that “in case it abuses its privileges, [the commanding officer to whom a cartel ship is sent] has the right to hold the cartel ship temporarily”.

II. National Practice

Military Manuals

266. Argentina’s Law of War Manual states that “in case of abuse [of his position] by the parlementaire, he may be temporarily detained”.²⁵³

267. Belgium’s Field Regulations provides that a parlementaire can be detained temporarily if he/she has collected information.²⁵⁴

268. Belgium’s Law of War Manual states that “the commander who receives a parlementaire . . . may retain him temporarily, if the parlementaire takes unfair advantage of his mission”.²⁵⁵

269. Canada’s LOAC Manual provides that:

If the parlementaire remains within enemy lines after being ordered to withdraw, he loses his inviolability and may be made a PW. Detention may occur if the parlementaire has abused the position of parlementaire, for example, by collecting

²⁵³ Argentina, *Law of War Manual* (1969), § 6.002.

²⁵⁴ Belgium, *Field Regulations* (1964), § 22.

²⁵⁵ Belgium, *Law of War Manual* (1983), p. 41.

information covertly. It is not an abuse of the position for the *parlementaire*, however, to report on observations made.²⁵⁶

270. Germany's Military Manual states that:

A *parlementaire* may be temporarily detained if he has accidentally acquired information the disclosure of which to the adversary would jeopardize the success of a current or impending operation of the friendly armed forces. In this case, the *parlementaire* may be detained until the operation has been completed.²⁵⁷

271. Italy's IHL Manual provides that, if information of a military character has unintentionally come to the knowledge of a *parlementaire*, he/she can be detained for the time the disclosure of information would be dangerous. Moreover, "the same measure applies to a *parlementaire* who, during his mission, has intentionally collected information".²⁵⁸ The manual also stresses that if *parlementaires* present themselves without an authorisation in writing, the military authority can retain them by adopting the necessary security measures and request instructions to commanding superiors. These superiors have the possibility of retaining accredited *parlementaires* if they have other "equivalent" elements on which to rely.²⁵⁹

272. New Zealand's Military Manual states that:

If the *parlementaire* stays within enemy lines after being ordered to withdraw he loses his inviolability and may be made a prisoner of war. He may similarly be detained and tried if there is *prima facie* evidence that he has abused his position as a *parlementaire*, for example by collecting information surreptitiously. It is not an abuse of his position for the *parlementaire* to report back anything he may have observed.²⁶⁰

273. Nigeria's Manual on the Laws of War states that the "*parlementaire* can be arrested if he abuses his privileges or succeeds unintentionally in gathering information that may be of benefit to the enemy".²⁶¹

274. Spain's LOAC Manual provides that a commander may temporarily detain a *parlementaire* if he/she abuses his/her condition.²⁶²

275. Switzerland's Basic Military Manual provides that "the commander to whom a *parlementaire* is sent . . . has the right, in case of abuse, to retain him temporarily".²⁶³

276. The UK Military Manual states that:

A commander has the right to detain a *parlementaire* temporarily if the latter abuses his position. In addition, a commander has, by a customary rule of international

²⁵⁶ Canada, *LOAC Manual* (1999), p. 14-1, § 9.

²⁵⁷ Germany, *Military Manual* (1992), § 228.

²⁵⁸ Italy, *IHL Manual* (1991), Vol. I, § 58.

²⁵⁹ Italy, *IHL Manual* (1991), Vol. I, § 52.

²⁶⁰ New Zealand, *Military Manual* (1992), § 406(7).

²⁶¹ Nigeria, *Manual on the Laws of War* (undated), § 24.

²⁶² Spain, *LOAC Manual* (1996), Vol. I, 2.6.c.(1).

²⁶³ Switzerland, *Basic Military Manual* (1987), Article 14, see also Article 15, commentary.

law, the right to retain a *parlementaire* so long as circumstances require, if the latter has seen anything, knowledge of which might have adverse consequences for the receiving forces, or if his departure would coincide with movements of troops whose destination or employment he might guess.²⁶⁴

277. The US Field Manual states that:

In case of abuse, [the commander to whom a parlementaire is sent] has the right to detain the parlementaire temporarily.

...

In addition to the right of detention for abuse of his position, a parlementaire may be detained in case he has seen anything or obtained knowledge which may be detrimental to the enemy, or if his departure would reveal information on the movement of troops. He should be detained only so long as circumstances imperatively demand, and information should be sent at once to his commander as to such detention, as well as of any other action taken against him or against his party.²⁶⁵

278. The YPA Military Manual of the SFRY (FRY) provides that:

A parlementaire or the persons escorting him can be temporarily detained if they have seen, without abusing the mission of parlementaire, something or collected information that could cause damage to the party receiving the parlementaire or if they could discover the movement of troops during return.

The parlementaire and his escort will be detained only as long as that information could cause damage to the side that received them.²⁶⁶

National Legislation

279. Italy's Law of War Decree as amended states that a parlementaire may be temporarily detained if military information has unintentionally come to his/her knowledge.²⁶⁷

National Case-law

280. No practice was found.

Other National Practice

281. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

282. No practice was found.

²⁶⁴ UK, *Military Manual* (1958), § 412. ²⁶⁵ US, *Field Manual* (1956), §§ 463 and 465.

²⁶⁶ SFRY (FRY), *YPA Military Manual* (1988), § 132.

²⁶⁷ Italy, *Law of War Decree as amended* (1938), Article 72.

Other International Organisations

283. No practice was found.

International Conferences

284. The Report of the Second Commission of the 1899 Hague Peace Conference stated that Article 33 of the 1899 HR “deals with the right that every belligerent has . . . to detain [a parlementaire] in case of abuse. All these rules conform to the necessities and customs of war.”²⁶⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

285. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

286. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that a commander “may retain . . . [the bearer of a white flag or similar persons] temporarily”.²⁶⁹

VI. Other Practice

287. No practice was found.

D. Loss of Inviolability of Parlementaires

I. Treaties and Other Instruments

Treaties

288. Article 34 of the 1899 HR provides that “the parlementaire loses his rights of inviolability if it is proved beyond doubt that he has taken advantage of his privileged position to provoke or commit an act of treason”.

289. Article 34 of the 1907 HR provides that “the parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason”.

Other Instruments

290. Article 45 of the 1874 Brussels Declaration states that “the parlementaire loses his rights of inviolability if it is proved in a clear and incontestable manner

²⁶⁸ James B. Scott (ed.), *The Reports of the Hague Conferences of 1899 and 1907*, Clarendon Press, Oxford, 1917, p. 147.

²⁶⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 540.

that he has taken advantage of his privileged position to provoke or commit an act of treason".

291. Article 31 of the 1880 Oxford Manual states that "if it be proved that [a parlementaire] has taken advantage of his privileged position to abet a treasonable act, he forfeits his right to inviolability".

292. Article 45 of the 1913 Oxford Manual of Naval War provides that "a cartel ship loses its rights of inviolability if it is proved, positively and unexceptionably, that the commander has profited by the privileged position of his vessel to provoke or to commit a treacherous act".

293. Article 65 of the 1913 Oxford Manual of Naval War deals with parlementaires and states that the personnel of a cartel ship loses its rights of inviolability "if it is proved in a clear and incontestable manner that it has taken advantage of its privileged position to provoke or commit an act of treason".

II. National Practice

Military Manuals

294. Argentina's Law of War Manual provides that "the parlementaire loses his right to inviolability if there is concrete and decisive evidence that he has taken advantage of his privileged situation to commit or provoke an act of treason".²⁷⁰

295. Belgium's Teaching Manual for Officers states that "the search for information, the fact of provoking or committing an act of treason under the cover of [a parlementaire's] mission induces the loss of his rights".²⁷¹

296. Canada's LOAC Manual states that a "parlementaire and those who are in his or her party are entitled to complete inviolability, so long as they do nothing to abuse this protection, or to take advantage of their protected position [for example, by collecting information covertly]".²⁷²

297. Germany's Military Manual provides that:

The parlementaire loses his right of inviolability if it is proved in an incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason . . . Such a case of misuse, which implies the right to detain the parlementaire . . . exists if the latter has committed acts contrary to international law and to the detriment of the adversary during his mission. This includes particularly the following activities:

- gathering intelligence beyond the observations he inevitably makes when accomplishing his mission;
- acts of sabotage;
- inducing soldiers of the adverse party to collaborate in collecting intelligence;
- instigating soldiers of the adverse party to refuse to do their duty;

²⁷⁰ Argentina, *Law of War Manual* (1969), § 6.003.

²⁷¹ Belgium, *Teaching Manual for Officers* (1994), Part I, Title II, p. 25.

²⁷² Canada, *LOAC Manual* (1999), p. 14-1, § 5.

- encouraging soldiers of the adverse party to desert; and
- organizing espionage in the territory of the adverse party.²⁷³

298. Italy's IHL Manual provides that the *parlementaire* who continues to advance, or does not withdraw after having been ordered to do so, loses the status of inviolability after sufficient time to withdraw has been given.²⁷⁴

The manual further states that if "the *parlementaire* takes advantage of his privileged position to accomplish or attempt to accomplish acts of treason, he loses the right to inviolability and can be punished according to wartime penal law".²⁷⁵

299. New Zealand's Military Manual states that:

The *parlementaire* and those with him are entitled to complete inviolability, so long as they do nothing to abuse this protection or to take advantage of their protected position . . .

When ordered to withdraw, the *parlementaire* must be given a reasonable time in which to do so. If he fails to withdraw, he loses his inviolability and may be fired upon.²⁷⁶

300. According to Spain's Field Regulations, *parlementaires* lose their inviolability and may be subject to severe punishment if they are "caught while collecting information or notes; violating in any manner the laws and customs of war . . . instigating prisoners to revolt; or inducing in any manner the populations to rise against the occupation army".²⁷⁷

301. Spain's LOAC Manual states that:

The *parlementaire* loses his inviolability if it is proved in an incontestable manner that he has taken advantage of his privileged situation to provoke or commit acts of treason, such as:

- Acts of sabotage.
- Inducing enemy soldiers to collect intelligence.
- Instigating enemy soldiers to refuse to do their duty.
- Encouraging soldiers to desert.
- Influencing negatively their morale.
- Organising espionage in enemy territory.²⁷⁸

302. Switzerland's Basic Military Manual states that "the *parlementaire* loses his right to inviolability if it is proven in a positive and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treason".²⁷⁹

303. The UK Military Manual provides that, "if signalled or ordered to retire, [a *parlementaire*] must do so at once. If he does not do so within reasonable

²⁷³ Germany, *Military Manual* (1992), § 229.

²⁷⁴ Italy, *IHL Manual* (1991), Vol. I, § 54.

²⁷⁵ Italy, *IHL Manual* (1991), Vol. I, § 58.

²⁷⁶ New Zealand, *Military Manual* (1992), § 406(3) and (7).

²⁷⁷ Spain, *Field Regulations* (1882), § 902.

²⁷⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.6.c.(1).

²⁷⁹ Switzerland, *Basic Military Manual* (1987), Article 15.

time he loses his inviolability."²⁸⁰ The manual further states that "a *parlementaire* loses his right of inviolability if it is proved beyond any doubt that he has taken advantage of his privileged position to provoke or commit an act of treachery".²⁸¹

304. The US Field Manual states that "the *parlementaire* loses his right of inviolability if it is proved in a clear and incontestable manner that he has taken advantage of his privileged position to provoke or commit an act of treachery".²⁸²

305. The YPA Military Manual of the SFRY (FRY) provides that:

A *parlementaire* or the persons in his escort can be court-martialled if they do not respect the conditions determined by the commander who receives the *parlementaire* and that the *parlementaire* or the commander who sends him had accepted, if it is clear and incontestable that they used their privileged position to collect information of military nature, or if the other side sends them for perfidious purposes, with intent of its troops to do military actions under the protection of the white flag, and they know of that intent.²⁸³

National Legislation

306. Ecuador's National Civil Police Penal Code provides that "parlementaires shall lose their character [of inviolability] if they abuse their condition to commit acts in favour of the armed forces of the enemy nation".²⁸⁴

307. Italy's Law of War Decree as amended states that a *parlementaire* who continues to advance, or does not withdraw after having been ordered to do so, loses the status of inviolability after sufficient time to withdraw has been given.²⁸⁵ The Decree also states that a *parlementaire* who "takes advantage of his privileged position to commit acts of treason loses his right to inviolability".²⁸⁶

308. The commentary on the Penal Code as amended of the SFRY (FRY) provides that "if [a *parlementaire*] abuses [his] duty (in order to perform espionage, to try to film positions or to establish contact with other persons in order to recruit them, etc.), he is no longer entitled to immunity".²⁸⁷

National Case-law

309. No practice was found.

²⁸⁰ UK, *Military Manual* (1958), § 405.

²⁸¹ UK, *Military Manual* (1958), § 413.

²⁸² US, *Field Manual* (1956), § 466.

²⁸³ SFRY (FRY), *YPA Military Manual* (1988), § 131.

²⁸⁴ Ecuador, *National Civil Police Penal Code* (1960), Article 117(7).

²⁸⁵ Italy, *Law of War Decree as amended* (1938), Article 70.

²⁸⁶ Italy, *Law of War Decree as amended* (1938), Article 72.

²⁸⁷ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 149.

Other National Practice

310. No practice was found.

III. Practice of International Organisations and Conferences

311. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

312. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

313. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that bearers of a white flag “may not take advantage of their mission for intelligence purpose[s]”.²⁸⁸

VI. Other Practice

314. No practice was found.

²⁸⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 540.

PART IV

USE OF WEAPONS

GENERAL PRINCIPLES ON THE USE OF WEAPONS

- A. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering (practice relating to Rule 70) §§ 1–261
- B. Weapons That Are by Nature Indiscriminate (practice relating to Rule 71) §§ 262–404
- C. Use of Prohibited Weapons §§ 405–461

A. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering

I. Treaties and Other Instruments

Treaties

1. The 1868 St. Petersburg Declaration provides that:

Considering:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity;

...

The Contracting or Acceding Parties reserve to themselves to come hereafter to an understanding whenever a precise proposition shall be drawn up in view of future improvements which science may effect in the armament of troops, in order to maintain the principles which they have established, and to conciliate the necessities of war with the laws of humanity.

2. The 1899 Hague Declaration concerning Asphyxiating Gases specifies that the contracting States are “inspired by the sentiments which found expression in the [1868] Declaration of St. Petersburg”.

3. The 1899 Hague Declaration concerning Expanding Bullets specifies that the contracting States are “inspired by the sentiments which found expression in the [1868] Declaration of St. Petersburg”.

4. Article 23(e) of the 1899 HR provides that it is “especially prohibited . . . to employ arms, projectiles, or material of a nature to cause superfluous injury”.

5. Article 23(e) of the 1907 HR provides that “it is especially forbidden . . . to employ arms, projectiles, or material calculated to cause unnecessary suffering”.

6. Article 35(2) AP I provides that “it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”. Article 35 AP I was adopted by consensus.¹

7. Article 20(2) of draft AP II submitted by the ICRC to the CDDH provided that “it is forbidden to employ weapons, projectiles, and material and methods of combat of a nature to cause superfluous injury or unnecessary suffering”.² This proposal was adopted by consensus in Committee III of the CDDH.³ Eventually, however, it was deleted in the plenary, after having been rejected by 25 votes in favour, 19 against and 33 abstentions.⁴

8. The preamble to the 1980 CCW provides that the States parties have based themselves “on the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.

9. Upon ratification of the 1980 CCW, France stated that:

With reference to the scope of application defined in article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, . . . it will apply the provisions of the Convention and its three Protocols to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949.⁵

10. Upon accession to the 1980 CCW, Israel stated that:

With reference to the scope of application defined in article 1 of the Convention, the Government of the State of Israel will apply the provisions of the Convention and those annexed Protocols to which Israel has agreed to become bound to all armed conflicts involving regular forces of States referred to in article 2 common to the Geneva Conventions of 12 August 1949, as well as to all armed conflicts referred to in article 3 common to the Geneva Conventions of 12 August 1949.⁶

11. Upon signature of the 1980 CCW, Romania affirmed “once again its decision to act, together with other States, to ensure the prohibition or restriction of all conventional weapons which are excessively injurious”.⁷

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 101.

² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 39.

³ CDDH, *Official Records*, Vol. XV, CDDH/III/SR.49, 4 June 1976, p. 107, § 2.

⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 114.

⁵ France, Reservations made upon ratification of the CCW, 4 March 1988.

⁶ Israel, Declarations and understandings made upon accession to the CCW, 22 March 1995, § (a).

⁷ Romania, Declaration made upon signature of the CCW, 8 April 1982, § 5.

12. Upon ratification of the 1980 CCW, the US declared that:

With reference to the scope of application defined in article 1 of the Convention, . . . the United States will apply the provisions of the Convention, Protocol I, and Protocol II to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949.⁸

13. Article 6(2) of the 1980 Protocol II to the CCW provides that “it is prohibited in all circumstances to use any booby-trap which is designed to cause superfluous injury or unnecessary suffering”.

14. Upon acceptance of the 1995 Protocol IV to the CCW, Sweden declared that:

Sweden has since long strived for explicit prohibition of the use of blinding laser which would risk causing permanent blindness to soldiers. Such an effect, in Sweden’s view is contrary to the principle of international law prohibiting means and methods of warfare which cause unnecessary suffering.⁹

15. Article 3(3) of the 1996 Amended Protocol II to the CCW provides that “it is prohibited in all circumstances to use any mine, booby-trap or other device which is designed or of a nature to cause superfluous injury or unnecessary suffering”.

16. According to the preamble to the 1997 Ottawa Convention, States parties based their agreement on various principles of IHL, including “the principle that prohibits the employment in armed conflicts of weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.

17. Pursuant to Article 8(2)(b)(xx) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts:

employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering . . . provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute.

18. Upon signature of the 1998 ICC Statute, Egypt stated that it understood Article 8 of the Statute as follows:

The provisions of the Statute with regard to the war crimes referred to in article 8 in general and article 8, paragraph 2(b) in particular shall apply irrespective of the means by which they were perpetrated or the type of weapon used, including nuclear weapons, which . . . cause unnecessary damage, in contravention of international humanitarian law.¹⁰

19. In 2001, States parties decided to amend Article 1 of the 1980 CCW governing its scope as follows:

⁸ US, Declaration made upon ratification of the CCW, 24 March 1995.

⁹ Sweden, Declaration made upon acceptance of Protocol IV to the CCW, 15 January 1997.

¹⁰ Egypt, Declarations made upon signature of the 1998 ICC Statute, 26 December 2000, § 4(a).

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions [international armed conflicts].
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949 [non-international armed conflicts]. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

Other Instruments

20. Article 16 of the 1863 Lieber Code states that “military necessity does not admit of cruelty – that is, the infliction of suffering for the sake of suffering”.

21. Article 16(2) of the 1913 Oxford Manual of Naval War provides that “it is forbidden . . . to employ arms, projectiles, or materials calculated to cause unnecessary suffering”.

22. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “use of . . . inhuman appliances”.

23. Paragraph 2 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

24. Paragraph 11(c) of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that “rules and regulations on the use of firearms by law enforcement officials should include guidelines that . . . prohibit the use of those firearms and ammunition that cause unwarranted injury or present an unwarranted risk”.

25. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 35(2) AP I and the 1980 Protocol II to the CCW.

26. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities

be conducted in accordance with Article 35(2) AP I and the 1980 Protocol II to the CCW.

27. Article 3 of the 1993 ICTY Statute provides that:

The International Tribunal shall have the power to prosecute persons violating the laws or customs of war. Such violations shall include, but not be limited to:

- (a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering.

28. Paragraph 42(a) of the 1994 San Remo Manual states that “it is forbidden to employ methods or means of warfare which are of a nature to cause superfluous injury or unnecessary suffering”.

29. Pursuant to Article 20(e)(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “employment of . . . weapons calculated to cause unnecessary suffering” is a war crime.

30. Section 6.4 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force is prohibited from using weapons or methods of combat of a nature to cause unnecessary suffering”.

31. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xx), “employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering” constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

32. Argentina’s Law of War Manual (1969) states that “the use of weapons, projectiles or material which can cause unnecessary suffering” is especially prohibited. It adds that “the projectiles and weapons covered by this prohibition shall be determined solely by the common practice of States to refrain from using certain means of warfare in recognition that they cause such suffering”.¹¹

33. Argentina’s Law of War Manual (1989) provides that “the use of weapons, projectiles, materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering is prohibited”.¹²

34. Australia’s Commanders’ Guide states that “some weapons and weapons systems are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law, are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering.”¹³ It adds that “both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population

¹¹ Argentina, *Law of War Manual* (1969), § 1.008(1).

¹² Argentina, *Law of War Manual* (1989), § 1.04(2).

¹³ Australia, *Commanders’ Guide* (1994), § 304.

in an indiscriminate fashion".¹⁴ Likewise, munitions which produce fragments undetectable by X-ray machines and hollow point weapons are prohibited based upon the principle of unnecessary suffering.¹⁵ The Guide also provides that "it is prohibited to employ weapons, projectiles, materiel and methods of warfare of a nature to cause superfluous injury or unnecessary suffering... Use of the following types of weapons is prohibited: a. weapons calculated to cause unnecessary suffering."¹⁶ With respect to weapons which are deemed as legal, the Guide states that "all legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used... in such a way as to cause unnecessary suffering."¹⁷

35. Australia's Defence Force Manual provides that:

The principle of unnecessary suffering forbids the use of means and methods of warfare which are calculated to cause suffering which is excessive in the circumstances. It has also been expressed as the infliction of suffering, injury or destruction not actually necessary for the accomplishment of legitimate military objectives.¹⁸

The manual adds that:

Weapons, projectiles, materials and means of warfare which cause unnecessary suffering are not permissible, that is, when the practical effect is to cause injury or suffering which is out of proportion to the military effectiveness of the weapon, projectile, material or means. Limitations on the use of weapons fall into two broad categories, namely:

- a. prohibited weapons, and
- b. the illegal use of lawful weapons.

...

Weapon use will be unlawful under LOAC when it breaches the principle of proportionality by causing unnecessary injury or suffering.¹⁹

The manual further states that "some weapons and weapons systems are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering."²⁰ In this respect, the manual prohibits the use of "weapons calculated or modified to cause unnecessary suffering".²¹ Likewise, "both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion".²² With

¹⁴ Australia, *Commanders' Guide* (1994), § 306.

¹⁵ Australia, *Commanders' Guide* (1994), §§ 308 and 309.

¹⁶ Australia, *Commanders' Guide* (1994), §§ 930 and 932(a).

¹⁷ Australia, *Commanders' Guide* (1994), § 311.

¹⁸ Australia, *Defence Force Manual* (1994), § 207.

¹⁹ Australia, *Defence Force Manual* (1994), §§ 401 and 402.

²⁰ Australia, *Defence Force Manual* (1994), § 404.

²¹ Australia, *Defence Force Manual* (1994), § 405.

²² Australia, *Defence Force Manual* (1994), § 414.

respect to weapons which are deemed as legal, the manual states that "all legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used . . . in such a way as to cause unnecessary injury or suffering."²³ With respect to booby-traps, the manual states that "those that are used must not be designed to cause unnecessary injury or suffering".²⁴

36. Belgium's Law of War Manual provides that the use of weapons or means and methods of warfare which render death inevitable or cause unnecessary suffering is illegal.²⁵

37. Belgium's Teaching Manual for Officers defines the concept of unnecessary suffering as "suffering . . . that needlessly adds to that already inflicted on the enemy to render him *hors de combat*". It provides that "it is prohibited to use weapons for the purpose of causing superfluous injury rather than for their military effectiveness".²⁶

38. Belgium's Teaching Manual for Soldiers states that "combatants must refrain from causing superfluous injury or unnecessary suffering to persons and unnecessary damage to property".²⁷

39. Benin's Military Manual states that "it is prohibited to resort to weapons or methods of warfare of a nature to cause unnecessary losses or superfluous injury".²⁸

40. Bosnia and Herzegovina's Military Instructions states that "it is prohibited to use weapons which cause excessive suffering".²⁹

41. Burkina Faso's Disciplinary Regulations states that, under the laws and customs of war, it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".³⁰

42. Cameroon's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".³¹

43. Cameroon's Instructors' Manual provides that "it is prohibited to employ weapons of a nature to cause . . . superfluous injury".³²

44. Canada's LOAC Manual states that "weapons, projectiles, materials and means of warfare that cause superfluous injury or unnecessary suffering are prohibited".³³ It adds that "weapons, projectiles, material or means of warfare

²³ Australia, *Defence Force Manual* (1994), § 415.

²⁴ Australia, *Defence Force Manual* (1994), § 428, see also § 431 (air warfare).

²⁵ Belgium, *Law of War Manual* (1983), p. 37.

²⁶ Belgium, *Teaching Manual for Officers* (1994), p. 36, § 17(1).

²⁷ Belgium, *Teaching Manual for Soldiers* (undated), p. 11.

²⁸ Benin, *Military Manual* (1995), Fascicule II, p. 5.

²⁹ Bosnia and Herzegovina, *Military Instructions* (1992), Item 11, § 1.

³⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

³¹ Cameroon, *Disciplinary Regulations* (1975), Article 32.

³² Cameroon, *Instructors' Manual* (1992), p. 95, § I.

³³ Canada, *LOAC Manual* (1999), p. 5-1, § 2, see also p. 5-2, § 10.

must not cause injury or suffering which is out of proportion to its military effectiveness".³⁴ As regards lawful weapons, it states that "legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used . . . in such a way as to cause superfluous injury or unnecessary suffering."³⁵ The manual further provides that "employing arms or other weapons that are calculated to cause unnecessary suffering" constitutes a war crime.³⁶

45. Canada's Code of Conduct instructs CF personnel: "Do not alter your weapons or ammunition to increase suffering."³⁷ It goes on to say that:

The use of weapons or ammunition that cause unnecessary suffering is unlawful . . .

...

When force is used, suffering is likely to result. However, the infliction of unnecessary suffering is prohibited. "Unnecessary suffering" refers to infliction of injuries or suffering beyond what is required to achieve the military aim.

...

Remember that even lawful weapons cannot be used in a manner that causes unnecessary suffering.³⁸

46. Colombia's Circular on Fundamental Rules of IHL provides that "using weapons or methods of warfare which can cause superfluous injury or unnecessary suffering is prohibited".³⁹

47. Colombia's Basic Military Manual states that employing weapons which "cause unnecessary and indiscriminate, extensive, lasting and serious damage to people" is prohibited.⁴⁰

48. Congo's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".⁴¹

49. Croatia's LOAC Compendium considers as a prohibited method of warfare the "use of means and methods of combat resulting in unnecessary suffering".⁴²

50. Croatia's Commanders' Manual states that "weapons causing unnecessary suffering may not be used".⁴³

51. The Military Manual of the Dominican Republic instructs troops: "Remember that any method of warfare which causes unnecessary injury or suffering is prohibited." It adds that "the law of war does not allow you to alter your weapons in order to cause unnecessary injury or suffering to the enemy".⁴⁴

³⁴ Canada, *LOAC Manual* (1999), p. 5-1, § 3.

³⁵ Canada, *LOAC Manual* (1999), p. 5-3, § 32.

³⁶ Canada, *LOAC Manual* (1999), p. 16-3, § 20(e).

³⁷ Canada, *Code of Conduct* (2001), Rule 3.

³⁸ Canada, *Code of Conduct* (2001), Rule 3, §§ 1, 5 and 6.

³⁹ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 6.

⁴⁰ Colombia, *Basic Military Manual* (1995), pp. 49-50.

⁴¹ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁴² Croatia, *LOAC Compendium* (1991), p. 40. ⁴³ Croatia, *Commanders' Manual* (1992), § 45.

⁴⁴ Dominican Republic, *Military Manual* (1980), p. 5.

52. Ecuador's Naval Manual provides that:

It is a fundamental tenet of the law of armed conflict that the right of nations engaged in armed conflict to choose methods or means of warfare is not unlimited. This rule of law is expressed in the prohibition of the employment of weapons, material, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering.

...

Antipersonnel weapons are designed to kill or disable enemy combatants and are lawful notwithstanding the death, pain, and suffering they inflict. Weapons which cause superfluous injury or unnecessary suffering are, however, prohibited because the degree of pain, the severity of the injuries and the certainty of death they entail are clearly out of all proportion to the military advantage sought. Poisoned projectiles and dum-dum bullets belong in this category since the small military advantage that may be derived from their use guarantees death due to poisoning or to the expanding effect of soft-nosed or unjacketed lead bullets.

Similarly, using materials that are difficult to detect or undetectable by field X-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds.⁴⁵

53. France's Disciplinary Regulations as amended provides that it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".⁴⁶

54. France's LOAC Summary Note states that "it is prohibited to use... weapons... of a nature to cause unnecessary losses or excessive suffering".⁴⁷

55. France's LOAC Teaching Note states that, "owing to their inhumane nature or to their excessive traumatic effect", the use of poison, chemical weapons, biological and bacteriological weapons, dum-dum bullets or other projectiles with expanding heads, anti-personnel mines, weapons that injure by non-detectable fragments, blinding laser weapons, and torpedoes without self-destruction mechanisms "is totally prohibited by the law of armed conflicts".⁴⁸

56. France's LOAC Manual states that, "owing to their inhuman nature or to their excessive traumatic effect", the use of poison, chemical weapons, biological and bacteriological weapons, dum-dum bullets or other projectiles with expanding heads, anti-personnel mines, weapons that injure by non-detectable fragments, blinding laser weapons, and torpedoes without self-destruction mechanisms "is totally prohibited by the law of armed conflicts".⁴⁹

57. Germany's Soldiers' Manual provides that "it is prohibited to use means or methods of warfare which are intended or of a nature to cause superfluous injuries or unnecessary suffering (e.g. dum-dum bullets)".⁵⁰

⁴⁵ Ecuador, *Naval Manual* (1989), §§ 9.1 and 9.1.1.

⁴⁶ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁴⁷ France, *LOAC Summary Note* (1992), § 4. ⁴⁸ France, *LOAC Teaching Note* (2000), p. 6.

⁴⁹ France, *LOAC Manual* (2001), p. 54, see also p. 97.

⁵⁰ Germany, *Soldiers' Manual* (1991), p. 5.

58. Germany's Military Manual states that:

It is particularly prohibited to employ means or methods which are intended or of a nature:

- to cause superfluous injury or unnecessary suffering . . .

...

"Superfluous injury" or "unnecessary suffering" is caused by the use of means . . . of combat whose presumable harm would definitely be excessive in relation to the lawful military advantage intended.

...

In the 1868 St. Petersburg Declaration the use of explosive and incendiary projectiles under 400 grammes was prohibited, since these projectiles were deemed to cause disproportionately severe injuries to soldiers, which is not necessary for putting them out of action . . .

...

It is prohibited to use bullets which expand or flatten easily in the human body (e.g. dum-dum bullets) . . . This applies also to the use of shotguns, since shot causes similar suffering unjustified from the military point of view.⁵¹

59. Germany's IHL Manual states that "it is prohibited, in particular, to employ means or methods of warfare, which are intended to or of a nature to cause superfluous injury or unnecessary suffering".⁵² The manual further states that:

International humanitarian law prohibits the use of a number of means of warfare which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g.

- bullets which easily expand or flatten in the human body, so-called dum-dum bullets,
- weapons whose primary effect is to injure by fragments which in the human body escape detection by X-rays, e.g. plastic or glass ammunition,
- explosive traps, when used in the form of an apparently harmless portable object, e.g. disguised as children's toys,
- bacteriological means of warfare, e.g. substances which cause disease,
- chemical means of warfare, e.g. poisonous gases.⁵³

60. Hungary's Military Manual includes, as a "basic rule", the obligation to "avoid unnecessary suffering, excessive damage and the use of more force than required to overpower the enemy". It also considers as a prohibited method of warfare the "use of means and methods of combat resulting in unnecessary suffering".⁵⁴**61.** According to Indonesia's Air Force Manual, it is prohibited to employ weapons which cause unnecessary suffering.⁵⁵**62.** With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "Israel and the IDF accept and comply with the provisions

⁵¹ Germany, *Military Manual* (1992), §§ 401, 402 and 406–407, see also § 415.

⁵² Germany, *IHL Manual* (1996), § 302. ⁵³ Germany, *IHL Manual* (1996), § 305.

⁵⁴ Hungary, *Military Manual* (1992), pp. 59 and 64.

⁵⁵ Indonesia, *Air Force Manual* (1990), § 15(b)(5).

of customary international law in relation to the prohibitions and restrictions on the use of weapons" which cause superfluous and unnecessary suffering.⁵⁶

63. Israel's Manual on the Laws of War states that "since St. Petersburg, there have been several universally accepted rules regarding weapons: . . . Weapons causing needless suffering are prohibited."⁵⁷

64. Italy's IHL Manual provides that "the use of means and methods of warfare of a nature to cause . . . superfluous injuries and unnecessary suffering is prohibited".⁵⁸

65. Italy's LOAC Elementary Rules Manual states that "weapons causing unnecessary suffering may not be used".⁵⁹

66. Kenya's LOAC Manual provides that "it is prohibited to employ weapons, projectiles and methods and materials of warfare of a nature to cause superfluous injury".⁶⁰

67. South Korea's Operational Law Manual states that weapons which cause unnecessary suffering are prohibited.⁶¹

68. Madagascar's Military Manual states that "weapons causing unnecessary suffering shall not be used".⁶²

69. Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".⁶³

70. Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".⁶⁴

71. The Military Manual of the Netherlands states that parties to an armed conflict "may not use means (weapons, projectiles and substances) and methods which cause unnecessary suffering or superfluous injury". The manual gives dum-dum bullets, serrated-edged bayonets or weapons injuring by non-detectable fragments are examples of such means of warfare.⁶⁵

72. The Military Handbook of the Netherlands states that "means which cause unnecessary suffering with respect to the objective (elimination of the enemy) may not be used". It gives as examples of such means of warfare: "poison and poisoned weapons, dum-dum bullets, serrated-edged bayonets, weapons whose primary effect is to injure by fragments which cannot be detectable by X-ray, booby-traps attached to the Red Cross Emblem, wounded or dead person, [and] medical objects or toys".⁶⁶

⁵⁶ Report on the Practice of Israel, 1997, Chapter 3.1, referring to *Law of War Booklet* (1986), p. 11.

⁵⁷ Israel, *Manual on the Laws of War* (1998), p. 11. ⁵⁸ Italy, *IHL Manual* (1991), Vol. I, § 7.

⁵⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 45.

⁶⁰ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 2.

⁶¹ South Korea, *Operational Law Manual* (1996), p. 129.

⁶² Madagascar, *Military Manual* (1994), Fiche No. 6-O, § 13.

⁶³ Mali, *Army Regulations* (1979), Article 36.

⁶⁴ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁶⁵ Netherlands, *Military Manual* (1993), pp. IV-1 and IV-7.

⁶⁶ Netherlands, *Military Handbook* (1995), pp. 7-36 and 7-39.

73. New Zealand's Military Manual provides that:

It is prohibited to employ weapons, projectiles and material of a nature to cause superfluous injury or unnecessary suffering. A weapon causes unnecessary suffering when in practice it inevitably causes injury or suffering disproportionate to its military effectiveness. In determining the military effectiveness of a weapon one looks at the primary purpose for which it was designed.⁶⁷

The manual further states that:

Examples of such weapons include such weapons as lances with a barbed head, irregularly-shaped bullets, projectiles filled with broken glass, and the like. The scoring of the surface of bullets, the filing off of the end of their hard case, and the smearing on them of any substance likely to inflame a wound, are also prohibited. Generally speaking, weapons which are agreed to cause unnecessary suffering are home-made weapons or unofficial modifications of weapons issued through normal channels.⁶⁸

Lastly, the manual states that "employing arms or other weapons which are calculated to cause unnecessary suffering" constitutes a war crime.⁶⁹

74. Nigeria's Military Manual states that it is prohibited "to employ arms, projectiles or material aimed at causing unnecessary suffering".⁷⁰ It further states that:

The basic principles are that every commander has the right to choose the means and methods of the type of warfare to be executed, to avoid unnecessary suffering and damage to men and material... The principle of avoiding unnecessary suffering and damage prohibits all forms of violence that are not required for the over-powering of the enemy.⁷¹

75. Nigeria's Manual on the Laws of Wars states that "it is expressly forbidden to use arms, projectiles or materials calculated to cause unnecessary suffering".⁷²

76. Nigeria's Soldier's Code of Conduct provides that it is prohibited "to employ arms, projectiles or material aimed at causing unnecessary suffering".⁷³

77. Romania's Soldier's Manual states that "the rules of humanitarian law prohibit causing unnecessary losses and excessive suffering to the adversary".⁷⁴

78. Russia's Military Manual provides that:

Prohibited means of warfare are the various weapons of an indiscriminate character and/or those that cause unnecessary suffering:

⁶⁷ New Zealand, *Military Manual* (1992), § 509(2) (land warfare) and § 616(2) (air warfare), see also §§ 510(1)(a) and 707(2) (naval warfare).

⁶⁸ New Zealand, *Military Manual* (1992), § 510(1)(a), footnote 44, see also § 1704(2)(e), footnote 37.

⁶⁹ New Zealand, *Military Manual* (1992), § 1704(2)(e).

⁷⁰ Nigeria, *Military Manual* (1994), pp. 39–40, § 5(1)(iv).

⁷¹ Nigeria, *Military Manual* (1994), p. 42, § 11.

⁷² Nigeria, *Manual on the Laws of War* (undated), § 11.

⁷³ Nigeria, *Soldiers' Code of Conduct* (undated), § 12(e).

⁷⁴ Romania, *Soldier's Manual* (1991), p. 34.

- a) bullets that expand or flatten easily in the human body;
- b) projectiles used with the only purpose to spread asphyxiating or poisonous gases;
- c) projectiles weighing less than 400 grammes, which are either explosive or charged with fulminating or inflammable substances;
- d) poisons or poisoned weapons;
- e) asphyxiating, poisonous or other similar gases and bacteriological means;
- f) bacteriological (biological) and toxin weapons;
- g) environmental modification techniques having widespread, long-term or serious effects as means of destruction, damage or injury;
- h) all types of weapons of an indiscriminate character or that cause excessive injury or suffering.⁷⁵

79. Senegal's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to use any means [of warfare] that causes unnecessary suffering and damage".⁷⁶

80. South Africa's LOAC Manual states that:

A basic principle of the LOAC is the prevention of unnecessary suffering. The test in relation to a particular weapon is whether the suffering occasioned by its use is needless, superfluous, or grossly disproportionate to the advantage gained.

- i. Weapons which are calculated to cause unnecessary suffering are illegal per se. Such weapons include barbed spears, dum-dum bullets, weapons filled with glass and weapons that inflame wounds.
- ii. Legal weapons may not be used in a manner which cause unnecessary suffering.⁷⁷

81. Spain's LOAC Manual states that "the right to choose means and methods of warfare is limited by the principle according to which unnecessary suffering and superfluous injury shall be avoided".⁷⁸ It further states that "weapons causing unnecessary suffering may not be used".⁷⁹

82. Sweden's IHL Manual considers the "prohibition of methods or means of warfare which cause superfluous injury or unnecessary suffering", as contained in Article 35(2) API, as a customary rule of international law.⁸⁰ It further states that, according to the criteria given in the St. Petersburg Declaration and in the 1907 Hague Convention (IV),

Weapons shall be considered particularly inhuman if they:

- cause unnecessary suffering or superfluous damage, or
- have indiscriminate effects, meaning that the weapon effects strike military objectives and civilian persons without any distinction.

⁷⁵ Russia, *Military Manual* (1990), § 6.

⁷⁶ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

⁷⁷ South Africa, *LOAC Manual* (1996), § 34(f).

⁷⁸ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(3).

⁷⁹ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.e.(1).

⁸⁰ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

These criteria have been used in all arms limitation negotiations in recent years.⁸¹

83. Switzerland's Basic Military Manual states that belligerents "must not use weapons, projectiles, toxic gases or means of combat that cause unnecessary suffering".⁸²

84. Togo's Military Manual states that "it is prohibited to resort to weapons or methods of warfare of a nature to cause unnecessary losses or superfluous injury".⁸³

85. The UK Military Manual stresses that:

It is expressly forbidden to employ arms, projectiles or material calculated to cause unnecessary suffering. Under this heading may be included such weapons as lances with a barbed head, irregularly-shaped bullets, projectiles filled with broken glass, and the like. The scoring of the surface of bullets, the filing off of the end of their hard case, and the smearing on them of any substance likely to inflame a wound, are also prohibited.

...

The prohibition is not, however, intended to apply to the use of explosives contained in mines, aerial torpedoes and hand-grenades. The use of flame throwers and napalm bombs when directed against military targets is lawful. However, their use against personnel is contrary to the law of war in so far as it is calculated to cause unnecessary suffering.⁸⁴

86. The UK LOAC Manual states that "the following are prohibited in *international* armed conflict: . . . d. arms, projectiles or material intended to cause excessive injury or suffering".⁸⁵ (emphasis in original)

87. The US Field Manual states that:

It is especially forbidden to employ arms, projectiles, or material calculated to cause unnecessary suffering.

What weapons cause "unnecessary injury" can only be determined in light of the practice of States in refraining from the use of a given weapon because it is believed to have that effect . . . Usage, has, however, established the illegality of the use of lances with barbed heads, irregular-shaped bullets, and projectiles filled with glass, the use of any substance on bullets that would tend unnecessarily to inflame a wound inflicted by them, and the scoring of the surface or the filing off of the ends of the hard cases of bullets.⁸⁶

88. The US Air Force Pamphlet provides that:

It is forbidden to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. This rule is a matter of customary international law . . .

The rule prohibiting the use of weapons causing unnecessary suffering or superfluous injury is firmly established in international law . . . This prohibition against

⁸¹ Sweden, *IHL Manual* (1991), Section 3.3.1, pp. 78–79.

⁸² Switzerland, *Basic Military Manual* (1987), Article 17.

⁸³ Togo, *Military Manual* (1996), Fascicule II, p. 5.

⁸⁴ UK, *Military Manual* (1958), § 110 and footnote 1.

⁸⁵ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(d).

⁸⁶ US, *Field Manual* (1956), § 34.

unnecessary suffering is a concrete expression of the general principles of proportionality and humanity. The rule reflects interests of combatants in avoiding needless suffering. Weapons are lawful, within the meaning of the prohibition against unnecessary suffering, so long as the foreseeable injury and suffering associated with wounds caused by such weapons are not disproportionate to the necessary military use of the weapon in terms of factors such as effectiveness against particular targets and available alternative weapons. What weapons or methods of warfare cause *unnecessary suffering*, and hence are unlawful *per se*, is best determined in the light of the practice of states. All weapons cause suffering. The critical factor in the prohibition against unnecessary suffering is whether the suffering is needless or disproportionate to the military advantages secured by the weapon, not the degree of suffering itself. International agreements may give specific content to the principle in the form of specific agreements to refrain from the use of particular weapons or methods of warfare. Thus, international law has condemned dum dum or exploding bullets because of types of injuries and inevitability of death.⁸⁷ [emphasis in original]

The Pamphlet also states that “the long-standing customary prohibition against poison is based on their uncontrolled character and the inevitability of death or permanent disability”.⁸⁸ It further adds that “a new weapon or method of warfare may be illegal, *per se*, if it is restricted by international law including treaty or international custom . . . [T]he legality of new weapons . . . is determined by whether the weapon’s effects violate the rule against unnecessary suffering.”⁸⁹

89. The US Air Force Commander’s Handbook states that:

Weapons that cause unnecessary suffering or superfluous injury are prohibited. Note that the degree of suffering is not the principal issue; the true test is whether the suffering is needless or disproportionate to the military advantage expected from the use of the weapon.

- (1) Thus, poisoned bullets are felt to cause unnecessary suffering since a person injured by modern military ammunition will ordinarily be placed out of the fighting by that alone; there is very little military advantage to be gained [by] making sure of the death of wounded persons through poison since they will be out of the battle when the poison takes effect.
- (2) Similarly, using clear glass as the injuring mechanism in an explosive projectile or bomb is prohibited, since glass is difficult for surgeons to detect in a wound and impedes treatment.⁹⁰

90. The US Soldier’s Manual stresses that “the law of war does not allow you to alter your weapons in order to cause unnecessary injury or suffering to the enemy”.⁹¹

91. The US Instructor’s Guide states that:

The customary law of war and the [1907] Hague Regulations . . . limit the weapons the armed force can use. Under the Hague Regulations, the employment of arms, material, or projectiles designed to cause unnecessary suffering is prohibited. These

⁸⁷ US, *Air Force Pamphlet* (1976), § 6-3(b)(1) and (2). ⁸⁸ US, *Air Force Pamphlet* (1976), § 6-4f.

⁸⁹ US, *Air Force Pamphlet* (1976), 6-7(a).

⁹⁰ US, *Air Force Commander’s Handbook* (1980), § 6-2a.

⁹¹ US, *Soldier’s Manual* (1984), p. 11, see also p. 10.

principles have outlawed irregular-shaped bullets such as dum-dum bullets, projectiles filled with glass, and any substances or projectiles that would tend to inflame a wound. [The US] Field Manual 27-10 states, in paragraph 34, that whether weapons cause unnecessary injury "... can only be determined in the light of the practice of the States in refraining from the use of a given weapon because it is believed to have that effect" ...

It is possible ... for a soldier to violate the law of war by misusing an issued weapon or using it at the wrong time or in the wrong place. An example of misusing a legitimate weapon would be cutting off the tip of a bullet. When the bullet hits someone, it expands and leaves a gaping wound. Such bullets cause unnecessary suffering and are forbidden. This misuse of a legitimate weapon is a crime for which you can be prosecuted.⁹²

92. The US Operational Law Handbook states that "using weapons which cause unnecessary suffering" is "expressly prohibited by the law of war and [is] not excusable on the basis of military necessity".⁹³

93. The US Naval Handbook provides that:

It is a fundamental tenet of the law of armed conflict that the right of nations engaged in armed conflict to choose methods or means of warfare is not unlimited. This rule of law is expressed in the concept that the employment of weapons, material, and methods of warfare that are designed to cause superfluous injury or unnecessary suffering is prohibited.

...

Antipersonnel weapons are designed to kill or disable enemy combatants and are lawful notwithstanding the death, pain, and suffering they inflict. Weapons that are designed to cause unnecessary suffering or superfluous injury are, however, prohibited because the degree of pain or injury, or the certainty of death they produce is needlessly or clearly disproportionate to the military advantage to be gained by their use. Poisoned projectiles and small arms ammunition intended to cause superfluous injury or unnecessary suffering fall into this category. Similarly, using materials that are difficult to detect or undetectable by field x-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds.⁹⁴

94. The YPA Military Manual of the SFRY (FRY) prohibits the use of weapons and material that cause unnecessary suffering. A commentary on this prohibition states that it concerns weapons causing "suffering disproportionate to the military objective achieved" and gives the example of dum-dum bullets.⁹⁵

National Legislation

95. Argentina's Draft Code of Military Justice punishes "any soldier who, on the occasion of an armed conflict, uses or orders to be used methods or means of combat ... designed to cause unnecessary suffering or superfluous injury".⁹⁶

⁹² US, *Instructor's Guide* (1985), p. 7.

⁹³ US, *Operational Law Handbook* (1993), p. Q-182, § (i).

⁹⁴ US, *Naval Handbook* (1995), §§ 9.1 and 9.1.1.

⁹⁵ SFRY (FRY), *YPA Military Manual* (1988), § 96.

⁹⁶ Argentina, *Draft Code of Military Justice* (1998), Article 290, introducing a new Article 874 in the *Code of Military Justice as amended* (1951).

96. Azerbaijan's Criminal Code provides that the "use of methods and means of warfare which can cause serious damage" constitutes a war crime in international and non-international armed conflicts.⁹⁷

97. The Criminal Code of Belarus provides that "the use of means or methods of warfare which can be considered as causing excessive traumatic effects" is a war crime.⁹⁸

98. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, the following constitutes a war crime in international armed conflicts: "employing weapons, projectiles, materials and methods of combat which are of a nature to cause superfluous injury or unnecessary suffering . . . provided that such weapons, projectiles, material and methods of combat are the subject of a comprehensive prohibition".⁹⁹

99. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁰⁰

100. China's Law Governing the Trial of War Criminals provides that "employment of inhuman weapons" constitutes a war crime.¹⁰¹

101. Colombia's Decree on the Control of Firearms, Ammunition and Explosives states that firearms which have undergone substantial modification in manufacture or origin to make them more deadly are prohibited.¹⁰²

102. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, uses means and methods of warfare . . . whose aim is to cause unnecessary suffering and loss or superfluous injury".¹⁰³

103. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁰⁴

104. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "employing weapons, projectiles and material . . . which are of a nature to cause superfluous injury or unnecessary suffering" in international armed conflicts, is a crime.¹⁰⁵

105. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 35 AP I, is a punishable offence.¹⁰⁶

⁹⁷ Azerbaijan, *Criminal Code* (1999), Article 116(1).

⁹⁸ Belarus, *Criminal Code* (1999), Article 136(1).

⁹⁹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(s).

¹⁰⁰ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁰¹ China, *Law Governing the Trial of War Criminals* (1946), Article 3(13).

¹⁰² Colombia, *Decree on the Control of Firearms, Ammunition and Explosives* (1993), Article 14(b).

¹⁰³ Colombia, *Penal Code* (2000), Article 142.

¹⁰⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁰⁵ Georgia, *Criminal Code* (1999), Article 413(d).

¹⁰⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

106. Italy's Law of War Decree as amended provides that "superfluous suffering shall not be inflicted on the enemy".¹⁰⁷

107. Under Mali's Penal Code, "employing weapons, projectiles, materials and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering . . . provided that such means are the subject of a comprehensive prohibition" is a war crime in international armed conflicts.¹⁰⁸

108. The Definition of War Crimes Decree of the Netherlands includes the "use of . . . inhuman appliances" in its list of war crimes.¹⁰⁹

109. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.¹¹⁰

110. Nicaragua's Military Penal Code punishes any soldier "who employs or orders the employment of weapons or means and methods of warfare . . . designed to cause unnecessary suffering or superfluous injury".¹¹¹

111. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹¹²

112. Spain's Military Criminal Code punishes "any soldier who uses, or orders the use of, means or methods of combat which are prohibited or destined to cause unnecessary suffering or superfluous injury".¹¹³

113. Spain's Penal Code punishes "anyone who, during an armed conflict, uses, or orders to be used, methods or means of combat which are prohibited or destined to cause unnecessary suffering or superfluous injury".¹¹⁴

114. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.¹¹⁵

115. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.¹¹⁶

116. Under the US War Crimes Act as amended, violations of Article 23(e) of the 1907 HR are war crimes.¹¹⁷

117. Venezuela's Code of Military Justice as amended punishes "those who make use of weapons or means that unnecessarily increase the suffering of the persons attacked".¹¹⁸

¹⁰⁷ Italy, *Law of War Decree as amended* (1938), Article 35.

¹⁰⁸ Mali, *Penal Code* (2001), Article 31(i)(20).

¹⁰⁹ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

¹¹⁰ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹¹¹ Nicaragua, *Military Penal Code* (1996), Article 51.

¹¹² Norway, *Military Penal Code as amended* (1902), § 108(b).

¹¹³ Spain, *Military Criminal Code* (1985), Article 70.

¹¹⁴ Spain, *Penal Code* (1995), Article 610.

¹¹⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹¹⁶ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹¹⁷ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

¹¹⁸ Venezuela, *Code of Military Justice as amended* (1998), Article 474(5).

118. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, “means or methods of combat prohibited under the rules of international law, during a war or an armed conflict” is a war crime. The commentary on this provision states that “the following weapons and means of combat are considered to be prohibited: . . . weapons, ammunition and materials that cause unnecessary suffering”.¹¹⁹

National Case-law

119. In the *Military Junta case* in 1985, Argentina’s National Court of Appeals, with reference to Articles 22 and 23 of the 1907 HR, mentioned the prohibition on the use of weapons, projectiles or material which cause “unnecessary damage” to enemies. It also referred to the opinion of some writers, according to whom unnecessary harm to the enemy or to the civilian population is prohibited.¹²⁰

120. In the *Shimoda case* in 1963, Japan’s District Court of Tokyo quoted the 1868 St. Petersburg Declaration and Article 23(e) of the 1907 HR, and also referred to the 1899 Hague Declaration concerning Asphyxiating Gases. The Court held, however, that “the use of a certain weapon, great as its inhuman result may be, need not be prohibited by international law if it has a great military effect”.¹²¹

Other National Practice

121. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Australia stated that:

41. On the question of weapons that might cause unnecessary suffering, humanitarian principles in weapons design, which Australia wished to see universally accepted, should not be selectively disadvantageous to any country. One factor that should be kept in mind was the differing capacity of countries to maintain high technology or capital-intensive defensive weapons systems, as opposed to manpower-intensive defensive weapons systems at a relatively lower level of technology. It must not be assumed that high-technology sophisticated weapons, if correctly used, were necessarily more inhumane than simpler weapons . . .
42. His delegation felt that there might have been a tendency in recent studies to place undue emphasis on unnecessary suffering as manifested in wounds of a complex or serious nature, and perhaps in that way to lose sight of the initial and basic St. Petersburg principle that it was better to wound than to kill an enemy combatant. The Committee should consider whether, from the point of view of the soldier involved, it was doing him a service if it fell into the error of giving preference to weapons that tended to kill cleanly, rather than to weapons that wounded, but did not kill.¹²²

¹¹⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1) and commentary.

¹²⁰ Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.

¹²¹ Japan, District Court of Tokyo, *Shimoda case*, Judgement, 7 December 1963.

¹²² Australia, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, pp. 15–16, §§ 41–42.

122. In a memorandum in 1991, Australia's Department of Foreign Affairs and Trade stated that:

The wide ban on weapons which cause superfluous injury (Article 35(2)) has to be read in conjunction with the Convention on the Prohibition on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects. This Convention specifically lists such weapons which are prohibited. Australia became a party to this Convention in 1984. In the light of the Convention a reservation on this ground is unnecessary.¹²³

123. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that:

One of the most fundamental and longest-standing humanitarian principles is the prohibition on employing weapons or methods of warfare of a nature to cause unnecessary losses or suffering. Yet while this principle has remained constant, its practical application has not and will not. The suffering inflicted by a particular type of weapon may be accepted as "necessary" in one age, but condemned as unnecessary in another. Such changes in the dictates of public conscience may have a number of causes. Advances in technology or changes in methods of warfare may provide alternatives to the use of weapons of that type. Or it may be that in a later age the level of suffering in warfare which the international community is prepared to tolerate is lower than the level which it tolerated previously.¹²⁴

124. In 1997, during a debate in the First Committee of the UN General Assembly, Austria stated that excessively injurious weapons must be banned, since humanitarian aspects must override others.¹²⁵

125. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Brazil stated that:

In principle, all available weapons could cause unnecessary suffering . . . depending on how they were used. There were good humanitarian reasons for the international community to agree at least on restricting the use of incendiary weapons against targets which were not exclusively military.¹²⁶

126. In 1973, in its comment on the UN Secretary-General's report on napalm and other incendiary weapons and all aspects of their possible use, Canada stated that:

Broadly, there should be concern with the use of all types of weapons in ways which could cause unnecessary suffering . . . [F]or this reason, the protocols additional to the Geneva Conventions of 1949 which are currently being prepared under the

¹²³ Australia, Department of Foreign Affairs and Trade, File: 1710/10/3/1, 13 February 1991, § 6.

¹²⁴ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, pp. 39–40.

¹²⁵ Austria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.13, 29 September 1977, p. 28.

¹²⁶ Brazil, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.2, 14 March 1974, p. 18, § 7.

auspices of the International Committee of the Red Cross in close co-operation with the United Nations General Assembly, should reaffirm the existing principles and rules of conventional and customary international law of armed conflicts which apply generally to the choice and use of weapons by States in armed conflict and are contained, *inter alia*, in the Hague Declaration [concerning Asphyxiating Gases] of 1899, the Hague Conventions of 1907 and the Geneva [Gas] Protocol of 1925.¹²⁷

127. In 1991, in a legal report concerning the withdrawal of its reservation to the 1925 Geneva Gas Protocol, Chile stated that “the prohibition of the use of arms, projectiles or material calculated to cause unnecessary suffering... is considered to be a norm of international customary law and hence to be binding on all States, whether or not they are party to the relevant Convention”.¹²⁸

128. The Report on the Practice of China, referring to a declaration by the delegation of China at the CCW Conference in 1980, notes that China often calls weapons of a nature to cause unnecessary suffering or superfluous injury “inhumane weapons”. It adds that China has always been in favour of a total ban on these weapons and of further restrictions on their use, and that it has always made efforts to achieve the prohibition or restrictions on the use of certain inhumane conventional weapons.¹²⁹

129. At the Second Review Conference of States Parties to the CCW in 2001, China declared that “the impermissibility of using means of warfare that caused excessive injuries... had become a universally accepted principle”.¹³⁰

130. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Colombia stated that:

8. ... His government ... supported all measures for the prohibition or limitation of the use of conventional weapons likely to cause unnecessary injury ...
9. ... His Government was opposed to the use of napalm and incendiary weapons. In view of the suffering inflicted on the victims, nothing could justify their use. Similarly, the use of high velocity small-calibre projectiles designed to cause excessive injury should be absolutely forbidden. Such weapons were indeed comparable to explosive bullets or dum-dum bullets.¹³¹

¹²⁷ Canada, Comments on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207/Add.1, 17 December 1973, p. 3.

¹²⁸ Chile, Ministry of Foreign Affairs, Memorandum Reservado No. 430/91, Santiago, 17 June 1991, §§ 3 and 6.

¹²⁹ Report on the Practice of China, 1997, Chapter 3.1, referring to Address to the Plenary Session of the UN Meeting on the Prohibition or Restrictions on Certain Conventional Weapons, 10 October 1980, *Selected Documents of the Chinese Delegation to the United Nations*, World Knowledge Press, Beijing, 1980, p. 265.

¹³⁰ China, Statement at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/SR.2, 16 January 2002, § 41.

¹³¹ Colombia, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.14, 5 March 1975, p. 132, §§ 8–9.

131. In 1977, during a debate in the First Committee of the UN General Assembly, Colombia advocated the elimination of “weapons of mass destruction, chemical and bacteriological weapons, incendiary weapons and all those weapons that are capable of bringing about the most horrifying suffering”.¹³²

132. In 1977, during a debate in the First Committee of the UN General Assembly, Cyprus stated that napalm caused unnecessary suffering.¹³³

133. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Ecuador stated that “the use of nuclear weapons contradicts the humanitarian dispositions against the use of warlike artifacts that provoke cruel and unnecessary sufferings to its victims”.¹³⁴

134. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Egypt stressed that it was “still in favour of complete prohibition of the use of all weapons that might cause unnecessary suffering . . . The main object was to humanize war as far as possible by imposing a certain discipline on belligerents.”¹³⁵

135. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

19. The prohibition against the use of weapons which render death inevitable or cause unnecessary suffering: “The right of belligerents to the conflict to adopt means of injuring the enemy is not unlimited.” [reference is made to Article 22 of the 1907 HR] This rule imposes on the belligerents the obligation to refrain from cruel and treacherous behaviour. As far as weapons are concerned, since the nineteenth century this humanitarian principle has been embodied in two rules: one forbids the use of poisons, while the other prohibits the use of weapons capable of causing superfluous injuries . . .
20. The laws of the Hague [reference is made to Article 23(e) of the 1907 HR] and Geneva [reference is made to Article 35(2) AP I] provide that it is especially forbidden to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. It goes without saying that the enormous blast waves, air blasts, fires, residual nuclear radiation or radioactive fallout, electromagnetic impulses and thermal radiation, which are primary effects of the use of nuclear weapons, cause extensive “unnecessary suffering”.¹³⁶

136. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, France stated that:

¹³² Colombia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.21, 5 October 1977, p. 11.

¹³³ Cyprus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.44, 24 October 1977, p. 17.

¹³⁴ Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2, § D.

¹³⁵ Egypt, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.6, 22 March 1974, p. 49, § 12.

¹³⁶ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp. 12–13, §§ 19 and 20.

The supporters of that theory [according to which the law of armed conflicts would contain legal rules from which a prohibition of the use of nuclear weapons could be deduced] base themselves . . . on various rules or principles enunciated in [AP I], and specifically “the prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering” (art. 35, para.2) . . .

The French Government formally rejects this reasoning . . . Besides the fact that it is not according to this procedure that the prohibitions concerning the use of arms are traditionally established, this method is random, and cannot in any case lead to the result aimed at by its authors.

The theory put forward supposes that it is established . . . that all the rules mentioned . . . correspond with customary principles recognized as such and . . . that the exact content of these principles is defined.

However, this content . . . has been the object, and still is the object, of doctrinal discussions.

With regard to this, the French government must again underline that the principles of international customary law applicable in armed conflict cannot be searched in [AP I] . . . If one cannot deny that certain provisions of the protocol find their inspiration in the principles of international customary law, it is obvious that others constitute a development.

...

The general practice in the field of the prohibition or the regulation of armament is to proceed by conventions . . .

Indeed, the regulation of the use of a weapon supposes precise rules which cannot be established other than by specific conventions.¹³⁷

137. Following the adoption by consensus of Article 33 of Draft AP I (now Article 35 AP I), France stated that it “went beyond the strict confines of humanitarian law and in fact regulated the law of war” and had “direct implications for the defence and security of States”. Therefore, it stated that it would have abstained if the article had not been adopted by consensus.¹³⁸

138. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “it is prohibited to employ methods or weapons which are of a nature to cause unnecessary losses or excessive suffering”.¹³⁹

139. According to the Report on the Practice of France, the French Minister of Foreign Affairs stated in an interview in 1999 that France considered Article 35 AP I to have become customary.¹⁴⁰

140. At the CDDH, in an explanation of vote concerning Article 33 draft AP I, the FRG stated that it had joined in the consensus on Article 33 of draft AP I

¹³⁷ France, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp. 40–45, §§ 28–30; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, June 1994, pp. 29–31, § 26.

¹³⁸ France, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 March 1977, p. 101, § 55.

¹³⁹ France, *Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral*, 1995, Section 6, § 65.

¹⁴⁰ Report on the Practice of France, 1999, Chapter 3.1.

(now Article 35 AP I) “with the understanding that paragraphs 1 and 2 reaffirm customary international law”.¹⁴¹

141. In 1970, during a debate in the Third Committee of the UN General Assembly on Resolution 2677 (XXIV) which emphasised the need to “secure the full observance of human rights applicable in all armed conflicts” and called upon “all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 . . . and other humanitarian rules applicable in armed conflicts”, India sought to change “all armed conflicts” in the second preambular paragraph to “armed conflicts”. Being unsuccessful, it then stated that it construed the expression “all armed conflicts” to denote all international armed conflicts.¹⁴²

142. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, India stated that it was

happy to note that all the delegations agreed in recognizing the need to avoid unnecessary suffering and that the differences of opinion concerned solely the extent to which countries were prepared to restrict their choice of that type of weapon for their defense, in order to avoid unnecessary suffering to civilians and combatants.¹⁴³

143. At the CDDH, India stated that it had agreed to join in the consensus on Article 33 of draft AP I (now Article 35),

with the understanding that the basic rules contained in this article will apply to all categories of weapons, namely nuclear, bacteriological, chemical, or conventional weapons or any other category of weapons. Secondly, the term “superfluous injury or unnecessary suffering” means those physical injuries which are more severe than would be necessary to render an adversary *hors de combat* or to make the enemy surrender and which are not justified by considerations of military necessity.¹⁴⁴

144. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that “the use of nuclear weapons in an armed conflict is unlawful, being contrary to the conventional as well as customary international law because such a use . . . could cause excessive injuries to the combatants making their death inevitable”.¹⁴⁵

145. The Report on the Practice of India states that India considers that the prohibition of weapons causing unnecessary suffering also applies in non-international armed conflicts.¹⁴⁶

146. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Indonesia stated that:

¹⁴¹ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 115.

¹⁴² India, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1801, 27 November 1970, p. 379.

¹⁴³ India, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 20 May 1976, p. 284, § 5.

¹⁴⁴ India, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 March 1977, p. 115.

¹⁴⁵ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 4.

¹⁴⁶ Report on the Practice of India, 1997, Chapter 3.1.

All international customary law and all treaties regulating the conduct of armed conflict among States are based on two fundamental principles, namely necessity and humanity . . . Actions which cause needless losses or suffering are prohibited. Furthermore, the employment of arms causing unnecessary suffering . . . is prohibited under the 1907 Hague Convention IV on Laws and Customs of Land Warfare.¹⁴⁷

147. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that “some of the principles of humanitarian international law from which one can deduce the illegitimacy of the use of nuclear weapons are: . . . Prohibition of means and methods of war that cause unnecessary suffering to human societies and environment.”¹⁴⁸

148. Article 20 of draft AP II, prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering, was deleted at the last moment by the CDDH, without any plenary debate, as part of a general revision of AP II. During the amendment voting at this stage, Ireland voted in favour of the article because it believed that “the principles enunciated in the article are of a purely humanitarian nature”.¹⁴⁹

149. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Italy stated that “the exercise of armed violence should be carried out so as not to bring about unnecessary, and thus superfluous or useless, sufferings”.¹⁵⁰

150. At the CDDH, the Italian delegation stated that it had joined in the consensus on Articles 33 and 34 draft AP I (now Articles 35 and 36) “bearing in mind above all the principles which inspired them” but that “it could not, however, conceal its perplexity about the wording of those provisions which could not be interpreted as introducing a specific prohibition operative in all circumstances attendant on the study, development, acquisition or adoption of particular weapons or methods of warfare”.¹⁵¹

151. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan stated that it was of the understanding that “the free and unlimited selection of weapons is unacceptable in terms of international law concerning warfare, and that . . . the infliction of unnecessary suffering . . . is prohibited, even with regard to weapons that are not expressly banned”.¹⁵²

152. According to the Report on the Practice of Kuwait, Kuwait does not import weapons which cause superfluous injury because it is of the opinion that such weapons are unacceptable.¹⁵³

¹⁴⁷ Indonesia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 3 November 1995, Verbatim Record CR 95/25, p. 27.

¹⁴⁸ Iran, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 1.

¹⁴⁹ Ireland, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 120.

¹⁵⁰ Italy, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 5.

¹⁵¹ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 March 1977, p. 102, § 59.

¹⁵² Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, 7 November 1995, Verbatim Record CR 95/27, p. 37.

¹⁵³ Report on the Practice of Kuwait, 1997, Chapter 3.3.

153. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Lesotho stated that “any use of nuclear weapons, even in self-defense, would violate international humanitarian law, including the Hague and Geneva Conventions, which prohibit as practices of war . . . causing unnecessary or aggravated suffering”.¹⁵⁴

154. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Madagascar stated in relation to the report of the Conference of Government Experts on the Use of Certain Conventional Weapons that Might Cause Unnecessary Suffering or Have Indiscriminate Effects that “those provisions . . . were inadequate, for they reaffirmed rules that were already to be found in other international instruments”.¹⁵⁵

155. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands stated that “any use of nuclear weapons violate the laws of war including the Geneva and Hague Conventions . . . Such laws prohibit . . . the causing of unnecessary or aggravated suffering.”¹⁵⁶

156. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Mauritania stated that:

7. He strongly supported the general prohibition of all weapons that might cause unnecessary suffering.
8. For humanitarian reasons, a ban should be placed on the use of incendiary weapons, anti-personnel fragmentation weapons, fléchettes, small calibre projectiles causing serious wounds and anti-personnel land mines which . . . caused unnecessary suffering through serious, terrifying and painful wounds that were difficult to treat.
9. His delegation considered that the provisions of Articles 22 and 23(e) of the [1907 HR], which were also to be found in the Preamble to the Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, as well as in the report of the United Nations Secretary-General on Napalm and other incendiary weapons and all aspects of their possible use . . . showed that the use of certain categories of weapons should be generally prohibited for the well-being of all mankind.¹⁵⁷

157. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Mexico stated that:

The debates in the United Nations General Assembly which culminated in the approval by an overwhelming majority of resolution 3076 (XXVIII) relating to napalm and other incendiary weapons were eloquent proof that humanity was anxious for

¹⁵⁴ Lesotho, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

¹⁵⁵ Madagascar, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.10, 19 February 1975, p. 102, §§ 52–53.

¹⁵⁶ Marshall Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 22 June 1995, § 5.

¹⁵⁷ Mauritania, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.11, 21 February 1975, p. 106, §§ 7–9.

the prohibition of the use of those weapons as well as other conventional weapons which could be considered as causing unnecessary suffering.¹⁵⁸

158. In 1976, during discussions on napalm and other incendiary weapons in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Mexico stated that “incendiary weapons . . . were cruel weapons which caused unnecessary suffering, especially to those with least protection, namely, innocent victims not participating in military operations”.¹⁵⁹

159. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico affirmed that:

The [1868] Declaration of Saint Petersburg was followed by a series of international instruments in which the idea of preventing unnecessary suffering and superfluous damage to the enemy led to a prohibition on the use of certain weapons. Such instruments included The Hague Conventions of 1899 and 1907, which prohibited the use of poisoned or poisonous weapons and or arms, projectiles or materials causing unnecessary suffering; the [1925] . . . Geneva Gas Protocol . . . and the [1972 BWC] . . . etc.

. . . All the above-mentioned instruments have made it clear that the right of the parties in an armed conflict to choose the means of harming the enemy is not unlimited and is, in fact, subject to restrictions. In this regard, it is worth highlighting Article 35 [AP I] . . . which reaffirms that the right of the Parties to an armed conflict to choose methods or means of warfare is not unlimited and that it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.

. . .

The international community considers that certain types of armaments should be prohibited on account of their inhumane effects on individuals.¹⁶⁰

160. At the CDDH, Mozambique stated that “while this Conference is meeting here, the people of Mozambique are being bombed by the illegal and racist régime of Ian Smith, which is using napalm and other materials causing superfluous injury”.¹⁶¹

161. In its response to submissions from other States submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Nauru stated that “it is also a violation of customary international law to use weapons that cause unnecessary suffering”.¹⁶²

162. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that:

¹⁵⁸ Mexico, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 8, § 6.

¹⁵⁹ Mexico, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 20 May 1976, p. 283, § 1.

¹⁶⁰ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, §§ 72, 73 and 75.

¹⁶¹ Mozambique, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 303.

¹⁶² Nauru, Response to submissions of other States submitted to the ICJ, *Nuclear Weapons (WHO) case*, 15 June 1995, Part 1, p. 11.

Suffering may be called “unnecessary” when its infliction is not necessary to attain a lawful military advantage or greatly exceeds what could reasonably have been considered necessary to attain that military advantage.

... The availability of considerably less harmful means to attain the military advantage or the causing of suffering out of proportion to the military advantage to be gained therefore appears to be the essential yardstick for determining whether the use of certain weapons must be deemed to cause “unnecessary” suffering. This approach has governed the development of rules with regard to means and methods of warfare since 1868.¹⁶³

163. In 1969, during a debate in the Third Committee of the UN General Assembly, the Netherlands stated that it was:

essential to update and broaden the Hague Conventions and the 1925 Geneva [Gas] Protocol, primarily in so far as related to international security and the protection of human rights, and to extend their application to cover armed conflicts which were not international in character.¹⁶⁴

164. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, New Zealand stated that “it was difficult to determine criteria for unnecessary suffering, except in the case of the indiscriminate use of weapons. One should not fall into the error of giving preference to weapons that killed cleanly rather than to weapons that wounded but did not kill.”¹⁶⁵

165. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated, with reference to customary international law, that “it is prohibited to use weapons or tactics that cause unnecessary or aggravated devastation and suffering”.¹⁶⁶

166. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Norway stated that:

7. It was the task of the Conference to protect the civilian population and also to protect the combatants from suffering more than the strict minimum required to put them *hors de combat*. He suggested that the Committee should agree on the general prohibition of the use of incendiary weapons...

9. ... It was also important to define inadmissible ways of using weapons, so as to avoid falling back on such criteria as “unnecessary suffering” which were far from specific.¹⁶⁷

¹⁶³ Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, §§ 19–21.

¹⁶⁴ Netherlands, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1733, 11 December 1969, p. 1.

¹⁶⁵ New Zealand, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.2, 14 March 1974, p. 18, § 5.

¹⁶⁶ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 69.

¹⁶⁷ Norway, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.5, 20 March 1974, p. 42, §§ 8–9.

167. In a statement at the First CCW Review Conference in 1995, Peru declared that it “shared the international community’s concern at the increasing use of certain conventional weapons, including anti-personnel landmines, whose devastating effects on the civilian population had been well documented”. It added that “the Review Conference was duty bound to bring an end to the humanitarian crisis caused by such weapons”.¹⁶⁸

168. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Poland stated that:

He feared that the idea of “unnecessary suffering” might tend to restrict the future work of the Committee to weapons and methods of combat which caused physical and moral suffering, but there were weapons which could inflict extremely serious wounds which were not necessarily accompanied by unbearable suffering, such as certain chemical substances which caused death or disablement. An example was laser, which could blind anyone coming in their range of action. It was his delegation’s opinion that it was not from the point of view of those who inflicted unnecessary suffering that weapons whose use should be restricted or forbidden should be defined, but from the point of view of the victims.¹⁶⁹

169. Article 20 of draft AP II, prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering, was deleted at the last moment by the CDDH, without any plenary debate, as part of a general revision of AP II. During the amendment voting at this stage, Portugal stated that it voted in favour of the inclusion of Article 20 in draft AP II “because it regards the article as a fundamental humanitarian provision the adoption of which will not imperil the authority of States”.¹⁷⁰

170. In 1972, during a debate in the Sixth Committee of the UN General Assembly, Romania stated that “the prohibition of weapons that caused unnecessary suffering . . . was of primordial importance”.¹⁷¹

171. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Russia stated that:

As to the attempts to justify the illegitimacy of the use of nuclear weapons by references that they cause “unnecessary sufferings while injuring, uselessly aggravate the sufferings of disabled men, or render their death inevitable”, they are . . . hardly reasonable . . . The reasonable comments of the ICRC confirm two considerations . . . The principle of not causing “unnecessary suffering” is not in itself a general ban on the use of nuclear weapons as such . . .

...

¹⁶⁸ Peru, Statement at the First Review Conference of the States Parties to the CCW, Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF.I/SR.5, 3 October 1995, §§ 67–69.

¹⁶⁹ Poland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 13, § 27.

¹⁷⁰ Portugal, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 123.

¹⁷¹ Romania, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1393, 12 December 1972, p. 501.

[AP I] reproduces, with slight changes (Art. 35), the above-mentioned provisions of the [1907 Hague Convention IV and the 1907 HR], but they, being treaty norms, are not applied to nuclear weapons . . .

The view that the said blanket formulas are not considered by the international community as a whole as a general ban on the use of specific types of weapons, including nuclear weapons as such, is supported by the fact that international law did not choose the option of a special ban of particular types of weapons and their use. That is how . . . the 1980 Convention on the Prohibition or Restrictions on the Use of Certain Conventional Weapons, which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, together with the Protocols thereto . . . appeared.¹⁷²

172. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Russia stated that:

References to the effect that nuclear weapons cause “unnecessary sufferings while injuring, uselessly aggravate the sufferings of disabled men, or render their death inevitable”, and, thus, to Article 23 (a) of the Regulation on the Laws and Customs of War on Land annexed to the 1907 Hague Convention with the aim to justify the illegality of their use can hardly be considered as appropriate . . . These reasonable comments of the ICRC experts [contained in the report entitled “Weapons that May Cause Unnecessary Suffering or Have Indiscriminate Effects”] confirm that the principle of not causing “unnecessary suffering” is not in itself a general ban on the use of nuclear weapons *per se*. This is also confirmed by the fact that international law did embark on the road of a special ban of particular types of weapons and their use. That is how appeared the . . . 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, together with the Protocols thereto.¹⁷³

173. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1993, Rwanda noted that “the use of nuclear weapons by a State during a war or an armed conflict constitutes a violation of the agreements relating to international humanitarian law in general and of the [1980 CCW] in particular”.¹⁷⁴

174. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Samoa stated that:

The use of nuclear weapons by a state in war or other armed conflict would be a violation of international customary law and conventions, including the Hague Conventions and the Geneva Conventions. Such law and conventions prohibit the use of weapons . . . which cause unnecessary suffering.¹⁷⁵

¹⁷² Russia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, pp. 12–14.

¹⁷³ Russia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 10 November 1995, Verbatim Record CR 95/29, pp. 45–46.

¹⁷⁴ Rwanda, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 8 December 1993, p. 1, § 3.

¹⁷⁵ Samoa, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 September 1994, p. 3.

175. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Samoa stressed that it “believes that the prohibition of the use or threat of use of nuclear weapons has been achieved under general international law. It has occurred by the cumulative effect of a series of multilateral treaties and of a series of resolutions of the General Assembly” including the 1868 St. Petersburg Declaration, the 1907 Hague Convention (IV) and AP I.¹⁷⁶

176. Article 20 of draft AP II, prohibiting the use of weapons of a nature to cause superfluous injury or unnecessary suffering, was deleted at the last moment by the CDDH, without any plenary debate, as part of a general revision of AP II. During the amendment voting at this stage, Saudi Arabia stated that “Article 20 (Basic rules) was rejected in a vote . . . since the legitimate party to an internal conflict is the *de jure* State. Obviously it will never try to exterminate its nationals or to damage its environment.”¹⁷⁷

177. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the Solomon Islands stated that “since [their qualitative] effects may affect people outside the scope of conflict, both in time and geographically, the use of nuclear weapons violates the prohibition on the use of weapons which cause unnecessary suffering”.¹⁷⁸

178. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands observed that:

According to the 1868 Declaration of St. Petersburg, the “legitimate objective” of war “would be exceeded by the employment of arms which uselessly aggravate the suffering of disabled men, or render their death inevitable.”

...

The obligation reflected in the preamble of the St. Petersburg Declaration remains in force and applicable today. It has been neither abolished nor superseded.

...

The prohibition on the use of weapons which render death inevitable reflects an even more fundamental principle of the law of armed conflict: the obligation to minimise harm to combatants. Accordingly in its use of force a State must not injure its enemy when it can capture him, nor cause serious injury when it can cause only slight injury, and not kill the enemy if he can be injured.¹⁷⁹

The Solomon Islands further stated that:

International law prohibits the use of weapons which:

...

- render death inevitable;
- cause unnecessary suffering.¹⁸⁰

¹⁷⁶ Samoa, Written statement submitted to the ICJ, *Nuclear Weapons case*, 15 June 1995, p. 3.

¹⁷⁷ Saudi Arabia, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 123.

¹⁷⁸ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 75, § 3.94.

¹⁷⁹ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 49, §§ 3.51–3.53.

¹⁸⁰ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 62, § 3.77.

179. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, Sri Lanka stated that “customary law principles which have evolved in the field of armed conflict prohibit the use of weapons and the methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.¹⁸¹

180. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Sweden stated that:

While it was difficult to discuss the degrees of suffering and injury caused by different weapons, it was not much easier to measure “military advantage” of weapons. Perhaps the gist of the concept was the effectiveness with which a weapon achieved its legitimate task of placing combatants *hors de combat*. It was not, on the other hand, legitimate military advantage that a weapon caused more or more severe injuries than were needed to disable a combatant . . .

With regard to weapons which might be deemed to cause unnecessary suffering or superfluous injury, it was hard to see why only civilians should be spared such suffering or injury. The dum-dum bullet had been banned because it caused excessive injury to soldiers. The same ban should apply . . . to high-velocity small arms projectiles, fléchettes and incendiaries.¹⁸²

181. In 1977, during a debate in the First Committee of the UN General Assembly, Sweden stated that high-velocity ammunition caused unnecessary suffering and should be banned.¹⁸³

182. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that:

The use of weapons which cause unnecessary suffering must be considered to be prohibited. The codification of the prohibition of dum-dum bullets was undertaken in accordance with this view, for example. The effect of radioactive radiation as a result of the use of nuclear weapons cause unnecessary suffering, not merely for third parties who are directly affected, but also future generations, for example as a result of genetic damage.¹⁸⁴

183. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Switzerland stated that the principle prohibiting unnecessary suffering “belongs to customary law” and was “already in force”.¹⁸⁵

184. In 1970, during a debate in the Third Committee of the UN General Assembly on Resolution 2677 (XXIV), which emphasised the need to “secure the full observance of human rights applicable in all armed conflicts” and called

¹⁸¹ Sri Lanka, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 2.

¹⁸² Sweden, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, pp. 11–12, §§ 19 and 23.

¹⁸³ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.32, 13 October 1977, p. 26.

¹⁸⁴ Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 5.

¹⁸⁵ Switzerland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, pp. 12–13, § 24.

upon "all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 . . . and other humanitarian rules applicable in armed conflicts", Syria emphasised that the principles laid down in the resolution applied in all armed conflicts, even though the relevant humanitarian treaties only applied in international wars.¹⁸⁶

185. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Togo stated that:

His delegation could not accept the concept of "unnecessary suffering". It considered that suffering could not be divided into categories. The Committee's report should state solemnly that the infliction of suffering was immoral and incompatible with human dignity.¹⁸⁷

186. In 1977, during a debate in the First Committee of the UN General Assembly, Turkey stated that it supported prohibitions or restrictions on incendiary and other excessively injurious weapons, but held that a ban would only be effective if this view reflected a consensus in the world community.¹⁸⁸

187. At the CDDH, the USSR considered that Article 20 of draft AP II "met the demands of humanitarian law and could give rise to no objections".¹⁸⁹

188. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the USSR stated that "the question of prohibition or restriction of the use of certain types of conventional weapons liable to cause unnecessary suffering . . . was one of great importance".¹⁹⁰

189. In 1970, during a debate in the Third Committee of the UN General Assembly on Resolution 2677 (XXIV), which emphasised the need to "secure the full observance of human rights applicable in all armed conflicts" and called upon "all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 . . . and other humanitarian rules applicable in armed conflicts", the UK, as one of the sponsors of the resolution (the others were Australia, Belgium, Ceylon, Greece, Ireland, Japan, Luxembourg, Netherlands, New Zealand, Philippines, Singapore and Spain)¹⁹¹ defended the broader expression "all armed conflicts",

¹⁸⁶ Syria, Statement before Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1794, 19 November 1970, p. 343.

¹⁸⁷ Togo, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 16, § 46.

¹⁸⁸ Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.44, 24 October 1977, p. 23.

¹⁸⁹ USSR, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.32, 14 March 1975, pp. 310–311, § 10.

¹⁹⁰ USSR, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.19, 21 March 1975, pp. 186–187, § 13.

¹⁹¹ Australia, Belgium, Ceylon, Greece, Ireland, Japan, Luxembourg, Netherlands, New Zealand, Philippines, Singapore, Spain and UK, Revised draft resolution on respect for human rights in armed conflict submitted to the Third Committee of the UN General Assembly, UN Doc. A/C.3/L.1809/Rev.2, 26 November 1970.

instead of India's proposal "armed conflicts". The UK stated that "the fact was that in any armed conflict, whether international or not, certain minimal standards had to be respected, and for that reason the sponsors wished to retain the phrase 'all armed conflicts'".¹⁹²

190. A training video on IHL produced by the UK Ministry of Defence emphasises that the 1907 HR prohibits weapons that cause unnecessary suffering. It adds that weapons must not be altered with a view to causing unnecessary suffering.¹⁹³

191. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

3.63 It has also been argued that the use of nuclear weapons would violate the prohibition on weapons which cause unnecessary suffering. The most recent statement of this principle is contained in Article 35(2) of Additional Protocol I, 1977, . . . The principle is, however, a long established one.

3.64 The principle prohibits only the use of weapons which cause *unnecessary* suffering or *superfluous* injury. It thus requires that a balance be struck between the military advantage which may be derived from the use of a particular weapon and the degree of suffering which the use of that weapon may cause. The more effective the weapon is from the military point of view, the less likely that the suffering which its use causes will be characterized as unnecessary. In particular, it has to be asked whether the same military advantage can be gained by using alternative means of warfare which will cause a lesser degree of suffering.¹⁹⁴ [emphasis in original]

192. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

The principle that a belligerent must not use methods or means of warfare which cause unnecessary suffering and superfluous injury does not prohibit the use of a weapon which causes extensive suffering unless that suffering is truly *unnecessary*. What is required, therefore, is a balancing of military necessity and humanity . . . Consideration of military necessity is an integral part of the *unnecessary* suffering principle. It is not a case of necessity being invoked to justify the use of an unlawful weapon; the use of that weapon is not unlawful if the injury it causes is necessary to the achievement of a legitimate military goal.¹⁹⁵ [emphasis in original]

193. In 1974, in reply to a letter from a member of the US House of Representatives, the Acting General Counsel of the US Department of Defense stated that:

¹⁹² UK, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1799, 26 November 1970, §§ 6 and 9.

¹⁹³ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 3.1.

¹⁹⁴ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, p. 50, §§ 3.63 and 3.64.

¹⁹⁵ UK, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/34, p. 39.

The distinguishing feature in Article 23 of the [1907 HR] is that it applies to all weapons, and qualifies the use of all weapons in armed conflict making unlawful uses which cause suffering intentionally superfluous to a valid military purpose. The term “unnecessary suffering” conveys this interpretation. The terms “calculated to cause” convey the element of intent such that members of the Armed Forces cannot justify the use of weapons inconsistent with attaining a legitimate military objective. This criterion must be distinguished from prohibitions agreed to by states for outlawing weapons regardless of how they are used or intended to be used. As noted in the Field Manual . . . one must refer to the practices of states in order to determine the present meaning of these principles.¹⁹⁶

194. At the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, held in Lucerne in 1974, the US stated that:

The prohibition against weapons that cause unnecessary suffering is a criterion to which we are currently bound under the Fourth Hague Convention of 1907, but interpretations of its scope and implications today vary significantly. It is the U.S. view that the “necessity” of the suffering must be judged in relation to the military utility of the weapons. The test is whether the suffering is needless, superfluous, or disproportionate to the military advantage reasonably expected from the use of the weapon.¹⁹⁷

195. In 1979, during the Preparatory Conference to the UN Conference that led to the adoption of the 1980 CCW, the US stated, in a discussion on incendiary weapons, that “some delegations had based themselves on the premise that incendiary weapons caused unnecessary suffering and were, by definition, inhumane, but if that premise was correct, they would already have been outlawed”.¹⁹⁸

196. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that the permissible means of injuring the enemy are not unlimited and that parties to a conflict not use weapons, projectiles, and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”.¹⁹⁹

¹⁹⁶ US, Reply of 18 January 1974 of the Acting General Counsel of the Department of Defense to a letter of a member of the House of Representatives, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, pp. 705–706.

¹⁹⁷ US, Statement of 25 September 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974, reprinted in Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, US Department of State Publication 8809, Washington, D.C., 1975, p. 707.

¹⁹⁸ US, Statement at the Preparatory Conference to the UN Conference on prohibitions or restrictions of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, 12 April 1979, UN Doc. A/CONF.95/PREP.CONF./II/SR.28, 18 April 1979, pp. 2–3.

¹⁹⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

197. In 1988, in a memorandum on laser weapons, the US Department of the Army affirmed that:

Article 23(e) [of the 1907 HR] prohibits the employment of "arms, projectiles, or material calculated to cause unnecessary suffering." There is no internationally accepted definition of "unnecessary suffering." In fact, an anomaly exists in that while it is legally permissible to kill an enemy soldier, in theory any wounding should not be calculated or intended to cause unnecessary suffering. In endeavoring to reconcile the two, in considering the customary practice of nations during this century, and in acknowledging the lethality of the battlefield for more than a century, certain factors emerge that are germane to this opinion:

- (a) No legal obligation exists or can exist to limit wounding mechanisms in a way that permits lawful killing while requiring that wounds merely temporarily disable, that is, that the effects of wounds do not extend beyond the period of hostilities; and
- (b) In considering whether a weapon may cause unnecessary suffering, it must be viewed in light of comparable wounding mechanisms extant on the modern battlefield rather than viewing the weapon in isolation.
- (c) The term "unnecessary suffering" implies that there is such a thing as "necessary suffering," *i.e.*, that ordinary use of any military effective weapon will result in suffering on the part of those against whom it is employed.
- (d) The rule does prohibit deliberate design or alteration of a weapon solely for the purpose of increasing the suffering of those against whom it is used, including acts that will make their wounds more difficult to treat. This is the basis for rules against poisoned weapons and certain small caliber hollow point ammunition.²⁰⁰

198. Course material from the US Army War College, in discussing the balance between military necessity and unnecessary suffering, states that the "existence of a weapon generally indicates a legitimate military requirement" and maintains that no effective weapon has ever been outlawed. The example used to prove this statement is the 1907 Hague Convention (VIII), which bans anchored automatic contact mines which do not become harmless when they break loose from their mooring and torpedoes that do not become harmless after they have missed their target. In contrast to this, the course material points to the 1899 Hague Declaration concerning Asphyxiating Gases, which the UK and US did not ratify, and to the fact that poison gas was used during the First World War.²⁰¹

199. In 1990, in a memorandum of law on sniper use of open-tip ammunition, the US Department of the Army stated that:

²⁰⁰ US, Department of the Army, Office of the Judge Advocate General, Memorandum of law concerning the legality of the use of lasers as antipersonnel weapons, 29 September 1988, § 4, reprinted in Marian Nash, *Cumulative Digest of United States Practice in International Law, 1981-1988*, Department of State Publication 10120, Washington, D.C., 1993-1995, p. 3424.

²⁰¹ US, Marine Corps Reference Material for Marine Corps Law of Warfare Course, *Army War College Selected Readings, Advanced Course Law for the Joint Warfighter*, Vol. II, 2nd edition, 1989, p. 254, § b.

Although the United States has made the formal decision that for military, political, and humanitarian reasons it will not become a party to [AP I], U.S. officials have taken the position that the language of article 35(2) of Protocol I... is a codification of customary international law, and therefore binding upon all nations.²⁰²

200. In 1992, in a review of the legality of extended range anti-armour munition, the US Department of the Air Force stated that "international law prohibits the use, even against military objectives, of weapons which cause unnecessary suffering or superfluous injury".²⁰³

201. In 1993, in a legal review of the USSOCOM Special Operations Offensive Handgun, the Judge Advocate General of the US Department of the Army stated that:

Although President Ronald Reagan declined to submit [AP I] to the Senate for its advice and consent to ratification, the U.S. Government considers the language quoted from article 35(2) of Protocol I to be a codification of customary international law to the extent that it prohibits superfluous injury, as prohibited by Article 23c of the ... [1907 HR], and therefore binding upon all nations.²⁰⁴

202. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that it "has long taken the position that various principles of the international law of armed conflict would apply to the use of nuclear weapons as well as to other means and methods of warfare". It added that the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering "was intended to preclude weapons designed to increase the injury or suffering of the persons attacked beyond that necessary to accomplish the military objective. It does not prohibit weapons that may cause great injury or suffering if the use of the weapon is necessary to accomplish the military mission."²⁰⁵

203. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the US stressed that:

Returning to the claims that have been made regarding specific principles of the law of armed conflict, it has also been argued that nuclear weapons categorically cause unnecessary suffering or superfluous injury and therefore violate the law of armed conflict. This line of argument cannot be sustained. The unnecessary suffering principle prohibits the use of weapons designed specifically to increase the suffering of persons attacked beyond that necessary to accomplish a particular military objective. As a general matter, however, it does not prohibit the use of weapons that cause great injury and pain, as such. Under this principle, whether use of a

²⁰² US, Department of the Army, Office of the Judge Advocate General, Memorandum of Law on Sniper Use of Open-Tip Ammunition, 12 October 1990, § 3.

²⁰³ US, Department of the Air Force, Office of the Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 3.

²⁰⁴ US, Department of the Army, Office of the Judge Advocate General, Legal Review of USSOCOM Special Operations Offensive Handgun, 16 February 1993, p. 11.

²⁰⁵ US, Written statement before the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 21.

particular weapon causes unnecessary suffering depends, therefore, on whether its use and resultant effects are required to accomplish a legitimate military objective, a question which again cannot be answered in the abstract.²⁰⁶

204. In 1997, in a message to the US Senate analysing Article 3(3) of the 1996 Amended Protocol II to the CCW, the US President noted that “this rule is derived from Article 23 of [the 1907 HR]... It thus reiterates a proscription already in place as a matter of customary international law applicable to all weapons.”²⁰⁷

205. In a memorandum of law issued in 1997, the Judge Advocate General of the US Department of the Army stated, with reference to Article 23(e) 1907 HR, that “the law of war prohibits weapons calculated to cause unnecessary suffering”.²⁰⁸

206. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that:

The touchstone for legality of a weapon under traditional concepts in the law of war is whether that weapon’s intended use or method of employment is calculated to cause unnecessary suffering . . .

The Regulations to the Hague Convention on Land Warfare of 1907 codify the prohibition on the employment of arms, projectiles, or material “calculated to cause unnecessary suffering”. This customary prohibition requires a balancing of the military necessity in employing a weapon and the likely suffering occasioned by that employment. Any injury, collateral damage, or general suffering wrought by a weapon’s use should be justified by a military need. Historically, this analysis has involved comparisons to other existing technologies and comparable wounding mechanisms as well as a survey of the practice of other States regarding use of a particular weapon.

...

Oleoresin Capsicum is not calculated (i.e., designed), nor does it in fact cause unnecessary suffering. It is designed specifically to temporarily incapacitate violent or threatening subjects while reducing human suffering and is in consonance with the DoD [Non-Lethal Weapon] program. Its physiological effects, while relatively painful, are temporary and do not rise to the level of unnecessary suffering contemplated in the prohibition . . . Provided a military necessity justifies its employment, the principle of unnecessary suffering would not preclude employment of OC in appropriate circumstances.²⁰⁹

²⁰⁶ US, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/34, pp. 70–72.

²⁰⁷ US, Message from the US President to the Senate transmitting Amended Protocol II, Protocol II and Protocol IV to the 1980 CCW, Treaty Doc. 105-1, 7 January 1997.

²⁰⁸ US, Department of the Army, Office of the Judge Advocate General, Memorandum of Law for AMSTA-AR-CCH-C, Picatinny Arsenal, NJ 07806-5000, 25 July 1997, § 4,

²⁰⁹ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 4.

207. According to the Report on US Practice, it is the *opinio juris* of the US that international law forbids weapons or methods of warfare calculated to cause unnecessary suffering or superfluous injury.²¹⁰

208. In the plenary session of the CDDH, the representative of the SFRY deplored the fact that the Ad Hoc Committee on Conventional Weapons established by the CDDH had not been able to “specify which were the weapons which caused superfluous injury”. He further stated that his delegation “was convinced that the question of prohibition and restriction of such weapons and methods or means of warfare came under humanitarian law and not under disarmament negotiations”.²¹¹

209. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY (FRY) stated that:

The nature of the injuries of some of the members of the Yugoslav People’s Army show that forbidden means have been used in the armed conflict, before all ammunition suitable to inflict disproportionate and needless injuries, that reduce the chances of the injured to survive.

In that respect, the injuries of [a] soldier . . . are characteristic. He was hit in the tip of his right forearm and the round had crumbled and split the forearm bone, the tissue and thus blew the fist of the injured to bits. In the riddled channel and the surrounding tissue, pieces of a fragmented round were found. All that implies for the use of the so-called soft-nosed bullet.²¹²

210. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Zimbabwe stated that it fully shared the analysis by other States that “the threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that create unnecessary suffering”.²¹³

211. According to the Report on the Practice of Zimbabwe, Zimbabwe “does not employ any weapons meant to cause unnecessary suffering or superfluous injury, e.g. exploding bullets, incendiary weapons, booby-traps, etc.”.²¹⁴

III. Practice of International Organisations and Conferences

United Nations

212. In Resolution 2677 (XXV) adopted in 1970, the UN General Assembly advocated the need to “secure the full observance of human rights applicable

²¹⁰ Report on US Practice, 1997, Chapter 3.1.

²¹¹ SFRY, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 March 1977, p. 100, § 52.

²¹² SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 4.

²¹³ Zimbabwe, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/35, p. 27.

²¹⁴ Report on the Practice of Zimbabwe, 1998, Chapter 3.1.

in all armed conflicts". It called upon "all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 . . . and other humanitarian rules applicable in armed conflicts".²¹⁵

213. In two resolutions adopted in 1971 on respect for human rights in armed conflicts, the UN General Assembly called upon "all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907".²¹⁶

214. In a resolution adopted in 1973, the UN General Assembly requested that the CDDH promote an agreement concerning incendiary weapons. It called for urgent efforts by States "to seek, through possible legal means, the prohibition or restriction of the use of weapons that may cause unnecessary suffering". It welcomed ICRC proposals at the Conference aimed at "a reaffirmation of the fundamental general principles of international law prohibiting the use of weapons which are likely to cause unnecessary suffering". The General Assembly invited the Conference to "seek agreement on rules prohibiting or restricting" the use of "incendiary weapons, as well as other specific conventional weapons which may be deemed to cause unnecessary suffering".²¹⁷

215. In a resolution adopted in 1973, the UN General Assembly called for "full and effective application by all parties to armed conflicts of existing legal rules to such conflicts" and for acknowledgement of and compliance with the "obligations under the humanitarian instruments and [observance of] the international humanitarian rules that are applicable", e.g., the Hague Conventions of 1899 and 1907. The General Assembly invited the CDDH to consider a prohibition of "specific conventional weapons which may cause unnecessary suffering".²¹⁸ The US explained its abstention in the vote on this resolution because it felt that "an inappropriate form of participation in the conference of entities that are not States would raise the question as to whether the [CDDH] would continue to be a useful forum for negotiation of international conventions".²¹⁹

216. In a number of resolutions adopted between 1973 and 1977, the UN General Assembly called upon "all parties to armed conflicts to acknowledge and to comply with their obligations under the humanitarian instruments and to observe the international humanitarian rules which are applicable, in

²¹⁵ UN General Assembly, Res. 2677 (XXV), 9 December 1970, preamble.

²¹⁶ UN General Assembly, Res. 2852 (XXVI), 20 December 1971, § 1; Res. 2853 (XXVI), 20 December 1971, § 1.

²¹⁷ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble and § 1. The resolution was adopted by 103 votes in favour, none against and 18 abstentions (Belarus, Belgium, Bulgaria, Central African Republic, Czechoslovakia, France, GDR, Greece, Hungary, Israel, Italy, Mongolia, Poland, Saudi Arabia, Ukraine, USSR, UK and US).

²¹⁸ UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, preamble and § 4. The resolution was adopted by 107 votes in favour, none against and 6 abstentions (Costa Rica, Israel, Paraguay, Portugal, Spain and US).

²¹⁹ UN General Assembly, UN Doc. A/PV.2197, 12 December 1973, p. 8.

particular the Hague Conventions of 1899 and 1907".²²⁰ These resolutions dropped the word "any" or "all" before "armed conflict" without an explanation.

217. In numerous resolutions adopted between 1973 and 1982, the UN General Assembly stated that the suffering of civilians and combatants would be reduced if all States could agree on restricting or prohibiting weapons causing unnecessary suffering.²²¹

218. In a resolution adopted in 1974, the UN General Assembly invited the CDDH to consider the prohibition of weapons that cause unnecessary suffering and a prohibition or restriction of napalm and other incendiary weapons. It called urgently "for renewed efforts by Governments to seek, through legal means, the prohibition of weapons that cause unnecessary suffering".²²²

219. In a resolution adopted in 1976, the UN General Assembly invited the CDDH:

to accelerate its consideration of the use of specific conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects, and to do its utmost to agree for humanitarian reasons on possible rules prohibiting or restricting the use of such weapons.²²³

220. In a resolution adopted in 1977, the UN General Assembly decided to convene a UN conference to seek agreement on the prohibition or restriction of conventional weapons. It stated that it was convinced that:

The suffering of civilian populations and combatants could be significantly reduced if general agreement can be attained on the prohibition or restriction for humanitarian reasons of the use of specific conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects.²²⁴

The 21 States which abstained in the vote on this resolution did not oppose humanitarian principles *per se* or the convening of the conference, but had reservations on procedural arrangements, details of the organisation and the directions the resolution gave the conference, for example.²²⁵

²²⁰ UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, § 4; Res. 3319 (XXIX), 14 December 1974, § 3; Res. 3500 (XXX), 15 December 1975, § 1; Res. 31/19, 24 November 1976, § 1; Res. 32/44, 8 December 1977, § 6.

²²¹ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble; Res. 3255 (XXIX), 9 December 1974, preamble; Res. 31/64, 10 December 1976, preamble; Res. 32/152, 14 December 1976, preamble and § 2; Res. 33/70, 14 December 1978, preamble; Res. 34/82, 11 December 1979, preamble; Res. 35/153, 12 December 1980, preamble; Res. 36/93, 9 December 1981, preamble; Res. 37/79, 9 December 1982, preamble.

²²² UN General Assembly, Res. 3255 (XXIX), 9 December 1974, preamble and §§ 1 and 3. The resolution was adopted by 108 votes in favour, none against and 13 abstentions (Belarus, Bulgaria, Czechoslovakia, France, GDR, Hungary, Israel, Mongolia, Poland, Ukraine, USSR, UK and US).

²²³ UN General Assembly, Res. 31/64, 10 December 1976, § 2.

²²⁴ UN General Assembly, Res. 32/152, 19 December 1977, preamble and § 2. The resolution was adopted by 115 votes in favour, none against and 21 abstentions (Belarus, Belgium, Bulgaria, Canada, Cuba, Czechoslovakia, France, GDR, FRG, Hungary, Israel, Italy, Japan, Luxembourg, Mongolia, Poland, Turkey, Ukraine, USSR, UK and US).

²²⁵ UN General Assembly, UN Doc. A/PV.106, 19 December 1977, pp. 1735–1736.

221. The Final Document of the Special Session on Disarmament (SSODI) was adopted without a vote in 1978 to lay the foundation for an international disarmament strategy. In it, the UN General Assembly stated that “further international action should be taken to prohibit or restrict for humanitarian reasons the use of specific conventional weapons, including those which may be excessively injurious, cause unnecessary suffering or have indiscriminate effects”.²²⁶ It further stated that:

The United Nations Conference on Prohibition or Restrictions of the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects should seek agreement, in the light of humanitarian and military considerations, on the prohibition or restriction of use of certain conventional weapons including those which may cause unnecessary suffering or have indiscriminate effects.²²⁷

222. In a resolution adopted in 1979, the UN General Assembly took note of the developments of the CCW Conference. It reaffirmed that the General Assembly’s objective was a general agreement to prohibit or restrict conventional weapons “which might be deemed to be excessively injurious or to have indiscriminate effects”.²²⁸

223. In a resolution adopted in 1980, the UN General Assembly commended the 1980 CCW agreed upon, “with a view to achieving the widest possible adherence to these instruments”. It reaffirmed that the General Assembly’s objective was a general agreement to prohibit or restrict conventional weapons “which might be deemed to be excessively injurious”.²²⁹

224. In a resolution adopted in 1981, the UN General Assembly urged all States to accede to the 1980 CCW and its Protocols. It also reaffirmed the General Assembly’s

conviction that the suffering of civilian populations and of combatants would be further significantly reduced if general agreement could be attained on the prohibition or restriction for humanitarian reasons of the use of specific conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects.²³⁰

These statements were repeated in numerous other General Assembly resolutions.²³¹

²²⁶ UN General Assembly, Final Document of the Special Session of the General Assembly on Disarmament, 23 May–1 June 1978, UN Doc. A/S-10/2, 1978, § 23.

²²⁷ UN General Assembly, Final Document of the Special Session of the General Assembly on Disarmament, 23 May–1 June 1978, UN Doc. A/S-10/2, 1978, § 86.

²²⁸ UN General Assembly, Res. 34/82, 11 December 1979, preamble.

²²⁹ UN General Assembly, Res. 35/153, 12 December 1980, § 4 and preamble.

²³⁰ UN General Assembly, Res. 36/93, 9 December 1981, preamble.

²³¹ UN General Assembly, Res. 37/79, 9 December 1982, preamble and § 1; Res. 38/66, 15 December 1983, preamble and § 3; Res. 39/56, 12 December 1984, preamble and § 3; Res. 40/84, 12 December 1985, preamble and § 3; Res. 41/50, 3 December 1986, preamble and § 3; Res. 42/30, 30 November 1987, preamble and § 3; Res. 43/67, 7 December 1988, preamble and § 3; Res. 45/64, 4 December 1990, preamble and § 3; Res. 46/40, 6 December 1991, preamble and § 3; Res. 47/56, 9 December 1992, preamble and § 3; Res. 48/79, 16 December 1993, preamble

225. In a resolution adopted in 1997, the UN General Assembly explicitly mentioned that it based its recommendations on the “IHL principle that the right of parties to an armed conflict to choose means or weapons of warfare is not unlimited”.²³²

226. In 1969, in a report on respect for human rights in armed conflicts, the UN Secretary-General stated that the reference to “all armed conflicts” in Resolution 2444 (XXIII) was made to avoid “certain traditional distinctions as between international wars, internal conflicts, or conflicts which although internal in nature are characterized by a degree of direct or indirect involvement of foreign Powers or foreign nationals”. The Secretary-General discussed the effects of weapons of mass destruction, which were deemed to be both indiscriminate and of a nature to cause unnecessary suffering. He also identified precision-weapons that caused unnecessary suffering, e.g. expanding bullets.²³³

227. A survey prepared by the UN Secretariat in 1973 on existing rules of international law concerning the prohibition or restriction of the use of specific weapons listed the following examples of weapons that are deemed to cause unnecessary suffering according to military manuals: shotgun pellets, explosive and incendiary projectiles under 400 grams, projectiles treated with a substance designed to cause inflammation of wounds, dum-dum bullets, certain types of tracer ammunition, bayonets or lances with barbs, poison weapons, irregular shaped bullets, projectiles filled with glass.²³⁴

228. In 1995, in a report concerning the conflict in Guatemala, the Director of MINUGUA stated that “the Mission recommends that URNG issue precise instructions to its combatants to refrain from causing unnecessary harm to individuals and property, to take due care not to create additional risks to life in attacking military targets”.²³⁵

Other International Organisations

229. In a resolution adopted in 1994 on respect for international humanitarian law, the OAS General Assembly stated that it was “deeply disturbed by the testing, production, sale, transfer, and use of certain conventional weapons which may be deemed to be excessively injurious”. It urged all member States to accede to AP I and AP II and to the 1980 CCW.²³⁶

230. In a resolution adopted in 1998 on promotion of and respect for international humanitarian law, the OAS General Assembly stated that “international

and § 3; Res. 49/79, 15 December 1994, preamble and § 3; Res. 50/74, 12 December 1995, preamble and § 3; Res. 51/49, 10 December 1996, preamble and § 3; Res. 52/42, 9 December 1997, § 2; Res. 53/81, 4 December 1998, § 5; Res. 54/58, 1 December 1999, § III (3).

²³² UN General Assembly, Res. 52/38, 9 December 1997, preamble.

²³³ UN Secretary-General, Report on respect for human rights in armed conflicts, UN Doc. A/7720, 20 November 1969, p. 11 and pp. 59–63, §§ 183–201.

²³⁴ UN Secretariat, Respect for human rights in armed conflicts, Existing rules of international law concerning the prohibition or restriction of use of specific weapons, Survey, UN Doc. A/9215, 7 November 1973, pp. 204–205.

²³⁵ MINUGUA, Director, Second report, UN Doc. A/49/929, Annex, 29 June 1995, § 197.

²³⁶ OAS General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, preamble.

humanitarian law prohibits the use of weapons, projectiles, material, and methods of warfare that . . . cause excessive injury or unnecessary suffering".²³⁷

International Conferences

231. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the prohibition or restriction of the use of certain weapons in which it endorsed the view of the UN General Assembly in Resolution 2932 (XXVII) A that:

the widespread use of many weapons and the emergence of new methods of warfare that cause unnecessary suffering or are indiscriminate call urgently for renewed efforts by governments to seek, through legal means, the prohibition or restriction of the use of such weapons and of indiscriminate and cruel methods of warfare and, if possible, through measures of disarmament, the elimination of specific, especially cruel or indiscriminate, weapons.

The resolution urged the CDDH to "begin consideration at its 1974 session of the question of the prohibition or restriction of the use of conventional weapons which may cause unnecessary suffering or have indiscriminate effects" and invited the ICRC to convene in 1974 a conference of government experts to study the issue in depth.²³⁸

232. At the CCW Conference in 1979, the concept of unnecessary suffering was not discussed as such but the term was mentioned repeatedly.²³⁹

233. The 24th International Conference of the Red Cross in 1981 adopted a resolution on conventional weapons in which it noted with satisfaction the adoption of the 1980 CCW and its Protocols and invited States to become parties to them "as soon as possible, to apply them and examine the possibility of strengthening or developing them further".²⁴⁰

234. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it stressed that "proper attention should be given to other existing conventional weapons or future weapons which may cause unnecessary suffering or have indiscriminate effects".²⁴¹

235. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent stated that:

States which have not done so are encouraged to establish mechanisms and procedures to determine whether the use of weapons, whether held in their inventories or being procured or developed, would conform to the obligations binding

²³⁷ OAS General Assembly, Res. 1565 (XXVIII-O/98), 2 June 1998, preamble.

²³⁸ 22nd International Conference of the Red Cross, Tehran, 8–15 November 1973, Res. XIV.

²³⁹ UN Conference on prohibitions or restrictions of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects, UN Doc. A/CONF.95, 10–28 September 1979 and 15 September–10 October 1980.

²⁴⁰ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. IX, § 2.

²⁴¹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § H(h).

on them under international humanitarian law... States and the ICRC may engage in consultations to promote these mechanisms, and in this regard analyse the extent to which the ICRC *SIRUS (Superfluous Injury or Unnecessary Suffering) Project Report* to the 27th Conference and other available information may assist States.²⁴²

236. In the Final Declaration of the Second Review Conference of States Parties to the CCW in 2001, the High Contracting Parties solemnly declared:

their reaffirmation of the principles of international humanitarian law, as mentioned in the Convention, [including] the principle that prohibits the employment in armed conflicts of weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.²⁴³

237. In the Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the participants stated that they were “worried in the face of the rapid expansion of arms trade and the uncontrolled proliferation of weapons, notably those which can... cause unnecessary suffering”.²⁴⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

238. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following... According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In application of that second principle, States do not have unlimited freedom of choice of means in the weapons they use... In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say, a harm greater than that unavoidable to achieve legitimate military objectives... Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.²⁴⁵

239. In her dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Higgins stated that “it is not permitted in the choice of weapons

²⁴² 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.5, § 21.

²⁴³ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, Final Declaration, UN Doc. CCW/CONF.II/2, 2001, p. 10.

²⁴⁴ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Final Declaration, Niamey, 18–20 February 2002, preamble.

²⁴⁵ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 78–79.

to cause unnecessary suffering to enemy combatants, nor to render their death inevitable". In her discussion on the balancing of necessity and humanity, she stated that "a military target may not be attacked if collateral civilian casualties would be excessive in relation to the military advantage".²⁴⁶

240. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Guillaume stated that "the harm caused to combatants must not be 'greater than that unavoidable to achieve legitimate military objectives'". He added that "therefore the nuclear weapon cannot be considered as unlawful due to the only fact of sufferings that it is likely to cause. It would be advisable to compare these sufferings to the 'military advantages' offered or to 'the military objectives' followed."²⁴⁷

241. In his declaration in the *Nuclear Weapons case* before the ICJ in 1996, President Bedjaoui stated that the effect of nuclear weapons was such that they caused unnecessary suffering.²⁴⁸

242. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Fleischhauer stated that "such immeasurable suffering" amounted to "the negation of the humanitarian considerations underlying the law of armed conflict".²⁴⁹

243. In his dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Weeramantry stated that "the facts... are more than sufficient to establish that the nuclear weapon causes unnecessary suffering going far beyond the purposes of war".²⁵⁰

244. In his dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Shahabudeen stated that the balance between military advantage and suffering "has to be struck by States". An important factor affecting this balance was public conscience which could consider that no conceivable military advantage could justify the suffering. It was "not possible to ascertain the humanitarian character of [international humanitarian] principles without taking account of the public conscience". Even though the use of chemical weapons was arguably "a more efficient way of deactivating the enemy in certain circumstances than other means in use during the First World War, [it] did not suffice to legitimize its use".²⁵¹

245. In his dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Koroma, after describing the effects of atomic weapons in Hiroshima, Nagasaki and the Marshall Islands, stated that the radioactive effects were "more harmful" than those caused by poison gas and added "the

²⁴⁶ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Higgins, 8 July 1996, §§ 12 and 21.

²⁴⁷ ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Guillaume, 8 July 1996, § 5.

²⁴⁸ ICJ, *Nuclear Weapons case*, Declaration of Judge Bedjaoui, President of the ICJ, 8 July 1996, § 20.

²⁴⁹ ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Fleischhauer, 8 July 1996, § 2.

²⁵⁰ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Weeramantry, 8 July 1996, p. 48.

²⁵¹ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Shahabudeen, 8 July 1996, pp. 180–181, Part III, § 2.

above findings by the court should have led it inexorably to conclude that any use of nuclear weapons is unlawful under international law".²⁵²

246. In its decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadić case* in 1995, the ICTY Appeals Chamber supported the view that UN General Assembly Resolution 2444 (XXIII) dealt with both international and internal conflicts. It stated that "the application of certain rules of war in both internal and international armed conflicts is corroborated by resolutions 2444 and 2675".²⁵³

V. Practice of the International Red Cross and Red Crescent Movement

247. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "it is prohibited to use weapons of a nature to cause: a) superfluous injury or unnecessary suffering".²⁵⁴

248. In a background paper submitted to the Conference of Government Experts in 1971, the ICRC stated that the term "unnecessary suffering" was defined as "a question of sparing even combatants from injuries to no purpose or from suffering which exceeds what is necessary to put the adversary *hors de combat*".²⁵⁵

249. The ICRC Commentary on the Additional Protocols states that:

1419. The specific applications of the prohibition formulated in Article 23, paragraph 1(e), of the Hague Regulations, or resulting from the Declarations of St. Petersburg and The Hague, are not very numerous. They include:

1. explosive bullets and projectiles filled with glass, but not explosives contained in artillery missiles, mines, rockets and hand grenades;
2. "dum-dum" bullets, i.e., bullets which easily expand or flatten in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions or bullets of irregular shape or with a hollowed out nose;
3. poison and poisoned weapons, as well as any substance intended to aggravate a wound;
4. asphyxiating or deleterious gases;
5. bayonets with a serrated edge, and lances with barbed heads;
6. hunting shotguns are the object of some controversy, depending on the nature of the ammunition and its effects on a soft target.

1420. The weapons which are prohibited under the provisions of the Hague Law are, *a fortiori*, prohibited under [Article 35(2) AP I].²⁵⁶

²⁵² ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Koroma, 8 July 1996, p. 346.

²⁵³ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 110.

²⁵⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 394, see also § 912(a).

²⁵⁵ ICRC, *Rules Relative to Behaviour of Combatants*, Submitted to the First Session of the Conference of Government Experts, 24 May–12 June 1971, Geneva, January 1971, p. 6.

²⁵⁶ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1419–1420.

250. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the belligerents that “the right to choose methods or means of warfare is not unlimited. Weapons... likely to cause disproportionate suffering... are prohibited.”²⁵⁷

251. In 1992, the ICRC reminded a separatist entity that the use of chemical weapons caused superfluous injury and that it considered the prohibition of weapons causing superfluous injury to be customary and therefore applicable even in internal conflicts.²⁵⁸

252. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that “under international law, the use of arms... which may cause undue loss of life or excessive suffering is prohibited”.²⁵⁹

253. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “it is prohibited to employ weapons, munitions or methods of warfare of a nature to cause unnecessary suffering to persons *hors de combat* or which render their death inevitable”.²⁶⁰

254. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “the use of arms or methods of combat which needlessly increase the suffering of persons placed *hors de combat* or which make their death inevitable is prohibited”.²⁶¹

255. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the employment of “weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”, when committed in international or non-international armed conflicts, be subject to the jurisdiction of the Court.²⁶²

256. The ICRC’s SIrUS Project initiated in 1998 aimed to contribute to the evaluation of the lawfulness of weapons by indicating the health effects actually caused by commonly used weapons in the armed conflicts that have taken place over the last few decades. This material provided for some objectivity in the evaluation, in particular, of the expected health effects of a weapon that had to be weighed against the foreseen military utility. The findings of the SIrUS

²⁵⁷ ICRC, Press Release No. 1659, Middle East conflict: ICRC appeals to belligerents, 1 February 1991, *IRRC*, No. 280, 1991, p. 27.

²⁵⁸ ICRC archive document.

²⁵⁹ Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1 de enero de 1994, 3 January 1994, § 2(E).

²⁶⁰ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

²⁶¹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § II, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 1308–1309.

²⁶² ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(i) and 3(vii).

Project illustrated in particular the effects not normally seen on the battlefield, namely:

- disease other than that resulting from physical trauma from explosions or projectiles;
- abnormal physiological state or abnormal psychological state (other than the expected response to trauma from explosions or projectiles);
- permanent disability specific to the kind of weapon (with the exception of the effects of point-detonated anti-personnel mines – now widely prohibited);
- disfigurement specific to the kind of weapon;
- inevitable or virtually inevitable death in the field or a high hospital mortality level;
- grade 3 wounds among those who survive to hospital;
- effects for which there is no well-recognised and proven treatment which can be applied in a well-equipped field hospital.

The SirUS Project suggested that:

States, when reviewing the legality of a weapon, take the above facts into account by:

- establishing whether the weapon in question would cause any of the above effects as a function of its design, and if so:
- weigh the military utility of the weapon against these effects; and
- determine whether the same purpose could reasonably be achieved by other lawful means that do not have such effects.

The project also proposed that “States make new efforts a) to build a common understanding of the norms to be applied in the review of new weapons and b) to promote transparency in the conduct and results of such reviews”.²⁶³

VI. Other Practice

257. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “it is prohibited to employ weapons . . . of a nature to cause unnecessary losses or excessive suffering”.²⁶⁴

258. Rule A3 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts, adopted in 1990 by the Council of the IIHL, states that “the prohibition of superfluous injury or unnecessary suffering is a general rule applicable in non-international armed conflicts. It prohibits, in particular, the use of means of warfare which uselessly aggravate the sufferings of disabled men or render their death inevitable.”²⁶⁵

²⁶³ Robin M. Coupland and Peter Herby, “Review of the legality of weapons: a new approach. The SirUS Project”, *IRRC*, No. 835, 1999, pp. 583–592.

²⁶⁴ ICRC archive document.

²⁶⁵ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule A3, *IRRC*, No. 278, 1990, pp. 389–390.

259. In 1993, the permanent representative of Brazil to the UN and other international organisations in Geneva wrote an article in which he declared that “since the time when chemical weapons were first used, the Brazilian Government has consistently argued against the use of these and all other inhumane means of warfare”. He added that “the word ‘inhumane’ is employed here, in accordance with common usage, to mean weapons that cause unnecessary devastation and suffering”.²⁶⁶

260. In 1995, the IHL stated that any declaration on minimum humanitarian standards should be based on “principles . . . of jus cogens, expressing basic humanitarian consideration[s] which are recognized to be universally binding”. According to the IHL, this included the principle that “in hostilities, it is prohibited to cause superfluous injury or unnecessary suffering”.²⁶⁷

261. At its 50th General Assembly in 1998, the World Medical Association (WMA) adopted a resolution in which it stated that it warmly welcomed and supported the ICRC’s SIrUS Project and called upon National Medical Associations to endorse the Project.²⁶⁸

B. Weapons That Are by Nature Indiscriminate

Note: *For practice concerning the use of means and methods of combat which cannot be directed at a specific military objective or the effects of which cannot be limited as required by international humanitarian law, see Chapter 3, section B.*

I. Treaties and Other Instruments

Treaties

262. The preamble to the 1980 CCW recalls “the general principle of the protection of the civilian population against the effects of hostilities”.

263. Upon signature of the 1980 CCW, Romania affirmed “once again its decision to act, together with other States, to ensure the prohibition or restriction of all conventional weapons which . . . have indiscriminate effects”.²⁶⁹

264. The preamble to the 1997 Ottawa Convention provides that the States parties are “basing themselves . . . on the principle that a distinction must be made between civilians and combatants”.

265. Pursuant to Article 8(2)(b)(xx) of the 1998 ICC Statute, the following constitutes a war crime in international armed conflicts:

²⁶⁶ Celso L. N. Amorim, “The Chemical Weapons Convention and the Security and the Developments Needs of Brazil”, *Disarmament*, Vol. 16, 1993, No. 1, p. 111.

²⁶⁷ IHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, §§ 1 and 14, reprinted in Report of the Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, pp. 8 and 10.

²⁶⁸ WMA, 50th General Assembly, Resolution on the SIrUS Project, Ottawa, October 1998.

²⁶⁹ Romania, Declaration made upon signature of the CCW, 8 April 1982, § 5.

employing weapons, projectiles and material and methods of warfare . . . which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute.

266. Upon signature of the 1998 ICC Statute, Egypt stated that its understanding of Article 8 of the Statute was as follows:

- (a) The provisions of the Statute with regard to the war crimes referred to in article 8 in general and article 8, paragraph 2(b) in particular shall apply irrespective of the means by which they were perpetrated or the type of weapon used, including nuclear weapons, which are indiscriminate in nature . . . in contravention of international humanitarian law.
...
- (d) Article 8, paragraph 2(b)(xvii) and (xviii) of the Statute shall be applicable to all types of emissions which are indiscriminate in their effects and the weapons used to deliver them, including emissions resulting from the use of nuclear weapons.²⁷⁰

Other Instruments

267. Article 14 of the 1956 New Delhi Draft Rules provides that:

Without prejudice to the present or future prohibition of certain specific weapons, the use is prohibited of weapons whose harmful effects – resulting in particular from the dissemination of incendiary, chemical, bacteriological, radioactive or other agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

268. Paragraph 42(b) of the 1994 San Remo Manual states that:

In addition to any specific prohibitions binding upon the parties to a conflict, it is forbidden to employ methods or means of warfare which:

- ...
- (b) are indiscriminate, in that:
 - (i) they are not, or cannot be, directed against a specific military objective;
 - or
 - (ii) their effects cannot be limited as required by international law as reflected in this document.

269. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xx), “employing weapons, projectiles and material and methods of warfare . . . which are inherently indiscriminate in violation of the international law of armed conflict” constitutes a war crime in international armed conflicts.

²⁷⁰ Egypt, Declarations made upon signature of the 1998 ICC Statute, 26 December 2000, § 4(a) and (d).

II. National Practice

Military Manuals

270. Australia's *Commanders' Guide* states that "some weapons and weapons systems are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law, are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering."²⁷¹ It also states that "both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion".²⁷² It also states poison or poisoned weapons are prohibited "because of their potential to be indiscriminate in application".²⁷³ With respect to weapons deemed to be legal, the Guide notes that "all legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used indiscriminately."²⁷⁴ In addition, it underlines that "weapons which cannot be directed at military objectives or the effect of which cannot be limited are prohibited".²⁷⁵ The Guide also states that:

Indiscriminate use is placement of such weapons [i.e. mines, booby traps and other devices] which:

- a. is not on, or directed at, a military objective; or
- b. employs a method or means of delivery which cannot be directed at a specific military objective; or
- c. may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.²⁷⁶

271. Australia's *Defence Force Manual* states that "some weapons and weapons systems are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law, are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering."²⁷⁷ It also states that poison or poisoned weapons are prohibited "because of their potential to be indiscriminate".²⁷⁸ Likewise, according to the manual, "both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion".²⁷⁹ With respect to weapons deemed to be legal, the manual notes that "all legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used indiscriminately."²⁸⁰

²⁷¹ Australia, *Commanders' Guide* (1994), § 304.

²⁷² Australia, *Commanders' Guide* (1994), § 306.

²⁷³ Australia, *Commanders' Guide* (1994), § 307.

²⁷⁴ Australia, *Commanders' Guide* (1994), § 311.

²⁷⁵ Australia, *Commanders' Guide* (1994), § 931.

²⁷⁶ Australia, *Commanders' Guide* (1994), § 937.

²⁷⁷ Australia, *Defence Force Manual* (1994), § 304.

²⁷⁸ Australia, *Defence Force Manual* (1994), § 406.

²⁷⁹ Australia, *Defence Force Manual* (1994), § 414.

²⁸⁰ Australia, *Defence Force Manual* (1994), § 415.

272. According to Belgium's Teaching Manual for Officers, it is especially forbidden to use indiscriminate weapons.²⁸¹

273. Canada's LOAC Manual states that some weapons are "totally prohibited by the LOAC" because they are indiscriminate. It further states that:

Weapons that are indiscriminate in their effect are prohibited. A weapon is indiscriminate if it might strike or affect legitimate targets and civilians or civilian objects without distinction. Therefore, a weapon that cannot be directed at a specific legitimate target or the effects of which cannot be limited as required by the law of armed conflict is prohibited. For example, it may be argued that the Scud missile used in the Gulf War falls in that category.²⁸²

The manual adds that the use of poison or poisoned weapons is

illegal because of their potential to be indiscriminate. For example, the poisoning or contamination of any source of drinking water is prohibited. Posting a notice that the water has been contaminated or poisoned does not make this practice legal, as both civilians and combatants might drink from that water source and be equally affected.²⁸³

As regards lawful weapons, the manual states that "legal weapons are limited in the way in which they may be used. Specifically, no weapons may be used indiscriminately."²⁸⁴

274. Colombia's Basic Military Manual states that the use of weapons which "cause unnecessary and indiscriminate, extensive, lasting and serious damage to people and the environment" is prohibited.²⁸⁵

275. Ecuador's Naval Manual states that "the use of weapons which by their nature are incapable of being directed specifically against military objectives, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect".²⁸⁶ The manual further specifies that:

Weapons that are incapable of being controlled in the sense that they can be directed at a military target are forbidden as being indiscriminate in their effect. Drifting armed contact mines and long-range unguided missiles (such as the German V-1 and V-2 rockets of World War II) fall into this category. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained. An artillery round that is capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage. Conversely, uncontrolled balloon-borne bombs, such as those released by the Japanese against the west coast of the United States and Canada in World War II, lack that capability of direction and are, therefore, unlawful.²⁸⁷

²⁸¹ Belgium, *Teaching Manual for Officers* (1994), p. 36, § 17.

²⁸² Canada, *LOAC Manual* (1999), p. 5-2, §§ 10 and 11.

²⁸³ Canada, *LOAC Manual* (1999), p. 5-2, § 20.

²⁸⁴ Canada, *LOAC Manual* (1999), p. 5-3, § 32.

²⁸⁵ Colombia, *Basic Military Manual* (1995), pp. 49-50, see also p. 30.

²⁸⁶ Ecuador, *Naval Manual* (1989), § 9.1. ²⁸⁷ Ecuador, *Naval Manual* (1989), § 9.1.2.

276. France's LOAC Teaching Note states that, "because of their indiscriminate effects", the use of poison, chemical weapons, biological and bacteriological weapons, dum-dum bullets or other projectiles with expanding heads, anti-personnel mines, weapons that injure by non-detectable fragments, blinding laser weapons, and torpedoes without self-destruction mechanisms "is totally prohibited by the law of armed conflicts".²⁸⁸

277. France's LOAC Manual states that weapons that have "indiscriminate effects" are prohibited.²⁸⁹ It adds that, "because of their indiscriminate effects", the use of poison, chemical weapons, biological and bacteriological weapons, dum-dum bullets or other projectiles with expanding heads, anti-personnel mines, weapons that injure by non-detectable fragments, blinding laser weapons, and torpedoes without self-destruction mechanisms "is totally prohibited by the law of armed conflicts".²⁹⁰

278. Germany's Soldiers' Manual provides that "it is prohibited to use means or methods of warfare which are intended or of a nature . . . to strike military targets and civilian persons or civilian objects indiscriminately".²⁹¹

279. Germany's IHL Manual states that "it is prohibited, in particular, to employ means or methods of warfare, which are intended to or of a nature . . . to strike military targets and civilian persons or civilian objects indiscriminately".²⁹²

280. Israel's Manual on the Laws of War states that:

Since St. Petersburg, there have been several universally accepted rules regarding weapons:

...

Another important goal to attain is control over the weapons to ensure that the harm they inflict is limited only to the battlefield and the combatants thereon, and does not spread out of control to innocent parties such as civilians. Weapons that do not distinguish between targets are prohibited.²⁹³

281. South Korea's Operational Law Manual provides that "weapons that are by nature indiscriminate shall be prohibited".²⁹⁴

282. New Zealand's Military Manual states that "weapons which cannot be directed at military objectives or the effects of which cannot be limited are prohibited".²⁹⁵

283. Nigeria's Military Manual states that "the basic principles are that every commander has the right to choose the means and methods of type of warfare" but has to "distinguish between military and civilian objects".²⁹⁶

284. Russia's Military Manual provides that:

²⁸⁸ France, *LOAC Teaching Note* (2000), p. 6. ²⁸⁹ France, *LOAC Manual* (2001), p. 53.

²⁹⁰ France, *LOAC Manual* (2001), p. 54. ²⁹¹ Germany, *Soldiers' Manual* (1991), p. 5.

²⁹² Germany, *IHL Manual* (1996), § 302.

²⁹³ Israel, *Manual on the Laws of War* (1998), pp. 11–12, see also p. 37.

²⁹⁴ South Korea, *Operational Law Manual* (1996), p. 129.

²⁹⁵ New Zealand, *Military Manual* (1992), § 509(4).

²⁹⁶ Nigeria, *Military Manual* (1994), p. 42, § 11.

Prohibited means of warfare are the various weapons of an indiscriminate character and/or those that cause unnecessary suffering:

- a) bullets that expand or flatten easily in the human body;
- b) projectiles used with the only purpose to spread asphyxiating or poisonous gases;
- c) projectiles weighing less than 400 grammes, which are either explosive or charged with fulminating or inflammable substances;
- d) poisons or poisoned weapons;
- e) asphyxiating, poisonous or other similar gases and bacteriological means;
- f) bacteriological (biological) and toxin weapons;
- g) environmental modification techniques having widespread, long-term or serious effects as means of destruction, damage or injury;
- h) all types of weapons of an indiscriminate character or that cause excessive injury or suffering.²⁹⁷

285. Sweden's IHL Manual states that, according to the criteria given in the 1868 St. Petersburg Declaration and in the 1907 Hague Convention (IV),

Weapons shall be considered particularly inhuman if they:

- cause unnecessary suffering or superfluous damage, or
- have indiscriminate effects, meaning that the weapon effects strike military objectives and civilian persons without any distinction.

These criteria have been used in all arms limitation negotiations in recent years.²⁹⁸

286. Switzerland's Basic Military Manual, with respect to nuclear weapons, refers to Article 51 AP I and states that "it is prohibited to use weapons the effects of which can harm civilian or military objectives without discrimination".²⁹⁹

287. The US Air Force Pamphlet states that:

The existing law of armed conflict does not prohibit the use of weapons whose destructive force cannot strictly be confined to the specific military objective. Weapons are not unlawful simply because their use may cause incidental casualties to civilians and destruction of civilian objects. Nevertheless, particular weapons or methods of warfare may be prohibited because of their indiscriminate effects . . . Indiscriminate weapons are those incapable of being controlled, through design or function, and thus they can not, with any degree of certainty, be directed at military objectives. For example, in World War II German V-1 rockets, with extremely primitive guidance systems yet generally directed toward civilian populations, and Japanese incendiary balloons without any guidance systems were regarded as unlawful. Both weapons were, as deployed, incapable of being aimed specifically at military objectives. Use of such essentially unguided weapons could be expected to cause unlawful excessive injury to civilians and damage to civilian objects . . . Some weapons, though capable of being directed only at military objectives, may have otherwise uncontrollable effects so as to cause disproportionate civilian injuries or damage. Biological warfare is a universally agreed illustration

²⁹⁷ Russia, *Military Manual* (1990), Article 6.

²⁹⁸ Sweden, *IHL Manual* (1991), Section 3.3.1, pp. 78-79.

²⁹⁹ Switzerland, *Basic Military Manual* (1987), Article 24.

of such an indiscriminate weapon. Uncontrollable effects, in this context, may include injury to the civilian population of other states as well as injury to an enemy's civilian population. Uncontrollable refers to effects which escape in time or space from the control of the user as to necessarily create risks to civilian persons or objects excessive in relation to the military advantage anticipated. International law does not require that a weapon's effects be strictly confined to the military objectives against which it is directed, but it does restrict weapons whose foreseeable effects result in unlawful disproportionate injury to civilians or damage to civilian objects.³⁰⁰

As regards new weapons, the Pamphlet states that:

A new weapon or method of warfare may be illegal, per se, if it is restricted by international law including treaty or international custom . . . [T]he legality of new weapons . . . is determined by whether the weapon's . . . effects are indiscriminate as to cause disproportionate civilian injury or damage to civilian objects.³⁰¹

288. The US Air Force Commander's Handbook states that:

Weapons that are incapable of being controlled enough to direct them against a military objective . . . are forbidden. A weapon is not unlawful simply because its use may cause incidental or collateral casualties to civilians, as long as those casualties are not foreseeably excessive in light of the expected military advantage. Using unpowered and uncontrolled balloons to carry bombs is thus forbidden, since these weapons would be incapable of being directed against a military objective.³⁰²

289. The US Naval Handbook states that "weapons which by their nature are incapable of being directed specifically against military objectives, and therefore that put noncombatants at equivalent risk, are forbidden due to their indiscriminate effect".³⁰³ The Handbook further specifies that:

Weapons that are incapable of being controlled (i.e., directed at a military target) are forbidden as being indiscriminate in their effect. Drifting armed contact mines and long-range unguided missiles (such as the German V-1 and V-2 rockets of World War II) fall into this category. A weapon is not indiscriminate simply because it may cause incidental or collateral civilian casualties, provided such casualties are not foreseeably excessive in light of the expected military advantage to be gained. An artillery round that is capable of being directed with a reasonable degree of accuracy at a military target is not an indiscriminate weapon simply because it may miss its mark or inflict collateral damage. Conversely, uncontrolled balloon-borne bombs, such as those released by the Japanese against the west coast of the United States and Canada in World War II, lack that capability of direction and are, therefore, unlawful.³⁰⁴

290. The YPA Military Manual of the SFRY (FRY) prohibits "blind weapons" the effects of which "cannot be controlled during their use".³⁰⁵

³⁰⁰ US, *Air Force Pamphlet* (1976), § 6-3(c). ³⁰¹ US, *Air Force Pamphlet* (1976), § 6-7(a).

³⁰² US, *Air Force Commander's Handbook* (1980), § 6-2(b).

³⁰³ US, *Naval Handbook* (1995), § 9.1. ³⁰⁴ US, *Naval Handbook* (1995), § 9.1.2.

³⁰⁵ SFRY (FRY), *YPA Military Manual* (1988), § 102.

National Legislation

291. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, the following constitutes a war crime in international armed conflicts:

employing weapons, projectiles, materials and methods of combat... which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles, material and methods of combat are the subject of a comprehensive prohibition.³⁰⁶

292. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.³⁰⁷

293. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.³⁰⁸

294. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "employing weapons, projectiles and material... which are inherently indiscriminate" in international armed conflicts, is a crime.³⁰⁹

295. Under Mali's Penal Code, "employing weapons, projectiles, materials and methods of warfare... which are inherently indiscriminate in violation of the international law of armed conflicts, provided that such means are the subject of a comprehensive prohibition" is a war crime in international armed conflicts.³¹⁰

296. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.³¹¹

297. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.³¹²

298. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xx) of the 1998 ICC Statute.³¹³

National Case-law

299. No practice was found.

³⁰⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(s).

³⁰⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

³⁰⁸ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁰⁹ Georgia, *Criminal Code* (1999), Article 413(d).

³¹⁰ Mali, *Penal Code* (2001), Article 31(i)(20).

³¹¹ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³¹² Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

³¹³ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

Other National Practice

300. In 1995, in a statement at the First Review Conference of States Parties to the CCW, the Australian delegation stated that:

Our presence at this conference reflects a shared belief that even the harsh reality of armed conflict should be tempered by humanitarian constraints. Participants in the diplomatic conferences on humanitarian law in the late 1970s concluded that the international community should develop a framework for specific regulations on the use of those conventional weapons which are indiscriminate or disproportionate in their effects. Those weapons have come to include landmines and booby traps, incendiary devices and weapons which injure by means of non-detectable fragments.³¹⁴

301. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia, admitting that “to date, international efforts have not culminated in an international convention banning the threat or use of nuclear weapons in all circumstances”, quoted UN General Assembly Resolution 1653 (XVI) according to which “the use of nuclear and thermo-nuclear weapons would . . . cause indiscriminate suffering” to conclude that “the use of nuclear weapons would be contrary to international law”.³¹⁵

302. In 1973, in its comments on the UN Secretary-General’s report on napalm and other incendiary weapons and all aspects of their possible use, Canada stated that:

Broadly, there should be concern with the use of all types of weapons in ways which could . . . be indiscriminate in effect; for this reason, the protocols additional to the Geneva Conventions of 1949 which are currently being prepared under the auspices of the International Committee of the Red Cross in close co-operation with the United Nations General Assembly, should reaffirm the existing principles and rules of conventional and customary international law of armed conflicts which apply generally to the choice and use of weapons by States in armed conflict and are contained, *inter alia*, in the Hague Declaration [concerning Asphyxiating Gases] of 1899, the Hague Conventions of 1907 and the Geneva [Gas] Protocol of 1925.³¹⁶

303. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Canada stated that “agreement was lacking on standards by which . . . ‘indiscriminate effects’ could be measured”.³¹⁷

304. At the CDDH, Canada stated that:

The definition of indiscriminate attack contained in paragraph 4 of Article 46 [now Article 51] is not intended to mean that there are means of combat the use of which

³¹⁴ Australia, Statement of 26 September 1995 at the First Review Conference of States Parties to the CCW, Vienna, 25 September–13 October 1995, reprinted in *Australian Year Book of International Law*, Vol. 16, 1995, p. 732.

³¹⁵ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, pp. 43–44.

³¹⁶ Canada, Comments on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207/Add.1, 17 December 1973, p. 2.

³¹⁷ Canada, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 14, § 31.

would constitute an indiscriminate attack in all circumstances. It is our view that this definition takes account of the circumstances, as evidenced by the examples listed in paragraph 5 to determine the legitimacy of the use of means of combat.³¹⁸

305. At the Second Review Conference of States Parties to the CCW in 2001, China declared that “the impermissibility of using means of warfare that . . . had indiscriminate effects had become a universally accepted principle”.³¹⁹

306. In 1977, during a debate in the First Committee of the UN General Assembly, Cyprus referred to the Stockholm International Peace Research Institute (SIPRI), which had stated in its report on the law of war and dubious weapons that indiscriminate weapons were prohibited by international law.³²⁰

307. In 1988, during a debate at the Fifteenth Special Session of the UN General Assembly, Ecuador stated that “weapons, . . . which threaten equally belligerents and the helpless civilian population, must be the subject of a ban without reservations or limitations”.³²¹

308. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Ecuador stated that:

The use of nuclear weapons does not discriminate by general norm the military objectives from civil objectives. This factor equally attends against a fundamental principle of the International Humanitarian Law: which takes care of the protection of innocent people during war times.

...

... The uncontrollable effects that a nuclear device has can easily go against the laws and the uses of the war.³²²

309. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Egypt stated that “time-delay[ed] weapons . . . were . . . indiscriminate”.³²³ In a later statement in 1976, Egypt also advocated a “total prohibition” of weapons that had indiscriminate effects.³²⁴

310. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that the use of nuclear weapons “cannot at all be legal” because:

by their inherent qualitative and quantitative characteristics of their effect, nuclear weapons necessarily have cataclysmic and indiscriminate effects and

³¹⁸ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 179.

³¹⁹ China, Statement at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/SR.2, 16 January 2002, § 41.

³²⁰ Cyprus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.44, 25 November 1977, p. 17.

³²¹ Ecuador, Statement at the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, p. 28.

³²² Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2, §§ D and E.

³²³ Egypt, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.6, 22 March 1974, p. 49, § 14.

³²⁴ Egypt, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.26, 18 May 1976, p. 272, § 61.

cannot distinguish between combatants and non-combatants and between protected and unprotected objects, and are expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.³²⁵

311. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

The use of nuclear weapons is prohibited not because they are or they are called nuclear weapons. They fall under the prohibitions of the fundamental and mandatory rules of humanitarian law which long predate them, by their effects; not because they are nuclear, but because they are indiscriminate weapons of mass destruction.³²⁶

312. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, France stated that:

29. ... Each weapon, with its characteristics, its effects and its method of use, had to be considered separately, if specific conclusions have to be reached.
30. ... The more important concept of indiscriminate effects might perhaps be applicable to some weapons, but related more often to their method of use. For instance, the mine became indiscriminate only when used as a drifting mine. Indiscriminateness lay much more in the use made of a weapon and in the brain of the commanding officer than in the weapon itself.³²⁷

313. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, France stated that:

The fact that the [CDDH] took into consideration only conventional weapons also follows from the creation therein of an *ad hoc* commission on "conventional weapons". Moreover, by its resolution 22, it [the CDDH] recommended the convocation of a conference "with a view to reaching a) agreements on prohibitions or restrictions on the use of specific conventional weapons including those which may be deemed to... have indiscriminate effects, taking into account humanitarian and military considerations; and b) agreement on a mechanism for the review of any such agreements and for the consideration of proposals for further such agreement".

...

It furthermore appears that the States which participated in the conference considered that the rules figuring in the protocol cannot in themselves suffice to establish the illegality of the use of specific weapons, to whatever type they might belong.

...

³²⁵ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, June 1995, § 18; see also Written comments of Egypt on other written statements submitted to the ICJ, *Nuclear Weapons case*, September 1995, §§ 53–55.

³²⁶ Egypt, Oral pleadings before the ICJ, *Nuclear Weapons case*, 1 November 1995, Verbatim Record CR 95/23, p. 34.

³²⁷ France, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.15, 7 March 1975, p. 146, §§ 29–30.

Also, one cannot but ascertain the absence of a customary rule prohibiting the use of nuclear weapons.

...

It is true that a certain trend of opinion tries to prove the existence of a legal principle of the prohibition of nuclear weapons not by relying on positive norms specifically dealing with such weapons, but by constructing a reasoning on the basis of other rules of international law. Without directly mentioning the weapons in question, it is said that these rules could be applied to them [i.e. the weapons], by way of implication or by way of extension. For instance, the idea is sometimes put forward that certain rules in force of humanitarian law and the law of war would involve the prohibition of nuclear weapons. The supporters of that theory base themselves especially on diverse rules or principles enunciated in [AP I] – without questioning which [of these rules] are of customary nature and which are of conventional nature – and especially . . . the prohibition of indiscriminate attacks in the terms of article 51 of the protocol . . .

The government of France does not deem it necessary . . . to discuss in detail such reasoning, which it formally rejects . . . Indeed, if one cannot contest that protocol I of 1977 expresses, in some respects, general basic principles of existing law, it is obvious that . . . with respect to others, it constitutes a development . . .

Moreover, to follow the reasoning recalled above, once the basic customary principles applicable to nuclear weapons were drawn out and defined, one would have to establish that a rule prohibiting the use of these weapons follows from it.³²⁸

314. At the CDDH, the FRG stated that:

The definition of indiscriminate attacks contained in paragraph 4 of Article 46 [now Article 51 AP I] is not intended to mean that there are means of combat the use of which would constitute an indiscriminate attack in all circumstances. Rather, the definition is intended to take account of the fact that the legality of the use of means of combat depends upon circumstances, as shown by the examples listed in paragraph 5. Consequently the definition does not prohibit as indiscriminate any specific weapon.³²⁹

315. In 1977, during a debate in the First Committee of the UN General Assembly, the Holy See condemned the use of indiscriminate weapons.³³⁰

316. The Report on the Practice of India states that:

The Geneva Convention norms regarding use of indiscriminate weapons are applicable by virtue of the Geneva Conventions Act. Although it is not specifically made applicable to internal conflicts, yet it is possible to suggest on the basis of the practice of not using such weapons that in India such weapons are prohibited in times of internal conflict.³³¹

³²⁸ France, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, June 1994, pp. 27–31, §§ 23–26.

³²⁹ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 187–188.

³³⁰ Holy See, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.24, 3 November 1977, p. 76.

³³¹ Report on the Practice of India, 1997, Chapter 3.3.

317. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that:

Some of the principles of humanitarian international law from which one can deduce the illegitimacy of the use of nuclear weapons are: . . . Prohibition of the use of instruments that cause indiscriminate effects, including means and methods that are used suddenly and equally against both civilian and military targets.³³²

318. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Iran stated that “the prohibition of weapons or tactics that cause indiscriminate harm between combatants and non combatants is another argument against the legality of the use of nuclear weapons”.³³³

319. According to the Report on the Practice of Iran, Iran’s “*opinio juris* is supportive of not using indiscriminate weapons (because in Iran’s view civilians must be protected against war effects)”.³³⁴

320. In 1991, during a debate in the First Committee of the UN General Assembly, Israel advocated that all weapons that can kill civilians indiscriminately be considered weapons of mass destruction. It gave Scud missiles as an example of this class of weapon.³³⁵

321. According to the Report on the Practice of Israel, Israel “does not make use of inaccurate weapon systems which are liable, by their very nature, to strike at locations far removed from their original targets” and considers Scud missiles and Katyusha rockets to be indiscriminate.³³⁶

322. At the CDDH, Italy stated that:

There was nothing in paragraph 4 [of Article 46, now Article 51 AP I] to show that certain methods or means of combat were prohibited in all circumstances by the Protocol except where an explicit prohibition was established by international rules in force for the State concerned with regard to certain weapons or methods.³³⁷

323. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan stated that “the radiation released by [nuclear] weapons cannot be confined to specific military targets”.³³⁸

324. The Report on the Practice of Jordan states that, while Jordan has no official specific interpretation of the concept of indiscriminate weapons, it does

³³² Iran, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 2; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 1.

³³³ Iran, Oral pleadings before the ICJ, *Nuclear Weapons case*, 6 November 1995, p. 1.

³³⁴ Report on the Practice of Iran, 1997, Chapter 3.3.

³³⁵ Israel, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.19, 28 October 1991, pp. 24–25; Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.34, 12 November 1991, p. 18.

³³⁶ Report on the Practice of Israel, 1997, Chapter 3.3.

³³⁷ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 122.

³³⁸ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, 7 November 1995, Verbatim Record CR 95/27, p. 36.

not “use, manufacture or export landmines, V-2 bombs or missiles that cannot be accurately guided”.³³⁹

325. According to the Report on the Practice of South Korea, South Korea considers the prohibition of the use of indiscriminate weapons to be part of customary international law.³⁴⁰ It refers to a presidential declaration in 1991 which stated that South Korea would not obtain these weapons.³⁴¹

326. According to the Report on the Practice of Kuwait, Kuwait is of the opinion that indiscriminate weapons must be prohibited.³⁴²

327. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Lesotho stated that “any use of nuclear weapons, even in self-defense, would violate international humanitarian law, including the Hague and Geneva Conventions, which prohibit as practices of war, indiscriminate killing”.³⁴³

328. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Malaysia stated that “nuclear weapons are not just another weapon. Their nature and effect are such that they are inherently incapable of being limited with any degree of certainty to a specific military target.”³⁴⁴

329. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands stated that “any use of nuclear weapons violates the laws of war including the Geneva and Hague Conventions and the United Nations Charter. Such laws prohibit . . . the use of indiscriminate weapons.”³⁴⁵

330. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands stated that “nuclear weapons, by their nature, are indiscriminate in their effects – and very seriously so”.³⁴⁶

331. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Mexico stated that “the principle of discrimination prohibits the use of weapons that fail to discriminate between civilian and military personnel”.³⁴⁷

332. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Nauru stated that “the nuclear weapons for which the status of legality

³³⁹ Report on the Practice of Jordan, 1997, Chapter 3.3.

³⁴⁰ Report on the Practice of South Korea, 1997, Chapter 3.3.

³⁴¹ Report on the Practice of South Korea, 1997, Chapter 3.3, referring to Presidential Declaration to Achieve Denuclearization and Peace of the Korean Peninsula, 8 November 1991.

³⁴² Report on the Practice of Kuwait, 1997, Chapter 3.3.

³⁴³ Lesotho, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

³⁴⁴ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, p. 22; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, pp. 5–6.

³⁴⁵ Marshall Island, Written statement submitted to the ICJ, *Nuclear Weapons case*, 22 June 1995, § 5.

³⁴⁶ Marshall Islands, Oral pleadings before the ICJ, *Nuclear Weapons case*, 14 November 1995, Verbatim Record CR 95/32, p. 23.

³⁴⁷ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 25; see also Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 77[d].

is claimed should be capable of distinguishing between military objectives and civilian objects".³⁴⁸

333. In 1969, during a debate in the Third Committee of the UN General Assembly, the Netherlands stated that it was:

essential to update and broaden the Hague Conventions and the 1925 Geneva [Gas] Protocol, primarily in so far as related to international security and the protection of human rights, and to extend their application to cover armed conflicts which were not international in character.³⁴⁹

334. In 1992, during a debate in the First Committee of the UN General Assembly, the Netherlands appealed to States to adhere to the 1980 CCW, arguing that "universal adherence would compel States not to use such weapons any more in a military conflict and it would at the same time make it more difficult for such weapons to be used in internal conflicts against civilians".³⁵⁰

335. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that:

the general principles of international humanitarian law in armed conflict also apply to the use of nuclear weapons. Two principles, in particular, which form part of that law are the prohibition on making the civilian population as such the target of an attack and the prohibition on attacking military targets if this would cause disproportionate harm to the civilian population. The applicability of general principles of international humanitarian law in armed conflict – among which must also be counted the principle laid down in Article 22 of the 1907 Hague Regulations that the right of a belligerent to adopt means of injuring the enemy is not unlimited – to the use of nuclear weapons was also confirmed as long ago as 1965 in Resolution XXVIII of the 20th International Conference of the Red Cross (Vienna) which was passed unanimously. Consensus on this point was also reached at the diplomatic conference on Additional Protocol I to the 1949 Geneva Conventions.³⁵¹

336. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated that "in general, international humanitarian law bears on the threat or use of nuclear weapons as it does of other weapons. . . . The general application of international humanitarian law to the use of nuclear weapons has also been specifically acknowledged by nuclear-weapon States."³⁵² Among the customary law rules applicable to the use of nuclear weapons, New Zealand further mentioned the fact that "it is prohibited to use indiscriminate

³⁴⁸ Nauru, Written statement submitted to the ICJ, *Nuclear Weapons case*, 15 June 1995, p. 21, see also pp. 19–20.

³⁴⁹ Netherlands, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1733, 11 December 1969, p. 1.

³⁵⁰ Netherlands, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 December 1992, p. 21.

³⁵¹ Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 32.

³⁵² New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, §§ 63 and 66.

methods and means of warfare which do not distinguish between combatants and civilians and other non-combatants".³⁵³

337. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Nigeria stated that "the wars of liberation... were being fought with conventional weapons, with the weaker side, particularly the freedom fighters, as the exclusive targets of... indiscriminate weapons" and that "his country was therefore anxious for restrictions to be imposed on such weapons".³⁵⁴

338. The Report on the Practice of Pakistan states that Pakistan "disapproves" of weapons of an indiscriminate nature.³⁵⁵

339. The Report on the Practice of Peru, referring to a statement by the head of the Peruvian delegation at the international meeting on the reduction of mines in 1995, states that anti-personnel landmines are considered by Peru as weapons indiscriminate by nature. In addition, the Peruvian State supports the prohibition of anti-personnel mines that are not equipped with self-destruct mechanisms.³⁵⁶

340. In 1973, during a debate in the Sixth Committee of the UN General Assembly on the UN Secretary-General's report on respect for human rights in armed conflicts, Poland advocated that special emphasis be placed on the prohibition of the use of weapons indiscriminately affecting civilians and combatants.³⁵⁷

341. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Romania stated that "the use of weapons with indiscriminate effects, including weapons of mass destruction... [and] biological and chemical weapons, was prohibited by international law and by legal conscience of peoples".³⁵⁸

342. In 1991, in a statement at the International Conference on the Protection of Victims of War, the Russian Minister of Foreign Affairs declared with reference to the conflict in Chechnya that in order to protect the civilian population against indiscriminate weapons, bombers, missiles, rockets, artillery shells, incendiary weapons and booby-traps should be completely banned in internal conflicts.³⁵⁹

³⁵³ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 71.

³⁵⁴ Nigeria, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.2, 14 March 1974, p. 19, § 12.

³⁵⁵ Report on the Practice of Pakistan, 1998, Chapter 3.3.

³⁵⁶ Report on the Practice of Peru, 1998, Chapter 3.1, referring to Statement of the head of the Peruvian delegation at the international meeting on the reduction of mines, *Boletín Informativo*, No. 2432, Lima, 15 July 1995, p. 2.

³⁵⁷ Poland, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1450, 29 November 1973, pp. 287-288.

³⁵⁸ Romania, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.3, 15 March 1974, p. 28, § 16.

³⁵⁹ Russia, Statement by the Minister of Foreign Affairs, Andrey Kozyrev, at the International Conference on the Protection of Victims of War, Geneva, 30 August-1 September 1991.

343. In 1993, during a debate in the First Committee of the UN General Assembly, Russia stated that “in view of the sharp increase in the scale of internal ethnic conflicts and in the bloodshed resulting therefrom,” it had put forward “an initiative to establish restrictions under international law on the use of the most destructive and indiscriminate weapons systems in those conflicts”.³⁶⁰

344. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Russia stated that:

As Hans Blix said, “it is certainly correct to say the legality of the use of most weapons depends upon the manner in which they are employed. A rifle may be lawfully aimed at the enemy or it may be employed indiscriminately against civilians and soldiers alike. Bombs may be aimed at specific military targets or thrown at random. The indiscriminate use of a weapon will be prohibited, not the weapon as such.” We should add that it is a duly qualified use rather than the use of weapons as such at large that will be regarded as illegal.³⁶¹

345. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1993, Rwanda stated that “the use of nuclear weapons by a State during a war or an armed conflict constitutes a contravention of the rules of IHL in general and of the [1980 CCW] in particular”.³⁶²

346. According to the Report on the Practice of Rwanda, “landmines and bombs” are considered to be weapons with indiscriminate effects.³⁶³

347. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the Solomon Islands stated that “since [their qualitative] effects may affect people outside the scope of conflict, both in time and geographically, the use of nuclear weapons violates the prohibition on the use of weapons which . . . cause harm to civilians and have indiscriminate effects”.³⁶⁴

348. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands referred to:

The customary rule which states that belligerents must always distinguish between combatants and non-combatants and limit their attack only to the former. This is an old and well-established rule which has achieved universal acceptance. The first multilateral instrument to state it was the St. Petersburg Declaration of 1868 . . . This obligation is repeated and further elaborated in different forms in many instruments.³⁶⁵

³⁶⁰ Russia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.7, 21 October 1993, p. 8.

³⁶¹ Russia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 18; see also Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/29, 10 November 1995, p. 49.

³⁶² Rwanda, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 8 December 1993, p. 1, § 3.

³⁶³ Report on the Practice of Rwanda, 1997, Chapter 3.3.

³⁶⁴ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, p. 75, § 3.94.

³⁶⁵ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 46, § 3.47.

The Solomon Islands further referred to:

Those rules of the international law of armed conflict which prohibit:

- the use of weapons that render death inevitable;
- the use of weapons which have indiscriminate effects;
- any behaviour which might violate this law.³⁶⁶

349. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, Sri Lanka stated that:

The unacceptability of the use of weapons that fail to discriminate between military and civilian personnel is firmly established as a fundamental principle of international humanitarian law. These principles which prohibit indiscriminate killing and make the fundamental distinction between combatants and non-combatants have also found expression in the body of treaty law which have been incorporated in a series of international conventions, from about the time of the 1899 Hague Peace Conference and culminating with the Geneva Conventions of 1949 and [their] Additional Protocols of 1977.³⁶⁷

350. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Sweden stated that:

20. A general prohibition of the use of "indiscriminate weapons" could be deduced from the general duty of belligerents to distinguish between combatants and civilians, and between military and civilian objectives . . . Since, however, article 46, paragraph 3, [of draft AP I] prohibited "the employment of means of combat, and any methods which strike or affect indiscriminately the civilian population and combatants or civilian objects, and military objectives", a special rule on weapons was perhaps redundant. What were not redundant were rules on specific categories of weapons which governments might agree to ban or restrict the use of on grounds of their indiscriminate effects.
21. All weapons could be used indiscriminately but some were incapable of being directed at military objectives alone. One example was bacteriological weapons: germs could not distinguish between soldiers and civilians . . . Some of the incendiary weapons had turned out to be quite indiscriminate.³⁶⁸

351. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Switzerland stated that:

24. He entirely agreed with the Swedish representative. Two basic principles provided the starting point for the Committee's discussions: the prohibition of arms which caused unnecessary sufferings, and the distinction between the

³⁶⁶ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 55, § 3.63.

³⁶⁷ Sri Lanka, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, undated, p. 2.

³⁶⁸ Sweden, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 12, §§ 20–21.

civilian population and armed forces. Those principles belonged to customary law. They were already in force, and were to be found in the Declaration of St. Petersburg and the Hague Conventions. The ICRC had taken over those principles in articles 33 and 43(3) of draft Protocol I. The proposals put forward by a number of delegations... were merely executing rules: they were not aimed at creating new law, but at clarifying and illustrating the rules already in force.

25. ... The problems of banning or restricting the use of certain categories of weapons [introduced by draft Article 33 of AP I submitted to the CDDH by the ICRC]... was a question of a codification of existing law rather than the creation of new legal norms...
26. ... The weapons in question – incendiary or fragmentation weapons, high-velocity projectiles, fléchettes, etc. – were small weapons and could have no decisive impact on the outcome of a conflict; but there was a grave disparity between the suffering they caused and the military advantage they might confer. Even if they were used in defiance of a ban, the advantage of surprise thus gained would be ephemeral.³⁶⁹

352. In its report on “gross violations of human rights” committed between 1960 and 1993, the South African Truth and Reconciliation Commission noted that the killing of more than 600 people in an attack on the SWAPO base/refugee camp at Kassinga in Angola in 1978 constituted a violation of IHL, stating that:

International humanitarian law stipulates that the right of parties in a conflict to adopt means of injuring the enemy is not unlimited and that a distinction must at all times be made between persons taking part in hostilities and civilians, with the latter being spared as much as possible.³⁷⁰

353. In 1977, during a debate in the First Committee of the UN General Assembly, Turkey stated that it supported a prohibition or restrictions on incendiary weapons and other indiscriminate weapons, but held that such rules would only be effective if they reflected a consensus in the world community.³⁷¹

354. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the USSR stated that “the question of prohibition or restriction of the use of certain types of conventional weapons... of an indiscriminate nature was one of great importance”.³⁷²

355. At the CDDH, the UK stated that:

The definition of indiscriminate attacks given in [Article 51(4) AP I] was not intended to mean that there were means of combat the use of which would constitute an indiscriminate attack in all circumstances. The paragraph did not in itself

³⁶⁹ Switzerland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, pp. 12–13, §§ 24–26.

³⁷⁰ South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 2, pp. 52–55, §§ 44–45.

³⁷¹ Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.44, 25 November 1977, p. 23.

³⁷² USSR, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.19, 21 March 1975, pp. 186–187, § 13.

prohibit the use of any specific weapon, but it took account of the fact that the lawful use of means of combat depended on the circumstances.³⁷³

356. In 1991, in a briefing note on the Gulf crisis, the UK Foreign and Commonwealth Office criticised Iraq's policy of launching Scud missiles against Israel and Saudi Arabia, "since these missiles are not precision weapons and are clearly intended to hit civilian targets".³⁷⁴

357. In 1995, in a letter to the UK House of Lords, the government spokesman deplored the use of weapons by the Israeli artillery in southern Lebanon that "may be deemed . . . to have indiscriminate effects".³⁷⁵

358. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

3.67 A further argument which has been raised is that the use of any nuclear weapon would necessarily have such terrible effects upon civilians that it would violate those rules of the law of armed conflict which exist for their protection. There are two principles of particular relevance in this respect. First, it is a well established principle of customary international law that the civilian population and individual civilians are not a legitimate target in their own right. The parties to an armed conflict are required to discriminate between civilians and civilian objects on the one hand and combatants and military objectives on the other hand and to direct their attacks only against the latter . . .

3.68 . . . Modern nuclear weapons are capable of far more precise targeting and can therefore be directed against specific military objectives without the indiscriminate effect on the civilian population which the older literature assumed to be inevitable.³⁷⁶

359. In 1972, the General Counsel of the US Department of Defense stated that:

Existing laws of armed conflict do not prohibit the use of weapons whose destructive force cannot be limited to a specific military objective. The use of such weapons is not proscribed when their use is necessarily required against a military target of sufficient importance to outweigh inevitable, but regrettable, incidental casualties to civilians and destruction of civilian objects . . . I would like to reiterate that it is recognized by all states that they may not lawfully use their weapons against civilian population[s] or civilians as such, but there is no rule of international law that restrains them from using weapons against enemy armed forces or military targets. The correct rule of international law which has applied in the past and continued to apply to the conduct of our military operations in Southeast Asia is that "the loss of life and damage to property must not be out of proportion to the military advantage to be gained".³⁷⁷

³⁷³ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 164, § 119.

³⁷⁴ UK, FCO, Briefing Note on the Gulf Crisis, January 1991, *BYIL*, Vol. 62, 1991, p. 678.

³⁷⁵ UK, House of Lords, Letter from the government spokesman, 6 February 1995, *BYIL*, Vol. 66, 1995, p. 713.

³⁷⁶ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, p. 52, §§ 3.67–3.68.

³⁷⁷ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 124.

360. In 1987, during the debate on Security Council Resolution 598 concerning the use of chemical weapons in the Iran–Iraq war, the US stated that chemical weapons “honored no distinction between combatants and non-combatants”.³⁷⁸

361. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense accused Iraq of “indiscriminate Scud missile attacks”.³⁷⁹

362. In 1992, in a review of the legality of extended range anti-armour munition, the US Department of the Air Force stated that:

International law also forbids the use of weapons or means of warfare which are “indiscriminate.” A weapon is indiscriminate if it cannot be directed at a military objective or if, under the circumstances, it produces excessive civilian casualties in relation to the concrete and direct military advantage anticipated. The ERAM [extended range antiarmor munition] is clearly capable of being directed at a military objective, i.e., enemy armor formations.³⁸⁰

363. In 1993, in its report to Congress on the protection of natural and cultural resources during times of war, the US Department of Defense stated that:

Finally, with the poor track record of compliance with the law of war by some nations, the United States has a responsibility to protect against threats that may inflict serious collateral damage to our own interests and allies. These threats can arise from any nation that does not have the capability or desire to respect the law of war. One example is Iraq’s indiscriminate use of SCUDs during the Iran–Iraq War and the Gulf War. These highly inaccurate theater ballistic missiles can cause extensive collateral damage well out of proportion to military results.³⁸¹

364. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

It has been argued that nuclear weapons are unlawful because they cannot be directed at a military objective. This argument ignores the ability of modern delivery systems to target specific military objectives with nuclear weapons, and the ability of modern weapon designers to tailor the effects of a nuclear weapon to deal with various types of military objectives. Since nuclear weapons can be directed at a military objective, they can be used in a discriminate manner and are not inherently indiscriminate.³⁸²

³⁷⁸ US, Statement before the UN Security Council, UN Doc. S/PV.2750, 20 July 1987, p. 18.

³⁷⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, 10 April 1992, Appendix O, The Role of the Law of War, *ILM*, Vol. 31, 1992, p. 635.

³⁸⁰ US, Department of the Air Force, Judge Advocate General, Legal Review: Extended Range Antiarmor Munition (ERAM), 16 April 1992, § 4.

³⁸¹ US, Department of Defense, Report to Congress on International Policies and Procedures Regarding the Protection of Natural and Cultural Resources During Times of War, 19 January 1993, p. 203.

³⁸² US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 23; see also Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/34, p. 70.

365. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that:

A weapon must be discriminating, or capable of being controlled (i.e., it can be directed against intended targets). Those weapons which cannot be employed in a manner which distinguishes between lawful combatants and noncombatants violate these principles. Indiscriminate weapons are prohibited by customary international law and treaty law.

The OC system contemplated for acquisition and employment by the Marine Corps is specifically designed to limit its effects only to intended targets. The contemplated OC dispersers utilize a target specific stream of ballistic droplets for controlled delivery and minimal cross contamination (i.e., point target delivery), rather than an aerosolized spray which increases the likelihood of unintended subject impact. Provided the weapon is employed in a discriminating manner, the principle of distinction/discrimination presents no prohibition to acquisition and employment of OC in appropriate circumstances.³⁸³

366. According to the Report on US Practice, "it is the *opinio juris* of the United States that customary international law prohibits the use of indiscriminate weapons. Indiscriminate weapons are those that cannot be directed at a military objective."³⁸⁴

367. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Vietnam stated that "no purpose would be served by suggesting the prohibition or the restriction of specific categories of weapons, since such suggestions amounted only to the classical criteria of the Declaration of St. Petersburg and the Hague Conventions".³⁸⁵

368. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Zimbabwe stated that:

Nuclear weapons create a vastly greater threat than any other weapon because of their indiscriminate nature. The radiation from nuclear weapons knows no boundaries . . . The threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that . . . are indiscriminate . . . Zimbabwe would like to emphasize that radiation from nuclear weapons cannot be contained either in space or in time.³⁸⁶

III. Practice of International Organisations and Conferences

United Nations

369. In a resolution adopted in 1961, the UN General Assembly stated that "the use of nuclear and thermo-nuclear weapons would exceed even the scope of war

³⁸³ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 5.

³⁸⁴ Report on US Practice, 1997, Chapter 3.3.

³⁸⁵ Vietnam, Statement at the CDDH, Vol. XVI, *Official Records*, CDDH/IV/SR.33, 2 June 1976, p. 344, § 25.

³⁸⁶ Zimbabwe, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/35, pp. 25–28.

and cause indiscriminate suffering and destruction to mankind and civilization and, as such, is contrary to the rules of international law and to the laws of humanity".³⁸⁷

370. In a resolution adopted after the Conference of Government Experts in 1972, the UN General Assembly expressed its concern that no agreement was reached concerning weapons which indiscriminately affected civilians and combatants.³⁸⁸

371. In numerous resolutions adopted between 1973 and 1982, the UN General Assembly emphasised the need to eliminate indiscriminate weapons by treaty in order to alleviate the suffering of civilians and combatants.³⁸⁹

372. In two resolutions adopted in 1973 and 1974, the UN General Assembly stressed the need for States to effect "if possible through measures of disarmament, the elimination of specific, especially cruel or indiscriminate weapons".³⁹⁰

373. In a resolution adopted in 1973, the UN General Assembly welcomed the proposal from the ICRC to aim "at a reaffirmation of the fundamental general principles of international law prohibiting the use of weapons which may... have indiscriminate effects".³⁹¹

374. In a resolution adopted in 1976, the UN General Assembly invited the CDDH

to accelerate its consideration of the use of specific conventional weapons, including any which may be deemed to be excessively injurious or to have indiscriminate effects, and to do its utmost to agree for humanitarian reasons on possible rules prohibiting or restricting the use of such weapons.³⁹²

375. In a resolution adopted in 1979, the UN General Assembly reaffirmed that an agreement prohibiting or restricting conventional weapons "which might be deemed to be excessively injurious or to have indiscriminate effects" would mitigate the suffering of civilians and combatants in armed conflicts.³⁹³

³⁸⁷ UN General Assembly, Res. 1653 (XVI), 24 November 1961, § 1(b). (The resolution was adopted by 55 votes in favour, 20 against and 26 abstentions. Three of the abstaining States, Ecuador, Iran and Sweden, nevertheless indicated in their written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995 that they did consider such weapons to be indiscriminate (see *supra*).

³⁸⁸ UN General Assembly, Res. 3032 (XXVII), 18 December 1972, preamble.

³⁸⁹ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble; Res. 3255 A (XXIX), 9 December 1974, preamble; Res. 31/64, 10 December 1976, preamble; Res. 32/152, 19 December 1977, preamble; Res. 33/70, 14 December 1978, preamble; Res. 34/82, 11 December 1979, preamble; Res. 35/153, 12 December 1980, preamble; Res. 36/93, 9 December 1981, preamble; Res. 37/79, 9 December 1982, preamble.

³⁹⁰ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble (adopted by 103 votes in favour, none against and 18 abstentions. GDR, Netherlands, UK, US and USSR explained their abstentions as being based on their opposition to the CDDH being considered the appropriate forum to discuss incendiary weapons); Res. 3255 (XXIX), 9 December 1974, preamble.

³⁹¹ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble.

³⁹² UN General Assembly, Res. 31/64, 10 December 1976, § 2.

³⁹³ UN General Assembly, Res. 34/82, 11 December 1979, adopted without a vote.

376. In numerous resolutions adopted between 1980 and 1999, the UN General Assembly called for the accession of all States to the 1980 CCW.³⁹⁴

377. In a resolution adopted in 1980, the UN General Assembly commended the 1980 CCW agreed upon “with a view to achieving the widest possible adherence to these instruments”. It reaffirmed that it believed that an agreement prohibiting or restricting conventional weapons “which might be deemed to be excessively injurious or to have indiscriminate effects” would mitigate the suffering of civilians and combatants in armed conflicts.³⁹⁵ A further resolution adopted in 1981 reiterated this view and urged all States that had not done so to accede to the 1980 CCW and its Protocols.³⁹⁶ Numerous resolutions have repeated this appeal.³⁹⁷

378. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights stated that chemical weapons were indiscriminate.³⁹⁸

379. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights urged all States “to be guided in their national policies by the need to curb the production and the spread of weapons of mass destruction or with indiscriminate effects”. It then listed the following as falling within this category: nuclear, chemical and biological weapons, fuel-air and cluster bombs, and napalm and weaponry containing depleted uranium. It also stated that the use of these weapons was incompatible with human rights law and IHL.³⁹⁹

380. A survey carried out by the UN Secretariat in 1973 analysed practice and doctrine in relation to different humanitarian rules and enumerated the weapons that had been discussed from the point of view of their indiscriminate effects. These were: chemical and bacteriological weapons, incendiary weapons, nuclear weapons, conventional aerial bombardment, fragmentation

³⁹⁴ UN General Assembly, Res. 35/153, 12 December 1980, preamble; Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67, 8 December 1989, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 2; Res. 53/81, 4 December 1998, § 5; Res. 54/58, 1 December 1999, § III (3).

³⁹⁵ UN General Assembly, Res. 35/153, 12 December 1980, § 4, adopted without a vote.

³⁹⁶ UN General Assembly, Res. 36/93, 9 December 1981, § 1, adopted without a vote.

³⁹⁷ UN General Assembly, Res. 37/79, 9 December 1982, preamble and § 1; Res. 38/66, 15 December 1983, preamble and § 3; Res. 39/56, 12 December 1984, preamble and § 3; Res. 40/84, 12 December 1985, preamble and § 3; Res. 41/50, 3 December 1986, preamble and § 3; Res. 42/30, 30 November 1987, preamble and § 3; Res. 43/67, 7 December 1988, preamble and § 3; Res. 45/64, 4 December 1990, preamble and § 3; Res. 46/40, 6 December 1991, preamble and § 3; Res. 47/56, 9 December 1992, preamble and § 3; Res. 48/79, 16 December 1993, preamble and § 3; Res. 49/79, 15 December 1994, preamble and § 3; Res. 50/74, 12 December 1995, preamble and § 3; Res. 51/49, 10 December 1996, preamble and § 3; Res. 52/42, 9 December 1997, § 2; Res. 53/81, 4 December 1998, § 5; Res. 54/58, 1 December 1999, § III (3).

³⁹⁸ UN Sub-Commission on Human Rights, Res. 1989/39, 1 September 1989, p. 60.

³⁹⁹ UN Sub-Commission on Human Rights, Res. 1996/16, 29 August 1996, preamble and § 1.

bombs, landmines and booby-traps, missiles, delayed action weapons and naval weapons.⁴⁰⁰

Other International Organisations

381. In a resolution adopted in 1994 on respect for international humanitarian law, the OAS General Assembly stated that it was “deeply disturbed by the testing, production, sale, transfer, and use of certain conventional weapons which may be deemed . . . to have indiscriminate effects”. It urged all member States to accede to API and AP II and to the 1980 CCW.⁴⁰¹ This call was repeated in 1995.⁴⁰²

382. In a resolution adopted in 1998 on respect for international humanitarian law, the OAS General Assembly stated that “international humanitarian law prohibits the use of weapons, projectiles, material, and methods of warfare that have indiscriminate effects or cause excessive injury or unnecessary suffering”.⁴⁰³

International Conferences

383. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the prohibition or restriction of the use of certain weapons in which it endorsed the view of the UN General Assembly in Resolution 2932 (XXVII) A that:

The widespread use of many weapons and the emergence of new methods of warfare that cause unnecessary suffering or are indiscriminate call urgently for renewed efforts by governments to seek, through legal means, the prohibition or restriction of the use of such weapons and of indiscriminate and cruel methods of warfare and, if possible, through measures of disarmament, the elimination of specific, especially cruel or indiscriminate, weapons.

The resolution urged the CDDH to “begin consideration at its 1974 session of the question of the prohibition or restriction of the use of conventional weapons which may cause unnecessary suffering or have indiscriminate effects” and invited the ICRC to convene in 1974 a conference of government experts to study in depth the issue.⁴⁰⁴

384. The 24th International Conference of the Red Cross in 1981 adopted a resolution on conventional weapons in which it noted with satisfaction the adoption of the 1980 CCW and its Protocols and invited States to become parties

⁴⁰⁰ UN Secretariat, Respect for human rights in armed conflicts, Existing rules of international law concerning the prohibition or restriction of use of specific weapons, Survey, UN Doc. A/9215, 21 November 1973, p. 209.

⁴⁰¹ OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, preamble.

⁴⁰² OAS, General Assembly, Res. 1335 (XXV-O/95), 9 June 1995, § 1.

⁴⁰³ OAS, General Assembly, Res. 1565 (XXVIII-O/98), 2 June 1998, preamble.

⁴⁰⁴ 22nd International Conference of the Red Cross, Tehran, 8–15 November 1973, Res. XIV.

to them “as soon as possible, to apply them and examine the possibility of strengthening or developing them further”.⁴⁰⁵

385. The 24th International Conference of the Red Cross in 1981 adopted a resolution on disarmament, weapons of mass destruction and respect for non-combatants in which it urged parties to armed conflicts “not to use methods and means of warfare that cannot be directed against specific military targets and whose effects cannot be limited”.⁴⁰⁶

386. The 26th International Conference of the Red Cross and Red Crescent in 1995 stressed that “proper attention should be given to other existing conventional weapons or future weapons which may cause unnecessary suffering or have indiscriminate effects”.⁴⁰⁷

387. In the Final Declaration of the Second Review Conference of States Parties to the CCW in 2001, the High Contracting Parties expressed their grave concern about the fact that “the indiscriminate effects . . . of certain conventional weapons often fall on civilians, including in non-international armed conflicts”.⁴⁰⁸

388. In the Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the participants stated that they were “worried in the face of the rapid expansion of arms trade and the uncontrolled proliferation of weapons, notably those which can have indiscriminate effects”.⁴⁰⁹

IV. Practice of International Judicial and Quasi-judicial Bodies

389. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that:

The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets . . . In conformity with the aforementioned principles, humanitarian law, at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians . . . Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.⁴¹⁰

⁴⁰⁵ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. IX, § 2.

⁴⁰⁶ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XIII, § 1.

⁴⁰⁷ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § H(h).

⁴⁰⁸ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, Final Declaration, UN Doc. CCW/CONF.II/2, 25 January 2002, p. 8.

⁴⁰⁹ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Final Declaration, Niamey, 18–20 February 2002, preamble.

⁴¹⁰ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 78–79.

390. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Guillaume stated that “customary law contains one single absolute prohibition: the one on so-called ‘blind’ weapons which are incapable to distinguish between civilian and military objectives”.⁴¹¹

391. In his dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Weeramantry stated that “the rule of discrimination between civilian populations and military personnel is, like some of the other rules of *ius in bello*, of ancient vintage and shared by many cultures”.⁴¹²

392. In her dissenting opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Higgins stated that:

Very important also . . . is the requirement of humanitarian law that weapons may not be used which are incapable of discriminating between civilian and military targets.

The requirement that a weapon be capable of differentiating between military and civilian targets is not a general principle of humanitarian law specified in the 1899, 1907 or 1949 law, but flows from the basic rule that civilians may not be the target of attack . . . It may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral damage occurs.⁴¹³

Judge Higgins was the only judge that offered a concrete definition of “indiscriminate weapons”, stating that:

It may be concluded that a weapon will be unlawful *per se* if it is incapable of being targeted at a military objective only, even if collateral harm occurs. Notwithstanding the unique and profoundly destructive characteristics of all nuclear weapons, that very term covers a variety of weapons which are not monolithic in all their effects. To the extent that a specific nuclear weapon would be incapable of this distinction, its use would be unlawful.⁴¹⁴

393. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Guillaume stated that “customary humanitarian law contains one single absolute prohibition: the one of so-called ‘blind’ weapons which are incapable of distinguishing between civilian targets and military targets. Obviously, nuclear weapons do not necessarily fall into this category” and that “the collateral damage caused to the civilian population must not be ‘excessive’ as compared to the ‘military advantage’ offered”.⁴¹⁵

394. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Fleischhauer arrived at the opposite conclusion, namely that “the nuclear weapon cannot distinguish between civilian and military targets”.⁴¹⁶

⁴¹¹ ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Guillaume, 8 July 1996, § 5.

⁴¹² ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Weeramantry, 8 July 1996, p. 277.

⁴¹³ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Higgins, 8 July 1996, §§ 23–24.

⁴¹⁴ ICJ, *Nuclear Weapons case*, Dissenting Opinion of Judge Higgins, 8 July 1996, § 24.

⁴¹⁵ ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Guillaume, 8 July 1996, § 5.

⁴¹⁶ ICJ, *Nuclear Weapons case*, Separate Opinion of Judge Fleischhauer, 8 July 1996, § 2.

395. In his separate opinion in the *Nuclear Weapons case* before the ICJ in 1996, Judge Herczegh judged nuclear weapons illegal because they were “weapons of mass destruction”.⁴¹⁷

396. In a declaration in the *Nuclear Weapons case* before the ICJ in 1996, President Bedjaoui considered the weapons to be “of a nature to hit victims indiscriminately, confusing combatants and non-combatants”.⁴¹⁸

397. In its review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber had to determine whether the use of cluster bombs was prohibited in an armed conflict. Noting that no formal provision forbade the use of such bombs, the Trial Chamber recalled that the choice of weapons and their use were clearly delimited by IHL. Among the relevant norms of customary law, the Court referred to Article 51(4)(b) API, which forbade indiscriminate attacks involving the use of a means or method of combat that could not be directed against a specific military objective.⁴¹⁹

V. Practice of the International Red Cross and Red Crescent Movement

398. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that it is prohibited to use weapons “which, because of their lack of precision or their effects, affect civilian persons and combatants without distinction”. Delegates also teach that “belligerent Parties and their armed forces shall abstain from using weapons whose harmful effects go beyond the control, in time or place, of those employing them”.⁴²⁰

399. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the belligerents that “weapons having indiscriminate effects . . . are prohibited”.⁴²¹

400. In 1996, in a statement before the First Committee of the UN General Assembly, the ICRC commented on the advisory opinion of the ICJ in the *Nuclear Weapons case* and stated that:

Turning now to the nature of nuclear weapons, we note that, on the basis of the scientific evidence submitted, the Court found that “. . . The destructive power of nuclear weapons cannot be contained in either space or time . . . the radiation released by a nuclear explosion would affect health, agriculture, natural resources and demography over a very wide area. Further, the use of nuclear weapons would be a serious danger to future generations . . .” In the light of this, . . . the ICRC finds

⁴¹⁷ ICJ, *Nuclear Weapons case*, Declaration of Judge Herczegh, 8 July 1996, § 2.

⁴¹⁸ ICJ, *Nuclear Weapons case*, Declaration of President Bedjaoui, President of the ICJ, 8 July 1996, § 20.

⁴¹⁹ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 18.

⁴²⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 912(b) and (c).

⁴²¹ ICRC, Press Release No. 1659, Middle East conflict: ICRC appeals to belligerents, 1 February 1991, *IRRC*, No. 280, 1991, p. 27.

it difficult to envisage how a use of nuclear weapons could be compatible with the rules of international humanitarian law.⁴²²

401. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the employment of “weapons, projectiles and material and methods of warfare . . . inherently indiscriminate”, when committed in international or non-international armed conflicts, be subject to the jurisdiction of the Court.⁴²³

VI. Other Practice

402. In a resolution adopted during its Edinburgh Session in 1969, the Institute of International Law stated that:

Existing international law prohibits the use of all weapons which, by their very nature, affect indiscriminately both military objectives and non-military objects, or both armed forces and civilian populations. In particular, it prohibits the use of weapons the destructive effect of which is so great that it cannot be limited to specific military objectives or is otherwise uncontrollable (self-generating weapons) as well as of “blind” weapons.⁴²⁴

403. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch listed the “use of ‘blind’ weapons that cannot be directed with any reasonable assurance against a specific military objective” among actions which were “prohibited by applicable international law rules”.⁴²⁵

404. In 1989, in a report on violations of the laws of war in Angola, Africa Watch listed the “use of ‘blind’ weapons that cannot be directed with any reasonable assurance against a specific military objective” among prohibited practices.⁴²⁶

C. Use of Prohibited Weapons

I. Treaties and Other Instruments

Treaties

405. Article 8 of the 1998 ICC Statute provides that:

⁴²² ICRC, Statement before the First Committee of the UN General Assembly, 18 October 1996.

⁴²³ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 2(i) and 3(vii).

⁴²⁴ Institute of International Law, Edinburgh Session, Resolution on the Distinction between Military Objectives and Non-military Objects in General and Particularly the Problems Associated with Weapons of Mass Destruction, 9 September 1969, § 7.

⁴²⁵ Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 34.

⁴²⁶ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1989, p. 141.

1. The Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes.
2. For the purpose of this Statute, "war crimes" means:
 - ...
 - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:
 - ...
 - (xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123.

Other Instruments

406. Article 22(2)(c) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that the "use of unlawful weapons" constitutes an "exceptionally serious war crime".

407. Section 6(2) of the 1999 UN Secretary-General's Bulletin provides that "the United Nations force shall respect the rules prohibiting or restricting the use of certain weapons . . . under the relevant instruments of international humanitarian law".

II. National Practice

Military Manuals

408. Australia's *Commanders' Guide* provides that "some weapons and weapons systems are totally prohibited".⁴²⁷ It further states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as poison".⁴²⁸

409. Australia's *Defence Force Manual* provides that "prohibited weapons" is one of the categories into which the limitations on the use of weapons fall.⁴²⁹ It further states that "the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as poison".⁴³⁰

⁴²⁷ Australia, *Commanders' Guide* (1994), § 304.

⁴²⁸ Australia, *Commanders' Guide* (1994), § 1305(p).

⁴²⁹ Australia, *Defence Force Manual* (1994), § 401.

⁴³⁰ Australia, *Defence Force Manual* (1994), § 1315(p).

- 410.** Bosnia and Herzegovina's Military Instructions states that "all means and methods of warfare are allowed, except for the ones which are prohibited or restricted by the international law of war".⁴³¹
- 411.** Ecuador's Naval Manual provides that "the following acts constitute war crimes: . . . use of prohibited weapons or ammunition".⁴³²
- 412.** Germany's Military Manual states that "grave breaches of international humanitarian law are in particular: . . . use of prohibited weapons".⁴³³
- 413.** Under South Korea's Military Regulation 187, using prohibited weapons and ammunitions constitutes a war crime.⁴³⁴
- 414.** Nigeria's Manual on the Laws of War includes "using . . . forbidden arms or ammunition" in its list of war crimes.⁴³⁵
- 415.** South Africa's LOAC Manual provides that "making use of . . . forbidden arms or ammunition" is a grave breach of the law of war and a war crime.⁴³⁶
- 416.** Switzerland's Basic Military Manual states that "employing methods and means of combat expressly prohibited in the Swiss army" constitutes a war crime.⁴³⁷
- 417.** The UK Military Manual provides that "in addition to the 'grave breaches' of the 1949 Geneva Conventions . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . using . . . forbidden arms or ammunition".⁴³⁸
- 418.** The US Field Manual provides that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . making use of . . . forbidden arms or ammunition".⁴³⁹
- 419.** The US Instructor's Guide provides that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: using . . . forbidden arms or ammunition".⁴⁴⁰
- 420.** The US Naval Handbook states that "the following acts are representative war crimes: . . . employing forbidden arms or ammunition".⁴⁴¹

National Legislation

- 421.** Argentina's Draft Code of Military Justice punishes "any soldier who, on the occasion of an armed conflict, uses or orders to be used prohibited methods or means of combat".⁴⁴²

⁴³¹ Bosnia and Herzegovina, *Military Instructions* (1992), Item 5, § 1.

⁴³² Ecuador, *Naval Manual* (1989), § 6.2.5(10). ⁴³³ Germany, *Military Manual* (1992), § 1209.

⁴³⁴ South Korea, *Military Regulation 187* (1991), Article 4.2.

⁴³⁵ Nigeria, *Manual on the Laws of War* (undated), § 6(7).

⁴³⁶ South Africa, *LOAC Manual* (1996), §§ 39(a) and 41.

⁴³⁷ Switzerland, *Basic Military Manual* (1987), Article 200(2)(a).

⁴³⁸ UK, *Military Manual* (1958), § 626(g). ⁴³⁹ US, *Field Manual* (1956), § 504(a).

⁴⁴⁰ US, *Instructor's Guide* (1985), p. 13. ⁴⁴¹ US, *Naval Handbook* (1995), § 6.2.5(10).

⁴⁴² Argentina, *Draft Code of Military Justice* (1998), Article 290, introducing a new Article 874 in the *Code of Military Justice as amended* (1951).

422. The Criminal Code of Belarus provides that “the use in an armed conflict of . . . means and methods of warfare prohibited by international treaties binding upon the Republic of Belarus” is a war crime.⁴⁴³

423. Under the Criminal Code of the Federation of Bosnia and Herzegovina, the use of, or order to use, “means or practices of warfare prohibited by the rules of international law” in time of war or armed conflict is a war crime.⁴⁴⁴ The Criminal Code of the Republika Srpska contains the same provision.⁴⁴⁵

424. Bulgaria’s Penal Code as amended provides that “a person who, in violation of the rules of international law for waging war, uses or orders the use of . . . impermissible means or methods for waging war” commits a war crime.⁴⁴⁶

425. Colombia’s Penal Code imposes a criminal sanction on “anyone who, during an armed conflict, uses prohibited means and methods of warfare”.⁴⁴⁷

426. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines as war crimes grave breaches of the Geneva Conventions, as well as all other grave breaches of the law and customs of war applied in international or non-international armed conflicts within the scope of international law.⁴⁴⁸

427. Under Croatia’s Criminal Code, the manufacture, improvement, production, stockpiling, offering for sale, purchase, interceding in purchasing or selling, possession, transfer, transport, use of, and order to use, “means or methods of combat prohibited by the rules of international law” are war crimes.⁴⁴⁹

428. The Czech Republic’s Criminal Code as amended punishes “any person who develops, produces, imports, possesses or stockpiles weapons, combat equipment or explosives prohibited by law or by an international treaty approved by the Parliament or otherwise disposes of them”.⁴⁵⁰ It also punishes “whoever in time of war or in combat . . . orders the use of a forbidden means of combat or material, or who uses such . . . means or material”.⁴⁵¹

429. Denmark’s Military Criminal Code as amended punishes “any person who uses war instruments or procedures the application of which violates an international agreement entered into by Denmark or the general rules of international law”.⁴⁵²

430. El Salvador’s Law on the Control of Firearms, Ammunition and Explosives states that the armed forces “may use all types of weapons as long as they are not

⁴⁴³ Belarus, *Criminal Code* (1999), Article 136(16).

⁴⁴⁴ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 160(1).

⁴⁴⁵ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 436(1).

⁴⁴⁶ Bulgaria, *Penal Code as amended* (1968), Article 415(1).

⁴⁴⁷ Colombia, *Penal Code* (2000), Article 142.

⁴⁴⁸ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁴⁴⁹ Croatia, *Criminal Code* (1997), Article 163(1) and (2).

⁴⁵⁰ Czech Republic, *Criminal Code as amended* (1961), Article 185a(1).

⁴⁵¹ Czech Republic, *Criminal Code as amended* (1961), Article 262(1)(a).

⁴⁵² Denmark, *Military Criminal Code as amended* (1978), § 25.

prohibited by international conventions or treaties subscribed to and ratified by El Salvador”.⁴⁵³

431. Under Estonia’s Penal Code, “use of . . . internationally prohibited weapons” is a war crime.⁴⁵⁴

432. Under Ethiopia’s Penal Code, it is a punishable offence to use, or order to be used, against the enemy “any means or method of combat expressly forbidden by international conventions to which Ethiopia is a party”.⁴⁵⁵

433. Under Finland’s Revised Penal Code, any person who, in time of war, “uses a prohibited means of warfare or weapon [or] otherwise violates the provisions of an international agreement on warfare binding on Finland or the generally acknowledged and established rules and customs of war under public international law” shall be punished for war crime.⁴⁵⁶

434. Under Hungary’s Criminal Code as amended, “any person who uses or orders the use of a weapon or instrument of war prohibited by international treaty in a theatre of military operation or in an occupied territory against the enemy” is guilty, upon conviction, of a war crime.⁴⁵⁷

435. Italy’s Wartime Military Penal Code punishes any “commander of a military force who, to harm the enemy, orders or authorises the use of any of the methods or means of warfare that are prohibited by the law or by international conventions, or are in any way contrary to military honour”. It also punishes “anyone who, to harm the enemy, adopts means or uses methods that are prohibited by the law or by international conventions, or are in any way contrary to military honour”.⁴⁵⁸

436. Under Kazakhstan’s Penal Code, “the use in an armed conflict of means and methods . . . prohibited by an international treaty to which the Republic of Kazakhstan is a party” is a criminal offence.⁴⁵⁹

437. Under Lithuania’s Criminal Code as amended, “an order to employ prohibited means of warfare or methods of combat and the employment of such [means or methods] in violation of the provisions of international agreements or universally accepted international customs regarding the means and methods of combat” are war crimes.⁴⁶⁰

438. Moldova’s Penal Code punishes “the use during an armed conflict of means and methods of warfare prohibited by international treaties to which the Republic of Moldova is a party”.⁴⁶¹

439. Under Mozambique’s Military Criminal Law, it is a crime against humanitarian rules “to employ unlawful means of combat”.⁴⁶²

⁴⁵³ El Salvador, *Law on the Control of Firearms, Ammunition and Explosives* (1999), Article 9.

⁴⁵⁴ Estonia, *Penal Code* (2001), § 103. ⁴⁵⁵ Ethiopia, *Penal Code* (1957), Article 288.

⁴⁵⁶ Finland, *Revised Penal Code* (1995), Chapter 11, Section 1(1)(1) and (3).

⁴⁵⁷ Hungary, *Criminal Code as amended* (1978), Section 160/A(1).

⁴⁵⁸ Italy, *Wartime Military Penal Code* (1941), Articles 174 and 175.

⁴⁵⁹ Kazakhstan, *Penal Code* (1997), Article 159(1).

⁴⁶⁰ Lithuania, *Criminal Code as amended* (1961), Article 340.

⁴⁶¹ Moldova, *Penal Code* (2002), Article 143(1).

⁴⁶² Mozambique, *Military Criminal Law* (1987), Article 83(a).

- 440.** New Zealand's Chemical Weapons Act forbids the use of weapons prohibited by international agreements.⁴⁶³
- 441.** Nicaragua's Military Penal Code punishes any soldier "who employs or orders the employment of prohibited weapons or means and methods of warfare".⁴⁶⁴
- 442.** Nicaragua's Revised Penal Code punishes "anyone who, during an international or civil war, commits serious violations of international conventions on the use of war weapons".⁴⁶⁵
- 443.** Norway's Military Penal Code as amended provides that "anyone who uses a weapon or means of combat which is prohibited by any international agreement to which Norway has acceded, or who is accessory thereto, is liable to imprisonment".⁴⁶⁶
- 444.** Poland's Penal Code punishes for a war crime "any person who, against the prohibition by international law or by the provisions of law, produces, stockpiles, acquires, sells, retains, transports or sends . . . means of warfare, or conducts research aimed at the production or use of such means".⁴⁶⁷
- 445.** Under Russia's Criminal Code, the "use in a military conflict of means and methods of warfare prohibited by an international treaty to which the Russian Federation is a party" is a crime against the peace and security of mankind.⁴⁶⁸
- 446.** Slovakia's Criminal Code as amended punishes "any person who develops, produces, imports, possesses or stockpiles weapons, combat equipment or explosives prohibited by law or by an international treaty approved by the Parliament or otherwise disposes of them". It also punishes "whoever in time of war or in combat . . . orders the use of a forbidden means of combat or material, or who uses such means or material".⁴⁶⁹
- 447.** Under Slovenia's Penal Code, the use of, or order to use, "weapons . . . prohibited under international law in time of war and armed conflict" is a war crime.⁴⁷⁰
- 448.** Spain's Military Criminal Code punishes "any soldier who uses, or orders the use of, means or methods of combat which are prohibited".⁴⁷¹
- 449.** Spain's Penal Code punishes "anyone who, during an armed conflict, uses, or orders to be used, methods or means of combat which are prohibited".⁴⁷²

⁴⁶³ New Zealand, *Chemical Weapons Act* (1996), Section 6.

⁴⁶⁴ Nicaragua, *Military Penal Code* (1996), Article 51.

⁴⁶⁵ Nicaragua, *Revised Penal Code* (1997), Article 551.

⁴⁶⁶ Norway, *Military Penal Code as amended* (1902), § 107.

⁴⁶⁷ Poland, *Penal Code* (1997), Article 121(1).

⁴⁶⁸ Russia, *Criminal Code* (1996), Article 356(1).

⁴⁶⁹ Slovakia, *Criminal Code as amended* (1961), Articles 185(a)(1) and 262(1)(a).

⁴⁷⁰ Slovenia, *Penal Code* (1994), Article 377(1).

⁴⁷¹ Spain, *Military Criminal Code* (1985), Article 70.

⁴⁷² Spain, *Penal Code* (1995), Article 610.

450. Under Sweden's Penal Code as amended, "use of any weapon prohibited by international law" constitutes a crime against international law.⁴⁷³

451. Tajikistan's Criminal Code punishes the "use during the hostilities or in armed conflict of means and materials prohibited under an international treaty".⁴⁷⁴

452. Uzbekistan's Criminal Code punishes "the employment of means of warfare forbidden by international law".⁴⁷⁵

453. Vietnam's Penal Code punishes "anyone who, in time of war, ... uses prohibited means or methods of warfare".⁴⁷⁶

454. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, "means or methods of combat prohibited under the rules of international law, during a war or an armed conflict" is a war crime.⁴⁷⁷

National Case-law

455. No practice was found.

Other National Practice

456. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Ecuador stated that "the use of nuclear weapons has the consequences that fit perfectly with the legal figure of war crimes against humankind: the assassination and extermination of entire populations and other inhuman acts committed against the civil population".⁴⁷⁸

457. At the CDDH, the SFRY voted in favour of the Philippine proposal concerning an amendment to include "the use of weapons prohibited by international Convention, namely: ... asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" in the list of grave breaches in Article 74 of draft AP I (now Article 85).⁴⁷⁹ However because that amendment had been rejected it stated that it:

deeply regrets that the use of unlawful methods or means of combat was not included in the grave breaches, particularly since to have done so would merely have been to have codified an already existing rule of customary law, because there can be no doubt that to use prohibited weapons or unlawful methods of making war is already to act unlawfully, that is, it is a war crime punishable by existing international law.⁴⁸⁰

⁴⁷³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(1).

⁴⁷⁴ Tajikistan, *Criminal Code* (1998), Article 405.

⁴⁷⁵ Uzbekistan, *Criminal Code* (1994), Article 152.

⁴⁷⁶ Vietnam, *Penal Code* (1990), Article 279.

⁴⁷⁷ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

⁴⁷⁸ Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2, § F.

⁴⁷⁹ see Philippines, Proposal of amendment to Article 74 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/418, 26 May 1977, p. 322.

⁴⁸⁰ SFRY, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 306.

III. Practice of International Organisations and Conferences

458. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

459. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

460. No practice was found.

VI. Other Practice

461. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances”.⁴⁸¹

⁴⁸¹ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 5(3), *IRRC*, No. 282, 1991, p. 332.

POISON

Poison (practice relating to Rule 72)

§§ 1–115

Poison*I. Treaties and Other Instruments**Treaties*

1. Article 23(a) of the 1899 HR provides that “it is especially prohibited . . . to employ poison or poisoned arms”.
2. Article 23(a) of the 1907 HR provides that “it is especially forbidden . . . to employ poison or poisoned weapons”.
3. Pursuant to Article 8(2)(b)(xvii) of the 1998 ICC Statute, “employing poison or poisoned weapons” is a war crime in international armed conflicts.

Other Instruments

4. Article 70 of the 1863 Lieber Code provides that “the use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He that uses it puts himself out of the pale of the law and usages of war.”
5. Article 13(a) of the 1874 Brussels Declaration states that “employment of poison or poisoned weapons” is especially forbidden.
6. Article 8(a) of the 1880 Oxford Manual provides that “it is forbidden . . . to make use of poison, in any form whatever”.
7. Article 16(1) of the 1913 Oxford Manual of Naval War provides that “it is forbidden . . . to employ poison or poisoned weapons”.
8. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “poisoning of wells”.
9. Article 3(a) of the 1993 ICTY Statute lists “employment of poisonous weapons” as a violation of the laws or customs of war to be subject to the jurisdiction of the Court.
10. Pursuant to Article 20(e)(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “employment of poisonous weapons” is a war crime.

11. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xvii), “employing poison or poisoned weapons” is a war crime in international armed conflicts.

II. National Practice

Military Manuals

12. Argentina’s Law of War Manual states that the use of “poison or poisoned weapons” is especially prohibited.¹

13. Australia’s Commanders’ Guide states that the use of poison or poisoned weapons is prohibited.² It also provides that “because of their potential to be indiscriminate in application, poison and poisoned weapons are prohibited”.³ It further states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as poison”.⁴

14. Australia’s Defence Force Manual states that:

Poison or poisoned weapons are illegal because of their potential to be indiscriminate. So, for example, the poisoning or contamination of any source of drinking water is prohibited and the illegality is not cured by posting a notice that the water has been contaminated or poisoned.⁵

The manual further states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as poison”.⁶

15. Belgium’s Law of War Manual proscribes “the use of poison or poisoned arms”. The prohibition includes the poisoning of water sources, even with a warning.⁷

16. Bosnia and Herzegovina’s Military Instructions states that “it is prohibited to use . . . poisonous gas”.⁸

17. Canada’s LOAC Manual states that:

Poison or poisoned weapons are illegal because of their potential to be indiscriminate. For example, the poisoning or contamination of any source of drinking water is prohibited. Posting a notice that the water has been contaminated or poisoned does not make this practice legal.⁹

¹ Argentina, *Law of War Manual* (1969), § 1.008(2).

² Australia, *Commanders’ Guide* (1994), § 932(b).

³ Australia, *Commanders’ Guide* (1994), § 307, see also § 304.

⁴ Australia, *Commanders’ Guide* (1994), § 1305(p).

⁵ Australia, *Defence Force Manual* (1994), § 406.

⁶ Australia, *Defence Force Manual* (1994), § 1315(p).

⁷ Belgium, *Law of War Manual* (1983), p. 37.

⁸ Bosnia and Herzegovina, *Military Instructions* (1992), Item 11, § 1.

⁹ Canada, *LOAC Manual* (1999), pp. 5-2 and 5-3, § 20.

The manual also prohibits the use of “bullets that have been dipped in poison”.¹⁰ It further states that “using poison or poisoned weapons” constitutes a war crime.¹¹

18. Canada’s Code of Conduct provides that the use of “poison or poison weapons” is forbidden.¹²

19. Colombia’s Basic Military Manual prohibits the poisoning of water.¹³

20. The Military Manual of the Dominican Republic prohibits the use of poison and poisonous weapons. It tells soldiers that “you may not use poison or poisoning agents such as dead animals, bodies, or defecation to poison any water and food. Of course, you may use non-poisonous methods to destroy military food and water supplies in order to deprive the enemy combatants of their use.”¹⁴

21. Ecuador’s Naval Manual states that “poisoned projectiles are considered illegal, owing to their alteration, as are any other munitions covered with poison”.¹⁵

22. France’s LOAC Summary Note states that it is prohibited to use poisoned weapons.¹⁶

23. France’s LOAC Teaching Note includes poison in the list of weapons that “are totally prohibited by the law of armed conflict” “owing to their inhuman nature or to their excessive traumatic effect”.¹⁷

24. France’s LOAC Manual incorporates the content of Article 23(a) of the 1907 HR.¹⁸ It also includes poison in the list of weapons that “are totally prohibited by the law of armed conflicts” “owing to their inhuman nature or to their excessive traumatic effect”.¹⁹

25. Germany’s Military Manual states that “it is prohibited to employ poison and poisoned weapons”.²⁰ It adds that “the prohibition also applies to the toxic contamination of water supply installations and foodstuffs . . . for military purposes”.²¹

26. Indonesia’s Air Force Manual states that “it is prohibited to use poison or poisonous weapons in warfare”.²²

27. Referring to Israel’s Law of War Booklet, the Report on the Practice of Israel provides that the IDF “does not condone the use of poison in warfare, irrespective of the method or means of its employment”.²³

28. Israel’s Manual on the Laws of War provides that:

¹⁰ Canada, *LOAC Manual* (1999), p. 5-2, § 12(c).

¹¹ Canada, *LOAC Manual* (1999), pp. 16-3 and 16-4, §§ 20(a) and 21(h).

¹² Canada, *Code of Conduct* (2001), Rule 3, § 10(b).

¹³ Colombia, *Basic Military Manual* (1995), p. 49.

¹⁴ Dominican Republic, *Military Manual* (1980), p. 5.

¹⁵ Ecuador, *Naval Manual* (1989), § 9.1, see also § 9.1.1.

¹⁶ France, *LOAC Summary Note* (1992), § 4.6.

¹⁷ France, *LOAC Teaching Note* (2000), p. 6.

¹⁸ France, *LOAC Manual* (2001), p. 97.

¹⁹ France, *LOAC Manual* (2001), p. 54.

²⁰ Germany, *Military Manual* (1992), § 426.

²¹ Germany, *Military Manual* (1992), § 434.

²² Indonesia, *Air Force Manual* (1990), § 15(b)(1).

²³ Report on the Practice Israel, 1997, Chapter 3.2, referring to *Law of War Booklet* (1986), p. 11.

It is forbidden to poison water sources, arrows or bullets. This is one of the most ancient prohibitions in the laws of war. Already back in ancient Greece and Rome, it was forbidden to use poison which was perceived as “a dishonorable weapon” that disgraces the user. This prohibition has been carefully upheld also into the twentieth century. Another reason for this prohibition is the difficulty in controlling the outcome of the poisoning, with the possibility that it could also spread to an innocent civilian population (for example, the poisoning of water sources that cannot be restricted to military use only).²⁴

29. Italy’s IHL Manual states that “it is specifically prohibited . . . to use poison or poisoned weapons”.²⁵

30. Kenya’s LOAC Manual states that “the use of poison or poisoned weapons is prohibited”.²⁶

31. Under South Korea’s Military Regulation 187, “poisoning ponds and streams” constitutes a war crime.²⁷

32. The Military Manual of the Netherlands states that “it is prohibited to use poison or poisoned weapons. This includes a prohibition to poison or contaminate water supplies.”²⁸

33. The Military Handbook of the Netherlands states that “it is prohibited to use poison and poisoned weapons”.²⁹

34. New Zealand’s Military Manual prohibits the use of “poison or poisoned weapons”.³⁰ It further notes that “the use of poison or poisoned weapons” is “an old-established rule of customary law” which constitutes a war crime.³¹

35. Under Nigeria’s Military Manual, it is prohibited “to employ poison or poisoned weapons”.³²

36. Nigeria’s Manual on the Laws of War states that “the use of poison or poisonous weapons is prohibited”. It adds that “smearing any substance [on bullets] likely to inflame a wound is also prohibited”.³³ The manual includes “using . . . poisoned . . . arms or ammunition [and] poisoning of wells, streams and other sources of water supply” in its list of war crimes.³⁴

37. Nigeria’s Soldiers’ Code of Conduct provides that it is prohibited “to employ poison or poisoned weapons”.³⁵

38. Russia’s Military Manual prohibits “poison and poisoned weapons”.³⁶

²⁴ Israel, *Manual on the Laws of War* (1998), p. 12.

²⁵ Italy, *IHL Manual* (1991), Vol. I, § 8(1).

²⁶ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 6.

²⁷ South Korea, *Military Regulation 187* (1991), Article 4(2).

²⁸ Netherlands, *Military Manual* (1993), p. IV-6.

²⁹ Netherlands, *Military Handbook* (1995), p. 7-39.

³⁰ New Zealand, *Military Manual* (1992), § 510.

³¹ New Zealand, *Military Manual* (1992), § 1704(2)(a) and footnote 32.

³² Nigeria, *Military Manual* (1994), p. 39, § 5(1)(i).

³³ Nigeria, *Manual on the Laws of War* (undated), §§ 12 and 11.

³⁴ Nigeria, *Manual on the Laws of War* (undated), § 6(7) and (9).

³⁵ Nigeria, *Soldiers’ Code of Conduct* (undated), § 12(a).

³⁶ Russia, *Military Manual* (1990), Article 6(d).

39. South Africa's LOAC Manual expressly prohibits the use of poison. It lists poison among "certain weapons . . . expressly prohibited by international agreement, treaty or custom".³⁷ The manual further provides that "making use of poisoned . . . arms or ammunition", as well as the "poisoning of wells or streams", are grave breaches of the law of war and war crimes.³⁸

40. Spain's LOAC Manual states that the use of "poison and poisoned weapons" is strictly forbidden in any circumstances.³⁹ It adds that "there also exists an absolute prohibition to poison food and water supplies".⁴⁰

41. Switzerland's Military Manual states that "the employment of poison . . . is prohibited".⁴¹

42. Switzerland's Teaching Manual states that the "law of armed conflict prohibits the use of poison".⁴²

43. Switzerland's Basic Military Manual states that "the employment of poison . . . is prohibited".⁴³ It also states that "poisoning springs" constitutes a war crime.⁴⁴

44. The UK Military Manual states that:

Poison and poisoned weapons . . . are forbidden.

Water in wells, pumps, pipes, reservoirs, lakes, rivers and the like, from which the enemy may draw drinking water, must not be poisoned or contaminated. The poisoning or contamination of water is not made lawful by posting up a notice informing the enemy that the water has been thus polluted.⁴⁵

The manual also provides that:

In addition to the "grave breaches" of the 1949 Geneva Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . using . . . poisoned . . . arms or ammunition; . . . poisoning of wells, streams, and other sources of water supply; . . . using . . . poisonous . . . gases.⁴⁶

45. The UK LOAC Manual states that "the following are prohibited in *international* armed conflict: . . . c. poison and poisoned weapons".⁴⁷ (emphasis in original)

46. The US Field Manual emphasises that "it is especially forbidden . . . to employ poison or poisoned weapons".⁴⁸ It further provides that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . making use of poisoned . . . arms or ammunition . . . [and] poisoning of wells or streams".⁴⁹

³⁷ South Africa, *LOAC Manual* (1996), § 34(f)(iii).

³⁸ South Africa, *LOAC Manual* (1996), §§ 39(a) and (g) and 41.

³⁹ Spain, *LOAC Manual* (1996), § 3.2.a.(2). ⁴⁰ Spain, *LOAC Manual* (1996), § 3.2.c.(1).

⁴¹ Switzerland, *Military Manual* (1984), p. 10. ⁴² Switzerland, *Teaching Manual* (1986), p. 41.

⁴³ Switzerland, *Basic Military Manual* (1987), Article 22.

⁴⁴ Switzerland, *Basic Military Manual* (1987), Article 200(2)(k).

⁴⁵ UK, *Military Manual* (1958), §§ 111 and 112.

⁴⁶ UK, *Military Manual* (1958), § 626(g), (i) and (r).

⁴⁷ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(c), see also Section 4, p. 12, § 2(e).

⁴⁸ US, *Field Manual* (1956), § 37(a). ⁴⁹ US, *Field Manual* (1956), § 504(a) and (i).

47. The US Air Force Pamphlet states that “a weapon may be illegal *per se* if either international custom or treaty has forbidden its use under all circumstances. An example is poison to kill or injure a person.”⁵⁰ It further states that “usage and practice has also determined that it is *per se* illegal . . . to use any substance on projectiles that tend unnecessarily to inflame the wound they cause”.⁵¹ The manual defines poison as a “biological or chemical substance” and adds that “the long-standing customary prohibition against poison is based on their uncontrolled character and the inevitability of death or permanent disability”.⁵²

48. The US Soldier’s Manual instructs soldiers that “using poison or poisoned weapons is against the law of war. You may not use poison or poisoning agents such as dead animals, bodies, or defecation to poison any water or food supply.”⁵³

49. The US Instructor’s Guide provides that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: using poisoned . . . arms or ammunition [and] poisoning wells or streams”.⁵⁴

50. The US Operational Law Handbook states that “using . . . poison weapons” is “expressly prohibited by the law of war” and is “not excusable on the basis of military necessity”.⁵⁵

51. The US Naval Handbook states that “a few weapons, such as poisoned projectiles, are unlawful, no matter how employed”.⁵⁶

52. The YPA Military Manual of the SFRY (FRY) provides that “it is forbidden to use poison or poisoned weapons. This includes, for example, the use of poisonous bullets. Poisoning of drinking water, food, etc., is not forbidden but it must be announced or marked.”⁵⁷

National Legislation

53. Use of poison is a criminal offence under countless pieces of domestic legislation, in particular penal codes.⁵⁸

54. Australia’s War Crimes Act considers “any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]” as a war crime, including poisoning of wells.⁵⁹

⁵⁰ US, *Air Force Pamphlet* (1976), § 6-2. ⁵¹ US, *Air Force Pamphlet* (1976), § 6-3b(2).

⁵² US, *Air Force Pamphlet* (1976), § 6-4f. ⁵³ US, *Soldier’s Manual* (1984), p. 10.

⁵⁴ US, *Instructor’s Guide* (1985), p. 13.

⁵⁵ US, *Operational Law Handbook* (1993), p. Q-182, § (i).

⁵⁶ US, *Naval Handbook* (1995), § 9.1. ⁵⁷ SFRY (FRY), *YPA Military Manual* (1988), § 98.

⁵⁸ See, e.g., Albania, *Penal Code* (1995), Article 34; Algeria, *Penal Code* (1966), Article 87 *bis* (e); Norway, *Penal Code* (1902), §§ 153 and 160; Rwanda, *Penal Code* (1977), Article 315.

⁵⁹ Australia, *War Crimes Act* (1945), Section 3.

55. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "employing poison or poisoned weapons" in international armed conflicts.⁶⁰
56. Brazil's Military Penal Code punishes "the poisoning of drinking water or foodstuffs".⁶¹
57. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "employing poison or poisoned weapons" constitutes a war crime in international armed conflicts.⁶²
58. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁶³
59. China's Law Governing the Trial of War Criminals provides that "putting poison on food or drinking water" constitutes a war crime.⁶⁴
60. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁶⁵
61. The DRC Code of Military Justice as amended punishes "in time of war . . . poisoning of water or foodstuffs, as well as deposits, spraying or using harmful substances intended to cause death".⁶⁶
62. Under Estonia's Penal Code, "use of . . . toxic weapons" is a war crime.⁶⁷
63. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "employing poison or poisoned weapons" in international armed conflicts, is a crime.⁶⁸
64. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or a non-international armed conflict, "employs poison or poisoned weapons".⁶⁹
65. Italy's Law of War Decree as amended provides that "it is prohibited . . . to use poison or poisoned weapons".⁷⁰
66. Under Mali's Penal Code, "using poison or poisoned weapons" is a war crime in international armed conflicts.⁷¹
67. The Definition of War Crimes Decree of the Netherlands includes the "poisoning of wells" in its list of war crimes.⁷²

⁶⁰ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.55.

⁶¹ Brazil, *Military Penal Code* (1969), Article 293.

⁶² Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(q).

⁶³ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁶⁴ China, *Law Governing the Trial of War Criminals* (1946), Article 3(15).

⁶⁵ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁶⁶ DRC, *Code of Military Justice as amended* (1972), Article 522.

⁶⁷ Estonia, *Penal Code* (2001), § 103. ⁶⁸ Georgia, *Criminal Code* (1999), Article 413(d).

⁶⁹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(1)(1).

⁷⁰ Italy, *Law of War Decree as amended* (1938), Article 35(1).

⁷¹ Mali, *Penal Code* (2001), Article 31(i)(17).

⁷² Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

68. Under the International Crimes Act of the Netherlands, “employing poison or poisoned weapons” is a crime, when committed in an international armed conflict.⁷³

69. Under New Zealand’s International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xvii) of the 1998 ICC Statute.⁷⁴

70. Switzerland’s Military Criminal Code as amended punishes “anyone who wilfully pollutes drinking water used for persons or cattle with substances harmful to health”.⁷⁵

71. Under Trinidad and Tobago’s Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xvii) of the 1998 ICC Statute.⁷⁶

72. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xvii) of the 1998 ICC Statute.⁷⁷

73. Under the US War Crimes Act as amended, violations of Article 23(a) of the 1907 HR are war crimes.⁷⁸

74. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, “means or methods of combat prohibited under the rules of international law, during a war or an armed conflict” is a war crime.⁷⁹ The commentary on this provision states that “the following weapons and means of combat are considered to be prohibited: . . . different kinds of poison and poisonous weapons”.⁸⁰

National Case-law

75. In its judgement in the *Shimoda case* in 1963, Japan’s District Court of Tokyo stated that “poison [and] poisonous gases” were part of “prohibited materials under international law”.⁸¹

Other National Practice

76. According to the Report on the Practice of Australia, the *opinio juris* of Australia supports the prohibition of poison or poisoned weapons.⁸²

77. According to the Report on the Practice of the Republika Srpska, the Instruction on Implementation of International Law of War in the Armed Forces of Republika Srpska states that “it is prohibited to use . . . poison”.⁸³

⁷³ Netherlands, *International Crimes Act* (2003), Article 5(5)(g).

⁷⁴ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁷⁵ Switzerland, *Military Criminal Code as amended* (1927), Article 169(1).

⁷⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁷⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁷⁸ US, *War Crimes Act as amended* (1996), Section 2441(c)(2).

⁷⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

⁸⁰ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

⁸¹ Japan, District Court of Tokyo, *Shimoda case*, Judgement, 7 December 1963.

⁸² Report on the Practice of Australia, 1998, Chapter 3.2(3).

⁸³ Report on the Practice of Republika Srpska, 1997, Chapter 3.2, referring to Instruction on Implementation of International Law of War in the Armed Forces of Republika Srpska, *Official Gazette of ARBiH*, 5 December 1992, § 11.

78. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt, referring to Article 22 of the 1907 HR, noted the “prohibition against the use of weapons which render death inevitable or cause unnecessary suffering” and, in this context, stated that “as far as weapons are concerned, since the nineteenth century this humanitarian principle has been embodied in two rules: one forbids the use of poisons”.⁸⁴

79. The Report on the Practice of India states that senior members of the Indian armed forces confirm that poison is not to be used in either international or non-international armed conflicts.⁸⁵

80. In 1991, during a debate in the UN Security Council concerning the aftermath of the Gulf War, Iraq implied that the use of shells made of depleted uranium was against international law, since they had poisonous effects.⁸⁶

81. The Report on the Practice of Iraq states that “the banning is absolute in using poisonous materials in itself due to its harmful effects to the individuals and the environment”.⁸⁷

82. The Report on the Practice of Jordan states that Jordan has never used poison or poisoned weapons.⁸⁸

83. In an article published in a military review, a member of the Kuwaiti armed forces stated that, during war, belligerents must:

respect restrictions and limits provided for in international conventions, such as restriction of the use of some weapons, and prohibition of using others, e.g. . . . the use of poisons. This is in application of well-established principles in wars, such as considerations of military honour and humanitarian considerations.⁸⁹

84. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Malaysia, in a part entitled “Principle of Non-Toxicity”, referred, *inter alia*, to the 1925 Geneva Gas Protocol and the 1956 New Delhi Draft Rules.⁹⁰ It made the same references in its oral pleadings in the *Nuclear Weapons case* in 1995.⁹¹

85. According to the Report on the Practice of Malaysia, the armed forces of Malaysia do not use poison in warfare.⁹²

86. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Marshall Islands stated that the “laws of war including the Geneva

⁸⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp.12-13, § 19.

⁸⁵ Report on the Practice of India, 1997, Chapter 3.2.

⁸⁶ Iraq, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 29–30.

⁸⁷ Report on the Practice of Iraq, 1998, Chapter 3.2.

⁸⁸ Report on the Practice of Jordan, 1997, Chapter 3.2.

⁸⁹ Fellah Awad Al-Anzi, “The Law of War”, *Homat Al-Watan*, No. 168, p. 57.

⁹⁰ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, pp. 23-24.

⁹¹ Malaysia, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/27, 7 November 1995, p. 57.

⁹² Report on the Practice of Malaysia, 1997, Chapter 3.2

and Hague Conventions and the United Nations Charter . . . prohibit the use of poisonous substances".⁹³

87. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico mentioned "a series of international instruments . . . [which] led to a prohibition on the use of certain weapons. Such instruments included the Hague Conventions of 1899 and 1907, which prohibited the use of poisoned or poisonous weapons."⁹⁴

88. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Nauru stated that:

Clearly it is a violation of customary international law to use poisons or other analogous substances. Thus even where a State is not a party to the Geneva Gas Protocol it is nonetheless bound under customary law to refrain from using poisonous weapons.⁹⁵

89. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated that "the use of poison and poisoned weapons has long been prohibited. The prohibition is set out in the 1925 Geneva [Gas] Protocol but also forms part of customary law."⁹⁶

90. The Norwegian National Group, in response to a questionnaire from the International Society for Military Law and the Law of War on the "Investigation and Prosecution of Violations of the Law of Armed Conflict", stated that the use of poisonous weapons was mentioned in the 1902 Military Penal Act.⁹⁷

91. In 1996, at the Fourth Review Conference of States Parties to the BWC, Pakistan stated that:

The 1925 protocol and the BWC is a manifestation of a moral and cultural ethos that is over 1400 years old. Violations of the prohibitions against the production or use of poisonous weapons should be treated with equal determination in all cases, without selectivity or discrimination.⁹⁸

92. On the basis of an interview with a high-ranking officer of the AFP, the Report on the Practice of the Philippines notes that poison is prohibited.⁹⁹

⁹³ Marshall Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 22 June 1995, § 5.

⁹⁴ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 12, § 72.

⁹⁵ Nauru, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 15 June 1995, p. 11.

⁹⁶ New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 72.

⁹⁷ Norway, Response from the Norwegian National Group to a Questionnaire on the Investigation and Prosecution of Violations of the Law of Armed Conflict, International Society for Military Law and the Law of War, XIVth International Congress, Athens 10-15 May 1997.

⁹⁸ Pakistan, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November-6 December 1996.

⁹⁹ Report on the Practice of the Philippines, 1997, Interview with Navy Lt. Office of the Deputy Chief of Staff for Intelligence, 5 March 1997, Chapter 3.2.

93. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda notes that the prohibition of the use of poison in armed conflicts is customary.¹⁰⁰

94. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that “international law prohibits the use of weapons which: . . . are poisonous”.¹⁰¹

95. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that the use of poisonous weapons was formally prohibited by Article 23(a) of the Hague Regulations of 1899 and 1907.¹⁰²

96. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Sweden stated that “as far back as the 17th century, Hugo Grotius stressed that poisoning was not allowed under international law. In certain respects, the principle of the prohibition of toxic weapons has also been codified (chiefly as a result of the 1925 Geneva Convention).”¹⁰³

97. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK referred to the “long established prohibition on the use of poison and poisoned weapons”, but it also stated that the prohibition was “intended to apply to weapons whose primary effect was poisonous and not to those where poison was a secondary or incidental effect”.¹⁰⁴

98. In 1974, in a memorandum on the depleted uranium tank round, the US Department of the Army stated that “the law of war prohibits the employment of poison or poisoned weapons”.¹⁰⁵

99. In 1975, in a legal review of 30MM ammunition, the US Department of the Air Force stated that “existing international law, both customary and treaty, prohibits the use of poison or poisoned weapons”.¹⁰⁶

100. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US accepted the prohibition of poison as such. However, it considered the prohibition to be applicable only to “weapons that carry poison into the body of the victim” or “that are designed to kill or injure by the inhalation or other absorption into the body of poisonous gases or analogous substances”.¹⁰⁷

¹⁰⁰ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 3.2.

¹⁰¹ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 62, § 3.77.

¹⁰² Solomon Islands, Oral pleadings before the ICJ, *Nuclear Weapons case*, 14 November 1995, Verbatim Record CR 95/32, p. 47.

¹⁰³ Sweden, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 5.

¹⁰⁴ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.59 and § 3.60.

¹⁰⁵ US, Department of the Army, Memorandum for US Army Research, Development and Engineering Center, M829A2 Cartridge, 120MM, APFSDS-T (Depleted Uranium Tank Round), *Law of War Review*, 27 December 1994, § 6(b).

¹⁰⁶ US, Department of the Air Force, Legal Review of 30MM Ammunition, 14 March 1975, § II(1).

¹⁰⁷ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 24.

101. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Zimbabwe fully shared the analysis by other States that “the threat or use of nuclear weapons violates the principles of humanitarian law prohibiting the use of weapons or methods of warfare that . . . utilize poisonous or analogous substances”.¹⁰⁸

102. The Report on the Practice of Zimbabwe states that the prohibition of the use of poison is part of customary international law.¹⁰⁹

III. Practice of International Organisations and Conferences

United Nations

103. In a resolution adopted in 1970 on respect for human rights in armed conflicts, the UN General Assembly underlined “the continuing value of existing humanitarian rules relating to armed conflict, in particular the Hague Conventions of 1899 and 1907” and called upon “all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907”, including Article 23(a) which prohibits the use of poison or poisoned weapons.¹¹⁰

104. In two resolutions adopted in 1971 on respect for human rights in armed conflicts, the UN General Assembly repeated its call upon “all parties to any armed conflicts” to respect the Hague Conventions of 1899 and 1907.¹¹¹

105. In a resolution adopted in 1972 on respect for human rights in armed conflicts, the UN General Assembly called upon “all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907”.¹¹²

106. In several resolutions adopted between 1973 and 1977 on respect for human rights in armed conflicts, the UN General Assembly called upon “all parties to armed conflicts to acknowledge and to comply with their obligations under the humanitarian instruments and to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907”.¹¹³

107. In 1969, in a report on respect for human rights in armed conflicts, the UN Secretary-General stated that “the use of poisons and poisoned bullets has been prohibited by the international law of war for a long time”.¹¹⁴

¹⁰⁸ Zimbabwe, Oral pleadings before the ICJ, *Nuclear Weapons case*, 15 November 1995, Verbatim Record CR 95/35, p. 27.

¹⁰⁹ Report on the Practice of Zimbabwe, 1998, Chapter 3.2.

¹¹⁰ UN General Assembly, Res. 2677 (XXV), 9 December 1970, preamble and § 1.

¹¹¹ UN General Assembly, Res. 2852 (XXVI), 20 December 1971, § 1; Res. 2853 (XXVI), 20 December 1971, § 1.

¹¹² UN General Assembly, Res. 3032 (XXVII), 18 December 1972, § 2.

¹¹³ UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, § 4; Res. 3319 (XXIX), 14 December 1974, § 3; Res. 3500 (XXX), 15 December 1975, § 1; Res. 31/19, 24 November 1976, § 1; Res. 32/44, 8 December 1977, § 6.

¹¹⁴ UN Secretary-General, Report on respect for human rights in armed conflicts, UN Doc. A/7720, 20 December 1969, § 190.

108. In 1973, in a survey on respect for human rights in armed conflicts, the UN Secretariat made a thorough study of different legal sources (practice, doctrine and treaties) to establish whether poison was prohibited. It concluded that most sources supported the view that there was a customary prohibition on the use of poison.¹¹⁵

Other International Organisations

109. In 1985, in a report on the deteriorating situation in Afghanistan, the Rapporteur of the Parliamentary Assembly of the Council of Europe stated that “according to several concordant accounts, water, cereals and livestock have been poisoned [and] chemical substances and incendiary bombs producing gases of various colours have been discharged”. In this respect, he added that the report of the Special Rapporteur of the UN Commission on Human Rights deserved mention.¹¹⁶ In that report, the UN Special Rapporteur had recommended that “the parties to the conflict, namely government and opposition forces, should be reminded that it is their duty to apply fully the rules of international humanitarian law without discrimination, particularly those concerning the protection of women and children”.¹¹⁷

International Conferences

110. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

111. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ discussed whether “nuclear weapons should be treated in the same way as poisoned weapons” and stated that, in that case, they would be prohibited under:

- (a) the Second Hague Declaration of 29 July 1899, which prohibits “the use of projectiles the object of which is the diffusion of asphyxiating or deleterious gases”;
- (b) Article 23 (a) of the Regulations respecting the laws and customs of war on land annexed to the Hague Convention IV of 18 October 1907, whereby “it is especially forbidden: . . . to employ poison or poisoned weapons”; and
- (c) the Geneva Protocol of 17 June 1925 which prohibits “the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices”.

¹¹⁵ UN Secretariat, *Respect for human rights in armed conflicts, Existing rules of international law concerning the prohibition or restriction of use of specific weapons*, Survey, UN Doc. A/9215, 7 November 1973, pp. 115-119.

¹¹⁶ Council of Europe, Parliamentary Assembly, Rapporteur, *Report on the deteriorating situation in Afghanistan*, Doc. 5495, 15 November 1985, pp. 7-8, § 16(e).

¹¹⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, *Report, Recommendations*, reprinted in Council of Europe, Parliamentary Assembly, Doc. 5495, Appendix 1, 15 November 1985, p. 11, § 190.

According to the Court, the terms “poison” and “poisoned weapons” “have been understood, in the practice of States, in their ordinary sense as covering weapons whose prime, or even exclusive, effect is to poison or asphyxiate. This practice is clear.”¹¹⁸

V. Practice of the International Red Cross and Red Crescent Movement

112. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the use of poison or poisoned weapons is prohibited”.¹¹⁹

113. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “in particular, the use of... poison is prohibited”.¹²⁰

VI. Other Practice

114. Rule B3 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, states that “the customary rule prohibiting the use of poison as a means or method of warfare is applicable in non-international armed conflicts”.¹²¹

115. In 1992, the Ecumenical Council for Justice and Peace of the Philippines denounced the use of poison by the Philippine military.¹²²

¹¹⁸ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 54 and 55.

¹¹⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 918.

¹²⁰ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

¹²¹ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B3, *IRRC*, No. 278, 1990, p. 398.

¹²² Ecumenical Council for Justice and Peace (ECJP), Documented Human Rights Violations in Marag Valley for 1992, Report on the Practice of the Philippines, 1997, Chapter 3.2.

NUCLEAR WEAPONS

Nuclear Weapons

§§ 1–4

Nuclear Weapons

1. As explained in Volume I, an assessment of the legality of the use of nuclear weapons was not undertaken in the framework of this study because such an assessment was ongoing by the ICJ in the *Nuclear Weapons case* at the time the scope of the study was decided on. As a result, no specific practice was collected in this study. However, States' positions on the legality of the use of nuclear weapons can be found in their written statements and oral pleadings before the ICJ in this case.¹

¹ See the *Nuclear Weapons case*: written statements of Bosnia and Herzegovina, Burundi, Ecuador, Egypt, Finland, France, Germany, India, Iran, Ireland, Italy, Japan, North Korea, Lesotho, Malaysia, Marshall Islands, Mexico, Nauru, Netherlands, New Zealand, Qatar, Russia, Samoa, San Marino, Solomon Islands, Sweden, UK and US; oral pleadings of Australia (Verbatim Record CR 95/22, 30 October 1995, pp. 29–65), Costa Rica, annexing ICRC communication (Verbatim Record CR 95/33, 14 November 1995, pp. 18–33), Egypt (Verbatim Record CR 95/23, 1 November 1995, pp. 17–37), France (Verbatim Record CR 95/23, 1 November 1995, pp. 38–67 and Verbatim Record CR 95/24, 2 November 1995, pp. 17–28), Germany (Verbatim Record CR 95/24, 2 November 1995, pp. 28–38), Indonesia (Verbatim Record CR 95/25, 3 November 1995, pp. 16–39), Iran (Verbatim Record CR 95/26, 6 November 1995, pp. 16–42), Italy (Verbatim Record CR 95/26, 6 November 1995, pp. 42–49), Japan (Verbatim Record CR 95/27, 7 November 1995, pp. 18–40), Malaysia (Verbatim Record CR 95/27, 7 November 1995, pp. 40–66), Marshall Islands (Verbatim Record CR 95/32, 14 November 1995, pp. 18–28), Mexico (Verbatim Record CR 95/25, 3 November 1995, pp. 29–57), New Zealand (Verbatim Record CR 95/28, 9 November 1995, pp. 19–49), Philippines (Verbatim Record CR 95/28, 9 November 1995, pp. 49–65), Qatar (Verbatim Record CR 95/29, 10 November 1995, pp. 19–39), Russia (Verbatim Record CR 95/29, 10 November 1995, pp. 39–51), Samoa (Verbatim Record CR 95/31, 13 November 1995, pp. 23–54), San Marino (Verbatim Record CR 95/31, 13 November 1995, pp. 19–23), Solomon Islands (Verbatim Record CR 95/32, 14 November 1995, pp. 28–73), UK (Verbatim Record CR 95/34, 15 November 1995, pp. 20–54), US (Verbatim Record CR 95/34, 15 November 1995, pp. 55–81), Zimbabwe (Verbatim Record CR 95/35, 15 November 1995, pp. 20–36) and WHO (Verbatim Record CR 95/22, 30 October 1995, pp. 19–29), available at <http://212.153.43.18/icjwww/icasess/iunan/iunanframe.htm>. On the same issue, see also the *Nuclear Weapons (WHO) case*: written statements of Australia, Colombia, Costa Rica, Finland, France, Germany, India, Iran, Ireland, Italy, Japan, Kazakhstan, North Korea, Lithuania, Malaysia, Mexico, Moldova, Nauru, Netherlands, New Zealand, Norway, Papua New Guinea, Philippines, Russia, Rwanda, Samoa, Saudi Arabia, Solomon Islands, Sri Lanka, Sweden, Uganda, Ukraine, UK and US, available at <http://212.153.43.18/icjwww/icasess/ianw/ianwframe.htm>.

2. The ICJ delivered its advisory opinion in the *Nuclear Weapons case* on 8 July 1996.²

3. In a subsequent debate in the First Committee of the UN General Assembly, several States expressed themselves on the implications of the advisory opinion.³

² ICJ, *Nuclear Weapons case*, 8 July 1996.

³ See the statements before the First Committee of the UN General Assembly of Algeria (UN Doc. A/C.1/51/PV.5, 16 October 1996, p. 10, UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 8 and UN Doc. A/C.1/51/PV.20, 12 November 1996, p. 1), Argentina (UN Doc. A/C.1/51/PV.3, 14 October 1996, p. 25 and UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 11), Austria (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 9), Bahrain (UN Doc. A/C.1/51/PV.11, 22 October 1996, p. 16), Bangladesh (UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 7), Belgium, also speaking on behalf of Luxembourg and Netherlands (UN Doc. A/C.1/51/PV.22, 14 November 1996, pp. 2–3), Bolivia (UN Doc. A/C.1/51/PV.7, 18 October 1996, p. 1), Botswana (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 3), Brazil (UN Doc. A/C.1/51/PV.4, 15 October 1996, p. 5), Brunei Darussalam (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 17), Burundi (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 9), Chile (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 11), China (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 7), Colombia (UN Doc. A/C.1/51/PV.4, 15 October 1996, p. 24), Costa Rica (UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 13), Cuba (UN Doc. A/C.1/51/PV.9, 21 October 1996, pp. 3–4, UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 3 and UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 9), Ecuador (UN Doc. A/C.1/51/PV.4, 15 October 1996, pp. 9–10), Egypt (UN Doc. A/C.1/51/PV.4, 15 October 1996, pp. 15–16), France (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 4), Gabon (UN Doc. A/C.1/51/PV.7, 18 October 1996, p. 18), Germany (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 10), Ghana (UN Doc. A/C.1/51/PV.7, 18 October 1996, pp. 15–16), Holy See (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 9), Iceland (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 4), India (UN Doc. A/C.1/51/PV.7, 18 October 1996, p. 12, UN Doc. A/C.1/51/PV.14, 4 November 1996, p. 16 and UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 10), Indonesia (UN Doc. A/C.1/51/PV.3, 14 October 1996, p. 19 and UN Doc. A/C.1/51/PV.20, 12 November 1996, p. 5), Indonesia, on behalf of the Non-Aligned Movement (UN Doc. A/C.1/51/PV.9, 21 October 1996, p. 4), Iran (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 17, UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 9 and UN Doc. A/C.1/51/PV.20, 12 November 1996, p. 6), Iraq (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 1), Ireland (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 9), Japan (UN Doc. A/C.1/51/PV.22, 14 November 1996, pp. 7–8), Kenya (UN Doc. A/C.1/51/PV.11, 22 October 1996, p. 22), South Korea (UN Doc. A/C.1/51/PV.6, 17 October 1996, p. 18–19), Laos (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 15), Libya (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 13), Malaysia (UN Doc. A/C.1/51/PV.3, 14 October 1996, p. 24 and UN Doc. A/C.1/51/PV.15, 6 November 1996, pp. 5–6), Marshall Islands (UN Doc. A/C.1/51/PV.6, 17 October 1996, p. 17), Mexico (UN Doc. A/C.1/51/PV.3, 14 October 1996, pp. 6–8 and UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 12), Mongolia (UN Doc. A/C.1/51/PV.10, 21 October 1996, pp. 6–8), Myanmar (UN Doc. A/C.1/51/PV.6, 17 October 1996, p. 9 and UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 4), Namibia (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 19), Nepal (UN Doc. A/C.1/51/PV.11, 22 October 1996, p. 17), New Zealand (UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 3, UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 14 and UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 8), Nicaragua (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 14), Nigeria (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 1), Oman (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 20), Pakistan (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 17, UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 4 and UN Doc. A/C.1/51/PV.19, 11 November 1996, p. 1), Papua New Guinea (UN Doc. A/C.1/51/PV.11, 22 October 1996, p. 21), Paraguay (UN Doc. A/C.1/51/PV.5, 16 October 1996, p. 5), Peru (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 12), Philippines (UN Doc. A/C.1/51/PV.11, 22 October 1996, pp. 8–9), Poland (UN Doc. A/C.1/51/PV.17, 7 November 1996, p. 15), Portugal (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 9), Russia (UN Doc. A/C.1/51/PV.6, 17 October 1996, p. 3 and UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 10), Samoa (UN Doc. A/C.1/51/PV.6, 17 October 1996, p. 22), Saudi Arabia (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 5), South Africa (UN Doc. A/C.1/51/PV.9, 21 October 1996, p. 2), Sri Lanka (UN Doc. A/C.1/51/PV.5, 17 October 1996, p. 2 and UN Doc. A/C.1/51/PV.18, 11 November 1996, p. 6), Sudan (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 19), Sweden (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 11), Switzerland (UN Doc. A/C.1/51/PV.4, 15 October 1996, p. 19),

4. During this debate, the ICRC also expressed its opinion on the issue.⁴

Tanzania (UN Doc. A/C.1/51/PV.11, 22 October 1996, p. 3), Thailand (UN Doc. A/C.1/51/PV.10, 21 October 1996, p. 11), Togo (UN Doc. A/C.1/51/PV.13, 24 October 1996, p. 7), UAE (UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 2), UK (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 5), US (UN Doc. A/C.1/51/PV.22, 14 November 1996, p. 3), Uruguay (UN Doc. A/C.1/51/PV.10, 21 October 1996, pp. 1–2), Venezuela (UN Doc. A/C.1/51/PV.7, 18 October 1996, p. 6), Yemen (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 13), Zambia (UN Doc. A/C.1/51/PV.12, 24 October 1996, p. 11); see also Rio Group, Statement by Bolivia on behalf of the Rio Group before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/51/SR.4, 19 November 1996, § 26.

⁴ See the statement of the ICRC before the First Committee of the UN General Assembly, UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 10, also reproduced in *IRRC*, No. 316, 1997, pp. 118–119.

BIOLOGICAL WEAPONS

Biological Weapons (practice relating to Rule 73)

§§ 1–283

Biological Weapons*I. Treaties and Other Instruments**Treaties*

1. According to the 1925 Geneva Gas Protocol, the States parties accept the prohibition on the use of asphyxiating, poisonous or other gases and “agree to extend this prohibition to the use of bacteriological methods of warfare”. There are 20 reservations to the Protocol related to biological weapons.¹ These generally indicate that if an adverse party does not respect the Protocol, the ratifying State will no longer consider itself bound by the Protocol vis-à-vis that party.² There were an additional 17 reservations to this effect, but they have been withdrawn.³

2. The three protocols to the 1948 Brussels Treaty deal with biological weapons. Article 1 Part I (Armaments not to be manufactured) of Protocol III states that:

The High Contracting Parties, members of the Western European Union,⁴ take note of and record their agreement with the Declarations of the Chancellor of the Federal Republic of Germany (made in London on 3rd October, 1954, and annexed hereto as Annex I) in which the Federal Republic of Germany undertook not to manufacture in its territory . . . biological . . . weapons.

3. Article 13(1) of the 1955 Austrian State Treaty provides that:

¹ Algeria, Angola, Bahrain, Bangladesh, China, Fiji, India, Iraq, Israel, Jordan, North Korea, Kuwait, Libya, Nigeria, Pakistan, Papua New Guinea, Portugal, Solomon Islands, Vietnam and SFRY.

² A number of reservations include non-respect by allies also as a reason for no longer being obliged to respect the Protocol.

³ By Ireland in 1972; by Australia in 1986; by New Zealand in 1989; by Slovakia in 1990; by Bulgaria, Canada (in relation to bacteriological weapons), Chile, Romania and UK (in relation to bacteriological weapons) in 1991; by Spain in 1992; by the Netherlands in 1995; by France and South Africa in 1996; by Belgium in 1997; and by Estonia in 1999; by Russia in 2001; by South Korea in 2002.

⁴ Belgium, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Spain and UK.

Austria shall not possess, construct or experiment with –

- ...
- (j) ... biological substances in quantities greater than, or of types other than, are required for legitimate civil purposes, or any apparatus designed to produce, project or spread such materials or substances for war purposes.

4. The preamble to the 1972 BWC provides that:

The States Parties to this Convention,
Determined to act with a view to achieving effective progress towards general and complete disarmament, including the prohibition and elimination of all types of weapons of mass destruction, and convinced that the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and their elimination, through effective measures, will facilitate the achievement of general and complete disarmament under strict and effective international control.

Recognising the important significance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925, and conscious also of the contribution which the said Protocol has already made, and continues to make, to mitigating the horrors of war,

Reaffirming their adherence to the principles and objectives of that Protocol and calling upon all States to comply strictly with them,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Geneva Protocol of 17 June 1925, ...

Convinced of the importance and urgency of eliminating from the arsenals of States, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents,

Recognising that an agreement on the prohibition of bacteriological (biological) and toxin weapons represents a first possible step towards the achievement of agreement on effective measures also for the prohibition of the development, production and stockpiling of chemical weapons, and determined to continue negotiations to that end,

Determined, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons,

Convinced that such use would be repugnant to the conscience of mankind and that no effort should be spared to minimise this risk.

5. Article 1 of the 1972 BWC provides that:

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

1. microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
2. weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

6. In September 1991, Argentina, Brazil and Chile signed the Mendoza Declaration on Chemical and Biological Weapons. Bolivia, Paraguay and Uruguay later acceded to the Declaration. In it, the parties state that they are “convinced that a complete ban on biological weapons will contribute to strengthening the security of all States”. In the first paragraph, they declare their “full commitment not to develop, produce, acquire in any way, stockpile or retain, transfer directly or indirectly, or use biological weapons”.
7. In December 1991, Bolivia, Colombia, Ecuador, Peru and Venezuela adopted the Cartagena Declaration on Weapons of Mass Destruction. The Declaration expresses the commitment of these governments to:

renounce the possession, production, development, use, testing and transfer of all weapons of mass destruction whether...bacteriological (biological), toxin... weapons, and to refrain from storing, acquiring or holding such categories of weapons, in any circumstances.

Other Instruments

8. Articles 6 and 9 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provide that:

Art. 6. The use of... bacterial weapons as against any State, whether or not a party to the present convention, and in any war, whatever its character, is prohibited.

...

Art. 9. The prohibition of the use of bacterial weapons shall apply to the use for the purpose of injuring an adversary of all methods for the dissemination of pathogenic microbes or of filter-passing viruses, or of infected substances, whether for the purpose of bringing them into immediate contact with human beings, animals or plants, or for the purpose of affecting any of the latter in any manner whatsoever, as, for example, by polluting the atmosphere, water, foodstuffs or any other objects of human use or consumption.

9. Article 14 of the 1956 New Delhi Draft Rules prohibits the use of weapons

whose harmful effects – resulting in particular from the dissemination of... bacteriological... agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

10. Under Article 4(4) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, “civilian population and civilians... shall be protected... from... the stockpiling near or in their midst, and the use of... biological weapons”.

11. Section 6.2 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of

international humanitarian law. These include, in particular, the prohibition on the use of . . . biological methods of warfare.”

II. National Practice

Military Manuals

12. Australia’s *Commanders’ Guide* provides that States are prohibited “from manufacturing, storing and using biological weapons. Both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion.”⁵ It defines the use of “certain unlawful weapons and ammunition” as “grave breaches or serious war crimes”.⁶

13. Australia’s *Defence Force Manual* states that “bacteriological methods of warfare are prohibited”. It further provides that States are prohibited “from manufacturing, storing and using biological weapons. Both chemical and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion.”⁷ The manual defines the use of “certain unlawful weapons and ammunition” as “grave breaches or serious war crimes”.⁸

14. Belgium’s *Law of War Manual* proscribes the use of biological weapons with reference to the 1925 Geneva Gas Protocol and the 1972 BWC.⁹

15. Bosnia and Herzegovina’s *Military Instructions* states that “it is prohibited to use . . . bacteriological agents”.¹⁰

16. Cameroon’s *Instructors’ Manual* states, on the issue of biological and bacteriological weapons, that “the restrictions here are clear. It is prohibited to use such weapons against enemy combatants as well as against civilian populations.” It also calls for the “total destruction of the existing stockpile”.¹¹

17. Canada’s *LOAC Manual* states that “nations are prohibited from manufacturing, storing and using biological weapons. Both bacteriological and biological weapons are prohibited because they cause unnecessary suffering and may affect the civilian population in an indiscriminate fashion.”¹² It further states that “using bacteriological methods of warfare” constitutes a war crime.¹³

18. Colombia’s *Basic Military Manual* states that the use, production, possession and importation of biological weapons are banned.¹⁴

⁵ Australia, *Commanders’ Guide* (1994), § 306.

⁶ Australia, *Commanders’ Guide* (1994), § 1305(p).

⁷ Australia, *Defence Force Manual* (1994), §§ 411 and 414.

⁸ Australia, *Defence Force Manual* (1994), § 1315(p).

⁹ Belgium, *Law of War Manual* (1983), p. 38.

¹⁰ Bosnia and Herzegovina, *Military Instructions* (1992), Item 11, § 1.

¹¹ Cameroon, *Instructors’ Manual* (1992), p. 124, § 441.

¹² Canada, *LOAC Manual* (1999), p. 5-3, § 25.

¹³ Canada, *LOAC Manual* (1999), pp. 16-3 and 16-4, § 21(i).

¹⁴ Colombia, *Basic Military Manual* (1995), pp. 49-50.

19. Ecuador's Naval Manual states that "international law prohibits all biological weapons or methods of warfare whether they are directed against persons, animals or plants. Biological weapons include microbial or biological or toxin agents of any origin (natural or artificial) or method of production."¹⁵

20. France's LOAC Summary Note states that it is prohibited to use biological weapons.¹⁶

21. France's LOAC Teaching Note includes biological and bacteriological weapons in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁷

22. France's LOAC Manual incorporates the content of Article 1 of the 1972 BWC and makes reference to the 1925 Geneva Gas Protocol.¹⁸ It further includes biological and bacteriological weapons in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁹

23. Germany's Soldiers' Manual provides that "the use... of bacteriological means of warfare is prohibited".²⁰

24. Germany's Military Manual proscribes "the use of bacteriological weapons" and refers to the 1925 Geneva Gas Protocol. It further states that:

The development, manufacture, acquisition and stockpiling of bacteriological (biological) and toxin weapons is prohibited (BWC). These prohibitions shall apply both to biotechnological and synthetic procedures serving other but peaceful purposes. They also include genetic engineering procedures and micro-organisms altered through genetic engineering.²¹

25. Germany's IHL Manual states that "international humanitarian law prohibits the use of a number of means of warfare which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g. ... bacteriological means of warfare, e.g. substances which cause disease".²²

26. Italy's IHL Manual provides that "the use of bacteriological means... is forbidden in conformity with the international provisions in force".²³

27. Kenya's LOAC Manual prohibits the use of "bacteriological methods of warfare".²⁴

28. The Military Manual of the Netherlands states that the 1972 BWC "prohibits the development, production and stockpiling of bacteriological (biological) and toxin weapons (means of warfare). Logically this implies that the use of these weapons is also prohibited."²⁵

¹⁵ Ecuador, *Naval Manual* (1989), § 10.4.

¹⁶ France, *LOAC Summary Note* (1992), § 4.6. ¹⁷ France, *LOAC Teaching Note* (2000), p. 6.

¹⁸ France, *LOAC Manual* (2001), p. 22. ¹⁹ France, *LOAC Manual* (2001), p. 54.

²⁰ Germany, *Soldiers' Manual* (1991), p. 5.

²¹ Germany, *Military Manual* (1992), §§ 438–439.

²² Germany, *IHL Manual* (1996), § 305. ²³ Italy, *IHL Manual* (1991), Vol. I, § 19.

²⁴ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 6.

²⁵ Netherlands, *Military Manual* (1993), pp. IV-7/IV-8, § 13.

29. The Military Handbook of the Netherlands states that “a general prohibition applies to the use of biological (bacteriological) means of warfare. The Netherlands shall in all circumstances respect this prohibition.”²⁶

30. New Zealand’s Military Manual states that “the [1925 Geneva Gas Protocol] prohibits the use . . . of bacteriological methods of warfare.”²⁷ It also includes “using bacteriological methods of warfare” in a list of “war crimes recognised by the customary law of armed conflict”.²⁸

31. Nigeria’s Manual on the Laws of War mentions the 1925 Geneva Gas Protocol and states that:

There is no rule to prevent measures being taken to dry up springs and destroy water-wells from which the enemy may draw water or devastate crops by means of chemicals and bacteria which are not harmful to human beings. Since 1925 a great number of States have signed a protocol for the prohibition of the use in war of asphyxiating gases or bacteriological means of warfare.

The manual includes “using bacteriological methods of warfare” in its list of war crimes.²⁹

32. Russia’s Military Manual prohibits bacteriological (biological) weapons. It refers to the 1925 Geneva Gas Protocol and the 1972 BWC.³⁰

33. South Africa’s LOAC Manual states that “the use of certain weapons is expressly prohibited by international agreement, treaty or custom (e.g. biological and toxic weapons)”.³¹

34. Spain’s LOAC Manual states that “it is prohibited to use . . . bacteriological weapons”. It repeats the content of Article 1 of the 1972 BWC.³²

35. Switzerland’s Teaching Manual states that the use of bacteriological means of warfare is prohibited.³³

36. Switzerland’s Basic Military Manual prohibits the use of biological weapons.³⁴

37. The UK Military Manual states that “the use of bacteriological methods of warfare is forbidden”.³⁵ A footnote explains that “the prohibition . . . in the [1925 Geneva] Gas Protocol was declaratory of the view generally accepted by the civilised world”. It adds that:

As Japan was not a party to the Protocol, the Russian military tribunal at Khabarovsk . . . would therefore seem to have assumed that the prohibition of bacteriological warfare derived from the customary law of war prevailing among civilised nations and it was only declaratory of such customary law.³⁶

²⁶ Netherlands, *Military Handbook* (1995), p. 7-39.

²⁷ New Zealand, *Military Manual* (1992), §§ 512, 619 and 711.

²⁸ New Zealand, *Military Manual* (1992), § 1704(5).

²⁹ Nigeria, *Manual on the Laws of War* (undated), § 12 and § 6(19).

³⁰ Russia, *Military Manual* (1990), § 6(e) and (f).

³¹ South Africa, *LOAC Manual* (1996), p. 12, § 34.f.(iii).

³² Spain, *LOAC Manual* (1996), §§ 3.2.c.(1) and 3.2.c.(2).

³³ Switzerland, *Teaching Manual* (1986), p. 41.

³⁴ Switzerland, *Basic Military Manual* (1987), Article 22.

³⁵ UK, *Military Manual* (1958), § 111. ³⁶ UK, *Military Manual* (1958), § 111, footnote 1(b).

The manual also provides that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . using bacteriological methods of warfare”.³⁷

38. The UK LOAC Manual states that “the following are prohibited in *international* armed conflict: . . . f. bacteriological weapons”.³⁸ (emphasis in original)

39. The US Field Manual states that:

The reservation of the United States [to the 1925 Geneva Gas Protocol] does not, however, reserve the right to retaliate with bacteriological methods of warfare against a state if that state or any of its allies fails to respect the prohibitions of the Protocol. The prohibition concerning bacteriological methods of warfare which the United States has accepted under the Protocol, therefore, proscribes not only the initial but also any retaliatory use of bacteriological methods of warfare. In this connection, the United States considers bacteriological methods of warfare to include not only biological weapons but also toxins, which, although not living organisms and therefore susceptible of being characterized as chemical agents, are generally produced from biological agents. All toxins, however, regardless of the manner of production, are regarded by the United States as bacteriological methods of warfare within the meaning of the proscription of the Geneva Protocol of 1925.³⁹

40. The US Air Force Pamphlet states that:

International law prohibits biological weapons or methods of warfare whether they are directed against persons, animals or plants. The wholly indiscriminate and uncontrollable nature of biological weapons has resulted in the condemnation of biological weapons by the international community, and the practice of states in refraining from their use in warfare has confirmed this rule. The Biological Weapons Convention prohibits also the development, preparation, stockpiling and supply to others of such weapons.⁴⁰

41. The US Air Force Commander’s Handbook states that “the United States has renounced the use of bacteriological weapons under all circumstances, and their possession is forbidden by a 1972 Treaty”.⁴¹

42. The US Operational Law Handbook states that “the US has renounced . . . all use of biological weapons”.⁴²

43. The US Naval Handbook states that:

The United States considers the prohibition against the use of biological weapons during armed conflict to be part of customary international law and thereby binding on all nations whether or not they are parties to the 1925 Gas Protocol or the 1972 Biological Weapons Convention.

The United States has, therefore, formally renounced the use of biological weapons under any circumstance. Pursuant to its treaty obligations, the United

³⁷ UK, *Military Manual* (1958), § 626(s). ³⁸ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(f).

³⁹ US, *Field Manual* (1956), § 38(d). ⁴⁰ US, *Air Force Pamphlet* (1976), § 6-4(b).

⁴¹ US, *Air Force Commander’s Handbook* (1980), § 6-3(b).

⁴² US, *Operational Law Handbook* (1993), p. Q-182, § (i).

States has destroyed all its biological and toxin weapons and restricts its research activities to development of defensive capabilities.⁴³

44. The YPA Military Manual of the SFRY (FRY) prohibits the use of bacteriological (biological) means of warfare.⁴⁴

National Legislation

45. Under Armenia's Penal Code, the development, production, acquisition, sale, use and testing of biological weapons and weapons of mass destruction constitute crimes against the peace and security of mankind.⁴⁵

46. Australia's Biological Weapons Act provides that:

- (1) It is unlawful to develop, produce, stockpile or otherwise acquire or retain:
 - (a) microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes; or
 - (b) weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflicts;
- (2) A corporation that, or a natural person who, does an act or thing declared by subsection (1) to be unlawful is guilty of an offence and is punishable, on conviction:
 - (a) in the case of a corporation – by a fine not exceeding \$ 200,000; and
 - (b) in the case of a natural person – by a fine not exceeding \$ 10,000, or by imprisonment for a specified period or for life, or both.⁴⁶

47. The Criminal Code of Belarus provides that “production, acquisition, stockpiling, transport, transfer or sale of weapons of mass destruction prohibited by international treaties binding upon the Republic of Belarus” is a criminal offence, while the use of such weapons is a war crime.⁴⁷

48. Brazil's Military Penal Code prohibits the spreading of epidemics or infestations in a location under military control which could result in damage to forests, crops, grazing pastures or animals used for economic or military purposes.⁴⁸

49. China's Law Governing the Trial of War Criminals provides that “use of . . . bacteriological warfare” constitutes a war crime.⁴⁹

50. Colombia's Constitution prohibits the “manufacture, import, possession and use of . . . biological . . . weapons”.⁵⁰

51. Under Croatia's Criminal Code, the manufacture, improvement, production, stockpiling, offering for sale, purchase, interceding in purchasing or

⁴³ US, *Naval Handbook* (1995), § 10.4.2.

⁴⁴ SFRY (FRY), *YPA Military Manual* (1988), § 99.

⁴⁵ Armenia, *Penal Code* (2003), Articles 386 and 387(2).

⁴⁶ Australia, *Biological Weapons Act* (1976), § 8.

⁴⁷ Belarus, *Criminal Code* (1999), Articles 129 and 134.

⁴⁸ Brazil, *Military Penal Code* (1969), Article 278.

⁴⁹ China, *Law Governing the Trial of War Criminals* (1946), Article 3(12).

⁵⁰ Colombia, *Constitution* (1991), Article 81.

selling, possession, transfer, transport, use of, and order to use, biological weapons are war crimes.⁵¹

52. Estonia's Penal Code punishes any "person who designs, manufactures, stores, acquires, hands over, sells or provides or offers for use in any other manner . . . biological or bacteriological weapons".⁵² Under the Code, "use of biological [or] bacteriological . . . weapons" is a war crime.⁵³

53. France's Law on the Prohibition of Biological Weapons prohibits the production, retention, acquisition, stockpiling and transfer of biological weapons.⁵⁴

54. Under Georgia's Criminal Code, "the production, acquisition or sale of . . . biological, or other kinds of weapon of mass destruction, prohibited by an international treaty" and the "use during hostilities or in armed conflict of such means and materials or weapons of mass destruction which are prohibited by an international treaty" are crimes.⁵⁵

55. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "employs biological . . . weapons".⁵⁶

56. Hungary's Law/Decree on the Prohibition of Biological Weapons prohibits the development, production, stockpiling and acquisition or retention of microbial or other biological agents, or toxins, weapons, equipment and means of delivery as specified in Article 1 of the 1972 BWC.⁵⁷

57. Under Hungary's Criminal Code as amended, employing "bacteriological methods of warfare" as set forth in the 1925 Geneva Gas Protocol is a war crime.⁵⁸

58. Italy's Law of War Decree as amended states that "the use of bacteriological means . . . is forbidden in conformity with the international provisions in force".⁵⁹

59. Italy's Law on the Export, Import and Transit of Armaments provides that "the manufacture, import, export and transit of biological, chemical and nuclear weapons are prohibited, as is research designed for their production or the provision of the relevant technology".⁶⁰

60. Under Kazakhstan's Penal Code, "the production, acquisition, or sale of biological weapons" is a criminal offence.⁶¹

61. Moldova's Draft Penal Code punishes the use of bacteriological weapons.⁶²

⁵¹ Croatia, *Criminal Code* (1997), Article 163(1) and (2).

⁵² Estonia, *Penal Code* (2001), § 93(1). ⁵³ Estonia, *Penal Code* (2001), § 103.

⁵⁴ France, *Law on the Prohibition of Biological Weapons* (1972), Article 1.

⁵⁵ Georgia, *Criminal Code* (1999), Articles 406 and 413(c).

⁵⁶ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(1)(2).

⁵⁷ Hungary, *Law/Decree on the Prohibition of Biological Weapons* (1975).

⁵⁸ Hungary, *Criminal Code as amended* (1978), Section 160, § A(3)(a).

⁵⁹ Italy, *Law of War Decree as amended* (1938), Article 51.

⁶⁰ Italy, *Law on the Export, Import and Transit of Armaments* (1990), Chapter 1, Section 1, § 7.

⁶¹ Kazakhstan, *Penal Code* (1997), Articles 158 and 159(2).

⁶² Moldova, *Draft Penal Code* (1999), Article 138(2).

62. New Zealand's Disarmament Act provides that "no person shall manufacture, station, acquire, or possess, or have control over any biological weapon in the New Zealand Nuclear Free Zone".⁶³

63. Norway's Penal Code provides that:

Any person shall be liable to imprisonment for a term not exceeding 10 years who develops, produces, stores or otherwise obtains or possesses:

- (1) bacteriological or other biological substances or toxins regardless of their origin or method of production, of such a kind and in such quantities that they are not justified for preventive, protective or other peaceful purposes,
- (2) weapons, equipment or means of dissemination made for using such substances or toxins as are mentioned in item 1 for hostile purposes or in armed conflict.

Accomplices shall be liable to the same penalty.⁶⁴

64. Poland's Penal Code punishes "any person who uses a means of mass destruction prohibited by international law" and "any person who, against the prohibition by international law or by the provision of law, produces, stockpiles, acquires, sells, retains, transports or sends means of mass destruction or means of combat, or conducts research aimed at the production or use of such means".⁶⁵

65. South Africa's Non-Proliferation of Weapons of Mass Destruction Act provides that:

The Minister may, by notice in the Gazette, determine the general policy to be followed with a view to:

- ...
- (d) the imposition of a prohibition, whether for offensive or defensive purposes, on the development, production, acquisition, stockpiling, maintenance or transit of any weapons of mass destruction.⁶⁶

66. Switzerland's Military Criminal Code as amended punishes "whoever will intentionally spread a dangerous and transmissible human disease".⁶⁷

67. Switzerland's Federal Law on War Equipment as amended provides that:

It is prohibited:

- a. to develop, produce, deliver to anyone, acquire, import, export, procure the transit of or stockpile biological weapons, engage in the brokerage thereof or otherwise dispose of them;
- b. to induce anyone to commit an act mentioned under letter a;
- c. to facilitate the commission of an act mentioned under letter a.⁶⁸

⁶³ New Zealand, *Disarmament Act* (1987), Section 8.

⁶⁴ Norway, *Penal Code* (1902), § 153a. ⁶⁵ Poland, *Penal Code* (1997), Articles 120 and 121.

⁶⁶ South Africa, *Non-Proliferation of Weapons of Mass Destruction Act* (1993), Section 2(1)(d).

⁶⁷ Switzerland, *Military Criminal Code as amended* (1927), Article 167.

⁶⁸ Switzerland, *Federal Law on War Equipment as amended* (1996), Article 7.

68. Tajikistan's Criminal Code punishes the "creation, production, acquisition, storage, transportation, sending or sale of . . . biological (bacteriological) . . . weapons of mass destruction, prohibited by an international treaty, as well as transfer to any other State, which does not possess nuclear weapons, of initial or special fissionable material, technologies, which can knowingly be used to produce weapons of mass destruction, or providing anyone with any other kind of weapons of mass destruction or components necessary for their production, prohibited by an international treaty". It further prohibits the "use of . . . biological (bacteriological) . . . weapons".⁶⁹

69. Under Ukraine's Criminal Code, "the use of weapons of mass destruction prohibited by international instruments consented to be binding by the [parliament] of Ukraine" is a war crime.⁷⁰

70. The UK Biological Weapons Act provides that:

No person shall develop, produce, stockpile, acquire or retain . . . any biological agent or toxin . . . in a quantity not justified for peaceful purposes . . . any weapon, equipment or means of delivery designed to use biological agents or toxins for hostile purposes or in armed conflict.⁷¹

71. The US Biological Weapons Anti-Terrorism Act criminalises "whoever knowingly develops, produces, stockpiles, transfers, acquires, retains, or possesses any biological agent, toxin or delivery system for use as a weapon or knowingly assists a foreign State or any organization to do so".⁷²

72. Uruguay's Organisational Law of Armed Forces states that it is forbidden for residents of the republic to possess war material for any purpose. Biological agents are included in this category.⁷³

73. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, "means or methods of combat prohibited under the rules of international law, during a war or an armed conflict" is a war crime.⁷⁴ The commentary on the Code adds that "the following weapons and means of combat are considered to be prohibited: . . . bacteriological agents".⁷⁵

National Case-law

74. In 1995, in a ruling on the constitutionality of AP II, Colombia's Constitutional Court stated in relation to the prohibition on the use of weapons of a nature to cause unnecessary suffering or superfluous injury that:

Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration

⁶⁹ Tajikistan, *Criminal Code* (1998), Articles 397 and 399, see also Article 405.

⁷⁰ Ukraine, *Criminal Code* (2001), Article 439(1).

⁷¹ UK, *Biological Weapons Act* (1974), Section 1.

⁷² US, *Biological Weapons Anti-Terrorism Act* (1989), § 175.

⁷³ Uruguay, *Organisational Law of Armed Forces* (1974), Article 49.

⁷⁴ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

⁷⁵ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

consequently considers that the bans (established partly by customary law and partly by treaty law) on the use of . . . bacteriological weapons . . . apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.⁷⁶

75. The Report on the Practice of Japan states that there is no national legislation specifically dealing with the prohibition of the use of bacteriological weapons, but that the judgement in the *Shimoda case* held that "bacteria" were part of "prohibited materials" under international law.⁷⁷

Other National Practice

76. In 1989, the Minister of Foreign Affairs of Afghanistan stated that "the Republic of Afghanistan, while once again confirming its pledges on the non-use and elimination of chemical weapons, announces that it will never resort to the production, use, development, storage, or export of . . . biological weapons".⁷⁸

77. At the CDDH, Algeria supported the Philippine amendment (see *infra*) because "it was a simple reaffirmation of the principles of positive humanitarian law".⁷⁹

78. In 1993, Argentina's Minister of Defence said that "we will not manufacture bacteriological weapons because we deem them immoral".⁸⁰

79. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that:

Both conventions have widespread adherence. The Biological Weapons Convention has 131 States parties. The very new Chemical Weapons Convention has already 159 signatories and 40 ratifications or acceptances. The final preambular paragraph to the Biological Weapons Convention expresses the conviction of the States Parties that the use of biological weapons "would be repugnant to the conscience of mankind and that no effort should be spared to minimise this risk". Clearly, this is a strong international statement that the use of such weapons would be contrary to fundamental general principles of humanity.⁸¹

80. In 1992, during a debate in the First Committee of the UN General Assembly, which dealt mostly with the 1972 BWC, Austria stated that the elimination of biological weapons was important.⁸²

⁷⁶ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995, § 23.

⁷⁷ Report on the Practice of Japan, 1998, Chapter 3.1, referring to District Court of Tokyo, *Shimoda case*, Judgement, 7 December 1963, § 11.

⁷⁸ Kabul Radio, "Foreign Minister Returns from Paris Conference", 10 January 1989, as translated in FBIS-NES-89-006.

⁷⁹ Algeria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 286, § 37.

⁸⁰ "Minister Admits 'US Pressure' To Suspend Condor-2 Project", *Noticias Argentinas*, Buenos Aires, 6 August 1993, as translated from Spanish in FBIS-LAT-93-151, 9 August 1993, p. 27.

⁸¹ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, § 39.

⁸² Austria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.5, 14 October 1992, p. 10.

81. In 1992, during a debate in the First Committee of the UN General Assembly, Bahrain stated that the Middle East had to be free from biological weapons.⁸³

82. At the Fourth Review Conference of States Parties to the BWC in 1996, Bangladesh affirmed its commitment to “general and complete disarmament”. It added that “any effort to try to contain the spread of weapons of mass destruction, biological weapons included, must be combined with measures for their complete elimination”.⁸⁴

83. In 1970, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), Belarus stated that:

The need for all States without exception to abide, in any armed conflict, by the existing international conventions defining and limiting the means, ways and methods of waging war assumes particular importance. Among these conventions are . . . the Geneva Protocol of 1925.⁸⁵

84. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Belarus ensured “the fulfilment of undertakings assumed by it under articles I, II, III, and IV, and also under the relevant parts of the preamble of the [1972 BWC]”.⁸⁶

85. In 1993, during a debate in the First Committee of the UN General Assembly, Belarus referred to a declaration in which all States which had emerged from the Soviet Union had expressed support for biological disarmament.⁸⁷

86. At the First Review Conference of States Parties to the BWC in 1980, Belgium stated that “with regard to article IV [of the 1972 BWC], Belgium, in common with many other States, had taken the necessary domestic measures, the Belgian Parliament having enacted legislation approving the Convention”.⁸⁸

87. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Benin confirmed that it “has developed no weapon of that kind, and intends to continue to respect its undertakings under the Convention, to which Benin is a party”.⁸⁹

⁸³ Bahrain, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.20, 28 October 1991, p. 32.

⁸⁴ Bangladesh, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

⁸⁵ Belarus, Reply dated 2 March 1970 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 118, § 5.

⁸⁶ Belarus, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 32.

⁸⁷ Belarus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.8, 22 October 1993, § 5.

⁸⁸ Belgium, Statement of 7 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.6, 7 March 1980, § 3.

⁸⁹ Benin, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 31.

88. In 1994, during a debate in the First Committee of the UN General Assembly, Benin advocated the elimination of bacteriological weapons.⁹⁰

89. At the Fourth Review Conference of States Parties to the BWC in 1996, Brazil stated that biological weapons, "given their sheer destructive force, indiscriminate effects and ghastly human toll... have from their inception generated international abhorrence". It further emphasised that it had always been a keen participant in efforts to rid the world of biological weapons. With reference to the BWC, it stated that it had "spared no effort in giving its contribution with a view to perfecting and strengthening this major international instrument".⁹¹

90. In 1991, during a debate in the First Committee of the UN General Assembly, Brunei declared that it had prohibited biological weapons.⁹²

91. At the First Review Conference of States Parties to the BWC in 1980, the representative of Bulgaria stated that:

10. His Government had already informed the Secretary-General of the United Nations that his country had never developed, produced, stockpiled or acquired by other means bacteriological (biological) weapons or toxins, and had stressed that it was strictly observing its commitments under the [1972 BCW]. That policy... provided a safeguard against any violations.

11. In the light of the obligations undertaken by... Bulgaria in ratifying all the international legal instruments banning or limiting the weapons or means used in armed conflicts, article 415 of the Bulgarian [Penal Code as amended] established severe penalties for anyone who in violation of the existing international rules of conduct in armed conflicts used, or ordered the use of, prohibited methods of warfare.⁹³

92. In 1977, during a debate in the First Committee of the UN General Assembly, Burma declared that the elimination of biological weapons was a goal of the Burmese Socialist Party.⁹⁴

93. At the CDDH, Canada voted against the Philippine amendment (see *infra*) because "the particular weapons are forbidden by international law and their use, other than by way of reprisal, already constitutes a war crime".⁹⁵

94. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Canada stated that "as a matter of national policy and in keeping with the Geneva Protocol of 1925, Canada does not 'develop, produce, stockpile, or otherwise acquire or retain' microbiological agents,

⁹⁰ Benin, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.3, 17 October 1994, p. 21.

⁹¹ Brazil, Statement of 25 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

⁹² Brunei, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.20, 28 October 1991, p. 38.

⁹³ Bulgaria, Statement of 6 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.5, 10 March 1980, §§ 10–11.

⁹⁴ Burma, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.10, 24 October 1977, p. 2.

⁹⁵ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 298.

toxins, weapons or other means of delivery for purposes of use in armed conflict".⁹⁶

95. In 1994, during a debate in the First Committee of the UN General Assembly, Canada stated that "biological weapons have no place in this world".⁹⁷

96. At the Fourth Review Conference of States Parties to the BWC in 1996, Canada stressed that it "believes that the time has . . . come to strengthen" the BWC and that "the purpose of the Convention is to prohibit an entire class of abhorred weapons" (i.e. biological weapons).⁹⁸

97. At the Fifth Review Conference of States Parties to the BWC in 2001, Canada, when talking about weapons of mass destruction, especially biological weapons, stated that "we need to make sure that they are never used". It added that biological weapons "cannot even be weapons of last resort, for their very preparation is banned".⁹⁹

98. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Cape Verde stated that it "has never been in violation of the provisions of Articles I, II, III, IV, V and X of the Convention on biological weapons and respects the obligations undertaken pursuant to the above-mentioned articles".¹⁰⁰

99. In 1992, during a debate in the First Committee of the UN General Assembly, which dealt mostly with the 1972 BWC, Chile referred to the 1991 Mendoza Declaration on Chemical and Biological Weapons, stating that "the region's participation in the Mendoza Accord on the complete prohibition of . . . biological weapons is an unequivocal demonstration of the will for disarmament that inspires the countries of South America".¹⁰¹

100. In 1986, during a debate in the UN Security Council on the Iran-Iraq War, China held that it "consistently opposed the use of . . . bacteriological . . . weapons at any place and time".¹⁰²

101. In 1991, during a debate in the First Committee of the UN General Assembly, China stated that it had always "stood for the complete prohibition of . . . biological weapons".¹⁰³

⁹⁶ Canada, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 33, Article I.

⁹⁷ Canada, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.4, 18 October 1994, p. 10.

⁹⁸ Canada, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

⁹⁹ Canada, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁰⁰ Cape Verde, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 34.

¹⁰¹ Chile, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.4, 13 October 1992, p. 6.

¹⁰² China, Statement before the UN Security Council, UN Doc. S/PV.2666, 24 February, pp. 29–30.

¹⁰³ China, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.9, 21 October 1991, p. 15.

102. A White Paper issued by the Information Office of the State Council of the People's Republic of China in 1995 states that China has consistently advocated the complete prohibition and thorough destruction of biological weapons. It opposes the production of biological weapons by any country and their proliferation in any form by any country. In 1984, China acceded to the 1972 BWC, and "since that date it has fully and conscientiously fulfilled its obligations under the convention".¹⁰⁴

103. At the Fourth Review Conference of States Parties to the BWC in 1996, China stated that it:

has all along stood against the arms race and for genuine disarmament, for the complete prohibition and thorough destruction of all weapons of mass destruction such as . . . biological weapons. The Chinese government gives full confirmation to the active role of the Convention, always supports the purposes and objectives of the Convention, and faithfully fulfils its obligations assumed as a State Party. China does not develop, produce, stockpile or otherwise acquire or retain biological agents, toxins, weapons, equipment or means of delivery prohibited under Article I of the Convention. China has always been against the proliferation of biological weapons and related technology. China has never in any way encouraged, assisted or induced any state, group of states or international organisation to conduct activities prohibited under the Convention.¹⁰⁵

104. At the Fifth Review Conference of States Parties to the BWC in 2001, China stated that it

is in favour of the complete prohibition and the thorough destruction of biological . . . weapons. Based on this very position, the Chinese government attaches great importance to the Convention and has always abided strictly its provisions in a serious and comprehensive manner.

It added that China "supports the effort to strengthen the effectiveness of the Convention. To this end, China has, since 1991, deeply involved itself in in-depth studies and exploration of possible verification measures within the Ad Hoc Group of Governmental Experts."¹⁰⁶

105. At the Fifth Review Conference of States Parties to the BWC in 2001, Croatia asked for the "immediate re-commencement of the work of the Ad Hoc Group, in whatever form delegations see fit".¹⁰⁷

106. In 1991, in a debate preceding UN Security Council Resolution 699 concerning the destruction of biological weapons in Iraq, Cuba stated that it favoured the "universal elimination of . . . biological weapons".¹⁰⁸

¹⁰⁴ White Paper on arms control and disarmament in China issued by the People's Republic of China, 16 November 1995, Xinhua News Agency, Beijing, as translated in BBC-SWB, 17 November 1995.

¹⁰⁵ China, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹⁰⁶ China, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁰⁷ Croatia, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁰⁸ Cuba, Statement before the UN Security Council, UN Doc. S/PV.2994, 17 June 1991, p. 23.

107. At the Fourth Review Conference of States Parties to the BWC in 1996, Cuba expressed the hope that the work of the Conference would lead to the crystallisation of the proposal to liberate the world of biological weapons.¹⁰⁹

108. In 1997, Cuba alleged that a US State Department aircraft, apparently on an approved flight to Grand Cayman Island, had dispensed Thrips Palmi insecticide over Cuba, which caused significant crop damage.¹¹⁰ The US Department of State categorically denied “the outrageous charges made by the Cuban Government” and noted that it had “not engaged in any act which would be in violation” of the 1972 BWC and that it had “unilaterally destroyed all stockpiled biological agents prior to entry into force of the Convention”.¹¹¹

109. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Cyprus stated that it “fully complies with the provisions of the Convention, as the Republic of Cyprus does not have at its disposal weapons of any such nature”.¹¹²

110. At the Second Review Conference of States Parties to the BWC in 1986, Czechoslovakia stated that it “fully complies with the obligations enshrined in its provisions and does not carry any weapons of that sort”.¹¹³

111. At the 733rd plenary meeting in Geneva of the Conference on Disarmament in 1996, the Czech Republic stated that it:

attaches great importance to the prohibition, elimination and non-proliferation of biological and toxin weapons. It regards the BWC as a binding international document and although it neither possesses nor develops any kind of biological weapons, it has been annually providing all necessary data in the form of non-mandatory declarations.¹¹⁴

112. At the Fifth Review Conference of States Parties to the BWC in 2001, the Czech Republic underlined “the importance the country attaches to the BWC and strict compliance with its terms and provisions”.¹¹⁵

113. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Denmark stated that:

¹⁰⁹ Cuba, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹¹⁰ Cuba, Information about the appearance in Cuba of the Thrips Palmi plague, annexed to Note verbale dated 28 April 1997 to the UN Secretary-General, UN Doc. A/52/128, 29 April 1997; see also Anthony Goodman, “Cuba accuses US of ‘biological aggression’”, Reuter, New York, 5 May 1997.

¹¹¹ US, Department of State, Office of the Spokesman, Press Statement by Acting Spokesman, “Cuba: No Use of Biological Weapons”, 6 May 1997.

¹¹² Cyprus, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 35.

¹¹³ Czechoslovakia, Statement at the Second Review Conference of States Parties to the BWC, Geneva, 8–26 September 1986, UN Doc. BWC/CONF.II/3, 25 August 1986, p. 2.

¹¹⁴ Czech Republic, Statement at the Conference on Disarmament, UN Doc. CD/PV.733, 28 March 1996, p. 17.

¹¹⁵ Czech Republic, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

Prior to ratification of the [1972 BWC], the Danish governmental departments concerned ascertained that no legislation, amendments of existing national law or other measures would be necessary in order to secure compliance with the obligations of the Convention. Accordingly, the requirements contained in the 1972 BWC have been implemented in Danish law and practice.¹¹⁶

114. In 1988, in a statement before the Fifteenth Special Session of the UN General Assembly, Ecuador stated that “among disarmament measures, Ecuador believes that priority should be given to the following: . . . a complete ban on the testing or production of new weapons of mass destruction, including . . . biological [weapons]”.¹¹⁷

115. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, Ecuador stated that “it is . . . timely to insist on observance of the international agreements which prohibit the use of asphyxiating and toxic gases and bacterial warfare and which seek the universal elimination of chemical and biological weapons”.¹¹⁸

116. At the CDDH, Egypt expressed “its disappointment at the failure of the Philippine amendment, establishing as a grave breach the use of prohibited weapons, to be adopted”, but noted that Article 74 of draft AP I (now Article 85) “as it stands now does cover the use of such weapons through their effects”.¹¹⁹

117. At the CDDH, Finland stated that it “attached the greatest importance . . . to the prohibition of . . . bacteriological warfare in the Geneva Protocol of 1925”.¹²⁰

118. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Finland stated that:

With regard to the compliance by the Government of Finland to articles I–V and X, I wish to communicate the following information: (1) the obligations set out in articles I–III have been complied with; (2) the legislation of Finland is in harmony with the obligations set out in article IV.¹²¹

119. At the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War in 1925, France, with regard to a Polish proposal to extend the prohibition contained in what became the 1925

¹¹⁶ Denmark, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 36.

¹¹⁷ Ecuador, Statement before the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, § 158.

¹¹⁸ Ecuador, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 107.

¹¹⁹ Egypt, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 300.

¹²⁰ Finland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 34.

¹²¹ Finland, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 37.

Geneva Gas Protocol to bacteriological warfare (see *infra*), begged “to second the Polish proposal”.¹²²

120. At the Second Review Conference of States Parties to the BWC in 1986, France stated that it:

had not initially signed the BWC taking a critical view of the lack of provisions relating to verification, it nevertheless recognised the importance of its purpose. It therefore adopted at the national level provisions similar to those of the Convention with regard to the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and their destruction. Thus, since that date France has for its part assumed the obligations in this field stemming from the Convention of 10 April 1972.

Accordingly, it added, all technological research and work on biological weapons have been interrupted. The biological agents and toxins produced have been destroyed. Since then no research has been undertaken on the production for hostile purposes of biological or toxin weapons or on the dissemination of such agents. No aid has been given to third countries in these fields. Therefore, France has fulfilled all the obligations stemming from Articles I, II, III, and IV since 1972, in other words, well before its accession to the Convention (27 September 1984).¹²³

121. In 1991, during a debate in the UN Security Council preceding the adoption of Resolution 699 concerning the destruction of biological weapons in Iraq, France held that the ban on Iraqi possession of biological weapons was carried out with the perspective of regional and global disarmament.¹²⁴

122. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, the GDR stated that:

Being a Party to the [1972 BWC], the German Democratic Republic has been fulfilling conscientiously its obligations deriving from the provisions of the Convention. Since the GDR has not developed, produced, stockpiled or otherwise acquired or retained such agents, toxins, weapons, equipment or means of delivery as specified in article I, the ruling in article II calling for their destruction and diversion to peaceful purposes is not applicable.

... Violations by individuals of the provisions of the Convention are to be regarded as impossible to occur so that, for its part, the German Democratic Republic definitely can declare that the Convention is being strictly observed.¹²⁵

123. At the First Review Conference of States Parties to the BWC in 1980, the representative of the GDR stated that:

¹²² France, Statement of 8 June 1925 at the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, Geneva, 4 May–17 June 1925, League of Nations, Records of the Conference, Doc. A.13.1925.IX, September 1925, p. 341.

¹²³ France, Statement at the Second Review Conference of States Parties to the BWC, Geneva, 8–26 September 1986, UN Doc. BWC/CONF.II/3Add. 5, 25 August 1986, pp. 1–2.

¹²⁴ France, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 92.

¹²⁵ GDR, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 38.

His country had been among the first to accede to the [1972 BWC] and... it had strictly abided by the obligations it had thereby assumed. His Government held the view that the Convention also covered the prohibition of all new scientific and technological developments in the field of microbiological and other biological agents and toxins and recombinant DNA techniques. The Convention thus prohibited their misuse for military purposes.¹²⁶

124. In 1983, the German government declared in parliament that biological weapons were as such prohibited.¹²⁷

125. At the Second Review Conference of States Parties to the BWC in 1986, the FRG stated that it had:

never researched, developed, produced, stockpiled or otherwise acquired or retained microbial or other biological agents or toxins of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes, as well as weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict... Furthermore, in 1954 the Federal Republic of Germany gave an internationally binding pledge within the WEU not to manufacture... biological... weapons... The legislation in force in the Federal Republic of Germany guarantees observance of the Convention's provisions.¹²⁸

126. In 1968, during a debate in the First Committee of the UN General Assembly, Ghana supported the prohibition of all biological weapons.¹²⁹

127. At the First Review Conference of States Parties to the BWC in 1980, Ghana stated that it "had abided strictly by its obligations under the [1972 BWC] and, as a developing country, had no intention of developing bacteriological weapons".¹³⁰

128. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Greece stated that it "complies with and applies the obligations set out in Articles I, II, III, IV, V and X" of the 1972 BWC.¹³¹

129. In 1992, during a debate in the First Committee of the UN General Assembly, which dealt mostly with the 1972 BWC, Guinea stated that Africa "should also become a region free from biological weapons".¹³²

130. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Hungary declared that it:

¹²⁶ GDR, Statement of 6 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.5, 10 March 1980, § 16.

¹²⁷ Germany, Lower House of Parliament, Reply by the government to a question in parliament, *Kriegsvölkerrechtliche Verträge*, 5 October 1983, *BT-Drucksache* 10/445, 1983, p. 14.

¹²⁸ FRG, Statement at the Second Review Conference of States Parties to the BWC, Geneva, 8–26 September 1986, UN Doc. BWC/CONF.II/3/Add. 3, 25 August 1986, p. 2.

¹²⁹ Ghana, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1614, 21 November 1968, p. 6.

¹³⁰ Ghana, Statement of 7 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.7, 11 March 1980, § 19.

¹³¹ Greece, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 39.

¹³² Guinea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.3, 12 October 1992, p. 59.

has never been in possession of any agents, toxins, weapons, equipment or means of delivery specified in article I of the Convention, and as a Party to the Convention has always complied and continues to comply fully and in good faith with [articles I, II, III, IV, V and X] of the Convention.¹³³

131. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, India stated that “as a party to the Biological Weapons Convention, India continues to comply with all the obligations under the Convention”.¹³⁴

132. At the Fourth Review Conference of States Parties to the BWC in 1996, India stated that “it has been our consistent belief that the only certain defence against the inhumane weapons is their destruction and total elimination”.¹³⁵

133. At the Fifth Review Conference of States Parties to the BWC in 2001, India expressed its feeling that “the comprehensive legal norm against biological weapons, embodied by the Biological and Toxins Convention, needs to be strengthened”.¹³⁶

134. At the Fourth Review Conference of States Parties to the BWC in 1996, Indonesia stated that “biological . . . weapons have no place in today’s world and should be considered things of the past”.¹³⁷

135. The Guidance Book in the Field for the Indonesian Army concerning the Use of Biological Weapons states that the use of biological weapons is prohibited.¹³⁸

136. At the Fourth Review Conference of States Parties to the BWC in 1996, Iran stated that it believed in a total ban on the use of biological weapons which was explicit and devoid of judgemental interpretations. It noted that:

The use of biological weapons is already in contradiction to the provisions and the spirit of the 1925 Geneva Protocol and the BWC. In fact, the predominant *Opinio Juris* considers the prohibition of use a matter of customary international law. Yet, lack of explicit reference in the Convention on the one hand, and persistence of reservations on the Geneva Protocol on the other, can leave the door ajar for those who have held a different opinion in the past or may perhaps continue to do so in future.¹³⁹

¹³³ Hungary, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 40.

¹³⁴ India, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 41.

¹³⁵ India, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹³⁶ India, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹³⁷ Indonesia, Statement of 27 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹³⁸ Report on the Practice of Indonesia, 1997, Chapter 3.4, referring to Guidance Book in the Field for the Indonesian Army concerning the Use of Biological Weapons, No. 42-01-06, p. 24, § 28.

¹³⁹ Iran, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

137. At the Fifth Review Conference of States Parties to the BWC in 2001, Iran recalled the “urgent need for an international legally binding instrument, for the strengthening of the Convention to be followed by establishment of an organisation in order to implement its provisions”. It added that it “supported the Ad Hoc Group negotiation and expected the successful conclusion and final adoption of a protocol”. According to Iran, the fact that the use is not expressly included in the Convention can be solved by using one of these alternatives: “insert the clause ‘use’ in the title and Article I, or the reservation to Geneva Protocol be withdrawn”.¹⁴⁰ Furthermore, while exercising its right of reply, it accused the US of not complying with its obligation by “transferring deadly agents to Israel and other allies as well as conducting research and development in the area of biological weapons”.¹⁴¹

138. In 1991, during a debate in the UN Security Council preceding the adoption of Resolution 699 concerning the destruction of biological weapons in Iraq, Iraq stated that it accepted not to “use, develop, manufacture or acquire any material referred to in the resolution”.¹⁴²

139. At the CDDH, Italy abstained in the vote on the Philippine amendment (see *infra*) stating that “it would not be useful because it dealt with means and methods of warfare which were already prohibited by the existing law”.¹⁴³

140. The Japanese army allegedly disseminated cholera and plague pathogens in several incidents in the USSR and Mongolia in the period 1939–1940 and in China between 1940 and 1944. These allegations were documented by Dr Robert Lim, the then head of the Chinese Red Cross, Dr R. Pollitzer, a League of Nations epidemiologist stationed in Hunan Province at the time of the alleged attacks, Dr P. Z. King, Director General of the Chinese National Health Administration, and a number of other sources.¹⁴⁴

141. In 1968, during a debate in the First Committee of the UN General Assembly, Japan stated that it should not only be prohibited to use biological weapons, but that this prohibition should also cover production and stockpiling.¹⁴⁵

¹⁴⁰ Iran, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁴¹ Iran, Statement of 19 November 2001 (right of reply) at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁴² Iraq, Statement before the UN Security Council, UN Doc. S/PV.2994, 17 June 1991, p. 6.

¹⁴³ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 30.

¹⁴⁴ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, pp. 217–221; see also British Medical Association, *Biotechnology, Weapons and Humanity*, Harwood Academic Publishers, Amsterdam, 1999, pp. 15–17; Erhard Geissler (ed.), *Biological and Toxin Weapons Today*, SIPRI, Oxford University Press, Oxford 1986, pp. 10–12; Thomas Stock, Maria Haug and Patricia Radler, Chemical and biological weapon developments and arms control, *SIPRI Yearbook 1996: Armaments, Disarmament and International Security*, Oxford University Press, Oxford, 1996, p. 687.

¹⁴⁵ Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1616, 22 November 1968, p. 8.

142. In 1992, during a debate in the First Committee of the UN General Assembly, Japan stated that it “attached great importance to the prohibition of biological weapons”.¹⁴⁶

143. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan stated that the 1925 Geneva Gas Protocol and the 1972 BWC “and similar laws all rest on the desire to prevent the most irrational deeds of humankind. International law has always sought to play a humanitarian role.”¹⁴⁷

144. At the Fourth Review Conference of States Parties to the BWC in 1996, Japan stated that “it is extremely important that more countries accede to the Convention so that we can achieve the desired universality”.¹⁴⁸

145. At the Fifth Review Conference of States Parties to the BWC in 2001, Japan stated that it had “undertaken legislative measures to strengthen the national legislation with further punitive actions against those who use biological weapons as well as those who disseminate biological agents and toxins”.¹⁴⁹

146. At the CDDH, Jordan supported the principle behind the Philippine amendment (see *infra*), but stated that “it would be more generally acceptable if it were amended to apply only to the first user of weapons prohibited by international conventions”.¹⁵⁰

147. In 1994, during a debate in the First Committee of the UN General Assembly, South Korea stated that it was dedicated to the elimination of biological weapons.¹⁵¹

148. At the Fourth Review Conference of States Parties to the BWC in 1996, South Korea stated that “the Republic of Korea, since it acceded in 1987, has faithfully implemented the obligations and duties under the BWC”. It added that it “has never developed, produced, stockpiled or otherwise acquired or retained any biological agents, nor the means for their delivery”. It further stated that the need for a legally binding verification regime of the BWC “has been reaffirmed in the light of the recent evidence that biological materials have been illegally acquired and developed by some states parties to the BWC, and sub-state organisations”.¹⁵²

¹⁴⁶ Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.4, 19 October 1993, § 23.

¹⁴⁷ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/27, 7 November 1995, p. 30.

¹⁴⁸ Japan, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹⁴⁹ Japan, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁵⁰ Jordan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 283, § 21.

¹⁵¹ South Korea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.6, 19 October 1994, pp. 12–13.

¹⁵² South Korea, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

149. At the Fifth Review Conference of States Parties to the BWC in 2001, South Korea stated that it “has faithfully implemented its obligations and duties under the BWC since its accession to it in 1987”.¹⁵³

150. According to the Report on the Practice of South Korea, South Korea is of the opinion that the prohibition of the use of biological weapons is customary.¹⁵⁴

151. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Kuwait stated that it supported “the prohibition of all weapons, including biological weapons, which caused mass destruction and genocide”.¹⁵⁵

152. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Kuwait stated that:

With regard to Article I of the Biological Weapons Convention, Kuwait has not developed, produced or stockpiled such weapons or placed them at the disposal of its armed forces. Kuwait has not in any manner used microbial or other biological agents or toxins for non-peaceful purposes.

Kuwait does not intend to acquire or retain weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.¹⁵⁶

153. In 1993, during a debate in the First Committee of the UN General Assembly, Kuwait said it supported all international efforts to destroy weapons of mass destruction.¹⁵⁷

154. In an article published in a military review, a member of the Kuwaiti armed forces stated that, during war, belligerents must:

respect restrictions and limits provided for in international conventions, such as restriction of the use of some weapons, and prohibition of using others, e.g. . . . biological weapons . . . This is in application of well-established principles in wars, such as considerations of military honour and humanitarian considerations.¹⁵⁸

155. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Laos stated that it:

has rigorously observed the relevant provisions of [the 1972 BWC] and favours their strict application in order to contribute to the cause of general and complete

¹⁵³ South Korea, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁵⁴ Report on the Practice of South Korea, 1997, Chapter 3.4.

¹⁵⁵ Kuwait, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.34, 3 June 1976, p. 355, § 18.

¹⁵⁶ Kuwait, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 42.

¹⁵⁷ Kuwait, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.7, 21 October 1993, § 81.

¹⁵⁸ Fellah Awad Al-Anzi, “The Law of War”, *Homat Al-Watan*, No. 168, p. 57.

disarmament. Furthermore, the Lao People's Republic has conducted no scientific or technical research with a view to developing and manufacturing such weapons.¹⁵⁹

156. In 1993, during a debate in the First Committee of the UN General Assembly, Lebanon held that a local ban on biological weapons was part of the concept of a global ban on the same weapons.¹⁶⁰

157. In 1991, during a debate in the First Committee of the UN General Assembly, Libya expressed its belief that there was a "need to prevent the human race from . . . biological warfare".¹⁶¹

158. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1972 BWC, Libya supported an Egyptian initiative for a Middle East zone free of weapons of mass destruction.¹⁶²

159. In 1993, during a debate in the First Committee of the UN General Assembly, Libya supported a regional ban on weapons of mass destruction.¹⁶³

160. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Malaysia stated that "biological weapons . . . have been banned".¹⁶⁴ In a part entitled "Principle of Non-Toxicity", Malaysia also referred to the 1925 Geneva Gas Protocol and the 1956 New Delhi Draft Rules.¹⁶⁵ Malaysia made the same reference in its oral pleadings in the *Nuclear Weapons case* in 1995.¹⁶⁶

161. At the Fourth Review Conference of States Parties to the BWC in 1996, Malta stated that it "strongly supports the BWC and is firmly committed to the total and comprehensive banning of biological weapons and to the control of the spread and use of such weapons".¹⁶⁷

162. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Mexico noted:

a series of international instruments . . . [which] led to a prohibition on the use of certain weapons. Such instruments included . . . the Protocol of 1925 for the

¹⁵⁹ Laos, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 43.

¹⁶⁰ Lebanon, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.12, 26 October 1993, § 10.

¹⁶¹ Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.22, 29 October 1991, p. 34.

¹⁶² Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.10, 20 October 1992, p. 9–10.

¹⁶³ Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.13, 26 October 1993, § 64.

¹⁶⁴ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, p. 2.

¹⁶⁵ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, pp. 23–24.

¹⁶⁶ Malaysia, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/27, 7 November 1995, p. 57.

¹⁶⁷ Malta, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

prohibition of the use in war . . . of bacteriological methods of warfare (The Geneva Gas Protocol); and the Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and their destruction of 10 April 1972, etc.¹⁶⁸

163. At the Fifth Review Conference of States Parties to the BWC in 2001, Mexico stated that “the 1972 Convention broadens the provisions of the 1925 Protocol and renders obsolete the reservations that had restricted the latter to an instrument of first use prohibition”. It encouraged “the States that have not yet done so to withdraw these reservations”. It also urged that the “goal must be to review and strengthen the compliance with the regime on the prohibition of biological weapons to protect nations and individuals from the risk of the possible use of weapons of mass destruction”.¹⁶⁹

164. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Mongolia stated that, as a party to the 1972 BWC, it “strictly complies with all the obligations under the Convention and particularly with Articles I, II, III, IV, V and X of the said Convention”.¹⁷⁰

165. At the First Review Conference of States Parties to the BWC in 1980, the representative of New Zealand stated that “since New Zealand possessed none of the weapons or delivery systems referred to in article I of the [1972 BWC], his Government had not considered it necessary to enact any special legislation prohibiting the activities in question”.¹⁷¹

166. At the Fourth Review Conference of States Parties to the BWC in 1996, New Zealand stressed that it was “strongly committed to the BWC”. Moreover, it stated that it was very conscious that:

[B]iological weapons pose as great a threat to humanity as nuclear weapons. But they are much easier to manufacture and conceal. For that reason States Parties to the Convention have a major responsibility to strengthen the Convention and establish a mechanism to ensure that the Parties to the Convention comply with its prohibition.¹⁷²

167. At the First Review Conference of States Parties to the BWC in 1980, Nigeria reported that it “had complied fully with its obligations under the [1972 BWC]. As Nigeria did not possess biological weapons, as defined in article I, it

¹⁶⁸ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 12, § 72.

¹⁶⁹ Mexico, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁷⁰ Mongolia, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 44.

¹⁷¹ New Zealand, Statement of 7 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.6, 7 March 1980, § 13.

¹⁷² New Zealand, Statement of 25 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

followed that it had no such weapons to destroy, as required by article II, or, indeed, to transfer."¹⁷³

168. In 1995, during a debate in the First Committee of the UN General Assembly, Nigeria stated that it was committed to the total prohibition of biological weapons.¹⁷⁴

169. At the Fourth Review Conference of States Parties to the BWC in 1996, Nigeria stated that "it is our hope that all weapons of mass destruction – be they biological... – will be under ban, their production prohibited and their transfer and use outlawed".¹⁷⁵

170. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Norway stated that it "has never developed, produced or stored any biological weapons, and has never had the intention of using such weapons in a conflict (arts. I and II)".¹⁷⁶

171. At the Fifth Review Conference of States Parties to the BWC in 2001, Norway stated that "a multilateral, legally binding instrument is needed now more than ever to fill the existing gap in the non-proliferation regime". It stated that such a legally binding instrument were "very important aspects of our fight against the use, or threat of use, of biological weapons".¹⁷⁷

172. At the Fourth Review Conference of States Parties to the BWC in 1996, Pakistan stated that "the 1925 protocol and the BWC is a manifestation of a moral and cultural ethos that is over 1400 years old".¹⁷⁸

173. At the Fifth Review Conference of States Parties to the BWC in 2001, Pakistan stated that it "has been fully abiding by all the provisions of the BWC".¹⁷⁹

174. In 1991, during a debate in the First Committee of the UN General Assembly, Peru stated that it had invited the countries of the Rio Group to reach an agreement on the prohibition of biological weapons.¹⁸⁰

175. At the CDDH, the Philippines proposed an amendment to include "the use of weapons prohibited by International Conventions, namely: ... bacteriological methods of warfare" in the list of grave breaches in Article 74 of draft

¹⁷³ Nigeria, Statement of 7 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.7, 11 March 1980, § 13.

¹⁷⁴ Nigeria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 18.

¹⁷⁵ Nigeria, Statement of 25 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹⁷⁶ Norway, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 45.

¹⁷⁷ Norway, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁷⁸ Pakistan, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

¹⁷⁹ Pakistan, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁸⁰ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 48.

AP I (now Article 85).¹⁸¹ The proposal was rejected because it failed to obtain the necessary two-thirds majority (41 votes in favour, 25 against and 25 abstentions).¹⁸²

176. The Report on the Practice of the Philippines states with reference to the prohibition of biological weapons that “the country holds such prohibition customary”.¹⁸³

177. At the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War in 1925, Poland proposed to complete what became the 1925 Geneva Gas Protocol as follows:

In the third paragraph of the draft concerning chemical warfare, we would say: “declare that the High Contracting Parties, so far as they are not already parties to treaties prohibiting such use, accept this prohibition, and extend it to means of bacteriological warfare, and agree to be bound thereby as between themselves.”¹⁸⁴

178. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Poland stated that it “does not conduct any activities contrary to the provisions of [the 1972 BWC] and that the bacteriological and toxin weapons have never been nor are at present part of the equipment of its armed forces”.¹⁸⁵

179. At the Fifth Review Conference of States Parties to the BWC in 2001, Poland confirmed its “strong and constant support for the Biological and Toxins Weapons Convention... especially for the work on effectiveness and implementation of the Convention”.¹⁸⁶

180. At the Fourth Review Conference of States Parties to the BWC in 1996, Romania stated that:

The BWC together with complementary efforts aimed at the non-proliferation of biological and toxin weapons constitutes at present and in the years to come one of the main pillars of international stability and security, both at regional and global

¹⁸¹ Philippines, Proposal of amendment to Article 74 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/418, 26 May 1977, p. 322.

¹⁸² CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 288–289. (Against: Australia, Belarus, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, FRG, GDR, Hungary, India, Luxembourg, Monaco, Mongolia, Netherlands, New Zealand, Poland, Portugal, Ukraine, USSR, UK, US and Zaire. Abstaining: Brazil, Cameroon, Cyprus, Cuba, Greece, Guatemala, Indonesia, Iran, Ireland, Israel, Italy, Japan, South Korea, Mauritania, Morocco, Nigeria, Norway, Romania, Spain, Swaziland, Sweden, Thailand, Turkey, Uganda and Vietnam.)

¹⁸³ Report on the Practice of the Philippines, 1997, Answers to additional questions on Chapter 3, referring to Statement by the Department of Foreign Affairs, Office of United Nations and International Organizations (UNIO), Manila, 6 March 1998.

¹⁸⁴ Poland, Proposal made on 8 June 1925 at the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, Geneva, 4 May–17 June 1925, League of Nations, Records of the Conference, Doc. A.13.1925.IX, September 1925, p. 341.

¹⁸⁵ Poland, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 46.

¹⁸⁶ Poland, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

levels. To that effect, Romania . . . has a consistent policy of strict observance of the provisions of the Convention and the export controls of biological agents, equipment and technologies which could be used for the production of biological and toxin weapons.

Strongly supporting the view that export controls are an essential lever of enforcing non-proliferation, Romania has established the necessary mechanisms, procedures and lists of items, all similar to those convened within existing international non-proliferation regimes.

...

We re-emphasize the significance of this international norm against biological and toxin weapons, the importance of full implementation by all parties of the provisions of the Convention, as well as the need to make all efforts to secure universal adherence to [the] BWC.¹⁸⁷

181. At the Fifth Review Conference of States Parties to the BWC in 2001, Russia asserted that it was standing "for creating a verification mechanism on a multilateral basis".¹⁸⁸

182. According to the Report on the Practice of Rwanda, Rwanda has prohibited the use of bacteriological means of warfare as stipulated by the 1925 Geneva Gas Protocol.¹⁸⁹

183. In 1968, during a debate in the First Committee of the UN General Assembly, Saudi Arabia advocated a total prohibition of the use and production of biological weapons.¹⁹⁰

184. In 1993, during a debate in the First Committee of the UN General Assembly, Saudi Arabia stated that it had worked tirelessly to reach a global elimination of weapons of mass destruction.¹⁹¹

185. In 1995, during a debate in the First Committee of the UN General Assembly, Saudi Arabia stated that it supported "all treaties and conventions that aim at eliminating all types of weapons of mass destruction, including biological weapons".¹⁹²

186. At the Fourth Review Conference of States Parties to the BWC in 1996, South Africa declared that it remained "committed to achieving a world free of all weapons of mass destruction and to addressing the proliferation of conventional weapons". It also reaffirmed its "commitment to strengthening the BWC by establishing a verifiable compliance protocol for the Convention".¹⁹³

¹⁸⁷ Romania, Statement of 25 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996, pp. 2–3.

¹⁸⁸ Russia, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁸⁹ Report on the Practice of Rwanda, 1997, Chapter 3.4.

¹⁹⁰ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1608, 14 November 1968, pp. 4 and 7.

¹⁹¹ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.14, 28 October 1993, § 24.

¹⁹² Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 12.

¹⁹³ South Africa, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

187. At the Fifth Review Conference of States Parties to the BWC in 2001, South Africa stated that “the use of disease – in this case anthrax – as a weapon of terror should . . . be condemned in the strongest possible terms”. It further emphasised:

the importance of the work that had been undertaken to negotiate a legally binding Protocol to strengthen the implementation of the Convention . . . South Africa continues to see the strengthening of the implementation of the BWC as a core element of the international security architecture.¹⁹⁴

188. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Spain stated that “since Spain is not developing or producing bacteriological (biological) or toxin weapons or acquiring them from any other country, the conditions referred to in articles I, II, III, IV, V and X of the [1972 BWC] do not exist [for Spain]”.¹⁹⁵

189. In 1968, during a debate in the First Committee of the UN General Assembly, Sweden advocated a process leading to a total prohibition of the use, production and stockpiling of biological weapons.¹⁹⁶

190. In 1970, during a debate in the Third Committee of the UN General Assembly, Sweden stated that “the rationale for a comprehensive ban on biological weapons in international armed conflicts would seem to be equally valid in internal armed conflicts. At all events, there should be no hesitation in imposing a complete ban in internal conflicts.”¹⁹⁷

191. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Sweden stated that “all weapons could be used indiscriminately, but some were incapable of being directed at military objectives alone. One example was bacteriological weapons: germs could not distinguish between soldiers and civilians.”¹⁹⁸

192. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Sweden stated that:

In 1970 the Swedish Government declared that Sweden does not possess and does not intend to acquire biological . . . weapons. National investigations in 1974 showed that no ongoing activity violated the provisions of the [1972 BWC] . . .

. . . The prohibition of the development and production of biological and toxin weapons is covered by national Swedish legislation passed in 1935 on the control of production of war materials according to which no such production may take place

¹⁹⁴ South Africa, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

¹⁹⁵ Spain, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 47.

¹⁹⁶ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1609, 18 November 1968, p. 11.

¹⁹⁷ Sweden, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1784, 10 November 1970, p. 273, § 5.

¹⁹⁸ Sweden, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 12, § 21.

without the Government's permission. The provisions of the Convention concerning stockpiling, acquisition and possession of these weapons have not resulted in any special legislation. The provisions may, as necessary, be enforced in accordance with national legislation of 1974 on the handling of dangerous goods.¹⁹⁹

193. In 1991, during a debate in the First Committee of the UN General Assembly, Sweden urged States to withdraw reservations to the 1925 Geneva Gas Protocol in order to make "it possible finally to exclude the possibility that biological weapons may be used in the future".²⁰⁰

194. At the CDDH, Switzerland voted in favour of the Philippine amendment (see *supra*) because:

It would be a step forward to state expressly that any violation of The Hague Declaration of 1899 and the Geneva Protocol of 1925 would constitute a grave breach. The rules laid down in those two instruments were undisputed and indisputable, and the amendment would have a deterrent effect on any State tempted to violate them, by exposing the members of its armed forces to the penalties applicable under the Geneva Conventions.²⁰¹

195. At the First Review Conference of States Parties to the BWC in 1980, Switzerland stated that:

Since it had possessed no bacteriological or toxin weapons before the conclusion of the [1972 BWC], Switzerland had had no stocks to destroy. With regard to the other States parties, he regretted that they had not all given formal assurances on that point. The Swiss army actually had a biological branch, but its sole purpose was to care for the health of army personnel; it would play only a protective role if bacteriological weapons were used against Switzerland in an armed conflict.²⁰²

196. At the Fourth Review Conference of States Parties to the BWC in 1996, Switzerland stated that it had never equipped itself with biological weapons and that its research in this field was strictly limited to protective measures. It further stated that since 30 June 1972, it had enacted a law which subjects the production, importation and exportation of all weaponry to authorisation.²⁰³

¹⁹⁹ Sweden, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 48; see also Statement of 5 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.3, 7 March 1980, § 36.

²⁰⁰ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 27.

²⁰¹ Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 281, § 9.

²⁰² Switzerland, Statement of 7 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.6, 7 March 1980, § 7.

²⁰³ Switzerland, Statement of 25 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

197. In 1993, during a debate in the First Committee of the UN General Assembly, Syria advocated a proposal to make the Middle East a zone free from weapons of mass destruction.²⁰⁴

198. In 1994, during a debate in the First Committee of the UN General Assembly, Syria supported an initiative to make the Middle East a zone free from weapons of mass destruction.²⁰⁵

199. At the Fifth Review Conference of States Parties to the BWC in 2001, Thailand declared that it had “always solemnly adhered to our commitments under the BWC”.²⁰⁶

200. In 1991, during a debate in the First Committee of the UN General Assembly, Tunisia advocated a complete ban on biological weapons.²⁰⁷

201. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Turkey stated that “no weapons, equipment or other materials that are the subject of the [1972 BWC] exist within the Turkish Armed Forces”.²⁰⁸

202. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, Ukraine stated that “the Ukrainian SSR is fully complying with its obligations under articles I, II, III, IV, V and X of the [1972 BWC], taking into account the relevant parts of the preamble to the Convention”.²⁰⁹

203. In 1994, during a debate in the First Committee of the UN General Assembly, Ukraine stated that it wanted to “rid the densely populated European continent, as well as other regions, of these deadly weapons by the beginning of next century”.²¹⁰

204. At the Fifth Review Conference of States Parties to the BWC in 2001, Ukraine stated that it “fully complies with its obligations under the Convention and has never had the intention to develop, produce, stockpile or acquire in any way the biological weapons, equipment or means of its delivery”.²¹¹

²⁰⁴ Syria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.9, 22 October 1993, § 44.

²⁰⁵ Syria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.7, 20 October 1994, p. 20.

²⁰⁶ Thailand, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

²⁰⁷ Tunisia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.11, 22 October 1991, p. 7.

²⁰⁸ Turkey, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 49.

²⁰⁹ Ukraine, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 50; see also Statement of 6 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.4, 7 March 1980, § 8.

²¹⁰ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.7, 20 October 1994, p. 17.

²¹¹ Ukraine, Statement of 20 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

205. In 1970, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), the USSR stated that:

The use of . . . bacteriological methods of warfare . . . was prohibited by the Geneva Protocol of 17 June 1925. The United States signed that Protocol, but did not ratify it. However, that does not mean that the prohibition of the use of poisonous substances does not extend to the United States. That prohibition has become a generally recognized rule of international law, and countries which violate it must bear responsibility before the international community.²¹²

206. In 1970, during a debate in the Third Committee of the UN General Assembly, the USSR stated that the 1925 Geneva Gas Protocol was fully applicable in situations where freedom fighters struggled for liberation against colonial powers.²¹³

207. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, the USSR stated that:

In accordance with the law and practice of the Soviet Union, compliance with the provisions of the [1972 BWC] which was ratified by a Decree of the Presidium of the Supreme Soviet of the USSR dated 11 February 1975 is guaranteed by the appropriate State institutions of the USSR. The Soviet Union does not possess any of the bacteriological (biological) agents or toxins, weapons, equipment or means of delivery mentioned in article I of the Convention. Thus, the implementation of articles I, II, III and IV of the Convention is reliably ensured.²¹⁴

208. In 1987, during a debate in the First Committee of the UN General Assembly, the USSR stated that "measures to consolidate the regime of the 1925 Geneva Protocol prohibiting the use of bacteriological weapons in war are in the interest of all".²¹⁵

209. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, the USSR, with regard to UN Security Council resolution 687 (1991), stated that:

The most acute issue is that of creating an effective barrier against the use of weapons of mass destruction in that region. From that viewpoint, of great importance are the provisions in the resolution regarding Iraq's destruction of . . . biological weapons . . . and in the context of Iraq's confirmation of its obligations of the Geneva Protocol of 1925 to bring into play the International Atomic

²¹² USSR, Reply dated 30 December 1969 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the UN Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 120.

²¹³ USSR, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1786, 12 November 1970, p. 284, § 6.

²¹⁴ USSR, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 51.

²¹⁵ USSR, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.23, 28 October 1987, p. 28.

Energy Agency... It is also important that all Middle Eastern countries accede to... those international agreements prohibiting... biological weapons.²¹⁶

210. The development of a biological weapons programme by the USSR between 1973 and 1992 was widely documented and detailed in a number of different sources.²¹⁷ The Chairman of the Presidential Committee on Chemical and Biological Weapons Problems, in response to a question about Soviet non-compliance with the 1972 BWC, said in an interview published in the journal *Rossiyskiye Vesti* in 1992 that:

Indeed, these clear violations... were only admitted after the totalitarian regime collapsed and duplicity in politics was abandoned. We admitted that after the convention was ratified, the offensive programs in the area of biological warfare were not immediately curtailed, research in this area continued, and production went on... The first palpable move... toward the offensive programs finally being wound down was made in 1985 when it was proposed that the Soviet Union present a report to the United Nations on its compliance with the convention. At this time research also began to be wound down, and the equipment for producing biological preparations began to be dismantled. But this winding down process went on for several years. The remnants of the offensive programs in the area of biological weapons were still around as recently as 1991. It was only in 1992 that Russia absolutely stopped this work.²¹⁸

211. During a tripartite meeting on biological weapons held in Moscow in September 1992 between Russia, UK and US, the Russian President admitted that Russia had conducted an offensive biological warfare programme in violation of the 1972 BWC.²¹⁹ However, the Russian government stated that it had taken steps to resolve compliance concerns, stating that it:

A. Noted that President Yeltsin had issued on 11 April 1992 a decree on securing the fulfilment of international obligations in the area of biological weapons. This affirms the legal succession of the Russian Federation to the obligations of the Convention and states that the development and carrying out of biological programs in violation of the Convention is illegal. Pursuant to that decree, the Presidential Committee on Convention-related problems of chemical weapons and biological weapons was entrusted with the oversight of the implementation of the 1972 Convention in the Russian Federation.

B. Confirmed the termination of offensive research, the dismantlement of experimental technological lines for the production of biological agents, and the closure of the biological weapons testing facility...

...

²¹⁶ USSR, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 101-102.

²¹⁷ British Medical Association, *Biotechnology Weapons and Humanity*, Harwood Academic Publishers, Amsterdam, 1999, pp. 44-45.

²¹⁸ Lev Chernenko, "In order to live we should destroy the deadly weapons stockpiles", *Rossiyskiye Vesti*, Moscow, 22 September 1992, p. 2, as translated from Russian in FBIS-SOV-92-186, 24 September 1992, pp. 2-4; Viktor Litovkin, "Yeltsin bans work on bacteriological weapons. This means: work was under way, and we were deceived", *Izvestiya*, Moscow, 27 April 1992, p. 1, as translated from Russian in BBC-SWB, 30 April 1992.

²¹⁹ J. Dahlburg, "Russia Admits it Violated Pact on Biological Warfare", *Los Angeles Times*, 15 September 1992, p. A1.

H. The Russian Parliament has recommended to the President of the Russian Federation that he propose legislation to enforce Russia's obligations under the 1972 Convention.

As a result of these exchanges, Russia agreed to the followings steps:

A. Visits to any non-military biological site at any time in order to remove ambiguities, subject to the need to respect proprietary information on the basis of agreed principles. Such visits would include unrestricted access, sampling interviews with personnel, and audio and video taping. After initial visits to Russian facilities there will be comparable visits to such US and UK facilities on the same basis.

B. The provision, on request, of information about dismantlement accomplished to date.

In addition, the three governments agreed to create working groups to examine several different issues, including the establishment of a system of reciprocal visits to military biological facilities; a review of potential monitoring mechanisms for the 1972 BWC; consideration of cooperation in developing biological weapons defence and "consideration of an exchange of information on a confidential, reciprocal basis concerning past offensive programmes not recorded in detail in the declarations to the UN".²²⁰

212. On Primetime Live in 1998, the former First Deputy Director of Biopreparat from 1988 to 1992, Dr Kanatjan Alibekov (a.k.a. Ben Alibek), stated that in Russia, under the guise of the development of defensive biological weapons, research continued on new biological agents. In Moscow, this allegation was described as "sheer nonsense" by one member of the President's Committee on CBW Convention Problems, who also said that "Russia has carried out no research and development of biological weapons since all work in the field was cancelled in 1990".²²¹ The Russian Defence Ministry also issued a denial, saying that Russia "scrupulously observes" the 1972 BWC.²²²

213. In 1998, a Russian Foreign Ministry spokesman told a news briefing that the offensive military biological programme of the USSR had been discontinued.²²³

214. At the CDDH, the UK voted against the Philippine amendment (see *supra*) because:

A significant number of the States party to the Geneva Protocol of 1925 had entered a reservation thereto; for those States the Protocol contained no absolute prohibition on the use of the weapons mentioned in it, but rather a prohibition on the first use only. Nor was it convincing to state that the Geneva Protocol of 1925 represented no more than the existing customary law of war; ever since the adoption of

²²⁰ Russia, UK and US, Joint Statement on Biological Weapons, 14 September 1992.

²²¹ "Russia – biological weapons", AP, New York, 25 February 1998.

²²² ITAR-TASS World Service (Moscow) in English, 27 February 1998, BBC-SWB, 2 March 1998.

²²³ Aleksei Meshkov, "There are no reasons to doubt Russia's undeviating observance of all its commitments under convention banning biological weapons, says Russian Foreign Ministry", RIA Novosti, Moscow, 31 March 1998, via RIA-Novosti Hotline; A. Mironov and I. Chumakova, "Russia denies allegations of violating biological weapons ban", TASS, Moscow, 31 March 1998.

resolution XXVIII by the XXth International Conference of the Red Cross (Vienna 1965), States had been urged in United Nations resolutions to accede to that Protocol in accordance with its express terms. Such a situation was entirely inconsistent with the contention made in debate that the Geneva Protocol of 1925 reflected existing customary international law. That contention could not be supported.²²⁴

215. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, the UK stated that:

The United Kingdom has never possessed and has not acquired microbial or other biological agents and toxins in quantities which could be employed for weapons purposes. The United Kingdom maintains only small quantities of such agents and toxins for peaceful purposes, primarily prophylaxis and research . . . No system designed to apply these agents for hostile purposes exists, nor are being developed.²²⁵

216. At the First Review Conference of States Parties to the BWC in 1980, the UK stated that:

Since the United Kingdom has never possessed any of the agents proscribed by the [1972 BWC] in quantities other than those explicitly permitted, related action had been confined to the passing of domestic legislation [i.e. the Biological Weapons Act] in compliance with the provisions of article IV. In addition, the United Kingdom had, over the period since the Convention's entry into force, concluded a series of bilateral and multilateral agreements on public health and medical research which, *inter alia*, supported the provisions of article X.²²⁶

217. In 1983, in reply to a question in the House of Lords on the subject of the use of chemical weapons in South-East Asia, the UK Minister of State, FCO, stated that "the use of toxins in South-East Asia would represent a breach of the 1972 Convention banning biological and toxin weapons".²²⁷

218. In 1990, during a debate in the UN Security Council on a peaceful and just post-Cold War world, the UK recalled that, under paragraph 12 of Resolution 670 (1990), individuals were held responsible for grave breaches of the Geneva Conventions. It added that "we should also hold personally responsible those involved in violations of the laws of armed conflict, including the prohibition against initiating the use of . . . biological weapons contrary to the Geneva Protocol of 1925, to which Iraq is a party".²²⁸

219. In 1991, during a debate in the House of Commons on the Gulf conflict, the UK Prime Minister stated that "contrary to international agreements, Iraq

²²⁴ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 282, § 17.

²²⁵ UK, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 52, Article I.

²²⁶ UK, Statement of 5 March 1980 at the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, UN Doc. BWC/CONF.I/SR.3, 7 March 1980, § 42.

²²⁷ UK, House of Lords, Reply by the Minister of State, FCO, *Hansard*, 7 June 1983, Vol. 431, col. 92.

²²⁸ UK, Statement before the UN Security Council, UN Doc. S/PV.2963, 29 November 1990, § 78.

has produced and threatened to use both chemical and biological weapons, the use of which would be wholly contrary to international agreements".²²⁹

220. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that "the Iraqi Ambassador [to the UK] was also reminded of Iraq's obligations under the 1925 Geneva [Gas] Protocol in respect of . . . biological weapons. The United Kingdom would take the severest view of any use of these weapons by Iraq."²³⁰

221. In 1991, during a debate in the First Committee of the UN General Assembly, the UK explained that it intended to withdraw its reservation to the 1925 Geneva Gas Protocol, in which it had reserved the right to retaliate with biological weapons.²³¹

222. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, the UK, with regard to UN Security Council Resolution 687 (1991), stated that:

The resolution contains tough provisions for the destruction of Iraqi chemical and biological weapons . . . It is surely right to do so. For Iraq alone in the region has not only developed many of these weapons, it has actually used them both against a neighbouring State and against its own population, and it has made the threat of their use part of the daily discourse of its diplomacy as it has attempted to bully and coerce its neighbours.²³²

223. At the Fourth Review Conference of States Parties to the BWC in 1996, the UK stated that it was of the utmost importance

to send out a strong message. That the 1972 Convention remains the unequivocal and comprehensive ban on Biological Weapons. But that recent history has proved that a ban alone is not enough. That the overwhelming majority of States Parties believe that strengthening the Convention is both necessary and possible; and that we are all determined to work to achieve this as quickly as possible.²³³

224. In 1998, in response to a question in the House of Commons on the UK's position on biological weapons at a meeting of the Preparatory Committee for the Establishment of an International Criminal Court, the UK Prime Minister stated that:

The UK delegation supported proposals to include within the jurisdiction of the ICC war crimes under existing customary international law. For that reason, the delegation supported the inclusion of the use of methods of warfare of a nature to

²²⁹ UK, House of Commons, Statement by the Prime Minister, *Hansard*, 15 January 1991, Vol. 183, col. 735.

²³⁰ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1; see also Statement by FCO spokesperson, 21 January 1991, reprinted in *BYIL*, Vol. 62, 1991, p. 680.

²³¹ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.27, 5 November 1991, p. 6.

²³² UK, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 113–114.

²³³ UK, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

cause superfluous injury or unnecessary suffering; these included bacteriological (biological) agents or toxins for hostile purposes or in armed conflict.²³⁴

225. According to the Report on UK Practice, representatives of the UK have repeatedly expressed condemnation of the use of biological weapons.²³⁵

226. At the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War in 1925, the US, with regard to a Polish proposal to extend the prohibition contained in what became the 1925 Geneva Gas Protocol to bacteriological warfare (see *supra*), stated that "bacteriological warfare is so revolting and so foul that it must meet with the condemnation of all civilized nations, and hence my delegation . . . accepts this amendment proposed by the Polish delegate".²³⁶

227. On 25 November 1969, the US President formally renounced the use of biological agents as weapons. On the same day, the US Secretary of State stated in a memo to the National Security Council that biological research and development would be limited to "defensive" activities and that research into "offensive" aspects of biological agents would only be permitted to the extent that it was pursued for "defensive" reasons.²³⁷

228. On 14 February 1970, the US President stated that "the United States renounces offensive preparations for and the use of toxins as a method of warfare". The reason given for the decision on toxins by the Office of the White House Press Secretary was that their production in any significant quantities "would require facilities similar to those needed for the production of biological agents. If the United States continued to operate such facilities, it would be difficult for others to know whether they were being used to produce only toxins but not biological agents."²³⁸

229. At the CDDH, the US voted against the Philippine amendment (see *supra*) because:

Grave breaches were meant to be the most serious type of crime; Parties had an obligation to punish or extradite those guilty of them. Such crimes should therefore be clearly specified, so that a soldier would know if he was about to commit an illegal act for which he could be punished. The amendment, however, was vague and imprecise . . . It would also punish those who used the weapons, namely,

²³⁴ UK, House of Commons, Reply by the Prime Minister, *Hansard*, 20 January 1998, Vol. 304, Written Answers, col. 477.

²³⁵ Report on UK Practice, 1997, Chapter 3.4.

²³⁶ US, Statement made on 8 June 1925 at the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, Geneva, 4 May–17 June 1925, League of Nations, Records of the Conference, Doc. A.13.1925.IX, September 1925, p. 341.

²³⁷ Alfred Mechttersheimer, "US military strategy and chemical and biological weapons", in Erhard Geissler (ed.), *Biological and Toxin Weapons Today*, SIPRI, Oxford University Press, Oxford, 1986, p. 79.

²³⁸ Erhard Geissler, "Introduction", in Erhard Geissler (ed.), *Biological and Toxin Weapons Today*, SIPRI, Oxford University Press, Oxford, 1986, p. 18.

the soldiers, rather than those who made the decision as to their use, namely, Governments.²³⁹

230. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, the US stated that:

Article I

The United States is in full compliance with the obligations contained in article I. Facilities previously used for development, production or stockpiling of biological weapons were now devoted to peaceful purposes . . .

...

Article IV

The US has taken, and is taking, a number of steps to prohibit and prevent activities contrary to the provisions of the Convention:

1. . . . all heads of federal departments and agencies certified to the President at his request, that their organizations were in compliance.
2. Detailed regulations have been established to ensure that the small remaining quantities of biological and toxin agents are used only for peaceful purposes.
3. Existing legislation already controls certain private actions concerning items prohibited under article I, including provisions of the Arms Export Control Act, the Export Administration Act, the Transportation of Dangerous Articles Act, and the regulations issued pursuant to these laws.²⁴⁰

231. In 1982, at the CSCE review meeting in Madrid, the US delegation directly accused the USSR of “seriously and deliberately” violating both the 1972 BWC and the 1925 Geneva Gas Protocol. The Soviet delegation rejected the charges as “monstrous accusations, false from beginning to end” and denied that the USSR had ever used chemical weapons “anywhere under any circumstances or by any means”.²⁴¹

232. In an executive order issued in 1990, the US President stated that “the proliferation of . . . biological weapons constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States”. The order also provided for the possibility of imposing sanctions against foreign persons and governments found to have “knowingly and materially” contributed to efforts to “use, develop, produce, stockpile or otherwise acquire . . . biological weapons”.²⁴²

²³⁹ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 280–281, § 7.

²⁴⁰ US, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 53, Articles I and IV.

²⁴¹ Julian Perry Robinson, “Chemical and biological warfare: developments in 1982”, *SIPRI Yearbook 1983: World Armaments and Disarmament*, Taylor & Francis, London, 1983, p. 393.

²⁴² US, Executive Order 12735, Chemical and Biological Weapons Proliferation, 16 November 1990, preamble and Section 4(b)(1), *Federal Register*, Vol. 55, 1990, p. 48587.

233. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that it “expects the Government of Iraq to respect its obligations under the Geneva [Gas] Protocol of 1925 not to use . . . biological weapons”.²⁴³

234. In 1993, during a debate in the First Committee of the UN General Assembly, the US stated that it had worked for the elimination of bacteriological weapons.²⁴⁴

235. At the Fourth Review Conference of States Parties to the BWC in 1996, the US stated that it had “unilaterally renounced all use of biological and toxin weapons and destroyed its offensive stockpile before the Convention’s effective date in 1975”. In its concluding statement, the US stressed that it was important that biological weapons were “not just renounced, but banished from the face of the earth”.²⁴⁵

236. At the Fifth Review Conference of States Parties to the BWC in 2001, the US accused a number of countries of not complying with their obligations under the 1972 BWC. It named Iraq, North Korea, Libya, Iran, Syria and Sudan as violating the Convention and specified that “this list is not meant to be exhaustive”.²⁴⁶ In a written statement, the US President declared that:

All civilized nations reject as intolerable the use of disease and biological weapons as instruments of war and terror . . . The vast majority of nations has banned all biological weapons in accordance with the 1972 Biological and Toxins Weapons Convention (BWC) . . . The United States unilaterally destroyed its biological weapons stockpiles and dismantled or converted to peaceful uses the facilities that had been used for developing and producing them.²⁴⁷

237. In 1991, during a debate in the UN Security Council preceding the adoption of Resolution 699 concerning the destruction of biological weapons in Iraq, Yemen stated that it supported eradication of weapons of mass destruction in the Middle East, but that unilateral disarmament of Iraq would create imbalance in the region.²⁴⁸

238. In 1970, the SFRY informed the First Committee of the UN General Assembly “of the decision of the Yugoslav Government on a unilateral renunciation of biological weapons”.²⁴⁹

²⁴³ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

²⁴⁴ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.5, 19 October 1993, p. 10.

²⁴⁵ US, Statement of 26 November 1996 at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

²⁴⁶ US, Statement of 19 November 2001 at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

²⁴⁷ US, Written statement dated 1 November 2001 by the US President submitted to the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

²⁴⁸ Yemen, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 42.

²⁴⁹ SFRY, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1750, 4 November 1970, p. 3, § 18.

239. At the CDDH, the SFRY voted in favour of the Philippine amendment (see *supra*). When the amendment was rejected it stated that it

deeply regrets that the use of unlawful methods or means of combat was not included in the grave breaches, particularly since to have done so would merely have been to have codified an already existing rule of customary law, because there can be no doubt that to use prohibited weapons or unlawful methods of making war is already to act unlawfully, that is, it is a war crime punishable by existing international law.²⁵⁰

240. In the preliminary stages of the First Review Conference of States Parties to the BWC in 1980, the SFRY stated that:

The Government of the Socialist Federal Republic of Yugoslavia strictly adheres to and fulfils the obligations regarding the prohibition of the development, production and stockpiling of bacteriological (biological) weapons, as set forth in articles I, II, IV, V and X of the [1972 BWC]. The Government of the Socialist Federal Republic of Yugoslavia further declares that it has never possessed biological weapons.²⁵¹

241. According to the Report on the Practice of Zimbabwe, Zimbabwe's practice in international fora shows that it believes that the prohibition of the use of biological weapons is customary.²⁵²

III. Practice of International Organisations and Conferences

United Nations

242. In a resolution adopted in 1938 concerning the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations reaffirmed that "the use of . . . bacterial methods in the conduct of war is contrary to international law".²⁵³

243. In Resolution 687 adopted in 1991 after the Gulf War, the UN Security Council recalled the objective of universal elimination of biological weapons and created a "Special Commission, which shall carry out immediate on-site inspection of Iraq's biological . . . capabilities".²⁵⁴

244. In a resolution adopted in 1991, the UN Security Council confirmed that the Special Commission (UNSCOM) had the authority to destroy biological weapons in Iraq.²⁵⁵

²⁵⁰ SFRY, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 306.

²⁵¹ SFRY, Response to the request by the Preparatory Committee for the First Review Conference of States Parties to the BWC, Geneva, 3–21 March 1980, excerpted in UN Doc. BWC/CONF.I/4, 20 February 1980, § 54.

²⁵² Report on the Practice of Zimbabwe, 1998, Chapter 3.4.

²⁵³ League of Nations, Assembly, Resolution adopted on 30 September 1938, § II, *Official Journal*, Special Supplement No. 182, Records of the XIXth Ordinary Session of the Assembly, pp. 15–17.

²⁵⁴ UN Security Council, Res. 687, 8 April 1991, preamble and section C.

²⁵⁵ UN Security Council, Res. 699, 17 June 1991, § 2.

245. In numerous resolutions, the UN General Assembly has called upon all States to become parties to the 1925 Geneva Gas Protocol.²⁵⁶

246. In numerous resolutions, the UN General Assembly has called upon all States to become parties to the 1972 BWC.²⁵⁷

247. A large number of UN General Assembly resolutions call for respect for the 1925 Geneva Gas Protocol or indicate its importance: 18 resolutions state that the General Assembly “reiterates its call for strict observance by all States of the principles and objectives” of the Protocol,²⁵⁸ another 14 resolutions repeat this call and condemn “all actions contrary to those objectives”.²⁵⁹ Similar wording is used in three other resolutions, in which the General Assembly stresses the “need for strict observance of existing international obligations regarding prohibitions on . . . biological weapons and condemns all actions that

²⁵⁶ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 5; Res. 2454 (XXIII) A, 20 December 1968, preamble; Res. 2603 B (XXIV), 16 December 1969, § 2; Res. 2662 (XXV), 7 December 1970, § 2; Res. 2677 (XXV), 9 December 1970, § 1; Res. 2827 (XXVI) A, 16 December 1971, § 6; Res. 2852 (XXVI), 20 December 1971, § 1; Res. 2853 (XXVII), 20 December 1971, § 1; Res. 2933 (XXVII), 29 December 1972, § 5; Res. 3077 (XXVIII), 6 December 1973, § 5; Res. 3256 (XXIX), 9 December 1974, § 5; Res. 3465 (XXX), 11 December 1975, § 5; Res. 31/65, 10 December 1976, § 4; Res. 32/77, 12 December 1977, § 3; Res. 33/59 A, 14 December 1978, § 4; Res. 35/144 C, 12 December 1980, § 2; Res. 37/98 D, 13 December 1982, § 1; Res. 40/92 A, 12 December 1985, § 5; Res. 41/58 B, 3 December 1986, § 5; Res. 43/74 A, 7 December 1988, § 2; Res. 44/115 B, 15 December 1989, § 2.

²⁵⁷ UN General Assembly, Res. 2826 (XXVI), 16 December 1971, § 3; Res. 2933 (XXVII), 29 November 1972, § 5; Res. 3077 (XXVIII), 6 December 1973, § 4; Res. 3256 (XXIX), 9 December 1974, § 4; Res. 3465 (XXX), 11 December 1975, § 4; Res. 31/65, 10 December 1976, § 4; Res. 32/77, 12 December 1977, § 3; Res. 33/59 A, 14 December 1978, § 4; Res. 34/72, 11 December 1979, preamble; Res. 35/144 A, 12 December 1980, § 2; Res. 35/144 B, 12 December 1980, preamble; Res. 36/96 A, 9 December 1981, preamble; Res. 37/98 B, 13 December 1982, preamble; Res. 38/187 B, 20 December 1983, preamble; Res. 39/65 A, 12 December 1984, preamble; Res. 39/65 C, 12 December 1984, preamble; Res. 40/92 B, 12 December 1985, preamble; Res. 40/92 C, 12 December 1985, preamble; Res. 41/58 A, 3 December 1986, § 3; Res. 42/37 A, 30 November 1987, preamble; Res. 42/37 C, 30 November 1987, preamble; Res. 43/74 A, 7 December 1988, preamble; Res. 43/74 B, 7 December 1988, § 5; Res. 43/74 C, 7 December 1988, preamble; Res. 44/115 A, 15 December 1989, preamble; Res. 44/115 B, 15 December 1989, preamble; Res. 45/57 A, 4 December 1990, preamble; Res. 45/57 B, 4 December 1990, § 7; Res. 46/35 A, 6 December 1991, § 5; Res. 48/65, 16 December 1993, § 6; Res. 49/86, 15 December 1994, § 5; Res. 50/79, 12 December 1995, § 6; Res. 51/54, 10 December 1996, § 5; Res. 52/47, 9 December 1997, § 5; Res. 54/61, 1 December 1999, § 2; Res. 55/40, 20 November 2000, § 1.

²⁵⁸ UN General Assembly, Res. 2454 (XXIII) A, 20 December 1968, preamble; Res. 3465 (XXX), 11 December 1975, § 5; Res. 31/65, 10 December 1976, preamble; Res. 35/144 B, 12 December 1980, preamble; Res. 35/144 C, 12 December 1980, § 3; Res. 36/96 A, 9 December 1981, preamble; Res. 37/98 B, 13 December 1982, preamble; Res. 38/187 B, 20 December 1983, preamble; Res. 40/92 B, 12 December 1985, preamble; Res. 41/58 C, 3 December 1986, preamble; Res. 41/58 D, 3 December 1986, preamble; Res. 44/115 A, 15 December 1989, preamble; Res. 45/57 A, 4 December 1990, preamble and § 1; Res. 45/57 C, 4 December 1990, § 2; Res. 46/35 C, 6 December 1991, preamble and § 1; Res. 51/45 P, 10 December 1996, § 1; Res. 53/77 L, 4 December 1998, § 1; Res. 55/33 J, 20 November 2000, preamble and § 1.

²⁵⁹ UN General Assembly, Res. 2162 (XXI) B, 5 December 1966, § 1; Res. 2662 (XXV), 7 December 1970, § 1; Res. 2674 (XXV), 9 December 1970, § 3; Res. 2827 (XXVI) A, 16 December 1971, preamble; Res. 2933 (XXVII), 29 November 1972, preamble; Res. 3077 (XXVIII), 6 December 1973, preamble; Res. 3256 (XXIX), 9 December 1974, preamble; Res. 3465 (XXX), 11 December 1975, preamble; Res. 39/65 A, 12 December 1984, § 1; Res. 42/37 C, 30 November 1987, § 1; Res. 43/74 A, 7 December 1988, § 1; Res. 44/115 B, 15 December 1989, § 1; Res. 45/57 C, 4 December 1990, § 1; Res. 46/35 B, 6 December 1991, §§ 1 and 2.

contravene these obligations".²⁶⁰ Two resolutions refer to the "continuing importance of the 1925 Geneva Protocol",²⁶¹ and several resolutions are entitled "Measures to uphold the authority of the 1925 Geneva Protocol".²⁶² A number of others refer to the Protocol as part of the rules of IHL to be respected: "[the General Assembly]... calls upon all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular... the 1925 Geneva Protocol"²⁶³ and "convinced of the continuing value of established humanitarian rules relating to armed conflict, in particular... the 1925 Geneva Protocol".²⁶⁴ Two resolutions recall the provisions of the 1925 Geneva Gas Protocol and other relevant rules of customary international law.²⁶⁵

248. In a resolution adopted in 1969, the UN General Assembly stated that the 1925 Geneva Gas Protocol "embodies the generally recognised rules of international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments". It declared:

as contrary to the generally recognized rules of international law, as embodied in the [1925 Geneva Gas Protocol], the use in international armed conflicts of:

- ...
- (b) Any biological agents of warfare – living organisms, whatever their nature, or infective material derived from them – which are intended to cause disease or death in man, animals or plants, and which depend for their effects on their ability to multiply in the person, animal or plant attacked.²⁶⁶

The large number of abstentions in the vote on this resolution (36) was partly due to disagreement on the scope of the 1925 Geneva Gas Protocol. Other

²⁶⁰ UN General Assembly, Res. 37/98 E, 13 December 1982, § 2; Res. 40/92 C, 12 December 1985, § 1; Res. 41/58 C, 3 December 1986, § 1.

²⁶¹ UN General Assembly, Res. 40/92 A, 12 December 1985, preamble; Res. 41/58 B, 3 December 1986, preamble.

²⁶² UN General Assembly, Res. 37/98 D, 13 December 1982; Res. 42/37 C, 30 November 1987; Res. 44/115 B, 15 December 1989; Res. 45/57 C, 4 December 1990; Res. 46/35 B, 6 December 1991, § 2; Res. 51/45 P, 10 December 1996, § 1; Res. 53/77 L, 4 December 1998; Res. 55/33 J, 20 November 2000, preamble and § 1.

²⁶³ See, e.g., UN General Assembly, Res. 3032 (XXVII), 18 December 1972, § 2; Res. 3102 (XXVIII), 12 December 1973, § 4; Res. 3319 (XXIX), 14 December 1974, § 3; Res. 3500 (XXX), 15 December 1975, § 1; Res. 31/19, 24 December 1976, § 1.

²⁶⁴ UN General Assembly, Res. 32/44, 8 December 1977, § 6.

²⁶⁵ UN General Assembly, Res. 42/37 C, 30 November 1987, preamble; Res. 43/74 A, 7 December 1988, preamble.

²⁶⁶ UN General Assembly, Res. 2603 A (XXIV), 16 December 1969, preamble and § (b). The resolution was adopted by 80 votes in favour, 3 against (Australia, Portugal and US) and 36 abstentions (Austria, Belgium, Bolivia, Canada, Chile, China, Denmark, El Salvador, France, Greece, Iceland, Israel, Italy, Japan, Laos, Liberia, Luxembourg, Madagascar, Malawi, Malaysia, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Philippines, Sierra Leone, Singapore, South Africa, Swaziland, Thailand, Tunisia, Turkey, UK, Uruguay and Venezuela), UN Doc. A/PV.1836, 16 December 1969, p. 4.

States thought that the UN General Assembly should not interpret multilateral treaties.²⁶⁷

249. In a resolution adopted in 1970, the UN General Assembly called upon the government of Portugal:

not to use biological methods of warfare against the peoples of Angola, Mozambique and Guinea (Bissau), contrary to the generally recognized rules of international law embodied in the [1925 Geneva Protocol] and to General Assembly 2603 (XXIV) of 16 December 1969.²⁶⁸

250. In resolutions adopted in 1971, the UN General Assembly called upon "all parties to *any armed conflict* to observe the rules laid down . . . in the 1925 Geneva Protocol".²⁶⁹ (emphasis added)

251. In a resolution adopted in 1974, the UN General Assembly stated that "the use of . . . bacteriological weapons in the course of military operations constitutes one of the most flagrant violations of the Geneva [Gas] Protocol of 1925 . . . and the principles of international humanitarian law . . . and shall be severely condemned".²⁷⁰

252. In the Final Document of its Tenth Special Session in 1978, the UN General Assembly stated that:

72. All States should adhere to the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925.

73. All States which have not yet done so should consider adhering to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.²⁷¹

253. In two resolutions, adopted in 1977 and 1978, the UN General Assembly called for "strict observance by all States of the principles and objectives of the 1972 Biological Weapons Treaty and the 1925 Geneva Protocol".²⁷²

254. In a resolution adopted in 1982, the UN General Assembly stated that "the use of . . . biological weapons has been declared incompatible with the accepted norms of civilization".²⁷³

²⁶⁷ Debates in the First Committee of the UN General Assembly, UN Doc.A/C.1/PV.1716, 9 December 1969; UN Doc. A/C.1/PV.1717, 10 December 1969.

²⁶⁸ UN General Assembly, Res. 2707 (XXV), 14 December 1970, § 9. (The resolution was adopted by 94 votes in favour, 6 against and 16 abstentions. Against: Brazil, Portugal, South Africa, Spain, UK and US. Abstaining: Argentina, Australia, Austria, Belgium, Canada, Denmark, Finland, France, Italy, Luxembourg, Malawi, Netherlands, New Zealand, Norway, Paraguay and Sweden.)

²⁶⁹ UN General Assembly, Res. 2852 (XXVI), 20 December 1971, § 1; Res. 2853 (XXVI), 20 December 1971, § 1.

²⁷⁰ UN General Assembly, Res. 3318 (XXIX), 14 December 1974, § 2.

²⁷¹ UN General Assembly, Final Document of the Tenth Special Session, UN Doc. A/S-10/2, 30 June 1978, §§ 72–73.

²⁷² UN General Assembly, Res. 32/77, 12 December 1977, preamble and § 3; Res. 33/59 A, 14 December 1978, preamble.

²⁷³ UN General Assembly, Res. 37/98 E, 13 December 1982, preamble.

255. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights stated that biological weapons were weapons of mass destruction and had indiscriminate effects. It also stated that the use of these weapons was incompatible with human rights and IHL.²⁷⁴

256. In 1969, in a report on chemical and bacteriological (biological) weapons and the effects of their possible use, the UN Secretary-General included an analysis by a group of experts on the effects of the use of biological weapons. The experts recommended the elimination of all biological weapons in order to make the world more peaceful. The UN Secretary-General urged all UN members: to accede to the 1925 Geneva Gas Protocol; to affirm that the prohibition covers all sorts of biological weapons; and to reach agreement to eliminate biological weapons.²⁷⁵

257. In reports in 1995 and 1996, the UN Secretary-General noted that UNSCOM, which was mandated to inspect and destroy facilities for weapons of mass destruction in Iraq following the Gulf War, had extensively documented an Iraqi biological weapons programme.²⁷⁶

258. In 1999, the report of an UNSCOM panel (constituted to examine issues of disarmament, monitoring and verification in Iraq following the decision to re-evaluate the work of UNSCOM) noted that:

22. UNSCOM uncovered the proscribed biological weapons (BW) programme of Iraq, whose complete existence had been concealed by Iraq until 1995 . . .
23. UNSCOM ordered and supervised the destruction of Iraq's main declared BW production and development facility, Al Hakam. Some 60 pieces of equipment from three other facilities involved in proscribed BW activities as well as some 22 tonnes of growth media for biological weapons production collected from four other facilities were also destroyed. As a result, the declared facilities of Iraq's biological weapons programme have been destroyed and rendered harmless.

Current status/remaining questions

24. In the biological area, Iraq's Full Final and Complete Disclosure (FFCD) has not been accepted by UNSCOM as a full account of Iraq's biological weapons programme . . . It has also been recognised that due to the fact that biological weapons agents can be produced using low technology and simple equipment, generally dual-use, Iraq possesses the capability and knowledge base through which biological warfare agents could be produced quickly and in volume.²⁷⁷

²⁷⁴ UN Sub-Commission on Human Rights, Res. 1996/16, 29 August 1996, § 1 and preamble.

²⁷⁵ UN Secretary-General, Report on chemical and bacteriological (biological) weapons and the effects of their possible use, UN Doc. A/7575, 1 July 1969, p. xii.

²⁷⁶ UN Secretary-General, Report on the status of the implementation of the Special Commission's plan for the ongoing monitoring and verification of Iraq's compliance with the relevant parts of section C of Security Council resolution 687 (1991), UN Doc. S/1995/864, 11 October 1995, Annex; Report on the activities of the Special Commission Established by the Secretary-General pursuant to paragraph 9 (b) (i) of resolution 687 (1991), UN Doc. S/1996/848, 11 October 1996; Report of the Secretary-General on the activities of the Special Commission Established by the Secretary-General pursuant to paragraph 9 (b) (i) of resolution 687 (1991), UN Doc. S/1997/301, 11 April 1997.

²⁷⁷ UNSCOM, Panel on disarmament and current and future ongoing monitoring and verification issues, Final report of 27 March 1999 annexed to Letters dated 27 and 30 March 1999

259. In his message at the opening of the Fifth Review Conference of States Parties to the BWC, held in Geneva in 2001, the UN Secretary-General stated that:

144 States have now undertaken the commitment never, under any circumstances, to develop, produce, stockpile or otherwise acquire or retain biological or toxin weapons. They have recognised that the use of biological agents and toxins as weapons would, in the words of the Convention's preamble, "be repugnant to the conscience of mankind".

He added that "the challenge for the international community is clear: to implement, to the fullest extent possible, the prohibition regime offered by the Convention".²⁷⁸

Other International Organisations

260. In 1995, during a debate in the First Committee of the UN General Assembly, Spain, on behalf of the EU, expressed support for the strengthening of the prohibition against biological weapons.²⁷⁹

261. At the Fourth Review Conference of States Parties to the BWC in 1996, the EU stated that it believed that "there is an urgent need to strengthen compliance with the international system of non-proliferation of these weapons of mass destruction including through the reinforcement of the BWC with a legally binding and effective verification regime". According to the EU, "the strengthening of the BWC through agreement on a legally binding verification regime would contribute to international peace and security and must henceforth be accorded the priority it warrants in international arms control and disarmament negotiations".²⁸⁰

262. At the Fifth Review Conference of States Parties to the BWC in 2001, Spain, on behalf of the EU, explained that:

In its conclusion of 11 June 2001, the Council of the European Union confirmed its commitment to contribute to drawing up a Protocol including the set of concrete measures which the EU's Common Position of 17 May 1999 defined as essential for the establishment of an instrument which would effectively reinforce the Convention.²⁸¹

respectively from the Chairman of the panels established pursuant to the Note by the President of the Security Council of 30 January 1999 (S/1999/100) addressed to the President of the Security Council, UN Doc. S/1999/356, 30 March 1999, Annex I, §§ 22–24.

²⁷⁸ UN Under-Secretary-General for Disarmament Affairs, Statement of 19 November 2001 on behalf of the UN Secretary-General at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

²⁷⁹ EU, Statement by Spain on behalf of the EU before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.3, 16 October 1995, p. 12.

²⁸⁰ EU, Statement of 25 November 1996 by Ireland on behalf of the EU and associated countries at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996. (The statement was also given on behalf of Bulgaria, Cyprus, Czech Republic, Estonia, Hungary, Iceland, Latvia, Liechtenstein, Lithuania, Norway, Poland, Romania, Slovenia and Slovakia.)

²⁸¹ EU, Statement of 19 November 2001 by Belgium on behalf of the EU at the Fifth Review Conference of States Parties to the BWC, Geneva, 19 November–7 December 2001.

263. In the Final Communiqué of its 12th Session in 1991, the GCC Supreme Council confirmed “the need to rid the entire Middle East region of all types of weapons of mass destruction, including . . . biological weapons”.²⁸²

264. In the Final Communiqué of its 16th Session in 1995, the GCC Supreme Council expressed “its deep regret that the Government of Iraq was continuing to produce bacteriological weapons of a pestilential nature to inflict overwhelming damage on Iraq itself and on the region as a whole”. It called for a zone free of weapons of mass destruction, including biological weapons, and confirmed “its concern for the elimination of all kinds of weapons of mass destruction, as a means of arriving at a Middle East region entirely free of such weapons”.²⁸³

International Conferences

265. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the protection of civilian populations against the dangers of indiscriminate warfare which expressly invited “all Governments who have not yet done so to accede to the Geneva Gas Protocol of 1925 which prohibits the use of . . . bacteriological methods of warfare”.²⁸⁴

266. In a resolution adopted in 1968, the Teheran International Conference on Human Rights emphasised that “the widespread violence and brutality of our times, including . . . the use of . . . biological means of warfare . . . erode human rights and engender counter-brutality”.²⁸⁵

267. The 21st International Conference of the Red Cross in 1969 adopted a resolution on appealed to States to accede to the 1925 Geneva Gas Protocol and “to comply strictly with its provisions”. The Conference further urged governments “to conclude as rapidly as possible an agreement banning the production and stockpiling of chemical and bacteriological weapons”.²⁸⁶

268. There have so far been five review conferences of the BWC (1980, 1986, 1991, 1996 and 2001), during which numerous States declared their commitment to the 1972 BWC and to the prohibition of the use of biological weapons.

269. The Final Declaration of the Paris Conference of State Parties to the 1925 Geneva Gas Protocol and Other Interested States in 1989 affirmed that:

The participating States recognise the importance and continuous validity of the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases,

²⁸² GCC, Supreme Council, 12th Session, Kuwait, 23–25 December 1991, Final Communiqué, annexed to Letter dated 30 December 1991 from Kuwait to the UN Secretary-General, UN Doc. A/46/833-S/23336, 30 December 1991, p. 5.

²⁸³ GCC, Supreme Council, 16th Session, Muscat, 4–6 December 1995, Final Communiqué, annexed to Letter dated 29 December 1995 from Oman to the UN Secretary-General, UN Doc. A/51/56-S/1995/1070, 29 December 1995, p. 4.

²⁸⁴ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

²⁸⁵ International Conference on Human Rights, Teheran, 22 April–13 May 1968, Res. XXIII on Human Rights in Armed Conflicts, preamble.

²⁸⁶ 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XIV.

and of Bacteriological Methods of Warfare, signed on 17 June 1925 in Geneva. The States party to the Protocol solemnly reaffirm the prohibition prescribed there in.²⁸⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

270. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ stated that:

The pattern until now has been for weapons of mass destruction to be declared illegal by specific instruments. The most recent such instruments are the Convention of 10 April 1972 on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their destruction (which prohibits the possession of bacteriological and toxin weapons and reinforces the prohibition of their use).²⁸⁸

V. Practice of the International Red Cross and Red Crescent Movement

271. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that it is prohibited to use "bacteriological methods of warfare".²⁸⁹

272. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the use of . . . bacteriological weapons is prohibited (1925 Geneva Protocol)".²⁹⁰

273. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the parties that "the use of . . . bacteriological weapons is prohibited under international humanitarian law."²⁹¹

274. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "in particular, the use of . . . bacteriological weapons . . . is prohibited".²⁹²

275. In its statement at the Fourth Review Conference of States Parties to the BWC in 1996, the ICRC, referring to the 1925 Geneva Gas Protocol, stated that "the norms which your predecessors so carefully constructed have now become

²⁸⁷ Conference of State Parties to the 1925 Geneva Gas Protocol and Other Interested States, Paris, 7–11 January 1989, Final Declaration, 11 January 1989, § 2, annexed to letter dated 19 January 1989 from France to the UN Secretary-General, UN Doc. A/44/88, 20 January 1989.

²⁸⁸ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 57.

²⁸⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 919(c).

²⁹⁰ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 25.

²⁹¹ ICRC, Press Release No. 1658, Gulf War: ICRC reminds States of their obligations, 17 January 1991, *IRRC*, No. 280, 1991, p. 26.

²⁹² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

elements of customary international law. With few exceptions, they have been respected even in times of armed conflict." It called upon States to adhere to the BWC and to consider withdrawing any reservations that they might have to the Geneva Gas Protocol. The ICRC concluded by stating that:

Biological warfare, in whatever form and by whatever party, is rightfully considered abhorrent by the public conscience and by the world's most ancient cultures. This Conference's most important task will be to reaffirm, in both word and action, that no party should even think of using biological knowledge to inflict harm and to assure anyone who does that this will not be tolerated by the international community.²⁹³

276. In its working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC stated that:

The applicability of weapons prohibitions to internal conflicts and the prohibitions now clearly attached to the use of such weapons as . . . biological weapons . . . in time of non-international armed conflicts is to be related to the more general principle that all means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering are unlawful.²⁹⁴

VI. Other Practice

277. According to commentators, between 1978 and 1987 the US repeatedly accused Soviet forces of having used toxin weapons in South-east Asia in the period 1978–1984. The allegations charged that attacks had been conducted by Soviet aircraft spraying a yellow material that fell like rain and contained trichothecene toxins, causing illness and death among thousands of victims, most of them among people from Laos living in Thai refugee camps. The USSR consistently denied the accusations concerning its alleged use of biological weapons in the region. In 1982, a UK government scientist analysed a sample of the "yellow rain" and concluded that it consisted largely of pollen. The UK finding was later independently corroborated by scientists in Australia, Canada, France, Sweden and Thailand. The US administration responded to this discovery by arguing that the USSR had deliberately added pollen when manufacturing the yellow rain. Between 1983 and 1986, following further scientific analysis, government and university researchers from France, Thailand, UK and US reported that the samples contained no trace of trichothecenes and concluded that the powder was actually the faeces of wild honeybees.²⁹⁵

²⁹³ ICRC, Statement at the Fourth Review Conference of States Parties to the BWC, Geneva, 25 November–6 December 1996.

²⁹⁴ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, p. 29.

²⁹⁵ Julian Robinson, Jeanne Harley Guillemin and Matthew Meselson, "Yellow Rain in Southeast Asia: The Story Collapses", in Susan Wright (ed.), *Preventing a Biological Arms Race*, MIT Press, Cambridge, Massachusetts, 1990, pp. 220–238.

278. Rule B1 of the Rules of International Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, states that “the customary rule prohibiting... the use of bacteriological (biological) weapons is applicable in non-international armed conflicts”.²⁹⁶

279. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances”.²⁹⁷

280. SIPRI has documented a number of allegations concerning the use of biological weapons since the Second World War. However, it noted that “there are no indisputably verified instances of their having been used”.²⁹⁸

281. The participating experts in the Workshop on International Criminalisation of Biological and Chemical Weapons at the Lauterpacht Research Centre for International Law in 1998 developed the text of a Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological and Chemical Weapons. The Draft Convention makes it an international criminal offence to use chemical or biological weapons.²⁹⁹

282. In 1999, the British Medical Association reported that in the light of the existence of non-parties to the 1925 Geneva Gas Protocol and the reservations of some States to the Protocol which permitted retaliatory use in kind of biological weapons, a number of countries undertook research in and developed and stockpiled biological agents for military retaliation purposes in the 20th century, although this practice had been progressively abandoned, in particular since the adoption of the 1972 BWC.³⁰⁰

283. According to a report by the Center for Non-Proliferation Studies, Algeria and India carry out research programmes into biological weapons. However, it emphasises that there is no evidence of production of such agents by those States. It adds that China, Egypt and Iran are likely to have maintained a research programme into biological weapons. It notes that Iraq had previously a research and production programme and emphasises that in the absence of

²⁹⁶ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B1, *IRRC*, No. 278, 1990, p. 395.

²⁹⁷ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 5(3), *IRRC*, No. 282, 1991, p. 332.

²⁹⁸ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, pp. 217–230.

²⁹⁹ Workshop on International Criminalisation of Biological and Chemical Weapons, Lauterpacht Research Centre for International Law, Cambridge, 1–2 May 1998, Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological and Chemical Weapons, reprinted in *The CBW Conventions Bulletin*, Issue No. 42, December 1998, pp. 1–5.

³⁰⁰ British Medical Association, *Biotechnology Weapons and Humanity*, Harwood Academic Publishers, London, 1999, pp. 14–32.

UN inspections and monitoring it is possible that Iraq has resumed its research programmes on biological agents. The report notes that Israel, Libya, North Korea and Syria conduct research programmes and that the production of biological weapons remains possible. It further states that Russia has a research programme. According to the report, it is also possible that Sudan and Taiwan have research programmes on biological agents.³⁰¹

³⁰¹ Monterey Institute of International Studies, Center for Nonproliferation Studies, Chemical and Biological Weapons: Possession and Programs Past and Present, last updated in 2002.

CHEMICAL WEAPONS

A. Chemical Weapons (practice relating to Rule 74)	§§ 1–526
B. Riot Control Agents (practice relating to Rule 75)	§§ 527–595
C. Herbicides (practice relating to Rule 76)	§§ 596–638

A. Chemical Weapons

I. Treaties and Other Instruments

Treaties

1. The 1899 Hague Declaration concerning Asphyxiating Gases was the first treaty to outlaw the use of gas in warfare. In the Declaration, which has been ratified by 31 States, “the contracting Powers agree to abstain from the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases”.
2. Article 171 of the 1919 Treaty of Versailles stipulated that “the use of asphyxiating, poisonous or other gases and analogous liquids, materials or devices being prohibited, their manufacture and importation are strictly forbidden in Germany.”
3. Article 5 of the 1922 Treaty on the Use of Submarines and Noxious Gases in Warfare provides that:

The use in war of asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices, having been justly condemned by the general opinion of the civilized world and a prohibition of such having been declared in treaties to which a majority of the civilized Powers are parties,

The Signatory Powers, to the end that this prohibition shall be universally accepted as a part of international law binding alike the conscience and practice of nations, declare their assent to such prohibition, agree to be bound thereby between themselves and invite all other civilized nations to adhere thereto.

4. The 1925 Geneva Gas Protocol provides that:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; and

Whereas the prohibition of such use has been declared in Treaties to which the majority of Powers of the world are Parties; and

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition . . . and agree to be bound as between themselves according to the terms of this declaration.

Of the 132 States party, 39 made reservations upon ratification of the Protocol, stating that if an adverse party does not respect the Protocol, the ratifying State will no longer consider itself bound by the Protocol vis-à-vis that party (a number of the reservations included non-respect by allies also as a reason for no longer being obliged to respect the Protocol).¹ As at 1 March 2003, 18 of these reservations had been withdrawn.²

5. According to Article 14 of the 1947 Treaty of Peace between the Allied and Associated Powers and Bulgaria, Bulgaria “shall not retain, produce or otherwise acquire, or maintain facilities for the manufacture of, war material in excess of that required for the maintenance of the armed forces”. According to Annex III of the treaty, “war material” comprises, *inter alia*, “asphyxiating, lethal, toxic or incapacitating substances intended for war purposes, or manufactured in excess of civilian requirements” (Category VI). Article 15 further provides that Bulgaria is obliged to hand over to the Allied Powers or destroy some of such war material.

6. According to Article 18 of the 1947 Treaty of Peace between the Allied and Associated Powers and Finland, “Finland shall not retain, produce or otherwise acquire, or maintain facilities for the manufacture of, war material in excess of that required for the maintenance of the armed forces”. According to Annex III of the treaty, “war material” comprises, *inter alia*, “asphyxiating, lethal, toxic or incapacitating substances intended for war purposes, or manufactured in excess of civilian requirements” (Category VI). Article 19 further provides that Finland is obliged to hand over to the Allied Powers or destroy some of such “war material”.

7. According to Article 16 of the 1947 Treaty of Peace between the Allied and Associated Powers and Hungary, “Hungary shall not retain, produce or otherwise acquire, or maintain facilities for the manufacture of, war material in

¹ Algeria, Angola, Australia, Bahrain, Bangladesh, Belgium, Bulgaria, Canada, Chile, China, Czechoslovakia, Estonia, Fiji, France, India, Iraq, Ireland, Israel, Jordan, North Korea, South Korea, Kuwait, Libya, Mongolia, Netherlands, New Zealand, Nigeria, Pakistan, Papua New Guinea, Portugal, Romania, Solomon Islands, South Africa, Spain, USSR, UK, US, Vietnam and SFRY.

² Ireland (1972); Australia (1986); New Zealand (1989); Czechoslovakia (1990); Mongolia (1990); Bulgaria (1991); Chile (1991); Romania (1991); UK (partially, 1991); Spain (1992); Netherlands (1995); France (1996); South Africa (1996); Belgium (1997); Estonia (1999); Canada (1999); Russia (2001); South Korea (2002).

excess of that required for the maintenance of the armed forces". According to Annex III of the treaty, "war material" comprises, *inter alia*, "asphyxiating, lethal, toxic or incapacitating substances intended for war purposes, or manufactured in excess of civilian requirements" (Category VI). Article 17 further provides that Hungary is obliged to hand over to the Allied Powers or destroy some of such "war material".

8. According to Article 53 of the 1947 Treaty of Peace between the Allied and Associated Powers and Italy, "Italy shall not manufacture or possess, either publicly or privately, any war material different from, or exceeding in quantity, that required for the forces permitted in" other sections of the treaty. According to the Annex XIII(C) of the treaty, "war material" comprises, *inter alia*, "asphyxiating, lethal, toxic or incapacitating substances intended for war purposes, or manufactured in excess of civilian requirements" (Category VI). Article 67 further provides that Italy is obliged to hand over to the Allied Powers or destroy such "war material".

9. According to Article 15 of the 1947 Treaty of Peace between the Allied and Associated Powers and Romania, "Romania shall not retain, produce or otherwise acquire, or maintain facilities for the manufacture of, war material in excess of that required for the maintenance of the armed forces". According to Annex III of the treaty, "war material" comprises, *inter alia*, "asphyxiating, lethal, toxic or incapacitating substances intended for war purposes, or manufactured in excess of civilian requirements" (Category VI). Article 16 further provides that Romania is obliged to hand over to the Allied Powers or destroy some of such "war material".

10. Article 13(1) of the 1955 Austrian State Treaty provides that:

Austria shall not possess, construct or experiment with –

...

- (j) asphyxiating, vesicant or poisonous materials or biological substances in quantities greater than, or of types other than, are required for legitimate civil purposes, or any apparatus designed to produce, project or spread such materials or substances for war purposes.

11. The preamble to the 1972 BWC states that the States party to the Convention are "convinced of the importance and urgency of eliminating from the arsenals of States, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents". States also recognize that "an agreement on the prohibition of bacteriological (biological) and toxin weapons represents a first possible step towards the achievement of agreement on effective measures also for the prohibition of the development, production and stockpiling of chemical weapons" and that they are "determined to continue negotiations to that end".

12. Article 1(1) of the 1990 US-Soviet Chemical Weapons Agreement states that:

In accordance with provisions of this Agreement, the Parties undertake:

- a. to cooperate regarding methods and technologies for the safe and efficient destruction of chemical weapons;
- b. not to produce chemical weapons;
- c. to reduce their chemical weapons stockpiles to equal, low levels;
- d. to cooperate in developing, testing, and carrying out appropriate inspection procedures; and
- e. to adopt practical measures to encourage all chemical weapons-capable states to become parties to the multilateral convention.

13. Article I of the 1993 CWC provides that:

1. Each State Party to this Convention undertakes never under any circumstances:
 - (a) To develop, produce, otherwise acquire, stockpile or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
 - (b) To use chemical weapons;
 - (c) To engage in any military preparations to use chemical weapons;
 - (d) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention;
2. Each State Party undertakes to destroy chemical weapons it owns or possesses, or that are located in any place under its jurisdiction or control . . .
3. Each State Party undertakes to destroy all chemical weapons it abandoned on the territory of another State Party . . .
4. Each State Party undertakes to destroy any chemical weapons production facilities it owns or possesses, or that are located in any place under its jurisdiction or control.

14. The 1993 CWC prohibits the use of chemical weapons in any circumstances, including by way of reprisal, and also obliges States parties not to use chemical weapons against non-parties.³ Article XXII states that “the Articles of this Convention shall not be subject to reservations”. The treaty includes an extensive implementation and verification regime.

15. Pursuant to Article 8(2)(b)(xviii) of the 1998 ICC Statute, “employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” is a war crime in international armed conflicts.

Other Instruments

16. Article 16(1) of the 1913 Oxford Manual of Naval War prohibits the use of “projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases”.

17. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on

³ Natalino Ronzitti, “Relations Between the Chemical Weapons Convention and Other Relevant International Norms”, *The Convention on the Prohibition and Elimination of Chemical Weapons: a Breakthrough in Multilateral Disarmament*, Hague Academy of International Law Workshop, Martinus Nijhoff Publishers, Dordrecht, 1994, p. 184.

Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the "use of deleterious and asphyxiating gases".

18. Articles 6 and 7 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that:

Art. 6. The use of chemical . . . weapons as against any State, whether or not a party to the present convention, and in any war, whatever its character, is prohibited.

Art. 7. (a) The prohibition of the use of chemical weapons shall apply to the use, by any method whatsoever, for the purpose of injuring an adversary, of any natural or synthetic substance (whether solid, liquid or gaseous) which is harmful to the human or animal organism by reason of its being a toxic, asphyxiating, irritant or vesicant substance.

(b) The said prohibition shall not apply:

- I. to explosives that are not in the last-mentioned category;
- II. to the noxious substances arising from the combustion or detonation of such explosives, provided that such explosives have not been designed or used with the object of producing such noxious substances;
- III. to smoke or fog used to screen objectives or for other military purposes, provided that such smoke or fog is not liable to produce harmful effects under normal conditions of use;
- IV. to gas that is merely lachrymatory.

19. Article 14 of the 1956 New Delhi Draft Rules provides, under the heading "Weapons with uncontrollable effects", that:

The use is prohibited of weapons whose harmful effects – resulting in particular from the dissemination of . . . chemical . . . agents – could spread to an unforeseen degree or escape, either in space or in time, from the control of those who employ them, thus endangering the civilian population.

20. The preamble to the 1991 Mendoza Declaration on Chemical and Biological Weapons states that the parties are "convinced that a complete ban on chemical . . . weapons will contribute to strengthening the security of all States". In paragraph 1, the parties declare their "full commitment not to develop, produce, acquire in any way, stockpile or retain, transfer directly or indirectly, or use chemical weapons".

21. The 1991 Cartagena Declaration on Weapons of Mass Destruction expresses the commitment of the signatory governments to:

renounce the possession, production, development, use, testing and transfer of all weapons of mass destruction whether . . . toxin or chemical weapons, and to refrain from storing, acquiring or holding such categories of weapons, in any circumstances.

22. The 1992 India-Pakistan Declaration on Prohibition of Chemical Weapons provides that the governments of India and Pakistan:

undertake never under any circumstances:

- a) to develop, produce or otherwise acquire chemical weapons;
- b) to use chemical weapons;
- c) to assist, encourage or induce, in any way, anyone to engage in development, production, acquisition, stockpiling or use of chemical weapons.

23. Under Article 4(4) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines, "civilian population and civilians . . . shall be protected . . . from . . . the stockpiling near or in their midst, and the use of chemical . . . weapons".

24. Section 6.2 of the 1999 UN Secretary-General's Bulletin provides that:

The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law. These include, in particular, the prohibition on the use of asphyxiating, poisonous or other gases.

25. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xviii), "employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" is a war crime in international armed conflicts.

II. National Practice

Military Manuals

26. Australia's *Commanders' Guide* places chemical weapons under the heading "Prohibited weapons" and refers to the 1993 CWC.⁴ The manual defines the use of "certain unlawful weapons and ammunition" as "grave breaches or serious war crimes".⁵

27. Australia's *Defence Force Manual* provides that "asphyxiating, poisonous or other gases are prohibited".⁶ It adds that "chemical weapons, which include toxic chemicals and their precursors (those chemicals which can cause death, permanent harm or temporary incapacity to humans or animals) and munitions or devices designed to carry such chemicals, are banned".⁷ The manual defines the use of "certain unlawful weapons and ammunition" as "grave breaches or serious war crimes".⁸

28. Belgium's *Law of War Manual*, with reference to the 1925 Geneva Gas Protocol, proscribes "the use of asphyxiating, toxic or similar gases, as well as all liquids, materials or analogous devices", with a reservation on the first use.⁹

⁴ Australia, *Commanders' Guide* (1994), § 305.

⁵ Australia, *Commanders' Guide* (1994), § 1305(p).

⁶ Australia, *Defence Force Manual* (1994), § 410.

⁷ Australia, *Defence Force Manual* (1994), § 412.

⁸ Australia, *Defence Force Manual* (1994), § 1315(p).

⁹ Belgium, *Law of War Manual* (1983), p. 38.

29. Bosnia and Herzegovina's Military Instructions states that "it is prohibited to use . . . poisonous gas".¹⁰
30. Cameroon's *Instructors' Manual* states on the issue of chemical weapons that "the restrictions here are clear. It is prohibited to use such weapons against enemy combatants as well as against civilian populations." It also calls for the "total destruction of the existing stockpile".¹¹
31. Canada's LOAC Manual prohibits the use of asphyxiating, poisonous or other gases "at all times and under all circumstances".¹² It also bans the use of chemical weapons, "which include toxic chemicals and their precursors (those chemicals which can cause death, permanent harm or temporary incapacity to humans or animals) and munitions or devices designed to carry such chemicals".¹³ It defines "using asphyxiating, poisonous and other gases" as a war crime.¹⁴ The manual also provides that "smoke grenades, smoke ammunition from indirect fire weapons and tank smoke ammunition are not prohibited as long as they are used to conceal position or movement or to mask target".¹⁵
32. Canada's Code of Conduct provides that the use of chemical weapons is forbidden.¹⁶
33. Colombia's Basic Military Manual states that the use of weapons which "cause unnecessary and indiscriminate, extensive, lasting and serious damage to people and the environment" is prohibited. It adds that the use of chemical weapons, as well as their production, possession and importation, is banned.¹⁷
34. Ecuador's Naval Manual states, under the heading "Chemical weapons", that "international law, both customary and treaty-based, prohibits taking the initiative to use lethal chemical weapons during armed conflicts".¹⁸ It also provides that "the following acts constitute war crimes: . . . use of prohibited weapons or ammunition".¹⁹
35. France's LOAC Summary Note states that it is prohibited to use combat gases.²⁰
36. France's LOAC Teaching Note includes chemical weapons in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.²¹
37. France's LOAC Manual incorporates the content of Article 2 of the 1993 CWC and refers to the 1899 Hague Declaration concerning Asphyxiating Gases

¹⁰ Bosnia and Herzegovina, *Military Instructions* (1992), Item 11, § 1.

¹¹ Cameroon, *Instructors' Manual* (1992), p. 124, § 441.

¹² Canada, *LOAC Manual* (1999), p. 5-3, § 23.

¹³ Canada, *LOAC Manual* (1999), p. 5-3, § 26.

¹⁴ Canada, *LOAC Manual* (1999), pp. 16-3 and 16-4, § 21(h).

¹⁵ Canada, *LOAC Manual* (1999), p. 5-3, § 24.

¹⁶ Canada, *Code of Conduct* (2001), Rule 3, § 10(d).

¹⁷ Colombia, *Basic Military Manual* (1995), pp. 49-50.

¹⁸ Ecuador, *Naval Manual* (1989), § 10.3.

¹⁹ Ecuador, *Naval Manual* (1989), § 6.2.5(10).

²⁰ France, *LOAC Summary Note* (1992), § 4.6.

²¹ France, *LOAC Teaching Note* (2000), p. 6.

and the 1925 Geneva Gas Protocol.²² It also includes chemical weapons in the list of weapons that “are totally prohibited by the law of armed conflict” because of their inhuman and indiscriminate character.²³

38. Germany’s Soldiers’ Manual provides that “the use of chemical weapons (for example poisonous gas) . . . is prohibited”.²⁴

39. Germany’s Military Manual proscribes “the use of asphyxiating, poisonous or other gases and all analogous liquids, materials or similar devices in war” and refers to the 1925 Geneva Gas Protocol and to Article 23(a) of the 1907 HR. It adds that:

The prohibition also applies to the toxic contamination of water supply installations and foodstuffs and the use of irritant agents for military purposes. This prohibition does not refer to unintentional and insignificant poisonous secondary effects of otherwise permissible munitions.

It further states that:

The scope of this prohibition is restricted by the fact that, when signing the Geneva Gas Protocol, numerous states declared that this Protocol should cease to be binding in regard to any enemy state whose armed forces fail to respect the prohibition embodied in the Protocol.²⁵

The manual refers to the 1993 CWC and stresses that it was not at the time (1992) in force. However, it declares that:

On signing the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction on 10 April 1972, the Federal Republic of Germany further declared that, in accordance with its attitude, it would neither develop nor acquire or stockpile under its own control chemical weapons whose manufacture it has already abstained from. This commitment was confirmed under Article 3 of the Treaty on the Final Settlement with respect to Germany of 12 September 1990.²⁶

40. Germany’s IHL Manual states that “international humanitarian law prohibits the use of a number of means of warfare, which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g. . . . chemical means of warfare, e.g. poisonous gases”.²⁷

41. Israel’s Manual on the Laws of War states that “today 128 countries are signatories to [the 1925 Geneva Gas Protocol], whose provisions are regarded as customary practice, thereby making it binding on all countries, irrespective of whether they signed the Protocol”.²⁸

²² France, *LOAC Manual* (2001), pp. 22 and 23.

²³ France, *LOAC Manual* (2001), p. 54.

²⁴ Germany, *Soldiers’ Manual* (1991), p. 5.

²⁵ Germany, *Military Manual* (1992), §§ 434 and 435.

²⁶ Germany, *Military Manual* (1992), §§ 436–437.

²⁷ Germany, *IHL Manual* (1996), § 305.

²⁸ Israel, *Manual on the Laws of War* (1998), p. 20.

42. Italy's IHL Manual states that "the use... of asphyxiating, toxic or similar gases... is forbidden in conformity with the international provisions in force".²⁹
43. Kenya's LOAC Manual prohibits the use of "asphyxiating, poisonous or other gases, all analogous liquids, materials or devices".³⁰
44. The Military Manual of the Netherlands states that "it is generally accepted that this prohibition [of the use of chemical weapons] applies to States which have not ratified the Gas Protocol; it belongs to customary law".³¹
45. The Military Handbook of the Netherlands provides a general prohibition on the use of chemical weapons.³²
46. New Zealand's Military Manual states that "the 1925 Geneva Protocol prohibits the use in war of asphyxiating, poisonous and other gases, and bacteriological methods of warfare".³³ It further includes "using asphyxiating, poisonous and other gases" in a list of "war crimes recognised by the customary law of armed conflict".³⁴
47. Nigeria's Manual on the Laws of War includes "using asphyxiating, poisonous or other gases and all analogous liquids, materials or devices" in its list of war crimes.³⁵
48. Russia's Military Manual prohibits the use of "projectiles used with the only purpose to spread asphyxiating or poisonous gases... asphyxiating, poisonous or other similar gases and bacteriological means".³⁶
49. South Africa's LOAC Manual states that "the use of certain weapons is expressly prohibited by international agreement, treaty or custom (e.g. chemical... and toxic weapons)".³⁷
50. Spain's LOAC Manual prohibits the use of asphyxiating or poisonous gases. It reproduces the content of Articles I and IV of the 1993 CWC.³⁸
51. Switzerland's Teaching Manual prohibits the use of toxic gases of any kind.³⁹
52. Switzerland's Basic Military Manual prohibits the use of poison, asphyxiating, toxic or similar gases, or analogous liquids or materials.⁴⁰
53. The UK Military Manual provides that "asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices are forbidden".⁴¹ A footnote to this passage states that the use of chemical weapons in the First World

²⁹ Italy, *IHL Manual* (1991), Vol. I, § 19.

³⁰ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 6.

³¹ Netherlands, *Military Manual* (1993), p. IV-8, § 14.

³² Netherlands, *Military Handbook* (1995), p. 7-39.

³³ New Zealand, *Military Manual* (1992), §§ 512, 619 and 711.

³⁴ New Zealand, *Military Manual* (1992), § 1704(5).

³⁵ Nigeria, *Manual on the Laws of War* (undated), § 6(18).

³⁶ Russia, *Military Manual* (1990), § 6(b) and (e).

³⁷ South Africa, *LOAC Manual* (1996), § 34(f)(iii).

³⁸ Spain, *LOAC Manual* (1996), § 3.2.c.(1) and (2).

³⁹ Switzerland, *Teaching Manual* (1986), p. 41.

⁴⁰ Switzerland, *Basic Military Manual* (1987), Articles 17 and 22.

⁴¹ UK, *Military Manual* (1958), § 111.

War was illegal “in so far as it exposed combatants to unnecessary suffering”.⁴² The manual also provides that “in addition to the ‘grave breaches’ of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . using asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices”.⁴³

54. The UK LOAC Manual states that “the following are prohibited in *international* armed conflict: . . . e. the first use of gas and chemical weapons”.⁴⁴ (emphasis in original)

55. The US Field Manual provides that:

Although the language of the 1925 Geneva Protocol appears to ban unqualifiedly the use in war of the chemical weapons within the scope of its prohibition, reservations submitted by most of the Parties to the Protocol, including the United States, have, in effect, rendered the Protocol a prohibition only of the first use in war of materials within its scope. Therefore, the United States, like many other Parties, has reserved the right to use chemical weapons against a state if that state or any of its allies fails to respect the prohibitions of this Protocol.⁴⁵

56. The US Air Force Pamphlet states that:

The first use of lethal chemical weapons is now regarded as unlawful in armed conflicts. During World War II President Roosevelt, in response to reports that the enemy was seriously contemplating the use of gas warfare, stated: “Use of such weapons has been outlawed by the general opinion of civilized mankind . . . We shall under no circumstances resort to the use of such weapons unless they are first used by our enemies.” This United States position has been reaffirmed on many occasions by the United States as well as confirmed by resolutions in various international forums.⁴⁶

57. The US Air Force Commander’s Handbook states that “the United States, however, has reserved the right to use chemical weapons against ‘an enemy State if such State or any of its allies fails to respect the prohibition of the Protocol.’ The USSR and the People’s Republic of China have reserved similar rights.”⁴⁷

58. The US Operational Law Handbook states that “the US has renounced first use of chemical weapons”.⁴⁸

59. The US Naval Handbook states that:

The United States considers the prohibition against first use of lethal and incapacitating chemical weapons to be part of customary international law and, therefore, binding on all nations whether or not they are parties to the 1925 Gas Protocol . . . Consistent with its first-use reservation to the 1925 Gas Protocol, the United States

⁴² UK, *Military Manual* (1958), § 111, footnote 1(a). ⁴³ UK, *Military Manual* (1958), § 626(r).

⁴⁴ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(e). ⁴⁵ US, *Field Manual* (1956), § 38(d).

⁴⁶ US, *Air Force Pamphlet* (1976), § 6-4(c), quoting Statement by the President, Use of Poison Gas, 12 June 1943, *State Department Bulletin*, Vol. 8, 1947, No. 207, p. 507.

⁴⁷ US, *Air Force Commander’s Handbook* (1980), § 6-3(a).

⁴⁸ US, *Operational Law Handbook* (1993), p. Q-182, § (i).

maintained a lethal and incapacitating chemical weapons capability for deterrence and possible retaliatory purposes only. National Command Authorities (NCA) approval was required for retaliatory use of lethal or incapacitating chemical weapons by U.S. forces. Retaliatory use of lethal or incapacitating chemical agents was to be terminated as soon as the enemy use of such agents that prompted the retaliation had ceased and any tactical advantage gained by the enemy through unlawful first use had been redressed. Upon coming into force of the 1993 Chemical Weapons Convention, any use of chemical weapons by a party to that convention, whether or not in retaliation against unlawful first use by another nation, will be prohibited.

[The 1993 CWC] will, upon entry into force, prohibit the development, production, stockpiling and use of chemical weapons, and mandate the destruction of chemical weapons and chemical weapons production facilities for all nations that are party to it.⁴⁹

60. The YPA Military Manual of the SFRY (FRY) prohibits the use of chemical agents such as asphyxiating and poisonous gases.⁵⁰

National Legislation

61. Under Armenia's Penal Code, the development, production, acquisition, sale, use and testing of chemical weapons and weapons of mass destruction constitute crimes against the peace and security of mankind.⁵¹

62. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including the use of deleterious and asphyxiating gases.⁵²

63. Australia's Chemical Weapons (Prohibition) Act provides that:

A person must not intentionally or recklessly:

- (a) develop, produce, otherwise acquire, stockpile or retain chemical weapons or
- (b) transfer, directly or indirectly, chemical weapons to another person; or
- (c) use chemical weapons; or
- (d) engage in any military preparations to use chemical weapons; or
- (e) assist, encourage or induce, in any way, another person to engage in any activity prohibited to a State Party under the Convention; or
- (f) use riot control agents as a method of warfare.

Penalty: imprisonment for life.

It also specifies the purposes which are not prohibited under the 1993 CWC:

- (a) industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes;
- (b) protective purposes, namely those purposes directly related to protection against toxic chemicals and to protection against chemical weapons;

⁴⁹ US, *Naval Handbook* (1995), §§ 10.3.1.1 and 10.3.1.2.

⁵⁰ SFRY (FRY), *YPA Military Manual* (1988), § 99.

⁵¹ Armenia, *Penal Code* (2003), Articles 386 and 387(2).

⁵² Australia, *War Crimes Act* (1945), Section 3.

- (c) military purposes not connected with the use of chemical weapons and not dependent on the use of the toxic properties of chemicals as a method of warfare;
- (d) law enforcement including domestic riot control purposes.⁵³

64. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "employing prohibited gases, liquids, materials or devices" in international armed conflicts.⁵⁴

65. The Criminal Code of Belarus provides that "production, acquisition, stockpiling, transport, transfer or sale of weapons of mass destruction prohibited by international treaties binding upon the Republic of Belarus" is a criminal offence, while the use of such weapons is a war crime.⁵⁵

66. Bulgaria's Penal Code as amended provides that "a person who, in violation of the rules of international law for waging war, uses or orders the use of . . . chemical weapons" commits a war crime.⁵⁶

67. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "the fact of employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices" constitutes a war crime in international armed conflicts.⁵⁷

68. Canada's Chemical Weapons Act provides that:

No person shall

- (a) develop, produce, otherwise acquire, stockpile or retain a chemical weapon or transfer, directly or indirectly, a chemical weapon to anyone;
- (b) use a chemical weapon;
- (c) engage in any military preparations to use a chemical weapon;
- (d) assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under the Convention.⁵⁸

69. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁵⁹

70. China's Law Governing the Trial of War Criminals provides that "use of poison gas" constitutes a war crime.⁶⁰

71. Colombia's Constitution prohibits "the manufacture, import, possession, and use of chemical . . . weapons".⁶¹

⁵³ Australia, *Chemical Weapons (Prohibition) Act* (1994), p. 13, Section 12 and p. 95, Section 9.

⁵⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.56.

⁵⁵ Belarus, *Criminal Code* (1999), Articles 129 and 134.

⁵⁶ Bulgaria, *Penal Code as amended* (1968), Article 415(1).

⁵⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(q).

⁵⁸ Canada, *Chemical Weapons Act* (1995), § 6.

⁵⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁶⁰ China, *Law Governing the Trial of War Criminals* (1946), Article 3(12).

⁶¹ Colombia, *Constitution* (1991), Article 81.

72. Colombia's Decree on the Control of Firearms, Ammunition and Explosives provides that "it is prohibited to carry devices manufactured on the basis of poisoned gases, corrosive substances or metal which by the expansion of gas produce fragments".⁶²
73. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁶³
74. Under Croatia's Criminal Code, the manufacture, improvement, production, stockpiling, offering for sale, purchase, interceding in purchasing or sale, possession, transfer, transport, use of, and order to use, chemical weapons are war crimes.⁶⁴
75. The Czech Republic's Act on the Prohibition of Chemical Weapons bans the "development, production, use and handling of chemical weapons", as well as the "import of chemical weapons to the Czech Republic or their transit".⁶⁵
76. Denmark's Executive Order on Weapons and Ammunition prohibits the importation, development, production, consumption, stockpiling, selling, exportation or possession of chemical weapons.⁶⁶
77. Ecuador's National Civil Police Penal Code states that members of the National Civil Police "who use or order to be used . . . asphyxiating or poisonous gases" commit a punishable offence.⁶⁷
78. Estonia's Penal Code punishes any "person who designs, manufactures, stores, acquires, hands over, sells or provides or offers for use in any other manner chemical . . . weapons". Under the Code, "use of . . . chemical weapons" is a war crime.⁶⁸
79. Under Finland's Revised Penal Code, it is a punishable offence to use, develop, produce, otherwise procure, stockpile, possess, transport or participate in military preparations for the use of chemical weapons, in violation of the 1993 CWC.⁶⁹
80. France's Law on the Implementation of the CWC prohibits the use of chemical weapons and the development, production, stockpiling, possession, retention, acquisition, assignment, import, export and transfer of such weapons, and selling or trading in them.⁷⁰
81. Under Georgia's Criminal Code, "the production, acquisition or sale of chemical . . . or other kinds of weapon of mass destruction prohibited by an

⁶² Colombia, *Decree on the Control of Firearms, Ammunition and Explosives* (1993), Article 14.

⁶³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁶⁴ Croatia, *Criminal Code* (1997), Article 163(1) and (2).

⁶⁵ Czech Republic, *Act on the Prohibition of Chemical Weapons* (1997), Part 2, § 3.

⁶⁶ Denmark, *Executive Order on Weapons and Ammunition* (1995), Section 11.

⁶⁷ Ecuador, *National Civil Police Penal Code* (1960), Article 117.4.

⁶⁸ Estonia, *Penal Code* (2001), §§ 93(1) and 103.

⁶⁹ Finland, *Revised Penal Code* (1995), Chapter 11, Section 7a.

⁷⁰ France, *Law on the Implementation of the CWC* (1998), Article 2.

international treaty” and the “use during hostilities or in armed conflict of such means and materials or weapons of mass destruction which are prohibited by an international treaty” are crimes.⁷¹

82. Germany’s Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, “employs . . . chemical weapons”.⁷²

83. Under Hungary’s Criminal Code as amended, employing “chemical weapons and chemical instruments of war” as defined in Article II(1) and (7) of the 1993 CWC is a war crime.⁷³

84. India’s Chemical Weapons Act provides that:

- (1) No person shall
 - (a) develop, produce, otherwise acquire, stockpile, retain or use Chemical Weapons, or transfer, directly or indirectly, any Chemical Weapons to any person;
 - ...
 - (c) engage in any military preparations to use Chemical Weapons;
 - (d) assist, encourage or induce, in any manner, any person to engage in
 - (i) the use of any riot control agent as a method of warfare
 - (ii) any other activity prohibited to a State Party under the Convention.

It also prohibits the production, acquisition, retaining or use of toxic chemicals or precursors listed in Schedule 1 of the Annex on Chemicals to the Convention.⁷⁴

85. Ireland’s Chemical Weapons Act provides that:

- 3. (1) No person shall –
 - (a) produce, develop, retain, use or transfer, directly or indirectly to anyone, a chemical weapon or assist another person to produce, develop, retain, use or transfer a chemical weapon,
 - (b) construct, convert, maintain or use any premises or equipment for a purpose referred to in paragraph (a) or assist another person to do any of those things for such a purpose, or
 - (c) engage in preparations of a military nature to use a chemical weapon.⁷⁵

86. Italy’s Law of War Decree as amended, in an article dealing with “Bacteriological and chemical means”, provides that “the use . . . of asphyxiating, toxic or similar gases . . . is forbidden in conformity with the international provisions in force”.⁷⁶

⁷¹ Georgia, *Criminal Code* (1999), Articles 406 and 413(c).

⁷² Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(1)(2).

⁷³ Hungary, *Criminal Code as amended* (1978), Section 160/A(3)(c).

⁷⁴ India, *Chemical Weapons Act* (2000), Chapter III, §§ 13 and 15.

⁷⁵ Ireland, *Chemical Weapons Act* (1997), Article 3.

⁷⁶ Italy, *Law of War Decree as amended* (1938), Article 51.

87. Italy's Law on the Prohibition of Chemical Weapons provides that:

Production, transfer or receipt, directly or indirectly, acquisition, import, export, transit, retention and use – with the exception of the cases referred to in comma 2 – of the chemicals listed in Schedule 1 of the Annex on Chemicals to the Convention, as well as of any other chemical product which might be exclusively employed for the production of chemical weapons, are prohibited.⁷⁷

88. Japan's Law on the Prohibition of Chemical Weapons provides that:

1. No person shall manufacture chemical weapons.
2. No person shall possess, assign or take over chemical weapons.
3. No person shall manufacture, possess, assign or take over toxic chemicals or chemicals having toxicity equivalent thereto or raw materials of these chemicals with the aim to supply for the manufacture of chemical weapons.
4. No person shall manufacture, possess, assign or take over parts used exclusively for chemical weapons or machinery and equipment used exclusively in case of the use of chemical weapons, which are provided for by Cabinet Order.⁷⁸

89. Japan's Law on the Prevention of Personal Injury Caused by Sarin prohibits the production, importation and use of sarin, and provides for a severe prison sentence for offenders.⁷⁹

90. Under Kazakhstan's Penal Code, "the production, acquisition, or sale of . . . chemical weapons" and "the use of the weapons of mass destruction prohibited by an international treaty to which the Republic of Kazakhstan is a party" are criminal offences.⁸⁰

91. South Korea's Chemical Weapons Act provides that:

- (1) A person who develops, produces, stockpiles, transfers or uses chemical weapons or assists or induces any other person to do so in violation of Article 3(1) shall be punished by life imprisonment or imprisonment for not less than five years or a fine not exceeding 100 million Wons.
- (2) A person who causes harm to human life, body or property or disturbs the public peace through the use of chemical weapons shall be punished by the death penalty, life imprisonment or imprisonment for not less than seven years.⁸¹

92. Luxembourg's Law on the Approval of the CWC provides that no natural or legal person may:

- a. develop, produce or acquire chemical weapons by any other means, stockpile or preserve them in any capacity or for any purpose, or transfer them directly or indirectly to any person;
- b. use chemical weapons;
- c. undertake any preparatory steps for using chemical weapons;

⁷⁷ Italy, *Law on the Prohibition of Chemical Weapons* (1995), Article 3.

⁷⁸ Japan, *Law on the Prohibition of Chemical Weapons* (1995), Chapter 2, Article 3.

⁷⁹ Japan, *Law on the Prevention of Personal Injury Caused by Sarin* (1995), Articles 3 and 5.

⁸⁰ Kazakhstan, *Penal Code* (1997), Articles 158 and 159(2).

⁸¹ South Korea, *Chemical Weapons Act* (1996), Chapter VII, Article 25.

- d. assist, encourage or incite any person by whatever means to undertake any activity prohibited by the Convention and by this law;
 - e. transfer or receive, subject to the applicable Community provisions, the chemical products defined in Annex 1 to the Convention in circumstances prohibited by the Convention and not authorised by the Licensing Office.⁸²
- 93.** Under Mali's Penal Code, "using asphyxiating, toxic or assimilated gases and all analogous liquids, materials or devices" is a war crime in international armed conflicts.⁸³
- 94.** The Definition of War Crimes Decree of the Netherlands includes the "use of deleterious and asphyxiating gases" in its list of war crimes.⁸⁴
- 95.** According to the Chemical Weapons Act of the Netherlands, the development, production, acquisition, stockpiling, retaining, transfer and use of chemical weapons is prohibited.⁸⁵
- 96.** Under the International Crimes Act of the Netherlands, "employing asphyxiating, poisonous or other gases and all analogous liquids, materials or devices" is a crime, when committed in an international armed conflict.⁸⁶
- 97.** New Zealand's Chemical Weapons Act provides that:
- (1) Every person commits an offence who intentionally or recklessly
 - (a) Develops, produces, otherwise acquires, stockpiles or retains chemical weapons; or
 - (b) Transfers directly or indirectly, chemical weapons to another person; or
 - (c) Uses chemical weapons; or
 - (d) Engages in any military preparations to use chemical weapons; or
 - (e) Assists, encourages, or induces, in any way any person to engage in any activity prohibited to a State Party under the Convention.⁸⁷
- 98.** Under New Zealand's International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xviii) of the 1998 ICC Statute.⁸⁸
- 99.** Norway's Chemical Weapons Act provides that it is "prohibited to develop, produce, otherwise acquire, stockpile, transfer . . . chemical weapons in contravention of the Convention of 13 January 1993".⁸⁹
- 100.** Panama incorporated the 1993 CWC in its entirety into national law in 1998.⁹⁰
- 101.** Peru's Law on Chemical Weapons prohibits the use of chemical weapons, as well as their development, production, acquisition and delivery, and makes reference to the 1993 CWC.⁹¹

⁸² Luxembourg, *Law on the Approval of the CWC* (1997), Article 3.

⁸³ Mali, *Penal Code* (2001), Article 31(i)(18).

⁸⁴ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁸⁵ Netherlands, *Chemical Weapons Act* (1995), Section 2.

⁸⁶ Netherlands, *International Crimes Act* (2003), Article 5(5)(h).

⁸⁷ New Zealand, *Chemical Weapons Act* (1996), Section 6, § 1.

⁸⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁸⁹ Norway, *Chemical Weapons Act* (1994), Article 1.

⁹⁰ Panama, *Chemical Weapons Law* (1998).

⁹¹ Peru, *Law on Chemical Weapons* (1996), Articles 4(b) and 5.

102. Poland's Penal Code punishes "any person who uses a means of mass destruction prohibited by international law" and "any person who, against the prohibition by international law or by the provision of law, produces, stockpiles, acquires, sells, retains, transports or sends means of mass destruction or means of combat, or conducts research aimed at the production or use of such means".⁹²

103. Romania's Law on the Prohibition of Chemical Weapons provides that:

- (1) It is prohibited for any person, under any circumstance:
 - (a) to develop, produce, acquire, retain or transfer chemical weapons, directly or indirectly, to other persons;
 - (b) to use chemical weapons;
 - (c) to engage, in any way, in military preparations to use chemical weapons;
 - (d) to assist, encourage or induce, in any way, other persons to engage in an activity prohibited under this Act;
- (2) Persons means any natural or legal person on the territory of Romania including public authorities.⁹³

It further provides that "the act of using chemical weapons is considered as a criminal act and is punished".⁹⁴

104. Under Russia's Criminal Code, the "use of weapons of mass destruction, prohibited by an international treaty to which the Russian Federation is a party" is a crime against peace and security of mankind.⁹⁵

105. Singapore's Chemical Weapons (Prohibition) Act provides that:

Any person who

- (a) uses a chemical weapon;
- (b) develops or produces a chemical weapon;
- (c) acquires, stockpiles or retains a chemical weapon;
- (d) transfers, directly or indirectly, a chemical weapon to another person;
- (f) knowingly assists, encourages or induces, in any way, another person to engage in any activity prohibited to a State Party under the Convention;

...

shall be guilty of an offence and shall on conviction be punished with

- (i) imprisonment for a term which may extend to life imprisonment, and
- (ii) a fine not exceeding \$ 1 million.⁹⁶

106. Slovenia's National Assembly passed a Chemical Weapons Law through a fast-track procedure in 1999.⁹⁷

107. South Africa's Non-Proliferation of Weapons of Mass Destruction Act provides that:

The Minister may, by notice in the Gazette, determine the general policy to be followed with a view to:

⁹² Poland, *Penal Code* (1997), Articles 120 and 121.

⁹³ Romania, *Law on the Prohibition of Chemical Weapons* (1997), Article 3.

⁹⁴ Romania, *Law on the Prohibition of Chemical Weapons* (1997), Article 50(1).

⁹⁵ Russia, *Criminal Code* (1996), Article 356(2).

⁹⁶ Singapore, *Chemical Weapons (Prohibition) Act* (2000), Section 8.

⁹⁷ Slovenia, *Chemical Weapons Law* (1999).

...

- (d) the imposition of a prohibition, whether for offensive or defensive purposes, on the development, production, acquisition, stockpiling, maintenance or transit of any weapons of mass destruction.⁹⁸

108. Sweden's Penal Code as amended provides that:

A person who:

1. develops, produces or by other means acquires, stores or holds chemical weapons or directly or indirectly transfers chemical weapons to another person,
2. uses chemical weapons,
3. participates in military preparations for the use of chemical weapons,

... shall be sentenced, if the act is not regarded as a war crime against international law, for *unlawful handling of chemical weapons* to [punishment].⁹⁹ [emphasis in original]

109. Switzerland's Military Criminal Code as amended punishes "whoever will intentionally endanger somebody's life or physical integrity by means of ... toxic gases".¹⁰⁰

110. Switzerland's Chemical Weapons Implementation Order provides that:

It shall be prohibited:

- a. to develop, produce, acquire, deliver to anyone, import, export, procure the transit of or stockpile chemical weapons within the meaning of Article II of the Chemical Weapons Convention, engage in the brokerage thereof or otherwise dispose of them;
- b. to induce anyone to commit an act mentioned under letter a;
- c. to facilitate the commission of an act mentioned under letter a.¹⁰¹

111. Tajikistan's Criminal Code punishes the

development, production, acquisition, storage, transportation, sending or sale of ... chemical ... weapons of mass destruction, prohibited by an international treaty, as well as transfer to any other State, which does not possess nuclear weapons, of initial or special fissionable material, technologies, which can knowingly be used to produce weapons of mass destruction, or providing anyone with any other kind of weapons of mass destruction or components necessary for their production, prohibited by an international treaty.¹⁰²

112. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xviii) of the 1998 ICC Statute.¹⁰³

⁹⁸ South Africa, *Non-Proliferation of Weapons of Mass Destruction Act* (1993), Section 2(1)(d).

⁹⁹ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6a(1)–(3).

¹⁰⁰ Switzerland, *Military Criminal Code as amended* (1927), Article 162.

¹⁰¹ Switzerland, *Chemical Weapons Implementation Order* (1994), Article 1; see also *Federal Law on War Equipment as amended* (1996), Article 7.

¹⁰² Tajikistan, *Criminal Code* (1998), Articles 397, see also Article 399 (biocide) and Article 405 (use of weapons of mass destruction prohibited by an international treaty).

¹⁰³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

113. Pursuant to Ukraine's Criminal Code, "the use of weapons of mass destruction prohibited by international instruments consented to be binding by the [parliament] of Ukraine" is a war crime.¹⁰⁴

114. The UK Chemical Weapons Act provides that:

- (1) No person shall—
 - (a) use a chemical weapon;
 - (b) develop or produce a chemical weapon;
 - (c) have a chemical weapon in his possession;
 - (d) participate in the transfer of a chemical weapon;
 - (e) engage in military preparations, or in preparations of a military nature, intending to use a chemical weapon.¹⁰⁵

115. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xviii) of the 1998 ICC Statute.¹⁰⁶

116. The US Chemical Weapons Act provides that:

It shall be unlawful for any person knowingly

- (1) to develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon; or
- (2) to assist or induce, in any way, any person to violate paragraph (1), or to attempt or conspire to violate paragraph (1).¹⁰⁷

117. Under Penal Code as amended of the SFRY (FRY), the use of, or the order to use, "means or methods of combat prohibited under the rules of international law, during a war or an armed conflict" is a war crime.¹⁰⁸ The commentary on this provision specifies that "the following weapons and means of combat are considered to be prohibited: . . . war gases".¹⁰⁹

118. Zimbabwe has incorporated the 1993 CWC into national law by means of the Chemical Weapons Prohibition Act.¹¹⁰

National Case-law

119. In 1995, in a ruling on the constitutionality of AP II, Colombia's Constitutional Court stated in relation to the prohibition on the use of weapons of a nature to cause unnecessary suffering or superfluous injury that:

Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration consequently considers that the bans (established partly by customary law and partly by

¹⁰⁴ Ukraine, *Criminal Code* (2001), Article 439(1).

¹⁰⁵ UK, *Chemical Weapons Act* (1996), Section 2(1).

¹⁰⁶ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁰⁷ US, *Chemical Weapons Act* (1998), § 229.

¹⁰⁸ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

¹⁰⁹ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

¹¹⁰ Zimbabwe, *Chemical Weapons Prohibition Act* (1998).

treaty law) on the use of chemical . . . weapons . . . apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.¹¹¹

120. In its judgement in the *Shimoda case* in 1963, Japan's District Court of Tokyo held that the use of poisonous gases was prohibited.¹¹²

Other National Practice

121. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, Afghanistan expressed its commitment to the non-use of chemical weapons, stating that:

Relying on the belief that the production, development, and propagation of chemical weapons should be prevented and that such weapons should be completely eliminated, the Republic of Afghanistan has acquired no chemical weapons of any type whatsoever. It does not and will not in the future seek to acquire such weapons, the use of which it considers a crime against humanity.¹¹³

122. In a speech delivered to the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, the Afghan Foreign Minister stated that Afghanistan, while once again confirming its pledges on the non-use and elimination of chemical weapons, announced that it would never resort to the production, use, development, storage or export of chemical weapons, and that it would not allow any country to pass chemical weapons through Afghan territory. The Foreign Minister added that Afghanistan would sign the convention on halting chemical weapons as soon as it was completed.¹¹⁴

123. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, the Albanian Minister of Foreign Affairs stated that "Albania not only is and always has been in favour of banning the production, storage, and use of chemical weapons, but is in favour of their total elimination".¹¹⁵

124. At the CDDH, Algeria supported the Philippine amendment (see *infra*) because "it was a simple reaffirmation of the principles of positive humanitarian law".¹¹⁶

125. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been

¹¹¹ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995, § 23.

¹¹² Japan, District Court of Tokyo, *Shimoda case*, Judgement, 7 December 1963, § 11.

¹¹³ "Foreign Ministry Spokesman Denies Use of Chemical Weapons", as translated in JPRS-TAC-89-019, 9 May 1989, p. 20.

¹¹⁴ "Foreign Minister Returns From Paris Conference", Kabul Radio, as translated in FBIS-NES-89-006, 10 January 1989.

¹¹⁵ "Action To Implement BW Ban Urged", as translated in JPRS-TAC-89-003, 27 January 1989.

¹¹⁶ Algeria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 286, § 37.

concluded by the Conference on Disarmament, Algeria expressed "its traditional position" for a complete ban on chemical weapons and their use.¹¹⁷

126. At the 1992 Session of the Conference of Disarmament, Algeria stated that it "has always been, and remains, in favour of a total ban on chemical weapons and their use". It added that:

Algeria is not developing and does not produce chemical weapons, and it is not seeking to acquire them. It remains profoundly convinced that the best way to curb the threat of these weapons is to banish them once and for all, by means of this international convention. In this regard, it will be Algeria's honour and duty to be among the original signatories.¹¹⁸

127. At the First Conference of States Parties to the CWC in 1997, Algeria made statements in support of the object and purpose of the 1993 CWC.¹¹⁹

128. In 1988, in a statement before the Fifteenth Special Session of the UN General Assembly, the President of Argentina confirmed that "Argentina does not possess chemical-weapon arsenals and that it will continue to commit all its efforts to the conclusion of a convention on chemical weapons".¹²⁰

129. In 1989, in a reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Argentina declared that it did not possess chemical weapons.¹²¹

130. During the 1991 Session of the Conference on Disarmament, Argentina stated that it "does not possess and has never possessed or used chemical weapons".¹²²

131. In a press communiqué issued in 1997, the Ministry of Foreign Affairs of Argentina stated that:

Argentina... does not have any chemical weapons installations or deposits in its territory. Such a declaration clearly conveys to the international community Argentina's political will to abide by the convention provisions within the framework of its foreign policy, which is committed to disarmament and the non-proliferation of weapons of mass destruction.¹²³

132. At the First Conference of States Parties to the CWC in 1997, Armenia emphasised the importance of the 1993 CWC and stated its commitment and

¹¹⁷ Algeria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.10, 20 October 1992, p. 27.

¹¹⁸ Algeria, Statement before the Conference on Disarmament, UN Doc. CD/PV.621, 21 May 1992, p. 5.

¹¹⁹ Algeria, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹²⁰ Argentina, Statement by the President before the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, § 44.

¹²¹ Argentina, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

¹²² Argentina, Statement before the Conference on Disarmament, UN Doc. CD/PV. 596, 20 June 1991, p. 11.

¹²³ "Foreign Ministry says no chemical weapons installations on Argentine Territory", *Noticias Argentinas*, Buenos Aires, 28 May 1997, as translated in BBC-SWB, 30 May 1997.

its determination to contribute actively to the realisation of the Convention's aims. It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.¹²⁴

133. In 1966, during a debate in the First Committee of the UN General Assembly, Australia supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.¹²⁵

134. In 1989, Australia co-sponsored a draft resolution in the UN Commission on Human Rights which expressed "grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries".¹²⁶

135. In 1995, in a statement in the Senate, Australia's Minister of Foreign Affairs said that Australia expressly condemned the use of chemical weapons by terrorist groups.¹²⁷

136. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Australia stated that:

Given the ever present threat of destruction that is inherently associated with nuclear weapons, and the way in which that threat is now so universally understood, Australia submits the attitude of the international community is that there are some weapons the very existence of which is inconsistent with fundamental general principles of humanity. In the case of weapons of this type, international law does not merely prohibit their threat or use. It prohibits even their acquisition or manufacture and by extension their possession. Such an attitude has been manifested in the case of other weapons of mass destruction. Both the 1972 Biological Weapons and the 1992 Chemical Weapons Convention do not merely prohibit the use of biological and chemical weapons of mass destruction, but prevent their very existence . . . Clearly, this is a strong international statement that the use of such weapons would be contrary to fundamental general principles of humanity. The approach of both conventions indicates a further conviction that the threats posed by certain types of weapons are so grave that they should be eliminated altogether, with their mere possession by a State made unlawful.¹²⁸

137. At the First Conference of States Parties to the CWC in 1997, Australia stated that the 1993 CWC would serve both the international community's security and economic interests. It added that it hoped that the CWC would lead to a world free from the scourge of chemical weapons.¹²⁹

¹²⁴ Armenia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹²⁵ Australia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1461, 23 November 1966, p. 202.

¹²⁶ Australia, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

¹²⁷ Australia, Senate, Statement by the Minister of Foreign Affairs, 27 March 1995, *Debates*, Vol. 170, p. 2107.

¹²⁸ Australia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 30 October 1995, Verbatim Record CR 95/22, pp. 49–50, §§ 38–40.

¹²⁹ Australia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

138. At the 1986 Session of the Conference on Disarmament, Austria stated that "Austria was among the first Parties that signed the 1925 Geneva Protocol. Furthermore, Austria renounced the possession of chemical . . . weapons in the State Treaty of 1955."¹³⁰ At a later Session in 1988, Austria stated that it "does not possess or produce chemical weapons and has no facilities to produce such weapons".¹³¹

139. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, Austria stated that Resolution 687 was a step "towards the objective of a global ban on chemical weapons".¹³²

140. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been concluded by the Conference on Disarmament, Austria stated that the elimination of chemical weapons was important.¹³³

141. In 1991, during a debate in the First Committee of the UN General Assembly, Bahrain stated that the Middle East had to be free from chemical weapons.¹³⁴

142. At the First Conference of States Parties to the CWC in 1997, Bahrain expressed support for the goals of the 1993 CWC and stated its full commitment to the provisions in the Convention and promised full cooperation with the OPCW.¹³⁵

143. At the First Conference of States Parties to the CWC in 1997, Bangladesh stated that it welcomed the entry into force of the 1993 CWC and hoped that it would be the first in a series that would eliminate weapons of mass destruction from the face of the earth.¹³⁶

144. In 1966, during a debate in the First Committee of the UN General Assembly, Belarus supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.¹³⁷

145. In 1970, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), Belarus stated that:

¹³⁰ Austria, Statement before the Conference on Disarmament, UN Doc. CD/PV.371, 17 July 1986, p. 5.

¹³¹ Austria, Statement before the Conference on Disarmament, UN Doc. CD/PV.471, 4 August 1988, p. 4.

¹³² Austria, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 119-120.

¹³³ Austria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.5, 14 October 1992, p. 10.

¹³⁴ Bahrain, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.20, 28 October 1991, p. 32.

¹³⁵ Bahrain, Statement at the First Conference of States Parties to the CWC, The Hague, 6-23 May 1997.

¹³⁶ Bangladesh, Statement at the First Conference of States Parties to the CWC, The Hague, 6-23 May 1997.

¹³⁷ Belarus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1454, 15 November 1966, p. 168.

The need for all States without exception to abide, in any armed conflict, by the existing international conventions defining and limiting the means, ways and methods of waging war assumes particular importance. Among these conventions are . . . the Geneva Protocol of 1925.¹³⁸

146. In 1977, during a debate in the First Committee of the UN General Assembly, Belarus supported a complete ban on chemical weapons.¹³⁹

147. In 1987, during a debate in the First Committee of the UN General Assembly, Belarus stated that it was committed to a global ban on chemical weapons.¹⁴⁰

148. In 1993, during a debate in the First Committee of the UN General Assembly, Belarus referred to a declaration in which all States emerging from the former Soviet Union expressed their support for chemical disarmament.¹⁴¹

149. At the First Conference of States Parties to the CWC in 1997, Belarus pointed out the large amount of work that had already been done by the government of Belarus in the area of chemical weapons destruction. Furthermore, it stated that it was prepared to work closely with the OPCW to contribute to the implementation of the provisions of the 1993 CWC and hence to the strengthening of international peace and security.¹⁴²

150. In 1980, in a statement before the Lower House of Parliament, Belgium's Minister of Foreign Affairs stated that disapproval of the hostile use of chemical agents in combat, as well as the 1925 Geneva Gas Protocol, were part of customary law.¹⁴³

151. In 1987, during a debate in the First Committee of the UN General Assembly, Belgium stated that the use of chemical weapons in the Iran–Iraq War against civilian populations was a “particularly shocking violation of the 1925 Geneva Protocol”.¹⁴⁴

152. In 1989, Belgium co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988

¹³⁸ Belarus, Reply dated 2 March 1970 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 118, § 5.

¹³⁹ Belarus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.29, 11 October 1977, p. 11.

¹⁴⁰ Belarus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.11, 19 October 1987, p. 36.

¹⁴¹ Belarus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.8, 22 October 1993, p. 2.

¹⁴² Belarus, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹⁴³ Belgium, Lower House of Parliament, Statement by the Minister of Foreign Affairs, *Bulletin des Questions et Réponses*, 1979–1980 Session, No. 36, 8 August 1980.

¹⁴⁴ Belgium, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.6, 15 October 1987, p. 42.

using, inter alia, chemical weapons and causing mass exodus to neighbouring countries".¹⁴⁵

153. At the 1989 Session of the Government-Industry Conference against Chemical Weapons, Belgium stated that it:

attaches the greatest importance to the unanimous expression of a willingness to respect the Geneva Gas Protocol on the part of all participants. As we moving towards a treaty which totally prohibits chemical weapons we all have to contribute to the realisation of this goal, the finalisation of the draft treaty, universal adherence and confidence in its being respected.

It added that "Belgium has no chemical weapons and has no intention to acquire any. It is taking the necessary steps to eliminate, in optimal conditions, the chemical bombs dating from the First World War which are periodically found on its soil".¹⁴⁶

154. In 1994, during a debate in the First Committee of the UN General Assembly, Benin urged the elimination of chemical weapons.¹⁴⁷

155. The Report on the Practice of Botswana states that Botswana has no capacity in chemical warfare and that it is opposed to chemical weapons.¹⁴⁸

156. At the 1985 and 1988 sessions of the Conference on Disarmament, Brazil stated that it "does not possess and does not intend to develop, produce or stockpile" chemical weapons.¹⁴⁹

157. In 1993, the Permanent Representative of Brazil to the UN in Geneva stated that "since the time when chemical weapons were first used, the Brazilian Government has consistently argued against the use of these and all other inhumane means of warfare". He added that "the word 'inhumane' is employed here, in accordance with common usage, to mean weapons that cause unnecessary devastation and suffering".¹⁵⁰

158. At the First Conference of States Parties to the CWC in 1997, Brazil emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims. It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.¹⁵¹

¹⁴⁵ Belgium, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

¹⁴⁶ Belgium, Statement at the Government-Industry Conference against Chemical Weapons, Canberra, 12–22 September 1989, *Final Record*, p. 280, §§ 6 and 8.

¹⁴⁷ Benin, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.3, 17 October 1994, p. 21.

¹⁴⁸ Report on the Practice of Botswana, 1998, Additional information on Chapter 3.4.

¹⁴⁹ Brazil, Statement before the Conference on Disarmament, UN Doc. CD/PV.323, 23 July 1985; Statement before the Conference on Disarmament, UN Doc. CD/PV.460, 26 April 1988, p. 3.

¹⁵⁰ Celso L. N. Amorim, "The Chemical Weapons Convention and the Security and the Development Needs of Brazil", *Disarmament*, Vol. 16, No. 1, 1993, p. 111.

¹⁵¹ Brazil, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

159. In 1989, in a reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Brunei Darussalam declared that it did not possess chemical weapons.¹⁵²

160. In 1966, during a debate in the First Committee of the UN General Assembly, Bulgaria supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.¹⁵³

161. In 1977, during a debate in the First Committee of the UN General Assembly, Bulgaria stated that chemical weapons had been morally and politically condemned for a long time.¹⁵⁴

162. In 1987, during a debate in the First Committee of the UN General Assembly, Bulgaria stated that it was committed to a global ban on chemical weapons.¹⁵⁵

163. During the 1988 and 1990 sessions of the Conference on Disarmament, Bulgaria stated that it did not possess, manufacture or stockpile chemical weapons.¹⁵⁶

164. In 1991, during a debate in the First Committee of the UN General Assembly, Bulgaria stated that it neither possessed nor produced chemical weapons.¹⁵⁷

165. In a declaration of 1 February 1996, the Bulgarian government stated that "there have not been stockpiles of chemical . . . weapons on the territory of Bulgaria in the past 50 years". The declaration was requested by the 28 member countries of the Australia Group, to which Bulgaria had applied for admission.¹⁵⁸

166. In 1987, during a debate in the First Committee of the UN General Assembly, Burkina Faso stated that it was committed to a global ban on chemical weapons.¹⁵⁹

¹⁵² Brunei Darussalam, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

¹⁵³ Bulgaria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1454, 15 November 1966, p. 165.

¹⁵⁴ Bulgaria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.24, 7 October 1977, p. 66.

¹⁵⁵ Bulgaria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.22, 27 October 1987, p. 12.

¹⁵⁶ Bulgaria, Statement before the Conference on Disarmament, UN Doc. CD/PV.457, 14 April 1988, p. 8; Statement before the Conference on Disarmament, UN Doc. CD/1017, 19 July 1990, p. 8.

¹⁵⁷ Bulgaria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 35.

¹⁵⁸ Bulgaria, Government declaration, 1 February 1996, BTA News Agency, Sofia, 9 February 1996, as translated in BBC-SWB, 11 February 1996, reprinted in *Chemical Weapons Convention Bulletin*, Issue No. 31, March 1996.

¹⁵⁹ Burkina Faso, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.30, 3 November 1987, p. 33.

167. In 1977, during a debate in the First Committee of the UN General Assembly, Burma explained that the elimination of chemical weapons was a goal for the Burma Socialist Party.¹⁶⁰

168. At the 1988 Session of the Conference on Disarmament, Burma declared that it “does not possess, develop, produce, stockpile or use chemical weapons. Nor will it do so in the future.”¹⁶¹

169. At the First Conference of States Parties to the CWC in 1997, Cameroon emphasised the importance of the 1993 CWC and stated its commitment to creating a world free of chemical weapons.¹⁶²

170. In 1966, during a debate in the First Committee of the UN General Assembly, Canada supported the principle that international law prohibited the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.¹⁶³

171. At the CDDH, Canada voted against the Philippine amendment (see *infra*) because “the particular weapons are forbidden by international law and their use, other than by way of reprisal, already constitutes a war crime”.¹⁶⁴

172. In 1977, during a debate in the First Committee of the UN General Assembly, Canada, while introducing the draft of UN General Assembly Resolution 32/77, stated that the world community “long ago reached consensus that a high priority should be accorded to early agreement on effective measures for the complete prohibition of the development, production and stockpiling of all chemical weapons and on their destruction”.¹⁶⁵

173. In 1989, Canada co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries”.¹⁶⁶

174. At the First Conference of States Parties to the CWC in 1997, Canada emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention’s aims. It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.¹⁶⁷

¹⁶⁰ Burma, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.10, 28 September 1977, p. 2.

¹⁶¹ Burma, Statement before the Conference on Disarmament, UN Doc. CD/PV.452, 29 March 1988, p. 9.

¹⁶² Cameroon, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹⁶³ Canada, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1461, 23 November 1966, p. 203.

¹⁶⁴ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 298.

¹⁶⁵ Canada, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.25, 7 October 1977, p. 51.

¹⁶⁶ Canada, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

¹⁶⁷ Canada, Statement by the Speaker of the Senate at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

175. During the 1990 Session of the Conference on Disarmament, Chile stated that it did not produce or possess chemical weapons.¹⁶⁸

176. At the First Conference of States Parties to the CWC in 1997, Chile emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims. It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.¹⁶⁹

177. At the Meeting on Human Environment in 1972, China condemned the US for causing "unprecedented damage to the human environment" in South Vietnam through the use of "chemical toxic and poisonous gas".¹⁷⁰

178. In 1986, during a debate in the UN Security Council, China stated that it "consistently opposed the use of chemical and toxic weapons at any place and time".¹⁷¹

179. In 1987, during a debate in the First Committee of the UN General Assembly, China stated that it had "consistently" stood for the complete prohibition of chemical weapons.¹⁷²

180. In 1991, during a debate in the First Committee of the UN General Assembly, China stated that it neither possessed nor produced chemical weapons and that it had always stood for a complete prohibition of chemical weapons.¹⁷³

181. At the signing ceremony of the CWC in 1993, China's Minister of Foreign Affairs stated that "China consistently supports the absolute ban and total destruction of chemical weapons".¹⁷⁴

182. Before the adoption of the 1993 CWC, China unilaterally declared that it would not produce, possess or export chemical weapons.¹⁷⁵

183. At the First Conference of States Parties to the CWC in 1997, China stated that "it always advocated the complete prohibition and thorough destruction of chemical weapons".¹⁷⁶

¹⁶⁸ Chile, Multilateral exchange of data relevant to the Chemical Weapons Convention submitted to the Conference on Disarmament, UN Doc. CD/1042-CD/CW/WP.322, 3 December 1990.

¹⁶⁹ Chile, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹⁷⁰ China, Address to the Meeting on Human Environment, 10 June 1972, *Selected Documents of the Chinese Delegation to the United Nations, 1972*, World Knowledge Press, Beijing, pp. 257–258.

¹⁷¹ China, Statement before the UN Security Council, UN Doc. S/PV.2666, 24 February 1986, pp. 29–30.

¹⁷² China, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.6, 15 October 1987, p. 32.

¹⁷³ China, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.9, 21 October 1991, pp. 15 and 19.

¹⁷⁴ China, Address to the signing ceremony of the CWC by the Chinese Foreign Minister, 13 January 1993, *Chinese Yearbook of International Law*, 1994, p. 375.

¹⁷⁵ China, Statement of the Ministry of Foreign Affairs of the People's Republic of China with regard to the Yinhe Incident, 4 September 1993, *Chinese Yearbook of International Law*, 1994, p. 397.

¹⁷⁶ China, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

184. In 1977, during a debate in the First Committee of the UN General Assembly, Colombia supported a complete ban on chemical weapons.¹⁷⁷

185. At the 1981 Session of the Government-Industry Conference against Chemical Weapons, Colombia stated that:

The Colombian Government, as it represents a country which does not manufacture or possess, nor intends to manufacture or possess, chemical weapons, as well as other weapons of mass destruction weapons, cannot but condemn the production, the possession, transfer and the use of such weapons.¹⁷⁸

186. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Colombia declared that it did not possess chemical weapons.¹⁷⁹

187. At the First Conference of States Parties to the CWC in 1997, DRC made statements in support of the object and purpose of the 1993 CWC.¹⁸⁰

188. At the First Conference of States Parties to the CWC in 1997, Côte d'Ivoire made statements in support of the object and purpose of the 1993 CWC.¹⁸¹

189. At the First Conference of States Parties to the CWC in 1997, Croatia stated that it "has never possessed or planned to produce chemical weapons nor even contemplated the idea of adhering to any form or method of chemical warfare, either tactical or strategic". It also stated that it "supports the provisions in the CWC and is in the middle of incorporating parts of it into its own national law".¹⁸²

190. In 1977, during a debate in the First Committee of the UN General Assembly, Cuba supported a complete ban on chemical weapons.¹⁸³

191. In 1991, during a debate in the UN Security Council, Cuba stated that it was in favour of the "universal elimination of . . . chemical . . . weapons".¹⁸⁴

192. During the 1991 Session of the Conference on Disarmament, Cuba stated that:

For Cuba, a country which does not possess chemical weapons, the conclusion of a non-discriminatory convention which prohibits the development, stockpiling, acquisition, transfer and use of these weapons and makes the necessary provision for

¹⁷⁷ Colombia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.21, 5 October 1977, p. 11.

¹⁷⁸ Colombia, Final Statement at the Government-Industry Conference against Chemical Weapons, GICCW/P/72 (Prov), Canberra, 21 September 1981, pp. 1-3.

¹⁷⁹ Colombia, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

¹⁸⁰ DRC, Statement by the Ambassador at the First Conference of States Parties to the CWC, The Hague, 6-23 May 1997.

¹⁸¹ Côte d'Ivoire, Statement at the First Conference of States Parties to the CWC, The Hague, 6-23 May 1997.

¹⁸² Croatia, Statement at the First Conference of States Parties to the CWC, The Hague, 6-23 May 1997.

¹⁸³ Cuba, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.23, 6 October 1977, p. 61.

¹⁸⁴ Cuba, Statement before the UN Security Council, UN Doc. S/PV.2994, 17 June 1991, p. 23.

the destruction of existing stockpiles, production facilities and launching systems, is not only of crucial importance but is an essential guarantee in its perception of security.¹⁸⁵

193. In 1991, during a debate in the First Committee of the UN General Assembly, Cuba stated that it neither possessed nor produced chemical weapons.¹⁸⁶

194. At the First Conference of States Parties to the CWC in 1997, Cuba stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.¹⁸⁷

195. In 1966, during a debate in the First Committee of the UN General Assembly, Cyprus supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.¹⁸⁸

196. In 1966, during a debate in the First Committee of the UN General Assembly, Czechoslovakia supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.¹⁸⁹

197. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Czechoslovakia declared that it did not possess chemical weapons.¹⁹⁰

198. At the 1989 Session of the Conference on Disarmament, Czechoslovakia stated that:

Two days before the Paris Conference, on 5 January, the Government of Czechoslovakia released a statement on issues concerning the prohibition and elimination of chemical weapons. This statement reaffirmed that Czechoslovakia does not possess, manufacture or stockpile on its territory any chemical weapons. Nor does it own facilities for their development or production. All scientific research in this field is oriented exclusively towards protection against the effects of chemical weapons and other peaceful goals.¹⁹¹

199. At the 1992 Session of the Conference on Disarmament, Czechoslovakia said that it had repeatedly stated that "it did not possess chemical weapons, and had declared its intention to become an original signatory of the CWC".¹⁹²

¹⁸⁵ Cuba, Statement before the Conference on Disarmament, UN Doc. CD/PV.603, 22 August 1991, p. 4.

¹⁸⁶ Cuba, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.10, 21 October 1991, p. 6.

¹⁸⁷ Cuba, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

¹⁸⁸ Cyprus, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1455, 16 November 1966, p. 175.

¹⁸⁹ Czechoslovakia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1455, 16 November 1966, p. 172.

¹⁹⁰ Czechoslovakia, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

¹⁹¹ Czechoslovakia, Statement before the Conference on Disarmament, UN Doc. CD/PV.488, 21 February 1989, p. 10.

¹⁹² Czechoslovakia, Statement before the Conference on Disarmament, UN Doc. CD/1136, UN Doc. CD/CW/WP.389, 27 February 1992, p. 1.

200. At the 1996 Session of the Conference on Disarmament, the Czech Republic stated that it “has never possessed or produced chemical weapons and neither have they ever been deployed on its territory. The humane idea of their complete ban and elimination has always had our full support.”¹⁹³

201. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons, the representative of Denmark, with respect to UN General Assembly Resolution 2603 (XXIV), stated that:

154. My delegation abstained in the vote on the draft resolution [on chemical and bacteriological (biological) weapons under discussion] on legal grounds. We cannot accept the concept on which the resolution is based, namely, that there exist generally recognized rules of international law according to which the prohibition in the 1925 Geneva [Gas] Protocol is total. Such a concept implies that there is a general, long-standing, well-established practice, as well as a legal conviction, that the resulting conduct manifested by action or inaction is legally binding; that is to say, there exists an *opinio juris*. Today's vote has proved that this is not the case. . . .

155. Having said this, I wish to add that my Government is generally in favour of making the prohibition against chemical and bacteriological weapons as comprehensive as possible.¹⁹⁴

202. In 1988, during a debate in the UN General Assembly, Denmark stated that:

Many have been the calls over the years for a ban on chemical weapons. We appreciate the progress made at the Conference on Disarmament. The abhorrent use of chemical weapons has made even more urgent the task of reaching agreement on a global convention prohibiting such weapons. All sides must take an active part in the negotiations toward this end. Denmark has signed the 1925 Protocol without conditions. We do not have any chemical weapons. We do not want any. This has always been our policy and we have declared it openly. It would be a sign of confidence and an important political signal if all countries declared their policy towards chemical weapons and whether or not they possessed those weapons.¹⁹⁵

203. In 1989, Denmark co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries”.¹⁹⁶

¹⁹³ Czech Republic, Statement before the Conference on Disarmament, UN Doc. CD/PV.733, 28 March 1996, p. 17.

¹⁹⁴ Denmark, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, §§ 154–155.

¹⁹⁵ Denmark, Statement before the UN General Assembly, UN Doc. A/43/PV.7, 27 September 1988, p. 112.

¹⁹⁶ Denmark, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

204. In 1988, in a statement before the Fifteenth Special Session of the UN General Assembly, Ecuador stated that “among disarmament measures, Ecuador believes that priority should be given to the following: . . . a complete ban on the testing or production of new weapons of mass destruction, including chemical [weapons]”.¹⁹⁷

205. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Ecuador declared that it did not possess chemical weapons.¹⁹⁸

206. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, Ecuador stated that “it is . . . timely to insist on observance of the international agreements which prohibit the use of asphyxiating and toxic gases and bacterial warfare and which seek the universal elimination of chemical and biological weapons”.¹⁹⁹

207. At the First Conference of States Parties to the CWC in 1997, Ecuador stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.²⁰⁰

208. Egypt is alleged to have used chemical agents in support of republican forces during the civil war in Yemen in the period between 1963 and 1967. The primary sources of these allegations were journalists, royalist sources opposed to the Egyptian intervention, and the ICRC. On 2 June 1967, the UK Prime Minister informed the House of Commons that he had evidence suggesting that poison gas had been used in Yemen.²⁰¹ The Egyptian government denied the allegations concerning the use of chemical agents in Yemen in a communiqué on 1 February 1967, in which the Minister of National Guidance stated that “in the name of the U.A.R. I have been entrusted to affirm once again and in a decisive manner that the U.A.R. has not used poisonous gas at any time and did not resort to using such gas even when there were military operations in Yemen”.²⁰²

209. At the CDDH, Egypt expressed “its disappointment at the failure of the Philippine amendment, establishing as a grave breach the use of prohibited weapons, to be adopted” but noted that Article 74 of draft AP I (now

¹⁹⁷ Ecuador, Statement before the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, § 158.

¹⁹⁸ Ecuador, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

¹⁹⁹ Ecuador, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 107.

²⁰⁰ Ecuador, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁰¹ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. VI, *The Prevention of CBW*, Almqvist & Wiksell, Stockholm, 1975, p. 231.

²⁰² Egypt, Statement by the Minister for National Guidance, 1 February 1967, reprinted in SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, p. 159, footnote 26.

Article 85) "as it stands now does cover the use of such weapons through their effects".²⁰³

210. During the 1988 Session of the Conference on Disarmament, Egypt stated that:

Egypt views with deep concern the use of chemical weapons anywhere, and considers that reports to that effect should give further impetus to the speedy conclusion by the Conference of a convention in this connection . . . Egypt . . . calls upon all parties to respect international treaties and conventions and reaffirms the importance of adherence to the main principles contained in the 1925 Geneva Protocol . . . Egypt does not produce, develop or stockpile such weapons, which it rightly regards as weapons of mass destruction that should be banned.²⁰⁴

211. During the 1990 Session of the Conference on Disarmament, Egypt reiterated that it neither possessed nor produced chemical weapons.²⁰⁵

212. At the First Conference of States Parties to the CWC in 1997, El Salvador stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.²⁰⁶

213. In 1977, during a debate in the First Committee of the UN General Assembly, Ethiopia supported a complete ban on chemical weapons.²⁰⁷

214. During the 1989 Session of the Conference on Disarmament, Ethiopia stated that it considered chemical weapons and their complete destruction to be a matter of the utmost priority. Furthermore, it stated that Ethiopia did not produce or stockpile chemical weapons.²⁰⁸

215. At the First Conference of States Parties to the CWC in 1997, Ethiopia emphasised the importance of the 1993 CWC and stated its commitment to creating a world free of chemical weapons.²⁰⁹

216. At the CDDH, Finland stated that it "attached the greatest importance . . . to the prohibition of chemical . . . warfare in the Geneva Protocol of 1925".²¹⁰

217. In 1991, during a debate in the First Committee of the UN General Assembly, Finland stated that a ban on chemical weapons was an urgent priority.²¹¹

²⁰³ Egypt, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 300.

²⁰⁴ Egypt, Statement before the Conference on Disarmament, UN Doc. CD/PV.459, 21 April 1988, p. 7.

²⁰⁵ Egypt, Statement before the Conference on Disarmament, UN Doc. CD/958, 23 January 1990, p. 1, § 2.

²⁰⁶ El Salvador, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁰⁷ Ethiopia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.25, 7 October 1977, p. 46.

²⁰⁸ Ethiopia, Statement before the Conference on Disarmament, UN Doc. CD/PV.487, 16 February 1989, p. 11.

²⁰⁹ Ethiopia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²¹⁰ Finland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 34.

²¹¹ Finland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.6, 16 October 1991, p. 21.

218. At the First Conference of States Parties to the CWC in 1997, Finland stated that it aligned itself with the position of the EU and added that it looked forward to “wiping all chemical weapons off the face of the earth”.²¹²

219. In 1966, during a debate in the First Committee of the UN General Assembly, France stated that it was opposed to a general prohibition of chemical weapons. It wondered “how could States which had not signed or ratified a treaty be required to undertake to observe its provisions?”²¹³

220. In 1980, during a debate in the First Committee of the UN General Assembly, France stated with respect to Resolution 35/144, which it had sponsored, that:

In sponsoring [Resolution 35/144], the French delegation had only one concern: the strengthening of the [1925 Geneva Gas Protocol], particularly by use of an inquiry procedure. Information from various sources regarding the possible use of chemical weapons suggested that it was appropriate, indeed even necessary for the international community to take a stand in favour of an impartial investigation into compliance with the provisions of the 1925 Protocol.

The French Government, as a depositary of the Geneva Protocol, felt that special attention had to be given to everything related to respect for commitments entered into in that connexion.

...

It seems to us that the authority of the Geneva Protocol, the banning of chemical weapons and the means of successfully ensuring that ban are all such important matters that they require and justify a clear affirmation of the will of the international community.²¹⁴

221. In 1987, in reply to a question in parliament, the French Minister of Foreign Affairs stated that “France attaches the greatest importance to the prohibition and elimination of chemical weapons”.²¹⁵

222. In 1988, the spokesperson for the French Ministry of Foreign Affairs condemned the use by Iraq of chemical gases against Iran. The French authorities reiterated “their absolute condemnation of these practices, in blatant violation of the Geneva Protocol of 1925”.²¹⁶

223. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, France declared that it did not possess chemical weapons.²¹⁷

²¹² Finland, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²¹³ France, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1461, 23 November 1966, p. 205.

²¹⁴ France, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/35/PV.45, 26 November 1980, pp. 26–27.

²¹⁵ France, Reply of the Ministry of Foreign Affairs to a question in parliament, 3 August 1987, reprinted in *AFDI*, Vol. 33, 1987, p. 958.

²¹⁶ France, Statement by the spokesperson of the Ministry of Foreign Affairs, 24 March 1988, reprinted in *AFDI*, Vol. 34, 1988, pp. 899–900.

²¹⁷ France, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

224. At the 1989 Session of the Conference on Disarmament, France stated that:

First of all, there is now a confirmed link between the present prohibition on use and the future [1993 CWC], a convention which will prohibit not only the use, but also the production, stockpiling and transfer of chemical weapons... Beyond the differences in legal commitments that exist between States, according to whether or not they are parties to the 1925 [Geneva Gas] Protocol, or whether they have tabled reservations to it, we now know – you now know – that there is a collective conviction on the part [of] 149 States, a conviction that makes it possible to move from the Protocol of 1925 to a global convention: the universal condemnation of the use of chemical weapons...

France possesses no chemical weapons and will not produce any once the [1993 CWC] enters into force.²¹⁸

225. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, France stated that the ban on the Iraqi possession of chemical weapons was carried out from the perspective of regional and global disarmament.²¹⁹

226. At the 1992 Session of the Conference on Disarmament, France stated that there were no chemical weapons present on its territory, nor did it hold such weapons in the territory of another State. It also stated that it had no chemical weapons production facilities.²²⁰

227. At the First Conference of States Parties to the CWC in 1997, Gambia made statements in support of the object and purpose of the 1993 CWC.²²¹

228. In 1987, during a debate in the First Committee of the UN General Assembly, the FRG noted that the world had called for the elimination of chemical weapons.²²²

229. In 1987, during a debate in the First Committee of the UN General Assembly, the FRG proposed a chemical weapons free zone in Europe.²²³

230. In 1989, the FRG co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries”.²²⁴

²¹⁸ France, Statement before the Conference on Disarmament, UN Doc. CD/PV.484, 7 February 1989, pp. 30 and 33.

²¹⁹ France, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 92.

²²⁰ France, Provision of data relevant to the Chemical Weapons Convention submitted to the Conference on Disarmament, UN Doc. CD/1141-CD/CW/WP.390, 3 March 1992, p. 3, Appendix 1.

²²¹ Gambia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²²² FRG, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.5, 14 October 1987, p. 52.

²²³ FRG, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.16, 22 October 1987, pp. 19–20.

²²⁴ FRG, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

231. In 1977, during a debate in the First Committee of the UN General Assembly, the GDR said that the socialist States had demanded a comprehensive prohibition of chemical weapons in 1972.²²⁵

232. In 1980, during a debate in the UN General Assembly, the GDR stated with respect to Resolution 35/144 that:

A number of delegations referred to reports concerning the use of chemical agents in the ongoing conflict between Iran and Iraq. Some delegations referred to reports concerning the use of chemical agents by Israel against the Arab population of Jerusalem or the use of chemical agents by the South African racists against the population of Namibia. Were those statements by delegations taken into account in the drafting of the report on the administrative and financial implications?²²⁶

233. In 1988, the Foreign Affairs Committee of the German parliament stated that it was afraid that poison gas could be used by Iraqi forces against the Kurdish population in northern Iraq. The Committee rejected in particular the line of argument that the 1925 Geneva Gas Protocol applied only to international armed conflicts. It called upon the German government to investigate into the alleged involvement of German companies in the production of chemical weapons for Iraq and stated that "in the opinion of the German Parliament, on the way to a universal outlawing of chemical weapons, any use of poison gas must meet the determined resistance of the international community".²²⁷

234. In 1968, during a debate in the First Committee of the UN General Assembly, Ghana supported the view that all chemical weapons should be prohibited.²²⁸

235. In 1987, during a debate in the UN Security Council, Ghana expressed the opinion that the 1925 Geneva Gas Protocol was no longer effective and needed to be reviewed.²²⁹

236. At the First Conference of States Parties to the CWC in 1997, Ghana made statements in support of the object and purpose of the 1993 CWC.²³⁰

237. In 1966, during a debate in the First Committee of the UN General Assembly, Greece supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.²³¹

²²⁵ GDR, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.14, 30 September 1977, pp. 23–25.

²²⁶ GDR, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/35/PV.46, 28 November 1980, p. 12.

²²⁷ Germany, Lower House of Parliament, Recommendation for a decision by the Foreign Affairs Committee concerning the use of poisoned gas by the government of Iraq against Kurds living in Iraq, *BT-Drucksache* 11/2962, 23 September 1988, pp. 1–2.

²²⁸ Ghana, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1614, 21 November 1968, p. 6.

²²⁹ Ghana, Statement before the UN Security Council, UN Doc. S/PV.2750, 20 July 1987, p. 38.

²³⁰ Ghana, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²³¹ Greece, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1457, 17 November 1966, p. 187.

238. In 1987, during a debate in the First Committee of the UN General Assembly, Greece proposed a chemical weapons free zone in the Balkans.²³²

239. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been concluded by the Conference on Disarmament, Guinea proposed that Africa become a continent free from chemical weapons.²³³

240. In 1987, during a debate in the First Committee of the UN General Assembly, Haiti stated that it was committed to a global ban on chemical weapons.²³⁴

241. At the First Conference of States Parties to the CWC in 1997, Haiti stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.²³⁵

242. At the First Conference of States Parties to the CWC in 1997, Honduras stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.²³⁶

243. In 1966, during a debate in the First Committee of the UN General Assembly, Hungary stated that:

33. ... Fascist Italy had used gas in the 1935–1936 war against Ethiopia, although both parties had accepted the provisions of the Geneva Protocol of 1925. Fascist Germany had used gas with unsurpassed savagery in a campaign of mass genocide. Chemical... weapons were being produced in the present armaments race and some of them were actually being used in the war in Viet-Nam. In a report published by the South Viet-Nam National Liberation Front on 22 July 1966, the Committee for the Denunciation of War Crimes Perpetrated in South Viet-Nam by the United States of America had noted that the 406th mobile unit of the United States Bacterial and Chemical Warfare Institute had been transferred from Japan to South Viet-Nam, and that the number of people killed and poisoned in some of the areas affected by the chemicals used had risen by 30 per cent...
34. ... A leading authority on international law [Lassa Oppenheim] had stated that the cumulative effect of customary law, and of the existing instruments such as the 1925 Protocol, was probably such as to render the prohibition legally effective upon practically all States...
35. ... Indeed, the use of such mass weapons verged upon genocide...
- ...
37. ... Accordingly, [the Hungarian] delegation had submitted a draft resolution... in which the General Assembly, after recalling that the Geneva Protocol of 1925 had been recognized by many States, would declare that the

²³² Greece, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.14, 21 October 1987, p. 8.

²³³ Guinea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.3, 12 October 1992, p. 59.

²³⁴ Haiti, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.17, 22 October 1987, p. 26.

²³⁵ Haiti, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²³⁶ Honduras, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

use of chemical . . . weapons for the purpose of destroying human beings and the means of their existence constituted an international crime.²³⁷

244. In 1987, during a debate in the First Committee of the UN General Assembly, India stated that its efforts to ban chemical weapons predated the birth of the UN.²³⁸

245. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, India declared that it did not possess chemical weapons.²³⁹

246. At the First Conference of States Parties to the CWC in 1997, India welcomed the entry into force of the 1993 CWC and offered its wholehearted cooperation. It stated that it hoped that the entry into force of the CWC would lead to the total elimination of chemical weapons.²⁴⁰

247. During the 1988 Session of the Conference on Disarmament, the Indonesian Minister of Foreign Affairs stated that Indonesia was a "country which has never possessed chemical weapons".²⁴¹

248. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, the Indonesia stated that it "never had and never will acquire chemical weapons".²⁴²

249. At the First Conference of States Parties to the CWC in 1997, Indonesia emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims.²⁴³

250. In 1987, during a debate in the First Committee of the UN General Assembly, Iran stated that it had never retaliated with chemical weapons against Iraq, even though the 1925 Geneva Gas Protocol only prohibited first use. It complained that the world community had not reacted to Iraq's breach of the 1925 Geneva Gas Protocol.²⁴⁴

251. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, after the ceasefire with Iraq, the Iranian Minister of

²³⁷ Hungary, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1451, 11 November 1966, §§ 33–35 and 37.

²³⁸ India, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.32, 4 November 1987, p. 33.

²³⁹ India, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

²⁴⁰ India, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁴¹ Indonesia, Statement by the Minister of Foreign Affairs before the Conference on Disarmament, UN Doc. CD/PV.437, 4 February 1988, p. 5.

²⁴² Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991 p. 429.

²⁴³ Indonesia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁴⁴ Iran, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.17, 22 October 1987, pp. 8 and 39–40.

Foreign Affairs declared that Iran “never resorted to chemical weapons use, even in retaliation”.²⁴⁵

252. At the 1989 Session of the Government-Industry Conference against Chemical Weapons, Iran declared in its plenary statement that during the war its chemical industry “never took any measure to divert its products for production of chemical weapons”.²⁴⁶

253. In 1991, during a debate in the First Committee of the UN General Assembly, Iran stated that it wanted the fourth preambular paragraph and the third operative paragraph of Resolution 46/35 B to not only deplore and call for the elimination of the threat of chemical weapons, but also their use.²⁴⁷

254. At the First Conference of States Parties to the CWC in 1997, Iran stated its commitment to the goals and provisions of the 1993 CWC, but also said it understood why some of the Arab States had not signed or ratified the Convention on the grounds that Israel refused to get rid of its nuclear weapons.²⁴⁸

255. According to the Report on the Practice of Iran, during the war with Iraq, Iran continuously objected to the use of chemical weapons and asked for the condemnation of Iraq’s use of these weapons. In its protests, Iran did not confine itself to the 1925 Geneva Gas Protocol, but stated that such use should be condemned by all the countries of the world, irrespective of whether they were parties to the Protocol or not.²⁴⁹

256. At the CDDH, Iraq supported the Philippine amendment (see *infra*), since “the use of . . . gas had been prohibited for a very long time but the user was not liable to criminal proceedings. It was high time that the use of such appalling weapons was made a grave offence.”²⁵⁰

257. In 1990, the Iraqi President, halfway through a long speech at a military award ceremony broadcast the next day on Baghdad Radio, stated that “we do not need an atomic bomb. We have the binary chemical [*al-kimawi al-muzdawij*]. Let them take note of this. We have the binary chemical.”²⁵¹

²⁴⁵ Iran, Statement at the Conference of States Parties to the 1925 Geneva Gas Protocol, Paris, 7–11 January 1989, referred to in Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991, p. 239.

²⁴⁶ Iran, Plenary statement at the Government-Industry Conference against Chemical Weapons, Doc. GICCW/P/36 (Prov), Canberra, 12–22 September 1989, p. 258.

²⁴⁷ Iran, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.33, 11 November 1991, p. 63.

²⁴⁸ Iran, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁴⁹ Report on the Practice of Iran, 1997, Chapter 3.4.

²⁵⁰ Iraq, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 284, § 24.

²⁵¹ Iraq, Speech by President Saddam Hussein at a ceremony honouring the Iraqi Minister of Defence, the Minister of Industry and Military Industrialization and members of the Armed Forces General Command on 1 April 1990, as in the “full recording” broadcast on Baghdad domestic radio, 2 April 1990, as translated from the Arabic in FBIS-NES-90-064, 3 April 1990, pp. 32–36.

258. In 1991, during a debate in the UN Security Council, Iraq stated that it had “undertaken the unconditional obligation not to use, develop, manufacture or acquire any material referred to in [Security Council Resolution 687 (1991)]”.²⁵²

259. In 1987, during a debate in the First Committee of the UN General Assembly, Ireland condemned the use of chemical weapons against civilians.²⁵³

260. In 1987, during a debate in the First Committee of the UN General Assembly, Israel condemned the use of chemical weapons in the Iran–Iraq War and chemical attacks against the civilian population and expressed alarm that Syria had developed chemical weapons and that Iran had used them.²⁵⁴

261. In 1991, during a debate in the First Committee of the UN General Assembly, Israel stated that it wanted the Middle East to be a zone free from chemical weapons.²⁵⁵

262. In 1995, during a debate in the First Committee of the UN General Assembly, Israel stated that it had repeatedly called for the elimination of chemical weapons.²⁵⁶

263. At the First Conference of States Parties to the CWC in 1997, Israel stated that, although it had not yet ratified the Convention because virtually none of its Arab neighbours had done so, it was nonetheless “strongly committed to the fundamental goal of the Convention, that is, the total elimination of the scourge of chemical weapons from the face of the earth”.²⁵⁷

264. Italy is said to have used gas in the war against Abyssinia.²⁵⁸ Representatives of Abyssinia complained repeatedly to the Council of the League of Nations about alleged use of gas by the Italian army, and on 30 June 1936, the Emperor of Abyssinia himself protested against and denounced the use of gas by the Italian army before the League of Nations.²⁵⁹ The League condemned the use of gas and imposed sanctions against Italy.²⁶⁰

265. In 1966, during a debate in the First Committee of the UN General Assembly, Italy supported the principle that international law prohibits the

²⁵² Iraq, Statement before the UN Security Council, UN Doc. S/PV.2994, 17 June 1991, p. 6.

²⁵³ Ireland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.26, 30 October 1987, p. 21.

²⁵⁴ Israel, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.16, 22 October 1987, p. 22.

²⁵⁵ Israel, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.19, 28 October 1991, p. 23.

²⁵⁶ Israel, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 20 October 1995, p. 5.

²⁵⁷ Israel, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁵⁸ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, pp. 142–146; Wil D. Verwey, *Riot Control Agents and Herbicides in War*, A. W. Sijthoff, Leyden, 1977, pp. 182–183.

²⁵⁹ League of Nations, *Official Journal*, Special Supplement No. 151, Records of the Sixteenth Assembly, Eighteenth Plenary Meeting, 30 June 1936, pp. 22–25.

²⁶⁰ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. IV, *CB Disarmament Negotiations, 1920–1970*, Almqvist & Wiksell, Stockholm, 1971, pp. 175–189.

use of chemical weapons as a result of the 1925 Geneva Gas Protocol, but expressed reservations about the resolution's bias against the West.²⁶¹

266. At the CDDH, Italy abstained in the vote on the Philippine amendment (see *infra*) stating that "it would not be useful because it dealt with means and methods of warfare which were already prohibited by the existing law".²⁶²

267. In 1987, during a debate in the UN Security Council, Italy called the prohibition of chemical weapons "a great and precious accomplishment of our civilization".²⁶³

268. In 1987, during a debate in the First Committee of the UN General Assembly, Italy stated that it was committed to a global ban on chemical weapons.²⁶⁴

269. According to a commentator, gas was allegedly used by Japan in the Sino-Japanese War (1937–1943), even though Japan has never admitted this.²⁶⁵ China protested several times to the Council of the League of Nations about these breaches of international law.²⁶⁶

270. In 1968, during a debate in the First Committee of the UN General Assembly, Japan argued in favour of prohibiting not only the use of chemical weapons, but also their production and stockpiling.²⁶⁷

271. In 1987, during a debate in the First Committee of the UN General Assembly, Japan stated that it was committed to a global ban on chemical weapons.²⁶⁸

272. In 1988, in a statement before the Fifteenth Special Session of the UN General Assembly, Japan stated that:

Chemical weapons, in particular, are weapons of mass destruction which kill and injure people with their potent toxicity. They are also extremely dangerous because they are easy to produce and use. It is profoundly regrettable that these heinous weapons have actually been used, for example, in the conflict between Iran and Iraq, despite the prohibition of their use in war under an international convention . . . In order to prevent totally the use of these weapons, it is essential that their stockpiling and production be prohibited and, indeed, that they be eliminated globally.²⁶⁹

²⁶¹ Italy, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1457, 17 November 1966, p. 187.

²⁶² Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 30.

²⁶³ Italy, Statement before the UN Security Council, UN Doc. S/PV.2750, 20 July 1987, p. 31.

²⁶⁴ Italy, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.18, 23 October 1987, p. 8.

²⁶⁵ Wil D. Verwey, *Riot Control Agents and Herbicides in War*, A. W. Sijthoff, Leyden, 1977, pp. 183–184.

²⁶⁶ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, pp. 147–152; League of Nations, *Official Journal*, May–June 1938, 101st Session of the Council, Second Meeting, pp. 306–308; League of Nations, *Official Journal*, November 1938, 101st Session of the Council, Fourth Meeting, pp. 863–865.

²⁶⁷ Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1616, 22 November 1968, p. 8.

²⁶⁸ Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.6, 15 October 1987, p. 6.

²⁶⁹ Japan, Statement before the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, § 115.

273. In 1993, during a debate in the First Committee of the UN General Assembly, Japan stated that it “attached great importance to the prohibition of chemical weapons”.²⁷⁰

274. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan referred to the 1925 Geneva Gas Protocol when stating that “the use of weapons of mass destruction . . . is prohibited by international declarations and binding agreements. These principles serve the foundation for the concept of humane treatment.”²⁷¹

275. At the First Conference of States Parties to the CWC in 1997, Japan stated that “in order to effectively achieve the objectives of the Convention to eliminate chemical weapons, it is essential to ensure the universality of this Convention”. For this reason, Japan urged the urgent participation of as many countries as possible in the 1993 CWC. It further reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.²⁷²

276. At the CDDH, Jordan supported the principle behind the Philippine amendment (see *infra*) but stated that “it would be more generally acceptable if it were amended to apply only to the first user of weapons prohibited by international conventions”.²⁷³

277. According to the Report on the Practice of Jordan, Jordan does not use, manufacture or stockpile chemical weapons and it does not plan to do so in the future.²⁷⁴

278. In 1980, the Ministry of Foreign Affairs of Kampuchea deplored the fact that “the Vietnamese army is increasingly resorting to toxic chemical products. In addition to the air-spreadings of these toxic chemical products, the Vietnamese army has conducted the systematic shellings of poison gas in every place.”²⁷⁵

279. In 1987, during a debate in the First Committee of the UN General Assembly, Democratic Kampuchea stated that it was committed to a global ban on chemical weapons.²⁷⁶ In 1991, it was reported that in Cambodia “the Phnom Penh government accused the guerillas of using chemical weapons for the first

²⁷⁰ Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.4, 19 October 1993, p. 6.

²⁷¹ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/27, 7 November 1995, p. 30.

²⁷² Japan, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁷³ Jordan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 283, § 21.

²⁷⁴ Report on the Practice of Jordan, 1997, Chapter 3.4.

²⁷⁵ Kampuchea, Ministry of Foreign Affairs, Statement of 5 February 1980 on the intensification by Hanoi in using chemical weapons and committing other criminal activities to exterminate the Kampuchean people, Press Release of the Permanent Mission of Kampuchea to the United Nations in Geneva, No. 21/2/80/E, 21 February 1980.

²⁷⁶ Democratic Kampuchea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.13, 20 October 1987, p. 33.

time in the 12 year-old civil war, by referring to artillery shells containing 'toxic substances' being fired".²⁷⁷

280. In 1966, during a debate in the First Committee of the UN General Assembly, Kenya supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.²⁷⁸

281. In 1987, during a debate in the First Committee of the UN General Assembly, Kenya maintained that "all States should co-operate in efforts to prevent the use of chemical weapons, in accordance with the principles and objectives of the Geneva Protocol of 1925" until a general convention prohibiting chemical weapons was enacted.²⁷⁹

282. At the First Conference of States Parties to the CWC in 1997, Kenya made statements in support of the object and purpose of the 1993 CWC.²⁸⁰

283. In a statement in January 1989, the Ministry of Foreign Affairs of North Korea stated that:

The government of the Republic in the future, too, as in the past, will not test, produce, store and introduce from outside nuclear and chemical weapons and will never permit the passage of foreign . . . chemical weapons through our territory and territorial waters and air.²⁸¹

284. In 1995, during a debate in the First Committee of the UN General Assembly, North Korea stated that it was opposed "in principle" to chemical weapons.²⁸²

285. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, South Korea declared that it did not possess chemical weapons.²⁸³

286. In 1994, during a debate in the First Committee of the UN General Assembly, South Korea stated that it was dedicated to the elimination of chemical weapons.²⁸⁴

287. At the First Conference of States Parties to the CWC in 1997, South Korea emphasised the importance of the 1993 CWC and stated its commitment and

²⁷⁷ *Asian Yearbook of International Law*, Vol. 1, 1991, p. 353.

²⁷⁸ Kenya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1456, 16 November 1966, p. 179.

²⁷⁹ Kenya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.27, 30 October 1987, p. 6.

²⁸⁰ Kenya, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁸¹ Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991, p. 397.

²⁸² North Korea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.7, 19 October 1995, p. 16.

²⁸³ South Korea, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

²⁸⁴ South Korea, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.6, 19 October 1994, p. 12.

its determination to contribute actively to the realisation of the Convention's aims.²⁸⁵

288. According to the Report on the Practice of South Korea, South Korea is of the view that the prohibition on the use of chemical weapons is customary.²⁸⁶

289. In an article published in a military review, a member of the Kuwaiti armed forces stated that, during war, belligerents must:

respect restrictions and limits provided for in international conventions, such as restrictions of the use of some weapons, and prohibition of using others, e.g. chemical . . . weapons . . . This is in application of well-established principles in war, such as considerations of military honour and humanitarian considerations.²⁸⁷

290. At the First Conference of States Parties to the CWC in 1997, Kuwait expressed support for the goals of the 1993 CWC and stated its full commitment to the provisions in the Convention and promised full cooperation with the OPCW.²⁸⁸

291. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, Laos stated that it would accede to the 1925 Geneva Gas Protocol and noted that "Laos does not produce chemical weapons and does not intend to".²⁸⁹

292. At the First Conference of States Parties to the CWC in 1997, Laos emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims.²⁹⁰

293. In 1977, during a debate in the UN General Assembly, Lebanon stated that "the Lebanese spirit has always stood against such [chemical] weapons".²⁹¹

294. The Report on the Practice of Lebanon states that Lebanon's refusal to sign the 1993 CWC does not imply that it opposes a prohibition on chemical weapons.²⁹²

295. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Lesotho stated that "any use of nuclear weapons, even in self-defense, would violate international humanitarian law, including the Hague and Geneva Conventions, which prohibit as practices of war . . . the use of poisonous gases, liquids and analogous substances".²⁹³

²⁸⁵ South Korea, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁸⁶ Report on the Practice of South Korea, 1997, Chapter 3.4.

²⁸⁷ Fellah Awad Al-Anzi, "The Law of War", *Homat Al-Watan*, No. 168, p. 57.

²⁸⁸ Kuwait, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁸⁹ Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991, p. 430.

²⁹⁰ Laos, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁹¹ Lebanon, Statement before the UN General Assembly, UN Doc. A/51/PV.100, 22 May 1997, p. 3.

²⁹² Report on the Practice of Lebanon, 1998, Chapter 3.4, referring to Speech by advisor to Lebanon's delegation to the UN, 22 May 1997.

²⁹³ Lesotho, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

296. At the First Conference of States Parties to the CWC in 1997, Lesotho made statements in support of the object and purpose of the 1993 CWC.²⁹⁴

297. The day before his address to the Conference of State Parties to the 1925 Geneva Protocol in 1989, the Libyan Minister of Foreign Affairs told a French interviewer that “despite the fact that the production of chemical weapons is not banned by the Geneva agreement, Libya has decided of its own free will that it will not produce, and furthermore does not intend to produce, chemical weapons”.²⁹⁵

298. In 1991, during a debate in the First Committee of the UN General Assembly, Libya expressed its belief that there was a “need to protect the human race from chemical warfare”.²⁹⁶

299. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been concluded by the Conference on Disarmament, Libya supported an Egyptian initiative for a Middle Eastern zone free of weapons of mass destruction.²⁹⁷

300. At the First Conference of States Parties to the CWC in 1997, Liechtenstein reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.²⁹⁸

301. In 1989, Luxembourg co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries”.²⁹⁹

302. At the First Conference of States Parties to the CWC in 1997, Luxembourg reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.³⁰⁰

303. In 1995, during a debate in the First Committee of the UN General Assembly, Malaysia supported a total ban on chemical weapons.³⁰¹

304. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, Malaysia stated that “chemical weapons have been banned”.³⁰² In a part entitled “Principle of Non-Toxicity”, it also referred to the

²⁹⁴ Lesotho, Statement at the First Conference of States Parties to the CWC, 8 May 1997.

²⁹⁵ Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991, p. 268.

²⁹⁶ Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.22, 29 October 1991, p. 34.

²⁹⁷ Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.10, 20 October 1992, pp. 9–10.

²⁹⁸ Liechtenstein, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

²⁹⁹ Luxembourg, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

³⁰⁰ Luxembourg, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁰¹ Malaysia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.3, 16 October 1995, p. 24.

³⁰² Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, p. 2.

1925 Geneva Gas Protocol and the 1956 New Delhi Draft Rules.³⁰³ Malaysia made the same reference in its oral pleadings in the *Nuclear Weapons case* in 1995.³⁰⁴

305. At the First Conference of States Parties to the CWC in 1997, Malaysia welcomed the entry into force of the 1993 CWC and expressed the hope that it would lead to “a world free of the scourge of chemical weapons and global and regional security for all”.³⁰⁵

306. In 1966, during a debate in the First Committee of the UN General Assembly, Mali supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.³⁰⁶

307. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Malta declared that it did not possess chemical weapons.³⁰⁷

308. At the First Conference of States Parties to the CWC in 1997, Malta referred to the enactment of a bill that unanimously authorised the ratification of the 1993 CWC and stated that it was “a tangible attestation of Malta’s unwavering commitment to ensure that our society lives in a tranquil and safe environment free from the menace of chemical weapons”.³⁰⁸

309. At the First Conference of States Parties to the CWC in 1997, Mauritius made statements in support of the object and purpose of the 1993 CWC.³⁰⁹

310. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Mexico declared that it did not possess chemical weapons.³¹⁰

311. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been concluded by the Conference on Disarmament, Mexico stated that it was very important that the international community was at the point of totally

³⁰³ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, pp. 23–24.

³⁰⁴ Malaysia, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/27, 7 November 1995, p. 57.

³⁰⁵ Malaysia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁰⁶ Mali, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1456, 16 November 1966, p. 179.

³⁰⁷ Malta, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Res. 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

³⁰⁸ Malta, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁰⁹ Mauritius, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³¹⁰ Mexico, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

banning a category of weapons which, despite the restrictions on their use, had been used in several conflicts by States party to the 1925 Geneva Gas Protocol. For Mexico, this proved that those countries that possessed these kinds of weapons were really willing to rid the world of these weapons by signing this new international treaty.³¹¹

312. At the First Conference of States Parties to the CWC in 1997, Mexico stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.³¹²

313. In 1968, during a debate in the First Committee of the UN General Assembly, Mongolia deplored the use of chemical weapons in South Africa.³¹³

314. In 1987, during a debate in the First Committee of the UN General Assembly, Mongolia stated that it was committed to a global ban on chemical weapons.³¹⁴

315. At the First Conference of States Parties to the CWC in 1997, Morocco made statements in support of the object and purpose of the 1993 CWC.³¹⁵

316. In 1987, during a debate in the First Committee of the UN General Assembly, Nepal stated that it was committed to a global ban on chemical weapons.³¹⁶

317. In 1969, during the debate in the Third Committee of the UN General Assembly on Resolution 2597 (XXIV) reaffirming Resolution 2444 (XXIII), the Netherlands stated that it was "essential to update and broaden . . . the Geneva Protocol and to extend [its] application to cover armed conflicts which are not international in character".³¹⁷

318. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, the Netherlands declared that it did not possess chemical weapons.³¹⁸

319. In 1989, the Netherlands co-sponsored a draft resolution in the UN Commission on Human Rights which expressed "grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during

³¹¹ Mexico, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.3, 12 October 1992, p. 16.

³¹² Mexico, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³¹³ Mongolia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1612, 19 November 1968, p. 3.

³¹⁴ Mongolia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.11, 19 October 1987, p. 47.

³¹⁵ Morocco, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³¹⁶ Nepal, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.9, 16 October 1987, p. 6.

³¹⁷ Netherlands, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1733, 11 December 1969, p. 1.

³¹⁸ Netherlands, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

1988 using, *inter alia*, chemical weapons and causing mass exodus to neighbouring countries".³¹⁹

320. In an explanatory memorandum submitted to the Dutch parliament in 1993 in the context of the ratification of the CWC, the government of the Netherlands stated that "the absolute prohibition of the use of chemical weapons (Article 1 § b) should fall within the laws and customs of war, as mentioned in article 8 of the Criminal Law in Wartime Act". It went on to say that "thus, the use of chemical weapons during armed conflict is at all times a violation of article 8, and prosecutions and adjudication of such a violation will therefore take place in accordance with its provisions".³²⁰

321. In 1980, during a debate in the UN General Assembly, New Zealand stated with respect to Resolution 35/144, which it had sponsored, that:

Of course, . . . no territorial limitations [for the investigations to be carried out by the UN Secretary-General into the alleged use of chemical weapons] are proposed. The Secretary-General is simply asked to look, with the assistance of qualified medical and technical experts, into all complaints of the alleged use of chemical weapons in military operations and to examine the evidence brought to his attention with a view to ascertaining the facts.³²¹

322. In 1987, during a debate in the First Committee of the UN General Assembly, New Zealand condemned the use of chemical weapons against civilians.³²²

323. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, New Zealand declared that it did not possess chemical weapons.³²³

324. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated, with reference to customary IHL, that "it is prohibited to use asphyxiating, poisonous or other gases and all analogous materials".³²⁴

325. At the First Conference of States Parties to the CWC in 1997, New Zealand emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims.³²⁵

³¹⁹ Netherlands, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

³²⁰ Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the CWC, 13 January 1993, 1994–1995 Session, Doc. 23 910 (R 1515) No. 3, pp. 34 and 57.

³²¹ New Zealand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/35/PV.45, 26 November 1980, p. 21.

³²² New Zealand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.14, 21 October 1987, p. 34.

³²³ New Zealand, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

³²⁴ Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 72.

³²⁵ New Zealand, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

326. In 1991, a Nigerian national newspaper reported that the Nigerian Ministry of Defence had organised a seminar in the 1990s "with the aim of sensitising the developing world to the adverse effects of a total ban on the production, storage and use of chemical weapons as advocated by the developed nations".³²⁶
327. In 1995, during a debate in the First Committee of the UN General Assembly, Nigeria stated that it was committed to the total prohibition of chemical weapons.³²⁷
328. In 1989, Norway co-sponsored a draft resolution in the UN Commission on Human Rights which expressed "grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries".³²⁸
329. At the First Conference of States Parties to the CWC in 1997, Norway reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.³²⁹
330. At the First Conference of States Parties to the CWC in 1997, Oman expressed support for the goals of the 1993 CWC and stated its full commitment to the provisions in the Convention and promised full cooperation with the OPCW.³³⁰
331. At the 1986 Session of the Conference on Disarmament, Pakistan declared that it "neither possesses chemical weapons nor desires to acquire them".³³¹
332. In 1987, during a debate in the First Committee of the UN General Assembly, Pakistan stated that it was committed to a global ban on chemical weapons.³³²
333. Pakistan accused India of using chemical weapons in the Jammu and Kashmir region in 1999.³³³ The allegation was vigorously denied by India, which called it "totally absurd".³³⁴

³²⁶ "We Need Chemical Weapons", *National Concord*, Lagos, 6 September 1991.

³²⁷ Nigeria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 18.

³²⁸ Norway, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

³²⁹ Norway, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³³⁰ Oman, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³³¹ Pakistan, Statement before the Conference on Disarmament, UN Doc. CD/PV.339, 13 February 1986, p. 9.

³³² Pakistan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.26, 30 October 1987, p. 48.

³³³ *Dawn*, "India using chemical weapons: PTV", Karachi, 13 June 1999; Scott McDonald from Islamabad for Reuter, "Pakistan says India using 'chemical' shells", 13 June 1999; Reuter from Islamabad, "Chemical weapons charge", as in *International Herald Tribune*, 14 June 1999, p. 4.

³³⁴ "India denies Pakistan charge chemical weapons used in Kashmir", AFP, 13 June 1999; "Kashmiri groups condemn alleged use of chemical weapons", AFP, 14 June 1999; "Pakistan investigates India's reported use of chemical weapons", AFP, 14 June 1999; "Indian army gains in Kashmir", Doordarshan television, New Delhi, 14 June 1999, as in BBC-SWB, 14 June 1999;

334. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Panama declared that it did not possess chemical weapons.³³⁵

335. In 1977, during a debate in the First Committee of the UN General Assembly, Peru supported a complete ban on chemical weapons.³³⁶

336. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Peru declared that it did not possess chemical weapons.³³⁷

337. In 1991, during a debate in the First Committee of the UN General Assembly, Peru stated that it had invited the countries of the Rio Group to reach an agreement on the prohibition of chemical weapons.³³⁸

338. In an official communiqué in 1995, Peru denied having used toxic chemical gases in its conflict with Ecuador.³³⁹

339. At the CDDH, the Philippines proposed an amendment to include “the use of weapons prohibited by international Convention, namely: . . . asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices” in the list of grave breaches in Article 74 of draft AP I (now Article 85).³⁴⁰ The proposal was rejected because it failed to obtain the necessary two-thirds majority (41 votes in favour, 25 against and 25 abstentions).³⁴¹

340. In 1991, during a debate in the First Committee of the UN General Assembly, the Philippines stated that it neither possessed nor produced chemical weapons.³⁴²

“Indian army recovers gas masks from Pakistani soldiers”, *Times of India*, Mumbai, Internet version, 15 June 1999; “US rejects Pak claim on chemical arms”, *The Hindu*, New Delhi, 17 June 1999.

³³⁵ Panama, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

³³⁶ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.16, 3 October 1977, p. 22.

³³⁷ Peru, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

³³⁸ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 48.

³³⁹ Peru, Joint Command of the Armed Forces, Official communiqué No. 011 CCFFAA, Lima, 24 February 1995.

³⁴⁰ Philippines, Proposal of amendment to Article 74 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/418, 26 May 1977, p. 322.

³⁴¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 288–289. (Against: Australia, Belarus, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, FRG, GDR, Hungary, India, Luxembourg, Monaco, Mongolia, Netherlands, New Zealand, Poland, Portugal, Ukraine, USSR, UK, US and Zaire. Abstaining: Brazil, Cameroon, Cyprus, Cuba, Greece, Guatemala, Indonesia, Iran, Ireland, Israel, Italy, Japan, South Korea, Mauritania, Morocco, Nigeria, Norway, Romania, Spain, Swaziland, Sweden, Thailand, Turkey, Uganda and Vietnam.)

³⁴² Philippines, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.15, 24 October 1991, p. 24.

341. At the First Conference of States Parties to the CWC in 1997, Philippines emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims.³⁴³

342. The Report on the Practice of the Philippines states with reference to the prohibition of chemical weapons that "the Philippines is against the use, production, and stockpiling of . . . chemical weapons. In fact, it adheres to peaceful, non-military approaches to conflict and renounces the use of . . . chemical weapons."³⁴⁴

343. In 1966, during a debate in the First Committee of the UN General Assembly, Poland supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.³⁴⁵

344. In 1989, Portugal co-sponsored a draft resolution in the UN Commission on Human Rights which expressed "grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries"³⁴⁶

345. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Qatar declared that it did not possess chemical weapons.³⁴⁷

346. In 1992, during a debate in the First Committee of the UN General Assembly dealing mainly with the 1993 CWC, the negotiation of which had been concluded by the Conference on Disarmament, Qatar stated that the Arab States were especially concerned with the elimination of chemical weapons.³⁴⁸

347. In 1966, during a debate in the First Committee of the UN General Assembly, Romania supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.³⁴⁹

³⁴³ Philippines, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁴⁴ Report on the Practice of Philippines, 1997, Answers to additional questions on Chapter 3, referring to Statement by the Department of Foreign Affairs, Office of United Nations and International Organizations (UNIO), Manila, 6 March 1998.

³⁴⁵ Poland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1455, 16 November 1966, p. 174.

³⁴⁶ Portugal, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

³⁴⁷ Qatar, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, § 98.

³⁴⁸ Qatar, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.8, 16 October 1992, p. 13.

³⁴⁹ Romania, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1453, 15 November 1966, p. 161.

348. In 1991, during a debate in the First Committee of the UN General Assembly, Romania stated that it neither possessed nor produced chemical weapons.³⁵⁰

349. At the First Conference of States Parties to the CWC in 1997, Romania reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.³⁵¹

350. Use of chemical weapons by Russia was alleged during the two conflicts in Chechnya in 1994–1996³⁵² and 1999.³⁵³ These allegations were, however, categorically denied by Russian officials.³⁵⁴

351. At the First Conference of States Parties to the CWC in 1997, Russia stated that, although it had not yet ratified the 1993 CWC, it “intends to refrain from any action that would deprive the Convention of its object and purpose”. It further stated that:

After we signed the Convention we have been honouring and will continue to honour the commitments regarding the non-development and non-production of

³⁵⁰ Romania, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 66.

³⁵¹ Romania, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁵² ITAR-TASS from Moscow, 14 December 1994, as translated from the Russian in FBIS-SOV-94-241, 15 December 1994, p. 38; Oleh Kruk for UNIAN (Kiev), 21 December 1994, as translated from the Ukrainian in FBIS-SOV-94-246, 22 December 1994, pp. 25–26; Ekho Moskvyy radio (Moscow), 22 July 1996, as translated from the Russian in BBC-SWB, Part 1, EE/D2672/B, 24 July 1996.

³⁵³ “Chechen envoy says Russia used chemical arms”, Reuter, Istanbul, 9 December 1999; Representative Office of the Chechen Republic of Ichkeria in Azerbaijan, Press Release, “Chechen office in Azerbaijan reports Russia’s use of chemical weapons”, Baku, 8 December 1999, as in BBC-SWB, 8 December 1999; (For example: Chechens charge Russian troops used chemical arms in Grozny, AFP, Geneva, 8 December 1999; Ian Bruce, “Illegal chemical weapon onslaught to flatten city”, *Herald*, Glasgow, 8 December 1999, p. 13; Opening statement by the Director-General to the Eighteenth Session of the Executive Council, 15 February 2000, via OPCW website as of 22 February 2000; Oleg Stulov, “Chemical spill in Chechnya: was it Maskhadov who spilled something extremely toxic in Chechnya?”, *Kommersant-daily*, Moscow, 11 December 1999, p. 3; “Pro-Chechen web site reports chemical attack on capital”, *Kavkaz-Tsentr* website, 11 December 1999, as translated from the Russian in BBC-SWB, 11 December 1999; “Chechen web site reports Russians preparing to use chemical weapons”, *Kavkaz-Tsentr* website, 23 December 1999, as translated from the Russian in BBC-SWB, 23 December 1999; “Pro-Chechen web site says Russians sprayed gas over Chechen positions”, *Kavkaz-Tsentr* website, 30 December 1999, as translated from the Russian in BBC-SWB, 31 December 1999; “Pro-Chechen web site reports Russians using napalm, chemical weapons”, *Kavkaz-Tsentr* website, 31 December 1999, as translated from the Russian in BBC-SWB, 31 December 1999; “Pro-Chechen web site says about 180 Russians killed in capital”, *Kavkaz-Tsentr* website, 8 January 2000, as translated from the Russian in BBC-SWB, 8 January 2000; “Chechens report fierce fighting for capital, Russians using chemical weapons”, *Kavkaz-Tsentr* website, 18 January 2000, as translated from the Russian in BBC-SWB, 18 January 2000.

³⁵⁴ ITAR-TASS from Moscow, 15 December 1994, as in FBIS- SOV-94-241, 15 December 1994, pp. 40–41; Anatoliy Yurkin from Moscow for ITAR-TASS world service (Moscow), 23 July 1996, as translated from the Russian in BBC-SWB, Part 1, EE/D2672/B, 24 July 1996; “Rebels claim victory over Russians in southwestern village of Bamut”, Radio Russia, Moscow, 24 July 1996, as reported in BBC-SWB, 25 July 1996; “Russian Defence Ministry denies using chemical weapons in Chechnya”, ITAR-TASS, Moscow, 9 December 1999, as in BBC-SWB, 9 December 1999; “Claims that Russia uses chemical weapons in Chechnya lies”, ITAR-TASS, Moscow, 10 December 1999; Russia, Statement of the official representative of the Foreign Ministry of the Russian Federation, 10 December 1999, *Diplomaticheskii vestnik*, No. 1, January 2000.

chemical weapons; their non-transfer, directly or indirectly, to anyone; the non-use of chemical weapons; the renunciation of engaging in any military preparations to use them, of providing assistance, encouraging or inducing in any way, anyone to engage in any activity prohibited by the convention.³⁵⁵

352. According to the Report on the Practice of Rwanda, there is no obvious evidence of a Rwandan *opinio juris* on the issue of chemical weapons. However, it states that, in practice, these types of weapons are not employed in Rwanda.³⁵⁶

353. In 1966, during a debate in the First Committee of the UN General Assembly, Saudi Arabia “whole-heartedly supported [a] Hungarian draft resolution” according to which the UN General Assembly would declare that “the use of chemical . . . weapons for the purpose of destroying human beings and the means of their existence constituted an international crime”.³⁵⁷

354. In 1968, during a debate in the First Committee of the UN General Assembly, Saudi Arabia advocated a total prohibition on the use and production of chemical weapons.³⁵⁸

355. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons and on what was to become Resolution 2603 (XXIV), the representative of Saudi Arabia stated that:

107. . . . Stockpiles of chemical weapons [should] be destroyed by all who have them in their arsenals. I would go further: they should not even be manufactured, let alone stockpiled . . .

108. The [1925 Geneva Gas Protocol] is unequivocal in considering the use of all poison gases and toxic chemical agents to be prohibited . . .

...

110. . . . I hope that in the future the United Nations will consider the use of any gas or germ as a criminal act.³⁵⁹

356. In 1995, during a debate in the First Committee of the UN General Assembly, Saudi Arabia stated that it supported “all treaties and conventions that aim at eliminating all types of weapons of mass destruction, including chemical weapons”.³⁶⁰

357. At the First Conference of States Parties to the CWC in 1997, Saudi Arabia stated its commitment to the goals and provisions of the 1993 CWC, but also said it understood why some of the Arab States had not signed or ratified

³⁵⁵ Russia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁵⁶ Report on the Practice of Rwanda, 1997, Chapter 3.4.

³⁵⁷ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1451, 11 November 1966, § 38.

³⁵⁸ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1608, 14 November 1968, p. 7.

³⁵⁹ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, §§ 107–108 and 110.

³⁶⁰ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 12.

the Convention on the grounds that Israel refused to get rid of its nuclear weapons.³⁶¹

358. At the Fifth Conference of States Parties to the CWC in 2000, Slovenia stated that:

In 1999 Slovenia adopted the Penal Code which regulates punishment for offences connected with violations of the Convention on Chemical Weapons and the Law on Chemical Weapons, which stipulates the obligations, interdictions and restrictions regarding chemical weapons in line with the Convention and lays down the basis for adoption of regulations by which this matter will be finally dealt on a legal basis in Slovenia. To Slovenia, as a country which has never had chemical weapons, the Convention on Chemical Weapons is of great importance.³⁶²

359. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that “international law prohibits the use of weapons which: – are chemical”.³⁶³

360. At the First Conference of States Parties to the CWC in 1997, South Africa emphasised the importance of the 1993 CWC and stated its commitment to creating a world free of chemical weapons. It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.³⁶⁴

361. According to the Report on the Practice of South Africa, South Africa considers chemical weapons to be among “certain weapons . . . expressly prohibited by international agreement, treaty or custom”.³⁶⁵

362. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Sri Lanka stated that it “had consistently stood for total and complete disarmament and for a ban on all weapons of mass destruction, including . . . chemical weapons”.³⁶⁶

363. In 1977, during a debate in the First Committee of the UN General Assembly, Sri Lanka supported a complete ban on chemical weapons.³⁶⁷

364. At the First Conference of States Parties to the CWC in 1997, Sri Lanka emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention’s aims.³⁶⁸

³⁶¹ Saudi Arabia, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁶² Slovenia, Statement at the Fifth Conference of States Parties to the CWC, The Hague, May 2000.

³⁶³ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 62, § 3.77.

³⁶⁴ South Africa, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁶⁵ Report on the Practice of South Africa, 1997, Chapter 3.4.

³⁶⁶ Sri Lanka, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.16, 12 March 1975, p. 154, § 5.

³⁶⁷ Sri Lanka, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.20, 5 October 1977, p. 56.

³⁶⁸ Sri Lanka, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

365. At the Fifth Conference of States Parties to the CWC in 2000, Sri Lanka stated that it neither possessed chemical weapons, nor had a chemical industry which could produce them.³⁶⁹

366. Sudan has been accused of using chemical weapons on towns in the south of the country.³⁷⁰ This alleged use has, however, never been officially verified and has always been denied by the Sudanese government.³⁷¹ There are some reports by independent institutes or NGOs, but these, too, are contradictory.³⁷²

367. In 1968, during a debate in the First Committee of the UN General Assembly, Sweden proposed that the UN begin a process leading to a total prohibition of the use, production and stockpiling of chemical weapons.³⁷³

368. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons and on what was to become Resolution 2603 (XXIV), Sweden agreed that "there should be a total ban on the use of chemical and biological weapons".³⁷⁴

369. In 1970, during a debate in the Third Committee of the UN General Assembly, Sweden stated that "the rationale for a comprehensive ban on chemical weapons in international armed conflicts would seem to be equally valid in internal armed conflicts. At all events, there should be no hesitation in imposing a complete ban, in internal conflicts."³⁷⁵

370. In 1971, during a debate in the Fourth Committee of the UN General Assembly, Sweden stated that the use of chemical weapons was "contrary to the generally recognized rules of international law as embodied in the Geneva Protocol of 17 June 1925".³⁷⁶

371. In 1988, in a statement before the Fifteenth Special Session of the UN General Assembly, Sweden stated that:

89. The large-scale use of chemical weapons against the city of Halabja was a flagrant violation of the 1925 Geneva Protocol and of customary international law prohibiting the use of chemical weapons. Such attacks must be universally condemned.

³⁶⁹ Sri Lanka, Statement at the Fifth Conference of States Parties to the CWC, The Hague, May 2000.

³⁷⁰ Chege Mbitiru, "Sudanese rebels accuse government of using chemical or biological bombs", AP from Nairobi, 30 July 1999.

³⁷¹ "Sudan denies using biological or chemical weapons", *Akhbar Al-Youm*, Khartoum, 1 August 1999, as quoted by AP from Khartoum, 1 August 1999.

³⁷² "Confirmed chemical bombing in southern Sudan", Norwegian People's Aid, 2 August 1999, as posted on ReliefWeb, www.reliefweb.int, version current on 14 December 1999; "UN sends doctors to treat survivors of toxic chemicals", IPS from Nairobi, 5 August 1999; MSF, Living under aerial bombardments: Report of an investigation in the Province of Equatoria, Southern Sudan, Geneva, February 2000; Marjatta Rautio and Paula Vanninen, from Helsinki, "Analysis of samples from Sudan", 20 June 2000, as in *ASA Newsletter*, No. 79, 31 August 2000, p. 14.

³⁷³ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1609, 18 November 1968, p. 11.

³⁷⁴ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, § 76.

³⁷⁵ Sweden, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1784, 10 November 1970, p. 273.

³⁷⁶ Sweden, Statement before the Fourth Committee of the UN General Assembly, UN Doc. A/C.4/SR.1961, 3 December 1971, p. 249.

90. ... The early conclusion of a convention which bans the production, storing and use of all chemical weapons should now be a high priority. All States should commit themselves to adhere to this treaty, thus eliminating the growing threat from chemical weapons.³⁷⁷

372. In 1989, Sweden co-sponsored a draft resolution in the UN Commission on Human Rights which expressed "grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries".³⁷⁸

373. At the First Conference of States Parties to the CWC in 1997, Sweden emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention's aims.³⁷⁹

374. At the CDDH, Switzerland voted in favour of the Philippine amendment (see *supra*) because:

It would be a step forward to state expressly that any violation of The Hague Declaration of 1899 and the Geneva Protocol of 1925 would constitute a grave breach. The rules laid down in those two instruments were undisputed and indisputable, and the amendment would have a deterrent effect on any State tempted to violate them, by exposing the members of its armed forces to the penalties applicable under the Geneva Conventions.³⁸⁰

375. In 1988, in a note on the prohibition on the use of chemical weapons issued, the Swiss Federal Department of Foreign Affairs stated that "the 1925 [Geneva Gas] Protocol declares a custom". It added that "the 1925 [Geneva Gas] Protocol and custom prohibit the first use of chemical weapons and accept the lawfulness of second use only in the case of reprisals in kind".³⁸¹

376. At the First Conference of States Parties to the CWC in 1997, Switzerland emphasised the importance of the 1993 CWC and stated its commitment to creating a world free of chemical weapons.³⁸²

377. In 1977, during a debate in the First Committee of the UN General Assembly, Syria supported a complete ban on chemical weapons.³⁸³

³⁷⁷ Sweden, Statement at the Fifteenth Special Session of the UN General Assembly, UN Doc. A/S-15/PV.2, 1 June 1988, §§ 89–90.

³⁷⁸ Sweden, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

³⁷⁹ Sweden, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁸⁰ Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 281, § 9.

³⁸¹ Switzerland, Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs, 15 December 1988, reprinted in *Annuaire Suisse de Droit International*, Vol. 46, 1989, pp. 244–247.

³⁸² Switzerland, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁸³ Syria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.15, 30 September 1977, pp. 11 and 16.

378. In 1987, during a debate in the First Committee of the UN General Assembly, Syria denied that it was developing chemical weapons.³⁸⁴
379. In 1966, during a debate in the First Committee of the UN General Assembly, Tanzania supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.³⁸⁵
380. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Tanzania supported a ban on chemical weapons.³⁸⁶
381. At the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, Thailand stated that it was strongly opposed to the development, production, stockpiling, and use of chemical weapons in any circumstances for whatever reasons.³⁸⁷
382. In 1991, during a debate in the First Committee of the UN General Assembly, Thailand stated that it neither possessed nor produced chemical weapons.³⁸⁸
383. In 1995, during a debate in the First Committee of the UN General Assembly, Thailand stated that the world community desired a complete elimination of chemical weapons.³⁸⁹
384. At the First Conference of States Parties to the CWC in 1997, Thailand stated its full commitment to the 1993 CWC and emphasised the importance of establishing an effective mechanism to ensure universal compliance with the Convention.³⁹⁰
385. In 1991, during a debate in the First Committee of the UN General Assembly, Tunisia advocated a complete ban on chemical weapons.³⁹¹
386. In 1977, during a debate in the First Committee of the UN General Assembly, Turkey supported a complete ban on chemical weapons.³⁹²
387. At the First Conference of States Parties to the CWC in 1997, Turkey emphasised the importance of the 1993 CWC and stated its commitment and

³⁸⁴ Syria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.17, 22 October 1987, p. 41.

³⁸⁵ Tanzania, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1457, 17 November 1966, p. 184.

³⁸⁶ Tanzania, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.2, 14 March 1974, p. 22, § 26.

³⁸⁷ Gordon M. Burck and Charles C. Flowerree, *International Handbook on Chemical Weapons Proliferation*, Greenwood Press, New York, 1991, p. 435.

³⁸⁸ Thailand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.19, 28 October 1991, p. 13.

³⁸⁹ Thailand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.5, 17 October 1995, p. 16.

³⁹⁰ Thailand, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁹¹ Tunisia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.11, 22 October 1991, p. 7.

³⁹² Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.15, 30 September 1977, p. 21.

its determination to contribute actively to the realisation of the Convention's aims.³⁹³

388. There have been allegations of the use of chemical weapons by Turkey against the country's Kurdish population; the use has not been verified and the allegations were denied by the Turkish government.³⁹⁴

389. In 1966, during a debate in the First Committee of the UN General Assembly, Ukraine supported Hungary's view that the 1925 Geneva Gas Protocol had developed into customary international law and that the use of chemical weapons constituted an international crime.³⁹⁵

390. In 1977, during a debate in the First Committee of the UN General Assembly, Ukraine also referred to the 1972 initiative and stated that the elimination of chemical weapons was one of the most important measures of disarmament.³⁹⁶

391. In 1987, during a debate in the First Committee of the UN General Assembly, Ukraine proposed a chemical weapons free zone in Europe.³⁹⁷

392. In 1991, during a debate in the First Committee of the UN General Assembly, Ukraine stated that it neither possessed nor produced chemical weapons.³⁹⁸

393. In 1994, during a debate in the First Committee of the UN General Assembly, Ukraine stated that it wanted to "rid the densely populated European continent, as well as other regions, of these deadly [chemical] weapons by the beginning of next century".³⁹⁹

394. At the First Conference of States Parties to the CWC in 1997, Ukraine stated that "it must be our general aim to give this document a universal stamp". It further offered its full cooperation with the OPCW and promised to ratify the 1993 CWC as soon as possible.⁴⁰⁰

³⁹³ Turkey, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

³⁹⁴ "Spokesman denies manufacture, use of chemical weapons", Anatolia news agency, Ankara, 28 October 1999, as translated from the Turkish in BBC-SWB, 30 October 1999; "German TV reports chemical weapons laboratory for Turkey", *ddp/ADN (Allgemeiner Deutscher Nachrichtendienst)* news agency, Berlin, 26 October 1999, as translated from the German in BBC-SWB, 27 October 1999; "Chemical weapons lab aid for Turkey from German military", DPA from Berlin, 27 October 1999; "Türkei beim Aufbau von C-Waffen-Labor unterstützt", *Der Spiegel* online 43/1999, 27 October 1999; "Spokesman denies manufacture, use of chemical weapons", Anatolia news agency, Ankara, 28 October 1999, as translated from the Turkish in BBC-SWB, 30 October 1999.

³⁹⁵ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1452, 14 November 1966, p. 154.

³⁹⁶ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.23, 6 October 1977, p. 2.

³⁹⁷ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.28, 2 November 1987, p. 17.

³⁹⁸ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.3, 14 October 1991, p. 86.

³⁹⁹ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.7, 20 October 1994, p. 17.

⁴⁰⁰ Ukraine, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

395. In 1970, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), the USSR stated that:

The use of asphyxiating, poisonous and tear gases and other gases of a similar nature ... was prohibited by the Geneva Protocol of 17 June 1925. The United States signed that Protocol, but did not ratify it. However, that does not mean that the prohibition of the use of poisonous substances does not extend to the United States. That prohibition has become a generally recognized rule of international law, and countries which violate it must bear responsibility before the international community.⁴⁰¹

396. In 1970, during a debate in the Third Committee of the UN General Assembly, the USSR stated that the 1925 Geneva Gas Protocol was fully applicable in situations where freedom fighters struggled for liberation against colonial powers.⁴⁰²

397. At the CSCE review meeting in Madrid in 1982, when the US delegation accused the USSR of violating the 1925 Geneva Gas Protocol, the Soviet delegation rejected the charges as "monstrous accusations, false from beginning to end" and denied that the USSR had ever used chemical weapons "anywhere under any circumstances or by any means".⁴⁰³

398. In 1987, during a debate in the First Committee of the UN General Assembly, the USSR strongly supported the global elimination of chemical weapons.⁴⁰⁴

399. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, the USSR declared that "it had never used chemical weapons or stockpiled them on foreign territories. It had stopped production of chemical weapons."⁴⁰⁵

400. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, the USSR stated with respect to Resolution 687 (1991) that:

The most acute issue is that of creating an effective barrier against the use of weapons of mass destruction in that region. From that viewpoint, of great importance are the provisions in the resolution regarding Iraq's destruction of chemical ... weapons ... and in the context of Iraq's confirmation of its obligations of

⁴⁰¹ USSR, Reply dated 30 December 1969 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 120.

⁴⁰² USSR, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1786, 12 November 1970, p. 284.

⁴⁰³ Julian Perry Robinson, "Chemical and biological warfare: developments in 1982", *SIPRI Yearbook 1983: World Armaments and Disarmament*, Taylor & Francis, London, 1983, p. 393.

⁴⁰⁴ USSR, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.23, 27 October 1987, pp. 16-30.

⁴⁰⁵ USSR, Reply to a note verbale of the UN Secretary-General referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, §§ 98 and 105.

the Geneva Protocol of 1925 to bring into play the International Atomic Energy Agency... It is also important that all Middle Eastern countries accede to... those international agreements prohibiting chemical... weapons.⁴⁰⁶

401. In 1966, during a debate in the First Committee of the UN General Assembly, the UK supported the principle that international law prohibits the use of chemical weapons as a result of the 1925 Geneva Gas Protocol.⁴⁰⁷

402. At the CDDH, the UK voted against the Philippine amendment (see *supra*) because:

A significant number of the States party to the Geneva Protocol of 1925 had entered a reservation thereto; for those States the Protocol contained no absolute prohibition on the use of the weapons mentioned in it, but rather a prohibition on the first use only. Nor was it convincing to state that the Geneva Protocol of 1925 represented no more than the existing customary law of war; ever since the adoption of resolution XXVIII by the XXth International Conference of the Red Cross (Vienna 1965), States had been urged in United Nations resolutions to accede to that Protocol in accordance with its express terms. Such a situation was entirely inconsistent with the contention made in debate that the Geneva Protocol of 1925 reflected existing customary international law. That contention could not be supported.⁴⁰⁸

403. In 1977, during a debate in the First Committee of the UN General Assembly, the UK supported a complete ban on chemical weapons.⁴⁰⁹

404. In 1983, in reply to a question in the House of Lords on the subject of the use of chemical weapons in South-East Asia, the UK Minister of State, FCO, stated that "the use of chemical weapons is a flagrant contradiction of the civilized standards reflected in the 1925 [Geneva Gas] Protocol".⁴¹⁰

405. In 1987, during a debate in the First Committee of the UN General Assembly, the UK stated that it and its allies were committed to a global ban on chemical weapons.⁴¹¹

406. At a press conference held on 30 March 1988, a spokesperson for the UK Foreign and Commonwealth Office stated that the Iraqi use of chemical weapons against Kurdish civilians in Halabja "represents a serious and grave violation of the 1925 Geneva Protocol and international humanitarian law. The UK condemns unreservedly this and all other uses of chemical weapons".⁴¹²

⁴⁰⁶ USSR, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 101–102.

⁴⁰⁷ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1454, 15 November 1966, p. 167.

⁴⁰⁸ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 282, § 17.

⁴⁰⁹ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.23, 6 October 1977, p. 21.

⁴¹⁰ UK, House of Lords, Reply by the Minister of State, FCO, *Hansard*, 7 June 1983, Vol. 431, col. 92.

⁴¹¹ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.5, 14 October 1987, p. 62.

⁴¹² UK, Statement by the FCO Spokesperson at a Press Conference, 30 March 1988, reprinted in *BYIL*, Vol. 59, 1988, p. 579.

407. In 1989, the UK co-sponsored a draft resolution in the UN Commission on Human Rights which expressed “grave concern about reports of killing of unarmed Kurdish civilians, in particular by military attacks during 1988 using, inter alia, chemical weapons and causing mass exodus to neighbouring countries”.⁴¹³

408. In 1990, during a debate in the UN Security Council on a peaceful and just post-Cold War world, the UK stated that, under paragraph 13 of Resolution 670 (1990), individuals were held responsible for grave breaches of the Geneva Conventions and that “we should also hold personally responsible those involved in violations of the laws of armed conflict, including the prohibition against initiating the use of chemical . . . weapons contrary to the Geneva Protocol of 1925, to which Iraq is a party”.⁴¹⁴

409. In 1991, during a debate in the House of Commons on the Gulf crisis, the UK Prime Minister stated that:

Chemical weapons, already used by Saddam Hussein against his own people, have been deployed. Contrary to international agreements, Iraq has produced and threatened to use both chemical and biological weapons, the use of which would be wholly contrary to international agreements.⁴¹⁵

410. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that “the Iraqi Ambassador [to the UK] was also reminded of Iraq’s obligations under the 1925 Geneva [Gas] Protocol in respect of chemical . . . weapons. The United Kingdom would take the severest view of any use of these weapons by Iraq.”⁴¹⁶

411. In 1991, during a debate in the House of Commons on the Gulf crisis, the UK Minister of State, FCO, stated that “we have always recognised that Saddam Hussein possesses chemical weapons and judging from his track record, he may well use them. To do so would be a breach of the 1925 [Geneva Gas Protocol]. It would be a gross crime.”⁴¹⁷

412. In 1991, during a debate in the UN Security Council on the situation between Iraq and Kuwait, the UK stated with respect to Resolution 687 (1991) that:

The resolution contains tough provisions for the destruction of Iraqi chemical and biological weapons . . . It is surely right to do so. For Iraq alone in the region has not only developed many of these weapons, it has actually used them both against a

⁴¹³ UK, Draft resolution on the situation of human rights in Iraq, UN Doc. E/CN.4/1989/L.82, 3 March 1989, § 2.

⁴¹⁴ UK, Statement before the UN Security Council, UN Doc. S/PV.2963, 29 November 1990, § 78.

⁴¹⁵ UK, House of Commons, Statement by the Prime Minister, *Hansard*, 15 January 1991, Vol. 183, col. 735.

⁴¹⁶ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1; see also Statement by FCO spokesperson, 21 January 1991, reprinted in *BYIL*, Vol. 62, 1991, p. 680.

⁴¹⁷ UK, House of Commons, Statement by the Minister of State, FCO, *Hansard*, 22 February 1991, Vol. 186, col. 576.

neighbouring State and against its own population, and it has made the threat of their use part of the daily discourse of its diplomacy as it has attempted to bully and coerce its neighbours . . . But action against Iraq's weapons of mass destruction must clearly not be the end of the affair, a one-off operation, and that is why the resolution so clearly situates this action within the wider framework of work towards a whole region free of weapons of mass destruction and, indeed, towards even wider actions – for example to outlaw chemical weapons worldwide.⁴¹⁸

413. In 1993, during a debate in the House of Commons, the UK Secretary of State for Defence stated that:

We would view with the gravest concern any evidence revealed to the United Nations – which is studying the situation in southern Iraq – that might give it reason to believe that chemical weapons might have been used in that part of the country. Clearly, the use of such weapons is contrary to Iraq's international obligations; moreover, it gives rise to a particular sense of abhorrence which is felt not only by all hon. Members but by the international community as a whole.⁴¹⁹

414. In 1998, in reply to a question in House of Commons about the UK's position on chemical and biological weapons and nuclear weapons at a meeting of the Preparatory Committee for the Establishment of an International Criminal Court, the UK Prime Minister stated that:

The UK delegation supported proposals to include within the jurisdiction of the ICC war crimes under existing customary international law. For that reason, the delegation supported the inclusion of the use of methods of warfare of a nature to cause superfluous injury or unnecessary suffering; these included . . . chemical weapons as referred to in the 1993 Chemical Weapons Convention.⁴²⁰

415. According to the Report on UK Practice, an IFOR restricted document (Legal Standard Operating Procedures) provides for “no use of chemical weapons – other than tightly controlled use in riot control situations”.⁴²¹

416. In 1966, during a debate in the First Committee of the UN General Assembly, the US, in reply to allegations made by Hungary that the US were using chemical weapons in Viet-Nam, stated that “allegations that the United States was using poison gas in Viet-Nam were completely unfounded”.⁴²²

417. In 1966, during a debate in the First Committee of the UN General Assembly, the US stated that it supported the 1925 Geneva Gas Protocol, even though it had not ratified it.⁴²³

⁴¹⁸ UK, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 113–114.

⁴¹⁹ UK, House of Commons, Statement by the Secretary of State for Defence, *Hansard*, 19 November 1993, Vol. 233, col. 181.

⁴²⁰ UK, House of Commons, Reply by the Prime Minister, *Hansard*, 20 January 1998, Vol. 304, Written Answers, col. 477.

⁴²¹ Report on UK Practice, 1997, Chapter 3.4.

⁴²² US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1451, 11 November 1966, § 41.

⁴²³ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1452, 14 November 1966, p. 158.

418. In 1970, during a debate in the Third Committee of the UN General Assembly, the US was criticised by different States for using chemical weapons in Vietnam in violation of the 1925 Geneva Gas Protocol. It rejected the allegations and proclaimed "its intention to abide strictly by [the 1925 Geneva Gas Protocol] terms" even though it was not a party.⁴²⁴

419. At the CDDH, the US voted against the Philippine amendment (see *supra*) because:

Grave breaches were meant to be the most serious type of crime; Parties had an obligation to punish or extradite those guilty of them. Such crimes should therefore be clearly specified, so that a soldier would know if he was about to commit an illegal act for which he could be punished. The amendment, however, was vague and imprecise. . . . The amendment would also make it unlawful to use certain gases in retaliation, whereas under Protocol I only first use of such gases was unlawful. It would also punish those who used the weapons, namely, the soldiers, rather than those who made the decision as to their use, namely, Governments.⁴²⁵

420. In 1980, in a memorandum of law on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", a legal adviser of the US Department of State stressed that:

The prohibition of the first use in war of chemical weapons has, by reason of the practice and affirmations of states, become a part of the rules of customary international law which are binding on all states; and neither the limitations of the [1925 Geneva Gas] Protocol text nor reservations to it can detract from these obligations. Therefore, all states should be regarded as being bound to refrain from such first use, whether or not they or their opponents are parties to the Protocol.

...

In theory, an attempt might also be made to justify the use of chemical weapons in Afghanistan as a lawful reprisal against violations of the general laws of war by Afghan insurgents (such as the summary execution of Soviet prisoners). However, such an argument would face several serious problems. First, the prohibition in the [1925 Geneva Gas] Protocol and in customary international law apparently itself precludes use of chemical weapons in reprisal except in response to enemy use of weapons prohibited by the [1925 Geneva Gas] Protocol.⁴²⁶

The Department of State noted that "the Afghan conflict seems clearly to be an external invasion and occupation to which the rules of international armed conflict, including the rules against first use of chemical weapons, apply". It added that "the [1925 Geneva Gas] Protocol itself does not apply to the Afghan conflict, because Afghanistan has never adhered to the Protocol. . . . However, . . . the

⁴²⁴ US, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1789, 12 November 1970, p. 289.

⁴²⁵ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 280-281, § 7.

⁴²⁶ US, Department of State, Memorandum of law by a Legal Adviser on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., 1986, pp. 1027 and 1041, footnote 38.

prohibition on the first use of chemical weapons in war has become a part of customary international law binding on all states, whether or not parties to the Protocol". With respect to the conflict in Laos, the memorandum stated that "the customary law prohibition [has] generally been described as rules applying in international armed conflicts . . . There are at this time no strong precedents establishing that the prohibition on chemical weapons would be regarded as applying to a conflict of this character".⁴²⁷

421. In 1986, during a debate in the UN Security Council, the US stated that "the use of chemical weapons is a serious violation of international law".⁴²⁸

422. In 1987, during a debate in the UN Security Council, the US stated that chemical weapons were not capable of distinguishing between combatants and civilians.⁴²⁹

423. In an executive order issued in 1990, the US President stated that "the proliferation of chemical . . . weapons constitutes an unusual and extraordinary threat to the national security and foreign policy of the United States". The order also provided for the possibility of imposing sanctions against foreign persons and governments found to have "knowingly and materially" contributed to efforts to "use, develop, produce, stockpile or otherwise acquire chemical . . . weapons".⁴³⁰

424. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that it "expects the Government of Iraq to respect its obligations under the Geneva [Gas] Protocol of 1925 not to use chemical . . . weapons".⁴³¹

425. In 1991, during a debate in the UN Security Council, the US supported the resolution on the elimination of Iraq's chemical weapons in order to keep the region secure.⁴³²

426. In 1991, during a debate in the First Committee of the UN General Assembly, the US stated that a ban on chemical weapons was a top priority in its foreign policy.⁴³³

427. In 1993, during a debate in the First Committee of the UN General Assembly, the US stated that it had worked for the elimination of chemical weapons.⁴³⁴

⁴²⁷ US, Department of State, Memorandum of law by a Legal Adviser on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., 1986, pp. 1033 and 1036.

⁴²⁸ US, Statement before the UN Security Council, UN Doc. S/PV.2666, 24 February 1986, p. 27.

⁴²⁹ US, Statement before the UN Security Council, UN Doc. S/PV.2750, 20 July 1987, p. 18.

⁴³⁰ US, Executive Order 12735, Chemical and Biological Weapons Proliferation, 16 November 1990, preamble and Section 4(b)(1), *Federal Register*, Vol. 55, 1990, p. 48587.

⁴³¹ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

⁴³² US, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, pp. 86–87.

⁴³³ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.4, 15 October 1991, p. 34.

⁴³⁴ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.5, 19 October 1993, p. 10.

428. At the First Conference of States Parties to the CWC in 1997, the US stated that “the United States recognises the importance of our full participation in the chemical weapons convention at entry into force” and that “the United States stands committed to stopping the spread of weapons of mass destruction and to ensuring that the CWC is implemented effectively”. It further reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.⁴³⁵

429. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that:

Like the Biological Weapons Convention, the CWC is an arms control treaty and is not limited to application during international armed conflict (i.e., it applies at all times and under all circumstances unless the treaty indicates otherwise)...

... The chemical, of course, must be potentially toxic, i.e., have harmful chemical action on life processes. Furthermore, the toxicity must affect humans or animals.⁴³⁶

430. In 1998, CNN alleged that the US used chemical weapons (sarin) to kill defectors in the Vietnam War. The US State Department responded that it had not used sarin in the operation, and that “the US policy since World War II has prohibited the use of lethal chemical agents, including sarin, unless first used by the enemy”.⁴³⁷ Later, the CNN President apologised for the report and stated that “there is insufficient evidence that sarin or any other deadly gas was used”.⁴³⁸

431. At the First Conference of States Parties to the CWC in 1997, Uruguay emphasised the importance of the 1993 CWC and stated its commitment and its determination to contribute actively to the realisation of the Convention’s aims.⁴³⁹

432. In 1989, in reply to a note verbale of the UN Secretary-General on the subject of chemical weapons, Venezuela declared that it did not possess chemical weapons. It furthermore stated that:

In order to ensure strict compliance with the principles and objectives of the Geneva Protocol of 1925, it was essential that the countries which had entered reservations to the 1925 Protocol should withdraw them, because the purpose of most of these reservations was to allow the States that had made them to retain the possibility

⁴³⁵ US, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

⁴³⁶ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 6(c), pp. 11–12.

⁴³⁷ US, Department of Defense, Review of allegations concerning “Operation Tailwind”, 21 July 1998.

⁴³⁸ US, American Forces Press Service, “DoD Welcomes CNN Retraction, Apology for Sarin Report”, July 1998.

⁴³⁹ Uruguay, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

of using chemical weapons in retaliation, should the need arise. As a result of these reservations, the Geneva Protocol, which was conceived as an instrument to prohibit the use of chemical weapons, had become an instrument of *non-first use*.⁴⁴⁰ [emphasis in original]

433. At the First Conference of States Parties to the CWC in 1997, Venezuela stated that it was in favour of global eradication of chemical weapons and stressed the importance of universal adherence to the 1993 CWC.⁴⁴¹

434. In 1981, in a letter to the UN Secretary-General in reaction to US allegations that charging Vietnam was “using Soviet-supplied toxic chemicals in Laos and Kampuchea”, Vietnam stated that:

The US is . . . supplying toxic chemicals to [others] to be used against the peoples of other countries as is the case in Afghanistan . . . [The charges made by the US are] aimed at covering the crime of the United States of using toxic chemicals on a large scale and for more than ten years during [US activities] against Vietnam . . . The Ministry of Foreign Affairs of the Socialist Republic of Viet Nam completely rejects the above [charges made by the US].⁴⁴²

435. In 1987, during a debate in the First Committee of the UN General Assembly, Vietnam stated that it was committed to a global ban on chemical weapons.⁴⁴³

436. At the 1989 Session of the Conference on Disarmament, Vietnam stated that “on the one hand, Viet Nam has been the victim of the use of chemical weapons on an enormous scale, while on the other it neither produces nor holds any chemical weapon”.⁴⁴⁴

437. In 1991, during a debate in the UN Security Council, Yemen stated that it supported the eradication of weapons of mass destruction in the Middle East, but that the unilateral disarmament of Iraq would create imbalance in the region.⁴⁴⁵

438. In 1977, during a debate in the First Committee of the UN General Assembly, the SFRY supported a complete ban on chemical weapons.⁴⁴⁶

⁴⁴⁰ Venezuela, Reply to a note verbale of the UN Secretary-General, referred to in Report of the Secretary-General on respect for the right to life: elimination of chemical weapons, prepared in accordance with UN Sub-Commission on Human Rights Resolution 1988/27, UN Doc. E/CN.4/Sub.2/1989/4, 17 August 1989, §§ 98 and 103.

⁴⁴¹ Venezuela, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

⁴⁴² Vietnam, Ministry of Foreign Affairs, Statement of 17 September 1981 by a spokesperson, reprinted in Letter dated 22 September 1981 to the UN Secretary-General, UN Doc. A/36/549, 23 September 1981, pp. 1–2.

⁴⁴³ Vietnam, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.29, 2 November 1987, p. 18.

⁴⁴⁴ Vietnam, Statement before the Conference on Disarmament, UN Doc. CD/PV.498, 28 March 1989, p. 11.

⁴⁴⁵ Yemen, Statement before the UN Security Council, UN Doc. S/PV.2981, 3 April 1991, p. 42.

⁴⁴⁶ SFRY, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.13, 29 September 1977, p. 62.

439. It was reported that in 1999, Serb forces used nerve gas against Kosovar Albanians; these claims were under investigation by the FBI.⁴⁴⁷

440. According to the Report on the Practice of the SFRY (FRY), there are unconfirmed reports of the use of chemical weapons by the YPA during the conflict in the former Yugoslavia.⁴⁴⁸ Bosnian Muslim forces⁴⁴⁹ and Serb forces⁴⁵⁰ were also alleged to have used chemical weapons during the conflict in Bosnia and Herzegovina.⁴⁵¹

⁴⁴⁷ Richard Norton-Taylor and Lucy Ward, "Serbs used chemical weapons", *The Guardian*, London, 24 August 1999; "Reports indicate Serbs using chemical weapons against UCK", *Zeri i Popullit*, Tirana, 23 April 1999, p. 14, as translated from Albanian in FBIS-EEU-1999-0424; "Kosovo rebels accuse Serbs of using nerve gas in recent fighting", Kosovapress news agency website, 22 April 1999, as in BBC-SWB, 22 April 1999; "Yugoslav Army denies having chemical weapons", TANJUG, Belgrade, 24 April 1999, as excerpted in BBC-SWB, 26 April 1999; UK, Ministry of Defence briefing, 27 April 1999; M. Binyon, "Volunteers for Kosovo face a grim death", *The Times*, London, 28 April 1999; David Thompson, "Serb killers gassed KLA: Milošević launches chemical warfare attacks in Kosovo", *Scottish Daily Record*, Glasgow, 28 April 1999, pp. 16-17; "Doctor claims to have treated refugees for Serb blister agent attack", AFP from Washington, 28 April 1999; "Serbia: Kosovo rebels report use of chemical weapons", Kosovapress news agency website, 3 May 1999, as in BBC-SWB, 4 May 1999; "UCK accuses Serbs of using nerve gas in Kosovo", AFP from Kukes, Albania, 7 May 1999, as in FBIS-EEU-1999-0507; ATA news agency (Tirana) in English, 8 May 1999, as in BBC-SWB, 8 May 1999; Barbara Demick (from Blace, Macedonia), "Refugees say Serbs rout rebels, possibly with gas", *Philadelphia Inquirer*, Philadelphia, 5 May 1999; Anne Swardson (from Cegrane, Macedonia), with John Ward Anderson (from Kukes) and Steven Pearlstein (from Brussels), "Serbs alleged to have used gas: refugees, KLA sources describe attacks on two villages", *Washington Post*, Washington, D.C., 23 May 1999, p. A24.

⁴⁴⁸ Report on the Practice of SFRY (FRY), 1997, Chapter 3.4.

⁴⁴⁹ "Chemical weapons claims probed", *Jane's Defence Weekly*, London, 21 August 1993, p. 5; "Muslims accused again of using CW rounds", *Jane's Defence Weekly*, London, 23 October 1993, p. 8.

⁴⁵⁰ Radio Bosnia-Herzegovina, Sarajevo, 12 February 1993, as in BBC-SWB, 15 February 1993; Radio Bosnia-Herzegovina, Sarajevo, 30 January 1993, as abstracted in BBC-SWB, 1 February 1993; Radio Bosnia-Herzegovina, Sarajevo, 31 January 1993, as translated in BBC-SWB, 2 February 1993; TANJUG from Belgrade in English, 31 January 1993, as excerpted in BBC-SWB, 2 February 1993; Radio Bosnia-Herzegovina, Sarajevo, 11 February 1993, as translated from the Serbo-Croat in FBIS-EEU-93-027, 11 February 1993, p. 33. (For example, the photograph by Kevin Weaver in *The Independent*, London, 26 February 1993, p. 10; Radio Bosnia-Herzegovina, Sarajevo, 13 March 1993, as translated in BBC-SWB, 15 March 1993; Radio Bosnia-Herzegovina, Sarajevo, 14 March 1993, as translated in BBC-SWB, 16 March 1993; Radio Bosnia-Herzegovina, Sarajevo, 15 March 1993, as translated in BBC-SWB, 17 March 1993; SRNA telephone service, 14 March 1993, as translated from Serbo-Croat in BBC-SWB, 16 March 1993.)

⁴⁵¹ TANJUG Belgrade, 20 June 1994, as in BBC-SWB; "Bosnians said to be using chemical grenades in War", Reuters, UN, 21 October 1993; "UN says non-lethal gas shells fired in Sarajevo", Reuters, UN, 28 July 1993; TANJUG Belgrade, 22 October 1993; Radio Bosnia-Herzegovina, 29 July 1993, as in BBC-SWB; "Bosnia Chief threatens to use poison gas", *The Houston Chronicle*, Houston, 31 October 1992; "2000 Bosnian Serb shells, toxic gas hit Teocak", AFP, Radio Sarajevo, 12 June 1993; "Bosnian Serb Commander charges Moslems make chemical arms", AFP, TANJUG, Belgrade, 12 January 1993; SRNA Review of Evening News, 25 August 1995; Major Garrett, "Mesic to tell senators of gas attacks on Croats", *Washington Times*, Washington, D.C., 27 September 1991, p. A3; Bill Gertz, "Report: Army gassed Croats", *Washington Times*, Washington, D.C., 26 September 1991, pp. A1 and A11; "Yugoslav president warns of CW use", MEDNews, Paris, Vol. 4, No. 24, 30 September 1991, p. 5; TANJUG, Belgrade, 26 September 1991, as translated from Serbo-Croat in BBC-SWB, 28 September 1991; TANJUG from Belgrade in English, 27 September 1991, as excerpted in BBC-SWB, 30 September 1991; Mirko Hunjadi from Vinkovici on Radio Croatia (Zagreb), 28 September 1991, as translated from the Serbo-Croat in FBIS-EEU-91-189, 30 September 1991, p. 39; Radio Croatia (Zagreb), 30 September 1991, as excerpted in BBC-SWB, 4 October 1991.

- 441.** In 1977, during a debate in the First Committee of the UN General Assembly, Zaire supported a complete ban on chemical weapons.⁴⁵²
- 442.** At the First Conference of States Parties to the CWC in 1997, Zimbabwe made statements in support of the object and purpose of the 1993 CWC.⁴⁵³
- 443.** According to the Report on the Practice of Zimbabwe, Zimbabwe's acceptance of the prohibition of the use of chemical weapons as part of customary international law may be deduced from its stance in international fora.⁴⁵⁴
- 444.** In 1980, a State denounced and condemned as a war crime the use by another State of chemical weapons during an armed conflict.⁴⁵⁵
- 445.** In 1980, an ambassador confirmed to the ICRC that his country would never use gas as a weapon.⁴⁵⁶

III. Practice of International Organisations and Conferences

United Nations

- 446.** In 1938, with respect to the alleged use of gas by Japan during the Sino-Japanese War (1937–1943) and Chinese protests against this use, the League of Nations recalled that “the use of gas is a method of warfare condemned by international law”.⁴⁵⁷
- 447.** In a resolution adopted in 1938 concerning the protection of civilian populations against air bombardment in case of war, the Assembly of the League of Nations reaffirmed that “the use of chemical . . . methods in the conduct of war is contrary to international law”.⁴⁵⁸
- 448.** In a resolution adopted in 1986, the UN Security Council deplored the use of chemical weapons in the Iran–Iraq War.⁴⁵⁹
- 449.** In a resolution adopted in 1987, the UN Security Council denounced of the use of chemical weapons.⁴⁶⁰
- 450.** In a resolution adopted in 1988 on the use of chemical weapons in the Iran–Iraq War, the UN Security Council stated that:

The Security Council,

...

Dismayed by the mission's [i.e. the Mission Dispatched by the UN Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict

⁴⁵² Zaire, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.28, 11 October 1977, p. 4.

⁴⁵³ Zimbabwe, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

⁴⁵⁴ Report on the Practice of Zimbabwe, 1998, Chapter 3.4.

⁴⁵⁵ ICRC archive document. ⁴⁵⁶ ICRC archive document.

⁴⁵⁷ League of Nations, 101st Session of the Council, Eighth Meeting, *Official Journal*, May–June 1938, pp. 378–379; 102nd Session of the Council, Fourth Meeting, *Official Journal*, November 1938, p. 881.

⁴⁵⁸ League of Nations, Assembly, Resolution adopted on 30 September 1938, § II, *Official Journal*, Special Supplement No. 182, Records of the 19th Ordinary Session of the Assembly, pp. 15–17.

⁴⁵⁹ UN Security Council, Res. 582, 24 February 1986, § 2.

⁴⁶⁰ UN Security Council, Res. 598, 20 July 1987, preamble.

between Iran and Iraq] conclusions that chemical weapons continue to be used in the conflict and that their use has been on an ever more intensive scale than before,

1. *Affirms* the urgent necessity of strict observance of the [1925 Geneva Gas Protocol];
2. *Condemns vigorously* the continued use of chemical weapons in the conflict between the Islamic Republic of Iran and Iraq contrary to obligations under the Geneva Protocol;
3. *Expects* both sides to refrain from the future use of chemical weapons in accordance with their obligations under the Geneva Protocol;
4. *Calls upon* all States to continue to apply or to establish strict control of the export to the parties to the conflict of chemical products serving for the production of chemical weapons.⁴⁶¹ [emphasis in original]

451. In a resolution adopted in 1988, the UN Security Council expressed its concern over the possible use of chemical weapons in the future and its determination to “intensify its efforts to end all use of chemical weapons in violation of international obligations now and in the future”. The meaning of “international obligations” was explained in the second operative paragraph, which encourages the UN Secretary-General to investigate alleged breaches of “the 1925 Geneva Protocol or other relevant rules of customary law”.⁴⁶²

452. In Resolution 687 adopted in 1991 following the cessation of hostilities in the Gulf War, the UN Security Council recalled that:

Iraq has subscribed to the Final Declaration adopted by all States participating in the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States, held in Paris from 7 to 11 January 1989, establishing the objective of universal elimination of chemical and biological weapons.

In Part C of the resolution, the Security Council stated that it:

7. *Invites* Iraq to reaffirm unconditionally its obligations under the [1925 Geneva Gas Protocol] . . .
8. *Decides* that Iraq shall unconditionally accept the destruction, removal, or rendering harmless, under international supervision, of:
 - (a) All chemical and biological weapons and all stocks of agents and all related subsystems and components and all research, development, support and manufacturing facilities related thereto.⁴⁶³ [emphasis in original]

453. In a large number of resolutions adopted between 1968 and 1989, the UN General Assembly called on all States to become parties to the 1925 Geneva Gas Protocol.⁴⁶⁴

⁴⁶¹ UN Security Council, Res. 612, 9 May 1988, preamble and §§ 1–4.

⁴⁶² UN Security Council, Res. 620, 26 August 1988, § 2.

⁴⁶³ UN Security Council, Res. 687, 3 April 1991, Part C, §§ 7–8.

⁴⁶⁴ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 5; Res. 2454 (XXIII) A, 20 December 1968, preamble; Res. 2603 (XXIV) B, 16 December 1969, § I(2); Res. 2662 (XXV), 7 December 1970, § 2; Res. 2677 (XXV), 9 December 1970, § 1; Res. 2827 (XXVI) A, 16 December 1971, § 6; Res. 2852 (XXVI), 20 December 1971, § 1; Res. 2853 (XXVI), 20 December 1971, § 1; Res. 2933 (XXVII), 29 December 1972, § 5; Res. 3077 (XXVIII), 6 December 1973, § 5; Res. 3256 (XXIX), 9 December 1974, § 5; Res. 31/65, 10 December 1976, § 4; Res. 32/77,

454. In several resolutions adopted between 1992 and 1999, the UN General Assembly called on all States to become parties to the 1993 CWC.⁴⁶⁵

455. A large number of UN General Assembly resolutions generally call for respect for the 1925 Geneva Gas Protocol or indicate its importance. Seventeen resolutions state that the UN General Assembly “reiterates its call for strict observance by all States of the principles and objectives of the 1925 Protocol”.⁴⁶⁶ Thirteen resolutions repeat this call and condemn “all actions contrary to those objectives”.⁴⁶⁷ Following the alleged use of chemical weapons by Iraq in 1988, the General Assembly further strengthened the language in several resolutions, by adding the word “vigorously” after “condemns”.⁴⁶⁸ In two other resolutions, the General Assembly stated the “need for strict observance of existing international obligations regarding prohibitions on chemical . . . weapons and condemns all actions that contravene these obligations”.⁴⁶⁹ Two resolutions referred to the “continuing importance of the 1925 Geneva Protocol”.⁴⁷⁰ Several resolutions had as their title “Measures to uphold the authority of the 1925 Geneva Protocol”.⁴⁷¹

456. A number of resolutions adopted by the UN General Assembly refer to the 1925 Geneva Gas Protocol as part of the rules of IHL to be respected. In them, the General Assembly calls upon “all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular . . . the

12 December 1977, § 3; Res. 33/59 A, 14 December 1978, § 4; Res. 35/144 C, 12 December 1980, § 2; Res. 37/98 D, 13 December 1982, § 1; Res. 40/92 A, 12 December 1985, § 5; Res. 41/58 B, 3 December 1986, § 5; Res. 43/74 A, 7 December 1988, § 2; Res. 44/115 B, 15 December 1989, § 2.

⁴⁶⁵ UN General Assembly, Res. 47/39, 30 November 1992, § 3; Res. 51/45 T, 10 December 1996, § 4; Res. 53/77 R, 4 December 1998, § 5; Res. 54/54 E, 1 December 1999, § 5.

⁴⁶⁶ UN General Assembly, Res. 2454 (XXIII) A, 20 December 1968, preamble; Res. 31/65, 10 December 1976, preamble; Res. 35/144 B, 12 December 1980, preamble; Res. 35/144 C, 12 December 1980, § 1; Res. 36/96 A, 9 December 1981, preamble; Res. 37/98 B, 13 December 1982, preamble; Res. 38/187 B, 20 December 1983, preamble; Res. 40/92 B, 12 December 1985, preamble; Res. 40/92 C, 12 December 1985, preamble; Res. 41/58 C, 3 December 1986, preamble; Res. 41/58 D, 3 December 1986, preamble; Res. 45/57 A, 4 December 1990, § 1; Res. 45/57 C, 4 December 1990, § 2; Res. 46/35 B, 6 December 1991, § 2; Res. 46/35 C, 6 December 1991, preamble and § 1; Res. 51/45 P, 10 December 1996, § 1; Res. 53/77 L, 4 December 1998, § 1.

⁴⁶⁷ UN General Assembly, Res. 2162 (XXI) B, 5 December 1966, § 1; Res. 2662 (XXV), 7 December 1970, § 1; Res. 2674 (XXV), 9 December 1970, § 3; Res. 2827 (XXVI) A, 16 December 1971, preamble; Res. 2933 (XXVII), 29 November 1972, preamble; Res. 3077 (XXVIII), 6 December 1973, preamble; Res. 3256 (XXIX), 9 December 1974, preamble; Res. 3465 (XXX), 11 December 1975, preamble; Res. 37/98 E, 13 December 1982, § 2; Res. 39/65 A, 12 December 1984, preamble; Res. 42/37 C, 30 November 1987, § 1; Res. 43/74 A, 7 December 1988, § 1; Res. 44/115 B, 15 December 1989, § 1.

⁴⁶⁸ UN General Assembly, Res. 44/115 B, 15 December 1980, § 1; Res. 45/57 C, 4 December 1990, § 1; Res. 46/35 B, 6 December 1991, § 1.

⁴⁶⁹ UN General Assembly, Res. 40/92 C, 12 December 1985, § 1; Res. 41/58 C, 3 December 1986, § 1. (Similar wording is to be found in Res. 39/65 A, 12 December 1984, § 1.)

⁴⁷⁰ UN General Assembly, Res. 40/92 A, 12 December 1985, preamble; Res. 41/58 B, 3 December 1986, preamble.

⁴⁷¹ UN General Assembly, Res. 37/98 D, 13 December 1982; Res. 42/37 C, 30 November 1987; Res. 44/115 B, 15 December 1989; Res. 45/57 C, 4 December 1990; Res. 46/35 B, 6 December 1991; Res. 51/45 P, 10 December 1996.

1925 Geneva Protocol"⁴⁷² and states that it is "convinced of the continuing value of established humanitarian rules relating to armed conflict, in particular... the 1925 Geneva Protocol".⁴⁷³ Two resolutions recall "the provisions of the 1925 Geneva Protocol and other relevant rules of customary international law".⁴⁷⁴

457. In a resolution adopted in 1969, the UN General Assembly stated that the 1925 Geneva Gas Protocol "embodies the generally recognised rules of international law prohibiting the use in international armed conflicts of all... chemical methods of warfare, regardless of any technical developments". It declared:

as contrary to the generally recognized rules of international law, as embodied in the [1925 Geneva Gas Protocol] the use in international armed conflicts of:

- (a) Any chemical agents of warfare – chemical substances, whether gaseous, liquid or solid – which might be employed because of their direct toxic effects on man, animals or plants.⁴⁷⁵

The large number of States which abstained in the vote on the resolution (36) was partly due to disagreement on the scope of the 1925 Geneva Gas Protocol. Other States thought that the UN General Assembly should not interpret multilateral treaties.⁴⁷⁶

458. In a resolution adopted in 1970, the UN General Assembly called upon "the Government of Portugal not to use chemical... methods of warfare against the peoples of Angola, Mozambique and Guinea (Bissau) contrary to the generally recognised rules of international law embodied in the 1925 Geneva Protocol".⁴⁷⁷

459. In a resolution adopted in 1971, the UN General Assembly reiterated its condemnation of the use of chemical weapons by Portugal against certain

⁴⁷² UN General Assembly, Res. 3032 (XXVII), 18 December 1972, § 2; Res. 3102 (XXVIII), 12 December 1973, § 4; Res. 3319 (XXIX), 14 December 1974, § 3; Res. 3500 (XXX), 15 December 1975, § 1; Res. 31/19, 24 December 1976, § 1.

⁴⁷³ UN General Assembly, Res. 32/44, 8 December 1977, § 6.

⁴⁷⁴ UN General Assembly, Res. 42/37 C, 30 November 1987, preamble; Res. 43/74 A, 7 December 1988, preamble.

⁴⁷⁵ UN General Assembly, Res. 2603 A (XXIV), 16 December 1969, preamble and § (a). The resolution was adopted by 80 votes in favour, 3 against (Australia, Portugal and US) and 36 abstentions (Austria, Belgium, Bolivia, Canada, Chile, China, Denmark, El Salvador, France, Greece, Iceland, Israel, Italy, Japan, Laos, Liberia, Luxembourg, Madagascar, Malawi, Malaysia, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Philippines, Sierra Leone, Singapore, South Africa, Swaziland, Thailand, Tunisia, Turkey, UK, Uruguay and Venezuela), UN Doc. A/PV.1836, 16 December 1969, p. 4.

⁴⁷⁶ Debates in the First Committee of the UN General Assembly, UN Doc.A/C.1/PV.1716, 9 December 1969; UN Doc. A/C.1/PV.1717, 10 December 1969.

⁴⁷⁷ UN General Assembly, Res. 2707 (XXV), 14 December 1970, § 9. (The resolution was adopted by 94 votes in favour, 6 against and 16 abstentions. The votes against and abstaining appear to have been linked to the colonial question rather than to the evaluation of the value of the 1925 Geneva Gas Protocol as such.)

territories under its administration.⁴⁷⁸ The condemnation was repeated in two further resolutions in 1972 and 1973.⁴⁷⁹

460. In two resolutions adopted in 1971, the UN General Assembly called upon “all parties to any armed conflict to observe the rules laid down . . . in the 1925 Geneva Protocol”.⁴⁸⁰

461. In a resolution adopted in 1974, the UN General Assembly stated that “the use of chemical . . . weapons in the course of military operations constitutes one of the most flagrant violations of the Geneva [Gas] Protocol of 1925 . . . and the principles of international humanitarian law . . . and shall be severely condemned”.⁴⁸¹

462. With a view to reaching an agreement that would provide for the total elimination of chemical weapons, the UN General Assembly expressed support for the goal of a total ban in numerous resolutions.⁴⁸²

463. In 1978, in the Final Document of its Tenth Special Session, the UN General Assembly stated that:

72. All States should adhere to the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on 17 June 1925.
75. The complete and effective prohibition of the development, production and stockpiling of all chemical weapons and their destruction represents one of the most urgent measures of disarmament. Consequently, the conclusions of a convention to this end, on which negotiations have been going on for several years, is one of the most urgent tasks of multilateral negotiations. After its conclusion, all States should contribute to ensuring the broadest possible application of the convention through its early signature and ratification.⁴⁸³

⁴⁷⁸ UN General Assembly, Res. 2795 (XXVI), 10 December 1971, preamble.

⁴⁷⁹ UN General Assembly, Res. 2918 (XXVII), 14 November 1972, preamble; Res. 3113 (XXVIII), 12 December 1973, § 3.

⁴⁸⁰ UN General Assembly, Res. 2852 (XXVI), 20 December 1971, § 1; Res. 2853 (XXVI), 20 December 1971, § 1.

⁴⁸¹ UN General Assembly, Res. 3318 (XXIX), 14 December 1974, § 2. (Similar language is used in Res. 39/65 E, 12 December 1984, which states in its second preambular paragraph that “the use of such agents in war is universally condemned.” The resolution was adopted without a vote.)

⁴⁸² UN General Assembly, Res. 2662 (XXV), 7 December 1970, § 5(a) and (b); Res. 2827 (XXVI) A, 16 December 1971, § 4; Res. 2827 (XXVI) B, 16 December 1971; Res. 2933 (XXVII), 29 December 1972, preamble, §§ 1 and 3; Res. 3077 (XXVIII), 6 December 1973, § 1; Res. 3256 (XXIX), 9 December 1974, §§ 1 and 2; Res. 3465 (XXX), 11 December 1975, preamble and § 2; Res. 31/65, 10 December 1976, preamble and § 1; Res. 32/77, 12 December 1977, preamble and § 1; Res. 33/59 A, 14 December 1978, preamble; Res. 34/72, 11 December 1979, § 1; Res. 35/144 A, 12 December 1980, § 1(a); Res. 36/96 B, 9 December 1981, § 1; Res. 37/98 A, 13 December 1982, preamble; Res. 37/98 B, 13 December 1982, preamble; Res. 38/187 A, 20 December 1983, preamble; Res. 39/65 A, 12 December 1984, § 3; Res. 39/65 C, 12 December 1984, § 2; Res. 40/92 A, 12 December 1985, preamble; Res. 41/58 B, 3 December 1986, preamble; Res. 41/58 C, 3 December 1986, § 3; Res. 42/37 A, 30 November 1987, § 2; Res. 43/74 C, 7 December 1988, preamble; Res. 44/115 A, 15 December 1989, preamble; Res. 45/57 A, 4 December 1990, preamble; Res. 46/35 C, 6 December 1991, preamble; Res. 47/39, 30 November 1992, preamble; Res. 51/45 P, 10 December 1996, preamble; Res. 51/45 T, 10 December 1996, preamble.

⁴⁸³ UN General Assembly, Final Document of the Tenth Special Session, UN Doc. A/S-10/2, 30 June 1978, III. Programme of Action, §§ 72 and 75.

464. In a resolution adopted in 1982, the UN General Assembly stated that “the use of chemical . . . weapons has been declared incompatible with the accepted norms of civilization”.⁴⁸⁴

465. In a resolution adopted in 1982, the UN General Assembly outlined a procedure for investigations into breaches of the 1925 Geneva Gas Protocol, which involved the UN Secretary-General convening a group of experts to investigate “activities that may constitute a violation of the Protocol or of the relevant rules of customary international law”.⁴⁸⁵ This resolution was adopted in the context of the East-West conflict over the alleged use of chemical weapons in Afghanistan, Kampuchea and Laos. Although the debates were strongly partisan in relation to the actual allegations, there was strong support for the norm prohibiting the use of chemical weapons.⁴⁸⁶

466. In a resolution adopted in 1988, the UN General Assembly expressed “deep dismay at the use of chemical weapons in violation of the 1925 Geneva Protocol and of other rules of customary international law” and requested that the Secretary-General investigate reports of the possible use of chemical weapons in the Iran–Iraq War.⁴⁸⁷ A further request for investigation into the use of chemical weapons was made in a resolution adopted by the UN General Assembly in 1989, which expressed the deep dismay of the UN General Assembly “at the use and risk of use of chemical weapons”.⁴⁸⁸

467. In a resolution adopted in 1991 on the situation of human rights in Iraq, the UN General Assembly stated that it was “deeply concerned by the fact that chemical weapons have been used on the Kurdish population”.⁴⁸⁹

468. In a resolution adopted in 1993, the UN General Assembly stated that it was “deeply concerned by the fact that chemical weapons have been used on the Kurdish population”.⁴⁹⁰

⁴⁸⁴ UN General Assembly, Res. 37/98 E, 13 December 1982, preamble. (Similar language is to be found in Res. 2162 (XXI) B, 5 December 1966, which states in its second preambular paragraph that “weapons of mass destruction constitute a danger to all mankind and are incompatible with the accepted norms of civilisation”. The resolution was adopted by 101 votes in favour, none against and 3 abstentions.)

⁴⁸⁵ UN General Assembly, Res. 37/98 D, 13 December 1982, § 4. (The resolution was adopted by 86 votes in favour, 19 against and 33 abstentions. Against: Afghanistan, Bulgaria, Belarus, Congo, Cuba, Czechoslovakia, Ethiopia, GDR, Grenada, Hungary, Laos, Libya, Mongolia, Poland, Syria, Ukraine, USSR, Vietnam and Democratic Yemen. Abstaining: Algeria, Argentina, Bahrain, Bhutan, Bolivia, Brazil, Burma, Burundi, Cyprus, Finland, Ghana, Guinea, Guinea-Bissau, Guyana, Iraq, Jordan, Kuwait, Madagascar, Mali, Mexico, Mozambique, Nicaragua, Panama, Peru, Qatar, Sierra Leone, Sri Lanka, Tanzania, Uganda, United Arab Emirates, Venezuela, Yemen and SFRY.)

⁴⁸⁶ UN General Assembly, UN Doc. A/37/PV.101, 13 December 1982, pp. 1667–1680.

⁴⁸⁷ UN General Assembly, Res. 43/74 A, 7 December 1988, preamble and § 5. (The resolution was adopted without a vote.)

⁴⁸⁸ UN General Assembly, Res. 44/115 B, 15 December 1989, preamble. (The resolution was adopted without a vote.)

⁴⁸⁹ UN General Assembly, Res. 46/134, 17 December 1991, preamble. The resolution was adopted by 129 votes in favour, one against (Iraq) and 17 abstentions (Bangladesh, Brunei Darussalam, China, Côte d'Ivoire, Cuba, Indonesia, Laos, Lesotho, Malaysia, Morocco, Namibia, Nigeria, Pakistan, Sri Lanka, Uganda, Tanzania and Zimbabwe).

⁴⁹⁰ UN General Assembly, Res. 48/144, 20 December 1993, preamble.

469. In several resolutions adopted between 1996 and 2000, the UN General Assembly stated its determination “to achieve the effective prohibition of the development, production, acquisition, transfer, stockpiling and use of chemical weapons and their destruction”. It stressed the importance of the OPCW and the necessity of universal adherence to the 1993 CWC.⁴⁹¹

470. In a resolution adopted in 1988, the UN Sub-Commission on Human Rights stated that it was “deeply concerned” by reports of the increased use of chemical weapons and called upon all States to “observe strictly the principles and objectives” of the 1925 Geneva Gas Protocol.⁴⁹²

471. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights stated that the use of chemical weapons was “also incompatible with the prohibition against any form of torture or cruel, inhuman or degrading treatment or punishment”. It called upon all States “to abide by their international obligations in this field”.⁴⁹³

472. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights stated that chemical weapons were “weapons of mass destruction or had indiscriminate effects”. It also stated that the use of these weapons was “incompatible with human rights and humanitarian law”.⁴⁹⁴

473. In 1969, in a report on chemical and bacteriological (biological) weapons and the effects of their possible use, the UN Secretary-General urged all UN member States to accede to the 1925 Geneva Gas Protocol, to affirm that the prohibition covered all sorts of chemical weapons and to reach an agreement on the elimination of chemical weapons.⁴⁹⁵

474. In 1981 and 1982, the UN Secretary-General produced reports on chemical and bacteriological (biological) weapons which included the reports of the Group of Experts to Investigate Reports on the Alleged Use of Chemical Weapons in accordance with UN General Assembly Resolutions 35/144 C (1980) and 36/96 C (1981).⁴⁹⁶

475. In 1984, in a message to the Presidents of Iran and Iraq, the UN Secretary-General stated that “it is a deplorable fact that chemical weapons have been used in contravention of the Geneva Protocol of 1925 . . . This drew widespread international condemnation. It is imperative that resort to such weapons should not occur.”⁴⁹⁷

⁴⁹¹ UN General Assembly, Res. 51/45 T, 10 December 1996, preamble and § 2; Res. 52/38 T, 9 December 1997, preamble and § 3; Res. 53/77 R, 4 December 1998, preamble and § 2; Res. 54/54 E, 1 December 1999, preamble and § 2; Res. 55/33 H, 20 November 2000, preamble and § 1.

⁴⁹² UN Sub-Commission on Human Rights, Res. 1988/27, 1 September 1988, preamble and § 1.

⁴⁹³ UN Sub-Commission on Human Rights, Res. 1989/39, 1 September 1989, preamble and § 1.

⁴⁹⁴ UN Sub-Commission on Human Rights, Res. 1996/16, 29 August 1996, § 1 and preamble.

⁴⁹⁵ UN Secretary-General, Report on chemical and bacteriological (biological) weapons and the effects of their possible use, UN Doc. A/7575, 1 July 1969, p. xii, §§ 1–3.

⁴⁹⁶ UN Secretary-General, Report on chemical and bacteriological (biological) weapons, UN Doc. A/36/613, 20 November 1981; Report on chemical and bacteriological (biological) weapons, UN Doc. A/37/259, 1 December 1982.

⁴⁹⁷ UN Secretary-General, Messages dated 29 June 1984 to the President of Iran and to the President of Iraq, UN Doc. S/16663, 6 July 1984, p. 1.

476. In 1988, in a note with regard to a report of the Mission Dispatched by the UN Secretary-General to Investigate Allegations of the Use of Chemical Weapons in the Conflict between Iran and Iraq, the UN Secretary-General stated that:

It is with a sense of dismay and deep regret that the Secretary-General informs the Security Council that, despite many international appeals and world-wide condemnations, chemical weapons continue to be used in the conflict between the Islamic Republic of Iran and Iraq in violation of the [1925 Geneva Gas Protocol] and that, indeed, the use of such weapons may have intensified. This, regrettably, is the conclusion of the mission of the medical specialist with the Secretary-General dispatched recently to the Islamic Republic of Iran and Iraq to investigate the allegations lodged by both Governments of the use of chemical weapons.⁴⁹⁸

477. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, Its Causes and Consequences stated that:

Modern warfare has often entailed the deployment of chemical weapons, the use of which is now clearly banned by the Rome Statute of the ICC. Use of such weapons is a war crime and a crime against humanity. The Special Rapporteur has recently received a number of testimonies of victims of the use of chemical weapons, especially from Vietnam. The victims have suffered disabilities related to their reproductive organs and have given birth to children with severe disabilities. The consequences resulting from the use of chemical weapons can be devastating, not only for the victim concerned but also for the next generation, unborn at the time of the armed conflict.⁴⁹⁹

Other International Organisations

478. In a resolution on chemical weapons adopted in 1996, the APC-EU Joint Assembly noted that the "CWC prohibits the development, production, stockpiling, circulation and use of chemical weapons, thereby helping to safeguard peace and international security". It called upon all members to ratify the Convention as soon as possible.⁵⁰⁰

⁴⁹⁸ UN Secretary-General, Note on the report of the mission dispatched by the Secretary-General to investigate allegations of the use of chemical weapons in the conflict between Iran and Iraq, UN Doc. S/19823, 25 April 1988, p. 1, § 1; see also the subsequent notes by the UN Secretary-General on the same matter such as UN Doc S/20060, 20 July 1988, p. 1, § 1, UN Doc. S/20063, 25 July 1988, p. 1, § 1, UN Doc. S/20134, 19 August 1988, p. 1, § 1 and Julian Perry Robinson, "The Negotiations on the Chemical Weapons Convention: A Historical Overview", in Michael Bothe, Natalino Ronzitti and Allan Rosas (eds.), *The New Chemical Weapons Convention: Implementation and Prospects*, Kluwer Law International, The Hague, 1998, pp. 19 and 34.

⁴⁹⁹ UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on violence against women perpetrated and/or condoned by the State during times of armed conflict (1997–2000), UN Doc. E/CN.4/2001/73, 23 January 2001, § 46.

⁵⁰⁰ ACP-EU Joint Assembly, Resolution on chemical weapons, 22 March 1996, *Official Journal*, No. C 254, 1996, Item 4.

479. In a resolution adopted in 1985 on war between Iran and Iraq, the Parliamentary Assembly of the Council of Europe called upon all member States to support efforts to put an end to the use of chemical weapons.⁵⁰¹

480. In 1985, in a report on the deteriorating situation in Afghanistan, the Rapporteur of the Parliamentary Assembly of the Council of Europe stated that “according to several concordant accounts, . . . chemical substances and incendiary bombs producing gases of various colours have been discharged”. In this respect, he added that the report of the Special Rapporteur of the UN Commission on Human Rights deserved mention.⁵⁰² In that report, the UN Special Rapporteur had recommended that “the parties to the conflict, namely government and opposition forces, should be reminded that it is their duty to apply fully the rules of international humanitarian law without discrimination”.⁵⁰³

481. In 1986, in a letter on the Iran–Iraq War submitted on behalf of the EC to the UN Secretary-General, the Netherlands stated that the EC member States were “particularly alarmed by renewed violations of humanitarian law and other laws of armed conflict, including the use of chemical weapons, and they condemn such violations wherever they occur”.⁵⁰⁴

482. In 1987, during a debate in the First Committee of the UN General Assembly, Denmark condemned, on behalf of the EC, the use of chemical weapons in the Iran–Iraq War and chemical attacks against the civilian population.⁵⁰⁵

483. The preamble to EEC Regulation No. 428/89 of 20 February 1989 concerning the export of certain chemical products recalls that, at the 1989 international conference in Paris, the EEC strongly condemned the use of chemical weapons.⁵⁰⁶

484. In 1990, during a debate in the First Committee of the UN General Assembly, Italy stated, on behalf of the EC, that it supported “the goal of a total chemical-weapons ban”.⁵⁰⁷

485. In 1991, during a debate in the First Committee of the UN General Assembly, the Netherlands expressed, on behalf of the EC, “the hope that States will make their commitment to the future Chemical Weapon Convention

⁵⁰¹ Council of Europe, Parliamentary Assembly, Resolution 849, 30 September 1985, pp. 103–104, § 10(v).

⁵⁰² Council of Europe, Parliamentary Assembly, Rapporteur, Report on the deteriorating situation in Afghanistan, Doc. 5495, 15 November 1985, pp. 7–8, § 16(e).

⁵⁰³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, Recommendations, reprinted in Council of Europe, Parliamentary Assembly, Doc. 5495, Appendix 1, 15 November 1985, p. 11, § 190.

⁵⁰⁴ EC, Letter dated 26 February 1986 from the Netherlands on behalf of the EC to the UN Secretary-General, UN Doc. S/17867, 26 February 1986.

⁵⁰⁵ EC, Statement by Denmark on behalf of the EC before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.4, 13 October 1987, p. 51; EC, Statement by Denmark on behalf of the EC before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.25, 29 October 1987, p. 13.

⁵⁰⁶ European Council, Regulation No. 428/89, *Official Journal of European Community*, No. L50, 20 February 1989, p. 1.

⁵⁰⁷ EC, Statement by Italy on behalf of the EC before the First Committee of the UN General Assembly, UN Doc. A/C.1/45/PV.3, 15 October 1990, p. 22.

unambiguously clear" and declared that "it is important that [chemical] weapons be banned everywhere and forever".⁵⁰⁸

486. In 1995, during a debate in the First Committee of the UN General Assembly, Spain expressed support, on behalf of the EU, for the strengthening of the prohibition against chemical weapons.⁵⁰⁹

487. At the First Conference of States Parties to the CWC in 1997, the Netherlands stated, on behalf of the EU, that "Member states of the Union have worked actively to promote the universality of the Convention. We are committed to ensuring... that the treaty is universal." It reconfirmed its good intentions by once more emphasising its commitment to global chemical disarmament.⁵¹⁰

488. In the Final Communiqué of its 12th Session in 1991, the GCC Supreme Council confirmed "the necessity of making the whole Middle East region free of all sorts of weapons of mass destruction, including... chemical... weapons".⁵¹¹

489. In the Final Communiqué of its 16th Session in 1995, the GCC Supreme Council expressed "its great regret that the Iraqi government continues to produce... chemical and radioactive weapons which are... dangerous and destructive". It called for a zone free of weapons of mass destruction, including chemical weapons, and confirmed "the importance of considering the process of removing Iraqi weapons of mass destruction as a step towards evacuating the whole region of such destructive weapons". It further called for a "ban on the spreading of technology related to the research on weapons of mass destruction and their production in the Gulf region".⁵¹²

490. In a resolution adopted in 1970, the Council of the League of Arab States invited:

the Arab Member States that did not adhere to the 1925 [Geneva Gas Protocol] to adhere to it with the following reservations:

- ...
- (b) If there is a breach of the prohibition provided by the protocol, under any form and by any entity, the adhering State would be freed of its commitment to its provisions.⁵¹³

⁵⁰⁸ EC, Statement by Netherlands on behalf of the EC before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.30, 7 November 1991, p. 22.

⁵⁰⁹ EU, Statement by Spain on behalf of the EU before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.3, 16 October 1995, p. 12.

⁵¹⁰ EU, Statement by Netherlands on behalf of the EU at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997. (The Member States of the EU, the Associated Countries from Central and Eastern Europe, the Associated Country Cyprus, as well as Norway, Iceland and Liechtenstein aligned themselves with this statement.)

⁵¹¹ GCC, Supreme Council, 12th Session, Kuwait, 23–25 December 1991, Final Communiqué, annexed to Letter dated 30 December 1991 from Kuwait to the UN Secretary-General, UN Doc. A/46/833-S/23336, 30 December 1991.

⁵¹² GCC, Supreme Council, 16th Session, Muscat, 4–6 December 1995, Final Communiqué, annexed to Letter dated 29 December 1995 from Oman to the UN Secretary-General, UN Doc. A/51/56-S/1995/1070, 29 December 1995.

⁵¹³ League of Arab States, Council, Res. 2676, 15 September 1970.

491. In 1994, the OIC expressed its deep concern that “UNPROFOR authorities allowed the Serbs from the UNPA’s in the Republic of Croatia to have at their disposal internationally prohibited weapons such as . . . poisonous gases used for mass killing of civilians”.⁵¹⁴

492. In its report on the implementation of the 1993 CWC in the year 2001, the OPCW stated that:

3. The year 2001 saw a number of significant milestones relating to the destruction of chemical weapons in all chemical weapons possessor States Parties – India, the Russian Federation, the United States of America, and a fourth State Party.
4. During 2001 India and the United States of America completed the destruction of 20% of their Category 1 chemical weapons ahead of the Convention’s timeline of 29 April 2002.
5. The destruction of Category 2 chemical weapons was well underway in 2001 in both India and the Russian Federation. No Category 2 chemical weapons were declared by the United States of America and the fourth chemical weapons possessor State Party.
6. India and the Russian Federation also completed the destruction of all their Category 3 chemical weapons in 2001. Another State Party had completed the destruction of these weapons in 1999. By the end of 2001 the United States of America had completed the destruction of over 99% of its Category 3 chemical weapons.⁵¹⁵

The OPCW further stated that:

Between [the entry into force of the 1993 CWC] and 31 December 2001, OPCW inspectors confirmed the destruction of a total of 6,518 metric tonnes of chemical agent contained in 2,098,013 munitions items (including 4,878 one-ton containers) in the four chemical weapons possessor States Parties [i.e. India, Russia, US and a fourth State Party].⁵¹⁶

International Conferences

493. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the protection of civilian populations against the dangers of indiscriminate warfare which expressly invited “all Governments who have not yet done so to accede to the Geneva Gas Protocol of 1925 which prohibits the use of asphyxiating, poisonous, or other gases, all analogous liquids, materials or devices”.⁵¹⁷

494. In a resolution adopted in 1968 on human rights in armed conflicts, the Teheran International Conference on Human Rights emphasised that

⁵¹⁴ OIC, Declaration of the Enlarged Meeting of the Foreign Ministers of the Contact Group of the OIC and OIC States Contributing Troops to UNPROFOR in Bosnia and Herzegovina, Geneva, 6 December 1994, § 6.

⁵¹⁵ OPCW, Report on the Implementation of the 1993 CWC in the Year 2001, Doc. C-7/3, 10 October 2002, Introduction and Overview, §§ 3–6.

⁵¹⁶ OPCW, Report on the Implementation of the 1993 CWC in the Year 2001, Doc. C-7/3, 10 October 2002, § 2.15.

⁵¹⁷ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

"the widespread violence and brutality of our times, including... the use of chemical... means of warfare... erode human rights and engender counter-brutality".⁵¹⁸

495. The 21st International Conference of the Red Cross in 1969 adopted a resolution on weapons of mass destruction in which it appealed to States to accede to the 1925 Geneva Gas Protocol and "to comply strictly with its provisions". The Conference further urged governments "to conclude as rapidly as possible an agreement banning the production and stockpiling of chemical... weapons".⁵¹⁹

496. The 25th International Conference of the Red Cross in 1986 adopted a resolution on protection of the civilian population in armed conflicts in which it deplored "the use of prohibited weapons such as chemical weapons... in violation of the laws and customs of war" and was "deeply concerned by information that prohibited weapons, including chemical weapons, have been used in some conflicts".⁵²⁰

497. The Final Declaration of the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989, adopted by consensus of the 149 participating States, stated that:

1. The participating States... are determined to prevent any recourse to chemical weapons by completely eliminating them. They solemnly affirm their commitments not to use chemical weapons and condemn such use...
2. The participating States recognize the importance and continuing validity of the [1925 Geneva Gas Protocol]. The States Parties to the Protocol solemnly reaffirm the prohibition as established in it. They call upon all States which have not yet done so to accede to the Protocol.
3. The participating States stress the necessity of concluding, at an early date, a Convention on the prohibition of the development, production, stockpiling and use of all chemical weapons, and on their destruction. This Convention shall be global and comprehensive and effectively verifiable. It should be of unlimited duration... In order to achieve as soon as possible the indispensable universal character of the Convention, they call upon all States to become parties thereto as soon as it is concluded.⁵²¹

498. During the First Session of the Conference of States Parties to the CWC in 1997, States parties widely acknowledged "a need for greater universality" and emphasized "the importance of ratification by the Russian Federation, States in 'regions of tension', and States with significant chemical industries".⁵²²

⁵¹⁸ International Conference on Human Rights, Teheran, 22 April–13 May 1968, Res. XXIII, 12 May 1968, preamble.

⁵¹⁹ 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XIV.

⁵²⁰ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, preamble and Res. VIII, preamble.

⁵²¹ Conference of States Parties to the 1925 Geneva Protocol and Other Interested States, Paris, 7–11 January 1989, Final Declaration, 11 January 1989, §§ 1–3, annexed to letter dated 19 January 1989 from France to the UN Secretary-General, UN Doc. A/44/88, 20 January 1989.

⁵²² Conference of States Parties to the CWC, First Session, The Hague, 6–23 May 1997, *Yearbook of the United Nations*, New York, 1997, Vol. 51, p. 500.

IV. Practice of International Judicial and Quasi-judicial Bodies

499. In the *Tadić* case in 1995, the ICTY discussed the use of chemical weapons in internal conflicts. The Court of Appeal stated that the use of chemical weapons was prohibited in both international and non-international armed conflicts.⁵²³ The basis of the Tribunal's finding was the reaction to the Iraqi use of gas against Kurdish villages. The world community reacted to it with condemnation. The 12 member States of the EC had called for respect for IHL, including the 1925 Geneva Gas Protocol and UN Security Council Resolutions 612 and 620. Germany, UK and US had individually condemned the use of chemical weapons as being a breach of international law. Iraq had denied the allegations. This implied, in the view of the Tribunal, an acceptance that the prohibition also applied to internal conflicts. The Tribunal concluded that:

It is therefore clear that, whether or not Iraq really used chemical weapons against its own Kurdish nationals... there undisputedly emerged a general consensus in the international community on the principle that the use of those weapons is also prohibited in internal armed conflicts.⁵²⁴

V. Practice of the International Red Cross and Red Crescent Movement

500. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that the use of "asphyxiating, poisonous or other gases [and] all analogous liquids, materials or devices" is prohibited.⁵²⁵

501. In a statement issued on 31 January 1967, the ICRC referred to the "alleged use of poison gas" by Egypt in support of republican forces during the civil war in Yemen and appealed urgently to all parties to "observe the rules of international morality and law".⁵²⁶ On 2 June 1967, an ICRC press release noted that a medical team in North Yemen had "collected various indications pointing to the use of poison gas". The statement went on to say that the ICRC was "extremely disturbed and concerned by these methods of warfare which are absolutely forbidden by codified international and customary law" and that it had "communicated its delegates' reports to all authorities concerned in the Yemen conflict, requesting them to take the solemn engagement not to resort

⁵²³ ICTY, *Tadić* case, Interlocutory Appeal, 2 October 1995, § 120.

⁵²⁴ ICTY, *Tadić* case, Interlocutory Appeal, 2 October 1995, § 124.

⁵²⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 919(a) and (b).

⁵²⁶ ICRC, Note d'Information No. 91, *L'actualité de la Croix-Rouge*, 8 February 1967, reprinted in SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. VI, *The Prevention of CBW*, Almqvist & Wiksell, Stockholm, 1975, p. 230, footnote 18.

in any circumstance whatsoever to the use of asphyxiating gases or any other similar toxic substance".⁵²⁷

502. In a memorandum on toxic gas in 1980, the ICRC stated that the prohibition of lethal poison gas was part of customary international law.⁵²⁸

503. At its Rio de Janeiro Session in 1987, the Council of Delegates adopted a resolution on the formal commitment by the Movement to obtain the full implementation of the Geneva Conventions in which it requested the ICRC "to take all necessary steps to enable it to protect and assist . . . victims of the use of prohibited weapons such as chemical weapons".⁵²⁹

504. In a press release issued in 1988 in the context of the Iran–Iraq War, the ICRC stated that:

In a new and tragic escalation of the Iran–Iraq conflict, chemical weapons have been used, killing a great number of civilians in the province of Sulaymaniyah. The use of chemical weapons, whether against military personnel or civilians, is absolutely forbidden by international law and is to be condemned at all times.⁵³⁰

505. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the use of chemical . . . weapons is prohibited (1925 Geneva Protocol); the rules of the law of armed conflict also apply to weapons of mass destruction".⁵³¹

506. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the parties that "the use of chemical . . . weapons is prohibited under international humanitarian law . . . Weapons of mass destruction having indiscriminate effects generally cause irreparable damage among the civilian population, which must be kept out of the fighting."⁵³²

507. In a letter to the ICRC in 1991, the Slovene Red Cross protested against "the use of chemical weapons in Croatia by the Yugoslav army".⁵³³

508. In a letter to the ICRC in 1991, the Croatian Red Cross stated that it had "received information from the battlefields that poisonous gas was applied against the defence forces of Croatia and civilians".⁵³⁴

⁵²⁷ ICRC, Press Release No. 829b, *The ICRC and the Yemen Conflict*, 2 June 1967, reprinted in SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. VI, *The Prevention of CBW*, Almqvist & Wiksell, Stockholm, 1975, p. 233, footnote 27.

⁵²⁸ ICRC archive document.

⁵²⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Rio de Janeiro Session, 27 November 1987, Res. 5, § 2.

⁵³⁰ ICRC, Press Release No. 1567, Iran–Iraq conflict: The ICRC condemns the use of chemical weapons, 23 March 1988.

⁵³¹ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § II, *IRRC*, No. 280, 1991, p. 25.

⁵³² ICRC, Press Release No. 1658, Gulf War: ICRC reminds States of their obligations, 17 January 1991, *IRRC*, No. 280, 1991, p. 26.

⁵³³ Slovene Red Cross, Protest and appeal of the Slovene Red Cross, 22 September 1991.

⁵³⁴ Croatian Red Cross, Appeal by the Croatian Red Cross, 24 September 1991.

509. In a memorandum issued in 1992, the ICRC expressed the view that the use of chemical weapons undermined the prohibition of the use of inherently indiscriminate weapons.⁵³⁵

510. In 1993, the National Society of a State denounced the use of chemical weapons by another State. It stated that during the siege of a major city, troops of that State used chemical weapons, which killed 22 soldiers of the other State.⁵³⁶

511. At the conference to commemorate the entry into force of the 1993 CWC and the establishment of the OPCW in 1997, the ICRC noted that “despite the occurrence of several hundred conflicts since 1918 the use of chemical weapons has been confirmed in only a few cases, including in one instance by the ICRC”. After retracing the history of the prohibition on the use of chemical weapons, a prohibition which has been observed in the rules of warfare of “diverse moral and cultural systems”, the ICRC concluded that “both the law and public abhorrence have undoubtedly played a role in making poison warfare unacceptable”. The ICRC called upon States to adhere to the 1993 CWC, to work towards its universal application and to withdraw any reservations that they might have to the 1925 Geneva Gas Protocol.⁵³⁷

512. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “in particular, the use of chemical . . . weapons . . . is prohibited”.⁵³⁸

VI. Other Practice

513. It is reported that Germany used mustard gas on a large scale in the second Battle of Ypres in April 1915. UK forces reportedly retaliated with gas in September the same year. Approximately 1,000,000 injuries and 91,198 deaths in the First World War were gas-related.⁵³⁹

514. The USSR is reported to have used gas during its incursion into Sinkiang in clashes with the Tungang Mujahideen in 1934.⁵⁴⁰

515. In 1981, an armed opposition group accused the pilots of a State of using “chemical bombs, herbicides and defoliants” against its bases and villages.⁵⁴¹

516. Rule B1 of the Rules Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHHL,

⁵³⁵ ICRC archive document. ⁵³⁶ ICRC archive document.

⁵³⁷ ICRC, Statement at the First Conference of States Parties to the CWC, The Hague, 6–23 May 1997.

⁵³⁸ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

⁵³⁹ Ann van Wynen Thomas and A. J. Thomas, Jr., *Legal Limits on the Use of Chemical and Biological Weapons*, Southern Methodist University Press, Dallas, 1970, p. 138.

⁵⁴⁰ Julian Perry Robinson, “The changing status of chemical and biological warfare: recent technical, military and political developments”, *SIPRI Yearbook 1982: World Armaments and Disarmament*, Taylor & Francis, London, 1982, p. 336.

⁵⁴¹ ICRC archive document.

states that "the customary rule prohibiting the use of chemical weapons, such as those containing asphyxiating or vesicant agents, . . . is applicable in non-international armed conflicts".⁵⁴²

517. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "weapons or other material or methods prohibited in international armed conflicts must not be employed in any circumstances".⁵⁴³

518. In 1990, in a report on human rights in Iraq, Middle East Watch stated with respect to the alleged use by Iraq of chemical weapons against the Kurdish minority in northern Iraq that:

Iraq's defenders argue that it did not literally violate the Geneva Protocol of 1925 when it used chemical weapons against its Kurdish population. The language of the Protocol simply bans the use of chemical weapons "in war". Based on the intent of the drafters, some jurists take the view that the Protocol applies only to international armed conflict, since that was the concern at the time of the states that drew it up. The Arab League ambassador to the United Nations . . . sought to use this legal loophole in Iraq's defence when the United States, Britain, and others condemned Iraq's use of chemical weapons against the Kurds in August and September 1988. The Arab League envoy pointed out that the 1925 Protocol prohibited the use of chemical weapons only between States and did not say anything about the use of such weapons within sovereign borders. He objected strongly to the United Nations being called upon "to investigate a matter within the prerogatives of sovereignty". On the other hand, a leading expert on international humanitarian law [Theodor Meron] consulted by Middle East Watch expressed the view that the prohibition on poison-gas attacks had assumed the status of customary international law, and thus would be prohibited in all circumstances, despite the limited scope of the Protocol.⁵⁴⁴

519. On various occasions between 1990 and 1999, UNITA accused Angolan government forces of using chemical weapons against it.⁵⁴⁵ Many of these

⁵⁴² IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B1, *IRRC*, No. 278, 1990, p. 395.

⁵⁴³ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 5(3), *IRRC*, No. 282, 1991, p. 332.

⁵⁴⁴ Middle East Watch, *Human Rights in Iraq*, 1990, Yale University Press, New Haven, pp. 82–83.

⁵⁴⁵ Voice of the Resistance of the Black Cockerel, 13 June 1993, as translated from the Portuguese in BBC-SWB, 14 June 1993; Voice of the Resistance of the Black Cockerel, 23 June 1993, as translated from the Portuguese in BBC-SWB, 25 June 1993; RDP Antena 1 (Lisbon), 27 June 1993, as translated from the Portuguese in JPRS-TND-93-021, 7 July 1993, p. 1; Carols Verism from Brussels on RDP Antena 1 (Lisbon), 19 July 1994, as excerpted from the Portuguese in BBC-SWB, 22 July 1994; "UNITA claims army is testing chemical weapons", AFP from Luanda, 27 July 1994; Radio Nacional (Luanda), 27 July 1994, as translated from the Portuguese in FBIS-AFR-94-145, 28 July 1994, pp. 9–10; Chris Gordon (from Luanda), "Angolan bombs destroy UNITA stronghold", *Mail & Guardian* website, Johannesburg, 4 October 1999, as in FBIS-AFR-1999-1004; "Fighting razes town in Angola, kills hundreds: rebel spokesman", AFP from Lisbon, 26 September 1999; "Angolan army 'takes key town'", BBC World News website, 26 September 1999; "Angolan army in major offensive against rebel-held Bailundo", SAP-AFP from Luanda, 27 September 1999; "Angola: UNITA denies Bailundo stronghold fallen into

allegations were not, however, substantiated. The only form of verification of use came from a private European medical team that visited Angola for eight days in 1990 and afterwards announced that the team's "clinical and toxicological study shows clearly that the chemical bombs have gassed the population in this region". The validity of these conclusions is, however, uncertain.⁵⁴⁶

520. In 1996, the United Tajik Opposition accused the government of Tajikistan of wanting to use chemical weapons against it. It stated that "according to reliable information from the sources close to the Dushanbe regime leadership, the authorities approached Russia with a request to apply chemical weapons in Tavildara to physically eliminate every living being in the region".⁵⁴⁷

521. In 1998, the participating experts at a Workshop on International Criminalisation of Biological and Chemical Weapons at the Lauterpacht Research Centre for International Law of Cambridge University formulated a Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological and Chemical Weapons. The Draft Convention makes it an international criminal offence to use chemical weapons.⁵⁴⁸

522. It is reported that "in 1999 three of the four states parties that have declared CW stockpiles to the OPCW – India, South Korea and the USA – began destroying these weapons. Russia has not begun the destruction of its CW stockpiles largely owing to a lack of sufficient funding."⁵⁴⁹

523. It is reported that Iraq destroyed chemical agents under UNSCOM supervision.⁵⁵⁰

government hands", RDP Antena 1 radio (Lisbon), 27 September 1999, as translated from the Portuguese in BBC-SWB, 27 September 1999.

⁵⁴⁶ "Chemical War", *The Independent*, London, 22 February 1990, p. 14; "Heyndrickx brengt blitzbezoek aan Angola", *De Morgen*, Brussels, 22 February 1990, p. 10; G. Freilinger, Unofficial Commission for exploration and verification of war gas injuries in the Angola war: preliminary report, Vienna, 3 March 1990; "Dispuut over 'gasoorlog' in Angola houdt aan", *De Standaard*, Brussels, 15 March 1990, p. 4. (See, for example, "Observers evidence use of chemical weapons", *Diary de Notices*, Lisbon, 9 March 1990, p. 14, as translated from the Portuguese in FBIS-AFR-90-077, 20 April 1990, pp. 32-33; "Savimbi, l'Unita et Angola", *Jeune Afrique Economie*, Hors Série, April 1996, collection Marchés nouveau, p. 75.)

⁵⁴⁷ Declaration of the leadership of the United Tajik Opposition addressed to the UN Secretary-General, 5 June 1996.

⁵⁴⁸ Workshop on International Criminalisation of Biological and Chemical Weapons, Lauterpacht Research Centre for International Law, Cambridge, 1-2 May 1998, Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological and Chemical Weapons, reprinted in *The CBW Conventions Bulletin*, No. 42, December 1998, pp. 1-5.

⁵⁴⁹ Jean Pascal Zanders and Maria Wahlberg, "Chemical and biological weapon developments and arms control", in *SIPRI Yearbook 2000: Armaments, Disarmament and International Security*, Oxford University Press, Oxford, 2000, p. 513.

⁵⁵⁰ Maria Wahlberg, Milton Leitenberg and Jean Pascal Zanders, "The future of chemical and biological weapon disarmament in Iraq: from UNSCOM to UNMOVIC", in *SIPRI Yearbook 2000: Armaments, Disarmament and International Security*, Oxford University Press, Oxford, 2000, p. 570.

524. An article in the *Bulletin of the Atomic Scientists* in 1997 listed the following States as allegedly possessing chemical weapons: Bosnia and Herzegovina, Bulgaria, Burma, China, Egypt, France, North Korea, South Korea, India, Iran, Iraq, Israel, Libya, Pakistan, Romania, Russia, Saudi Arabia, Syria, Taiwan, US, Vietnam and FRY. The same article alleged that Burma, Iran, Iraq and Libya had used chemical weapons.⁵⁵¹

525. Employment of chemical weapons by at least four States parties has been alleged since the 1993 CWC entered into force for those countries: India,⁵⁵² Russia,⁵⁵³ Sudan⁵⁵⁴ and Turkey.⁵⁵⁵ The allegations remain unresolved in the public record, notwithstanding the verification capacity maintained by the OPCW.⁵⁵⁶

526. According to the Center for Nonproliferation Studies collecting information from open sources, in 2002 Algeria, Cuba, Sudan and Vietnam were possible possessors of chemical weapons. Probable possessors of chemical weapons were China, Egypt, Ethiopia, Israel, Myanmar, Pakistan and Taiwan. Known possessors, according to this source, were Iran, Iraq, North Korea, Libya, Russia and Syria.⁵⁵⁷

B. Riot Control Agents

I. Treaties and Other Instruments

Treaties

527. The 1925 Geneva Gas Protocol provides that:

Whereas the use in war of asphyxiating, poisonous or any other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; . . .

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

⁵⁵¹ E. J. Hogendoorn, "A Chemical Weapons Atlas", *Bulletin of the Atomic Scientists*, Vol. 53, No. 5, September/October 1997, pp. 35–39.

⁵⁵² During the conflict in Jammu and Kashmir, see "8 September 1999", *The CBW Conventions Bulletin*, No. 46, December 1999, p. 27.

⁵⁵³ During the conflict in Chechnya in 1999, see "5 December 1999", *The CBW Conventions Bulletin*, No. 47, March 2000, p. 30.

⁵⁵⁴ In southern Sudan in July and August 1999, see "31 December 1999", *The CBW Conventions Bulletin*, No. 47, March 2000, p. 35.

⁵⁵⁵ When CS munitions were allegedly used by the Turkish army in an attack on a PKK position in south-eastern Turkey on 11 May 1999 that reportedly resulted in the deaths of 20 Kurdish fighters: see "28 October 1999" (Turkey), *The CBW Conventions Bulletin*, No. 46, December 1999, p. 41.

⁵⁵⁶ Julian Perry Robinson, Item 383 of 3 April 2000, "Effectiveness of the international treaties against chemical and biological armament, and experiences worth sharing", *Pugwash Meeting No. 254*, Oegstgeest, 8–9 April 2000, p. 3.

⁵⁵⁷ Monterey Institute of International Studies, Center for Nonproliferation Studies, *Chemical and Biological Weapons: Possession and Programs Past and Present*, last updated in 2002.

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition.

No State has at any time ratified or acceded to the Protocol with a reservation or declaration of interpretation limiting the types of chemical weapons to which it applies.

528. Article I(5) of the 1993 CWC states that "each State Party undertakes not to use riot control agents as a method of warfare".

529. The non-use of riot control agents is subject to the provisions of a number of articles in the 1993 CWC, first of which is the definition of "chemical weapons" in Article II:

1. "Chemical Weapons" means the following, together or separately:
 - (a) Toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes.

530. Article II(2) of the 1993 CWC defines the term "toxic chemical" as:

any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. This includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere.

531. Article II(7) of the 1993 CWC defines "Riot Control Agent" as "any chemical not listed in a Schedule, which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure".

532. Article II(9)(d) of the 1993 CWC provides that:

9. "Purposes Not Prohibited Under this Convention" means:
 - ...
 - (d) Law enforcement including domestic riot control purposes.

The cumulative effect of these provisions is that riot control agents may not be used as a method of warfare but may be used for certain law enforcement purposes including riot control.

Other Instruments

533. Article 7 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that:

- (a) The prohibition of the use of chemical weapons shall apply to the use, by any method whatsoever, for the purpose of injuring an adversary, of any natural or synthetic substance (whether solid, liquid or gaseous) which is harmful to the human or animal organism by reason of its being a toxic, asphyxiating, irritant or vesicant substance.

(b) The said prohibition shall not apply:

...

- III. to smoke or fog used to screen objectives or for other military purposes, provided that such smoke or fog is not liable to produce harmful effects under normal conditions of use;
- IV. to gas that is merely lachrymatory.

II. National Practice

Military Manuals

534. Australia's *Commanders' Guide* repeats the prohibition of the 1993 CWC, specifying that the use of riot control agents "by ADF members in peacetime requires approval at the highest level of command. Where such approval is given, strict rules of engagement are likely to prescribe the specific situations in which they may be employed."⁵⁵⁸

535. Australia's *Defence Force Manual* states that:

Riot control agents, including tear gas and other gases which have debilitating but non-permanent effects as a means of warfare, is prohibited in armed conflict under the 1993 Chemical Weapons Convention. This does not mean riot control agents cannot be used in times of conflict (e.g. against rioting prisoners of war). Legal advice should be sought on the occasions when their use is considered.⁵⁵⁹

536. Belgium's *Law of War Manual* states that "it is uncertain whether... chemical products that do not cause widespread, long-term and severe damage to the environment" are covered by the prohibition on the use of asphyxiating and other analogous gases.⁵⁶⁰

537. Canada's *LOAC Manual* states that "the use of riot control agents including tear gas and other gases that have debilitating but non-permanent effects, as a means of warfare is prohibited".⁵⁶¹

538. Canada's *Code of Conduct* provides that "the use of CS gas or pepper spray is lawful and may be used for crowd control purposes, but their use as a means of warfare is illegal".⁵⁶²

539. Germany's *Military Manual*, under the heading "Chemical Weapons", proscribes "the use of irritant agents for military purposes".⁵⁶³

540. The *Military Manual of the Netherlands* states that:

Opinion is divided over whether or not the prohibition applies to tear gas, defoliants and other non deadly means. It is said, with regard to tear gas, that it should be prohibited in armed conflicts. It can be used to control order. This should be

⁵⁵⁸ Australia, *Commanders' Guide* (1994), § 312.

⁵⁵⁹ Australia, *Defence Force Manual* (1994), § 413.

⁵⁶⁰ Belgium, *Law of War Manual* (1983), p. 38.

⁵⁶¹ Canada, *LOAC Manual* (1999), p. 5-3, § 27.

⁵⁶² Canada, *Code of Conduct* (2001), Rule 3, § 9.

⁵⁶³ Germany, *Military Manual* (1992), § 434.

distinguished from the use in armed conflict because there it runs the danger of provoking the use of other more dangerous chemicals.⁵⁶⁴

541. New Zealand's Military Manual, in a footnote relating to the 1925 Geneva Gas Protocol, states that "a number of states, including New Zealand, take the view that this does not prevent the use of lachrymose agents, especially if used to maintain or restore discipline in internment or prisoner of war camps".⁵⁶⁵ It further states that "among other war crimes recognised by the customary law of armed conflict are . . . using asphyxiating poisonous and other gases".⁵⁶⁶

542. Spain's LOAC Manual prohibits the use of riot control agents as a means of warfare.⁵⁶⁷

543. The US Field Manual states that:

It is the position of the United States that the Geneva Protocol of 1925 does not prohibit the use in war of . . . riot control agents, which are those agents of a type widely used by governments for law enforcement purposes because they produce, in all but the most unusual circumstances, merely transient effects that disappear within minutes after exposure to the agent has terminated. In this connection, however, the United States has unilaterally renounced, as a matter of national policy, certain uses in war of . . . riot control agents. The policy and provisions of Executive Order No. 11850 do not, however, prohibit or restrict the use of . . . riot control agents by US armed forces either (1) as retaliation in kind during armed conflict or (2) in situations when the United States is not engaged in armed conflict. Any use in armed conflict of . . . riot control agents, however, requires Presidential approval in advance.⁵⁶⁸

544. The US Rules of Engagement for Vietnam stated that:

Riot control agents will be used to the maximum extent possible. CS agents can be effectively employed in inhabited and urban area operations to flush enemy personnel from buildings and fortified positions, thus increasing the enemy's vulnerability to allied firepower while reducing the unnecessary danger to civilians and the likelihood of destruction of civilian property.⁵⁶⁹

545. The US Air Force Pamphlet restates Executive Order No. 11850 of 8 April 1975 and specifies that "the legal effect of this Executive Order is to reflect national policy. It is not intended to interpret the Geneva Protocol of 1925 or change the interpretation of the US that the Protocol does not restrain the use of riot control agents as such."⁵⁷⁰

546. The US Air Force Commander's Handbook states that:

The United States does not regard the Geneva [Gas] Protocol as forbidding use of riot control agents . . . in armed conflict. However, the United States has, as a matter of

⁵⁶⁴ Netherlands, *Military Manual* (1993), p. IV-6/IV-8, § 14.

⁵⁶⁵ New Zealand, *Military Manual* (1992), p. 5-15, § 512, footnote 51.

⁵⁶⁶ New Zealand, *Military Manual* (1992), § 1704(5).

⁵⁶⁷ Spain, *LOAC Manual* (1996), § 3.3.b.(8).

⁵⁶⁸ US, *Field Manual* (1956), § 38(d).

⁵⁶⁹ US, *Rules of Engagement for Vietnam* (1971), § d(2).

⁵⁷⁰ US, *Air Force Pamphlet* (1976), § 6-4(e).

national policy, renounced the first use of riot control agents . . . with certain limited exceptions specified in Executive Order 11850, 8 April 1975. Using . . . riot control agents . . . in armed conflict requires Presidential approval.⁵⁷¹

547. The US Operational Law Handbook states that the prohibition on “using weapons which cause unnecessary suffering, prolonged damage to the natural environment, or poison weapons . . . does preclude the use of . . . riot control agents by US forces in wartime when authorized by the President of the US or his delegate”.⁵⁷²

548. The US Naval Handbook states that:

The United States considers that use of riot control agents in armed conflict was not prohibited by the 1925 Gas Protocol. However, the United States formally renounced first use of riot control agents in armed conflict except in defensive military modes to save lives. Uses of riot control agents in time of armed conflict which the United States considers not to be violative of the 1925 Gas Protocol include:

1. Riot control situations in areas under effective U.S. military control, to include control of rioting prisoners of war.
2. Situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
3. Rescue missions involving downed aircrews or escaping prisoners of war.
4. Protection of military supply depots, military convoys, and other military activities in rear echelon areas from civil disturbances, terrorist activities, or paramilitary operations.

Such employment of riot control agents by U.S. forces in armed conflict requires NCA approval.

Use of riot control agents as a “method of warfare” is prohibited by the 1993 Chemical Weapons Convention. However, that term is not defined by the Convention. The United States considers that this prohibition applies in international as well as internal armed conflict but that it does not apply in normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and non-combatant rescue operations conducted outside of such conflicts.

The United States also considers that it is permissible to use riot control agents against other than combatants in areas under direct U.S. military control, including to control rioting prisoners of war and to protect convoys from civil disturbances, terrorists and paramilitary organizations in rear areas outside the zone of immediate combat.⁵⁷³

National Legislation

549. Australia's Chemical Weapons (Prohibition) Act provides that “a person must not intentionally or recklessly: . . . use riot control agents as a method of

⁵⁷¹ US, *Air Force Commander's Handbook* (1980), § 6-3(a).

⁵⁷² US, *Operational Law Handbook* (1993), p. Q-182, § (i).

⁵⁷³ US, *Naval Handbook* (1995), §§ 10.3.2.1.1 and 10.3.2.1.2.

warfare. Penalty: imprisonment for life." It adds, however, that use for "law enforcement including domestic riot control purposes" is not prohibited.⁵⁷⁴

550. Under Hungary's Criminal Code as amended, employing "chemical weapons and chemical instruments of war" as defined in Article II(1) and (7) of the 1993 CWC is a war crime.⁵⁷⁵

551. India's Chemical Weapons Act provides that:

- (1) No person shall
 - ...
 - (b) use riot control agents as a method of warfare;
 - ...
 - (d) assist, encourage or induce, in any manner, any person to engage in
 - (i) the use of any riot control agent as a method of warfare
 - (ii) any other activity prohibited to a State Party under the Convention.⁵⁷⁶

552. New Zealand's Chemical Weapons Act provides that "every person commits an offence who intentionally or recklessly uses riot control agents as a method of warfare, and is liable on conviction on indictment to imprisonment for life or a fine not exceeding \$1,000,000".⁵⁷⁷

553. Romania's Law on the Prohibition of Chemical Weapons provides that:

- (1) It is prohibited for any person, under any circumstance:
 - ...
 - (e) to use riot control agents as a method of warfare.
- (2) Persons means any natural or legal person on the territory of Romania including public authorities.⁵⁷⁸

It further provides that:

- (1) The act of using chemical weapons is considered a criminal act and is punished by imprisonment, for not less than 5 years and not exceeding 15 years, and prohibition of certain rights.
- (2) In the case of an act with serious consequences, the penalty is imprisonment for not less than 10 years and not exceeding 20 years and prohibition of certain rights and if it caused the death of one or more persons, the penalty is life imprisonment or imprisonment for not less than 15 years and not exceeding 25 years and prohibition of certain rights.⁵⁷⁹

554. Singapore's Chemical Weapons (Prohibition) Act provides that:

Any person who:

- (a) uses a chemical weapon;
- ...

⁵⁷⁴ Australia, *Chemical Weapons (Prohibition) Act* (1994), p. 13, Section 12(f) and p. 95, Section 9(d).

⁵⁷⁵ Hungary, *Criminal Code as amended* (1978), Section 160, §A(3)(c).

⁵⁷⁶ India, *Chemical Weapons Act* (2000), Chapter III, § 13.

⁵⁷⁷ New Zealand, *Chemical Weapons Act* (1996), Part II, Section 8.

⁵⁷⁸ Romania, *Law on the Prohibition of Chemical Weapons* (1997), Article 3.

⁵⁷⁹ Romania, *Law on the Prohibition of Chemical Weapons* (1997), Article 50.

- (g) uses a riot control agent as a method of warfare shall be guilty of an offence and shall on conviction be punished with
- (i) imprisonment for a term which may extend to life imprisonment, and
 - (ii) a fine not exceeding \$ 1 million.⁵⁸⁰

555. Under Sweden's Penal Code as amended, "use of any weapon prohibited by international law" constitutes a crime against international law.⁵⁸¹ It further states that:

A person who:

- ... uses riot control materials as a means of warfare shall be sentenced, if the act is not regarded as a war crime against international law, for *unlawful handling of chemical weapons* to [punishment].⁵⁸² [emphasis in original]

National Case-law

556. No practice was found.

Other National Practice

557. In 1969, during a debate in the UN General Assembly on the question of chemical and bacteriological (biological) weapons, Australia stated that:

The draft resolution [on chemical and bacteriological (biological) weapons under discussion] would declare as contrary to the [1925 Geneva Gas Protocol] "any chemical agent of warfare" with "direct toxic effects on man, animals and plants". It is the view of the Australian Government that the use of non-lethal substances such as riot control agents... and defoliants does not contravene the Geneva Protocol nor customary international law.⁵⁸³

558. The Report on the Practice of Australia refers to a document of 1971 entitled "Protection of the Civil Population Against the Effects of Certain Weapons", which states that:

In answer to a question in the House of Representatives, the Australian Minister for External Affairs... stated that the use of non-lethal tear gases, C.N., C.S., and C.N.D.M., as used in South Vietnam "would not be contrary to any international convention, nor would it contravene the [1925 Geneva Gas Protocol]"...

Neither lethal nor non-lethal gases are employed at present in any part of [the Australian Military Forces], including [the Pacific Islands Regime]. No soldiers are trained in use of weapons involving the use of either such type of gas. In [Papua

⁵⁸⁰ Singapore, *Chemical Weapons (Prohibition) Act* (2000), Section 8.

⁵⁸¹ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6(1).

⁵⁸² Sweden, *Penal Code as amended* (1962), Chapter 22, § 6a(4).

⁵⁸³ Australia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1716, 9 December 1969, § 180.

New Guinea] the civil constabulary are trained in the use of and have available non-lethal gas weapons.⁵⁸⁴

In this connection, the report states that “as a state party to the CWC, Australia is obligated not to use riot control agents as a weapon of war. The CWC does, however, explicitly allow the use of such agents for riots and quelling civil disturbances”.⁵⁸⁵

559. In 1971, during a debate in the UN General Assembly, Canada stated that:

Tear gas and other riot- and crowd-control agents were excluded from Canada’s commitment not to develop, produce, acquire, stockpile or use any chemical weapons in warfare . . . Canada’s reservations with regard to the use of these agents in war should be waived.⁵⁸⁶

560. In 1931, during the League of Nations Preparatory Commission for the Disarmament Conference, France, in a note regarding a memorandum submitted by the UK, stated that:

- I. All the texts at present in force or proposed in regard to the prohibition of the use *in war* of asphyxiating, poisonous or similar gases are identical. In the French delegation’s opinion, they apply to all gases employed with a view to toxic action on the human organism, whether the effects of such action are more or less temporary irritation of certain mucous membranes or whether they cause serious or even fatal lesions.
- II. The French military regulations, which refer to the undertaking not to use gas for warfare (*gaz de combat*) subject to reciprocity, classify such gases as suffocating, blistering, *irritant* and poisonous gases in general, and define irritant gases as those causing *tears*, sneezing, etc.
- III. The French Government therefore considers that the use of lachrymatory gases is covered by the prohibition arising out of the Geneva Protocol of 1925 . . .

The fact that, for the maintenance of internal order, the police, when dealing with offenders against the law, sometimes use various appliances discharging irritant gases cannot, in the French delegation’s opinion, be adduced in a discussion on this point, since the Protocol . . . relates only to the use of poisonous or similar gases *in war*.⁵⁸⁷ [emphasis in original]

561. In 1931, during the League of Nations Preparatory Commission for the Disarmament Conference, Italy, with respect to a memorandum submitted by the UK, stated that it “interprets the 1925 Protocol, to mean that ‘other gases’

⁵⁸⁴ Australia, *Protection of the Civil Population Against the Effects of Certain Weapons* (unknown author), Doc. AA-A1838/267, File No. AA-889/702/7/2 Pt 1, May 1971, Report on the Practice of Australia, 1998, Chapter 3.5.

⁵⁸⁵ Report on the Practice of Australia, 1998, Chapter 3.5.

⁵⁸⁶ Canada, Statement before the UN General Assembly, UN Doc A/PV.1827, 11 November 1971, p. 7.

⁵⁸⁷ France, Note by the French Delegation to the League of Nations Preparatory Commission for the Disarmament Conference regarding a British Memorandum, reprinted in League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 311.

include lachrymatory gases – that is to say that, subject to reciprocity, the use of lachrymatory gases is prohibited”.⁵⁸⁸

562. In 1966, during a debate in the First Committee of the UN General Assembly, Hungary stated that:

34. ... It was sometimes argued that the Geneva Protocol referred to circumstances existing in 1925, and not to the present situation when new types of gases, including comparatively harmless riot-control agents, had been invented. But practising riot control and conducting warfare were two distinctly different problems. The former fell within the domestic jurisdiction of each State, whereas the latter was governed by international law.
35. The gases being used in Viet-Nam were intended to undermine morale, destroy health, spread disease and create starvation. They were being used mainly in populated areas where they were likely to affect more people, and more civilians than soldiers. It had been asserted that able-bodied persons could recover quickly from the effects of the gases. But for elderly and sick people, pregnant women and children, the effects were very grave and sometimes fatal. Indeed, the use of such mass weapons verged upon genocide...
36. The hollow pretexts given for using riot-control gases in Viet-Nam had been rejected by world public opinion and by the international scientific community, including scholars in the United States itself. Weapons of that kind... were difficult to control and might affect those who were using them, as well as those against whom they were used.⁵⁸⁹

563. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons and on what was to become Resolution 2603 (XXIV), the representative of Saudi Arabia stated that:

108. ... I wish to mention a particular gas which is being used in many countries, namely tear gas, which is used inhumanely for breaking up demonstrations. Of course, here we are discussing the question of disarmament, the international aspect of these weapons, but we should not neglect or ignore the covenants of human rights or the Universal Declaration of Human Rights, which in its third article states that “everyone has the right to life, liberty and security of person”. We should at some time in the future go further than prohibiting or trying to prohibit the use of chemical weapons among nations. They should be banned inside every State, even tear gas should be banned.

109. ... If conventional means are not enough and tear gas or any similar gas is used to disperse crowds, then the Government had better fold up and dissolve.

110. ... I hope that in the future the United Nations will consider the use of any gas or germ as a criminal act.⁵⁹⁰

⁵⁸⁸ Italy, Statement before the League of Nations Preparatory Commission for the Disarmament Conference, 15 January 1931, League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 313.

⁵⁸⁹ Hungary, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1451, 11 November 1966, §§ 34–36.

⁵⁹⁰ Saudi Arabia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, §§ 108–110.

564. In 1931, during the League of Nations Preparatory Commission for the Disarmament Conference, Turkey, with respect to a memorandum submitted by the UK, stated that “we also consider the use of lachrymatory gases prohibited by the [1925 Geneva Gas] Protocol”.⁵⁹¹

565. In 1931, during the League of Nations Preparatory Commission for the Disarmament Conference, the USSR stated with respect to a memorandum submitted by the UK that:

In 1929, the Soviet delegation proposed not only the renunciation of the use of gases in warfare, but also of their preparation in peace-time; this proposal, however, was rejected by the majority of the Commission.

We interpret this paragraph [of the 1925 Geneva Gas Protocol] to mean that the use of all gases, including irritant gases, is prohibited.

As regards the text proposed by the French delegation [according to which “the use of lachrymatory gases is covered by the prohibition arising out of the Geneva Protocol of 1925” and “the fact that, for the maintenance of internal order, the police, when dealing with offenders against the law, sometimes use various appliances discharging irritant gases cannot . . . be adduced in a discussion on this point, since the Protocol . . . relates only to the use of poisonous or similar gases *in war*”, (emphasis in original)], the Soviet delegation is of [the] opinion that it is not for the Preparatory Commission to legalise the use of these gases by police forces, and it accordingly regards as unacceptable, particularly as one speaker referred to the use of gases by police forces for the purpose of controlling mobs.⁵⁹²

566. In 1970, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), the USSR stated that:

The use of . . . tear gases and other gases of a similar nature . . . was prohibited by the Geneva Protocol of 17 June 1925. The United States signed that Protocol, but did not ratify it. However, that does not mean that the prohibition of the use of poisonous substances does not extend to the United States. That prohibition has become a generally recognized rule of international law, and countries which violate it must bear responsibility before the international community.⁵⁹³

567. In 1989, the Moscow daily newspaper *Sovetskaya Rossiya* published an interview with the USSR’s Deputy Chief Military Prosecutor who was supervising a criminal investigation into the behaviour of MVD and army troops during

⁵⁹¹ Turkey, Statement before the League of Nations Preparatory Commission for the Disarmament Conference, 15 January 1931, League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 313.

⁵⁹² USSR, Statement before the League of Nations Preparatory Commission for the Disarmament Conference, 15 January 1931, League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 313.

⁵⁹³ USSR, Reply dated 30 December 1969 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 120.

their suppression of a demonstration in Tbilisi in April 1988. The Prosecutor stated that:

Special "cheremukha" (27 units) containing chloracetophenone and three units of K-51 containing CS were employed. They are not chemical weapons. In the US and other countries CS is ranked among the so-called "police gases". Let me also note that a USSR Supreme Soviet Presidium decree of 28 July 1988 makes provision for the use of special means . . . The arguments set out were confirmed by UN experts. Experts confirmed that only 30 people had been poisoned in connection with the troops' use of the special means "cheremukha" and K-51. Experts are continuing their studies . . . Nor do the claims that the troops allegedly used chloropicrin correspond with reality. Neither the Soviet Army nor the MVD internal troops have products containing chloropicrin designed for such purposes.⁵⁹⁴

568. In 1931, a memorandum submitted to the League of Nations Preparatory Commission for the Disarmament Conference, the UK government stated that:

Basing itself on this English text [of the 1925 Geneva Gas Protocol], the British Government have taken the view that the use in war of "other gases", including lachrymatory gases, was prohibited. They also considered that the intention was to incorporate the same prohibition in the present Convention [i.e. in a draft convention on disarmament discussed at the Preparatory Commission].⁵⁹⁵

Canada, China, Czechoslovakia, Japan, Romania, Spain and SFRY were among the States which expressly associated themselves with the UK memorandum.⁵⁹⁶

569. In 1970, in reply to a question in the House of Commons, the UK Secretary of State for Foreign and Commonwealth Affairs stated that:

In 1930, the Under-Secretary of State for Foreign Affairs . . . in reply to a Parliamentary Question on the scope of the [1925 Geneva Gas] Protocol said:

"Smoke screens are not considered as poisonous and do not, therefore, come within the terms of the Geneva Gas Protocol. Tear gases and shells producing poisonous fumes are, however, prohibited under the Protocol"

...

That is still the Government's position. However, modern technology has developed CS smoke which, unlike the tear gases available in 1930, is considered to be not significantly harmful to man in other than wholly exceptional circumstances; and we regard CS and other such gases accordingly as being outside the scope of

⁵⁹⁴ N. Belan, *Sovetskaya Rossiya* [Moscow], 13 December 1989, p. 4, as translated in FBIS-SOV-89-246, 26 December 1989, pp. 57-60; David Remnick, "Soviet aides blamed in Georgian deaths", *Washington Post*, Washington, D.C., 22 December 1989, pp. A37 and A39.

⁵⁹⁵ UK, Memorandum by the UK Delegation to the League of Nations Preparatory Commission for the Disarmament Conference, reprinted in League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 311.

⁵⁹⁶ Canada, China, Czechoslovakia, Japan, Romania, Spain and Yugoslavia, Statements before the League of Nations Preparatory Commission for the Disarmament Conference, 15 January 1931, League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 311.

the [1925 Geneva Gas Protocol]. CS is in fact less toxic than the screening smokes which the 1930 statement specifically excluded.⁵⁹⁷

570. In 1992, in reply to a question in the House of Commons asking “what allowances have been made for the retention of disabling agents for riot control purposes under the terms of the [1993 CWC]”, the UK Minister of State, FCO, stated that:

Under the terms of the convention, states parties will be entitled to use toxic chemicals for law enforcement, including domestic riot control purposes, provided that such chemicals are limited to those not listed in the schedules to the convention and which can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure. States parties will undertake not to use riot control agents as a method of warfare.⁵⁹⁸

571. In 1994, in reply to a question in the House of Commons about the use of gas weapons by the police, the UK Parliamentary Under-Secretary of State for Home Affairs stated that:

The Association of Chief Police Officers is considering the possible use of products containing the incapacitating inflammatory agent, oleoresin capsicum . . . The only chemical agent which police forces are currently permitted to use is CS irritant. The considerable research which has been undertaken into this agent was evaluated by the 1969–1971 inquiry into the medical and toxicological aspects of CS . . . Police forces are permitted to use CS in extreme public order incidents where the chief officer of police judges such action to be necessary because of risk of loss of life or serious injury or widespread destruction of property; or against armed besieged criminals or violently insane persons where a senior officer judges that not to use it would endanger lives. There are no current proposals to change arrangements relating to CS.⁵⁹⁹

572. In 1996, the House of Lords addressed a question to the UK government to the effect that:

How is the development and manufacture of chemical weapons for “domestic riot control purposes”, which are included as “Purposes Not Prohibited Under this Convention” in Article (9) of the Chemical Weapons Convention, to be distinguished from the development and manufacture of chemical weapons for purposes prohibited under the convention, and who is to be responsible for making these distinctions, and whether international peacekeeping operations are included among the “Purposes Not Prohibited Under this Convention”.⁶⁰⁰

⁵⁹⁷ UK, House of Commons, Reply by the Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 2 February 1970, Vol. 795, Written Answers, p. 18.

⁵⁹⁸ UK, House of Commons, Reply by the Minister of State, FCO, *Hansard*, 7 December 1992, Vol. 215, Written Answers, cols. 459–460.

⁵⁹⁹ UK, House of Commons, Reply by the Parliamentary Under-Secretary of State for Home Affairs, *Hansard*, 31 March 1994, Vol. 240, Written Answers, col. 946.

⁶⁰⁰ UK, House of Lords, Question addressed to the Government by Lord Kennet, *Hansard*, 18 June 1996, Vol. 573, Written Answers, cols. 23–24.

In a written answer to this question, the UK Minister of State, FCO, replied that:

The Chemical Weapons Convention prohibits the development and manufacture of any chemical weapons. The term "chemical weapons" includes toxic chemicals except those intended for purposes not prohibited by the convention, including "domestic riot control purposes". Provided that the types and quantities of chemicals used are consistent with the intended permitted purpose they are not prohibited under the convention. Each State Party is obliged to declare details of chemicals held for riot control purposes (commonly known as riot control agents). The convention establishes a verification mechanism to monitor States Parties' compliance with their obligations. The provisions include inspections of declared sites and investigations into allegations that riot control agents have been used in warfare. Inspections and investigations will be carried out by the Organisation for the Prohibition of Chemical Weapons.

The CWC prohibits the use of toxic chemicals as a method of warfare in international peacekeeping operations.⁶⁰¹

573. In 1998, the UK Minister of State for the Armed Forces provided a public explanation of why, in written answers to two parliamentary questions, he had told one questioner that "CS irritant is the only riot control agent held by my Department", having just informed the other questioner that "the Ministry of Defence currently holds stocks of CR gas . . . a riot control agent designed to cause temporary irritation". His explanation was that because the physiological effects of CR are among those which the 1993 CWC uses to define a "riot control agent" – because CR, in the words of Article II(7) 1993 CWC, "can produce rapidly in humans sensory irritation or disabling physical effects which disappear within a short time following termination of exposure" – CR can properly be described as a "riot control agent", even though it is in fact held by the UK Defence Ministry for a purpose other than riot control, namely "maintaining an effective terrorism response capability".⁶⁰²

574. In 1998, in reply to a question in the House of Lords, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that the government had recently approved the export to the Netherlands of 2,500 rounds of CS gas and shotgun ammunition for use in riot control by the Dutch contingent to the UN forces in Bosnia and Herzegovina.⁶⁰³

⁶⁰¹ UK, House of Lords, Reply by Minister of State, FCO, *Hansard*, 18 June 1996, Vol. 573, Written Answers, col. 24.

⁶⁰² UK, Letters dated 25 March 1998 from the Minister of State for the Armed Forces addressed to Messrs Harry Cohen and Ken Livingstone, with copies placed in the House of Commons Library.

⁶⁰³ UK, House of Lords, Reply to a question by the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 12 January 1998, Vol. 584, Written Answers, cols. 122–123.

575. In 1927, during a debate in the US Senate, an argument against ratification of the 1925 Geneva Gas Protocol was that it outlawed the use of tear gas.⁶⁰⁴

576. In 1931, during the League of Nations Preparatory Commission for the Disarmament Conference, the US representative, with respect to a memorandum submitted by the UK, stated that:

While lachrymatory gases may serve some useful military purpose, for instance as harassing agencies, it is doubtless well-known to all my colleagues that the greatest use of lachrymatory gas is found, not in military service, but in police work either for controlling mobs, in which use it is certainly far more humane and probably more effective than the use of machine guns, sabres, or even truncheons, or it serves the purpose of effecting the capture of a barricaded criminal without bloodshed or loss of life . . . I think there would be considerable hesitation on the part of many Governments to bind themselves to refrain from the use in war, against an enemy, of agencies which they have adopted for peace-time use against their own population, agencies adopted on the ground that, while causing temporary inconvenience, they cause no real suffering or permanent disability, and are thereby more clearly humane than the use of weapons to which they were formerly obliged to resort to in times of emergency.⁶⁰⁵

577. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons, the US representative stated with respect to the then still draft Resolution 2603 (XXIV) that:

41. . . . We do not agree with the interpretation which this resolution would place upon international law as embodied in the [1925 Geneva Gas Protocol]. I note that for the last forty years States have recognized the ambiguity of the Geneva Protocol, as to whether it prohibits the use of riot-control agents. They have not been able to resolve this ambiguity, despite several efforts to do so, and here we must respectfully differ with the Swedish delegation with regard to the conclusive – or we would say “inconclusive” – character of the negotiations leading up to the abortive Disarmament Conference of 1933. For if, as [the Swedish delegation] said . . . of the Geneva Protocol, “States did not doubt the comprehensive nature of the ban”, one must then ask why in the years after 1925 they continued to debate it.

...

43. We have examined in detail the negotiating histories of the 1899 and 1907 Hague Conventions, the Treaty of Versailles of 1919, the 1922 Washington Treaty, which never entered into force, and the 1925 Geneva Protocol, and we have come to the conclusion that the negotiating histories of these treaties

⁶⁰⁴ US, Senate, Statement by Senator James Reed, Congressional Records, Vol. 68, pp. 141–154, 1927, referred to in Richard R. Baxter and Thomas Buergenthal, “Legal Aspects of the Geneva Protocol of 1925”, *AJIL*, Vol. 64, 1970, p. 861.

⁶⁰⁵ US, Statement before the League of Nations Preparatory Commission for the Disarmament Conference, 15 January 1931, League of Nations Doc. C.4.M.4. 1931, IX, Documents of the Preparatory Commission for the Disarmament Conference, Series X, Minutes of the Sixth Session (Second Part), 15 January 1931, p. 311.

support the view that riot-control agents are not covered by the Geneva Protocol, and that, accordingly, [the draft resolution which became UN General Assembly resolution 2603 (XXIV)] incorrectly interprets the generally recognized rules of international law as embodied in the Geneva Protocol.⁶⁰⁶

578. Executive Order No. 11850, issued by the US President on 8 April 1975, states that:

The United States renounces, as a matter of national policy, ... first use of riot control agents in war except in defensive military modes to save lives such as:

- a) Use of riot control agents in riot control situations in areas under direct and distinct U.S. military control, to include controlling rioting prisoners of war.
- b) Use of riot control agents in situations in which civilians are used to mask or screen attacks and civilian casualties can be reduced or avoided.
- c) Use of riot control agents in rescue missions in remotely isolated areas, of downed aircrews and passengers, and escaping prisoners.
- d) Use of riot control agents in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbances, terrorists and paramilitary organizations.

...

Section 1. The Secretary of Defense shall take all necessary measures to ensure that the use by the Armed Forces of the United States of any riot control agents ... in war is prohibited unless such use has Presidential approval, in advance.⁶⁰⁷

579. Various sources observed that riot control agents were used in the Vietnam War by the US and South Vietnamese forces.⁶⁰⁸ In some circumstances, tear gas was allegedly used in conjunction with fragmentation bombs.⁶⁰⁹ An article in a Swedish newspaper stated that VX gas was used against the North Vietnamese army in Cambodia.⁶¹⁰

580. At the CDDH, the US stated, with regard to the asphyxiating, poisonous or other gases, that "opinions differed as to whether tear gas was covered by the Geneva Protocol of 1925".⁶¹¹

581. In 1980, in a memorandum of law on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", a legal adviser of the US Department of State stressed that:

Although the United States does not regard the prohibition [on first use of chemical weapons] as applying to riot control agents, this view is not shared by the great

⁶⁰⁶ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, §§ 41 and 43.

⁶⁰⁷ US, Executive Order No. 11850, 8 April 1975, *Federal Register*, Vol. 40, 1975, p. 16187.

⁶⁰⁸ Wil D. Verwey, *Riot Control Agents and Herbicides in War*, A. W. Sijthoff, Leyden, 1977, pp. 46–67.

⁶⁰⁹ Guenter Lewy, *America in Vietnam*, Oxford University Press, Oxford, 1978, pp. 248–257.

⁶¹⁰ Wil D. Verwey, *Riot Control Agents and Herbicides in War*, A. W. Sijthoff, Leyden, 1977, p. 185, translation from article in *Dagens Nyheter*, 16 August 1970.

⁶¹¹ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 280–281, § 7.

majority of states (including the Soviets), and they would presumably regard themselves as being entitled to use chemical agents (including lethal agents) in response to use of riot control agents against them.⁶¹²

582. In 1994, the US President transmitted to the US Senate the findings of his administration's review of the impact of the 1993 CWC on Executive Order No. 11850 concerning US policy on the use of riot control agents in armed conflict. The accompanying message of the President stated that:

Article I(5) of the CWC prohibits Parties from using [riot control agents, RCAs] as a "method of warfare". That phrase is not defined in the CWC. The United States interprets this provision to mean that:

- The CWC applies only to the use of RCAs in international or internal armed conflict. Other peacetime uses of RCAs, such as normal peacekeeping operations, law enforcement operations, humanitarian and disaster relief operations, counter-terrorist and hostage rescue operations, and non-combatant rescue operations conducted outside such conflicts are unaffected by the Convention.
- The CWC does not apply to all uses of RCAs in time of armed conflict. Use of RCAs solely against noncombatants for law enforcement, riot control, or other noncombatant purposes would not be considered as a "method of warfare" and therefore would not be prohibited. Accordingly, the CWC does not prohibit the use of RCAs in riot control situations in areas under direct U.S. military control, including against rioting prisoners of war, and to protect convoys from civil disturbances, terrorists, and paramilitary organizations in rear areas outside the zone of immediate combat.
- The CWC does prohibit the use of RCAs solely against combatants. In addition, according to the current international understanding, the CWC's prohibition on the use of RCAs as a "method of warfare" also precludes the use of RCAs even for humanitarian purposes in situations where combatants and noncombatants are intermingled, such as the rescue of downed air crews, passengers, and escaping prisoners and situations where civilians are being used to mask or screen attacks. However, were the international understanding of this issue to change, the United States would not consider itself bound by this position.⁶¹³

583. In 1996, during hearings on the 1993 CWC before the US Senate's Foreign Relations Committee, the US Secretary of Defense stated that:

The CWC does not prohibit the use of RCAs in riot control situations in areas under direct and distinct US military control, to include controlling rioting prisoners of war, and in rear echelon areas outside the zone of immediate combat to protect convoys from civil disturbance, terrorist and paramilitary organizations. The CWC does prohibit the use of RCAs solely against combatants and, according to the

⁶¹² US, Department of State, Memorandum of law by a Legal Adviser on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., 1986, p. 1034.

⁶¹³ US, Message from the US President transmitting the report on the chemical weapons convention, 23 June 1994, *PM*, Vol. 140, PM 129, reprinted in *Congressional Record* (daily edition), 24 June 1994, p. S7635.

understanding of our allies and treaty signatories, even for humanitarian purposes in situations where combatants and non-combatants are intermingled.⁶¹⁴

At the same hearing, the Joint Staff Director of Strategic Plans and Policy stated that "in peacekeeping operations under Chapter six, Chapter seven UN operations, of course, the provisions of this convention don't apply, and we would be able to use riot control agents... It's my understanding that we could use riot control agents in Bosnia."⁶¹⁵

584. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that:

Oleoresin Capsicum is not calculated (i.e., designed), nor does it in fact cause unnecessary suffering. It is designed specifically to temporarily incapacitate violent or threatening subjects while reducing human suffering and is in consonance with the DoD [Non-Lethal Weapon] program. Its physiological effects, while relatively painful, are temporary and do not rise to the level of unnecessary suffering contemplated in the prohibition... Provided a military necessity justifies its employment, the principle of unnecessary suffering would not preclude employment of OC in appropriate circumstances.

...

The OC system contemplated for acquisition and employment by the Marine Corps is specifically designed to limit its effects only to intended targets. The contemplated OC dispersers utilize a target specific stream of ballistic droplets for controlled delivery and minimal cross contamination (i.e., point target delivery), rather than an aerosolized spray which increases the likelihood of unintended subject impact. Provided the weapon is employed in a discriminating manner, the principle of distinction/discrimination presents no prohibition to acquisition and employment of OC in appropriate circumstances.

...

The second major category of chemicals regulated by the CWC is Riot Control Agents...

While the proscriptions imposed by the CWC on *chemical weapons* are stated as absolute, the Convention seems to permit employment of RCAs, provided they are not used as a *method of warfare*. The CWC does not address whether a given substance can be subject to both the restrictions placed on RCAs and those placed on *chemical weapons*. Subsequent analysis in this memorandum concludes that RCAs are only constrained by the *method of warfare* restriction, that is, the CWC Treaty establishes a regime for treatment of RCAs separate from the regime dealing with *chemical weapons*.

... The definition of *toxic chemicals* [of the CWC] appears broad enough to include many, if not all, RCAs. Specifically, the use of the term *temporary incapacitation* in the definition of *toxic chemical* is difficult to distinguish from the term

⁶¹⁴ US, Statement by the Secretary of Defense on the Chemical Weapons Convention, Committee hearing, Senate Foreign Relations Committee, 28 March 1996, *FDCH Political Transcripts*, 28 March 1996, via Nexis.

⁶¹⁵ US, Statement by the Joint Staff Director of Strategic Plans and Policy, Committee hearing, Senate Foreign Relations Committee, 28 March 1996, *FDCH Political Transcripts*, 28 March 1996.

disabling effect used in the definition of RCAs. Thus, some contend that RCAs fall under the CWC's definition of *toxic chemical*. If that is the case, then RCAs become subject to the CWC's chemical weapon regime as well as the RCA regime. The consequences of such an interpretation are significant. RCAs would then be a *chemical weapon*, subject to all the limitations applicable to such weapons, unless they were used for a *purpose not prohibited*. This is problematic and would have a major impact on the use of RCAs since the *purposes not prohibited* exclusion for use of *chemical weapons* is an enumerated and apparently exclusive list of four activities only. Alternatively, if the CWC provides for a regime for RCAs separate than that for *chemical weapons*, then the only limitation on their use is that they may not be employed as a *method of warfare*.⁶¹⁶ [emphasis in original]

In a footnote on this point, the Deputy Assistant Judge Advocate General of the Department of the Navy stated that "if RCAs were subject to the chemical weapons regime, then the only 'purpose not prohibited' that would permit employment of RCAs is article II(9)(d) [of the 1993 CWC], the law enforcement exclusion".⁶¹⁷ However, he went on to state that:

It is apparent . . . that the nature of the harm caused by RCAs is generally much less severe and that the toxic effects of RCAs are transient. Thus, it is clear from the definition of RCAs that the CWC envisages RCAs to be a relatively benign category of chemicals. The fact that the definition excludes those chemicals listed on Chemical Annex Schedules, many of which are extremely toxic, bolsters this point. While RCAs may well be toxic chemicals, in establishing a separate regime for a particular category of toxic chemicals, RCAs, the CWC has limited the boundaries of this category by narrowly defining the chemicals that qualify as RCAs.⁶¹⁸

Turning to the 1925 Geneva Gas Protocol, the Deputy Assistant Judge Advocate General stated that:

Disagreement swirled around the Protocol's coverage of RCAs. Since the 1960s, the U.S. has maintained that the Protocol applies only to lethal and incapacitating chemical agents and not to RCAs. The U.S. therefore maintained that RCAs could be used during armed conflict. That view was not universally shared in the international community. The United States' extensive use of RCAs during the Vietnam War brought the differing interpretations to light. As a matter of national policy, however, the U.S., upon ratifying the Protocol in 1975, renounced the first use of RCAs in war except in defensive military modes to save lives. Nonetheless, the U.S. maintained that RCAs were not chemical weapons covered by the Protocol.

. . . Some nations, however, expressed concern that "RCAs would constitute an immediate risk and danger if they were allowed to develop into a new generation of

⁶¹⁶ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, §§ 4–5 and 6(c), pp. 6–7 and 14–15.

⁶¹⁷ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, footnote 37, p. 15.

⁶¹⁸ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 6(c), p. 16.

non-lethal but effective chemical agents of warfare, causing insurmountable problems in trying to distinguish between 'real' and 'non-lethal' chemical weapons on the battlefield, as well as 'real' and 'non-lethal' chemical warfare units." The result was a compromise in which the U.S. accepted the CWCs Article I (5) prohibition on the use of RCAs as a "method of warfare" in exchange for their categorization outside the chemical weapon regime.

...

The phrase *method of warfare* is not defined in the CWC or in the negotiating record and has been the subject of significant debate in the United States. The Administration view is that United States Armed Forces must be involved in an armed conflict, either international or non-international, to engage in a *method of warfare*.⁶¹⁹ [emphasis in original]

With respect to Executive Order No. 11850, issued by the US President on 8 April 1975, the Deputy Assistant Judge Advocate General stated that:

U.S. ratification of the Chemical Weapons Convention . . . created a debate regarding the continuing efficacy of [Executive Order] 11850, particularly exceptions (b) and (c) . . . If a use of RCAs constitutes a "method of warfare" then the CWC prohibits such use as a U.S. treaty obligation under international law. The executive order, however, authorizes use of RCAs, *in war* in certain situations. Though not explicitly stated, the apparent intent of the Executive Order permits RCA employment against combatants *in war* in situations like those enumerated in exceptions (b) and (c). Although the CWC does not define the phrase *method of warfare*, the apparent intent seems to prohibit the uses of RCAs contemplated in exceptions (b) and (c) to [Executive Order] 11850.

...

This review reiterates that the continuing efficacy of [Executive Order] 11850 is currently an issue of debate. The draft instruction [i.e., the draft of the Chairman of the Joint Chiefs of Staff Instruction (CJCSI) 3110.07A, Nuclear, Biological, and Chemical (NBC) Defence; Riot Control Agents; and Herbicides Annual Review, of 1 March 1998] and its list of permissible uses of RCAs is, however, currently the U.S. military position. Should appropriate U.S. Government authority determine that [Executive Order] 11850 is no longer valid authority, such a decision would only impact the use of RCAs in war . . . when the U.S. is a party to the conflict. All other uses of RCAs listed in the draft instruction would remain unaffected.⁶²⁰ [emphasis in original]

585. In 1998, a US Department of Defense document discussing the use of chemical agents in the Vietnam War stated that the "use of tear gas, or Riot Control Agents (RCA) as they were sometimes called, was in accordance with US policy at the time".⁶²¹

⁶¹⁹ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, §§ 6(c) and 7, pp. 18–20.

⁶²⁰ US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 7, pp. 20–21.

⁶²¹ US, Department of Defense, Review of Allegations Concerning "Operation Tailwind", 21 July 1998, § c(3).

*III. Practice of International Organisations and Conferences**United Nations*

586. In a resolution adopted in 1969, the UN General Assembly stated that the 1925 Geneva Gas Protocol “embodies the generally recognised rules of international law prohibiting the use in international armed conflicts of all . . . chemical methods of warfare, regardless of any technical developments”. It declared:

as contrary to the generally recognized rules of international law, as embodied in the [1925 Geneva Gas Protocol] the use in international armed conflicts of:

- (a) Any chemical agents of warfare – chemical substances, whether gaseous, liquid or solid – which might be employed because of their direct toxic effects on man, animals or plants.⁶²²

The large number of abstentions was partly due to disagreement on the scope of the 1925 Geneva Gas Protocol. Other States thought that the UN General Assembly should not interpret multilateral treaties.⁶²³

587. In a resolution adopted in 1988 on the situation in the Palestinian and other Arab territories occupied by Israel, the UN Sub-Commission on Human Rights stated that “acts perpetrated by the Israeli occupation authorities [e.g.] firing gas bombs inside houses, mosques and hospitals . . . constitute grave violations of international law”.⁶²⁴ This statement was repeated in four further resolutions on the same subject between 1991 and 1993. The last two of these added that the acts were violations of the Geneva Conventions, the UDHR, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights.⁶²⁵

Other International Organisations

588. No practice was found.

International Conferences

589. No practice was found.

⁶²² UN General Assembly, Res. 2603 A (XXIV), 16 December 1969, preamble and § (a). The resolution was adopted by 80 votes in favour, 3 against (Australia, Portugal and US) and 36 abstentions (Austria, Belgium, Bolivia, Canada, Chile, China, Denmark, El Salvador, France, Greece, Iceland, Israel, Italy, Japan, Laos, Liberia, Luxembourg, Madagascar, Malawi, Malaysia, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Philippines, Sierra Leone, Singapore, South Africa, Swaziland, Thailand, Tunisia, Turkey, UK, Uruguay and Venezuela), UN Doc. A/PV.1836, 16 December 1969, p. 4.

⁶²³ Debates in the First Committee of the UN General Assembly, UN Doc.A/C.1/PV.1716, 9 December 1969; UN Doc. A/C.1/PV.1717, 10 December 1969.

⁶²⁴ UN Sub-Commission on Human Rights, Res. 1988/10, 31 August 1988.

⁶²⁵ UN Sub-Commission on Human Rights, Res. 1989/4, 31 August 1989, p. 20; Res. 1991/6, 23 August 1991, p. 30; Res. 1992/10, 26 August 1992, p. 40; Res. 1993/15, 20 August 1993, p. 45.

IV. Practice of International Judicial and Quasi-judicial Bodies

590. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

591. No practice was found.

VI. Other Practice

592. SIPRI reported that in 1936, during the Spanish Civil War, Spanish government forces fired tear-gas shells against insurgent positions on the Guadarrama front. Threats by the insurgents to retaliate with their own stocks of "gas" were also reported.⁶²⁶

593. SIPRI reported that in 1949, during the later stages of the Greek Civil War, the Greek War Ministry stated that a respiratory irritant had been used to drive guerrillas out of caves.⁶²⁷

594. SIPRI reported that according to Dean Rusk, US Secretary of State, the South Vietnamese Army used irritant-agent weapons, both in riot control and combat situations.⁶²⁸

595. Robinson has stated that in the war in Bosnia and Herzegovina, CS irritant and perhaps Agent BZ were reportedly used by Serb factions to disrupt resistance and to drive people out of protective cover. He further stated that in Turkey in May 1999, CS grenades were reportedly used by the Turkish army against 20 members of the PKK.⁶²⁹

C. Herbicides*I. Treaties and Other Instruments**Treaties*

596. The 1925 Geneva Gas Protocol provides that:

Whereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilized world; . . .

To the end that this prohibition shall be universally accepted as a part of International Law, binding alike the conscience and the practice of nations;

⁶²⁶ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, p. 147.

⁶²⁷ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, p. 157.

⁶²⁸ SIPRI, *The Problem of Chemical and Biological Warfare*, Vol. I, *The Rise of CB Weapons*, Almqvist & Wiksell, Stockholm, 1971, p. 185.

⁶²⁹ Julian Perry Robinson, *The General Purpose Criterion and the New Utility of Toxicants as Weapons*, Working paper for the Pugwash Meeting No. 264, 17 June 2001, p. 4.

Declare:

That the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition.

No State on ratifying the 1925 Geneva Gas Protocol has made a reservation or declaration of interpretation to the effect that the Protocol does not apply to herbicides.

597. Article I(1) of the 1976 ENMOD Convention provides that:

Each State Party to this convention undertakes not to engage in military or any other hostile use of environmental modification techniques having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State Party.

598. Article II of the 1976 ENMOD Convention provides that:

As used in article I, the term “environmental modification techniques” refers to any technique for changing – through the deliberate manipulation of natural processes – the dynamics, composition or structure of the Earth, including its biota, lithosphere, hydrosphere and atmosphere, or of outer space.

599. The seventh preambular paragraph of the 1993 CWC reads: “Recognizing the prohibition, embodied in the pertinent agreements and relevant principles of international law, of the use of herbicides as a method of warfare, . . .”.

Other Instruments

600. No practice was found.

II. National Practice

Military Manuals

601. Australia’s *Commanders’ Guide* states that “it is prohibited to use methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment and thereby prejudice the health or survival of the population”.⁶³⁰ It also states that “weapons that cause widespread, long-term and severe damage to the environment are prohibited”.⁶³¹

602. Australia’s *Defence Force Manual* states that:

Any method or means of warfare which is planned, or expected, to cause widespread, long-term and severe damage to the natural environment and thereby jeopardise the survival or seriously prejudice the health of the population is prohibited . . . Means and methods which are not expected to cause such damage are permitted even if damage results.⁶³²

⁶³⁰ Australia, *Commanders’ Guide* (1994), § 909, see also § 930.

⁶³¹ Australia, *Commanders’ Guide* (1994), § 310.

⁶³² Australia, *Defence Force Manual* (1994), § 713, see also § 545(b).

603. Belgium's Law of War Manual states that it is uncertain whether "chemical products that do not cause widespread, long-term and severe damage to the environment" are covered by the prohibition on the use of asphyxiating and other analogous gases.⁶³³

604. The Military Manual of the Netherlands states that "opinion is divided over whether [the prohibition on the use of chemical weapons] applies to . . . defoliants". Concerning defoliants, the manual states that Article 35 API was drafted in the light of the large-scale use of defoliants in the Vietnam War.⁶³⁴

605. Nigeria's Manual on the Laws of War mentions the 1925 Geneva Gas Protocol and states that "there is no rule to prevent measures being taken to dry up springs and destroy water-wells from which the enemy may draw water or devastate crops by means of chemicals and bacterias which are not harmful to human beings".⁶³⁵

606. The US Field Manual states that:

It is the position of the United States that the Geneva Protocol of 1925 does not prohibit the use in war of . . . chemical herbicides . . . In this connection, however, the United States has unilaterally renounced, as a matter of national policy, certain uses in war of chemical herbicides . . . The policy and provisions of Executive Order No. 11850 do not, however, prohibit or restrict the use of chemical herbicides . . . by US armed forces either (1) as retaliation in kind during armed conflict or (2) in situations when the United States is not engaged in armed conflict. Any use in armed conflict of herbicides . . . however, requires Presidential approval in advance.⁶³⁶

607. The US Air Force Pamphlet restates Executive Order No. 11850 of 8 April 1975 and specifies that "the legal effect of this Executive Order is to reflect national policy. It is not intended to interpret the Geneva Protocol of 1925 or change the interpretation of the US that the Protocol does not restrain the use of chemical herbicides as such."⁶³⁷

608. The US Air Force Commander's Handbook states that:

The United States does not regard the Geneva Protocol as forbidding use of . . . herbicides in armed conflict. However, the United States has, as a matter of national policy, renounced the first use of . . . herbicides, with certain limited exceptions specified in Executive Order 11850, 8 April 1975. Using . . . herbicides in armed conflict requires Presidential approval.⁶³⁸

609. The US Operational Law Handbook states that the prohibition on "using weapons which cause unnecessary suffering, prolonged damage to the natural

⁶³³ Belgium, *Law of War Manual* (1983), p. 38.

⁶³⁴ Netherlands, *Military Manual* (1993), pp. IV-8, § 14 and p. V-9, § 7.

⁶³⁵ Nigeria, *Manual on the Laws of War* (undated), §§ 12 and 6(9).

⁶³⁶ US, *Field Manual* (1956), § 38(d). ⁶³⁷ US, *Air Force Pamphlet* (1976), § 6-4(d).

⁶³⁸ US, *Air Force Commander's Handbook* (1980), § 6-3(a).

environment, or poison weapons...does preclude the use of herbicides... by US forces in wartime when authorized by the President of the US or his delegate".⁶³⁹

610. The US Naval Handbook states that:

The United States considers that use of herbicidal agents in wartime is not prohibited by either the 1925 Gas Protocol or the 1993 Chemical Weapons Convention but has formally renounced the first use of herbicides in time of armed conflict except for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters. Use of herbicidal agents during armed conflict requires NCA approval.⁶⁴⁰

National Legislation

611. Brazil's Military Penal Code prohibits the spreading of epidemics or infestations in a location under military control which could result in damage to forests, crops, grazing pastures or animals used for economic or military purposes.⁶⁴¹

612. Ecuador's National Civil Police Penal Code states that members of the National Civil Police "who use or order to be used...herbicides" commit a punishable offence.⁶⁴²

National Case-law

613. No practice was found.

Other National Practice

614. Following the adoption of the Final Declaration of the Second ENMOD Review Conference by consensus, Argentina and Sweden "expressed their satisfaction with the ban on the use of herbicides as a method of warfare."⁶⁴³

615. In 1969, during a debate in the UN General Assembly on the question of chemical and bacteriological (biological) weapons, Australia stated that:

The draft resolution [on chemical and bacteriological (biological) weapons under discussion] would declare as contrary to the [1925 Geneva Gas Protocol] "any chemical agent of warfare" with "direct toxic effects on man, animals and plants". It is the view of the Australian Government that the use of non-lethal substances such as...herbicides and defoliant does not contravene the Geneva Protocol nor customary international law.⁶⁴⁴

⁶³⁹ US, *Operational Law Handbook* (1993), p. Q-182, § (i).

⁶⁴⁰ US, *Naval Handbook* (1995), § 10.3.3.

⁶⁴¹ Brazil, *Military Penal Code* (1969), Article 278.

⁶⁴² Ecuador, *National Civil Police Penal Code* (1960), Article 117.4.

⁶⁴³ Argentina and Sweden, Statements at the Second ENMOD Review Conference, Geneva, 14-21 September 1992, *United Nations Disarmament Yearbook*, Vol. 17, 1993, p. 234.

⁶⁴⁴ Australia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1716, 9 December 1969, § 180.

616. Following the adoption of the Final Declaration of the Second ENMOD Review Conference by consensus, Canada stated that “the work of the Conference demonstrated that all was not well with the Convention owing, in large measure, to significant problems with regard to the interpretation of its scope.”⁶⁴⁵ It added that “while some parties maintained that the ENMOD was a futuristic document covering exotic technologies that had yet to be invented, they contended at the same time that it covered the use of herbicides, which was a low-technology environmental modification technique.”⁶⁴⁶ Accordingly, Canada believed that “all environmental modification techniques were covered by the Convention, regardless of the level of technology applied.”⁶⁴⁷

617. In 1972, the head of the Chinese delegation to the Meeting on Human Environment condemned the US for having caused “unprecedented damage to the human environment” in South Vietnam through the use of “chemical, toxic and poisonous gas”, having as a consequence to poison “rivers and other water resources”.⁶⁴⁸

618. In 1980, the Chinese government denounced actions taken by Israel and accused it of having “inhumanely sprayed defoliant on Palestinian lands”.⁶⁴⁹

619. In 1966, during a debate in the First Committee of the UN General Assembly, Hungary stated with respect to the use of chemical weapons by the US in Viet-Nam that “food and drinking water were being poisoned by toxic herbicides”.⁶⁵⁰

620. The Minister of Foreign Affairs of the Netherlands stated in a parliamentary debate in 1995 that:

Generally speaking, the use of herbicides as a means of warfare is prohibited according to international customary law, and also according to the ENMOD treaty and the Geneva Conventions (1949), if this use causes widespread, long-term and severe damage. Then, the prohibition is binding upon all states.⁶⁵¹

⁶⁴⁵ Canada, Statement at the Second ENMOD Review Conference, Geneva, 14–21 September 1992, *United Nations Disarmament Yearbook*, Vol. 17, 1993, p. 233.

⁶⁴⁶ Canada, Statement at the Second ENMOD Review Conference, Geneva, 14–21 September 1992, *United Nations Disarmament Yearbook*, Vol. 17, 1993, p. 233.

⁶⁴⁷ Canada, Statement at the Second ENMOD Review Conference, Geneva, 14–21 September 1992, *United Nations Disarmament Yearbook*, Vol. 17, 1993, p. 233.

⁶⁴⁸ China, Address to the Meeting of Human Environment on Our Government's Position on the Protection and Improvement of Human Environment, 10 June 1972, *Selected Documents of the Chinese Delegation to the United Nations*, The People's Press, Beijing, 1972, pp. 257–258.

⁶⁴⁹ China, Statement on the Issue of Human Rights in the Israeli Occupied Territory, 12 November 1980, *Selected Documents of the Chinese Delegation to the United Nations*, World Knowledge Press, Beijing, 1980, p. 97.

⁶⁵⁰ Hungary, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1451, 11 November 1966, § 35.

⁶⁵¹ Netherlands, Lower House of Parliament, Debate on Chemical Weapons, *Tweede Kamer* 68, 25 April 1995, pp. 68–4105.

621. During the Geneva Conference of 1925, the representative of Poland, a sponsor of the prohibition of biological weapons at this conference, repeatedly stated that unless biological warfare was outlawed, “great masses of men, animals and plants would be exterminated”.⁶⁵²

622. The commander of the Russian Defence Minister RKhB Protection Troops said to reporters in 2000 that “the Russian army is not planning to use any defoliants in the course of the anti-terrorism operation in Chechnya”. He was responding to reports that the army could use chemical herbicides to destroy natural cover throughout the highland areas of Chechnya.⁶⁵³

623. In 1969, during a debate in the UN General Assembly on the question of chemical and bacteriological (biological) weapons, Sweden stated that:

195. It has . . . been said that, in any case, the prohibitory rule [concerning chemical weapons] could not cover anti-plant agents as they were not known in 1925, and that when they were discussed in the General Commission of the Geneva Disarmament Conference of 1933 it was only sought to prohibit the use of anti-plant chemical agents which also were harmful to man or animals.

196. We maintain that the indiscriminate use of anti-plant agents in armed conflict runs counter to the generally recognized rules of international law.⁶⁵⁴

624. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons, the UK stated with respect to the then still draft Resolution 2603 (XXIV) that “the evidence seems to us to be notably inadequate for the assertion that the use in war of chemical substances specifically toxic to plants is prohibited by international law”.⁶⁵⁵

625. In 1966, during a debate in the First Committee of the UN General Assembly, the US stated that it supported the 1925 Geneva Gas Protocol, even though it had not ratified it, but that the use of herbicides in Vietnam was neither covered by the Protocol, nor against accepted norms of behaviour.⁶⁵⁶ In a subsequent debate, the US repeated its opposition to the view that herbicides were included in the scope of the 1925 Geneva Gas Protocol.⁶⁵⁷

626. In 1969, during a debate in the First Committee of the UN General Assembly on the question of chemical and bacteriological (biological) weapons,

⁶⁵² Poland, Statement made on 8 June 1925 at the Conference for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, Geneva, 4 May–17 June 1925, League of Nations, Records of the Conference, Doc. A.13.1925.IX, September 1925, p. 340.

⁶⁵³ “Russian army not to use defoliants in Chechnya”, ITAR-TASS, Moscow, 17 April 2000.

⁶⁵⁴ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1716, 9 December 1969, §§ 195–196.

⁶⁵⁵ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, § 51.

⁶⁵⁶ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/SR.1452, 14 November 1966, p. 158.

⁶⁵⁷ US, Statement before the UN General Assembly, UN Doc. A/PV.1484, 5 December 1966, p. 4.

the US stated with respect to the then still draft Resolution 2603 (XXIV) that:

Since chemical herbicides, unknown at the time the [1925 Geneva Gas Protocol] was negotiated, were not prohibited by that instrument, it is unwarranted for the General Assembly now to engage in lawmaking by attempting to extend the Geneva Protocol to include herbicides.⁶⁵⁸

627. Executive Order No. 11850, issued by the US President on 8 April 1975, states that:

The United States renounces, as a matter of national policy, first use of herbicides in war except use, under regulations applicable to their domestic use, for control of vegetation within U.S. bases and installations or around their immediate defensive perimeters.

...

Section 1. The Secretary of Defense shall take all necessary measures to ensure that the use by the Armed Forces of the United States of any . . . chemical herbicides in war is prohibited unless such use has Presidential approval, in advance.⁶⁵⁹

628. The Report on US Practice states that the possibility of environmental damage caused by the use of herbicides during the Vietnam War was not a major issue in the Kennedy administration.⁶⁶⁰ On the other hand, one commentator notes that environmental concerns played a significant role in President Nixon's decision to end the herbicidal programme.⁶⁶¹

629. In 1998, in a legal review of Oleoresin Capsicum (OC) pepper spray, the Deputy Assistant Judge Advocate General of the US Department of the Navy stated that "the toxicity must affect humans or animals. Thus, herbicides would be excluded from the CWC's proscriptions." In a footnote on this point, he stated that "on the other hand, if a particular herbicide were toxic to humans and was intentionally employed against humans, it would be considered a chemical weapon".⁶⁶²

III. Practice of International Organisations and Conferences

United Nations

630. In a resolution adopted in 1969, the UN General Assembly stated that the 1925 Geneva Gas Protocol "embodies the generally recognised rules of

⁶⁵⁸ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1717, 10 December 1969, § 47.

⁶⁵⁹ US, Executive Order No. 11850, 8 April 1975, *Federal Register*, Vol. 40, 1975, p. 16187.

⁶⁶⁰ Report on US Practice, 1997, Chapter 4.4.

⁶⁶¹ William A. Buckingham, *Operation Ranch Hand: The Air Force and Herbicides in Southeast Asia, 1961–1971*, Office of Air Force History, US Air Force, Washington, 1982, pp. 138–140, 163 and 174–175.

⁶⁶² US, Department of the Navy, Deputy Assistant Judge Advocate General, International and Operational Law Division, Legal Review of Oleoresin Capsicum (OC) Pepper Spray, 19 May 1998, § 6(c) and footnote 27, p. 12.

international law prohibiting the use in international armed conflicts of all biological and chemical methods of warfare, regardless of any technical developments". It declared:

as contrary to the generally recognized rules of international law, as embodied in the [1925 Geneva Gas Protocol] the use in international armed conflicts of:

- (a) Any chemical agents of warfare – chemical substances, whether gaseous, liquid or solid – which might be employed because of their direct toxic effects on man, animals or plants.⁶⁶³

The large number of States which abstained in the vote on the resolution (36) was partly due to disagreement on the scope of the 1925 Geneva Gas Protocol.⁶⁶⁴

631. In a resolution adopted in 1992 following the Second Review Conference of the Parties to the ENMOD Convention, the UN General Assembly stated that it:

notes with satisfaction the confirmation by the Review Conference that the military or any other hostile use of herbicides as an environmental modification technique in the meaning of Article II is a method of warfare prohibited by Article I if such use of herbicides upsets the ecological balance of a region, thus causing widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other State party.⁶⁶⁵

Other International Organisations

632. No practice was found.

International Conferences

633. The Final Declaration of the Second Review Conference of the Parties to the ENMOD Convention in 1992 stated that:

The conference reaffirms that the military and any other hostile use of herbicides as an environmental modification technique in the meaning of Article II is a method of warfare prohibited by Article I if such a use of herbicides upsets the ecological balance of a region, thus causing widespread, long-lasting or severe effects as the means of destruction, damage or injury to another State Party.⁶⁶⁶

⁶⁶³ UN General Assembly, Res. 2603 A (XXIV), 16 December 1969, preamble and § (a). The resolution was adopted by 80 votes in favour, 3 against (Australia, Portugal and US) and 36 abstentions (Austria, Belgium, Bolivia, Canada, Chile, China, Denmark, El Salvador, France, Greece, Iceland, Israel, Italy, Japan, Laos, Liberia, Luxembourg, Madagascar, Malawi, Malaysia, Netherlands, New Zealand, Nicaragua, Norway, Paraguay, Philippines, Sierra Leone, Singapore, South Africa, Swaziland, Thailand, Tunisia, Turkey, UK, Uruguay and Venezuela), UN Doc. A/PV.1836, 16 December 1969, p. 4.

⁶⁶⁴ Debates in the First Committee of the UN General Assembly, UN Doc.A/C.1/PV.1716, 9 December 1969; UN Doc. A/C.1/PV.1717, 10 December 1969.

⁶⁶⁵ UN General Assembly, Res. 47/52 E, 9 December 1992, § 3.

⁶⁶⁶ Second Review Conference of the Parties to the ENMOD Convention, Geneva, 14-21 September 1992, Final Declaration, UN Doc. ENMOD/CONF.II/11, 17 September 1992, p. 11.

IV. Practice of International Judicial and Quasi-judicial Bodies

634. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

635. No practice was found.

VI. Other Practice

636. In 1981, an armed opposition group denounced the use of “chemical bombs, herbicides and defoliants” against its bases and the villages populated by civilians by pilots of a third State involved in the conflict.⁶⁶⁷

637. Robinson alleges that herbicides were used by the UK in Malaya in the 1950s, by France in North Africa in the 1950s, by the US in Indochina in the 1960s, by Portugal in its African colonies in the 1970s and by Ethiopia in Eritrea in the early 1980s.⁶⁶⁸

638. According to an opposition radio broadcast, the Angolan delegate to the Conference of States Parties to the 1925 Geneva Protocol and Other Interested States in 1989 “peremptorily denied having used chemical weapons on Angolan territory”.⁶⁶⁹

⁶⁶⁷ ICRC archive document.

⁶⁶⁸ Julian Perry Robinson, “The changing status of chemical and biological warfare: recent technical, military and political developments”, in *SIPRI Yearbook 1982: World Armaments and Disarmament*, Taylor & Francis, London, 1982, p. 336.

⁶⁶⁹ Voice of Resistance of the Black Cockerel, in Portuguese to Southern and Central Africa, 27 April 1989, JPRS-TAC-89-018, 3 May 1989.

EXPANDING BULLETS

Expanding Bullets (practice relating to Rule 77)

§§ 1–94

Expanding Bullets

I. Treaties and Other Instruments

Treaties

1. The 1899 Hague Declaration concerning Expanding Bullets stipulates that “the Contracting Parties agree to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”.
2. Pursuant to Article 8(2)(b)(xix) of the 1998 ICC Statute, “employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” constitutes a war crime in international armed conflicts.

Other Instruments

3. Article 16(2) of the 1913 Oxford Manual of Naval War provides that it is forbidden

to employ arms, projectiles, or materials calculated to cause unnecessary suffering. Entering especially into this category are . . . bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not cover the core entirely or is pierced with incisions.

4. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “use of . . . expanding bullets”.
5. Section 6.2 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations force shall respect the rules prohibiting or restricting the use of certain weapons . . . These include, in particular, the prohibition on the use of . . . bullets which . . . expand or flatten easily in the human body”.
6. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes.

According to Section 6(1)(b)(xix), “employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

7. Australia’s Commanders’ Guide states that “use of the following types of weapons is prohibited: . . . (c) bullets with a hard envelope which do not entirely cover the core or are pierced with incisions (dum-dum bullets)”.¹ It also states that “hollow point weapons are prohibited because they cause gaping wounds which lead to unnecessary suffering”.² The Guide states that these weapons are included in those which are “totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering.”³ It further states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as . . . expanding rounds”.⁴

8. Australia’s Defence Force Manual provides that:

Weapons such as irregularly shaped bullets, projectiles filled with broken glass, bullets which have been scored, have had their ends filed, have been altered or which have been smeared with any substance likely to exacerbate a trauma injury are prohibited. “Dum dum” bullets (those with a hard envelope that does not entirely cover the core or which have been pierced with incisions or which have had their points filed off) come within this category of weapon.⁵

The manual further states that “the following examples constitute grave breaches or serious war crimes likely to warrant institution of criminal proceedings: . . . using certain unlawful weapons and ammunition such as . . . expanding rounds”.⁶

9. Belgium’s Law of War Manual states, with a reference to the 1899 Hague Declaration concerning Expanding Bullets, that “the use of dum-dum bullets, i.e. bullets which expand or flatten easily in the human body, is banned”.⁷

10. Cameroon’s Instructors’ Manual states that:

¹ Australia, *Commanders’ Guide* (1994), § 932(c).

² Australia, *Commanders’ Guide* (1994), § 309.

³ Australia, *Commanders’ Guide* (1994), § 304.

⁴ Australia, *Commanders’ Guide* (1994), § 1305(p).

⁵ Australia, *Defence Force Manual* (1994), § 405.

⁶ Australia, *Defence Force Manual* (1994), § 1315(p).

⁷ Belgium, *Law of War Manual* (1983), p. 37.

These [small calibre] weapons are those which shoot bullets at very high initial speed and which cause excessive trauma comparable to that produced by dum-dum bullets

...

These bullets, unlike traditional bullets, spread or flatten out after entering the body to create a wound larger than their own diameter, thus causing excessive injury.⁸

11. Canada's LOAC Manual states that "bullets that expand or flatten easily in the human body, such as bullets with a hard envelope that not entirely covers the core or is pierced with incisions (i.e., hollow point or 'dum-dum' bullets)," are prohibited.⁹

12. Canada's Code of Conduct provides that "the alteration of ammunition so that it expands or flattens easily when striking the human body is expressly prohibited".¹⁰ It also provides that the use of "bullets designed to expand or flatten easily on contact with the human body (i.e., dum-dum bullets or hollow point bullets)" is forbidden.¹¹

13. The Military Manual of the Dominican Republic strictly prohibits the use of dum-dum bullets.¹²

14. Ecuador's Naval Manual states that:

Weapons which cause superfluous injury or unnecessary suffering are prohibited because the degree of pain, the severity of the injuries and the certainty of death they entail are clearly out of all proportion with the military advantage to be gained by their use . . . [D]um-dum bullets belong in this category since the small military advantage that may be derived from their use guarantees death due to . . . the expanding effect of soft-nosed or unjacketed lead bullets.¹³

15. France's LOAC Summary Note states that "it is prohibited to use . . . projectiles that spread or flatten easily in human body".¹⁴

16. France's LOAC Teaching Note includes dum-dum bullets and other weapons with expanding heads in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁵

17. France's LOAC Manual incorporates the content of the 1899 Hague Declaration concerning Expanding Bullets.¹⁶ It further includes dum-dum bullets and other weapons with expanding heads in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁷

⁸ Cameroon, *Instructors' Manual* (1992), p. 125, § 442.1.

⁹ Canada, *LOAC Manual* (1999), p. 5-2, § 12(b).

¹⁰ Canada, *Code of Conduct* (2001), Rule 3, § 4.

¹¹ Canada, *Code of Conduct* (2001), Rule 3, § 10(a).

¹² Dominican Republic, *Military Manual* (1980), pp. 5 and 6.

¹³ Ecuador, *Naval Manual* (1989), § 9.1.1.

¹⁴ France, *LOAC Summary Note* (1992), § 4.6.

¹⁵ France, *LOAC Teaching Note* (2000), p. 6.

¹⁶ France, *LOAC Manual* (2001), p. 28.

¹⁷ France, *LOAC Manual* (2001), p. 54.

18. Germany's Soldiers' Manual provides that "it is prohibited to use means or methods of warfare which are intended or of a nature to cause superfluous injuries or unnecessary suffering (e.g. dum-dum bullets)".¹⁸

19. Germany's Military Manual states that:

It is prohibited to use bullets which expand or flatten easily in the human body (e.g. *dum-dum bullets*) . . . This applies also to the use of *shotguns*, since shot causes similar suffering unjustified from the military point of view. It is also prohibited to use projectiles of a nature:

- to burst or deform while penetrating the human body;
- to tumble early in the human body; or
- to cause shock waves leading to extensive tissue damage or even a lethal shock.¹⁹ [emphasis in original]

20. Germany's IHL Manual states that "international humanitarian law prohibits the use of a number of means of warfare which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g. bullets which easily expand or flatten in the human body, so-called dum-dum bullets".²⁰

21. Israel's Manual on the Laws of War includes dum-dum bullets in the list of prohibited weapons.²¹

22. Italy's IHL Manual states that "it is specifically prohibited . . . to use bullets which expand or flatten easily in the human body, or bullets which are pierced with incisions".²²

23. Kenya's LOAC Manual states that "the use of bullets that expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, is prohibited".²³

24. The Military Manual of the Netherlands states that the use of

bullets which expand or transform inside the human body is prohibited; this is the prohibition of the so-called dum-dum bullet. These are bullets with a soft, possibly flattened head. The effect of transformation can also be obtained by using a saw or similar tool to remove the tip of the bullet.²⁴

25. The Military Handbook of the Netherlands prohibits the use of dum-dum bullets.²⁵

26. New Zealand's Military Manual states that the use of "bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions (Dum Dum bullets)" is prohibited.²⁶ It notes that the qualification of the use of poison or poisoned weapons as a war crime "is an old-established rule of

¹⁸ Germany, *Soldiers' Manual* (1991), p. 5.

¹⁹ Germany, *Military Manual* (1992), § 407.

²⁰ Germany, *IHL Manual* (1996), § 305.

²¹ Israel, *Manual on the Laws of War* (1998), pp. 12-13.

²² Italy, *IHL Manual* (1991), Vol. I, § 8(6).

²³ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 5.

²⁴ Netherlands, *Military Manual* (1993), p. IV-7.

²⁵ Netherlands, *Military Handbook* (1995), p. 7-39.

²⁶ New Zealand, *Military Manual* (1992), §§ 510(c) (land warfare) and 617(c) (air warfare).

customary law and applies equally to the use of any forbidden weapon such as expanding (dum-dum) bullets".²⁷

27. Nigeria's Manual on the Laws of War states that "it is expressly forbidden to use . . . irregularly shaped bullets . . . The scoring of the surface of bullets and filing off of the end of their hard case . . . are also prohibited."²⁸ The manual includes "using expanding bullets" in its list of war crimes.²⁹

28. Russia's Military Manual prohibits the use of various weapons that cause unnecessary suffering, including "bullets that expand or flatten easily in the human body".³⁰

29. South Africa's LOAC Manual provides that "weapons which are calculated to cause unnecessary suffering are illegal *per se*. Such weapons include . . . dum-dum bullets."³¹

30. Spain's LOAC Manual imposes an "absolute prohibition on the use of . . . bullets that expand (Dum-Dum) or flatten easily in the human body".³²

31. The UK Military Manual states that the UK engages "to abstain from the use of bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions".³³ It further notes that "it is expressly forbidden to employ arms, projectiles or material calculated to cause unnecessary suffering . . . such . . . as . . . irregularly-shaped bullets".³⁴ The manual also provides that "in addition to the 'grave breaches' of the 1949 Geneva Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . using expanding bullets".³⁵

32. The UK LOAC Manual states that "the following are prohibited in *international* armed conflict: . . . b. dum-dum bullets".³⁶ (emphasis in original)

33. The US Field Manual states that "usage, has . . . established the illegality of . . . the scoring of the surface or the filing off of the ends of the hard cases of bullets".³⁷

34. The US Air Force Pamphlet states that:

International law has condemned dum dum . . . bullets because of types of injuries and inevitability of death. Usage and practice has also determined that it is *per se* illegal . . . to use irregularly shaped bullets or to score the surface or to file off the end of the hard cases of the bullets which cause them to expand upon contact and thus aggravate the wound they cause.³⁸

35. The US Instructor's Guide stresses the prohibition of "irregular-shaped bullets such as dum-dum bullets".³⁹ It also provides that "in addition to the

²⁷ New Zealand, *Military Manual* (1992), § 1704(2)(a) and footnote 32.

²⁸ Nigeria, *Manual on the Laws of War* (undated), § 11.

²⁹ Nigeria, *Manual on the Laws of War* (undated), § 6(7).

³⁰ Russia, *Military Manual* (1990), § 6(a). ³¹ South Africa, *LOAC Manual* (1996), § 34(f)(i).

³² Spain, *LOAC Manual* (1996), Vol. I, § 3.2.a.(2). ³³ UK, *Military Manual* (1958), § 109.

³⁴ UK, *Military Manual* (1958), § 110. ³⁵ UK, *Military Manual* (1958), § 626(g).

³⁶ UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(b).

³⁷ US, *Field Manual* (1956), § 34(b).

³⁸ US, *Air Force Pamphlet* (1976), § 6-3(b)(2). ³⁹ US, *Instructor's Guide* (1985), p. 7.

grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: using . . . forbidden arms or ammunition such as dum-dum bullets".⁴⁰

National Legislation

36. Andorra's Decree on Arms prohibits the use of expanding weapons.⁴¹

37. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including the use of expanding bullets.⁴²

38. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "employing prohibited bullets . . . [which] expand or flatten easily in the human body" in international armed conflicts.⁴³

39. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions," constitutes a war crime in international armed conflicts.⁴⁴

40. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁴⁵

41. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁴⁶

42. Ecuador's National Civil Police Penal Code punishes the members of the National Civil Police "who use or order to be used . . . dum-dum bullets".⁴⁷

43. Under Estonia's Penal Code, "use of . . . expanding bullets" is a war crime.⁴⁸

44. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions," in international armed conflicts, is a crime.⁴⁹

45. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed

⁴⁰ US, *Instructor's Guide* (1985), p. 13.

⁴¹ Andorra, *Decree on Arms* (1989), Chapter 1, Section 3, Article 2.

⁴² Australia, *War Crimes Act* (1945), Section 3.

⁴³ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.57.

⁴⁴ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(r).

⁴⁵ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁴⁶ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁴⁷ Ecuador, *National Civil Police Penal Code* (1960), Article 117(4).

⁴⁸ Estonia, *Penal Code* (2001), § 103.

⁴⁹ Georgia, *Criminal Code* (1999), Article 413(d).

conflict, “employs bullets which expand or flatten easily in the human body, in particular bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”.⁵⁰

46. Italy’s Law of War Decree as amended provides that “it is prohibited to . . . use bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions”.⁵¹

47. Under Mali’s Penal Code, “using bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” is a war crime in international armed conflicts.⁵²

48. The Definition of War Crimes Decree of the Netherlands includes the “use of . . . expanding bullets” in its list of war crimes.⁵³

49. Under the International Crimes Act of the Netherlands, “employing bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions” is a crime, when committed in an international armed conflict.⁵⁴

50. Under New Zealand’s International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xix) of the 1998 ICC Statute.⁵⁵

51. Under Trinidad and Tobago’s Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xix) of the 1998 ICC Statute.⁵⁶

52. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xix) of the 1998 ICC Statute.⁵⁷

53. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, “means or methods of combat prohibited under the rules of international law, during a war or an armed conflict” is a war crime.⁵⁸ The commentary on the Penal Code as amended adds that “the following weapons and means of combat are considered to be prohibited: . . . projectiles that spread easily when they come in contact with a human body”.⁵⁹

National Case-law

54. In 1995, in a ruling on the constitutionality of AP II, the Constitutional Court of Colombia stated in relation to the prohibition on the use of weapons of a nature to cause unnecessary suffering or superfluous injury that:

⁵⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 12(1)(3).

⁵¹ Italy, *Law of War Decree as amended* (1938), Article 35(6).

⁵² Mali, *Penal Code* (2001), Article 31(i)(19).

⁵³ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁵⁴ Netherlands, *International Crimes Act* (2003), Article 5(5)(i).

⁵⁵ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁵⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁵⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁵⁸ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

⁵⁹ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration consequently considers that the bans (established partly by customary law and partly by treaty law) on the use of... "dum-dum" bullets... apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.⁶⁰

Other National Practice

55. At the CDDH, Algeria supported the Philippine amendment (see *infra*), because "it was a simple reaffirmation of the principles of positive humanitarian law".⁶¹

56. At the CDDH, Canada voted against the Philippine amendment (see *infra*) because "the particular weapons are forbidden by international law and their use, other than by way of reprisal, already constitutes a war crime".⁶²

57. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH on the legality of high-velocity weapons, Colombia stated that "such weapons were indeed comparable to... dum-dum bullets... It was thus essential to expedite the formulation of rules prohibiting their use."⁶³

58. At the CDDH, Egypt expressed "its disappointment at the failure of the Philippine amendment, establishing as a grave breach the use of prohibited weapons, to be adopted", but noted that Article 74 of draft API (now Article 85) "as it stands now does cover the use of such weapons through their effects".⁶⁴

59. The Report on the Practice of Ethiopia states, with reference to a press release by the Ministry of Defence, that "dum-dum bullets, which expand or flatten easily in the human body, were used during the war with Somalia in 1956".⁶⁵

60. At the CDDH, Finland stated that it "attached the greatest importance to the prohibition of dum-dum bullets in The Hague Declaration of 1899".⁶⁶

61. Finnish police are reported to have used hollow-point handgun bullets since 1994.⁶⁷ According to an article by the Finnish Senior Advisor of the Weapons Technology Police Technical Centre, the use of hollow-point expanding

⁶⁰ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

⁶¹ Algeria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 286, § 37.

⁶² Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 298.

⁶³ Colombia, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.14, 5 March 1975, pp. 132–133, § 9.

⁶⁴ Egypt, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 300.

⁶⁵ Report on the Practice of Ethiopia, 1998, Chapter 3.1, referring to Ministry of Defence, Press Release, no date available, p. 16.

⁶⁶ Finland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 34.

⁶⁷ Jorma Jussila and Ralph Wilhelm, "Sicher und wirksam: Munition der finnischen Polizei", *Deutsches Waffenzentrum*, No. 9, 2000, p. 132.

handgun bullets presents some advantages, such as the avoidance of danger to bystanders through over-penetration of the bullet or ricochet. The article's author emphasises the existence of "a very common misunderstanding", which is that hollow-point handgun bullets cause much more tissue damage than non-deforming full metal jacket bullets. He states that "the truth, is, however, that a well designed expanding bullet causes less damage than some non-deforming full metal jacket bullet. This is because the latter starts tumbling causing an effect similar to that of an expanding bullet." He adds that:

Even when lethal ammunition are used some injury avoidance criteria must, however, be met. A bullet shall have consistent and controlled penetration thus minimising danger to bystanders while yet providing sufficient penetration in all circumstances. This is technically not possible without some braking mechanism like expansion or terminal ballistic instability. A bullet shall not cause more injury than is unavoidable. It shall not break up to fragments upon impact with soft tissue even when shot through various materials. A bullet shall have controlled trajectory. Upon impact with hard surface it shall not turn into excessively dangerous ricochets and the ricochets must not deflect significantly from the impact surface tangent.⁶⁸

62. According to the Report on the Practice of India, "since India has subscribed to most of the Conventions which specifically declare certain weapons as prohibited, there is no possibility of use... of expanding bullets in times of international or internal armed conflicts". In addition, the report states that, according to India's practice, there is "a ban and restriction on the use of... expanding bullets".⁶⁹

63. On the basis of an interview with the Director of the Nuclear, Biological and Chemical Weapons Division of the Indonesian Armed Forces, the Report on the Practice of Indonesia states that Indonesia has prohibited the use of expanding bullets.⁷⁰

64. At the CDDH, Iraq supported the Philippine amendment (see *infra*), since "the use of dum-dum bullets... had been prohibited for a very long time but the user was not liable to criminal proceedings. It was high time that the use of such appalling weapons was made a grave offence."⁷¹

65. At the CDDH, Italy abstained in the vote on the Philippine amendment (see *infra*) because "it would not be useful because it dealt with means and methods of warfare which were already prohibited by the existing law".⁷²

⁶⁸ Jorma Jussila, "Future Police Operations and Non-Lethal Weapons", *Medicine, Conflict and Survival*, Vol. 17, No. 3, July-September 2001, p. 259.

⁶⁹ Report on the Practice of India, 1997, Chapter 3.4.

⁷⁰ Report on the Practice of Indonesia, 1997, Interview with the Director of Nuclear, Biological and Chemical Weapons Division of the Armed Forces, Chapter 3.4.

⁷¹ Iraq, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 284, § 24.

⁷² Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 285, § 30.

66. According to the Report on the Practice of Jordan, Jordan has indicated that it does not use, manufacture or stockpile expanding bullets and it has no intention of possessing nor using such weapons in the future.⁷³

67. At the CDDH, the Philippines proposed an amendment to include “the use of weapons prohibited by International Conventions, namely: bullets which expand or flatten easily in the human body” in the list of grave breaches in Article 74 of draft AP I (now Article 85).⁷⁴ The proposal was rejected because it failed to obtain the necessary two-thirds majority (41 votes in favour, 25 against and 25 abstentions).⁷⁵

68. In 1977, during a debate in the First Committee of the UN General Assembly, Sweden stated that it, “together with others”, wanted to restate the ban on expanding bullets from 1899, but that the proposal had not met with general approval.⁷⁶

69. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Sweden stated that:

Several governments, including the US and the UK governments, had avoided a narrow interpretation of The Hague ban; their current military manuals prohibited not merely soft-nose bullets, but also irregularly-shaped bullets . . . It was significant that The Hague ban . . . had even had a decisive influence on the choice of weapons for police use, although it was not formally applicable in the domestic sphere.⁷⁷

70. At the CDDH, Switzerland voted in favour of the Philippine amendment (see *supra*) because:

It would be a step forward to state expressly that any violation of The Hague Declaration of 1899 and the Geneva Protocol of 1925 would constitute a grave breach. The rules laid down in those two instruments were undisputed and indisputable, and the amendment would have a deterrent effect on any State tempted to violate them, by exposing the members of its armed forces to the penalties applicable under the Geneva Conventions.⁷⁸

71. In 1974, in reply to a letter from a member of the US House of Representatives, the Acting General Counsel of the US Department of Defense stated that:

⁷³ Report on the Practice of Jordan, 1997, Chapter 3.4.

⁷⁴ Philippines, Proposal of amendment to Article 74 of draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/418, 26 May 1977, p. 322.

⁷⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 288–289. (Against: Australia, Belarus, Belgium, Bulgaria, Canada, Czechoslovakia, Denmark, Finland, France, FRG, GDR, Hungary, India, Luxembourg, Monaco, Mongolia, Netherlands, New Zealand, Poland, Portugal, Ukraine, USSR, UK, US and Zaire. Abstaining: Brazil, Cameroon, Cyprus, Cuba, Greece, Guatemala, Indonesia, Iran, Ireland, Israel, Italy, Japan, South Korea, Mauritania, Morocco, Nigeria, Norway, Romania, Spain, Swaziland, Sweden, Thailand, Turkey, Uganda and Vietnam.)

⁷⁶ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.32, 14 November 1977, p. 27.

⁷⁷ Sweden, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.11, 21 February 1975, p. 111, § 29.

⁷⁸ Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 281, § 9.

The United States is not a party to the agreement prohibiting the use of expanding bullets or “dum-dums”, signed at The Hague, July 29 1899. In that Agreement, the parties agreed “to abstain from the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core, or is pierced with incisions”. The United States has, however, acknowledged that it will abide by the terms of the agreement prohibiting expanding bullets.⁷⁹

72. At the CDDH, the US voted against the Philippine amendment (see *supra*) because:

Grave breaches were meant to be the most serious type of crime; Parties had an obligation to punish or extradite those guilty of them. Such crimes should therefore be clearly specified, so that a soldier would know if he was about to commit an illegal act for which he could be punished. The amendment, however, was vague and imprecise. What standard would be applied, for example, in deciding whether a bullet expanded or flattened “easily” in the human body? . . . It would also punish those who used the weapons, namely, the soldiers, rather than those who made the decision as to their use, namely, Governments.⁸⁰

73. In 1983, in a memorandum on the use of small-caliber armor-piercing incendiary (API) ammunition against enemy personnel, the US Department of the Army emphasised that no US ammunition violated, *inter alia*, the 1899 Hague Declaration concerning Expanding Bullets.⁸¹

74. In 1990, in a memorandum of law on sniper use of open-tip ammunition, the US Department of the Army stated that:

The United States is not a party to [the 1899 Hague Declaration concerning Expanding Bullets], but U.S. officials over the years have taken the position that the armed forces of the United States will adhere to its terms to the extent that its application is consistent with the object and purpose of article 23e of [the 1907 HR].⁸²

He added, however, that:

Wound ballistic research over the past fifteen years has determined that the prohibition contained in the 1899 Hague Declaration [concerning Expanding Bullets] is of minimal to no value, inasmuch as virtually all jacketed military bullets employed since 1899 with pointed ogival spitzer tip shape have a tendency to fragment on impact with soft tissue, harder organs, bone or the clothing and/or equipment worn by the individual soldier.

...

⁷⁹ US, Department of Defense, Acting General Counsel, Reply of 18 January 1974 to a letter of 14 November 1973 of a member of the House of Representatives, Arthur W. Rovine, *Digest of United States Practice in International Law, 1974*, Department of State Publication 8809, Washington, D.C., 1975, pp. 705–706.

⁸⁰ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, pp. 280–281, § 7.

⁸¹ US, Department of the Army, Office of the Judge Advocate General, Memorandum on the use of small-caliber armor-piercing incendiary (API) ammunition against enemy personnel, 15 March 1983, § 2.

⁸² US, Department of the Army, Office of the Judge Advocate General, Sniper Use of Open-Tip Ammunition – Memorandum of Law, 12 October 1990, p. 4, § 3.

Weighing the increased performance of the pointed ogival spitzer tip bullet against the increased injury its break-up may bring, the nations of the world – through almost a century of practice – have concluded that the need for the former outweighs concern for the latter and does not result in unnecessary suffering as prohibited by the 1899 Hague Declaration Concerning Expanding Bullets and the 1907 Hague Convention IV. The 1899 Hague Declaration Concerning Expanding Bullets remains valid for expression of the principle that a nation may not employ a bullet that expands easily on impact for the purpose of unnecessarily aggravating the wound inflicted upon an enemy soldier.⁸³

75. In 1990, in a memorandum of law on sniper use of open-tip ammunition, the US Department of the Army stated that the use of the 7.62 Norma Match ammunition with open-tip bullet is not contrary to the Hague or Geneva rules, since the

purpose of the 7.62mm “open-tip” MatchKing bullet is to provide maximum accuracy at very long range . . . It may fragment upon striking its target, although the probability of its fragmentation is not as great as some military ball bullets currently in use by some nations. Bullet fragmentation is not a design characteristic, however, nor a purpose for use of the MatchKing by U.S. Army snipers. Wounds caused by MatchKing ammunition are similar to those caused by a fully jacketed military ball bullet, which is legal under the law of war . . . The military necessity for its use . . . is complemented by the high degree of discriminate fire it offers.⁸⁴

76. In 1993, in a legal review of the USSOCOM Special Operations Offensive Handgun, the US Department of the Army stated that:

The Hague Declaration Concerning Expanding Bullets of 29 July 1899 prohibits the use in international armed conflict . . . of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions.

The United States is not a party to this declaration, but has taken the position that it will adhere to the terms of this convention and its conventional military operations to the extent that its application is consistent with the object and purpose of article 23e of the [1907 HR].

...

The conflict spectrum clearly has changed from 1899, and the immediate incapacitation essential to the prevention of the release of dangerous materials or the murder of hostages or prisoners of war necessitates reconsideration of the 1899 prohibition in light of these changed circumstances. The Hague Declaration retains its general validity in limiting use of expanding ammunition by conventional military forces in conventional armed conflict when such use may result in superfluous injury, absent a clear showing of military necessity for its use.⁸⁵

⁸³ US, Department of the Army, Office of the Judge Advocate General, *Sniper Use of Open-Tip Ammunition – Memorandum of Law*, 12 October 1990, pp. 6–7, § 6.

⁸⁴ US, Department of the Army, Office of the Judge Advocate General, *Sniper use of open-tip ammunition – Memorandum of law*, 12 October 1990, p. 7.

⁸⁵ US, Department of the Army, Office of the Judge Advocate General, *Legal Review of USSOCOM Special Operations Offensive Handgun*, 16 February 1993, pp. 12 and 17.

77. In 1996, in a legal review of the Fabrique Nationale 5.7x28mm Weapon System, the US Department of the Army stated that “the United States is not a party to [the 1899 Hague Declaration concerning Expanding Bullets], but has taken the position that it will adhere to the terms of the convention in armed conflict to the extent that its application is consistent with the object and purpose of article 23e of the [1907 HR]”.⁸⁶

78. At the CDDH, the SFRY voted in favour of the Philippine amendment (see *supra*), but because that amendment had been rejected it stated that it

deeply regrets that the use of unlawful methods or means of combat was not included in the grave breaches, particularly since to have done so would merely have been to have codified an already existing rule of customary law, because there can be no doubt that to use prohibited weapons or unlawful methods of making war is already to act unlawfully, that is, it is a war crime punishable by existing international law.⁸⁷

79. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the Ministry of Defence of the SFRY (FRY) stated that:

The nature of the injuries of some of the members of the Yugoslav People’s Army show that forbidden means have been used in the armed conflict, before all ammunition suitable to inflict disproportionate and needless injuries, that reduce the chances of the injured to survive.

In that respect, the injuries of [a] soldier . . . are characteristic. He was hit in the tip of his right forearm and the round had crumbled and split the forearm bone, the tissue and thus blew the fist of the injured to bits. In the riddled channel and the surrounding tissue, pieces of a fragmented round were found. All that implies for the use of the so-called soft-nosed bullet.⁸⁸

80. In a communication to the ICRC in 1991, a Red Cross Society transmitted a government report which denounced the use of dum-dum bullets in a non-international conflict.⁸⁹

81. In 2000, the government of a State stated that, although the prohibition of expanding bullets applied to military action and not to civil law enforcement, its police “should operate within the *spirit*” of the 1907 Hague Convention (IV) and therefore not cause unnecessary suffering. The justification of discharging a firearm by a police officer is to take immediate and effective action to stop a life-threatening action by an armed offender. In these circumstances, it is important to immediately stop the offender without putting at risk the lives of the officer or of others. Therefore, ammunition must immediately incapacitate and

⁸⁶ US, Department of the Army, Office of the Judge Advocate General, Fabrique Nationale 5.7x28mm Weapon System: Legal Review, 13 May 1996, p. 3.

⁸⁷ SFRY, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 306.

⁸⁸ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 4.

⁸⁹ ICRC archive document.

minimise the risk of “over-penetration” (i.e. going through the target and perhaps hitting someone else as well). Expanding ammunition helped to slow the projectile on impact with the target; reduced the potential for over-penetration thereby endangering others; and minimised the potential of ricochet should it hit a hard surface. Handgun ammunition used by police forces in the State were jacketed soft-nosed, but when rifle ammunition was used in order to operate over longer ranges, it was usually full-metal jacket and conformed to military specifications. Handgun soft-point or hollow-point ammunition was designed to provide controlled expansion and did not fragment in the same way as “dum-dum” bullets.⁹⁰

III. Practice of International Organisations and Conferences

United Nations

82. In resolutions adopted in 1970 and 1971, the UN General Assembly called upon “all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907”.⁹¹

83. In a resolution adopted in 1972, the UN General Assembly called upon “all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907”.⁹²

84. In a resolution adopted in 1973, the UN General Assembly reaffirmed the urgent need to ensure full and effective application by all the parties to armed conflicts of existing legal rules relating to such conflicts, in particular the Hague Conventions of 1899 and 1907.⁹³

85. In three resolutions adopted between 1974 and 1976, the UN General Assembly called upon “all parties to armed conflict” to acknowledge and to comply with their obligations under the humanitarian instruments and observe the international humanitarian rules which are applicable, in particular, the Hague Conventions of 1899 and 1907.⁹⁴

86. In 1969, in a report on respect for human rights in armed conflict, the UN Secretary-General stated that some weapons which caused unnecessary suffering “have been prohibited for a long time by the international community

⁹⁰ ICRC archive document.

⁹¹ UN General Assembly, Res. 2677 (XXV), 9 December 1970, § 1; Res. 2852 (XXVI), 20 December 1971, § 1.

⁹² UN General Assembly, Res. 3032 (XXVII), 18 December 1972, § 2. The resolution was adopted by 103 votes in favour, none against and 25 abstentions (Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Canada, Colombia, Cuba, France, Greece, Guatemala, Honduras, Israel, Italy, Japan, Laos, Luxembourg, Malawi, Nepal, Portugal, South Africa, UK, US and Uruguay), UN Doc. A/PV.2114, 18 December 1972, p. 20.

⁹³ UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, preamble. The resolution was adopted by 107 votes in favour, none against and 6 abstentions (Costa Rica, Israel, Paraguay, Portugal, Spain and US), UN Doc. A/PV.2197, 12 December 1973, p. 17.

⁹⁴ UN General Assembly, Res. 3319 (XXIX), 14 December 1974, § 3; Res. 3500 (XXX), 15 December 1975, § 1; Res. 31/19, 24 November 1976, § 1.

(see for instance, the Hague Declaration of 1899 which prohibits the use of bullets ‘which expand or flatten in the human body’).⁹⁵

87. In 1973, a survey conducted by the UN Secretariat noted that there was a consensus that expanding bullets were prohibited under the 1899 Hague Declaration concerning Expanding Bullets.⁹⁶

Other International Organisations

88. The first OAU/ICRC seminar on IHL for diplomats accredited to the OAU in 1994 recommended that the “Hague Law and relevant provisions regulating the means and methods of warfare such as the use of specific weapons must be applied to both international and non international conflictual situations”.⁹⁷

International Conferences

89. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

90. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

91. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the use of bullets which expand or flatten easily in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions, is prohibited”.⁹⁸

92. The ICRC Commentary on the Additional Protocols states that:

1419. The specific applications of the prohibition formulated in Article 23, paragraph 1(e), of the Hague Regulations, or resulting from the Declarations of St. Petersburg and The Hague, are not very numerous. They include:

...
 2. “dum-dum” bullets, i.e., bullets which easily expand or flatten in the human body, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions or bullets of irregular shape or with a hollowed out nose;
 ...

⁹⁵ UN General Assembly, Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/7720, 20 November 1969, p. 59.

⁹⁶ UN Secretariat, Survey on respect for human rights in armed conflicts, Existing rules of international law concerning the prohibition or restriction of the use of specific weapons, UN Doc. A/9215, 7 November 1973, p. 134.

⁹⁷ OAU/ICRC, First seminar on IHL, Addis Ababa, 7 April 1994, Conclusions and Recommendations, § 9.

⁹⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 917.

1420. The weapons which are prohibited under the provisions of the Hague Law are, a *fortiori*, prohibited under [Article 35(2) AP I].⁹⁹

93. In a communication to the ICRC in 1991, a Red Cross Society denounced the use of dum-dum bullets in an international conflict.¹⁰⁰

VI. *Other Practice*

94. Rule B2 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IIHL, states that “the customary rule prohibiting the use of bullets which expand or flatten easily in the human body, such as dum-dum bullets, is applicable in non-international armed conflicts”.¹⁰¹

⁹⁹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1419–1420.

¹⁰⁰ ICRC archive document.

¹⁰¹ IIHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B2, *IRRC*, No. 278, 1990, p. 397.

EXPLODING BULLETS

Exploding Bullets (practice relating to Rule 78)

§§ 1–49

Exploding Bullets

I. Treaties and Other Instruments

Treaties

1. The 1868 St. Petersburg Declaration states that “the Contracting Parties engage mutually to renounce, in case of war among themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes, which is either explosive or charged with fulminating or inflammable substances”. The weight of 400 grammes was chosen since it was the weight of the smallest artillery shell of that time.

Other Instruments

2. Under Article 13(e) of the 1874 Brussels Declaration, “the use of projectiles prohibited by the Declaration of St. Petersburg of 1868” is “especially forbidden”.

3. Article 9(a) of the 1880 Oxford Manual states that “it is forbidden . . . to employ . . . projectiles, . . . calculated to cause superfluous suffering, or to aggravate wounds – notably projectiles of less weight than four hundred grams which are explosive or are charged with fulminating or inflammable substances”.

4. Article 16(2) of the 1913 Oxford Manual of Naval War provides that “it is forbidden . . . to employ . . . projectiles . . . calculated to cause unnecessary suffering. Entering especially into this category are explosive projectiles or those charged with fulminating or inflammable materials, less than 400 grammes in weight.”

5. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the “use of explosive . . . bullets”.

6. Article 18 of the 1923 Hague Rules of Air Warfare provides that “the use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited.

This provision applies equally to states which are parties to the Declaration of St. Petersburg, 1868, and to those which are not."

7. Section 6.2 of the 1999 UN Secretary-General's Bulletin provides that "the United Nations force shall respect the rules prohibiting... the use of certain weapons... These include, in particular, the prohibition on the use of... bullets which explode... in the human body."

II. National Practice

Military Manuals

8. Australia's *Commanders' Guide* prohibits the use of "projectiles weighing less than 400 grams which are either explosive or charged with fulminating or inflammable substances (St. Petersburg)".¹

9. Australia's *Defence Force Manual* states that "bullets or other projectiles weighing less than 400 grams which are either explosive or contain fulminating or inflammable substances (exploding small arms projectiles) are prohibited".²

10. Belgium's *Law of War Manual* proscribes the use of exploding bullets under 400 grammes, with reference to the 1868 St. Petersburg Declaration.³

11. Canada's *LOAC Manual* states that "the following types of ammunition are prohibited: a. projectiles of a weight below 400 grams that are either explosive or charged with fulminating (exploding) or inflammable substances".⁴

12. France's *LOAC Manual* refers to the 1868 St. Petersburg Declaration.⁵

13. Germany's *Military Manual* states that:

In the 1868 St. Petersburg Declaration the use of explosive and incendiary projectiles under 400 grammes was prohibited, since these projectiles were deemed to cause disproportionately severe injury to soldiers, which is not necessary for putting them out of action. This prohibition is only of limited importance now, since it is reduced by customary law to the use of explosive and incendiary projectiles of a weight significantly lower than 400 grammes which can disable only the individual directly concerned but not any other persons. 20 mm high-explosive grenades and projectiles of a similar calibre are not prohibited.⁶

14. Italy's *IHL Manual* states that "it is specifically prohibited... to use explosive or incendiary projectiles of a weight below 400 grammes, except for air or anti-air systems."⁷

15. New Zealand's *Military Manual* prohibits the use of "projectiles weighing less than 400 grams which are either explosive or charged with fulminating or inflammable substances". It adds that:

The use of tracer and incendiary ammunition by the armed forces of belligerents was general during the Second World War and must be considered to be lawful. An argument can be made that the use of such ammunition is illegal if directed

¹ Australia, *Commanders' Guide* (1994), § 932(f).

² Australia, *Defence Force Manual* (1994), § 408. ³ Belgium, *Law of War Manual* (1983), p. 37.

⁴ Canada, *LOAC Manual* (1999), p. 5-2. ⁵ France, *LOAC Manual* (2001), p. 53.

⁶ Germany, *Military Manual* (1992), § 406. ⁷ Italy, *IHL Manual* (1991), Vol. I, § 8(5).

solely against combatant personnel because of the St Petersburg Declaration and [the 1907] HR Art. 23(e). This argument ignores the fact that the UN Conference which negotiated the [1980 Protocol III to the CCW], was unable to agree on any requirement to protect combatants from the effects of incendiary weapons.⁸

16. Russia's Military Manual prohibits the use of various weapons that cause unnecessary suffering, including "projectiles weighing less than 400 grammes, which are either explosive or charged with fulminating or inflammable substances".⁹

17. Spain's LOAC Manual imposes a total prohibition on "the use of projectiles weighing less than 400 grammes which are explosive".¹⁰

18. The UK Military Manual states that:

The international agreements limiting the means of destruction of enemy combatants are contained in [Article 23 of the 1907 HR] and in three Declarations and one Protocol, by which the contracting parties, of which Great Britain is one, engage to:

- (i) "to renounce in case of war amongst themselves, the employment by their military or naval troops of any projectile of a weight below 400 grammes . . . which is either explosive or charged with fulminating or inflammable substances" (Declaration of St. Petersburg, 1868)

...

... This work deals only with land warfare (whether conducted by land, sea or air forces) and therefore is not concerned with air warfare. However, attention must be drawn to the Air Warfare Rules drafted at the Hague in 1923 by a commission of jurists appointed by certain Governments. Art. 18 of that code provides as follows: "The use of tracer, incendiary or explosive projectiles by or against aircraft is not prohibited." This provision applies equally to States which are parties to the Declaration [of St. Petersburg of 1868], and those which are not. During the Second World War such projectiles were used by the air forces of all belligerents . . . The use of tracer and incendiary ammunition by the armed forces of belligerents was general during the Second World War and must be considered to be lawful provided that it is directed solely against inanimate military targets (including aircraft). The use of such ammunition is illegal if directed solely against combatant personnel. This is so for two reasons, first the renunciation contained in the Declaration of St. Petersburg, 1868, referred to and second the prohibition in [Article 23(e) of the 1907 HR].¹¹

19. The UK LOAC Manual states that "the following are prohibited in *international* armed conflict: a. explosive or inflammable bullets for use against personnel".¹² (emphasis in original)

20. The US Air Force Pamphlet states that "international law has condemned . . . exploding bullets because of types of injuries and inevitability of death".¹³

⁸ New Zealand, *Military Manual* (1992), § 510(f) and footnote 49, see also § 617(f) and footnote 37 (air warfare).

⁹ Russia, *Military Manual* (1990), § 6(c). ¹⁰ Spain, *LOAC Manual* (1996), Vol. I, § 3.2.a.(2).

¹¹ UK, *Military Manual* (1956), § 109 and footnote 1.

¹² UK, *LOAC Manual* (1981), Section 5, p. 20, § 1(a).

¹³ US, *Air Force Pamphlet* (1976), § 6-3(b)(2).

National Legislation

21. Andorra's Decree on Arms prohibits the use of exploding bullets.¹⁴
22. Australia's War Crimes Act considers "any war crime within the meaning of the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]" as a war crime, including the use of explosive bullets.¹⁵
23. Ecuador's National Civil Police Penal Code punishes the members of the National Civil Police "who use or order to be used . . . exploding bullets".¹⁶
24. Italy's Law of War Decree as amended provides that "it is prohibited . . . to use explosive or incendiary projectiles of a weight below 400 grammes, except for air or anti-air systems".¹⁷
25. The Definition of War Crimes Decree of the Netherlands includes the "use of explosive . . . bullets" in its list of war crimes.¹⁸
26. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, "means or methods of combat prohibited under the rules of international law, during a war or an armed conflict" is a war crime.¹⁹ The commentary on the Penal Code as amended notes that "the following weapons and means of combat are considered to be prohibited: explosive projectiles under 400 g. that burst or have an incendiary charge".²⁰

National Case-law

27. No practice was found.

Other National Practice

28. At the Second Review Conference of States Parties to the CCW in 2001, Brazil stated that it "shared the concern that the 1868 St. Petersburg Declaration's ban on the use of projectiles that might explode with the human body should not be subverted".²¹
29. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Colombia stated that "high-velocity small-calibre projectiles . . . were indeed comparable to exploding bullets" and should be prohibited.²²

¹⁴ Andorra, *Decree on Arms* (1989), Chapter 1, Section 3, Article 2.

¹⁵ Australia, *War Crimes Act* (1945), Section 3.

¹⁶ Ecuador, *National Civil Police Penal Code* (1960), Article 117(4).

¹⁷ Italy, *Law of War Decree as amended* (1938), Article 35(5).

¹⁸ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

¹⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

²⁰ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

²¹ Brazil, Statement of 11 December 2001 at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/2, 2001, p. 85, § 71; see also Statement at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001, UN Doc. CCW/CONF.II/PC.3/PV.1, 5 October 2001, p. 54.

²² Colombia, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.14, 5 March 1975, pp. 132–133, § 9.

30. According to the Report on the Practice of Indonesia, the use of exploding bullets is prohibited in Indonesia.²³

31. According to the Report on the Practice of Jordan, Jordan does not use, manufacture or stockpile explosive bullets and it has no intention of possessing or using such weapons in the future.²⁴

32. In a letter to the ICRC in 2001, Norway stated that:

We fully recognise the validity of the St. Petersburg Declaration and the customary law established on the basis of the Declaration. The principle set out in the Declaration should, however, be interpreted in the light of more recent international humanitarian law, and in particular the prohibition against employing weapons and ammunition that are of such a nature as to cause superfluous injury or unnecessary suffering. In the assessment of the legality of a particular weapon or kind of ammunition, there has been a clear practice among nations since 1868 of weighing the legality against the intended use of the weapon or ammunition. In such assessments several factors, such as distance from the target, intended target categories and depth of penetration are considered to be relevant when establishing the effect on the target.²⁵

33. At the Second Review Conference of States Parties to the CCW in 2001, Norway stated that it “endorsed all efforts to strengthen the fundamental principle that the development and use of weapons systems deemed contrary to the 1868 St. Petersburg Declaration should be prevented”.²⁶

34. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that the 1868 St. Petersburg Declaration prohibited projectiles the use of which “was considered to be gratuitously cruel, because it caused horrific and almost invariably fatal injuries, while offering little or no military advantage over the use of ordinary ammunition”.²⁷

35. In 1998, in a legal review of a 12.7 mm explosive bullet, the US Department of the Army stated that “a projectile that will explode on impact with the human body would be prohibited by the law of war from use for anti-personnel purposes. This remains the view of the US.”²⁸ In an update of this legal review in 2000, the Department of the Army stated that “the considerable practice of nations during this century suggests that States accept that an exploding projectile designed exclusively for antipersonnel use would be prohibited, as there is no military purpose for it”.²⁹

36. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, the US stated that it agreed with the ICRC

²³ Report on the Practice of Indonesia, 1997, Chapter 3.4.

²⁴ Report on the Practice of Jordan, 1997, Chapter 3.4.

²⁵ Norway, Letter to the President of the ICRC, 11 May 2001.

²⁶ Norway, Statement of 11 December 2001 at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/2, 2001, p. 83, § 58.

²⁷ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.65.

²⁸ US, Department of the Army, Office of the Judge Advocate General, DAJA-IO (27-1A), Subject: Mk211, MOD O, Cal. 50 Multi-purpose Projectiles: Legal Review, 19 February 1998.

²⁹ US, Department of the Army, Office of the Judge Advocate General, DAJA-IO (27-1A), Subject: Mk211, MOD O, Cal. 50 Multipurpose Projectile: Legal Review, 14 January 2000, p. 17.

“that there is no valid military requirement for a bullet designed to explode upon impact with the human body”.³⁰

37. In a statement in 1991, the Supreme Command of the YPA of the SFRY stated that:

The authorities and Armed Forces of the Republic of Slovenia are treating JNA as an occupation army; and are in their ruthless assaults on JNA members and their families going as far as to employ means and methods which were not even used by fascist units and which are prohibited under international law . . . They are . . . using explosive bullets.³¹

III. Practice of International Organisations and Conferences

United Nations

38. No practice was found.

Other International Organisations

39. No practice was found.

International Conferences

40. In 1999, the ICRC organised an Expert Meeting on Exploding Projectiles of 12.7 mm and Below to which military, legal and ballistic governmental experts from Belgium, Norway, Switzerland and US (i.e. countries that produce and/or stock 12.7 mm multipurpose bullets) were invited in their personal capacity. The summary report of the meeting, reviewed and accepted by all participants, stated that there was a general consensus, in relation to projectiles of 12.7 mm and below, that:

The prohibition on the intentional use against combatants of such projectiles which explode upon impact with the human body, which originated in the 1868 St. Petersburg Declaration, continues to be valid.

The targeting of combatants with such projectiles the foreseeable effect of which is to explode upon impact with the human body would be contrary to the object and purpose of the St. Petersburg Declaration.

There is no military requirement for a projectile designed to explode upon impact with the human body.

...

States producing such projectiles notify past and future recipients of these projectiles that their intentional use against combatants is a violation of the Law of Armed Conflict.³²

41. The Final Declaration of the Second Review Conference of States Parties to the CCW in 2001 took note of “the report of the International Committee

³⁰ US, Statement at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001, UN Doc. CCW/CONF.II/PC.3/PV.1, 5 October 2001, p. 54.

³¹ SFRY (FRY), YPA Supreme Command, Statement, 1 July 1991, TANJUG, Belgrade.

³² Expert Meeting on Exploding Projectiles of 12.7 mm and Below, Geneva, 29–30 March 1999, Summary.

of the Red Cross on 'Ensuring respect for the 1868 St. Petersburg Declaration prohibiting the use of certain explosive projectiles' (dated 18 September 2001)" and invited "States to consider this report and other relevant information, and take any appropriate action".³³

IV. Practice of International Judicial and Quasi-judicial Bodies

42. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

43. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the use of projectiles of a weight below 400 grammes, which are either explosive or charged with fulminating or inflammable substances, is prohibited".³⁴

44. The ICRC Commentary on the Additional Protocols states that:

1419. The specific applications of the prohibition formulated in Article 23, paragraph 1(e), of the Hague Regulations, or resulting from the Declarations of St. Petersburg and The Hague, are not very numerous. They include:

1. explosive bullets . . .

1420. The weapons which are prohibited under the provisions of the Hague Law are, *a fortiori*, prohibited under [Article 35(2) AP I].³⁵

45. In 1998, in a statement in the First Committee of the UN General Assembly, the ICRC declared that:

The ICRC considers the 1868 St. Petersburg Declaration, renouncing the use of exploding bullets, to be a cornerstone of efforts to protect soldiers from superfluous injury or unnecessary suffering. It is disturbing to learn that some armed forces are considering the use of bullets which will explode on impact with soft targets. The ICRC calls on all States rigorously to review, in accordance with article 36 of the 1977 Additional Protocol I, their procurement policies.³⁶

46. In 1999, in a statement in the First Committee of the UN General Assembly, the ICRC expressed concern about a "multipurpose" bullet, some versions of which exploded on impact with the human body. It further stated that:

The 1868 St. Petersburg Declaration prohibited the use of explosive bullets in order to protect soldiers from suffering which serves no military purpose and is therefore contrary to the laws of humanity. It is disturbing to learn that in recent years bullets capable of exploding on impact with a human body have been produced, sold and

³³ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, Final Declaration, UN Doc. CCW/CONF.II/2, 2001, p. 9.

³⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 916.

³⁵ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 1419–1420.

³⁶ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/53/PV.9, 19 October 1998, p. 19.

used. In early 1999 the ICRC hosted a meeting of technical and legal governmental experts, who reaffirmed that the proliferation of such bullets is a serious problem and undermines the very purpose of the St. Petersburg Declaration. We urge all States to refrain from the production and export of such bullets and urge those that possess them to strictly prohibit their use against persons, a practice which violates existing law. The ICRC expects to report on this problem and seek appropriate action during the 2001 CCW Review Conference.³⁷

47. In a report submitted in 2001 to the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, the ICRC recalled the consensus expressed by the participants in the 1999 Expert Meeting on Exploding Projectiles of 12.7 mm and Below:

calls on *all States* to

- take steps to ensure that explosive projectiles under 400 grams which may explode within the human body are not produced, used or transferred;
- undertake a rigorous review, as required by Article 36 of Protocol I of 1977 Additional to the Geneva Conventions of 1949, before acquiring or developing explosive projectiles under 400 grams and sniper rifles capable of using such projectiles in order to ensure that such projectiles will not explode within the human body.

The ICRC urges *States which produce or transfer explosive projectiles* under 400 grams which may explode within the human body urgently to:

- Inform past recipients of such projectiles that their use against combatants is prohibited under international humanitarian law.
- Suspend the production and export of such projectiles until they have been adapted so as to ensure that their use against combatants will not contravene the object and purpose of the St Petersburg Declaration. This would involve testing, redesign and other steps to ensure that the chance of the projectile's explosion within the human body (whether soft tissue or bone) has been eliminated.³⁸ [emphasis in original]

48. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, the ICRC stated that “the object and purpose of the 1868 [St. Petersburg] Declaration to protect combatants from unnecessary suffering or death from explosive projectiles remains valid and in the view of the ICRC is part of customary international law”.³⁹

VI. Other Practice

49. No practice was found.

³⁷ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/54/PV.12, 20 October 1999, p. 31.

³⁸ ICRC, Ensuring respect for the 1868 St Petersburg Declaration: Prohibiting the use of certain explosive projectiles, Report submitted to the Third Preparatory Committee for the Second Review Conference of the States Parties to the CCW, UN Doc. CCW/CONF.II/PC.3/WP.6, 18 September 2001, p. 4.

³⁹ US, Statement at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001, UN Doc. CCW/CONF.II/PC.3/PV.1, 5 October 2001, p. 54.

WEAPONS PRIMARILY INJURING BY NON-DETECTABLE FRAGMENTS

Weapons Primarily Injuring by Non-Detectable Fragments
(practice relating to Rule 79)

§§ 1–55

Weapons Primarily Injuring by Non-Detectable Fragments

I. Treaties and Other Instruments

Treaties

1. The 1980 Protocol I to the CCW provides that “it is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays”.

2. Upon ratification of the 1980 CCW, Canada stated that “with respect to [the 1980] Protocol I [to the CCW], it is the understanding of the Government of Canada that the use of plastics or similar materials for detonators or other weapons parts not designed to cause injury is not prohibited”.¹

3. Upon ratification of the 1980 CCW, France stated that:

with reference to the scope of application defined in article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, . . . it will apply the provisions of the Convention and its three Protocols [I, II and III] to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949 [international and non-international armed conflicts].²

4. Upon accession to the 1980 CCW, Israel stated that:

With reference to the scope of application defined in article 1 of the Convention, the Government of the State of Israel will apply the provisions of the Convention and those annexed Protocols to which Israel has agreed [I, II and III] become bound to all armed conflicts involving regular forces of States referred to in article 2 common to the Geneva Conventions of 12 August 1949, as well as to all armed conflicts referred to in article 3 common to the Geneva Conventions of 12 August 1949 [international and non-international armed conflicts].³

Israel also declared that “with respect to [the 1980] Protocol I [to the CCW], it is the understanding of the Government of Israel that the use of plastics or

¹ Canada, Declaration made upon ratification of the CCW, 24 June 1994, § 2.

² France, Reservations made upon ratification of the CCW, 4 March 1988.

³ Israel, Declarations and understandings made upon accession to the CCW, 22 March 1995, § (a).

similar materials for detonators or other weapon parts not designed to cause injury is not prohibited".⁴

5. Upon ratification of the 1980 CCW, the US declared that:

with reference to the scope of application defined in article 1 of the Convention, that the United States will apply the provisions of the Convention, Protocol I, and Protocol II to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949 [international and non-international armed conflicts].⁵

6. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.
3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

Other Instruments

7. Section 6.2 of the 1999 UN Secretary-General's Bulletin provides that "the use of certain conventional weapons, such as non-detectable fragments, ... is prohibited".

II. National Practice

Military Manuals

8. Argentina's Law of War Manual provides that it is prohibited "to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-ray".⁶

9. Australia's Commanders' Guide states that "munitions which produce fragments undetectable by X-ray machines, such as glass, are prohibited based upon the principle of unnecessary suffering".⁷ It provides that the use of "weapons which injure by fragments which, in the human body, escape detection by

⁴ Israel, Declarations and understandings made upon accession to the CCW, 22 March 1995, § (b).

⁵ US, Declaration made upon ratification of the CCW, 24 March 1995.

⁶ Argentina, *Law of War Manual* (1989), § 4.16.

⁷ Australia, *Commanders' Guide* (1994), § 308.

X-rays" is prohibited.⁸ The guide also states that these weapons are included in those which "are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law, are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering."⁹

10. Australia's Defence Force Manual states that "weapons which cause injury by the use of fragments which are undetectable by X-ray in the human body are prohibited".¹⁰ It also states that these weapons are included in those which "are totally prohibited. These blanket prohibitions, which may be traced to treaty or customary international law, are justified on the grounds that the subject weapons are either indiscriminate in their effect or cause unnecessary suffering."¹¹

11. Belgium's Law of War Manual states that "the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-ray is prohibited".¹²

12. Canada's LOAC Manual provides that "weapons that cause injury by the use of fragments undetectable by X-ray in the human body are prohibited".¹³

13. Ecuador's Naval Manual states that "the incorporation in the ammunition of materials which are difficult to detect or undetectable by X-ray equipment, such as glass or clear plastic, is prohibited, since they unnecessarily inhibit the treatment of wounds".¹⁴

14. France's LOAC Teaching Note includes weapons that injure by non-detectable fragments in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁵

15. France's LOAC Manual includes weapons that injure by non-detectable fragments in the list of weapons that "are totally prohibited by the law of armed conflict" because of their inhuman and indiscriminate character.¹⁶

16. Germany's Military Manual prohibits the use of "any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays".¹⁷

17. Germany's IHL Manual states that:

International humanitarian law prohibits the use of a number of means of warfare, which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g. . . . weapons whose primary effect is to injure by fragments

⁸ Australia, *Commanders' Guide* (1994), § 932(d).

⁹ Australia, *Commanders' Guide* (1994), § 304.

¹⁰ Australia, *Defence Force Manual* (1994), § 407.

¹¹ Australia, *Defence Force Manual* (1994), § 404.

¹² Belgium, *Law of War Manual* (1983), p. 39.

¹³ Canada, *LOAC Manual* (1999), p. 5-3, § 21.

¹⁴ Ecuador, *Naval Manual* (1989), § 9.1.1.

¹⁵ France, *LOAC Teaching Note* (2000), p. 6.

¹⁶ France, *LOAC Manual* (2001), pp. 53-54.

¹⁷ Germany, *Military Manual* (1992), § 408.

which in the human body escape detection by X-rays, e.g. plastic or glass ammunition.¹⁸

18. Israel's Manual on the Laws of War states, regarding the use of weapons that injure by non-detectable fragments, that "the resultant injury is far in excess of what is required, hence forbidden".¹⁹

19. Italy's IHL Manual states that "it is specifically prohibited... to use... bullets radiologically invisible."²⁰

20. Kenya's LOAC Manual states that "the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-ray is prohibited."²¹

21. The Military Manual of the Netherlands provides that:

Weapons whose primary effect is to cause wounds by means of elements (splinters or fragments) which cannot be detected by X-rays in the human body are prohibited...

The meaning of this prohibition, however, is limited. It is in fact what remains of attempts to get a prohibition for more categories of explosive ammunition, such as projectiles with pre-fragmented jacket, or filled with very small bullets (pellets) or with needle-like objects (fléchettes). These kinds of ammunition are not prohibited; in essence they do not differ from long existing and widely used high explosive shells.²²

22. New Zealand's Military Manual prohibits the use of "weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays".²³

23. Nigeria's Manual on the Laws of War states that "it is expressly forbidden to use... projectiles with broken glass".²⁴

24. Russia's Military Manual prohibits the use of weapons that may cause superfluous injury or suffering and refers to the 1980 Protocol I to the CCW.²⁵

25. South Africa's LOAC Manual states that "weapons which are calculated to cause unnecessary suffering are illegal per se. Such weapons include... weapons filled with glass."²⁶

26. Spain's LOAC Manual imposes an "absolute prohibition on the use of... weapons the primary effect of which is to injure by fragments which in the human body escape detection by X-rays".²⁷

27. Sweden's IHL Manual states that "[the 1980] Protocol I to the CCW relates to certain fragmentation weapons. The Protocol forbids the use of weapons

¹⁸ Germany, *IHL Manual* (1996), § 305. ¹⁹ Israel, *Manual on the Laws of War* (1998), p. 13.

²⁰ Italy, *IHL Manual* (1991), Vol. I, § 8(6).

²¹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 6.

²² Netherlands, *Military Manual* (1993), p. IV-7.

²³ New Zealand, *Military Manual* (1992), §§ 510(d) (land warfare) and 617(d) (air warfare).

²⁴ Nigeria, *Manual on the Laws of War* (undated), § 11.

²⁵ Russia, *Military Manual* (1990), § 6. ²⁶ South Africa, *LOAC Manual* (1996), § 34(f)(i).

²⁷ Spain, *LOAC Manual* (1996), Vol. I, § 3.2.a.(2).

whose primary effect is to injure by fragments which cannot be detected by X-raying the injured person.”²⁸

28. Under Switzerland’s Basic Military Manual, “it is prohibited to use weapons the primary effect of which is the formation of fragments non-detectable in the human body by X-rays”.²⁹

29. The UK Military Manual prohibits the use of projectiles filled with broken glass.³⁰

30. The UK LOAC Manual, under the heading “Future Developments”, considers the possibility, thanks to the 1980 CCW, of “a ban on weapons whose main purpose is to produce fragments that cannot be detected by X-ray”.³¹

31. The US Air Force Pamphlet states that “usage and practice has also determined that it is *per se* illegal to use projectiles filled with glass or other materials inherently difficult to detect medically”.³²

32. The US Air Force Commander’s Handbook states that “using clear glass as the injuring mechanism in an explosive projectile or bomb is prohibited, since glass is difficult for surgeons to detect in a wound and impedes treatment”.³³

33. The US Instructor’s Guide states that the principle of unnecessary suffering “outlawed the use of . . . projectiles filled with glass”.³⁴

34. The US Naval Handbook provides that “using materials that are difficult to detect or undetectable by field x-ray equipment, such as glass or clear plastic, as the injuring mechanism in military ammunition is prohibited, since they unnecessarily inhibit the treatment of wounds”.³⁵

National Legislation

35. Under Estonia’s Penal Code, “use of . . . weapons injuring by fragments invisible by X-ray” is a war crime.³⁶

36. Under Hungary’s Criminal Code as amended, employing “weapons causing injury by fragments which cannot be detected by X-ray” as defined in the 1980 Protocol I to the CCW is a war crime.³⁷

National Case-law

37. No practice was found.

Other National Practice

38. In 1977, in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Austria, Colombia, Denmark, Mexico, Norway, Spain, Sweden, Switzerland and SFRY presented a draft article for AP I stipulating that “it

²⁸ Sweden, *IHL Manual* (1991), Section 3.3.2, p. 79.

²⁹ Switzerland, *Basic Military Manual* (1987), Article 23(a).

³⁰ UK, *Military Manual* (1958), § 110. ³¹ UK, *LOAC Manual* (1981), Section 11, p. 40, § 4(c).

³² US, *Air Force Pamphlet* (1976), § 6-3(b)(2).

³³ US, *Air Force Commander’s Handbook* (1980), § 6-2(a)(2).

³⁴ US, *Instructor’s Guide* (1985), p. 7.

³⁵ US, *Naval Handbook* (1995), § 9.1.1. ³⁶ Estonia, *Penal Code* (2001), § 103.

³⁷ Hungary, *Criminal Code as amended* (1978), Section 160/A(3)(b)(1).

is prohibited to use any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays".³⁸ The proposal received support from FRG, US and Venezuela.³⁹

39. During the CCW preparatory conference in 1979, Australia, Austria, Belarus, Belgium, Bulgaria, Canada, Cuba, Denmark, Finland, France, FRG, GDR, Greece, Hungary, Ireland, Italy, Jamaica, Mexico, Morocco, Netherlands, New Zealand, Norway, Panama, Philippines, Poland, Portugal, Romania, Spain, Sudan, Sweden, Switzerland, Syria, Togo, Ukraine, USSR, UK, US, Venezuela, SFRY and Zaire unanimously sponsored a proposal on the prohibition of weapons that primarily injure by non-detectable fragments, identical to the earlier consensus proposal.⁴⁰

40. At the First Review Conference of States Parties to the CCW in 1995, Australia stated that "the restrictions laid down in the Convention regarding the use of . . . weapons which injured by non-detectable fragments were strong and clear".⁴¹

41. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, India indicated that it "fully supported the idea of expanding the scope of the CCW to cover armed internal conflicts".⁴²

42. According to the Report on the Practice of India, in India there is "a ban and restriction on the use of . . . weapons primarily wounding by non-detectable fragments".⁴³

43. Referring to an interview with the Director of Nuclear, Biological and Chemical Weapons Division of the Indonesian Armed Forces, the Report on the Practice of Indonesia affirms that Indonesia prohibits the use of weapons primarily injuring by non-detectable fragments.⁴⁴

44. According to the Report on the Practice of Jordan, Jordan does not use, manufacture or stockpile weapons primarily wounding by non-detectable

³⁸ Austria, Colombia, Denmark, Mexico, Norway, Spain, Sweden, Switzerland and SFRY, Draft article entitled "Non-detectable fragments" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/408/Rev.1, 17 March–10 June 1977, p. 539.

³⁹ FRG, Statement at the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.40, 19 May 1976, p. 407, § 20; US, Statement at the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.32, 1 June 1976, p. 334, § 15; Venezuela, Statement at the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.25, 13 May 1976, p. 257, § 23.

⁴⁰ Preparatory Conference for the CCW, 19 March–12 April 1979, Draft proposal concerning non-detectable fragments, UN Doc. A/CONF.95/PREP.CONF/L.10, 12 September 1978; Draft proposal concerning non-detectable fragments, UN Doc. A/CONF.95/PREP.CONF/L.10/Add. 1, 13 September 1978; Draft proposal concerning non-detectable fragments, UN Doc. A/CONF.95/PREP.CONF/L.10/Add. 2, 15 September 1978; Draft proposal concerning non-detectable fragments, UN Doc. A/CONF.95/PREP.CONF/L.10/Add. 3, 10 April 1979.

⁴¹ Australia, Statement at the First Review Conference of States Parties to the CCW, Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF.I/SR 3, 2 October 1995, § 25.

⁴² India, Statement of 24 September 2001 at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001.

⁴³ Report on the Practice of India, 1997, Answers to additional questions on Chapter 3.4.

⁴⁴ Report on the Practice of Indonesia, 1997, Interview with the Director of Nuclear, Biological and Chemical Weapons Division of the Armed Forces, Chapter 3.4.

fragments and it has no intention of possessing nor of using such weapons in the future.⁴⁵

45. In 1992, during a debate in the First Committee of the UN General Assembly, the Netherlands implied that universal adherence to the 1980 CCW would give it effect in internal conflicts.⁴⁶

46. In 1979, in a legal review of the Maverick Alternate Warhead, the US Department of the Air Force stated that "it is generally accepted . . . that . . . only weapons designed to injure through non detectable fragments would be prohibited. Incidental effects arising from the use of a few plastic parts in a munition would still be considered lawful."⁴⁷

III. Practice of International Organisations and Conferences

United Nations

47. In a resolution adopted in 1980, the UN General Assembly welcomed the successful conclusion of the 1980 CCW and its Protocols and commended the Convention and the three annexed Protocols to all States "with a view to achieving the widest possible adherence to these instruments".⁴⁸

48. In numerous resolutions adopted between 1981 and 1998, the UN General Assembly urged all States that had not done so to accede to the 1980 CCW and its Protocols.⁴⁹

Other International Organisations

49. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited,

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

- ...
- b. ratify, if they have not done so, . . . the United Nations Convention of 1980 on the prohibitions or restrictions on the use of certain conventional weapons and its protocols . . .
- ...

⁴⁵ Report on the Practice of Jordan, 1997, Chapter 3.4.

⁴⁶ Netherlands, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 November 1992, p. 21.

⁴⁷ US, Air Force, Judge Advocate General, Legal Review of Maverick Alternate Warhead, (AGM-65E), 4 January 1979, § 3.

⁴⁸ UN General Assembly, Res. 35/153, 12 December 1980, § 4.

⁴⁹ UN General Assembly, Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67, 7 December 1988, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 3; Res. 53/81, 4 December 1998, § 5.

- j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.⁵⁰

50. In a resolution adopted in 1994 on respect for IHL and support for humanitarian action in armed conflicts, the OAU Council of Ministers invited “all States that have not yet become party to the... [1980] CCW, to consider, or reconsider, without delay the possibility of doing so in the near future”.⁵¹

51. In two resolutions adopted in 1994 and 1996 on respect for IHL, the OAS General Assembly urged member States to accede to the 1980 CCW.⁵²

International Conferences

52. In 1976, the Rapporteur of the Working Group of the Ad Hoc Committee on Conventional Weapons established by the CDDH noted that “there had been agreement on the proposal” to prohibit the use of any weapon the primary effect of which is to injure by fragments non-detectable by X-ray.⁵³

IV. Practice of International Judicial and Quasi-judicial Bodies

53. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

54. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the use of any weapon the primary effect of which is to injure by fragments which in the human body escape detection by X-rays is prohibited”.⁵⁴

VI. Other Practice

55. No practice was found.

⁵⁰ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(b) and (j).

⁵¹ OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 6.

⁵² OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 1; Res. 1408 (XXVI-O/96), 7 June 1996, § 1.

⁵³ CDDH, Ad Hoc Committee on Conventional Weapons, Statement by the Rapporteur of the Working Group, *Official Records*, Vol. XVI, CDDH/IV/SR.40, 19 May 1976, p. 403, § 2.

⁵⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 920.

BOOBY-TRAPS

Booby-Traps (practice relating to Rule 80)

§§ 1–100

Booby-Traps*I. Treaties and Other Instruments**Treaties*

1. Article 2(2) of the 1980 Protocol II to the CCW and Article 2(4) of the 1996 Amended Protocol II to the CCW define a booby-trap as “any device or material which is designed, constructed or adapted to kill or injure, and which functions unexpectedly when a person disturbs or approaches an apparently harmless object or performs an apparently safe act”.

2. Article 4 of the 1980 Protocol II to the CCW provides that:

1. This Article applies to:

...
(b) booby-traps; ...

2. It is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either: (a) they are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party; or (b) measures are taken to protect civilians from their effects, for example, the posting of warning signs, the posting of sentries, the issue of warnings or the provision of fences.

3. Article 6(2) of the 1980 Protocol II to the CCW and Article 3(3) of the 1996 Amended Protocol II to the CCW prohibit the use of booby-traps which are designed to cause or of a nature to cause superfluous injury or unnecessary suffering.

4. Article 3(4) of the 1980 Protocol II to the CCW and Article 3(10) of the 1996 Amended Protocol II to the CCW provide that:

All feasible precautions shall be taken to protect civilians from the effects of weapons to which this Article applies. Feasible precautions are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

Article 3(10) of the Protocol adds that:

These circumstances include, but are not limited to:

- ...
- (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring);
- (c) the availability and feasibility of using alternatives.

Article 3(11) provides that "effective advance warning shall be given of any emplacement of... booby-traps... which may affect the civilian population, unless circumstances do not permit".

5. Article 6(1)(b) of the 1980 Protocol II to the CCW and Article 7(1) of the 1996 Amended Protocol II to the CCW list the categories of booby-traps that are banned. They provide that it is prohibited in all circumstances to use booby-traps and other devices which are in any way attached to or associated with:

- (a) internationally recognized protective emblems, signs or signals;
- (b) sick, wounded or dead persons;
- (c) burial or cremation sites or graves;
- (d) medical facilities, medical equipment, medical supplies or medical transportation;
- (e) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
- (f) food or drink;
- (g) kitchen utensils or appliances except in military establishments, military locations or military supply depots;
- (h) objects clearly of a religious nature;
- (i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- (j) animals or their carcasses.

6. Article 6(1)(a) of the 1980 Protocol II to the CCW and Article 7(2) of the 1996 Amended Protocol II to the CCW provide that "it is prohibited to use booby-traps or other devices in the form of apparently harmless portable objects which are specifically designed and constructed to contain explosive material".

7. Articles 7 and 9 of the 1980 Protocol II to the CCW and Articles 9 and 10 of the 1996 Amended Protocol II to the CCW contain detailed provisions on the recording and use of information on booby-traps and on the removal of booby-traps.

8. Upon signature of the 1980 CCW, China stated that:

The Protocol [to the CCW] on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices fails to lay down strict restrictions on the use of such weapons by the aggressor on the territory of his victim and to provide

adequately for the right of a state victim of an aggressor to defend itself by all necessary means.¹

9. Upon ratification of the 1980 CCW, France stated that:

With reference to the scope of application defined in article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, . . . it will apply the provisions of the Convention and its three Protocols [I, II and III] to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949.²

10. Upon accession to the 1980 CCW, Israel stated that:

With reference to the scope of application defined in article 1 of the Convention, the Government of the State of Israel will apply the provisions of the Convention and those annexed Protocols to which Israel has agreed [I, II and III] to become bound to all armed conflicts involving regular forces of States referred to in article 2 common to the Geneva Conventions of 12 August 1949, as well as to all armed conflicts referred to in article 3 common to the Geneva Conventions of 12 August 1949.³

11. Upon ratification of the 1980 CCW, the US declared that:

With reference to the scope of application defined in article 1 of the Convention, . . . the United States will apply the provisions of the Convention, Protocol I, and Protocol II to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949.⁴

12. Upon ratification of the 1980 CCW, the US stated that “the United States understands that article 6(1) of the Protocol II [to the CCW] does not prohibit the adaptation for use as booby-traps of portable objects created for a purpose other than as a booby-trap if the adaptation does not violate paragraph (1)(b) of the article”.⁵

13. Article 3(2) of the 1996 Amended Protocol II to the CCW provides that:

Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all . . . booby-traps . . . employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol.

14. Article 3(5) of the 1996 Amended Protocol II to the CCW prohibits the use of booby-traps that are designed to detonate “by the presence of commonly available mine detectors”.

¹ China, Declaration made upon signature of the CCW, 14 September 1981, § 3.

² France, Reservations made upon ratification of the CCW, 4 March 1988.

³ Israel, Declarations and understandings made upon accession to the CCW, 22 March 1995, § (a).

⁴ US, Declaration made upon ratification of the CCW, 24 March 1995.

⁵ US, Statements of understanding made upon ratification of the CCW, 24 March 1995.

15. Article 7(3) of the 1996 Amended Protocol II to the CCW provides that:

3. Without prejudice to the provisions of Article 3, it is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:
 - a) they are placed on or in the close vicinity of a military objective; or
 - b) measures are taken to protect civilians from their effects, for example, the posting of warning sentries, the issuing of warnings or the provision of fences.

16. Article 1(2) of the 1996 Amended Protocol II to the CCW provides that:

This Protocol shall apply, in addition to situations referred to in Article I of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

17. Upon acceptance of the 1996 Amended Protocol II to the CCW, Austria, Denmark, Finland, France, Germany, Ireland, Italy, South Africa and Sweden stated that "the provisions of the amended Protocol which by their contents or nature may be applied also in peacetime, shall be observed at all times".⁶

18. Upon acceptance of the 1996 Amended Protocol II to the CCW, Belgium declared that "the provisions of Protocol II as amended which by their contents or nature may be applied also in peacetime, shall be observed at all times".⁷

19. Upon acceptance of the 1996 Amended Protocol II to the CCW, Canada stated that "it is understood that the provisions of Amended Protocol II shall, as the context requires, be observed at all times".⁸

20. Upon acceptance of the 1996 Amended Protocol II to the CCW, Greece declared that "it is understood that the provisions of the protocol shall, as the context requires, be observed at all times".⁹

⁶ Austria, Declaration made upon acceptance of Amended Protocol II to the CCW, 27 July 1998; Denmark, Declaration made upon acceptance of Amended Protocol II to the CCW, 30 April 1997; Finland, Declaration made upon acceptance of Amended Protocol II to the CCW, 3 April 1998; France, Declarations made upon acceptance of Amended Protocol II to the CCW, 23 July 1998; Germany, Declarations made upon acceptance of Amended Protocol II to the CCW, 2 May 1997; Ireland, Declaration made upon acceptance of Amended Protocol II to the CCW, 27 March 1997; Italy, Declarations made upon acceptance of Amended Protocol II to the CCW, 13 January 1999; South Africa, Declaration made upon acceptance of Amended Protocol II to the CCW, 26 June 1998; Sweden, Declaration made upon acceptance of Amended Protocol II to the CCW, 16 July 1997.

⁷ Belgium, Interpretative declarations made upon acceptance of Amended Protocol II to the CCW, 10 March 1999.

⁸ Canada, Statements of understanding made upon acceptance of Amended Protocol II to the CCW, 26 June 1998, § 1.

⁹ Greece, Declarations made upon acceptance of Amended Protocol II to the CCW, 20 January 1999.

21. Upon acceptance of the 1996 Amended Protocol II to the CCW, Liechtenstein stated that “the provisions of the amended Protocol II which by their contents or nature may also be applied in peacetime, shall be observed at all times”.¹⁰

22. Upon acceptance of the 1996 Amended Protocol II to the CCW, the Netherlands declared that “the provisions of the Protocol which, given their content or nature, can also be applied in peacetime, must be observed in all circumstances”.¹¹

23. Upon acceptance of the 1996 Amended Protocol II to the CCW, Pakistan stated that “the provisions of the Protocol must be observed at all times, depending on the circumstances”.¹²

24. Upon acceptance of the 1996 Amended Protocol II to the CCW, the US declared that:

- (A) the prohibition contained in Article 7(2) of the Amended Mines Protocol [1996 Amended Protocol II to the CCW] does not preclude the expedient adaptation or adaptation in advance of other objects for use as booby-traps or other devices;
- (B) a trip-wired hand grenade shall be considered a “booby-trap” under Article 2(4) of the Amended Mines Protocol and shall not be considered a “mine” or an “anti-personnel mine” under Article 2(1) or Article 2(3), respectively; and
- (C) none of the provisions of the Amended Mines Protocol, including Article 2(5), applies to hand grenade other than trip-wired hand grenades.¹³

25. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.
3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

¹⁰ Liechtenstein, Declaration upon acceptance of Amended Protocol II to the CCW, 19 November 1997.

¹¹ Netherlands, Declaration made upon acceptance of Amended Protocol II to the CCW, 25 March 1999, § 1.

¹² Pakistan, Declarations made upon acceptance of Amended Protocol II to the CCW, 9 March 1999, § 3.

¹³ US, Statements of understanding made upon acceptance of Amended Protocol II to the CCW, 24 May 1999, § (6)(A)–(C).

Other Instruments

26. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with the 1980 Protocol II to the CCW.

27. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with the 1980 Protocol II to the CCW.

28. Section 6.2 of the 1999 UN Secretary-General's Bulletin states that the UN force is prohibited from using certain conventional weapons, such as booby-traps.

*II. National Practice**Military Manuals*

29. Argentina's Law of War Manual reproduces the content of Articles 2(2) and (4), 3, 4, 6 and 7 of the 1980 Protocol II to the CCW.¹⁴

30. Australia's Commanders' Guide states that "the primary concern with the employment of . . . booby traps is that they could be disturbed by innocent parties. Their use is permitted if they can be confined to areas where only lawful combatants would encounter them."¹⁵ It also states that:

Booby traps . . . may not be directed against civilians under any circumstances and they may not be used indiscriminately. Indiscriminate use is placement of such weapons which:

- a. is not on, or directed at, a military objective; or
- b. employs a method or means of delivery which cannot be directed at a specific military objective; or
- c. may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.¹⁶

The Guide adds that:

There are also restrictions on the use of . . . booby traps . . . These weapons may not be used in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:

- (a) they are placed on or in the vicinity of a military objective belonging to or under the control of an enemy; or
- (b) measures are taken to protect civilians from their effects, e.g. posting of warning signs or sentries, issue of warnings or provision of fences.¹⁷

¹⁴ Argentina, *Law of War Manual* (1989), §§ 4.17, 4.18, 4.19, 4.20, 4.21, 4.23 and 4.24(2).

¹⁵ Australia, *Commanders' Guide* (1994), § 316.

¹⁶ Australia, *Commanders' Guide* (1994), § 937.

¹⁷ Australia, *Commanders' Guide* (1994), § 939.

The Guide further states that:

941. The use of the following types of booby traps is prohibited:
- a. any booby traps in the form of an apparently harmless portable object which is specifically designed and constructed (prefabricated) to contain explosive material and to detonate when it is disturbed or approached or,
 - b. booby traps which are in any way attached to or associated with:
 - (1) internationally recognized protective emblems and signs or signals;
 - (2) sick, wounded or dead persons;
 - (3) burial or cremation sites or graves;
 - (4) medical facilities, medical equipment, medical supplies or medical transportation;
 - (5) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
 - (6) food or drink;
 - (7) kitchen utensils or appliances except in military establishment, military locations or military supply depots;
 - (8) objects clearly of a religious nature;
 - (9) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; and
 - (10) animals or their carcasses.

942. The location of . . . areas where there is use of booby traps is to be recorded.¹⁸

31. Australia's Defence Force Manual states that:

All feasible precautions must be taken to protect civilians from the effects of . . . booby traps . . . They must not be directed at civilians nor may they be used indiscriminately. It is indiscriminate to place them so that they are not on or not directed at a military objective, to use them as a means of delivery which cannot be directed at a military target, or to place them so that they may be expected to cause excessive collateral damage, that is injury, loss or damage to civilians which is excessive in relation to the concrete and direct military advantage anticipated.¹⁹

The manual further repeats the prohibitions contained in Article 6 of the 1980 Protocol II to the CCW.²⁰ It adds that "when booby-traps are not prohibited, those that are used must not be designed to cause unnecessary injury or suffering".²¹ It also emphasises that "all feasible precautions must be taken to protect civilians from the effects of . . . booby-traps . . . They must not be directed at civilians nor may they be used indiscriminately." The manual further states that:

Booby traps . . . must not be used in areas containing civilian concentrations if combat between ground forces is neither imminent nor actually taking place unless they are placed on, or in the vicinity, of an enemy military objective or there are

¹⁸ Australia, *Commanders' Guide* (1994), §§ 941 and 942.

¹⁹ Australia, *Defence Force Manual* (1994), § 421.

²⁰ Australia, *Defence Force Manual* (1994), § 427.

²¹ Australia, *Defence Force Manual* (1994), § 428.

protective measures for civilians such as warning signs, sentries, fences or other warnings to civilians.²²

Lastly, the manual provides that “the location of . . . areas in which there has been large scale and pre-planned use of booby-traps must be recorded. A record should also be kept of all other . . . booby traps so that they may be disarmed when they are no longer required.”²³

32. Belgium’s Law of War Manual, under the heading “Mines and traps (booby traps)”, states that they “must only be used against military objectives”. It further states that:

Traps looking like portable inoffensive objects are prohibited.

It is also prohibited to attach traps to or associate them with:

- 1) internationally recognised protective emblems, signs or signals;
- 2) sick, wounded or dead persons;
- 3) burial sites;
- 4) medical material, medical installations etc.;
- 5) children’s toys, children’s food and children’s clothes;
- 6) food or drink;
- 7) kitchen utensils or appliances except in military establishments.²⁴

33. Bosnia and Herzegovina’s Military Instructions states that “all means and methods of warfare are allowed, except for the ones which are prohibited or restricted by the international law of war”.²⁵

34. Cameroon’s Instructors’ Manual provides that it is prohibited to use booby-traps of a nature to cause superfluous injuries (1980 Protocol II to the CCW, Article 6(2)), such as “perforation, impaling, crushing, poisoning, strangulation”. It also prohibits the use of booby-traps in the form of apparently harmless portable objects for daily use, such as food, or those associated with the sick, wounded or dead.²⁶

35. Canada’s Rules of Engagement for Operation Deliverance states that “unattended means of force, including booby traps . . . are not authorised”.²⁷

36. Canada’s LOAC Manual states that “explosive booby-traps are not to be employed as, or used as, a substitute for antipersonnel mines. Where booby-traps are lawfully used, they must not cause unnecessary injury or suffering.”²⁸ The manual provides an exhaustive list of prohibited objects to which booby-traps must not be attached. It states that:

Booby traps and other devices, attached to or associated with the following objects, are prohibited:

²² Australia, *Defence Force Manual* (1994), §§ 421 and 422.

²³ Australia, *Defence Force Manual* (1994), § 423.

²⁴ Belgium, *Law of War Manual* (1983), pp. 38–39.

²⁵ Bosnia and Herzegovina, *Military Instructions* (1992), Item 5, § 1.

²⁶ Cameroon, *Instructors’ Manual* (1992), p. 123, § 441.1(c).

²⁷ Canada, *Rules of Engagement for Operation Deliverance* (1992), § 28.

²⁸ Canada, *LOAC Manual* (1999), p. 5-4, § 40.

- (a) internationally recognized protective emblems and signs;
- (b) sick, wounded or dead persons;
- (c) burial or cremation sites or graves;
- (d) medical facilities, equipment, supplies or transportation;
- (e) children's toys or objects designed for feeding, health, hygiene, clothing or education of children;
- (f) food or drink;
- (g) kitchen utensils or appliances (except those in military establishment, locations or supply depots);
- (h) objects of a religious nature;
- (i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- (j) animals or their carcasses.²⁹

The manual adds that: "it is prohibited to use booby-traps . . . in the form of apparently harmless portable objects which are specifically designed and construed to contain explosive material".³⁰ It also lists some restrictive rules about the use of booby-traps:

All feasible precautions must be taken to protect civilians from the effects of . . . booby traps. They must not be directed at civilians nor may they be used indiscriminately. It is indiscriminate to:

- (a) place . . . booby traps so that they are not on or not directed at a legitimate target;
- (b) use a means of delivery for . . . booby traps that cannot be directed at a legitimate target; and
- (c) place . . . booby traps so that they may be expected to cause collateral civilian damage that is excessive in relation to the concrete and direct military advantage anticipated.³¹

The manual further states that:

Booby traps . . . must not be used in areas containing civilian concentrations if combat between ground forces is neither imminent nor actually taking place unless: (a) they are placed on, or in the vicinity of, an enemy military objective; or (b) measures are taken to protect civilians (e.g. warning signs, sentries, fences or other warnings to civilians).³²

According to the manual, "the location of . . . areas in which there has been large scale and pre-planned use of booby traps must be recorded. A record should also be kept of all other . . . booby traps so that they may be disarmed when they are no longer required."³³ Lastly, the manual states that:

It is prohibited to use . . . booby traps that employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations.³⁴

²⁹ Canada, *LOAC Manual* (1999), p. 5-4, § 38.

³¹ Canada, *LOAC Manual* (1999), p. 5-5, § 44.

³³ Canada, *LOAC Manual* (1999), p. 5-5, § 46.

³⁰ Canada, *LOAC Manual* (1999), p. 5-4, § 39.

³² Canada, *LOAC Manual* (1999), p. 5-5, § 45.

³⁴ Canada, *LOAC Manual* (1999), p. 5-5, § 47.

37. Canada's Code of Conduct provides that "booby traps are lawful but can only be used in very limited circumstances, and in particular must be directed only at military objectives".³⁵

38. Ecuador's Naval Manual states that:

Booby traps... are not unlawful, provided they are not designed to cause unnecessary suffering. Devices that are designed to simulate items likely to attract and injure non-combatants... are prohibited. Attaching booby traps to protected persons or objects, such as the wounded and sick, dead bodies, or medical facilities and supplies, is similarly prohibited.³⁶

39. France's LOAC Summary Note prohibits the use of booby-traps which are associated with: wounded and dead persons; protective emblems, signs or signals; toys or other objects designed for children; food or drink; objects clearly of a religious nature; works of art; and animals or their carcasses.³⁷

40. France's LOAC Teaching Note provides that "the use of booby-traps is permitted only on condition that they are laid outside areas where civilians are concentrated and that they are directed against military targets".³⁸

41. France's LOAC Manual quotes Articles 2(2) and 6 of the 1980 Protocol II to the CCW and specifies that "the use of booby-traps is permitted only on condition that they are laid outside areas where civilians are concentrated and that they are directed against military targets".³⁹

42. Germany's Military Manual states that "it is prohibited in all circumstances to use any booby-traps in the form of an apparently harmless portable object" and refers to the 1980 Protocol II to the CCW. It also prohibits:

booby-traps which are in any way attached to or associated with internationally recognized protective emblems, signs or signals, sick, wounded or dead persons, burial or cremation sites or graves, medical facilities, medical transportation, medical equipment or medical supplies, food or drink, objects of a religious nature, cultural objects and children's toys, and all other objects related to children, animals or their carcasses.

The manual further prohibits the use of "booby-traps designed to cause superfluous injury or unnecessary suffering", again with reference to the 1980 Protocol II to the CCW.⁴⁰ It adds that "this prohibition does not apply to fixed demolition appliances and portable demolition devices lacking harmless appearances".⁴¹ The manual further provides that "the location of... booby-traps shall be recorded: the parties to the conflict shall retain these records and whenever possible, by mutual agreement, provide for their publication".⁴²

³⁵ Canada, *Code of Conduct* (2001), Rule 3, § 7.

³⁶ Ecuador, *Naval Manual* (1989), § 9.5.

³⁷ France, *LOAC Summary Note* (1992), § 4.6.

³⁸ France, *LOAC Teaching Note* (2000), p. 6.

³⁹ France, *LOAC Manual* (2001), pp. 96 and 55.

⁴⁰ Germany, *Military Manual* (1992), § 415.

⁴¹ Germany, *Military Manual* (1992), § 416.

⁴² Germany, *Military Manual* (1992), § 417.

43. Germany's IHL Manual states that:

International humanitarian law prohibits the use of a number of means of warfare which are of a nature to violate the principle of humanity and to cause unnecessary suffering, e.g. . . . explosive traps, when used in the form of an apparently harmless portable object, e.g. disguised as children's toys.⁴³

44. Israel's Manual on the Laws of War states that "within the framework of the [1980] CCW Convention, it was decided to prohibit the exposure of the civilian population to booby traps and booby-trapped objects". It adds that:

The Protocol enumerates the objects and places where booby-trapping is severely and absolutely forbidden:

1. Innocent-looking objects (transistors, televisions)
2. Objects bearing international protection signs (a cross, crescent or red Magen David, U.N. emblems, etc.) or tied to them
3. Wounded, sick or dead, as well as interment or cremation sites. The booby trapping of the wounded or dead conflicts with the duty prescribed by the laws of war to administer treatment to the wounded and to see to the proper interment of the dead. Therefore, it was also prohibited to abuse the special treatment accorded them.
4. Hospitals, clinics, medical equipment, medical transports
5. Objects connected with children (toys, clothes, food, care utensils etc.)
6. Food, drink, eating utensils (except for eating utensils and preparation equipment in army facilities)
7. Objects connected with religious ritual
8. Historical sites, objets d'art or ritual articles, constituting the cultural or religious heritage of a people
9. Animals and their carcasses

In any event, the laws of war ban the use of a booby-trap designed to cause needless damage and suffering (also in cases where it is permitted to use booby traps against combatants).⁴⁴

45. Kenya's LOAC Manual prohibits the use of booby-traps which are:

in any way attached to or associated with internationally recognised protective emblems, signs or signals; sick, wounded or dead persons; burial or cremation sites or graves; medical facilities, medical equipment, medical supplies or medical transportation; children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children; food or drinks; kitchen utensils or appliances except in military establishments, military locations or military supply depots; objects clearly of a religious nature; historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; animals or their carcasses.

The manual further provides that booby-traps and other devices may only be used (except those quoted previously) in populated areas "when they are placed on or in the close vicinity of a military objective belonging to or under the

⁴³ Germany, *IHL Manual* (1996), § 305.

⁴⁴ Israel, *Manual on the Laws of War* (1998), pp. 15–16.

control of the enemy; or when measures are taken to protect civilian persons (e.g. warning signs, sentries, issue of warnings, provision of fences)". Lastly, it states that "the location shall be recorded of: . . . areas where large scale and pre-planned use is made of booby-traps, other . . . booby-traps, when the tactical situation permits".⁴⁵

46. The Military Manual of the Netherlands cites the prohibitions contained in Article 6 of the 1980 Protocol II to the CCW.⁴⁶

47. New Zealand's Military Manual restricts the use of booby-traps. It refers expressly to and reproduces the content of Articles 3, 4, 5 and 6 of the 1980 Protocol II to the CCW. It adds that "all feasible efforts will be made to record the location of all areas where there is a large-scale use of booby-traps".⁴⁷

48. Russia's Military Manual prohibits the use of weapons that are by nature indiscriminate. It refers to the 1980 Protocol II to the CCW.⁴⁸

49. South Africa's LOAC Manual does not prohibit booby-traps as such. It does, however, state that the main concern is whether indiscriminate use endangers the civilian population. When employing booby-traps, it says, the military must therefore consider what or who is the likely target.⁴⁹

50. Spain's LOAC Manual makes reference to Articles 3, 6 and 7 of the 1980 Protocol II to the CCW as the principal body of law concerning the restriction and prohibition of the use of booby-traps.⁵⁰ It also states that:

Independent of the type of target, its location, the kind of military operation, the given mission or any other circumstances, it is prohibited to use this type of weapon [i.e., among others, booby traps] . . . wherever its location is indiscriminate . . . wherever it cannot be guided towards a specific military target and wherever there is reason to believe that it will cause disproportionate collateral damage.⁵¹

51. Sweden's IHL Manual states that booby-traps cannot be "used against civilian populations or individual civilians, which is in full agreement with AP I (Art. 51)". It adds that "should it be necessary to use booby-traps against objectives within populated areas, special restrictions on delivery exist to protect the civilian population". It stresses that:

During the conflicts of recent years it has been possible to discern an increasing use of booby-traps. It has become common to use booby-traps even against persons and objects already afforded protection under earlier conventions. . . . This has led an increased terror effect in warfare, but with little or no military significance.

⁴⁵ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 3-5.

⁴⁶ Netherlands, *Military Manual* (1993), pp. IV-6/IV-10.

⁴⁷ New Zealand, *Military Manual* (1992), § 514.

⁴⁸ Russia, *Military Manual* (1990), § 6(h).

⁴⁹ South Africa, *LOAC Manual* (1996), Article 34(f)(iv).

⁵⁰ Spain, *LOAC Manual* (1996), §§ 2.4.c.(2) and 3.2.a.(4).

⁵¹ Spain, *LOAC Manual* (1996), § 3.2.a.(3).

The manual refers to Articles 6 and 7 of the 1980 Protocol II to the CCW.⁵²

52. Switzerland's Military Manual states that "it is prohibited to use a booby-trap which functions unexpectedly when one moves or touches an apparently harmless object".⁵³

53. Switzerland's Basic Military Manual states that:

It is forbidden to use booby-traps wherever they can be expected directly to endanger the physical integrity and the lives of civilians. They must not be set up in a perfidious manner, that is be attached or connected in some way to protective signs or signals, protected persons, animals, food or protected installations.

It refers to the 1980 Protocol II to the CCW.⁵⁴

54. Switzerland's Teaching Manual provides that "it is prohibited to use booby-traps which can be triggered unexpectedly". It gives the example of a transistor radio.⁵⁵

55. The UK LOAC Manual, under the heading "Future Developments", considers the possibility of a treaty imposing "restrictions on the use of booby-traps".⁵⁶

56. The US Air Force Pamphlet states that:

Mines in the nature of booby-traps are frequently unlawfully used, such as when they are attached to objects under the protection of international law, e.g., wounded and sick, dead bodies and medical facilities. Also objectionable are portable booby traps in the form of fountain pens, watches and trinkets which suggest treachery and unfairly risk injuries to civilians likely to be attracted to the objects.⁵⁷

57. The US Rules of Engagement for Operation Desert Storm states that "booby traps may be used to protect friendly positions or to impede the progress of enemy forces. They may not be used on civilian personal property. They will be recovered or destroyed when the military necessity for their use no longer exists."⁵⁸

58. The US Naval Handbook states that:

Booby traps . . . are not unlawful, provided they are not designed to cause unnecessary suffering or employed in an indiscriminate manner. . . . Attaching booby traps to protected persons or objects, such as the wounded and sick, dead bodies, or medical facilities and supplies, is similarly prohibited. Belligerents are required to record the location of booby traps . . . in the same manner as land mines.⁵⁹

⁵² Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 80–81.

⁵³ Switzerland, *Military Manual* (1984), p. 11.

⁵⁴ Switzerland, *Basic Military Manual* (1987), Article 23(b).

⁵⁵ Switzerland, *Teaching Manual* (1986), pp. 19–22.

⁵⁶ UK, *LOAC Manual* (1981), Section 11, p. 40, § 4(b).

⁵⁷ US, *Air Force Pamphlet* (1976), § 6-6(d).

⁵⁸ US, *Rules of Engagement for Operation Desert Storm* (1991), § E.

⁵⁹ US, *Naval Handbook* (1995), § 9.6.

National Legislation

59. Under Estonia's Penal Code, "use of... booby-traps, i.e. explosives disguised as small harmless objects" is a war crime.⁶⁰

60. Under Hungary's Criminal Code as amended, employing "booby-traps" as defined in Article 2 of the 1980 Protocol II to the CCW is a war crime.⁶¹

61. South Korea's Conventional Weapons Act provides that:

No one is allowed to use or transfer a weapon that falls under any of the following categories:

- (1) ... booby-traps ... made to detonate resulting from the magnetism of a mine-destruction device or other cause without physical contact of person or device during detection operation with standard mine detection devices available in Korea.⁶²

The Act further prohibits the use of certain booby-traps:

which are attached to or associated with the following persons, things, or places:

1. Emblems, signs or signals protected under international laws including military flags, Red Cross emblems, civilian protective force emblems,
2. Sick, wounded or dead persons,
3. Cremation or burial sites or graves,
4. Medical facilities, medical equipment, medical supplies or medical transportation,
5. Children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children,
6. Food or drink,
7. Kitchen utensils or appliances not in the military unit, base or supply depot facilities,
8. Objects obviously used for religious purposes,
9. Historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of human beings, or
10. Animals or their carcasses.⁶³

The Act also provides that the "commander of the military unit that emplaces... booby-traps... must take all necessary measures including advance warning so as to prevent damage to the life, body, and property of the civilians residing in vicinity".⁶⁴ Lastly, it adds that:

1. The commander of the military unit that emplaced... booby-traps... must record and maintain the following information on the emplaced field:
 - a. Precise location and boundary of the emplaced area;
 - b. Type, number, emplacing method, type of fuse and life time of the emplaced... booby-traps ..., and
 - c. Location of every emplaced... booby-trap ...

⁶⁰ Estonia, *Penal Code* (2001), § 103.

⁶¹ Hungary, *Criminal Code as amended* (1978), Section 160/A(3)(b)(2).

⁶² South Korea, *Conventional Weapons Act* (2001), Article 3.

⁶³ South Korea, *Conventional Weapons Act* (2001), Article 4.

⁶⁴ South Korea, *Conventional Weapons Act* (2001), Article 6.

2. The commander of the emplacing unit must manage the information which was recorded and maintained as per the paragraph 1 in accordance with the Military Secret Protection Act.⁶⁵

National Case-law

62. In 1995, in a ruling on the constitutionality of AP II, Colombia's Constitutional Court stated with respect to the prohibition on the use of weapons of a nature to cause unnecessary suffering or superfluous injury that:

Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration consequently considers that the bans (established partly by customary law and partly by treaty law) on the use of . . . booby-traps . . . apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.⁶⁶

Other National Practice

63. At the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects held in Lucerne in 1974, Australia advocated a specific definition of "perfidiously used weapons" which included "explosives perfidious by nature" (toys and objects in daily life) and "booby traps which in the circumstances in which they are used present an actual danger to the civilian population".⁶⁷

64. At the CCW Preparatory Conference in 1978, Australia, Austria, Denmark, France, FRG, Mexico, Netherlands, New Zealand, Norway, Spain and UK submitted a similar proposal to one presented during the CDDH. However, the authors returned to using the expression "booby-trap" instead of "explosive or non-explosive device".⁶⁸ Mexico advocated "limitation of the use of . . . booby-traps to military targets and their immediate surroundings, with effective precautions to protect civilians".⁶⁹

65. In the Ad Hoc Committee on Conventional Weapons established by the CDDH, Denmark, France, Netherlands and UK submitted a proposal building on an earlier proposal from the Conference of Government Experts on the Use of Certain Conventional Weapons in Lugano in 1976 entitled "The Regulation

⁶⁵ South Korea, *Conventional Weapons Act* (2001), Article 8.

⁶⁶ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995, § 23.

⁶⁷ Australia, Statement of 17 October 1974 at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects, Lucerne, 24 September–18 October 1974.

⁶⁸ Austria, Denmark, France, Mexico, Netherlands, Spain, Sweden, Switzerland and UK, Proposal submitted at the CCW Preparatory Conference, A/CONF.95/PREP.CONF./L.9, 12 September 1978 and A/CONF.95/PREP.CONF./L.9/Add.1, 13 September 1978; see also the proposal by the same States submitted at the CDDH, *Official Records*, Vol. XVI, CDDH/408/Rev.1, Appendix II, Working Group Document CDDH/IV/GT/4, p. 546, § 6.

⁶⁹ CCW Preparatory Conference, A/CONF.95/PREP.CONF./I/SR.3, 4 September 1978, pp. 3–4.

of the Use of Land-Mines and Other Devices". Article 5 ("Prohibitions on the Use of Certain Explosive and Non-Explosive Devices") read:

1. It is forbidden in any circumstance to use any apparently harmless portable object (other than an item of military equipment or supplies) which is specifically designed and constructed to obtain explosive material and to detonate when it is disturbed or approached.
2. It is forbidden in any circumstances to use any explosive or non-explosive device or other material which is deliberately placed to kill or injure when a person disturbs or approaches an apparently harmless object or performs an apparently safe act and which is in any way attached to or associated with:
 - (a) internationally recognized protective emblems, signs or signals;
 - (b) sick, wounded or dead persons;
 - (c) burial or cremation sites or graves;
 - (d) medical facilities, medical equipment, medical supplies or medical transport; or
 - (e) children's toys.
3. It is forbidden in any circumstances to use any non-explosive device or any material which is deliberately placed to kill or injure when a person disturbs or approaches an apparently harmless object or performs an apparently safe act and which is designed to kill or injure by stabbing, impaling, crushing, strangling, infecting or poisoning the victim.⁷⁰

66. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Egypt stated that:

14. It was generally agreed that time-delay weapons such as . . . booby traps, often placed far from the combat areas, could injure civilians as well as combatants and were therefore indiscriminate. Moreover, such devices generally exploded close to the victims, causing grave injuries; they also slowed up the evacuation of the sick and wounded from mined areas, thus increasing their suffering. His delegation called for prohibition of the use of weapons of that category.
15. Booby traps, often disguised as harmless devices such as pens or transistor radios, exposed civilians as well as combatants to the danger of injury from explosion and should therefore be banned.⁷¹

67. According to the Report on the Practice of Egypt, Egypt considers that, owing to their drastic effects, some weapons, such as delayed-action weapons and booby-traps, should be prohibited in any circumstances.⁷²

68. In 1994, at the Third Session of the Meeting of Governmental Experts prior to the CCW Review Conference, France and Germany advocated a total ban

⁷⁰ Denmark, France, Netherlands and UK, Article 5 of the proposal entitled "The Regulation of the Use of Land-Mines and Other Devices" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/213 within CDDH/IV/226, pp. 590-591.

⁷¹ Egypt, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.6, 22 March 1974, p. 49, §§ 14-15.

⁷² Report on the Practice of Egypt, 1997, Chapter 3.4.

on the use of booby-traps. Their proposal provided a revision of Article 6 of the draft (1996) Amended Protocol II to the CCW as follows:

1. It is prohibited to [develop, manufacture, stockpile] use [or transfer, directly or indirectly]:
 - the booby-traps [defined in article 2, paragraph 2 of this Protocol] and . . .
2. The States Parties undertake to destroy weapons to which this article applies and which are in their ownership and possession.⁷³

69. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the FRG supported a proposal restricting the use of booby-traps.⁷⁴

70. In 1987, a member of the German parliament condemned the use of booby-traps by Russian forces in Afghanistan. He stated that “the USSR, in Afghanistan, uses so called butterfly-bombs against children, which the children mistake to be toys because of their small size and their slowly floating down from the sky”. The speaker continued that “this war against children is a shame”. His speech met with the approval of the majority of the members of parliament.⁷⁵

71. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, India indicated that it “fully supported the idea of expanding the scope of the CCW to cover armed internal conflicts”.⁷⁶

72. According to the Report on the Practice of India, in India there is “a ban and restriction on the use of . . . certain booby traps”.⁷⁷

73. According to the Report on the Practice of Indonesia, Indonesia has prohibited the use of certain booby-traps.⁷⁸

74. The Report on the Practice of Jordan states that Jordan does not use, manufacture or stockpile booby-traps and it does not plan to do so in the future.⁷⁹

75. In 1977, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Libya supported the proposal restricting the use of booby-traps submitted by Denmark, France, Netherlands and UK.⁸⁰

76. Mexico, Switzerland and SFRY submitted a draft article on booby traps to the Ad Hoc Committee on Conventional Weapons established by the CDDH, which summarised previous proposals from the Conference of Government

⁷³ France and Germany, Proposal submitted to the Meeting of Governmental Experts to Prepare the First Review Conference of States Parties to the CCW, Third Session, Geneva, 8–19 August 1994, UN Doc. CCW/CONF.I/GE/CRP.2/Rev.1, 28 June 1994, Geneva, 8–19 August 1994.

⁷⁴ FRG, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.30, 26 May 1976, p. 308, § 13.

⁷⁵ Germany, Lower House of Parliament, Statement by a Member of Parliament, Dr. Todenhöfer, 11 December 1987, *Plenarprotokoll* 11/50, p. 3570.

⁷⁶ India, Statement of 24 September 2001 at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001.

⁷⁷ Report on the Practice of India, 1997, Answers to additional questions on Chapter 3.4.

⁷⁸ Report on the Practice of Indonesia, 1997, Chapter 3.4.

⁷⁹ Report on the Practice of Jordan, 1997, Chapter 3.4.

⁸⁰ Libya, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.40, 19 May 1977, p. 411, § 38.

Experts on the Use of Certain Conventional Weapons in Lugano in 1976. The draft article provided, *inter alia*, that:

2. Booby-traps may only be used when they are placed inside or outside military objects. The civilian population in the proximity of such a site shall be given warning of danger.
3. It is prohibited in any circumstances to attach or connect booby-traps to the dead, sick or wounded, to first aid installations, equipment and supplies, to children's toys or to objects of current use among the civilian population.⁸¹

77. In 1992, during a debate in the First Committee of the UN General Assembly, the Netherlands implied that universal adherence to the 1980 CCW would give it effect in internal conflicts.⁸²

78. The Report on the Practice of the Netherlands states that the Netherlands is of the opinion that the use of "booby traps connected with the emblem of the Red Cross, wounded or dead persons, medical goods or children's toys is prohibited".⁸³

79. At the International Conference on the Protection of Victims of War in Geneva in 1993, Russia declared that, in order to protect the civilian population against indiscriminate weapons, booby-traps should be completely banned in internal conflicts.⁸⁴

80. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the US welcomed proposals by other States to restrict the use of booby-traps and stated that "it was clearly desirable to place certain restrictions on the use of land-mines and other devices, including booby-traps". It added that the US "welcomed and shared the concern evidenced in the various proposals for the protection of the civilian population against the effects of mines and similar devices, and believed that those proposals constituted a good basis for the formulation of an effective agreement".⁸⁵

81. Venezuela presented a proposal concerning booby traps to the Ad Hoc Committee on Conventional Weapons established by the CDDH, which read:

2. Booby traps may only be used when they are placed inside or outside clearly defined military objectives. In all cases, the civilian population in the proximity of booby traps shall be given warning of the danger.
3. It shall be prohibited in all circumstances to set or place booby traps on the dead, wounded or sick, on installations, vehicles or equipment used for relief

⁸¹ Mexico, Switzerland and SFRY, Draft article entitled "Booby-traps" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/209 within CDDH/IV/226, p. 583.

⁸² Netherlands, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 November 1992, p. 21.

⁸³ Report on the Practice of the Netherlands, 1997, Chapter 3.4.

⁸⁴ Russia, Statement by Andrey Kozyrev, Minister of Foreign Affairs, at the International Conference on the Protection of Victims of War, Geneva, 30 August–1 September 1993.

⁸⁵ US, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.29, 25 May 1976, p. 300, §§ 34–36.

purposes, on children's toys or on objects of common or domestic use for the civilian population.⁸⁶

82. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Venezuela stated that, regardless of its own proposal restricting the use of booby traps, it "was willing to support the proposal" made by Mexico, Switzerland and SFRY on the same issue.⁸⁷

83. According to the Report on the Practice of Zimbabwe, in Zimbabwe it is military practice not to use booby-traps.⁸⁸

84. During an armed conflict between two States, another State condemned the use by one of the States of a lethal incendiary booby-trap particularly attractive to children. In a report, the State emphasised that:

Children frequently are killed or maimed by bombs disguised as toys. The majority of these antipersonnel weapons are designed to maim rather than kill. However, reports of a new incendiary bomb describe a transparent, plastic tube shaped like a circle... It is filled with brightly coloured liquid and the device explodes when shaken. The victim is usually burned to death within minutes. These devices... are particularly attractive to children. We can only surmise that the targeting of children is part of the [State's] effort to demoralize the civilian population which overwhelmingly supports the freedom fighters.⁸⁹

III. Practice of International Organisations and Conferences

United Nations

85. In a resolution adopted in 1996 on the situation in Cyprus, the UN Security Council called upon the military authorities on both sides "to clear all... booby-trapped areas inside the buffer zone without further delay, as requested by UNFICYP".⁹⁰

86. In a resolution adopted in 1980, the UN General Assembly welcomed the successful agreement upon the 1980 CCW and its Protocols. It commended the Convention agreed upon "with a view to achieving the widest possible adherence to these instruments".⁹¹

87. Many resolutions of the UN General Assembly have urged "all States which have not yet done so to take all measures to become parties" to the 1980 CCW and its Protocols.⁹²

⁸⁶ Venezuela, Draft article entitled "Booby traps" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/212 within CDDH/IV/226.

⁸⁷ Venezuela, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 20 May 1976, p. 291, § 29.

⁸⁸ Report on the Practice of Zimbabwe, 1998, Chapter 3.5.

⁸⁹ ICRC archive document.

⁹⁰ UN Security Council, Res. 1062, 28 June 1996, § 6(c).

⁹¹ UN General Assembly, Res. 35/153, 12 December 1980, § 4.

⁹² UN General Assembly, Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67,

88. In a resolution adopted in 1993, the UN General Assembly stated that it was “desirous of reinforcing international co-operation in the area of prohibitions or restrictions on the use of certain conventional weapons, in particular for the removal of . . . booby-traps”.⁹³

89. In several resolutions adopted between 1997 and 1999, the UN General Assembly expressed its satisfaction at the many ratifications of the 1996 Amended Protocol II to the CCW and urgently called upon all States that had not yet done so to become parties to the 1980 CCW and its Protocols, in particular Amended Protocol II.⁹⁴

90. In 1986, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights condemned the booby-trapping of children’s toys.⁹⁵

Other International Organisations

91. In 1985, in a report on the deteriorating situation in Afghanistan, the Parliamentary Assembly of the Council of Europe noted that “children of all ages . . . have been the victims of . . . ‘booby-trapped toys’”.⁹⁶

92. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited:

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

- ...
- b. ratify, if they have not done so, . . . the United Nations Convention of 1980 on the prohibitions or restrictions on the use of certain conventional weapons [1980 CCW] and its protocols . . .
- j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.⁹⁷

7 December 1988, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 3; Res. 53/81, 4 December 1998, § 5.

⁹³ UN General Assembly, Res. 48/79, 16 December 1993, preamble; see also Res. 49/79, 15 December 1994, preamble, Res. 50/74, 12 December 1995, preamble and Res. 51/49, 10 December 1996, preamble.

⁹⁴ UN General Assembly, Res. 52/42, 9 December 1997, §§ 1 and 2; Res. 53/81, 4 December 1998, §§ 1 and 5 and Res. 54/58, 1 December 1999, preamble and § III(3).

⁹⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1986/24, 17 February 1986, §§ 88–89 and 119.

⁹⁶ Council of Europe, Parliamentary Assembly, Report on the deteriorating situation in Afghanistan, Doc. 5495, 15 November 1985, p. 7.

⁹⁷ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8b and j.

93. In a resolution adopted in 1994 on respect for IHL and support for humanitarian action in armed conflicts, the OAU Council of Ministers invited “all States that have not yet become party to the... [1980] CCW, to consider, or reconsider, without delay the possibility of doing so in the near future”.⁹⁸

94. In two resolutions adopted in 1994 and 1996, the OAS General Assembly urged all member States to accede to the 1980 CCW.⁹⁹

International Conferences

95. The 25th International Conference of the Red Cross in 1986 adopted a resolution in which it urged all States to become parties to the 1980 CCW and its Protocols “as early as possible so as ultimately to obtain universality of adherence”. It noted “the dangers to civilians caused by... booby-traps... employed during an armed conflict and the need for international co-operation in this field consistent with Article 9 of Protocol II attached to the 1980 Convention”.¹⁰⁰

96. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution in which it urged “all States which have not yet done so to become party to the [1980 CCW] and in particular to its Protocol II on landmines[, booby-traps and other devices], with a view to achieving universal adherence thereto” and underlined “the importance of respect for its provisions by all parties to armed conflict”.¹⁰¹

IV. Practice of International Judicial and Quasi-judicial Bodies

97. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

98. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The use of any booby-trap in the form of an apparently harmless portable object which is specifically designed and constructed to contain explosive material and to detonate when it is disturbed or approached, is prohibited.

The use of any booby-trap which is designed to cause superfluous or unnecessary suffering is prohibited.

The use of booby-traps which are in any way attached or associated with the following persons or objects is prohibited:

⁹⁸ OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 6.

⁹⁹ OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 1; Res. 1408 (XXVI-O/96), 7 June 1996, § 1.

¹⁰⁰ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VII, §§ B(2) and B(5).

¹⁰¹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § G(g).

- (a) internationally recognized protective emblems, signs or signals;
- (b) sick, wounded or dead persons;
- (c) burial or cremation sites or graves;
- (d) medical facilities, medical equipment, medical supplies or medical transportation;
- (e) children's toys or other portable objects or products specially designed for the feeding, health, hygiene, clothing or education of children;
- (f) food or drink;
- (g) kitchen utensils or appliances except in military establishments, military locations or military supply depots;
- (h) objects clearly of a religious nature;
- (i) historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples; or
- (j) animals or their carcasses.

... Booby-traps ... may be used in populated areas:

- a) when they are placed on or in the close vicinity of a military objective belonging to or under the control of the enemy; or
- b) when measures are taken to protect civilians persons (e.g. warning signs, sentries, issue of warnings, provision of fences).

The location shall be recorded of:

- ...
- b) areas where large-scale and pre-planned use is made of booby-traps.¹⁰²

VI. *Other Practice*

99. In 1986, in a report on the use of landmines in the conflicts in El Salvador and Nicaragua, Americas Watch listed the following uses of booby-traps among those that "should be prohibited in the conduct of hostilities in both countries":

1. Their direct use against individual or groups of unarmed civilians where no legitimate military objective, such as enemy combatants or war material, is present. Such uses of these weapons are indiscriminate.
2. The direct use against civilian objects, i.e., towns, villages, dwellings or buildings dedicated to civilian purposes where no military objective is present. Such weapons' use is also indiscriminate.
- ...
4. The use of ... booby-traps in or near a civilian locale containing military objectives which are deployed *without* any precaution, markings or other warnings, or which do *not* self-destruct or are *not* removed once their military purpose has been served. Such uses are similarly indiscriminate.¹⁰³ [emphasis in original]

¹⁰² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 921–923 and 928–929.

¹⁰³ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 100–101.

100. Rule B4 of the Rules of International Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, states that:

In application of the general rules listed in section A above, especially those on the distinction between combatants and civilians and on the immunity of the civilian population, . . . booby-traps . . . may not be directed against the civilian population as such or against individual civilians, nor used indiscriminately.

The prohibition of booby-traps listed in Article 6 of that Protocol II extends to their use in non-international armed conflicts, in application of the general rules on the distinction between combatants and civilians, the immunity of the civilian population, the prohibition of superfluous injury or unnecessary suffering, and the prohibition of perfidy.

To ensure the protection of the civilian population referred to in the previous paragraphs, precautions must be taken to protect them from attacks in the form of . . . booby-traps.¹⁰⁴

¹⁰⁴ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B4, *IRRC*, No. 278, 1990, p. 399.

LANDMINES

A. Prohibition of Certain Types of Landmines	§§ 1–190
B. Restrictions on the Use of Landmines (practice relating to Rule 81)	§§ 191–339
C. Measures to Reduce the Danger Caused by Landmines (practice relating to Rules 82 and 83)	§§ 340–427

A. Prohibition of Certain Types of Landmines

I. Treaties and Other Instruments

Treaties

1. Article 3(3) of the 1996 Amended Protocol II to the CCW prohibits the use of any mine “which is designed or of a nature to cause superfluous injury or unnecessary suffering”.
2. Article 3(5) of the 1996 Amended Protocol II to the CCW prohibits the use of mines “which employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations”.
3. Article 3(6) of the 1996 Amended Protocol II to the CCW prohibits the use of a “self-deactivating mine equipped with an anti-handling device that is designed in such a manner that the anti-handling device is capable of functioning after the mine has ceased to be capable of functioning”.
4. Article 4 of the 1996 Amended Protocol II to the CCW provides that “it is prohibited to use anti-personnel mines which are not detectable, as specified in paragraph 2 of the Technical Annex”.
5. Article 6(2) of the 1996 Amended Protocol II to the CCW prohibits the use of remotely delivered anti-personnel mines which are not equipped with self-destruction and self-deactivation devices.
6. Article 6(3) of the 1996 Amended Protocol II to the CCW provides that:

It is prohibited to use remotely-delivered mines other than anti-personnel mines, unless, to the extent feasible, they are equipped with an effective self-destruction or self-neutralization mechanism and have a back-up self-deactivation feature, which

is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position

7. Upon ratification of the 1996 Amended Protocol II to the CCW, the UK declared that “nothing in the present declaration or in Protocol II as amended shall be taken as limiting the obligations of the United Kingdom under the . . . [1997 Ottawa Convention] nor its rights in relation to other Parties to that Convention”.¹

8. Article 1 of the 1997 Ottawa Convention provides that:

1. Each State Party undertakes never under any circumstances:
 - (a) To use anti-personnel mines;
 - (b) To develop, produce, otherwise acquire, stockpile, retain or transfer to anyone, directly or indirectly, anti-personnel mines;
 - (c) To assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.
2. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in accordance with the provisions of this Convention.

9. Article 2 of the 1997 Ottawa Convention contains the following definitions:

- (1) “Anti-personnel mine” means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.
- ...
- (3) “Anti-handling device” means a device intended to protect a mine and which is part of, linked to, attached to or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.

10. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

¹ UK, Declaration made upon ratification of the 1996 Amended Protocol II to the CCW, 11 February 1999, § (c).

3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

Other Instruments

11. Article II(8) of the 1992 N'Sele Ceasefire Agreement provides that "cease-fire" shall imply "a ban on any mine-laying operations".

12. Section 6.2 of the 1999 UN Secretary-General's Bulletin provides that:

The United Nations force shall respect the rules prohibiting or restricting the use of certain weapons and methods of combat under the relevant instruments of international humanitarian law . . . The use of certain conventional weapons . . . such as anti-personnel mines . . . is prohibited.

II. National Practice

Military Manuals

13. Canada's LOAC Manual states that:

The possession or use of anti-personnel mines is prohibited by the Anti-Personnel Mines Convention signed in 1997 by over 100 states. Canada has already ratified the Convention. While many other nations may continue to possess and use anti-personnel land mines, the CF is bound not to do so.²

It adds that "the use of an anti-personnel mine that is manually detonated (e.g., by land line or electronic signal from a remote or protected position) by a CF member is not prohibited". The manual places certain restrictions on the use of "horizontal fragmentation weapons which propel fragments in a horizontal arc of less than 90 degrees", including that they "may be used for a maximum period of 72 hours if they are located in the immediate proximity to the military unit that emplaced them, and the area is monitored by military personnel to ensure the effective exclusion of civilians".³ The manual also states that "it is prohibited to use mines . . . that employ a mechanism or device specifically designed to detonate the munition by the presence of commonly available mine detectors as a result of their magnetic or other non-contact influence during normal use in detection operations".⁴ It also states that "self-deactivating mines" are "lawful unless they are used with an anti-handling device that continues to function after the mine has stopped functioning". It adds, however, that "under Canadian doctrine, anti-handling devices are used only with tank-mines".⁵

14. Canada's Code of Conduct provides that "the use of land mines, other than anti-personnel mines, is lawful, but is subject to strict regulation . . . The use of

² Canada, *LOAC Manual* (1999), p. 5-2, § 13. ³ Canada, *LOAC Manual* (1999), p. 5-2, § 19.

⁴ Canada, *LOAC Manual* (1999), p. 5-5, § 47.

⁵ Canada, *LOAC Manual* (1999), p. 5-5, §§ 48 and 49.

all but manually detonated anti-personnel mines (e.g., Claymore mine that is manually detonated) by CF members is prohibited.”⁶

15. Colombia’s Basic Military Manual states that the use of weapons which “cause unnecessary and indiscriminate, extensive, lasting and serious damage to people and the environment” is prohibited. It adds that “the use as well as the production, possession and importation of cruel means of war such as anti-personnel mines is banned”.⁷

16. France’s LOAC Teaching Note includes anti-personnel mines in the list of weapons that “are totally prohibited by the law of armed conflict” because of their inhuman and indiscriminate character.⁸

17. France’s LOAC Manual includes anti-personnel mines in the list of weapons that “are totally prohibited by the law of armed conflict” because of their inhuman and indiscriminate character.⁹ It notes that France is a party to the 1997 Ottawa Convention and summarises the provisions of the Convention prohibiting the use, stockpiling, production and transfer of anti-personnel mines “in or by ratifying States”.¹⁰

18. Israel’s Manual on the Laws of War underlines the existence of “a wide international movement . . . with a view to bring about an absolute prohibition of the use of anti-personnel mines”. It states that “Israel has not joined the Convention, just as the Arab states have not. Nevertheless Israel has declared a moratorium on the manufacture and export of anti-personnel mines.”¹¹

19. Russia’s Military Manual prohibits the use of weapons that are by nature indiscriminate or which cause unnecessary suffering. It refers to the 1980 Protocol II to the CCW.¹²

20. Spain’s LOAC Manual, referring to the use of mines, states that:

Independent of the type of target, its location, the kind of military operation, the given mission or any other circumstances, it is prohibited to use this type of weapon . . . wherever its location is indiscriminate . . . wherever it cannot be guided towards a specific military target and wherever there is reason to believe that it will cause disproportionate collateral damage.¹³

National Legislation

21. Numerous States have passed national legislation enacting comprehensive prohibitions on the use, stockpiling, production and transfer of anti-personnel mines, including: Albania,¹⁴ Australia,¹⁵ Austria,¹⁶ Belgium,¹⁷

⁶ Canada, *Code of Conduct* (2001), Rule 3, §§ 8 and 11.

⁷ Colombia, *Basic Military Manual* (1995), pp. 49–50.

⁸ France, *LOAC Teaching Note* (2000), p. 6.

⁹ France, *LOAC Manual* (2001), p. 54.

¹⁰ France, *LOAC Manual* (2001), pp. 83–84.

¹¹ Israel, *Manual on the Laws of War* (1998), pp. 13–14.

¹² Russia, *Military Manual* (1990), § 6(h).

¹³ Spain, *LOAC Manual* (1996), § 3.2.a.(3).

¹⁴ Albania, *Anti-Personnel Mines Decision* (2000), §§ 1, 2, 3 and 4.

¹⁵ Australia, *Anti-Personnel Mines Convention Act* (1998).

¹⁶ Austria, *Anti-Personnel Mines Law* (1997).

¹⁷ Belgium, *Anti-Personnel Mines Convention Law* (1998).

Brazil,¹⁸ Burkina Faso,¹⁹ Cambodia,²⁰ Canada,²¹ Costa Rica,²² Czech Republic,²³ France,²⁴ Germany,²⁵ Guatemala,²⁶ Honduras,²⁷ Italy,²⁸ Japan,²⁹ Luxembourg,³⁰ Malaysia,³¹ Mali,³² Mauritius,³³ Monaco,³⁴ New Zealand,³⁵ Nicaragua,³⁶ Norway,³⁷ Spain,³⁸ Switzerland,³⁹ Trinidad and Tobago,⁴⁰ UK⁴¹ and Zimbabwe.⁴²

22. Regarding the implementation in domestic legislation of the 1997 Ottawa Convention as required by Article 9, the *Landmine Monitor Report 2001* states that:

Some countries have deemed existing domestic law to be sufficient to implement the treaty. These laws cover civilian possession of armaments and explosives. Included among these are Andorra,⁴³ Denmark,⁴⁴ Ireland,⁴⁵ Jordan,⁴⁶ Lesotho,⁴⁷ Liechtenstein,⁴⁸ Namibia,⁴⁹ Netherlands,⁵⁰ and Peru.⁵¹ Another seven States Parties indicate that the legislation used for ratification is sufficient because international treaties become self-executing in those countries: Mexico, Portugal, Rwanda, Seychelles, Slovakia, Slovenia, and Yemen.⁵² [footnotes added]

¹⁸ Brazil, *Anti-Personnel Mines Act* (2001), Article 1.

¹⁹ Burkina Faso, *Anti-Personnel Mines Decree* (2001), Article 1.

²⁰ Cambodia, *Law Banning Anti-Personnel Mines* (1999).

²¹ Canada, *Anti-Personnel Mines Act* (1997).

²² Costa Rica, *Law on the Prohibition of Anti-Personnel Mines* (2002).

²³ Czech Republic, *Act on Anti-Personnel Mines* (1999).

²⁴ France, *Anti-Personnel Mines Law* (1998).

²⁵ Germany, *Law on Anti-Personnel Mines* (1998).

²⁶ Guatemala, *Law on the Prohibition of Anti-Personnel Mines* (1997).

²⁷ Honduras, *Anti-Personnel Mines Law* (2000).

²⁸ Italy, *Law on the Prohibition of Anti-Personnel Mines* (1997).

²⁹ Japan, *Law Prohibiting Anti-Personnel Landmines* (1998).

³⁰ Luxembourg, *Law on the Prohibition of Anti-Personnel Mines* (1999).

³¹ Malaysia, *Anti-Personnel Mines Act* (2000).

³² Mali, *Anti-Personnel Mines Order* (2000).

³³ Mauritius, *Anti-Personnel Mines (Prohibition) Act* (2001).

³⁴ Monaco, *Anti-Personnel Mines Order* (1999).

³⁵ New Zealand, *Anti-Personnel Mines Act* (1998).

³⁶ Nicaragua, *Law on the Prohibition of Anti-Personnel Mines* (1999).

³⁷ Norway, *Anti-Personnel Mines Act* (1998).

³⁸ Spain, *Law on the Prohibition of Anti-Personnel Mines* (1998).

³⁹ Switzerland, *Federal Law on War Equipment as amended* (1996); *Message from the Federal Council on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction* (1998).

⁴⁰ Trinidad and Tobago, *Anti-Personnel Mines Act* (2000).

⁴¹ UK, *Landmines Act* (1998).

⁴² Zimbabwe, *Anti-Personnel Mines (Prohibition) Act* (2000).

⁴³ Andorra, *Decree on Arms* (1989), Chapter 1, Section 3, Article 2.

⁴⁴ Denmark, *Executive Order on Weapons and Ammunition* (1995); *Military Criminal Code as amended* (1978), § 25.

⁴⁵ Ireland, *Explosives(Landmine)Order* (1996).

⁴⁶ Jordan, *Law on Explosive Material* (1953).

⁴⁷ Lesotho, *Internal Security Act* (1984).

⁴⁸ Liechtenstein, *Ordinance on the Indirect Transfer of War Material* (1999).

⁴⁹ Namibia, *Constitution* (1990), Article 144.

⁵⁰ Netherlands, *Import and Export Act* (1962).

⁵¹ Peru, *Penal Code as amended* (1991); *Law against the Possession of War Weapons* (1998); *Order against the Possession of War Weapons* (1998).

⁵² ICBL, *Landmine Monitor Report 2001*, Human Rights Watch, New York, August 2001, p. 25.

23. Hungary's Criminal Code as amended provides that:

The following shall be construed as weapons prohibited by international treaty:

- ...
 b) the following weapons listed in the protocols to the [1980 CCW]...
 ...
 2. mines, remotely-delivered mines, anti-personnel mines, booby-traps and other devices specified in Points 1–5 of Article 2 of the Amended Protocol II...
 d) anti-personnel mines specified in Point 1 of Article 2 of the convention signed at Oslo on 18 September 1997 on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.⁵³

24. Prior to adhering to the 1997 Ottawa Convention, Ireland enacted the Explosives (Landmine) Order, which provides that:

3. (1) No person shall manufacture, keep, import into the State, convey or sell any land mine.
 (2) In this Article "land mine" means any munition designed to be placed under, on or near the ground or other surface area and designed to be detonated or exploded by the presence or proximity of, or contact with, a person or vehicle.⁵⁴

25. South Korea's Conventional Weapons Act provides that:

No one is allowed to use or transfer a weapon that falls under any of the following:

1. Mines... or other devices made to detonate resulting from the magnetism of a mine-detection device or other cause without physical contact of a person or device during detection operations with standard mine-detection devices available in Korea.
2. Anti-personnel mines that are undetectable by standard mine-detection devices available in Korea and that do not respond with a signal, which is detected from 8 grams or more of iron.
3. Remotely-delivered anti-personnel mines that do not fulfil any of the following:
 - (a) Over 90 percent of the total amount shot or dropped shall automatically detonate within 30 days.
 - (b) Over 99.9 percent of the total amount shot or dropped shall automatically detonate or otherwise lose its function as a mine within 120 days.⁵⁵

26. In 1998, Mexico adopted and published its Decree on the Ratification of the Ottawa Convention.⁵⁶ According to Mexico's Constitution, it is thereby considered as a Supreme Law in all the territory.⁵⁷**27. Portugal's Ministry of Foreign Affairs acknowledged in October 2000 that Portugal's official publication of the 1997 Ottawa Convention on 23 November**

⁵³ Hungary, *Criminal Code as amended* (1978), Section 160/A(3).

⁵⁴ Ireland, *Explosives (Landmine) Order* (1996), Article 3(1) and (2).

⁵⁵ South Korea, *Conventional Weapons Act* (2001), Article 3.

⁵⁶ Mexico, *Decree on the Ratification of the Ottawa Convention* (1998).

⁵⁷ Mexico, *Constitution* (1917), Article 133.

1999 “does not achieve total legislative implementation of the Treaty through the imposition of penal sanctions and this matter should be handled at an inter-ministry level”.⁵⁸ In January 2001, the Ministries of Foreign Affairs and Defence stated that Portugal “is currently studying the way, in coordination with the different competent entities, to create internal legislation on this matter”. Nevertheless, they pointed out that Portugal had existing legislation which punished the possession, transportation, selling or production of explosive devices and substances.⁵⁹

28. An official of Slovakia stated that national implementation was achieved when the Slovak parliament approved ratification of the 1997 Ottawa Convention on 4 June 1999, making it part of national legislation.⁶⁰ It was published as a new law in the official bulletin of the Ministry of Justice.⁶¹

29. South Africa’s Anti-Personnel Mines Bill provides that it is one of “the principal objects of the Act . . . to prohibit the use, stockpiling, production, development, acquisition and transfer of anti-personnel mines and ensure the destruction thereof”. It adds that “neither an Organ of State nor a person within the Republic or any South African citizen outside the Republic may . . . place an anti-personnel mine”.⁶²

30. Under Sweden’s Penal Code as amended, “a person who uses, develops, manufactures, acquires, possesses or transfers anti-personnel mines [as defined in the 1997 Ottawa Convention] shall be sentenced for unlawful dealings with mines to imprisonment . . . unless the act is to be considered as a crime against international law”.⁶³

National Case-law

31. In 1995, in a ruling on the constitutionality of AP II, Colombia’s Constitutional Court stated in relation to the prohibition on the use of weapons of a nature to cause unnecessary suffering or superfluous injury that:

Although none of the treaty rules expressly applicable to internal conflicts prohibits indiscriminate attacks or the use of certain weapons, the Taormina Declaration consequently considers that the bans (established partly by customary law and partly by treaty law) on the use of . . . mines . . . apply to non-international armed conflicts, not only because they form part of customary international law but also because they evidently derive from the general rule prohibiting attacks against the civilian population.⁶⁴

⁵⁸ ICBL, *Landmines Monitor Report 2001*, August 2001, p. 761.

⁵⁹ Portugal, *Penal Code* (1996), Article 275(1).

⁶⁰ ICBL, *Landmine Monitor Report 2000*, August 2000, p. 711.

⁶¹ Slovakia, *Law on the Ratification of the Ottawa Convention* (1999).

⁶² South Africa, *Anti-Personnel Mines Bill* (2001), Sections 3(c) and 4(a).

⁶³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6b.

⁶⁴ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

Other National Practice

32. Between 1994 and September 1997, 117 States declared their support for a global ban on the production, stockpiling, transfer and use of anti-personnel mines. These States were: Afghanistan, Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Burkina Faso, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Estonia, Ethiopia, Fiji, France, Gabon, Georgia, Germany, Ghana, Grenada, Guatemala, Guinea, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Kuwait, Laos, Lesotho, Liechtenstein, Luxembourg, FYROM, Malaysia, Malawi, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Nigeria, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Rwanda, St. Kitts and Nevis, St. Vincent and the Grenadines, San Marino, St. Lucia, Senegal, Seychelles, Sierra Leone, Slovakia, Slovenia, South Africa, Spain, Sudan, Surinam, Swaziland, Sweden, Switzerland, Tanzania, Togo, Trinidad and Tobago, Turkmenistan, Uganda, United Arab Emirates, UK, US, Uruguay, Venezuela, Yemen, Zambia and Zimbabwe.⁶⁵

33. The Final Declaration of the 1997 Brussels Conference on Anti-personnel Landmines, which called for the "early conclusion of a comprehensive ban on anti-personnel landmines" and welcomed "the convening of a Diplomatic Conference by the Government of Norway in Oslo on 1 September 1997 to negotiate such an agreement", was supported by 111 States. These were: Algeria, Angola, Antigua and Barbuda, Argentina, Australia, Austria, Bahamas, Barbados, Belgium, Belize, Benin, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Burkina Faso, Cambodia, Cameroon, Canada, Cape Verde, Chad, Chile, Colombia, Congo, Costa Rica, Côte d'Ivoire, Croatia, Czech Republic, Denmark, Dominica, Dominican Republic, Ecuador, El Salvador, Ethiopia, Fiji, France, Gabon, Germany, Ghana, Grenada, Guatemala, Guinea, Guyana, Haiti, Holy See, Honduras, Hungary, Iceland, Ireland, Italy, Jamaica, Japan, Jordan, Kenya, Kuwait, Lesotho, Liechtenstein, Luxembourg, Former Yugoslav Republic of Macedonia, Malaysia, Malawi, Mali, Malta, Mauritania, Mauritius, Mexico, Moldova, Monaco, Mozambique, Namibia, Netherlands, New Zealand, Nicaragua, Norway, Panama, Papua New Guinea, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Rwanda, St. Kitts and Nevis, St. Vincent and the Grenadines, San Marino, St. Lucia, Senegal, Seychelles, Slovakia, Slovenia, South Africa, Spain, Sudan, Surinam, Swaziland, Sweden, Switzerland,

⁶⁵ ICRC, List of States unilaterally supporting a global ban on the production, stockpiling, transfer and use of anti-personnel mines, 18 September 1997 (public declarations on file with the ICRC).

Tanzania, Togo, Trinidad and Tobago, Turkmenistan, Uganda, United Arab Emirates, UK, US, Uruguay, Venezuela, Yemen, Zambia and Zimbabwe.⁶⁶

34. Between 1994 and September 1997, 29 States unilaterally prohibited the production of anti-personnel mines. These were: Australia, Austria, Belgium, Burkina Faso, Cambodia, Canada, Colombia, Congo, France, Germany, Ghana, Honduras, Ireland, Italy, Jamaica, Luxembourg, Mexico, Mozambique, Netherlands, New Zealand, Norway, Philippines, Portugal, Slovenia, South Africa, Sweden, Switzerland, UK and Zimbabwe.⁶⁷

35. Between 1994 and September 1997, 30 States unilaterally prohibited the use of anti-personnel mines by their own forces. These were: Australia, Austria, Belgium, Cambodia, Canada, Colombia, Congo, Croatia, Denmark, Fiji, France, Georgia, Germany, Haiti, Honduras, Ireland, Italy, Jamaica, Luxembourg, Mexico, Mozambique, Netherlands, New Zealand, Norway, Philippines, Portugal, South Africa, Sweden, Switzerland and UK.⁶⁸

36. At the Second Meeting of States Parties to the Ottawa Convention in 2000, several States in their interventions accused signatories, in particular Angola, Burundi, Sudan and some of the forces active in the DRC, of continuing to use mines in violation of their international obligations. In reply, Burundi denied any use of anti-personnel mines by its forces and welcomed an international fact-finding mission to its territory to investigate further, while Angola readily admitted its use of mines to defend military positions and requested understanding in light of its special circumstances.⁶⁹

37. At the First Meeting of States Parties to the Ottawa Convention in 1999, numerous States condemned the continued use of anti-personnel mines and, in particular, the use by treaty signatories including Angola and Senegal.⁷⁰

38. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Albania stated that it would "continue working on ratifying as soon as possible the Ottawa treaty".⁷¹

39. In 1995, during a debate in the First Committee of the UN General Assembly, Australia stated that it was "committed to the elimination of all anti-personnel land-mines as an ultimate goal".⁷²

⁶⁶ ICRC, Published list of signatories to the Brussels Declaration, 18 September 1997 (on file with the ICRC.)

⁶⁷ ICRC, List of States unilaterally supporting a global ban on the production, stockpiling, transfer and use of anti-personnel mines, Section on unilateral production bans, 18 September 1997 (public declarations on file with the ICRC).

⁶⁸ ICRC, List of States unilaterally supporting a global ban on the production, stockpiling, transfer and use of anti-personnel mines, Section on unilateral prohibition of use of anti-personnel mines, 18 September 1997 (public declarations on file with the ICRC).

⁶⁹ ICRC internal document.

⁷⁰ ICRC internal document.

⁷¹ Albania, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷² Australia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.5, 17 October 1995, p. 6.

40. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Australia stated that it would “promote the achievement of increased adherence to the Ottawa Convention, the commencement of negotiations for a transfer ban on landmines”.⁷³

41. At the Second Review Conference of States Parties to the CCW in 2001, Australia reiterated its “commitment to universal adherence both to the Convention on Conventional Weapons and its annexed protocols, and to the Ottawa Convention” and urged “all States which had not yet done so to accede to those important instruments”.

42. At the First Meeting of States Parties to the Ottawa Convention in 1999, Austria condemned the laying of new mines in “Kosovo, Angola and some other places”.⁷⁴

43. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Austria (together with the EU) stated that it would “support efforts to improve the humanitarian standards of the Protocol II to the 1980 CCW”.⁷⁵

44. At the Landmines Treaty Signing Conference in Ottawa in December 1997, Belarus stated that it “completely shares the objectives of the Convention” and that it would “search for financial resources for destruction of the existing millions of anti-personnel mines stockpiled in Belarus in order to achieve complete elimination of this weapon”.⁷⁶

45. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, Belarus stated that it had “established a moratorium on exports” of anti-personnel landmines and that it “does not produce and does not expect to produce or modernize mines in the future, neither anti-personnel nor any other mines”, nor did it “use mines to protect the state border or for any other purposes”.⁷⁷

46. In 1995, during a debate in the First Committee of the UN General Assembly, Benin declared that there was an “imperative need for a ban on the manufacture and use of anti-personnel land-mines”.⁷⁸

47. In 1995, during a debate in the First Committee of the UN General Assembly, Burkina Faso stated that it supported an eventual ban on anti-personnel mines.⁷⁹

⁷³ Australia, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷⁴ Austria, Statement at the First Meeting of the States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

⁷⁵ Austria (together with the EU), Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷⁶ Belarus, Statement at the Landmines Treaty Signing Conference, Ottawa, 3 December 1997.

⁷⁷ Belarus, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 17 December 1999.

⁷⁸ Benin, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.10, 26 October 1995, p. 24.

⁷⁹ Burkina Faso, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 20 October 1995, p. 10.

48. In 1995, during a debate in the First Committee of the UN General Assembly, Canada stated that it continued “to advocate the elimination of land-mines, recognizing that this goal will take a considerable time to achieve”.⁸⁰

49. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Canada (together with the Canadian Red Cross and Norway) stated that it would “continue support for the universalization and full implementation of the Ottawa Convention”.⁸¹

50. At the Second Meeting of States Parties to the Ottawa Convention in 2000, Canada stated that it was:

deeply concerned by reports that Angola, a treaty signatory, continues to deploy new mines – increasing the scale of human tragedy for peoples who have already suffered after years of civil war. We are also concerned about allegations of new mine use by Burundi and Sudan, also treaty signatories. We urge these states to clarify these matters quickly and in a manner consistent with the political and moral obligations they undertook when they signed this Convention. There are also allegations that parties to the conflict in the Democratic Republic of the Congo have deployed mines. The fact the some of the states with forces engaged in the DRC are States Parties to this Convention underscores the need for these states to clarify the facts surrounding these allegations.

Canada further noted that:

Beyond the immediate community bound by this Convention, mines are still being used by governments and non-state actors to an extent that merits our collective condemnation. It is important to highlight the indiscriminate use of landmines by both Russian and Chechen forces in Chechnya – surely one of the most serious setbacks for the already minimal norms regarding mine use contained within the Landmines Protocol of the Convention on Certain Conventional weapons... We call upon all states, signatory and non-signatory alike, to work co-operatively to clarify compliance issues in a manner that will build greater respect for the norms we have worked so long and hard to create.⁸²

51. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Chile stated that it would “make every effort to ensure that lawmakers incorporate those offences and those set forth in the Ottawa landmines treaty... into domestic legislation”.⁸³

52. In 1998, in a White Paper on China’s National Defence, China stated that it was “in favour of imposing proper and rational restrictions on the use and

⁸⁰ Canada, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 20 October 1995, p. 6.

⁸¹ Canada (together with Norway), Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁸² Canada, Statement at the Second Meeting of the States Parties to the Ottawa Convention, Geneva, 11–15 September 2000.

⁸³ Chile, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

transfer of APLs in a bid to achieve the ultimate objective of a comprehensive prohibition of such landmines through a phased approach".⁸⁴

53. At the First Meeting of States Parties to the Ottawa Convention in 1999, China, attending the meeting as an observer, expressed the hope that "the international community could make joint efforts to further improve the international security environment, and to create favourable conditions for the ultimate goal of a complete ban on APLs in a bid to eliminate the threat to innocent civilians by APLs".⁸⁵

54. At the Second Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 2000, China stated in relation to anti-personnel landmines that "complete prohibition is undoubtedly the best solution . . . However, it should also be recognized that given the divergence of national conditions, countries may differ in terms of their respective security concerns and military technological development levels."⁸⁶

55. In 1995, during a debate in the First Committee of the UN General Assembly, Colombia reiterated its "support for the initiative of an international moratorium on the production and transfer of anti-personnel land-mines, with a view to their complete elimination".⁸⁷

56. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Costa Rica stated that it would promote "the struggle to clear the land of all anti-personnel mines".⁸⁸

57. In 1995, during a debate in the First Committee of the UN General Assembly, Côte d'Ivoire stated that it felt it was "time to think about an international agreement prohibiting the production, utilization and transfer of mines".⁸⁹

58. In 1995, during a debate in the First Committee of the UN General Assembly, Ecuador encouraged "new international efforts to find solutions to the problems caused by these weapons with a view to their total elimination".⁹⁰

59. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Egypt stated that:

It was generally agreed that time-delay weapons such as anti-personnel weapons, land-mines and aircraft, artillery and naval gun-delivered mines and booby traps, often placed far from the combat areas, could injure civilians as well as combatants

⁸⁴ China, Information Office of the State Council, White Paper: China's National Defence, 27 July 1998, cited in ICBL, *Landmine Monitor Report 2000*, August 2000, p. 481, footnote 3.

⁸⁵ China, Statement at the First Meeting of the States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

⁸⁶ China, Statement at the Second Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 11 December 2000.

⁸⁷ Colombia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 20.

⁸⁸ Costa Rica, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁸⁹ Côte d'Ivoire, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.6, 18 October 1995, p. 2.

⁹⁰ Ecuador, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.3, 16 October 1995, p. 19.

and were therefore indiscriminate. Moreover, such devices generally exploded close to the victims, causing grave injuries; they also slowed up the evacuation of the sick and wounded from mined areas, thus increasing their suffering. His delegation called for prohibition of the use of weapons of that category.⁹¹

60. In 2000, during a debate in the First Committee of the UN General Assembly, Egypt stated that while it recognised the “humanitarian goal” of the 1997 Ottawa Convention, it continued “to maintain that the Ottawa Convention lacks the vision necessary to deal comprehensively with all aspects related to landmines”.⁹²

61. In 1995, during a debate in the First Committee of the UN General Assembly, Ethiopia stated that there was “a compelling need for a total ban on these insidious weapons”.⁹³

62. In 1997, the Finnish government released a fact sheet in which it explained its position on the use of anti-personnel mines:

APLs are an integral part of the Finnish territorial defence doctrine. They would only be used in response to armed aggression against Finland. Given their importance to Finland’s defence, any decision to destroy APLs and to bear the considerable cost of providing the same defensive impact with other means would have to be made in the context of such a total ban that Finland regards as responding to the global landmine crisis.⁹⁴

63. In a speech addressed to the UN General Assembly in 1995, the German Minister of Foreign Affairs stated that “anti-personnel mines . . . are ‘weapons of mass destruction’. Day in, day out, they are taking a terrible toll on human life, and many of the victims are women and, above all, innocent children. If any kind of weapon must be outlawed, then this one should be.”⁹⁵

64. In 2001, Greece and Turkey made a joint statement in which they declared that:

They also recognize that a total ban on these [anti-personnel] mines is an important confidence building measure that would contribute to security and stability in the region. With these considerations in mind, the Minister of Foreign Affairs of the Republic of Turkey . . . and the Minister of Foreign Affairs of the Hellenic Republic . . . have emphasized the desirability of the adherence of all states to the Convention on Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, namely the Ottawa Convention. In this context, they have decided to concurrently start the procedures that will make

⁹¹ Egypt, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.6, 22 March 1974, p. 49, § 14.

⁹² Egypt, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/55/PV.4, 3 October 2000, p. 23.

⁹³ Ethiopia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 15.

⁹⁴ Finland, Position on Anti-Personnel Landmines: Fact Sheet of the Finnish Ministry for Foreign Affairs, Political Department, 26 August 1997, reprinted in *YIHL*, Vol. 1, 1998, p. 562.

⁹⁵ Germany, Statement by the German Minister of Foreign Affairs before the UN General Assembly, UN Doc. A/50/PV.8, 27 September 1995, p. 7.

both sides parties to the Ottawa Convention. For this purpose, while Greece initiates ratification process, Turkey will start accession procedures. It is also agreed that the instruments of ratification by Greece and accession by Turkey will be simultaneously deposited with the Secretary General of the United Nations in due course.⁹⁶

65. In 1995, during a debate in the First Committee of the UN General Assembly, India stated that:

Having agreed to the extension of the scope of the Protocol to non-international armed conflicts as defined in the Geneva Conventions, [India] has proposed a ban on the use of land-mines in such conflicts and a ban on the transfer of these weapons . . . We would, therefore, be happy to join other sponsors of the draft resolution on a moratorium on the export of land-mines, with the goal of their eventual elimination as viable and humane alternatives are developed.⁹⁷

66. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, India stated that it:

remains committed to the objective of a non-discriminatory, universal and global ban on anti-personnel mines through a phased process that addresses the legitimate defence requirements of States, while at the same time ameliorating the humanitarian crises that have resulted from an irresponsible transfer and indiscriminate use of landmines.⁹⁸

67. At the First Meeting of States Parties to the Ottawa Convention in 1999, Israel, attending the meeting as an observer, Israel stated that it “wholeheartedly supports the ultimate goal of this Convention” and that it:

supports a gradual process in which each state will begin doing its part to reduce the indiscriminate use of landmines, toward the eventual goal of a total ban . . . The first step should be the elimination of the production of APLs to be followed by finding appropriate replacements for landmines and then, later on, when security circumstances allow, a total ban on the use of APLs.⁹⁹

68. In 2001, during a debate in the First Committee of the UN General Assembly, Israel stated that:

Israel supports the ultimate humanitarian goal of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction, aimed at eliminating the consequences of indiscriminate use of anti-personnel landmines . . . [Israel] is still required to resort to defensive operations

⁹⁶ Greece and Turkey, Joint Statement by the Minister of Foreign Affairs of the Republic of Turkey and the Minister of Foreign Affairs of the Hellenic Republic on Anti-Personnel Land Mines, Ankara, 6 April 2001.

⁹⁷ India, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.11, 26 October 1995, p. 20.

⁹⁸ India, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 15 December 1999.

⁹⁹ Israel, Statement at the First Meeting of the States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

against terrorists in order to prevent attacks on its civilians. Therefore, we remain at present unable to support an immediate enactment of a total ban on landmines.¹⁰⁰

69. At the First Meeting of States Parties to the Ottawa Convention in 1999, Japan stated that it was deeply concerned about the use of anti-personnel landmines in Kosovo and called upon "all parties involved in the Kosovo question to refrain from the use of anti-personnel landmines".¹⁰¹

70. In 2000, during a debate in the First Committee of the UN General Assembly, Kazakhstan stated that:

Kazakhstan fully supports the humanitarian orientation of the Ottawa Convention, whose goal is the complete elimination of anti-personnel mines . . . However, in our view, the movement for the complete prohibition of anti-personnel mines should be an ongoing and step-by-step process based on the mine Protocol to the Convention on inhumane weapons.¹⁰²

71. In 1995, during a debate in the First Committee of the UN General Assembly, Kenya declared its support for a ban on anti-personnel mines.¹⁰³

72. At the International Strategy Conference Towards a Global Ban on Anti-Personnel Mines in 1996, South Korea stated that it "in principle supports the ultimate goal of eliminating APLs" but that due to the "unique security situation" on the Korean Peninsula, it "cannot fully subscribe to the total and unconditional ban of APLs".¹⁰⁴

73. At the 27th International Conference of the Red Cross and Red Crescent in 1999, FYROM stated that it would "work with the States and the relevant international bodies on a total elimination of anti-personnel landmines globally and in the region".¹⁰⁵

74. In 1995, during a debate in the First Committee of the UN General Assembly, Mali stated that it was "urgent to put an end to the production of land-mines and to . . . plan for their progressive destruction".¹⁰⁶

75. In 1993, during a debate in the First Committee of the UN General Assembly, Mexico stated that it supported an export moratorium on anti-personnel mines as "a step in the direction of the ultimate prohibition of anti-personnel mines and their destruction".¹⁰⁷

¹⁰⁰ Israel, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/56/PV.19, 31 October 2001, p. 6.

¹⁰¹ Japan, Statement at the First Meeting of the States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

¹⁰² Kazakhstan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/55/PV.12, 12 October 2000, p. 13.

¹⁰³ Kenya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.6, 18 October 1995, p. 15.

¹⁰⁴ South Korea, Statement at the International Strategy Conference Towards a Global Ban on Anti-Personnel Mines, Ottawa, 3–5 October 1996.

¹⁰⁵ FYROM, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹⁰⁶ Mali, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.5, 17 October 1995, p. 17.

¹⁰⁷ Mexico, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 9.

76. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mexico stated that it would “redouble efforts and step up coordination with other governments and with civilian organizations for the universality and implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on their Destruction”.¹⁰⁸

77. In 1995, during a debate in the First Committee of the UN General Assembly, New Zealand stated that it remained “committed to the goal of the elimination of all anti-personnel land-mines”.¹⁰⁹

78. At the 27th International Conference of the Red Cross and Red Crescent in 1999, New Zealand stated that it would “continue to play a constructive role in international de-mining efforts and in encouraging the universal ratification of the Ottawa Convention”¹¹⁰

79. In 1995, during a debate in the First Committee of the UN General Assembly, Nicaragua emphasised that “the definitive solution to the problem created by mines and other devices in various parts of the world lies in a total ban on the production, stockpiling, exportation and proliferation of such inhumane weapons”.¹¹¹

80. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Nicaragua stated that it would “work for prompt ratification of the 1980 United Nations Convention on Certain Conventional Weapons and its Protocols...[and] continue to work unsparingly for mine clearance with a view to making the region a mine-free zone and help mine-blast victims fully reintegrate into society”.¹¹²

81. In 1995, during a debate in the First Committee of the UN General Assembly, Norway stated that it would “continue to work for a total ban on the production, stockpiling, trade and use of anti-personnel land-mines”.¹¹³

82. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, Pakistan declared its hope that the international community would continue working towards “the objective of the complete elimination of anti-personnel mines everywhere”.¹¹⁴

83. In 1999, in a letter to the ICBL, Pakistan stated that while it “remains fully committed to the cause of eventual elimination of anti-personnel

¹⁰⁸ Mexico, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹⁰⁹ New Zealand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 3.

¹¹⁰ New Zealand, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹¹¹ Nicaragua, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.11, 26 October 1995, p. 14.

¹¹² Nicaragua, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹¹³ Norway, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.6, 18 October 1995, p. 9.

¹¹⁴ Pakistan, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 17 December 1999.

landmines, defence requirements do not allow it to join the Ottawa Convention at present".¹¹⁵

84. In 2000, during a debate in the First Committee of the UN General Assembly, Pakistan stated that:

The issue of anti-personnel landmines has particular importance for Pakistan because we witnessed at first hand the plight and the suffering of innocent victims as a result of the massive saturation of Afghanistan with anti-personnel landmines. Millions of mines have still not been cleared in Afghanistan . . . Although our security environment does not permit us to accept a comprehensive ban on anti-personnel landmines, Pakistan will strictly abide by its commitments and obligations under the amended Protocol II on landmines, to the Convention on Certain Conventional Weapons. We will continue to work with other States parties to promote universal acceptance of Protocol II.¹¹⁶

85. At the First Session of the First Review Conference of States Parties to the CCW in 1995, Peru stated that it supported a prohibition on the use of landmines which were not equipped with self-destruct mechanisms.¹¹⁷

86. In 1995, during a debate in the First Committee of the UN General Assembly, Peru stated that it was essential that the international community adopt the necessary measures to eliminate anti-personnel landmines.¹¹⁸

87. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Peru stated that it would "support and work in favour of any initiatives launched to fortify the international system for the total prohibition of antipersonnel landmines".¹¹⁹

88. Prior to the international conference on "New Steps for a Mine-Free Future: Political, Military and Humanitarian Aspects", held in Moscow in May 1998, Russia stated in a press release issued by the Ministry of Defence that it was "in favour of a complete prohibition of antipersonnel landmines" and that it supported "a stage-by-stage and gradual progress towards this goal".¹²⁰

89. Slovenia, with a view to ensuring the effective national implementation of the 1997 Ottawa Convention, enacted two administrative measures concerning in particular the destruction of anti-personnel mines.¹²¹

¹¹⁵ Pakistan, Letter to the UN addressed to the Chair, ICBL Treaty Working Group, 15 November 1999, cited in ICBL, *Landmine Monitor Report 2000*, August 2000, p. 522.

¹¹⁶ Pakistan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/55/PV.13, 13 October 2000, p. 12.

¹¹⁷ Peru, Statement at the First Review Conference of States Parties to the CCW (First Session), Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF.I/SR 5, 3 October 1995, §§ 67–69.

¹¹⁸ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 11.

¹¹⁹ Peru, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹²⁰ Russia, Ministry of Defence, Press Release, Elimination of antipersonnel mines: position of Russia, 26 May 1998.

¹²¹ Slovenia, Execution Plan confirmed by Minister of Defence, 1998; Order by the Chief of General Staff of the Slovenian Army concerning the Destruction of Anti-Personnel Mines in the Slovenian Army, 1999.

90. In its report on “gross violations of human rights” committed between 1960 and 1993, South Africa’s Truth and Reconciliation Commission found that the ANC’s use of landmines in the rural areas of Northern and Eastern Transvaal in the period 1985–1987 “cannot be condoned in that it resulted in gross violations of human rights – causing injuries to and loss of lives of civilians, including farm labourers and children”. The Commission further noted that “the use of landmines inevitably leads to civilian casualties as it does not discriminate between military and civilian targets” and that “to its credit, the ANC abandoned the landmine campaign in the light of the high civilian casualty rate”.¹²²

91. At the 27th International Conference of the Red Cross and Red Crescent in 1999, South Africa stated that it would “promulgate legislation implementing the Ottawa Convention into domestic law”.¹²³

92. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Thailand stated that it would “take concrete steps towards elimination of anti-personnel mines and assistance to mine victims in accordance with the 1997 Ottawa Convention”.¹²⁴

93. In 1995, during the debate in the First Committee of the UN General Assembly on Resolution 50/70, which encouraged “further immediate international efforts to seek solutions to the problems caused by anti-personnel landmines, with a view to the eventual elimination of anti-personnel landmines”, Turkey stated that it understood the definition of “eventual elimination” in that paragraph as “a political goal that we must strive to attain in the future”. Turkey further noted that it had joined the consensus on the basis of its understanding of the paragraph on eventual elimination but that it would have abstained had the paragraph been put to a separate vote.¹²⁵

94. At the First Meeting of States Parties to the Ottawa Convention in 1999, the Turkish representative, attending the meeting as an observer, declared that “the security situation around Turkey so far precludes my country from signing the Ottawa Convention”. However, the delegate announced the government’s intention “to sign the Ottawa Convention at the beginning of the next decade if present conditions do not change adversely”.¹²⁶

95. In 2001, during a debate in the First Committee of the UN General Assembly, Turkey stated that:

¹²² South Africa, Truth and Reconciliation Commission Report, 1998, Vol. 2, p. 335.

¹²³ South Africa, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹²⁴ Thailand, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹²⁵ Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.26, 17 November 1995, p. 18.

¹²⁶ Turkey, Statement at the First Meeting of States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

Turkey is fully conscious of the casualties and the ensuing human suffering caused by the irresponsible and indiscriminate use of mines. We attach importance to the mine-ban Treaty and consider it to be one of the major achievements of the international community towards the total elimination of anti-personnel mines. However, the security situation around Turkey is distinctly different from that faced by the proponents of the Ottawa process. This has prevented us from signing the Treaty. However, our commitment to the Treaty's goals was manifested by our participation in the First, Second and Third Meetings of the States Parties . . . Furthermore, Turkey has initiated a number of contacts with some neighbouring countries with a view to seeking the establishment of special regimes in order to keep our common borders free of anti-personnel mines . . . I would like to stress once more my Government's determination to become a party to the Ottawa Convention.¹²⁷

96. In a press release issued in March 2002, the Turkish Minister of Foreign Affairs declared that:

Turkey has come to the stage of submitting the Convention to the Turkish Grand National Assembly for finalization of the accession procedures. In the meantime, the duration of Turkey's national moratorium on the export and transfer of anti-personnel land mines expired in January 2002. Turkey has decided to extend once again her moratorium on the export and transfer of anti-personnel land mines, this time indefinitely, as an expression of her sincere commitment to becoming party to the Ottawa Convention.¹²⁸

97. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Turkmenistan stated that it would "continue practical efforts to increase the number of governments joining the Ottawa Convention. As a country strongly backing the Ottawa process, Turkmenistan is committing itself to be in the lead of the Movement for complete elimination of land-mines."¹²⁹

98. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, Ukraine declared that:

Being an active participant of the Ottawa process, which by no means has the intention to compete with the Amended Protocol II, Ukraine follows consequent policy directed to the prohibition and elimination of APLs, as exemplified in spring 1998 by destruction of 100 thousands of PFM-1 type mines in stocks, signing on 24 February 1999 the Ottawa convention as well as prolongation for subsequent four years of the moratorium on export of all types of APLs, that originally was introduced by governmental Decree in September 1995.¹³⁰

99. In 1995, during a debate in the First Committee of the UN General Assembly, the US stated that "we must renew our commitment to clear, control

¹²⁷ Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/56/PV.11, 17 October 2001, pp. 14–15.

¹²⁸ Turkey, Minister of Foreign Affairs, Press Release, 15 March 2002.

¹²⁹ Turkmenistan, Statement at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹³⁰ Ukraine, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 17 December 1999.

and eventually eliminate these indiscriminate killers and we must act on this commitment now".¹³¹

100. In 1996, in a White House fact sheet announcing its anti-personnel landmine policy, the US stated that it would "aggressively pursue an international agreement to ban use, stockpiling, production, and transfer of anti-personnel landmines with a view to completing the negotiation as soon as possible".¹³²

101. In 1998, US Presidential Decision Directive (PDD) 64 stated that the US would sign the 1997 Ottawa Convention by 2006 if it succeeded in developing suitable alternatives to anti-personnel mines and mixed anti-tank systems by that time. It also stated that the US would end the use of anti-personnel landmines outside Korea by 2003.¹³³

III. Practice of International Organisations and Conferences

United Nations

102. In a resolutions adopted in 1996, the UN Security Council called upon "the Government of Angola and UNITA to signal their commitment to peace by destroying their stockpiles of landmines".¹³⁴ In a further resolution adopted the same year, the Security Council reiterated "the need for continued commitment to peace by destruction of stockpiles of landmines monitored and verified by UNAVEM III".¹³⁵

103. In a resolution adopted in 1997 on the situation in Georgia, the UN Security Council stated that it condemned "the continued laying of mines, including new types of mines, in the Gali region, which has already caused several deaths and injuries among the civilian population and the peacekeepers and the observers of the international community". It called upon the parties "to take all measures in their power to prevent mine-laying and intensified activities by armed groups".¹³⁶ In another resolution adopted several months later, the UN Security Council repeated this call.¹³⁷

104. In a resolution adopted in 1998 on the situation in Angola, the UN Security Council called on the government of Angola and in particular UNITA "to cease minelaying activity".¹³⁸

105. In two resolutions adopted in 1999 and 2000 on the protection of civilians in armed conflict, the UN Security Council took note of the entry into force

¹³¹ US, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.13, 6 November 1995, p. 4.

¹³² US, Memorandum No. 102-M, Fact Sheets from the White House on Anti-Personnel Land Mines, 17 May 1996.

¹³³ The substance of the Directive is contained in a public letter from the US National Security Advisor to Senator Patrick Leahy, 15 May 1998, cited in ICBL, *Landmine Monitor Report 2000*, August 2000, pp. 333-334.

¹³⁴ UN Security Council, Res. 1055, 8 May 1996, § 18.

¹³⁵ UN Security Council, Res. 1087, 11 December 1996, § 17.

¹³⁶ UN Security Council, Res. 1096, 30 January 1997, § 14.

¹³⁷ UN Security Council, Res. 1124, 31 July 1997, § 14.

¹³⁸ UN Security Council, Res. 1213, 3 December 1998, § 7.

of the 1997 Ottawa Convention and of the 1996 Amended Protocol II to the CCW and recalled "the relevant provisions contained therein". It further noted "the beneficial effects that their implementation will have on the safety of civilians".¹³⁹

106. In a resolution adopted in 1980, the UN General Assembly welcomed the successful conclusion of the 1980 CCW and its Protocols and commended the Convention and the three annexed Protocols to all States "with a view to achieving the widest possible adherence to these instruments".¹⁴⁰

107. In numerous resolutions adopted between 1981 and 1998, the UN General Assembly urged all States that had not done so to accede to the 1980 CCW and its Protocols.¹⁴¹

108. In two resolutions adopted in 1994 and 1995 on the moratorium on the export of anti-personnel landmines, the UN General Assembly stated that it encouraged "further immediate international efforts to seek solutions to the problems caused by anti-personnel land-mines, with a view to the eventual elimination of anti-personnel land-mines".¹⁴²

109. In three resolutions adopted between 1994 and 1996, the UN General Assembly urged the Cambodian government to ban all anti-personnel landmines.¹⁴³

110. In a resolution adopted in 1996, the UN General Assembly recalled with satisfaction "its resolutions 49/75 D and 50/70 O, in which it, *inter alia*, established as a goal of the international community, the eventual elimination of anti-personnel landmines". The General Assembly declared that it recognised the need to pursue "an effective, legally binding international agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines".¹⁴⁴

111. In a resolution adopted in 1997, the UN General Assembly urged all States to adhere to the 1997 Ottawa Convention. It stressed the need to work towards universalisation of this Convention in all relevant fora.¹⁴⁵

¹³⁹ UN Security Council, Res. 1265, 17 September 1999, § 18; Res. 1296, 19 April 2000, § 20.

¹⁴⁰ UN General Assembly, Res. 35/153, 12 December 1980, § 4.

¹⁴¹ UN General Assembly, Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67, 7 December 1988, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 3; Res. 53/81, 4 December 1998, § 5.

¹⁴² UN General Assembly, Res. 49/75 D, 15 December 1994, preamble and § 6; Res. 50/70 O, 12 December 1995, § 6.

¹⁴³ UN General Assembly, Res. 49/199, 23 December 1994; Res. 50/178, 22 December 1995; Res. 51/98, 12 December 1996.

¹⁴⁴ UN General Assembly, Res. 51/45 S, 10 December 1996, preamble. (The resolution was adopted by 155 votes in favour, none against and 10 abstentions. Abstaining: Belarus, China, Cuba, North Korea, South Korea, Israel, Pakistan, Russia, Syria and Turkey.)

¹⁴⁵ UN General Assembly, Res. 52/38 A, 9 December 1997, preamble. (The resolution was adopted by 142 votes in favour, none against and 18 abstentions. Abstaining: Azerbaijan, China, Cuba, Egypt, India, Iran, Israel, Kazakhstan, South Korea, Mongolia, Morocco, Myanmar, Pakistan, Russia, Syria, Tajikistan, Turkey and US.)

112. In a resolution adopted in 1997, the UN General Assembly urged “all States and regional organizations to intensify their efforts to contribute to the objective of the elimination of anti-personnel landmines”.¹⁴⁶

113. In a resolution adopted in 1998, the UN General Assembly reiterated its invitation to all States to accede to or ratify the 1997 Ottawa Convention.¹⁴⁷

114. In two resolutions adopted in 1999 and 2000 respectively, the UN General Assembly emphasised the “desirability of attracting the adherence of all States to the [Ottawa] Convention” and stated its determination “to work strenuously towards the promotion of its universalization”. The General Assembly also invited “all States that have not ratified the Convention or acceded to it to provide, on a voluntary basis, information to make global mine action efforts more effective”.¹⁴⁸

115. In a resolution adopted in 1996 on the situation of human rights in Cambodia, the UN Commission on Human Rights welcomed “the intention of the Government of Cambodia to ban all anti-personnel landmines”.¹⁴⁹

116. In two resolutions adopted in 1995 and 1996 respectively, the UN Sub-Commission on Human Rights urged States that had not yet done so to sign and ratify the 1980 CCW and its Protocols and declared itself “in favour of a total ban on the production, marketing and use of anti-personnel landmines”. In the second resolution, the Sub-Commission declared that it favoured a total ban on anti-personnel landmines “as a means to protect the right to life” and urged all States “to modify, where necessary, their legislation in order to prohibit the production, marketing and use of anti-personnel land-mines in and from their territories”.¹⁵⁰

117. In 1994, in a report on assistance in mine clearance, the UN Secretary-General stated that the “best and most effective way to halt the proliferation of mines is to ban completely the production, use and transfer of all landmines.

¹⁴⁶ UN General Assembly, Res. 52/38 H, 9 December 1997, § 1. (The resolution was adopted by 147 votes in favour, none against and 15 abstentions. Abstaining: Benin, Botswana, Cuba, Eritrea, Indonesia, Kenya, Malawi, Mexico, Mozambique, Namibia, Philippines, South Africa, Togo, Zambia and Zimbabwe.)

¹⁴⁷ UN General Assembly, Res. 53/77 N, 4 December 1998, § 1. (The resolution was adopted by 147 in favour, none against and 21 abstentions. Abstaining: Azerbaijan, China, Cuba, Egypt, India, Iran, Israel, Kazakhstan, Libya, Marshall Islands, Micronesia, Morocco, Myanmar, Pakistan, South Korea, Russia, Syria, Tajikistan, US, Vietnam and Yemen.)

¹⁴⁸ UN General Assembly, Res. 54/54 B, 1 December 1999, preamble and § 5 (the resolution was adopted by 139 in favour, one against and 20 abstentions. Against: Lebanon. Abstaining: Azerbaijan, China, Cuba, Egypt, India, Iran, Israel, Kazakhstan, South Korea, Libya, Marshall Islands, Micronesia, Morocco, Myanmar, Pakistan, Russia, Syria, US, Uzbekistan and Vietnam); Res. 55/33 V, December 2000, preamble and § 5 (the resolution was adopted by 143 votes in favour, none against and 22 abstentions. Abstaining: Azerbaijan, China, Cuba, Egypt, India, Iran, Israel, Kazakhstan, South Korea, Kyrgyzstan, Lebanon, Libya, Marshall Islands, Micronesia, Morocco, Myanmar, Pakistan, Russia, Syria, US, Uzbekistan and Vietnam).

¹⁴⁹ UN Commission on Human Rights, Res. 1996/54, 19 April 1996, § 22.

¹⁵⁰ UN Sub-Commission on Human Rights, Res. 1995/24, 24 August 1995, §§ 2 and 7; Res. 1996/15, 23 August 1996, preamble and §§ 1, 2 and 3.

Member States are invited to consider establishing such a ban as a matter of urgency.”¹⁵¹

118. In 1994, in an article on landmines in *Foreign Affairs*, the UN Secretary-General stated that “the nature of mines makes them indiscriminate as to their effect; as such, they are prohibited under international humanitarian law, and practical measures should be taken to put that prohibition into general practice”. He went on to suggest that the aim of any future international mines treaty should be “to reach agreement on a total ban on the production, stockpiling, trade and use of mines and their components”.¹⁵²

119. In 1995, in a report on assistance in mine clearance, the UN Secretary-General emphasised that “the ultimate goal must be a total ban on the production, transfer and use of landmines. Only a total ban will stop their spread.”¹⁵³

120. In 1996 and again in 1997, the UN Secretary-General reported that a total ban on landmines remained the ultimate objective of his office.¹⁵⁴

121. In 1996, in a report on the impact of armed conflict on children, the UN Secretary-General stated that “the only viable long-term solution to the global land-mine epidemic is a total and immediate ban on all land-mines, beginning with anti-personnel mines” and commended an initiative for a statutory ban on landmines.¹⁵⁵

122. In 1998, in a report on assistance in mine clearance, the UN Secretary-General emphasised the importance of the 1997 Ottawa Convention and of the 1996 Amended Protocol II to the CCW, as well as the desirability of attracting the adherence of all States to both instruments.¹⁵⁶

123. In 1997, in a report on the situation of human rights in Cambodia, the Special Representative of the UN Commission on Human Rights stated that the use of anti-personnel landmines by any party to the conflict must be stopped. He recommended an initiative for a statutory ban on landmines.¹⁵⁷

Other International Organisations

124. In a resolution on landmines in Angola adopted at its Dakar Session in 1995, the ACP-EU Joint Assembly state that it supported “all current appeals,

¹⁵¹ UN Secretary-General, Report on Assistance in Mine Clearance, UN Doc. A/49/357, 6 September 1994, § 22.

¹⁵² Boutros Boutros-Ghali, “The Land Mine Crisis”, *Foreign Affairs*, Vol. 73, No. 5, September–October 1994, p. 13.

¹⁵³ UN Secretary-General, Report on Assistance in Mine Clearance, UN Doc. A/50/408, 6 September 1995, §§ 106–107.

¹⁵⁴ UN Secretary-General, Report on Assistance in Mine Clearance, UN Doc. A/51/540, 23 October 1996, § 100; Report on Assistance in Mine Clearance, UN Doc. A/52/679, 11 December 1997, § 96.

¹⁵⁵ UN Secretary-General, Report on the impact of armed conflict on children, UN Doc E/CN.4/1996/110, 5 February 1996, § 35.

¹⁵⁶ UN Secretary-General, Report on Assistance in Mine Clearance, UN Doc. A/53/496, 14 October 1998, pp. 4 and 27.

¹⁵⁷ UN Commission on Human Rights, Special Representative on the Situation of Human Rights in Cambodia, Report, UN Doc. E/CN.4/1997/85, 31 January 1997, § 54.

namely within the framework of the United Nations, to ban globally all use, production and export of anti-personnel land mines".¹⁵⁸

125. In a resolution on landmines adopted at its Brussels Session in 1995, the ACP-EU Joint Assembly called for a "total ban on the sale, production, transfer, export and use of land mines and their components". It further urged that:

Pending the adopting and implementation of all necessary national and international legal instruments, manufacturers and national suppliers of land mines should be held responsible as reflected, for example, by the introduction of a tax intended to fund the destruction of these mines.¹⁵⁹

126. In a resolution on anti-personnel mines adopted at its Windhoek Session in March 1996, the ACP-EU Joint Assembly expressed regret that the First Review Conference of States Parties to the CCW in 1995 had not reached an agreement to ban anti-personnel mines. It called on all ACP and EU member States "to draw up and adopt without delay national legislation placing an outright ban on the production, stockpiling, transfer, sale, import, export and use of anti-personnel land mines and/or their component parts" and called for "the destruction of existing stockpiles wherever they may be held, and whatever their type or particular characteristics".¹⁶⁰

127. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe emphasised that it "appreciates...[the] diplomatic efforts [of the ICRC] to secure the banning of certain particularly cruel weapons, such as antipersonnel mines".¹⁶¹ It also invited:

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

...

- i. support total prohibition of the transfer and use of land-based antipersonnel mines, and to ban their export immediately.¹⁶²

128. In a press release issued in 1996, the Parliamentary Assembly of the Council of Europe demanded a total ban on the transfer, exportation and use of anti-personnel landmines.¹⁶³

129. In 1995, in answer to a question from the European Parliament, the EU Council of Ministers stated that member States welcomed the adoption of a

¹⁵⁸ ACP-EU Joint Assembly, Resolution on land mines in Angola, Doc. OJSE 95/C 245/04, Dakar, 2 February 1995, § 1.

¹⁵⁹ ACP-EU Joint Assembly, Resolution on land mines, Doc. 95/C 61/04, Brussels, 28 September 1995, §§ 1 and 5.

¹⁶⁰ ACP-EU Joint Assembly, Resolution on anti-personnel mines, Doc. OJSE 96/C 254/04, Windhoek, 22 March 1996, § 1.

¹⁶¹ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 6.

¹⁶² Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8i.

¹⁶³ Council of Europe, Parliamentary Assembly, Press Release, Ref. 233(96), 24 April 1996.

resolution declaring the elimination of landmines as a goal of the 49th Session of the UN General Assembly.¹⁶⁴

130. In 1995, in answer to a question from the European Parliament, the European Commission stated that it was conscious of the suffering inflicted by landmines and that it supported "further measures for the curtailment of the availability and use of anti-personnel landmines, through multilateral action, with an effective regime of control and verification and with the ultimate goal of eliminating such weapons".¹⁶⁵

131. In 1996, the EU Council of Ministers adopted a joint action on anti-personnel landmines in order to achieve their complete elimination. The way to reach this objective, it stated, was through raising the issue in the appropriate international fora. It declared that member States would "endeavour to implement national restrictions or bans additional to those contained in the 1996 Amended Protocol II to the CCW, particularly on the operational use of anti-personnel landmines".¹⁶⁶

132. In a resolution adopted in 1995 on the failure of the international conference on anti-personnel mines, the European Parliament reiterated "its demand for a total ban on anti-personnel mines and spare parts, to cover the production, storage, transfer, sale, export and use of such weapons". It called on "all Member States to establish immediately such a ban in the European Union as a joint action under the Common Foreign and Security Policy".¹⁶⁷

133. In a resolution adopted in 1996 on the Ottawa Conference on anti-personnel landmines, the European Parliament reiterated its demand "for a total ban on anti-personnel mines to cover the production, storage, transfer, sale, export and use of such weapons" and called on the EU and its member States to unilaterally ban the production and use of all mines.¹⁶⁸

134. In 1995, during a debate in the First Committee of the UN General Assembly, the EU called on all participating States at the Review Conference of States Parties to the CCW:

to spare no effort to ensure a satisfactory outcome of the Review Conference, which will significantly reduce the dangers posed by the indiscriminate use of landmines and contribute to the eventual elimination of anti-personnel landmines, as viable and humane alternatives are developed, as the ultimate goal of efforts in this field.¹⁶⁹

¹⁶⁴ EU, Council of Ministers, Answer to Written Question E-2570/94 from the European Parliament, Doc. 95/C 55/120, 23 January 1995.

¹⁶⁵ European Commission, Answer to Written Question E-1384/95 from the European Parliament, Doc. 95/C 257/59, 30 June 1995.

¹⁶⁶ EU, Council, Decision on Joint Action 96/588/CFSP adopted by the Council on the basis of Article J.3 of the Treaty of the European Union on anti-personnel landmines, 1 October 1996, *Official Journal of the European Communities*, No. L 260/1, 12 October 1996, p. 1.

¹⁶⁷ European Parliament, Resolution on the failure of the international conference on anti-personnel mines and laser weapons, 16 November 1995, § 1.

¹⁶⁸ European Parliament, Resolution on the Ottawa Conference on anti-personnel landmines, 24 October 1996, §§ 3 and 5.

¹⁶⁹ EU, Statement by Spain on behalf of the EU before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.3, 16 October 1995, p. 13.

135. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, the EU stated that “the total elimination of anti-personnel mines remains a key objective, as provided for in the Ottawa Convention”.¹⁷⁰

136. In 2000, during a debate in the First Committee of the UN General Assembly, the EU welcomed the large number of signatories to the 1997 Ottawa Convention and called upon “all States to work together to achieve the total elimination of anti-personnel landmines throughout the world”.¹⁷¹

137. In a resolution adopted in 1994 on respect for IHL and support for humanitarian action in armed conflicts, the OAU Council of Ministers invited “all States that have not yet become party to the . . . [1980] CCW, to consider, or reconsider, without delay the possibility of doing so in the near future”.¹⁷²

138. In a resolution adopted in 1995 on the 1980 CCW and problems posed by the proliferation of anti-personnel mines in Africa, the OAU Council of Ministers stated that it was concerned by the indiscriminate use of landmines worldwide, and especially in Africa. It urged all members “to defend an African common position . . . particularly: (i) the total ban on the manufacture and use of mines”.¹⁷³

139. In a resolution adopted in 1996 on the revision of the 1980 CCW and the problems posed by the proliferation of anti-personnel mines in Africa, the OAU Council of Ministers noted that Africa had the largest presence of landmines of all continents. It therefore called upon African sub-regional organisations to take initiatives to ban landmines.¹⁷⁴

140. In a resolution adopted in 1996 on international humanitarian law, water and armed conflict in Africa, the OAU Council of Ministers reaffirmed Africa’s common position supporting a total ban on anti-personnel landmines.¹⁷⁵

141. In 1997, in a decision based on the report of the OAU Secretary-General on the issue of anti-personnel mines and the efforts undertaken at the international level to achieve a global prohibition, the OAU Council of Ministers urged its members to participate fully and actively in the Ottawa process in order to sign a treaty completely banning landmines.¹⁷⁶

142. In the recommendations of the second OAU/ICRC seminar on IHL for diplomats accredited to the OAU held in 1995, the participants expressed “their deep concern about the scourge of mines and their generalised and indiscriminate use and the attendant harmful consequences”. They recommended the “establishment and adoption within that perspective, of an African common position on the following issues: a total ban of the manufacture and use of

¹⁷⁰ EU, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 15 December 1999.

¹⁷¹ EU, Statement by France on behalf of the EU before the First Committee of the UN General Assembly, UN Doc. A/C.1/55/PV.3, 2 October 2000, p. 18.

¹⁷² OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 6.

¹⁷³ OAU, Council of Ministers, Res. 1593 (LXII), 21–23 June 1995, preamble and § 4.

¹⁷⁴ OAU, Council of Ministers, Res. 1628 (LXIII), 26–28 February 1996, § 10.

¹⁷⁵ OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996, § 7.

¹⁷⁶ OAU, Council of Ministers, Dec. 363 (LXVI), 28–31 May 1997, § g.

mines; the extension of the scope of implementation of the 1980 Convention to non-international armed conflict".¹⁷⁷

143. In the recommendations of the third OAU/ICRC seminar on IHL for diplomats accredited to the OAU held in 1996, the participants reaffirmed "the African common position on the total ban on anti-personnel mines as contained in Resolution CM/Res. 1628 (LXIII)" and deplored "the mixed outcome" of the 1996 CCW Review Conference. They stressed "the necessity to adopt purposeful measures at both national and regional levels to ensure a total ban on anti-personnel mines".¹⁷⁸

144. In the recommendations of the fourth OAU/ICRC seminar on IHL for diplomats accredited to the OAU held in 1997, the participants stated that they "appreciated the efforts made by the ICRC and the OAU for the total elimination of anti-personnel mines, that is, the total ban on their production, transfer, stockpiling". They further expressed their support for "the Ottawa process aimed at the conclusion of a Treaty on the total ban on mines in December 1997 and called upon the African countries to contribute fully to it".¹⁷⁹

145. In 1997, the OAU Secretary-General reported that the government of Mozambique, during the Fourth International Conference of NGOs on Land Mines, held in Maputo in February 1997, had announced its decision to prohibit, with immediate effect, the production, marketing, utilisation and unauthorised transportation of anti-personnel mines. The Secretary-General further noted that:

This announcement, which came after the decision made by South Africa on 19th of February to prohibit the utilization, development, production and storage of mines, was warmly welcomed by the participants. The meeting also commended the OAU for the resolutions it adopted and, through which, it unanimously stood for a total ban on mines . . . At the end of the meeting, the participants adopted a declaration calling upon all governments to proceed resolutely with the signing of the [Ottawa] Treaty.¹⁸⁰

146. In April 1998, in a report on the OAU and Rappane's Continental Conference on Children in Situations of Armed Conflict, the OAU Secretary-General stated that member States should give their full support to the 1997 Ottawa Convention and that "the use of landmines by persons involved in armed conflict, whether by rebel forces or any other group, should be condemned and the perpetrators treated as the authors of crimes against humanity and punished in accordance with the law in force".¹⁸¹

¹⁷⁷ OAU/ICRC, Second seminar on IHL, Addis Ababa, 11–12 April 1995, Recommendations, § 3(c).

¹⁷⁸ OAU/ICRC, Third seminar on IHL, Addis Ababa, 2–3 May 1996, Recommendations, § 3.2.

¹⁷⁹ OAU/ICRC, Fourth seminar on IHL, Addis Ababa, 29–30 April 1997, Recommendations, § 7.

¹⁸⁰ OAU, Council of Ministers, Harare, 26–30 May 1997, Report of the Secretary-General on the activities of the General Secretary covering the period February–May 1997, Doc. CM/2000 (LXVI) Part I, p. 31–32, §§ 106 and 107.

¹⁸¹ OAU, Labour and Social Affairs Commission, Secretary-General's Report on the OAU and Rappane's Continental Conference on Children in Situations of Armed Conflict, 13–18 April 1998, 21st Ordinary Session, Pretoria, Doc. LSC/3(b) (XXI), p. 10.

147. In an introductory note to the proceedings of the OAU Conference of Heads of State and Government and the Council of Ministers held in Burkina Faso in June 1998, the OAU Secretary-General wrote that the Council of Ministers “invites its members to sign and ratify the Ottawa treaty”.¹⁸²

148. In two resolutions adopted in 1994 and 1996 on respect for IHL, the OAS General Assembly urged member States to accede to the 1980 CCW.¹⁸³

149. In a resolution adopted in 1995 on respect for international humanitarian law, the OAS General Assembly urged all member States to take part in the Review Conference of States Parties to the CCW “with a view to promoting, in such countries as consider doing so desirable, the eventual prohibition of anti-personnel mines”.¹⁸⁴

150. In a resolution adopted in 1996, the OAS General Assembly set as its goal “the global elimination of anti-personnel landmines and conversion of the Western Hemisphere into an antipersonnel-landmine-free zone”. It also encouraged member States to adopt, as a preliminary step towards a complete ban, domestic legislation to prohibit private possession and transfer of landmines.¹⁸⁵

151. In a resolution adopted in 1998, the OAS General Assembly reaffirmed its goal “of the global elimination of antipersonnel land mines and the conversion of the Western Hemisphere into an antipersonnel-landmine-free zone”. It urged “member States that have not yet signed or ratified the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction to consider doing so as soon as possible to ensure its earliest possible entry to force”.¹⁸⁶

152. In two resolutions on the elimination of anti-personnel mines and mine-clearing operations adopted in 1995 and 1996 respectively, the OIC expressed its “deep concern over the consequences of the use of anti-personnel mines on the security of civilian populations and their economic development”. It asked “OIC member states to take part in the efforts aimed at adopting effective measures to put an end to the indiscriminate use of anti-personnel mines, for their complete elimination”.¹⁸⁷

International Conferences

153. In a resolution adopted in 1995 on challenges posed by calamities arising from armed conflicts, the 93rd Inter-Parliamentary Conference called on States

¹⁸² OAU, Secretary-General, Introductory remarks, Conference of Heads of State and Government, 34th Ordinary Session, Ouagadougou, 1–10 June 1998, p. 36.

¹⁸³ OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 1; Res. 1408 (XXVI-O/96), 7 June 1996, § 1.

¹⁸⁴ OAS, General Assembly, Res. 1335 (XXV-O/95), 9 June 1995, § 1.

¹⁸⁵ OAS, General Assembly, Res. 1411 (XXVI-O/96), 7 June 1996, §§ 1 and 5.

¹⁸⁶ OAS, General Assembly, Res. 1569 (XXVIII-O/98), 2 June 1998, §§ 1 and 6.

¹⁸⁷ OIC, Conference of Ministers of Foreign Affairs, Res. 36/23-P, 9–12 December 1995; Res. 27/24-P, 9–13 December 1996; see also Res. 28/25-P, 15–17 March 1998.

“to lay down a ban on anti-personnel mines” during the review of the 1980 CCW.¹⁸⁸

154. In a resolution adopted in 1995 on health and war, the Conference of African Ministers of Health requested member States “to decree the ban on anti-personnel mines on the review of the CCW . . . and to extend the Convention to cover all internal conflicts”.¹⁸⁹

155. During the First Session of the First Review Conference of States Parties to the CCW in November 1995, the effort to create a global ban on anti-personnel landmines was supported by “sixteen States, the UN Secretary-General, the heads of numerous UN agencies, the Council of Ministers of the Organization of African Unity, the European Parliament and Pope John Paul II”.¹⁹⁰

156. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of the civilian population in period of armed conflict in which it took note of the fact that “the Movement and a growing number of States, international, regional and non-governmental organizations have undertaken to work urgently for the total elimination of anti-personnel landmines”. It further noted that “the ultimate goal of States is to achieve the eventual elimination of anti-personnel landmines as viable alternatives are developed that significantly reduce the risk to the civilian population”.¹⁹¹

157. In 1996, the Canadian government hosted an International Strategy Conference, held in Ottawa, entitled “Towards a Global Ban on Anti-personnel Mines”. The conference was attended by 50 pro-ban States, which became known as the Ottawa Group,¹⁹² as well as by numerous inter-governmental and non-governmental organisations. The Final Declaration of the Ottawa Conference committed all those present to work together to ensure “the earliest possible conclusion of a legally binding international agreement to ban anti-personnel mines” and for this purpose noted that a follow-on conference would be held in Brussels in 1997 “to review the progress of the international

¹⁸⁸ 93rd Inter-Parliamentary Conference, Madrid, 27 March–1 April 1999, Resolution on the International Community in the Face of the Challenges posed by Calamities Arising from Armed Conflicts and by Natural or Man-made Disasters: The Need for a Coherent and Effective Response through Political and Humanitarian Assistance Means and Mechanisms Adapted to the Situation, § 16.

¹⁸⁹ Conference of African Ministers of Health, Cairo, 26–28 April 1995, Res. 14 (V), § 3.

¹⁹⁰ ICRC, Position Paper No. 2, Landmine Negotiations: Impasse in Vienna Highlights Urgency of National and Regional Measures, November 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 394–398.

¹⁹¹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § G(b) and (c).

¹⁹² Angola, Australia, Austria, Belgium, Bolivia, Bosnia and Herzegovina, Burkina Faso, Cambodia, Cameroon, Canada, Colombia, Croatia, Denmark, Ethiopia, Finland, France, Gabon, Germany, Greece, Guatemala, Guinea, Honduras, Hungary, Iceland, Iran, Ireland, Italy, Japan, Luxembourg, Mexico, Mozambique, Netherlands, New Zealand, Nicaragua, Norway, Peru, Philippines, Poland, Portugal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Trinidad and Tobago, UK, US, Uruguay and Zimbabwe.

community in achieving a global ban on anti-personnel mines".¹⁹³ The Ottawa Conference also adopted a detailed Global Plan of Action which laid out "concrete activities to be undertaken by the international community – on an immediate and urgent basis – to build upon the Ottawa Declaration and to move this process ahead in preparation for the follow-up meeting". The Global Plan of Action stated that "building the necessary political will for a new legally-binding international agreement banning AP mines will require more nations to adopt national bans or moratoria on the production, stockpiling, use and transfer of AP mines".¹⁹⁴

158. In a resolution adopted in 1996 on a worldwide ban on anti-personnel mines and the need for mine clearance for humanitarian purposes, the 96th Inter-Parliamentary Conference called on parliamentarians "to urge their governments to ban anti-personnel mines . . . and support international efforts to achieve a binding international agreement on a global ban". It requested the UN "to strengthen its efforts to secure the elimination of anti-personnel landmines".¹⁹⁵

159. The Final Declaration of the 1997 Brussels Conference on Anti-personnel Landmines, which was signed by over 100 States, recalled UN General Assembly Resolution 51/45 S and urged the vigorous pursuit of "an effective, legally binding international agreement to ban the use, stockpiling, production and transfer of anti-personnel landmines". The Declaration also welcomed "the convening of a Diplomatic Conference by the Government of Norway in Oslo on 1 September 1997 to negotiate such an agreement".¹⁹⁶

160. The Maputo Declaration, adopted by the First Meeting of States Parties to the Ottawa Convention in 1999, reaffirmed their "unwavering commitment to the total eradication of an insidious instrument of war and terror: anti-personnel mines". The Declaration also called upon "those who continue to use, develop, produce, otherwise acquire, stockpile, retain and transfer these weapons: cease now, and join us in this task". The parties to the 1997 Ottawa Convention further declared:

In this spirit, we voice our outrage at the unabated use of anti-personnel mines in conflicts around the world. To those few signatories who continue to use these

¹⁹³ International Strategy Conference, Towards a Global Ban on Anti-personnel Mines, Ottawa, 3–5 October, Declaration, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 480–481.

¹⁹⁴ International Strategy Conference, Towards a Global Ban on Anti-personnel Mines, Ottawa, 3–5 October, Global Plan of Action, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 481–487.

¹⁹⁵ 96th Inter-Parliamentary Conference, Beijing, 16–20 September 1996, Resolution on a Worldwide Ban on Anti-Personnel Mines and the Need for Mine Clearance for Humanitarian Purposes, §§ 1 and 5.

¹⁹⁶ Brussels Conference on Anti-Personnel Landmines, Declaration, 27 June 1997, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 545–546.

weapons, this is a violation of the object and purpose of the Convention that you solemnly signed. We call upon you to respect your commitments.¹⁹⁷

161. In a resolution adopted on the occasion of the 50th anniversary of the Geneva Conventions in 1999 on the contribution of parliaments to ensuring respect for and promoting International humanitarian law, the 102nd Inter-Parliamentary Conference stressed “the serious threat posed by the widespread use of landmines, which have brought dead to many innocent civilians and hindered the return of refugees, the provision of infrastructure and reconstruction in the affected areas long after hostilities have ended”. It therefore stated that it:

10. Also calls on States to accede to or ratify the Ottawa Convention on Anti-Personal Mines, if they have not done so;
...
12. Calls on States to assist, at the international level, in efforts to eliminate the use of landmines, and to monitor compliance with the provisions of the Ottawa Convention;
...
14. Condemns those States and non-State actors that produce, use or export these obnoxious weapons in defiance of the Ottawa Convention;
15. Urges States that produce or use this pernicious weapons, to cease production immediately.¹⁹⁸

162. The Declaration adopted by the Second Meeting of States Parties to the Ottawa Convention in 2000 stated that:

5. We deplore the continued use of anti-personnel mines. Such acts are contrary to the aims of the Convention and exacerbate the humanitarian problems already caused by the use of these weapons. We call upon all those who continue to use anti-personnel mines, as well as those who develop, produce, otherwise acquire, stockpile, retain and transfer these weapons, to cease now and to join us in the task of eradicating these weapons.
6. We implore those States that have declared their commitment to the object and purpose of the Convention and that continue to use anti-personnel mines to recognize that this is a clear violation of their solemn commitment. We call upon all States concerned to respect their commitments.¹⁹⁹

163. In the Final Declaration of the Second Review Conference of States Parties to the CCW in 2001, the participants expressed:

their conviction that all States should strive towards the goal of the eventual elimination of anti-personnel mines globally and in this regard [noted] that a significant

¹⁹⁷ First Meeting of States Parties to the Ottawa Convention, Maputo, 3–7 May 1999, Declaration, UN Doc. APLC/MSP.1/1999/1, 20 May 1999, §§ 1, 6 and 11, see also § 3.

¹⁹⁸ 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on the contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the 50th anniversary of the Geneva Conventions, preamble and §§ 10, 12, 14 and 15.

¹⁹⁹ Second Meeting of States Parties to the Ottawa Convention, Geneva, 11–15 September 2000, Declaration, UN Doc. APLC/MSP.2/2000/L.8, 13 September 2000, p. 12, §§ 5–6.

number of States Parties have formally committed themselves to a prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction.²⁰⁰

The following 65 States participated in the conference as parties to the 1980 CCW: Argentina, Australia, Austria, Bangladesh, Belarus, Belgium, Benin, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, China, Colombia, Croatia, Cuba, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Guatemala, Holy See, Hungary, India, Ireland, Israel, Italy, Japan, Jordan, South Korea, Latvia, Liechtenstein, Lithuania, Luxembourg, Malta, Mauritius, Mexico, Monaco, Mongolia, Netherlands, New Zealand, Norway, Pakistan, Peru, Philippines, Poland, Portugal, Romania, Russian Federation, Senegal, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Ukraine, UK, US and SFRY (FRY); the following four States participated as Signatory States: Egypt, Morocco, Turkey and Vietnam; the following 18 States not parties to the 1980 CCW participated as observers: Albania, Armenia, Bahrain, Chile, Eritrea, Honduras, Iran, Kuwait, Libya, Oman, Saudi Arabia, Singapore, Sri Lanka, Tanzania, Thailand, Tonga, Venezuela and Yemen.²⁰¹

164. The Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002 emphasised that the participants were “worried in the face of the rapid expansion of arms trade and the uncontrolled proliferation of weapons, notably those which can have indiscriminate effects or cause unnecessary suffering, like antipersonnel mines”.²⁰²

IV. Practice of International Judicial and Quasi-judicial Bodies

165. In its Final Report to the ICTY Prosecutor in 2000, the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia stated that “whether antipersonnel landmines are prohibited under current customary law is debatable, although there is a strong trend in that direction”.²⁰³

166. In a resolution on anti-personnel mines adopted in 1995, the ACiHPR urged African States to “participate in large numbers in the 1996 CCW Review Conference to press for the introduction of a clause on the prohibition or restriction of the use of mines in that Convention”.²⁰⁴

²⁰⁰ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, Final Declaration, UN Doc. CCW/CONF.II/2, 25 January 2002, p. 11.

²⁰¹ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/2, Final Document, §§ 20–22.

²⁰² African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.

²⁰³ ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June 2000, § 27.

²⁰⁴ ACiHPR, Res. 4 (XVII), 13–22 March 1995, §§ 1 and 2.

V. Practice of the International Red Cross and Red Crescent Movement

167. In 1993, in a publication entitled “Mines: A Perverse Use of Technology”, the ICRC condemned the indiscriminate use of anti-personnel mines. The foreword by the ICRC President urged “all States, humanitarian organizations and peoples of the world... to unite their energies to eradicate this scourge”.²⁰⁵

168. In February 1994, prior to the First Preparatory Meeting of a group of governmental experts for the Review Conference of the CCW, the ICRC President stated that “from a humanitarian point of view, we believe that a world-wide ban on anti-personnel mines is the only, truly effective solution”.²⁰⁶

169. In May 1994, at the Second Session of the Meeting of Governmental Experts prior to the CCW Review Conference, the ICRC presented several alternative proposals on landmines. The ICRC described its proposal calling for a prohibition on the use, manufacture, stockpiling or transfer of anti-personnel mines as the way to “most effectively deal with the problems caused by landmines”.²⁰⁷

170. In 1994, in a statement before the First Committee of the UN General Assembly, the ICRC declared that it was “firmly of the opinion that the only really effective measure is to ban the use and production of anti-personnel landmines”.²⁰⁸

171. In 1995, in a position paper released following the final meeting of the group of governmental experts that proposed amendments for the First Session of the CCW Review Conference, the ICRC expressed its conviction that the “only clear and effective means of ending the suffering inflicted on civilians by anti-personnel landmines is their total prohibition”.²⁰⁹

172. At the UN International Meeting on Mine Clearance in 1995, the ICRC President stated that “it is essential that the forthcoming Vienna Review Conference of the 1980 UN Convention on Certain Conventional Weapons reaches

²⁰⁵ ICRC, *Mines: A Perverse Use of Technology*, Geneva, 1993, extracts reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 257–263.

²⁰⁶ ICRC, Statement by the President, A Total Ban on Anti-personnel Mines and Blinding Weapons is the Best Option, Geneva, 24 February 1994, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 264–265.

²⁰⁷ ICRC, Proposals on Prohibitions and Restrictions submitted to the Meeting of Governmental Experts to Prepare the First Review Conference of the CCW (Second Session), UN Doc. CCW/CONF/GE/CRP.24, 27 May 1994, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 322–324.

²⁰⁸ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.10, 24 October 1994, p.11.

²⁰⁹ ICRC, Position Paper No. 1, Landmines and Blinding Weapons: From Expert Group to the Review Conference, February 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 328–331.

the goal, endorsed by the 49th UN General Assembly, of the elimination of anti-personnel mines".²¹⁰

173. In 1995, in a statement before the First Committee of the UN General Assembly, the ICRC expressed its disappointment at the failure of the First Review Conference of States Parties to the CCW to reach agreement on a strengthened Protocol II and appealed to States "to evaluate whether measures short of a total ban on anti-personnel landmines will in fact put a stop to the present situation".²¹¹

174. In 1995, in a position paper on landmines, the ICRC reiterated its earlier position stating that it remained convinced that "the only effective means of ending the scourge of anti-personnel landmines is to entirely prohibit their production, transfer and use".²¹²

175. In November 1995, the ICRC, together with National Red Cross and Red Crescent Societies, launched an international media campaign calling for a ban on anti-personnel landmines under the slogan "Landmines must be stopped".²¹³

176. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on anti-personnel landmines in which it expressed its "great concern about the indiscriminate effects of anti-personnel landmines and the consequences for civilian populations and humanitarian action" and urged all components of the Movement "to work for a total ban on anti-personnel landmines".²¹⁴

177. At the Second Session of the First Review Conference of States Parties to the CCW in 1996, the ICRC stated that "only a total ban on anti-personnel landmines can solve the problem".²¹⁵

178. In a press release issued at the end of the Second Session of the First Review Conference of States Parties to the CCW in May 1996, the ICRC described the 1996 Amended Protocol II to the CCW as "woefully inadequate" in its

²¹⁰ ICRC, Statement by the President at the UN International Meeting on Mine Clearance, Geneva, 6 July 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 349–351.

²¹¹ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.11, 26 October 1995, pp. 25–26.

²¹² ICRC, Position Paper No. 2, Landmine Negotiations: Impasse in Vienna Highlights Urgency of National and Regional Measures, November 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 394–398.

²¹³ ICRC, Statement by the President at the Launch of the International Media Campaign against Anti-personnel Landmines by the ICRC and National Red Cross and Red Crescent Societies, Geneva, 22 November 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 404–406.

²¹⁴ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 10, §§ 1 and 2.

²¹⁵ ICRC, Statement at the First Review Conference of States Parties to the CCW (Second Session), Geneva, January 1996, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 411–414.

limitations on the use of anti-personnel mines and called for “ongoing work towards a total ban” to be undertaken at national and regional levels.²¹⁶

179. At the International Strategy Conference Towards a Global Ban on Anti-Personnel Mines in 1996, the ICRC President stated that “anti-personnel mines must not only be outlawed, but their use must also be stigmatized, so that whatever their understanding of the law combatants will choose not to use them because they are considered abhorrent to the societies in which they operate”.²¹⁷

180. In 1996, in the First Committee of the UN General Assembly, the ICRC welcomed the establishment of the Ottawa Group and the Canadian initiative to invite foreign ministers to Ottawa to sign a mine ban treaty in December 1997. The ICRC stated that it would promote adherence to the 1996 Amended Protocol II to the CCW, but urged States “to go far beyond the provisions of the Protocol and to renounce the production, transfer and use of anti-personnel mines”. The ICRC also called for the UN General Assembly to adopt a strong resolution unequivocally supporting “a global ban on, and the elimination of, anti-personnel mines”.²¹⁸

181. At its Seville Session in 1997, the Council of Delegates adopted a resolution on peace, international humanitarian law and human rights in which it urgently called upon National Societies to promote the signing by their governments of the 1997 Ottawa Convention, “to work for the earliest possible ratification of this treaty to ensure its rapid entry into force, and to encourage their governments to take all appropriate additional means to achieve the total elimination of all anti-personnel mines”.²¹⁹

182. In a statement at the First Meeting of States Parties to the Ottawa Convention in 1999, the ICRC voiced its “concern about the reports of new use of landmines in some countries. There is clearly a need for a collective response from States Parties on this issue. This concern is particularly acute when such use involves a signatory State.” The ICRC urged “the conference to send a clear message that anti-personnel mines are no longer an acceptable weapon of warfare and to remind any signatory State using them that such use is contrary to the spirit and purpose of the Ottawa treaty”.²²⁰

²¹⁶ ICRC, Statement at the First Review Conference of States Parties to the CCW (Second Session), ICRC Views Amended Landmine Protocol as “Woefully Inadequate”, Geneva, 3 May 1996, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 448–449.

²¹⁷ ICRC, Statement by the President at the International Strategy Conference Towards a Global Ban on Anti-Personnel Mines, Ottawa, 3–5 October 1996, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 474–479.

²¹⁸ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 9.

²¹⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 8, Section 3, § 1.

²²⁰ ICRC, Statement by the Vice President at the First Meeting of States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

183. At its Geneva Session in 1999, the Council of Delegates adopted a resolution in which it approved the Movement's Strategy on Landmines, one of the core elements of which was to "achieve universal adherence to and effective implementation of the norms established by the Ottawa Convention and amended Protocol II to the 1980 Convention on Certain Conventional Weapons".²²¹

VI. Other Practice

184. In 1993, an armed opposition group stated that it had never used landmines.²²²

185. In the Final Declaration of the ICRC Regional Seminar for Asian Military and Strategic Studies Experts in 1997, the participants called upon States of the Asian region to consider the following urgent measures, especially:

1. The adoption of national prohibitions on the production, stockpiling, transfer and use of anti-personnel mines . . .
5. The rapid adoption of a regional agreement to prohibit remotely delivered anti-personnel mines in Asia so as to prevent an escalation of mine warfare in the region and even higher levels of civilian casualties
6. Participation in upcoming negotiations aimed at the conclusion of a new treaty comprehensively prohibiting anti-personnel landmines by the end of 1997.

The participants further appealed to the international community:

1. To pursue as a matter of urgency the prohibition and elimination of anti-personnel mines . . .
3. To recognise that the use of anti-personnel landmines in internal armed conflicts, either by State or non-State actors, should not be condoned
4. To explore how non-State actors involved in internal armed conflicts can be encouraged to end the use of anti-personnel mines.²²³

186. In its statement to the First Meeting of States Parties to the Ottawa Convention in 1999, the ICBL noted the use of mines in 13 conflicts and allegations of such use in 5 other conflicts during the period December 1997–May 1999.²²⁴

187. The ICBL's *Landmine Monitor Report 1999* noted that while there was no evidence of anti-personnel landmine use by any of the States parties to the 1997 Ottawa Convention, there was evidence to suggest that mines had been used in 13 conflicts during the period December 1997–March 1999 and there were allegations of such use in five other conflicts in the same period. According to

²²¹ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 10, § 1.

²²² ICRC archive document.

²²³ ICRC Regional Seminar for Asian Military and Strategic Studies Experts, Manila, 20–23 July 1997, Final Declaration, Anti-personnel Mines: What Future for Asia?, p. 3–4.

²²⁴ ICBL, Statement at the First Meeting of States Parties to the Ottawa Convention, Maputo, 3–7 May 1999.

the report, there was alleged new use of anti-personnel mines by government forces in this period in: Angola, Burma, DRC, Eritrea, Guinea-Bissau, Senegal, Sri Lanka, Sudan, Turkey and FRY.²²⁵

188. In presenting the *Landmine Monitor Report* at the First Meeting of States Parties to the Ottawa Convention in 1999, the ICBL highlighted the use of anti-personnel mines by three States signatory to the 1997 Ottawa Convention:

Angola's continued use has been properly noted and criticised by many yesterday and today. Guinea-Bissau also used mines in its internal conflict in 1998, and it is likely that the forces of Senegal used mines as well in that conflict... Yugoslavia has rightly been criticised for recent mine use, but non-signatories and non-state actors are still using mines on a near daily basis in places such as Burma and Sri Lanka, and on occasion in such rarely noticed places as Djibouti.²²⁶

189. At the Second Meeting of States Parties to the Ottawa Convention in 2000, the ICBL delivered a statement in which it urged pro-ban governments "not only to criticise and stigmatise mine users consistently, but also to take concrete steps to penalise them, diplomatically or otherwise – while taking care not to penalise civilians living in mined areas". In the same statement, while noting the overall decrease in anti-personnel mine use throughout the world, the ICBL highlighted the "disturbing" use of mines by Ottawa Convention signatories Angola, Burundi and Sudan and stated that even though these countries have yet to ratify the treaty "they are in violation of international law because they engage in activities that defeat the object and purpose of the treaty that they have signed".²²⁷

190. The ICBL's *Landmine Monitor Report 2000* identified 11 governments and dozens of armed opposition groups that had used mines since the 1997 Ottawa Convention entered into force in March 1999. Non-State actors named in the report as having used anti-personnel mines between 1999 and 2000 were identified in the following regions: Angola, Afghanistan, Chechnya, Colombia, DRC, Georgia, northern Iraq, Kashmir, southern Lebanon, Nepal, Philippines, Senegal, Somalia, Sri Lanka, Sudan, Turkey and Uganda.²²⁸

B. Restrictions on the Use of Landmines

I. Treaties and Other Instruments

Treaties

191. Article 2(1) of the 1980 Protocol II to the CCW defines a mine "any munition placed under, on or near the ground or other surface area and designed

²²⁵ ICBL, *Landmine Monitor Report 1999*, 1999, Executive Summary, p. 5.

²²⁶ ICBL, *Landmine Monitor Report 2000*, August 2000, Executive Summary, pp. 7–9.

²²⁷ ICBL, Statement at the Second Meeting of States Parties to the Ottawa Convention, Geneva, 11–15 September 2000.

²²⁸ ICBL, *Landmine Monitor Report 2000*, August 2000, pp. 4–6.

to be detonated or exploded by the presence, proximity or contact of a person or vehicle”.

192. Article 3(4) of the 1980 Protocol II to the CCW and Article 3(10) of the 1996 Amended Protocol II to the CCW require parties to take “all feasible precautions” to protect civilians from mines. “Feasible precautions” are defined in both the original and amended protocol as “those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”. Amended Protocol II lists these circumstances as including, but not being limited to:

- (a) the short- and long-term effect of mines upon the local civilian population for the duration of the minefield;
- (b) possible measures to protect civilians (for example, fencing, signs, warning and monitoring);
- (c) the availability and feasibility of using alternatives; and
- (d) the short- and long-term military requirements for a minefield.

193. Article 3(2) of the 1980 Protocol II to the CCW and Article 3(7) of the 1996 Amended Protocol II to the CCW prohibit the use of mines against the civilian population by way of reprisal.

194. Articles 4 and 5 of the 1980 Protocol II to the CCW provide that:

Article 4

1. This Article applies to:
 - (a) mines other than remotely delivered mines;
 - ...
2. It is prohibited to use weapons to which this Article applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:
 - (a) they are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party; or
 - (b) measures are taken to protect civilians from their effects, for example, the posting of warning signs, the posting of sentries, the issue of warnings or the provision of fences.

Article 5

1. The use of remotely delivered mines is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives, and unless:
 - (a) their location can be accurately recorded in accordance with Article 7(1)(a); or
 - (b) an effective neutralizing mechanism is used on each such mine, that is to say, a self-actuating mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position, or a remotely-controlled mechanism which is designed to render harmless or destroy a mine when the mine no longer serves the military purpose for which it was placed in position.

2. Effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit.

195. Upon signature of the 1980 CCW, China stated that:

The Protocol [to the CCW] on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices fails to lay down strict restrictions on the use of such weapons by the aggressor on the territory of his victim and to provide adequately for the right of a state victim of an aggressor to defend itself by all necessary means.²²⁹

196. Upon ratification of the 1980 CCW, France stated that:

With reference to the scope of application defined in article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, . . . it will apply the provisions of the Convention and its three Protocols [I, II and III] to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949 [international and non-international armed conflicts].²³⁰

197. Upon accession to the 1980 CCW, the Holy See declared that:

The Holy See . . . reiterates the objective hoped for by many parties: an agreement that would totally ban anti-personnel mines, the effects of which are tragically well-known.

In this regard, the Holy See considers that the modifications made so far in the second Protocol are insufficient and inadequate. It wishes, by means of its own accession to the Convention, to offer support to every effort aimed at effectively banning anti-personnel mines . . .²³¹

198. Upon accession to the 1980 CCW, Israel stated that:

With reference to the scope of application defined in article 1 of the [1980 CCW], the Government of the State of Israel will apply the provisions of the Convention and those annexed Protocols to which Israel has agreed [I, II and III] to become bound to all armed conflicts involving regular forces of States referred to in article 2 common to the Geneva Conventions of 12 August 1949, as well as to all armed conflicts referred to in article 3 common to the Geneva Conventions of 12 August 1949.²³²

199. Upon ratification of the 1980 CCW, the US declared that:

With reference to the scope of application defined in article 1 of the Convention, . . . the United States will apply the provisions of the Convention, Protocol I,

²²⁹ China, Declaration made upon signature of the CCW, 14 September 1981, § 3.

²³⁰ France, Reservations made upon ratification of the CCW, 4 March 1988.

²³¹ Holy See, Declaration made upon accession to the CCW, 22 July 1997.

²³² Israel, Declarations and statements of understanding made upon accession to the CCW, 22 March 1995, § a.

and Protocol II to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions for the Protection of War Victims of August 12, 1949 [international and non-international armed conflicts].²³³

200. Article 1(2) of the 1996 Amended Protocol II to the CCW provides that:

This Protocol shall apply, in addition to situations referred to in Article I of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949 [non-international armed conflicts]. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

201. Article 2 of the 1996 Amended Protocol II to the CCW contains the following definitions:

For the purpose of this Protocol:

1. "Mine" means a munition placed under, on or near the ground or other surface area and designed to be exploded by the presence, proximity or contact of a person or vehicle.
- ...
3. "anti-personnel mine" means a mine primarily designed to be exploded by the presence, proximity or contact of a person and that will incapacitate, injure or kill one or more persons.

202. Article 3(11) of the 1996 Amended Protocol II to the CCW provides that "effective advance warning shall be given of any emplacement of mines... which may affect the civilian population, unless circumstances do not permit".

203. Articles 5 and 6 of the 1996 Amended Protocol II to the CCW provide that:

Article 5

1. This Article applies to anti-personnel mines other than remotely-delivered mines.
2. It is prohibited to use weapons to which this Article applies which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex, unless:
 - (a) such weapons are placed within a perimeter-marked area which is monitored by military personnel and protected by fencing or other means, to ensure the effective exclusion of civilians from the area. The marking must be of a distinct and durable character and must at least be visible to a person who is about to enter the perimeter-marked area; and
 - (b) such weapons are cleared before the area is abandoned, unless the area is turned over to the forces of another State which accept responsibility for the maintenance of the protections required by this Article and the subsequent clearance of those weapons.

²³³ US, Declaration made upon ratification of the CCW, 24 March 1995.

3. A party to a conflict is relieved from further compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article only if such compliance is not feasible due to forcible loss of control of the area as a result of enemy military action, including situations where direct enemy military action makes it impossible to comply. If that party regains control of the area, it shall resume compliance with the provisions of sub-paragraphs 2 (a) and 2 (b) of this Article.
4. If the forces of a party to a conflict gain control of an area in which weapons to which this Article applies have been laid, such forces shall, to the maximum extent feasible, maintain and, if necessary, establish the protections required by this Article until such weapons have been cleared.
5. All feasible measures shall be taken to prevent the unauthorized removal, defacement, destruction or concealment of any device, system or material used to establish the perimeter of a perimeter-marked area.
6. Weapons to which this Article applies which propel fragments in a horizontal arc of less than 90 degrees and which are placed on or above the ground may be used without the measures provided for in sub-paragraph 2 (a) of this Article for a maximum period of 72 hours, if:
 - (a) they are located in immediate proximity to the military unit that emplaced them; and
 - (b) the area is monitored by military personnel to ensure the effective exclusion of civilians.

Article 6

1. It is prohibited to use remotely-delivered mines unless they are recorded in accordance with sub-paragraph I (b) of the Technical Annex.
2. It is prohibited to use remotely-delivered anti-personnel mines which are not in compliance with the provisions on self-destruction and self-deactivation in the Technical Annex.
3. It is prohibited to use remotely-delivered mines other than anti-personnel mines, unless, to the extent feasible, they are equipped with an effective self-destruction or self-neutralization mechanism and have a back-up self-deactivation feature, which is designed so that the mine will no longer function as a mine when the mine no longer serves the military purpose for which it was placed in position.
4. Effective advance warning shall be given of any delivery or dropping of remotely-delivered mines which may affect the civilian population, unless circumstances do not permit.

204. Upon acceptance of the 1996 Amended Protocol II to the CCW, Austria, Denmark, Finland, France, Germany, Ireland, South Africa and Sweden stated that:

The provisions of the amended Protocol which by their contents or nature may be applied also in peacetime, shall be observed at all times . . .

It is the understanding of [the State in question] that the word "primarily" is included in article 2, paragraph 3 of the amended Protocol to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices are not considered anti-personnel mines as a result of being so equipped.²³⁴

²³⁴ Austria, Declaration made upon acceptance of Amended Protocol II to the CCW, 27 July 1998; Denmark, Declaration made upon acceptance of Amended Protocol II to the CCW, 30 April

205. Upon acceptance of the 1996 Amended Protocol II to the CCW, Belgium stated that:

It is the understanding of the Government of the Kingdom of Belgium that the provisions of Protocol II as amended which by their contents or nature may be applied also in peacetime, shall be observed at all times.

...

It is the understanding of the Government of the Kingdom of Belgium that the word "primarily" is included in article 2, paragraph 3 of amended Protocol II to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.²³⁵

206. Upon acceptance of the 1996 Amended Protocol II to the CCW, Canada made the following reservation: "Canada reserves the right to transfer and use a small number of mines prohibited under this Protocol to be used exclusively for training and testing purposes. Canada will ensure that the number of such mines shall not exceed that absolutely necessary for such purposes."²³⁶ Canada also declared that:

1. It is understood that the provisions of Amended Protocol II shall, as the context requires, be observed at all times.
2. It is understood that the word "primarily" is included in Article 2, paragraph 3 of Amended Protocol II to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.
3. It is understood that the maintenance of a minefield referred to in Article 10, in accordance with the standards on marking, monitoring and protection by fencing or other means set out in Amended Protocol II, would not be considered as a use of the mines contained therein.²³⁷

207. Upon acceptance of the 1996 Amended Protocol II to the CCW, China declared that:

[T]he word "primarily" is included in article 2, paragraph 3 of the amended Protocol to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices are not considered anti-personnel mines as a result of being so equipped.²³⁸

1997; Finland, Declaration made upon acceptance of Amended Protocol II to the CCW, 3 April 1998; France, Declarations made upon acceptance of Amended Protocol II to the CCW, 23 July 1998; Germany, Declarations made upon acceptance of Amended Protocol II to the CCW, 2 May 1997; Ireland, Declaration made upon acceptance of Amended Protocol II to the CCW, 27 March 1997; South Africa, Declaration made upon acceptance of Amended Protocol II to the CCW, 26 June 1998; Sweden, Declaration made upon acceptance of Amended Protocol II to the CCW, 16 July 1997.

²³⁵ Belgium, Interpretative declarations made upon acceptance of Amended Protocol II to the CCW, 10 March 1999.

²³⁶ Canada, Reservation made upon acceptance of Amended Protocol II to the CCW, 26 June 1998.

²³⁷ Canada, Statements of understanding made upon acceptance of Amended Protocol II to the CCW, 26 June 1998, §§ 1–3.

²³⁸ China, Declaration made upon acceptance of Amended Protocol II to the CCW, 4 November 1998.

208. Upon acceptance of the 1996 Amended Protocol II to the CCW, Germany, Greece, South Africa and Sweden stated that:

It is understood that article 5, paragraph 2(b) does not preclude agreement among the states concerned, in connection with peace treaties or similar arrangements, to allocate responsibilities under paragraph 2(b) in another manner which nevertheless respects the essential spirit and purpose of the article.²³⁹

209. Upon acceptance of the 1996 Amended Protocol II to the CCW, Greece stated that:

It is understood that the provisions of the protocol shall, as the context requires, be observed at all times . . .

It is the understanding of Greece that the word "primarily" is included in article 2, paragraph 3 of the amended Protocol to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices are not considered anti-personnel mines as a result of being so equipped.²⁴⁰

210. Upon acceptance of the 1996 Amended Protocol II to the CCW, Hungary declared that:

The Republic of Hungary . . .

4) announces a total ban on the development, production, acquisition, export and transfer of all types of anti-personnel landmines;

...

9) reiterates her commitment to promote the early conclusion of and wide adherence to an international convention stipulating a total and comprehensive ban on anti-personnel landmines, by reaffirming her determination to contribute actively to the success of international efforts furthering this goal.²⁴¹

211. Upon acceptance of the 1996 Amended Protocol II to the CCW, Italy stated that:

The provisions of the amended Protocol which by their contents or nature may be applied also in peacetime, shall be observed at all times . . .

Under article 2 of the amended Protocol II, in order to fully address the humanitarian concerns raised by anti-personnel land-mines, the Italian Parliament has enacted and brought into force a legislation containing a far more stringent definition of those devices. In this regard, while reaffirming its commitment to promote the further development of international humanitarian law, the Italian Government confirms its understanding that the word "primarily" is included in article 2,

²³⁹ Germany, Declarations made upon acceptance of Amended Protocol II to the CCW, 2 May 1997; Greece, Declarations made upon acceptance of Amended Protocol II to the CCW, 20 January 1999; South Africa, Declaration made upon acceptance of Amended Protocol II to the CCW, 26 June 1998; Sweden, Declarations made upon acceptance of Amended Protocol II to the CCW, 16 July 1997.

²⁴⁰ Greece, Declarations made upon acceptance of Amended Protocol II to the CCW, 20 January 1999.

²⁴¹ Hungary, Declaration made upon acceptance of Amended Protocol II to the CCW, 30 January 1998, §§ 4 and 9.

paragraph 3 of the amended Protocol to clarify that mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, that are equipped with anti-handling devices are not considered anti-personnel mines as a result of being so equipped.²⁴²

212. Upon acceptance of the 1996 Amended Protocol II to the CCW, Liechtenstein declared that “the provisions of the amended Protocol II which by their contents or nature may also be applied in peacetime, shall be observed at all times”.²⁴³

213. Upon acceptance of the 1996 Amended Protocol II to the CCW, the Netherlands stated that:

With regard to Article 1, paragraph 2:

The Government of the Kingdom of the Netherlands takes the view that the provisions of the Protocol which, given their content or nature, can also be applied in peacetime, must be observed in all circumstances.

...

With regard to Article 2, paragraph 3:

The Government of the Kingdom of the Netherlands takes the view that the word “primarily” means only that mines that are designed to be exploded by the presence, proximity or contact of a vehicle and that are equipped with an anti-handling device are not regarded as anti-personnel mines because of that device.²⁴⁴

214. Upon acceptance of the 1996 Amended Protocol II to the CCW, Pakistan stated that:

Article 1:

...

The provisions of the Protocol must be observed at all times, depending on the circumstances...

Article 2 (paragraph 3):

In the context of the word “primarily”, it is understood that such anti-tank mines which use anti-personnel mines as a fuse but do not explode on contact with a person are not anti-personnel mines.²⁴⁵

215. Upon acceptance of the 1996 Amended Protocol II to the CCW, Switzerland declared that it “interprets the definition of ‘anti-personnel mine’ as excluding any mine designed to explode in the presence or proximity of, or upon contact with, a vehicle, when such mine is equipped with an anti-handling device”.²⁴⁶

²⁴² Italy, Declarations made upon acceptance of Amended Protocol II to the CCW, 13 January 1999.

²⁴³ Liechtenstein, Declaration made upon acceptance of Amended Protocol II to the CCW, 19 November 1997.

²⁴⁴ Netherlands, Declaration made upon acceptance of Amended Protocol II to the CCW, 25 March 1999, §§ 1 and 2.

²⁴⁵ Pakistan, Declarations made upon acceptance of Amended Protocol II to the CCW, 9 March 1999, §§ 3 and 4.

²⁴⁶ Switzerland, Declaration made upon acceptance of Amended Protocol II to the CCW, 24 March 1998.

216. Upon acceptance of the 1996 Amended Protocol II to the CCW, the US declared that:

- (2) **EFFECTIVE EXCLUSION.** – The United States understands that, for the purposes of Article 5(6)(b) of the Amended Mines Protocol, the maintenance of observation over avenues of approach where mines subject to that Article are deployed constitutes one acceptable form of monitoring to ensure the effective exclusion of civilians.
- ...
- (5) **PEACE TREATIES.** – The United States understands that the allocation of responsibilities for landmines in Article 5(2)(b) of the Amended Mines Protocol does not preclude agreement, in connection with peace treaties or similar arrangements, to allocate responsibilities under that Article in a manner that respects the essential spirit and purpose of the Article.
- (6) **BOOBY-TRAPS AND OTHER DEVICES.** – For the purposes of the Amended Mines Protocol, the United States understands that –
 - ...
 - (B) a trip-wired hand grenade shall be considered a “booby-trap” under Article 2(4) of the Amended Mines Protocol and shall not be considered a “mine” or an “anti-personnel mine” under Article 2(1) or Article 2(3), respectively; and
 - (C) none of the provisions of the Amended Mines Protocol, including Article 2(5), applies to hand grenade other than trip-wired hand grenades.²⁴⁷

217. At the Second Session of the First Review Conference of States Parties to the CCW in 1996, Australia, Bulgaria, Canada, Czech Republic, Denmark, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Netherlands, Norway, Poland, Romania, South Africa, Sweden, UK and US each made statements of understanding concerning the word “primarily” in Article 2(3) of Amended Protocol II. All stated in similar terms that mines designed to be detonated by the presence, proximity or contact of a vehicle, as opposed to a person, that are equipped with anti-handling devices shall not be considered to be anti-personnel mines as a result of being so equipped.²⁴⁸

218. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment, not yet in force, states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal

²⁴⁷ US, Statements of understanding made upon acceptance of Amended Protocol II to the CCW, 24 May 1999, §§ 2, 5 and 6(B)–(C).

²⁴⁸ First Review Conference of States Parties to the CCW (Second Session), Interpretative statements on article 2 of Amended Protocol II, UN Doc. CCW/CONF.I/SR.14, 3 May 1996, pp. 3 and 4, § 8.

disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

Other Instruments

219. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with the 1980 Protocol II to the CCW.

220. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with the 1980 Protocol II to the CCW.

II. National Practice

Military Manuals

221. Argentina's Law of War Manual reproduces the content of Articles 2(1) and (4), 3, 4 and 5 of the 1980 Protocol II to the CCW.²⁴⁹

222. Australia's Commanders' Guide lists mines under the heading "Limitations on lawful weapons" and states that "the primary concern with the employment of mines and booby traps is that they could be disturbed by innocent parties". It states, however, that the use of mines is permitted "if they can be confined to areas where only lawful combatants would encounter them".²⁵⁰ It refers to the restrictions on the use of mines contained in Article 3(3) and (4) and Article 4 of the 1980 Protocol II to the CCW. The Guide also states that:

Mines . . . may not be directed against civilians under any circumstances and they may not be used indiscriminately. Indiscriminate use is placement of such weapons which:

- a. is not on, or directed at, a military objective; or
- b. employs a method or means of delivery which cannot be directed at a specific military objective; or
- c. may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.²⁵¹

The Guide further provides that:

Remotely delivered mines may only be used within an area which is a military objective or which contains military objectives. Either the location of minefields containing remotely delivered mines must be accurately recorded or the mines

²⁴⁹ Argentina, *Law of War Manual* (1989), §§ 4.17–4.22.

²⁵⁰ Australia, *Commanders' Guide* (1994), § 316.

²⁵¹ Australia, *Commanders' Guide* (1994), § 937.

themselves must be equipped with an effective neutralising mechanism which destroys or renders them harmless after a period of time. If circumstances permit, the civilian population should be warned in advance of the delivery of remotely delivered mines which may affect them.²⁵²

223. Australia's Defence Force Manual provides that:

All feasible precautions must be taken to protect civilians from the effects of land mines . . . and similar devices. They must not be directed at civilians nor may they be used indiscriminately. It is indiscriminate to place them so that they are not on or not directed at a military objective, to use a means of delivery which cannot be directed at a military target, or to place them so that they may be expected to cause excessive collateral damage, that is, injury, loss or damage to civilians which is excessive in relation to the concrete and direct military advantage anticipated.²⁵³

The manual adds that:

Land mines (other than remotely delivered mines) . . . must not be used in areas containing civilian concentrations if combat between ground forces is neither imminent nor actually taking place unless they are placed on, or in the vicinity, of an enemy military objective or there are protective measures for civilians such as warning signs, sentries, fences or other warnings to civilians.²⁵⁴

With respect to remotely delivered landmines, the manual states that they "can be used within the area of a military objective if their location can be accurately recorded and they can be neutralised when they no longer serve the military purpose of which they were placed in position". It further states that "if circumstances permit, effective advance warning should be given where remotely delivered mines are likely to affect civilians".²⁵⁵

224. Belgium's Law of War Manual states, with reference to Article 3 of the 1980 Protocol II to the CCW, that mines can only be used against military objectives. It also states, with reference to Article 5 of the 1980 CCW, that remotely delivered minefields are only permitted if the location of the mines is mapped and if the mines are fitted with self-neutralising devices. The manual adds that the civilian population must be warned in advance of the emplacement of remotely delivered mines unless circumstances do not permit.²⁵⁶

225. Cameroon's Instructors' Manual states that the restrictions contained in the 1980 Protocol II to the CCW must be scrupulously applied in order to avoid civilian casualties. The manual provides, therefore, that the use of mines, booby-traps and other devices must follow the rules on the prohibition of indiscriminate use and on the taking of all feasible precautions to protect civilians as provided for in Article 3 of the 1980 Protocol II to the CCW.²⁵⁷

²⁵² Australia, *Commanders' Guide* (1994), § 940.

²⁵³ Australia, *Defence Force Manual* (1994), § 421.

²⁵⁴ Australia, *Defence Force Manual* (1994), § 422.

²⁵⁵ Australia, *Defence Force Manual* (1994), § 425.

²⁵⁶ Belgium, *Law of War Manual* (1983), p. 38.

²⁵⁷ Cameroon, *Instructors' Manual* (1992), p. 123, § 441.

226. Canada's LOAC Manual, under the heading "Use of authorized land mines", states that states that:

All feasible precautions must be taken to protect civilians from the effects of land mines . . . They must not be directed at civilians nor may they be used indiscriminately. It is indiscriminate to:

- (a) place mines . . . so that they are not on or not directed at a legitimate target;
- (b) use a means of delivery for mines . . . that cannot be directed at a legitimate target; and
- (c) place mines . . . so that they may be expected to cause collateral civilian damage that is excessive in relation to the concrete and direct military advantage anticipated.²⁵⁸

With respect to remotely delivered mines, the manual provides that they

can only be used within the area of a military objective if their location can be accurately recorded, and they can be neutralized when they no longer serve the military purpose for which they were placed in position. Each mine must have: (a) an effective self neutralizing or destroying mechanism; or (b) a remotely controlled mechanism designed to render the mine harmless or destroy it.²⁵⁹

227. France's LOAC Teaching Note states that:

The use of mines except from anti-personnel mines is allowed on the condition that the exact location of mine fields is recorded. All feasible precautions must be taken to protect civilians from the effects of these mines.²⁶⁰

228. According to France's LOAC Manual, employing landmines (except anti-personnel mines) is allowed on condition that all feasible precautions are taken to protect civilians from the effects of these mines. At the end of hostilities, the mine fields have to be indicated and as far as possible neutralised.²⁶¹

229. Germany's Military Manual states that the "use of mines and other devices on land is, in principle, permissible". It adds that:

It is prohibited to direct the above mentioned munitions – neither by way of reprisals – against the civilian population as such or against individual civilians. Any indiscriminate use of these weapons is prohibited. All feasible precautions shall be taken to protect civilians also from unintended effects of these munitions.²⁶²

The manual further provides that:

Mines and other devices shall not be used in any built-up area or other area predominantly inhabited by civilians in which combat between ground forces is neither taking place nor imminent. Exceptions are permissible if: these munitions are placed on or in the close vicinity of a military objective; or measures are taken to

²⁵⁸ Canada, *LOAC Manual* (1999), p. 5-5, § 44.

²⁵⁹ Canada, *LOAC Manual* (1999), p. 5-5, § 50.

²⁶⁰ France, *LOAC Teaching Note* (2000), p. 7.

²⁶¹ France, *LOAC Manual* (2001), pp. 55 and 82.

²⁶² Germany, *Military Manual* (1992), §§ 409–411.

protect civilians from their effects, for example, the posting of warning signs, the posting of sentries, the provision of fences or the issue of warnings.²⁶³

With respect to the use of remotely delivered mines, the manual provides that this kind of weapon is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives. . . . If a mine does no longer serve its military purpose, a self-actuating mechanism shall ensure its destruction or neutralization within a reasonable lapse of time.

The manual also states that “effective advance warning shall be given of any delivery or dropping of remotely delivered mines which may affect the civilian population, unless circumstances do not permit”.²⁶⁴

230. Israel’s Manual on the Laws of War states that:

The mining of areas for protection against invasion of a country’s territory is permitted. The problem arises when mines are used as aggressive weapons and concealed within enemy territory (where the concealing party has no control over the movement of people). Such mines are liable to lie in the path of innocent civilians and injure them rather than combatants. In other words, the prohibition is not on the weapon itself but on the manner of its employment. Likewise, it is forbidden to use mines flung from a plane or fired in shells.²⁶⁵

231. Kenya’s LOAC Manual states that mines, other than remotely delivered, may be used in populated areas “when they are placed on or in the close vicinity of a military objective belonging to or under the control of the enemy; or when measures are taken to protect civilian persons (e.g. warning signs, sentries, issue of warnings, provision of fences)”. According to the manual, remotely delivered mines

may be used

- a) only within an area being itself a military objective, or containing military objectives, and
- b) when their location can be accurately recorded, or an effective neutralising mechanism is issued on each mine;
- c) subject to effective advanced warning to the civilian population when the tactical situation permits.²⁶⁶

232. The Military Manual of the Netherlands reproduces Articles 4 and 5 of the 1980 Protocol II to the CCW.²⁶⁷

233. New Zealand’s Military Manual states that “Protocol II to the CCW . . . restricts the use of mines . . . It also contains specific provisions on the use of

²⁶³ Germany, *Military Manual* (1992), p. 38.

²⁶⁴ Germany, *Military Manual* (1992), §§ 413–414.

²⁶⁵ Israel, *Manual on the Laws of War* (1998), p. 14.

²⁶⁶ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 3–4.

²⁶⁷ Netherlands, *Military Manual* (1993), pp. IV-6/IV-10.

remotely delivered mines". The manual reproduces Articles 3–8 of the 1980 Protocol II to the CCW.²⁶⁸

234. Spain's LOAC Manual provides the same restrictions and prohibitions on the use of mines and remotely delivered mines as are contained in Articles 3, 4, and 5 of the 1980 Protocol II to the CCW.²⁶⁹ It also states that:

Independent of the type of target, its location, the kind of military operation, the given mission or any other circumstances, it is prohibited to use this type of weapon [i.e., *inter alia*, mines] . . . wherever its location is indiscriminate . . . wherever it cannot be guided towards a specific military target and wherever there is reason to believe that it will cause disproportionate collateral damage.²⁷⁰

235. Sweden's IHL Manual, with reference to the 1980 Protocol II to the CCW, states that landmines cannot be "used against civilian populations or individual civilians, which is in full agreement with AP I (Art. 51)". It adds that "it is particularly stated that the indiscriminate use of mines . . . is prohibited". It further stresses that "the new method of remote delivery, *i.e.* planting mines from aircraft or dispersing them over large areas by firing them with missiles or artillery, may be used only against an area which is itself a military objective or which contains military objectives".²⁷¹

236. The US Air Force Pamphlet states that:

Aerial dropped mines . . . are not prohibited under international law, provided that they do not in their design or inherent characteristics cause unnecessary suffering. The manner of use of such weapons, however, is regulated by the rules of armed conflict . . . Necessary precautions must be taken in the use of all weapons, including delayed action weapons, to avoid or minimize incidental civilian casualties. Also mines must not be used for the purpose of preventing rescue of or protection to wounded or sick persons or to deny other humanitarian protections.²⁷²

237. The US Air Force Commander's Handbook states that:

The main legal problem raised by mine warfare is to make sure that civilian persons and property are not unnecessarily endangered, both during and after the conflict, and the parties to the conflict should take reasonable measures to this end. Depending on the circumstances, these measures might include warning civilians, using mines that self-destruct after a period of time and clearing minefields after the end of hostilities.²⁷³

238. The US Naval Handbook states that:

As with all weapons, to be lawful, land mines must be directed at military objectives. The controlled nature of command detonated land mines provides effective

²⁶⁸ New Zealand, *Military Manual* (1992), § 514.

²⁶⁹ Spain, *LOAC Manual* (1996), § 2.4.c.(2).

²⁷⁰ Spain, *LOAC Manual* (1996), § 3.2.a.(3).

²⁷¹ Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 80–81.

²⁷² US, *Air Force Pamphlet* (1976), § 6-6(d).

²⁷³ US, *Air Force Commander's Handbook* (1980), § 6-5.

target discrimination. In the case of non-command detonated land mines, however, there exists potential for indiscriminate injury to noncombatants. Accordingly special care must be taken when employing land mines to ensure non-combatants are not indiscriminately injured.²⁷⁴

National Legislation

239. South Korea's Conventional Weapons Act provides that "the commander of the military unit that emplaces mines . . . must take all necessary measures including advance warning so as to prevent damage to the life, body, and property of the civilians residing in the vicinity".²⁷⁵ It adds that:

1. The Commander of the military unit that has emplaced mines or controls over the mine-emplaced area that can potentially harm civilians (herein after referred to as "minefield") must place warning signs that fulfil the conditions specified in the attached material in or around the minefield.
2. The Commander of the military unit that holds jurisdiction over the minefield with non remotely-delivered anti-personnel mines which do not fulfil the conditions of Article 3, paragraph 3, must take the necessary precautions and measures to deny access of civilians in addition to the warning sign as stipulated in Article 1. However, an exceptional case would be: if the angle of flight taken by the fragment is less than 90 degrees from the horizontal level, the use of the anti-personnel mine occurs within 72 hours since it has been placed and the military unit that emplaced the anti-personnel mine is adjacent.
3. No one is allowed to remove, damage, destroy, hide or otherwise undermine the proper utility of the warning signs placed as per the Article 1.²⁷⁶

240. Under the US War Crimes Act as amended, wilfully killing or causing serious injury to civilians in relation to an armed conflict and in violation of the provisions of the 1996 Amended Protocol II to the CCW is a war crime.²⁷⁷

National Case-law

241. No practice was found.

Other National Practice

242. In 1994, during a debate in the First Committee of the UN General Assembly, Australia stated that the 1980 Protocol II to the CCW "should apply to non-international as well as to international conflicts", that "mines should not be exported to States that are not party to Protocol II" and that "anti-personnel mines should be detectable and incorporate a self-destruct mechanism".²⁷⁸

243. In 1995, in response to a report of the Australian Joint Standing Committee on Foreign Affairs, Defence and Trade that recommended that "international

²⁷⁴ US, *Naval Handbook* (1995), § 9.3.

²⁷⁵ South Korea, *Conventional Weapons Act* (2001), Article 6.

²⁷⁶ South Korea, *Conventional Weapons Act* (2001), Article 7.

²⁷⁷ US, *War Crimes Act as amended* (1996), Section 2441(c)(4).

²⁷⁸ Australia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.3, 17 October 1994, p. 15.

conventions relating to land mines could be couched in terms of rights and obligations, thereby making international criminal law applicable and making breaches subject to international criminal tribunals or war crimes tribunals", the Australian government stated that:

One of our proposals for the Review Conference [of the CCW] was to have the States parties acknowledge in their conference declaration that a deliberate or indiscriminate use of land mines against civilians ought to attract the same criminal responsibility as it does under other humanitarian instruments.²⁷⁹

244. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, Canada stated that it:

continues to have serious concerns about reports concerning the indiscriminate use of anti-personnel mines by the Russian military in the context of the ongoing conflict in Chechnya . . . Many of these mines were remotely delivered against no apparent military target . . . Moreover, Russian forces appear to have undertaken few if any steps to protect civilians in that conflict from the effects of mines, for example through the posting of signs, sentries or fences around known mined areas.

It also voiced its concerns "about recent public reports that representatives of the state-owned Pakistan Ordnance Factories are alleged to have offered anti-personnel mines for sale to a private UK citizen in direct violation of their obligations under the Amended Protocol II to the CCW".²⁸⁰

245. At the Second Meeting of States Parties to the Ottawa Convention in 2000, Canada stated that:

It is important to highlight the indiscriminate use of landmines by both Russian and Chechen forces in Chechnya – surely one of the most serious setbacks for the already minimal norms regarding mine use contained within the Landmines Protocol of the Convention on Certain Conventional Weapons.²⁸¹

246. In 1993, during a debate in the First Committee of the UN General Assembly, China stated that it "understood the desire to avoid the killing of civilians by land mines, but oversimplified measures limited to halting the export of those weapons could not solve the problem".²⁸²

247. At the Second Session of the First Review Conference of States Parties to the CCW in 1996, China expressed its concern about the suffering of and casualties among civilians caused by the "irresponsible use of landmines, especially anti-personnel landmines". It added that "China has made enormous

²⁷⁹ Australia, Senate, *Debates*, 29 November 1995, Vol. 176, pp. 4246–4281, reprinted in *Australian Yearbook of International Law*, 1995, pp. 737 and 741–742.

²⁸⁰ Canada, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 15 December 1999.

²⁸¹ Canada, Statement at the Second Meeting of States Parties to the Ottawa Convention, Geneva, 11–15 September 2000.

²⁸² China, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 7.

efforts on a series of important issues such as the scope of application, technical specifications on the detectability, self-destruction and self-deactivation of landmines and transfer of landmines". It announced that "pending the entry-into-force of the Amended Protocol, it will implement a moratorium on its export of anti-personnel landmines which do not meet the technical specifications on detectability, self-destruction and self-deactivation as provided for by the Protocol".²⁸³

248. At the Second Review Conference of States Parties to the CCW in 2001, the representative of China declared that "his country, a party to the Convention and all its protocols, faithfully discharged its obligations under them. His Government had launched a number of education campaigns concerning the Convention . . . Furthermore, the Government had amended domestic law in order to guarantee the enforcement of the Convention."²⁸⁴

249. In 1994, during a debate in the First Committee of the UN General Assembly, the Czech Republic stated that it supported proposals concerning "the detectability of landmines and the limitation of their functioning after the end of conflicts", as well as "a moratorium on the export of such land-mines".²⁸⁵

250. In 1993, during a debate in the First Committee of the UN General Assembly, Egypt stated that it supported the comments made by several other delegations which had expressed the view that export restrictions alone "would not achieve the desired results" and that "a resolution dealing with the production and use of anti-personnel mines would have been preferable".²⁸⁶

251. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Finland stated that:

In the case of weapons, the draft Additional Protocols did little more than reaffirm existing law and should be supplemented with prohibitions and restrictions of the use of specific categories of conventional weapons. The Ad Hoc Committee should endeavour to define such weapons and prepare a list mentioning, at least, . . . delayed action weapons including mines.²⁸⁷

252. In 1994, during a debate in the First Committee of the UN General Assembly, Finland stated that it wished to prevent "future indiscriminate and irresponsible use of anti-personnel land-mines".²⁸⁸

²⁸³ China, Statement at the First Review Conference of States Parties to the CCW (Second Session), Geneva, 22 April–3 May 1996, UN Doc. CCW/CONF.I/SR.11, 29 January 1996, § 20.

²⁸⁴ China, Statement at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/SR.2, 16 January 2002, § 44.

²⁸⁵ Czech Republic, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.6, 19 October 1994, p. 15.

²⁸⁶ Egypt, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 9.

²⁸⁷ Finland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 9, § 9.

²⁸⁸ Finland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.4, 18 October 1994, p. 17.

253. In 1993, during a debate in the First Committee of the UN General Assembly, France stated that while it

strongly supported international action on the indiscriminate laying of non-self-destructing mines... Protocol II to the inhuman weapons convention permitted self-destructing or self-neutralizing anti-personnel mines as legitimate forms of self-defence if directed at military targets.²⁸⁹

254. In 1993, during a debate in the First Committee of the UN General Assembly, Ghana stated that "it would have been preferable for the resolution to cover the production, use and stockpiling of anti-personnel mines, as well as their export".²⁹⁰

255. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Italy stated that "the obligation to record the location of minefields and to fit a neutralising mechanism on remotely delivered mines provided a satisfactory guarantee for the civilian population".²⁹¹

256. In 1994, during a debate in the First Committee of the UN General Assembly, Japan stated that it would "participate actively in the work of reviewing the [1980 CCW] in order to tighten the controls on the use and availability of land-mines".²⁹²

257. In 2000, during a debate in the First Committee of the UN General Assembly, South Korea stated that it was intending to accede to the 1980 CCW and the 1996 Amended Protocol II to the CCW.²⁹³

258. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Kuwait stated that:

17. ... As a defensive measure, the practice of laying mine-fields – provided that they were properly marked for the benefit of the local population and friendly forces – could not be prohibited. It supported restrictions on the use of mines as a defensive weapon and that their use as offensive weapons should be prohibited. ... He himself considered that the use of anti-personnel landmines for the purpose of paralysing the enemy's movements was acceptable.
18. On the other hand, he stressed the danger to civilians as well as to members of the armed forces of air-delivered mines, which were likely to strike indiscriminately, especially if they were scattered over a wide area. He therefore considered that, in the case of delayed-action and treacherous weapons, it was better to make every effort to provide a rule for limiting their use rather than

²⁸⁹ France, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 7.

²⁹⁰ Ghana, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 9.

²⁹¹ Italy, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.29, 25 May 1976, p. 297.

²⁹² Japan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.4, 18 October 1994, p. 21.

²⁹³ South Korea, Statement before the First Committee of the UN General Assembly, 6 October 2000, UN Doc. A/C.1/55/PV.7, 6 October 2000, p. 14.

to try to lay stress on their inhuman aspects or the medical results they produced, and that the best course would be to regard them as defensive weapons and to prohibit their use as offensive weapons.²⁹⁴

259. At the CCW Preparatory Conference, Mexico stated that it had already submitted proposals concerning the “limitation of the use of anti-personnel and anti-tank mines and booby traps to military targets and their immediate surroundings, with effective precautions to protect civilians”.²⁹⁵

260. In 1994, during a debate in the First Committee of the UN General Assembly, New Zealand advocated a “tougher regime of controls on the use . . . of mines”.²⁹⁶

261. In 1994, during a debate in the First Committee of the UN General Assembly, Norway called for restrictions “on the production and use of such land-mines” and the development of “an efficient verification regime” for the enforcement of the 1980 CCW and its Protocols.²⁹⁷

262. In 2000, during a debate in the First Committee of the UN General Assembly, Pakistan stated that “although our security environment does not permit us to accept a comprehensive ban on APLs, Pakistan will strictly abide by its commitments and obligations under the amended Protocol II on landmines”.²⁹⁸

263. At the Second Review Conference of States Parties to the CCW in 2001, Pakistan declared its full commitment to the 1980 CCW and proposed that during the Review Conference a method would be examined to accelerate the process of achieving universal adherence to the CCW and its Protocols.²⁹⁹

264. In government communiqués in 1995, Peru stated that it considered Ecuador’s “indiscriminate use” of anti-personnel landmines in the border dispute between them as a violation of Articles 35(2) and 51(4) AP I and as a violation of the 1980 CCW.³⁰⁰

265. In 1995, during a debate in the First Committee of the UN General Assembly, Peru stated that it deemed it “essential to . . . set up standards to determine the responsibilities of States and the application of sanctions for damage caused to non-combatant victims and the environment”.³⁰¹

²⁹⁴ Kuwait, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.13, 28 February 1975, p. 127, §§ 17–18.

²⁹⁵ Mexico, Statement at the CCW Preparatory Conference, Doc. A/CONF.95/PREP.CONF./I/SR.3, 30 August 1978, pp. 3–4.

²⁹⁶ New Zealand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.4, 18 October 1994, p. 14.

²⁹⁷ Norway, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.6, 19 October 1994, p. 7.

²⁹⁸ Pakistan, Statement before the First Committee of the UN General Assembly, 13 October 2000, UN Doc. A/C.1/55/PV.13, 13 October 2000, p. 12.

²⁹⁹ Pakistan, Statement of 11 December 2001 at the Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/SR.2, 16 January 2002, §§ 26–28.

³⁰⁰ Peru, Government Communiqué, Geneva, 6 March 1995; Official Communiqué No. 011 of the Joint Command of the Armed Forces, 24 February 1995.

³⁰¹ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 11.

266. In 1995, during a debate in the First Committee of the UN General Assembly, Poland stated that it had “declared a moratorium on the export of anti-personnel land-mines that do not have self-destruct or self-neutralizing devices”.³⁰²

267. In 1993, during a debate in the First Committee of the UN General Assembly, Sri Lanka stated that it felt that the proposed moratorium on the export of anti-personnel mines was inadequate as it did not deal with production or use, and in particular the use of anti-personnel landmines by non-State entities.³⁰³

268. At the CCW Preparatory Conference, Switzerland stated that it supported “the prohibition or extensive restriction of the use of mines and booby-traps, backed by the necessary guarantees”.³⁰⁴

269. In 1994, during a debate in the First Committee of the UN General Assembly, Ukraine advocated “strong action to reduce the threat posed to civilian populations by the indiscriminate use of landmines”.³⁰⁵

270. In 1976, during a meeting of the Ad Hoc Committee on Conventional Weapons established by the CDDH, the UK, introducing a working paper on the regulation of the use of landmines and other devices on behalf of France, Netherlands and UK, stated that:

Article 2 of the present working paper... required the location of minefields to be recorded. It should, however, be noted that the amount of detail in which the recording was made would depend on the type of minefield in question. Where mines were laid by engineers, it might be possible to record the location of each one; in minefields laid by artillery, however, it would only be possible to record the area covered.³⁰⁶

271. In 1993, during a debate in the First Committee of the UN General Assembly, the UK stated that while it “strongly supported international action on the indiscriminate laying of non-self-destructing mines... Protocol II to the inhumane weapons convention permitted self-destructing or self-neutralizing anti-personnel mines as legitimate forms of self-defence if directed at military targets”.³⁰⁷

272. In 1995, during a debate in the House of Commons, the UK Minister of State for Defence Procurement stated that “the parties in the conflict in the former Yugoslavia have indiscriminately sown anti-personnel land mines. That

³⁰² Poland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 7.

³⁰³ Sri Lanka, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, pp. 8–9.

³⁰⁴ Switzerland, Statement at the CCW Conference, Doc. A/CONF.95/PREP.CONF./II/SR.28, 18 April 1978, p. 3.

³⁰⁵ Ukraine, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.7, 20 October 1994, p. 17.

³⁰⁶ UK, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 25 May 1976, p. 289, § 24.

³⁰⁷ UK, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, § 31.

may be in direct contravention of the United Nations weaponry convention [1980 CCW]."³⁰⁸

273. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of the US stated that:

35. It was clearly desirable to place certain restrictions on the use of land mines and other devices... Her delegation supported reasonable and feasible requirements for recording the location of minefields. In that respect she agreed with the statement of the United Kingdom representative at [another meeting of the Committee on Conventional Weapons] that the nature and extent of the recording would depend on the type of minefield in question and the circumstances and method of its emplacement.

36. She also supported a prohibition on the use of remotely delivered mines unless such mines were fitted with a neutralizing mechanism or the area in which they were delivered was clearly marked. Furthermore, her delegation welcomed and shared the concern evidenced in the various proposals for the protection of the civilian population against the effects of mines and similar devices.³⁰⁹

274. Following a decision by the US President in 1996, the US unilaterally undertook:

not to use, and to place in inactive stockpile status with intent to demilitarize by the end of 1999, all non-self-destructing APL not needed for (a) training personnel engaged in demining and countermining operations, and (b) to defend the United States and its allies from armed aggression across the Korean demilitarized zone.³¹⁰

275. In 1991, a State denounced the use of drop-mines on civilian objects in the non-international conflict to which it was a party.³¹¹

III. Practice of International Organisations and Conferences

United Nations

276. In two resolutions adopted in 1994, the UN Security Council condemned all acts by parties to the conflict in Angola "including the laying of landmines, that imperil or inhibit humanitarian relief efforts".³¹²

277. In a resolution adopted in 1994 concerning the situation in Angola, the UN Security Council noted that "the widespread dispersal of landmines is causing hardship to the civilian population and is hampering the return of refugees and displaced persons and other humanitarian relief efforts".³¹³

³⁰⁸ UK, House of Commons, Statement by the Minister of State for Defence Procurement, *Hansard*, 31 January 1995, Vol. 253, cols. 842-3.

³⁰⁹ US, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.29, 25 May 1976, p. 300, §§ 35-36.

³¹⁰ US, Secretary of Defense, Memorandum for Secretaries of the Military Departments, Implementation of the President's Decision on Anti-Personnel Landmines, 17 June 1996.

³¹¹ ICRC archive document.

³¹² UN Security Council, Res. 945, 29 September 1994, § 10; Res. 952, 27 October 1994, § 7.

³¹³ UN Security Council, Res. 965, 30 November 1994, preamble.

278. In a resolution adopted in 1995, the UN Security Council noted “with concern that unexploded landmines constitute a substantial hazard to the population of Rwanda” and underlined “the importance the Council attaches to efforts to eliminate the threat posed by unexploded landmines in a number of States”.³¹⁴

279. In a resolution adopted in 1996, the UN Security Council expressed “its regret at the civilian casualties inflicted by landmines” and called upon all parties in Afghanistan “to desist from the indiscriminate use of landmines”.³¹⁵

280. In a resolution adopted in 1996, the UN Security Council expressed its “serious concern at the indiscriminate use of landmines in Tajikistan and the threat which this poses to the population and UNMOT personnel”.³¹⁶

281. In a resolution adopted in 1997 on the situation in Georgia, the UN Security Council stated that it was “deeply concerned at the continued deterioration of the security conditions in the Gali region, with an increase of acts of violence by armed groups, and indiscriminate laying of mines”. It also condemned “the continued laying of mines, including new types of mines, in the Gali region, which has already caused several deaths and injuries among the civilian population and the peacekeepers and the observers of the international community”.³¹⁷

282. In numerous resolutions adopted between 1986 and 1999, the UN General Assembly expressed its wish for all States to accede to the 1980 CCW and its Protocols.³¹⁸

283. In two resolutions adopted in 1994 and 1995 respectively, the UN General Assembly stated that it was “gravely concerned with the suffering and casualties caused to non-combatants as a result of the proliferation, as well as the indiscriminate and irresponsible use of anti-personnel land-mines”. It emphasised the importance of the 1980 CCW and its Protocols as the “authoritative international instrument governing the responsible use of anti-personnel land-mines and related devices”.³¹⁹

284. In three resolutions adopted between 1994 and 1996, the UN General Assembly expressed grave concern at the indiscriminate use of anti-personnel landmines in Cambodia.³²⁰

³¹⁴ UN Security Council, Res. 1005, 17 July 1995, preamble.

³¹⁵ UN Security Council, Res. 1076, 22 October 1996, §§ 6 and 9.

³¹⁶ UN Security Council, Res. 1089, 13 December 1996, § 11.

³¹⁷ UN Security Council, Res. 1096, 30 January 1997, preamble and § 14.

³¹⁸ UN General Assembly, Res. 35/153, 12 December 1980; Res. 36/93, 9 December 1981; Res. 37/79, 9 December 1982; Res. 38/66, 15 December 1983; Res. 39/56, 12 December 1984; Res. 40/84, 12 December 1985; Res. 41/50, 3 December 1986; Res. 42/30, 30 November 1987; Res. 43/67, 7 December 1988; Res. 45/64, 4 December 1990; Res. 46/40, 6 December 1991; Res. 47/56, 9 December 1992; Res. 48/79, 16 December 1993; Res. 49/75 D, 15 December 1994, § 5; Res. 49/79, 15 December 1994; Res. 50/70 O, 12 December 1995, § 5; Res. 50/74, 12 December 1995; Res. 51/45 S, 10 December 1996; Res. 51/49, 10 December 1996; Res. 52/42, 9 December 1997; Res. 53/81, 10 December 1998; Res. 54/58, 1 December 1999.

³¹⁹ UN General Assembly, Res. 49/75 D, 15 December 1994; Res. 50/70 O, 12 December 1995.

³²⁰ UN General Assembly, Res. 49/199, 23 December 1994; Res. 50/178, 22 December 1995; Res. 51/98, 12 December 1996.

285. In three resolutions adopted between 1994 and 1996, the UN General Assembly deplored the use of landmines against civilians in Sudan.³²¹

286. In a resolution adopted in 1996, the UN General Assembly welcomed the adoption of Amended Protocol II to the CCW, as well as the “national measures adopted by an increasing number of Member States relating to bans, moratoriums or restrictions on the transfer, use or production of anti-personnel landmines or to the reduction of existing stockpiles of such mines”. It urged “more international co-operation in the area of prohibitions or restrictions on the use of certain conventional weapons”.³²²

287. In a resolution adopted in 1998, the UN General Assembly welcomed “as interim measures, the various bans, moratoriums and other restrictions already declared by States on anti-personnel landmines” and called upon “States that have not yet done so to declare and implement such bans, moratoriums and other restrictions as soon as possible”.³²³

288. In three resolutions adopted between 1997 and 1999, the UN General Assembly welcomed the adoption of the 1996 Amended Protocol II to the CCW and urged all States which had not yet done so to agree to be bound by it.³²⁴

³²¹ UN General Assembly, Res. 49/198, 23 December 1994 (the resolution was adopted by 101 votes in favour, 13 against and 49 abstentions. Against: Afghanistan, China, Cuba, India, Indonesia, Iran, Iraq, Libya, Myanmar, Pakistan, Sudan, Syria and Vietnam. Abstaining: Bahrain, Bangladesh, Benin, Bhutan, Brunei Darussalam, Burkina Faso, Burundi, Cameroon, Colombia, Congo, Côte d'Ivoire, Cyprus, North Korea, Egypt, Ethiopia, Gabon, Ghana, Guatemala, Guinea, Jordan, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Malaysia, Maldives, Mali, Marshall Islands, Mauritania, Morocco, Mozambique, Niger, Nigeria, Oman, Papua New Guinea, Philippines, Qatar, South Korea, Saudi Arabia, Sierra Leone, Sri Lanka, Swaziland, Thailand, Togo, Tunisia, Turkmenistan and United Arab Emirates); Res. 50/197, 22 December 1995 (the resolution was adopted by 94 votes in favour, 15 against and 54 abstentions. Against: Afghanistan, China, Cuba, India, Indonesia, Iran, Libya, Myanmar, Nigeria, Pakistan, Qatar, Saudi Arabia, Sudan, Syria and Vietnam. Abstaining: Algeria, Angola, Bahrain, Bangladesh, Benin, Bhutan, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Chad, Colombia, Congo, Côte d'Ivoire, North Korea, Equatorial Guinea, Fiji, Gabon, Gambia, Ghana, Grenada, Guatemala, Guinea, Guinea-Bissau, Jordan, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Lesotho, Malaysia, Maldives, Mali, Mauritania, Morocco, Nepal, Niger, Oman, Papua New Guinea, Philippines, South Korea, Rwanda, Saint Kitts and Nevis, Sierra Leone, Sri Lanka, Swaziland, Thailand, Togo, Tunisia, United Arab Emirates and Vanuatu); Res. 51/112, 12 December 1996 (the resolution was adopted by 100 votes in favour, 16 against and 50 abstentions. Against: Afghanistan, China, Cuba, India, Indonesia, Iran, Jordan, Libya, Myanmar, Nigeria, Pakistan, Qatar, Saudi Arabia, Sudan, Syria and Vietnam. Abstaining: Algeria, Bahrain, Bangladesh, Benin, Bhutan, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Chad, Colombia, Congo, Côte d'Ivoire, Egypt, Equatorial Guinea, Fiji, Gabon, Ghana, Guinea, Guinea-Bissau, Kenya, Kuwait, Kyrgyzstan, Laos, Lebanon, Liberia, Malaysia, Maldives, Mali, Mauritania, Morocco, Mozambique, Nepal, Niger, Oman, Panama, Papua New Guinea, Philippines, South Korea, Senegal, Sierra Leone, Sri Lanka, Swaziland, Thailand, Togo, Tunisia, United Arab Emirates and Zaire).

³²² UN General Assembly, Res. 51/49, 8 January 1997.

³²³ UN General Assembly, Res. 52/38 H, 8 January 1998, § 2. (The resolution was adopted by 147 votes in favour, none against and 15 abstentions. Abstaining: Benin, Botswana, Cuba, Eritrea, Indonesia, Kenya, Malawi, Mexico, Mozambique, Namibia, Philippines, South Africa, Togo, Zambia and Zimbabwe.)

³²⁴ UN General Assembly, Res. 52/42, 9 December 1997; Res. 53/81, 4 December 1998; Res. 54/58, 1 December 1999.

289. In a resolution adopted in 2000, the UN General Assembly expressed its deep concern about the continuing serious violations of human rights and IHL in Sudan. It focused especially on “the use of weapons, including indiscriminate artillery shelling and landmines against the civilian population”.³²⁵

290. In five resolutions adopted between 1993 and 1998 concerning the situation of human rights in Sudan, the UN Commission on Human Rights called upon parties to the hostilities “to halt the use of weapons, including landmines, against the civilian population”.³²⁶

291. In six resolutions between 1994 and 1996, the UN Commission on Human Rights requested States to give full support to the prevention of the indiscriminate use of anti-personnel mines and the use of landmines against civilian populations.³²⁷

292. In two resolutions adopted in 1995 and 1996 respectively, the UN Sub-Commission on Human Rights urged States that had not yet done so to sign and ratify the 1980 CCW and its Protocols.³²⁸

293. In 1994, in an article concerning landmines published in the journal *Foreign Affairs*, the UN Secretary-General recommended that the restrictions in the 1980 CCW and its Protocol II be strengthened.³²⁹

294. In 1998, in a report on mine clearance, the UN Secretary-General emphasised the importance of the 1997 Ottawa Convention and the 1996 Amended Protocol II to the CCW, as well as the desirability of achieving the adherence of all States to both of these instruments.³³⁰

295. In 1995, in a report concerning the conflict in Guatemala, the Director of MINUGUA stated that:

The Mission recommends that URNG issue precise instructions to its combatants to refrain from causing unnecessary harm to individuals and property, to take due

³²⁵ UN General Assembly, Res. 55/116, 4 December 2000, § 2(a)(v). (The resolution was adopted by 85 votes in favour, 32 against and 49 abstentions. Against: Algeria, Bahrain, Chad, China, Comoros, Cuba, North Korea, DRC, Djibouti, Egypt, Gambia, India, Indonesia, Iran, Jordan, Kuwait, Laos, Lebanon, Libya, Mauritania, Morocco, Myanmar, Oman, Pakistan, Qatar, Saudi Arabia, Sudan, Syria, Togo, Tunisia, United Arab Emirates and Vietnam. Abstaining: Azerbaijan, Bangladesh, Belarus, Benin, Bhutan, Botswana, Brunei Darussalam, Burkina Faso, Burundi, Cambodia, Cameroon, Cape Verde, Congo, Côte d’Ivoire, Ethiopia, Fiji, Georgia, Ghana, Guinea, Honduras, Jamaica, Kenya, Lesotho, Madagascar, Malawi, Malaysia, Maldives, Mali, Marshall Islands, Micronesia, Mozambique, Nepal, Nigeria, Palau, Philippines, Russia, Rwanda, Saint Lucia, Senegal, Sierra Leone, Singapore, Sri Lanka, Suriname, Swaziland, Thailand, Uganda, Ukraine, Tanzania and US.)

³²⁶ UN Commission on Human Rights, Res. 1993/60, 10 March 1993, § 9; Res. 1994/79, 9 March 1994, § 10; Res. 1995/77, 8 March 1995, § 15; Res. 1996/73, 23 April 1996, § 15; Res. 1998/67, 21 April 1998, § 6.

³²⁷ UN Commission on Human Rights, Res. 1994/94, 9 March 1994, Res. 1995/77, 8 March 1995, § 15; Res. 1996/54, 19 April 1996, § 15; Res. 1996/73, 23 April 1996, § 22; Res. 1996/75, 23 April 1996, § 4; Res. 1996/85, 24 April 1996, § 18.

³²⁸ UN Sub-Commission on Human Rights, Res. 1995/24, 24 August 1995, § 2; Res. 1996/15, 23 August 1996, § 2.

³²⁹ Boutros Boutros-Ghali, “The Land Mine Crisis”, *Foreign Affairs*, Vol. 73(5), September/October 1994, pp. 8–13.

³³⁰ UN General Assembly, UN Doc. A/53/496, Report of the Secretary-General on Assistance in Mine-Clearance, 14 October 1998, §§ 16–21.

care not to create additional risks to life in attacking military targets and, in particular, to end the practice of laying mines or explosives in areas where civilians work, live or circulate.³³¹

Other International Organisations

296. In a resolution on landmines in Angola adopted at its Dakar Session in February 1995, the ACP-EU Joint Assembly appealed to the Angolan government "to finally sign and ratify the 1980 CCW including the 1980 Protocol II to the CCW, and abide by its provisions".³³²

297. In a resolution on landmines adopted at its Brussels Session in September 1995, the ACP-EU Joint Assembly called upon African and Asian countries which had not yet done so to ratify the 1980 CCW.³³³

298. In a joint statement in 1993, the Social, Health and Family Affairs Committee of the Parliamentary Assembly of the Council of Europe and UNICEF condemned "the widespread use of antipersonnel mines, particularly those which look like toys, of which the main victims are children".³³⁴

299. In a resolution on Rwanda and the prevention of humanitarian crises adopted in 1994, the Parliamentary Assembly of the Council of Europe invited all member States to ratify the 1980 CCW and support a revision of Protocol II, particularly with a view to making self-destruct mechanisms compulsory on landmines.³³⁵

300. In 1995, in a written declaration on landmines and blinding laser weapons, 25 European parliamentarians declared their support for a strengthened 1980 Protocol II to the CCW applicable in non-international armed conflict.³³⁶

301. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited:

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

- ...
- b. ratify, if they have not done so, ... the [1980 CCW] and its protocols ...
- ...
- j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.³³⁷

³³¹ MINUGUA, Director, Second Report, UN Doc. A/49/929, 29 June 1995, Annex, § 197.

³³² ACP-EU Joint Assembly, Resolution on land mines in Angola, Doc. 95/C 245/04, Dakar, 2 February 1995, § 6.

³³³ ACP-EU Joint Assembly, Resolution on land mines, Doc. 95/C 61/04, Brussels, 28 September 1995, § 6.

³³⁴ Council of Europe, Parliamentary Assembly, Report on the situation of women and children in the former Yugoslavia, Doc. No. 6903, 22 September 1993, p. 11.

³³⁵ Council of Europe, Parliamentary Assembly, Res. 1050, 10 November 1994.

³³⁶ Council of Europe, Parliamentary Assembly, Written declaration No. 242 on landmines and blinding laser weapons, Doc. 7343, 29 June 1995.

³³⁷ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8b and j.

302. In 1995, the EU Council of Ministers adopted a decision concerning a joint action on anti-personnel landmines, the aim of which was “to help combat the indiscriminate use and spread throughout the world of anti-personnel landmines which are very dangerous for civilian populations”. It stated that the member States “shall work to strengthen [the 1980 Protocol II to the CCW], in particular by . . . extending its scope to non-international armed conflicts [and] substantially strengthening restrictions or bans on anti-personnel mines”.³³⁸

303. In 1995, in answer to a question from the European Parliament, the European Commission stated that it was conscious of the suffering inflicted by landmines and that it supported “further measures for the curtailment of the availability and use of antipersonnel-landmines, through multilateral action, with an effective regime of control and verification and with the ultimate goal of eliminating such weapons”.³³⁹

304. In 1996, the EU Council adopted a decision concerning a joint action on anti-personnel landmines stating that “the European Union has resolved to combat and end the indiscriminate use and spread throughout the world of anti-personnel landmines as well as to contribute to solving problems already caused by these weapons”.³⁴⁰

305. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, the EU stated that “wide adherence to Amended Protocol II to the CCW is . . . important . . . The EU is committed to the goal of total elimination of anti-personnel mines world-wide as well as to contributing to solving problems caused by these weapons.”³⁴¹

306. In a resolution adopted in 1994 on respect for international humanitarian law and support for humanitarian action in armed conflicts, the OAU Council of Ministers invited its members to “consider, or reconsider, without delay the possibility” of adhering to the 1980 CCW.³⁴²

307. In a resolution adopted in 1995 on the 1980 CCW and problems posed by the proliferation of anti-personnel mines in Africa, the OAU Council of Ministers stated that it was “deeply concerned over the tragic consequences resulting from the generalised and indiscriminate use of anti-personnel mines and the fact that of all the regions of the world, Africa is the continent with the largest number of these weapons”. It further condemned “cases of flagrant violation of the IHL by the indiscriminate use of anti-personnel mines” and urged member

³³⁸ EU, Council Decision 95/170/CFSP concerning the joint action adopted by the Council on the basis of Article J.3 of the Treaty of the European Union on anti-personnel mines, 12 May 1995, *Official Journal of the European Communities*, No. L 115, 22 May 1995, Articles 1 and 3(2). (The decision is no longer in force)

³³⁹ European Commission, Answer to Written Question E-1384/95 from the European Parliament, Doc. 95/C 257/59, 30 June 1995.

³⁴⁰ EU, Council Decision 96/588/CFSP concerning the joint action adopted by the Council on the basis of Article J.3 of the Treaty of the European Union on anti-personnel landmines, 1 October 1996, *Official Journal of the European Communities*, No. L 260, 12 October 1996, Article 1.

³⁴¹ EU, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 15 December 1999.

³⁴² OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 6(b).

States to support an African common position advocating “the extension of the field of application of the 1980 Convention to non-international armed conflicts”.³⁴³

308. In a resolution adopted in 1996 on the revision of the 1980 CCW and problems posed by the proliferation of anti-personnel mines in Africa, the OAU Council of Ministers noted that the African continent had the largest presence of landmines of all continents. It condemned the indiscriminate use of landmines and urged all member States which had not yet acceded to the CCW “to consider doing so as early as possible, particularly to its Protocol II”.³⁴⁴

309. In the recommendations of the second OAU/ICRC seminar on IHL for diplomats accredited to the OAU in 1995, the participants expressed “their deep concern about the scourge of mines and their generalised and indiscriminate use and the attendant harmful consequences”. They recommended the “establishment and adoption... of an African common position on the following issues: ... The extension of the scope of implementation of the 1980 Convention to non-international armed conflicts [and] inclusion, in the Convention, of a mechanism to guarantee an effective implementation of the Convention.”³⁴⁵

310. In a resolution adopted in 1994 on respect for international humanitarian law, the OAS General Assembly stated that it was “deeply disturbed by the testing, production, sale, transfer, and use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects”. It urged all member States to accede to the 1980 CCW.³⁴⁶

311. In a resolution adopted in 1995 on respect for international humanitarian law, the OAS General Assembly stated that it was “alarmed by the terrible and lasting consequences for the civilian population of the use of anti-personnel mines”. It urged member States “to consider the possibility of becoming parties to the 1980 CCW and... to take part in the Review Conference on that Convention”.³⁴⁷

312. In a resolution adopted in 1996 on respect for international humanitarian law, the OAS General Assembly stated that it was “particularly alarmed at the indiscriminate effects of land mines on the civilian population and on humanitarian action” and urged those countries that deemed it desirable to consider the possibility of taking steps internally to prohibit the manufacture, sale and exportation of anti-personal mines”. It urged non-parties to the 1980 CCW to accede to it.³⁴⁸

³⁴³ OAU, Council of Ministers, Res. 1593 (LXII), 21–23 June 1995, preamble and §§ 2, 3 and 4(ii).

³⁴⁴ OAU, Council of Ministers, Res. 1628 (LXIII), 26–28 February 1996, preamble and §§ 2 and 3.

³⁴⁵ OAU/ICRC, Second seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 12 April 1995, Recommendations, p. 3, § 3(c).

³⁴⁶ OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, preamble and § 1.

³⁴⁷ OAS, General Assembly, Res. 1335 (XXV-O/95), 9 June 1995, preamble and § 1.

³⁴⁸ OAS, General Assembly, Res. 1408 (XXVI-O/96), 7 June 1996, preamble and § 1.

International Conferences

313. Mexico and Switzerland proposed a draft article to the Ad Hoc Committee on Conventional Weapons established by the CDDH entitled "Anti-tank and anti-personnel mines" which read:

1. It is prohibited to lay mines in an area which contains a concentration of civilians and in which combat between ground forces is neither taking place nor imminent, unless:
 - (a) they are placed on or in the immediate vicinity of a military objective; and
 - (b) effective precautions have been taken to protect civilians from their effects.
2. The location of methodically laid minefields shall be recorded on sketches or plans, or shown on topographic maps. Such documents shall, so far as possible, be prepared in respect of mines laid during combat. These documents shall be preserved in order to make possible the subsequent removal of the mines without danger.
3. It is prohibited to lay remotely-delivered mines or similar explosive devices which are dropped, fired or teleguided, unless:
 - (a) they are equipped with a self-destruct or neutralization mechanism which becomes operative on the expiry of . . . hours at most, and
 - (b) the area in which they are employed is inside the combat zone of the ground forces.³⁴⁹

314. In the Ad Hoc Committee on Conventional Weapons established by the CDDH, a proposal entitled "Anti-personnel land-mines" was supported by Afghanistan, Algeria, Austria, Colombia, Egypt, Kuwait, Lebanon, Mali, Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela and SFRY which stated that "anti-personnel land-mines must not be laid by aircraft".³⁵⁰ According to an explanatory memorandum:

The use of anti-personnel mines is a generally accepted means of hampering enemy advance and of putting combatants out of action.

However, certain ways of employing anti-personnel landmines may easily lead to injuries indiscriminately being inflicted upon combatants and civilians. The risks for such results are especially high if such mines are laid, perhaps in very large numbers, by aircraft. The limits of the mines will often be very uncertain with this method. The results are apt to be particularly cruel if the mines are not equipped with self-destruction devices which will function reliably after a relatively short time. The risk of indiscriminate effects may be reduced also through marking of minefields – this is not possible, however, when the mines are scattered over a vast area.³⁵¹

³⁴⁹ Mexico and Switzerland, Draft article entitled "Anti-tank and anti-personnel mines" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/211 within CDDH/IV/226, p. 585.

³⁵⁰ Afghanistan, Algeria, Austria, Colombia, Egypt, Kuwait, Lebanon, Mali, Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela and SFRY, Proposal entitled "Anti-personnel land-mines" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/201 (V) within CDDH/IV/226, p. 581.

³⁵¹ Afghanistan, Algeria, Austria, Colombia, Egypt, Kuwait, Lebanon, Mali, Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela and SFRY, Explanatory Memorandum on "Anti-personnel land-mines" submitted to the Ad Hoc Committee on Conventional Weapons

315. A draft text entitled "The Regulation of the Use of Land-Mines and Other Devices" proposed to the Ad Hoc Committee on Conventional Weapons established by the CDDH by Denmark, France, Netherlands and UK elaborated upon an earlier proposal made at the Conference of Government Experts on the Use of Certain Conventional Weapons in Lugano in 1976. This draft text suggested a number of measures including: the compulsory recording of pre-planned minefields (Article 2); a prohibition on the use of remotely delivered mines unless these mines were self-neutralising or the target area was marked (Article 3); and the prohibition of manually emplaced mines in towns or civilian areas unless "they are placed on or in the close vicinity of a military objective" or "due precautions are taken to protect civilians from their effects" (Article 4).³⁵² The proposal was generally favourably received and was explicitly supported by the FRG and Libya.³⁵³

316. A draft article was introduced in the Ad Hoc Committee on Conventional Weapons established by the CDDH by Austria, Mexico, Sweden, Switzerland, Uruguay and SFRY which read, *inter alia*, as follows:

1. It is forbidden to use mines and devices to which this article applies in an area containing a concentration of civilians and in which combat between ground forces is not taking place or is not imminent unless effective precautions are taken to protect civilians from their effects.
2. The location of pre-planned minefields shall always be recorded. Minefields laid during combat and the location of certain explosive and non-explosive devices shall be recorded as far as possible. These records shall be preserved in order to make possible the subsequent removal of the mines and devices and to make the records public when it is necessary.
3. The use of remotely-delivered mines is prohibited unless
 - (a) each such mine is fitted with a neutralizing mechanism which renders the mine harmless within a period of . . . , and
 - (b) they are used within the combat zone.³⁵⁴

317. A proposal submitted by Austria, Denmark, France, Mexico, the Netherlands, Spain, Sweden, Switzerland and the UK to the Ad Hoc Committee on Conventional Weapons established by the CDDH provided that:

1. Scope of application

The proposals relate to the use in armed conflict on land of the mines and other devices defined therein . . .

established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/201 within CDDH/IV/226, pp. 581–582.

³⁵² Denmark, France, Netherlands and UK, Proposal entitled "The Regulation of the Use of Land-Mines and Other Devices" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/213 within CDDH/IV/226, pp. 588–591.

³⁵³ CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.30, 26 May 1976, p. 308 (FRG); *Official Records*, Vol. XVI, CDDH/IV/SR.40, 19 May 1977, p. 411 (Libya).

³⁵⁴ Austria, Mexico, Sweden, Switzerland, Uruguay and SFRY, "Draft article on the Use of Land Mines and the Use of Certain Explosive and Non-Explosive Devices" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/222 within CDDH/IV/226, p. 593.

3. Recording of the location of minefields and other devices

- (1) The Parties to a conflict shall record the location of:
 - (a) all pre-planned minefields laid by them; and
 - (b) all areas in which they have made large-scale and pre-planned use of explosive or non-explosive devices.
- (2) The Parties shall endeavour to ensure the recording of the location of all other minefields, mines and explosive and non-explosive devices which they have laid or placed in position.
- (3) All such records shall be retained by the Parties and the location of all recorded minefields, mines and explosive or non-explosive devices remaining in territory controlled by an adverse Party shall be made public after the cessation of hostilities.

4. Restrictions on the use of remotely delivered mines

The use of remotely delivered mines is prohibited unless:

- (a) each such mine is fitted with an effective neutralizing mechanism, that is to say a self-actuating or remotely controlled mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position;

or
- (b) the area in which they are delivered is marked in some definite manner in order to warn the civilian population,

and, in either case, they are only used within an area containing military objectives.

5. Restrictions on the use of mines and other devices in populated areas

- (1) This proposal applies to mines (other than remotely delivered [anti-tank] mines), explosive and non-explosive devices, and other manually-emplaced munitions and devices designed to kill, injure or damage and which are actuated by remote control or automatically after a lapse of time.
- (2) It is prohibited to use any object to which this proposal applies in any city, town, village or other area containing a similar concentration of civilians in which combat between ground forces is not taking place or does not appear to be imminent, unless either:
 - (a) they are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse Party; or
 - (b) effective precautions are taken to protect civilians from their effects.³⁵⁵

318. The Final Report of the CCW Conference submitted to the UN General Assembly stated in connection with Article 3 of the 1980 Protocol II to the CCW that “the parties must take whatever measures are open to them to protect civilians wherever they are. They may use records for this purpose by, for example, marking minefields or otherwise warning the civilian population of the dangers of mines and booby traps.”³⁵⁶

³⁵⁵ Austria, Denmark, France, Mexico, Netherlands, Spain, Sweden, Switzerland and UK, Proposal submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, Working Group Document CDDH/IV/GT/4*, *Official Records*, Vol. XVI, CDDH/408/Rev. 1, pp. 544–546.

³⁵⁶ UN Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Second Session, Geneva, 15 September–10 October 1980, Final Report to the UN General Assembly, UN Doc. A/CONF.95/15, 27 October 1980, p. 9.

319. The 25th International Conference of the Red Cross in 1986 adopted a resolution on work on international humanitarian law in armed conflicts at sea and on land in which it urged all States to become parties to the 1980 CCW and its Protocols "as early as possible so as ultimately to obtain universality of adherence". It also noted "the dangers to civilians caused by mines... employed during an armed conflict and the need for international co-operation in this field consistent with Article 9 of Protocol II attached to the 1980 Convention".³⁵⁷

320. In a resolution adopted in 1995 on challenges posed by calamities arising from armed conflict, the 93rd Inter-Parliamentary Conference called on States "to lay down a ban on anti-personnel mines" during the review of the 1980 CCW, and, pending their total prohibition:

- (a) to stipulate that all anti-personnel mines must be equipped with effective self-destruction devices;
- (b) to ban all mines which cannot be easily localized and to recommend specifications to this end;
- (c) to broaden the Convention to cover all internal conflicts.³⁵⁸

321. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of the civilian population in period of armed conflict in which it urged "all States which have not yet done so to become party to the [1980 CCW] and in particular to its Protocol II on landmines, with a view to achieving universal adherence thereto" and further underlined "the importance of respect for its provisions by all parties to armed conflict".³⁵⁹

322. In the Final Declaration of the ICRC Regional Seminar for Asian Military and Strategic Studies Experts in 1997, the participants called upon States of the Asian region but also the international community to consider the following urgent measures especially

for those States which are not yet Parties, adherence to the 1980 United Nations Convention on Certain Conventional Weapons, including its Protocol II on landmines (as amended on 3 May 1996), and for current States party to this Convention that have not yet done so adherence to its amended Protocol II at the earliest possible date to ensure its early entry into force.³⁶⁰

³⁵⁷ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VII, § B(2) and (5).

³⁵⁸ 93rd Inter-Parliamentary Conference, Madrid, 27 March–1 April 1999, Resolution on the International Community in the Face of the Challenges posed by Calamities Arising from Armed Conflicts and by Natural or Man-made Disasters: The Need for a Coherent and Effective Response through Political and Humanitarian Assistance Means and Mechanisms Adapted to the Situation, § 16.

³⁵⁹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § G(g).

³⁶⁰ ICRC Regional Seminar for Asian Military and Strategic Studies Experts, Manila, 20–23 July 1997, Final Declaration, Anti-personnel Mines: What Future for Asia?, p. 3–4.

IV. Practice of International Judicial and Quasi-judicial Bodies

323. In a resolution on anti-personnel mines adopted in 1995, the ACiHPR urged African States to “participate in large numbers in the 1996 CCW Review Conference to press for the introduction of a clause on the prohibition or restriction of the use of mines in that Convention”.³⁶¹

V. Practice of the International Red Cross and Red Crescent Movement

324. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Mines other than remotely delivered, booby-traps and other devices may be use in populated areas:

- a) when they are placed on or in the close vicinity of a military objective belonging to or under the control of the enemy; or
- b) when measures are taken to protect civilians persons (e.g. warning signs, sentries, issue of warnings, provision of fences).

The location shall be recorded of:

- a) pre-planned minefields;
- b) areas where large-scale and pre-planned use is made of booby-traps;
- c) other minefields, mines and booby-traps, when the tactical situation permits.

Remotely delivered mines may be used:

- a) only within an area
 - being itself a military objective, or
 - containing military objectives; and
- b) when their location can be accurately recorded, or an effective neutralizing mechanism is used on each mine;
- c) subject to effective advance warning to the civilian population, when the tactical situation permits.³⁶²

325. In May 1993, in a publication entitled “Mines: A Perverse Use of Technology”, the ICRC condemned the indiscriminate use of anti-personnel mines.³⁶³

326. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on mines, in which it urged States

which have not yet done so to ratify the 1980 United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be

³⁶¹ ACiHPR, Res. 4 [XVII], 13–22 March 1995, §§ 1 and 2.

³⁶² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 924–930.

³⁶³ ICRC, *Mines: A Perverse Use of Technology*, May 1993, extracts reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 257–263.

Deemed to be Excessively Injurious or to Have Indiscriminate Effects and to seek, during the forthcoming Review Conference, effective means to deal with the problem caused by mines by reinforcing the normative provisions of the Convention and by introducing implementation mechanisms.³⁶⁴

327. At the Second Session of the Meeting of Governmental Experts to prepare the CCW Review Conference in May 1994, the ICRC made several different proposals on prohibitions and restrictions on anti-personnel mines. While the ICRC's preferred option was a blanket prohibition on the use, manufacture, stockpiling and transfer of anti-personnel mines, it also proposed an alternative prohibiting the use, manufacture, stockpiling or transfer of certain types of mines including: mines that are not easily detectable; mines with anti-handling devices; mines without an effective self-destruction mechanism; and "anti-vehicle mines that are not equipped with an effective integrated self-neutralizing mechanism together with an effective locating mechanism".³⁶⁵

328. In 1994, in a statement before the First Committee of the UN General Assembly, the ICRC, after expressing its support for a total ban on anti-personnel mines, added that "as a minimum all anti-personnel mines should automatically and reliably render themselves harmless within a specified period of time".³⁶⁶

329. In 1995, in a position paper on landmines, the ICRC stated that "if States are unable, in the short term, to agree to a total prohibition on the use of anti-personnel mines, the ICRC proposes, as a minimum, the banning of all anti-personnel landmines lacking effective self-destruct mechanisms". The paper also outlined other "essential minimum steps" that must be taken in order to protect civilians and to facilitate mine clearance including: the prohibition of mines that are not easily detectable; an extension of the 1980 CCW to cover all internal conflicts; reinforcing implementation mechanisms for the 1980 CCW; and encouraging universal adherence to the 1980 CCW.³⁶⁷

330. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on anti-personnel landmines in which it expressed its "great concern about the indiscriminate effects of anti-personnel landmines and the consequences for civilian populations and humanitarian action".³⁶⁸

³⁶⁴ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 3, § 1.

³⁶⁵ ICRC, Proposal at the Meeting of Governmental Experts to Prepare the CCW Review Conference (Second Session), UN Doc. CCW/CONF.I/GE/CRP.24, 27 May 1994, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 322–324.

³⁶⁶ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.10, 24 October 1994, p. 11.

³⁶⁷ ICRC, Position Paper No. 1 Landmines and Blinding Weapons: From Expert Group to the Review Conference, February 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, pp. 328–331.

³⁶⁸ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 10, § 1.

331. In 1996, in a statement before the First Committee of the UN General Assembly, the ICRC welcomed the improvements that had been made in the 1996 Amended Protocol II to the CCW. These improvements included: the extension of the Protocol to non-international conflicts; protections for humanitarian workers; annual meetings of States parties; and a requirement that States punish serious violations of the Amended Protocol. The ICRC went on to make the case for a total ban on the basis that “the new limitations on the use of anti-personnel mines are both weak and complex” and “the implementation of new provisions on detectability and self-destruction can be delayed for up to nine years after entry into force of the revised Protocol”.³⁶⁹

332. At its Geneva Session in 1999, the Council of Delegates adopted a resolution on the Movement strategy on landmines in which it approved the Movement Strategy on Landmines, one of the core elements of which was to “achieve universal adherence to and effective implementation of the norms established by the Ottawa Convention and amended Protocol II to the 1980 Convention on Certain Conventional Weapons”.³⁷⁰

VI. Other Practice

333. In 1986, in a report on landmines in El Salvador and Nicaragua, Americas Watch listed the following uses of landmines, booby-traps and related devices among those that “should be prohibited in the conduct of hostilities in both countries”:

1. Their direct use against individual or groups of unarmed civilians where no legitimate military objective, such as enemy combatants or war material, is present. Such uses of these weapons are indiscriminate.
2. The direct use against civilian objects, i.e., towns, villages, dwellings or buildings dedicated to civilian purposes where no military objective is present. Such weapons’ use is also indiscriminate.
3. The use of any remotely delivered mines which are not effectively marked and have *no* self-actuating or remotely controlled mechanism to cause its destruction or neutralization once its military purpose has been served. Such mines are “blind weapons” and their use is indiscriminate as to time.
4. The use of hand delivered mines, such as Claymore varieties, and booby-traps in or near a civilian locale containing military objectives which are deployed *without* any precaution, markings or other warnings, or which do *not* self-destruct or are *not* removed once their military purpose has been served. Such uses are similarly indiscriminate.³⁷¹ [emphasis in original]

³⁶⁹ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 9.

³⁷⁰ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 10, § 1.

³⁷¹ Americas Watch, *Land Mines in El Salvador and Nicaragua: The Civilian Victims*, New York, December 1986, pp. 100–101.

334. According to the Report on the Practice of El Salvador, the FMLN acknowledged in 1987 that landmines are important for its strategy, but has stated that they were directed exclusively against the army.³⁷² The report alleges that the FMLN did not comply with the requirement of sign-posting minefields.³⁷³

335. Rule B4 of the Rules of International Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, states that:

In application of the general rules listed in section A above, especially those on the distinction between combatants and civilians and on the immunity of the civilian population, mine, booby-traps and other devices within the meaning of Protocol II to the [1980 CCW] may not be directed against the civilian population as such or against individual civilians, nor used indiscriminately.

...

To ensure the protection of the civilian population referred to in the previous paragraphs, precautions must be taken to protect them from attacks in the form of mines, booby-traps and other devices.³⁷⁴

336. In 1993, an armed opposition group declared that it neither placed landmines in places which might be frequented by civilians, nor used them during raids.³⁷⁵

337. In 1994, an armed opposition group stated that it only used anti-tank mines which were detonated remotely. It also systematically informed the ICRC of mined locations.³⁷⁶

338. An editorial in *Economic and Political Weekly* in 1997 stated that India was in favour of a "'phased approach' [to restrictions on the use of anti-personnel mines] which will for the present allow the use of land-mines in the defence of countries' borders".³⁷⁷

339. In 1998, in report on violations of the laws of war by both sides in Angola, Africa Watch stated that "it is prohibited to use landmines near a civilian object, even if it contains military objectives, without any precautions, markings or other warnings or if such devices do not self-destruct or are not removed after their military purpose has been served".³⁷⁸

³⁷² Report on the Practice of El Salvador, 1997, Chapter 3.3, referring to "La guerra en el mes de julio y el informe castrense", *Estudios Centroamericanos*, Universidad Centroamericana José Simeón Cañas, Vol. XLII, No. 465, July 1987, p. 65.

³⁷³ Report on the Practice of El Salvador, 1997, Chapter 3.3, referring to IDHUCA, Instituto de Derechos Humanos, Universidad Centroamericana José Simeón Cañas, *Los Derechos Humanos en El Salvador en 1989*, San Salvador, 1991.

³⁷⁴ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B4, *IRRC*, No. 278, 1990, p. 399.

³⁷⁵ ICRC archive document. ³⁷⁶ ICRC archive document.

³⁷⁷ India, Editorial entitled "Welcome Movement", *Economic and Political Weekly*, 27 September 1997, p. 2433.

³⁷⁸ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1998, p. 58.

C. Measures to Reduce the Danger Caused by Landmines*I. Treaties and Other Instruments**Treaties*

340. Article 5(1) of the 1980 Protocol II to the CCW provides that:

The use of remotely delivered mines is prohibited unless such mines are only used within an area which is itself a military objective or which contains military objectives, and unless:

- (a) their location can be accurately recorded in accordance with Article 7(1)(a); or
- (b) an effective neutralizing mechanism is used on each such mine, that is to say, a self-actuating mechanism which is designed to render a mine harmless or cause it to destroy itself when it is anticipated that the mine will no longer serve the military purpose for which it was placed in position, or a remotely-controlled mechanism which is designed to render harmless or destroy a mine when the mine no longer serves the military purpose for which it was placed in position.

341. Article 7 of the 1980 Protocol II to the CCW provides that:

1. The parties to the conflict shall record the location of:
 - (a) all pre-planned minefields laid by them; . . .
 - . . .
2. The parties shall endeavour to ensure the recording of the location of all other minefields, mines . . . which they have laid or placed in position.
3. All such records shall be retained by the parties who shall:
 - (a) immediately after the cessation of active hostilities:
 - (i) take all necessary and appropriate measures, including the use of such records, to protect civilians from the effects of minefields, mines . . . and either
 - (ii) in cases where the forces of neither party are in the territory of the adverse party, make available to each other and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines . . . in the territory of the adverse party; or
 - (iii) once complete withdrawal of the forces of the parties from the territory of the adverse party has taken place, make available to the adverse party and to the Secretary-General of the United Nations all information in their possession concerning the location of minefields, mines . . . in the territory of the adverse party;
 - (b) when a United Nations force or mission performs functions in any area, make available to the authority mentioned in Article 8 such information as is required by that Article;
 - (c) whenever possible, by mutual agreement, provide for the release of information concerning the location of minefields, mines . . . particularly in agreements governing the cessation of hostilities.

342. Article 8 of the 1980 Protocol II to the CCW stipulates that:

1. When a United Nations force or mission performs functions of peacekeeping, observation or similar functions in any area, each party to the conflict shall, if requested by the head of the United Nations force or mission in that area, as far as it is able:
 - (a) remove or render harmless all mines or booby-traps in that area;
 - (b) take such measures as may be necessary to protect the force or mission from the effects of minefields, mines and booby-traps while carrying out its duties; and
 - (c) make available to the head of the United Nations force or mission in that area, all information in the party's possession concerning the location of minefields, mines and booby traps in that area.
2. When a United Nations fact-finding mission performs functions in any area, any party to the conflict concerned shall provide protection to that mission except where, because of the size of such mission, it cannot adequately provide such protection. In that case it shall make available to the head of the mission the information in its possession concerning the location of minefields, mines and booby-traps in that area.

343. Upon ratification of the 1980 CCW, Canada stated that:

With respect to Protocol II [to the 1980 CCW], it is the understanding of the Government of Canada that:

- (a) Any obligation to record the location of remotely delivered mines pursuant to sub-paragraph 1(a) of article 5 refers to the location of mine fields and not to the location of individual remotely delivered mines.
- (b) The term "pre-planned", as used in sub-paragraph 1(a) of article 7, means that the position of the minefield in question should have been determined in advance so that an accurate record of the location of the minefield, when laid, can be made.
- (c) The phrase 'similar functions' used in article 8, includes the concepts of 'peace-making', 'preventive peace-keeping' and 'peace-enforcement' as defined in an agenda for peace (United Nations document A/47/277 of 17 June 1992).³⁷⁹

344. Upon ratification of the 1980 CCW, the Netherlands stated that "with regard to article 8, paragraph 1, of Protocol II: It is the understanding of the Government of the Kingdom of the Netherlands that the words 'as far as it is able' mean 'as far as it is technically able'."³⁸⁰

345. Upon accession to the 1980 CCW, Israel stated that:

With respect to Protocol II [to the 1980 CCW], it is the understanding of the Government of Israel that:

- (i) Any obligation to record the location of remotely delivered mines pursuant to sub-paragraph 1(a) of article 5 refers to the location of mine fields and not to the location of individual remotely delivered mines;

³⁷⁹ Canada, Declaration made upon ratification of the CCW, 24 June 1994, § 3.

³⁸⁰ Netherlands, Declaration made upon ratification of the CCW, 18 June 1987, § 3.

- (ii) the term pre-planned, as used in sub-paragraph 1(a) of article 7, means that the position of the minefield in question should have been determined in advance so that an accurate record of the location of the minefield, when laid, can be made.³⁸¹

346. Article 9 of the 1980 Protocol II to the CCW provides that:

After the cessation of active hostilities, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of information and technical and material assistance – including, in appropriate circumstances, joint operations – necessary to remove or otherwise render ineffective minefields, mines . . . placed in position during the conflict.

347. Article 1(2) of the 1996 Amended Protocol II to the CCW provides that:

This Protocol shall apply, in addition to situations referred to in Article I of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

348. Article 3(2) of the 1996 Amended Protocol II to the CCW provides that:

Each High Contracting Party or party to a conflict is, in accordance with the provisions of this Protocol, responsible for all mines, booby-traps, and other devices employed by it and undertakes to clear, remove, destroy or maintain them as specified in Article 10 of this Protocol.

349. Article 6(1) of the 1996 Amended Protocol II to the CCW states that “it is prohibited to use remotely-delivered mines unless they are recorded in accordance with sub-paragraph I (b) of the Technical Annex”.

350. Article 9 of the 1996 Amended Protocol II to the CCW provides that:

1. All information concerning minefields, mined areas, mines, booby-traps and other devices shall be recorded in accordance with the provisions of the Technical Annex.
2. All such records shall be retained by the parties to a conflict, who shall, without delay after the cessation of active hostilities, take all necessary and appropriate measures, including the use of such information, to protect civilians from the effects of minefields, mined areas, mines, booby-traps and other devices in areas under their control.

At the same time, they shall also make available to the other party or parties to the conflict and to the Secretary-General of the United Nations all such information in their possession concerning minefields, mined areas, mines, booby-traps and other devices laid by them in areas no longer under their control; provided, however, subject to reciprocity, where the forces of a party to a conflict are in the territory of an adverse party, either party may withhold such information from the Secretary-General and the other party, to the extent

³⁸¹ Israel, Declarations and statements of understanding made upon accession to the CCW, 22 March 1995, § c.

that security interests require such withholding, until neither party is in the territory of the other. In the latter case, the information withheld shall be disclosed as soon as those security interests permit. Wherever possible, the parties to the conflict shall seek, by mutual agreement, to provide for the release of such information at the earliest possible time in a manner consistent with the security interests of each party.

3. This Article is without prejudice to the provisions of Articles 10 and 12 of this Protocol.

351. Article 10 of the 1996 Amended Protocol II to the CCW provides that:

1. Without delay after the cessation of active hostilities, all minefields, mined areas, mines . . . shall be cleared, removed, destroyed or maintained in accordance with Article 3 and paragraph 2 of Article 5 of this Protocol.
2. High Contracting Parties and parties to a conflict bear such responsibility with respect to minefields, mined areas, mines . . . in areas under their control.
3. With respect to minefields, mined areas, mines . . . laid by a party in areas over which it no longer exercises control, such party shall provide to the party in control of the area pursuant to paragraph 2 of this Article, to the extent permitted by such party, technical and material assistance necessary to fulfil such responsibility.
4. At all times necessary, the parties shall endeavour to reach agreement, both among themselves and, where appropriate, with other States and with international organizations, on the provision of technical and material assistance, including, in appropriate circumstances, the undertaking of joint operations necessary to fulfil such responsibilities.

352. Article 12 of the 1996 Amended Protocol II to the CCW provides that:

1. Application
 - (a) With the exception of the forces and missions referred to in sub-paragraph 2(a) (i) of this Article, this Article applies only to missions which are performing functions in an area with the consent of the High Contracting Party on whose territory the functions are performed.
 - (b) The application of the provisions of this Article to parties to a conflict which are not High Contracting Parties shall not change their legal status or the legal status of a disputed territory, either explicitly or implicitly.
 - (c) The provisions of this Article are without prejudice to existing international humanitarian law, or other international instruments as applicable, or decisions by the UN Security Council of the United Nations, which provide for a higher level of protection to personnel functioning in accordance with this Article.
2. Peace-keeping and certain other forces and missions
 - (a) This paragraph applies to:
 - (i) any United Nations force or mission performing peace-keeping, observation or similar functions in any area in accordance with the Charter of the United Nations;
 - (ii) any mission established pursuant to Chapter VIII of the Charter of the United Nations and performing its functions in the area of a conflict.
 - (b) Each High Contracting Party or party to a conflict, if so requested by the head of a force or mission to which this paragraph applies, shall:

- (i) so far as it is able, take such measures as are necessary to protect the force or mission from the effects of mines, booby-traps and other devices in any area under its control;
 - (ii) if necessary in order effectively to protect such personnel, remove or render harmless, so far as it is able, all mines, booby-traps and other devices in that area; and
 - (iii) inform the head of the force or mission of the location of all known minefields, mined areas, mines, booby-traps and other devices in the area in which the force or mission is performing its functions and, so far as is feasible, make available to the head of the force or mission all information in its possession concerning such minefields, mined areas, mines, booby-traps and other devices.
- 3. Humanitarian and fact-finding missions of the United Nations System
 - (a) This paragraph applies to any humanitarian or fact-finding mission of the United Nations System.
 - (b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:
 - (i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article; and
 - (ii) if access to or through any place under its control is necessary for the performance of the mission's functions and in order to provide the personnel of the mission with safe passage to or through that place:
 - (aa) unless on-going hostilities prevent, inform the head of the mission of a safe route to that place if such information is available; or
 - (bb) if information identifying a safe route is not provided in accordance with sub-paragraph (aa), so far as is necessary and feasible, clear a lane through minefields.
- 4. Missions of the International Committee of the Red Cross
 - (a) This paragraph applies to any mission of the International Committee of the Red Cross performing functions with the consent of the host State or States as provided for by the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.
 - (b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall:
 - (i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article; and
 - (ii) take the measures set out in sub-paragraph 3(b) (ii) of this Article.
- 5. Other humanitarian missions and missions of enquiry
 - (a) Insofar as paragraphs 2, 3 and 4 above do not apply to them, this paragraph applies to the following missions when they are performing functions in the area of a conflict or to assist the victims of a conflict:
 - (i) any humanitarian mission of a national Red Cross or Red Crescent Society or of their International Federation;
 - (ii) any mission of an impartial humanitarian organization, including any impartial humanitarian demining mission; and
 - (iii) any mission of enquiry established pursuant to the provisions of the Geneva Conventions of 12 August 1949 and, where applicable, their Additional Protocols.
 - (b) Each High Contracting Party or party to a conflict, if so requested by the head of a mission to which this paragraph applies, shall, so far as is feasible:

- (i) provide the personnel of the mission with the protections set out in sub-paragraph 2(b) (i) of this Article, and
 - (ii) take the measures set out in sub-paragraph 3(b) (ii) of this Article.
6. Confidentiality
All information provided in confidence pursuant to this Article shall be treated by the recipient in strict confidence and shall not be released outside the force or mission concerned without the express authorization of the provider of the information.
7. Respect for laws and regulations
Without prejudice to such privileges and immunities as they may enjoy or to the requirements of their duties, personnel participating in the forces and missions referred to in this Article shall:
- (a) respect the laws and regulations of the host State; and
 - (b) refrain from any action or activity incompatible with the impartial and international nature of their duties.

353. Upon ratification of the 1996 Amended Protocol II to the CCW, Canada stated that "it is understood that the maintenance of a minefield referred to in Article 10, in accordance with the standards on marking, monitoring and protection by fencing or other means set out in Amended Protocol II, would not be considered as a use of the mines contained therein".³⁸²

354. Upon acceptance of the 1996 Amended Protocol II to the CCW, France stated that:

France takes it that article 4 and the Technical Annex to amended Protocol II do not require the removal or replacement of mines that have already been laid . . .

The provisions of amended Protocol II such as those concerning the marking, monitoring and protection of zones which contain anti-personnel mines and are under the control of a party, are applicable to all zones containing mines, irrespective of the date on which those mines were laid.³⁸³

355. Article 5 of the 1997 Ottawa Convention provides that:

1. Each State Party undertakes to destroy or ensure the destruction of all anti-personnel mines in mined areas under its jurisdiction or control, as soon as possible but not later than ten years after the entry into force of this Convention for that State Party.
2. Each State Party shall make every effort to identify all areas under its jurisdiction or control in which anti-personnel mines are known or suspected to be emplaced and shall ensure as soon as possible that all anti-personnel mines in mined areas under its jurisdiction or control are perimeter-marked, monitored and protected by fencing or other means, to ensure the effective exclusion of civilians, until all anti-personnel mines contained therein have been destroyed. The marking shall at least be to the standards set out in the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996, annexed to the Convention

³⁸² Canada, Reservations and statements of understanding made upon ratification of Amended Protocol II to the CCW, 5 January 1998, § 3.

³⁸³ France, Declarations made upon acceptance of Amended Protocol II to the CCW, 23 July 1998.

on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects.

3. If a State Party believes that it will be unable to destroy or ensure the destruction of all anti-personnel mines referred to in paragraph 1 within that time period, it may submit a request to a Meeting of the States Parties or a Review Conference for an extension of the deadline for completing the destruction of such anti-personnel mines, for a period of up to ten years.

356. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article 1 of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

Other Instruments

357. Article 15 of the 1956 New Delhi Draft Rules provides that “if the Parties to the conflict make use of mines, they are bound . . . to chart the minefields. The charts shall be handed over, at the close of active hostilities, to the adverse Party, and also to other authorities responsible for the safety of the population.”

358. Article II(8) of the 1992 N’Sele Ceasefire Agreement provides that “cease-fire” shall imply “a ban on . . . the hindering of operations to remove mines”.

359. Paragraphs 79 and 80 of the 2000 Cairo Declaration adopted at the Africa-Europe Summit states that there is a need to intensify efforts “in the fields of mine clearance, assistance thereto, as well as with respect to mine victims and mine awareness”. The States present at the Summit declared that they would “continue to co-operate towards a comprehensive resolution of the landmine problem in Africa, in particular by addressing the issue of the removal of existing landmines”.

II. National Practice

Military Manuals

360. Argentina’s Law of War Manual reproduces the content of Article 7 of the 1980 Protocol II to the CCW.³⁸⁴

³⁸⁴ Argentina, *Law of War Manual* (1989), § 4.24(2).

361. Australia's *Commanders' Guide* states that "the location of minefields... is to be recorded".³⁸⁵ As regards remotely delivered mines, it states that "either the location of minefields containing remotely delivered mines must be accurately recorded or the mines themselves must be equipped with an effective neutralising mechanism which destroy or renders them harmless after a period of time".³⁸⁶

362. Australia's Defence Force Manual states that:

The location of all pre-planned minefields and areas in which there has been large scale and pre-planned use of booby-traps must be recorded. A record should also be kept of all other minefields, mines and booby traps so that they may be disarmed when they are no longer required.³⁸⁷

The manual further states that:

Remotely delivered mines can only be used within the area of a military objective if their location can be accurately recorded and they can be neutralised when they no longer serve the military purpose for which they were placed in position. Either each mine must have an effective self neutralising or destroying mechanism or a remotely controlled mechanism designed to render the mine harmless or destroy it.³⁸⁸

363. Belgium's Law of War Manual states, with reference to the 1980 CCW, that remotely delivered minefields are only permitted if the location of the mines is mapped.³⁸⁹

364. Cameroon's *Instructors' Manual* states that the restrictions contained in the 1980 Protocol II to the CCW must be scrupulously applied in order to avoid civilian casualties. The manual provides, therefore, that the use of mines, booby-traps and other devices must follow the rules on recording and publication of the location of mines and minefields as defined in Article 7 of the Protocol.³⁹⁰

365. Canada's LOAC Manual states that "the location of all pre-planned minefields... must be recorded. A record should also be kept of all other minefields [and] mines... so that they may be disarmed when they are no longer required".³⁹¹ It stresses that "Canada's obligation to clear minefields after the cessation of hostilities will vary depending upon circumstances such as the degree of jurisdiction or control exercised over the territory, the terms of any peace accord and any other bilateral or multilateral arrangement".³⁹²

³⁸⁵ Australia, *Commanders' Guide* (1994), § 942.

³⁸⁶ Australia, *Commanders' Guide* (1994), § 940.

³⁸⁷ Australia, *Defence Force Manual* (1994), § 423.

³⁸⁸ Australia, *Defence Force Manual* (1994), § 425.

³⁸⁹ Belgium, *Law of War Manual* (1983), p. 38.

³⁹⁰ Cameroon, *Instructors' Manual* (1992), p. 123.

³⁹¹ Canada, *LOAC Manual* (1999), p. 5-5, § 46.

³⁹² Canada, *LOAC Manual* (1999), p. 5-2, § 19.

366. According to France's LOAC Teaching Note, employing landmines (except anti-personnel mines) is allowed on the condition that their exact location is recorded. It further provides that "at the end of hostilities the mine fields have to be indicated and as far as possible neutralised".³⁹³

367. France's LOAC Manual states that employing landmines (except anti-personnel mines) is allowed on the condition that their exact location is recorded. It further states that "at the end of hostilities the mine fields have to be indicated and as far as possible neutralised".³⁹⁴

368. Germany's Military Manual states that:

The location of minefields [and] mines... shall be recorded: the parties to the conflict shall retain these records and, whenever possible, by mutual agreement, provide for their publication (Weapons Conv., Prot. 2, Art. 7). In the Federal Armed Force the territorial command authorities are responsible for the mining documentation.

It adds that:

After the cessation of an international armed conflict, the parties to the conflict shall, both among themselves and, where appropriate, with other states or international organizations, exchange information and technical assistance necessary to remove or otherwise render ineffective minefields [and] mines.³⁹⁵

With respect to remotely delivered mines, the manual, quoting Article 5(1) of the 1980 Protocol II to the CCW, provides that "after emplacement their location shall be accurately recorded".³⁹⁶

369. Israel's Manual on the Laws of War states that "it is incumbent on every army to keep a record of a minefield laid during combat. Any mine manufactured after the Convention came into force must contain a metal piece of at least 8 grams to enable its detection by a mine detector."³⁹⁷

370. Kenya's LOAC Manual states that "the location shall be recorded of: pre-planned minefields... other minefields, mines... when the tactical situation permits". With respect to remotely delivered mines, the manual states that their use is allowed when "their location can be accurately recorded or an effective neutralizing mechanism is used on each mine".³⁹⁸

371. The Military Manual of the Netherlands reproduces the content of Article 7 of the 1980 Protocol II to the CCW.³⁹⁹

³⁹³ France, *LOAC Teaching Note* (2000), p. 7.

³⁹⁴ France, *LOAC Manual* (2001), p. 55, see also p. 82.

³⁹⁵ Germany, *Military Manual* (1992), §§ 417 and 419.

³⁹⁶ Germany, *Military Manual* (1992), § 413.

³⁹⁷ Israel, *Manual on the Laws of War* (1998), p. 14.

³⁹⁸ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 3-4.

³⁹⁹ Netherlands, *Military Manual* (1993), pp. IV-6/IV-10.

372. New Zealand's Military Manual cites Article 7 of the 1980 Protocol II to the CCW and states that "all feasible efforts will be made to record the location of all minefields".⁴⁰⁰

373. Spain's LOAC Manual contains the same provisions as Article 7 of the 1980 Protocol II to the CCW.⁴⁰¹

374. Sweden's IHL Manual states that:

According to Protocol II [to the 1980 CCW], the parties to a conflict shall record the locations of all pre-planned minefields . . . The parties shall retain all mine records and, after cessation of hostilities, shall make them available to the adversary – this provision, however, is not obligatory in a case where the latter party still has combat forces on the wrong side of the frontier.⁴⁰²

With respect to remotely delivered mines, the manual states that "the protocol [II to the 1980 CCW] states the special precautionary measures to be observed in the form of recording the locations of the mine fields, or the use of self-destruction mechanisms".⁴⁰³

375. Switzerland's Basic Military Manual states that large-scale minefields must be mapped, and after the cessation of hostilities, in order to protect the civilian population, these maps shall be handed over to the adverse party and to the UN. In this context, the manual refers to Articles 6 to 9 of the 1980 Protocol II to the CCW.⁴⁰⁴

376. The UK LOAC Manual, under the heading "Future Developments", considers the possibility of a treaty imposing "an obligation to record minefields and to fit remotely delivered mines with self-neutralising mechanisms or to record their location".⁴⁰⁵

377. The US Air Force Commander's Handbook states that "the party establishing a minefield should always keep a record of its location."⁴⁰⁶

378. The US Naval Handbook states that international law "requires that, to the extent possible, belligerents record the location of all minefields in order to facilitate their removal upon the cessation of hostilities. It is the practice of the United States to record the location of minefields in all circumstances."⁴⁰⁷

National Legislation

379. Albania's Anti-personnel Mines Decision provides that "all the areas of the Republic of Albania infested with mines must be determined and cleared by 2009".⁴⁰⁸

⁴⁰⁰ New Zealand, *Military Manual* (1992), § 514. ⁴⁰¹ Spain, *LOAC Manual* (1996), § 3.2.a.(4).

⁴⁰² Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 80–81.

⁴⁰³ Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 80–81.

⁴⁰⁴ Switzerland, *Basic Military Manual* (1987), Article 23.

⁴⁰⁵ UK, *LOAC Manual* (1981), Section 11, p. 40, § 4(b).

⁴⁰⁶ US, *Air Force Commander's Handbook* (1980), § 6-5.

⁴⁰⁷ US, *Naval Handbook* (1995), p. 448, § 9.3.

⁴⁰⁸ Albania, *Anti-personnel Mines Decision* (2000), § 7.

380. South Korea's Conventional Weapons Act provides that:

1. The Commander of the military unit that emplaced mines . . . must record and maintain the following information on the emplaced field:
 - a. Precise location and boundary of the emplaced area;
 - b. Type, number, emplacing method, type of fuse and life time of the emplaced mine . . . and
 - c. Location of every emplaced mine (except for remotely-delivered anti-personnel mines) . . .
2. The Commander of the military unit that emplaced mines must manage the information, which was recorded and maintained as prescribed by paragraph 1 in accordance with the Military Secrets Protection Act.⁴⁰⁹

381. Malaysia's Anti-personnel Mines Act provides that:

Where an area is identified as a mined area or is suspected to be a mined area, the Minister shall, wherever possible, ensure that such area is perimeter-marked and protected by fencing or otherwise employ such means as necessary so as to notify civilians of the presence of anti-personnel mines.⁴¹⁰

National Case-law

382. No practice was found.

Other National Practice

383. In 1994, during the debate in the UN General Assembly that preceded the adoption of Resolution 49/215, Afghanistan stated that it and "many others expect the Secretary-General to enhance the role of the existing Mine Clearance and Policy Unit . . . in order, *inter alia*, to study on a continuous basis the problem of land-mines and mine-clearance in war-stricken countries". It further stated that "all States that have spread land-mines in other countries must provide maps of the minefields".⁴¹¹

384. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Canada advocated the "automatic and compulsory marking" of remotely delivered minefields.⁴¹²

385. In 1995, during a debate in the First Committee of the UN General Assembly, Côte d'Ivoire stated that it welcomed the establishment of the UN fund for assistance in demining.⁴¹³

⁴⁰⁹ South Korea, *Conventional Weapons Act* (2001), Article 8.

⁴¹⁰ Malaysia, *Anti-personnel Mines Act* (2002), Section 6.

⁴¹¹ Afghanistan, Statement before the UN General Assembly, UN Doc. A/49/PV.95, 23 December 1994, p. 4.

⁴¹² Canada, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.14, 5 March 1975, p. 131.

⁴¹³ Côte d'Ivoire, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.6, 18 October 1995, p. 2.

386. In 1995, during a debate in the First Committee of the UN General Assembly, Ethiopia stated that it “welcomed the outcome of the July 1995 international meeting on mine clearance and the pledges made there”.⁴¹⁴

387. In 1994, during the debate in the UN General Assembly that preceded the adoption of Resolution 49/215, Honduras stated that it was “grateful for the work the Secretary-General has done in connection with the establishment of a fund for assistance in mine clearance” and that it supported the mine-clearance work of the OAS in the Central America region.⁴¹⁵

388. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Italy stated that “the obligation to record the location of minefields and to fit a neutralizing mechanism on remotely delivered mines provided a satisfactory guarantee for the civilian population”.⁴¹⁶

389. In 1995, during a debate in the First Committee of the UN General Assembly, Libya raised the issue of the clearance of mines on its territory dating from the Second World War and stated that it had “asked the countries concerned, bilaterally or through the United Nations, to provide us with maps of the minefields, to help us in the necessary demining operations and to pay compensation for the damage these mines have caused”.⁴¹⁷

390. In 1993, during a debate in the First Committee of the UN General Assembly, Pakistan stated that it would have preferred “a more comprehensive approach to the issue of uncleared anti-personnel mines” and that “issues relating to self-neutralizing mines should also be considered”.⁴¹⁸

391. In 1995, during a debate in the First Committee of the UN General Assembly, Pakistan stated that “millions of indiscriminately used mines threaten civilian populations in over 60 countries. There must be a global commitment to remove these mines, especially those in developing countries.”⁴¹⁹

392. At the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW in 1999, Pakistan stated that it would convert its entire stock of anti-personnel mines to detectable mines.⁴²⁰

393. In 1995, during a debate in the First Committee of the UN General Assembly, Peru stated that it supported the “establishment of a voluntary fund to

⁴¹⁴ Ethiopia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 16.

⁴¹⁵ Honduras, Statement before the UN General Assembly, UN Doc. A/49/PV.95, 23 December 1994, p. 3.

⁴¹⁶ Italy, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.29, 25 May 1976, p. 297, § 20.

⁴¹⁷ Libya, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 20 October 1995, p. 18.

⁴¹⁸ Pakistan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/48/SR.28, 18 November 1993, p. 8.

⁴¹⁹ Pakistan, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 26 October 1995, p. 19.

⁴²⁰ Pakistan, Statement at the First Annual Conference of High Contracting Parties to Amended Protocol II to the CCW, Geneva, 17 December 1999.

finance information and training programmes on de-mining” and stated that it would definitely contribute to the fund.⁴²¹

394. In 1995, during a debate in the First Committee of the UN General Assembly, Poland stated that it had “pledged to make an important contribution to the United Nations Voluntary Trust Fund for Assistance in Mine Clearance”.⁴²²

395. At the CCW Preparatory Conference in 1978, Sweden stated that certain limitations on the use of conventional weapons should be agreed upon by the participants including “that minefields on land must be charted when they were laid, so that they could be cleared at the end of hostilities and not remain as permanent hazards to life”.⁴²³

396. In 1995, during a debate in the First Committee of the UN General Assembly, Thailand stated that it appreciated “the efforts of the United Nations in drawing up a comprehensive mine clearance programme, in launching mine awareness activities, and, more importantly, in establishing the United Nations Voluntary Trust Fund for land mine-affected countries”.⁴²⁴

397. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the US supported “reasonable and feasible requirements for recording the location of minefields”.⁴²⁵

398. In 1994, a State declared that its armed forces laid mines according to plans or pre-planned maps as required by international law.⁴²⁶

III. Practice of International Organisations and Conferences

United Nations

399. In a resolution adopted in 1995, the UN Security Council noted “the desire of the Government of Rwanda to address the problem of unexploded landmines, and the interest on the part of other States to assist with the detection and destruction of these mines”. It underlined “the importance the Council attaches to efforts to eliminate the threat posed by unexploded landmines in a number of States, and the humanitarian nature of demining programmes”.⁴²⁷

400. In a resolution adopted in 1996 on the situation in Cyprus, the UN Security Council called upon the military authorities on both sides “to clear

⁴²¹ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 11.

⁴²² Poland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.9, 25 October 1995, p. 7.

⁴²³ Sweden, Statement at the United Nations Preparatory Conference for the CCW Conference, Doc. A/CONF.95/PREP.CONF./I/SR.4, 31 August 1978, p. 2.

⁴²⁴ Thailand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.5, 17 October 1995, p. 16.

⁴²⁵ US, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.29, 25 May 1976, p. 300, § 35.

⁴²⁶ ICRC archive document.

⁴²⁷ UN Security Council, Res. 1005, 17 July 1995, preamble.

all minefields... inside the buffer zone without further delay, as requested by UNFICYP".⁴²⁸

401. In a resolution adopted in 1996 on the situation in Angola, the UN Security Council emphasised "the need for the political will to speed up demining efforts to enable the free circulation of people and goods and to restore public confidence".⁴²⁹ In another resolution adopted the same year, the Council noted the progress being made in the area of demining in Angola and encouraged "both parties to intensify their demining efforts".⁴³⁰ In October 1996, the UN Security Council adopted a further resolution on Angola in which it expressed "serious concern about interference by UNITA with mine-clearing activities" and called upon "both parties to intensify their demining efforts".⁴³¹ In another resolution adopted in 1996, the UN Security Council expressed its support "for various United Nations demining activities in Angola, including plans aimed at enhancing national demining capacity".⁴³²

402. In two resolutions adopted in 1997 concerning Croatia, the UN Security Council called upon the parties to "cooperate fully with the United Nations military observers and to ensure their safety and freedom of movement, including through the removal of landmines".⁴³³

403. In a resolution adopted in 1993, the UN General Assembly expressed its concern about the damaging effects of uncleared landmines.⁴³⁴

404. In a resolution adopted in 1994, the UN General Assembly expressed its will to reinforce "international co-operation in the area of... the removal of minefields, mines and booby-traps".⁴³⁵

405. In two resolutions adopted in 1994 and 1995, the UN General Assembly recognised "the importance of recording, where appropriate, the location of mines". It further called upon:

Member States, especially those that have a capacity to do so, to provide the necessary information and technical and material assistance, as appropriate, and to locate, remove, destroy or otherwise render ineffective minefields, mines booby-traps and other devices, in accordance with international law.⁴³⁶

Both resolutions were adopted by consensus.

406. In three resolutions adopted in 1994 and 1996, the UN General Assembly expressed:

⁴²⁸ UN Security Council, Res. 1062, 28 June 1996, § 6(c).

⁴²⁹ UN Security Council, Res. 1055, 8 May 1996, § 11.

⁴³⁰ UN Security Council, Res. 1064, 11 July 1996, § 15.

⁴³¹ UN Security Council, Res. 1075, 11 October 1996, § 20.

⁴³² UN Security Council, Res. 1087, 11 December 1996, § 17.

⁴³³ UN Security Council, Res. 1093, 14 January 1997, § 4; Res. 1119, 14 July 1997, § 2.

⁴³⁴ UN General Assembly, Res. 48/75K, 13 December 1993.

⁴³⁵ UN General Assembly, Res. 49/79, 15 December 1994, preamble.

⁴³⁶ UN General Assembly, Res. 49/215, 23 December 1994, preamble and § 9; Res. 50/82, 14 December 1995, preamble and § 10.

grave concern at the indiscriminate use of anti-personnel landmines in Cambodia and the devastating consequences and destabilising effects of such mines have on Cambodian society, and encourages the Government of Cambodia to continue its support for the removal of these mines.⁴³⁷ [emphasis in original]

The resolutions were adopted without a vote.

407. In a resolution adopted in 1996, the UN General Assembly welcomed the adoption of the 1996 Amended Protocol II to the CCW and expressed its will to reinforce “international cooperation in the area of . . . the removal of minefields [and] mines”.⁴³⁸

408. In a resolution adopted in 1998, the UN General Assembly reaffirmed “its deep concern at the problem caused by the presence of mines and other unexploded devices”. It emphasised “the importance of recording the location of mines, of retaining all such records and making them available to concerned parties upon cessation of hostilities”. The General Assembly recognised “the important role that the international community, particularly States involved in the deployment of mines, can play in assisting mine clearance in affected countries” and urged:

Member States, regional, governmental and non-governmental organizations and foundations to continue to extend full assistance and cooperation to the Secretary-General and, in particular, to provide him with information and data as well as other appropriate resources that could be useful in strengthening the coordination role of the United Nations in mine action.⁴³⁹

409. In a resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly called upon “all parties, in particular those of the Federal Republic of Yugoslavia (Serbia and Montenegro), to clear the area forthwith of all landmines and booby-traps and to work with the relevant international bodies to this end”.⁴⁴⁰

410. In a resolution adopted in 1996, the UN Commission on Human Rights, concerned by the impact of anti-personnel landmines, encouraged Cambodia to “continue its efforts to remove these mines”.⁴⁴¹

411. In 1997, in a report on assistance in mine clearance, the UN Secretary-General noted that the UN had developed quite an extensive mine-clearance

⁴³⁷ UN General Assembly, Res. 49/199, 23 December 1994, § 13; Res. 50/178, 22 December 1995, § 13; Res. 51/98, 12 December 1996, § 25.

⁴³⁸ UN General Assembly, Res. 51/49, 10 December 1996, preamble.

⁴³⁹ UN General Assembly, Res. 53/26, 31 December 1998, preamble and § 10.

⁴⁴⁰ UN General Assembly, Res. 53/164, 25 February 1999, § 12. (The resolution was adopted by 122 votes in favour, 3 against and 34 abstentions. Against: Belarus, India and Russia. Abstaining: Angola, Antigua and Barbuda, Belize, Bhutan, Botswana, Cameroon, Central African Republic, China, Colombia, DRC, Côte d'Ivoire, Cuba, Eritrea, Ethiopia, Gabon, Ghana, Guinea, Guinea-Bissau, Jamaica, Laos, Mozambique, Myanmar, Namibia, Nepal, Peru, Philippines, Singapore, Sri Lanka, FYROM, Trinidad and Tobago, Ukraine, Tanzania, Venezuela and Zimbabwe.)

⁴⁴¹ UN Commission on Human Rights, Res. 1996/54, 3 March 1995, § 22.

programme, but that a more precise global assessment of the mine problem was needed in order to tackle the issue properly.⁴⁴²

Other International Organisations

412. No practice was found.

International Conferences

413. A draft text submitted by Denmark, France, the Netherlands and the UK to the Ad Hoc Committee on Conventional Weapons established by the CDDH, which elaborated upon an earlier proposal made at the Lugano Conference, dealt with the problems created by landmines and "other devices". A number of measures were suggested, including the compulsory recording of pre-planned minefields.⁴⁴³ The proposal was positively received by the States present and was explicitly supported by the FRG and Libya.⁴⁴⁴

414. A proposal was introduced by Austria, Mexico, Sweden, Switzerland, Uruguay and SFRY to the Ad Hoc Committee on Conventional Weapons established by the CDDH, which provided that the use of remotely delivered mines was prohibited unless "each such mine is fitted with a neutralizing mechanism" and "they are used within the combat zone".⁴⁴⁵

415. Austria, Denmark, France, Mexico, Netherlands, Spain, Sweden, Switzerland and UK submitted a proposal to the Ad Hoc Committee on Conventional Weapons established by the CDDH which provided that parties to a conflict "shall record the location of (a) all pre-planned minefields laid by them; and (b) all areas in which they have made large-scale and pre-planned use of explosive or non-explosive devices". The final part of the section on recording required parties to retain these records and "the location of all recorded minefields, mines and explosive or non-explosive devices remaining in territory controlled by an adverse Party shall be made public after the cessation of active hostilities".⁴⁴⁶

⁴⁴² UN Secretary-General, Report on Assistance in Mine Clearance, UN Doc. A/52/679, 11 December 1997, §§ 107-111.

⁴⁴³ Denmark, France, Netherlands and UK, Proposal entitled "The Regulation of the Use of Land-Mines and Other Devices" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/213 within CDDH/IV/226, pp. 588-591.

⁴⁴⁴ CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.30, 26 May 1976, p. 308 (FRG); *Official Records*, Vol. XVI, CDDH/IV/SR.40, 19 May 1977, p. 411 (Libya).

⁴⁴⁵ Austria, Mexico, Sweden, Switzerland, Uruguay and SFRY, "Draft article on the Use of Land Mines and the Use of Certain Explosive and Non-Explosive Devices" submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/222 within CDDH/IV/226, p. 593.

⁴⁴⁶ Austria, Denmark, France, Mexico, the Netherlands, Spain, Sweden, Switzerland and UK, Proposal submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, Working Group Document CDDH/IV/GT/4*, *Official Records*, Vol. XVI, CDDH/408/Rev. 1, pp. 544-546.

416. In 1980, the Secretariat of the 1979–1980 CCW Conference issued a note concerning the recording and publication of minefields, mines and booby-traps commenting on the draft Protocol II to the CCW and stating that:

The accurate recording of the location of minefields and related weapons is only one aspect of the obligation which should be imposed on the parties in order to ensure the protection of a United Nations force or mission . . . The recording should not only cover the boundaries of the fields but also the number, type and pattern of distribution of the mines, as well as details of any anti-lifting devices attached to them.⁴⁴⁷

417. The Final Report of the CCW submitted to the UN General Assembly stated in connection with Article 3 of the 1980 Protocol II to the CCW that:

The parties must take whatever measures are open to them to protect civilians wherever they are . . . The parties may, if they wish, assist in this process by providing, either unilaterally or by mutual agreement, or through the Secretary-General of the United Nations, information about the location of minefields, mines and booby traps.⁴⁴⁸

418. The 25th International Conference of the Red Cross in 1986 adopted a resolution on work on international humanitarian law in armed conflicts at sea and on land in which it urged all States to become parties to the 1980 CCW and its Protocols “as early as possible so as ultimately to obtain universality of adherence”. It noted “the dangers to civilians caused by mines, booby-traps and other devices employed during an armed conflict and the need for international co-operation in this field consistent with Article 9 of Protocol II attached to the 1980 Convention”.⁴⁴⁹

419. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of civilians in armed conflict in which it urged:

all States and competent organizations to take concrete action to increase their support for mine-clearance efforts in affected States, which will need to continue for many decades, to strengthen international co-operation and assistance in this field and, in this regard, to provide the necessary maps and information and appropriate technical and material assistance to remove or otherwise render

⁴⁴⁷ UN Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Second Session, Geneva, 15 September–10 October 1980, Note by the Secretariat on the Draft Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, UN Doc. A/CONF.95/CW/4, 15 September 1980.

⁴⁴⁸ UN Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Second Session, Geneva, 15 September–10 October 1980, Final Report of the Conference to the UN General Assembly, Doc. A/CONF.95/15, 27 October 1980, p. 9.

⁴⁴⁹ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VII, § B(2) and [5].

ineffective minefields, mines and booby traps, in accordance with international law.⁴⁵⁰

420. In a resolution adopted on the occasion of the 50th anniversary of the Geneva Conventions in 1999 on the contribution of parliaments to ensuring respect for and promoting International humanitarian law, the 102nd Inter-Parliamentary Conference urged “States that produce or use this pernicious weapon [antipersonnel landmines], . . . to provide financial and technical assistance for (i) de-mining efforts, especially in heavily mined areas, (ii) victim assistance programmes, including rehabilitation and retraining activities, and (iii) mine awareness activities to reduce the risk of accidents”.⁴⁵¹

IV. Practice of International Judicial and Quasi-judicial Bodies

421. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

422. In 1995, in a position paper on landmines, the ICRC stated that “certain essential minimum steps must be taken to protect civilians and facilitate mine clearance” including the prohibition of “all mines which are not easily detectable”.⁴⁵²

423. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on anti-personnel landmines in which it encouraged “all measures to alleviate the suffering of victims and to remove mines already in place”.⁴⁵³

424. In 1996, in a statement before the First Committee of the UN General Assembly, the ICRC welcomed the improvements that had been made in the 1996 Amended Protocol II to the CCW, including: the extension of the Protocol to non-international conflicts; clear assignment of responsibility for mine clearance; and requirements that the location of all mines be recorded.⁴⁵⁴

425. At its Geneva Session in 1999, the Council of Delegates adopted a resolution on the Movement strategy on landmines in which it approved the Movement Strategy on Landmines. One of the core elements of the strategy was to:

⁴⁵⁰ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § G(h).

⁴⁵¹ 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on the contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the 50th anniversary of the Geneva Conventions, § 15.

⁴⁵² ICRC, Position Paper No. 1 Landmines and Blinding Weapons: From Expert Group to the Review Conference, February 1995, reprinted in Louis Maresca and Stuart Maslen (eds.), *The Banning of Anti-Personnel Landmines*, Cambridge University Press, Cambridge, 2000, p. 330.

⁴⁵³ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 10, § 2.

⁴⁵⁴ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/51/PV.8, 18 October 1996, p. 9.

cooperate with mine-clearance organizations according to humanitarian priorities, by developing mine-awareness activities and providing medical assistance to clearance teams, in accordance with the *Guidelines on Red Cross/Red Crescent involvement in mine-clearance activities*, adopted at the 1997 session of the Council of Delegates.⁴⁵⁵

VI. Other Practice

426. In 1994, an armed opposition group stated that it systematically informed the ICRC of mined locations.⁴⁵⁶

427. In 1998, in a report on violations of the laws of war by both sides in Angola, Africa Watch stated that "it is prohibited to use landmines near a civilian object, even if it contains military objectives, without any precautions, markings or other warnings or if such devices do not self-destruct or are not removed after their military purpose has been served".⁴⁵⁷

⁴⁵⁵ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 10, § 1.

⁴⁵⁶ ICRC archive document.

⁴⁵⁷ Africa Watch, *Angola: Violations of the Laws of War by Both Sides*, New York, April 1998, p. 58.

INCENDIARY WEAPONS

A. Use of Incendiary Weapons against Civilians and Civilian Objects (practice relating to Rule 84)	§§ 1–183
Use of incendiary weapons in general	§§ 1–107
Use of incendiary weapons against civilians and civilian objects in particular	§§ 108–183
B. Use of Incendiary Weapons against Combatants (practice relating to Rule 85)	§§ 184–215
Use of incendiary weapons in general	§ 184
Use of incendiary weapons against combatants in particular	§§ 185–215

A. Use of Incendiary Weapons against Civilians and Civilian Objects

Use of incendiary weapons in general

I. Treaties and Other Instruments

Treaties

1. No practice was found.

Other Instruments

2. Section 6.2 of the 1999 UN Secretary-General’s Bulletin states that “the use of certain conventional weapons, such as . . . incendiary weapons is prohibited”.

II. National Practice

Military Manuals

3. Canada’s Code of Conduct provides that the use of “tracer rounds for other than marking” is forbidden.¹
4. Colombia’s Basic Military Manual prohibits the use of weapons which “cause unnecessary and indiscriminate, widespread, long-term and severe damage to people and the environment. This includes, *inter alia*: . . . incendiary

¹ Canada, *Code of Conduct* (2001), Rule 3, § 10(c).

weapons, whose production, importation, possession and use is also prohibited by Article 81 of the National Constitution."²

National Legislation

5. Andorra's Decree on Arms prohibits the use of incendiary weapons.³

6. Hungary's Criminal Code as amended prohibits incendiary weapons. It provides that:

- (1) Any person who uses or orders the use of a weapon or instrument of war prohibited by international treaty in a theatre of military operation or in an occupied territory against the enemy, civilians or prisoners of war commits a felony offence and shall be punishable by imprisonment of between 10 to 15 years or life imprisonment.
- (2) Any person who makes preparations for the use of a weapon prohibited by international treaty commits a felony offence and shall be punishable by imprisonment of up to five years.
- (3) For the purpose of Subsections (1)–(2) the following shall be construed as weapons prohibited by international treaty:

...
b) the following weapons listed in the Protocols to the Convention signed at Geneva on 15 October 1980 on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, as promulgated by Law-Decree 2 of 1984...

...
3. incendiary weapons specified in Point 1 of Article 1 of Protocol III.⁴

7. Under the Penal Code as amended of the SFRY (FRY), the use of, or the order to use, "means or methods of combat prohibited under the rules of international law, during a war or an armed conflict" is a war crime.⁵ The commentary on the Penal Code as amended states that "the following weapons and means of combat are considered to be prohibited: . . . napalm bombs and other incendiary weapons".⁶

National Case-law

8. No practice was found.

Other National Practice

9. A draft provision prohibiting the use of incendiary weapons was proposed to the Ad Hoc Committee on Conventional Weapons established by the CDDH by Afghanistan, Algeria, Austria, Colombia, Egypt, Kuwait, Lebanon, Mali,

² Colombia, *Basic Military Manual* (1995), pp. 49–50.

³ Andorra, *Decree on Arms* (1989), Chapter 1, Section 3, Article 2.

⁴ Hungary, *Criminal Code as amended* (1978), Article 160/A, §§ 1, 2 and 3(b)(3).

⁵ SFRY (FRY), *Penal Code as amended* (1976), Article 148(1).

⁶ SFRY (FRY), *Penal Code as amended* (1976), commentary on Article 148(1).

Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela and SFRY. It stated that:

Incendiary weapons shall be prohibited for use.

- A. This prohibition shall apply to:
the use of any munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame and/or heat produced by a chemical reaction of a substance delivered on the target. Such munitions include flame-throwers, incendiary shells, rockets, grenades, mines and bombs.
- B. This prohibition shall not apply to:
1. Munitions which may have secondary or incidental incendiary effects, such as illuminants, tracers, smoke, or signalling systems;
 2. Incendiary munitions which are designed and used specifically for defence against aircraft or armoured vehicles.⁷

A slightly revised proposal was later presented to the Committee by Afghanistan, Algeria, Austria, Côte d'Ivoire, Egypt, Iran, Kuwait, Lebanon, Lesotho, Mali, Mauritania, Mexico, Norway, Romania, Sudan, Sweden, Switzerland, Tunisia, Tanzania, Venezuela, SFRY and Zaire. This proposal changed the second exception (B2) to "munitions which combine incendiary effects with penetration or fragmentation effects and which are specifically designed for use against aircraft, armoured vehicles and similar targets".⁸

10. In 1973, with respect to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Australia stated that it "reaffirms the principles [in international agreements prohibiting the employment in war of weapons calculated to cause unnecessary suffering] and their application to the use of all classes of weapons, particular napalm". It further stated that it "does not possess aerial or mechanized napalm-type weapons and does not intend to acquire them".⁹

11. In 1977, during a debate in the First Committee of the UN General Assembly, Austria stated that development, production and use of incendiary weapons should be banned.¹⁰

⁷ Afghanistan, Algeria, Austria, Colombia, Egypt, Kuwait, Lebanon, Mali, Mauritania, Mexico, Norway, Sudan, Sweden, Switzerland, Venezuela and SFRY, Proposal submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/20 at CDDH/IV/226, p. 556.

⁸ Afghanistan, Algeria, Austria, Côte d'Ivoire, Egypt, Iran, Kuwait, Lebanon, Lesotho, Mali, Mauritania, Mexico, Norway, Romania, Sudan, Sweden, Switzerland, Tunisia, Tanzania, Venezuela, SFRY and Zaire, Proposal submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/Inf.220 at CDDH/IV/226, pp. 560-561.

⁹ Australia, Reply of 21 September 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 4.

¹⁰ Austria, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.13, 27 October 1977, p. 28.

12. In 1973, with respect to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Barbados stated that it “supports the conclusions contained in chapter V of the report”, namely “the necessity of working out measures for the prohibition of the use, production, development and stockpiling of napalm and other incendiary weapons” (see *infra*).¹¹

13. In 1972, during a debate preceding the adoption of Resolution 3032 (XXVII) in which the UN General Assembly called upon “all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907”, Belgium stated that this paragraph contained a very clear reference to napalm.¹²

14. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Canada stated that “both considerations of limitations on the use of specific weapons, such as napalm and other incendiary weapons, and efforts to promote the further development of the international humanitarian law of armed conflict, should be undertaken quickly and effectively”.¹³

15. In 1972, during a debate on Resolution 2932 A (XXVII) in the First Committee of the UN General Assembly, Chile stated that it preferred a firmer resolution, but that it accepted that the process banning incendiary weapons had not been developed to that point and acquiesced with the draft proposal. Regarding napalm, it stated that “international law is extremely out of date and deficient” and added that “it is urgent that the United Nations adopt all necessary measures and arrive at a legal instrument prohibiting its production, stockpiling and use”.¹⁴

16. In 1973, during a debate in the First Committee of the UN General Assembly, China stated that it was against the use of incendiary weapons and condemned Israel’s use of them in the Yom Kippur War in 1973.¹⁵

17. At the 18th International Conference of the Red Cross, China condemned the use of napalm by US forces in the Korean War, stating that “foreign invaders

¹¹ Barbados, Reply of 22 February 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 4.

¹² Belgium, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1388, 9 December 1972, p. 468.

¹³ Canada, Reply sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207/Add.1, 11 October 1973, p. 3.

¹⁴ Chile, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1888, 9 November 1972, p. 18–19.

¹⁵ China, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1968, 23 November 1973, p. 569.

also wantonly bombarded the undefended cities and villages located far from the front line, for many times used the most inhumane napalm bombs".¹⁶

18. In 1977, during a debate in the First Committee of the UN General Assembly, Colombia supported the elimination of incendiary weapons.¹⁷

19. In 1973, with respect to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Cyprus concurred with the conclusions of the report and recommended that "both the General Assembly and the ICRC be involved in the measures for the prohibition of the use, production, development and stockpiling of napalm and other incendiary weapons".¹⁸

20. In 1973, with respect to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Czechoslovakia assured the UN Secretary-General that the competent Czechoslovak authorities were prepared to "exert every effort to achieve a solution leading to the final prohibition of the use of napalm and other incendiary weapons".¹⁹

21. In 1972, during a debate on Resolution 2932 A (XXVII) in the First Committee of the UN General Assembly, Ecuador stated that no pretext could justify the use of incendiary weapons and that the effects were especially grave in colonial conflicts in less-developed nations.²⁰

22. In 1973, in its reply on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Finland deemed it important "to continue discussions and studies in order to find various ways and means to restrict the use of inhuman weapons and methods of warfare". It recommended that the issue of incendiary weapons be discussed at the upcoming CDDH.²¹

23. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Finland stated that:

¹⁶ China, Statement of 30 July 1952 at the 18th International Conference of the Red Cross, Toronto, 26 July–7 August 1952, reprinted in *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, Vol. 2, pp. 82–83.

¹⁷ Colombia, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.21, 2 November 1977, p. 11.

¹⁸ Cyprus, Reply of 5 April 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 5.

¹⁹ Czechoslovakia, Reply of 31 August 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 6.

²⁰ Ecuador, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1883, 3 November 1972, p. 6.

²¹ Finland, Reply of 21 September 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 7.

9. In view of the development of modern weaponry and warfare and their consequences on the civilian population, it was of prime importance to reach early agreement on general principles prohibiting or restricting the use of specific weapons. . . . Reports . . . showed clearly that the deployment of extremely cruel weapons, such as napalm and other incendiary weapons, seemed to be most frequent in cases where their strict military value was least, namely, when directed against civilian targets. The suffering they caused was disproportionate to any military advantage gained.
10. . . . The Ad Hoc Committee should endeavour to define [specific categories of conventional weapons] and prepare a list mentioning, at least, napalm and other incendiary weapons.²²

24. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of the FRG stated that "he did not think . . . that the time had come to renounce flame weapons. Security considerations prevented not only his country, but many others, from doing so." He added that:

Although his country had to look for solutions which were sound from a security point of view, it did not wish to minimize the seriousness of wounds caused by napalm and other flame weapons. Although he agreed with the United Kingdom representative, who had pointed out that with the elimination of napalm a number of burn casualties would be reduced by only a fairly small percentage, he favoured the widespread endeavours to prohibit the sources of those grave injuries.²³

25. At the CCW Preparatory Conference in 1979, the FRG stated that proposals made by delegations "for a total ban" on incendiary weapons or for "a ban with explicit exceptions" were:

not only inconsistent with the mandate [set out in UN General Assembly Resolution 32/152] but were based on an unproven hypothesis, namely that incendiary weapons were excessively injurious in all circumstances. The exceptions, for their part, would give rise to a definite paradox since, if there was not excessive injury under all circumstances, it was illogical to start from the idea of a total ban.²⁴

26. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Guatemala stated that "it is necessary to make renewed efforts for the legal prohibition of the use of weapons that cause unnecessary suffering in all armed conflicts, especially the mass use of incendiary weapons".²⁵

²² Finland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 9, §§ 9–10.

²³ FRG, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.32, 1 June 1976, p. 336, §§ 30 and 32.

²⁴ FRG, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./II/SR.24, 9 April 1979, p. 6, § 23.

²⁵ Guatemala, Reply of 10 August 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 8.

27. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of India stated that:

His delegation, for its part, was of the opinion that a country should not be placed at a disadvantage when the defence of its territory was at stake. It should accordingly be entitled to use incendiary weapons against the enemy on its own soil. Once the enemy had been driven back beyond the international borders, however, the use of incendiary weapons against him would be illegal. His delegation therefore proposed a complete prohibition of the use of incendiary weapons by the armed forces of a country outside that country's own borders or the borders of its allies. It thought that that proposal would provide a fair solution to a very complicated problem.²⁶

28. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Iran stated that "given a general consensus within the international community to take action on these weapons, the Government of Iran would think that the most practical approach would be to consider a prohibition on the use of all incendiary weapons".²⁷

29. According to the Report on the Practice of Iran, in February 1981, an Iranian colonel announced that Iraq had used incendiary bombs against the Iranian city of Marivan. He called this act a "crime" and stated that these weapons were banned.²⁸

30. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Iraq stated that:

27. ... His Government considered incendiary weapons to be completely inhumane. The sufferings caused by their use could not be minimized, especially as such weapons did not discriminate between civilian and military objectives. There was a tendency for military forces to be more cautious in employing them in attacks, out of regard for the protection of their own forces, but in cities incendiary weapons could present a serious danger to the civilian population.

28. Some delegations seemed to favour criteria which would not prohibit the use of incendiary weapons altogether. In his opinion it was impossible to establish such criteria because of the inherently lethal nature of those weapons. That point had already been brought up by the Secretary-General of the United Nations in his 1972 report entitled "Napalm and other incendiary weapons and all aspects of their possible use" ... His delegation was in full agreement with the conclusions in that report to the effect that all efforts should be made to prohibit the use of incendiary weapons in warfare.²⁹

²⁶ India, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 20 May 1976, p. 284, § 5.

²⁷ Iran, Reply of 31 July 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 10, § 5.

²⁸ Report on the Practice of Iran, 1997, Chapter 3.4.

²⁹ Iraq, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.27, 19 May 1976, p. 279, §§ 27-28.

31. At the CCW Preparatory Conference in 1978, Iraq stated that it “desired the prohibition of certain incendiary weapons”.³⁰
32. According to the Report on the Practice of Iraq, Iraq has “restrictions and limitations” on the use of incendiary weapons.³¹
33. At the CCW Preparatory Conference in 1978, Japan declared that while it “was not sure it would be practicable to ban completely” all incendiary weapons, the use of incendiary weapons containing yellow phosphorus should be prohibited.³²
34. According to the Report on the Practice of Jordan, the “Jordanian army was constantly bombarded with napalm bombs throughout the 1967 War. Jordan condemned officially the use by Israel of these horrible weapons.”³³
35. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Kuwait stated that it “will whole-heartedly support any action that may be taken by the United Nations to prevent the use of napalm in armed conflicts and especially against the civilian population”.³⁴
36. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Kuwait stated that:

16. There were several types of weapon which could be included in the category of incendiary weapons, and military authorities would claim that their use was necessary without concerning themselves with the humanitarian side of the question.
17. Several types of incendiary weapons such as napalm, flame-throwers and incendiary munitions, should be prohibited forthwith, regardless of military considerations. The other incendiary weapons should be classified as defensive or offensive, and as anti-personnel or anti-matériel. Incendiary weapons would thus be divided into two categories from the operational point of view.
18. His delegation suggested that incendiary weapons used indiscriminately against members of the armed forces and the civilian population should be prohibited. It also suggested that incendiary weapons used against civilian objects should be prohibited. It considered, moreover, that incendiary weapons other than napalm and flame-throwers should be used only for defence or for attacking military matériel. It would support any measure designed to prohibit or restrict the use of destructive weapons.³⁵

³⁰ Iraq, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./I/SR.8, 6 September 1978, p. 7.

³¹ Report on the Practice of Iraq, 1998, Chapter 3.5.

³² Japan, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./I/SR.12, 12 September 1978, p. 2, § 3.

³³ Report on the Practice of Jordan, 1997, Chapter 3.5, referring to Press Conference by his Majesty the King of Jordan, 19 June 1967.

³⁴ Kuwait, Reply of 20 February 1973 sent to the UN Secretary-General, reprinted in Report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 11.

³⁵ Kuwait, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.10, 19 February 1975, pp. 94–95, §§ 16–18.

37. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Madagascar welcomed the establishment of the Committee and stated that this "would enable the [CDDH] to . . . draw up rules prohibiting the use of napalm and other incendiary weapons" and that "the Government of Madagascar condemned the use of incendiary weapons and all methods of destruction employing napalm or phosphorus, which caused terrible injuries. In such cases no argument or subterfuge could prevail over humanitarian law."³⁶

38. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Mexico stated that it was in favour of the total prohibition of the use of incendiary weapons, including napalm, to be achieved by an international agreement.³⁷

39. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Mexico stated that:

33. . . . The ban on incendiary weapons should, in fact, be a total one.

34. He expressed satisfaction that the United Nations General Assembly had reflected the wishes of international opinion regarding the prohibition of incendiary weapons.³⁸

40. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Mexico, with respect to the draft protocol relative to the prohibition of the use of incendiary weapons submitted by Norway (see *infra*), stated that:

The actual content of the Norwegian proposal . . . was discouraging in so far as it appeared to constitute a further attempt to restrict the use of incendiary weapons on the basis of the targets attacked, whereas negotiations thus far had been directed towards the total prohibition of incendiary weapons, or at least of some of them. The extensive information considered at previous meetings of the Committee and at the two sessions of the Conference of Government Experts showed that incendiary weapons were particularly cruel and caused wounds which were difficult to treat. The same sources also showed that the military effectiveness of such weapons was limited, that their tactical value lay mainly in the terror which fire inspired in everyone except trained troops, and that substitutes could be used in practically all the circumstances for which incendiary weapons were employed. Moreover, such weapons were *par excellence* weapons which caused superfluous injury. [The prohibition to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering] was absolute. To accept restrictions on the use of incendiary weapons on the basis

³⁶ Madagascar, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.10, 19 February 1975, p. 103, § 55.

³⁷ Mexico, Reply of 29 August 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 11.

³⁸ Mexico, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.10, 19 February 1975, p. 98, §§ 33–34.

of the targets attacked would entail the acceptance of one of two assumptions: either incendiary weapons did not cause superfluous injury and therefore did not fall within the meaning of the absolute prohibition laid down in article 33, paragraph 2; or else the Ad Hoc Committee was going to limit the scope of what had already been approved in Committee III. His delegation could accept neither of those assumptions.³⁹

41. At the CCW Preparatory Conference in 1978, Mexico stated that its earlier proposal on the prohibition of incendiary weapons ought to be a base for the future treaty.⁴⁰ It proposed the following:

Art. 1. It is prohibited to use incendiary weapons . . .

Art. 2. The prohibition referred to in the foregoing article shall apply to the use of any munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame and/or heat produced by chemical reaction of the substance delivered on the target. Such munitions include flame-throwers, incendiary shells, rockets, grenades, mines and bombs.

Art. 3. The prohibition referred to in article 1 above shall not apply to munitions which may have secondary or incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems.⁴¹

42. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Mongolia stated that it "fully associates itself with the views of the consultant expert as to the necessity of working out measures for the prohibition of the use, production, development and stockpiling of napalm and incendiary weapons".⁴²

43. At the CDDH, Mozambique stated that "while this Conference is meeting here, the people of Mozambique are being bombed by the illegal and racist régime of Ian Smith, which is using napalm and other materials causing superfluous injury".⁴³

44. In 1992, during a debate in the First Committee of the UN General Assembly, the Netherlands implied that universal adherence to the 1980 CCW would give it effect in internal conflicts.⁴⁴

³⁹ Mexico, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.25, 13 May 1976, p. 259, § 33.

⁴⁰ Mexico, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./I/SR.3, 31 August 1978, p. 3.

⁴¹ Mexico, Draft clauses relating to the prohibition of the use of incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.4, 11 September 1978.

⁴² Mongolia, Reply of 21 July 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 12, § 5.

⁴³ Mozambique, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 303.

⁴⁴ Netherlands, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 November 1992, p. 21.

45. In 1973, during a debate in the Sixth Committee of the UN General Assembly, New Zealand stated that it “believed that there was a strong case for a total prohibition of the use of napalm and other incendiary weapons”.⁴⁵

46. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of New Zealand stated that:

38. ... As the New Zealand delegation had already said in the United Nations General Assembly and as was also stated in [a] working paper, a rule prohibiting the use of napalm and other incendiary weapons in all circumstances was much more likely to be complied with than a restriction on particular uses...

39. So far as concerned the principle of prohibiting or restricting the use of napalm and other incendiary weapons, he recalled that on a number of occasions since 1973 his Government had stated its position, which was that, while the paramount requirement was to protect civilians, such protection should not be restricted to civilians. If the use of incendiaries was prohibited only in particular circumstances or against particular targets, there would be substantial difficulties of implementation. There was a strong case for a total prohibition of such weapons.⁴⁶

47. At the CCW Preparatory Conference in 1979, Nigeria expressed “great concern over the fact that the negotiations on incendiary weapons had not yielded positive results”. It hoped, on behalf of the African bloc, that the Conference would result in “a treaty or convention restricting or prohibiting certain conventional weapons deemed to be excessively injurious or to have indiscriminate effects”.⁴⁷

48. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Norway stated that a prohibition on production, development and stockpiling of incendiary weapons would be extremely complicated to implement, since production of incendiary weapons was easy. Consequently, it preferred a total prohibition of the use of some or all incendiary weapons.⁴⁸

49. Norway submitted a “Draft Protocol Relative to the Prohibition of the Use of Incendiary Weapons” to the Ad Hoc Committee on Conventional Weapons established by the CDDH which read, *inter alia*, as follows:

⁴⁵ New Zealand, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.6/SR.1453, 4 December 1973, p. 308.

⁴⁶ New Zealand, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.10, 19 February 1975, pp. 99–100, §§ 38–39.

⁴⁷ Nigeria, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.24, 9 April 1979, p. 5, § 17.

⁴⁸ Norway, Reply of 11 September 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 16.

Article 1 – Field of application

The present Protocol shall apply in the situations referred to in articles 2 and 3 common to the Geneva Conventions of August 12, 1949 for the Protection of War Victims.

...

Article 3 – General prohibition

With the further limitations spelled out in the present Protocol and subject to the provisions of [AP I], incendiary weapons may only be used against objects that are military objectives in the sense of article 47, paragraph 2 of the said Protocol, including in close support of friendly forces.

The use of incendiary weapons against personnel is prohibited.

Nevertheless, the presence of combatants or civilians within or in the immediate vicinity of legitimate targets as described in this article does not render such targets immune from attacks with incendiary weapons.

...

Article 5 – Precaution in attack

Any use of incendiary weapons is subject to article 50 of [AP I].

In addition, it is prohibited to launch an attack with incendiary weapons except when:

- (a) the location of the target is known and properly recognized, and
- (b) all feasible precaution is taken to limit the incendiary effects to the specific military objectives and to avoid incidental injury or incidental loss of lives.

Article 6 – Protection against environmental effects

Before deciding upon the launching of attack with incendiary weapons, special care must be taken to ensure that environmental effects as described in article 48 *bis* of [AP I] will be avoided.⁴⁹

50. In 1977, during a debate in the First Committee of the UN General Assembly, Peru stated that incendiary weapons should be prohibited.⁵⁰

51. In 1995, in an official communiqué released by the Joint Command of the Peruvian armed forces, Peru denied having used flame-throwers in its conflict with Ecuador.⁵¹

52. A 1998, in statement issued in reply to a question from the ICRC on the customary norms of IHL of the Philippines, the Philippine Department of Foreign Affairs declared that the Philippines had renounced the use of napalm.⁵²

53. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General

⁴⁹ Norway, Draft protocol relative to the prohibition of the use of incendiary weapons submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/207 within CDDH/IV/226, pp. 567–569.

⁵⁰ Peru, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.16, 28 October 1977, p. 22.

⁵¹ Peru, Joint Command of the Armed Forces, Official Communiqué No. 011 CCFFAA, Lima, 24 February 1995.

⁵² Philippines, Statement by the Department of Foreign Affairs, Office of United Nations and International Organizations (UNIO), Manila, 6 March 1998, Report on the Practice of the Philippines, 1997, Additional material on Chapter 3.

on napalm and other incendiary weapons and all aspects of their possible use, Poland stated that it considered that the report could “serve as a suitable basis for further considerations of the direction and manner of negotiating with a view to reaching an agreement on the prohibition of the use of incendiary weapons and, subsequently, their total elimination from military arsenals”.⁵³

54. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Poland stated that “napalm and other incendiary weapons . . . should be banned”.⁵⁴

55. At the CCW Preparatory Conference in 1979, Poland stated that “it was disappointing” that the Conference had not reached an agreement on the prohibition or restriction of incendiary weapons. It hoped that “the extensive debate on the total prohibition of the use of such weapons in inhabited areas would eventually lead to the elimination of at least the most drastic and indiscriminate weapons in that category”.⁵⁵

56. At the International Conference on the Protection of War Victims in 1993, Russia declared that “in order to protect the civilian population against indiscriminate weapons . . . incendiary weapons . . . should be completely banned in internal conflicts”.⁵⁶

57. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of Sudan stated that “recent experience had shown the untold sufferings produced by the use of . . . incendiary weapons. His country was ready to co-operate with the ICRC in its endeavours to ensure respect for all the rules laid down concerning their prohibition.”⁵⁷

58. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Sweden stated that “if total prohibition of use were attained as regards some or all incendiary weapons the question of a ban on production, development and stockpiling, etc. could subsequently be taken up”.⁵⁸

59. In 1977, during a debate in the First Committee of the UN General Assembly, Sweden stated that it, “together with many others”, was convinced that

⁵³ Poland, Reply of 25 September sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 17.

⁵⁴ Poland, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 13, § 28.

⁵⁵ Poland, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.28, 18 April 1979, p. 2, § 2.

⁵⁶ Russia, Statement at the International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993.

⁵⁷ Sudan, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.3, 15 March 1974, p. 27, § 11.

⁵⁸ Sweden, Reply of 5 June 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 23.

incendiary weapons could be restricted and partially banned without “upsetting any military balance”.⁵⁹

60. At the CCW Preparatory Conference in 1979, Sweden stated that “no category of conventional weapons had evoked greater public revulsion than incendiary weapons, including napalm” and that, given the difficulty of applying partial bans on incendiary weapons, it was of the view that a “complete prohibition was the preferable course”.⁶⁰

61. In 1987, during a debate in the First Committee of the UN General Assembly, Sweden stated that further restrictions on incendiary weapons should be enacted.⁶¹ It reiterated this view in 1992.⁶²

62. At the CCW Preparatory Conference in 1978, Switzerland stated that “although civilians and combatants could be distinguished in theory, it was impossible to do so in practice” and therefore it “advocated the total prohibition of the main types of incendiary weapons”.⁶³

63. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Syria endorsed “all the provisions contained in the report, and in particular, those concerning the ban on [napalm and other incendiary weapons]”.⁶⁴

64. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Togo stated that the CDDH “should prohibit the use of weapons such as napalm, incendiary and area weapons”.⁶⁵

65. In 1977, during a debate in the First Committee of the UN General Assembly, Turkey stated that it supported the prohibition or restrictions on incendiary weapons, but held that it would only be effective if it reflected a consensus in the world community.⁶⁶

66. In 1969, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), the USSR stated that:

⁵⁹ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.32, 15 November 1977, p. 26.

⁶⁰ Sweden, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./II/SR.28, 18 April 1979, p. 3, § 7.

⁶¹ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.32, 12 October 1987, p. 6.

⁶² Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 November 1992, p. 18.

⁶³ Switzerland, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./I/SR.12, 12 September 1978, p. 2, § 3.

⁶⁴ Syria, Reply of 31 July 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 23.

⁶⁵ Togo, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.1, 13 March 1974, p. 16, § 45.

⁶⁶ Turkey, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.44, 25 November 1977, p. 23.

For the purpose of crushing the resistance of the Arabs [in the territories occupied by Israel], the aggressors from Israel are continuing to use napalm, which is forbidden by international law.

The criminal, inhuman acts of the imperialist States are a shameful violation of international law, and also of the resolutions of the International Conferences of the Red Cross.⁶⁷

67. In 1972, during a debate in the Sixth Committee of the UN General Assembly, the USSR stated that it “was in favour of the prohibition of means of warfare which were particularly cruel, because their use was incompatible with the norms of international law. One such means was napalm.”⁶⁸

68. In 1975, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of the UAE stated that “he himself would be grateful if the Diplomatic Conference succeeded in prohibiting certain deadly weapons which were already condemned by world public opinion, such as napalm and other incendiary weapons”.⁶⁹

69. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of the UK stated that:

18. His country had at present no requirement for napalm, but that it possessed other weapons capable of causing death by burning . . . His delegation could not subscribe to [a] prohibition [of these weapons].

19. The United Kingdom, which was seriously concerned about the suffering caused by flame weapons, was participating actively in negotiations designed to ascertain ways in which the international community might reduce such suffering.

...

21. . . . Incendiary weapons could be both effective and discriminating . . .

22. The issue at stake was the right of States to use incendiary weapons when they felt their security threatened. It was not easy to deny them that right; but at the same time there was good reason to believe that the great majority of delegations at the current Conference would be happy to see some limitation on the use of such weapons . . . The Netherlands proposal [submitted as an annex to a working paper on incendiary weapons, see *supra*] provided an excellent basis for negotiation, and it was greatly to be hoped that the Committee would reach agreement along these lines.⁷⁰

70. At the CCW Preparatory Conference in 1978, the US felt that an “early agreement” on the use of incendiary weapons was unlikely and that “continued

⁶⁷ USSR, Reply dated 30 December 1969 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 120.

⁶⁸ USSR, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1388, 9 December 1972, p. 469.

⁶⁹ UAE, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.16, 12 March 1975, p. 158, § 20.

⁷⁰ UK, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.28, 20 May 1976, p. 287, §§ 18–22.

insistence on the total prohibition of such weapons, or prohibition of their use against people, would preclude the possibility of agreement" as "a compromise could be reached only if consideration was given both to humanitarian concerns and to military requirements and if the effects of alternative weapons were taken into account".⁷¹

71. In 1977, during a debate in the First Committee of the UN General Assembly, Zaire stated that development, production and use of incendiary weapons should be banned.⁷²

72. According to the Report on the Practice of Zimbabwe, it is not the military practice of Zimbabwe to use incendiary weapons.⁷³

73. In 1978, during an armed conflict between two States, one of the States denounced the use of napalm and phosphorous bombs based on international law and conventions.⁷⁴

III. Practice of International Organisations and Conferences

United Nations

74. UN General Assembly Resolution 2932 A (XXVII), adopted in 1972, was the first to deal with incendiary weapons. The resolution referred to the "proposals for both the elimination and non-use of incendiary weapons" that were advanced at disarmament negotiations in 1933 and noted that "similar proposals had been repeatedly made in recent years". The resolution deplored "the use of napalm and other incendiary weapons in all armed conflicts".⁷⁵ The resolution's provision deploring the use of incendiary weapons in "all armed conflicts" was part of an amendment sponsored by Jordan, Kenya, Syria and Uganda.⁷⁶

75. In a resolution adopted following the CE (1972), the UN General Assembly expressed its concern that no agreement had been reached concerning, *inter alia*, weapons that cause unnecessary suffering. It reiterated its call upon "all parties to armed conflicts to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907".⁷⁷

76. In a resolution adopted in 1972, the UN General Assembly deplored "the use of napalm and other incendiary weapons in all armed conflicts".⁷⁸

⁷¹ US, Statement at the CCW Preparatory Conference, Doc. A/CONF.95/PREP.CONF.I/SR.5, 1 September 1978, p. 3, § 7.

⁷² Zaire, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.28, 9 November 1977, p. 4.

⁷³ Report on the Practice of Zimbabwe, 1998, Chapter 3.5.

⁷⁴ ICRC archive document.

⁷⁵ UN General Assembly, Res. 2932 A (XXVII), 29 November 1972, preamble and § 3.

⁷⁶ Jordan, Kenya, Syria and Uganda, Proposal submitted to the First Committee of the UN General Assembly, UN Doc. A/C.1/PV.1894, 16 November 1972, p. 5.

⁷⁷ UN General Assembly, Res. 3032 (XXVII), 14 December 1972, § 2.

⁷⁸ UN General Assembly, Res. 2932 A (XXVII), 29 November 1972, § 3.

77. In several resolutions between 1973 and 1977, the UN General Assembly invited the upcoming CDDH to “seek agreement” on rules prohibiting or restricting the use of incendiary weapons.⁷⁹

78. In a resolution adopted in 1973, the UN General Assembly stated that:

The efficacy of these general principles [of international law prohibiting the use of weapons which are likely to cause unnecessary suffering and means and methods of warfare which have indiscriminate effects] could be further enhanced if rules were elaborated and generally accepted prohibiting or restricting the use of napalm and other incendiary weapons.⁸⁰

79. In a resolution adopted in 1974, the UN General Assembly condemned “the use of napalm and other incendiary weapons in armed conflicts in circumstances where it may affect human beings or may cause damage to the environment and/or natural resources”. It also urged “all States to refrain from the production, stockpiling, proliferation, and use of such weapons pending the conclusion of agreements on the prohibition of these weapons”.⁸¹

80. In a resolution adopted in 1980, the UN General Assembly welcomed the successful conclusion of the 1980 CCW and its Protocols and commended the Convention and the three annexed Protocols to all States “with a view to achieving the widest possible adherence to these instruments”.⁸²

81. In numerous resolutions adopted between 1981 and 1998, the UN General Assembly urged all States that had not done so to accede to the 1980 CCW and its Protocols.⁸³

82. In a resolution adopted in 1996, the UN Sub-Commission on Human Rights listed napalm as “a weapon of mass destruction or with indiscriminate effects”. It also stated that “the use of napalm is incompatible with human rights and humanitarian law”.⁸⁴

83. In 1969, in his report on respect for human rights in armed conflict, the UN Secretary-General stated that there was no consensus on the legal status of incendiary weapons. Some experts stated that napalm could be used discriminately and that this use must be controlled.⁸⁵

⁷⁹ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, § 1; Res. 3255 A (XXIX), 9 December 1974, § 3; Res. 31/64, 10 December 1976, § 2; Res. 32/152, 19 December 1977, § 2.

⁸⁰ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, preamble.

⁸¹ UN General Assembly, Res. 3255 B (XXIX), 9 December 1974, §§ 1 and 2.

⁸² UN General Assembly, Res. 35/153, 12 December 1980, § 4.

⁸³ UN General Assembly, Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67, 7 December 1988, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 3; Res. 53/81, 4 December 1998, § 5.

⁸⁴ UN Sub-Commission on Human Rights, Res. 1996/16, 29 August 1996, § 1 and preamble.

⁸⁵ UN Secretary-General, Report on respect for human rights in armed conflicts, UN Doc. A/7720, 20 November 1969, p. 62.

84. In 1973, in his report on napalm and other incendiary weapons and all aspects of their possible use, the UN Secretary-General noted that Article 22 of 1907 Hague Convention (IV), “the right of belligerents to adopt means of injuring the enemy is not unlimited”, and Article 23(e) prohibiting means of warfare which caused unnecessary suffering were applicable to incendiary weapons. These principles were deemed to be of a customary nature. The report concluded by bringing “to the attention of the General Assembly the necessity of working out measures for the prohibition of the use, production, development and stockpiling of napalm and other incendiary weapons”.⁸⁶

85. The UN Secretariat’s survey on respect for human rights in armed conflicts in 1973 analysed practice and doctrine on incendiary weapons. A majority of the sources supported the view that there were restrictions on the use of incendiary weapons.⁸⁷

Other International Organisations

86. In 1985, in a report on the deteriorating situation in Afghanistan, the Rapporteur of the Parliamentary Assembly of the Council of Europe stated that “according to several concordant accounts, . . . chemical substances and incendiary bombs producing gases of various colours have been discharged”. In this respect, he added that the report of the Special Rapporteur of the UN Commission on Human Rights deserved mention.⁸⁸ In that report, the UN Special Rapporteur had recommended that “the parties to the conflict, namely government and opposition forces, should be reminded that it is their duty to apply fully the rules of international humanitarian law without discrimination”.⁸⁹

87. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited:

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

- ...
- b. ratify, if they have not done so, . . . the United Nations Convention of 1980 on the prohibitions or restrictions on the use of certain conventional weapons and its protocols . . .

⁸⁶ UN Secretary-General, Report on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/8803/Rev.1, April 1973, p. 56.

⁸⁷ UN Secretariat, Respect for human rights in armed conflicts, Existing rules of international law concerning the prohibition or restriction of use of specific weapons, UN Doc. A/9215, 7 November 1973, p. 120.

⁸⁸ Council of Europe, Parliamentary Assembly, Rapporteur, Report on the deteriorating situation in Afghanistan, Doc. 5495, 15 November 1985, pp. 7–8, § 16(e).

⁸⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, Recommendations, reprinted in Council of Europe, Parliamentary Assembly, Doc. 5495, Appendix 1, 15 November 1985, p. 11, § 190.

- j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.⁹⁰

88. In a resolution adopted in 1994 on respect for IHL and support for humanitarian action in armed conflicts, the OAU Council of Ministers invited “all States that have not yet become party to the...[1980] CCW, to consider, or reconsider, without delay the possibility of doing so in the near future”.⁹¹

89. In two resolutions adopted in 1994 and 1996 on respect for IHL, the OAS General Assembly urged member States to accede to the 1980 CCW.⁹²

90. In 1994, the OIC denounced the use of napalm by Serb forces during the conflict in Bosnia and Herzegovina.⁹³

International Conferences

91. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

92. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

93. No practice was found.

VI. Other Practice

94. In 1979, in a letter to the ICRC, an armed group confirmed its commitment to IHL and denounced the use of “all kinds of prohibited weapons such napalm bombs”.⁹⁴

95. *Jane’s Infantry Weapons* reported that the DNG incendiary smoke hand grenade, which contains “a charge of stabilised red phosphorus composition which gives both incendiary and smoke-producing effects”, is being produced in Austria.⁹⁵ *Jane’s Ammunition Handbook* also reported that the 81 mm

⁹⁰ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(b) and (j).

⁹¹ OAU, Council of Ministers, Res. 1526 (LX), 6–11 June 1994, § 6.

⁹² OAS, General Assembly, Res. 1270 (XXIV-O/94), 10 June 1994, § 1; Res. 1408 (XXVI-O/96), 7 June 1996, § 1.

⁹³ OIC, Declaration of the Enlarged Meeting of the Foreign Ministers of the Contact Group of the OIC and OIC States Contributing Troops to UNPROFOR in Bosnia and Herzegovina, Geneva, 6 December 1994, § 6.

⁹⁴ ICRC archive document.

⁹⁵ Terry J. Gander (ed.), *Jane’s Infantry Weapons*, Jane’s Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, pp. 506.

smoke/incendiary bomb RPI Mk 3, which is filled in order to “provide a greater fire raising capability while still producing a useful amount of screening smoke”, is being manufactured in Austria.⁹⁶

96. *Jane’s Infantry Weapons* reported that Brazil’s arsenal contains the Hydroar LC T1 M1 flame-thrower.⁹⁷ Furthermore, according to the *Jane’s Air-Launched Weapons*, AV-BI bombs are being manufactured in Brazil and included in its arsenal.⁹⁸

97. According to *Jane’s Air-Launched Weapons*, Chile produces and possesses napalm bombs.⁹⁹

98. According to *Jane’s Infantry Weapons*, China’s PLA stockpiles the NORINCO portable flame-thrower, which is also offered for export sale.¹⁰⁰ *Jane’s Ammunition Handbook* also reports that the PLA stockpiles the 82 mm incendiary bomb Type 53 for 82 mm mortars which “is filled with an unidentified incendiary agent (probably red phosphorus) in the form of pellets”.¹⁰¹

99. According to *Jane’s Infantry Weapons*, “various European countries” stockpile the Haley and Weller E108 incendiary grenade. The grenade “was developed for use as a sabotage and a destruction weapon . . . It burns at a temperature in excess of 2,700° C and will melt through 2mm of steel.”¹⁰²

100. According to *Jane’s Infantry Weapons*, “the former Warsaw-pact nations and others” use the RPO-A Schmel Rocket Infantry flame-thrower and the LPO-50 flame-thrower.¹⁰³

101. *Jane’s Infantry Weapons* reported that the DM 24 incendiary smoke hand grenade is being produced in Germany. The grenade is an “incendiary mass”, which “burns for about five minutes at a temperature of approximately 1,200°C. This heat ignites any combustible material the burning mass touches.”¹⁰⁴

⁹⁶ Terry J. Gander and Charles Q. Cutshaw (eds.), *Jane’s Ammunition Handbook*, Jane’s Information Group, Coulsdon, Seventh edition, 1998–1999, p. 414.

⁹⁷ Terry J. Gander (ed.), *Jane’s Infantry Weapons*, Jane’s Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 231.

⁹⁸ Duncan Lennox (ed.), *Jane’s Air-Launched Weapons*, Jane’s Information Group, Coulsdon, Issue 33, August 1999.

⁹⁹ Duncan Lennox (ed.), *Jane’s Air-Launched Weapons*, Jane’s Information Group, Coulsdon, Issue 27, June 1997.

¹⁰⁰ Terry J. Gander (ed.), *Jane’s Infantry Weapons*, Jane’s Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 232.

¹⁰¹ Terry J. Gander and Charles Q. Cutshaw (eds.), *Jane’s Ammunition Handbook*, Jane’s Information Group, Coulsdon, Seventh edition, 1998–1999, p. 440.

¹⁰² Terry J. Gander (ed.), *Jane’s Infantry Weapons*, Jane’s Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 539.

¹⁰³ Terry J. Gander (ed.), *Jane’s Infantry Weapons*, Jane’s Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 247.

¹⁰⁴ Terry J. Gander (ed.), *Jane’s Infantry Weapons*, Jane’s Information Group, Coulsdon, Twenty-fourth edition, 1998–1999, p. 520.

102. According to *Jane's Air-Launched Weapons*, Russia produces and possesses ZB-500GD and ZB-500ShM, which are "napalm type fire bombs".¹⁰⁵

103. *Jane's Infantry Weapons* reported that the arsenal of South Africa's National Defence Force contains a red phosphorus hand grenade and the M1A1 60 mm red phosphorus bomb. The effect of the grenade is to:

spread the burning red phosphorous granules over the immediate area. The grenade can be used in a defensive role where screening smoke is required and as an offensive weapon when the acrid smoke and incendiary effect can be used for bunker or room clearance. The burning granules will also ignite various materials.¹⁰⁶

104. *Jane's Infantry Weapons* reported that the EXPAL incendiary hand grenade is being produced in Spain. There are three versions of this grenade: the GWP, which "is filled with white phosphorous and therefore has applications as a smoke-producer, an antipersonnel weapon or as an incendiary grenade"; the GRP, which "has a primary role as a smoke-producer but will also act as an incendiary device with easily ignited substances"; and the CTE grenade, which "is filled with thermite and is therefore purely an incendiary device which will ignite anything capable of being burned".¹⁰⁷ Furthermore, according to *Jane's Air-Launched Weapons*, Spain produces and possesses BIN incendiary bombs.¹⁰⁸

105. *Jane's Infantry Weapons* reported that the arsenal of the Taiwan Army and Marine Corps contains the Type 67 flame-thrower.¹⁰⁹

106. *Jane's Infantry Weapons* reported that the arsenal of the US army contains the AN-M14 TH3 incendiary hand grenade. The grenade is used "primarily to provide a source of intense heat to destroy equipment. It generates heat to 2,200°C. The grenade filler will burn from 30 to 45 seconds... The grenade is normally hand thrown, although it may be rifle-launched using a special M2 series projection adapter."¹¹⁰ Furthermore, according to *Jane's Air-Launched Weapons*, the US produces and possesses M 116 napalm bombs.¹¹¹

107. According to *Jeune Afrique Economie* in 1996, Portugal allegedly used napalm in the conflict in Angola.¹¹²

¹⁰⁵ Duncan Lennox (ed.), *Jane's Air-Launched Weapons*, Jane's Information Group, Coulsdon, Issue 33, August 1999.

¹⁰⁶ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998-1999, pp. 534 and 619.

¹⁰⁷ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998-1999, p. 535.

¹⁰⁸ Duncan Lennox (ed.), *Jane's Air-Launched Weapons*, Jane's Information Group, Coulsdon, Issue 28, November 1997.

¹⁰⁹ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998-1999, p. 254.

¹¹⁰ Terry J. Gander (ed.), *Jane's Infantry Weapons*, Jane's Information Group, Coulsdon, Twenty-fourth edition, 1998-1999, p. 543.

¹¹¹ Duncan Lennox (ed.), *Jane's Air-Launched Weapons*, Jane's Information Group, Coulsdon, Issue 31, November 1998.

¹¹² "Savimbi, l'Unita et l'Angola", *Jeune Afrique Economie*, hors série, April 1996, collection Marchés Nouveaux, p. 117.

Use of incendiary weapons against civilians and civilian objects in particular

I. Treaties and Other Instruments

Treaties

108. Article 1(1) of the 1980 Protocol III to the CCW defines “incendiary weapon” as:

Any weapon or munition which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target.

- (a) Incendiary weapons can take the form of, for example, flame throwers, fougasses, shells, rockets, grenades, mines, bombs and other containers of incendiary substances.
- (b) Incendiary weapons do not include:
 - i. Munitions which may have incidental incendiary effects, such as illuminants, tracers, smoke or signalling systems;
 - ii. Munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour-piercing projectiles, fragmentation shells, explosive bombs and similar combined-effects munitions in which the incendiary effect is not specifically designed to cause burn injury to persons, but to be used against military objectives, such as armoured vehicles, aircraft and installations or facilities.

109. Article 1(5) of the 1980 Protocol III to the CCW provides that “‘feasible precautions’ are those precautions which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations”.

110. Article 2 of the 1980 Protocol III to the CCW restricts the use of incendiary weapons in order to protect civilians and civilian objects. It provides that:

1. It is prohibited in all circumstances to make the civilian population as such, individual civilians or civilian objects the object of attack by incendiary weapons.
2. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by air-delivered incendiary weapons.
3. It is further prohibited to make any military objective located within a concentration of civilians the object of attack by means of incendiary weapons other than air-delivered incendiary weapons, except when such military objective is clearly separated from the concentration of civilians and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective and to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.
4. It is prohibited to make forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.

111. Upon ratification of the 1980 CCW, Canada stated that:

With respect to Protocol III, it is the understanding of the Government of Canada that the expression “clearly separated” in paragraph 3 of Article 2 includes both spatial separation or separation by means of an effective physical barrier between the military objective and the concentration of civilians.¹¹³

112. Upon ratification of the 1980 CCW, France declared that:

With reference to the scope of application defined in article 1 of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, . . . it will apply the provisions of the Convention and its three Protocols [I, II and III] to all armed conflicts referred to in articles 2 and 3 common to the Geneva Conventions of 12 August 1949 [international and non-international armed conflicts].¹¹⁴

113. Upon accession to the 1980 CCW, Israel stated that:

With reference to the scope of application defined in article 1 of the Convention, the Government of the State of Israel will apply the provisions of the Convention and those annexed Protocols to which Israel has agreed [I, II and III] to become bound to all armed conflicts involving regular forces of States referred to in article 2 common to the Geneva Conventions of 12 August 1949, as well as to all armed conflicts referred to in article 3 common to the Geneva Conventions of 12 August 1949.¹¹⁵

114. Upon ratification of the 1980 CCW, the UK stated that:

The United Kingdom accepts the provisions of article 2(2) and (3) on the understanding that the terms of those paragraphs of that article do not imply that the air-delivery of incendiary weapons, or of any other weapons, projectiles or munitions, is less accurate or less capable of being carried out discriminately than all or any other means of delivery.¹¹⁶

115. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.

¹¹³ Canada, Declaration made upon ratification of the CCW, 24 June 1994, § 4.

¹¹⁴ France, Reservations made upon ratification of the CCW, 4 March 1988.

¹¹⁵ Israel, Declarations and statements of understanding made upon accession to the CCW, 22 March 1995, § a.

¹¹⁶ UK, Declarations made upon ratification of the CCW, 13 February 1995, § d.

3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

Other Instruments

116. No practice was found.

II. National Practice

Military Manuals

117. Argentina's Law of War Manual reproduces the content of Article 1(1), (2) and (3) and Article 2 of the 1980 Protocol III to the CCW.¹¹⁷

118. Australia's Commanders' Guide states that "incendiary weapons should only be used against military targets. Incendiaries include weapons such as "napalm, flame-throwers, tracer rounds and white phosphorous".¹¹⁸

119. Australia's Defence Force Manual states that:

416. Incendiary weapons include any weapon or munition which is designed to set fire to objects or to cause burn injury to humans through the action of flame, heat or a combination of the two causes by a chemical reaction of a substance delivered on a target. They include flame throwers, shell, rockets, grenades, mines, bombs and other containers of incendiary materials.

417. Incendiary weapons do not include munitions which have incidental incendiary effects such as illuminants, tracers, smoke or signalling devices; nor do they include munitions designed to combine penetration, blast or fragmentation effects with an additional incendiary effect, such as armour piercing projectiles, fragmentation shells, explosive bombs and similar combined effects ammunition in which the incendiary effect is not specifically designed to cause burn injury to humans, but to be used against military objectives such as armoured vehicles, aircraft and installations and facilities.

418. Specific rules prohibit the use of incendiary weapons:

- (a) in all circumstances to attack the civilian population, individual citizens or civilian objects with air delivered incendiary weapons;
- (b) in all circumstances to make any military objective located within a concentration of civilians the object of attack by air delivered incendiary weapons;
- (c) to make any military objective located within a concentration of civilians the object of an attack by other than air delivered incendiary weapons, except where the military objective is clearly separated from the civilians and all feasible precautions are taken to minimise incidental loss of civilian life and damage to civilian objects (separation in this context can mean a barrier (such as an air raid shelter or a hill) or distance; and
- (d) on forests or plant cover except when the forests or plant cover are either being used to cover, conceal or camouflage military objectives or are themselves military objectives (if it is necessary to use incendiaries on a forest to clear a

¹¹⁷ Argentina, *Law of War Manual* (1989), §§ 4.25 and 4.26.

¹¹⁸ Australia, *Commanders' Guide* (1994), § 314, see also §§ 933–934.

field of fire or facilitate an advance or attack against an enemy, the forest has become a military objective and may legitimately be attacked).¹¹⁹

120. Belgium's Law of War Manual defines incendiary weapons in accordance with Article 1 of the 1980 Protocol III to the CCW and states that:

The use of such [incendiary] weapons against persons is prohibited because they cause unnecessary suffering, but their use against military objectives, such as bunkers, tanks, depots, etc. is permitted. However, if these military objectives are located inside a civilian concentration, their use is prohibited, except when the object is clearly separate from the concentration of civilians and all precautions are taken to avoid any loss of life among the civilian population and any damage to civilian objects. Their use against forests is also prohibited, except when they constitute a military objective or are used to conceal combatants or other military objectives.¹²⁰

121. Cameroon's Instructors' Manual restates the definition of incendiary weapons found in Article 1 of the 1980 Protocol III to the CCW and, with reference to Article 2 of the Protocol, states that "the only restrictions applicable to such arms concern their use against non-military objectives, against the environment and against military objectives located in areas of civilian concentration".¹²¹

122. Canada's LOAC Manual restates the definition of incendiary weapons and the restrictions concerning their application contained in Articles 1 and 2 respectively of the 1980 Protocol III to the CCW.¹²²

123. Ecuador's Naval Manual states that:

Incendiary weapons such as tracing ammunition, heat-producing bombs, flame throwers, napalm and any other incendiary weapons or agents, are considered lawful. Persons selecting these weapons for use should employ them in such a way as to minimize uncontrolled and indiscriminate effects on the civilian population, in a manner compatible with the fulfilment of the mission and the security of the forces.¹²³

124. France's LOAC Teaching Note states that "the use of incendiary weapons is strictly limited to military objectives" and that "it is forbidden to launch an attack with incendiary weapons against military objectives located near or within a concentration of civilians".¹²⁴

125. France's LOAC Manual states that "the use of incendiary weapons is strictly limited to military objectives" and that "it is forbidden to launch an attack with incendiary weapons against military objectives located near or within a concentration of civilians".¹²⁵ It also states that "it is possible to

¹¹⁹ Australia, *Defence Force Manual* (1994), §§ 416–418.

¹²⁰ Belgium, *Law of War Manual* (1983), p. 38.

¹²¹ Cameroon, *Instructors' Manual* (1992), pp. 123–124, § 441.

¹²² Canada, *LOAC Manual* (1999), p. 5-4, §§ 33, 34 and 36.

¹²³ Ecuador, *Naval Manual* (1989), § 9-6.

¹²⁵ France, *LOAC Manual* (2001), p. 54.

¹²⁴ France, *LOAC Teaching Note* (2000), p. 6.

use incendiary weapons when the military target is clearly separated from the civilian concentration and all feasible precautions are taken with a view to limiting the incendiary effects to the military objective, when the tactical situation allows it".¹²⁶ As regards napalm and flame-throwers, the manual repeats the same provision and quotes Article 1 of the 1980 Protocol III to the CCW.¹²⁷

126. Germany's Military Manual states, with reference to the 1980 Protocol III to the CCW, defines incendiary weapons in accordance with the Protocol and further states that:

422. When incendiary weapons are used, precautions shall be taken which are practicable or practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations.

423. The civilian population as such, individual civilians and civilian objects shall be granted special protection. They shall never be made the object of attack by incendiary weapons.

424. It is prohibited in all circumstances to make any military objective located within a concentration of civilians the object of attack by incendiary weapons.

425. It is further prohibited to use incendiary weapons against forests or other kinds of plant cover except when such natural elements are used to cover, conceal or camouflage a military objective, or are themselves military objectives.¹²⁸

127. Israel's Manual on the Laws of War states that:

Incendiary arms are not banned. Nevertheless, because of their wide range of cover, this protocol of the CCW Convention is meant to protect civilians and forbids making a population centre a target for an incendiary weapons attack. Furthermore, it is forbidden to attack a military objective situated within a population centre employing incendiary weapons. The protocol does not ban the use of these arms during combat (for instance, in flushing out bunkers).¹²⁹

128. Kenya's LOAC Manual defines incendiary weapons in accordance with Article 1 of the 1980 Protocol III to the CCW and states that the "conditions for permitted use" are:

Incendiary weapons which are not air-delivered may be used:

- (a) when the military objective is clearly separated from a concentration of civilian persons; and
- (b) subject to precautions to limit incendiary effects to the military objective, when the tactical situation permits.

Air-delivered incendiary weapons may be so used only in attack against a military objective located outside concentrations of civilian persons.¹³⁰

¹²⁶ France, *LOAC Manual* (2001), p. 24. ¹²⁷ France, *LOAC Manual* (2001), pp. 86 and 79.

¹²⁸ Germany, *Military Manual* (1992), §§ 420–425.

¹²⁹ Israel, *Manual on the Laws of War* (1998), p. 16.

¹³⁰ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 5.

129. The Military Manual of the Netherlands defines incendiary weapons in accordance with Article 1 of the 1980 Protocol III to the CCW. It further specifies that:

The general rules with regard to the protection of the civilian population apply, namely, in the first place, that the civilian population, individual civilians and civilian objects may not be attacked. Furthermore, it is forbidden to attack military objectives located inside a concentration of civilians by air-delivered incendiary weapons. Attacks by incendiary weapons which are not air-delivered are permitted provided two conditions are fulfilled:

- The military objective has to be clearly separated from the concentration of civilians.
- Precautionary measures have to be taken to limit the incendiary effect to the military objective and to avoid collateral damage to civilians and civilian objects.¹³¹

130. New Zealand's Military Manual restates Article 2 of the 1980 Protocol III to the CCW.¹³²

131. Russia's Military Manual prohibits "any weapons which strike indiscriminately or whose use causes superfluous injury and destruction" and specifically refers to the 1980 Protocol III to the CCW.¹³³

132. Spain's LOAC Manual defines incendiary weapons in accordance with Article 1 of the 1980 Protocol III and restates the restrictions of the use of incendiary weapons contained in Article 2 of the Protocol.¹³⁴

133. Sweden's IHL Manual states that:

[The 1980] Protocol III [to the CCW] contains restrictions applying where incendiary weapons are used. This protocol does not constitute a total prohibition of the use of incendiary weapons – which Sweden and other states had proposed. However, the protocol lays down such heavy restrictions on their use that there is reason to characterize it as a *partial prohibition of incendiary weapons*.

A great bone of contention has been how incendiary weapons are to be defined. Agreement has now been reached on a definition by which "incendiary weapon" covers any weapon or ammunition primarily designed to set fire to objects or to cause burn injuries to persons through the action of flames, heat or a combination of these. Incendiary weapons do not include those with incidental incendiary effects, such as illuminants or tracers. Nor shall armour-piercing projectiles and explosive shells that act through penetrating, blast or fragmentation effects in combination with the incendiary effect be considered as incendiary weapons.

...

This new rule [in Article 2 of Protocol III] affords civilians considerably better protection than hitherto against incendiary weapons.

...

¹³¹ Netherlands, *Military Manual* (1993), pp. V-13/14, § 11.

¹³² New Zealand, *Military Manual* (1992), §§ 513 and 620.

¹³³ Russia, *Military Manual* (1990), § 6(h). ¹³⁴ Spain, *LOAC Manual* (1996), § 3.2.a.(3).

There is a need to supplement the present Protocol III so that the agreement constitutes a *complete prohibition of incendiary weapons*. In this way, protection of civilians could be further enhanced.¹³⁵ [emphasis in original]

134. Switzerland's Basic Military Manual, with reference to the 1980 Protocol III to the CCW, states that "it is forbidden to use incendiary weapons against civilian objects or against a military objective that is not clearly separated from a concentration of civilians".¹³⁶

135. The US Rules of Engagement for Vietnam stated that "the use of incendiary type munitions in inhabited or urban areas will be avoided unless friendly survival is at stake or it is necessary for the accomplishment of the commander's mission".¹³⁷

136. The US Air Force Pamphlet states that:

The potential of fire to spread beyond the immediate target area has also raised concerns about uncontrollable or indiscriminate effects affecting the civilian population or civilian objects. Accordingly, any applicable rules of engagement relating to incendiary weapons must be followed closely to avoid controversy. The manner in which incendiary weapons are employed is also regulated by the other principles and rules regulating armed force. . . In particular, the potential capacity of fire to spread must be considered in relation to the rules protecting civilians and civilian objects. . . For example, incendiary weapons should be avoided in urban areas, to the extent that other weapons are available and as effective.¹³⁸

137. The US Naval Handbook states that:

Incendiary devices such as tracer ammunition, thermite bombs, flame throwers, napalm, and other incendiary weapons and agents, are lawful weapons. Where incendiary devices are the weapons of choice, they should be employed in a manner that does not cause incidental injury or collateral damage that is excessive in light of the military advantage anticipated by the attack.¹³⁹

National Legislation

138. Under Estonia's Penal Code, "large scale use of incendiary weapons under conditions where the military objective cannot be clearly separated from civilian population, civilian objects or the surrounding environment" is a war crime.¹⁴⁰

139. Under Hungary's Criminal Code as amended, employing "incendiary weapons" as defined in the 1980 Protocol III to the CCW is a war crime.¹⁴¹

National Case-law

140. No practice was found.

¹³⁵ Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 81–83.

¹³⁶ Switzerland, *Basic Military Manual* (1987), Article 23(d).

¹³⁷ US, *Rules of Engagement for Vietnam* (1971), § 6(d)(1).

¹³⁸ US, *Air Force Pamphlet* (1976), § 6-6(c). ¹³⁹ US, *Naval Handbook* (1995), § 9.7.

¹⁴⁰ Estonia, *Penal Code* (2001), § 103.

¹⁴¹ Hungary, *Criminal Code as amended* (1978), Section 160/A(3)(b)(3).

Other National Practice

141. In 1971, in an Australian report on the protection of the civil population against the effects of certain weapons, it was stated that:

In respect of napalm and other weapons of an incendiary nature the Army recognises certain complexities of classification. It contemplates no less than three types of weapon:

- a. "flame weapons" such as napalm bombs and flame throwers which employ or involve the projection of a flaming (petroleum or other) substance;
- b. pure heat weapons; and,
- c. electronic/nuclear (sub-atomic) weapons of the nature of laser rays or any development of that general conception.

This is not an exhaustive classification and ignores the atom weapon, whether as a bomb or otherwise.

Presently only napalm bombs and flamethrowers are available or in use. They present problems of economic use. Currently they are not used against any human target but only against structures although their use against structures is possibly less useful if a structure is unmanned by enemy personnel.

Even if not used against human targets flame weapons do present an advantage as a means of generating fear and despondency, even if not of terror and even if no enemy is actually harmed by them or is within range.

Their weight and lack of economy in use is a problem which may cause flame throwers to be discarded in favour of more sophisticated and longer ranging means of dispersing their (napalm) content.

These weapons as presently existing are not held to contravene international law if used in accepted fashion and not indiscriminately against humans or against inanimate targets so as to involve innocent civilians as little as possible. However, it is conceivable that new or "unconventional" uses of these weapons may be alleged to be contrary to law, depending upon interpretation of the Hague Rules and any extension of them.¹⁴²

142. In an annex to a working paper on incendiary weapons submitted by Australia, Denmark and Netherlands to the Ad Hoc Committee on Conventional Weapons established by the CDDH, the Netherlands proposed the following rules:

2. Rules

- (a) As a consequence of the rules of international law applicable with respect to the protection of the civilian population against the effects of hostilities, it is prohibited to make any city, town, village or other area containing a concentration of civilians the object of attack by means of any incendiary munition.
- (b) Specific military objectives that are within such an area may be made the object of attack by means of incendiary munitions, provided that the attack is otherwise lawful and that all feasible precautions are taken to limit the

¹⁴² Australia, Report on the protection of the civil population against the effects of certain weapons, May 1971, pp. 2-3, Report on the Practice of Australia, 1998, Chapter 3.5.

incendiary effects to the specific military objectives and to avoid incidental loss of civilian life or injury to civilians.

- (c) In order to reduce to a minimum the risks posed to civilians by the use of flame weapons, it is prohibited to make any specific military objective that is within such an area the object of aerial attack by means of napalm or other flame munition unless that objective is located within an area in which combat between ground forces is taking place or is imminent.¹⁴³

This proposal was later subject to slight revision.¹⁴⁴

143. At the CCW Preparatory Conference in 1978, Australia and the Netherlands sponsored a draft proposal which divided incendiary weapons into "incendiary" and "flame" munitions and stated that "it is prohibited to make any concentration of civilians the object of attack by means of any incendiary munition". The proposal further stated that "specific military objectives that are situated within a concentration of civilians" may be attacked with incendiary weapons if "all feasible precautions are taken to limit the incendiary effects to all specific military objectives and to avoid incidental loss of civilian life or injury to civilians". The final part of the proposal provided that, in order to:

reduce to a minimum the risks posed to civilians by the use of flame weapons, it is prohibited to make any specific military objective that is situated within a concentration of civilians the object of aerial attack by means of napalm or other flame munitions unless that objective is located within an area in which combat between ground forces is taking place or appears to be imminent.¹⁴⁵

144. In 1979, towards the end of CCW Preparatory Conference, Australia and the Netherlands submitted a further draft proposal on incendiary weapons. The proposal provided that "as a consequence of the rules of international law applicable with respect to the protection of civilians against the effects of hostilities, it is prohibited to make the civilian population as such as well as individual civilians the object of attack by means of incendiary munitions". It also prohibited aerial attacks with napalm or other flame munitions against military targets situated within concentrations of civilians. Attacks with incendiary munitions against military objectives in civilian concentrations were not prohibited, "provided the attack is otherwise lawful and that all feasible precautions are taken to limit the incendiary effects to the

¹⁴³ Netherlands, Proposal annexed to a working paper on incendiary weapons submitted by Australia, Denmark and Netherlands to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/206 within CDDH/IV/226, pp. 562–563.

¹⁴⁴ Netherlands, Revised proposal annexed to a working paper on incendiary weapons submitted by Australia, Denmark and Netherlands to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/206 (Rev. 1) within CDDH/IV/226, pp. 564–565.

¹⁴⁵ Australia and Netherlands, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.11, 13 September 1978.

military objective and to avoid incidental loss of civilian life and injury to civilians".¹⁴⁶

145. At the First Review Conference of States Parties to the CCW in 1995, Australia stated that "the restrictions laid down in the Convention regarding the use of incendiary devices . . . were strong and clear".¹⁴⁷

146. Towards the end of the CCW Preparatory Conference in 1979, Austria, Egypt, Ghana, Jamaica, Mexico, Romania, Sweden, Venezuela, SFRY and Zaire, which had earlier sponsored a proposal which called for a total ban, submitted a proposal which restricted the ban on the use of incendiary weapons to use against civilians, military objectives located within a concentration of civilians and unprotected combatants.¹⁴⁸

147. In 1974, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Brazil stated that "there were good humanitarian reasons for the international community to agree at least on restricting the use of incendiary weapons against targets which were not exclusively military".¹⁴⁹

148. In 1973, in its reply on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, Denmark stated that it wanted to work out an agreement restricting or prohibiting the use of napalm and other incendiary weapons. It added that "the aim of such agreements should be to restrict or prohibit the use of napalm and other incendiary weapons, especially in circumstances where these weapons have an indiscriminate effect against the civilian population".¹⁵⁰

149. At the CCW Preparatory Conference in 1978, Denmark and Norway presented a proposal which stated that "it is prohibited to make the civilian population or individual civilians the object of attack by incendiary weapons" and that "it is prohibited to make any military objective located within a concentration of civilians the object of attack by incendiary weapons delivered by aircraft, except when that military objective is clearly separated and distinct from the civilian population". The final rule contained in the proposal provided that:

Whenever an attack is made by incendiary weapons in accordance with the above provisions and other applicable rules of international law, all feasible precautions

¹⁴⁶ Australia and Netherlands, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.15, 5 April 1979.

¹⁴⁷ Australia, Statement at the First Review Conference of States Parties to the CCW, Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF.I/SR.3, 2 October 1995, § 25.

¹⁴⁸ Austria, Egypt, Ghana, Jamaica, Mexico, Romania, Sweden, Venezuela, SFRY and Zaire, Draft protocol on Prohibition or Restrictions on the Use of incendiary Weapons submitted to the CCW Conference, UN Doc. A/CONF.95/CW/L.1, 27 September 1979, pp. 1–2

¹⁴⁹ Brazil, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.2, 14 March 1974, p. 18, § 7; see also *Official Records*, Vol. XVI, CDDH/IV/SR.6, 22 March 1974, p. 50, § 18 and Vol. XVI, CDDH/IV/SR.10, 19 February 1975, p. 92, § 5.

¹⁵⁰ Denmark, Reply of 28 August 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 6.

shall be taken to limit the effects of such attack to the military objective itself with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.¹⁵¹

150. In 1977, during a debate in the First Committee of the UN General Assembly, Egypt advocated the prohibition or restriction of incendiary weapons.¹⁵²

151. In 1987, the French Ministry of Foreign Affairs explained that the reasons for which France refused to ratify the 1980 Protocol III to the CCW was the provision relating to the use of incendiary weapons against military objectives located within a concentration of civilians. It considered the provision to be “too imprecise, thus unrealistic”.¹⁵³

152. In 1973, in its reply on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, India stated that possible agreement could only be found on restrictions of use against civilian objects. It stated that it would “take an active interest in, and promote” a prohibition of all inhumane weapons, including incendiary weapons, against civilian targets, with due regard for the principles of reciprocity and right of retaliation.¹⁵⁴

153. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, India stated that it “fully supported the idea of expanding the scope of the CCW to cover armed internal conflicts”.¹⁵⁵

154. At the CCW Preparatory Conference in 1978, Indonesia submitted a draft proposal, which developed the proposal it had submitted during the CDDH.¹⁵⁶ The proposal prohibited the use of incendiaries, except against:

military objects other than personnel, provided that these objects are not within civilian population centres and against combatants holding positions in field fortifications such as bunkers and pillboxes where the use of alternate weapons will inevitably render more casualties.¹⁵⁷

155. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, Japan stated that:

¹⁵¹ Denmark and Norway, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.12, 13 September 1978.

¹⁵² Egypt, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/32/PV.26, 4 November 1977, p. 17.

¹⁵³ France, Ministry of Foreign Affairs, Statement of 2 December 1987 by the Secretary of State before the National Assembly, excerpt reprinted in *Annuaire Français de Droit International*, Vol. 34, 1988, p. 900.

¹⁵⁴ India, Reply of 16 October 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 9.

¹⁵⁵ India, Statement of 24 September 2001 at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001.

¹⁵⁶ Indonesia, Proposal concerning incendiary weapons submitted to the Ad Hoc Committee established by the CDDH, Vol. XVI, *Official Records*, CDDH/IV/223 within CDDH/IV 226, p. 578.

¹⁵⁷ Indonesia, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.13, 22 March 1979.

21. A consensus had been reached at the first session of the Conference of Government Experts that attacks in which incendiary weapons were used against cities with a concentration of civilians were indiscriminate and should be prohibited.
22. The working paper on incendiary weapons . . . submitted by eleven countries, including Japan, had been intended to start the prohibition or restriction of the use of such weapons from the point at which a minimum consensus had been reached, and had therefore been completely realistic.¹⁵⁸

156. At the CCW Preparatory Conference in 1978, Japan declared that while it "was not sure it would be practicable to ban completely weapons of that kind [incendiaries] other than those which employed yellow phosphorus, it would be useful to prohibit their use in indiscriminate attacks on cities or populated areas".¹⁵⁹

157. In 1992, prior to the adoption of UN General Assembly Resolution 47/37 on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum entitled "International Law Providing Protection to the Environment in Times of Armed Conflict", which stated that:

For States parties the following principles of international law, as applicable, provide additional protection for the environment in times of armed conflict:

Article 2(4) of [the 1980 Protocol III to the CCW] prohibits States parties from making forests or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements cover, conceal or camouflage combatants or other military objectives, or are themselves military objectives.¹⁶⁰

158. In 1973, in its reply on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, the Netherlands supported restrictions on the use of incendiary weapons, especially to protect civilians.¹⁶¹

159. At the CCW Preparatory Conference in 1979, New Zealand stated that "it shared the view expressed by the overwhelming majority of delegations concerning the need for stronger provisions for the protection of civilians and civilian centres against all incendiary weapons".¹⁶²

¹⁵⁸ Japan, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.27, 19 May 1976, p. 278, §§ 21–22.

¹⁵⁹ Japan, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF.I/SR.12, 12 September 1978, p. 2, § 3.

¹⁶⁰ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 2(d).

¹⁶¹ Netherlands, Reply of 30 August 1973 sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, 11 October 1973, p. 13.

¹⁶² New Zealand, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.27, 18 April 1979, p. 8, § 72.

160. Norway submitted a “Draft Protocol Relative to the Prohibition of the Use of Incendiary Weapons” to the Ad Hoc Committee on Conventional Weapons established by the CDDH which read, *inter alia*, as follows:

Article 1 – Field of application

The present Protocol shall apply in the situations referred to in articles 2 and 3 common to the Geneva Conventions of August 12, 1949 for the Protection of War Victims.

...

Article 4 – Protection of the civilian population

Any use of incendiary weapons is subject to article 46 of [AP I].

In any city, town, village or other area containing a concentration of civilians, incendiary weapons may be used only provided that combat between ground forces is taking place in that area, or the military objective is clearly separated from the civilian population.¹⁶³

161. At the International Conference on the Protection of War Victims in 1993, Russia declared that “in order to protect the civilian population against indiscriminate weapons . . . incendiary weapons . . . should be completely banned in internal conflicts”.¹⁶⁴

162. At the CCW Preparatory Conference in 1979, during the debate on the second proposal made by Australia and the Netherlands, Syria criticised the proposal, stating that “in its present form, the proposal left serious doubts regarding the precautions taken to limit the incendiary effects and to avoid loss of human lives” and that “it had not been proved that napalm was more dangerous than other incendiary weapons”.¹⁶⁵

163. At the CCW Preparatory Conference in 1979, the USSR stated that it was “regrettable” that no agreement on restricting the use of incendiary weapons had been reached. It felt that the:

draft revised at the second session extended the scope of the prohibition of the use of incendiary weapons, particularly against military objectives situated within a concentration of civilians, and might constitute a good point of departure for the future work of the Conference.¹⁶⁶

164. At the CCW Preparatory Conference in 1979, the UK stated that:

The exchange of views in the past week had proved disappointing because some delegations had adopted extreme positions. These positions were doubtless dictated by humanitarian considerations which could in no sense be criticised. However, if

¹⁶³ Norway, Draft protocol relative to the prohibition of the use of incendiary weapons submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/207 within CDDH/IV/226, pp. 567–569.

¹⁶⁴ Russia, Statement at the International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993.

¹⁶⁵ Syria, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.23, 6 April 1979, p. 3, §§ 6–7.

¹⁶⁶ USSR, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.24, 9 April 1979, p. 5, § 16.

agreement was to be reached on anything specific that would be an advance over the present state of the law, the objective would plainly have to be a more limited one. The text of the proposal submitted by Australia and the Netherlands met precisely that need.¹⁶⁷

165. In 1976, during discussions in the Ad Hoc Committee on Conventional Weapons established by the CDDH, the representative of the US stated that:

36. . . . The United States delegation could not accept any proposal which would have the effect of precluding the use of napalm or similar weapons in close-combat situations. It could therefore not accept total prohibition of the use of such weapons or prohibition of their anti-personnel use.
37. Her delegation recognized, however, that special limitations were appropriate in areas populated by civilians. It had carefully studied the proposal in the working paper submitted to the Lugano Conference [of Government Experts on the Use of Certain Conventional Weapons] by the Netherlands experts and introduced again in the Ad Hoc Committee [as an annex to a working paper, see *supra*] that the use of air delivered flame weapons should be prohibited in populated areas, except for the zone in which combat between ground forces was taking place or was imminent. Such a prohibition would preclude the use of air-delivered napalm against military targets in cities, towns or villages, such as ammunition and supply dumps, vehicle parks, convoys and barracks. Acceptance of that proposal would involve the abandonment of lawful uses of napalm against legitimate military targets. In view, however, of the concern that the use of air-delivered napalm in populated areas might prove dangerous to civilians, the United States delegation was prepared to accept the Netherlands proposal as a basis for serious negotiation, and was also prepared to consider any other proposals for protecting the civilian population from the effects of incendiary weapons.¹⁶⁸

166. At the CCW Preparatory Conference in 1979, the US explained that it:

could not accept a total ban on the use of incendiary weapons, because the weapons substituted for them would, in certain situations, be more destructive and consequently more injurious, and would thus be contrary to the spirit of article 57 of the Protocol on International Armed Conflict.

It went on to say that, while it could not accept a restriction on the use of incendiaries against combatants, "an agreement on limiting the use of incendiaries in areas containing civilian concentrations was appropriate and possible . . . The [Australia/Netherlands] proposal was the maximum that some of the principal interested parties at the Conference would be prepared to accept".¹⁶⁹

¹⁶⁷ UK, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.23, 6 April 1979, p. 2.

¹⁶⁸ US, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.27, 19 May 1976, p. 281, §§ 36–37.

¹⁶⁹ US, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.28, 18 April 1979, pp. 2–3, §§ 5–6.

167. With respect to the decision by the US whether or not to use incendiary weapons during a strategic bombing campaign against North Korean industrial areas during the Korean War, it is reported that:

At the Target Selection Committee meeting General Weyland pointed out that someone would have to decide whether or not the B-29's could use incendiary munitions, and within a few days FEAF [Far Eastern Air Force] got the answer to this question – in the negative. Washington was very hesitant about any air action which might be exploited by Communist propaganda and desired no unnecessary civilian casualties which might result from fire raids. General Stratemeyer consequently directed General O'Donnell not to employ incendiaries without specific approval.¹⁷⁰

168. In transmitting the Protocols to the 1980 CCW to the US Senate, the US President stated that “the United States must retain its ability to employ incendiaries to hold high priority military targets such as those at risk in a manner consistent with the principle of proportionality which governs the use of all weapons under existing law”.¹⁷¹

III. Practice of International Organisations and Conferences

United Nations

169. In several resolutions between 1973 and 1977, the UN General Assembly invited the upcoming CDDH to “seek agreement” on rules prohibiting or restricting the use of incendiary weapons.¹⁷²

170. In a resolution adopted in 1973, the UN General Assembly called on the CDDH to “seek agreement on rules prohibiting or restricting the use of [incendiary] weapons.” The preamble to the resolution states that “the efficacy of the general principles of [IHL] could be further enhanced if rules were elaborated and generally accepted prohibiting or restricting the use of napalm and other incendiary weapons”.¹⁷³

171. Two UN General Assembly resolutions adopted on the same occasion in 1974 dealt with two different aspects of incendiary weapons. Resolution 3255 A contained an invitation to the CDDH to consider a prohibition or restriction on these weapons.¹⁷⁴ Resolution 3255 B condemned “the use of napalm and other incendiary weapons in armed conflicts in circumstances where it may

¹⁷⁰ Robert F. Futrell, *The US Air Force in Korea 1950–1953*, Office of Air Force History, US Air Force, Washington, D.C., Revised edition, 1983, p. 187.

¹⁷¹ US, Message from the US President transmitting Protocols II, III and IV to the CCW to the Senate, Treaty Doc. 105-1, Washington, 7 January 1997, pp. 37–40.

¹⁷² UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, § 1; Res. 3255 A (XXIX), 9 December 1974, § 3; Res. 31/64, 10 December 1976, § 2; Res. 32/152, 19 December 1977, § 2.

¹⁷³ UN General Assembly, Res. 3076 (XXVIII), 6 December 1973, § 1 and preamble.

¹⁷⁴ UN General Assembly, Res. 3255 A (XXIX), 9 December 1974, § 3.

affect human beings or may cause damage to the environment and/or natural resources".¹⁷⁵

172. In a resolution adopted in 1980, the UN General Assembly welcomed the successful agreement on the 1980 CCW and its Protocols. It urged States to agree to be bound by the Convention and Protocols "with a view to achieving the widest possible adherence to these instruments".¹⁷⁶

173. In numerous resolutions, the UN General Assembly urged all States that had not yet done so to accede to the 1980 CCW and its Protocols.¹⁷⁷

174. In resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN General Assembly condemned "the use of . . . napalm bombs on civilian targets by Croatian Serb and Bosnian Serb forces".¹⁷⁸

175. In a resolution adopted in 1995, the UN Commission on Human Rights condemned "the use of . . . napalm bombs against civilian targets by Bosnian and Croatian Serb forces".¹⁷⁹

176. In a resolution adopted in 1997, the UN Sub-Commission on Human Rights declared that "the use on civilian population of napalm and fuel-air bombs violates Protocol III . . . of the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons".¹⁸⁰

Other International Organisations

177. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited:

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

- ...
- b. ratify, if they have not done so, . . . the United Nations Convention of 1980 on the prohibitions or restrictions on the use of certain conventional weapons [1980 CCW] and its protocols . . .
- j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.¹⁸¹

¹⁷⁵ UN General Assembly, Res. 3255 B (XXIX), 9 December 1974, § 1.

¹⁷⁶ UN General Assembly, Res. 35/153, 12 December 1980, §§ 2 and 4.

¹⁷⁷ UN General Assembly, Res. 36/93, 9 December 1981, § 1; Res. 37/79, 9 December 1982, § 1; Res. 38/66, 15 December 1983, § 3; Res. 39/56, 12 December 1984, § 3; Res. 40/84, 12 December 1985, § 3; Res. 41/50, 3 December 1986, § 3; Res. 42/30, 30 November 1987, § 3; Res. 43/67, 7 December 1988, § 3; Res. 45/64, 4 December 1990, § 3; Res. 46/40, 6 December 1991, § 3; Res. 47/56, 9 December 1992, § 3; Res. 48/79, 16 December 1993, § 3; Res. 49/79, 15 December 1994, § 3; Res. 50/74, 12 December 1995, § 3; Res. 51/49, 10 December 1996, § 3; Res. 52/42, 9 December 1997, § 2; Res. 53/81, 4 December 1998, § 5; Res. 54/58, 1 December 1999, § III(3).

¹⁷⁸ UN General Assembly, Res. 49/196, 23 December 1994, § 7.

¹⁷⁹ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 5.

¹⁸⁰ UN Sub-Commission on Human Rights, Res. 1997/36, 28 August 1997, preamble.

¹⁸¹ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8b and j.

178. In 1982, at the 7th Extraordinary Session of the UN General Assembly, Denmark expressed its concern on behalf of the EC over civilian casualties caused by Israel's use of phosphorous shrapnel during the invasion of Lebanon.¹⁸²

International Conferences

179. No practice was found

IV. Practice of International Judicial and Quasi-judicial Bodies

180. In the case concerning the events at La Tablada in Argentina before the IACiHR in 1997, the petitioners held that the military attack to retake the barracks was a "legal violation of all current legislation on this subject" and especially mentioned that the military had used white phosphorus or incendiary bombs.¹⁸³ The IACiHR stated that:

The Commission must note that even if it were proved that the Argentine military had used such weapons, it cannot be said that their use in January 1989 violated an explicit prohibition applicable to the conduct of internal armed conflicts at that time. In this connection, protocol III to the CCW cited by petitioners, was not ratified by Argentina until 1995. Moreover and most pertinently, Article 1 of the CCW states that the Incendiary Weapons Protocol applies only to interstate armed conflicts and to a limited class of national liberation wars. As such, this instrument did not directly apply to the internal hostilities at the Tablada. In addition, the Protocol does not make the use of such weapons per se unlawful. Although it prohibits their direct use against peaceable civilians, it does not ban their deployment against lawful military targets, which include civilians who directly participate in combat.¹⁸⁴

V. Practice of the International Red Cross and Red Crescent Movement

181. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the definition of incendiary weapons in accordance with Article 1 of the 1980 Protocol III to the CCW and that:

934. Incendiary weapons which are not air-delivered may be used:

- a) when the military object is clearly separated from a concentration of civilian persons; and
- b) subject to precautions to limit incendiary effects to the military objective, when the tactical situation permits.

935. Air-delivered incendiary weapons may be so used only in attack against a military objective located outside concentrations of civilian persons.¹⁸⁵

¹⁸² EC, Statement by Denmark on behalf of the EC at the 7th Extraordinary Session of the UN General Assembly, UN Doc. A/ES-7/PV. 26, 17 August 1982, pp. 14–17.

¹⁸³ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 9–10.

¹⁸⁴ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 187.

¹⁸⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 931–935.

VI. *Other Practice*

182. Rule B5 of the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, adopted in 1990 by the Council of the IHL, states that:

In application of the general rules listed in Section A above, especially those on the distinction between combatants and civilians and on the immunity of the civilian population, incendiary weapons may not be directed against the civilian population as such, against individual civilians or civilian objects, nor used indiscriminately.¹⁸⁶

183. A journalist reported that in Grozny in 2000:

Incendiary bombs, incendiary cluster bombs and containers were extensively used to torch enemy-occupied objects and to destroy enemy manpower concentrations. At the time of these air raids there were several thousand Chechen fighters in Grozny and up to 100,000 civilians . . . Concrete evidence has been gathered by journalists and human rights groups on the use of different air-delivered incendiary weapons, including "vacuum" or "fuel" bombs against Grozny and other Chechen towns and villages. There is also concrete evidence that hundreds of civilians, including women and children, have been killed by such weapons.

The journalist went on to say that:

The use of prohibited incendiary weapons in violation of international agreements is a much more serious war crime than the abuse of civilians by troops and bombardments by "ordinary" bombs or shells. The Russian military knows that the use of incendiary weapons is severely limited by international agreements. Such weapons are not part of the normal inventory of Russian units. Military sources say the orders to forgo internationally outlawed air-delivered incendiary weapons and attack towns and villages "came from the highest authorities". It is a legal fact that by using incendiary weapons Russia as a state committed a war crime.

Lastly, the journalist stated that "[General] Zolotov agreed with me that attacking Grozny with incendiary weapons was a terrible war crime".¹⁸⁷

B. Use of Incendiary Weapons against Combatants

Use of incendiary weapons in general

184. The practice concerning the use of incendiary weapons in general in section A is relevant, *mutatis mutandis*, for this section but is not repeated here.

¹⁸⁶ IHL, Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-international Armed Conflicts, Rule B5, *IRRC*, No. 278, 1990, p. 402.

¹⁸⁷ Pavel Felgenhauer, "Endorsing War Crimes", *Moscow Times*, 12 July 2001, p. 6 (citing an article by Russian General Leonid Zolotov).

Use of incendiary weapons against combatants in particular

I. Treaties and Other Instruments

Treaties

185. Upon signature of the 1980 CCW, China stated that “the Protocol [to the CCW] on Prohibitions or Restrictions on the Use of Incendiary Weapons does not stipulate restrictions on the use of such weapons against combat personnel”.¹⁸⁸

Other Instruments

186. Articles 6 and 8 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provide that:

Art. 6. The use of . . . incendiary . . . weapons as against any State, whether or not a party to the present convention, and in any war, whatever its character, is prohibited.

The application of this rule shall be regulated by the following . . . articles.

...

Art. 8. The prohibition of the use of incendiary weapons shall apply to all projectiles specifically intended to cause fires except when used for defence against aircraft. The prohibition shall not apply:

- I. to projectiles specially constructed to give light or to be luminous;
- II. to pyrotechnics not normally likely to cause fires;
- III. to projectiles of all kinds which, though capable of producing incendiary effects accidentally, are not normally likely to produce such effects;
- IV. to incendiary projectiles designed specifically for defence against aircraft when used exclusively for that purpose;
- V. to appliances, such as flame-projectors, used to attack individual combatants by fire.

II. National Practice

Military Manuals

187. Australia’s *Commanders’ Guide* states that “there are no prohibitions on the use of incendiary weapons against combatants”.¹⁸⁹

188. Belgium’s *Law of War Manual* states that “the use of [incendiary] weapons against persons is prohibited because they cause unnecessary suffering, but their use against military objectives, such as bunkers, tanks, depots, etc. is permitted”.¹⁹⁰

¹⁸⁸ China, Declaration made upon signature of the CCW, 14 September 1981, § 3.

¹⁸⁹ Australia, *Commanders’ Guide* (1994), § 935.

¹⁹⁰ Belgium, *Law of War Manual* (1983), p. 38.

189. Canada's LOAC Manual stipulates that "the use of incendiary weapons against combatants is not prohibited unless such use results in superfluous injury or unnecessary suffering".¹⁹¹

190. Colombia's Basic Military Manual prohibits the use of weapons which "cause unnecessary and indiscriminate, widespread, long-term and severe damage to people and the environment. This includes, *inter alia*: . . . incendiary weapons, whose production, importation, possession and use is also prohibited by Article 81 of the National Constitution."¹⁹²

191. New Zealand's Military Manual states that "there are no provisions on the use of incendiaries against combatants in [the 1980 Protocol III to the CCW]. The use of incendiary weapons to cause unnecessary suffering is prohibited. A value judgement must be made in particular circumstances to determine whether or not the suffering caused is unnecessary."¹⁹³ The manual also recalls that "the UN Conference which negotiated the [1980 Protocol III to the CCW] was unable to agree on any requirement to protect combatants from the effects of incendiary weapons".¹⁹⁴

192. Sweden's IHL Manual states that:

[The 1980] Protocol III [to the CCW] contains restrictions applying where incendiary weapons are used.

...

At the same time it must be noted that it has not been possible to reach agreement on a rule that would also afford combatants protection against these weapons.

...

There is a need to supplement the present Protocol III so that the agreement constitutes a *complete prohibition of incendiary weapons*. In this way, protection of civilians could be further enhanced, and this should be extended to cover combatants. For, in fact, the latter also experience injury from incendiary weapons as unnecessary suffering.¹⁹⁵ [emphasis in original]

193. The UK Military Manual states that "the use of flame throwers when directed against military targets is lawful. However, their use against personnel is contrary to the law of war in so far as it is calculated to cause unnecessary suffering."¹⁹⁶

194. The US Field Manual states that "the use of weapons which employ fire, such as tracer flame-throwers, napalm and other incendiary agents, against targets requiring their use is not a violation of international law. They should not, however, be employed in such a way as to cause unnecessary suffering to individuals."¹⁹⁷

¹⁹¹ Canada, *LOAC Manual* (1999), p. 5-4, § 35.

¹⁹² Colombia, *Basic Military Manual* (1995), pp. 49-50.

¹⁹³ New Zealand, *Military Manual* (1992), §§ 513(7) and 620(7).

¹⁹⁴ New Zealand, *Military Manual* (1992), § 510(f), footnote 49 and § 617(f), footnote 37.

¹⁹⁵ Sweden, *IHL Manual* (1991), Section 3.3.2, pp. 81-83.

¹⁹⁶ UK, *Military Manual* (1958), § 110, footnote 1. ¹⁹⁷ US, *Field Manual* (1956), § 36.

195. The US Air Force Pamphlet states that:

Incendiary weapons, such as incendiary ammunition, flame throwers, napalm and other incendiary agents have widespread uses in armed conflict. Although evoking intense international concern, combined with attempts to ban their use, state practice indicates clearly they are regarded as lawful in situations requiring their use. Conventional incendiary weapons are normally employed against materiel targets and combatants in the vicinity of such targets, such as pill boxes, tanks, vehicles, fortifications, etc. Use in ground support of friendly troops in close contact with enemy troops is an important use. Such uses are justified by the military effectiveness of incendiary weapons demonstrated during World War I, World War II, Korea, Vietnam and other conflicts. Controversy over incendiary weapons has evolved over the years partly as the result of concern about the medical difficulties in treating burn injuries, as well as arbitrary attempts to analogise incendiary weapons to prohibited means of chemical warfare... Additionally, incendiary weapons must not be used so as to cause unnecessary suffering.¹⁹⁸

National Legislation

196. No practice was found.

National Case-law

197. No practice was found.

Other National Practice

198. Towards the end of the CCW Conference in 1979, Austria, Egypt, Ghana, Jamaica, Mexico, Romania, Sweden, Venezuela, SFRY and Zaire, which had earlier sponsored a proposal which called for a total ban, submitted a proposal which restricted the ban on the use of incendiary weapons to use against civilians and against "combatants except when they are in, or in the vicinity of, armoured vehicles, field fortifications or other similar objectives".¹⁹⁹

199. At the CCW Preparatory Conference in 1978, Denmark and Norway presented a proposal prohibiting, *inter alia*, making military personnel as such the object of attack by incendiary weapons except when "the personnel is engaged or about to engage in combat or being deployed for combat engagement" or "the personnel is under armoured protection, in field fortifications or under similar protection".²⁰⁰

200. At the CCW Preparatory Conference, Indonesia submitted a draft proposal, which developed the proposal submitted during the CDDH.²⁰¹ It

¹⁹⁸ US, *Air Force Pamphlet* (1976), § 6-6(c).

¹⁹⁹ Austria, Egypt, Ghana, Jamaica, Mexico, Romania, Sweden, Venezuela, SFRY and Zaire, Draft protocol on incendiary weapons submitted to the CCW Conference, UN Doc. A/CONF.95/CW/L.1, 26 September 1979, pp. 1-2.

²⁰⁰ Denmark and Norway, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.12, 13 September 1978.

²⁰¹ See Indonesia, Proposal concerning incendiary weapons submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/223 within CDDH/IV 226, p. 578.

proposed a prohibition of the use of incendiaries, except against “military objects other than personnel” and “against combatants holding positions in field fortifications such as bunkers and pillboxes where the use of alternate weapons will inevitably render more casualties”.²⁰²

201. With reference to a press conference by the King of Jordan in 1967, the Report on the Practice of Jordan states that “the Jordanian army was constantly bombarded with napalm bombs throughout the 1967 War. Jordan condemned officially the use by Israel of this horrible weapon.”²⁰³

202. Norway submitted a “Draft Protocol Relative to the Prohibition of the Use of Incendiary Weapons” to the Ad Hoc Committee on Conventional Weapons established by the CDDH which read, *inter alia*, as follows:

Article 1 – Field of application

The present Protocol shall apply in the situations referred to in articles 2 and 3 common to the Geneva Conventions of August 12, 1949 for the Protection of War Victims.

...

Article 3 – General prohibition

With the further limitations spelled out in the present Protocol and subject to the provisions of [AP I], incendiary weapons may only be used against objects that are military objectives in the sense of article 47, paragraph 2 of the said Protocol, including in close support of friendly forces.

The use of incendiary weapons against personnel is prohibited.

Nevertheless, the presence of combatants or civilians within or in the immediate vicinity of legitimate targets as described in this article does not render such targets immune from attacks with incendiary weapons.

...

Article 5 – Precaution in attack

Any use of incendiary weapons is subject to article 50 of [AP I].

In addition, it is prohibited to launch an attack with incendiary weapons except when:

- (a) the location of the target is known and properly recognized, and
- (b) all feasible precaution is taken to limit the incendiary effects to the specific military objectives and to avoid incidental injury or incidental loss of lives.²⁰⁴

203. At the CCW Preparatory Conference in 1979, during the general debate on the second proposal made by Australia and the Netherlands, Poland stated that it hoped that:

²⁰² Indonesia, Draft proposal on incendiary weapons submitted to the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF./L.13, 22 March 1979.

²⁰³ Report on the Practice of Jordan, 1997, Chapter 3.5, referring to press conference by his Majesty the King of Jordan, 19 June 1967.

²⁰⁴ Norway, Draft protocol relative to the prohibition of the use of incendiary weapons submitted to the Ad Hoc Committee on Conventional Weapons established by the CDDH, *Official Records*, Vol. XVI, CDDH/IV/207 within CDDH/IV/226, pp. 567–569.

the extensive debate on the total prohibition of the use of such weapons in inhabited areas would eventually lead to the elimination of at least the most drastic and indiscriminate weapons in that category, and might help to restrict the use of incendiaries against military personnel when they inflicted unnecessary suffering.²⁰⁵

204. In 1969, in the context of the adoption of UN General Assembly Resolution 2444 (XXIII), the USSR stated that:

For the purpose of crushing the resistance of the Arabs [in the territories occupied by Israel], the aggressors from Israel are continuing to use napalm, which is forbidden by international law.

The criminal, inhuman acts of the imperialist States are a shameful violation of international law, and also of the resolutions of the International Conferences of the Red Cross.²⁰⁶

205. In 1973, in response to Resolution 2932 A (XXVII) in which the UN General Assembly asked States to comment on the report of the UN Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, the UK emphasised that incendiary weapons must not be used to create unnecessary suffering and recommended further study of this issue.²⁰⁷

206. At the CCW Preparatory Conference in 1979, the US explained that it could not accept a restriction on the use of incendiaries against combatants for two reasons. First, "troops in or near the targets attacked with incendiaries would inevitably be killed, and commanding officers would risk being charged with violating the antipersonnel restriction". Second, "the establishment of any rule embodying a comprehensive set of exceptions would not change present practices and its effect would be purely cosmetic".²⁰⁸

207. Course material from the US Army War College, which is also used by the US Marine Corps, states that "a) Incendiaries are lawful when utilized for the purpose(s) for which they were designed. b) There is NO prohibition on the use of napalm or flame-throwers against enemy personnel."²⁰⁹

²⁰⁵ Poland, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.28, 18 April 1979, p. 2, § 2.

²⁰⁶ USSR, Reply dated 30 December 1969 to the UN Secretary-General regarding the preparation of the study requested in paragraph 2 of General Assembly Resolution 2444 (XXIII), annexed to Report of the Secretary-General on respect for human rights in armed conflicts, UN Doc. A/8052, 18 September 1970, Annex III, p. 120.

²⁰⁷ UK, Reply sent to the UN Secretary-General, reprinted in Report of the Secretary-General on napalm and other incendiary weapons and all aspects of their possible use, UN Doc. A/9207, rev.1 add.1, 11 October 1973.

²⁰⁸ US, Statement at the CCW Preparatory Conference, UN Doc. A/CONF.95/PREP.CONF/II/SR.28, 18 April 1979, pp. 2-3, §§ 5-6.

²⁰⁹ US, Marine Corps, Reference Material for Marine Corps Law of Warfare Course, *Army War College Selected Readings*, Advanced Course Law for the Joint Warfighter, Vol. II, Second edition, 1989, pp. 256.

III. Practice of International Organisations and Conferences

United Nations

208. In a resolution adopted in 1974, the UN General Assembly condemned “the use of napalm and other incendiary weapons in armed conflicts in circumstances where it may affect human beings”.²¹⁰

209. In a resolution adopted in 1976, the UN General Assembly invited the CDDH “to accelerate its consideration of the use of specific conventional weapons, including any which may be deemed to be excessively injurious . . . and to do its utmost to agree for humanitarian reasons on possible rules prohibiting or restricting the use of such weapons”.²¹¹

Other International Organisations

210. No practice was found.

International Conferences

211. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

212. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

213. No practice was found.

VI. Other Practice

214. In 1994, in a report on arms trade and violation of the IHL in Angola, Human Rights Watch stated that UN officials had accused the Angolan government of systematically bombing UNITA-controlled areas with incendiary bombs in 1992.²¹²

215. It has been reported that in the context of the conflict in Ethiopia, “the Ethiopian armed forces had used napalm and cluster bombs against separatists in Eritrea and Tigray”.²¹³

²¹⁰ UN General Assembly, Res. 3255 (XXIX), 9 December 1974, § 1.

²¹¹ UN General Assembly, Res. 31/64, 10 November 1976, § 2.

²¹² Human Rights Watch, *Angola: Arms Trade and Violations of the Laws of War Since the 1992 Elections*, New York, November 1994, p. 77.

²¹³ Thomas P. Ofcansky and LaVerle Berry (eds.), *Ethiopia: A Country Study*, Government Printing Office, Washington D.C., Fourth edition, 1993, p. 328.

BLINDING LASER WEAPONS

Blinding Laser Weapons (practice relating to Rule 86)	§§ 1–106
Laser weapons specifically designed to cause permanent blindness	§§ 1–90
Laser systems incidentally causing blindness	§§ 91–106

Blinding Laser Weapons**Laser weapons specifically designed to cause permanent blindness***I. Treaties and Other Instruments**Treaties***1. Article 1 of the 1995 Protocol IV to the CCW provides that:**

It is prohibited to employ laser weapons specifically designed, as their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision, that is to the naked eye or to the eye with corrective eyesight devices. The High Contracting Parties shall not transfer such weapons to any State or non-State entity.

2. Article 4 of the 1995 Protocol IV to the CCW specifies that “for the purpose of this protocol ‘permanent blindness’ means irreversible and uncorrectable loss of vision which is seriously disabling with no prospect of recovery. Serious disability is equivalent to visual acuity of less than 20/200 Snellen measured using both eyes.”

3. The 1995 Protocol IV to the CCW was adopted by consensus, although a number of States would have preferred a stronger text that included a prohibition of blinding as a method of warfare and indicated this orally during negotiations and at the final plenary session.¹ Discussions on Article 1, which refers to “laser weapons specifically designed as their sole combat function or as one of their combat functions”, turned on whether it was enough to indicate “specifically designed”, and one State, the UK, would have preferred “primarily designed”. The issue was that the systems concerned could easily be designed

¹ Austria, Australia, Belgium, Denmark, Ecuador, Finland, France, Germany, Iran, Mexico, Netherlands, Norway, Poland, Romania, Russia and Sweden.

to aim at both electro-optical systems and human eyes, and therefore alternative formulations were abandoned in favour of this explicit description that would cover dual use systems.

4. Upon acceptance of the 1995 Protocol IV to the CCW, Austria, Belgium, Canada, Greece, Ireland, Italy, Liechtenstein and South Africa stated that "the provisions of . . . Protocol [IV] which by their contents or nature may also be applied in peacetime, shall be observed at all times".²

5. Upon acceptance of the 1995 Protocol IV to the CCW, Australia stated that "the provisions of Protocol IV shall apply in all circumstances".³

6. Upon acceptance of the 1995 Protocol IV to the CCW, Germany declared that "it will apply the provisions of Protocol IV under all circumstances and at all times".⁴

7. Upon acceptance of the 1995 Protocol IV to the CCW, Israel declared that:

With reference to the scope of application defined in Article 1 of the Convention, the Government of the State of Israel will apply the provisions of the Protocol on Blinding Laser Weapons as well as the Convention and those annexed Protocols to which Israel has agreed to become bound, to all armed conflicts involving regular armed forces of States referred to in article 2 common to the Geneva Convention of 12 August 1949, as well as to all armed conflicts referred to in Article 3 common to the Geneva Convention of 12 August 1949.⁵

8. Upon acceptance of the 1995 Protocol IV to the CCW, the Netherlands declared that "the provisions of Protocol IV which, given their content or nature, can also be applied in peacetime must be observed in all circumstances".⁶

9. Upon acceptance of the 1995 Protocol IV to the CCW, Sweden stated that:

Sweden intends to apply the Protocol to all types of armed conflict . . .

Sweden has since long strived for explicit prohibition of the use of blinding lasers which would risk causing permanent blindness to soldiers. Such an effect, in Sweden's view is contrary to the principle of international law prohibiting means and methods of warfare which cause unnecessary suffering.⁷

10. Upon acceptance of the 1995 Protocol IV to the CCW, Switzerland stated that "the provisions of Protocol IV shall apply in all circumstances".⁸

² Austria, Declaration made upon acceptance of Protocol IV to the CCW, 27 July 1998; Belgium, Declaration made upon acceptance of Protocol IV to the CCW, 10 March 1999; Canada, Declaration made upon acceptance of Protocol IV to the CCW, 25 June 1998; Greece, Declaration made upon acceptance of Protocol IV to the CCW, 5 August 1997; Ireland, Declaration made upon acceptance of Protocol IV to the CCW, 27 March 1997; Italy, Declaration made upon acceptance of Protocol IV to the CCW, 13 January 1999; Liechtenstein, Declaration made upon acceptance of Protocol IV to the CCW, 19 November 1997; South Africa, Declaration made upon acceptance of Protocol IV to the CCW, 26 June 1998.

³ Australia, Declaration made upon acceptance of Protocol IV to the CCW, 22 August 1997.

⁴ Germany, Declaration made upon acceptance of Protocol IV to the CCW, 27 June 1997.

⁵ Israel, Declaration upon acceptance of Protocol IV to the CCW, 30 October 2000.

⁶ Netherlands, Declaration made upon acceptance of Protocol IV to the CCW, 25 March 1999.

⁷ Sweden, Declaration made upon acceptance of Protocol IV to the CCW, 15 January 1997.

⁸ Switzerland, Declaration made upon acceptance of Protocol IV to the CCW, 24 March 1998.

11. Upon acceptance of the 1995 Protocol IV to the CCW, the UK stated that “the application of its provisions will not be limited to the situations set out in Article 1 of the [1980 CCW]”.⁹

12. In 2001, States parties to the 1980 CCW decided to amend Article 1 of the Convention, governing its scope. This amendment states that:

1. This Convention and its annexed Protocols shall apply in the situations referred to in Article 2 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, including any situation described in paragraph 4 of Article I of Additional Protocol I to these Conventions.
2. This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Convention and its annexed Protocols shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature, as not being armed conflicts.
3. In case of armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply the prohibitions and restrictions of this Convention and its annexed Protocols.

Other Instruments

13. No practice was found.

II. National Practice

Military Manuals

14. Bosnia and Herzegovina’s Military Instructions states that “it is prohibited to use . . . ‘blinding’ weapons”.¹⁰

15. Canada’s LOAC Manual provides that “laser weapons specifically designed, as their sole combat function or one of their combat functions, to cause permanent blindness to unenhanced vision (i.e., the naked eye or to the eye with corrective eyesight devices) are prohibited”.¹¹

16. France’s LOAC Teaching Note includes blinding laser weapons in the list of weapons that “are totally prohibited by the law of armed conflict” because of their inhuman and indiscriminate character.¹²

17. France’s LOAC Manual incorporates the content of Article 1 of the 1995 Protocol IV to the CCW.¹³ It further includes blinding laser weapons in the list of weapons that “are totally prohibited by the law of armed conflict” because of their inhuman and indiscriminate character.¹⁴

18. Germany’s IHL Manual states that “new weapon developments may also violate a specific prohibition or general principles of international

⁹ UK, Declaration made upon acceptance of Protocol IV to the CCW, 11 February 1999.

¹⁰ Bosnia and Herzegovina, *Military Instructions* (1992), Item 11, § 1.

¹¹ Canada, *LOAC Manual* (1999), p. 5-3, § 28. ¹² France, *LOAC Teaching Note* (2000), p. 6.

¹³ France, *LOAC Manual* (2001), p. 80. ¹⁴ France, *LOAC Manual* (2001), p. 54.

humanitarian law, e.g. the use of laser weapons which are specifically intended to cause permanent blindness to the adversary".¹⁵

19. According to Israel's Manual on the Laws of War, the 1995 Protocol IV to the CCW "states that it is forbidden to employ weapons that use laser beams for the operational objective of causing blindness to an unprotected eye".¹⁶

20. The US Naval Handbook states that:

Directed energy devices, which include laser... are not proscribed by the law of armed conflict. Lasers may be employed as a range finder or for target acquisition with the possibility of ancillary injury to enemy personnel, or directly against combatants as an anti-personnel weapon. Their use does not violate the prohibition against the infliction of unnecessary suffering.¹⁷

21. The Annotated Supplement to the US Naval Handbook states that the position defined in the Naval Handbook

is no longer completely accurate with respect to antipersonnel weapons. There have been various efforts over the years to prohibit the use of lasers as antipersonnel weapons... [The 1995] Protocol IV [to the CCW] prohibits the use or transfer of laser weapons specifically designed to cause blindness to unenhanced vision.¹⁸

National Legislation

22. Austria's Law on the Prohibition of Blinding Laser Weapons states that "the acquisition, possession, development, transportation, production, trade and arrangement of acquisition and sale of blinding laser weapons and specific parts of them are prohibited". It punishes "whoever, and even if only by negligence, contravenes the prohibition of § 2 of this Federal Law".¹⁹

23. Under Hungary's Criminal Code as amended, employing "blinding laser weapons" as defined in the 1995 Protocol IV to the CCW is a war crime.²⁰

24. Luxembourg's Blinding Laser Weapons Act prohibits the use and the transfer of blinding laser weapons to another State or an entity other than a State.²¹

National Case-law

25. No practice was found.

Other National Practice

26. In 1997, in its response to the Joint Standing Committee On Treaties, the Australian government stated that:

¹⁵ Germany, *IHL Manual* (1996), § 302. ¹⁶ Israel, *Manual on the Laws of War* (1998), pp. 16–17.

¹⁷ US, *Naval Handbook* (1995), pp. 452–454, § 9.8.

¹⁸ US, *Annotated Supplement to the Naval Handbook* (1997), § 9.8, footnote 45.

¹⁹ Austria, *Law on the Prohibition of Blinding Laser Weapons* (1998), §§ 2(1) and 3.

²⁰ Hungary, *Criminal Code as amended* (1978), Section 160/A(3)(b)(4).

²¹ Luxembourg, *Blinding Laser Weapons Act* (1999), Article 3.

There is no evidence of any actual use of blinding laser weapons. Against this background, constructing and implementing arduous verification mechanisms was not regarded as a vital element of Protocol IV to the CCW. Should future developments indicate a need for verification and compliance measures, the Australian government would consider the options accordingly... In the face of the global community's overwhelming support for the achievements of Protocol IV and the absence of any consensus on a need to tighten its provisions, the Australian Government considers the text to be essentially adequate in dealing with the limited problem at hand. However, should persuasive evidence of any substantive weaknesses emerge, the Government will, through official review processes including the Review Conference in 2001, explore options for ensuring that effect is given to the intent behind Protocol IV.²²

27. In 1995, during a debate in the First Committee of the UN General Assembly, Burkina Faso called for "the halting of the use of laser weapons, particularly those which lead to irreversible blindness".²³

28. In 1995, during a debate in the First Committee of the UN General Assembly, Chile called the 1995 Protocol IV to the CCW imperfect.²⁴

29. At the First Review Conference of States Parties to the CCW (Second Session) in 1996, China made the following statement:

The Chinese delegation positively appraises the important results achieved by this conference. We adopted a new Protocol banning the use and transfer of blinding laser weapons which are specially designed to cause permanent blindness to naked eyes. This is the first time in human history that a kind of inhumane weapon is declared illegal and prohibited before it is actually used. This is significant.²⁵

30. In 1995, in reply to questions in parliament, the French President stated that "it should be stressed that France also subscribes to the objective of a prohibition on the deliberate blinding of persons as a method of warfare".²⁶

31. In 1995, the German government expressed its support for a prohibition on the use and production of blinding laser weapons.²⁷ In August 1995, in answer to questions in parliament, a Minister of State noted that the government knew of no German companies that were involved in the development or testing of blinding laser weapons. He added that blinding laser weapons were not part of NATO planning, that the German Department of Defence had never placed an

²² Australia, Joint Standing Committee On Treaties, Restrictions on the Use of Blinding Laser Weapons and Landmines, Government Response, Canberra, August 1997.

²³ Burkina Faso, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.8, 20 October 1995, p. 10.

²⁴ Chile, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.10, 26 October 1995, p. 22.

²⁵ China, Statement at the First Review Conference of States Parties to the CCW (Second Session), Geneva, 3 May 1996, p. 1.

²⁶ France, Reply to written questions from Members of Parliament, *SIRPA Actualité*, No. 30, 9 September 1995, quoted in Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, 1996, p. 291, footnote 80.

²⁷ Germany, Lower House of Parliament, Reply by the government to a question, Konferenz zur Überprüfung des VN-Waffenübereinkommens in Wien (25 September bis 13 Oktober 1995), *BT-Drucksache* 13/2998, 14 November 1995, p. 2.

order for the development or purchasing of such weapons and that it did not intend to do so in the future.²⁸

32. At the First Review Conference of States Parties to the CCW (First Session) in 1995, Germany stated that “while the review of Protocol II was the top priority of the Conference, other conventional weapons which were excessively injurious or might have indiscriminate effects should not be ignored”. Therefore Germany was strongly in favour of prohibiting blinding laser weapons.²⁹

33. At the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW in 2001, India stated that it “fully supported the idea of expanding the scope of the CCW to cover armed internal conflicts”.³⁰

34. The Report on the Practice of Indonesia states that Indonesia has prohibited the use of blinding laser weapons.³¹

35. In 1991, during a debate in the First Committee of the UN General Assembly, Ireland stated that it might support the proposal to ban blinding laser weapons.³²

36. According to the Report on the Practice of Jordan, Jordan does not use, manufacture or stockpile anti-personnel lasers and it does not plan to do so in the future.³³

37. In 1992, during a debate in the First Committee of the UN General Assembly, the Netherlands implied that universal adherence to the 1980 CCW would give it effect in internal conflicts.³⁴

38. A working paper submitted by the Netherlands to the First Review Conference of States Parties to the CCW (First Session) in 1995 evaluated existing customary law relating to the use of blinding lasers prior to the negotiation and adoption of Protocol IV. It stated that the “use of antipersonnel lasers whose sole purpose is to cause permanent blindness in military personnel is . . . illegal under the current laws of armed conflicts”. It noted, however, one possible exception to this under the then existing law, namely:

One exception might be cases in which blinding an opponent with a highly discriminate weapon such as a laser would be more humane than using a different method or means. This instance could occur if, for example, a sniper were to hide himself in a civilian environment. In this case other, more conventional methods of disabling

²⁸ Germany, Lower House of Parliament, Reply by a Minister of State to a written question, *BT-Drucksache* 13/2140, 11 August 1995, pp. 3–4.

²⁹ Germany, Statement at the First Review Conference of States Parties to the CCW (First Session), UN Doc. CCW/Conf.I/SR.2, 29 September 1995, p. 10, § 50.

³⁰ India, Statement of 24 September 2001 at the Third Preparatory Committee for the Second Review Conference of States Parties to the CCW, Geneva, 24–28 September 2001.

³¹ Report on the Practice of Indonesia, 1997, Chapter 3.4.

³² Ireland, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.31, 7 November 1991, p. 37.

³³ Report on the Practice of Jordan, 1997, Chapter 3.4.

³⁴ Netherlands, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 5 November 1992, p. 21.

the sniper can be expected to cause a large number of civilian casualties that could be prevented through the use of a laser.³⁵

39. In the Ad Hoc Committee on Conventional Weapons of the CDDH, Sweden stated that:

It might be thought that the mere suspicion that a new or improved type of weapon might cause greater suffering or have more indiscriminate effects than its predecessor would constitute a basis for serious negotiations on the prohibition of such weapons on humanitarian grounds. It might be argued, for instance, that because laser weapons, if used against personnel, were likely to cause permanent damage to, or a complete loss of eyesight, they should be considered unnecessarily cruel. His delegation was inclined to that opinion and accordingly urged the great Powers to desist from further work in that direction and to agree on rules prohibiting the use of such weapons. If that were not possible, because some countries might consider that laser weapons would prove to be of considerable military value, for instance, in combating attacking missiles, it might still prove possible to negotiate an agreement prohibiting their use against any target other than a military target. It was possible that laser weapons would never be used against personnel because of their relative complexity and high cost, but there could be no certainty of that. It would therefore be worth while prohibiting such use.³⁶

40. At the 25th International Conference of the Red Cross in 1986, Sweden and Switzerland submitted a draft resolution which stated that:

The development of laser technology for military use includes a risk that laser equipment of armed forces can be specifically used for antipersonnel purposes on the battlefield, such as causing permanent blindness of human beings, and that such use may be considered already prohibited under existing international law.³⁷

This wording was not retained, and the resolution adopted instead stated that the Conference noted "that some governments have voiced their concern about the development of new weapons technologies the use of which, in certain circumstances, could be prohibited under existing international law".³⁸

41. In 1987, during debates in the First Committee of the UN General Assembly, Sweden stated that "the use of blinding laser weapons designed to cause permanent blindness would be in clear contravention of fundamental principles of the law of warfare" and that "the International Community should consider a ban on the use of laser weapons for such purposes".³⁹

³⁵ Netherlands, Working paper submitted to the First Review Conference of States Parties to the CCW (First Session), UN Doc. CCW/CONF.I/MCIII/WP.1, 26 September 1995, p. 9.

³⁶ Sweden, Statement at the CDDH, *Official Records*, Vol. XVI, CDDH/IV/SR.33, 2 June 1976, p. 339, § 6.

³⁷ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Commission I, CI/2.6/PR3, Item 2.6, quoted in Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, 1996, p. 273.

³⁸ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VII, § B(6).

³⁹ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.3, 12 October 1987, p. 55; Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/42/PV.34, 12 October 1987, p. 6.

42. In 1991, during a debate in the First Committee of the UN General Assembly, Sweden stated that it would seek consensus on a resolution on the prohibition of blinding laser weapons at the International Conference of the Red Cross and Red Crescent to be held in 1991 in Budapest (but eventually cancelled).⁴⁰

43. In 1992, during a debate in the First Committee of the UN General Assembly, Sweden advocated prohibitions or restrictions on blinding laser weapons.⁴¹

44. In 1994, in a working paper submitted to the Group of Governmental Experts to prepare the First Review Conference of States Parties to the CCW, Sweden proposed the following provision: "It is prohibited to use laser beams as an anti-personnel method of warfare, with the intention or expected result of seriously damaging the eyesight of persons."⁴²

45. In 1995, during a debate in the First Committee of the UN General Assembly, Sweden stated that for ten years it had been calling for a ban on blinding laser weapons.⁴³

46. In 1987, during a debate in the First Committee of the UN General Assembly, the USSR stated that it had no objection to a ban on anti-personnel laser weapons.⁴⁴

47. In 1998, in a letter to the ICRC President, the UK Secretary of Defence stressed that "the UK's Armed Forces have never planned to use weapons intended to cause permanent blindness. The capabilities of weapons systems under development which employ lasers, and the concepts of operation for their use, are already consistent with the [1995 Protocol IV to the CCW]."⁴⁵

48. Prior to the adoption of the 1995 Protocol IV to the CCW, the US was developing a number of laser systems intended to blind either personnel and/or optical systems. An evaluation in 1988 by the Office of the Judge Advocate General concluded that such weapons would not cause unnecessary suffering and therefore would not be illegal.⁴⁶ During the meetings of governmental experts preparatory to the Review Conference, the US opposed the adoption of a Protocol on the subject. The system that was closest to deployment was the "Laser Countermeasure System" (LCMS also referred to as the PLQ-5),

⁴⁰ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/46/PV.8, 18 October 1991, p. 28.

⁴¹ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/47/PV.26, 9 November 1992, p. 19.

⁴² Sweden, Working paper submitted to the Group of Government Experts to prepare the First Review Conference of States Parties to the CCW, UN Doc. CCW/CONF.I/GE/CRP.3, 16 May 1994.

⁴³ Sweden, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.17, 9 October 1995, p. 2.

⁴⁴ USSR, Statement before the UN General Assembly, UN Doc. A/C.1/42/PV.5, 14 October 1987, p. 34-35.

⁴⁵ UK, Letter from the Secretary of Defence to the ICRC President, 23 March 1998.

⁴⁶ US, Department of the Army, Office of the Judge Advocate General, Memorandum on Use of Lasers as Antipersonnel Weapons, Doc. DA PAM 27-50-191, 29 September 1988, reprinted in *The Army Lawyer*, November 1988, p. 3.

mounted on an M16 rifle, for which the army hoped to have government approval for manufacture in June 1995. This system was described as having "the primary objective to detect, jam and suppress threat fire control, optical and electro-optical systems".⁴⁷ It certainly had the capacity to blind at considerable distances and its use for this purpose was not excluded.⁴⁸ Congress decided to delay its decision on whether to give approval for manufacture.⁴⁹ As a result of pressure from a number of Congressmen,⁵⁰ the Department of Defense reconsidered its policy. In September 1995, the Secretary of Defense announced that "the Department of Defense prohibits the use of lasers specifically designed to cause permanent blindness of unenhanced vision and supports negotiations prohibiting the use of such weapons".⁵¹ A Department of Defense News Briefing in October 1995 indicated that "with lasers, we have an opportunity to stop a proliferation of a new and dangerous weapon, we hope. We are now engaged in discussions at the Conference on Conventional Weapons in Vienna to do just that. Secretary Perry felt strongly that we should take a lead role in that by swearing off the development and use of lasers intentionally designed to blind people."⁵²

49. A controversial analysis of the 1995 Protocol IV to the CCW by the Judge Advocate General of the US Department of the Army in 1995 stated that the Protocol was only applicable in international armed conflict, and not in operations such as "non-combatant evacuation, peacekeeping or counter terrorism missions, or in internal conflicts". It also stated that the "State Parties that negotiated and adopted (by consensus) the laser Protocol did not conclude that use of a laser to blind an enemy combatant causes unnecessary suffering, or that use of a laser to blind an individual enemy combatant was illegal".⁵³ Further to concern expressed at this interpretation by a US Senator,⁵⁴ the Secretary of Defense replied as follows:

Regretting any confusion created by the internal November 1995 memo, I would like to take this opportunity to reaffirm the Department's policy. As you know, it is US policy to prohibit the use of weapons specifically designed to permanently blind... It was not the intent of the States Parties to Protocol IV to prohibit only

⁴⁷ Lockheed-Sanders Fact Sheet, Laser Countermeasure System (LCMS), Doc. AN/PLQ-5, 1994.

⁴⁸ US, Department of the Army, Office of the Judge Advocate General, Memorandum on the subject AN/PLQ-5 Laser Countermeasure System, *Law of War Review*, 16 September 1994.

⁴⁹ Human Rights Watch Arms Project, *US Blinding Laser Weapons*, 21 May 1995, New York/Washington D.C., Vol. 7, No. 5, pp. 2 and 9; *Inside the Pentagon*, 13 July 1995, p. 9.

⁵⁰ US, Letter to the Secretary of Defense from 48 US Senators and Congressmen, 31 July 1995.

⁵¹ US, Defenselink News Release No. 482-95, 1 September 1995. (The US Secretary of Defense repeated the same statement on 17 January 1997, SECDEF Memo U00888/97, DoD Policy on Blinding Lasers.)

⁵² US, Defenselink Transcript, DoD News Briefing, Mr. Kenneth H. Bacon, ASTD (PA), 12 October 1995.

⁵³ US, Department of the Army, Office of the Judge Advocate General, Memorandum on Effect of Laser Protocol on U.S. Army Programs, 1 November 1995, *US Airforce Operations Law Deskbook*, Vol. II, 1996, p. IX-14, §§ 4(d) and 5.

⁵⁴ US, Letter from Senator Patrick Leahy to the Secretary of Defense, 18 April 1996.

mass blinding . . . As you note, there is no prohibition in CCW on research, development or production. Nevertheless, the Department has no intent to spend money developing weapons we are prohibited from using. We certainly would not want to encourage other countries to loosely interpret the treaty's prohibitions, by implying that we want to develop or produce weapons we are prohibited from using . . . On the question of individual blinding, your interpretation is correct. Under both CCW and DoD policy, laser weapons designed specifically to cause permanent blindness may not be used against an individual enemy combatant.⁵⁵

50. On 5 October 1995, namely after the adoption of new policy and during the final negotiations of Protocol IV to the CCW, the US army cancelled the LCMS programme.⁵⁶

51. During the final plenary session of the First Review Conference of States Parties to the CCW (Second Session) in 1996, the US stated that it "supported expansion of the scope of Protocol IV and it is the policy of the US to refrain from the use of laser weapons prohibited by Protocol IV at all times".⁵⁷

52. The guidelines on blinding laser weapons issued in 1997 by the US Secretary of Defense state that:

The Department of Defense prohibits the use of lasers specifically designed to cause permanent blindness and supports negotiations to prohibit the use of such weapons. However, laser systems are absolutely vital to our modern military. Among other things, they are currently used for detection, targeting, range-finding, communications and target destruction. They provide a critical technological edge to US forces and allow our forces to fight, win and survive on an increasingly lethal battlefield. In addition, lasers provide significant humanitarian benefits. They allow weapon systems to be increasingly discriminate, thereby reducing collateral damage to civilian lives and property. The Department of Defense recognizes that accidental or incidental eye injuries may occur on the battlefield as the result of the use of lasers not specifically designed to cause permanent blindness. Therefore, we continue to strive, through training and doctrine, to minimize these injuries.⁵⁸

53. In 1997, in his message to the US Senate transmitting the 1995 Protocol IV to the CCW for consent to ratification, the US President stated that "these blinding lasers are not needed by our military forces. They are potential weapons of the future, and the US is committed to preventing their emergence and use." Regarding the scope of the Protocol, whilst recognising that it was officially that of international armed conflicts, the same message indicated that

⁵⁵ US, Letter from the Secretary of Defence to Senator Patrick Leahy, 8 May 1996.

⁵⁶ Bradley Graham, "Army Laser Weapon Becomes First Casualty of New Policy", *Washington Post*, 13 October 1995; "Army finalizing LCMS termination plan", *Inside the Pentagon*, 19 October 1995.

⁵⁷ US, Statement at the First Review Conference of States Parties to the CCW (Second Session), 3 May 1996, reprinted in W. Hays Parks, "Memorandum of Law: Travaux préparatoires and legal analysis of blinding laser weapons protocol", *The Army Lawyer*, June 1997, p. 41.

⁵⁸ US, Secretary of Defence, DOD Policy on Blinding Lasers, SECDEF Memo U00888/97, 17 January 1997, reprinted in *Annotated Supplement to the Naval Handbook* (1997), § 9.8, footnote 45.

“it is US policy to apply the Protocol to all such conflicts, however they may be characterized, and in peacetime”.⁵⁹

54. According to the Report on the Practice of Zimbabwe, Zimbabwe is opposed to the use of laser weapons.⁶⁰

III. Practice of International Organisations and Conferences

United Nations

55. In several resolutions adopted between 1995 and 1999, the UN General Assembly urged all States that had not yet done so to become parties to the 1980 CCW and its Protocols. The General Assembly expressed its satisfaction that the 1995 Protocol IV to the CCW had entered into force on July 1998 and recommended that States express their consent to be bound by the Protocol, with a view to widest possible adherence to this instrument at an early date.⁶¹

56. During the negotiation of Protocol IV to the CCW in Vienna in 1995, the UNDP representative stated that he was speaking “on behalf of the International Initiative Against Avoidable Disability promoted by UNDP, WHO and UNICEF”. He held that “the laser weapons had now been designed specially to blind personnel” and believed that “the use of such a weapon is abhorrent to the conscience of humanity”.⁶²

Other International Organisations

57. In a resolution on anti-personnel mines adopted in 1996, the ACP-EU Joint Assembly called upon the European Council to adopt a new joint action before the final session of the CCW Review Conference, stipulating that all EU members should ratify the 1995 Protocol IV to the CCW, ban the development and production of blinding laser weapons and proceed to the destruction of the existing stocks of blinding laser weapons.⁶³

58. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe emphasised that it appreciated the ICRC’s “diplomatic efforts to secure the banning of certain particularly cruel weapons, such as . . . laser weapons that blind victims. In this connection, it welcomes the recent adoption of the [1995 Protocol IV to the CCW].”⁶⁴ The Parliamentary Assembly also invited:

⁵⁹ US, Message from the US President transmitting the Protocols to the CCW to the Senate for consent to ratification, Treaty Doc. 105-1, Washington D.C., 1997.

⁶⁰ Report on the Practice of Zimbabwe, 1998, Chapter 3.1.

⁶¹ UN General Assembly, Res. 50/74, 12 December 1995, preamble and §§ 3 and 6; Res. 51/49, 10 December 1996, preamble and §§ 3 and 7; Res. 52/42, 9 December 1997, preamble and §§ 2 and 4; Res. 53/81, 4 December 1998, preamble and §§ 1 and 5; Res. 54/58, 1 December 1999, preamble and §§ I(1), II(1) and III(3).

⁶² UNDP, Statement at the First Review Conference of States Parties to the CCW (First Session), UN Doc. CCW/CONF.I/SR5, 27 September 1995, pp. 10–11, §§ 49 and 50.

⁶³ ACP-EU, Joint Assembly, Resolution on anti-personnel mines, 22 March 1996, *Official Journal of the European Community*, No. C 254, 1996, Item 4, § 2(c), (e) and (f).

⁶⁴ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 6.

in particular, the governments of the member states of the Council of Europe, of the states whose parliaments enjoy or have applied for special guest status with the Assembly, of the states whose parliaments enjoy observer status, namely Israel, and of all other states to:

- ...
- b. ratify, if they have not done so, ... the United Nations Convention of 1980 on the prohibitions or restrictions on the use of certain conventional weapons [1980 CCW] and its protocols ...
 - j. promote extension of the aforesaid United Nations Convention of 1980 to non-international armed conflicts, and inclusion in its provisions of effective procedures for verification and regular inspection.⁶⁵

59. In a resolution adopted in 1995, the European Parliament:

G. welcomed the agreement on a Protocol to the Convention on Certain Conventional Weapons to restrict the use and transfer of blinding laser weapons, but regretted that the Protocol fails to ban the production of blinding laser weapons and provides loopholes for the production, use and transfer of some blinding laser weapons, including those that target optical systems;

H. believed that deliberate blinding as a method of warfare is abhorrent and in contravention of established custom, the principles of humanity and the dictates of the public conscience;

I. believing that deliberate blinding as a method of warfare is abhorrent and in contravention of established custom, the principles of humanity and the dictates of the public conscience ...

- 2. Urged Member States to ratify the laser weapon Protocol without delays or reservations;
- 3. Welcomed the decision to convene a follow-up conference ... and calls on all Member States to use this opportunity to promote a comprehensive ban on ... all blinding laser weapons.⁶⁶

60. In 1995, the EU Council of Ministers adopted a common position stating that the member States shall "actively promote" the adoption of a Protocol on blinding laser weapons.⁶⁷

61. In 1995, in answer to a question from the European Parliament, the European Commission stated that it was "fully associated with the common position of the Member States".⁶⁸

62. In 1995, in answer to a question from the European Parliament, the Council of Ministers explained the EU common position and stated that

⁶⁵ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(b) and (j).

⁶⁶ European Parliament, Resolution on the failure of the international conference on anti-personnel mines and laser weapons, 29 June 1995.

⁶⁷ EU, Council of Ministers, Common Position concerning blinding laser weapons defined by the Council on the basis of Article J.2 of the Treaty on European Union, concerning blinding laser weapons, 18 September 1995, Doc. 95/379/CFSP, *Official Journal of the European Community*, No. L 227, 1995, p. 3.

⁶⁸ European Commission, Answer to Written Question E-2490/95 from the European Parliament, *Official Journal of the European Community*, No. C 340, 1995, Item 82, 9 October 1995.

"certain of the Union's partners have adopted similar positions to that of the Union".⁶⁹

63. In a resolution adopted in 1995, the OAU Council of Ministers urged all member States to accede to the 1980 CCW and expressed its support for the adoption of "a Protocol banning laser blinding weapons".⁷⁰

64. In a resolution adopted in 1996, the OAU Council of Ministers expressed "satisfaction with the adoption of a Protocol banning blinding laser weapons by the Review Conference" and called upon "all Member States to consider adhering to it".⁷¹

65. In a resolution adopted in 1996 on respect for IHL, the OAS General Assembly urged member States to accede to the 1980 CCW.⁷²

International Conferences

66. The expert report prepared for the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects held in Lucerne in 1974 noted that "use of lasers as anti-personnel devices is unlikely due to low cost-effectiveness for this purpose. Laser could, of course, have antipersonnel effects in addition to primary antimatériel purposes".⁷³

67. A report on the discussion concerning laser weapons which took place at the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects held in Lucerne in 1974 states that:

261. Experts noted that lasers had already found military application in certain range-finding, guidance and communication systems. The opinion was expressed by one expert that certain laser weapons were feasible and might appear rather soon. Other experts, however, stated their doubts about the military practicability of such weapons, citing the high level of complexity and running costs likely to be involved if anything but the most specialized applications were envisaged. With regard to such specialized applications, there was some discussion of the potential of laser radiation weapons in an anti-aircraft or anti-missile role; the view was expressed that, having regard to energy requirements and to the transmissivity of the atmosphere at different altitudes to possible wavelengths of laser radiation, laser weapons of this type, if they were feasible at all, would probably only be usable from large aircraft.

262. With regard to the effects on the human body of laser radiation, two types of likely injury were cited. The first was burn injury. The second was ocular injury, already a well recognized hazard to users of existing laser devices, and one which stems from the natural capacity of the ocular lens to focus incident light, thereby

⁶⁹ EU, Council of Ministers, Answer to Written Question E2489/95 from the European Parliament, *Official Journal of the European Community*, No. C 56, 1996, Item 38, 21 December 1995.

⁷⁰ OAU, Council of Ministers, Res. 1593 (LXII), 21–23 June 1995, §§ 3 and 7.

⁷¹ OAU, Council of Ministers, Res. 1628 (LXIII), 26–28 February 1996, § 9.

⁷² OAS, General Assembly, Res. 1408 (XXVI-O/96), 7 June 1996, § 1.

⁷³ Weapons that may Cause Unnecessary Suffering or have Indiscriminate Effects, Report on the Work of Experts, ICRC, Geneva, 1973, p. 69, § 240.

concentrating its power, and hence its effect, on the retina. The resultant damage may lead to partial or total blindness. One expert observed that the degree of laser damage to human tissue depended on the wavelength of the incident radiation, and he stated that the most powerful forms of laser currently available did not in fact operate at the most damaging wavelengths.

...

Evaluation

277. Some experts were of the opinion that, because the effects of potential future weapons could have important humanitarian implications, it was necessary to keep a close watch in order to develop any prohibitions or limitations that might seem necessary before the weapon in question had become widely accepted.⁷⁴

68. At the Conference of Government Experts on the Use of Certain Conventional Weapons held in Lugano in 1976, one expert stated that "laser weapons would appear at the beginning of the eighties, and this expectation would necessitate a watch to be kept on the military use of the laser beam, especially in an anti-personnel capacity, so as to prevent its causing a greater incidence of casualties among combatants".⁷⁵

69. At the Conference of Government Experts on the Use of Certain Conventional Weapons held in Lugano in 1976, one expert read out paragraph 277 of the report of the Conference of Government Experts on Weapons which may Cause Unnecessary Suffering or have Indiscriminate Effects held in Lucerne in 1974 (see *supra*) and pointed out that it was a text with which most experts could agree. He further stated that:

In view of the fact that the laser beam could cause blindness, its use as an anti-personnel weapon would have very grave consequences even if the combatants aimed at had protective equipment. To completely forbid its use against people was therefore desirable and also possible, but its unqualified prohibition was impossible, as it might be extremely useful against strategically important targets.⁷⁶

70. In a resolution adopted in 1995 on the challenges posed by calamities arising from armed conflict, the 93rd Inter-Parliamentary Conference called on States "to ban blinding laser weapons in an additional Protocol".⁷⁷

71. At the First Review Conference of States Parties to the CCW in 1995, a consensus emerged during the negotiations that blinding laser weapons must not be used in any armed conflict.⁷⁸ A number of States supported the Austrian

⁷⁴ Conference of Government Experts on the Use of Certain Conventional Weapons, Lucerne, 24 September–18 October 1974, Report, ICRC, Geneva, 1975, §§ 261–262 and 277.

⁷⁵ Conference of Government Experts on the Use of Certain Conventional Weapons, Second Session, Lugano, 28 January–26 February 1976, Report, ICRC, Geneva, 1976, p. 19, § 54.

⁷⁶ Conference of Government Experts on the Use of Certain Conventional Weapons, Second Session, Lugano, 28 January–26 February 1976, Report, ICRC, Geneva, 1976, pp. 80–81, § 5.

⁷⁷ 93rd Inter-Parliamentary Conference, Madrid, 27 March–1 April 1995, Resolution on the international community in the face of the challenges posed by calamities arising from armed conflicts and by natural or man-made disasters: the need for a coherent and effective response through political and humanitarian assistance means and mechanisms adapted to the situation, § 16(e).

⁷⁸ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, p. 29.

proposal that would have applied the Protocol "in all circumstances including armed conflict and times of peace".⁷⁹ The proposal retained was that the scope of the Protocol should be the same as that agreed on for the new 1980 Protocol II to the CCW also in the process of being negotiated in another Committee.⁸⁰ The lack of agreement on the 1996 Amended Protocol II to the CCW (for reasons other than its scope) meant that that Protocol could not be adopted at the Vienna session of the Conference. States decided to go ahead and adopt the Protocol IV nonetheless, even though the extension of the scope of application to internal armed conflict could not be included. At the final session of the First Review Conference, in May 1996, the suggestion was made to return to Protocol IV and add the same scope of application clause that was finally agreed on for Protocol II. All States were in favour, with the sole exception of one State, which declared that it opposed this alteration purely because of its principled opposition to extending IHL instruments to non-international armed conflict. At the same time, however, that State declared that it was opposed to the production and use of blinding laser weapons and that it had no intention of using these weapons in any type of conflict.⁸¹

72. The 26th International Conference of the Red Cross and Red Crescent in 1996 welcomed the adoption of the 1995 Protocol IV to the CCW "as an important step in the development of international humanitarian law" and emphasised "the prohibition on the use or transfer of laser weapons specifically designed to cause permanent blindness". The Conference further welcomed "the general agreement achieved at the Review Conference that the scope of application of this Protocol should apply not only to international armed conflicts".⁸²

73. The Final Declaration of the First Review Conference of States Parties to the CCW (Second Session) in 1996 contained the following statement in relation to blinding laser weapons:

Welcoming the adoption of Protocol IV on Blinding Laser Weapons as a codification and progressive development of the rules of international law,
Noting that a number of issues could be considered in the future, for example at a review conference, taking into account scientific and technological developments, including the questions of proliferation on the production, stockpiling and transfer of blinding laser weapons and the question of compliance with regard to such weapons, as well as other pertinent issues, such as the definition of "permanent blindness", including the concept of field of vision.

⁷⁹ First Review Conference of States Parties to the CCW (First Session), UN Doc. CCW/CONF.I/MCIII/WP.2, 26 September 1995, Article 1(2).

⁸⁰ First Review Conference of States Parties to the CCW (First Session), UN Doc. CCW/CONF.I/4, 12 October 1995, § 5. (The report of the Main Committee (III) stated that "during the course of negotiations on the draft text, the Committee decided to leave the question of scope, as referred to in Article 1, to the decision of the Drafting Committee of the Review Conference, pending the agreed text on scope negotiated in Main Committee II".)

⁸¹ ICRC archive document.

⁸² 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § H(c), (d) and (f).

The High Contracting Parties solemnly declare:
 Their satisfaction at the adoption of the Protocol on Blinding Laser Weapons (Protocol IV) to the Convention,
 Their conviction of the importance of the earliest possible entry into force of Protocol IV,
 Their desire that all States, pending the entry into force, respect and ensure respect of the substantive provisions of Protocol IV to the fullest extent possible,
 Their recognition of the need for achieving the total prohibition of blinding laser weapons, the use and transfer of which are prohibited in Protocol IV,
 Their wish to keep the issue of the blinding effects related to the use of laser systems under consideration.⁸³

74. In the Final Declaration of the Second Review Conference of the CCW in 2001, States Parties expressed their determination "to encourage all States to become Parties to the Protocol [on blinding laser weapons] as soon as possible". States Parties also reaffirmed "the recognition by the First Review Conference of the need for the total prohibition of blinding laser weapons, the use and transfer of which are prohibited in Protocol IV".⁸⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

75. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

76. Research, analysis and discussion on blinding laser weapons that helped lead to the adoption of the 1995 Protocol IV to the CCW took place largely in the context of a series of expert meetings on this subject convened by the ICRC.⁸⁵

77. At the Group of Governmental Experts to prepare the First Review Conference of States Parties to the CCW in 1994, the ICRC made a proposal to the effect that:

1. Blinding as a method of warfare is prohibited.
2. Laser weapons may not be used against the eyesight of persons.⁸⁶

78. In 1994, in the First Committee of the UN General Assembly, the ICRC addressed the issue of blinding laser weapons in the following terms:

⁸³ First Review Conference of States Parties to the CCW (Second Session), UN Doc. CCW/CONF.I/16, Final Declaration, 22 April to 3 May 1996, §§ 14–20.

⁸⁴ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, UN Doc. CCW/CONF.II/2, Final Declaration, 25 January 2002, p. 11.

⁸⁵ Louise Doswald-Beck (ed.), *Blinding Weapons: Reports of the meetings of experts convened by the International Committee of the Red Cross on Battlefield Laser Weapons 1989–1991*, ICRC, Geneva, 1993, 371 pp.

⁸⁶ ICRC, Working paper submitted to the Group of Government Experts to prepare the First Review Conference of States Parties to the CCW, UN Doc. CCW/CONF.I/GE/CRP.28, 12 August 1994.

The ICRC is very pleased that a large number of States have either formally or informally indicated their support for a Protocol on the subject of blinding weapons... This preventive step will save the world from the horrifying prospect of large numbers of persons being suddenly blinded for life by certain laser weapons that could soon be both inexpensive and easily available.⁸⁷

79. In 1996, at the close of the session of the First Review Conference of States Parties to the CCW that adopted Protocol IV, the head of the ICRC delegation made the following formal statement:

The adoption of the Protocol on blinding laser weapons represents a victory for civilization over barbarity. Above and beyond the text of the Protocol, what we will remember about the decision taken today, and what the people of the world will understand, is that States do not accept the idea that men might deliberately blind other men, in any circumstances whatsoever.⁸⁸

80. In 1995, in the First Committee of the UN General Assembly, the ICRC made the following statement:

The adoption, on 13 October 1995, of Protocol IV, on blinding laser weapons, is a major achievement. To our knowledge, this is the first time since 1868 that a weapon has been prohibited before it could be used on the battlefield. Thus, humanity has been spared the horror that such blinding weapons would have created. Quite apart from the actual wording of the instrument, the effect of its adoption is a strong message that States will not tolerate the deliberate blinding of people in any circumstances. Thus, it is a triumph of civilization over barbarity. It is also a major achievement that this Protocol includes a prohibition on the transfer of blinding laser weapons. The ICRC sincerely hopes that States will adhere to it as quickly as possible and will take all appropriate measures to ensure respect for its provisions.⁸⁹

VI. Other Practice

81. *Jane's Defence Weekly* and other journalists alleged that the UK had deployed prototypes of blinding laser weapons in the war in the South Atlantic.⁹⁰

82. According to the Human Rights Watch Arms Project, "two Stingray prototypes were deployed [by the US], but not used, in the Gulf War".⁹¹

⁸⁷ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/49/PV.10, 24 October 1994, p. 11.

⁸⁸ Louise Doswald-Beck, "New Protocol on Blinding Laser Weapons", *IRRC*, No. 312, 1996, p. 297.

⁸⁹ ICRC, Statement before the First Committee of the UN General Assembly, UN Doc. A/C.1/50/PV.11, 26 October 1995, pp. 25–26.

⁹⁰ Simon O'Dwyer-Russell, "Navy's top secret laser was tried out in Falklands", *Sunday Telegraph*, 7 January 1990; Fermin Gallego and Mark Daly, "Laser Weapons in Royal Navy Service", *Jane's Defence Weekly*, 13 January 1990, pp. 48–49.

⁹¹ Human Rights Watch Arms Project, *US Blinding Laser Weapons*, Washington D.C., May 1995, p. 1.

83. Prior to the adoption of Protocol IV, there were a number of programmes developing blinding laser weapons. The extent of these is not known, not all of them having been confirmed. Some research on the extent of such developments was undertaken by the Human Rights Watch Arms Project, which published a report in 1995 in which it indicated that such weapons were being researched or developed in China, France, Germany, Israel, Russia, UK, Ukraine and US.⁹²

84. There were reports that a Chinese company NORINCO had developed a portable blinding laser weapon that was displayed in March 1995 at defence exhibitions in Manila and Abu Dhabi. According to *Jane's Intelligence Review*, the Chinese ZM-87 was the first openly offensive laser to be marketed.⁹³ In October 1995, China ratified the 1995 Protocol IV to the CCW.

85. In a public statement in April 1995, the WMA stated that "the development of antipersonnel lasers as blinding weapons represent[s] one of the biggest public health issues facing the world today. The World Medical Association fully supports the ICRC in its efforts to combat this growing menace."⁹⁴

86. In two press releases in 1995, Human Rights Watch condemned the use of blinding laser weapons. In the first, it stated that "blinding laser weapons are cruel and inhumane weapons that would cause unnecessary suffering to countless soldiers and possibly civilians".⁹⁵ In the second, it emphasised its belief that "blinding laser weapons are an excessively cruel weapon, and that the use of blinding laser weapons is repugnant to the public conscience and should therefore be banned".⁹⁶ These statements were based on a Human Rights Watch report, "Blinding Laser Weapons, the Need to Ban a Cruel and Inhuman Weapon", in which it stated that:

Given the long-term effects on a country of permanently blinding large numbers of soldiers, the intentional blinding by lasers or any other weapon cannot justify whatever minimal military utility might be gained in the short run. Tactical lasers, including weapons that are often referred to as anti-material or anti-sensor such as LCMS, have the capacity for directly causing blindness and in some cases are intended to cause blindness. This characteristic renders them essentially antipersonnel and requires that they be banned.⁹⁷

⁹² Human Rights Watch Arms Project, *Blinding Laser Weapons: The Need to Ban a Cruel and Inhumane Weapon*, Washington, D.C., September 1995; Nick Cook, "Chinese laser 'blinder' weapon for export", *Jane's Defence Weekly*, 27 May 1995.

⁹³ Sebastian Gorka and Richard Sullivan, "Assuming the offensive: The laser threat on the 21st century battlefield", *Jane's Intelligence Review*, February 1998, pp. 45-46; see also *Jane's Defence Weekly*, 27 May 1995, p. 3 and *International Defense Review*, May 1995, pp. 19-21.

⁹⁴ WMA, Public statement, 24 April 1995.

⁹⁵ Human Rights Watch Arms Project, Press Release, 24 September 1995.

⁹⁶ Human Rights Watch Arms Project, Press Release, 21 May 1995.

⁹⁷ Human Rights Watch Arms Project, *Blinding Laser Weapons: the Need to Ban a Cruel and Inhumane Weapon*, Vol. 7, No. 1, Washington, D.C., September 1995.

87. At the First Review Conference of States Parties to the CCW in 1995, the World Blind Union supported a ban on blinding laser weapons.⁹⁸

88. At the First Review Conference of States Parties to the CCW in 1995, the World Veterans Association supported a ban on blinding laser weapons.⁹⁹

89. At the First Review Conference of States Parties to the CCW in 1995, the Cristoffel-Blindenmission of Germany stated that it considered laser weapons to be an “inhumane weapon system”. It therefore made an urgent appeal:

to ban any use of laser beams against other people within international conflicts and civil wars; to forbid the development, production, storage, trading and use of such weapons; and to provide for implementation and verification of the Protocol, including sanctions if necessary.¹⁰⁰

90. In a resolution adopted in 1995, the Blinded Veterans Association of the US stated that:

Laser weapons with the potential to blind are cruel and inhumane weapons, and we as a society must not accept blinding as a method of warfare... The Blinded Veterans Association actively supports efforts to seek an international prohibition on the use of lasers for the purpose of blinding as a method of warfare.¹⁰¹

Laser systems incidentally causing blindness

I. Treaties and Other Instruments

Treaties

91. Articles 2 and 3 of the 1995 Protocol IV to the CCW provide that:

In the employment of laser systems, the High Contracting Parties shall take all feasible precautions to avoid the incidence of permanent blindness to unenhanced vision. Such precautions shall include training of their armed forces and other practical measures.

Blinding as an incidental or collateral effect of the legitimate military employment of laser systems, including laser systems used against optical equipment, is not covered by the prohibition of this Protocol.

Other Instruments

92. No practice was found.

⁹⁸ World Blind Union, Statement at the First Review Conference of States Parties to the CCW (First Session), Vienna, 28 September 1995, UN Doc. CCW/CONF.I/SR.6, 5 October 1995, p. 12, § 56; see also Louise Doswald-Beck, “New Protocol on Blinding Laser Weapons”, *IRRC*, No. 312, 1996, p. 276.

⁹⁹ World Veterans Federation, Statement at the First Review Conference of States Parties to the CCW (First Session), Vienna, 28 September 1995, UN Doc. CCW/CONF.I/SR.6, 5 October 1995, p. 17, § 82; see also Louise Doswald-Beck, “New Protocol on Blinding Laser Weapons”, *IRRC*, No. 312, 1996, p. 276.

¹⁰⁰ Cristoffel-Blindenmission, Statement at the First Review Conference of States Parties to the CCW (First Session), Vienna, 28 September 1995, UN Doc. CCW/CONF.I/SR.6, 5 October 1995, p. 11, § 50.

¹⁰¹ Blinded Veterans Association, National Convention, Resolution 26-95, 26 August 1995.

II. National Practice

Military Manuals

93. Canada's LOAC Manual states that:

Blinding as an incidental or collateral effect of the legitimate military employment of laser systems is not covered by the prohibition. For example, the legitimate use of a laser targeting system in a tank is lawful even if one of its collateral effects may be to cause blindness. However, such a laser targeting system could not be deliberately used to blind enemy combatants.¹⁰²

94. Israel's Manual on the Laws of War states that "in the employment of arms applying laser technology for purposes other than causing blindness (i.e. for ranging purposes), it is incumbent on the states to take all precautionary measures to prevent unintentional blinding".¹⁰³

95. The Annotated Supplement to the US Naval Handbook states that "while blinding as an incidental effect of 'legitimate military employment' of range finding or target acquisition lasers is not prohibited by [the 1995 Protocol IV to the CCW], parties thereto are obligated 'to take all feasible precautions' to avoid such injuries".¹⁰⁴

National Legislation

96. No practice was found.

National Case-law

97. No practice was found.

Other National Practice

98. In 1997, in its response to the Joint Standing Committee On Treaties, the Australian government stated that:

Efforts are under way to increase the safety of these [laser] systems. For example, the Defence Department's Defence Science and Technology Organization has a program aimed at making laser range-finders safer through the development and use of lasers which can be operated in the eye-safe region of the electromagnetic spectrum.¹⁰⁵

99. In 1998, in a letter to the ICRC President, the UK Secretary of Defence stressed that "the capabilities of weapons systems under development which employ lasers, and the concepts of operation for their use, are already consistent with the [1995 Protocol IV to the CCW]".¹⁰⁶

¹⁰² Canada, *LOAC Manual* (1999), p. 5-3, § 30.

¹⁰³ Israel, *Manual on the Laws of War* (1998), p. 17.

¹⁰⁴ US, *Annotated Supplement to the Naval Handbook* (1997), § 9.8, footnote 45.

¹⁰⁵ Australia, Joint Standing Committee On Treaties, *Restrictions on the Use of Blinding Laser Weapons and Landmines, Government Response*, Canberra, August 1997.

¹⁰⁶ UK, Letter from the Secretary of Defence to the ICRC President, 23 March 1998.

100. In 1995, in a US Department of Defense policy statement on blinding lasers, the need for some restrictions, aside from the prohibition of deliberate blinding, was explained in the following fashion:

Laser systems are absolutely vital to our modern military. Among other things, they are currently used for detection, targeting, range-finding, communications and target destruction. They provide a critical technological edge to US forces and allow our forces to fight, win and survive on an increasingly lethal battlefield. In addition, lasers provide significant humanitarian benefits. They allow weapons systems to be increasingly discriminate, thereby reducing collateral damage to civilian lives and property. The Department of Defense recognizes that accidental or incidental eye injuries may occur on the battlefield as the result of the use of legitimate laser systems. Therefore we continue to strive, through training and doctrine, to minimize these injuries.¹⁰⁷

III. Practice of International Organisations and Conferences

United Nations

101. No practice was found.

Other International Organisations

102. No practice was found.

International Conferences

103. The Final Declaration of the First Review Conference of States Parties to the CCW in 1996 stated that:

Welcoming the adoption of Protocol IV on Blinding Laser Weapons as a codification and progressive development of the rules of international law . . .

The High Contracting Parties solemnly declare:

Their conviction of the importance of the earliest possible entry into force of Protocol IV,

Their desire that all States, pending the entry into force, respect and ensure respect of the substantive provisions of Protocol IV to the fullest extent possible,

Their wish to keep the issue of the blinding effects related to the use of laser systems under consideration.¹⁰⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

104. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

105. No practice was found.

¹⁰⁷ US, DefenseLink News Release, Reference Number: 482-95, 1 September 1995.

¹⁰⁸ First Review Conference of States Parties to the CCW (Second Session), Final Declaration, UN Doc. CCW/CONF.I/16, 22 April-3 May 1996, § 14 and §§ 17-19.

VI. Other Practice

106. In 1995, in its report on blinding laser weapons, Human Rights Watch stated that:

Laser target designators and range finders are of great military utility and may reduce the number of casualties or ensure more precise attacks on military targets. Still, experts believe that because they can cause significant injury and permanent blindness, combatants remain under a legal obligation to weigh the human consequences of even these instruments. Perhaps the most important consideration is to ensure that laser range finders and target designators are not abused and used intentionally against the eyesight of individuals and outside their missions. Government officials have expressed the fear that personnel using such lasers might be charged with war crimes if an individual is blinded. However, soldiers and their commanders always are required to know the legitimate and illegitimate, unacceptable uses of weapons.¹⁰⁹

¹⁰⁹ Human Rights Watch, *Blinding Laser Weapons: the Need to Ban a Cruel and Inhumane Weapon*, September 1995, Vol. 7, No. 1, p. 37.

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PRACTICE

Part 2

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A. Humane Treatment

General

I. Treaties and Other Instruments

Treaties

1. Common Article 3 of the 1949 Geneva Conventions provides that “persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely”.

2. Article 75(1) AP I provides that “persons who are in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under this Protocol shall be treated humanely in all circumstances”. Article 75 AP I was adopted by consensus.¹
3. According to Article 4(1) AP II, “all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, . . . shall in all circumstances be treated humanely”. Article 4 AP II was adopted by consensus.²
4. Article 5 of the 1981 ACHPR provides that “every individual shall have the right to the respect of the dignity inherent in a human being”.

Other Instruments

5. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75(1) AP I.
6. Under Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions and Article 75(1) AP I.
7. Article 4(1) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “persons hors de combat and those who do not take a direct part in hostilities . . . shall be . . . treated humanely”.
8. According to Section 7.1 of the 1999 UN Secretary-General’s Bulletin, “persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention, shall, in all circumstances, be treated humanely”.

II. National Practice

Military Manuals

9. Argentina’s Law of War Manual (1969) incorporates the provisions of common Article 3 of the 1949 Geneva Conventions and, in respect of occupied territories, states that protected persons “shall be treated, at all times, with humanity”.³
10. Argentina’s Law of War Manual (1989) considers that, in the course of armed conflicts not of an international character, “all persons who do not

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

² CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

³ Argentina, *Law of War Manual* (1969), §§ 8.001 and 4.010.

directly participate in the hostilities shall be treated with humanity in all circumstances".⁴

11. Australia's Defence Force Manual provides that "the general rule is that persons are to be treated humanely". It also states that "an obligation is imposed on all parties to deal humanely with protected persons".⁵

12. Belgium's Law of War Manual states, with reference to common Article 3 of the 1949 Geneva Conventions, that in internal armed conflicts, "persons who do not take a direct part in hostilities, including members of the armed forces who have laid down their arms and persons placed *hors de combat*, must be treated humanely".⁶

13. Benin's Military Manual provides that all persons *hors de combat* and who do not take a direct part in hostilities shall be treated humanely.⁷

14. Burkina Faso's Disciplinary Regulations instructs combatants to "treat humanely ... all persons *hors de combat*".⁸

15. Cameroon's Disciplinary Regulations instructs combatants to "treat humanely ... all persons *hors de combat*".⁹

16. Cameroon's Instructors' Manual instructs combatants to "treat humanely ... all regular combatants *hors de combat*".¹⁰

17. According to Canada's LOAC Manual, "AP I provides that all persons in the power of a party to the conflict are entitled to at least a minimum humane treatment".¹¹ With regard to non-international armed conflicts, the manual incorporates the provisions of common Article 3 of the 1949 Geneva Conventions.¹²

18. Colombia's Circular on Fundamental Rules of IHL provides that "persons *hors de combat* and who do not participate directly in hostilities ... shall be protected and treated in all circumstances with humanity".¹³

19. Colombia's Basic Military Manual provides that humane treatment is one of the fundamental aspects of common Article 3 of the 1949 Geneva Conventions.¹⁴ It stipulates that "in Colombia's application of AP II, the State demonstrates that it respects the fundamental guarantees of humane treatment of persons not participating directly in hostilities".¹⁵

20. Colombia's Soldiers' Manual and Instructors' Manual underline the importance of humane treatment of the enemy.¹⁶

⁴ Argentina, *Law of War Manual* (1989), § 7.04.

⁵ Australia, *Defence Force Manual* (1994), §§ 945 and 953.

⁶ Belgium, *Law of War Manual* (1983), p. 17 and Chapter IX, § 2.

⁷ Benin, *Military Manual* (1995), Fascicule II, p. 4 and Fascicule III, p. 4.

⁸ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

⁹ Cameroon, *Disciplinary Regulations* (1975), Article 31.

¹⁰ Cameroon, *Instructors' Manual* (1992), § 421(1).

¹¹ Canada, *LOAC Manual* (1999), p. 11-7, § 63.

¹² Canada, *LOAC Manual* (1999), p. 17-2, § 10(a).

¹³ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 1.

¹⁴ Colombia, *Basic Military Manual* (1995), p. 42.

¹⁵ Colombia, *Basic Military Manual* (1995), p. 43.

¹⁶ Colombia, *Soldiers' Manual* (1999), p. 12; *Instructors' Manual* (1999), p. 22.

21. Congo's Disciplinary Regulations instructs combatants to "treat humanely . . . all persons *hors de combat* ".¹⁷
22. Croatia's Instructions on Basic Rules of IHL instructs soldiers to treat humanely and show respect for persons and their property.¹⁸
23. The Military Manual of the Dominican Republic requires that all persons in the power of a party, whether combatants or civilians, be treated humanely, according to the laws of war.¹⁹
24. France's Disciplinary Regulations as amended instructs combatants to "treat humanely . . . all persons *hors de combat* ".²⁰
25. France's LOAC Summary Note provides that persons *hors de combat* shall be treated humanely.²¹
26. France's LOAC Teaching Note provides that "combatants placed *hors de combat*, certain categories of military personnel, as well as the entire civilian population, must be particularly protected and treated with humanity".²²
27. Germany's Military Manual states that combatants must be treated humanely.²³
28. India's Army Training Note orders troops not to "ill treat any one, and in particular, women and children".²⁴
29. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that as a general policy, all individuals falling in the power of a party to a conflict should, at a minimum, be treated in accordance with the principles of humanity.²⁵
30. Kenya's LOAC Manual states that "persons not involved in the fighting because they are not taking part in hostilities, or because they are wounded or have surrendered, or have been detained, must be treated humanely".²⁶
31. According to Madagascar's Military Manual, one of the seven fundamental rules of IHL is that "persons placed *hors de combat* and who do not take a direct part in hostilities shall, in all circumstances, be protected and treated with humanity, without any adverse distinction".²⁷
32. Mali's Army Regulations provides that "the refusal to treat with humanity all persons *hors de combat* " is a violation of the laws and customs of war.²⁸
33. Morocco's Disciplinary Regulations instructs combatants to "treat humanely . . . all regular combatants *hors de combat* ".²⁹

¹⁷ Congo, *Disciplinary Regulations* (1986), Article 32.

¹⁸ Croatia, *Instructions on Basic Rules of IHL* (1993), §§ 1–3.

¹⁹ Dominican Republic, *Military Manual* (1980), pp. 6 and 7.

²⁰ France, *Disciplinary Regulations as amended* (1975), Article 9 *bis*.

²¹ France, *LOAC Summary Note* (1992), §§ 2.1 and 3.2.

²² France, *LOAC Teaching Note* (2000), pp. 4 and 5.

²³ Germany, *Military Manual* (1992), § 704.

²⁴ India, *Army Training Note* (1995), p. 4/24, § 10.

²⁵ Report on the Practice of Israel, 1997, Chapter 5.6, referring to *Law of War Booklet* (1986), p. 12.

²⁶ Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 5–6, see also Précis No. 3, p. 14.

²⁷ Madagascar, *Military Manual* (1994), p. 91, Rule 1.

²⁸ Mali, *Army Regulations* (1979), Article 36.

²⁹ Morocco, *Disciplinary Regulations* (1974), Article 25(1).

34. The Military Manual of the Netherlands provides that protected persons shall be treated humanely. With respect to non-international armed conflicts in particular, the manual states that persons protected by common Article 3 of the 1949 Geneva Conventions “shall in all circumstances be treated humanely”.³⁰
35. The Military Handbook of the Netherlands provides for the punishment of “a war law violation which contains inhuman treatment”.³¹
36. New Zealand’s Military Manual stipulates that “protected persons must be humanely treated at all times”. It qualifies “inhuman treatment of protected persons” as a grave breach.³² The manual adds that, in non-international armed conflicts, persons protected by common Article 3 of the 1949 Geneva Conventions “shall in all circumstances be treated humanely”.³³
37. Nicaragua’s Military Manual reproduces common Article 3 of the 1949 Geneva Conventions.³⁴
38. In Peru’s Human Rights Charter of the Security Forces, respect for the integrity of persons and their human dignity is one of the ten basic rules.³⁵
39. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that “members of the AFP and PNP shall treat suspects and enemies who are out of combat . . . humanely and with respect”.³⁶
40. Romania’s Soldiers’ Manual provides that it is one of the fundamental principles and rules of IHL that “persons *hors de combat* (e.g. those who surrender or the wounded) and those not taking a direct part in hostilities . . . shall be protected and treated humanely”.³⁷
41. Russia’s Military Manual provides that war victims “shall be granted such a status that would guarantee humane treatment”.³⁸
42. Senegal’s Disciplinary Regulations instructs combatants to “treat humanely . . . all persons *hors de combat*”.³⁹
43. Senegal’s IHL Manual restates common Article 3 of the 1949 Geneva Conventions.⁴⁰
44. Sweden’s IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.⁴¹
45. Switzerland’s Basic Military Manual provides that “foreigners of enemy nationality who are in the territory of one of the parties to the conflict or in occupied territory must in all cases be treated humanely”.⁴² It adds that AP II

³⁰ Netherlands, *Military Manual* (1993), pp. VIII-2 and XI-1.

³¹ Netherlands, *Military Handbook* (1995), p. 7-44.

³² New Zealand, *Military Manual* (1992), §§ 1137 and 1812.

³³ New Zealand, *Military Manual* (1992), § 1807(1).

³⁴ Nicaragua, *Military Manual* (1982), Articles 6 and 14.

³⁵ Peru, *Human Rights Charter of the Security Forces* (1991), Rule 3.

³⁶ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2a(3).

³⁷ Romania, *Soldiers’ Manual* (1991), p. 32.

³⁸ Russia, *Military Manual* (1990), § 7.

³⁹ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

⁴⁰ Senegal, *IHL Manual* (1999), p. 4. ⁴¹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁴² Switzerland, *Basic Military Manual* (1987), Article 146.

and common Article 3 of the 1949 Geneva Conventions are applicable during internal armed conflicts and contain “some minimal guarantees for persons involved in the conflict”.⁴³

46. Togo’s Military Manual provides that all persons *hors de combat* and who do not take a direct part in hostilities shall be treated humanely.⁴⁴

47. The UK LOAC Manual states that “in the event of a civil war, Common Article 3 to the 1949 Geneva Conventions provides: a. that persons out of the fighting... because they are wounded... must be treated humanely”, notably they “may not be subjected to any form of violence”.⁴⁵

48. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions.⁴⁶

49. According to the US Air Force Pamphlet, common Article 3 of the 1949 Geneva Conventions “represents the first attempt to provide protection for victims of all internal armed conflicts. Its general provisions insure humane treatment to civilians and others who are *hors de combat*.”⁴⁷

50. The US Soldier’s Manual states that the “humane treatment of non-combatants may produce valuable information, gain active support and deny support for the enemy. Mistreatment serves only the interests of the enemy.” The manual specifies that non-combatants include civilians, medical personnel, chaplains, detained or captured persons and the wounded and sick.⁴⁸

51. The US Instructor’s Guide provides that the rules of IHL “are based on one general principle: treat all non-combatants... humanely”.⁴⁹

National Legislation

52. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁵⁰

53. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of common Article 3, and of AP I, including violations of Article 75(1) AP I, as well as any “contravention” of AP II, including violations of Article 4(1) AP II, are punishable offences.⁵¹

54. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions

⁴³ Switzerland, *Basic Military Manual* (1987), Article 4.

⁴⁴ Togo, *Military Manual* (1996), Fascicule I, p. 11, Fascicule II, pp. 4 and 5 and Fascicule III, pp. 4 and 5.

⁴⁵ UK, *LOAC Manual* (1981), Section 12, p. 42, § 2. ⁴⁶ US, *Field Manual* (1956), § 11.

⁴⁷ US, *Air Force Pamphlet* (1976), § 11-3.

⁴⁸ US, *Soldier’s Manual* (1984), p. 5.

⁴⁹ US, *Instructor’s Guide* (1985), pp. 4, 8 and 17.

⁵⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁵¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".⁵²

55. Paraguay's Law on the Status of Military Personnel provides that respect for human dignity is one of the duties imposed on military personnel because of the constitutional responsibility of the armed forces.⁵³

56. Under the US War Crimes Act as amended, violations of common Article 3 of the 1949 Geneva Conventions are war crimes.⁵⁴

National Case-law

57. In its judgement in the *Videla case* in 1994, Chile's Appeal Court of Santiago held that common Article 3 of the 1949 Geneva Conventions obliged parties to non-international armed conflicts "to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons".⁵⁵

58. In its judgement in the *Situation in Chechnya case* in 1995, Russia's Constitutional Court recognised the applicability of AP II to the conflict in Chechnya and while noting that amendments to domestic legislation to ensure its application had not been adopted, it stated that "nevertheless, provisions of [AP II] regarding the humane treatment of all persons who did not directly take part in hostilities or who ceased to take part in hostilities, of wounded, sick and civilian population... must be respected by both parties to the armed conflict".⁵⁶

Other National Practice

59. The Report on the Practice of Colombia refers to a draft working paper in which the Colombian government stated that "persons taking no active part in the hostilities... shall in all circumstances be treated humanely".⁵⁷

60. During the Iran–Iraq War, the Iranian authorities emphasised that Iraqi combatants who were *hors de combat* were well treated on the basis of Islamic law.⁵⁸

61. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that, during the Iran–Iraq War, members of the opposing forces who were *hors de combat* were well treated.⁵⁹

⁵² Norway, *Military Penal Code as amended* (1902), § 108.

⁵³ Paraguay, *Law on the Status of Military Personnel* (1997), Article 15(j).

⁵⁴ US, *War Crimes Act as amended* (1996), Section 2441(c).

⁵⁵ Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994.

⁵⁶ Russia, Constitutional Court, *Situation in Chechnya case*, Judgement, 31 July 1995, § 5.

⁵⁷ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled "El Derecho Internacional Humanitario", § 1.

⁵⁸ Report on the Practice of Iran, 1997, Chapter 2.1.

⁵⁹ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.1.

62. According to the Report on the Practice of Israel, the protection of persons who are *hors de combat* is a basic tenet of the IDF.⁶⁰

63. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.⁶¹

64. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that:

We support in particular the fundamental guarantees contained in Article 75 [AP I] such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions.⁶²

65. According to the Report on US Practice, "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".⁶³

III. Practice of International Organisations and Conferences

United Nations

66. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II "have long been considered customary international law".⁶⁴

Other International Organisations

67. No practice was found.

International Conferences

68. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

69. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions

⁶⁰ Report on the Practice of Israel, 1997, Chapter 2.1.

⁶¹ Report on the Practice of Jordan, 1997, Chapter 5.

⁶² US, Remarks by Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

⁶³ Report on US Practice, 1997, Chapter 5.3.

⁶⁴ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called “elementary considerations of humanity”.⁶⁵

70. In its judgement in the *Aleksovski case* in 1999, the ICTY held that:

A reading of paragraph (1) of common Article 3 [of the 1949 Geneva Conventions] reveals that its purpose is to uphold and protect the inherent human dignity of the individual. It prescribes humane treatment without discrimination based on “race, colour, religion or faith, sex, birth, or wealth, or any other similar criteria”. Instead of defining the humane treatment which is guaranteed, the States parties chose to proscribe particularly odious forms of mistreatment that are without question incompatible with humane treatment . . . Hence, while there are four sub-paragraphs which specify the absolutely prohibited forms of inhuman treatment from which there can be no derogation, the general guarantee of humane treatment is not elaborated, except for the guiding principle underlying the Convention, that its object is the humanitarian one of protecting the individual qua human being and, therefore, it must safeguard the entitlements which flow therefrom.⁶⁶

71. In a case concerning Peru in 1996, the IACiHR reinforced the principle that the right to humane treatment must be respected at all times, even during emergency or conflict situations, by State agents responsible for law enforcement.⁶⁷

V. Practice of the International Red Cross and Red Crescent Movement

72. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rules contained in common Article 3 of the 1949 Geneva Conventions and that “humane treatment shall be given in all circumstances”.⁶⁸

73. In 1978, the ICRC indicated to a National Red Crescent Society that there are persons and objects that must be respected and protected in all circumstances, *inter alia*, combatants who have laid down their arms.⁶⁹

74. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “persons not participating or no longer participating in the hostilities . . . must be respected and protected in all circumstances”.⁷⁰

⁶⁵ ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

⁶⁶ ICTY, *Aleksovski case*, Judgement, 25 June 1999, § 49.

⁶⁷ IACiHR, *Case 10.559 (Peru)*, Report, 1 March 1996, Section V(2).

⁶⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 31 and 187.

⁶⁹ ICRC archive document.

⁷⁰ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

75. In a press release issued in 1991 in the context of the Gulf War, the ICRC reminded the parties that “combatants placed *hors de combat* must be treated humanely”.⁷¹

76. In a communication to the press issued in 1993, the ICRC enjoined the parties to the conflict in Somalia “respect and protect all those not or no longer participating in hostilities”.⁷²

77. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross reminded the parties of their obligation to treat with humanity non-combatants and persons *hors de combat*. It recalled the Geneva Conventions and AP I.⁷³

78. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “persons not or no longer taking part in hostilities . . . shall be protected and respected in all circumstances, regardless of the party to which they belong”.⁷⁴

79. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “persons not participating or no longer participating in confrontations . . . shall be protected and respected in all circumstances”.⁷⁵

80. In a communication to the press issued in 2001, the ICRC reminded the parties to the conflict in Afghanistan of “the requirement that persons not taking part in hostilities must be treated with humanity in all circumstances . . . Threats to their lives, their physical integrity and their dignity are prohibited.”⁷⁶

VI. Other Practice

81. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “persons *hors de combat* and those who do not take part in hostilities . . . shall in all circumstances be protected and treated humanely”.⁷⁷

⁷¹ ICRC, Press Release No. 1658, Gulf War: ICRC reminds States of their obligations, 17 January 1991, *IRRC*, No. 280, 1991, p. 26; see also Press Release No. 1659, Middle East Conflict: ICRC appeals to belligerents, 1 February 1991, *IRRC*, No. 280, 1991, p. 27.

⁷² ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

⁷³ Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de Enero de 1994, 3 January 1994.

⁷⁴ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

⁷⁵ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994 § I, reprinted in Marco Sassòli and Antoine A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

⁷⁶ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

⁷⁷ ICRC archive document.

Civilians

I. Treaties and Other Instruments

Treaties

82. Article 5 GC IV provides that an individual protected person suspected of or engaged in activities hostile to the security of the State in the territory of a Party to the conflict or an individual protected person detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the Occupying Power, “shall nevertheless be treated with humanity”.

83. Article 27, first paragraph, GC IV provides that protected persons “shall at all times be humanely treated”.

84. Upon ratification of GC IV, China stated that:

Although the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949, does not apply to civilian persons outside enemy-occupied areas and consequently does not completely meet humanitarian requirements, it is found to be in accord with the interest of protecting civilian persons in occupied territory and in certain other cases.⁷⁸

85. Article 8(b) of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel provides that “all Vietnamese civilian personnel captured and detained in South Vietnam shall be treated humanely at all times, and in accordance with international practice”.

Other Instruments

86. Article 22 of the 1863 Lieber Code provides that “the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit”.

87. Article 7 of the 1880 Oxford Manual provides that “it is forbidden to maltreat inoffensive populations”.

88. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75(1) AP I.

89. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75(1) AP I.

⁷⁸ China, Reservations made upon ratification of GC IV, 28 December 1956, § 4.

*II. National Practice**Military Manuals*

90. Argentina's Law of War Manual (1969) provides that persons not entitled to claim rights and benefits under GC IV "shall always be treated with humanity".⁷⁹

91. Argentina's Law of War Manual (1989) stipulates that "when . . . people in the power of a party to the conflict . . . do not benefit from a better protection than the one provided by the Conventions and the Protocol, they shall be treated . . . with humanity".⁸⁰

92. Australia's Commanders' Guide provides that civilians "are to be treated with compassion and respect".⁸¹

93. Australia's Defence Force Manual stipulates that the inhabitants of an occupied territory "must be humanely treated at all times and be especially safeguarded against all acts of violence or threats of violence and against insults and public curiosity".⁸²

94. Belgium's Law of War Manual states that, in internal armed conflicts, the following must be respected: "humanitarian treatment of persons who do not take a direct part in hostilities, including members of the armed forces who have laid down their arms and persons placed *hors de combat*". It also provides that "the population in occupied territory must be treated with humanity".⁸³

95. Benin's Military Manual provides that the soldier must treat civilians humanely.⁸⁴

96. Cameroon's Instructors' Manual instructs the soldier to treat civilian persons in his or her power humanely.⁸⁵

97. Canada's LOAC Manual states that, in occupied territories, "protected persons must be treated humanely at all times".⁸⁶ With regard to non-international armed conflict, the manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.⁸⁷

98. Canada's Code of Conduct instructs: "Treat all civilians humanely". It explains that "in your daily interaction with the civilian population, they must at all times be humanely treated".⁸⁸ It also provides a list of 11 fundamental rules, among which is "treat all civilians humanely".⁸⁹

⁷⁹ Argentina, *Law of War Manual* (1969), § 4.003.

⁸⁰ Argentina, *Law of War Manual* (1989), § 4.15.

⁸¹ Australia, *Commanders' Guide* (1994), § 603.

⁸² Australia, *Defence Force Manual* (1994), § 1218.

⁸³ Belgium, *Law of War Manual* (1983), p. 17 and Chapter IX, § 2.

⁸⁴ Benin, *Military Manual* (1995), Fascicule I, p. 16, Fascicule II, p. 19 and Fascicule III, p. 5.

⁸⁵ Cameroon, *Instructors' Manual* (1992), § 532.

⁸⁶ Canada, *LOAC Manual* (1999), p. 12-4, § 37.

⁸⁷ Canada, *LOAC Manual* (1999), p. 17-2, § 10(a).

⁸⁸ Canada, *Code of Conduct* (2001), Rule 4, § 2.

⁸⁹ Canada, *Code of Conduct* (2001), Chapter 3, § 4.

99. Colombia's Soldiers' Manual and Instructors' Manual provide that civilians must be treated humanely.⁹⁰
100. Croatia's Commanders' Manual provides that civilians must be respected and treated humanely.⁹¹
101. Croatia's Instructions on Basic Rules of IHL requires soldiers to treat captured civilians with humanity.⁹²
102. France's LOAC Manual incorporates the content of Article 5 GC IV.⁹³
103. Germany's Military Manual provides that civilians not benefiting from the protection of the Geneva Conventions and their Additional Protocols shall be treated humanely.⁹⁴
104. Italy's IHL Manual provides that, in occupied territories, civilians shall be treated with humanity in all circumstances.⁹⁵
105. Italy's LOAC Elementary Rules Manual provides that civilians must be treated humanely. It adds that "the occupying Power must treat the inhabitants humanely".⁹⁶
106. Madagascar's Military Manual instructs the armed forces to "treat humanely civilians who are in your power".⁹⁷
107. New Zealand's Military Manual provides that "protected persons must be humanely treated" in both international and non-international armed conflicts.⁹⁸
108. Nigeria's Operational Code of Conduct provides that "male civilians hostile to the Federal Forces are to be dealt with firmly but fairly. They must be humanely treated."⁹⁹
109. Nigeria's Military Manual provides that "civilians shall...be treated humanely".¹⁰⁰
110. The Soldier's Rules of the Philippines instruct soldiers to "treat all civilians...in your power with humanity".¹⁰¹
111. Romania's Soldiers' Manual instructs soldiers to "treat humanely [civilian] persons in your power" and "protect them from ill-treatment".¹⁰²
112. Russia's Military Manual states that the civilian population "shall be granted such a status that would guarantee humane treatment".¹⁰³

⁹⁰ Colombia, *Soldiers' Manual* (1999), p. 10; *Instructors' Manual* (1999), p. 8.

⁹¹ Croatia, *Commanders' Manual* (1992), Rule No. 15.

⁹² Croatia, *Instructions on Basic Rules of IHL Manual* (1993), Instruction No. 5.

⁹³ France, *LOAC Manual* (2001), p. 64. ⁹⁴ Germany, *Military Manual* (1992), § 518.

⁹⁵ Italy, *IHL Manual* (1991), Vol. I, § 41(a).

⁹⁶ Italy, *LOAC Elementary Rules Manual* (1991), §§ 15 and 104 and p. 29.

⁹⁷ Madagascar, *Military Manual* (1994), p. 82, Rule 23 and p. 85, Rule 6.

⁹⁸ New Zealand, *Military Manual* (1992), §§ 1114 and 1321(2).

⁹⁹ Nigeria, *Operational Code of Conduct* (1967), § 4(j).

¹⁰⁰ Nigeria, *Military Manual* (1994), p. 39, § 5(k).

¹⁰¹ Philippines, *Soldier's Rules* (1989), § 6.

¹⁰² Romania, *Soldiers' Manual* (1991), pp. 14–15.

¹⁰³ Russia, *Military Manual* (1990), § 7.

- 113.** Spain's LOAC Manual provides that in occupied territory, "the Occupying Power shall treat the inhabitants humanely".¹⁰⁴
- 114.** Switzerland's military manuals provide that the enemy civilian population is to be treated with humanity.¹⁰⁵
- 115.** Togo's Military Manual stipulates that the soldier shall "treat [civilians] humanely and protect them".¹⁰⁶
- 116.** Uganda's Code of Conduct instructs: "Never abuse, insult, shout or beat any member of the public".¹⁰⁷
- 117.** The UK Military Manual provides that civilians "must be humanely treated". This also applies in occupied territories.¹⁰⁸
- 118.** The UK LOAC Manual explains that "an obligation is imposed on belligerents to deal humanely with protected persons". With regard to enemy aliens, the manual specifies that "[GC III] ensures the humane treatment of those who remain".¹⁰⁹
- 119.** The US Field Manual recalls Article 27 GC IV, which provides that in occupied territories, civilians must be treated humanely.¹¹⁰
- 120.** The US Soldier's Manual states that "inhumane treatment of civilians [is a violation] of the law of war for which you can be prosecuted".¹¹¹
- 121.** The US Instructor's Guide provides that "persons taking no direct part in hostilities shall in all circumstances be treated humanely".¹¹²
- 122.** The US Rules of Engagement for Operation Desert Storm instructs forces to "treat all civilians and their property with respect and dignity".¹¹³
- 123.** The US Air Force Pamphlet states that Articles 27–34 GC IV "provide for humane treatment of the individuals protected". It also states that "Articles 27 and 38 require protected persons in the territory of a belligerent to be humanely treated".¹¹⁴

National Legislation

- 124.** Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, "civilian persons belonging to the adverse party, who are in the hands of the Republic of Azerbaijan are respected and treated humanely".¹¹⁵

¹⁰⁴ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.i.

¹⁰⁵ Switzerland, *Basic Military Manual* (1987), Articles 4 and 146; *Military Manual* (1984), p. 34; *Teaching Manual* (1986), p. 43.

¹⁰⁶ Togo, *Military Manual* (1996), Fascicule I, p. 17 and Fascicule II, p. 19.

¹⁰⁷ Uganda, *Code of Conduct* (1986), Rule 1.

¹⁰⁸ UK, *Military Manual* (1958), §§ 39 and 547.

¹⁰⁹ UK, *LOAC Manual* (1981), Section 9, p. 35, §§ 9 and 11, see also Annex A, p. 49, § 20.

¹¹⁰ US, *Field manual* (1956), § 266.

¹¹¹ US, *Soldier's Manual* (1984), p. 20.

¹¹² US, *Instructor's Guide* (1985), pp. 4, 8 and 17.

¹¹³ US, *Rules of Engagement for Operation Desert Storm* (1991), § H.

¹¹⁴ US, *Air Force Pamphlet* (1996), §§ 11-3, 14-4 and 14-5.

¹¹⁵ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 14.

125. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹¹⁶

126. Under El Salvador's Penal Code, "the civilian... who commits any inhumane act against the civilian population before, during or after the war" is guilty of a crime.¹¹⁷

127. Under the Draft Amendments to the Penal Code of El Salvador, the civilian "who commits an inhumane act against the civilian population before, during or after the war" is punishable.¹¹⁸

128. Under Hungary's Criminal Code as amended, anyone who treats a civilian person inhumanely, is guilty, upon conviction, of a war crime.¹¹⁹

129. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 5 and 27 GC IV, is a punishable offence.¹²⁰

130. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... is liable to imprisonment".¹²¹

131. Vietnam's Penal Code provides for the punishment of "any person who commits an act of harassment that harms civilians or causes a loss of unity between the military and civilians".¹²²

National Case-law

132. No practice was found.

Other National Practice

133. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense noted some specific Iraqi war crimes, including inhumane treatment of Kuwaiti and third country civilians.¹²³

III. Practice of International Organisations and Conferences

United Nations

134. No practice was found.

¹¹⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹¹⁷ El Salvador, *Penal Code* (1997), Article 363.

¹¹⁸ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Violación de los deberes de humanidad".

¹¹⁹ Hungary, *Criminal Code as amended* (1978), Section 158(1).

¹²⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹²¹ Norway, *Military Penal Code as amended* (1902), § 108(a).

¹²² Vietnam, *Penal Code* (1990), Article 273(1).

¹²³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.

Other International Organisations

135. No practice was found.

International Conferences

136. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the application of GC I, II and III in the Middle East in which it called for “the total application” of these conventions by the parties to the conflict, in particular, “those provisions which relate to the treatment of . . . civilian victims of the conflict”.¹²⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

137. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

138. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “persons not participating or no longer participating in the hostilities, such as . . . civilians, must be respected and protected in all circumstances” and that “civilians and all non-combatants must be respected and protected”.¹²⁵

139. In a communication to the press issued in 1993, the ICRC enjoined the parties to the conflict in Somalia “to respect and protect all those not participating or no longer participating in hostilities, such as . . . civilians”.¹²⁶

140. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “persons not or no longer taking part in hostilities, such as . . . civilians, shall be protected and respected in all circumstances, regardless of the party to which they belong” and that “civilians do not constitute a military danger and must be respected and humanely treated”.¹²⁷

141. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “persons not participating or no longer participating in confrontations, such as . . . civilians, shall be protected and respected in all circumstances” and that “civilian persons who refrain from acts of hostility must be respected and treated humanely”.¹²⁸

¹²⁴ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. IV.

¹²⁵ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

¹²⁶ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹²⁷ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, pp. 502–503.

¹²⁸ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

VI. Other Practice

142. No practice was found.

Wounded and sick*I. Treaties and Other Instruments**Treaties*

143. Article 12, first paragraph, GC I provides that wounded and sick members of the armed forces in the field “shall be treated humanely”.

144. Article 12, first paragraph, GC II provides that wounded, sick and shipwrecked members of the armed forces at sea “shall be treated humanely”.

145. Article 10(2) AP I provides that “in all circumstances [all the wounded, sick and shipwrecked] shall be treated humanely”. Article 10 AP I was adopted by consensus.¹²⁹

146. Article 7(2) AP II provides that “in all circumstances [all the wounded, sick and shipwrecked] shall be treated humanely”. Article 7 AP II was adopted by consensus.¹³⁰

Other Instruments

147. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia undertook “to apply the following fundamental principles: wounded and ill persons must be helped and protected in all circumstances”.

148. Article 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “all the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected. In all circumstances, they shall be respected and protected.”

149. In Article IX of the 1994 Comprehensive Agreement on Human Rights in Guatemala, the parties recognised the need “to respect the human rights of the wounded”.

150. According to Section 9.1 of the 1999 UN Secretary-General’s Bulletin, “members of the armed forces and other persons in the power of the United Nations force who are wounded or sick shall be . . . treated humanely”.

*II. National Practice**Military Manuals*

151. Argentina’s Law of War Manual (1969) provides that the sick and wounded must be respected and protected in all circumstances.¹³¹

¹²⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.

¹³⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109.

¹³¹ Argentina, *Law of War Manual* (1969), § 3.001.

152. Argentina's Law of War Manual (1989) provides for the protection of and respect for the wounded, sick and shipwrecked in both international and non-international armed conflicts.¹³²
153. Australia's Defence Force Manual provides that "sick, wounded and shipwrecked combatants are to be . . . treated humanely".¹³³
154. Benin's Military Manual provides that the "wounded, sick and shipwrecked . . . shall be treated humanely".¹³⁴
155. Bosnia and Herzegovina's Military Instructions provides that the wounded and sick must be treated humanely.¹³⁵
156. Burkina Faso's Disciplinary Regulations provides that all persons *hors de combat* must be treated with humanity.¹³⁶
157. Cameroon's Instructors' Manual provides that "the sick, wounded and shipwrecked shall be treated humanely . . . and protected".¹³⁷
158. Canada's LOAC Manual provides that "the wounded, sick and shipwrecked are to be . . . treated humanely".¹³⁸
159. Colombia's Instructors' Manual provides that the "wounded, sick and shipwrecked shall be treated humanely".¹³⁹
160. The Military Manual of the Dominican Republic provides that the rule for "wounded and sick . . . is to treat [them] in a human way".¹⁴⁰
161. Ecuador's Naval Manual provides that "wounded and sick personnel falling into enemy hands must be treated humanely".¹⁴¹
162. According to France's LOAC Teaching Note, wounded, sick and shipwrecked persons must be protected and treated humanely.¹⁴²
163. Germany's Soldiers' Manual provides that the wounded, sick and shipwrecked shall be treated with humanity.¹⁴³
164. Germany's Military Manual states that wounded and sick persons shall be treated humanely.¹⁴⁴
165. Kenya's LOAC Manual provides that the wounded, sick and shipwrecked shall be treated humanely.¹⁴⁵
166. According to Madagascar's Military Manual, the "wounded, sick and shipwrecked shall be . . . treated with humanity".¹⁴⁶

¹³² Argentina, *Law of War Manual* (1989), §§ 2.03 and 7.05.

¹³³ Australia, *Defence Force Manual* (1994), § 990.

¹³⁴ Benin, *Military Manual* (1995), Fascicule II, p. 9.

¹³⁵ Bosnia and Herzegovina, *Military Instructions* (1992), Item 14, § 1.

¹³⁶ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

¹³⁷ Cameroon, *Instructors' Manual* (1992), p. 44, § 163, see also p. 41, § 152.

¹³⁸ Canada, *LOAC Manual* (1999), p. 9-2, § 17.

¹³⁹ Colombia, *Instructors' Manual* (1999), p. 24.

¹⁴⁰ Dominican Republic, *Military Manual* (1980), p. 6.

¹⁴¹ Ecuador, *Naval Manual* (1989), § 11.4.

¹⁴² France, *LOAC Teaching Note* (2000), p. 4.

¹⁴³ Germany, *Soldiers' Manual* (1991), p. 5.

¹⁴⁴ Germany, *Military Manual* (1992), §§ 608 and 1057.

¹⁴⁵ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 10.

¹⁴⁶ Madagascar, *Military Manual* (1994), p. 77, Rule 21.

167. New Zealand's Military Manual provides that the sick, wounded and shipwrecked shall be treated humanely.¹⁴⁷
168. Nigeria's Operational Code of Conduct provides that "all military and civilian wounded . . . must be respected and protected in all circumstances".¹⁴⁸
169. Nigeria's Manual on the Laws of War provides that the wounded and sick who are in the power of a belligerent must be humanely treated.¹⁴⁹
170. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that "members of the AFP and PNP shall treat enemies who are *hors de combat* (e.g. wounded) humanely and with respect".¹⁵⁰
171. Russia's Military Manual provides that belligerents are obliged to ensure the legal protection of war victims, namely the wounded, sick and shipwrecked.¹⁵¹
172. Senegal's Disciplinary Regulations provides that soldiers in combat shall treat with humanity all persons placed *hors de combat*.¹⁵²
173. Senegal's IHL Manual provides that one of the fundamental guarantees common to IHL conventions and the 1948 UDHR is that all the wounded and sick shall be treated with humanity.¹⁵³
174. South Africa's LOAC Manual provides that "all wounded, sick and shipwrecked . . . shall be treated humanely".¹⁵⁴
175. Spain's LOAC Manual provides that the wounded and sick shall be treated humanely.¹⁵⁵
176. Sweden's Military Manual provides that the wounded and sick, whether civilian or combatant, shall be humanely treated.¹⁵⁶
177. Switzerland's Basic Military Manual provides that the wounded and sick shall be humanely treated. It adds that the "enemy sick and wounded who have laid down their arms or are *hors de combat* shall be respected".¹⁵⁷
178. Togo's Military Manual provides that wounded, sick and shipwrecked combatants "shall be treated humanely".¹⁵⁸
179. The UK Military Manual and LOAC Manual provide that "the wounded and sick . . . must be humanely treated".¹⁵⁹
180. The US Field Manual restates Article 12 GC II.¹⁶⁰

¹⁴⁷ New Zealand, *Military Manual* (1992), § 1003(1).

¹⁴⁸ Nigeria, *Operational Code of Conduct* (1967), § 4(1).

¹⁴⁹ Nigeria, *Manual on the Laws of War* (undated), § 35.

¹⁵⁰ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2a(3).

¹⁵¹ Russia, *Military Manual* (1990), § 7.

¹⁵² Senegal, *Disciplinary Regulations* (1990), § 1.

¹⁵³ Senegal, *IHL Manual* (1999), pp. 3 and 24.

¹⁵⁴ South Africa, *LOAC Manual* (1996), § 31.

¹⁵⁵ Spain, *LOAC Manual* (1996), Vol. I, §§ 5.5b, and 7.3.a.(11).

¹⁵⁶ Sweden, *Military Manual* (1976), p. 16.

¹⁵⁷ Switzerland, *Basic Military Manual* (1987), Articles 69 and 70(1).

¹⁵⁸ Togo, *Military Manual* (1996), Fascicule II, pp. 9 and 12.

¹⁵⁹ UK, *Military Manual* (1958), § 339; *LOAC Manual* (1981), Section 6, p. 22, § 2.

¹⁶⁰ US, *Field Manual* (1956), § 215.

181. The US Air Force Pamphlet provides that “one of the important principles relating to wounded and sick requires . . . humane treatment”.¹⁶¹

182. According to the US Naval Handbook, “wounded and sick personnel falling into enemy hands must be treated humanely”.¹⁶²

National Legislation

183. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.¹⁶³

184. Under El Salvador’s Penal Code, “the civilian who violates the duties of humanity . . . against the wounded . . . or persons placed in hospitals or places designed for the wounded . . . before, during or after the war” is guilty of a crime.¹⁶⁴

185. Under the Draft Amendments to the Penal Code of El Salvador, the civilian who commits an inhumane act against the wounded and sick or persons placed in medical institutions or camps for the wounded and sick is punishable.¹⁶⁵

186. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 12 GC I and 12 GC II, and of AP I, including violations of Article 10 AP I, as well as any “contravention” of AP II, including violations of Article 7 AP II, are punishable offences.¹⁶⁶

187. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.¹⁶⁷

National Case-law

188. No practice was found.

Other National Practice

189. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal “to make protection and treatment of all wounded and sick persons possible”.¹⁶⁸

¹⁶¹ US, *Air Force Pamphlet* (1976), § 3-4(d).

¹⁶² US, *Naval Handbook* (1995), § 11-4.

¹⁶³ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹⁶⁴ El Salvador, *Penal Code* (1997), Article 363.

¹⁶⁵ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Violación de los deberes de humanidad”.

¹⁶⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁶⁷ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁶⁸ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

190. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that all wounded and sick and shipwrecked be respected and protected”.¹⁶⁹

191. According to the Report on US Practice, it is the *opinio juris* of the US that the wounded and sick in internal armed conflicts should be treated humanely.¹⁷⁰

III. Practice of International Organisations and Conferences

United Nations

192. In resolutions adopted in 1985 and 1986 on the conflict in El Salvador, the UN General Assembly recommended that the UN Special Representative report on the observance of rules pertaining to the humanitarian treatment of and respect for wounded combatants.¹⁷¹

Other International Organisations

193. No practice was found.

International Conferences

194. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the application of GC I, II and III in the Middle East in which it called for “the total application” of these conventions by the parties to the conflict, in particular, “those provisions which relate to the treatment of . . . the sick and wounded”.¹⁷²

IV. Practice of International Judicial and Quasi-judicial Bodies

195. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

196. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the wounded, sick and shipwrecked shall be treated humanely”.¹⁷³

¹⁶⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

¹⁷⁰ Report on US Practice, 1997, Chapter 5.1.

¹⁷¹ UN General Assembly, Res. 40/139, 13 December 1985, § 3; Res. 41/157, 4 December 1986, § 4.

¹⁷² 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. IV.

¹⁷³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 504.

197. In 1978, the ICRC indicated to a National Red Crescent Society that the wounded, sick and shipwrecked must be respected and protected in all circumstances.¹⁷⁴

198. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “persons not participating or no longer participating in the hostilities, such as the wounded, sick [and] shipwrecked . . . must be respected and protected in all circumstances”.¹⁷⁵

199. In a communication to the press issued in 1993, the ICRC enjoined the parties to the conflict in Somalia “to respect and protect all those not participating or no longer participating in hostilities, such as . . . wounded [and] sick”.¹⁷⁶

200. In a declaration issued in 1994, in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross reminded the parties of their obligation to provide treatment and protection to wounded persons in their power.¹⁷⁷

201. In a press release issued in 1994, the ICRC reminded all parties to the conflict in Afghanistan that the wounded and sick must benefit from a special protection and be respected in all circumstances.¹⁷⁸

202. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “persons not or no longer taking part in hostilities, such as the wounded [and] the sick . . . shall be protected and respected in all circumstances, regardless of the party to which they belong”.¹⁷⁹

203. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “persons not participating or no longer participating in confrontations, such as the wounded [and] the sick . . . shall be protected and respected in all circumstances”.¹⁸⁰

VI. Other Practice

204. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi

¹⁷⁴ ICRC archive document.

¹⁷⁵ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

¹⁷⁶ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹⁷⁷ Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1 de Enero de 1994, 3 January 1994.

¹⁷⁸ ICRC, Press Release No. 1764, Afghanistan: ICRC calls for respect for the civilian population, 8 February 1994.

¹⁷⁹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 502.

¹⁸⁰ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

University in Turku/Åbo, Finland in 1990, provides that “in every circumstance, the wounded and sick, whether or not they have taken part in acts of violence, shall be . . . treated humanely”.¹⁸¹

Persons deprived of their liberty

I. Treaties and Other Instruments

Treaties

205. Article 4, second paragraph, of the 1899 HR provides that POWs “must be humanely treated”.

206. Article 4, second paragraph, of the 1907 HR provides that POWs “must be humanely treated”.

207. Article 2, second paragraph, of the 1929 Geneva POW Convention provides that POWs “shall at all times be humanely treated and protected, particularly against acts of violence, from insults and from public curiosity”.

208. Article 13 GC III provides that “prisoners of war must at all times be humanely treated . . . Likewise, prisoners of war must at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity”.

209. Article 27, first paragraph, GC IV provides that protected persons “shall at all times be humanely treated”.

210. Paragraph I(3) of the Annex to the 1953 Panmunjon Armistice Agreement (establishing a Neutral Nations Repatriation Commission) provides that:

no . . . affront to their dignity or self-respect [of prisoners of war] shall be permitted in any manner for any purpose whatsoever . . . This Commission shall ensure that prisoners of war shall at all times be treated humanely in accordance with the specific provisions of the Geneva Convention [GC III], and with the general spirit of that Convention.

211. Article 10(1) of the 1966 ICCPR provides that “all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person”.

212. Article 5 of the 1969 ACHR provides that “all persons deprived of their liberty shall be treated with respect for the inherent dignity of the human person”.

213. Article 8(a) of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian

¹⁸¹ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 12, *IRRC*, No. 282, 1991, p. 335.

Personnel provides that “all captured military personnel of the parties . . . shall be treated humanely at all times, and in accordance with international practice”.

214. Article 5(3) AP II provides that “persons . . . whose liberty has been restricted in any way whatsoever for reasons related to the armed conflict shall be treated humanely”. Article 5 AP II was adopted by consensus.¹⁸²

Other Instruments

215. Article 76 of the 1863 Lieber Code provides that “prisoners of war shall . . . be treated with humanity”.

216. Article 23(2) of the 1874 Brussels Declaration provides that POWs must be treated humanely.

217. Article 63 of the 1880 Oxford Manual provides that POWs must be treated humanely.

218. According to Article XXV of the 1948 American Declaration on the Rights and Duties of Man, “every individual who has been deprived of his liberty has the right to . . . humane treatment during the time he is in custody”.

219. Rule 1 of the 1987 European Prison Rules states that “the deprivation of liberty shall be effected in material and moral conditions which ensure respect for human dignity and are in conformity with these rules”.

220. Principle 1 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “all persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person”.

221. Paragraph 1 of the 1990 Basic Principles for the Treatment of Prisoners provides that “all prisoners shall be treated with the respect due to their inherent dignity and value as human beings”.

222. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia undertook “to apply the following fundamental principles: . . . all arrested persons, and notably combatants who have surrendered, must be treated with humanity; all detaining authorities must ensure the protection of the prisoners”.

223. Article 4(6) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that all persons deprived of their liberty for reasons related to the armed conflict shall be treated humanely.

224. According to Section 8 of the 1999 UN Secretary-General’s Bulletin, “the United Nations force shall treat with humanity and respect for their dignity detained members of the armed forces and other persons who no longer take part in military operations by reason of detention”.

¹⁸² CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

II. National Practice

Military Manuals

225. Argentina's Law of War Manual (1969) provides that POWs shall be treated humanely.¹⁸³

226. Argentina's Law of War Manual (1989) stipulates that "prisoners of war shall at all times be treated humanely".¹⁸⁴

227. Australia's Commanders' Guide states that POWs "must be treated humanely and not subjected to cruel, degrading or unfair treatment".¹⁸⁵

228. Australia's Defence Force Manual provides that "the fundamental principle underlying the treatment of PW is that they are . . . entitled to humane and decent treatment throughout their captivity . . . The fundamental rules for the treatment of PW are . . . they must be treated humanely and honourably".¹⁸⁶

229. Belgium's Law of War Manual provides that:

POWs shall be treated at all times with humanity. Any unlawful act or omission by the Detaining Power causing death or seriously endangering the health of a prisoner of war in its custody is prohibited and will be regarded as a serious breach of the Convention [GC III]. POWs shall at all times be protected, particularly against acts of violence or intimidation and against insults and public curiosity.¹⁸⁷

230. Belgium's Teaching Manual for Soldiers provides that "prisoners of war must be treated humanely and protected".¹⁸⁸

231. Benin's Military Manual provides that all captured combatants shall be treated humanely.¹⁸⁹

232. Burkina Faso's Disciplinary Regulations stipulates that "from the moment of their capture, prisoners must be treated humanely. They must be protected against any acts of violence, insults and public curiosity."¹⁹⁰

233. Cameroon's Disciplinary Regulations provides that "from the moment of their capture, prisoners must be treated humanely. They must be protected against any acts of violence, insults and public curiosity."¹⁹¹

234. Cameroon's Instructors' Manual provides that captured enemy combatants shall be treated humanely.¹⁹²

235. Canada's LOAC Manual provides that "PWs must at all times be treated humanely and must be protected, particularly against any acts of violence or intimidation, as well as against insults and public curiosity".¹⁹³ With regard to

¹⁸³ Argentina, *Law of War Manual* (1969), § 2.013.

¹⁸⁴ Argentina, *Law of War Manual* (1989), § 3.12.

¹⁸⁵ Australia, *Commanders' Guide* (1994), § 716, see also § 701.

¹⁸⁶ Australia, *Defence Force Manual* (1994), §§ 1001–1002.

¹⁸⁷ Belgium, *Law of War Manual* (1983), p. 44.

¹⁸⁸ Belgium, *Teaching Manual for Soldiers* (undated), p. 10.

¹⁸⁹ Benin, *Military Manual* (1995), Fascicule I, p. 16, Fascicule II, pp. 9 and 11 and Fascicule III, p. 5.

¹⁹⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 36(1).

¹⁹¹ Cameroon, *Disciplinary Regulations* (1975), Article 33.

¹⁹² Cameroon, *Instructors' Manual* (1992), §§ 152 and 532 and p. 96.

¹⁹³ Canada, *LOAC Manual* (1999), p. 10-3, § 19.

internees, it states that “in many respects the articles contained in [GC IV] as to the treatment of internees are comparable to provisions of [GC III] concerned with the treatment of PWs”.¹⁹⁴ With regard to non-international armed conflicts, the manual provides that “the wounded and sick among [persons whose liberty has been restricted] are to be treated humanely”.¹⁹⁵

236. Canada’s Code of Conduct states that Canadian forces must “treat all detained persons humanely in accordance with the standard set by the Third Geneva Convention”.¹⁹⁶ The Code specifies that “the concept of humane treatment towards those under your control and the standard of treatment which applies to all detained persons . . . is a long standing rule”.¹⁹⁷ It further states that “humane treatment includes not only the proper provision of necessities of life but also the type of treatment provided to detained persons”.¹⁹⁸

237. Colombia’s Soldiers’ Manual and Instructors’ Manual provide that enemy combatants who surrender must be treated humanely.¹⁹⁹

238. Congo’s Disciplinary Regulations provides that “from the moment of their capture, prisoners must be treated humanely. They must be protected against any acts of violence, insults and public curiosity.”²⁰⁰

239. Croatia’s Commanders’ Manual provides that POWs and captured medical and religious personnel must be respected and treated humanely.²⁰¹

240. Croatia’s Soldiers’ Manual states that captured combatants must be treated humanely.²⁰²

241. Croatia’s Instructions on Basic Rules of IHL requires soldiers to treat captured combatants with humanity.²⁰³

242. The Military Manual of the Dominican Republic requires that all prisoners and detainees, i.e. any persons in the power of the armed forces, whatever their status, be treated humanely.²⁰⁴

243. Ecuador’s Naval Manual provides that captured enemy combatants and internees shall be treated humanely.²⁰⁵

244. El Salvador’s Soldiers’ Manual provides that enemy combatants who lay down their arms and surrender shall be treated humanely.²⁰⁶

245. France’s LOAC Summary Note provides that “captured combatants shall be treated humanely”.²⁰⁷

¹⁹⁴ Canada, *LOAC Manual* (1999), p. 11-6, § 49.

¹⁹⁵ Canada, *LOAC Manual* (1999), p. 17-3, § 25.

¹⁹⁶ Canada, *Code of Conduct* (2001), Rule 6.

¹⁹⁷ Canada, *Code of Conduct* (2001), Rule 6, § 3.

¹⁹⁸ Canada, *Code of Conduct* (2001), Rule 6, § 5.

¹⁹⁹ Colombia, *Soldiers’ Manual* (1999), p. 18; *Instructors’ Manual* (1999), p. 22.

²⁰⁰ Congo, *Disciplinary Regulations* (1986), Article 33.

²⁰¹ Croatia, *Commanders’ Manual* (1992), Rule No. 15.

²⁰² Croatia, *Soldiers’ Manual* (1992), p. 4.

²⁰³ Croatia, *Instructions on Basic Rules of IHL* (1993), Instruction No. 4.

²⁰⁴ Dominican Republic, *Military Manual* (1980), pp. 6 and 7.

²⁰⁵ Ecuador, *Naval Manual* (1989), § 11.8.

²⁰⁶ El Salvador, *Soldiers’ Manual* (undated), p. 8.

²⁰⁷ France, *LOAC Summary Note* (1992), § 2.1.

246. France's LOAC Teaching Note provides that "every captured combatant . . . has the right to respect for his dignity. He shall be treated humanely."²⁰⁸
247. France's LOAC Manual provides that "prisoners of war must be spared and treated with humanity . . . They shall be protected from acts of violence, insults and intimidation."²⁰⁹
248. Germany's Military Manual states that "unlawful combatants do, however, have a legitimate claim to certain fundamental guarantees, including the right to humane treatment". It also states that civilian "internees shall be treated humanely".²¹⁰ The manual further provides that captured combatants shall be treated with dignity and their person and honour respected.²¹¹
249. Hungary's Military Manual provides that captured combatants and internees shall be treated humanely.²¹²
250. India's Army Training Note states that "Prisoners of War must at all times be humanely treated".²¹³
251. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that all individuals falling under the power of a party to a conflict should, at a minimum, be treated in accordance with the principles of humanity.²¹⁴
252. Italy's IHL Manual provides that POWs shall be treated with humanity in all cases.²¹⁵
253. Italy's LOAC Elementary Rules Manual stipulates that "captured enemy combatants shall be . . . treated humanely".²¹⁶
254. Kenya's LOAC Manual provides that "those who have surrendered must be treated humanely as POWs or prisoners depending on the nature of the conflict".²¹⁷
255. According to Madagascar's Military Manual, "prisoners of war are entitled to humane treatment".²¹⁸
256. Mali's Army Regulations provides that "from the moment of their capture, prisoners must be treated humanely. They must be protected against any acts of violence, insults and public curiosity."²¹⁹
257. Morocco's Disciplinary Regulations provides that "from the moment of their capture, prisoners must be treated humanely. They must be protected against any acts of violence, insults and public curiosity."²²⁰

²⁰⁸ France, *LOAC Teaching Note* (2000), p. 3. ²⁰⁹ France, *LOAC Manual* (2001), p. 102.

²¹⁰ Germany, *Military Manual* (1992), §§ 302 and 595.

²¹¹ Germany, *Military Manual* (1992), § 704; see also *Soldiers' Manual* (1991), p. 7, § 3.

²¹² Hungary, *Military Manual* (1992), pp. 75 and 99.

²¹³ India, *Army Training Note* (1995), p. 3/7, § 15(a).

²¹⁴ Report on the Practice of Israel, 1997, Chapter 5.6, referring to *Law of War Booklet* (1986), pp. 12 and 14.

²¹⁵ Italy, *IHL Manual* (1991), Vol. II, Chapter I, §§ 2 and 84.

²¹⁶ Italy, *LOAC Elementary Rules Manual* (1991), §§ 15 and 74 and p. 29.

²¹⁷ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 6, 7 and 14.

²¹⁸ Madagascar, *Military Manual* (1994), p. 22, Rule 15, p. 32, Rule 21, p. 78, Rule 26 and p. 85, Rule 7.

²¹⁹ Mali, *Army Regulations* (1979), Article 37.

²²⁰ Morocco, *Disciplinary Regulations* (1974), Article 25(3).

258. The Military Manual of the Netherlands provides that “prisoners of war must at all times be treated humanely”.²²¹
259. The Military Handbook of the Netherlands states that POWs “have the right to humane treatment. They cannot be exposed to acts of violence, insults and public curiosity.”²²²
260. New Zealand’s Military Manual provides that, in both international and non-international armed conflicts, all detainees must at all times be treated humanely and protected against insults and public curiosity and particularly against any acts of violence or intimidation.²²³
261. Nicaragua’s Military Manual states that prisoners have the right to be protected against all forms of violence, in both internal and international armed conflicts.²²⁴
262. Nigeria’s Operational Code of Conduct states that “soldiers who surrender . . . are entitled in all circumstances to humane treatment and respect for their person and their honor”.²²⁵
263. Nigeria’s Military Manual states that “enemy prisoners . . . shall be treated humanely”.²²⁶
264. Nigeria’s Manual on the Laws of War provides that “prisoners of war must at all times be humanely treated . . . Prisoners of war must be protected from violence, threats and the curiosity of the public.”²²⁷
265. Peru’s Human Rights Charter of the Security Forces requires that detained persons be treated humanely.²²⁸
266. The Soldier’s Rules of the Philippines instructs soldiers that “prisoners must be treated humanely”.²²⁹
267. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that “members of the AFP and PNP shall treat enemies who are *hors de combat* (e.g. surrendered/captured) humanely and with respect”.²³⁰
268. Romania’s Soldiers’ Manual provides that enemy combatants who surrender shall be treated humanely.²³¹
269. Russia’s Military Manual provides that the humane treatment of war victims, namely prisoners of war, must be guaranteed.²³²
270. Senegal’s IHL Manual provides, with regard to the rights of persons deprived of their liberty, that “all wounded and sick shall be treated humanely in any circumstances”.²³³

²²¹ Netherlands, *Military Manual* (1993), p. VII-3, § 2.

²²² Netherlands, *Military Handbook* (1995), p. 7-41.

²²³ New Zealand, *Military Manual* (1992), §§ 915, 1137(1) and 1814.

²²⁴ Nicaragua, *Military Manual* (1996), Articles 6 and 14(18).

²²⁵ Nigeria, *Operational Code of Conduct* (1967), § 4(e).

²²⁶ Nigeria, *Military Manual* (1994), p. 39, § 5(j).

²²⁷ Nigeria, *Manual on the Laws of War* (undated), § 37.

²²⁸ Peru, *Human Rights Charter of the Security Forces* (undated), p. 19.

²²⁹ Philippines, *Soldier’s Rules* (1989), § 6.

²³⁰ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2a(3).

²³¹ Romania, *Soldiers’ Manual* (1991), p. 7.

²³² Russia, *Military Manual* (1990), §§ 7 and 8(e).

²³³ Senegal, *IHL Manual* (1999), p. 24.

- 271.** South Africa's LOAC Manual states that "soldiers who have surrendered or who are in the control of the enemy . . . must be protected".²³⁴
- 272.** Spain's LOAC Manual provides that captured enemy combatants, those who surrender and prisoners of war must be respected and treated with humanity.²³⁵
- 273.** Switzerland's military manuals provide that prisoners have the right to be treated humanely and protected against all forms of violence.²³⁶
- 274.** Togo's Military Manual provides that all captured combatants shall be treated humanely.²³⁷
- 275.** The UK Military Manual provides that prisoners of war "must at all times be humanely treated".²³⁸ According to the manual, all violations of the Geneva Conventions that do not amount to grave breaches are also war crimes. In the non-exhaustive list of such war crimes, the manual includes "ordering punishment drill for internees" and "exposing prisoners of war to public insults or mob violence".²³⁹
- 276.** The UK LOAC Manual provides that "PW must at all times be humanely treated".²⁴⁰
- 277.** The US Field Manual states that "prisoners of war must at all times be humanely treated". The manual stipulates that "protected persons who are confined pending proceedings or serving a sentence involving loss of liberty shall during confinement be humanely treated".²⁴¹
- 278.** The US Air Force Commander's Handbook provides that "a prisoner of war is always to be humanely treated, and must be protected against violence, intimidation, insults and public curiosity".²⁴²
- 279.** The US Soldier's Manual provides that all captured combatants, whether POWs or not, shall be treated humanely.²⁴³
- 280.** The US Instructor's Guide states that "American soldiers must treat all prisoners of war, other captured or detained personnel . . . humanely". It reminds commanders that "the Hague and the Geneva conventions and the customary law of war explicitly require you to treat captured and detained personnel humanely".²⁴⁴
- 281.** The US Operational Law Handbook recognises that soldiers have a duty to treat all POWs humanely.²⁴⁵

²³⁴ South Africa, *LOAC Manual* (1996), § 30.

²³⁵ Spain, *LOAC Manual* (1996), Vol. I, §§ 7.3.a.(7), 8.4.a.(1), 10.6.b.(2), 10.6.c. and 10.8.f.(2).

²³⁶ Switzerland, *Military Manual* (1984), p. 24; *Basic Military Manual* (1987), Article 97; *Teaching Manual* (1986), p. 43.

²³⁷ Togo, *Military Manual* (1996), Fascicule I, p. 16, Fascicule II, pp. 9 and 11 and Fascicule III, p. 5.

²³⁸ UK, *Military Manual* (1958), § 133(b).

²³⁹ UK, *Military Manual* (1958), § 626. ²⁴⁰ UK, *LOAC Manual* (1981), Section 8, p. 29, § 5.

²⁴¹ US, *Field manual* (1956), §§ 89 and 276.

²⁴² US, *Air Force Commander's Handbook* (1980), § 4-1(a).

²⁴³ US, *Soldier's Manual* (1984), pp. 12-15.

²⁴⁴ US, *Instructor's Guide* (1985), pp 4 and 24.

²⁴⁵ US, *Operational Law Handbook* (1993), p. Q-191.

282. The US Air Force Pamphlet refers to Article 13 GC III and provides that “prisoners of war must at all times be humanely treated”.²⁴⁶

283. The US Naval Handbook provides that “combatants that have surrendered or otherwise fallen into enemy hands are entitled to prisoner-of-war status and, as such, must be treated humanely”.²⁴⁷ It stipulates that “all interned persons must be treated humanely”.²⁴⁸

284. The US Rules of Engagement for Operation Desert Storm instruct forces to “treat all prisoners humanely and with respect and dignity”.²⁴⁹

285. The YPA Military Manual of the SFRY (FRY) provides that prisoners must be treated humanely.²⁵⁰

National Legislation

286. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, prisoners of war must be humanely treated and their person and honour respected.²⁵¹

287. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.²⁵²

288. Under El Salvador’s Penal Code, “the civilian who violates the duties of humanity against prisoners of war or hostages . . . before, during or after the war” is guilty of a crime.²⁵³

289. Under the Draft Amendments to the Penal Code of El Salvador, the civilian who commits an inhumane act against prisoners of war is punishable.²⁵⁴

290. Under Hungary’s Criminal Code as amended, the person who treats a prisoner of war inhumanely is guilty, upon conviction, of a war crime.²⁵⁵

291. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 13 GC III and 27 GC IV, as well as any “contravention” of AP II, including violations of Article 5(3) AP II, are punishable offences.²⁵⁶

292. Nicaragua’s Military Penal Code punishes any soldier “who maltreats an enemy who has surrendered”.²⁵⁷

²⁴⁶ US, *Air Force Pamphlet* (1976), §§ 13-2, 14-2 and 14-7.

²⁴⁷ US, *Naval Handbook* (1995), § 11-7. ²⁴⁸ US, *Naval Handbook* (1995), § 11-8.

²⁴⁹ US, *Rules of Engagement for Operation Desert Storm* (1991), § I.

²⁵⁰ SFRY (FRY), *YPA Military Manual* (1988), § 253(3).

²⁵¹ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 22.

²⁵² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁵³ El Salvador, *Penal Code* (1997), Article 363.

²⁵⁴ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Violación de los deberes de humanidad”.

²⁵⁵ Hungary, *Criminal Code as amended* (1978), Section 158(1).

²⁵⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁵⁷ Nicaragua, *Military Penal Code* (1996), Article 53.

293. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".²⁵⁸

294. Uruguay's Military Penal Code as amended punishes the violation of "respect for [a POW's] dignity".²⁵⁹

295. Vietnam's Penal Code provides that "whoever has mistreated... soldiers who have surrendered shall be punished".²⁶⁰

National Case-law

296. In its judgement in the *Brocklebank case* in 1996, in the context of events that occurred during UN operations in Somalia, the Canadian Military Court of Appeal stated that it was a general principle of law that a person who had custody of a prisoner had the duty to protect him or her.²⁶¹

297. In the *Maelzer case* in 1946, the US Military Commission in Florence convicted the accused of having exposed prisoners of war in his custody to acts of violence, insults and public curiosity in violation of Article 2, second paragraph, of the 1929 Geneva POW Convention. The prisoners had, among other things, been forced to march through the streets of Rome in a parade emulating ancient triumphal marches.²⁶²

Other National Practice

298. It is reported that during Algeria's war of independence, "the ALN has always tried to treat French prisoners as humanely as possible".²⁶³

299. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal to "treat all imprisoned persons humanely".²⁶⁴

300. The Report on the Practice of Malaysia notes that it has been the policy of the Malaysian security forces not to mistreat captured enemies as part of a strategy to give a positive image of themselves, particularly in relation to communist sympathisers.²⁶⁵

301. The US Directives on the Combined Screening of Detainees in Vietnam issued in 1967 stated that "detainees are entitled to humane treatment in accordance with the provisions of the Geneva Conventions".²⁶⁶

²⁵⁸ Norway, *Military Penal Code as amended* (1902), § 108.

²⁵⁹ Uruguay, *Military Penal Code as amended* (1943), Article 58(8).

²⁶⁰ Vietnam, *Penal Code* (1990), Article 275.

²⁶¹ Canada, Military Court of Appeal, *Brocklebank case*, Judgement, 2 April 1996.

²⁶² US, Military Commission in Florence, *Maelzer case*, Trial of 9-14 September 1946.

²⁶³ *El Moudjahid*, Vol. 1, p. 440.

²⁶⁴ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

²⁶⁵ Report on the Practice of Malaysia, 1997, Chapter 2.1.

²⁶⁶ US, Military Assistance Command, Vietnam, Directive No. 381-46, Military Intelligence: Combined Screening of Detainees, 27 December 1967.

302. An instruction card issued to all US troops engaged in Vietnam directed soldiers always to treat prisoners humanely, adding that “all persons in your hands, whether suspects, civilians, or combat captives, must be protected against violence, insults, curiosity, and reprisals of any kind”.²⁶⁷

303. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that “Iraqi prisoners of war will not be mistreated and will be provided humane and safe detention”.²⁶⁸

304. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.²⁶⁹

305. In a statement in 1991, the Federal Executive Council of the SFRY (FRY) reiterated that “it is essential . . . to ensure humane treatment of all detainees and particularly of the participants in the armed conflicts who surrender”.²⁷⁰

III. Practice of International Organisations and Conferences

United Nations

306. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council demanded that “the Bosnian Serb party respect fully the rights of [all persons detained against their will]”.²⁷¹

307. In a resolution adopted in 1995, the UN Security Council called upon the government of Rwanda to take further steps to resolve the humanitarian problems in its prisons.²⁷²

308. In a resolution adopted in 1970 on respect for human rights in armed conflicts, the UN General Assembly urged that “combatants in all armed conflicts not covered by Article 4 GC III be accorded the same humane treatment defined by the principles of international law applied to POWs”.²⁷³

309. In resolutions on El Salvador adopted in 1985 and 1986, the UN General Assembly, considering that common Article 3 of the 1949 Geneva Conventions

²⁶⁷ US, The enemy in your hands, Reproduction of 3x5 instruction card issued to all troops, Major General G. S. Prugh, *Law at War: Vietnam 1964–1973*, Department of the Army, Vietnam Studies, 1975, Appendix H.

²⁶⁸ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, 21 January 1991, UN Doc. S/22122, Annex I, p. 2.

²⁶⁹ Report on US Practice, 1997, Chapter 5.3.

²⁷⁰ SFRY (FRY), Statement by the Federal Executive Council regarding the Need for Respect for the Norms of International Humanitarian Law in the Armed Conflicts in Yugoslavia, Belgrade, 31 October 1991.

²⁷¹ UN Security Council, Res. 1010, 10 August 1995, § 2; see also Res. 1019, 9 November 1995, § 3.

²⁷² UN Security Council, Res. 1011, 16 August 1995, § 6.

²⁷³ UN General Assembly, Res. 2676 (XXV), 9 December 1970, § 5.

and AP II were applicable, recommended that the Special Representative report on the observance of rules pertaining to the humanitarian treatment of and respect for prisoners of war.²⁷⁴

310. In a resolution adopted in 1980 in the context of the conflict in Kampuchea, the UN Commission on Human Rights urged the parties to treat enemy combatants who surrendered or who were captured humanely.²⁷⁵

311. In several resolutions on Afghanistan adopted between 1989 and 1992, the UN Commission on Human Rights demanded that all parties treat their prisoners according to the recognised principles of IHL and protect them from acts of violence, including ill-treatment.²⁷⁶

312. In resolutions adopted in 1991 and 1992 in the context of the Iraqi occupation of Kuwait, the UN Commission on Human Rights strongly condemned Iraq for not treating prisoners of war and detained civilians according to recognised IHL principles and insisted that it abstain from acts of violence against them, including ill-treatment.²⁷⁷

313. In 1992, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission of Human Rights noted that the field commanders who were members of the nation-wide *Shura* (Council) stated that they would treat their prisoners humanely.²⁷⁸

Other International Organisations

314. In a resolution adopted in 1994 on the follow-up of the Intifada's developments, the Council of the League of Arab States decided "to ask the International Organisations concerned with Human Rights . . . to treat the prisoners and those put under arrest in accordance with the provisions of the Fourth Geneva Convention of 1949".²⁷⁹

International Conferences

315. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the treatment of prisoners of war in which it recognised that "the international community has consistently demanded humane treatment for prisoners of war". The Conference called upon all authorities involved in an armed conflict "to ensure that every prisoner of war is given the treatment

²⁷⁴ UN General Assembly, Res. 40/139, 13 December 1985, § 3; Res. 41/157, 4 December 1986, § 4.

²⁷⁵ UN Commission on Human Rights, Res. 29 (XXXVI), 11 March 1980, § 5.

²⁷⁶ UN Commission on Human Rights, Res. 1989/67, 8 March 1989, § 11; Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6.

²⁷⁷ UN Commission on Human Rights, Res. 1991/67, 6 March 1991, § 5; Res. 1992/60, 3 March 1992, § 3.

²⁷⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1992/33, 17 February 1992, § 51.

²⁷⁹ League of Arab States, Council, Res. 5414, 15 September 1994, § 4.

and full measure of protection prescribed by the Geneva Convention of 1949 on the protection of prisoners of war".²⁸⁰

316. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that, irrespective of GC III, "the international community has consistently demanded humane treatment for prisoners of war".²⁸¹

317. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the status of combatants in non-international armed conflicts in which it stated that:

Combatants and members of resistance movements who participate in non-international armed conflicts and who conform to the provisions of Article 4 of the Third Geneva Convention . . . should when captured be protected against any inhumanity and brutality and receive treatment similar to that which that Convention lays down for prisoners of war.²⁸²

318. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the application of GC I, II and III in the Middle East in which it called for "the total application" of these conventions by the parties to the conflict, in particular, "those provisions which relate to the treatment of prisoners of war".²⁸³

319. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "all persons deprived of their liberty for reasons related to the armed conflict are fully respected and protected".²⁸⁴

IV. Practice of International Judicial and Quasi-judicial Bodies

320. In its General Comment on Article 10 of the 1966 ICCPR in 1992, the HRC held that:

Treating all persons deprived of their liberty with humanity and with respect for their dignity is a fundamental and universally applicable rule. Consequently, the application of this rule, as a minimum, cannot be dependent on the material resources available in the State party. This rule must be applied without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.²⁸⁵

²⁸⁰ 20th International Conference of the Red Cross, Vienna, 2–9 October, 1965, Res. XXIV.

²⁸¹ 21st International Conference of the Red Cross, Istanbul, 6–13 September, 1969, Res. XI.

²⁸² 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XVIII.

²⁸³ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. IV.

²⁸⁴ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(d).

²⁸⁵ HRC, General Comment No. 21 (Article 10 ICCPR), 10 April 1992, § 4.

321. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that:

In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee's opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below.

- (a) All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. Although this right, prescribed in article 10 of the Covenant, is not separately mentioned in the list of non-derogable rights in article 4, paragraph 2, the Committee believes that here the Covenant expresses a norm of general international law not subject to derogation. This is supported by the reference to the inherent dignity of the human person in the preamble to the Covenant and by the close connection between articles 7 and 10.²⁸⁶

322. In 1982, in *Améndola Massiotti and Baritussio v. Uruguay*, the HRC found that:

The Human Rights Committee, acting under article 5 (4) of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts as found by the Committee, in so far as they continued or occurred after 23 March 1976 (the date on which the Covenant and the Optional Protocol entered into force for Uruguay) disclose the following violations of the International Covenant on Civil and Political Rights, in particular of:

In the case of Carmen Améndola Massiotti

Articles 7 and 10 (1), because the conditions of her imprisonment amounted to inhuman treatment.²⁸⁷

323. In *Drescher Caldas v. Uruguay* in 1983, the HRC found that holding a detainee *incommunicado* for six weeks after arrest was incompatible with the standard of humane treatment required by Article 10(1) of the 1966 ICCPR.²⁸⁸

324. In *Martínez Machado v. Uruguay* in 1983, the HRC found a violation of Article 10(1) of the 1966 ICCPR because the detainee in question, arrested for security reasons, was held *incommunicado* for more than five months.²⁸⁹

325. In *Arzuaga Gilboa v. Uruguay* in 1985, the HRC found that holding the plaintiff *incommunicado* for a period of 15 days was a violation of Article 10(1) of the 1966 ICCPR.²⁹⁰

326. In 1998, in *Deidrick v. Jamaica*, the HRC found that:

With regard to the deplorable conditions of detention at St. Catherine's District Prison, the Committee notes that author's counsel has made precise allegations, related thereto, i.e. that the author is locked-up in his cell 23 hours a day, no mattress or bedding are provided, that there is lack of artificial light and no integral sanitation, inadequate medical services, deplorable food and no recreational facilities etc.

²⁸⁶ HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, § 13(a).

²⁸⁷ HRC, *Améndola Massiotti and Baritussio v. Uruguay*, Views, 26 July 1982, § 13.

²⁸⁸ HRC, *Drescher Caldas v. Uruguay*, Views, 21 July 1983, § 14.

²⁸⁹ HRC, *Martínez Machado v. Uruguay*, Views, 4 November 1983, p. 148.

²⁹⁰ HRC, *Arzuaga Gilboa v. Uruguay*, Views, 1 November 1985, § 14.

All of this has not been contested by the State party, except in a general manner saying that these conditions affect all prisoners. In the Committee's opinion, the conditions described above, which affect the author directly are such as to violate his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to the Covenant. It finds that holding a prisoner in such conditions of detention constitutes inhuman treatment in violation of article 10, paragraph 1, and of article 7 [of the 1966 ICCPR].²⁹¹

327. In 1999, in *Civil Liberties Organisation v. Nigeria (151/96)*, the ACiHPR stated that "deprivation of light, insufficient food and lack of access to medicine or medical care [of persons deprived of their liberty] also constitute violations of Article 5" of the ACHPR.²⁹²

328. In 1969, in the *Greek case*, the ECiHR concluded that accommodation in the Lakki camp violated article 3 of the 1950 ECHR because of "the conditions of gross overcrowding and its consequences"; the dormitories could hold 100 to 150 persons.²⁹³

329. In 1980, the IACiHR recommended that Argentina:

provide humanitarian treatment to those detained for reasons of security or public order, which treatment should in no case be inferior to that given to common prisoners, bearing in mind in both cases the internationally accepted Standard Minimum Rules for the Treatment of Prisoners.²⁹⁴

V. Practice of the International Red Cross and Red Crescent Movement

330. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "prisoners of war shall be spared and treated humanely".²⁹⁵

331. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC stated that all parties to the conflict must "give humane treatment to all captured enemy combatants".²⁹⁶

332. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "persons not participating or no longer participating in the hostilities, such as . . . prisoners of war . . . , must be respected and protected in all circumstances".²⁹⁷

²⁹¹ HRC, *Deidrick v. Jamaica*, Views, 9 April 1998, § 9.3.

²⁹² ACiHPR, *Civil Liberties Organisation v. Nigeria (151/96)*, Decision, 15 November 1999, § 27.

²⁹³ ECiHR, *Greek case*, Report, 5 November 1969, §§ 14 and 21.

²⁹⁴ IACiHR, Report on Argentina, Doc. OEA/Ser.L/V/II.49 Doc. 19, 11 April 1980, Conclusions, Section B, § 8.

²⁹⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 496.

²⁹⁶ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 5, *IRRC*, No. 209, 1979, p. 88.

²⁹⁷ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

333. In an appeal issued in 1991 in the context of the conflict in the former Yugoslavia, the ICRC enjoined the military and civilian authorities of the parties involved to take all the necessary steps to “treat all captured combatants humanely”.²⁹⁸

334. In 1991, the President of the ICRC appealed personally to the highest authorities of the parties to a non-international armed conflict to treat captured enemy combatants humanely.²⁹⁹

335. In a press release in 1992, the ICRC urged the parties to the conflict in Nagorno-Karabakh “to ensure that combatants who surrender or who are no longer able to take part in the fighting are treated humanely”.³⁰⁰

336. In a press release in 1992, the ICRC enjoined the parties to the conflict in Bosnia and Herzegovina to “treat all captured combatants humanely”.³⁰¹

337. In a press release in 1992, the ICRC appealed to the parties to the conflict in Bosnia and Herzegovina to treat captured combatants and any captured civilians humanely, and to instruct all combatants in the field to respect captured persons.³⁰²

338. In a press release in 1992, the ICRC urged all the parties involved in the conflict in Afghanistan to “treat all captured combatants humanely”.³⁰³

339. In a press release in 1992, the ICRC urged all the parties involved in the conflict in Tajikistan to ensure the protection of civilians and military victims, in compliance with the basic rules of IHL and, in particular, to treat all captured combatants humanely.³⁰⁴

340. In a communication to the press in 1993, the ICRC stated that its delegates in Bosnia and Herzegovina were once more witnessing “blatant violations of the basic principles of international humanitarian law” and cited as an example that “prisoners are not treated humanely”.³⁰⁵

341. In a communication to the press issued in 1993, the ICRC enjoined the parties to the conflict in Somalia “to respect and protect all those not or no longer participating in hostilities, such as prisoners” and to “treat all prisoners humanely”.³⁰⁶

²⁹⁸ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

²⁹⁹ ICRC archive documents.

³⁰⁰ ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.

³⁰¹ ICRC, Press Release No. 1705, Bosnia and Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

³⁰² ICRC, Press Release No. 1725, Bosnia and Herzegovina: ICRC issues solemn appeal to all parties to the conflict, 13 August 1992.

³⁰³ ICRC, Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules 14 August 1992; see also Press Release No. 1712, Afghanistan: ICRC appeal for respect for humanitarian rules, 5 May 1992.

³⁰⁴ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

³⁰⁵ ICRC, Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity, 16 June 1993.

³⁰⁶ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

342. In a press release issued in 1994 during the non-international conflict in Yemen, the ICRC appealed to the parties to treat persons captured or arrested in connection with the conflict according to the principles and relevant provisions of international humanitarian law.³⁰⁷

343. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “persons not or no longer taking part in hostilities, such as . . . prisoners . . . shall be protected and respected in all circumstances, regardless of the party to which they belong”. It further stated that “captured combatants and persons who have laid down their arms no longer represent any danger and must be respected; . . . subjecting them or threatening to subject them to ill-treatment . . . is a violation of international humanitarian law at all times”.³⁰⁸

344. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “persons not participating or no longer participating in confrontations, such as . . . prisoners . . . shall be protected and respected in all circumstances”. It further states that combatants and other persons who are captured, and those who have laid down their arms, shall not, in particular, be “ill-treated”.³⁰⁹

345. In a press release issued in 1994 regarding the situation in Bihac (Bosnia and Herzegovina), the ICRC appealed to the parties to respect IHL and reminded them that captured combatants must be treated humanely.³¹⁰

346. In a press release in 1994, the ICRC requested all concerned parties to the conflict in Chechnya to treat humanely all captured combatants and civilians detained in connection with the conflict.³¹¹

347. In a press release in 1995, the ICRC appealed to all the parties involved in Turkey’s military operations in northern Iraq “to accord humane treatment to captured combatants and arrested civilians”.³¹²

348. In a communication to the press in 1996, the ICRC appealed to the parties to the conflict in Chechnya to ensure that all captured combatants and civilians were treated humanely.³¹³

³⁰⁷ ICRC, Press Release No. 1775, Yemen: ICRC active on both sides appeals to belligerents, 12 May 1994.

³⁰⁸ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § II, *IRRC*, No. 320, 1997, p. 504.

³⁰⁹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

³¹⁰ ICRC, Press Release No. 1792, Bihac: urgent appeal, 26 November 1994.

³¹¹ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.

³¹² ICRC, Press Release No. 1797, ICRC calls for compliance with international law in Turkey and Northern Iraq, 22 March 1995.

³¹³ ICRC, Communication to the Press No. 96/10, Chechen conflict: ICRC Appeal, 8 March 1996.

VI. Other Practice

349. In 1979, in a letter to the ICRC; an armed group confirmed its commitment to IHL and to “grant humane treatment to prisoners of war”.³¹⁴

350. On several occasions in the context of the conflict in Lebanon, Amnesty International called upon both the governmental party and the militias to guarantee the physical safety of all detainees.³¹⁵

351. In 1990, an armed opposition group issued strict orders to treat all prisoners “correctly”.³¹⁶

352. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “all persons deprived of their liberty shall be treated humanely”.³¹⁷

353. In 1996, a separatist entity proposed good treatment of detainees on the basis of reciprocity, that is, it would agree to respect international standards on the treatment of prisoners if the ICRC could prove that the other party did the same.³¹⁸

354. According to the Report on the Practice of Indonesia, the leader of an armed opposition group during the insurgencies of the 1950s and 1960s in Western Java stated that the Indonesian armed forces treated the rebels humanely.³¹⁹

B. Non-discrimination

General

I. Treaties and Other Instruments

Treaties

355. Article 1(3) of the 1945 UN Charter provides that one of the purposes of the UN is “to achieve international co-operation . . . in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion”.

356. Common Article 3 of the 1949 Geneva Conventions provides that:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness,

³¹⁴ ICRC archive document.

³¹⁵ Amnesty International, *Annual Report 1984*, London, pp. 405-406; *Annual Report 1988*, London, p. 308; *Annual Report 1989*, London, p. 298; *Annual Report 1991*, London, p. 170.

³¹⁶ ICRC archive document.

³¹⁷ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 4(4), *IRRC*, No. 282, 1991, p. 332.

³¹⁸ ICRC archive document.

³¹⁹ Report on the Practice of Indonesia, 1997, Chapter 5.7.

wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

357. Article 14 of the 1950 ECHR stipulates that the rights and freedoms contained in the Convention shall be secured “without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status”. Article 15(1) provides that “in time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.”

358. Article 2 of the 1965 Convention on the Elimination of Racial Discrimination provides that “States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races”. Article 5 provides that State parties undertake “to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law”.

359. Article 2(1) of the 1966 ICCPR stipulates that:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

360. Article 4(1) of the 1966 ICCPR provides that during war, public danger and other emergencies, in which derogations from the obligations of the Convention are allowed, a State party is nonetheless not permitted to take measures “inconsistent with its other obligations under international law” and involving “discrimination on the ground of race, colour, sex, language, religion or social origin”.

361. Article 26 of the 1966 ICCPR provides that:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

362. Article 2(2) of the 1966 ICESCR provides that:

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any

kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

363. Article 3 of the 1966 ICESCR provides that “the States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant”.

364. Article 1 of the 1969 ACHR provides that:

The States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

365. Article 27 of the 1969 ACHR provides that during war, public danger and other emergencies, in which derogations from the obligations of the Convention are allowed, a State party is nonetheless not permitted to take measures “inconsistent with its other obligations under international law” and involving “discrimination on the ground of race, color, sex, language, religion or social origin”.

366. The preamble to AP I states that:

The provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.

367. Article 9(1) AP I states that the provisions of the Protocol shall apply “without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria”. Article 9 AP I was adopted by consensus.³²⁰

368. Article 75(1) AP I provides that persons who are in the power of a party shall be treated humanely and enjoy the protection provided “without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria”. Article 75 AP I was adopted by consensus.³²¹

369. Article 2(1) AP II provides that “this Protocol shall be applied without any adverse distinction founded on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria”. Article 2 AP II was adopted by consensus.³²²

³²⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.

³²¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

³²² CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 85.

370. Article 4(1) AP II specifies that “all persons who do not take a direct part or who have ceased to take part in hostilities . . . shall in all circumstances be treated humanely, without any adverse distinction”. Article 4 AP II was adopted by consensus.³²³

371. Article 2 of the 1979 Convention on the Elimination of Discrimination against Women provides that “State Parties condemn discrimination against women in all its forms”.

372. Article 2 of the 1981 ACHPR provides that:

Every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present Charter without distinction of any kind such as race, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, fortune, birth or other status.

373. Article 2(1) of the 1989 Convention on the Rights of the Child provides that:

States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

374. Under Article 7(1)(h) of the 1998 ICC Statute, the following is a crime against humanity subject to the jurisdiction of the Court, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

375. Article 1 of the 2000 Protocol 12 to the 1950 ECHR provides that:

1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.
2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1.

Other Instruments

376. Article 2 of the 1948 UDHR provides that “everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any

³²³ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

377. Article 7 of the 1948 UDHR provides that “all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

378. According to Article 1 of the 1990 Cairo Declaration on Human Rights in Islam, “all men are equal in terms of basic human dignity and basic obligations and responsibilities, without any discrimination on the grounds of race, colour, language, sex, religious belief, political affiliation, social status or other considerations”.

379. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

380. In paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.

381. Article 18(e) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “persecution on political, racial, religious or ethnic grounds” constitutes a crime against humanity.

382. Article 2(10) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the “right to equal protection of the law and against any form of discrimination on the basis of race, ethnicity, gender, belief, age, physical condition or civil status and against any incitement to such discrimination”. Article 4(1) of Part IV of the Agreement stipulates that “persons *hors de combat* and those who do not take a direct part in hostilities . . . shall be . . . treated . . . without any adverse distinction founded on race, color, faith, sex, birth, social standing or any other similar criteria”.

383. Section 7.1 of the 1999 UN Secretary-General’s Bulletin provides that:

Persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention, shall, in all circumstances, be treated humanely and without any adverse distinction based on race, sex, religious convictions or any other ground.

384. Article 21 of the 2000 EU Charter of Fundamental Rights prohibits “any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of national minority, property, birth, disability, age or sexual orientation”.

II. National Practice

Military Manuals

385. Argentina's Law of War Manual (1969) restates the provisions of common Article 3 of the 1949 Geneva Conventions.³²⁴

386. Argentina's Law of War Manual (1989) stipulates that the provisions of the chapter regarding non-international armed conflicts are applicable "without any adverse distinction for reasons of race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other analogous condition or criteria, to persons affected by an armed conflict".³²⁵

387. Australia's Defence Force Manual states that, with regard to non-international armed conflicts, "the general rule is that persons are to be treated humanely without adverse discrimination on the ground of race, sex, language, religion, political discrimination or similar criteria".³²⁶ The manual stipulates that inhabitants of an occupied territory "must be treated with the same consideration, without any adverse distinction based, in particular, on race, religion or political opinion".³²⁷

388. Belgium's Law of War Manual states, with reference to common Article 3 of the 1949 Geneva Conventions, that in internal armed conflicts "persons who do not take a direct part in hostilities, including members of the armed forces who have laid down their arms and persons placed *hors de combat* must be treated... without any adverse distinction".³²⁸

389. Benin's Military Manual provides that persons placed *hors de combat* "shall in any circumstances be protected... without any adverse distinction".³²⁹

390. The Military Instructions of Bosnia and Herzegovina provides that the wounded and sick *hors de combat* must be treated without any discrimination.³³⁰

391. Burkina Faso's Disciplinary Regulations provides that it is a custom of war to treat all persons *hors de combat* humanely and without distinction.³³¹

392. Cameroon's Disciplinary Regulations and Instructors' Manual provide that each soldier must treat "all persons placed *hors de combat* without distinction".³³²

393. Canada's LOAC Manual establishes non-discrimination as an operational principle of the law of armed conflict, stating that "the LOAC is to be applied without any adverse distinction founded on race, colour, religion or faith,

³²⁴ Argentina, *Law of War Manual* (1969), § 8.001.

³²⁵ Argentina, *Law of War Manual* (1989), § 7.02.

³²⁶ Australia, *Defence Force Manual* (1994), § 945.

³²⁷ Australia, *Defence Force Manual* (1994), § 1218.

³²⁸ Belgium, *Law of War Manual* (1983), p. 17 and Chapter IX, § 2.

³²⁹ Benin, *Military Manual* (1995), Fascicule II, p. 4.

³³⁰ Bosnia and Herzegovina, *Military Instructions* (1992), Item 14, § 1.

³³¹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

³³² Cameroon, *Disciplinary Regulations* (1975), Article 31; *Instructors' Manual* (1992), § 421(1).

gender, birth or wealth, or any other similar criteria".³³³ The manual restates common Article 3 of the 1949 Geneva Conventions and specifies that:

AP II applies without any adverse distinction founded on race, colour, gender, language, religion, or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria.

AP II provides that all persons not participating in the conflict or who have ceased to do so are entitled to respect...and to be treated...without adverse distinction.³³⁴

394. Colombia's Circular on Fundamental Rules of IHL provides that "persons placed *hors de combat* or who do not participate directly in the hostilities... shall be protected... without any adverse distinction".³³⁵

395. Colombia's Soldiers' Manual and Instructors' Manual provide that:

All persons are born free and equal before the law, receive the same protection and treatment from the authorities and possess the same rights, freedoms and opportunities without any discrimination based on sex, race, family or nationality, origin, language, religion or political or philosophical opinion.³³⁶

396. Congo's Disciplinary Regulations stipulates that persons placed *hors de combat* "shall be treated without distinction".³³⁷

397. El Salvador's Human Rights Charter of the Armed Forces provides that "according to the law, we are all equal, without distinction based on sex, race, ideology or religion".³³⁸

398. France's Disciplinary Regulations as amended exhorts combatants to "treat humanely and without distinction all persons *hors de combat*".³³⁹

399. France's LOAC Manual restates Article 75(1) API.³⁴⁰ It further emphasises that one of the three main principles common to IHL and human rights is the principle of non-discrimination, according to which "individuals are treated without any distinction based on race, sex, nationality, philosophical, religious or political opinion".³⁴¹

400. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that:

As a general policy... all individuals falling in the power of a party to a conflict should, at a minimum, be treated in accordance with the principles of humanity, without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or on any other similar criteria.³⁴²

³³³ Canada, *LOAC Manual* (1999), p. 2-2, § 14.

³³⁴ Canada, *LOAC Manual* (1999), p. 17-2, §§ 10-12, p. 17-3, §§ 18 and 19.

³³⁵ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 1.

³³⁶ Colombia, *Soldiers' Manual* (1999), p. 12; *Instructors' Manual* (1999), p. 12.

³³⁷ Congo, *Disciplinary Regulations* (1986), Article 32.

³³⁸ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 7.

³³⁹ France, *Disciplinary Regulations as amended* (1975); Article 9 *bis*.

³⁴⁰ France, *LOAC Manual* (2001), p. 51. ³⁴¹ France, *LOAC Manual* (2001), pp. 51-52.

³⁴² Report on the Practice of Israel, 1997, Chapter 5.6, referring to *Law of War Booklet* (1986), p. 12.

401. Kenya's LOAC Manual states that "persons not involved in the fighting because they are not taking part in hostilities, or because they are wounded or have surrendered, or have been detained, must be treated . . . without adverse discrimination".³⁴³

402. Madagascar's Military Manual states that one of the seven fundamental rules of IHL is that "persons placed *hors de combat* and those who do not take a direct part in hostilities . . . shall in all circumstances be protected and treated humanely, without any adverse distinction".³⁴⁴

403. Mali's Army Regulations provides that the refusal to treat without distinction all persons *hors de combat* is a serious breach of its rules.³⁴⁵

404. Morocco's Disciplinary Regulations provides that as a custom of war, soldiers are required to treat without distinction all regular combatants placed *hors de combat*.³⁴⁶

405. The Military Manual of the Netherlands provides that protected persons shall be treated humanely "without adverse distinction based on race, colour, sex, language, religion or belief, political or other opinion, nationality or social origin, wealth, birth or other status, or on any other similar criteria".³⁴⁷ With respect to non-international armed conflict, the manual restates the principle of non-discrimination contained in common Article 3 of the 1949 Geneva Conventions and Article 4 AP II.³⁴⁸

406. The Military Handbook of the Netherlands provides in respect of protected persons that "any discrimination based on race, religion, sex . . . is prohibited".³⁴⁹

407. New Zealand's Military Manual states that the principle of non-discrimination is one of the key principles of the law of armed conflict. It states that "the law is to be applied without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria".³⁵⁰ It further provides that "all protected persons must be treated with the same consideration, without any adverse distinction based, in particular, on race, religion or political opinion".³⁵¹ The manual also emphasises the principle of non-discrimination with regard to non-international armed conflicts, and provides that AP II "is to apply without any adverse distinction founded on race, colour, sex, language, religion or other opinion, national or social origin, wealth, birth or other status or any other similar criteria". It adds that "all persons not participating in the conflict or who have ceased so to do are entitled, whether under restriction or not, to respect for their persons, honour and

³⁴³ Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 5–6.

³⁴⁴ Madagascar, *Military Manual* (1994), p. 91, Rule 1.

³⁴⁵ Mali, *Army Regulations* (1979), Article 36.

³⁴⁶ Morocco, *Disciplinary Regulations* (1974), Article 25(1).

³⁴⁷ Netherlands, *Military Manual* (1993), pp. VIII-2/VIII-3.

³⁴⁸ Netherlands, *Military Manual* (1993), pp. XI-1 and XI-4.

³⁴⁹ Netherlands, *Military Handbook* (1995), p. 7-38.

³⁵⁰ New Zealand, *Military Manual* (1992), § 206.

³⁵¹ New Zealand, *Military Manual* (1992), § 1321.2.

convictions, and religious practices and are, in all circumstances, to be treated humanely and without adverse distinction.³⁵²

408. Nicaragua's Military Manual reproduces common Article 3 of the 1949 Geneva Conventions.³⁵³

409. Peru's Human Rights Charter of the Armed Forces states that non-discrimination, i.e. respect for all without any distinction on the grounds of nationality, race, religion, social condition or political opinion, is one of the three common principles of the Geneva Conventions which represent the minimum level of protection to which every human being is entitled.³⁵⁴

410. Senegal's Disciplinary Regulations provides that all persons placed *hors de combat* must be treated without distinction.³⁵⁵

411. Senegal's IHL Manual restates common Article 3 of the 1949 Geneva Conventions.³⁵⁶

412. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are part of customary international law.³⁵⁷

413. Togo's Military Manual provides that persons placed *hors de combat* "shall in any circumstances be protected...without any adverse distinction".³⁵⁸

414. The UK LOAC Manual incorporates the provisions of common Article 3 of the 1949 Geneva Conventions.³⁵⁹

415. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions.³⁶⁰ It provides that the wounded and sick in the hands of one party to the conflict shall be cared for "without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria".³⁶¹ The manual also states that:

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.³⁶²

416. The US Air Force Pamphlet provides that the provisions of common Article 3 of the 1949 Geneva Conventions "insure humane treatment to civilians and others who are *hors de combat*, without regard to race, colour, religion, sex, birth, or wealth".³⁶³ It also stipulates that under GC IV, "any distinction in treatment based upon race, religion or political opinion is specially

³⁵² New Zealand, *Military Manual* (1992), § 1810.

³⁵³ Nicaragua, *Military Manual* (1996), Article 6.

³⁵⁴ Peru, *Human Rights Charter of the Armed Forces* (1994), § 24.

³⁵⁵ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

³⁵⁶ Senegal, *IHL Manual* (1999), p. 4. ³⁵⁷ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

³⁵⁸ Togo, *Military Manual* (1996), Fascicule II, p. 4.

³⁵⁹ UK, *LOAC Manual* (1981), Section 12, p. 42, § 2(a). ³⁶⁰ US, *Field Manual* (1956), § 11.

³⁶¹ US, *Field Manual* (1956), § 215. ³⁶² US, *Field Manual* (1956), § 266.

³⁶³ US, *Air Force Pamphlet* (1976), § 11-3.

forbidden".³⁶⁴ The Pamphlet quotes Article 1 of the 1945 UN Charter and adds that the set of documents elaborated by the UN and the Geneva Conventions safeguard such fundamental freedoms as "freedom from discrimination based on race, sex, language, or religion".³⁶⁵

417. The US Instructor's Guide restates the provisions of common Article 3 of the 1949 Geneva Conventions.³⁶⁶

National Legislation

418. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes against humanity defined in the 1998 ICC Statute, including persecution.³⁶⁷

419. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁶⁸

420. Canada's Crimes against Humanity and War Crimes Act provides that the crimes against humanity defined in Article 7 of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.³⁶⁹

421. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.³⁷⁰

422. Croatia's Criminal Code provides for the punishment of "any person who, on the basis of race, sex, skin colour, nationality or ethnic origin, violates basic human rights and freedoms accepted by the international community".³⁷¹

423. Finland's Revised Penal Code, under the heading "Offences against humanity", provides for the punishment of "any persons who, in their private or public functions, discriminate on grounds of race, national or ethnic origin, language, colour, sex, age, family ties, sexual preferences, state of health, religion, political orientation, political or industrial activity or other comparable circumstance".³⁷²

424. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of common Article 3 and of AP I, including violations of Articles 9(1) and 75(1) AP I, as well as any

³⁶⁴ US, *Air Force Pamphlet* (1976), § 14-4. ³⁶⁵ US, *Air Force Pamphlet* (1976), § 11-4.

³⁶⁶ US, *Instructor's Guide* (1985), p. 8.

³⁶⁷ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.20.

³⁶⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁶⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

³⁷⁰ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.

³⁷¹ Croatia, *Criminal Code* (1997), Article 174.

³⁷² Finland, *Revised Penal Code* (1995), Chapter 11, Section 9.

“contravention” of AP II, including violations of Articles 2(1) and 4(1) AP II, are punishable offences.³⁷³

425. Israel’s Nazis and Nazi Collaborators (Punishment) Law includes “persecution on national, racial, religious or political grounds” in its definition of crimes against humanity.³⁷⁴

426. Kenya’s Constitution provides that every person in Kenya is entitled to the fundamental rights and freedoms of the individual whatever his or her race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex.³⁷⁵

427. Under the International Crimes Act of the Netherlands, “persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognised as impermissible under international law, in connection with any act referred to in this subsection or any other crime as referred to in this Act”, is a crime against humanity. Persecution is defined as “the intentional and severe deprivation of fundamental rights contrary to international law by reason of the identity of the group or collectivity”.³⁷⁶

428. Under New Zealand’s International Crimes and ICC Act, crimes against humanity include the crime defined in Article 7(1)(h) of the 1998 ICC Statute.³⁷⁷

429. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment”.³⁷⁸

430. Poland’s Penal Code provides for the repression of incitement and use of violence or unlawful threat against a group or a particular person because he or she belongs to a particular racial group.³⁷⁹

431. Under Trinidad and Tobago’s Draft ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(h) of the 1998 ICC Statute.³⁸⁰

432. Under the UK ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(h) of the 1998 ICC Statute.³⁸¹

433. Under the US War Crimes Act as amended, violations of common Article 3 of the 1949 Geneva Conventions are war crimes.³⁸²

³⁷³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁷⁴ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b).

³⁷⁵ Kenya, *Constitution* (1992), Article 70.

³⁷⁶ Netherlands, *International Crimes Act* (2003), Articles 4(1)(h) and 4(2)(c).

³⁷⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 10(2).

³⁷⁸ Norway, *Military Penal Code as amended* (1902), § 108.

³⁷⁹ Poland, *Penal Code* (1997), Article 119.

³⁸⁰ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

³⁸¹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

³⁸² US, *War Crimes Act as amended* (1996), Section 2441(c).

434. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as “persecution on political, racial, national or religious grounds”.³⁸³

435. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as “persecution on political, racial, national or religious grounds”.³⁸⁴

436. The Penal Code as amended of the SFRY (FRY) provides that racial and other discrimination is a war crime.³⁸⁵

National Case-law

437. No practice was found.

Other National Practice

438. On the basis of the reply by Iraq’s Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that, during the Iran–Iraq War, members of the opposing forces who were *hors de combat* were treated without distinction based on military rank or category.³⁸⁶

439. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.³⁸⁷

440. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that:

We support in particular the fundamental guarantees contained in article 75 [AP I], such as the principle that all persons who are in the power of a party to a conflict and who do not benefit from more favourable treatment under the Conventions be treated humanely in all circumstances and enjoy, at a minimum, the protections specified in the Conventions without any adverse distinction based upon race, sex, language, religion or belief, political or other opinion, national or social origin, or any similar criteria.³⁸⁸

441. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3 [of the 1949 Geneva Conventions]”.³⁸⁹

³⁸³ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

³⁸⁴ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).

³⁸⁵ SFRY (FRY), *Penal Code as amended* (1976), Article 154.

³⁸⁶ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.1.

³⁸⁷ Report on the Practice of Jordan, 1997, Chapter 5.

³⁸⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

³⁸⁹ Report on US Practice, 1997, Chapter 5.3.

442. A memorandum on the responsibilities and obligations applicable to contacts with the local population issued by the Ministry of Defence of a State engaged in an international military operation in 1992 included a prohibition on discrimination founded on race, religion, sex or any other similar criteria.³⁹⁰

III. Practice of International Organisations and Conferences

United Nations

443. In a resolution on the former Yugoslavia adopted in 1995, the UN Sub-Commission on Human Rights demanded that “those who have engaged in incitement to ethnic or religious hatred be brought to justice and held individually accountable for their acts”.³⁹¹

444. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II “have long been considered customary international law”.³⁹²

Other International Organisations

445. In an opinion adopted in 1995 in the context of Turkey’s military intervention in northern Iraq, the Parliamentary Assembly of the Council of Europe observed that “ICRC efforts have been directed towards a pragmatic approach, whose operational objectives are . . . to assess on the spot the medical and sanitary needs of the wounded and sick, civilian or combatant, regardless of their origin”.³⁹³

International Conferences

446. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the elimination of racial discrimination in which it condemned “all forms of racism and racial discrimination at all levels”.³⁹⁴

447. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed dismay and condemnation that “gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including] . . . all forms of racism, racial discrimination and . . . discrimination against women”.³⁹⁵

³⁹⁰ ICRC archive document.

³⁹¹ UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, § 9.

³⁹² UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

³⁹³ Council of Europe, Parliamentary Assembly, Doc. 7295, 25 April 1995, §§ 10 and 11.

³⁹⁴ 22nd International Conference of the Red Cross, Teheran, 8-15 November 1973, Res. X.

³⁹⁵ World Conference on Human Rights, Vienna, 14-25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(30).

IV. Practice of International Judicial and Quasi-judicial Bodies

448. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called “elementary considerations of humanity”.³⁹⁶

449. In its General Comment on non-discrimination under the 1966 ICCPR in 1989, the HRC held that:

The Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms.³⁹⁷

450. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that:

According to article 4, paragraph 1, one of the conditions for the justifiability of any derogation from the Covenant is that the measures taken do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. Even though article 26 or the other Covenant provisions related to non-discrimination (article 2, 3, 14, paragraph 1, 23, paragraph 4, 24, paragraph 1, and 25) have not been listed among the non-derogable provisions in article 4, paragraph 2, there are elements or dimensions of the right to non-discrimination that cannot be derogated from in any circumstances. In particular, this provision of article 4, paragraph 1, must be complied with if any distinctions between persons are made when resorting to measures that derogate from the Covenant.³⁹⁸

V. Practice of the International Red Cross and Red Crescent Movement

451. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “any discriminatory distinction of treatment is prohibited if based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria”.³⁹⁹

452. At its Teheran Session in 1973, the Council of Delegates adopted a resolution on action in the struggle against racism and racial discrimination in which it noted that “racism and racial discrimination constitute a serious violation of basic human rights” and of the Red Cross principle of impartiality. The resolution recalled the “provisions of the Geneva Conventions forbidding

³⁹⁶ ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

³⁹⁷ HRC, General Comment No. 18 (Non-discrimination), 10 November 1989, § 7.

³⁹⁸ HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, § 8.

³⁹⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 199.

any discrimination of a racial character" and stressed the necessity "to engage still more actively in the struggle for the elimination of racism and racial discrimination".⁴⁰⁰

453. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that Transitional Government in Salisbury "allow the ICRC to provide medical care without discrimination to all wounded and sick war victims".⁴⁰¹

454. In a communication to the press issued in 1993, the ICRC stated that its delegates in Bosnia and Herzegovina were once more witnessing "blatant violations of the basic principles of international humanitarian law" and cited the "adverse discrimination . . . practiced in the medical care given to sick and wounded civilians and combatants" as an example.⁴⁰²

455. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross reminded the parties of their obligation to treat without any distinction non-combatants and persons *hors de combat*. It recalled the Geneva Conventions and AP I.⁴⁰³

VI. Other Practice

456. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "a state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (f) systematic racial discrimination".⁴⁰⁴

457. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "all persons, even if their liberty has been restricted . . . shall in all circumstances be treated . . . without any adverse distinction".⁴⁰⁵

458. The SPLM Constitution provides that a member of the SPLM has the duty and obligation to "combat racism, tribalism, political sectarianism, religious intolerance and all other forms of discrimination in the New Sudan".⁴⁰⁶

⁴⁰⁰ International Red Cross and Red Crescent Movement, Council of Delegates, Teheran, 8–15 November 1973, Resolution on action in the struggle against racism and racial discrimination.

⁴⁰¹ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 6, *IRRC*, No. 209, 1979, p. 88.

⁴⁰² ICRC, Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity, 16 June 1993.

⁴⁰³ Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1 de Enero de 1994, 3 January 1994.

⁴⁰⁴ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(f).

⁴⁰⁵ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(1), *IRRC*, No. 282, 1991, p. 331.

⁴⁰⁶ SPLM, Constitution, March 1996, Article 7(2).

Civilians

Note: For practice concerning non-discrimination towards returning displaced persons, see Chapter 38, section D.

I. Treaties and Other Instruments

Treaties

459. Article 13 GC IV provides that the general protection of populations against certain consequences of war is applicable “without any adverse distinction based, in particular, on race, nationality, religion or political opinion”.

460. Article 27, third paragraph, GC IV stipulates that:

Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion.

461. Article 54, first paragraph, GC IV provides that, should judges and public officials in the occupied territories abstain from fulfilling their functions for reasons of conscience, “the occupying power may not . . . take any measures of coercion or discrimination against them”.

462. Article 69(1) AP I provides that the occupying power shall provide food, medical and other supplies necessary for the survival of the civilian population in the occupied territory “without any adverse distinction”. Article 69 AP I was adopted by consensus.⁴⁰⁷

463. Article 70(1) AP I provides that the relief actions of the occupying power and of relief societies are to be “conducted without any adverse distinction”. Article 70 AP I was adopted by consensus.⁴⁰⁸

464. Article 18(2) AP II states that the relief actions of the occupying power and of relief societies are to be “conducted without any adverse distinction”. Article 18 AP II was adopted by consensus.⁴⁰⁹

Other Instruments

465. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that all civilians shall be treated in accordance with Article 75 AP I”.

466. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “in the treatment of the civilian population, there shall be no distinction founded on race, religion or faith, or any other similar criteria”.

467. Under Article 5(h) of the 1993 ICTY Statute, “persecution on political, racial and religious grounds”, “when committed in armed conflict, whether

⁴⁰⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

⁴⁰⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

⁴⁰⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 150.

international or internal in character, and directed against any civilian population", constitutes a crime against humanity.

468. Under Article 3(h) of the 1994 ICTR Statute, "persecution on political, racial and religious grounds", "when committed as part of a widespread and systematic attack against any civilian population", constitutes a crime against humanity.

II. National Practice

Military Manuals

469. Argentina's Law of War Manual restates the provisions of Article 75(1) AP I.⁴¹⁰

470. Canada's LOAC Manual states that in occupied territories, "protected persons must receive equal treatment without any adverse distinction based on race, religion, or political opinion".⁴¹¹ It also stipulates that Article 75 AP I "provides that all persons in the power of a party to the conflict are entitled to at least a humane treatment without adverse discrimination on grounds of race, gender, language, religion, political discrimination or similar criteria".⁴¹² With regard to non-international armed conflicts, the manual states that "APII applies without any adverse distinction founded on race, colour, gender, language, religion or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria".⁴¹³

471. Canada's Code of Conduct provides that all civilians must be treated humanely and that "subject to favourable considerations based on sex, health or age, [civilians] must be treated with the same consideration and without any adverse distinction based in particular on race, religion or political opinion".⁴¹⁴

472. Germany's Military Manual provides that, in case of occupation, "any discrimination for reasons of race, nationality, language, religious convictions and practices, political opinion, social origin or position or similar considerations is unlawful".⁴¹⁵

473. Italy's IHL Manual provides that, in occupied territories, civilians shall be treated without any distinction based on sex, race, religion or political opinion.⁴¹⁶

474. New Zealand's Military Manual provides that "protected persons must receive equal treatment without any adverse distinction based on race, religion or political opinion".⁴¹⁷

⁴¹⁰ Argentina, *Law of War Manual* (1989), § 4.15.

⁴¹¹ Canada, *LOAC Manual* (1999), p. 11-4, § 30.

⁴¹² Canada, *LOAC Manual* (1999), p. 11-7, § 63.

⁴¹³ Canada, *LOAC Manual* (1999), p. 17-3, § 18.

⁴¹⁴ Canada, *Code of Conduct* (2001), Rule 4, § 2.

⁴¹⁵ Germany, *Military Manual* (1992), § 533. ⁴¹⁶ Italy, *IHL Manual* (1991), Vol. I, § 41(b).

⁴¹⁷ New Zealand, *Military Manual* (1992), §§ 1114 and 1137.

- 475.** Nicaragua's Military Manual provides that civilian persons "benefit from the fundamental guarantees without any discrimination".⁴¹⁸
- 476.** Sweden's IHL Manual states with regard to civilians within an occupied area that "there may be no discrimination on racial, religious or political grounds or the like".⁴¹⁹
- 477.** Switzerland's Basic Military Manual provides that "all civilian persons shall benefit from an equal treatment. No one can be disadvantaged because of race, colour, language, religion, political or other opinions, social origin, faith, sex, wealth or any other circumstance".⁴²⁰
- 478.** The UK Military Manual prohibits discrimination in the treatment of protected civilians and also stipulates that non-discrimination also applies in occupied territories.⁴²¹
- 479.** The UK LOAC Manual prohibits discrimination in the treatment of protected civilians.⁴²²
- 480.** The US Field Manual restates Article 13 GC IV.⁴²³
- 481.** The US Air Force Pamphlet refers to Article 27 GC IV and provides that "any distinction in treatment based upon race, religion or political opinion is specifically forbidden".⁴²⁴

National Legislation

- 482.** Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, "civilian persons belonging to the adverse party, who are in the hands of the Azerbaijan Republic, are respected and treated humanely without any adverse distinction founded on race, sex, language, religion, national and social origin or any other similar criteria".⁴²⁵
- 483.** Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴²⁶
- 484.** Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 13, 27 and 54 GC IV, and of AP I, including violations of Articles 69(1) and 70(1) AP I, as well as any "contravention" of AP II, including violations of Article 18(2) AP II, are punishable offences.⁴²⁷

⁴¹⁸ Nicaragua, *Military Manual* (1996), Article 14(31).

⁴¹⁹ Sweden, *IHL Manual* (1991), Section 6, p. 122.

⁴²⁰ Switzerland, *Basic Military Manual* (1987), Article 148.

⁴²¹ UK, *Military Manual* (1958), §§ 39, 133 and 547.

⁴²² UK, *LOAC Manual* (1981), Section 9, p. 35, § 9.

⁴²³ US, *Field Manual* (1956), § 252.

⁴²⁴ US *Air Force Pamphlet* (1976), § 14-4.

⁴²⁵ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 14.

⁴²⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴²⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

485. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".⁴²⁸

National Case-law

486. No practice was found.

Other National Practice

487. According to the Report on the Practice of China, China protects foreigners in China, provided that they obey local laws, and makes no distinction between persons on the basis of whether they are from a country that is neutral or belligerent in relation to China.⁴²⁹

III. Practice of International Organisations and Conferences

United Nations

488. In a resolution on Lebanon adopted in 1982, the UN Security Council called for "respect for the rights of the civilian populations without any discrimination".⁴³⁰

Other International Organisations

489. No practice was found.

International Conferences

490. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

491. In its judgement in the *Cyprus case* in 2001, the ECtHR found, in relation to living conditions of Greek Cypriots in the Karpas region of northern Cyprus, that there had been a violation of Article 3 of the 1950 ECHR in that the Greek Cypriots had been subjected to discrimination amounting to degrading treatment.⁴³¹

V. Practice of the International Red Cross and Red Crescent Movement

492. No practice was found.

⁴²⁸ Norway, *Military Penal Code as amended* (1902), § 108.

⁴²⁹ Report on the Practice of China, 1997, Chapter 5.

⁴³⁰ UN Security Council, Res. 513, 4 July 1982, § 1.

⁴³¹ ECtHR, *Cyprus case*, Judgement, 10 May 2001, § 311.

VI. Other Practice

493. No practice was found.

Wounded and sick

Note: For practice concerning distinction among the wounded and sick on medical grounds, see Chapter 34, section B.

*I. Treaties and Other Instruments**Treaties*

494. Article 12, second paragraph, GC I provides that the protection due to wounded and sick members of the armed forces in the field shall be granted “without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria”.

495. Article 12, second paragraph, GC II provides that the protection due to wounded, sick and shipwrecked members of the armed forces at sea shall be granted “without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria”.

496. Article 30, first paragraph, GC II provides that military hospital ships and the hospital ships of National Red Cross Societies of the parties to the conflict and of neutral States and small craft employed for coastal rescue operations “shall afford relief and assistance to the wounded and sick and the shipwrecked without distinction of nationality”.

Other Instruments

497. Paragraphs 1 and 2 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provide that “all wounded and sick” and “all wounded and sick at sea” shall be treated in accordance with GC I.

498. Section 9.1 of the 1999 UN Secretary-General’s Bulletin provides that “members of the armed forces and other persons in the power of the United Nations force who are wounded or sick . . . shall . . . receive the medical care and attention required by their condition, without adverse distinction”.

*II. National Practice**Military Manuals*

499. Argentina’s Law of War Manual states that the wounded and sick “shall be treated and cared for . . . without any adverse distinction based on sex, race, nationality, religion, political opinions or on any other similar criteria”.⁴³²

⁴³² Argentina, *Law of War Manual* (1969), § 3.001.

500. Australia's *Commanders' Guide* provides with regard to the wounded and sick that "no regard is to be paid to the nationality of the patient".⁴³³
501. Australia's *Defence Force Manual* provides that "while there is no absolute obligation to accept civilian wounded and sick, once civilian patients have been accepted, discrimination against them, on any grounds other than medical, is not permissible". Concerning wounded, sick and shipwrecked combatants, the manual states that they "are to be protected and respected, treated humanely . . . and cared for by any detaining power without any adverse discrimination".⁴³⁴
502. Belgium's *Field Regulations* provides that wounded and sick soldiers who have laid down their arms shall be treated without distinction based on nationality.⁴³⁵
503. Belgium's *Teaching Manual for Soldiers* provides that during search and rescue operations, "no difference shall be made between fellow or enemy wounded and sick".⁴³⁶
504. Benin's *Military Manual* instructs soldiers to "collect and care for the wounded and sick, whether they are friends or enemies".⁴³⁷
505. Bosnia and Herzegovina's *Military Instructions* provides that the wounded and sick must be treated without any discrimination.⁴³⁸
506. Canada's *LOAC Manual* provides that "regardless of the party to which they belong, or whether they are combatants or non-combatants, the wounded, sick and shipwrecked are to be respected and protected without any adverse discrimination".⁴³⁹
507. Croatia's military manuals provide that wounded and sick persons shall be cared for and protected without distinction.⁴⁴⁰
508. The *Military Manual of the Dominican Republic* provides that enemy sick and wounded and wounded and sick enemy captives shall receive the same medical care as for one's own troops.⁴⁴¹
509. Ecuador's *Naval Manual* provides that wounded and sick members of the armed forces shall be cared for without any distinction with regard to nationality.⁴⁴²
510. France's *LOAC Summary Note* states that "captured combatants whether they are wounded, sick or shipwrecked shall be cared for . . . and benefit from the same treatment as friendly military personnel".⁴⁴³

⁴³³ Australia, *Commanders' Guide* (1994), § 622.

⁴³⁴ Australia, *Defence Force Manual* (1994) §§ 987 and 990.

⁴³⁵ Belgium, *Field Regulations* (1964), Article 23.

⁴³⁶ Belgium, *Teaching Manual for Soldiers* (undated), p. 17.

⁴³⁷ Benin, *Military Manual* (1995), Fascicule II, p. 18.

⁴³⁸ Bosnia and Herzegovina, *Military Instructions* (1992), Item 14, § 1.

⁴³⁹ Canada, *LOAC Manual* (1999), p. 9-2, §§ 19-20.

⁴⁴⁰ Croatia, *LOAC Compendium* (1991), p. 45; *Soldiers' Manual* (1992), p. 3; *Commanders' Manual* (1992), Rule No. 71, p. 10; *Instructions on Basic Rules of IHL* (1993), p. 11, Articles 1-3.

⁴⁴¹ Dominican Republic, *Military Manual* (1980), p. 6.

⁴⁴² Ecuador, *Naval Manual* (1989), § 11.4. ⁴⁴³ France, *LOAC Summary Note* (1992), § 2.1

511. Germany's Military Manual states that in conflicts at sea, "hospital ships shall afford assistance to all wounded, sick and shipwrecked without distinction of nationality".⁴⁴⁴

512. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that:

The IDF has a strict policy [according to which] all wounded and sick shall be treated, respected and protected, irrespective of whichever party they belong to, and without any distinction based upon race, colour, sex, language, religion, belief, political or other opinion, national or social origin, wealth, birth or other similar criteria.⁴⁴⁵

513. Italy's IHL Manual provides that "the wounded and sick enemy will receive the same care as members of national forces".⁴⁴⁶

514. Morocco's Disciplinary Regulations states that wounded and sick persons shall be protected without distinction.⁴⁴⁷

515. The Military Manual of the Netherlands provides that the wounded and sick "must be treated without any distinction based on race, skin colour, sex, language, religion, political beliefs, nationality, birth or any other criteria".⁴⁴⁸

516. The IFOR Instructions of the Netherlands instructs troops to take care of the wounded whether they are friends or enemies.⁴⁴⁹

517. Nicaragua's Military Manual provides that:

People who do not participate directly in hostilities, including persons placed *hors de combat* because . . . of sickness or wounds . . . shall be treated in all circumstances with humanity without any adverse distinction based on race, colour, language, religion or belief, sex, birth, economic status or any other similar criteria or situation.⁴⁵⁰

518. Nigeria's Operational Code of Conduct states that wounded and sick persons shall be protected without distinction.⁴⁵¹

519. Nigeria's Manual on the Laws of War provides that no discrimination with regard to the wounded or sick "based on sex, race, nationality, religion, political belief, or any other similar criteria" is permitted.⁴⁵²

520. Spain's LOAC Manual states that wounded and sick prisoners and one's own troops shall be evacuated under the same conditions.⁴⁵³

⁴⁴⁴ Germany, *Military Manual* (1992), § 1057.

⁴⁴⁵ Report on the Practice of Israel, 1997, Chapter 5.1, referring to *Law of War Booklet* (1986), p. 16.

⁴⁴⁶ Italy, *IHL Manual* (1991), Vol. IV, Article 93.

⁴⁴⁷ Morocco, *Disciplinary Regulations* (1974), Article 25.

⁴⁴⁸ Netherlands, *Military Manual* (1993), p. VI-1, § 2 and p. VI-2.

⁴⁴⁹ Netherlands, *IFOR Instructions* (1995), § 1.

⁴⁵⁰ Nicaragua, *Military Manual* (1996), Article 6.

⁴⁵¹ Nigeria, *Operational Code of Conduct* (1967), § 4(1).

⁴⁵² Nigeria, *Manual on the Laws of War* (undated), § 35.

⁴⁵³ Spain, *LOAC Manual* (1996), Vol. I, Article 7.3.a.(11).

521. Switzerland's military manuals provide that medical personnel shall collect and care for enemy wounded, as well as those of friendly forces.⁴⁵⁴

522. Togo's Military Manual instructs soldiers to "collect and care for the wounded and sick, whether they are friends or enemies". It recalls the duties of States which have ratified the Geneva Conventions, *inter alia*, "to care for friends or enemies without distinction".⁴⁵⁵

523. The UK Military Manual states that the wounded and sick "must be cared for . . . without adverse distinction based on sex, race, nationality, religion, political belief or any other similar test".⁴⁵⁶

524. The UK LOAC Manual provides that, in the event of a civil war, "persons out of the fighting . . . because they are wounded must be treated . . . without any adverse discrimination".⁴⁵⁷

525. The US Field Manual provides that sick and wounded captives shall be provided with the same medical care as friendly sick and wounded. It also restates Article 12 GC II.⁴⁵⁸

526. The US Air Force Pamphlet states that "one of the important principles relating to wounded and sick requires medical care and humane treatment to friend and foe without distinction founded on sex, race, nationality, religion, political opinions or similar criteria".⁴⁵⁹

527. The US Naval Handbook provides that "wounded and sick personnel falling into enemy hands must be . . . cared for without adverse distinction".⁴⁶⁰

528. The YPA Military Manual of the SFRY (FRY) states that there is an obligation to treat the wounded and sick humanely, without any discrimination.⁴⁶¹

National Legislation

529. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴⁶²

530. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 12 GC I, 12 and 30 GC II, is a punishable offence.⁴⁶³

531. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

⁴⁵⁴ Switzerland, *Military Manual* (1984), p. 15; *Teaching Manual* (1986), p. 43; *Basic Military Manual* (1987), Article 70.

⁴⁵⁵ Togo, *Military Manual* (1996), Fascicule II, p. 18 and Fascicule I, p. 11.

⁴⁵⁶ UK, *Military Manual* (1958), § 339.

⁴⁵⁷ UK, *LOAC Manual* (1981), Section 12, p. 42, § 2(a).

⁴⁵⁸ US, *Field Manual* (1956), §§ 92 and 215.

⁴⁵⁹ US, *Air Force Pamphlet* (1976), § 3-4(d), see also §§ 12-2(a) and 13-2.

⁴⁶⁰ US, *Naval Handbook* (1995), § 11-4.

⁴⁶¹ SFRY (FRY), *YPA Military Manual* (1988), Articles 161-166.

⁴⁶² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴⁶³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".⁴⁶⁴

532. Spain's Royal Ordinance for the Armed Forces specifies that assistance will be lent to both one's own and enemy wounded whenever the circumstances of security and of the mission permit.⁴⁶⁵

National Case-law

533. No practice was found.

Other National Practice

534. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal to ensure the protection of all wounded and sick persons "regardless of the side they belong to".⁴⁶⁶

III. Practice of International Organisations and Conferences

United Nations

535. In 1995, in a report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights condemned the alleged practice of both parties of withholding medical care on the basis of ethnic origin.⁴⁶⁷

Other International Organisations

536. No practice was found.

International Conferences

537. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

538. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

539. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of

⁴⁶⁴ Norway, *Military Penal Code as amended* (1902), § 108(a).

⁴⁶⁵ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 140.

⁴⁶⁶ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

⁴⁶⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Initial report, UN Doc. E/CN.4/1996/16, 14 November 1995, § 121.

the Gulf War, the ICRC stated that “the wounded, the sick and the shipwrecked must be collected and cared for regardless of the party to which they belong”.⁴⁶⁸

540. In a press release issued in 1992, the ICRC urged all parties involved in the conflict in Nagorno-Karabakh “to ensure that the wounded and sick are cared for in all circumstances, regardless of the side to which they belong”.⁴⁶⁹

541. In a press release issued in 1992, the ICRC urged the parties to the conflict in Tajikistan to ensure that “the wounded and sick are cared for in all circumstances, regardless of the side to which they belong”.⁴⁷⁰

542. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “all the wounded and sick, both civilian and military, must be collected and cared for, without distinction”.⁴⁷¹

543. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “all the wounded and sick must be collected and cared for, without distinction”.⁴⁷²

544. In a press release issued in 1994, the ICRC called on the parties to the conflict in Chechnya to ensure that “the wounded and sick are cared for, regardless of the side to which they belong”.⁴⁷³

545. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC recalled that “the wounded and sick must be collected and cared for regardless of the party to which they belong”.⁴⁷⁴

VI. *Other Practice*

546. No practice was found.

Persons deprived of their liberty

I. *Treaties and Other Instruments*

Treaties

547. Article 14, second paragraph, GC III provides that “women shall be treated with all regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men”.

⁴⁶⁸ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

⁴⁶⁹ ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect of humanitarian law, 12 March 1992.

⁴⁷⁰ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

⁴⁷¹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

⁴⁷² ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

⁴⁷³ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.

⁴⁷⁴ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

548. Article 16 GC III provides that “all prisoners of war shall be treated alike by the Detaining Power, without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria”.

Other Instruments

549. Rule 6(1) of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that “the following rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

550. Rule 2 of the 1987 European Prison Rules provides that “the rules shall be applied impartially. There shall be no discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, birth, economic or other status”.

551. Principle 5 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “these principles shall be applied to all persons within the territory of any given State, without distinction of any kind, such as race, colour, sex, language, religion or religious belief, political or other opinion, national, ethnic or social origin, property, birth or other status”.

552. Paragraph 2 of the 1990 Basic Principles for the Treatment of Prisoners provides that “there shall be no discrimination on the grounds of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

553. Paragraph 3 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “captured combatants shall enjoy the treatment provided for by [GC III]”.

II. National Practice

Military Manuals

554. Argentina’s Law of War Manual (1969) provides that “all prisoners shall be treated in the same way by the detaining power, without any adverse distinction based on race, nationality, religion, political opinions or any other similar criteria”.⁴⁷⁵

555. Argentina’s Law of War Manual (1989) provides that “prisoners of war, at all times, shall be treated...equally without distinction based on rank, sex, race, nationality, age, religion, political opinion, professional skills, etc.”.⁴⁷⁶

⁴⁷⁵ Argentina, *Law of War Manual* (1969), § 2.015.

⁴⁷⁶ Argentina, *Law of War Manual* (1989), § 3.12.

556. Australia's Defence Force Manual states that one of the fundamental rules for the treatment of POW s is that "any discrimination on the grounds of race, nationality, religious belief or political opinions is unlawful".⁴⁷⁷
557. Benin's Military Manual provides that "prisoners of war . . . shall be treated alike".⁴⁷⁸
558. Canada's LOAC Manual provides that "all POW s are to be treated alike without any adverse distinction based on race, nationality, religious belief, or political opinions, or any other distinction founded on similar criteria".⁴⁷⁹ With regard to non-international armed conflict, the manual states that "the wounded and sick among [persons whose liberty has been restricted] are to be treated humanely".⁴⁸⁰
559. Canada's Code of Conduct states that "the standard of treatment which applies to all detained persons, without adverse distinction based on race, nationality, sex, religious belief or political opinion, is a long standing rule".⁴⁸¹
560. Ecuador's Naval Manual provides that "when prisoners of war are given medical treatment, no distinction among them will be based on any grounds other than medical ones".⁴⁸²
561. Germany's Soldiers' Manual recalls the prohibition of any distinction based on race, nationality, religion or political opinions in the treatment of captured combatants.⁴⁸³
562. Germany's Military Manual provides that, with regard to the treatment of POW s, one of the fundamental rules is the unlawfulness of any discrimination on the grounds of race, nationality, religious belief or political opinions or similar criteria.⁴⁸⁴
563. The Military Manual of the Netherlands states that "prisoners shall be treated with equality, without any distinction based on race, nationality, religion, political beliefs or any other criteria. The only exception is the preferential treatment based on the health situation, age . . .".⁴⁸⁵
564. New Zealand's Military Manual, under the heading "Adverse discrimination prohibited", recalls that "by Article 16 of [GC III], subject to differences in treatment based on rank, sex, or health, all prisoners are to be treated alike without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria".⁴⁸⁶
565. Nigeria's Manual on the Laws of War provides that no discrimination with regard to POW s is permitted.⁴⁸⁷

⁴⁷⁷ Australia, *Defence Force Manual* (1994), § 1002.

⁴⁷⁸ Benin, *Military Manual* (1995), Fascicule II, p. 13.

⁴⁷⁹ Canada, *LOAC Manual* (1999), p. 10-3, § 18.

⁴⁸⁰ Canada, *LOAC Manual* (1999), p. 17-3 § 25.

⁴⁸¹ Canada, *Code of Conduct* (2001), Rule 4, § 3.

⁴⁸² Ecuador, *Naval Manual* (1989), § 11.8.

⁴⁸³ Germany, *Soldiers' Manual* (1991), p. 7, § 4.

⁴⁸⁴ Germany, *Military Manual* (1992), § 704.

⁴⁸⁵ Netherlands, *Military Manual* (1993), p. VII-3, § 2.

⁴⁸⁶ New Zealand, *Military Manual* (1992), § 914.

⁴⁸⁷ Nigeria, *Manual on the Laws of War* (undated), § 37.

566. Spain's LOAC Manual lists among the rules for the basic treatment of POW s the prohibition of any "discrimination based on sex, race, nationality or political opinion".⁴⁸⁸

567. Switzerland's Basic Military Manual recalls that "no adverse distinction can be based on race, nationality, religion, political opinions, language, colour, social condition, birth or other similar criteria".⁴⁸⁹

568. Togo's Military Manual provides that "prisoners of war . . . shall be treated alike".⁴⁹⁰

569. The UK Military Manual and LOAC Manual prohibit discrimination in the treatment of POW s and restate the provisions of common Article 3 of the 1949 Geneva Conventions. The Military Manual also quotes Article 14 GC III.⁴⁹¹

570. The US Field Manual provides that "all POW s shall be treated alike without any adverse distinction based on race, nationality, religious belief or political opinions, or any other distinction founded on similar criteria".⁴⁹²

571. The US Air Force Pamphlet prohibits any adverse distinction with regard to POW s.⁴⁹³

572. The US Naval Handbook provides that "when prisoners of war are given medical treatment, no distinction among them will be based on any grounds other than medical ones".⁴⁹⁴

National Legislation

573. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts:

Persons detained by an individual, a group of persons, some organisation or military unit from the Republic of Azerbaijan as a party to the conflict, are entitled to respect for their dignity and honour irrespective of their status, nationality, religion, language, political opinions, their belonging to a defined social group or other similar criteria.⁴⁹⁵

574. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴⁹⁶

⁴⁸⁸ Spain, *LOAC Manual* (1996), Vol. I, § 8.4.a.(1).

⁴⁸⁹ Switzerland, *Basic Military Manual* (1987), Article 97.

⁴⁹⁰ Togo, *Military Manual* (1996), Fascicule II, p. 13.

⁴⁹¹ UK, *Military Manual* (1958), §§ 39 and 133; *LOAC Manual* (1981), Section 8, §§ 2 and 9.

⁴⁹² US, *Field Manual* (1956), § 92. ⁴⁹³ US, *Air Force Pamphlet* (1976), §§ 12-2(a) and 13-2.

⁴⁹⁴ US, *Naval Handbook* (1993), § 11-7.

⁴⁹⁵ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 18.

⁴⁹⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

575. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 14 and 16 GC III, is a punishable offence.⁴⁹⁷

576. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...is liable to imprisonment".⁴⁹⁸

National Case-law

577. No practice was found.

Other National Practice

578. No practice was found.

III. Practice of International Organisations and Conferences

579. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

580. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

581. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "all prisoners of war must be treated alike, subject...to the provisions of [GC III and AP I] relating to rank, sex and age...[and] to any privileged treatment accorded to them by reason of their state of health, age or professional qualification".⁴⁹⁹

VI. Other Practice

582. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "persons *hors de combat* and those who do not take part in hostilities...shall in all circumstances be...treated...without any adverse distinction".⁵⁰⁰

⁴⁹⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁹⁸ Norway, *Military Penal Code as amended* (1902), § 108(a).

⁴⁹⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 667.

⁵⁰⁰ ICRC archive document.

Apartheid

I. Treaties and Other Instruments

Treaties

583. In Article I of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, the State Parties declared that “apartheid is a crime against humanity” and that “inhuman acts resulting from the policies and practices of apartheid and similar policies and practices of racial segregation and discrimination, as defined in article II of the Convention, are crimes violating the principles of international law”.

584. Article 85(4)(c) AP I provides that “practices of apartheid and other inhuman or degrading practices involving outrages upon personal dignity, based on racial discrimination” shall be regarded as grave breaches of the Protocol. Article 85 AP I was adopted by consensus.⁵⁰¹

585. Article 7(1)(j) of the 1998 ICC Statute provides that “the crime of apartheid” constitutes a crime against humanity.

Other Instruments

586. Article 20 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that:

1. An individual who as a leader or organizer commits or orders the commission of the crime of apartheid shall, on conviction thereof, be sentenced.
2. Apartheid consists of any of the following acts based on policies and practices of racial segregation and discrimination committed for the purpose of establishing or maintaining domination by one racial group over any other racial group and systematically oppressing it:
 - (a) denial to a member of a racial group of the right to life and liberty of person;
 - (b) deliberate imposition on a racial group of living conditions calculated to cause its physical destruction in whole or in part;
 - (c) any legislative measures and other measures calculated to prevent a racial group from participating in the political, social, economic and cultural life of the country and the deliberate creation of conditions preventing the full development of such a group;
 - (d) any measures, including legislative measures, designed to divide the population along racial lines, in particular by the creation of separate reserves and ghettos for the members of a racial group, the prohibition of marriages among members of various racial groups or the expropriation of landed property belonging to a racial group or to members thereof;
 - (e) exploitation of the labour of the members of a racial group, in particular by submitting them to forced labour;
 - (f) persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose apartheid.

587. Under Article 18(f) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “institutionalized discrimination on racial, ethnic or

⁵⁰¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

religious grounds involving the violation of fundamental human rights and freedoms and resulting in seriously disadvantaging a part of the population" is considered a crime against humanity.

588. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including crimes against humanity. According to Section 6(1)(j) "the crime of apartheid" constitutes a crime against humanity.

II. National Practice

Military Manuals

589. Argentina's Law of War Manual stipulates that the practice of apartheid and similar practices are grave breaches of the Geneva Conventions and API.⁵⁰²

590. Canada's LOAC Manual provides that "practices of apartheid and other inhumane and degrading practices involving outrages upon personal dignity based on racial discrimination" are a grave breach of AP I.⁵⁰³

591. France's LOAC Manual quotes Article 7(1)(j) of the 1998 ICC Statute, which defines the crime of apartheid as a crime against humanity.⁵⁰⁴

592. Germany's Military Manual provides that "practices of apartheid and other inhuman and degrading practices based on racial discrimination" are a grave breach of IHL.⁵⁰⁵

593. Italy's IHL Manual states that "the practice of apartheid and other inhuman and degrading treatments based on racial discrimination which offends the dignity of the human person is a grave breach of the . . . [Geneva] conventions and their additional protocols".⁵⁰⁶

594. The Military Manual of the Netherlands provides that "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination, are a grave breach of the Geneva Conventions and their Additional Protocols".⁵⁰⁷

595. New Zealand's Military Manual provides that "practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination", when committed wilfully, are grave breaches of the Geneva Conventions or AP I.⁵⁰⁸

596. Russia's Military Manual provides that the "practice of apartheid" is prohibited.⁵⁰⁹

⁵⁰² Argentina, *Law of War Manual* (1989), § 8.03.

⁵⁰³ Canada, *LOAC Manual* (1999), p. 16-3, § 17(c).

⁵⁰⁴ France, *LOAC Manual* (2001), pp. 32, 51 and 52.

⁵⁰⁵ Germany, *Military Manual* (1992), § 1209.

⁵⁰⁶ Italy, *IHL Manual* (1991), Vol. I, § 85.

⁵⁰⁷ Netherlands, *Military Manual* (1993), p. IX-6.

⁵⁰⁸ New Zealand, *Military Manual* (1992), § 1703.4.

⁵⁰⁹ Russia, *Military Manual* (1990), § 5(1).

597. South Africa's LOAC Manual provides that "segregation and other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination" is a grave breach of the Geneva Conventions and their Additional Protocols.⁵¹⁰

598. Spain's LOAC Manual states that "carrying out practices of apartheid and other inhuman and degrading practices" is a grave breach and is qualified as a war crime.⁵¹¹

599. Switzerland's Basic Military Manual provides that "practices of apartheid or other inhumane and humiliating treatment based on racial discrimination, implying a serious violation of human dignity", is a grave breach of AP I.⁵¹²

National Legislation

600. Under Armenia's Penal Code, "outrage upon personal self-esteem, based on apartheid or racial discrimination, application of inhuman and other humiliating practices", during an armed conflict, constitute crimes against the peace and security of mankind.⁵¹³

601. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".⁵¹⁴

602. Australia's ICC (Consequential Amendments) Act incorporates into the Criminal Code the crimes against humanity defined in the 1998 ICC Statute, including apartheid.⁵¹⁵ In addition, it incorporates into the Criminal Code the war crimes that are grave breaches of AP I, including apartheid.⁵¹⁶

603. Azerbaijan's Criminal Code provides a punishment for the crime of apartheid and inhuman and degrading practices based on racial discrimination.⁵¹⁷

604. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides for the punishment of anyone "indulging in practices of apartheid or other inhuman or degrading practices based on racial discrimination and resulting in outrages upon personal dignity".⁵¹⁸

605. Bulgaria's Penal Code as amended punishes the crime of apartheid and practices based on racial discrimination.⁵¹⁹

⁵¹⁰ South Africa, *LOAC Manual* (1996), § 38(b).

⁵¹¹ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

⁵¹² Switzerland, *Basic Military Manual* (1987), Article 193(2)(c).

⁵¹³ Armenia, *Penal Code* (2003), Article 390.4(3).

⁵¹⁴ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

⁵¹⁵ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.22.

⁵¹⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.100.

⁵¹⁷ Azerbaijan, *Criminal Code* (1999), Article 111.

⁵¹⁸ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(19), see also Article 1(2)(8) (crime against humanity).

⁵¹⁹ Bulgaria, *Penal Code as amended* (1968), Article 418.

- 606.** Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that the crime of apartheid is a crime against humanity.⁵²⁰
- 607.** Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".⁵²¹
- 608.** Canada's Crimes against Humanity and War Crimes Act provides that the crimes against humanity defined in Article 7 of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁵²²
- 609.** Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, orders or carries out against protected persons practices of racial segregation or other inhuman or degrading practices based on racial discrimination and which result in outrages upon personal dignity".⁵²³
- 610.** Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "crimes of discrimination: tribal, ethnic or religious", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, are crimes against humanity.⁵²⁴
- 611.** The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".⁵²⁵
- 612.** Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".⁵²⁶
- 613.** The Czech Republic's Criminal Code as amended provides for the punishment of anyone who carries out practices of apartheid.⁵²⁷
- 614.** Under the Draft Amendments to the Penal Code of El Salvador, "anyone who carries out against protected persons practices of racial segregation and other practices based on racial discrimination and resulting in outrages upon personal dignity" is punishable.⁵²⁸
- 615.** Georgia's Criminal Code punishes the carrying out of practices of apartheid or other inhuman and degrading practices involving outrages upon personal dignity.⁵²⁹

⁵²⁰ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 3(j).

⁵²¹ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

⁵²² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁵²³ Colombia, *Penal Code* (2000), Article 147.

⁵²⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.

⁵²⁵ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

⁵²⁶ Cyprus, *AP I Act* (1979), Section 4(1).

⁵²⁷ Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(1).

⁵²⁸ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Prácticas de segregación racial".

⁵²⁹ Georgia, *Criminal Code* (1999), Article 411(1)(i).

- 616.** Hungary's Criminal Code as amended punishes anyone who commits the crime of apartheid.⁵³⁰
- 617.** Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.⁵³¹
- 618.** Jordan's Draft Military Criminal Code provides that apartheid and any other form of racial discrimination involving outrages upon personal dignity constitutes a war crime.⁵³²
- 619.** Under the Draft Amendments to the Code of Military Justice of Lebanon, the practice of apartheid or other inhuman and degrading practices involving outrages upon personal dignity is a war crime.⁵³³
- 620.** Mali's Penal Code states that apartheid is a crime against humanity.⁵³⁴
- 621.** Moldova's Penal Code punishes "grave breaches of international humanitarian law committed during international and non-international armed conflicts".⁵³⁵
- 622.** Under the International Crimes Act of the Netherlands, it is a crime to commit, in an international armed conflict, "the following acts if committed intentionally and in violation of the Geneva Conventions and Additional Protocol (I): . . . practices of apartheid and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination".⁵³⁶
- 623.** New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".⁵³⁷
- 624.** Under New Zealand's International Crimes and ICC Act, crimes against humanity include the crime defined in Article 7(1)(j) of the 1998 ICC Statute.⁵³⁸
- 625.** Nicaragua's Draft Penal Code provides for the punishment of "anyone who during international or internal armed conflicts or in peacetime carries out practices of racial segregation or other practices based on racial discrimination which involve outrages upon personal dignity".⁵³⁹
- 626.** According to Niger's Penal Code as amended, it is a war crime to carry out against persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977 "practices of apartheid or other inhuman and degrading practices involving outrages upon personal dignity".⁵⁴⁰

⁵³⁰ Hungary, *Criminal Code as amended* (1978), Section 157.

⁵³¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

⁵³² Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(17).

⁵³³ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(17).

⁵³⁴ Mali, *Penal Code* (2001), Article 29(j). ⁵³⁵ Moldova, *Penal Code* (2002), Article 391.

⁵³⁶ Netherlands, *International Crimes Act* (2003), Article 5(2)(d)(iii), see also Article 4(1)(j) (apartheid as a crime against humanity).

⁵³⁷ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

⁵³⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 10(2).

⁵³⁹ Nicaragua, *Draft Penal Code* (1999), Article 448.

⁵⁴⁰ Niger, *Penal Code as amended* (1961), Article 208.3(19).

627. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁵⁴¹

628. Peru's Penal Code punishes the carrying out of practices of apartheid.⁵⁴²

629. Slovakia's Criminal Code as amended provides for the punishment of anyone who carries out practices of apartheid.⁵⁴³

630. Spain's Penal Code provides for the punishment of anyone who orders or carries out practices of racial segregation or other inhuman and degrading practices involving outrages upon personal dignity.⁵⁴⁴

631. Tajikistan's Criminal Code provides for the punishment of anyone who orders or carries out practices of apartheid or other inhuman and degrading practices involving outrages upon personal dignity based on racial discrimination.⁵⁴⁵

632. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(j) of the 1998 ICC Statute.⁵⁴⁶

633. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]".⁵⁴⁷

634. Under the UK ICC Act, it is a punishable offence to commit a crime against humanity as defined in Articles 7(1)(j) of the 1998 ICC Statute.⁵⁴⁸

635. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]".⁵⁴⁹

National Case-law

636. No practice was found.

Other National Practice

637. In 1979, during a debate in the UN General Assembly, Bulgaria stated that under international law, the practice of apartheid was a crime against humanity.⁵⁵⁰

⁵⁴¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁵⁴² Peru, *Penal Code as amended* (1991), Article 319.

⁵⁴³ Slovakia, *Criminal Code as amended* (1961), Article 263(a)(1).

⁵⁴⁴ Spain, *Penal Code* (1995), Article 611(6).

⁵⁴⁵ Tajikistan, *Criminal Code* (1998), Article 403(1).

⁵⁴⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁵⁴⁷ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

⁵⁴⁸ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁵⁴⁹ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

⁵⁵⁰ Bulgaria, Statement before the UN General Assembly, UN Doc. A/34/PV.55, 6 November 1979, § 85.

638. In 1981, during a debate in the UN General Assembly, Kenya recalled that the practice of apartheid was considered a crime against humanity by international law and the international community.⁵⁵¹

639. In 1973, during a debate in the Third Committee of the UN General Assembly on a draft convention on apartheid, Romania stated that “in light of the references to *apartheid* in the United Nations instruments and resolutions mentioned in the preamble to the draft Convention, it could be said that *apartheid* was already regarded in international law as constituting a crime against humanity”.⁵⁵²

640. The Report on the Practice of Syria asserts that Syria considers Article 85 AP I to be part of customary international law.⁵⁵³

641. In 1973, during a debate in the Third Committee of the UN General Assembly on a draft convention on apartheid, the USSR stated that apartheid was recognised as a crime against humanity in international law and was thus binding on South Africa.⁵⁵⁴

642. In 1980, during a debate in the UN General Assembly, the UAE stated that apartheid was “a crime against the human conscience and a serious violation of the human principles and values on which civilization is based”.⁵⁵⁵

643. In 1981, during a debate in the UN General Assembly, Vietnam declared that the practice of apartheid was considered a crime against humanity by international law.⁵⁵⁶

III. Practice of International Organisations and Conferences

United Nations

644. In two resolutions on South Africa adopted in 1976 and 1980, the UN Security Council affirmed that “the policy of apartheid is a crime against the conscience and dignity of mankind”.⁵⁵⁷

645. In several resolutions adopted between 1966 and 1979, the UN General Assembly categorised the practice of apartheid, and all forms of racial discrimination, as crimes against humanity. It also condemned the policies of oppression, racial discrimination and segregation in Southern Rhodesia as crimes against

⁵⁵¹ Kenya, Statement before the UN General Assembly, UN Doc. A/35/PV.108, 5 March 1981, § 101.

⁵⁵² Romania, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.2004, 23 October 1973, § 7.

⁵⁵³ Report on the Practice of Syria, 1997, Chapter 5.6.

⁵⁵⁴ USSR, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.2004, 23 October 1973, § 45.

⁵⁵⁵ UAE, Statement before the UN General Assembly, UN Doc. A/35/PV.56, 11 November 1980, § 69.

⁵⁵⁶ Vietnam, Statement before the UN General Assembly, UN Doc. A/35/PV.106, 4 March 1981, § 29.

⁵⁵⁷ UN Security Council, Res. 392, 19 June 1976, § 3; Res. 473, 13 June 1980, § 3.

humanity and referred to apartheid as “a crime against the conscience and dignity of mankind”.⁵⁵⁸

646. In resolutions adopted in 1992 and 1993, the UN Commission on Human Rights reaffirmed that apartheid was a crime against humanity.⁵⁵⁹

647. In 1974, the UN Sub-Commission on Human Rights established a Working Group on contemporary forms of slavery to review developments in various fields, including practices of apartheid.⁵⁶⁰

Other International Organisations

648. No practice was found.

International Conferences

649. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed dismay and condemnation that “gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including] . . . apartheid”.⁵⁶¹

IV. Practice of International Judicial and Quasi-judicial Bodies

650. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

651. The ICRC’s commentary on Article 85 API notes that “the practices concerned were already grave breaches of the Conventions, whatever their motive; this is simply a special mention of reprehensible conduct for which the motive is particularly shocking”.⁵⁶²

652. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following war crime, when committed wilfully and in violation of international humanitarian law, be subject to the jurisdiction of the

⁵⁵⁸ UN General Assembly, Res. 2189 (XXI), 13 December 1966, § 6; Res. 2326 (XXII), 16 December 1967, § 5; Res. 2262 (XXII), 3 November 1967, § 2; Res. 33/183 B, 24 January 1979, preamble; Res. 34/93 A, 12 December 1979, preamble.

⁵⁵⁹ UN Commission on Human Rights, Res. 1992/19, 21 February 1992, § 1; Res. 1993/11, 26 February 1993, § 1.

⁵⁶⁰ UN Sub-Commission on Human Rights, Report of the Working Group on Contemporary Forms of Slavery on its 26th Session, UN Doc. E/CN.4/Sub.2/2001/30, 16 July 2001, § 1.

⁵⁶¹ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(30).

⁵⁶² Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3515.

Court: “practices of *apartheid*, and other inhuman and degrading practices involving outrages upon personal dignity, based on racial discrimination”.⁵⁶³

VI. Other Practice

653. No practice was found.

C. Violence to Life

Note: For practice concerning attacks against civilians, see Chapter 1, section A. For practice concerning attacks on persons hors de combat, see Chapter 15, section B.

I. Treaties and Other Instruments

Treaties

654. Article 6 of the 1945 IMT Charter (Nuremberg) provides that:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- ...
- (b) “War crimes:” namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder . . . of civilian population of or in occupied territory, murder . . . of prisoners of war or persons on the seas . . .
 - (c) “Crimes against humanity:” namely, murder, extermination . . . and other inhumane acts committed against any civilian population, before or during the war.

655. Common Article 3 of the 1949 Geneva Conventions prohibits at any time and in any place whatsoever “violence to life and person, in particular murder of all kinds” with respect to “persons taking no active part in hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause”.

656. Article 12, second paragraph, GC I provides, with respect to wounded and sick members of the armed forces in the field, that “any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated”.

657. Article 12, second paragraph, GC II provides, with respect to wounded, sick and shipwrecked members of the armed forces at sea, that “any attempts upon their lives, or violence to their persons, shall be strictly prohibited; in particular, they shall not be murdered or exterminated”.

⁵⁶³ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(c)(iii).

658. Article 13, first paragraph, GC III provides that “any unlawful act or omission by the Detaining Power causing death . . . of a prisoner of war in its custody is prohibited”.

659. Article 42 GC III provides that:

The use of weapons against prisoners of war, especially against those who are escaping or attempting to escape, shall constitute an extreme measure, which shall always be preceded by warnings appropriate to the circumstances.

660. Article 27, first paragraph, GC IV provides that protected persons shall be “protected especially against all acts of violence”.

661. Article 32 GC IV provides that:

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the . . . extermination of protected persons in their hands. This prohibition applies not only to murder . . . but also to any other measures of brutality whether applied by civilian or military agents.

662. According to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, “wilful killing” is a grave breach of these instruments.

663. According to Article 2 of the 1948 Genocide Convention, “killing members of the group” constitutes genocide when “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.

664. Article 2 of the 1950 ECHR provides that “everyone’s right to life shall be protected by law”. It also states that “deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary in action lawfully taken for the purpose of quelling a riot or insurrection”. Article 15(2) provides that “no derogation from Article 2, except in respect of deaths resulting from lawful acts of war, shall be made under this provision”.

665. Paragraph I(3) of the Annex to the 1953 Panmunjon Armistice Agreement (establishing a Neutral Nations Repatriation Commission) provides that “no violence to their persons [of prisoners of war] . . . shall be permitted in any manner for any purpose whatsoever”.

666. Article 6(1) of the 1966 ICCPR states that “every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life.” This right is non-derogable under Article 4(2) ICCPR.

667. Article 4 of the 1969 ACHR provides that “every person has the right to have his life respected . . . No one shall be arbitrarily deprived of his life.” This right is non-derogable under Article 27(2) ACHR.

668. Article 8(a) and (b) of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel provides that all captured military personnel and

all captured civilian personnel “shall be protected against all violence to life and person, in particular against murder in any form”.

669. Article 75(2)(a) AP I provides that “violence to the life . . . of persons”, in particular “murder”, is prohibited at any time and in any place whatsoever. Article 75 AP I was adopted by consensus.⁵⁶⁴

670. Article 4(2)(a) AP II provides that “violence to the life . . . of persons”, in particular “murder”, is prohibited at any time and in any place whatsoever. Article 4 AP II was adopted by consensus.⁵⁶⁵

671. Article 4 of the 1981 ACHPR provides that “human beings are inviolable. Every human being shall be entitled to respect for his life and the integrity of his person. No one may be arbitrarily deprived of this right.” The ACHPR does not provide for any derogation in a state of emergency.

672. According to Article 1(1) of the 1995 Agreement on Human Rights annexed to the Dayton Accords, “the Parties shall secure to all persons within their jurisdiction the right to life”.

673. Pursuant to Article 6(a) of the 1998 ICC Statute, “killing members of the group” constitutes genocide when “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.

674. Pursuant to Article 7(1)(a) of the 1998 ICC Statute, “murder” constitutes a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

675. Pursuant to Article 8(2)(a)(i) of the 1998 ICC Statute, “wilful killing” constitutes a war crime in international armed conflicts.

676. Pursuant to Article 8(2)(c)(i) of the 1998 ICC Statute, “violence to life and person, in particular murder of all kinds,” constitutes a war crime in non-international armed conflicts.

677. Article 3(a) of the 2002 Statute of the Special Court for Sierra Leone provides that:

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977, [which include] violence to life . . . in particular murder.

Other Instruments

678. Article 23 of the 1863 Lieber Code provides that “private citizens are no longer murdered”.

679. Article 44 of the 1863 Lieber Code provides that “all wanton violence committed against persons in the invaded country . . . all killing of such inhabitants, are prohibited”.

⁵⁶⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

⁵⁶⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

680. Article 56 of the 1863 Lieber Code provides that “a prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of . . . death, or any other barbarity”.

681. Article 61 of the 1863 Lieber Code provides that “troops that give no quarter have no right to kill enemies already disabled on the ground, or prisoners captured by other troops”.

682. Article 71 of the 1863 Lieber Code provides that:

Whoever intentionally inflicts additional wounds on an enemy already wholly disabled, or kills such an enemy, or who orders or encourages soldiers to do so, shall suffer death, if duly convicted, whether he belongs to the Army of the United States, or is an enemy captured after having committed his misdeed.

683. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including murder, massacres and putting hostages to death.

684. Article II of the 1945 Allied Control Council Law No. 10 provides that:

1. Each of the following acts is recognized as a crime:

- ...
- (b) War crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, murder . . . of civilian population from occupied territory, murder . . . of prisoners of war or persons on the seas . . .
 - (c) Crimes against humanity. Atrocities and offenses, including but not limited to murder, extermination . . . or other inhumane acts committed against any civilian population.

685. Article 5(c) of the 1946 IMT Charter (Tokyo) established individual responsibility for crimes against humanity, including “murder, extermination . . . and other inhumane acts committed against any civilian population, before or during the war”.

686. Article 2 of the 1948 UDHR provides that “everyone has the right to life, liberty and security of person”.

687. Principle VI of the 1950 Nuremberg Principles adopted by the ILC provides that:

The crimes hereinafter set out are punishable as crimes under international law:

- ...
- (b) War crimes: Violations of the laws or customs of war include, but are not limited to, murder . . . of civilian population of or in occupied territory, murder . . . of prisoners of war, of persons on the seas . . .
 - (c) Crimes against humanity: Murder, extermination . . . and other inhuman acts done against any civilian population.

688. Rule 4 of the 1950 UN Command Rules and Regulations gave to Military Commissions of the UN Command in Korea jurisdiction over various offences, including “murder of civilians or prisoners of war”.

689. Paragraph 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict provides that “all forms of repression . . . of women and children, including . . . shooting . . . committed by belligerents in the course of military operations or in occupied territories shall be considered criminal”.

690. The 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provide that:

2. Governments and law enforcement agencies should develop a range of means as broad as possible and equip law enforcement officials with various types of weapons and ammunition that would allow for a differentiated use of force and firearms. These should include the development of non-lethal incapacitating weapons for use in appropriate situations, with a view to increasingly restraining the application of means capable of causing death or injury to persons. For the same purpose, it should also be possible for law enforcement officials to be equipped with self-defensive equipment such as shields, helmets, bullet-proof vests and bullet-proof means of transportation, in order to decrease the need to use weapons of any kind.

...

4. Law enforcement officials, in carrying out their duty, shall, as far as possible, apply non-violent means before resorting to the use of force and firearms. They may use force and firearms only if other means remain ineffective or without any promise of achieving the intended result.

5. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall:

- (a) Exercise restraint in such use and act in proportion to the seriousness of the offence and the legitimate objective to be achieved;
- (b) Minimize damage and injury, and respect and preserve human life;

...

8. Exceptional circumstances such as internal political instability or any other public emergency may not be invoked to justify any departure from these basic principles.

691. Article 2(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that “life is a God-given gift and the right to life is guaranteed to every human being. It is the duty of individuals, societies and states to protect this right from any violation, and it is prohibited to take away life except for a Shari’ah prescribed reason.”

692. According to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, “acts of inhumanity, cruelty or barbarity directed against life . . . in particular wilful killing” are considered as exceptionally serious war crimes and as serious violations of the principles and rules of international law applicable in armed conflict.

693. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

694. Under paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.

695. Under Article 2(a) of the 1993 ICTY Statute, the Tribunal is competent to prosecute wilful killing of persons protected under the provisions of the relevant Geneva Convention. Article 5(a) provides that murder, "when committed in armed conflict, whether international or internal in character, and directed against any civilian population" constitutes a crime against humanity. Article 4(2)(a) provides that killing members of "a national, ethnical, racial or religious group, when committed with intent to destroy it, in whole or in part, as such" constitutes genocide.

696. Article 2(2)(a) of the 1994 ICTR Statute provides that killing members of "a national, ethnical, racial or religious group, when committed with intent to destroy it, in whole or in part, as such" constitutes genocide. Article 3(a) provides that murder, "when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds", constitutes a crime against humanity. Under Article 4(a), the Tribunal is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions, including "violence to life... in particular murder".

697. Article 18(a)–(b) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind states that "murder" and "extermination" are crimes against humanity. Article 20(a) provides that "wilful killing", committed in an international armed conflict and in violation of international humanitarian law, is a war crime. Under Article 20(f)(i), "violence to the life, health and physical or mental well-being of persons, in particular murder", committed in violation of IHL applicable in armed conflict not of an international character, is a war crime.

698. Article 2(4) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right to life, especially against massacres, and the right not to be subject to campaigns of violence against one's person. Article 3(1) of Part IV further provides that violence to life shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*. Article 4(1) of Part IV adds that "persons *hors de combat*... are entitled to respect for their lives".

699. According to Section 7.2 of the 1999 UN Secretary-General's Bulletin, "violence to life" or "murder" of persons not, or no longer, taking part in

military operations and persons placed *hors de combat* is prohibited at any time and in any place.

700. Article 1 of the 2000 EU Charter of Fundamental Rights provides that “everyone has the right to life”.

701. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(i), “wilful killing” constitutes a war crime in international armed conflicts. According to Section 6(1)(c)(i), “violence to life and person, in particular murder of all kinds,” constitutes a war crime in non-international armed conflicts.

II. National Practice

Military Manuals

702. Argentina’s Law of War Manual (1969) restates the provisions of common Article 3 of the 1949 Geneva Conventions.⁵⁶⁶

703. Argentina’s Law of War Manual (1989) provides that “wilful killing” is a war crime and a grave breach of the Geneva Conventions. It also stipulates that “violence to life” is prohibited against persons who are in the power of a party to the conflict and who do not benefit from a more favourable treatment under the Geneva Conventions.⁵⁶⁷

704. Australia’s Commanders’ Guide states that wilful killing is a war crime which warrants the institution of criminal proceedings.⁵⁶⁸

705. Australia’s Defence Force Manual provides that “attempts upon the lives [of the wounded and sick and shipwrecked], and violence against them is prohibited. They shall not be murdered.” It further states that “wilful killing” is a grave breach of the Geneva Conventions which warrants institution of criminal proceedings.⁵⁶⁹

706. Belgium’s Law of War Manual prohibits, in internal armed conflicts, “attacks on the life and physical integrity” of “persons who do not take a direct part in hostilities, including members of the armed forces who have laid down their arms and persons placed *hors de combat* ”.⁵⁷⁰ It further states that wilful killing is a grave breach of the Geneva Conventions.⁵⁷¹

707. Benin’s Military Manual provides that all persons *hors de combat* and who do not take a direct part in hostilities shall be entitled to respect for their lives and physical integrity.⁵⁷²

⁵⁶⁶ Argentina, *Law of War Manual* (1969), § 8.001.

⁵⁶⁷ Argentina, *Law of War Manual* (1989), §§ 4.15 and 8.03.

⁵⁶⁸ Australia, *Commanders’ Guide* (1994), § 1305(a).

⁵⁶⁹ Australia, *Defence Force Manual* (1994), §§ 990 and 1315(a) and (n), see also § 945.

⁵⁷⁰ Belgium, *Law of War Manual* (1983), pp. 16–17.

⁵⁷¹ Belgium, *Law of War Manual* (1983), p. 55.

⁵⁷² Benin, *Military Manual* (1995), Fascicule II, p. 4 and Fascicule III, p. 4.

708. The Instructions to the Muslim Fighter issued by the ARB iH in Bosnia and Herzegovina in 1993 states that:

Killing of women, children and priests who do not participate at all in the war and who do not directly or indirectly assist the enemy is forbidden . . . These are general rules which are binding for our soldiers. However, if the commanding officer assesses that the situation and the general interest demand a different course of action, then the soldiers are duty-bound to obey their commanding officer . . . It is also left to the military command's discretion to decide whether it is more useful or in the general interest to free, exchange or liquidate enemy prisoners of war.⁵⁷³

709. Burkina Faso's Disciplinary Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.⁵⁷⁴

710. Cameroon's Disciplinary Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.⁵⁷⁵

711. Cameroon's Instructors' Manual states that "an obligation is given to safeguard the life of [prisoners of war]"⁵⁷⁶

712. Canada's LOAC Manual states that "wilful killing" is a grave breach of the Geneva Conventions and provides that the following acts are prohibited: assassination, attempts upon the lives of the wounded, sick and shipwrecked, killing of prisoners of war, and murder of persons protected by GC IV, AP I and AP II.⁵⁷⁷ With regard to non-international armed conflicts, the manual restates common Article 3 of the 1949 Geneva Conventions.⁵⁷⁸

713. Colombia's Circular on Fundamental Rules of IHL states that "persons *hors de combat* and who no longer participate directly in hostilities have the right to respect for their lives and physical integrity"⁵⁷⁹ It also states that "captured persons and civilian persons who are in the power of the adverse Party have the right to respect for their life"⁵⁸⁰

714. Colombia's Basic Military Manual provides that, in both international and non-international armed conflicts, the lives of all persons *hors de combat* shall be respected.⁵⁸¹ With regard to internal armed conflict, the manual contains the provisions of common Article 3 of the 1949 Geneva Conventions.⁵⁸²

⁵⁷³ Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.

⁵⁷⁴ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁵⁷⁵ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁵⁷⁶ Cameroon, *Instructors' Manual* (1992), § 142.

⁵⁷⁷ Canada, *LOAC Manual* (1999), p. 6-3, § 25, p. 9-2, § 18, p. 10-3, § 26, p. 11-4, § 33, p. 11-7, § 63(a), p. 17-3, § 21 and p. 16-2, § 12, see also p. 16-4, § 21(j) (genocide as a violation of the Hague Conventions and customary law).

⁵⁷⁸ Canada, *LOAC Manual* (1999), p. 17-2, § 10(a).

⁵⁷⁹ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 1.

⁵⁸⁰ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 4.

⁵⁸¹ Colombia, *Basic Military Manual* (1995), pp. 20, 22 and 29.

⁵⁸² Colombia, *Basic Military Manual* (1995), p. 42.

715. Colombia's Soldiers' Manual and Instructors' Manual provide that the right to life is a human right which the armed forces must respect.⁵⁸³

716. Congo's Disciplinary Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.⁵⁸⁴

717. Croatia's LOAC Compendium provides that wilful killing is a grave breach of IHL and a war crime.⁵⁸⁵

718. Croatia's Instructions on Basic Rules of IHL requires that the armed forces protect the lives and physical and mental integrity of persons *hors de combat*, the wounded and sick, who must not be killed or wounded.⁵⁸⁶

719. Ecuador's Naval Manual provides that the "killing without just cause" of prisoners of war, civilian inhabitants of occupied territories, the wounded and sick, enemies *hors de combat* and the shipwrecked is a war crime.⁵⁸⁷

720. In El Salvador's Human Rights Charter of the Armed Forces, one of the ten basic rules is to respect human life. In a chapter devoted to the "right to life", the manual contains the following provisions: "human life is the most sacred thing of any person; nobody can deprive someone arbitrarily of his life".⁵⁸⁸

721. France's Disciplinary Regulations as amended prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.⁵⁸⁹

722. France's LOAC Summary Note provides that all persons *hors de combat* have the right to respect for their lives.⁵⁹⁰ It further states that "wilful killing" is a war crime.⁵⁹¹

723. France's LOAC Teaching Note provides that "it is prohibited to . . . kill or injure an adversary . . . who is *hors de combat*". It further states that "wilful killing" is a grave breach of the law of armed conflict and is a war crime.⁵⁹²

724. France's LOAC Manual provides that "attacks upon the life and physical and mental well-being of persons, such as murder" constitute war crimes.⁵⁹³ The manual also states that wilful killing and attempts on the physical integrity or health of the wounded and sick are war crimes.⁵⁹⁴ It further stipulates that one of the three main principles common to IHL and human rights is the principle of inviolability, which guarantees every human being the right to respect for his or her life.⁵⁹⁵ It also provides that the execution of hostages is

⁵⁸³ Colombia, *Soldiers' Manual* (1999), p. 10; *Instructors' Manual* (1999), pp. 8 and 21.

⁵⁸⁴ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁵⁸⁵ Croatia, *LOAC Compendium* (1991), Annex 9, p. 56.

⁵⁸⁶ Croatia, *Instructions on Basic Rules of IHL* (1993), §§ 1–3.

⁵⁸⁷ Ecuador, *Naval Manual* (1989), § 6.2.5.

⁵⁸⁸ El Salvador, *Human Rights Charter of the Armed Forces* (undated), pp. 3 and 6.

⁵⁸⁹ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁵⁹⁰ France, *LOAC Summary Note* (1992), § 2.1.

⁵⁹¹ France, *LOAC Summary Note* (1992), § 3.4.

⁵⁹² France, *LOAC Teaching Note* (2000), pp. 2 and 7.

⁵⁹³ France, *LOAC Manual* (2001), p. 45, see also p. 44 (killing as a part of a genocide campaign).

⁵⁹⁴ France, *LOAC Manual* (2001), p. 45. ⁵⁹⁵ France, *LOAC Manual* (2001), pp. 50–52.

expressly prohibited by the law of armed conflict and has been a war crime since 1949.⁵⁹⁶

725. Germany's Military Manual provides that attempts on the lives of civilians and the wounded, sick and shipwrecked, or violence to their persons, are prohibited.⁵⁹⁷ It lists "wilful killing" among the grave breaches of IHL.⁵⁹⁸

726. Germany's Soldiers' Manual provides that any attack on the lives or persons of the wounded, sick and shipwrecked is prohibited".⁵⁹⁹

727. Hungary's Military Manual states that "wilful killing" is a grave breach of the Geneva Conventions and a war crime.⁶⁰⁰

728. Israel's Manual on the Laws of War states that "it is strictly forbidden to cause (by act or omission) the death of a prisoner of war after he has surrendered or to put him in a situation that endangers his health and physical integrity".⁶⁰¹

729. Italy's IHL Manual provides that, in occupied territories, civilians shall not be subject to brutality and violence against their lives.⁶⁰² It also provides that wilful killing and attacks on the physical and mental integrity of any person in the power of a belligerent, genocide and wilful killing of prisoners of war, the wounded and sick are war crimes.⁶⁰³

730. Kenya's LOAC Manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.⁶⁰⁴

731. South Korea's Military Regulation 187 provides that "killing non-combatants" is a war crime.⁶⁰⁵

732. Madagascar's Military Manual states that one of the seven fundamental rules of IHL is that persons *hors de combat* and who do not take a direct part in hostilities are entitled to respect for their lives and their mental and physical integrity.⁶⁰⁶

733. Mali's Army Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.⁶⁰⁷

734. Morocco's Disciplinary Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.⁶⁰⁸

735. The Military Manual of the Netherlands provides that "every attempt on the life of the wounded and sick is prohibited. In particular, they may not

⁵⁹⁶ France, *LOAC Manual* (2001), p. 101.

⁵⁹⁷ Germany, *Military Manual* (1992), §§ 502, 601 and 608.

⁵⁹⁸ Germany, *Military Manual* (1992), § 1209. ⁵⁹⁹ Germany, *Soldiers' Manual* (1991), p. 5.

⁶⁰⁰ Hungary, *Military Manual* (1992), p. 90.

⁶⁰¹ Israel, *Manual on the Laws of War* (1998), p. 51.

⁶⁰² Italy, *IHL Manual* (1991), Vol. 1, § 41(e). ⁶⁰³ Italy, *IHL Manual* (1991), Vol. 1, § 84.

⁶⁰⁴ Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 5 and 6.

⁶⁰⁵ South Korea, *Military Regulation 187* (1991), Article 4.2.

⁶⁰⁶ Madagascar, *Military Manual* (1994), p. 22 and p. 91, Rule 1.

⁶⁰⁷ Mali, *Army Regulations* (1979), Article 36.

⁶⁰⁸ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

be killed or exterminated".⁶⁰⁹ It further restates the prohibition of violence directed against a protected person's life, health, physical or psychological well-being, such as murder as found in Article 75 AP I.⁶¹⁰ With respect to non-international armed conflicts, the manual restates the prohibition of violence to life and person, in particular murder, as found in common Article 3 of the 1949 Geneva Conventions and Article 4 AP II.⁶¹¹

736. New Zealand's Military Manual prohibits killing and provides that "self-preservation or military necessity can never provide an excuse for the murder of prisoners of war".⁶¹² It further states that "wilful killing" is a grave breach of the Geneva Conventions and their Additional Protocols.⁶¹³ With respect to non-international armed conflicts, the manual states that violence to life and person of those protected by common Article 3 of the 1949 Geneva Conventions, in particular murder of all kinds, is prohibited at any time and in any place.⁶¹⁴

737. Nicaragua's Military Manual states that, in both internal and international armed conflicts as well as in situations of internal troubles, the right to life is inviolable and inherent to the human being.⁶¹⁵

738. Nigeria's Operational Code of Conduct provides that soldiers who surrender, pregnant women and children must not be killed.⁶¹⁶

739. Nigeria's Military Manual refers to Article 12 GC I, which "prohibits any attempt upon the lives [of the wounded and sick], or violence to their persons, and in particular to wound or to exterminate them".⁶¹⁷

740. Nigeria's Manual on the Laws of War provides that attempts on the lives of the wounded and sick and unlawful acts or omissions endangering the lives of POWs are prohibited.⁶¹⁸ It also specifies that wilful killing of all protected persons is a grave breach of the Geneva Conventions and is considered as a serious war crime.⁶¹⁹

741. Peru's Human Rights Charter of the Security Forces states that one of the 10 basic rules is to respect human life. It adds that "human life is sacred for every person" and that the lives of the wounded or of persons who surrender must be respected. These rules must be respected by the armed and police forces.⁶²⁰

⁶⁰⁹ Netherlands, *Military Manual* (1993), pp. VI-1/VI-2.

⁶¹⁰ Netherlands, *Military Manual* (1993), p. VIII-3.

⁶¹¹ Netherlands, *Military Manual* (1993), pp. XI-1 and XI-4.

⁶¹² New Zealand, *Military Manual* (1992), § 919(1).

⁶¹³ New Zealand, *Military Manual* (1992), §§ 1137(1), 1702(1) and 1704(2-c), see also § 1704(5) (genocide as an offence against the law of armed conflict and a war crime).

⁶¹⁴ New Zealand, *Military Manual* (1992), § 1807(1).

⁶¹⁵ Nicaragua, *Military Manual* (1982), Articles 3, 7.1, 8 and 14(31).

⁶¹⁶ Nigeria, *Operational Code of Conduct* (1967), § 4(a), (b) and (c).

⁶¹⁷ Nigeria, *Military Manual* (1994), p. 13, § 4.

⁶¹⁸ Nigeria, *Manual on the Laws of War* (undated), §§ 35 and 37.

⁶¹⁹ Nigeria, *Manual on the Laws of War* (undated), § 6(a), see also § 6(12) and (20) (killing of spies, saboteurs and partisans, and genocide).

⁶²⁰ Peru, *Human Rights Charter of the Security Forces* (1991), p. 3, § 2 and p. 7.

742. Peru's Human Rights Charter of the Armed Forces states that respect for a person's life and mental and physical integrity is one of the three principles common to the 1949 Geneva Conventions, which represent the minimum level of protection to which every human being is entitled.⁶²¹

743. The Rules for Combatants of the Philippines provides that "prisoners must be respected. It is prohibited to . . . kill them."⁶²²

744. Romania's Soldiers' Manual provides that persons *hors de combat* and who do not take a direct part in hostilities and captured combatants have the right to respect for their lives.⁶²³ It also states that the "killing and injuring of an adversary who surrenders or who is *hors de combat* is prohibited".⁶²⁴

745. Russia's Military Manual prohibits violence to the lives and physical integrity, in particular murder of all kinds, of war victims, namely the wounded, sick and shipwrecked, POWs and the civilian population.⁶²⁵

746. Senegal's Disciplinary Regulations prohibits attacks on the lives and physical integrity of the wounded, sick and shipwrecked, prisoners and civilians, including murder.⁶²⁶

747. Senegal's IHL Manual restates the provisions of common Article 3 of the 1949 Geneva Conventions and prohibits attacks on life.⁶²⁷

748. South Africa's LOAC Manual provides that "wilful killing" is a grave breach of the Geneva Conventions.⁶²⁸

749. Spain's LOAC Manual provides that a person who has participated in hostilities and who does not benefit from POW status and who does not benefit from a better treatment under GC IV is entitled to a minimum of guarantees, *inter alia*, "the prohibition at all times and in all places of the following acts, whether they are committed by civilians or soldiers: attacks on life, health and physical integrity, in particular homicide".⁶²⁹ According to the manual, "wilful killing" committed by medical personnel is a war crime.⁶³⁰ It also states that soldiers must respect the lives of surrendered or captured combatants.⁶³¹

750. Switzerland's Military Manual and Teaching Manual provide that enemy civilians shall not be murdered.⁶³²

751. Switzerland's Basic Military Manual states that it is prohibited to make an attempt on the lives of the wounded and sick.⁶³³ It further provides that wilful killing of protected persons (wounded and sick, medical personnel, prisoners

⁶²¹ Peru, *Human Rights Charter of the Armed Forces* (1994), § 24.

⁶²² Philippines, *Rules for Combatants* (1989), § 6(4).

⁶²³ Romania, *Soldiers' Manual* (1991), p. 33, § 1.

⁶²⁴ Romania, *Soldiers' Manual* (1991), p. 32, § 2.

⁶²⁵ Russia, *Military Manual* (1990), §§ 7 and 8.

⁶²⁶ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

⁶²⁷ Senegal, *IHL Manual* (1999), pp. 4 and 23. ⁶²⁸ South Africa, *LOAC Manual* (1996), § 40.

⁶²⁹ Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.

⁶³⁰ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

⁶³¹ Spain, *LOAC Manual* (1996), Vol. I, §§ 7.3.a.(7) and 10.8.f.(2).

⁶³² Switzerland, *Military Manual* (1984), p. 34; *Teaching Manual* (1986), p. 43.

⁶³³ Switzerland, *Basic Military Manual* (1987), Articles 69 and 147.

of war, inhabitants of occupied territory and enemy civilians on national territory) is a grave breach of the Geneva Conventions. Examples provided include “killing prisoners of war or letting them die of starvation”.⁶³⁴

752. Togo’s Military Manual provides that all persons *hors de combat* and who do not take a direct part in hostilities shall be entitled to respect for their lives and physical integrity.⁶³⁵

753. Uganda’s Code of Conduct provides: “Never kill any member of the public or any captured prisoners, as the guns should only be reserved for armed enemies or opponents.”⁶³⁶

754. Uganda’s Operational Code of Conduct states that “the offence of disobeying lawful orders shall include . . . unauthorised killing of prisoners of war”.⁶³⁷ It also stipulates that “the following crimes shall cause an immediate arrest of an officer by any soldier . . . murder”.⁶³⁸

755. The UK Military Manual provides that “a commander may not put his prisoners of war to death” that “it is unlawful for a commander to kill prisoners of war on grounds of self-preservation” and that “any attempts on [the lives of the wounded and sick] . . . are strictly prohibited”.⁶³⁹ The manual also states that it is prohibited to “take any measure of such a character as to cause . . . extermination of protected persons”.⁶⁴⁰ It further states that wilful killing of persons protected by the 1949 Geneva Conventions is a grave breach of these instruments.⁶⁴¹

756. The UK LOAC Manual restates the provisions of common Article 3 of the 1949 Geneva Conventions and provides that “murder or violence to the person are strictly prohibited”.⁶⁴²

757. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions.⁶⁴³

758. The US Air Force Pamphlet stipulates that “wilful killing” is a grave breach of the Geneva Conventions.⁶⁴⁴

759. The US Soldier’s Manual states that “an order to commit a crime such as murder . . . is in violation of the laws of war”.⁶⁴⁵

760. The US Instructor’s Guide provides that violating life and person, in particular murder, is a capital offence prohibited at any time and in any place whatsoever. It specifically prohibits murder of prisoners.⁶⁴⁶ It also states that “killing, without proper legal trial, spies or other captured persons who have committed hostile acts” is a war crime.⁶⁴⁷

⁶³⁴ Switzerland, *Basic Military Manual* (1987), Article 192.

⁶³⁵ Togo, *Military Manual* (1996), Fascicule II, p. 4 and Fascicule III, p. 4.

⁶³⁶ Uganda, *Code of Conduct* (1986), Rule 4.

⁶³⁷ Uganda, *Operational Code of Conduct* (1986), Rule 17(i).

⁶³⁸ Uganda, *Operational Code of Conduct* (1986), Rule 26(a).

⁶³⁹ UK, *Military Manual* (1958), §§ 137 and 339. ⁶⁴⁰ UK, *Military Manual* (1958), § 549.

⁶⁴¹ UK, *Military Manual* (1958), § 625(a).

⁶⁴² UK, *LOAC Manual* (1981), Section 6, p. 22, § 2. ⁶⁴³ US, *Field Manual* (1956), § 502.

⁶⁴⁴ US, *Air Force Pamphlet* (1976), § 15-2(b). ⁶⁴⁵ US, *Soldier’s Manual* (1984), p. 26.

⁶⁴⁶ US, *Instructor’s Guide* (1985), pp. 8 and 9. ⁶⁴⁷ US, *Instructor’s Guide* (1985), p. 14.

761. The US Naval Handbook provides that the “killing without just cause” of prisoners of war, civilian inhabitants of occupied territories, the wounded and sick, enemies *hors de combat* and the shipwrecked is a war crime.⁶⁴⁸

National Legislation

762. Albania’s Military Penal Code criminalises killing as a war crime.⁶⁴⁹

763. Argentina’s Draft Code of Military Justice provides that acts of “wilful killing” of protected persons is a criminal offence.⁶⁵⁰

764. Under Armenia’s Penal Code, “murder” committed during an armed conflict constitutes a crime against the peace and security of mankind.⁶⁵¹

765. Australia’s War Crimes Act provides that “murder and massacres” and “putting hostages to death” are war crimes.⁶⁵²

766. Australia’s War Crimes Act as amended identifies murder and manslaughter as “serious war crimes”.⁶⁵³

767. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence”.⁶⁵⁴

768. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes defined in the 1998 ICC Statute: “genocide by killing”; crimes against humanity, including murder when committed “as part of a widespread or systematic attack directed against a civilian population”; and war crimes, including “wilful killing” of a person protected under the Geneva Conventions or AP I in international armed conflicts, and murder of persons who are *hors de combat* in non-international armed conflicts.⁶⁵⁵

769. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, “violence to life” and “murder” are acts prohibited against civilian persons and prisoners of war.⁶⁵⁶

770. Azerbaijan’s Criminal Code provides that “wilful killing” of protected persons is a violation of the laws and customs of war.⁶⁵⁷

771. Bangladesh’s International Crimes (Tribunal) Act states that murder of the civilian population, murder of prisoners of war and the killing of detainees is a

⁶⁴⁸ US, *Naval Handbook* (1995), § 6.2.5.

⁶⁴⁹ Albania, *Military Penal Code* (1995), Articles 73–75.

⁶⁵⁰ Argentina, *Draft Code of Military Justice* (1998), Article 289, introducing a new Article 873 in the *Code of Military Justice as amended* (1951).

⁶⁵¹ Armenia, *Penal Code* (2003), Article 390.1(1), see also Article 392 (systematic execution without trial as a crime against humanity) and Article 393 (killing as part of a genocide campaign).

⁶⁵² Australia, *War Crimes Act* (1945), Section 3.

⁶⁵³ Australia, *War Crimes Act as amended* (1945), Sections 6(1) and 7(1).

⁶⁵⁴ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

⁶⁵⁵ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.3, 268.8, 268.24 and 268.70.

⁶⁵⁶ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 17 and 21.

⁶⁵⁷ Azerbaijan, *Criminal Code* (1999), Article 115.4, see also Article 103 (genocide as a crime against peace and the security of humanity).

war crime.⁶⁵⁸ It adds that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁶⁵⁹

772. The Geneva Conventions Act of Barbados provides that “a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados”.⁶⁶⁰

773. The Criminal Code of Belarus provides that “wilful killing” of persons that have laid down their arms or are defenceless, the wounded, sick and shipwrecked, sanitary and religious personnel, prisoners of war, the civilian population in an occupied territory or in the conflict zone, or other persons enjoying international protection, is a violation of the laws and customs of war.⁶⁶¹

774. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that “wilful killing” constitutes a crime under international law.⁶⁶²

775. The Criminal Code of the Federation of Bosnia and Herzegovina provides that killing of civilians, prisoners of war, the wounded, sick and shipwrecked is a war crime.⁶⁶³ The Criminal Code of the Republika Srpska contains the same provision.⁶⁶⁴

776. Botswana’s Geneva Conventions Act punishes “any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions”.⁶⁶⁵

777. Bulgaria’s Penal Code as amended provides that ordering and committing acts of murder of the wounded, sick, shipwrecked, medical personnel, prisoners of war and the civilian population is a war crime.⁶⁶⁶

778. Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes provides that “wilful killing” is a war crime in both international and non-international armed conflicts.⁶⁶⁷

779. Cambodia’s Law on the Khmer Rouge Trial provides that “the Extraordinary Chambers shall have the power to bring to trial all suspects

⁶⁵⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d).

⁶⁵⁹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁶⁶⁰ Barbados, *Geneva Conventions Act* (1980), Section 3(2).

⁶⁶¹ Belarus, *Criminal Code* (1999), Article 135(3).

⁶⁶² Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(1), see also Article 1(1)(1) (killing as a part of a genocide campaign) and Article 1(1)(2) (killing as a crime against humanity).

⁶⁶³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154(1), 155 and 156.

⁶⁶⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1), 434 and 435.

⁶⁶⁵ Botswana, *Geneva Conventions Act* (1970), Section 3(1).

⁶⁶⁶ Bulgaria, *Penal Code as amended* (1968), Articles 410(a), 411(a) and 412(a).

⁶⁶⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(a) and (C)(a), see also Article 2(a) (genocide) and Article 3(a) (crimes against humanity).

who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979".⁶⁶⁸

780. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] . . . is guilty of an indictable offence".⁶⁶⁹

781. Canada's Crimes against Humanity and War Crimes Act provides that the crimes of genocide, crimes against humanity and war crimes defined in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁶⁷⁰

782. China's Law Governing the Trial of War Criminals provides that acts of planned slaughter and murder constitute war crimes.⁶⁷¹

783. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, carries out or orders the carrying out of the killing of a protected person.⁶⁷²

784. The DRC Code of Military Justice as amended provides that in times of war, violence to or serious injury of the civilian population is an offence.⁶⁷³

785. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, killing members of an ethnical, racial or religious group, as such, with intent to destroy the group, in whole or in part, constitutes a crime of genocide.⁶⁷⁴ Moreover, "murder", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.⁶⁷⁵ The Act further defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁶⁷⁶

786. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions".⁶⁷⁷

787. Under the Penal Code as amended of Côte d'Ivoire, organising, ordering or carrying out, in time of war or occupation, murder and attacks on the physical integrity of the civilian population constitute a "crime against the civilian population". The same applies in relation to prisoners of war and internees.⁶⁷⁸

⁶⁶⁸ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

⁶⁶⁹ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

⁶⁷⁰ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁶⁷¹ China, *Law Governing the Trial of War Criminals* (1946), Article 3, §1.

⁶⁷² Colombia, *Penal Code* (2000), Article 135.

⁶⁷³ DRC, *Code of Military Justice as amended* (1972), Article 472.

⁶⁷⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 1.

⁶⁷⁵ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.

⁶⁷⁶ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁶⁷⁷ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

⁶⁷⁸ Côte d'Ivoire, *Penal Code as amended* (1981), Articles 138(1) and 139(1).

788. Croatia's Criminal Code provides that the killing of the civilian population, the wounded, sick, shipwrecked, medical or religious personnel or prisoners of war is a war crime.⁶⁷⁹

789. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person, in the commission of grave breaches of the Geneva Conventions".⁶⁸⁰

790. Egypt's Penal Code and Military Criminal Code prohibit homicide of the wounded.⁶⁸¹

791. El Salvador's Penal Code includes murder as part of a genocide campaign in its list of crimes against humanity.⁶⁸²

792. Under Estonia's Penal Code, the killing of civilians, prisoners of war and interned civilians is a war crime.⁶⁸³

793. Ethiopia's Penal Code provides that in time of war, armed conflict or occupation, the organisation, ordering or killing of civilians, the wounded, sick and shipwrecked or prisoners and interned persons constitutes a war crime.⁶⁸⁴

794. Finland's Revised Penal Code provides for the punishment of acts of killing perpetrated as a part of the crime of genocide.⁶⁸⁵

795. Under France's Penal Code, "killing members of the group" constitutes genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".⁶⁸⁶

796. Under Georgia's Criminal Code, in international or internal armed conflicts, it is a crime to wilfully kill persons not taking part in hostilities, persons *hors de combat*, the wounded and sick, prisoners of war, civilians and the civilian population in an occupied territory or zone of combat, refugees and stateless persons, as well as other persons enjoying international protection.⁶⁸⁷ The Code also states that, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as violence to life of those placed *hors de combat* by detention in non-international armed conflicts, is a war crime.⁶⁸⁸

797. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international or

⁶⁷⁹ Croatia, *Criminal Code* (1997), Articles 158, 159 and 160.

⁶⁸⁰ Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

⁶⁸¹ Egypt, *Penal Code* (1937), Article 251 *bis* ; *Military Criminal Code* (1966), Article 137.

⁶⁸² El Salvador, *Penal Code* (1997), Article 361.

⁶⁸³ Estonia, *Penal Code* (2001), §§ 97 and 99, see also § 89 (killing as a crime against humanity) and § 90 (killing and physical elimination as part of a genocide campaign).

⁶⁸⁴ Ethiopia, *Penal Code* (1957), Articles 282(a), 283(a) and 284(a), see also Article 281 (killing as a part of a genocide campaign).

⁶⁸⁵ Finland, *Revised Penal Code* (1995), Chapter 11, Section 6.

⁶⁸⁶ France, *Penal Code* (1994), Article 211-1, see also Article 212-1 (massive and summary executions as a crime against humanity).

⁶⁸⁷ Georgia, *Criminal Code* (1999), Article 411(2)(a), see also Article 407 (killing as a part of a genocide campaign) and Article 408 (killing as a crime against humanity).

⁶⁸⁸ Georgia, *Criminal Code* (1999), Article 413(d).

non-international armed conflict, “kills a person who is to be protected under international humanitarian law”.⁶⁸⁹

798. Under Hungary’s Criminal Code as amended, the killing of a member of a national, ethnic, racial or religious group, as a part of a genocide campaign, constitutes a “crime against the freedom of peoples”.⁶⁹⁰

799. India’s Geneva Conventions Act provides that “if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished”.⁶⁹¹

800. Ireland’s Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions are punishable offences.⁶⁹² In addition, any “minor breach” of the Geneva Conventions, including violations of common Article 3, of Articles 12 GC I, 12 GC II, 13 GC III, 27 and 32 GC IV, and of AP I, including violations of Article 75(2)(a) AP I, as well as any “contravention” of AP II, including violations of Article 4(2)(a) AP II, are also punishable offences.⁶⁹³

801. Israel’s Nazis and Nazi Collaborators (Punishment) Law includes in its definition of war crimes the following acts: “murder of [the] civilian population of or in occupied territories; murder of . . . prisoners of war and persons on the seas . . .”.⁶⁹⁴

802. Under Jordan’s Draft Military Criminal Code, wilful killing of a protected person is a war crime.⁶⁹⁵

803. Kenya’s Geneva Conventions Act punishes “any person, whatever his nationality, who, whether within or outside Kenya, commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions”.⁶⁹⁶

804. Kenya’s Constitution provides that no person shall be deprived of life intentionally, except as the result of a lawful act of war.⁶⁹⁷

805. Under Latvia’s Criminal Code, committing an act of murder constitutes a war crime.⁶⁹⁸

806. Under the Draft Amendments to the Code of Military Justice of Lebanon, “wilful killing” constitutes a war crime.⁶⁹⁹

⁶⁸⁹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(1), see also § 6(1)(1) (killing as a part of a genocide campaign) and § 7(1)(1) (killing as a crime against humanity).

⁶⁹⁰ Hungary, *Criminal Code as amended* (1978), Section 155(1)(a).

⁶⁹¹ India, *Geneva Conventions Act* (1960), Section 3(1).

⁶⁹² Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

⁶⁹³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁹⁴ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b) (this section also considers killing as a crime of genocide, and murder and extermination as crimes against humanity).

⁶⁹⁵ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(1).

⁶⁹⁶ Kenya, *Geneva Conventions Act* (1968), Section 3(1).

⁶⁹⁷ Kenya, *Constitution* (1992), Article 71.

⁶⁹⁸ Latvia, *Criminal Code* (1998), Section 74, see also Section 71 (killing as a part of a genocide campaign).

⁶⁹⁹ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(1).

807. Under Lithuania's Criminal Code as amended, the killing of the wounded, sick and shipwrecked, prisoners of war, civilians or of other persons in occupied or annexed territories and combat zones is a war crime.⁷⁰⁰

808. Under Luxembourg's Law on the Punishment of Grave Breaches, "wilful killing" is a grave breach of the Geneva Conventions.⁷⁰¹

809. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi, commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".⁷⁰²

810. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".⁷⁰³

811. Under Mali's Penal Code, wilful killing is a war crime.⁷⁰⁴

812. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".⁷⁰⁵

813. Mexico's Penal Code as amended provides for the punishment of the killing, as a part of a genocide campaign, of a member of a national, ethnic, racial or religious group.⁷⁰⁶

814. Moldova's Penal Code provides for the punishment of anyone ordering and carrying out the killing of protected persons or executing them without due process.⁷⁰⁷

815. Under Mozambique's Military Criminal Law, killing any member of the civilian population is a criminal offence.⁷⁰⁸

816. Myanmar's Defence Service Act provides that:

Any person subject to this law who commits an offence of murder against any person not subject to military law, or culpable of homicide not amounting to murder against such a person . . . shall not be deemed to be guilty of an offence against this act and shall not be tried by a court-martial unless he commits any of the said offences . . . while in active service.⁷⁰⁹

817. The Definition of War Crimes Decree of the Netherlands includes "murder and massacres" and "putting hostages to death" in its list of war crimes.⁷¹⁰

⁷⁰⁰ Lithuania, *Criminal Code as amended* (1961), Article 333.

⁷⁰¹ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(1).

⁷⁰² Malawi, *Geneva Conventions Act* (1967), Section 4(1).

⁷⁰³ Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

⁷⁰⁴ Mali, *Penal Code* (2001), Article 31(a), see also Article 29(a) (killing and extermination as crimes against humanity) and Article 30(a) (killing as a part of a genocide campaign).

⁷⁰⁵ Mauritius, *Geneva Conventions Act* (1970), Section 3(1).

⁷⁰⁶ Mexico, *Penal Code as amended* (1931), Article 149 *bis*.

⁷⁰⁷ Moldova, *Penal Code* (2002), Article 137, see also Article 135(a) (killing as a part of a genocide campaign).

⁷⁰⁸ Mozambique, *Military Criminal Law* (1987), Article 85(a).

⁷⁰⁹ Myanmar, *Defence Services Act* (1959), Section 72.

⁷¹⁰ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

818. Under the International Crimes Act of the Netherlands, it is a crime to commit “in the case of an international armed conflict, one of the grave breaches of the Geneva Conventions”, including “intentional killing”.⁷¹¹ Furthermore, it is also a crime to commit, “in the case of an armed conflict not of an international character, a violation of Article 3 common to all of the Geneva Conventions”, including “violence to life and person, in particular killing of all kinds” of persons taking no active part in the hostilities.⁷¹²

819. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence”.⁷¹³

820. Under New Zealand’s International Crimes and ICC Act, genocide includes the crimes defined in Article 6(a) of the 1998 ICC Statute, crimes against humanity include the crimes defined in Article 7(1)(a) of the Statute, and war crimes include the crimes defined in Article 8(2)(a)(i) and (c)(i) of the Statute.⁷¹⁴

821. Nicaragua’s Military Penal Code provides for the punishment of the wilful killing of prisoners of war, the wounded, sick and shipwrecked and civilians.⁷¹⁵

822. According to Niger’s Penal Code as amended, wilful killing of persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977 is a war crime.⁷¹⁶

823. Nigeria’s Geneva Conventions Act punishes any person who “whether in or outside the Federation . . . whatever his nationality, commits, or aids, abets or procures any other person to commit, any such grave breach of any of the [Geneva] Conventions”.⁷¹⁷

824. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.⁷¹⁸

825. Papua New Guinea’s Geneva Conventions Act punishes any “person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions”.⁷¹⁹

826. Paraguay’s Penal Code provides for the punishment for “anyone who, in violation of international law in times of war, armed conflict or military

⁷¹¹ Netherlands, *International Crimes Act* (2003), Article 5(1)(a), see also Article 3(1)(a) (killing members of a group as part of a genocide campaign) and Article 4(1)(a) and (b) (intentional killing and extermination as crimes against humanity).

⁷¹² Netherlands, *International Crimes Act* (2003), Article 6(1)(a).

⁷¹³ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

⁷¹⁴ New Zealand, *International Crimes and ICC Act* (2000), Sections 9(2), 10(2) and 11(2).

⁷¹⁵ Nicaragua, *Military Penal Code* (1996), Article 54.

⁷¹⁶ Niger, *Penal Code as amended* (1961), Article 208.3(1), see also Article 208.1 (killing as part of a genocide campaign) and Article 208.2 (summary and systematic executions as crimes against humanity).

⁷¹⁷ Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

⁷¹⁸ Norway, *Military Penal Code as amended* (1902), § 108.

⁷¹⁹ Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

occupation, commits against the civilian population, the wounded and sick, or prisoners of war an act of . . . homicide."⁷²⁰

827. Under the War Crimes Trial Executive Order of the Philippines applicable to acts committed during the Second World War, "murder of civilian population of or in occupied territory; murder . . . of prisoners of war or internees or persons on the seas or elsewhere" are violations of the laws and customs of war.⁷²¹ It adds that "murder, extermination [of] . . . civilian populations before or during [the Second World War]" constitutes a war crime whether or not in violation of the local laws.⁷²²

828. Poland's Penal Code provides for the punishment of any person who, in violation of international law, kills persons *hors de combat*, protected persons and persons enjoying international protection.⁷²³

829. Portugal's Penal Code provides for the punishment of anyone who, in violation of international law, in times of war, armed conflict or occupation, commits wilful killing of the civilian population, the wounded and sick or prisoners of war.⁷²⁴

830. Romania's Penal Code provides for the punishment of anyone who kills the wounded, sick and shipwrecked, members of civil medical services, the Red Cross or similar organisations, prisoners of war, or any person in the hands of the adverse party.⁷²⁵

831. Russia's Criminal Code provides for the punishment of the killing or extermination of a national, ethnic, racial or religious group when conducted as a part of a genocide campaign.⁷²⁶

832. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who, whether in or outside the Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".⁷²⁷

833. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".⁷²⁸

834. Under Slovenia's Penal Code, the killing of civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel is a war crime.⁷²⁹

⁷²⁰ Paraguay, *Penal Code* (1997), Article 320(1), see also Article 319 (killing as a part of a genocide campaign).

⁷²¹ Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(2).

⁷²² Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(3).

⁷²³ Poland, *Penal Code* (1997), Article 123(1), see also Article 118(1) (killing as a part of a genocide campaign).

⁷²⁴ Portugal, *Penal Code* (1996), Article 241(1)(a).

⁷²⁵ Romania, *Penal Code* (1968), Article 358. ⁷²⁶ Russia, *Criminal Code* (1996), Article 357.

⁷²⁷ Seychelles, *Geneva Conventions Act* (1985), Section 3(1).

⁷²⁸ Singapore, *Geneva Conventions Act* (1973), Section 3(1).

⁷²⁹ Slovenia, *Penal Code* (1994), Articles 374(1), 375 and 376.

835. Spain's Military Criminal Code punishes military personnel for "wilful killing" of the wounded, sick and shipwrecked, prisoners of war or the civilian population.⁷³⁰

836. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, (a) a grave breach of any of the [Geneva] Conventions; or (b) a breach of common Article 3 of the Conventions, is guilty of an indictable offence".⁷³¹

837. Tajikistan's Criminal Code provides that in international or internal armed conflicts, "wilful killing" of protected persons is a crime.⁷³²

838. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit genocide as defined in Article 6(a) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(a) of the Statute, and a war crime as defined in Article 8(2)(a)(i) and (c)(i) of the Statute.⁷³³

839. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda, commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".⁷³⁴

840. Ukraine's Criminal Code provides for the punishment of the "wilful killing" of civilians or prisoners of war.⁷³⁵

841. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".⁷³⁶

842. Under the UK War Crimes Act, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the UK irrespective of his or her nationality if that offence, *inter alia*, constituted a violation of the laws and customs of war.⁷³⁷

843. Under the UK ICC Act, it is a punishable offence to commit genocide as defined in Article 6(a) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(a) of the Statute and a war crime as defined in Article 8(2)(a)(i) and (c)(i) of the Statute.⁷³⁸

844. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction

⁷³⁰ Spain, *Military Criminal Code* (1985), Article 76.

⁷³¹ Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1).

⁷³² Tajikistan, *Criminal Code* (1998), Article 403(2)(a), see also Article 398 (killing and extermination as a part of a genocide campaign).

⁷³³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁷³⁴ Uganda, *Geneva Conventions Act* (1964), Section 1(1).

⁷³⁵ Ukraine, *Criminal Code* (2001), Article 408, see also Article 442 (killing and extermination as a part of a genocide campaign).

⁷³⁶ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

⁷³⁷ UK, *War Crimes Act* (1991), Article 1.

⁷³⁸ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

over offences such as extermination, murder of prisoners of war or persons on the seas, hostages or civilians of or in an occupied territory.⁷³⁹

845. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as the murder of the civilian population of or in occupied territory, prisoners of war or internees or persons on the seas or elsewhere.⁷⁴⁰

846. Under the US War Crimes Act as amended, violations of common Article 3 and grave breaches of the 1949 Geneva Conventions are war crimes.⁷⁴¹

847. Under Uzbekistan's Criminal Code, ordering or carrying out the physical extermination of prisoners of war or the civilian population constitutes a violation of the laws and customs of war.⁷⁴²

848. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".⁷⁴³

849. Vietnam's Penal Code provides for the punishment of anyone who, in time of war, orders or directly commits the killing of civilians, the wounded or prisoners of war.⁷⁴⁴

850. Under Yemen's Military Criminal Code, the killing of prisoners or civilians is a war crime.⁷⁴⁵

851. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of murders" committed war crimes.⁷⁴⁶

852. The Penal Code as amended of the SFRY (FRY) provides that the killing of civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel is a war crime.⁷⁴⁷

853. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions".⁷⁴⁸

⁷³⁹ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

⁷⁴⁰ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).

⁷⁴¹ US, *War Crimes Act as amended* (1996), Section 2441(c).

⁷⁴² Uzbekistan, *Criminal Code* (1994), Article 152, see also Article 153 (extermination as a part of a genocide campaign).

⁷⁴³ Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).

⁷⁴⁴ Vietnam, *Penal Code* (1990), Article 279, see also Article 278 (killing as a part of a genocide campaign).

⁷⁴⁵ Yemen, *Military Criminal Code* (1998), Article 21(1).

⁷⁴⁶ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

⁷⁴⁷ SFRY (FRY), *Penal Code as amended* (1976), Articles 142(1), 143 and 144, see also Article 141 (killing as a part of a genocide campaign).

⁷⁴⁸ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

National Case-law

854. Numerous cases were brought after the Second World War in Australia, China, Israel, Netherlands, Norway and US, in which the defendants were found guilty of having summarily executed or murdered prisoners of war, ordinary civilians, and individuals suspected of espionage.⁷⁴⁹

855. In its judgement in the *Sergeant W. case* in 1966, the Court-Martial of Brussels in Belgium sentenced to imprisonment a sub-officer who wilfully killed a civilian while serving in the Congolese army within the framework of military technical cooperation between Congo and Belgium. The Court held that the act committed was murder under the Belgian and Congolese Penal Codes and also a clear violation of the laws and customs of war and of the laws of humanity.⁷⁵⁰

856. In its judgement in the *Videla case* in 1994, Chile's Appeal Court of Santiago held that the Geneva Conventions "protect the human rights of the contestants in the event of external war or a conflict between organized armed forces within the State, which latter situation effectively prevailed in the country in 1974". The Court stated that common Article 3 of the 1949 Geneva Conventions obliged parties to non-international armed conflicts "to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons, and prohibits at any time and in any place violence to life and person". The Court found that the acts charged constituted grave breaches under Article 147 GC IV and that the prison order issued against the defendant should therefore be upheld.⁷⁵¹

857. In 1995, Colombia's Constitutional Court held that the prohibitions contained in Article 4(2) AP II were consistent with the Constitution, since they were not only in harmony with the principles and values of the Constitution, but also practically reproduced specific constitutional provisions.⁷⁵²

⁷⁴⁹ Australia, Military Court at Rabaul, *Ohashi case*, Judgement, 23 March 1946; Australia, Military Court at Rabaul, *Baba Masao case*, Judgement, 2 June 1947; China, War Crimes Military Tribunal of the Ministry of National Defence at Nanking, *Takashi Sakai case*, Judgement, 29 August 1946; Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961; Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962; Netherlands, Temporary Court-Martial at Makassar, *Motomura case*, Judgement, 18 July 1947; Netherlands, Temporary Court-Martial at Makassar, *Notomi Sueo case*, Judgement, 4 January 1947; Netherlands, Temporary Court-Martial at Amboina, *Motosuke case*, Judgement, 28 January 1948; Netherlands, Special Court of Cassation, *Silbertanne murders case*, Judgement, 24 June 1946; Netherlands, Special Court (War Criminals) at Arnhem, *Enkelstroth case*, Judgement, 20 February 1948; Netherlands, Special Court of Cassation, *Burghof case*, Judgement, 17 October 1949; Norway, Court of Appeal, *Bruns case*, Judgement, 20 March 1946; Norway, Court of Appeal, *Hans case*, Judgement, 17 January 1947; UK, Military Court at Almelo, *Sandrock case*, Judgement, 26 November 1945; US, Military Commission at Rome, *Dostler case*, Judgement, 12 October 1945; US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948.

⁷⁵⁰ Belgium, Court-Martial of Brussels, *Sergeant W. case*, Judgement, 18 May 1966.

⁷⁵¹ Chile, Appeal Court of Santiago, *Videla case*, Judgement, 26 September 1994, §§ 6-20.

⁷⁵² Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

858. In its judgement in the *Jaluit Atoll case* in 1945, the US Military Commission in the Far East found five accused guilty of “wilfully, feloniously, with malice aforethought without justifiable cause, and without trial or other due process, assault and kill, by shooting and stabbing to death, three American fliers . . . then . . . captured and unarmed prisoners of war in the custody of the . . . accused”.⁷⁵³

859. In its judgement in the *Schultz case* in 1969, a US Court of Military Appeal upheld a court-martial conviction of a soldier for killing a person who, the soldier believed, had signalled enemy guerrillas with a light. While the Court recognised that this act could have been considered as an unauthorised communication with the enemy, it held that the victim was entitled to protection against summary execution once he had been taken prisoner. The Court referred to GC IV and identified murder, manslaughter and assaults as “crimes universally recognized as properly punishable under the law of war”.⁷⁵⁴

Other National Practice

860. In 1995, during a debate in the UN Security Council on the situation in the former Yugoslavia, Botswana stated that if the information relative to the execution of captives were confirmed, these acts would constitute the most blatant and flagrant violations of IHL and accepted norms of international morality.⁷⁵⁵

861. In 1994, during a debate in the UN Security Council on the situation in Rwanda, Brazil stated that the international community could not “stand still and allow the continuation of mass killings in Rwanda”.⁷⁵⁶

862. During the Chinese civil war, the PLA’s policy forbade the killing of prisoners of war.⁷⁵⁷

863. In 1952, during the Korean War, the Chinese government denounced the killing and injuring of prisoners of war by the US army, stating that “it destroyed the principle of humanity and essentially violated the Geneva Conventions”.⁷⁵⁸

⁷⁵³ US, Military Commission in the Far East, *The Jaluit Atoll case*, Judgement, 7–13 December 1945.

⁷⁵⁴ US, Court of Military Appeals, *Schultz case*, Judgement, 7 March 1969.

⁷⁵⁵ Botswana, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 5.

⁷⁵⁶ Brazil, Statement before the UN Security Council, UN Doc. S/PV.3388, 8 June 1994, p. 4.

⁷⁵⁷ China, Political Report on the United Government to the Seventh Plenary Session of National Representatives of the Chinese Communist Party by Mao Zedong, 24 April 1945, *Selected Works of Mao Zedong*, Vol. IV, Foreign Language Press, Beijing, pp. 47–51, p. 1039; Instruction on Implementing the Works of Land Reform and Consolidation of the Party by Deng Xiaoping, 6 June 1948, *Selected Works of Deng Xiaoping*, Vol. 1, The People’s Press, Beijing, p. 122.

⁷⁵⁸ China, Letter from Foreign Minister Zhou Enlai to the Chairman of the UN General Assembly Protesting the US Criminal Activity of Killing POWs on Fengyan Island, 21 December 1952, *Documents on Foreign Affairs of the People’s Republic of China*, World Knowledge Press, Beijing, pp. 115–116.

864. In a press release issued in 1980, the Colombian Ministry of National Defence denounced the killing of an army officer after he had been taken prisoner by the FARC.⁷⁵⁹

865. The Report on the Practice of Colombia refers to a draft working paper in which the Colombian government stated that it was prohibited in particular to kill persons taking no active part in the hostilities.⁷⁶⁰

866. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Costa Rica stated that:

The human right to life has found support both within the United Nations Treaties, Declarations and Resolutions as well as in Regional and International Agreements.

...

Through the evolution from the Universal Declaration of Human Rights to the present time, the principles and articles, build upon each other to construct a strong structure where it is conclusive that the use of nuclear weapons violates the international law governing the Human Rights to Life and Health.⁷⁶¹

867. In 1967, in a note submitted to the ICRC, Egypt qualified the “extermination of great numbers of the wounded” as a “flagrant violation of the elementary principle of humanity, and a serious breach of the laws of war and the Geneva Conventions of 1949”.⁷⁶²

868. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, France stated that the right to life was not absolute and that an armed conflict necessarily entailed attempts on life. It added that Article 15(2) of the 1950 ECHR and the *travaux préparatoires* of Article 6 of the 1966 ICCPR recognised this.⁷⁶³

869. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that persons not participating in hostilities (particularly the civilian population) have the right to respect for their lives.⁷⁶⁴

870. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Indonesia affirmed that “the right to life is one of the four non-derogable rights

⁷⁵⁹ Colombia, Ministry of National Defence, Press Bulletin No. 041, 25 August 1980, reprinted in IACiHR, Report on the Situation of Human Rights in Colombia, Doc. OEA/Ser.L/V/II.53 Doc. 22, 1981, p. 198.

⁷⁶⁰ Report on the Practice of Colombia, 1998, Chapter 4.1, referring to Presidential Council, Proposal of the Government to the Coordinator Guerrillera Simón Bolívar to humanise war, Draft Internal Working Paper, Part entitled “El Derecho Internacional Humanitario”, § 2.

⁷⁶¹ Costa Rica, Written statement submitted to the ICJ, *Nuclear Weapons case*, 4 July 1995, pp. 6 and 7.

⁷⁶² Egypt, Note to the International Committee of the Red Cross, 7 July 1967, annexed to Letter dated 17 July 1967 to the UN Secretary-General, UN Doc. S/8064, 17 July 1967, §§ 1 and 2(c).

⁷⁶³ France, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 38; see also Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/23, 2 November 1995, § 44.

⁷⁶⁴ France, Etat-major de la Force d’Action Rapide, Ordres pour l’Opération Mistral, 1995, Section 6, § 62.

which constitute the 'irreducible core' of human rights... A non-derogable right is one which cannot be suspended by the State even in times of public emergency."⁷⁶⁵

871. In 1973, during a debate in the Sixth Committee of the UN General Assembly on the protection of human rights in times of armed conflict, Israel accused Syria of killing and maltreating Israeli prisoners of war.⁷⁶⁶

872. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Malaysia stated that "the right to life is one of the four non-derogable rights which constitute the 'irreducible core' of human rights".⁷⁶⁷

873. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, Mexico stated that both conventional and customary international law guaranteed the right to life.⁷⁶⁸

874. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Nauru indicated that the right to life was non-derogable and thus could not be suspended by the State even in times of public emergency.⁷⁶⁹

875. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that:

The use of nuclear weapons cannot be considered in itself to be a violation of the right to life, as enshrined, *inter alia*, in Article 6 [1966 ICCPR] or in Article 2 [1950 ECHR]. According to the Netherlands Government, these articles do not create an absolute right to life. Thus, the travaux préparatoires of Article 6 [1966 ICCPR] make it clear that instead of listing the circumstances in which the deprivation of life would not be considered contrary to the right to life, the drafters decided to agree on the formulation that "No one shall be arbitrarily deprived of his life" . . . One of the instances mentioned in this connection by drafters as an example of a deprivation of life which is not arbitrary was "the performance of lawful acts of war".⁷⁷⁰

876. In 1968, during the Nigerian civil war, following the killing of an unarmed Biafran soldier, the Nigerian army officer responsible was executed for committing murder and for violating the code of conduct of Nigerian soldiers.⁷⁷¹

877. In 1994, during a debate in the UN Security Council on the situation in Rwanda, Nigeria noted with great concern the continuation of large-scale killings.⁷⁷²

⁷⁶⁵ Indonesia, Oral pleadings before the ICJ, *Nuclear Weapons case*, 3 November 1995, Verbatim Record CR 95/25, § 51.

⁷⁶⁶ Israel, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1453, 4 December 1973, p. 316, § 62.

⁷⁶⁷ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 14; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 1994, p. 12.

⁷⁶⁸ Mexico, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, p. 8.

⁷⁶⁹ Nauru, Written statement submitted to the ICJ, *Nuclear Weapons case*, 15 June 1995, p. 21.

⁷⁷⁰ Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 27; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 6 June 1994, § 34.

⁷⁷¹ *The Times*, Execution of Nigerian Officer Filmed, London, 4 September 1968.

⁷⁷² Nigeria, Statement before the UN Security Council, UN Doc. S/PV.3388, 8 June 1994, p. 5.

878. In 1994, during a debate in the UN Security Council on the situation in Rwanda, Oman expressed regret at “the killing of thousands of innocent civilians in Rwanda”.⁷⁷³

879. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Qatar stated that:

The right to life is one of the four non-derogable rights which constitute the “irreducible core” of human rights. This means that the right to life cannot be suspended by a State, even in times of public death. Although it is expected that in times of war human beings might perish, such killings should not exceed the limits of law.⁷⁷⁴

880. In 1994, during a debate in the UN Security Council on the situation in Rwanda, Russia expressed serious concern at “the deliberate mass extermination of innocent people”.⁷⁷⁵

881. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Russia affirmed that the existence of the right to life did not mean that it was not possible to deprive a person of life through legitimate use of force, as confirmed, for instance, in Article 2(2) of the 1950 ECHR.⁷⁷⁶

882. In a declaration issued in 1990, the Rwandan Minister of Justice denied the reported allegations of existing threats to physically exterminate certain political prisoners.⁷⁷⁷

883. Rwanda’s *Ecole Supérieure Militaire* teaches its students that the lives of captured enemy combatants shall be safeguarded.⁷⁷⁸

884. In its report on “gross violations of human rights” committed between 1960 and 1993, the South African Truth and Reconciliation Commission stated that:

Those combatants who were killed or seriously injured while they were unarmed or out of combat, executed after they had been captured, or wounded when they clearly could have been arrested were held to be victims of gross violations of human rights, and those responsible were held accountable.⁷⁷⁹

885. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that it was entirely appropriate that the human rights agreements should, in effect, refer to the law of armed conflict in order to determine whether or not any particular instance of the deprivation of life in wartime was arbitrary.⁷⁸⁰

886. In 1992, in reports submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the

⁷⁷³ Oman, Statement before the UN Security Council, UN Doc. S/PV.3377, 16 May 1994, p. 7.

⁷⁷⁴ Qatar, Oral pleadings before the ICJ, *Nuclear Weapons case*, Verbatim Record CR 95/29, 10 November 1995, § 30.

⁷⁷⁵ Russia, Statement before the UN Security Council, UN Doc. S/PV.3388, 8 June 1994, p. 6.

⁷⁷⁶ Russia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 9.

⁷⁷⁷ Rwanda, Declaration of the Minister of Justice, Kigali, 29 November 1990.

⁷⁷⁸ Rwanda, *Ecole Supérieure Militaire*, *Cours de tactique*, Leçon No. 22, p. 17.

⁷⁷⁹ South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 1, p. 76, § 102.

⁷⁸⁰ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, p. 68.

former Yugoslavia, the US described acts of “wilful killing” perpetrated by the parties to the conflict.⁷⁸¹

887. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense listed Iraqi war crimes, including the murder of civilians.⁷⁸² It also noted specific Iraqi war crimes, including wilful killing in violation of Articles 32 and 147 GC IV.⁷⁸³

888. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US held that none of the instruments asserting the right to life prohibited, directly or indirectly, the taking of life for legitimate purposes, including in the exercise of the right to self-defence. It added that these provisions were clearly understood by their drafters as to exclude the lawful taking of life.⁷⁸⁴

889. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular the beating to death of many US military and civilian prisoners.⁷⁸⁵

890. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.⁷⁸⁶

891. According to the Report on the Practice of Zimbabwe, Zimbabwe considers that civilians of any description should be protected from murder.⁷⁸⁷

892. In 1988, in connection with a non-international armed conflict, government officials denied in a meeting with the ICRC that it was the government’s policy to execute prisoners. It was, however, admitted that it might have occurred in a few instances.⁷⁸⁸

⁷⁸¹ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, pp. 4–6; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Second Submission), annexed to Letter dated 22 October 1992 to the UN Secretary-General, UN Doc. S/24705, 23 October 1992, pp. 4–10; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, pp. 3–11; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Fourth Submission), annexed to Letter dated 7 December 1992 to the UN Secretary-General, UN Doc. S/24918, 8 December 1992, pp. 3–11.

⁷⁸² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

⁷⁸³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.

⁷⁸⁴ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 20.

⁷⁸⁵ US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON.RES. 357, 106th Congress, 2nd Session, 19 June 2000.

⁷⁸⁶ Report on US Practice, 1997, Chapter 5.3.

⁷⁸⁷ Report on the Practice of Zimbabwe, 1997, Chapter 5.6.

⁷⁸⁸ ICRC archive document.

893. In 1989, in connection with a non-international armed conflict, the government of a State denied in a note verbale to the ICRC the allegations that it was its policy to execute prisoners.⁷⁸⁹

894. In 1992, in the context of a non-international armed conflict, a State wrote to the ICRC to denounce the killing of wounded soldiers by the armed forces of an opposition group.⁷⁹⁰

III. Practice of International Organisations and Conferences

United Nations

895. In a number of resolutions on South Africa adopted between 1976 and 1985, the UN Security Council condemned the wanton killing and maiming of defenceless demonstrators.⁷⁹¹

896. In a resolution adopted in 1993, the UN Security Council expressed “its grave alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings”.⁷⁹²

897. In a resolution adopted in 1995, the UN Security Council referred to the situation in Bosnia and Herzegovina and expressed its grave concern “at reports... of grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder”.⁷⁹³

898. In a resolution adopted in 1996, the UN Security Council expressed deep concern at the deterioration in security and the humanitarian situation in Burundi, including killings and massacres.⁷⁹⁴

899. In 1998, in two statements by its President, the UN Security Council expressed its support for “the steps of the Secretary-General to launch investigations into alleged mass killings of prisoners of war and civilians in Afghanistan, the outcome of which will be submitted to the General Assembly and the Security Council as soon as it becomes available”.⁷⁹⁵

900. In 1998, in a statement by its President, the UN Security Council condemned as gross violations of IHL atrocities carried out against the civilian population, including widespread slaughter.⁷⁹⁶

⁷⁸⁹ ICRC archive document. ⁷⁹⁰ ICRC archive document.

⁷⁹¹ UN Security Council, Res. 392, 19 June 1976, preamble and § 1; Res. 417, 31 October 1977, preamble and § 3; Res. 473, 13 June 1980, preamble; Res. 556, 23 October 1984, preamble and § 2; Res. 560, 12 March 1985, § 2; Res. 569, 26 July 1985, preamble and § 2.

⁷⁹² UN Security Council, Res. 827, 25 May 1993, preamble.

⁷⁹³ UN Security Council, Res. 1019, 9 November 1995, preamble.

⁷⁹⁴ UN Security Council, Res. 1072, 30 August 1996, preamble.

⁷⁹⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998; Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998.

⁷⁹⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/13, 20 May 1998.

901. In a resolution on South Africa adopted in 1986, the UN General Assembly strongly condemned the use of capital punishment against freedom fighters and patriots and demanded that death sentences be annulled.⁷⁹⁷

902. In a resolution adopted in 1995 on the situation of human rights in the former Yugoslavia, the UN General Assembly expressed its concern at reports regarding “grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including reports of mass murder”. It expressed “its outrage at the instances of massive and systematic violations of human rights and humanitarian law, including... killings”.⁷⁹⁸

903. In a resolution adopted in 1980 in the context of the conflict in Kampuchea, the UN Commission on Human Rights urged the parties to “spare the lives of those enemy combatants who surrender or are captured”.⁷⁹⁹

904. In several resolutions on Afghanistan adopted between 1989 and 1992, the UN Commission on Human Rights demanded that all parties treat their prisoners according to the recognised principles of IHL and protect them from acts of violence, including executions.⁸⁰⁰

905. In a resolution adopted in 1996, the UN Commission on Human Rights stated that it condemned:

in the strongest terms all violations of human rights and international humanitarian law during the conflict, in particular in areas which were under the control of the self-proclaimed Bosnian and Croatian Serb authorities, in particular massive and systematic violations, including, *inter alia*, systematic ethnic cleansing.⁸⁰¹

906. In 1995, in reports to the UN Security Council, the UN Secretary-General concluded that there was significant *prima facie* evidence that violations of IHL had occurred during and after the Bosnian Serb offensive on Srebrenica. The Secretary-General mentioned information presented by UNPROFOR, by the Special Rapporteur of the UN Commission on Human Rights and by the US government on massacres near Nova Kasaba where civilians and captured soldiers were detained.⁸⁰²

907. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II “have long been considered customary international law”.⁸⁰³

⁷⁹⁷ UN General Assembly, Res. 41/35 A, 10 November 1986, §§ 6–9.

⁷⁹⁸ UN General Assembly, Res. 50/193, 22 December 1995, p. 4.

⁷⁹⁹ UN Commission on Human Rights, Res. 29 (XXXVI), 11 March 1980, § 5.

⁸⁰⁰ UN Commission on Human Rights, Res. 1989/67, 8 March 1989, § 11; Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6.

⁸⁰¹ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.

⁸⁰² UN Secretary-General, Report submitted pursuant to Security Council Resolution 1010, UN Doc. S/1995/755, 30 August 1995; Report submitted pursuant to Security Council Resolution 1019, UN Doc. S/1995/988, 27 November 1995, § 21.

⁸⁰³ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

908. In 1992, in a report on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported the discovery of mass graves near Vukovar and stated that according to expert forensic opinion, bodies bore signs of trauma sustained around the time of death.⁸⁰⁴

909. In 1992, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights stated that the leader of a party to the conflict in Afghanistan had issued a written order which provided that “no person is allowed to . . . murder a prisoner of war”.⁸⁰⁵

910. In 1993, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights called upon the government of Turkey to ensure full respect for the right to life of members of the armed opposition who had been captured or had laid down their arms “in accordance with the international instruments governing the use of force and firearms by law enforcement officials”.⁸⁰⁶

911. In 1994, in a report on the situation of human rights in Rwanda, the Special Rapporteur of the UN Commission on Human Rights pointed out that many of the alleged acts, such as murder, political assassination, execution of hostages and other inhumane acts committed against unarmed soldiers by the armed forces of the two parties constituted war crimes in violation of the 1949 Geneva Conventions and their common Article 3. The Rapporteur also noted that the FPR had told the ICRC that it considered itself bound by the Geneva Conventions and their Additional Protocols.⁸⁰⁷

912. On several occasions, the Special Rapporteur of the UN Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions made urgent appeals to the Israeli government to ensure the right to life and physical security of all persons *hors de combat* in Lebanon. The Special Rapporteur also called on all parties to conflicts, whether international or internal, to respect the norms and standards of international human rights and IHL which were enacted to protect the lives of the civilian population and of combatants who were captured or who had laid down their arms.⁸⁰⁸

913. In 1995, in a report on the situation of human rights in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights

⁸⁰⁴ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report, UN Doc. E/CN.4/1992/S-1/10, 27 October 1992, Annex II.

⁸⁰⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, UN Doc. E/CN.4/1992/33, Report, 17 February 1992, § 51.

⁸⁰⁶ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1994/7, 7 December 1993, §§ 595, 604, 610 and 706.

⁸⁰⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Rwanda, Report, UN Doc. E/CN.4/1995/7, 28 June 1994, § 54.

⁸⁰⁸ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1995/61, 14 December 1994, §§ 394-396; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1996/4, 25 January 1996, § 589; Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1997/60, 24 December 1996, § 39.

reported with regard to attacks by Bosnian Serb forces on people fleeing after the fall of Srebrenica that “a number of accounts describe physical assaults on men who had surrendered and thus had the status of prisoners of war. Such assaults sometimes led to their death.” The Rapporteur concluded that “prisoners of war were . . . in all likelihood executed in flagrant violation of international humanitarian law”.⁸⁰⁹

914. In 1995, in a joint report, the Special Rapporteur of the UN Commission on Human Rights on Torture and the Special Rapporteur of the UN Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions reported, under the section “Violations of the right to life”, that members of the security forces captured in combat were often executed by Colombian rebel groups.⁸¹⁰

915. In 1997, in a report on the situation of human rights in Zaire (DRC), the Special Rapporteur of the UN Commission on Human Rights noted that “none of the parties involved – the rebels, FAR, the *interahamwe* or the Government – were properly respecting the provisions of Article 3 common to the four Geneva Conventions of 1949, which should unquestionably have governed the situation”.⁸¹¹ In the section relative to violations of common Article 3, the Rapporteur noted killings by Zairean troops and rebel forces of “soldiers who had laid down their arms or were not participating in military operations”.⁸¹²

916. Following allegations by both Iran and Iraq of the killing of prisoners of war and the execution of captured soldiers during the Iran–Iraq War, the UN Secretary-General sent a mission of enquiry which reported that Iran had denied allegations that captured combatants had been executed and that Iraq had denied the allegation that orders had been issued by Iraqi authorities to treat “Khomeini Guards” as “war criminals in the battlefield”. The mission also informed the UN Security Council that the Iraqi authorities had pointed out that such orders “would contradict humanitarian law and would thus be against Iraqi principles”.⁸¹³

917. In its report in 1993, the UN Commission on the Truth for El Salvador found that “the execution of an individual, whether a combatant or a non-combatant, who is in the power of a guerrilla force and who does not put up any resistance is not a combat operation” and that the executions carried out

⁸⁰⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1996/9, 22 August 1995, §§ 33 and 53.

⁸¹⁰ UN Commission on Human Rights, Special Rapporteur on Torture and Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Joint report, UN Doc. E/CN.4/1995/111, 16 January 1995, § 33.

⁸¹¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6, 28 January 1997, § 171.

⁸¹² UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6, 28 January 1997, §§ 190, 191 and 198.

⁸¹³ UN Secretary-General, Prisoners of war in Iran and Iraq: the report of a mission dispatched by the Secretary-General, January 1985, UN Doc. S/16962, 22 February 1985, §§ 72–73.

during the internal conflict in El Salvador were in violation of IHL and human rights law.⁸¹⁴

Other International Organisations

918. The report of the Political Affairs Committee accompanying a resolution on Afghanistan adopted by the Parliamentary Assembly of the Council of Europe in 1985 expressed alarm at reports of the systematic execution of captured combatants.⁸¹⁵

919. In a resolution adopted in 2000 on violations of human rights and humanitarian law in Chechnya, the European Parliament called upon the Russian authorities to ensure that the right to life of the Chechen people was protected.⁸¹⁶

920. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council reaffirmed its conviction that “acts of brutality [and] murder . . . represent a total contravention of all the Charters, Laws and Conventions of the International Community of Nations”.⁸¹⁷

921. In a resolution on Tunisia adopted in 1961, the Council of the League of Arab States strongly condemned:

the tyrannical French aggression against Tunisia . . . and the genocidal war against the defenceless Tunisian people, including the old, the women and the children, burning villages and houses and killing internees and unarmed civilians in all kinds of ways, which stands in contradiction with France’s commitment to the International Conventions and Charters that prohibit genocidal practices, such as the Geneva Convention of 12 August 1949 relative to the Protection of Civilian Persons in Times of War, the Declaration of Human Rights and the United Nations Charter.⁸¹⁸

International Conferences

922. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants declared that they refused “to accept that wounded are shown no mercy, children massacred . . .”.⁸¹⁹

923. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that “strict

⁸¹⁴ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 151.

⁸¹⁵ Council of Europe, Parliamentary Assembly, Political Affairs Committee, Deteriorating situation in Afghanistan, Report, Doc. 5495, 15 November 1985, p. 7.

⁸¹⁶ European Parliament, Resolution on violations of human rights and humanitarian law in Chechnya, 16 March 2000, § 2.

⁸¹⁷ GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 6.

⁸¹⁸ League of Arab States, Council, Res. 1778, 20 July 1961, preamble.

⁸¹⁹ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1), *ILM*, Vol. 33, 1994, p. 298.

orders are given to prevent all serious violations of international humanitarian law, including massacres . . . and threats to carry out such actions".⁸²⁰

924. The Final Declaration adopted by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002 expressed deep concern about "the number and expansion of conflicts in Africa" and alarm at "the spread of violence, in particular in the form of . . . murder . . . which seriously violate[s] the rules of International Humanitarian Law".⁸²¹

IV. Practice of International Judicial and Quasi-judicial Bodies

925. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called "elementary considerations of humanity".⁸²²

926. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ held that:

In principle, the right not arbitrarily to be deprived of one's life [contained in Article 6 of the 1966 ICCPR] applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the ICCPR, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.⁸²³

927. In the *Ntakirutimana and Others case* before the ICTR in 2000, a Rwandan prefect was indicted for, *inter alia*, failure to prevent massacres from taking place and for failure subsequently to punish those responsible.⁸²⁴

928. In the interlocutory appeal in the *Tadić case* in 1995, the ICTY Appeals Chamber referred to a Nigerian newspaper article in which it was reported that "on 27 June 1968, two officers of the Nigerian Army were publicly executed by a firing squad in Benin City in Mid-Western Nigeria for the murder of four civilians near Asaba".⁸²⁵ The Appeals Chamber stated that Article 3 of the

⁸²⁰ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

⁸²¹ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.

⁸²² ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

⁸²³ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 25.

⁸²⁴ ICTR, *Ntakirutimana and Others case*, Amended Indictment, 20 October 2000, § 5.

⁸²⁵ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 106, referring to *New Nigerian*, 28 June 1968, p. 1.

ICTY Statute also covered violations of common Article 3 of the 1949 Geneva Conventions.⁸²⁶

929. In the second amended indictment in the *Tadić case* in 1995, the Prosecutor of the ICTY charged the accused with grave breaches of the Geneva Conventions (wilful killing) and violations of the laws or customs of war (murder).⁸²⁷

930. In its judgement in the *Tadić case* in 1997, the ICTY stated that:

The customary international humanitarian law regime governing conflicts not of an international character extends protection, from acts of murder, torture and other acts proscribed by Common Article 3 [of the 1949 Geneva Conventions], to . . . persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.⁸²⁸

931. In the *Mrkšić case* before the ICTY in 1995, the accused was charged with grave breaches under Article 2(a) of the Statute of the Tribunal (wilful killing), violations of the laws or customs of war under Article 3 of the Statute (murder) and crimes against humanity under Article 5(a) (killing of civilians and wounded soldiers who had been removed by the accused from Vukovar hospital).⁸²⁹

932. In the *Erdemović case* in 1995, the accused pleaded guilty to a crime against humanity (the massacre of hundreds of Muslims at the Branjevo farm at Pilica). In its sentencing judgement in 1996, the ICTY Trial Chamber convicted Dražen Erdemović of the violation of the laws and customs of war.⁸³⁰

933. In its judgement in the *Delalić case* in 1998, the ICTY held that:

There can be no line drawn between “wilful killing” [wording of the grave breaches provisions of the Geneva Conventions] and “murder” [wording of common Article 3 of the 1949 Geneva Conventions] which affects their content . . . Thus, as it is prohibited to kill protected persons during an international armed conflict, so it is prohibited to kill those taking no active part in hostilities which constitute an internal armed conflict.

The Tribunal found some of the accused guilty of grave breaches of GC IV (wilful killing) and violations of the laws and customs of war (murder).⁸³¹

934. In its judgement in the *Jelisić case* in 1999, the ICTY held that “the charges for murder and cruel treatment are based on Article 3 common to the [1949] Geneva Conventions whose customary character has been noted on several occasions by this Tribunal and the Criminal Tribunal for Rwanda”. The Court

⁸²⁶ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, §§ 89, 134 and 136.

⁸²⁷ ICTY, *Tadić case*, Second Amended Indictment, 14 December 1995, §§ 6, 11 and 12.

⁸²⁸ ICTY, *Tadić case*, Judgement, 7 May 1997, § 615.

⁸²⁹ ICTY, *Mrkšić case*, Initial Indictment, 26 October 1995, § 26; see also *Mrkšić case*, Review of the Indictment, 3 April 1996, Disposition.

⁸³⁰ ICTY, *Erdemović case*, Sentencing Judgement, 29 November 1996, Part IV; *Erdemović case*, Judgement on Appeal, 7 October 1997, § 20; *Erdemović case*, Sentencing Judgement *bis*, 5 March 1998, § 23.

⁸³¹ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 422–423, 452 and 454 and Part IV.

found Goran Jelisić guilty of murders as violations of the laws and customs of war, as well as crimes against humanity.⁸³²

935. In its judgment in the *Kupreškić case* in 2000, the ICTY found Drago Josipović and Vladimir Šantić “guilty of a crime against humanity (murder)”.⁸³³

936. In its judgement in the *Blaškić case* in 2000, the ICTY found the accused guilty of violations of the laws and customs of war and held that the offence of violence to life and person

appears in Article 3(1)(a) common to the Geneva Conventions. It is a broad offence which, at first glance, encompasses murder and which is accordingly defined by the cumulation of the elements of these specific offences. The offence is to be linked to those of Article 2(a) (wilful killing) of the [ICTY] Statute.⁸³⁴

937. In the *Kordić and Čerkez case* before the ICTY in 1998, the accused were charged with “murder” as a crime against humanity and violation of laws or customs of war and “wilful killing” (as recognised by Articles 2(a), 7(1) and 7(3) of the Statute of the Tribunal).⁸³⁵ In its judgement in 2001, the Tribunal found the accused guilty of “murder” as a crime against humanity, and “wilful killing” as a grave breach of the Geneva Conventions.⁸³⁶

938. In its General Comment on Article 6 of the 1966 ICCPR in 1982, the HRC held that:

2. The Committee observes that war and other acts of mass violence continue to be a scourge of humanity and take the lives of thousands of innocent human beings every year . . . The Committee considers that States have the supreme duty to prevent wars, acts of genocide and other acts of mass violence causing arbitrary loss of life. Every effort they make to avert the danger of war, especially thermonuclear war, and to strengthen international peace and security would constitute the most important condition and guarantee for the safeguarding of the right to life . . .
3. The protection against arbitrary deprivation of life which is explicitly required by the third sentence of article 6 (1) is of paramount importance. The Committee considers that States parties should take measures not only to prevent and punish deprivation of life by criminal acts, but also to prevent arbitrary killing by their own security forces. The deprivation of life by the authorities of the State is a matter of the utmost gravity. Therefore, the law must strictly control and limit the circumstances in which a person may be deprived of his life by such authorities.
4. States parties should also take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life. Furthermore, States should establish effective facilities and procedures to investigate

⁸³² ICTY, *Jelisić case*, Judgement, 14 December 1999, §§ 41 and 138.

⁸³³ ICTY, *Kupreškić case*, Judgement, 14 January 2000, Disposition, §§ 5 and 6.

⁸³⁴ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 182 and Part VI.

⁸³⁵ ICTY, *Kordić and Čerkez case*, First Amended Indictment, 30 September 1998, Counts 1–2, 7–9 and 14–16.

⁸³⁶ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Section V, Disposition, Counts 7–8 and 14–15.

thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life.⁸³⁷

939. In *Camargo v. Colombia* in 1982, the HRC held that:

The requirements that the right [to life] shall be protected by law and that no one shall be arbitrarily deprived of his life mean that the law must strictly control and limit the circumstances in which a person may be deprived of his life by the authorities of a State.

...

In the present case it is evident from the fact that seven persons lost their lives as a result of the deliberate action of the police that the deprivation of life was intentional. Moreover, the police action was apparently taken without warning to the victims and without giving them any opportunity to surrender to the police patrol or to offer any explanation of their presence or intentions. There is no evidence that the action of the police was necessary in their own defence or that of others, or that it was necessary to effect the arrest or prevent the escape of the persons concerned. Moreover, the victims were no more than suspects of the kidnapping which had occurred some days earlier and their killing by the police deprived them of all the protections of due process of law laid down by the Covenant.

...

For these reasons it is the Committee's view that the action of the police resulting in the death of Mrs. Maria Fanny Suarez de Guerrero was disproportionate to the requirements of law enforcement in the circumstances of the case and that she was arbitrarily deprived of her life contrary to article 6(1) of the International Covenant on Civil and Political Rights.⁸³⁸

940. In 1995, in its decision in *Civil Liberties Organisation v. Chad (74/92)*, the ACiHPR stated that:

In the present case, Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the [ACHPR].⁸³⁹

941. In its admissibility decision in the *Dujardin and Others v. France case* in 1991, concerning the killing of four disarmed gendarmes by about 50 assailants (two were executed after having been wounded), the ECiHR held that the proclamation of a general amnesty law was not contrary to the right to life as protected under the Convention, as long as "a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law".⁸⁴⁰

⁸³⁷ HRC, General Comment No. 6 (Article 6 ICCPR), 30 July 1982, §§ 2–4.

⁸³⁸ HRC, *Camargo v. Colombia*, 31 March 1982, Views, §§ 13.1–13.3.

⁸³⁹ ACiHPR, *Civil Liberties Organisation v. Chad (74/92)*, Decision, 11 October 1995, § 22.

⁸⁴⁰ ECiHR, *Dujardin and Others v. France*, Admissibility Decision, 2 September 1991, p. 9.

942. In its judgement in *McCann and Others v. UK* in 1995, the ECtHR found that, in relation to the conduct and planning of an operation which resulted in the killing of three IRA suspects, it had to examine not only whether the force used by the soldiers was strictly proportionate to the aim of protecting persons against unlawful violence, but also whether the anti-terrorist operation was planned and controlled by the authorities so as to minimise, to the greatest extent possible, recourse to lethal force. The Court found that the failure to make allowances for erroneous intelligence assessments and the automatic recourse to lethal force constituted a use of force that exceeded the level that was absolutely necessary in defence of persons from unlawful violence and therefore amounted to a violation of Article 2 of the 1950 ECHR.⁸⁴¹

943. In three separate judgements in 1998, the ECtHR held that the responsibility of a State could be engaged where agents of the State failed to take all feasible precautions in the choice of means and methods of a security operation mounted against an opposing group with a view to avoiding and, in any event, to minimising, incidental loss of civilian life.⁸⁴²

944. In its judgement in *Kurt v. Turkey* in 1998, the ECtHR asserted that presumptions deduced from the circumstances of detention, combined with allegations of an officially tolerated practice of disappearance, were not in themselves sufficient to establish that the disappeared person had died in custody and did not therefore support a finding of violation of the right to life.⁸⁴³

945. In *Kaya v. Turkey* in 2000, the ECtHR stated that:

91... The authorities were aware, or ought to have been aware, of the possibility that this risk [of falling victim to an unlawful attack] derived from the activities of persons or groups acting with the knowledge or acquiescence of elements in the security forces. A 1993 report by a Parliamentary Investigation Commission... stated that it had received information that a Hizbullah training camp was receiving aid and training from the security forces and concluded that some officials might be implicated in the 908 unsolved killings in the south-east region. The Susurluk report, published in January 1998, informed the Prime Minister's Office that the authorities were aware of killings being carried out to eliminate alleged supporters of the PKK... The Government insisted that this report did not have any judicial or evidential value. However, even the Government described the report as providing information on the basis of which the Prime Minister was to take further appropriate measures. It may therefore be regarded as a significant document.

...

108. The Court is not satisfied that the investigation carried out into the killing of Hasan Kaya and Metin Can was adequate or effective. It failed to establish significant elements of the incident or clarify what happened to the two men and has not been conducted with the diligence and determination necessary for there to be any realistic prospect of identifying and apprehending the perpetrators. It has

⁸⁴¹ ECtHR, *McCann and Others v. UK*, Judgement, 27 September 1995, §§ 194 and 210–214.

⁸⁴² ECtHR, *Ergi v. Turkey*, Judgement, 28 July 1998, §§ 79, 81 and 85; *Yasa v. Turkey*, Judgement, 2 September 1998, § 104.

⁸⁴³ ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, §§ 107–108.

remained from the early stages within the jurisdiction of the National Security Court prosecutors, who investigate primarily terrorist or separatist offences.

109. The Court concludes that there has been in this respect a violation of Article 2 of the [ECHR].⁸⁴⁴

946. In *Avsar v. Turkey* in 2001, the ECtHR stated that:

394. For an investigation into alleged unlawful killing by state agents to be effective, it may generally be regarded as necessary for the persons responsible for and carrying out the investigation to be independent from those implicated in the events . . . The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used in such cases was or was not justified in the circumstances . . . and to the identification and punishment of those responsible . . . This is not an obligation of result, but of means. The authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including *inter alia* eye witness testimony, forensic evidence, and where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death . . . Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard.

...

408. The Court concludes that the investigation by the gendarmes, public prosecutor and before the criminal court did not provide a prompt or adequate investigation of the circumstances surrounding the killing of Mehmet Serif Avsar and therefore was in breach of the State's procedural obligation to protect the right to life. This rendered recourse to civil remedies equally ineffective in the circumstances. It accordingly dismisses the criminal and civil proceedings limb of the Government's preliminary objection . . . and holds that there has been a violation of Article 2 [of the 1950 ECHR] in this respect.⁸⁴⁵

947. In its judgement in *K.-H. W. v. Germany* in 2001, the ECtHR took the view that "even a private soldier could not show total, blind obedience to orders which flagrantly infringed" GDR legal principles and international human rights, particularly the right to life, which the Court found to be "the supreme value in the hierarchy of human rights".⁸⁴⁶

948. In a resolution adopted in 1968 concerning the law applicable to emergency situations, the IACiHR declared that:

The suspension of constitutional guarantees or state of siege is compatible with the system of representative democratic government only if enacted under the following conditions:

...

- e. When it does not in any manner presuppose the suspension of the right to life.⁸⁴⁷

⁸⁴⁴ ECtHR, *Kaya v. Turkey*, Judgement, 28 March 2000, §§ 91 and 108–109.

⁸⁴⁵ ECtHR, *Avsar v. Turkey*, Judgement, 10 July 2001, §§ 394 and 408.

⁸⁴⁶ ECtHR, *K.-H. W. v. Germany*, Judgement, 22 March 2001, § 75.

⁸⁴⁷ IACiHR, Resolution adopted at the 1968 Session, Doc. OEA/Ser.L/V/II.19 Doc. 32, *Inter-American Yearbook on Human Rights*, 1968, pp. 59–61.

949. The IACiHR has repeatedly stated that the right to life may never be suspended and that governments may not use, under any circumstances, illegal or summary execution to restore public order. It has also made clear that States are under an obligation to investigate alleged cases of summary or extrajudicial executions.⁸⁴⁸

950. In reviewing individual cases brought against El Salvador between 1985 and 1992, the IACiHR noted a number of them concerning the killing of persons detained or in the custody of the armed forces and declared that “such acts constituted serious violations of the right to life (Article 4 ACHR)”.⁸⁴⁹

951. In a case brought before the IACiHR in 1992 concerning the killing of 74 persons by members of the Salvadoran security forces, the petitioners argued that the application of an amnesty decree constituted a clear violation of the obligation of the Salvadoran government to investigate and punish the violation of the victim’s rights, and more particularly a violation of Article 27 of the 1969 ACHR, which prohibited the suspension of the guarantees indispensable to the protection of non-derogable rights such as the right to life protected under Article 4. The Commission declared that the government of El Salvador had failed to comply with the obligation to guarantee the free and full exercise of human rights and fundamental guarantees of all persons subject to its jurisdiction. The Commission also recommended that the government of El Salvador submit those responsible to justice in order to establish their responsibility so that they might receive the sanctions demanded by such serious actions.⁸⁵⁰

952. In 1993, in a report on the situation of human rights in Peru, the IACiHR reminded Peru that the summary execution of persons by the forces of order cannot be justified in any context. It also recommended that Peru, in the context of a prison to which members of the Tupac Amaru Revolutionary Movement were transferred, separate members of rival armed groups so as to avoid violence threatening the safety or lives of the inmates.⁸⁵¹

953. In 1997, in a report concerning a case in Argentina, the IACiHR stated that:

157. Before addressing petitioner’s specific claims, the Commission thinks it useful to clarify the reasons why it has deemed it necessary at times to apply directly rules of international humanitarian law or to inform its interpretations of relevant provisions of the [ACHR] by reference to these rules. A basic understanding of the interrelationship of these two branches of international law – human rights and humanitarian law – is instructive in this regard.

...

⁸⁴⁸ IACiHR, *Annual Report 1980–1981*, Doc. OEA. Ser.L/V/II.54, 16 October 1981, p. 112; *Case 10.559 (Peru)*, Report, 1 March 1996, Section V(2).

⁸⁴⁹ IACiHR, *Case 6724 (El Salvador)*, Resolution, 5 March 1985, §§ 1–2; *Case 10.190 (El Salvador)*, Resolution, 4 February 1992, preamble and § 1; *Case 10.284 (El Salvador)*, Resolution, 4 February 1992, § 1.

⁸⁵⁰ IACiHR, *Case 10.287 (El Salvador)*, Report, 24 September 1992, Sections I(5), VI(4) and VI(5)(a).

⁸⁵¹ IACiHR, Report on the situation of human rights in Peru, Doc. OEA/Ser.L/V/II. 83 Doc. 31, 1993, pp. 29 and 38.

327. As for the facts linked directly to the attack on the La Tablada barracks and its recapture, the Commission concludes that those events constituted a non-international armed conflict... As such, the conduct during the hostilities is governed by the rules on internal armed conflicts, which the Commission is competent to apply...

328. Based on its application of said norms of humanitarian law, the Commission found that there was not sufficient evidence to determine that the State used illegal methods and means of combat to retake the barracks at La Tablada in January 1989. It also determined that the civilians who took up arms and attacked those barracks became military targets for such time as they actively participated in the conflict. Therefore, the deaths of and wounds inflicted on the attackers, while they were active participants in the conflict, were legitimately related to the combat, and do not constitute violations of the [ACHR] or of the applicable provisions of humanitarian law.⁸⁵²

954. In 2001, in the *Case of the Ríofrío massacre (Colombia)*, the IACiHR stated that:

Article 4 of the [ACHR] establishes that every person has the right to have his life respected and no one shall be arbitrarily deprived of his life. It is also important to note that intentional mistreatment, and particularly extrajudicial execution of civilians under the control of one of the parties in any kind of armed conflict is absolutely prohibited in all circumstances in light of the basic considerations of humanity reflected in common Article 3 of the Geneva Conventions.⁸⁵³

955. In 1988, in the *Velásquez Rodríguez case*, the IACtHR stated that:

The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.⁸⁵⁴

956. In its judgement in the *Neira Alegría and Others case* in 1995, involving the disappearance of three prisoners following a riot in which control and jurisdiction of the prison was handed over to the army, the IACtHR held that:

60. In the terms of Article 5(2) of the Convention, every person deprived of her or his liberty has the right to live in detention conditions compatible with her or his personal dignity, and the State must guarantee to that person the right to life and to humane treatment. Consequently, since the State is the institution responsible for detention establishments, it is the guarantor of these rights of the prisoners.

...

76. Given the circumstances that surrounded the crushing of the riot at the San Juan Bautista Prison; the fact that eight years after the riot occurred there is still no knowledge of the whereabouts of the three persons to whom this

⁸⁵² IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 157 and 327–328.

⁸⁵³ IACiHR, *Case of the Ríofrío massacre (Colombia)*, Report, 6 April 2001, § 54.

⁸⁵⁴ IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 181.

case refers, as was acknowledged by the Minister of Foreign Affairs stating that the victims were not among the survivors and that “three of the [non-identified bodies] undoubtedly correspond to those three persons”; and the disproportionate use of force; it may be reasonably concluded that they were arbitrarily deprived of their lives by the Peruvian forces in violation of Article 4(1) of the [of the 1969 ACHR].⁸⁵⁵

V. Practice of the International Red Cross and Red Crescent Movement

957. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “violence to life . . . of persons in general is prohibited”, that “murder is prohibited” and that “wilful killing” is a grave breach of the law of war.⁸⁵⁶

958. On 18 September 1982, the ICRC addressed an appeal to the international community in which it condemned the fact that, according to reports from its delegates in Beirut:

hundreds of women, children, adolescents and elderly persons have been killed in Beirut in the district of Chatila, the streets of which are strewn with their bodies. The ICRC is also aware that wounded persons have been killed in hospital beds and that others, including doctors, have been abducted . . . The ICRC solemnly appeals to the international community to intervene to put an immediate stop to the intolerable massacre perpetrated on whole groups of people and to ensure that . . . the basic right to life is observed.⁸⁵⁷

959. In an appeal launched in 1983 in the context of the Iran–Iraq War, the ICRC pointed to grave violations of IHL committed by both countries, including “summary execution of captive soldiers”.⁸⁵⁸

960. In an interview in 1989, a representative of the Executive Committee of the Union of the Red Cross and Red Crescent Societies of the USSR denounced as a “monstrous crime in terms of international law” the plan of an Afghan faction to execute several Soviet prisoners and to show their corpses as proof of the USSR’s interference in the conflict in Afghanistan.⁸⁵⁹

961. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “civilians and all non-combatants must be respected and protected, and violence to life and person . . . [is] specifically prohibited”.⁸⁶⁰

⁸⁵⁵ IACtHR, *Neira Alegria and Others case*, Judgement, 19 January 1995, §§60 and 76.

⁸⁵⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 190, 191 and 776(a).

⁸⁵⁷ ICRC, *Annual Report 1982*, Geneva, 1983, p. 57.

⁸⁵⁸ ICRC, *Conflict between Iraq and Iran: ICRC Appeal, IRRIC*, No. 235, 1983, p. 221.

⁸⁵⁹ Executive Committee of the Union of the Red Cross and Red Crescent Societies of the USSR, “Plan to Murder Soviet POWs Denounced”, Interview with Komsomolskaya Pravda Correspondent, Bulletin ISL of the USSR Embassy in Afghanistan, 2 April 1989.

⁸⁶⁰ ICRC, *Memorandum on the Applicability of International Humanitarian Law*, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

962. In an appeal issued in 1991 in the context of the conflict in the former Yugoslavia, the ICRC enjoined the military and civilian authorities of the parties involved to take all the necessary steps “to spare the lives of those who surrender”.⁸⁶¹

963. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross stated that “persons *hors de combat* and those who do not take a direct part in hostilities have the right to respect for their lives”.⁸⁶²

964. In a communication to the press issued in 1994 in the context of the conflict in Rwanda, the ICRC stated that:

Armed militiamen shot to death, in the presence of members of the armed forces, six wounded people who were being taken by Rwandese Red Cross volunteers to a field hospital set up . . . by the [ICRC]. This outrageous act has compelled the ICRC and the Rwandese Red Cross to suspend the collection of casualties in the capital, where the most elementary rules of humanity are being flouted.

The ICRC and the Rwandan Red Cross called on all combatants and the militia to stop the massacres.⁸⁶³

965. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “attacks on civilians’ life” are prohibited and that killing captured combatants and persons who have laid down their arms “constitutes a crime and is absolutely forbidden”.⁸⁶⁴

966. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that “violence to [the] lives of [civilian persons who refrain from acts of hostility]” is prohibited and that “combatants and other persons who are captured, and those who have laid down their arms . . . shall not, in particular, be killed”.⁸⁶⁵

967. In 1996, in a note on respect for IHL in an internal armed conflict, the ICRC stated that the authorities must “make sure that the lives of those detained are protected”.⁸⁶⁶

968. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of wilful killing, when committed in an international armed conflict, be subject to the jurisdiction of the Court. It also proposed

⁸⁶¹ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

⁸⁶² Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de enero de 1994, 3 January 1994, § 2(A), see also § 2(D).

⁸⁶³ ICRC, Communication to the Press No. 94/16, Rwanda: six wounded killed in a Red Cross ambulance, 14 April 1994.

⁸⁶⁴ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

⁸⁶⁵ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier (eds.), *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

⁸⁶⁶ ICRC archive document.

that “violence to the life, health and physical or mental well-being of persons, in particular murder”, as a serious violation of IHL applicable in non-international conflicts, be subject to the jurisdiction of the Court.⁸⁶⁷

969. In a communication to the press issued in 2001, the ICRC reminded the parties to the conflict in Afghanistan that “persons not taking part in hostilities must be . . . spared the effects of the violence . . . Threats to their lives . . . are prohibited.”⁸⁶⁸

VI. Other Practice

970. In 1979, in a letter to the ICRC, an armed opposition group confirmed its commitment to IHL and to respect the lives of civilians.⁸⁶⁹

971. In a special communiqué issued in 1980, UNITA denounced the death sentences imposed on captured persons as violations of human rights. The communiqué also referred to the international law of armed conflicts.⁸⁷⁰

972. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “persons *hors de combat* and those who do not take part in hostilities are entitled to respect for their lives and their moral and physical integrity” and that “captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives”.⁸⁷¹

973. In 1983, when ICRC delegates inquired about the execution of four prisoners detained by an armed opposition group, the group’s representative stated that “in war time, such behaviour is normal and engenders no consequences”. The ICRC delegates replied that such practices are against IHL and are of serious concern.⁸⁷²

974. In 1984, in a letter to the ICRC, an armed opposition group denounced the practice of the forces of the regime in place which “always tried to arrest our partisans and after torturing and getting their confessions by force martyred them”.⁸⁷³

975. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that “a state violates international law if, as a matter of state policy, it practices, encourages, or condones (a) genocide, . . . (c) the murder . . . of individuals”.⁸⁷⁴

⁸⁶⁷ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(i) and 3(i).

⁸⁶⁸ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

⁸⁶⁹ ICRC archive document.

⁸⁷⁰ UNITA, Special Communiqué No. 12/80: UNITA draws international attention to violations of human rights and appeals to humanitarian organisations, 4 August 1980.

⁸⁷¹ ICRC archive document. ⁸⁷² ICRC archive document. ⁸⁷³ ICRC archive document.

⁸⁷⁴ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(a) and (c).

976. In 1986, various opposing factions in an internal conflict acknowledged that captured combatants were executed.⁸⁷⁵

977. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “violence to life . . . in particular murder” shall remain prohibited. It further states that “every human being has the inherent right to life. The right shall be protected by law. No one shall be arbitrarily deprived of his or her life.”⁸⁷⁶

978. In a widely circulated communiqué in 1994, the general staff of an armed opposition group called for the extermination of another group by any available means. The events in that State were universally condemned.⁸⁷⁷

979. The SPLM Human Rights Charter provides that “persons taking no active part in fighting, whether civilians or sick, wounded or captured soldiers, shall be protected from execution or other abuses, including during combat”.⁸⁷⁸

D. Torture and Cruel, Inhuman or Degrading Treatment

General

I. Treaties and Other Instruments

Treaties

980. Article 28 of the 1906 GC provides that “in the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of . . . ill treatment of the sick and wounded of the armies”.

981. Article 5 of the 1929 Geneva POW Convention provides that “no pressure shall be exercised on prisoners to obtain information regarding the situation in their armed forces or their country. Prisoners who refuse to reply may not be threatened, insulted, or exposed to unpleasantness or disadvantages of any kind whatsoever.”

982. Article 6 of the 1945 IMT Charter (Nuremberg) provides that:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- ...
 (b) “War crimes:” namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, . . . ill-treatment . . . of civilian population of or in occupied territory, . . . ill-treatment of prisoners of war or persons on the seas . . .

⁸⁷⁵ ICRC archive document.

⁸⁷⁶ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Articles 3(1) and 8(1), *IRRC*, No. 282, 1991, pp. 331 and 333.

⁸⁷⁷ ICRC archive document. ⁸⁷⁸ SPLM, Human Rights Charter, May 1996, § 4.2.

(c) "Crimes against humanity:" namely . . . inhumane acts committed against any civilian population, before or during the war.

983. According to Article 2 of the 1948 Genocide Convention, "causing serious bodily or mental harm to members of the group" constitutes genocide when "committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group".

984. Common Article 3 of the 1949 Geneva Conventions explicitly prohibits "violence to life and person, in particular . . . cruel treatment and torture [and] outrages upon personal dignity, in particular humiliating and degrading treatment" with respect to persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.

985. Article 12, second paragraph, GC I provides that violence to wounded and sick members of the armed forces in the field shall be strictly prohibited, in particular torture.

986. Article 12, second paragraph, GC II provides that violence to wounded, sick and shipwrecked members of the armed forces at sea shall be strictly prohibited, in particular torture.

987. Article 17, fourth paragraph, GC III provides that:

No physical or mental torture, nor any other form of coercion, may be inflicted on prisoners of war to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.

988. Article 87, third paragraph, GC III provides that "any form of torture or cruelty is forbidden".

989. Article 89 GC III provides that "in no case shall disciplinary punishments be inhuman, brutal or dangerous to the health of prisoners of war".

990. Article 32 GC IV provides that:

The High Contracting Parties specifically agree that each of them is prohibited from taking any measure of such a character as to cause the physical suffering . . . of protected persons in their hands. This prohibition applies not only to . . . torture . . . but also to any other measures of brutality whether applied by civilian or military agents.

991. According to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, "torture or inhuman treatment" and "wilfully causing great suffering or serious injury to body or health" are grave breaches of these instruments.

992. Article 3 of the 1950 ECHR provides that "no one shall be subjected to torture or to inhuman or degrading treatment or punishment". Article 15(2) adds that Article 3 is non-derogable "in time of war or other public emergency threatening the life of the nation".

993. Article 7 of the 1966 ICCPR provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”. Article 4(2) states that there can be no derogation from Article 7.

994. Article 5(2) of the 1969 ACHR provides that “no one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment”. Article 27(2) “does not authorize any suspension” of Article 5(2).

995. Article 8(a) and (b) of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel provides that all captured military personnel, captured foreign civilians and captured civilian personnel “shall be protected against...torture and cruel treatment, and outrages upon personal dignity”.

996. Article 75(2) AP I prohibits “torture of all kinds, whether physical or mental”, “outrages upon personal dignity, in particular humiliating and degrading treatment”. Article 75 AP I was adopted by consensus.⁸⁷⁹

997. Article 4(2) AP II prohibits “cruel treatment such as torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment”. Article 4 AP II was adopted by consensus.⁸⁸⁰

998. Article 5 of the 1981 ACHPR provides that “torture, cruel, inhuman or degrading punishment and treatment shall be prohibited”.

999. Article 2(2) of the 1984 Convention against Torture states, after having regard to Article 7 of the 1966 ICCPR, that “no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture”.

1000. The 1985 Inter-American Convention against Torture, after recalling the prohibition of torture contained in Article 5 of the 1969 ACHR, states in Article 1 that State parties undertake to prevent and punish torture. Article 5 further stipulates that:

The existence of circumstances such as a state of war, threat of war, state of siege or of emergency, domestic disturbance or strife, suspension of constitutional guarantees, domestic political instability, or other public emergencies or disasters shall not be invoked or admitted as justification for the crime of torture.

1001. The preamble to the 1987 European Convention for the Prevention of Torture refers to Article 3 of the 1950 ECHR which provides for the absolute prohibition of torture.

1002. Article 37(a) of the 1989 Convention on the Rights of the Child provides that States Parties shall ensure that “no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment”.

⁸⁷⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

⁸⁸⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

1003. According to Article 1(2) of the 1995 Agreement on Human Rights annexed to the Dayton Accords, the parties shall secure to all persons within their jurisdiction the right not to be subjected to torture.

1004. Pursuant to Article 6(b) of the 1998 ICC Statute, “causing serious bodily or mental harm to members of the group” constitutes genocide when “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.

1005. Pursuant to Article 7(1)(f) of the 1998 ICC Statute, torture constitutes a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

1006. Pursuant to Article 8(2)(a)(ii) and (iii) of the 1998 ICC Statute, “torture or inhuman treatment” and “wilfully causing great suffering, or serious injury to body or health” constitute war crimes in international armed conflicts.

1007. Pursuant to Article 8(2)(c)(i) of the 1998 ICC Statute, “cruel treatment and torture” constitute war crimes in non-international armed conflicts.

1008. Pursuant to Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute, “committing outrages upon personal dignity, in particular humiliating and degrading treatment” constitutes a war crime in both international and non-international armed conflicts.

1009. According to Article 3(a) and (e) of the 2002 Statute of the Special Court for Sierra Leone, the Tribunal has jurisdiction over violations of common Article 3 of the 1949 Geneva Conventions and of AP II, including “violence to life, health and physical or mental well-being of persons, in particular . . . cruel treatment such as torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment”.

Other Instruments

1010. Article 16 of the 1863 Lieber Code states that military necessity does not admit “torture to extort confessions”.

1011. Article 56 of the 1863 Lieber Code provides that “a prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering, or disgrace, by cruel imprisonment . . . or any other barbarity”.

1012. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including torture of civilians, ill-treatment of prisoners of war and internment of civilians under inhuman conditions.

1013. Article II(1) of the 1945 Allied Control Council Law No. 10, provides that “ill treatment . . . of civilian population from occupied territory” is a war crime and that “torture . . . or other inhumane acts committed against any civilian population” is a crime against humanity.

1014. Article 5(c) of the 1946 IMT Charter (Tokyo) established individual responsibility for crimes against humanity, including “inhumane acts committed against any civilian population, before or during the war”.

1015. Article 5 of the 1948 UDHR provides that “no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment”.

1016. Principle VI of the 1950 Nuremberg Principles adopted by the ILC provides that:

The crimes hereinafter set out are punishable as crimes under international law:

- ...
- (b) War crimes: Violations of the laws or customs of war include, but are not be limited to, ... ill-treatment ... of civilian population of or in occupied territory, ... ill-treatment of prisoners of war, of persons on the seas ...
 - (c) Crimes against humanity: ... inhuman acts done against any civilian population.

1017. Rule 4 of the 1950 UN Command Rules and Regulations gave Military Commissions of the UN Command in Korea jurisdiction over offences such as ill-treatment of civilians or prisoners of war.

1018. Paragraph 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict provides that “all forms of repression and cruel and inhuman treatment of women and children, including ... torture ... committed by belligerents in the course of military operations or in occupied territories shall be considered criminal”.

1019. Article 2 of the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment provides that:

Any act of torture or other cruel, inhuman or degrading treatment or punishment is an offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations and as a violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration of Human Rights.

1020. Article 5 of the 1979 Code of Conduct for Law Enforcement Officials provides that “no law enforcement official may inflict, instigate or tolerate any act of torture or other cruel, inhuman or degrading treatment or punishment”.

1021. Principle 6 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. No circumstance whatever may be invoked as a justification for torture or other cruel, inhuman or degrading treatment or punishment.

1022. According to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, “acts of inhumanity, cruelty or barbarity directed against life ... in particular ... torture” are considered as an exceptionally

serious war crime and as a serious violation of the principles and rules of international law applicable in armed conflict.

1023. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

1024. Under Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.

1025. Under Article 2(b) of the 1993 ICTY Statute, the Tribunal is competent to prosecute torture of persons protected under the provisions of the relevant Geneva Convention.

1026. Article 5(f) of the 1993 ICTY Statute provides that torture constitutes a crime against humanity when committed in armed conflict, whether international or internal in character, and directed against any civilian population.

1027. According to Article 3(f) of the 1994 ICTR Statute, torture constitutes a crime against humanity, when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

1028. Under Article 4(a) and (e) of the 1994 ICTR Statute, the Tribunal is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions, including "cruel treatment such as torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment".

1029. Article 18(c) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "torture" is a crime against humanity.

1030. Article 20(a)(ii)–(iii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "torture or inhuman treatment" and "wilfully causing great suffering or serious injury to body or health" are crimes against the peace and security of mankind.

1031. Article 20(d) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that "outrages upon personal dignity in violation of international humanitarian law, in particular humiliating and degrading treatment" are war crimes.

1032. Article 20(f)(i) and (v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind stipulates that "cruel treatment such as torture" and "outrages upon personal dignity, in particular humiliating and degrading treatment" constitute war crimes in armed conflicts not of an international character.

1033. Article 2(7) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines states that the Agreement seeks to confront, remedy and prevent the most serious human rights violations, including "the right not to be subjected to physical or mental torture, solitary

confinement... and other inhuman, cruel or degrading treatment, detention and punishment”.

1034. Article 3(1) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines further provides that physical or mental torture and cruel or degrading treatment shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.

1035. According to Section 7(2) of the 1999 UN Secretary-General’s Bulletin, cruel treatment such as torture of persons not, or no longer, taking part in military operations and persons placed *hors de combat* is prohibited at any time and in any place.

1036. Section 8(d) of the 1999 UN Secretary-General’s Bulletin provides that detained persons “shall under no circumstances be subjected to any form of torture or ill-treatment”.

1037. Article 4 of the 2000 EU Charter of Fundamental Rights provides that “no one shall be subject to torture or to inhuman or degrading treatment or punishment”.

1038. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(ii), “torture or inhuman treatment” constitutes a war crime in international armed conflicts. According to Section 6(1)(c)(i), “cruel treatment and torture” constitute war crimes in non-international armed conflicts. According to Section 6(1)(b)(xxi) and (c)(ii), “committing outrages upon personal dignity, in particular humiliating and degrading treatment”, constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

1039. Argentina’s Law of War Manual (1969) provides that “you cannot exercise on prisoners physical or mental torture nor any form of coercion to obtain any type of information”.⁸⁸¹ It further states that “it is especially prohibited to submit [the wounded and sick] to torture”.⁸⁸² This prohibition also applies to civilians in occupied territories.⁸⁸³ The manual restates common Article 3 of the 1949 Geneva Conventions.⁸⁸⁴

1040. Argentina’s Law of War Manual (1989) provides that mental and physical torture against all protected persons is prohibited in international as well as non-international armed conflicts.⁸⁸⁵ It stipulates that torture and inhuman

⁸⁸¹ Argentina, *Law of War Manual* (1969), § 2.016.

⁸⁸² Argentina, *Law of War Manual* (1969), § 3.001.

⁸⁸³ Argentina, *Law of War Manual* (1969), § 4.012.

⁸⁸⁴ Argentina, *Law of War Manual* (1969), § 8.001.

⁸⁸⁵ Argentina, *Law of War Manual* (1989), §§ 3.10, 3.25, 4.15, 4.29 and 7.04.

treatment and wilful causing of grievous suffering or serious injury to the body or health of protected persons are grave breaches of the Geneva Conventions and AP I.⁸⁸⁶

1041. Australia's *Commanders' Guide* states that civilians shall "not be subjected to harsh, cruel or degrading treatment". It also states that after the capture of a combatant, "no physical or mental pressure may be exerted in order to extract further information". With regard to POWs, the manual provides that "no torture or other forms of physical or mental coercion may be employed". It also states that crimes of torture or inhuman treatment of protected persons warrant the institution of criminal proceedings.⁸⁸⁷

1042. Australia's *Defence Force Manual* prohibits physical and mental torture, inhuman treatment or brutality and states that "torturing or inhumanely treating protected persons", "wilfully causing great suffering or serious injury to body or health of protected persons" and "mistreating PW... torturing, subjecting them to inhuman treatment" are grave breaches which warrant the institution of criminal proceedings.⁸⁸⁸

1043. Belgium's *Manual for Soldiers* states that POWs and enemy soldiers who are no longer able to fight shall not be subjected to mental or physical torture. The manual considers this prohibition to be a general principle and specifies that it also applies to prisoners of war.⁸⁸⁹

1044. According to Belgium's *Law of War Manual*, "the Detaining Power cannot exercise mental or physical torture on prisoners".⁸⁹⁰ It adds that torture and inhuman treatment are grave breaches of the Geneva Conventions.⁸⁹¹

1045. Benin's *Military Manual* provides that "nobody shall be subjected to physical or mental torture... nor to inhuman or degrading treatment".⁸⁹²

1046. The *Instructions to the Muslim Fighter* issued by the ARBiH in Bosnia and Herzegovina in 1993 state that "Islam likewise forbids the torture and brutalisation of prisoners of war".⁸⁹³

1047. Burkina Faso's *Disciplinary Regulations* provides that soldiers are prohibited to submit the wounded, sick and shipwrecked, prisoners and civilians to "inhuman treatment or torture of any kind".⁸⁹⁴ It also provides that "prisoners must be protected against any act of violence, insults and public curiosity".⁸⁹⁵

1048. Canada's *LOAC Manual* provides that "no physical or mental torture, or any other form of coercion, shall be inflicted on PWs or detainees to force them

⁸⁸⁶ Argentina, *Law of War Manual* (1989), § 8.03.

⁸⁸⁷ Australia, *Commanders' Guide* (1994), §§ 603, 709, 713 and 1305(a).

⁸⁸⁸ Australia, *Defence Force Manual* (1994), §§ 945, 953, 1022, 1219, 1221 and 1315(a)-(b) and (n).

⁸⁸⁹ Belgium, *Manual for Soldiers* (undated), pp. 7, 10 and 62, slide 5/1.

⁸⁹⁰ Belgium, *Law of War Manual* (1983), pp. 46 and 55.

⁸⁹¹ Belgium, *Law of War Manual* (1983), p. 55.

⁸⁹² Benin, *Military Manual* (1995), Fascicule II, p. 5 and Fascicule III, p. 4.

⁸⁹³ Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.

⁸⁹⁴ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁸⁹⁵ Burkina Faso, *Disciplinary Regulations* (1994), Article 36(1).

to provide information of any kind".⁸⁹⁶ It stipulates that "any form of torture or cruelty, are forbidden".⁸⁹⁷ It also states that belligerents are forbidden to use physical or moral coercion against protected persons.⁸⁹⁸ It further states that "the following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents . . . torture of all kinds, whether physical or mental".⁸⁹⁹ The manual adds that torture is an act against humanity and that "torture and inhumane treatment along with wilfully causing great suffering or serious injury to the wounded, sick and shipwrecked" is a grave breach of GC I, GC II and AP I.⁹⁰⁰ With regard to non-international armed conflicts, the manual restates the provisions of common Article 3 of the 1949 Geneva Conventions. It adds that AP II contains a "statement of fundamental guarantees prohibiting at any time and anywhere . . . cruel treatment, such as torture".⁹⁰¹

1049. Canada's Code of Conduct states as a general rule the prohibition of "any form of abuse, including torture".⁹⁰² Regarding the 1984 Convention against Torture, the manual explains that "it is a service and a criminal offence to torture a PW or detained person. Any form of physical or psychological abuse is prohibited."⁹⁰³ It further states that "where interrogation or debriefing is conducted by qualified and authorized personnel, no physical or mental torture, or any other form of coercion, shall be inflicted on PWs or detainees to force them to provide information of any kind".⁹⁰⁴ The manual also provides a list of 11 fundamental rules, among which is "any form of abuse, including torture, is prohibited".⁹⁰⁵

1050. China's PLA Rules of Discipline which regulated the behaviour of the Red Army during the Chinese civil war, and were later used by the PLA, provided that prisoners of war were not to be maltreated.⁹⁰⁶

1051. Colombia's Circular on Fundamental Rules of IHL provides that "nobody shall be subjected to mental or physical torture . . . cruel or degrading treatment".⁹⁰⁷

1052. Colombia's Basic Military Manual provides that persons *hors de combat*, the wounded and sick and detained persons shall not be subjected to torture or cruel or humiliating treatment.⁹⁰⁸ It adds that the civilian population shall not

⁸⁹⁶ Canada, *LOAC Manual* (1999), p. 10-3, § 24.

⁸⁹⁷ Canada, *LOAC Manual* (1999), p. 10-7, § 61.

⁸⁹⁸ Canada, *LOAC Manual* (1999), p. 11-4, §§ 32-33.

⁸⁹⁹ Canada, *LOAC Manual* (1999), pp. 11-7/11-8, § 63.

⁹⁰⁰ Canada, *LOAC Manual* (1999), p. 16-1, § 4, p. 16-2, § 12 and p. 16-3, § 17.

⁹⁰¹ Canada, *LOAC Manual* (1999), p. 17-2, § 10 and p. 17-3, § 21.

⁹⁰² Canada, *Code of Conduct* (2001), Rule 6.

⁹⁰³ Canada, *Code of Conduct* (2001), Rule 6, § 6.

⁹⁰⁴ Canada, *Code of Conduct* (2001), Rule 6, § 11.

⁹⁰⁵ Canada, *Code of Conduct* (2001), Chapter 3, § 6.

⁹⁰⁶ China, *PLA Rules of Discipline* (1947), Point 8.

⁹⁰⁷ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 5.

⁹⁰⁸ Colombia, *Basic Military Manual* (1995), p. 29

be tortured.⁹⁰⁹ The manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.⁹¹⁰

1053. Congo's Disciplinary Regulations prohibits torture and inhuman treatment of the wounded and sick, shipwrecked, prisoners of war and civilians.⁹¹¹

1054. Croatia's LOAC Compendium provides that "torture, inhumane treatment, acts causing great suffering or serious injury and degrading and inhumane practices" are grave breaches of IHL and war crimes.⁹¹²

1055. According to Croatia's Instructions on Basic Rules of IHL, detainees must be protected against all acts of violence, including physical or mental torture and cruel or humiliating treatment.⁹¹³

1056. The Military Manual of the Dominican Republic prohibits torture, threats or other forms of coercion of detained persons to obtain military information. It further states that "inhuman treatment of civilians is a violation of the law of war".⁹¹⁴

1057. Ecuador's Naval Handbook provides with regard to prisoners of war and civilians that "torture or inhumane treatment, subjection to public insult or curiosity" are representative war crimes.⁹¹⁵

1058. El Salvador's Soldiers' Manual provides that physical or mental torture is prohibited.⁹¹⁶

1059. El Salvador's Human Rights Charter of the Armed Forces lists respect for the integrity of persons and their human dignity and the prohibition of torture among the ten basic rules. It also states that torture is a violation of human rights.⁹¹⁷

1060. France's Disciplinary Regulations as amended prohibits any kind of cruel treatment and torture of the wounded, sick and shipwrecked, prisoners and civilians.⁹¹⁸

1061. France's LOAC Summary Note provides that "no one shall be subject to physical or psychological torture . . . nor cruel or degrading treatment".⁹¹⁹ The manual lists torture, inhuman treatment and inhuman and degrading practices among war crimes.⁹²⁰

1062. France's LOAC Teaching Note includes torture among prohibited criminal acts and behaviour which are criminally prosecuted. It provides that "every

⁹⁰⁹ Colombia, *Basic Military Manual* (1995), p. 30.

⁹¹⁰ Colombia, *Basic Military Manual* (1995), p. 42.

⁹¹¹ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁹¹² Croatia, *LOAC Compendium* (1991), Annex 9, p. 56.

⁹¹³ Croatia, *Instructions on Basic Rules of IHL* (1993), §§ 4–5.

⁹¹⁴ Dominican Republic, *Military Manual* (1980), pp. 8 and 9.

⁹¹⁵ Ecuador, *Naval Manual* (1989), § 6.2.5(1)–(2).

⁹¹⁶ El Salvador, *Soldiers' Manual* (undated), p. 10.

⁹¹⁷ El Salvador, *Human Rights Charter of the Armed Forces* (undated), Rules 3 and 7, pp. 3, 14 and 18.

⁹¹⁸ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁹¹⁹ France, *LOAC Summary Note* (1992), § 3.2.

⁹²⁰ France, *LOAC Summary Note* (1992), § 3.4.

captured combatant shall be protected from torture".⁹²¹ It further stipulates that "torture, . . . inhuman and degrading treatment, attacks on physical integrity or on health" are grave breaches and war crimes under the law of armed conflict.⁹²²

1063. France's LOAC Manual provides that the "authorities are responsible for the . . . physical integrity of persons in their power".⁹²³ The manual refers to Article 7 of the 1998 ICC statute and stipulates that torture and inhuman and degrading treatment are crimes against humanity.⁹²⁴ It further provides that torture is prohibited by the law of armed conflict and in particular by the 1984 Convention against Torture.⁹²⁵ It also states that one of the three main principles common to IHL and human rights law is the principle of inviolability, which guarantees every human being the right to respect for his or her physical and mental integrity.⁹²⁶

1064. Germany's Military Manual provides that one of the fundamental rules governing the treatment of POWs is the prohibition on treating them inhumanely or dishonourably.⁹²⁷ It adds that when questioned, "no physical or mental torture, nor any form of coercion, may be inflicted on prisoners of war".⁹²⁸ It further states that "torture and inhumane treatment . . . [and] wilfully causing great suffering, serious injury to body or health" are grave breaches of IHL.⁹²⁹

1065. Hungary's Military Manual provides that "torture, inhumane treatment, acts causing great suffering or serious injury and degrading and inhumane practices" are grave breaches of the Geneva Conventions and war crimes.⁹³⁰

1066. India's Army Training Note prohibits ill-treatment, harassment of civilians and torture.⁹³¹

1067. Indonesia's Directive on Human Rights in Trikora states that "respect for personal and human dignity consists of no acts of torture, no acts of cruelty, ill-treatment or inhuman punishment".⁹³²

1068. Indonesia's Field Manual specifies that although the government has the right to use legitimate force against rebels, the fundamental principles of the Geneva Conventions still apply and the Indonesian armed forces have to ensure that the personal dignity of POWs is respected in all circumstances.⁹³³

1069. Israel's Manual on the Laws of War states that "the rationale behind the law of war is that even in the midst of the inferno, there are grave deeds that

⁹²¹ France, *LOAC Teaching Note* (2000), pp. 2 and 3.

⁹²² France, *LOAC Teaching Note* (2000), p. 7.

⁹²³ France, *LOAC Manual* (2001), p. 32.

⁹²⁴ France, *LOAC Manual* (2001), p. 45.

⁹²⁵ France, *LOAC Manual* (2001), pp. 51 and 52.

⁹²⁶ France, *LOAC Manual* (2001), p. 122.

⁹²⁷ Germany, *Military Manual* (1992), § 704.

⁹²⁸ Germany, *Military Manual* (1992), § 713.

⁹²⁹ Germany, *Military Manual* (1992), § 1209.

⁹³⁰ Hungary, *Military Manual* (1992), p. 90.

⁹³¹ India, *Army Training Note* (1995), p. 4/23, §§ 10–12.

⁹³² Indonesia, *Directive on Human Rights in Trikora* (1995), § 4(a).

⁹³³ Indonesia, *Field Manual* (1979), Section 1, § 4 and Section 3, § 5.

must not be committed... torture of prisoners".⁹³⁴ The manual specifies that a combatant *hors de combat* is entitled to special rights, i.e. protection against physical and mental harm and that "torture and imprisonment under inhuman conditions are absolutely forbidden".⁹³⁵

1070. Italy's IHL Manual provides that, in occupied territories, civilians shall not be subject to brutality and torture. It also stipulates that the ill-treatment of prisoners of war is a war crime.⁹³⁶

1071. Kenya's LOAC Manual provides that "no physical or mental torture, nor any form of coercion may be used to obtain [information]". It stipulates that "no physical or mental torture of prisoners is permitted". The manual restates common Article 3 of the 1949 Geneva Conventions.⁹³⁷

1072. Madagascar's Military Manual provides that "no mental or physical torture of prisoners of war is allowed". It also states that one of the seven fundamental rules of IHL is that nobody shall be subject to mental or physical torture or to humiliating or degrading treatment.⁹³⁸

1073. Mali's Army Regulations provides that attacks on the physical integrity, in particular torture, of the wounded, sick and shipwrecked, prisoners and civilians are a grave breach of the laws and customs of war. It adds that from the moment of their capture, "prisoners of war must be treated humanely. They must be protected against all acts of violence, against insults and public curiosity. They have the right of respect for their honour."⁹³⁹

1074. Morocco's Disciplinary Regulations prohibits the torture and cruel treatment of the sick, wounded and shipwrecked, prisoners and civilians.⁹⁴⁰

1075. The Military Manual of the Netherlands restates the prohibition of torture contained in common Article 3 of the 1949 Geneva Conventions, Article 17 GC III, Article 75 AP I and Article 4 AP II.⁹⁴¹

1076. New Zealand's Military Manual provides, regarding the punishment of POWs, that "cruelty and torture are forbidden".⁹⁴² It further provides with regard to internees that "in no case shall disciplinary penalties be inhuman, brutal...".⁹⁴³ The manual restates Article 75(2) AP I.⁹⁴⁴ It further stipulates, regarding civilians, that GC IV prohibits the parties from "taking any measure of such character as to cause the physical suffering... of protected persons in their hands", including torture.⁹⁴⁵ According to the manual, "torture

⁹³⁴ Israel, *Manual on the Laws of War* (1998), p. 4.

⁹³⁵ Israel, *Manual on the Laws of War* (1998), pp. 46 and 53.

⁹³⁶ Italy, *IHL Manual* (1991), Vol. I, §§ 41(e) and 84.

⁹³⁷ Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 5–6, and Précis No. 3, pp. 8 and 14.

⁹³⁸ Madagascar, *Military Manual* (1994), Fiche No. 5-T, § 7, and p. 91, Rule 5.

⁹³⁹ Mali, *Army Regulations* (1979), Article 36.

⁹⁴⁰ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁹⁴¹ Netherlands, *Military Manual* (1993), pp. VII-4, VIII-3, XI-1 and XI-4.

⁹⁴² New Zealand, *Military Manual* (1992), § 931.2.

⁹⁴³ New Zealand, *Military Manual* (1992), § 1129.2.

⁹⁴⁴ New Zealand, *Military Manual* (1992), § 1137.2.

⁹⁴⁵ New Zealand, *Military Manual* (1992), § 1321.4.

or inhuman treatment of protected persons” is a grave breach of GC I and GC II.⁹⁴⁶ With regard to non-international armed conflicts, the manual restates the prohibition of torture and cruel treatment contained in common Article 3 of the 1949 Geneva Conventions.⁹⁴⁷

1077. Nicaragua’s Military Manual prohibits torture and cruel treatment.⁹⁴⁸ It also states that prisoners have the right to be protected against all forms of violence, in both internal and international armed conflicts.⁹⁴⁹

1078. Nigeria’s Manual on the Laws of War provides that it is particularly prohibited to torture the wounded and sick.⁹⁵⁰ It specifies that torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health are grave breaches of the Geneva Conventions and serious war crimes.⁹⁵¹

1079. Nigeria’s Military Manual recalls the content of Article 12 GC I and prohibits subjecting the wounded and sick to torture. It adds that military forces “are not allowed to make recourse to physical or mental torture or any form of coercion”.⁹⁵²

1080. Peru’s Human Rights Charter of the Security Forces lists the prohibition of torture as one of the ten basic rules. The manual also prohibits the ill-treatment of unresisting wounded persons.⁹⁵³

1081. The Rules for Combatants of the Philippines provides that “prisoners must be respected” and that “it is forbidden to . . . torture or mistreat them”.⁹⁵⁴

1082. The Soldier’s Rules of the Philippines instructs soldiers that “no physical or mental torture of prisoners of war is permitted”.⁹⁵⁵

1083. Romania’s Soldiers’ Manual provides that captured combatants and civilians “shall not be subjected to physical or mental torture . . . or cruel, inhuman or degrading treatment”.⁹⁵⁶

1084. Russia’s Military Manual states that prohibited methods of warfare include “torture aimed at obtaining information of any kind”.⁹⁵⁷ It further prohibits the torture and cruel treatment of victims of war, namely the wounded, sick and shipwrecked, POWs and the civilian population.⁹⁵⁸

1085. Senegal’s Disciplinary Regulations provides that it is prohibited for soldiers in combat to make an attack on the integrity or dignity of the wounded, sick, shipwrecked, prisoners and civilians, including cruel treatment or any type of torture.⁹⁵⁹

⁹⁴⁶ New Zealand, *Military Manual* (1992), § 1702.1.

⁹⁴⁷ New Zealand, *Military Manual* (1992), § 1807.1, see also § 1812.1.

⁹⁴⁸ Nicaragua, *Military Manual* (1996), Articles 7(1) and 14(31).

⁹⁴⁹ Nicaragua, *Military Manual* (1996), Articles 6 and 14(18).

⁹⁵⁰ Nigeria, *Manual on the Laws of War* (undated), § 35.

⁹⁵¹ Nigeria, *Manual on the Laws of War* (undated), § 6(a).

⁹⁵² Nigeria, *Military Manual* (1994), Chapter 2, §§ 4 and 9.

⁹⁵³ Peru, *Human Rights Charter of the Security Forces* (1991), Rule 7 and pp. 7–9.

⁹⁵⁴ Philippines, *Rules for Combatants* (1989), § 4(a).

⁹⁵⁵ Philippines, *Soldier’s Rules* (1989), § 7.

⁹⁵⁷ Russia, *Military Manual* (1990), § 5(b).

⁹⁵⁸ Russia, *Military Manual* (1990), § 8(a).

⁹⁵⁹ Senegal, *Disciplinary Regulations* (1990), § 2.

⁹⁵⁶ Romania, *Soldiers’ Manual* (1991), p. 34, § 2.

1086. Senegal's IHL Manual restates the provisions of common Article 3 of the 1949 Geneva Conventions. It points out that one of the fundamental guarantees common to the IHL conventions and the 1948 UDHR is the prohibition of torture and humiliating, cruel and degrading treatment.⁹⁶⁰

1087. South Africa's LOAC Manual provides that "inhuman and degrading practices are grave breaches of AP I".⁹⁶¹ It further states that "torture or inhuman treatment and . . . wilfully causing great suffering or serious injury to body or health" are grave breaches of the Geneva Conventions.⁹⁶² Regarding the treatment of prisoners of war, the manual states that "it is forbidden to obtain further information through . . . physical or mental torture or coercion".⁹⁶³

1088. Spain's LOAC Manual lists the obligations of the detaining power, *inter alia*, that "it is prohibited to use physical or mental torture to obtain information" from prisoners of war.⁹⁶⁴ According to the manual, POWs have the right "not to be subjected to any form of pressure or torture".⁹⁶⁵ It adds that it is prohibited at all times and in all places to subject POWs to torture, whether physical or mental, whether committed by military or civilian agents.⁹⁶⁶ Regarding the penal and disciplinary regime for POWs, the manual states that "it is prohibited . . . generally speaking, all forms of torture and cruelty".⁹⁶⁷ The manual contains the provisions of Article 75 AP I.⁹⁶⁸ Under the manual, torture or inhuman treatment, wilfully causing great suffering or serious injury to body or health and any deliberate act or omission endangering the health or physical and mental integrity committed by medical personnel are war crimes.⁹⁶⁹

1089. Sweden's Military Manual provides that military persons and civilians in the power of a party to the conflict shall not be tortured or mistreated.⁹⁷⁰

1090. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are part of customary international law.⁹⁷¹ It provides that "torture or inhuman treatment" is a grave breach of the Geneva Conventions.⁹⁷² The manual also states that "protected persons may not be exposed to any form of physical or mental coercion".⁹⁷³

1091. Switzerland's military manuals provide that enemy civilians shall have their human dignity and honour respected and not be tortured or subjected to inhuman treatment or mental and physical cruelty.⁹⁷⁴ The Basic Military

⁹⁶⁰ Senegal, *IHL Manual* (1999), pp. 3, 4 and 23.

⁹⁶¹ South Africa, *LOAC Manual* (1996), § 38(b).

⁹⁶² South Africa, *LOAC Manual* (1996), § 40. ⁹⁶³ South Africa, *LOAC Manual* (1996), § 62.

⁹⁶⁴ Spain, *LOAC Manual* (1996), Vol. I, § 6.4.h.(1), see also § 8.3.b.(2).

⁹⁶⁵ Spain, *LOAC Manual* (1996), Vol. I, § 6.4.h.(2).

⁹⁶⁶ Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c. ⁹⁶⁷ Spain, *LOAC Manual* (1996), Vol. I, § 8.7.b.

⁹⁶⁸ Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.

⁹⁶⁹ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2). ⁹⁷⁰ Sweden, *Military Manual* (1976), p. 28.

⁹⁷¹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

⁹⁷² Sweden, *IHL Manual* (1991), Section 4.2, p. 93.

⁹⁷³ Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.

⁹⁷⁴ Switzerland, *Military Manual* (1984), p. 34; *Teaching Manual* (1986), p. 43; *Basic Military Manual* (1987), Articles 106, 147–147.

Manual provides that “torture or inhuman treatment . . . wilfully causing great suffering or serious injury to body or health” are grave breaches of the Geneva Conventions.⁹⁷⁵ It also provides for the punishment of the ill-treatment of enemy combatants who surrender.⁹⁷⁶

1092. Togo’s Military Manual provides that “nobody will be subjected to physical or mental torture . . . nor to inhuman or degrading treatment”.⁹⁷⁷

1093. Uganda’s Code of Conduct requires members of the armed forces not to abuse, insult, shout at or beat any member of the public.⁹⁷⁸

1094. The UK Military Manual prohibits measures against protected persons (POWs, civilians) which would cause physical suffering, including torture and brutal treatment.⁹⁷⁹ The manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.⁹⁸⁰ It provides that “torture or inhuman treatment” of prisoners of war is a grave breach of the Geneva Conventions.⁹⁸¹

1095. The UK LOAC Manual provides that the “wounded and sick of the opposing forces must not be tortured”.⁹⁸² With respect to prisoners of war, the Manual states that “a PW is not required to provide any further information and no physical or mental torture nor any form of coercion may be used to obtain it” and adds that “in no case, may disciplinary punishments be inhumane, brutal or dangerous to health”.⁹⁸³ With regard to non-international armed conflicts, the manual restates common Article 3 of the 1949 Geneva Conventions.⁹⁸⁴

1096. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions.⁹⁸⁵ The manual provides that “in no case shall disciplinary penalties be inhuman, brutal or dangerous for the health of internees”.⁹⁸⁶ The manual specifies that “torture or inhuman treatment” is a war crime under the Geneva Conventions.⁹⁸⁷

1097. The US Air Force Pamphlet states that both human rights law and IHL “safeguard such fundamental rights as freedom from torture or cruel and inhuman punishment”. It further refers to Article 12 GC II, which provides that sick and wounded members of the opposing forces shall not be subjected to torture.⁹⁸⁸

1098. The US Air Force Commander’s Handbook prohibits “torture, threats, or other coercion against prisoners of war to obtain further information”.⁹⁸⁹

⁹⁷⁵ Switzerland, *Basic Military Manual* (1987), Article 192(a).

⁹⁷⁶ Switzerland, *Basic Military Manual* (1987), Article 194.

⁹⁷⁷ Togo, *Military Manual* (1996), Fascicule I, p. 11, Fascicule II, p. 5 and Fascicule III, p. 4.

⁹⁷⁸ Uganda, *Code of Conduct* (1986), Rule 1.

⁹⁷⁹ UK, *Military Manual* (1958), §§ 42, 205, 282 and 549.

⁹⁸⁰ UK, *Military Manual* (1958), § 131. ⁹⁸¹ UK, *Military Manual* (1958), § 625(a).

⁹⁸² UK, *LOAC Manual* (1981), Section 6, p. 22, § 2.

⁹⁸³ UK, *LOAC Manual* (1981), Section 8, p. 29, § 9 and p. 32, § 19(d), see also Annex A, p. 48, § 18(f) and p. 49, § 19(e).

⁹⁸⁴ UK, *LOAC Manual* (1981), Section 12, p. 42, § 2. ⁹⁸⁵ US, *Field Manual* (1956), § 11.

⁹⁸⁶ US, *Field Manual* (1956), §§ 93, 163, 215, 271 and 326. ⁹⁸⁷ US, *Field Manual* (1956), § 502.

⁹⁸⁸ US, *Air Force Pamphlet* (1976), §§ 11-5 and 12-2(a).

⁹⁸⁹ US, *Air Force Commander’s Handbook* (1980), § 4-2(a).

1099. The US Soldier's Manual and Instructor's Guide provide that no physical or mental torture, nor any other form of coercion, may be inflicted on detainees.⁹⁹⁰ The Soldier's Manual provides that inhumane treatment of civilians is a violation of the law of war for which every soldier can be prosecuted and that "inhumane treatment of any person is a capital offence prohibited at any time and in any place whatsoever".⁹⁹¹

1100. The US Naval Handbook provides with regard to prisoners of war and civilians that "torture or inhumane treatment, subjection to public insult or curiosity" are representative war crimes.⁹⁹²

National Legislation

1101. Albania's Military Penal Code criminalises mistreatment of protected persons as a war crime.⁹⁹³

1102. Argentina's Code of Military Justice as amended provides that the ill-treatment of prisoners of war is an offence.⁹⁹⁴

1103. Argentina's Draft Code of Military Justice punishes any soldier who "mistreats or puts in serious danger the health or physical or mental integrity of any protected person, [or] subjects them to torture or inhuman treatment".⁹⁹⁵ It also provides for the punishment of members of the armed forces who subject detainees to humiliating or degrading treatment.⁹⁹⁶

1104. Under Armenia's Penal Code, "torture and inhuman treatment", and "wilfully causing great suffering or other actions threatening physical or mental health", during an armed conflict, constitute crimes against the peace and security of mankind.⁹⁹⁷

1105. Australia's War Crimes Act provides that the following are war crimes:

(iv) Torture of civilians,

...

(ix) internment of civilians under inhuman conditions

...

(xxx) Ill-treatment of wounded and prisoners of war, including –

(a) transportation of wounded and prisoners of war under improper conditions;

(b) public exhibition or ridicule of prisoners of war.⁹⁹⁸

⁹⁹⁰ US, *Soldiers' Manual* (1984), p. 5; *Instructor's Guide* (1985), p. 10.

⁹⁹¹ US, *Soldiers' Manual* (1984), pp. 16 and 20.

⁹⁹² US, *Naval Handbook* (1995), § 6.2.5.1.

⁹⁹³ Albania, *Military Penal Code* (1995), Articles 73–75.

⁹⁹⁴ Argentina, *Code of Military Justice as amended* (1951), Article 746.

⁹⁹⁵ Argentina, *Draft Code of Military Justice* (1998), Article 289, introducing a new Article 873 in the *Code of Military Justice as amended* (1951).

⁹⁹⁶ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).

⁹⁹⁷ Armenia, *Penal Code* (2003), Article 390.1(2)–(3) and Article 390.2(1), see also Article 392 (torture or cruel treatment of civilians as crimes against humanity) and Article 393 (inflicting severe damage to health as part of a genocide campaign).

⁹⁹⁸ Australia, *War Crimes Act* (1945), Section 3.

1106. Australia's War Crimes Act as amended identifies "causing grievous bodily harm" and "wounding" as serious war crimes.⁹⁹⁹

1107. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".¹⁰⁰⁰

1108. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes defined in the 1998 ICC Statute: "genocide by causing serious bodily or mental harm", including torture; crimes against humanity, including torture; and war crimes, including torture and inhumane treatment in international armed conflicts, cruel treatment and torture in non-international armed conflicts, and outrages upon personal dignity in both international and non-international armed conflicts.¹⁰⁰¹

1109. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, all kinds of torture and outrages upon personal dignity, in particular humiliating and degrading treatment, carried out against civilians are prohibited. It also prohibits cruel treatment and torture, as well as attacks upon personal dignity, including humiliating and degrading treatment of prisoners of war.¹⁰⁰²

1110. Azerbaijan's Criminal Code punishes anyone who inflicts "severe pain or suffering, whether physical or mental, upon a person detained or whose liberty was restricted in any other way".¹⁰⁰³

1111. Bangladesh's International Crimes (Tribunal) Act mentions torture in the list of crimes against humanity. It also provides that ill-treatment of civilians and of prisoners of war is a war crime.¹⁰⁰⁴ In addition, it states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹⁰⁰⁵

1112. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".¹⁰⁰⁶

1113. The Criminal Code of Belarus provides that wilfully causing grievous bodily harm to, or inhumane treatment of, persons who have laid down their arms or are defenceless, of the wounded, sick and shipwrecked, medical and religious personnel, prisoners of war, the civilian population in an occupied

⁹⁹⁹ Australia, *War Crimes Act as amended* (1945), Sections 6(1) and 7(1).

¹⁰⁰⁰ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁰⁰¹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.4, 268.13, 268.25, 268.26, 268.58, 268.72, 268.73 and 268.74.

¹⁰⁰² Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 17(2) and 21(1)–(2).

¹⁰⁰³ Azerbaijan, *Criminal Code* (1999), Article 113.

¹⁰⁰⁴ Bangladesh, *International Crimes (Tribunal) Act* (1973), Article 3(2)(a) and (d).

¹⁰⁰⁵ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹⁰⁰⁶ Barbados, *Geneva Conventions Act* (1980), Section 3(2).

territory or in the conflict zone or other persons enjoying international protection is a violation of the laws and customs of war.¹⁰⁰⁷

1114. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that torture or other inhuman treatment and wilfully causing great suffering or serious damage to physical integrity or health constitute crimes under international law.¹⁰⁰⁸

1115. The Criminal Code of the Federation of Bosnia and Herzegovina provides that subjecting civilians, prisoners of war, the wounded, sick and shipwrecked to torture or inhuman treatment and causing great suffering to physical and mental health is a war crime.¹⁰⁰⁹ The Criminal Code of the Republika Srpska contains the same provision.¹⁰¹⁰

1116. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".¹⁰¹¹

1117. Bulgaria's Penal Code as amended provides that ordering and committing acts of torture and inhuman treatment, causing great suffering or other injuries to the body and health of the wounded, sick, shipwrecked, medical personnel, prisoners of war and the civilian population, is a war crime.¹⁰¹²

1118. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that torture or inhuman treatment, wilfully causing great suffering or injuries to physical and mental health, is a war crime in both international and non-international armed conflicts.¹⁰¹³

1119. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979".¹⁰¹⁴

1120. Cameroon's Penal Code as amended states that torture may not be justified in any circumstance, including a state of war or internal political instability.¹⁰¹⁵

¹⁰⁰⁷ Belarus, *Criminal Code* (1999), Article 135(1).

¹⁰⁰⁸ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(2), see also Article 1(1)(2)–(3) (genocide).

¹⁰⁰⁹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154(1), 155 and 156.

¹⁰¹⁰ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1), 434 and 435.

¹⁰¹¹ Botswana, *Geneva Conventions Act* (1970), Section 3(1).

¹⁰¹² Bulgaria, *Penal Code as amended* (1968), Articles 410(a), 411(a) and 412(a).

¹⁰¹³ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(b)–(c), (B)(t) and (C)(a)–(b), see also Article 2(b) (genocide) and Article 3(f) (crimes against humanity).

¹⁰¹⁴ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

¹⁰¹⁵ Cameroon, *Penal Code as amended* (1967), Article 132 *bis*.

1121. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] . . . is guilty of an indictable offence".¹⁰¹⁶

1122. Canada's Crimes against Humanity and War Crimes Act provides that genocide, crimes against humanity and war crimes defined in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁰¹⁷

1123. Under Chile's Code of Military Justice, seriously injuring prisoners of war and committing acts of serious violence against civilians, the wounded, sick and POWs are considered an "offence against international law".¹⁰¹⁸

1124. China's Law Governing the Trial of War Criminals provides that "torturing of non-combatants . . . inflicting on them inhuman treatment [and] ill-treating prisoners of war or wounded persons" constitute war crimes.¹⁰¹⁹

1125. Under China's Criminal Code as amended, it is a criminal offence to cruelly injure innocent civilians and ill-treat prisoners of war during armed conflict and in areas of military operations.¹⁰²⁰

1126. Colombia's Penal Code punishes anyone who, during an armed conflict, carries out or orders the carrying out of acts of torture, serious wounding of protected persons or inhuman and degrading treatment.¹⁰²¹

1127. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "causing serious bodily or mental harm" to the members of an ethnical, racial or religious group, as such, with intent to destroy the group, in whole or in part, constitutes a crime of genocide.¹⁰²² Moreover, "torture", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.¹⁰²³ The Act further defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁰²⁴

1128. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions".¹⁰²⁵

1129. Under Côte d'Ivoire's Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, acts of torture or inhuman treatment of the civilian population constitutes a "crime against the civilian population".¹⁰²⁶ It adds that torture or inhuman treatment or causing great

¹⁰¹⁶ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁰¹⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁰¹⁸ Chile, *Code of Military Justice* (1925), Articles 261(1) and 262.

¹⁰¹⁹ China, *Law Governing the Trial of War Criminals* (1946), Article 3(16), (19) and (29).

¹⁰²⁰ China, *Criminal Code as amended* (1997), Articles 446 and 448.

¹⁰²¹ Colombia, *Penal Code* (2000), Articles 136, 173 and 146.

¹⁰²² Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 1.

¹⁰²³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.

¹⁰²⁴ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁰²⁵ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁰²⁶ Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(1).

injuries and suffering to prisoners of war and internees is a “crime against prisoners of war”.¹⁰²⁷

1130. Croatia’s Criminal Code provides that it is a war crime to subject the civilian population, the wounded, sick and shipwrecked, prisoners of war and medical or religious personnel to acts of torture, inhuman treatment or causing great suffering or serious injury to body or health.¹⁰²⁸

1131. Cuba’s Military Criminal Code punishes anyone who severely ill-treats a wounded or sick prisoner.¹⁰²⁹

1132. Cyprus’s Geneva Conventions Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions”.¹⁰³⁰

1133. The Czech Republic’s Criminal Code as amended provides that “a person who violates the provisions... of international law by inhumanly maltreating... members of the enemy’s armed forces who have laid down their weapons” commits a crime.¹⁰³¹

1134. The Code of Military Justice of the Dominican Republic punishes any member of the armed forces who mistreats prisoners of war or causes them severe injuries.¹⁰³²

1135. El Salvador’s Code of Military Justice punishes any soldier who maltreats prisoners of war.¹⁰³³

1136. Under El Salvador’s Penal Code, “anyone who, during an international or a civil war, . . . causes damage to physical or mental health . . . of the civilian population . . . [or] maltreats prisoners of war” commits a crime.¹⁰³⁴

1137. The Draft Amendments to the Penal Code of El Salvador provide for the punishment of anyone who “in a situation of international or internal armed conflict, subjects another person to any type of torture or causes physical and mental suffering”.¹⁰³⁵

1138. Under Estonia’s Penal Code, acts of torture, mistreatment, inhumane treatment or serious attacks on the physical and mental integrity of combatants who have laid down their arms, civilians, prisoners of war and interned civilians constitute war crimes.¹⁰³⁶

1139. Ethiopia’s Penal Code provides that in time of war, armed conflict or occupation, the organisation, ordering or carrying out of “torture or inhuman

¹⁰²⁷ Côte d’Ivoire, *Penal Code as amended* (1981), Article 139(1).

¹⁰²⁸ Croatia, *Criminal Code* (1997), Articles 158, 159, 160 and 176.

¹⁰²⁹ Cuba, *Military Criminal Code* (1979), Article 42(1)–(2).

¹⁰³⁰ Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

¹⁰³¹ Czech Republic, *Criminal Code as amended* (1961), Articles 259(a)(1) and 263(1).

¹⁰³² Dominican Republic, *Code of Military Justice* (1953), Article 201(1).

¹⁰³³ El Salvador, *Code of Military Justice* (1934), Article 69(1).

¹⁰³⁴ El Salvador, *Penal Code* (1997), Article 362, see also Article 361 (causing physical or psychological damages as part of a genocide campaign).

¹⁰³⁵ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Tortura en conflicto armado”.

¹⁰³⁶ Estonia, *Penal Code* (2001), §§ 97, 98 and 101, see also § 89 (torture as a crime against humanity) and § 90 (torture as part of a genocide campaign).

treatment or other acts entailing dire suffering or physical or mental injury” to civilians, the wounded, sick and shipwrecked or prisoners and interned persons constitutes a war crime.¹⁰³⁷

1140. Under France’s Penal Code, “causing serious bodily or mental harm” to members of a group constitutes genocide when “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.¹⁰³⁸

1141. Under Georgia’s Criminal Code, in international or internal armed conflicts, it is a crime to torture or treat inhumanely or to cause great suffering or injuries that threaten the physical and mental health of a person.¹⁰³⁹

1142. Germany’s Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international or non-international armed conflict,

treats a person who is to be protected under international humanitarian law cruelly or inhumanely by causing him or her substantial physical or mental harm or suffering, especially by torturing . . . that person, [or] . . . treats a person who is to be protected under international humanitarian law in a gravely humiliating and degrading manner.¹⁰⁴⁰

1143. Greece’s Military Penal Code contains penalties for members of the Greek armed forces who insult, threaten or commit violent or inhumane acts against POWs.¹⁰⁴¹

1144. Under Hungary’s Criminal Code as amended, inflicting “serious bodily or mental injury to the members of a [national, ethnic, racial or religious group]”, as part of a genocide campaign, constitutes a “crime against the freedom of peoples”.¹⁰⁴²

1145. India’s Geneva Conventions Act provides that “if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished”.¹⁰⁴³

1146. Iraq’s Military Penal Code states that causing suffering to wounded persons is an offence.¹⁰⁴⁴

1147. Ireland’s Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions are punishable offences.¹⁰⁴⁵ In addition,

¹⁰³⁷ Ethiopia, *Penal Code* (1957), Articles 282(a), 283(a) and 284(a), see also Article 281 (torture as part of a genocide campaign).

¹⁰³⁸ France, *Penal Code* (1994), Article 211-1, see also Article 212-1 (torture and inhuman treatment as crimes against humanity).

¹⁰³⁹ Georgia, *Criminal Code* (1999), Article 411(2)(b)–(c), see also Article 407 (torture as part of a genocide campaign).

¹⁰⁴⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(3) and (9), see also § 6(1)(2) (torture as part of a genocide campaign) and § 7(1)(5) and (8) (torture as a crime against humanity).

¹⁰⁴¹ Greece, *Military Penal Code* (1995), Articles 160–163.

¹⁰⁴² Hungary, *Criminal Code as amended* (1978), Section 155(1)(b).

¹⁰⁴³ India, *Geneva Conventions Act* (1960), Section 3(1).

¹⁰⁴⁴ Iraq, *Military Penal Code* (1940), Article 115(c).

¹⁰⁴⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

any “minor breach” of the Geneva Conventions, including violations of common Article 3, of Articles 12 GC I, 12 GC II, 17, 87 and 89 GC III, and 32 GC IV, and of AP I, including violations of Article 75(2) AP I, as well as any “contravention” of AP II, including violations of Article 4(2) AP II, are punishable offences.¹⁰⁴⁶

1148. Israel’s Nazis and Nazi Collaborators (Punishment) Law includes the ill-treatment of the civilian population, of prisoners of war and of persons on the seas in its definition of war crimes.¹⁰⁴⁷

1149. Italy’s Wartime Military Penal Code provides for the punishment of any member of the military who tortures or ill-treats prisoners of war while escorting, guarding or holding them in custody. It also punishes acts of violence or threats of injuries to prisoners of war, as well as forcing them to provide information which would compromise the interests of their country.¹⁰⁴⁸

1150. Under Jordan’s Draft Military Criminal Code, torture and inhuman treatment, wilfully causing great suffering, and attempts on physical and mental health are war crimes.¹⁰⁴⁹

1151. Kazakhstan’s Penal Code provides that inhuman treatment of prisoners of war or the civilian population is a punishable offence.¹⁰⁵⁰

1152. Kenya’s Geneva Conventions Act punishes “any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions”.¹⁰⁵¹

1153. Kenya’s Constitution provides that no person shall be subjected to torture or inhuman or degrading punishment or other treatment.¹⁰⁵²

1154. Kuwait’s Constitution states that fundamental rights, including the prohibition on torture or humiliating treatment, apply equally in war time.¹⁰⁵³

1155. Under Latvia’s Criminal Code, acts of torture constitute a war crime.¹⁰⁵⁴

1156. Under the Draft Amendments to the Code of Military Justice of Lebanon, torture or inhuman treatment, wilfully causing great suffering or inflicting grave injuries to the physical and mental integrity or health of protected persons, constitute war crimes.¹⁰⁵⁵

1157. Under Lithuania’s Criminal Code as amended, torture and inhumane treatment of protected persons is a war crime.¹⁰⁵⁶

¹⁰⁴⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁰⁴⁷ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b) (this section also includes causing serious bodily or mental harm as a crime of genocide).

¹⁰⁴⁸ Italy, *Wartime Military Penal Code* (1941), Articles 209, 211 and 212(1).

¹⁰⁴⁹ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(2)–(4).

¹⁰⁵⁰ Kazakhstan, *Penal Code* (1997), Article 159.

¹⁰⁵¹ Kenya, *Geneva Conventions Act* (1968), Section 3(1).

¹⁰⁵² Kenya, *Constitution* (1992), Article 74(1). ¹⁰⁵³ Kuwait, *Constitution* (1962), Article 31.

¹⁰⁵⁴ Latvia, *Criminal Code* (1998), Section 74, see also Section 71 (torture as part of a genocide campaign).

¹⁰⁵⁵ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(2)–(4).

¹⁰⁵⁶ Lithuania, *Criminal Code as amended* (1961), Article 335.

1158. Under Luxembourg's Law on the Repression of War Crimes, "acts of violence and cruelty committed against prisoners of war, detainees, deportees, accused, witnesses or persons compelled to work" constitute war crimes.¹⁰⁵⁷

1159. Luxembourg's Law on the Punishment of Grave Breaches provides that torture or inhuman treatment, wilfully causing great suffering or injuries to the physical and mental integrity or health of protected persons, constitute grave breaches of the Geneva Conventions.¹⁰⁵⁸

1160. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".¹⁰⁵⁹

1161. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".¹⁰⁶⁰

1162. Under Mali's Penal Code, torture and inhuman treatment, wilfully causing great suffering or injuries to the physical and mental integrity or health of protected persons is a war crime.¹⁰⁶¹

1163. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".¹⁰⁶²

1164. Mexico's Penal Code as amended provides for the punishment of acts of torture and causing suffering to a member of a national, ethnic, racial or religious group, as part of a genocide campaign.¹⁰⁶³ It adds that "compelling the accused to confess by [using] *incommunicado*, intimidation or torture" is a crime committed against the administration of justice.¹⁰⁶⁴

1165. Mexico's Code of Military Justice as amended provides penalties for persons who mistreat or otherwise cause physical or mental injuries to prisoners and detainees.¹⁰⁶⁵

1166. Moldova's Penal Code punishes the ordering or commission of acts of torture and inhuman treatment of the wounded, sick, prisoners, civilians, civilian medical personnel or members of the Red Cross and other similar organisations.¹⁰⁶⁶

1167. Mozambique's Military Criminal Law provides that cruel acts against the civilian population, the wounded and sick or prisoners is a criminal offence.¹⁰⁶⁷

¹⁰⁵⁷ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(3).

¹⁰⁵⁸ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(1)–(2).

¹⁰⁵⁹ Malawi, *Geneva Conventions Act* (1967), Section 4(1).

¹⁰⁶⁰ Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

¹⁰⁶¹ Mali, *Penal Code* (2001), Articles 31(b)–(c) and 31(i)(21), see also Article 29(f) and (k) (torture and inhuman treatment as crimes against humanity).

¹⁰⁶² Mauritius, *Geneva Conventions Act* (1970), Section 3(1).

¹⁰⁶³ Mexico, *Penal Code as amended* (1931), Article 149 *bis*.

¹⁰⁶⁴ Mexico, *Penal Code as amended* (1931), Article 225(XII).

¹⁰⁶⁵ Mexico, *Code of Military Justice as amended* (1933), Article 324.

¹⁰⁶⁶ Moldova, *Penal Code* (2002), Article 137.

¹⁰⁶⁷ Mozambique, *Military Criminal Law* (1987), Article 83(b).

1168. Myanmar's Defence Service Act provides for the punishment of "any person subject to this law who . . . is guilty of any disgraceful conduct of a cruel, indecent or unnatural kind".¹⁰⁶⁸

1169. The Definition of War Crimes Decree of the Netherlands includes "torture of civilians" "internment of civilians under inhuman conditions" and "ill-treatment of . . . prisoners of war" in its list of war crimes.¹⁰⁶⁹

1170. Under the International Crimes Act of the Netherlands, it is a crime to commit "in the case of an international armed conflict, one of the grave breaches of the Geneva Conventions", including "torture . . . or inhuman treatment [and] intentionally causing great suffering or serious injury to body or health".¹⁰⁷⁰ Furthermore, it is also a crime to commit, "in the case of an armed conflict not of an international character, a violation of Article 3 common to all of the Geneva Conventions", including "cruel treatment and torture" of persons taking no active part in the hostilities.¹⁰⁷¹

1171. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".¹⁰⁷²

1172. Under New Zealand's International Crimes and ICC Act, genocide includes the crimes defined in Article 6(b) of the 1998 ICC Statute, crimes against humanity include the crimes defined in Article 7(1)(f) of the Statute and war crimes include the crimes defined in Article 8(2)(a)(ii), (b)(xxi) and (c)(i) and (ii) of the Statute.¹⁰⁷³

1173. Nicaragua's Military Penal Law provides for the punishment of persons found guilty of seriously mistreating prisoners.¹⁰⁷⁴

1174. Nicaragua's Military Penal Code provides for the punishment of acts of torture, inhuman and degrading treatment and causing grave injuries and suffering to prisoners of war, the wounded, sick and shipwrecked and civilians.¹⁰⁷⁵

1175. Nicaragua's Draft Penal Code provides for the punishment of anyone who "tortures, causes grave physical and mental suffering, . . . degrades the personality of the victim or diminishes the victim's physical or mental capacity, as well as causes physical pain or psychological damage". It also provides a sanction

¹⁰⁶⁸ Myanmar, *Defence Services Act* (1959), Section 45(a).

¹⁰⁶⁹ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

¹⁰⁷⁰ Netherlands, *International Crimes Act* (2003), Article 5(1)(b) and (c), see also Article 3(1)(b) (causing serious bodily or mental harm to members of a group as part of a genocide campaign), Article 4(1)(f) and (k) (torture and inhumane acts which intentionally cause great suffering or serious injury to body or to mental or physical health as crimes against humanity) and Article 8 (torture committed by a public servant or other person working in the service of the authorities in the course of his duties).

¹⁰⁷¹ Netherlands, *International Crimes Act* (2003), Article 6(1)(a).

¹⁰⁷² New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁰⁷³ New Zealand, *International Crimes and ICC Act* (2000), Sections 9(2), 10(2) and 11(2).

¹⁰⁷⁴ Nicaragua, *Military Penal Law* (1980), Article 80.

¹⁰⁷⁵ Nicaragua, *Military Penal Code* (1996), Articles 54 and 55(3).

for the civilian not subject to military jurisdiction who “before, during or after hostilities, inhumanely treats the civilian population”.¹⁰⁷⁶

1176. According to Niger’s Penal Code as amended, “torture or other inhuman treatment” and “wilfully causing great suffering or injury to the physical integrity or health” of persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977, constitute war crimes.¹⁰⁷⁷

1177. Nigeria’s Geneva Conventions Act punishes any person who “whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions”.¹⁰⁷⁸

1178. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.¹⁰⁷⁹

1179. Papua New Guinea’s Geneva Conventions Act punishes any “person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions”.¹⁰⁸⁰

1180. Paraguay’s Penal Code provides for the punishment of anyone who, in violation of the international laws of war, armed conflict or military occupation, subjects civilians, prisoners of war and the wounded and sick to inhumane treatment.¹⁰⁸¹

1181. Under Peru’s Code of Military Justice, the ill-treatment of prisoners of war or of unresisting wounded persons is a violation of the law of nations.¹⁰⁸²

1182. Peru’s Penal Code as amended provides for the punishment of acts of torture.¹⁰⁸³

1183. Under the War Crimes Trial Executive Order of the Philippines, applicable to acts committed during the Second World War, “ill-treatment of . . . the civilian population of or in occupied territory” or “ill-treatment of prisoners of war or internees or persons on the seas or elsewhere; improper treatment of hostages” are violations of the laws and customs of war.¹⁰⁸⁴ It adds that “inhumane acts committed against civilian populations before or during . . . [the Second World War]” also constitute war crimes whether or not in violation of the local laws.¹⁰⁸⁵

¹⁰⁷⁶ Nicaragua, *Draft Penal Code* (1999), Articles 445 and 456.

¹⁰⁷⁷ Niger, *Penal Code as amended* (1961), Article 208.3(2)–(3), see also Article 208.1 (wilfully causing great injury to the physical integrity as part of a genocide campaign) and Article 208.2 (torture or inhuman acts as crimes against humanity).

¹⁰⁷⁸ Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

¹⁰⁷⁹ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁰⁸⁰ Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

¹⁰⁸¹ Paraguay, *Penal Code* (1997), Article 320(2), see also Article 309 (torture by a public official) and 319(2) (inhuman treatment as part of a genocide campaign).

¹⁰⁸² Peru, *Code of Military Justice* (1980), Articles 94 and 95(1).

¹⁰⁸³ Peru, *Penal Code as amended* (1991), Article 321.

¹⁰⁸⁴ Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(2).

¹⁰⁸⁵ Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(3).

1184. Poland's Penal Code provides for the punishment of any person who, in violation of international law, causes "serious harm to [the] health [of persons *hors de combat*, protected persons and persons enjoying international protection], subjects them to torture or cruel or inhumane treatment".¹⁰⁸⁶

1185. Portugal's Penal Code provides for the punishment of anyone who, in times of war, armed conflict or occupation, commits torture or cruel, degrading or inhumane treatment or injures the physical or mental integrity of the civilian population, the wounded and sick or prisoners of war.¹⁰⁸⁷

1186. Romania's Law on the Punishment of War Criminals provides that "criminals of war" are persons who:

inhumanely treated prisoners and hostages of war, . . . ordered or committed acts of cruelty with regard to the population of the territory affected by war, . . . [treated inhumanely the supervised] prisoners [in camps], including those interned, deported, imprisoned for political purposes, or who have been convicted and are doing forced labour.¹⁰⁸⁸

1187. Romania's Penal Code provides for the punishment of inhuman treatment or torture of the wounded, sick and shipwrecked, members of civil medical services, the Red Cross or similar organisations, prisoners of war, or of all persons in the hands of the adverse party.¹⁰⁸⁹

1188. Under Russia's Criminal Code, the cruel treatment of civilians or prisoners of war is a "crime against the peace and security of mankind".¹⁰⁹⁰

1189. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".¹⁰⁹¹

1190. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".¹⁰⁹²

1191. Slovakia's Criminal Code as amended provides that "a person who, during the war, violates the provisions . . . of international law by inhumanly maltreating . . . members of the enemy's armed forces who have laid down their weapons" commits a crime.¹⁰⁹³

1192. Under Slovenia's Penal Code, subjecting civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel to acts of

¹⁰⁸⁶ Poland, *Penal Code* (1997), Article 123(2), see also Article 118(1) (causing serious harm to health as part of a genocide campaign).

¹⁰⁸⁷ Portugal, *Penal Code* (1996), Article 241(1)(b)–(c).

¹⁰⁸⁸ Romania, *Law on the Punishment of War Criminals* (1945), Article I(a)–(b) and (e).

¹⁰⁸⁹ Romania, *Penal Code* (1968), Article 358.

¹⁰⁹⁰ Russia, *Criminal Code* (1996), Article 356(1), see also Article 357 (causing injuries as part of a genocide campaign).

¹⁰⁹¹ Seychelles, *Geneva Conventions Act* (1985), Section 3(1).

¹⁰⁹² Singapore, *Geneva Conventions Act* (1973), Section 3(1).

¹⁰⁹³ Slovakia, *Criminal Code as amended* (1961), Articles 259(a)(1) and 263(1).

torture and inhuman treatment or the infliction of great suffering and injury to their physical and mental health is a war crime.¹⁰⁹⁴

1193. Spain's Military Criminal Code punishes military personnel who ill-treat or wilfully torture surrendered or helpless enemy combatants. It also punishes the soldier who treats inhumanely or causes serious injury to the wounded, sick and shipwrecked, prisoners of war or the civilian population.¹⁰⁹⁵

1194. Spain's Penal Code punishes anyone who, during an armed conflict, commits the following acts against a protected person: ill-treatment, torture, inhuman treatment or causing great suffering.¹⁰⁹⁶

1195. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, (a) a grave breach of any of the [Geneva] Conventions; or (b) a breach of common Article 3 of the Conventions, is guilty of an indictable offence".¹⁰⁹⁷

1196. Sweden's Penal Code as amended provides that causing severe suffering to persons enjoying special protection under international law is a crime against international law.¹⁰⁹⁸

1197. Tajikistan's Criminal Code provides for the punishment of anyone who commits acts of torture, inhuman treatment, causes great suffering or threatens the physical or mental state of protected persons.¹⁰⁹⁹

1198. Thailand's Prisoners of War Act provides for the punishment of "whoever threatens, insults or subjects a prisoner of war to humiliating or degrading treatment" or "whoever inflicts physical or mental torture or any other form of coercion on prisoners of war to secure information of any kind whatsoever, or threatens, insults, or exposes a prisoner of war who refuses to answer to any unpleasant or disadvantageous treatment of any kind". This prohibition also extends to persons protected by common Article 3 of the 1949 Geneva Conventions.¹¹⁰⁰

1199. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit genocide as defined in Article 6(b) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(f) of the Statute, and a war crime as defined in Article 8(2)(a)(ii), (b)(xxi) and (c)(i) and (ii) of the Statute.¹¹⁰¹

1200. Ukraine's Criminal Code provides for the punishment of cruel treatment and ill-treatment of prisoners of war or civilians.¹¹⁰²

¹⁰⁹⁴ Slovenia, *Penal Code* (1994), Articles 374(1), 375 and 376.

¹⁰⁹⁵ Spain, *Military Criminal Code* (1985), Articles 69, 76 and 77(5).

¹⁰⁹⁶ Spain, *Penal Code* (1995), Articles 609 and 612(3).

¹⁰⁹⁷ Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1).

¹⁰⁹⁸ Sweden, *Penal Code as amended* (1962), Article 22(6).

¹⁰⁹⁹ Tajikistan, *Criminal Code* (1998), Article 403(2)(b)-(c), see also Article 398 (causing harm to health as part of a genocide campaign).

¹¹⁰⁰ Thailand, *Prisoners of War Act* (1955), Sections 13-14 (prisoners of war) and Section 18 (persons protected by common Article 3).

¹¹⁰¹ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹¹⁰² Ukraine, *Criminal Code* (2001), Articles 434 and 438(1), see also Article 442 (causing grave injuries as part of a genocide campaign).

1201. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".¹¹⁰³

1202. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".¹¹⁰⁴

1203. Under the UK ICC Act, it is a punishable offence to commit genocide as defined in Article 6(b) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(f) of the Statute, and a war crime as defined in Article 8(2)(a)(ii), (b)(xxi) and (c)(i) and (ii) of the Statute.¹¹⁰⁵

1204. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as torture and ill-treatment of prisoners of war or persons on the seas, ill-treatment of hostages or civilians of or in an occupied territory.¹¹⁰⁶

1205. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as ill-treatment of the civilian population of or in occupied territory, prisoners of war or internees or persons on the seas or elsewhere or improper treatment of hostages.¹¹⁰⁷

1206. In 1961, the US Congress adopted an act on foreign assistance to other nations in which it defined torture, cruel, inhuman or degrading treatment or punishment as "gross violations of internationally recognized human rights" that would call into question whether or not a country should receive military aid.¹¹⁰⁸

1207. Under the US War Crimes Act as amended, violations of common Article 3 and grave breaches of the 1949 Geneva Conventions are war crimes.¹¹⁰⁹

1208. Under Uzbekistan's Criminal Code, ordering or carrying out acts of torture constitutes a violation of the laws and customs of war.¹¹¹⁰

1209. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an

¹¹⁰³ Uganda, *Geneva Conventions Act* (1964), Section 1(1).

¹¹⁰⁴ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹¹⁰⁵ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹¹⁰⁶ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

¹¹⁰⁷ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).

¹¹⁰⁸ US, *Foreign Assistance Act as amended* (1961), Sections 116 and 502 B.

¹¹⁰⁹ US, *War Crimes Act as amended* (1996), Section 2441(c).

¹¹¹⁰ Uzbekistan, *Criminal Code* (1994), Article 152.

offence under such provision of the Penal Code or any other law if committed outside Vanuatu".¹¹¹¹

1210. Venezuela's Code of Military Justice as amended provides for the punishment of anyone who commits grave attempts against persons who surrender or against women, the elderly or children in the territories occupied by national forces . . . and other acts of cruelty".¹¹¹²

1211. Vietnam's Penal Code provides for the punishment of "anyone who maltreats prisoners of war or soldiers".¹¹¹³

1212. Under Yemen's Military Criminal Code, the following acts constitute war crimes: "torture or maltreatment of prisoners or causing them intentionally great suffering" or "committing grave attempts to the physical and mental integrity and health of prisoners of war and civilians".¹¹¹⁴

1213. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of . . . torture" committed a war crime.¹¹¹⁵

1214. Under the Penal Code of the SFRY (FRY), subjecting civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel to acts of torture, inhuman treatment, infliction of great suffering and injury to their physical and mental health is a war crime.¹¹¹⁶

1215. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions".¹¹¹⁷

National Case-law

1216. Numerous cases were brought after the Second World War in Australia, China, Israel, Netherlands, Norway and US, in which the defendants were found guilty of having tortured or ill-treated prisoners of war and civilians.¹¹¹⁸

1217. In the *Tanaka Chuichi case* before an Australian military court in 1946, the accused had ill-treated Sikh prisoners of war, had cut their hair and beards and had forced some of them to smoke a cigarette, acts contrary to their culture

¹¹¹¹ Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).

¹¹¹² Venezuela, *Code of Military Justice as amended* (1998), Article 474(2).

¹¹¹³ Vietnam, *Penal Code* (1990), Article 275.

¹¹¹⁴ Yemen, *Military Criminal Code* (1998), Article 21(2)-(3).

¹¹¹⁵ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

¹¹¹⁶ SFRY (FRY), *Penal Code as amended* (1976), Articles 142(1), 143, 144 and 150, see also Article 141 (causing grave injuries as part of a genocide campaign).

¹¹¹⁷ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

¹¹¹⁸ Australia, Military Court at Rabaul, *Baba Masao case*, Judgement, 2 June 1947; China, War Crimes Military Tribunal of the Ministry of National Defence at Nanking, *Takashi Sakai case*, Judgement, 29 August 1946; Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961; Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962; Netherlands, Temporary Court-Martial at Makassar, *Motomura case*, Judgement, 18 July 1947; Netherlands, Temporary Court-Martial at Makassar, *Notomi Sueo case*, Judgement, 4 January 1947; Norway, Court of Appeal, *Bruns case*, Judgement, 20 March 1946; US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948.

and religion. The Court found the accused guilty of violations of, *inter alia*, the 1929 Geneva POW Convention.¹¹¹⁹

1218. In the *Drago case* in 1997, the Cantonal Court in Tuzla in Bosnia and Herzegovina convicted a person of causing serious bodily harm, ill-treatment and inhuman acts against detained civilians and military personnel. In its judgement, the Court referred to the Geneva Conventions and AP I and to the protection afforded to certain categories of persons in international armed conflicts.¹¹²⁰

1219. In the *Brocklebank case* in 1996, the Court Martial Appeal Court of Canada acquitted a Canadian soldier accused of torture and negligent performance of a military duty in respect of acts committed while serving as a member of the peacekeeping mission in Somalia.¹¹²¹

1220. In its judgement in the *Benado Medwinsky case* in 1980, Chile's Appeal Court of Santiago denounced the torture inflicted on the plaintiff. It held that the state of emergency could not justify the torture in question, which was an assault on the life and physical integrity of the person.¹¹²²

1221. In its judgement in the *Videla case* in 1994 concerning the abduction, torture and murder of Lumi Videla in 1974, Chile's Appeal Court of Santiago stated that common Article 3 of the 1949 Geneva Conventions obliged parties to non-international armed conflicts "to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons, and prohibits at any time and in any place...cruel treatment and torture, humiliating and degrading treatment". The Court found that the acts charged constituted grave breaches under Article 147 GC IV and that the prison order issued against the defendant should therefore be upheld.¹¹²³

1222. In 1995, Colombia's Constitutional Court held that the prohibitions contained in Article 4(2) AP II coincided with the protection of human dignity and life and the prohibition of cruel, inhuman and degrading treatment established by Articles 11 and 12 of the Constitution.¹¹²⁴

1223. In its judgement in the *Eichmann case* in 1961, the District Court of Jerusalem held that the following behaviour caused serious bodily or mental harm and, therefore, amounted to a violation of Israel's Nazis and Nazi Collaborators (Punishment) Law: "detention [of Jews] in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture".¹¹²⁵

¹¹¹⁹ Australia, Military Court at Rabaul, *Tanaka Chuichi case*, Judgement, 12 July 1946.

¹¹²⁰ Bosnia and Herzegovina, Cantonal Court in Tuzla, *Drago case*, Judgement, 13 October 1997.

¹¹²¹ Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996.

¹¹²² Chile, Appeal Court of Santiago, *Benado Medwinsky case*, Judgement, 29 July 1980.

¹¹²³ Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994.

¹¹²⁴ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

¹¹²⁵ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.

1224. In its judgement in the *General Security Service case* in 1999 dealing with the interrogation methods of the General Security Service, Israel's High Court held that:

A reasonable investigation is necessarily one free of torture, free of cruel, inhuman treatment of the subject and free of any degrading handling whatsoever... There is a prohibition on the use of "brutal or inhuman means" in the course of an investigation... This conclusion is in perfect accord with (various) International Law treaties – to which Israel is a signatory – which prohibit the use of torture, "cruel, inhuman treatment" and "degrading treatment"... These prohibitions are "absolute". There are no exceptions to them and there is no room for balancing.¹¹²⁶

1225. In its judgement in the *Heering case* in 1946, the UK Military Court at Hanover found that acts of "ill-treatment of prisoners of war in violation of the laws and usages of war causing their death, for example by forced marches with insufficient food or medical supplies," amounted to war crimes.¹¹²⁷

1226. In the *Filartiga case* in 1984, a civil lawsuit filed in a US court against an official from Paraguay who had allegedly tortured the applicant – a national of Paraguay – in Paraguay, the US government, acting as *amicus curiae*, submitted that the practice of official torture amounted to a violation of customary international law.¹¹²⁸

Other National Practice

1227. In 1990, it was reported that the government in Afghanistan had admitted that it practised torture and that it needed to reform its policy.¹¹²⁹

1228. In 1993, Azerbaijan's Ministry of the Interior ordered that troops "in zones of combat, during military operations... must not subject an enemy taken prisoner to acts of violence or torture".¹¹³⁰

1229. During the Chinese civil war, the PLA's policy forbade the killing, torture and insulting of prisoners of war.¹¹³¹ The same policy was adopted in the context of the conflict between China and Japan.¹¹³² In an interview conducted by a British journalist in 1937, the Chairman of the Chinese Communist Party stated that "we still leniently treat the captured ordinary Japanese soldiers and those lower ranking officers who were forced to fight, they shall not be insulted

¹¹²⁶ Israel, High Court, *General Security Service case*, Joint Judgement, 6 September 1999, § 23.

¹¹²⁷ UK, Military Court at Hanover, *Heering case*, Judgement, 25–26 January 1946.

¹¹²⁸ US, District Court of the Eastern District of New York, *Filartiga case*, Judgement, 10 January 1984.

¹¹²⁹ AFP, Communiqué, 28 June 1990.

¹¹³⁰ Azerbaijan, Ministry of the Interior, Command of the Troops of the Interior, Order No. 42, Baku, 9 January 1993, § 2.

¹¹³¹ China, Political Report on the United Government to the 7th Plenary Session of National Representatives of the Chinese Communist Party by Mao Zedong, 24 April 1945, *Selected Works of Mao Zedong*, Vol. 4, The People's Press, Beijing, p. 1039.

¹¹³² China, Instruction on Implementing the Works of Land Reform and Consolidation of the Party by Deng Xiaoping, 6 June 1948, *Selected Works of Deng Xiaoping*, Vol. 1, The People's Press, Beijing, p. 122.

or condemned and would be set free after being informed of the consistency of the interests of the Japanese and the Chinese people".¹¹³³

1230. In a note submitted to the ICRC in 1967, Egypt qualified "torture of captives, wounded and civilians by barbaric means" as a "flagrant violation of the elementary principle of humanity, and a serious breach of the laws of war and the Geneva Conventions of 1949".¹¹³⁴

1231. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that "captured combatants and civilians in the hands of the enemy, as well as inhabitants of occupied territory, shall be subject neither to torture (physical or mental), nor to cruel or degrading treatment".¹¹³⁵

1232. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.¹¹³⁶

1233. According to the Explanatory Memorandum to the Act Implementing the 1984 Convention against Torture presented to the parliament of the Netherlands, torture is an "offence under civil criminal law, but, if committed in times of armed conflict, it is considered a violation of the international law of armed conflict and therefore an offence under section 8 of the Criminal Law in Wartime Act".¹¹³⁷

1234. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that:

We support the principle that [all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions] not be subjected to violence to life, health, or physical or mental well-being. . . The basic core of Protocol II is, of course, reflected in common article 3 of the 1949 [Geneva] Conventions and therefore is, and should be, a part of generally accepted customary law: This specifically includes its prohibitions [of] . . . degrading treatment.¹¹³⁸

1235. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that:

¹¹³³ China, Mao Zedong Talking with British Journalist Bertram on 25 October 1937, *Selected Works of Mao Zedong*, Vol. II, Foreign Language Press, Beijing, 1967, pp. 47–59.

¹¹³⁴ Egypt, Note to the International Committee of the Red Cross, 7 July 1967, annexed to Letter dated 17 July 1967 to the UN Secretary-General, UN Doc. S/8064, 17 July 1967, p. 3, §§ 1 and 1(B).

¹¹³⁵ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 63.

¹¹³⁶ Report on the Practice of Jordan, 1997, Chapter 5.

¹¹³⁷ Netherlands, Lower House of Parliament, Explanatory Memorandum to the Act Implementing the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1986–1987 Session, Doc. 20 042, No. 3, pp. 3–4.

¹¹³⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 427 and 430–431.

Iraqi prisoners of war will not be mistreated and will be provided humane and safe detention.

...

The Government of Iraq appears to have subjected [captured American and coalition military personnel] to unlawful treatment for propaganda purposes and coercion – both physical and mental – in order to secure information and statements from them. If these broadcasts are authentic, Iraq has committed serious violations of the Third Geneva Convention.

...

The Government of the United States protests the apparently unlawful coercion and misuse of prisoners of war for propaganda purposes, the failure to respect their honor and well-being, and the subjection of such individuals to public humiliation.

...

The mistreatment of prisoners of war is a war crime, and the inhumane treatment of prisoners of war is a grave breach of the Convention.

...

The Government of the United States again reminds the Government of Iraq that prisoners of war must at all times be humanely treated.¹¹³⁹

1236. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that “the Government of the United States reminds the Government of Iraq that Iraqi individuals who are guilty of . . . other war crimes such as the exposure of POWs to mistreatment, coerced statements, public curiosity and insult, are personally liable”.¹¹⁴⁰

1237. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that “all US POWs suffered physical abuse at the hands of their Iraqi captors, in violation of Articles 13, 14 and 17 GPW. Most POWs were tortured, a grave breach, in violation of Article 130 GPW”. The report further dealt with specific crimes, including “inhumane treatment of Kuwaiti and third country civilians . . . in violation of Articles 27, 32 and 147 GC [IV]”, and mentioned “torture and other inhumane treatment of POWs, in violation of Articles 13, 17, 22, 25, 26, 27, and 130 GC [III]”.¹¹⁴¹

1238. In 1992, in reports submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described acts of “torture of prisoners” perpetrated by the parties to the conflict.¹¹⁴²

¹¹³⁹ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, p. 4.

¹¹⁴⁰ US, Department of State, Diplomatic Note to Iraq, Washington, 21 January 1991, annexed to Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 4.

¹¹⁴¹ US, Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 630, 632, 634 and 635.

¹¹⁴² US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, pp. 6–7; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Second

1239. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.¹¹⁴³

1240. According to the Report on US Practice, it is the *opinio juris* of the US that military necessity will not justify derogation of the right not to be subjected to torture, cruel, inhuman or degrading treatment or punishment.¹¹⁴⁴

1241. Order No. 579 issued in 1991 by the YPA Chief of Staff of the SFR (FRY) provides that YPA units shall:

apply all means to prevent any attempt of . . . mistreatment of the civilian population and all persons who are not taking part in armed conflict, persons who surrender or hoist the white flag in order to surrender, the wounded and sick, religious and medical personnel and all other protected persons.¹¹⁴⁵

1242. The Report on the Practice of Zimbabwe states that Zimbabwe believes that civilians of any description should be protected from torture or other forms of inhumane treatment.¹¹⁴⁶

1243. In 1988, in connection with a non-international armed conflict, government officials of a State denied that it was the government’s policy to torture prisoners. They did, however, admit that it might have occurred in a few instances.¹¹⁴⁷

1244. In 1989, the government of a State denied allegations that it had a policy of torturing prisoners. It also denounced, with reference to humanitarian principles and the Geneva Conventions, the intention of an armed opposition group to cut off one leg of all of its prisoners.¹¹⁴⁸

1245. In 1990, in a report on the activities of the governmental army in the context of a non-international armed conflict, the ICRC concluded that the army had behaved in an alarming way towards its detainees, by indulging in ill-treatment.¹¹⁴⁹

1246. In 1994, a State denied allegations concerning its practice of torturing detainees and insisted that torture of prisoners was a crime and that perpetrators should be punished.¹¹⁵⁰

Submission), annexed to Letter dated 22 October 1992 to the UN Secretary-General, UN Doc. S/24705, 23 October 1992, p. 10; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, pp. 11–16; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Fourth Submission), annexed to Letter dated 7 December 1992 to the UN Secretary-General, UN Doc. S/24918, 8 December 1992, pp. 12–13.

¹¹⁴³ Report on US Practice, 1997, Chapter 5.3.

¹¹⁴⁴ Report on US Practice, 1997, Chapter 5.3 and 5.7.

¹¹⁴⁵ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

¹¹⁴⁶ Report on the Practice of Zimbabwe, 1998, Chapter 5.6. ¹¹⁴⁷ ICRC archive document.

¹¹⁴⁸ ICRC archive document. ¹¹⁴⁹ ICRC archive document. ¹¹⁵⁰ ICRC archive document.

1247. In 1994, in the context of a non-international armed conflict, a State denied accusations of torture by a separatist entity and issued specific orders forbidding the torture of captured enemy combatants.¹¹⁵¹

III. Practice of International Organisations and Conferences

United Nations

1248. In a resolution adopted in 1990 in the context of the Iraqi invasion of Kuwait, the UN Security Council condemned the mistreatment and oppression of Kuwaiti and third-State nationals.¹¹⁵²

1249. In a resolution adopted in 1992, the UN Security Council demanded that all detainees in camps, prisons and detention centres in Bosnia and Herzegovina receive humane treatment.¹¹⁵³

1250. In a resolution adopted in 1992, the UN Security Council expressed grave alarm at the widespread violations of IHL occurring within the territory of the former Yugoslavia, especially in Bosnia and Herzegovina, including abuse of civilians in detention centres, and demanded that all parties and others concerned immediately cease such actions.¹¹⁵⁴

1251. In a resolution adopted in 1996, the UN Security Council expressed deep concern at the deterioration in security and in the humanitarian situation, including torture, in Burundi.¹¹⁵⁵

1252. In 1993, in a statement by its President regarding the treatment of Bosnian Muslims in detention camps by Bosnian Croats, the UN Security Council emphasised that “inhuman treatment and abuses in detention centres violates international humanitarian law”.¹¹⁵⁶

1253. In numerous resolutions, the UN General Assembly has condemned the inhuman and degrading treatment of political prisoners, detainees and captured combatants in South Africa, declaring that they should be treated as POWs under international law and accorded the protections laid down in GC III.¹¹⁵⁷

1254. In a resolution adopted in 1974 on the protection of women and children in emergency and armed conflict, the UN General Assembly stated that “all the necessary steps shall be taken to ensure the prohibition of measures such as . . . torture, degrading treatment and violence particularly against the part of the civilian population that consists of women and children”. It added that “all forms of . . . cruel and inhuman treatment of women and children, including . . . torture . . . shall be considered criminal”.¹¹⁵⁸

¹¹⁵¹ ICRC archive document.

¹¹⁵² UN Security Council, Res. 674, 29 October 1990, preamble and § 5.

¹¹⁵³ UN Security Council, Res. 770, 13 August 1992, § 3.

¹¹⁵⁴ UN Security Council, Res. 771, 13 August 1992, preamble and § 3.

¹¹⁵⁵ UN Security Council, Res. 1072, 30 August 1996, preamble.

¹¹⁵⁶ UN Security Council, Statement by the President, UN Doc. S/26437, 14 September 1993.

¹¹⁵⁷ UN General Assembly, Res. 2547 (XXIV), 11 December 1969, §§ 2–3 and 7; Res. 3103 (XXVIII), 12 November 1974, § 4; Res. 34/93 H, 12 December 1979, §§ 1 and 4; Res. 41/35, 10 November 1986, §§ 6–9 and 13.

¹¹⁵⁸ UN General Assembly, Res. 3318 (XXIX), 14 December 1974, §§ 4 and 5.

1255. In a resolution adopted in 1995 on the situation of human rights in the former Yugoslavia, the UN General Assembly expressed “its outrage at the instances of massive and systematic violations of human rights and humanitarian law, including . . . torture”.¹¹⁵⁹

1256. In a resolution adopted in 1998, the UN General Assembly strongly condemned the overwhelming number of human rights violations committed by the authorities of the FRY, the police and the military authorities in Kosovo, including torture and other cruel, inhuman or degrading treatment, in breach of IHL, including common Article 3 of the 1949 Geneva Conventions and AP II.¹¹⁶⁰

1257. In resolutions on Afghanistan adopted between 1989 and 1992, the UN Commission on Human Rights demanded that all parties treat their prisoners according to the recognised principles of IHL and protect them from acts of violence, including torture.¹¹⁶¹

1258. In resolutions adopted in 1991 and 1992, the UN Commission on Human Rights strongly condemned Iraq for not treating prisoners of war and detained civilians according to recognised IHL principles and insisted that it abstain from acts of violence against them, including torture.¹¹⁶²

1259. In a resolution adopted in 1994, the UN Commission on Human Rights demanded immediate, firm and resolute action by the international community to stop all human rights violations during the conflict in the former Yugoslavia, including torture.¹¹⁶³

1260. In a resolution adopted in 1996, the UN Commission on Human Rights condemned in the strongest terms all violations of human rights and IHL during the conflict in the former Yugoslavia and, in particular, massive and systematic violations, including beatings and torture.¹¹⁶⁴

1261. In a resolution adopted in 1996, the UN Commission on Human Rights called upon all parties to the hostilities in Sudan to protect all civilians from violations of human rights and humanitarian law, including ill-treatment and torture.¹¹⁶⁵

1262. In resolutions adopted in 1988 and 1989 on the Palestinian and other Arab territories occupied by Israel, the UN Sub-Commission on Human Rights, after reaffirming that GC IV was applicable to the situation, stated that the torture and inhuman treatment of detainees was a war crime under international law.¹¹⁶⁶

¹¹⁵⁹ UN General Assembly, Res. 50/193, 22 December 1995, pp. 4–5.

¹¹⁶⁰ UN General Assembly, Res. 53/164, 9 December 1998, § 8.

¹¹⁶¹ UN Commission on Human Rights, Res. 1989/67, 8 March 1989, § 11; Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6.

¹¹⁶² UN Commission on Human Rights, Res. 1991/67, 6 March 1991, § 5; Res. 1992/60, 3 March 1992, § 3.

¹¹⁶³ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 5.

¹¹⁶⁴ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.

¹¹⁶⁵ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 15.

¹¹⁶⁶ UN Sub-Commission on Human Rights, Res. 1988/10, 31 August 1988, § 3; Res. 1989/4, 31 August 1989, § 3.

1263. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II “have long been considered customary international law”.¹¹⁶⁷

1264. In 1992, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights stated that the leader of a party to the conflict in Afghanistan had issued a written order which provided that “no person is allowed to insult, threaten, harass . . . [a] prisoner of war”.¹¹⁶⁸

1265. In 1996, in a report on the situation of human rights in Sudan, the Special Rapporteur of the UN Commission on Human Rights stated that he had received eye-witness accounts and reports indicating that “if a prisoner is captured and he refuses to change sides, he is cruelly tortured and executed”.¹¹⁶⁹

Other International Organisations

1266. In 1993, in a report to EC foreign ministers, the EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia stated that “the mission believes there is now a strong case for clearly identifying [torture and degrading and humiliating treatment] as war crimes, irrespective of whether they occur in national or international conflicts”.¹¹⁷⁰

1267. In a resolution adopted in 1985, the Council of the League of Arab States condemned Israel for indulging “in all kinds of violence, persecution and torture against the civilian population” and decided to “call upon the international community to exercise pressure on Israel to stop these practices immediately, in accordance with the provisions of the Fourth Geneva Convention of 1949”.¹¹⁷¹

1268. In a resolution adopted in 1992, the Council of the League of Arab States decided “to strongly condemn Israel for . . . its inhuman practices against the peaceful inhabitants”.¹¹⁷²

1269. In a resolution adopted in 1993, the Council of the League of Arab States decided “to strongly condemn Israel for . . . its inhuman practices against the peaceful people”.¹¹⁷³

¹¹⁶⁷ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

¹¹⁶⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1992/33, 17 February 1992, § 51.

¹¹⁶⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 9.

¹¹⁷⁰ EC, Report of the investigative mission into the treatment of Muslim women in the former Yugoslavia, annexed to Letter dated 2 February 1993 from Denmark to the UN Secretary-General, UN Doc. S/25240, 3 February 1993, Annex I, § 42.

¹¹⁷¹ League of Arab States, Council, Res. 4430, 28 March 1985, § 2.

¹¹⁷² League of Arab States, Council, Res. 5169, 29 April 1992, § 2.

¹¹⁷³ League of Arab States, Council, Res. 5324, 21 September 1993, § 2.

International Conferences

1270. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that irrespective of GC III, “the international community has consistently demanded humane treatment for prisoners of war, including...protection at all times from physical and mental torture [and] abuse”.¹¹⁷⁴

1271. The 23rd International Conference of the Red Cross in 1977 adopted a resolution on torture in which it reaffirmed that “torture is contrary to the fundamental principles of the Red Cross” and underlined the need to “make known and ensure respect for those provisions in the Geneva Conventions and Protocols which prohibit torture and those resolutions of the International Conference of the Red Cross and Red Crescent which condemn inhuman and degrading treatment”. The Conference therefore condemned “all forms of torture” and urged governments and appropriate international organisations “to ensure application of the international instruments and laws forbidding torture and to do their utmost to eliminate its practice”.¹¹⁷⁵

1272. The 24th International Conference of the Red Cross in 1981 adopted a resolution on torture in which it noted that “torture is condemned and forbidden by international humanitarian law, international instruments relating to human rights and the general principles of international law”, but that “despite such prohibition torture is practised to an alarming extent in many countries”. The Conference therefore urged governments and international organisations concerned to “make greater efforts to ensure universal respect for these prohibitions” and requested that the UN “expedite the adoption of an international convention against torture and other cruel, inhuman or degrading treatment or punishment, and including provision for the effective supervision and enforcement of its application”.¹¹⁷⁶

1273. The 25th International Conference of the Red Cross in 1986 adopted a resolution on torture in which it welcomed with satisfaction “the adoption by the General Assembly of the United Nations, on 10 December 1984, of the Convention against torture and other cruel, inhuman or degrading treatment or punishment” and invited “States to ratify it”. The Conference also encouraged States and regional organisations to draft “regional conventions against torture and other cruel, inhuman or degrading treatment or punishment, providing efficient supervisory mechanisms”.¹¹⁷⁷

1274. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed dismay and condemnation that

¹¹⁷⁴ 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.

¹¹⁷⁵ 23rd International Conference of the Red Cross, Bucharest, 15–21 October 1977, Res. XIV, preamble and §§ 1 and 2.

¹¹⁷⁶ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XIV, preamble and §§ 1 and 2.

¹¹⁷⁷ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. X, §§ 1 and 2.

“gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including] . . . torture and cruel, inhuman and degrading treatment or punishment”.¹¹⁷⁸

1275. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants declared that they “refuse to accept that . . . prisoners [are] tortured”.¹¹⁷⁹

1276. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that “strict orders are given to prevent all serious violations of international humanitarian law, including . . . torture . . . and threats to carry out such actions”.¹¹⁸⁰

1277. The Final Declaration adopted by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002 expressed deep concern about “the number and expansion of conflicts in Africa” and alarm at “the spread of violence, in particular in the form of . . . torture . . . which seriously violate[s] the rules of International Humanitarian Law”.¹¹⁸¹

IV. Practice of International Judicial and Quasi-judicial Bodies

1278. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called “elementary considerations of humanity”.¹¹⁸²

1279. In the *Tadić case* before the ICTY in 1995, the accused was charged with grave breaches of the Geneva Conventions (torture, inhuman treatment and wilfully causing great suffering or serious injury to body or health), crimes against humanity (inhumane acts) and violations of the laws and customs of war (cruel treatment).¹¹⁸³ In its judgement in 1997, the Tribunal found the accused guilty of crimes against humanity (inhumane acts) and violations of the laws and customs of war (cruel treatment).¹¹⁸⁴

1280. In the *Mrkšić case* before the ICTY in 1995, the accused was charged with grave breaches of the Geneva Conventions (wilfully causing great suffering),

¹¹⁷⁸ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(30).

¹¹⁷⁹ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1), *ILM*, Vol. 33, 1994, p. 298.

¹¹⁸⁰ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

¹¹⁸¹ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.

¹¹⁸² ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

¹¹⁸³ ICTY, *Tadić case*, Second Amended Indictment, 14 December 1995, §§ 6, 11 and 12.

¹¹⁸⁴ ICTY, *Tadić case*, Judgement, 7 May 1997, p. 300.

violations of the laws and customs of war (cruel treatment) and crimes against humanity (inhumane acts).¹¹⁸⁵

1281. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber stated that the prohibition of torture was absolute and non-derogable in any circumstances.¹¹⁸⁶ It found the accused guilty of grave breaches of GC IV (wilfully causing great suffering or serious injury to body or health, torture and inhuman treatment) and violations of the laws and customs of war (cruel treatment and torture).¹¹⁸⁷

1282. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber stated that, in any case, the proposition was warranted that a general prohibition against torture had evolved in customary international law. It added that:

This prohibition has gradually crystallised from the Lieber Code and The Hague Conventions, in particular articles 4 and 46 of the Regulations annexed to Convention IV of 1907, read in conjunction with the “Martens clause” laid down in the preamble to the same Convention. Torture was not specifically mentioned in the London Agreement of 8 August 1945 establishing the International Military Tribunal at Nuremberg, but it was one of the acts expressly classified as a crime against humanity under article II (1)(c) of Allied Control Council Law No. 10. As stated above, the Geneva Conventions of 1949 and the Protocols of 1977 prohibit torture.

...

That these treaty provisions have ripened into customary rules is evinced by various factors. First, these treaties and in particular the Geneva Conventions have been ratified by practically all States of the world. Admittedly those treaty provisions remain as such and any contracting party is formally entitled to relieve itself of its obligations by denouncing the treaty (an occurrence that seems extremely unlikely in reality); nevertheless the practically universal participation in these treaties shows that all States accept among other things the prohibition of torture. In other words, this participation is highly indicative of the attitude of States to the prohibition of torture. Secondly, no State has ever claimed that it was authorised to practice torture in time of armed conflict, nor has any State shown or manifested opposition to the implementation of treaty provisions against torture. When a State has been taken to task because its officials allegedly resorted to torture, it has normally responded that the allegation was unfounded, thus expressly or implicitly upholding the prohibition of this odious practice. Thirdly, the International Court of Justice has authoritatively, albeit not with express reference to torture, confirmed this custom-creating process: in the *Nicaragua case* it held that common article 3 of the 1949 Geneva Conventions, which *inter alia* prohibits torture against persons taking no active part in hostilities, is now well-established as belonging to the corpus of customary international law and is applicable both to international and internal armed conflicts.

...

It therefore seems incontrovertible that torture in time of armed conflict is prohibited by a general rule of international law. In armed conflicts this rule may be

¹¹⁸⁵ ICTY, *Mrkšić case*, Initial Indictment, 26 October 1995, § 26.

¹¹⁸⁶ ICTY, *Delalić case*, Judgement, 16 November 1998, § 454.

¹¹⁸⁷ ICTY, *Delalić case*, Judgement, 16 November 1998, Part IV.

applied both as part of international customary law and – if the requisite conditions are met – as treaty law, the content of the prohibition being the same.¹¹⁸⁸

The Tribunal further stated that no loopholes had been left in international human rights law with respect to the prohibition of torture. It also held that the prohibition even covered potential breaches, that it imposed an obligation *erga omnes* and that it had acquired the status of *jus cogens*. The Tribunal found Anto Furundžija guilty of a violation of the laws and customs of war (torture).¹¹⁸⁹

1283. In its judgement in the *Jelisić case* in 1999, the ICTY Trial Chamber found Goran Jelisić guilty of causing bodily harm, a violation of the laws and customs of war (cruel treatment) and a crime against humanity (inhumane acts).¹¹⁹⁰

1284. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber, after considering charges of crimes against humanity (inhumane acts) and violations of the laws and customs of war (cruel treatment), found the accused guilty of committing a crime against humanity pursuant to Article 5(i) of the 1993 ICTY Statute.¹¹⁹¹

1285. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber found the accused guilty of committing grave breaches of the Geneva Conventions (wilfully causing great suffering or serious injury to body or health, inhuman treatment and cruel treatment), crimes against humanity (inhumane acts) and violations of the laws and customs of war (cruel treatment).¹¹⁹²

1286. In its judgement in the *Kunarac case* in 2001, the ICTY Trial Chamber held that “torture is prohibited under both conventional and customary international law and it is prohibited both in times of peace and during an armed conflict. The prohibition can be said to constitute a norm of *jus cogens*.” The Tribunal found Dragoljub Kunarac and Zoran Vuković guilty of crimes against humanity (torture) and violations of the laws and customs of war (torture).¹¹⁹³

1287. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber found Dario Kordić and Mario Čerkez guilty of crimes against humanity (inhumane acts) and grave breaches of the Geneva Conventions (inhumane treatment).¹¹⁹⁴

1288. In 1993, the CAT recalled in the context of Afghanistan that no exceptional circumstances could be invoked as a justification of torture.¹¹⁹⁵

1289. In its Annual Report 1980–81, the IACiHR reminded Peru that torture of persons by the forces of order cannot be justified.¹¹⁹⁶

¹¹⁸⁸ ICTY, *Furundžija case*, Judgement, 10 December 1998, §§ 137–139.

¹¹⁸⁹ ICTY, *Furundžija case*, Judgement, 10 December 1998, Part IX.

¹¹⁹⁰ ICTY, *Jelisić case*, Judgement, 14 December 1999, § 138.

¹¹⁹¹ ICTY, *Kupreškić case*, Judgement, 14 January 2000, §§ 822 and 832.

¹¹⁹² ICTY, *Blaškić case*, Judgement, 3 March 2000, Part VI, Disposition.

¹¹⁹³ ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 466, 883, 886 and 888.

¹¹⁹⁴ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Part V.

¹¹⁹⁵ CAT, Report to the UN General Assembly, UN Doc. A/48/44, 24 June 1993, §§ 50–62.

¹¹⁹⁶ IACiHR, *Annual Report 1980–1981*, Doc. OEA/Ser.L/V/II.54 Doc. 9 rev. 1, p. 112.

1290. In a case concerning Argentina in 1997, the IACiHR considered that the intentional mistreatment of wounded persons would constitute a particularly serious violation of common Article 3 of the 1949 Geneva Conventions.¹¹⁹⁷

V. Practice of the International Red Cross and Red Crescent Movement

1291. The ICRC Commentary on the Third Geneva Convention states, with reference to Article 17, that:

The Detaining Power may not . . . exert any pressure on prisoners, and this prohibition even refers to the information specified in the first paragraph of the Article. The holding of prisoners *incommunicado*, which was practised by certain Detaining Powers in “interrogation camps” during the last war, is also implicitly forbidden by this paragraph, but even more so by Article 126 [GC III].¹¹⁹⁸

1292. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “torture of all kinds, whether physical or mental” and “humiliating and degrading treatment (e.g. enforced prostitution, any form of indecent assault or other outrages upon personal dignity)” are prohibited. It adds that the following acts constitute grave breaches of the law of war “torture or inhuman treatment, causing great suffering or serious injury to body or health, [and] inhuman and degrading practices involving outrages upon personal dignity”.¹¹⁹⁹

1293. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “civilians and all non-combatants must be respected and protected, and violence to life and person . . . [and] outrages upon personal dignity . . . are specifically prohibited”.¹²⁰⁰

1294. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross reminded the parties of their obligation to respect the physical and moral integrity of non-combatants and persons *hors de combat*. It also stated that combatants and civilians have the right to the protection of their dignity. The statement recalled the Geneva Conventions and AP I.¹²⁰¹

1295. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that attacks on the “physical integrity or personal dignity” of civilians were prohibited. It added, with respect to captured combatants and persons who have laid down their arms, that “subjecting them

¹¹⁹⁷ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, § 189.

¹¹⁹⁸ Jean S. Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, Geneva, 1960, p. 163.

¹¹⁹⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 192, 195 and 776(a)–(c).

¹²⁰⁰ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

¹²⁰¹ Mexican Red Cross, *Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de Enero de 1994*, 3 January 1994.

or threatening to subject them to ill-treatment” was a violation of IHL at all times. It further stated that “persons deprived of their freedom, both civilians and military personnel, must always be treated humanely and shall never be tortured”.¹²⁰²

1296. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that, with respect to civilian persons who refrain from acts of hostility, that “violence to their lives and person [and] outrages upon their personal dignity” are prohibited. It added that, with respect to combatants and other persons who are captured, and those who have laid down their arms, that they shall not, in particular, be “ill-treated”. It furthermore stated, with respect to detained combatants and civilian persons that “any form of torture or ill-treatment is strictly prohibited”.¹²⁰³

1297. In a note on respect for IHL issued in 1996 in the context of an internal armed conflict, the ICRC stated that “officers must be instructed that, whatever the circumstances, any form of ill-treatment is illegal and prohibited”.¹²⁰⁴

1298. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of “torture or inhuman treatment and wilfully causing great suffering or serious injury to body or health” be subject to the jurisdiction of the Court with respect to international armed conflicts. It also proposed that the war crime of “violence to health and physical or mental well-being of persons, in particular cruel treatment such as torture” be subject to the jurisdiction of the Court with respect to non-international armed conflicts.¹²⁰⁵

1299. In 1998, in a letter to the League of Red Cross and Red Crescent Societies, the Afghan Red Crescent Society noted that the Constitution of Afghanistan, following its adoption of the 1984 Convention against Torture, contained legal provisions outlawing the practice of torture.¹²⁰⁶

1300. In a communication to the press in 2001, the ICRC reminded the parties to the conflict in Afghanistan that the physical integrity and dignity of persons not taking part in hostilities must not be threatened.¹²⁰⁷

¹²⁰² ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

¹²⁰³ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassoli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹²⁰⁴ ICRC archive document.

¹²⁰⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(ii)–(iii) and 3(i).

¹²⁰⁶ Afghan Red Crescent Society, Letter to the League of Red Cross and Red Crescent Societies, 14 June 1998, § 202(2).

¹²⁰⁷ ICRC, Communication to the Press No. 01/47, Afghanistan: ICRC calls on all parties to conflict to respect international humanitarian law, 24 October 2001.

VI. Other Practice

1301. In 1979, in a meeting with the ICRC, the leader of an armed opposition group noted that he considered it legitimate to torture prisoners in order to obtain information.¹²⁰⁸

1302. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “no one shall be subjected to physical or mental torture... or cruel or degrading treatment”.¹²⁰⁹

1303. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that “a state violates international law if, as a matter of state policy, it practices, encourages, or condones... (d) torture or other cruel, inhuman, or degrading treatment or punishment”.¹²¹⁰

1304. In 1987, in a meeting with the ICRC, the leader of an armed opposition group criticised the inhuman treatment of prisoners by other parties to the conflict and insisted that their own commanders had been instructed to treat captured combatants humanely.¹²¹¹

1305. In 1990, an armed opposition group undertook to refrain from torturing its prisoners and insisted that commanders responsible for such actions had been sanctioned.¹²¹²

1306. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “torture... as well as cruel, inhuman and degrading treatment or punishment and other outrages upon personal dignity” shall remain prohibited.¹²¹³

Definitions

I. Treaties and Other Instruments

Treaties

1307. Article 1 of the 1984 Convention against Torture defines torture as follows:

“Torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from

¹²⁰⁸ ICRC archive document. ¹²⁰⁹ ICRC archive document.

¹²¹⁰ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(d).

¹²¹¹ ICRC archive document. ¹²¹² ICRC archive document.

¹²¹³ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(a), *IRRC*, No. 282, 1991, p. 331.

him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

1308. Article 2 of the 1985 Inter-American Convention against Torture defines torture as:

any act intentionally performed whereby physical or mental pain or suffering is inflicted on a person for purposes of criminal investigation, as a means of intimidation, as personal punishment, as a preventive measure, as a penalty or for any other purpose. Torture shall also be understood to be the use of methods upon a person intended to obliterate the personality of the victim or to diminish his physical or mental capacities, even if they do not cause physical pain or mental anguish. The concept of torture shall not include physical or mental pain or suffering that is inherent in or solely the consequence of lawful measures, provided that they do not include the performance of the acts or use of the methods referred to in this article.

1309. Article 7(2)(e) of the 1998 ICC Statute defines torture, when a crime against humanity, as “the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions”.

Other Instruments

1310. Article 1(1) of the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include suffering arising only from, inherent in, or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.

1311. Principle 6 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

No person under any form of detention or imprisonment shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.*

...

* The term “cruel, inhuman or degrading treatment or punishment” should be interpreted so as to extend the widest possible protection against abuses, whether physical or mental, including the holding of a detained or imprisoned person in conditions which deprive him, temporarily or permanently of the use of any of his

natural senses, such as sight or hearing, or of his awareness of place and the passing of time.

1312. The 2000 ICC Elements of Crimes defines torture, when a war crime, in part as follows:

1. The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons.
2. The perpetrator inflicted the pain or suffering for such purposes as: obtaining information or a confession, punishment, intimidation or coercion or for any reason based on discrimination of any kind.

1313. The 2000 ICC Elements of Crimes defines inhuman treatment, when a war crime, in part as follows: "The perpetrator inflicted severe physical or mental pain or suffering upon one or more persons".

1314. The 2000 ICC Elements of Crimes defines outrages upon personal dignity, when a war crime, in part as follows:

1. The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.
2. The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.

The Elements of Crimes further specifies, in footnote 49, that:

For this crime, "persons" can include dead persons. It is understood that the victim need not personally be aware of the existence of the humiliation or degradation or other violation. This element takes into account relevant aspects of the cultural background of the victim.

1315. Section 5(2)(d) of the 2000 UNTAET Regulation 2000/15 defines torture, when a crime against humanity, as "the intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions".

II. National Practice

Military Manuals

1316. Australia's Defence Force Manual defines torture as including "any measures of such character as to cause the physical suffering or extermination of protected persons".¹²¹⁴

1317. Canada's LOAC Manual provides that:

Torture is any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as:

¹²¹⁴ Australia, *Defence Force Manual* (1994), § 1219.

- a. obtaining from that person or a third person information or confession;
- b. punishing that person or a third person for an act he or a third person has committed or is suspected of having committed;
- c. intimidating or coercing that person or a third person; or
- d. for any reason based on discrimination of any kind;

when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.¹²¹⁵

1318. France's LOAC Manual refers to the 1984 Convention against Torture and defines torture as:

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind.¹²¹⁶

1319. The US Field Manual restates Article 32 GC IV, which provides that States have agreed not to take any "measures of such character as to cause the physical suffering . . . of protected persons in their hands".¹²¹⁷

1320. According to the US Instructor's Guide, "beating a prisoner or applying electric shocks, dunking his head into a barrel of water, and putting a plastic bag over his head to make him talk" are acts of torture and inhumane treatment.¹²¹⁸

National Legislation

1321. The US Torture Victim Protection Act defines torture as "any act, directed against an individual in the offender's custody or physical control, by which severe pain or suffering . . . whether physical or mental, is intentionally inflicted on that individual".¹²¹⁹

National Case-law

1322. No practice was found.

Other National Practice

1323. In 1994, an official of a State, discussing that State's ratification of the 1984 Convention against Torture, considered that the limit between torture and (deserved) ill-treatment was that which was accepted by the public.¹²²⁰

¹²¹⁵ Canada, *LOAC Manual* (1999), Glossary, p. 18.

¹²¹⁶ France, *LOAC Manual* (2001), p. 122.

¹²¹⁷ US, *Field Manual* (1956), § 271. ¹²¹⁸ US, *Instructor's Guide* (1985), p. 10.

¹²¹⁹ US, *Torture Victim Protection Act* (1991), Section 3. ¹²²⁰ ICRC archive document.

III. Practice of International Organisations and Conferences

United Nations

1324. In 1998, in a report on systematic rape, sexual slavery and slavery-like practices during wartime, the Special Rapporteur of the UN Commission on Human Rights stated that:

As prohibited by customary norms, the crime of torture requires the intentional infliction of severe mental or physical pain or suffering, and a nexus to government action or inaction. In most, if not all cases described in this report, rape and serious sexual violence during armed conflict may also be prosecuted as torture.¹²²¹

Other International Organisations

1325. No practice was found.

International Conferences

1326. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1327. In its judgement in the *Akayesu case* in 1998, the ICTR Trial Chamber defined the essential elements of torture as:

- (i) The perpetrator must intentionally inflict severe physical or mental pain or suffering upon the victim for one or more of the following purposes:
 - (a) to obtain information or a confession from the victim or a third person;
 - (b) to punish the victim or a third person for an act committed or suspected of having been committed by either of them;
 - (c) for the purpose of intimidating or coercing the victim or the third person;
 - (d) for any reason based on discrimination of any kind.
- (ii) The perpetrator was himself an official, or acted at the instigation of, or with the consent or acquiescence of, an official or person acting in an official capacity.¹²²²

1328. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber compared the three existing definitions of torture, that is, under the 1975 UN Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Article 1(1) of the 1984 Convention against Torture, and the 1985 Inter-American Convention on Torture. It concluded that “the definition of torture contained in the Torture Convention includes the definitions contained in both the Declaration on Torture and the Inter-American Convention and thus reflects a consensus

¹²²¹ UN Sub-Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, §§ 53 and 55.

¹²²² ICTR, *Akayesu case*, Judgement, 2 September 1998, § 594.

which the Trial Chamber considers to be representative of customary international law".¹²²³ The Trial Chamber also stated that "whenever rape and other forms of sexual violence meet the aforementioned criteria, then they shall constitute torture, in the same manner as any other acts that meet this criteria".¹²²⁴ It further concluded that:

The Trial Chamber thus finds that the offence of wilfully causing great suffering or serious injury to body or health constitutes an act or omission that is intentional, being an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury. It covers those acts that do not meet the purposive requirements for the offence of torture, although clearly all acts constituting torture could also fall within the ambit of this offence[.]

...

In sum, the Trial Chamber finds that inhuman treatment is an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. The plain, ordinary meaning of the term inhuman treatment in the context of the Geneva Conventions confirms this approach and clarifies the meaning of the offence. Thus, inhuman treatment is intentional treatment which does not conform with the fundamental principle of humanity, and forms the umbrella under which the remainder of the listed "grave breaches" in the Conventions fall. Hence, acts characterised in the Conventions and Commentaries as inhuman, or which are inconsistent with the principle of humanity, constitute examples of actions that can be characterised as inhuman treatment.

...

In this framework of offences, all acts found to constitute torture or wilfully causing great suffering or serious injury to body or health would also constitute inhuman treatment. However, this third category of offence is not limited to those acts already incorporated into the other two and extends further to other acts which violate the basic principle of humane treatment, particularly the respect for human dignity. Ultimately, the question of whether any particular act which does not fall within the categories of the core group is inconsistent with the principle of humane treatment, and thus constitutes inhuman(e) treatment, is a question of fact to be judged in all the circumstances of the particular case.

...

In light of the foregoing, the Trial Chamber finds that cruel treatment constitutes an intentional act or omission, that is an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity. As such, it carries an equivalent meaning and therefore the same residual function for the purposes of common article 3 of the Statute, as inhuman treatment does in relation to grave breaches of the Geneva Conventions. Accordingly, the offence of torture under common article 3 of the [1949] Geneva Conventions is also included within the concept of cruel treatment. Treatment that does not meet the purposive requirement for the offence of torture in common article 3, constitutes cruel treatment.¹²²⁵

1329. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber spelled out some specific elements that pertained to torture as "considered

¹²²³ ICTY, *Delalić case*, Judgement, 16 November 1998, § 459.

¹²²⁴ ICTY, *Delalić case*, Judgement, 16 November 1998, § 496.

¹²²⁵ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 511, 543–544 and 552.

from the specific viewpoint of international criminal law relating to armed conflicts". Thus, the Trial Chamber considered that the elements of torture in an armed conflict required that torture:

- (i) consists of the infliction by act or omission of severe pain or suffering, whether physical or mental; in addition
- (ii) this act or omission must be intentional;
- (iii) it must aim at obtaining information or a confession, or at punishing, intimidating, humiliating or coercing the victim or a third person; or at discriminating, on any ground, against the victim or a third person;
- (iv) it must be linked to an armed conflict;
- (v) at least one of the persons involved in the torture process must be a public official or must at any rate act in a non-private capacity, e.g. as a de facto organ of a State or any other authority-wielding entity.

As is apparent from this enumeration of criteria, the Trial Chamber considers that among the possible purposes of torture one must also include that of humiliating the victim.¹²²⁶

This finding was confirmed in the same case by the Appeals Chamber in 2000.¹²²⁷

1330. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber found that:

The crime of wilfully causing great suffering or serious injury to body or health constitutes an intentional act or omission which causes serious mental or physical suffering or injury, provided the requisite level of suffering or injury can be proven. This crime is distinguished from that of inhuman treatment in that it requires a showing of serious mental or physical injury. Thus, acts where the resultant harm relates solely to an individual's human dignity are not included within this offence.¹²²⁸

The Trial Chamber also confirmed the definition of inhumane treatment and cruel treatment as set out in the *Delalić case*.¹²²⁹ In relation to "other inhumane acts", it held that:

It is not controversial that the category "other inhumane acts" provided for in Article 5 is a residual category, which encompasses acts not specifically enumerated. Trial Chambers have considered the threshold to be reached by these other acts in order to be incorporated in this category, reaching similar conclusions as to the serious nature of these acts. The Tadić Trial Chamber found that "inhumane acts" are acts "similar in gravity to those listed in the preceding subparagraphs". In the words of the Kupreškić Trial Chamber, in order to be characterised as inhumane, acts "must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5." The Tadić Trial Chamber, in relation to the requisite

¹²²⁶ ICTY, *Furundžija case*, Judgement, 10 December 1998, § 162.

¹²²⁷ ICTY, *Furundžija case*, Judgement on Appeal, 21 July 2000, § 111.

¹²²⁸ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 245.

¹²²⁹ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 256.

nature of “other inhumane acts”, held that they “must in fact cause injury to a human being in terms of physical or mental integrity, health or human dignity.”¹²³⁰

1331. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber stated that it was “of the view that treatment may be cruel whatever the status of the person concerned”.¹²³¹

1332. In its judgement in the *Kunarac case* in 2001, the ICTY Trial Chamber departed from the findings on the definition of torture confirmed in the *Furundžija case*. In general terms it held that:

The Trial Chamber is therefore wary not to embrace too quickly and too easily concepts and notions developed in a different legal context. The Trial Chamber is of the view that notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law.¹²³²

More specifically with regard to torture, the Trial Chamber stated that:

Three elements of the definition of torture contained in the Torture Convention are, however, uncontroversial and are accepted as representing the status of customary international law on the subject:

- (i) Torture consists of the infliction, by act or omission, of severe pain or suffering, whether physical or mental.
- (ii) This act or omission must be intentional.
- (iii) The act must be instrumental to another purpose, in the sense that the infliction of pain must be aimed at reaching a certain goal . . .
 - . . . On the other hand, [the following] elements remain contentious:
 - (i) The list of purposes the pursuit of which could be regarded as illegitimate and coming within the realm of the definition of torture.
 - . . .
 - (iii) The requirement, if any, that the act be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

The Trial Chamber is satisfied that the following purposes have become part of customary international law: (a) obtaining information or a confession, (b) punishing, intimidating or coercing the victim or a third person, (c) discriminating, on any ground, against the victim or a third person. There are some doubts as to whether other purposes have come to be recognised under customary international law. The issue does not need to be resolved here, because the conduct of the accused is appropriately subsumable under the above-mentioned purposes . . .

. . .
The Trial Chamber concludes that the definition of torture under international humanitarian law does not comprise the same elements as the definition of torture generally applied under human rights law. In particular, the Trial Chamber is of the view that the presence of a state official or of any other authority-wielding person

¹²³⁰ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 269.

¹²³¹ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 186.

¹²³² ICTY, *Kunarac case*, Judgement, 22 February 2001, § 471.

in the torture process is not necessary for the offence to be regarded as torture under international humanitarian law . . .

. . . On the basis of what has been said, the Trial Chamber holds that, in the field of international humanitarian law, the elements of the offence of torture, under customary international law are as follows:

- (i) The infliction, by act or omission, of severe pain or suffering, whether physical or mental.
- (ii) The act or omission must be intentional.
- (iii) The act or omission must aim at obtaining information or a confession, or at punishing, intimidating or coercing the victim or a third person, or at discriminating, on any ground, against the victim or a third person.¹²³³

1333. In its General Comment on Article 7 of the 1966 ICCPR in 1992, the HRC stated that the prohibition of torture or cruel, inhuman or degrading treatment “relates not only to acts that cause physical pain but also to acts that cause mental suffering to the victim”. It also noted that “prolonged solitary confinement of the detained or imprisoned person may amount to acts prohibited by Article 7”.¹²³⁴ On the basis of these considerations, the HRC has found a breach of Article 7 ICCPR on numerous occasions.¹²³⁵

1334. In *Améndola Massiotti and Baritussio v. Uruguay* in 1982, the HRC held that the following conditions of imprisonment amounted, as inhuman treatment, to a violation of Article 7 of the 1966 ICCPR:

During the rainy period the water was 5 to 10 cm deep on the floor of the cells. In three of the cells, each measuring 4m by 5m, 35 prisoners were kept. The prison had no open courtyard and the prisoners were kept indoors under artificial light all day. On 1 August 1977 Carmen Améndola Massiotti was transferred to Punta Rieles prison. There she was kept in a hut measuring 5m by 10m. The place was overcrowded with 100 prisoners and the sanitary conditions were insufficient. She was subjected to hard labour and the food was very poor.¹²³⁶

1335. In *Deidrick v. Jamaica* in 1998, the HRC held that:

With regard to the deplorable conditions of detention at St. Catherine’s District Prison, the Committee notes that author’s counsel has made precise allegations, related thereto, i.e that the author is locked-up in his cell 23 hours a day, no mattress or bedding are provided, that there is lack of artificial light and no integral sanitation, inadequate medical services, deplorable food and no recreational facilities etc. All of this has not been contested by the State party, except in a general manner saying that these conditions affect all prisoners. In the Committee’s opinion, the conditions described above, which affect the author directly are such as to violate

¹²³³ ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 483–484 and 496–497.

¹²³⁴ HRC, General Comment No. 20 (Article 7 ICCPR), 10 April 1992, §§ 5–6.

¹²³⁵ See, e.g., HRC, *Marais v. Madagascar*, Views, 24 March 1983, § 17(4) (three years in a cell measuring 1m by 2m); *Larrosa Bequiro v. Uruguay*, Views, 29 March 1983, § 10(3) (one visitor in seven months); *Gómez de Voituret v. Uruguay*, Views, 10 April 1984, § 12(2) (solitary confinement for several months); *Espinoza de Polay v. Peru*, Views, 6 November 1997, § 8(6) (total isolation for a year).

¹²³⁶ HRC, *Améndola Massiotti and Baritussio v. Uruguay*, Views, 26 July 1982, §§ 10–13.

his right to be treated with humanity and with respect for the inherent dignity of the human person, and are therefore contrary to the [1966 ICCPR]. It finds that holding a prisoner in such conditions of detention constitutes inhuman treatment in violation of article 10, paragraph 1, and of article 7.¹²³⁷

1336. In its decision in *Krishna Achutan v. Malawi* in 1994, the ACiHPR held that:

The conditions of overcrowding and acts of beating and torture that took place in prisons in Malawi contravened [Article 5 of the 1981 ACHPR]. Aspects of the treatment . . . such as excessive solitary confinement, shackling within a cell, extremely poor quality food and denial of access to adequate medical care, were also in contravention of this article.¹²³⁸

1337. In its decision in *International Pen and Others v. Nigeria* in 1998 concerning the trial and execution of Ken Saro-Wiwa and other co-defendants, the ACiHPR found a violation of Article 5 of the 1981 ACHPR. It held that the detention of Mr Saro-Wiwa in leg irons and handcuffs with no evidence of attempts to escape constituted actions which humiliated the individual or forced him to act against his will or conscience.¹²³⁹

1338. In its decision in *Civil Liberties Organisations v. Nigeria* in 1999, the ACiHPR dealt with the allegation that the conditions of detention of persons convicted Nigeria constituted inhuman and degrading treatment. The Commission stated that “deprivation of light, insufficient food and lack of access to medicine or medical care can . . . constitute violations of Article 5” of the ACHPR.¹²⁴⁰

1339. In its report in the *Greek case* in 1969, the ECiHR stated that the notion of inhuman treatment:

covers at least such treatment as deliberately causes severe suffering, mental or physical, which, in the particular situation, is unjustifiable. The word torture is often used to describe inhuman treatment, which has a purpose, such as the obtaining of information or confessions, or the infliction of punishment, and it is generally an aggravated form of inhuman treatment. Treatment or punishment may be said to be degrading if it grossly humiliates the victim before others or drives the detainee to act against his/her will or conscience.¹²⁴¹

The ECiHR also concluded that the conditions of detention in several camps amounted to breaches of Article 3 of the 1950 ECHR, notably the combination of “complete absence of heating in winter, . . . lack of hot water, . . . poor lavatory

¹²³⁷ HRC, *Deidrick v. Jamaica*, Views, 9 April 1998, § 9.3.

¹²³⁸ ACiHPR, *Krishna Achutan v. Malawi*, Decision, 25 October–30 November 1994; see also *AI v. Malawi*, Decision, 13–22 March 1995.

¹²³⁹ ACiHPR, *International Pen and Others v. Nigeria*, Decision, 22–31 October 1998.

¹²⁴⁰ ACiHPR, *Civil Liberties Organisations v. Nigeria (151/96)*, Decision, 15 November 1999, §§ 25–26.

¹²⁴¹ ECiHR, *Greek case*, Report, 5 November 1969, § 186.

facilities, [and] unsatisfactory dental treatment", as well as "the conditions of gross overcrowding and its consequences".¹²⁴²

1340. In its admissibility decisions in two cases in 1978 and 1980, the ECiHR found that solitary confinement did not, in itself, constitute a form of inhuman treatment. Although prolonged periods of solitary confinement were undesirable, regard had to be had to the particular situation, the stringency of the measure, its duration, the objective pursued and its effects on the person concerned.¹²⁴³

1341. In *Kröcher and Möller v. Switzerland* in 1982, the ECiHR stated that "complete sensory isolation coupled with total social isolation, can destroy the personality and constitutes a form of treatment which cannot be justified by the requirements of security or any other reason". The ECiHR considered, however, that there was "a distinction between this and removal from association with other prisoners for security, disciplinary or protective reasons" which would not constitute inhuman treatment or degrading treatment or punishment.¹²⁴⁴

1342. In its judgement in *Selçuk and Asker v. Turkey* in 1996, the ECiHR stated that the burning of the applicants' homes in their presence and the deliberate destruction of their belongings which caused them a great deal of anguish and suffering, particularly in view of the fact that one of the applicants was both elderly and infirm, constituted inhuman and degrading treatment.¹²⁴⁵ The ECtHR upheld this finding in 1998, adding that even if it had been found that the acts in question were carried out without any intention of punishing the applicants, but only to prevent their homes being used by terrorists, this would not provide a justification for the ill-treatment.¹²⁴⁶

1343. In its judgement in the *Campbell and Cosans case* in 1982, the ECtHR considered the issue of corporal punishment against schoolchildren and stated that "provided it is sufficiently real and immediate, a mere threat of conduct prohibited by Article 3 (art. 3) may itself be in conflict with that provision. Thus, to threaten an individual with torture might in some circumstances constitute at least 'inhuman treatment'."¹²⁴⁷

1344. In its judgement in *Aydin v. Turkey* in 1997, the ECtHR held that:

Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. The Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected

¹²⁴² ECiHR, *Greek case*, Report, 5 November 1969, Part B, Chapter IV(B)(VI), Section A, § 34, Section C, §§ 16–17 and Section D, § 21.

¹²⁴³ ECiHR, *Ensslin, Baader and Raspe v. FRG*, Admissibility Decision, 8 July 1978, pp. 109–110; *X v. UK*, Admissibility Decision, 10 July 1980, pp. 99–100.

¹²⁴⁴ ECiHR, *Kröcher and Möller v. Switzerland*, Report, 16 December 1982, § 62.

¹²⁴⁵ ECiHR, *Selçuk and Asker v. Turkey*, Report, 28 November 1996, §§ 171–178.

¹²⁴⁶ ECiHR, *Selçuk and Asker v. Turkey*, Judgement, 24 April 1998, §§ 78–80.

¹²⁴⁷ ECtHR, *Campbell and Cosans case*, Judgement, 25 February 1982, § 26.

amounted to torture, indeed the Court would have reached that conclusion on either of these grounds taken separately.¹²⁴⁸

1345. In its judgement in the *Cyprus case* in 2001, the ECtHR found that, in relation to the living conditions of Greek Cypriots in the Karpas region of northern Cyprus, there had been a violation of Article 3 of the 1950 ECHR in that the Greek Cypriots had been subjected to discrimination amounting to degrading treatment.¹²⁴⁹

1346. In its Second General Report in 1992, the European Committee for the Prevention of Torture stated that:

The principle of proportionality requires that a balance be struck between the requirements of the case and the application of a solitary confinement-type regime, which is a step that can have very harmful consequences for the person concerned. Solitary confinement can, in certain circumstances, amount to inhuman and degrading treatment; in any event, all forms of solitary confinement should be as short as possible.¹²⁵⁰

1347. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR stated that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman punishment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being”.¹²⁵¹

1348. In a case concerning El Salvador in 1989, the IACiHR found that the mutilation of suspected guerrillas amounted to inhumane treatment and therefore constituted a violation of Article 5 of the 1969 ACHR.¹²⁵²

1349. In a case concerning Peru in 1996, the IACiHR found that rape perpetrated by a public official constituted torture under Article 5 of the 1969 ACHR.¹²⁵³

V. Practice of the International Red Cross and Red Crescent Movement

1350. No practice was found.

1351. In its judgement in the *Castillo Petruzzi and Others case* in 1999, the IACtHR found that the victims were held incommunicado for 36, respectively 37 days. The Court referred to the *Velásquez Rodríguez case* and repeated that “prolonged isolation and deprivation of communication are in themselves cruel and inhuman punishment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being”. It concluded by saying

¹²⁴⁸ ECtHR, *Aydin v. Turkey*, Judgement, 25 September 1997, §§ 83–86.

¹²⁴⁹ ECtHR, *Cyprus case*, Judgement, 10 May 2001, § 311.

¹²⁵⁰ European Committee for the Prevention of Torture, Second General Report, Doc. CPT/Inf. (92)3, 13 April 1992, § 56.

¹²⁵¹ IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 156, see also § 187.

¹²⁵² IACiHR, *Case 10.179 (El Salvador)*, Resolution, 28 September 1989, § 8.

¹²⁵³ IACiHR, *Case 10.970 (Peru)*, Report, 1 March 1996, Section V(A)(3)(a).

that "the terms of confinement that the military tribunals imposed upon the victims . . . constituted cruel, inhuman and degrading forms of punishment that violated Article 5 of the [1969 ACHR]".¹²⁵⁴

VI. Other Practice

1352. No practice was found.

E. Corporal Punishment

I. Treaties and Other Instruments

Treaties

1353. Article 87, third paragraph, GC III provides that corporal punishment is forbidden.

1354. Under Article 32 GC IV, corporal punishment is prohibited.

1355. Article 100, first paragraph, GC IV provides that "the disciplinary regime in places of internment shall be consistent with humanitarian principles, and shall in no circumstances include regulations imposing on internees any physical exertion dangerous to their health or involving physical or moral victimization". The second paragraph provides that punishment drill is prohibited.

1356. Under Article 75(2)(iii) AP I, corporal punishment is prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents. Article 75 AP I was adopted by consensus.¹²⁵⁵

1357. Under Article 4(2)(a) AP II, any form of corporal punishment is prohibited at any time and in any place whatsoever. Article 4 AP II was adopted by consensus.¹²⁵⁶

1358. Article 3 of the 2002 Statute of the Special Court for Sierra Leone provides that the Court is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions and AP II, which include "any form of corporal punishment".

Other Instruments

1359. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

1360. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

1361. According to Article 4(a) of the 1994 ICTR Statute, the Tribunal has jurisdiction over violations of common Article 3 of the 1949 Geneva

¹²⁵⁴ IACtHR, *Castillo Petruzzi and Others case*, Judgement, 30 May 1999, § 194 and 198.

¹²⁵⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

¹²⁵⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

Conventions and of AP II, including “violence to life, health and physical or mental well-being of persons, in particular . . . any form of corporal punishment”.

1362. Article 20(f)(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “any form of corporal punishment” committed in violation of international humanitarian law applicable in armed conflict not of an international character is a war crime.

1363. Article 3(1) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides, *inter alia*, that corporal punishment shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.

1364. According to Section 7.2 of the 1999 UN Secretary-General’s Bulletin, any form of corporal punishment, against persons not, or no longer, taking part in military operations and persons placed *hors de combat* are prohibited at any time and in any place.

II. National Practice

Military Manuals

1365. Argentina’s Law of War Manual provides that corporal punishment of prisoners of war and civilians is prohibited, in both international and internal armed conflicts.¹²⁵⁷

1366. Australia’s Defence Force Manual states, with regard to inhabitants of occupied territory, that corporal punishment is prohibited.¹²⁵⁸

1367. Benin’s Military Manual states that “no one shall be subjected . . . to corporal punishment”.¹²⁵⁹

1368. Canada’s LOAC Manual prohibits corporal punishment of POWs, civilians and protected persons in international and non-international armed conflicts.¹²⁶⁰

1369. Colombia’s Circular on Fundamental Rules of IHL provides that “nobody shall be subjected to corporal punishment”.¹²⁶¹

1370. According to Croatia’s Instructions on Basic Rules of IHL, detainees must be protected against all acts of violence, including corporal punishment.¹²⁶²

1371. France’s LOAC Summary Note provides that no one shall be subjected to corporal punishment.¹²⁶³

1372. France’s LOAC Manual refers to Article 75 AP I and provides that corporal punishment is a war crime.¹²⁶⁴

¹²⁵⁷ Argentina, *Law of War Manual* (1989), §§ 3.25, 4.15 and 7.04.

¹²⁵⁸ Australia, *Defence Force Manual* (1994), § 1219.

¹²⁵⁹ Benin, *Military Manual* (1995), Fascicule II, p. 5 and Fascicule III, p. 4.

¹²⁶⁰ Canada, *LOAC Manual* (1999), p. 10-7, § 61, p. 11-4, § 33, p. 11-8, § 63-a(iii) and p. 17-3, § 21.

¹²⁶¹ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 5.

¹²⁶² Croatia, *Instructions on Basic Rules of IHL* (1993), §§ 4-5.

¹²⁶³ France, *LOAC Summary Note* (1992), § 3.2. ¹²⁶⁴ France, *LOAC Manual* (2001), p. 45.

1373. Israel's Manual on the Laws of War refers to GC III and provides that corporal punishment of POWs is prohibited.¹²⁶⁵

1374. Italy's IHL Manual provides that, in occupied territories, civilians shall not be subject to corporal punishment.¹²⁶⁶

1375. According to Madagascar's Military Manual, one of the seven fundamental rules of IHL is that nobody shall be subjected to corporal punishment.¹²⁶⁷

1376. The Military Manual of the Netherlands restates the prohibition of corporal punishment contained in Article 75 AP I and Article 4 AP II.¹²⁶⁸

1377. New Zealand's Military Manual provides that "corporal punishments [of POWs] . . . are forbidden".¹²⁶⁹ It restates Article 75(2) AP I, according to which "corporal punishment" is prohibited "at any time and in any place whatsoever, whether committed by civilian or by military agents".¹²⁷⁰ Regarding civilians, the manual stipulates that GC IV prohibits the parties from "taking any measure of such character as to cause the physical suffering . . . of protected persons in their hands", including corporal punishment.¹²⁷¹ In the case of non-international armed conflict, the manual prohibits at any time and anywhere "any form of corporal punishment".¹²⁷²

1378. Nicaragua's Military Manual states that the prohibition of corporal punishment is a fundamental guarantee.¹²⁷³

1379. Romania's Soldiers' Manual provides that captured combatants and civilians "shall not be subjected to . . . corporal punishments".¹²⁷⁴

1380. Spain's LOAC Manual states that corporal punishment of prisoners of war or persons protected by GC IV is prohibited at any time and in any place, whether carried out by military or by civilian agents.¹²⁷⁵

1381. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are part of customary international law.¹²⁷⁶

1382. Switzerland's military manuals provide that enemy civilians shall not be subjected to corporal punishment.¹²⁷⁷

1383. Togo's Military Manual provides that "no one shall be subjected . . . to corporal punishment".¹²⁷⁸

¹²⁶⁵ Israel, *Manual on the Laws of War* (1998), p. 53.

¹²⁶⁶ Italy, *IHL Manual* (1991), Vol. I, § 41(e).

¹²⁶⁷ Madagascar, *Military Manual* (1994), p. 91, Rule 5.

¹²⁶⁸ Netherlands, *Military Manual* (1993), pp. VIII-3 and XI-4.

¹²⁶⁹ New Zealand, *Military Manual* (1992), § 931.2.

¹²⁷⁰ New Zealand, *Military Manual* (1992), § 1137.2.

¹²⁷¹ New Zealand, *Military Manual* (1992), § 1321.4.

¹²⁷² New Zealand, *Military Manual* (1992), § 1812.1.

¹²⁷³ Nicaragua, *Military Manual* (1996), Article 14(31).

¹²⁷⁴ Romania, *Soldiers' Manual* (1991), p. 34, § 2.

¹²⁷⁵ Spain, *LOAC Manual* (1996), Vol. I, §§ 8.2.c and 8.7.b.

¹²⁷⁶ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

¹²⁷⁷ Switzerland, *Military Manual* (1984), p. 34; *Teaching Manual* (1986), p. 43; *Basic Military Manual* (1987), Article 147.

¹²⁷⁸ Togo, *Military Manual* (1996), Fascicule II, p. 5 and Fascicule III, p. 4.

1384. The UK Military Manual prohibits measures against protected persons which will cause physical suffering and states that “this prohibition applies . . . to corporal punishments”.¹²⁷⁹ It further states that “corporal punishments . . . are forbidden”.¹²⁸⁰ The manual states that, in occupied territories, the prohibition of measures of such character as to cause the physical suffering or extermination of protected persons in the hands of the occupant “applies . . . to corporal punishment”.¹²⁸¹ It recalls that “corporal punishment is excluded” with regard to the punishment of war criminals.¹²⁸²

1385. The UK LOAC Manual forbids corporal punishment.¹²⁸³

1386. The US Field Manual forbids corporal punishment of POWs and civilians.¹²⁸⁴

National Legislation

1387. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, it is prohibited to carry out corporal punishment against civilian persons and prisoners of war.¹²⁸⁵

1388. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.¹²⁸⁶

1389. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 87 GC III and 32 and 100 GC IV, and of AP I, including violations of Article 75(2)(iii) AP I, as well as any “contravention” of AP II, including violations of Article 4(2)(a) AP II, are punishable offences.¹²⁸⁷

1390. Mozambique’s Military Criminal Law provides that carrying out corporal punishments is a criminal offence.¹²⁸⁸

1391. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.¹²⁸⁹

¹²⁷⁹ UK, *Military Manual* (1958), § 42. ¹²⁸⁰ UK, *Military Manual* (1958), § 205.

¹²⁸¹ UK, *Military Manual* (1958), § 549. ¹²⁸² UK, *Military Manual* (1958), § 638.

¹²⁸³ UK, *LOAC Manual* (1981), Section 9, p. 35, § 9.

¹²⁸⁴ US, *Field Manual* (1956), §§ 163 and 271.

¹²⁸⁵ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 17(1) and 21(1).

¹²⁸⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹²⁸⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹²⁸⁸ Mozambique, *Military Criminal Law* (1987), Article 85(a).

¹²⁸⁹ Norway, *Military Penal Code as amended* (1902), § 108.

1392. Poland's Penal Code provides for the punishment of any person who, in violation of international law, subjects to corporal punishment persons *hors de combat*, protected persons and person enjoying international protection.¹²⁹⁰

National Case-law

1393. In 1995, Colombia's Constitutional Court held that prohibitions contained in Article 4(2) AP II were consistent with the Constitution, since they were not only in harmony with the principles and values of the Constitution, but also practically reproduced specific constitutional provisions.¹²⁹¹

Other National Practice

1394. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.¹²⁹²

1395. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".¹²⁹³

III. Practice of International Organisations and Conferences

United Nations

1396. In 1997, in a report on torture, the Special Rapporteur of the UN Commission on Human Rights took the view that:

Corporal punishment [a variety of methods of punishment, including flagellation, stoning, amputation of ears, fingers, toes or limbs, and branding or tattooing] is inconsistent with the prohibition of torture and other cruel, inhuman or degrading treatment or punishment enshrined, inter alia, in the [1948 UDHR, 1966 ICCPR], the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.¹²⁹⁴

Other International Organisations

1397. No practice was found.

¹²⁹⁰ Poland, *Penal Code* (1997), Article 124.

¹²⁹¹ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

¹²⁹² Report on the Practice of Jordan, 1997, Chapter 5.

¹²⁹³ Report on US Practice, 1997, Chapter 5.3.

¹²⁹⁴ UN Commission on Human Rights, Special Rapporteur on Torture, Report, UN Doc. E/CN.4/1997/7, 10 January 1997, §§ 5–6.

International Conferences

1398. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1399. In the *Semanza case* before the ICTR in 1997, the accused was charged with causing corporal punishment in a situation of non-international armed conflict in violation of Article 4(2)(a) AP II and Articles 22 and 23 of the ICTR Statute.¹²⁹⁵

1400. In its General Comment on Article 7 of the 1966 ICCPR in 1992, the HRC stated that the prohibition of torture and cruel, inhuman or degrading treatment or punishment “must extend to corporal punishment, including excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure”.¹²⁹⁶

1401. In its judgement in the *Tyrer case* in 1978 dealing with judicial corporal punishment, the ECtHR held that in that context, the offender was placed in a position where his dignity and physical integrity were compromised and that “the judicial corporal punishment inflicted on Mr. Tyrer amounted to degrading punishment within the meaning of Article 3 [of the 1950 ECHR]”.¹²⁹⁷

1402. In its judgement in the *A. v. UK case* in 1998, the ECtHR considered the corporal punishment carried by a stepfather (and not by a public official) and held that it could amount to inhumane treatment. The ECtHR stated that:

Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim... The Court considers that treatment of this kind reaches the level of severity prohibited by Article 3.¹²⁹⁸

V. Practice of the International Red Cross and Red Crescent Movement

1403. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “corporal punishment is prohibited”.¹²⁹⁹

1404. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that corporal punishment, as a serious violation of international

¹²⁹⁵ ICTR, *Semanza case*, Indictment, 21 October 1997, Count 7.

¹²⁹⁶ HRC, General Comment No. 20 (Article 7 ICCPR), 10 April 1992, § 5.

¹²⁹⁷ ECtHR, *Tyrer case*, Judgement, 25 April 1978, § 2 (decision).

¹²⁹⁸ ECtHR, *A. v. UK*, Judgement, 23 September 1998, §§ 20–21.

¹²⁹⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 193.

humanitarian law applicable in non-international armed conflicts, be subject to the jurisdiction of the Court.¹³⁰⁰

VI. Other Practice

1405. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “no one shall be subjected to . . . corporal punishment”.¹³⁰¹

1406. In 1985, Amnesty International reported that the People’s Assembly of the People’s Republic of Mozambique reintroduced corporal punishment for a number of offences, including for persons found to be members of RENAMO.¹³⁰²

F. Mutilation and Medical, Scientific or Biological Experiments

I. Treaties and Other Instruments

Treaties

1407. Common Article 3(1)(a) of the 1949 Geneva Conventions provides that mutilation of persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause is prohibited at any time and in any place whatsoever.

1408. Article 12 GC I provides that wounded and sick members of the armed forces in the field shall not be subjected to biological experiments. According to Article 50, conducting biological experiments on the wounded and sick is a grave breach of GC I.

1409. Article 12 GC II provides that wounded, sick and shipwrecked members of the armed forces at sea shall not be subjected to biological experiments. According to Article 51, conducting biological experiments on the wounded, sick and shipwrecked is a grave breach of GC II.

1410. Article 13 GC III provides that “no prisoner of war may be subject to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest”. According to Article 130, conducting biological experiments on prisoners of war is a grave breach of GC III.

1411. Under Article 32 GC IV, “mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person” are

¹³⁰⁰ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 3(i).

¹³⁰¹ ICRC archive document.

¹³⁰² Amnesty International, Reports of the use of torture in the People’s Republic of Mozambique, AI Index: AFR 41/102/85, April 1985, pp. 6–8.

prohibited. According to Article 147, conducting biological experiments on protected persons is a grave breach of GC IV.

1412. Article 7 of the 1966 ICCPR provides that “no one shall be subjected without his free consent to medical or scientific experimentation”.

1413. Article 11 AP I provides that:

1. The physical or mental health and integrity of persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1 shall not be endangered by any unjustified act or omission. Accordingly, it is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty.
2. It is, in particular, prohibited to carry out on such persons, even with their consent:
 - (a) physical mutilations;
 - (b) medical or scientific experiments;
 - (c) removal of tissue or organs for transplantation, except where these acts are justified in conformity with the conditions provided for in paragraph 1.
3. Exceptions to the prohibition in paragraph 2 (c) may be made only in the case of donations of blood for transfusion or of skin for grafting, provided that they are given voluntarily and without any coercion or inducement, and then only for therapeutic purposes, under conditions consistent with generally accepted medical standards and controls designed for the benefit of both the donor and the recipient.
4. Any wilful act or omission which seriously endangers the physical or mental health or integrity of any person who is in the power of a Party other than the one on which he depends and which either violates any of the prohibitions in paragraphs 1 and 2 or fails to comply with the requirements of paragraph 3 shall be a grave breach of this Protocol.
5. The persons described in paragraph 1 have the right to refuse any surgical operation. In case of refusal, medical personnel shall endeavour to obtain a written statement to that effect, signed or acknowledged by the patient.
6. Each Party to the conflict shall keep a medical record for every donation of blood for transfusion or skin for grafting by persons referred to in paragraph 1, if that donation is made under the responsibility of that Party. In addition, each Party to the conflict shall endeavour to keep a record of all medical procedures undertaken with respect to any person who is interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1. These records shall be available at all times for inspection by the Protecting Power.

Article 11 AP I was adopted by consensus.¹³⁰³

1414. Article 75(2) AP I prohibits, *inter alia*, acts of mutilation. Article 75 AP I was adopted by consensus.¹³⁰⁴

¹³⁰³ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.

¹³⁰⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

1415. According to Article 85 AP I, conducting biological experiments on protected persons is a grave breach of this instrument. Article 85 AP I was adopted by consensus.¹³⁰⁵

1416. Upon ratification of AP I, Canada stated that:

The Government of Canada does not intend to be bound by the prohibitions contained in Article 11, sub-paragraph 2 (c), with respect to Canadian nationals or other persons ordinarily resident in Canada who may be interned, detained or otherwise deprived of liberty as a result of a situation referred to in Article 1, so long as the removal of tissue or organs for transplantation is in accordance with Canadian laws and applicable to the population generally and the operation is carried out in accordance with normal Canadian medical practices, standards or ethics.¹³⁰⁶

1417. Upon ratification of AP I, Ireland stated that:

For the purposes of investigating any breach of the Geneva Conventions of 1949 or of the Protocols Additional to the Geneva Conventions of 1949 adopted at Geneva on 8 June 1977, Ireland reserves the right to take samples of blood, tissue, saliva or other bodily fluids for DNA comparisons from a person who is detained, interned or otherwise deprived of liberty as a result of a situation referred to in Article 1, in accordance with Irish law and normal Irish medical practice, standards and ethics. Ireland declares that nothing in Article 11 paragraph 2(c) shall prohibit the donation of tissue, bone marrow or of an organ from a person who is detained, interned or otherwise deprived of liberty as a result of a situation referred to in Article 2 to a close relative who requires a donation of tissue, bone marrow or an organ from such a person for medical reasons, so long as the removal of tissue, bone marrow or organs for transplantation is in accordance with Irish law and the operation is carried out in accordance with normal Irish medical practice, standards and ethics.¹³⁰⁷

1418. Article 4(2) AP II prohibits, *inter alia*, acts of mutilation. Article 4 AP II was adopted by consensus.¹³⁰⁸

1419. Article 5(2)(e) AP II provides that:

It is prohibited to subject the persons described in this Article to any medical procedure which is not indicated by the state of health of the person concerned, and which is not consistent with the generally accepted medical standards applied to free persons under similar medical circumstances.

Article 5 AP II was adopted by consensus.¹³⁰⁹

1420. According to Article 8(2)(a)(ii) of the 1998 ICC Statute, "biological experiments" committed against persons protected under the 1949 Geneva Conventions are war crimes.

¹³⁰⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291, § 72.

¹³⁰⁶ Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 1.

¹³⁰⁷ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, §§ 2–3.

¹³⁰⁸ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

¹³⁰⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

1421. Pursuant to Article 8(2)(b)(x) and (e)(xi) of the 1998 ICC Statute, the following is a war crime in both international and non-international armed conflicts:

subjecting persons who are in the power of an adverse party [or another party to the conflict] to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death or seriously endanger the health of such person or persons.

1422. Article 3 of the 2002 Statute of the Special Court for Sierra Leone provides that the Court is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions and AP II, which include “mutilation”.

Other Instruments

1423. Article 56 of the 1863 Lieber Code provides that “a prisoner of war is subject to no punishment for being a public enemy, nor is any revenge wreaked upon him by the intentional infliction of any suffering . . . by mutilation . . . or any other barbarity”.

1424. Principle 22 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “no detained or imprisoned person shall, even with his consent, be subjected to any medical or scientific experimentation which may be detrimental to his health”.

1425. According to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, biological experiments are considered to be an exceptionally serious war crime and a serious violation of the principles and rules of international law applicable in armed conflict.

1426. Under Article 2(b) of the 1993 ICTY Statute, the Tribunal is competent to prosecute individuals who have carried out biological experiments on persons protected under the provisions of the relevant Geneva Convention.

1427. According to Article 4(a) of the 1994 ICTR Statute, the Tribunal has jurisdiction to try acts in violation of common Article 3 of the 1949 Geneva Conventions, including “mutilation”.

1428. Article 18(k) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “inhumane acts which severely damage physical or mental integrity, health or human dignity, such as mutilation and severe bodily harm” constitute crimes against humanity. Article 20(a)(ii) states that biological experiments are war crimes. Article 20(f)(i) states that “mutilation” committed in violation of international humanitarian law applicable in armed conflict not of an international character is a war crime.

1429. Article 3(1) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that mutilation shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*. Article 4(9) adds that every possible measure shall be taken to prevent the mutilation of the wounded and sick.

1430. According to Section 7(2) of the 1999 UN Secretary-General's Bulletin, mutilation of persons not, or no longer, taking part in military operations and persons placed *hors de combat* is prohibited at any time and in any place.

1431. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(x) and (e)(xi), the following is a war crime in both international and non-international armed conflicts:

subjecting persons who are in the power of an adverse party [or another party to the conflict] to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death or seriously endanger the health of such person or persons.

II. National Practice

Military Manuals

1432. Argentina's Law of War Manual (1969) stipulates that prisoners of war "cannot be subjected to physical mutilation and to medical and scientific experiments of any kind not justified by medical treatment".¹³¹⁰ It adds that "it is especially prohibited to subject [the wounded and sick]... to biological experiments". The prohibition also applies to civilians.¹³¹¹

1433. Argentina's Law of War Manual (1989) provides that it is prohibited to subject the wounded and sick to medical procedures not indicated by their state of health.¹³¹² This prohibition extends to mutilation or scientific experiments on prisoners of war and civilians in occupied territories.¹³¹³ Such acts are identified as a grave breach of the Geneva Conventions.¹³¹⁴

1434. Australia's Commanders' Guide provides that "performing physical mutilations, conducting medical or scientific experimentation and removing tissue or organs for transplantation without consent" is a grave breach of the Geneva Conventions.¹³¹⁵

1435. Australia's Defence Force Manual provides that performing physical mutilations, conducting medical or biological experiments or scientific experimentation and removing tissue and organs for transplantation without consent on the wounded and sick, POWs and protected persons is prohibited and is considered a war crime. The manual refers to persons protected under the Geneva Conventions or the Additional Protocols.¹³¹⁶

¹³¹⁰ Argentina, *Law of War Manual* (1969), § 2.013.

¹³¹¹ Argentina, *Law of War Manual* (1969), §§ 3.001 (wounded and sick) and 4.012 (civilians).

¹³¹² Argentina, *Law of War Manual* (1989), § 2.04.

¹³¹³ Argentina, *Law of War Manual* (1989), § 3.12 (POWs) and § 4.29 (civilians in occupied territory).

¹³¹⁴ Argentina, *Law of War Manual* (1989), § 8.03.

¹³¹⁵ Australia, *Commanders' Guide* (1994), § 1305(m).

¹³¹⁶ Australia, *Defence Force Manual* (1994), §§ 953, 990, 1008, 1219 and 1315(m).

1436. Belgium's Law of War Manual provides that carrying out medical and biological experiments on protected persons is a grave breach of Geneva Conventions.¹³¹⁷

1437. The Instructions to the Muslim Fighter issued by the ARBiH in Bosnia and Herzegovina in 1993 stated that "Islam likewise forbids the . . . mutilation of enemy wounded".¹³¹⁸

1438. Burkina Faso's Disciplinary Regulations provides that it is prohibited to mutilate the wounded, sick and shipwrecked, prisoners and civilians.¹³¹⁹

1439. Canada's LOAC Manual provides that it is a violation of GC I to "subject the wounded, sick and shipwrecked, even with their consent, to physical mutilations, medical or scientific experiments, or the removal of tissue for transplantation, except where justified by their medical needs".¹³²⁰ It prohibits similar acts with regard to persons protected by GC IV.¹³²¹ The manual further provides that it is a war crime and a grave breach of AP I to subject a person to a medical procedure that

is not indicated by the state of health of that person, and . . . is not consistent with generally accepted medical standards applicable in similar circumstances to persons who are nationals of the party conducting the procedure and who are in no way deprived of liberty [and to subject a person] to medical or scientific experiments, [or] the removal of tissue for transplantation, except for donations of blood or of skin for grafting given voluntarily and in conformity with generally accepted medical standards, unless justified by the medical needs of the person.¹³²²

1440. Ecuador's Naval Manual provides that "nor may [the wounded and sick] be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards".¹³²³

1441. France's Disciplinary Regulations as amended provides that soldiers in combat are prohibited to subject the wounded, sick and shipwrecked, prisoners and civilians to mutilations.¹³²⁴

1442. France's LOAC Summary Note provides that biological experiments are war crimes under the law of armed conflicts.¹³²⁵

1443. France's LOAC Manual provides that mutilation is a war crime.¹³²⁶

1444. Germany's Military Manual provides that:

It is prohibited to subject wounded, sick and shipwrecked persons to any medical procedure which is not consistent with generally accepted standards. In particular,

¹³¹⁷ Belgium, *Law of War Manual* (1983), p. 55.

¹³¹⁸ Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.

¹³¹⁹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹³²⁰ Canada, *LOAC Manual* (1999), p. 9-2, § 21.

¹³²¹ Canada, *LOAC Manual* (1999), p. 11-4, § 33.

¹³²² Canada, *LOAC Manual* (1999), p. 16-2, § 15(a)-(b).

¹³²³ Ecuador, *Naval Manual* (1989), § 11.4.

¹³²⁴ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

¹³²⁵ France, *LOAC Summary Note* (1992), § 3.4.

¹³²⁶ France, *LOAC Manual* (2001), p. 45.

it is prohibited to carry out physical mutilation, medical or other scientific experiments or removal of tissue or organs for transplantation.

...

The wounded and sick have the right to refuse any surgical operation and similar manipulation, in which case medical personnel shall request a written statement to that effect, signed or acknowledged by the patient. Simple diagnostic measures, such as the taking of blood, shall be permitted, as shall measures necessary to prevent, combat and cure contagious diseases and epidemics.¹³²⁷

The manual further states that conducting biological experiments is a grave breach of IHL.¹³²⁸

1445. Israel's Manual on the Laws of War states that "the rationale behind the law of war is that even in the midst of the inferno, there are grave deeds that must not be committed (... medical experiments)".¹³²⁹

1446. Italy's IHL Manual provides that, in occupied territories, civilians shall not be subjected to "mutilations, medical or scientific experiments not indicated by their state of health".¹³³⁰

1447. Morocco's Disciplinary Regulations provides that soldiers in combat are prohibited to subject the wounded, sick and shipwrecked, prisoners and civilians to mutilations.¹³³¹

1448. The Military Manual of the Netherlands restates the prohibition of mutilation contained in Articles 75 AP I and 4 AP II.¹³³² It further states that "it is prohibited to subject the wounded and sick to mutilation and – even with their permission – to medical or scientific experiments". The manual lists "unnecessary medical treatment, mutilation and medical or scientific experiments" among grave breaches of the Geneva Conventions and AP I.¹³³³

1449. New Zealand's Military Manual provides that the sick, wounded and shipwrecked "must not be subject to any medical procedure which is not required by their state of health or which is inconsistent with accepted medical standards".¹³³⁴ The manual further states that GC IV prohibits the parties from "taking any measure of such character as to cause the physical suffering... of protected persons in their hands", including mutilation and medical or scientific experiments not necessitated by the medical treatment of a protected person.¹³³⁵ The manual considers biological experiments as a grave breach of GC I and II.¹³³⁶ It adds that:

¹³²⁷ Germany, *Military Manual* (1992), §§ 606 and 608.

¹³²⁸ Germany, *Military Manual* (1992), § 1209.

¹³²⁹ Israel, *Manual on the Laws of War* (1998), p. 4.

¹³³⁰ Italy, *IHL Manual* (1991), Vol. I, § 41(e).

¹³³¹ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

¹³³² Netherlands, *Military Manual* (1993), pp. VIII-3 and XI-4.

¹³³³ Netherlands, *Military Manual* (1993), pp. VI-2 and IX-5.

¹³³⁴ New Zealand, *Military Manual* (1992), § 1003.3, see also § 1003.1 and 4.

¹³³⁵ New Zealand, *Military Manual* (1992), § 1321.4.

¹³³⁶ New Zealand, *Military Manual* (1992), § 1702.1.

AP I, Art. 11, makes a number of medical practices grave breaches of the Protocol . . . It is a grave breach to carry out on persons detained by an adverse Party, even with their consent, physical mutilations, medical or scientific experiments or removal of tissue or organs for transplantation, except where such action is justified by the medical needs of the person affected.¹³³⁷

1450. Nigeria's Military Manual recalls the content of Article 12 GC I, which "expressly prohibits [subjecting the wounded and sick] to . . . biological experiments".¹³³⁸

1451. Nigeria's Manual on the Laws of War provides that biological experiments on all persons protected by the Geneva Conventions are war crimes.¹³³⁹ With regard to the wounded and sick, it adds that "it is particularly prohibited to . . . abandon them to scientific experiments".¹³⁴⁰

1452. Russia's Military Manual prohibits medical or scientific experiments carried out on war victims, namely the wounded, sick and shipwrecked, POWs and the civilian population.¹³⁴¹

1453. Senegal's Disciplinary Regulations provides that it is prohibited for soldiers in combat to mutilate the wounded, sick, shipwrecked, prisoners and civilians.¹³⁴²

1454. Senegal's IHL Manual provides that one of the fundamental guarantees common to the IHL conventions and the 1948 UDHR is the prohibition of medical acts on persons deprived of their liberty which are not justified by the state of health of the person concerned and are not in accordance with the generally accepted and recognised medical norms.¹³⁴³

1455. South Africa's LOAC Manual provides that one type of grave breach "relates to combat activities and medical experimentation. It requires both wilfulness and that death or serious injury to body or health is caused (Article 85(3))."¹³⁴⁴ The manual also provides that "physical experimentation and medical experiments (Article 22)" are grave breaches of AP I.¹³⁴⁵

1456. Spain's LOAC Manual provides that "it is not permitted to subject [POWs] to scientific experiments not justified by medical reasons or which are not in the interests of the prisoner".¹³⁴⁶ The manual further states that subjecting protected persons to medical procedures not required by their state of health and carrying out medical, biological or scientific experiments, committed by medical personnel, are war crimes.¹³⁴⁷ It adds that in occupied territories, "medical or scientific experiments not required by health" are absolutely prohibited.¹³⁴⁸ The manual also provides that subjecting "prisoners, internees

¹³³⁷ New Zealand, *Military Manual* (1992), § 1703.2.

¹³³⁸ Nigeria, *Military Manual* (1994), p. 13, § 4.

¹³³⁹ Nigeria, *Manual on the Laws of War* (undated), § 6(a).

¹³⁴⁰ Nigeria, *Manual on the Laws of War* (undated), § 35.

¹³⁴¹ Russia, *Military Manual* (1990), § 8(d). ¹³⁴² Senegal, *Disciplinary Regulations* (1990), § 2.

¹³⁴³ Senegal, *IHL Manual* (1999), pp. 3 and 24. ¹³⁴⁴ South Africa, *LOAC Manual* (1996), § 36(a).

¹³⁴⁵ South Africa, *LOAC Manual* (1996), § 37(e), see also § 40.

¹³⁴⁶ Spain, *LOAC Manual* (1996), Vol. I, § 8.4.a.(1).

¹³⁴⁷ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(2).

¹³⁴⁸ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.a.(3).

and any other detained person to acts which endanger their physical or mental integrity, such as mutilations, medical or scientific experiments, removal of tissues and organs and any medical procedure not indicated by their state of health and not applied in accordance with generally accepted medical standards" are grave breaches of the 1949 Geneva Conventions and constitute war crimes.¹³⁴⁹

1457. Sweden's IHL Manual provides that "biological experiments" are grave breaches of the Geneva Conventions.¹³⁵⁰

1458. Switzerland's Basic Military Manual provides that "medical and scientific experiments" run counter to the obligation of humane treatment and prohibits medical and scientific experiments other than those required for medical reasons. It adds that conducting biological experiments on persons protected by the Geneva Conventions constitutes a grave breach of these instruments.¹³⁵¹

1459. The UK Military Manual prohibits measures that cause physical suffering, including mutilations or scientific and medical experiments on protected persons. This rule also applies in occupied territories.¹³⁵² The manual specifies that biological experiments and "wilfully causing great suffering or serious injury to body or to health" are grave breaches of the Geneva Conventions.¹³⁵³

1460. The UK LOAC Manual provides that neither wounded and sick members of the opposing forces nor civilians may be subjected to biological experiments.¹³⁵⁴

1461. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions.¹³⁵⁵ The manual provides that "no prisoner of war may be subjected to physical mutilation or to medical or scientific experiments of any kind which are not justified by the medical, dental or hospital treatment of the prisoner concerned and carried out in his interest".¹³⁵⁶ The manual also provides that wounded and sick members of the armed forces shall not be subjected to biological experiments.¹³⁵⁷ It stipulates that medical or scientific experiments not necessitated by the medical treatment of a protected person are prohibited.¹³⁵⁸

The manual also provides that "biological experiments, wilfully causing great suffering or serious injury to body or health" are war crimes under the Geneva Conventions.¹³⁵⁹

1462. The US Air Force Pamphlet refers to Articles 12 GC I, 12 GC II and 13 GC III and prohibits medical, scientific and biological experiments.¹³⁶⁰

¹³⁴⁹ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

¹³⁵⁰ Sweden, *IHL Manual* (1991), Section 4.2, p. 93.

¹³⁵¹ Switzerland, *Basic Military Manual* (1987), Articles 97, 147 and 192.

¹³⁵² UK, *Military Manual* (1958), §§ 42, 282 and 549.

¹³⁵³ UK, *Military Manual* (1958), § 625(a).

¹³⁵⁴ UK, *LOAC Manual* (1981), Section 6, p. 22, § 2 and Section 9, p. 35, § 9.

¹³⁵⁵ US, *Field Manual* (1956), § 11. ¹³⁵⁶ US, *Field Manual* (1956), § 89.

¹³⁵⁷ US, *Field Manual* (1956), § 215. ¹³⁵⁸ US, *Field Manual* (1956), § 271.

¹³⁵⁹ US, *Field Manual* (1956), § 502.

¹³⁶⁰ US, *Air Force Pamphlet* (1976), §§ 12-2(a), 13-2 and 14-4.

1463. The US Instructor's Guide provides that subjecting captured persons to medical or scientific experiments is a capital offence prohibited at any time and in any place whatsoever.¹³⁶¹

1464. The US Naval Handbook provides that "nor may [the wounded and sick] be subjected to any medical procedure not called for by their condition or inconsistent with accepted medical standards".¹³⁶²

National Legislation

1465. Argentina's Draft Code of Military Justice punishes any soldier who submits protected persons to biological experiments and causes them great suffering or subjects them to "medical procedures which are not indicated by their state of health and which are not consistent with generally accepted medical standards which would, under similar medical circumstances, be applied by the responsible party to its own free nationals".¹³⁶³

1466. Armenia's Penal Code contains a list of crimes against the peace and security of mankind, including, when committed during an armed conflict, "biological experiments", as well as

medical procedure which is not indicated by the state of health of persons under the power of the enemy, . . . detrimental to the physical or mental health of these persons or violating generally accepted medical standards, even with the consent of these persons, inflicting physical injuries, subjecting people to medical or scientific experiments or the removal of tissue or organs for transplantation.¹³⁶⁴

1467. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence".¹³⁶⁵

1468. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "biological experiments" in international armed conflicts, as well as "mutilation" and "medical or scientific experiments" in both international and non-international armed conflicts.¹³⁶⁶ Furthermore, the Act incorporates in the Criminal Code, as war crimes, other grave breaches of AP I, including any "medical procedure" which "seriously endangers a person's physical or mental health or integrity" or which "is not justified by the state of health of the person", and "removal of blood, tissue or organs for transplantation".¹³⁶⁷

1469. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international

¹³⁶¹ US, *Instructor's Guide* (1985), p. 8. ¹³⁶² US, *Naval Handbook* (1995), § 11-4.

¹³⁶³ Argentina, *Draft Code of Military Justice* (1998), Article 289, introducing a new Article 873 in the *Code of Military Justice as amended* (1951).

¹³⁶⁴ Armenia, *Penal Code* (2003), Article 390.1(2) and Article 390.5.

¹³⁶⁵ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹³⁶⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.27, 268.47, 268.48, 268.71, 268.92 and 268.93.

¹³⁶⁷ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.95 and 268.96.

armed conflicts, medical or scientific experiments on prisoners of war are prohibited.¹³⁶⁸

1470. Azerbaijan's Criminal Code provides that medical, biological or other experiments and the removal of internal organs are violations of the laws and customs of war.¹³⁶⁹

1471. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹³⁷⁰

1472. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".¹³⁷¹

1473. The Criminal Code of Belarus provides that subjecting, even with their consent, persons that have laid down their arms or which are defenceless, the wounded, sick and shipwrecked, medical and religious personnel, prisoners of war, the civilian population in an occupied territory or in the conflict zone or other persons enjoying international protection to medical, scientific or biological experiments is a violation of the laws and customs of war.¹³⁷²

1474. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols provides that the following acts constitute crimes under international law:

biological experiments, . . . acts and omissions not justified in the law which are likely to endanger the physical or mental health and integrity of persons protected by one of the Conventions relative to the protection of wounded, sick and shipwrecked persons, in particular any medical procedure which is not indicated by the state of health of such persons or not consistent with generally accepted medical standards . . . [and] acts which consist in carrying out . . . physical mutilations, medical or scientific experiments or the removal of tissue or organs for transplantation, except in the cases of donations of blood for transfusion or of skin for grafting, provided that such donations are voluntary, consented to and intended for therapeutic purposes.¹³⁷³

1475. The Criminal Code of the Federation of Bosnia and Herzegovina provides that subjecting civilians, prisoners of war, the wounded, sick and shipwrecked to biological, medical and scientific experiments, removal of tissues and organs

¹³⁶⁸ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 21(1).

¹³⁶⁹ Azerbaijan, *Criminal Code* (1999), Article 115.2.

¹³⁷⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹³⁷¹ Barbados, *Geneva Conventions Act* (1980), Section 3(2).

¹³⁷² Belarus, *Criminal Code* (1999), Article 135(2).

¹³⁷³ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(2) and (9)-(10).

for transplant are war crimes.¹³⁷⁴ The Criminal Code of the Republika Srpska contains the same provision.¹³⁷⁵

1476. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".¹³⁷⁶

1477. Bulgaria's Penal Code as amended provides that ordering or carrying out biological experiments or torture on the wounded, sick, shipwrecked, medical personnel, prisoners of war and the civilian population is a war crime.¹³⁷⁷

1478. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, the following acts constitute war crimes in both international and non-international armed conflicts "subjecting persons falling into the hands of the enemy to mutilations or medical or scientific experiments of any kind which are neither required by medical, dental or hospital procedures nor required by their state of health".¹³⁷⁸

1479. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 ... which were committed during the period from 17 April 1975 to 6 January 1979".¹³⁷⁹

1480. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions or of AP I] is guilty of an indictable offence".¹³⁸⁰

1481. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹³⁸¹

1482. Colombia's Penal Code provides for the punishment of anyone who, during an armed conflict, inflicts on a protected person biological experiments or subjects a protected person to any medical act which is not indicated and not in conformity with the generally recognised medical norms.¹³⁸²

1483. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹³⁸³

¹³⁷⁴ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154(1), 155 and 156.

¹³⁷⁵ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1), 434 and 435.

¹³⁷⁶ Botswana, *Geneva Conventions Act* (1970), Section 3(1).

¹³⁷⁷ Bulgaria, *Penal Code as amended* (1968), Articles 410(a), 411(a) and 412(a).

¹³⁷⁸ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(b) and (j) and (D)(k).

¹³⁷⁹ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

¹³⁸⁰ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹³⁸¹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹³⁸² Colombia, *Penal Code* (2000), Article 141.

¹³⁸³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

1484. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I]”.¹³⁸⁴

1485. Under Côte d’Ivoire’s Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, biological experiments on the civilian population constitutes a “crime against the civilian population”.¹³⁸⁵

1486. Croatia’s Criminal Code provides that it is a war crime to subject the civilian population, the wounded, sick and shipwrecked, prisoners of war, medical or religious personnel to medical, to scientific and biological experiments and to removal of tissues and organs for transplantation.¹³⁸⁶

1487. Cyprus’s Geneva Conventions Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions”.¹³⁸⁷

1488. Cyprus’s AP I Act punishes “any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach”.¹³⁸⁸

1489. The Draft Amendments to the Penal Code of El Salvador provide for the punishment of “anyone who during an international or internal armed conflict conducts biological experiments that cause harm to the physical and mental health of protected persons”.¹³⁸⁹ It also punishes the carrying out of “medical procedures not indicated by the state of health of protected persons, or which are not in conformity with the generally accepted medical norms”.¹³⁹⁰

1490. Ethiopia’s Penal Code provides that carrying out biological experiments is a war crime against the civilian population.¹³⁹¹

1491. Under Georgia’s Criminal Code, in international or internal armed conflicts, it is a crime to subject protected persons to medical experiments. It adds that it also constitutes a crime to subject persons under the authority of a party (in detention or deprived of liberty) to

any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party conducting the procedure, in particular, subjecting such persons, even with their consent:

¹³⁸⁴ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹³⁸⁵ Côte d’Ivoire, *Penal Code as amended* (1981), Article 138(1).

¹³⁸⁶ Croatia, *Criminal Code* (1997), Articles 158, 159 and 160.

¹³⁸⁷ Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

¹³⁸⁸ Cyprus, *AP I Act* (1979), Section 4(1).

¹³⁸⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Experimentos biológicos”.

¹³⁹⁰ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled “Actos médicos dañinos”.

¹³⁹¹ Ethiopia, *Penal Code* (1957), Article 282(a).

- (a) to acts causing physical mutilations;
- (b) carrying out medical and scientific experiments;
- (c) removal of tissue or organs for transplantation.¹³⁹²

1492. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international or non-international armed conflict, mutilates a person who is to be protected under international humanitarian law or who

exposes a person who is to be protected under international humanitarian law to the risk of death or of serious injury to health

- a) by carrying out experiments on such person and who has not consented in advance or whether the experiments concerned are neither medically necessary nor carried out in his or her interest,
- b) by removing tissue or organs from such a person for transplantation purposes, save where blood or skin is taken for therapeutic purposes consistent with generally recognized medical principles and where the person has freely and expressly consented in advance, or
- c) by using on such persons methods of treatment which are not medically recognized, without there being any medical necessity for doing so and without the person having freely and expressly consented in advance.¹³⁹³

1493. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".¹³⁹⁴

1494. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions and of AP I are punishable offences.¹³⁹⁵ In addition, any "minor breach" of the Geneva Conventions, including violations of common Article 3, of Articles 12 GC I, 12 GC II, 13 GC III and 32 GC IV, and of AP I, including violations of Article 75(2) AP I, as well as any "contravention" of AP II, including violations of Articles 4(2) and 5(2)(e) AP II, are also punishable offences.¹³⁹⁶

1495. Under Jordan's Draft Military Criminal Code, the following acts constitute war crimes:

biological experiments, ...mutilations, medical and scientific experiments, removal of tissues and organs for transplantations not indicated by the state of health of [protected persons, internees and persons deprived of their liberty in connection with an armed conflict] and which are not in conformity with generally accepted medical standards applied in similar circumstances to operations on own nationals.¹³⁹⁷

¹³⁹² Georgia, *Criminal Code* (1999), Articles 411(2)(b) and 412.

¹³⁹³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(3) and (8).

¹³⁹⁴ India, *Geneva Conventions Act* (1960), Section 3(1).

¹³⁹⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹³⁹⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹³⁹⁷ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(2) and (20).

1496. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".¹³⁹⁸

1497. Under the Draft Amendments to the Code of Military Justice of Lebanon, the following acts constitute war crimes:

biological experiments, ... mutilations, medical and scientific experiments, removal of tissues and organs for transplantations not indicated by the state of health of [protected persons, internees and persons deprived of their liberty in connection with an armed conflict] and which are not in conformity with medical standards respected in similar medical circumstances during operations on own nationals.¹³⁹⁹

1498. Under Lithuania's Criminal Code as amended, carrying out biological experiments on protected persons and removal of organs or tissues for transplantation constitute war crimes.¹⁴⁰⁰

1499. Luxembourg's Law on the Punishment of Grave Breaches provides that carrying out biological experiments on protected persons is a grave breach of the Geneva Conventions.¹⁴⁰¹

1500. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".¹⁴⁰²

1501. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the ... [Geneva] conventions".¹⁴⁰³

1502. Under Mali's Penal Code, carrying out medical experiments is a war crime. It adds that mutilation of and carrying out any medical and scientific experiments on enemy persons which are not justified by their state of health is a war crime in international armed conflicts.¹⁴⁰⁴

1503. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".¹⁴⁰⁵

1504. Moldova's Penal Code provides for the punishment of anyone who subjects the wounded, sick, prisoners, civilians, civilian medical personnel or personnel of Red Cross and other similar organisations to "medical, biological or scientific experiments not justified by their state of health".¹⁴⁰⁶

¹³⁹⁸ Kenya, *Geneva Conventions Act* (1968), Section 3(1).

¹³⁹⁹ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(2) and (20).

¹⁴⁰⁰ Lithuania, *Criminal Code as amended* (1961), Article 335.

¹⁴⁰¹ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(2).

¹⁴⁰² Malawi, *Geneva Conventions Act* (1967), Section 4(1).

¹⁴⁰³ Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

¹⁴⁰⁴ Mali, *Penal Code* (2001), Article 31(a) and (i)(10).

¹⁴⁰⁵ Mauritius, *Geneva Conventions Act* (1970), Section 3(1).

¹⁴⁰⁶ Moldova, *Penal Code* (2002), Article 137.

1505. Under the International Crimes Act of the Netherlands, it is a crime to commit “in the case of an international armed conflict, one of the grave breaches of the Geneva Conventions”, including “biological experiments”,¹⁴⁰⁷ as well as grave breaches of AP I, including:

any intentional act or omission which jeopardises the health of anyone who is in the power of a party other than the party to which he or she belongs, and which:

- (i) entails any medical treatment which is not necessary as a consequence of the state of health of the person concerned and is not consistent with generally accepted medical standards which would be applied under similar medical circumstances to persons who are nationals of the party responsible for the acts and who are in no way deprived of their liberty;
- (ii) entails the carrying out on the person concerned, even with his consent, of physical mutilations;
- (iii) entails the carrying out on the person concerned, even with his consent, of medical or scientific experiments; or
- (iv) entails removing from the person concerned, even with his consent, tissue or organs for transplantation.¹⁴⁰⁸

Likewise, it is a crime, whether in time of international or non-international armed conflict, to subject

persons who are in the power of an adverse party to the conflict to physical mutilation or medical or scientific experiments of any kind, which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest, and which cause death to or seriously endanger the health of such persons.¹⁴⁰⁹

Furthermore, it is also a crime to commit, “in the case of an armed conflict not of an international character, a violation of Article 3 common to all of the Geneva Conventions”, including “mutilation” of persons taking no active part in the hostilities.¹⁴¹⁰

1506. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence”.¹⁴¹¹

1507. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(x) and (e)(xi) of the 1998 ICC Statute.¹⁴¹²

1508. Nicaragua’s Military Penal Code punishes the carrying out on prisoners of war of “medical and scientific experiments not justified by their state of health and without their consent”.¹⁴¹³

¹⁴⁰⁷ Netherlands, *International Crimes Act* (2003), Article 5(1)(b).

¹⁴⁰⁸ Netherlands, *International Crimes Act* (2003), Article 5(2)(b).

¹⁴⁰⁹ Netherlands, *International Crimes Act* (2003), Articles 5(3)(c) and 6(3)(c).

¹⁴¹⁰ Netherlands, *International Crimes Act* (2003), Article 6(1)(a).

¹⁴¹¹ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁴¹² New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁴¹³ Nicaragua, *Military Penal Code* (1996), Article 54.

1509. Nicaragua's Draft Penal Code provides for the punishment of anyone who "during an international or internal armed conflict conducts biological experiments . . . on protected persons". It also punishes "carrying out medical procedures not justified by the state of health of the protected persons and which are not in conformity with generally accepted medical standards".¹⁴¹⁴

1510. According to Niger's Penal Code as amended, the following acts, committed against persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977, constitute war crimes: mutilations, medical, scientific or biological experiments, removal of tissues and organs for transplantation, as well as

acts and omissions which are not legally justified and which may endanger the physical and mental integrity of persons protected by one of the conventions relative to the protection of the wounded, sick and shipwrecked, including any act which is not justified by the state of health of these persons or not in conformity with generally accepted medical standards.¹⁴¹⁵

1511. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".¹⁴¹⁶

1512. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".¹⁴¹⁷

1513. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".¹⁴¹⁸

1514. Paraguay's Penal Code provides for the punishment of anyone who, in violation of the international laws of war, armed conflict or military occupation, carries out medical and scientific experiments against the civilian population, the wounded and sick or prisoners of war.¹⁴¹⁹

1515. Poland's Penal Code provides for the punishment of any person who, in violation of international law, carries out scientific experiments on persons *hors de combat*, protected persons and persons enjoying international protection.¹⁴²⁰

1516. Romania's Penal Code punishes the carrying out of medical and scientific experiments on the wounded, sick and shipwrecked, members of civil medical

¹⁴¹⁴ Nicaragua, *Draft Penal Code* (1999), Articles 446–447.

¹⁴¹⁵ Niger, *Penal Code as amended* (1961), Article 208.3(2) and Article 208.3(9)–(10).

¹⁴¹⁶ Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

¹⁴¹⁷ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁴¹⁸ Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

¹⁴¹⁹ Paraguay, *Penal Code* (1997), Article 320(2).

¹⁴²⁰ Poland, *Penal Code* (1997), Article 123(2), see also Article 118(1) (causing serious harm to health as part of a genocide campaign).

services, the Red Cross or similar organisations, prisoners of war, or on all persons in the hands of the adverse party, or subjecting them to mutilations or medical procedures not justified by their state of health.¹⁴²¹

1517. The Geneva Conventions Act of the Seychelles punishes “any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions”.¹⁴²²

1518. Singapore’s Geneva Conventions Act punishes “any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention”.¹⁴²³

1519. Under Slovenia’s Penal Code, subjecting civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel to biological, medical and other scientific experiments or removal of tissues and organs for transplantation is a war crime.¹⁴²⁴

1520. Spain’s Military Criminal Code provides for the punishment of military personnel who carry out medical or scientific experiments on the wounded, sick and shipwrecked, prisoners of war or the civilian population.¹⁴²⁵

1521. Spain’s Penal Code punishes anyone who, in time of armed conflict, subjects any protected person to biological experiments or medical treatment not justified by their state of health and not recognised by medical standards.¹⁴²⁶

1522. Sri Lanka’s Draft Geneva Conventions Act provides that “a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, (a) a grave breach of any of the [Geneva] Conventions; or (b) a breach of common Article 3 of the Conventions, is guilty of an indictable offence.”¹⁴²⁷

1523. Tajikistan’s Criminal Code provides for the punishment of anyone carrying out, in an international or internal armed conflict, medical, scientific or biological experiments on protected persons or subjecting them to mutilations, removal of tissues and organs for transplantation or any other medical procedure not indicated by their state of health and not conforming to generally accepted medical standards.¹⁴²⁸

1524. Thailand’s Prisoners of War Act provides for the punishment of “whoever subjects a prisoner of war to medical, biological, or scientific experiments of any kind which are not justified by the medical treatment of the prisoner

¹⁴²¹ Romania, *Penal Code* (1968), Article 358.

¹⁴²² Seychelles, *Geneva Conventions Act* (1985), Section 3(1).

¹⁴²³ Singapore, *Geneva Conventions Act* (1973), Section 3(1).

¹⁴²⁴ Slovenia, *Penal Code* (1994), Articles 374(1), 375 and 376.

¹⁴²⁵ Spain, *Military Criminal Code* (1985), Article 76.

¹⁴²⁶ Spain, *Penal Code* (1995), Article 609.

¹⁴²⁷ Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1).

¹⁴²⁸ Tajikistan, *Criminal Code* (1998), Articles 403(2)(b) and 404.

concerned". This prohibition also extends to persons protected by common Article 3 of the 1949 Geneva Conventions.¹⁴²⁹

1525. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(x) and (e)(xi) of the 1998 ICC Statute.¹⁴³⁰

1526. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".¹⁴³¹

1527. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions or of [AP I]".¹⁴³²

1528. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(x) and (e)(xi) of the 1998 ICC Statute.¹⁴³³

1529. Under the US War Crimes Act as amended, grave breaches of the Geneva Conventions are war crimes.¹⁴³⁴

1530. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".¹⁴³⁵

1531. Under Yemen's Military Criminal Code, subjecting prisoners of war or civilians to any scientific experiment is a war crime.¹⁴³⁶

1532. Under the Penal Code as amended of the SFRY (FRY), subjecting civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel to biological, medical and other scientific experiments or removal of tissues and organs for transplantation is a war crime.¹⁴³⁷

1533. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions or [AP I]".¹⁴³⁸

National Case-law

1534. In its judgement in the *Videla case* in 1994 concerning the abduction, torture and murder of Lumi Videla in Chile in 1974, Chile's Appeal Court

¹⁴²⁹ Thailand, *Prisoners of War Act* (1955), Section 12 (prisoners of war) and Section 18 (persons protected by common Article 3).

¹⁴³⁰ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁴³¹ Uganda, *Geneva Conventions Act* (1964), Section 1(1).

¹⁴³² UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹⁴³³ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁴³⁴ US, *War Crimes Act as amended* (1996), Section 2441(c).

¹⁴³⁵ Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).

¹⁴³⁶ Yemen, *Military Criminal Code* (1998), Article 21(2).

¹⁴³⁷ SFRY (FRY), *Penal Code as amended* (1976), Articles 142–144.

¹⁴³⁸ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

of Santiago stated that common Article 3 of the 1949 Geneva Conventions obliged parties to non-international armed conflicts "to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons, and prohibits at any time and in any place . . . mutilation".¹⁴³⁹

1535. Colombia's Constitutional Court held in 1995 that the prohibitions contained in Article 4(2) AP II were consistent with the Constitution, since they were not only in harmony with the principles and values of the Constitution, but also practically reproduced specific constitutional provisions.¹⁴⁴⁰

1536. In the *Hoess trial* in 1947, the Supreme National Tribunal of Poland convicted individuals charged with committing "medical war crimes", including "castration experiments, experiments intended to produce sterilization, premature termination of pregnancy and other experiments on pregnant or child-bearing women, experiments of artificial insemination, experiments aimed at cancer research".¹⁴⁴¹

1537. In its judgement in the *Milch case* in 1947, the US Military Tribunal at Nuremberg found the accused guilty of conducting medical experiments on prisoners of war and inhabitants of occupied territories without their consent.¹⁴⁴²

1538. In the *Brandt (The Medical Trial) case* in 1947, the US Military Tribunal at Nuremberg convicted 16 persons of carrying out medical experiments on prisoners of war and civilians which amounted to cruel and inhuman treatment and which were war crimes and crimes against humanity. The Tribunal found the accused guilty of committing medical experiments which included, but was not limited to:

High Altitude Experiments, Freezing Experiments, Malaria Experiments, Mustard Gas Experiments, Ravensbrueck Experiments Concerning Sulphanilamide and Other Drugs; Bone, Muscle, and Nerve Regeneration and Bone Transplantation, Sea-Water Experiments, Epidemic Jaundice, Sterilization Experiments, Typhus (Fleckfieber) and Related Experiments, Poison Experiments, Incendiary Bomb Experiments, Jewish Skeleton Collection.

The Tribunal also held that:

Obviously all of these experiments involving brutalities, tortures, disabling injuries and death were performed in complete disregard of international conventions, the laws and customs of war, the general principle of criminal law as derived from the criminal laws of all civilized nations . . . Manifestly inhuman experiments under such conditions are contrary to "the principles of the laws of nations as they result from the usages established among civilized peoples, from the laws of humanity, and from the dictates of public conscience."¹⁴⁴³

¹⁴³⁹ Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994.

¹⁴⁴⁰ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

¹⁴⁴¹ Poland, Supreme National Tribunal at Poznan, *Hoess trial*, Judgement, 11-29 March 1947.

¹⁴⁴² US, Military Tribunal at Nuremberg, *Milch case*, Judgement, 17 April 1947.

¹⁴⁴³ US, Military Tribunal at Nuremberg, *Brandt (The Medical Trial) case*, Judgement, 20 August 1947.

1539. In its judgement in the *Schultz case* in 1969, the US Court of Military Appeals identified maiming among “crimes universally recognized as properly punishable under the law of war”.¹⁴⁴⁴

Other National Practice

1540. In 1994, in a note to foreign embassies and all international humanitarian organizations in Azerbaijan, the Ministry of Foreign Affairs of Azerbaijan denounced cases of removal of organs for transplantation by the adverse party.¹⁴⁴⁵

1541. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that:

We support the principle reflected in article 11 [AP I] that the physical or mental health and integrity of persons under the control of a party to the conflict not be endangered by any unjustified act or omission and not be subjected to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards.¹⁴⁴⁶

1542. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.¹⁴⁴⁷

1543. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular experiments conducted on living prisoners of war. The resolution asked the government of Japan to apologise for these crimes and pay immediate reparations to the victims.¹⁴⁴⁸

III. Practice of International Organisations and Conferences

United Nations

1544. In 1992, in reports submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described acts of mutilation perpetrated by the parties to the conflict.¹⁴⁴⁹

¹⁴⁴⁴ US, Court of Military Appeals, *Schultz case*, Judgement, 7 March 1969.

¹⁴⁴⁵ Azerbaijan, Ministry of Foreign Affairs, Note 151, Baku, 26 March 1994.

¹⁴⁴⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

¹⁴⁴⁷ Report on US Practice, 1997, Chapter 5.3.

¹⁴⁴⁸ US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON. RES. 357, 106th Congress, 2nd Session, 19 June 2000.

¹⁴⁴⁹ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791,

Other International Organisations

1545. No practice was found.

International Conferences

1546. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1547. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called “elementary considerations of humanity”.¹⁴⁵⁰

1548. In the *Semanza case* before the ICTR in 1997, the accused was charged with causing mutilations in a situation of non-international armed conflict in violation of common Article 3 of the 1949 Geneva Conventions, Article 4(2)(a) AP II and Articles 22 and 23 of the 1994 ICTR Statute.¹⁴⁵¹

1549. In its General Comment on Article 7 ICCPR in 1992, the HRC held that:

Article 7 expressly prohibits medical or scientific experimentation without the free consent of the person concerned. The Committee notes that the reports of States parties generally contain little information on this point. More attention should be given to the need and means to ensure observance of this provision. The Committee also observes that special protection in regard to such experiments is necessary in the case of persons not capable of giving valid consent, and in particular those under any form of detention or imprisonment. Such persons should not be subjected to any medical or scientific experimentation that may be detrimental to their health.¹⁴⁵²

1550. In 1992, in *Herczegfalvy v. Austria*, the ECtHR stated that:

83. In this case it is above all the length of time during which the handcuffs and security bed were used . . . which appears worrying. However, the evidence before the Court is not sufficient to disprove the Government's argument that, according to the psychiatric principles generally accepted at the time, medical necessity justified the treatment in issue [i.e. treatment with antibiotics and neuroleptics] . . .

84. No violation of Article 3 (art. 3) [of the 1950 ECHR] has thus been shown.¹⁴⁵³

10 November 1992, pp. 8 and 13; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Fourth Submission), annexed to Letter dated 7 December 1992 to the UN Secretary-General, UN Doc. S/24918, 8 December 1992, p. 12.

¹⁴⁵⁰ ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

¹⁴⁵¹ ICTR, *Semanza case*, Indictment, 21 October 1997, Count 7.

¹⁴⁵² HRC, General Comment No. 20 (Article 7 ICCPR), 10 March 1992, § 7.

¹⁴⁵³ ECtHR, *Herczegfalvy v. Austria*, Judgement (Merits and just satisfaction), 24 September 1992, §§ 83–84.

V. Practice of the International Red Cross and Red Crescent Movement

1551. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “mutilation is prohibited, unless indicated by the state of health of the individual or medical ethics (e.g. removal of tissue or organs for transplantation)”.¹⁴⁵⁴

1552. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following crimes, when committed in an international armed conflict, be subject to the jurisdiction of the Court:

biological experiments . . . subjecting persons who are in the power of the adverse Party or who are interned, detained or otherwise deprived of liberty, to any medical procedure which is not indicated by the state of health of the person concerned and which is not consistent with generally accepted medical standards which would be applied in similar medical circumstances to persons who are nationals of the Party conducting the procedure and who are in no way deprived of liberty, in particular to carry out on such persons, even with their consent:

- a) physical mutilations;
- b) medical or scientific experiments;
- c) removal of tissue or organs for transplantation.¹⁴⁵⁵

In addition, the ICRC proposed that the crime of “mutilation”, when committed in a non-international armed conflict, be subject to the jurisdiction of the Court.¹⁴⁵⁶

VI. Other Practice

1553. In 1987, in a meeting with the ICRC, the leader of an armed opposition group criticised the inhuman treatment of prisoners by other parties to the conflict but later admitted to mutilating certain prisoners to dissuade them from fighting.¹⁴⁵⁷

1554. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “mutilation” shall remain prohibited.¹⁴⁵⁸

¹⁴⁵⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 194.

¹⁴⁵⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(a)(ii) and (d).

¹⁴⁵⁶ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 3(i).

¹⁴⁵⁷ ICRC archive document.

¹⁴⁵⁸ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(a), *IRRC*, No. 282, 1991, p. 331.

G. Rape and Other Forms of Sexual Violence

I. Treaties and Other Instruments

Treaties

1555. Common Article 3(1)(c) of the 1949 Geneva Conventions provides that “outrages upon personal dignity” are prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.

1556. Article 27, second paragraph, GC IV provides that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault”.

1557. Article 1 of the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others provides that:

The Parties to the present Convention agree to punish any person who . . .

- (1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person;
- (2) Exploits the prostitution of another person, even with the consent of that person.

1558. Article 75(2)(b) AP I provides that “enforced prostitution and any form of indecent assault” shall remain prohibited at any time and in any place whatsoever. Article 75 AP I was adopted by consensus.¹⁴⁵⁹

1559. Article 4(2)(e) AP II provides that “enforced prostitution and any form of indecent assault” shall remain prohibited at any time and in any place whatsoever. Article 4 AP II was adopted by consensus.¹⁴⁶⁰

1560. Article 76(1) AP I provides that women “shall be protected in particular against rape, forced prostitution and any other form of indecent assault”. Article 76 AP I was adopted by consensus.¹⁴⁶¹

1561. Article 77(1) AP I provides that children “shall be protected against any form of indecent assault”. Article 77 AP I was adopted by consensus.¹⁴⁶²

1562. Article 27 of the 1990 African Charter on the Rights and Welfare of the Child provides that:

States Parties to the present Charter shall undertake to protect the child from all forms of sexual exploitation and sexual abuse and shall in particular take measures to prevent: (a) the inducement, coercion or encouragement of a child to engage in any sexual activity; (b) the use of children in prostitution or other sexual practices; (c) the use of children in pornographic activities, performances and materials.

1563. Pursuant to Article 6(d) of the 1998 ICC Statute, “imposing measures intended to prevent births within the group” constitutes genocide when

¹⁴⁵⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

¹⁴⁶⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

¹⁴⁶¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

¹⁴⁶² CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

“committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.

1564. Pursuant to Article 7(1)(g) of the 1998 ICC Statute, “rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity” constitutes a crime against humanity “when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”.

1565. Pursuant to Article 8(2)(b)(xxii) and (e)(vi) of the 1998 ICC Statute, “committing rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence” constitutes a war crime in both international and non-international armed conflicts.

1566. Article 1 of the 2000 Optional Protocol on Child Trade, Prostitution and Pornography provides that the States parties shall prohibit child prostitution and child pornography.

1567. Article 1 of the 2000 Protocol on Trafficking in Persons states that “the purposes of this Protocol are . . . (a) to prevent and combat trafficking in persons, paying particular attention to women and children”. Article 5 of the same Protocol provides that:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol [i.e. trafficking in persons] , when committed intentionally.
2. Each State Party shall also adopt such legislative and other measures as may be necessary to establish as criminal offences:
 - (a) Subject to the basic concepts of its legal system, attempting to commit an offence established in accordance with paragraph 1 of this article;
 - (b) Participating as an accomplice in an offence established in accordance with paragraph 1 of this article; and
 - (c) Organizing or directing other persons to commit an offence established in accordance with paragraph 1 of this article.

1568. Article 3 of the 2002 SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution provides that:

1. The State Parties to the Convention shall take effective measures to ensure that trafficking in any form is an offence under their respective criminal law and shall make such an offence punishable by appropriate penalties which take into account its grave nature.
2. The State Parties to the Convention, in their respective territories, shall provide for punishment of any person who keeps, maintains or manages or knowingly finances or takes part in the financing of a place used for the purpose of trafficking and knowingly lets or rents a building or other place or any part thereof for the purpose of trafficking.
3. Any attempt or abetment to commit any crime mentioned in paras 1 and 2 above or their financing shall also be punishable.

1569. Article 3(e) of the 2002 Statute of the Special Court for Sierra Leone states that “the Special Court shall have the power to prosecute persons who

committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977", which include rape, enforced prostitution and any form of indecent assault.

Other Instruments

1570. Article 44 of the 1863 Lieber Code provides that "all rape [of persons in the invaded country] is prohibited".

1571. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including rape and the abduction of girls and women for the purpose of enforced prostitution.

1572. Article II(1)(c) of the 1945 Allied Control Council Law No. 10 provides that "rape, or other inhumane acts committed against any civilian population" is a crime against humanity.

1573. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

1574. Under Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.

1575. The preamble to the 1993 UN Declaration on the Elimination of Violence against Women expresses concern about the fact that "women in situations of armed conflict are especially vulnerable to violence". Article 2 of the Declaration provides that:

Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

1576. Article 5(g) of the 1993 ICTY Statute provides that rape, when committed in armed conflict, whether international or internal in character, and directed against any civilian population, constitutes a crime against humanity.

1577. According to Article 3(g) of the 1994 ICTR Statute, rape, when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds, constitutes a crime against humanity. Article 4(c) provides that the Tribunal is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions, including rape, enforced prostitution and any form of indecent assault.

1578. Under Article 18(j) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “rape, enforced prostitution and any form of sexual abuse” constitute crimes against humanity.

1579. Article 20(d) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind states that “rape, enforced prostitution and any form of indecent assault” committed in violation of international humanitarian law applicable in international conflict are war crimes.

1580. Article 20(f)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind stipulates that “rape, enforced prostitution and any form of indecent assault” constitutes a war crime in conflicts not of an international character.

1581. Article 2(7) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right not to be subject to rape and sexual abuse.

1582. According to Section 7.2, 7.3 and 7.4 of the 1999 UN Secretary-General’s Bulletin, rape, enforced prostitution or any form of sexual assault and humiliation against persons not, or no longer, taking part in military operations and persons placed *hors de combat*, with a specific reference to women and children, are prohibited at any time and in any place.

1583. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxii) and (e)(vi), “committing rape, sexual slavery, enforced prostitution, forced pregnancy . . . enforced sterilization, or any other form of sexual violence” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

1584. Argentina’s Law of War Manual (1969) stipulates that “women will be especially protected against attempts on their honour, particularly against rape, enforced prostitution and indecent assault”.¹⁴⁶³

1585. Argentina’s Law of War Manual (1989) states that “women shall be subject to special respect and protected particularly against all forms of indecent assault”. It provides that forced prostitution and any other form of indecent

¹⁴⁶³ Argentina, *Law of War Manual* (1969), § 4.010.

assault are prohibited in international and internal armed conflicts and in occupied territories.¹⁴⁶⁴

1586. Australia's *Commanders' Guide* states that the Geneva Conventions provide "particular protection for women and children, specifically against acts of rape or indecency".¹⁴⁶⁵

1587. Australia's *Defence Force Manual* stipulates that "women receive special protection under LOAC against any attack on their honour, in particular against rape, forced prostitution and any other form of indecent assault".¹⁴⁶⁶

1588. Canada's *LOAC Manual* provides that women must be specially protected against any attack on their honour, in particular against rape, enforced prostitution or any other form of indecent assault. It states that this provision also applies in occupied territories. According to the manual, rape is a crime against humanity.¹⁴⁶⁷

1589. Canada's *Code of Conduct* provides that "women and children in particular must not be subjected to rape, enforced prostitution, and any form of indecent assault".¹⁴⁶⁸

1590. The *PLA Rules of Discipline* provides that women are not to be assailed with obscenities.¹⁴⁶⁹

1591. The *Military Manual of the Dominican Republic* provides that "women in combat zones shall be protected against sexual assault and forced prostitution".¹⁴⁷⁰

1592. El Salvador's *Human Rights Charter of the Armed Forces* lists the prohibition of sexual violence against women as one of the ten basic rules. It stipulates that it is prohibited to commit sexual abuse and that soldiers "do not permit others to commit" such acts. According to the manual, sexual abuse is a violation of human rights.¹⁴⁷¹

1593. El Salvador's *Soldiers' Manual* instructs soldiers not to mistreat women.¹⁴⁷²

1594. France's *LOAC Teaching Note* provides that acts of rape are criminally prosecuted.¹⁴⁷³ It states that rape is a grave breach of the law of armed conflict.¹⁴⁷⁴

1595. France's *LOAC Manual* restates Article 7(1) of the 1998 ICC Statute.¹⁴⁷⁵ It adds that "forced prostitution and any attempts on decency" and "rape" are crimes against humanity.¹⁴⁷⁶

¹⁴⁶⁴ Argentina, *Law of War Manual* (1989), §§ 4.13, 4.15, 4.27 and 7.04.

¹⁴⁶⁵ Australia, *Commanders' Guide* (1994), § 603.

¹⁴⁶⁶ Australia, *Defence Force Manual* (1994), §§ 946, 1010 and 1218.

¹⁴⁶⁷ Canada, *LOAC Manual* (1999), p. 10-3, § 21, p. 11-4, § 30, p. 11-8, § 63, p. 12-4, § 37, p. 16-1, § 4 and p. 17-3, § 21(e).

¹⁴⁶⁸ Canada, *Code of Conduct* (2001), Rule 4, § 2.

¹⁴⁶⁹ China, *PLA Rules of Discipline* (1947), Point 8.

¹⁴⁷⁰ Dominican Republic, *Military Manual* (1980), p. 10.

¹⁴⁷¹ El Salvador, *Human Rights Charter of the Armed Forces* (undated), Rule 6, pp. 3, 13 and 18.

¹⁴⁷² El Salvador, *Soldiers' Manual* (undated), p. 3.

¹⁴⁷³ France, *LOAC Teaching Note* (2000), p. 2. ¹⁴⁷⁴ France, *LOAC Teaching Note* (2000), p. 7.

¹⁴⁷⁵ France, *LOAC Manual* (2001), p. 43. ¹⁴⁷⁶ France, *LOAC Manual* (2001), p. 45.

1596. Germany's Military Manual provides that "any attack on the honour of women, in particular rape, enforced prostitution, or any other form of indecent assault, is prohibited".¹⁴⁷⁷

1597. Israel's Manual on the Laws of War states that "the rationale behind the law of war is that even in the midst of the inferno, there are grave deeds [such as rape] that must not be committed". It recalls the definition of crimes against humanity contained in the 1998 ICC Statute, stating that "crimes against humanity were defined as the systematic harming of a civilian population, which includes deeds such as: . . . rape".¹⁴⁷⁸

1598. Madagascar's Military Manual states that "women . . . shall be subject to special respect and protected against any indecent assault".¹⁴⁷⁹

1599. The Military Manual of the Netherlands restates the prohibition of sexual violence found in common Article 3 to the 1949 Geneva Conventions, Articles 75–77 AP I and Article 4 AP II.¹⁴⁸⁰

1600. New Zealand's Military Manual provides that female civilians and female prisoners must be specially protected against rape and other forms of sexual assault.¹⁴⁸¹ It further specifies that "women must be specially protected against any attack on their honour, in particular against rape, enforced prostitution or any other form of indecent assault".¹⁴⁸² The manual restates Article 75(2) AP I.¹⁴⁸³ In the case of non-international armed conflict, the manual prohibits, at any time and anywhere, "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault".¹⁴⁸⁴

1601. Nicaragua's Military Manual provides that fundamental guarantees for the wounded and sick, POWs and civilians include protection against "degrading treatments and indecent assaults".¹⁴⁸⁵

1602. Nigeria's Operational Code of Conduct provides that "women will be protected against any attack on their person, honor and in particular against rape or any form of indecent assault".¹⁴⁸⁶

1603. Peru's Human Rights Charter of the Security Forces lists the prohibition of sexual violence against women and children as one of the ten basic rules.¹⁴⁸⁷

1604. Senegal's IHL Manual provides that one of the fundamental guarantees common to the IHL conventions and the 1948 UDHR is the prohibition of rape, forced prostitution and any form of sexual assault.¹⁴⁸⁸

¹⁴⁷⁷ Germany, *Military Manual* (1992), § 504.

¹⁴⁷⁸ Israel, *Manual on the Laws of War* (1998), pp. 4 and 68.

¹⁴⁷⁹ Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 27.

¹⁴⁸⁰ Netherlands, *Military Manual* (1993), pp. VIII-3, XI-1 and XI-4.

¹⁴⁸¹ New Zealand, *Military Manual* (1992), § 916.

¹⁴⁸² New Zealand, *Military Manual* (1992), § 1114, see also § 1321.2 (civilians).

¹⁴⁸³ New Zealand, *Military Manual* (1992), § 1137.2.

¹⁴⁸⁴ New Zealand, *Military Manual* (1992), § 1812.1.

¹⁴⁸⁵ Nicaragua, *Military Manual* (1996), Article 14(32).

¹⁴⁸⁶ Nigeria, *Operational Code of Conduct* (1967), § 4(i).

¹⁴⁸⁷ Peru, *Human Rights Charter of the Security Forces* (1991), Rule 6.

¹⁴⁸⁸ Senegal, *IHL Manual* (1999), pp. 3 and 23.

1605. Spain's LOAC Manual stipulates that "women are subject to special respect and shall be protected in particular against all forms of indecent assault".¹⁴⁸⁹ It prohibits "attacks on personal dignity, especially degrading and humiliating treatment, enforced prostitution and any form of indecent assault".¹⁴⁹⁰

1606. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I and the general protection of women contained in 76(1) AP I are part of customary international law.¹⁴⁹¹ It further specifies that "women shall be especially protected against any form of insulting treatment".¹⁴⁹²

1607. Switzerland's military manuals provide that women must be particularly respected and protected against rape, enforced prostitution and any other form of indecent assault.¹⁴⁹³

1608. Uganda's Operational Code of Conduct provides that rape is a crime that entails a specific punishment.¹⁴⁹⁴

1609. The UK Military Manual states that "women must be specially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault". The manual states that the rule also applies in occupied territories.¹⁴⁹⁵ It further specifies that forcing women into prostitution, even if it is not considered a grave breach of the Geneva Conventions, qualifies as a war crime.¹⁴⁹⁶

1610. The UK LOAC Manual provides that "the question of honour of women is specific; there must be no rape, no enforced prostitution and no indecent assault".¹⁴⁹⁷

1611. The US Field Manual restates Article 27 GC IV.¹⁴⁹⁸

1612. The US Air Force Pamphlet provides with regard to national or occupied territories that "women are to be protected against sexual attack and enforced prostitution".¹⁴⁹⁹

1613. The US Soldier's Manual states that "women in war zones must be protected against rape and forced prostitution".¹⁵⁰⁰

1614. The US Instructor's Guide provides with regard to the treatment of non-combatants that "women must be protected from attacks on their honour, to include any form of sexual assault".¹⁵⁰¹

¹⁴⁸⁹ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1).

¹⁴⁹⁰ Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.

¹⁴⁹¹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

¹⁴⁹² Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.

¹⁴⁹³ Switzerland, *Military Manual* (1984), p. 34; *Basic Military Manual* (1987), Article 146; *Teaching Manual* (1986), p. 43.

¹⁴⁹⁴ Uganda, *Operational Code of Conduct* (1986), Rule 26(d).

¹⁴⁹⁵ UK, *Military Manual* (1958), §§ 39 and 547.

¹⁴⁹⁶ UK, *Military Manual* (1958), § 626.

¹⁴⁹⁷ UK, *LOAC Manual* (1981), Section 9, p. 35, § 9.

¹⁴⁹⁸ US, *Field Manual* (1956), § 266. ¹⁴⁹⁹ US, *Air Force Pamphlet* (1976), § 14-4.

¹⁵⁰⁰ US, *Soldier's Manual* (1984), p. 21. ¹⁵⁰¹ US, *Instructor's Guide* (1985), pp. 8 and 13.

1615. The US Operational Law Handbook states that the “law of war specifically prohibits any attacks on [women’s] honour, including any form of sexual assault”.¹⁵⁰²

1616. The YPA Military Manual of the SFRY (FRY) provides for the protection of women against attacks on their honour, especially rape and forced prostitution.¹⁵⁰³

National Legislation

1617. Argentina’s Draft Code of Military Justice punishes any soldier who subjects any protected person to enforced prostitution or any form of indecent assault.¹⁵⁰⁴

1618. Under Armenia’s Penal Code, the “application of . . . humiliating practices” during an armed conflict constitutes a crime against the peace and security of mankind.¹⁵⁰⁵ It is also the case of acts of genocide, including “violently preventing births” within a national, ethnic, racial or religious group.¹⁵⁰⁶

1619. Australia’s War Crimes Act provides that rape and “abduction of girls and women for the purpose of enforced prostitution” are war crimes.¹⁵⁰⁷

1620. Under Australia’s War Crimes Act as amended, rape, indecent assault and “abduction, or procuring, for immoral purposes” are considered serious war crimes.¹⁵⁰⁸

1621. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes defined in the 1998 ICC Statute, including: “genocide by imposing measures intended to prevent births”; crimes against humanity, including “rape”, “sexual slavery”, “enforced prostitution”, “forced pregnancy”, “enforced sterilisation” and “sexual violence”; and war crimes, including “rape”, “sexual slavery”, “enforced prostitution”, “forced pregnancy”, “enforced sterilisation” and “sexual violence”, in both international and non-international armed conflicts.¹⁵⁰⁹

1622. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, rape of civilian persons, degrading and humiliating treatment of women, forced prostitution and attacks on their dignity are prohibited. It further prohibits the rape of prisoners of war and adds that “women and young girls are especially protected against attacks on their honour”.¹⁵¹⁰

¹⁵⁰² US, *Operational Law Handbook* (1993), p. Q-192(2)(a).

¹⁵⁰³ SFRY (FRY), *YPA Military Manual* (1988), § 253.

¹⁵⁰⁴ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).

¹⁵⁰⁵ Armenia, *Penal Code* (2003), Article 390.4(3).

¹⁵⁰⁶ Armenia, *Penal Code* (2003), Article 393.

¹⁵⁰⁷ Australia, *War Crimes Act* (1945), Section 3.

¹⁵⁰⁸ Australia, *War Crimes Act as amended* (1945), Sections 6(1) and 7(1).

¹⁵⁰⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.6, 268.14-268.19, 268.59-268.64 and 268.82-268.87.

¹⁵¹⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 17(2), 21(1) and 22(1).

1623. Azerbaijan's Criminal Code provides that "committing rape, sexual slavery, enforced prostitution, enforced sterilization and other acts related to sexual violence" are war crimes.¹⁵¹¹

1624. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹⁵¹²

1625. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity" constitutes a crime under international law.¹⁵¹³

1626. The Criminal Code of the Federation of Bosnia and Herzegovina provides that forced prostitution and rape of civilians is a war crime.¹⁵¹⁴ The Criminal Code of the Republika Srpska contains the same provision.¹⁵¹⁵

1627. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that "rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilisation or any other form of sexual violence" constitutes a grave breach of the Geneva Conventions.¹⁵¹⁶

1628. Canada's Crimes against Humanity and War Crimes Act provides that genocide, crimes against humanity and war crimes defined in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁵¹⁷

1629. China's Law Governing the Trial of War Criminals provides that rape and "kidnapping females and forcing them to become prostitutes" is a war crime.¹⁵¹⁸

1630. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, carries out or orders the "carrying out of forced sexual acts on protected persons" and "forced prostitution or sexual slavery".¹⁵¹⁹

1631. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "imposing measures intended to prevent births" within an ethnical, racial or religious group, as such, with intent to destroy the group, in whole or in part, constitutes a crime of genocide.¹⁵²⁰ Moreover, "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation and any other form of

¹⁵¹¹ Azerbaijan, *Criminal Code* (1999), Article 116.0.17, see also Article 108 (gender violations: rape, gender enslavement, enforced prostitution and any other forms of sexual violence).

¹⁵¹² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹⁵¹³ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(2)(7).

¹⁵¹⁴ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

¹⁵¹⁵ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

¹⁵¹⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(u), see also Articles 4(C)(f) and 2(d) (genocide) and Article 3(g) (crimes against humanity).

¹⁵¹⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁵¹⁸ China, *Law Governing the Trial of War Criminals* (1946), Article 3(3) and (17).

¹⁵¹⁹ Colombia, *Penal Code* (2000), Articles 139 and 141.

¹⁵²⁰ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 1.

sexual violence of comparable gravity" when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.¹⁵²¹ The Act further defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁵²²

1632. Croatia's Criminal Code provides that forced prostitution and rape are war crimes.¹⁵²³

1633. Under El Salvador's Penal Code, "adopting measures aimed at preventing reproduction" of a national, racial or religious group, with the intent to destroy partially or totally such group, is a crime of genocide.¹⁵²⁴

1634. Estonia's Penal Code provides that rape of a civilian person is a war crime.¹⁵²⁵

1635. Under Ethiopia's Penal Code "compulsion to acts of prostitution, debauchery and rape" are war crimes against the civilian population.¹⁵²⁶

1636. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "rape, sexual slavery, enforced prostitution, forced pregnancy, . . . enforced sterilisation, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions" in international and non-international armed conflicts, is a war crime.¹⁵²⁷

1637. Germany's Law Introducing the International Crimes Code, provides for the punishment of anyone who, in connection with an international or non-international armed conflict, "sexually coerces, rapes, forces into prostitution or deprives a person who is to be protected under international humanitarian law of his or her reproductive capacity, or confines a woman forcibly made pregnant with the intent of affecting the ethnic composition of any population".¹⁵²⁸

1638. Under Hungary's Criminal Code as amended, taking measures aiming at prevention of births within a national, ethnic, racial or religious group, as a part of a genocide campaign, constitutes a "crime against the freedom of peoples".¹⁵²⁹

1639. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of common Article 3

¹⁵²¹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.

¹⁵²² Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁵²³ Croatia, *Criminal Code* (1997), Article 158.

¹⁵²⁴ El Salvador, *Penal Code* (1997), Article 361.

¹⁵²⁵ Estonia, *Penal Code* (2001), § 97, see also § 89 (rape and subjection to prostitution as crimes against humanity) and § 90 (coercive measures preventing childbirth within a group as part of a genocide campaign).

¹⁵²⁶ Ethiopia, *Penal Code* (1957), Article 282(f).

¹⁵²⁷ Georgia, *Criminal Code* (1999), Article 413(d).

¹⁵²⁸ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(4), see also § 6(1)(4) (genocide) and § 7(1)(6) (crimes against humanity).

¹⁵²⁹ Hungary, *Criminal Code as amended* (1978), Section 155(1)(d).

and Article 27 GC IV, and of AP I, including violations of Articles 75(2), 76(1) and 77(1) AP I, as well as any “contravention” of AP II, including violations of Article 4(2)(e) AP II, are punishable offences.¹⁵³⁰

1640. Israel’s Nazis and Nazi Collaborators (Punishment) Law includes “imposing measures intended to prevent births among Jews” in its definition of genocide.¹⁵³¹

1641. South Korea’s Military Criminal Code provides that the rape of women in combat or in an occupied zone is punishable by the death penalty.¹⁵³²

1642. Under Lithuania’s Criminal Code as amended, “rape of women or forcing them to engage in prostitution” constitutes a war crime.¹⁵³³

1643. Mali’s Penal Code provides that “rape, sexual slavery, forced prostitution, forced pregnancies, forced sterilisation or any other form of sexual violence which is a grave breach of the 1949 Geneva Conventions” constitutes a war crime in international armed conflicts.¹⁵³⁴

1644. Mozambique’s Military Criminal Law criminalises sexual intercourse with a woman against her will, as well as the rape of minors under 12 years old.¹⁵³⁵

1645. Myanmar’s Defence Service Act provides that:

Any person subject to this law who commits an offence . . . of rape in relation to [any person not subject to military law] shall not be deemed to be guilty of an offence against this act and shall not be tried by a court-martial unless he commits any of the said offences . . . while in active service.¹⁵³⁶

1646. The Definition of War Crimes Decree of the Netherlands includes “rape” and “abduction of girls and women for the purpose of enforced prostitution” in its list of war crimes.¹⁵³⁷

1647. Under the International Crimes Act of the Netherlands, “rape, sexual slavery, enforced prostitution, enforced sterilisation, or any other form of sexual violence which can be deemed to be of a gravity comparable to a grave breach of the Geneva Conventions”, “forced pregnancy”, as well as “outrages upon personal dignity, in particular humiliating and degrading treatment” of persons taking no active part in the hostilities, constitute crimes, whether committed in time of international or non-international armed conflict.¹⁵³⁸

¹⁵³⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁵³¹ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b).

¹⁵³² South Korea, *Military Criminal Code* (1962), Article 84(1).

¹⁵³³ Lithuania, *Criminal Code as amended* (1961), Article 336.

¹⁵³⁴ Mali, *Penal Code* (2001), Article 31(i)(22), see also Article 29(g) (sexual violence as a crime against humanity) and Article 30(d) (prevention of births as part of a genocide campaign).

¹⁵³⁵ Mozambique, *Military Criminal Law* (1987), Article 85(b)–(c).

¹⁵³⁶ Myanmar, *Defence Services Act* (1959), Section 72.

¹⁵³⁷ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

¹⁵³⁸ Netherlands, *International Crimes Act* (2003), Articles 5(3)(a) and (b), 5(5)(j), 6(1)(c) and 6(2)(a) and (b), see also Article 3(1)(d) (imposition of measures intended to prevent births within a group as part of a genocide campaign) and Article 4(1)(g) (rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity as crimes against humanity).

1648. Under New Zealand's International Crimes and ICC Act, genocide includes the crimes defined in Article 6(d) of the 1998 ICC Statute, crimes against humanity include the crimes defined in Article 7(1)(g) of the Statute, and war crimes include the crimes defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.¹⁵³⁹

1649. According to Niger's Penal Code as amended, it is a crime of genocide to adopt "measures aimed at preventing birth" within a group, with the intent to destroy partially or totally a national, ethnic, racial or religious group or a group defined on the basis of any other arbitrary criterion.¹⁵⁴⁰

1650. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".¹⁵⁴¹

1651. Under Paraguay's Military Penal Code, rape is a crime.¹⁵⁴²

1652. Under Slovenia's Penal Code, forced prostitution and rape are war crimes.¹⁵⁴³

1653. Spain's Military Criminal Code provides for the punishment of military personnel who commit rape of the wounded, sick and shipwrecked, prisoners of war or the civilian population.¹⁵⁴⁴

1654. Under Spain's Penal Code, in time of war, armed conflict or occupation, acts of rape, sexual assault and enforced prostitution are criminal offences.¹⁵⁴⁵

1655. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit genocide as defined in Article 6(d) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(g) of the Statute, and a war crime as defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.¹⁵⁴⁶

1656. Under the UK ICC Act, it is a punishable offence to commit genocide as defined in Article 6(d) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(g) of the Statute, and a war crime as defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.¹⁵⁴⁷

1657. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of... abduction for prostitution, or raping" committed war crimes.¹⁵⁴⁸

¹⁵³⁹ New Zealand, *International Crimes and ICC Act* (2000), Sections 9(2), 10(2) and 11(2).

¹⁵⁴⁰ Niger, *Penal Code as amended* (1961), Article 208.1.

¹⁵⁴¹ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁵⁴² Paraguay, *Military Penal Code* (1980), Articles 289–290.

¹⁵⁴³ Slovenia, *Penal Code* (1994), Article 374(1).

¹⁵⁴⁴ Spain, *Military Criminal Code* (1985), Article 76.

¹⁵⁴⁵ Spain, *Penal Code* (1995), Article 612(3).

¹⁵⁴⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁵⁴⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁵⁴⁸ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

1658. The Penal Code as amended of the SFRY (FRY) provides that forced prostitution and rape are war crimes.¹⁵⁴⁹

National Case-law

1659. In its judgement in the *Takashi Sakai case* in 1946, the War Crimes Military Tribunal of the Chinese Ministry of National Defence found the accused guilty of war crimes and crimes against humanity inasmuch as he had incited or permitted his subordinates to commit, *inter alia*, acts of rape.¹⁵⁵⁰

1660. In 1995, Colombia's Constitutional Court held that the prohibitions contained in Article 4(2) AP II practically reproduced specific constitutional provisions.¹⁵⁵¹

1661. In its judgement in the *John Schultz case* in 1952, the US Court of Military Appeals listed rape as a "crime universally recognized as properly punishable under the law of war".¹⁵⁵²

1662. In the civil action brought against Radovan Karadžić in the US in 1995, a US Court of Appeals held that rape committed in the course of hostilities violated the laws of war and was a war crime.¹⁵⁵³

1663. In its memorandum opinion concerning the admissibility of the claim in the *Comfort Women case* in 2001, the US District Court of Columbia stated that "Japan's use of its war-time military to impose 'a premeditated master plan' of sexual slavery upon the women of occupied Asian countries might be characterized properly as a war crime or a crime against humanity".¹⁵⁵⁴

Other National Practice

1664. In response to a report by the Australian Joint Standing Committee on Foreign Affairs, Defence and Trade, which recommended that the Australian government establish a mechanism for investigating and identifying those responsible for serious crimes, including rape, committed in the former Yugoslavia, the Australian government replied that this mechanism was already in place subsequent to the enactment of the International War Crimes Tribunal Act of 1995.¹⁵⁵⁵

¹⁵⁴⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

¹⁵⁵⁰ China, War Crimes Military Tribunal of the Ministry of National Defence, *Takashi Sakai case*, Judgement, 29 August 1946.

¹⁵⁵¹ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

¹⁵⁵² US, Court of Military Appeals, *John Schultz case*, Judgement, 5 August 1952.

¹⁵⁵³ US, Court of Appeals for the Second Circuit, *Karadžić case*, Decision, 13 October 1995.

¹⁵⁵⁴ US, District Court of Columbia, *Comfort Women case*, Memorandum Opinion and Judgement, 4 October 2001.

¹⁵⁵⁵ Australia, Department of Foreign Affairs and Trade, Legal Office, *Australian Practice in International Law*, 1995, Chapter XII, printed in *Australian Yearbook of International Law*, 1996, pp. 626–628.

1665. In 1991, three political parties in the German parliament tabled a resolution that referred to rape as a crime in the context of the Sudanese civil war.¹⁵⁵⁶

1666. In 1992, in a written reply to questions in parliament concerning the systematic rape of Muslim women and girls by Serb forces in Bosnia and Herzegovina, the German government stated that it had made “vigorous and repeated representations to the ‘Yugoslav’ government, both bilaterally and within the framework of the European Community, in connection with these rapes and other grave human rights violations”. It reaffirmed that rape was “already prohibited in armed conflict and deemed a war crime under the existing provisions of international humanitarian law” and cited Article 27 GCIV and Article 4(2)(e) AP II in support of its position. The government further stated that “should the reports of systematic mass rape of predominantly Muslim women and girls be confirmed, this would, moreover, meet the statutory definition for systematic harm to an ethnical group within the meaning of the 1948 Genocide Convention”.¹⁵⁵⁷

1667. In a letter to parliament in 1993, the Minister of Foreign Affairs of the Netherlands condemned the maltreatment and rape of women in the former Yugoslavia.¹⁵⁵⁸

1668. In 1995, the Commission on Human Rights of the Philippines proposed that rape and sexual violence in situations of conflict be recognised as war crimes.¹⁵⁵⁹

1669. In 1993, during a debate in the House of Lords in 1993, the UK Minister of State, FCO, stated that “rape probably already comes within the definition of a war crime”.¹⁵⁶⁰

1670. In 1994, in a briefing note on Britain’s peacemaking role in the former Yugoslavia, the UK Minister of State, FCO, in reply to the question as to whether he considered rape as a war crime, stated that:

In international armed conflicts, a war crime can be defined as any serious violation of the laws and customs of war, including grave breaches of the 1949 Geneva Conventions. Article 27 of the Fourth Geneva Convention specifically prohibits rape; and Article 3, which applies to non-international armed conflicts and which

¹⁵⁵⁶ Germany, Lower House of Parliament, Proposal by the CDU/CSU and FDP, Entwicklungspolitische Chancen in Umbruchsituationen nutzen – entwicklungspolitische Herausforderungen und den Beispielen Äthiopien einschließlich Eritrea, Somalia, Sudan und Angola, *BT-Drucksache* 12/1814, 11 December 1991, p. 4.

¹⁵⁵⁷ Germany, Lower House of Parliament, Answer by the government to questions by members of Parliament, Systematische Vergewaltigung als Mittel der serbischen Kriegsführung u.a. in Bosnien, *BT-Drucksache* 12/4048, 29 December 1992, pp. 2–3.

¹⁵⁵⁸ Netherlands, Lower House of Parliament, Letter from the Minister of Foreign Affairs concerning the situation in Yugoslavia, 1992–1993 Session, Doc. 22 181, No. 36, 25 February 1993, p. 1.

¹⁵⁵⁹ Philippines, Commission on Human Rights, *Philippine Human Rights Plan 1996–2000*, 1995, Vol. 2, § 14.

¹⁵⁶⁰ UK, House of Lords, Statement by the Minister of State, FCO, *Hansard*, 24 May 1993, Vol. 225, col. 575.

is common to all four Conventions, refers to “outrages upon personal dignity, in particular humiliating and degrading treatment”. This would clearly include rape.¹⁵⁶¹

1671. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that . . . women be protected against rape and indecent assault”.¹⁵⁶²

1672. In 1992, in reports submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described acts of sexual violence and rape perpetrated by the parties to the conflict.¹⁵⁶³

1673. In 1992, in its final report on the conduct of the Gulf War, the US Department of Defense listed some specific Iraqi war crimes, in particular “inhumane treatment of Kuwaiti and third country civilians, to include rape”.¹⁵⁶⁴

1674. In 1998, in response to the situation in Kosovo, but also referring to the other conflicts in the former Yugoslavia, the US Congress adopted a resolution by unanimous consent stating that:

Whereas there is reason to believe that as President of the Federal Republic of Yugoslavia (Serbia and Montenegro), Slobodan Milošević was responsible for the conception and direction of a war of aggression . . . and that mass rape and forced impregnation were among the tools used to wage this war . . .

it is the sense of Congress that . . . the United States should publicly declare that it considers that there is reason to believe that Slobodan Milošević, President of the Federal Republic of Yugoslavia (Serbia and Montenegro), has committed war crimes, crimes against humanity and genocide.¹⁵⁶⁵

1675. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular the rape of civilian women on the island of Guam and in Nanjing.¹⁵⁶⁶

¹⁵⁶¹ UK, House of Lords, Briefing Note by the Foreign and Commonwealth Office on Britain’s peacemaking role in former Yugoslavia, *Hansard*, 9 June 1994, Vol. 555, col. 1321.

¹⁵⁶² US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

¹⁵⁶³ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, pp. 7–8; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Second Submission), annexed to Letter dated 22 October 1992 to the UN Secretary-General, UN Doc. S/24705, 23 October 1992, pp. 7, 10–11 and 13; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, Annex, pp. 9 and 16–18; Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Fourth Submission), annexed to Letter dated 7 December 1992 to the UN Secretary-General, UN Doc. S/24918, 8 December 1992, pp. 6–8, 10 and 12.

¹⁵⁶⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.

¹⁵⁶⁵ US, Congress, S. Con. Resolution 105 on the Sense of Congress Regarding the Culpability of Slobodan Milošević, 17 July 1998, *Congressional Record* (Senate), pp. S8456–S8458.

¹⁵⁶⁶ US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON. RES. 357, 106th Congress, 2nd Session, 19 June 2000.

1676. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.¹⁵⁶⁷

1677. In an exceptional report submitted to CEDAW in 1993, the FRY reported its position that abuses of women in war zones were crimes contrary to IHL and apologised for an earlier statement which might have given the false impression that rape was considered normal behaviour in times of war.¹⁵⁶⁸

III. Practice of International Organisations and Conferences

United Nations

1678. In a resolution adopted in 1992, the UN Security Council stated that it was “appalled by reports of massive, organised and systematic detention and rape of women, in particular Muslim women, in Bosnia and Herzegovina” and strongly condemned “these acts of unspeakable brutality”.¹⁵⁶⁹

1679. In a resolution adopted in 1993 in the context of the conflict in Bosnia and Herzegovina, the UN Security Council stated that it condemned “massive, organized and systematic detention and rape of women”.¹⁵⁷⁰

1680. In a resolution adopted in 1993, the UN Security Council expressed grave alarm at the widespread and flagrant violations of IHL occurring within the territory of the former Yugoslavia, especially Bosnia and Herzegovina, including “reports of massive, organised and systematic rape of women”.¹⁵⁷¹

1681. In a resolution adopted in 1995 on the situation in Bosnia and Herzegovina, the UN Security Council stated that rape was a “grave violation of international humanitarian law”.¹⁵⁷²

1682. In a resolution adopted in 1995, the UN Security Council expressed grave concern and condemned in the strongest possible terms the violations of IHL and human rights in Bosnia and Herzegovina, including “evidence of a consistent pattern of rape”.¹⁵⁷³

1683. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council urged all parties to armed conflicts “to take special measures to protect children, in particular girls, from rape and other forms of sexual abuse and gender-based violence in situations of armed conflict”.¹⁵⁷⁴

¹⁵⁶⁷ Report on US Practice, 1997, Chapter 5.3.

¹⁵⁶⁸ FRY, Statement before CEDAW, UN Doc. A/48/39, 12 April 1994, §§ 761 and 769.

¹⁵⁶⁹ UN Security Council, Res. 798, 18 December 1992, preamble and § 2.

¹⁵⁷⁰ UN Security Council, Res. 820, 17 April 1993, § 6.

¹⁵⁷¹ UN Security Council, Res. 827, 25 May 1993, preamble.

¹⁵⁷² UN Security Council, Res. 1019, 9 November 1995, preamble.

¹⁵⁷³ UN Security Council, Res. 1034, 21 December 1995, preamble and § 2.

¹⁵⁷⁴ UN Security Council, Res. 1261, 25 August 1999, § 10.

1684. In a resolution adopted in 2000 on women and peace and security, the UN Security Council called on “all parties to armed conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, and all other forms of violence in situations of armed conflict”.¹⁵⁷⁵

1685. In 1998, in a statement by its President on Sierra Leone, the UN Security Council condemned as gross violations of IHL “atrocities against the civilian population, particularly women and children”, including widespread rape.¹⁵⁷⁶

1686. In 1998, in a statement by its President on children and armed conflict, the UN Security Council strongly condemned the sexual abuse of children.¹⁵⁷⁷

1687. In 1993, in a resolution proclaiming the UN Declaration on the Elimination of Violence against Women, the UN General Assembly stated that:

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

- (a) Consider, where they have not yet done so, ratifying or acceding to the Convention on the Elimination of All Forms of Discrimination against Women or withdrawing reservations to that Convention;
- (b) Refrain from engaging in violence against women;
- (c) Exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons;
- (d) Develop penal, civil, labour and administrative sanctions in domestic legislation to punish and redress the wrongs caused to women who are subjected to violence . . .¹⁵⁷⁸

1688. In a resolution adopted in 1993, the UN General Assembly strongly condemned the practice of rape and abuse of women and children in areas of armed conflict in the former Yugoslavia and emphasised “the particularly heinous nature of the crime of rape”. It considered that “the abhorrent practice of rape and abuse of women and children” constituted a war crime.¹⁵⁷⁹

1689. In a resolution adopted in 1994 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly expressed “its outrage that the systematic practice of rape continues to be used as a weapon of war against women and children and as an instrument of ethnic cleansing” and recognized that “rape in this context constitutes a war crime”.¹⁵⁸⁰

¹⁵⁷⁵ UN Security Council, Res. 1325, 31 October 2000, § 10.

¹⁵⁷⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/13, 20 May 1998, § 1.

¹⁵⁷⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998, § 2.

¹⁵⁷⁸ UN General Assembly, Res. 48/104, 20 December 1993, Article 4.

¹⁵⁷⁹ UN General Assembly, Res. 48/143, 20 December 1993, §§ 1–3.

¹⁵⁸⁰ UN General Assembly, Res. 49/196, 23 December 1994, § 16.

1690. In a resolution adopted in 1995 on rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly stated that it:

Strongly condemns the abhorrent practice of rape and abuse of women and children in the areas of armed conflict in the former Yugoslavia, which constitutes a war crime;

... Expresses its outrage that the systematic practice of rape has been used as a weapon of war and an instrument of ethnic cleansing against women and children in the Republic of Bosnia and Herzegovina;

... Reaffirms that rape in the conduct of armed conflict constitutes a war crime and that under certain circumstances it constitutes a crime against humanity and an act of genocide as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, and calls upon States to take all measures required for the protection of women and children from such acts and to strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice.¹⁵⁸¹

1691. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and FRY (Serbia and Montenegro), the UN General Assembly expressed its outrage that “the systematic practice of rape has been used as a weapon of war against women and children and as an instrument of ethnic cleansing, and recognizes that rape in this context constitutes a war crime”.¹⁵⁸²

1692. In a resolution on Rwanda adopted in 1996, the UN General Assembly expressed “its deep concern at the intense suffering of the victims of genocide and crimes against humanity” and recognized “the ongoing suffering of their survivors, particularly the extremely high number of traumatized children and women victims of rape and sexual violence”.¹⁵⁸³

1693. In a resolution adopted in 1996 on the rights of the child, the UN General Assembly reaffirmed that:

Rape in the conduct of armed conflict constitutes a war crime and that under certain circumstances it constitutes a crime against humanity and an act of genocide, as defined in the Convention on the Prevention and Punishment of the Crime of Genocide, and calls upon all States to take all measures required for the protection of women and children from all acts of gender-based violence, including rape, sexual exploitation and forced pregnancy, and to strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice.¹⁵⁸⁴

1694. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights expressed its outrage that “the systematic practice of rape continues to be used as

¹⁵⁸¹ UN General Assembly, Res. 50/192, 22 December 1995, §§ 1–3; see also Res. 50/193, 22 December 1995 and Res. 51/115, 12 December 1996, §§ 1 and 3.

¹⁵⁸² UN General Assembly, Res. 50/193, 22 December 1995, § 15.

¹⁵⁸³ UN General Assembly, Res. 51/114, 12 December 1996, § 3.

¹⁵⁸⁴ UN General Assembly, Res. 51/77, 12 December 1996, § 28; see also Res. 52/107, 12 December 1997, Section IV, § 12.

a weapon of war against women and children and as an instrument of 'ethnic cleansing'" and recognized that "rape in these circumstances constitutes a war crime".¹⁵⁸⁵

1695. In a resolution adopted in 1996, the UN Commission on Human Rights condemned "in the strongest terms" all violations of human rights and international humanitarian law during the conflicts in the former Yugoslavia, in particular massive and systematic violations, including rape, and reaffirmed that "all persons who plan, commit or authorize such acts will be held personally responsible and accountable" and called for the punishment of those responsible.¹⁵⁸⁶

1696. In a resolution adopted in 1998 on abduction of children from northern Uganda, the UN Commission on Human Rights condemned in the strongest terms all parties involved in the rape of children.¹⁵⁸⁷

1697. In a resolution adopted in 1998 on the rights of the child, the UN Commission on Human Rights reaffirmed that "rape in the conduct of armed conflict constitutes a war crime and that under certain circumstances it constitutes a crime against humanity and an act of genocide" and called upon "all States to take all measures required for the protection of children and women from all acts of gender-based violence, including rape, sexual exploitation and forced pregnancy".¹⁵⁸⁸

1698. In a resolution adopted in 1995 on the situation in the territory of the former Yugoslavia, the UN Sub-Commission on Human Rights condemned rape as a war crime.¹⁵⁸⁹

1699. In a resolution adopted in 1998, following a study by the Special Rapporteur on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, the UN Sub-Commission on Human Rights reiterated the Rapporteur's view that "the existing international legal frameworks of humanitarian law, human rights law and criminal law clearly prohibit and criminalize sexual violence... in all circumstances".¹⁵⁹⁰

1700. In 1996, in a report on the impact of armed conflict on children, the expert appointed by the UN Secretary-General recommended that "practical protection measures to prevent sexual violence... must be a priority in all assistance programmes in refugee and displaced [persons] camps". The report further stated that:

Acts of gender-based violence, particularly rape, committed during armed conflicts constitute a violation of international humanitarian law. When it occurs on a massive scale or as a matter of orchestrated policy, this added dimension is recognized... as a crime against humanity.

¹⁵⁸⁵ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 14.

¹⁵⁸⁶ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, §§ 1-2.

¹⁵⁸⁷ UN Commission on Human Rights, Res. 1998/75, 22 April 1998, § 3.

¹⁵⁸⁸ UN Commission on Human Rights, Res. 1998/76, 22 April 1998, § 13.

¹⁵⁸⁹ UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, § 7.

¹⁵⁹⁰ UN Sub-Commission on Human Rights, Res. 1998/18, 21 August 1998, § 3

The report also emphasised that “unwanted pregnancy resulting from forced impregnation should be recognised as a distinct harm”.¹⁵⁹¹

1701. In 1998, in report on assistance to unaccompanied refugee minors, which included a section on internally displaced children, the UN Secretary-General noted that UNICEF had been “pressing for an end to the systematic abduction of children from northern Uganda by members of an armed group” to base camps in southern Sudan where they were reportedly “tortured, enslaved, raped and otherwise abused”.¹⁵⁹²

1702. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II “have long been considered customary international law”.¹⁵⁹³

1703. In 1996, in a report on her mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on violence against women, its causes and consequences argued that:

Even if it is considered that the 1949 Geneva Conventions are not evidence of customary international law because of *ratione temporis* and that the 1929 Geneva Convention is not applicable because Japan was not a signatory, Japan was a party to the Hague Convention and Annexed Regulations concerning the Laws and Customs of War on Land of 1907. The Regulations are not applicable if all belligerents are not parties to the Convention (art. 2) but its provisions would be a clear example of customary international law operating at that time. Article 46 of the Hague Regulations places on States the obligation to protect family honour and rights. Family honour has been interpreted to include the right of women in the family not to be subjected to the humiliating practice of rape.¹⁵⁹⁴

The Special Rapporteur also stated that “the abduction and systematic rape of women and girl children in the case of ‘comfort women’ clearly constituted an inhumane act against the civilian population and a crime against humanity”.¹⁵⁹⁵

1704. In 1998, in a report on violence against women, its causes and consequences, the Special Rapporteur of the UN Commission on Human Rights stated that:

¹⁵⁹¹ Expert appointed by the UN Secretary-General on the Impact of Armed Conflict on Children, Report, UN Doc. A/51/306, 26 August 1996, §§ 90(c), 91 and 104.

¹⁵⁹² UN Secretary-General, Assistance to unaccompanied refugee minors, Report, UN Doc. A/53/325, 26 August 1998, § 20.

¹⁵⁹³ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

¹⁵⁹⁴ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, § 101.

¹⁵⁹⁵ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, § 113.

Until recently, violence against women in armed conflict has been couched in terms of “protection” and “honour”. Article 27 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War treats violence against women as a crime of honour rather than as a crime of violence. By using the honour paradigm, linked as it is to concepts of chastity, purity and virginity, stereotypical concepts of femininity have been formally enshrined in humanitarian law. Thus, criminal sexual assault, in both national and international law, is linked to the morality of the victim. When rape is perceived as a crime against honour or morality, shame commonly ensues for the victim, who is often viewed by the community as “dirty” or “spoiled”. Consequently, many women will neither report nor discuss the violence that has been perpetrated against them. The nature of rape and the silence that tends to surround it makes it a particularly difficult human rights violation to investigate.

...

Perhaps more than the honour of the victim, it is the perceived honour of the enemy that is targeted in the perpetration of sexual violence against women; it is seen and often experienced as a means of humiliating the opposition. Sexual violence against women is meant to demonstrate victory over the men of the other group who have failed to protect their women. It is a message of castration and emasculation of the enemy group. It is a battle among men fought over the bodies of women.¹⁵⁹⁶

1705. In 1998, in her final report on systematic rape, sexual slavery and slavery-like practices during armed conflict, the Special Rapporteur of the UN Commission on Human Rights defined “sexual violence” as:

any violence, physical or psychological, carried out through sexual means or by targeting sexuality. Sexual violence covers both physical and psychological attacks directed at a person’s sexual characteristics, such as forcing a person to strip naked in public, mutilating a person’s genitals, or slicing off a woman’s breasts.¹⁵⁹⁷

The Special Rapporteur further stated that the following constituted rape:

The insertion, under conditions of force, coercion or duress, of any object, including but not limited to a penis, into a victim’s vagina or anus; or the insertion, under conditions of force, coercion or duress, of a penis into the mouth of the victim. Rape is defined in gender-neutral terms, as both men and women are victims of rape.¹⁵⁹⁸

The Special Rapporteur also stated that “sexual slavery” should be understood:

to be the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including sexual access through rape or other forms of sexual violence.

...

¹⁵⁹⁶ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1998/54, 26 January 1998, Part I, §§ 4 and 5.

¹⁵⁹⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 21.

¹⁵⁹⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 24.

In addition to treaty law, the prohibition of slavery is a *jus cogens* norm in customary international law. The crime of slavery does not require government involvement or State action, and constitutes an international crime whether committed by State actors or private individuals.¹⁵⁹⁹

With regard to the nature of sexual offences, while the Rapporteur asserted that they constituted crimes against humanity, she considered that “acts of sexual slavery and sexual violence may constitute war crimes in certain cases”.¹⁶⁰⁰

1706. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur of the UN Commission on Human Rights stated that:

Violence against women during wartime continues to involve horrendous crimes that must shock the conscience of humanity. Despite the significant progress that has been made in recent years to strengthen legal prohibitions against rape and other sexual violence, women and girls throughout the world continue to be the victims of unimaginable brutality. As the case studies illustrate, gender-based violence can take a variety of forms. Since 1997, women and girls have been raped – vaginally, anally and orally – sometimes with burning wood, knives or other objects. They have been raped by government forces and non-State actors, by police responsible for their protection, by refugee camp and border guards, by neighbours, local politicians, and sometimes family members under threat of death. They have been maimed or sexually mutilated, and often later killed or left to die. Women have been subjected to humiliating strip searches, forced to parade or dance naked in front of soldiers or in public, and to perform domestic chores while nude.¹⁶⁰¹

1707. Principle 2 of the Recommended Principles on Human Rights and Human Trafficking which are contained in a report of the UNHCHR of 2002 provides that “States have a responsibility under international law to act with due diligence to prevent trafficking, to investigate and prosecute traffickers and to assist and protect trafficked persons”. Principles 12–16 furthermore provide that:

12. States shall adopt appropriate legislative and other measures necessary to establish, as criminal offences, trafficking, its component acts 2 and related conduct.
13. States shall effectively investigate, prosecute and adjudicate trafficking, including its component acts and related conduct, whether committed by governmental or by non-State actors.
14. States shall ensure that trafficking, its component acts and related offences constitute extraditable offences under national law and extradition treaties.

¹⁵⁹⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, §§ 27–28.

¹⁶⁰⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 56.

¹⁶⁰¹ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/2001/73, 23 January 2001, § 44.

States shall cooperate to ensure that the appropriate extradition procedures are followed in accordance with international law.

15. Effective and proportionate sanctions shall be applied to individuals and legal persons found guilty of trafficking or of its component or related offences.
16. States shall, in appropriate cases, freeze and confiscate the assets of individuals and legal persons involved in trafficking. To the extent possible, confiscated assets shall be used to support and compensate victims of trafficking.¹⁶⁰²

1708. Guideline 4 of the Recommended Guidelines on Human Rights and Human Trafficking which are contained in a report of the UNHCHR of 2002 provides that:

States should consider:

1. Amending or adopting national legislation in accordance with international standards so that the crime of trafficking is precisely defined in national law and detailed guidance is provided as to its various punishable elements. All practices covered by the definition of trafficking such as debt bondage, forced labour and enforced prostitution should also be criminalized.
2. Enacting legislation to provide for the administrative, civil and, where appropriate, criminal liability of legal persons for trafficking offences in addition to the liability of natural persons. Reviewing current laws, administrative controls and conditions relating to the licensing and operation of businesses that may serve as cover for trafficking such as marriage bureaux, employment agencies, travel agencies, hotels and escort services.
3. Making legislative provision for effective and proportional criminal penalties (including custodial penalties giving rise to extradition in the case of individuals). Where appropriate, legislation should provide for additional penalties to be applied to persons found guilty of trafficking in aggravating circumstances, including offences involving trafficking in children or offences committed or involving complicity by State officials.
4. Making legislative provision for confiscation of the instruments and proceeds of trafficking and related offences. Where possible, the legislation should specify that the confiscated proceeds of trafficking will be used for the benefit of victims of trafficking. Consideration should be given to the establishment of a compensation fund for victims of trafficking and the use of confiscated assets to finance such a fund.
- ...
11. Making legislative provision for the punishment of public sector involvement or complicity in trafficking and related exploitation.¹⁶⁰³

Other International Organisations

1709. In a declaration adopted in 1993, the Committee of Ministers of the Council of Europe stated that it condemned the systematic practice of rape in

¹⁶⁰² UNHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report to ECOSOC, UN Doc. E/2002/68/Add.1, 20 May 2002, Recommended Principles on Human Rights and Human Trafficking, Principles 2 and 12–16.

¹⁶⁰³ UNHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, Report to ECOSOC, UN Doc. E/2002/68/Add.1, 20 May 2002, Recommended Guidelines on Human Rights and Human Trafficking, Guideline 4.

Bosnia and Herzegovina and reaffirmed that the use of sexual violence as an instrument of warfare constituted a war crime.¹⁶⁰⁴

1710. In a resolution adopted in 1993 on the massive and flagrant violations of human rights in the territory of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe declared its “profound consternation . . . at the perpetration of crimes against humanity such as . . . the systematic rape of women belonging to minority groups, and in particular to the Muslim population”.¹⁶⁰⁵

1711. In a resolution adopted in 1993, the European Parliament expressed its view that the ICTY should “consider acts of violence against women committed in former Yugoslavia”.¹⁶⁰⁶

1712. In a resolution adopted in 1993 on the rape of women in the former Yugoslavia, the European Parliament demanded that the systematic abuse of women be considered a war crime and a crime against humanity and called for the revision of existing military codes of conduct to set up new guidelines on the collection of evidence on the incidence of rape.¹⁶⁰⁷

1713. In 1993, the EC Investigative Mission into the Treatment of Muslim Women in the Former Yugoslavia stated that “the mission believes there is now a strong case for clearly identifying [rape as a war crime], irrespective of whether they occur in national or international conflicts”.¹⁶⁰⁸

1714. In 2001, ECOWAS adopted a declaration on the fight against trafficking in persons in which the members committed themselves to:

Adopt, as quickly as possible, such legislative and other measures as that are necessary to establish as criminal offences the trafficking in persons within, between, or from, their territory; to organize, direct, or participate as an accomplice, in this trafficking.¹⁶⁰⁹

1715. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council stated that it followed with grave concern and deep regret the degradation of the situation in Bosnia and Herzegovina, including the “carrying out of the worst crimes of . . . rape” perpetrated by the irregular Serbian troops.¹⁶¹⁰

¹⁶⁰⁴ Council of Europe, Committee of Ministers, Declaration on the Rape of Women and Children in the Territory of Former Yugoslavia, 18 February 1993, § 4.

¹⁶⁰⁵ Council of Europe, Parliamentary Assembly, Res. 994, 3 February 1993, § 1.

¹⁶⁰⁶ EU, European Parliament, Resolution on human rights in the world and Community human rights policy for the years 1991–92, 26 April 1993, §§ 7 and 8.

¹⁶⁰⁷ European Parliament, Resolution on the rape of women in the former Yugoslavia, 11 March 1993, §§ 1, 3 and 4.

¹⁶⁰⁸ EC, Report of the investigative mission into the treatment of Muslim women in the former Yugoslavia, annexed to Letter dated 2 February 1993 from Denmark to the UN Secretary-General, UN Doc. S/25240, 3 February 1993, Annex I, § 42.

¹⁶⁰⁹ ECOWAS, Declaration on the Fight against Trafficking in Persons (Decl. A/DC12/12/01), 25th Ordinary Session of Authority of Heads of State and Government, Dakar, 20–21 December 2001, § 5.

¹⁶¹⁰ GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 8.

1716. In 2002, the OAS Inter-American Commission of Women adopted a resolution on fighting the crime of trafficking in persons, especially women, adolescents, and children, in which it acknowledged “that trafficking in women and children for labour-related and sexual exploitation purposes and other contemporary forms of slavery constitute a violation of human rights”. It also reaffirmed that:

That trafficking in women, adolescents, and children for exploitation in the Americas is an offense that must be prevented, suppressed, and punished through the adoption of a multidimensional approach involving the judicial system, the national and border police, immigration authorities, health and labor ministries, consulates, and civil society, as well as the victims and their families.¹⁶¹¹

International Conferences

1717. In a resolution adopted in 1993 on urgent action in the former Yugoslavia, the 89th Inter-Parliamentary Conference categorically condemned “the systematic rape of women and girls in the former Yugoslavia, especially in Bosnia and Herzegovina”, urged the belligerent parties “immediately to cease violence against women and girls” and declared that “systematic rape of women and girls in armed conflicts is a war crime and must be designated as a crime against humanity under international law”.¹⁶¹²

1718. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed its dismay at and strongly condemned as abhorrent practices the “massive violations of human rights especially in the form of . . . systematic rape of women in war situations” and reiterated its call that “perpetrators of such crimes be punished and such practices immediately stopped”.¹⁶¹³

1719. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants declared that they refused “to accept that . . . women [are] raped” and that they were “alarmed by the marked increase in acts of sexual violence directed notably against women and children”. They reiterated that “such acts constitute grave breaches of international humanitarian law”.¹⁶¹⁴

1720. In a resolution adopted in 1993 on respect for international humanitarian law and support for humanitarian action in armed conflicts, the 90th

¹⁶¹¹ OAS, Inter-American Commission of Women, Res. CIM/RES. 225 (XXXI-0/02), *Fighting the Crime of Trafficking in Persons, especially Women, Adolescents, and Children*, 31 October 2002, preamble.

¹⁶¹² 89th Inter-Parliamentary Conference, New Delhi, 12–17 April 1993, Resolution on the need for urgent action in the former Yugoslavia, particularly as regards the protection of minorities and the prevention of further loss of life in order that peaceful coexistence and respect for human rights can be restored for all peoples, §§ 12 and 13.

¹⁶¹³ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(28).

¹⁶¹⁴ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1) and (3), *ILM*, Vol. 33, 1994, p. 298.

Inter-Parliamentary Conference condemned “the renewed outbreak of systematic sexual violence against women and children which constitutes a grave violation of international humanitarian law”.¹⁶¹⁵

1721. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of the civilian population in period of armed conflict, which contained a section on women, stating that the Conference:

- (a) expresses its outrage at practices of sexual violence in armed conflicts, in particular the use of rape as an instrument of terror, forced prostitution and any other form of indecent assault;
- ...
- (c) strongly condemns sexual violence, in particular rape, in the conduct of armed conflict as a war crime, and under certain circumstances a crime against humanity, and urges the establishment and strengthening of mechanisms to investigate, bring to justice and punish all those responsible;
- (d) underlines the importance of providing appropriate training to prosecutors, judges and other officials in handling such cases, in order to preserve the dignity and interests of the victims.¹⁶¹⁶

1722. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that “strict orders are given to prevent all serious violations of international humanitarian law, including... gender-based violence in particular rape and other forms of sexual violence... and threats to carry out such actions”.¹⁶¹⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

1723. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called “elementary considerations of humanity”.¹⁶¹⁸

1724. In the *Nyiramasuhuko and Ntahobali case* before the ICTR in 1997, the accused were charged with “rape as a part of a widespread and systematic attack on a civilian population on political, ethnic or racial grounds”, thereby committing crimes against humanity and a serious violation of common Article 3 of the 1949 Geneva Conventions and AP II.¹⁶¹⁹

¹⁶¹⁵ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts, preamble.

¹⁶¹⁶ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § B(a), (c) and (d).

¹⁶¹⁷ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

¹⁶¹⁸ ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

¹⁶¹⁹ ICTR, *Nyiramasuhuko and Ntahobali case*, Indictment, 26 May 1997, Counts 5 and 6.

1725. In the *Akayesu case* before the ICTR in 1997, the accused was charged with crimes against humanity (rape) and violations of common Article 3 of the 1949 Geneva Conventions and Article 4(2)(e) AP II (outrages upon personal dignity, in particular rape, degrading and humiliating treatment and indecent assault). It provided that “in this indictment, acts of sexual violence include forcible sexual penetration of the vagina, anus or oral cavity by a penis and/or of the vagina or anus by some other object, and sexual abuse, such as forced nudity”.¹⁶²⁰

1726. In its judgement in the *Akayesu case* in 1998, the ICTR Trial Chamber recognised for the first time that acts of sexual violence can be prosecuted as constituent elements of a genocidal campaign. Jean-Paul Akayesu, then Mayor of Taba commune, was charged with genocide, crimes against humanity and war crimes and with having known that acts of sexual violence were being committed and having facilitated the commission of such acts by permitting them to be carried out on communal premises.¹⁶²¹ The Trial Chamber considered that:

Rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts... Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity...

The Chamber defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. Sexual violence, which includes rape, is considered to be any act of a sexual nature which is committed on a person under circumstances which are coercive.¹⁶²²

The ICTR Trial Chamber further held that:

Rape and sexual violence... constitute genocide in the same way as any other act as long as they are committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such... Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole.¹⁶²³

1727. In the *Musema case* before the ICTR in 1996, the accused was charged with “the rape of Tutsi civilians, as part of a widespread and systematic attack against a civilian population on political, ethnic or racial grounds” and stated that the accused had “thereby committed a crime against humanity”.¹⁶²⁴

¹⁶²⁰ ICTR, *Akayesu case*, Amended Indictment, 30 June 1997, Counts 13 and 15 and § 10(A).

¹⁶²¹ ICTR, *Akayesu case*, Judgement, 2 September 1998, § 12(B).

¹⁶²² ICTR, *Akayesu case*, Judgement, 2 September 1998, § 596-598.

¹⁶²³ ICTR, *Akayesu case*, Judgement, 2 September 1998, § 731.

¹⁶²⁴ ICTR, *Musema case*, Amended Indictment, 12 July 1996, Count 7.

1728. In its judgement in the *Musema case* in 2000, the ICTR Trial Chamber found that the evidence presented – considering both the murders as well as acts of serious bodily and mental harm, including rape and other forms of sexual violence – amounted to genocide. The Trial Chamber stated that “acts of rape and sexual violence were an integral part of the plan conceived to destroy the Tutsi group. Such acts targeted Tutsi women, in particular, and specifically contributed to their destruction and therefore that of the Tutsi group as such.” The Trial Chamber found that “the Accused had knowledge of a widespread or systematic attack on the civilian population. The Chamber finds that the rape of Nyiramusugi by the Accused was consistent with the pattern of this attack and formed a part of this attack.” The Trial Chamber found Musema guilty of crimes against humanity (rape).¹⁶²⁵

1729. In its review of the indictment in the *Nikolić case* in 1995, the ICTY Trial Chamber stated that it considered that “rape and other forms of sexual assault inflicted on women in circumstances such as those described by the witnesses, may fall within the definition of torture submitted by the Prosecutor”.¹⁶²⁶

1730. In the *Kvočka case* before the ICTY in 1998, the accused was charged with “sexual assault . . . of Bosnian Muslim, Bosnian Croat and other non-Serb detainees”.¹⁶²⁷

1731. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber stated that “there can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law” and that it considered “rape to constitute a physical invasion of a sexual nature, committed on a person under circumstances that are coercive”. It also considered that:

The rape of any person [is] a despicable act which strikes at the very core of human dignity and physical integrity. The condemnation and punishment of rape becomes all the more urgent where it is committed by, or at the instigation of, a public official, or with the consent or acquiescence of such an official . . . It is difficult to envisage circumstances in which rape, by, or at the instigation of a public official, or with the consent or acquiescence of an official, could be considered as occurring for a purpose that does not, in some way, involve punishment, coercion, discrimination or intimidation. In the view of this Trial Chamber this is inherent in situations of armed conflict.

It then stated that whenever rape and other forms of sexual violence meet the conditions, they shall constitute torture, in the same manner as any other acts that meet these criteria.¹⁶²⁸

1732. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber noted that a prohibition of rape and serious sexual assault in armed conflict under customary international law has

¹⁶²⁵ ICTR, *Musema case*, Judgement, 27 January 2000, §§ 907, 933 and 966.

¹⁶²⁶ ICTY, *Nikolić case*, Review of the Indictment, 20 October 1995, § 33.

¹⁶²⁷ ICTY, *Kvočka case*, Indictment, 12 June 1998, § 28, see also § 35.

¹⁶²⁸ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 476, 479, 495–496.

gradually crystallised out of the express prohibition of rape in article 44 of the Lieber Code and the general provisions contained in article 46 of the regulations annexed to Hague Convention IV, read in conjunction with the “Martens clause” laid down in the preamble to that Convention. While rape and sexual assaults were not specifically prosecuted by the Nuremberg Tribunal, rape was expressly classified as a crime against humanity under article II (1)(c) of Control Council Law No. 10. The Tokyo International Military Tribunal convicted Generals Toyoda and Matsui of command responsibility for violations of the laws or customs of war committed by their soldiers in Nanking, which included widespread rapes and sexual assaults. The former Foreign Minister of Japan, Hirota, was also convicted for these atrocities. This decision and that of the United States Military Commission in Yamashita, along with the ripening of the fundamental prohibition of “outrages upon personal dignity” laid down in common article 3 into customary international law, has contributed to the evolution of universally accepted norms of international law prohibiting rape as well as serious sexual assault. These norms are applicable in any armed conflict.¹⁶²⁹

The Tribunal also defined rape and serious sexual assault:

Thus, the Trial Chamber finds that the following may be accepted as the objective elements of rape:

- (i) the sexual penetration, however slight:
 - (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
 - (b) of the mouth of the victim by the penis of the perpetrator;
- (ii) by coercion or force or threat of force against the victim or a third person.

...

As pointed out above, international criminal rules punish not only rape but also any serious sexual assault falling short of actual penetration. It would seem that the prohibition embraces all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim’s dignity. As both these categories of acts are criminalised in international law, the distinction between them is one that is primarily material for the purposes of sentencing.¹⁶³⁰

The Tribunal found the accused guilty of a violation of the laws and customs of war (outrages upon dignity, including rape).¹⁶³¹

1733. In the judgement on appeal in the *Furundžija case* in 2000, the ICTY Appeals Chamber stated that:

With regard to the issue of the reaffirmation by the International Tribunal of rape as a war crime, the Appeals Chamber finds that the international community has long recognised rape as a war crime. In the *Delalić and Others Judgement*, one of the accused was convicted of torture by means of rape, as a violation of the laws or customs of war. This recognition by the international community of rape as a

¹⁶²⁹ ICTY, *Furundžija case*, Judgement, 10 December 1998, § 168.

¹⁶³⁰ ICTY, *Furundžija case*, Judgement, 10 December 1998, §§ 185 and 186.

¹⁶³¹ ICTY, *Furundžija case*, Judgement, 10 December 1998, Part IX.

war crime is also reflected in the Rome Statute where it is designated as a war crime.¹⁶³²

1734. In its judgement in the *Kunarac case* in 2000, the ICTY Trial Chamber held that:

The Chamber further considers that it is unnecessary to discuss any additional requirements for the application of rape charges based on treaty law, since common Article 3 alone is sufficient in principle to form the basis of these charges under Article 3 [of the ICTY Statute], as is observed below.

...

Rape has been charged against the three accused as a violation of the laws or customs of war under Article 3 and as a crime against humanity under Article 5 of the Statute. The Statute refers explicitly to rape as a crime against humanity within the Tribunal's jurisdiction in Article 5(g). The jurisdiction to prosecute rape as an outrage against personal dignity, in violation of the laws or customs of war pursuant to Article 3 of the Statute, including upon the basis of common Article 3 to the 1949 Geneva Conventions, is also clearly established.

...

The Trial Chamber considers that the Furundžija definition, although appropriate to the circumstances of that case, is in one respect more narrowly stated than is required by international law. In stating that the relevant act of sexual penetration will constitute rape only if accompanied by coercion or force or threat of force against the victim or a third person, the Furundžija definition does not refer to other factors which would render an act of sexual penetration non-consensual or non-voluntary on the part of the victim, which, as foreshadowed in the hearing and as discussed below, is in the opinion of this Trial Chamber the accurate scope of this aspect of the definition in international law.¹⁶³³

The Tribunal found the accused guilty of "crimes against humanity (rape)" and "violations of the laws or customs of war (rape)".¹⁶³⁴

1735. In its General Recommendation on Violence against Women in 1992, CEDAW provided that:

1. Gender-based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men.

...

6. The [1979 Convention on the Elimination of Discrimination against Women] in article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

...

¹⁶³² ICTY, *Furundžija case*, Judgement on Appeal, 21 July 2000, § 210.

¹⁶³³ ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 406, 436 and 438.

¹⁶³⁴ ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 883, 886 and 888.

16. Wars, armed conflicts and the occupation of territories often lead to increased prostitution, trafficking in women and sexual assault of women, which require specific protective and punitive measures.¹⁶³⁵

1736. In a letter to the Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, the Chair of CEDAW emphasised that rape and other attacks on women's physical and mental integrity violated international human rights guarantees and constituted grave breaches of GC IV and of customary international law. The Special Rapporteur replied that he shared the Committee's preoccupation with the reported occurrence of mass rape and other attacks on the physical and mental integrity of women in the conflict in the former Yugoslavia.¹⁶³⁶

1737. In 1998, CEDAW stated in relation to Indonesia that:

The Committee is concerned that the information provided on the situation of women in areas of armed conflict reflects a limited understanding of the problem. The Government's remarks are confined to the participation of women in armed forces and do not address the vulnerability of women to sexual exploitation in conflict situations.¹⁶³⁷

1738. In 2000, CEDAW stated in relation to India that:

The Committee is concerned that women are exposed to the risk of high levels of violence, rape, sexual harassment, humiliation and torture in areas where there are armed insurrections.

... The Committee recommends a review of prevention of terrorism legislation and the Armed Forces Special Provisions Act... so that special powers given to the security forces do not prevent the investigation and prosecution of acts of violence against women in conflict areas and during detention and arrest.¹⁶³⁸

1739. In 1997, in its recommendations on Myanmar, the CRC expressed grave concern with regard to "numerous documented cases of rape of young girls by soldiers" and strongly recommended that:

all reported cases of abuse, rape and/or violence against children committed by members of the armed forces be rapidly, impartially, thoroughly and systematically investigated. Appropriate judicial sanctions should be applied to perpetrators and wide publicity should be given to such sanctions.¹⁶³⁹

1740. In *S. W. v. UK* in 1995, the ECtHR stated that:

43. The decisions of the Court of Appeal and then the House of Lords did no more than continue a perceptible line of case-law development dismantling the

¹⁶³⁵ CEDAW, General Recommendation No. 19 (Violence against women), 29 January 1992, §§ 1, 6 and 16.

¹⁶³⁶ CEDAW, Report on its 12th Session, UN Doc. A/48/38, 28 May 1993, Annex 1, p. 115 and Annex II, p. 116.

¹⁶³⁷ CEDAW, Report on its 18th and 19th Session, UN Doc. A/53/38/rev.1, 1998, § 295.

¹⁶³⁸ CEDAW, Report on its 22nd and 23d Session, UN Doc. A/55/38, 2000. §§ 71–72.

¹⁶³⁹ CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, §§ 40–41.

immunity of a husband from prosecution for rape upon his wife . . . There was no doubt under the law as it stood on 18 September 1990 that a husband who forcibly had sexual intercourse with his wife could, in various circumstances, be found guilty of rape. Moreover, there was an evident evolution, which was consistent with the very essence of the offence, of the criminal law through judicial interpretation towards treating such conduct generally as within the scope of the offence of rape. This evolution had reached a stage where judicial recognition of the absence of immunity had become a reasonably foreseeable development of the law . . .

44. The essentially debasing character of rape is so manifest that the result of the decisions of the Court of Appeal and the House of Lords – that the applicant could be convicted of attempted rape, irrespective of his relationship with the victim – cannot be said to be at variance with the object and purpose of Article 7 (art. 7) of the Convention, namely to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment . . . What is more, the abandonment of the unacceptable idea of a husband being immune against prosecution for rape of his wife was in conformity not only with a civilised concept of marriage but also, and above all, with the fundamental objectives of the Convention, the very essence of which is respect for human dignity and human freedom.
45. Consequently, . . . Mr Justice Rose did not render a decision permitting a finding of guilt incompatible with Article 7 (art. 7) of the [ECHR].¹⁶⁴⁰

1741. In its judgement in *Aydin v. Turkey* in 1997, the ECtHR stated that:

83. While being held in detention the applicant was raped by a person whose identity has still to be determined. Rape of a detainee by an official of the State must be considered to be an especially grave and abhorrent form of ill-treatment given the ease with which the offender can exploit the vulnerability and weakened resistance of his victim. Furthermore, rape leaves deep psychological scars on the victim which do not respond to the passage of time as quickly as other forms of physical and mental violence. The applicant also experienced the acute physical pain of forced penetration, which must have left her feeling debased and violated both physically and emotionally.
 . . .
86. Against this background the Court is satisfied that the accumulation of acts of physical and mental violence inflicted on the applicant and the especially cruel act of rape to which she was subjected amounted to torture in breach of article 3 of the Convention. Indeed the court would have reached this conclusion on either of these grounds taken separately.¹⁶⁴¹

1742. In 2001, in *Valasinas v. Lithuania*, the ECtHR stated that:

117. The Court considers that, while strip-searches may be necessary on occasions to ensure prison security or prevent disorder or crime, they must be conducted in an appropriate manner. Obliging the applicant to strip naked in the presence of a woman, and then touching his sexual organs and food with bare hands showed a clear lack of respect for the applicant, and

¹⁶⁴⁰ ECtHR, *S. W. v. UK*, Judgement, 22 November 1995, §§ 43–45.

¹⁶⁴¹ ECtHR, *Aydin v. Turkey*, Judgement, 25 September 1997, § 83.

diminished in effect his human dignity. It must have left him with feelings of anguish and inferiority capable of humiliating and debasing him. The Court concludes, therefore, that the search of 7 May 1998 amounted to degrading treatment within the meaning of Article 3 of the Convention.

118. Accordingly, there has been a violation of Article 3 [of the 1950 ECHR] in this respect.¹⁶⁴²

1743. In a case concerning Peru in 1996, the IACiHR stated that:

Current international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by the State or as a result of failure by the State to prevent the occurrence of this crime, constitutes a violation of the victims' human rights, especially the right to physical and mental integrity.

In the context of international humanitarian law, Article 27 of the Fourth Geneva Convention of 1949 concerning the protection due to civilians in times of war explicitly prohibits sexual abuse. Article 147 of that Convention which lists acts considered as "serious offenses" or "war crimes" includes rape in that it constitutes "torture or inhuman treatment". The International Committee of the Red Cross (ICRC) has declared that the "serious offense" of "deliberately causing great suffering or seriously harming physical integrity or health" includes sexual abuse.

Moreover, Article 76 of Additional Protocol I to the 1949 Geneva Conventions expressly prohibits rape or other types of sexual abuse. Article 85(4), for its part, states that when these practices are based on racial discrimination they constitute "serious offenses". As established in the Fourth Convention and Protocol I, any act of rape committed individually constitutes a war crime.

In the case of non-international conflicts, both Article 3 common to the four Geneva Conventions and Article 4(2) of Protocol II additional to the Conventions, include the prohibition against rape and other sexual abuse insofar as they are the outcome of harm deliberately influenced on a person. The ICRC has stated that the prohibition laid down in Protocol II reaffirms and complements the common Article 3 since it was necessary to strengthen the protection of women, who can be victims of rape, forced prostitution or other types of abuse.

Article 5 of the Statute of the [ICTY] established for investigating the serious violations of international humanitarian law committed in the territory of the former Yugoslavia, considers rape practiced on a systematic and large scale a crime against humanity.

In the context of international human rights law, the American Convention on Human Rights stipulates in its Article 5 that:

1. Every person has the right to have his physical, mental and moral integrity respected.
2. No one shall be subjected to torture or to cruel, inhuman or degrading punishment or treatment . . .

The letter of the Convention does not specify what is to be understood by torture. However, in the inter-American sphere, acts constituting torture are established in the Inter-American Convention to Prevent and Punish Torture . . .

¹⁶⁴² ECtHR, *Valasinas v. Lithuania*, Judgement (Merits and just satisfaction), 24 July 2001, §§ 117–118.

Accordingly, for torture to exist three elements have to be combined:

1. it must be an intentional act through which physical and mental pain and suffering is inflicted on a person;
2. it must be committed with a purpose;
3. it must be committed by a public official or by a private person acting at the instigation of the former.

Regarding the first element, the Commission considers that rape is a physical and mental abuse that is perpetrated as a result of an act of violence. The definition of rape contained in Article 170 of the Peruvian Criminal Code confirms this by using the phrasing “[h]e who, *with violence* or serious threat, obliges a person to practice the sex act . . .” The Special Rapporteur against Torture has noted that sexual abuse is one of the various methods of physical torture. Moreover, rape is considered to be a method of psychological torture because its objective, in many cases, is not just to humiliate the victim but also her family or community. In this connection, the above-mentioned Special Rapporteur has stated that, particularly in Peru, “. . . rape would appear to be a weapon used to punish, intimidate and humiliate.”

Rape causes physical and mental suffering in the victim. In addition to the violence suffered at the time it is committed, the victims are commonly hurt or, in some cases, are even made pregnant. The fact of being made the subject of abuse of this nature also causes a psychological trauma that results, on the one hand, from having been humiliated and victimized, and on the other, from suffering the condemnation of the members of their community if they report what has been done to them.

...

The second element establishes that for an act to be torture it must have been committed intentionally, i.e. to produce a certain result in the victim.

...

The third requirement of the definition of torture is that the act must have been perpetrated by a public official or by a private individual at the instigation of the former.

As concluded in the foregoing, the man who raped [the victim] was member of the security forces who had himself accompanied by a large group of soldiers.

Accordingly, the Commission, having established that the three elements of the definition of torture are present in the case under consideration, concludes that the Peruvian State is responsible for violation of Article 5 of the American Convention.¹⁶⁴³[emphasis in original]

V. Practice of the International Red Cross and Red Crescent Movement

1744. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “humiliating and degrading treatment (e.g. enforced prostitution, any form of indecent assault or other outrages upon personal dignity) is prohibited”.¹⁶⁴⁴

¹⁶⁴³ IACiHR, *Case 10.970 (Peru)*, Report, 1 March 1996, Section V(A)(3)(a).

¹⁶⁴⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 192 and 195.

1745. In 1992, in a memorandum on the issue of rape as a war crime, the ICRC stated that the definition of grave breaches in Article 147 GC IV, in particular wilfully causing great suffering or serious injury to body or health, “obviously covers not only rape, but also any other attack on a woman’s dignity”.¹⁶⁴⁵

1746. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of rape and enforced prostitution, as serious violations of international humanitarian law applicable in international and non-international conflicts, be subject to the jurisdiction of the Court.¹⁶⁴⁶

1747. In its pledge to promote the respect of women in armed conflicts, made at the 27th International Conference of the Red Cross and Red Crescent in 1999, the ICRC expressed grave concern about “the occurrence of sexual violence in armed conflict” and stated that “sexual violence, in all its forms, is prohibited under international humanitarian law and should be vigorously prevented”. The ICRC pledged to place focus “on actively disseminating the prohibition of all forms of sexual violence to parties to an armed conflict”.¹⁶⁴⁷

VI. Other Practice

1748. In 1979, in a letter to the ICRC, an armed opposition group confirmed its commitment to IHL and denounced the “rape of spouses in the presence of their husbands and relatives”.¹⁶⁴⁸

1749. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that rape is and shall remain prohibited.¹⁶⁴⁹

1750. In 1995, the IIHL stated that any declaration on minimum humanitarian standards should be based on “principles . . . of *jus cogens*, expressing basic humanitarian consideration[s] which are recognized to be universally binding”. According to the IIHL, women were a category calling for special mention, as they were exposed to additional forms of violence. It stated that an article should be inserted in the declaration which could read “women shall be especially protected against any attack on their honour, in particular against rape,

¹⁶⁴⁵ ICRC, Aide-Memoire, Geneva, 3 December 1992.

¹⁶⁴⁶ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(a)(iii) and 3(iv).

¹⁶⁴⁷ ICRC, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

¹⁶⁴⁸ ICRC archive document.

¹⁶⁴⁹ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(a), *IRRC*, No. 282, 1991, p. 331.

enforced prostitution, or any other form of indecent assault. They are entitled to treatment which takes into account their special needs."¹⁶⁵⁰

1751. In 1993, in a report on Kashmir, Asia Watch and Physicians for Human Rights stated that "Indian security forces and militant forces in Kashmir use rape as a weapon: to punish, intimidate, coerce, humiliate and degrade their female victims". They further stated that "Indian government authorities have rarely investigated charges of rape by security forces in Kashmir" and that they were "unaware of any efforts by the militant groups to prevent their forces from committing rape".¹⁶⁵¹

1752. The Bangkok NGO Declaration on Human Rights adopted in 1993 stated that "crimes against women, including rape... and domestic violence, are rampant. Crimes against women are crimes against humanity, and the failure of governments to prosecute those responsible implies complicity."¹⁶⁵²

1753. In December 2000, a Japanese NGO simulated a "Women's International War Crimes Tribunal on Japan's Military Sexual Slavery" which had jurisdiction over crimes committed against women, including sexual slavery.¹⁶⁵³

H. Slavery, Slave Trade and Forced Labour

Note: For practice concerning compensation for forced labour, see Chapter 42, section B.

General

I. Treaties and Other Instruments

Treaties

1754. Article 6 of the 1899 HR provides that:

The State may utilize the labour of prisoners of war according to their rank and aptitude. Their tasks shall not be excessive, and shall have nothing to do with the military operations.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State shall be paid for according to the tariffs in force for soldiers of the national army employed on similar tasks.

When the work is for other branches of the public service or for private persons, the conditions shall be settled in agreement with the military authorities.

¹⁶⁵⁰ IHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, § 18, reprinted in Report of the UN Secretary-General, UN Doc. E/CN.4/1996/80, 28 November 1995, p. 10.

¹⁶⁵¹ Physicians for Human Rights and Asia Watch, Press Release, Rape in Kashmir: A Crime of War, India, 9 May 1993.

¹⁶⁵² World Conference on Human Rights, Regional Preparatory Meeting for the Asia-Pacific, Bangkok, 24–28 March 1993, Bangkok NGO Declaration on Human Rights, UN Doc. A/CONF.157/PC/83, 19 April 1993, § 6.

¹⁶⁵³ VAWW-NET Japan, Women's International War Crimes Tribunal on Japan's Military Sexual Slavery, 7–12 December 2000.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them at the time of their release, after deducting the cost of their maintenance.

1755. Article 6 of the 1907 HR provides that:

The State may utilize the labour of prisoners of war according to their rank and aptitude, officers excepted. The tasks shall not be excessive and shall have no connection with the operations of the war.

Prisoners may be authorized to work for the public service, for private persons, or on their own account.

Work done for the State is paid for at the rates in force for work of a similar kind done by soldiers of the national army, or, if there are none in force, at a rate according to the work executed.

When the work is for other branches of the public service or for private persons the conditions are settled in agreement with the military authorities.

The wages of the prisoners shall go towards improving their position, and the balance shall be paid them on their release, after deducting the cost of their maintenance.

1756. In Articles 1 and 2 of the 1926 Slavery Convention, the contracting parties agreed to “prevent and suppress the slave trade” and “to bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms”. They also provided that:

- (1) Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.
- (2) The slave trade includes all acts involved in the capture, acquisition or disposal of a person with intent to reduce him to slavery; all acts involved in the acquisition of a slave with a view to selling or exchanging him; all acts of disposal by sale or exchange of a slave acquired with a view to being sold or exchanged, and, in general, every act of trade or transport in slaves.

1757. Article 31 of the 1929 Geneva POW Convention provides that “work done by prisoners of war shall have no direct connection with the operations of the war”.

1758. Article 1 of the 1930 Forced Labour Convention provides that “Each Member of the International Labour Organisation which ratifies this Convention undertakes to suppress the use of forced or compulsory labour in all its forms within the shortest possible period”. Article 2 adds that “the term ‘forced or compulsory labour’ shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.

1759. Article 6 of the 1945 IMT Charter (Nuremberg) provides that “deportation to slave labor or for any other purpose of civilian population of or in occupied territory” is a war crime and that “enslavement” is a crime against humanity.

1760. Articles 49–68 GC III regulate the labour of prisoners of war.

1761. Article 50 GC III lays down the categories of work that prisoners of war may be compelled to do.

1762. Article 52 GC III provides that prisoners of war shall not be compelled to carry out unhealthy, dangerous or humiliating work.

1763. Article 40, first and second paragraphs, GC IV provides that:

Protected persons may be compelled to work only to the same extent as nationals of the Party to the conflict in whose territory they are.

If protected persons are of enemy nationality, they may only be compelled to do work which is normally necessary to ensure the feeding, sheltering, clothing, transport and health of human beings and which is not directly related to the conduct of military operations.

1764. Article 51, second paragraph, GC IV provides that:

The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country.

1765. Article 95, first paragraph, GC IV provides that:

The Detaining Power shall not employ internees as workers, unless they so desire. Employment which, if undertaken under compulsion by a protected person not in internment, would involve a breach of Articles 40 or 51 of the present Convention, and employment on work which is of a degrading or humiliating character are in any case prohibited.

1766. Article 4(1) of the 1950 ECHR provides that “no one shall be held in slavery or servitude”. Article 4(2) provides that “no one shall be required to perform forced or compulsory labour”. According to Article 15(2), Article 4(1) is non-derogable.

1767. Article 1 of the 1956 Supplementary Convention on the Abolition of Slavery provides that “each of the States Parties... shall take all practicable and necessary legislative and other measures to bring about progressively and as soon as possible the complete abolition or abandonment” of slavery and institutions and practices similar to slavery, such as debt bondage, serfdom and inheritance or transfer of women or children.

1768. Article 1 of the 1957 Convention concerning the Abolition of Forced Labour provides that:

Each Member of the [ILO] which ratifies this Convention undertakes to suppress and not to make use of any form of forced or compulsory labour:

- (a) As a means of political coercion or education or as a punishment for holding or expressing political views or views ideologically opposed to the established political, social or economic system;
- (b) As a method of mobilising and using labour for purposes of economic development;
- (c) As a means of labour discipline;
- (d) As a punishment for having participated in strikes;
- (e) As a means of racial, social, national or religious discrimination.

1769. Article 2 of the 1957 Convention concerning the Abolition of Forced Labour states that “each Member . . . undertakes to take effective measures to secure the immediate and complete abolition of forced or compulsory labour as specified in article 1 of this Convention”.

1770. Article 8 of the 1966 ICCPR provides that:

1. No one shall be held in slavery; slavery and the slave-trade in all their forms shall be prohibited.
2. No one shall be held in servitude.
3. (a) No one shall be required to perform forced or compulsory labour.

According to Article 4(2) ICCPR, the prohibition of slavery and servitude is non-derogable.

1771. Article 6(1) of the 1969 ACHR provides that “no one shall be subject to slavery or to involuntary servitude, which are prohibited in all their forms, as are the slave trade and traffic in women”. Article 27(2) states that this prohibition is non-derogable.

1772. Article 4(2)(f) AP II provides that “slavery and the slave trade in all their forms” are and shall remain prohibited at any time and in any place whatsoever. Article 4 AP II was adopted by consensus.¹⁶⁵⁴

1773. Article 5(1)(e) AP II provides that persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained “shall, if made to work, have the benefit of working conditions and safeguards similar to those enjoyed by the local civilian population”. Article 5 AP II was adopted by consensus.¹⁶⁵⁵

1774. Article 5 of the 1981 ACHPR states that “all forms of exploitation and degradation of man, particularly slavery, slave trade . . . shall be prohibited”.

1775. Article 29(a) of the 1990 African Charter on the Rights and Welfare of the Child provides that “States Parties to the present Charter shall take appropriate measures to prevent: (a) the abduction, the sale of, or traffic in children for any purpose or in any form, by any person, including parents or legal guardians of the child”.

1776. According to Article 1(3) of the 1995 Agreement on Human Rights annexed to the Dayton Accords, the parties shall “secure to all persons within their jurisdiction the right not to be held in slavery”.

1777. Article 7(1)(c) of the 1998 ICC Statute provides that enslavement, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, constitutes a crime against humanity. Article 7(2)(c) defines “enslavement” as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children”.

¹⁶⁵⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

¹⁶⁵⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

1778. Article 8(2)(b)(xxii) and (e)(vi) of the 1998 ICC Statute provides that “sexual slavery [and] enforced prostitution” constitute war crimes in international and non-international armed conflicts respectively.

1779. Article 1 of the 1999 Convention on the Worst Forms of Child Labour provides that States “shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency”. Article 3 provides that the term “the worst forms of child labour” comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict;
- (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances;
- (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties;
- (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.

1780. Article 1 of the 2000 Optional Protocol on Child Trade, Prostitution and Pornography provides that the States parties shall prohibit the sale of children. It also contains detailed implementation measures to be adopted.

1781. Articles 1, 3 and 5 of the 2000 Protocol on Trafficking in Persons provides that States parties shall criminalise, *inter alia*, attempts to commit trafficking in persons, participation as an accomplice in trafficking in persons and organization or direction of other persons to commit trafficking in persons.

Other Instruments

1782. Article 23 of the 1863 Lieber Code provides that “private citizens are no longer . . . enslaved”.

1783. Article 42 of the 1863 Lieber Code provides that:

In a war between the United States and a belligerent which admits of slavery, if a person held in bondage by that belligerent be captured by or come as a fugitive under the protection of the military force of the United States, such person is immediately entitled to the rights and privileges of a freeman. To return such person into slavery would amount to enslaving a free person, and neither the United States nor any officer under their authority can enslave any human being. Moreover, a person so made free by the law of war is under the shield of the law of nations.

1784. Article 58 of the 1863 Lieber Code stipulates that “the United States cannot retaliate by enslavement; therefore death must be the retaliation for this crime against the law of nations.”

1785. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on

Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including forced labour of civilians in connection with the military operations of the enemy and the employment of prisoners of war on unauthorised works.

1786. Article II(1) of the 1945 Allied Control Council Law No. 10 provides that “deportation to slave labour or for any other purpose, of civilian population from occupied territory” is a war crime and that “enslavement . . . or other inhumane acts committed against any civilian population” is a crime against humanity.

1787. Article 5(c) of the 1946 IMT Charter (Tokyo) established individual responsibility for crimes against humanity, including “enslavement”.

1788. Article 4 of the 1948 UDHR provides that “no one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms”.

1789. Principle VI of the 1950 Nuremberg Principles adopted by the ILC provides that “deportation to slave labour or for any other purpose of civilian population of or in occupied territory” is a war crime and that “enslavement . . . and other inhuman acts done against any civilian population” is a crime against humanity.

1790. Article 2(11) of the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind includes enslavement in its list of crimes against humanity.

1791. Article 11(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that “human beings are born free, and no one has the right to enslave, humiliate, oppress or exploit them, and there can be no subjugation but to Allah the Almighty”.

1792. Article 21 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind includes “establishing or maintaining over persons a status of slavery, servitude or forced labour” as systematic or massive violations of human rights. The commentary explains that slavery is defined in the following treaties: the 1926 Slavery Convention, 1956 Supplementary Convention on the Abolition of Slavery, 1966 ICCPR, 1930 Forced Labour Convention and the 1957 Convention concerning the Abolition of Forced Labour.

1793. Article 5(c) of the 1993 ICTY Statute provides that enslavement, when committed in armed conflict, whether international or internal in character, and directed against any civilian population, constitutes a crime against humanity.

1794. Article 3(c) of the 1994 ICTR Statute provides that enslavement, when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds, constitutes a crime against humanity.

1795. Article 18(d) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind includes enslavement among crimes against humanity.

1796. Article 2(8) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right not to be held in involuntary servitude or to perform forced or compulsory labour.

1797. According to Section 7.2 of the 1999 UN Secretary-General's Bulletin, enslavement of persons not, or no longer, taking part in military operations and persons placed *hors de combat* is prohibited at any time and in any place.

1798. Article 5 of the 2000 EU Charter of Fundamental Rights provides that "no one shall be held in slavery or servitude" and that "trafficking in human beings is prohibited".

1799. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxii) and (e)(vi), "sexual slavery [and] enforced prostitution" constitute war crimes in both international and non-international armed conflicts.

II. National Practice

Military Manuals

1800. According to Canada's LOAC Manual, enslavement is a crime against humanity.¹⁶⁵⁶

1801. Ecuador's Naval Manual provides that "offences against civilian inhabitants of the occupied territory, including . . . forced labour" are representative war crimes.¹⁶⁵⁷

1802. France's LOAC Manual restates Article 4 of the 1948 UDHR and Article 7(1) of the 1998 ICC Statute, which include enslavement in the list of crimes against humanity.¹⁶⁵⁸

1803. Israel's Manual on the Laws of War recalls the definition of crimes against humanity contained in the 1998 ICC Statute by stating that "crimes against humanity were defined as the systematic harming of a civilian population, which includes deeds such as: . . . enslavement".¹⁶⁵⁹

1804. The Military Manual of the Netherlands restates the rules on labour carried out by POWs as found in Articles 49–52, 54, 60, 64 GC III and Article 51 GC IV.¹⁶⁶⁰ The manual further restates the prohibition of slavery and slave trade as found in Article 4 AP II.¹⁶⁶¹

1805. New Zealand's Military Manual refers to AP II and prohibits at any time and anywhere "slavery and the slave trade in all their forms".¹⁶⁶²

¹⁶⁵⁶ Canada, *LOAC Manual* (1999), p. 16-1, § 4(c).

¹⁶⁵⁷ Ecuador, *Naval Manual* (1989), § 6.2.5(2).

¹⁶⁵⁸ France, *LOAC Manual* (2001), pp. 43 and 51.

¹⁶⁵⁹ Israel, *Manual on the Laws of War* (1998), p. 68.

¹⁶⁶⁰ Netherlands, *Military Manual* (1993), pp. VI-9/VII-10 and VIII-5.

¹⁶⁶¹ Netherlands, *Military Manual* (1993), p. XI-4.

¹⁶⁶² New Zealand, *Military Manual* (1992), § 1812.1.

1806. Nigeria's Manual on the Laws of War gives a list of examples of war crimes, *inter alia*, "compelling prisoners of war to perform prohibited work" and "using and, in particular, deporting civilians for forced labour".¹⁶⁶³

1807. Senegal's IHL Manual provides that one of the fundamental guarantees common to the IHL conventions and the 1948 UDHR is the prohibition of slavery and the slave trade in any form.¹⁶⁶⁴

1808. South Africa's LOAC Manual provides that the "compelling of civilians to perform prohibited labour" is a grave breach of the Geneva Conventions and their Additional Protocols.¹⁶⁶⁵

1809. The UK Military Manual provides that "compelling prisoners of war to perform prohibited work", "using and, in particular, deporting civilians for forced labour" are examples of punishable violations of the laws of war or war crimes.¹⁶⁶⁶

1810. The US Field Manual states that compelling prisoners of war and civilians to perform prohibited labour is a war crime.¹⁶⁶⁷

1811. The US Air Force Pamphlet restates Article 51 GC IV and provides that "wilfully compelling civilians or PWs to perform prohibited labour" is an act involving individual criminal responsibility.¹⁶⁶⁸

1812. The US Instructor's Guide states that:

In addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . compelling prisoners of war to perform prohibited labor such as removing mines or digging defensive positions [and] compelling civilians to perform prohibited labor such as carrying mortars.¹⁶⁶⁹

1813. The US Naval Handbook provides that "international law strictly prohibits the use of the seas for the purpose of transporting slaves".¹⁶⁷⁰ It also stipulates that it is prohibited to subject prisoners of war to "unhealthy, dangerous, or otherwise prohibited labour".¹⁶⁷¹ It adds that imposing "forced labor" on civilian inhabitants of occupied territory is a war crime.¹⁶⁷²

National Legislation

1814. Albania's Military Penal Code provides that sentencing a person to slave labour is a war crime.¹⁶⁷³

1815. Under Armenia's Penal Code, "enslavement" constitutes a crime against humanity.¹⁶⁷⁴

¹⁶⁶³ Nigeria, *Manual on the Laws of War* (undated), § 6(11) and (13).

¹⁶⁶⁴ Senegal, *IHL Manual* (1999), pp. 3 and 23. ¹⁶⁶⁵ South Africa, *LOAC Manual* (1996), § 39(i).

¹⁶⁶⁶ UK, *Military Manual* (1958), § 626(k) and (m).

¹⁶⁶⁷ US, *Field Manual* (1956), § 504(k) and (m).

¹⁶⁶⁸ US, *Air Force Pamphlet* (1976), §§ 14-6(b) and 15-3(c)(9).

¹⁶⁶⁹ US, *Instructor's Guide* (1985), p. 13. ¹⁶⁷⁰ US, *Naval Handbook* (1995), § 3.6.

¹⁶⁷¹ US, *Naval Handbook* (1995), § 6.2.5.(1). ¹⁶⁷² US, *Naval Handbook* (1995), § 6.2.5.(2).

¹⁶⁷³ Albania, *Military Penal Code* (1995), Articles 73–75.

¹⁶⁷⁴ Armenia, *Penal Code* (2003), Article 392.

1816. Australia's War Crimes Act provides that "forced labour of civilians in connection with the military operations of the enemy" is a war crime.¹⁶⁷⁵

1817. Under Australia's War Crimes Act as amended, the deportation of a person to, or the internment of a person in, a death camp or a slave labour camp is a serious war crime.¹⁶⁷⁶

1818. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes defined in the 1998 ICC Statute: crimes against humanity, including "enslavement"; and war crimes, including "sexual slavery" and "enforced prostitution", in both international and non-international armed conflicts.¹⁶⁷⁷

1819. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, forcing persons under 18 years to work is prohibited.¹⁶⁷⁸

1820. Azerbaijan's Criminal Code provides that "making [protected persons] carry out forced labour" is a violation of the laws and customs of war.¹⁶⁷⁹

1821. Bangladesh's International Crimes (Tribunal) Act states that "deportation to slave labour... of civilian population in the territory of Bangladesh" constitutes a war crime. It adds that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹⁶⁸⁰

1822. Under the Criminal Code of Belarus, the deportation of the civilian population to forced labour is a violation of the laws and customs of war.¹⁶⁸¹

1823. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, provides that enslavement constitutes a crime under international law.¹⁶⁸²

1824. The Criminal Code of the Federation of Bosnia and Herzegovina provides that compelling civilians to carry out forced labour is a war crime.¹⁶⁸³ The Criminal Code of the Republika Srpska contains the same provision.¹⁶⁸⁴

1825. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that enslavement is a crime against humanity.¹⁶⁸⁵

¹⁶⁷⁵ Australia, *War Crimes Act* (1945), Section 3.

¹⁶⁷⁶ Australia, *War Crimes Act as amended* (1945), Section 6.

¹⁶⁷⁷ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.10, 268.60, 268.61, 268.83 and 268.84.

¹⁶⁷⁸ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 17.

¹⁶⁷⁹ Azerbaijan, *Criminal Code* (1999), Article 115.2.

¹⁶⁸⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d) and (e).

¹⁶⁸¹ Belarus, *Criminal Code* (1999), Article 135(2).

¹⁶⁸² Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(2)(3).

¹⁶⁸³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

¹⁶⁸⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

¹⁶⁸⁵ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 3(c).

1826. Canada's Crimes against Humanity and War Crimes Act provides that the crimes against humanity and war crimes defined in Articles 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁶⁸⁶

1827. China's Law Governing the Trial of War Criminals provides that "scheming to enslave the inhabitants of occupied territory" and "forcing prisoners of war to engage in work not allowed by the International Conventions" constitute war crimes.¹⁶⁸⁷

1828. The DRC Code of Military Justice as amended provides that compelling civilians to carry out forced labour is an offence.¹⁶⁸⁸

1829. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "enslavement", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.¹⁶⁸⁹ The Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁶⁹⁰

1830. Under Côte d'Ivoire's Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, detention of the civilian population in forced labour camps constitutes a "crime against the civilian population".¹⁶⁹¹

1831. Croatia's Criminal Code provides that subjecting the civilian population to forced labour is a war crime.¹⁶⁹² It also punishes any person who "places another person in slavery, or keeps a person in such a state or a similar state, buys, sells or hands him or her over to another person, or is an intermediary in the purchase, sale or handing over of a person, or encourages another person to sell the freedom of a person in his or her care".¹⁶⁹³

1832. Ethiopia's Penal Code provides that "systematic deportation, transfer or detention in concentration or forced labour camps" is a war crime against the civilian population.¹⁶⁹⁴

1833. Under France's Penal Code, enslavement is a crime against humanity.¹⁶⁹⁵

1834. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 49–68 GC III and 40, 51 and 95 GC IV, as well as any "contravention" of AP II, including violations of Article 4(2)(f) AP II, are punishable offences.¹⁶⁹⁶

1835. Israel's Nazis and Nazi Collaborators (Punishment) Law includes deportation to forced labour of the civilian population of or in occupied territories in its definition of war crimes.¹⁶⁹⁷

¹⁶⁸⁶ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁶⁸⁷ China, *Law Governing the Trial of War Criminals* (1946), Article 3(23) and (30).

¹⁶⁸⁸ DRC, *Code of Military Justice as amended* (1972), Article 526.

¹⁶⁸⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.

¹⁶⁹⁰ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁶⁹¹ Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(3).

¹⁶⁹² Croatia, *Criminal Code* (1997), Article 158(1).

¹⁶⁹³ Croatia, *Criminal Code* (1997), Article 175.

¹⁶⁹⁴ Ethiopia, *Penal Code* (1957), Article 282(c). ¹⁶⁹⁵ France, *Penal Code* (1994), Article 212–1.

¹⁶⁹⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁶⁹⁷ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b), this section also includes enslavement as a crime against humanity.

1836. Italy's Wartime Military Penal Code provides for the punishment of any member of the military who compels prisoners of war to carry out labour which is directly linked to military operations or which is especially prohibited by law or international conventions.¹⁶⁹⁸

1837. Kenya's Constitution provides that no person shall be held in slavery or servitude.¹⁶⁹⁹

1838. Latvia's Criminal Code provides that assignment to forced labour of prisoners of war and civilians in the occupied territories is a war crime.¹⁷⁰⁰

1839. Under Lithuania's Criminal Code as amended, the unlawful internment of civilians in labour camps is an offence.¹⁷⁰¹

1840. Under Luxembourg's Law on the Repression of War Crimes, any constraint to work and provide services destined for war purposes outside or in the territory of Luxembourg constitutes a war crime.¹⁷⁰²

1841. Mali's Penal Code provides that enslavement of a group of the civilian population is a crime against humanity.¹⁷⁰³

1842. The Definition of War Crimes Decree of the Netherlands includes "forced labour of civilians in connection with the military operations of the enemy" and "the employment of prisoners of war on unauthorised works" in its list of war crimes.¹⁷⁰⁴

1843. Under the International Crimes Act of the Netherlands, "enslavement" committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity. Enslavement is defined as "the exercise of any or all of the powers attaching to the right of ownership over a person, including the exercise of such power in the course of trafficking in persons, in particular women and children".¹⁷⁰⁵

1844. Under New Zealand's International Crimes and ICC Act, crimes against humanity include the crimes defined in Article 7(1)(c) of the 1998 ICC Statute, and war crimes include the crimes defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.¹⁷⁰⁶

1845. Nicaragua's Military Penal Code punishes the compelling of prisoners of war to carry out work related to the war effort.¹⁷⁰⁷

1846. According to Niger's Penal Code as amended, enslavement is a crime against humanity.¹⁷⁰⁸

1847. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of

¹⁶⁹⁸ Italy, *Wartime Military Penal Code* (1941), Articles 182 and 212(2).

¹⁶⁹⁹ Kenya, *Constitution* (1992), Article 73(1). ¹⁷⁰⁰ Latvia, *Criminal Code* (1998), Section 74.

¹⁷⁰¹ Lithuania, *Criminal Code as amended* (1961), Article 336.

¹⁷⁰² Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(1).

¹⁷⁰³ Mali, *Penal Code* (2001), Article 29(a).

¹⁷⁰⁴ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

¹⁷⁰⁵ Netherlands, *International Crimes Act* (2003), Articles 4(1)(c) and 4(2)(b).

¹⁷⁰⁶ New Zealand, *International Crimes and ICC Act* (2000), Sections 10(2) and 11(2).

¹⁷⁰⁷ Nicaragua, *Military Penal Code* (1996), Article 55(2).

¹⁷⁰⁸ Niger, *Penal Code as amended* (1961), Article 208.2.

12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".¹⁷⁰⁹

1848. Paraguay's Penal Code provides that during war, armed conflict or military occupation, it is a war crime to subject the civilian population, the wounded and sick and prisoners of war to forced labour.¹⁷¹⁰

1849. Under the War Crimes Trial Executive Order of the Philippines, "enslavement [of]... civilian populations before or during [the Second World War]" constitutes a war crime.¹⁷¹¹

1850. Under Slovenia's Penal Code, subjecting civilians to forced labour is a war crime.¹⁷¹²

1851. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(c) of the 1998 ICC Statute, and war crimes as defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.¹⁷¹³

1852. Ukraine's Criminal Code penalises the deportation of the civilian population to forced labour.¹⁷¹⁴

1853. Under the UK ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(c) of the 1998 ICC Statute, and war crimes as defined in Article 8(2)(b)(xxii) and (e)(vi) of the Statute.¹⁷¹⁵

1854. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as enslavement of the civilian population.¹⁷¹⁶

1855. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as enslavement of the civilian population.¹⁷¹⁷

1856. Under Uzbekistan's Criminal Code, ordering or subjecting civilians to forced labour is a violation of the laws and customs of war.¹⁷¹⁸

1857. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of... forced labour of the population of Yugoslavia" committed war crimes.¹⁷¹⁹

¹⁷⁰⁹ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁷¹⁰ Paraguay, *Penal Code* (1997) Article 320(4).

¹⁷¹¹ Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(3).

¹⁷¹² Slovenia, *Penal Code* (1994), Article 374(1).

¹⁷¹³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁷¹⁴ Ukraine, *Criminal Code* (2001), Article 408(1).

¹⁷¹⁵ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁷¹⁶ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

¹⁷¹⁷ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).

¹⁷¹⁸ Uzbekistan, *Criminal Code* (1994), Clause 152.

¹⁷¹⁹ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

1858. The Penal Code as amended of the SFRY (FRY) provides that subjecting civilians to forced labour is a war crime.¹⁷²⁰

National Case-law

1859. In the *Rudolph and Minister of Employment and Immigration case* in 1992, the Canadian Federal Court of Appeal upheld an order for the removal from Canada of the accused, a German national who during the Second World War had requested and supervised the deportation and use of foreign civilians as slave labourers in the production of V2 rockets, on the ground that he had committed outside Canada an act that constituted a war crime.¹⁷²¹

1860. Colombia's Constitutional Court held in 1995 that the prohibitions contained in Article 4(2) AP II were perfectly consistent with the Constitution, since they were not only in harmony with the principles and values of the Constitution, but also practically reproduced specific constitutional provisions. The Court said that the prohibition of Article 4(2)(f) was almost identical to Article 17 of the Constitution.¹⁷²²

1861. In its judgement in the *Roechling case* in 1948, the General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany held the accused guilty of forcing prisoners of war to work in the German metallurgical industry, whose output was directly connected with the operations of war. The Tribunal considered that the use of the term "operations of war" should be understood as envisaging a prohibition of the employment of prisoners of war in work capable of increasing the war potential of the enemy.¹⁷²³

1862. In its judgement in the *Eichmann case* in 1961, the District Court of Jerusalem held that "enslavement" caused serious bodily or mental harm and amounted to a violation of Israel's Nazis and Nazi Collaborators (Punishment) Law.¹⁷²⁴

1863. In its judgement in the *Koshiro case* in 1947, the Temporary Court-Martial of Makassar of the Netherlands found that forcing prisoners of war to build ammunition depots and fill them with ammunition amounted to "employing prisoners of war on war work" and qualified it as a violation of Article 6 of the 1907 HR and of Article 31 of the 1929 Geneva POW Convention.¹⁷²⁵

1864. In its judgement in the *Rohrig and Others case* in 1950, a Special Court of Cassation of the Netherlands found the accused guilty of having deported

¹⁷²⁰ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1), see also Article 155 (enslavement).

¹⁷²¹ Canada, Federal Court of Appeal, *Rudolph and Minister of Employment and Immigration case*, Judgement, 1 May 1992.

¹⁷²² Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

¹⁷²³ France, General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany, *Roechling case*, Judgement, 30 June 1948.

¹⁷²⁴ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.

¹⁷²⁵ Netherlands, Temporary Court-Martial of Makassar, *Koshiro case*, Judgement, 5 February 1947.

civilians from the Netherlands to Germany and having put them to forced labour in the construction of the fortifications of the German “West Wall”.¹⁷²⁶

1865. In its judgement in the *Greiser case* in 1947, the Supreme National Tribunal of Poland at Poznan found the accused guilty of deporting the civilian population to forced labour camps.¹⁷²⁷

1866. In its judgement in the *Student case* in 1946, the UK Military Court at Lüneberg found the accused guilty of forcing prisoners of war to unload arms, ammunition and warlike stores from German aircraft.¹⁷²⁸

1867. In its judgement in the *Pohl case* in 1947, the US Military Tribunal at Nuremberg, in considering charges of war crimes and crimes against humanity, held that:

Slavery may exist even without torture. Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery – compulsory uncompensated labour – would still remain. There is no such thing as benevolent slavery. Involuntary servitude, even if tempered by humane treatment, is still slavery.¹⁷²⁹

1868. In the *List (Hostages Trial) case* in 1948, the US Military Tribunal at Nuremberg found the defendants guilty of committing acts of “deportation to slave labour of prisoners of war and members of the civilian populations in territories occupied by the German Armed Forces”.¹⁷³⁰

1869. In the *Milch case* in 1947, the US Military Tribunal at Nuremberg found the accused guilty of war crimes in that he was responsible for the slave labour and deportation to slave labour of the civilian populations of countries and territories occupied by the German armed forces, and in the enslavement, deportation, ill-treatment and terrorisation of such persons. The Tribunal found the accused guilty of crimes against humanity for the same war crimes insofar as they related to foreign nationals. Judge Fitzroy D Phillips referred to the definition of crimes in the 1945 Allied Control Council Law No. 10 and stated in his concurring opinion that the law treats as separate crimes and different types of crime deportation to slave labour (as a war crime) and enslavement (as a crime against humanity).¹⁷³¹

1870. In its judgement in the *Krauch (I. G. Farben Trial) case* in 1948, the US Military Tribunal at Nuremberg, without attempting to define what constituted “work in direct relation to war operations” within the meaning of the 1929 Geneva POW Convention, held that the use of prisoners of war in coal

¹⁷²⁶ Netherlands, Special Court of Cassation, *Rohrig and Others case*, Judgement, 15 May 1950.

¹⁷²⁷ Poland, Supreme National Tribunal of Poland at Poznan, *Greiser case*, Judgement, 7 July 1946.

¹⁷²⁸ UK, Military Court at Lüneberg, *Student case*, Judgement, 10 May 1946.

¹⁷²⁹ US, Military Tribunal at Nuremberg, *Pohl case*, Judgement, 3 November 1947.

¹⁷³⁰ US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948.

¹⁷³¹ US, Military Tribunal at Nuremberg, *Milch case*, Judgement, 17 April 1947.

mines under the existing conditions amounted to a violation of the Convention and, therefore, was a war crime. With regard to the deportation of the civilian inhabitants of occupied territories to slave labour, the Tribunal held that:

The use of concentration camp labour and forced foreign workers at Auschwitz, with the initiative displayed by the officials of Farben in the procurement and utilization of such labour, is a crime against humanity and, to the extent that non-German nationals were involved, also a war crime, to which the slave labour programme of the Reich will not warrant the defence of necessity.¹⁷³²

1871. In its judgement in the *Krupp case* in 1948, the US Military Tribunal at Nuremberg referred to the statement of the law applicable to the deportation to slave labour and enslavement made by Judge Phillips in the *Milch case* and found the accused guilty of forcing French prisoners of war to work in the armament industry.¹⁷³³

1872. In its judgement in the *Von Leeb case (The High Command Trial)* in 1948, the US Military Tribunal at Nuremberg found that forcing the civilian inhabitants of occupied territories to construct fortifications was prohibited work.¹⁷³⁴

Other National Practice

1873. In a statement before the CRC in 1997, the representative of Myanmar, responding to the comment that “children should work as ‘porters’ for the army – apparently on a systematic basis”, stated that he was aware that the law permitting the recruitment of child labour, in particular for portering duties, was incompatible with the 1989 Convention on the Rights of the Child and ILO standards and consideration was being given to repealing it.¹⁷³⁵

1874. In a report submitted in 1992 pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described acts of hard and forced labour perpetrated by the parties to the conflict.¹⁷³⁶

1875. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular the enslavement of millions of Koreans.¹⁷³⁷

1876. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in

¹⁷³² US, Military Tribunal at Nuremberg, *Krauch (I. G. Farben Trial) case*, Judgement, 29 July 1948.

¹⁷³³ US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948.

¹⁷³⁴ US, Military Tribunal at Nuremberg, *Von Leeb case (The High Command Trial)*, Judgement, 28 October 1948.

¹⁷³⁵ Myanmar, Statement before the CRC, UN Doc. CRC/C/SR.359, 21 March 1997, §§ 17 and 43.

¹⁷³⁶ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Third Submission), annexed to Letter dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24791, 10 November 1992, p. 14.

¹⁷³⁷ US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON. RES. 357, 106th Congress, 2nd Session, 19 June 2000.

armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".¹⁷³⁸

III. Practice of International Organisations and Conferences

United Nations

1877. In two resolutions adopted in 1995, the UN Security Council expressed its grave concern and condemned in the strongest possible terms the violations of IHL and human rights in Bosnia and Herzegovina, including evidence of a consistent pattern of forced labour. It referred to forced labour as a "grave violation of international humanitarian law".¹⁷³⁹

1878. In 1993, in a statement by its President following the death of persons detained by Bosnian Serb forces when the vehicle transporting them for work at the front was ambushed, the UN Security Council reminded the parties concerned that "they must not compel detainees to do work of a military nature or destined to serve a military purpose".¹⁷⁴⁰

1879. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and FRY, the UN General Assembly expressed its concern regarding "grave violations of international humanitarian law and of human rights in and around Srebrenica, and in the areas of Banja Luka and Sanski Most, including... forced labour".¹⁷⁴¹

1880. In a resolution adopted in 1996, the UN General Assembly expressed "deep concern at the government of Sudan's failure to take measures to halt the use of large numbers of women and children in the slave trade, in situations of servitude and for forced labour". It urged the government to investigate and put an immediate end to these practices.¹⁷⁴²

1881. In a resolution adopted in 1996, the UN Commission on Human Rights urged the government of Sudan, following Sudan's letter to the Centre for Human Rights of 22 March 1996, to carry out its investigations without delay into cases of slavery, servitude, the slave trade, forced labour and similar institutions and practice, as reported by the Special Rapporteur.¹⁷⁴³

1882. In a resolution adopted in 1998 on the situation of human rights in Myanmar, the UN Commission on Human Rights expressed concern at the widespread use of forced labour "including for work on infrastructure projects

¹⁷³⁸ Report on US Practice, 1997, Chapter 5.3.

¹⁷³⁹ UN Security Council, Res. 1019, 9 November 1995, preamble; Res. 1034, 21 December 1995, preamble and § 2.

¹⁷⁴⁰ UN Security Council, Statement by the President, UN Doc. S/25557, 8 April 1993.

¹⁷⁴¹ UN General Assembly, Res. 50/193, 22 December 1995, preamble.

¹⁷⁴² UN General Assembly, Res. 51/112, 12 December 1996, §§ 1-3 and 12.

¹⁷⁴³ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 10.

and as porters for the army". It specifically condemned this practice in relation to women and children.¹⁷⁴⁴

1883. In 1996, in the report on her mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, its Causes and Consequences stated that she was

aware of the position of the government of Japan whereby the application of the term "slavery", defined as "the status or condition of a person over whom any or all powers attaching to the right of ownership are exercised" in accordance with Article 1(1) of the 1926 Slavery Convention, was inaccurate in the case of "comfort women" under existing provisions of international law.

... the practice of "comfort women" should be considered a clear case of sexual slavery and slave-like practice in accordance with the approach adopted by relevant international human rights bodies and mechanisms.¹⁷⁴⁵

1884. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, its Causes and Consequences stated that:

During wartime, women are often trafficked across borders to sexually service combatants to the armed conflict. Armed conflict increases the risk of women and girls being abducted and forced into sexual slavery and/or forced prostitution. Although most conflicts are now internal ones, women and girls may be transported across international borders, often to camps of soldiers or rebels located in the territory of a neighbouring State. At least some of these abductions result in women and girls being sold to others and trafficked to other regions or countries. The Governments which host and support the rebel forces also assume a specific obligation to stop the trafficking in human beings and to hold accountable those found responsible for such crimes.¹⁷⁴⁶

1885. In 1998, the Special Rapporteur of the UN Sub-Commission on Human Rights on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, having carried out a comprehensive study of the question of rape and other forms of sexual violence during armed conflict, stated that:

In all respects and in all circumstances, sexual slavery is slavery and its prohibition is a *jus cogens* norm. The "comfort stations" that were maintained by the Japanese military during the Second World War (see appendix) and the "rape camps" that have been well documented in the former Yugoslavia are particularly egregious examples of sexual slavery. Sexual slavery also encompasses situations where women

¹⁷⁴⁴ UN Commission on Human Rights, Res. 1998/63, 21 April 1998, § 3(a), (c) and (d).

¹⁷⁴⁵ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, §§ 7–8.

¹⁷⁴⁶ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/2001/73, 23 January 2001, § 53.

and girls are forced into “marriage”, domestic servitude or other forced labour that ultimately involves forced sexual activity, including rape by their captors. For instance, in addition to the cases documented in Rwanda and the former Yugoslavia, there are reports from Myanmar of women and girls who have been raped and otherwise sexually abused after being forced into “marriages” or forced to work as porters or minefield sweepers for the military. In Liberia, there are similar reports of women and girls who have been forced by combatants into working as cooks and who are also held as sexual slaves.

...

Sexual slavery also encompasses most, if not all forms of forced prostitution. The terms “forced prostitution” or “enforced prostitution” appear in international and humanitarian conventions but have been insufficiently understood and inconsistently applied. “Forced prostitution” generally refers to conditions of control over a person who is coerced by another to engage in sexual activity.

...

Older definitions of forced prostitution focus either in vague terms on “immoral” attacks on a woman’s “honour”, or else they are nearly indistinct from definitions that seem more accurately to describe the condition of slavery. Despite these limitations, as the crime is clearly criminalized within the Geneva Conventions and the Additional Protocols thereto, it remains a potential, albeit limited alternative tool for future prosecutions of sexual violence in armed conflict situations.

...

As a general principle it would appear that in situations of armed conflict, most factual scenarios that could be described as forced prostitution would also amount to sexual slavery and could more appropriately and more easily be characterized and prosecuted as slavery.¹⁷⁴⁷

1886. In 1974, the UN Sub-Commission on Human Rights was authorized by ECOSOC to establish a Working Group on contemporary forms of slavery to:

review developments in the fields of slavery, the slave trade and the slavery-like practices, of apartheid and colonialism, the traffic in persons and the exploitation of the prostitution of others, as defined in the 1926 Slavery Convention, the 1956 Supplementary Convention on the Abolition of Slavery and the 1949 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others.¹⁷⁴⁸

In its report containing recommendations to the Sub-Commission in 2001, the Working Group reaffirmed that “every woman, man and child has a fundamental right to be free from all forms of slavery and servitude” and that “forced labour is a contemporary form of slavery”.¹⁷⁴⁹

¹⁷⁴⁷ UN Sub-Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, §§ 30–33.

¹⁷⁴⁸ UN Sub-Commission on Human Rights, Working Group on Contemporary Forms of Slavery, Report on its 26th Session, UN Doc. E/CN.4/Sub.2/2001/30, 16 July 2001, § 1.

¹⁷⁴⁹ UN Sub-Commission on Human Rights, Working Group on Contemporary Forms of Slavery, Report on its 26th Session, UN Doc. E/CN.4/Sub.2/2001/30, 16 July 2001, § 136, Recommendation 1 (General and preamble) and Recommendation 10, § 1 (Forced labour).

Other International Organisations

1887. No practice was found.

International Conferences

1888. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1889. The indictment in the *case of the Major War Criminals* before the IMT Nuremberg in 1945 listed “enslavement” among crimes against humanity. It added that:

The defendants conscripted and forced the inhabitants to labor and requisitioned their services for purposes other than meeting the needs of the armies of occupation and to an extent far out of proportion to the resources of the countries involved. All the civilians so conscripted were forced to work for the German war effort. Civilians were required to register and many of those who registered were forced to join the Todt Organization and the Speer Legion, both of which were semi-military organizations involving some military training. These acts violated Articles 46 and 52 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from the criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed, and Article 6 (b) of the Charter.¹⁷⁵⁰

1890. In its judgement in the *case of the Major War Criminals* in 1945, the IMT Nuremberg stated that “the laws relating to forced labour by the inhabitants of occupied territories are found in Article 52 of The Hague Convention” and that “the policy of the German occupation authorities was in flagrant violation of the terms of this Convention”.¹⁷⁵¹

1891. The indictment in the *case of the Major War Criminals* before the IMT Tokyo in 1946 contained references to forced labour and mentioned violations, including “deportation and enslavement of the inhabitants . . . contrary to [the 1907 HR] and to the Laws and Customs of War: Large numbers of the inhabitants or [occupied] territories were . . . arrested and interned without justification, sent to forced labour . . .”.¹⁷⁵²

1892. In its judgement in the *case of the Major War Criminals* in 1948, the IMT Tokyo stated with respect to the use of labour by civilians from occupied territories that:

Having decided upon a policy of employing prisoners of war and civilian internees on work directly contributing to the prosecution of the war, and having established

¹⁷⁵⁰ IMT Nuremberg, *Case of the Major War Criminals*, Indictment, 20 November 1945, Counts 1, 3(E), 3(H) and 4.

¹⁷⁵¹ IMT Nuremberg, *Case of the Major War Criminals*, Indictment, 20 November 1945, Judgment (Slave Labour Policy).

¹⁷⁵² IMT Tokyo, *Case of the Major War Criminals*, Indictment, 29 April 1946, Count 53, Appendix D.

a system to carry that policy into execution, the Japanese went further and supplemented this source of manpower by recruiting labourers from the native population of the occupied territories. This recruiting of labourers was accomplished by false promises, and by force . . . The labourers were transported to and confined in camps. Little or no distinction appears to have been made between these conscripted labourers on the one hand and prisoners of war and civilian internees on the other hand. They were all regarded as slave labourers to be used to the limit of their endurance.¹⁷⁵³

1893. In the *Kunarac case* before the ICTY in 1996, the accused was charged with slavery as a crime against humanity. The accused were charged with detaining nine women in a private apartment where the women were sexually assaulted on a regular basis and forced to work both inside and outside the home.¹⁷⁵⁴

1894. In its judgement in the *Kunarac case* in 2001, the ICTY Trial Chamber stated that “at the time relevant to the indictment, enslavement as a crime against humanity in customary international law consisted of the exercise of any or all of the powers attaching to the right of ownership over a person” and that “the *actus reus* of the violation is the exercise of any or all of the powers attaching to the right of ownership over a person. The *mens rea* of the violation consists in the intentional exercise of such powers.”¹⁷⁵⁵ The Tribunal found the accused guilty of crimes against humanity (enslavement).¹⁷⁵⁶

1895. In the *Krnojelac case* before the ICTY in 1997, the accused was charged with “slavery” as a violation of the laws and customs of war pursuant to Article 3 of the Statute, on the basis of both the 1926 Slavery Convention and customary international law, and with “enslavement” as a crime against humanity pursuant to Article 5 of the 1993 ICTY Statute. The case revealed that detainees were forced to work, *inter alia*, in mines, construction, farming, mine detection and trench-digging on the front line. “The detainees were not paid for their work. Work was not voluntary. Even ill or injured detainees were forced to work. Those who refused were sent to solitary confinement.”¹⁷⁵⁷ In its judgement in 2002, the Trial Chamber found the accused guilty of “enslavement as a crime against humanity” and of “slavery as a violation of the laws or customs of war”.¹⁷⁵⁸

1896. In 1993, in its concluding observations on the report of Sudan, the CRC expressed “its concern regarding the issues of forced labour and slavery”.¹⁷⁵⁹

1897. In 1997, in its concluding observations on the report of Myanmar, the CRC expressed its grave concern for “cases of children systematically being

¹⁷⁵³ IMT Tokyo, *Case of the Major War Criminals*, Judgement, 12 November 1948, pp. 416–417.

¹⁷⁵⁴ ICTY, *Kunarac case*, Initial Indictment, 26 June 1996.

¹⁷⁵⁵ ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 539–540.

¹⁷⁵⁶ ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 883 and 886.

¹⁷⁵⁷ ICTY, *Krnojelac case*, Initial Indictment, 17 June 1997, §§ 5.36–5.41.

¹⁷⁵⁸ ICTY, *Krnojelac case*, Judgement, 15 March 2002, § 525.

¹⁷⁵⁹ CRC, Concluding observations on the report of Sudan, UN Doc. CRC/C/15/Add.6, 18 February 1993, § 12.

forced into labour, including as porters” and strongly recommended the abolition of children’s involvement in forced labour.¹⁷⁶⁰

1898. In its admissibility decision in *Van Droogenbroeck v. Belgium* in 1979, the ECiHR (guided by Article 1 of the 1956 Supplementary Convention on the Abolition of Slavery) observed that the distinction between servitude and forced labour was not explicitly stated in the 1950 ECHR and that “it may be considered, however, that in addition to the obligation to perform certain services for others, the notion of servitude embraces the obligation for the ‘serf’ to live on another person’s property and the impossibility of altering his condition”.¹⁷⁶¹

1899. In its judgement in *Van der Musselle v. Belgium* in 1983, the ECtHR noted that the 1950 ECHR “lays down a general and absolute prohibition of forced or compulsory labour” but it “does not define what is meant by ‘forced or compulsory labour’”. The Court referred to the definitions provided in the 1930 Forced Labour Convention and stated that:

For there to be forced or compulsory labour, for the purposes of Article [4(2)] of the European Convention, two cumulative conditions have to be satisfied: not only must the labour be performed by the person against his or her will, but either the obligation to carry it out must be “unjust” or “oppressive” or its performance must constitute “an avoidable hardship”, in other words be “needlessly distressing” or “somewhat harassing”.¹⁷⁶²

V. Practice of the International Red Cross and Red Crescent Movement

1900. In 1994, the Red Crescent Society of Azerbaijan denounced the treatment of prisoners by Armenia and Nagorno-Karabakh, including forced labour.¹⁷⁶³

VI. Other Practice

1901. The Bangkok NGO Declaration on Human Rights adopted in 1993 stated that:

Crimes against women, including sexual slavery and trafficking are rampant. Crimes against women are crimes against humanity, and the failure of governments to prosecute those responsible implies complicity... In crisis situations – ethnic violence, communal riots, armed conflicts, military conflicts, military occupation and displacement of population – women’s rights are specifically violated.¹⁷⁶⁴

¹⁷⁶⁰ CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, §§ 21 and 42.

¹⁷⁶¹ ECiHR, *Van Droogenbroeck v. Belgium*, Admissibility Decision, 5 July 1979, p 59.

¹⁷⁶² ECtHR, *Van der Musselle v Belgium*, Judgement, 20 November 1983, § 37.

¹⁷⁶³ Red Crescent Society of Azerbaijan, Declaration of the Executive Committee, 21 April 1994.

¹⁷⁶⁴ World Conference on Human Rights, Regional Preparatory Meeting for the Asia-Pacific, Bangkok, 24–28 March 1993, Bangkok NGO Declaration on Human Rights, UN Doc. A/CONF.157/PC/83, 19 April 1993, § 6.

1902. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that “a state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (b) slavery or slave trade”.¹⁷⁶⁵

1903. In 1994, the International Commission of Jurists argued that the 1921 International Convention for the Suppression of the Traffic in Women and Children was evidence of customary law in existence at the time of its adoption.¹⁷⁶⁶

1904. In December 2000, a Japanese NGO simulated a “Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery” which had jurisdiction over crimes committed against women, including sexual slavery and enslavement.¹⁷⁶⁷

Compelling persons to serve in the forces of a hostile power

I. Treaties and Other Instruments

Treaties

1905. Article 52 of the 1899 HR provides that:

Neither requisitions in kind nor services can be demanded from . . . inhabitants except for the needs of the army of occupation. They must be in proportion to the resources of the country, and of such a nature as not to involve the population in the obligation of taking part in military operations against their country.

1906. Article 44 of the 1899 HR provides that “any compulsion of the population of occupied territory to take part in military operations against its own country is prohibited”.

1907. Article 23(h) of the 1907 HR provides that it is “a belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent’s service before the commencement of the war”.

1908. Article 52 of the 1907 HR provides that:

Requisitions in kind and services shall not be demanded from . . . inhabitants except for the needs of the army of occupation. They shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country.

1909. Article 51, first paragraph, GC IV provides that “the Occupying Power may not compel protected persons to serve in its armed or auxiliary forces.

¹⁷⁶⁵ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(b).

¹⁷⁶⁶ Ustina Dolgopol and Snehil Paranjape, *Comfort Women: an Unfinished Ordeal*, International Commission of Jurists, Geneva, 1994.

¹⁷⁶⁷ VAWW-NET Japan, Women’s International War Crimes Tribunal on Japan’s Military Sexual Slavery, 7–12 December 2000.

No pressure or propaganda which aims at securing voluntary enlistment is permitted."

1910. Articles 130 GC III and 147 GC IV provide that compelling a prisoner of war or a protected person to serve in the forces of a hostile power is a grave breach of these instruments.

1911. Article 8 of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the return of military personnel and civilians provides that captured military personnel of the parties and captured foreign civilians of the parties "shall not be forced to join the armed forces of the detaining party".

1912. Pursuant to Article 8(2)(a)(vi) and (b)(xv) of the 1998 ICC Statute, "compelling a prisoner of war or other protected person to serve in the forces of a hostile power" and "compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war" constitute war crimes in international armed conflicts.

Other Instruments

1913. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including compulsory enlistment of soldiers among the inhabitants of occupied territory.

1914. According to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, "compelling a protected person to serve in the forces of a hostile Power" is considered as an exceptionally serious war crime and as a serious violation of the principles and rules of international law applicable in armed conflict.

1915. Article 2 of the 1993 ICTY Statute gives the Tribunal jurisdiction over grave breaches of the Geneva Conventions and expressly includes "compelling a prisoner of war or civilian to serve in the forces of a hostile power".

1916. Under Article 20(a)(v) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, "compelling a prisoner of war or other protected person to serve in the forces of a hostile Power" constitutes a war crime.

1917. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(vi) and (b)(xv), "compelling a prisoner of war or other protected person to serve in the forces of a hostile power" and "compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war" constitute war crimes in international armed conflicts.

*II. National Practice**Military Manuals*

1918. Argentina's Law of War Manual provides that compelling a protected person to serve in the armed forces of a hostile power is a grave breach of the Geneva Conventions.¹⁷⁶⁸

1919. Australia's Commanders' Guide states that "compelling PW or other protected persons to serve in the forces of a hostile power" is a crime which warrants the institution of criminal proceedings.¹⁷⁶⁹

1920. Australia's Defence Force Manual provides that "the population [in occupied areas] cannot be compelled to participate in any work which would involve participation in military operations".¹⁷⁷⁰

1921. Belgium's Law of War Manual states that compelling a prisoner of war to serve in the armed forces of the enemy is a grave breach of the Geneva Conventions.¹⁷⁷¹

1922. Benin's Military Manual prohibits "compelling nationals of the enemy State to take part in military operations against their own country, even if they used to serve you before the outbreak of hostilities". The same prohibition applies to prisoners of war.¹⁷⁷²

1923. Burkina Faso's Disciplinary Regulations prohibits "compelling nationals of the adverse party to take part in war operations against their own country".¹⁷⁷³

1924. Cameroon's Disciplinary Regulations prohibits "compelling nationals of the adverse party to take part in war operations against their own country".¹⁷⁷⁴

1925. Canada's LOAC Manual provides that "the occupying power is prohibited from compelling protected persons to enlist in its armed forces and may not use any pressure or propaganda aimed at securing their voluntary enlistment. To compel the population of occupied territory so to enlist is a grave breach of [GC IV]."¹⁷⁷⁵ The manual adds that "it is also a breach to compel a PW to serve in the forces of the hostile power" and that "in the case of civilians in the hands of the adverse party, it is also a grave breach . . . to compel a protected person to serve in the forces of a hostile power". It further states that "in accordance with the Hague Rules, a number of acts are 'especially forbidden' . . . compelling enemy nationals to take part in hostilities against their own country, even if they were members of the particular belligerent's forces before the commencement of the conflict".¹⁷⁷⁶

¹⁷⁶⁸ Argentina, *Law of War Manual* (1989), § 8.03.

¹⁷⁶⁹ Australia, *Commanders' Guide* (1994), § 1305(e); see also *Defence Force Manual* (1994), § 1315(e).

¹⁷⁷⁰ Australia, *Defence Force Manual* (1994), § 1222.

¹⁷⁷¹ Belgium, *Law of War Manual* (1983), p. 55.

¹⁷⁷² Benin, *Military Manual* (1995), Fascicule II, p. 12, § 2-1 and Fascicule III, p. 12.

¹⁷⁷³ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹⁷⁷⁴ Cameroon, *Disciplinary Regulations* (1975), Article 32.

¹⁷⁷⁵ Canada, *LOAC Manual* (1999), p. 12-5, § 42.

¹⁷⁷⁶ Canada, *LOAC Manual* (1999), p. 16-2, §§ 13 and 14 and p. 16-3, § 20.

1926. France's Disciplinary Regulations as amended prohibits "compelling nationals of the adverse party to take part in war operations against their own country".¹⁷⁷⁷

1927. France's LOAC Summary Note stipulates that "compelling [prisoners of war] to serve in enemy armed forces" is a war crime under the law of armed conflict.¹⁷⁷⁸

1928. France's LOAC Manual provides that prisoners of war "shall not be compelled to take part in activities with a military character or objective".¹⁷⁷⁹

1929. Germany's Military Manual states that "compelling prisoners of war and civilians to serve in the forces of the adversary" is a grave breach of IHL.¹⁷⁸⁰

1930. Israel's Manual on the Laws of War stipulates that "the Conventions expressly forbid harnessing prisoners to the war effort of the detaining state".¹⁷⁸¹

1931. Italy's IHL Manual forbids the compelling "of enemy soldiers to participate in military actions against their own country". It provides that "the inhabitants of an occupied territory . . . shall not be enrolled into the national armed forces, or . . . provide services directly linked to the war".¹⁷⁸² The manual stipulates that "in no case shall civilian persons be compelled to carry out works which would oblige them to take part in military operations".¹⁷⁸³

1932. Kenya's LOAC Manual provides that captured combatants "shall not be compelled to engage in activities having a military character or purpose".¹⁷⁸⁴

1933. South Korea's Military Regulation 187 provides that "forcing war prisoners to serve the enemy army" is an unjustifiable crime.¹⁷⁸⁵

1934. Mali's Army Regulations prohibits "compelling nationals of the adverse party to take part in war operations against their own country".¹⁷⁸⁶

1935. Morocco's Disciplinary Regulations prohibits "compelling nationals of the adverse party to take part in war operations against their own country".¹⁷⁸⁷

1936. The Military Manual of the Netherlands provides that compelling a protected person to serve a hostile power is a grave breach of the Geneva Conventions and their Additional Protocols.¹⁷⁸⁸

1937. New Zealand's Military Manual refers to Article 23 of the 1907 HR and provides that "a belligerent is forbidden to compel the subjects of the hostile party to take part in the operations of war directed against their own country, even if they were in the service of the belligerent before the commencement of the war". It further provides that:

¹⁷⁷⁷ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

¹⁷⁷⁸ France, *LOAC Summary Note* (1992), § 3.4. ¹⁷⁷⁹ France, *LOAC Manual* (2001), p. 102.

¹⁷⁸⁰ Germany, *Military Manual* (1992), § 1209.

¹⁷⁸¹ Israel, *Manual on the Laws of War* (1998), p. 53.

¹⁷⁸² Italy, *IHL Manual* (1991), Vol. I, §§ 11 and 39. ¹⁷⁸³ Italy, *IHL Manual* (1991), Vol. I, § 48(11).

¹⁷⁸⁴ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

¹⁷⁸⁵ South Korea, *Military Regulation 187* (1991), § 4.2.

¹⁷⁸⁶ Mali, *Army Regulations* (1979), Article 36.

¹⁷⁸⁷ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

¹⁷⁸⁸ Netherlands, *Military Manual* (1993), p. IX-5.

The Occupying Power must not compel protected persons to serve in its armed or auxiliary forces but [Article 51 GC IV] lays down expressly that pressure or propaganda which aims at securing voluntary enlistment in those forces is prohibited. To compel the population of occupied territory so to enlist is a grave breach of IV GC.¹⁷⁸⁹

According to the manual, it is a grave breach of GC III and GC IV to compel a prisoner of war and a protected civilian to serve in the forces of the hostile power.¹⁷⁹⁰ It also states that it is a war crime and an offence against the law of armed conflict to compel "enemy nationals to take part in hostilities against their own State, even if they were members of the particular belligerent's forces before the beginning of the conflict".¹⁷⁹¹

1938. Nigeria's Soldiers' Code of Conduct and Military Manual provide that "a belligerent is forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war".¹⁷⁹²

1939. Nigeria's Manual on the Laws of War states that compelling a prisoner of war and a protected person to serve in the forces of the hostile power is a grave breach of the Geneva Conventions and is considered a serious war crime.¹⁷⁹³ It further states that "compelling a citizen to take part in war operations directed against his own state" is an illegitimate tactic.¹⁷⁹⁴

1940. Under Russia's Military Manual, it is prohibited as a method of warfare "to compel persons belonging to the enemy party to participate in hostilities against their country".¹⁷⁹⁵

1941. Senegal's Disciplinary Regulations prohibits "compelling nationals of the adverse party to take part in war operations against their own country".¹⁷⁹⁶

1942. South Africa's LOAC Manual states that "compelling a protected person to serve in the forces of the hostile power" is a grave breach of the Geneva Conventions.¹⁷⁹⁷

1943. Sweden's IHL Manual provides that "according to [GC IV], an occupying power may not compel protected persons to serve in its armed forces or auxiliary organizations. It is likewise forbidden to use any pressure to persuade persons to enlist voluntarily in the forces of the occupying power." It adds that "the Convention also states that protected persons may not be compelled to perform any work which would involve them in the obligation of taking part in military operations".¹⁷⁹⁸ The manual further stipulates that "the status

¹⁷⁸⁹ New Zealand, *Military Manual* (1992), § 1320.2.

¹⁷⁹⁰ New Zealand, *Military Manual* (1992), § 1702(2) and 1702(3)(c).

¹⁷⁹¹ New Zealand, *Military Manual* (1992), § 1704(2)(i).

¹⁷⁹² Nigeria, *Soldiers' Code of Conduct* (undated), p. 4; *Military Manual* (1994), p. 40, § 6.

¹⁷⁹³ Nigeria, *Manual on the Laws of War* (undated), § 6(a) and (c).

¹⁷⁹⁴ Nigeria, *Manual on the Laws of War* (undated), § 14(a).

¹⁷⁹⁵ Russia, *Military Manual* (1990), § 5(q).

¹⁷⁹⁶ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

¹⁷⁹⁷ South Africa, *LOAC Manual* (1996), § 40.

¹⁷⁹⁸ Sweden, *IHL Manual* (1991), Section 6.1.3, p. 124.

of protected persons also entails the advantage that this category of refugees cannot be compelled to serve in the armed forces of the occupying power (GC IV, Art. 51)¹⁷⁹⁹. It also provides that “compelling a protected person to serve in the armed forces of the hostile power” is a grave breach of the Geneva Conventions.¹⁸⁰⁰

1944. Switzerland’s Basic Military Manual provides that “protected persons shall not be compelled to do any work which would make it compulsory for them to take part in military operations. It is prohibited to recruit labour force in order to achieve a mobilisation of workers placed under a military or half-military regime.”¹⁸⁰¹ The manual further specifies that “compelling [prisoners of war and civilians] to serve in the forces of the enemy Power” is a grave breach of the Geneva Conventions.¹⁸⁰²

1945. Togo’s Military Manual prohibits the “compelling of nationals of the enemy State to take part in military operations against their own country, even if they used to serve you before the outbreak of hostilities”. The same prohibition applies to prisoners of war.¹⁸⁰³

1946. The UK Military Manual provides that “protected persons of enemy nationality . . . must not be required to do work directly related to the conduct of military operations”. The compelling of prisoners of war and civilians to serve in the forces of the hostile power is strictly prohibited.¹⁸⁰⁴ It also states that “compelling a prisoner of war to serve in the forces of the hostile power” is a war crime.¹⁸⁰⁵ It adds that “compelling a person to serve in the forces of the hostile power” is a war crime under GC IV.¹⁸⁰⁶

1947. Under the UK LOAC Manual, it is prohibited “to compel enemy nationals to take part in operations against their own country, even if they were in your service before the outbreak of hostilities”.¹⁸⁰⁷

1948. The US Field Manual provides that compelling a prisoner of war or a protected person to serve in the forces of a hostile power is a grave breach of the Geneva Conventions.¹⁸⁰⁸

1949. The US Air Force Pamphlet recalls Article 23 of the 1907 HR, which “forbids compelling nationals of the hostile party to take part in the operations of war directed against their own country”, and Article 45 of the 1907 HR, which “forbids compelling the inhabitants of occupied territory to swear allegiance to the hostile power”. The Pamphlet also refers to Article 51 GC IV and states that “compulsory military service by protected persons in the armed forces

¹⁷⁹⁹ Sweden, *IHL Manual* (1991), Section 6.1.4, p. 127.

¹⁸⁰⁰ Sweden, *IHL Manual* (1991), Section 4.2, p. 93.

¹⁸⁰¹ Switzerland, *Basic Military Manual* (1987), Article 178.

¹⁸⁰² Switzerland, *Basic Military Manual* (1987), Article 192.

¹⁸⁰³ Togo, *Military Manual* (1996), Fascicule II, p. 12, § 2-1 and Fascicule III, p. 12.

¹⁸⁰⁴ UK, *Military Manual* (1958), §§ 48, 282 and 556.

¹⁸⁰⁵ UK, *Military Manual* (1958), § 625(b).

¹⁸⁰⁶ UK, *Military Manual* (1958), § 625(c).

¹⁸⁰⁷ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5, see also Annex A, p. 46, § 9.

¹⁸⁰⁸ US, *Field Manual* (1956), §§ 418 and 502.

of the occupant is prohibited".¹⁸⁰⁹ It adds that "wilfully compelling civilians or PWs to perform prohibited labour" is an act involving individual criminal responsibility".¹⁸¹⁰

1950. According to the US Air Force Commander's Handbook, "a belligerent is likewise forbidden to compel the nationals of the hostile party to take part in the operations of war directed against their own country".¹⁸¹¹

National Legislation

1951. Argentina's Draft Code of Military Justice punishes any soldier who "compels a prisoner of war or a civilian to serve in the armed forces of the adverse party".¹⁸¹²

1952. Under Armenia's Penal Code, "compelling a protected person or a prisoner of war to serve in the opponent army", during an armed conflict, constitutes a crime against the peace and security of mankind.¹⁸¹³

1953. Australia's War Crimes Act provides that "compulsory enlistment of soldiers among the inhabitants of occupied territory" is a war crime.¹⁸¹⁴

1954. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".¹⁸¹⁵

1955. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "compelling service in hostile forces" and "compelling participation in military operations", in international armed conflicts.¹⁸¹⁶

1956. Azerbaijan's Criminal Code provides that "compelling prisoners of war or other persons protected by international humanitarian law to serve in the forces of a hostile power, as well as compelling citizens of an enemy State to take part in hostilities against their State" are violations of the laws and customs of war.¹⁸¹⁷

1957. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹⁸¹⁸

1958. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect

¹⁸⁰⁹ US, *Air Force Pamphlet* (1976), § 14-6(a) and (b).

¹⁸¹⁰ US, *Air Force Pamphlet* (1976), § 15-3(c)(9).

¹⁸¹¹ US, *Air Force Commander's Handbook* (1980), § 32.

¹⁸¹² Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(3) in the *Code of Military Justice as amended* (1951).

¹⁸¹³ Armenia, *Penal Code* (2003), Article 390.2(2).

¹⁸¹⁴ Australia, *War Crimes Act* (1945), Section 3.

¹⁸¹⁵ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

¹⁸¹⁶ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.30 and 268.53.

¹⁸¹⁷ Azerbaijan, *Criminal Code* (1999), Article 115.1.

¹⁸¹⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

of similar offences in Barbados as if the grave breach had been committed in Barbados".¹⁸¹⁹

1959. Under the Criminal Code of Belarus, the following is a violation of the laws and customs of war:

Compelling persons that have laid down their arms or are defenceless, the wounded, sick and shipwrecked, sanitary and religious personnel, prisoners of war, the civilian population in an occupied territory or in the conflict zone, or other persons enjoying international protection to serve in the forces of a foreign power" is a violation of laws and customs of war.¹⁸²⁰

1960. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that compelling a prisoner of war, a civilian person or persons protected by AP I and AP II to serve in the forces of a hostile power or adverse party constitutes a crime under international law.¹⁸²¹

1961. The Criminal Code of the Federation of Bosnia and Herzegovina provides that compelling civilians and prisoners of war to serve in the armed forces of the enemy power is a war crime.¹⁸²² The Criminal Code of the Republika Srpska contains the same provision.¹⁸²³

1962. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".¹⁸²⁴

1963. Bulgaria's Penal Code as amended provides that compelling a captive or a civilian "to serve in the armed forces of an enemy state" is a war crime.¹⁸²⁵

1964. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that compelling a prisoner of war, a protected person or an enemy national to serve in the forces of the enemy power is a war crime in international armed conflicts.¹⁸²⁶

1965. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 ... which were committed during the period from 17 April 1975 to 6 January 1979".¹⁸²⁷

¹⁸¹⁹ Barbados, *Geneva Conventions Act* (1980), Section 3(2).

¹⁸²⁰ Belarus, *Criminal Code* (1999), Article 135(1).

¹⁸²¹ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(4).

¹⁸²² Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154(1) and 156.

¹⁸²³ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1) and 435.

¹⁸²⁴ Botswana, *Geneva Conventions Act* (1970), Section 3(1).

¹⁸²⁵ Bulgaria, *Penal Code as amended* (1968), Articles 411(b) and 412(d).

¹⁸²⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(e) and (B)(o).

¹⁸²⁷ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

1966. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] . . . is guilty of an indictable offence".¹⁸²⁸

1967. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁸²⁹

1968. Under Chile's Code of Military Justice, compelling a prisoner of war to fight against his or her own army is an "offence against international law".¹⁸³⁰

1969. China's Law Governing the Trial of War Criminals provides that "forcing non-combatants to engage in military activities with the enemy" and "conscripting by force of inhabitants in the occupied territory" constitute war crimes.¹⁸³¹

1970. Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, compels or orders the compelling of a protected person to serve in the armed forces of the enemy.¹⁸³²

1971. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁸³³

1972. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions".¹⁸³⁴

1973. Côte d'Ivoire's Penal Code as amended provides that in time of war or occupation, organising, ordering or compelling the civilian population to serve in the enemy armed forces, intelligence services or administration constitutes a "crime against the civilian population".¹⁸³⁵ The same provision applies with regard to prisoners of war.¹⁸³⁶

1974. Croatia's Criminal Code provides that compelling civilians and prisoners of war to serve in the armed forces or in the administration of the enemy power is a war crime.¹⁸³⁷

1975. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".¹⁸³⁸

¹⁸²⁸ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁸²⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁸³⁰ Chile, *Code of Military Justice* (1925), Article 261(1).

¹⁸³¹ China, *Law Governing the Trial of War Criminals* (1946), Article 3(20) and (22).

¹⁸³² Colombia, *Penal Code* (2000), Article 150.

¹⁸³³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁸³⁴ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁸³⁵ Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(4).

¹⁸³⁶ Côte d'Ivoire, *Penal Code as amended* (1981), Article 139(2).

¹⁸³⁷ Croatia, *Criminal Code* (1997), Articles 158 and 160.

¹⁸³⁸ Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

1976. The Code of Military Justice of the Dominican Republic punishes any member of the armed forces who compels a prisoner of war to fight against his or her own country.¹⁸³⁹

1977. El Salvador's Code of Military Justice provides that coercing POWs or other persons in the power of the adverse party to serve in the armed forces of the enemy is a war crime.¹⁸⁴⁰

1978. Under Estonia's Penal Code, compelling civilians, prisoners of war and interned civilians to serve in the armed forces of the enemy or to take part in military operations is a war crime.¹⁸⁴¹

1979. Ethiopia's Penal Code provides that it is a war crime to forcibly enlist the civilian population, prisoners of war and interned persons in the enemy's armed forces, intelligence services or administration.¹⁸⁴²

1980. Georgia's Criminal Code provides that it is a crime, in international or internal armed conflicts, to compel a prisoner of war or any other protected person to serve in the armed forces of the enemy.¹⁸⁴³

1981. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international armed conflict "compels a protected person . . . by force or threat of appreciable harm to serve in the forces of a hostile power, [or] compels a national of the adverse party by force or threat of appreciable harm to take part in the operations of war directed against his or her own country".¹⁸⁴⁴

1982. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".¹⁸⁴⁵

1983. Ireland's Geneva Conventions Act as amended provides that grave breaches of the 1949 Geneva Conventions are punishable offences.¹⁸⁴⁶ In addition, any "minor breach" of the Geneva Conventions, including violations of Article 51 GC IV, is a punishable offence.¹⁸⁴⁷

1984. Italy's Law of War Decree as amended provides that "it is prohibited to compel your enemies to participate in actions of war against their own country".¹⁸⁴⁸ It instructs soldiers that "you cannot implicate prisoners of war in work which would involve their participation in military operations".¹⁸⁴⁹ It also states that "enemies cannot, in any case, even if they used to serve the State before the outbreak of hostilities, be compelled to enlist

¹⁸³⁹ Dominican Republic, *Code of Military Justice* (1953), Article 201(1).

¹⁸⁴⁰ El Salvador, *Code of Military Justice* (1934), Article 69(1).

¹⁸⁴¹ Estonia, *Penal Code* (2001), §§ 97 and 98.

¹⁸⁴² Ethiopia, *Penal Code* (1957), Articles 282(d) and 284(b).

¹⁸⁴³ Georgia, *Criminal Code* (1999), Article 411(2)(d).

¹⁸⁴⁴ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(3)(3)-(4).

¹⁸⁴⁵ India, *Geneva Conventions Act* (1960), Section 3(1).

¹⁸⁴⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

¹⁸⁴⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁸⁴⁸ Italy, *Law of War Decree as amended* (1938), Article 37.

¹⁸⁴⁹ Italy, *Law of War Decree as amended* (1938), Article 106(3).

in the armed forces of the State, or to render services directly linked to the war".¹⁸⁵⁰

1985. Italy's Wartime Military Penal Code provides for the punishment of any member of the military who compels enemy nationals to take part in war actions against their own country.¹⁸⁵¹

1986. Jordan's Draft Military Criminal Code provides that compelling prisoners of war or protected persons to serve in the armed forces of the enemy is a war crime.¹⁸⁵²

1987. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".¹⁸⁵³

1988. Under the Draft Amendments to the Code of Military Justice of Lebanon, compelling prisoners of war or protected persons to serve in the armed forces of the enemy constitutes a war crime.¹⁸⁵⁴

1989. Under Lithuania's Criminal Code as amended, the compulsory use of civilians and prisoners of war in the armed forces of the enemy is a war crime.¹⁸⁵⁵

1990. Luxembourg's Law on the Repression of War Crimes provides that "any enlistment by the enemy (or its agents) in either the regular army, police units or military or paramilitary organisations" is a war crime.¹⁸⁵⁶

1991. Under Luxembourg's Law on the Punishment of Grave Breaches, "compelling a person protected by [GC III] and [GC IV] to serve in the armed forces of the enemy power" is a grave breach of the Geneva Conventions.¹⁸⁵⁷

1992. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".¹⁸⁵⁸

1993. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".¹⁸⁵⁹

1994. Mali's Penal Code provides that compelling a prisoner of war or a protected person to serve in the armed forces of a foreign power is a war crime. It adds that "compelling by a belligerent the nationals of the adverse party to

¹⁸⁵⁰ Italy, *Law of War Decree as amended* (1938), Article 281.

¹⁸⁵¹ Italy, *Wartime Military Penal Code* (1941), Article 182.

¹⁸⁵² Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(5).

¹⁸⁵³ Kenya, *Geneva Conventions Act* (1968), Section 3(1).

¹⁸⁵⁴ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(5).

¹⁸⁵⁵ Lithuania, *Criminal Code as amended* (1961), Article 338.

¹⁸⁵⁶ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(1).

¹⁸⁵⁷ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(4).

¹⁸⁵⁸ Malawi, *Geneva Conventions Act* (1967), Section 4(1).

¹⁸⁵⁹ Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

take part in hostilities against their country, even if they were in the service of the belligerent before the commencement of hostilities," constitutes a war crime in international armed conflicts.¹⁸⁶⁰

1995. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".¹⁸⁶¹

1996. Mexico's Code of Military Justice as amended provides for the punishment of persons found guilty of forcing detainees to participate in military campaigns against their own country.¹⁸⁶²

1997. Moldova's Penal Code provides a punishment for anyone who compels protected persons "to serve in the armed forces of the enemy".¹⁸⁶³

1998. The Definition of War Crimes Decree of the Netherlands includes "compulsory enlistment of soldiers among the inhabitants of occupied territory" in its list of war crimes.¹⁸⁶⁴

1999. Under the International Crimes Act of the Netherlands, it is a crime to commit in an international armed conflict grave breaches of the 1949 Geneva Conventions, including "compelling a prisoner of war or other protected person to serve in the armed forces of a hostile power", as well as "compelling the nationals of the hostile party to take part in the operations of war directed against their own country, even if they were in the belligerent's service before the commencement of the war".¹⁸⁶⁵

2000. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".¹⁸⁶⁶

2001. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(a)(vi) and(b)(xv) of the 1998 ICC Statute.¹⁸⁶⁷

2002. Nicaragua's Military Penal Code punishes the compelling of prisoners of war to fight against their own armed forces. It also punishes the compelling of enemy civilians to serve in Nicaragua's armed forces.¹⁸⁶⁸

2003. According to Niger's Penal Code as amended, it is a war crime to "compel to serve in the armed forces of the enemy power or of the adverse party" persons protected by the 1949 Geneva Conventions or their Additional Protocols of 1977.¹⁸⁶⁹

¹⁸⁶⁰ Mali, *Penal Code* (2001), Article 31(e) and (i)(15).

¹⁸⁶¹ Mauritius, *Geneva Conventions Act* (1970), Section 3(1).

¹⁸⁶² Mexico, *Code of Military Justice as amended* (1933), Article 324(V).

¹⁸⁶³ Moldova, *Penal Code* (2002), Article 137(2)(a).

¹⁸⁶⁴ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

¹⁸⁶⁵ Netherlands, *International Crimes Act* (2003), Articles 5(1)(e) and 5(5)(f).

¹⁸⁶⁶ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹⁸⁶⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁸⁶⁸ Nicaragua, *Military Penal Code* (1996), Articles 55(1) and 58.

¹⁸⁶⁹ Niger, *Penal Code as amended* (1961), Article 208.3(4).

2004. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".¹⁸⁷⁰

2005. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".¹⁸⁷¹

2006. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".¹⁸⁷²

2007. Paraguay's Penal Code states that coercing prisoners of war or other persons in the power of the adverse party to serve in the armed forces of the enemy is a war crime.¹⁸⁷³

2008. Peru's Code of Military Justice provides that compelling prisoners of war to fight against their own forces is a violation of the law of nations.¹⁸⁷⁴

2009. Poland's Penal Code provides for the punishment of any person who, in violation of international law, compels persons *hors de combat*, protected persons and persons enjoying international protection to "serve in hostile armed forces".¹⁸⁷⁵

2010. Portugal's Penal Code provides that in times of war, armed conflict or occupation, compelling the civilian population, the wounded, the sick and prisoners of war to serve in the enemy armed forces is a war crime.¹⁸⁷⁶

2011. Romania's Penal Code punishes the compelling of the wounded, sick and shipwrecked, members of civil medical services, the Red Cross or similar organisations, prisoners of war, or of all persons in the hands of the adverse party to serve in the armed forces of the foreign power.¹⁸⁷⁷

2012. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".¹⁸⁷⁸

2013. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".¹⁸⁷⁹

¹⁸⁷⁰ Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

¹⁸⁷¹ Norway, *Military Penal Code as amended* (1902), § 108(a).

¹⁸⁷² Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

¹⁸⁷³ Paraguay, *Penal Code* (1997), Article 320(6).

¹⁸⁷⁴ Peru, *Code of Military Justice* (1980), Article 95(1).

¹⁸⁷⁵ Poland, *Penal Code* (1997), Article 124.

¹⁸⁷⁶ Portugal, *Penal Code* (1996), Article 241(e).

¹⁸⁷⁷ Romania, *Penal Code* (1968), Article 358(a).

¹⁸⁷⁸ Seychelles, *Geneva Conventions Act* (1985), Section 3(1).

¹⁸⁷⁹ Singapore, *Geneva Conventions Act* (1973), Section 3(1).

2014. Slovenia's Penal Code provides that compelling civilian persons and prisoners of war to serve in the armed forces or administration of the enemy is a war crime.¹⁸⁸⁰

2015. Spain's Military Criminal Code punishes the compelling of prisoners of war and civilians to fight against their own forces.¹⁸⁸¹

2016. Spain's Penal Code provides for the punishment of anyone found guilty of "compelling a prisoner of war or a civilian person to serve, in whatever form, in the Armed Forces of the Adverse Party".¹⁸⁸²

2017. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, . . . a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".¹⁸⁸³

2018. Sweden's Penal Code as amended provides that compelling prisoners of war or civilian persons to serve in the armed forces of the enemy is a crime against international law.¹⁸⁸⁴

2019. Under Tajikistan's Criminal Code, "compelling a prisoner of war or any other protected person to serve in the armed forces of the hostile power" is a punishable offence.¹⁸⁸⁵

2020. Thailand's Prisoners of War Act provides for the punishment of "whoever coerces a prisoner of war into active service with his enemy's forces".¹⁸⁸⁶

2021. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vi) and (b)(xv) of the 1998 ICC Statute.¹⁸⁸⁷

2022. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".¹⁸⁸⁸

2023. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".¹⁸⁸⁹

2024. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vi) and (b)(xv) of the 1998 ICC Statute.¹⁸⁹⁰

¹⁸⁸⁰ Slovenia, *Penal Code* (1994), Articles 374(1) and 376.

¹⁸⁸¹ Spain, *Military Criminal Code* (1985), Article 77(5)–(6).

¹⁸⁸² Spain, *Penal Code* (1995), Article 611(3).

¹⁸⁸³ Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1)(a).

¹⁸⁸⁴ Sweden, *Penal Code as amended* (1962), Article 22(6).

¹⁸⁸⁵ Tajikistan, *Criminal Code* (1998), Article 403(2)(d).

¹⁸⁸⁶ Thailand, *Prisoners of War Act* (1955), Section 15.

¹⁸⁸⁷ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁸⁸⁸ Uganda, *Geneva Conventions Act* (1964), Section 1(1).

¹⁸⁸⁹ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹⁸⁹⁰ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

2025. Under the US War Crimes Act as amended, violations of common Article 3 of the 1949 Geneva Conventions, grave breaches of the Geneva Conventions and violations of Article 23 of the 1907 HR are war crimes.¹⁸⁹¹

2026. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".¹⁸⁹²

2027. Uruguay's Military Penal Code as amended punishes the compelling of prisoners of war to fight against their own armed forces.¹⁸⁹³

2028. Venezuela's Code of Military Justice as amended provides for the punishment of anyone who compels a prisoner of war to fight against his or her own forces.¹⁸⁹⁴

2029. Under Yemen's Military Criminal Code, compelling prisoners of war or civilians to serve in the armed forces of the enemy constitutes a war crime.¹⁸⁹⁵

2030. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of . . . compulsory mobilisation" committed a war crime.¹⁸⁹⁶

2031. The Penal Code as amended of the SFRY (FRY) provides that compelling civilians and prisoners of war to serve in the forces of a hostile power or administration is a war crime.¹⁸⁹⁷

2032. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions".¹⁸⁹⁸

National Case-law

2033. In its judgement in the *Wagner case* in 1946, the Permanent Military Tribunal at Strasbourg in France ruled that the introduction of compulsory military service for Alsatian civilians was a war crime.¹⁸⁹⁹

2034. In its judgement in the *Weizsaecker case* in 1949, the US Military Tribunal at Nuremberg held that "pressure or coercion to compel [prisoners of war] to enter into the armed forces obviously violated international law" and that the conscription of foreign nationals into the armed forces of a belligerent was a crime against humanity.¹⁹⁰⁰

¹⁸⁹¹ US, *War Crimes Act as amended* (1996), Section 2441(c).

¹⁸⁹² Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).

¹⁸⁹³ Uruguay, *Military Penal Code as amended* (1943), Article 58(8).

¹⁸⁹⁴ Venezuela, *Code of Military Justice as amended* (1998), Article 474(15).

¹⁸⁹⁵ Yemen, *Military Criminal Code* (1998), Article 21(3).

¹⁸⁹⁶ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

¹⁸⁹⁷ SFRY (FRY), *Penal Code as amended* (1976), Articles 142(1) and 144.

¹⁸⁹⁸ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

¹⁸⁹⁹ France, Permanent Military Tribunal at Strasbourg, *Wagner case*, Judgement, 3 May 1946.

¹⁹⁰⁰ US, Military Tribunal at Nuremberg, *Weizsaecker case*, Judgement, 14 April 1949.

Other National Practice

2035. According to the Report on the Practice of Chile, the prohibition of compelling a prisoner of war to fight against his or her own country (reflected in Article 261 of the Chilean Code of Military Justice), predates the Geneva Conventions and is based on the 1907 HR.¹⁹⁰¹

2036. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that “compelling hostages to serve in the armed forces of Iraq constitute Grave Breaches (that is, major violations of the law of war) under Article 147 GC [IV]”.¹⁹⁰² It also listed some specific Iraqi war crimes including “compelling Kuwaiti and third country nationals to serve in the armed forces of Iraq, in violation of Articles 51 and 147 GC [IV]”.¹⁹⁰³

2037. In 1991, in a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”, the SFRY Ministry of Defence included the following: “The YPA are arrested, while in their identity booklets they state that the military service is completed, and then are forcefully mobilised into Slovenian forces.”¹⁹⁰⁴

*III. Practice of International Organisations and Conferences**United Nations*

2038. In 1996, in his report on the situation of human rights in Sudan, the Special Rapporteur of the UN Commission on Human Rights stated that “if a prisoner is captured and he refuses to change sides, he is cruelly tortured and executed”.¹⁹⁰⁵

Other International Organisations

2039. No practice was found.

International Conferences

2040. The Final Declaration adopted by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflicts in 2002 expressed deep concern about “the number and expansion of conflicts in Africa” and alarm at “the spread of violence, in particular

¹⁹⁰¹ Report on the Practice of Chile, 1997, Chapter 6.5.

¹⁹⁰² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 618.

¹⁹⁰³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.

¹⁹⁰⁴ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 3(ii).

¹⁹⁰⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 9.

in the form of...compelling civilians to join in the armed forces...which seriously violate[s] the rules of International Humanitarian Law".¹⁹⁰⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

2041. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

2042. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "compelling [protected persons] to serve in the forces of an enemy Party" constitutes a grave breach of the law of war.¹⁹⁰⁷

2043. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of "compelling a prisoner of war or another protected person to serve with forces of a hostile Power", when committed in an international armed conflict, be subject to the jurisdiction of the Court.¹⁹⁰⁸

VI. Other Practice

2044. In 1979, in a letter to the ICRC, an armed opposition group confirmed its commitment to IHL and denounced the rounding up of the homeless in barracks in order to compel them to join the army and physical liquidation of those who refused to do so.¹⁹⁰⁹

I. Hostage-Taking

I. Treaties and Other Instruments

Treaties

2045. Under Article 6(b) of the 1945 IMT Charter (Nuremberg) "killing of hostages" is a war crime.

2046. Common Article 3 of the 1949 Geneva Conventions states that the taking of hostages is and shall remain prohibited at any time and in any place whatsoever.

¹⁹⁰⁶ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.

¹⁹⁰⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 776(j).

¹⁹⁰⁸ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(a)(iv).

¹⁹⁰⁹ ICRC archive document.

- 2047.** Article 34 GC IV states that the taking of hostages is prohibited.
- 2048.** Article 147 GC IV states that hostage-taking is a grave breach of GC IV.
- 2049.** Article 2 of the 1973 Convention on Crimes against Internationally Protected Persons obliges State parties to make punishable attacks upon the person or liberty of an internationally protected person.
- 2050.** Article 75(2)(c) AP I states that the taking of hostages is an act which is and “shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents”. Article 75 AP I was adopted by consensus.¹⁹¹⁰
- 2051.** Article 4(2)(c) AP II states that the taking of hostages is prohibited. Article 4 AP II was adopted by consensus.¹⁹¹¹
- 2052.** The 1979 International Convention against the Taking of Hostages criminalises hostage-taking. Article 1 provides that:

Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as “hostage”) in order to compel a third party, namely, a State, an international intergovernmental organisation, a natural or juridical person, or a group of persons to do or to abstain from doing any act as an explicit or implicit condition for the release of the hostage, commits the offence of taking of hostages.

2053. Article 12 of the 1979 International Convention against the Taking of Hostages specifies that the Convention is not applicable to acts of hostage-taking committed in armed conflicts if the Geneva Conventions or the Additional Protocols thereto are applicable in so far as the Conventions require States to prosecute or hand over the hostage-takers.

2054. Pursuant to Article 8(2)(a)(viii) and (c)(iii) of the 1998 ICC Statute, the “taking of hostages” constitutes a war crime in both international and non-international armed conflicts.

2055. Article 3(c) of the 2002 Statute of the Special Court for Sierra Leone provides that “the Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977”, which include “taking of hostages”.

Other Instruments

2056. Article II(1)(b) of the 1945 Allied Control Council Law No. 10 provides that “killing of hostages” is a war crime.

2057. Principle VI of the 1950 Nuremberg Principles adopted by the ILC provides that “killing of hostages” is a war crime.

¹⁹¹⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

¹⁹¹¹ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

2058. Under Rule 4 of the 1950 UN Command Rules and Regulations, Military Commissions of the UN Command had jurisdiction over offences such as the improper treatment of hostages.

2059. According to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, “acts of . . . taking of hostages” are considered as an exceptionally serious war crime and as a serious violation of the principles and rules of international law applicable in armed conflict.

2060. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

2061. Under Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, the parties committed themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.

2062. Under Article 2(h) of the 1993 ICTY Statute, the Tribunal is competent to prosecute the taking of civilians as hostages.

2063. Under Article 4(c) of the 1994 ICTR Statute, the Tribunal is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions, including the taking of hostages.

2064. According to Article 20(a)(viii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, the “taking of hostages” is regarded as a war crime. Under Article 20(f)(iii), “taking of hostages” constitutes a war crime in conflicts not of an international character.

2065. Article 3(1) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that all acts of violence, including hostage-taking, shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.

2066. According to Section 7.2 of the 1999 UN Secretary-General’s Bulletin, the taking hostage of persons not, or no longer, taking part in military operations and persons placed *hors de combat* is prohibited at any time and in any place.

2067. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(viii) and (c)(iii), the “taking of hostages” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

2068. Argentina’s Law of War Manual (1969) and Law of War Manual (1989) prohibit the taking of hostages.¹⁹¹²

¹⁹¹² Argentina, *Law of War Manual* (1969), §§ 4.012 and 8.001; *Law of War Manual* (1989), §§ 4.15, 4.29, 7.04 and 8.03.

- 2069.** Australia's Commanders' Guide provides that "taking protected persons as hostages" is a crime likely to warrant institution of criminal proceedings.¹⁹¹³
- 2070.** Australia's Defence Force Manual provides that hostage-taking is prohibited.¹⁹¹⁴
- 2071.** Belgium's Law of War Manual prohibits hostage-taking and adds that it constitutes a grave breach of the Geneva Conventions.¹⁹¹⁵
- 2072.** Belgium's Teaching Manual for Soldiers explains that the prohibition on taking hostages is a necessary corollary of the obligation to respect the civilian population.¹⁹¹⁶
- 2073.** Benin's Military Manual states that the taking of hostages is prohibited in international and non-international armed conflicts.¹⁹¹⁷
- 2074.** Burkina Faso's Disciplinary Regulations prohibits hostage-taking.¹⁹¹⁸
- 2075.** Cameroon's Disciplinary Regulations prohibits hostage-taking.¹⁹¹⁹
- 2076.** Cameroon's Instructors' Manual explicitly forbids civilian hostage-taking.¹⁹²⁰
- 2077.** Canada's LOAC Manual prohibits the taking of hostages in international and non-international armed conflicts.¹⁹²¹
- 2078.** Colombia's Basic Military Manual prohibits the taking of the civilian population as hostages.¹⁹²²
- 2079.** Congo's Disciplinary Regulations prohibits hostage-taking.¹⁹²³
- 2080.** Croatia's LOAC Compendium provides that "hostage-taking" is a grave breach of IHL and a war crime.¹⁹²⁴
- 2081.** Croatia's Soldiers' Manual explicitly forbids civilian hostage-taking.¹⁹²⁵
- 2082.** The Military Manual of the Dominican Republic provides that "it is a breach of the laws of war to take civilians as hostages".¹⁹²⁶
- 2083.** Ecuador's Naval Manual provides that "enemy civilians may not be interned as hostages".¹⁹²⁷
- 2084.** France's Disciplinary Regulations as amended prohibits hostage-taking.¹⁹²⁸

¹⁹¹³ Australia, *Commanders' Guide* (1994), § 1305(c).

¹⁹¹⁴ Australia, *Defence Force Manual* (1994), §§ 953 and 1315.

¹⁹¹⁵ Belgium, *Law of War Manual* (1983), pp. 50 and 55.

¹⁹¹⁶ Belgium, *Teaching Manual for Soldiers* (undated), pp. 10, 14 and 41 and slide 1/7.

¹⁹¹⁷ Benin, *Military Manual* (1995), Fascicule I, p. 17, Fascicule II, p. 19 and Fascicule III, p. 4.

¹⁹¹⁸ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹⁹¹⁹ Cameroon, *Disciplinary Regulations* (1975), Article 32.

¹⁹²⁰ Cameroon, *Instructors' Manual* (1992), p. 151, § 421(1).

¹⁹²¹ Canada, *LOAC Manual* (1999), p. 11-4, §§ 33(c) and 63(c), p. 16-3, § 14(e) and p. 17-2, §§ 10 and 21.

¹⁹²² Colombia, *Basic Military Manual* (1995), p. 30.

¹⁹²³ Congo, *Disciplinary Regulations* (1986), Article 32(2).

¹⁹²⁴ Croatia, *LOAC Compendium* (1991), Annex 9, p. 56.

¹⁹²⁵ Croatia, *Soldiers' Manual* (1992), p. 5.

¹⁹²⁶ Dominican Republic, *Military Manual* (1980), p. 10.

¹⁹²⁷ Ecuador, *Naval Manual* (1989), § 11-9.

¹⁹²⁸ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

- 2085.** France's LOAC Summary Note states that the taking of hostages is a war crime under the law of armed conflict.¹⁹²⁹
- 2086.** France's LOAC Teaching Note provides that neither prisoners of war nor any protected persons shall be used as hostages and that hostage-taking is a violation of the laws of armed conflict.¹⁹³⁰
- 2087.** France's LOAC Manual provides that hostage-taking is a war crime. It adds that hostage-taking is expressly prohibited by the law of armed conflict and has been considered a war crime since 1949.¹⁹³¹ The manual also states that one of the three main principles common to IHL and human rights is the principle of security, which prohibits the taking of hostages.¹⁹³²
- 2088.** Germany's Military Manual states that "the taking of hostages is prohibited".¹⁹³³ It also states that hostage-taking is prohibited in case of occupation.¹⁹³⁴ The manual provides that hostage-taking is a grave breach of IHL.¹⁹³⁵
- 2089.** Hungary's Military Manual provides that hostage-taking is a grave breach of IHL and a war crime.¹⁹³⁶
- 2090.** Italy's IHL Manual prohibits hostage-taking and states that the taking of hostages is a war crime.¹⁹³⁷
- 2091.** Italy's LOAC Elementary Rules Manual prohibits hostage-taking.¹⁹³⁸
- 2092.** Kenya's LOAC Manual lists as one of the soldier's rules for behaviour in combat "do not take hostages".¹⁹³⁹
- 2093.** South Korea's Military Regulation 187 provides that taking hostages is an "unjustifiable crime".¹⁹⁴⁰
- 2094.** Madagascar's Military Manual states that the taking of hostages is prohibited.¹⁹⁴¹
- 2095.** Mali's Army Regulations prohibits hostage-taking.¹⁹⁴²
- 2096.** Morocco's Disciplinary Regulations prohibits hostage-taking.¹⁹⁴³
- 2097.** The Military Manual of the Netherlands restates the prohibition of hostage-taking found in common Article 3 to the 1949 Geneva Conventions and Articles 75 AP I and 4 AP II.¹⁹⁴⁴ The manual further provides that hostage-taking is a grave breach of the Geneva Conventions and AP I.¹⁹⁴⁵

¹⁹²⁹ France, *LOAC Summary Note* (1992), § 3.4.

¹⁹³⁰ France, *LOAC Teaching Note* (2000), pp. 3, 5 and 7.

¹⁹³¹ France, *LOAC Manual* (2001), pp. 45 and 51.

¹⁹³² France, *LOAC Manual* (2001), p. 101.

¹⁹³³ Germany, *Military Manual* (1992), § 508. ¹⁹³⁴ Germany, *Military Manual* (1992), § 537.

¹⁹³⁵ Germany, *Military Manual* (1992), § 1209. ¹⁹³⁶ Hungary, *Military Manual* (1992), p. 90.

¹⁹³⁷ Italy, *IHL Manual* (1991), Vol. I, §§ 20, 41(f), 48(6) and 84.

¹⁹³⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 17.

¹⁹³⁹ Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 5–6 and Précis No. 3, p. 14, § 2.

¹⁹⁴⁰ South Korea, *Military Regulation 187* (1991), § 4.2.

¹⁹⁴¹ Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 17, Fiche No. 4-T, § 23 and Fiche No. 5-T, § 8.

¹⁹⁴² Mali, *Army Regulations* (1979), Article 36.

¹⁹⁴³ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

¹⁹⁴⁴ Netherlands, *Military Manual* (1993), pp. VIII-3, XI-1 and XI-4.

¹⁹⁴⁵ Netherlands, *Military Manual* (1993), p. IX-5.

- 2098.** New Zealand's Military Manual restates Article 75(2) AP I, which provides for the prohibition of "the taking of hostages" at any time and in any place whatsoever, whether committed by civilian or by military agents.¹⁹⁴⁶ It also states that "the taking of hostages is now forbidden by treaty".¹⁹⁴⁷ The manual further provides that it is a grave breach of GC IV "to take a protected civilian hostage" (Article 147).¹⁹⁴⁸ The manual prohibits hostage-taking in non-international armed conflicts and explains that "it has now become accepted, in international conflicts at least, that the taking of hostages is an offence under customary law and most systems of national law forbid such actions".¹⁹⁴⁹
- 2099.** Nicaragua's Military Manual prohibits the taking of hostages, including the threat to commit such acts.¹⁹⁵⁰
- 2100.** Nigeria's Manual on the Laws of War provides that hostage-taking is a grave breach of the Geneva Conventions and is considered a serious war crime.¹⁹⁵¹ The manual also specifies that "killing of hostages" is a war crime.¹⁹⁵²
- 2101.** The Soldier's Rules of the Philippines instructs soldiers: "Do not take hostages."¹⁹⁵³
- 2102.** Romania's Soldiers' Manual provides that hostage-taking of civilians and captured combatants is prohibited.¹⁹⁵⁴
- 2103.** Russia's Military Manual prohibits "the taking of hostages" as a method of warfare.¹⁹⁵⁵
- 2104.** Senegal's IHL Manual restates common Article 3 of the 1949 Geneva Conventions and prohibits the taking of hostages.¹⁹⁵⁶
- 2105.** South Africa's LOAC Manual states that the "taking of hostages" is a grave breach of the Geneva Conventions.¹⁹⁵⁷
- 2106.** Spain's LOAC Manual prohibits the taking of hostages among the civilian population.¹⁹⁵⁸ The same prohibition applies to prisoners of war.¹⁹⁵⁹
- 2107.** Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are part of customary international law.¹⁹⁶⁰ The manual also provides that "taking hostages" is a grave breach of the Geneva Conventions.¹⁹⁶¹

¹⁹⁴⁶ New Zealand, *Military Manual* (1992), § 1137.2.

¹⁹⁴⁷ New Zealand, *Military Manual* (1992), § 1607.

¹⁹⁴⁸ New Zealand, *Military Manual* (1992), § 1702.3(e).

¹⁹⁴⁹ New Zealand, *Military Manual* (1992), § 1812.1(c), including footnote 35, and § 1807.1.

¹⁹⁵⁰ Nicaragua, *Military Manual* (1996), Articles 7(2) and 14(35).

¹⁹⁵¹ Nigeria, *Manual on the Laws of War* (undated), § 6(c).

¹⁹⁵² Nigeria, *Manual on the Laws of War* (undated), § 6(17).

¹⁹⁵³ Philippines, *Soldier's Rules* (1989), § 8.

¹⁹⁵⁴ Romania, *Soldiers' Manual* (1991), pp. 15 and 34.

¹⁹⁵⁵ Russia, *Military Manual* (1990), § 5(m). ¹⁹⁵⁶ Senegal, *IHL Manual* (1999), pp. 4 and 23.

¹⁹⁵⁷ South Africa, *LOAC Manual* (1996), § 40.

¹⁹⁵⁸ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.a.(1), see also § 10.6.b.(4) and 10.8.b.

¹⁹⁵⁹ Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.

¹⁹⁶⁰ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

¹⁹⁶¹ Sweden, *IHL Manual* (1991), Section 4.2, p. 93.

- 2108.** Switzerland's Basic Military Manual prohibits the taking of hostages and any order given to that end.¹⁹⁶² It specifies that the taking of protected civilians as hostages is a grave breach of the Geneva Conventions.¹⁹⁶³
- 2109.** Togo's Military Manual states that hostage-taking is prohibited in international and non-international armed conflicts.¹⁹⁶⁴
- 2110.** The UK Military Manual forbids the taking hostage of the civilian population, whether in an occupied territory or not.¹⁹⁶⁵ It specifies that "the taking of hostages" among persons protected by GC IV is a grave breach of that Convention.¹⁹⁶⁶ The manual also mentions the killing of hostages in its list of war crimes.¹⁹⁶⁷
- 2111.** The UK LOAC Manual prohibits the taking of hostages, including in non-international armed conflicts.¹⁹⁶⁸
- 2112.** The US Field Manual restates common Article 3 of the 1949 Geneva Conventions and provides that the "taking of hostages" is a war crime under GC IV.¹⁹⁶⁹
- 2113.** The US Air Force Pamphlet states that hostage-taking is a grave breach of the Geneva Conventions.¹⁹⁷⁰
- 2114.** The US Instructor's Guide prohibits hostage-taking and specifies that it is a grave breach of the Geneva Conventions.¹⁹⁷¹
- 2115.** The US Naval Handbook provides that "enemy civilians may not be interned as hostages".¹⁹⁷²
- 2116.** The YPA Military Manual of the SFRY (FRY) forbids civilian hostage-taking.¹⁹⁷³

National Legislation

- 2117.** Argentina's Draft Code of Military Justice punishes any soldier who takes any protected person hostage.¹⁹⁷⁴
- 2118.** Under Armenia's Penal Code, "taking hostages" during an armed conflict constitutes a crime against the peace and security of mankind.¹⁹⁷⁵
- 2119.** Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".¹⁹⁷⁶

¹⁹⁶² Switzerland, *Basic Military Manual* (1987), Articles 147(d)–(e) and 154.

¹⁹⁶³ Switzerland, *Basic Military Manual* (1987), Article 192(1)(c).

¹⁹⁶⁴ Togo, *Military Manual* (1996), Fascicule I, p. 18, Fascicule II, p. 19 and Fascicule III, p. 4.

¹⁹⁶⁵ UK, *Military Manual* (1958), §§ 42, 131, 554 and 650.

¹⁹⁶⁶ UK, *Military Manual* (1958), § 625(c). ¹⁹⁶⁷ UK, *Military Manual* (1958), § 626(q).

¹⁹⁶⁸ UK, *LOAC Manual* (1981), Section 9, p. 35, § 9 and Section 12, p. 42, § 2, see also Annex A, p. 48, § 20.

¹⁹⁶⁹ US, *Field Manual* (1956), §§ 11 and 502(c). ¹⁹⁷⁰ US, *Air Force Pamphlet* (1976), § 15-3(c).

¹⁹⁷¹ US, *Instructor's Guide* (1985), p. 8. ¹⁹⁷² US, *Naval Handbook* (1995), § 11-8.

¹⁹⁷³ SFRY (FRY), *YPA Military Manual* (1988), § 253(3).

¹⁹⁷⁴ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(4) in the *Code of Military Justice as amended* (1951).

¹⁹⁷⁵ Armenia, *Penal Code* (2003), Article 390.2(5).

¹⁹⁷⁶ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

2120. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "taking hostages" in both international and non-international armed conflicts.¹⁹⁷⁷

2121. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international armed conflicts, the hostage-taking of civilians is prohibited.¹⁹⁷⁸

2122. Azerbaijan's Criminal Code provides that the taking hostage of protected persons is a violation of the laws and customs of war.¹⁹⁷⁹

2123. Bangladesh's International Crimes (Tribunal) Act states that the killing of hostages is a war crime.¹⁹⁸⁰ It adds that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹⁹⁸¹

2124. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949... may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".¹⁹⁸²

2125. The Criminal Code of Belarus provides that the capture and detention of persons as hostage who have laid down their arms or who are defenceless, the wounded, sick and shipwrecked, medical and religious personnel, prisoners of war, the civilian population in an occupied territory or in the conflict zone or other persons enjoying international protection are a violation of the laws and customs of war.¹⁹⁸³

2126. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that hostage-taking constitutes a crime under international law.¹⁹⁸⁴

2127. The Criminal Code of the Federation of Bosnia and Herzegovina provides that hostage-taking is a war crime.¹⁹⁸⁵ The Criminal Code of the Republika Srpska contains the same provision.¹⁹⁸⁶

2128. Botswana's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions".¹⁹⁸⁷

¹⁹⁷⁷ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.34 and 268.75.

¹⁹⁷⁸ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 17(3).

¹⁹⁷⁹ Azerbaijan, *Criminal Code* (1999), Article 115.2.

¹⁹⁸⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d).

¹⁹⁸¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹⁹⁸² Barbados, *Geneva Conventions Act* (1980), Section 3(2).

¹⁹⁸³ Belarus, *Criminal Code* (1999), Article 135(2).

¹⁹⁸⁴ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(7).

¹⁹⁸⁵ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

¹⁹⁸⁶ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

¹⁹⁸⁷ Botswana, *Geneva Conventions Act* (1970), Section 3(1).

- 2129.** Bulgaria's Penal Code as amended provides that ordering or carrying out the taking of a civilian hostage is a war crime.¹⁹⁸⁸
- 2130.** Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that hostage-taking is a war crime in both international and non-international armed conflicts.¹⁹⁸⁹
- 2131.** Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979".¹⁹⁹⁰
- 2132.** Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] . . . is guilty of an indictable offence".¹⁹⁹¹
- 2133.** Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.¹⁹⁹²
- 2134.** China's Law Governing the Trial of War Criminals provides that the "killing of hostages" constitutes a war crime.¹⁹⁹³
- 2135.** Colombia's Penal Code imposes a criminal sanction on anyone who, during an armed conflict, orders or carries out the taking of hostages.¹⁹⁹⁴
- 2136.** Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.¹⁹⁹⁵
- 2137.** The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions".¹⁹⁹⁶
- 2138.** Côte d'Ivoire's Penal Code as amended provides that in time of war or occupation, the organising ordering or carrying out of hostage-taking constitutes a "crime against the civilian population".¹⁹⁹⁷
- 2139.** Croatia's Criminal Code provides that hostage-taking is a war crime.¹⁹⁹⁸
- 2140.** Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave

¹⁹⁸⁸ Bulgaria, *Penal Code as amended* (1968), Article 412(b).

¹⁹⁸⁹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(h) and (C)(c).

¹⁹⁹⁰ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

¹⁹⁹¹ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

¹⁹⁹² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

¹⁹⁹³ China, *Law Governing the Trial of War Criminals* (1946), Article 3, § 2.

¹⁹⁹⁴ Colombia, *Penal Code* (2000), Article 148.

¹⁹⁹⁵ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

¹⁹⁹⁶ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

¹⁹⁹⁷ Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(5).

¹⁹⁹⁸ Croatia, *Criminal Code* (1997), Articles 158 and 171.

breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".¹⁹⁹⁹

2141. Under El Salvador's Penal Code, "the killing of hostages" during an international or a civil war is a crime.²⁰⁰⁰

2142. Under the Draft Amendments to the Penal Code of El Salvador, hostage-taking is prohibited in both international and non-international armed conflicts.²⁰⁰¹

2143. Estonia's Penal Code provides that hostage-taking of civilians is a war crime.²⁰⁰²

2144. Under Ethiopia's Penal Code, in time of war, armed conflict or occupation, the organising, ordering or carrying out of hostage-taking of civilians constitutes a war crime.²⁰⁰³

2145. Under Georgia's Criminal Code, hostage-taking is a crime in international and internal armed conflicts.²⁰⁰⁴

2146. Germany's Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international or non-international armed conflict, "takes hostage a person who is to be protected under international humanitarian law".²⁰⁰⁵

2147. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".²⁰⁰⁶

2148. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions are punishable offences.²⁰⁰⁷ In addition, any "minor breach" of the Geneva Conventions, including violations of common Article 3 and Article 34 GC IV, and of AP I, including violations of Article 75(2)(c) AP I, as well as any "contravention" of AP II, including violations of Article 4(2)(c) AP II, are also punishable offences.²⁰⁰⁸

2149. Israel's Nazis and Nazi Collaborators (Punishment) Law includes "killing of hostages" in its definition of war crimes.²⁰⁰⁹

2150. Jordan's Draft Military Criminal Code provides that hostage-taking is a war crime.²⁰¹⁰

2151. Kazakhstan's Penal Code provides that hostage-taking is a crime.²⁰¹¹

¹⁹⁹⁹ Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

²⁰⁰⁰ El Salvador, *Penal Code* (1997), Article 362.

²⁰⁰¹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Toma de rehenes".

²⁰⁰² Estonia, *Penal Code* (2001), § 97. ²⁰⁰³ Ethiopia, *Penal Code* (1957), Article 282(g).

²⁰⁰⁴ Georgia, *Criminal Code* (1999), Article 411(2)(g).

²⁰⁰⁵ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(2).

²⁰⁰⁶ India, *Geneva Conventions Act* (1960), Section 3(1).

²⁰⁰⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

²⁰⁰⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁰⁰⁹ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b).

²⁰¹⁰ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(6).

²⁰¹¹ Kazakhstan, *Penal Code* (1997), Article 229.

2152. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".²⁰¹²

2153. Kyrgyzstan's Criminal Code provides that hostage-taking is a punishable offence.²⁰¹³

2154. Under the Draft Amendments to the Code of Military Justice of Lebanon, hostage-taking of protected persons constitutes a war crime.²⁰¹⁴

2155. Under Lithuania's Criminal Code as amended, hostage-taking is a war crime.²⁰¹⁵

2156. Luxembourg's Law on the Punishment of Grave Breaches provides that hostage-taking is a grave breach of the Geneva Conventions.²⁰¹⁶

2157. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".²⁰¹⁷

2158. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the ... [Geneva] conventions".²⁰¹⁸

2159. Under Mali's Penal Code, hostage-taking is a war crime.²⁰¹⁹

2160. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".²⁰²⁰

2161. Mexico's Code of Military Justice as amended criminalises the taking of hostages.²⁰²¹

2162. Moldova's Penal Code punishes the hostage-taking of protected persons.²⁰²²

2163. Under the International Crimes Act of the Netherlands, "the taking of hostages" is a crime, whether committed in an international armed conflict (as a grave breach of the 1949 Geneva Conventions) or in a non-international armed conflict (as a violation of Article 3 common to the Geneva Conventions).²⁰²³

2164. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures

²⁰¹² Kenya, *Geneva Conventions Act* (1968), Section 3(1).

²⁰¹³ Kyrgyzstan, *Criminal Code* (1997), Article 224.

²⁰¹⁴ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(6).

²⁰¹⁵ Lithuania, *Criminal Code as amended* (1961), Article 336.

²⁰¹⁶ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(8).

²⁰¹⁷ Malawi, *Geneva Conventions Act* (1967), Section 4(1).

²⁰¹⁸ Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

²⁰¹⁹ Mali, *Penal Code* (2001), Article 31(h).

²⁰²⁰ Mauritius, *Geneva Conventions Act* (1970), Section 3(1).

²⁰²¹ Mexico, *Code of Military Justice as amended* (1933), Article 215.

²⁰²² Moldova, *Penal Code* (2002), Article 137(2)(b).

²⁰²³ Netherlands, *International Crimes Act* (2003), Articles 5(1)(h) and 6(1)(b).

the commission by another person of, a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".²⁰²⁴

2165. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(a)(viii) and (c)(iii) of the 1998 ICC Statute.²⁰²⁵

2166. Nicaragua's Military Penal Code provides that hostage-taking is an offence against the laws and customs of war, in both international and non-international conflicts.²⁰²⁶

2167. Nicaragua's Draft Penal Code punishes hostage-taking in international and internal armed conflicts.²⁰²⁷

2168. According to Niger's Penal Code as amended, hostage-taking of persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977 is a war crime.²⁰²⁸

2169. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".²⁰²⁹

2170. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".²⁰³⁰

2171. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".²⁰³¹

2172. Poland's Penal Code provides for the punishment of any person who, in violation of international law, takes persons *hors de combat*, protected persons and persons enjoying international protection hostage.²⁰³²

2173. Portugal's Penal Code provides for the punishment of anyone who, in violation of international law, in times of war, armed conflict or occupation, takes the civilian population, the wounded and sick or prisoners of war hostage.²⁰³³

2174. Romania's Penal Code punishes the hostage-taking of the wounded, sick and shipwrecked, members of civil medical services, the Red Cross or similar

²⁰²⁴ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

²⁰²⁵ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²⁰²⁶ Nicaragua, *Military Penal Code* (1996), Articles 48 and 49, see also Article 58.

²⁰²⁷ Nicaragua, *Draft Penal Code* (1999), Article 453.

²⁰²⁸ Niger, *Penal Code as amended* (1961), Article 208.3(7).

²⁰²⁹ Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

²⁰³⁰ Norway, *Military Penal Code as amended* (1902), § 108.

²⁰³¹ Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

²⁰³² Poland, *Penal Code* (1997), Article 123(2).

²⁰³³ Portugal, *Penal Code* (1996), Article 241(1)(d).

organisations, prisoners of war, or of all persons in the hands of the adverse party.²⁰³⁴

2175. Russia's Criminal Code punishes "the capture or detention of a person as a hostage committed with a view to compel a State, an organisation or a person to accomplish or to abstain from a certain action as a condition for release of the hostage".²⁰³⁵

2176. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".²⁰³⁶

2177. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".²⁰³⁷

2178. Slovenia's Penal Code provides that hostage-taking is a war crime.²⁰³⁸

2179. Under Spain's Military Criminal Code, hostage-taking of nationals of the State with which Spain is at war is an offence against the laws and customs of war.²⁰³⁹

2180. Spain's Penal Code punishes anyone who, in time of armed conflict, takes any protected person hostage.²⁰⁴⁰

2181. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, (a) a grave breach of any of the [Geneva] Conventions; or (b) a breach of common Article 3 of the [Geneva] Conventions, is guilty of an indictable offence".²⁰⁴¹

2182. Tajikistan's Criminal Code provides for the punishment of hostage-taking in international or non-international armed conflicts.²⁰⁴²

2183. Thailand's Prisoners of War Act provides a punishment for "whoever takes a hostage" in a non-international armed conflict.²⁰⁴³

2184. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(viii) and (c)(iii) of the 1998 ICC Statute.²⁰⁴⁴

2185. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets

²⁰³⁴ Romania, *Penal Code* (1968), Article 358(b).

²⁰³⁵ Russia, *Criminal Code* (1996), Article 206.

²⁰³⁶ Seychelles, *Geneva Conventions Act* (1985), Section 3(1).

²⁰³⁷ Singapore, *Geneva Conventions Act* (1973), Section 3(1).

²⁰³⁸ Slovenia, *Penal Code* (1994), Article 374(1).

²⁰³⁹ Spain, *Military Criminal Code* (1985), Article 77(6).

²⁰⁴⁰ Spain, *Penal Code* (1995), Article 611(4).

²⁰⁴¹ Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1).

²⁰⁴² Tajikistan, *Criminal Code* (1998), Article 403(2)(g).

²⁰⁴³ Thailand, *Prisoners of War Act* (1955), Section 19.

²⁰⁴⁴ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

or procures the commission by any other person of any grave breach of the [Geneva] Conventions".²⁰⁴⁵

2186. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".²⁰⁴⁶

2187. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(viii) and (c)(iii) of the 1998 ICC Statute.²⁰⁴⁷

2188. Under the US War Crimes Act as amended, violations of common Article 3 and grave breaches of the 1949 Geneva Conventions are war crimes.²⁰⁴⁸

2189. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".²⁰⁴⁹

2190. Under Yemen's Military Criminal Code, hostage-taking of civilians is a war crime.²⁰⁵⁰

2191. The Penal Code as amended of the SFRY (FRY) provides that hostage-taking is a war crime.²⁰⁵¹

2192. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions".²⁰⁵²

National Case-law

2193. The Report on the Practice of Colombia refers to a decision by the Council of State in which the Council notes that the category of direct attacks on civilians also includes hostage-taking and that "this is especially true when the military operations are disorderly and improvised and an unwillingness to protect the hostages is combined with a total disregard for human rights and the basic principles of the law of nations".²⁰⁵³

2194. In 1995, Colombia's Constitutional Court held that the prohibitions contained in Article 4(2) AP II were consistent with the Constitution and practically reproduced specific constitutional provisions.²⁰⁵⁴

²⁰⁴⁵ Uganda, *Geneva Conventions Act* (1964), Section 1(1).

²⁰⁴⁶ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

²⁰⁴⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²⁰⁴⁸ US, *War Crimes Act as amended* (1996), Section 2441(c).

²⁰⁴⁹ Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).

²⁰⁵⁰ Yemen, *Military Criminal Code* (1998), Article 21(4).

²⁰⁵¹ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

²⁰⁵² Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

²⁰⁵³ Colombia, Council of State, *Constitutional Case No. 9276*, Judgement, 19 August 1994.

²⁰⁵⁴ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

2195. In its judgement in the *List (Hostages Trial) case* in 1948, the US Military Tribunal at Nuremberg considered the right to take hostages from the innocent civilian population of an occupied territory and stated that:

Certain rules of customary law . . . lay down the rules applicable to the subject of hostages.

...

The term "hostages" will be considered as those persons of the civilian population who are taken into custody for the purpose of guaranteeing with their lives the future good conduct of the population of the community from which they were taken.

The Tribunal further stated that:

The occupant may properly insist upon compliance with regulations necessary to the security of the occupying forces and for the maintenance of law and order. In the accomplishment of this objective, the occupant may, only as a last resort, take and execute hostages . . . The occupant is required to use every available method to secure order and tranquility before . . . taking and execution of hostages.

...

If attacks upon troops and military installations [continue to] occur . . . hostages may be taken from the population to deter similar acts in the future provided it can be shown that the population generally is a party to the offence, either actively or passively.

...

It is essential to a lawful taking of hostages under customary law that proclamation be made, giving the names and addresses of hostages taken, notifying the population that upon the recurrence of stated acts of war treason that the hostages will be shot . . . Unless the foregoing requirements are met, the shooting of hostages is . . . a war crime in itself.²⁰⁵⁵

Other National Practice

2196. On the basis of an interview with a retired army general, the Report on the Practice of Botswana considers that should an internal conflict arise, Article 4 AP II would be applied by military personnel.²⁰⁵⁶

2197. According to the Report on the Practice of France, hostage-taking is inadmissible. This entails refusing any distinction as to its object, to forbid such behaviour and to refuse any condition to obtain the liberation of hostages. According to the report, diplomatic, UN and NGO personnel are particularly concerned.²⁰⁵⁷

2198. In 1995, in the context of the conflict in Nagorno-Karabakh, all political parties in the German parliament requested the release of hostages.²⁰⁵⁸

²⁰⁵⁵ US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948.

²⁰⁵⁶ Report on the Practice of Botswana, 1998, Interview with a retired army general, Answers to additional questions on Chapter 1.4.

²⁰⁵⁷ Report on the Practice of France, 1999, Chapter 5.3.

²⁰⁵⁸ Germany, Lower House of Parliament, Proposal by the CDU/CSU, SPD, the Greens and FDP, Initiative zum Karabach-Konflikt, *BT-Drucksache*13/1029, 30 March 1995, p. 1.

2199. In 1976, during a debate in the Sixth Committee of the UN General Assembly, Italy stated that the odious practice of taking hostages was clearly condemned under the modern rules of war. It further stated that:

Each time a hostage had been taken, those responsible have been disowned by the organisations for which they had claimed to act, showing that the practice was condemned in respect of both international and non-international armed conflict... The need was therefore not to protect any particular category of persons but simply to devise an effective ban on the practice of taking hostages as such, in view of its inhuman nature, which was an affront to the bases of the social conscience.²⁰⁵⁹

Italy also recalled UN General Assembly Resolution 2645 (XXV) of 1970, Article 34 GC IV and common Article 3 of the 1949 Geneva Conventions and declared that the proposed convention on the taking of hostages was entirely in keeping with the evolution of IHL.²⁰⁶⁰

2200. In 1979, during a debate in the Sixth Committee of the UN General Assembly, Italy commented on the outcome of the work of the Ad Hoc Committee on the Drafting of a Convention against the Taking of Hostages and stated that the taking of hostages was one of the greatest evils of modern times and an act which, even in wartime, was considered an international crime.²⁰⁶¹

2201. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.²⁰⁶² The report refers to a booklet prepared by the ICRC and notes that the Jordanian armed forces are instructed not to take civilian hostages.²⁰⁶³

2202. In 1995, the Pakistani government condemned the kidnapping of British and American nationals in the context of the conflict in Kashmir, emphasising that it was the responsibility of the Indian government to ensure the safety of visitors to the region.²⁰⁶⁴

2203. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that [all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions] not be subjected to... the taking of hostages”. He added that “the basic core of [AP II] is, of course, reflected in common Article 3 of the 1949 [Geneva] Conventions and therefore is, and should be, a part

²⁰⁵⁹ Italy, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/31/SR.55, 26 November 1976, § 13.

²⁰⁶⁰ Italy, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/31/SR.55, 26 November 1976, §§ 14 and 15.

²⁰⁶¹ Italy, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/34/SR.11, 5 October 1979, § 13.

²⁰⁶² Report on the Practice of Jordan, 1997, Chapter 5.

²⁰⁶³ Report on the Practice of Jordan, 1997, Answers to additional questions on Chapter 1.1.

²⁰⁶⁴ Pakistan, Foreign Office Briefings, Transcript of the press briefing by the Foreign Office spokesman, 13 July 1995, pp. 73–80.

of generally accepted customary law. This specifically includes its prohibitions on . . . hostagetaking."²⁰⁶⁵

2204. In 1991, in a letter to the President of the UN Security Council, the US protested against "the announcement of the intention of the Government of Iraq to hold prisoners of war as hostages . . . in flagrant violation of the Third Geneva Convention of 1949"²⁰⁶⁶

2205. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Whatever the purpose, whether for intimidation, concessions, reprisal, or to render areas or legitimate military objects immune from military operations, the taking of hostages is unequivocally and expressly prohibited by Article 34 GC [IV]. . .

The taking of hostages . . . constitute Grave Breaches (that is, major violations of the law of war) under Article 147 GC [IV].²⁰⁶⁷

The report listed Iraqi war crimes, including the taking of hostages.²⁰⁶⁸ It also mentioned some specific Iraqi war crimes:

- the taking of Kuwaiti nationals as hostages . . . in violation of Articles 34 . . . and 147 GC [IV].
- the taking of third nationals in Kuwait as hostages . . . in violation of Articles 34 . . . and 147 GC [IV].
- the taking of third nationals in Iraq as hostages . . . in violation of Articles 34 . . . and 147 GC [IV].²⁰⁶⁹

2206. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".²⁰⁷⁰

2207. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the Ministry of Defence of the SFRY included the following example: "Taking hostages among wives and children of YPA soldiers, they brought them

²⁰⁶⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 427 and 430-431.

²⁰⁶⁶ US, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991.

²⁰⁶⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 617-618 and 624.

²⁰⁶⁸ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 632.

²⁰⁶⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.

²⁰⁷⁰ Report on US Practice, 1997, Chapter 5.3.

in front of barracks and forced them to call upon their husbands and fathers to surrender."²⁰⁷¹

2208. In 1974, in a letter to the ICRC, a party to an international armed conflict denounced, on the basis of Article 34 GC IV, the taking of civilian hostages by the other party.²⁰⁷²

III. Practice of International Organisations and Conferences

United Nations

2209. In a resolution adopted in 1989 on incidents of hostage-taking and abduction, the UN Security Council considered that the taking of hostages and abductions were "offences of grave concern to all States" and "serious violations of international humanitarian law". It also condemned "unequivocally all acts of hostage-taking and abduction" and demanded "the immediate safe release of all hostages and abducted persons, wherever and by whomever they are being held".²⁰⁷³

2210. In a resolution adopted in 1990 in connection with the Iraqi occupation of Kuwait, the UN Security Council stated that it condemned "the actions by the Iraqi authorities and occupying forces to take third-State nationals hostage" and demanded that they immediately "cease and desist from taking third-State nationals hostage [and] mistreating and oppressing Kuwaiti and third-State nationals".²⁰⁷⁴

2211. In two statements by its President in 1997 and 1998 concerning the situation in Tajikistan, the UN Security Council denounced the taking of relief workers and others as hostages, demanded their immediate release and expressly stressed the inadmissibility of kidnapping.²⁰⁷⁵

2212. In a statement by its President in 1998, the UN Security Council condemned hostage-taking by former members of the deposed junta in Sierra Leone and called for the immediate release of all international personnel and others who had been held hostage.²⁰⁷⁶

2213. In a resolution adopted in 1998, the UN General Assembly strongly condemned the overwhelming number of human rights violations committed by the authorities of the FRY, the police and the military authorities in Kosovo, including the taking of civilian hostages, in breach of international humanitarian law, including common Article 3 of the 1949 Geneva Conventions and AP II.²⁰⁷⁷

²⁰⁷¹ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 1(v).

²⁰⁷² ICRC archive document.

²⁰⁷³ UN Security Council, Res. 638, 31 July 1989, preamble and §§ 1–2.

²⁰⁷⁴ UN Security Council, Res. 664, 18 August 1990, § 1; see also Res. 674, 29 October 1990, § 1; Res. 686, 2 March 1991, § 2(c); Res. 706, 15 August 1991, § 6.

²⁰⁷⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/6, 7 February 1997; Statement by the President, UN Doc. S/PRST/1998/4, 24 February 1998.

²⁰⁷⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/5, 26 February 1998.

²⁰⁷⁷ UN General Assembly, Res. 53/164, 9 December 1998, § 8.

2214. In a resolution adopted in 1992 on the situation of human rights in Iraq, the UN Commission on Human Rights strongly condemned hostage-taking.²⁰⁷⁸

2215. In a resolution adopted in 1992, the UN Commission on Human Rights included the taking of hostages among violations of human rights in the territory of the former Yugoslavia.²⁰⁷⁹

2216. In a resolution adopted in 1995, the UN Commission on Human Rights condemned hostage-taking during the internal armed conflict in Cambodia. It expressed its “grave concern over the atrocities committed by the Khmer Rouge including the taking and killing of foreign hostages”.²⁰⁸⁰

2217. In a resolution on Cambodia adopted in 1998, the UN Commission on Human Rights endorsed the comments of the Special Representative stating that “in recent history the most serious human rights violations in Cambodia have been committed by the Khmer Rouge” and cited the taking and killing of hostages as an example.²⁰⁸¹

2218. In a resolution on Lebanon adopted in 1998, the UN Commission on Human Rights “called upon the government of Israel... to refrain from holding Lebanese detainees incarcerated in its prisons as hostages for bargaining purposes and to release them immediately”.²⁰⁸²

2219. In a resolution on hostage-taking adopted in 1998, the UN Commission on Human Rights condemned all acts of hostage-taking anywhere in the world and stated that such acts were illegal wherever and by whomever committed and that they were unjustifiable under any circumstances, as their aim was the destruction of fundamental human rights. The Commission demanded the immediate and unconditional release of all hostages.²⁰⁸³

2220. In a resolution on hostage-taking adopted in 2001, the UN Commission on Human Rights stated that the Commission:

recognizes that hostage-taking calls for resolute, firm and concerted efforts on the part of the international community in order, in strict conformity with international human rights standards, to bring such abhorrent practices to an end,

...

reaffirms that hostage-taking, wherever and by whomever committed, is an illegal act aimed at the destruction of human rights and is, under any circumstances, unjustifiable, including as a means to promote and protect human rights.²⁰⁸⁴

2221. In 1996, in a report concerning the situation in Abkhazia, Georgia, the UN Secretary-General reported that, following a series of hostage-taking incidents, the two sides had agreed to exchange all hostages and to consider

²⁰⁷⁸ UN Commission on Human Rights, Res. 1992/71, 5 March 1992, § 2(d).

²⁰⁷⁹ UN Commission on Human Rights, Res. 1992/S-1/1, 14 August 1992, § 5.

²⁰⁸⁰ UN Commission on Human Rights, Res. 1995/55, 3 March 1995, § 11.

²⁰⁸¹ UN Commission on Human Rights, Res. 1998/60, 17 April 1998, § 19.

²⁰⁸² UN Commission on Human Rights, Res. 1998/62, 21 April 1998, § 4.

²⁰⁸³ UN Commission on Human Rights, Res. 1998/73, 22 April 1998, §§ 1–4.

²⁰⁸⁴ UN Commission on Human Rights, Res. 2001/38, 23 April 2001, preamble and § 1.

kidnapping a crime whose authors would be arrested and prosecuted. In the space of one month, UNOMIG assisted in the exchange of 13 hostages, 11 held by the Abkhaz side, two by the Georgian side.²⁰⁸⁵

2222. In 1997, in a report on the situation in Somalia, the UN Secretary-General, citing violations of human rights and IHL, pointed out that the practice of kidnapping remained common.²⁰⁸⁶

2223. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II “have long been considered customary international law”.²⁰⁸⁷

Other International Organisations

2224. In a resolution adopted in 1990 concerning the Gulf War, the Parliamentary Assembly of the Council of Europe condemned the taking of foreign nationals as hostages. It demanded the immediate release of third State nationals being held as hostages by the Iraqi authorities in Iraq and Kuwait.²⁰⁸⁸

2225. In a resolution adopted in 2000 on violations of human rights and humanitarian law in Chechnya adopted, the European Parliament called upon the Chechen authorities to take all measures in their power to locate and release all civilian hostages kidnapped before and during the current conflict.²⁰⁸⁹

2226. In 1989, in with a resolution on hostages in El Salvador, the Permanent Council of the OAS resolved to make an urgent appeal to safeguard the lives and persons of those being held hostage, and to call for their immediate and unconditional release.²⁰⁹⁰

International Conferences

2227. The 23rd International Conference of the Red Cross in 1977 adopted a resolution in which it condemned “the taking of hostages” and urged “all governments to take the necessary measures to prevent the recurrence of such acts”.²⁰⁹¹

2228. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all

²⁰⁸⁵ UN Secretary-General, Report concerning the situation in Abkhazia, Georgia, UN Doc. S/1996/284, 15 April 1996, § 33.

²⁰⁸⁶ UN Secretary-General, Report on the situation in Somalia, UN Doc. S/1997/135, 17 February 1997, § 32.

²⁰⁸⁷ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

²⁰⁸⁸ Council of Europe, Parliamentary Assembly, Res. 950, 1 October 1990, §§ 2 and 5(ii).

²⁰⁸⁹ European Parliament, Resolution on violations of human rights and humanitarian law in Chechnya, 16 March 2000, § 11.

²⁰⁹⁰ OAS, Permanent Council, Resolution on Hostages in El Salvador, 1989, § 4.

²⁰⁹¹ 23rd International Conference of the Red Cross, Bucharest, 15–21 October 1977, Res. VIII, §§ 1 and 2.

the parties to an armed conflict ensure that “the prohibition of taking hostages is strictly respected”.²⁰⁹²

2229. The Final Declaration adopted by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002 expressed deep concern about “the number and expansion of conflicts in Africa” and alarm at “the spread of violence, in particular in the form of . . . hostage-taking . . . which seriously violate[s] the rules of International Humanitarian Law”.²⁰⁹³

IV. Practice of International Judicial and Quasi-judicial Bodies

2230. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called “elementary considerations of humanity”.²⁰⁹⁴

2231. In the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged with grave breaches and violations of the laws and customs of war for having seized 284 UN peacekeepers in Pale, Sarajevo, Goražde and other locations and held them as hostages in order to prevent further air strikes by NATO.²⁰⁹⁵ In its review of the indictment in 1996, the ICTY Trial Chamber upheld the charges and stated that these acts could “be characterised as war crimes (taking UNPROFOR soldiers as hostages and using them as human shields)”.²⁰⁹⁶

2232. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber held that:

The taking of hostages is prohibited by Article 3(b) common to the Geneva Conventions which is covered by Article 3 of the [ICTY] Statute . . . Consonant with the spirit of the Fourth Convention, the Commentary sets out that the term “hostage” must be understood in the broadest sense. The definition of hostages must be understood as being similar to that of civilians taken as hostages within the meaning of grave breaches under Article 2 of the Statute, that is – persons unlawfully deprived of their freedom, often wantonly and sometimes under threat of death.

The Trial Chamber found the accused guilty of a violation of the laws and customs of war recognised by common Article 3(1)(a) (taking of hostages) of the

²⁰⁹² 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(d).

²⁰⁹³ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.

²⁰⁹⁴ ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

²⁰⁹⁵ ICTY, *Karadžić and Mladić case*, Initial Indictment, 24 July 1995, §§ 46–48.

²⁰⁹⁶ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 13 and 89.

1949 Geneva Conventions and of a grave breach of the Geneva Conventions (taking civilians as hostages).²⁰⁹⁷

2233. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber held that “an individual commits the offence of taking civilians as hostages when he threatens to subject civilians, who are unlawfully detained, to inhuman treatment or death as a means of achieving the fulfilment of a condition”. The Trial Chamber found the accused guilty of a grave breach of the Geneva Conventions (taking civilians as hostages).²⁰⁹⁸

2234. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that:

States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by taking hostages.

...

In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee’s opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below.

...

- (b) The prohibitions against taking of hostages, abductions, or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.²⁰⁹⁹

V. Practice of the International Red Cross and Red Crescent Movement

2235. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that the taking of hostages is prohibited and that it constitutes a grave breach of the law of war.²¹⁰⁰

2236. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the taking of hostages” is specifically prohibited.²¹⁰¹

2237. In 1992, the ICRC reminded a State party to a non-international armed conflict of the prohibition of hostage-taking.²¹⁰²

2238. In a press release in 1992, the ICRC urged all the parties involved in the conflict in Tajikistan to ensure the protection of civilians and military victims,

²⁰⁹⁷ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 187 and Part VI.

²⁰⁹⁸ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, Part V.

²⁰⁹⁹ HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, §§ 11 and 13(b).

²¹⁰⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 196 and 776(d).

²¹⁰¹ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

²¹⁰² ICRC archive document.

in compliance with the basic rules of IHL and in particular “to refrain from taking hostages”.²¹⁰³

2239. In a letter to a representative of a separatist entity in 1993, the ICRC held that persons forcibly evacuated from a conflict zone where fighting is going on must be immediately released, once brought to safer areas. The ICRC further stated that “there is no doubt that those who are not going to be released unconditionally and unilaterally are hostages. We have repeatedly stated that IHL strictly prohibits hostage taking and ask you to act accordingly.”²¹⁰⁴

2240. In a communication to the press in 1993, the ICRC reminded the parties to the conflict in Nagorno-Karabakh “to refrain from taking hostages”.²¹⁰⁵

2241. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “hostage-taking” of civilians is, in particular, prohibited.²¹⁰⁶

2242. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated, with respect to civilian persons who refrain from acts of hostility, that “the taking of hostages” is prohibited.²¹⁰⁷

2243. In a press release in 1994, the ICRC urged parties to the conflict in Chechnya “to refrain from taking hostages”.²¹⁰⁸

2244. In a communication to the press in 1995, the ICRC stated that it was “alarmed by the dramatic events taking place in the town of Budyonnovsk, where Chechen fighters have taken hostage hundreds of civilians” and condemned “the taking of hostages in Budyonnovsk . . . which violates norms of international humanitarian law”.²¹⁰⁹

2245. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of “taking of hostages”, when committed in an international armed conflict, together with the crime of hostage-taking, as a serious violation of IHL applicable in non-international armed conflicts, be subject to the jurisdiction of the Court.²¹¹⁰

²¹⁰³ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 23 November 1992.

²¹⁰⁴ ICRC archive document.

²¹⁰⁵ ICRC, Communication to the Press No. 93/25, Nagorno-Karabakh conflict: 60,000 civilians flee fighting in south-western Azerbaijan, 19 August 1993.

²¹⁰⁶ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

²¹⁰⁷ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

²¹⁰⁸ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.

²¹⁰⁹ ICRC, Communication to the Press, ICRC Moscow, 17 June 1995.

²¹¹⁰ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(a)(vii) and 3(iii).

VI. Other Practice

2246. In 1979, in a letter to the ICRC, an armed opposition group confirmed its commitment to IHL and denounced the hostage-taking of civilians.²¹¹¹

2247. In 1985, in a report on violations of the laws of war in Nicaragua, Americas Watch reported an incident in which the leader of an armed opposition group threatened to kill 23 captured soldiers unless ten Miskito prisoners were released. The report commented that this behaviour “reflects a serious disregard for the rights of prisoners under [common] Article 3” of the 1949 Geneva Conventions.²¹¹²

2248. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “the taking of hostages” shall remain prohibited.²¹¹³

2249. In 1993, a representative of a separatist entity held that the forced displacement of civilians from a specific town was only carried out after timely warning of the possibility to flee and was only justified by the concern to keep the civilians away from the combat zone. It also held that this action was not motivated by the intention to take these civilians as hostages since the authorities of the separatist entity had always refused to resort to such practices.²¹¹⁴

J. Human Shields

I. Treaties and Other Instruments

Treaties

2250. Article 19, second paragraph, GC I provides that “the responsible authorities shall ensure that [fixed establishments and mobile medical units] are, as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety”.

2251. Article 23, second paragraph, GC III provides that “no prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations”.

2252. Article 28 GC IV provides that “the presence of a protected person may not be used to render certain points or areas immune from military operations”.

2253. Article 12(4) AP I provides that “under no circumstances shall medical units be used in an attempt to shield military objectives from attack. Whenever

²¹¹¹ ICRC archive document.

²¹¹² Americas Watch, *Violations of the Laws of War by Both Sides in Nicaragua: 1981–1985*, New York, March 1985, p. 43.

²¹¹³ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(c), *IRRC*, No. 282, 1991, p. 332.

²¹¹⁴ ICRC archive document.

possible, the Parties to the conflict shall ensure that medical units are so sited that attacks against military objectives do not imperil their safety." Article 12 AP I was adopted by consensus.²¹¹⁵

2254. Article 51(7) AP I provides that:

The presence or movements of the civilian population or individual civilians shall not be used to render certain points or areas immune from military operations, in particular in attempts to shield military objectives from attacks or to shield, favour or impede military operations. The Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations.

Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.²¹¹⁶

2255. Pursuant to Article 8(2)(b)(xxiii) of the 1998 ICC Statute, "utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" constitutes a war crime in international armed conflicts.

Other Instruments

2256. Article 13 of the 1956 New Delhi Draft Rules provides that "parties to the conflict are prohibited from placing or keeping members of the civilian population subject to their authority in or near military objectives, with the idea of inducing the enemy to refrain from attacking those objectives".

2257. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 51(7) AP I.

2258. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxiii), "utilizing the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

2259. Argentina's Law of War Manual requires that no prisoner of war nor protected person be used "to render, because of their presence, certain points, areas or regions immune from military operations".²¹¹⁷

2260. Australia's Commanders' Guide provides that civilians in enemy territory "are not to be used as a shield for combat operations or as a means of obtaining protection for military facilities".²¹¹⁸

²¹¹⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.

²¹¹⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

²¹¹⁷ Argentina, *Law of War Manual* (1989), § 4.29, see also § 3.12 (POWs).

²¹¹⁸ Australia, *Commanders' Guide* (1994), § 609.

2261. Australia's Defence Force Manual states that:

[The] requirement [to distinguish between military objects and civilian objects] imposes obligations on all parties to a conflict to establish and maintain this distinction. Inherent in this requirement, and to make it effective, is the obligation not to use civilians to protect military objectives. Civilians may not be used as shields . . . Any party who uses civilians in this manner violates international law including its obligations to protect its own civilian population.²¹¹⁹

The manual further states that the "civilian population shall not be used to attempt to render military objectives immune from attack or to shield, favour or impede military operations".²¹²⁰ It also states that "PW camps must not be located near military objectives with the intention of securing exemption from attack for those objectives".²¹²¹

2262. Belgium's Teaching Manual for Soldiers reiterates the prohibition on using civilians as human shields and contains an illustration of the prohibition on using civilians in order to facilitate an attack.²¹²²

2263. Cameroon's Instructors' Manual prohibits the use of human shields as a method of warfare.²¹²³

2264. Canada's Code of Conduct provides that prisoners of war or detainees "will not be used as 'human shields' to protect military objectives or cover military operations".²¹²⁴

2265. Colombia's Basic Military Manual states that parties in conflict shall "abstain from using [the civilian population] as shields or barricades in order to obtain a military advantage".²¹²⁵ It further states that it is prohibited "to use the civilian population as human shields".²¹²⁶

2266. Croatia's Commanders' Manual forbids the use of civilians or populated areas as shields for the protection of military units, movements or positions.²¹²⁷

2267. According to the Military Manual of the Dominican Republic, soldiers "cannot use prisoners as shields to defend against attacks by enemy forces".²¹²⁸

2268. Ecuador's Naval Manual provides that "deliberate use of non combatants to shield military objectives from enemy attacks is prohibited".²¹²⁹

2269. France's LOAC Summary Note prohibits the use of individual civilians or inhabited areas in order to protect military formations, movements or positions.²¹³⁰

²¹¹⁹ Australia, *Defence Force Manual* (1994), § 504.

²¹²⁰ Australia, *Defence Force Manual* (1994), § 922.

²¹²¹ Australia, *Defence Force Manual* (1994), § 1014.

²¹²² Belgium, *Teaching Manual for Soldiers* (undated), p. 14, see also p. 41 and slide 1/4.

²¹²³ Cameroon, *Instructors' Manual* (1992), p. 30, § 131.

²¹²⁴ Canada, *Code of Conduct* (2001), Rule 6, § 12.

²¹²⁵ Colombia, *Basic Military Manual* (1995), p. 22.

²¹²⁶ Colombia, *Basic Military Manual* (1995), p. 30.

²¹²⁷ Croatia, *Commanders' Manual* (1992), Article 47, p. 7.

²¹²⁸ Dominican Republic, *Military Manual* (1980), p. 9.

²¹²⁹ Ecuador, *Naval Manual* (1989), § 11-2.

²¹³⁰ France, *LOAC Summary Note* (1992), § 4.3.

2270. France's LOAC Teaching Note provides that protected persons "cannot be used in any case as human shields". The prohibition is also stated regarding prisoners of war.²¹³¹

2271. France's LOAC Manual restates Article 51(7) AP I.²¹³² It states that "to use protected persons as human shields to protect military objectives is strictly prohibited".²¹³³

2272. Germany's Military Manual provides that "none of the parties to the conflict shall use civilians as a shield to render certain points or areas immune from military operations".²¹³⁴ It also provides that POWs "shall not be used to render certain points or areas immune from military operations".²¹³⁵

2273. Israel's Manual on the Laws of War states that it is prohibited to exploit the presence of prisoners to render military objectives immune from attack and it is obligatory to provide the prisoners with bomb shelters as well as other means of defence.²¹³⁶

2274. Italy's IHL Manual provides that "it is prohibited to use civilian persons to shelter, owing to their presence, a place, a military objective or a zone of military operations".²¹³⁷

2275. Kenya's LOAC Manual provides that "neither may the presence of civilian persons be used to render certain points or areas immune from military operations".²¹³⁸

2276. The Military Manual of the Netherlands restates the provisions of Article 51(7) AP I.²¹³⁹

2277. New Zealand's Military Manual states, regarding restrictions on targeting, that "if the enemy is deliberately using civilians to shield military objectives the commander may take this into account in making his decision".²¹⁴⁰ It also restates the provisions of Article 51 AP I.²¹⁴¹ The manual further states that "the presence of a protected person in a particular place or area must not be used to give that place immunity from military operations (for example by placing trainloads of protected persons in railway sidings alongside ammunition trains)".²¹⁴² It adds that "it is forbidden to use the presence of protected persons to render certain points or areas immune from military operations".²¹⁴³

2278. Spain's LOAC Manual states that "it is prohibited to use protected persons as shields in order to protect military objectives from enemy attacks".²¹⁴⁴

²¹³¹ France, *LOAC Teaching Note* (2000), pp. 3 and 5.

²¹³² France, *LOAC Manual* (2001), pp. 33–34. ²¹³³ France, *LOAC Manual* (2001), p. 101.

²¹³⁴ Germany, *Military Manual* (1992), § 506.

²¹³⁵ Germany, *Military Manual* (1992), § 714.

²¹³⁶ Israel, *Manual on the Laws of War* (1998), pp. 52 and 57.

²¹³⁷ Italy, *IHL Manual* (1991), Vol. I, § 41(c).

²¹³⁸ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 2.

²¹³⁹ Netherlands, *Military Manual* (1993), p. V-5.

²¹⁴⁰ New Zealand, *Military Manual* (1992), § 515(3), see also § 622(3).

²¹⁴¹ New Zealand, *Military Manual* (1992), § 519.

²¹⁴² New Zealand, *Military Manual* (1992), § 1114, including footnote 28.

²¹⁴³ New Zealand, *Military Manual* (1992), § 1231.3.

²¹⁴⁴ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(4).

It further states that civilians and civilian goods or protected persons and goods may suffer from the effects of an attack against a proper military object due to their proximity to it and when their presence shields the latter from attacks.²¹⁴⁵

It also states that combatants must position their weapons in the field in order to avoid the use of the civilian population as a shield.²¹⁴⁶

2279. Switzerland's Basic Military Manual states that "no civilian person can be used to shield, by its presence, certain places or regions from military operations".²¹⁴⁷

2280. The UK Military Manual provides that "it is forbidden to use the presence of protected persons to render certain points or areas immune from military operations". It also states that:

In the past prominent inhabitants were placed on engines of trains running on the lines of communication in occupied territories to ensure the safety of the trains. Such a measure exposed innocent inhabitants to the illegitimate acts of train wrecking by private enemy individuals, and also to the lawful operations of raiding parties of the armed forces of the belligerent. It now comes within the prohibition of the [GC IV].²¹⁴⁸

2281. The UK LOAC Manual states that civilians "may not be used to shield military operations".²¹⁴⁹

2282. According to the US Air Force Commander's Handbook, "civilians should never be deliberately used to shield military operations or to protect objectives from attack".²¹⁵⁰

2283. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . using an enemy prisoner of war as point man on patrol".²¹⁵¹

2284. The US Naval Handbook prohibits the "deliberate use of non combatants to shield military objectives from enemy attacks".²¹⁵²

National Legislation

2285. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "using protected persons as shields", in international armed conflicts.²¹⁵³

2286. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that in international and non-international

²¹⁴⁵ Spain, *LOAC Manual* (1996), Vol. I, § 4.4.e.

²¹⁴⁶ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.a.(1).

²¹⁴⁷ Switzerland, *Basic Military Manual* (1987), Article 151(1).

²¹⁴⁸ UK, *Military Manual* (1958), §§ 548 and 651.

²¹⁴⁹ UK, *LOAC Manual* (1981), Annex A, p. 48, § 20.

²¹⁵⁰ US, *Air Force Commander's Handbook* (1980), § 3-1(4).

²¹⁵¹ US, *Instructor's Guide* (1985), p. 13.

²¹⁵² US, *Naval Handbook* (1995), § 11-2.

²¹⁵³ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.65.

armed conflicts, using prisoners of war “as a shield in the hostilities” is prohibited.²¹⁵⁴

2287. Azerbaijan’s Criminal Code provides that using protected persons “for the protection of one’s own Armed Forces or military objectives from military actions” is a violation of the laws and customs of war.²¹⁵⁵

2288. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.²¹⁵⁶

2289. The Criminal Code of Belarus provides that using persons who have laid down their arms or who are defenceless, the wounded, sick and shipwrecked, medical and religious personnel, prisoners of war, the civilian population in an occupied territory or in the conflict zone or other persons enjoying international protection as a cover for one’s own troops and objects against the effects of hostilities is a violation of the laws and customs of war.²¹⁵⁷

2290. Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes provides that “using the presence of a civilian person or any other protected person to prevent certain points, zones or military forces from being military targets” is a war crime in both international and non-international armed conflicts.²¹⁵⁸

2291. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.²¹⁵⁹

2292. Under the DRC Code of Military Justice as amended, the use of prisoners of war or of civilians as a method of protection is an offence.²¹⁶⁰

2293. Congo’s Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.²¹⁶¹

2294. Germany’s Law Introducing the International Crimes Code provides for the punishment of anyone who, in connection with an international or non-international armed conflict, “uses a person who is to be protected under international humanitarian law as a shield to restrain a hostile party from undertaking operations of war against certain targets”.²¹⁶²

2295. Under Georgia’s Criminal Code, the “use of civilians to cover the troops or objects from the hostilities” is a crime.²¹⁶³

²¹⁵⁴ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 21(3).

²¹⁵⁵ Azerbaijan, *Criminal Code* (1999), Article 115.2.

²¹⁵⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²¹⁵⁷ Belarus, *Criminal Code* (1999), Article 135(2).

²¹⁵⁸ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(v).

²¹⁵⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²¹⁶⁰ DRC, *Code of Military Justice as amended* (1972), Article 524.

²¹⁶¹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

²¹⁶² Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 11(1)(4).

²¹⁶³ Georgia, *Criminal Code* (1999), Article 413(b).

2296. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 19 GC I, 23 GC III and 28 GC IV, and of AP I, including violations of Articles 12(4) and 51(7) AP I, are punishable offences.²¹⁶⁴

2297. Under Lithuania's Criminal Code as amended, the "use of civilians or prisoners of war as a living shield in military operations" is an offence.²¹⁶⁵

2298. Mali's Penal Code provides that "using the presence of a civilian person or other protected person in order to avoid that certain zones, points or military forces become a target for military operations" constitutes a war crime in international armed conflicts.²¹⁶⁶

2299. Under the International Crimes Act of the Netherlands, "utilising the presence of a civilian or other protected person to render certain points, areas or military forces immune from military operations" is a crime when committed in an international armed conflict.²¹⁶⁷

2300. Under New Zealand's International Crimes and ICC Act, war crimes include the crime defined in Article 8(2)(b)(xxiii) of the 1998 ICC Statute.²¹⁶⁸

2301. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".²¹⁶⁹

2302. Under Peru's Code of Military Justice, the "use of prisoners of war as... human shields" constitutes a violation of the law of nations.²¹⁷⁰

2303. Poland's Penal Code provides for the punishment of any person who, in violation of international law, uses persons *hors de combat*, protected persons and persons enjoying international protection to "shield with their presence an area or an object or his own troops from attack".²¹⁷¹

2304. Tajikistan's Criminal Code punishes the "use of [protected persons] to cover the troops or objects from hostilities".²¹⁷²

2305. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxiii) of the 1998 ICC Statute.²¹⁷³

2306. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxiii) of the 1998 ICC Statute.²¹⁷⁴

²¹⁶⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²¹⁶⁵ Lithuania, *Criminal Code as amended* (1961), Article 338.

²¹⁶⁶ Mali, *Penal Code* (2001), Article 31(i)(23).

²¹⁶⁷ Netherlands, *International Crimes Act* (2003), Article 5(5)(k).

²¹⁶⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²¹⁶⁹ Norway, *Military Penal Code as amended* (1902), § 108.

²¹⁷⁰ Peru, *Code of Military Justice* (1980), Article 95(1).

²¹⁷¹ Poland, *Penal Code* (1997), Article 123(2).

²¹⁷² Tajikistan, *Criminal Code* (1998), Article 405.

²¹⁷³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²¹⁷⁴ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

2307. Under Yemen's Military Criminal Code, the "use of civilians as human shields during war operations" constitutes a war crime.²¹⁷⁵

National Case-law

2308. In its judgement in the *Student case* in 1946, the UK Military Court at Lüneberg found the accused guilty of using six British prisoners of war as a screen for the advance of German troops, which resulted in the deaths of some of the prisoners.²¹⁷⁶

2309. In its judgement in the *Von Leeb case (The German High Command Trial)* in 1948, the US Military Tribunal at Nuremberg held that "to use prisoners of war as a shield for the troops is contrary to international law".²¹⁷⁷

Other National Practice

2310. In 1996, during a debate in the UN Security Council on the situation in Liberia, the representative of Chile said that he especially regretted the "unfortunate recurrence, in a United Nations peacekeeping operation, of the use of human shields, as a result of the fighting in Tubmanburg and Kle".²¹⁷⁸

2311. The Report on the Practice of Croatia refers to a communiqué of the Ministry of Defence in 1995 which stated that the Croatian authorities had taken into custody and prosecuted the commander of a small Croatian military unit because of his alleged use of seven Danish UN peacekeepers as human shields during the August 1995 military operations.²¹⁷⁹

2312. In a communiqué issued in August 1990, El Salvador vigorously condemned Iraq's actions on the basis of IHL, in particular Iraq's violation of the rule prohibiting the taking and use of hostages and the denial of an individual's basic rights to liberty and freedom of transit.²¹⁸⁰

2313. The Report on the Practice of France refers to various statements in which the French President, Prime Minister and Minister of Foreign Affairs have condemned the use of civilians, prisoners of war and members of peacekeeping operations as human shields.²¹⁸¹

²¹⁷⁵ Yemen, *Military Criminal Code* (1998), Article 21(4).

²¹⁷⁶ UK, Military Court at Lüneberg, *In re Student*, Judgement, 10 May 1946.

²¹⁷⁷ US, Military Tribunal at Nuremberg, *Von Leeb case (The German High Command Trial)*, Judgement, 28 October 1948.

²¹⁷⁸ Chile, Statement before the UN Security Council, UN Doc. S/PV.3621, 25 January 1996, p. 18.

²¹⁷⁹ Report on the Practice of Croatia, 1997, Chapter 1.7, referring to Communiqué of the Ministry of Defence, 10 August 1995.

²¹⁸⁰ El Salvador, Communiqué concerning the situation between Iraq and Kuwait, annexed to Letter dated 30 August 1990 to the UN Secretary-General, UN Doc. S/21708, 5 September 1990.

²¹⁸¹ Report on the Practice of France, 1999, Chapter 1.7, referring to Message of the President to parliament, 27 August 1990, *Politique étrangère de la France*, August 1990, p. 105, Communiqué of the Ministry of Foreign Affairs, 21 January 1991, *Annuaire français de droit international*, Vol. 37, 1991, p. 1019, *Politique étrangère de la France*, 21 August 1990, p. 91, Prime Minister, Answer to questions in parliament regarding Bosnia and Herzegovina, 31 May 1995, *Politique étrangère de la France*, May 1995, pp. 81–82, Minister of Foreign Affairs, Declaration before

2314. In an address to parliament in 1990, the German Minister of Foreign Affairs stated with respect to EU nationals detained in Kuwait and Iraq that “it is particularly abominable that they will be placed around military defence objects” and that such practice constituted a “breach of international law and rules governing civilised behaviour”.²¹⁸²

2315. The Report on the Practice of Iran notes that no instances were found in which the civilian population or objects were used as human shields by the Iranian authorities.²¹⁸³

2316. According to the Report on the Practice of Israel, the IDF strictly prohibits the use of civilians to render certain points, areas or personnel immune from military operations. The report expresses regret that Israel’s opponents do not always respect this obligation.²¹⁸⁴

2317. In January 1991, in a letter to the President of the UN Security Council, Italy warned Iraq in the strongest terms against carrying out its alleged intention to move POWs to strategic sites and recalled Article 23 GC III.²¹⁸⁵

2318. According to the Report on the Practice of Jordan, Jordan has never used civilians as shields to protect areas or installations from enemy attacks.²¹⁸⁶

2319. In January 1991, in a letter to the President of the UN Security Council, Kuwait denounced Iraq’s announcement that prisoners of war were to be sent to various economic and scientific installations to serve as human shields. The letter stated that such inhuman practices were in violation of GC III and GC IV.²¹⁸⁷

2320. The Report on the Practice of Kuwait notes that the use of human shields by Iraq to protect certain strategic sites was condemned by Kuwait.²¹⁸⁸

2321. On the basis of interviews with members of the armed forces, the Report on the Practice of Malaysia states that during the communist insurgency, civilians were never used as human shields.²¹⁸⁹

2322. According to the records published by the Directorate of Legal Services of the Nigerian army, cited in the Report on the Practice of Nigeria, Nigerian practice does not allow the use of human shields.²¹⁹⁰

parliament, 6 June 1995, *Politique étrangère de la France*, June 1995, p. 99 and Minister of Foreign Affairs, Declaration before the Senate, 7 June 1995, *Politique étrangère de la France*, June 1995, p. 106.

²¹⁸² Germany, Statement of the Minister of Foreign Affairs, 23 August 1990, *Bulletin*, No. 102, Presse- und Informationsamt der Bundesregierung, Bonn, 25 August 1990, p. 858.

²¹⁸³ Report on the Practice of Iran, 1997, Chapter 1.7.

²¹⁸⁴ Report on the Practice of Israel, 1997, Chapter 1.7.

²¹⁸⁵ Italy, Letter dated 23 January 1991 to the President of the UN Security Council, UN Doc. S/22137, 23 January 1991.

²¹⁸⁶ Report on the Practice of Jordan, 1997, Chapter 1.7.

²¹⁸⁷ Kuwait, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22128, 22 January 1991.

²¹⁸⁸ Report on the Practice of Kuwait, 1997, Chapter 1.7.

²¹⁸⁹ Report on the Practice of Malaysia, 1997, Interviews with members of the armed forces, Chapter 1.7.

²¹⁹⁰ Report on the Practice of Nigeria, 1997, Chapter 1.7, referring to Records of the Directorate of Legal Services of the Nigerian army.

2323. The Report on the Practice of Rwanda includes several examples of the use of civilians as human shields by combatants of the former government during the hostilities in Kigali in 1994. On the basis of a statement of the Rwandan Minister of Justice at the 53rd Session of the UN Commission on Human Rights condemning the use of the civilian population as human shields during hostilities, the report considers that it is the *opinio juris* of Rwanda that the use of human shields in combat is prohibited.²¹⁹¹

2324. In a statement in 1992, the President of Senegal said that "Iraq has . . . used prisoners of war as human shields, in violation of the Geneva Convention on the treatment of prisoners of war. Deeply shocked and angered, the Government of Senegal has condemned this inhumane policy which runs counter to law."²¹⁹²

2325. The Report on the Practice of Spain cites several occasions in 1990 and 1991 when the Spanish government condemned Iraq for its use of human shields.²¹⁹³

2326. In a statement in February 1996, the Ministry of Foreign Affairs of Tajikistan denounced the opposition's use of prisoners as human shields. According to the statement, opposition forces hid behind a "living shield" of members of government forces, compelling the command of the armed forces of Tajikistan to abandon positions in order to avoid unjustified loss of life among military personnel. Such practice was qualified as a flagrant violation of the Geneva Conventions.²¹⁹⁴

2327. Speaking in an emergency debate in the House of Commons at the time of the Gulf crisis in 1990, the UK Prime Minister declared that "every norm of law, of diplomatic convention and of civilised behaviour has been offended by the way in which those citizens have been rounded up . . . and used as a human shield".²¹⁹⁵

2328. In an emergency debate in the House of Lords at the time of the Gulf crisis in 1990, the UK Minister of State, FCO, declared that he was shocked by the Iraqi government's decision to use human shields, such practice being "abhorrent and a further breach of humanitarian law".²¹⁹⁶

²¹⁹¹ Report on the Practice of Rwanda, 1997, Chapter 1.7.

²¹⁹² Senegal, Statement by the President, annexed to Letter dated 29 January 1991 to the UN Secretary-General, UN Doc. S/22181, 31 January 1991, §§ 5–6.

²¹⁹³ Report on the Practice of Spain, 1998, Chapter 1.7, referring to Statement by the Minister of Foreign Affairs before Congress, 28 August 1990 and Press Conference by the Prime Minister on the Gulf War, 15 February 1991, Interview with the Minister of Foreign Affairs in a magazine, January/February 1991.

²¹⁹⁴ Tajikistan, Statement of the Ministry of Foreign Affairs, annexed to Letter dated 9 January 1996 to the UN Secretary-General, UN Doc. S/1996/95, 8 February 1996.

²¹⁹⁵ UK, House of Commons, Statement by the Prime Minister, *Hansard*, 6 September 1990, Vol. 177, col. 739.

²¹⁹⁶ UK, House of Lords, Statement by the Minister of State, FCO, *Hansard*, 6 September 1990, Vol. 521, col. 1798.

2329. In 1990, during a debate in the UN Security Council, the UK described Iraq's illegal practices of using human shields as "acts which outrage international law and international opinion".²¹⁹⁷

2330. In January 1991, in a letter to the President of the UN Security Council, the UK recalled Article 13 GC III and declared that "there had also been news agency reports that the Iraqi authorities were considering sending captured POWs to strategic sites in Iraq. This would be a serious breach of Iraq's obligations under the Conventions." It added that "scrupulous compliance with the Convention was expected in respect to all British prisoners of war including British servicemen".²¹⁹⁸

2331. On 21 January 1991, the UK Minister of Foreign Affairs summoned the Iraqi Ambassador to discuss Iraq's obligations under international law in the context of the Gulf War. After the meeting, the spokesperson for the Foreign and Commonwealth Office, stated that the Minister:

had raised press reports concerning the detention of POWs at strategic sites [and] had made it clear that if Iraq did this it would be an outrageous breach of the Geneva Conventions. The British Government would take the gravest view of any such breach. He also reminded the Iraqi Ambassador of the personal liability of those individuals who broke the Convention in this way.²¹⁹⁹

2332. In 1991, during a debate in the House of Commons on the subject of the Gulf War, the UK Prime Minister stated that:

There has been a reported threat to use captured airmen as human shields. Such action would be inhuman, illegal and totally contrary to the third Geneva convention. The convention expressly . . . prohibits the sending of a prisoner of war to an area where he may be exposed to fire, or his detention there, and forbids the use of the presence of prisoners of war to render points or areas immune from military operations. There is no doubt about Iraq's obligations under the Geneva convention.²²⁰⁰

2333. In 1950 and 1966, during the Korean and Vietnam wars respectively, the US protested against the use of civilians as human shields.²²⁰¹

2334. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we also support the principle that the civilian population not be used to shield military objectives or operations from attack".²²⁰²

²¹⁹⁷ UK, Statement before the UN Security Council, UN Doc. S/PV.2937, 18 August 1990, p. 21.

²¹⁹⁸ UK, Letter to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991.

²¹⁹⁹ UK, Statement by FCO spokesperson, 21 January 1991, *BYIL*, Vol. 62, 1991, p. 680.

²²⁰⁰ UK, House of Commons, Statement by the Prime Minister, *Hansard*, 21 January 1991, Vol. 184, col. 27.

²²⁰¹ US, Statement by the Secretary of State, Dean Acheson, 6 September 1950, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, pp. 139–141; Statement by the Secretary of Defence, Robert McNamara, 2 February 1966, reprinted in Marjorie Whiteman, *Digest of International Law*, Vol. 10, Department of State Publication 8367, Washington, D.C., 1968, pp. 426–428.

²²⁰² US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International

2335. In 1990, during a debate in the UN Security Council concerning the crisis in the Gulf, the US stated that “it is contrary to international law and to all the norms of Arab hospitality to use guests as military shields”.²²⁰³

2336. In 1991, in response to an ICRC Memorandum on the Applicability of IHL in the Gulf Region, the US emphasised the duty of a force which has control over a civilian population to ensure it is located in a safe place. It also stated that “in no case may a combatant force utilize individual civilians or the civilian population to shield a military objective from attack”.²²⁰⁴

2337. In 1991, in a letter to the President of the UN Security Council concerning operations in the Gulf War, the US protested against “the announcement of the intention of the Government of Iraq . . . to use [prisoners of war] as human shields in flagrant violation of the Third Geneva Convention of 1949”.²²⁰⁵

2338. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that:

Baghdad radio has reported that the Government of Iraq intends to locate United States and other coalition POWs in Iraq at likely strategic targets of coalition forces. The United States strongly protests the Government of Iraq’s threat to so endanger POWs.

...

If the Government of Iraq places coalition POWs at military targets in Iraq, then the Government of Iraq will be in violation of the Third Geneva Convention, and Iraqi officials . . . will have committed a serious war crime.²²⁰⁶

2339. In January 1991, in a letter to the President of the UN Security Council, the US stated that “Baghdad radio has subsequently reported that the Government of Iraq intends to locate United States and other coalition POWs at strategic sites that may be subject to attack. This is a violation of the Geneva Conventions.”²²⁰⁷

2340. In January 1991, in a letter to the President of the UN Security Council, the US stated that “Iraqi authorities . . . have reportedly used United States and other allied POWs as ‘human shields’ in direct violation of the Third Geneva Convention . . . Such treatment is outrageous and Iraq must understand that such actions constitute war crimes.”²²⁰⁸

Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

²²⁰³ US, Statement before the UN Security Council, UN Doc. S/PV.2937, 18 August 1990, p. 12.

²²⁰⁴ US, Message from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf, 11 January 1991, Report on US Practice, 1997, Chapter 1.4.

²²⁰⁵ US, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991.

²²⁰⁶ US, Department of State, Diplomatic Note to Iraq, Washington, 21 January 1991, annexed to Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/2213022, January 1991, p. 4.

²²⁰⁷ US, Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 2.

²²⁰⁸ US, Letter dated 30 January 1991 to the President of the UN Security Council, UN Doc. S/22173, 30 January 1991, p. 2.

2341. In January 1991, in a letter to the President of the UN Security Council, the US denounced Iraq's disregard for the norms of the Geneva Conventions, including the deliberate exposure of prisoners of war to the dangers of combat.²²⁰⁹

2342. In March 1991, in a letter to the President of the UN Security Council, the US listed some of the practices by which the Iraqi government put civilians at risk by "moving significant amounts of military weapons and equipment into civilian areas with the deliberate purpose of using innocent civilians and their homes as shields against attacks on legitimate military targets".²²¹⁰

2343. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that "US and other hostages in Iraq, including civilians forcibly deported from Kuwait, were placed in or around military targets as 'human shields', in violation of Articles 28 and 38(4) [GC IV]".²²¹¹ It further noted some specific Iraqi war crimes including "using POWs as a shield to render certain points immune from military operations, in violation of Article 23 GPW".²²¹²

2344. In 1993, in its report on the protection of natural and cultural resources during times of war, the US Department of Defense stated that "in conflicts such as the Korean and Vietnam War, as well as the 1991 Persian Gulf War, the armed forces of the United States have faced opponents who have elected to use their civilian populations and civilian objects to shield military objectives from attack".²²¹³

2345. In 2000, the US Ambassador at Large for War Crimes Issues stated that:

Articles 51 and 58 of Protocol I quite properly articulate the principle that a party on the defensive cannot intentionally use civilian noncombatants or civilian property to shield military targets. In one sense, this is simply a refinement of the protected status that civilians and their property enjoy under the laws of armed conflict. The law has now been clear that the failure of one party to abide by the full range of the law of armed conflict does not relieve the other party of its legal obligations.²²¹⁴

2346. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the Ministry of Defence of the SFRY included the following example: "During the attack on the tanks of YPA in the Rozna Dolina, the Slovenian troops had

²²⁰⁹ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991.

²²¹⁰ US, Letter dated 5 March 1991 to the President of the UN Security Council, UN Doc. S/22341, 8 March 1991.

²²¹¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 10 April 1992, pp. 618 and 634.

²²¹² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 10 April 1992, p. 635.

²²¹³ US, Department of Defense, Report to Congress on International Policies and Procedures regarding the Protection of Natural and Cultural Resources during Times of War, 19 January 1993, p. 203.

²²¹⁴ US, David J. Scheffer, Ambassador at Large for War Crimes Issues, Address to I Corps Soldiers and Commanders Fort Lewis entitled "Ambassadors for Freedom", Washington, 4 May 2000, pp. 5-6.

brought in front of their units women and children, expecting quite rightly that YPA soldiers would not open fire on them".²²¹⁵

III. Practice of International Organisations and Conferences

United Nations

2347. In a resolution adopted in 1992, the UN Commission on Human Rights condemned the use of human shields by Iraq as an extremely serious violation of international law.²²¹⁶

2348. In a resolution adopted in 1995, the UN Commission on Human Rights vigorously condemned the use of civilians as human shields on the front line in the conflict in the former Yugoslavia.²²¹⁷

2349. In 1996, the UN Secretary-General reported that during the conflict in Liberia, UNOMIL was charged with carrying out investigations of major violations of human rights. In this context, UNOMIL confirmed that, during fighting in Tubmanburg on 30 December 1995, ULIMO-J fighters forced civilians out of the government hospital, where they had taken refuge, and used them as human shields to protect their position in the town. In addition, fighters generally prevented civilians from fleeing the town.²²¹⁸

2350. In 1998, in a report on UNOMSIL in Sierra Leone, the UN Secretary-General referred to accounts of atrocities compiled by the human rights adviser (to the UN Secretary-General's Special Representative for Sierra Leone) and stated, *inter alia*, that "elements of the former junta . . . have used civilians as human shields in their military operations".²²¹⁹

2351. The report pursuant to paragraph 5 of UN Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on UN forces in Somalia noted that:

No principle is more central to the humanitarian law of war than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants.

The report went on to say that central principles such as this one were clearly a part of contemporary customary international law and were applicable as soon as "political ends are sought through military means".²²²⁰

²²¹⁵ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 1(iv).

²²¹⁶ UN Commission on Human Rights, Res. 1992/71, 5 March 1992, § 2(d).

²²¹⁷ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 3.

²²¹⁸ UN Secretary-General, Fifteenth progress report on UNOMIL, UN Doc. S/1996/47, 23 January 1996, § 24.

²²¹⁹ UN Secretary-General, First progress report on the UNOMSIL, UN Doc. S/1998/750, 12 August 1998, §§ 33 and 36.

²²²⁰ Report pursuant to paragraph 5 of Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on United Nations forces in Somalia conducted on behalf of the UN Security Council, UN Doc. S/26351, 24 August 1993, Annex, §§ 8–9.

2352. In 1993, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights described how civilian detainees were used as human shields to protect the army's advance. According to the report, these civilian detainees were arrested and drafted into the army and forced to dig shelters on the front line. On 14 August 1993, the Special Rapporteur wrote to the government to express his abhorrence of this practice. The Special Rapporteur also reported that the Bosnian Serbs used civilian detainees as human shields, forcing them to stand as a "living wall" on the front.²²²¹

Other International Organisations

2353. In a resolution adopted in 1991 in the context of the Gulf War, the Parliamentary Assembly of the Council of Europe warned Iraq against the criminal use of prisoners of war as human shields in strategic sites, flagrantly violating GC III.²²²²

2354. In a resolution adopted in 1993 on the situation of women and children in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe urged governments of the member and non-member States grouped together in the Council of Europe "to undertake to protect children from the scourge of war and to condemn the barbaric practice in recent armed conflicts of using women and children as . . . human shields".²²²³

2355. In 1993, in a report on the situation of refugees and displaced persons in the former Yugoslavia, the Rapporteur of the Parliamentary Assembly of the Council of Europe considered "prisoners being ferried to the front line, for example for use as a human shield" as a war crime.²²²⁴

2356. In a declaration issued in August 1990, the 12 EC member States stated that the use of civilians as human shields was "particularly heinous as well as taken in contempt of the law of basic humanitarian principles".²²²⁵

2357. In 1990, during a debate in the Third Committee of the UN General Assembly, Italy stated on behalf of the EC that Iraq's "decision to use certain foreign nationals as a human shield was illegal and morally repugnant".²²²⁶

2358. In 1991, in a statement on the situation of the POWs detained by Iraq, the EC and its member States expressed:

²²²¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, §§ 36, 37, 39 and 84.

²²²² Council of Europe, Parliamentary Assembly, Res. 954, 29 January 1991, § 5.

²²²³ Council of Europe, Parliamentary Assembly, Res. 1011, 28 September 1993, § 7(iii).

²²²⁴ Council of Europe, Parliamentary Assembly, Report on the situation of refugees and displaced persons in the former Yugoslavia, Doc. 6740, 19 January 1993, p. 19.

²²²⁵ EC, Declaration on the situation of foreigners in Iraq and Kuwait, Paris, 21 August 1990, annexed to Letter dated 22 August 1990 from Italy to the UN Secretary-General, UN Doc. A/45/433-S/21590, 22 August 1990, § 2.

²²²⁶ EC, Statement by Italy on behalf of the EC before the Third Committee of the UN General Assembly, UN Doc. A/C.3/45/SR.3, 8 October 1990, § 42.

their deep concern at the unscrupulous use of prisoners of war and at the intention announced by Iraq to concentrate them near military bases and targets. They consider these actions particularly odious because they are contrary to elementary respect for international law and humanitarian principles. They condemn these actions unreservedly.²²²⁷

2359. In a declaration on the Gulf crisis adopted in November 1990, the European Council denounced “the practice of holding foreign nationals as hostages and keeping some of them in strategic sites”.²²²⁸

2360. In the Final Communiqué of its 36th Session in 1990, the GCC Ministerial Council urged “the Iraqi authorities to meet their established international obligations towards third-country nationals by providing them with appropriate protection, ensuring the safety of their lives and property and safeguarding them from the dangers of exposure to military operations”.²²²⁹

2361. In a resolution adopted in August 1990, the Council of the League of Arab States urged the Iraqi authorities to preserve foreign civilians from the dangers of exposure to military operations.²²³⁰

2362. In a declaration on the Iraq–Kuwait conflict issued in 1990, the Nordic Foreign Ministers considered the relocation of foreign nationals in the vicinity of potential military targets as “a gross violation of international law and elementary humanitarian considerations”. The declaration added that “such conduct displays such deep contempt for fundamental humanitarian principles and obligations under international law that it has aroused the abhorrence of the entire world”.²²³¹

International Conferences

2363. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 stated that the participants refused to accept that “civilian populations should become more and more frequently the principal victims of hostilities and acts of violence perpetrated in the course of armed conflicts, for example where they are . . . used as human shields”.²²³²

²²²⁷ EC, Statement on the situation of prisoners of war, annexed to Letter dated 23 January 1991 from Luxembourg to the UN Secretary-General, UN Doc. A/45/940-S/22140, 23 January 1991, p. 2.

²²²⁸ EC, Declaration on the Gulf crisis, annexed to Letter dated 30 October 1990 from Italy to the UN Secretary-General, UN Doc. A/45/700-S/21920, 1 November 1990, § 3.

²²²⁹ GCC, Ministerial Council, 36th Session, Jeddah, 5–6 September 1990, Final Communiqué, annexed to Letter dated 6 September 1990 from Oman to the UN Secretary-General, UN Doc. S/21719, 6 September 1990, p. 4.

²²³⁰ League of Arab States, Council, Res. 5039, The detention by Iraq of nationals of third countries, 31 August 1990, § 2.

²²³¹ Nordic Foreign Ministers, Declaration on the Iraq–Kuwait conflict, Molde, 12 September 1990, annexed to Letter dated 12 September 1990 from Norway to the UN Secretary-General, UN Doc. S/21751, 13 September 1990, § 6.

²²³² International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I (3), *ILM*, Vol. 33, 1994, p. 298.

IV. Practice of International Judicial and Quasi-judicial Bodies

2364. In the *Karadžić and Mladić case* before the ICTY in 1995, the accused were charged with grave breaches and violations of the laws and customs of war for having seized UN peacekeepers in the Pale area, having selected some of these hostages to use as “human shields” and having physically secured or otherwise held the peacekeepers against their will at potential NATO air targets, including ammunition bunkers, a radar site and a nearby communications centre in order to render these locations immune from further NATO air strikes.²²³³ In its review of the indictment in 1996, the ICTY Trial Chamber upheld the charges and stated that these acts could “be characterised as war crimes (taking UNPROFOR soldiers as hostages and using them as human shields)”. The Trial Chamber noted that civilians were used as human shields against other troops.²²³⁴

2365. In its General Comment on Article 6 of the 1966 ICCPR in 1982, the HRC held that “the Committee has noted that the right to life has been too often narrowly interpreted. The expression ‘inherent right to life’ cannot properly be understood in a restrictive manner, and the protection of this right requires that States adopt positive measures”.²²³⁵

2366. In its judgement in *Commission Nationale des Droits de l’Homme et des Libertés v. Chad* in 1999, the ACiHPR stated that:

The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the [ACHPR].²²³⁶

2367. In its judgement in *Demiray v. Turkey* in 2000, the ECtHR stated that:

The text of Article 2 [of the 1950 ECHR], read as a whole, demonstrates that it covers not only intentional killing, but also the situations where it is permitted to use force which may result, as an unintended outcome, in the deprivation of life. Article 2 may also imply in certain well-defined circumstances a positive obligation on the authorities to take preventive operational measures to protect an individual for whom they are responsible.²²³⁷

²²³³ ICTY, *Karadžić and Mladić case*, First Indictment, 24 July 1995, Counts 15–16.

²²³⁴ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 13 and 89.

²²³⁵ HRC, General Comment No. 6 (Article 6 ICCPR), 30 July 1982, § 5.

²²³⁶ ACiHPR, *Commission Nationale des Droits de l’Homme et des Libertés v. Chad*, Judgement, 2 October 1995, § 22.

²²³⁷ ECtHR, *Demiray v. Turkey*, Judgement, 21 November 2000, § 41.

V. Practice of the International Red Cross and Red Crescent Movement

2368. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia not “to misuse civilians for military operations”.²²³⁸

2369. In 1996, in a note on respect for IHL in an internal armed conflict, the ICRC stated that “the ICRC was informed on . . . instances in which civilians, including women and children, were compelled to walk in front of the troops along the railway track in order to protect the soldiers from the mines possibly laid there” and that civilians “were summoned and compelled to spend the night around [a] military camp as a shield against possible . . . attacks”. After receiving a protest from the ICRC, the authorities issued instructions to immediately cease such practices.²²³⁹

VI. Other Practice

2370. No practice was found.

K. Enforced Disappearance

Note: For practice concerning the right of the families to know the fate of their relatives, see Chapter 36.

General

I. Treaties and Other Instruments

Treaties

2371. The preamble to the 1994 Inter-American Convention on the Forced Disappearance of Persons states that the “forced disappearance of persons is an affront to the conscience of the Hemisphere and a grave and abominable offence against the inherent dignity of the human being”. The Convention also states that “forced disappearance of persons violates numerous non-derogable and essential human rights” and reaffirms that the systematic practice of disappearance “constitutes a crime against humanity”. The field of application of the Convention does not include armed conflicts of an international character that are governed by the Geneva Conventions and AP I.

2372. Article 7(1)(i) of the 1998 ICC Statute provides that “enforced disappearance of persons” constitutes a crime against humanity.

2373. Article 7(2)(i) of the 1998 ICC Statute defines enforced disappearance as:

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or

²²³⁸ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

²²³⁹ ICRC archive document.

whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

2374. The preamble to the 1998 Draft Convention on Forced Disappearance states that “any act of forced disappearance of a person constitutes a violation of the rules of international law guaranteeing the right to recognition as a person before the law, the right to liberty and security of the person”.

2375. Article 1 of the 1998 Draft Convention on Forced Disappearance provides that:

For the purposes of this Convention, forced disappearance is considered to be the deprivation of a person’s liberty, in whatever form or for whatever reason, brought about by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by an absence of information, or refusal to acknowledge the deprivation of liberty or information, or concealment of the fate or whereabouts of the disappeared person.

2376. Article 2(1) of the 1998 Draft Convention on Forced Disappearance provides that “the perpetrator of and other participants in the offence of forced disappearance or of any constituent elements of the offence, as defined in Article 1 of this Convention, shall be punished”.

2377. Article 3(1) of the 1998 Draft Convention on Forced Disappearance states that “the systematic or massive practice of forced disappearance constitutes a crime against humanity”.

2378. Article 4(1)(a) of the 1998 Draft Convention on Forced Disappearance provides for the obligation of States parties “not to practise, permit or tolerate forced disappearance”.

Other Instruments

2379. Article 1 of the 1992 UN Declaration on Enforced Disappearance states that:

1. Any act of enforced disappearance is an offence to human dignity. It is condemned as a denial of the purposes of the Charter of the UN and as a grave and flagrant violation of the human rights and fundamental freedoms proclaimed in the Universal Declaration on Human Rights and reaffirmed and developed in international instruments in this field.
2. Any act of enforced disappearance places the persons subjected thereto outside the protection of the law and inflicts severe suffering on them and their families. It constitutes a violation of the rules of international law guaranteeing, inter alia, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment. It also violates or constitutes a grave threat to the right to life.

2380. Under Section III(2) of the 1994 Comprehensive Agreement on Human Rights in Guatemala, the government of Guatemala undertook to modify the Penal Code so that “enforced or involuntary disappearances . . . may be characterized as crimes of particular gravity and punished as such”.

2381. Under Article 18(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “forced disappearance of persons” is a crime against humanity.

2382. Article 2(4) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right to life, especially against involuntary disappearances.

2383. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including crimes against humanity. According to Section 5(1)(i), “enforced disappearance of persons” constitutes a crime against humanity.

2384. Section 6(2)(i) of the 2000 UNTAET Regulation No. 2000/15 defines enforced disappearance as:

the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.

II. National Practice

Military Manuals

2385. Colombia’s Basic Military Manual provides that “it is prohibited to deprive [the civilian population] of its liberty (sequestration, enforced disappearances)”.²²⁴⁰

2386. El Salvador’s Human Rights Charter of the Armed Forces provides that “detention-disappearance” is a violation of human rights.²²⁴¹

2387. Indonesia’s Directive on Human Rights in Irian Jaya and Maluku instructs soldiers: “Do not be involved in or permit the disappearance of people”.²²⁴²

2388. According to Peru’s Human Rights Charter of the Security Forces, causing the disappearance of a detainee is one of the gravest violations of human rights.²²⁴³

National Legislation

2389. Under Armenia’s Penal Code, “kidnapping followed by disappearance” constitutes a crime against humanity.²²⁴⁴

²²⁴⁰ Colombia, *Basic Military Manual* (1995), p. 30.

²²⁴¹ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 18.

²²⁴² Indonesia, *Directive on Human Rights in Irian Jaya and Maluku* (1995), § 8.

²²⁴³ Peru, *Human Rights Charter of the Security Forces* (1991), p. 19.

²²⁴⁴ Armenia, *Penal Code* (2003), Article 392.

2390. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes against humanity defined in the 1998 ICC Statute, including "enforced disappearances of persons".²²⁴⁵

2391. Azerbaijan's Criminal Code, in a provision entitled "Enforced disappearance of persons" provides for the punishment of "the arrest, detention or abduction of persons with the authorization, support or acquiescence of a State or a political organization, followed by a refusal to acknowledge that deprivation of liberty or to give information on the fate or whereabouts of those persons".²²⁴⁶

2392. The Criminal Code of Belarus provides that the abduction followed by the disappearance of individuals is a crime against the security of mankind.²²⁴⁷

2393. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that enforced disappearance of persons is a crime against humanity.²²⁴⁸

2394. Canada's Crimes against Humanity and War Crimes Act provides that the crimes against humanity defined in Article 7 of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.²²⁴⁹

2395. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "enforced disappearances", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, are crimes against humanity.²²⁵⁰

2396. El Salvador's Penal Code provides for the punishment of the crime of enforced disappearance.²²⁵¹

2397. Under France's Penal Code, abduction of persons followed by their disappearance is a crime against humanity.²²⁵²

2398. Germany's Law Introducing the International Crimes Code, under the heading "Crimes against humanity", punishes anyone who:

causes a person's enforced disappearance, with the intention of removing him or her from the protection of the law for a prolonged period of time,

- (a) by abducting that person on behalf of or with the approval of a State or political organisation, or by otherwise severely depriving such person of his or her physical liberty, followed by a failure to give immediately truthful information, upon inquiry, of that person's fate and whereabouts, or
- (b) by refusing, on behalf of a State or political organisation or in contravention of a legal duty, to give information immediately on the fate and whereabouts

²²⁴⁵ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.21.

²²⁴⁶ Azerbaijan, *Criminal Code* (1999), Article 110.

²²⁴⁷ Belarus, *Criminal Code* (1999), Article 128.

²²⁴⁸ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 3(i).

²²⁴⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²²⁵⁰ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.

²²⁵¹ El Salvador, *Penal Code* (1997), Article 364.

²²⁵² France, *Penal Code* (1994), Article 212(1).

of the person deprived of his or her physical liberty under the circumstances referred to under letter (a) above, or by giving false information thereon.²²⁵³

2399. Under Mali's Penal Code, "enforced disappearance" is a crime against humanity.²²⁵⁴

2400. Under the International Crimes Act of the Netherlands, "enforced disappearance of persons" is a crime against humanity, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack.²²⁵⁵ Enforced disappearance is defined as:

the arrest, detention or abduction of persons by, or with the authorisation, support or acquiescence of a State or a political organisation, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.²²⁵⁶

2401. According to Niger's Penal Code as amended, "abduction of persons followed by their disappearance" is a crime against humanity.²²⁵⁷

2402. Under New Zealand's International Crimes and ICC Act, crimes against humanity include the crimes defined in Article 7(1)(i) and (2)(i) of the 1998 ICC Statute.²²⁵⁸

2403. Nicaragua's Draft Penal Code punishes the carrying out or allowing of enforced disappearances of protected persons when committed by public agents, officials or private individuals.²²⁵⁹

2404. Paraguay's Penal Code provides for the punishment of the crime of enforced disappearance.²²⁶⁰

2405. Peru's Penal Code punishes the carrying out of acts of enforced disappearance perpetrated by government agents.²²⁶¹

2406. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(i) and (2)(i) of the 1998 ICC Statute.²²⁶²

2407. Under the UK ICC Act, it is a punishable offence to commit a crime against humanity as defined in Article 7(1)(i) and (2)(i) of the 1998 ICC Statute.²²⁶³

²²⁵³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 7(1)(7).

²²⁵⁴ Mali, *Penal Code* (2001), Article 29(i).

²²⁵⁵ Netherlands, *International Crimes Act* (2003), Article 4(1)(i).

²²⁵⁶ Netherlands, *International Crimes Act* (2003), Article 4(2)(d).

²²⁵⁷ Niger, *Penal Code as amended* (1961), Article 208.2.

²²⁵⁸ New Zealand, *International Crimes and ICC Act* (2000), Section 10(2).

²²⁵⁹ Nicaragua, *Draft Penal Code* (1999), Articles 457–457.

²²⁶⁰ Paraguay, *Penal Code* (1997), Article 236.

²²⁶¹ Peru, *Penal Code* (1988), Article 320.

²²⁶² Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²²⁶³ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

National Case-law

2408. No practice was found.

Other National Practice

2409. In September 1984, Argentina's National Commission concerning Missing Persons (CONADEP) released a report containing individual chapters for different categories of victims, including disappeared children.²²⁶⁴

2410. In 1995, during a debate in the UN Security Council on violations of IHL and human rights in the former Yugoslavia, Botswana noted that numerous specific instances of disappearances had been documented and that this confirmed beyond any doubt that massive violations of IHL and human rights had taken place.²²⁶⁵

2411. On 7 January 2001, the Chilean President announced that a special Chilean panel investigating crimes committed during the military regime of General Augusto Pinochet had established the fate of about 180 prisoners who went missing between 1973 and 1990. The President said that the fate of more than 600 other prisoners who disappeared without a trace remained unknown. The data was provided by the Civilian-Military Roundtable, an investigative panel created in 1999, which included representatives of the armed forces, police and various churches. The information was handed over to the Supreme Court to enable it to investigate the disappearances and take legal action.²²⁶⁶

2412. In 1995, during a debate in the UN Security Council on violations of IHL and human rights in the former Yugoslavia, Honduras expressed grave concern at the overwhelming evidence of a consistent pattern of large-scale disappearances.²²⁶⁷

2413. In 1995, during a debate in the UN Security Council on violations of IHL and human rights in the former Yugoslavia, Indonesia described the contents of the UN Secretary-General's report on the situation as "some of the most heinous acts committed against humanity since World War II" and made specific reference to large-scale disappearances.²²⁶⁸

2414. In 1994, the President of Sri Lanka established a Commission of Inquiry into Involuntary Removal or Disappearances of Persons in certain provinces since 1 January 1988. The Commission was charged with inquiring and reporting on whether any such removals or disappearances had actually occurred; whether there existed any credible material indicating who was responsible

²²⁶⁴ Argentina, Report of the National Commission concerning Missing Persons (CONADEP), 20 September 1984, reprinted in Argentina: The Truth about the Disappeared, *Review of the International Commission of Jurists*, Vol. 33, 1984, p. 4.

²²⁶⁵ Botswana, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 9.

²²⁶⁶ AFP, Chile: Special panel establishes the fate of 180 missing, 8 January 2001.

²²⁶⁷ Honduras, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 10.

²²⁶⁸ Indonesia, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 12.

and identifying the legal proceedings that could be taken against the persons held to be responsible; the measures necessary to prevent repetition of occurrences; and the relief that should be afforded to the families of those removed or disappeared.²²⁶⁹

III. Practice of International Organisations and Conferences

United Nations

2415. In a resolution adopted in 1995 on violations of IHL and human rights in the former Yugoslavia, the UN Security Council condemned “in particular in the strongest possible terms the violations of international humanitarian law and of human rights . . . as described in the [Secretary-General’s report] . . . and showing a consistent pattern of . . . large-scale disappearances”.²²⁷⁰

2416. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN General Assembly expressed “its outrage at the instances of massive and systematic violations of human rights and humanitarian law, including . . . disappearances”.²²⁷¹

2417. In a resolution on Sudan adopted in 2000, the UN General Assembly expressed its deep concern at continuing serious violations of human rights and IHL by all parties, in particular the occurrence of cases of forced and involuntary disappearance.²²⁷²

2418. In a resolution adopted in 1979, ECOSOC asked the UN Commission on Human Rights to consider the question of disappeared persons as a matter of priority with a view to making appropriate recommendations. It also asked the UN Sub-Commission on Human Rights to consider communications on disappeared persons.²²⁷³

2419. In a resolution adopted in 1994 on the question of enforced disappearances, the UN Commission on Human Rights stated that “all acts of enforced disappearances are offences punishable by appropriate penalties which take into account their extreme seriousness under criminal law . . . [and that] perpetrators should be prosecuted”. The resolution also noted that the Working Group on Enforced or Involuntary Disappearances considered the Vienna Declaration adopted by the World Conference on Human Rights in 1993 to be an encouraging development “especially in so far as it recognizes that the systematic practice of such acts is of the nature of a crime against humanity”.²²⁷⁴

²²⁶⁹ Sri Lanka, Executive order of the President of Sri Lanka on the Establishment of a Commission of Inquiry into Involuntary Removal or Disappearances of Persons in Western, Southern and Sabaragamuwa Provinces, Doc. No. SP/6/N/192/94, 30 November 1994.

²²⁷⁰ UN Security Council, Res. 1034, 21 December 1995, § 2.

²²⁷¹ UN General Assembly, Res. 50/193, 22 December 1995, § 4.

²²⁷² UN General Assembly, Res. 55/116, 4 December 2000, § 2(ii).

²²⁷³ ECOSOC, Res. 1979/38, 10 May 1979, § 3.

²²⁷⁴ UN Commission on Human Rights, Res. 1994/39, 4 March 1994, preamble and §§ 6 and 15.

2420. In a resolution adopted in 1994 on the situation of human rights in the former Yugoslavia, the UN Commission on Human Rights demanded “immediate, firm and resolute action by the international community to stop all human rights violations, including . . . enforced and involuntary disappearances”.²²⁷⁵

2421. In a resolution adopted in 1996, the UN Commission on Human Rights condemned all violations of human rights and IHL during the conflict in the former Yugoslavia, in particular massive and systematic violations, including disappearances, and reaffirmed that “all persons who plan, commit or authorize such acts will be held personally responsible and accountable”.²²⁷⁶

2422. In a resolution adopted in 2001 on the question of enforced or involuntary disappearances, the UN Commission on Human Rights expressed its deep concern at “the increase in enforced or involuntary disappearances in various regions of the world and by the growing number of reports concerning harassment, ill-treatment and intimidation of witnesses of disappearances or relatives of persons who have disappeared”. The Commission also welcomed “the fact that acts of enforced disappearance, as defined in the Rome Statute of the ICC, come within the jurisdiction of the Court as crimes against humanity” and reminded governments that “all acts of enforced or involuntary disappearance are crimes punishable by appropriate penalties which should take due account of their extreme seriousness under penal law”.²²⁷⁷

2423. In 1981, following the discovery of secret graves in Argentina, the UN Sub-Commission on Human Rights recommended that the ILC be asked to include involuntary disappearances as a crime against humanity when drafting the Code of Crimes against the Peace and Security of Mankind.²²⁷⁸

2424. In 1996, in a statement on the situation of human rights in Colombia, the Chairman of the UN Commission on Human Rights noted that the Commission remained deeply preoccupied by the large number of cases of disappearance as shown in the report of the Working Group on the matter.²²⁷⁹

2425. In 1995, in his second report, the Director of MINUGUA recommended that the government of Guatemala “join in the efforts already under way in the international community, at the level of the United Nations and the Organization of American States, to ensure the recognition of enforced disappearance and extra-legal execution as crimes against humanity”.²²⁸⁰

Other International Organisations

2426. In a resolution adopted in 1980 on the situation of human rights in Latin America, the Parliamentary Assembly of the Council of Europe stated that

²²⁷⁵ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 5.

²²⁷⁶ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.

²²⁷⁷ UN Commission on Human Rights, Res. 2001/46, 23 April 2001, preamble and §§ 5–7.

²²⁷⁸ UN Sub-Commission on Human Rights, Res. 15 (XXXIV), 10 September 1981, § 3.

²²⁷⁹ UN Commission on Human Rights, Chairman’s statement on the situation of human rights in Colombia, UN Doc. E/CN.4/1996/SR.60, 23 April 1996, p. 12, § 4.

²²⁸⁰ MINUGUA, Director, Second report, UN Doc. A/49/929, 29 June 1995, § 178.

it was “profoundly alarmed by the disappearance of large numbers of people in such countries [Argentina, Chile, Uruguay, Guatemala and Cuba], including many children, pregnant women and foreign nationals” and invited the member countries of the Council of Europe to “promote, in a world context within the United Nations, the conclusion of an international convention designed to prevent and abolish disappearances, in particular by defining the guilt of those responsible for them”.²²⁸¹

2427. In a resolution adopted in 1981 on refugees from El Salvador, the Parliamentary Assembly of the Council of Europe stated that it was:

appalled by the dramatic situation of the population suffering from violent and ruthless confrontation in which violence, disappearances and murders follow one another, affecting not only the combatants, but also all those who, one way or another, are caught up in events which do not concern them.²²⁸²

2428. In a resolution adopted in 1982, the Parliamentary Assembly of the Council of Europe protested “in particular against the recourse by governments to emergency legislation as a means of covering up their repressive methods and against the practices of forcible disappearance”.²²⁸³

2429. In a resolution on enforced disappearances adopted in 1984, the Parliamentary Assembly of the Council of Europe considered that “the recognition of enforced disappearance as a crime against humanity is essential if it is to be prevented and its authors punished”.²²⁸⁴ The Assembly called on the governments of member States of the Council of Europe:

to support the preparation and adoption by the United Nations of a declaration setting forth the following principles:

- i. Enforced disappearance is a crime against humanity which:
 1. cannot be considered a political offence and is therefore subject to the extradition laws;
 2. is not subject to limitation;
 3. may not be covered by amnesty laws.²²⁸⁵

2430. In a resolution adopted in 1985, the Parliamentary Assembly of the Council of Europe condemned “the systematic use by military governments and other totalitarian regimes in the subcontinent of brutal methods of repression, including . . . forced disappearances”.²²⁸⁶

2431. In a resolution adopted in 1983 on missing persons in Argentina, the European Parliament urged Foreign Ministers to request from the Argentine

²²⁸¹ Council of Europe, Parliamentary Assembly, Res. 722, 1 February 1980, §§ 5 and 11(e).

²²⁸² Council of Europe, Parliamentary Assembly, Res. 751, 15 May 1981, § 7.

²²⁸³ Council of Europe, Parliamentary Assembly, Res. 774, 29 April 1982, § 5.

²²⁸⁴ Council of Europe, Parliamentary Assembly, Res. 828, 26 September 1984, § 12.

²²⁸⁵ Council of Europe, Parliamentary Assembly, Res. 828, 26 September 1984, § 13(a).

²²⁸⁶ Council of Europe, Parliamentary Assembly, Res. 835, 30 January 1985, § 11.

government detailed information on the fate of those who had disappeared, including children.²²⁸⁷

2432. In a resolution adopted in 1993, the European Parliament condemned the many serious human rights abuses in the world, including the alarming number of unresolved politically motivated disappearances, many of which had been perpetrated by paramilitary groups.²²⁸⁸

International Conferences

2433. The 24th International Conference of the Red Cross in 1981 adopted a resolution on forced or involuntary disappearances. In its preamble, the resolution stated that such disappearances implied violations of fundamental human rights such as the right to life, freedom and personal safety, the right not to be submitted to torture or cruel, inhuman or degrading treatment, the right not to be arbitrarily arrested or detained, and the right to a just and public trial. The resolution condemned “any action resulting in forced or involuntary disappearances, conducted or perpetrated by governments or with their connivance or consent” and recommended that the ICRC and the Central Tracing Agency take appropriate action to “reveal the fate of missing persons or bring their families relief”.²²⁸⁹

2434. The 25th International Conference of the Red Cross in 1986 adopted a resolution on obtaining and transmitting personal data as a means of protection and of preventing disappearances in which it condemned “any act leading to the forced or involuntary disappearance of individuals or groups of individuals”.²²⁹⁰

2435. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed its dismay and condemnation that “gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including] . . . disappearances”.²²⁹¹

2436. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that “strict orders are given to prevent all serious violations of international humanitarian law, including . . . enforced disappearances . . . and threats to carry out such actions”.²²⁹²

²²⁸⁷ European Parliament, Resolution on missing persons in Argentina, 13 October 1983, p. 132, § 1(c).

²²⁸⁸ European Parliament, Resolution on Human Rights in the world and Community human rights policy for the years 1991/92, 26 April 1993, Article 4.

²²⁸⁹ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. II.

²²⁹⁰ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XIII, § 3.

²²⁹¹ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(30).

²²⁹² 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

IV. Practice of International Judicial and Quasi-judicial Bodies

2437. In its judgement in the *Kupreškić case* in 2000, the ICTY, in defining the constituent offences of the category of “other inhumane acts” as crimes against humanity, held that:

Less broad parameters for the interpretation of “other inhumane acts” can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity . . . Similarly, the expression at issue undoubtedly embraces . . . the enforced disappearance of persons (prohibited by General Assembly Resolution 47/133 of 18 December 1992 and the Inter-American Convention of 9 June 1994). Plainly, all these, and other similar acts, must be carried out in a systematic manner and on a large scale. In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5.²²⁹³

2438. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that:

In those provisions of the Covenant that are not listed in article 4, paragraph 2, there are elements that in the Committee’s opinion cannot be made subject to lawful derogation under article 4. Some illustrative examples are presented below.

- ...
 (b) The prohibitions against taking of hostages, abductions, or unacknowledged detention are not subject to derogation. The absolute nature of these prohibitions, even in times of emergency, is justified by their status as norms of general international law.²²⁹⁴

2439. In *Quinteros v. Uruguay* in 1983, the HRC found that Elena Quinteros was arrested, held in a military detention and subjected to torture, which constituted violations of Articles 7, 9 and 10(1) of the 1966 ICCPR. The Commission further held that:

With regard to the violations alleged by the author on her own behalf, the Committee notes that, the statement of the author that she was in Uruguay at the time of the incident regarding her daughter, was not contradicted by the State party. The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the [1966 ICCPR] suffered by her daughter in particular, of article 7.²²⁹⁵

2440. In *Lyashkevich v. Belarus* in 2003, the HRC held that:

²²⁹³ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 566.

²²⁹⁴ HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, § 13(b).

²²⁹⁵ HRC, *Quinteros v. Uruguay*, Views, 21 July 1983, §§ 12.3–14.

The Committee understands the continued anguish and mental stress caused to the author, as the mother of the condemned prisoner, by the persisting uncertainty of the circumstances that led to his execution, as well as the location of his gravesite. Complete secrecy surrounding the date of execution, and the place of burial and the refusal to hand over the body for burial have the effect of intimidating or punishing families by intentionally leaving them in a state of uncertainty and mental distress. The Committee considers that the authorities' initial failure to notify the author of the scheduled date for the execution of her son, and their subsequent persistent failure to notify her of the location of her son's grave amounts to inhuman treatment of the author, in violation of article 7 of the [1966 ICCPR].²²⁹⁶

2441. In 2001, in *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, the ACiHPR stated that:

Article 5 of the [ACHPR] guarantees respect for the dignity inherent in the human person and the recognition of his legal status. This text further prohibits all forms of exploitation and degradation of man, particularly slavery, slave trade, torture cruel, inhuman or degrading punishment and treatment. The guarantee of the physical integrity and security of the person is also enshrined in Article 6 of the African Charter, as well as in the Declaration on the Protection of all Persons against Forced Disappearances, adopted by the General Assembly of the United Nations in Resolution 47/133 of 18th December 1992, which stipulates in article 1(2) that "any act leading to forced disappearance excludes the victim from the protection of the law and causes grave suffering to the victim and his family. It constitutes a violation of the rules of international law, especially those that guarantee to all the right to the recognition of their legal status, the right to freedom and security of their person and the right not be subjected to torture or any other inhuman or degrading punishment or treatment. It also violates the right to life or seriously imperils it". The disappearances of persons suspected or accused of plotting against the instituted authorities, including Mr. Guillaume Sessouma and a medical student, Dabo Boukary, arrested in May 1990 by the presidential guard and who have not been seen since then constitute a violation of the above-cited texts and principles.²²⁹⁷

2442. In *Kurt v. Turkey* in 1998, the ECtHR found that, following the disappearance of her son, the applicant was victim of inhuman treatment. The Court held that she

... has been left with the anguish of knowing that her son had been detained and that there is a complete absence of official information as to his subsequent fate. This anguish has endured over a prolonged period of time.

134. Having regard to the circumstances described above as well as to the fact that the complainant was the mother of the victim of a human rights violation and herself the victim of the authorities' complacency in the face of her anguish and distress, the Court finds that the respondent State is in breach of Article 3 [of the 1950 ECHR] in respect of the applicant.²²⁹⁸

²²⁹⁶ HRC, *Lyashkevich v. Belarus*, Views, 3 April 2003, § 9.2.

²²⁹⁷ ACiHPR, *Mouvement Burkinabé des Droits de l'Homme et des Peuples v. Burkina Faso*, Decision, 23 April–7 May 2001, § 44.

²²⁹⁸ ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, §§ 133–134.

2443. In *Timurtas v. Turkey* in 2000, the ECtHR, considering the fact that the applicant was the father of the disappeared person, that he proceeded to make many enquiries in order to find out what had happened to his son, that the investigation lacked promptitude and efficiency, and that the applicant's anguish concerning his son's fate continued at the time of the judgement, found that the disappearance amounts to inhuman and degrading treatment contrary to Article 3 of the 1950 ECHR.²²⁹⁹

2444. In the *Cyprus case* in 2001, the ECtHR found that there had been a violation of Article 3 of the 1950 ECHR (inhuman treatment) in respect of the relatives of the Greek-Cypriot missing persons. The Court stated that:

the question whether a family member of a "disappeared person" is a victim of treatment contrary to Article 3 [of the 1950 ECHR] will depend on the existence of special factors which give the suffering of the person concerned a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human-rights violation. Relevant elements will include the proximity of the family tie-in that context, a certain weight will attach to the parent-child bond—, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court further recalls that the essence of such a violation does not so much lie in the fact of the "disappearance" of the family member but rather in the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct.²³⁰⁰

2445. In 1980, in a report on the situation of human rights in Argentina, the IACiHR recommended that the government of Argentina hand over children who had disappeared to their natural parents or other close family members.²³⁰¹ The Commission insisted that the government give urgent priority to the investigation of cases involving disappeared children who were apprehended with their parents or who were born during the time of their detention.²³⁰²

2446. In 1987, in a case concerning Peru, the IACiHR declared that the disappearance of a mayor following a charge of membership of the Sendero Luminoso ("Shining Path") constituted a "very serious violation of the right to personal liberty (Article 7) and of the right to life (Article 4) set forth in the American Convention on Human Rights".²³⁰³

2447. In 1988, in a case concerning El Salvador, the IACiHR "energetically condemned" the official practice of government security forces involving the forced detention and disappearance of individuals.²³⁰⁴

²²⁹⁹ ECtHR, *Timurtas v. Turkey*, Judgement, 13 June 2000, §§ 96–98.

²³⁰⁰ ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 156–158.

²³⁰¹ IACiHR, Report on the situation of human rights in Argentina, Doc. OEA/Ser.L/V/II.49, 11 April 1980, p. 7.

²³⁰² IACiHR, *Annual Report 1980–1981*, Doc. OEA/Ser.L/V/II.54, 16 October 1981, p. 13.

²³⁰³ IACiHR, *Case 9466 (Peru)*, Resolution, 30 June 1987, p. 137, § 2.

²³⁰⁴ IACiHR, *Case 9844 (El Salvador)*, Resolution, 13 September 1988, p. 144, § 2.

2448. In 1988, in a case concerning Peru, the IACiHR informed the government of Peru that the forced disappearance of two persons, one by the Naval Infantry, the other by the Army Intelligence Service, constituted extremely serious violations of the right to personal freedom and the right to life.²³⁰⁵

2449. In 1999, in a report on the human rights situation in Colombia, the IACiHR noted that the forced disappearance of persons violated numerous rights protected under the 1969 ACHR and that the victims of forced disappearances were frequently civilians suspected of playing some role in the armed conflict. The IACiHR added that in any case, State agents were absolutely prohibited from causing the disappearance of combatants as well as civilians.²³⁰⁶

2450. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR stated that:

155. The forced disappearance of human beings is a multiple and continuous violation of many rights under the Convention that the States Parties are obligated to respect and guarantee. The kidnapping of a person is an arbitrary deprivation of liberty, an infringement of a detainee's right to be taken without delay before a judge and to invoke the appropriate procedures to review the legality of the arrest, all in violation of Article 7 of the Convention . . .

156. Moreover, prolonged isolation and deprivation of communication are in themselves cruel and inhuman treatment, harmful to the psychological and moral integrity of the person and a violation of the right of any detainee to respect for his inherent dignity as a human being. Such treatment, therefore, violates Article 5 of the Convention, which recognizes the right to the integrity of the person . . .

In addition, investigations into the practice of disappearances and the testimony of victims who have regained their liberty show that those who are disappeared are often subjected to merciless treatment, including all types of indignities, torture and other cruel, inhuman and degrading treatment, in violation of the right to physical integrity recognized in Article 5 of the Convention.

157. The practice of disappearances often involves secret execution without trial, followed by concealment of the body to eliminate any material evidence of the crime and to ensure the impunity of those responsible. This is a flagrant violation of the right to life, recognized in Article 4 of the Convention . . .

158. The practice of disappearances, in addition to directly violating many provisions of the Convention, such as those noted above, constitutes a radical breach of the treaty in that it shows a crass abandonment of the values which emanate from the concept of human dignity and of the most basic principles of the inter-American system and the Convention.²³⁰⁷

V. Practice of the International Red Cross and Red Crescent Movement

2451. No practice was found.

²³⁰⁵ IACiHR, *Case 9786 (Peru)*, Resolution, 14 September 1988, p. 35, § 2.

²³⁰⁶ IACiHR, Third report on the human rights situation in Colombia, Doc. OEA/Ser.L/V/II.102, 26 February 1999, § 218.

²³⁰⁷ IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, §§ 155–158.

VI. Other Practice

2452. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that “a state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (c) the murder or causing the disappearance of individuals”.²³⁰⁸

2453. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “practising, permitting or tolerating the involuntary disappearance of individuals” shall remain prohibited.²³⁰⁹

Preventive measures

Note: For practice concerning accounting for the dead, see Chapter 35, section E. For practice concerning accounting for missing persons, see Chapter 36. For practice concerning recording and notification of personal details of persons deprived of their liberty, see Chapter 37, section F. For practice concerning ICRC access to persons deprived of their liberty, see Chapter 37, section G.

I. Treaties and Other Instruments

Treaties

2454. Article I of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that:

The State Parties . . . undertake . . . not to practice, permit, or tolerate the forced disappearance of persons, even in states of emergency or suspension of individual guarantees, . . . to cooperate with one another in helping to prevent, punish, and eliminate the forced disappearance of persons [and] to take legislative, administrative, judicial, and any other measures necessary to comply with the commitments undertaken in this Convention.

2455. Article XI of the 1994 Inter-American Convention on the Forced Disappearance of Persons states that:

Every person deprived of liberty shall be held in an officially recognized place of detention and be brought before a competent judicial authority without delay . . . The States Parties shall establish and maintain official up-to-date registries of their detainees and . . . shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities.

²³⁰⁸ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(c).

²³⁰⁹ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Articles 3(2)(d) and 4(1), *IRRC*, No. 282, 1991, pp. 331 and 332.

Other Instruments

2456. Article 2(2) of the 1992 UN Declaration on Enforced Disappearance provides that “States shall act at the national and regional levels and in cooperation with the United Nations to contribute by all means to the prevention and eradication of enforced disappearance”.

2457. Article 3 of the 1992 UN Declaration on Enforced Disappearance provides that “each State shall take effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance in any territory under its jurisdiction”.

2458. Article 8(1) of the 1992 UN Declaration on Enforced Disappearance provides that “no State shall expel, return (*refouler*) or extradite a person to another State where there are substantial grounds to believe that he would be in danger of enforced disappearance”.

2459. Article 9(1) of the 1992 UN Declaration on Enforced Disappearance provides that:

The right to a prompt and effective judicial remedy as a means of determining the whereabouts or state of health of persons deprived of their liberty and/or identifying the authority ordering or carry out the deprivation of liberty is required to prevent enforced disappearances under all circumstances.

2460. Article 10(1) and (3) of the 1992 UN Declaration on Enforced Disappearance provides that:

Any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention.

...

An official up-to-date register of all persons deprived of their liberty shall be maintained in every place of detention.

2461. Article 12(2) of the 1992 UN Declaration on Enforced Disappearance provides that:

Each State shall . . . ensure strict supervision, including a clear chain of command, of all law enforcement officials responsible for apprehensions, arrests, detentions, custody, transfers and imprisonment, and of other officials authorized by law to use force and firearms.

2462. Article 20(1) of the 1992 UN Declaration on Enforced Disappearance provides that “States shall prevent and suppress the abduction of children of parents subjected to enforced disappearance and of children born during their mother’s enforced disappearance”.

II. National Practice

Military Manuals

2463. No practice was found.

National Legislation

2464. No practice was found.

National Case-law

2465. No practice was found.

Other National Practice

2466. In November 1991, Ecuador reported to the CAT that an international commission set up to look into the disappearance of two brothers had recommended, following a finding of negligence and cover-up in the investigation, that the necessary measures be adopted to prevent similar cases occurring in the future.²³¹⁰

*III. Practice of International Organisations and Conferences**United Nations*

2467. In a resolution adopted in 2001 on the question of enforced or involuntary disappearances, the UN Commission on Human Rights invited States:

to take legislative, administrative, legal and other steps, including when a state of emergency has been declared, to take action at the national and regional levels and in cooperation with the United Nations, if appropriate through technical assistance, and to provide the Working Group with concrete information on the measures taken and the obstacles encountered in preventing enforced, involuntary or arbitrary disappearances and in giving effect to the principles set forth in the [1992] Declaration [on Enforced Disappearance].²³¹¹

2468. In April 1996, in a statement on the situation of human rights in Colombia, the Chairman of the UN Commission on Human Rights called for the urgent adoption of more effective legislative, administrative, judicial or other measures to prevent and terminate acts of enforced disappearance.²³¹²

2469. In a resolution adopted in 1985, the UN Sub-Commission on Human Rights adopted a draft Declaration against Unacknowledged Detention which stated that:

Governments shall, (a) disclose the identity, location and condition of all persons detained by members of their police, military or security authorities or others acting with their knowledge, together with the cause of such detention, and (b) seek to locate all other persons who have disappeared. In countries where legislation does not exist to this effect, steps shall be taken to enact such legislation as soon as possible.²³¹³

²³¹⁰ CAT, *Report of the Committee against Torture*, New York, 1992, UN Doc. A/47/44, § 60.

²³¹¹ UN Commission on Human Rights, Res. 2001/46, 23 April 2001, preamble and § 7.

²³¹² UN Commission on Human Rights, Chairman's statement on the situation of human rights in Colombia, UN Doc. E/CN.4/1996/SR.60, 23 April 1996, p. 12, § 4.

²³¹³ UN Sub-Commission on Human Rights, Res. 1985/26, 29 August 1985, § 2.

Other International Organisations

2470. No practice was found.

International Conferences

2471. The 24th International Conference of the Red Cross in 1981 adopted a resolution on forced or involuntary disappearances in which it urged governments to “endeavour to prevent forced or involuntary disappearances and to cooperate with humanitarian organizations with a view to putting an end to that phenomenon”.²³¹⁴

2472. The 25th International Conference of the Red Cross in 1986 adopted a resolution on obtaining and transmitting personal data as a means of protection and of preventing disappearances in which it urged governments “to endeavour to prevent [forced or involuntary disappearances]”.²³¹⁵

2473. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 welcomed “the adoption by the General Assembly of the Declaration on the Protection of All Persons from Enforced Disappearance” and called upon all States “to take effective legislative, administrative, judicial or other measures to prevent, terminate and punish acts of enforced disappearances”.²³¹⁶

2474. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that “strict orders are given to prevent all serious violations of international humanitarian law, including . . . enforced disappearances . . . and threats to carry out such actions”.²³¹⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

2475. In its General Comment on Article 6 of the 1966 ICCPR in 1982, the HRC held that “States parties should . . . take specific and effective measures to prevent the disappearance of individuals, something which unfortunately has become all too frequent and leads too often to arbitrary deprivation of life”.²³¹⁸

2476. In *Herrera Rubio v. Colombia* in 1987, the HRC found that Colombia had violated the 1966 ICCPR, on the basis that it had failed to take appropriate measures to prevent the disappearance of two persons suspected of subversive activities.²³¹⁹

²³¹⁴ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. II.

²³¹⁵ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XIII, § 3.

²³¹⁶ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § II(62).

²³¹⁷ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal I.1, § 1(b).

²³¹⁸ HRC, General Comment No. 6 (Article 6 ICCPR), 30 July 1982, § 4.

²³¹⁹ HRC, *Herrera Rubio v. Colombia*, Views, 2 November 1987, p. 198, § 11.

2477. In its Annual Report 1980–1981, the IACiHR recommended that arrests only be made by competent and duly identified authorities and that detained persons be kept in premises designed for that purpose.²³²⁰

2478. In its doctrine concerning judicial guarantees and the right to personal liberty and security published in 1982, the IACiHR recommended that States take all necessary measures to prevent security forces from arresting and detaining persons without the knowledge of the competent authorities and the relatives of the prisoner. Among such measures, the Commission mentioned:

Close vigilance by the high officials and by the Judicial Branch over the actions of the security forces; periodic visits to the places described as illegal detention centers and imposition of severe sanctions on members of these forces who give an evasive or false reply to requests for information about persons they have detained.²³²¹

V. Practice of the International Red Cross and Red Crescent Movement

2479. According to the ICRC, in order to prevent disappearances, the identity of persons arrested must be established as soon as possible after their arrest/capture and a follow-up on their whereabouts must be carried out. Within the framework of its protection activities, the ICRC always registers and follows up on persons deprived of their liberty. The registration of persons deprived of their liberty and the repetition of visits enables the ICRC to keep track of the persons concerned until their release. In registering a person deprived of his/her liberty, the ICRC takes on the responsibility of monitoring that person's situation conscientiously. The regularity of follow-up visits is defined according to a particular person's protection needs. If, during a visit, a person turns out to be absent, the ICRC asks the authorities to explain his/her whereabouts.

VI. Other Practice

2480. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “unacknowledged detention” shall remain prohibited. It adds that “all persons deprived of their liberty shall be held in recognized places of detention”.²³²²

²³²⁰ IACiHR, *Annual Report 1980–1981*, Doc. OEA/Ser.L/V/II.54 Doc. 9 rev. 1, 16 October 1981, pp. 113 and 129; see also Report on the situation of human rights in Argentina, Doc. OEA/Ser.L/V/II.49 Doc. 19, 11 April 1980, p. 264, Report on the situation of human rights in Chile, Doc. OEA/Ser.L/V/II.66 Doc. 17, 9 September 1985, § 126 and Report on the situation of human rights in Peru, Doc. OEA/Ser.L/V/II.83 Doc. 31, 12 March 1993, p. 60.

²³²¹ IACiHR, *Doctrine concerning judicial guarantees and the right to personal liberty and security*, reprinted in *Ten years of activities (1971–1981)*, General Secretariat of the IACiHR, Washington, D.C., 1982, p. 319.

²³²² Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Articles 3(2)(d) and 4(1), *IRRC*, No. 282, 1991, pp. 331 and 332.

Investigation of enforced disappearance*I. Treaties and Other Instruments**Treaties*

2481. According to Article 12 of the 1994 Inter-American Convention on the Enforced Disappearance of Persons, “the States Parties shall give each other mutual assistance in the search for, identification, location, and return of minors who have been removed to another state or detained therein as a consequence of the forced disappearance of their parents or guardians”.

2482. Article 4(1)(b) and (d) of the 1998 Draft Convention on Forced Disappearance states that:

The States parties undertake: . . . to investigate immediately and swiftly any complaint of forced disappearance and to inform the family of the disappeared person about his or her fate and whereabouts . . . and to cooperate with each other and with the United Nations to contribute to the . . . investigation, punishment and eradication of forced disappearance.

2483. Article 11 of the 1998 Draft Convention on Forced Disappearance provides that:

2. Whenever there are grounds to believe that a forced disappearance has been committed, the State shall refer the matter to that authority without delay for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.
3. Each State Party shall ensure that the competent authority has the necessary powers and resources to conduct the investigation . . .
- ...
7. It must be possible to conduct an investigation, in accordance with the procedures described above, for as long as the fate or whereabouts of the disappeared person has not been established with certainty.

Other Instruments

2484. Article 13 of the 1992 UN Declaration on Enforced Disappearance provides that:

1. Each State shall ensure that any person having knowledge or a legitimate interest who alleges that a person has been subjected to enforced disappearance has the right to complain to a competent and independent State authority and to have that complaint promptly, thoroughly and impartially investigated by that authority. Whenever there are reasonable grounds to believe that an enforced disappearance has been committed, the State shall promptly refer the matter to that authority for such an investigation, even if there has been no formal complaint. No measure shall be taken to curtail or impede the investigation.
2. Each State shall ensure that the competent authority shall have the necessary powers and resources to conduct the investigation effectively, including powers to compel attendance of witnesses and production of relevant documents and to make immediate on-site visits.

3. Steps shall be taken to ensure that all involved in the investigation, including the complainant, counsel, witnesses and those conducting the investigation, are protected against ill-treatment, intimidation or reprisal.
4. The findings of such an investigation shall be made available upon request to all persons concerned, unless doing so would jeopardize an ongoing criminal investigation.
5. Steps shall be taken to ensure that any ill-treatment, intimidation or reprisal or any other form of interference on the occasion of the lodging of a complaint or during the investigation procedure is appropriately punished.
6. An investigation, in accordance with the procedures described above, should be able to be conducted for as long as the fate of the victim of enforced disappearance remains unclarified.

2485. Paragraph 2.1.1 of the Plan of Operation for the 1991 Joint Commission to Trace Missing Persons and Mortal Remains set up in the context of the former Yugoslavia states that “each party is responsible for compiling a list of its reported missing, as well as a file on each missing [person]”. Paragraph 2.2.2 further adds that “the adverse party/parties shall take all possible measures (administrative steps and public appeals) to obtain information on the person reported missing”.

II. National Practice

Military Manuals

2486. Colombia’s Basic Military Manual provides that “in time of peace, States have the obligation to take preventive measures”, *inter alia*, to “create efficient mechanisms enabling disappeared persons to be located”.²³²³

National Legislation

2487. No practice was found.

National Case-law

2488. No practice was found.

Other National Practice

2489. In September 1984, the National Commission concerning Missing Persons of Argentina (CONADEP) released a report, stressing that the objective was not to pass judgement but to inquire into the fate of the people who had disappeared.²³²⁴

2490. The main task of the Commission for Tracing Persons Missing in War Activities in the Republic of Croatia, established by the Croatian government

²³²³ Colombia, *Basic Military Manual* (1995), p. 27.

²³²⁴ Argentina, Report of the National Commission concerning Missing Persons (CONADEP), 20 September 1984, reprinted in Argentina: The truth about the disappeared, *Review International Commission of Jurists*, Vol. 33, December 1984, p. 2.

in 1991, was to collect and process the information about civil and other persons missing from the territory of Croatia during the war. In 1993, a new Commission, the Commission for Detained and Missing Persons, replaced the one established in 1991, yet with the same task.²³²⁵

2491. In November 1991, Ecuador reported to the CAT that an international commission set up to look into the disappearance of two brothers had recommended, following a finding of negligence and cover-up in the investigation, that the necessary measures be adopted to guarantee an investigation of other cases in the future.²³²⁶

2492. In 1993, the government of the Philippines created a Task Force on Involuntary Disappearances to assist relatives of the disappeared in discovering the fate of their family members.²³²⁷

III. Practice of International Organisations and Conferences

United Nations

2493. In a resolution adopted in 1985, the UN General Assembly requested that the government of Guatemala investigate and clarify the fate of those who had disappeared.²³²⁸

2494. In a resolution adopted in 1996, the UN Commission on Human Rights took note of efforts reported by the government of Sudan to begin investigation of cases of forced disappearance.²³²⁹

2495. In a resolution adopted in 2001 on the question of enforced or involuntary disappearances, the UN Commission on Human Rights reminded governments:

- (a) that all acts of enforced or involuntary disappearance are crimes punishable by appropriate penalties which should take due account of their extreme seriousness under penal law;
- (b) that they should ensure that their competent authorities proceed immediately to conduct impartial inquiries in all circumstances where there is reason to believe that an enforced disappearance has occurred in territory under their jurisdiction;
- (c) that, if such belief is borne out, all the perpetrators of enforced or involuntary disappearances must be prosecuted.²³³⁰

²³²⁵ Croatia, Directive on the Establishment and Functioning of the Commission for Tracing Persons Missing in War Activities in the Republic of Croatia, 1991; Regulations establishing the Commission for Detained and Missing Persons in Croatia, *Official Gazette*, No. 46, 17 May 1993.

²³²⁶ CAT, *Report of the Committee against Torture*, New York, 1992, UN Doc. A/47/44, § 60.

²³²⁷ Philippines, International Week of the Disappeared: The Desaparecidos in Our Midst, *Philippine Human Rights Update*, Vol. 10, No. 5, May–June 1996; Congress of the Republic of the Philippines, Res. Nos. 95–96, 22 July 1996.

²³²⁸ UN General Assembly, Res. 40/140, 13 December 1985, Article 6.

²³²⁹ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble.

²³³⁰ UN Commission on Human Rights, Res. 2001/46, 23 April 2001, preamble and §§ 5–7.

2496. In 1998, the Working Group on Enforced or Involuntary Disappearances of the UN Commission on Human Rights reported that the President of the Philippines had in 1993 set up a Fact-Finding Committee on Involuntary Missing Persons.²³³¹

Other International Organisations

2497. In a recommendation adopted in June 1979, the Parliamentary Assembly of the Council of Europe expressed alarm at the dramatic situation of several hundred missing persons arrested or detained by the Chilean security forces, noted that the Chilean authorities had not given satisfactory explanations for the disappearances, nor ordered serious research into the fate of the missing persons, and regretted that the enquiries conducted by the tribunals had given no satisfactory results. It recommended that the Committee of Ministers invite member States to urge the Chilean authorities in the strongest terms to obtain information on the fate of the missing persons.²³³²

2498. In a resolution on enforced disappearances adopted in 1984, the Parliamentary Assembly of the Council of Europe urged the “governments of countries where disappearances are reported to follow the example of Bolivia and Argentina, and to set up national inquiry commissions to investigate disappearances”.²³³³

2499. In a resolution adopted in November 1982, the European Parliament called on the European Council and Foreign Ministers to make formal representations and vigorous protests to the Argentine government in order to pressure it to provide detailed information concerning the fate of those who had disappeared, particularly EC citizens.²³³⁴

2500. In a resolution adopted in May 1983, the European Parliament expressed concern that no complete clarification had yet been given about the whereabouts of all those who had disappeared in Argentina, in spite of urgent appeals by “world public opinion”. It demanded a full explanation from the Argentine government concerning the fate of all individuals reported missing in Argentina.²³³⁵

2501. In a resolution adopted in October 1983, the European Parliament urged Foreign Ministers to request detailed information from the Argentine government about the fate of those who had disappeared.²³³⁶

International Conferences

2502. The 24th International Conference of the Red Cross in 1981 adopted a resolution on forced or involuntary disappearances which urged governments

²³³¹ UN Commission on Human Rights, Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc. E/CN.4/1999/622, 8 December 1998, § 246.

²³³² Council of Europe, Parliamentary Assembly, Rec. 868, 5 June 1979, p. 2.

²³³³ Council of Europe, Parliamentary Assembly, Res. 828, 26 September 1984, § 9.

²³³⁴ European Parliament, Resolution on the events in Argentina, 18 November 1982.

²³³⁵ European Parliament, Resolution on the statement by the Argentine military junta concerning the fate of the persons who have disappeared since the last coup d'état, 19 May 1983, p. 117.

²³³⁶ European Parliament, Resolution on persons missing in Argentina, 13 October 1983.

“to undertake and complete thorough inquiries into every case of disappearance occurring in their territory”.²³³⁷

2503. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 reaffirmed that “it is the duty of all States, under any circumstances, to make investigations whenever there is reason to believe that an enforced disappearance has taken place on a territory under their jurisdiction and, if allegations are confirmed, to prosecute its perpetrators”.²³³⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

2504. In its General Comment on Article 6 of the 1966 ICCPR in 1982, the HRC held that “States should establish effective facilities and procedures to investigate thoroughly cases of missing and disappeared persons in circumstances which may involve a violation of the right to life”.²³³⁹

2505. In *Quinteros v. Uruguay* in 1983, the HRC dealt with the case of Elena Quinteros who disappeared after having been arrested, held in a military detention and subjected to torture. The Commission stated that “the Government of Uruguay has a duty to conduct a full investigation into the matter”.²³⁴⁰

2506. In *Kurt v. Turkey* in 1998, the ECtHR found that there was a violation of Article 13 of the 1950 ECHR. The Court held that:

124. . . . Article 5 [of the 1950 ECHR] must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.

128. Having regard to these considerations, the Court concludes that the authorities have failed to offer any credible and substantiated explanation for the whereabouts and fate of the applicant son after he was detained in the village and that no meaningful investigation was conducted into the applicant insistence that he was in detention and that she was concerned for his life.

140. In the instant case the applicant is complaining that she has been denied an “effective” remedy which would have shed light on the whereabouts of her son. She asserted in her petitions to the public prosecutor that he had been taken into custody and that she was concerned for his life since he had not been seen since 25 November 1993. In the view of the Court, where the relatives of a person have an arguable claim that the latter has disappeared at the hands of the authorities, the notion of an effective remedy for the purposes of Article 13 entails, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible and including effective access for the relatives to the investigatory procedure. . . . Seen in these terms, the requirements of Article 13 are broader than a Contracting State obligation

²³³⁷ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. II.

²³³⁸ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § II(62).

²³³⁹ HRC, General Comment No. 6 (Article 6 ICCPR), 30 July 1982, § 4.

²³⁴⁰ HRC, *Quinteros v. Uruguay*, Views, 21 July 1983, § 15.

under Article 5 to conduct an effective investigation into the disappearance of a person who has been shown to be under their control and for whose welfare they are accordingly responsible.²³⁴¹

2507. In its judgement in *Timurtas v. Turkey* in 2000, the ECtHR found that the failure to conduct an effective investigation into a disappearance and the failure to grant the relatives effective access to the investigation was a violation of Article 13 of the 1950 ECHR.²³⁴²

2508. In its judgement in the *Cyprus case* in 2001, the ECtHR found that there had been a continuing violation of Article 2 of the 1950 ECHR (right to life) concerning the failure of the authorities of the respondent State to conduct an effective investigation into the whereabouts and fate of Greek-Cypriot missing persons who had disappeared in life-threatening circumstances. The Court also found a continuing violation of Article 5 ECHR (right to liberty and security) concerning the failure of the Turkish authorities to conduct an effective investigation into the whereabouts and fate of the Greek-Cypriot missing persons in respect of whom there was an arguable claim that they were in Turkish custody at the time of their disappearance.²³⁴³

2509. In its Annual Report 1980–1981, the IACiHR stated that the problem of disappearance after detention could not be considered as having been overcome “unless a clear accounting is provided, giving all the circumstances of the status and whereabouts of the persons who have disappeared”.²³⁴⁴

2510. In its Annual Report 1987–1988, the IACiHR proposed an amendment to the Guatemalan *habeas corpus* procedure whereby, until the whereabouts of the missing person had been established, the magistrate was required to continue to investigate and the case could not be declared closed.²³⁴⁵

2511. In 1991, in a case concerning El Salvador, the IACiHR, finding that the investigations into two disappearances were insufficient, asked the Salvadoran government to accept the jurisdiction of the IACtHR in respect of these cases.²³⁴⁶

2512. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR found that:

The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the

²³⁴¹ ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, §§ 124, 128 and 140.

²³⁴² ECtHR, *Timurtas v. Turkey*, Judgement, 13 June 2000, §§ 111–113.

²³⁴³ ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 136 and 150.

²³⁴⁴ IACiHR, *Annual Report 1980–1981*, Doc. OEA/Ser.L/VIII.54 Doc. 9 rev. 1, 16 October 1981, p. 12.

²³⁴⁵ IACiHR, *Annual Report 1987–1988*, Doc. OEA/Ser.L/V/II.74 Doc. 10 rev. 1, 16 September 1988, p. 302.

²³⁴⁶ IACiHR, *Case 10.000 (El Salvador)*, Report, 13 February 1991, p. 99, § 2; *Case 10.001 (El Salvador)*, Report, 13 February 1991, p. 103, § 2.

State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the [1969 ACHR] are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.

...

The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.²³⁴⁷

2513. In its judgement in the *Bámaca Velásquez case* in 2002, the IACtHR found that the government of Guatemala had failed to investigate the disappearance of the victim and stated that:

Whenever a violation of human rights occurs, it is an obligation of the State to investigate the facts and punish those responsible, and such an obligation must be seriously respected and not be a mere formality.

...

The State has an obligation to investigate the facts that generate violations of the American Convention on Human Rights and identify and punish those responsible, as well as publicly reveal the results of such investigation.²³⁴⁸

V. Practice of the International Red Cross and Red Crescent Movement

2514. Following the Gulf War in 1991, a Tripartite Commission was established under ICRC auspices to trace people reported missing. The Commission is made up of representatives of Iraq, on the one hand, and of France, Kuwait, Saudi Arabia, UK and US, on the other.

VI. Other Practice

2515. In 1994, in report on an insurrection in the Mexican state of Chiapas, the International Commission of Jurists noted that many involuntary disappearances might have occurred and that the competent State authorities and national NGOs were attempting to collect the relevant information.²³⁴⁹

²³⁴⁷ IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, §§ 177 and 181.

²³⁴⁸ IACtHR, *Bámaca Velásquez case*, Judgement, 22 February 2002, §§ 74 and 106(2), see also §§ 73, 75 and 78.

²³⁴⁹ International Commission of Jurists, Mexico: Preliminary report of the ICJ mission to Mexico with regard to the insurrection of indigenous peoples in Chiapas, 1–10 February 1994, *Review of the International Commission of Jurists*, No. 52, 1994, p. 14.

L. Deprivation of Liberty

Note: *This section does not include practice on the detention of members of the armed forces as prisoners of war in accordance with Article 3 of the 1907 HR, Article 4(A) GC III and Article 44(1) AP I.*

General

I. Treaties and Other Instruments

Treaties

2516. Article 42 GC IV provides that “the internment or placing in assigned residence of protected persons may be ordered only if the security of the Detaining Power makes it absolutely necessary”.

2517. According to Article 147 GC IV, “unlawful confinement of a protected person” is a grave breach of this instrument.

2518. Article 5(1) of the 1950 ECHR provides that “everyone has the right to liberty and security of person”.

2519. Article 9(1) of the 1966 ICCPR provides that “every one has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention.”

2520. Article 7(1) ACHR provides that “every person has the right to personal liberty and security”. Article 7(3) provides that “no one shall be subject to arbitrary arrest or imprisonment”.

2521. Article 6 of the 1981 ACHPR provides that “every individual shall have the right to liberty and to the security of his person . . . In particular, no one may be arbitrarily arrested or detained.”

2522. Article 37 of the 1989 Convention on the Rights of the Child provides that “no child shall be deprived of his or her liberty unlawfully or arbitrarily”.

2523. Pursuant to Article 8(2)(a)(vii) of the 1998 ICC Statute, “unlawful confinement” constitutes a war crime in international armed conflicts.

2524. Article 55(1)(d) of the 1998 ICC Statute provides that “in respect of an investigation under this statute, a person . . . shall not be subjected to arbitrary arrest or detention”.

Other Instruments

2525. Article II(1)(c) of the 1945 Allied Control Council Law No. 10 provides that “imprisonment . . . or other inhumane acts committed against any civilian population” is a crime against humanity.

2526. Article 3 of the 1948 UDHR provides that “everyone has the right to life, liberty and security of person”. Article 9 provides that “no one shall be subjected to arbitrary arrest, detention or exile”.

2527. According to Article I of the 1948 American Declaration on the Rights and Duties of Man, “every Human Being has the right to . . . liberty and the security of his person”.

2528. Article 20 of the 1990 Cairo Declaration on Human Rights in Islam provides that “it is not permitted without legitimate reason to arrest an individual or to restrict his freedom”.

2529. Article 2(g) of the 1993 ICTY Statute gives the Tribunal jurisdiction over grave breaches of the Geneva Conventions, expressly including the unlawful confinement of civilians.

2530. Under Article 18(j) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “arbitrary imprisonment” constitutes a crime against humanity.

2531. Article 20(a)(vii) 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “unlawful confinement of protected persons” is a war crime.

2532. Article 2(5) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right to liberty, particularly against unwarranted and unjustified arrest and detention, and to effectively avail of the privilege of the writ of *habeas corpus*.

2533. Article 6 of the 2000 EU Charter of Fundamental Rights provides that “everyone has the right to liberty and security of person”.

2534. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(vii), “unlawful confinement” constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

2535. Argentina’s Law of War Manual provides that illegal detention of protected persons is a grave breach of the Geneva Conventions and of AP I.²³⁵⁰

2536. Australia’s Commanders’ Guide states that unlawful confinement of a protected person is a grave breach of the Geneva Conventions and warrants the institution of criminal proceedings.²³⁵¹

2537. Canada’s LOAC Manual states that it is a grave breach of the Geneva Conventions to “unlawfully confine a protected person”.²³⁵²

2538. Colombia’s Basic Military Manual provides that “it is prohibited to deprive [the civilian population] of its liberty (sequestration, enforced disappearances)”.²³⁵³

2539. Croatia’s LOAC Compendium provides that “unlawful confinement” is a grave breach of IHL and a war crime.²³⁵⁴

²³⁵⁰ Argentina, *Law of War Manual* (1989), § 8.03.

²³⁵¹ Australia, *Commanders’ Guide* (1994), § 1305(d).

²³⁵² Canada, *LOAC Manual* (1999), p. 16-3, § 14(b).

²³⁵³ Colombia, *Basic Military Manual* (1995), p. 30.

²³⁵⁴ Croatia, *LOAC Compendium* (1991), Annex 9, p. 56.

- 2540.** El Salvador's Human Rights Charter of the Armed Forces states that "any person has the right to liberty".²³⁵⁵ It further provides that "lengthy detention" is a violation of human rights.²³⁵⁶
- 2541.** France's LOAC Summary Note provides that "illegal detention" is a grave breach of the Geneva Conventions.²³⁵⁷
- 2542.** France's LOAC Teaching Note provides that "protected persons shall not be detained arbitrarily".²³⁵⁸
- 2543.** Germany's Military Manual states that "illegal...confinement of protected civilians" is a grave breach of IHL.²³⁵⁹
- 2544.** Hungary's Military Manual states that "unlawful confinement" is a grave breach of IHL and a war crime.²³⁶⁰
- 2545.** The Military Manual of the Netherlands provides that "unlawful confinement" is a grave breach of the Geneva Conventions and their Additional Protocols.²³⁶¹
- 2546.** New Zealand's Military Manual provides that unlawful confinement of a protected civilian is a grave breach of the Geneva Conventions.²³⁶²
- 2547.** Nicaragua's Military Manual provides that "any person has the right to individual liberty".²³⁶³
- 2548.** Nigeria's Manual on the Laws of War states that "unlawful confinement" of persons protected under GC IV is a grave breach of the Geneva Conventions.²³⁶⁴
- 2549.** South Africa's LOAC Manual provides that "unlawful confinement of a protected person" is a grave breach of the Geneva Conventions.²³⁶⁵
- 2550.** Switzerland's Basic Military Manual provides that "illegal detention" of protected civilians is a grave breach of the Geneva Conventions.²³⁶⁶
- 2551.** Uganda's National Resistance Army Statute provides for the punishment of a person subject to military law who unnecessarily detains any other person without bringing him or her to trial.²³⁶⁷
- 2552.** The UK Military Manual provides that "unlawful confinement" of persons protected by GC IV is a grave breach of the Convention.²³⁶⁸

²³⁵⁵ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 8.

²³⁵⁶ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 18.

²³⁵⁷ France, *LOAC Summary Note* (1992), § 3.4.

²³⁵⁸ France, *LOAC Teaching Note* (2000), p. 5.

²³⁵⁹ Germany, *Military Manual* (1992), § 1209.

²³⁶⁰ Hungary, *Military Manual* (1992), p. 90.

²³⁶¹ Netherlands, *Military Manual* (1993), p. IX-5.

²³⁶² New Zealand, *Military Manual* (1992), § 1702(3)(b).

²³⁶³ Nicaragua, *Military Manual* (1996), Article 4.

²³⁶⁴ Nigeria, *Manual on the Laws of War* (undated), § 6(c).

²³⁶⁵ South Africa, *LOAC Manual* (1996), § 40.

²³⁶⁶ Switzerland, *Basic Military Manual* (1987), Article 192(1)(c).

²³⁶⁷ Uganda, *National Resistance Army Statute* (1992), Article 45(b).

²³⁶⁸ UK, *Military Manual* (1958), § 625(c).

2553. The US Field Manual states that “unlawful confinement of a protected person” is a grave breach of the Geneva Conventions.²³⁶⁹

National Legislation

2554. Argentina’s Draft Code of Military Justice punishes any soldier who illegally detains any protected person.²³⁷⁰

2555. Under Armenia’s Penal Code, “unlawful . . . confinement of a protected person, or any other unlawful deprivation of freedom”, during an armed conflict, constitutes a crime against the peace and security of mankind.²³⁷¹

2556. Under Australia’s War Crimes Act as amended, the internment of a person in a death camp or a slave labour camp is a serious war crime.²³⁷²

2557. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence”.²³⁷³

2558. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including “unlawful confinement” in international armed conflicts.²³⁷⁴

2559. Azerbaijan’s Criminal Code provides that “the arrest or deprivation of liberty of people contrary to the norms of international law” as well as “deprivation of procedural rights” is a war crime.²³⁷⁵

2560. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.²³⁷⁶

2561. The Geneva Conventions Act of Barbados provides that “a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados”.²³⁷⁷

2562. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that unlawful detention of a civilian person constitutes a crime under international law.²³⁷⁸

²³⁶⁹ US, *Field Manual* (1956), § 502.

²³⁷⁰ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(4) in the *Code of Military Justice as amended* (1951).

²³⁷¹ Armenia, *Penal Code* (2003), Article 390.2(4), see also Article 392 (illegal arrest as a crime against humanity).

²³⁷² Australia, *War Crimes Act as amended* (1945), Section 6.

²³⁷³ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

²³⁷⁴ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.33.

²³⁷⁵ Azerbaijan, *Criminal Code* (1999), Articles 112 and 116.0.18.

²³⁷⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²³⁷⁷ Barbados, *Geneva Conventions Act* (1980), Section 3(2).

²³⁷⁸ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(1)(6), see also Article 1(2)(5)(crime against humanity).

2563. The Criminal Code of the Federation of Bosnia and Herzegovina provides that “illegal arrests and detention” are war crimes.²³⁷⁹ The Criminal Code of the Republika Srpska contains the same provision.²³⁸⁰

2564. Botswana’s Geneva Conventions Act punishes “any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions”.²³⁸¹

2565. Bulgaria’s Penal Code as amended provides that ordering and committing unlawful detention is a war crime.²³⁸²

2566. Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes provides that illegal detention of persons protected by the Geneva Conventions is a war crime in both international and non-international armed conflicts.²³⁸³

2567. Cambodia’s Law on the Khmer Rouge Trial provides that “the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979”.²³⁸⁴

2568. Canada’s Geneva Conventions Act as amended provides that “every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions] . . . is guilty of an indictable offence”.²³⁸⁵

2569. Canada’s Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are “crimes according to customary international law” and, as such, indictable offences under the Act.²³⁸⁶

2570. China’s Law Governing the Trial of War Criminals provides that “making indiscriminate mass arrests” constitutes a war crime.²³⁸⁷

2571. Colombia’s Penal Code imposes a criminal sanction on anyone who, during an armed conflict, carries out or orders the illegal detention of a protected person.²³⁸⁸

2572. The DRC Code of Military Justice as amended provides for the punishment of anyone who, in the course of hostilities, without order from the authorities and except when the law so provides, arrests, detains or confines any person.²³⁸⁹

²³⁷⁹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

²³⁸⁰ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

²³⁸¹ Botswana, *Geneva Conventions Act* (1970), Section 3(1).

²³⁸² Bulgaria, *Penal Code as amended* (1968), Article 412(c).

²³⁸³ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(g) and (d), see also Article 3(e) (crimes against humanity).

²³⁸⁴ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

²³⁸⁵ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

²³⁸⁶ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²³⁸⁷ China, *Law Governing the Trial of War Criminals* (1946), Article 3(32).

²³⁸⁸ Colombia, *Penal Code* (2000), Article 149.

²³⁸⁹ DRC, *Code of Military Justice as amended* (1972), Article 527.

2573. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.²³⁹⁰

2574. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions".²³⁹¹

2575. Under Côte d'Ivoire's Penal Code as amended, organising, ordering or carrying out, in time of war or occupation, systematic detention of the civilian population in concentration camps constitutes a "crime against the civilian population".²³⁹²

2576. Croatia's Criminal Code provides that unlawful confinement of civilians is a war crime.²³⁹³

2577. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".²³⁹⁴

2578. The Draft Amendments to the Penal Code of El Salvador provides for the punishment of any civil servant or public employee, agent of the authorities or individual who detains or orders to detain lawfully or unlawfully a person and does not give any reason for detention.²³⁹⁵ It also punishes the deprivation of liberty of civilians.²³⁹⁶

2579. Ethiopia's Penal Code provides that illegal detention in concentration camps is a war crime against the civilian population.²³⁹⁷

2580. Under Georgia's Criminal Code, the unlawful confinement of a protected person constitutes a crime in both international and non-international armed conflicts.²³⁹⁸

2581. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international armed conflict, unlawfully holds a protected person as prisoner.²³⁹⁹

2582. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the

²³⁹⁰ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

²³⁹¹ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

²³⁹² Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(3).

²³⁹³ Croatia, *Criminal Code* (1997), Article 158(1).

²³⁹⁴ Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

²³⁹⁵ El Salvador, *Draft Amendments to the Penal Code* (1998), Articles entitled "Desaparición forzada de personas" and "Desaparición forzada cometida por particular", see also Article entitled "Desaparición de personas permitida culposamente".

²³⁹⁶ El Salvador, *Draft Amendments to the Penal Code* (1998), Articles entitled "Privación de libertad de personas civiles".

²³⁹⁷ Ethiopia, *Penal Code* (1957), Article 282(c).

²³⁹⁸ Georgia, *Criminal Code* (1999), Article 411(2)(f).

²³⁹⁹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(3)(1).

commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".²⁴⁰⁰

2583. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions are punishable offences.²⁴⁰¹

2584. Jordan's Draft Military Criminal Code provides that the illegal detention of persons protected by GC IV is a war crime.²⁴⁰²

2585. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".²⁴⁰³

2586. Kenya's Constitution provides that "no person may be deprived of his personal liberty save as may be authorised by law".²⁴⁰⁴

2587. Under the Draft Amendments to the Code of Military Justice of Lebanon, the illegal detention of civilian persons protected by GC IV is a war crime.²⁴⁰⁵

2588. Under Luxembourg's Law on the Punishment of Grave Breaches, the detention of a protected person contrary to the provisions of GC III and GC IV is a grave breach of these instruments.²⁴⁰⁶

2589. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".²⁴⁰⁷

2590. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".²⁴⁰⁸

2591. Under Mali's Penal Code, "illegal detention of protected persons is a war crime".²⁴⁰⁹

2592. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".²⁴¹⁰

2593. Moldova's Penal Code punishes "grave breaches of international humanitarian law committed during international and non-international armed conflicts".²⁴¹¹

²⁴⁰⁰ India, *Geneva Conventions Act* (1960), Section 3(1).

²⁴⁰¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

²⁴⁰² Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(7).

²⁴⁰³ Kenya, *Geneva Conventions Act* (1968), Section 3(1).

²⁴⁰⁴ Kenya, *Constitution* (1992), Article 72.

²⁴⁰⁵ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(7).

²⁴⁰⁶ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(7).

²⁴⁰⁷ Malawi, *Geneva Conventions Act* (1967), Section 4(1).

²⁴⁰⁸ Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

²⁴⁰⁹ Mali, *Penal Code* (2001), Article 31(g), see also Article 29(e) (illegal imprisonment as a crime against humanity).

²⁴¹⁰ Mauritius, *Geneva Conventions Act* (1970), Section 3(1).

²⁴¹¹ Moldova, *Penal Code* (2002), Article 391.

2594. Myanmar's Defence Service Act provides for the punishment of "any person subject to this law who...unnecessarily detains a person in arrest or confinement".²⁴¹²

2595. Under the International Crimes Act of the Netherlands, it is a crime to commit in an international armed conflict grave breaches of the 1949 Geneva Conventions, including "unlawful confinement" of persons protected by the Geneva Conventions.²⁴¹³

2596. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions... is guilty of an indictable offence".²⁴¹⁴

2597. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(a)(vii) of the 1998 ICC Statute.²⁴¹⁵

2598. Nicaragua's Military Penal Code provides for the punishment of "illegal detention of civilians".²⁴¹⁶

2599. Nicaragua's Draft Penal Code punishes "anyone who, during an international or internal armed conflict, deprives civilian persons of their liberty".²⁴¹⁷

2600. According to Niger's Penal Code as amended, the illegal detention of a person protected by GC IV or the 1977 Additional Protocols is a war crime.²⁴¹⁸

2601. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, ... whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".²⁴¹⁹

2602. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... is liable to imprisonment".²⁴²⁰

2603. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".²⁴²¹

2604. Under Paraguay's Military Penal Code, abduction is a crime.²⁴²²

2605. Paraguay's Penal Code punishes anyone who, in violation of the international laws of war, armed conflict or military occupation, deprives members

²⁴¹² Myanmar, *Defence Services Act* (1959), Section 49(a).

²⁴¹³ Netherlands, *International Crimes Act* (2003), Article 5(1)(g), see also Article 4(1)(e) (imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law as a crime against humanity).

²⁴¹⁴ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

²⁴¹⁵ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²⁴¹⁶ Nicaragua, *Military Penal Code* (1996), Article 58.

²⁴¹⁷ Nicaragua, *Draft Penal Code* (1999), Article 461.

²⁴¹⁸ Niger, *Penal Code as amended* (1961), Article 208.3(6).

²⁴¹⁹ Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

²⁴²⁰ Norway, *Military Penal Code as amended* (1902), § 108(a).

²⁴²¹ Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

²⁴²² Paraguay, *Military Penal Code* (1980), Articles 287–288.

of the civilian population, the wounded and sick or prisoners of war of their freedom.²⁴²³

2606. Poland's Penal Code provides for the punishment of any person who, in violation of international law, deprives persons *hors de combat*, protected persons and persons enjoying international protection of their liberty.²⁴²⁴

2607. Under Portugal's Penal Code, in times of war, armed conflict or occupation, prolonged and unjustified restriction of the liberty of the civilian population, the wounded and sick or prisoners of war is a war crime.²⁴²⁵

2608. Romania's Penal Code provides for the punishment of the illegal detention of the wounded, sick and shipwrecked, members of civil medical services, the Red Cross or similar organisations, prisoners of war, or of all persons in the hands of the adverse party.²⁴²⁶

2609. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".²⁴²⁷

2610. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".²⁴²⁸

2611. Slovenia's Penal Code provides that unlawful confinement of civilian persons is a war crime.²⁴²⁹

2612. Spain's Military Criminal Code states that the illegal detention of protected persons of a State with which Spain is at war is an offence against the laws and customs of war.²⁴³⁰

2613. Spain's Penal Code provides for the punishment of the "illegal detention of any protected person".²⁴³¹

2614. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, . . . a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".²⁴³²

2615. Sweden's Penal Code as amended provides that "depriving civilians of their liberty in contravention of international law" is a crime against international law.²⁴³³

²⁴²³ Paraguay, *Penal Code* (1997), Article 320(5). ²⁴²⁴ Poland, *Penal Code* (1997), Article 124.

²⁴²⁵ Portugal, *Penal Code* (1996), Article 241(1)(g).

²⁴²⁶ Romania, *Penal Code* (1968), Article 358(d).

²⁴²⁷ Seychelles, *Geneva Conventions Act* (1985), Section 3(1).

²⁴²⁸ Singapore, *Geneva Conventions Act* (1973), Section 3(1).

²⁴²⁹ Slovenia, *Penal Code* (1994), Article 374(1).

²⁴³⁰ Spain, *Military Criminal Code* (1985), Article 77(6).

²⁴³¹ Spain, *Penal Code* (1995), Article 611(4).

²⁴³² Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1)(a).

²⁴³³ Sweden, *Penal Code as amended* (1962), Article 22(6).

2616. Tajikistan's Criminal Code provides for the punishment of the "unlawful confinement of protected persons".²⁴³⁴

2617. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vii) of the 1998 ICC Statute.²⁴³⁵

2618. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".²⁴³⁶

2619. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions".²⁴³⁷

2620. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vii) of the 1998 ICC Statute.²⁴³⁸

2621. Under the US War Crimes Act as amended, grave breaches of the Geneva Conventions are war crimes.²⁴³⁹

2622. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".²⁴⁴⁰

2623. Under Yemen's Military Criminal Code, the "unlawful detention of civilians" is a war crime.²⁴⁴¹

2624. The Penal Code as amended of the SFRY (FRY) provides that "unlawful confinement of civilian persons is a war crime".²⁴⁴²

2625. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions".²⁴⁴³

National Case-law

2626. With regard to unlawful confinement, several post-Second World War trials found army officers and, occasionally, industrialists guilty of war crimes because of their participation in the wrongful internment of civilians, their illegal detention and internment under inhumane conditions. Examples are

²⁴³⁴ Tajikistan, *Criminal Code* (1998), Article 403(2)(f).

²⁴³⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²⁴³⁶ Uganda, *Geneva Conventions Act* (1964), Section 1(1).

²⁴³⁷ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

²⁴³⁸ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²⁴³⁹ US, *War Crimes Act as amended* (1996), Section 2441(c).

²⁴⁴⁰ Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).

²⁴⁴¹ Yemen, *Military Criminal Code* (1998), Article 21(4).

²⁴⁴² SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

²⁴⁴³ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

the Dutch *Motomura case* and the *Notomi Sueo case* before the Temporary Court-Martial at Makassar in 1947, the *Rauter case* before the Special Court at The Hague and Special Court of Cassation in 1948 and 1949, and the *Zühlke case* before the Special Court in Amsterdam and the Special Court of Cassation in 1948.²⁴⁴⁴ Other examples are the *Auschwitz and Belsen case* before the UK Military Court at Lüneburg in 1945 and the *Pohl case* before the US Military Tribunal at Nuremberg in 1947.²⁴⁴⁵

Other National Practice

2627. In 1988, the Human Rights Commission of the Philippines declared that all people residing in the Philippines had the right not to be detained unlawfully and when detained, they could not be held in secret detention places, in solitary confinement or *incommunicado* or be subjected to other similar forms of detention.²⁴⁴⁶

III. Practice of International Organisations and Conferences

United Nations

2628. In a number of resolutions on South Africa adopted between 1976 and 1985, the UN Security Council condemned mass arbitrary arrests and detentions and described the use of detention without trial as totally unacceptable.²⁴⁴⁷

2629. In two resolutions adopted in 1995, the UN Security Council expressed grave concern at and condemned in the strongest possible terms violations of IHL and human rights in Bosnia and Herzegovina, including evidence of a consistent pattern of arbitrary detentions.²⁴⁴⁸

2630. In a resolution adopted in 1996, the UN Security Council expressed deep concern at the deterioration in security and in the humanitarian situation in Burundi, including arbitrary detention.²⁴⁴⁹

2631. In a resolution adopted in 1974 on the protection of women and children in emergency and armed conflict, the UN General Assembly stated that

²⁴⁴⁴ Netherlands, Temporary Court-Martial at Makassar, *Motomura case*, Judgement, 18 July 1947; Temporary Court Martial at Makassar, *Notomi Sueo case*, Judgement, 4 January 1947; Special Court (War Criminals) at The Hague, *Rauter case*, Judgement, 4 May 1948, and Special Court of Cassation, *Rauter case*, Judgement, 12 January 1949; Special Court in Amsterdam *Zühlke case* Judgement, 3 August 1948, and Special Court of Cassation, *Zühlke case*, Judgement, 6 December 1948.

²⁴⁴⁵ UK, Military Court at Lüneberg, *Auschwitz and Belsen case*, Judgement, 17 November 1945; US, Military Tribunal at Nuremberg, *Pohl case* Judgement, 3 November 1947.

²⁴⁴⁶ UN Secretary-General, Report on information submitted by Governments pursuant to Sub-Commission Res. 7 (XXVII) of 20 August 1974, UN Doc. E/CN.4/Sub.2/1990/20, 19 July 1990, §§ 2, 11 and 15.

²⁴⁴⁷ UN Security Council, Res. 392, 19 June 1976, preamble and § 1; Res. 417, 31 October 1977, preamble and § 3; Res. 473, 13 June 1980, preamble; Res. 556, 23 October 1984, preamble and § 2; Res. 560, 12 March 1985, § 2; Res. 569, 26 July 1985, preamble and § 2.

²⁴⁴⁸ UN Security Council, Res. 1019, 9 November 1995, preamble; Res. 1034, 21 December 1995, preamble and § 2.

²⁴⁴⁹ UN Security Council, Res. 1072, 30 August 1996, preamble.

all forms of repression “including imprisonment . . . shall be considered criminal”.²⁴⁵⁰

2632. In several resolutions adopted between 1981 and 1985, the UN General Assembly condemned, on the basis of Articles 1 and 49 GC IV, the imprisonment of the mayors of towns in the Israeli-occupied territories as an “illegal measure”.²⁴⁵¹

2633. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and SFRY, the UN General Assembly expressed its grave concern at reports of “grave violations of international humanitarian law and of human rights . . . including . . . unlawful detention”.²⁴⁵²

2634. In a resolution on Sudan adopted in 2000, the UN General Assembly expressed its deep concern at continuing serious violations of human rights and IHL by all parties, in particular arbitrary detention.²⁴⁵³

2635. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights condemned “in the strongest terms all violations of human rights and [IHL] . . . in particular massive and systematic violations, including . . . detentions”.²⁴⁵⁴

2636. In a resolution on Sudan adopted in 1996, the UN Commission on Human Rights called upon all parties to the hostilities to protect all civilians from violations of human rights and IHL, including arbitrary detention.²⁴⁵⁵

2637. In a resolution adopted in 1998, the UN Commission on Human Rights called for the immediate and unconditional release and safe return of all children abducted from northern Uganda and held by the LRA.²⁴⁵⁶

2638. In resolutions adopted in 1988 and 1989 on the situation in the Israeli-occupied territories, the UN Sub-Commission on Human Rights, after reaffirming that GC IV was applicable, considered that the administrative detention of thousands of Palestinians was a war crime under international law.²⁴⁵⁷

Other International Organisations

2639. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council reaffirmed its conviction that “arbitrary arrests represent a total

²⁴⁵⁰ UN General Assembly, Res. 3318 (XXIX), 14 December 1974, § 5.

²⁴⁵¹ UN General Assembly, Res. 36/147 D, 16 December 1981, § 1; Res. 37/88 D, 10 December 1982, § 1; Res. 38/79 E, 15 December 1983, § 1; Res. 39/95, 14 December 1984, § 1; Res. 40/161, 16 December 1985, § 1.

²⁴⁵² UN General Assembly, Res. 50/193, 22 December 1995, preamble.

²⁴⁵³ UN General Assembly, Res. 55/116, 4 December 2000, § 2(ii).

²⁴⁵⁴ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.

²⁴⁵⁵ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 15.

²⁴⁵⁶ UN Commission on Human Rights, Res. 1998/75, 22 April 1998, § 5.

²⁴⁵⁷ UN Sub-Commission on Human Rights, Res. 1988/10, 31 August 1988, § 3; Res. 1989/4, 31 August 1989, § 3.

contravention of all the Charters, Laws and Conventions of the International Community of Nations".²⁴⁵⁸

2640. In a resolution adopted in 1997, the Council of the League of Arab States decided "to denounce Israel's persistent violations of human rights in the occupied areas of South Lebanon and the Western Beka', exemplified by the kidnapping and arbitrary imprisonment of civilians".²⁴⁵⁹

International Conferences

2641. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed dismay and condemnation that "gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including]... arbitrary detentions".²⁴⁶⁰

2642. The Final Declaration adopted by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002 expressed deep concern about "the number and expansion of conflicts in Africa" and alarm at "the spread of violence, in particular in the form of arbitrary detention... which seriously violate[s] the rules of International Humanitarian Law".²⁴⁶¹

IV. Practice of International Judicial and Quasi-judicial Bodies

2643. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber considered the issue of legality of the confinement of civilians and held that:

Clearly, internment is only permitted when absolutely necessary. Subversive activity carried on inside the territory of a party to the conflict, or actions which are of direct assistance to an opposing party, may threaten the security of the former, which may, therefore, intern people or place them in assigned residence if it has *serious and legitimate reasons* to think that they may seriously prejudice its security by means such as sabotage or espionage.

...

The mere fact that a person is a national of, or aligned with, an enemy party cannot be considered as threatening the security of the opposing party where he is living and is not, therefore, a valid reason for interning him or placing him in assigned residence. To justify recourse to such measures, the party must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.²⁴⁶²

²⁴⁵⁸ GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 6.

²⁴⁵⁹ League of Arab States, Council, Res. 5635, 31 March 1997, § 1.

²⁴⁶⁰ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I (30).

²⁴⁶¹ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.

²⁴⁶² ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 576–577.

The Tribunal also stated that:

The judicial or administrative body reviewing the decision of a party to a conflict to detain an individual must bear in mind that such measures of detention should only be taken if absolutely necessary for reasons of security. Thus, if these measures were inspired by other considerations, the reviewing body would be bound to vacate them. Clearly, the procedures established in Geneva Convention IV itself are a minimum and the fundamental consideration must be that no civilian should be kept in assigned residence or in an internment camp for a longer time than the security of the detaining party absolutely demands.

...

The confinement of civilians during armed conflict may be permissible in limited cases, but has in any event to be in compliance with the provisions of articles 42 and 43 of Geneva Convention IV.²⁴⁶³

The ICTY Trial Chamber found the accused guilty of grave breaches of GC IV (unlawful confinement of civilians).²⁴⁶⁴

2644. In its General Comment on Article 9 of the 1966 ICCPR in 1982, the HRC held that:

The Committee points out that paragraph 1 [of Article 9 of the 1966 ICCPR] is applicable to all deprivations of liberty, whether in criminal cases or in other cases such as, for example, mental illness, vagrancy, drug addiction, educational purposes, immigration control, etc. . . . and in particular the important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention. Furthermore, States parties have in accordance with article 2 (3) also to ensure that an effective remedy is provided in other cases in which an individual claims to be deprived of his liberty in violation of the Covenant.

...

Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5).²⁴⁶⁵

2645. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that:

States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance . . . through arbitrary deprivations of liberty.

...

It is inherent in the protection of rights explicitly recognized as non-derogable in article 4, paragraph 2, that they must be secured by procedural guarantees, including, often, judicial guarantees. The provisions of the Covenant relating to procedural

²⁴⁶³ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 580 and 583.

²⁴⁶⁴ ICTY, *Delalić case*, Judgement, 16 November 1998, Part IV.

²⁴⁶⁵ HRC, General Comment No. 8 (Article 9 ICCPR), 30 July 1982, §§ 1 and 4.

safeguards may never be made subject to measures that would circumvent the protection of non-derogable rights.²⁴⁶⁶

2646. In 1980, in *García Lanza de Netto v. Uruguay*, the HRC held that there was a violation of Article 9(1) of the ICCPR “because [the applicants] were not released, in the case of Alcides Lanza Perdomo, for five months and, in the case of Beatriz Weismann de Lanza, for 10 months, after their sentences of imprisonment had been fully served”.²⁴⁶⁷

2647. In 1980, in *Torres Ramírez v. Uruguay*, the HRC held that there was a violation of Article 9(1) ICCPR “because [the victim] was not released for six weeks after his release was ordered by the military judge”.²⁴⁶⁸

2648. In its decision in *Krishna Achutan v. Malawi* in 1994, the ACiHPR held that detention of a political figure “at the pleasure of the Head of State”, for 12 years without charge or trial, was “arbitrary” and violated the right to liberty and security of person. The fact that the victim had no access to the courts also violated Article 6 of the 1981 ACHPR.²⁴⁶⁹

2649. In its decision in *Pagnouille v. Cameroon* in 1997 concerning the five-year imprisonment of a Cameroonian citizen by a military tribunal, the ACiHPR held that his continued detention and house arrest after a five-year sentence had been served was arbitrary and in violation of Article 6 of the 1981 ACHPR.²⁴⁷⁰

2650. In its decision in *International Pen and Others v. Nigeria* in 1998, the ACiHPR held that the detention of individuals under a decree that permitted the government “to arbitrarily hold people critical of the government for up to three months without having to explain themselves and without the opportunity for the complainant to challenge the arrest and detention before a court of law” was a violation of Article 6 of the 1981 ACHPR.²⁴⁷¹

2651. In its decision in *Constitutional Rights Project v. Nigeria (148/96)* in 1999, the ACiHPR stated that “(although it was unnecessary because they were found innocent of any crime), the soldiers were granted state pardons, but still not freed. This constitutes a further violation of Article 6 of the [ACHPR]”.²⁴⁷²

2652. In the *Lawless case* in 1961 involving the detention of a suspected IRA activist for five months in a military detention camp under a statute that permitted the internment of persons engaged in activities prejudicial to the security of a State and public order, the ECtHR found no breach of Article 5 of the 1950 ECHR because of Ireland’s derogation under Article 15 according to

²⁴⁶⁶ HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, §§ 11 and 15.

²⁴⁶⁷ HRC, *García Lanza de Netto v. Uruguay*, Views, 3 April 1980, § 16.

²⁴⁶⁸ HRC, *Torres Ramírez v. Uruguay*, Views, 23 July 1980, § 18.

²⁴⁶⁹ ACiHPR, *Krishna Achutan v. Malawi*, Decision, 25 October–30 November 1994.

²⁴⁷⁰ ACiHPR, *Pagnouille v. Cameroon*, Decision, 15–24 April 1997, § 17.

²⁴⁷¹ ACiHPR, *International Pen and Others v. Nigeria*, Decision, 22–31 October 1998.

²⁴⁷² ACiHPR, *Constitutional Rights Project v. Nigeria (148/96)*, Decision, 15 November 1999, § 16.

which it found that the detention was strictly required by the exigencies of the situation.²⁴⁷³

2653. In a resolution adopted in 1968 concerning the law applicable to emergency situations, the IACiHR declared that:

The suspension of constitutional guarantees or state of siege is compatible with the system of representative democratic government only if enacted under the following conditions:

- ...
e. When it does not in any manner presuppose the suspension of the right to life, liberty or personal security, the right to protection against arbitrary detention...²⁴⁷⁴

2654. In its Annual Report 1980–1981, the IACiHR stated that the deprivation of personal liberty for prolonged or indefinite periods of time without due process or formal charges violated human rights. The Commission thus urged the member states of the OAS that “the detentions carried out under the state of emergency be for brief periods and always subject to review by the judiciary, in cases of abuses committed by the authorities who have ordered them”.²⁴⁷⁵

2655. In its doctrine concerning judicial guarantees and the right to personal liberty and security published in 1982, the IACiHR stated that:

No domestic or international legal norm justifies... the holding of detainees in prison for long and unspecified periods, ... [especially] without any charges being brought against them for violation of the Law of National Security or another criminal law, and without their being brought to trial so that they might exercise the right to a fair trial and to due process of law.²⁴⁷⁶

2656. In its Annual Report 1983–1984, the IACiHR noted in relation to El Salvador that the 1969 ACHR “does not authorise suspension of the judicial guarantees necessary to protect fundamental rights” during emergency situations.²⁴⁷⁷

2657. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR found that:

As a result of the disappearance, Manfredo Velásquez was the victim of an arbitrary detention, which deprived him of his physical liberty without legal cause and without a determination of the lawfulness of his detention by a judge or competent

²⁴⁷³ ECtHR, *Lawless case*, Judgement, 1 July 1961, §§ 35–37; see also *Ireland v. UK*, Judgement, 18 January 1978, §§ 214–220 and *Brannigan and McBride v. UK*, Judgement, 26 May 1993, §§ 43 and 66.

²⁴⁷⁴ IACiHR, Resolution adopted at the 1968 Session, Doc. OEA/Ser.L/V/II.19 Doc. 32, *Inter-American Yearbook on Human Rights*, 1968, pp. 59–61.

²⁴⁷⁵ IACiHR, *Annual Report 1980–1981*, Doc. OEA/Ser.L/V/II.54 Doc. 9 rev. 1, 16 October 1981, p. 119.

²⁴⁷⁶ IACiHR, Doctrine concerning judicial guarantees and the right to personal liberty and security, reprinted in *Ten years of activities (1971–1981)*, General Secretariat of the IACiHR, Washington, D.C., 1982, p. 337.

²⁴⁷⁷ IACiHR, *Annual Report 1983–1984*, Doc. OEA/Ser.L/V/II.63 Doc. 10, 24 September 1984, p. 98.

tribunal. Those acts directly violate the right to personal liberty recognized by Article 7 of the [1969 ACHR] and are a violation imputable to Honduras of the duties to respect and ensure that right under Article 1(1).²⁴⁷⁸

V. Practice of the International Red Cross and Red Crescent Movement

2658. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “unlawful confinement” constitutes a grave breach of the law of war.²⁴⁷⁹

2659. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that “a state violates international law if, as a matter of state policy, it practices, encourages, or condones . . . (e) prolonged arbitrary detention”.²⁴⁸⁰

2660. In a note on respect for IHL in an internal armed conflict, the ICRC recommended that “the commanding officers . . . exercise stronger control over the units in order to put an end to unofficial and unacknowledged detention”.²⁴⁸¹

2661. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the war crime of “unlawful confinement of a protected person”, when committed in an international armed conflict, be subject to the jurisdiction of the Court.²⁴⁸²

VI. Other Practice

2662. No practice was found.

Deprivation of liberty in accordance with legal procedures

I. Treaties and Other Instruments

Treaties

2663. Article 78, second paragraph, GC IV provides that “decisions regarding such assigned residence or internment [for imperative reasons of security] shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention”.

2664. Article 5(1) of the 1950 ECHR provides that “no one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law”.

²⁴⁷⁸ IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 186.

²⁴⁷⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 776(e).

²⁴⁸⁰ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 702(e).

²⁴⁸¹ ICRC archive document.

²⁴⁸² ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, § 1(a)(vi).

2665. Article 9(1) of the 1966 ICCPR provides that “no one shall be deprived of his liberty except on such grounds and in accordance with such procedures as are established by law”.

2666. Article 7(2) of the 1969 ACHR provides that “no one shall be deprived of his physical liberty except for reasons and under the conditions established beforehand by the constitution of the State Party concerned or by law established pursuant thereto”.

2667. Article 6 of the 1981 ACHPR provides that “no one may be deprived of his freedom except for reasons and conditions previously laid down by law”.

2668. Article 37 of the 1989 Convention on the Rights of the Child provides that “the arrest, detention or imprisonment of a child shall be in conformity with the law”.

2669. Article 7(2) of the 1998 Draft Convention on Forced Disappearance provides, concerning the custody of persons suspected of having committed a forced disappearance, that “such detention and measures shall be exercised in conformity with the legislation of that State, and may be continued only for the period necessary to enable any criminal or extradition proceedings to be instituted”.

2670. Article 21(3) of the 1998 Draft Convention on Forced Disappearance provides that “arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by the competent authorities or persons authorized for that purpose”.

2671. Article 55(1)(d) of the 1998 ICC Statute provides that “in respect of an investigation under this statute, a person . . . shall not be deprived of his or her liberty except on such grounds and in accordance with such procedures as are established in this Statute”.

Other Instruments

2672. According to Article XXV of the 1948 American Declaration on the Rights and Duties of Man, “no person may be deprived of his liberty except in the cases and according to the procedure established by pre-existing law”.

2673. Principle 2 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “arrest, detention or imprisonment shall only be carried out strictly in accordance with the provisions of the law and by competent officials or persons authorized for that purpose”.

II. National Practice

Military Manuals

2674. According to the UK Military Manual, “the decisions regarding such assigned residence or internment [for imperative reasons of security] can only be

made in accordance with a regular procedure to be prescribed by the Occupant in accordance with the obligations of [GC IV]".²⁴⁸³

National Legislation

2675. Countless pieces of national legislation require that arrest be carried out in accordance with legal procedures. For instance, India's Code of Criminal Procedure contains elaborate rules regarding arrest by law enforcement agencies and the protection of human rights while arrest is being executed.²⁴⁸⁴

2676. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁴⁸⁵

2677. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 78 GC IV, is a punishable offence.²⁴⁸⁶

2678. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... is liable to imprisonment".²⁴⁸⁷

National Case-law

2679. No practice was found.

Other National Practice

2680. According to the Report on the Practice of Ethiopia, during the Mengistu regime in Ethiopia, unlawful detention and internment were widely practised. The report also states that "the law seems to allow deprivation of one's liberty on mere suspicion. The individual may also lose his liberty in circumstances where formal arrest is not justified for lack of evidence."²⁴⁸⁸

2681. In 1969, in the context of derogation under Article 15 of the 1950 ECHR, Greece informed the Secretary-General of the Council of Europe that it was beginning to restore application of the Constitution. The Constitution considered personal liberty to be inviolable, so that no one should be arrested or detained without a guarantee of constitutional forms and procedures. However, Greece added that this did not apply to persons charged with crimes against public order, who could be arrested without formalities if necessary.²⁴⁸⁹

²⁴⁸³ UK, *Military Manual* (1958), § 555.

²⁴⁸⁴ India, *Code of Criminal Procedure* (1973), Sections 41–60.

²⁴⁸⁵ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁴⁸⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁴⁸⁷ Norway, *Military Penal Code as amended* (1902), § 108(a).

²⁴⁸⁸ Report on the Practice of Ethiopia, 1998, Chapter 5.3 and 5.7.

²⁴⁸⁹ Greece, Letter to the Secretary-General of the Council of Europe, Doc. 2199, 4 October 1969, § A.

2682. In a memorandum order issued in 1988, the President of the Philippines required the armed and police forces to strictly comply with the required legal processes in all cases of arrest and detention, for which they were given specific instructions.²⁴⁹⁰

III. Practice of International Organisations and Conferences

2683. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

2684. In *McVeigh, O'Neill and Evans v. UK* in 1981, the ECiHR did not condemn the UK Arrest under Prevention of Terrorism Act, which allows detention based on the "examining officer's appreciation" of the information available to him.²⁴⁹¹

2685. In its judgement in *Fox, Campbell and Hartley* in 1990, the ECtHR, when considering the notion of "reasonable suspicion" when conducting an arrest of a person, stated that:

The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5 § 1 (c) . . . The Court agrees . . . that having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will however depend upon all the circumstances.

...

As the Government pointed out, in view of the difficulties inherent in the investigation and prosecution of terrorist-type offences in Northern Ireland, the "reasonableness" of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5 § 1 (c) (art. 5-1-c) is impaired.²⁴⁹²

V. Practice of the International Red Cross and Red Crescent Movement

2686. No practice was found.

VI. Other Practice

2687. No practice was found.

²⁴⁹⁰ Philippines, Memorandum Order 209, 13 December 1988, § 1.

²⁴⁹¹ ECiHR, *McVeigh, O'Neill and Evans v. UK*, Report, 18 March 1981, §§ 195 and 205.

²⁴⁹² ECtHR, *Fox, Campbell and Hartley*, Judgement, 30 August 1990, § 32.

Prompt information of the reasons for deprivation of liberty

I. Treaties and Other Instruments

Treaties

2688. Article 41, first paragraph, GC III provides that “in every camp the text of the present Convention and its Annexes and the contents of any special agreement provided for in Article 6, shall be posted, in the prisoners’ own language, at places where all may read them”.

2689. Article 99, second paragraph, GC IV provides that “the text of the present Convention and the texts of special agreements concluded under the said Convention shall be posted inside the place of internment, in a language which the internees understand, or shall be in the possession of the Internee Committee”.

2690. According to Article 5(2) of the 1950 ECHR, “everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him”.

2691. Article 9(2) of the 1966 ICCPR provides that “anyone who is arrested shall be informed, at the time of the arrest, of the reasons for his arrest and shall be promptly informed of any charges against him”.

2692. Article 7(4) of the 1969 ACHR states that “anyone who is detained shall be informed of the reasons for his detention and shall be promptly notified of the charge or charges against him”.

2693. Article 75(3) AP I provides that “any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken”. Article 75 AP I was adopted by consensus.²⁴⁹³

Other Instruments

2694. Principle 10 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “anyone who is arrested shall be informed at the time of his arrest of the reasons for his arrest and shall be promptly informed of any charges against him”.

2695. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

2696. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

²⁴⁹³ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

*II. National Practice**Military Manuals*

2697. Canada's LOAC Manual provides that "any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language that person understands, of the reasons why these measures have been taken".²⁴⁹⁴

2698. India's Police Manual states that the reasons for a detention order should be communicated as soon as possible, but ordinarily not later than five days after arrest, and in exceptional circumstances, for reasons to be recorded in writing, not later than ten days. For Punjab and Chandigarh, this period was extended to 15 days.²⁴⁹⁵

2699. New Zealand's Military Manual provides that "any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he understands, of the reasons why these measures have been taken".²⁴⁹⁶

2700. Sweden's IHL Manual considers that any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly, in a language he or she understands, of the reasons why these measures have been taken. The manual considers Article 75 AP I to be part of customary international law.²⁴⁹⁷

2701. Switzerland's Basic Military Manual provides that "every person arrested, detained or interned for acts committed in connection with the conflict shall be informed, without delay, in a language he or she understands, of the reasons why the measures have been taken".²⁴⁹⁸

National Legislation

2702. Countless pieces of domestic legislation provide for prompt information of the reasons of detention. For instance, preventive detention is permitted by India's Constitution subject to a number of safeguards, namely that detainees have a right to be informed of the reasons for the detention order.²⁴⁹⁹

2703. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 75(3) AP I, is a punishable offence.²⁵⁰⁰

2704. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

²⁴⁹⁴ Canada, *LOAC Manual* (1999), p. 11-8, § 64.

²⁴⁹⁵ India, *Police Manual* (1986), pp. 21, 27 and 29.

²⁴⁹⁶ New Zealand, *Military Manual* (1992), § 1137(3).

²⁴⁹⁷ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

²⁴⁹⁸ Switzerland, *Basic Military Manual* (1987), Article 175.

²⁴⁹⁹ India, *Constitution* (1950), Article 22.

²⁵⁰⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁵⁰¹

2705. Spain's Penal Code provides for the punishment of anyone who in the case of an armed conflict, fails to fulfil his or her obligation to inform protected persons clearly and without delay about their situation.²⁵⁰²

2706. The Revised Edition of Zimbabwe's Constitution provides that all arrested persons have the right to be informed of the reasons for their detention as soon as reasonably practicable after the commencement of detention, and in any case not later than seven days thereafter.²⁵⁰³

National Case-law

2707. No practice was found.

Other National Practice

2708. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.²⁵⁰⁴

III. Practice of International Organisations and Conferences

2709. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

2710. In its General Comment on Article 9 of the 1966 ICCPR in 1982, the HRC held that "if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. . . . information of the reasons must be given (para. 2)".²⁵⁰⁵

2711. In numerous cases, the HRC has found a violation of Article 9(2) of the 1966 ICCPR because no or insufficient information was given on the reasons of detention, or the information was not given promptly.²⁵⁰⁶

2712. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: "Persons who are arrested shall be informed at the time of arrest, in a language

²⁵⁰¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁵⁰² Spain, *Penal Code* (1995), Article 612(3).

²⁵⁰³ Zimbabwe, *Constitution Revised Edition* (1996), Section 2, Schedule 2.

²⁵⁰⁴ Report on the Practice of Jordan, 1997, Chapter 5.

²⁵⁰⁵ HRC, General Comment No. 8 (Article 9 ICCPR), 30 July 1982, § 4.

²⁵⁰⁶ See, e.g., HRC, *Hernández Valentini de Bazzano v. Uruguay*, Views, 15 August 1979, § 10, see also *Buffo Carballal v. Uruguay*, Views, 27 March 1981, § 13; *Pietrarola v. Uruguay*, Views, 27 March 1981, § 14; *Drescher Caldas v. Uruguay*, Views, 21 July 1983, §§ 13.2 and 14; *Luyeye Magana ex-Philibert v. Zaire*, Views, 21 July 1983, § 8; *Hiber Conteris v. Uruguay*, Views, 17 July 1985, § 10; *Kelly v. Jamaica*, Views, 8 April 1991, § 5(8); *Harward v. Norway*, Views, 15 July 1994, § 9(4)–(5).

which they understand, of the reason for their arrest and shall be informed promptly of any charges against them."²⁵⁰⁷

2713. In its admissibility decision in *X v. Austria* in 1975, the ECiHR held that all persons arrested shall be informed of the reasons for the arrest and notified of the charges against them in a language they understand.²⁵⁰⁸

2714. In *Fox, Campbell and Hartley* in 1990, the ECtHR decided that an applicant must be told in "simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness".²⁵⁰⁹

2715. In *Van der Leer v. Netherlands* in 1990, dealing with a case in which a court authorised the applicant's confinement for six months without holding any hearings and in which the applicant was not informed for ten days of the confinement order and the reasons for it, the ECtHR held the delay to be unacceptable and in breach of Article 5 of the 1950 ECHR.²⁵¹⁰

V. Practice of the International Red Cross and Red Crescent Movement

2716. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly in a language understandable to him of the reasons for the measure taken".²⁵¹¹

2717. The ICRC Commentary on the Additional Protocols states that:

Legal practice in most countries recognises preventive custody, i.e., a period during which the police or the public prosecutor can detain a person in custody without having to charge him with a specific accusation; in peacetime this period is no more than two or three days, but sometimes it is longer for particular offences (acts of terrorism) and in time of armed conflict it is often prolonged. Useful indications can be found in national legislation. In any case, even in time of armed conflict, detaining a person for longer than, say, ten days without informing the detainee of the reasons for his detention would be contrary to [Article 75(3) AP I].²⁵¹²

VI. Other Practice

2718. No practice was found.

²⁵⁰⁷ ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(b).

²⁵⁰⁸ ECiHR, *X v. Austria*, Admissibility Decision, 29 May 1975, p. 70.

²⁵⁰⁹ ECtHR, *Fox, Campbell and Hartley*, Judgement, 30 August 1990, § 40.

²⁵¹⁰ ECtHR, *Van der Leer v. Netherlands*, Judgement, 21 February 1990, § 31.

²⁵¹¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 201.

²⁵¹² Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3073.

Prompt appearance before a judge or judicial officer*I. Treaties and Other Instruments**Treaties*

2719. Article 5(3) of the 1950 ECHR provides that:

Everyone lawfully arrested or detained [for the purpose of being brought before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so] shall be brought promptly before a judge or other officer authorised by law to exercise judicial power.

2720. Article 9(3) of the 1966 ICCPR provides that “anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial power”.

2721. Article 7(5) of the 1969 ACHR provides that “any person detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power”.

2722. Article XI of the 1994 Inter-American Convention on the Forced Disappearance of Persons states that “every person deprived of liberty shall be ...brought before a competent judicial authority without delay, in accordance with applicable domestic law”.

2723. Article 59(2) of the 1998 ICC Statute provides that:

A person arrested shall be brought promptly before the competent judicial authority in the custodial State which shall determine, in accordance with the law of that State, that:

- (a) The warrant applies to that person;
- (b) The person has been arrested in accordance with the proper process; and
- (c) The person’s rights have been respected.

Other Instruments

2724. Principle 11 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “a person shall not be kept in detention without being given an effective opportunity to be heard promptly by a judicial or other authority”.

2725. Principle 37 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “a person detained on a criminal charge shall be brought before a judicial or other authority provided by law promptly after his arrest”.

2726. According to Article 10 of the 1992 UN Declaration on Enforced Disappearance, “any person deprived of liberty shall be held in an officially recognized place of detention and, in conformity with national law, be brought before a judicial authority promptly after detention”.

2727. Article 22(1) of the 1998 Draft Convention on Forced Disappearance provides that “States Parties guarantee that any person deprived of liberty

shall . . . be brought before a judge or other competent judicial authority without delay, who will also be informed of the place where the person is being deprived of liberty”.

II. National Practice

Military Manuals

2728. Colombia’s Instructors’ Manual provides that “persons in preventive detention shall be brought before a judge in the 36 hours following [arrest]”.²⁵¹³

National Legislation

2729. Countless pieces of domestic legislation contain provisions on the right to be brought promptly before a judge or other officer authorised by law to exercise judicial power. For instance, India’s Constitution provides fundamental guarantees for arrested persons, including the right to be produced before a magistrate.²⁵¹⁴

2730. Myanmar’s Defence Service Act provides for the punishment of “any person subject to this law who . . . fails to bring [the case of a detained or confined person] before the proper authority for investigation”.²⁵¹⁵

2731. Uganda’s National Resistance Army Statute provides for the punishment of the person subject to military law who fails to bring a detained person’s case before the proper authority for investigation.²⁵¹⁶

National Case-law

2732. No practice was found.

Other National Practice

2733. No practice was found.

III. Practice of International Organisations and Conferences

2734. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

2735. In its General Comment on Article 9 of the 1966 ICCPR in 1982, the HRC held that:

Paragraph 3 of article 9 requires that in criminal cases any person arrested or detained has to be brought “promptly” before a judge or other officer authorized by

²⁵¹³ Colombia, *Instructors’ Manual* (1999), p. 10.

²⁵¹⁴ India, *Constitution* (1950), Article 22.

²⁵¹⁵ Myanmar, *Defence Services Act* (1959), Section 49(a).

²⁵¹⁶ Uganda, *National Resistance Army Statute* (1992), Article 45(b).

law to exercise judicial power. More precise time-limits are fixed by law in most States parties and, in the view of the Committee, delays must not exceed a few days . . .

Another matter is the total length of detention pending trial. In certain categories of criminal cases in some countries this matter has caused some concern within the Committee, and members have questioned whether their practices have been in conformity with the entitlement "to trial within a reasonable time or to release" under paragraph 3. Pre-trial detention should be an exception and as short as possible.²⁵¹⁷

2736. On numerous occasions, the HRC has found violations of Article 9(3) of the 1966 ICCPR because of the delay in bringing arrested persons before a judge.²⁵¹⁸ In *Martínez Portorreal v. the Dominican Republic* in 1987, however, the HRC ruled that 50 hours of detention did not justify a finding as to the alleged violation of Article 9(3) ICCPR.²⁵¹⁹

2737. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: "Persons arrested or detained shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or be released."²⁵²⁰

2738. In its judgement in *Schiesser v. Switzerland* in 1979, the ECtHR held that the function of the judicial officer must be that of "reviewing the circumstances militating for and against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons".²⁵²¹

2739. In its judgement in the *De Jong, Baljet and Van den Brink case* in 1984, the ECtHR held that detention without access to a court for a period exceeding six days was incompatible with Article 5(4) of the 1950 ECHR, which required that "the lawfulness of his detention shall be decided speedily".²⁵²²

2740. In its judgement in the *Brogan and Others case* in 1988, the ECtHR held that the delay in bringing the arrested person before a judge under Article 5(3) must not exceed three days. It stated that while it accepted that the context of terrorism in Northern Ireland may, subject to the existence of adequate safeguards, have the effect of prolonging the period during which the authorities could lawfully keep persons suspected of serious terrorist offences in custody before bringing them before a judge, the circumstances could not justify dispensing with prompt judicial control altogether. The flexibility in the

²⁵¹⁷ HRC, General Comment No. 8 (Article 9 ICCPR), 30 July 1982, §§ 2 and 3.

²⁵¹⁸ See, e.g., HRC, *García Lanza de Netto v. Uruguay*, Views, 3 April 1980, § 8; *Buffo Carballal v. Uruguay*, Views, 27 March 1981, § 13; *Lafuente Peñarrieta and Others v. Bolivia*, Views, 2 November 1987, § 16; *Terán Jijón v. Ecuador*, Views, 26 March 1992, § 5(3); *Stephens v. Jamaica*, Views, 18 October 1995, § 9(6); *P. Grant v. Jamaica*, Views, 22 March 1996, § 8(2).

²⁵¹⁹ HRC, *Martínez Portorreal v. the Dominican Republic*, Views, 5 November 1987, § 10(2).

²⁵²⁰ ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(c).

²⁵²¹ ECtHR, *Schiesser v. Switzerland*, Judgement, 4 December 1979, § 31.

²⁵²² ECtHR, *De Jong, Baljet and Van den Brink case*, Judgement, 22 May 1984, § 58.

interpretation of “promptness” in Article 5(3) of the 1950 ECHR was very limited according to the Court. To attach such importance to the special features of the case as to justify so lengthy a period of detention without appearance before a judicial officer would be an unacceptably wide interpretation of the plain meaning of the word “promptly”, according to the Court.²⁵²³

2741. In its judgement in *Brannigan and McBride v. UK* in 1993, the ECtHR held that the UK had not exceeded its margin of appreciation by derogating from its obligations under Article 5 of the 1950 ECHR to the extent that individuals suspected of terrorist offences were allowed to be held for up to seven days without judicial control because there were real guarantees against abuse and incommunicado detention.²⁵²⁴

2742. In its judgement in *Aksoy v. Turkey* in 1996, concerning the derogation by Turkey from numerous articles of the of the 1950 ECHR, including Article 5, on account of the threat to national security in the south-east of the country, the ECtHR held that it was for each contracting State to determine whether life was threatened by a public emergency and how far it was necessary to go in attempting to overcome the emergency. However, the national authorities did not enjoy an unlimited discretion and it was for the Court to rule whether States had gone beyond the extent strictly required by the exigencies of the situation. It held that although the investigation of terrorist offences undoubtedly presented the authorities with special problems, it could not accept that it was necessary to hold a suspect for 14 days without judicial intervention.²⁵²⁵

2743. In its judgement in the *Castillo Petruzzi and Others case* in 1999, the IACtHR held that “those Peruvian laws that allow the authorities to hold a person suspected of the crime of treason in preventive custody for 15 days, with the possibility of a 15-day extension, without bringing that person before a judicial authority”, were contrary to Article 7(5) of the 1969 ACHR. It consequently found that “the period of approximately 36 days that elapsed between the time of detention and the date on which the alleged victims were brought before a judicial authority is excessive and contrary to the provisions of the [1969 ACHR]”.²⁵²⁶

V. Practice of the International Red Cross and Red Crescent Movement

2744. No practice was found.

VI. Other Practice

2745. No practice was found.

²⁵²³ ECtHR, *Brogan and Others case*, Judgement, 29 November 1988, §§ 55–62.

²⁵²⁴ ECtHR, *Brannigan and McBride v. UK*, Judgement, 26 May 1993, §§ 61–66.

²⁵²⁵ ECtHR, *Aksoy v. Turkey*, Judgement, 18 December 1996, §§ 78 and 83–84.

²⁵²⁶ IACiHR, *Castillo Petruzzi and Others case*, Judgement, 30 May 1999, §§ 110–111.

Decision on the lawfulness of deprivation of liberty

I. Treaties and Other Instruments

Treaties

2746. Article 43, first paragraph, GC IV provides that:

Any protected person who has been interned or placed in assigned residence shall be entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board designated by the Detaining Power for that purpose. If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.

2747. Article 78 GC IV provides that the occupying power may take a decision to apply safety measures (such as assigned residence or to internment) with regard to protected persons. It adds that such a decision shall be made under a regular procedure and that “it shall be subject to periodical review, if possible every six months, by a competent body set up by the said Power”.

2748. Article 5(4) of the 1950 ECHR stipulates that “everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful”.

2749. Article 9(4) of the 1966 ICCPR provides that “anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that that court may decide on the lawfulness of his detention and order his release if the detention is not lawful”.

2750. Article 7(6) of the 1969 ACHR provides that “anyone who is deprived of his liberty shall be entitled to recourse to a competent court, in order that the court may decide without delay on the lawfulness of his arrest or detention and order his release if the arrest or detention is unlawful”.

2751. Article 37 of the 1989 Convention on the Rights of the Child provides that “every child deprived of his or her liberty shall have . . . the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action”.

Other Instruments

2752. According to Article XXV of the 1948 American Declaration on the Rights and Duties of Man, “every individual who has been deprived of his liberty has the right to have the legality of his detention ascertained without delay by a court without undue delay or, otherwise, to be released”.

2753. Principle 32 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “a detained

person or his counsel shall be entitled at any time to take proceedings according to domestic law before a judicial or other authority to challenge the lawfulness of his detention in order to obtain his release without delay, if it is unlawful".

2754. Article 5 of Part II of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that all persons have the right to effectively avail of the privilege of the writ of *habeas corpus*.

II. National Practice

Military Manuals

2755. Argentina's Law of War Manual (1969) provides that:

Any protected person who has been interned or placed in assigned residence shall have the right to obtain that a court or an administrative board, created by the [Detaining Power] for this purpose, reconsider within a brief time limit the decision taken against him. If it maintains the internment or assigned residence, the court or administrative board shall proceed periodically, and at least twice a year, to the examination of the case of the concerned person in order to modify in his favour the initial decision, if circumstances permit.²⁵²⁷

2756. Argentina's Law of War Manual (1989) provides that:

Any protected person who has been subjected to [enforced residence or internment] will have the right that a competent tribunal or administrative council, especially created by the Detaining Power, reconsider, as promptly as possible, the decision adopted.

If the internment or placing in assigned residence is maintained, the court or administrative board shall periodically and at least twice yearly, give consideration to his or her case, with a view to the favourable amendment of the initial decision, if circumstances permit.²⁵²⁸

2757. Canada's LOAC Manual provides that:

A person who has been interned or placed in an assigned residence is entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board of the belligerent. If the internment or placing in assigned residence is maintained, the court or administrative board must periodically, and at least twice yearly, reconsider the case with a view to the favourable amendment of the initial decision if circumstances permit.²⁵²⁹

2758. Colombia's Basic Military Manual provides that "the work undertaken by persons who cooperate with those who are deprived of their liberty in order to invoke the right to *habeas corpus*, or who invoke this right directly in their name, finds its legal basis in their status as human rights defenders".²⁵³⁰

²⁵²⁷ Argentina, *Law of War Manual* (1969), § 4.017(3).

²⁵²⁸ Argentina, *Law of War Manual* (1989), § 4.30(6).

²⁵²⁹ Canada, *LOAC Manual* (1999), p. 11.5, § 43.

²⁵³⁰ Colombia, *Basic Military Manual* (1995), p. 62.

2759. Germany's Military Manual provides, regarding aliens placed in assigned residence or internment, that "it shall be possible to have the measures reconsidered by an appropriate court or administrative board".²⁵³¹

2760. New Zealand's Military Manual provides that:

A person who has been interned or placed in an assigned residence is entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board of the belligerent. If the internment or placing in assigned residence is maintained, the court or administrative board must periodically, and at least twice yearly, reconsider the case with a view, if circumstances permit, to the favourable amendment of the initial decision.²⁵³²

2761. The UK Military Manual provides that:

A person who has been interned or placed in an assigned residence is entitled to have such action reconsidered as soon as possible by an appropriate court or administrative board of the belligerent. If the internment or placing in assigned residence is maintained, the court or administrative board must periodically, and at least twice yearly, reconsider the case with a view to the favourable amendment of the initial decision if circumstances permit.²⁵³³

The manual further specifies that, in occupied territories,

the decisions regarding such assigned residence or internment can only be made in accordance with regular procedure . . . If the decision to intern, or to assign a special place of residence to, a protected person is upheld on appeal, such decision must be subject to periodical review – if possible every six months – by a competent body set up by the Occupant.²⁵³⁴

2762. The US Field Manual reproduces Article 43 GC IV.²⁵³⁵ With respect to situations of occupation, the manual uses the same wording as Article 78 GC IV and specifies that "'competent bodies' to review the internment or assigned residence of protected persons may be created with advisory functions only, leaving the final decision to a high official of the Government".²⁵³⁶

2763. The US Air Force Pamphlet provides, regarding the internment or placing in assigned residence of protected persons, that if such internment is maintained, the internee is entitled to a periodic review of his or her case by an appropriate court or administrative board at least twice yearly.²⁵³⁷ It further states that "persons placed in internment or assigned residence in occupied territory are entitled to a review or reconsideration by a 'competent body'".²⁵³⁸

National Legislation

2764. Countless pieces of domestic legislation contain provisions on the right to have the lawfulness of detention reviewed by a court and the release ordered

²⁵³¹ Germany, *Military Manual* (1992), § 587.

²⁵³² New Zealand, *Military Manual* (1992), § 1120(3).

²⁵³³ UK, *Military Manual* (1958), § 51. ²⁵³⁴ UK, *Military Manual* (1958), § 555.

²⁵³⁵ US, *Field Manual* (1956), § 282. ²⁵³⁶ US, *Field Manual* (1956), § 433.

²⁵³⁷ US, *Air Force Pamphlet* (1976), § 14-5.

²⁵³⁸ US, *Air Force Pamphlet* (1976), § 14-7.

in case it is not lawful (so-called writ of *habeas corpus*). For instance, Russia's Constitution provides that "arrest, detention and keeping in custody shall be allowed only by an order of a court of law. No person may be detained for more than 48 hours without an order of a court of law including the right to make a representation against the order of arrest".²⁵³⁹

2765. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁵⁴⁰

2766. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 43 and 78 GC IV, is a punishable offence.²⁵⁴¹

2767. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".²⁵⁴²

National Case-law

2768. No practice was found.

Other National Practice

2769. In 1989, in a statement before the HRC, Uruguay reported that *habeas corpus* definitely continued to apply in emergency situations.²⁵⁴³

III. Practice of International Organisations and Conferences

United Nations

2770. In 1996, in a report to the UN Sub-Commission on Human Rights, the Special Rapporteur on States of Emergency stated that the remedy of *habeas corpus* "is not derogable at any time or under any circumstances".²⁵⁴⁴

Other International Organisations

2771. No practice was found.

International Conferences

2772. No practice was found.

²⁵³⁹ Russia, Constitution (1993), Article 22(2).

²⁵⁴⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁵⁴¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁵⁴² Norway, *Military Penal Code as amended* (1902), § 108(a).

²⁵⁴³ Uruguay, Statement before the HRC, UN Doc. CCPR/C/SR.877, 30 March 1989, §§ 44 and 49.

²⁵⁴⁴ UN Sub-Commission on Human Rights, Special Rapporteur on States of Emergency, Report, UN Doc. E/CN.4/Sub.2/1996/19, 18 June 1996, § 13.

IV. Practice of International Judicial and Quasi-judicial Bodies

2773. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber stated that:

As Geneva Convention IV leaves a great deal to the discretion of the detaining party in the matter of the original internment or placing in assigned residence of an individual, the party's decision that such measures of detention are required must be "reconsidered as soon as possible by an appropriate court or administrative board".²⁵⁴⁵

2774. In its judgement on appeal in the *Delalić case* in 2001, the ICTY Appeals Chamber held that:

The involuntary confinement of a civilian where the security of the Detaining Power does not make this absolutely necessary will be unlawful. Further, an initially lawful internment clearly becomes unlawful if the detaining party does not respect the basic procedural rights of the detained persons and does not establish an appropriate court or administrative board as prescribed in Article 43 of Geneva Convention IV.²⁵⁴⁶

2775. In its General Comment on Article 9 of the 1966 ICCPR in 1982, the HRC held that "if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, i.e. . . . court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5)".²⁵⁴⁷

2776. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that "in order to protect non-derogable rights, the right to take proceedings before a court to enable the court to decide without delay on the lawfulness of detention, must not be diminished by a State party's decision to derogate from the Covenant".²⁵⁴⁸

2777. In numerous cases concerning Uruguay between 1979 and 1981, the HRC found a violation of the right to *habeas corpus* particularly with regard to a large number of persons who had been imprisoned without court supervision under emergency legislation during the period of military rule.²⁵⁴⁹ The HRC has also found a violation of Article 9(4) of the 1966 ICCPR in numerous other cases.²⁵⁵⁰

²⁵⁴⁵ ICTY, *Delalić case*, Judgement, 16 November 1998, § 581.

²⁵⁴⁶ ICTY, *Delalić case*, Judgement on Appeal, 20 February 2001, § 320.

²⁵⁴⁷ HRC, General Comment No. 8 (Article 9 ICCPR), 30 July 1982, § 4.

²⁵⁴⁸ HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, § 16.

²⁵⁴⁹ HRC, *Torres Ramírez v. Uruguay*, Views, 23 July 1980, § 18; *Hernández Valentini de Bazzano v. Uruguay*, Views, 15 August 1979, § 10; *Sequeria v. Uruguay*, Views, 29 July 1980, § 16; *García Lanza de Netto v. Uruguay*, Views, 3 April 1980, § 16; *Santullo Valcada v. Uruguay*, Views, 26 October 1979, § 12; *Altesor v. Uruguay*, Views, 29 March 1982, § 15; *Buffo Carballal v. Uruguay*, Views, 27 March 1981, § 13; *Soriano de Bouton v. Uruguay*, Views, 27 March 1981, § 12; *Pietraroia v. Uruguay*, Views, 27 March 1981, § 17; *Sala de Tourón v. Uruguay*, Views, 31 March 1981, § 6.

²⁵⁵⁰ See, e.g., HRC, *Dermit Barbato v. Uruguay*, Views, 21 October 1982, § 10 (incommunicado detention); *Tshitenge Muteba v. Zaire*, Views, 24 July 1984, § 12 (incommunicado detention);

2778. In 1998, in its concluding observations on Israel, the HRC stressed that even where there had been a derogation from the 1966 ICCPR, a State party to the Covenant could not depart from the requirement of effective judicial review of detention.²⁵⁵¹

2779. In 1996, in a communication alleging the expulsion from Zambia of over 500 west Africans after they had been administratively detained, the ACiHPR referred to its decision finding the case admissible as evidence that it had already established that none of the deportees had the opportunity to seize the Zambian courts to challenge their detention or deportation, which was a violation of Article 7 of the 1981 ACHPR as well as of national law.²⁵⁵²

2780. In a number of judgements, the ECtHR held that the court charged with making the decision as to the legality of the detention must function in accordance with procedural guarantees,²⁵⁵³ such as an oral hearing,²⁵⁵⁴ adversarial proceedings²⁵⁵⁵ and time and facilities to prepare application.²⁵⁵⁶ The ECtHR has specified that the tribunal making the determination as to the legality of the detention must have the power to release the person.²⁵⁵⁷ The Court has specified, however, that due consideration must be given to the diligence of the national authorities and any delays brought about by the conduct of the detained person, as well as other factors responsible for delays that might be beyond the power of the State organs.²⁵⁵⁸

2781. In its advisory opinion in the *Habeas Corpus case* in 1987, the IACtHR stated that:

In order for habeas corpus to achieve its purpose, which is to obtain a judicial determination of the lawfulness of a detention, it is necessary that the detained person be brought before a competent judge or tribunal with jurisdiction over him. Here habeas corpus performs a vital role in ensuring that a person's life and physical integrity are respected, in preventing his disappearance or the keeping of his whereabouts secret and in protecting him against torture or other cruel, inhumane, or degrading punishment or treatment.²⁵⁵⁹

Kelly v. Jamaica, Views, 8 April 1991, § 5(6) (detention of five weeks without access to a judge); *Berry v. Jamaica*, Views, 7 April 1994, § 11.1 (two and half months without court ruling on legality of detention).

²⁵⁵¹ HRC, Concluding observations on Israel, UN Doc. CCPR/C/79/Add.93, 18 August 1998, § 21.

²⁵⁵² ACiHPR, *RADDH v. Zambia*, Decision, 21–31 October 1996.

²⁵⁵³ ECtHR, *De Wilde, Ooms and Versyp v. Belgium*, Judgement, 18 June 1971, § 76; *Ireland v. UK*, Judgement, 18 January 1978, §§ 84 and 200.

²⁵⁵⁴ ECtHR, *Sánchez-Reisse case*, Judgement, 21 October 1986, § 51; *Hussain v. UK*, Judgement, 21 February 1996, § 59; *Singh v. UK*, Judgement (Chamber), 21 February 1996, §§ 69–70.

²⁵⁵⁵ ECtHR, *Toth v. Austria*, Judgement, 12 December 1991, § 84; *Lamy case*, Judgement, 30 March 1989, § 29; *Hussain v. UK*, Judgement, 21 February 1996, § 59; *Singh v. UK*, Judgement, 21 February 1996, §§ 65, 68 and 70.

²⁵⁵⁶ ECtHR, *K v. Austria*, Judgement, 2 June 1993, § 64; *Farmakopoulos v. Belgium*, Judgement, 27 March 1992, § 53.

²⁵⁵⁷ ECtHR, *X. v. UK*, Judgement, 5 November 1981, § 58; *Van Droogenbroeck case*, Judgement, 24 June 1982, § 49.

²⁵⁵⁸ ECtHR, *Sánchez-Reisse case*, Judgement, 21 October 1986, § 56; *Navarra v. France*, Judgement, 23 November 1993, § 29; *Kolompar v. Belgium*, Judgement, 24 September 1992, §§ 42–43.

²⁵⁵⁹ IACtHR, *Habeas Corpus case*, Advisory Opinion, 30 January 1987, § 35.

The Court concluded that “writs of habeas corpus and of ‘amparo’ are among those judicial remedies that are essential for the protection of various rights whose derogation is prohibited by Article 27(2) [1969 ACHR] and that serve, moreover, to preserve legality in a democratic society”.²⁵⁶⁰

2782. In its advisory opinion in the *Judicial Guarantees case* in 1987, the IACtHR interpreted the scope of the prohibition on the suspension of judicial guarantees essential for the protection of non-derogable rights. The Court found that:

The “essential” judicial guarantees which are not subject to derogation, according to Article 27(2) [1969 ACHR], include habeas corpus (Art. 7(6)), amparo, and any other effective remedy before judges or competent tribunals (Art. 25(1)), which is designed to guarantee the respect of the rights and freedoms whose suspension is not authorized by the [1969 ACHR].²⁵⁶¹

2783. In its judgement in the *Neira Alegria and Others case* in 1995, the IACtHR found that the principles it had established in the two advisory opinions on *habeas corpus* and human rights during states of emergency applied equally in a case where the control and jurisdiction over a prison had been delegated to the armed forces as the result of a riot. The Court found that there had been a consequent violation of the right to *habeas corpus*.²⁵⁶²

V. Practice of the International Red Cross and Red Crescent Movement

2784. No practice was found.

VI. Other Practice

2785. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that:

The right to an effective remedy, including habeas corpus, shall be guaranteed as a means to determine the whereabouts or the state of health of persons deprived of their liberty and for identifying the authority ordering or carrying out the deprivation of liberty. Everyone who is deprived of his or her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of the detention shall be decided speedily by a court and his or her release ordered if the detention is not lawful.²⁵⁶³

The Declaration also provides that:

²⁵⁶⁰ IACtHR, *Habeas Corpus case*, Advisory Opinion, 30 January 1987, § 42.

²⁵⁶¹ IACtHR, *Judicial Guarantees case*, Advisory Opinion, 6 October 1987, § 41(1).

²⁵⁶² IACtHR, *Neira Alegria and Others case*, Judgement, 19 January 1995, §§ 82–84 and 91(2).

²⁵⁶³ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 4(3), *IRRC*, No. 282, 1991, p. 331.

If it is considered necessary for imperative reasons of security to subject any person to assigned residence, internment or administrative detention, such decisions shall be subject to a regular procedure prescribed by law affording all the judicial guarantees which are recognized as indispensable by the international community, including the right of appeal or to a periodical review.²⁵⁶⁴

M. Fair Trial Guarantees

General

Note: For practice concerning executions, see section C of this chapter. For practice concerning the status of spies, see Chapter 33, section B.

I. Treaties and Other Instruments

Treaties

2786. Article 16 of the 1945 IMT Charter (Nuremberg), entitled “Fair trial for defendants”, provides a list of procedures to be followed “in order to ensure fair trial for the Defendants”.

2787. Common Article 3 of the 1949 Geneva Conventions prohibits “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.

2788. Article 49, fourth paragraph, GC I and Article 50, fourth paragraph, GC II provide that:

In all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949.

2789. Articles 102–108 GC III contain detailed provisions to ensure a fair trial in any judicial proceedings against POWs.

2790. According to Article 130 GC III, “if committed against persons or property protected by the Convention . . . wilfully depriving a prisoner of war of the rights of fair and regular trial” is a grave breach of the Convention.

2791. Article 5 GC IV provides that an individual protected person suspected of or engaged in activities hostile to the security of the State in the territory of a party to the conflict or an individual protected person detained as a spy or saboteur, or as a person under definite suspicion of activity hostile to the security of the occupying power “shall nevertheless be treated with humanity,

²⁵⁶⁴ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 11, *IRRC*, No. 282, 1991, p. 334.

and in case of trial, shall not be deprived of the rights of fair and regular trial prescribed by the present Convention”.

2792. Article 66 GC IV provides that “in case of a breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country”. Articles 67–75 GC IV contain more detailed provisions concerning the procedure which must be followed.

2793. Article 78, second paragraph, GC IV provides that “decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention”.

2794. According to Article 147 GC IV “wilfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention” is a grave breach of the Convention.

2795. Article 6(1) of the 1950 ECHR provides that “in the determination of his civil rights and obligations or for any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”. Article 6(3) lists the minimum rights to which everyone charged with a criminal offence is entitled.

2796. Article 14(1) of the 1966 ICCPR provides that “in the determination of any criminal charge...or...rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”. Article 14(3) then lists the minimum guarantees to which everyone charged with a criminal offence is entitled “in full equality”.

2797. Article 8(1) of the 1969 ACHR provides that “every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent...tribunal, previously established by law”. Article 8(2) lists the minimum guarantees to which everyone is entitled “with full equality”.

2798. Article 71(1) AP I provides that “no sentence shall be pronounced by the competent courts of the Occupying Power except after a regular trial”.

2799. Article 75(4) AP I provides that:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure.

Article 75 AP I was adopted by consensus.²⁵⁶⁵

2800. Article 85(4)(e) AP I states that “depriving a person protected by the Conventions or referred to in paragraph 2 of this Article of the rights of fair and

²⁵⁶⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

regular trial" is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.²⁵⁶⁶

2801. Article 7 of the 1981 ACHPR provides that "every individual shall have the right to have his cause heard".

2802. Article 40(2)(b)(iii) of the 1989 Convention on the Rights of the Child states that "every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (iii) to have the matter determined without delay by a competent . . . authority or judicial body in a fair hearing according to law".

2803. Under Article 8(2)(a)(vi) of the 1998 ICC Statute, "wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial" constitutes a war crime in international armed conflicts. Under Article 8(2)(c)(iv), "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable," constitutes a war crime in non-international armed conflicts.

2804. Article 64(2) of the 1998 ICC Statute provides that "the Trial Chamber shall ensure that a trial is fair and expeditious and is conducted with full respect for the rights of the accused". Article 64(3)(a) adds that "the Trial Chamber assigned to deal with the case shall . . . confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings". Article 64(8)(b) states that "at the trial, the presiding judge may give directions for the conduct of proceedings, including to ensure that they are conducted in a fair and impartial manner".

2805. Article 67(1) of the 1998 ICC Statute provides that "in the determination of any charge, the accused shall be entitled to a . . . fair hearing conducted impartially".

2806. Article 69 of the 1998 ICC Statute states with regard to evidence that:

The Court may rule on the relevance or admissibility of any evidence, taking into account, *inter alia*, the probative value of the evidence and any prejudice that such evidence may cause to a fair trial or to a fair evaluation of the testimony of a witness, in accordance with the Rules of Procedure and Evidence.

2807. Article 17(2) of the 1999 Second Protocol to the 1954 Hague Convention provides that "any person . . . shall be guaranteed . . . a fair trial in accordance with domestic law and international law at all stages of the proceedings, and in no cases shall be provided guarantees less favorable to such person than those provided by international law".

2808. Article 3(g) of the 2002 Statute of the Special Court for Sierra Leone states that:

²⁵⁶⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

The Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the Protection of War Victims, and of Additional Protocol II thereto of 8 June 1977.

These violations include “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.

2809. Article 17(2) of the 2002 Statute of the Special Court for Sierra Leone, entitled “Rights of the accused”, provides that “the accused shall be entitled to a fair and public hearing”.

Other Instruments

2810. Article 148 of the 1863 Lieber Code provides that “the law of war does not allow proclaiming either an individual belonging to the hostile army, or a citizen, or a subject of the hostile government, an outlaw, who may be slain without trial by any captor, any more than the law of peace allows such intentional outlawry”.

2811. Article 9 of the 1946 IMT Charter (Tokyo), entitled “Fair trial for accused”, provides a list of procedures to be followed “in order to insure fair trial for the accused”.

2812. Article 10 of the 1948 UDHR provides that “everyone is entitled in full equality to a fair and public hearing”.

2813. Article XVIII of the 1948 American Declaration on the Rights and Duties of Man, entitled “Right to a fair trial”, states that “every person may resort to the courts to ensure respect for his legal rights”.

2814. Principle V of the 1950 Nuremberg Principles adopted by the ILC provides that “any person charged with a crime under international law has the right to a fair trial on the facts and law”.

2815. Article 19 of the 1956 New Delhi Draft Rules provides that:

The accused persons shall be tried only by a regular civil or military court; they shall, in all circumstances, benefit by the safeguards of proper trial and defence at least equal to those provided under Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949.

2816. Paragraph 6 of the 1985 Basic Principles on the Independence of the Judiciary states that “the principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected”.

2817. Paragraph 1 of the 1989 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides that:

Governments shall prohibit by law all extra-legal, arbitrary and summary executions and shall ensure that any such executions are recognized as offences under their criminal laws, and are punishable by appropriate penalties which take into account the seriousness of such offences. Exceptional circumstances including a state of war or threat of war, internal political instability or any other public emergency may not be invoked as a justification of such executions.

2818. Article 19(e) of the 1990 Cairo Declaration on Human Rights in Islam provides that “a defendant is innocent until his guilt is proven in a fair trial in which he shall be given all the guarantees of defence”.

2819. Article 8(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right, “in the determination of any charge against him, to have a fair and public hearing”.

2820. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

2821. Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that the parties commit themselves to respect and ensure respect for common Article 3 of the 1949 Geneva Conventions. Paragraph 2.3 requires that all civilians be treated in accordance with Article 75 AP I.

2822. Under Article 2(f) of the 1993 ICTY Statute, the Tribunal is competent to prosecute wilful deprivation of a POW or a civilian of the rights of fair and regular trial.

2823. Article 20(1) of the 1993 ICTY Statute provides that “the Trial Chambers shall ensure that a trial is fair”.

2824. Article 21(2) of the 1993 ICTY Statute provides that “in the determination of charges against him, the accused shall be entitled to a fair and public hearing”.

2825. Under Article 4(g) of the 1994 ICTR Statute, the Tribunal is competent to prosecute violations of common Article 3 of the 1949 Geneva Conventions, including “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples”.

2826. Article 19(1) of the 1994 ICTR Statute states that “the Trial Chambers shall ensure that a trial is fair”.

2827. Article 20(2) of the 1994 ICTR Statute provides that “in the determination of charges against him or her, the accused shall be entitled to a fair and public hearing”.

2828. Under Section III (2) of the 1994 Comprehensive Agreement on Human Rights in Guatemala, the government of Guatemala undertook to modify the

Penal Code so that “summary or extra-judicial executions may be characterized as crimes of particular gravity and punished as such”.

2829. Article 11(1)(a) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right, “in the determination of any charge against him, to have a fair and public hearing”.

2830. Article 20(a)(vi) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “wilfully depriving a protected person or other protected persons of the rights of fair and regular trial” is as a war crime. Article 20(f)(vii) states that “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognized as indispensable”, committed in violation of international humanitarian law applicable in armed conflict not of an international character, is a war crime.

2831. Article 2(4) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines prohibits “summary executions (salvagings)”. Article 2(9) provides that the Agreement seeks to protect and promote “the right to substantive and procedural due process”.

2832. Article 3(2) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “punishing anyone without complying with all the requisites of due process” shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.

2833. Article 47 of the 2000 EU Charter of Fundamental Rights provides that “everyone is entitled to a fair and public hearing within a reasonable period of time by . . . [a] tribunal previously established by law”.

2834. According to Article 8(2)(a)(vi) and (c)(iv) of the 2000 ICC Elements of Crime, “denying a fair trial” is defined by reference to the Geneva Conventions (III and IV in particular), while “sentencing or execution without due process” is defined by reference to the requirements of independence and impartiality and to “all other judicial guarantees generally recognized as indispensable under international law”.

2835. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(vi), “wilfully depriving a prisoner of war or other protected person of the rights of fair and regular trial” constitutes a war crime in international armed conflicts. According to Section 6(1)(c)(iv), “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees which are generally recognized as indispensable,” constitutes a war crime in non-international armed conflicts.

II. National Practice

Military Manuals

2836. Argentina's Law of War Manual (1969) provides that protected persons arrested on suspicion of performing acts prejudicial to the occupying power cannot be "deprived . . . of a fair and regular trial".²⁵⁶⁷ It further states that a "competent tribunal of the Occupying Power cannot impose any sentence without having proceeded to a regular trial".²⁵⁶⁸ With respect to non-international armed conflicts, the manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.²⁵⁶⁹

2837. Argentina's Law of War Manual (1989) states that "depriving [a protected person] of his right to a regular and impartial trial" is a grave breach of the Geneva Conventions.²⁵⁷⁰

2838. Australia's Commanders' Guide provides that "wilfully depriving PWs or other protected persons of the right of a fair and regular trial as prescribed by the Geneva Conventions" is a grave breach of the Geneva Conventions.²⁵⁷¹

2839. Australia's Defence Force Manual states that "wilfully depriving PWs or other protected persons of the right of a fair and regular trial as prescribed by the Geneva Conventions" is a grave breach of the Geneva Conventions.²⁵⁷²

2840. Belgium's Law of War Manual refers to common Article 3 of the 1949 Geneva Conventions and prohibits the conviction of protected persons without a prior fair trial.²⁵⁷³ It further states that depriving a POW or other protected persons of the right to be tried by a regular court is a grave breach of the Geneva Conventions.²⁵⁷⁴

2841. Benin's Military Manual provides that every person shall benefit from fundamental judicial guarantees.²⁵⁷⁵

2842. Burkina Faso's Disciplinary Regulations states that it is prohibited to "convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law".²⁵⁷⁶

2843. Under Cameroon's Disciplinary Regulations, it is prohibited to "convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law".²⁵⁷⁷

2844. Canada's LOAC Manual provides that:

²⁵⁶⁷ Argentina, *Law of War Manual* (1969), § 4.003.

²⁵⁶⁸ Argentina, *Law of War Manual* (1969), § 5.029(5).

²⁵⁶⁹ Argentina, *Law of War Manual* (1969), § 8.001.

²⁵⁷⁰ Argentina, *Law of War Manual* (1989), § 8.03.

²⁵⁷¹ Australia, *Commanders' Guide* (1994), § 1305(f).

²⁵⁷² Australia, *Defence Force Manual* (1994), § 1315.

²⁵⁷³ Belgium, *Law of War Manual* (1983), p. 17.

²⁵⁷⁴ Belgium, *Law of War Manual* (1983), p. 55.

²⁵⁷⁵ Benin, *Military Manual* (1995), Fascicule II, p. 5.

²⁵⁷⁶ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

²⁵⁷⁷ Cameroon, *Disciplinary Regulations* (1975), Article 32.

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure.²⁵⁷⁸

The manual also provides that “sentences may be pronounced only after a regular trial”.²⁵⁷⁹ It further specifies that it is a grave breach of GC III to “deprive a PW of the right to a fair and regular trial”²⁵⁸⁰ and that it is a grave breach to “wilfully deprive a protected person of the rights of a fair and regular trial prescribed by [GC IV]”.²⁵⁸¹ According to the manual, “denial of a fair and regular trial to any person protected by the Geneva Conventions or AP I” is a grave breach of AP I.²⁵⁸² The manual further states that the “Geneva Conventions provide that all persons accused of grave breaches enjoy the safeguards of a proper trial and defence in accordance with international standards”. With regard to non-international armed conflicts, the manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.²⁵⁸³

2845. Colombia’s Basic Military Manual states that “to protect [non-combatants] means . . . to offer the necessary conditions for a fair trial before a competent tribunal, so that the requirement of due process is guaranteed”.²⁵⁸⁴

2846. Colombia’s Instructors’ Manual provides that “whoever is deprived of his liberty has the right to a legal trial”.²⁵⁸⁵ It adds that “nobody can be tried except in conformity with laws in force before the imputed act and by a judge or a competent tribunal, and in full compliance with all rules for each trial”.²⁵⁸⁶

2847. Colombia’s Soldiers’ Manual provides that “whoever is deprived of liberty has the right to a legal trial”.²⁵⁸⁷

2848. Colombia’s Circular on Fundamental Rules of IHL provides that “each person shall benefit from the fundamental judicial guarantees”.²⁵⁸⁸

2849. Under Congo’s Disciplinary Regulations, it is prohibited to “convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law”.²⁵⁸⁹

2850. Ecuador’s Naval Manual provides that “offences against prisoners of war, including . . . denying the right to a fair trial for committed offences” and “offences against civilian inhabitants of the occupied territory, including . . . denying the right to a fair trial for committed offences” constitute war

²⁵⁷⁸ Canada, *LOAC Manual* (1999), p. 11-8, § 65.

²⁵⁷⁹ Canada, *LOAC Manual* (1999), p. 12-6, § 54.

²⁵⁸⁰ Canada, *LOAC Manual* (1999), p. 16-2, § 13.

²⁵⁸¹ Canada, *LOAC Manual* (1999), p. 16-2, § 14.

²⁵⁸² Canada, *LOAC Manual* (1999), p. 16-3, § 17.

²⁵⁸³ Canada, *LOAC Manual* (1999), p. 17-2, § 10(a)(iv) and p. 17-4, § 28.

²⁵⁸⁴ Colombia, *Basic Military Manual* (1995), p. 21.

²⁵⁸⁵ Colombia, *Instructors’ Manual* (1999), p. 9.

²⁵⁸⁶ Colombia, *Instructors’ Manual* (1999), p. 10.

²⁵⁸⁷ Colombia, *Soldiers’ Manual* (1999), p. 11.

²⁵⁸⁸ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 5.

²⁵⁸⁹ Congo, *Disciplinary Regulations* (1986), Article 32(2).

crimes.²⁵⁹⁰ It further provides that “individuals captured as spies or as illegal combatants . . . may not be summarily executed” and that they “have the right to be fairly tried for violations of the law of armed conflict”.²⁵⁹¹

2851. El Salvador’s Human Rights Charter of the Armed Forces lists as one of the ten basic rules that “any person has the right to be heard” in trial.²⁵⁹²

2852. El Salvador’s Soldiers’ Manual provides that “only a fairly constituted tribunal can pronounce and impose a judgement or a sentence against captured enemy combatants”.²⁵⁹³

2853. France’s Disciplinary Regulations as amended provides that it is prohibited to “convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law”.²⁵⁹⁴

2854. France’s LOAC Summary Note provides that “every person, whether combatant or non-combatant, shall benefit from the fundamental judicial guarantees”.²⁵⁹⁵ It further states that “deprivation of the fundamental judicial guarantees” is a grave breach of GC III.²⁵⁹⁶

2855. France’s LOAC Teaching Note states that “violations of the fundamental judicial guarantees” are grave breaches of the law of armed conflict.²⁵⁹⁷

2856. France’s LOAC Manual provides that “practices of massive and systematic summary executions” constitute war crimes.²⁵⁹⁸ It further states that one of the three main principles common to IHL and human rights is the “principle of inviolability” which guarantees to every human being the fundamental judicial guarantees.²⁵⁹⁹ The manual refers to common Article 3 of the 1949 Geneva Conventions and stipulates that the “passing of sentences and carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples” is prohibited.²⁶⁰⁰

2857. Germany’s Military Manual provides that civilians “shall have the right to a regular and fair judicial procedure”.²⁶⁰¹ It further states that “prevention of a fair and regular trial” is a grave breach of IHL.²⁶⁰²

2858. According to Indonesia’s Directive on Human Rights in Trikora, “the protection of personal integrity consists of: the protection of the civil and political rights of citizens from cruel treatment and punishment without judicial procedure” and “due process of law . . . and fair trial guarantees”.²⁶⁰³

²⁵⁹⁰ Ecuador, *Naval Manual* (1989), § 6.2.5(1)–(2).

²⁵⁹¹ Ecuador, *Naval Manual* (1989), §§ 11.7 and 11.8.

²⁵⁹² El Salvador, *Human Rights Charter of the Armed Forces* (undated), pp. 3 and 15.

²⁵⁹³ El Salvador, *Soldiers’ Manual* (undated), p. 10.

²⁵⁹⁴ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

²⁵⁹⁵ France, *LOAC Summary Note* (1992), § III.

²⁵⁹⁶ France, *LOAC Summary Note* (1992), § 3.4.

²⁵⁹⁷ France, *LOAC Teaching Note* (2000), p. 7.

²⁵⁹⁸ France, *LOAC Manual* (2001), p. 44.

²⁵⁹⁹ France, *LOAC Manual* (2001), p. 52.

²⁶⁰⁰ France, *LOAC Manual* (2001), p. 101.

²⁶⁰¹ Germany, *Military Manual* (1992), § 518.

²⁶⁰² Germany, *Military Manual* (1992), § 1209.

²⁶⁰³ Indonesia, *Directive on Human Rights in Trikora* (1995), §§ 1(b) and 4(a).

2859. Italy's IHL Manual provides that the violation "of the right to a regular and impartial trial for acts committed in connection with an armed conflict" constitutes a grave breach of the Geneva Conventions and their Additional Protocols.²⁶⁰⁴

2860. Kenya's LOAC Manual refers to common Article 3 of the 1949 Geneva Conventions and states that persons *hors de combat* "may not be sentenced without proper trial".²⁶⁰⁵

2861. South Korea's Military Regulation 187 states that "executing the death penalty for spies and persons who have taken part in hostilities through summary trial not full trial" is an "unjustifiable crime".²⁶⁰⁶

2862. Madagascar's Military Manual refers to one of the "seven fundamental rules of IHL" which states that "every person shall benefit from the fundamental judicial guarantees".²⁶⁰⁷

2863. Mali's Army Regulations provides that it is prohibited to "convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law".²⁶⁰⁸

2864. Morocco's Disciplinary Regulations provides that it is prohibited to "convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law".²⁶⁰⁹

2865. The Military Manual of the Netherlands provides that spies caught in *flagrante delicto* cannot, in any circumstances, be punished without due process.²⁶¹⁰ It prohibits punishments "without a previous judgement . . . through a fair trial".²⁶¹¹ It further states that "wilfully depriving a protected person of the rights of a fair and regular trial" is a grave breach of the Geneva Conventions and their Additional Protocols.²⁶¹² With respect to non-international armed conflicts, the manual restates the fundamental requirement of fair trial found in common Article 3 of the 1949 Geneva Conventions and Article 6 AP II.²⁶¹³

2866. New Zealand's Military Manual states that:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court, respecting the generally recognized principles of regular judicial procedure.²⁶¹⁴

²⁶⁰⁴ Italy, *IHL Manual* (1991), Vol. I, § 85.

²⁶⁰⁵ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 6.

²⁶⁰⁶ South Korea, *Military Regulation 187* (1991), Article 4.2; see also *Military Operations Law of War Compliance Regulation* (1993), § D.

²⁶⁰⁷ Madagascar, *Military Manual* (1994), p. 91, Rule 5.

²⁶⁰⁸ Mali, *Army Regulations* (1979), Article 36.

²⁶⁰⁹ Morocco, *Disciplinary Regulations* (1974), Article 25.

²⁶¹⁰ Netherlands, *Military Manual* (1993), p. III-6.

²⁶¹¹ Netherlands, *Military Manual* (1993), p. VII-2.

²⁶¹² Netherlands, *Military Manual* (1993), pp. IX-5 and IX-6.

²⁶¹³ Netherlands, *Military Manual* (1993), p. XI-1 and XI-5.

²⁶¹⁴ New Zealand, *Military Manual* (1992), § 1137(4).

The manual further provides that it is a grave breach “to deprive [a POW] of his rights to a fair and regular trial” and to “wilfully deprive a protected civilian of the rights of fair and regular trial”.²⁶¹⁵ It also states that depriving “any person protected by the Conventions or the Protocol of a fair and regular trial” and “punishment of a spy without a proper trial” is a grave breach of AP I.²⁶¹⁶ With regard to non-international armed conflicts, the manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.²⁶¹⁷

2867. Nicaragua’s Military Manual states that “in no case may summary executions be carried out”.²⁶¹⁸

2868. Nigeria’s Manual on the Laws of War provides that “wilfully depriving prisoners of war and civilians of the rights to a fair and regular trial” is a grave breach of the Geneva Conventions and is considered as a serious war crime.²⁶¹⁹ It further states that “in any case, it must be ensured that no punishment is imposed on a prisoner of war without a fair trial”.²⁶²⁰

2869. Peru’s Human Rights Charter of the Security Forces lists the right of a detainee to a fair trial as one of the ten basic rules.²⁶²¹

2870. Peru’s Human Rights Charter of the Armed Forces states that the right to judicial guarantees is one of the main civil rights which must be respected by armed forces.²⁶²²

2871. Russia’s Military Manual prohibits the punishment of war victims, namely the wounded, sick and shipwrecked, POWs and civilian population, “without a previous judgement pronounced by a regularly constituted court, with all the judicial guarantees which are recognised as indispensable by civilised nations”.²⁶²³

2872. Senegal’s Disciplinary Regulations provides that it is prohibited to “convict persons without a previous judgement pronounced by a regularly constituted tribunal affording judicial guarantees provided by law”.²⁶²⁴

2873. Senegal’s IHL Manual restates common Article 3 of the 1949 Geneva Conventions.²⁶²⁵

2874. South Africa’s LOAC Manual provides that depriving a “protected person of the rights to a fair and regular trial” constitutes a grave breach of the Geneva Conventions.²⁶²⁶

2875. Spain’s LOAC Manual provides that “the guarantee of judicial proceedings” is one of the minimum guarantees provided to prisoners of war.²⁶²⁷

²⁶¹⁵ New Zealand, *Military Manual* (1992), §§ 1702(2) and 1702(3)(d).

²⁶¹⁶ New Zealand, *Military Manual* (1992), §§ 1703(4)(e) and 1704(4).

²⁶¹⁷ New Zealand, *Military Manual* (1992), § 1807(1)(d).

²⁶¹⁸ Nicaragua, *Military Manual* (1996), Article 3.

²⁶¹⁹ Nigeria, *Manual on the Laws of War* (undated), § 6(b) and (c).

²⁶²⁰ Nigeria, *Manual on the Laws of War* (undated), § 44.

²⁶²¹ Peru, *Human Rights Charter of the Security Forces* (1991), Rule 8.

²⁶²² Peru, *Human Rights Charter of the Armed Forces* (1994), § 27(4).

²⁶²³ Russia, *Military Manual* (1990), §§ 7 and 8(e).

²⁶²⁴ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

²⁶²⁵ Senegal, *IHL Manual* (1999), p. 4. ²⁶²⁶ South Africa, *LOAC Manual* (1996), § 40.

²⁶²⁷ Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.

2876. Sweden's Military Manual provides that in occupied territories, POWs or civilians shall be granted all fundamental judicial guarantees.²⁶²⁸

2877. Sweden's IHL Manual considers that the principle of the right to have a sentence pronounced by an impartial and regularly constituted court respecting the generally recognised principles of regular judicial procedure as contained in Article 75 AP I is part of customary international law.²⁶²⁹ It further states that "wilfully depriving [a protected person] of the rights of a fair and regular trial" is a grave breach of the Geneva Conventions.²⁶³⁰

2878. Switzerland's Basic Military Manual provides that "a spy caught in *flagrante delicto* shall not be punished without previous judgement".²⁶³¹ It also provides that when captured, "saboteurs . . . cannot be punished without prior judgement".²⁶³² The manual notes that "in judicial proceedings, some minimum guarantees in accordance with the regime of the rule of law shall be granted to those accused of possible war crimes and who no longer benefit from prisoner-of-war status".²⁶³³ It adds that "Article 75 AP I contains a series of provisions that guarantee to the accused a fair trial".²⁶³⁴ It further provides that:

A person found guilty of a criminal offence committed in connection with the armed conflict shall be sentenced only in accordance with a judgement . . . This judgement shall be rendered by an impartial and regularly constituted tribunal which follows the generally recognised principles of a regular judicial procedure.²⁶³⁵

According to the manual, it is a grave breach of the Geneva Conventions to deprive POWs and civilians of "their right to be tried by an impartial and regularly constituted tribunal, in accordance with the conventions".²⁶³⁶ In an article entitled "Judicial guarantees", the manual states that "prisoners of war prosecuted for war crimes shall benefit from the rights prescribed by [GC III]".²⁶³⁷

2879. Togo's Military Manual provides that every person shall benefit from fundamental judicial guarantees.²⁶³⁸

2880. The UK Military Manual provides that if civil inhabitants "commit or attempt to commit hostile acts, they are liable to punishment, after a proper trial".²⁶³⁹ It further provides that "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognised as

²⁶²⁸ Sweden, *Military Manual* (1976), pp. 16 and 26.

²⁶²⁹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

²⁶³⁰ Sweden, *IHL Manual* (1991), Section 4.2, p. 93.

²⁶³¹ Switzerland, *Basic Military Manual* (1987), Article 43.

²⁶³² Switzerland, *Basic Military Manual* (1987), Article 46.

²⁶³³ Switzerland, *Basic Military Manual* (1987), Article 66.

²⁶³⁴ Switzerland, *Basic Military Manual* (1987), Article 153.

²⁶³⁵ Switzerland, *Basic Military Manual* (1987), Article 175.

²⁶³⁶ Switzerland, *Basic Military Manual* (1987), Article 192(b), see also § 193(2)(e).

²⁶³⁷ Switzerland, *Basic Military Manual* (1987), Article 201.

²⁶³⁸ Togo, *Military Manual* (1996), Fascicule II, p. 5.

²⁶³⁹ UK, *Military Manual* (1958), § 88.

indispensable by civilised peoples" is prohibited at any time.²⁶⁴⁰ The manual specifies that "wilfully depriving a prisoner of war of the rights to a fair and regular trial prescribed in the Convention" is a grave breach of GC III".²⁶⁴¹

In cases of occupation, the manual states that "sentences may be pronounced only after a regular trial".²⁶⁴² The manual further emphasises that wilfully depriving a prisoner of war or persons protected under GC IV of the rights of fair and regular trial required by GC III and GC IV is a grave breach of those instruments.²⁶⁴³ The manual also states that "in addition to the 'grave breaches' of the 1949 [Geneva] Conventions, . . . the following are examples of punishable violations of the laws of war, or war crimes: . . . killing without trial of spies, saboteurs, partisans and others who have committed hostile acts".²⁶⁴⁴

2881. The UK LOAC Manual recalls that "Protocol I contains fundamental guarantees to . . . ensure that persons are not punished without properly conducted trials".²⁶⁴⁵ With respect to non-international armed conflicts, the manual refers to common Article 3 of the 1949 Geneva Conventions and states that persons *hors de combat* "may not be sentenced without proper trial".²⁶⁴⁶

2882. The US Field Manual restates common Article 3 of the 1949 Geneva Conventions and Articles 102 and 108 GC III.²⁶⁴⁷ With respect to occupied territories, it uses the same wording as Articles 5, 66 and 71 GC IV.²⁶⁴⁸ The manual provides that "wilfully depriving a prisoner of war or a protected person of the rights of a fair and regular trial" is a grave breach of the Geneva Conventions.²⁶⁴⁹ It also provides that "in addition to the 'grave breaches' of the Geneva Conventions of 1949, the following acts are representative of violations of the law of war ('war crimes'): . . . killing without trial spies or other persons who have committed hostile acts".²⁶⁵⁰

2883. The US Air Force Pamphlet states that GC III "provides specific safeguards and guarantees of fair judicial proceedings".²⁶⁵¹ It further states that "protected persons in occupied territory who are detained for spying or sabotage . . . are guaranteed the right to a fair trial".²⁶⁵² The manual specifies that "wilfully killing without trial persons in custody who have committed hostile acts" and "deliberate deprivation of fair trial rights to any protected persons" are acts involving individual criminal responsibility.²⁶⁵³

2884. The US Air Force Commander's Handbook provides that "a prisoner of war must be tried by the same courts as try members of the armed forces of the detaining power, and must be given the same procedural rights as members

²⁶⁴⁰ UK, *Military Manual* (1958), § 131(1)(d).

²⁶⁴¹ UK, *Military Manual* (1958), § 282.

²⁶⁴² UK, *Military Manual* (1958), § 570.

²⁶⁴³ UK, *Military Manual* (1958), § 625(b)-(c).

²⁶⁴⁴ UK, *Military Manual* (1958), § 626(1).

²⁶⁴⁵ UK, *LOAC Manual* (1981), Section 9, p. 35, § 10.

²⁶⁴⁶ UK, *LOAC Manual* (1981), Section 12, p. 42, § 2(a)(4).

²⁶⁴⁷ US, *Field Manual* (1956), §§ 11, 178 and 184.

²⁶⁴⁸ US, *Field Manual* (1956), §§ 248, 436 and § 441.

²⁶⁴⁹ US, *Field Manual* (1956), § 502. ²⁶⁵⁰ US, *Field Manual* (1956), § 504(1).

²⁶⁵¹ US, *Air Force Pamphlet* (1976), § 13-8. ²⁶⁵² US, *Air Force Pamphlet* (1976), § 14-2.

²⁶⁵³ US, *Air Force Pamphlet* (1976), § 15-3(c)(10)-(11).

of that state's armed forces".²⁶⁵⁴ It adds that "even terrorists, spies, and illegal partisans have the right to be tried and cannot be summarily executed".²⁶⁵⁵ With respect to war crimes trials, the manual states that "these trials must meet certain minimum standards of fairness and due process, now set out in detail in the 1949 Geneva Conventions" and that the "failure to accord captured personnel the right to a fair trial is itself a serious violation of the law of armed conflict".²⁶⁵⁶

2885. The US Soldier's Manual prohibits sentencing protected persons without a proper trial.²⁶⁵⁷

2886. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . killing, without proper legal trial, spies or other captured persons who have committed hostile acts".²⁶⁵⁸

2887. The US Naval Handbook provides that "the following acts are representative war crimes . . . denial of a fair trial" for prisoners of war and civilian inhabitants of an occupied territory.²⁶⁵⁹ It adds that the "failure to provide a fair trial for the alleged commission of a war crime is itself a war crime".²⁶⁶⁰ The manual specifies that "individuals captured as spies or as illegal combatants . . . may not be summarily executed" and that they "have the right to be fairly tried for violations of the law of armed conflict".²⁶⁶¹

National Legislation

2888. Argentina's Draft Code of Military Justice punishes any soldier who deprives a prisoner of war or a civilian of "his or her right to a regular and impartial trial".²⁶⁶²

2889. Under Armenia's Penal Code, "depriving a protected person or a prisoner of war of the right to a fair and regular trial", during an armed conflict, constitutes a crime against the peace and security of mankind.²⁶⁶³

2890. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence".²⁶⁶⁴

2891. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including

²⁶⁵⁴ US, *Air Force Commander's Handbook* (1980), § 4-2(c).

²⁶⁵⁵ US, *Air Force Commander's Handbook* (1980), § 4-2(e).

²⁶⁵⁶ US, *Air Force Commander's Handbook* (1980), §§ 8-3(a) and (b).

²⁶⁵⁷ US, *Soldier's Manual* (1984), pp. 5 and 20.

²⁶⁵⁸ US, *Instructor's Guide* (1985), pp. 13 and 14.

²⁶⁵⁹ US, *Naval Handbook* (1995), § 6.2.5(1) and (2).

²⁶⁶⁰ US, *Naval Handbook* (1995), § 6.2.5(2) and (3).

²⁶⁶¹ US, *Naval Handbook* (1995), § 11.7.

²⁶⁶² Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(3) in the *Code of Military Justice as amended* (1951).

²⁶⁶³ Armenia, *Penal Code* (2003), Article 390.2(3).

²⁶⁶⁴ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

“denying a fair trial” in international armed conflicts and “sentencing or execution without due process” in non-international armed conflicts.²⁶⁶⁵

2892. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War prohibits, with regard to civilian persons and prisoners of war, the “passing of sentences and carrying out of executions without a previous judgement pronounced by a regularly constituted court affording all the judicial guarantees provided by international law”.²⁶⁶⁶

2893. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.²⁶⁶⁷

2894. The Geneva Conventions Act of Barbados provides that “a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados”.²⁶⁶⁸

2895. The Criminal Code of Belarus provides that depriving persons who have laid down their arms or are defenceless, the wounded, sick and shipwrecked, sanitary and religious personnel, prisoners of war, civilian population in an occupied territory or in the conflict zone, or other persons enjoying international protection of their right to be judged by a regular and impartial tribunal is a violation of the laws and customs of war.²⁶⁶⁹

2896. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that “denying a prisoner of war [or] a protected civilian person the right to a fair and impartial trial” constitutes a crime under international law.²⁶⁷⁰

2897. The Criminal Code of the Federation of Bosnia and Herzegovina provides that “depriving civilians and prisoners of war of their right to a fair and impartial trial” is a war crime.²⁶⁷¹ The Criminal Code of the Republika Srpska contains the same provision.²⁶⁷²

2898. Botswana’s Geneva Conventions Act punishes “any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions”.²⁶⁷³

²⁶⁶⁵ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.31 and 268.76.

²⁶⁶⁶ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 17 and 21(4).

²⁶⁶⁷ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁶⁶⁸ Barbados, *Geneva Conventions Act* (1980), Section 3(2).

²⁶⁶⁹ Belarus, *Criminal Code* (1999), Article 135(1).

²⁶⁷⁰ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(5).

²⁶⁷¹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154(1) and 156.

²⁶⁷² Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1) and 435.

²⁶⁷³ Botswana, *Geneva Conventions Act* (1970), Section 3(1).

2899. Bulgaria's Penal Code as amended provides that depriving a captive or a civilian person of his or her "right to be tried by a regular court and under a regular procedure" is a war crime.²⁶⁷⁴

2900. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that "wilfully depriving a prisoner of war or any other protected persons of their right to a regular and impartial trial" is a war crime in both international and non-international armed conflicts.²⁶⁷⁵

2901. Cambodia's Law on the Khmer Rouge Trial provides that "the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979".²⁶⁷⁶

2902. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions or of AP I] is guilty of an indictable offence".²⁶⁷⁷

2903. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.²⁶⁷⁸

2904. Colombia's Penal Code provides for the punishment of anyone who during an armed conflict "orders or deprives protected persons of their right to a fair and regular trial".²⁶⁷⁹

2905. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.²⁶⁸⁰

2906. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I]".²⁶⁸¹

2907. Croatia's Criminal Code provides that denying the civilian population and prisoners of war their "rights to a fair and impartial trial" is a war crime.²⁶⁸²

2908. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".²⁶⁸³

²⁶⁷⁴ Bulgaria, *Penal Code as amended* (1968), Articles 411(c) and 412(e).

²⁶⁷⁵ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(f) and (C)(d).

²⁶⁷⁶ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

²⁶⁷⁷ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

²⁶⁷⁸ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²⁶⁷⁹ Colombia, *Penal Code* (2000), Article 149.

²⁶⁸⁰ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

²⁶⁸¹ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

²⁶⁸² Croatia, *Criminal Code* (1997), Articles 158 and 160.

²⁶⁸³ Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

2909. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".²⁶⁸⁴

2910. Under the Draft Amendments to the Penal Code of El Salvador, anyone who, "in the context of an international or internal armed conflict, deprives a protected person of the right to a regular and impartial trial" is punishable.²⁶⁸⁵

2911. Estonia's Penal Code provides, with respect to civilians, prisoners of war and interned civilians, that the "deprivation of the right to a fair trial" is a war crime.²⁶⁸⁶

2912. Ethiopia's Penal Code provides that denying civilians, wounded and sick, prisoners of war or internees of their "right to a fair trial" constitutes a crime.²⁶⁸⁷

2913. Under Georgia's Criminal Code, it is a crime in both international and non-international armed conflicts to "wilfully deprive a prisoner of war or any other protected person of their right to a fair trial".²⁶⁸⁸

2914. Germany's Law Introducing the International Crimes Code provides a punishment for anyone who, in connection with an international or non-international armed conflict:

imposes on or enforces against a person protected under international humanitarian law a severe punishment, particularly the death penalty or imprisonment, without such person having been convicted by an impartial and regularly constituted court affording the judicial guarantees required under international law.²⁶⁸⁹

2915. Under Hungary's Criminal Code as amended, the person who deprives "the civilian population and prisoners of war of their right to be tried in a regular and impartial procedure" is guilty, upon conviction, of a war crime.²⁶⁹⁰

2916. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".²⁶⁹¹

2917. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions and of AP I are punishable offences.²⁶⁹² In addition, any "minor breach" of the Geneva Conventions, including violations of common Article 3, Articles 49 GC I, 50 GC II, 102–108 GC III and 5 GC IV,

²⁶⁸⁴ Cyprus, *API Act* (1979), Section 4(1).

²⁶⁸⁵ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Incumplimiento del debido proceso".

²⁶⁸⁶ Estonia, *Penal Code* (2001), §§ 97 and 99.

²⁶⁸⁷ Ethiopia, *Penal Code* (1957), Article 292.

²⁶⁸⁸ Georgia, *Criminal Code* (1999), Article 411(2)(e).

²⁶⁸⁹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(7).

²⁶⁹⁰ Hungary, *Criminal Code as amended* (1978), Article 158(3)(b).

²⁶⁹¹ India, *Geneva Conventions Act* (1960), Section 3(1).

²⁶⁹² Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

and of AP I, including violations of Articles 71(1), 75(4) and 78(2) AP I, are also punishable offences.²⁶⁹³

2918. Italy's Wartime Military Penal Code punishes any "commander who, with the exception of the cases of imminent danger for the security of the armed force or for the military defence of the State, orders that, without prior regular judgement, a person caught in the act of spying shall be immediately executed".²⁶⁹⁴

2919. Jordan's Draft Military Criminal Code provides that "depriving protected persons of their right to a fair trial" is a war crime.²⁶⁹⁵

2920. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".²⁶⁹⁶

2921. Kenya's Constitution provides that "if a person is charged with a criminal offence, the case shall be afforded a fair hearing".²⁶⁹⁷

2922. Under the Draft Amendments to the Code of Military Justice of Lebanon, "depriving protected persons of their right to a fair trial" constitutes a war crime.²⁶⁹⁸

2923. Under Lithuania's Criminal Code as amended, the imposition of "criminal penalties without a previous judgement by an independent court or guarantees of defence during the trial" constitutes a war crime.²⁶⁹⁹

2924. Under Luxembourg's Law on the Punishment of Grave Breaches, depriving a person protected by GC III and GC IV of the right to a fair and regular trial is a grave breach of these instruments.²⁷⁰⁰

2925. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".²⁷⁰¹

2926. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".²⁷⁰²

2927. Mali's Penal Code provides that "wilfully depriving a prisoner of war or any other protected person of his/her right to a fair and impartial trial" is a war crime.²⁷⁰³

²⁶⁹³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁶⁹⁴ Italy, *Wartime Military Penal Code* (1941), Article 183.

²⁶⁹⁵ Jordan, *Draft Military Criminal Code* (2000), Article 41(A)(19).

²⁶⁹⁶ Kenya, *Geneva Conventions Act* (1968), Section 3(1).

²⁶⁹⁷ Kenya, *Constitution* (1992), Article 77(1).

²⁶⁹⁸ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(19).

²⁶⁹⁹ Lithuania, *Criminal Code as amended* (1961), Article 336.

²⁷⁰⁰ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1(5).

²⁷⁰¹ Malawi, *Geneva Conventions Act* (1967), Section 4(1).

²⁷⁰² Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

²⁷⁰³ Mali, *Penal Code* (2001), Article 31(f).

2928. The Geneva Conventions Act of Mauritius punishes “any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions”.²⁷⁰⁴

2929. Moldova’s Penal Code punishes the “passing of sentences without a trial by a regularly constituted court not affording all the judicial guarantees provided by law”.²⁷⁰⁵

2930. Under the International Crimes Act of the Netherlands, it is a crime to commit in an international armed conflict one of the following: grave breaches of the 1949 Geneva Conventions, including “intentionally depriving a prisoner of war or other protected person of the right to a fair and regular trial”; and “intentionally . . . depriving a person protected by the Geneva Conventions or Article 85, paragraph 2, of Additional Protocol (I) of the right to a fair and regular trial”.²⁷⁰⁶ Furthermore, it is also a crime to commit, “in the case of an armed conflict not of an international character, a violation of Article 3 common to all the Geneva Conventions”, including “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognised as indispensable”.²⁷⁰⁷

2931. New Zealand’s Geneva Conventions Act as amended provides that “any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence”.²⁷⁰⁸

2932. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(a)(vi) and (c)(iv) of the 1998 ICC Statute.²⁷⁰⁹

2933. Nicaragua’s Military Penal Code provides for the punishment of denying prisoners of war and civilians their right to a regular and impartial trial.²⁷¹⁰

2934. Nicaragua’s Draft Penal Code punishes anyone who “during an international or internal armed conflict, deprives a protected person of the right to a regular and impartial trial”.²⁷¹¹

2935. According to Niger’s Penal Code as amended, depriving a prisoner of war, a civilian person protected by GC IV or a person protected by the Additional Protocols of 1977 of “the right to a regular and impartial trial” constitutes a war crime.²⁷¹²

2936. Nigeria’s Geneva Conventions Act punishes any person who “whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets

²⁷⁰⁴ Mauritius, *Geneva Conventions Act* (1970), Section 3(1).

²⁷⁰⁵ Moldova, *Penal Code* (2002), Article 137(2)(d).

²⁷⁰⁶ Netherlands, *International Crimes Act* (2003), Articles 5(1)(f) and 5(2)(d)(v).

²⁷⁰⁷ Netherlands, *International Crimes Act* (2003), Article 6(1)(d).

²⁷⁰⁸ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

²⁷⁰⁹ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

²⁷¹⁰ Nicaragua, *Military Penal Code* (1996), Articles 55(5) and 58.

²⁷¹¹ Nicaragua, *Draft Penal Code* (1999), Article 462.

²⁷¹² Niger, *Penal Code as amended* (1961), Article 208.3(5).

or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".²⁷¹³

2937. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".²⁷¹⁴

2938. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".²⁷¹⁵

2939. Poland's Penal Code provides for the punishment of "any person who, in violation of international law, deprives persons *hors de combat*, protected persons and persons enjoying international protection of their right to a fair and impartial trial".²⁷¹⁶

2940. Under Romania's Penal Code, the "imposition of sanctions on wounded, sick and shipwrecked, members of civil medical services, Red Cross or similar organisations, prisoners of war, or all persons in the hands of the adverse party without a previous judgment by a regular court affording all judicial guarantees" constitutes a crime.²⁷¹⁷

2941. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] Conventions".²⁷¹⁸

2942. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".²⁷¹⁹

2943. Slovenia's Penal Code provides that "depriving civilians, the wounded, sick and shipwrecked, prisoners of war and medical and religious personnel of their right to a fair and regular trial" is a war crime.²⁷²⁰

2944. Spain's Military Criminal Code provides for the punishment of military personnel who deprive prisoners of war and civilians of their right to a regular and impartial trial.²⁷²¹

2945. Under Spain's Penal Code, depriving a prisoner of war or a civilian person of his/her right to a regular and impartial trial is an offence.²⁷²²

²⁷¹³ Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

²⁷¹⁴ Norway, *Military Penal Code as amended* (1902), § 108.

²⁷¹⁵ Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

²⁷¹⁶ Poland, *Penal Code* (1997), Article 124. ²⁷¹⁷ Romania, *Penal Code* (1968), Article 358(e).

²⁷¹⁸ Seychelles, *Geneva Conventions Act* (1985), Section 3(1).

²⁷¹⁹ Singapore, *Geneva Conventions Act* (1973), Section 3(1).

²⁷²⁰ Slovenia, *Penal Code* (1994), Articles 374(1), 375 and 376.

²⁷²¹ Spain, *Military Criminal Code* (1985), Article 77(5)-(6).

²⁷²² Spain, *Penal Code* (1995), Article 611(3).

2946. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, (a) a grave breach of any of the [Geneva] Conventions; or (b) a breach of common Article 3 of the Conventions, is guilty of an indictable offence".²⁷²³

2947. Tajikistan's Criminal Code provides for the punishment of "wilfully depriving a prisoner of war or any other protected person of the rights of a fair and regular trial".²⁷²⁴

2948. Thailand's Prisoners of War Act punishes whoever deprives a prisoner of war of "an impartial trial or a trial according to the rules set up in the Convention" in both international and non-international armed conflicts.²⁷²⁵

2949. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vi) and (c)(iv) of the 1998 ICC Statute.²⁷²⁶

2950. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".²⁷²⁷

2951. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions or of [AP I]".²⁷²⁸

2952. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(a)(vi) and (c)(iv) of the 1998 ICC Statute.²⁷²⁹

2953. Under the US War Crimes Act as amended, violations of common Article 3 and grave breaches of the 1949 Geneva Conventions are war crimes.²⁷³⁰

2954. Vanuatu's Geneva Conventions Act provides that "any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu".²⁷³¹

2955. The Penal Code as amended of the SFRY (FRY) states that "depriving civilians and prisoners of war of their right to a regular and fair trial" is a war crime.²⁷³²

²⁷²³ Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1).

²⁷²⁴ Tajikistan, *Criminal Code* (1998), Article 403(2)(e).

²⁷²⁵ Thailand, *Prisoners of War Act* (1955), Sections 16 and 18.

²⁷²⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²⁷²⁷ Uganda, *Geneva Conventions Act* (1964), Section 1(1).

²⁷²⁸ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

²⁷²⁹ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²⁷³⁰ US, *War Crimes Act as amended* (1996), Section 2441(c).

²⁷³¹ Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).

²⁷³² SFRY (FRY), *Penal Code as amended* (1976), Articles 142(1) and 144.

2956. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions or [AP I]".²⁷³³

National Case-law

2957. In the *Ohashi case* before the Australian Military Court at Rabaul in 1946, the Judge Advocate stated that the notion of "fair trial" supposed the following:

- consideration by a tribunal comprised of one or more persons who will endeavour to judge the accused fairly upon the evidence using their own common knowledge of ordinary affairs and if they are soldiers their military knowledge, honestly endeavouring to discard any preconceived belief in the guilt of the accused or any prejudice against him/her;
- the accused should know the exact nature of the charge against him/her;
- the accused should know what is alleged against him/her by way of evidence;
- he should have full opportunity to give his own version of the case and produce evidence to support it;
- the court should satisfy itself that the accused is guilty before awarding punishment. It would be sufficient if the court believed it to be more likely than not that the accused was guilty;
- the punishment should not be one which outrages the sentiments of humanity.²⁷³⁴

2958. In its judgement in the *Videla case* in 1994, which concerned the abduction, torture and murder of Lumi Videla in 1974, Chile's Appeal Court of Santiago held that the Geneva Conventions "protect the human rights of the contestants in the event of external war or a conflict between organized armed forces within the State, which latter situation effectively prevailed in the country in 1974". The Court stated that common Article 3 of the 1949 Geneva Conventions obliged parties to non-international armed conflicts "to extend humanitarian treatment to persons taking no active part in the hostilities or who have placed themselves *hors de combat* for various reasons, and prohibits at any time and in any place... the passing of summary sentences". The Court found that the acts charged constituted grave breaches under Article 147 GC IV and upheld the prison order issued against the accused.²⁷³⁵

2959. In its judgement in the *Almelo case* in 1945, the UK Military Court at Almelo held that "killing captured members of the opposing forces or civilian inhabitants of occupied territories suspected of espionage or treason unless their guilt had been established by a court of law" amounts to a war crime. On

²⁷³³ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

²⁷³⁴ Australia, Military Court at Rabaul, *Ohashi case*, Statement by the Judge Advocate, 23 March 1946.

²⁷³⁵ Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994, §§ 6–20.

this basis, it found the accused guilty of the killing without trial of a British soldier who was alleged to be a spy.²⁷³⁶

2960. In the *Dostler case* before the US Military Commission at Rome in 1945, the accused, the commander of a German army corps, was found guilty of having ordered the shooting of 15 American prisoners of war in violation of the 1907 HR and of long-established laws and customs of war. The Defence submitted that the US soldiers had worn no distinctive emblem and that their mission had been undertaken for the purpose of sabotage. The Defence considered, therefore, that they were not entitled to the privileges of a lawful belligerent, though it was admitted that they were entitled to a lawful trial even if they were treated as spies.²⁷³⁷

2961. In the *Sawada case* before the US Military Commission at Shanghai in 1946, the accused was charged with “knowingly, unlawfully and wilfully” denying the status of prisoner of war to eight members of the US forces who were “tried and sentenced by a Japanese Military Tribunal in violation of the laws of war”. The Military Commission considered that “false and fraudulent charges” and “false and fraudulent evidence” contributed to the criminal character of the trial.²⁷³⁸

2962. In the *Isayama case* in 1946, the US Military Commission at Shanghai tried Lieutenant-General Harukei Isayama and other members of the Japanese Military Tribunal on charges that members of the Japanese Military Tribunal did “permit, authorize and direct an illegal, unfair, unwarranted and false trial [of prisoners of war] . . . upon false and fraudulent evidence and without affording said prisoners of war a fair hearing”. The Commission found that the accused had falsified the records of interrogation of 14 US airmen, that the US airmen were not afforded the opportunity to obtain evidence or to call witnesses on their own behalf, that they were not permitted to be represented by legal counsel and that they were executed in violation of international law. The Commission found Lieutenant-General Isayama and the seven other accused guilty of all counts alleged.²⁷³⁹

2963. In its judgement in the *Rhode case* in 1947, the UK Military Court at Wuppertal found that “executions in the absence of a fair trial” amounted to war crimes.²⁷⁴⁰

2964. In its judgement in the *Altstötter (The Justice Trial) case* in 1947, the US Military Tribunal at Nuremberg held that:

The trials of the accused . . . did not approach a semblance of fair trial or justice. The accused . . . were arrested and secretly transported to Germany and other countries for trial. They were held incommunicado. In many instances they were denied

²⁷³⁶ UK, Military Court at Almelo, *Almelo case*, Judgement, 24–26 November 1945.

²⁷³⁷ US, Military Commission at Rome, *Dostler case*, Judgement, 12 October 1945.

²⁷³⁸ US, Military Commission at Shanghai, *Sawada case*, Judgement, 15 April 1946.

²⁷³⁹ US, Military Commission at Shanghai, *Isayama case*, Judgement, 25 July 1946.

²⁷⁴⁰ UK, Military Court at Wuppertal, *Rhode case*, Judgement, 1 June 1946.

the right to introduce evidence, to be confronted by witnesses against them, or to present witnesses on their own behalf. They were tried secretly and denied the right of counsel of their own choice, and occasionally denied the aid of any counsel. No indictment was served in many instances and the accused learned only a few moments before the trial of the nature of the alleged crime for which he was to be tried. The entire proceedings from the beginning to end were secret and no public record was allowed to be made of them.

The Tribunal concluded that the trial was "unfair".²⁷⁴¹

Other National Practice

2965. It is reported that, during the Algerian war of independence, the ALN stated that prisoners were only executed after having been tried and found guilty of violating the laws and customs of war.²⁷⁴²

2966. At the CDDH, Belgium stated that the guarantees contained in Article 6 AP II were based on customary international law and human rights law.²⁷⁴³

2967. During the Chinese civil war, the Chinese Communist Party issued instructions concerning the treatment of captured combatants which provided that "those must-be-killed notorious criminals shall be executed by shooting after being tried and convicted by court, and shall not be beaten to death or by other illegal manners which would make us lose the sympathy of the society". According to Deng Xiaoping, POWs considered "notorious criminals" were executed, but only following trial and conviction by a court.²⁷⁴⁴

2968. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that "every person has the right to a fair trial by a regularly constituted tribunal respecting the fundamental judicial guarantees".²⁷⁴⁵

2969. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.²⁷⁴⁶

2970. The Report on the Practice of Syria asserts that Syria considers Article 85 AP I to be part of customary international law.²⁷⁴⁷

2971. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that . . . no sentence be passed and penalty

²⁷⁴¹ US, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case*, Judgement, 4 December 1947.

²⁷⁴² Le problème des prisonniers de guerre, *El Moudjahid*, Vol. 1, p. 474.

²⁷⁴³ Belgium, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.33, 19 March 1975, p. 323, § 41.

²⁷⁴⁴ China, Instruction on Implementing the Works of Land Reform and Consolidation of the Party by Deng Xiaoping, 6 June 1948, *Selected Works of Deng Xiaoping*, Vol. 1, The People's Press, Beijing, p. 122.

²⁷⁴⁵ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 64.

²⁷⁴⁶ Report on the Practice of Jordan, 1997, Chapter 5.

²⁷⁴⁷ Report on the Practice of Syria, 1997, Chapter 5.6.

executed except pursuant to conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure". He added that "the basic core of Protocol II is, of course, reflected in common article 3 of the 1949 [Geneva] Conventions and therefore is, and should be a part of generally accepted customary law. This specifically includes its prohibitions on . . . punishment without due process."²⁷⁴⁸

2972. In 1992, in reports submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US described acts of "summary executions" perpetrated by the parties to the conflict.²⁷⁴⁹

2973. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular summary executions of many US military and civilian prisoners.²⁷⁵⁰

2974. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".²⁷⁵¹

2975. In 1990, an ICRC report on the army's activities in one region of a State concluded that the army behaved in an alarming way towards its detainees, by engaging in summary executions.²⁷⁵²

III. Practice of International Organisations and Conferences

United Nations

2976. In a resolution adopted in 1995 on violations of international humanitarian law and of human rights in the territory of the former Yugoslavia, the UN Security Council condemned:

in the strongest possible terms the violations of international humanitarian law and of human rights by Bosnian Serb and paramilitary forces in the areas of Srebrenica, žepa, Banja Luka and Sanski Most as described in the report of the Secretary-General of 27 November 1995 and showing a consistent pattern of summary executions.²⁷⁵³

²⁷⁴⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 427-428 and 430-431.

²⁷⁴⁹ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, p. 4.

²⁷⁵⁰ US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON.RES. 357, 106th Congress, 2nd Session, 19 June 2000.

²⁷⁵¹ Report on US Practice, 1997, Chapter 5.3. ²⁷⁵² ICRC archive document.

²⁷⁵³ UN Security Council, Res. 1034, 21 December 1995, preamble and § 2.

2977. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly called upon the government of the FRY (Serbia and Montenegro) “to respect all human rights and fundamental freedoms fully... especially in regard to respect for... free and fair trials”.²⁷⁵⁴ It also strongly condemned “the overwhelming number of human rights violations... including summary executions”.²⁷⁵⁵

2978. In a resolution adopted in 2000 on the situation of human rights in Sudan, the UN General Assembly called upon the government of Sudan “to ensure that all accused persons are held in ordinary custody and receive prompt, just and fair trials under internationally recognized standards”.²⁷⁵⁶

2979. In numerous resolutions, the UN Commission on Human Rights has denounced summary executions and/or extra-judicial killings committed during the armed conflicts in Afghanistan,²⁷⁵⁷ El Salvador,²⁷⁵⁸ Georgia,²⁷⁵⁹ Guatemala,²⁷⁶⁰ Sudan,²⁷⁶¹ former Yugoslavia²⁷⁶² and Zaire.²⁷⁶³

2980. In resolutions adopted in 1991 and 1992 in the context of the Iraqi occupation of Kuwait, the UN Commission on Human Rights strongly condemned Iraq for not treating prisoners of war and detained civilians according to recognised IHL principles and insisted that it abstain from acts of violence against them, including summary executions.²⁷⁶⁴

2981. In a resolution adopted in 1996, the UN Commission on Human Rights called upon the government of Croatia “to pursue vigorously prosecutions against those suspected of past violations of international humanitarian law and human rights, while ensuring that the rights to a fair trial... are afforded to all persons suspected of such crimes”.²⁷⁶⁵

2982. In a resolution adopted in 1996 on the situation of human rights in the Sudan, the UN Commission on Human Rights called upon all parties to hostilities to protect all civilians from violations of human rights and IHL, including summary executions.²⁷⁶⁶

²⁷⁵⁴ UN General Assembly, Res. 53/164, 9 December 1998, § 5.

²⁷⁵⁵ UN General Assembly, Res. 53/164, 9 December 1998, § 8.

²⁷⁵⁶ UN General Assembly, Res. 55/116, 4 December 2000, § 4(d).

²⁷⁵⁷ UN Commission on Human Rights, Res. 1986/40, 12 March 1986, § 6; Res. 1987/58, 11 March 1987, § 6.

²⁷⁵⁸ UN Commission on Human Rights, Res. 1990/77, 7 March 1990, § 2; Res. 1991/75, 6 March 1991, § 5.

²⁷⁵⁹ UN Commission on Human Rights, Res. 1994/59, 4 March 1994, § 1.

²⁷⁶⁰ UN Commission on Human Rights, Res. 1985/36, 13 March 1985, § 2; Res. 1991/51, 6 March 1991, §§ 5 and 7.

²⁷⁶¹ UN Commission on Human Rights, Res. 1993/60, 10 March 1993, § 1; Res. 1994/79, 9 March 1994, § 2; Res. 1996/73, 23 April 1996, § 2.

²⁷⁶² UN Commission on Human Rights, Res. 1993/7, 23 February 1993, § 10.

²⁷⁶³ UN Commission on Human Rights, Res. 1997/58, 15 April 1997, § 2.

²⁷⁶⁴ UN Commission on Human Rights, Res. 1991/67, 6 March 1991, § 5; Res. 1992/60, 3 March 1992, § 3.

²⁷⁶⁵ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 22.

²⁷⁶⁶ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 15.

2983. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II “have long been considered customary international law”.²⁷⁶⁷

2984. In 1991, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights stated that he had received reports alleging that armed opposition groups had carried out mass executions of soldiers and civilians after the surrender of a garrison in 1990. Other instances of summary executions of militia members and governmental troops had also been reported. The Special Rapporteur made reference to common Article 3 of the 1949 Geneva Conventions and GC III.²⁷⁶⁸

2985. In 1996, in a report on the situation of human rights in the Sudan, the Special Rapporteur of the UN Commission on Human Rights stated that “those captured have been and are . . . summarily executed”.²⁷⁶⁹

2986. In 1991, in the context of the conflict in El Salvador, ONUSAL examined the case of the summary execution of a member of the rural police a few days after his capture by the FMLN. The local FMLN Command argued that it had to carry out such an extreme measure at the request of the community that feared his release. ONUSAL considered the case to be a violation of the guarantees offered by AP II, in particular Articles 4(2)(a), 5 and 6.²⁷⁷⁰

2987. In its report in 1993, the UN Commission on the Truth for El Salvador stated that:

When punishing persons accused of crimes, it is necessary to observe the basic elements of due process. International humanitarian law does not in any way exempt the parties to a conflict from that obligation, and international human rights law does not exempt the party which has effective control of a territory from that obligation with respect to persons within its jurisdiction. On the contrary, those two sources of law expressly prohibit the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted independent and impartial tribunal attaching all the judicial guarantees generally recognized as indispensable . . . In none of the cases mentioned above is there any evidence that a proper trial was held prior to the execution.²⁷⁷¹

Other International Organisations

2988. With respect to the drafting of the 1950 ECHR, the Committee of Experts of the Council of Europe stated that the right to recognition before the law could

²⁷⁶⁷ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

²⁷⁶⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Report, UN Doc. E/CN.4/1991/31, 28 January 1991, §§ 61 and 65–66.

²⁷⁶⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Report, UN Doc. E/CN.4/1996/62, 20 February 1996, § 9.

²⁷⁷⁰ ONUSAL, Director of the Human Rights Division, Report, UN Doc. A/46/658-S/23222, 15 November 1991, Annex, §§ 62–63.

²⁷⁷¹ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 152–153.

be deduced from the other Articles and therefore did not need to be expressly indicated.²⁷⁷²

2989. In 2000, the Rapporteur of the Council of Europe reported an account by a Russian soldier of the summary execution of captured combatants “because they were snipers”. In the report’s recommendations, the Rapporteur asked the Russian federal authorities to treat captured fighters in accordance with IHL and in particular to stop summary executions of captured snipers.²⁷⁷³

International Conferences

2990. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the treatment of prisoners of war in which it called upon all authorities involved in armed conflicts “to ensure that every prisoner of war is given the treatment and full measure of protection prescribed by the Geneva Convention of 1949 on the protection of prisoners of war, including the judicial safeguards afforded to every prisoner of war charged with any offence”.²⁷⁷⁴

2991. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993, expressed dismay and condemnation that “gross and systematic violations and situations that constitute serious obstacles to the full enjoyment of all human rights continue to occur in all parts of the world, [including]... summary and arbitrary executions”.²⁷⁷⁵

2992. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that “strict orders are given to prevent all serious violations of international humanitarian law, including... summary executions... and threats to carry out such actions”.²⁷⁷⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

2993. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what the Court in 1949 in the *Corfu Channel case (Merits)* had called “elementary considerations of humanity”.²⁷⁷⁷

2994. In the *Karadžić and Mladić case* before the ICTY in 1996, the accused were charged with genocide, crimes against humanity and violations of the

²⁷⁷² Council of Europe, Committee of Experts, CE Doc. H(70)7, § 41.f.

²⁷⁷³ Council of Europe, Parliamentary Assembly, Opinion on Russia’s request for membership in the light of the situation in Chechnya, Doc. 7231, 2 February 1995, § 75.

²⁷⁷⁴ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXIV.

²⁷⁷⁵ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(30).

²⁷⁷⁶ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

²⁷⁷⁷ ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

laws and customs of war for the summary executions of Bosnian Muslims who were *hors de combat* because of injury, surrender or capture.²⁷⁷⁸ In its review of the indictments, the ICTY Trial Chamber confirmed all counts.²⁷⁷⁹

2995. In its decision on the defence motion for interlocutory appeal on jurisdiction in the *Tadić case* in 1995, the ICTY Appeals Chamber held that Article 3 of the 1993 ICTY Statute also covered violations of common Article 3 of the 1949 Geneva Conventions.²⁷⁸⁰

2996. In the *Erdemović case* in 1998, the accused pleaded guilty to the charge of a violation of the laws and customs of war for his participation in the summary executions of Bosnian Muslims who, *inter alia*, had surrendered following the fall of Srebrenica. He was sentenced to five years' imprisonment.²⁷⁸¹

2997. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

3. The Committee would find it useful if, in their future reports, States parties could provide more detailed information on the steps taken to ensure that equality before the courts, including equal access to courts, fair and public hearings and competence, impartiality and independence of the judiciary are established by law and guaranteed in practice . . .
4. The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. The Committee has noted a serious lack of information in this regard in the reports of some States parties whose judicial institutions include such courts for the trying of civilians. In some countries such military and special courts do not afford the strict guarantees of the proper administration of justice in accordance with the requirements of article 14 which are essential for the effective protection of human rights. If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.²⁷⁸²

²⁷⁷⁸ ICTY, *Karadžić and Mladić case*, Second Indictment, 16 November 1995, §§ 6, 19–20, 21–23 and 51.

²⁷⁷⁹ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 21–41 and 86–95.

²⁷⁸⁰ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, p. 51, § 89 and p. 73, §§ 134 and 136.

²⁷⁸¹ ICTY, *Erdemović case*, Sentencing Judgement *bis*, 5 March 1998, Part X (Disposition). (The accused originally pleaded guilty to the charge of a crime against humanity. The Appeals Chamber held that the plea was not informed and ordered a new trial.)

²⁷⁸² HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, §§ 3–4.

2998. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC stated that:

11. ... States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance ... by deviating from fundamental principles of fair trial.

...

16. Safeguards related to derogation, as embodied in article 4 of the Covenant, are based on the principles of legality and the rule of law inherent in the Covenant as a whole. As certain elements of the right to a fair trial are explicitly guaranteed under international humanitarian law during armed conflict, the Committee finds no justification for derogation from these guarantees during other emergency situations. The Committee is of the opinion that the principles of legality and the rule of law require that fundamental requirements of fair trial must be respected during a state of emergency. Only a court of law may try and convict a person for a criminal offence.²⁷⁸³

2999. In its views in *Bahamonde v. Equatorial Guinea* in 1993, the HRC stated that one of the guarantees contained in Article 14(1) of the 1966 ICCPR was the general right of the accused to be granted access to a court.²⁷⁸⁴

3000. In *Äärelä and Näkkäljärvi v. Finland* in 2001, the HRC stated that:

It is the fundamental duty of the courts to ensure equality between the parties, including the ability to contest all the argument and evidence adduced by the other party. ... These circumstances disclose a failure of the Court of Appeal to provide full opportunity to each party to challenge the submissions of the other, thereby violating the principles of equality before the courts and of fair trial contained in article 14, paragraph 1, of the Covenant.²⁷⁸⁵

3001. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: "All persons shall have the right to have their cause heard and shall be equal before the courts and tribunals in the determination of their rights and obligations."²⁷⁸⁶

3002. In its decision in *Union Inter-Africaine des Droits de l'Homme et al. v Angola* in 1997, concerning deportations of "illegal immigrants", the ACiHPR stated that "it is unacceptable to deport individuals without giving them the possibility to plead their case before the competent national courts as this is contrary to the spirit and letter of the [1981 ACHPR] and international law".²⁷⁸⁷

²⁷⁸³ HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, §§ 11 and 16.

²⁷⁸⁴ HRC, *Bahamonde v. Equatorial Guinea*, Views, 20 October 1993, § 9.4.

²⁷⁸⁵ HRC, *Äärelä and Näkkäljärvi v. Finland*, Views, 24 October 2001, § 7.4, see also *Wolf v. Panama*, Views, 26 March 1992, § 6.6 (equality of arms requires an adversarial procedure).

²⁷⁸⁶ ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(a).

²⁷⁸⁷ ACiHPR, *Union Inter-Africaine des Droits de l'Homme and Others v. Angola*, Decision, 11 November 1997, § 20.

3003. In its decision in *Media Rights Agenda v. Nigeria (224/98)* in 2000, the ACiHPR, referring to Article 7(1)(d) of the 1981 ACHPR, stated that:

60. ... The Commission finds the selection of serving military officers, with little or no knowledge of law, as members of the Tribunal in contravention of Principle 10 of the Basic Principles on the Independence of Judges. The said Principle states: "Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law".
61. In the same vein, the Commission considers the arraignment, trial and conviction of Malaolu [i.e. the editor of an independent Nigerian newspaper], a civilian, by a Special Military Tribunal, presided over by serving military officers, who are still subject to military commands, without more, prejudicial to the basic principles of fair hearing guaranteed by Article 7 of the [1981 ACHPR].
62. ... [Military tribunals] should not, in any circumstances whatsoever, have jurisdiction over civilians. Similarly, Special Tribunals should not try offences that fall within the jurisdiction of regular courts.²⁷⁸⁸

3004. In its decision in *Civil Liberties Organisation v. Nigeria (129/94)* in 1995, concerning the revocation of the jurisdiction of the Court to review the legality of decrees, the ACiHPR stated that:

13. The ousting of jurisdiction of the courts... constitutes an attack of incalculable proportions on Article 7 [1981 ACHPR]... An attack of this sort is especially invidious, because, while it is a violation of human rights in itself, it permits other violations of rights to go unredressed.
14. Article 26 [1981 ACHPR]... clearly envisions the protection of the courts which have traditionally been the bastion of protection of the individual's rights against the abuses of State power.²⁷⁸⁹

3005. In its decision in *Civil Liberties Organisation v. Nigeria (151/96)* in 1999, relating to the setting up of special military tribunals by decree to try persons accused of plotting to overthrow the government and thereby excluding ordinary courts from taking up cases placed before the special tribunals ("ouster clauses"), the ACiHPR stated that:

17. ... The ouster clauses... were found to constitute violations of Article 7 [1981 ACHPR]. The Commission must take this opportunity, not only to reiterate the conclusions made before, that the constitution and procedures of the special tribunals violate Articles 7(1)(a) and (c) and 26, but to recommend an end to the practice of removing entire areas of law from the jurisdiction of the ordinary courts.
- ...
21. [A] Commission's previous decisions found that the special tribunals violated the Charter because their judges were specially appointed for each case by the executive branch, and would include on the panel at least one, and

²⁷⁸⁸ ACiHPR, *Media Rights Agenda v. Nigeria (224/98)*, Decision, 23 October–6 November 2000, §§ 60–62.

²⁷⁸⁹ ACiHPR, *Civil Liberties Organisation v. Nigeria (129/94)*, Decision, 13–22 March 1995, §§ 13–14.

often a majority, of military or law enforcement officers, in addition to a sitting or retired judge. The Commission here reiterates its previous decisions and declares that the trial of these persons before a special tribunal violates Article 7(1)(d) and Article 26.

23. ... The setting up of a parallel system has the danger of undermining the court system and creates the likelihood of unequal application of the laws.²⁷⁹⁰

3006. In its decision in *Avocats Sans Frontières v. Burundi* (231/99) in 2000, the ACiHPR stated that:

The right to equal treatment by a jurisdiction, especially in criminal matters, means, in the first place, that both the defence and the public prosecutor shall have equal opportunity to prepare and present their pleas and indictment during the trial. Simply put, they should argue their cases before the jurisdiction on an equal footing. Secondly it entails the equal treatment of all accused persons by jurisdictions charged with trying them. This does not mean that identical treatment should be meted to all accused. The idea here is the principle that when objective facts are alike, the response of the judiciary should also be similar. There is a breach of the principle of equality if judicial or administrative decisions are applied in a discriminatory manner.²⁷⁹¹

3007. In its decision in *Civil Liberties Organisation and Others v. Nigeria* in 2001, the ACiHPR stated that:

It is our view that the provisions of Article 7 [1981 ACHPR] should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike... The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial.²⁷⁹²

3008. In its report in *Ofner and Hopfinger v. Austria* in 1962, the ECiHR stated that:

Article 6 of the Convention does not define the notion of a "fair trial" in a criminal case. Paragraph 3 of the Article enumerates certain specific rights which constitute essential elements of that general notion, and paragraph 2 may be considered to add another element. The words "minimum rights", however, clearly indicate that the five rights specifically enumerated in paragraph (3) are not exhaustive... The Commission is of the opinion that what is generally called "the equality of arms", that is the procedural equality of the accused with the public prosecutor, is an inherent element of a "fair trial".²⁷⁹³

3009. In its judgement in the *Golder v. UK case*, the ECtHR stated that Article 6(1) of the 1950 ECHR:

²⁷⁹⁰ ACiHPR, *Civil Liberties Organisation v. Nigeria* (151/96), Decision, 15 November 1999, §§ 17, 21 and 23.

²⁷⁹¹ ACiHPR, *Avocats sans Frontières v. Burundi* (231/99), Decision, 23 October-6 November 2000, § 27.

²⁷⁹² ACiHPR, *Civil Liberties Organisation and Others v. Nigeria* (218/98), Decision, 23 April-7 May 2001, § 27.

²⁷⁹³ ECiHR, *Ofner and Hopfinger v. Austria*, Report, 23 November 1962, § 46.

28. ... does not state a right of access to the courts or tribunals in express terms. It enunciates rights which are distinct but stem from the same basic idea and which, taken together, make up a single right not specifically defined in the narrower sense of the term. It is the duty of the Court to ascertain, by means of interpretation, whether access to the courts constitutes one factor or aspect of this right.
- ...
31. The terms of [Article 6(1)] of the European Convention, taken in their context, provide reason to think that this right is included among the guarantees set forth.
- ...
35. ... It would be inconceivable, in the opinion of the Court, that [Article 6(1)] should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court. The fair, public and expeditious characteristics of judicial proceedings are of no value at all if there are no judicial proceedings.
36. Taking all the preceding considerations together, it follows that the right of access constitutes an element which is inherent in the right stated by [Article 6(1)]... The Court thus reaches the conclusion... that [Article 6(1)] secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the "right to a court", of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6 para. 1 (art. 6-1) as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.²⁷⁹⁴

3010. In its judgement in *Engel v. Netherlands* in 1976, concerning procedures for breaches of military discipline, the ECtHR stated that the right to fair trial is not limited to cases categorised as "criminal" by the State. It added that:

If the Contracting States were able at their discretion to classify an offence as disciplinary instead of criminal... the operation of the fundamental clauses of Articles 6 and 7 would be subordinated to their sovereign will. A latitude extending this far might lead to results incompatible with the purpose and object of the Convention.

The Court further stated that "the criteria to be taken into account when deciding whether a 'disciplinary accusation' is in fact a criminal matter are: 'the very nature of the offence' and 'the degree of severity of the penalty that the person concerned risks incurring'"²⁷⁹⁵.

3011. In its judgement in the *Deweere case* in 1980, the ECtHR stated that one of the elements contained in Article 6(1) of the 1950 ECHR was the general right of persons to access a court.²⁷⁹⁶

3012. In its judgement in *Borgers v. Belgium* in 1991, the ECtHR found that:

²⁷⁹⁴ ECtHR, *Golder v. UK*, Judgement, 21 February 1975, §§ 28–36.

²⁷⁹⁵ ECtHR, *Engel v. Netherlands*, Judgement, 8 June 1976, §§ 81–82.

²⁷⁹⁶ ECtHR, *Deweere case*, Judgement, 27 February 1980, § 49.

27. In the present case the hearing on 18 June 1985 before the Court of Cassation concluded with the *avocat général's* submissions to the effect that Mr Borger's appeal should not be allowed . . . At no time could the latter reply to those submissions: before hearing them, he was unaware of their contents because they had not been communicated to him in advance; thereafter he was prevented from doing so by statute . . .

The Court cannot see the justification for such restrictions on the rights of the defence. Once the *avocat général* had made submissions unfavourable to the applicant, the latter had a clear interest in being able to submit his observations on them before argument was closed. The fact that the Court of Cassation's jurisdiction is confined to questions of law makes no difference in this respect.

28. Further and above all, the inequality was increased even more by the *avocat général's* participation, in an advisory capacity, in the Court's deliberations. Assistance of this nature, given with total objectivity, may be of some use in drafting judgments, although this task falls in the first place to the Court of Cassation itself. It is however hard to see how such assistance can remain limited to stylistic considerations, which are in any case often indissociable from substantive matters, if it is in addition intended . . . to contribute towards maintaining the consistency of the case-law . . .

29. In conclusion, having regard to the requirements of the rights of the defence and of the principle of the equality of arms and to the role of appearances in determining whether they have been complied with, the Court finds a violation of Article 6 para. 1 [1950 ECHR].²⁷⁹⁷

3013. In its judgement in *Bulut v. Austria* in 1996, the ECtHR stated that "under the principle of equality of arms, as one of the features of the wider concept of a fair trial, each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a disadvantage vis-à-vis his opponent".²⁷⁹⁸

3014. In its judgement in *Belziuk v. Poland* in 1998, the ECtHR, recalling "the fundamental principles which emerge from its jurisprudence relating to Article 6 § 1 in conjunction with paragraph 3 (c)" of the 1950 ECHR, stated that:

The principle of equality of arms is only one feature of the wider concept of a fair trial, which also includes the fundamental right that criminal proceedings should be adversarial. The right to an adversarial trial means, in a criminal case, that both prosecution and defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. Various ways are conceivable in which national law may secure that this requirement is met. However, whatever method is chosen, it should ensure that the other party is aware that observations have been filed and gets a real opportunity to comment thereon.²⁷⁹⁹

²⁷⁹⁷ ECtHR, *Borgers v. Belgium*, Judgement, 30 October 1991, §§ 27–29.

²⁷⁹⁸ ECtHR, *Bulut v. Austria*, Judgement, 22 February 1996, § 47.

²⁷⁹⁹ ECtHR, *Belziuk v. Poland*, Judgement, 25 March 1998, § 37.

3015. In its judgement in *McElhinney v. Ireland* in 2001, relating to non-access because of the principle of sovereign immunity, the ECtHR stated that:

The right of access to court is not, however, absolute, but may be subject to limitations; these are permitted by implication since the right of access by its very nature calls for regulation by the State. In this respect, the Contracting States enjoy a certain margin of appreciation... [The ECtHR] must be satisfied that the limitations applied do not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired. Furthermore, a limitation will not be compatible with Article 6 § 1 [1950 ECHR] if it does not pursue a legitimate aim and if there is no reasonable relationship of proportionality between the means employed and the aim sought to be achieved.²⁸⁰⁰

3016. In a resolution adopted in 1968 concerning the law applicable to emergency situations, the IACiHR declared that:

The suspension of constitutional guarantees or state of siege is compatible with the system of representative democratic government only if enacted under the following conditions:

- ...
e. When it does not in any manner presuppose the suspension of... the right to due process of law.²⁸⁰¹

3017. In 1981, in a report on the situation of human rights in Colombia, the IACiHR recommended that Colombia issue legal regulations so that persons arrested or detained were guaranteed the right to a fair trial.²⁸⁰²

3018. In its doctrine concerning judicial guarantees and the right to personal liberty and security published in 1982, the IACiHR stated that replacing regular courts with military courts, the judges in which are beholden to the political power and less well trained in law, undermines the guarantees to which all accused persons are entitled.²⁸⁰³

3019. In 2002, in its report on terrorism and human rights, the IACiHR stated that:

Where an emergency situation is involved that threatens the independence or security of a state, the fundamental components of the right to due process and to a fair trial must nevertheless be respected... The basic components of the right to a fair trial cannot be justifiably suspended. These protections include, in particular, the right to a fair trial by a competent, independent and impartial court for persons charged with criminal offenses, the presumption of innocence, the right to be informed promptly and intelligibly of any criminal charge, the right to adequate time

²⁸⁰⁰ ECtHR, *McElhinney v. Ireland*, Judgement, 21 November 2001, § 34.

²⁸⁰¹ IACiHR, Resolution adopted at the 1968 Session, Doc. OEA/Ser.L/V/II.19 Doc. 32, *Inter-American Yearbook on Human Rights*, 1968, pp. 59-61.

²⁸⁰² IACiHR, Report on the situation of human rights in Colombia, Doc. OEA/Ser.L/V/II.53 Doc. 22, 30 June 1981, p. 221.

²⁸⁰³ IACiHR, Doctrine concerning judicial guarantees and the right to personal liberty and security, reprinted in *Ten years of activities (1971-1981)*, General Secretariat of the IACiHR, Washington, D.C., 1982, p. 331.

and facilities to prepare a defense, the right to legal assistance of one's choice for free legal counsel where the interests of justice require, the right not to testify against oneself and protection against coerced confessions, the right to attendance of witnesses, the right of appeal, as well as respect for the principle of non-retroactive application of penal laws.²⁸⁰⁴

3020. In its advisory opinion in the *Judicial Guarantees case* in 1987, the IACtHR stressed that the "concept of due process" in Article 8 of the 1969 ACHR "should be understood as applicable, in the main, to all judicial guarantees referred to in the American Convention", even where there had been legitimate derogations from certain rights under Article 27 of the 1969 ACHR. It further noted that:

Reading Article 8 together with Articles 7(6), 25, and 27(2) of the Convention leads to the conclusion that the principles of due process of law cannot be suspended in states of exception insofar as they are necessary conditions for the procedural institutions regulated by the Convention to be considered judicial guarantees.²⁸⁰⁵

3021. In its judgement in several cases concerning Argentina in 1992, the IACiHR, referring to the judgement of the IACtHR in the *Velásquez Rodríguez case* of 1988, stated that:

36. Under Article 1.1 of the [1969 ACHR], the States Parties are obliged "to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms . . ."
37. The laws and the Decree [granting general amnesty] sought to, and effectively did obstruct the exercise of the petitioners' right under Article 8.1 [1969 ACHR] cited earlier. With enactment and enforcement of the laws and the Decree, Argentina has failed to comply with its duty to guarantee the rights to which Article 8.1 [1969 ACHR] refers, has abused those rights and has violated the Convention.²⁸⁰⁶

V. Practice of the International Red Cross and Red Crescent Movement

3022. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict without trial. The conviction must be pronounced by an impartial and regularly constituted court respecting the

²⁸⁰⁴ IACiHR, Report on Terrorism and Human Rights, Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, §§ 245 and 247.

²⁸⁰⁵ IACtHR, *Judicial Guarantees case*, Advisory Opinion, 6 October 1987, §§ 29–30.

²⁸⁰⁶ IACiHR, *Cases 10.147, 10.181, 10.240, 10.262, 10.309 and 10.311 (Argentina)*, Report, 2 October 1992, §§ 36–37.

generally recognized principles of regular judicial procedure, which include . . . the right to fair trial.²⁸⁰⁷

Delegates also teach that depriving a person of the rights of fair and regular trial constitutes a grave breach of the law of war.²⁸⁰⁸

3023. The ICRC Commentary on the Additional Protocols underlines the relevance of Article 6(2) AP II for the interpretation of common Article 3(1)(d) of the 1949 Geneva Conventions, stating that:

Article 6 lays down some principles of universal application which every responsibly organized body must, and can, respect. It supplements and develops common Article 3, paragraph 1, subparagraph (1) (d), which prohibits “the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.” This very general rule required clarification to strengthen the prohibition of summary justice and of convictions without trial, which it already covers. Article 6 reiterates the principles contained in the Third and Fourth Conventions, and for the rest is largely based on the International Covenant on Civil and Political Rights, particularly Article 15, from which no derogation is permitted, even in the case of a public emergency threatening the life of the nation.²⁸⁰⁹

3024. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following principles in particular must be respected . . . the passing of sentences and carrying out of executions without fair trial are specifically prohibited”.²⁸¹⁰

3025. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated, in relation to civilians, that “summary executions” and “sentencing without a fair trial” are prohibited.²⁸¹¹

3026. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC emphasised, in relation to civilian persons who refrain from acts of hostility, that “the passing of sentences without a fair trial in particular” is prohibited.²⁸¹²

²⁸⁰⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(a).

²⁸⁰⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 776(h).

²⁸⁰⁹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4597.

²⁸¹⁰ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

²⁸¹¹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

²⁸¹² ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

3027. In a summary note on respect for IHL in an internal armed conflict, the ICRC stated that “the ICRC urges the authorities to take all necessary measures to put an end to . . . the extra-judicial killings that are feared to occur in some cases”.²⁸¹²

3028. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following war crime, when committed in an international armed conflict, be subject to the jurisdiction of the Court: “wilfully depriving a prisoner of war or another protected person of the rights to fair and regular trial”. The working paper also proposed that the crime of “passing sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all judicial guarantees recognized as indispensable”, as a serious violation of IHL applicable in non-international armed conflicts, be subject to the jurisdiction of the Court.²⁸¹³

3029. In a communication to the press issued in 2000 in the context of the conflict in Colombia, the ICRC condemned two separate incidents

in which wounded combatants being evacuated by its delegates were seized and summarily executed by men belonging to enemy forces. These acts, which constitute grave breaches of international humanitarian law, have obliged the organization to suspend all medical evacuations of wounded combatants within Colombia.²⁸¹⁴

VI. Other Practice

3030. In 1979, in a meeting with the ICRC, the leader of an armed opposition group stated that he was in favour of executing POWs who attempted to escape.²⁸¹⁵

3031. In 1984 and 1988, an armed opposition group told the ICRC that it generally refrained from executing prisoners in reprisal and only pronounced death sentences on the basis of at least three witness accounts.²⁸¹⁶

3032. In 1985, in a meeting with the ICRC, an armed opposition group stated that it had changed its policy from executing captured combatants immediately to giving them a choice between joining the movement and being transferred to party authorities.²⁸¹⁷

3033. In 1987, in a meeting with the ICRC, an armed opposition group stated that prisoners were given the chance to repent and that detainees were not

²⁸¹² ICRC archive document.

²⁸¹³ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(a)(v) and 3(v).

²⁸¹⁴ ICRC, Communication to the Press No. 00/35, Colombia: ICRC condemns grave breaches of IHL, suspends medical evacuations of wounded combatants, 3 October 2000.

²⁸¹⁵ ICRC archive document.

²⁸¹⁶ ICRC archive documents. ²⁸¹⁷ ICRC archive document.

mistreated. It maintained, however, that if a prisoner admitted to having killed civilians or combatants, the prisoner should be put to death. When the ICRC protested against the sentencing of combatants as criminals, the group stated that religious law had precedence over IHL.²⁸¹⁸

3034. In 1988, in a meeting with the ICRC, an armed opposition group justified the execution of captured combatants for reasons of security, as a means of avoiding reprisals, or simply as revenge.²⁸¹⁹

3035. In 1990, Amnesty International condemned summary executions ordered by the Iraqi authorities in the context of the Gulf War.²⁸²⁰

3036. In 1994, in a report entitled "Medical Practice in the Context of Internal Armed Conflict", the Peruvian Medical Federation for Human Rights documented the practice of trying civilian persons accused of being involved in insurgent activities by military courts, and alleged that the trials were frequently conducted by "faceless judges" and that the courts were not impartial.²⁸²¹

3037. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that:

No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence without previous judgement pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by the community of nations.²⁸²²

Trial by an independent, impartial and regularly constituted court

I. Treaties and Other Instruments

Treaties

3038. Common Article 3 of the 1949 Geneva Conventions provides that, in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties:

- (1) ...the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to [persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause]:

...

²⁸¹⁸ ICRC archive document. ²⁸¹⁹ ICRC archive document.

²⁸²⁰ Amnesty International, News Release No. MDE 14/15/90, 3 October 1990.

²⁸²¹ Peru, Federación Médica Peruana Asociación Pro Derechos Humanos, Medical Practice in the Context of Internal Armed Conflict, August 1994.

²⁸²² Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9, *IRRC*, No. 282, 1991, p. 333.

- (b) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

3039. Article 84, second paragraph, GC III provides that “in no circumstances whatever shall a prisoner of war be tried by a court of any kind which does not offer the essential guarantees of independence and impartiality as generally recognized”.

3040. Article 66 GC IV provides that:

In case of breach of the penal provisions promulgated by it by virtue of the second paragraph of Article 64, the Occupying Power may hand over the accused to its properly constituted, non-political military courts, on condition that the said courts sit in the occupied country. Courts of appeal shall preferably sit in the occupied country.

3041. Article 6(1) of the 1950 ECHR provides that “everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal”.

3042. Article 14(1) of the 1966 ICCPR provides that “everyone shall be entitled to a . . . hearing by a competent, independent and impartial tribunal”.

3043. Article 8(1) of the 1969 ACHR provides that “every person has the right to a hearing . . . by a competent, independent, and impartial tribunal”.

3044. Article 75(4) AP I provides that “no sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court”. Article 75 AP I was adopted by consensus.²⁸²³

3045. Article 6(2) AP II provides that “no sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality”. Article 6 AP II was adopted by consensus.²⁸²⁴

3046. Article 7(1)(d) of the 1981 ACHPR provides that “every individual shall have the right to have his cause heard. This comprises: . . . (d) the right to be tried within a reasonable time by an impartial court or tribunal.”

3047. Article 26 of the 1981 ACHPR provides that “States parties to the present Charter shall have the duty to guarantee the independence of the Courts”.

3048. Article 40(2)(b)(iii) of the 1989 Convention on the Rights of the Child provides that “every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body”.

²⁸²³ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

²⁸²⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3049. Article 67(1) of the 1998 ICC Statute provides that “in the determination of any charge, the accused shall be entitled to a . . . fair hearing conducted impartially”.

Other Instruments

3050. Article 10 of the 1948 UDHR states that “everyone is entitled in full equality to a . . . hearing by an independent and impartial tribunal”.

3051. Article XXVI of the 1948 American Declaration on the Rights and Duties of Man provides that “every person accused of an offense has the right to be given an impartial . . . hearing”.

3052. The 1985 Basic Principles on the Independence of the Judiciary provide that:

1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.
2. The judiciary shall decide matters before them impartially, based on facts and according to law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.
5. Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of the legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals.
6. The principle of the independence of the judiciary entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected.
- ...
10. Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.

Paragraphs 11–12 and 17–20 of the Basic Principles add conditions that ensure security of tenure of judges so that they will not be under pressure to decide a case in a way that is not impartial.

3053. Article 8(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right, “in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law or by treaty”.

3054. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3055. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3056. Article 11(1)(a) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind states that an individual charged with a crime against the peace and security of mankind has the right, “in the determination of any charge against him, to have a fair and public hearing by a competent, independent and impartial tribunal duly established by law”.

3057. Article 47 of the 2000 EU Charter of Fundamental Rights provides that “everyone is entitled to a...hearing by an independent and impartial tribunal”.

II. National Practice

Military Manuals

3058. Argentina’s Law of War Manual (1969) provides that “in any case, a prisoner of war shall not appear in front of a tribunal, whatever its nature, if it does not offer essential guarantees of independence and impartiality”.²⁸²⁵

3059. Argentina’s Law of War Manual (1989) provides that in non-international armed conflicts, “only a tribunal offering the essential guarantees of independence and impartiality can pronounce a sentence”.²⁸²⁶

3060. Belgium’s Law of War Manual provides that depriving a POW or other protected persons of the right to be judged by an impartial court is a grave breach of the Geneva Conventions.²⁸²⁷

3061. Canada’s LOAC Manual provides for the necessity that “the tribunal offers the essential guarantees of independence and impartiality generally recognized as compatible with the rule of law”.²⁸²⁸ It also contains the requirement of “an impartial and regularly constituted tribunal” for internees in occupied territories.²⁸²⁹ With respect to non-international armed conflicts, the manual states that “no sentences shall be passed or penalties executed for offences

²⁸²⁵ Argentina, *Law of War Manual* (1969), § 2.074.

²⁸²⁶ Argentina, *Law of War Manual* (1989), § 7.10.

²⁸²⁷ Belgium, *Law of War Manual* (1983), p. 55.

²⁸²⁸ Canada, *LOAC Manual* (1999), p. 10-6, § 56.

²⁸²⁹ Canada, *LOAC Manual* (1999), p. 11-8, § 65.

related to the conflict except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality".²⁸³⁰

3062. Croatia's Instructions on Basic Rules of IHL states that judicial independence and impartiality are essential guarantees that may not be suspended even in situations of armed conflict.²⁸³¹

3063. The Military Manual of the Netherlands prohibits punishments "without a previous judgement by an impartial tribunal".²⁸³² It also provides with regard to protected persons that "no one may be sentenced and punished without a previous judgement by an impartial and independent tribunal".²⁸³³ With respect to non-international armed conflicts, the manual prohibits sentences pronounced by a tribunal that does not fulfil "the essential requirements of independence and impartiality".²⁸³⁴

3064. New Zealand's Military Manual provides that "prisoners may only be tried by a civil court if the Detaining Power's Forces may be so tried for the offence involved, and provided the tribunal offers the essential guarantees of independence and impartiality generally recognised as compatible with the rule of law".²⁸³⁵ It further specifies that "no sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court".²⁸³⁶

3065. Spain's LOAC Manual states that "any tribunal shall offer guarantees of independence and impartiality" and that "depriving a person of his right to be tried impartially" is a grave breach of the Geneva Conventions.²⁸³⁷

3066. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.²⁸³⁸

3067. Switzerland's Basic Military Manual provides that "only an impartial and regularly constituted tribunal can judge and sentence an accused person".²⁸³⁹ It further states that "a person found guilty of a criminal offence committed in connection with the armed conflict shall be sentenced only in accordance with a judgement . . . This judgement shall be pronounced by an impartial and regularly constituted tribunal."²⁸⁴⁰ According to the manual, it is a grave breach of the Geneva Conventions to deprive POWs and civilians of "their right to be

²⁸³⁰ Canada, *LOAC Manual* (1999), p. 17-3, § 28.

²⁸³¹ Croatia, *Instructions on Basic Rules of IHL* (1993), Instruction No. 4.

²⁸³² Netherlands, *Military Manual* (1993), p. VII-2.

²⁸³³ Netherlands, *Military Manual* (1993), p. VIII-3.

²⁸³⁴ Netherlands, *Military Manual* (1993), p. XI-54.

²⁸³⁵ New Zealand, *Military Manual* (1992), § 930(1).

²⁸³⁶ New Zealand, *Military Manual* (1992), § 1137(4), see also § 1815(1).

²⁸³⁷ Spain, *LOAC Manual* (1996), Vol. I, §§ 8.7.c.(2) and 11.8.b.(1).

²⁸³⁸ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

²⁸³⁹ Switzerland, *Basic Military Manual* (1987), Article 153, commentary.

²⁸⁴⁰ Switzerland, *Basic Military Manual* (1987), Article 175.

tried by an impartial and regularly constituted tribunal, in accordance with the conventions".²⁸⁴¹

3068. The UK Military Manual states that "in no circumstances whatsoever may [POWs] be tried by a court which does not afford the essential guarantees of independence and impartiality". It explains that POWs, under certain conditions, may be tried by civil courts and that "such courts must in any case comply with the requirement of independence and impartiality".²⁸⁴²

3069. The US Field Manual reproduces Article 84 GC III.²⁸⁴³

3070. The US Air Force Pamphlet emphasises that "in no event may [a POW] be tried by any court not offering the [generally recognized] essential guarantees of independence and impartiality".²⁸⁴⁴

National Legislation

3071. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁸⁴⁵

3072. The Czech Republic's Criminal Code as amended provides for the punishment of anyone who deprives civilians or prisoners of war of their right to be tried by an impartial tribunal.²⁸⁴⁶

3073. Georgia's Code of Criminal Procedure states that the right of the accused to be tried by an independent and impartial tribunal cannot be suspended in situations of emergency.²⁸⁴⁷

3074. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, imposes a severe punishment, particularly the death penalty or imprisonment, without such person having been convicted by an impartial and regularly constituted court.²⁸⁴⁸

3075. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 84 GC III, and of AP I, including violations of Article 75(5) AP I, as well as any "contravention" of AP II, including violations of Article 6(2) AP II, are punishable offences.²⁸⁴⁹

3076. Kenya's Constitution provides that, if a person is charged with a criminal offence, the case shall be tried by an independent and impartial court established by law.²⁸⁵⁰

²⁸⁴¹ Switzerland, *Basic Military Manual* (1987), Article 192(b), see also § 193(2)(e).

²⁸⁴² UK, *Military Manual* (1958), § 202. ²⁸⁴³ US, *Field Manual* (1956), § 160.

²⁸⁴⁴ US, *Air Force Pamphlet* (1976), § 13-8.

²⁸⁴⁵ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁸⁴⁶ Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(2)(c).

²⁸⁴⁷ Georgia, *Code of Criminal Procedure* (1998), Article 8.

²⁸⁴⁸ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(7).

²⁸⁴⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁸⁵⁰ Kenya, *Constitution* (1992), Article 77(1).

3077. Kuwait's Constitution specifies that the right to be tried by an independent judge is both fundamental and non-derogable.²⁸⁵¹

3078. Kyrgyzstan's Criminal Code states that emergency situations do not abrogate the right of the accused to be tried by an independent and impartial tribunal.²⁸⁵²

3079. Lithuania's Criminal Code as amended punishes the imposition of criminal penalties without a previous judgement by an independent court.²⁸⁵³

3080. Under the International Crimes Act of the Netherlands, it is a crime to commit, "in the case of an armed conflict not of an international character, a violation of Article 3 common to all the Geneva Conventions", including "the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are generally recognised as indispensable".²⁸⁵⁴

3081. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".²⁸⁵⁵

3082. Slovakia's Criminal Code as amended provides for the punishment of anyone who deprives civilians or prisoners of war of their right to be tried by an impartial tribunal.²⁸⁵⁶

National Case-law

3083. In the *Ohashi case* in 1946 before the Australian Military Court at Rabaul, the judge advocate stated that one of the fundamental principles of justice was:

Consideration by a tribunal comprised of one or more men who will endeavour to judge the accused fairly upon the evidence using their own common knowledge of ordinary affairs and if they are soldiers their military knowledge, honestly endeavouring to discard any preconceived believe in the guilt of [the] accused or any prejudice against him.²⁸⁵⁷

Other National Practice

3084. The Report on the Practice of Jordan states that Article 75 API embodies customary law.²⁸⁵⁸

3085. Country reports on human rights practices issued by the US Department of State in 1983 and 1996 stress that the right to be tried by a trained, impartial

²⁸⁵¹ Kuwait, *Constitution* (1962), Articles 162–163.

²⁸⁵² Kyrgyzstan, *Criminal Code* (1997), Article 17.

²⁸⁵³ Lithuania, *Criminal Code as amended* (1961), Article 336.

²⁸⁵⁴ Netherlands, *International Crimes Act* (2003), Article 6(1)(d).

²⁸⁵⁵ Norway, *Military Penal Code as amended* (1902), § 108.

²⁸⁵⁶ Slovakia, *Criminal Code as amended* (1961), Article 263(a)(2)(c).

²⁸⁵⁷ Australia, Military Court at Rabaul, *Ohashi case*, Judgement, 23 March 1946.

²⁸⁵⁸ Report on the Practice of Jordan, 1997, Chapter 5.

and independent judge may not be suspended, even during an emergency situation.²⁸⁵⁹

3086. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that...no sentence be passed and penalty executed except pursuant to conviction pronounced by an impartial and regularly constituted court”.²⁸⁶⁰

3087. The Report on US Practice states that “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3 of the 1949 Geneva Conventions”. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.²⁸⁶¹

III. Practice of International Organisations and Conferences

3088. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3089. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14... If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14.²⁸⁶²

²⁸⁵⁹ US, Department of State, Country reports on human rights practices for 1983, Nicaragua, p. 637; Country reports on human rights practices for 1996, Cambodia, p. 611.

²⁸⁶⁰ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 427–428.

²⁸⁶¹ Report on US Practice, 1997, Chapter 5.3.

²⁸⁶² HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 4.

3090. In its views in *Karttunen v. Finland* in 1992, the HRC defined the elements of guarantees of a fair trial contained in Article 14(1) of the 1966 ICCPR and stated that:

“Impartiality” of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria. A trial flawed by the participation of a judge who, under domestic statutes, should have been disqualified cannot normally be considered to be fair or impartial within the meaning of Article 14.²⁸⁶³

3091. In its views in *Bahamonde v. Equatorial Guinea* in 1993, the HRC stated that “a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable or where the latter is able to control or direct the former is incompatible with the notion of an independent and impartial tribunal”.²⁸⁶⁴

3092. In its views in *Espinoza de Polay v. Peru* in 1997, the HRC found a violation of Article 14 of the 1966 ICCPR and stated that “in a system of trial by ‘faceless judges’, neither the independence nor the impartiality of the judges is guaranteed, since the tribunal, being established *ad hoc*, may comprise serving members of the armed forces”.²⁸⁶⁵

3093. In its decision in *Constitutional Rights Project v. Nigeria (60/91)* in 1995, the ACiHPR stated that:

The [national law under consideration] describes the constitution of the tribunals, which shall consist of three persons: one judge, one officer of the Army, Navy or Air Force and one officer of the Police Force. Jurisdiction has thus been transferred from the normal courts to a tribunal chiefly composed of persons belonging to the executive branch of government, the same branch that passed the [law under consideration], whose members do not necessarily possess any legal expertise. [Article 7(1)(d) of the 1981 ACHPR] requires the court or tribunal to be impartial. Regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack of impartiality. It thus violates [Article 7(1)(d)].²⁸⁶⁶

3094. In its decision in *Centre For Free Speech v. Nigeria (206/97)* in 1999, the ACiHPR stated that:

15. The issue of the arraignment and trial of the Journalists must also be addressed here. The complainant alleges that the Journalists were arraigned, tried and convicted by a Special Military Tribunal, presided over by a serving military officer and whose membership also included some serving military officers. This is in violation of the provisions of Article 7 of the [1981

²⁸⁶³ HRC, *Karttunen v. Finland*, Views, 23 October 1992, § 7.2.

²⁸⁶⁴ HRC, *Bahamonde v. Equatorial Guinea*, Views, 20 October 1993, § 9.4.

²⁸⁶⁵ HRC, *Espinoza de Polay v. Peru*, Views, 6 October 1997, § 8(5)–(8).

²⁸⁶⁶ ACiHPR, *Constitutional Rights Project v. Nigeria (60/91)*, Decision, 13–22 March 1995, § 8.

ACHPR] and Principle 5 of the [1985 Basic Principles on the Independence of the Judiciary].

16. It could not be said that the trial and conviction of the four Journalists by a Special Military Tribunal presided over by a serving military officer who is also a member of the PRC, the body empowered to confirm the sentence, took place under conditions which genuinely afforded the full guarantees of fair hearing as provided for in article 7 of the [1981 ACHPR]. The above act is also in contravention of Article 26 of the [1981 ACHPR].²⁸⁶⁷

3095. In its decision in *Malawi African Association and Others v. Mauritania* in 2000, which concerned the trial of military and civilian persons by a special court consisting of army officers, the ACiHPR stated that:

Withdrawing criminal procedure from the competence of the Courts established within the judicial order and conferring onto an extension of the executive necessarily compromises the impartiality of the Courts, to which the African Charter refers. Independent of the qualities of the persons sitting in such jurisdictions, their very existence constitutes a violation of the principles of impartiality and independence of the judiciary and, thereby, of article 7, 1 (d) [1981 ACHPR].²⁸⁶⁸

3096. In its decision in *Civil Liberties Organisation and Others v. Nigeria* in 2001, the ACiHPR, with regard to the question whether a (military) tribunal, composed of military personnel as judges, meets the requirements of Article 7 of the 1981 ACHPR, stated that:

25. The issues brought before the Commission have to be judged in the environment of a military junta and serving military officers accused of offences punishable in terms of military discipline in any jurisdiction. This caution has to be applied especially as pertaining to serving military officers. The civilian accused is part of the common conspiracy and as such it is reasonable that he be charged with his military co-accused in the same judicial process. We are making this decision conscious of the fact that Africa continues to have military regimes who are inclined to suspend the constitution, govern by decree and seek to oust the application of international obligations . . .

27. It is our view that the provisions of Article 7 [1981 ACHPR] should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike especially under an unaccountable, undemocratic military regime . . . It is noted that [military or special courts trying civilians] could present serious problems as far as equitable, impartial and independent administration of justice is concerned. Such courts are resorted to in order to justify recourse to exceptional measures which do not comply with normal procedures . . . The military tribunals are not negated by the mere fact of being presided over by military officers. The critical factor is whether the process is fair, just and impartial.

...

²⁸⁶⁷ ACiHPR, *Centre For Free Speech v. Nigeria* (206/97), Decision, 15 November 1999, §§ 15–16.

²⁸⁶⁸ ACiHPR, *Malawi African Association and Others v. Mauritania* (54/91), Decision, 11 May 2000, § 98.

43. The communication alleges that the composition of the tribunal which was presided over by a serving military officer did not meet the requirement of an independent and impartial judicial panel to try the accused, and therefore a violation of Article 7(1)(d) of the Charter . . .
44. It has been stated elsewhere in this decision, that a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process. We make the point that Military Tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process. What causes offence is failure to observe basic or fundamental standards that would ensure fairness. As that matter has been dealt with above, it is not necessary to find that a tribunal presided over by a military officer is a violation of the Charter. It has already been pointed out that the military tribunal fails the independence test.²⁸⁶⁹

3097. In its judgement in the *Piersack case* in 1982, the ECtHR held that “impartiality” in Article 6(1) of the 1950 ECHR meant, *inter alia*, a lack of prejudice or bias and that there were two aspects to this requirement: “First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect.”²⁸⁷⁰

3098. In its judgement in the *Belilos case* in 1988, the ECtHR gave the following definition of a tribunal:

“Tribunal” is characterised in the substantive sense of the term by its judicial function, that is to say determining matters within its competence on the basis of rules of law and after proceedings conducted in a prescribed manner . . . It must also satisfy a series of further requirements – independence, in particular of the executive; impartiality; duration of its members’ term of office; guarantees afforded by its procedure – several of which appear in the text of Article 6(1) itself.²⁸⁷¹

3099. In *Holm v. Sweden* before the ECtHR in 1993, the applicant alleged that, “owing to the participation of five active SAP [Swedish Social Democratic Workers Party] members in the jury at the District Court of Stockholm, his case had not been heard by ‘an independent and impartial tribunal’ within the meaning of [Article 6(1) of the 1950 ECHR]”. In its judgement, the ECtHR held that:

30. In determining whether the District Court could be considered “independent and impartial”, the Court will have regard to the principles established in its own case-law . . . which apply to jurors as they do to professional judges and lay judges. Like the Commission, it finds it difficult in this case to examine the issues of independence and impartiality separately . . .
31. It is only the independence and the objective impartiality of the five jurors who were affiliated to the SAP which are in issue; the applicant did not

²⁸⁶⁹ ACiHPR, *Civil Liberties Organisation and Others v. Nigeria (218/98)*, Decision, 23 April–7 May 2001, §§ 25, 27 and 43–44.

²⁸⁷⁰ ECtHR, *Piersack case*, Judgement, 1 October 1982, §§ 28–34; *De Cubber case*, Judgement, 26 October 1984, §§ 24–26; *Findlay v. UK*, Judgement, 25 February 1997, § 73.

²⁸⁷¹ ECtHR, *Belilos case*, Judgement, 29 April 1988, § 64.

contest their subjective impartiality, finding it impracticable to do so in view of the secrecy of each juror's vote . . .

It is undisputed that the jurors in question were elected in the prescribed manner by the competent elective body, in conformity with the legal conditions for eligibility: namely that the persons concerned be known to be independent and fair-minded and to have sound judgment and also that different social groups and currents of opinion as well as geographical areas be represented among the jurors . . . The jury was constituted by the drawing of lots after each party to the proceedings had had an opportunity to express its views on the existence of grounds for disqualification of any of the jurors on the list and to exclude an equal number of jurors . . . It was also possible for the parties to appeal to the Court of Appeal against decisions by the District Court on requests for disqualification, and the applicant, albeit unsuccessfully, availed himself of this remedy . . . Before participating in the trial, each juror had to take an oath to the effect that he or she was to carry out the tasks to the best of his or her abilities and in a judicial manner . . .

32. . . . Nevertheless, it is to be noted that there were links between the defendants and the five jurors who had been challenged by the applicant which could give rise to misgivings as to the jurors' independence and impartiality. The jurors in question were active members of the SAP who held or had held offices in or on behalf of the SAP . . .
33. Having regard to the foregoing, the Court considers that the independence and impartiality of the District Court were open to doubt and that the applicant's fears in this respect were objectively justified. Moreover, since the Court of Appeal's jurisdiction, like that of the District Court, was limited by the terms of the jury's verdict, the defect in the proceedings before the latter court could not have been cured by an appeal to the former . . .

In sum, there has been a violation of Article 6 para. 1 . . . in the particular circumstances of the present case.²⁸⁷²

3100. In its judgement in *Findlay v. UK* in 1997 concerning the trial of a soldier by court martial for breaches of military discipline and criminal offences, the ECtHR stated that:

73. The Court recalls that in order to establish whether a tribunal can be considered as "independent", regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence

. . .

As to the question of "impartiality", there are two aspects to this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect . . .

74. The Court observes that the convening officer . . . played a significant role before the hearing of Mr Findlay's case. He decided which charges should

²⁸⁷² ECtHR, *Holm v. Sweden*, Judgement, 25 November 1993, §§ 30–33; see also IACiHR, *Case 11.139 (US)*, Report, 6 December 1996, § 168.

be brought and which type of court martial was most appropriate. He convened the court martial and appointed its members and the prosecuting and defending officers . . .

75. The question therefore arises whether the members of the court martial were sufficiently independent of the convening officer and whether the organisation of the trial offered adequate guarantees of impartiality.

...It is noteworthy that all the members of the court martial, appointed by the convening officer, were subordinate in rank to him. Many of them, including the president, were directly or ultimately under his command... Furthermore, the convening officer had the power, albeit in prescribed circumstances, to dissolve the court martial either before or during the trial . . .

76. In order to maintain confidence in the independence and impartiality of the court, appearances may be of importance. Since all the members of the court martial which decided Mr Findlay's case were subordinate in rank to the convening officer and fell within his chain of command, Mr Findlay's doubts about the tribunal's independence and impartiality could be objectively justified . . .

77. In addition, the Court finds it significant that the convening officer also acted as "confirming officer". Thus, the decision of the court martial was not effective until ratified by him, and he had the power to vary the sentence imposed as he saw fit . . . This is contrary to the well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of "tribunal" and can also be seen as a component of the "independence" required by Article 6 para. 1 [1950 ECHR].²⁸⁷³

3101. In its judgement in *Ciraklar v. Turkey* in 1998, which concerned the trial by the Turkish State Security Court of a student arrested during a demonstration, the ECtHR reiterated its view that appearances mattered in that ascertainable facts might give rise to legitimate doubts as to the independence and impartiality of a tribunal. In this case, a violation was found because the judges belonged to the army and were subject to military discipline, their designation and appointment required the intervention of the army administration and they only received a four-year renewable mandate. The Court stated that "what is decisive is whether the fear [of non-independence or non-impartiality] can be held to be objectively justified".²⁸⁷⁴

3102. In its judgement in the *Cyprus case* in 2001, the ECtHR stated that:

For the Court, examination *in abstracto* of the impugned "constitutional provision" and the "Prohibited Military Areas Decree" leads it to conclude that these texts clearly introduced and authorised the trial of civilians by military courts. It considers that there is no reason to doubt that these courts suffer from the same defects of independence and impartiality which were highlighted in its *Incal v. Turkey*

²⁸⁷³ ECtHR, *Findlay v. UK*, Judgement, 25 February 1997, §§ 73–77; see also *Ringeisen case*, Judgement, 16 July 1971, § 95; *Campbell and Fell case*, Judgement, 28 June 1984, § 78 and *Bentham case*, Judgement, 23 October 1985, §§ 41–43.

²⁸⁷⁴ ECtHR, *Ciraklar v. Turkey*, Judgement, 28 October 1998, § 38.

judgment in respect of the system of National Security Courts established in Turkey by the respondent State (. . .), in particular the close structural links between the executive power and the military officers serving on the “TRNC” military courts. In the Court’s view, civilians in the “TRNC” accused of acts characterised as military offences before such courts could legitimately fear that they lacked independence and impartiality.

The Court concluded that there had been a violation of Article 6 of the 1950 ECHR “on account of the legislative practice of authorising the trial of civilians by military courts”.²⁸⁷⁵

3103. In its judgement in *Sahiner v. Turkey* in 2001 concerning the trial of a civilian by a martial law court composed of two civilian judges, two military officers and an army officer, the ECtHR stated that:

45. The Court considers in this connection that where, as in the present case, a tribunal’s members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, *vis-à-vis* one of the parties, accused persons may entertain a legitimate doubt about those persons’ independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society . . . In addition, the Court attaches great importance to the fact that a civilian had to appear before a court composed, even if only in part, of members of the armed forces . . .
46. In the light of the foregoing, the Court considers that the applicant – tried in a Martial Law Court on charges of attempting to undermine the constitutional order of the State – could have legitimate reason to fear about being tried by a bench which included two military judges and an army officer acting under the authority of the officer commanding the state of martial law. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat on that court makes no difference in this respect . . .
47. In conclusion, the applicant’s fears as to the Martial Law Court’s lack of independence and impartiality can be regarded as objectively justified. There has accordingly been a violation of Article 6 § 1 [1950 ECHR].²⁸⁷⁶

3104. In its Annual Report 1992–1993, the IACiHR discussed the principles that member States should apply in order to satisfy the requirements of judicial independence and impartiality. The list included:

- a) guaranteeing the judiciary freedom from interference by the executive and legislative branches;
- b) providing the judiciary with the necessary political support for performing its functions;
- c) giving judges security of tenure;
- d) preserving the rule of law and declaring states of emergency only when necessary and in strict conformity with the requirements of the American Convention;
- e) returning to the judiciary responsibility for the disposition and supervision of detained persons.²⁸⁷⁷

²⁸⁷⁵ ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 358–359.

²⁸⁷⁶ ECtHR, *Sahiner v. Turkey*, Judgement, 25 September 2001, §§ 45–47.

²⁸⁷⁷ IACiHR, *Annual Report 1992–1993*, Doc. OEA/Ser.L/V/II.83 Doc. 14, 12 March 1993, p. 207.

3105. In its report in a case concerning Peru in 1994, the IACiHR stated that a Special Military Court was not an independent and impartial tribunal inasmuch as it was subordinate to the Ministry of Defence and thus to the executive.²⁸⁷⁸

3106. In its report in a case concerning Peru in 1995, the IACiHR referred to the *Campbell and Fell case* before the ECtHR and held that the determination of whether a court is independent of the executive depends on the “manner of appointment of its members, the duration of their terms . . . [and] the existence of guarantees against outside pressures”. The Commission further noted the jurisprudence of the ECtHR and stated that “the irremovability of judges . . . must . . . be considered a necessary corollary of their independence”.²⁸⁷⁹

3107. In its report in a case concerning Peru in 1996, the IACiHR stated in relation to the meaning of “impartiality”, that:

Impartiality presumes that the court or judge does not have preconceived opinions about the case *sub judice* and, in particular, does not presume the accused to be guilty. For the European Court, the impartiality of the judge is made up of subjective and objective elements. His subjective impartiality in the specific case is presumed as long as there is no evidence to the contrary. Objective impartiality, on the other hand, requires that the tribunal or judge offer sufficient guarantees to remove any doubt as to their impartiality in the case.²⁸⁸⁰

3108. In its judgement in the *Castillo Petruzzi and Others case* in 1999, the IACtHR stated that:

132. In the instant case, the Court considers that the military tribunals that tried the alleged victims for the crimes of treason did not meet the requirements implicit in the guarantees of independence and impartiality that Article 8(1) of the [1969 ACHR] recognizes as essentials of due process of law.

133. What is more, because judges who preside over the treason trials are “faceless,” defendants have no way of knowing the identity of their judge and, therefore, of assessing their competence. Compounding the problem is the fact that the law does not allow these judges to recuse themselves.

134. The Court therefore finds that the State violated Article 8(1) of the [1969 ACHR].²⁸⁸¹

V. Practice of the International Red Cross and Red Crescent Movement

3109. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”.²⁸⁸²

²⁸⁷⁸ IACiHR, *Case 11.084 (Peru)*, Report, 30 November 1994, Section V(3).

²⁸⁷⁹ IACiHR, *Case 11.006 (Peru)*, Report, 7 February 1995, Section VI(2)(a).

²⁸⁸⁰ IACiHR, *Case 10.970 (Peru)*, Report, 1 March 1996, Section V(B)(3)(c).

²⁸⁸¹ IACiHR, *Castillo Petruzzi and Others case*, Judgement, 30 May 1999, §§ 132–134.

²⁸⁸² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202.

3110. In a press release issued in 1994 in the context of the conflict in Chechnya, the ICRC urged the parties to ensure that “no sentence was passed and no penalty executed without a judgement pronounced by a court offering essential guarantees of independence and impartiality”.²⁸⁸³

VI. Other Practice

3111. In 1985, the ICRC noted that an armed opposition group had emphasised that trial by an impartial and independent judiciary was required by Islamic law.²⁸⁸⁴

Presumption of innocence

I. Treaties and Other Instruments

Treaties

3112. Article 6(2) of the 1950 ECHR provides that “everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law”.

3113. Article 14(2) of the 1966 ICCPR provides that “everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law”.

3114. Article 8(2) of the 1969 ACHR provides that “every person accused of a criminal offence has the right to be presumed innocent so long as his guilt has not been proven according to law”.

3115. Article 75(4)(d) AP I provides that “anyone charged with an offence is presumed innocent until proved guilty according to law”. Article 75 AP I was adopted by consensus.²⁸⁸⁵

3116. Article 6(2)(d) AP II provides that “anyone charged with an offence is presumed innocent until proved guilty according to law”. Article 6 AP II was adopted by consensus.²⁸⁸⁶

3117. Article 7(1) of the 1981 ACHPR provides that “every individual shall have the right to have his cause heard. This comprises: . . . the right to be presumed innocent until proved guilty by a competent court or tribunal.”

3118. Article 40(2)(b)(i) of the 1989 Convention on the Rights of the Child provides that “every child alleged or accused of having infringed the penal law has at least the following guarantees: (i) to be presumed innocent until proven guilty according to the law”.

²⁸⁸³ ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.

²⁸⁸⁴ ICRC archive document.

²⁸⁸⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

²⁸⁸⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3119. Article 66 of the 1998 ICC Statute, entitled “Presumption of innocence”, provides that:

1. Everyone shall be presumed innocent until proved guilty before the Court in accordance with the applicable law.
2. The onus is on the Prosecutor to prove the guilt of the accused.
3. In order to convict the accused, the Court must be convinced of the guilt of the accused beyond reasonable doubt.

3120. Article 17(3) of the 2002 Statute of the Special Court for Sierra Leone states that “the accused shall be presumed innocent until proved guilty according to the provisions of the present Statute”.

Other Instruments

3121. Article 11 of the 1948 UDHR provides that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law”.

3122. Article XXVI of the 1948 American Declaration on the Rights and Duties of Man states that “every accused person is presumed innocent until proven guilty”.

3123. Principle 36 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “a detained person suspected of or charged with a criminal offence shall be presumed innocent and shall be treated as such until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence”.

3124. Article 19 of the 1990 Cairo Declaration on Human Rights in Islam states that “a defendant is innocent until his guilt is proven in a fair trial”.

3125. Article 8 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “to be presumed innocent until proved guilty”.

3126. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3127. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3128. According to Article 21(3) of the 1993 ICTY Statute, “the accused shall be presumed innocent until proved guilty according to the provisions of the present Statute”.

3129. According to Article 20(3) of the 1994 ICTR Statute, “the accused shall be presumed innocent until proved guilty according to the provisions of the present Statute”.

3130. Article 11(1) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against

the peace and security of mankind “shall be presumed innocent until proved guilty”.

3131. Article 2(9) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines states that all accused persons have the right “to be presumed innocent until proven guilty”.

3132. Article 48(1) of the 2000 EU Charter of Fundamental Rights provides that “everyone who has been charged shall be presumed innocent until proven guilty according to law”.

II. National Practice

Military Manuals

3133. Argentina’s Law of War Manual provides that presumption of innocence is a fundamental judicial guarantee which applies to prisoners of war and civilians in occupied territories.²⁸⁸⁷ The presumption of innocence is also a fundamental guarantee in situations of non-international armed conflict.²⁸⁸⁸

3134. Canada’s LOAC Manual provides that in non-international armed conflicts, “accused persons shall be presumed innocent until proved guilty according to law”.²⁸⁸⁹

3135. Colombia’s Basic Military Manual provides that in both international and non-international armed conflicts, civilians benefit from the right to be presumed innocent.²⁸⁹⁰

3136. Colombia’s Instructors’ Manual provides that “any person is presumed innocent until he is judicially declared guilty”.²⁸⁹¹

3137. New Zealand’s Military Manual provides that “anyone charged with an offence is presumed innocent until proved guilty according to law”.²⁸⁹² With respect to non-international armed conflicts, the manual states that “an accused is to be presumed innocent until proved guilty according to the law”.²⁸⁹³

3138. Sweden’s IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.²⁸⁹⁴

National Legislation

3139. Countless pieces of domestic legislation provide for the right of the accused to be presumed innocent until found guilty of an offence.²⁸⁹⁵

²⁸⁸⁷ Argentina, *Law of War Manual* (1989), § 3.30 (POWs), § 4.15 (civilians) and § 5.09 (occupied territory).

²⁸⁸⁸ Argentina, *Law of War Manual* (1989), § 7.10.

²⁸⁸⁹ Canada, *LOAC Manual* (1999), p. 17-3, § 29(d).

²⁸⁹⁰ Colombia, *Basic Military Manual* (1995), p. 24.

²⁸⁹¹ Colombia, *Instructors’ Manual* (1999), p. 10.

²⁸⁹² New Zealand, *Military Manual* (1992), § 1137(4)(d).

²⁸⁹³ New Zealand, *Military Manual* (1992), § 1815(1)(d).

²⁸⁹⁴ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

²⁸⁹⁵ See, e.g., Ethiopia, *Constitution* (1994), Article 20(3); Georgia, *Constitution* (1995), Article 40(1); Georgia, *Code of Criminal Procedure* (1998), Article 10; Kenya, *Constitution*

3140. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁸⁹⁶

3141. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 75(4)(d) AP I, as well as any "contravention" of AP II, including violations of Articles 6(2)(d) AP II, are punishable offences.²⁸⁹⁷

3142. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".²⁸⁹⁸

National Case-law

3143. In the *Ohashi case* in 1946 before the Australian Military Court at Rabaul, the judge advocate stated that the fundamental principles of justice included:

- (a) Consideration by a tribunal comprised of one or more men who will endeavour to judge the accused fairly upon the evidence using their own common knowledge of ordinary affairs and if they are soldiers their military knowledge, honestly endeavouring to discard any preconceived believe in the guilt of [the] accused or any prejudice against him.
- ...
- (e) The court should satisfy itself that the accused is guilty before awarding punishment. It would be sufficient if the court believed it to be more likely than not that the accused was guilty.²⁸⁹⁹

Other National Practice

3144. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.²⁹⁰⁰

3145. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".²⁹⁰¹

(1992), Article 77(2)(a); Kuwait, *Constitution* (1962), Article 34; Kyrgyzstan, *Constitution* (1993), Article 39(1); Russia, *Constitution* (1993), Article 49(1).

²⁸⁹⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁸⁹⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁸⁹⁸ Norway, *Military Penal Code as amended* (1902), § 108.

²⁸⁹⁹ Australia, Military Court at Rabaul, *Ohashi case*, Judgement, 23 March 1946.

²⁹⁰⁰ Report on the Practice of Jordan, 1997, Chapter 5.

²⁹⁰¹ Report on US Practice, 1997, Chapter 5.3.

III. Practice of International Organisations and Conferences

3146. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3147. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

By reason of the presumption of innocence, the burden of proof of the charge is on the prosecution and the accused has the benefit of the doubt. No guilt can be presumed until the charge has been proved beyond reasonable doubt . . . It is, therefore, a duty for all public authorities to refrain from prejudging the outcome of a trial.²⁹⁰²

3148. In its views in *Gridin v. Russia* in 2000, the HRC found a violation of the presumption of innocence because of public declarations by officials, which were given wide media coverage, presenting the accused as guilty before his conviction.²⁹⁰³

3149. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: "Persons charged with a criminal offence shall be presumed innocent until proven guilty by a competent court."²⁹⁰⁴

3150. In its decision in *Pagnouille v. Cameroon* in 1997 concerning the five-year imprisonment of a Cameroonian citizen by a military tribunal, the ACiHPR held that "detention on the mere suspect that an individual may cause problems is a violation of his right to be presumed innocent".²⁹⁰⁵

3151. In its decision in *Malawi African Association and Others v. Mauritania* in 2000, dealing with a case in which the accused refused to defend themselves in the absence of a lawyer, the ACiHPR held that:

In the judgement of early September 1986 . . . the presiding judge declared that the refusal of the accused persons to defend themselves was tantamount to an admission of guilt. In addition, the tribunal based itself, in reaching the verdicts it handed down, on the statements made by the accused during their detention in police cells, which statements were obtained from them by force. This constitutes a violation of [Article 7(1)(b) of the 1981 ACHPR].²⁹⁰⁶

3152. In *Neumeister v. Austria* in 1968, the ECtHR stated that:

4. The Court is of the opinion that [Article 5(3) of the 1950 ECHR] cannot be understood as giving the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional

²⁹⁰² HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 7.

²⁹⁰³ HRC, *Gridin v. Russia*, Views, 20 July 2000, § 8.3.

²⁹⁰⁴ ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(a).

²⁹⁰⁵ ACiHPR, *Pagnouille v. Cameroon*, Decision, 15–24 April 1997, § 21.

²⁹⁰⁶ ACiHPR, *Malawi African Association and Others v. Mauritania (54/91)*, Decision, 11 May 2000, § 95.

release even subject to guarantees. The reasonableness of the time spent by an accused person in detention up to the beginning of the trial must be assessed in relation to the very fact of his detention. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable . . .

5. The Court is likewise of the opinion that, in determining in a given case whether or not the detention of an accused person exceeds a reasonable limit, it is for the national judicial authorities to seek all the facts arguing for or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty.

...

12. The Court is of the opinion that in these circumstances the danger that Neumeister would avoid appearing at the trial by absconding was, in October 1962 in any event, no longer so great that it was necessary to dismiss as quite ineffective the taking of the guarantees which, under Article 5(3) (art. 5-3) may condition a grant of provisional release in order to reduce the risks which it entails.²⁹⁰⁷

3153. In its judgement in *Alenet de Ribemont v. France* in 1995, the ECtHR stated that:

The Court notes that in the instant case some of the highest-ranking officers in the French police referred to Mr Alenet de Ribemont, without any qualification or reservation, as one of the instigators of a murder and thus an accomplice in that murder (see paragraph 11 above). This was clearly a declaration of the applicant's guilt which, firstly, encouraged the public to believe him guilty and, secondly, prejudged the assessment of the facts by the competent judicial authority. There has therefore been a breach of Article 6 para. 2 [1950 ECHR].²⁹⁰⁸

3154. In its report in a case concerning Peru in 1996, the IACiHR stated that:

The essential thing is therefore that the judge who hears the case is free of any prejudice concerning the accused's guilt and affords him the benefit of the doubt, i.e. does not condemn him until he is certain or convinced of his criminal liability, so that all reasonable doubt that the accused might be innocent is removed.²⁹⁰⁹

3155. In its report in a case concerning Argentina in 1996, the IACiHR found that an excessive period of pre-trial detention may violate the presumption of innocence:

The prolonged imprisonment . . . without conviction, with its natural consequence of undefined and continuous suspicion of an individual, constitutes a violation of the principle of presumed innocence . . . The substantiation of guilt calls for the formulation of a judgement establishing blame in a final sentence. If the use of that procedure fails to assign blame within a reasonable length of time and the State is able to justify further holding of the accused in pre-trial incarceration, based on

²⁹⁰⁷ ECtHR, *Neumeister v. Austria*, Judgement (Merits), 27 June 1968, §§ 4 and 12 of the part entitled "As to the Law".

²⁹⁰⁸ ECtHR, *Alenet de Ribemont v. France*, Judgement, 10 February 1995, § 41.

²⁹⁰⁹ IACiHR, *Case 10.970 (Peru)*, Report, 1 March 1996, § V(B9(3)(c).

the suspicion of guilt, then it is essentially substituting pre-trial detention for the punishment.²⁹¹⁰

3156. In its judgement in the *Suárez Rosero case* in 1997, the IACtHR held that:

77. This Court is of the view that the principle of the presumption of innocence- inasmuch as it lays down that a person is innocent until proven guilty- is founded upon the existence of judicial guarantees. Article 8(2) of the Convention establishes the obligation of the State not to restrict the liberty of a detained person beyond the limits strictly necessary to ensure that he will not impede the efficient development of an investigation and that he will not evade justice; preventive detention is, therefore, a precautionary rather than a punitive measure. This concept is laid down in a goodly number of instruments of international human rights law, including the International Covenant on Civil and Political Rights, which provides that preventive detention should not be the normal practice in relation to persons who are to stand trial (Art. 9(3)). This would be tantamount to anticipating a sentence, which is at odds with universally recognized general principles of law.
78. The Court considers that Mr. Suárez-Rosero's prolonged preventive detention violated the principle of presumption of innocence, in that he was detained from June 23, 1992, to April 28, 1996, and that the order for his release issued on July 10, 1995, was only executed a year later. In view of the above, the Court rules that the State violated Article 8(2) of the American Convention.²⁹¹¹

V. Practice of the International Red Cross and Red Crescent Movement

3157. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . presumed innocence until proved guilty".²⁹¹²

3158. The ICRC Commentary on the Additional Protocols states that "it is a widely recognized legal principle that it is not the responsibility of the accused to prove he is innocent, but of the accuser to prove he is guilty".²⁹¹³

VI. Other Practice

3159. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum

²⁹¹⁰ IACiHR, *Case 11.245 (Argentina)*, Report, 1 March 1996, § 113; see also IACiHR, *Case 11.205 and Others*, Report, 11 March 1997, §§ 46–48.

²⁹¹¹ IACtHR, *Suárez Rosero case*, Judgement, 12 November 1997, §§ 77–78.

²⁹¹² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(d).

²⁹¹³ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3108.

judicial guarantees, including that “anyone charged with an offence is presumed innocent until proved guilty according to law”.²⁹¹⁴

Information on the nature and cause of the accusation

I. Treaties and Other Instruments

Treaties

3160. Article 16(a) of the 1945 IMT Charter (Nuremberg) provides that “in order to ensure fair trial for the Defendants, the following procedure shall be followed: (a) the Indictment shall include full particulars specifying in detail the charges against the Defendants”.

3161. Article 96, fourth paragraph, GC III provides that “before any disciplinary award is pronounced, the accused shall be given precise information regarding the offences of which he is accused”.

3162. Article 105, fourth paragraph, GC III provides that:

Particulars of the charge or charges on which the prisoner of war is to be arraigned, as well as the documents which are generally communicated to the accused by virtue of the laws in force in the armed forces of the Detaining Power, shall be communicated to the accused prisoner of war in a language he understands, and in good time before the opening of the trial.

3163. Article 71, second paragraph, GC IV provides that “accused persons who are prosecuted by the Occupying Power shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them”.

3164. Article 123, second paragraph, GC IV provides that “before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused”.

3165. Article 6(3)(a) of the 1950 ECHR provides that “everyone charged with a criminal offence has the following minimum rights:...to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”.

3166. Article 14(3)(a) of the 1966 ICCPR provides that “everyone shall be entitled to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”.

3167. Article 8(2)(b) of the 1969 ACHR provides that “every accused person is entitled to prior notification in detail of the charges against him”.

3168. Article 75(4)(a) AP I provides that “the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him”. Article 75 AP I was adopted by consensus.²⁹¹⁵

²⁹¹⁴ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(c), *IRRC*, No. 282, 1991, p. 334.

²⁹¹⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

3169. Article 6(2)(a) AP II provides that “the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him”. Article 6 AP II was adopted by consensus.²⁹¹⁶

3170. Article 40(2)(b)(ii) of the 1989 Convention on the Rights of the Child provides that “every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (ii) to be informed promptly and directly of the charges against him or her”.

3171. Article 55(2) of the 1998 ICC Statute provides that:

Where there are grounds to believe that a person has committed a crime within the jurisdiction of the Court . . . that person shall also have the following rights of which he or she shall be informed prior to being questioned:

- (a) To be informed, prior to being questioned, that there are grounds to believe that he or she has committed a crime within the jurisdiction of the Court.

3172. Article 60(1) of the 1998 ICC Statute provides that:

Upon the surrender of the person to the Court, or the person’s appearance before the Court voluntarily or pursuant to a summons, the Pre-Trial Chamber shall satisfy itself that the person has been informed of the crimes which he or she is alleged to have committed, and of his or her rights under this Statute, including the right to apply for interim release pending trial.

3173. Article 67(1)(a) of the 1998 ICC Statute provides that:

In the determination of any charge, the accused shall be entitled . . . to the following minimum guarantees, in full equality:

- (a) To be informed promptly and in detail of the nature, cause and content of the charge, in a language which the accused fully understands and speaks.

3174. Article 17(4)(a) of the 2002 Statute of the Special Court for Sierra Leone provides that:

In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: . . . to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her.

Other Instruments

3175. Article 9(a) of the 1946 IMT Charter (Tokyo) provides that “in order to insure fair trial for the accused, the following procedure shall be followed: (a) Indictment. The Indictment shall consist of a plain, concise, and adequate statement of each offence charged.”

3176. Principle 10 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “anyone who is arrested shall be promptly informed of any charges against him”.

²⁹¹⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3177. Article 8(b) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him”.

3178. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3179. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3180. Article 21(4)(a) of the 1993 ICTY Statute provides that:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality: . . . to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.

3181. Article 20(4)(a) of the 1994 ICTR Statute provides that the accused shall be entitled “to be informed promptly and in detail in a language which he or she understands of the nature and cause of the charge against him or her”.

3182. Article 11(1)(b) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him.”

II. National Practice

Military Manuals

3183. Argentina’s Law of War Manual (1969) provides, in a paragraph entitled “Right of defence”, that “before giving a disciplinary penalty, the accused prisoner must be informed, with precision, of the acts he is charged with”.²⁹¹⁷ It further provides that:

The accused prisoner of war will receive, as quickly as possible before the beginning of the trial, communication in an understandable language, of the bill of indictment as well as the acts which generally are notified to the accused in accordance with the laws in force in the army of the [detaining power].²⁹¹⁸

The manual also provides that the occupying power shall inform “any indicted person . . . without delay, of the motives of accusation that have been formulated against him, in a language he will understand”.²⁹¹⁹

²⁹¹⁷ Argentina, *Law of War Manual* (1969), § 2.082(2).

²⁹¹⁸ Argentina, *Law of War Manual* (1969), § 2.086.

²⁹¹⁹ Argentina, *Law of War Manual* (1969), § 5.029(2).

3184. Argentina's Law of War Manual (1989) provides that, at least certain guarantees shall be respected, such as: "the information of the prisoner without delay of the details of the offence of which he is charged".²⁹²⁰ It further states that any accused person shall be informed without delay of the particulars of the offences of which he is accused.²⁹²¹ The same provision applies in non-international armed conflicts.²⁹²²

3185. Australia's Defence Force Manual states that "notice of proceedings must be given to . . . the accused notifying the particulars of the charges in good time before the trial".²⁹²³

3186. Canada's LOAC Manual provides that "accused persons must be promptly informed, in writing, and in a language which they understand, of the charges brought against them".²⁹²⁴ With respect to non-international armed conflicts, the manual states that "accused persons shall be informed of the particulars of the offence charged".²⁹²⁵

3187. Indonesia's Directive on Human Rights in Trikora states that respect for personal and human dignity includes the right to obtain explanation of charges.²⁹²⁶

3188. The Military Manual of the Netherlands provides, with respect to non-international armed conflict, that "the suspect must be informed without delay of the particulars of the offences alleged".²⁹²⁷

3189. New Zealand's Military Manual states that "before any disciplinary punishment is awarded, the accused internee shall be given precise information regarding the offences of which he is accused".²⁹²⁸ It further provides that "the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him".²⁹²⁹ The manual also specifies that "the accused must be promptly informed, in writing, and in a language which they understand, of the charges brought against them".²⁹³⁰

3190. Spain's LOAC Manual provides that "before a [disciplinary] decision is imposed, the accused prisoner shall be informed of the acts of which he is charged".²⁹³¹

3191. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.²⁹³²

²⁹²⁰ Argentina, *Law of War Manual* (1989), § 3.30.

²⁹²¹ Argentina, *Law of War Manual* (1989), § 5.09(1) (occupied territories), see also § 4.15 (civilians).

²⁹²² Argentina, *Law of War Manual* (1989), § 7.10.

²⁹²³ Australia, *Defence Force Manual* (1994), § 1042(c).

²⁹²⁴ Canada, *LOAC Manual* (1999), p. 12-6, § 54.

²⁹²⁵ Canada, *LOAC Manual* (1999), p. 17-4, § 29(a).

²⁹²⁶ Indonesia, *Directive on Human Rights in Trikora* (1995), § 4(a).

²⁹²⁷ Netherlands, *Military Manual* (1993), p. XI-5.

²⁹²⁸ New Zealand, *Military Manual* (1992), § 1130(1).

²⁹²⁹ New Zealand, *Military Manual* (1992), § 1137(4)(a).

²⁹³⁰ New Zealand, *Military Manual* (1992), § 1330(1), see also § 1815(2)(a).

²⁹³¹ Spain, *LOAC Manual* (1996), Vol. I, § 8.7.e.(2).

²⁹³² Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

3192. Switzerland's Basic Military Manual provides that "every person arrested, detained or interned for acts committed in connection with the conflict shall be informed, without delay, in a language he or she understands, of the reasons why the measures have been taken".²⁹³³

3193. The UK Military Manual states that "before any disciplinary award is pronounced [against a prisoner of war] the accused must be given full information regarding the offence with which he is charged".²⁹³⁴ With regard to judicial proceedings against prisoners of war, the manual provides that "particulars of the charges brought against the accused . . . must be given to the accused in a language which he understands".²⁹³⁵ With respect to situations of occupation, the manual states that "the accused must be promptly informed, in writing and in a language which they understand, of the charges brought against them".²⁹³⁶

3194. The US Field Manual reproduces Articles 96 and 105 GC III.²⁹³⁷ It also contains the provisions of Articles 71 and 123 GC IV.²⁹³⁸

3195. The US Air Force Pamphlet provides, with respect to protected persons arrested for criminal offences, that "among other rights, accused persons are assured the right to be informed promptly of the charges against them".²⁹³⁹

3196. The US Air Force Commander's Handbook provides that "a prisoner must be given notice of the charges".²⁹⁴⁰

National Legislation

3197. Countless pieces of domestic legislation provide for the right of the accused to be informed of the particulars of the alleged offence.²⁹⁴¹

3198. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁹⁴²

3199. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 96 and 105 GC III and Articles 71 and 123 GC IV, and of AP I, including violations of Article 75(4)(a) AP I, as well as any "contravention" of AP II, including violations of Article 6(2)(a) AP II, are punishable offences.²⁹⁴³

3200. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

²⁹³³ Switzerland, *Basic Military Manual* (1987), Article 175.

²⁹³⁴ UK, *Military Manual* (1958), § 208. ²⁹³⁵ UK, *Military Manual* (1958), § 228.

²⁹³⁶ UK, *Military Manual* (1958), § 570. ²⁹³⁷ US, *Field Manual* (1956), §§ 172 and 181.

²⁹³⁸ US, *Field Manual* (1956), §§ 330 and 441.

²⁹³⁹ US, *Air Force Pamphlet* (1976), § 14-6.

²⁹⁴⁰ US, *Air Force Commander's Handbook* (1980), § 4-2(c).

²⁹⁴¹ See, e.g., Ethiopia, *Constitution* (1994), Article 20(2); Georgia, *Constitution* (1995), Article 18(5); Georgia, *Code of Criminal Procedure* (1998), Articles 12 and 74; India, *Constitution* (1950), Article 22(1); Kenya, *Constitution* (1992), Article 77(2)(b); Kyrgyzstan, *Criminal Code* (1997), Articles 18; Mexico, *Constitution* (1917), Article 20(III).

²⁹⁴² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁹⁴³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".²⁹⁴⁴

National Case-law

3201. In the *Ohashi case* before the Australian Military Court at Rabaul in 1946, the Judge Advocate stated that the notion of "fair trial" supposed, *inter alia*, the following:

- the accused should know the exact nature of the charge against him/her;
- the accused should know what is alleged against him/her by way of evidence;
- he should have full opportunity to give his own version of the case and produce evidence to support it.²⁹⁴⁵

Other National Practice

3202. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.²⁹⁴⁶

3203. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".²⁹⁴⁷

III. Practice of International Organisations and Conferences

3204. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3205. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

Article 14(3)(a) applies to all cases of criminal charges, including those of persons not in detention. The Committee notes further that the right to be informed of the charge "promptly" requires that information is given in the manner described as soon as the charge is first made by a competent authority. In the opinion of the Committee this right must arise when in the course of an investigation a court or an authority of the prosecution decides to take procedural steps against a person suspected of a crime or publicly names him as such. The specific requirements of subparagraph 3(a) may be met by stating the charge either orally or in writing,

²⁹⁴⁴ Norway, *Military Penal Code as amended* (1902), § 108.

²⁹⁴⁵ Australia, Military Court at Rabaul, *Ohashi case*, Statement by the Judge Advocate, 23 March 1946.

²⁹⁴⁶ Report on the Practice of Jordan, 1997, Chapter 5.

²⁹⁴⁷ Report on US Practice, 1997, Chapter 5.3.

provided that the information indicates both the law and the alleged facts on which it is based.²⁹⁴⁸

V. Practice of the International Red Cross and Red Crescent Movement

3206. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “any person arrested, detained or interned for actions related to the armed conflict shall be informed promptly in a language understandable to him of the reasons for the measure taken”.²⁹⁴⁹

VI. Other Practice

3207. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, and states that “the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him or her”.²⁹⁵⁰

Necessary rights and means of defence

I. Treaties and Other Instruments

Treaties

3208. Article 16(d) of the 1945 IMT Charter (Nuremberg) provides that “a Defendant shall have the right to conduct his own defense before the Tribunal or to have the assistance of counsel”.

3209. Article 49, fourth paragraph, GC I provides that “in all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949”.

3210. Article 50, fourth paragraph, GC II provides that “in all circumstances, the accused persons shall benefit by safeguards of proper trial and defence, which shall not be less favourable than those provided by Article 105 and those following of the Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949”.

3211. Article 84, second paragraph, GC III provides that “in no circumstances whatever shall a prisoner of war be tried by a court of any kind . . . the procedure

²⁹⁴⁸ HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 8.

²⁹⁴⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 201.

²⁹⁵⁰ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(a), *IRRC*, No. 282, 1991, p. 334.

of which does not afford the accused the rights and means of defence provided for in Article 105”.

3212. Article 96, fourth paragraph, GC III stipulates that “the accused shall be . . . given an opportunity of explaining his conduct and of defending himself”.

3213. Article 99, third paragraph, GC III provides that “no prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel”.

3214. Article 105, first paragraph, GC III provides that “the prisoner of war shall be entitled to assistance by one of his prisoner comrades, to defence by a qualified advocate or counsel of his own choice”. Article 105, second paragraph, provides that “failing a choice by the prisoner of war, the Protecting Power shall find him an advocate or counsel . . . Failing a choice of an advocate or counsel by the prisoner of war or the Protecting Power, the Detaining Power shall appoint a competent advocate or counsel to conduct the defence.” Article 105, third paragraph, provides that:

The advocate or counsel conducting the defence on behalf of the prisoner of war shall have at his disposal a period of two weeks at least before the opening of the trial, as well as the necessary facilities to prepare the defence of the accused. He may, in particular, freely visit the accused and interview him in private. He may also confer with any witnesses for the defence, including prisoners of war. He shall have the benefit of these facilities until the term of appeal or petition has expired.

3215. Article 72, first paragraph, GC IV provides that:

Accused persons shall have the right to present evidence necessary for their defence . . . They shall have the right to be assisted by a qualified advocate or counsel of their own choice, who shall be able to visit them freely and shall enjoy the necessary facilities for preparing the defence.

3216. Article 123, first paragraph, GC IV provides that “the accused internee shall be . . . given an opportunity of explaining his conduct and of defending himself”.

3217. Article 6(3)(b) and (c) of the 1950 ECHR provides that:

Everyone charged with a criminal offence has the following minimum rights . . . to have adequate time and facilities for the preparation of his defence; to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

3218. Article 14(3)(b) and (d) of the 1966 ICCPR provides that:

In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees: . . . to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing; . . . to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and

without payment by him in any such case if he does not have sufficient means to pay for it.

3219. Article 8(2)(c)-(e) of the 1969 ACHR provides that:

Every person is entitled . . . to the following minimum guarantees: . . . adequate time and means for the preparation of his defense; . . . to defend himself personally or to be assisted by legal counsel of his own choosing, and to communicate freely and privately with his counsel; the inalienable right to be assisted by counsel provided by the state, paid or not as the domestic law provides, if the accused does not defend himself personally or engage his own counsel within the time period established by law.

3220. Article 75(4)(a) AP I provides that “the procedure . . . shall afford the accused before and during his trial all necessary rights and means of defence”. Article 75 AP I was adopted by consensus.²⁹⁵¹

3221. Article 6(2)(a) AP II stipulates that “the procedure shall . . . afford the accused before and during his trial all necessary rights and means of defence”. Article 6 AP II was adopted by consensus.²⁹⁵²

3222. Article 7(1)(c) of the 1981 ACHPR provides that every individual accused shall have “the right to defence, including the right to be defended by counsel of his choice”.

3223. Article 40(2)(b)(ii) of the 1989 Convention on the Rights of the Child provides that “every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (ii) to have legal or other appropriate assistance in the preparation and presentation of his or her defence”.

3224. Article 55(2) of the 1998 ICC Statute provides that the accused shall have the right to have “legal assistance of the person’s choosing”.

3225. Article 67(1)(b) and (d) of the 1998 ICC Statute provides that:

In the determination of any charge, the accused shall be entitled to . . . have adequate time and facilities for the preparation of the defence and to communicate freely with the counsel of the accused’s choosing in confidence . . . to conduct the defence in person or through legal assistance of the accused’s choosing, . . . to be informed, if the accused does not have legal assistance, of this right and to have legal assistance assigned by the Court in any case where the interests of justice so require, and without payment if the accused lacks sufficient means to pay for it.

3226. Article 17(4) of the 2002 Statute of the Special Court for Sierra Leone provides that:

In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

...

²⁹⁵¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

²⁹⁵² CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

- (b) To have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;
- ...
- (d) ... to defend himself or herself in person or through legal assistance of his or her own choosing ... to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interests of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

Other Instruments

3227. Article 9(c) of the 1946 IMT Charter (Tokyo) provides that:

Each accused shall have the right to be represented by counsel of his own selection, subject to the disapproval of such counsel at any time by the Tribunal. The accused shall file with the General Secretary of the Tribunal the name of his counsel. If an accused is not represented by counsel and in open court requests the appointment of counsel, the Tribunal shall designate counsel for him. In the absence of such request the Tribunal may appoint counsel for an accused if in its judgment such appointment is necessary to provide for a fair trial.

3228. Article 11 of the 1948 UDHR provides that everyone charged with a penal offence has the right to a trial "at which he has had all the guarantees necessary for his defence".

3229. Principle 15 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "communication of the detained or imprisoned person with the outside world, and in particular his ... counsel, shall not be denied for more than a matter of days".

3230. Principle 17 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

1. A detained person shall be entitled to have the assistance of a legal counsel. He shall be informed of his right by the competent authority promptly after arrest and shall be provided with reasonable facilities for exercising it.
2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

3231. Principle 18 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultation with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, with delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered

indispensable by a judicial or other authority in order to maintain security and good order.

4. Interviews between a detained or imprisoned person and his legal counsel may be within sight, but not within hearing, of a law enforcement official.
5. Communications between a detained or imprisoned person and his legal counsel mentioned in the present principle shall be inadmissible as evidence against the detained or imprisoned person unless they are connected with a continuing or contemplated crime.

3232. Article 19(e) of the 1990 Cairo Declaration on Human Rights in Islam states that a defendant has the right to a fair trial “in which he shall be given all guarantees of defence”.

3233. Article 8 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right:

- (c) to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- ...
- (e) ... to defend himself in person and through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him and without payment by him in any such case if he does not have sufficient means to pay for it.

3234. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3235. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3236. Article 18(3) of the 1993 ICTY Statute provides that “if questioned, the suspect shall be entitled to be assisted by counsel of his own choice”.

3237. Article 21(4) of the 1993 ICTY Statute provides that:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

- (b) ... to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
- ...
- (d) ... to defend himself in person ... to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it.

3238. Article 17(3) of the 1994 ICTR Statute provides that “if questioned, the suspect shall be entitled to be assisted by counsel of his or her own choice”.

3239. Article 20(4) of the 1994 ICTR Statute provides that:

In the determination of any charge against the accused pursuant to the present Statute, the accused shall be entitled to the following minimum guarantees, in full equality:

- ...
- (b) to have adequate time and facilities for the preparation of his or her defence and to communicate with counsel of his or her own choosing;

...

 - (d) ... to defend himself or herself in person... to be informed, if he or she does not have legal assistance, of this right; and to have legal assistance assigned to him or her, in any case where the interest of justice so require, and without payment by him or her in any such case if he or she does not have sufficient means to pay for it.

3240. Article 11(1)(c) and (e) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" and "to defend himself in person or through legal assistance of his own choosing".

3241. The 1990 Basic Principles on the Role of Lawyers states that:

Whereas the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that a detained person shall be entitled to have the assistance of, and to communicate and consult with, legal counsel,

Whereas the Standard Minimum Rules for the Treatment of Prisoners recommend, in particular, that legal assistance and confidential communication with counsel should be ensured to untried prisoners.

...

1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings;
2. Governments shall ensure that efficient procedures and responsive mechanisms for effective and equal access to lawyers are provided for all persons within their territory and subject to their jurisdiction, without distinction of any kind, such as discrimination based on race, colour, ethnic origin, sex, language, religion, political or other opinion, national or social origin, property, birth, economic or other status.

...

5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence;
6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services;

7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention;
8. All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within hearing, of law enforcement officials.

3242. Article 47(2) of the 2000 EU Charter of Fundamental Rights provides that “everyone shall have the possibility of being advised, defended and represented”.

3243. Article 48(2) of the 2000 EU Charter of Fundamental Rights provides that “respect for the rights of the defence of anyone who has been charged shall be guaranteed”.

II. National Practice

Military Manuals

3244. Argentina’s Law of War Manual (1969) provides that “in no case shall a prisoner of war appear in front of a tribunal . . . if the proceedings do not ensure to the accused person the rights and means of defence”.²⁹⁵³ It further provides that:

A prisoner of war has the right to be assisted by one of his inmates [or] to be defended by a qualified lawyer of his own choosing. . . In order to prepare his defence, counsel will have at least a period of two weeks before the examination of the case, as well as the necessary facilities; he can visit the accused freely and meet with him without witness. Counsel may also meet all witnesses on his behalf, including other prisoners of war. He will enjoy these facilities until the expiration of the delay to appeal.²⁹⁵⁴

3245. Argentina’s Law of War Manual (1989) states that “the right of prisoners to a defence is recognised and guaranteed. To this effect, prisoners have the right to be assisted by one of their fellow inmates, or to be defended by a qualified lawyer of their own choosing”.²⁹⁵⁵

3246. Australia’s Defence Force Manual states that POWs “are entitled to be represented by a qualified lawyer of their choice and assisted by another PW”.²⁹⁵⁶

3247. Canada’s LOAC Manual states that prisoners of war and accused persons in occupied territory must be allowed to present their defence.²⁹⁵⁷ The manual further states that “accused persons in occupied territory must “have the right

²⁹⁵³ Argentina, *Law of War Manual* (1969), § 2.074.

²⁹⁵⁴ Argentina, *Law of War Manual* (1969), § 2.086, see also § 5.029(3) (occupied territory).

²⁹⁵⁵ Argentina, *Law of War Manual* (1989), § 3.30, see also § 5.09.

²⁹⁵⁶ Australia, *Defence Force Manual* (1994), § 1042(d).

²⁹⁵⁷ Canada, *LOAC Manual* (1999), p. 10-7, § 76.

to be assisted by a qualified advocate or counsel of their own choice".²⁹⁵⁸ It adds that the advocate or counsel of the accused "must be able to visit them freely and to be provided with the necessary facilities for preparing the defence".²⁹⁵⁹ With respect to non-international armed conflicts, the manual provides that "accused persons shall be afforded all the necessary rights and means of defence".²⁹⁶⁰

3248. Colombia's Instructors' Manual provides that during the investigation and the trial, "any accused has the right . . . to be assisted by a qualified lawyer of his own choosing or by an *ex-officio* lawyer".²⁹⁶¹

3249. Ecuador's Naval Manual provides that "at a minimum, [procedural] rights must include the assistance of lawyer counsel, an interpreter and a fellow prisoner".²⁹⁶²

3250. Germany's Military Manual provides that "prisoners of war shall be given the opportunity to present their defence".²⁹⁶³

3251. Hungary's Military Manual provides that accused POWs shall be granted rights and means of defence.²⁹⁶⁴

3252. The Military Manual of the Netherlands provides, with regard to non-international armed conflicts, that a suspect "must be given the necessary rights and means of defence".²⁹⁶⁵

3253. New Zealand's Military Manual provides that a prisoner of war "must be allowed to present his defence and be represented by qualified counsel or an advocate".²⁹⁶⁶ With respect to occupied territory, it states that accused persons "have the right to be assisted by a qualified advocate or counsel of their own choice, who must be able to visit them freely and to enjoy the necessary facilities for preparing the defence".²⁹⁶⁷ According to the manual, "insofar as civilians accused of war crimes are held by a Power of which they are not nationals, they are entitled to the safeguards of proper trial and defence, which shall not be less than those provided for prisoners of war by Articles 105 to 108 III GC".²⁹⁶⁸ With respect to non-international armed conflicts, the manual states that, as a minimum, "the accused shall be . . . afforded all the necessary rights and means of defence".²⁹⁶⁹

3254. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that "legal counsels of detainees or arrested persons must

²⁹⁵⁸ Canada, *LOAC Manual* (1999), p. 12-6, § 57.

²⁹⁵⁹ Canada, *LOAC Manual* (1999), p. 12-7, § 57.

²⁹⁶⁰ Canada, *LOAC Manual* (1999), p. 17-3, § 29(a).

²⁹⁶¹ Colombia, *Instructors' Manual* (1999), p. 11.

²⁹⁶² Ecuador, *Naval Manual* (1989), § 11.8.1.

²⁹⁶³ Germany, *Military Manual* (1992), § 725.

²⁹⁶⁴ Hungary, *Military Manual* (1992), p. 92.

²⁹⁶⁵ Netherlands, *Military Manual* (1993), p. XI-5.

²⁹⁶⁶ New Zealand, *Military Manual* (1992), § 932(2), see also § 1130 (civilian internees).

²⁹⁶⁷ New Zealand, *Military Manual* (1992), § 1330(2) and (4).

²⁹⁶⁸ New Zealand, *Military Manual* (1992), § 1716.

²⁹⁶⁹ New Zealand, *Military Manual* (1992), § 1815(2)(a).

be granted free access to the detention center/jail where the detainees are held".²⁹⁷⁰

3255. Spain's LOAC Manual provides that the right of defence must be respected during criminal proceedings in occupied territories.²⁹⁷¹

3256. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.²⁹⁷²

3257. Switzerland's Basic Military Manual states that "only military tribunals can try prisoners. They shall provide the accused with all recognised means of defence."²⁹⁷³ It also provides that an accused prisoner "shall have the possibility of expressing himself on the subject of the accusation of which he is charged".²⁹⁷⁴

3258. The UK Military Manual states that "in no circumstances whatsoever may [POWs] be tried by a court . . . the procedure of which does not afford the accused the rights and means of defence laid down in Art. 105 [GC III]".²⁹⁷⁵ The manual further states that "no prisoner of war may be convicted without having had an opportunity to present his defence and the assistance of a qualified advocate or counsel".²⁹⁷⁶ In addition, the manual provides that:

In any judicial proceedings against him, the prisoner of war is entitled to . . . defence by a qualified advocate or counsel of his own choice . . .

Defending Counsel must be given at least two weeks before the opening of the trial in which to prepare the defence of the accused. He must also be given all necessary facilities; in particular, he must be allowed freely to visit the accused and to interview him in private . . . The facilities are to remain available until the expiry of the time for appeal or petition against conviction.²⁹⁷⁷

With respect to situations of occupation, the manual states that the accused "have the right to be assisted by a qualified advocate or counsel of their own choice", that the qualified advocate or counsel of the choosing of the accused "must be able to visit them freely and to enjoy the necessary facilities for preparing the defence" and that the "accused have the right to present evidence necessary to their defence".²⁹⁷⁸

3259. The US Field Manual reproduces Articles 96, 99 and 105 GC III.²⁹⁷⁹ It also restates Articles 71 and 72 GC IV, concerning situations of occupation, and Article 123 GC IV, regarding disciplinary punishment.²⁹⁸⁰

3260. The US Air Force Pamphlet provides that "in no event may [a POW] be tried . . . under procedure which fails to accord the rights of defense set forth

²⁹⁷⁰ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(b)(2).

²⁹⁷¹ Spain, *LOAC Manual* (1996), Vol. I, § 2.7.b.(3).

²⁹⁷² Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

²⁹⁷³ Switzerland, *Basic Military Manual* (1987), Article 106.

²⁹⁷⁴ Switzerland, *Basic Military Manual* (1987), Article 153.

²⁹⁷⁵ UK, *Military Manual* (1958), § 202.

²⁹⁷⁶ UK, *Military Manual* (1958), § 225. ²⁹⁷⁷ UK, *Military Manual* (1958), § 227.

²⁹⁷⁸ UK, *Military Manual* (1958), § 571. ²⁹⁷⁹ US, *Field Manual* (1956), §§ 172, 175 and 181.

²⁹⁸⁰ US, *Field Manual* (1956), §§ 441, 442 and 330.

in Article 105 [GC III]". It adds that Article 105 GC III "gives [the accused] the right to counsel of his choice" and that the POW's "counsel will have the opportunity to prepare an adequate defense".²⁹⁸¹ The manual also states that "among other rights, accused persons are assured the right to . . . obtain defense counsel".²⁹⁸²

3261. The US Air Force Commander's Handbook states that prisoners must "be allowed the help of a lawyer".²⁹⁸³

3262. The US Naval Handbook provides that "at a minimum, [procedural] rights must include the assistance of lawyer counsel".²⁹⁸⁴

National Legislation

3263. Countless pieces of domestic legislation provide for the right of accused persons to have legal assistance, sometimes of their own choosing and/or for free.²⁹⁸⁵

3264. Argentina's Code of Criminal Procedure states that "incommunicado detention may not prevent the detainee from communicating with his counsel promptly before the beginning of his statement before the judge".²⁹⁸⁶

3265. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁹⁸⁷

3266. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 49 GC I, 50 GC II, 84, 96, 99 and 104 GC III, 71, 72 and 123 GC IV, and of AP I, including violations of Article 75(4)(a) AP I, as well as any "contravention" of AP II, including violations of Article 6(2)(a) AP II, are punishable offences.²⁹⁸⁸

3267. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".²⁹⁸⁹

²⁹⁸¹ US, *Air Force Pamphlet* (1976), § 13-8. ²⁹⁸² US, *Air Force Pamphlet* (1976), § 14-6.

²⁹⁸³ US, *Air Force Commander's Handbook* (1980), § 4-2(c).

²⁹⁸⁴ US, *Naval Handbook* (1995), § 11.7.1.

²⁹⁸⁵ See, e.g., Ethiopia, *Penal Code* (1957), Article 292; *Constitution* (1994), Article 20(5); Georgia, *Constitution* (1995), Article 18(5) and 42(3); *Code of Criminal Procedure* (1998), Articles 11, 17, 74 and 77; India, *Constitution* (1950), Article 22(1); Kenya, *Constitution* (1992), Article 77(2); Kuwait, *Constitution* (1962), Article 34; Kyrgyzstan, *Constitution* (1993), Articles 40 and 88; Mexico, *Constitution* (1917), Article 20(V)(VII) and (IX); Russia, *Constitution* (1993), Article 48.

²⁹⁸⁶ Argentina, *Code of Criminal Procedure* (1991), Article 205.

²⁹⁸⁷ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁹⁸⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁹⁸⁹ Norway, *Military Penal Code as amended* (1902), § 108.

National Case-law

3268. In its judgement in the *Ward case* in 1942, the US Supreme Court stated that:

This Court has set aside convictions based upon confessions extorted from ignorant persons . . . who have been unlawfully held incommunicado without advice of friends or counsel, or who have been taken at night to lonely and isolated places for questioning. Any one of these grounds would be sufficient cause for reversal.²⁹⁹⁰

Other National Practice

3269. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.²⁹⁹¹

3270. Country reports on human rights practices issued by the US Department of State have often noted that defendants must be given an opportunity to present their defence. More specifically, in 1986, the Department of State expressed concern that several indicted political prisoners in Ethiopia had been denied the right to present a defence, to call witnesses or to search for further evidence.²⁹⁹²

3271. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".²⁹⁹³

*III. Practice of International Organisations and Conferences**United Nations*

3272. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN Commission on Human Rights called upon the government of Croatia "to pursue vigorously prosecutions against those suspected of past violations of international humanitarian law and human rights, while ensuring that the rights . . . to legal representation are afforded to all persons suspected of such crimes".²⁹⁹⁴

Other International Organisations

3273. No practice was found.

²⁹⁹⁰ US, Supreme Court, *Ward case*, Judgement, 1 June 1942.

²⁹⁹¹ Report on the Practice of Jordan, 1997, Chapter 5.

²⁹⁹² US, Department of State, Country reports on human rights practices for 1986, Ethiopia, p. 144; see also Country reports on human rights practices for 1993, Nicaragua, p. 637; Country reports on human rights practices for 1996, Cambodia, p. 611.

²⁹⁹³ Report on US Practice, 1997, Chapter 5.3.

²⁹⁹⁴ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 22.

International Conferences

3274. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3275. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

9. Subparagraph 3 (b) [of Article 14 of the 1966 ICCPR] provides that the accused must have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing. What is “adequate time” depends on the circumstances of each case, but the facilities must include access to documents and other evidence which the accused requires to prepare his case, as well as the opportunity to engage and communicate with counsel. When the accused does not want to defend himself in person or request a person or an association of his choice, he should be able to have recourse to a lawyer. Furthermore, this subparagraph requires counsel to communicate with the accused in conditions giving full respect for the confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with their established professional standards and judgement without any restrictions, influences, pressures or undue interference from any quarter.

...

11. ... The accused or his lawyer must have the right to act diligently and fearlessly in pursuing all available defences and the right to challenge the conduct of the case if they believe it to be unfair. When exceptionally for justified reasons trials in absentia are held, strict observance of the rights of the defence is all the more necessary.²⁹⁹⁵

3276. In 1992, in its concluding observations on the report of Senegal, the HRC rejected the argument that the 1966 ICCPR’s provisions should be interpreted against the background of the conditions prevailing in the country (a state of emergency) and expressed concern at provisions in legislation “particularly in so far as they allow detainees to be kept incommunicado during the first eight days following arrest and deprived of access to a lawyer for the period of arrest”.²⁹⁹⁶

3277. In several cases, the HRC found a violation of the right of defence because of lack of access to counsel during detention, including during *incommunicado* detention.²⁹⁹⁷

3278. In several cases, the HRC has stressed the need for free legal assistance where the interests of justice so require. This was not required in criminal

²⁹⁹⁵ HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, §§ 9 and 11.

²⁹⁹⁶ HRC, Concluding observations on the report of Senegal, UN Doc. CCPR/C/79/Add.10, 28 December 1992, § 5.

²⁹⁹⁷ HRC, *Sala de Tourón v. Uruguay*, Views, 31 March 1981, § 12; *Pietrarroia v. Uruguay*, Views, 27 March 1981, § 17; *Wight v. Madagascar*, Views, 1 April 1985, § 17; *Lafuente Peñarrieta and Others v. Bolivia*, Views, 2 November 1987, § 16.

proceedings concerning breach of traffic regulations,²⁹⁹⁸ but was found to be necessary in cases of murder trials, as well as appeals contesting the fairness of a trial.²⁹⁹⁹

3279. In its views in *Little v. Jamaica* in 1991, the HRC held that the meaning of “adequate time” to prepare a defence would vary according to the circumstances and complexity of the case, but a few days would normally be deemed insufficient.³⁰⁰⁰

3280. In its views in *Saldías López v. Uruguay* in 1981, the HRC found a violation of Article 14 (3)(d) of the 1966 ICCPR when an *ex-officio* defence attorney had been appointed for the accused against their will.³⁰⁰¹

3281. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following:

In the determination of charges against individuals, the individual shall be entitled in particular to:

- ...
i) Have adequate time and facilities for the preparation of their defence and to communicate in confidence with counsel of their choice.³⁰⁰²

3282. In its decision in *Constitutional Rights Project v. Nigeria (87/93)* in 1995, the ACiHPR held that:

The communication alleges that during the trials the defense counsel for the complainants was harassed and intimidated to the extent of being forced to withdraw from the proceedings. In spite of this forced withdrawal of counsel, the tribunal proceeded to give judgment in the matter, finally sentencing the accused to death. The Commission finds that defendants were deprived of their right to defense, including the right to be defended by counsel of their choice, [which constitutes a] violation of [Article 7(1)(c) of the 1981 ACHPR].³⁰⁰³

3283. In its decision in *Avocats Sans Frontières v. Burundi (231/99)* in 2000, the ACiHPR emphatically recalled that:

The right to legal assistance is a fundamental element to the right to fair trial. Moreso where the interests of justice demand it. It holds the view that in the case under consideration, considering the gravity of the allegations brought against the accused and the nature of the penalty faced [i.e. death penalty], it was in the interest of Justice for him to have benefit of the assistance of a lawyer at each stage of the case.³⁰⁰⁴

²⁹⁹⁸ HRC, *O.F. v. Norway*, Admissibility Decision, 26 October 1984, § 5.6.

²⁹⁹⁹ HRC, *Currie v. Jamaica*, Views, 29 March 1994, § 13.2–13.4; *Thomas v. Jamaica*, Views, 3 November 1997, § 6.4.

³⁰⁰⁰ HRC, *Little v. Jamaica*, Views, 1 November 1991, § 8.3–8.4.

³⁰⁰¹ HRC, *Saldías López v. Uruguay*, Views, 29 July 1981, § 13; see also *Celiberti de Casariego v. Uruguay*, Views, 29 July 1981, § 11.

³⁰⁰² ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(e)(i).

³⁰⁰³ ACiHPR, *Constitutional Rights Project v. Nigeria (87/93)*, Decision, 13–22 March 1995, § 9.

³⁰⁰⁴ ACiHPR, *Avocats Sans Frontières v. Burundi (231/99)*, Decision, 23 October–6 November 2000, § 30.

3284. In its decision in *Civil Liberties Organisation and Others v. Nigeria* (218/98) in 2001, the ACiHPR stated, with respect to Article 7(1)(c) of the 1981 ACHPR, that:

27. It is our view that the provisions of Article 7 should be considered non-derogable providing as they do the minimum protection to citizens and military officers alike especially under an unaccountable, undemocratic military regime . . .
28. It is alleged that in contravention of Article 7(1)(c) of the Charter, the convicted persons were not given the opportunity to be represented and defended by counsel of their choice, but rather that junior military lawyers were assigned to them and their objections were overruled. The fairness of the trial is critical if justice is to be done. For that especially in serious cases, which carry the death penalty, the accused should be represented by a lawyer of his choice. The purpose of this provision is to ensure that the accused has confidence in his legal counsel. Failure to provide for this may expose the accused to a situation where they will not be able to give full instructions to their counsel for lack of confidence.
29. Besides, it is desirable that in cases where the accused are unable to afford legal counsel, that they be represented by counsel at state expense. Even in such cases, the accused should be able to choose out of a list the preferred independent counsel "not acting under the instructions of government but responsible only to the accused". The Human Rights Committee also prescribes that the accused person must be able to consult with his lawyer in conditions which ensure confidentiality of their communications. Lawyers should be able to counsel and to represent their clients in accordance with established professional standards without any restrictions, influences, pressures or undue interference from any quarter . . .
30. The right to fair trial is essential for the protection of all other fundamental rights and freedoms . . .
31. The assignment of military lawyers to accused persons is capable of exposing the victims to a situation of not being able to communicate, in confidence, with counsel of their choice. The Commission therefore finds the assignment of military counsel to the accused persons, despite their objections, and especially in a criminal proceeding which carries the ultimate punishment a breach of Article 7(1)(c) [of the 1981 ACHPR].³⁰⁰⁵

3285. In its decision in *Ensslin, Baader and Raspe v. FRG* in 1978, the ECiHR held that it was permissible to bar a particular lawyer from representing an accused because of his support for a criminal organisation to which the accused belonged and in circumstances in which a number of other lawyers nominated by the accused were permitted to act.³⁰⁰⁶

3286. In its judgement in the *Pakelli case* in 1983, the ECtHR reaffirmed that free legal assistance must be given if the accused does not have sufficient means to pay counsel and if the interests of justice so require. In this case, one of the

³⁰⁰⁵ ACiHPR, *Civil Liberties Organisation and Others v. Nigeria* (218/98), Decision, 23 April–7 May 2001, §§ 27–31.

³⁰⁰⁶ ECiHR, *Ensslin, Baader and Raspe v. FRG*, Decision, 8 July 1978, §§ 25 and 57.

grievances of the accused related to the application of a new rule of criminal procedure and therefore the presence of counsel was necessary.³⁰⁰⁷

3287. In its judgement in the *Campbell and Fell case* in 1984, the ECtHR observed that the “privileged contact prior to the commencement of litigation may be just as important as privileged contact after proceedings have been instituted”.³⁰⁰⁸

3288. In its decision in the *Can case* in 1984, the ECiHR explained that the right of the accused to “adequate facilities” under the 1950 ECHR implied that:

The substantive defence activity on his behalf may comprise everything which is “necessary” to prepare the main trial... The accused must have the opportunity to organise his defence in an appropriate way and without restriction as to the possibility to put all relevant defence arguments before the trial court.³⁰⁰⁹

The ECiHR further stated that “to subject the defence counsel’s contacts with the accused to supervision of the court” is in principle incompatible with the right to effective assistance by a lawyer as guaranteed by the 1950 ECHR. It added that:

This does not mean, however, that the right to free contact with the defence counsel must be granted under all circumstances and without any exceptions. Any restrictions in this respect must however remain an exception to the general rule, and therefore need to be justified by the special circumstances of the case.³⁰¹⁰

3289. In its judgement in *Quaranta v. Switzerland* in 1991, the ECtHR, considering that the case concerned the possibility of up to three years’ imprisonment, which was severe, and that the personality of the accused was such that the lack of counsel made it impossible for him to plead his cause adequately, stated that:

27. ... The right of an accused to be given, in certain circumstances, free legal assistance constitutes one aspect of the notion of a fair trial in criminal proceedings...
32. In order to determine whether the “interests of justice” required that the applicant receive free legal assistance, the Court will have regard to various criteria...
33. In the first place, consideration should be given to the seriousness of the offence... and the severity of the sentence which [the accused] risked...
34. An additional factor is the complexity of the case.³⁰¹¹

3290. In its judgement in the *Imbrioscia v. Switzerland case* in 1993, the ECtHR stated, with respect to Article 6(3)(c) of the 1950 ECHR, that:

³⁰⁰⁷ ECtHR, *Pakelli case*, Judgement, 25 April 1983, §§ 30–40.

³⁰⁰⁸ ECtHR, *Campbell and Fell case*, Judgement, 28 June 1984, § 159.

³⁰⁰⁹ ECiHR, *Can case*, Decision, 12 July 1984, § 53.

³⁰¹⁰ ECiHR, *Can case*, Decision, 12 July 1984, § 57.

³⁰¹¹ ECtHR, *Quaranta v. Switzerland*, Judgement, 24 May 1991, §§ 27 and 32–34.

33. ... [The applicant] inferred that in order to be effective, the right to defend oneself must cover not only the trial, but also the preceding interrogations by the police and the phase which took place before the district prosecutor.
...
36. The Court cannot accept the Government's first submission without qualification. Certainly the primary purpose of Article 6 [1950 ECHR] as far as criminal matters are concerned is to ensure a fair trial by a "tribunal" competent to determine "any criminal charge", but it does not follow that the Article (art. 6) has no application to pre-trial proceedings. The "reasonable time" mentioned in [Article 6(1)], for instance, begins to run from the moment a "charge" comes into being, within the autonomous, substantive meaning to be given to that term.³⁰¹²

3291. In its judgement in *Averill v. UK* in 2000, the ECtHR found that the "concept of fairness" enshrined in Article 6 of the 1950 ECHR required that legal assistance be accessible even "at the initial stages of police interrogation".³⁰¹³

3292. In a case concerning Nicaragua in 1989, the IACiHR considered the issue of adequacy of time to prepare a defence. The Commission inferred from the shortness of the period during which the accused had been detained and tried that he had not been accorded adequate time for the preparation of his defence.³⁰¹⁴

3293. In its advisory opinion in the *Exceptions to the Exhaustion of Domestic Remedies case* in 1990, the IACtHR stated that:

25. ... If a person refuses or is unable to defend himself personally, he has the right to be assisted by counsel of his own choosing. In cases where the accused neither defends himself nor engages his own counsel within the time period established by law, he has the right to be assisted by counsel provided by the state, paid or not as the domestic law provides. To that extent the Convention guarantees the right to counsel in criminal proceedings. But since it does not stipulate that legal counsel be provided free of charge when required, an indigent would suffer discrimination for reason of his economic status if, when in need of legal counsel, the state were not to provide it to him free of charge.
26. Article 8 must, then, be read to require legal counsel only when that is necessary for a fair hearing. Any state that does not provide indigents with such counsel free of charge cannot, therefore, later assert that appropriate remedies existed but were not exhausted.
27. Even in those cases in which the accused is forced to defend himself because he cannot afford legal counsel, a violation of Article 8 of the Convention could be said to exist if it can be proved that the lack of legal counsel affected the right to a fair hearing to which he is entitled under that Article.³⁰¹⁵

³⁰¹² ECtHR, *Imbrioscia v. Switzerland*, Judgement, 24 November 1993, §§ 33 and 36.

³⁰¹³ ECtHR, *Averill v. UK*, Judgement, 6 June 2000, § 57.

³⁰¹⁴ IACiHR, *Case 10.198 (Nicaragua)*, Resolution, 29 September 1989, § 9.

³⁰¹⁵ IACtHR, *Exceptions to the Exhaustion of Domestic Remedies case*, Advisory Opinion, 10 August 1990, §§ 25-27.

V. Practice of the International Red Cross and Red Crescent Movement

3294. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that the courts must respect “the generally recognized principles of regular judicial procedure, which include . . . the right to fair trial including means of defence”.³⁰¹⁶

VI. Other Practice

3295. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that “unacknowledged detention” shall remain prohibited. It also provides a list of the minimum judicial guarantees, including that “the procedure . . . shall afford the accused before and during his or her trial all the necessary rights and means of defence”.³⁰¹⁷

Trial without undue delay

I. Treaties and Other Instruments

Treaties

3296. Article 103, first paragraph, GC III provides that “judicial investigations relating to a prisoner of war shall be conducted as rapidly as circumstances permit and so that his trial shall take place as soon as possible”.

3297. Article 71, second paragraph, GC IV provides that accused persons prosecuted by the occupying power “shall be brought to trial as rapidly as possible”.

3298. Article 5(3) of the 1950 ECHR provides that “everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article . . . shall be entitled to trial within a reasonable time or to release pending trial”.

3299. Article 6(1) of the 1950 ECHR provides that “everyone is entitled to a fair and public hearing within a reasonable time”.

3300. Article 9(3) of the 1966 ICCPR provides that “anyone arrested or detained on a criminal charge . . . shall be entitled to trial within a reasonable time or to release”.

3301. Article 14(3)(c) of the 1966 ICCPR provides that everyone shall be entitled “to be tried without undue delay”.

3302. Article 8(1) of the 1969 ACHR provides that “every person has the right to a hearing, with due guarantees and within a reasonable time”.

³⁰¹⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(a).

³⁰¹⁷ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Articles 4(2) and 9(a), *IRRC*, No. 282, 1991, pp. 331–332 and 334.

3303. Article 7(1)(d) of the 1981 ACHPR provides that every individual shall have “the right to be tried within a reasonable time by an impartial court or tribunal”.

3304. Article 40(2)(b)(iii) of the 1989 Convention on the Rights of the Child provides that “every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (iii) to have the matter determined without delay by a competent, independent and impartial authority or judicial body”.

3305. According to Article 64(2) of the 1998 ICC Statute, “the Trial Chamber shall ensure that the trial is . . . expeditious”. Article 64(3) provides that “upon assignment of a case for trial in accordance with this Statute, the Trial Chamber assigned to deal with the case shall . . . confer with the parties and adopt such procedures as are necessary to facilitate the fair and expeditious conduct of the proceedings”.

3306. Article 67(1)(c) of the 1998 ICC Statute provides that the accused shall be entitled “to be tried without undue delay”.

3307. Article 17(4)(c) of the 2002 Statute of the Special Court for Sierra Leone provides that “in the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: . . . to be tried without undue delay”.

Other Instruments

3308. Principle 38 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “a person detained on a criminal charge shall be entitled to trial within a reasonable time or to release pending trial”.

3309. Article 8(d) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “to be tried without undue delay”.

3310. Article 20(1) of the 1993 ICTY Statute provides that “the Trial Chamber shall ensure that a trial is fair and expeditious”.

3311. Article 21(4)(c) of the 1993 ICTY Statute provides that the accused shall “be tried without undue delay”.

3312. Article 19(1) of the 1994 ICTR Statute provides that “the Trial Chamber shall ensure that a trial is fair and expeditious”.

3313. Article 20(4)(c) of the 1994 ICTR Statute provides that the accused shall “be tried without undue delay”.

3314. Article 11(1)(d) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “to be tried without undue delay”.

3315. Article 47 of the 2000 EU Charter of Fundamental Rights provides that “everyone is entitled to a fair and public hearing within a reasonable time”.

II. National Practice

Military Manuals

3316. Argentina’s Law of War Manual states that the verdict shall be given in “the shortest time limit as possible”.³⁰¹⁸ It also provides that the occupying power shall conduct the case “in the most speedy way”.³⁰¹⁹

3317. Australia’s Defence Force Manual sets out a number of procedural rules which include, *inter alia*, that “investigations must be conducted as rapidly as possible”.³⁰²⁰

3318. Canada’s LOAC Manual provides that in an occupied territory, accused persons “must be brought to trial as rapidly as possible”.³⁰²¹

3319. Colombia’s Instructors’ Manual provides that “anybody who is accused has the right to . . . a due . . . trial without unjustified delay”.³⁰²²

3320. New Zealand’s Military Manual provides that “internees charged with disciplinary offences are entitled to a speedy trial”.³⁰²³ It further provides that the accused “must be brought to trial as rapidly as possible”.³⁰²⁴

3321. Spain’s LOAC Manual provides that judicial criminal proceedings in occupied territory shall not last longer than the usual delay.³⁰²⁵

3322. The UK Military Manual provides that “the investigation of charges against a prisoner of war shall be carried out as quickly as circumstances permit and in such manner that his trial will take place as quickly as possible”.³⁰²⁶ The manual further states that in occupied territories, the accused “must be brought to trial as rapidly as possible”.³⁰²⁷

3323. The US Field Manual reproduces Article 103 GC III and Article 71 GC IV.³⁰²⁸

National Legislation

3324. Countless pieces of domestic legislation provide for the right to be tried without undue delay.³⁰²⁹

³⁰¹⁸ Argentina, *Law of War Manual* (1969), § 5.008(2).

³⁰¹⁹ Argentina, *Law of War Manual* (1969), § 5.029(2).

³⁰²⁰ Australia, *Defence Force Manual* (1994), § 1042(a).

³⁰²¹ Canada, *LOAC Manual* (1999), p. 12-6, § 54.

³⁰²² Colombia, *Instructors’ Manual* (1999), p. 11.

³⁰²³ New Zealand, *Military Manual* (1992), § 1129(5).

³⁰²⁴ New Zealand, *Military Manual* (1992), § 1330(1).

³⁰²⁵ Spain, *LOAC Manual* (1996), Vol. I, § 2.7.b.(3).

³⁰²⁶ UK, *Military Manual* (1958), § 230.

³⁰²⁷ UK, *Military Manual* (1958), § 570.

³⁰²⁸ US, *Field Manual* (1956), §§ 179 and 441.

³⁰²⁹ See, e.g., Kenya, *Constitution* (1992), Article 77(1).

3325. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁰³⁰

3326. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 103 GC III and 71 GC IV, is a punishable offence.³⁰³¹

3327. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... is liable to imprisonment".³⁰³²

National Case-law

3328. No practice was found.

Other National Practice

3329. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

3330. No practice was found.

Other International Organisations

3331. In a resolution adopted in 1984 concerning the situation of martial law in Turkey, the Parliamentary Assembly of the Council of Europe urged the Turkish authorities to ensure respect for the right of individuals to have their cases heard within a reasonable time.³⁰³³

International Conferences

3332. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3333. In its General Comment on Article 9 of the 1966 ICCPR in 1982, the HRC stated that "pre-trial detention should be an exception and as short as possible".³⁰³⁴

3334. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

³⁰³⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁰³¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁰³² Norway, *Military Penal Code as amended* (1902), § 108.

³⁰³³ Council of Europe, Parliamentary Assembly, Res. 822, 10 May 1984, § 17(b)(iv).

³⁰³⁴ HRC, General Comment No. 8 (Article 9 ICCPR), 30 July 1982, § 3.

Subparagraph 3 (c) provides that the accused shall be tried without undue delay. This guarantee relates not only to the time by which a trial should commence, but also the time by which it should end and judgement be rendered; all stages must take place “without undue delay”. To make this right effective, a procedure must be available in order to ensure that the trial will proceed “without undue delay”, both in first instance and on appeal.³⁰³⁵

3335. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: “In the determination of charges against individuals, the individual shall be entitled in particular to: . . . ii) Be tried within a reasonable time.”³⁰³⁶

3336. In its decision in *Pagnouille v. Cameroon* in 1997, the ACiHPR held that:

Mr. Mazou has not yet had a judgment on his case brought before the Supreme Court over 2 years ago, without being given any reason for the delay . . . The delegation [of Cameroon] held that the case might be decided upon by the end of October 1996, but still no news of it has been forwarded to the Commission. Given that this case concerns Mr. Mazou’s ability to work in his profession, two years without any hearing or projected trial date constitutes a violation of [Article 7(1)(d) of the 1981 ACHPR].³⁰³⁷

3337. In its decision in *Abubakar v. Ghana* in 1996, involving the arrest and detention of a Ghanaian national, the ACiHPR found that “the complainant was detained in prison for seven years without trial before his escape. This period clearly violates the “reasonable time” standard stipulated in the [1981 ACHPR].”³⁰³⁸

3338. In several cases, the ECtHR found that the reasonableness of the length of time for pre-trial detention would depend upon factors relating to the circumstances of the case, including the difficulty of the investigations, the behaviour of the accused and the handling of the case by the national authorities.³⁰³⁹

3339. In its judgement in *Boddaert v. Belgium* in 1992, the ECtHR stated that Article 6 of the 1950 ECHR commanded that judicial proceedings be expeditious, but it also laid down the more general principle of the proper administration of justice.³⁰⁴⁰

3340. In a case concerning Argentina in 1989, the IACiHR referred to the jurisprudence of the ECtHR and stated that the:

³⁰³⁵ HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 10.

³⁰³⁶ ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(e)(ii).

³⁰³⁷ ACiHPR, *Pagnouille v. Cameroon*, Decision, 15–24 April 1997, § 19.

³⁰³⁸ ACiHPR, *Abubakar v. Ghana*, Decision, 21–31 October 1996, § 12.

³⁰³⁹ ECtHR, *Wemhoff case*, Judgement, 27 June 1968, § 104; *Matznetter v. Austria*, Judgement, 10 November 1969, § 12; *Stögmüller case*, Judgement, 10 November 1969, § 16; *König v. Germany*, Judgement, 28 June 1978, § 99; *Letellier v. France*, Judgement, 26 June 1991, § 51; *Kemmache v. France*, Judgement, 27 November 1991, § 52; *Tomasi v. France*, Judgement, 27 August 1992, § 102; *Olsson v. Sweden (No. 2)*, Judgement, 27 November 1992, § 99; *Scopel-liti v. Italy*, Judgement, 23 November 1993, § 19.

³⁰⁴⁰ ECtHR, *Boddaert v. Belgium*, Judgement, 12 October 1992, § 39.

reasonableness of a court order or of length of time must be weighed within its own and specific context, that is, there are no general universally valid criteria and what is involved is something that is legally known as a question of fact

...

It is not possible to define this [reasonable length of time] period *in abstracto*, but, instead, that it shall be defined in each case... The Commission... agrees with the opinion that the referenced State party is "not bound (by the Convention) to fix a valid period for all cases, independently from the circumstances".³⁰⁴¹

3341. In a case concerning Argentina in 1996, the IACiHR noted in relation to the right to a hearing within a reasonable time that a series of factors might determine the length of a trial. The relevant considerations included "the complexity of the case, the behaviour of the accused, and the diligence of the competent authorities in their conduct of the proceedings".³⁰⁴²

V. Practice of the International Red Cross and Red Crescent Movement

3342. No practice was found.

VI. Other Practice

3343. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that "the procedure... shall provide for a trial within a reasonable time".³⁰⁴³

Examination of witnesses

I. Treaties and Other Instruments

Treaties

3344. Article 16(e) of the 1945 IMT Charter (Nuremberg) provides that "a Defendant shall have the right through himself or through his Counsel to present evidence at the Trial in support of his defence, and to cross-examine any witness called by the Prosecution".

3345. Article 96, third paragraph, GC III provides that "the accused shall be... permitted, in particular, to call witnesses".

3346. Article 105, first paragraph, GC III provides that "the prisoner of war shall be entitled... to the calling of witnesses".

³⁰⁴¹ IACiHR, *Case 10.037 (Argentina)*, Resolution, 13 April 1989, Section 11(a)(s) and Section 17(seven).

³⁰⁴² IACiHR, *Case 11.245 (Argentina)*, Report, 1 March 1996, § 111.

³⁰⁴³ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(a), *IRRC*, No. 282, 1991, p. 334.

3347. Article 72, first paragraph, GC IV provides that “accused persons shall have the right to present evidence necessary to their defence and may, in particular, call witnesses”.

3348. Article 123, second paragraph, GC IV provides that “the accused internee shall be . . . permitted, in particular, to call witnesses”.

3349. Article 6(3)(d) of the 1950 ECHR provides as a minimum right for any person who is charged with a criminal offence “to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

3350. Article 14(3)(e) of the 1966 ICCPR provides that, in the determination of any criminal charge, the accused is entitled as a minimum guarantee “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

3351. Article 8(2)(f) of the 1969 ACHR states that every person accused of a criminal offence is entitled to be guaranteed “the right of the defense to examine witnesses present in the court and to obtain the appearance, as witnesses, of experts or other persons who may throw light on the facts”.

3352. Article 75(4)(g) AP I provides that “anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”. Article 75 AP I was adopted by consensus.³⁰⁴⁴

3353. Article 40(2)(b)(iv) of the 1989 Convention on the Rights of the Child provides that “every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (iv) to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality”.

3354. Article 67(1)(e) of the 1998 ICC Statute states that the accused is entitled: To examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her. The accused shall also be entitled to raise defences and to present other evidence admissible under this Statute.

3355. Article 17(4) of the 2002 Statute of the Special Court for Sierra Leone provides that the accused

shall be entitled to the following minimum guarantees, in full equality:

...

- (e) to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her.

³⁰⁴⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

Other Instruments

3356. Article 9(d) of the 1946 IMT Charter (Tokyo) provides that “an accused shall have the right, through himself or through his counsel (but not through both), to conduct his defense, including the right to examine any witness, subject to such reasonable restrictions as the Tribunal may determine”.

3357. Article 8(f) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

3358. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3359. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3360. Article 21(4)(e) of the 1993 ICTY Statute provides that the accused shall be entitled “to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her”.

3361. Article 20(4)(e) of the 1994 ICTR Statute provides that the accused shall be entitled “to examine, or have examined, the witnesses against him or her and to obtain the attendance and examination of witnesses on his or her behalf under the same conditions as witnesses against him or her”.

3362. Article 11(1)(f) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him”.

*II. National Practice**Military Manuals*

3363. Argentina’s Law of War Manual (1969) states that POWs have the right to “call witnesses”.³⁰⁴⁵ It further states that the counsel for defence “can . . . talk with witnesses for the prosecution, including prisoners of war”.³⁰⁴⁶ The manual also stresses that “any accused has the right to assert the means of evidence necessary for his defence . . . including citing witnesses”.³⁰⁴⁷

³⁰⁴⁵ Argentina, *Law of War Manual* (1969), § 2.082.

³⁰⁴⁶ Argentina, *Law of War Manual* (1969), § 2.086.

³⁰⁴⁷ Argentina, *Law of War Manual* (1969), § 5.029(3).

3364. Argentina's Law of War Manual (1989) states that a POW has the "right to subpoena witnesses".³⁰⁴⁸

3365. Canada's LOAC Manual provides that accused persons in occupied territory must "have the right to present evidence necessary to their defence and may, in particular, call witnesses".³⁰⁴⁹

3366. New Zealand's Military Manual states that in order to defend himself, the accused internee "shall be permitted, in particular, to call witnesses".³⁰⁵⁰ It further provides that "anyone charged with an offence shall have the right to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him".³⁰⁵¹ The manual also stresses that "accused persons have the right to present evidence necessary to their defence and may, in particular, call witnesses".³⁰⁵²

3367. Spain's LOAC Manual states that "before imposing a [disciplinary] decision, the accused prisoner... can explain his conduct and defend himself, including by presenting witnesses".³⁰⁵³

3368. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.³⁰⁵⁴

3369. The UK Military Manual provides, regarding disciplinary punishment of a POW, that "he must be allowed to call witnesses".³⁰⁵⁵ It further provides that "in any judicial proceedings against him, the prisoner of war is entitled to... call witnesses" and that "Defending Counsel... must also be allowed to interview any witness for the defence, including prisoners of war".³⁰⁵⁶ With respect to cases of occupation, the manual states that the "accused have the right to present evidence necessary to their defence and may, in particular, call witnesses".³⁰⁵⁷

3370. The US Field Manual reproduces Articles 96 and 105 GC III.³⁰⁵⁸ It also uses the same wording as Article 123 GC IV regarding disciplinary punishments and Article 72 GC IV concerning situations of occupation.³⁰⁵⁹

3371. The US Air Force Pamphlet provides that Article 105 GC III "gives the right to [the prisoner of war]... to the calling of witnesses".³⁰⁶⁰ It also states that "among other rights, accused persons are assured the right to... call witnesses".³⁰⁶¹

³⁰⁴⁸ Argentina, *Law of War Manual* (1989), § 3.30, see also § 5.09.

³⁰⁴⁹ Canada, *LOAC Manual* (1999), p. 12-7, § 57.

³⁰⁵⁰ New Zealand, *Military Manual* (1992), § 1130(1).

³⁰⁵¹ New Zealand, *Military Manual* (1992), § 1137(4)(g).

³⁰⁵² New Zealand, *Military Manual* (1992), § 1330(2).

³⁰⁵³ Spain, *LOAC Manual* (1996), Vol. I, § 8.2.e.(2).

³⁰⁵⁴ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

³⁰⁵⁵ UK, *Military Manual* (1958), § 208. ³⁰⁵⁶ UK, *Military Manual* (1958), § 227.

³⁰⁵⁷ UK, *Military Manual* (1958), § 571. ³⁰⁵⁸ US, *Field Manual* (1956), §§ 172 and 181.

³⁰⁵⁹ US, *Field Manual* (1956), §§ 330 and 441.

³⁰⁶⁰ US, *Air Force Pamphlet* (1976), § 13-8. ³⁰⁶¹ US, *Air Force Pamphlet* (1976), § 14-6.

3372. The US Air Force Commander's Handbook states that in case of trial, prisoners must "be allowed to call witnesses for the defense".³⁰⁶²

National Legislation

3373. Countless pieces of domestic legislation provide for the right to call witnesses.³⁰⁶³

3374. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁰⁶⁴

3375. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 96 and 105 GC III and Articles 72 and 123 GC IV, and of AP I, including violations of Article 75(4)(g) AP I, are punishable offences.³⁰⁶⁵

3376. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".³⁰⁶⁶

National Case-law

3377. No practice was found.

Other National Practice

3378. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.³⁰⁶⁷

III. Practice of International Organisations and Conferences

3379. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3380. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that "subparagraph 3(e)... is designed to guarantee to the accused the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution".³⁰⁶⁸

³⁰⁶² US, *Air Force Commander's Handbook* (1980), § 4-2(c).

³⁰⁶³ See, e.g., Ethiopia, *Constitution* (1994), Article 20(4); Georgia, *Constitution* (1995), Article 42(6); Kenya, *Constitution* (1992), Article 77(2)(e); Mexico, *Constitution* (1917), Article 20(IV).

³⁰⁶⁴ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁰⁶⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁰⁶⁶ Norway, *Military Penal Code as amended* (1902), § 108.

³⁰⁶⁷ Report on the Practice of Jordan, 1997, Chapter 5.

³⁰⁶⁸ HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 12.

3381. In its views in *L. Grant v. Jamaica* in 1994 and *García Fuenzalida v. Ecuador* in 1996, the HRC found a violation of Article 14(3)(e) of the 1966 ICCPR if the State did not take the necessary measures to enable important witnesses to appear.³⁰⁶⁹

3382. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following:

In the determination of charges against individuals, the individual shall be entitled in particular to:

...

- iii) Examine, or have examined, the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them.³⁰⁷⁰

3383. In its judgement in *Engel v. Netherlands* in 1976, the ECtHR stated that Article 6 of the 1950 ECHR did not require

the attendance and examination of every witness on the accused's behalf. Its essential aim, as is indicated by the words "under the same conditions", is a full "equality of arms" in the matter. With this proviso, it leaves it to the competent national authorities to decide upon the relevance of proposed evidence insofar as is compatible with the concept of a fair trial which dominates the whole of Article 6 (art. 6).³⁰⁷¹

3384. In its judgement in *J. J. v. the Netherlands* in 1998, the ECtHR stated that under Article 6(3)(d) of the 1950 ECHR, the right of the defence to call and examine witnesses meant, in principle, "the opportunity for the parties to a criminal... trial to have knowledge of and comment on all evidence addressed or observations filed... with a view to influencing the court's decision".³⁰⁷²

V. Practice of the International Red Cross and Red Crescent Movement

3385. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include... presence of defence witnesses [and] examination of witnesses against the accused".³⁰⁷³

³⁰⁶⁹ HRC, *L. Grant v. Jamaica*, Views, 31 March 1994, § 8.5; *García Fuenzalida v. Ecuador*, Views, 12 July 1996, § 9.5.

³⁰⁷⁰ ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(e)(iii).

³⁰⁷¹ ECtHR, *Engel v. Netherlands*, Judgement, 8 June 1976, § 91.

³⁰⁷² ECtHR, *J. J. v. the Netherlands*, Judgement, 27 March 1998, § 43.

³⁰⁷³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(g)–(h).

3386. The ICRC Commentary on Article 75 AP I points out that “the possibility of examining witnesses is an essential prerequisite for an effective defence”.³⁰⁷⁴

VI. *Other Practice*

3387. No practice was found.

Assistance of an interpreter

I. Treaties and Other Instruments

Treaties

3388. Article 96, fourth paragraph, GC III provides that “the accused shall be . . . permitted . . . to have recourse, if necessary, to the services of a qualified interpreter”.

3389. Article 105, first paragraph, GC III provides that “the prisoner of war shall be entitled . . . if he deems necessary, to the services of a competent interpreter”.

3390. Article 72, third paragraph, GC IV provides that “accused persons shall, unless they freely waive such assistance, be aided by an interpreter, both during preliminary investigation and during the hearing in court. They shall have the right at any time to object to the interpreter and to ask for his replacement.”

3391. Article 123, second paragraph, GC IV provides that “the accused internee shall be . . . permitted . . . to have recourse, if necessary, to the services of a qualified interpreter”.

3392. Article 6(3)(e) of the 1950 ECHR provides that “everyone charged with a criminal offence has the following minimum rights . . . to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

3393. Article 14(3)(f) of the 1966 ICCPR provides that “in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

3394. Article 8(2)(a) of the 1969 ACHR establishes “the right of the accused to be assisted without charge by a translator or interpreter, if he does not understand or does not speak the language of the tribunal or court”.

3395. According to Article 40(2)(b)(vi) of the 1989 Convention on the Rights of the Child, “every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (vi) to have the free assistance of an interpreter if the child cannot understand or speak the language used”.

3396. Article 55(1)(c) of the 1998 ICC Statute provides that a person “shall, if questioned in a language other than a language the person fully understands

³⁰⁷⁴ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3115.

and speaks, have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness”.

3397. Article 67(1) of the 1998 ICC Statute provides that:

In the determination of any charge, the accused shall be entitled . . . to the following minimum guarantees, in full equality:

- ...
- (f) To have, free of any cost, the assistance of a competent interpreter and such translations as are necessary to meet the requirements of fairness, if any of the proceedings or documents presented to the Court are not in a language which the accused fully understands and speaks.

3398. Article 17(4) of the 2002 Statute of the Special Court for Sierra Leone provides that:

In the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality:

- ...
- (f) to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the Special Court.

Other Instruments

3399. Article 8(g) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

3400. Article 21(4)(f) of the 1993 ICTY Statute provides that the accused shall be entitled “to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal”.

3401. Article 20(4)(f) of the 1994 ICTR Statute provides that the accused shall be entitled “to have the free assistance of an interpreter if he or she cannot understand or speak the language used in the International Tribunal for Rwanda”.

3402. Article 11(1)(g) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “to have the free assistance of an interpreter if he cannot understand or speak the language used in court”.

II. National Practice

Military Manuals

3403. Argentina’s Law of War Manual (1969) provides that the accused POW “shall be authorised . . . to ask for the assistance of a qualified interpreter” and that a POW has the right to “use, if he considers it to be necessary, the services of

a qualified interpreter".³⁰⁷⁵ The manual states that "any accused person, except if he refuses freely, can be assisted by an interpreter during the investigation as well as during the hearings before the tribunal. He can, at any time, challenge the interpreter and ask for his substitution."³⁰⁷⁶

3404. Argentina's Law of War Manual (1989) states that a POW has the "right to . . . have access to an interpreter".³⁰⁷⁷

3405. Canada's LOAC Manual provides that accused persons in occupied territory must "be aided by an interpreter, both during preliminary investigation and during the hearing in court".³⁰⁷⁸

3406. Ecuador's Naval Manual provides that "at a minimum, [procedural] rights must include the assistance of . . . an interpreter".³⁰⁷⁹

3407. New Zealand's Military Manual provides that the accused "shall have recourse, if necessary, to the services of a qualified interpreter".³⁰⁸⁰ It further states that "both during the preliminary investigation and during the hearing in court, the accused must be aided by an interpreter, unless such assistance is voluntarily waived. Similarly, an accused has the right at any time to object to the interpreter and to ask for his replacement."³⁰⁸¹

3408. The UK Military Manual provides, regarding disciplinary punishment of a POW, that "if necessary, [he must] be given the services of a qualified interpreter".³⁰⁸² It further states that "in any judicial proceedings against him, the prisoner of war is entitled . . . if he so desires, to have the services of a qualified interpreter".³⁰⁸³ With respect to situations of occupation, the manual states that "unless they voluntarily waive such assistance, accused persons must be aided by an interpreter, both during preliminary investigation and during the hearing in court. They have the right at any time to object to the interpreter and to ask for his replacement."³⁰⁸⁴

3409. The US Field Manual reproduces Articles 96 and 105 GC III.³⁰⁸⁵ It also uses the same wording as Articles 72 and 123 GC IV.³⁰⁸⁶

3410. The US Air Force Pamphlet provides that Article 105 GC III "gives [the prisoner of war] the right to . . . the services of a competent interpreter".³⁰⁸⁷ It also states that "among other rights, accused persons are assured the right to . . . obtain an interpreter".³⁰⁸⁸

3411. The US Air Force Commander's Handbook states that prisoners must be allowed "the help of . . . an interpreter" in case of trial.³⁰⁸⁹

³⁰⁷⁵ Argentina, *Law of War Manual* (1969), §§ 2.082 and 2.086.

³⁰⁷⁶ Argentina, *Law of War Manual* (1969), § 5.029(3).

³⁰⁷⁷ Argentina, *Law of War Manual* (1989), § 3.30, see also § 5.09.

³⁰⁷⁸ Canada, *LOAC Manual* (1999), p. 12-7, § 58.

³⁰⁷⁹ Ecuador, *Naval Manual* (1989), § 11.8.1.

³⁰⁸⁰ New Zealand, *Military Manual* (1992), § 1130(1).

³⁰⁸¹ New Zealand, *Military Manual* (1992), § 1330(2).

³⁰⁸² UK, *Military Manual* (1958), § 208. ³⁰⁸³ UK, *Military Manual* (1958), § 227.

³⁰⁸⁴ UK, *Military Manual* (1958), § 571. ³⁰⁸⁵ US, *Field Manual* (1956), §§ 172 and 181.

³⁰⁸⁶ US, *Field Manual* (1956), §§ 442 and 330. ³⁰⁸⁷ US, *Air Force Pamphlet* (1976), § 13-8.

³⁰⁸⁸ US, *Air Force Pamphlet* (1976), § 14-6.

³⁰⁸⁹ US, *Air Force Commander's Handbook* (1980), § 4-2(c).

3412. The US Naval Handbook states that “at a minimum, [procedural] rights must include the assistance of . . . an interpreter”.³⁰⁹⁰

National Legislation

3413. Countless pieces of domestic legislation provide for the right to have the free assistance of an interpreter if the accused cannot understand or speak the language used in court.³⁰⁹¹

3414. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.³⁰⁹²

3415. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 96 and 105 GC III and Articles 72 and 123 GC IV, is a punishable offence.³⁰⁹³

3416. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment”.³⁰⁹⁴

National Case-law

3417. No practice was found.

Other National Practice

3418. No practice was found.

III. Practice of International Organisations and Conferences

3419. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3420. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

[The right conferred by] Subparagraph 3(f) . . . is independent of the outcome of the proceedings and applies to aliens as well as to nationals. It is of basic importance in cases in which ignorance of the language used by a court or difficulty in understanding may constitute a major obstacle to the right of defence.³⁰⁹⁵

³⁰⁹⁰ US, *Naval Handbook* (1995), § 11.7.1.

³⁰⁹¹ See, e.g., Ethiopia, *Constitution* (1994), Article 20(7); Germany, *Criminal Procedure Code as amended* (1987), Section 259; Kenya, *Constitution* (1992), Article 77(2)(f).

³⁰⁹² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(f).

³⁰⁹³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁰⁹⁴ Norway, *Military Penal Code as amended* (1902), § 108(a).

³⁰⁹⁵ HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 13.

3421. In its views in *Cadoret and Le Bihan v. France* in 1991, the HRC explained the scope of the right to an interpreter as follows:

The provision for the use of one official court language by States parties to the Covenant does not . . . violate article 14. Nor does the requirement of a fair hearing obligate State parties to make available to a person whose mother tongue differs from the official court language, the services of an interpreter, if that person is capable of understanding and expressing himself adequately in the official language. Only if the accused or the witnesses have difficulties in understanding or expressing themselves in the court language is it obligatory that the services of an interpreter be made available.³⁰⁹⁶

3422. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR considered that the right to fair trial included, *inter alia*, the following: "In the determination of charges against individuals, the individual shall be entitled in particular to: . . . iv) Have the free assistance of an interpreter if they cannot speak the language used in court."³⁰⁹⁷

3423. In its decision in *Malawi African Association and Others v. Mauritania* in 2000, the ACiHPR held that:

The right to defence should also be interpreted as including the right to understand the charges being brought against oneself. In [one of the trials under consideration which allegedly violated the 1981 ACHPR], only 3 of the 21 accused persons spoke Arabic fluently, and this was the language used during the trial. This means that the 18 others did not have the right to defend themselves; this . . . constitutes a violation of [Article 7(1)(c) of the 1981 ACHPR].³⁰⁹⁸

3424. In its judgement in the *Luedicke, Belkacem and Koç case* in 1978, the ECtHR stated that:

The right protected by Article 6 para. 3 (e) (art. 6-3-e) entails, for anyone who cannot speak or understand the language used in court, the right to receive the free assistance of an interpreter, without subsequently having claimed back from him payment of the costs thereby incurred.

...

Construed in the context of the right to a fair trial guaranteed by Article 6, paragraph 3 (e) (art. 6-3-e) signifies that an accused who cannot understand or speak the language used in court has the right to the free assistance of an interpreter for the translation or interpretation of all those documents or statements in the proceedings instituted against him which it is necessary for him to understand in order to have the benefit of a fair trial.³⁰⁹⁹

³⁰⁹⁶ HRC, *Cadoret and Le Bihan v. France*, Views, 11 April 1991, § 5(6); see also *Guesdon v. France*, Views, 25 July 1990, § 10(2); *Barzhig v. France*, Views, 11 April 1991, § 5.5; *Z. P. v. Canada*, Admissibility Decision, 11 April 1991, § 5.3; *C. E. A. v. Finland*, Admissibility Decision, 10 July 1991, § 6.2; *C. L. D. v. France*, Admissibility Decision, 8 November 1991, § 4.2.

³⁰⁹⁷ ACiHPR, Eleventh Session, Tunis, 2–9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 2(e)(iv).

³⁰⁹⁸ ACiHPR, *Malawi African Association and Others v. Mauritania (54/91)*, Decision, 11 May 2000, § 97.

³⁰⁹⁹ ECtHR, *Luedicke, Belkacem and Koç case*, Judgement, 28 November 1978, §§ 46 and 48.

3425. In its judgement in the *Kamasinski case* in 1989, the ECtHR stated that Article 6(3)(e) of the 1950 ECHR

does not go so far as to require a written translation of all items of written evidence or official documents in the procedure. The interpretation assistance provided should be such as to enable the defendant to have knowledge of the case against him and to defend himself, notably by being able to put before the court his version of the events.³¹⁰⁰

V. Practice of the International Red Cross and Red Crescent Movement

3426. No practice was found.

VI. Other Practice

3427. No practice was found.

Presence of the accused at the trial

I. Treaties and Other Instruments

Treaties

3428. Article 12 of the 1945 IMT Charter (Nuremberg) provides that:

The Tribunal shall have the right to take proceedings against a person charged with crimes set out in Article 6 of this Charter in his absence, if he has not been found or if the Tribunal, for any reason, finds it necessary, in the interests of justice, to conduct the hearing in his absence.

3429. Article 123, second paragraph, GC IV refers to the disciplinary punishment awarded to internees and states that “the decision shall be announced in the presence of the accused”.

3430. Article 6(3)(c) of the 1950 ECHR provides that everyone charged with a criminal offence has the right “to defend himself in person”.

3431. Article 14(3)(d) of the 1966 ICCPR provides that “everyone shall be entitled to . . . be tried in his presence”.

3432. Article 8(2)(d) of the 1969 ACHR provides that during proceedings, every person accused of a criminal offence has “the right . . . to defend himself personally”.

3433. Article 75(4)(e) AP I provides that “anyone charged with an offence shall have the right to be tried in his presence”. Article 75 AP I was adopted by consensus.³¹⁰¹

³¹⁰⁰ ECtHR, *Kamasinski case*, Judgement, 19 December 1989, § 74.

³¹⁰¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

3434. Upon ratification of AP I, Austria stated that:

Article 75 of Protocol I will be applied insofar as sub-paragraph (e) of paragraph 4 is not incompatible with legislation providing that any defendant, who causes a disturbance at the trial or whose presence is likely to impede the questioning of another defendant or the hearing of a witness or expert witness, may be removed from the courtroom.³¹⁰²

3435. Upon ratification of AP I, Germany stated that “Article 74, paragraph 4, subparagraph (e) of Additional Protocol I will be applied in such manner that it is for the court to decide whether an accused person held in custody may appear in person at the hearing before the court of review”.³¹⁰³

3436. Upon ratification of AP I, Ireland stated that “Article 75 will be applied in Ireland insofar as paragraph 4(e) is not incompatible with the power enabling a judge, in exceptional circumstances, to order the removal of an accused from the court who causes a disturbance at the trial”.³¹⁰⁴

3437. Upon ratification of AP I, Liechtenstein stated in relation to Article 75 that “paragraph 4(e) is not incompatible with legislation under which any accused who causes a disturbance in court or whose presence could impede the questioning of another accused, a witness or expert may be excluded from the courtroom”.³¹⁰⁵

3438. Upon ratification of AP I, Malta stated in relation to Article 75 that:

Sub-paragraph (e) of paragraph 4 is not incompatible with legislation providing that any defendant, who causes a disturbance at the trial or whose presence is likely to impede the questioning of another defendant or the hearing or another witness or expert witness, may be removed from the courtroom.³¹⁰⁶

3439. Article 6(2)(e) AP II provides that “anyone charged with an offence shall have the right to be tried in his presence”. Article 6 AP II was adopted by consensus.³¹⁰⁷

3440. Upon ratification of AP II, Austria stated that:

Article 6, paragraph 2, sub-paragraph (e) of Protocol II will be applied insofar as it is not incompatible with legislation providing that any defendant, who causes a disturbance at the trial or whose presence is likely to impede the questioning of another defendant or the hearing of a witness or expert witness, may be removed from the courtroom.³¹⁰⁸

3441. Upon ratification of AP II, Germany stated that “Article 6, paragraph 2, subparagraph (e) of Additional Protocol II will be applied in such manner that

³¹⁰² Austria, Reservations made upon ratification of AP I, 13 August 1982, § 3(a).

³¹⁰³ Germany, Declarations made upon ratification of AP I and AP II, 14 February 1991, § 8.

³¹⁰⁴ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 13.

³¹⁰⁵ Liechtenstein, Reservations made upon ratification of AP I, 10 August 1989, § 1(a).

³¹⁰⁶ Malta, Reservations made upon accession to AP I and AP II, 17 April 1989, § 1(a).

³¹⁰⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

³¹⁰⁸ Austria, Reservations made upon ratification of AP II, 13 August 1982, § 6.

it is for the court to decide whether an accused person held in custody may appear in person at the hearing before the court of review".³¹⁰⁹

3442. Upon ratification of AP II, Ireland stated that "Article 6 will be applied in Ireland insofar as paragraph 2(e) is not incompatible with the power enabling a judge, in exceptional circumstances, to order the removal of an accused from the court who causes a disturbance at the trial".³¹¹⁰

3443. Upon ratification of AP II, Liechtenstein stated that:

Article 6, paragraph 2(e), of Protocol II will be implemented provided that it is not incompatible with legislation under which any accused who causes a disturbance in court or whose presence could impede the questioning of another accused or of a witness or expert may be excluded from the court room.³¹¹¹

3444. Upon ratification of AP II, Malta stated in relation to Article 6 that:

paragraph 2, sub-paragraph (e) of Protocol II will be applied insofar as it is not incompatible with legislation providing that any defendant, who causes a disturbance at the trial or whose presence is likely to impede the questioning of another defendant or the hearing of a witness or expert witness, may be removed from the courtroom.³¹¹²

3445. Article 63(1) of the 1998 ICC Statute provides that "the accused shall be present during the trial".

3446. Article 67(1)(d) of the 1998 ICC Statute states that the accused, "subject to article 63, paragraph 2, [shall] be present at the trial".

3447. Article 17(4)(d) of the 2002 Statute of the Special Court for Sierra Leone provides that "in the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: . . . to be tried in his or her presence".

Other Instruments

3448. Article 12(c) of the 1946 IMT Charter (Tokyo) provides that the Tribunal shall "provide for the maintenance of order at the trial and deal summarily with any contumacy, imposing appropriate punishment, including exclusion of any accused or his counsel from some or all further proceedings, but without prejudice to the determination of the charges".

3449. Article 8(e) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right "to be tried in his presence".

3450. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

³¹⁰⁹ Germany, Declarations made upon ratification of AP I and AP II, 14 February 1991, § 8.

³¹¹⁰ Ireland, Declarations and reservations made upon ratification of AP II, 19 May 1999, § 2.

³¹¹¹ Liechtenstein, Reservations made upon ratification of AP II, 10 August 1989, § 2.

³¹¹² Malta, Reservations made upon accession to AP I and AP II, 17 April 1989, § 2.

3451. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3452. Article 21(4)(d) of the 1993 ICTY Statute provides that the accused shall be entitled “to be tried in his presence”.

3453. Article 20(4)(d) of the 1994 ICTR Statute provides that the accused shall be entitled “to be tried in his or her presence”.

3454. Article 11(1)(e) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “to be tried in his presence”.

II. National Practice

Military Manuals

3455. Argentina’s Law of War Manual lists the fundamental guarantees for prisoners of war, including “trial in the presence of the accused”.³¹¹³ The same provision applies to civilians and in occupied territories.³¹¹⁴ With respect to non-international armed conflicts, the manual states that one of the fundamental judicial guarantees is “trial in the presence of the accused”.³¹¹⁵

3456. Canada’s LOAC Manual provides that, in non-international armed conflict, “accused persons have the right to be present at their trial”.³¹¹⁶

3457. New Zealand’s Military Manual states, in an explanatory footnote, that “no prisoner may be tried in absentia”.³¹¹⁷ It further provides that “anyone charged with an offence shall have the right to be tried in his presence”.³¹¹⁸ With respect to non-international armed conflicts, the manual states that “the accused has the right to be present at his trial”.³¹¹⁹

3458. Sweden’s IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.³¹²⁰

National Legislation

3459. Countless pieces of domestic legislation provide for the right of the accused to be tried in their presence.³¹²¹

³¹¹³ Argentina, *Law of War Manual* (1989), § 3.30.

³¹¹⁴ Argentina, *Law of War Manual* (1989), §§ 4.15 and 5.09(4).

³¹¹⁵ Argentina, *Law of War Manual* (1989), § 7.10.

³¹¹⁶ Canada, *LOAC Manual* (1999), p. 17-3, § 29(e).

³¹¹⁷ New Zealand, *Military Manual* (1992), § 932(3), footnote 145.

³¹¹⁸ New Zealand, *Military Manual* (1992), § 1137(4)(e).

³¹¹⁹ New Zealand, *Military Manual* (1992), § 1815(4)(e).

³¹²⁰ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

³¹²¹ See, e.g., Georgia, *Code of Criminal Procedure* (1998), Article 77(3); Kenya, *Constitution* (1992), Article 77; Kyrgyzstan, *Criminal Code* (1997), Article 28; Russia, *Constitution* (1993), Article 123(2).

3460. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³¹²²

3461. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 123 GC IV, and of AP I, including violations of Article 75(4)(e) AP I, as well as any "contravention" of AP II, including violations of Article 6(2)(e) AP II, are punishable offences.³¹²³

3462. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".³¹²⁴

National Case-law

3463. No practice was found.

Other National Practice

3464. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.³¹²⁵

3465. The Report on US Practice states that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II". The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".³¹²⁶

III. Practice of International Organisations and Conferences

United Nations

3466. No practice was found.

Other International Organisations

3467. No practice was found.

International Conferences

3468. The Rapporteur of the Third Committee at the CDDH noted in relation to Article 75(4)(e) AP I that "it was understood that persistent misconduct by a defendant could justify his banishment from the courtroom".³¹²⁷

³¹²² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³¹²³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³¹²⁴ Norway, *Military Penal Code as amended* (1902), § 108.

³¹²⁵ Report on the Practice of Jordan, 1997, Chapter 5.

³¹²⁶ Report on US Practice, 1997, Chapter 5.3.

³¹²⁷ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 10 June 1977, p. 462, § 48.

IV. Practice of International Judicial and Quasi-judicial Bodies

3469. In *Daniel Monguya Mbenge v. Zaire* in 1983, the HRC held that:

14.1 ... According to article 14 (3) of the [ICCPR], everyone is entitled to be tried in his presence and to defend himself in person or through legal assistance. This provision and other requirements of due process enshrined in article 14 cannot be construed as invariably rendering proceedings in absentia inadmissible irrespective of the reasons for the accused person's absence. Indeed, proceedings in absentia are in some circumstances (for instance, when the accused person, although informed of the proceedings sufficiently in advance, declines to exercise his right to be present) permissible in the interest of the proper administration of justice. Nevertheless, the effective exercise of the rights under article 14 presupposes that the necessary steps should be taken to inform the accused beforehand about the proceedings against him (art. 14 (3) (a)). Judgement in absentia requires that, notwithstanding the absence of the accused, all due notification has been made to inform him of the date and place of his trial and to request his attendance. Otherwise, the accused, in particular, is not given adequate time and facilities for the preparation of his defence (art. 14 (3) (b)), cannot defend himself through legal assistance of his own choosing (art. 14 (3) (d)) nor does he have the opportunity to examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf (art. 14 (3) (e)).

14.2 The Committee acknowledges that there must be certain limits to the efforts which can duly be expected of the responsible authorities of establishing contact with the accused. With regard to the present communication, however, those limits need not be specified. The State party has not challenged the author's contention that he had known of the trials only through press reports after they had taken place. It is true that both judgements state explicitly that summonses to appear had been issued by the clerk of the court. However, no indication is given of any steps actually taken by the State party in order to transmit the summonses to the author, whose address in Belgium is correctly reproduced in the judgement of 17 August 1977 and which was therefore known to the judicial authorities. The fact that, according to the judgement in the second trial of March 1978, the summons had been issued only three days before the beginning of the hearings before the court, confirms the Committee in its conclusion that the State party failed to make sufficient efforts with a view to informing the author about the impending court proceedings, thus enabling him to prepare his defence. In the view of the Committee, therefore, the State party has not respected D. Monguya Mbenge's rights under article 14 (3) (a), (b), (d) and (e) of the Covenant.³¹²⁸

3470. In *Karttunen v. Finland* in 1992, the HRC stated that:

7.3 ... The Committee considers that the author was entitled to oral proceedings before the Court of Appeal. As the State party itself concedes, only this procedure would have enabled the Court to proceed with the reevaluation of all the evidence submitted by the parties, and to determine whether the procedural flaw had indeed affected the verdict of the District Court. In the light of the above, the Committee concludes that there has been a violation of article 14, paragraph 1 [of the 1966 ICCPR].³¹²⁹

³¹²⁸ HRC, *Daniel Monguya Mbenge v. Zaire*, Views, 25 March 1983, §§ 14.1–14.2.

³¹²⁹ HRC, *Karttunen v. Finland*, Views, 23 October 1992, § 7.3.

3471. In its judgement in the *Colozza case* in 1985, the ECtHR held that the conduct of a criminal trial without the presence of the accused was incompatible with Article 6 of the 1950 ECHR and that in cases where a person was convicted *in absentia*, there must be an opportunity for that person to reopen the trial.³¹³⁰ The ECtHR held that a hearing *in absentia* was permitted if the State had acted diligently, but unsuccessfully, to give the accused effective notice of the hearing.³¹³¹

3472. In several cases, the ECtHR decided that the right to be present included appeal proceedings if the issues considered were not purely those of law, but included issues of fact or sentencing.³¹³²

V. Practice of the International Red Cross and Red Crescent Movement

3473. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . trial in the presence of the accused”.³¹³³

3474. The ICRC Commentary on the Additional Protocols states that Article 75(4)(e) API “does not exclude sentencing a defendant in his absence if the law of the State permits judgement *in absentia*”.³¹³⁴ It adds that:

In some countries the discussions of the judges of the court are public and take place before the defendant; in other countries the discussion is held *in camera*, and only the verdict is made public. Finally, there are countries where the court’s decision is communicated to the defendant by the clerk of the court in the absence of the judges. This sub-paragraph does not prohibit any such practices: the important thing is that the defendant is present at the sessions where the prosecution puts its case, when oral arguments are heard, etc. In addition, the defendant must be able to hear the witnesses and experts, to ask questions himself and to make his objections or propose corrections.³¹³⁵

VI. Other Practice

3475. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi

³¹³⁰ ECtHR, *Colozza case*, Judgement, 12 February 1985, § 29.

³¹³¹ ECtHR, *Colozza case*, Judgement, 12 February 1985, § 28; see also *F. C. B. v. Italy case*, Judgement, 28 August 1991, § 33.

³¹³² See, e.g., ECtHR, *Ekbatani v. Sweden*, Judgement, 26 May 1988, § 31; *Kremzow v. Austria*, Judgement, 21 September 1993, §§ 59 and 67.

³¹³³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(e).

³¹³⁴ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3109.

³¹³⁵ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, 7break; § 3110.

University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that “anyone charged with an offence shall have the right to be tried in his or her presence”.³¹³⁶

Compelling accused persons to testify against themselves or to confess guilt

I. Treaties and Other Instruments

Treaties

3476. Article 99, second paragraph, GC III provides that “no moral or physical coercion may be exerted on a prisoner of war in order to induce him to admit himself guilty of the act of which he is accused”.

3477. Article 14(3)(g) of the 1966 ICCPR provides that “everyone is entitled to the following minimum guarantees, in full equality: . . . not to be compelled to testify against himself or to confess guilt”.

3478. Article 8(2)(g) of the 1969 ACHR provides for “the right not to be compelled to be a witness against himself or to plead guilty”. It can be read in conjunction with Article 8(3) which states that “a confession of guilt by the accused shall be valid only if it is made without coercion of any kind”.

3479. Article 75(4)(f) AP I provides that “no one shall be compelled to testify against himself or to confess guilt”. Article 75 AP I was adopted by consensus.³¹³⁷

3480. Article 6(2)(f) AP II provides that “no one shall be compelled to testify against himself or to confess guilt”. Article 6 AP II was adopted by consensus.³¹³⁸

3481. According to Article 40(2)(b)(iv) of the 1989 Convention on the Rights of the Child “every child alleged as or accused of having infringed the penal law has at least the following guarantees: . . . (iv) not to be compelled to give testimony or to confess guilt”.

3482. Article 55(1)(a) of the 1998 ICC Statute provides that “in respect of an investigation under this Statute, a person . . . shall not be compelled to incriminate himself or herself or to confess guilt”.

3483. Article 67(1)(g) of the 1998 ICC Statute provides that:

In the determination of any charge, the accused shall be entitled . . . to the following minimum guarantees, in full equality:

- ...
- (g) Not to be compelled to testify or to confess guilt and to remain silent, without such silence being a consideration in the determination of guilt or innocence.

³¹³⁶ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(d), *IRRC*, No. 282, 1991, p. 334.

³¹³⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

³¹³⁸ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3484. Article 17(4)(g) of the 2002 Statute of the Special Court for Sierra Leone provides that “in the determination of any charge against the accused pursuant to the present Statute, he or she shall be entitled to the following minimum guarantees, in full equality: . . . not to be compelled to testify against himself or herself or to confess guilt”.

Other Instruments

3485. Principle 21 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “it shall be prohibited to take undue advantage of the situation of a detained or imprisoned person for the purpose of compelling him to confess, to incriminate himself otherwise or to testify against any other person”.

3486. Article 8(h) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “not to be compelled to testify against himself or to confess guilt”.

3487. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3488. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3489. Article 21(4)(g) of the 1993 ICTY Statute provides that, among the minimum guarantees, the accused is “not to be compelled to testify against himself or to confess guilt”.

3490. Article 20(4)(g) of the 1994 ICTR Statute provides that, among the minimum guarantees, the accused is “not to be compelled to testify against himself or herself or to confess guilt”.

3491. Article 11(1)(h) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “not to be compelled to testify against himself or to confess guilt”.

3492. Article 2(9) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the Agreement seeks to protect and promote the right against self-incrimination.

II. National Practice

Military Manuals

3493. Argentina’s Law of War Manual (1969) provides that “no moral or physical pressure shall be exercised on a prisoner of war to make him confess guilt for the act of which he is accused”.³¹³⁹

³¹³⁹ Argentina, *Law of War Manual* (1969), § 2.083(1).

3494. Argentina's Law of War Manual (1989) states that judicial proceedings must afford the guarantee that there is "no pressure on the prisoner to confess guilt".³¹⁴⁰ With respect to occupied territories, the manual states that there shall be "no pressure in order to obtain a confession".³¹⁴¹ In the case of non-international armed conflict, the manual provides for the "absence of pressure [on the accused] to obtain a confession of guilt".³¹⁴²

3495. Canada's LOAC Manual provides that "no force of any kind may be imposed upon a PW to cause the PW to plead guilty".³¹⁴³ It further states that in cases of non-international armed conflicts, "accused persons shall not be compelled to testify against themselves or to confess their guilt".³¹⁴⁴

3496. Colombia's Basic Military Manual provides that it is prohibited to "compel someone to confess or to incriminate himself".³¹⁴⁵

3497. New Zealand's Military Manual states that "no force of any kind may be imposed upon a prisoner to cause him to plead guilty".³¹⁴⁶ It further provides that "no one shall be compelled to testify against himself or to confess guilt".³¹⁴⁷ The manual also states that in cases of non-international armed conflict, one of the minimum guarantees is that "no accused shall be compelled to testify against himself or to confess his guilt".³¹⁴⁸

3498. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.³¹⁴⁹

3499. Switzerland's Basic Military Manual provides that "no coercion shall be exercised to lead the prisoner to confess guilt to the act of which he is accused".³¹⁵⁰

3500. The US Field Manual reproduces Article 99 GC III.³¹⁵¹

National Legislation

3501. Countless pieces of domestic legislation provide for the right not to be compelled to testify against oneself or to confess guilt.³¹⁵²

³¹⁴⁰ Argentina, *Law of War Manual* (1989), § 3.30.

³¹⁴¹ Argentina, *Law of War Manual* (1989), § 5.09(3).

³¹⁴² Argentina, *Law of War Manual* (1989), § 7.10.

³¹⁴³ Canada, *LOAC Manual* (1999), p. 10-7, § 76.

³¹⁴⁴ Canada, *LOAC Manual* (1999), p. 17-3, § 29(f).

³¹⁴⁵ Colombia, *Basic Military Manual* (1995), p. 29.

³¹⁴⁶ New Zealand, *Military Manual* (1992), § 932(2).

³¹⁴⁷ New Zealand, *Military Manual* (1992), § 1137(4)(f).

³¹⁴⁸ New Zealand, *Military Manual* (1992), § 1815(4)(f).

³¹⁴⁹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

³¹⁵⁰ Switzerland, *Basic Military Manual* (1987), Article 106.

³¹⁵¹ US, *Field Manual* (1956), § 175.

³¹⁵² See, e.g., Georgia, *Constitution* (1995), Article 42(8); India, *Constitution* (1950), Article 20(3); Kenya, *Constitution* (1992), Article 77(7); Mexico, *Constitution* (1917), Article 20(II); Russia, *Constitution* (1993), Article 51(1).

3502. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³¹⁵³

3503. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 99 GC III, and of AP I, including violations of Article 75(4)(f) AP I, as well as any "contravention" of AP II, including violations of Article 6(2)(f) AP II, are punishable offences.³¹⁵⁴

3504. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".³¹⁵⁵

National Case-law

3505. In its judgement in the *Ward case* in 1942, the US Supreme Court stated that:

This Court has set aside convictions based upon confessions extorted from ignorant persons who have been subjected to persistent and protracted questioning, or who have been threatened with mob violence, or who have been unlawfully held *incommunicado* without advice of friends or counsel, or who have been taken at night to lonely or isolated places for questioning. Any one of these grounds would be sufficient cause for reversal... The use of a confession obtained under such circumstances is a denial of due process.³¹⁵⁶

Other National Practice

3506. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.³¹⁵⁷

3507. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".³¹⁵⁸

III. Practice of International Organisations and Conferences

3508. No practice was found.

³¹⁵³ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³¹⁵⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³¹⁵⁵ Norway, *Military Penal Code as amended* (1902), § 108.

³¹⁵⁶ US, Supreme Court, *Ward case*, Judgement, 1 June 1942.

³¹⁵⁷ Report on the Practice of Jordan, 1997, Chapter 5.

³¹⁵⁸ Report on US Practice, 1997, Chapter 5.3.

IV. Practice of International Judicial and Quasi-judicial Bodies

3509. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard, the provisions of article 7 and article 10 paragraph 1 should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.³¹⁵⁹

3510. In several cases, the HRC explained that the guarantee of Article 14(3)(g) of the 1966 ICCPR must be understood “in terms of the absence of any direct or indirect physical or psychological pressure from the investigating authorities on the accused, with a view to obtaining a confession of guilt”.³¹⁶⁰

3511. The right not to be compelled to testify against oneself or to confess guilt has been seen by the ECtHR as one element of the right to a fair trial.³¹⁶¹ In its judgement in *Coëme and Others v. Belgium* in 2000, the ECtHR stated that what mattered was that the guilt of the accused must not be established through evidence obtained from him by force or other forms of pressure.³¹⁶²

3512. In its report in a case concerning Argentina in 1990, the IACiHR stated that conviction on the basis of confessions obtained under torture violated Article XXVI of the 1948 American Declaration on the Rights and Duties of Man.³¹⁶³

3513. In its report in a case concerning Nicaragua in 1989, the IACiHR found a violation of Article 8(2)(g) of the 1969 ACHR because a confession had been obtained whilst the defendant was being held *incommunicado* which was therefore invalid under Article 8(3).³¹⁶⁴

V. Practice of the International Red Cross and Red Crescent Movement

3514. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . no compulsion to confess guilt”.³¹⁶⁵

³¹⁵⁹ HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 14.

³¹⁶⁰ HRC, *Saldías López v. Uruguay*, Views, 29 July 1981, §§ 11.5–13; *Teti Izquierdo v. Uruguay*, Views, 1 April 1982, § 9; *Estrella v. Uruguay*, Views, 29 March 1983, § 10; *Hiber Conteris v. Uruguay*, Views, 17 July 1985, § 10; *Carboni v. Uruguay*, Views, 27 October 1987, § 10; *Kelly v. Jamaica*, Views, 8 April 1991, § 5(5); *Berry v. Jamaica*, Views, 7 April 1994, § 11(7); *Johnson v. Jamaica*, Views, 22 March 1996, § 8(7).

³¹⁶¹ ECtHR, *Funke case*, Judgement, 25 February 1993, § 44; *Serves v. France*, Judgement (Chamber), 20 October 1997, § 47.

³¹⁶² ECtHR, *Coëme and Others v. Belgium*, Judgement, 22 June 2000, § 128.

³¹⁶³ IACiHR, *Case 9850 (Argentina)*, Report, 4 October 1990, Part III, § 7.

³¹⁶⁴ IACiHR, *Case 10.198 (Nicaragua)*, Resolution, 29 September 1989, § 1.

³¹⁶⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(f).

VI. Other Practice

3515. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that “no one shall be compelled to testify against himself or herself or to confess guilt”.³¹⁶⁶

Public proceedings

I. Treaties and Other Instruments

Treaties

3516. Article 62 of the 1929 Geneva POW Convention provides that:

The representatives of the protecting Power shall have the right to attend the hearing of the case. The only exception to this rule is where the hearing has to be kept secret in the interests of the safety of the State. The detaining Power would then notify the protecting Power accordingly.

3517. Article 105, fifth paragraph, GC III provides that “the representatives of the Protecting Power shall be entitled to attend the trial of the case, unless, exceptionally, this is held in camera in the interest of State security”.

3518. Article 74, first paragraph, GC IV provides that:

Representatives of the Protecting Power shall have the right to attend the trial of any protected person, unless the hearing has, as an exceptional measure, to be held in camera in the interests of the security of the Occupying Power, which shall then notify the Protecting Power.

3519. Article 6(1) of the 1950 ECHR provides that:

In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

3520. Article 14(1) of the 1966 ICCPR provides that:

In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing. . . . The press and the public may be excluded from all or part of a trial for reasons of morals, public order (ordre public) or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would

³¹⁶⁶ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(e), *IRRC*, No. 282, 1991, p. 334.

prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes or the guardianship of children.

3521. Article 8(5) of the 1969 ACHR provides that “criminal proceedings shall be public, except insofar as may be necessary to protect the interests of justice”.

3522. Article 75(4)(i) AP I provides that “anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly”. Article 75 AP I was adopted by consensus.³¹⁶⁷

3523. Upon ratification of AP I, Finland stated that “with regard to Article 75, paragraph 4 (i), Finland enters a reservation to the effect that under Finnish law a judgement can be declared secret if its publication can be an affront to morals or endanger national security”. This reservation was withdrawn with effect from 16 February 1987.³¹⁶⁸

3524. Upon ratification of AP I, Liechtenstein stated in relation to Article 75 that “paragraph 4(i) is not incompatible with legislation relating to the public nature of hearings and of the pronouncement of judgement”.³¹⁶⁹

3525. Article 64(7) of the 1998 ICC Statute provides that:

The trial shall be held in public. The Trial Chamber may, however, determine that special circumstances require that certain proceedings be in closed session for the purposes set forth in article 68, or to protect confidential or sensitive information to be given in evidence.

3526. Article 67(1) of the 1998 ICC Statute provides that “in the determination of any charge, the accused shall be entitled to a public hearing”.

3527. Article 68(2) of the 1998 ICC Statute provides that “as an exception to the principle of public hearings provided for in article 67, the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings in camera”.

3528. Article 76(4) of the 1998 ICC Statute provides that “the sentence shall be pronounced in public, and whenever possible, in the presence of the accused”.

3529. Article 17(2) of the 2002 Statute of the Special Court for Sierra Leone provides that “the accused shall be entitled to a... public hearing, subject to measures ordered by the Special Court for the protection of victims and witnesses”.

3530. Article 18 of the 2002 Statute of the Special Court for Sierra Leone provides that “the judgement shall be... delivered in public”.

Other Instruments

3531. Article 10 of the 1948 UDHR provides that “everyone is entitled in full equality to a... public hearing”.

³¹⁶⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

³¹⁶⁸ Finland, Reservations made upon ratification of AP I, 7 August 1980, § 1.

³¹⁶⁹ Liechtenstein, Reservations made upon ratification of AP I, 10 August 1989, § 1(c).

3532. Article 11 of the 1948 UDHR provides that “everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial”.

3533. Article XXVI of the 1948 American Declaration on the Rights and Duties of Man provides that “every person accused of an offense has the right to be given . . . a public hearing”.

3534. Article 8(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right “in the determination of any charge against him, to have a fair and public hearing”.

3535. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3536. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3537. Article 20(4) of the 1993 ICTY Statute provides that “the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence”.

3538. Article 23(2) of the 1993 ICTY Statute provides that “the judgement . . . shall be delivered by the Trial Chamber in public”.

3539. Article 19(4) of the 1994 ICTR Statute provides that “the hearings shall be public unless the Trial Chamber decides to close the proceedings in accordance with its rules of procedure and evidence”.

3540. Article 22(2) of the 1994 ICTR Statute provides that “the judgement . . . shall be delivered by the Trial Chamber in public”.

3541. Article 11(1)(a) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that an individual charged with a crime against the peace and security of mankind has the right, “in the determination of any charge against him, to have a fair and public hearing”.

3542. Article 47(2) of the 2000 EU Charter of Fundamental Rights provides that “everyone is entitled to a fair and public hearing”.

II. National Practice

Military Manuals

3543. Argentina’s Law of War Manual lists the fundamental guarantees for prisoners of war, *inter alia*, “public trial”.³¹⁷⁰ The same provision applies to civilians and in occupied territories.³¹⁷¹

3544. Colombia’s Instructors’ Manual provides that “anybody who is accused has the right to . . . a due public trial”.³¹⁷²

³¹⁷⁰ Argentina, *Law of War Manual* (1989), § 3.30.

³¹⁷¹ Argentina, *Law of War Manual* (1989), §§ 4.15 and 5.09(4).

³¹⁷² Colombia, *Instructors’ Manual* (1999), p. 11.

3545. New Zealand's Military Manual states that "unless the trial is to be held in camera, the Protecting Power's representative is entitled to be present". The footnote to this provision explains that "the Protecting Power must be informed of any trial that is to be held *in camera*".³¹⁷³ The manual further states that "anyone prosecuted for an offence shall have the right to have the judgement pronounced publicly".³¹⁷⁴

3546. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.³¹⁷⁵

3547. The UK Military Manual provides that if the trial of a POW is held *in camera*, "the Detaining Power shall notify the Protecting Power" of the reasons why.³¹⁷⁶

National Legislation

3548. Countless pieces of domestic legislation provide for the right to have a public trial and for the judgement to be pronounced publicly.³¹⁷⁷

3549. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³¹⁷⁸

3550. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 75(4)(i) AP I, is a punishable offence.³¹⁷⁹

3551. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".³¹⁸⁰

National Case-law

3552. In its judgement in the *Altstötter (The Justice Trial) case* in 1947, the US Military Tribunal at Nuremberg stated that "the entire proceedings from the beginning to end were secret and no public record was allowed to be made of them" and concluded, on this and other bases, that the trial of the accused was "unfair".³¹⁸¹

³¹⁷³ New Zealand, *Military Manual* (1992), § 932(3) and its footnote 145.

³¹⁷⁴ New Zealand, *Military Manual* (1992), § 1137(4)(i).

³¹⁷⁵ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

³¹⁷⁶ UK, *Military Manual* (1958), § 229.

³¹⁷⁷ See, e.g., Ethiopia, *Constitution* (1994), Article 20(1); Kenya, *Constitution* (1992), Article 77(10); Kuwait, *Constitution* (1962), Article 165; Mexico, *Constitution* (1917), Article 20(VI); Russia, *Constitution* (1993), Article 123(1).

³¹⁷⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³¹⁷⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³¹⁸⁰ Norway, *Military Penal Code as amended* (1902), § 108.

³¹⁸¹ US, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case*, Judgement, 4 December 1947.

Other National Practice

3553. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.³¹⁸²

III. Practice of International Organisations and Conferences

3554. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3555. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

The publicity of hearings is an important safeguard in the interest of the individual and of society at large. At the same time article 14, paragraph 1, acknowledges that courts have the power to exclude all or part of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons. It should be noted that, even in cases in which the public is excluded from the trial, the judgement must, with certain strictly defined exceptions, be made public.³¹⁸³

3556. In its decision in *Media Rights Agenda v. Nigeria (224/98)* in 2000, the ACiHPR stated that:

The exceptional circumstances [to the right to a public trial] under the International Covenant on Civil and Political Rights . . . are for reasons of morals, public order or national security in a democratic society, or when the interest of the private lives of the parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice. The Commission notes that these circumstances are exhaustive, as indicated by the use of the phrase “apart from such exceptional circumstances”.³¹⁸⁴

3557. In its decision in *Civil Liberties Organisation and Others v. Nigeria* in 2001, the ACiHPR stated that:

35. The communication further alleges that except for the opening and closing ceremonies, the trial was conducted in camera in contravention of Article 7 of the [1981 ACHPR]. The Charter does not specifically mention the right to public trials; neither does its Resolution on the Right to Recourse Procedure and Fair Trial. Mindful of developments in international human rights law and practice, and drawing especially from General Comment of the Human Rights Committee to the effect that “the publicity of the hearings is an important safeguard in the interest of the individual and of society at large . . . apart from exceptional circumstances, the Committee considers

³¹⁸² Report on the Practice of Jordan, 1997, Chapter 5.

³¹⁸³ HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 6.

³¹⁸⁴ ACiHPR, *Media Rights Agenda v. Nigeria (224/98)*, Decision, 23 October–6 November 2000, § 52.

that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons . . .” . . .

36. The publicity of hearings is an important safeguard in the interest of the individual and the society at large. At the same time article 14, paragraph 1 [1966 ICCPR] acknowledges that courts have the power to exclude all or parts of the public for reasons spelt out in that paragraph. It should be noted that, apart from such exceptional circumstances, the UN Human Rights Committee considers that a hearing must be open to the public in general, including members of the press, and must not, for instance, be limited only to a particular category of persons.³¹⁸⁵

3558. In its judgement in *Stefanelli v. San Marino* in 2000, the ECtHR stated that:

The Court reiterates that it is a fundamental principle enshrined in Article 6 § 1 that court hearings should be held in public. This public character protects litigants against the administration of justice without public scrutiny; it is also one of the means whereby people’s confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6 § 1, namely a fair trial, the guarantee of which is one of the principles of any democratic society.³¹⁸⁶

V. Practice of the International Red Cross and Red Crescent Movement

3559. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . public pronouncement of the judgement”.³¹⁸⁷

3560. The ICRC Commentary on the Additional Protocols states that:

It is an essential element of fair justice that judgements should be pronounced publicly. Of course, a clear distinction should be made between proceedings and judgement. It may be necessary because of the circumstances and the nature of the case to hold the proceedings in camera, but the judgement itself must be made in public, unless, as the Rapporteur pointed out, this is prejudicial to the defendant himself; this could be the case for a juvenile offender.³¹⁸⁸

VI. Other Practice

3561. No practice was found.

³¹⁸⁵ ACiHPR, *Civil Liberties Organisation and Others v. Nigeria* (218/98), Decision, 7 May 2001, §§ 36–37.

³¹⁸⁶ ECtHR, *Stefanelli v. San Marino*, Judgement, 8 February 2000, § 19.

³¹⁸⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(j).

³¹⁸⁸ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3118.

Advising convicted persons of available remedies and of their time-limits

I. Treaties and Other Instruments

Treaties

3562. Article 106 GC III provides that “every prisoner of war . . . shall be fully informed of his right to appeal or petition and of the time limit within which he may do so”.

3563. Article 73, first paragraph, GC IV provides that “a convicted person . . . shall be fully informed of his right to appeal or petition and of the time limit within which he may do so”.

3564. Article 75(4)(j) AP I provides that, among other fundamental guarantees, “a convicted person shall be advised on conviction of his judicial and other remedies and of the time-limits within which they may be exercised”. Article 75 AP I was adopted by consensus.³¹⁸⁹

3565. Article 6(3) AP II provides that “a convicted person shall be advised of his judicial and other remedies and of the time-limits within which they may be exercised”. Article 6 AP II was adopted by consensus.³¹⁹⁰

Other Instruments

3566. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3567. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

II. National Practice

Military Manuals

3568. Argentina’s Law of War Manual (1969) provides that “any prisoner of war . . . shall be fully informed of his rights of recourse, as well as the required time limit to exercise them”.³¹⁹¹ It further states that the “proceedings shall foresee the right to appeal for the persons [placed in assigned residence or interned]”.³¹⁹²

3569. Argentina’s Law of War Manual (1989) states that, in occupied territory, any convicted person shall be informed of the means of recourse available and how to exercise them.³¹⁹³ With respect to non-international armed conflict,

³¹⁸⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

³¹⁹⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

³¹⁹¹ Argentina, *Law of War Manual* (1969), § 2.087.

³¹⁹² Argentina, *Law of War Manual* (1969), § 5.008(2).

³¹⁹³ Argentina, *Law of War Manual* (1989), § 5.09.

the manual states that “information on the right to judicial appeals” is one of the fundamental guarantees.³¹⁹⁴

3570. Canada’s LOAC Manual provides that, in non-international armed conflicts, “accused persons shall be told, if convicted, of their judicial and other remedies and appellate procedures”.³¹⁹⁵

3571. The Military Manual of the Netherlands provides with respect to non-international armed conflicts that “a person who is convicted must be informed about the judicial remedies available to him”.³¹⁹⁶

3572. New Zealand’s Military Manual provides that prisoners charged with offences shall be informed “with details as to the right of appeal”.³¹⁹⁷ It further states that “a convicted person shall be advised of the remedies and of the time limits within which they may be exercised”.³¹⁹⁸ With respect to non-international armed conflicts, the manual provides that “a convicted person shall be told on conviction of his judicial and other remedies and appellate procedures”.³¹⁹⁹

3573. Spain’s LOAC Manual lists the “conditions and limits regarding proceedings” established by the law of war, *inter alia*, “remedies and appeal” and “time limits”.³²⁰⁰

3574. Sweden’s IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.³²⁰¹

3575. The UK Military Manual states that “every prisoner of war . . . must be fully informed of this right [of appeal or petition] and also of any time limit for appeal or petition”.³²⁰²

National Legislation

3576. Countless pieces of domestic legislation provide for the right of the convicted person to receive advice on judicial and other remedies available.³²⁰³

3577. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.³²⁰⁴

3578. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 106

³¹⁹⁴ Argentina, *Law of War Manual* (1989), § 7.10.

³¹⁹⁵ Canada, *LOAC Manual* (1999), p. 17-3, § 29(g).

³¹⁹⁶ Netherlands, *Military Manual* (1993), p. XI-5.

³¹⁹⁷ New Zealand, *Military Manual* (1992), § 932.

³¹⁹⁸ New Zealand, *Military Manual* (1992), § 1137(4)(j).

³¹⁹⁹ New Zealand, *Military Manual* (1992), § 1815(2).

³²⁰⁰ Spain, *LOAC Manual* (1996), Vol. I, § 2.7.b.(3).

³²⁰¹ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

³²⁰² UK, *Military Manual* (1958), § 232.

³²⁰³ See, e.g., Georgia, *Code of Criminal Procedure* (1998), Article 511; Mexico, *Constitution* (1917), Article 20(IX).

³²⁰⁴ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

GC III and 73 GC IV, and of AP I, including violations of Article 75(4)(j) AP I, as well as any “contravention” of AP II, including violations of Article 6(3) AP II, are punishable offences.³²⁰⁵

3579. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment”.³²⁰⁶

National Case-law

3580. No practice was found.

Other National Practice

3581. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.³²⁰⁷

3582. The Report on the Practice of Syria asserts that Syria considers Article 75 AP I to be part of customary international law.³²⁰⁸

3583. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.³²⁰⁹

III. Practice of International Organisations and Conferences

3584. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3585. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

3586. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the conviction must be pronounced by an impartial and regularly constituted court respecting

³²⁰⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³²⁰⁶ Norway, *Military Penal Code as amended* (1902), § 108.

³²⁰⁷ Report on the Practice of Jordan, 1997, Chapter 5.

³²⁰⁸ Report on the Practice of Syria, 1997, Chapter 5.1.

³²⁰⁹ Report on US Practice, 1997, Chapter 5.3.

the generally recognized principles of regular judicial procedure, which include . . . information on the right of appeal and other remedies and their time-limits".³²¹⁰

3587. The ICRC Commentary on the Additional Protocols explains the rationale behind the guarantee of Article 75(4)(j) AP I as follows:

It was not considered realistic in view of the present state of national legislation in various countries to lay down a principle to the effect that everyone has a right of appeal against [the] sentence pronounced upon him, i.e., to guarantee the availability of such a right, as provided in the ICRC draft. However, it is clear that if such remedies do exist, not only should everyone have the right to information about them and about the time-limits within which they must be exercised, as explicitly provided in the text, but in addition, no one should be denied the right to use such remedies.³²¹¹

VI. Other Practice

3588. No practice was found.

Right to appeal

I. Treaties and Other Instruments

Treaties

3589. Article 106 GC III provides that "every prisoner of war shall have, in the same manner as the members of the armed forces of the Detaining Power, the right of appeal or petition from any sentence pronounced upon him, with a view to the quashing or revising of the sentence or the reopening of the trial".

3590. Article 73, first paragraph, GC IV provides that "a convicted person shall have the right of appeal provided for by the laws applied by the court".

3591. Article 14(5) of the 1966 ICCPR provides that "everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law".

3592. Article 8(2)(h) of the 1969 ACHR provides that "during the proceedings, every person is entitled, with full equality, to the following minimum guarantees . . . the right to appeal the judgment to a higher court".

3593. Article 7(1)(a) of the 1981 ACHPR provides that "every individual shall have the right to have his cause heard. This comprises . . . the right to an appeal to competent national organs against acts violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force."

³²¹⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(k).

³²¹¹ Yves Sandoz et al. (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4611.

3594. Article 2(1) of the 1984 Protocol 7 to the 1950 ECHR provides that “everyone convicted of a criminal offence by a tribunal shall have the right to have his conviction or sentence reviewed by a higher tribunal. The exercise of this right, including the grounds on which it may be exercised, shall be governed by law.”

3595. Article 40(2)(b) of the 1989 Convention on the Rights of the Child provides that:

Every child alleged or accused of having infringed the penal law has at least the following guarantees:

- ...
- (v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law.

Other Instruments

3596. Article 11(2) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “an individual convicted of a crime shall have the right to his conviction and sentence being reviewed according to law”.

II. National Practice

Military Manuals

3597. Argentina’s Law of War Manual (1969) provides that “any prisoner of war has the right, under the same conditions as the members of the armed forces of the [Detaining Power], to make an appeal against any sentence pronounced against him”.³²¹² It further provides that the “proceedings shall foresee the right to appeal for the persons [placed in assigned residence or interned]”.³²¹³ With respect to occupied territory, the manual states that:

Any sentenced person has the possibility to use the recourse prescribed in the legislation which applies to the tribunal. . . If the legislation which applies to the tribunal does not foresee possibilities of appeal, the sentenced/convicted person shall have the right to appeal the sentence in front of the competent authority of the Occupying Power.³²¹⁴

3598. Hungary’s Military Manual states, regarding the prosecution of POWs, that there is a right of appeal.³²¹⁵

³²¹² Argentina, *Law of War Manual* (1969), § 2.087.

³²¹³ Argentina, *Law of War Manual* (1969), § 5.008(2).

³²¹⁴ Argentina, *Law of War Manual* (1969), § 5.029(4).

³²¹⁵ Hungary, *Military Manual* (1992), p. 92.

3599. New Zealand's Military Manual provides that prisoners charged with offences "shall enjoy the same right of appeal as members of the Detaining Power's own forces".³²¹⁶ It further states that:

There is no absolute right of appeal against sentence. The IV GC Article 73 merely lays down that "the convicted person shall have the right of appeal provided for by the laws applied by the court". If, however, the court makes no provision for appeal, the convicted person must be given the right to petition the competent authority of the Occupying Power against the finding and sentence. In either case, he must be fully informed of his right to appeal or petition and of the time limit within which he may do so.³²¹⁷

3600. According to Switzerland's Basic Military Manual, "the right of recourse in appeal, cassation and review shall be ensured".³²¹⁸

3601. The UK Military Manual states that "every prisoner of war must be given, in the same manner as members of the armed forces of the Detaining Power, the right of appeal or petition against any judgement or sentence passed on him, with a view to the quashing of the sentence or the reopening of the trial".³²¹⁹ With respect to situations of occupation, the manual provides that:

There is no absolute right of appeal against sentence. The Civilian Convention Article 73 merely lays down that "the convicted person shall have the right of appeal provided for by the laws applied by the court". However, where the law makes no provision for appeal, the convicted person must be given the right to petition the competent authority of the Occupying Power against the finding and sentence. In either case, he must be fully informed of his right to appeal or petition and of the time limit within which he may do so.³²²⁰

3602. The US Field Manual reproduces Article 106 GC III.³²²¹ It also uses the same wording as Article 73 GC IV.³²²²

3603. The US Air Force Pamphlet provides that there are provisions in GC III which "grant [the prisoner of war] the right of appeal".³²²³ It further states with respect to protected persons arrested for criminal offences that "among other rights, accused persons are assured the right . . . to appeal".³²²⁴

National Legislation

3604. The vast majority of States provide for a right to appeal in their Constitutions and/or legislation relating to criminal or military law.³²²⁵

³²¹⁶ New Zealand, *Military Manual* (1992), § 932.

³²¹⁷ New Zealand, *Military Manual* (1992), § 1330(3).

³²¹⁸ Switzerland, *Basic Military Manual* (1987), Article 106.

³²¹⁹ UK, *Military Manual* (1958), § 232.

³²²⁰ UK, *Military Manual* (1958), § 572.

³²²¹ US, *Field Manual* (1956), § 182. ³²²² US, *Field Manual* (1956), § 443.

³²²³ US, *Air Force Pamphlet* (1976), § 13-8. ³²²⁴ US, *Air Force Pamphlet* (1976), § 14-6.

³²²⁵ See, e.g., Ethiopia, *Constitution* (1994), Article 20(6); Georgia, *Constitution* (1995), Article 42(1); Kuwait, *Constitution* (1962), Article 166; Russia, *Constitution* (1993), Articles 46(2) and (3), 47 and 50(3).

3605. Colombia's Constitution provides that "any judicial sentence may be appealed or adjudicated, but for exceptions provided by law".³²²⁶

3606. Estonia's Constitution provides that "every person shall have the right to appeal a judgement by a court in his or her case to a higher court, in accordance with procedures established by law".³²²⁷

3607. Hungary's Constitution as amended provides that "in the Republic of Hungary everyone is entitled to legal redress or has the right to appeal against court or administrative decisions, or any other authority's decisions that infringe his rights or lawful interests".³²²⁸

National Case-law

3608. No practice was found.

Other National Practice

3609. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

3610. In a resolution adopted in 2002 on the integrity of the judicial system, the UN Commission on Human Rights reaffirmed that "every convicted person should have the right to have his/her conviction and sentence reviewed by a higher tribunal according to law".³²²⁹

Other International Organisations

3611. In 1992, the Committee of Ministers of the Council of Europe recommended that "the governments of member states be guided in their internal legislation and practice by the principles set out in the text of the European rules on community sanctions and measures, appended to the present recommendation". These provide, *inter alia*, that "the offender shall have the right to make a complaint to a higher deciding authority against a decision subjecting him to a community sanction or measure, or modifying or revoking such a sanction or measure".³²³⁰

International Conferences

3612. No practice was found.

³²²⁶ Colombia, *Constitution* (1991), Article 31.

³²²⁷ Estonia, *Constitution* (1992), Article 24.

³²²⁸ Hungary, *Constitution as amended* (1994), Article 57(5).

³²²⁹ UN Commission on Human Rights, Res. 2002/37, 22 April 2002, § 7.

³²³⁰ Council of Europe, Committee of Ministers, Rec. R (92) 16 on the European rules on community sanctions and measures, 19 October 1992, Appendix, Rule 13.

IV. Practice of International Judicial and Quasi-judicial Bodies

3613. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that:

Article 14, paragraph 5, provides that everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law. Particular attention is drawn to the other language versions of the word "crime" ("infraction", "delito", "prestuplenie") which show that the guarantee is not confined only to the most serious offences.³²³¹

3614. In its views in *Salgar de Montejo v. Colombia* in 1982, the HRC stated that the expression "according to law" contained in Article 14, paragraph 5, is not intended to leave the existence of the right of review at the discretion of States, but only refers to the "modalities by which the review by a higher tribunal is to be carried out". In this case, an appeal to the same judge was a breach of the right of appeal.³²³² However, in *Lumley v. Jamaica* in 1999, the HRC decided that refusal of appeal, where a proper procedure was followed reviewing with care the evidence and the law, was not in violation of the right to appeal.³²³³

3615. In its views in *Henry v. Jamaica* in 1991 and *Frances v. Jamaica* in 1993, the HRC stated that the right of appeal presupposed a written reasoned judgement delivered by the Court of earlier instance, even where such a court is itself an appeal court.³²³⁴

3616. In its views in *Domukovsky and Others v. Georgia* in 1998, the HRC stated that the right of appeal required a review of both facts and law, and not only of law.³²³⁵

3617. In a resolution adopted in 1992 on the right to recourse and fair trial, the ACiHPR stated that "persons convicted of an offence shall have the right of appeal to a higher court".³²³⁶

3618. In its decision in *Constitutional Rights Project v. Nigeria (60/91)* in 1995, the ACiHPR held that:

While punishments decreed as the culmination of a carefully conducted criminal procedure do not necessarily constitute violations of these rights, to foreclose any avenue of appeal to "competent national organs" in criminal cases bearing such penalties clearly violates [Article 7(1)(a) of the 1981 ACHPR], and increases the risk that severe violations may go unredressed.³²³⁷

³²³¹ HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 17.

³²³² HRC, *Salgar de Montejo v. Colombia*, Views, 24 March 1982, § 10.4.

³²³³ HRC, *Lumley v. Jamaica*, Views, 31 March 1999, § 7.2-7.3.

³²³⁴ HRC, *Henry v. Jamaica*, Views, 1 November 1991, § 8.4; *Francis v. Jamaica*, Views, 24 March 1993, § 12.2.

³²³⁵ HRC, *Domukovsky and Others v. Georgia*, Views, 6 April 1998, § 18.11.

³²³⁶ ACiHPR, Eleventh Session, Tunis, 2-9 March 1992, Resolution on the Right to Recourse and Fair Trial, § 3.

³²³⁷ ACiHPR, *Constitutional Rights Project v. Nigeria (60/91)*, Decision, 13-22 March 1995, § 8.

3619. In its decision in *Malawi African Association and Others v. Mauritania* in 2000, the ACiHPR stated that:

For an appeal to be effective, the appellate jurisdiction must, objectively and impartially, consider both the elements of fact and of law that are brought before it. Since this approach was not followed in the cases under consideration, the Commission considers, consequently, that there was a violation of [Article 7(1)(a) of the 1981 ACHPR].³²³⁸

3620. In the case of *Hadjianastassiou v. Greece*, the ECtHR indicated that the right of appeal presupposed a written reasoned judgement delivered by the Court of earlier instance, even where such a court is itself an appeal court.³²³⁹

3621. In a case concerning Argentina in 1997, the IACiHR decided, in the context of a situation that it characterised as a non-international armed conflict, that there had been a violation of the petitioner's right to appeal to a higher court.³²⁴⁰

3622. In 2002, in its report on terrorism and human rights, the IACiHR stated that even in a state of emergency, "the basic components of the right to a fair trial cannot be justifiably suspended" and that these included "the right of appeal".³²⁴¹

V. Practice of the International Red Cross and Red Crescent Movement

3623. The ICRC Commentary on the Additional Protocols explains the rationale behind the guarantee of Article 75(4)(j) AP I as follows:

It was not considered realistic in view of the present state of national legislation in various countries to lay down a principle to the effect that everyone has a right of appeal against [the] sentence pronounced upon him, i.e., to guarantee the availability of such a right, as provided in the ICRC draft. However, it is clear that if such remedies do exist, not only should everyone have the right to information about them and about the time-limits within which they must be exercised, as explicitly provided in the text, but in addition, no one should be denied the right to use such remedies.³²⁴²

³²³⁸ ACiHPR, *Malawi African Association and Others v. Mauritania* (54/91), Decision, 11 May 2000, § 94.

³²³⁹ ECtHR, *Hadjianastassiou v. Greece*, Judgement, 16 December 1992, §§ 29–37.

³²⁴⁰ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 156 and 435.

³²⁴¹ IACiHR, Report on Terrorism and Human Rights, Doc. OEA/Ser.L/V/II.116 Doc. 5 rev. 1 corr., 22 October 2002, § 247.

³²⁴² Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4611.

VI. Other Practice

3624. Amnesty International, in relation to political prisoners, has often denounced the denial of the right to appeal in cases of the death penalty, as, for instance, in Georgia.³²⁴³

Non bis in idem*I. Treaties and Other Instruments**Treaties*

3625. Article 86 GC III provides that “no prisoner of war may be punished more than once for the same act, or on the same charge”.

3626. Article 117, third paragraph, GC IV states that “no internee may be punished more than once for the same act, or on the same count”.

3627. Article 14(7) of the 1966 ICCPR provides “no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country”.

3628. Article 8(4) of the 1969 ACHR provides that “an accused person acquitted by a nonappealable judgement shall not be subjected to a new trial for the same cause”.

3629. Article 75(4)(h) API provides that “no one shall be prosecuted or punished by the same Party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure”. Article 75 AP I was adopted by consensus.³²⁴⁴

3630. Upon ratification of API, Austria stated that “Article 75 of Protocol I will be applied insofar as sub-paragraph (h) of paragraph 4 is not incompatible with legal provisions authorizing the reopening of proceedings that have resulted in a final declaration of conviction or acquittal”.³²⁴⁵

3631. Upon ratification of AP I, Denmark stated that:

Denmark expresses a reservation with regard to the application of Article 75, paragraph 4 (h) (Protocol I), to the effect that the provisions of this paragraph shall not prevent the reopening of criminal proceedings in cases where the rules of the Danish Code of civil and criminal procedure, in exceptional circumstances, provide for such a measure.³²⁴⁶

3632. Upon ratification of AP I, Finland stated that “with reference to Article 75, paragraph 4 (h) of the Protocol, the Finnish Government wish to

³²⁴³ Amnesty International, Georgia: Fear of Imminent Execution, AI-Index EUR 56/03/96, 21 June 1996.

³²⁴⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

³²⁴⁵ Austria, Reservations made upon ratification of AP I, 13 August 1982, § 3(b).

³²⁴⁶ Denmark, Reservation made upon ratification of AP I, 17 June 1992.

clarify that under Finnish law a judgement shall not be considered final until the time-limit for exercising any extraordinary legal remedies has expired".³²⁴⁷

3633. Upon ratification of AP I, Germany stated that "Article 74, paragraph 4, subparagraph (h) of Additional Protocol I will only be applied to the extent that it is in conformity with legal provisions which permit under special circumstances the re-opening of proceedings that had led to final conviction or acquittal".³²⁴⁸

3634. Upon ratification of AP I, Iceland stated that its ratification was "subject to a reservation with respect to Article 75, paragraph 4(h), of Protocol I regarding the resumption of cases which have already been tried, the Icelandic law containing detailed provisions on this matter".³²⁴⁹

3635. Upon ratification of AP I, Liechtenstein stated in relation to Article 75 that "paragraph 4(h) is not incompatible with legislation providing for the reopening of a trial which has already led to a person's conviction or acquittal".³²⁵⁰

3636. Upon ratification of AP I, Malta stated in relation to Article 75 that "sub-paragraph (h) of paragraph 4 is not incompatible with legal provisions authorizing the reopening of proceedings that have resulted in a final declaration of conviction or acquittal".³²⁵¹

3637. Upon ratification of AP I, Sweden stated in relation to Article 75 that "paragraph 4, sub-paragraph (h) shall be applied only to the extent that it is not in conflict with legal provisions which allow, in exceptional circumstances, the reopening of proceedings which have resulted in a final conviction or acquittal".³²⁵²

3638. Article 4(1)–(3) of the 1984 Protocol 7 to the 1950 ECHR provides that:

No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.

... The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case.

3639. Article 20(2) of the 1998 ICC Statute provides that "no person shall be tried by another court for a crime referred to in article 5 for which that person has already been convicted or acquitted by the Court".

3640. Article 9(1) of the 2002 Statute of the Special Court for Sierra Leone, entitled "*Non bis in idem*", provides that "no person shall be tried before a

³²⁴⁷ Finland, Reservations made upon ratification of AP I, 7 August 1980, § 3.

³²⁴⁸ Germany, Declarations made upon ratification of AP I and AP II, 14 February 1991, § 8.

³²⁴⁹ Iceland, Reservations made upon ratification of AP I, 10 April 1987.

³²⁵⁰ Liechtenstein, Reservations made upon ratification of AP I, 10 August 1989, § 1(b).

³²⁵¹ Malta, Reservations made upon accession to AP I and AP II, 17 April 1989, § 1(b).

³²⁵² Sweden, Reservations made upon ratification of AP I, 31 August 1979, § 2.

national court of Sierra Leone for acts for which he or she has already been tried by the Special Court”.

Other Instruments

3641. Article 9 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that:

1. No one shall be tried or punished for a crime under this Code for which he has already been finally convicted or acquitted by an international criminal court.
2. . . . No one shall be tried or punished for a crime under this Code in respect of an act for which he has already been finally convicted or acquitted by a national court, provided that, if a punishment was imposed, it has been enforced or is in the process of being enforced.

3642. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3643. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3644. Article 10(1) of the 1993 ICTY Statute, entitled “*Non bis in idem*”, provides that “no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal”.

3645. Article 9(1) of the 1994 ICTR Statute, entitled “*Non bis in idem*”, provides that “no person shall be tried before a national court for acts constituting serious violations of international humanitarian law under the present Statute, for which he or she has already been tried by the International Tribunal for Rwanda”.

3646. Article 12(1) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled “*Non bis in idem*”, provides that “no one shall be tried for a crime against the peace and security of mankind of which he has already been finally convicted or acquitted by an international criminal court”.

3647. Article 50 of the 2000 EU Charter of Fundamental Rights states that “no one shall be liable to be tried or punished again in criminal proceedings for an offence for which he or she has already been finally acquitted or convicted within the Union in accordance with the law”.

II. National Practice

Military Manuals

3648. Argentina’s Law of War Manual (1969) provides that “a prisoner of war cannot be sentenced more than once because of the same act or on the same charge”.³²⁵³

³²⁵³ Argentina, *Law of War Manual* (1969), § 2.076.

- 3649.** Argentina's Law of War Manual (1989) states that "no prisoner of war may be punished more than once for the same act or on the same charge (Article 86 GC III)".³²⁵⁴ With respect to occupied territory, the manual states that "civilians shall not be punished more than once for the same fault" . . . and that anyone "shall be tried only once for the same offence or the same accusation in conformity with the same legislation in the same proceedings".³²⁵⁵
- 3650.** Canada's LOAC Manual provides that "no PW may be punished more than once for the same offence, or on the same charge".³²⁵⁶
- 3651.** Colombia's Instructors' Manual provides that "anybody who is accused has the right . . . not to be tried twice for the same act".³²⁵⁷
- 3652.** Germany's Military Manual provides that "prisoners of war may not be punished or disciplined more than once for the same act".³²⁵⁸
- 3653.** According to New Zealand's Military Manual, "no prisoner may be punished more than once for the same offence or on the same charge".³²⁵⁹ It further states that "no internee may be punished more than once for the same offence or on the same count".³²⁶⁰ The manual also provides that "no one shall be prosecuted or punished by the same party for an offence in respect of which a final judgement acquitting or convicting that person has been previously pronounced under the same law and judicial procedure".³²⁶¹
- 3654.** According to Spain's LOAC Manual, "prisoners of war cannot be punished more than once for the same act or the same accusation".³²⁶²
- 3655.** Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.³²⁶³
- 3656.** Switzerland's Basic Military Manual provides that a prisoner "shall be punished only once for the same act or on the same count".³²⁶⁴
- 3657.** The UK Military Manual provides that "no internee may be punished more than once for the same act or on the same count".³²⁶⁵ It also states that "a prisoner of war may not be punished more than once for the same act or on the same charge".³²⁶⁶
- 3658.** The US Field Manual reproduces Article 86 GC III.³²⁶⁷ It also uses the same wording as Article 117 GC IV.³²⁶⁸

³²⁵⁴ Argentina, *Law of War Manual* (1989), § 3.23.

³²⁵⁵ Argentina, *Law of War Manual* (1989), §§ 4.36 and 5.09.

³²⁵⁶ Canada, *LOAC Manual* (1999), p. 10-6, § 58.

³²⁵⁷ Colombia, *Instructors' Manual* (1999), p. 11.

³²⁵⁸ Germany, *Military Manual* (1992), § 725.

³²⁵⁹ New Zealand, *Military Manual* (1992), § 931(1).

³²⁶⁰ New Zealand, *Military Manual* (1992), § 1128.

³²⁶¹ New Zealand, *Military Manual* (1992), § 1137(4)(h).

³²⁶² Spain, *LOAC Manual* (1996), Vol. I, § 8.7.b.

³²⁶³ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

³²⁶⁴ Switzerland, *Basic Military Manual* (1987), Article 106.

³²⁶⁵ UK, *Military Manual* (1958), § 71.

³²⁶⁶ UK, *Military Manual* (1958), § 204.

³²⁶⁷ US, *Field Manual* (1956), § 162.

³²⁶⁸ US, *Field Manual* (1956), § 324.

3659. The US Air Force Pamphlet provides that “Article 86 [GC III] prohibits punishing POWs more than once for the same offence (*non bis in idem*)”.³²⁶⁹

National Legislation

3660. Countless pieces of domestic legislation provide for the principle of *non bis in idem*.³²⁷⁰

3661. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.³²⁷¹

3662. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 86 GC III and 117 GC IV, and of AP I, including violations of Article 75(4)(h) AP I, are punishable offences.³²⁷²

3663. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.³²⁷³

National Case-law

3664. No practice was found.

Other National Practice

3665. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.³²⁷⁴

3666. The Report on the Practice of Syria asserts that Syria considers Article 75 AP I to be part of customary international law.³²⁷⁵

III. Practice of International Organisations and Conferences

3667. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3668. In its General Comment on Article 14 of the 1966 ICCPR in 1984, the HRC stated that “it seems to the Committee that most States parties make a

³²⁶⁹ US, *Air Force Pamphlet* (1976), § 13-8.

³²⁷⁰ See, e.g., Ethiopia, *Constitution* (1994), Article 23; Georgia, *Constitution* (1995), Article 42(4); *Criminal Code* (1999), Article 3(1); India, *Constitution* (1950), Article 20(2); Kenya, *Constitution* (1992), Article 77(5); Kyrgyzstan, *Criminal Code* (1997), Article 3(3); Mexico, *Constitution* (1917), Article 23; Russia, *Constitution* (1993), Article 50(1).

³²⁷¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³²⁷² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³²⁷³ Norway, *Military Penal Code as amended* (1902), § 108.

³²⁷⁴ Report on the Practice of Jordan, 1997, Chapter 5.

³²⁷⁵ Report on the Practice of Syria, 1997, Chapter 5.1.

clear distinction between a resumption of a trial justified by exceptional circumstances and a re-trial prohibited pursuant to the principle of *ne bis in idem* as contained in paragraph 7".³²⁷⁶

3669. In its admissibility decision in *A. P. v. Italy* in 1987, the HRC stated that Article 14(7) did not prohibit double jeopardy for the same offence when the prosecutions were initiated in different States.³²⁷⁷

3670. In its report in a case concerning Peru in 1995, the IACiHR stated that the underlying elements of the principle of *ne bis in idem* are that: the accused has been acquitted, the judgment in question is final and that the new proceedings are based on the same cause.³²⁷⁸

V. Practice of the International Red Cross and Red Crescent Movement

3671. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . no punishment more than once for the same act or the same charge".³²⁷⁹

VI. Other Practice

3672. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that "no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted or acquitted in accordance with the law and penal procedure".³²⁸⁰

N. Principle of Legality

I. Treaties and Other Instruments

Treaties

3673. Article 99, first paragraph, GC III provides that "no prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law, in force at the time the said act was committed".

³²⁷⁶ HRC, General Comment No. 13 (Article 14 ICCPR), 12 April 1984, § 19.

³²⁷⁷ HRC, *A. P. v. Italy*, Admissibility Decision, 2 November 1987, § 7.3.

³²⁷⁸ IACiHR, *Case 11.006 (Peru)*, Report, 7 February 1995, pp. 298–302.

³²⁷⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(i).

³²⁸⁰ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(f), *IRRC*, No. 282, 1991, p. 334.

3674. Article 65 GC IV provides that “the penal provisions enacted by the Occupying Power shall not come into force before they have been published” and “the effect of these penal provisions shall not be retroactive”.

3675. Article 67 GC IV provides that “the courts shall apply only those provisions of law which were applicable prior to the offence”.

3676. Article 7(1) of the 1950 ECHR provides that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

Article 15(2) prohibits derogations from Article 7 of the 1950 ECHR.

3677. Article 15(1) of the 1966 ICCPR provides that:

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby.

Article 4 provides that no derogations are possible from Article 15 of the 1966 ICCPR.

3678. Article 9 of the 1969 ACHR provides that:

No one shall be convicted of any act or omission that did not constitute a criminal offense, under the applicable law, at the time it was committed. A heavier penalty shall not be imposed than the one that was applicable at the time the criminal offense was committed. If subsequent to the commission of the offense the law provides for the imposition of a lighter punishment, the guilty person shall benefit therefrom.

Article 27 prohibits any suspension of Article 9 of the 1969 ACHR.

3679. Article 75(4)(c) AP I provides that:

No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Article 75 AP I was adopted by consensus.³²⁸¹

3680. Article 6(2)(c) AP II provides that:

No one shall be accused or convicted of a criminal offence on account of any act or omission which did not constitute a criminal offence under the national or

³²⁸¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

international law to which he was subject at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if, after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Article 6 AP II was adopted by consensus.³²⁸²

3681. Article 7(2) of the 1981 ACHPR provides that “no one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed”.

3682. Article 40(2)(a) of the 1989 Convention on the Rights of the Child provides that “no child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed”.

3683. Article 22(1) of the 1998 ICC Statute provides that “a person shall not be criminally responsible under this Statute unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court”.

3684. Article 24(1)–(2) of the 1998 ICC Statute provides that:

No person shall be criminally responsible under this Statute for conduct prior to the entry into force of the Statute . . . In the event of a change in the law applicable to a given case prior to a final judgement, the law more favourable to the person being investigated, prosecuted or convicted shall apply.

Other Instruments

3685. Article 11 of the 1948 UDHR provides that:

No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

3686. Article 10 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled “Non-retroactivity”, provides that:

1. No one shall be convicted under this Code for acts committed before its entry into force.
2. Nothing in this article shall preclude the trial and punishment of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or domestic law applicable in conformity with international law.

3687. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

³²⁸² CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3688. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3689. Article 13 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled “Non-retroactivity”, provides that:

1. No one shall be convicted under the present Code for acts committed before its entry into force.
2. Nothing in this article precludes the trial of anyone for any act which, at the time when it was committed, was criminal in accordance with international law or national law.

3690. Article 49 of the 2000 EU Charter of Fundamental Rights provides that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national law or international law at the time when it was committed”.

II. National Practice

Military Manuals

3691. Argentina’s Law of War Manual (1969) provides that “tribunals will only apply legal provisions existing previously to the offence”.³²⁸³ It adds that the “legal provisions decreed by the Occupying Power . . . cannot have a retroactive effect”.³²⁸⁴

3692. Argentina’s Law of War Manual (1989) states that the prisoner shall be informed of the offence for which he or she is charged, an offence “which shall constitute a criminal act at the time it was committed”.³²⁸⁵ It further states that criminal provisions “cannot have a retroactive effect” and that the alleged offence against the accused “must constitute a criminal act at the moment it was committed”.³²⁸⁶ The same provision applies in non-international armed conflicts.³²⁸⁷

3693. Canada’s LOAC Manual provides that “no PW may be tried or punished for any offence which was not, at the time of its commission, forbidden by International Law or the law of the Detaining Power”.³²⁸⁸ With respect to occupied territories, the manual states that “the penal provisions enacted by the occupant must not be retroactive”.³²⁸⁹ It further provides that “no person may be tried for a war crime unless the crime in question was an offence at the

³²⁸³ Argentina, *Law of War Manual* (1969), § 5.025.

³²⁸⁴ Argentina, *Law of War Manual* (1969), § 5.026.

³²⁸⁵ Argentina, *Law of War Manual* (1989), § 3.30.

³²⁸⁶ Argentina, *Law of War Manual* (1989), §§ 5.08 and 5.09 (occupied territory), see also § 4.15 (civilians).

³²⁸⁷ Argentina, *Law of War Manual* (1989), § 7.10.

³²⁸⁸ Canada, *LOAC Manual* (1999), p. 10-7, § 76.

³²⁸⁹ Canada, *LOAC Manual* (1999), p. 12-6, § 49(a).

time of its commission in accordance with national legislation or International Law".³²⁹⁰ The same provision applies to non-international armed conflicts.³²⁹¹

3694. Colombia's *Instructors' Manual* provides that "nobody can be tried except according to the laws that pre-existed the alleged act".³²⁹²

3695. The *Military Manual* of the Netherlands provides with respect to non-international armed conflict that "nobody may be condemned for acts or omissions which did not constitute a punishable act at the time of the act or omission in question".³²⁹³

3696. New Zealand's *Military Manual* states that "no prisoner may be tried or punished for any offence which was not, at the time of its commission, forbidden by international law or the law of the Detaining Power".³²⁹⁴ It further states that "no one shall be accused or convicted of a criminal offence on account of any act or commission which did not constitute a criminal offence under the national or international law to which he was subject at the time when it was committed".³²⁹⁵ The manual also states that "the penal provisions enacted by the Occupying Power must not be retroactive".³²⁹⁶ According to the manual, "no person may be tried for a war crime unless the act in question was an offence at the time of its commission".³²⁹⁷ With respect to non-international armed conflicts, the manual states that:

No one shall be guilty of an offence in respect of any act or omission which was not an offence at the time of commission, nor shall any punishment be more severe than was applicable at that time, although, if the punishment has been alleviated, the accused shall benefit accordingly.³²⁹⁸

3697. Spain's *LOAC Manual* provides that "no prisoner shall be subject to judicial proceedings or be sentenced for an act which was not previously prohibited whether by the national legislation of the party under whose power he is, or by International Law in force at the time the act was committed".³²⁹⁹

3698. Sweden's *IHL Manual* considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.³³⁰⁰

3699. The *UK Military Manual* provides that "no prisoner of war may be tried or sentenced for an act which is not forbidden by the law of the Detaining

³²⁹⁰ Canada, *LOAC Manual* (1999), p. 16-6, § 42.

³²⁹¹ Canada, *LOAC Manual* (1999), p. 17-3, § 29(c).

³²⁹² Colombia, *Instructors' Manual* (1999), p. 10.

³²⁹³ Netherlands, *Military Manual* (1993), p. XI-5.

³²⁹⁴ New Zealand, *Military Manual* (1992), § 932(2).

³²⁹⁵ New Zealand, *Military Manual* (1992), § 1137(4)(c).

³²⁹⁶ New Zealand, *Military Manual* (1992), § 1327(1)(a).

³²⁹⁷ New Zealand, *Military Manual* (1992), § 1711(3).

³²⁹⁸ New Zealand, *Military Manual* (1992), § 1815(2)(c).

³²⁹⁹ Spain, *LOAC Manual* (1996), Vol. I, § 8.7.c.(1).

³³⁰⁰ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

Power or by international law in force at the time the act in question was committed".³³⁰¹

3700. The UK LOAC Manual provides that "no PW may be tried or sentenced for an act which is not forbidden by the law of the Detaining Power or by international law in force when the act in question was committed".³³⁰²

3701. The US Field Manual reproduces Article 99 GC III.³³⁰³ With respect to situations of occupation, the manual uses the same wording as Article 65 GC IV.³³⁰⁴

3702. The US Air Force Pamphlet provides that "no PW may be tried or sentenced for an act which is not forbidden by the law of the detaining power or by international law in force at the time the act was committed".³³⁰⁵

National Legislation

3703. Countless pieces of domestic legislation contain the principle of non-retroactivity in criminal matters.³³⁰⁶

3704. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³³⁰⁷

3705. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 99 GC III and 65 and 67 GC IV, and of AP I, including violations of Article 75(4)(c) AP I, as well as any "contravention" of AP II, including violations of Article 6(2)(c) AP II, are punishable offences.³³⁰⁸

3706. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".³³⁰⁹

National Case-law

3707. No practice was found.

Other National Practice

3708. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.³³¹⁰

³³⁰¹ UK, *Military Manual* (1958), § 223.

³³⁰² UK, *LOAC Manual* (1981), Section 8, p. 33, § 19(f).

³³⁰³ US, *Field Manual* (1956), § 175. ³³⁰⁴ US, *Field Manual* (1956), § 435.

³³⁰⁵ US, *Air Force Pamphlet* (1976), § 13-8.

³³⁰⁶ See, e.g., India, *Constitution* (1950), Article 22; Kenya, *Constitution* (1992), Article 77(4); Kuwait, *Constitution* (1962), Article 32; Kyrgyzstan, *Criminal Code* (1997), Article 7.

³³⁰⁷ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³³⁰⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³³⁰⁹ Norway, *Military Penal Code as amended* (1902), § 108.

³³¹⁰ Report on the Practice of Jordan, 1997, Chapter 5.

3709. The Report on the Practice of Syria asserts that Syria considers Article 75 AP I to be part of customary international law.³³¹¹

3710. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”. According to the report, it is also the *opinio juris* of the US that military necessity will not justify derogation of the right not to be subjected to retroactive penal legislation.³³¹²

III. Practice of International Organisations and Conferences

3711. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3712. In its judgement in *Kokkinakis v. Greece* in 1993, the ECtHR maintained that:

Article 7 § 1 of the Convention is not confined to prohibiting the retroactive application of the criminal law to an accused’s disadvantage. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*) and the principle that the criminal law must not be extensively construed to an accused’s detriment, for instance by analogy; it follows from this that an offence must be clearly defined in law. This condition is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the court’s interpretation of it, what acts and omissions will make him liable.³³¹³

3713. In its judgement in *S. W. v. UK* in 1995, the ECtHR stated that “Article 7 [1950 ECHR] cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen”.³³¹⁴

3714. In its judgement in the *Castillo Petruzzi and Others case* in 1999, the IACtHR held that:

The Court considers that crimes must be classified and described in precise and unambiguous language that narrowly defines the punishable offense, thus giving full meaning to the principle of *nullum crimen nulla poena sine lege praevia* in

³³¹¹ Report on the Practice of Syria, 1997, Chapter 5.1.

³³¹² Report on US Practice, 1997, Chapter 5.3 and 5.7.

³³¹³ ECtHR, *Kokkinakis v. Greece*, Judgement, 25 May 1993, § 52.

³³¹⁴ ECtHR, *S. W. v. UK*, Judgement, 22 November 1995, § 36.

criminal law. This means a clear definition of the criminalized conduct, establishing its elements and the factors that distinguish it from behaviors that are either not punishable offences or are punishable but not with imprisonment. Ambiguity in describing crimes creates doubts and the opportunity for abuse of power, particularly when it comes to ascertaining the criminal responsibility of individuals and punishing their criminal behavior with penalties that exact their toll on the things that are most precious, such as life and liberty. Laws of the kind applied in the instant case, that fail to narrowly define the criminal behaviors, violate the principle of *nullum crimen nulla poena sine lege praevia* recognized in Article 9 of the [1969 ACHR].³³¹⁵

V. Practice of the International Red Cross and Red Crescent Movement

3715. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . law in force at the time the offence was committed (i.e. no retroactive law)”.³³¹⁶

VI. Other Practice

3716. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that “no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under applicable law, at the time when it was committed”.³³¹⁷

O. Individual Criminal Responsibility and Collective Punishments

I. Treaties and Other Instruments

Treaties

3717. Article 50 of the 1899 HR provides that “no general penalty, pecuniary or otherwise, can be inflicted on the population on account of the acts of individuals for which it cannot be regarded as collectively responsible”.

3718. Article 50 of the 1907 HR provides that “no general penalty, pecuniary or otherwise, shall be inflicted upon the population on account of the acts of individuals for which they cannot be regarded as jointly and severally responsible”.

³³¹⁵ IACtHR, *Castillo Petruzzi and Others case*, Judgement, 30 May 1999, § 121.

³³¹⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(c).

³³¹⁷ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 9(g), *IRRC*, No. 282, 1991, p. 334.

3719. Article 26, sixth paragraph, GC III states that “collective disciplinary measures affecting food are prohibited”.

3720. Article 87, third paragraph, GC III provides that “collective punishment for individual acts” is forbidden.

3721. Article 33, first paragraph, GC IV provides that “no protected person may be punished for an offence he or she has not personally committed. Collective penalties . . . are prohibited.”

3722. Article 5(3) of the 1969 ACHR provides that “punishment shall not be extended to any person other than the criminal”. This guarantee is non-derogable under Article 27(2).

3723. Article 75(2)(d) AP I provides that “the following acts are and shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents: . . . collective punishments”. Article 75(4)(b) provides that “no one shall be convicted of an offence except on the basis of individual penal responsibility”. Article 75 AP I was adopted by consensus.³³¹⁸

3724. Article 4(2)(b) AP II provides that “the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: . . . collective punishments”. Article 4 AP II was adopted by consensus.³³¹⁹

3725. Article 6(2)(b) AP II provides that “no one shall be convicted of an offence except on the basis of individual penal responsibility”. Article 6 AP II was adopted by consensus.³³²⁰

3726. Article 7(2) of the 1981 ACHPR provides that “punishment is personal and can be imposed only on the offender”.

3727. Article 25(2) of the 1998 ICC Statute, entitled “Individual criminal responsibility”, provides that “a person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute”.

3728. Article 3(b) of the 2002 Statute of the Special Court for Sierra Leone provides that “the Special Court shall have the power to prosecute persons who committed or ordered the commission of serious violations of article 3 common to the Geneva Conventions of 12 August 1949 . . . and [API and AP II]”, which include “collective punishment”.

Other Instruments

3729. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including the imposition of collective penalties.

³³¹⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

³³¹⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

³³²⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

3730. Paragraph 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict provides that “all forms of repression . . . of women and children, including . . . collective punishment . . . committed by belligerents in the course of military operations or in occupied territories, shall be considered criminal”.

3731. Article 19(c) of the 1990 Cairo Declaration on Human Rights in Islam states that “liability is in essence personal”.

3732. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3733. Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, states that “collective punishment” is an exceptionally serious war crime and a serious violation of the principles and rules of international law applicable in armed conflict.

3734. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3735. Article 20(f)(ii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “collective punishments” committed in violation of international humanitarian law applicable in armed conflict not of an international character are war crimes.

3736. Article 4(b) of the 1994 ICTR Statute grants the Tribunal jurisdiction over violations of common Article 3 of the 1949 Geneva Conventions and AP II, and expressly refers to, *inter alia*, collective punishments.

3737. Section 7.2 of the 1999 UN Secretary-General’s Bulletin states that:

The following acts against any of the persons mentioned in section 7.1 [persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention] are prohibited at any time and in any place: . . . collective punishment.

II. National Practice

Military Manuals

3738. Argentina’s Law of War Manual (1969) prohibits “collective punishments” of the civilian population.³³²¹

3739. Argentina’s Law of War Manual (1989) prohibits collective punishments and provides that this is a fundamental guarantee which applies in international and non-international armed conflicts.³³²² The manual further states that the

³³²¹ Argentina, *Law of War Manual* (1969), § 4.012.

³³²² Argentina, *Law of War Manual* (1989), §§ 3.25, 4.15, 4.29 and 7.04.

“exclusion of collective responsibility for any sentence” is a fundamental guarantee in non-international armed conflicts.³³²³

3740. Under Australia’s Defence Force Manual, collective penalties are expressly prohibited as measures for the control of the population of occupied territory.³³²⁴

3741. Belgium’s Law of War Manual states that “it is prohibited to impose collective punishments [or] to take measures of intimidation or terrorism”.³³²⁵

3742. Benin’s Military Manual prohibits collective punishment.³³²⁶

3743. Burkina Faso’s Disciplinary Regulations prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishment.³³²⁷

3744. Cameroon’s Disciplinary Regulations prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishment.³³²⁸

3745. Canada’s LOAC Manual forbids collective punishment against prisoners of war, civilians in general and in occupied territories, whether in international or internal armed conflicts.³³²⁹ It also provides that, in non-international armed conflict, “no accused persons shall be convicted of an offence except on the basis of individual penal responsibility”.³³³⁰

3746. Colombia’s Circular on Fundamental Rules of IHL provides that “nobody can be considered as responsible for an act he has not committed”.³³³¹

3747. Congo’s Disciplinary Regulations prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishment.³³³²

3748. Ecuador’s Naval Manual states that prisoners of war and interned persons “may not be subjected to collective punishment”.³³³³

3749. France’s Disciplinary Regulations as amended prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishment.³³³⁴

3750. France’s LOAC Summary Note provides that “no one shall be held responsible for an act he did not commit”.³³³⁵

3751. France’s LOAC Manual provides that collective punishment is a war crime and that one of the three main principles common to IHL and human rights is the principle of security, which guarantees to every human being the

³³²³ Argentina, *Law of War Manual* (1989), § 7.10.

³³²⁴ Australia, *Defence Force Manual* (1994), §§ 953 and 1221.

³³²⁵ Belgium, *Law of War Manual* (1983), p. 50.

³³²⁶ Benin, *Military Manual* (1996), Fascicule III, p. 4.

³³²⁷ Burkina Faso, *Disciplinary Regulations* (1994), Articles 35(2) and 73(3).

³³²⁸ Cameroon, *Disciplinary Regulations* (1975), Article 32.

³³²⁹ Canada, *LOAC Manual* (1999), p. 10-7, § 61, p. 11-4, § 33, p. 11-8, § 63, p. 12-5, § 41(d) and p. 17-3, § 21(a).

³³³⁰ Canada, *LOAC Manual* (1999), p. 17-3, § 29(b).

³³³¹ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 5.

³³³² Congo, *Disciplinary Regulations* (1986), Article 32(2).

³³³³ Ecuador, *Naval Manual* (1989), §§ 11-8-1 and 11-9.

³³³⁴ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

³³³⁵ France, *LOAC Summary Note* (1992), § 3.1.

right not to be held responsible for an offence he or she did not commit³³³⁶ and which prohibits collective punishments.³³³⁷ The manual further states that “no protected person may be punished for an offence he or she has not personally committed”.³³³⁸

3752. Germany’s Soldiers’ Manual provides for the prohibition of collective punishment against civilians.³³³⁹

3753. Germany’s Military Manual refers to Article 33 GC IV and prohibits “collective penalties” of civilians.³³⁴⁰ It specifies that this prohibition also applies in occupied territories.³³⁴¹ With regard to prisoners of war, the manual refers to Article 87(3) GC III and provides that “collective punishment for individual acts and cruel punishment are forbidden”.³³⁴²

3754. Germany’s IHL Manual states that “collective punishments are prohibited”.³³⁴³

3755. Israel’s Manual on the Laws of War states that “collective punishment” of prisoners of war is absolutely forbidden.³³⁴⁴

3756. Italy’s IHL Manual states that civilian persons in occupied territory have the right not to be subjected to collective punishment.³³⁴⁵

3757. Mali’s Army Regulations prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishments.³³⁴⁶

3758. Madagascar’s Military Manual provides that “nobody shall be held responsible for an act he/she did not commit”.³³⁴⁷

3759. Morocco’s Disciplinary Regulations prohibits subjecting the wounded, sick and shipwrecked, prisoners and civilians to collective punishments.³³⁴⁸

3760. The Military Manual of the Netherlands reproduces the prohibition of collective punishments found in Articles 75 AP I and 4 AP II.³³⁴⁹ With respect to non-international armed conflict, the manual states that “nobody may be condemned but on the basis of individual criminal responsibility”.³³⁵⁰

3761. New Zealand’s Military Manual, referring to Articles 32–34 GC IV, states that “the following are . . . prohibited: a. the punishment of a protected person for an offence not committed by him personally; b. collective penalties”.³³⁵¹ The manual reproduces Article 75(2) AP I.³³⁵² With regard to the control of persons in occupied territory, it also states that “impermissible

³³³⁶ France, *LOAC Manual* (2001), p. 52.

³³³⁷ France, *LOAC Manual* (2001), pp. 45 and 51.

³³³⁸ France, *LOAC Manual* (2001), p. 74.

³³³⁹ Germany, *Soldiers’ Manual* (1991), p. 4.

³³⁴⁰ Germany, *Military Manual* (1992), § 507.

³³⁴¹ Germany, *Military Manual* (1992), § 536.

³³⁴² Germany, *Military Manual* (1992), § 725.

³³⁴³ Germany, *IHL Manual* (1996), § 405.

³³⁴⁴ Israel, *Manual on the Laws of War* (1998), p. 53.

³³⁴⁵ Italy, *IHL Manual* (1991), Vol. I, § 41(f).

³³⁴⁶ Mali, *Army Regulations* (1979), Article 36.

³³⁴⁷ Madagascar, *Military Manual* (1994), p. 91, Rule 5.

³³⁴⁸ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

³³⁴⁹ Netherlands, *Military Manual* (1993), pp. VIII-3 and XI-4, see also p. VII-2.

³³⁵⁰ Netherlands, *Military Manual* (1993), p. XI-52.

³³⁵¹ New Zealand, *Military Manual* (1992), § 1116(2)(a) and (b).

³³⁵² New Zealand, *Military Manual* (1992), § 1137.

measures of population control include: . . . punishments for acts of others, that is . . . collective penalties".³³⁵³ The manual also states that:

Until and during World War II, Occupying Powers occasionally sought to secure observance of the law of armed conflict by the inhabitants of the occupied territory by the imposition or threat of collective penalties. Such action was contrary to HR Art. 50, and any collective penalties are now expressly forbidden by IV GC Art. 33 and AP I Art. 75 (2)(d).³³⁵⁴

With regard to non-international armed conflicts, the manual states that "although AP II contains no provisions relating to enforcement or punishment of breaches, it does contain a statement of fundamental guarantees prohibiting at any time and anywhere: . . . collective punishment".³³⁵⁵ In a part entitled "Trial and Punishment: Restrictions and Guarantees", the manual also states that "as a minimum: . . . no one shall be convicted of an offence except on the basis of individual criminal responsibility".³³⁵⁶

3762. Nicaragua's Military Manual prohibits acts of collective punishment, including the threat to commit such acts.³³⁵⁷

3763. Romania's Soldiers' Manual provides that captured combatants and civilians "shall not be held responsible for acts which they have not committed" and that collective punishments are prohibited.³³⁵⁸

3764. Russia's Military Manual refers to the Geneva Conventions and AP I and prohibits collective punishment "of war victims".³³⁵⁹

3765. Senegal's IHL Manual lists the prohibition of collective punishment among the most basic universal rights to which every individual is entitled.³³⁶⁰

3766. Spain's LOAC Manual prohibits collective punishments.³³⁶¹ It further stresses that "any collective punishment for individual acts" is prohibited.³³⁶²

3767. Sweden's IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.³³⁶³ In a chapter on IHL rules during occupation, the manual refers to Article 33 GC IV and states that "protected persons may not be punished for actions they have not themselves performed. Collective punishment of a whole group is also prohibited."³³⁶⁴

³³⁵³ New Zealand, *Military Manual* (1992), § 1322(3).

³³⁵⁴ New Zealand, *Military Manual* (1992), § 1608.

³³⁵⁵ New Zealand, *Military Manual* (1992), § 1812(1)(b).

³³⁵⁶ New Zealand, *Military Manual* (1992), § 1815(2)(b).

³³⁵⁷ Nicaragua, *Military Manual* (1996), Article 14(35).

³³⁵⁸ Romania, *Soldiers' Manual* (1991), p. 34.

³³⁵⁹ Russia, *Military Manual* (1990), § 8(b).

³³⁶⁰ Senegal, *IHL Manual* (1999), Chapter IV(A)(2), p. 23.

³³⁶¹ Spain, *LOAC Manual* (1996), Vol. I, § 8.2.c.

³³⁶² Spain, *LOAC Manual* (1996), Vol. I, § 8.7.b.

³³⁶³ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

³³⁶⁴ Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.

3768. Switzerland's Basic Military Manual states that "no one shall be punished for an act he did not personally commit".³³⁶⁵ It also refers to Article 87 GC III and states that "collective punishments are prohibited" and that "collective and individual punishments affecting food are prohibited".³³⁶⁶ With respect to occupied territories, the manual states that "collective punishments . . . are prohibited". It also provides the following examples of prohibited collective punishments: "condemnation of the whole population of a village to forced labour [and] collective fines or temporary closing of all schools in retaliation for offences committed by a few inhabitants".³³⁶⁷

3769. Togo's Military Manual prohibits collective punishment.³³⁶⁸

3770. The UK Military Manual states that:

The Hague Rules forbid collective punishment, in the form of a general pecuniary or other penalty, of the population for acts of individuals for which the population as a whole cannot be regarded as jointly and severally responsible. It was formerly thought that the prohibition did not exclude reprisals against a locality or community for some act committed by its inhabitants or members who cannot be identified. However, the Civilian Convention, Art. 33 has prohibited collective penalties and has expressly adopted the principle that "no protected person may be punished for an offence he or she has not personally committed".³³⁶⁹

According to the manual, all "violations of the Geneva Conventions not amounting to 'grave breaches', are also war crimes, for example, . . . imposing collective disciplinary measures affecting food of prisoners of war".³³⁷⁰

3771. The UK LOAC Manual forbids collective punishments.³³⁷¹

3772. The US Field Manual reproduces Articles 87 GC III and 33 GC IV and Article 50 of the 1907 HR.³³⁷²

3773. The US Air Force Pamphlet prohibits collective punishment imposed on prisoners of war for individual acts.³³⁷³ It refers to Article 33 GC IV and states that "collective penalties (punishment of a protected person for offences which he has not personally committed)" are prohibited.³³⁷⁴

3774. The US Naval Handbook states that "prisoners of war may not be subjected to collective punishment". The same provision applies to interned persons.³³⁷⁵

³³⁶⁵ Switzerland, *Basic Military Manual* (1987), Article 153.

³³⁶⁶ Switzerland, *Basic Military Manual* (1987), Articles 106 (POWs) and 120.

³³⁶⁷ Switzerland, *Basic Military Manual* (1987), Article 153 (civilians in occupied territory).

³³⁶⁸ Togo, *Military Manual* (1996), Fascicule III, p. 4.

³³⁶⁹ UK, *Military Manual* (1958), § 647, see also §§ 42 (civilians), 205 (POWs) and 553 (occupied territory).

³³⁷⁰ UK, *Military Manual* (1958), § 626.

³³⁷¹ UK, *LOAC Manual* (1981), Section 9, p. 35, § 9, see also Annex A, p. 48, § 20.

³³⁷² US, *Field Manual* (1956), §§ 163(a) (POWs), 272 (civilians) and 448 (occupied territory).

³³⁷³ US, *Air Force Pamphlet* (1976), § 13-8 (POWs).

³³⁷⁴ US, *Air Force Pamphlet* (1976), § 14-4 (civilians).

³³⁷⁵ US, *Naval Handbook* (1995), §§ 11.7.1 (POWs) and 11.8 (interned persons).

3775. The YPA Military Manual of the SFRY (FRY) prohibits collective punishment of civilians, the wounded, sick and shipwrecked and prisoners of war.³³⁷⁶

National Legislation

3776. Argentina's Draft Code of Military Justice punishes any soldier who subjects any protected person to "collective punishments for individual acts".³³⁷⁷

3777. Australia's War Crimes Act provides that the "imposition of collective punishment" is a war crime.³³⁷⁸

3778. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³³⁷⁹

3779. The Criminal Code of the Federation of Bosnia and Herzegovina provides that the "imposition of collective punishment" is a war crime.³³⁸⁰ The Criminal Code of the Republika Srpska contains the same provision.³³⁸¹

3780. China's Law Governing the Trial of War Criminals provides that "enforcing collective torture" is a war crime.³³⁸²

3781. The DRC Code of Military Justice as amended provides that the imposition of collective penalties during war or in an area under siege or during a declared state of emergency is an offence.³³⁸³

3782. Under Côte d'Ivoire's Penal Code as amended, in times of war or occupation, organising, ordering or imposing collective punishments on the civilian population constitutes a "crime against the civilian population".³³⁸⁴

3783. Croatia's Criminal Code provides that the imposition of collective punishment is a war crime.³³⁸⁵

3784. Under Ethiopia's Penal Code, in time of war, armed conflict or occupation, the imposition of collective punishment on civilian population is a war crime.³³⁸⁶

3785. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 26 and 87 GC III and 33 GC IV, and of AP I, including violations of Article 75(2)(d) AP I, as well as any "contravention" of AP II, including violations of Article 4(2)(b) AP II, are punishable offences.³³⁸⁷

³³⁷⁶ SFRY (FRY), *YPA Military Manual* (1988), § 31(1).

³³⁷⁷ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).

³³⁷⁸ Australia, *War Crimes Act* (1945), Section 3.

³³⁷⁹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³³⁸⁰ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

³³⁸¹ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1).

³³⁸² China, *Law Governing the Trial of War Criminals* (1946), Article 3(6).

³³⁸³ DRC, *Code of Military Justice as amended* (1972), Article 525.

³³⁸⁴ Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(5).

³³⁸⁵ Croatia, *Criminal Code* (1997), Article 158.

³³⁸⁶ Ethiopia, *Penal Code* (1957), Article 282(g).

³³⁸⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

3786. Italy's Law of War Decree as amended provides that "no collective sanction, financial or of any kind, can be imposed on the population because of an individual fault".³³⁸⁸

3787. Kyrgyzstan's Criminal Code of provides that "the Criminal Code is based upon the principles of . . . personal criminal responsibility".³³⁸⁹

3788. Under Lithuania's Criminal Code as amended, the imposition of collective punishments constitutes a war crime.³³⁹⁰

3789. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".³³⁹¹

3790. Romania's Law on the Punishment of War Criminals provides that "criminals of war" are persons who "ordered or executed collective . . . repression".³³⁹²

3791. Slovenia's Penal Code provides that "the imposition of collective punishments" is a war crime.³³⁹³

3792. Under Spain's Penal Code, "the imposition of collective punishments" is an offence.³³⁹⁴

3793. The Penal Code as amended of the SFRY (FRY) provides that "the imposition of collective penalties" is a war crime.³³⁹⁵

National Case-law

3794. In 1995, Colombia's Constitutional Court held that the prohibitions contained in Article 4(2) AP II practically reproduced specific constitutional provisions.³³⁹⁶

3795. In its judgement in the *Priebke case* in 1997, the Military Tribunal of Rome found that the killing of 335 civilians at the Ardeatine caves ordered by the accused as a reprisal for the killing of German officers in Rome by partisans was a war crime. The Court held that the "multiple murder of civilians in occupied territory had been perpetrated beyond the limits set by customary laws on reprisals and by Article 50 of the Hague Regulations on collective punishments".³³⁹⁷

3796. In the *Calley case* in 1973, a US army officer was convicted of murder for killing South Vietnamese civilians. The US Army Court of Military Review

³³⁸⁸ Italy, *Law of War Decree as amended* (1938), Article 65.

³³⁸⁹ Kyrgyzstan, *Criminal Code* (1997), Article 3(1).

³³⁹⁰ Lithuania, *Criminal Code as amended* (1961), Article 336.

³³⁹¹ Norway, *Military Penal Code as amended* (1902), § 108.

³³⁹² Romania, *Law on the Punishment of War Criminals* (1945), Article I(d).

³³⁹³ Slovenia, *Penal Code* (1994), Article 374(1).

³³⁹⁴ Spain, *Penal Code* (1995), Article 612(3).

³³⁹⁵ SFRY (FRY), *Penal Code as amended* (1976), Article 142(1).

³³⁹⁶ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

³³⁹⁷ Italy, Military Tribunal of Rome, *Priebke case*, Judgement, 22 July 1997.

dismissed the argument that the acts were lawful reprisals for illegal acts of the enemy and held that "slaughtering many for the presumed delicts of a few is not a lawful response to the delicts . . . Reprisal by summary execution of the helpless is forbidden in the laws of land warfare."³³⁹⁸

Other National Practice

3797. The Report on the Practice of Jordan states that Article 75 AP I embodies customary law.³³⁹⁹

3798. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that [all persons who are in the power of a party to a conflict and who do not benefit from more favorable treatment under the Conventions] not be subjected to . . . collective punishments".³⁴⁰⁰

3799. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Iraqi policy provided for the collective punishment of the family of any individual who served in or was suspected of assisting the Kuwaiti resistance. This punishment routinely took the form of destruction of the family home and execution of all family members. Collective punishment is prohibited expressly by Article 33 GC [IV].³⁴⁰¹

3800. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".³⁴⁰²

III. Practice of International Organisations and Conferences

United Nations

3801. In a resolution adopted in 1974 on the protection of women and children in emergency and armed conflict, the UN General Assembly stated that "all forms of . . . collective punishment . . . shall be considered criminal".³⁴⁰³

³³⁹⁸ US, Army Court of Military Review, *Calley case*, Judgement, 16 February 1973.

³³⁹⁹ Report on the Practice of Jordan, 1997, Chapter 5.

³⁴⁰⁰ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

³⁴⁰¹ US, Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 620.

³⁴⁰² Report on US Practice, 1997, Chapter 5.3.

³⁴⁰³ UN General Assembly, Res. 3318 [XXIX], 14 December 1974, §§ 4 and 5.

3802. In a resolution adopted in 1993 on the occupied Arab territories, the UN Commission on Human Rights condemned “the policies and practices of Israel . . . and, in particular, . . . collective punishment”.³⁴⁰⁴

3803. In a resolution adopted in 1998, the UN Commission on Human Rights called upon Israel:

to cease immediately its policy of enforcing collective punishments, such as the demolition of houses and closure of the Palestinian territory, measures which constitute flagrant violations of international law and international humanitarian law, endanger the lives of the Palestinians and also constitute a major obstacle in the way of peace.³⁴⁰⁵

3804. In two resolutions adopted in 1988 and 1989 on the situation in the Palestinian and other Arab territories occupied by Israel, the UN Sub-Commission on Human Rights, after reaffirming that GC IV applied to the situation, considered that “collective punishment . . . amounted to a war crime under international law”.³⁴⁰⁶

3805. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that “violations . . . of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law”.³⁴⁰⁷

Other International Organisations

3806. No practice was found.

International Conferences

3807. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all parties to an armed conflict take effective measures to ensure that “strict orders are given to prevent all serious violations of international humanitarian law, including . . . collective punishment . . . and threats to carry out such actions”.³⁴⁰⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

3808. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber addressed the question of the legality of the confinement of civilians. It referred to

³⁴⁰⁴ UN Commission on Human Rights, Res. 1993/2 A, 19 February 1993, § 1.

³⁴⁰⁵ UN Commission on Human Rights, Res. 1998/1, 27 March 1998, § 7.

³⁴⁰⁶ UN Sub-Commission on the Human Rights, Res. 1988/10, 31 August 1988, § 3; Resolution 1989/4, 31 August 1989, § 3.

³⁴⁰⁷ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

³⁴⁰⁸ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(b).

Article 78 GC IV and ruled that “internment and assigned residence, whether in the occupying power’s national territory or in the occupied territory, are exceptional measures to be taken only after careful consideration of each individual case. Such measures are never to be taken on a collective basis.”³⁴⁰⁹

3809. In its General Comment on Article 4 of the 1966 ICCPR in 2001, the HRC held that “States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance . . . by imposing collective punishments”.³⁴¹⁰

3810. In its judgement in *A. P., M. P. and T. P. v. Switzerland* in 1997, the ECtHR, accepting that, “whether or not the late Mr P. was actually guilty, the applicants were subjected to a penal sanction for tax evasion allegedly committed by him”, stated that “it is a fundamental rule of criminal law that criminal liability does not survive the person who has committed the criminal act”.³⁴¹¹

V. Practice of the International Red Cross and Red Crescent Movement

3811. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “collective punishments are prohibited”.³⁴¹² Delegates also teach that “the conviction must be pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure, which include . . . individual and not collective penal responsibility”.³⁴¹³

3812. The ICRC Commentary on the Additional Protocols explains with regard to Article 6(2)(b) AP II that:

This subparagraph lays down the fundamental principle of individual responsibility; a corollary of this principle is that there can be no collective penal responsibility for acts committed by one or several members of a group. This principle is contained in every national legislation. It is already expressed in Article 33 of the fourth Convention, where it is more elegantly worded as follows: “No protected person may be punished for an offence he or she has not personally committed” . . . The wording was modified to meet the requirement of uniformity between the texts in the different languages and, in this particular case, with the English terminology (“individual penal responsibility”). Article 75, paragraph 4 (b), of Protocol I, lays down the same principle.

³⁴⁰⁹ ICTY, *Delalić case*, Judgement, 16 November 1998, § 578.

³⁴¹⁰ HRC, General Comment No. 29 (Article 4 ICCPR), 24 July 2001, § 11.

³⁴¹¹ ECtHR, *A. P., M. P. and T. P. v. Switzerland*, Judgement, 29 August 1997, §§ 47–48.

³⁴¹² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 197.

³⁴¹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 202(b).

According to the Commentary, this does not exclude cases of complicity or incitement, which are punishable offences in themselves and may lead to a conviction.³⁴¹⁴

3813. In a working paper submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC proposed that the following war crime, when committed in an international armed conflict, be subject to the jurisdiction of the Court: collective punishment. Collective punishments, as serious violations of IHL in non-international conflicts, were also listed as war crimes.³⁴¹⁵

3814. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC recalled that “restrictions on movements by means of curfews or the sealing-off of areas may in no circumstances amount to collective penalties”.³⁴¹⁶

VI. Other Practice

3815. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “no one shall be held responsible for an act he has not committed”.³⁴¹⁷

3816. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides a list of the minimum judicial guarantees, including that “collective punishments against persons and their property” shall remain prohibited and that “no one shall be convicted of an offence except on the basis of individual penal responsibility”.³⁴¹⁸

P. Respect for Convictions and Religious Practices

Note: For practice concerning the religious beliefs of the dead, see Chapter 35, section D. For practice concerning respect for the convictions and religious practices of persons deprived of their liberty, see Chapter 37, section J. For practice concerning the education of children, see Chapter 39, section B.

³⁴¹⁴ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4603.

³⁴¹⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1(ii)–(iii) and 3(i).

³⁴¹⁶ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

³⁴¹⁷ ICRC archive document.

³⁴¹⁸ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(2)(b), *IRRC*, No. 282, 1991, pp. 331 and 334.

I. Treaties and Other Instruments

Treaties

3817. Article 46 of the 1899 HR provides that “religious convictions and liberty must be respected”.

3818. Article 46 of the 1907 HR provides that “religious convictions and practice must be respected”.

3819. Article 27, first paragraph, GC IV provides that “protected persons are entitled, in all circumstances, to respect for . . . their religious convictions and practices”.

3820. Article 38, third paragraph, GC IV provides that protected persons “shall be allowed to practise their religion and to receive spiritual assistance from ministers of their faith”.

3821. Article 58 GC IV provides that:

The Occupying Power shall permit ministers of religion to give spiritual assistance to the members of their religious communities.

The Occupying Power shall also accept consignments of books and articles required for religious needs and shall facilitate their distribution in occupied territory.

3822. Article 9 of the 1950 ECHR provides that:

1. Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief and freedom, either alone or in community with others and in public or private, to manifest his religion or belief, in worship, teaching, practice and observance.
2. Freedom to manifest one’s religion or beliefs shall be subject only to such limitations as are prescribed by law and are necessary in a democratic society in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.

3823. Article 18 of the 1966 ICCPR provides that:

1. Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.
2. No one shall be subject to coercion which would impair his freedom to have or to adopt a religion or belief of his choice.
3. Freedom to manifest one’s religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others.

Under Article 4(2) ICCPR no derogation may be made from this provision.

3824. Article 12 of the 1969 ACHR provides that:

1. Everyone has the right to freedom of conscience and of religion. This right includes freedom to maintain or to change one’s religion or beliefs, and freedom to profess or disseminate one’s religion or beliefs, either individually or together with others, in public or in private.

2. No one shall be subject to restrictions that might impair his freedom to maintain or to change his religion or beliefs.
3. Freedom to manifest one's religion and beliefs may be subject only to the limitations prescribed by law that are necessary to protect public safety, order, health, or morals, or the rights or freedoms of others.
4. Parents or guardians, as the case may be, have the right to provide for the religious and moral education of their children or wards that is in accord with their own convictions.

Under Article 27(2) no derogation may be made from this provision.

3825. Article 75(1) AP I provides that "each Party shall respect . . . the convictions and religious practices" of all persons who are in its power. Article 75 AP I was adopted by consensus.³⁴¹⁹

3826. Article 4(1) AP II provides that all persons *hors de combat* are entitled to respect for their convictions and religious practices. Article 4 AP II was adopted by consensus.³⁴²⁰

3827. Article 8 of the 1981 ACHPR provides that "freedom of conscience, the profession and free practice of religion shall be guaranteed. No one may, subject to law and order, be submitted to measures restricting the exercise of these freedoms."

3828. Article 14(1) of the 1989 Convention on the Rights of the Child provides that "States Parties shall respect the right of the child to freedom of thought, conscience and religion". Article 14(3) provides that "freedom to manifest one's religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedoms of others".

3829. Article 30 of the 1989 Convention on the Rights of the Child provides that "in those States in which . . . religious . . . minorities . . . exist, a child belonging to such a minority . . . shall not be denied the right, in community with other members of his or her group, . . . to profess and practise his or her own religion".

Other Instruments

3830. Article 37 of the 1863 Lieber Code provides that "the United States acknowledge and protect, in hostile countries occupied by them, religion and morality . . . Offenses to the contrary shall be rigorously punished."

3831. Article 38 of the 1874 Brussels Declaration, in the section on "the military power with respect to private persons", provides that "religious convictions [of persons] and their practice, must be respected".

3832. Article 49 of the 1880 Oxford Manual, in the section on "the rules of conduct with respect to persons" in occupied territory, provides that "their religious convictions and practice, must be respected".

³⁴¹⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

³⁴²⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

3833. Article 18 of the 1948 UDHR provides that:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

3834. According to Article III of the 1948 American Declaration on the Rights and Duties of Man, “every person has the right freely to profess a religious faith, and to manifest and practice it both in public and in private”.

3835. Article 1 of the 1981 UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief provides that:

Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have a religion or whatever belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.

3836. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75 AP I.

3837. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75 AP I.

3838. Section 7.1 of the 1999 UN Secretary-General’s Bulletin provides that:

Persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of sickness, wounds or detention . . . shall be accorded full respect for their . . . religious and other convictions.

3839. Article 10 of the 2000 EU Charter of Fundamental Rights provides that:

Everyone has the right to freedom of thought, conscience and religion. This right includes freedom to change religion or belief and freedom, either alone or in community with others and in public or in private, to manifest religion or belief, in worship, teaching, practice and observance.

II. National Practice

Military Manuals

3840. Argentina’s Law of War Manual (1969) provides that “protected persons have the right to respect for their beliefs and religious practice”.³⁴²¹ With respect to non-repatriated foreigners, the manual provides that they “shall have

³⁴²¹ Argentina, *Law of War Manual* (1969), § 4.010.

the possibility to practice their religion and receive spiritual assistance from a minister of religion".³⁴²²

3841. Argentina's Law of War Manual (1989) provides that "protected persons have the right, in any circumstance, to respect for their beliefs and religious practices".³⁴²³ With respect to non-repatriated foreigners, the manual states that "they shall be allowed to practice their religion and to receive spiritual assistance from ministers of their faith".³⁴²⁴ In the case of non-international armed conflict, the manual states that "all persons who do not directly take part in hostilities . . . have the right to be respected in their beliefs and religious practices".³⁴²⁵

3842. Australia's Defence Force Manual states that "religious convictions [of protected persons] . . . shall be respected".³⁴²⁶

3843. Canada's LOAC Manual provides that, in the territories of the parties to the conflict and in occupied territories, "religious conventions and practices . . . of protected persons must in all circumstances be respected".³⁴²⁷ It further provides that "the occupant is obligated to allow freedom of religion in the occupied territory".³⁴²⁸ According to the manual, "it is a duty of the occupant to see that religious convictions [of inhabitants of occupied territory] are not interfered with".³⁴²⁹ With respect to non-international armed conflicts, the manual states that "all persons not participating in the conflict or who have ceased to do so are entitled to . . . respect for their convictions and religious practices".³⁴³⁰

3844. Canada's Code of Conduct states that "civilians [in a foreign land] are entitled in all circumstances to respect for . . . their religious convictions and practices, and their manners and customs".³⁴³¹

3845. Colombia's Basic Military Manual states that "a means to guarantee the rights of non-combatants is to respect their convictions and beliefs".³⁴³² It further provides that it is a duty of the parties to the conflict "to permit religious practices".³⁴³³

3846. Colombia's Circular on Fundamental Rules of IHL provides that "captured combatants and civilian persons who are under the power of the adverse party have the right to respect . . . for their convictions".³⁴³⁴

³⁴²² Argentina, *Law of War Manual* (1969), § 4.016.

³⁴²³ Argentina, *Law of War Manual* (1989), § 4.27.

³⁴²⁴ Argentina, *Law of War Manual* (1989), § 4.30(4.3).

³⁴²⁵ Argentina, *Law of War Manual* (1989), § 7.04.

³⁴²⁶ Australia, *Defence Force Manual* (1994), § 953.

³⁴²⁷ Canada, *LOAC Manual* (1999), p. 11-4, § 29, see also p. 12-4, § 37 (occupied territory).

³⁴²⁸ Canada, *LOAC Manual* (1999), p. 12-3, § 28.

³⁴²⁹ Canada, *LOAC Manual* (1999), p. 12-5, § 36.

³⁴³⁰ Canada, *LOAC Manual* (1999), p. 17-3, § 19.

³⁴³¹ Canada, *Code of Conduct* (2001), Rule 4, § 2.

³⁴³² Colombia, *Basic Military Manual* (1995), p. 21.

³⁴³³ Colombia, *Basic Military Manual* (1995), p. 28.

³⁴³⁴ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 4.

3847. The Military Manual of the Dominican Republic instructs soldiers that “however different or unusual a foreign land may seem to you, remember to respect its people and their . . . religious beliefs”.³⁴³⁵

3848. Ecuador’s Naval Manual prohibits “offences against civilian inhabitants of the occupied territory, including . . . infringing religious rights”.³⁴³⁶

3849. France’s LOAC Summary Note provides that all persons taking no direct part in the hostilities and persons *hors de combat* have the right to respect for their individual beliefs.³⁴³⁷

3850. France’s LOAC Teaching Note states that “everybody has the right to respect . . . for their beliefs”.³⁴³⁸

3851. France’s LOAC Manual refers to Article 75(1) AP I and provides that “all the parties shall respect . . . religious practices of all persons [under their power]”.³⁴³⁹

3852. Germany’s Military Manual provides that “civilians who do not take part in hostilities . . . are entitled to respect for their religious convictions”.³⁴⁴⁰ It further provides that the belligerent shall ensure the “freedom of religion” to aliens remaining in the territory of a party to the conflict.³⁴⁴¹

3853. Hungary’s Military Manual provides for “respect for the religious convictions” of civilians in occupied territories.³⁴⁴²

3854. Indonesia’s Directive on Human Rights in Trikora states that respect for personal and human dignity includes a prohibition on the violation or derogation of individual rights, such as freedom of thought, conscience and religion.³⁴⁴³

3855. Italy’s IHL Manual provides that, in occupied territory, civilians have the right to respect for their religious convictions and practices.³⁴⁴⁴

3856. Kenya’s LOAC Manual provides that “religious convictions and practices are to be respected”.³⁴⁴⁵

3857. Madagascar’s Military Manual provides that “captured combatants and civilians in the power of the adverse party have the right to respect for . . . their beliefs”.³⁴⁴⁶

3858. New Zealand’s Military Manual provides that “religious convictions and practices . . . of protected persons must in all circumstances be respected”.³⁴⁴⁷ It further provides that protected persons who remain in the territory of the

³⁴³⁵ Dominican Republic, *Military Manual* (1980), p. 10.

³⁴³⁶ Ecuador, *Naval Manual* (1989), § 6.2.5(1)–(2).

³⁴³⁷ France, *LOAC Summary Note* (1992), § 2.1(1).

³⁴³⁸ France, *LOAC Teaching Note* (2000), p. 2.

³⁴³⁹ France, *LOAC Manual* (2001), p. 51.

³⁴⁴⁰ Germany, *Military Manual* (1992), § 502, see also § 532.

³⁴⁴¹ Germany, *Military Manual* (1992), § 585.

³⁴⁴² Hungary, *Military Manual* (1992), p. 97.

³⁴⁴³ Indonesia, *Directive on Human Rights in Trikora* (1995), § 4(a).

³⁴⁴⁴ Italy, *IHL Manual* (1991), Vol. I, § 41(a).

³⁴⁴⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

³⁴⁴⁶ Madagascar, *Military Manual* (1994), p. 91, Rule 4.

³⁴⁴⁷ New Zealand, *Military Manual* (1992), § 1114.

belligerents “must be allowed... to practise their religion”.³⁴⁴⁸ According to the manual, “the Occupying Power has a duty to allow freedom of religion in the occupied territory”.³⁴⁴⁹ In addition, “it is the duty of the Occupying Power to see that... [the] religious convictions [of the inhabitants] are not interfered with” and that “according to the IV GC, protected persons are entitled in all circumstances to respect for... their religious convictions and practices”.³⁴⁵⁰

3859. Nicaragua’s Military Manual states that “victims of an armed conflict have the right in any circumstance to respect for... their beliefs and religious practices”.³⁴⁵¹

3860. Romania Soldiers’ Manual provides that captured combatants and civilians have the right to respect for their convictions and to practice their religion freely.³⁴⁵²

3861. Spain’s LOAC Manual states that “religious beliefs and the practice of worship shall be respected”.³⁴⁵³ It further states that “the civilian population has the right to respect for its religious beliefs”.³⁴⁵⁴

3862. Sweden’s IHL Manual considers that the fundamental guarantees for persons in the power of one party to the conflict as contained in Article 75 AP I are a part of customary international law.³⁴⁵⁵ It provides that “as a general rule, civilians within an occupied area shall, as protected persons, under all circumstances enjoy respect as to... religious convictions and practice”.³⁴⁵⁶ The manual also provides that “occupation shall not involve any change in the faith and religious practice of the population. The IV Geneva Convention contains a number of articles providing protection for religion, faith and religious practices, without this being linked to any particular confession.”³⁴⁵⁷

3863. Switzerland’s Basic Military Manual provides, with respect to civilians in the power of a party to the conflict, that “religious convictions and customs shall be respected”.³⁴⁵⁸ In the case of occupied territories, the manual states that “the ministers of religion shall be able to give spiritual assistance to the members of their religious communities. Religious convictions and performing religious practices shall be respected.”³⁴⁵⁹

3864. The UK Military Manual states that “protected persons who remain in the territory of the belligerent must, in general, ... be allowed... to practice their religion”.³⁴⁶⁰ In the case of occupied territories, the manual states that

³⁴⁴⁸ New Zealand, *Military Manual* (1992), § 1118.

³⁴⁴⁹ New Zealand, *Military Manual* (1992), § 1315.

³⁴⁵⁰ New Zealand, *Military Manual* (1992), § 1321(1)–(2).

³⁴⁵¹ Nicaragua, *Military Manual* (1996), Article 14(30).

³⁴⁵² Romania, *Soldiers’ Manual* (1991), p. 33, § 1.

³⁴⁵³ Spain, *LOAC Manual* (1996), Vol. I, § 2.7.c.(3).

³⁴⁵⁴ Spain, *LOAC Manual* (1996), Vol. I, § 5.6.a.(1).

³⁴⁵⁵ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

³⁴⁵⁶ Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.

³⁴⁵⁷ Sweden, *IHL Manual* (1991), Section 6.1.3, pp. 127–128.

³⁴⁵⁸ Switzerland, *Basic Military Manual* (1987), Article 146.

³⁴⁵⁹ Switzerland, *Basic Military Manual* (1987), Article 167.

³⁴⁶⁰ UK, *Military Manual* (1958), § 46.

“public worship must be permitted and religious convictions respected by the Occupant, who must permit ministers of religion to give spiritual assistance to the members of their religious communities”.³⁴⁶¹ It also states that “it is a duty of the Occupant to see that . . . [the] religious convictions [of the inhabitants] are not interfered with”. It adds that “according to the Civilian Convention, protected persons are entitled in all circumstances to respect for . . . their religious convictions and practices”.³⁴⁶²

3865. The UK LOAC Manual states that “in all circumstances . . . religious convictions . . . of protected persons should be respected”.³⁴⁶³

3866. The US Field Manual reproduces Articles 27, 38, third paragraph, and 58 GC IV. It also uses the same wording as Article 46 of the 1907 HR.³⁴⁶⁴

3867. The US Air Force Pamphlet recalls that GC IV contains provisions on the treatment of protected persons, including “to respect . . . religious customs”.³⁴⁶⁵ It adds that protected persons in the territory of a belligerent “in any case, are entitled . . . to practice their religion”.³⁴⁶⁶ The Pamphlet refers to Article 46 of the 1907 HR and provides for respect for “religious convictions and practices”.³⁴⁶⁷

3868. The US Soldier’s Manual instructs soldiers that “however different or unusual a foreign land may seem to you, remember to respect its people and their honor, family rights, religious beliefs, and customs”.³⁴⁶⁸

3869. The US Naval Handbook provides that “the following acts are representative war crimes: . . . infringement of religious rights” of civilian inhabitants of occupied territory.³⁴⁶⁹

National Legislation

3870. Countless pieces of domestic legislation provide for the right to freedom of conscience and of religion.³⁴⁷⁰

3871. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.³⁴⁷¹

3872. The Criminal Code of the Federation of Bosnia and Herzegovina provides that compelling civilians to “forcible conversion to another nationality

³⁴⁶¹ UK, *Military Manual* (1958), § 536.

³⁴⁶² UK, *Military Manual* (1958), §§ 546 and 547.

³⁴⁶³ UK, *LOAC Manual* (1981), Section 9, p. 34, § 9.

³⁴⁶⁴ US, *Field Manual* (1956), § 110 (Article 34 GC III), § 266 (Article 27 GC IV), § 277 (Article 38 GC IV), § 387 (Article 58 GC IV), § 293 (Article 86 GC IV), § 300 (Article 93 GC IV) and § 380.

³⁴⁶⁵ US, *Air Force Pamphlet* (1976), § 14-4. ³⁴⁶⁶ US, *Air Force Pamphlet* (1976), § 14-5.

³⁴⁶⁷ US, *Air Force Pamphlet* (1976), § 14-6(a).

³⁴⁶⁸ US, *Soldier’s Manual* (1984), p. 21.

³⁴⁶⁹ US, *Naval Handbook* (1995), § 6.2.5(1) and (2).

³⁴⁷⁰ See, e.g., Ethiopia, *Constitution* (1994), Article 27(1); India, *Constitution* (1950), Article 25(1); Kenya, *Constitution* (1992), Article 78; Kuwait, *Constitution* (1962), Article 35; Kyrgyzstan, *Constitution* (1993), Article 16(2); Mexico, *Constitution* (1917) Article 24; Russia *Constitution* (1993), Article 28.

³⁴⁷¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

or religion" is a war crime.³⁴⁷² The Criminal Code of the Republika Srpska contains the same provision.³⁴⁷³

3873. Croatia's Criminal Code provides that "conversion to another religion" of civilian population is a war crime.³⁴⁷⁴

3874. Ethiopia's Penal Code provides that "forcible religious conversion" is a war crime against the civilian population.³⁴⁷⁵

3875. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 27, 38 and 58 GC IV, and of AP I, including violations of Article 75(1) AP I, as well as any "contravention" of AP II, including violations of Article 4(1) AP II, are punishable offences.³⁴⁷⁶

3876. Under Lithuania's Criminal Code as amended, "compelling [civilians] to convert to another faith" constitutes a war crime.³⁴⁷⁷

3877. Myanmar's Defence Services Act provides for the punishment of "any person subject to this law who . . . by defiling any place of worship, or otherwise, intentionally insults the religions or wounds the religious feelings of any person".³⁴⁷⁸

3878. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".³⁴⁷⁹

3879. Under Slovenia's Penal Code, "conversion of the population to another religion" is a war crime.³⁴⁸⁰

3880. The Criminal Offences against the Nation and State Act of the SFRY (FRY) considers that, during war or enemy occupation, "any person who ordered, assisted or otherwise was the direct executor of . . . forced conversion to any other faith" committed war crimes.³⁴⁸¹

3881. The Penal Code as amended of the SFRY (FRY) provides that "conversion of the population to another religion" is a war crime.³⁴⁸²

³⁴⁷² Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1).

³⁴⁷³ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433(1), 434 and 435.

³⁴⁷⁴ Croatia, *Criminal Code* (1997), Article 158.

³⁴⁷⁵ Ethiopia, *Penal Code* (1957), Article 282(e).

³⁴⁷⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁴⁷⁷ Lithuania, *Criminal Code as amended* (1961), Article 336.

³⁴⁷⁸ Myanmar, *Defence Services Act* (1959), Section 66(b).

³⁴⁷⁹ Norway, *Military Penal Code as amended* (1902), § 108.

³⁴⁸⁰ Slovenia, *Penal Code* (1994), Article 374(1).

³⁴⁸¹ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

³⁴⁸² SFRY (FRY), *Penal Code as amended* (1976), Article 142.

National Case-law

3882. In its judgement in the *Zühlke case* in 1948, a Special Court of Cassation of the Netherlands held that refusal to admit a clergyman or priest to a person awaiting execution of the death sentence constituted a war crime.³⁴⁸³

3883. In the *Tanaka Chuichi case* before an Australian military court in 1946, the accused had ill-treated Sikh prisoners of war, had cut their hair and beards and had forced some of them to smoke a cigarette, acts contrary to their culture and religion. The Court found the accused guilty of violations of, *inter alia*, the 1929 Geneva POW Convention.³⁴⁸⁴

Other National Practice

3884. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.³⁴⁸⁵

III. Practice of International Organisations and Conferences

United Nations

3885. In a resolution on Sudan adopted in 2000, the UN General Assembly expressed its deep concern “at continuing violations of human rights in areas under the control of the Government of the Sudan, in particular: . . . restrictions on freedom of religion”.³⁴⁸⁶

3886. In a resolution adopted in 1996, the UN Commission on Human Rights expressed serious concern about reports of religious persecution and forced conversion in the government-controlled areas of Sudan.³⁴⁸⁷

3887. In a resolution adopted in 2001 on the elimination of all forms of religious intolerance, the UN Commission on Human Rights condemned “all forms of intolerance [and] discrimination based on religion or belief” and urged States “to recognize the right of all persons to worship or assemble in connection with a religion or belief and to establish and maintain places for these purposes”.³⁴⁸⁸

3888. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949

³⁴⁸³ Netherlands, Special Court of Cassation (Second Chamber), *Zühlke case*, Judgement, 6 December 1948.

³⁴⁸⁴ Australia, Military Court at Rabaul, *Tanaka Chuichi case*, Judgement, 12 July 1946.

³⁴⁸⁵ Report on US Practice, 1997, Chapter 5.3.

³⁴⁸⁶ UN General Assembly, Res. 55/116, 4 December 2000, § 2(b)(iii).

³⁴⁸⁷ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble.

³⁴⁸⁸ UN Commission on Human Rights, Res. 2001/42, 23 April 2001, §§ 2 and 4(d).

Geneva Conventions and Article 4 AP II “have long been considered customary international law”.³⁴⁸⁹

3889. In a report in 1993, the UN Special Rapporteur on the Implementation of the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief stated that:

The Special Rapporteur has continued to receive allegations of infringements in most regions of the world of the rights and freedoms contained in the Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. Practices of religious intolerance have continued to occur in countries with varying degrees of development and different political and social systems and have not been confined to a particular faith.³⁴⁹⁰

Other International Organisations

3890. No practice was found.

International Conferences

3891. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

3892. In its General Comment on Article 18 of the 1966 ICCPR in 1993, the HRC stated that:

The right to freedom of thought, conscience and religion (which includes the freedom to hold beliefs) in article 18.1 is far-reaching and profound; it encompasses freedom of thought on all matters, personal conviction and the commitment to religion or belief, whether manifested individually or in community with others. The Committee draws the attention of States parties to the fact that the freedom of thought and the freedom of conscience are protected equally with the freedom of religion and belief. The fundamental character of these freedoms is also reflected in the fact that this provision cannot be derogated from, even in time of public emergency, as stated in article 4.2 of the Covenant.³⁴⁹¹

3893. In 1999, in the case of the *Association of Members of the Episcopal Conference of East Africa v. Sudan*, the ACiHPR stated that:

73. Another matter is the application of Shari’a law. There is no controversy as to Shari’a being based upon the interpretation of the Muslim religion. When Sudanese tribunals apply Shari’a, they must do so in accordance with the other obligations undertaken by the State of Sudan. Trials must always

³⁴⁸⁹ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

³⁴⁹⁰ UN Commission on Human Rights, Special Rapporteur on the Implementation of the Declaration on the Elimination of all Forms of Intolerance and of Discrimination Based on Religion or Belief, Report, UN Doc. E/CN.4/1993/62, 6 January 1993, § 74; see also Report, UN Doc. E/CN.4/1987/35, 24 December 1986; Report, UN Doc. E/CN.4/1988/45, 6 January 1988; Report, UN Doc. E/CN.4/1989/44, 30 December 1988; Report, UN Doc. E/CN.4/1990/46, 22 January 1990; Report, UN Doc. E/CN.4/1991/56, 18 January 1991 and Report, UN Doc. E/CN.4/1992/52, 18 December 1991.

³⁴⁹¹ HRC, General Comment No. 22 (Article 18 ICCPR), 30 July 1993, § 1.

accord with international fair-trial standards. Also, it is fundamentally unjust that religious laws should be applied against non-adherents of the religion. Tribunals that apply only Shari'a are thus not competent to judge non-Muslims, and everyone should have the right to be tried by a secular court if they wish.

74. It is alleged that non-Muslims were persecuted in order to cause their conversion to Islam. They do not have the right to preach or build their Churches; there are restrictions on freedom of expression in the national press. Members of the Christian clergy are harassed; Christians are subjected to arbitrary arrests, expulsions and denial of access to work and food aid.
75. In its various oral and written submissions to the African Commission, the government has not responded in any convincing manner to all the allegations of human made against it. The Commission reiterates the principle that in such cases where the government does not respect its obligation to provide the Commission with a response on the allegations of which it is notified, it shall consider the facts probable.
76. Other allegations refer to the oppression of Christian civilians and religious leaders and the expulsion of missionaries. It is alleged that non-Muslims suffer persecution in the form of denial of work, food aid and education. A serious allegation is that of unequal food distribution in prisons, subjecting Christian prisoners to blackmail in order obtain food. These attacks on individuals on account of their religious persuasion considerably restrict their ability to practice freely the religion to which they subscribe. The government provides no evidence or justifications that would mitigate this conclusion. Accordingly, the Commission holds a violation of Article 8 [of the ACHPR].³⁴⁹²

3894. In 1993, in its judgement in *Kokkinakis v. Greece*, the ECtHR stated that:

31. As enshrined in Article 9 (art. 9) [of the 1950 ECHR], freedom of thought, conscience and religion is one of the foundations of a "democratic society" within the meaning of the Convention. It is, in its religious dimension, one of the most vital elements that go to make up the identity of believers and their conception of life, but it is also a precious asset for atheists, agnostics, sceptics and the unconcerned. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it.

While religious freedom is primarily a matter of individual conscience, it also implies, inter alia, freedom to "manifest [one's] religion". Bearing witness in words and deeds is bound up with the existence of religious convictions.

According to Article 9 (art. 9), freedom to manifest one's religion is not only exercisable in community with others, "in public" and within the circle of those whose faith one shares, but can also be asserted "alone" and "in private"; furthermore, it includes in principle the right to try to convince one's neighbour, for example through "teaching", failing which, moreover, "freedom to change [one's] religion or belief", enshrined in Article 9 (art. 9), would be likely to remain a dead letter.³⁴⁹³

³⁴⁹² ACiHPR, *Association of Members of the Episcopal Conference of East Africa v. Sudan*, Decision, 1–15 November 1999, §§ 73–76.

³⁴⁹³ ECtHR, *Kokkinakis v. Greece*, Judgement, 25 May 1993, § 31.

3895. In its judgement in the *Cyprus case* in 2001, the ECtHR found, in relation to the living conditions of Greek Cypriots in the Karpas region of northern Cyprus, that there had been a violation of Article 9 of the 1950 ECHR (freedom of thought, conscience and religion) in respect of Greek Cypriots concerning the effects of restrictions on freedom of movement, which limited access to places of worship and participation in other aspects of religious life.³⁴⁹⁴

3896. In a resolution adopted in 1968 concerning the law applicable to emergency situations, the IACiHR declared that:

The suspension of constitutional guarantees or state of siege is compatible with the system of representative democratic government only if enacted under the following conditions:

- ...
 e. When it does not in any manner presuppose the suspension of ... the right to freedom of thought, conscience and religion.³⁴⁹⁵

V. Practice of the International Red Cross and Red Crescent Movement

3897. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the person and the person's honour, convictions and religious practices shall be respected".³⁴⁹⁶ Delegates also teach that in occupied territories "the religious convictions and practices of the inhabitants must be respected. Religious personnel shall be permitted to give spiritual assistance to the members of their religious communities with the aid of the occupying power."³⁴⁹⁷

3898. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross recalled the Geneva Conventions and AP I and reminded the parties of their obligation to respect the beliefs of combatants and civilians.³⁴⁹⁸

3899. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC recalled that "religious customs must be respected, which implies access to places of worship to the fullest extent possible".³⁴⁹⁹

³⁴⁹⁴ ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 245–246.

³⁴⁹⁵ IACiHR, Resolution adopted at the 1968 Session, Doc. OEA/Ser.L/V/II.19 Doc. 32, *Inter-American Yearbook on Human Rights*, 1968, pp. 59–61.

³⁴⁹⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 188.

³⁴⁹⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 824.

³⁴⁹⁸ Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de Enero de 1994, 3 January 1994.

³⁴⁹⁹ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

VI. Other Practice

3900. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “captured combatants and civilians under the authority of the adverse party are entitled to respect for their . . . convictions”.³⁵⁰⁰

3901. In 1986, an armed opposition group was said to release or execute captured combatants according to their willingness to convert to Islam and their behaviour in detention. If no solution was found to their case after two years of detention, the prisoners would have been executed.³⁵⁰¹

3902. A colloquium held jointly by the IIHL and the International Institute of Human Rights in 1973 adopted a resolution on spiritual and intellectual assistance in time of armed conflict and civil disturbances. The resolution appealed to any party involved in an international or non-international armed conflict to respect the right of any victim of an armed conflict to exercise his or her spiritual and intellectual activities and to supply him or her with the facilities necessary therefor, as well as to refrain from controlling such activities in a manner incompatible with respect for beliefs and convictions, or from practising methods of information, training or teaching which were incompatible with freedom of thought and the principles of humanitarian law. It also invited all States to ratify the universal and regional instruments asserting the right to freedom of thought, conviction and religion, and to apply the provisions of those instruments in all circumstances, including during international and non-international conflicts, and in situations of internal tension.³⁵⁰²

3903. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “all persons, even if their liberty has been restricted, are entitled to respect for their person, honour and convictions, freedom of thought, conscience and religious practices”.³⁵⁰³

Q. Respect for Family Life

Note: For practice concerning enforced disappearance, see section K of this chapter. For practice concerning accounting for the dead, see Chapter 35, section E. For practice concerning the right of the families to know the fate of their relatives, see Chapter 36. For practice concerning the grouping of families in detention, correspondence with and visits to persons deprived of their liberty, see Chapter 37, sections B, C, H and I. For practice concerning respect for family unity during displacement, see Chapter 38, section C.

³⁵⁰⁰ ICRC archive document. ³⁵⁰¹ ICRC archive document.

³⁵⁰² IIHL/International Institute of Human Rights, Colloquium on Spiritual and Intellectual Assistance in Time of Armed Conflicts and Civil Disturbances, *IRRC*, No. 152, 1973, p. 609.

³⁵⁰³ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(1), *IRRC*, No. 282, 1991, p. 331.

*I. Treaties and Other Instruments**Treaties*

3904. Article 46 of the 1899 HR provides that “family honour and rights... must be respected”.

3905. Article 46 of the 1907 HR provides that “family honour and rights... must be respected”.

3906. Article 26 GC IV provides that:

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

3907. Article 27, first paragraph, GC IV provides that “protected persons are entitled, in all circumstances, to respect for their... family rights”.

3908. Article 8 of the 1950 ECHR provides that:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

3909. Article 17(1) of the 1966 ICCPR provides that “no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation”. Article 17(2) provides that “everyone has the right to protection of the law against such interference or attacks”.

3910. Article 23(1) of the 1966 ICCPR provides that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

3911. Article 10(1) of the 1966 ICESCR provides that “the widest possible protection and assistance should be accorded to the family, which is the natural and fundamental group unit of society”.

3912. Article 11 of the 1969 ACHR provides that:

1. Everyone has the right to have his honor respected and his dignity recognized.
2. No one may be the object of arbitrary or abusive interference with his private life, his family, his home, or his correspondence, or of unlawful attacks on his honor or reputation.
3. Everyone has the right to the protection of the law against such interferences or attacks.

3913. Article 17(1) of the 1969 ACHR provides that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the state”.

3914. Article 74 AP I provides that “Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organizations engaged in this task”. Article 74 AP I was adopted by consensus.³⁵⁰⁴

3915. Article 4(3)(b) AP II provides that “all appropriate steps shall be taken to facilitate the reunion of families temporarily separated”. Article 4 AP II was adopted by consensus.³⁵⁰⁵

3916. Article 18 of the 1981 ACHPR provides that:

1. The family shall be the natural unit and basis of society. It shall be protected by the State which shall take care of its physical health and moral.
2. The State shall have the duty to assist the family which is the custodian of morals and traditional values recognized by the community.

3917. Article 15(1) of the 1988 Protocol of San Salvador provides that “the family is the natural and fundamental element of society and ought to be protected by the State, which should see to the improvement of its spiritual and material conditions”.

3918. Article 9 of the 1989 Convention on the Rights of the Child provides that “Parties shall ensure that a child shall not be separated from his or her parents against their will”.

3919. Article 10 of the 1989 Convention on the Rights of the Child provides that “applications by a child or his or her parents to enter or leave a State Party for the purpose of family reunification shall be dealt with by States Parties in a positive, humane and expeditious manner”.

3920. Article 16 of the 1989 Convention on the Rights of the Child provides that:

1. No child shall be subjected to arbitrary or unlawful interference with his or her privacy, family, home or correspondence, nor to unlawful attacks on his or her honour and reputation.
2. The child has the right to the protection of the law against such interference or attacks.

3921. Article 22(2) of the 1989 Convention on the Rights of the Child provides that:

States Parties shall provide, as they consider appropriate, cooperation in any efforts by the United Nations and other competent intergovernmental organizations or non-governmental organizations cooperating with the United Nations . . . to trace the parents or other members of the family of any refugee child in order to obtain information necessary for reunification with his or her family.

³⁵⁰⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 248.

³⁵⁰⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

3922. In the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that:

In accordance with the fundamental principle of preserving family unity, where it is not possible for families to repatriate as units, a mechanism shall be established for their reunification in Abkhazia. Measures shall also be taken for the identification and extra care/assistance for unaccompanied minors and other vulnerable persons during the repatriation process.

Other Instruments

3923. Article 37 of the 1863 Lieber Code provides that “the United States acknowledge and protect, in hostile countries occupied by them, . . . the sacredness of domestic relations. Offenses to the contrary shall be rigorously punished.”

3924. Article 38 of the 1874 Brussels Declaration provides that “family honour and rights . . . must be respected”.

3925. Article 48 of the 1880 Oxford Manual provides that “family honour and rights . . . must be respected”.

3926. Article 12 of the 1948 UDHR provides that “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”.

3927. Article 16(3) of the 1948 UDHR provides that “the family is the natural and fundamental group unit of society and is entitled to protection by society and the State”.

3928. Article V of the 1948 American Declaration on the Rights and Duties of Man provides that “everyone has the right to the protection of the law against abusive attacks upon his . . . family life”.

3929. Article VI of the 1948 American Declaration on the Rights and Duties of Man provides that “every person has the right to establish a family, the basic element of society, and to receive protection therefor”.

3930. Article 5(b) of the 1990 Cairo Declaration on Human Rights in Islam provides that society and the State “shall ensure family protection and welfare”.

3931. Principle 17 of the 1998 Guiding Principles on Internal Displacement provides that:

1. Every human being has the right to respect of his or her family life.
2. To give effect to this right for internally displaced persons, family members who wish to remain together shall be allowed to do so.
3. Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.

4. Members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together.

3932. Article 7 of the 2000 EU Charter of Fundamental Rights provides that “everyone has the right to respect for his or her private and family life”.

II. National Practice

Military Manuals

3933. Argentina’s Law of War Manual (1969) contains provisions specifying that parties to a conflict must assist members of families to keep in contact and, if possible, facilitate the process of family reunification.³⁵⁰⁶

3934. Argentina’s Law of War Manual (1989) provides that “the High Contracting Parties and the Parties to the conflict shall facilitate in every possible way the reunion of families dispersed as a result of armed conflicts and shall encourage in particular the work of the humanitarian organisations engaged in this task”.³⁵⁰⁷

3935. Australia’s Defence Force Manual provides that “family rights [of protected persons] . . . shall be respected”.³⁵⁰⁸

3936. Canada’s Code of Conduct provides that civilians in a foreign land are entitled in all circumstances to respect for their family rights.³⁵⁰⁹

3937. The Military Manual of the Dominican Republic instructs soldiers that “however different or unusual a foreign land may seem to you, remember to respect its people and their honour, family rights . . . and customs”.³⁵¹⁰

3938. El Salvador’s Human Rights Charter of the Armed Forces recalls that “the Universal Declaration of Human Rights establishes . . . the protection of the family”.³⁵¹¹

3939. Germany’s Military Manual provides that “civilians who do not take part in hostilities . . . are entitled to respect for their family rights”.³⁵¹²

3940. Italy’s IHL Manual provides that, in occupied territory, civilians have the right to respect for their family rights.³⁵¹³

3941. Kenya’s LOAC Manual provides that “family and private honour . . . are to be respected”.³⁵¹⁴

3942. New Zealand’s Military Manual provides that “family rights . . . of protected persons must in all circumstances be respected”.³⁵¹⁵ It also recalls the

³⁵⁰⁶ Argentina, *Law of War Manual* (1969), § 4.009.

³⁵⁰⁷ Argentina, *Law of War Manual* (1989), § 4.14.

³⁵⁰⁸ Australia, *Defence Force Manual* (1994), § 953.

³⁵⁰⁹ Canada, *Code of Conduct* (2001), Rule 4, § 2.

³⁵¹⁰ Dominican Republic, *Military Manual* (1980), p. 10.

³⁵¹¹ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 2.

³⁵¹² Germany, *Military Manual* (1992), § 502, see also § 532.

³⁵¹³ Italy, *IHL Manual* (1991), Vol. I, § 41(a).

³⁵¹⁴ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

³⁵¹⁵ New Zealand, *Military Manual* (1992), § 1114.

provisions of AP I, stating that “parties to the conflict are obliged to facilitate the reunion of families dispersed as a result of armed conflicts”.³⁵¹⁶ The manual further states that “according to the IV GC, protected persons are entitled in all circumstances to respect for . . . their family rights”.³⁵¹⁷

3943. Nicaragua’s Military Manual states that “victims of an armed conflict have the right in any circumstances to respect for . . . their family rights”.³⁵¹⁸

3944. The Handbook on Discipline of the Philippines provides for the punishment of abduction and separation of family members.³⁵¹⁹

3945. Spain’s LOAC Manual provides that “the reunion of dispersed families shall be favoured”.³⁵²⁰ It clearly stipulates that “family rights shall be respected”.³⁵²¹

3946. Sweden’s IHL Manual provides that “as a general rule, civilians within an occupied area shall, as protected persons, under all circumstances enjoy respect as to . . . family rights”.³⁵²²

3947. The UK Military Manual states that in situations of occupation, “according to the Civilian Convention, protected persons are entitled in all circumstances to respect for . . . their family rights”.³⁵²³

3948. The UK LOAC Manual states that “in all circumstances, the . . . family rights . . . of protected persons should be respected”.³⁵²⁴

3949. The US Field Manual reproduces Article 27 GC IV.³⁵²⁵ It also uses the same wording as Article 46 of the 1907 HR.³⁵²⁶

3950. The US Air Force Pamphlet recalls that GC IV has provisions on the treatment of protected persons, including “to respect . . . family rights”.³⁵²⁷ It also refers to Article 46 of the 1907 HR, which provides for respect for “family honour”.³⁵²⁸

3951. The US Soldier’s Manual instructs soldiers that “however different or unusual a foreign land may seem to you, remember to respect its people and their honor, family rights . . . and customs”.³⁵²⁹

3952. The Annotated Supplement to the US Naval Handbook provides that “the United States supports the principles in [AP I], Article 74, that nations facilitate in every possible way the reunion of families dispersed as a result of armed conflict and encourage the work of humanitarian organizations engaged in this task”.³⁵³⁰

³⁵¹⁶ New Zealand, *Military Manual* (1992), § 1136.

³⁵¹⁷ New Zealand, *Military Manual* (1992), § 1321(2).

³⁵¹⁸ Nicaragua, *Military Manual* (1996), Article 14(30).

³⁵¹⁹ Philippines, *Handbook on Discipline* (1989), p. 16.

³⁵²⁰ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1).

³⁵²¹ Spain, *LOAC Manual* (1996), Vol. I, § 2.7.c.(3).

³⁵²² Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.

³⁵²³ UK, *Military Manual* (1958), § 547. ³⁵²⁴ UK, *LOAC Manual* (1981), Section 9, p. 34, § 9.

³⁵²⁵ US, *Field Manual* (1956), § 266. ³⁵²⁶ US, *Field Manual* (1956), § 380.

³⁵²⁷ US, *Air Force Pamphlet* (1976), § 14-4.

³⁵²⁸ US, *Air Force Pamphlet* (1976), § 14-6(a). ³⁵²⁹ US, *Soldier’s Manual* (1984), p. 21.

³⁵³⁰ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.

National Legislation

3953. Angola's Rules on the Resettlement of Internally Displaced Populations provides that:

It is the responsibility of the Provincial Governments, through the Sub-Groups on Displaced Persons and Refugees of the Provincial Humanitarian Coordination Groups, to carry out the following:

...
h) To take appropriate measures to ensure family reunification.³⁵³¹

3954. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁵³²

3955. According to Colombia's Law on Internally Displaced Persons, the family of forcibly displaced persons must benefit from the right to family reunification.³⁵³³

3956. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 27 GC IV, and of AP I, including violations of Article 74 AP I, as well as any "contravention" of AP II, including violations of Articles 4(3)(b) AP II, are punishable offences.³⁵³⁴

3957. Lithuania's Criminal Code as amended punishes as a "violation of the norms of international humanitarian law in time of war, an armed conflict or under the conditions of occupation or annexation: . . . separation of children from their parents or guardians".³⁵³⁵

3958. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".³⁵³⁶

3959. The Act on Child Protection of the Philippines provides that:

All appropriate steps shall be taken to facilitate the reunion of families temporarily separated due to armed conflict . . .

Whenever possible, members of the same family shall be housed in the same premises and given separate accommodation from other evacuees and be provided with facilities to lead a normal family life.³⁵³⁷

National Case-law

3960. No practice was found.

³⁵³¹ Angola, *Rules on the Resettlement of Internally Displaced Populations* (2001), Article 2(h).

³⁵³² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁵³³ Colombia, *Law on Internally Displaced Persons* (1997), Article 2(4).

³⁵³⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁵³⁵ Lithuania, *Criminal Code as amended* (1961), Article 336.

³⁵³⁶ Norway, *Military Penal Code as amended* (1902), § 108.

³⁵³⁷ Philippines, *Act on Child Protection* (1992), Sections 22(f) and 23.

Other National Practice

3961. A resolution adopted by the National Assembly of South Korea in December 1998 urged cooperation between the authorities in North and South Korea in reuniting separated family members and proposed that the National Red Cross Societies in each region proceed with their work on family reunification.³⁵³⁸

3962. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support the principle that . . . states facilitate in every possible way the reunion of families dispersed as a result of armed conflicts".³⁵³⁹

3963. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".³⁵⁴⁰

*III. Practice of International Organisations and Conferences**United Nations*

3964. In several resolutions on the rights of the child, the UN General Assembly has called upon all States and UN bodies and agencies "to ensure the early identification and registration of unaccompanied refugee and internally displaced children [and] to give priority to programmes for family tracing and reunification".³⁵⁴¹

3965. In two resolutions adopted in 1997 and 1998 on the rights of the child, the UN Commission on Human Rights called upon all States "to give priority to programmes for family tracing and reunification, and to continue monitoring the care arrangements for unaccompanied refugee and internally displaced children".³⁵⁴²

3966. In 1996, in a report on the impact of armed conflict on children, the UN Secretary-General noted that:

³⁵³⁸ South Korea, Resolution Calling for the Confirmation of Life or Death and the Reunion of Members of Separated Families in South and North Korea, 198th Regular Session, 1 December 1998.

³⁵³⁹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 427.

³⁵⁴⁰ Report on US Practice, 1997, Chapter 5.3.

³⁵⁴¹ UN General Assembly, Res. 51/77, 12 December 1996, Section III, § 42; Res. 52/107, 12 December 1997, Section V, § 3; Res. 53/128, 9 December 1998, Section V, § 3.

³⁵⁴² UN Commission on Human Rights, Res. 1997/78, 18 April 1997, § 16; Res. 1998/76, 22 April 1998, § 17(b).

A substantial body of rules and standards already confirms the principle of family reunion, whether children are separated from parents by armed conflict or other events. In practice, however, reunification is often frustrated or protracted, resulting in further psychological damage to children and their families.³⁵⁴³

3967. In 1981, in a Conclusion on Family Reunification, the UNHCR Executive Committee stressed that “every effort should be made to ensure the reunification of separated families”.³⁵⁴⁴

3968. In 1997, in a Conclusion on Refugee Children and Adolescents, the UNHCR Executive Committee stated that the role of the family as the fundamental group of society should be protected in accordance with human rights and humanitarian law.³⁵⁴⁵

Other International Organisations

3969. No practice was found.

International Conferences

3970. The 25th International Conference of the Red Cross in 1986 adopted a resolution on protection of children in armed conflict in which it recommended that “according to the Geneva Conventions and the two Additional Protocols, all necessary measures be taken to preserve the unity of the family and to facilitate the reuniting of families”.³⁵⁴⁶

3971. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it stated that it:

- (a) demands that all parties to armed conflict avoid any action aimed at, or having the effect of, causing the separation of families in a manner contrary to international humanitarian law;
- (b) appeals to States to do their utmost to solve the serious humanitarian issue of dispersed families without delay.³⁵⁴⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

3972. In its General Comment No. 16 on Article 17 of the 1966 ICCPR in 1988, the HRC held that:

³⁵⁴³ UN Secretary-General, Impact of armed conflict on children, Report prepared by the expert appointed pursuant to UN General Assembly Resolution 48/157 (1993), UN Doc. E/CN.4/1996/110, 5 February 1996, § 44.

³⁵⁴⁴ UNHCR, Executive Committee, Conclusion No. 24 (XXXII): Family Reunification, 22 October 1981, § 1.

³⁵⁴⁵ UNHCR, Executive Committee, Conclusion No. 84 (XLVIII): Refugee Children and Adolescents, 20 October 1997, § b(i).

³⁵⁴⁶ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. IX, § 5.

³⁵⁴⁷ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § D(a)-(d).

1. Article 17 provides for the right of every person to be protected against arbitrary or unlawful interference with his privacy, family, home or correspondence as well as against unlawful attacks on his honour and reputation. In the view of the Committee this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed by this article require the State to adopt legislative and other measures to give effect to the prohibition against such interferences and attacks as well as to the protection of this right.
- ...
4. The expression "arbitrary interference" is also relevant to the protection of the right provided for in article 17. In the Committee's view the expression "arbitrary interference" can also extend to interference provided for under the law. The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in the particular circumstances.
5. Regarding the term "family", the objectives of the Covenant require that for purposes of article 17 this term be given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned. The term "home" in English, "manzel" in Arabic, "zhùzhái" in Chinese, "domicile" in French, "zhilische" in Russian and "domicilio" in Spanish, as used in article 17 of the Covenant, is to be understood to indicate the place where a person resides or carries out his usual occupation. In this connection, the Committee invites States to indicate in their reports the meaning given in their society to the terms "family" and "home".³⁵⁴⁸

3973. In 1997, in its concluding observations on the report of Myanmar, the CRC stated that the State should reinforce its central tracing agency to favour family reunification.³⁵⁴⁹

3974. In several cases, the ECtHR addressed the issue of family unity and held that Article 8 of the 1950 ECHR included a right for parents to have measures taken with a view to them being reunited with their children and an obligation for national authorities to take such measures. According to the Court, preventing parents from living with their children amounted to interference with the right to respect for family life.³⁵⁵⁰

3975. In *Johnston and Others v. Ireland* in 1986 dealing with a couple prevented from marrying one another for reasons related to the domestic law on divorce of Ireland, the ECtHR stated that:

55. The principles which emerge from the Court's case-law on Article 8 (art. 8) [of the 1950 ECHR] include the following.

³⁵⁴⁸ HRC, General Comment No. 16 (Article 17 ICCPR), 8 April 1988, §§ 1 and 4–5.

³⁵⁴⁹ CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, § 40–41.

³⁵⁵⁰ ECtHR, *Eriksson case*, Judgement, 22 June 1989, p. 26, § 71; *Andersson v. Sweden*, Judgement, 25 February 1992, p. 30, § 91; *Rieme v. Sweden*, Judgement, 22 April 1992, §§ 55, 56 and 69; *Olsson v. Sweden*, Judgement, 27 November 1992, pp. 35–36, § 90; *Hokkanen v. Finland*, Judgement, 23 September 1994; *Gül v. Switzerland*, Judgement, 19 February 1996, p. 14.

- (a) By guaranteeing the right to respect for family life, Article 8 (art. 8) presupposes the existence of a family . . .
- (b) Article 8 (art. 8) applies to the "family life" of the "illegitimate" family as well as to that of the "legitimate" family . . .
- (c) Although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life. However, especially as far as those positive obligations are concerned, the notion of "respect" is not clear-cut: having regard to the diversity of the practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case. Accordingly, this is an area in which the Contracting Parties enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals . . .

56. In the present case, it is clear that the applicants, the first and second of whom have lived together for some fifteen years . . ., constitute a "family" for the purposes of Article 8 (art. 8). They are thus entitled to its protection, notwithstanding the fact that their relationship exists outside marriage . . .³⁵⁵¹

3976. In *B. v. UK* in 1987, the ECtHR stated that:

- 60. The mutual enjoyment by parent and child of each other's company constitutes a fundamental element of family life. Furthermore, the natural family relationship is not terminated by reason of the fact that the child is taken into public care. It follows – and this was not contested by the Government – that the Authority's decisions resulting from the procedures at issue amounted to interferences with the applicant's right to respect for her family life.
- 61. According to the Court's established case-law:
 - (a) an interference with the right to respect for family life entails a violation of Article 8 (art. 8) [of the 1950 ECHR] unless it was "in accordance with the law", had an aim or aims that is or are legitimate under Article 8 § 2 (art. 8-2) and was "necessary in a democratic society" for the aforesaid aim or aims . . .
 - (b) the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued . . .
 - (c) although the essential object of Article 8 (art. 8) is to protect the individual against arbitrary interference by the public authorities, there may in addition be positive obligations inherent in an effective "respect" for family life . . .
 - (d) in determining whether an interference is "necessary in a democratic society" or whether there has been breach of a positive obligation, the Court will take into account that a margin of appreciation is left to the Contracting States . . .³⁵⁵²

³⁵⁵¹ ECtHR, *Johnston and Others v. Ireland*, Judgement (Merits and just satisfaction), 18 December 1986, §§ 55–56.

³⁵⁵² ECtHR, *B. v. UK*, Judgement, 8 July 1987, §§ 60–61.

3977. In *Moustaquim v. Belgium* in 1991, the ECtHR stated that:

34. Mr Moustaquim submitted that his deportation by the Belgian authorities interfered with his family and private life. He relied on Article 8 (art. 8) of the Convention . . .
35. The Government expressed doubts as to whether the applicant and his parents had any real family life at the time he was deported, as family ties were, at the least, strained in view of the number of occasions on which the youth had run away and had been imprisoned. They did not, however, expressly dispute that Article 8 (art. 8) was applicable.
36. Mr Moustaquim lived in Belgium, where his parents and his seven brothers and sisters also resided. He had never broken off relations with them. The measure complained of resulted in his being separated from them for more than five years, although he tried to remain in touch by correspondence. There was accordingly interference by a public authority with the right to respect for family life guaranteed in paragraph 1 of Article 8 (art. 8-1).³⁵⁵³

3978. In *Vermeire v. Belgium* in 1991, the ECtHR stated that:

25. . . . There was nothing imprecise or incomplete about the rule which prohibited discrimination against Astrid Vermeire compared with her cousins Francine and Michel, on the grounds of the "illegitimate" nature of the kinship between her and the deceased [i.e. her grandparents] . . .

For these reasons, the Court . . .

2. Holds unanimously that the applicant's exclusion from the estate of Camiel Vermeire [i.e. her grandfather] violated Article 14 in conjunction with Article 8 (art. 14+8) of the [1950 ECHR].³⁵⁵⁴

V. Practice of the International Red Cross and Red Crescent Movement

3979. No practice was found.

VI. Other Practice

3980. The SPLM Human Rights Charter provides that "children have the right not to be separated from their families and to be reunited with them".³⁵⁵⁵

³⁵⁵³ ECtHR, *Moustaquim v. Belgium*, Judgement (Merits and just satisfaction), 18 February 1991, §§ 34–36.

³⁵⁵⁴ ECtHR, *Vermeire v. Belgium*, Judgement (Merits), 29 November 1991, § 25 and Disposition 2.

³⁵⁵⁵ SPLM, Human Rights Charter, May 1996, § 6.

COMBATANTS AND PRISONER-OF-WAR STATUS

A.	Conditions for Prisoner-of-War Status (practice relating to Rule 106)	§§ 1–141
	Distinction from the civilian population	§§ 1–48
	Levée en masse	§§ 49–80
	Resistance and liberation movements	§§ 81–141
B.	Spies (practice relating to Rule 107)	§§ 142–231
	Definition of spies	§§ 142–176
	Status of spies	§§ 177–231
C.	Mercenaries (practice relating to Rule 108)	§§ 232–324
	Definition of mercenaries	§§ 232–269
	Status of mercenaries	§§ 270–324

Note: For practice concerning the definition of combatants, see Chapter 1, section C. The treatment of captured combatants entitled to prisoner-of-war status is regulated by the Third Geneva Convention. Practice pertaining thereto is not examined in detail in this study because the Third Geneva Convention is considered to be part of customary international law and, in any event, binds almost all States as a matter of treaty law. Chapter 32 contains practice on fundamental guarantees for all combatants hors de combat, whether entitled to prisoner-of-war status or not. Chapter 37 contains practice on persons deprived of their liberty in connection with an armed conflict, whether they are prisoners of war or not.

A. Conditions for Prisoner-of-War Status

Distinction from the civilian population

Note: Chapter 1, sections C and D, provides numerous references to the requirements for militia and volunteer corps to be considered as combatants, including having a distinctive sign and carrying arms openly, as provided for in Article 1 of the 1907 HR and Article 4(A)(2) GC III. These are not, generally, repeated here.

I. Treaties and Other Instruments

Treaties

1. Article 44(3) AP I provides that “in order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack”. Article 44(7) AP I provides that “this Article is not intended to change the generally accepted practice of States with respect to the wearing of the uniform by combatants assigned to the regular, uniformed armed units of a Party to the conflict”. Article 44 AP I was adopted by 73 votes in favour, one against and 21 abstentions.¹

2. Article 45(3) AP I provides that “any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol”. Article 45 AP I was adopted by consensus.²

3. Upon accession to AP I, Argentina declared that Articles 44(2), 44(3) and 44(4) AP I could not be interpreted:

- a) as conferring on persons who violate the rules of international law applicable in armed conflicts any kind of immunity exempting them from the system of sanctions which apply to each case;
- b) as specifically favouring anyone who violates the rules the aim of which is the distinction between combatants and the civilian population;
- c) as weakening respect for the fundamental principle of the international law of war which requires that a distinction be made between combatants and the civilian population, with the prime purpose of protecting the latter.³

Other Instruments

4. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina states that “in order to promote the protection of the civilian population, combatants are obliged to distinguish themselves from the civilian population”.

II. National Practice

Military Manuals

5. Argentina’s Law of War Manual states that “in order to promote the protection of the civilian population from the effects of hostilities, combatants are

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 121.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 155.

³ Argentina, Interpretative declarations made upon accession to AP I and AP II, 26 November 1986, § 1.

obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack".⁴

6. Australia's Defence Force Manual provides that combatants must "have a fixed distinctive sign recognisable at a distance and carry arms openly... Combatants are normally expected to distinguish themselves from the civilian population by wearing a uniform."⁵

7. Belgium's Law of War Manual states that there is a "customary rule according to which all members of the regular armed forces wear a uniform".⁶

8. According to Benin's Military Manual, combatants "distinguish themselves by their uniform or by a fixed recognisable sign or at least by carrying arms openly".⁷

9. According to Cameroon's Instructors' Manual, combatants "wear a uniform, a distinctive sign and carry arms openly. They distinguish themselves from the civilian population."⁸

10. Canada's LOAC Manual states that "to ensure the protection of the civilian population, combatants are required to distinguish themselves from that population when engaging in attack or preparing to mount an attack".⁹

11. Colombia's Instructors' Manual states that:

Combatants must distinguish themselves from the civilian population when they participate in combat action or in an operation preparatory thereto. Members of regular Armed Forces normally wear their uniform. Members of other militias, such as rebels and guerrillas, use a distinctive sign and normally carry their arms openly.¹⁰

12. Croatia's LOAC Compendium states that combatants distinguish themselves from civilians by wearing a uniform, having a distinctive sign, being under a responsible command, being subject to the law of war and by "carrying arms openly at least: during every military engagement [and] as long as visible to the enemy while engaged in a military deployment".¹¹

13. Croatia's Commanders' Manual states that combatants, members of the armed forces, "distinguish themselves by their uniform or by a recognizable distinctive sign or at least by carrying their arms openly".¹²

14. The Military Manual of the Dominican Republic states that "uniformed, armed soldiers are easily recognisable. However, guerrillas often mix with the civilians, perform undercover operations, and dress in civilian clothes. Alertness and caution must guide you in deciding who is a combatant."¹³

⁴ Argentina, *Law of War Manual* (1989), § 1.08(3).

⁵ Australia, *Defence Force Manual* (1994), §§ 512-513.

⁶ Belgium, *Law of War Manual* (1983), p. 20.

⁷ Benin, *Military Manual* (1995), Fascicule I, p. 12.

⁸ Cameroon, *Instructors' Manual* (1992), p. 17, see also p. 77.

⁹ Canada, *LOAC Manual* (1999), p. 3-2, § 15.

¹⁰ Colombia, *Instructors' Manual* (1999), p. 16.

¹¹ Croatia, *LOAC Compendium* (1991), p. 6. ¹² Croatia, *Commanders' Manual* (1992), § 2.

¹³ Dominican Republic, *Military Manual* (1980), p. 3.

15. France's LOAC Summary Note, LOAC Teaching Note and LOAC Manual provide that combatants distinguish themselves by their uniform, a fixed and recognisable sign or, at least, by carrying arms openly.¹⁴

16. Germany's Military Manual provides that:

Combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. In accordance with the generally agreed practice of states, members of regular armed forces shall wear their uniform. Combatants who are not members of uniformed armed forces nevertheless wear a permanent distinctive sign visible from a distance and carry their arms openly.¹⁵

17. According to Hungary's Military Manual, combatants distinguish themselves from civilians by wearing a uniform, having a distinctive sign, being under a responsible command, being subject to the law of war and by "carrying arms openly at least: during every military engagement [and] as long as visible to the enemy while engaged in a military deployment".¹⁶

18. Israel's Manual on the Laws of War states that "it is prohibited to use civilians for the purpose of masking military movements or hiding among them. From this provision stems the soldiers' obligation to wear a uniform or identifying symbol to clearly distinguish them from civilians."¹⁷

19. Italy's IHL Manual states that "in order to obtain the best possible protection of the civilian population, lawful combatants are obliged to distinguish themselves from the civilian population when they participate in an attack or in a military operation preparatory to an attack".¹⁸

20. Italy's LOAC Elementary Rules Manual states that combatants, members of the armed forces, "distinguish themselves by their uniform or by a recognizable distinctive sign or at least by carrying their arms openly".¹⁹

21. Kenya's LOAC Manual states that:

While engaged in combat action or in a military operation preparatory to it, combatants must distinguish themselves from the civilian population. It is customary for members of organized armed forces to wear uniform. Members of any other militias, volunteer corps or organized resistance movements wear a fixed recognizable distinctive sign or at least [carry] their arms openly.²⁰

22. Madagascar's Military Manual states that combatants "distinguish themselves by their uniform or by a fixed recognisable sign or, at least, by carrying arms openly".²¹ The manual further specifies that:

¹⁴ France, *LOAC Summary Note* (1992), § 1.2; *LOAC Teaching Note* (2000), p. 2; *LOAC Manual* (2001), p. 39.

¹⁵ Germany, *Military Manual* (1992), § 308. ¹⁶ Hungary, *Military Manual* (1992), p. 17.

¹⁷ Israel, *Manual on the Laws of War* (1998), p. 38. ¹⁸ Italy, *IHL Manual* (1991), Vol. I, § 5.

¹⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 2.

²⁰ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8.

²¹ Madagascar, *Military Manual* (1994), Fiche No. 2-O, § 2.

Combatants must distinguish themselves from the civilian population while engaged in a combat action or in a preparatory military operation. Members of regular armed forces or persons who are assimilated thereto usually distinguish themselves by their uniform.²²

23. The Military Manual of the Netherlands states that:

[Combatants] have to distinguish themselves from the civilian population. This is a consequence of the principle that the parties to the conflict have to distinguish at all times between civilians and combatants. Combatants distinguish themselves in the first place by wearing a uniform. In addition, they have to carry their arms openly.²³

24. New Zealand's Military Manual provides that:

With a view to ensuring protection of the civilian population, combatants are required to distinguish themselves from that population when engaged in an attack or preparing to mount an attack. Under the HR this distinction depended upon a recognisable emblem and the carrying of arms openly. In the case of a State's regular forces, the uniform worn by the forces strengthens the distinction.²⁴

25. South Africa's LOAC Manual states that:

It is clearly important that combatants, while engaged in combat action or in a military operation preparatory thereto, must distinguish themselves from the civilian population. Members of regular and assimilated armed forces normally distinguish themselves by their uniform. Members of other armed forces wear a fixed, recognisable and distinctive sign and carry their arms openly.²⁵

26. Sweden's IHL Manual states that:

The basic rule for the conduct of combatants is that they are obliged to distinguish themselves from the civilian population when taking part in an attack or in a military operation in preparation for an attack. For combatants belonging to regular forces, this is no problem, since they are recognizable by their uniforms and normally also by the carrying of weapons.²⁶

27. Switzerland's Basic Military Manual states that "in order to increase the protection of the civilian population against the effects of hostilities, combatants must distinguish themselves from the civilian population by wearing a uniform, before and during an attack".²⁷ The manual specifies that "all members of the regular armed forces wear a uniform . . . The uniform allows for a distinction to be made between friendly and enemy armed forces, on the one hand, and between armed forces and civilians, on the other hand."²⁸

²² Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § A.

²³ Netherlands, *Military Manual* (1993), p. III-4; see also *Military Handbook* (1995), p. 7-39.

²⁴ New Zealand, *Military Manual* (1992), § 805(3).

²⁵ South Africa, *LOAC Manual* (1996), § 26.

²⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.4, p. 36.

²⁷ Switzerland, *Basic Military Manual* (1987), Article 26(1).

²⁸ Switzerland, *Basic Military Manual* (1987), Articles 57 and 58.

28. Togo's Military Manual states that "combatants must distinguish themselves from the civilian population by wearing their uniform – or a fixed distinctive sign – and by carrying their arms openly".²⁹

29. The UK LOAC Manual states that "all combatants are required to distinguish themselves from the civilian population, usually by wearing uniform".³⁰ The manual also states that "it is customary for members of organised armed forces to wear uniform".³¹

30. The US Air Force Pamphlet states that combatants are only entitled to POW status if, *inter alia*, they have a fixed distinctive sign and carry arms openly.³² It explains that the requirement of having a fixed distinctive sign "may be satisfied by wearing a uniform [and] insures that combatants are clearly distinguishable from civilians to enhance protection of civilians. Less than a complete uniform will suffice provided it serves to distinguish clearly combatants from civilians."³³ With respect to the requirement to carry arms openly, the Pamphlet considers that "irregular forces do not satisfy this requirement by carrying arms concealed about the person or if the individuals hide their weapons on the approach of the enemy".³⁴

31. The US Naval Handbook states that "combatants...carry their arms openly, and otherwise distinguish themselves clearly from the civilian population".³⁵

National Legislation

32. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Articles 44(3) and 45(3) AP I, is a punishable offence.³⁶

33. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the two additional protocols to [the Geneva] Conventions... is liable to imprisonment".³⁷

National Case-law

34. In its judgement in the *Kassem case* in 1969, an Israeli Military Court held that the defendants sufficiently fulfilled the requirement to distinguish themselves from the civilian population by wearing mottled caps and green

²⁹ Togo, *Military Manual* (1996), Fascicule I, p. 13.

³⁰ UK, *LOAC Manual* (1981), Section 3, p. 9, § 2.

³¹ UK, *LOAC Manual* (1981), Section 3, p. 8, § 1.

³² US, *Air Force Pamphlet* (1976), § 3-2(b)(3); see also *Field Manual* (1956), § 61(a)(2).

³³ US, *Air Force Pamphlet* (1976), § 3-2(b)(4)(b), see also § 7-2 and *Field Manual* (1956), § 64(b).

³⁴ US, *Air Force Pamphlet* (1976), § 3-2(b)(4)(c); see also *Field Manual* (1956), § 64(c).

³⁵ US, *Naval Handbook* (1995), § 5.3.

³⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁷ Norway, *Military Penal Code as amended* (1902), § 108(b).

clothes, which were not customary attire for the inhabitants of the area in which the accused were captured.³⁸

35. In the *Swarka case* before an Israeli Military Court in 1974, the defendants had infiltrated Israeli territory from Egypt and had launched rockets at a civilian settlement. Upon their capture, they argued that they were entitled to POW status according to Article 4(A)(1) GC III because they were regular soldiers in the Egyptian army operating under orders from their commander. The Prosecutor contended that they could not benefit from this status since they wore civilian clothes while carrying out their mission. The Court observed that, indeed, neither the Hague Regulations nor GC III provided that a member of the regular armed forces had to wear a uniform at the time of capture in order to be considered a POW. It considered, however, that it would be quite illogical to regard the duty to wear a uniform (in the sense of a distinctive sign) as imposed only on the quasi-military units referred to in Article 4(A)(2) GC III and not on soldiers of regular armed forces. The Court concluded that the defendants were to be prosecuted as saboteurs.³⁹

Other National Practice

36. On the basis of an interview with a retired army general, the Report on the Practice of Botswana states that “the position of Botswana is that combatants will usually have well identifiable uniforms”.⁴⁰

37. At the CDDH, the FRG stated that “the basic rule set forth in Article 42 [now Article 44], paragraph 3, first sentence, that combatants are obliged to distinguish themselves from the civilian population means that these combatants have to distinguish themselves in a clearly recognizable manner”.⁴¹

38. On the basis of interviews with senior army officers, the Report on the Practice of Indonesia states that:

There is no national regulation for the implementation of the distinction principle in non-international armed conflict. However, in certain insurgencies during the 1950's and the 1960's, Indonesian armed forces used uniforms as one of the criteria to distinguish between rebels and civilians . . . Though the uniforms used by some rebels did not resemble the military uniform, for example, the rebels used no insignia or other emblems, their differing colour was the main criterion by which the military was able to distinguish them from civilians.⁴²

39. At the CCDH, Italy stated that draft Article 42(3) AP I (now Article 44(3)) “embodied and reaffirmed without amendment or derogation a basic rule of existing international law, the need for combatants to distinguish themselves

³⁸ Israel, Military Court at Ramallah, *Kassem case*, Judgement, 13 April 1969.

³⁹ Israel, Military Court, *Swarka case*, Judgement, 1974.

⁴⁰ Report on the Practice of Botswana, 1998, Interview with a retired army general, Chapter 1.1.

⁴¹ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 136.

⁴² Report on the Practice of Indonesia, 1997, Interviews with senior army officers, Chapter 1.1, note 2.

from the civilian population". It added that "it was essential that the distinction principle should remain the basis of international humanitarian law, because on respect for that principle depended the protection of the civilian population".⁴³

40. At the CDDH, the Netherlands stated that it was convinced that "the fundamental rule of distinction between combatants and the civilian population had not been weakened by Article 42 [now Article 44]". It stressed, however, that "the article should not be construed as entitling combatants to waive that distinction".⁴⁴

41. At the CDDH, the US voted in favour of draft Article 42 AP I (now Article 44) and stated that:

The basic rule contained in the first sentence of paragraph 3 meant that throughout their military operations combatants must distinguish themselves in a clearly recognized manner. Representatives who had stated or implied that the only rule on the subject was that set forth in the second sentence of paragraph 3 were wrong.⁴⁵

42. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support . . . the principle that combatant personnel distinguish themselves from the civilian populations while engaged in military operations".⁴⁶

43. In 1987, the Legal Adviser of the US Department of State stated that:

A fundamental premise of the Geneva Conventions has been that to earn the right to protection as military fighters, soldiers must distinguish themselves from civilians by wearing uniforms and carrying their weapons openly . . . Fighters who attempt to take advantage of civilians by hiding among them in civilian dress, with their weapons out of view, lose their claim to be treated as soldiers. The law thus attempts to encourage fighters to avoid placing civilians in unconscionable jeopardy.⁴⁷

III. Practice of International Organisations and Conferences

44. No practice was found.

⁴³ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, pp. 122–123, §§ 21 and 24.

⁴⁴ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 142, § 5.

⁴⁵ US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 150, § 44.

⁴⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

⁴⁷ US, Remarks of Judge Abraham D. Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 466.

IV. Practice of International Judicial and Quasi-judicial Bodies

45. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

46. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

While engaged in combat action or in a military operation preparatory to it, combatants must distinguish themselves from the civilian population.

Members of regular and assimilated armed forces normally distinguish themselves by their uniform.

Members of other armed forces wear a fixed recognizable distinctive sign and carry their arms openly.⁴⁸

47. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC reminded all those involved that in order “to avoid endangering the civilian population, those bearing weapons and all those who take part in violence must distinguish themselves from civilians”.⁴⁹

VI. Other Practice

48. No practice was found.

Levée en masse

I. Treaties and Other Instruments

Treaties

49. Article 2 of the 1899 HR provides that:

The population of a territory which has not been occupied who, on the enemy’s approach, spontaneously take up arms to resist the invading troops without having time to organize themselves in accordance with Article 1, shall be regarded as belligerents, if they respect the laws and customs of war.

50. Article 2 of the 1907 HR provides that:

The inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1, shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

⁴⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 48.

⁴⁹ ICRC, Communication to the Press No. 00/42, ICRC Appeal to All Involved in Violence in the Near East, 21 November 2000.

51. Article 4(A)(6) GC III grants POW status to persons taking part in a *levée en masse* “provided they carry arms openly and respect the laws and customs of war”.

Other Instruments

52. The 1863 Lieber Code states that:

51. If the people of that portion of an invaded country which is not yet occupied by the enemy, or of the whole country, at the approach of a hostile army, rise, under a duly authorized levy “en masse” to resist the invader, they are now treated as public enemies, and, if captured, are prisoners of war.

52. No belligerent has the right to declare that he will treat every captured man in arms of a levy “en masse” as a brigand or bandit.

If, however, the people of a country, or any portion of the same, already occupied by an army, rise against it, they are violators of the laws of war, and are not entitled to their protection.

53. Article 10 of the 1874 Brussels Declaration states that:

The population of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves . . . shall be regarded as belligerents if they respect the laws and customs of war.

54. According to Article 2 of the 1880 Oxford Manual “the armed force of a State includes . . . the inhabitants of non-occupied territory, who, on the approach of the enemy, take up arms spontaneously and openly to resist the invading troops, even if they have not had time to organize themselves”.

II. National Practice

Military Manuals

55. Argentina’s Law of War Manual provides that participants in a *levée en masse* enjoy POW status upon capture provided they carry arms openly and respect the laws and customs of war.⁵⁰

56. Australia’s Defence Force Manual provides that:

Where the inhabitants of a country or territory spontaneously “take up arms” to resist an invader, LOAC recognises them as combatants provided they do so when there has not been time to form themselves into units and they respect LOAC. Individuals acting on their own are not entitled to combatant status nor the benefits or detriment flowing from that status.⁵¹

57. Belgium’s Law of War Manual states that:

⁵⁰ Argentina, *Law of War Manual* (1969), § 2.002(6).

⁵¹ Australia, *Defence Force Manual* (1994), § 514, see also Glossary, p. xxiv and *Commanders’ Guide* (1994), § 612.

The population of a non-occupied territory who spontaneously take up arms to resist the invading forces without having had time to form themselves into an organised resistance movement or to join the regular armed forces are considered combatants on the condition that this population:

- a. respects the laws and customs of war;
- b. carries arms openly.⁵²

58. Cameroon's *Instructors' Manual* states that participants in a *levée en masse* are recognised as combatants.⁵³

59. Canada's LOAC Manual provides that:

As a general rule, civilians are considered non-combatants and cannot lawfully engage in hostilities. There is, however, an exception to this rule for inhabitants of a territory that has not been occupied by an enemy. Where they have not had time to form themselves into regular armed units, inhabitants of a non-occupied territory are lawful combatants if:

- a. on the approach of the enemy they spontaneously take up arms to resist the invading forces;
- b. they carry arms openly; and
- c. they respect the LOAC.

This situation is referred to as a *levée en masse*.⁵⁴

60. Germany's *Military Manual* provides that members of a *levée en masse* "shall be combatants. They shall carry arms openly and respect the laws and customs of war in their military operations."⁵⁵

61. Italy's IHL Manual states that participants in a *levée en masse* are considered combatants provided they "carry arms openly and respect the laws and customs of war".⁵⁶

62. According to Kenya's LOAC Manual, "participants in a *levée en masse*... are considered as combatants if: (a) they carry their arms openly [and] (b) they comply with the law of armed conflict".⁵⁷

63. According to Madagascar's *Military Manual*, "participants in a *levée en masse* are considered as combatants if they carry arms openly and respect the law of war".⁵⁸

64. The *Military Manual* of the Netherlands states that participants in a *levée en masse* are considered as combatants if "they carry arms openly and comply with the humanitarian law of war".⁵⁹

⁵² Belgium, *Law of War Manual* (1983), p. 20.

⁵³ Cameroon, *Instructors' Manual* (1992), p. 35, see also pp. 20 and 143.

⁵⁴ Canada, *LOAC Manual* (1999), p. 3-2, § 13.

⁵⁵ Germany, *Military Manual* (1992), § 310. ⁵⁶ Italy, *IHL Manual* (1991), Vol. I, § 4(c).

⁵⁷ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8.

⁵⁸ Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § A.

⁵⁹ Netherlands, *Military Manual* (1993), pp. III-1 and III-2.

65. New Zealand's Military Manual states that:

Civilians who take up arms on the approach of an enemy to resist the invasion of their State constitute a *levée en masse* and are regarded as combatants so long as they carry their arms openly and respect the laws and customs of war... They are not entitled to such treatment if they take up arms after their territory has been occupied, unless they are so organised as to constitute a resistance movement.⁶⁰

66. According to Nigeria's Manual on the Laws of War, "inhabitants of a territory not under occupation, who on the approach of the enemy take up arms to resist the invading forces without having had time to form themselves into regular armed units," have the right to POW status, "provided they carry arms openly and respect the Laws of War".⁶¹

67. Russia's Military Manual provides that participants in a *levée en masse* enjoy POW status upon capture provided they carry arms openly and respect IHL.⁶²

68. South Africa's LOAC Manual states that participants in a *levée en masse* are considered combatants "if they carry arms openly and respect the law of war".⁶³

69. Spain's LOAC Manual considers the population of a territory that spontaneously takes up arms against an invading army to be combatants, provided they are part of an organised force, commanded by a person responsible for the conduct of his or her subordinates, subject to an internal disciplinary system, and comply with the law of war.⁶⁴

70. Switzerland's Basic Military Manual states that "the civilian population does not have the right to take up arms except in the case of a *levée en masse* to resist an invader".⁶⁵ The manual further specifies that:

The civilian population of a non-occupied territory which, *en masse*, takes up arms spontaneously at the approach of the enemy is entitled to commit acts of war, even if this population did not have time to organise itself, provided arms are carried openly and the laws and customs of war are respected.⁶⁶

71. The UK Military Manual considers that participants in a *levée en masse*

are recognised as being entitled to the privileges of belligerent forces if they fulfil the last two conditions laid down for irregulars, namely, if they carry arms openly and conduct their operations in accordance with the laws and customs of war. They are exempt from the obligations of being under the command of a responsible commander and wearing a distinctive sign. The inhabitants of a territory already invaded by the enemy who rise in arms do not enjoy the privileges of belligerent

⁶⁰ New Zealand, *Military Manual* (1992), §§ 803(2) and 806(4).

⁶¹ Nigeria, *Manual on the Laws of War* (undated), § 33(f).

⁶² Russia, *Military Manual* (1990), § 13.

⁶³ South Africa, *LOAC Manual* (1996), § 24(b).

⁶⁴ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(1).

⁶⁵ Switzerland, *Basic Military Manual* (1987), Article 26(3).

⁶⁶ Switzerland, *Basic Military Manual* (1987), Article 65.

forces and are not entitled to be treated as prisoners of war, unless they are members of organised resistance movements fulfilling the conditions set out in the P.O.W. Convention, Art. 4A(2).⁶⁷

72. The US Air Force Pamphlet provides that:

A levée en masse need not be organized, under command, or wear a distinctive sign. However, members must carry arms openly and comply with the law of armed conflict. To be a lawful *levée en masse*, it must be a spontaneous response by inhabitants of a territory not under occupation to an invading force. Spontaneity requires that there be no time to organize into regular armed forces.⁶⁸

73. The YPA Military Manual of the SFRY (FRY) states that participants in a *levée en masse* are considered members of the armed forces if they carry arms openly and respect the law of war.⁶⁹

National Legislation

74. No practice was found.

National Case-law

75. No practice was found.

Other National Practice

76. In 1991, a Belgian parliamentary report considered that in the case of a *levée en masse*, actions in defence of the territory are permitted and justified by law even if they are not ordered by a proper authority.⁷⁰

III. Practice of International Organisations and Conferences

77. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

78. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

79. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

⁶⁷ UK, *Military Manual* (1958), § 97; see also *LOAC Manual* (1981), Section 3, pp. 8–9, § 1(c).

⁶⁸ US, *Air Force Pamphlet* (1976), § 3-2(b)(5); see also *Field Manual* (1956), § 65.

⁶⁹ SFRY (FRY), *YPA Military Manual* (1988), § 48(3).

⁷⁰ Belgium, Senate, Report, Enquête parlementaire sur l'existence en Belgique d'un réseau de renseignements clandestin international, 1990–1991 Session, Doc. 1117-4, 1 October 1991, § 24.

Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously and in mass take up arms to resist the invading forces, without having had time to form themselves into organized armed units, provided they carry arms openly and respect the law of war, are considered as combatants.⁷¹

VI. Other Practice

80. No practice was found.

Resistance and liberation movements

Note: *Chapter 1, sections C and D, provides numerous references to the requirements for resistance movements to be considered as combatants, notably by having a distinctive sign and carrying arms openly, as provided for in Article 4(A)(2) GC III. These are not, generally, repeated here.*

I. Treaties and Other Instruments

Treaties

81. Article 44(3) AP I provides that:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 c).

Article 44 AP I was adopted by 73 votes in favour, one against and 21 abstentions.⁷²

82. Article 45(3) AP I provides that “any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol”. Article 45 AP I was adopted by consensus.⁷³

⁷¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 50.

⁷² CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 121.

⁷³ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 155.

83. Upon signature and/or ratification of AP I, Australia, Belgium, Canada, France, Germany, Ireland, South Korea and UK stated that the situation described in the second sentence of Article 44(3) AP I could exist only in occupied territories or in armed conflicts covered by Article 4(1) AP I (wars of national liberation).⁷⁴

84. Upon ratification of AP I, Italy and Spain stated that the situation described in the second sentence of Article 44(3) AP I could exist only in occupied territories.⁷⁵

85. Upon ratification of AP I, Australia stated that, in the context of Article 44(3) AP I, the term “deployment” meant “any movement towards a place from which an attack is to be launched”.⁷⁶ Similar statements were made by Belgium, Canada, France, Germany, Ireland, Italy, South Korea, Netherlands, New Zealand, Spain, UK and US upon signature and/or ratification of AP I.⁷⁷

86. Upon ratification of AP I, Australia stated that it would interpret the words “visible to the adversary” used in Article 44(3) AP I as “including visible with the aid of binoculars, or by infra-red or image intensification devices”.⁷⁸

87. Upon ratification of AP I, New Zealand stated that it would interpret the words “visible to the adversary” used in Article 44(3) AP I as including “visible with the aid of any form of surveillance, electronic or otherwise, available to help keep a member of the armed forces of the adversary under observation”.⁷⁹

Other Instruments

88. No practice was found.

⁷⁴ Australia, Declarations made upon ratification of AP I, 21 June 1991, § 2; Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 4; Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 6(a); France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 8; Germany, Declarations made upon ratification of AP I, 14 February 1991, § 3; Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 7(a); South Korea, Declarations made upon ratification of AP I, 15 January 1982, § 1; UK, Declarations made upon signature of AP I, 12 December 1977, § c; UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § g.

⁷⁵ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 3; Spain, Interpretative declarations made upon ratification of AP I, 21 April 1989, § 4.

⁷⁶ Australia, Declarations made upon ratification of AP I, 21 June 1991, § 2.

⁷⁷ Belgium, Interpretative declarations made upon ratification of AP I, 20 May 1986, § 4; Canada, Reservations and statements of understanding made upon ratification of AP I, 20 November 1990, § 6(b); France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 8; Germany, Declarations made upon ratification of AP I, 14 February 1991, § 3; Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 7(b); Italy, Declarations made upon ratification of AP I, 27 February 1986, § 4; South Korea, Declarations made upon ratification of AP I, 15 January 1982, § 1; Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 3; New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 1; Spain, Interpretative declarations made upon ratification of AP I, 11 April 1989, § 4; UK, Declarations made upon signature of AP I, 12 December 1977, § c; UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § g; US, Declarations made upon signature of AP I, 12 December 1977, § 2.

⁷⁸ Australia, Declarations made upon ratification of AP I, 21 June 1991, § 2.

⁷⁹ New Zealand, Declarations made upon ratification of AP I, 8 February 1988, § 1.

II. National Practice

Military Manuals

89. Military manuals of Argentina, Australia, Belgium, Canada, Germany, Italy, Kenya, Madagascar, Netherlands, New Zealand, South Africa, Sweden and UK restate the rule contained in the second sentence of Article 44(3) AP I.⁸⁰

90. According to Benin's Military Manual, combatants "distinguish themselves . . . at least by carrying arms openly".⁸¹

91. Croatia's LOAC Compendium states that combatants must carry their arms openly "at least during every military engagement [and] as long as they are visible to the enemy while engaged in a military deployment".⁸²

92. Ecuador's Naval Manual provides that *guerrilleros* and members of resistance movements are considered combatants if they meet certain requirements, including "wearing a uniform or some form of identification recognizable from a distance [and] carrying arms openly".⁸³

93. France's LOAC Manual states that:

Members of guerrilla movements or armed groups can have combatant status . . . provided they carry arms openly during each engagement and they are subject to a hierarchical command structure and an internal disciplinary system which ensures, in particular, respect for the law of armed conflict.⁸⁴

94. According to Hungary's Military Manual, combatants must carry their arms openly "at least during every military engagement [and] as long as they are visible to the enemy while engaged in a military deployment".⁸⁵ The manual further states that "inhabitants of occupied territory may organize resistance movements. Members are combatants if they meet the requirements of armed forces."⁸⁶

95. Israel's Manual on the Laws of War states that:

Undoubtedly, the conditions mentioned [in Article 4(A)(2) GC III] make it very difficult for non-regular forces for which, in many cases, the fulfilment of the cumulative conditions of openly bearing arms and wearing a recognizable distinctive sign may be suicidal. Still, these are the necessary conditions called for in conducting a regular war between combatant forces, without dragging the population into the conflict.

In an effort to extend the protection accorded to include non-regular combatants, the Additional Protocols from 1977 drastically scaled back the conditions for

⁸⁰ Argentina, *Law of War Manual* (1989), § 1.08(3); Australia, *Defence Force Manual* (1994), § 513; Belgium, *Law of War Manual* (1983), pp. 20–21; Canada, *LOAC Manual* (1999), p. 3-2, § 16; Germany, *Military Manual* (1992), § 309; Italy, *IHL Manual* (1991), Vol. I, § 5; Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8; Madagascar, *Military Manual* (1994), Fiche No. 2-SO, § A; Netherlands, *Military Manual* (1993), p. III-4; Netherlands, *Military Handbook* (1995), p. 7-39; New Zealand, *Military Manual* (1992), § 805(3) and (4); South Africa, *LOAC Manual* (1996), § 27; Sweden, *IHL Manual* (1991), Section 3.2.1.4; UK, *LOAC Manual* (1981), Section 3, p. 9, § 2.

⁸¹ Benin, *Military Manual* (1995), Fascicule I, p. 12.

⁸² Croatia, *LOAC Compendium* (1991), p. 6.

⁸³ Ecuador, *Naval Manual* (1989), § 11.8.

⁸⁴ France, *LOAC Manual* (2001), p. 39.

⁸⁵ Hungary, *Military Manual* (1992), p. 17.

⁸⁶ Hungary, *Military Manual* (1992), p. 103.

defining a legal combatant. These protocols established that it is sufficient for an underground fighter to bear his arms openly during a military operation and for the duration that he is visible to the enemy, omitting all the other conditions. More seriously, the Protocols state that even non-compliance with the laws of war does not in itself deprive the non-regular combatant of his right to prisoner-of-war status. . . . Clearly, such provisions deplete the provisions of the Geneva Convention of all substance, since we are losing sight of the primary goals for which such requirements were intended, namely the mutual observance of the laws of war and the distinction between combatants and the civilian population as well as the concealment of combatants among the civilian population.

We find then that, in effect, the Additional Protocols grant prisoner-of-war protection to any terrorist group that is organized and under the direct command of a commander in charge of his subordinates. Obviously, countries that find themselves embroiled in a struggle with terrorist groups have not adopted these provisions, which is one reason why many countries (including Israel and the U.S.) have not ratified the Additional Protocols. Claims made by terrorists before the IDF's military courts that they are entitled to prisoner-of-war status have been rejected.⁸⁷

96. Russia's Military Manual provides that members of organised resistance movements enjoy POW status upon capture provided they fulfil the conditions set out in Article 4(A)(2) GC III.⁸⁸

97. Spain's LOAC Manual states that *guerrilleros* are considered lawful combatants if "they operate in occupied territory, carry arms openly during each engagement and during any movement towards the place from which or towards which an attack is to be launched".⁸⁹

98. Switzerland's Basic Military Manual provides that:

Exceptionally, for example, in the case of guerrilla warfare, combatants are not obliged to wear a uniform or a distinctive sign. They are considered as members of the armed forces who have the right to prisoner-of-war status, provided they fight for a State or a liberation movement, within an organisation which has a responsible command and a disciplinary system, and provided they carry their arms openly before and during an attack.⁹⁰

99. The US Air Force Pamphlet provides that irregular forces, such as members of organised resistance movements belonging to a party to the conflict, are considered combatants if they meet certain requirements "customarily required of all combatants", including having a fixed distinctive sign recognisable at a distance and carrying arms openly.⁹¹

100. The YPA Military Manual of the SFRY (FRY) states that:

Civilians who during an armed attack or a military operation preparatory to an attack do not wear any distinctive sign, that is do not distinguish themselves from the

⁸⁷ Israel, *Manual on the Laws of War* (1998), pp. 50–51.

⁸⁸ Russia, *Military Manual* (1990), § 13. ⁸⁹ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.a.(1).

⁹⁰ Switzerland, *Basic Military Manual* (1987), Article 26(2), see also Article 64.

⁹¹ US, *Air Force Pamphlet* (1976), § 3-2(b)(3); see also *Field Manual* (1956), § 61(a)(2) and *Naval Handbook* (1995), § 11.7.

civilian population, are considered combatants and members of the armed forces, provided they carry arms openly during each military engagement as well as during such time as they are visible to the adversary preceding an attack in which they are to participate and provided they comply with the laws of war.⁹²

101. Several manuals also contain interpretations of the terms used in the second sentence of Article 44(3) AP I, including those of Belgium, Germany, Italy, Kenya, Netherlands, New Zealand, South Africa, Sweden and UK.

102. Belgium's Law of War Manual states that:

It would be preferable that Belgium only supports this rule on condition that it does not apply to operations on non-occupied Belgian territory. The term "military deployment" should, on the other hand, be interpreted very widely in the sense that it covers every movement towards the place from which an attack is to be launched. To be "visible" includes being able to "be observed" even at night by means of infrared rays and the notion "adversary" should be clarified.⁹³

103. Germany's Military Manual limits the application of the rule contained in the second sentence of Article 44(3) AP I to a "situation in occupied territories and in wars of national liberation" and states that "the term 'military deployment' refers to any movement towards the point from which an attack shall be launched".⁹⁴

104. Italy's IHL Manual states that the situation envisaged in the second sentence of Article 44(3) AP I does not apply to Italian territory but only to occupied territory and that the term deployment means any movement towards a place from which an attack is to be launched.⁹⁵

105. According to Kenya's LOAC Manual, the term deployment refers to "any movement towards a place from which or where a combat action is to take place".⁹⁶

106. The Military Manual of the Netherlands considers that the rule contained in the second sentence of Article 44(3) AP I applies in wars of national liberation and in occupied territories, i.e. "conflicts which are fought with guerrilla-like tactics in which it is not feasible for combatants to distinguish themselves at all times from the civilian population and to constantly carry arms openly". The manual adds that "the Netherlands, together with a number of other NATO countries, has taken the position that the term 'deployment' means any movement towards a place from which an attack is to be launched".⁹⁷

107. New Zealand's Military Manual specifies that the situations to which the rule contained in the second sentence of Article 44(3) AP I applies are "special and exceptional. Many States, including New Zealand in its ratification,

⁹² SFRY (FRY), *YPA Military Manual* (1988), § 48(4).

⁹³ Belgium, *Law of War Manual* (1983), p. 21.

⁹⁴ Germany, *Military Manual* (1992), § 309.

⁹⁵ Italy, *IHL Manual* (1991), Vol. I, § 5.

⁹⁶ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8.

⁹⁷ Netherlands, *Military Manual* (1993), p. III-4.

have declared that these situations can occur only...during a war of self-determination conducted by a national liberation movement or in occupied territory".⁹⁸ With respect to the expression "visible to the adversary", the manual observes that:

The text does not indicate whether they must be visible to the naked eye or whether it is sufficient for them to be seen with the aid of instruments. New Zealand's declaration on ratification provided for the term to include "the assistance of any form of surveillance, electronic or otherwise, available to help keep a member of the armed forces of the adversary under observation." While this view was shared by a number of Western States at the time of negotiation of AP I, few States have made it the subject of an understanding: Australia, indeed, takes the view that visibility without electronic aids is a more appropriate interpretation.⁹⁹

With respect to the term "deployment", the manual states that "many States, including New Zealand on ratification [of AP I], have declared that this means any movement towards a place from which an attack is to be launched".¹⁰⁰

108. South Africa's LOAC Manual states that the term "deployment" refers to "any movement towards a place from which, or where, a combat action is to take place".¹⁰¹

109. Sweden's IHL Manual provides that "the rule in Article 44:3 may only be applied by resistance units in enemy occupied or held territory or – in the case of a national liberation movement – within an area controlled by the adversary". The manual considers that part of the text contained in the second sentence of Article 44(3) AP I, namely the description "during the time the combatant is visible to the adversary when participating in military preparation for the launching of an attack in which he is to take part", is "very unclear, giving rise to varying interpretations".¹⁰²

110. The UK LOAC Manual states that the "unusual combat conditions" to which the rule in the second sentence of Article 44(3) AP I applies "can only occur in occupied territory and during wars of national liberation... 'Deployment' in this context means any movement towards the place from which the attack is to be launched."¹⁰³

National Legislation

111. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Articles 44(3) and 45(3) AP I, is a punishable offence.¹⁰⁴

⁹⁸ New Zealand, *Military Manual* (1992), § 805(3), footnote 17.

⁹⁹ New Zealand, *Military Manual* (1992), § 805(4), footnote 23.

¹⁰⁰ New Zealand, *Military Manual* (1992), § 805(4), footnote 24.

¹⁰¹ South Africa, *LOAC Manual* (1996), § 27.

¹⁰² Sweden, *IHL Manual* (1991), Section 3.2.1.4, p. 37.

¹⁰³ UK, *LOAC Manual* (1981), Section 3, p. 9, §§ 3 and 5.

¹⁰⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

112. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁰⁵

National Case-law

113. In its judgement in the *Kassem case* in 1969, an Israeli Military Court held that in order to benefit from POW status, a person must carry arms openly. The Court specified that the phrase "carrying arms openly" was not to be construed as carrying arms in places where the arms and the persons bearing them cannot be seen, nor does it refer to bearing arms during a hostile engagement. According to the Court, the fact that the defendants used their weapons during their encounter with the IDF is unimportant since no weapons were known to be in their possession until they started firing at Israeli soldiers. It was thus ruled that they did not carry arms openly.¹⁰⁶

Other National Practice

114. At the CDDH, Argentina abstained in the vote on draft Article 42 API (now Article 44) because "the text adopted did not guarantee the civilian population the minimum protection it needed".¹⁰⁷

115. At the CDDH, Brazil voted against draft Article 42 AP I (now Article 44) in Committee III because "the provisions relating to identification of combatants were not sufficiently clear to ensure that the civilian population would be protected from the inevitable risks when it was not possible to identify unmistakably those engaged in military activities".¹⁰⁸ In the final vote in plenary session, Brazil abstained but gave no additional explanation.

116. At the CDDH, Canada abstained in the vote on draft Article 42 AP I (now Article 44) because it "was concerned about the perhaps necessary vagueness of the language adopted in some paragraphs, but hoped that time would make the meaning more precise".¹⁰⁹ Canada further explained its understanding that the situations referred to in the second sentence of the third paragraph "could exist only in occupied territory; or in armed conflicts as described in Article 1, paragraph 4, of Protocol I" and that the term "military deployment" meant "any movement towards a place from which an attack was to be launched".¹¹⁰

¹⁰⁵ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹⁰⁶ Israel, Military Court at Ramallah, *Kassem case*, Judgement, 13 April 1969.

¹⁰⁷ Argentina, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 124, § 33.

¹⁰⁸ Brazil, Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.56, 22 April 1977, p. 185, § 80.

¹⁰⁹ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 145, § 23.

¹¹⁰ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 146, § 24.

117. At the CDDH, Colombia abstained in the vote on draft Article 42 AP I (now Article 44) because it lacked precision and did not safeguard the civilian population sufficiently.¹¹¹

118. At the CDDH, Egypt stated that “the right to disguise was confined to the combatants of liberation movements; regular combatants were not released . . . from the obligation to wear uniform during military operations – failure to do so would be to commit an act of perfidy”. It further explained that it interpreted the expression “military deployment” as meaning “the last step when the combatants were taking their firing positions just before the commencement of hostilities; a guerrilla should carry his arms openly only when within range of the natural vision of his adversary”.¹¹²

119. At the CDDH, the FRG stated that the second sentence of draft Article 42(3) AP I (now Article 44(3)) “applies only to exceptional situations such as those occurring in occupied territories” and that the term “military deployment” means “any movement toward a place from which an attack is to be launched”.¹¹³

120. In reply to a written question in parliament in 1977, a German Minister of State emphasised that the German delegation present during the negotiation of the Additional Protocols favoured the inclusion of a rule imposing a duty on guerrillas to carry arms openly in combat, as well as during the phase preceding an attack. According to Germany, a clear distinction between civilians and combatants was absolutely necessary, even in the context of guerrilla warfare.¹¹⁴

121. At the CDDH, Greece stated that the situations described in the second sentence of draft Article 42(3) AP I (now Article 44(3)) “which were quite exceptional, could exist not only in occupied territories but also in armed conflicts as described in paragraph 4 of Article 1 of draft Protocol I”.¹¹⁵

122. At the CDDH, Iran indicated that draft Article 42(3) AP I (now Article 44(3)) “applied only to members of resistance movements fighting in occupied territory against an Occupying Power and to members of national liberation movements fighting against minority racist régimes”.¹¹⁶

123. At the CDDH, Ireland abstained in the vote on draft Article 42 AP I (now Article 44) because it considered that “the protection of the civilian population

¹¹¹ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 181.

¹¹² Egypt, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 145, §§ 19 and 21.

¹¹³ FRG, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 136.

¹¹⁴ Germany, Lower House of Parliament, Answer by Dr. Hamm-Brücher, Minister of State, to a written question, 13 May 1977, *Plenarprotokoll* 8/27, 13 May 1977, p. 1985.

¹¹⁵ Greece, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 127, § 47.

¹¹⁶ Iran, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 152, § 55.

demanding by humanitarian principles is eroded by Article 42 to an unacceptable extent".¹¹⁷

124. At the CDDH, Israel voted against draft Article 42 AP I (now Article 44) because it was of the opinion that:

Article 42, paragraph 3, could be interpreted as allowing the combatant not to distinguish himself from the civilian population, which would expose the latter to serious risks and was contrary to the spirit and to a fundamental principle of humanitarian law. In the case of guerrilla warfare it was particularly necessary for combatants to distinguish themselves because that was the only way in which the civilian population could be effectively protected. . . . Moreover, once combatants were freed from the obligation to distinguish themselves from the civilian population the risk of terrorist acts increased. . . . Prisoner-of-war status depended on two essential conditions: first, respect for the rules of international law applicable in armed conflicts (for the members of regular forces there was a *praesumptio juris et de jure* that that condition had been met); secondly, a clear and unmistakable distinction between the combatants and the civilian population. They were two *sine qua non* conditions established in international custom and in numerous treaties.¹¹⁸

125. The Report on the Practice of Israel states that Israel does not consider that Article 44(3) AP I reflects customary international law.¹¹⁹

126. At the CDDH, Italy abstained in the vote on draft Article 42 AP I (now Article 44) "essentially because of the ambiguity of paragraphs 3 and 4 of Article 42, but considered that the article was not unacceptable in itself if its true meaning. . . . could be detected".¹²⁰ Italy further stated that the particular situations to which the second sentence of the third paragraph referred "were evidently those which occurred in occupied territory or in other identical situations so far as substance was concerned, that was to say where resistance movements were organized".¹²¹

127. At the CDDH, Japan abstained in the vote on draft Article 42 AP I (now Article 44) because it considered that "the provisions of paragraph 3 on the ways in which members of irregular forces were required to distinguish themselves from civilians would lead to inadequate protection of the civilian population".¹²² It further stated that paragraph 3 should be construed "as applying restrictively to exceptional cases" and that the term "military deployment" used in paragraph 3(b) meant "any movement towards a place from which an attack was to be launched".¹²³

¹¹⁷ Ireland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 137.

¹¹⁸ Israel, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, pp. 121–122, §§ 17 and 19.

¹¹⁹ Report on the Practice of Israel, 1997, Answers to additional questions on Chapter 1.1.

¹²⁰ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 122, § 20.

¹²¹ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 123, § 22.

¹²² Japan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 152, § 51.

¹²³ Japan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 152, § 53.

128. At the CDDH, the Netherlands stated that it understood the phrase “military deployment” in paragraph 3(b) of draft Article 42 AP I (now Article 44) to mean “any tactical movement towards a place from which the attack is to be launched”.¹²⁴

129. At the CDDH, Portugal abstained in the vote on draft Article 42 AP I (now Article 44) and considered that “the exceptional rule in the second sentence of the [third] paragraph did not ensure reasonable protection for the civilian population”.¹²⁵

130. At the CDDH, Spain abstained in the vote on draft Article 42 AP I (now Article 44) because:

The text presented does not guarantee the safety of the civilian population, which is the essential aim of the instruments under consideration. In the view of this delegation, the terms in which the article is drafted could favour the development of the new phenomenon known as urban guerrilla warfare and, therefore, a certain form of terrorism, thus constituting a grave danger to the security of States and a step on the road to international subversion.¹²⁶

131. At the CDDH, Switzerland abstained in the vote on draft Article 42 AP I (now Article 44) because it was afraid that “the article would only have the effect of doing away with the distinctions between combatants and civilians. The consequence would be that the adverse party could take draconian measures against civilians suspected of being combatants.”¹²⁷

132. At the CDDH, the UAE stated that it agreed with the interpretation given by Egypt of the expression “military deployment”.¹²⁸

133. At the CDDH, the UK abstained in the vote on draft Article 42 AP I (now Article 44) and stated that “any failure to distinguish between combatants and civilians could only put the latter at risk. That risk might well become unacceptable unless a satisfactory interpretation could be given to certain provisions of Article 42.”¹²⁹ The UK further stated that it considered that “the situations in which a guerrilla fighter was unable to distinguish himself from the civilian population could exist only in occupied territory” and that the word “deployment” must be interpreted as meaning “any movement towards a place from which an attack was to be launched”.¹³⁰

134. At the CDDH, Uruguay abstained in the vote on draft Article 42 AP I (now Article 44) and referred to the statements made by Argentina and Switzerland

¹²⁴ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 142, § 6.

¹²⁵ Portugal, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 148, § 36.

¹²⁶ Spain, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.55, 26 May 1977, p. 138.

¹²⁷ Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 131, § 68.

¹²⁸ UAE, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 146, § 25.

¹²⁹ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 132, § 73.

¹³⁰ UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, p. 132, § 74.

and to its own statement in Committee III in which it had expressed its concern about “the foreseeable consequences of the lack of a clear distinction between the combatants and the civilian population, which would expose the civilian population to a quite unnecessary risk”.¹³¹

135. At the CDDH, the US explained its vote in favour of draft Article 42 AP I (now Article 44) as follows:

The article conferred no protection on terrorists. It did not authorize soldiers to conduct military operations while disguised as civilians. However, it did give members of the armed forces who were operating in occupied territory an incentive to distinguish themselves from the civilian population when preparing for and carrying out an attack . . . As regards the second sentence of paragraph 3, it was the understanding of [the US] delegation that situations in which combatants could not distinguish themselves throughout their military operations could exist only in the exceptional circumstances of territory occupied by the adversary or in those armed conflicts described in Article 1, paragraph 4, of draft Protocol I . . . The sentence was clearly designed to ensure that combatants, while engaged in military operations preparatory to an attack, could not use their failure to distinguish themselves from civilians as an element of surprise in the attack. Combatants using their appearance as civilians in such circumstances in order to aid in the attack would forfeit their status as combatants . . . Combatants must distinguish themselves from civilians during the phase of the military operation which involved moving to the position from which the attack was to be launched.¹³²

136. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “the executive branch regards [the provision of Article 44(3) AP I, second sentence] as highly undesirable and potentially dangerous to the civilian population and of course does not recognize it as customary law or deserving of such status”.¹³³

137. In a memorandum issued in 1988, the Office of the Legal Adviser of the US Department of State stated that:

Article 44 grants combatant status to irregular forces in certain circumstances even if they do not satisfy the traditional requirements to distinguish themselves from the civilian population and otherwise comply with the existing laws of war. This was not acceptable as a new norm of international law. It clearly does not reflect customary law.¹³⁴

¹³¹ Uruguay, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 144, § 18; Statement at the CDDH, *Official Records*, Vol. XV, CDDH/III/SR.55, 22 April 1977, p. 160, § 32.

¹³² US, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 149–150, § 43.

¹³³ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 425.

¹³⁴ US, Memorandum prepared by the Office of the Legal Adviser of the Department of State, 29 March 1988, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice*

III. Practice of International Organisations and Conferences

138. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

139. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

140. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

In situations where, owing to the nature of hostilities an armed combatant cannot distinguish himself, he keeps his status as a combatant if he carries his arms openly:

- a) during every military engagement;
- b) as long as he is visible to the enemy while he is engaged in a military deployment, that is in any movement towards a place from which or where a combat action is to take place.¹³⁵

VI. Other Practice

141. At the CDDH, the PLO stated that the phrase “during such time as he is visible to the adversary” used in paragraph 3 of draft Article 42 AP I (now Article 44) must be interpreted as meaning “visible to the naked eye” and that the phrase “while he is engaged in a military deployment preceding the launching of an attack” could only mean “immediately before the attack, often coinciding with the actual beginning of the attack”.¹³⁶

B. Spies**Definition of spies***I. Treaties and Other Instruments**Treaties*

142. Article 29 of the 1899 HR provides that:

An individual can only be considered a spy if, acting clandestinely, or on false pretences, he obtains, or seeks to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

in International Law, 1981–1988, Department of State Publication 10120, Washington, D.C., 1993–1995, p. 3441.

¹³⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 49.

¹³⁶ PLO, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.40, 26 May 1977, pp. 147–148, § 31.

Thus, soldiers not in disguise who have penetrated into the zone of operations of a hostile army to obtain information are not considered spies. Similarly, the following are not considered spies: soldiers or civilians, carrying out their mission openly, charged with the delivery of despatches destined either for their own army or for that of the enemy. To this class belong likewise individuals sent in balloons to deliver despatches, and generally to maintain communication between the various parts of an army or a territory.

143. Article 29 of the 1907 HR provides that:

A person can only be considered a spy when, acting clandestinely or on false pretences, he obtains or endeavours to obtain information in the zone of operations of a belligerent, with the intention of communicating it to the hostile party.

Thus, soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies. Similarly, the following are not considered spies: Soldiers and civilians, carrying out their mission openly, entrusted with the delivery of despatches intended either for their own army or for the enemy's army. To this class belong likewise persons sent in balloons for the purpose of carrying despatches and, generally, of maintaining communications between the different parts of an army or a territory.

144. Article 46(2) AP I provides that:

A member of the armed forces of a Party to the conflict who, on behalf of that Party and in territory controlled by an adverse Party, gathers or attempts to gather information shall not be considered as engaging in espionage if, while so acting, he is in the uniform of his armed forces.

Article 46 AP I was adopted by consensus.¹³⁷

Other Instruments

145. Article 88 of the 1863 Lieber Code states that "a spy is a person who secretly, in disguise or under false pretense, seeks information with the intention of communicating it to the enemy".

146. Article 19 of the 1874 Brussels Declaration provides that "a person can only be considered a spy when acting clandestinely or on false pretences he obtains or endeavours to obtain information in the districts occupied by the enemy, with the intention of communicating it to the hostile party".

147. Article 22 of the 1874 Brussels Declaration provides that "soldiers not wearing a disguise who have penetrated into the zone of operations of the hostile army, for the purpose of obtaining information, are not considered spies".

148. Article 24 of the 1880 Oxford Manual provides that "individuals may not be regarded as spies, who, belonging to the armed force of either belligerent, have penetrated, without disguise, into the zone of operations of the enemy".

¹³⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

II. National Practice

Military Manuals

149. Argentina's Law of War Manual defines spies with reference to Article 29 of the 1907 HR and considers that this definition implies that members of the armed forces who wear their uniform while gathering information are not considered to be spies.¹³⁸

150. Australia's Commanders' Guide defines spies as "combatants who conduct covert espionage operations in enemy occupied territory, while not in uniform".¹³⁹

151. Australia's Defence Force Manual defines espionage as "the clandestine collection of information behind enemy lines or in the area of operations with the intention of communicating that information to a hostile party to the conflict".¹⁴⁰

152. Belgium's Law of War Manual defines a spy as:

an individual who gathers or attempts to gather, clandestinely or on false pretences, information in the zone of operations of a belligerent with the intention of communicating it to the adverse party. The "zone of operations" comprises zones where no land operations are taking place but which may be hit by aerial bombardment (including bombardment by long-range missiles). This interpretation is very wide. Neutral territory on which a spy may operate cannot, however, be considered as a "zone of operations".¹⁴¹

153. Cameroon's Instructors' Manual states that "spying is to be distinguished from military intelligence. The latter is legal while the former is vigorously condemned in all national and international jurisdictions. Spying is an unlawful search for information."¹⁴²

154. Canada's LOAC Manual defines espionage as "the collection of information clandestinely behind enemy lines or in the zone of operations while wearing civilian clothing or otherwise disguised or concealed. Spies are those who engage in espionage."¹⁴³ The manual specifies that "members of the armed forces of a party to the conflict who gather or attempt to gather information *while wearing the uniform of their armed forces* will not be considered as engaging in espionage".¹⁴⁴ (emphasis in original)

155. Ecuador's Naval Manual defines a spy as:

someone who, while in territory under enemy control or the zone of operations of a belligerent force, seeks to obtain information while operating under a false claim of non-combatant or friendly forces status with the intention of passing that

¹³⁸ Argentina, *Law of War Manual* (1989), § 1.09(1); see also *Law of War Manual* (1969), § 2.009(1).

¹³⁹ Australia, *Commanders' Guide* (1994), § 707, see also § 913.

¹⁴⁰ Australia, *Defence Force Manual* (1994), § 717.

¹⁴¹ Belgium, *Law of War Manual* (1983), p. 21.

¹⁴² Cameroon, *Instructors' Manual* (1992), pp. 36 and 60.

¹⁴³ Canada, *LOAC Manual* (1999), p. 6-3, § 23.

¹⁴⁴ Canada, *LOAC Manual* (1999), p. 3-4, § 33.

information to an opposing belligerent. Members of the armed forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies. Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.¹⁴⁵

156. France's LOAC Manual defines spies with reference to Article 29 of the 1907 HR.¹⁴⁶

157. Germany's Military Manual defines spies as "persons who clandestinely or on false pretences, i.e. not wearing the uniform of their armed forces, gather information in the territory controlled by the adversary".¹⁴⁷

158. Kenya's LOAC Manual defines spies as:

persons who, acting clandestinely or on false pretences, gather information in the territory of a belligerent party with the intent of communicating it to the enemy . . . If members of the armed forces gather intelligence in occupied territory, they may not be treated as spies provided they are in uniform.¹⁴⁸

159. The Military Manual of the Netherlands defines spies with reference to Article 29 of the 1907 HR and states that this definition implies that combatants gathering information in uniform are not considered as spies.¹⁴⁹

160. New Zealand's Military Manual defines spies as "people, wearing civilian clothing or otherwise disguised, who collect information clandestinely behind enemy lines or in the zone of operations with the intention of communicating that information to a hostile Party".¹⁵⁰

161. Nigeria's Manual on the Laws of War states that:

Soldiers or civilians acting clandestinely or on false pretences to obtain information about a belligerent with the intention to communicate it to his enemy are engaged in espionage . . . Soldiers wearing their uniform when penetrating the enemy zone of operations are not spies and if captured, should be treated as prisoners of war.¹⁵¹

162. South Africa's LOAC Manual states that espionage "entails acting clandestinely in order to obtain information for transmission back to one's own side".¹⁵²

163. Spain's LOAC Manual states that "a member of the armed forces who gathers information is not considered to be engaged in espionage if that person is wearing regular uniform or is a resident in an occupied territory and is collecting information in that territory on behalf of the occupied power".¹⁵³

¹⁴⁵ Ecuador, *Naval Manual* (1989), § 12.8.

¹⁴⁶ France, *LOAC Manual* (2001), p. 64.

¹⁴⁷ Germany, *Military Manual* (1992), § 321.

¹⁴⁸ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.

¹⁴⁹ Netherlands, *Military Manual* (1993), p. III-5.

¹⁵⁰ New Zealand, *Military Manual* (1992), § 506(2).

¹⁵¹ Nigeria, *Manual on the Laws of War* (undated), § 31.

¹⁵² South Africa, *LOAC Manual* (1996), § 34(d).

¹⁵³ Spain, *LOAC Manual* (1996), Vol. I, § 1.4.a.

164. Switzerland's Basic Military Manual defines a spy as "an individual who, acting clandestinely or on false pretences, gathers or attempts to gather information in the zone of operation of a belligerent with the intention of communicating it to the adverse party".¹⁵⁴

165. The UK LOAC Manual defines spies as "persons who, acting clandestinely or on false pretences, gather information in the territory of a belligerent with intent to communicate it to the enemy".¹⁵⁵

166. The US Naval Handbook defines a spy as:

someone who, while in territory under enemy control or the zone of operations of a belligerent force, seeks to obtain information while operating under a false claim of noncombatant or friendly forces status with the intention of passing that information to an opposing belligerent. Members of the armed forces who penetrate enemy-held territory in civilian attire or enemy uniform to collect intelligence are spies. Conversely, personnel conducting reconnaissance missions behind enemy lines while properly uniformed are not spies.¹⁵⁶

167. The YPA Military Manual of the SFRY (FRY) provides a definition of spies similar to that contained in Article 29 of the 1907 HR.¹⁵⁷

National Legislation

168. Chile's Code of Military Justice defines a spy as:

1) anyone who surreptitiously or with the aid of a disguise or a false name, or by concealing his status or nationality, introduces himself in time of war and without justified aim in a war zone, a military post or among troops in the field; 2) anyone who conveys communications, messages or sealed documents from the enemy without being compelled to do so, or who being so compelled does not hand them over to the national authorities; 3) anyone who engages in reconnaissance, draws up plans or makes sketches of the terrain; 4) anyone who conceals, causes to be concealed or places in a safe place a person whom he knows to be an enemy spy, agent or member of the military.

The Code also provides that "enemy soldiers who, wearing their uniforms, openly enter the national territory for, *inter alia*, the purpose of engaging in reconnaissance of the terrain or observing troop movements" shall not be considered as spies but shall be subject to the rules of war as laid down by international law.¹⁵⁸

169. Mexico's Code of Military Justice as amended defines a spy as someone who has penetrated a defended place or troops in the field with the aim of collecting useful information and communicating it to the enemy.¹⁵⁹

¹⁵⁴ Switzerland, *Basic Military Manual* (1987), Article 42.

¹⁵⁵ UK, *LOAC Manual* (1981), Section 3, p. 9, § 6.

¹⁵⁶ US, *Naval Handbook* (1995), § 12.8.

¹⁵⁷ SFRY (FRY), *YPA Military Manual* (1988), § 109.

¹⁵⁸ Chile, *Code of Military Justice* (1925), Articles 252–253.

¹⁵⁹ Mexico, *Code of Military Justice as amended* (1933), Articles 206–207.

170. A publication on Philippine military law states that:

A spy is a person who, without authority and secretly, or under a false pretext, contrives to enter within the lines of an army for the purpose of obtaining material information and communicating it to the enemy; or one who, being by authority within the lines, attempts secretly to accomplish such purpose.¹⁶⁰

National Case-law

171. No practice was found.

Other National Practice

172. No practice was found.

III. Practice of International Organisations and Conferences

173. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

174. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

175. No practice was found.

VI. Other Practice

176. No practice was found.

Status of spies

Note: For practice concerning summary execution of spies, see Chapter 32, section M.

I. Treaties and Other Instruments

Treaties

177. Article 30 of the 1899 HR provides that "a spy taken in the act cannot be punished without previous trial". Article 31 specifies that "a spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage."

¹⁶⁰ Claro C. Gloria, *Philippine Military Law*, Capitol Publishing House, Quezon City, 1956, p. 263.

178. Article 30 of the 1907 HR provides that “a spy taken in the act shall not be punished without previous trial”. Article 31 specifies that “a spy who, after rejoining the army to which he belongs, is subsequently captured by the enemy, is treated as a prisoner of war, and incurs no responsibility for his previous acts of espionage”.

179. Article 46(1) AP I provides that:

Notwithstanding any other provision of the Conventions or of this Protocol, any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the status of prisoner of war and may be treated as a spy.

Article 46 AP I was adopted by consensus.¹⁶¹

180. Article 45(3) AP I provides that “any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol”. Article 45 AP I was adopted by consensus.¹⁶²

Other Instruments

181. Article 88 of the 1863 Lieber Code states that “the spy is punishable with death by hanging by the neck, whether or not he succeeded in obtaining information or in conveying it to the enemy”.

182. Article 20 of the 1874 Brussels Declaration states that “a spy taken in the act shall be tried and treated according to the laws in force in the army which captures him”. Article 21 adds that “a spy who rejoins the army to which he belongs and who is subsequently captured by the enemy is treated as a prisoner of war and incurs no responsibility for his previous acts”.

183. Article 23 of the 1880 Oxford Manual states that “individuals captured as spies cannot demand to be treated as prisoners of war”.

184. Article 25 of the 1880 Oxford Manual states that “in order to avoid the abuses to which accusations of espionage too often give rise in war, it is important to assert emphatically that no person charged with espionage shall be punished until the judicial authority shall have pronounced judgment”.

185. Article 26 of the 1880 Oxford Manual states that “a spy who succeeds in quitting the territory occupied by the enemy incurs no responsibility for his previous acts, should he afterwards fall into the hands of that enemy”.

II. National Practice

Military Manuals

186. Argentina’s Law of War Manual cites Articles 29–31 of the 1907 HR.¹⁶³

¹⁶¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.39, 25 May 1977, p. 111.

¹⁶² CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 155.

¹⁶³ Argentina, *Law of War Manual* (1969), § 2.009.

187. Australia's Commanders' Guide states that:

The most notable exception to granting of PW status to enemy military personnel is to those individuals who are classified as spies . . . Such individuals are not entitled to PW status and may be tried as common criminals under the detaining power's criminal code. It is important to note, however, that if military clothing is worn during such operations, the perpetrators are lawful combatants and are entitled to PW status.¹⁶⁴

188. Belgium's Law of War Manual states that:

Spying is not contrary to the law of war and, as a result, does not constitute a war crime. Most countries provide, however, that spying is a crime [under domestic law] in order to protect their national interests and the interests of their armed forces. A person who is caught spying for the enemy is liable to punishment, but only after being tried . . . In general, civilians act as spies. This activity, by itself, does not give them the status of combatant . . . Members of the armed forces who perform spying missions in the zone of operations will be treated, if captured, either as prisoners of war or as spies, depending on whether they accomplished their mission wearing their uniform or disguised as civilians wearing civilian clothes.¹⁶⁵

189. Cameroon's Disciplinary Regulations states that:

Members of the Armed Forces in organised units, *francs-tireurs* detached from their regular units, commando detachments and isolated *saboteurs*, as well as voluntary militias, self-defence groups and organised resistance formations are lawful combatants on condition that those units, organisations or formations have a designated commander, that their members wear a distinctive sign, notably on their clothing, that they carry arms openly and that they respect the laws and customs of war. These combatants must be considered prisoners of war. Anyone who does not comply with these conditions may be considered a spy subject to the applicable criminal sanctions.¹⁶⁶

190. Cameroon's Instructors' Manual states that a combatant caught spying "loses his status as a prisoner of war".¹⁶⁷**191.** Canada's LOAC Manual states that:

Members of the armed forces engaging in espionage *while not in uniform* may be treated as spies and lose their entitlement to PW status if they are captured before rejoining the armed forces to which they belong. Spies who are not in uniform are not lawful combatants. If they engage in hostilities, they may be punished for doing so but only after a fair trial affording all judicial guarantees.¹⁶⁸ [emphasis in original]

192. Croatia's LOAC Compendium states that:

The Occupying Power may impose the death penalty only on inhabitants guilty of espionage, sabotage [and] intentional offences having caused death. However, such

¹⁶⁴ Australia, *Commanders' Guide* (1994), § 707, see also §§ 511 and 913–914 and *Defence Force Manual* (1994), § 717.

¹⁶⁵ Belgium, *Law of War Manual* (1983), pp. 21–22.

¹⁶⁶ Cameroon, *Disciplinary Regulations* (1975), Article 30.

¹⁶⁷ Cameroon, *Instructors' Manual* (1992), p. 89, see also pp. 36, 60, 77 and 143.

¹⁶⁸ Canada, *LOAC Manual* (1999), p. 3-4, §§ 34 and 35, see also p. 6-3, §§ 23 and 24.

offences must have been punishable by death under the law in force in occupied territory before occupation.¹⁶⁹

193. Croatia's Commanders' Manual provides that "search for information in uniform or without disguise concealing combatant status is legitimate. Spies may be used but they do not have the right to prisoner-of-war status."¹⁷⁰

194. According to Ecuador's Naval Manual,

Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to prisoner-of-war status. The captor nation may try and punish spies in accordance with its national law. Should a spy succeed in eluding capture and return to friendly territory, liability to punishment terminates. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage.¹⁷¹

195. France's LOAC Teaching Note states that "spies... are not combatants and have no right to prisoner-of-war status".¹⁷²

196. France's LOAC Manual states that "a spy has no right to prisoner-of-war status and is subject to the national legislation of the territory where he is captured".¹⁷³

197. Germany's Military Manual states that:

Even if they are members of their armed forces, [spies] do not have the right to the status of prisoner of war. Persons who fall into the hands of the adversary while engaging in espionage shall be liable to punishment. Even if taken while engaging in espionage, a spy shall not be punished without prior conviction pursuant to regular judicial proceedings.¹⁷⁴

198. Hungary's Military Manual states that:

The Occupying Power may impose the death penalty only on inhabitants guilty of espionage, sabotage [and] intentional offences having caused death. However, such offences must have been punishable by death under the law in force in occupied territory before occupation.¹⁷⁵

199. Israel's Manual on the Laws of War states that:

The spy does not meet the conditions required of a legal combatant (since he is assimilated in the civilian population) and thus is not entitled to the prisoner-of-war's immunity against being tried. Therefore, a state that captures a spy is allowed to bring him to trial in accordance with its own internal laws, an offense that is generally punishable by a long prison sentence or even death... A spy who

¹⁶⁹ Croatia, *LOAC Compendium* (1991), p. 65.

¹⁷⁰ Croatia, *Commanders' Manual* (1992), § 31.

¹⁷¹ Ecuador, *Naval Manual* (1989), § 12.8.1.

¹⁷² France, *LOAC Teaching Note* (2000), p. 2.

¹⁷³ France, *LOAC Manual* (2001), p. 64, see also p. 40.

¹⁷⁴ Germany, *Military Manual* (1992), §§ 321–322.

¹⁷⁵ Hungary, *Military Manual* (1992), p. 101.

has succeeded in completing his mission and returning to his army is once again entitled to legal combatant status.¹⁷⁶

200. Italy's LOAC Elementary Rules Manual provides that "search for information in uniform or without disguise concealing combatant status is legitimate. Spies may be used but they do not have the right to prisoner-of-war treatment."¹⁷⁷

201. Kenya's LOAC Manual states that:

Those captured while engaged in espionage do not have POW status but may not be punished without trial... Members of the armed forces who were involved in spying cease to be spies as soon as they return to their own lines. If subsequently captured, they cannot be punished for their previous spying activities.¹⁷⁸

202. Madagascar's Military Manual provides that "the search for information in uniform or without disguise concealing combatant status is legitimate. Spies may be used but they do not have the right to prisoner-of-war status."¹⁷⁹

203. The Military Manual of the Netherlands states that:

A member of the armed forces who falls into the hands of the adversary while engaged in espionage has no entitlement to the status of prisoner of war; he can be treated as a spy... Military spies, who rejoin their forces after having accomplished their task and are subsequently captured, must be treated as prisoners of war and no longer be convicted for their earlier spying activities... A spy caught in the act may under no circumstances be sentenced without trial.¹⁸⁰

204. New Zealand's Military Manual states that:

Although spying is not contrary to the law of armed conflict, international law provides that spies, if captured, may be tried in accordance with the law of the captor and may be liable to the death penalty. To punish them without a proper trial is, however, a war crime. The collection of information by persons wearing uniform is a permitted means of conflict and a person so engaged is liable to be fired upon as is any other member of the enemy forces. If captured, such a person is to be treated as a prisoner of war.¹⁸¹

The manual adds that:

Persons who have evaded capture when carrying out acts of espionage and who have rejoined their own forces or own national authority cannot be charged with such acts if subsequently captured; if they are members of armed forces they must be treated as prisoners of war.¹⁸²

¹⁷⁶ Israel, *Manual on the Laws of War* (1998), p. 59.

¹⁷⁷ Italy, *LOAC Elementary Rules Manual* (1991), § 31.

¹⁷⁸ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.

¹⁷⁹ Madagascar, *Military Manual* (1994), Fiche No. 5-O, § 31.

¹⁸⁰ Netherlands, *Military Manual* (1993), pp. III-5 and III-6.

¹⁸¹ New Zealand, *Military Manual* (1992), § 506(2) and (3).

¹⁸² New Zealand, *Military Manual* (1992), § 506(4).

205. Nigeria's Military Manual states that "spies...are however not to be considered as prisoner of war".¹⁸³

206. Nigeria's Manual on the Laws of War states that:

For the purpose of waging war it is necessary to obtain information about the enemy. To get such information, it is lawful to employ spies and use soldiers and civilians of the enemy for committing acts of treason. But although this practice by the states is considered legitimate, lawful punishment under the municipal law may be imposed upon individuals engaged in espionage or treason when they are caught by the enemy... Soldiers wearing their uniform when penetrating the enemy zone of operations are not spies and if captured, should be treated as prisoners of war. When a spy is apprehended, he should not be punished without a fair regular trial. A spy who succeeds to rejoin his armed forces and is subsequently captured by the enemy is not liable to be punished for his previous acts of espionage. Such immunity is not accorded to a civilian spy captured by the enemy after reaching his own territory.¹⁸⁴

207. South Africa's LOAC Manual states that espionage "is not a violation of the law of war but there is no protection under the Geneva Conventions in respect of acts of espionage".¹⁸⁵

208. Spain's LOAC Manual states that spies are not entitled to POW status.¹⁸⁶

209. According to Sweden's IHL Manual, "spies... are not entitled to combatant or prisoner-of-war status".¹⁸⁷

210. Switzerland's Basic Military Manual states that:

International law applicable in armed conflict does not prohibit the use of spies and secret agents, who can even be soldiers or civilians of enemy nationality. Nevertheless, upon their capture or arrest, these persons are liable to be sentenced severely, according to the domestic law of the State concerned... A spy who is caught in the act may not be sentenced without previous judgement.¹⁸⁸

211. The UK Military Manual states that "regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war. But they would appear to be entitled, as a minimum, to the limited privileges conferred upon civilian spies or saboteurs by [Article 5 GC IV]."¹⁸⁹

212. The UK LOAC Manual provides that:

Those captured while engaged in espionage do not have PW status but may not be punished without trial. If members of the armed forces gather intelligence in occupied territory they may not be treated as spies provided that they are in uniform. Even if not in uniform, members of the armed forces who were involved in spying

¹⁸³ Nigeria, *Military Manual* (1994), p. 8, § 9(c)(2).

¹⁸⁴ Nigeria, *Manual on the Laws of War* (undated), § 31.

¹⁸⁵ South Africa, *LOAC Manual* (1996), § 34(d).

¹⁸⁶ Spain, *LOAC Manual* (1996), Vol. I, § 1.4.

¹⁸⁷ Sweden, *IHL Manual* (1991), Section 3.2.1.4, p. 36.

¹⁸⁸ Switzerland, *Basic Military Manual* (1987), Articles 41(2) and 43.

¹⁸⁹ UK, *Military Manual* (1958), § 96.

cease to be spies as soon as they return to their own lines. If subsequently captured they cannot be punished for their previous spying activities.¹⁹⁰

213. The US Naval Handbook states that:

Spying during armed conflict is not a violation of international law. Captured spies are not, however, entitled to prisoner-of-war status. The captor nation may try and punish spies in accordance with its national law. Should a spy succeed in eluding capture and return to friendly territory, liability to punishment terminates. If subsequently captured during some other military operation, the former spy cannot be tried or punished for the earlier act of espionage.¹⁹¹

214. The YPA Military Manual of the SFRY (FRY) states that spies caught in the act cannot be punished without previous trial, but spies who rejoin their army and are subsequently caught must be treated as POWs and incur no responsibility for their previous acts of espionage.¹⁹²

National Legislation

215. Chile's Code of Military Justice states that spies can be sentenced to life imprisonment or death.¹⁹³

216. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 45(3) AP I, is a punishable offence.¹⁹⁴

217. Referring to Malaysia's Armed Forces Act, the Report on the Practice of Malaysia states that the use of spies is unlawful in Malaysia. The report adds that there is no statutory definition of "spy", but it nevertheless considers that it is an offence for any person subject to service law in Malaysia to assist the enemy, communicate with it or share intelligence with it and that the Official Secrets Act and Armed Forces Act provide a penalty for spying.¹⁹⁵

218. Mexico's Code of Military Justice as amended provides that spies will be punished by death. Once spies have returned to their own troops and are then arrested, they cannot be punished as spies, but have to be treated as POWs.¹⁹⁶

219. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹⁹⁷

¹⁹⁰ UK, *LOAC Manual* (1981), Section 3, pp. 9–10, § 6.

¹⁹¹ US, *Naval Handbook* (1995), § 12.8.1.

¹⁹² SFRY (FRY), *YPA Military Manual* (1988), §§ 111–112.

¹⁹³ Chile, *Code of Military Justice* (1925), Articles 252–253.

¹⁹⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁹⁵ Report on the Practice of Malaysia, 1997, Answers to additional questions on Chapter 1.1, referring to *Armed Forces Act* (1972), Section 41 and *Official Secrets Act* (1972), Sections 2–3.

¹⁹⁶ Mexico, *Code of Military Justice as amended* (1933), Articles 206–207.

¹⁹⁷ Norway, *Military Penal Code as amended* (1902), § 108(b).

220. A publication on Philippine military law states that:

Any person who in time of war shall be found lurking or acting as a spy in or about any of the fortifications, posts, quarters, or encampments of the Armed Forces of the Philippines or elsewhere, shall be tried by a general court-martial or by a military commission, and shall, on conviction thereof, suffer death.¹⁹⁸

221. Spain's Military Criminal Code provides that non-combatants involved in military espionage are subject to punishment and do not benefit from POW status.¹⁹⁹

National Case-law

222. No practice was found.

Other National Practice

223. The Report on the Practice of Botswana maintains that spies are not protected.²⁰⁰

224. The Report on the Practice of Jordan notes that while there is no definition of the concept of spies in domestic law nor any provision concerning their status, interviews with military officers confirmed that spies are put on trial in Jordan.²⁰¹

225. According to the legal adviser of the South Korean Ministry of Foreign Affairs, a captured spy who is a member of enemy armed forces cannot be deemed a POW and may be punished under national law.²⁰²

226. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda affirms that spies are not considered as civilians. The report therefore concludes that spies are liable to attack.²⁰³

227. According to the Report on the Practice of Zimbabwe, "spies and mercenaries are likely to be regarded as combatants in Zimbabwe for purposes of being military targets. They are, however, unlikely to be afforded POW status and related protection if captured."²⁰⁴

III. Practice of International Organisations and Conferences

228. No practice was found.

¹⁹⁸ Claro C. Gloria, *Philippine Military Law*, Capitol Publishing House, Quezon City, 1956, p. 263.

¹⁹⁹ Spain, *Military Criminal Code* (1985), Articles 52 and 57.

²⁰⁰ Report on the Practice of Botswana, 1998, Chapter 1.1.

²⁰¹ Report on the Practice of Jordan, 1997, Interviews with military officers, Answers to additional questions on Chapter 1.1.

²⁰² South Korea, Opinion of a legal adviser of the Ministry of Foreign Affairs concerning the North Korean Submarine Infiltration Case, September 1996, Report on the Practice of South Korea, 1997, Chapter 1.1.

²⁰³ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 1.1.

²⁰⁴ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

IV. Practice of International Judicial and Quasi-judicial Bodies

229. In its admissibility decision in *Treholt v. Norway* in 1991, the ECiHR held that the special character of espionage meant that there was a need for additional security measures and surveillance in relation to persons suspected of spying. The Commission stated that while these increased security measures were permitted, they might not extend to interference with the fundamental rights of a detainee.²⁰⁵

V. Practice of the International Red Cross and Red Crescent Movement

230. No practice was found.

VI. Other Practice

231. No practice was found.

C. Mercenaries

Definition of mercenaries

I. Treaties and Other Instruments

Treaties

232. Mercenaries are defined by Article 47(2) AP I as any person who:

- a) is specially recruited locally or abroad in order to fight in an armed conflict;
- b) does, in fact, take a direct part in the hostilities;
- c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- d) is neither a national of a party to the conflict nor a resident of territory controlled by a Party to the conflict;
- e) is not a member of the armed forces of a Party to the conflict; and
- f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

Article 47 AP I was adopted by consensus.²⁰⁶

233. In an interpretative declaration made upon accession to AP I, Algeria reserved judgement on the definition of mercenarism as set out in Article 47(2) AP I, which it deemed "restrictive".²⁰⁷

²⁰⁵ ECiHR, *Treholt v. Norway*, Admissibility Decision, 9 July 1991, pp. 192 and 194.

²⁰⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 156.

²⁰⁷ Algeria, Interpretative declarations made upon accession to AP I, 16 August 1989, § 3.

234. Article 1 of the 1977 OAU Convention against Mercenarism defines a mercenary as:

Any person who:

- a) is specially recruited locally or abroad in order to fight in an armed conflict;
- b) does in fact take a direct part in the hostilities;
- c) is motivated to take part in the hostilities essentially by the desire for private gain and in fact is promised by or on behalf of a party to the conflict material compensation;
- d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- e) is not a member of the armed forces of a party to the conflict; and
- f) is not sent by a state other than a party to the conflict on official mission as a member of the armed forces of the said state.

235. Article 1 of the 1989 UN Mercenary Convention defines a mercenary as:

1. Any person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) is not a member of the armed forces of a party to the conflict; and
- (e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

2. A mercenary is also any person who, in any other situation:

- (a) is specially recruited locally or abroad for the purpose of participating in a concerted act of violence aimed at:
 - (i) overthrowing a Government or otherwise undermining the constitutional order of a State; or
 - (ii) undermining the territorial integrity of a State;
- (b) is motivated to take part therein essentially by the desire for significant private gain and is prompted by the promise or payment of material compensation;
- (c) is neither a national nor a resident of the State against which such an act is directed;
- (d) has not been sent by a State on official duty; and
- (e) is not a member of the armed forces of the State on whose territory the act is undertaken.

Other Instruments

236. Article 23(2) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind defines a mercenary as any individual who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party;
- (c) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict;
- (d) is not a member of the armed forces of a party to the conflict; and
- (e) has not been sent by a State which is not a party to the conflict on official duty as a member of its armed forces.

II. National Practice

Military Manuals

237. Military manuals of Argentina, Australia, Belgium, Canada, France, Netherlands, New Zealand, Spain and SFRY (FRY) contain a definition of mercenaries that is identical to the one provided by Article 47(2) AP I.²⁰⁸

238. Cameroon's *Instructors' Manual* defines mercenaries as "persons who are specially recruited at home or abroad to fight for pay during an armed conflict".²⁰⁹

239. Germany's *Military Manual* defines mercenaries as "any person who is motivated to take a direct part in the hostilities by the desire for private gain without being a national or a member of the armed forces of a party to the conflict (Art. 47 AP I). In addition, the provisions of the 1989 Mercenary Convention apply."²¹⁰

240. Kenya's *LOAC Manual* defines a mercenary as "a person who takes part in the conflict for private gain, who is not a member of any organized armed forces of a Party to the conflict and has not been sent on official duty by a country not involved in the conflict".²¹¹

241. The UK *LOAC Manual* states that "a mercenary is a person who takes part in the conflict for private gain, who is not a member of any organised armed forces and has no connection with the countries involved in the conflict".²¹²

242. The US Air Force Commander's Handbook states that:

Until recently, there was no generally accepted definition of a "mercenary," but the term was usually applied to foreigners who took part in an armed conflict on one side or the other, primarily for high pay or hope of booty... The definition of

²⁰⁸ Argentina, *Law of War Manual* (1989), § 1.09(2); Australia, *Defence Force Manual* (1994), Glossary; Australia, *Commanders' Guide* (1994), Glossary, p. xxiii; Belgium, *Law of War Manual* (1983), p. 23; Canada, *LOAC Manual* (1999), p. 3-4, § 30; France, *LOAC Manual* (2001), p. 81; Netherlands, *Military Manual* (1993), p. III-6; New Zealand, *Military Manual* (1992), § 807; Spain, *LOAC Manual* (1996), Vol. I, § 1.4.b; SFRY (FRY), *YPA Military Manual* (1988), § 113.

²⁰⁹ Cameroon, *Instructors' Manual* (1992), pp. 36 and 60.

²¹⁰ Germany, *Military Manual* (1992), § 303.

²¹¹ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.

²¹² UK, *LOAC Manual* (1981), Section 3, p. 10, § 7.

“mercenary” in [AP I] is so narrow that few persons would fit within it. The United States has signed this Protocol but has not yet ratified it.²¹³

National Legislation

243. Armenia’s Penal Code defines a mercenary as:

a person who is specially recruited, who acts in exchange for financial remuneration, who is neither a national of a party to the armed conflict or the military operations, nor its permanent resident, who is not a member of the armed forces of a party to the conflict, and who is not sent by another State to carry out official duties within the armed forces.²¹⁴

244. Azerbaijan’s Criminal Code defines a mercenary as “a person not being a citizen of a State party to an armed conflict or hostilities, not having permanent residence on the territory of the State, as well as not being sent to carry out official duties, who acts with a view to private gain”.²¹⁵

245. The Criminal Code of Belarus defines a mercenary as a person who participates, “on the territory of a foreign State, in armed conflict or hostilities and who does not belong to the armed forces of the parties to the conflict and who acts with a view to a material remuneration without being authorised by the State of his origin or by the State on whose territory he permanently resides”.²¹⁶

246. Georgia’s Criminal Code defines a mercenary as “a specially recruited person who acts with the view to receive a remuneration and who is neither a national of a State party to the conflict or hostilities, nor its permanent resident and who is not sent by any other State on official duty as a member of its armed forces”.²¹⁷

247. Kazakhstan’s Penal Code defines a mercenary as “any person who acts with a view to receive material remuneration or any other personal advantage and who does not belong to any party to the conflict, is not a permanent resident on its territory and is not dispatched by another State to fulfil official duties”.²¹⁸

248. Kyrgyzstan’s Criminal Code defines a mercenary as “a person who acts with a view to receive a remuneration and who is not a citizen of a state party to an armed conflict or hostilities, who is not its permanent resident and who is not a person sent on an official mission”.²¹⁹

249. Moldova’s Penal Code defines a mercenary as:

a person acting in the territory of a state involved in an armed conflict or in military hostilities with the aim to receive material gains, while not being a national of the

²¹³ US, *Air Force Commander’s Handbook* (1980), § 5-3.

²¹⁴ Armenia, *Penal Code* (2003), Article 395(4).

²¹⁵ Azerbaijan, *Criminal Code* (1999), Article 114, remark.

²¹⁶ Belarus, *Criminal Code* (1999), Article 133.

²¹⁷ Georgia, *Criminal Code* (1999), Article 410, note.

²¹⁸ Kazakhstan, *Penal Code* (1997), Article 162, note.

²¹⁹ Kyrgyzstan, *Criminal Code* (1997), Article 375, note.

said state, not having a permanent residence on the territory of the latter and not being under the duty to exercise official obligations.²²⁰

250. Russia's Criminal Code defines a mercenary as "a person who acts for the purpose of getting a material reward and is not a citizen of the State that participates in the armed conflict or hostilities, who does not reside on a permanent basis on its territory, and who is not fulfilling official duties".²²¹

251. Tajikistan's Criminal Code defines a mercenary as:

a specially recruited person who acts with a view to receive a remuneration and who is neither a national of a State party to the conflict nor its permanent resident, nor a member of the armed forces of a party which is in a state of war and is not sent by any other State on official duty as a member of its armed forces.²²²

252. Ukraine's Criminal Code defines mercenary activity as "participation in armed conflicts of other States for the purpose of pecuniary compensation without authorisation obtained from appropriate government authorities".²²³

253. Uzbekistan's Criminal Code defines mercenary activity as:

participation on the territory or side of a foreign State in an armed conflict or military actions by a person who is neither a citizen nor a member of the armed forces of State in conflict, nor a permanent resident of the territory under its control, nor someone sent on official duty by any State to the armed forces of another State, with a view to receive a financial reward or other personal advantages.²²⁴

National Case-law

254. No practice was found.

Other National Practice

255. At the CDDH, Afghanistan stated that it "does not see any need for the retention of the clause immediately following the words 'private gain' in paragraph 2(c)" of Article 42 *quater* of draft AP I (now Article 47).²²⁵

256. At the CDDH, Cameroon suggested that the definition of a mercenary in Article 42 *quater* of draft AP I (now Article 47) would have been improved by the deletion of the condition of a promise of "material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions" in paragraph 2(c) because "it would be very difficult to prove that a mercenary received exorbitant pay".²²⁶

²²⁰ Moldova, *Penal Code* (2002), Article 130.

²²¹ Russia, *Criminal Code* (1996), Article 359, note.

²²² Tajikistan, *Criminal Code* (1998), Article 401, note.

²²³ Ukraine, *Criminal Code* (2001), Article 447(2).

²²⁴ Uzbekistan, *Criminal Code* (1994), Article 154.

²²⁵ Afghanistan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 175.

²²⁶ Cameroon, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 156, § 76.

257. At the CDDH, Cuba stated, with regard to paragraph 2(c) of Article 42 *quater* of draft AP I (now Article 47), that it “has serious doubts about its objectivity, since in practice it will not be possible to verify whether or not the material compensation is in excess of that paid to combatants of similar rank and functions”.²²⁷

258. At the CDDH, Mauritania expressed “the greatest reservation with regard to the definition, motivation and scope” of mercenary activity as set forth in paragraphs 2(a)–(c) of Article 42 *quater* of draft API (now Article 47). It explained that “the mercenary of today is no longer motivated solely by the desire for private gain” and, as a result, considered that “the definition and motivations of the mercenary as specified in Article 42 *quater*, paragraph 2, are incomplete in so far as their range does not cover all categories of mercenaries”.²²⁸

259. At the CDDH, the Netherlands stated that:

We are somewhat worried by the fact that in the list of criteria [to define a mercenary], the motivation of a person has been brought into play. We should like to reiterate our position that the application of humanitarian law and the granting of humanitarian treatment should not be made dependent on someone’s motivation for taking part in the armed conflict. Moreover the element of motivation will be difficult to establish and could give rise to more than one interpretation.²²⁹

260. At the CDDH, Nigeria stated that it “appreciated the suggestion made by the representative of the United Republic of Cameroon and regretted that it had been made too late”.²³⁰

261. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we do not favor the provisions of article 47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law, and do not consider the provisions of article 47 to be part of current customary law”.²³¹

262. In 1980, during a debate in the Sixth Committee of the UN General Assembly on the UN Mercenary Convention, the SFRY stated that it supported the definition of a mercenary provided by Article 47 AP I.²³²

²²⁷ Cuba, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 185.

²²⁸ Mauritania, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, pp. 191–192.

²²⁹ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 194.

²³⁰ Nigeria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 156, § 77.

²³¹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 426–427.

²³² SFRY, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/35/SR.23, 17 October 1980, § 70.

263. At the CDDH, Zaire stated that it considered that paragraph 2(c) in Article 42 *quater* of draft AP I (now Article 47) “was greatly weakened by the inclusion of the second clause” requiring a promise of “material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions”.²³³

III. Practice of International Organisations and Conferences

United Nations

264. In a resolution adopted in 1999 on the use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination, the UN General Assembly asked the UN Secretary-General:

to invite Governments to make proposals towards a clearer legal definition of mercenaries, and, in this regard, requests the United Nations High Commissioner for Human Rights to convene expert meetings, as requested in previous General Assembly resolutions, to study and update the international legislation in force and to propose recommendations for a clearer legal definition of mercenaries that would allow for more efficient prevention and punishment of mercenary activities.²³⁴

Regional Organisations

265. No practice was found.

International Conferences

266. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

267. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

268. No practice was found.

VI. Other Practice

269. No practice was found.

²³³ Zaire, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 160, § 100.

²³⁴ UN General Assembly, Res. 54/151, 17 December 1999, § 12.

Status of mercenaries

I. Treaties and Other Instruments

Treaties

270. Pursuant to Article 47(1) AP I, “a mercenary shall not have the right to be a combatant or a prisoner of war”. Article 47 AP I was adopted by consensus.²³⁵

271. Article 45(3) AP I provides that “any person who has taken part in hostilities, who is not entitled to prisoner-of-war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of Article 75 of this Protocol”. Article 45 AP I was adopted by consensus.²³⁶

272. Upon ratification of AP I, Ireland declared that “Article 47 in no way prejudices the application of Articles 45(3) and 75 of Protocol I to mercenaries as defined in this Article”.²³⁷

273. Upon ratification of AP I, the Netherlands stated that “Article 47 in no way prejudices the application of Articles 45 and 75 of Protocol I to mercenaries as defined in this Article”.²³⁸

274. Article 3 of the 1977 OAU Convention against Mercenarism states that “mercenaries shall not enjoy the status of combatants and shall not be entitled to prisoner of war status”.

275. Article 11 of the 1977 OAU Convention against Mercenarism states that a mercenary “shall be entitled to all guarantees normally granted to any ordinary person by the State on whose territory he is being tried”.

Other Instruments

276. No practice was found.

II. National Practice

Military Manuals

277. Military manuals of Argentina, Australia, Belgium, Cameroon, France, Italy, Netherlands, New Zealand, Nigeria, Spain, Sweden, Switzerland, UK and SFRY (FRY) state that mercenaries are neither combatants nor entitled to POW status.²³⁹

²³⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 156.

²³⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 155.

²³⁷ Ireland, Declarations and reservations made upon ratification of AP I, 19 May 1999, § 8.

²³⁸ Netherlands, Declarations made upon ratification of AP I, 26 June 1987, § 4.

²³⁹ Argentina, *Law of War Manual* (1989), § 1.09(2); Australia, *Commanders' Guide* (1994), § 708; Belgium, *Law of War Manual* (1983), p. 23; Cameroon, *Instructors' Manual* (1992), p. 143, see also pp. 36, 60 and 77; France, *LOAC Teaching Note* (2000), p. 2; France, *LOAC Manual* (2001), p. 40, see also p. 81; Italy, *IHL Manual* (1991), Vol. I, § 6; Netherlands, *Military Manual* (1993), p. III-6, § 5; New Zealand, *Military Manual* (1992), § 807; Nigeria, *Military Manual* (1994), p. 8, § 9(c)(2); Spain, *LOAC Manual* (1996), Vol. I, § 1.4.b; Sweden, *IHL Manual* (1991), Section

278. Canada's LOAC Manual states that:

Mercenaries are unlawful combatants and may be attacked for such time as they take a direct part in hostilities. If captured, mercenaries are not entitled to PW status. They may be punished for being mercenaries but only following a fair trial affording all judicial guarantees.²⁴⁰

279. Germany's Military Manual provides that:

Mercenaries shall be regarded as unlawful combatants [i.e.] persons who take a direct part in the hostilities without being entitled to do so and have to face penal consequences. They do not have the right to the status of a prisoner of war. [They] do, however, have a legitimate claim to certain fundamental guarantees (Art. 75 AP I), including the right to humane treatment and a regular judicial procedure.²⁴¹

280. Israel's Manual on the Laws of War states that "another provision in the Additional Protocols is meant precisely to deny prisoner-of-war status to . . . mercenaries. This provision, which was adopted under pressure from African countries, is accepted as a customary rule and is therefore binding."²⁴²

281. Kenya's LOAC Manual states that "mercenaries are neither entitled to combatant nor to POW status . . . Nevertheless, a captured mercenary . . . cannot be deprived of his fundamental rights and may not be punished without trial."²⁴³

282. New Zealand's Military Manual states that:

Prior to 1977 there was no restriction upon the use of mercenaries in armed conflict and, in accordance with the principles of humanitarian law, any form of discrimination among combatants was forbidden. By a series of resolutions in relation to specific anti-colonial conflicts in Africa, the United Nations recommended prohibition of the use of such personnel against national liberation movements. This did not affect their legal status, although the government of Angola instituted criminal proceedings against captured mercenaries. Insofar as countries accepting AP I are concerned mercenaries are not entitled to combatant rights, thus denying to this type of soldier the equal treatment otherwise prescribed by the Protocol. Nevertheless, they remain entitled to the provisions concerning humanitarian treatment contained in AP I Art. 75.²⁴⁴

283. Nigeria's Operational Code of Conduct states that "foreign nationals on legitimate business will not be molested, but mercenaries will not be spared: they are the worst of enemies".²⁴⁵

3.2.1.4, p. 36; Switzerland, *Basic Military Manual* (1987), Article 177; UK, *LOAC Manual* (1981), Section 3, p. 10, § 7; SFRY (FRY), *YPA Military Manual* (1988), § 114.

²⁴⁰ Canada, *LOAC Manual* (1999), p. 3-4, § 31.

²⁴¹ Germany, *Military Manual* (1992), §§ 302-303.

²⁴² Israel, *Manual on the Laws of War* (1998), p. 51.

²⁴³ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 9.

²⁴⁴ New Zealand, *Military Manual* (1992), § 807(2).

²⁴⁵ Nigeria, *Operational Code of Conduct* (1967), § 4(l).

284. Nigeria's Military Manual states that "mercenaries are however not to be considered as prisoner[s] of war".²⁴⁶

285. Spain's LOAC Manual states that mercenaries are not entitled to POW status.²⁴⁷

286. Switzerland's Basic Military Manual provides that "a mercenary has no right to combatant or prisoner-of-war status".²⁴⁸

287. The US Air Force Commander's Handbook states that:

In recent years, many countries have claimed that "mercenaries" are unlawful combatants and subject to punishment upon capture . . .

- a. The United States has long recognized that neutral nationals taking part in an armed conflict can encourage the escalation of that conflict, and US statutes place certain limits on the recruitment of mercenaries in this country. We have also, however, regarded mercenaries as lawful combatants entitled to PW status upon capture. The US government has always protested vigorously against any attempt by other nations to punish American citizens as mercenaries.
- b. [AP I] provides that mercenaries do not have the right to be combatants or prisoners of war, but the definition of "mercenary" in this Protocol is so narrow that few persons would fit within it.²⁴⁹

National Legislation

288. Armenia's Penal Code, Azerbaijan's Criminal Code, the Criminal Code of Belarus, Georgia's Criminal Code, Kazakhstan's Penal Code, Moldova's Penal Code, Russia's Criminal Code, Tajikistan's Criminal Code, Ukraine's Criminal Code, Uzbekistan's Criminal Code and Vietnam's Penal Code criminalise the participation of a mercenary in an armed conflict.²⁵⁰

289. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 45(3) AP I, is a punishable offence.²⁵¹

290. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁵²

National Case-law

291. No practice was found.

²⁴⁶ Nigeria, *Military Manual* (1994), p. 8, § 9(c)(2).

²⁴⁷ Spain, *LOAC Manual* (1996), Vol. I, § 1.4.

²⁴⁸ Switzerland, *Basic Military Manual* (1987), Article 177.

²⁴⁹ US, *Air Force Commander's Handbook* (1980), § 5-3.

²⁵⁰ Armenia, *Penal Code* (2003), Article 395(3); Azerbaijan, *Criminal Code* (1999), Article 114(3); Belarus, *Criminal Code* (1999), Article 133; Georgia, *Criminal Code* (1999), Article 410(3); Kazakhstan, *Penal Code* (1997), Article 162(3); Moldova, *Penal Code* (2002), Article 141(1); Russia, *Criminal Code* (1996), Article 359(3); Tajikistan, *Criminal Code* (1998), Article 401(3); Ukraine, *Criminal Code* (2001), Article 447(2); Uzbekistan, *Criminal Code* (1994), Article 154; Vietnam, *Penal Code* (1990), Article 280(2).

²⁵¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁵² Norway, *Military Penal Code as amended* (1902), § 108(b).

Other National Practice

292. At the CDDH, Australia stated that it held the view that “mercenaries, who are in the hands of a Party to an armed conflict to which draft Protocol I applies, are entitled to the benefits of the treatment provided for by Article 65 [now Article 75] of that Protocol”.²⁵³

293. The Report on the Practice of Botswana asserts that “mercenaries have no protection at all”.²⁵⁴

294. At the CDDH, Canada stated that it “welcomed the recognition by the Nigerian representative that mercenaries were entitled to the fundamental guarantees provided in Article 65 [now Article 75 AP I]”.²⁵⁵

295. China considers that mercenaries should not benefit from the treatment reserved for POWs and that they may also be liable to punishment, depending upon the seriousness of the crimes committed.²⁵⁶

296. At the CDDH, Colombia stated that it “would have liked some specific reference to be included [in Article 42 *quater* draft AP I (now Article 47)] to the fundamental guarantees provided for in Article 65 [now Article 75 AP I]”.²⁵⁷

297. At the CDDH, Cyprus stated that it “wished to express its appreciation for the clarification given by the Nigerian representative”.²⁵⁸

298. In 1982, during a debate in the Sixth Committee of the UN General Assembly, Egypt stated that mercenaries should benefit from humanitarian treatment according to human rights principles and established norms.²⁵⁹

299. At the CDDH, the Holy See stated that it:

could not agree that mercenaries should not be expressly granted the minimum protection given to all men, whatever their faults and their moral destitution. Consequently, . . . the Holy See would have liked Article 42 *quater* [now Article 47 AP I] to refer explicitly to Article 65 on fundamental guarantees [now Article 75].²⁶⁰

300. At the CDDH, India stated that it “welcomed the clarification given by the Nigerian representative”.²⁶¹

²⁵³ Australia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 175, see also p. 176.

²⁵⁴ Report on the Practice of Botswana, 1998, Chapter 1.1.

²⁵⁵ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 160, § 98.

²⁵⁶ China, Address on the Convention on Suppressing the Activities of Mercenaries, *Selected Documents of the Chinese Delegation to the United Nations*, World Knowledge Press, Beijing, 1980, p. 173.

²⁵⁷ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161, § 105, see also p. 182.

²⁵⁸ Cyprus, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 159, § 96.

²⁵⁹ Egypt, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/37/SR.10, 14 October 1982, § 10.

²⁶⁰ Holy See, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 158, §§ 87–88.

²⁶¹ India, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 159, § 90.

301. With reference to a press conference by the Iraqi Minister of Defence in 1986, the Report on the Practice of Iraq states that mercenaries are not treated as POWs.²⁶²

302. At the CDDH, Italy stated that:

Mercenaries, though not entitled to prisoner-of-war status, were covered by Article 65 [now Article 75 AP I], which contained the fundamental safeguards to be given to all persons not enjoying more favourable treatment, regardless of the gravity of the crimes with which they might be charged.²⁶³

303. In 1981, during a debate in the Sixth Committee of the UN General Assembly, Italy stated that Article 47 AP I should be interpreted in parallel to Article 75 AP I.²⁶⁴

304. At the CDDH, Mexico stated that “the guarantees contained in Article 65 [now Article 75 AP I] are implicitly applicable to the persons dealt with in Article 42 *quater* [now Article 47]”.²⁶⁵

305. At the CDDH, the Netherlands reiterated “the applicability to a mercenary of the fundamental guarantees” embodied in Article 65 of draft AP I (now Article 75).²⁶⁶

306. In 1980, during a debate in the Sixth Committee of the UN General Assembly, the representative of the Netherlands stated that the status of mercenaries under Article 47 AP I was less than the Dutch delegation found desirable. He added that, notwithstanding their reprehensible activities, the human rights of mercenaries should be respected, as with every other human being.²⁶⁷

307. At the CDDH, Nigeria stated:

While recognizing the fundamental guarantees provided for in the new Article 65 of draft Protocol I [now Article 75] and not denying the common humanity which mercenaries shared with the rest of mankind, [Nigeria] did not think that such considerations could serve as a pretext for giving mercenaries the rights of combatants or prisoners of war in any situation of armed conflict.²⁶⁸

²⁶² Report on the Practice of Iraq, 1998, Chapter 5.3, referring to Press conference by the Iraqi Minister of Defence, 4 October 1986.

²⁶³ Italy, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 159, § 92.

²⁶⁴ Italy, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/36/SR.18, 28 October 1981, § 36.

²⁶⁵ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 192.

²⁶⁶ Netherlands, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 194, see also p. 195.

²⁶⁷ Netherlands, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/35/SR.23, 7 November 1980, § 76.

²⁶⁸ Nigeria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 157, § 81.

308. At the CDDH, Portugal stated that according to its interpretation of draft Article 65 on fundamental guarantees and draft Article 42 *quater* on mercenaries (now Articles 75 and 47 AP I), “the latter were in a category covered by the fundamental guarantees set out in Article 65”.²⁶⁹

309. The Report on the Practice of Russia states that:

As far as mercenaries are concerned, it must be said that they participate in nearly all the conflicts in the CIS countries. In connection with various political considerations, however, their legal status is made equal to the status of “volunteers”. Once Georgians brought down a plane and captured a mercenary – an officer of the Russian armed forces who fought for Abkhazia. Georgia demonstrated goodwill: it released the man and handed him over to Russia.²⁷⁰

310. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda states that mercenaries are not considered as civilians. The report concludes, therefore, that mercenaries are liable to attack.²⁷¹

311. At the CDDH, Sweden stated that the text of Article 42 *quater* of draft AP I (now Article 47) “should be complemented with a sentence stating that mercenaries are entitled to the protection laid down in Article 65 [now Article 75] in Protocol I”.²⁷²

312. At the CDDH, Switzerland stated that it “regretted that there had been no reference in Article 42 *quater* [now Article 47 AP I] to other provisions of the Protocol, in particular Article 65 [now Article 75]”.²⁷³

313. In 1980, in a memorandum concerning the international legal rights of captured mercenaries, the US Department of State stated that:

The act of being a mercenary is not a crime under international law. An individual who is accused of being a mercenary and who is captured during an armed conflict is entitled to the basic humanitarian protections of the international law applicable in armed conflict, including those specified in the Geneva Convention Relative to the Protection of Civilian Persons in Time of War. The specific rights which such an individual would be entitled to vary depending on whether the conflict is an international conflict or an internal one and, in the case of international armed conflicts, on whether the person is entitled to prisoner-of-war status . . . The protections of [common] article 3 [of the 1949 Geneva Conventions] would also apply to any captured individual accused of being a mercenary during a civil war. [Common Article 3] does not provide any immunity from prosecution to individuals for engaging in combatant acts. The provisions of the Geneva Conventions

²⁶⁹ Portugal, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 160, § 97.

²⁷⁰ Report on the Practice of Russia, 1997, Chapter 5.3.

²⁷¹ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 1.1.

²⁷² Sweden, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 198.

²⁷³ Switzerland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 158, § 82.

dealing with prisoners of war do not apply in civil wars, and combatants captured during civil wars are not prisoners of war within the meaning of international law.²⁷⁴

314. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we do not favor the provisions of article 47 on mercenaries, which among other things introduce political factors that do not belong in international humanitarian law, and do not consider the provisions of article 47 to be part of current customary law”.²⁷⁵

315. In 1987, the Legal Adviser of the US Department of State stated that:

For a third example [of why the Joint Chiefs of Staff judged AP I too ambiguous and complicated to use as a practical guide for military operations], article 47 of Protocol I provides that “a mercenary shall not have the right to be a combatant or a prisoner of war.” This article was included in the Protocol not for humanitarian reasons, but purely to make the political point that mercenary activity in the Third World is unwelcome. In doing so, this article disregards one of the fundamental principles of international humanitarian law by defining the right to combatant status, at least in part, on the basis of the personal or political motivations of the individual in question. This politicizing of the rules of warfare is contrary to Western interests and the interests of humanitarian law itself.²⁷⁶

316. In 1980, during a debate in the Sixth Committee of the UN General Assembly on the UN Mercenary Convention, the SFRY recalled that Article 47 AP I provided that mercenaries did not have a right to the status of combatant or POW and concluded that mercenaries could not enjoy any protection under international law.²⁷⁷

317. According to the Report on the Practice of Zimbabwe, “spies and mercenaries are likely to be regarded as combatants in Zimbabwe for purposes of being military targets. They are, however, unlikely to be afforded POW status and related protection if captured.”²⁷⁸

²⁷⁴ US, International Legal Rights of Captured Mercenaries, Memorandum prepared by the Attorney-Adviser in the Office of the Assistant Legal Adviser for African Affairs, US Department of State, 17 October 1980, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3457 and 3463–3464.

²⁷⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, pp. 426–427.

²⁷⁶ US, Remarks of Judge Abraham D. Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 469.

²⁷⁷ SFRY, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/35/SR.23, 17 October 1980, § 70.

²⁷⁸ Report on the Practice of Zimbabwe, 1998, Chapter 1.1.

318. In 1985, in a meeting with the ICRC, a government stated that “foreign prisoners may be exchanged after being tried”.²⁷⁹

III. Practice of International Organisations and Conferences

United Nations

319. The mission dispatched by the UN Secretary-General in 1988 to investigate the situation of POWs in Iran and Iraq reported that:

Some of the prisoners detained in [Iran] are not Iraqi nationals but come from other countries . . . The Iranian authorities call them mercenaries and have argued that, under Protocol I of the Geneva Conventions, they are not protected. The Iranian authorities contend that they could, according to custom, suffer capital punishment but have not been executed; on the contrary, they are treated as the other POWs. Since this seems to be the case, the legal argument about mercenaries has become redundant. (Otherwise, one would have to observe that [Iran] is not a party to the Protocol mentioned, and in any event has not shown that the condition[s] of its article 47 have been fulfilled.) . . . The Iranian authorities . . . promised that the non-Iraqi prisoners also will be released after the cessation of hostilities.²⁸⁰

Regional Organisations

320. No practice was found.

International Conferences

321. The Rapporteur of Committee III at the CDDH stated with regard to Article 47 AP I that:

Although the proposed new article makes no reference to the fundamental protections of Article 65 [now Article 75 AP I], it was understood by the Committee Group that mercenaries would be one of the groups entitled to the protections of that article which establishes minimum standards of treatment for persons not entitled to more favourable treatment under the Conventions and Protocol I.²⁸¹

IV. Practice of International Judicial and Quasi-judicial Bodies

322. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

323. No practice was found.

²⁷⁹ ICRC archive document.

²⁸⁰ UN Secretary-General, Report of the mission dispatched by the Secretary-General on the situation of prisoners of war in the Islamic Republic of Iran and Iraq, UN Doc. S/20147, Annex, 24 August 1988, § 65.

²⁸¹ CDDH, *Official Records*, Vol. XV, CDDH/407/Rev.1, 17 March–10 June 1977, p. 455, § 27.

VI. Other Practice

324. In an address to the nation in 1993, the President of UNITA stated that “captured mercenaries will be summarily executed”.²⁸²

²⁸² UNITA, Address to the Nation by Jonas Savimbi, President, relayed live from Huambo, 9 March 1993.

THE WOUNDED, SICK AND SHIPWRECKED

A. Search for and Collection and Evacuation of the Wounded, Sick and Shipwrecked (practice relating to Rule 109)	§§ 1–190
Search and collection	§§ 1–117
Evacuation	§§ 118–190
B. Treatment and Care of the Wounded, Sick and Shipwrecked (practice relating to Rule 110)	§§ 191–402
Medical care	§§ 191–343
Distinction between the wounded and the sick	§§ 344–402
C. Protection of the Wounded, Sick and Shipwrecked against Pillage and Ill-treatment (practice relating to Rule 111)	§§ 403–550
General	§§ 403–524
Respect by civilians for the wounded, sick and shipwrecked	§§ 525–550

A. Search for and Collection and Evacuation of the Wounded, Sick and Shipwrecked

Search and collection

I. Treaties and Other Instruments

Treaties

1. Article 6 of the 1864 GC provides that “wounded or sick combatants, to whatever nation they may belong, shall be collected”.
2. Article 16 of the 1907 Hague Convention (X) provides that “after every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked”.
3. Common Article 3 of the 1949 Geneva Conventions provides that “the wounded and sick shall be collected”. (Article 3 GC II adds the shipwrecked)
4. Article 4 GC I and Article 5 GC II provide that neutral and other States not parties to the conflict shall apply the provisions of these instruments to the wounded, sick and shipwrecked of the armed forces of the parties to the conflict.

5. Article 15, first paragraph, GC I provides that “at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded and sick”.

6. Article 18 GC I provides that:

The military authorities may appeal to the charity of the inhabitants voluntarily to collect . . . under their direction, the wounded and sick, granting persons who have responded to this appeal the necessary protection and facilities . . .

The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality.

7. Article 18, first paragraph, GC II states that “after each engagement, Parties to the conflict shall, without delay, take all possible measures to search for and collect the shipwrecked, wounded and sick”.

8. Article 21, first paragraph, GC II states that “the Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board and care for wounded, sick or shipwrecked persons”.

9. According to Article 13 GC IV, the obligation to search and care for the wounded applies to the “whole population of the countries in conflict”.

10. Article 16, second paragraph, GC IV provides that “as far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the . . . wounded”.

11. Article 17(2) AP I provides that “the Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 [i.e. aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies] to collect . . . the wounded, sick and shipwrecked”. Article 17 AP I was adopted by consensus.¹

12. Article 19 AP I provides that neutral and other States not parties to the conflict shall apply the provisions of API to the wounded, sick and shipwrecked of the armed forces of the parties to the conflict. Article 19 AP I was adopted by consensus.²

13. Article 8 AP II provides that “whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to search for and collect the wounded, sick and shipwrecked”. Article 8 AP II was adopted by consensus.³

14. Article 18(1) AP II provides that “the civilian population may, even on its own initiative, offer to collect . . . the wounded, sick and shipwrecked”. Article 18 AP II was adopted by consensus.⁴

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

³ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.

⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 150.

Other Instruments

15. Article 10 of the 1880 Oxford Manual provides that “wounded and sick soldiers should be brought in . . . to whatever nation they belong”.

16. Paragraph 1 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “all wounded and sick on land shall be treated in accordance with the provisions of the First and Second Geneva Conventions of 12 August 1949”.

17. In the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia undertook “to apply the following fundamental principles: wounded and ill persons must be helped and protected in all circumstances”.

18. Paragraph 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “the treatment provided to the wounded, sick and shipwrecked shall be in accordance with the provisions of the First and Second Geneva Conventions of 12 August 1949”.

19. Article 4(2) and (9) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that the wounded and sick shall be searched for and collected.

20. Section 9.2 of the 1999 UN Secretary-General’s Bulletin states that “whenever circumstances permit, a suspension of fire shall be arranged, or other local arrangements made, to permit the search for . . . the wounded [and] the sick . . . left on the battlefield and allow for their collection . . .”.

*II. National Practice**Military Manuals*

21. Argentina’s Law of War Manual (1969) states that “at all times and particularly after an engagement, the belligerents shall take all possible measures to search for and collect the wounded and sick”.⁵ It adds that “appeal can be made to the civilian population for the collection . . . of the wounded and sick”.⁶

22. Argentina’s Law of War Manual (1989) provides that the wounded, sick and shipwrecked shall be searched for and collected.⁷

23. Australia’s Commanders’ Guide and Defence Force Manual require that all possible measures be taken to search for and collect the shipwrecked, wounded and sick.⁸

24. Belgium’s Law of War Manual refers to common Article 3 of the 1949 Geneva Conventions and provides that the wounded and sick shall be searched for.⁹

⁵ Argentina, *Law of War Manual* (1969), § 3.003.

⁶ Argentina, *Law of War Manual* (1969), § 3.006.

⁷ Argentina, *Law of War Manual* (1989), § 2.05.

⁸ Australia, *Commanders’ Guide* (1994), § 858; *Defence Force Manual* (1994), §§ 668 and 986.

⁹ Belgium, *Law of War Manual* (1983), p. 17.

25. Belgium's Teaching Manual for Soldiers states that "if operations so permit, the wounded must be searched for".¹⁰
26. Benin's Military Manual provides that "combatants shall participate in the search for... the wounded and sick".¹¹ It instructs soldiers to "collect... the wounded and sick, whether friend or foe".¹²
27. Burkina Faso's Disciplinary Regulations provides that "whenever circumstances permit, the wounded, sick and shipwrecked shall be collected".¹³
28. Cameroon's Disciplinary Regulations states that "when operational circumstances permit, the wounded, sick and shipwrecked must be collected".¹⁴
29. Cameroon's Instructors' Manual provides that the wounded and shipwrecked shall be searched for and collected. It adds that "an appeal may be launched to the civilian population to help National Societies of the Red Cross and Red Crescent to collect... the wounded, sick and shipwrecked".¹⁵
30. Canada's LOAC Manual states that "following an engagement, parties to a conflict are obliged to take all possible measures to search for and collect the wounded and sick and shipwrecked".¹⁶ It adds that "appeals may be made to local inhabitants and relief societies to collect... the wounded and sick. Such inhabitants and relief societies, even in occupied or invaded territory, shall be permitted spontaneously to collect... such personnel."¹⁷ In the case of non-international armed conflicts, the manual states that "after an engagement and whenever circumstances permit, all possible steps must be taken without delay to search for and collect the wounded, sick and shipwrecked".¹⁸
31. Canada's Code of Conduct instructs soldiers "to take all possible measures to search for and collect the wounded and sick from all sides, opposing forces or not, as well as civilians".¹⁹ It also provides that "military authorities may ask the inhabitants in the area of conflict to voluntarily collect... the wounded under their direction".²⁰
32. Colombia's Circular on Fundamental Rules of IHL provides that the "parties to the conflict shall collect and assist the wounded and sick in their power".²¹
33. Colombia's Basic Military Manual states that "the wounded and sick must be collected".²²

¹⁰ Belgium, *Teaching Manual for Soldiers* (undated), pp. 16-17, see also p. 32.

¹¹ Benin, *Military Manual* (1995), Fascicule II, p. 10.

¹² Benin, *Military Manual* (1995), Fascicule II, p. 18.

¹³ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

¹⁴ Cameroon, *Disciplinary Regulations* (1975), Article 31.

¹⁵ Cameroon, *Instructors' Manual* (1992), p. 96.

¹⁶ Canada, *LOAC Manual* (1999), p. 9-1, § 8.

¹⁷ Canada, *LOAC Manual* (1999), p. 9-2, § 12.

¹⁸ Canada, *LOAC Manual* (1999), p. 17-4, § 32.

¹⁹ Canada, *Code of Conduct* (2001), Rule 7, § 3.

²⁰ Canada, *Code of Conduct* (2001), Rule 10, § 8.

²¹ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.

²² Colombia, *Basic Military Manual* (1995), p. 28.

34. Colombia's *Instructors' Manual* provides that "the wounded, sick and shipwrecked shall be collected".²³
35. Colombia's *Soldiers' Manual* provides that wounded enemy combatants shall be collected.²⁴
36. Congo's *Disciplinary Regulations* instructs soldiers "to collect...the wounded, the sick and shipwrecked whenever circumstances permit".²⁵
37. Croatia's *LOAC Compendium* provides that "whenever the tactical situation permits, the wounded, sick and shipwrecked shall be collected".²⁶
38. Croatia's *Commanders' Manual* stipulates that the wounded and shipwrecked shall be searched for and collected.²⁷
39. Croatia's *Soldiers' Manual* instructs soldiers to search for and collect the wounded, sick and shipwrecked members of the adversary's armed forces.²⁸
40. Croatia's *Instructions on Basic Rules of IHL* instructs soldiers to collect the wounded and sick.²⁹
41. Ecuador's *Naval Manual* provides that "parties to the conflict shall, after each engagement and without delay, take all possible measures to search for and collect the wounded and sick on the field of battle".³⁰ It contains similar provisions with respect to the shipwrecked.³¹
42. France's *LOAC Summary Note* provides that "wounded, sick and shipwrecked shall be searched for and collected...by the Party to the conflict in whose power they may be".³²
43. France's *LOAC Teaching Note* provides that the "wounded, sick and shipwrecked shall be searched for and collected...by the Party to the conflict in whose power they may be".³³
44. Germany's *Military Manual* states that a cease-fire may be concluded for "humanitarian purposes, in particular searching and collecting the wounded and the shipwrecked".³⁴ It adds that "at all times, all possible measures shall be taken to collect the wounded and sick and shipwrecked".³⁵ The manual also provides that "civilians and help organisations such as, for example, the National Red Cross or Red Crescent Society are permitted to collect...the wounded, sick and shipwrecked".³⁶

²³ Colombia, *Instructors' Manual* (1999), p. 24.

²⁴ Colombia, *Soldiers' Manual* (1999), p. 20.

²⁵ Congo, *Disciplinary Regulations* (1986), Article 32.

²⁶ Croatia, *LOAC Compendium* (1991), p. 45.

²⁷ Croatia, *Commanders' Manual* (1992), p. 10, Rule No. 71.

²⁸ Croatia, *Soldiers' Manual* (1992), p. 3.

²⁹ Croatia, *Instructions on Basic Rules of IHL* (1993), p. 11, Nos. 1-3.

³⁰ Ecuador, *Naval Manual* (1989), § 11.4.

³¹ Ecuador, *Naval Manual* (1989), § 11.6.

³² France, *LOAC Summary Note* (1992), § 2.1.

³³ France, *LOAC Teaching Note* (2000), p. 3.

³⁴ Germany, *Military Manual* (1992), § 233.

³⁵ Germany, *Military Manual* (1992), § 605.

³⁶ Germany, *Military Manual* (1992), § 632.

45. Hungary's Military Manual provides that "whenever the tactical situation permits, the wounded, sick and shipwrecked shall be collected".³⁷
46. Indonesia's Military Manual states that "the wounded and sick should be searched for and collected, as soon as the hostilities end".³⁸
47. Italy's LOAC Elementary Rules Manual instructs soldiers that when confronted with wounded enemy combatants, the following rule must be observed: "Collect them."³⁹
48. Kenya's LOAC Manual refers to common Article 3 of the 1949 Geneva Conventions and states that the "wounded and sick shall be collected and cared for".⁴⁰ The manual provides that "combatants are required to search for and collect the wounded and sick" and states that this principle also applies to wounded enemy combatants.⁴¹ It also provides that "civil defence units and personnel shall participate in the search for victims, particularly when there are civilian casualties". The manual adds that "commanders may appeal to the civilian population, to aid societies such as National Red Cross or Red Crescent Societies . . . to collect . . . the wounded and shipwrecked".⁴²
49. Lebanon's Teaching Manual instructs members of the armed forces to search for and collect enemy wounded in the field as well as shipwrecked at sea.⁴³
50. Madagascar's Military Manual provides that "when the mission so permits, the wounded [and] shipwrecked . . . shall be searched for and collected". It instructs soldiers that, when confronted with wounded enemy combatants, the following rule must be observed: "Collect them."⁴⁴ It also states that "local arrangements may be concluded for the search, collection [and] exchange . . . of the wounded and shipwrecked".⁴⁵
51. Mali's Army Regulations provides that "refusal to collect and protect the wounded, sick and shipwrecked whenever circumstances permit" is a violation of the laws and customs of war.⁴⁶
52. Morocco's Disciplinary Regulations instructs soldiers "to collect and protect the wounded and sick when circumstances permit".⁴⁷
53. According to the Military Manual of the Netherlands, "particularly after an engagement, wounded and sick shall be searched for and collected".⁴⁸ In

³⁷ Hungary, *Military Manual* (1992), p. 73.

³⁸ Indonesia, *Military Manual* (1982), § 37.

³⁹ Italy, *LOAC Elementary Rules Manual* (1991), p. 29.

⁴⁰ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 6 and Précis No. 3, p. 14.

⁴¹ Kenya, *LOAC Manual* (1997), Précis No. 2, pp. 13 and 15 and Précis No. 3, p. 11.

⁴² Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.

⁴³ Lebanon, *Teaching Manual* (1997), pp. 77-78.

⁴⁴ Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 16, Fiche No. 2-T, § 21, Fiche No. 5-SO, § C and Fiche No. 4-T, § 2.2(22).

⁴⁵ Madagascar, *Military Manual* (1994), Fiche No. 7-SO, § B.

⁴⁶ Mali, *Army Regulations* (1979), Article 36.

⁴⁷ Morocco, *Disciplinary Regulations* (1974), Article 25.

⁴⁸ Netherlands, *Military Manual* (1993), p. VI-2.

the case of non-international armed conflicts, the manual states that the “wounded, sick and shipwrecked must be searched for and collected”.⁴⁹

54. The Military Handbook of the Netherlands provides that the “wounded . . . shall be searched for and collected when the circumstances permit it”.⁵⁰

55. The IFOR Instructions of the Netherlands instruct soldiers to “collect the wounded . . . whether friend or foe”.⁵¹

56. New Zealand’s Military Manual provides that “the Parties to a conflict are obliged to take all possible measures to search for and collect, without delay, the wounded, sick and shipwrecked”.⁵² It adds that “appeals may be made to the charity and humanity of the local inhabitants and relief societies to collect . . . the wounded and sick”.⁵³ With regard to non-international armed conflict, the manual states that “after any engagement and whenever circumstances permit, all possible steps must be taken, without delay, to search for and collect the wounded, sick and shipwrecked”.⁵⁴

57. Nicaragua’s Military Manual provides that, in internal armed conflicts, the wounded and sick shall be collected.⁵⁵

58. Nigeria’s Military Manual states that “as soon as the tactical situation permits, necessary measures shall be taken to search for [and] collect . . . the wounded [and] shipwrecked”.⁵⁶

59. Nigeria’s Manual on the Laws of War states that “at all times and particularly after a campaign, the belligerents must immediately take all possible measures to search for and collect the wounded and sick”.⁵⁷

60. Nigeria’s Soldiers’ Code of Conduct states that “the wounded enemy shall be collected”.⁵⁸ It adds that “the wounded and shipwrecked enemies at sea shall be accorded similar respect and protection”.⁵⁹

61. The Soldier’s Rules of the Philippines instruct soldiers to “care for the wounded and sick, be they friendly or foe”.⁶⁰

62. Romania’s Soldiers’ Manual requires that wounded and sick enemy combatants be collected.⁶¹

63. Russia’s Military Manual provides that:

Military commanders may appeal to the charity of the local population to voluntarily collect . . . the wounded and sick. The military authorities must permit the

⁴⁹ Netherlands, *Military Manual* (1993), p. XI-5.

⁵⁰ Netherlands, *Military Handbook* (1995), p. 7-40.

⁵¹ Netherlands, *IFOR Instructions* (1995), § 6.

⁵² New Zealand, *Military Manual* (1992), § 1003(1).

⁵³ New Zealand, *Military Manual* (1992), § 1003(4).

⁵⁴ New Zealand, *Military Manual* (1992), § 1817(1).

⁵⁵ Nicaragua, *Military Manual* (1996), Article 6.

⁵⁶ Nigeria, *Military Manual* (1994), p. 13, § 4, see also p. 39, § 5(f) and (h) and p. 46, § 16(g).

⁵⁷ Nigeria, *Manual on the Laws of War* (undated), § 34.

⁵⁸ Nigeria, *Soldiers’ Code of Conduct* (undated), § 6.

⁵⁹ Nigeria, *Soldiers’ Code of Conduct* (undated), § 8.

⁶⁰ Philippines, *Soldier’s Rules* (1989), § 5.

⁶¹ Romania, *Soldiers’ Manual* (1991), p. 9.

inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect . . . wounded or sick.⁶²

64. Senegal's Disciplinary Regulations provides that "the wounded, sick and shipwrecked shall be collected".⁶³

65. Senegal's IHL Manual provides that during internal disturbances, local agreements may be concluded to search for and collect the wounded.⁶⁴

66. Spain's LOAC Manual provides that "at all times, but particularly after an engagement, parties to the conflict shall, without delay, take all possible measures to search for and collect the wounded . . . during combat".⁶⁵

67. Sweden's IHL Manual considers that Article 17 AP I on the role of aid organisations has the status of customary law.⁶⁶

68. Switzerland's Basic Military Manual provides that "at all times, and especially following an engagement, all means should be taken to search for and collect the wounded".⁶⁷ It also provides that "appeal may be made to civilians or civilian relief societies to collect . . . the wounded".⁶⁸

69. According to Togo's Military Manual, "combatants shall participate in the search for . . . the wounded and sick".⁶⁹ It instructs soldiers "to collect and care for the wounded and sick, whether friend or foe".⁷⁰

70. The UK Military Manual provides that "at all times, and particularly after an engagement, the belligerents must immediately take all possible measures to search for and collect the wounded and sick".⁷¹ It also provides that:

The military authorities may appeal to the charitable zeal of local inhabitants to collect . . . the wounded and sick, under their direction, granting to those who respond to this appeal special protection and facilities. The inhabitants, as also relief societies, must be permitted spontaneously to collect . . . wounded and sick, whatever nationality.⁷²

71. The UK LOAC Manual states that "combatants are required to search for and collect the shipwrecked, wounded and sick and to ensure their adequate care".⁷³ It also provides that "military authorities must allow the local population and relief societies to collect . . . the wounded and sick".⁷⁴ The manual restates the provisions of common Article 3 of the 1949 Geneva Conventions.⁷⁵

⁶² Russia, *Military Manual* (1990), § 15.

⁶³ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

⁶⁴ Senegal, *IHL Manual* (1999), p. 20.

⁶⁵ Spain, *LOAC Manual* (1996), Vol. I, § 7.5.a, see also §§ 5.2.d.(5), 10.6.b.(3) and 10.6.c.

⁶⁶ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

⁶⁷ Switzerland, *Basic Military Manual* (1987), Article 71.

⁶⁸ Switzerland, *Basic Military Manual* (1987), Article 75.

⁶⁹ Togo, *Military Manual* (1996), Fascicule II, p. 10.

⁷⁰ Togo, *Military Manual* (1996), Fascicule II, p. 18.

⁷¹ UK, *Military Manual* (1958), § 342.

⁷² UK, *Military Manual* (1958), § 345.

⁷³ UK, *LOAC Manual* (1981), Section 7, p. 26, § 2.

⁷⁴ UK, *LOAC Manual* (1981), Section 6, p. 22, § 6.

⁷⁵ UK, *LOAC Manual* (1981), Section 12, p. 42, § 2.

72. The US Field Manual reproduces common Article 3 of the 1949 Geneva Conventions and Articles 15 and 18 GC I.⁷⁶

73. The US Air Force Pamphlet refers to Article 15 GC I and states that it “includes, *inter alia*, an obligation to search for and collect wounded and sick”.⁷⁷ The manual also refers to Article 12 GC II and defines shipwreck as “a shipwreck from any cause, including forced landings at sea by or from an aircraft”. The manual specifies that “it is important to the Air Force since it provides a fully protected status for pilots downed or forced to land at sea”.⁷⁸ It also provides that “military authorities shall permit the inhabitants and relief societies spontaneously to collect . . . wounded of all nationalities”.⁷⁹

74. The US Naval Handbook states that:

Parties to the conflict must, after each engagement and without delay, take all possible measures to search for and collect the wounded and sick on the field of battle . . . Shipwrecked persons include those in peril at sea or in other waters as a result of either the sinking, grounding, or other damage to the vessel in which they are embarked, or of the downing or distress of an aircraft. It is immaterial whether the peril was the result of enemy action or nonmilitary causes.⁸⁰

75. The YPA Military Manual of the SFRY (FRY) provides that:

164. At all times and especially after an engagement, all necessary measures shall be taken without delay to search for and collect the wounded and sick.

...

Whenever circumstances permit, a cease-fire may be arranged in order to collect, exchange or transport wounded and sick left on the battlefield . . .

165. The civilian population or humanitarian societies may, of their own initiative, collect . . . the wounded and sick, whether friend or foe, even in occupied territory. Military commanders are obliged to permit such humanitarian activities while retaining the right of supervision.⁸¹

National Legislation

76. Argentina’s Draft Code of Military Justice punishes any soldier who fails to search for and rescue the wounded, sick and shipwrecked of any party to the conflict.⁸²

77. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in both international and non-international armed conflicts, at any time and especially after an engagement, the wounded and sick shall be searched for.⁸³

⁷⁶ US, *Field Manual* (1956), §§ 11, 216 and 219.

⁷⁷ US, *Air Force Pamphlet* (1976), § 12-2(a).

⁷⁸ US, *Air Force Pamphlet* (1976), § 12-3(a).

⁷⁹ US, *Air Force Pamphlet* (1976), § 12-2(a).

⁸⁰ US, *Naval Handbook* (1995), § 11-4.

⁸¹ SFRY (FRY), *YPA Military Manual* (1988), §§ 164–165.

⁸² Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(1) in the *Code of Military Justice as amended* (1951).

⁸³ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 24.

78. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁸⁴
79. Botswana's Geneva Conventions Act provides for the obligation to search for the wounded and sick.⁸⁵
80. China's Criminal Code as amended punishes those who are directly responsible for the deliberate abandonment of the wounded and sick on the battlefield.⁸⁶
81. Colombia's Penal Code provides for the punishment of "anyone who, during an armed conflict, . . . abandons the wounded and sick".⁸⁷
82. The DRC Code of Military Justice as amended provides for the punishment of any member of the armed forces who does not assist persons in danger.⁸⁸
83. Under the Draft Amendments to the Penal Code of El Salvador provide a prison sentence for "anyone who, during an international or non-international armed conflict, fails to rescue and provide assistance to protected persons, while having an obligation to do so".⁸⁹
84. Iraq's Military Penal Code punishes any person who abandons the wounded.⁹⁰
85. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 4 and 15 GC I, 5 and 18 GC II and 16 GC IV, and of AP I, including violations of Article 19 AP I, as well as any "contravention" of AP II, including violations of Article 8 AP II, are punishable offences.⁹¹
86. Italy's Wartime Military Penal Code provides for the punishment of any military medical personnel who, during or after an engagement, fail to provide assistance to the wounded, sick or shipwrecked.⁹²
87. Nicaragua's Military Penal Code provides for the punishment of the soldier who fails to search for and rescue the wounded, sick and shipwrecked, irrespective of the party to which they belong.⁹³
88. Nicaragua's Draft Penal Code provides for the punishment of a civilian not subject to military jurisdiction who "violates the duty of humanity towards the . . . wounded and sick, or those placed in hospital or camps for the wounded". It also provides a prison sentence for "anyone who, during an international

⁸⁴ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁸⁵ Botswana, *Geneva Conventions Act* (1970), Schedule 1, Article 15.

⁸⁶ China, *Criminal Code as amended* (1997), Article 444.

⁸⁷ Colombia, *Penal Code* (2000), Article 145.

⁸⁸ DRC, *Code of Military Justice as amended* (1972), Article 519.

⁸⁹ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Omisión y obstaculización de medidas de socorro y asistencia humanitaria".

⁹⁰ Iraq, *Military Penal Code* (1940), Article 115(c).

⁹¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁹² Italy, *Wartime Military Penal Code* (1941), Article 190.

⁹³ Nicaragua, *Military Penal Code* (1996), Article 56(2).

or non-international armed conflict, fails to rescue and provide assistance to protected persons, while having an obligation to do so".⁹⁴

89. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".⁹⁵

90. Spain's Royal Ordinance for the Armed Forces punishes the failure to search for and rescue the wounded and sick of both parties.⁹⁶

91. Under Spain's Military Criminal Code, failure to use the available means to search and rescue the wounded, sick and shipwrecked constitutes an offence against the laws and customs of war.⁹⁷

92. Under the US War Crimes Act as amended, violations of common Article 3 of the 1949 Geneva Conventions are war crimes.⁹⁸

93. Uruguay's Military Penal Code as amended provides for the punishment of "failure to assist, when possible, an enemy who surrenders in case of shipwreck, fire, explosion, earthquake or similar circumstances".⁹⁹

94. Venezuela's Code of Military Justice as amended provides for the punishment of anyone who denies or obstructs assistance to the wounded and sick.¹⁰⁰

95. Vietnam's Penal Code provides for the punishment of anyone who "intentionally leaves behind a soldier killed or wounded on the battlefield" or for the failure to "care for or give medical treatment to a wounded soldier".¹⁰¹

National Case-law

96. No practice was found.

Other National Practice

97. The Report on the Practice of Egypt states that "in application of its long dated experience, Egypt considers the search for and care of wounded [and] sick... as a tradition which should be respected at all times and in any circumstance, particularly in time of military operations".¹⁰²

98. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that "the wounded

⁹⁴ Nicaragua, *Draft Penal Code* (1999), Articles 456 and 463.

⁹⁵ Norway, *Military Penal Code as amended* (1902), § 108.

⁹⁶ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 140.

⁹⁷ Spain, *Military Criminal Code* (1985), Article 77(1).

⁹⁸ US, *War Crimes Act as amended* (1996), Section 2441(c).

⁹⁹ Uruguay, *Military Penal Code as amended* (1943), Article 58(20), see also Article 58(21).

¹⁰⁰ Venezuela, *Code of Military Justice as amended* (1998), Article 474(4).

¹⁰¹ Vietnam, *Penal Code* (1990), Article 271(1).

¹⁰² Report on the Practice of Egypt, 1997, Chapter 5.1.

and sick, whether civilian or military, must be respected, collected, protected and cared for".¹⁰³

99. The Report on the Practice of Jordan states that "Jordan recognizes that its armed forces are under an obligation to search for the wounded . . . as soon as circumstances permit".¹⁰⁴

100. On the basis of an interview with the Ministry of Home Affairs, the Report on the Practice of Malaysia states that "there exists a practice of searching for the wounded after any confrontation".¹⁰⁵ Furthermore, on the basis of interviews with members of the armed forces, the report states that:

The Maritime Police Unit is responsible for the rescue of any shipwrecked vessel notwithstanding the fact that the vessel is an enemy vessel. Enemy vessels, which are shipwrecked in the course of battle, are only provided with assistance upon surrender. Once enemy ships are no longer seaworthy, no further attack is permitted. Enemy personnel are left to carry out their own evacuation and life saving procedures.

There exists a practice of searching for those parachuting in distress.¹⁰⁶

101. According to the Report on the Practice of the Philippines:

In an armed conflict where guerilla warfare is the strategy used, distinguishing between civilians and combatants is very difficult. This is precisely the reason why the Philippines have adopted the same rules for both civilians and combatants with regard to the search for . . . the wounded [and] sick.¹⁰⁷

102. In 1984, in reply to a question in the House of Commons regarding the war in the South Atlantic in 1982 and in particular the sinking of the Argentine warship *Belgrano* by HMS *Conqueror*, the UK Prime Minister wrote that:

Immediately after the attack upon the *Belgrano*, *Conqueror* herself came under attack from the Argentine escorting destroyers and, to evade this, moved away from the area . . . When on 4th May *Conqueror* signalled she was returning to that area, she was ordered not to attack warships engaged in rescuing survivors from the *Belgrano*.¹⁰⁸

103. According to the Report on US Practice, it is the *opinio juris* of the US that, whenever circumstances permit, all possible measures should be taken to search for the wounded and sick in accordance with Article 8 AP II.¹⁰⁹

¹⁰³ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 62.

¹⁰⁴ Report on the Practice of Jordan, 1997, Chapter 5.1.

¹⁰⁵ Report on the Practice of Malaysia, 1997, Interview with the Ministry of Home Affairs, Chapter 5.1.

¹⁰⁶ Report on the Practice of Malaysia, 1997, Interviews with members of the armed forces, Chapter 5.1.

¹⁰⁷ Report on the Practice of the Philippines, 1997, Chapter 5.1.

¹⁰⁸ UK, House of Commons, Annex to a letter of the Prime Minister in reply to a question, *Hansard*, 29 October 1984, Vol. 65, Written Answers, cols. 786-9, § 13.

¹⁰⁹ Report on US Practice, 1997, Chapter 5.1.

104. According to the Report on the Practice of Zimbabwe, “Zimbabwe seems to regard as customary, the rules of international practice codified in the Geneva Conventions as regards the search for . . . the wounded”.¹¹⁰

III. Practice of International Organisations and Conferences

United Nations

105. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that common Article 3 of the 1949 Geneva Conventions and Article 4 AP II “have long been considered customary international law”.¹¹¹

Other International Organisations

106. No practice was found.

International Conferences

107. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

108. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ held that the rules contained in common Article 3 of the 1949 Geneva Conventions reflected what in 1949 in the *Corfu Channel case (Merits)* the Court had called “elementary considerations of humanity”.¹¹²

V. Practice of the International Red Cross and Red Crescent Movement

109. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

As soon as the tactical situation permits, necessary measures shall be taken . . . to search for [and] collect . . . the wounded and shipwrecked . . .

[C]ivil defence units and personnel shall participate in the search for victims, particularly when there are civilian casualties . . .

Commanders may appeal to the civilian population, to aid societies such as National Red Cross or Red Crescent Societies and to commanders of neutral merchant vessels, yachts or other craft, to collect . . . the wounded and shipwrecked . . .

Civilian persons and aid societies such as National Red Cross or Red Crescent Societies shall be permitted, even on their own initiative, to search for [and] collect . . . the wounded and shipwrecked. No one shall be harmed, prosecuted or punished for such acts . . .

¹¹⁰ Report on the Practice of Zimbabwe, 1998, Chapter 5.1.

¹¹¹ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

¹¹² ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 218.

Local arrangements shall be concluded for the search [and] removal... of the wounded and shipwrecked.¹¹³

110. In an appeal issued in 1983 in the context of the Iran–Iraq War, the ICRC pointed to grave violations of IHL committed by both countries, including “abandoning of enemy wounded on the battlefield”.¹¹⁴

111. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the following principles in particular must be respected:... the wounded, the sick and the shipwrecked must be collected... regardless of the party to which they belong”.¹¹⁵

112. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia “to collect... wounded and sick”.¹¹⁶

113. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “all the wounded and sick, both civilian and military, must be collected”.¹¹⁷

114. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC emphasised that “all the wounded and sick must be collected... without distinction, in accordance with the provisions laid down primarily in the First and Fourth Geneva Conventions”.¹¹⁸

115. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that “the wounded and sick must be collected... regardless of the party to which they belong”.¹¹⁹

VI. Other Practice

116. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “the wounded and sick shall be collected... by the party in conflict which has them in its power”.¹²⁰

¹¹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 483–486 and 535.

¹¹⁴ ICRC, Conflict between Iraq and Iran: ICRC Appeal, *IRRC*, No. 235, 1983, p. 221.

¹¹⁵ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

¹¹⁶ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹¹⁷ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

¹¹⁸ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹¹⁹ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

¹²⁰ ICRC archive document.

117. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that “every possible measure shall be taken, without delay, to search for and collect wounded [and] sick”.¹²¹

Evacuation

I. Treaties and Other Instruments

Treaties

118. Article 15, second and third paragraphs, GC I provides that:

Whenever circumstances permit, an armistice or a suspension of fire shall be arranged, or local arrangements made, to permit the removal, exchange and transport of the wounded left on the battlefield.

Likewise, local arrangements may be concluded between Parties to the conflict for the removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way to that area.

119. Article 18, second paragraph, GC II provides that:

Whenever circumstances permit, the Parties to the conflict shall conclude local arrangements for the removal of the wounded and sick by sea from a besieged or encircled area and for the passage of medical and religious personnel and equipment on their way to that area.

120. Article 17 GC IV provides that:

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded [and] sick . . . and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.

121. Paragraph 7(b)(2) of the 1987 NATO STANAG 2067 provides that “stragglers requiring medical care should be treated and, if necessary, evacuated through medical channels”.

Other Instruments

122. Article 11 of the 1880 Oxford Manual provides that “commanders in chief have power to deliver immediately to the enemy outposts hostile soldiers who have been wounded in an engagement, when circumstances permit and with the consent of both parties”. Article 12 provides that “evacuations, together

¹²¹ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, 1991, p. 335.

with the persons under whose direction they take place, shall be protected by neutrality”.

123. Paragraph 1 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “all wounded and sick on land shall be treated in accordance with the provisions of the First Geneva Convention”.

124. Paragraph 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “the treatment provided to the wounded, sick and shipwrecked shall be in accordance with the provisions of the First and Second Geneva Conventions of 12 August 1949”.

125. Section III(2)(b) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina provides that “appropriate measures will be taken to permit the evacuation of the wounded, the sick and other vulnerable persons”.

126. Section 9.2 of the 1999 UN Secretary-General’s Bulletin states that “whenever circumstances permit, a suspension of fire shall be arranged, or other local arrangements made, to permit the [removal, exchange and transport] of the wounded [and] the sick . . . left on the battlefield”.

II. National practice

Military Manuals

127. Argentina’s Law of War Manual restates the provisions of Article 15 GC I.¹²²

128. Australia’s Commanders’ Guide provides that:

Belligerents should endeavour to conclude local agreements for the removal from besieged or encircled areas of wounded [and] sick . . . and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.¹²³

129. Australia’s Defence Force Manual states that “commanders may make agreements for the exchange, removal and transport of the wounded left on the field, besieged or encircled areas and to allow the passage of medical personnel and chaplains proceeding to any such area”.¹²⁴ It also states that:

The opposing parties are required to try and conclude local agreements for the removal from besieged or encircled areas of wounded [and] sick . . . and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas.¹²⁵

¹²² Argentina, *Law of War Manual* (1969), § 3.003.

¹²³ Australia, *Commanders’ Guide* (1994), § 926.

¹²⁴ Australia, *Defence Force Manual* (1994), § 986.

¹²⁵ Australia, *Defence Force Manual* (1994), § 735.

130. Belgium's *Teaching Manual for Soldiers* states that "if operations so permit, the wounded must be . . . evacuated from the combat zone".¹²⁶

131. Benin's *Military Manual* provides that "combatants shall participate in the . . . evacuation of the wounded and sick".¹²⁷ It further provides that "as soon as the tactical situation permits, the wounded and sick shall be evacuated by the appropriate channel".¹²⁸

132. Canada's *LOAC Manual* provides that "if circumstances permit, the parties to a conflict must endeavour to conclude local agreements for the removal from besieged areas of wounded [and] sick".¹²⁹ It adds that:

In the case of land engagement, agreements between commanders, whether by armistice or cease-fire, may be made for the exchange, removal and transport of the wounded left on the field. In both land and sea engagements, arrangements may also be made for the removal of the wounded and sick from a besieged area and for the passage of medical personnel and chaplains proceeding to such an area.¹³⁰

133. Canada's *Code of Conduct* states that "whenever circumstances permit, a suspension of fire shall be arranged or local arrangements made to permit the removal of the sick, wounded and dead, and the exchange and transport of the wounded and sick".¹³¹

134. Cameroon's *Instructors' Manual* provides that evacuation of wounded and sick can take place during combat, after combat or during a cease-fire.¹³²

135. Croatia's *LOAC Compendium* provides that "whenever the tactical situation permits, all wounded and sick must be . . . evacuated".¹³³

136. The *Military Manual of the Dominican Republic* states that "wounded prisoners and captives shall be evacuated as soon as possible to the rear through medical channels".¹³⁴

137. Ecuador's *Naval Manual* provides that "whenever circumstances permit, an armistice or cease-fire should be arranged to enable the wounded and sick to be located and removed to safety and medical care".¹³⁵

138. France's *LOAC Manual* restates Articles 15 GC I and 18 GC II.¹³⁶

139. Hungary's *Military Manual* states that "whenever the tactical situation permits, the wounded, sick and shipwrecked shall be . . . evacuated".¹³⁷

140. According to India's police regulations, police forces "should make arrangements for the rapid evacuation to hospital by ambulance of the sick and of persons injured by police fire".¹³⁸

¹²⁶ Belgium, *Teaching Manual for Soldiers* (undated), p. 17.

¹²⁷ Benin, *Military Manual* (1995), Fascicule II, p. 10.

¹²⁸ Benin, *Military Manual* (1995), Fascicule II, p. 12.

¹²⁹ Canada, *LOAC Manual* (1999), p. 6-4, § 35.

¹³¹ Canada, *Code of Conduct* (2001), Rule 7, § 3.

¹³² Cameroon, *Instructors' Manual* (1992), p. 67.

¹³³ Croatia, *LOAC Compendium* (1991), p. 45.

¹³⁴ Dominican Republic, *Military Manual* (1980), p. 8.

¹³⁵ Ecuador, *Naval Manual* (1989), § 11.4.

¹³⁶ France, *LOAC Manual* (2001), pp. 37 and 64.

¹³⁷ Hungary, *Military Manual* (1992), p. 73.

¹³⁸ India, *Police Manual* (1986), Article 13(xvi); *West Bengal Police Regulations* (1962), Article 156(a); *Madras Police Standing Orders* (1951), Article 667.

141. Italy's LOAC Elementary Rules Manual states that "wounded enemy combatants and shipwrecked shall be evacuated".¹³⁹

142. Kenya's LOAC Manual states that "arrangements may be made between the Parties to permit the removal, exchange and transport of the wounded left on the battlefield".¹⁴⁰ The manual further states that "a local cease-fire may be arranged for the removal from the besieged or encircled areas of the wounded and sick".¹⁴¹

143. Madagascar's Military Manual provides that the wounded and shipwrecked shall be evacuated.¹⁴² It further notes that "local arrangements may be concluded for . . . evacuation of the wounded and shipwrecked".¹⁴³

144. The Military Manual of the Netherlands provides that "whenever circumstances permit, a cease-fire or a suspension of fire should be sought to enable the . . . removal of the wounded".¹⁴⁴

145. New Zealand's Military Manual provides that:

In the case of a land engagement, agreements between the commanders, whether by armistice or cease-fire, may be made for the exchange, removal and transport of the wounded left on the field. In both land and sea engagements, arrangements may be made for the removal of the wounded and sick from a besieged or encircled area and for the passage of medical personnel and chaplains proceeding to such an area.¹⁴⁵

146. Nigeria's Manual on the Laws of War provides that "whenever possible, an armistice or cease-fire should be arranged or local arrangements should be made to enable the transfer, exchange and carriage of the wounded who have been left on the battlefield".¹⁴⁶

147. The Military Directive to Commanders of the Philippines provides that:

Medical teams must be made available to provide . . . evacuation to injured civilians caught in the crossfire . . .

Coordination and liaison with national and local government agencies should be pursued in undertaking the following immediate tasks after [the] conduct of operations . . . rescue, evacuation and hospitalization.¹⁴⁷

148. The Military Instructions of the Philippines provides that:

In the aftermath of military or law enforcement operations involving a firefight that results in unavoidable casualties, caring for the wounded . . . must be a paramount concern of all commanders and troops at all levels . . . To increase their chances of survival, their immediate evacuation to the nearest clinic or hospital must be ensured.¹⁴⁸

¹³⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 75.

¹⁴⁰ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.

¹⁴¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.

¹⁴² Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 22.

¹⁴³ Madagascar, *Military Manual* (1994), Fiche No. 7-SO, § B.

¹⁴⁴ Netherlands, *Military Manual* (1993), p. VI-2.

¹⁴⁵ New Zealand, *Military Manual* (1992), § 1003(1), see also § 314(2).

¹⁴⁶ Nigeria, *Manual on the Laws of War* (undated), § 34.

¹⁴⁷ Philippines, *Military Directive to Commanders* (1988), Guideline 4(d) and (h).

¹⁴⁸ Philippines, *Military Instructions* (1989), § 4.

149. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that members of the AFP and PNP must at the earliest possible opportunity turn the enemy *hors de combat* (e.g. wounded, surrendered/captured) “over to higher echelons of command/office for proper disposition”.¹⁴⁹

150. Romania’s Soldiers’ Manual provides that wounded and sick enemy combatants shall be evacuated from the combat zone.¹⁵⁰

151. Rwanda’s Military Instructions states that immediate evacuation of wounded persons to the nearest clinic or hospital should be ensured.¹⁵¹

152. Senegal’s IHL Manual provides that during internal disturbances, local agreements may be concluded to evacuate the wounded and allow the passage of medical assistance.¹⁵²

153. Spain’s LOAC Manual provides that “‘as far as circumstances permit’, agreements shall be concluded to facilitate the search, removal, exchange and transport of wounded left on the battlefield”.¹⁵³ It further states that “wounded and sick enemies shall be evacuated as soon as possible” and “in the same conditions as our own troops”.¹⁵⁴ The manual specifies that “in besieged or encircled areas where there is civilian population, it shall be endeavoured to conclude local agreements with the enemy to organise the evacuation of the wounded [and] sick . . . and the passage of medical and religious personnel”.¹⁵⁵

154. Switzerland’s Basic Military Manual states that “local arrangements or a temporary cease-fire shall be concluded to permit the removal, exchange and transport of wounded and sick left on the battlefield and for the evacuation or exchange of wounded and sick from a besieged or encircled area”.¹⁵⁶

155. According to Togo’s Military Manual, “combatants shall participate in the . . . evacuation of the wounded and sick”.¹⁵⁷ It adds that “as soon as the tactical situation permits, the wounded and sick shall be evacuated by the appropriate channel”.¹⁵⁸

156. The UK Military Manual states that “belligerents should endeavour to conclude local agreements for the removal from besieged or encircled areas of wounded [and] sick . . . and for the passage of ministers of all religions and medical personnel and medical equipment on their way to such areas”.¹⁵⁹ It further states that “whenever circumstances permit, a local armistice or suspension

¹⁴⁹ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a)(3).

¹⁵⁰ Romania, *Soldiers’ Manual* (1991), p. 9.

¹⁵¹ Rwanda, *Military Instructions* (1987), pp. 41–42.

¹⁵² Senegal, *IHL Manual* (1999), p. 20.

¹⁵³ Spain, *LOAC Manual* (1996), Vol. I, § 2.4.a.(1), see also § 2.6.b.(1).

¹⁵⁴ Spain, *LOAC Manual* (1996), Vol. I, §§ 5.2.(d).4 and 7.3.(a).11.

¹⁵⁵ Spain, *LOAC Manual* (1996), Vol. I, § 9.4.a.

¹⁵⁶ Switzerland, *Basic Military Manual* (1987), Article 71, see also Article 12(2).

¹⁵⁷ Togo, *Military Manual* (1996), Fascicule II, p. 10.

¹⁵⁸ Togo, *Military Manual* (1996), Fascicule II, p. 12.

¹⁵⁹ UK, *Military Manual* (1958), § 29, see also § 343.

of fire must be arranged to permit the removal of the wounded left on the battlefield".¹⁶⁰

157. The UK LOAC Manual provides that "arrangements may be made between the parties to permit the removal, exchange and transport of the wounded left on the battlefield".¹⁶¹ It also states that "in appropriate local circumstances, arrangements should be made for the evacuation by sea of the wounded and sick and for the passage of medical and religious personnel and equipment especially to besieged areas" and that "a local cease-fire may be arranged for the removal from besieged or encircled areas of the wounded and sick".¹⁶²

158. The US Field Manual reproduces Articles 15 GC I and 18 GC II.¹⁶³

159. The US Air Force Pamphlet states that "Article 15 [GC I] . . . authorizes the conclusion of local arrangements between the parties for removal or exchange of wounded and sick from a besieged or encircled area, and for the passage of medical and religious personnel and equipment on their way thereto".¹⁶⁴ It adds that "parties are encouraged to conclude local arrangements for the removal of the wounded and sick by sea from besieged or encircled areas, and for the passage of medical and religious personnel and equipment on their way thereto".¹⁶⁵

160. The US Soldier's Manual instructs soldiers to evacuate sick and wounded captives to the rear through medical channels "as soon as possible".¹⁶⁶

161. The US Naval Handbook states that:

When circumstances permit, an armistice or cease-fire should be arranged to enable the wounded and sick to be located and removed to safety and medical care.

...

Following each naval engagement at sea, the belligerents are obligated to take all possible measures, consistent with the security of their forces, to search for and rescue the shipwrecked.¹⁶⁷

162. The YPA Military Manual of the SFRY (FRY) provides that:

At all times and especially after an engagement, all appropriate measures shall be taken without delay to . . . transport [the wounded and sick] to appropriate medical units . . . A cease-fire may be arranged in order to . . . transport wounded and sick left on the battlefield.¹⁶⁸

National Legislation

163. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in both international and

¹⁶⁰ UK, *Military Manual* (1958), § 342.

¹⁶¹ UK, *LOAC Manual* (1981), Section 6, p. 22, § 3.

¹⁶² UK, *LOAC Manual* (1981), Section 7, p. 26, § 2 and Section 9, p. 34, § 3.

¹⁶³ US, *Field Manual* (1956), §§ 216 and 256.

¹⁶⁴ US, *Air Force Pamphlet* (1976), § 12-2a. ¹⁶⁵ US, *Air Force Pamphlet* (1976), § 12-3a.

¹⁶⁶ US, *Soldier's Manual* (1984), p. 17. ¹⁶⁷ US, *Naval Handbook* (1995), § 11-4.

¹⁶⁸ SFRY (FRY), *YPA Military Manual* (1988), § 164.

non-international armed conflicts, at any time and especially after an engagement, the wounded and sick shall be evacuated from the battlefield.¹⁶⁹

164. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹⁷⁰

165. Under Iraq's Military Penal Code, failure to bring a wounded person to a designated location is an offence.¹⁷¹

166. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 15 GC I, 18 GC II and 17 GC IV, is a punishable offence.¹⁷²

167. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... is liable to imprisonment".¹⁷³

National Case-law

168. No practice was found.

Other National Practice

169. The Report on the Practice of Bosnia and Herzegovina provides the following examples concerning the evacuation and transportation of the wounded and sick: instructions of the army general in November 1993 to the command of the 4th Corps regarding the evacuation of the wounded and sick;¹⁷⁴ approval given by the army general to the command of the 3rd Corps in December 1993 for the evacuation of 11 seriously ill persons from Vitez, with the assistance of the ICRC, as well as for the evacuation of 15 wounded HVO members;¹⁷⁵ and instructions of the army general to the 5th Corps in December 1993 regarding the evacuation of the wounded and sick.¹⁷⁶

170. In February 1987, the French government issued a communiqué in relation to the besieged Palestinian camps in southern Lebanon and invited "the entire

¹⁶⁹ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 24.

¹⁷⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹⁷¹ Iraq, *Military Penal Code* (1940), Article 115C.

¹⁷² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁷³ Norway, *Military Penal Code as amended* (1902), § 108(a).

¹⁷⁴ Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Instructions to the 4th Corps, No. 1/297-536, 13 November 1993, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 5.1.

¹⁷⁵ Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Instructions to the 3rd Corps, No. 1/297-590, 5 December 1993, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 5.1.

¹⁷⁶ Bosnia and Herzegovina, Headquarters of the Supreme Command of the Armed Forces, Office of the Commander in Chief, Instructions to the 5th Corps, No. 1/297-625, 13 December 1993, Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 5.1.

international community to mobilise and act in solidarity so that . . . wounded can be safely evacuated".¹⁷⁷

171. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran evacuated wounded Iraqi combatants to safe places, in accordance with the principles of Islamic law.¹⁷⁸

172. The Guidelines on Evacuations adopted in 1991 by the Presidential Human Rights Committee of the Philippines provided that "non-Government health workers . . . shall be permitted to go to evacuation centers to render medical/relief assistance to evacuees".¹⁷⁹

III. Practice of International Organisations and Conferences

United Nations

173. In a resolution adopted in 1978 in the context of the conflict in Lebanon, the UN Security Council called upon the belligerents to allow ICRC units into the conflict area to evacuate the wounded.¹⁸⁰

174. In a resolution adopted in 1985, the UN General Assembly appealed to the government of El Salvador to "permit the International Committee of the Red Cross to continue to evacuate those wounded and maimed by war to where they can receive needed medical attention".¹⁸¹

175. In a resolution adopted in 1986, the UN Commission on Human Rights reiterated the request to:

the Government of El Salvador and the opposition forces to co-operate fully with the humanitarian organizations dedicated to alleviating the suffering of the civilian population, wherever these organizations operate in the country, and to permit the International Committee of the Red Cross to continue to evacuate those wounded and maimed by the war to places where they can receive medical attention they need.¹⁸²

176. In a resolution adopted in 1988, the UN Commission on Human Rights requested the government of El Salvador and the FMLN "with the intention of humanizing the conflict, to continue to apply the agreements for the evacuation of war-wounded for medical attention unaffected by new [ex]changes and negotiations".¹⁸³ This request was reiterated in a subsequent resolution adopted in 1989.¹⁸⁴

¹⁷⁷ France, Ministry of Foreign Affairs, Communiqué on Palestinian camps under siege in Lebanon, 11 February 1987, *Politique étrangère de la France*, February 1987, p. 103.

¹⁷⁸ Report on the Practice of Iran, 1997, Chapter 5.1.

¹⁷⁹ Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, 26 March 1991, § 5.

¹⁸⁰ UN Security Council, Res. 436, 6 October 1978, § 2.

¹⁸¹ UN General Assembly, Res. 40/139, 13 December 1985, § 9; see also Res. 41/157, 4 December 1986, § 8.

¹⁸² UN Commission on Human Rights, Res. 1986/39, 12 March 1986, § 6.

¹⁸³ UN Commission on Human Rights, Res. 1988/65, 10 March 1988, § 11.

¹⁸⁴ UN Commission on Human Rights, Res. 1989/68, 8 March 1989, § 11.

177. In a resolution adopted in 1991, the UN Commission on Human Rights called upon the parties to the conflict in El Salvador to guarantee respect for IHL, “particularly with regard to the evacuation of the war-wounded and maimed in order that they may receive prompt medical attention”.¹⁸⁵

178. In a resolution adopted in 1987 on the situation in El Salvador, the UN Sub-Commission on Human Rights welcomed:

the implementation of the agreement reached by both contending parties to allow the International Committee of the Red Cross to evacuate the war-wounded and disabled of the Farabundo Marti National Liberation Front without the need for exchanges or prior negotiations in order for them to receive the necessary medical care.¹⁸⁶

179. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights expressed regret that “the Government of El Salvador has continued to prevent the International Committee of the Red Cross from evacuating the war-wounded and maimed to other countries and frequently does not even allow it to transfer the seriously wounded to a local emergency hospital”. It reminded “the Government of El Salvador that in accordance with Additional Protocol II to the Geneva Conventions . . . it may not prevent [the] evacuation [of the war-wounded and disabled] by the International Committee of the Red Cross so that they may receive the medical attention they require”.¹⁸⁷

180. In 1996, in a report concerning Liberia, the UN Secretary-General reported that UNOMIL had facilitated discussions on the evacuation of the wounded.¹⁸⁸

Other International Organisations

181. In two resolutions adopted in 1995 in the context of the conflict in Chechnya, the European Parliament called on “the Russian and Chechen sides to call an immediate humanitarian ceasefire to permit the retrieval of the . . . wounded”.¹⁸⁹

International Conferences

182. No practice was found.

¹⁸⁵ UN Commission on Human Rights, Res. 1991/75, 6 March 1991, § 9.

¹⁸⁶ UN Sub-Commission on Human Rights, Res. 1987/18, 2 September 1987, § 4.

¹⁸⁷ UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, preamble and § 4, see also § 7.

¹⁸⁸ UN Secretary-General, 15th progress report on UNOMIL, UN Doc. S/1996/47, 23 January 1996, § 26.

¹⁸⁹ European Parliament, Resolution on the humanitarian situation in Chechnya and the neighbouring republics of Ingushetia, Daghestan and Northern Ossetia, 16 February 1995, § 1; Resolution on human rights in Chechnya, 16 March 1995, § 2.

IV. Practice of International Judicial and Quasi-judicial Bodies

183. In the *Aloeboetoe and Others case* before the IACtHR in 1988, the facts as stated in the petition alleged that following an incident in which a group of soldiers arrested and shot a number of “unarmed maroons (bushnegroes)” on suspicion of membership of the Jungle Commando, “the representative of the International Red Cross received a permit to evacuate Mr. Aside [a seriously injured man] after negotiating with the authorities [of Suriname] for 24 hours”.¹⁹⁰

V. Practice of the International Red Cross and Red Crescent Movement

184. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “evacuation through the appropriate channel shall be organised and start as rapidly as the tactical situation permits” and that “local arrangements shall be concluded for the . . . evacuation of the wounded and shipwrecked”.¹⁹¹

185. On numerous occasions, the ICRC has acted as a neutral intermediary and provided its good offices in order to facilitate the negotiation of truces or cease-fire agreements for the removal of wounded and sick.¹⁹² It has been the case, in particular, in the following situations: in the Palestinian conflict (between June and August 1948);¹⁹³ during the clashes in Budapest (November 1956);¹⁹⁴ in the conflict between the armed forces of France and Tunisia in Bizerte (July 1961);¹⁹⁵ during the civil war in the Dominican Republic (May 1961);¹⁹⁶ during the events in Kisangani between European mercenaries and the Congolese army (July 1967);¹⁹⁷ during the hostilities opposing the Jordanian armed forces and Palestinian movements (September 1967);¹⁹⁸ during the 1973 war between Egypt and Israel (November 1973 and January 1974);¹⁹⁹ during the civil

¹⁹⁰ IACtHR, *Aloeboetoe and Others case*, Judgement, 4 December 1991, § 15.

¹⁹¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 507 and 535, see also § 581.

¹⁹² François Bugnion, *Le Comité International de la Croix-Rouge et la Protection des Victimes de la Guerre*, ICRC, Geneva, 1994, pp. 557–564.

¹⁹³ *IRRC*, No. 354, June 1948, pp. 401–407; *IRRC*, No. 356, August 1948, pp. 552–553; *IRRC*, No. 357, September 1948, pp. 618–620; ICRC, Report of Mission of Mr de Reyner, 31 March 1948; ICRC, Report of Mission of Dr Lehner and Mrs Torin, 15 June 1948; ICRC, Report of Mission of Mr de Reyner, January 1948–July 1949.

¹⁹⁴ *IRRC*, No. 456, December 1956, p. 720.

¹⁹⁵ *IRRC*, No. 515, November 1961, p. 530; *Keesing's Contemporary Archives*, 1961, pp. 18341–18343.

¹⁹⁶ *IRRC*, No. 558, June 1965, p. 283; *IRRC*, No. 559, July 1965, pp. 335–337; ICRC, *Annual Report 1965*, Geneva, 1966, pp. 39–42; *Keesing's Contemporary Archives*, 1965, pp. 20813–20818.

¹⁹⁷ *IRRC*, No. 584, August 1967, pp. 371–372; *Keesing's Contemporary Archives*, 1967, p. 22188.

¹⁹⁸ *IRRC*, No. 622, October 1970, pp. 618–624; *Keesing's Contemporary Archives*, 1970, p. 24230.

¹⁹⁹ *IRRC*, No. 660, December 1973, pp. 728–729; *IRRC*, No. 662, February 1974, pp. 92–93; ICRC, *Annual Report 1973*, Geneva, 1974, pp. 12–13; ICRC, *Annual Report 1974*, Geneva, 1975, p. 20; *Keesing's Contemporary Archives*, 1973, pp. 26202–26203.

war in Lebanon (August 1976 and 1981),²⁰⁰ during the civil war in Nicaragua (September 1978);²⁰¹ during the civil war in Chad (February and March 1979);²⁰² and during the Israeli offensive in Lebanon (August and September 1982).²⁰³

186. In a communication to the press in 1991, the ICRC urged all the parties to the conflict in Somalia to help the Red Cross and Red Crescent “in evacuating the wounded”.²⁰⁴

187. In 1992, the ICRC reminded a State of its obligation to transfer the wounded to places where they could receive adequate medical care.²⁰⁵

188. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “when [the wounded and sick] cannot receive the care needed for their survival on the spot, their evacuation shall be organized and facilitated, insofar as the security situation permits”.²⁰⁶

189. In a communication to the press issued in 1996 in the context of the conflict in Chechnya, the ICRC called upon the parties to do everything possible to facilitate the evacuation of the wounded and sick to hospitals.²⁰⁷ In another communication to the press later the same year, the ICRC appealed to the parties to provide security guarantees to enable its delegates to evacuate the wounded.²⁰⁸

VI. Other Practice

190. In 1984, in the context of the conflict in East Timor, a statement issued by the head of the FRETILIN external delegation referred to an incident in which a FALINTIL unit was forced to withdraw when Indonesian helicopters intervened to evacuate the wounded after an attack.²⁰⁹

²⁰⁰ *IRRC*, No. 692, August 1976, pp. 477–478; *IRRC*, No. 693, September 1976, pp. 545–546; *ICRC, Annual Report 1976*, Geneva, 1977, p. 6; *ICRC, Annual Report 1981*, Geneva, 1982, pp. 52–53; *Keesing's Contemporary Archives*, 1976, pp. 28119–28121.

²⁰¹ *IRRC*, No. 713, September–October 1978, p. 293; *IRRC*, No. 717, May–June 1979, pp. 160–161; *IRRC*, No. 718, July–August 1979, pp. 206–207; *Keesing's Contemporary Archives*, 1978, p. 29375.

²⁰² *IRRC*, No. 716, March–April 1979, pp. 95–96; *IRRC*, No. 723, May–June 1980, pp. 148–150; *Keesing's Contemporary Archives*, 1981, p. 30693.

²⁰³ *IRRC*, No. 737, September–October 1982, p. 305; *ICRC, Annual Report 1982*, Geneva, 1983, pp. 56–57; *Keesing's Contemporary Archives*, 1983, pp. 31914–31920.

²⁰⁴ ICRC, Communication to the Press No. 91/49, Desperate situation in Mogadishu, 29 November 1991.

²⁰⁵ ICRC archive document.

²⁰⁶ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

²⁰⁷ ICRC, Communication to the Press No. 96/10, Chechen conflict: ICRC appeal, 8 March 1996, § 2.

²⁰⁸ ICRC, Communication to the Press No. 96/25, Russian Federation/Chechnya: ICRC calls on all parties to observe a truce, 10 August 1996, § 1.

²⁰⁹ São Tomé and Príncipe, Documents on the question of East Timor submitted to the UN Secretariat, UN Doc. A/39/345-S/16668, 16 July 1984, Annex, p. 14.

B. Treatment and Care of the Wounded, Sick and Shipwrecked

Medical care

Note: For practice concerning humane treatment of the wounded and sick, see Chapter 32, section A. For practice concerning the provision of basic necessities to persons deprived of their liberty, including medical care, see Chapter 37, section A.

I. Treaties and Other Instruments

Treaties

191. Article 6 of the 1864 GC provides that “wounded or sick combatants, to whatever nation they may belong, shall be . . . cared for”.

192. Common Article 3 of the 1949 Geneva Conventions provides that “the wounded and sick shall be . . . cared for”. (Article 3 GC II adds the shipwrecked)

193. Article 12, second paragraph, GC I and Article 12, second paragraph, GC II provide that members of the armed forces who are wounded, sick or shipwrecked shall be “cared for by the Party to the conflict in whose power they may be . . . [T]hey shall not wilfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created”.

194. Article 15, first paragraph, GC I provides that “at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures . . . to ensure . . . adequate care” of the wounded and sick.

195. Article 18, first and second paragraphs, GC I states that:

The military authorities may appeal to the charity of the inhabitants voluntarily to . . . care for, under their direction, the wounded and sick, granting persons who have responded to this appeal the necessary protection and facilities . . .

The military authorities shall permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of whatever nationality.

196. Article 18, first paragraph, GC II provides that “after each engagement, Parties to the conflict shall, without delay, take all possible measures . . . to ensure . . . adequate care” of the shipwrecked, wounded and sick.

197. Article 21, first paragraph, GC II states that “the Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft, to take on board . . . wounded, sick or shipwrecked persons”.

198. Article 16, first paragraph, GC IV provides that the wounded and sick “shall be the object of particular protection and respect”.

199. Article 10 AP I provides that:

1. All the wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected.
2. In all circumstances, they shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.

Article 10 AP I was adopted by consensus.²¹⁰

200. Article 17(2) AP I provides that “the Parties to the conflict may appeal to the civilian population and the aid societies referred to in paragraph 1 [i.e. aid societies, such as national Red Cross (Red Crescent, Red Lion and Sun) Societies] to . . . care for the wounded, sick and shipwrecked”. Article 17 AP I was adopted by consensus.²¹¹

201. Article 7 AP II provides with regard to the wounded, sick and shipwrecked that:

1. All the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict, shall be respected and protected.
2. In all circumstances they shall be treated humanely and shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition.

Article 7 AP II was adopted by consensus.²¹²

202. Article 8 AP II provides that “whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay . . . to ensure . . . adequate care” of the wounded and sick. Article 8 AP II was adopted by consensus.²¹³

203. Article 18(1) AP II provides that “the civilian population may, even on its own initiative, offer to . . . care for the wounded, sick and shipwrecked”. Article 18 AP II was adopted by consensus.²¹⁴

204. Article 7(b)(2) of the 1987 NATO STANAG 2067 provides that “stragglers requiring medical care should be treated”.

Other Instruments

205. Article 79 of the 1863 Lieber Code provides that “every captured wounded enemy shall be medically treated, according to the ability of the medical staff”.

206. Article 10 of the 1880 Oxford Manual provides that “wounded or sick soldiers shall be brought in and cared for”.

207. Article 6 of the 1979 Code of Conduct for Law Enforcement Officials provides that “law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required”. The commentary on the Article states that:

While the medical personnel are likely to be attached to the law enforcement operation, law enforcement officials must take into account the judgement of such personnel when they recommend providing the person in custody with appropriate

²¹⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69.

²¹¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

²¹² CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109.

²¹³ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.

²¹⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 150.

treatment through, or in consultation with, medical personnel from outside the law enforcement operation.

208. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that “in the event of the use of force and in case of armed conflict . . . the wounded and the sick shall have the right to medical treatment”.

209. In paragraphs 1 and 2 of the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia undertook to apply the principle that “wounded and ill persons must be helped and protected in all circumstances”.

210. Paragraph 1 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “all wounded and sick on land shall be treated in accordance with the provisions of the First Geneva Convention”.

211. Paragraph 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that in all circumstances, the wounded, sick and shipwrecked “shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition”.

212. Article 4(2) and (9) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “the wounded and the sick shall be collected and cared for by the party to the armed conflict which has them in its custody or responsibility” and that “every possible measure shall be taken, without delay, . . . to ensure their adequate care”.

213. Section 9.1 of the 1999 UN Secretary-General’s Bulletin states that “members of the armed forces and other persons in the power of the United Nations force who are wounded or sick shall . . . receive the medical care and attention required by their condition”.

II. National Practice

Military Manuals

214. Argentina’s Law of War Manual (1969) provides that “appeal can be made to the civilian population for the . . . care of the wounded and sick”.²¹⁵

215. Argentina’s Law of War Manual (1989) refers to Articles 10 AP I and 7 AP II and states that “in all circumstances, the wounded, sick and shipwrecked of either party shall be respected, protected . . . and shall receive, to the fullest extent practicable and with the least possible delay, appropriate medical care”.²¹⁶

216. Australia’s Commanders’ Guide provides that “wounded, sick and shipwrecked combatants are to be afforded necessary medical care”.²¹⁷ It also

²¹⁵ Argentina, *Law of War Manual* (1969), § 3.006.

²¹⁶ Argentina, *Law of War Manual* (1989), § 2.03.

²¹⁷ Australia, *Commanders’ Guide* (1994), § 622.

provides that “civilians in enemy territory are protected persons and as such must be afforded necessary medical treatment”.²¹⁸

217. Australia’s Defence Force Manual provides that “parties to a conflict must take all possible measures to . . . ensure . . . care” of the wounded, sick and shipwrecked.²¹⁹ It adds that wounded, sick and shipwrecked combatants shall not be “left without proper medical care and attention, or . . . exposed to conditions which might result in contagion or infection”.²²⁰

218. Belgium’s Law of War Manual refers to common Article 3 of the 1949 Geneva Conventions and provides that the wounded and sick shall be cared for.²²¹

219. Belgium’s Teaching Manual for Soldiers states that “if operations so permit, the wounded must be . . . cared for”.²²²

220. Benin’s Military Manual provides that “the wounded and sick shall be . . . cared for by the party to the conflict in whose power they may be”.²²³ The manual instructs soldiers to “care for and protect” wounded enemy combatants.²²⁴

221. Bosnia and Herzegovina’s Military Instructions provides that “the wounded and sick who have ceased to resist . . . must be provided with medical care and assistance”.²²⁵

222. Burkina Faso’s Disciplinary Regulations provides that “whenever circumstances permit, the wounded, sick and shipwrecked shall be . . . protected and cared for”.²²⁶

223. Cameroon’s Disciplinary Regulations states that “when circumstances so permit, the wounded, sick and shipwrecked shall be . . . cared for”.²²⁷

224. Cameroon’s Instructors’ Manual states that “wounded enemy combatants shall be cared for”.²²⁸ It also states that “an appeal may be launched to the civilian population to help National Societies of the Red Cross and Red Crescent to . . . care for the wounded, sick and shipwrecked”.²²⁹

225. Canada’s LOAC Manual states that AP I “also contains provisions amplifying the obligation to care for persons protected by GC I and GC II” and that “the innovation of AP I in this area is to extend the scope of the earlier Conventions so that civilians as well as military personnel are entitled to protection”.²³⁰ It also provides that “the wounded, sick and shipwrecked shall not

²¹⁸ Australia, *Commanders’ Guide* (1994), § 609.

²¹⁹ Australia, *Defence Force Manual* (1994), § 986.

²²⁰ Australia, *Defence Force Manual* (1994), § 990(b)–(c).

²²¹ Belgium, *Law of War Manual* (1983), p. 17.

²²² Belgium, *Teaching Manual for Soldiers* (undated), pp. 16–17, see also p. 32.

²²³ Benin, *Military Manual* (1995), Fascicule II, p. 4, see also pp. 9 and 12.

²²⁴ Benin, *Military Manual* (1995), Fascicule I, p. 16, see also Fascicule III, p. 5.

²²⁵ Bosnia and Herzegovina, *Military Instructions* (1992), § 14(1)

²²⁶ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(1).

²²⁷ Cameroon, *Disciplinary Regulations* (1975), Article 31.

²²⁸ Cameroon, *Instructors’ Manual* (1992), p. 40, § 152, p. 44, § 163(1) and p. 149, § 531(2).

²²⁹ Cameroon, *Instructors’ Manual* (1992), p. 96.

²³⁰ Canada, *LOAC Manual* (1999), p. 9-1, § 2.

be left without proper medical care".²³¹ The manual further states that "appeals may be made to local inhabitants and relief societies to . . . care for the wounded and sick. Such inhabitants and relief societies, even in occupied or invaded territory, shall be permitted spontaneously to . . . care for such personnel."²³² In the case of non-international armed conflicts, the manual states that "after an engagement and whenever circumstances permit, all possible steps must be taken without delay . . . to ensure . . . adequate care" of the wounded, sick and shipwrecked".²³³

226. Canada's Code of Conduct provides that "in all circumstances [the wounded, sick and shipwrecked] shall . . . receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition".²³⁴ It also provides that "military authorities may ask the inhabitants in the area of conflict to voluntarily . . . care for the wounded under their direction".²³⁵

227. Colombia's Basic Military Manual provides that all wounded and sick combatants shall be cared for.²³⁶

228. Colombia's Instructors' Manual provides that "wounded enemy combatants must be cared for".²³⁷

229. Colombia's Circular on Fundamental Rules of IHL provides that "the wounded and sick shall be . . . cared for by the parties to the conflict".²³⁸

230. Congo's Disciplinary Regulations states that "when circumstances so permit, the wounded, sick and shipwrecked shall be . . . cared for".²³⁹

231. Croatia's Commanders' Manual states that adequate care must be taken of the wounded and shipwrecked.²⁴⁰

232. Croatia's LOAC Compendium, Commanders' Manual and Soldiers' Manual instruct soldiers to protect civilian boats that rescue the shipwrecked.²⁴¹

233. Croatia's Instructions on Basic Rules of IHL requires that the wounded and sick be cared for.²⁴²

234. Ecuador's Naval Manual provides that wounded and sick members of the armed forces shall be cared for.²⁴³

235. El Salvador's Soldiers' Manual provides that wounded and sick persons shall be assisted and cared for in all circumstances.²⁴⁴

²³¹ Canada, *LOAC Manual* (1999), p. 9-1, § 18.

²³² Canada, *LOAC Manual* (1999), p. 9-2, § 12.

²³³ Canada, *LOAC Manual* (1999), p. 17-4, § 32.

²³⁴ Canada, *Code of Conduct* (2001), Rule 7, § 1.

²³⁵ Canada, *Code of Conduct* (2001), Rule 10, § 8.

²³⁶ Colombia, *Basic Military Manual* (1995), p. 21.

²³⁷ Colombia, *Instructors' Manual* (1999), p. 24; see also *Soldiers' Manual* (1999), p. 20.

²³⁸ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 3.

²³⁹ Congo, *Disciplinary Regulations* (1986), Article 32.

²⁴⁰ Croatia, *Commanders' Manual* (1992), Rule 16.

²⁴¹ Croatia, *LOAC Compendium* (1991), p. 45; *Commanders' Manual* (1992), Rules 71 and 75-76; *Soldiers' Manual* (1992), p. 3.

²⁴² Croatia, *Instructions on Basic Rules of IHL* (1993), Nos. 1-3.

²⁴³ Ecuador, *Naval Manual* (1989), § 11.4.

²⁴⁴ El Salvador, *Soldiers' Manual* (undated), p. 7.

236. France's LOAC Summary Note provides that the "wounded, sick and shipwrecked shall be . . . cared for . . . by the Party to the conflict in whose power they may be".²⁴⁵

237. France's LOAC Teaching Note provides that the "wounded, sick and shipwrecked shall be . . . cared for . . . by the Party to the conflict in whose power they may be".²⁴⁶

238. France's LOAC Manual provides that the "authorities are responsible for the health and physical integrity of the persons in their power. They commit war crimes if they refuse to provide them with medical care or if they deliberately place their health in danger."²⁴⁷

239. Germany's Soldiers' Manual provides that the wounded, sick and shipwrecked shall be cared for.²⁴⁸

240. Germany's Military Manual states that the wounded, sick and shipwrecked shall be cared for.²⁴⁹ It adds that "at all times all possible measures shall be taken to . . . ensure their adequate medical assistance".²⁵⁰ The manual also provides that "civilians and help organisations such as, for example, the National Red Cross or Red Crescent Society are permitted to . . . care for the wounded, sick and shipwrecked".²⁵¹

241. Hungary's Military Manual makes an explicit reference to GC I as being the regime applicable to the wounded and sick.²⁵²

242. India's Police Manual states that "police should be ready to render First Aid to the injured and should make arrangements for the speedy transport of such injured persons to the hospital".²⁵³

243. India's Army Training Note states that "on humanitarian grounds, medical help and care has to be provided to sick and wounded of even an enemy as laid down in [the] Geneva Conventions". The manual explains that the denial of medical care is most likely to occur because of a shortage of medicine and doctors; because troops may give priority to their own wounded and sick; because wounded insurgents or terrorists may have themselves killed or injured armed forces personnel in an ambush or a raid; and because the sick and wounded may sympathise with or harbour insurgents or terrorists. The manual warns, however, that the denial of medical care may lead to allegations and charges of "(a) inhuman behaviour, (b) cruelty to fellow human beings, [or] (c) death due to the carelessness and negligence of Armed Forces personnel".²⁵⁴ With respect to a situation where the armed forces are called upon to assist the civilian authorities, the manual states that, after firing, "immediate steps should be taken to succour the wounded rioters" and that "it is most important that

²⁴⁵ France, *LOAC Summary Note* (1992), § 2.1.

²⁴⁶ France, *LOAC Teaching Note* (2000), p. 3.

²⁴⁸ Germany, *Soldiers' Manual* (1991), p. 5.

²⁵⁰ Germany, *Military Manual* (1992), § 605.

²⁵² Hungary, *Military Manual* (1992), p. 86.

²⁵³ India, *Police Manual* (1986), p. 39, Article 13(xvi).

²⁵⁴ India, *Army Training Note* (1995), Appendix Y, § 5.

²⁴⁷ France, *LOAC Manual* (2001), p. 32.

²⁴⁹ Germany, *Military Manual* (1992), § 601.

²⁵¹ Germany, *Military Manual* (1992), § 632.

the best possible arrangements for first aid, medical attention and evacuation to hospital of injured rioters are made".²⁵⁵

244. Indonesia's Military Manual provides that the wounded and sick must be cared for.²⁵⁶

245. According to Israel's Manual on the Laws of War, "it is imperative to tend to the enemy's wounded".²⁵⁷ The manual further provides that:

Belonging to combatant forces entitles the combatant to special rights when he steps out of the sphere of hostilities by surrendering, being taken as a prisoner of war, injury or loss of fighting ability. Such a combatant is entitled to the status of a prisoner of war, according him medical treatment.²⁵⁸

246. Italy's LOAC Elementary Rules Manual provides that "wounded and shipwrecked enemy combatants shall be cared for and evacuated to the rear".²⁵⁹

247. Kenya's LOAC Manual provides that as soon as the tactical situation permits, "the wounded, sick and shipwrecked shall be cared for".²⁶⁰ The manual contains the same provision with regard to captured enemy combatants.²⁶¹ It also provides that "commanders may appeal to the civilian population, to aid societies such as National Red Cross or Red Crescent Societies . . . [to] care for the wounded and shipwrecked".²⁶²

248. Lebanon's Teaching Manual instructs combatants to care for the wounded and shipwrecked.²⁶³

249. Madagascar's Military Manual provides that one of the seven fundamental rules of IHL is that "the wounded and sick shall be cared for by the power in whose hands they are". It instructs soldiers: "Care for them . . . Hand them over to your superior . . . or to the nearest medical personnel."²⁶⁴

250. Under Mali's Army Regulations, "refusal to . . . care for the wounded, sick and shipwrecked, when the circumstances so permit," constitutes a breach of the laws and customs of war.²⁶⁵

251. Morocco's Disciplinary Regulations provides that "when circumstances so permit, the wounded, sick and shipwrecked shall be . . . cared for".²⁶⁶

252. The Military Manual of the Netherlands states that "the wounded and sick may not be left without medical care and attention".²⁶⁷ With respect to

²⁵⁵ India, *Army Training Note* (1995), p. 13, § 19(b).

²⁵⁶ Indonesia, *Military Manual* (1982), §§ 36–37.

²⁵⁷ Israel, *Manual on the Laws of War* (1998), p. 44.

²⁵⁸ Israel, *Manual on the Laws of War* (1998), p. 46.

²⁵⁹ Italy, *LOAC Elementary Rules Manual* (1991), § 75.

²⁶⁰ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 10–11.

²⁶¹ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 15 and Précis No. 3, p. 7.

²⁶² Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.

²⁶³ Lebanon, *Teaching Manual* (1997), pp. 77–78.

²⁶⁴ Madagascar, *Military Manual* (1994), Fiche No. 4-T, § 2.2(22) and p. 91, Rule 3, see also Fiche No. 2-T, § 21.

²⁶⁵ Mali, *Army Regulations* (1979), Article 36.

²⁶⁶ Morocco, *Disciplinary Regulations* (1974), Article 25(4).

²⁶⁷ Netherlands, *Military Manual* (1993), p. VI-2.

non-international armed conflicts, the manual states that the “wounded, sick and shipwrecked shall receive medical care”.²⁶⁸

253. The Military Handbook of the Netherlands provides that “all wounded and sick must be cared for”.²⁶⁹

254. The IFOR Instructions of the Netherlands instructs soldiers to “care for [the wounded] whether friend or foe”.²⁷⁰

255. New Zealand’s Military Manual provides that “the sick, wounded and shipwrecked members of the armed forces and others entitled to be treated as combatants . . . shall not be . . . left without proper medical care and attention, nor exposed to conditions which might result in contagion or infection”.²⁷¹ It also provides that “appeals may be made to the charity and humanity of the local inhabitants and relief societies to . . . care for the wounded and sick”.²⁷² In the case of non-international armed conflicts, the manual states that all possible steps must be taken to ensure the adequate care of the wounded, sick and shipwrecked.²⁷³

256. Nicaragua’s Military Manual provides that in both internal and international armed conflicts, the wounded and sick shall be cared for.²⁷⁴

257. Nigeria’s Operational Code of Conduct states that “all wounded military and civilians will be given necessary medical attention and care”.²⁷⁵

258. Nigeria’s Military Manual provides that “the wounded and sick shall be cared for by the party to the conflict in whose power they may be”.²⁷⁶ It further states that “as soon as the tactical situation permits, necessary measures shall be taken to . . . care for the wounded [and] shipwrecked”.²⁷⁷

259. Nigeria’s Manual on the Laws of War provides that the wounded and sick who are in the power of a belligerent must be cared for and that it is prohibited to leave the wounded and sick “without assistance and care or to create conditions that could lead to epidemics or infections”.²⁷⁸

260. Nigeria’s Soldiers’ Code of Conduct states that the wounded and shipwrecked enemies “shall be . . . treated or handed over to a superior or the nearest medical personnel”.²⁷⁹

261. The Military Directive to Commanders of the Philippines provides that:

Medical teams must be made available to provide emergency medical attention . . . to injured civilians caught in the crossfire . . .

²⁶⁸ Netherlands, *Military Manual* (1993), p. XI-5.

²⁶⁹ Netherlands, *Military Handbook* (1995), p. 7-37.

²⁷⁰ Netherlands, *IFOR Instructions* (1995), § 6.

²⁷¹ New Zealand, *Military Manual* (1992), § 1004(1).

²⁷² New Zealand, *Military Manual* (1992), § 1003(4).

²⁷³ New Zealand, *Military Manual* (1992), § 1817.

²⁷⁴ Nicaragua, *Military Manual* (1996), Articles 6 and 14.

²⁷⁵ Nigeria, *Operational Code of Conduct* (1967), § 4(k).

²⁷⁶ Nigeria, *Military Manual* (1994), p. 13, § 4.

²⁷⁷ Nigeria, *Military Manual* (1994), p. 46, § 16(g), see also p. 39, § 5(f) and (h).

²⁷⁸ Nigeria, *Manual on the Laws of War* (undated), § 35.

²⁷⁹ Nigeria, *Soldiers’ Code of Conduct* (undated), § 6.

To demonstrate AFP and government concern for the population, military civic action shall be undertaken immediately after the operation. This includes such immediate tasks as providing medical aid to sick and wounded civilians; procuring and distributing food and shelter to displaced persons; and, restoring vital facilities.²⁸⁰

262. The Military Instructions of the Philippines provides that:

In the aftermath of military or law enforcement operations involving firefight that results in unavoidable casualties, caring for the wounded . . . which includes our own troops, the enemy and particularly innocent civilians must be a paramount concern of all commanders and troops at all levels. In the scene of the incident, all wounded must be treated with care and their wounds attended by providing them with first aid.²⁸¹

263. The Soldier's Rules of the Philippines requires soldiers to care for the wounded and sick.²⁸²

264. The Police Rules of Engagement of the Philippines states that, after a shoot-out and "in case the suspect has been wounded and disabled, he shall be brought . . . to the nearest hospital for medical treatment".²⁸³

265. Romania's Soldiers' Manual provides that "wounded and sick enemy combatants shall be given first aid and brought to superiors or nearest sanitary personnel".²⁸⁴

266. Russia's Military Manual provides that "military commanders may appeal to the charity of the local population to voluntarily . . . care for the wounded and sick. The military authorities must permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to . . . care for wounded or sick."²⁸⁵

267. Rwanda's Military Instructions provides that those wounded and sick during combat must be hospitalised.²⁸⁶

268. Senegal's Disciplinary Regulations provides that "when circumstances so permit, the wounded, sick and shipwrecked shall be . . . cared for".²⁸⁷

269. South Africa's LOAC Manual states that the wounded and sick "shall receive, to the fullest possible extent and with the least possible delay, the medical care and attention required by their condition".²⁸⁸

270. Spain's LOAC Manual provides that "as soon as the tactical situation permits, all measures shall be taken to care for the wounded and shipwrecked".²⁸⁹

²⁸⁰ Philippines, *Military Directive to Commanders* (1988), p. 28, Guidelines 4(d)-(e).

²⁸¹ Philippines, *Military Instructions* (1989), § 4.

²⁸² Philippines, *Soldier's Rules* (1989), § 5.

²⁸³ Philippines, *Police Rules of Engagement* (1993), Section 4(f).

²⁸⁴ Romania, *Soldiers' Manual* (1991), pp. 10-12, see also p. 32.

²⁸⁵ Russia, *Military Manual* (1990), § 15.

²⁸⁶ Rwanda, *Military Instructions* (1987), pp. 41-42.

²⁸⁷ Senegal, *Disciplinary Regulations* (1990), Article 34(1).

²⁸⁸ South Africa, *LOAC Manual* (1996), § 31.

²⁸⁹ Spain, *LOAC Manual* (1996), Vol. I, § 5.d.2.(5).

It adds that enemy wounded must be brought to the commander or to the nearest medical post.²⁹⁰

271. Sweden's Military Manual provides that the wounded and sick, whether civilians or combatants, shall receive medical care.²⁹¹

272. Sweden's IHL Manual considers that Article 10 AP I on the protection of the wounded, the sick and the shipwrecked and Article 17 AP I on the role of aid organisations have the status of customary law.²⁹²

273. Switzerland's Basic Military Manual provides that the wounded and sick shall be cared for and states that the refusal to provide care to the wounded is a grave breach of the Geneva Conventions.²⁹³ It also states that "appeal may be made to civilians or civilian relief societies to . . . care for the wounded".²⁹⁴

274. Togo's Military Manual provides that the "wounded and sick shall be cared for by the Party to the conflict in whose power they may be".²⁹⁵ The manual instructs soldiers to "care for and protect" wounded enemy combatants.²⁹⁶

275. Uganda's Code of Conduct instructs soldiers to render medical treatment to members of the public who may be in the territory of the unit.²⁹⁷

276. The UK Military Manual states that in international armed conflicts, "the wounded and sick must be cared for by the belligerents in whose power they are".²⁹⁸ It also provides that:

The military authorities may appeal to the charitable zeal of local inhabitants to . . . care for the wounded and sick, under their direction, granting to those who respond to this appeal special protection and facilities. The inhabitants, as also relief societies, must be permitted spontaneously to . . . care for wounded and sick, whatever nationality.²⁹⁹

277. The UK LOAC Manual states that "combatants are required to . . . ensure . . . adequate care" of the shipwrecked, wounded and sick.³⁰⁰ It also provides that "military authorities must allow the local population and relief societies to . . . tend the wounded and sick".³⁰¹ The manual also restates the provisions of common Article 3 of the 1949 Geneva Conventions and specifies that, in the case of non-international armed conflicts, the wounded and sick shall be cared for.³⁰²

278. The US Field Manual provides that the "wounded and sick shall be cared for by the party to the conflict in whose power they may be" and that "they shall not wilfully be left without medical assistance and care, nor shall conditions

²⁹⁰ Spain, *LOAC Manual* (1996), Vol. I, § 10.6.b.(3) and 10.6.c.

²⁹¹ Sweden, *Military Manual* (1976), p. 16.

²⁹² Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

²⁹³ Switzerland, *Basic Military Manual* (1987), Articles 69, 70(1) and 192(1).

²⁹⁴ Switzerland, *Basic Military Manual* (1987), Article 75.

²⁹⁵ Togo, *Military Manual* (1996), Fascicule II, p. 4, see also pp. 8 and 12.

²⁹⁶ Togo, *Military Manual* (1996), Fascicule I, p. 17, see also Fascicule III, p. 5.

²⁹⁷ Uganda, *Code of Conduct* (1986), Rule 7. ²⁹⁸ UK, *Military Manual* (1958), § 339.

²⁹⁹ UK, *Military Manual* (1958), § 345. ³⁰⁰ UK, *LOAC Manual* (1981), Section 7, p. 26, § 2.

³⁰¹ UK, *LOAC Manual* (1981), Section 6, p. 22, § 6.

³⁰² UK, *LOAC Manual* (1981), Section 12, p. 42, § 2.

exposing them to contagion or infection be created".³⁰³ The manual reproduces Articles 15 and 18 GC I.³⁰⁴

279. The US Air Force Pamphlet provides that "military authorities shall permit the inhabitants and relief societies spontaneously to . . . care for wounded of all nationalities". It also reproduces Article 12 GC I.³⁰⁵

280. The US Instructor's Guide reproduces Article 12 GC I.³⁰⁶

281. The US Naval Handbook provides that parties shall take all possible measures to ensure the care of the wounded, sick and shipwrecked.³⁰⁷

National Legislation

282. Argentina's Draft Code of Military Justice punishes any soldier who "deprives a protected person of, or does not provide, necessary medical care".³⁰⁸

283. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in both international and non-international armed conflicts, "the Armed Forces of the Azerbaijan Republic and appropriate authorities and governmental bodies shall ensure [in all circumstances and with the least possible delay] medical assistance and care needed for the wounded and sick".³⁰⁹

284. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³¹⁰

285. China's Criminal Code as amended provides for the punishment of "those working in medical aid or medical treatment positions during wartime who refuse to save or treat seriously injured or critically sick servicemen when conditions permit them to do so".³¹¹

286. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, fails to rescue and provide assistance to protected persons, while having an obligation to do so".³¹²

287. Cuba's Military Criminal Code punishes the failure to fulfil the obligations concerning care and treatment of the wounded and sick.³¹³

288. The Czech Republic's Criminal Code as amended provides for the punishment of anyone who does not take measures or obstructs measures to protect or provide assistance to the wounded.³¹⁴

³⁰³ US, *Field Manual* (1956), § 215. ³⁰⁴ US, *Field Manual* (1956), §§ 216 and 219.

³⁰⁵ US, *Air Force Pamphlet* (1976), § 12-2(a). ³⁰⁶ US, *Instructor's Guide* (1985), p. 8.

³⁰⁷ US, *Naval Handbook* (1995), § 11.4.

³⁰⁸ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).

³⁰⁹ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 25.

³¹⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³¹¹ China, *Criminal Code as amended* (1997), Article 445.

³¹² Colombia, *Penal Code* (2000), Article 152.

³¹³ Cuba, *Military Criminal Code* (1979), Article 42(2).

³¹⁴ Czech Republic, *Criminal Code as amended* (1961), Article 263(2)(a).

289. Under the Draft Amendments to the Penal Code of El Salvador, anyone who prevents medical personnel from providing the medical and humanitarian relief that according to IHL they are entitled to provide is punishable.³¹⁵

290. Under Estonia's Penal Code, "refusal to provide assistance to a sick, wounded or shipwrecked person in a war zone, if such refusal causes the death of or damage to the health of that person" is a war crime.³¹⁶

291. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 12 and 15 GC I, 12 and 18 GC II and 16 GC IV, and of AP I, including violations of Article 10 AP I, as well as any "contravention" of AP II, including violations of Articles 7(2) and 8 AP II, are punishable offences.³¹⁷

292. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".³¹⁸

293. Slovakia's Criminal Code as amended provides for the punishment of anyone who does not take measures or obstructs measures to protect or provide assistance to the wounded.³¹⁹

294. Spain's Penal Code punishes the deprivation of necessary medical aid.³²⁰

295. Under Ukraine's Criminal Code, failure to fulfil the obligation to provide medical treatment and care to the wounded and sick constitutes a war crime.³²¹

296. Uruguay's Military Penal Code as amended provides for the punishment of the soldier who "fails to assist a surrendered enemy in cases of shipwreck, fire, explosion, earthquake or similar accidents". It also punishes the soldier who does not assist, when possible, his own comrades in distress.³²²

297. Venezuela's Code of Military Justice as amended punishes "those who deny or impede assistance to the wounded and sick".³²³

298. Vietnam's Penal Code provides for the punishment of "any person who... fails to care for or give medical treatment to a wounded soldier".³²⁴

National Case-law

299. In the *Military Junta case* in 1985, Argentina's National Court of Appeals established that, in a situation of internal violence, wounded persons should receive adequate treatment.³²⁵

³¹⁵ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Omission y obstaculización de medidas de socorro y asistencia humanitaria".

³¹⁶ Estonia, *Penal Code* (2001), § 100.

³¹⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³¹⁸ Norway, *Military Penal Code as amended* (1902), § 108.

³¹⁹ Slovakia, *Criminal Code as amended* (1961), Article 263(2)(a).

³²⁰ Spain, *Penal Code* (1995), Article 609.

³²¹ Ukraine, *Criminal Code* (2001), Article 434.

³²² Uruguay, *Military Penal Code as amended* (1943), Article 58(20)-(21)

³²³ Venezuela, *Code of Military Justice as amended* (1998), Article 474(4).

³²⁴ Vietnam, *Penal Code* (1990), Article 271(1).

³²⁵ Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.

Other National Practice

300. The briefing notes prepared by the Office of the Attorney General of Australia and cleared by the Defence Forces for debate on the 1991 Geneva Conventions Amendment Bill stated that AP II had produced some important principles, including “general duties of care for the wounded and sick”.³²⁶

301. The Report on the Practice of Colombia states that Colombia authorizes the Colombian Red Cross or the ICRC to render aid to the wounded.³²⁷

302. According to the Report on the Practice of Egypt “in application of its long dated experience, Egypt considers the . . . care for wounded [and] sick . . . as a tradition which should be respected at all times and in any circumstance, particularly in time of military operations”.³²⁸

303. Under the instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, “the wounded and sick, whether civilian or military, must be respected, collected, respected and cared for”.³²⁹

304. In 1985, the government of Honduras reported to the IACiHR that medical professionals were caring for an individual wounded during an incident in a refugee camp by a member of a Honduran patrol.³³⁰

305. According to the Report on the Practice of India, there is an obligation to provide immediate medical treatment to those who are injured in police firing.³³¹

306. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran brought wounded Iraqi combatants to safe places and treated them in accordance with Islamic principles which, according to Iran’s *opinio juris*, require that wounded and sick combatants be cared for.³³²

307. With reference to two communiqués issued by the General Military Commander in September 1970, the Report on the Practice of Jordan states that Jordan “made sure that adequate care to the wounded during the internal armed conflict which occurred in its territory in 1970 was provided”.³³³

308. According to the Report on the Practice of Malaysia, enemy sick or wounded are handed over to the police, who are under an obligation to provide the necessary medical treatment.³³⁴

³²⁶ Australia, Department of Foreign Affairs and Trade, Geneva Protocols: Geneva Convention Amendment Bill, Doc. DFAT-92/013031 Pt 8, 13 February 1991, p. 2.

³²⁷ Report on the Practice of Colombia, 1998, Chapter 5.1, referring to Program Presidencial para la defensa de la libertad personal, Bogotá, April 1996, p. 17.

³²⁸ Report on the Practice of Egypt, 1997, Chapter 5.7.

³²⁹ France, Etat-major de la Force d’Action Rapide, Ordres pour l’Opération Mistral, 1995, Section 6, § 62.

³³⁰ IACiHR, *Case 9619* (Honduras), Resolution, 28 March 1987, § 4.

³³¹ Report on the Practice of India, 1997, Chapter 5.1.

³³² Report on the Practice of Iran, 1997, Chapter 5.1.

³³³ Report on the Practice of Jordan, 1997, Chapter 5.1, referring to Communiqué from the General Military Commander, 18 September 1970 and Communiqué from the General Military Commander, 24 September 1970.

³³⁴ Report on the Practice of Malaysia, 1997, Chapter 5.1.

309. According to the Report on the Practice of the Philippines:

In an armed conflict where guerilla warfare is the strategy used, distinguishing between civilians and combatants is very difficult. This is precisely the reason why the Philippines have adopted the same rules for both civilians and combatants with regard to the . . . care of the wounded [and] sick.³³⁵

310. In 1989, when submitting information on the rights of detainees for consideration by the UN Sub-Commission on Human Rights, Portugal stated that where firearms were used, those wounded had to be given first aid as soon as possible.³³⁶

311. In 1997, a senior officer of the RPF in Rwanda declared to a gathering of diplomats and NGO representatives that civilians caught in crossfire were being brought to hospital by members of the RPF in order to receive care.³³⁷

312. In its report on "Gross violations of human rights" committed between 1960 and 1993, South Africa's Truth and Reconciliation Commission stated that it had evidence from the war in south-west Africa that "on occasion, badly wounded SWAPO fighters were . . . not given medical treatment".³³⁸

313. According to the Report on US Practice, it is the *opinio juris* of the US that the wounded and sick in internal armed conflicts should be respected and protected in accordance with Article 7 AP II. They must receive the medical care required by their condition.³³⁹

314. In 1975, the government of Uruguay informed the IACiHR that a prisoner who was shot and seriously injured during an escape attempt was immediately given first aid and brought to a military hospital for surgery.³⁴⁰

315. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the Ministry of Defence of the SFRY (FRY) included the following example: "It was quite normal to prevent assistance to be provided to the wounded YPA soldiers . . . Civilian hospitals and clinics have refused to provide medical assistance to the wounded and sick soldiers and their dependants."³⁴¹

316. According to the Report on the Practice of Zimbabwe, "Zimbabwe seems to regard as customary, the rules of international practice codified in the Geneva Conventions as regards the . . . care of the wounded".³⁴²

³³⁵ Report on the Practice of the Philippines, 1997, Chapter 5.1.

³³⁶ Portugal, Report on the Administration of Justice and the Human Rights of Detainees submitted to the UN Sub-Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1989/20/Add.1, 15 June 1989, §§ 54 and 61(d).

³³⁷ "Vers la fin de l'aventure des infiltrés", *La Nouvelle Relève*, No. 346, 15 August 1997, pp. 1-2.

³³⁸ South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 2, p. 54, § 47.

³³⁹ Report on US Practice, 1997, Chapter 5.1.

³⁴⁰ IACiHR, *Case 1954* (Uruguay), Resolution, 6 March 1981, § 5.

³⁴¹ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 3(i)-(ii); see also Secretariat of the Federal Executive Council, Press Release, Statement by Lieutenant-General Marko Negovanovic, Belgrade, 2 July 1991.

³⁴² Report on the Practice of Zimbabwe, 1998, Chapter 5.1.

*III. Practice of International Organisations and Conferences**United Nations*

317. In a resolution adopted in 1984, the UN Commission on Human Rights called on all parties to the conflict in El Salvador to respect and protect the wounded from all sides.³⁴³

318. In a resolution adopted in 1991, the UN Commission on Human Rights called upon the parties "to guarantee respect for the humanitarian rules applicable to non-international armed conflicts such as that in El Salvador, particularly with regard to the evacuation of the war wounded and maimed in order that they receive prompt medical attention".³⁴⁴

319. In a resolution adopted in 1989, the UN Sub-Commission on Human Rights reminded:

the Government of El Salvador that in accordance with Additional Protocol II to the Geneva Conventions, it must respect and give protection to the war-wounded and disabled, it may not prevent their evacuation by the International Committee of the Red Cross so that they may receive the medical attention they require.³⁴⁵

320. In 1995, in a report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights condemned the alleged practice of both parties of refusing to provide medical care to the wounded brought to clinics or hospitals.³⁴⁶

321. In 1997, in a report on the situation of human rights in Nigeria, the UN Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and the UN Special Rapporteur on the Independence of Judges and Lawyers expressed their particular concern that the government of Nigeria had "reportedly denied medical care to detainees suffering from allegedly life-threatening conditions".³⁴⁷

322. In 1992, in a report concerning El Salvador, the Director of the Human Rights Division of ONUSAL reported that the wounded and sick were entitled to immediate care, failure to observe this rule of conduct being a serious violation of the norms of IHL.³⁴⁸

³⁴³ UN Commission on Human Rights, Res. 1984/52, 14 March 1984, § 5.

³⁴⁴ UN Commission on Human Rights, Res. 1991/75, 6 March 1991, § 9.

³⁴⁵ UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, § 4, see also § 3.

³⁴⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Initial report, UN Doc. E/CN.4/1996/16, 14 November 1995, § 121.

³⁴⁷ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions and Special Rapporteur on the Independence of Judges and Lawyers, Report on the situation of human rights in Nigeria, UN Doc. E/CN.4/1997/62/Add.1, 24 March 1997, § 76.

³⁴⁸ ONUSAL, Director of the Human Rights Division, Report for November and December 1991, UN Doc. A/46/876-S/23580, 19 February 1992, Annex, § 170.

Other International Organisations

323. In 1995, the Rapporteur of the Council of Europe on the human rights situation in Chechnya reported two cases in which wounded Russian soldiers were attacked in hospitals but noted that these incidents were isolated and did not derive from a deliberate policy of the Chechen authorities.³⁴⁹

324. In a resolution adopted in 1985 on the situation in Afghanistan, the European Parliament demanded that the USSR allow the ICRC access to care for the wounded.³⁵⁰

325. In a resolution on Yemen adopted in 1964, the Council of the League of Arab States decided "to call upon the International Committee of the Red Cross to take the initiative of providing care for the wounded and help for the victims".³⁵¹

International Conferences

326. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

327. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

328. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Commanders may appeal to the civilian population, to aid societies such as National Red Cross or Red Crescent Societies and to commanders of neutral merchant vessels, yachts or other craft, to . . . care for the wounded and shipwrecked . . .

Civilian persons and aid societies such as National Red Cross or Red Crescent Societies shall be permitted, even on their own initiative, to . . . care for the wounded and shipwrecked. No one shall be harmed, prosecuted or punished for such acts . . .

The wounded, sick and shipwrecked shall be . . . cared for . . .

The wounded and sick shall receive the medical care and attention required by their state of health.³⁵²

329. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that "the wounded, the sick and the shipwrecked must be . . . cared for".³⁵³

³⁴⁹ Council of Europe, Parliamentary Assembly, Opinion on Russia's request for membership in the light of the situation in Chechnya, Doc. 7231, 2 February 1995, § 75.

³⁵⁰ European Parliament, Resolution on the situation in Afghanistan, 31 December 1985, § 1.

³⁵¹ League of Arab States, Council, Res. 1984, 31 March 1964, § 3.

³⁵² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 485, 486, 504 and 728.

³⁵³ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

330. In two press releases issued in 1991 in the context of the Gulf War, the ICRC reminded the parties that “the wounded, sick and shipwrecked members of the armed forces must be cared for; [and] the wounded, whether civilian or military, . . . must receive special consideration and protection”.³⁵⁴

331. In a press release in 1992, the ICRC urged all the parties involved in the conflict in Tajikistan to ensure the protection of civilian and military victims and in particular “to ensure that the wounded and sick were cared for in all circumstances, regardless of the side to which they belong”.³⁵⁵

332. In a press release in 1992, the ICRC urged all parties to the conflict in Nagorno-Karabakh “to ensure that the wounded and sick are cared for in all circumstances”.³⁵⁶

333. In a communication to the press in 1993, the ICRC enjoined the parties to the conflict in Somalia to “care for wounded and sick”.³⁵⁷

334. In a press release in 1994, the ICRC reminded the parties to the conflict in Afghanistan that the sick and wounded must be respected in all circumstances.³⁵⁸

335. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross, basing itself on the Geneva Conventions and AP I, which it considered applicable to the situation in Chiapas, stated that the parties were under an obligation to protect and care for wounded persons in their power.³⁵⁹

336. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “all the wounded and sick, both civilian and military, must be . . . cared for”.³⁶⁰

337. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC emphasised that “all the wounded and sick must be . . . cared for, without distinction, in accordance with the provisions laid down primarily in the First and Fourth Geneva Conventions”.³⁶¹

³⁵⁴ ICRC, Press Release No. 1658, Gulf War: ICRC Reminds States of their Obligations, 17 January 1991, *IRRC*, No. 280, 1991, p. 26; Press Release No. 1659, Middle East Conflict: ICRC Appeals to Belligerents, 1 February 1991, *IRRC*, No. 280, 1991, p. 27.

³⁵⁵ ICRC, Press Release, Tajikistan: ICRC urges respect for humanitarian rules, ICRC Dushanbe, 25 November 1992.

³⁵⁶ ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.

³⁵⁷ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

³⁵⁸ ICRC, Press Release No. 1764, Afghanistan: ICRC calls for respect for the civilian population, 8 February 1994.

³⁵⁹ Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de enero de 1994, 3 January 1994, § 2(B).

³⁶⁰ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

³⁶¹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

338. In a press release in 1994, the ICRC called on parties to the conflict in Chechnya to ensure that the wounded and sick were cared for.³⁶²

339. In a press release in 1995, the ICRC appealed to all the parties involved in Turkey's military operations in northern Iraq "to care for the wounded and sick".³⁶³

340. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that "the wounded and sick must be . . . cared for regardless of the party to which they belong".³⁶⁴

VI. Other Practice

341. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "the wounded and sick shall be . . . cared for by the party in conflict which has them in its power".³⁶⁵

342. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that "in every circumstance, the wounded and sick, whether or not they have taken part in acts of violence, . . . shall receive, to the fullest extent practicable and with the least possible delay, the medical care and attention required by their condition".³⁶⁶

343. With reference to the Penal and Disciplinary Rules and OLS Ground Rules, the Report on SPLM/A Practice states that "the SPLM/A has a long-standing practice of care for the sick and wounded. This practice has been expressed in outstanding legal instruments of the SPLM/A."³⁶⁷

Distinction between the wounded and the sick

Note: For practice concerning non-discrimination between the wounded and the sick in general, see Chapter 32, section B.

³⁶² ICRC, Press Release No. 1793, Chechnya: ICRC urges respect for humanitarian rules, 28 November 1994.

³⁶³ ICRC, Press Release No. 1797, ICRC calls for compliance with international law in Turkey and Northern Iraq, 22 March 1995.

³⁶⁴ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

³⁶⁵ ICRC archive document.

³⁶⁶ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 12, *IRRC*, No. 282, 1991, p. 334.

³⁶⁷ Report on SPLM/A Practice, 1998, Chapter 5, referring to SPLM/A, Penal and Disciplinary Rules, 4 July 1984, Section 30(2) ("The SPLA as an organised and disciplined Army, shall observe and be bound by internationally recognized humanitarian standards for the conduct of warfare.") and Agreement on Ground Rules for Operation Lifeline Sudan, 1995, preamble (expressing support for the Geneva Conventions and their Additional Protocols).

*I. Treaties and Other Instruments**Treaties*

344. Article 12, third paragraph, GC I provides that “only urgent medical reasons will authorize priority in the order of treatment to be administered”.

345. Article 12, third paragraph, GC II provides that “only urgent medical reasons will authorize priority in the order of treatment to be administered”.

346. Article 10(2) AP I provides that “there shall be no distinction among [the wounded, sick and shipwrecked] founded on any grounds other than medical ones”. Article 10 AP I was adopted by consensus.³⁶⁸

347. Article 15(3) AP I states that “the Occupying Power may not require that, in the performance of [humanitarian] functions, [civilian medical] personnel shall give priority to the treatment of any person except on medical grounds”. Article 15 AP I was adopted by consensus.³⁶⁹

348. Article 7(2) AP II provides that “there shall be no distinction among [the wounded, sick and shipwrecked] founded on any grounds other than medical ones”. Article 7 AP II was adopted by consensus.³⁷⁰

349. Article 9(2) AP II states that “in the performance of their duties, medical personnel may not be required to give priority to any person except on medical grounds”. Article 9 AP II was adopted by consensus.³⁷¹

Other Instruments

350. Article 10 of the 1880 Oxford Manual provides that “wounded or sick soldiers shall be brought in and cared for, *to whatever nation they belong*”. (emphasis added)

351. Paragraph 1 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “all wounded and sick on land shall be treated in accordance with the provisions of the First Geneva Convention”.

352. Paragraph 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “there shall be no distinction among [the wounded, sick and shipwrecked] founded on any grounds other than medical ones”.

353. Section 9.1 of the 1999 UN Secretary-General’s Bulletin specifies that “*only* urgent medical reasons will authorize priority in the order of treatment to be administered”. (emphasis added)

³⁶⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR. 37, 24 May 1977, p. 69.

³⁶⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR. 37, 24 May 1977, p. 70.

³⁷⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109.

³⁷¹ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 112.

II. National Practice

Military Manuals

354. Argentina's Law of War Manual (1969) provides that "*only* urgent medical reasons will authorise priority in the order of treatment to be administered".³⁷² (emphasis added)

355. Argentina's Law of War Manual (1989) refers to Articles 10 AP I and 7 AP II and provides that "in all circumstances, the wounded, sick and shipwrecked, to whichever party they belong, must be respected and protected . . . There shall be *no distinction* based on any grounds other than medical ones."³⁷³ (emphasis added)

356. Australia's Commanders' Guide provides that "if medical supplies, personnel or facilities are inadequate to treat all the sick and wounded then medical assistance is to be provided *strictly on the basis of medical triage*" and that "the most in need of medical treatment are to be given priority".³⁷⁴ (emphasis added)

357. Australia's Defence Force Manual states that "priority in medical treatment can *only* be determined on the basis of medical need".³⁷⁵ (emphasis added) The manual also states that "while there is no absolute obligation to accept civilian wounded and sick, once civilian patients have been accepted, discrimination against them, on any grounds other than medical, is not permissible".³⁷⁶

358. Belgium's Teaching Manual for Soldiers states that "during search and rescue operations, priority shall be given to a wounded enemy in the event that he/she is more seriously affected".³⁷⁷

359. Benin's Military Manual instructs soldiers to "care for the wounded and sick, *whether friend or foe*".³⁷⁸ (emphasis added)

360. Canada's LOAC Manual provides that "*only* urgent medical requirements will justify any priority in treatment among those who are sick and wounded".³⁷⁹ (emphasis added)

361. Canada's Code of Conduct provides that "there shall be no distinction among [the wounded, sick and shipwrecked] based on any grounds other than medical ones . . . *Only* medical reasons will determine the priority of treatment."³⁸⁰ (emphasis added)

362. Colombia's Soldiers' Manual provides that "the most seriously wounded enemy combatants must be cared for first".³⁸¹

³⁷² Argentina, *Law of War Manual* (1969), § 3.001.

³⁷³ Argentina, *Law of War Manual* (1989), § 2.03.

³⁷⁴ Australia, *Commanders' Guide* (1994), § 622.

³⁷⁵ Australia, *Defence Force Manual* (1994), § 992.

³⁷⁶ Australia, *Defence Force Manual* (1994) § 987.

³⁷⁷ Belgium, *Teaching Manual for Soldiers* (undated), p. 17, see also p. 32.

³⁷⁸ Benin, *Military Manual* (1995), Fascicule II, p. 18.

³⁷⁹ Canada, *LOAC Manual* (1999), p. 9-2, §§ 19-20.

³⁸⁰ Canada, *Code of Conduct* (2001), Rule 7, §§ 1 and 4.

³⁸¹ Colombia, *Soldiers' Manual* (1999), p. 20.

363. Ecuador's Naval Manual provides that "priority in order of treatment may only be justified by urgent medical considerations".³⁸²

364. France's LOAC Manual provides with regard to the wounded and sick that "the law of armed conflicts does not allow any distinction other than that based on medical needs".³⁸³

365. Germany's Soldiers' Manual provides with regard to the treatment of the wounded, sick and shipwrecked that "there shall be no distinction other than on medical grounds".³⁸⁴

366. Hungary's Military Manual makes an explicit reference to GC I as being the regime applicable to the wounded and sick.³⁸⁵

367. Kenya's LOAC Manual instructs soldiers to "care for the wounded and sick, *be they friend or foe*".³⁸⁶ (emphasis added)

368. Madagascar's Military Manual provides that the wounded and sick shall receive the medical care required by their state of health. It specifies that this obligation also applies in the case of wounded, sick and shipwrecked enemies.³⁸⁷

369. The Military Manual of the Netherlands provides that "*only* urgent medical reasons will determine priority of treatment among the wounded and sick".³⁸⁸ (emphasis added) With respect to non-international armed conflicts, the manual states that the wounded, sick and shipwrecked shall receive medical care without discrimination".³⁸⁹

370. The Military Handbook of the Netherlands provides that "all wounded and sick must be cared for, also those from the enemies. Priority in treatment may only be based on medical grounds."³⁹⁰

371. New Zealand's Military Manual provides that "*only* urgent medical requirements will justify any priority in treatment among those who are sick and wounded".³⁹¹ (emphasis added) With regard to civilian sick and wounded, the manual provides that:

There is no absolute obligation to accept civilian wounded and sick only so far as it is practicable to do so. For example, if military medical facilities are not being used but might be used in the immediate future because of an impending battle, there is no obligation to treat civilians. Once a civilian patient has been accepted, however, discrimination against him/her on other than medical grounds is not permissible.³⁹²

³⁸² Ecuador, *Naval Manual* (1989), § 11.4. ³⁸³ France, *LOAC Manual* (2001), p. 32.

³⁸⁴ Germany, *Soldiers' Manual* (1991), p. 5. ³⁸⁵ Hungary, *Military Manual* (1992), p. 86.

³⁸⁶ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 14.

³⁸⁷ Madagascar, *Military Manual* (1994), Fiche No. 3-O, § 16 and Fiche No. 2-T, § 2.

³⁸⁸ Netherlands, *Military Manual* (1993), p. VI-1.

³⁸⁹ Netherlands, *Military Manual* (1993), p. XI-5.

³⁹⁰ Netherlands, *Military Handbook* (1995), p. 7-37.

³⁹¹ New Zealand, *Military Manual* (1992), § 1004(2).

³⁹² New Zealand, *Military Manual* (1992), § 1003(2).

372. Nigeria's Military Manual states that "*only* urgent medical reasons will authorise priority in the order of treatment to be administered".³⁹³ (emphasis added)

373. Nigeria's Manual on the Laws of War provides that "priority in treatment should be granted to the most gravely wounded".³⁹⁴

374. The Soldier's Rules of the Philippines requires soldiers to "care for the wounded and sick, *be they friend or foe*".³⁹⁵ (emphasis added)

375. Romania's Soldiers' Manual tells soldiers that "nobody will punish you for rendering first aid to a wounded, not even to an enemy one".³⁹⁶

376. Russia's Military Manual provides that:

Military commanders may appeal to the charity of the local population to voluntarily collect and care for the wounded and sick. The military authorities must permit the inhabitants and relief societies, even in invaded or occupied areas, spontaneously to collect and care for wounded or sick of *whatever nationality*.³⁹⁷ [emphasis added]

377. Senegal's IHL Manual provides that one of the fundamental guarantees common to IHL and the 1948 UDHR is that no distinction other than that based on medical grounds shall be made in the treatment of the wounded and sick.³⁹⁸

378. Spain's LOAC Manual provides that medical personnel shall provide the wounded and sick with the medical care required by their condition. It states that *only* urgent medical reasons may justify priority in the order of medical treatment.³⁹⁹

379. Switzerland's Basic Military Manual provides that "at all times, and especially following an engagement, all means should be taken to search for and collect the wounded. . . *whether friend or foe*".⁴⁰⁰ (emphasis added) It further provides that "*only* emergency medical reasons shall establish the priority in the treatment of friendly or enemy wounded".⁴⁰¹ (emphasis added)

380. Togo's Military Manual instructs soldiers to "care for the wounded and sick, *whether friend or foe*".⁴⁰² (emphasis added)

381. The UK LOAC Manual provides that "priority in the order of medical treatment is decided *only* for urgent medical reasons".⁴⁰³ (emphasis added)

382. The US Field Manual provides that "*only* urgent medical reasons will authorize priority in the order of treatment to be administered".⁴⁰⁴ (emphasis added)

³⁹³ Nigeria, *Military Manual* (1994), p. 13, § 4.

³⁹⁴ Nigeria, *Manual on the Laws of War* (undated), § 35.

³⁹⁵ Philippines, *Soldier's Rules* (1989), § 5.

³⁹⁶ Romania, *Soldiers' Manual* (1991), p. 22, § 3.

³⁹⁷ Russia, *Military Manual* (1990), § 15.

³⁹⁸ Senegal, *IHL Manual* (1999), pp. 3 and 24.

³⁹⁹ Spain, *LOAC Manual* (1996), Vol. I, § 9.2.(a).2.

⁴⁰⁰ Switzerland, *Basic Military Manual* (1987), Article 71.

⁴⁰¹ Switzerland, *Basic Military Manual* (1987), Article 74.

⁴⁰² Togo, *Military Manual* (1995), Fascicule II, p. 18.

⁴⁰³ UK, *LOAC Manual* (1981), Section 6, p. 22, § 2. ⁴⁰⁴ US, *Field Manual* (1956), § 215.

383. The US Air Force Pamphlet states that “priority in order of treatment is justified *only* by urgent medical reasons”.⁴⁰⁵ (emphasis added)

384. The US Naval Handbook provides that “priority in order of treatment may *only* be justified by urgent medical considerations”.⁴⁰⁶ (emphasis added)

385. The YPA Military Manual of the SFRY (FRY) provides that “*only* urgent medical reasons shall determine priority of treatment among the wounded and sick”.⁴⁰⁷ (emphasis added)

National Legislation

386. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in international and non-international armed conflicts:

the Armed Forces of the Azerbaijan Republic and appropriate authorities and governmental bodies shall ensure [in all circumstances and with the least possible delay] medical assistance and care, needed for the wounded and sick *irrespective of their status*.⁴⁰⁸ [emphasis added]

387. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁴⁰⁹

388. Ethiopia’s Red Cross Legal Notice refers to one of the objectives of the Red Cross, notably “caring for the sick and wounded among troops and civilians without national discretion”.⁴¹⁰

389. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 12 GC I and 12 GC II, and of AP I, including violations of Articles 10(2) and 15(3) AP I, as well as any “contravention” of AP II, including violations of Articles 7(2) and 9(2) AP II, are punishable offences.⁴¹¹

390. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment”.⁴¹²

National Case-law

391. No practice was found.

⁴⁰⁵ US, *Air Force Pamphlet* (1976), § 12-2. ⁴⁰⁶ US, *Naval Handbook* (1995), § 11.4.

⁴⁰⁷ SFRY (FRY), *YPA Military Manual* (1988), Article 162.

⁴⁰⁸ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 25.

⁴⁰⁹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴¹⁰ Ethiopia, *Red Cross Legal Notice* (1947), Article 4(a).

⁴¹¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴¹² Norway, *Military Penal Code as amended* (1902), § 108.

Other National Practice

392. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that when [the wounded, sick and shipwrecked] are given medical treatment, no distinction among them be based on any grounds other than medical ones”.⁴¹³

393. According to the Report on US Practice, it is the *opinio juris* of the US that there should be no distinction among the wounded and sick on any but medical grounds.⁴¹⁴

III. Practice of International Organisations and Conferences

394. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

395. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

396. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “there shall be no distinction among wounded, sick and shipwrecked founded on any grounds other than medical ones” and that “only urgent medical reasons shall authorize priority in the order of treatment to be administered. Criteria based on nationality or rank are excluded.”⁴¹⁵

397. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “the wounded, the sick and the shipwrecked must be collected and cared for *regardless of the party to which they belong*”.⁴¹⁶ (emphasis added)

398. In a press release in 1992, the ICRC urged all parties to the conflict in Nagorno-Karabakh “to ensure that the wounded and sick are cared of in all circumstances, regardless of the side to which they belong”.⁴¹⁷

⁴¹³ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

⁴¹⁴ Report on US Practice, 1997, Chapter 5.1.

⁴¹⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 200 and 215.

⁴¹⁶ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

⁴¹⁷ ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.

399. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “all the wounded and sick, both civilian and military, must be collected and cared for, *without distinction*”.⁴¹⁸ (emphasis added)

400. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC emphasised that “all the wounded and sick must be collected and cared for *without distinction*, in accordance with the provisions laid down primarily in the First and Fourth Geneva Conventions”.⁴¹⁹ (emphasis added)

VI. Other Practice

401. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that “in every circumstance, the wounded and sick, whether or not they have taken part in acts of violence, . . . shall receive . . . medical care . . . There shall be no distinction among them on any grounds other than their medical condition.”⁴²⁰

402. In 1993, in a communication on violations of IHL in Somalia during UNOSOM operations, MSF denounced “obstruction of civilian access to hospitals and medical care” in the following terms:

The access of the only two civilian hospitals which have surgical units, Benadir and Digfer, was blocked on July 17, 1993 by the deployment of United Nations’ tanks.

The military hospitals were reserved exclusively for the treatment of United Nations’ troops, thus setting up an unacceptable discrimination between the wounded.

Only the Moroccan hospital remained open to the wounded Somalis. This building was inaccessible to the residents west of the K6/Digfer axis. Moreover, as the Moroccan troops were involved in front line military operations, the civilian population could expect little help from them.

MSF urged the UN military commander and the commanders of the various national contingents to respect humanitarian law, including “the right of the injured to treatment, anytime, anywhere, civilian and military alike (article 3 of the four Geneva Conventions)” and requested that “access to treatment be always guaranteed, with no discrimination”.⁴²¹

⁴¹⁸ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

⁴¹⁹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

⁴²⁰ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Articles 12 and 14, *IRRC*, No. 282, 1991, p. 335.

⁴²¹ MSF, Communication on the violations of humanitarian law in Somalia during UNOSOM operations, 20 July 1993, Part I, § 3(a), Part II and Part III, § 2(b).

C. Protection of the Wounded, Sick and Shipwrecked against Pillage and Ill-treatment

General

Note: For practice concerning pillage in general, see Chapter 16, section D.

I. Treaties and Other Instruments

Treaties

403. Article 28 of the 1906 GC provides that “in the event of their military penal laws being insufficient, the signatory governments also engage to take, or to recommend to their legislatures, the necessary measures to repress, in time of war, individual acts of robbery and ill treatment of the sick and wounded of the armies”.

404. Article 16 of the 1907 Hague Convention (X) provides that “after every engagement, the two belligerents, so far as military interests permit, shall take steps to look for the shipwrecked, sick, and wounded, and to protect them . . . against pillage and ill-treatment”.

405. Article 15, first paragraph, GC I provides that “at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures . . . to protect [the wounded and sick] against pillage and ill-treatment”.

406. Article 18, first paragraph, GC II provides that “after an engagement, Parties to the conflict shall, without delay, take all possible measures . . . to protect [the shipwrecked, wounded and sick] against pillage and ill-treatment”.

407. Article 16, second paragraph, GC IV provides that “as far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed and wounded, to assist the shipwrecked and other persons exposed to grave danger, and to protect them against pillage and ill-treatment”.

408. Article 4(2)(g) AP II prohibits acts of pillage against “all persons who do not take a direct part or who have ceased to take part in hostilities”. Article 4 AP II was adopted by consensus.⁴²²

409. Article 8 AP II provides that “whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, . . . to protect [the wounded, sick and shipwrecked] against pillage and ill-treatment”. Article 8 AP II was adopted by consensus.⁴²³

Other Instruments

410. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution, including ill-treatment of wounded.

⁴²² CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

⁴²³ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.

411. Rule 4 of the 1950 UN Command Rules and Regulations gave Military Commissions of the UN Command in Korea jurisdiction over offences including acts of marauding.

412. Paragraph 1 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “all wounded and sick on land shall be treated in accordance with the provisions of the First Geneva Convention”.

413. Paragraph 2.1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “the treatment provided to the wounded, sick and shipwrecked shall be in accordance with the provisions of the First and Second Geneva Conventions of 12 August 1949”.

414. Section 7.2 of the 1999 UN Secretary-General’s Bulletin states that pillage of persons *hors de combatis* prohibited.

II. National Practice

Military Manuals

415. Argentina’s Law of War Manual states that the sick and wounded on the battlefield must be protected against pillage.⁴²⁴

416. Australia’s Defence Force Manual provides that all possible measures must be taken to protect the wounded and sick against pillage and ill-treatment.⁴²⁵

417. Burkina Faso’s Disciplinary Regulations states that “it is prohibited the plunder the . . . wounded”.⁴²⁶

418. Cameroon’s Disciplinary Regulations states that “it is prohibited the plunder the wounded, sick and shipwrecked”.⁴²⁷

419. Canada’s LOAC Manual provides that “the parties to a conflict must protect the wounded, sick and shipwrecked against pillage and ill-treatment” in both international and non-international armed conflicts.⁴²⁸

420. Canada’s Code of Conduct provides that following an engagement, there is an obligation to protect the sick, wounded and civilians against theft and ill-treatment. It further provides that “the personal property of sick and wounded . . . shall not be taken”.⁴²⁹

421. Colombia’s Circular on Fundamental Rules of IHL provides that the wounded and sick must be protected by the party which has them in its power.⁴³⁰

⁴²⁴ Argentina, *Law of War Manual* (1969), § 3.003.

⁴²⁵ Australia, *Defence Force Manual* (1994), § 986.

⁴²⁶ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁴²⁷ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁴²⁸ Canada, *LOAC Manual* (1999), p. 9-1, § 9 and p. 17-4, § 32.

⁴²⁹ Canada, *Code of Conduct* (2001), Rule 7, § 3 and Rule 8, § 2.

⁴³⁰ Colombia, *Circular on Fundamental Rules of IHL* (1992), §§ 1 and 3.

422. Congo's Disciplinary Regulations states that "it is prohibited to plunder the . . . wounded".⁴³¹
423. France's Disciplinary Regulations as amended states that "it is prohibited to plunder the . . . wounded".⁴³²
424. Germany's Military Manual states that the wounded, sick and shipwrecked "shall be protected against pillage and ill-treatment".⁴³³
425. Israel's Manual on the Laws of War states that the "Geneva Conventions contain provisions banning the looting of the wounded, sick [and] shipwrecked . . . Looting is regarded as a despicable act that tarnishes both the soldier and the IDF, leaving a serious moral blot."⁴³⁴
426. Italy's IHL Manual provides that the ill-treatment of the wounded, sick and shipwrecked is a war crime.⁴³⁵
427. Indonesia's Military Manual provides that the wounded and sick must be protected from robbery and ill-treatment.⁴³⁶
428. Lebanon's Army Regulations, Field Manual and Teaching Manual prohibit the pillage of the wounded.⁴³⁷
429. Mali's Army Regulations states that "it is prohibited to plunder the . . . wounded".⁴³⁸
430. Morocco's Disciplinary Regulations states that "it is prohibited to plunder the . . . wounded".⁴³⁹
431. The Military Manual of the Netherlands provides with regard non-international armed conflicts that "the wounded, sick and shipwrecked must be protected against pillage".⁴⁴⁰
432. New Zealand's Military Manual provides that the sick, wounded and shipwrecked are to be protected from pillage and ill-treatment in both international and non-international armed conflicts.⁴⁴¹
433. Nigeria's Manual on the Laws of War provides that "the belligerents must immediately take all possible measures to protect the sick and wounded against pillage and ill-treatment".⁴⁴²
434. The Rules for Combatants of the Philippines provides that "it is forbidden to mistreat a wounded enemy combatant".⁴⁴³
435. Romania's Soldiers' Manual provides that "it is prohibited to despoil or pillage wounded and sick enemy combatants".⁴⁴⁴

⁴³¹ Congo, *Disciplinary Regulations* (1986), Article 32.2.

⁴³² France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁴³³ Germany, *Military Manual* (1992), § 605.

⁴³⁴ Israel, *Manual on the Laws of War* (1998), p. 62.

⁴³⁵ Italy, *IHL Manual* (1991), Vol. I, § 84. ⁴³⁶ Indonesia, *Military Manual* (1982), § 37.

⁴³⁷ Lebanon, *Army Regulations* (1971), § 17; *Field Manual* (1996), § 8; *Teaching Manual* (1997), p. 77.

⁴³⁸ Mali, *Army Regulations* (1979), Article 36.

⁴³⁹ Morocco, *Disciplinary Regulations* (1974), Article 25.2.

⁴⁴⁰ Netherlands, *Military Manual* (1993), p. XI-1.

⁴⁴¹ New Zealand, *Military Manual* (1992), §§ 1003(1) and 1817(1).

⁴⁴² Nigeria, *Manual on the Laws of War* (undated), § 34.

⁴⁴³ Philippines, *Rules for Combatants* (1989), § 3.

⁴⁴⁴ Romania, *Soldiers' Manual* (1991), p. 9.

436. Senegal's Disciplinary Regulations provides that "it is prohibited to plunder the . . . wounded".⁴⁴⁵

437. Switzerland's Basic Military Manual provides that "it is prohibited to despoil the wounded".⁴⁴⁶

438. The UK Military Manual states that the wounded and sick must be protected against pillage and ill-treatment.⁴⁴⁷ The manual refers to:

a special class of war crime that is sometimes known as "marauding". This consists of ranging over battlefields and following advancing or retreating armies in quest of loot, robbing, maltreating and killing stragglers and wounded and plundering the dead – all acts done not as a means of carrying on the war but for private gain. Nevertheless, such acts are treated as violations of the law of war. Those who commit them, whether civilians who have never been lawful combatants, or persons who have belonged to a military unit, an organised resistance movement or a *levée en masse*, and have deserted and so ceased to be lawful combatants, are liable to be punished as war criminals. They may be tried and sentenced by the courts of either belligerent.⁴⁴⁸

439. The UK LOAC Manual refers to Article 15 GC I and states that combatants shall prevent the wounded and sick from being despoiled.⁴⁴⁹

440. The US Field Manual states that the parties shall take all possible measures to protect the wounded and sick against pillage and ill-treatment and prevent their being despoiled.⁴⁵⁰

441. The US Air Force Pamphlet refers to Article 15 GC I and states the obligation to protect the sick and wounded from pillage and ill-treatment.⁴⁵¹

442. The US Naval Handbook provides that "mistreating enemy forces, the shipwrecked disabled by sickness or wounds" is a war crime.⁴⁵²

National Legislation

443. Albania's Military Penal Code provides for the punishment of "stealing on the battlefield".⁴⁵³

444. Algeria's Code of Military Justice provides for the punishment of soldiers or civilians who, in an area of hostilities, steal from the wounded, sick or shipwrecked.⁴⁵⁴

445. Under Argentina's Draft Code of Military Justice, "despoliation of . . . the wounded, sick [and] shipwrecked" is an offence.⁴⁵⁵

446. Under Armenia's Penal Code, stealing objects from the wounded and sick on the battlefield is a punishable offence.⁴⁵⁶

⁴⁴⁵ Senegal, *Disciplinary Regulations* (1990), Article 34.2.

⁴⁴⁶ Switzerland, *Basic Military Manual* (1987), Article 72; see also *Teaching Manual* (1986), p. 19.

⁴⁴⁷ UK, *Military Manual* (1958), § 342. ⁴⁴⁸ UK, *Military Manual* (1958), § 636.

⁴⁴⁹ UK, *LOAC Manual* (1981), Section 6, p. 22, § 3. ⁴⁵⁰ US, *Field Manual* (1956), § 216.

⁴⁵¹ US, *Air Force Pamphlet* (1976), § 12-3(a). ⁴⁵² US, *Naval Handbook* (1995), § 6.2.5.

⁴⁵³ Albania, *Military Penal Code* (1995), Articles 91–93.

⁴⁵⁴ Algeria, *Code of Military Justice* (1971), Article 287.

⁴⁵⁵ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(8) in the *Code of Military Justice as amended* (1951).

⁴⁵⁶ Armenia, *Penal Code* (2003), Article 383.

447. Australia's Defence Force Discipline Act, in an article on looting, provides that:

A person, being a defence member or a defence civilian, who, in the course of operations against the enemy, or in the course of operations undertaken by the Defence Force for the preservation of law and order or otherwise in aid of the civil authorities –

...
(b) takes any property from the body of a person... wounded [or] injured... in those operations...

is guilty of [an] offence.⁴⁵⁷

448. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "in international and non-international armed conflicts, at any time and especially after an engagement, all possible measures must be taken to protect the wounded and sick from pillage and ill-treatment".⁴⁵⁸

449. Azerbaijan's Criminal Code provides for the punishment of "pillage of property of persons killed or wounded on the battlefield".⁴⁵⁹

450. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴⁶⁰

451. Bolivia's Military Penal Code provides that "the person who plunders the belongings of wounded in combat" commits a punishable offence.⁴⁶¹

452. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "the unlawful appropriation of belongings from the... wounded on the battlefield" is a war crime. It adds that ill-treatment of wounded, sick and shipwrecked is a war crime.⁴⁶² The Criminal Code of the Republika Srpska contains the same provisions.⁴⁶³

453. Bulgaria's Penal Code as amended provides that taking on the battlefield "objects from a wounded [person],... with the intention to unlawfully appropriate them" is a crime.⁴⁶⁴

454. Under Burkina Faso's Code of Military Justice, "the despoliation of the wounded [and] sick... in a unit's area of operations" is an offence.⁴⁶⁵

455. Canada's National Defence Act provides that "every person who... steals from, or with intent to steal searches, the person of any person... wounded, in the course of warlike operations, ... is guilty of [an] offence".⁴⁶⁶

⁴⁵⁷ Australia, *Defence Force Discipline Act* (1982), Section 48(1).

⁴⁵⁸ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 24.

⁴⁵⁹ Azerbaijan, *Criminal Code* (1999), Article 118.

⁴⁶⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴⁶¹ Bolivia, *Military Penal Code* (1976), Article 156.

⁴⁶² Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 159(1) and 173.

⁴⁶³ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 439(1) and 441.

⁴⁶⁴ Bulgaria, *Penal Code as amended* (1968), Article 405.

⁴⁶⁵ Burkina Faso, *Code of Military Justice* (1994), Article 193.

⁴⁶⁶ Canada, *National Defence Act* (1985), Section 77(g).

- 456.** Under Chad's Code of Military Justice, the taking of property from the wounded is a criminal offence.⁴⁶⁷
- 457.** Chile's Code of Military Justice provides that "anyone who plunders the clothing or other objects belonging to a wounded person . . . in order to appropriate them" commits a punishable offence against international law.⁴⁶⁸
- 458.** Colombia's Penal Code imposes a sanction on "anyone who, during an armed conflict, despoils . . . a protected person".⁴⁶⁹
- 459.** Côte d'Ivoire's Penal Code as amended provides for the punishment of "anyone who, in an area of military operations, plunders a wounded, sick [or] shipwrecked . . . person".⁴⁷⁰
- 460.** Croatia's Criminal Code provides that the "unlawful taking of the personal belongings of the . . . wounded on the battlefield" is a war crime.⁴⁷¹
- 461.** Cuba's Military Criminal Code punishes "anyone who, in areas of military operations, plunders for personal gain money or other belongings from wounded persons".⁴⁷²
- 462.** The Czech Republic's Criminal Code as amended punishes "whoever in a theatre of war, on the battlefield or in places affected by military operations, . . . seizes another person's belongings, taking advantage of such person's distress".⁴⁷³
- 463.** Under Egypt's Penal Code, stealing from enemy or friendly wounded on the battlefield is a punishable offence.⁴⁷⁴
- 464.** Egypt's Military Criminal Code criminalises the theft in zones of military operations of property belonging to wounded or sick whether friend or foe.⁴⁷⁵
- 465.** El Salvador's Code of Military Justice provides that "a soldier who plunders the clothes or other personal effects of a wounded person . . . in order to appropriate them" commits a punishable offence.⁴⁷⁶
- 466.** Under Ethiopia's Penal Code, "whosoever . . . lays hands on or does violence to a wounded [or] sick . . . enemy on the field of battle, with intent to rob or plunder him" commits a crime. The Code also provides for the punishment of the ill-treatment of the wounded and sick.⁴⁷⁷
- 467.** France's Code of Military Justice provides for the punishment of "any individual, military or not, who, in the area of operation of a force or a unit, . . . plunders a wounded, sick [or] shipwrecked . . . person".⁴⁷⁸
- 468.** Gambia's Armed Forces Act provides that "every person subject to this Act who . . . steals from or with intent to steal searches, the person of any

⁴⁶⁷ Chad, *Code of Military Justice* (1962), Article 62.

⁴⁶⁸ Chile, *Code of Military Justice* (1925), Article 263.

⁴⁶⁹ Colombia, *Penal Code* (2000), Article 151.

⁴⁷⁰ Côte d'Ivoire, *Penal Code as amended* (1981), Article 465.

⁴⁷¹ Croatia, *Criminal Code* (1997), Articles 162 and 165.

⁴⁷² Cuba, *Military Criminal Code* (1979), Article 43(1).

⁴⁷³ Czech Republic, *Criminal Code as amended* (1961), Article 264(a).

⁴⁷⁴ Egypt, *Penal Code* (1937), Article 317(9).

⁴⁷⁵ Egypt, *Military Criminal Code* (1966), Article 136, see also Article 123.

⁴⁷⁶ El Salvador, *Code of Military Justice* (1934), Article 70.

⁴⁷⁷ Ethiopia, *Penal Code* (1957), Articles 287(c) and 291.

⁴⁷⁸ France, *Code of Military Justice* (1982), Article 428.

person . . . wounded, in the course of war-like operations" commits a punishable offence.⁴⁷⁹

469. Ghana's Armed Forces Act states that "every person subject to the Code of Service Discipline who . . . steals from or with the intent to steal searches, the person of any person . . . wounded, in the course of warlike operations" commits a punishable offence.⁴⁸⁰

470. Under Georgia's Criminal Code, "pillage, *i.e.* seizure in a combat situation of things which are on . . . wounded", is a crime.⁴⁸¹

471. Guinea's Criminal Code provides that "whoever, in an area of military operation, plunders a wounded, sick [or] shipwrecked person" commits a punishable offence.⁴⁸²

472. Under Hungary's Criminal Code as amended, "the person who loots the fallen, injured or sick on the battlefield" is guilty, upon conviction, of a war crime.⁴⁸³

473. Under Indonesia's Military Penal Code, theft from sick or wounded members of the armed forces of parties to the conflict is a punishable offence.⁴⁸⁴

474. Iraq's Military Penal Code provides for the punishment of "every person who, with the intent to appropriate for himself or unjustifiably, takes money or other things . . . from the wounded while on the march or in hospital or during movements".⁴⁸⁵

475. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 15 GC I, 18 GC II and 16 GC IV, as well as any "contravention" of AP II, including violations of Articles 4(2)(g) and 8 AP II, are punishable offences.⁴⁸⁶

476. Italy's Wartime Military Penal Code provides for the punishment of anyone who ill-treats the wounded, sick and shipwrecked. It also provides that anyone who plunders a wounded, sick or shipwrecked person is guilty of a punishable offence.⁴⁸⁷

477. Under Kazakhstan's Penal Code, "theft of objects belonging to the . . . wounded on the battlefield (marauding)" is a crime.⁴⁸⁸

478. Under Kenya's Armed Forces Act, anyone who steals from the wounded commits a punishable offence.⁴⁸⁹

479 Gambia, *Armed Forces Act* (1985), Section 40(g).

480 Ghana, *Armed Forces Act* (1962), Section 18(g).

481 Georgia, *Criminal Code* (1999), Article 413(a).

482 Guinea, *Criminal Code* (1998), Article 570.

483 Hungary, *Criminal Code as amended* (1978), Section 161.

484 Indonesia, *Military Penal Code* (1947), Articles 140–143.

485 Iraq, *Military Penal Code* (1940), Article 115(a).

486 Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

487 Italy, *Wartime Military Penal Code* (1941), Articles 192 and 193.

488 Kazakhstan, *Penal Code* (1997), Article 385.

489 Kenya, *Armed Forces Act* (1968), Section 23.

479. Under South Korea's Military Criminal Code, "a person who takes the clothes and other property of the . . . wounded in the combat area" commits a punishable offence.⁴⁹⁰

480. Latvia's Criminal Code provides that the appropriation of property of the wounded on the battlefield is a war crime.⁴⁹¹

481. Under Lebanon's Code of Military Justice, pillage of the sick or the wounded by non-military persons in an "area of military operations" is a punishable offence.⁴⁹²

482. Under Lithuania's Criminal Code as amended, "an order to plunder or seize things from . . . wounded victims on the battlefield" is a war crime.⁴⁹³

483. Malaysia's Armed Forces Act provides for the punishment of "every person subject to service law under this Act who . . . steals from, or with intent to steal searches, the person of anyone . . . wounded in the course of warlike operations".⁴⁹⁴

484. Under Mali's Code of Military Justice, "anyone who plunders a wounded, sick [or] shipwrecked . . . person" commits a punishable offence.⁴⁹⁵

485. Mexico's Code of Military Justice as amended provides penalties for persons who mistreat or otherwise cause physical or mental injuries to the wounded and sick.⁴⁹⁶

486. Mozambique's Military Criminal Law provides for the punishment of stealing valuables and objects from the wounded.⁴⁹⁷

487. The Definition of War Crimes Decree of the Netherlands includes "ill-treatment of wounded" in its list of war crimes.⁴⁹⁸

488. Under the Military Criminal Code as amended of the Netherlands, "theft from a . . . sick or wounded person, who belongs to one of the parties to the conflict," is a criminal offence.⁴⁹⁹

489. New Zealand's Armed Forces Discipline Act provides that:

Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who –

- (a) Steals from, or with intent to steal searches, the person of anyone . . . wounded . . . in the course of any war or warlike operations in which New Zealand is engaged, or . . . injured . . . in the course of operations undertaken by any service of the Armed Forces for the preservation of law and order or otherwise in aid of the civil power.⁵⁰⁰

⁴⁹⁰ South Korea, *Military Criminal Code* (1962), Article 82.

⁴⁹¹ Latvia, *Criminal Code* (1998), Section 76.

⁴⁹² Lebanon, *Code of Military Justice* (1968), Article 132.

⁴⁹³ Lithuania, *Criminal Code as amended* (1961), Article 341.

⁴⁹⁴ Malaysia, *Armed Forces Act* (1972), Section 46(a).

⁴⁹⁵ Mali, *Code of Military Justice* (1995), Article 134(1).

⁴⁹⁶ Mexico, *Code of Military Justice as amended* (1933), Article 324.

⁴⁹⁷ Mozambique, *Military Criminal Law* (1987), Articles 83(b) and 85(d).

⁴⁹⁸ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁴⁹⁹ Netherlands, *Military Criminal Code as amended* (1964), Article 156.

⁵⁰⁰ New Zealand, *Armed Forces Discipline Act* (1971), Section 31(a).

490. Nicaragua's Military Penal Law punishes "anyone who, in military operations, steals for personal gain money or other belongings of the wounded".⁵⁰¹

491. Nicaragua's Military Penal Code provides for the punishment of the soldier who, in the zone of operations, "despoils a . . . wounded, sick or shipwrecked person of their clothing or other personal effects".⁵⁰²

492. Nigeria's Armed Forces Decree 105 as amended punishes any person subject to service law who "steals from, or with intent to steal searches, the body of a person . . . wounded . . . in the course of a war-like operation".⁵⁰³

493. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁵⁰⁴

494. Paraguay's Military Penal Code punishes "any soldier who has plundered another wounded soldier".⁵⁰⁵

495. Under Peru's Code of Military Justice, ill-treatment of a non-resisting wounded enemy constitutes a violation of the law of nations.⁵⁰⁶

496. Romania's Penal Code criminalises "robbing the . . . wounded on the battlefield of objects they possess".⁵⁰⁷

497. Singapore's Armed Forces Act as amended provides for the punishment of every person subject to military law who:

steals from or, with intent to steal, searches the person of anyone . . . wounded . . . in the course of warlike operations, or . . . injured . . . in the course of operations undertaken by the Singapore Armed Forces for the preservation of law and order or otherwise in aid of the civil authorities.⁵⁰⁸

498. Slovakia's Criminal Code as amended punishes "whoever in a theatre of war, on [the] battlefield or in places affected by military operations, . . . seizes another person's belongings, taking advantage of such person's distress".⁵⁰⁹

499. Under Slovenia's Penal Code, plundering or ordering the plunder of objects belonging to casualties on the battlefield constitutes a war crime.⁵¹⁰

500. Under Spain's Military Criminal Code, the despoliation of wounded, sick or shipwrecked persons and appropriation of their personal belongings in a combat area is an offence against the laws and customs of war.⁵¹¹

⁵⁰¹ Nicaragua, *Military Penal Law* (1980), Article 81.

⁵⁰² Nicaragua, *Military Penal Code* (1996), Article 56(1).

⁵⁰³ Nigeria, *Armed Forces Decree 105 as amended* (1993), Section 51.

⁵⁰⁴ Norway, *Military Penal Code as amended* (1902), § 108.

⁵⁰⁵ Paraguay, *Military Penal Code* (1980), Article 293.

⁵⁰⁶ Peru, *Code of Military Justice* (1980), Article 94.

⁵⁰⁷ Romania, *Penal Code* (1968), Article 350.

⁵⁰⁸ Singapore, *Armed Forces Act as amended* (1972), Section 18(a).

⁵⁰⁹ Slovakia, *Criminal Code as amended* (1961), Article 264(a).

⁵¹⁰ Slovenia, *Penal Code* (1994), Article 380(1).

⁵¹¹ Spain, *Military Criminal Code* (1985), Article 77(2).

501. Spain's Penal Code provides for the punishment of anyone who during an armed conflict despoils the wounded, sick or shipwrecked and appropriates their personal belongings.⁵¹²

502. Switzerland's Military Criminal Code as amended punishes anyone who, on the battlefield, despoils and pillages the wounded and sick. It also provides for the punishment of anyone who uses violence against the wounded and sick.⁵¹³

503. Under Tajikistan's Criminal Code, pillage of wounded and sick in a combat zone is a crime in both international and non-international armed conflicts.⁵¹⁴

504. Togo's Code of Military Justice punishes "any soldier who plunders a wounded, sick or shipwrecked person".⁵¹⁵

505. Trinidad and Tobago's Defence Act as amended contains a section on "looting" which states that "any person subject to military law who . . . steals from, or with intent to steal searches, the person of anyone . . . wounded in the course of warlike operations . . . is guilty of looting".⁵¹⁶

506. Uganda's National Resistance Army Statute provides that "a person subject to military law who . . . steals from or, with intent to steal, searches the person or any person . . . wounded in the course of war-like operations . . . commits an offence".⁵¹⁷

507. Under Ukraine's Criminal Code, stealing the belongings of the wounded and sick on the battlefield or treating them cruelly constitutes a war crime.⁵¹⁸

508. The UK Army Act as amended provides that:

Any person subject to military law who –

- (a) steals from, or with intent to steal searches, the person of anyone . . . wounded . . . in the course of warlike operations, or . . . injured . . . in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities . . .

shall be guilty of looting.⁵¹⁹ [emphasis in original]

509. The UK Air Force Act as amended provides for the punishment of any person subject to air force law who:

steals from, or with intent to steal searches, the person of anyone . . . wounded . . . in the course of warlike operations, or . . . injured . . . in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities.⁵²⁰

⁵¹² Spain, *Penal Code* (1995), Article 612(7).

⁵¹³ Switzerland, *Military Criminal Code as amended* (1927), Articles 139–140.

⁵¹⁴ Tajikistan, *Criminal Code* (1998), Article 405.

⁵¹⁵ Togo, *Code of Military Justice* (1981), Article 95.

⁵¹⁶ Trinidad and Tobago, *Defence Act as amended* (1962), Section 40(a).

⁵¹⁷ Uganda, *National Resistance Army Statute* (1992), Section 35(f).

⁵¹⁸ Ukraine, *Criminal Code* (2001), Articles 432 and 434.

⁵¹⁹ UK, *Army Act as amended* (1955), Section 30(a).

⁵²⁰ UK, *Air Force Act as amended* (1955), Section 30(a).

510. Uruguay's Military Penal Code as amended punishes the "despoliation of the wounded . . . in combat".⁵²¹

511. Under Venezuela's Code of Military Justice as amended, it is a crime against international law to "plunder . . . the wounded and sick".⁵²²

512. Vietnam's Penal Code provides for the punishment of "any person who steals personal belongings from a wounded soldier".⁵²³

513. Under Yemen's Military Criminal Code, despoliation of the wounded or sick is a war crime.⁵²⁴

514. Zambia's Defence Act as amended states that "any person subject to military law under this Act who . . . steals from or with intent to steal searches the person of anyone . . . wounded in the course of warlike operations . . . shall be guilty of looting".⁵²⁵

515. Zimbabwe's Defence Act as amended provides for the punishment of "any member [of the Defence Forces] who . . . steals from or with intent to steal searches the person of anyone . . . wounded in the course of warlike operations".⁵²⁶

National Case-law

516. No practice was found.

Other National Practice

517. According to German investigations following allegations of crimes committed against members of the armed forces in Crete in May 1941, it appeared that "wounded soldiers were robbed and deprived of parts of their clothing, primarily by the civilian population".⁵²⁷

518. According to the Report on US Practice, it is the *opinio juris* of the US that the wounded and sick in internal armed conflicts should be respected and protected in accordance with Article 8 AP II.⁵²⁸

519. Order No. 579 issued in 1991 by the Chief of Staff of the YPA provides that YPA units shall apply "all means to prevent any attempt of pillage [and] mistreatment of . . . the wounded and sick".⁵²⁹

III. Practice of International Organisations and Conferences

520. No practice was found.

⁵²¹ Uruguay, *Military Penal Code as amended* (1943), Article 58(10).

⁵²² Venezuela, *Code of Military Justice as amended* (1998), Article 474(11).

⁵²³ Vietnam, *Penal Code* (1990), Article 271(2).

⁵²⁴ Yemen, *Military Criminal Code* (1998), Article 20.

⁵²⁵ Zambia, *Defence Act as amended* (1964), Section 35(a).

⁵²⁶ Zimbabwe, *Defence Act as amended* (1972), First Schedule, Section 11(a).

⁵²⁷ Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau, 1939–1945*, University of Nebraska Press, 1989, pp. 156–157.

⁵²⁸ Report on US Practice, 1997, Chapter 5.1.

⁵²⁹ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, § 2.

IV. Practice of International Judicial and Quasi-judicial Bodies

521. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

522. No practice was found.

VI. Other Practice

523. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, provides that “every possible measure shall be taken, without delay, . . . to protect [the wounded and sick] against pillage and ill-treatment”.⁵³⁰

Respect by civilians for the wounded, sick and shipwrecked

I. Treaties and Other Instruments

Treaties

524. Article 18, second paragraph, GC I states that “the civilian population shall respect [the] wounded and sick, and in particular abstain from offering them violence”.

525. Article 17(1) AP I provides that “the civilian population shall respect the wounded, sick and shipwrecked, even if they belong to the adverse Party, and shall commit no act of violence against them”. Article 17 AP I was adopted by consensus.⁵³¹

Other Instruments

526. No practice was found.

II. National Practice

Military Manuals

527. Argentina’s Law of War Manual provides that the civilian population shall respect the wounded, sick and shipwrecked and shall not commit any act of violence against them.⁵³²

⁵³⁰ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, 1991, p. 335.

⁵³¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

⁵³² Argentina, *Law of War Manual* (1989), § 2.03.

528. Australia's Defence Force Manual states that while personnel from a disabled aircraft may be captured by non-combatants, they may not be subjected to violent assault by them.⁵³³

529. Germany's Military Manual provides that "civilians must respect the wounded, the sick and the shipwrecked, even if they belong to the opposite party. They must not use violence against them."⁵³⁴

530. Spain's LOAC Manual refers to Article 17 AP I.⁵³⁵

531. Sweden's IHL Manual considers that Article 17 AP I on the role of aid organisations has the status of customary law.⁵³⁶

532. Switzerland's Basic Military Manual, although it refers to Article 18 GCI, does not provide explicitly for the duty of civilians to respect the wounded and sick. The commentary gives as an example, however, that if "a seriously injured parachutist lands near a farm, he shall be cared for until the arrival of the authorities".⁵³⁷

533. The UK Military Manual provides that "the civilian population must respect the wounded and sick, and refrain from offering them violence". The manual further provides that "nursing the wounded and sick should not be penalised, though this immunity does not extend to the concealment of enemy personnel or the activities of escape organisations".⁵³⁸

534. The US Field Manual provides that "the civilian population shall respect [the] wounded and sick, and in particular abstain from offering them violence".⁵³⁹

535. The US Health Service Manual reproduces Article 18 GC I and provides that "the civilian population must respect the wounded and the sick and refrain from offering them violence".⁵⁴⁰

National Legislation

536. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵⁴¹

537. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 18 GCI, and of AP I, including violations of Article 17(1) AP I, are punishable offences.⁵⁴²

538. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

⁵³³ Australia, *Defence Force Manual* (1994), § 848.

⁵³⁴ Germany, *Military Manual* (1992), § 632.

⁵³⁵ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.a.(4).

⁵³⁶ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 18.

⁵³⁷ Switzerland, *Basic Military Manual* (1987), Article 75.

⁵³⁸ UK, *Military Manual* (1958), § 345.

⁵³⁹ US, *Field Manual* (1956), § 219.

⁵⁴⁰ US, *Health Service Manual* (1991), p. A-2.

⁵⁴¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁵⁴² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁵⁴³

National Case-law

539. No practice was found.

Other National Practice

540. According to the Report on the Practice of Chile, civilians also have a duty to respect persons *hors de combat*.⁵⁴⁴

541. According to the Report on Report on the Practice of Indonesia, although civilians do not have the legal duty to safeguard the enemy *hors de combat*, they would have a moral duty to do so under the principle of humanity stated in the State's fundamental philosophy (*Pancasila*).⁵⁴⁵

542. According to the Report on the Practice of Iran, during the Iran–Iraq War, in reply to allegations that "angry [Iranian] mobs had killed parachuting Iraqis", Iranian military authorities stated that pilots were under the control of the army and well treated.⁵⁴⁶ The Iranian authorities repeatedly asked the Iranian population not to shoot at parachuting pilots and to capture them alive.⁵⁴⁷

543. The Report on the Practice of Israel states that:

With respect to civilians, the Israeli Penal Law 1997 prohibits any assault on the person of another, except in situations where there exists a defence prescribed by law, such as self defence. Civilians are, therefore, also under the duty not to harm [the] enemy *hors de combat*.⁵⁴⁸

544. According to the Report on the Practice of Jordan, civilians also have a duty to respect persons *hors de combat*.⁵⁴⁹

III. Practice of International Organisations and Conferences

United Nations

545. In a resolution on Angola adopted in 1993, the UN Security Council condemned the "violations of international humanitarian law, in particular . . . the extensive killings carried out by armed civilians".⁵⁵⁰

Other International Organisations

546. No practice was found.

⁵⁴³ Norway, *Military Penal Code as amended* (1902), § 108.

⁵⁴⁴ Report on the Practice of Chile, 1997, Answers to additional questions on Chapter 2.1.

⁵⁴⁵ Report on the Practice of Indonesia, 1997, Answers to additional questions on Chapter 2.1.

⁵⁴⁶ Report on the Practice of Iran, 1997, Chapter 2.1.

⁵⁴⁷ Report on the Practice of Iran, 1997, Chapters 2.1 and 5.3; see also Military Communiqué No. 66, 29 September 1980.

⁵⁴⁸ Report on the Practice of Israel, 1998, Chapter 2.1, referring to Penal Law as amended (1977).

⁵⁴⁹ Report on the Practice of Jordan, 1997, Answers to additional questions on Chapter 2.1.

⁵⁵⁰ UN Security Council, Res. 804, 29 January 1993, § 10.

International Conferences

547. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

548. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

549. The ICRC Commentary on Article 17 AP I states that its “provision was inspired by Article 18, paragraphs 2, 3 and 4, of the First Convention – the principle of which came from the original Convention of 22 August 1864 (Article 5) – and it was aimed at extending the scope of Article 18 to the civilian wounded and sick”.⁵⁵¹

VI. Other Practice

550. No practice was found.

⁵⁵¹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 692.

THE DEAD

A. Search for and Collection of the Dead (practice relating to Rule 112)	§§ 1-57
B. Treatment of the Dead (practice relating to Rule 113)	§§ 58-243
Respect for the dead	§§ 58-124
Protection of the dead against despoliation	§§ 125-243
C. Return of the Remains and Personal Effects of the Dead (practice relating to Rule 114)	§§ 244-327
Return of the remains of the dead	§§ 244-289
Return of the personal effects of the dead	§§ 290-327
D. Disposal of the Dead (practice relating to Rule 115)	§§ 328-517
General	§§ 328-371
Respect for the religious beliefs of the dead	§§ 372-397
Cremation of bodies	§§ 398-429
Burial in individual or collective graves	§§ 430-463
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Respect for and maintenance of graves	§§ 485-517
E. Accounting for the Dead (practice relating to Rule 116)	§§ 518-712
Identification of the dead prior to disposal	§§ 518-587
Recording of the location of graves	§§ 588-613
Marking of graves and access to gravesites	§§ 614-645
Identification of the dead after disposal	§§ 646-668
Information concerning the dead	§§ 669-712

A. Search for and Collection of the Dead*I. Treaties and Other Instruments**Treaties*

1. Article 3 of the 1929 GC provides that “after each engagement the occupant of the field of battle shall take measures to search for . . . the dead”.
2. Article 15, first paragraph, GC I provides that “at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures . . . to search for the dead”.

3. Article 18, first paragraph, GC II provides that “after each engagement, Parties to the conflict shall, without delay, take all possible measures . . . to search for the dead”.
4. Article 21, first paragraph, GC II states that “the Parties to the conflict may appeal to the charity of commanders of neutral merchant vessels, yachts or other craft . . . to collect the dead”.
5. Article 16, second paragraph, GC IV provides that “as far as military considerations allow, each Party to the conflict shall facilitate the steps taken to search for the killed”.
6. Article 17(2) AP I states that “the Parties to the conflict may appeal to the civilian population and the aid societies . . . to search for the dead and report their location”. Article 17 AP I was adopted by consensus.¹
7. Article 33(4) AP I provides that “the Parties to the conflict shall endeavour to agree on arrangements for teams to search for . . . and recover the dead from the battlefield areas”. Article 33 AP I was adopted by consensus.²
8. Article 8 AP II provides that “whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay . . . to search for the dead”. Article 8 AP II was adopted by consensus.³

Other Instruments

9. Article II(5) of the 1992 N’Sele Ceasefire Agreement provides that the ceasefire shall imply “the possibility of recovering the remains of the dead”.
10. Article 4(9) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “every possible measure shall be taken, without delay, . . . to search for the dead”.

II. National Practice

Military Manuals

11. Argentina’s Law of War Manual states that the parties shall, without delay, take all possible measures to search for and collect the dead.⁴
12. Australia’s Defence Force Manual provides that “parties must search for the dead”.⁵ The manual further states that:

All of the protagonists to a conflict shall attempt to agree to form special teams to undertake the search, identity and recovery of their dead from a belligerent’s battlefield. This will include any arrangements for such teams to be accompanied by members of the belligerent force upon whose land they are searching. In the course of their duties search teams are deemed to be protected persons.⁶

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 70.

² CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

³ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.

⁴ Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 2.06.

⁵ Australia, *Defence Force Manual* (1994), § 986, see also § 994.

⁶ Australia, *Defence Force Manual* (1994), § 9-104.

13. Belgium's Law of War Manual provides that "the belligerents must search for the dead and collect them".⁷

14. Benin's Military Manual provides that "combatants must search for the dead". The manual also states that "military commanders can make an appeal to the civilian population, to aid societies such as the National Red Cross or Red Crescent Societies . . . to collect . . . the dead".⁸

15. Cameroon's Instructors' Manual states that military commanders must take care of searching for the dead and that they must be evacuated.⁹ It further provides that "in case of civilian losses, civil defence units and personnel shall participate in the search for the victims".¹⁰ The manual also states that "an appeal to the charity of the population can be made to help National Societies such as the Red Cross or the Red Crescent in order to collect . . . the dead".¹¹

16. Canada's LOAC Manual provides that the belligerents "must also search for the dead".¹² With respect to non-international armed conflicts in particular, the manual specifies that "steps must also be taken to search for the dead".¹³ It also states that:

Parties to the conflict shall endeavour to reach agreements to allow teams to search for . . . and recover the dead from battlefield areas. They may also attach to such teams representatives of the adverse party when the search is taking place in areas controlled by the adverse party. While carrying out these duties, members of the teams shall be respected and protected.¹⁴

17. Canada's Code of Conduct provides that "there is . . . an obligation to search for . . . the dead".¹⁵

18. Croatia's Commanders' Manual provides that "when the mission permits, the . . . dead in action shall be searched for and collected".¹⁶ It further states that "bodies not buried or cremated on the spot shall be evacuated".¹⁷

19. France's LOAC Summary Note and LOAC Teaching Note provide that the dead must be collected.¹⁸

20. According to Germany's Military Manual, "the dead are to be collected".¹⁹

21. Under India's police regulations, Indian police are required to make arrangements for the collection of dead persons killed in police firing.²⁰

⁷ Belgium, *Law of War Manual* (1983), p. 49.

⁸ Benin, *Military Manual* (1995), Fascicule II, p. 10.

⁹ Cameroon, *Instructors' Manual* (1992), p. 67, § 241(1).

¹⁰ Cameroon, *Instructors' Manual* (1992), pp. 95-96, DG 34.

¹¹ Cameroon, *Instructors' Manual* (1992), p. 96, DG 34.

¹² Canada, *LOAC Manual* (1999), p. 9-1, § 9, see also p. 11-2, § 16.

¹³ Canada, *LOAC Manual* (1999), p. 17-4, § 32.

¹⁴ Canada, *LOAC Manual* (1999), p. 9-5, § 53.

¹⁵ Canada, *Code of Conduct* (2001), Rule 7, § 3.

¹⁶ Croatia, *Commanders' Manual* (1992), § 71.

¹⁷ Croatia, *Commanders' Manual* (1992), § 89.

¹⁸ France, *LOAC Summary Note* (1992), § 2.1; *LOAC Teaching Note* (2000), p. 3.

¹⁹ Germany, *Military Manual* (1992), § 611.

²⁰ India, *Police Manual* (1986), Article 13(xvii-xviii); *West Bengal Police Regulations* (1962), Article 156(a).

22. Italy's LOAC Elementary Rules Manual provides that "when the mission permits, the . . . dead in action shall be searched for and collected".²¹

23. Kenya's LOAC Manual provides that "at all times, and particularly after an engagement, Parties to the conflict must take measures to search for and collect the dead". It adds that "civil defence units and personnel shall participate in the search for victims, particularly when there are civilian casualties".²² The manual also provides that "commanders may appeal to the civilian population, to aid societies such as National Red Cross or Red Crescent Societies and to commanders of neutral merchant vessels, yachts or other craft . . . to collect and identify the dead".²³

24. Madagascar's Military Manual provides that, "when the mission so permits . . . those killed in action shall be searched for and collected".²⁴

25. The Military Manual of the Netherlands states that, with regard to non-international armed conflicts, "whenever circumstances permit, all measure shall be taken, without delay to search for and collect . . . the dead".²⁵

26. According to the Military Handbook of the Netherlands, "the dead shall systematically, if possible, be searched for and collected".²⁶

27. New Zealand's Military Manual provides that "the parties to a conflict are obliged to take all possible measures . . . to search for the dead".²⁷ The manual further states that:

To facilitate the finding of the missing personnel Parties to the conflict endeavour to reach agreement to allow teams to search for . . . and recover the dead from battle-field areas and may attach to such teams representatives of the adverse Party when the search is taking place in areas controlled by the adverse Party. While carrying out these duties, members of the teams shall be respected and protected.²⁸

With respect to non-international armed conflicts, the manual states that "steps must be taken to search for the dead".²⁹

28. Nigeria's Military Manual provides that the dead must be searched for "may be, with the aid of the civilian population or the Red Cross/Crescent".³⁰

29. Nigeria's Manual on the Laws of War provides that "at all times and particularly after a campaign, the belligerents must immediately take measures to . . . search for the dead".³¹

²¹ Italy, *LOAC Elementary Rules Manual* (1991), § 71.

²² Kenya, *LOAC Manual* (1997), Précis No. 2, p. 14, see also Précis No. 3, pp. 11 and 13.

²³ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.

²⁴ Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 16, see also Fiche No. 5-SO, § C, Fiche No. 8-SO, § C and Fiche 2-T, § 22.

²⁵ Netherlands, *Military Manual* (1993), p. XI-5.

²⁶ Netherlands, *Military Handbook* (1995), p. 7-40.

²⁷ New Zealand, *Military Manual* (1992), § 1003(1), see also § 1011(1).

²⁸ New Zealand, *Military Manual* (1992), § 1011(3).

²⁹ New Zealand, *Military Manual* (1992), § 1817.

³⁰ Nigeria, *Military Manual* (1994), p. 46, § 16(g).

³¹ Nigeria, *Manual on the Laws of War* (undated), § 34(c).

30. The Military Instructions of the Philippines provides that “evacuation of the dead bodies must be done expeditiously and brought to the nearest morgue”.³²
31. According to Spain’s LOAC Manual, “the belligerent parties must, at all times and particularly after an engagement, take all possible measures to search for and collect . . . the dead in action”.³³ The manual also states that “the dead bodies not buried, cremated or buried at sea because of the circumstances, shall be evacuated”.³⁴
32. Switzerland’s Basic Military Manual provides that “at all times, and particularly after an engagement, all measures shall be taken to search for and collect the dead, be they enemies or friends”.³⁵
33. Togo’s Military Manual provides that “combatants must search for the dead”. It also states that “military commanders can make an appeal to the civilian population, to aid societies such as the National Red Cross or Red Crescent Societies . . . to collect . . . the dead”.³⁶
34. The UK Military Manual provides that “belligerents must at all times, and particularly after an engagement, take all possible measures to search for the dead”.³⁷
35. The UK LOAC Manual provides that “combatants are required . . . to search for the dead”.³⁸
36. The US Field Manual reproduces Article 15 GC I.³⁹
37. The US Air Force Pamphlet refers to Article 15 GC I.⁴⁰
38. The US Operational Law Handbook states that “the LOW requires Parties to a conflict to search for the dead”.⁴¹
39. The Annotated Supplement to the US Naval Handbook provides that the requirement for parties to the conflict, after each engagement and without delay, to take all possible measures to search for and collect the wounded and sick “also extends to the dead”.⁴²
40. The YPA Military Manual of the SFRY (FRY) provides that the civilian population or humanitarian societies may, of their own initiative, collect the dead, while military commanders assist and supervise these groups.⁴³

³² Philippines, *Military Instructions* (1989), p. 27, § 4; see also *Military Directive to Commanders* (1988), p. 30, guideline 4(h)(6).

³³ Spain, *LOAC Manual* (1996), Vol. I, § 7.5.a, see also § 5.2.d.(5).

³⁴ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).

³⁵ Switzerland, *Basic Military Manual* (1987), Article 71(1).

³⁶ Togo, *Military Manual* (1996), Fascicule II, p. 10.

³⁷ UK, *Military Manual* (1958), § 381.

³⁸ UK, *LOAC Manual* (1981), Section 6, p. 22, § 3.

³⁹ US, *Field Manual* (1956), § 216.

⁴⁰ US, *Air Force Pamphlet* (1976), § 12-2(a).

⁴¹ US, *Operational Law Handbook* (1993), p. Q-185.

⁴² US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.

⁴³ SFRY (FRY), *YPA Military Manual* (1988), Article 166.

National Legislation

41. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴⁴

42. Botswana's Geneva Conventions Act provides that "Parties to the conflict, shall, without delay take all possible measures . . . to search for the dead".⁴⁵

43. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 15 GC I, 18 GC II and 16 GC IV, and of AP I, including violations of Article 33(4) AP I, as well as any "contravention" of AP II, including violations of Article 8 AP II, are punishable offences.⁴⁶

44. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁴⁷

45. Vietnam's Penal Code punishes "anyone who abandons . . . dead soldiers on the battlefield".⁴⁸

National Case-law

46. In its ruling in the *Jenin (Mortal Remains) case* in 2002, dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel's High Court of Justice stated that "teams would be selected, and include soldiers from the bomb disposal unit, medical and other professional representatives. These teams will locate the bodies."⁴⁹ It also stated that "locating . . . the bodies is a highly important humanitarian deed. It is derived from the respect to the dead. The respect of every dead."⁵⁰

Other National Practice

47. According to the Report on the Practice of Indonesia, whenever circumstances permit, all possible measures should be taken to search for the dead.⁵¹

48. According to the Report on the Practice of the Philippines:

In an armed conflict where guerilla warfare is the strategy used, distinguishing between civilians and combatants is very difficult. This is precisely the reason why the Philippines have adopted the same rules for both civilians and combatants with regard to the search for and care of the wounded, sick and dead.⁵²

⁴⁴ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴⁵ Botswana, *Geneva Conventions Act* (1970), Article 15, Schedule 1.

⁴⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁷ Norway, *Military Penal Code as amended* (1902), § 108.

⁴⁸ Vietnam, *Penal Code* (1990), Article 271(1).

⁴⁹ Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, §7.

⁵⁰ Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, § 9.

⁵¹ Report on the Practice of Indonesia, 1997, Chapter 5.1.

⁵² Report on the Practice of the Philippines, 1997, Chapter 5.1.

49. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support . . . the principle that each party to a conflict permit teams to search for . . . and recover the dead from the battlefield”.⁵³

50. According to the Report on US Practice, it is the *opinio juris* of the US that all possible measures should be taken to search for the dead.⁵⁴

III. Practice of International Organisations and Conferences

United Nations

51. In 1992, in a report concerning Bosnia and Herzegovina, the UN Secretary-General reported that ICRC delegates had recovered the war dead.⁵⁵

52. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted, with respect to its investigation into mass graves, that “the Geneva Conventions require parties to a conflict to search for the dead”.⁵⁶

Other International Organisations

53. No practice was found.

International Conferences

54. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

55. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

56. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “as soon as the tactical situation permits, necessary measures shall be taken . . . to search for the dead”.⁵⁷ Delegates also teach that “commanders may appeal to the civilian population, to

⁵³ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

⁵⁴ Report on US Practice, 1997, Chapter 5.1.

⁵⁵ UN Secretary-General, Report pursuant to Security Council resolution 752 (1992), UN Doc. S/24000, 26 May 1992, § 9.

⁵⁶ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

⁵⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 483.

aid societies such as National Red Cross or Red Crescent Societies and to commanders of neutral merchant vessels, yachts or other craft ...to collect... the dead".⁵⁸

VI. Other Practice

57. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "every possible measure shall be taken, without delay, ... to search for the dead".⁵⁹

B. Treatment of the Dead

Respect for the dead

I. Treaties and Other Instruments

Treaties

58. Under Article 16, second paragraph, GC IV, "as far as military considerations allow, each Party to the conflict shall facilitate the steps taken... to protect [the killed] against... ill-treatment".

59. Article 34(1) AP I provides that "the remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities... shall be respected". Article 34 AP I was adopted by consensus.⁶⁰

60. Article 4 AP II states that:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person [and] honour...
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:
 - ...
 - (e) outrages upon personal dignity, in particular humiliating and degrading treatment...

61. Pursuant to Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute, "committing outrages upon personal dignity" constitutes a war crime in both international and non-international armed conflicts.

Other Instruments

62. Article 19 of the 1880 Oxford Manual provides that "it is forbidden to... mutilate the dead lying on the field of battle".

⁵⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 485.

⁵⁹ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, p. 335.

⁶⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

63. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that “in the event of the use of force and in case of armed conflict . . . it is prohibited to mutilate dead bodies”.

64. Article 3(4) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “desecration of the remains of those who have died in the course of the armed conflict or while under detention” shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*. Article 4(9) provides that “every possible measure shall be taken, without delay, . . . [to prevent] mutilation [the dead]”.

65. With reference to the crime of outrages upon personal dignity, the 2000 ICC Elements of Crimes specifies that Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute also applies to dead persons.

66. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxi) and (c)(ii), “committing outrages upon personal dignity” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

67. Australia’s Defence Force Manual provides that:

The remains of the dead, regardless of whether they are combatants, noncombatants, protected persons or civilians, are to be respected, in particular their honour, family rights, religious convictions and practices and manners and customs. At all times they shall be humanely treated.⁶¹

68. The Instructions to the Muslim Fighter issued by the ARBiH in Bosnia and Herzegovina in 1993 stated that:

(c) Prisoners of war:

. . . Islam likewise forbids the mutilation of enemy . . . dead . . . These are general rules which are binding for our soldiers. However, if the commanding officer assesses that the situation and the general interest demand a different course of action, then the soldiers are duty-bound to obey their commanding officer.⁶²

69. Canada’s LOAC Manual provides that “the remains of all persons who have died as a result of hostilities or while in occupation or detention in relation thereto shall be respected”.⁶³ The manual considers that “mutilation or other maltreatment of dead bodies” is a war crime.⁶⁴

⁶¹ Australia, *Defence Force Manual* (1994), § 998.

⁶² Bosnia and Herzegovina, *Instructions to the Muslim Fighter* (1993), § c.

⁶³ Canada, *LOAC Manual* (1999), p. 9-6, § 54.

⁶⁴ Canada, *LOAC Manual* (1999), p. 16-4, § 21(a).

70. Canada's Code of Conduct provides that "there is...an obligation to...protect and pay proper respect for the dead".⁶⁵

71. Ecuador's Naval Manual provides that "mutilation and other mistreatment of the dead" are representative war crimes.⁶⁶

72. According to Israel's Manual on the Laws of War, "it is imperative to tend to the enemy's wounded and dead".⁶⁷ It further provides that a "[legal] combatant is entitled to the status of a prisoner of war, according him...protection against the abuse of dead soldiers' bodies".⁶⁸ The manual also provides that it is absolutely forbidden to abuse the corpses of the enemy's dead.⁶⁹

73. South Korea's Operational Law Manual provides that the mutilation of dead bodies is a war crime.⁷⁰

74. Under South Korea's military regulations, "injuring dead bodies" is a war crime.⁷¹

75. The Military Manual of the Netherlands states that "remains must be protected".⁷²

76. The Military Handbook of the Netherlands provides that "the dead must not be mutilated".⁷³

77. New Zealand's Military Manual provides that "the remains of all persons who have died as a result of hostilities, or while in occupation or detention in relation to hostilities, shall be respected".⁷⁴ It also provides that "among other war crimes recognised by the customary law of armed conflict are mutilation or other maltreatment of dead bodies".⁷⁵ With respect to non-international armed conflicts, the manual states that "steps must be taken to prevent...abuse" of the dead.⁷⁶

78. According to Nigeria's Manual on the Laws of War, "maltreatment of dead bodies" is a war crime.⁷⁷

79. The Military Instructions of the Philippines provides that "respect for the dead which includes our own troops, the enemy and particularly innocent civilians must be a paramount concern of all commanders and troops at all levels... All dead bodies... must be handled humanely and treated with care and respect."⁷⁸

⁶⁵ Canada, *Code of Conduct* (2001), Rule 7, § 3.

⁶⁶ Ecuador, *Naval Manual* (1989), p. 6-5, § 6.2.5.

⁶⁷ Israel, *Manual on the Laws of War* (1998), p. 44.

⁶⁸ Israel, *Manual on the Laws of War* (1998), p. 46.

⁶⁹ Israel, *Manual on the Laws of War* (1998), p. 61.

⁷⁰ South Korea, *Operational Law Manual* (1996), Articles 1(4) and 2.

⁷¹ South Korea, *Military Regulation 187* (1991), Article 4.2; *Military Operations Law of War Compliance Regulation* (1993).

⁷² Netherlands, *Military Manual* (1993), p. VI-2.

⁷³ Netherlands, *Military Handbook* (1995), p. 7-37.

⁷⁴ New Zealand, *Military Manual* (1992), § 1012(1).

⁷⁵ New Zealand, *Military Manual* (1992), § 1704(5).

⁷⁶ New Zealand, *Military Manual* (1992), § 1817(1).

⁷⁷ Nigeria, *Manual on the Laws of War* (undated), § 6.

⁷⁸ Philippines, *Military Instructions* (1989), §§ 2 and 4.

80. According to South Africa's LOAC Manual, "maltreatment of dead bodies" is a grave breach.⁷⁹
81. Spain's LOAC Manual provides that "the dead shall be preserved from attack".⁸⁰ It also stipulates that "the dead shall be respected".⁸¹
82. Switzerland's Basic Military Manual states that anyone who "mutilates the dead" will be punished.⁸²
83. The UK Military Manual provides that "the dead must be protected against...maltreatment".⁸³ It further states that "maltreatment of dead bodies" is a war crime.⁸⁴
84. The UK LOAC Manual provides that "the dead must not be...mutilated".⁸⁵
85. The US Field Manual provides that "maltreatment of dead bodies" is a war crime.⁸⁶
86. The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: ... mutilating or mistreating dead bodies".⁸⁷
87. The US Naval Handbook provides that "mutilation and other mistreatment of the dead" are representative war crimes.⁸⁸

National Legislation

88. Australia's War Crimes Act states that "the expression 'war crime' includes the following: ... cannibalism ... [and] mutilation of the dead".⁸⁹
89. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "outrages upon personal dignity" of the bodies of dead persons in both international and non-international armed conflicts.⁹⁰
90. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁹¹
91. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁹²

⁷⁹ South Africa, *LOAC Manual* (1996), § 39(c).

⁸⁰ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).

⁸¹ Spain, *LOAC Manual* (1996), Vol. I, § 7.5.a.

⁸² Switzerland, *Basic Military Manual* (1987), Articles 194(2) and 200(f).

⁸³ UK, *Military Manual* (1958), § 380. ⁸⁴ UK, *Military Manual* (1958), § 626(b).

⁸⁵ UK, *LOAC Manual* (1981), Annex A, p. 47, § 15. ⁸⁶ US, *Field Manual* (1956), § 504(c).

⁸⁷ US, *Instructor's Guide* (1985), pp. 13 and 14. ⁸⁸ US, *Naval Handbook* (1995), § 6.2.5.

⁸⁹ Australia, *War Crimes Act* (1945), Section 3(xxxiv) and (xxxv).

⁹⁰ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.58(2) and 268.74(2).

⁹¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁹² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

92. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁹³

93. Under Ethiopia's Penal Code, it is a punishable offence to "mutilate a dead person".⁹⁴

94. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 16 GCIV, and of AP I, including violations of Article 34(1) AP I, are punishable offences.⁹⁵

95. Italy's Law of War Decree as amended provides that "commanders shall take all necessary measures to ensure respect for the bodies of enemy dead on the battlefield".⁹⁶

96. Italy's Wartime Military Penal Code provides that anyone who mutilates or commits outrages upon the cadaver of a soldier fallen on the battlefield is guilty of a punishable offence.⁹⁷

97. Lithuania's Criminal Code as amended punishes outrages upon the bodies of the killed out of revenge or for terror purposes.⁹⁸

98. The Military Criminal Code as amended of the Netherlands provides for the punishment of persons committing violent acts against a dead person.⁹⁹

99. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute.¹⁰⁰

100. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".¹⁰¹

101. Spain's Royal Ordinance for the Armed Forces states that "the dead shall be respected".¹⁰²

102. Switzerland's Military Criminal Code as amended punishes anyone who mutilates a dead person.¹⁰³

103. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute.¹⁰⁴

⁹³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁹⁴ Ethiopia, *Penal Code* (1957), Article 287(b).

⁹⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁹⁶ Italy, *Law of War Decree as amended* (1938), Article 94.

⁹⁷ Italy, *Wartime Military Penal Code* (1941), Article 197.

⁹⁸ Lithuania, *Criminal Code as amended* (1961), Article 335.

⁹⁹ Netherlands, *Military Criminal Code as amended* (1964), Article 143.

¹⁰⁰ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

¹⁰¹ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁰² Spain, *Royal Ordinance for the Armed Forces* (1978), Article 140.

¹⁰³ Switzerland, *Military Criminal Code as amended* (1927), Article 140(2).

¹⁰⁴ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

104. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxi) and (c)(ii) of the 1998 ICC Statute.¹⁰⁵

105. Under Venezuela's Code of Military Justice as amended, committing outrages against the dead is considered a crime against international law.¹⁰⁶

National Case-law

106. In 1945, in the *Takehiko case*, an Australian Military Court sentenced the accused, a Japanese soldier, for "mutilating the dead body of a prisoner of war" and for "cannibalism".¹⁰⁷

107. In 1946, in the *Tisato case*, an Australian Military Court found the accused, a Japanese soldier, guilty of "cannibalism". The prosecution in this case alleged that several prisoners had been killed and that their flesh had been eaten.¹⁰⁸

108. In its ruling in the *Jenin (Mortal Remains) case* in 2002, dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel's High Court of Justice stated that "needless to say, the burial will be made in an appropriate and respectful manner, maintaining the respect for the dead. In this matter, no distinction will be made between the bodies of armed combatants and the bodies of civilians."¹⁰⁹

109. In 1946, in the *Kikuchi and Mahuchi case*, a US Military Commission sentenced the accused, who were Japanese soldiers, for "bayoneting and mutilating the dead body of a United States prisoner of war".¹¹⁰

110. In 1946, in the *Yochio and Others case*, a US Military Commission tried and convicted some of the accused Japanese soldiers for "preventing an honorable burial due to the consumption of parts of the bodies of prisoners of war by the accused during a special meal in the officers' mess". The accused were found guilty of these charges.¹¹¹

111. In its judgement in the *Schmid case* in 1947, the US General Military Court at Dachau found the accused, a German medical officer, guilty of maltreating the body of a deceased US airman in violation of Article 3 of the 1929 Geneva Convention. The accused had severed the head from the body of the airman, had baked it and removed the skin and flesh and had bleached the skull.¹¹²

¹⁰⁵ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁰⁶ Venezuela, *Code of Military Justice as amended* (1998), Article 474(12).

¹⁰⁷ Australia, Military Court at Wewak, *Takehiko case*, Judgement, 30 November 1945.

¹⁰⁸ Australia, Military Court at Rabaul, *Tisato case*, Judgement, 2 April 1946.

¹⁰⁹ Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, § 8.

¹¹⁰ US, Military Commission at Yokohama, *Kikuchi and Mahuchi case*, Judgement, 20 April 1946.

¹¹¹ US, Military Commission at the Mariana Islands, *Yochio and Others case*, Judgement, 2–15 August 1946.

¹¹² US, General Military Court at Dachau, *Schmid case*, Judgement, 19 May 1947.

Other National Practice

112. In 1993, the Ministry of the Interior of Azerbaijan ordered that troops “in zones of combat, during military operations . . . must not desecrate the remains of enemies”.¹¹³

113. In case before Colombia’s Council of State in 1994, the Prosecutor stated that failure to treat the bodies of dead combatants and civilians with respect constituted a violation of common Article 3 of the 1949 Geneva Conventions.¹¹⁴

114. The Report on the Practice of Indonesia states that it is the practice of Indonesia to care for the dead.¹¹⁵

115. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support . . . the principle that . . . the remains of the dead be respected and maintained”.¹¹⁶

116. In 1991, the Ministry of Defence of the SFRY (FRY) issued a document entitled “Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia”. This document included the following example: “the attitude towards dead YPA soldiers has been absolutely uncivilized and without any trace of humanity”.¹¹⁷

III. Practice of International Organisations and Conferences

117. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

118. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

119. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the dead may not be attacked”.¹¹⁸

¹¹³ Azerbaijan, Ministry of the Interior, Command of the Troops of the Interior, Order No. 42, Baku, 9 January 1993, § 5.

¹¹⁴ Colombia, Council of State, *Case No. 9276*, Concepto del Procurador Primero Delegado, 19 August 1994.

¹¹⁵ Report on the Practice of Indonesia, 1997, Chapter 5.1.

¹¹⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

¹¹⁷ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 2(iv).

¹¹⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 230.

120. In 1993, the ICRC reminded officials of a State of their duty to prevent the abuse of remains of dead nationals of another State, even if such abuses were committed by the civilian population.¹¹⁹ The following year, it again reminded the State of its obligation to respect the bodies of dead soldiers and protect them from mutilation and degrading treatment.¹²⁰

121. In 1993, in a letter to the ICRC, a National Red Crescent Society denounced the inhumane treatment of bodies of dead combatants by troops of one of the parties to the conflict.¹²¹

122. In a press release issued in 1993 in the context of the conflict in Somalia, the ICRC condemned abuses committed on the remains of dead combatants of the UNOSOM II forces.¹²²

VI. Other Practice

123. Investigations following allegations concerning crimes committed against members of the armed forces fighting in Crete during the Second World War found evidence that dead German soldiers had been mutilated:

Some had their genitals mutilated, eyes put out, ears and noses cut off; others had knife wounds in the face, stomach, and back; throats were slit, and hands chopped off. The majority of these mutilations were probably defilement of dead bodies; only in a few cases does the evidence indicate that the victim was maltreated and tortured to death.¹²³

124. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “every possible measure shall be taken, without delay, . . . to prevent [the dead] being . . . mutilated”.¹²⁴

Protection of the dead against despoliation

I. Treaties and Other Instruments

Treaties

125. Article 16 of the 1907 Hague Convention (X) provides that, “after every engagement, the two belligerents, so far as military interests permit, shall take steps . . . to protect . . . the dead . . . against pillage”.

¹¹⁹ ICRC archive document. ¹²⁰ ICRC archive document. ¹²¹ ICRC archive document.

¹²² ICRC, Press Release No. 1759, Somalia: The ICRC appeals for respect for international humanitarian law, 7 October 1993, § 1.

¹²³ Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau, 1939–1945*, University of Nebraska Press, 1989, pp. 156 and 157.

¹²⁴ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, p. 335.

126. Article 15, first paragraph, GC I provides that “at all times, and particularly after an engagement, Parties to the conflict shall, without delay, take all possible measures to . . . prevent [the dead from] being despoiled”.

127. Article 18, first paragraph, GC II provides that “after each engagement, Parties to the conflict shall, without delay, take all possible measures to . . . prevent [the dead from] being despoiled”.

128. Article 16, second paragraph, GC IV provides that “as far as military considerations allow, each Party to the conflict shall facilitate the steps taken . . . to protect [the killed] against pillage”.

129. Article 4 AP II states that:

2. Without prejudice to the generality of the foregoing, the following acts against [all persons who do not take a direct part or who have ceased to take part in hostilities] are and shall remain prohibited at any time and in any place whatsoever:

. . .
(g) pillage.

130. Article 8 AP II provides that “whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to . . . prevent [the dead from] being despoiled”. Article 8 AP II was adopted by consensus.¹²⁵

Other Instruments

131. Article 19 of the 1880 Oxford Manual provides that “it is forbidden to rob . . . the dead lying on the field of battle”.

132. Rule 4 of the 1950 UN Command Rules and Regulations gave Military Commissions of the UN Command in Korea jurisdiction over offences including acts of marauding.

133. Article 4(9) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “every possible measure shall be taken, without delay, to . . . prevent despoliation [of the dead]”.

II. National Practice

Military Manuals

134. Argentina’s Law of War Manual provides that the dead shall be prevented from being despoiled.¹²⁶

135. Australia’s Defence Force Manual specifies that “parties must take measures to protect the bodies from being despoiled”.¹²⁷ It adds that the remains of the dead “must be protected against pillage and despoilment”.¹²⁸

¹²⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.

¹²⁶ Argentina, *Law of War Manual* (1969), § 3.005; *Law of War Manual* (1989), § 2.06.

¹²⁷ Australia, *Defence Force Manual* (1994), § 986.

¹²⁸ Australia, *Defence Force Manual* (1994), § 998.

- 136.** Under Belgium's Field Regulations, "it is forbidden to despoil the dead".¹²⁹ The manual adds that "only weapons, ammunition, war material and personal documents may be removed from the body".¹³⁰
- 137.** Benin's Military Manual provides that "combatants must prevent the dead from being despoiled".¹³¹
- 138.** Burkina Faso's Disciplinary Regulations states that it is prohibited "to despoil the dead".¹³²
- 139.** Cameroon's Disciplinary Regulations states that it is forbidden "to despoil the dead".¹³³
- 140.** Canada's LOAC Manual specifies that the belligerents "must . . . prevent [the] remains [of the dead] from being despoiled".¹³⁴ With respect to non-international armed conflicts in particular, the manual states that "steps must also be taken to . . . prevent despoliation [of the dead]".¹³⁵
- 141.** Canada's Code of Conduct provides that "the personal property of . . . the dead shall not be taken".¹³⁶
- 142.** Congo's Disciplinary Regulations states that, under the laws and customs of war, it is forbidden to "despoil the dead".¹³⁷
- 143.** France's Disciplinary Regulations as amended provides that, under international conventions, "it is prohibited to despoil the dead".¹³⁸
- 144.** According to Germany's Military Manual, "the dead are to be . . . prevented from being despoiled".¹³⁹
- 145.** Kenya's LOAC Manual states that "Parties to a conflict must . . . prevent [the dead] being despoiled".¹⁴⁰
- 146.** Lebanon's Army Regulations and Field Manual prohibit pillage of the dead.¹⁴¹
- 147.** Madagascar's Military Manual provides that "all possible measures must be taken . . . to prevent [the dead] being despoiled".¹⁴²
- 148.** Mali's Army Regulations provides that, under the laws and customs of war, it is prohibited to plunder the dead.¹⁴³
- 149.** Morocco's Disciplinary Regulations provides that, under the laws and customs of war, it is prohibited "to despoil the dead".¹⁴⁴

¹²⁹ Belgium, *Field Regulations* (1964), Article 24; see also *Law of War Manual* (1983), p. 49.

¹³⁰ Belgium, *Field Regulations* (1964), Article 24.

¹³¹ Benin, *Military Manual* (1995), Fascicule II, p. 10, see also Fascicule III, p. 5.

¹³² Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹³³ Cameroon, *Disciplinary Regulations* (1975), Article 32.

¹³⁴ Canada, *LOAC Manual* (1999), p. 9-1, § 9, see also p. 11-2, § 16.

¹³⁵ Canada, *LOAC Manual* (1999), p. 17-4, § 32.

¹³⁶ Canada, *Code of Conduct* (2001), Rule 8, § 2.

¹³⁷ Congo, *Disciplinary Regulations* (1986), Article 32(2).

¹³⁸ France, *Disciplinary Regulations as amended* (1975), Article 9 bis.

¹³⁹ Germany, *Military Manual* (1992), § 611.

¹⁴⁰ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 14, see also Précis No. 3, p. 11.

¹⁴¹ Lebanon, *Army Regulations* (1971), § 17; *Field Manual* (1996), § 8.

¹⁴² Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 22.

¹⁴³ Mali, *Army Regulations* (1979), Article 36.

¹⁴⁴ Morocco, *Disciplinary Regulations* (1974), Article 25(2)(6).

150. The Military Handbook of the Netherlands provides that “the property [of the dead] must not be taken or destroyed”.¹⁴⁵

151. New Zealand’s Military Manual provides that “the Parties to a conflict are obliged . . . to prevent [the dead] . . . being looted”.¹⁴⁶

152. Nigeria’s Manual on the Laws of War provides that “at all times and particularly after a campaign, the belligerents must immediately take measures to . . . prevent [the dead] being despoiled”.¹⁴⁷

153. Romania’s Soldiers’ Manual provides that it is prohibited to despoil or pillage dead enemy combatants.¹⁴⁸

154. Senegal’s Disciplinary Regulations states that, under the laws and customs of war, it is prohibited for soldiers in combat “to despoil the dead”.¹⁴⁹

155. Spain’s LOAC Manual provides that “the dead shall not be . . . despoiled”.¹⁵⁰

156. Switzerland’s Basic Military Manual provides that it is prohibited “to despoil the . . . dead”.¹⁵¹

157. Togo’s Military Manual provides that “combatants must . . . prevent the dead from being despoiled”.¹⁵²

158. The UK Military Manual provides that “the dead must be protected against pillage”, specifying that “this is a well-established rule of customary international law”.¹⁵³ It adds that “belligerents must at all times, and particularly after an engagement, take all possible measures . . . to prevent [the dead] . . . being despoiled”.¹⁵⁴ The manual further states that:

A special class of war crime is that sometimes known as “marauding”. This consists of ranging over battlefields and following advancing or retreating armies in quest of loot, robbing . . . and plundering the dead – all acts done not as a means of carrying on the war but for private gain. Nevertheless, such acts are treated as violations of the law of war. Those who commit them, whether civilians who have never been lawful combatants, or persons who have belonged to a military unit, an organised resistance movement or a *levée en masse*, and have deserted and so ceased to be lawful combatants, are liable to be punished as war criminals. They may be tried and sentenced by the courts of either belligerent.¹⁵⁵

159. The UK LOAC Manual provides that “combatants are required to . . . prevent [the dead] being despoiled”.¹⁵⁶

¹⁴⁵ Netherlands, *Military Handbook* (1995), p. 7-37.

¹⁴⁶ New Zealand, *Military Manual* (1992), § 1003(1).

¹⁴⁷ Nigeria, *Manual on the Laws of War* (undated), § 34(c).

¹⁴⁸ Romania, *Soldiers’ Manual* (1991), p. 9.

¹⁴⁹ Senegal, *Disciplinary Regulations* (1990), Article 34(2).

¹⁵⁰ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6), see also § 7.5.a.

¹⁵¹ Switzerland, *Basic Military Manual* (1987), Article 72; see also *Military Manual* (1984), p. 4 and *Teaching Manual* (1986), p. 38.

¹⁵² Togo, *Military Manual* (1996), Fascicule II, p. 10, see also Fascicule III, p. 5.

¹⁵³ UK, *Military Manual* (1958), § 380. ¹⁵⁴ UK, *Military Manual* (1958), § 381.

¹⁵⁵ UK, *Military Manual* (1958), § 636.

¹⁵⁶ UK, *LOAC Manual* (1981), Section 6, p. 22, § 3, see also Annex A, p. 47, § 15.

- 160.** The US Field Manual reproduces Article 15 GC I.¹⁵⁷
- 161.** The US Air Force Pamphlet refers to Article 15 GC I.¹⁵⁸
- 162.** The US Instructor's Guide states that "in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . taking and keeping . . . property from dead bodies".¹⁵⁹
- 163.** The US Operational Law Handbook states that "the LOW requires Parties to a conflict to prevent [the] despoilment [of the dead]".¹⁶⁰
- 164.** The Annotated Supplement to the US Naval Handbook provides that the "requirement [to protect from harm and ensure the care of wounded, sick and shipwrecked] also extends to the dead and includes a requirement to prevent despoiling of the dead".¹⁶¹

National Legislation

- 165.** Under Albania's Military Penal Code, "stealing on the battlefield" is an offence.¹⁶²
- 166.** Under Algeria's Code of Military Justice, it is a punishable offence for a military or civilian person to steal from dead persons in the area of operation.¹⁶³
- 167.** Argentina's Draft Code of Military Justice punishes any soldier who "despoils a cadaver".¹⁶⁴
- 168.** Under Armenia's Penal Code, stealing objects from the dead on the battlefield is a punishable offence.¹⁶⁵
- 169.** Australia's Defence Force Discipline Act, in an article concerning looting, provides that:

A person, being a defence member or a defence civilian, who, in the course of operations against the enemy, or in the course of operations undertaken by the Defence Force for the preservation of law and order or otherwise in aid of the civil authorities –

...
 (b) takes any property from the body of a person killed . . . in those operations . . . is guilty of [a punishable] offence.¹⁶⁶

- 170.** Azerbaijan's Criminal Code provides that "pillage of property of persons killed . . . on the battlefield" constitutes a war crime in international and non-international armed conflicts.¹⁶⁷

¹⁵⁷ US, *Field Manual* (1956), § 216. ¹⁵⁸ US, *Air Force Pamphlet* (1976), § 12-2(a).

¹⁵⁹ US, *Instructor's Guide* (1985), pp. 13 and 14.

¹⁶⁰ US, *Operational Law Handbook* (1993), p. Q-185.

¹⁶¹ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.

¹⁶² Albania, *Military Penal Code* (1995), Articles 91–93.

¹⁶³ Algeria, *Code of Military Justice* (1971), Article 287.

¹⁶⁴ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(8) in the *Code of Military Justice as amended* (1951).

¹⁶⁵ Armenia, *Penal Code* (2003), Article 383.

¹⁶⁶ Australia, *Defence Force Discipline Act* (1982), Section 48(1).

¹⁶⁷ Azerbaijan, *Criminal Code* (1999), Article 118.

171. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹⁶⁸

172. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "the unlawful appropriation of belongings from the killed . . . on the battlefield" is a war crime.¹⁶⁹ The Criminal Code of the Republika Srpska contains the same provision.¹⁷⁰

173. Botswana's Geneva Conventions Act provides that "Parties to the conflict, shall, without delay take all possible measures . . . to protect [the dead] being despoiled".¹⁷¹

174. Bulgaria's Penal Code as amended provides that any "person who, on the battlefield, takes away objects from . . . a killed person, with the intention to unlawfully appropriate them" commits a punishable crime.¹⁷²

175. Under Burkina Faso's Code of Military Justice, the despoliation of the dead in the area of operations of military units is a punishable offence.¹⁷³

176. Canada's National Defence Act provides that "every person who . . . steals from, or with intent to steal searches, the person of any person killed . . . in the course of warlike operations . . . is guilty of [a punishable] offence".¹⁷⁴

177. Under Chad's Code of Military Justice, taking the property of the dead on the battlefield is a criminal offence.¹⁷⁵

178. Chile's Code of Military Justice provides that "military personnel who plunder soldiers or auxiliary personnel dead on the battlefield of their money, jewellery or other objects, in order to appropriate them," commits a punishable offence.¹⁷⁶

179. Colombia's Penal Code imposes a criminal sanction on "anyone who, during an armed conflict, despoils a dead person".¹⁷⁷

180. Côte d'Ivoire's Penal Code as amended punishes "whoever, in an area of military operations, despoils . . . a dead person".¹⁷⁸

181. Under Croatia's Criminal Code, "the unlawful taking of the personal belongings of those killed on the battlefield" is a war crime.¹⁷⁹

182. Cuba's Military Criminal Code punishes "anyone who, in areas of military operations, for personal gain, despoils the money or other belongings of . . . the dead".¹⁸⁰

¹⁶⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹⁶⁹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 159(1).

¹⁷⁰ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 439(1).

¹⁷¹ Botswana, *Geneva Conventions Act* (1970), Article 15, Schedule 1.

¹⁷² Bulgaria, *Penal Code as amended* (1968), Article 405.

¹⁷³ Burkina Faso, *Code of Military Justice* (1994), Article 193.

¹⁷⁴ Canada, *National Defence Act* (1985), Section 77(g).

¹⁷⁵ Chad, *Code of Military Justice* (1962), Article 62.

¹⁷⁶ Chile, *Code of Military Justice* (1925), Article 365.

¹⁷⁷ Colombia, *Penal Code* (2000), Article 151.

¹⁷⁸ Côte d'Ivoire, *Penal Code as amended* (1981), Article 465.

¹⁷⁹ Croatia, *Criminal Code* (1997), Article 162(1).

¹⁸⁰ Cuba, *Military Criminal Code* (1979), Article 43(1).

183. The Czech Republic's Criminal Code as amended punishes "a person who, in the area of combat, on the battlefield, in places affected by war operations or in occupied territory, . . . robs the war dead".¹⁸¹

184. Denmark's Military Criminal Code as amended provides that "any person who unlawfully takes an object from a person killed through an act of war shall be punishable for theft".¹⁸²

185. Under Egypt's Penal Code, the theft of property belonging to a dead combatant . . . in zones of military operations, "even if he is an enemy", is an offence.¹⁸³

186. Egypt's Military Criminal Code punishes "any person who, in an area of military operations, steals from a dead . . . soldier, even if he is an enemy".¹⁸⁴ The provision applies both to the military and to civilians.¹⁸⁵

187. El Salvador's Code of Military Justice punishes "the soldier who despoils his comrade-in-arms, killed on the battlefield, of the money or jewellery carried with him, and appropriates it for himself".¹⁸⁶

188. Under Ethiopia's Penal Code, "whoever, in time of war and contrary to public international law and humanitarian conventions, . . . lays hands on or does violence to a . . . dead enemy on the field of battle, with intent to rob or plunder him" commits a punishable offence against the law of nations.¹⁸⁷

189. Under France's Code of Military Justice, "any individual, military or not, who, in the area of operation of a force or a unit, . . . plunders a . . . dead person" commits a punishable offence.¹⁸⁸

190. Gambia's Armed Forces Act provides that "every person subject to this Act who . . . steals from or with intent to steal searches, the person of any person killed . . . in the course of war-like operations" commits a punishable offence.¹⁸⁹

191. Under Georgia's Criminal Code, "pillage, *i.e.* seizure in a combat situation of things which are on a dead person," is a crime.¹⁹⁰

192. Ghana's Armed Forces Act states that "every person subject to the Code of Service Discipline who . . . steals from or with the intent to steal searches, the person of any person killed . . . in the course of warlike operations" commits a punishable offence.¹⁹¹

193. Guinea's Criminal Code provides that "whoever, in an area of military operation, plunders a . . . dead person" commits a punishable offence.¹⁹²

¹⁸¹ Czech Republic, *Criminal Code as amended* (1961), Article 264(c).

¹⁸² Denmark, *Military Criminal Code as amended* (1978), Article 24(2).

¹⁸³ Egypt, *Penal Code* (1937), Article 317(9).

¹⁸⁴ Egypt, *Military Criminal Code* (1966), Article 136.

¹⁸⁵ Egypt, *Military Criminal Code* (1966), Articles 123 and 136.

¹⁸⁶ El Salvador, *Code of Military Justice* (1934), Article 71.

¹⁸⁷ Ethiopia, *Penal Code* (1957), Article 287(c).

¹⁸⁸ France, *Code of Military Justice* (1982), Article 428.

¹⁸⁹ Gambia, *Armed Forces Act* (1985), Section 40(g).

¹⁹⁰ Georgia, *Criminal Code* (1999), Article 413(a).

¹⁹¹ Ghana, *Armed Forces Act* (1962), Section 18(g).

¹⁹² Guinea, *Criminal Code* (1998), Article 570.

194. Under Hungary's Criminal Code as amended, "the person who loots the dead . . . on the battlefield" is guilty, upon conviction, of a war crime.¹⁹³

195. Indonesia's Military Penal Code provides that "those who commit theft from dead bodies" commit a punishable offence.¹⁹⁴

196. Iraq's Military Penal Code states that "every person who, with the intent to appropriate for himself or unjustifiably, takes money or other things from the killed in the field of battle . . . shall be punished".¹⁹⁵

197. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 15 GCI, 18 GC II and 16 GC IV, as well as any "contravention" of AP II, including violations of Article 8 AP II, are punishable offences.¹⁹⁶

198. Italy's Wartime Military Penal Code provides that anyone who despoils a cadaver on the battlefield for private purposes is guilty of a punishable offence.¹⁹⁷

199. Under Kazakhstan's Penal Code, "theft of objects belonging to the dead . . . on the battlefield" is a punishable offence.¹⁹⁸

200. Under Kenya's Armed Forces Act, anyone who steals from the person of the dead commits a punishable offence.¹⁹⁹

201. Under South Korea's Military Criminal Code, "a person who takes the clothes and other property of the dead . . . in the combat area" commits a punishable offence.²⁰⁰

202. Under Latvia's Criminal Code, the pillage of persons killed on the battlefield is a punishable offence.²⁰¹

203. Lebanon's Code of Military Justice stipulates that "any person, military or not, who, in an area of military operations, despoils a . . . dead person" commits a punishable offence.²⁰²

204. Under Lithuania's Criminal Code as amended, "an order to plunder or seize things from fallen . . . victims on the battlefield" is a war crime.²⁰³

205. Malaysia's Armed Forces Act provides that:

Every person subject to service law under this Act who –

- (a) steals from, or with intent to steal searches, the person of anyone killed . . . in the course of warlike operations . . .

¹⁹³ Hungary, *Criminal Code as amended* (1978), Section 161.

¹⁹⁴ Indonesia, *Military Penal Code* (1947), Article 143.

¹⁹⁵ Iraq, *Military Penal Code* (1940), Article 115(a).

¹⁹⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁹⁷ Italy, *Wartime Military Penal Code* (1941), Article 197.

¹⁹⁸ Kazakhstan, *Penal Code* (1997), Article 385.

¹⁹⁹ Kenya, *Armed Forces Act* (1968), Section 23.

²⁰⁰ South Korea, *Military Criminal Code* (1962), Article 82.

²⁰¹ Latvia, *Criminal Code* (1998), Section 74, see also Section 71 (deliver children on a compulsory basis from one group of people into another as a part of a genocide campaign).

²⁰² Lebanon, *Code of Military Justice* (1968), Article 132.

²⁰³ Lithuania, *Criminal Code as amended* (1961), Article 341.

shall be guilty of looting and liable on conviction by court-martial to imprisonment or any less punishment provided by this Act.²⁰⁴

206. Under Mali's Code of Military Justice, "anyone who despoils a . . . dead person" commits a punishable offence.²⁰⁵

207. Under Moldova's Penal Code, "pillage of the dead on the battlefield" is a punishable offence.²⁰⁶

208. Under the Military Criminal Code as amended of the Netherlands "theft from a dead . . . person, who belongs to one of the parties to the conflict" is a criminal offence.²⁰⁷

209. New Zealand's Armed Forces Discipline Act provides that:

Every person subject to this Act commits the offence of looting, and is liable to imprisonment . . . who –

- (a) Steals from, or with intent to steal searches, the person of anyone killed . . . in the course of any war or warlike operations in which New Zealand is engaged, or killed . . . in the course of operations undertaken by any service of the Armed Forces for the preservation of law and order or otherwise in aid of the civil power.²⁰⁸

210. Nicaragua's Military Penal Law punishes "anyone who, in military operations, steals, for personal gain, the money or other belongings of . . . the dead".²⁰⁹

211. Nicaragua's Military Penal Code provides for the punishment of the soldier who, in the zone of operations, "despoils a dead person . . . of his or her clothes or other personal effects".²¹⁰

212. Under Nigeria's Armed Forces Decree 105 as amended, looting is a punishable offence. A person is guilty of looting who "steals from, or with intent to steal, searches the body of a person killed . . . in the course of war-like operations, or killed . . . in the course of operations undertaken by any service of the Armed Forces for the preservation of law and order or otherwise in aid of the civil authorities".²¹¹

213. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".²¹²

²⁰⁴ Malaysia, *Armed Forces Act* (1972), Section 46(a).

²⁰⁵ Mali, *Code of Military Justice* (1995), Article 134(1).

²⁰⁶ Moldova, *Penal Code* (2002), Article 389.

²⁰⁷ Netherlands, *Military Criminal Code as amended* (1965), Article 156.

²⁰⁸ New Zealand, *Armed Forces Discipline Act* (1971), Section 31(a).

²⁰⁹ Nicaragua, *Military Penal Law* (1980), Article 81.

²¹⁰ Nicaragua, *Military Penal Code* (1996), Article 56(1).

²¹¹ Nigeria, *Armed Forces Decree 105 as amended* (1993), Section 51(a).

²¹² Norway, *Military Penal Code as amended* (1902), § 108.

214. Romania's Penal Code criminalises "robbing the dead . . . on the battlefield of objects they possess".²¹³

215. Singapore's Armed Forces Act as amended provides that:

Every person subject to military law who –

- (a) steals from or, with intent to steal, searches the person of anyone killed . . . in the course of warlike operations, or killed . . . in the course of operations undertaken by the Singapore Armed Forces for the preservation of law and order or otherwise in aid of the civil authorities . . .

shall be guilty of looting and shall be liable on conviction by a subordinate military court to imprisonment.²¹⁴

216. Slovakia's Criminal Code as amended punishes "a person who in the area of combat, on the battlefield, in places affected by war operations or in the occupied territory . . . rob the war dead".²¹⁵

217. Under Slovenia's Penal Code, plundering or ordering the plunder of the belongings of casualties on the battlefield is a war crime.²¹⁶

218. Under Spain's Military Criminal Code, "the military personnel who . . . strip a cadaver . . . of his personal effects in the area of operations, with the intent to appropriate them," commit punishable offences against the laws and customs of war.²¹⁷

219. Under Spain's Penal Code, "anyone who, on the occasion of an armed conflict . . . strips a cadaver . . . of his personal effects" commits a punishable "offence against protected persons and objects in the event of armed conflict".²¹⁸

220. Switzerland's Military Criminal Code as amended punishes anyone who, on the battlefield, despoils dead persons.²¹⁹

221. Tajikistan's Criminal Code punishes "pillage, i.e. seizure in a combat situation of things which are on the dead".²²⁰

222. Under Togo's Code of Military Justice, taking the property from the dead on the battlefield is a criminal offence.²²¹

223. Trinidad and Tobago's Defence Act as amended contains a section on "looting" which states that:

Any person subject to military law who –

- (a) steals from, or with intent to steal searches, the person of anyone killed . . . in the course of warlike operations . . .

²¹³ Romania, *Penal Code* (1968), Article 350.

²¹⁴ Singapore, *Armed Forces Act as amended* (1972), Section 18(a).

²¹⁵ Slovakia, *Criminal Code as amended* (1961), Article 264(c).

²¹⁶ Slovenia, *Penal Code* (1994), Article 380(1).

²¹⁷ Spain, *Military Criminal Code* (1985), Article 77(2).

²¹⁸ Spain, *Penal Code* (1995), Article 612(7).

²¹⁹ Switzerland, *Military Criminal Code as amended* (1927), Article 140(1).

²²⁰ Tajikistan, *Criminal Code* (1998), Article 405.

²²¹ Togo, *Code of Military Justice* (1981), Article 95.

is guilty of looting and, on conviction by court-martial, liable to imprisonment or less punishment.²²²

224. Uganda's National Resistance Army Statute stipulates that "a person subject to military law who . . . steals from or with intent to steal, searches the person or any person killed . . . in the course of war-like operations . . . commits an offence and shall on conviction, be liable to . . . imprisonment".²²³

225. Pursuant to Ukraine's Criminal Code, "stealing belongings of the dead . . . on a battlefield" is a war crime.²²⁴

226. The UK Army Act as amended provides that:

Any person subject to military law who –

- (a) steals from, or with intent to steal searches, the person of anyone killed . . . in the course of warlike operations, or killed . . . in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities . . .

shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.²²⁵

227. The UK Air Force Act as amended provides that:

Any person subject to air-force law who –

- (a) steals from, or with intent to steal searches, the person of anyone killed . . . in the course of warlike operations, or killed . . . in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities . . .

shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.²²⁶

228. Uruguay's Military Penal Code as amended punishes "the spoliation of . . . the dead in combat".²²⁷

229. Under Venezuela's Code of Military Justice as amended, it is a crime against international law to plunder a dead person.²²⁸

230. Vietnam's Penal Code punishes "anyone who steals things from . . . remains of soldiers dead on the battlefield".²²⁹

231. Under Yemen's Military Criminal Code, "any person who . . . despoils . . . a dead person" commits a war crime.²³⁰

²²² Trinidad and Tobago, *Defence Act as amended* (1962), Section 40(a).

²²³ Uganda, *National Resistance Army Statute* (1992), Section 35(f).

²²⁴ Ukraine, *Criminal Code* (2001), Article 432.

²²⁵ UK, *Army Act as amended* (1955), Section 30(a).

²²⁶ UK, *Air Force Act as amended* (1955), Section 30(a).

²²⁷ Uruguay, *Military Penal Code as amended* (1943), Article 58(10).

²²⁸ Venezuela, *Code of Military Justice as amended* (1998), Article 474(12).

²²⁹ Vietnam, *Penal Code* (1990), Article 271(2).

²³⁰ Yemen, *Military Criminal Code* (1998), Article 20.

232. Under the Penal Code as amended of the SFRY (FRY), ordering or executing the unlawful seizure of belongings from the killed on the battlefield is a war crime.²³¹

233. Zambia's Defence Act as amended states that:

Any person subject to military law under this Act who –

- (a) steals from or with intent to steal searches the person of anyone killed . . . in the course of warlike operations . . .

shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.²³²

234. Zimbabwe's Defence Act as amended provides that:

Any member [of the Defence Forces] who –

- (a) steals from or with intent to steal searches the person of anyone killed . . . in the course of warlike operations . . .

shall be guilty of the offence of looting and liable to imprisonment or any less punishment.²³³

National Case-law

235. In its judgement in the *Pohl case* in 1947, the US Military Tribunal at Nuremberg stated that “robbing the dead, even without the added offence of killing, is and always has been a crime. And when it is organized and planned and carried out on a hundred-million mark scale, it becomes an aggravated crime, and anyone who takes part in it is a criminal”.²³⁴

Other National Practice

236. A training video on IHL produced by the UK Ministry of Defence illustrates the rule that “stealing from a dead soldier is illegal and also a court martial offence”.²³⁵

III. Practice of International Organisations and Conferences

United Nations

237. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780

²³¹ SFRY (FRY), *Penal Code as amended* (1976), Article 147(1).

²³² Zambia, *Defence Act as amended* (1964), Section 35(a).

²³³ Zimbabwe, *Defence Act as amended* (1972), First Schedule, Section 11(a).

²³⁴ US, Military Tribunal at Nuremberg, *Pohl case*, Judgement, 3 November 1947.

²³⁵ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 2.3.

(1992) stated that “the Geneva Conventions require parties to a conflict . . . to prevent [the] bodies and remains [of the dead] from being despoiled”.²³⁶

Other International Organisations

238. No practice was found.

International Conferences

239. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

240. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

241. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the dead may not be . . . despoiled”.²³⁷

VI. Other Practice

242. According to German investigations following allegations of crimes committed against members of armed forces in Crete in May 1941, it appeared that:

Dead . . . soldiers were robbed and deprived of parts of their clothing, primarily by the civilian population . . .

From these investigations it appears that . . . the maltreatment of soldiers [was] committed almost exclusively by Cretan civilians. In some cases survivors observed that civilians fell upon dead soldiers [and] robbed them.²³⁸

243. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “every possible measure shall be taken, without delay . . . to prevent [the dead] being despoiled”.²³⁹

²³⁶ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

²³⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 230.

²³⁸ Alfred M. de Zayas, *The Wehrmacht War Crimes Bureau, 1939–1945*, University of Nebraska Press, 1989, pp. 156–157.

²³⁹ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, p. 335.

C. Return of the Remains and Personal Effects of the Dead

Return of the remains of the dead

I. Treaties and Other Instruments

Treaties

244. Article 17, third paragraph, GC I provides that an "Official Graves Registration Service [shall be established] to allow . . . the possible transportation of the remains to the home country. These provisions shall likewise apply to the ashes."

245. Article 120, sixth paragraph, GC III provides, with regard to the possibility of return of the remains to the home country, that:

Responsibility . . . for records of any subsequent moves of the bodies shall rest on the Power controlling the territory . . . These provisions shall also apply to the ashes, which shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country.

246. Article 130, second paragraph, GC IV provides that "the ashes [of deceased internees] shall be retained for safe-keeping by the detaining authorities and shall be transferred as soon as possible to the next of kin on their request".

247. Article II(13)(f) of the 1953 Panmunjon Armistice Agreement provides that:

the Commanders of the opposing sides shall:

...

f. In those cases where places of burial are a matter of record and graves are actually found to exist, permit graves registration personnel of the other side to enter, within a definite time limit after this Armistice Agreement becomes effective, the territory of Korea under their military control, for the purpose of proceeding to such graves to recover and evacuate the bodies of the deceased military personnel of that side, including deceased prisoners of war.

248. Article 8(b) of the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam contains provisions designed "to facilitate . . . repatriation of remains".

249. Article 34 AP I provides that:

2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:

...

(b) to protect and maintain such gravesites permanently;

(c) to facilitate the return of the remains of the deceased . . . to the home country upon its request or, unless that country objects, upon the request of the next of kin.

3. In the absence of the agreements provided for in paragraph 2 (b) or (c) and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.

Article 34 AP I was adopted by consensus.²⁴⁰

250. The 1992 Finnish–Russian Agreement on War Dead provides for cooperation in relation to the identification and return of the remains of soldiers dating from the Second World War.

251. The 1997 Estonian–Finnish Agreement on War Dead provides for cooperation in relation to the identification and return of the remains of soldiers dating from the Second World War.

Other Instruments

252. Proposal 1.2 of the 1991 Plan of Operation for the Joint Commission to Trace Missing Persons and Mortal Remains in the context of the former Yugoslavia provided that, “at the request of the party on which the deceased depended, the parties to the conflict shall organize the handover of the mortal remains”.

253. Article 3(4) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “breach of [the] duty to tender immediately [the remains of those who have died in the course of the armed conflict or while under detention] to their families” shall remain prohibited at any time and in any place whatsoever with respect to persons *hors de combat*.

II. National Practice

Military Manuals

254. Argentina’s Law of War Manual provides that ashes “shall be kept by the Graves Registration Service until the home country makes known what arrangements it wants made”.²⁴¹

255. Australia’s Defence Force Manual provides that “the ashes of the deceased shall be forwarded to the Graves Registration and the ashes exchanged as soon as practical following the conclusion of hostilities”.²⁴²

256. Croatia’s LOAC Compendium provides that one of the measures required after a conflict is to return ashes and remains.²⁴³

²⁴⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

²⁴¹ Argentina, *Law of War Manual* (1969), § 3.005.

²⁴² Australia, *Defence Force Manual* (1994), § 9-100.

²⁴³ Croatia, *LOAC Compendium* (1991), p. 21.

257. France's LOAC Teaching Note provides that "at the end of an engagement, the dead of both sides . . . should be buried in order to facilitate the possible repatriation of mortal remains".²⁴⁴

258. Hungary's Military Manual provides that one of the measures required after a conflict is to return ashes and remains of the dead.²⁴⁵

259. The Military Manual of the Netherlands states that the parties "shall conclude agreements in order to facilitate the return of the remains of the deceased".²⁴⁶

260. Spain's LOAC Manual provides that when bodies have been cremated, the ashes of the deceased shall be forwarded to the Graves Registration Authority and handed over to relatives as soon as practicable.²⁴⁷

261. Switzerland's Basic Military Manual provides that "if possible, the remains of the deceased shall be repatriated to the country of origin, according to special agreements".²⁴⁸

262. The UK Military Manual provides that "the ashes must be respectfully treated, and kept by the Graves Registration Service until properly disposed of according to the wishes of the home country".²⁴⁹

263. The US Field Manual provides that an Official Graves Registration Service "shall allow . . . the possible transportation to the home country" of the bodies exhumed. The manual adds that the ashes "shall be kept by the Graves Registration Service until proper disposal thereof in accordance with the wishes of the home country".²⁵⁰

264. The Annotated Supplement to the US Naval Handbook provides that "as soon as circumstances permit, arrangement be made to . . . facilitate the return of the remains when requested".²⁵¹

National Legislation

265. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that: . . . the places where dead bodies . . . were buried should be marked . . . and recorded . . . with the aim to return back these dead bodies . . . following a request from the parties and close relatives of the dead persons.²⁵²

²⁴⁴ France, *LOAC Teaching Note* (2000), p. 3.

²⁴⁵ Hungary, *Military Manual* (1992), p. 38.

²⁴⁶ Netherlands, *Military Manual* (1993), p. VI-3.

²⁴⁷ Spain, *LOAC Manual* (1996), Vol. I, Article 5.2.d.(6).

²⁴⁸ Switzerland, *Basic Military Manual* (1987), Article 71(2).

²⁴⁹ UK, *Military Manual* (1958), § 384. ²⁵⁰ US, *Field Manual* (1956), § 218.

²⁵¹ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.

²⁵² Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 29(5).

266. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁵³

267. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 120 GC III and 130 GC IV, and of AP I, including violations of Article 34 AP I, are punishable offences.²⁵⁴

268. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".²⁵⁵

National Case-law

269. In a case before Colombia's Administrative Court in Cundinamarca in 1985, it was stated that families must not be denied their legitimate right to claim the bodies of their relatives, transfer them to wherever they see fit, and bury them.²⁵⁶

270. According to the Report on the Practice of Israel, in the *Abu-Rijwa case* in 2000, the IDF carried out DNA identification tests when asked by family members to repatriate remains, implying that when these remains are identified correctly, they will be returned.²⁵⁷

Other National Practice

271. According to the Report on the Practice of Egypt, it is the well-established practice of Egypt to exchange and repatriate mortal remains, in order to enable burial in accordance with the wishes of the deceased and their families.²⁵⁸ In 1975 and 1976, the exchange and repatriation of mortal remains of both civilians and combatants were carried out between Egypt and Israel in the presence of ICRC delegates.²⁵⁹

272. In 1996, the Greek observer to the UN Commission on Human Rights stressed that if the deaths of persons missing in Cyprus were confirmed, their remains would be returned to their families.²⁶⁰

²⁵³ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁵⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁵⁵ Norway, *Military Penal Code as amended* (1902), § 108.

²⁵⁶ Colombia, Administrative Tribunal of Cundinamarca, *Case No. 4010*, Informe del Tribunal Especial de Instrucción, 6–7 November 1985, cuaderno de pruebas.

²⁵⁷ Report on the Practice of Israel, 1997, Chapter 5.1, referring to High Court, *Abu-Rijwa case*, Judgement, 15 November 2000.

²⁵⁸ Report on the Practice of Egypt, 1997, Chapter 5.1.

²⁵⁹ ICRC, *Annual Report 1975*, Geneva, 1976, p. 21; *Annual Report 1976*, Geneva, 1977, p. 13.

²⁶⁰ Greece, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.46, 22 May 1996, § 24.

273. In 1975 and 1976, the exchange and repatriation of mortal remains of both civilians and combatants were carried out between Egypt and Israel in the presence of ICRC delegates.²⁶¹

274. According to the Report on the Practice of Iran, it is the *opinio juris* of Iran, based on practice in the Iran–Iraq War, that attempts should be made to return the bodies of dead combatants to the relevant party.²⁶²

275. In 1991, the *Asian Yearbook of International Law* reported that the “ashes of 3,500 Japanese soldiers killed during World War II in Irian Jaya were handed over by Indonesia to the Japanese Ambassador at Jakarta”.²⁶³

276. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support . . . the principle that each party to a conflict permit teams to . . . facilitate the return of the remains when requested”.²⁶⁴

277. In 1983, a faction of a State agreed to repatriate the remains of combatants, although the State had not at the time ratified the Geneva Conventions.²⁶⁵

278. In 1999, the exchange committees of the parties to a non-international armed conflict signed an agreement concerning the treatment of prisoners, which provided that “bodies of the prisoners died in jails must be handed over to the concerned sides without any conditions”.²⁶⁶

III. Practice of International Organisations and Conferences

United Nations

279. In a resolution adopted in 1974, the UN General Assembly called upon parties to armed conflicts, “regardless of their character and location, during and after the end of hostilities and in accordance with the Geneva Conventions, to take such action as may be within their power . . . to facilitate the disinterment and the return of remains, if requested by their families”.²⁶⁷

280. In 1996, in a report concerning Liberia, the UN Secretary-General reported that UNOMIL had facilitated discussions on the release of the bodies of soldiers killed in the fighting, which ULIMO-J had accepted on the understanding that concerns about its own combatants would be considered.²⁶⁸

²⁶¹ ICRC, *Annual Report 1975*, Geneva, 1976, p. 21; *Annual Report 1976*, Geneva, 1977, p. 13.

²⁶² Report on the Practice of Iran, 1997, Chapter 5.1, referring to Statement by the Iranian Minister of Foreign Affairs, 15 November 1980 and Military Communiqué No. 2176, 27 July 1985.

²⁶³ *Asian Yearbook of International Law*, Vol. 1, 1991, p. 354.

²⁶⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

²⁶⁵ ICRC archive document. ²⁶⁶ ICRC archive document.

²⁶⁷ UN General Assembly, Res. 3220 (XXIX), 6 November 1974, §§ 2 and 4.

²⁶⁸ UN Secretary-General, Fifteenth progress report on the UNOMIL, UN Doc. S/1996/47, 23 January 1996, § 26.

Other International Organisations

281. No practice was found.

International Conferences

282. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it called on parties to armed conflicts “during hostilities and after cessation of hostilities . . . to facilitate the disinterment and return of remains”.²⁶⁹

283. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “every effort is made to identify dead persons, inform their families and return their bodies to them”.²⁷⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

284. In a case concerning Suriname before the IACiHR in 1989, it was reported that, in 1987, the military did not allow family members to collect the remains of a large number of dead following an attack by the National Army.²⁷¹

285. In a case concerning Colombia before the IACiHR in 1995, testimony was given to the effect that, in 1990, the witness was permitted by a Colombian brigade commander to collect the body of her husband for burial, following his death in an indiscriminate attack on a house suspected of harbouring guerrillas.²⁷²

V. Practice of the International Red Cross and Red Crescent Movement

286. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the return of remains and ashes of the deceased . . . to the home State shall be facilitated”.²⁷³

287. The ICRC often acts as a neutral intermediary between the parties to the conflict regarding servicemen missing in action so that the mortal remains of combatants may be returned to the respective parties. For instance, in 1998, in the context of the conflict in Sri Lanka, the ICRC transported the mortal remains of 1,014 soldiers and LTTE combatants.²⁷⁴ The same year, it “repatriated

²⁶⁹ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.

²⁷⁰ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(e).

²⁷¹ IACiHR, *Case 10.124 (Suriname)*, Resolution, 27 September 1989, § 6(iv).

²⁷² IACiHR, *Case 11.010 (Colombia)*, Report, 13 September 1995, Section 11A(a).

²⁷³ Frédéric de Mulinex, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 262.

²⁷⁴ ICRC, *Annual Report 1998*, Geneva, 1999, p. 175.

the mortal remains of an Israeli soldier and of 40 Lebanese fighters to their respective countries".²⁷⁵

288. In 1995, the ICRC asked the parties to an international conflict to return the remains of dead combatants to their families.²⁷⁶

VI. Other Practice

289. No practice was found.

Return of the personal effects of the dead

I. Treaties and Other Instruments

Treaties

290. Article 4, third paragraph, of the 1929 GC provides that belligerents shall "collect and transmit to each other all articles of a personal nature found on the field of battle or on the dead".

291. Article 16, fourth paragraph, GC I provides that parties to the conflict shall "collect and forward through the [Information Bureau]... money and in general all articles of an intrinsic or sentimental value, which are found on the dead". Article 19, third paragraph, GC II contains the same provision.

292. Article 122, ninth paragraph, GC III provides that:

The Information Bureau shall furthermore be charged with collecting all personal valuables, including sums in currencies other than that of the Detaining Power and documents of importance to the next of kin, left by prisoners of war who have... died, and shall forward the said valuables to the Powers concerned.

Article 139 GC IV contains a similar provision with respect to civilian internees.

293. Article 34(2)(c) AP I provides that as soon "as the circumstances and the relations between the adverse Parties permit, ... [they] shall conclude agreements in order ... to facilitate the return of the personal effects of the deceased". Article 34 AP I was adopted by consensus.²⁷⁷

294. The 1999 NATO STANAG 2070 provides that:

18. With the exception of deceased United States personnel, all personal effects (including all personal and official papers) are removed from the remains and placed in a suitable receptacle. One identification tag/disc must be buried with the corpse. The second identification tag/disc, or the removable part, is placed in the receptacle with the personal effects. In the case of United States personnel, all personal effects and one identification tag are buried with the remains ...

²⁷⁵ ICRC, *Annual Report 1998*, Geneva, 1999, p. 279.

²⁷⁶ ICRC archive document.

²⁷⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

19. An inventory is to be made of the personal effects, checked and signed by an officer, and dispatched with the receptacle containing the personal effects.

Other Instruments

295. Article 20 of the 1880 Oxford Manual provides that “the articles... collected from the dead of the enemy are transmitted to its army or government”.

II. National Practice

Military Manuals

296. Argentina’s Law of War Manual provides that “last wills or other documents of importance to the family of the dead, money and in general all objects of an intrinsic or sentimental value which are found on the dead” shall be transmitted to the other party through its national Information Bureau.²⁷⁸

297. Benin’s Military Manual provides that “personal effects [of the dead] shall be collected and evacuated”.²⁷⁹ It further specifies that “identity cards and personal effects of the deceased shall be sent to superiors”.²⁸⁰

298. Cameroon’s Instructors’ Manual provides that “personal effects of the dead shall be evacuated”.²⁸¹

299. Croatia’s LOAC Compendium provides that one of the measures required after a conflict is to return personal effects of the dead.²⁸²

300. Croatia’s Commanders’ Manual states that “personal effects of the dead shall be collected and evacuated to the rear”.²⁸³

301. France’s LOAC Summary Note provides that “the belongings of the dead must be collected and evacuated to the rear”.²⁸⁴

302. France’s LOAC Teaching Note provides that the personal effects of the dead “shall be collected and transferred to the rear. They shall be returned to the family if it claims them.”²⁸⁵

303. Hungary’s Military Manual provides that one of the requirements after a conflict is the return of the personal effects of the dead.²⁸⁶

304. According to Israel’s Manual on the Laws of War, “it is incumbent on each party to... hand over to the other side half of the dog-tag worn by the fallen soldier as well as his personal effects”.²⁸⁷

²⁷⁸ Argentina, *Law of War Manual* (1989), § 6.03.

²⁷⁹ Benin, *Military Manual* (1995), Fascicule II, p. 13.

²⁸⁰ Benin, *Military Manual* (1995), Fascicule III, p. 6.

²⁸¹ Cameroon, *Instructors’ Manual* (1992), p. 44, § 163(2).

²⁸² Croatia, *LOAC Compendium* (1991), p. 21.

²⁸³ Croatia, *Commanders’ Manual* (1992), § 76; see also *LOAC Compendium* (1991), p. 21.

²⁸⁴ France, *LOAC Summary Note* (1992), § 2.1.

²⁸⁵ France, *LOAC Teaching Note* (2000), p. 3.

²⁸⁶ Hungary, *Military Manual* (1992), p. 38.

²⁸⁷ Israel, *Manual on the Laws of War* (1998), p. 61.

305. Kenya's LOAC Manual states that "personal effects [of the dead] shall be collected and evacuated".²⁸⁸
306. Madagascar's Military Manual provides that "the personal effects of the deceased shall be collected and evacuated to the rear".²⁸⁹
307. The Military Manual of the Netherlands provides that the parties to the conflict shall conclude agreements in order to "facilitate the return of the personal effects of the deceased to the home country".²⁹⁰
308. The Military Handbook of the Netherlands provides that "the property of the dead may not be confiscated or destroyed".²⁹¹
309. Nigeria's Manual on the Laws of War provides that "money and articles of personal or sentimental value found on the dead must be forwarded to the enemy".²⁹²
310. Senegal's IHL Manual provides that, in situations of internal troubles, the personal effects of the dead shall be collected and evacuated with the dead body.²⁹³
311. Spain's LOAC Manual stipulates that personal belongings, identity tags and any last will left by the deceased must be sent to the national Information Bureau.²⁹⁴
312. Togo's Military Manual provides that "personal effects [of the dead] shall be collected and evacuated".²⁹⁵ It further specifies that "identity cards shall be evacuated. One half of the identity card shall remain on the corpse, the other half shall be evacuated."²⁹⁶
313. The UK Military Manual provides that "the belligerents must also forward to each other through . . . [the information] bureau . . . last wills or other documents of importance to the next of kin; money and all articles of an intrinsic or sentimental value which are found on the dead".²⁹⁷
314. The US Field Manual provides that parties to the conflict shall "collect and forward through the . . . [information] bureau one half of the double identity disc, last wills or other documents of importance to the next of kin, money and in general all articles of an intrinsic or sentimental value, which are found on the dead".²⁹⁸

National Legislation

315. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the appropriate authorities and

²⁸⁸ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 12.

²⁸⁹ Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 23.

²⁹⁰ Netherlands, *Military Manual* (1993), p. VI-3.

²⁹¹ Netherlands, *Military Handbook* (1995), p. 7-37.

²⁹² Nigeria, *Manual on the Laws of War* (undated), § 35.

²⁹³ Senegal, *IHL Manual* (1999), p. 18, § 6.

²⁹⁴ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).

²⁹⁵ Togo, *Military Manual* (1996), Fascicule II, p. 13.

²⁹⁶ Togo, *Military Manual* (1996), Fascicule II, p. 12.

²⁹⁷ UK, *Military Manual* (1958), § 382. ²⁹⁸ US, *Field Manual* (1956), § 217.

governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken . . . to return back . . . personal property [of the dead] following a request from the parties and close relatives of the dead persons".²⁹⁹

316. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁰⁰

317. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 16 GC I, 19 GC II, 122 GC III and 139 GC IV, and of AP I, including violations of Article 34(2)(c) AP I, are punishable offences.³⁰¹

318. Italy's Law of War Decree as amended provides that "the objects of personal use belonging to enemy dead on the battlefield shall be collected and kept safely".³⁰²

319. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".³⁰³

National Case-law

320. No practice was found.

Other National Practice

321. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

322. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted that "for every deceased person who falls into the hands of the adverse party, the adverse party must . . . forward . . . personal effects to the appropriate parties".³⁰⁴

Other International Organisations

323. No practice was found.

²⁹⁹ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 29(5).

³⁰⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁰¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁰² Italy, *Law of War Decree as amended* (1938), Article 94.

³⁰³ Norway, *Military Penal Code as amended* (1902), § 108.

³⁰⁴ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

International Conferences

324. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

325. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

326. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that the “return of . . . [the] personal effects [of the deceased] to the home State shall be facilitated”.³⁰⁵

VI. Other Practice

327. No practice was found.

D. Disposal of the Dead**General***I. Treaties and Other Instruments**Treaties*

328. Article 4, fifth paragraph, of the 1929 GC provides that belligerents shall ensure that “the dead are honourably interred”.

329. Article 76, third paragraph, of the 1929 Geneva POW Convention provides that “the belligerents shall ensure that prisoners of war who have died in captivity are honourably buried”.

330. Articles 17 GC I, 20 GC II, 120 GC III and 130 GC IV contain provisions pertaining to the disposal of the dead in order to ensure that it takes place in a respectful manner.

331. Article 8 AP II provides that, whenever circumstances permit, and particularly after an engagement, all possible measures shall be taken, without delay, to dispose decently of the dead. Article 8 AP II was adopted by consensus.³⁰⁶

Other International Instruments

332. Article 3(4) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “breach of the duty . . . to give [those who have died in the course of the armed conflict or while under detention] decent burial” shall remain prohibited at any time and in any

³⁰⁵ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 262 and 739.

³⁰⁶ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 110.

place whatsoever with respect to persons *hors de combat*. Article 4(9) provides that “every possible measure shall be taken, without delay . . . to dispose of [the dead] with respect”.

II. National Practice

Military Manuals

333. Argentina’s Law of War Manual provides that the remains of deceased persons shall be honourably buried.³⁰⁷

334. Australia’s Defence Force Manual provides that “the minimum respect for the remains of the dead is a decent burial or cremation”.³⁰⁸ The manual further states that “the deceased should be honourably interred”.³⁰⁹

335. Belgium’s Law of War Manual provides that “the necessary measures shall be taken to bury the dead”.³¹⁰

336. Canada’s LOAC Manual provides that “parties to the conflict shall ensure that the dead are honourably interred”.³¹¹ It also states that “regulations with regard to burial at sea are adjusted to meet the requirements of the situation”.³¹² With respect to non-international armed conflicts in particular, the manual provides that “steps must also be taken to . . . provide for decent disposition [of the dead]”.³¹³

337. Canada’s Code of Conduct provides that “the dead shall be honourably interred”.³¹⁴

338. Croatia’s Commanders’ Manual provides that “as a rule, the dead shall be identified and buried, cremated or buried at sea individually”.³¹⁵

339. France’s LOAC Summary Note provides that the dead must be and buried, cremated or buried at sea.³¹⁶

340. France’s LOAC Manual reproduces Article 17 GC I.³¹⁷

341. Hungary’s Military Manual states that “the dead may be buried, buried at sea, cremated”.³¹⁸

342. According to Israel’s Manual on the Laws of War, a “[legal] combatant is entitled to the status of a prisoner of war, according him . . . the right to a proper burial”.³¹⁹

³⁰⁷ Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 2.06.

³⁰⁸ Australia, *Defence Force Manual* (1994), § 998.

³⁰⁹ Australia, *Defence Force Manual* (1994), § 999.

³¹⁰ Belgium, *Law of War Manual* (1983), p. 49.

³¹¹ Canada, *LOAC Manual* (1999), p. 9-6, § 58.

³¹² Canada, *LOAC Manual* (1999), p. 9-2, § 11.

³¹³ Canada, *LOAC Manual* (1999), p. 17-4, § 32.

³¹⁴ Canada, *Code of Conduct* (2001), Rule 7, § 5.

³¹⁵ Croatia, *Commanders’ Manual* (1992), § 76, see also § 89 and *LOAC Compendium* (1991), p. 47.

³¹⁶ France, *LOAC Summary Note* (1992), § 2.1; see also *LOAC Teaching Note* (2000), p. 3.

³¹⁷ France, *LOAC Manual* (2001), p. 121.

³¹⁸ Hungary, *Military Manual* (1992), p. 77.

³¹⁹ Israel, *Manual on the Laws of War* (1998), p. 46.

343. Italy's LOAC Elementary Rules Manual provides that "as a general rule, the dead shall be . . . buried, cremated or buried at sea individually".³²⁰
344. Kenya's LOAC Manual states that "the dead shall be buried, cremated or buried at sea individually, when the tactical situation and other circumstances (e.g. hygiene) permit".³²¹
345. Madagascar's Military Manual provides that "generally, the dead shall be . . . buried, incinerated or buried at sea individually".³²²
346. New Zealand's Military Manual provides that "the remains [of the dead] . . . shall be respected".³²³ It also states that "the regulations with regard to burial at sea are adjusted to meet the requirements of the situation".³²⁴ With respect to non-international armed conflicts, the manual states that the parties to a conflict must take steps to "provide for [the] decent disposal [of the dead]".³²⁵
347. The Military Instructions of the Philippines provides that "evacuation of all dead bodies must be done . . . and arrangements for a decent burial made".³²⁶
348. Russia's Military Manual states that the emergency disposal of the dead is one of the activities of civil defence that helps eliminate the immediate effects of hostilities or disaster.³²⁷
349. Spain's LOAC Manual stipulates that "the dead shall be buried, cremated or buried at sea as soon as the tactical situation and other circumstances permit".³²⁸
350. Switzerland's Basic Military Manual provides that "burial shall be honourable".³²⁹
351. Togo's Military Manual provides that the dead "shall be buried, incinerated or disposed of at sea individually when the tactical situation or other circumstances (hygiene) so permit".³³⁰
352. The UK Military Manual provides that "the belligerents must make provision for honourable interment" of the dead.³³¹
353. The US Field Manual states that parties to the conflict "shall further ensure that the dead are honourably interred".³³²

³²⁰ Italy, *LOAC Elementary Rules Manual* (1991), § 76.

³²¹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.

³²² Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 23, see also Fiche No. 8-O, § 25 and Fiche No. 6-SO, § B.

³²³ New Zealand, *Military Manual* (1992), § 1012(1).

³²⁴ New Zealand, *Military Manual* (1992), § 1003(3).

³²⁵ New Zealand, *Military Manual* (1992), § 1817.

³²⁶ Philippines, *Military Instructions* (1989), p. 27, § 4; see also *Military Directive to Commanders* (1988), p. 30, Guideline 4(h)(6).

³²⁷ Russia, *Military Manual* (1990), § 9(1).

³²⁸ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).

³²⁹ Switzerland, *Basic Military Manual* (1987), Article 76(2).

³³⁰ Togo, *Military Manual* (1996), Fascicule II, p. 12, see also p. 9 and Fascicule III, p. 5.

³³¹ UK, *Military Manual* (1958), § 383.

³³² US, *Field Manual* (1956), § 218.

354. The US Operational Law Handbook provides that “the Parties must ensure proper burial”.³³³

National Legislation

355. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that: . . . the dead bodies of persons who are not citizens of the State concerned and died of wounds or in prison, and whose death is connected with the military operations or occupation, should be buried with the necessary respect.³³⁴

356. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.³³⁵

357. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 17 GC I, 20 GC II, 120 GC III and 130 GC IV, as well as any “contravention” of AP II, including violations of Article 8 AP II, are punishable offences.³³⁶

358. Italy’s Law of War Decree as amended provides that commanders shall take all the necessary measures “to give [the dead] an honourable burial”.³³⁷

359. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.³³⁸

360. Venezuela’s Code of Military Justice as amended punishes “those who do not take care of the burial, cremation or burial at sea of the dead”.³³⁹

National Case-law

361. In its ruling in the *Jenin (Mortal Remains) case* in 2002, dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel’s High Court of Justice stated that “needless to say, the burial will be made in an appropriate and respectful manner, maintaining the respect for the

³³³ US, *Operational Law Handbook* (1993), p. Q-185.

³³⁴ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 29(3).

³³⁵ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³³⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³³⁷ Italy, *Law of War Decree as amended* (1938), Article 94.

³³⁸ Norway, *Military Penal Code as amended* (1902), § 108.

³³⁹ Venezuela, *Code of Military Justice as amended* (1998), Article 474(12).

dead... [T]he burial will be conducted in a respectful manner, conforming to religious laws, and as soon as possible."³⁴⁰

Other National Practice

362. The Report on the Practice of Algeria notes that during the Algerian war of independence, "Algerian soldiers on occasion buried enemy personnel who died in combat".³⁴¹

363. According to the Report on the Practice of Iran, it is the *opinio juris* of Iran, based on practice during the Iran–Iraq War, that, where dead combatants cannot be returned to the relevant party, they should be buried.³⁴²

364. According to the Report on the Practice of Israel, the IDF is sensitive to the correct and proper treatment of remains, and has established detailed internal regulations and procedures concerning their burial.³⁴³

III. Practice of International Organisations and Conferences

United Nations

365. In 1996, the Special Rapporteur of the UN Commission on Human Rights on Extrajudicial, Summary or Arbitrary Executions identified as a particular concern a report that the bodies of six civilians who had been beaten and summarily executed by the Papua New Guinea Defence Forces were dumped at sea from helicopters.³⁴⁴

366. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted that "interment should be carried out in an honourable fashion".³⁴⁵

Other International Organisations

367. In February 1995, in a statement before the Permanent Council of the OSCE on the situation in Chechnya, the EU stated that the proposal to establish a "humanitarian truce" appeared essential in order to provide the victims with a decent burial.³⁴⁶

³⁴⁰ Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, §§ 8 and 9.

³⁴¹ Report on the Practice of Algeria (1997), Chapter 5.1, referring to *El Moudjahid*, Vol. 2, p. 641.

³⁴² Report on the Practice of Iran, 1997, Chapter 5.1, referring to Statement by the Iranian Minister of Foreign Affairs, 15 November 1980 and Military Communiqué No. 2176, 27 July 1985.

³⁴³ Report on the Practice of Israel, 1997, Chapter 5.1.

³⁴⁴ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1996/4/Add.2, 27 February 1996, § 73.

³⁴⁵ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

³⁴⁶ EU, Statement by France on behalf of the EU before the Permanent Council of the OSCE, Vienna, 2 February 1995, *Politique étrangère de la France*, February 1995, p. 155.

International Conferences

368. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

369. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

370. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the dead shall be buried, cremated or buried at sea individually, when the tactical situation and other circumstances (e.g. hygiene) permit”.³⁴⁷

VI. Other Practice

371. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “every possible measure shall be taken, without delay, . . . to dispose of [the dead] with respect”.³⁴⁸

Respect for the religious beliefs of the dead

Note: For practice concerning convictions and religious practices in general, see Chapter 32, section P.

I. Treaties and Other Instruments

Treaties

372. Article 17, third paragraph, GC I, Article 120, fourth paragraph, GC III and Article 130, first paragraph, GC IV provide that the dead shall be “buried, if possible according to the rites of the religion to which they belonged”.

373. The 1999 NATO STANAG 2070 provides that:

10. Whenever practicable, a brief burial service of the appropriate religion is to be held . . .
11. An appropriate (religious) marker high enough to be seen readily is to be erected.

³⁴⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 512.

³⁴⁸ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, p. 335.

Other Instruments

374. No practice was found.

*II. National Practice**Military Manuals*

375. Argentina's Law of War Manual provides that the dead "shall be buried . . . if possible according to their religious rites".³⁴⁹

376. According to Australia's Defence Force Manual, the dead should be given a decent burial in accordance with their religious rights and practices.³⁵⁰

377. Benin's Military Manual provides that "the dead shall be . . . buried . . . according to their religious rites".³⁵¹

378. Cameroon's Instructors' Manual states that the burial shall take place according to the religion of the deceased.³⁵²

379. Canada's LOAC Manual provides that "parties to the conflict shall ensure that the dead are . . . interred and if possible according to the rites of the religion to which they belong".³⁵³

380. Canada's Code of Conduct provides that "the dead shall be . . . interred, and if possible accorded the rites of the religion to which the deceased belonged".³⁵⁴

381. According to Israel's Manual on the Laws of War, "generally speaking, the enemy fallen are to be interred (in accordance with their religion's customs insofar as possible)".³⁵⁵

382. The Military Instructions of the Philippines stipulates that "religious services must be provided if required".³⁵⁶

383. Switzerland's Basic Military Manual provides that "inhumation shall . . . [take place] if possible according to the religious rites of the deceased".³⁵⁷

384. Togo's Military Manual provides that "the dead shall be . . . buried . . . according to their religious rites".³⁵⁸

385. The UK Military Manual provides that "the belligerents must make provision for . . . interment . . . if possible according to the rites of the religion to which the dead belong".³⁵⁹

³⁴⁹ Argentina, *Law of War Manual* (1969), § 3.005.

³⁵⁰ Australia, *Defence Force Manual* (1994), §§ 998 and 999.

³⁵¹ Benin, *Military Manual* (1995), Fascicule III, p. 5, see also Fascicule II, p. 12.

³⁵² Cameroon, *Instructors' Manual* (1992), p. 118, § 431(2).

³⁵³ Canada, *LOAC Manual* (1999), p. 9-6, § 58.

³⁵⁴ Canada, *Code of Conduct* (2001), Rule 7, § 5.

³⁵⁵ Israel, *Manual on the Laws of War* (1998), p. 61.

³⁵⁶ Philippines, *Military Instructions* (1989), p. 27, § 4.

³⁵⁷ Switzerland, *Basic Military Manual* (1987), Article 76(2).

³⁵⁸ Togo, *Military Manual* (1996), Fascicule III, p. 5, see also Fascicule II, p. 12.

³⁵⁹ UK, *Military Manual* (1958), § 383.

386. The US Field Manual states that parties to the conflict “shall further ensure that the dead are . . . interred, if possible according to the rites of the religion to which they belonged”.³⁶⁰

National Legislation

387. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.³⁶¹

388. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of the Geneva Conventions, including violations of Articles 17 GC I, 120 GC III and 130 GC IV, is a punishable offence.³⁶²

389. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment”.³⁶³

National Case-law

390. In its ruling in the *Jenin (Mortal Remains) case* in 2002, dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel’s High Court of Justice stated that “the burial will be conducted . . . conforming to religious laws”.³⁶⁴

Other National Practice

391. According to the Report on the Practice of Malaysia, the bodies of members of enemy forces and civilians that remain unclaimed, but whose religious persuasions are identified, are buried according to their religious rites.³⁶⁵

III. Practice of International Organisations and Conferences

United Nations

392. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council 780 (1992) stated that “interment should be carried out . . . according to the religious rites of the deceased”.³⁶⁶

³⁶⁰ US, *Field Manual* (1956), § 218; see also *Operational Law Handbook* (1993), p. Q-185.

³⁶¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁶² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁶³ Norway, *Military Penal Code as amended* (1902), § 108(a).

³⁶⁴ Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, § 8.

³⁶⁵ Report on the Practice of Malaysia, 1997, Chapter 5.1.

³⁶⁶ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

Other International Organisations

393. No practice was found.

International Conferences

394. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

395. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

396. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "burial or cremation shall, as far as circumstances permit, be carried out . . . according to the rites of the religion to which the dead belonged".³⁶⁷

VI. Other Practice

397. No practice was found.

Cremation of bodies*I. Treaties and Other Instruments**Treaties*

398. Article 17, second paragraph, GC I provides that "bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead."

399. Article 120, fifth paragraph, GC III provides that "bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his express wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased."

400. Article 130, second paragraph, GC IV provides that "bodies may be cremated only for imperative reasons of hygiene, on account of the religion of the deceased or in accordance with his expressed wish to this effect. In case of cremation, the fact shall be stated and the reasons given in the death certificate of the deceased."

³⁶⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 735.

Other Instruments

401. No practice was found.

*II. National Practice**Military Manuals*

402. Argentina's Law of War Manual provides that "bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the reasons must be stated in detail on the death certificate or on the authenticated list of the dead."³⁶⁸

403. Australia's Defence Force Manual stipulates that "the cremation of the dead shall be carried out individually in accordance with the religious rights and practices of the deceased".³⁶⁹ It then specifies that "bodies shall only be cremated for imperative reasons of hygiene and health, or for the requirements of the deceased".³⁷⁰

404. Benin's Military Manual provides that "cremation shall only take place for imperative hygiene reasons and according to the deceased's religion".³⁷¹

405. Canada's LOAC Manual provides that "bodies shall not be cremated except for imperative reasons of hygiene or for religious motives".³⁷²

406. Canada's Code of Conduct provides that "bodies must not be cremated except for imperative reasons of hygiene or because of the religion of the deceased. Reasons for cremation must be recorded."³⁷³

407. France's LOAC Manual states that "bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased".³⁷⁴

408. According to Israel's Manual on the Laws of War, "generally speaking, the enemy fallen are to be interred (in accordance with their religion's customs insofar as possible), with cremation allowed only in cases where this is necessary hygienically or for religious reasons".³⁷⁵

409. Kenya's LOAC Manual provides that "cremation shall take place only for imperative reasons of hygiene or for motives based on the religion of the deceased".³⁷⁶

410. The Military Manual of the Netherlands states that "the cremation of a body shall be granted for imperative reasons of hygiene or for motives based on the religion" of the deceased.³⁷⁷

³⁶⁸ Argentina, *Law of War Manual* (1969), § 3.005.

³⁶⁹ Australia, *Defence Force Manual* (1994), § 999.

³⁷⁰ Australia, *Defence Force Manual* (1994), § 9-100.

³⁷¹ Benin, *Military Manual* (1995), Fascicule II, p. 12.

³⁷² Canada, *LOAC Manual* (1999), p. 9-6, § 59.

³⁷³ Canada, *Code of Conduct* (2001), Rule 7, § 5.

³⁷⁴ France, *LOAC Manual* (2001), p. 121.

³⁷⁵ Israel, *Manual on the Laws of War* (1998), p. 61.

³⁷⁶ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.

³⁷⁷ Netherlands, *Military Manual* (1993), p. VI-2.

411. Spain's LOAC Manual stipulates that cremation is permitted only if required on religious grounds or for reasons of hygiene in cases where there is a risk of disease.³⁷⁸
412. Switzerland's Basic Military Manual states that "cremation is only permitted for imperative hygiene reasons or for religious motives".³⁷⁹
413. Togo's Military Manual provides that "cremation shall only take place for imperative hygiene reasons and according to the deceased's religion".³⁸⁰
414. The UK Military Manual stipulates that "bodies must not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. When cremation is carried out the circumstances and reasons for it must be stated in detail on the death certificate."³⁸¹
415. The UK LOAC Manual provides that "cremation is allowed only on religious grounds or for imperative reasons of hygiene".³⁸²
416. The US Field Manual provides that "bodies shall not be cremated except for imperative reasons of hygiene or for motives based on the religion of the deceased. In case of cremation, the circumstances and reasons for cremation shall be stated in detail in the death certificate or on the authenticated list of the dead."³⁸³
417. The US Air Force Pamphlet provides that "cremation is permitted only for imperative reasons of hygiene or for motives based on the deceased's religion".³⁸⁴
418. The US Operational Law Handbook provides that "Parties may cremate the dead only for hygienic or religious reasons".³⁸⁵

National Legislation

419. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁸⁶
420. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 120 GC III and 130 GC IV, is a punishable offence.³⁸⁷
421. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".³⁸⁸

³⁷⁸ Spain, *LOAC Manual* (1996), Vol. I, Article 5.2.d.(6).

³⁷⁹ Switzerland, *Basic Military Manual* (1987), Article 76, commentary.

³⁸⁰ Togo, *Military Manual* (1995), Fascicule II, p. 12.

³⁸¹ UK, *Military Manual* (1958), § 384.

³⁸² UK, *LOAC Manual* (1981), Section 6, p. 22, § 5.

³⁸³ US, *Field Manual* (1956), § 218.

³⁸⁴ US, *Air Force Pamphlet* (1976), § 12-2(a).

³⁸⁵ US, *Operational Law Handbook* (1993), p. Q-185.

³⁸⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁸⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁸⁸ Norway, *Military Penal Code as amended* (1902), § 108(a).

National Case-law

422. No practice was found.

Other National Practice

423. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

424. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted, with respect to its investigation into mass graves, that:

A mass gravesite is a potential repository of evidence of mass killing of civilians and POWs . . .

The manner and method by which a mass grave is created may itself be a breach of the Geneva Conventions, as well as a violation of the customary regulations of armed conflict . . . Bodies should not be cremated except for hygiene reasons or for the religious reasons of the deceased.³⁸⁹

Other International Organisations

425. No practice was found.

International Conferences

426. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

427. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

428. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “burial or cremation shall, as far as circumstances permit, be carried out individually”.³⁹⁰

VI. Other Practice

429. No practice was found.

³⁸⁹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(a) and (b).

³⁹⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 735.

Burial in individual or collective graves

I. Treaties and Other Instruments

Treaties

430. Article 17, first paragraph, GC I provides that parties to the conflict shall ensure that burial or cremation of the dead is “carried out individually as far as circumstances permit”.

431. Article 20, first paragraph, GC II provides that parties to the conflict shall ensure that burial at sea of the dead be “carried out individually as far as circumstances permit”.

432. Article 120, fifth paragraph, GC III provides that “deceased prisoners of war shall be buried in individual graves unless unavoidable circumstances require the use of collective graves”.

433. Article 130, second paragraph, GC IV provides that “deceased internees shall be buried in individual graves unless unavoidable circumstances require the use of collective graves”.

434. The 1999 NATO STANAG 2070 provides that:

3. Whenever practicable, separate burial should be given to the remains, or even part remains, of each deceased person.

...

6. The following definitions are taken from the NATO Glossary of Terms and Definitions for military use in English and French . . . :

a. Emergency Burial. A burial, usually on the battlefield, when conditions do not permit evacuation for burial in a cemetery.

b. Group Burial. A burial in a common grave of two or more individually unidentified remains.

c. Trench Burial. A method of burial resorted to when casualties are heavy whereby a trench is prepared and the individual remains are laid in it side by side, thus obviating the necessity of digging and filling individual graves.

...

12. In the case of trench and group burials a marker and list in a suitable container endorsed accordingly is to be placed at each end of the grave and the distance of the remains from the marker is to be shown against the relevant entry in the list. In group burials, the number of bodies buried must be recorded, with the names of the known but unidentifiable dead listed.

Other Instruments

435. No practice was found.

II. National Practice

Military Manuals

436. Argentina’s Law of War Manual provides that the deceased must “be buried individually, so far as the circumstances so permit”.³⁹¹

³⁹¹ Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 6.04.

437. According to Australia's Defence Force Manual, "the burial or cremation of the dead shall be carried out individually".³⁹²
438. Benin's Military Manual provides that the dead "shall be buried, cremated or buried at sea individually".³⁹³
439. Canada's LOAC Manual provides that "parties to the conflict shall ensure that burial or cremation of the dead is carried out individually as far as circumstances permit".³⁹⁴
440. Canada's Code of Conduct provides that "the burial or cremation of the dead should be carried out individually as far as circumstances permit".³⁹⁵
441. Croatia's Commanders' Manual provides that "as a rule, the dead shall be . . . buried, cremated or buried at sea individually".³⁹⁶
442. France's LOAC Manual reproduces Article 17 GC I.³⁹⁷
443. Italy's LOAC Elementary Rules Manual provides that "as a general rule, the dead shall be . . . buried, cremated or buried at sea individually".³⁹⁸
444. Kenya's LOAC Manual states that "after identification, the dead shall be buried, cremated or buried at sea individually, when the tactical situation and other circumstances (e.g. hygiene) permit".³⁹⁹
445. Madagascar's Military Manual provides that "generally, the dead shall be . . . buried, cremated or buried at sea individually".⁴⁰⁰
446. The Military Manual of the Netherlands states that "parties to the conflict are obliged to ensure that burial or cremation of the dead shall be carried out individually".⁴⁰¹
447. Spain's LOAC Manual stipulates that "the dead shall be buried, cremated or buried at sea individually".⁴⁰²
448. Switzerland's Basic Military Manual states that "if possible, corpses shall be buried separately".⁴⁰³
449. Togo's Military Manual provides that the dead "shall be buried, incinerated or buried at sea individually".⁴⁰⁴
450. The UK Military Manual provides that "the belligerents must make provision for . . . interment, in individual graves so far as possible".⁴⁰⁵
451. The US Field Manual provides that "Parties to the conflict shall ensure burial or cremation of the dead, carried out individually as far as circumstances permit".⁴⁰⁶

³⁹² Australia, *Defence Force Manual* (1994), § 999.

³⁹³ Benin, *Military Manual* (1995), Fascicule II, p. 12, see also Fascicule III, p. 5.

³⁹⁴ Canada, *LOAC Manual* (1999), p. 9-6, § 55.

³⁹⁵ Canada, *Code of Conduct* (2001), Rule 7, § 5.

³⁹⁶ Croatia, *Commanders' Manual* (1992), § 76. ³⁹⁷ France, *LOAC Manual* (2001), p. 121.

³⁹⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 76.

³⁹⁹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.

⁴⁰⁰ Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 23, see also Fiche No. 6-SO, § B.

⁴⁰¹ Netherlands, *Military Manual* (1993), p. VI-2.

⁴⁰² Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).

⁴⁰³ Switzerland, *Basic Military Manual* (1987), Article 76, commentary.

⁴⁰⁴ Togo, *Military Manual* (1996), Fascicule II, p. 12, see also Fascicule III, p. 5.

⁴⁰⁵ UK, *Military Manual* (1958), § 383.

⁴⁰⁶ US, *Field Manual* (1956), § 218; see also *Air Force Pamphlet* (1976), § 12-2(a).

452. The YPA Military Manual of the SFRY (FRY) stipulates that bodies should be buried individually.⁴⁰⁷

National Legislation

453. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴⁰⁸

454. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 20 GC II, 120 GC III and 130 GC IV, is a punishable offence.⁴⁰⁹

455. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... is liable to imprisonment".⁴¹⁰

National Case-law

456. In 1995, Colombia's Council of State held that the deceased must be buried individually, subject to all the requirements of the law, and not in mass graves.⁴¹¹

Other National Practice

457. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

458. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted, with respect to its investigation into mass graves, that:

A mass gravesite is a potential repository of evidence of mass killings of civilians and POWs...

The manner and method by which a mass grave is created may itself be a breach of the Geneva Conventions, as well as a violation of the customary regulations of armed conflict... Parties to a conflict must also ensure that deceased persons are... buried in individual graves, as far apart as circumstances permit.⁴¹²

⁴⁰⁷ SFRY (FRY), *YPA Military Manual* (1988), Article 167.

⁴⁰⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴⁰⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴¹⁰ Norway, *Military Penal Code as amended* (1902), § 108(a).

⁴¹¹ Colombia, Council of State, *Administrative Case No. 10941*, Judgement, 6 September 1995.

⁴¹² UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(a) and (b).

Other International Organisations

459. No practice was found.

International Conferences

460. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

461. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

462. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that “burial or cremation shall, as far as circumstances permit, be carried out individually”.⁴¹³

VI. Other Practice

463. No practice was found.

Grouping of graves according to nationality

I. Treaties and Other Instruments

Treaties

464. Article 17, third paragraph, GC I provides that graves shall be “grouped if possible according to the nationality of the deceased”.

465. Article 120, fourth paragraph, GC III provides that “whenever possible, deceased prisoners of war who depended on the same Power shall be interred in the same place”.

466. Paragraph 9 of the 1999 NATO STANAG 2070 states that “burials are to be grouped by nationalities. Different areas for separate graves, trench or group burials are to be allotted to each nationality.”

Other Instruments

467. No practice was found.

II. National Practice

Military Manuals

468. Argentina’s Law of War Manual provides that graves “shall be grouped if possible according to the nationality of the dead”.⁴¹⁴

⁴¹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 735.

⁴¹⁴ Argentina, *Law of War Manual* (1969), § 3.005.

469. Australia's Defence Force Manual provides that the graves of the deceased shall "be grouped by nationality".⁴¹⁵

470. Cameroon's Instructors' Manual provides that the deceased shall be buried by nationality.⁴¹⁶

471. The Military Manual of the Netherlands provides that "graves shall be grouped if possible according to the nationality of the deceased".⁴¹⁷

472. The US Field Manual provides that the "graves [of the dead] are . . . grouped if possible according to the nationality of the deceased".⁴¹⁸

473. The YPA Military Manual of the SFRY (FRY) provides that military graves should, if possible, be grouped by nationality.⁴¹⁹

National Legislation

474. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴²⁰

475. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I and 120 GC III, is a punishable offence.⁴²¹

476. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".⁴²²

National Case-law

477. No practice was found.

Other National Practice

478. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

479. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780

⁴¹⁵ Australia, *Defence Force Manual* (1994), § 999.

⁴¹⁶ Cameroon, *Instructors' Manual* (1992), p. 119, § 431(2).

⁴¹⁷ Netherlands, *Military Manual* (1993), p. VI-2.

⁴¹⁸ US, *Field Manual* (1956), § 218.

⁴¹⁹ SFRY (FRY), *YPA Military Manual* (1988), Article 168.

⁴²⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴²¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴²² Norway, *Military Penal Code as amended* (1902), § 108(a).

(1992) stated, with respect to its investigation into mass graves, that “victims should be grouped by nationality”.⁴²³

Other International Organisations

480. No practice was found.

International Conferences

481. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

482. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

483. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “wherever possible, the dead of the same nationality shall be buried at the same place”.⁴²⁴

VI. Other Practice

484. No practice was found.

Respect for and maintenance of graves

I. Treaties and Other Instruments

Treaties

485. Article 4, fifth paragraph, of the 1929 GC provides that belligerents shall ensure that graves are respected.

486. Article 76, third paragraph, of the 1929 Geneva POW Convention provides that belligerents shall ensure that the graves of POWs are “treated with respect and suitably maintained”.

487. Article 17, third paragraph, GC I, Article 120, fourth paragraph, GC III and Article 130, first paragraph, GC IV provide that graves shall be respected and properly maintained.

⁴²³ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

⁴²⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 735.

488. Article 34 AP I provides that:

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be respected [and] maintained . . . as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.
2. As soon as circumstances and the relation between the adverse Parties permit, . . . [they] shall conclude agreements in order:
 - ...
 - (b) to protect and maintain such gravesites permanently;
 - ...
3. In the absence of [such] agreements . . . and if the home country of such deceased is not willing to arrange at its expense for the maintenance of such gravesites, the High Contracting Party in whose territory the gravesites are situated may offer to facilitate the return of the remains of the deceased to the home country. Where such an offer has not been accepted the High Contracting Party may, after the expiry of five years from the date of the offer and upon due notice to the home country, adopt the arrangements laid down in its own laws relating to cemeteries and graves.

Article 34 AP I was adopted by consensus.⁴²⁵

489. Article 8(b) of the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam contained provisions requiring the parties to take care of the graves of the dead so as to facilitate the exhumation and repatriation of the remains.

Other Instruments

490. No practice was found.

II. National Practice

Military Manuals

491. Argentina's Law of War Manual provides that graves shall be "respected . . . and properly maintained".⁴²⁶

492. Australia's Defence Force Manual provides that the graves of the deceased "shall be respected".⁴²⁷

493. Canada's LOAC Manual states that the grave sites of all persons who have died as a result of hostilities or while in occupation or detention in relation thereto shall be "properly respected [and] maintained".⁴²⁸

494. Croatia's LOAC Compendium provides that one of the requirements after a conflict is to "respect . . . and maintain gravesites".⁴²⁹

⁴²⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

⁴²⁶ Argentina, *Law of War Manual* (1969), § 3.005.

⁴²⁷ Australia, *Defence Force Manual* (1994), § 999.

⁴²⁸ Canada, *LOAC Manual* (1999), p. 9-6, § 54. ⁴²⁹ Croatia, *LOAC Compendium* (1991), p. 21.

495. France's LOAC Manual reproduces Article 17 GC I.⁴³⁰
496. Hungary's Military Manual provides that one of the requirements after a conflict is to "respect . . . and maintain gravesites".⁴³¹
497. Israel's Manual on the Laws of War states that "the IDF maintains a cemetery in the north for the interment of the bodies of terrorists killed in clashes with the IDF".⁴³²
498. The Military Manual of the Netherlands provides that "graves must be properly maintained".⁴³³
499. New Zealand's Military Manual provides that the grave sites of the dead shall be "properly respected, maintained and marked".⁴³⁴
500. Spain's LOAC Manual provides that "the graves of the dead shall be respected and properly maintained, wherever they are located".⁴³⁵
501. Switzerland's Basic Military Manual provides that "graves shall be respected" and "properly maintained".⁴³⁶
502. The UK Military Manual provides that "graves must be respected and properly maintained".⁴³⁷
503. The US Field Manual provides that the graves of the dead "are respected [and] properly maintained".⁴³⁸
504. The Annotated Supplement to the US Naval Handbook requires that "as soon as circumstances permit, arrangement be made to . . . protect and maintain such sites permanently".⁴³⁹
505. The YPA Military Manual of the SFRY (FRY) provides that the graves of the deceased shall be respected.⁴⁴⁰

National Legislation

506. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the places of burial of [the dead] are respected".⁴⁴¹
507. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴⁴²
508. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I,

⁴³⁰ France, *LOAC Manual* (2001), p. 121.

⁴³¹ Hungary, *Military Manual* (1992), p. 38.

⁴³² Israel, *Manual on the Laws of War* (1998), p. 61.

⁴³³ Netherlands, *Military Manual* (1993), p. VI-3.

⁴³⁴ New Zealand, *Military Manual* (1992), § 1012(1).

⁴³⁵ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).

⁴³⁶ Switzerland, *Basic Military Manual* (1987), Article 71(2) and Article 76, commentary.

⁴³⁷ UK, *Military Manual* (1958), § 383. ⁴³⁸ US, *Field Manual* (1956), § 218.

⁴³⁹ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.

⁴⁴⁰ SFRY (FRY), *YPA Military Manual* (1988), Article 168.

⁴⁴¹ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 13(3).

⁴⁴² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

120 GC III and 130 GC IV, and of AP I, including violations of Article 34 AP I, are punishable offences.⁴⁴³

509. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".⁴⁴⁴

National Case-law

510. No practice was found.

Other National Practice

511. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support... the principle... to maintain [grave] sites permanently".⁴⁴⁵

III. Practice of International Organisations and Conferences

United Nations

512. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted, with respect to its investigation into mass graves, that the graves of victims should be maintained.⁴⁴⁶

Other International Organisations

513. No practice was found.

International Conferences

514. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it called on parties to armed conflicts "during hostilities and after cessation of hostilities, to help locate and care for the graves of the dead".⁴⁴⁷

⁴⁴³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁴⁴ Norway, *Military Penal Code as amended* (1902), § 108.

⁴⁴⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

⁴⁴⁶ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

⁴⁴⁷ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.

IV. Practice of International Judicial and Quasi-judicial Bodies

515. In the *Neira Alegría and Others case* in 1995, the government of Peru informed the IACtHR that a certain cemetery under discussion was official and permanent in nature, and that the bodies of persons who died as a result of disproportionate use of force in putting down a prison mutiny would not therefore be moved except in accordance with regulations on the subject and at the request of an interested party.⁴⁴⁸

V. Practice of the International Red Cross and Red Crescent Movement

516. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “gravesites of deceased persons shall be respected and maintained, wherever located”.⁴⁴⁹

VI. Other Practice

517. In 1996, in the context of the conflict in Bosnia and Herzegovina, Amnesty International called for IFOR to protect mass grave sites.⁴⁵⁰

E. Accounting for the Dead

Note: For practice concerning respect for family rights, see Chapter 32, section Q. For practice concerning the right of the families to know the fate of their relatives, see Chapter 36.

Identification of the dead prior to disposal

I. Treaties and Other Instruments

Treaties

518. Article 4 of the 1929 GC provides that the belligerents “shall ensure that the burial or cremation of the dead is preceded by a careful, and if possible medical, examination of the bodies, with a view to confirming death, establishing identity and enabling a report to be made”.

519. Article 16, first paragraph, GC I and Article 19, first paragraph, GC II provide that:

Parties to the conflict shall record as soon as possible, in respect of each . . . dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.

⁴⁴⁸ IACtHR, *Neira Alegría and Others case*, Judgement, 19 January 1995, § 36.

⁴⁴⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 261, see also § 230.

⁴⁵⁰ Amnesty International, *Bosnia and Herzegovina: Amnesty International renews calls for IFOR to comply with international law*, AI Index: EUR 63/11/96, 18 April 1996, p. 4.

These records should if possible include:

- (a) designation of the Power on which he depends;
- (b) army, regimental, personal or serial number;
- (c) surname;
- (d) first name or names;
- (e) date of birth;
- (f) any other particulars shown on his identity card or disc;
- (g) date and place of capture or death;
- (h) particulars concerning wounds or illness, or cause of death.

520. Article 17, first paragraph, GC I and Article 20, first paragraph, GC II provide that "Parties to the conflict shall ensure that burial or cremation of the dead . . . is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made".

521. Articles 120 and 121 GC III contain detailed provisions relating to identification, death certificates and investigation in the case of death of POWs.

522. Article 129, second paragraph, GC IV provides that "deaths of internees shall be certified in every case by a doctor, and a death certificate shall be made out, showing the causes of death and the conditions under which it occurred".

523. Article 131, first paragraph, GC IV provides that any suspect death shall be followed by an official enquiry.

524. Article III(58)(a) of the 1953 Panmunjon Armistice Agreement provides that:

The Commander of each side shall furnish to the Commander of the other side as soon as practicable, but not later than ten (10) days after this Armistice Agreement becomes effective, the following information concerning prisoners of war:

...
 (2) Insofar as practicable, information regarding name, nationality, rank, and other identification data, date and cause of death, and place of burial, of those prisoners of war who died while in custody.

525. The 1974 NATO STANAG 2132 describes the procedures to be followed with respect to documentation relative to medical evacuation, treatment and cause of death of patients.

526. Article 33 AP I provides that:

- 2. . . . each Party to the conflict shall . . .
 - (a) record the information . . . [on those] who have died during any period of detention;
 - (b) . . . facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

...

4. The Parties to the conflict shall endeavour to agree on arrangements for teams to . . . identify . . . the dead from battlefield areas.

Article 33 AP I was adopted by consensus.⁴⁵¹

527. The 1999 NATO STANAG 2070 provides that:

11. An appropriate (religious) marker high enough to be seen is to be erected. At its base, a bottle, can, or other suitable container is to be half buried, open end downwards, containing a paper on which is recorded such information listed below as is available:
 - a. Name (surname, prefix and forename or initials).
 - b. Rank or Grade.
 - c. Gender.
 - d. Service Number.
 - e. National Force, Unit, and Place of Birth, if desired.
 - f. Date and cause of death, if known.
 - g. Date buried.
 - h. By whom buried.
 - i. Religious faith.
 - j. Nature of contamination.
12. In the case of trench and group burials a marker and list in a suitable container endorsed accordingly is to be placed at each end of the grave and the distance of the remains from the marker is to be shown against the relevant entry in the list. In group burials the number of bodies buried must be recorded, with the names of the known but unidentifiable dead listed.
...
15. Unidentifiable dead should be buried and reported as others except that the word "unknown" is to be used in place of the name. Particular care must be taken to list all information which may assist identification later. The fullest possible physical, especially dental, description is to be recorded and fingerprints taken if possible. Details of numbers and markings on uniforms, equipment, vehicles or aircraft, and particulars of IDENTIFIABLE DEAD in the vicinity should be noted.
16. In all cases an emergency burial report must be completed by the unit responsible. The type of report form to be used is given at Annex A. This is not a prescribed format, but shows generally the information most nations consider essential to have, provided it is available.
...
18. . . . One identification tag/disc must be buried with the corpse. The second identification tag/disc, or the removable part, is placed in the receptacle with the personal effects. In the case of United States personnel, all personal effects and one identification tag are buried with the remains and the second identification tag affixed to the grave marker.

Other Instruments

528. Article 20 of the 1880 Oxford Manual provides that "the dead should never be buried until all articles on them which may serve to fix their identity, such as pocket-books, numbers, etc., shall have been collected".

⁴⁵¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

*II. National Practice**Military Manuals*

529. Argentina's Law of War Manual provides that the dead shall be identified prior to their disposal.⁴⁵²

530. Australia's Defence Force Manual provides that:

As soon as is practical following the death of a combatant, a belligerent shall record the following information to aid identification . . .

- a) nationality;
- b) regimental or serial number and rank;
- c) surname and all first names;
- d) date of birth, religion and any other particulars shown on the body's identity card or identity discs; and
- e) the date, cause and place of death and if the body is given a field burial, the exact location of the remains to enable future exhumation of the body, or remains if necessary.⁴⁵³

531. Belgium's Law of War Manual states that "the belligerents must . . . identify the dead".⁴⁵⁴

532. Benin's Military Manual provides that "the dead must be identified".⁴⁵⁵

533. Cameroon's Instructors' Manual states that, when the tactical situation permits, the dead should be buried after identification and medical examination. It also states that "all the dead must be listed".⁴⁵⁶

534. Canada's LOAC Manual provides that "Parties to the conflict shall endeavour to reach agreements to allow teams to . . . identify . . . the dead from battlefield areas".⁴⁵⁷ It further states that "burial or cremation must be preceded by a careful examination of the bodies (if possible by a medical examination), with a view to confirming death, establishing identity and enabling a report to be made".⁴⁵⁸

535. Canada's Code of Conduct provides that "burial must be preceded by a careful examination, and if possible, by a medical examination of the bodies in order to confirm death, establish identity and make appropriate reports".⁴⁵⁹

536. Croatia's LOAC Compendium states that "the dead shall be identified according to the circumstances".⁴⁶⁰

537. Croatia's Commanders' Manual provides that "as a rule, the dead shall be identified".⁴⁶¹

⁴⁵² Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), §§ 2.06, 6.01 and 6.04.

⁴⁵³ Australia, *Defence Force Manual* (1994), § 9-101.

⁴⁵⁴ Belgium, *Law of War Manual* (1983), p. 49.

⁴⁵⁵ Benin, *Military Manual* (1995), Fascicule II, pp. 9 and 12.

⁴⁵⁶ Cameroon, *Instructors' Manual* (1992), p. 44, § 163(2) and p. 118, § 431(2).

⁴⁵⁷ Canada, *LOAC Manual* (1999), p. 9-5, § 53. ⁴⁵⁸ Canada, *LOAC Manual* (1999), p. 9-6, § 56.

⁴⁵⁹ Canada, *Code of Conduct* (2001), Rule 7, § 5.

⁴⁶⁰ Croatia, *LOAC Compendium* (1991), p. 47.

⁴⁶¹ Croatia, *Commanders' Manual* (1992), § 76, see also § 89.

538. France's LOAC Summary Note and LOAC Teaching Note provide that the dead must be identified.⁴⁶²
539. France's LOAC Manual reproduces Article 17 GC I.⁴⁶³
540. Germany's Military Manual provides that "burial or cremation of the dead shall be preceded by an examination of the bodies with documentation".⁴⁶⁴
541. Hungary's Military Manual states that "the dead shall be identified according to the circumstances".⁴⁶⁵
542. India's Police Manual provides that, in cases of death resulting from a clash, the police are required to hold an inquest and to send the body for post-mortem examination.⁴⁶⁶
543. According to Israel's Manual on the Laws of War, "it is incumbent on each party to keep a record of a fallen soldier's personal details and particulars of death, and hand over to the other side half of the dog-tag worn by the fallen soldier, as well as a death certificate".⁴⁶⁷
544. Italy's LOAC Elementary Rules Manual provides that "as a general rule, the dead shall be identified".⁴⁶⁸
545. Kenya's LOAC Manual provides that "the dead shall be identified. After identification, the dead shall be buried . . . Identity cards shall be evacuated."⁴⁶⁹
546. Madagascar's Military Manual provides that "generally, the dead shall be identified".⁴⁷⁰
547. The Military Manual of the Netherlands provides that:

Parties to the conflict are obliged to ensure that burial or cremation of the dead . . . is preceded for each dead by a careful examination, if possible by a medical examination, of the body, with a view to confirming death and establishing identity. One half of the double identity disc or the identity disc itself if it is a single disc, should remain on the body.⁴⁷¹

548. The Military Handbook of the Netherlands provides that "the identification of the dead must be done".⁴⁷²
549. New Zealand's Military Manual states that "to facilitate the finding of the missing personnel, Parties to the conflict endeavour to reach agreement to allow teams to . . . identify . . . the dead from battlefield areas".⁴⁷³

⁴⁶² France, *LOAC Summary Note* (1992), § 2.1; *LOAC Teaching Note* (2000), p. 3.

⁴⁶³ France, *LOAC Manual* (2001), p. 121.

⁴⁶⁴ Germany, *Military Manual* (1992), § 611. ⁴⁶⁵ Hungary, *Military Manual* (1992), p. 77.

⁴⁶⁶ India, *Police Manual* (1986), Article 13(xviii), p. 39.

⁴⁶⁷ Israel, *Manual on the Laws of War* (1998), p. 61.

⁴⁶⁸ Italy, *LOAC Elementary Rules Manual* (1991), § 76.

⁴⁶⁹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 11.

⁴⁷⁰ Madagascar, *Military Manual* (1994), Fiche No. 7-O, § 23, see also Fiche No. 8-O, § 25, Fiche No. 6-SO, § B and Fiche No. 2-T, § 22.

⁴⁷¹ Netherlands, *Military Manual* (1993), p. VI-2.

⁴⁷² Netherlands, *Military Handbook* (1995), p. 7-37.

⁴⁷³ New Zealand, *Military Manual* (1992), § 1011(3).

550. Nigeria's Manual on the Laws of War provides that "the belligerents have to register as soon as possible all the particulars that can help to identify an enemy soldier who is wounded, sick or dead".⁴⁷⁴

551. Senegal's IHL Manual provides that, in situations of internal troubles, "the dead shall be identified".⁴⁷⁵

552. Spain's LOAC Manual states that "the dead must be identified".⁴⁷⁶

553. Switzerland's Basic Military Manual provides that "no corpse shall be buried or cremated without an examination, if possible medical, to certify the death and establish the identity of the deceased".⁴⁷⁷

554. Togo's Military Manual provides that "the dead must be identified".⁴⁷⁸

555. The UK Military Manual provides that "belligerents must record as soon as possible any particulars which may assist in the identification of dead persons belonging to the opposing belligerent who fall into their hands".⁴⁷⁹ The manual adds that "before being buried or cremated, the bodies must be carefully examined to ensure that life is extinct, and also to establish identity and enable a report to be made".⁴⁸⁰

556. The US Field Manual provides that:

Parties to the conflict shall record as soon as possible, in respect of each . . . dead person of the adverse Party falling into their hands, any particulars which may assist in his identification.

These records should if possible include:

- (a) designation of the Power on which he depends;
- (b) army, regimental, personal or serial number;
- (c) surname;
- (d) first name or names;
- (e) date of birth;
- (f) any other particulars shown on his identity card or disc;
- (g) date and place of capture or death;
- (h) particulars concerning wounds or illness, or cause of death.⁴⁸¹

The manual also provides that "Parties to the conflict shall ensure that burial or cremation of the dead . . . is preceded by a careful examination, if possible by a medical examination, of the bodies, with a view to confirming death, establishing identity and enabling a report to be made".⁴⁸²

557. The US Air Force Pamphlet refers to Article 16 GC I.⁴⁸³

⁴⁷⁴ Nigeria, *Manual on the Laws of War* (undated), § 35.

⁴⁷⁵ Senegal, *IHL Manual* (1999), p. 18, § 6.

⁴⁷⁶ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).

⁴⁷⁷ Switzerland, *Basic Military Manual* (1987), Article 76(1).

⁴⁷⁸ Togo, *Military Manual* (1996), Fascicule II, pp. 9 and 12.

⁴⁷⁹ UK, *Military Manual* (1958), § 382. ⁴⁸⁰ UK, *Military Manual* (1958), § 383.

⁴⁸¹ US, *Field Manual* (1956), § 217; see also *Operational Law Handbook* (1993), p. Q-185.

⁴⁸² US, *Field Manual* (1956), § 218.

⁴⁸³ US, *Air Force Pamphlet* (1976), § 12-2(a).

National Legislation

558. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "each party buries [the dead] after they take all the measures for their identification".⁴⁸⁴

559. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴⁸⁵

560. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 16 and 17 GC I, 19 and 20 GC II, 120 and 121 GC III, 129 and 131 GC IV, and of AP I, including violations of Article 33 AP I, are punishable offences.⁴⁸⁶

561. Italy's Law of War Decree as amended provides that "commanders shall take all necessary measures to . . . ascertain [the] identity [of the dead]".⁴⁸⁷

562. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁴⁸⁸

National Case-law

563. In its judgement in the *Military Juntas case* in 1985, Argentina's Court of Appeal referred to the rule that prior to burial or cremation, the dead should be examined, if possible by a doctor.⁴⁸⁹

564. In 1995, Colombia's Council of State held that a report must be made concerning the circumstances of death: in the aftermath of a battle, the bodies of all those killed, whether combatants or non-combatants, must be treated in accordance with forensic requirements in order to "permit complete identification and establishment of the circumstances of death".⁴⁹⁰

565. According to the Report on the Practice of Israel, in the *Abu-Rijwa case* in 2000, the IDF carried out DNA identification tests when asked by family members to repatriate remains.⁴⁹¹

566. In its ruling in the *Jenin (Mortal Remains) case* in 2002, dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel's High Court of Justice stated that "once the identification process is over, the

⁴⁸⁴ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 13(3).

⁴⁸⁵ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴⁸⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁸⁷ Italy, *Law of War Decree as amended* (1938), Article 94.

⁴⁸⁸ Norway, *Military Penal Code as amended* (1902), § 108.

⁴⁸⁹ Argentina, Court of Appeal, *Military Juntas case*, Judgement, 9 December 1985.

⁴⁹⁰ Colombia, Council of State, *Case No. 10941*, Judgement, 6 September 1995, pp. 37–42.

⁴⁹¹ Report on the Practice of Israel, 1997, Chapter 5.1, referring to High Court, *Abu-Rijwa case*, Judgement, 15 November 2000.

burial shall begin" and that "identifying... the bodies is a highly important humanitarian need".⁴⁹²

Other National Practice

567. According to the Report on the Practice of Malaysia, the "bodies of enemies and civilians are identified, sent to a morgue and subsequently buried".⁴⁹³

568. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support... the principle that each party to a conflict permit teams to identify... the dead".⁴⁹⁴

III. Practice of International Organisations and Conferences

United Nations

569. In Resolution 3320 (XXIX), adopted in 1974, the UN General Assembly:

2. Calls upon parties to armed conflicts, regardless of their character or location, during and after the end of hostilities and in accordance with the Geneva Conventions of 1949, to take such action as may be within their power to help locate and mark the graves of the dead [and] to facilitate the disinternment and the return of the remains, if requested by the families...

...

4. Calls upon all parties to armed conflicts to cooperate, in accordance with the Geneva Conventions of 1949, with Protecting Powers or their substitutes and with the International Committee of the Red Cross in providing information on the... dead in armed conflicts, including persons belonging to other countries not parties to the armed conflict.⁴⁹⁵

570. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights recommended that the Croatian authorities identify all those killed.⁴⁹⁶

571. In 1991, in a report on El Salvador, the Director of the Human Rights Division of ONUSAL recommended that:

The immediate disposal of bodies should be avoided in cases of violent death or death in questionable circumstances and an adequate autopsy should be conducted in accordance with the conditions recommended in the Principles [on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions].⁴⁹⁷

⁴⁹² Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, §§ 8 and 9.

⁴⁹³ Report on the Practice of Malaysia, 1997, Chapter 5.1.

⁴⁹⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

⁴⁹⁵ UN General Assembly, Res. 3220 (XXIX), 6 November 1974, §§ 2 and 4.

⁴⁹⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1996/6, 5 July 1995, § 59.

⁴⁹⁷ ONUSAL, Director of the Human Rights Division, Report, UN Doc. A/46/658-S/23222, 15 November 1991, Annex, § 151.

572. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated, with respect to its investigation into mass graves, that “for every deceased person who falls into the hands of the adverse party, the adverse party must record, prepare, and forward all identification information, death certificates . . . to the appropriate parties. Parties to a conflict must also ensure that deceased persons are autopsied.”⁴⁹⁸

573. In its report in 1993, the UN Commission on the Truth for El Salvador noted that, following a reported clash between FMLN troops and a military patrol, a member of the Salvadoran Armed Service Press Committee (COPREFA) photographed the bodies of the dead, and members of the National Police performed paraffin tests to see whether the persons had fired weapons.⁴⁹⁹

Other International Organisations

574. In 1999, the Committee of Ministers of the Council of Europe adopted a recommendation on the harmonisation of medico-legal autopsy rules, without making any exception for situations of armed conflict. In particular, it stated that autopsies should be carried out “in all cases of obvious or suspected unnatural death, in particular arising out of violations of human rights such as suspicion of torture or any other form of ill-treatment and deaths in custody or death associated with police or military activities”.⁵⁰⁰

575. In a resolution adopted in 1997, the Council of the League of Arab States decided “to call for the implementation of the investigations provided for by the international conventions to be applied to the death of Lebanese detainees in Israeli detention camps and prisons”.⁵⁰¹

576. In February 1995, in a statement before the Permanent Council of the OSCE on the situation in Chechnya, the EU stated that the proposal to establish a “humanitarian truce” appeared essential in order to permit the identification of the victims.⁵⁰²

International Conferences

577. The 24th International Conference of the Red Cross in 1981 adopted a resolution on the wearing of identity discs in which it recalled that Articles 16 and 17 GC I “provide for identity discs to be worn by members of the armed forces to facilitate their identification in case they are killed”. The Conference further stated that it:

⁴⁹⁸ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

⁴⁹⁹ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 90.

⁵⁰⁰ Council of Europe, Committee of Ministers, Rec. (99)3, Harmonisation of medico-legal autopsy rules, 2 February 1999, §§ 2(c) and (i).

⁵⁰¹ League of Arab States, Council, Res. 5635, 31 March 1997, § 5.

⁵⁰² EU, Statement by France on behalf of the EU before the Permanent Council of the OSCE, Vienna, 2 February 1995, *Politique étrangère de la France*, February 1995, p. 155.

1. *urges* the Parties to an armed conflict to take all necessary steps to provide the members of their armed forces with identity discs and to ensure that the discs are worn during service,
2. *recommends* that the Parties to an armed conflict should see that these discs give all the indications required for a precise identification of members of the armed forces such as full name, date and place of birth, religion, serial number and blood group; that every disc be double and composed of two separable parts, each bearing the same indications; and that the inscriptions be engraved on a substance as resistant as possible to the destructive action of chemical and physical agents, especially to fire and heat.⁵⁰³

578. The 25th International Conference of the Red Cross in 1986 urged the parties to every international armed conflict “to implement the provisions of Articles 16 and 17 of the First Geneva Convention, prescribing the wearing of identity discs by members of the armed forces, in order to facilitate the identification of the . . . dead”.⁵⁰⁴

579. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “every effort is made . . . to identify dead persons”.⁵⁰⁵

IV. Practice of International Judicial and Quasi-judicial Bodies

580. In its judgement in *Kaya v. Turkey* in 1998, the ECtHR found that an autopsy on a man shot by Turkish security forces, who reportedly believed him to be a terrorist, was inadequate on the basis that the number of bullets in the body was not recorded, no tests for fingerprints or gunpowder traces were made and no attempt was made to identify the body. While acknowledging the difficult security conditions under which the examination was carried out, the ECtHR expressed surprise that the body had not been evacuated to a safer location for further examination.⁵⁰⁶

581. In its judgement in *Ergi v. Turkey* in 1998, the ECtHR recalled the obligation pointed out in its previous judgements that “neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation . . . to ensure that an effective, independent investigation is conducted into the deaths arising out of clashes involving the security forces, more so in cases . . . where the circumstances are in many respects unclear”.⁵⁰⁷

⁵⁰³ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. I, §§ 1 and 2.

⁵⁰⁴ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XIII, § 1.

⁵⁰⁵ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(e).

⁵⁰⁶ ECtHR, *Kaya v. Turkey*, Judgement, 19 February 1998, § 89.

⁵⁰⁷ ECtHR, *Ergi v. Turkey*, Judgement, 28 July 1998, § 85.

582. In its judgement in *Yasa v. Turkey* in 1998, the ECtHR recalled the obligation pointed out in its judgement in *Kaya v. Turkey* “to carry out an investigation” into the circumstances surrounding the death of individuals killed as a result of the use of force by the State authorities, even when arising in a climate marked by violent action.⁵⁰⁸

583. In 1997, in a case concerning Argentina, in the context of a clash which the IACiHR qualified as being of sufficient intensity to trigger the application of IHL, the IACiHR found that the autopsies were, according to expert evidence, superficial and did not make any serious attempt to examine the injuries, invoking instead the degree of putrefaction of the corpses as a bar to further examination. The Commission recognised that in certain situations of conflict, the collection of evidence may be difficult, but that this justification may not be used where, immediately following the incident, the State had absolute control over the evidence.⁵⁰⁹

584. In its judgement in the *Neira Alegría and Others case* in 1995, involving the disappearance of three prisoners following a riot in which control and jurisdiction of the prison was handed over to the army, the IACtHR stated that:

The Court likewise considers it proven that the identification of the bodies was not undertaken with the required diligence, since only a few of those bodies recovered during the days immediately following the end of the conflict were identified. Of the rest, which were recovered over a span of nine months, certainly a long period, this was not done either although, according to the statement of the experts, identification could have been possible by applying certain techniques. This conduct on the part of the Government constitutes a serious act of negligence.⁵¹⁰

V. Practice of the International Red Cross and Red Crescent Movement

585. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the dead shall be identified”.⁵¹¹

586. In 1995, the ICRC asked the military leaders of a separatist entity to establish death certificates of deceased captured combatants.⁵¹²

VI. Other Practice

587. No practice was found.

⁵⁰⁸ ECtHR, *Yasa v. Turkey*, Judgement, 2 September 1998, § 104.

⁵⁰⁹ IACiHR, *Case 11.137 (Argentina)*, Report, 18 November 1997, §§ 238–242 and 423.

⁵¹⁰ IACtHR, *Neira Alegría and Others case*, Judgement, 19 January 1995, § 71.

⁵¹¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 511 and 734.

⁵¹² ICRC archive document.

Recording of the location of graves

I. Treaties and Other Instruments

Treaties

588. Article 4, sixth and seventh paragraphs, of the 1929 GC provides that:

At the commencement of hostilities, [the belligerents] shall organize officially a graves registration service, to render eventual exhumations possible, and to ensure the identification of bodies whatever may be the subsequent site of the grave. After the cessation of hostilities they shall exchange the list of graves and of dead interred in their cemeteries and elsewhere.

589. Article 17, fourth paragraph, GC I, Article 120, sixth paragraph, GC III and Article 130, third paragraph, GC IV provide that lists showing the exact location and markings of the graves together with the particulars of the dead interred therein shall be made by the Graves Registration Service in order to allow subsequent exhumations, to ensure the identification of the bodies and the possible transportation to the home country. These lists are also meant to be forwarded to the Power on whom the deceased depended.

590. Article 8(b) of the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam contains provisions requiring the parties to determine the location of the graves of the dead so as to facilitate the exhumation and repatriation of the remains.

Other Instruments

591. No practice was found.

II. National Practice

Military Manuals

592. Argentina's Law of War Manual provides that "when circumstances so permit and at latest at the end of the hostilities [the obituary] services shall communicate to each other, through the Information Office . . . the lists indicating the location and designation of the graves".⁵¹³

593. Australia's Defence Force Manual provides that "as soon as is practical following the death of a combatant, a belligerent shall record the following information to aid identification . . . [including] the exact location of the remains to enable future exhumation of the body or remains if necessary".⁵¹⁴

594. Canada's LOAC Manual provides that "API also imposes obligations . . . to report upon the disposal of the remains of the dead".⁵¹⁵

⁵¹³ Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 6.05.

⁵¹⁴ Australia, *Defence Force Manual* (1994), § 9-101.

⁵¹⁵ Canada, *LOAC Manual* (1999), p. 9-5, § 51.

595. Kenya's LOAC Manual provides that "as soon as the tactical situation permits, a report on the death and the subsequent measures taken shall be established".⁵¹⁶

596. The Military Manual of the Netherlands provides that "as soon as circumstances and the relation between the parties to the conflict permit, the parties, in whose territories graves of the persons who have died as a result of hostilities are located, shall conclude agreements in order . . . to facilitate access to the gravesites".⁵¹⁷

597. Spain's LOAC Manual stipulates that "the Graves Registration Service shall be responsible for recording all particulars concerning the deceased and their graves, as well as for the conservation of ashes".⁵¹⁸

598. The UK Military Manual provides that "as soon as possible, and at latest at the end of the hostilities, these services must exchange lists showing the location and marking of the graves and giving particulars of the dead interred therein".⁵¹⁹

599. The US Field Manual reproduces Article 17 GC I.⁵²⁰

600. The US Operational Law Handbook provides that "the Parties must . . . register grave sites, and, as soon as circumstances permit, relay to the affected Party, the exact location of burial and details of death".⁵²¹

National Legislation

601. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that: . . . all the information regarding the burial and graves should be registered by the funeral parlour.⁵²²

602. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵²³

603. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 120 GC III and 130 GC IV, is a punishable offence.⁵²⁴

604. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the

⁵¹⁶ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 12.

⁵¹⁷ Netherlands, *Military Manual* (1993), p. VI-3.

⁵¹⁸ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).

⁵¹⁹ UK, *Military Manual* (1958), § 383. ⁵²⁰ US, *Field Manual* (1956), § 218.

⁵²¹ US, *Operational Law Handbook* (1993), p. Q-185.

⁵²² Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 29(3).

⁵²³ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁵²⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".⁵²⁵

National Case-law

605. In 1995, the Colombian Council of State stated that the bodies of enemy dead must be placed at the disposal of the competent authority and may not be concealed. Commanders are bound to report the death of detainees and their place of burial.⁵²⁶

Other National Practice

606. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

607. In a resolution adopted in 1974, the UN General Assembly called upon parties to armed conflicts, "regardless of their character or location, during and after the end of hostilities and in accordance with the Geneva Conventions of 1949, to take such action as may be within their power to help locate . . . the graves of the dead".⁵²⁷

Other International Organisations

608. No practice was found.

International Conferences

609. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the tracing of burial places of persons killed during armed conflict in which it recommended "the exchange among National Societies in agreement with their respective Governments and in co-operation with the International Committee of the Red Cross, of all available data concerning these places of burial" and "the tracing, by any appropriate means, of places of burial which have not so far been registered".⁵²⁸

610. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it called on parties to armed conflicts "during hostilities and after cessation of hostilities, to help . . . care for the graves of the dead".⁵²⁹

⁵²⁵ Norway, *Military Penal Code as amended* (1902), § 108(a).

⁵²⁶ Colombia, Council of State, *Case No. 11369*, Judgement, 6 February 1997, pp. 20–25.

⁵²⁷ UN General Assembly, Res. 3220 (XXIX), 6 November 1974, §§ 2 and 4.

⁵²⁸ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXIII, §§ 1 and 2.

⁵²⁹ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.

IV. Practice of International Judicial and Quasi-judicial Bodies

611. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

612. No practice was found.

VI. Other Practice

613. No practice was found.

Marking of graves and access to gravesites

I. Treaties and Other Instruments

Treaties

614. Article 4, fifth paragraph, of the 1929 GC, Article 76, third paragraph, of the 1929 Geneva POW Convention, Article 17, third paragraph, GC I, Article 120, fourth paragraph, GC III and Article 130, first paragraph, GC IV provide that graves must be marked so that they can easily be found.

615. Article 34 AP I provides that:

1. The remains of persons who have died for reasons related to occupation or in detention resulting from occupation or hostilities and those of persons not nationals of the country in which they have died as a result of hostilities shall be respected, and the gravesites of all such persons shall be . . . marked as provided for in Article 130 of the Fourth Convention, where their remains or gravesites would not receive more favourable consideration under the Conventions and this Protocol.
2. As soon as circumstances and the relations between the adverse Parties permit, the High Contracting Parties in whose territories graves and, as the case may be, other locations of the remains of persons who have died as a result of hostilities or during occupation or in detention are situated, shall conclude agreements in order:
 - (a) to facilitate access to the gravesites by relatives of the deceased and by representatives of official graves registration services and to regulate the practical arrangements for such access.

Article 34 AP I was adopted by consensus.⁵³⁰

616. The 1999 NATO STANAG 2070 provides that:

7. Graves are normally located as near as convenient to the scene of death. Sites should be selected as much as possible with reference to ease of subsequent relocation and identification. Graves should not be dispersed. Easy recovery is essential and protection from water is desirable.

...

⁵³⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

11. An appropriate (religious) marker high enough to be seen readily is to be erected...
12. In the case of trench or group burials a marker and list in a suitable container endorsed accordingly is to be placed at each end of the grave.

Other Instruments

617. No practice was found.

II. National Practice

Military Manuals

618. Argentina's Law of War Manual provides that graves shall be "marked so that they can always be found".⁵³¹
619. Australia's Defence Force Manual provides that the graves of the deceased "are to be correctly marked to allow future exhumation".⁵³²
620. Benin's Military Manual provides that "the graves shall be marked so that they can be easily found".⁵³³
621. Cameroon's Instructors' Manual states that "the graves shall be marked so that they can be easily found".⁵³⁴
622. Canada's LOAC Manual provides that the grave sites of the dead shall be marked.⁵³⁵
623. Croatia's LOAC Compendium provides that one of the requirements after a conflict is to "mark... gravesites".⁵³⁶
624. Kenya's LOAC Manual provides that "the graves shall be marked so that they can be easily found (e.g. improvised wooden cross or similar)".⁵³⁷
625. The Military Manual of the Netherlands provides that "graves must be properly... marked".⁵³⁸ It also provides that:

As soon as circumstances and the relations between the parties to the conflict permit, the parties, in whose territories graves of the persons who have died as a result of hostilities are located, shall conclude agreements in order: to facilitate access to the gravesites by relatives of the deceased and by representatives of official Graves Registration Services.⁵³⁹

626. New Zealand's Military Manual provides that grave sites shall be properly marked.⁵⁴⁰

⁵³¹ Argentina, *Law of War Manual* (1969), § 3.005.

⁵³² Australia, *Defence Force Manual* (1994), § 999.

⁵³³ Benin, *Military Manual* (1995), Fascicule II, p. 12.

⁵³⁴ Cameroon, *Instructors' Manual* (1992), p. 44, § 163(2).

⁵³⁵ Canada, *LOAC Manual* (1999), p. 9-6, § 54.

⁵³⁶ Croatia, *LOAC Compendium* (1991), p. 21.

⁵³⁷ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 12.

⁵³⁸ Netherlands, *Military Manual* (1993), pp. VI-2 and VI-3.

⁵³⁹ Netherlands, *Military Manual* (1993), p. VI-3.

⁵⁴⁰ New Zealand, *Military Manual* (1992), § 1012(1).

- 627.** Spain's LOAC Manual provides that "graves shall be marked so that they can always be found".⁵⁴¹
- 628.** Switzerland's Basic Military Manual provides that graves shall be "respected and marked with a distinctive sign" and "properly maintained and marked".⁵⁴²
- 629.** Togo's Military Manual provides that "the graves shall be marked so that they can be easily found".⁵⁴³
- 630.** The UK Military Manual provides that graves "must be marked so that they may always be found".⁵⁴⁴
- 631.** The US Field Manual provides that the graves of the dead are "marked so that they may always be found".⁵⁴⁵
- 632.** The Annotated Supplement to the US Naval Handbook requires that "as soon as circumstances permit, arrangement be made to facilitate access to grave sites by relatives".⁵⁴⁶

National Legislation

- 633.** Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the places of burial of [the dead]... are signed with the purpose to find them any time".⁵⁴⁷
- 634.** Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵⁴⁸
- 635.** Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 17 GC I, 120 GC III and 130 GC IV, and of AP I, including violations of Article 34 AP I, are punishable offences.⁵⁴⁹
- 636.** Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".⁵⁵⁰

National Case-law

- 637.** No practice was found.

⁵⁴¹ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).

⁵⁴² Switzerland, *Basic Military Manual* (1987), Article 71(2) and Article 76, commentary.

⁵⁴³ Togo, *Military Manual* (1996), Fascicule II, p. 12.

⁵⁴⁴ UK, *Military Manual* (1958), § 383. ⁵⁴⁵ US, *Field Manual* (1956), § 218.

⁵⁴⁶ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.

⁵⁴⁷ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 13(3).

⁵⁴⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁵⁴⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁵⁰ Norway, *Military Penal Code as amended* (1902), § 108.

Other National Practice

638. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support...the principle that...the remains of the dead be...marked...[and] as soon as circumstances permit, arrangements be made to facilitate access to grave sites by relatives”.⁵⁵¹

*III. Practice of International Organisations and Conferences**United Nations*

639. In a resolution adopted in 1974, the UN General Assembly called upon parties to armed conflicts, “regardless of their character or location, during and after the end of hostilities and in accordance with the Geneva Conventions of 1949, to take such action as may be within their power to help...mark the graves of the dead”.⁵⁵²

640. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated, with respect to its investigation into mass graves, that the “graves [of victims should]...be marked so that they can be easily found”.⁵⁵³

Other International Organisations

641. No practice was found.

International Conferences

642. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

643. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

644. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “graves shall be...marked so that they can be easily found”.⁵⁵⁴

⁵⁵¹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

⁵⁵² UN General Assembly, Res. 3220 (XXIX), 6 November 1974, § 2.

⁵⁵³ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

⁵⁵⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 736.

VI. Other Practice

645. No practice was found.

Identification of the dead after disposal*I. Treaties and Other Instruments**Treaties*

646. Article 4, sixth paragraph, of the 1929 GC provides that “at the commencement of hostilities, [the belligerents] shall organize officially a graves registration service, to render eventual exhumations possible, and to ensure the identification of bodies whatever may be the subsequent site of the grave.

647. Article 17, third paragraph, GC I provides that parties to the conflict “shall organize at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumation and to ensure the identification of bodies, whatever the site of the graves”.

648. According to Article 34(4) AP I, exhumation is allowed only where it is “a matter of overriding public necessity, including cases of investigative necessity”. Article 34 AP I was adopted by consensus.⁵⁵⁵

Other Instruments

649. Proposal 1.2 of the 1991 Plan of Operation for the Joint Commission to Trace Missing Persons and Mortal Remains in the context of the former Yugoslavia provides that, “at the request of the party on which the deceased depend, the parties to the conflict shall . . . allow the identification of the [mortal remains of the] deceased by the adverse party”. Proposal 1.3 provides that “by mutual agreement, the parties may decide on the participation of foreign medical experts in identifying the deceased”.

*II. National Practice**Military Manuals*

650. Argentina’s Law of War Manual provides that “an official Graves Registration Service must be established from the commencement of hostilities in order to allow possible exhumations, to ensure the identity of the bodies”.⁵⁵⁶

651. Australia’s Defence Force Manual states that the graves “are to be correctly marked to allow future exhumation”.⁵⁵⁷

652. The UK Military Manual provides that “Graves Registration Services must be officially established at the outbreak of hostilities, to allow of

⁵⁵⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71, § 36.

⁵⁵⁶ Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 6.05.

⁵⁵⁷ Australia, *Defence Force Manual* (1994), § 999.

exhumations and to ensure the identification of the bodies and their possible transportation to the home country".⁵⁵⁸

653. The US Field Manual provides that the belligerents "shall organize at the commencement of hostilities an Official Graves Registration Service, to allow subsequent exhumations and to ensure the identification of bodies, whatever the site of the graves, and the possible transportation to the home country".⁵⁵⁹

National Legislation

654. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵⁶⁰

655. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 17 GCI, and of API, including violations of Article 34(4) API, are punishable offences.⁵⁶¹

656. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".⁵⁶²

National Case-law

657. According the Report on the Practice of Israel, in the *Abu-Rijwa case*, the IDF carried out DNA identification tests on the remains of two "terrorists" buried in Israel at the request of a Jordanian family who petitioned the Israeli High Court in 1992 for the purpose of repatriating the remains of their son.⁵⁶³

Other National Practice

658. The Report on the Practice of Bosnia and Herzegovina states that:

During the aggression on Bosnia and Herzegovina, a large number of persons were registered as missing and the tracing process is still ongoing. It is assumed that the majority of the missing persons were killed by the aggressor and thrown into mass graves in different locations... The State Commission for the Exchange of Prisoners of War has undertaken huge efforts to locate mass graves, to exhume and identify bodies of innocent victims. Allegations of mass graves are received from eyewitnesses of the committed massacres.⁵⁶⁴

⁵⁵⁸ UK, *Military Manual* (1958), § 383.

⁵⁵⁹ US, *Field Manual* (1956), § 218.

⁵⁶⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁵⁶¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁶² Norway, *Military Penal Code as amended* (1902), § 108.

⁵⁶³ Report on the Practice of Israel, 1997, Chapter 5.1, referring to High Court, *Abu-Rijwa case*, Judgement, 15 November 2000.

⁵⁶⁴ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 5.2.

*III. Practice of International Organisations and Conferences**United Nations*

659. In a resolution adopted in 1996 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights welcomed the establishment of the Expert Group on Exhumation and Missing Persons chaired by the Office of the High Representative.⁵⁶⁵

660. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights recommended that the Croatian authorities identify all those killed, including by exhumation, which, whenever necessary, should be carried out under the supervision of international experts.⁵⁶⁶

661. In 1996, the Office of the UN High Commissioner for Human Rights, in a briefing on the investigation of violations of international law, noted that a project was arranged by the Special Rapporteur on the Situation of Human Rights in the former Yugoslavia, in coordination with the Expert on Missing Persons, the Office of the High Commissioner for Human Rights and the governments of Finland and the Netherlands, to recover and identify remains of the dead in a particular area, with the humanitarian aim of identifying persons for the sake of their relatives. The Expert emphasised the problem of mass graves and called upon the parties and the international community to intensify efforts to clarify the fate of missing persons using every possible means, including exhumation of mortal remains where necessary.⁵⁶⁷

662. In 1997, the Expert for the Special Process on Missing Persons in the Territory of the Former Yugoslavia drew the attention of the UN Commission on Human Rights to the fact that "governments were apparently growing less hostile to the use of forensic methods to elucidate the fate of disappeared persons".⁵⁶⁸ The UN Observer for Croatia further commented that "the exhumation of [certain] mass graves . . . which had resulted in the exhumation and identification of the remains of some 200 disappeared persons [was] a step in the right direction".⁵⁶⁹

663. In 1996, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina reported that national authorities and international mechanisms and organisations dealing with the issue of mass

⁵⁶⁵ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, preamble.

⁵⁶⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1996/6, 5 July 1995, § 59.

⁵⁶⁷ Office of the UN High Commissioner for Human Rights, Briefing on Progress Reached in Investigation of Violations of International Law in the Areas of Srebrenica, Žepa, Banja Luka and Sanski Most pursuant to Security Council Resolution 1034 (1995), 22 August 1996, §§ 9–12.

⁵⁶⁸ Expert for the Special Process on Missing Persons in the Territory of the Former Yugoslavia, Statement before the UN Commission on Human Rights, 26 March 1997, UN Doc. E/CN.4/1997/SR.25, 13 May 1997, § 9.

⁵⁶⁹ UN Observer for Croatia, Statement before the UN Commission on Human Rights, 26 March 1997, UN Doc. E/CN.4/1997/SR.25, 13 May 1997, § 17.

graves had undertaken considerable efforts towards establishing the fate of the dead bodies found in mass grave sites.⁵⁷⁰

Other International Organisations

664. No practice was found.

International Conferences

665. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the tracing of burial places of persons killed during armed conflict in which it recommended "recourse, in the event of exhumation, to all possible identification procedures with the help of specialist services".⁵⁷¹

IV. Practice of International Judicial and Quasi-judicial Bodies

666. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

667. No practice was found.

VI. Other Practice

668. No practice was found.

Information concerning the dead

I. Treaties and Other Instruments

Treaties

669. Article 4, second paragraph, of the 1929 GC provides that belligerents "shall establish and transmit to each other the certificates of death".

670. Article 16 GC I provides for the communication, exchange and mutual forwarding of certificates of death, cause of death, identity discs, lists showing the exact location and markings of the graves and other important documents through the Information Bureau described in Article 122 GC III. In this respect, Article 17 GC I provides for the establishment of an Official Graves Registration Service. Articles 19 GC II, 120 GC III and 130 GC IV contain similar provisions.

671. Article 33 AP I provides that:

2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:

⁵⁷⁰ High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/542, 10 July 1996, Annex, § 41.

⁵⁷¹ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXIII, § 3.

- (a) record the information specified in Article 138 of the Fourth Convention in respect of . . . persons who have . . . died during any period of detention;
- (b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

Article 33 AP I was adopted by consensus.⁵⁷²

672. Paragraph 9 of the 1974 NATO STANAG 2132 describes the “procedure for reporting on allied patients to parent nations”. Paragraph 10 states that “in the case of death of a member of NATO forces if examined by a medical officer, the medical officer should determine the cause of death and report . . . to the deceased’s parent nation”.

Other Instruments

673. In proposal 1.1 of the 1991 Plan of Operation for the Joint Commission to Trace Missing Persons and Mortal Remains, the parties to the conflict in the former Yugoslavia agreed that they “shall provide to the adverse party/parties, through the intermediary of the ICRC and National Information Bureaux and, as rapidly as possible, all available information regarding: the identification of deceased persons [and] the gravesites of deceased persons belonging to the adverse parties”.

II. National Practice

Military Manuals

674. Argentina’s Law of War Manual provides that “one half of a double identity disc or the whole disc if it is a single disc, shall remain on the body”.⁵⁷³ It also states that “when circumstances so permit and at latest at the end of the hostilities, [the obituary] services shall communicate to each other, through the Information Office . . . the lists indicating . . . the details relative to the dead”.⁵⁷⁴

675. Australia’s Defence Force Manual states that “each of the protagonists shall record the following information for each person detained, imprisoned or otherwise held in captivity for a period of two weeks, or who has died”.⁵⁷⁵ The manual further states that “bodies shall be buried with one half of a double identity disc placed in the mouth of the deceased. The other half is to be kept for records by Graves Registration”.⁵⁷⁶

⁵⁷² CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

⁵⁷³ Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), §§ 6.03 and 6.04.

⁵⁷⁴ Argentina, *Law of War Manual* (1969), § 3.005; see also *Law of War Manual* (1989), § 6.05.

⁵⁷⁵ Australia, *Defence Force Manual* (1994), § 997.

⁵⁷⁶ Australia, *Defence Force Manual* (1994), § 999.

676. Belgium's Law of War Manual provides that "the belligerents are obliged to exchange the information collected about the dead of the adverse party under their power".⁵⁷⁷

677. Benin's Military Manual states that "one half of a double identity disc should remain on the body; the other half should be evacuated".⁵⁷⁸

678. Canada's LOAC Manual provides that "the Geneva Conventions impose certain obligations on Detaining Powers with regard to burial and reporting of dead personnel belonging to the adverse party".⁵⁷⁹ It further states that "one half of a double disc, or the identity disc itself if it is a single disc, should remain on the body".⁵⁸⁰

679. Canada's Code of Conduct provides that "one half of the double identity disc, or the identity disc itself if it is a single disc, should remain with the body".⁵⁸¹

680. Croatia's LOAC Compendium provides that, with respect to the dead on land with a single identity disc, the disc shall remain on the body or with the urn containing the ashes. The single identity disc of dead at sea shall be evacuated. With respect to the dead bearing a double identity disc (on land and at sea), one half shall remain on the body or with the urn containing the ashes and the other half evacuated.⁵⁸²

681. France's LOAC Manual reproduces Article 17 GC I.⁵⁸³ The manual also provides for the creation of a national information bureau, which would be in liaison with the Central Information Agency.⁵⁸⁴

682. Hungary's Military Manual provides that with respect to the dead on land with a single identity disc, the disc shall remain on the body or with the urn containing the ashes. The single identity disc of dead at sea shall be evacuated. With respect to the dead bearing a double identity disc (on land and at sea), one half shall remain on the body or with the urn containing the ashes and the other half evacuated.⁵⁸⁵

683. According to Israel's Manual on the Laws of War, "it is incumbent on each party to keep a record of a fallen soldier's personal details and particulars of death, and hand over to the other side half of the dog-tag worn by the fallen soldier . . . as well as a death certificate".⁵⁸⁶

684. Kenya's LOAC Manual states that:

Identity cards shall be evacuated. With respect to the dead bearing a double identity disc, one half shall remain on the body (or with the urn containing the ashes) and

⁵⁷⁷ Belgium, *Law of War Manual* (1983), p. 49.

⁵⁷⁸ Benin, *Military Manual* (1995), Fascicule II, p. 12.

⁵⁷⁹ Canada, *LOAC Manual* (1999), p. 9-5, § 51.

⁵⁸⁰ Canada, *LOAC Manual* (1999), p. 9-6, § 57.

⁵⁸¹ Canada, *Code of Conduct* (2001), Rule 7, § 5.

⁵⁸² Croatia, *LOAC Compendium* (1991), p. 47.

⁵⁸³ France, *LOAC Manual* (2001), p. 121.

⁵⁸⁴ France, *LOAC Manual* (2001), p. 34.

⁵⁸⁵ Hungary, *Military Manual* (1992), p. 77.

⁵⁸⁶ Israel, *Manual on the Laws of War* (1998), p. 61.

the other half evacuated. With respect to the dead with a single identity disc, the whole disc shall remain on the body (or with the urn containing the ashes) . . . As soon as the tactical situation permits, a report on the death and the subsequent measures taken shall be established.⁵⁸⁷

685. Madagascar's Military Manual provides that "information concerning the identification of the . . . dead must be recorded".⁵⁸⁸

686. Nigeria's Manual on the Laws of War provides that "the belligerents have to register as soon as possible all the particulars that can help to identify an enemy soldier who is . . . dead. These registration records together with identification tags, documents . . . must be forwarded to the enemy."⁵⁸⁹

687. The Military Instructions of the Philippines provides that, upon evacuation of the deceased to the nearest morgue, "the next of kin if at all possible" should be informed.⁵⁹⁰

688. Senegal's IHL Manual provides that, in situations of internal troubles, "the dead shall be identified. This information shall be sent to civil authorities. Red Cross or Red Crescent organisations are entitled to collect such information."⁵⁹¹

689. Switzerland's Basic Military Manual provides that "half of the double identity disc, or the whole disc if single, shall remain on the body".⁵⁹² It further states that "all elements helping to identify the . . . dead enemy . . . shall be recorded and communicated without delay to the Official Information Office".⁵⁹³ The information to be collected includes, for instance, the date and place of death, indications concerning the death and all other information on the identity card or the half of a double identity disc.⁵⁹⁴

690. Togo's Military Manual states that "one half of a double identity disc should remain on the body; the other half should be evacuated".⁵⁹⁵

691. The UK Military Manual provides that:

Belligerents must record as soon as possible any particulars which may assist in the identification of dead persons belonging to the opposing belligerent who fall into their hands. This information must be forwarded to the information bureau described in the P.O.W. Convention, Article 122. The belligerents must also forward to each other through that bureau certificates of death or duly authenticated lists of the dead; one half of the identity discs found on the bodies (the other half to be left on the body) . . .⁵⁹⁶

⁵⁸⁷ Kenya, *LOAC Manual* (1997), Précis No. 3, pp. 11 and 12.

⁵⁸⁸ Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 23.

⁵⁸⁹ Nigeria, *Manual on the Laws of War* (undated), § 35.

⁵⁹⁰ Philippines, *Military Instructions* (1989), p. 27, § 4.

⁵⁹¹ Senegal, *IHL Manual* (1999), p. 18, § 6.

⁵⁹² Switzerland, *Basic Military Manual* (1987), Article 76, commentary.

⁵⁹³ Switzerland, *Basic Military Manual* (1987), Article 77.

⁵⁹⁴ Switzerland, *Basic Military Manual* (1987), Article 77, commentary.

⁵⁹⁵ Togo, *Military Manual* (1996), Fascicule II, p. 12.

⁵⁹⁶ UK, *Military Manual* (1958), § 382; see also *LOAC Manual* (1981), Section 6, p. 22, § 4.

692. The US Field Manual provides that:

As soon as possible the . . . information [recorded by the parties to the conflict on the dead person of the adverse party] shall be forwarded to the Information Bureau described in Article 122 GC I, which shall transmit this information to the Power on which these persons depend . . . Parties to the conflict shall prepare and forward to each other through the same bureau, certificates of death or duly authenticated lists of the dead.⁵⁹⁷

National Legislation

693. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that:

- ...
- 3) . . . all the information regarding the burial and graves should be registered by the funeral parlour;
 - 4) the list of the graves and all information concerning the prisoners of war buried in the cemeteries and other places should be given to the party the prisoners of war belong to.⁵⁹⁸

694. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵⁹⁹

695. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 16 and 17 GC I, 19 GC II, 120 GC III and 130 GC IV, and of AP I, including violations of Article 33(2) AP I, are punishable offences.⁶⁰⁰

696. Italy's Law of War Decree as amended provides that "the Government of the King, in the way it considers appropriate, will make available to the enemy State news of the death of people belonging to the latter's armed forces as well as the objects mentioned above".⁶⁰¹

697. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁶⁰²

⁵⁹⁷ US, *Field Manual* (1956), § 217; see also *Operational Law Handbook* (1993), p. Q-185.

⁵⁹⁸ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 29(3)-(4).

⁵⁹⁹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁶⁰⁰ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁰¹ Italy, *Law of War Decree as amended* (1938), Article 94.

⁶⁰² Norway, *Military Penal Code as amended* (1902), § 108.

National Case-law

698. No practice was found.

Other National Practice

699. According to the Report on the Practice of Malaysia, “unidentified bodies are briefly described (e.g. by age, sex, any distinguishing feature) and buried. Lists are made available to interested parties indicating burial sites of the unidentified dead.”⁶⁰³

700. The Report on the Practice of the Philippines notes that it is the practice in the Philippines during clashes between government troops and insurgent forces for the military to account for the number of dead insurgents and of those taken prisoner. The information collected is then passed on to the authorities with a view to transmitting the names of the missing to the rebel side. This notification is, however, frequently subject to delay.⁶⁰⁴

III. Practice of International Organisations and Conferences

United Nations

701. In a resolution adopted in 1974, the UN General Assembly stated that:

Recognizing that one of the tragic results of armed conflicts is the lack of information on persons – civilians as well as combatants – who are missing or dead in armed conflicts.

Noting with satisfaction the resolution V, adopted by the twenty-second International Conference of the Red Cross held at Teheran from 28 October to 15 November 1973, calling on parties to armed conflicts to accomplish the humanitarian task of accounting for the dead . . .

Considering that . . . the provision of information on those who are missing . . . should not be delayed . . .

Calls upon all parties to armed conflicts to cooperate, in accordance with the Geneva Conventions of 1949, with protecting Powers or their substitutes, and with the ICRC, in providing information on the missing and dead in armed conflicts, including persons belonging to other countries not parties to the armed conflict.⁶⁰⁵

702. In a resolution adopted in 1992, the UN Sub-Commission on Human Rights urged the Indonesian authorities, on humanitarian grounds to cooperate with the families of victims of the fighting in East Timor by providing information about the dead and the whereabouts of their remains.⁶⁰⁶

703. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights recommended that the Croatian authorities identify all those killed and

⁶⁰³ Report on the Practice of Malaysia, 1997, Chapter 5.1.

⁶⁰⁴ Report on the Practice of the Philippines, 1997, Chapter 5.4, referring to Human Rights Update, *Soldiers detain, torture 5 civilians*, Vol. 10(8), November–December 1996.

⁶⁰⁵ UN General Assembly, Res. 3220 (XXIX), 6 November 1974, preamble and § 4.

⁶⁰⁶ UN Sub-Commission on Human Rights, Res. 1992/20, 27 August 1992, § 7.

provide information to the families about the causes of death and the place of burial.⁶⁰⁷

704. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted, with respect to its investigation into mass graves, that “for every deceased person who falls into the hands of the adverse party, the adverse party must record, prepare, and forward all identification information, death certificates . . . to the appropriate parties”.⁶⁰⁸

Other International Organisations

705. No practice was found.

International Conferences

706. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it recognised that “one of the tragic consequences of armed conflicts is a lack of information on persons missing, killed or deceased in captivity”. The Conference further called on parties to conflicts to:

co-operate with Protecting Powers, with the ICRC and its Central Tracing Agency, and with such other appropriate bodies as may be established for this purpose, and in particular National Red Cross Societies, to accomplish the humanitarian mission of accounting for the dead and missing, including those belonging to third countries not parties to the armed conflict.⁶⁰⁹

707. The 24th International Conference of the Red Cross in 1981 adopted a resolution on the wearing of identity discs in which it recalled that Articles 16 and 17 GC I “provide for identity discs to be worn by members of the armed forces to facilitate . . . the communication of their deaths to the Power on which they depend”. The Conference further stated that it “*reminds* the Parties to an armed conflict that one half of each disc must, in case of death, be detached and sent back to the Power on which the member of the armed forces depended, the other half remaining on the body”.⁶¹⁰

708. The 25th International Conference of the Red Cross in 1986 urged the parties to every international armed conflict “to implement the provisions of Articles 16 and 17 of the First Geneva Convention, prescribing the wearing of identity discs by members of the armed forces, in order to facilitate the

⁶⁰⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1996/6, 5 July 1995, § 59.

⁶⁰⁸ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, § 503(b).

⁶⁰⁹ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.

⁶¹⁰ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. I, § 3.

forwarding of information concerning [the dead] to the Power on which they depend".⁶¹¹

IV. Practice of International Judicial and Quasi-judicial Bodies

709. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR found that the State was obliged to use the means at its disposal to inform the relatives of the location of the remains of the dead.⁶¹²

710. In its judgement in the *Godínez Cruz case* in 1989, the IACtHR stated that, where a person has been killed as a result of a disappearance, the State had an obligation to inform the relatives of the location of the remains.⁶¹³

V. Practice of the International Red Cross and Red Crescent Movement

711. No practice was found.

VI. Other Practice

712. No practice was found.

⁶¹¹ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XIII, § 1.

⁶¹² IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 181.

⁶¹³ IACtHR, *Godínez Cruz case*, Judgement, 20 January 1989, § 191.

MISSING PERSONS

Accounting for Missing Persons (practice relating to Rule 117)	§§ 1–195
Search for missing persons	§§ 1–50
Provision of information on missing persons	§§ 51–94
International cooperation to account for missing persons	§§ 95–142
Right of the families to know the fate of their relatives	§§ 143–195

Note: For practice concerning enforced disappearance, see Chapter 32, section K. For practice concerning accounting for the dead, see Chapter 35, section E. For practice concerning the recording and notification of personal details of persons deprived of their liberty, see Chapter 37, section F.

Accounting for Missing Persons
Search for missing persons
I. Treaties and Other Instruments
Treaties

1. Paragraph 5 of the 1956 Joint Declaration on Soviet-Japanese Relations states that “with regard to those Japanese whose fate is unknown, the USSR, at the request of Japan, will continue its effort to discover what has happened to them”.

2. Article 33 AP I provides that:

1. As soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by the adverse Party. Such adverse Party shall transmit all relevant information concerning such persons in order to facilitate such searches.
2. In order to facilitate the gathering of information pursuant to the preceding paragraph, each Party to the conflict shall, with respect to persons who would not receive more favourable consideration under the Conventions and this Protocol:

- a) record the information specified in Article 138 of the Fourth Convention in respect of such persons who have been detained, imprisoned or otherwise held in captivity for more than two weeks as a result of hostilities or occupation, or who have died during any period of detention;
- b) to the fullest extent possible, facilitate and, if need be, carry out the search for and the recording of information concerning such persons if they have died in other circumstances as a result of hostilities or occupation.

Article 33 AP I was adopted by consensus.¹

Other Instruments

3. In Article XIX of the 1994 Agreement on the Gaza Strip, the government of Israel and the PLO agreed that:

The Palestinian Authority shall cooperate with Israel by providing all necessary assistance in the conduct of searches by Israel within the Gaza Strip and the Jericho Area for missing Israelis ... Israel shall cooperate with the Palestinian Authority in searching for ... missing Palestinians.

4. Article 4(9) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that "every possible measure shall be taken, without delay, to search for ... missing persons".

II. National Practice

Military Manuals

5. Argentina's Law of War Manual provides that "at all times, particularly after an engagement, the parties to the conflict shall, without delay, take all possible measures to search for ... missing persons".²

6. Australia's Defence Force Manual provides that "as soon as possible each party to an armed conflict must search for those reported missing by the enemy". It adds that "in order to facilitate the search for missing combatants ... each protagonist shall record ... information for each person detained, imprisoned or otherwise held in captivity for a period of two weeks, or who has died".³

7. Canada's LOAC Manual provides that "as soon as possible, and certainly immediately upon the end of hostilities, each party to the conflict must search for those reported missing by the adverse party".⁴ The manual further states that "to facilitate the finding of missing personnel, parties to the conflict shall endeavour to reach agreements to allow teams to search for ... the dead from the battlefield areas".⁵

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

² Argentina, *Law of War Manual* (1989), § 2.05, see also § 6.01.

³ Australia, *Defence Force Manual* (1994), §§ 994, 996 and 997.

⁴ Canada, *LOAC Manual* (1999), p. 9-5, § 52. ⁵ Canada, *LOAC Manual* (1999), p. 9-5, § 53.

8. Croatia's LOAC Compendium instructs local commanders to offer their assistance to the civil authorities in the search for missing persons.⁶
9. Hungary's Military Manual provides that one of the requirements after a conflict is to "search for missing persons".⁷
10. Indonesia's Military Manual provides that "the parties to the conflict should search for missing persons, who are reported by the adverse party, soon after the hostilities cease".⁸
11. Israel's Manual on the Laws of War provides that according to the Additional Protocols, "each party must . . . search for missing persons of the enemy and try to reach arrangements for the dispatch of search teams".⁹
12. Kenya's LOAC Manual provides that "as soon as circumstances permit or, at least, at the end of active hostilities, each Party to the conflict must search for persons who have been reported missing by the adverse Party".¹⁰
13. Madagascar's Military Manual states that missing persons must be searched for.¹¹
14. The Military Manual of the Netherlands provides that "as soon as circumstances permit, and at the latest from the end of active hostilities, each Party to the conflict shall search for the persons who have been reported missing by an adverse Party".¹²
15. New Zealand's Military Manual provides that "as soon as possible, and certainly immediately upon the end of hostilities, each party to the conflict must search for those reported missing by the adverse Party".¹³
16. Spain's LOAC Manual states that the relevant provisions relating to the dead apply also to the missing. It also states that "the belligerents shall search for the persons whose disappearance has been notified by the adverse party, who shall communicate all the relevant information concerning them".¹⁴

National Legislation

17. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The appropriate authorities and governmental bodies of the Azerbaijan Republic shall begin the tracing of the persons considered to be missing by the adverse party to the conflict at the first opportunity and at the latest as soon as active military operations are over . . .

The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that:

⁶ Croatia, *LOAC Compendium* (1991), p. 50, see also p. 21.

⁷ Hungary, *Military Manual* (1992), p. 38. ⁸ Indonesia, *Military Manual* (1982), § 98.

⁹ Israel, *Manual on the Laws of War* (1998), p. 61.

¹⁰ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 14, see also Précis No. 3, p. 13.

¹¹ Madagascar, *Military Manual* (1994), Fiche No. 8-SO, § C, see also Fiche No. 1-T, § 22(3).

¹² Netherlands, *Military Manual* (1993), p. VI-3.

¹³ New Zealand, *Military Manual* (1992), § 1011(2).

¹⁴ Spain, *LOAC Manual* (1996), Vol. I, § 5.d.2.(6).

1) information is collected and registered concerning the missing person in all cases irrespective of whether they are detained, in prison or dead.¹⁵

18. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 33 AP I, are punishable offences.¹⁶

19. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".¹⁷

20. In Zimbabwe, domestic legislation on missing persons outside armed conflict empowers judicial officers to compel police officers to search for a missing person. The Report on the Practice of Zimbabwe states that this demonstrates that the authorities in Zimbabwe believe that missing persons, even in armed conflict, should be searched for.¹⁸

National Case-law

21. No practice was found.

Other National Practice

22. The Report on the Practice of Botswana states that there is a duty on all parties to armed conflicts to search for persons reported missing.¹⁹

23. The main task of the Commission for Tracing Persons Missing in War Activities in the Republic of Croatia, established by the Croatian government in 1991, was to collect and process the information about civil and other persons missing from the territory of Croatia during the war. In 1993, a new Commission, the Commission for Detained and Missing Persons, replaced the one established in 1991, yet with the same task.²⁰

24. At the CDDH, the FRG stated that the draft rule that each party to the conflict should try to obtain information on missing persons would meet a "fundamental humanitarian need, which was not yet fully and explicitly covered by existing treaty obligations".²¹

¹⁵ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 28 and 29(1).

¹⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(4).

¹⁷ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁸ Report on the Practice of Zimbabwe, 1998, Chapter 5.2, referring to *Missing Persons Act as amended* (1978), Section 4.

¹⁹ Report on the Practice of Botswana, 1998, Chapter 5.2.

²⁰ Croatia, Directive on the Establishment and Functioning of the Commission for Tracing Persons Missing in War Activities in the Republic of Croatia, 1991; Regulations establishing the Commission for Detained and Missing Persons in Croatia, *Official Gazette*, No. 46, 17 May 1993.

²¹ FRG, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.19, 13 February 1975, p. 186, § 79–80.

25. In 1995, during a debate in the UN Security Council concerning Bosnia and Herzegovina, the German representative noted that his delegation had taken the initiative in the Security Council to push for measures to be taken to establish the whereabouts of missing Bosnian men.²²
26. According to the Report on the Practice of Israel, it is the policy of the Israeli authorities to conduct ongoing searches for members of the IDF who are missing in action.²³
27. The Report on the Practice of Jordan states that Jordan recognises that it has a special duty to search for persons reported missing.²⁴
28. According to the Report on the Practice of Kuwait, it is the *opinio juris* of Kuwait that missing persons must be searched for in order to establish their fate and enable their return.²⁵
29. According to the Report on the Practice of Malaysia, search operations for missing persons are initiated upon receipt of information on the missing person and continue for seven years.²⁶
30. In 1988, in a report on Measures of Implementation of the 1949 Geneva Conventions and the 1977 Additional Protocols, the Ministry of Foreign Affairs of the Netherlands stated that “the National Information Bureau has a plan for the organization of searches” with regard to missing persons.²⁷
31. According to the Report on the Practice of Peru, during the international armed conflict between Peru and Ecuador in 1995, Peru carried out search and rescue operations to recover missing Peruvian aircraft crews.²⁸
32. According to the Report on the Practice of Russia, a great effort has been made to determine the fate of Japanese persons who were reported missing in the USSR, but only during the period of *perestroika*. The Joint Soviet-Japanese Commission and the Japanese Union of ex-Prisoners have made some progress in this field.²⁹ According to the report, there are no specific rules in Russia or in other CIS countries to regulate the search for missing persons. In practice, private organisations have assumed State functions. Representatives of the Soldiers’ Mothers Committee, for example, have gone to Chechnya with the mothers of missing soldiers to find out what happened to their sons.³⁰
33. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that . . . each party to a conflict should search

²² Germany, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, pp. 2–3.

²³ Report on the Practice of Israel, 1997, Chapter 5.2.

²⁴ Report on the Practice of Jordan, 1997, Chapter 5.2.

²⁵ Report on the Practice of Kuwait, 1997, Chapter 5.2.

²⁶ Report on the Practice of Malaysia, 1997, Chapter 5.2.

²⁷ Netherlands, Measures of Implementation of the 1949 Geneva Conventions and the 1977 Additional Protocols, annexed to Letter dated 20 December 1988 from the Minister of Foreign Affairs to the Permanent Mission of the Netherlands in Geneva for submission to the ICRC, Comments on Article 33 AP I.

²⁸ Report on the Practice of Peru, 1999, Chapter 5.2.

²⁹ Report on the Practice of Russia, 1997, General Notes.

³⁰ Report on the Practice of Russia, 1997, Chapter 5.2.

areas under its control for persons reported missing, when circumstances permit, and at the latest from the end of active hostilities".³¹

34. In 1995, during a debate in the UN Security Council concerning Bosnia and Herzegovina, the US stated, with respect to the civilians missing and unaccounted for, that "we have a responsibility to investigate, to find out what we can".³²

III. Practice of International Organisations and Conferences

United Nations

35. In 1996, in a statement by its President, the UN Security Council expressed concern that endeavours by the relevant international authorities to identify the fate of the missing by, *inter alia*, carrying out exhumations had met with limited success "largely due to obstruction by Republika Srpska". It also noted with concern that the fate of only a few hundred missing persons had so far been established.³³

36. In a resolution adopted in 1987 on the question of human rights in Cyprus, the UN Commission on Human Rights called for the tracing of missing persons without further delay.³⁴

37. In a resolution on missing persons adopted in 2002, the UN Commission on Human Rights reaffirmed that "each party to an armed conflict, as soon as circumstances permit and at the latest from the end of active hostilities, shall search for the persons who have been reported missing by an adverse party". The Commission further called upon "States which are parties to an armed conflict to take immediate steps to determine the identity and fate of persons reported missing in connection with the armed conflict". It also requested that States "pay the utmost attention to cases of children reported missing in connection with armed conflicts and to take appropriate measures to search for and identify those children".³⁵

38. In 1995, the chairman of the UN Commission on Human Rights called upon the government of Indonesia to continue its investigation into those persons missing as a result of incidents in Dili.³⁶

³¹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

³² US, Statement before the UN Security Council, UN Doc. S/PV.3564, 10 August 1995, p. 6.

³³ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/41, 10 October 1996, p. 1.

³⁴ UN Commission on Human Rights, Res. 1987/50, 11 March 1987, p. 113, § 3.

³⁵ UN Commission on Human Rights, Res. 2002/60, 25 April 2002, §§ 3–5.

³⁶ UN Commission on Human Rights, Chairman's statement on the situation of human rights in East Timor, UN Doc. E/CN.4/1995/SR.49, 1 March 1995, § 27(4).

39. In resolutions adopted in 1984 and 1985, the UN Sub-Commission on Human Rights urged that the fate of disappeared persons in the context of the conflict in Guatemala be clarified.³⁷

40. In a resolution adopted in 1987, the UN Sub-Commission on Human Rights expressed concern at the fate of the missing in Cyprus and urged the immediate tracing of these persons.³⁸

41. In 1996, the Expert for the Special Process on Missing Persons in the Territory of the Former Yugoslavia called upon the parties and the international community to intensify their efforts to clarify the fate of missing persons using every possible means, including exhumation of mortal remains where necessary.³⁹

Other International Organisations

42. In a recommendation adopted in 1983 on the situation in Cyprus, the Parliamentary Assembly of the Council of Europe asked the Committee of Ministers to instruct the Secretary-General of the Council of Europe to undertake all necessary steps to gather information on the events in Cyprus and to investigate the cases of those persons who had disappeared following the invasion by armed forces in 1974.⁴⁰

43. In a recommendation adopted in 1987 on national refugees and missing persons in Cyprus, the Parliamentary Assembly of the Council of Europe urged the Committee of Ministers to support every effort made to investigate the fate of missing persons.⁴¹

44. In a recommendation adopted in 1998 on the humanitarian situation of the Kurdish refugees and displaced persons in south-eastern Turkey and northern Iraq, the Parliamentary Assembly of the Council of Europe invited Turkey to bring to light the fate of missing persons.⁴²

International Conferences

45. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “every effort is made to clarify the fate of all persons unaccounted for”.⁴³

³⁷ UN Sub-Commission on Human Rights, Res. 1984/23, 29 August 1984; Res. 1985/28, 30 August 1985, § 2.

³⁸ UN Sub-Commission on Human Rights, Res. 1987/19, 2 September 1987, § 2.

³⁹ Expert for the Special Process on Missing Persons in the Territory of the Former Yugoslavia, Statement during a briefing on progress reached in investigation of violations of international law in the areas of Srebrenica, epa, Banja Luka and Sanski Most pursuant to UN Security Council resolution 1034 (1995), Office of the UN High Commissioner for Human Rights, 22 August 1996, §§ 12–13.

⁴⁰ Council of Europe, Parliamentary Assembly, Rec. 974, 5 November 1983, p. 81.

⁴¹ Council of Europe, Parliamentary Assembly, Rec. 1056, 5 May 1987, § 7.

⁴² Council of Europe, Parliamentary Assembly, Rec. 1377, 25 June 1998, § iv.

⁴³ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(e).

IV. Practice of International Judicial and Quasi-judicial Bodies

46. In the *Cyprus case* in 2001, the ECtHR found that, in relation to Greek-Cypriot missing persons and their relatives:

There has been a continuing violation of Article 2 [of the 1950 ECHR] on account of the failure of the authorities of the respondent State [Turkey] to conduct an effective investigation aimed at clarifying the whereabouts and fate of Greek-Cypriot missing persons who disappeared in life-threatening circumstances . . .

There has been a continuing violation of Article 5 of the Convention [of the 1950 ECHR] by virtue of the failure of the authorities of the respondent State [Turkey] to conduct an effective investigation into the whereabouts and fate of the missing Greek-Cypriot persons in respect of whom there is an arguable claim that they were in custody at the time they disappeared.⁴⁴

47. In the *Caballero Delgada and Santana case* before the IACtHR in 1995, the government of Colombia submitted evidence that it had made several unsuccessful attempts to recover the remains of two missing persons.⁴⁵

V. Practice of the International Red Cross and Red Crescent Movement

48. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “each belligerent shall search for the persons who have been reported missing by an enemy Party. Such enemy Party shall transmit all relevant information concerning these persons in order to facilitate the searches.”⁴⁶

VI. Other Practice

49. According to a 1984 report of the Fédération Internationale des Droits de l’Homme (FIDH), the Lebanese government has established a commission on missing and kidnapped persons.⁴⁷

50. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “every possible measure shall be taken, without delay, to search for . . . missing persons”.⁴⁸

⁴⁴ ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 136 and 150.

⁴⁵ IACtHR, *Caballero Delgado and Santana case*, Judgement, 8 December 1995, § 51.

⁴⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 260.

⁴⁷ Fédération Internationale des Droits de l’Homme, Liban: Le problème des disparus, *La lettre de la F.I.D.H.*, No. 42, 27 January 1984.

⁴⁸ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 13, *IRRC*, No. 282, p. 335.

Provision of information on missing persons*I. Treaties and Other Instruments**Treaties*

51. Article 14 of the 1899 HR provides that:

A bureau for information relative to prisoners of war is instituted, on the commencement of hostilities, in each of the belligerent States, and, when necessary, in the neutral countries on whose territory belligerents have been received. This bureau is intended to answer all inquiries about prisoners of war, and is furnished by the various services concerned with all the necessary information to enable it to keep an individual return for each prisoner of war. It is kept informed of internments and changes, as well as of admissions into hospital and deaths.

52. Article 14 of the 1907 HR provides that:

An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war. The office must state in this return the regimental number, name and surname, age, place of origin, rank, unit, wounds, date and place of capture, internment, wounding, and death, as well as any observations of a special character. The individual return shall be sent to the Government of the other belligerent after the conclusion of peace.

53. Article 122, first paragraph, GC III and Article 136, second paragraph, GC IV provide that “each of the Parties to the conflict shall establish an official Information Bureau responsible for transmitting information in respect of [the POWs and protected persons] who are in its power”. Article 122, third paragraph, GC III and Article 137, first paragraph, GC IV provide that each Information Bureau shall transmit this information to the Powers of whom the persons are nationals, through the Protecting Powers or the Central Information Agency.

54. Article 33(1) AP I provides that, in order to facilitate the search, each party shall transmit all relevant information concerning the persons it has reported missing. Article 33(3) provides that:

Information concerning persons reported missing pursuant to paragraph 1 and requests for such information shall be transmitted either directly or through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross (Red Crescent, Red Lion and Sun) Societies. Where the information is not transmitted through the International Committee of the Red Cross and its Central Tracing Agency, each Party to the conflict shall ensure that such information is also supplied to the Central Tracing Agency.

Article 33 AP I was adopted by consensus.⁴⁹

55. According to Article 5 of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, "the Parties shall provide information through the tracing mechanisms of the ICRC on all persons unaccounted for".

56. Under Article 6 of the 1996 Agreement on the Normalization of Relations between Croatia and the FRY, the parties undertook to speed up the process of solving the question of missing persons and agreed to immediately exchange all available information about these persons.

Other Instruments

57. In Article XIX of the 1994 Agreement on the Gaza Strip, the government of Israel and the PLO agreed that "the Palestinian Authority shall cooperate with Israel by providing . . . information about missing Israelis. Israel shall cooperate with the Palestinian Authority in . . . providing necessary information about missing Palestinians."

58. In the 1996 Protocol to the Moscow Agreement on a Cease-fire in Chechnya to Locate Missing Persons and to Free Forcibly Detained Persons, the working groups decided that:

5. The competence of the joint working group shall extend to the location of persons who have been missing since 11 December 1994 . . .
6. By 11 June 1996, the working groups shall exchange lists of forcibly detained persons.

II. National Practice

Military Manuals

59. Argentina's Law of War Manual states that "information recorded shall be communicated as soon as possible to the National Office provided for, so that it can be transmitted to the adverse party, in particular through the Central Tracing Agency of the International Committee of the Red Cross".⁵⁰

60. Australia's Defence Force Manual provides that "any request and all information which may assist in tracing or identifying [missing] persons shall be transmitted through the Protecting Power or the Central Tracing Agency of the ICRC or the national Red Cross societies".⁵¹ The manual further states that "the report of a missing person is to be notified by each belligerents' National Bureau direct, or through a Protecting Power to the Central Agency of the ICRC".⁵²

61. Canada's LOAC Manual states that "the requests and all information which may assist in tracing or identifying [missing] persons shall be transmitted

⁴⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

⁵⁰ Argentina, *Law of War Manual* (1989), § 6.02.

⁵¹ Australia, *Defence Force Manual* (1994), § 994.

⁵² Australia, *Defence Force Manual* (1994), § 996.

through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross (ICRC) or the national Red Cross societies".⁵³

62. Germany's Military Manual provides that "each of the Parties to the conflict is obliged to forward information regarding the fate of protected civilians...as well as of prisoners of war...wounded, sick, shipwrecked, and dead".⁵⁴

63. The Military Manual of the Netherlands states that:

An important task of the Netherlands Red Cross is the establishment of a National Information Bureau. The task of this bureau consists of the collection and transmission, in cooperation with the Central Tracing Agency of the ICRC, of information about prisoners of war and other protected persons.⁵⁵

64. New Zealand's Military Manual provides that "the requests and all information which may assist in tracing or identifying [missing] persons shall be transmitted through the Protecting Power or the Central Tracing Agency of the International Committee of the Red Cross or the national Red Cross societies".⁵⁶ The manual further states that:

Each national Bureau must forward without delay information concerning protected persons to the Power of which such persons are nationals or in whose territory they formerly resided... The national Bureau must also reply to all enquiries concerning protected persons unless sending such information would be detrimental to the person concerned or to his relatives. Even then the information must be given to the Central Agency.⁵⁷

65. Russia's Military Manual recalls the rule of IHL, "which set the obligation: a) in peacetime: ... to provide for a set of measures relating to the organisation of tracing, registration of and reporting of missing persons, and also of a service to implement these measures".⁵⁸

66. The US Field Manual reproduces Articles 122 GC III and 136 and 137 GC IV.⁵⁹

National Legislation

67. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

In order to further trace such persons [considered to be missing by the adverse party], information concerning them shall be given to the adverse party directly through the Protecting Power or their substitute – the ICRC ...

⁵³ Canada, *LOAC Manual* (1999), p. 9-5, § 52.

⁵⁴ Germany, *Military Manual* (1992), §§ 538 and 708.

⁵⁵ Netherlands, *Military Manual* (1993), p. II-10, § 9.

⁵⁶ New Zealand, *Military Manual* (1992), § 1011(2).

⁵⁷ New Zealand, *Military Manual* (1992), § 1134(2).

⁵⁸ Russia, *Military Manual* (1990), § 14. ⁵⁹ US, *Field Manual* (1956), §§ 203, 343 and 344.

The appropriate authorities and governmental bodies of the Azerbaijan Republic shall ensure that the necessary measures be taken that:

...

- 2) correct information concerning the missing and requests about them are given to the adverse party directly through the Protecting Power or their substitute – the International Committee of the Red Cross.⁶⁰

68. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁶¹

69. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 122 GC III and 136 and 137 GC IV, and of AP I, including violations of Article 33(1) and (3) AP I, are punishable offences.⁶²

70. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions...is liable to imprisonment".⁶³

National Case-law

71. No practice was found.

Other National Practice

72. According to the Report on the Practice of Algeria, in the late 1950s, during the Algerian war of independence, the ALN denied all responsibility for missing persons on the basis that it had systematically released all prisoners.⁶⁴

73. In 1988, in a report on the Measures of Implementation of the 1949 Geneva Conventions and the 1977 Additional Protocols, the Ministry of Foreign Affairs of the Netherlands stated that "the National Information Bureau has a plan for the...registration and communication of information" with regard to missing persons.⁶⁵

74. The Report on the Practice of the Philippines states that it is the practice of the Philippines during clashes between government troops and insurgent

⁶⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 28 and 29(2).

⁶¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁶² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶³ Norway, *Military Penal Code as amended* (1902), § 108.

⁶⁴ Report on the Practice of Algeria, 1997, Chapter 5.2, referring to Farouk Benatia, *Les actions humanitaires pendant la lutte de libération (1954–1962)*, Editions Dahlab, Algiers, 1997, pp. 119–126.

⁶⁵ Netherlands, Measures of Implementation of the 1949 Geneva Conventions and the 1977 Additional Protocols, annexed to Letter dated 20 December 1988 from the Minister of Foreign Affairs to the Permanent Mission of the Netherlands in Geneva for submission to the ICRC, 20 December 1988, Comments on Article 33 AP I.

forces for the military to account for the number of dead insurgents and of those taken prisoner. The information collected is then passed on to the authorities with a view to transmitting the names of the missing to the rebel side. This notification is, however, frequently subject to delay.⁶⁶

75. According to the Report on US Practice, it is the *opinio juris* of the US that the parties to all armed conflicts should take such action as may be within their power to provide information about missing persons.⁶⁷

III. Practice of International Organisations and Conferences

United Nations

76. In a resolution adopted in 1974, the UN General Assembly called upon parties to armed conflicts, "regardless of their character or location, during and after the end of hostilities, and in accordance with the Geneva Conventions of 1949, to take such action as may be within their power . . . to provide information about those who are missing in action".⁶⁸

77. In resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly called upon the authorities of the FRY (Serbia and Montenegro) "to provide information on the fate and whereabouts of the high number of missing persons from Kosovo".⁶⁹

78. In a resolution adopted in 1994, the UN Commission on Human Rights urged all the parties in the former Yugoslavia to disclose relevant information and documentation concerning thousands of missing persons.⁷⁰

79. In a resolution adopted in 1995 on the special process dealing with the problem of missing persons in the territory of the former Yugoslavia, the UN Commission on Human Rights emphasised the obligation contained in the 1995 Dayton Accords to disclose all relevant information concerning missing persons.⁷¹

80. In a resolution adopted in 1998 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights called upon Croatia to disclose all relevant material on missing persons.⁷²

81. In a resolution adopted in 1992 on the situation in East Timor, the UN Sub-Commission on Human Rights urged the government of Indonesia to provide information on those persons who were reported missing following incidents in Dili.⁷³

⁶⁶ Report on the Practice of the Philippines, 1997, Chapter 5.2, referring to "Soldiers Detain and Torture 5 Civilians", *Human Rights Update*, Vol. 10(8), November–December 1996.

⁶⁷ Report on US Practice, 1997, Chapter 5.2.

⁶⁸ UN General Assembly, Res. 3220 (XXIX), 6 November 1974, § 2.

⁶⁹ UN General Assembly, Res. 54/183, 17 December 1999, § 18.

⁷⁰ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 23.

⁷¹ UN Commission on Human Rights, Res. 1995/35, 3 March 1995, §§ 2–5.

⁷² UN Commission on Human Rights, Res. 1998/79, 22 April 1998, §§ 37 and 42.

⁷³ UN Sub-Commission on Human Rights, Res. 1992/20, 27 August 1992, § 6.

82. In 1996, its report to the 50th Session of the UN General Assembly, the UNHCR Executive Committee expressed “its utmost concern for the fate of . . . missing persons within and from the territory of the former Yugoslavia” and reiterated “the urgent appeals by the international community . . . to provide full information on the fate of those unaccounted for.”⁷⁴

Other International Organisations

83. In a resolution adopted in 1995 on the situation in some parts of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe demanded information about the whereabouts of 5,000 Bosnian Muslims from Srebrenica.⁷⁵

84. In a recommendation adopted in 1998, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers urge the parties to the conflict in Kosovo to provide information about missing persons.⁷⁶

85. In a resolution adopted in 1990, the European Parliament condemned the continuing lack of information on persons missing on both sides following the invasion of Cyprus in 1974 and calling for the immediate provision of information on the fate of these persons.⁷⁷

International Conferences

86. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it recognised that “one of the tragic consequences of armed conflicts is a lack of information on persons missing, killed or deceased in captivity” and called on “parties to armed conflicts, during hostilities and after cessation of hostilities . . . to provide information about those who are missing in action”. The Conference further called on parties to conflicts to:

co-operate with Protecting Powers, with the ICRC and its Central Tracing Agency, and with such other appropriate bodies as may be established for this purpose, and in particular National Red Cross Societies, to accomplish the humanitarian mission of accounting for the dead and missing, including those belonging to third countries not parties to the armed conflict.⁷⁸

87. The 26th International Conference of the Red Cross and Red Crescent in 1995 emphasized that “family reunification must begin with the tracing of separated family members at the request of one of them and end with their coming together as a family” and stressed “the particular vulnerability of children separated from their families as a result of armed conflict, and invites

⁷⁴ UNHCR, Addendum to the Report to the UN General Assembly, UN Doc. A/50/12/Add.1, 1 January 1996, § 31(a) and (f).

⁷⁵ Council of Europe, Parliamentary Assembly, Res. 1066, 27 September 1995, p. 2, § 6.

⁷⁶ Council of Europe, Parliamentary Assembly, Rec. 1385, 24 September 1998, § 7(iii)(a).

⁷⁷ European Parliament, Resolution on the violation of human rights in Cyprus, 12 July 1990, §§ D and 2.

⁷⁸ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.

the ICRC, the National Societies and the International Federation, within the scope of their respective mandates, to intensify their efforts to locate unaccompanied children, to identify them, to re-establish contact and reunite them with their families, and to give them the necessary assistance and support". It strongly urged States and parties to armed conflict "to provide families with information on the fate of their missing relatives" and urged them "to cooperate with the ICRC in tracing missing persons and providing necessary documentation".⁷⁹

88. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "every effort is made to clarify the fate of all persons unaccounted for and to inform the families accordingly".⁸⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

89. In its judgement in *Kurt v. Turkey* in 1998, the ECtHR held that where it was established that a disappeared person had been in the custody of the security forces, this gave rise to a presumption of responsibility on the part of the authorities to account for that person's subsequent fate.⁸¹

90. On different occasions, the IACiHR recommended that the governments of Argentina, Chile and Guatemala provide detailed information to family members concerning the status of disappeared persons.⁸²

91. In 1992, in a case concerning Colombia, the IACiHR concluded that:

The Colombian Government has failed to comply with its obligation to respect and guarantee Articles 4 (the right to life), 5 (the right to humane treatment), 7 (the right to personal liberty) and 25 (on judicial protection) . . . in respect to the abduction and subsequent disappearance of Mr. Alirio de Jesús Pedraza Becerra.

[It recommended that the government of Colombia] continue and enlarge the investigation into the events denounced.⁸³

92. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR found that:

The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished

⁷⁹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § D(c), (d), (k) and (l).

⁸⁰ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(e).

⁸¹ ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, § 124.

⁸² IACiHR, *Cases of Disappeared Persons (Argentina)*, Resolution, 8 April 1983, § 2(a); *Cases of Disappeared Persons (Chile)*, Resolution, 1 July 1983, § 2(a); *Cases of Disappeared Persons (Guatemala)*, Resolution, 9 April 1986, § 4(a).

⁸³ IACiHR, *Case 10.581 (Colombia)*, Report, 25 September 1992, Conclusions, § 1.

under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.⁸⁴

V. Practice of the International Red Cross and Red Crescent Movement

93. In 1996, the ICRC asked the authorities of a separatist entity to release information regarding the fate of persons missing as a result of the hostilities.⁸⁵

VI. Other Practice

94. No practice was found.

International cooperation to account for missing persons

I. Treaties and Other Instruments

Treaties

95. Articles 123 GC III and 140 GC IV provide that a Central Information Agency shall be created in a neutral country for the purpose of collecting all information it may obtain through official or private channels respecting POWs or internees, and transmit it to the countries of origin or residence of the persons concerned. The ICRC shall, if it deems it necessary, propose to the powers concerned the organisation of such an agency. The parties are requested to collaborate with the Agency.

96. Chapter III of the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam provided that the parties were to help each other in obtaining information about military personnel and foreign civilians of the parties missing in action and to take any measures as may be required to get information about those missing. The Four-Party Joint Military Commission was to ensure joint action by the parties in implementing this part of the agreement.

97. According to Article 5 of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, "the Parties shall also cooperate fully with the ICRC in its efforts to determine the identities, whereabouts and fate of the unaccounted for".

Other Instruments

98. Paragraph 8 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that:

The parties agree to set up a Joint Commission to trace missing persons: the Joint Commission will be made up of representatives of the parties concerned, all Red Cross Organisations concerned and in particular the Yugoslav Red Cross, the Croatian Red Cross and the Serbian Red Cross, with ICRC participation.

⁸⁴ IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 181.

⁸⁵ ICRC archive document.

99. The 1991 Rules of Procedure of the Joint Commission to Trace Missing Persons and Mortal Remains set up in the context of the former Yugoslavia provides that:

Rule 1(2)

... All of the Red Cross organizations concerned ... are designated as permanent advisers to the members of the Joint Commission.

Rule 2(1)

The International Committee of the Red Cross (ICRC), acting as a neutral intermediary, shall put at the Joint Commission's disposal a delegation which will chair the meetings of the Joint Commission.

...

Rule 18(1)

The ICRC shall bring to the Joint Commission's attention, on its own initiative, any communication, proposal, plan of work or information which might contribute to the efficiency of the Joint Commission's work.

100. The Plan of Operation for the 1991 Joint Commission to Trace Missing Persons and Mortal Remains set up in the context of the former Yugoslavia states that:

2.1.1 Each party is responsible for compiling a list of its reported missing, as well as a file on each missing [person] ...

2.2.1 Each opened file shall be sent ... to the ICRC which shall arrange for it to be forwarded to the party concerned ...

2.2.2 ... the adverse party/parties shall take all possible measures (administrative steps and public appeals) to obtain information on the person reported missing ...

2.2.3 Once the enquiry has been completed, ... the form "official request for missing person" with the accompanying documents shall be returned in duplicate to the ICRC, which shall forward them to the party on which the missing person depends.

101. Paragraph 3 of the Joint Declaration by the Presidents of the FRY and Croatia (October 1992) states that "the two Presidents further agree that their representatives will provide for an exchange of information on missing persons".

102. According to Section 9.8 of the 1999 UN Secretary-General's Bulletin, "the United Nations force ... shall facilitate the work of the ICRC's Central Tracing Agency".

II. National Practice

Military Manuals

103. Statements found in military manuals concerning the provision of information through the Protecting Power, the Central Tracing Agency of the International Committee of the Red Cross or national Red Cross societies have been quoted in Section B of this chapter and are not repeated here.

National Legislation

104. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁸⁶

105. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 123 GC III and 140 GC IV, is a punishable offence.⁸⁷

106. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... is liable to imprisonment".⁸⁸

National Case-law

107. No practice was found.

Other National Practice

108. According to the Report on the Practice of Australia, diplomatic correspondence and press releases show that, in 1984, a joint Australian-Vietnamese operation was launched "to search for the remains and resolve the cases" of six Australian personnel listed as "missing in action" in Vietnam and "to follow up any other case which might subsequently be drawn to its attention". The report states that the motive for the operation appears to be based primarily on political considerations (i.e. improvement of bilateral relations with Vietnam).⁸⁹

109. In 1995, in reply to a question in parliament, the German government declared that it fully supported all efforts undertaken by the UNHCR and the ICRC to find missing persons in the region of Srebrenica and to take care of them.⁹⁰

110. In 1995, during a debate in the UN Security Council, Germany expressed its government's full support for "the ongoing efforts of the ICRC and United Nations representatives to gain access to... information about the fate of all missing persons".⁹¹

111. In 1995, during a debate in the UN Security Council, Honduras stated that it considered it "deplorable that the parties have not fulfilled their commitments to allow the International Committee of the Red Cross and other humanitarian organizations to have access to persons... reported missing".⁹²

⁸⁶ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁸⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁸⁸ Norway, *Military Penal Code as amended* (1902), § 108(a).

⁸⁹ Report on the Practice of Australia, 1998, Chapter 5.2.

⁹⁰ Germany, Lower House of Parliament, Reply by the government to a question, Verbleib der Verschwundenen aus Srebrenica, *BT-Drucksache* 13/2877, 7 November 1995, p. 1.

⁹¹ Germany, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, pp. 2-3.

⁹² Honduras, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, pp. 6-7.

112. In 1995, during a debate in the UN Security Council, Indonesia associated itself “with the demands that . . . representatives of UNHCR, the ICRC and other international agencies [be granted] unconditional access to persons . . . reported missing”.⁹³

113. In 1995, during a debate in the UN Security Council, Italy supported a resolution aimed at granting representatives of UNHCR, the ICRC and other international agencies unconditional access to persons reported missing.⁹⁴

114. In 1995, during a debate in the UN Security Council, the UK stated that it was essential that the ICRC be given full access to those missing from Srebrenica and elsewhere and urged the Bosnian Serb party to comply with its obligations in this respect.⁹⁵

III. Practice of International Organisations and Conferences

United Nations

115. In a resolution adopted in 1995 on violations of IHL in the former Yugoslavia, the UN Security Council expressed “its strong support for the efforts of the International Committee of the Red Cross (ICRC) in seeking access to . . . persons . . . reported missing” and condemned “in the strongest possible terms the failure of the Bosnian Serb party to comply with their commitments in respect of such access”. The Council reaffirmed its demand that “the Bosnian Serb party give immediate and unimpeded access to representatives of the United Nations High Commissioner for Refugees, the ICRC and other international agencies to persons . . . reported missing”.⁹⁶

116. In a resolution adopted in 1995 on violations of IHL and of human rights in the former Yugoslavia, the UN Security Council reiterated “its strong support for the efforts of the International Committee of the Red Cross (ICRC) in seeking access to . . . persons . . . reported missing” and called on all parties “to comply with their commitments in respect of such access”.⁹⁷

117. In a resolution adopted in 1994, the UN General Assembly urged all parties to the conflicts in the former Yugoslavia, and in particular in the FRY (Serbia and Montenegro):

to cooperate with the Working Group on Enforced and Involuntary Disappearances in determining the fate of thousands of missing persons by disclosing information and documentation on inmates in prisons, camps and other places of detention in order to finally locate such persons and alleviate the suffering of their relatives.⁹⁸

⁹³ Indonesia, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 12.

⁹⁴ Italy, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 14.

⁹⁵ UK, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, pp. 8–9.

⁹⁶ UN Security Council, Res. 1019, 9 November 1995, preamble and § 2.

⁹⁷ UN Security Council, Res. 1034, 21 December 1995, § 4.

⁹⁸ UN General Assembly, Res. 49/196, 23 December 1994, § 25.

118. In a resolution adopted in 1995, the UN General Assembly expressed its dismay at “the huge number of missing persons still unaccounted for, particularly in Bosnia and Herzegovina and Croatia” and urged all parties, and in particular the government of the FRY (Serbia and Montenegro), “to cooperate with the ‘special process’ dealing with the problem of missing persons in the territory of the former Yugoslavia . . . by disclosing information and documentation on inmates in prisons, camps and other places of detention”. It further urged “the de facto Bosnian Serb authorities to provide prompt access for monitors to territories controlled by them, in particular to the Banja Luka region and to Srebrenica, emphasizing that the fate of thousands of missing persons from Srebrenica requires immediate clarification”.⁹⁹

119. In a resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly encouraged the ICRC “to pursue its clarification efforts in regard [to the high number of missing persons from Kosovo], in cooperation with other organizations such as the OSCE”.¹⁰⁰

120. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights urged all the parties “to cooperate in determining the fate of thousands of missing persons”.¹⁰¹

121. In a resolution adopted in 1995 on the special process dealing with the problem of missing persons in the territory of the former Yugoslavia, the UN Commission on Human Rights urged all the parties “to cooperate by disclosing all relevant available information and documentation in order to determine the fate of the thousands of missing persons”.¹⁰²

122. In a resolution adopted in 1995, the UN Commission on Human Rights asked for the cooperation of the parties to the conflict in Afghanistan in the tracing of the many persons reported missing as a result of the war.¹⁰³

123. In a resolution adopted in 1996 on Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN Commission on Human Rights welcomed “the report of the expert member of the Working Group on Enforced and Involuntary Disappearances on the special process on missing persons in the territory of the former Yugoslavia”.¹⁰⁴

124. In a resolution on missing persons adopted in 2002, the UN Commission on Human Rights stated that it:

invites States which are parties to an armed conflict to cooperate fully with the International Committee of the Red Cross in establishing the fate of missing persons and to adopt a comprehensive approach to this issue, including all practical

⁹⁹ UN General Assembly, Res. 50/193, 22 December 1995, preamble and §§ 22 and 28 (a).

¹⁰⁰ UN General Assembly, Res. 54/183, 17 December 1999, § 18.

¹⁰¹ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 23.

¹⁰² UN Commission on Human Rights, Res. 1995/35, 3 March 1995, § 3.

¹⁰³ UN Commission on Human Rights, Res. 1995/74, 8 March 1995, §§ 7–8.

¹⁰⁴ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, preamble.

and coordination mechanisms as may be necessary, based on humanitarian considerations only.

urges States and encourages intergovernmental and non-governmental organizations to take all necessary measures at the national, regional and international levels to address the problem of persons reported missing in connection with armed conflicts and to provide appropriate assistance as requested by the concerned States.¹⁰⁵

125. In a resolution on Guatemala adopted in 1985, the UN Sub-Commission on Human Rights requested that the government allow international humanitarian organisations, in particular the ICRC, to investigate the fate of the disappeared.¹⁰⁶

126. In 1996, in a briefing on progress made in investigating violations of international law in certain areas of Bosnia and Herzegovina, the Office of the UN High Commissioner for Human Rights noted that a Working Group chaired by the ICRC had been set up to implement a process for the tracing of missing persons, in which the three parties to the conflict also participated. As agreed in the 1995 Dayton Accords, the ICRC was to be fully involved in the question of missing persons and to collect information from families. The ICRC relied on its own extensive network of offices and local branches throughout the former Yugoslavia. In June 1996, it also implemented a new step in its tracing procedure by launching a public campaign calling for people to come forward with any information they might have. The Expert Group on Missing Persons and Exhumations was said to seek to coordinate procedures on exhumations among the concerned international authorities. The briefing also stated that international agencies and authorities indicated that they generally had no problems with immediate and unimpeded access to areas throughout the country in pursuit of their mandated activities.¹⁰⁷

127. In March 1996, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina reported that, following consultation with the parties, a Working Group on Missing Persons chaired by the ICRC had been established. He also reported that a Working Group on Missing Persons and Exhumation had been created in conjunction with several UN agencies.¹⁰⁸ In July 1996, the High Representative reported that considerable efforts had been made by relevant national authorities and international mechanisms, notably by the Expert Group on Missing Persons and Exhumation, the UN Special Rapporteurs on the former Yugoslavia and on missing persons and

¹⁰⁵ UN Commission on Human Rights, Res. 2002/60, 25 April 2002, §§ 6–7.

¹⁰⁶ UN Sub-Commission on Human Rights, Res. 1985/28, 30 August 1985, § 4.

¹⁰⁷ Office of the UN High Commissioner for Human Rights, Briefing on Progress Reached in Investigation of Violations of International Law in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most pursuant to Security Council Resolution 1034 (1995), 22 August 1996, §§ 12–13, p. 20.

¹⁰⁸ High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/190, 14 March 1996, Annex, §§ 75–76.

the Working Group on Persons Unaccounted For, towards establishing the fate of missing persons and the location of mass grave sites.¹⁰⁹

Other International Organisations

128. In 1981, in its consideration of a report on refugees from El Salvador presented by the Committee on Migration, Refugees and Demography, the Parliamentary Assembly of the Council of Europe noted that one of the main activities of the ICRC in El Salvador was tracing missing persons, with its Central Tracing Agency bureau acting as an intermediary between persons arrested or missing and their families.¹¹⁰

129. In a resolution on the situation in Cyprus adopted in 1984, the Parliamentary Assembly of the Council of Europe welcomed the continued consideration of the issue of missing persons on both sides in the context of the Committee on Missing Persons in Cyprus and urged the parties to continue their deliberations.¹¹¹

130. In a recommendation adopted in 1996 on refugees, displaced persons and reconstruction in certain countries of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe invited member States to give support to the ICRC in the implementation of the tasks conferred upon it under the 1995 Dayton Accords, namely to clarify the fate of missing persons.¹¹²

131. In an opinion adopted in 1996 on Croatia's request for membership of the Council of Europe, the Parliamentary Assembly of the Council of Europe expressed its expectation that Croatia would cooperate with international humanitarian organisations and take all necessary steps to solve several ongoing humanitarian problems, notably in connection with missing persons.¹¹³

132. In a resolution adopted in 1983 on the problem of missing persons in Cyprus, the European Parliament urged the ICRC to provide all assistance necessary for the speedy and effective completion of the investigations.¹¹⁴

133. In a resolution adopted in 1988 on the situation in Cyprus, the European Parliament suggested that the Foreign Ministers meeting in Council should endeavour to obtain an agreement from all of the parties involved to call on the ICRC to carry out independent searches whenever it was felt that relevant facts could be uncovered.¹¹⁵

¹⁰⁹ High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/542, 10 July 1996, Annex, § 41.

¹¹⁰ Council of Europe, Parliamentary Assembly, Working Document, Report on Refugees in El Salvador, Doc. 4698, 7 April 1981, p. 10.

¹¹¹ Council of Europe, Parliamentary Assembly, Res. 816, 21 March 1984, p. 117, § 12.

¹¹² Council of Europe, Parliamentary Assembly, Rec. 1287, 24 January 1996, p. 5, § viii(d).

¹¹³ Council of Europe, Parliamentary Assembly, Opinion No. 195 (1996) on Croatia's request for membership of the Council of Europe, Human rights information sheet No. 38, April 1996, p. 110, § 10(ii).

¹¹⁴ European Parliament, Resolution on the problem of missing persons in Cyprus, 11 January 1983, § 2.

¹¹⁵ European Parliament, Resolution on the situation in Cyprus, 27 June 1988, §§ 7–8.

International Conferences

134. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the missing and dead in armed conflicts in which it called on parties to armed conflicts:

to co-operate with Protecting Powers, with the ICRC and its Central Tracing Agency, and with such other appropriate bodies as may be established for this purpose, and in particular National Red Cross Societies, to accomplish the humanitarian mission of accounting for the dead and missing, including those belonging to third countries not parties to the armed conflict.¹¹⁶

135. The 25th International Conference of the Red Cross in 1986 adopted a resolution on cooperation between National Red Cross and Red Crescent Societies and governments in reuniting dispersed families. The resolution reaffirmed the constant willingness of National Societies to “co-operate in humanitarian action, in reuniting members of dispersed families, in exchanging information regarding families and in facilitating the search for missing persons” and called upon governments to support the efforts of National Societies “dealing with the problems of conducting searches and reuniting families”.¹¹⁷

136. The Conclusions of the London Peace Implementation Conference for Bosnia and Herzegovina in 1995 state that fulfilment of the 1995 Dayton Accords will require “full cooperation of the parties over... the provision of information about the fate of persons unaccounted for”.¹¹⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

137. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

138. In 1980, in the context of the conflict in Lebanon, the ICRC undertook to search for missing persons.¹¹⁹

139. Following the Gulf War in 1991, a Tripartite Commission was established under ICRC auspices to trace people reported missing. The Commission is made up of representatives of Iraq, on the one hand, and of France, Kuwait, Saudi Arabia, UK and US, on the other.

140. In a joint declaration with UNICEF and UNHCR in 1994, the ICRC and the International Federation of Red Cross and Red Crescent Societies reaffirmed the need to do everything possible to ensure the survival and

¹¹⁶ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. V.

¹¹⁷ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XV, §§ 1 and 2.

¹¹⁸ Peace Implementation Conference for Bosnia and Herzegovina, London, 8–9 December 1995, Conclusions, annexed to Letter dated 11 December 1995 from the UK to the UN Secretary-General, UN Doc. S/1995/1029, 12 December 1995, § 25.

¹¹⁹ ICRC, *Annual Report 1980*, Geneva, 1981, p. 60.

protection of unaccompanied children, trace their families and facilitate family reunification.¹²⁰

141. In the context of the conflict in Kosovo, although the Military Technical Agreement signed on 9 June 1999 between NATO and the Yugoslav army is different from the 1995 Dayton Accords in that it contains no provisions for the tracing of missing persons, UNMIK entrusted the ICRC, following the cessation of hostilities, with the responsibility of dealing with these matters and with the lead role regarding the issue of missing people.

VI. Other Practice

142. In 1988, the Hezb-i-Islami faction in Afghanistan advised its fighters to give all possible assistance to the ICRC in its efforts to trace missing persons.¹²¹

Right of the families to know the fate of their relatives

Note: For practice concerning respect for family rights, see Chapter 32, section Q.

I. Treaties and Other Instruments

Treaties

143. Article 26 GC IV stipulates that:

Each Party to the conflict shall facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. It shall encourage, in particular, the work of organizations engaged on this task provided they are acceptable to it and conform to its security regulations.

144. Article 32 AP I states that, in the implementation of the section concerning the missing and the dead, the parties “shall be prompted mainly by the right of families to know the fate of their relatives”. Article 32 AP I was adopted by consensus.¹²²

145. Article 19(3) of the 1990 African Charter on the Rights and Welfare of the Child provides that:

Where separation results from the action of a State Party, the State Party shall provide the child, or if appropriate, another member of the family with essential information concerning the whereabouts of the absent member or members of the family. States Parties shall also ensure that the submission of such a request shall not entail any adverse consequences for the person or persons in whose respect it is made.

¹²⁰ ICRC, International Federation of Red Cross and Red Crescent Societies, UNHCR and UNICEF, Joint declaration on family reunification, 27 June 1994.

¹²¹ Hezb-i-Islami, Monthly Bulletin, Communiqué on International Humanitarian Law, October 1988.

¹²² CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

146. Article 25(2)(b) of the 1990 African Charter on the Rights and Welfare of the Child provides that “States Parties . . . shall take all necessary measures to trace parents or relatives [of children] where separation is caused by internal and external displacement arising from armed conflicts”.

Other Instruments

147. Principles 16(1) and 17(4) of the 1998 Guiding Principles on Internal Displacement specify that families of “all internally displaced persons have the right to know the fate and whereabouts of missing relatives”.

148. According to Section 9.8 of the 1999 UN Secretary-General’s Bulletin, “the United Nations force shall respect the right of the families to know about the fate of their sick, wounded and deceased relatives”.

II. National Practice

Military Manuals

149. Argentina’s Law of War Manual provides that a general principle is “for families to have the right to know the fate of their relatives”.¹²³ It also provides that the High Contracting Parties and the parties to the conflict shall in particular:

facilitate enquiries made by members of families dispersed owing to the war, with the object of renewing contact with one another and of meeting, if possible. All persons in the territory of a Party to the conflict, or in a territory occupied by it, shall be enabled to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them.¹²⁴

150. Australia’s Defence Force Manual provides that:

The request for information relating to either the missing or the dead must be humanitarian in nature and stem from the need for relatives to be notified of their whereabouts and subsequent repatriation, or re-interment. Should there be any controversy resulting from the request for information, the humanitarian needs and interests of the families concerned must prevail.¹²⁵

151. Cameroon’s Instructor’s Manual provides that the families of the dead and victims of war have the right to know the fate of their relatives.¹²⁶

152. Canada’s LOAC Manual contains provisions stipulating that “belligerents must facilitate enquiries by members of families dispersed as the result of war with the object of renewing contact between them”.¹²⁷

¹²³ Argentina, *Law of War Manual* (1989), § 2.05.

¹²⁴ Argentina, *Law of War Manual* (1989), § 4.14.

¹²⁵ Australia, *Defence Force Manual* (1994), § 995.

¹²⁶ Cameroon, *Instructors’ Manual* (1992), p. 21.

¹²⁷ Canada, *LOAC Manual* (1999), p. 11–3, § 28.

- 153.** Kenya's LOAC Manual states that "the basis principles relating to 'missing and dead' persons, military or civilians, are based on the right of the families to know the fate of their relatives".¹²⁸
- 154.** Israel's Manual on the Laws of War recalls the Additional Protocols which "specify the families' right to know the fate of their relatives".¹²⁹
- 155.** Madagascar's Military Manual provides that "the provisions of the law of war concerning the dead are based on the right of the families to know the fate of their members".¹³⁰
- 156.** New Zealand's Military Manual provides that "belligerents must facilitate enquiries by members of families dispersed as a result of the war, with the object of renewing contact between them".¹³¹
- 157.** Spain's LOAC Manual provides that "the provisions of the law of armed conflicts concerning the dead are based on the right of the families to know the fate of their relatives".¹³²
- 158.** The UK Military Manual states that "belligerents must facilitate enquiries by members of families dispersed as a result of war, with the object of renewing contact between them".¹³³
- 159.** The US Field Manual reproduces Article 26 GC IV.¹³⁴
- 160.** The US Air Force Pamphlet stipulates that GC IV contains "measures for facilitating the establishment of contact between members of a family who have been separated because of the war".¹³⁵
- 161.** The Annotated Supplement to the US Naval Handbook states that "the United States also supports the new principles in GP [AP] I, art. 32 & 34, that families have the right to know the fate of their relatives".¹³⁶

National Legislation

- 162.** Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Article 26 GC IV, and of AP I, including Article 32 AP I, is a punishable offence.¹³⁷
- 163.** Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹³⁸

¹²⁸ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 14, see also Précis No. 4, p. 5.

¹²⁹ Israel, *Manual on the Laws of War* (1998), p. 61.

¹³⁰ Madagascar, *Military Manual* (1994), Fiche No. 4-SO, § C, see also Fiche No. 1-T, § 22(3).

¹³¹ New Zealand, *Military Manual* (1992), § 1113(2).

¹³² Spain, *LOAC Manual* (1996), Vol. I, § 5.2.d.(6).

¹³³ UK, *Military Manual* (1958), § 38. ¹³⁴ US, *Field Manual* (1956), § 265.

¹³⁵ US, *Air Force Pamphlet* (1976), § 14-3.

¹³⁶ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.4, footnote 19.

¹³⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹³⁸ Norway, *Military Penal Code as amended* (1902), § 108(b).

National Case-law

164. No practice was found.

Other National Practice

165. At the CDDH in 1975, Cyprus, France, Greece and the Holy See submitted an amendment to what became Article 32 AP I which aimed at adding the following sentence: "The activity of the Parties to the conflict and the international agencies shall be mainly prompted by the fundamental right of families to know what has happened to their relatives".¹³⁹

166. At the CDDH in 1976, Austria, Cyprus, France, Greece, the Holy See, Nicaragua and Spain submitted an amendment which aimed at introducing the following text in AP I:

In the implementation of the provisions of this Chapter [i.e. what became Section III of AP I], the activity of the High Contracting Parties and of the international agencies shall be mainly prompted by the right of families to know what has happened to their relatives, and by the desire to spare them moral suffering.¹⁴⁰

167. At the CDDH in 1975, when it introduced an amendment to what became Article 32 AP I, Germany, on behalf of the sponsors (Germany, UK and US), stated that:

To mitigate the suffering of the families of those who disappeared in war by removing the uncertainty about their fate and to give them an opportunity to remember their dead in the place where their remains lay was a fundamental humanitarian principle. Such principle was already included in the . . . Oxford Manual of 1880 and in the Hague Regulations of 1899 and 1907 and in the Geneva Conventions of 1906, 1929 and 1949.¹⁴¹

168. At the CDDH in 1975, the Holy See stated that:

Its [i.e. an amendment's] purpose was to remedy an omission, namely the absence of any reference to families, and to call the attention of all representatives – legal experts, politicians, doctors and soldiers – and their States to the suffering caused to families as a result of armed conflicts. It was not only separation, but anxiety, uncertainty and lack of news for months, or even years, in the case of both families and prisoners. It was not merely a question of feelings but one of respect for a fundamental right which had never been officially recognized and which was often overlooked. Indeed, in some countries the fate of certain civilians was deliberately kept secret. Unless specific mention was made of families, the bureaucrats dealing with the present provision would recognize only the technical, not the humanitarian, aspect of the problem.¹⁴²

¹³⁹ Cyprus, France, Greece and Holy See, Amendment submitted to the CDDH, *Official Records*, Vol. III, CDDH/II/259 and Add.1, 11 March 1975, p. 102.

¹⁴⁰ Austria, Cyprus, France, Greece, Holy See, Nicaragua and Spain, Amendment submitted to the CDDH, *Official Records*, Vol. III, CDDH/II/354 and Add. 1, 28 April 1976, p. 105.

¹⁴¹ Germany, Statement at the CDDH on behalf of the sponsors (Germany, UK and US), *Official Records*, Vol. XI, CDDH/II/SR.19, 13 February 1975, p. 185, § 70.

¹⁴² Holy See, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.35, 13 March 1975, p. 363, § 2.

169. In an explanatory memorandum submitted to parliament in 1990 in the context of the ratification procedure of the Additional Protocols, the German government stated, with reference to Articles 32–34 AP I, that all parties to the conflict were under a duty to search for missing persons, but that this principle did not include an individual and subjective right of the relatives of the person missing to gain information.¹⁴³

170. In a resolution adopted in December 1998, the National Assembly of South Korea urged cooperation between the authorities in North and South Korea in reuniting separated family members and proposed that the National Red Cross Societies in each region proceed with their work on family reunification. In cases where family reunification was not possible, the Assembly asked the authorities and Red Cross Societies “to start working on the confirmation of their fate”.¹⁴⁴

171. At the CDDH in 1975, the representative of UK stated that:

He did not consider, for instance, that it could be said that it was a fundamental right of families to know what had happened to their relatives, although it was a basic need. To go further than that would not be wise.¹⁴⁵

172. At the CDDH in 1974, the US referred to “the anguish of the families of persons of whom there was no word during conflicts” and stressed:

the need to inform those families of the fate of their missing relatives as soon as possible, and pointed out that the draft followed logically from resolution V adopted on that subject by the XXIInd International Conference of the Red Cross at Teheran in 1973.¹⁴⁶

173. At the CDDH in 1976, the US stated that:

The statement of the right of the families to know the fate of their relatives was of primary importance for the understanding of the Section under discussion. Paragraph 1 of article 20 bis did not refer to other sections of the draft Protocol or the Geneva Conventions. If the right of the families was not specifically mentioned, the section might be interpreted as referring to the right of Governments, for instance, to know what had happened to certain missing persons. . . . As regards [a] query of the Yugoslav representative whether paragraph 1 of article 20 bis was necessary, he agreed that it was unusual to state the premises on which an article was based. The paragraph had been included in response to a strong feeling of many delegations and institutions that it was important to express in the Protocol the idea that families had a right to know what had happened to their relatives. United Nations

¹⁴³ Germany, Lower House of Parliament, Explanatory memorandum on the Additional Protocols to the Geneva Conventions, *BT-Drucksache* 11/6770, 22 March 1990, p. 109.

¹⁴⁴ South Korea, National Assembly, Resolution Calling for the Confirmation of Life or Death and the Reunion of Members of Separated Families in South and North Korea, 198th Regular Session, 1 December 1998.

¹⁴⁵ UK, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.35, 13 March 1975, p. 371, § 49.

¹⁴⁶ US, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.6, 14 March 1974, p. 41, § 4.

General Assembly resolution 3220 (XXIX), which the Working Group had studied when drawing up the present text, stated in the last preambular that “the desire to know . . . is a basic human need”, but the next under consideration went even further by referring to the “right”.¹⁴⁷

174. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that families have a right to know the fate of their relatives”.¹⁴⁸

III. Practice of International Organisations and Conferences

United Nations

175. In a resolution adopted in 1974, the UN General Assembly recognised that “one of the tragic results of armed conflicts is the lack of information on persons, civilians as well as combatants, who are missing or dead in armed conflict”. It also considered that:

The desire to know the fate of loved ones lost in armed conflicts is a basic human need which should be satisfied to the greatest extent possible, and that provision of information on those who are missing or who have died in armed conflicts should not be delayed merely because other issues remained pending.¹⁴⁹

176. In a resolution adopted in 2002, the UN Commission on Human Rights reaffirmed “the right of families to know the fate of their relatives reported missing in connection with armed conflict”.¹⁵⁰

177. In a resolution adopted in 1981 on the question of the human rights of persons subjected to any form of detention or imprisonment, the UN Sub-Commission on Human Rights reiterated the right of families to know the fate of their relatives.¹⁵¹

Other International Organisations

178. In a recommendation adopted in 1979 on the missing political prisoners in Chile, the Parliamentary Assembly of the Council of Europe stressed the right of families to know the fate of members who had disappeared.¹⁵² It also adopted an order instructing the President of the Assembly to inform the Chilean government of its deep concern about the fate of missing political

¹⁴⁷ US, Statement at the CDDH, *Official Records*, Vol. XII, CDDH/II/SR.76, 1 June 1976, p. 232, §§ 28–29.

¹⁴⁸ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 424.

¹⁴⁹ UN General Assembly, Res. 3220 (XXIX), 6 November 1974, preamble.

¹⁵⁰ UN Commission on Human Rights, Res. 2002/60, 25 April 2002, § 2.

¹⁵¹ UN Sub-Commission on Human Rights, Res. 15 (XXXIV), 10 September 1981, § 3.

¹⁵² Council of Europe, Parliamentary Assembly, Rec. 868, 5 June 1979, §§ 7–12.

prisoners, emphasising the right of families to be informed of the fate of their missing members after arrest or detention by the security forces.¹⁵³

179. In a resolution adopted in 1980, the Parliamentary Assembly of the Council of Europe expressed its profound alarm at the disappearances of large numbers of people in Latin America.¹⁵⁴

180. In a recommendation adopted in 1987 on national refugees and missing persons in Cyprus, the Parliamentary Assembly of the Council of Europe emphasised that the families of missing persons have a right to know the truth, and called upon European Foreign Ministers to step up their efforts to find a positive solution, in agreement with both parties, to this humanitarian problem.¹⁵⁵ In the report upon which the recommendation was based, the Committee on Migration, Refugees and Demography took the view that the Council of Europe should support the efforts of the Committee on Missing Persons to clarify the fate of the missing persons, noting that after so many years, the uncertainty was both shameful and unnecessarily cruel.¹⁵⁶

181. In a resolution adopted in 1983 on the problem of missing persons in Cyprus, the European Parliament confirmed the inalienable right of all families to know the fate of members of their family who have involuntarily disappeared due to the action of governments or their agents.¹⁵⁷

International Conferences

182. The 25th International Conference of the Red Cross in 1986 recalled “the principle by which families have the right to know the fate of their members”.¹⁵⁸

183. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants declared that they refused “to accept that . . . families of missing persons [are] denied information about the fate of their relatives”.¹⁵⁹

184. The 26th International Conference of the Red Cross and Red Crescent in 1995 stressed “the need and the right of families to obtain information on missing persons, including missing prisoners of war and those missing in action” and urged States and parties to armed conflict to “provide families with information on the fate of their missing relatives”.¹⁶⁰

¹⁵³ Council of Europe, Parliamentary Assembly, 31st Ordinary Session, Order No. 381, 28 June 1979.

¹⁵⁴ Council of Europe, Parliamentary Assembly, Res. 722, 28 January 1980, §§ 1–3.

¹⁵⁵ Council of Europe, Parliamentary Assembly, Rec. 1056, 5 May 1987, §§ 7–8.

¹⁵⁶ Council of Europe, Parliamentary Assembly, Working document: Report on national refugees and missing persons in Cyprus, Doc. 5716, 39th Ordinary Session, 6 April 1987, p. 21.

¹⁵⁷ European Parliament, Resolution on the problem of missing persons in Cyprus, 11 January 1983, §§ E and H(2).

¹⁵⁸ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XIII, preamble.

¹⁵⁹ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(1).

¹⁶⁰ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § D(k).

185. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “every effort is made to clarify the fate of all persons unaccounted for and to inform the families accordingly”.¹⁶¹

IV. Practice of International Judicial and Quasi-judicial Bodies

186. In *Quinteros v. Uruguay* in 1983, the HRC dealt with the case of Elena Quinteros who disappeared after having been arrested, held in a military detention and subjected to torture. The Commission stated that it

understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has the right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the [1966 ICCPR] suffered by her daughter in particular, of article 7.¹⁶²

187. In its decision in *Amnesty International and Others v. Sudan* in 1999, the ACiHPR held that “holding an individual without permitting him or her to have any contact with his or her family, and refusing to inform the family whether the individual is being held and his or her whereabouts is an inhuman treatment of both the detainee and the family concerned”.¹⁶³

188. In its judgement in *Kurt v. Turkey* in 1998, the ECtHR found that the anguish suffered by a mother at knowing that her son had been detained by the security forces, yet finding a complete absence of official information as to his subsequent fate, constituted ill-treatment of sufficient severity to fall within the scope of Article 3 of the 1950 ECHR (prohibition of inhuman or degrading treatment).¹⁶⁴ In its judgement in *Timurtas v. Turkey* in 2000, the Court confirmed this view.¹⁶⁵

189. In its judgement in the *Cyprus case* in 2001, the ECtHR found that, in relation to Greek-Cypriot missing persons and their relatives, there had been a continuing violation of Article 3 of the 1950 ECHR in that the silence of the Turkish authorities in the face of the real concerns of the relatives attained a level of severity which could only be categorised as inhuman treatment.¹⁶⁶

¹⁶¹ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(e).

¹⁶² HRC, *Quinteros v. Uruguay*, Views, 21 July 1983, § 14.

¹⁶³ ACiHPR, *Amnesty International and Others v. Sudan*, Decision, 1–15 November 1999, § 54.

¹⁶⁴ ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, §§ 130–134.

¹⁶⁵ ECtHR, *Timurtas v. Turkey*, Judgement, 13 June 2000, § 98.

¹⁶⁶ ECtHR, *Cyprus case*, Judgement, 10 May 2001, §§ 157–158.

190. On different occasions, the IACiHR recommended that the governments of Argentina, Chile and Guatemala provide detailed information to family members concerning the status of disappeared persons.¹⁶⁷

191. In its judgement in the *Velásquez Rodríguez case* in 1988, the IACtHR found that:

The duty to investigate facts of this type continues as long as there is uncertainty about the fate of the person who has disappeared. Even in the hypothetical case that those individually responsible for crimes of this type cannot be legally punished under certain circumstances, the State is obligated to use the means at its disposal to inform the relatives of the fate of the victims and, if they have been killed, the location of their remains.¹⁶⁸

192. In 2000, in the *Bámaca Velásquez case* dealing with the disappearance and death of a member of the URNG, the IACtHR stated that Guatemala had violated the right to humane treatment embodied in Article 5(1) and (2) of the ACHR to the detriment of, *inter alia*, the wife, father and sisters of the victim. It found that, while the victim had been held in detention without the family being informed, several judicial proceedings had been initiated, none of which had been effective, and that exhumation procedures had been ordered but obstructed by State agents. It stated that, at the time when the facts relating to the case took place, "Guatemala was convulsed by an internal conflict", and that:

The Court has evaluated the circumstances of this case, particularly the continued obstruction of [the victims wife's] efforts to learn the truth of the facts and, above all, the concealment of the corpse of [the victim] and the obstacles to the attempted exhumation procedures that various public authorities created, and also the official refusal to provide relevant information. Based on these circumstances, the Court considers that the suffering to which [the wife of the victim] was subjected clearly constitutes cruel, inhuman or degrading treatment, violating Article 5(1) and 5(2) of the [ACHR]. The Court also considers that ignorance of the whereabouts of [the victim] caused his next of kin . . . profound anguish . . . and, therefore, considers that they, too, are victims of the violation of the said Article.¹⁶⁹

193. In its judgement in the *Bámaca Velásquez case (Reparations)* in 2002, the IACtHR stated that:

The right of every person to know the truth has been developed in international human rights law . . . and the possibility for the next of kin of the victim to know what happened, and, in this case, where the remains are located, constitutes a means

¹⁶⁷ IACiHR, *Cases of Disappeared Persons (Argentina)*, Resolution, 8 April 1983, § 2(a); *Cases of Disappeared Persons (Chile)*, Resolution, 1 July 1983, § 2(a); *Cases of Disappeared Persons (Guatemala)*, Resolution, 9 April 1986, § 4(a).

¹⁶⁸ IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, § 181.

¹⁶⁹ IACtHR, *Bámaca Velásquez case*, Judgement, 25 November 2000, §§ 121 (b) and (m), 165–166 and 230(2).

of reparation and, as such, an expectation of the next of kin of the victim and the society as a whole the State has to meet.¹⁷⁰

V. Practice of the International Red Cross and Red Crescent Movement

194. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the law of war provisions relating to the dead are based on the right of families to know the fate of their relatives”.¹⁷¹

VI. Other Practice

195. Section 24(1) of the SPLM/A Penal and Disciplinary Laws requires that “every Battalion Commander shall maintain a register” of military personnel and the keeping of records pertaining to such personnel in the SPLM/A headquarters, on the premise that this will facilitate the search for any persons who later go missing.¹⁷² The Report on SPLM/A Practice notes that:

The SPLM/A also used to announce names of Government of Sudan Officers and men and any personnel that they captured from the government when Radio SPLA was operational. The SPLM/A today still publishes in their bulletins names and other particulars of officers and men and personnel that fall into the hands of the SPLA during military operations. The SPLM/A claims to do this for the benefit of the families of those who go missing from the side of the government.¹⁷³

¹⁷⁰ IACtHR, *Bámaca Velásquez case (Reparations)*, Judgement, 22 February 2002, § 76.

¹⁷¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 127.

¹⁷² SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 24, § 1.

¹⁷³ Report on SPLM/A Practice, 1998, Chapter 5.2.

PERSONS DEPRIVED OF THEIR LIBERTY

A. Provision of Basic Necessities to Persons Deprived of Their Liberty (practice relating to Rule 118)	§§ 1–98
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Note: For practice concerning non-discrimination of persons deprived of their liberty, see Chapter 32, section B. For practice concerning humane treatment of persons deprived of their liberty, see Chapter 32, section A.

A. Provision of Basic Necessities to Persons Deprived of Their Liberty

I. Treaties and Other Instruments

Treaties

1. Article 7 of the 1899 HR provides that:

The Government into whose hands prisoners of war have fallen is bound to maintain them.

Failing a special agreement between the belligerents, prisoners of war shall be treated as regards food, quarters, and clothing, on the same footing as the troops of the Government which has captured them.

2. Article 7 of the 1907 HR provides that:

The Government into whose hands prisoners of war have fallen is charged with their maintenance. In the absence of a special agreement between the belligerents, prisoners of war shall be treated as regards board, lodging, and clothing on the same footing as the troops of the Government who captured them.

3. Articles 25–32 GC III deal with the provision of appropriate shelter, food, clothing, canteens, hygiene and medical care to POWs. Articles 76, 85, 87 and 89–92 GC IV contain similar provisions for internees.

4. Articles 72 and 73 GC III and Articles 76, 108 and 109 GC IV provide that POWs and detainees shall be allowed to receive individual parcels or collective shipments containing in particular foodstuffs, clothing and medical supplies. Collective shipments shall in no way free the detaining power from its obligations. The conditions for the sending of parcels and relief may be subject to special agreement between the powers concerned. In the absence of such agreement, rules and regulations concerning collective shipments are annexed to the Conventions.

5. Article 125, first paragraph, GC III provides that:

Subject to the measures which the Detaining Powers may consider essential to ensure their security or to meet any other reasonable need, the representatives of religious organizations, relief societies, or any other organization assisting prisoners of war, shall receive from the said Powers, for themselves and their duly accredited agents, all necessary facilities for visiting the prisoners, for distributing relief supplies and material, from any source, intended for religious, educational or recreative purposes, and for assisting them in organizing their leisure time within the camps.

Article 142 GC IV contains similar provisions for protected persons.

6. Article III(57)(a) of the 1953 Panmunjon Armistice Agreement provides that joint Red Cross teams “shall visit the prisoner of war camps of both sides to comfort the prisoners of war and to bring in and distribute gift articles for the comfort and welfare of the prisoners of war”. Paragraphs 14 and 17 of the Annex to the Armistice Agreement (establishing a Neutral Nations Repatriation Commission) further add that:

Each side shall provide logistical support for the prisoners of war in the area under its military control, delivering required support to the Neutral Nations Repatriation Commission at an agreed delivery point in the vicinity of each prisoner of war installation.

...

The Neutral Nations Repatriation Commission shall provide medical support for the prisoners of war as may be practicable. The detaining side shall provide medical support as practicable upon the request of the Neutral Nations Repatriation Commission and specifically for those cases requiring extensive treatment or hospitalization.

7. Article 8 of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam states that all captured military personnel and captured civilians "shall be given adequate food, clothing, shelter and medical attention required for their state of health. They shall be allowed . . . to receive parcels" from their families.

8. Article 5(1)(b) AP II provides that persons whose liberty has been restricted shall "be provided with food and drinking water, and be afforded safeguards as regards health and hygiene and protection against the rigours of the climate and the dangers of the armed conflict". Article 5(1)(c) provides that "they shall be allowed to receive individual or collective relief". Article 5 AP II was adopted by consensus.¹

Other Instruments

9. Article 76 of the 1863 Lieber Code provides that "prisoners of war shall be fed upon plain and wholesome food, whenever practicable". Article 79 stipulates that "every captured wounded enemy shall be medically treated, according to the ability of the medical staff".

10. Article 27 of the 1874 Brussels Declaration states that, in the absence of an agreement settling the conditions of maintenance of prisoners of war, they shall be treated as regards food and clothing, on the same footing as the troops of the government which captured them.

11. Article 69 of the 1880 Oxford Manual provides that:

The government into whose hands prisoners have fallen is charged with their maintenance. In the absence of an agreement on this point between the belligerent parties, prisoners are treated, as regards food and clothing, on the same footing as the troops of the government which captured them.

12. Rules 9–20 of the 1955 Standard Minimum Rules for the Treatment of Prisoners provide detailed directions concerning accommodation, personal hygiene, clothing, bedding and food.

13. Rules 14–25 of the 1987 European Prison Rules provide detailed directions concerning accommodation, personal hygiene, clothing, bedding and food.

¹ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

14. Article 6 of the 1979 Code of Conduct for Law Enforcement Officials provides that “law enforcement officials shall ensure the full protection of the health of persons in their custody and, in particular, shall take immediate action to secure medical attention whenever required”.

15. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that “in the event of the use of force and in case of armed conflict . . . prisoners of war shall have the right to be fed, sheltered and clothed”.

16. Paragraph 9 of the 1990 Basic Principles for the Treatment of Prisoners provides that “prisoners shall have access to the health services available in the country without discrimination on the grounds of their legal situation”.

17. Article 4(6) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “all persons deprived of their liberty for reasons related to the armed conflict shall . . . be provided with adequate food and drinking water, and be afforded safeguards as regards to health and hygiene”.

18. Section 8(c) of the 1999 UN Secretary-General’s Bulletin provides that detained persons “shall be entitled to receive food and clothing, hygiene and medical attention”.

II. National Practice

Military Manuals

19. Argentina’s Law of War Manual (1969) states that “the power detaining prisoners of war shall be bound to provide free of charge for their maintenance and for the medical attention required by their state of health”.² It further lists in detail the basic needs of POWs that must be provided for and under which specific conditions.³

20. Argentina’s Law of War Manual (1989) provides that prisoners of war shall receive adequate accommodation, food and clothing.⁴

21. Australia’s Commanders’ Guide provides that “PW must at all times receive adequate medical attention, food, clothing and accommodation”.⁵ Under the manual, the same rule applies to captured enemy combatants, who should be treated as being entitled to PW status.⁶

22. Australia’s Defence Force Manual states that “food must be sufficient to keep prisoners in good health, and the customs and normal diet of PW must be taken into account, i.e. PW dietary practices and customs must be accommodated if possible”.⁷ It adds that “clothing, underwear and footwear must be sufficient and take into account the climate of the region where the PW is

² Argentina, *Law of War Manual* (1969), § 2.014.

³ Argentina, *Law of War Manual* (1969), §§ 2.022–2.028.

⁴ Argentina, *Law of War Manual* (1989), § 3.13.

⁵ Australia, *Commanders’ Guide* (1994), § 716.

⁶ Australia, *Commanders’ Guide* (1994), § 719.

⁷ Australia, *Defence Force Manual* (1994), § 1026.

detained".⁸ The manual specifies that "medical personnel of the PW are to be made available to attend to PW".⁹

23. Benin's Military Manual provides that captured enemy combatants shall have the right to receive relief from their families and shall be cared for.¹⁰

24. Cameroon's Instructors' Manual provides that captured enemy combatants shall be cared for, fed and protected when necessary.¹¹

25. Cameroon's Disciplinary Regulations states that prisoners shall be authorised to receive parcels by the intermediary of the ICRC.¹²

26. Canada's LOAC Manual provides that POWs are to receive medical attention, if possible from doctors attached to their own forces or of their own nationality.¹³ In respect of internees, the manual states that "the interning power is obligated to maintain interned persons and to provide them with medical care, all free of charge".¹⁴ It also emphasises that "effective measures must be provided with adequate food, water and clothing".¹⁵ The manual further specifies that persons undergoing punishment in occupied territories "must enjoy conditions of food and hygiene sufficient to keep them in good health and at least equal to those obtaining in prisons in the occupied country".¹⁶ With regard to non-international armed conflicts, the manual states that the persons whose liberty has been restricted must "receive such medical care as their condition requires" and "be supplied with food and water".¹⁷

27. Canada's Code of Conduct provides that "for the provision of food, water and shelter, the idea is not to treat PWs or detainees better than CF members but to treat them at least as well".¹⁸ It further provides that "all detained persons shall be afforded the necessary medical care".¹⁹

28. Colombia's Basic Military Manual provides that, in both international and non-international armed conflicts, the basic needs of all detained persons, such as medical assistance, food and water, shall be provided for.²⁰

29. Colombia's Instructors' Manual requires that prisoners be provided with food and medical attention.²¹

30. Croatia's Instructions on Basic Rules of IHL states that captured civilians and combatants are entitled to receive relief shipments.²²

⁸ Australia, *Defence Force Manual* (1994), § 1027.

⁹ Australia, *Defence Force Manual* (1994), § 1029.

¹⁰ Benin, *Military Manual* (1995), Fascicule II, pp. 5 and 11.

¹¹ Cameroon, *Instructors' Manual* (1992), p. 40, § 152, p. 96, § 2 and p. 154, § 541.

¹² Cameroon, *Disciplinary Regulations* (1975), Article 33.

¹³ Canada, *LOAC Manual* (1999), p. 10-4, § 36.

¹⁴ Canada, *LOAC Manual* (1999), p. 11-6, § 50.

¹⁵ Canada, *LOAC Manual* (1999), p. 11-6, § 55.

¹⁶ Canada, *LOAC Manual* (1999), p. 12-7, § 62(a).

¹⁷ Canada, *LOAC Manual* (1999), p. 17-3, § 25.

¹⁸ Canada, *Code of Conduct* (2001), Rule 6, § 7.

¹⁹ Canada, *Code of Conduct* (2001), Rule 6, § 9.

²⁰ Colombia, *Basic Military Manual* (1995), p. 21.

²¹ Colombia, *Instructors' Manual* (1999), p. 22.

²² Croatia, *Instructions on Basic Rules of IHL* (1993), Instruction No. 4.

31. The Military Manual of the Dominican Republic requires that all prisoners and detainees, whatever their status, receive the same medical attention as friendly forces would receive.²³
32. Ecuador's Naval Manual provides that captured enemy combatants shall receive medical care without any adverse distinction.²⁴
33. France's LOAC Summary Note provides that "captured combatants have the right to . . . receive assistance".²⁵
34. France's LOAC Teaching Note provides that wounded POWs shall be cared for and that every prisoner of war is entitled to receive assistance.²⁶
35. France's LOAC Manual provides that prisoners of war shall be cared for and provided with necessary medical care.²⁷ It also states that regulation of the treatment of civilian internees is very similar to that of POWs.²⁸
36. Germany's Military Manual provides that "prisoners of war shall receive sufficient food and clothing as well as the necessary medical attention".²⁹ It also specifies that in case of the evacuation of prisoners, they "shall be supplied with sufficient food, clothing and medical care".³⁰
37. Hungary's Military Manual provides that captured combatants and internees shall be protected and cared for.³¹
38. Israel's Manual on the Laws of War provides that "prisoners must be administered proper medical care, at the expense of the detaining State, and a monthly follow-up examination must be made of each detainee's state of health. It is incumbent on the detaining State to provide the prisoners with sufficient food, drink and clothing." The manual also provides that "one of the most important provisions in the Geneva Convention are the rules concerning the right of prisoners . . . to receive packages from [their families] containing food, clothes, medications, ritual articles, literature and means of study".³²
39. Italy's IHL Manual provides that POWs shall be provided with food, clothing and medical assistance.³³
40. Kenya's LOAC Manual provides that "captured combatants shall be cared for".³⁴
41. Madagascar's Military Manual provides that "prisoners of war shall be provided free of charge with food, sufficient clothes, adequate housing and the medical care that their state of health requires".³⁵

²³ Dominican Republic, *Military Manual* (1980), p. 8.

²⁴ Ecuador, *Naval Manual* (1989), § 11.8. ²⁵ France, *LOAC Summary Note* (1992), § 2.1.

²⁶ France, *LOAC Teaching Note* (2000), p. 3.

²⁷ France, *LOAC Manual* (2001), p. 102. ²⁸ France, *LOAC Manual* (2001), p. 73.

²⁹ Germany, *Military Manual* (1992), § 717. ³⁰ Germany, *Military Manual* (1992), § 711.

³¹ Hungary, *Military Manual* (1992), pp. 75 and 99.

³² Israel, *Manual on the Laws of War* (1998), p. 53.

³³ Italy, *IHL Manual* (1991), Vol. II, Chapter III, p. 18, §§ 51–53.

³⁴ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 7.

³⁵ Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 26.

42. Mali's Disciplinary Regulations provides that "sick and wounded prisoners of war are to be put in the care of the health service".³⁶
43. The Military Manual of the Netherlands states that prisoners shall be provided with adequate food, clothing and accommodation.³⁷ It further states that "prisoners of war shall be allowed to receive parcels, in particular foodstuffs, clothing, medical supplies and articles of a recreational character (books, sports outfits, musical instruments)".³⁸
44. The Military Handbook of the Netherlands provides that it is forbidden to take the clothes and food of prisoners of war. It adds that "food shall be sufficient to keep prisoners of war in good health and to prevent loss of weight".³⁹
45. New Zealand's Military Manual provides that "prisoners of war are to receive medical . . . attention, if possible from doctors . . . of their own forces or of their own nationality".⁴⁰ It also provides that prisoners "shall be allowed to receive parcels containing clothing, food, medical supplies, religious and educational material, books, examination papers, musical instruments and the like . . ." and that "they may receive collective relief parcels in accordance with specific agreements between the parties".⁴¹ Concerning internees, the manual states that they "must be provided free of charge with adequate food, water and the facilities to provide themselves with clothing or, if necessary, the clothing itself. Internees shall be medically inspected once a month and shall be provided with adequate medical care free of charge."⁴² In addition, the manual states that "under certain circumstances, internees are allowed to receive individual parcels or collective shipments".⁴³ With respect to non-international conflicts, the manual specifies that "all detainees are to be supplied with food and water and the same safeguards as regards health and hygiene".⁴⁴
46. Nicaragua's Military Manual provides that POWs have the right to receive medical care and shall be treated in terms of food and clothing on the same footing as the detaining power's own troops.⁴⁵
47. Nigeria's Manual on the Laws of War provides that POWs must be cared for and provided with adequate accommodation, food and clothing.⁴⁶ It also provides that POWs shall "be permitted to receive parcels containing food, clothing, medicines, etc."⁴⁷

³⁶ Mali, *Disciplinary Regulations* (1979), Article 36.

³⁷ Netherlands, *Military Manual* (1993), pp. VII-6/VII-7, § 4.

³⁸ Netherlands, *Military Manual* (1993), p. VII-10.

³⁹ Netherlands, *Military Handbook* (1995), p. 7-41.

⁴⁰ New Zealand, *Military Manual* (1992), § 924.

⁴¹ New Zealand, *Military Manual* (1992), § 929.

⁴² New Zealand, *Military Manual* (1992), § 1123(5).

⁴³ New Zealand, *Military Manual* (1992), § 1127.

⁴⁴ New Zealand, *Military Manual* (1992), § 1814(2).

⁴⁵ Nicaragua, *Military Manual* (1996), Article 14(20) and (22-24).

⁴⁶ Nigeria, *Manual on the Laws of War* (undated), § 41.

⁴⁷ Nigeria, *Manual on the Laws of War* (undated), § 43.

48. The Rules for Combatants of the Philippines provides that wounded and sick prisoners must receive medical treatment.⁴⁸

49. Romania's Soldiers' Manual provides that captured combatants and civilians in the hands of a party to the conflict shall be provided with sufficient food and decent accommodation and shall be cared for.⁴⁹

50. Senegal's IHL Manual provides that one of the fundamental guarantees common to the IHL conventions and the UDHR is that "persons deprived of their liberty shall receive, to the same extent as the civilian population, food and drinking water, shall benefit from healthy and hygienic living conditions and shall be protected against the climate and the dangers of military operations". It also provides that "they shall be allowed to receive individual and collective relief".⁵⁰

51. Spain's LOAC Manual provides that "food shall be sufficient in quantity, quality and variety to keep prisoners in good health". It adds that "respect shall be provided for the habitual diet of the prisoners. Thus, prisoners of war shall be involved in the preparation of their meals". It further states that "collective disciplinary measures affecting food are prohibited".⁵¹ The manual restates the right of prisoners to receive a sufficient daily food ration and drinking water.⁵² It also provides that "prisoners of war shall be allowed to receive by post parcels containing foodstuffs, clothing, medical supplies, etc."⁵³ In addition, the manual provides that appropriate clothes and medical attention shall be provided to prisoners of war.⁵⁴

52. Switzerland's Basic Military Manual provides that prisoners of war "shall be quartered under conditions as favourable as those for the forces of the Detaining Power".⁵⁵ It states that "their daily food shall be sufficient in quantity, quality and variety to keep prisoners of war in good health. Account shall be taken of the habitual diet of the prisoners."⁵⁶ The manual also states that "prisoners of war shall be provided with appropriate clothes and shoes, which shall take into account the climate and the nature of work demands".⁵⁷ In addition, "prisoners of war shall be allowed to receive individual or collective parcels".⁵⁸

53. Togo's Military Manual provides that captured enemy combatants shall be cared for and that they have the right to receive relief.⁵⁹

⁴⁸ Philippines, *Rules for Combatants* (1989), § 4.

⁴⁹ Romania, *Soldiers' Manual* (1991), Part III, § 4.

⁵⁰ Senegal, *IHL Manual* (1999), pp. 23 and 24.

⁵¹ Spain, *LOAC Manual* (1996), Vol. I, § 6.4.(i).20.

⁵² Spain, *LOAC Manual* (1996), Vol. I, § 8.5.(b).1.

⁵³ Spain, *LOAC Manual* (1996), Vol. I, § 8.4.(a).6.

⁵⁴ Spain, *LOAC Manual* (1996), Vol. I, §§ 6.4.(i).14 and 6.4.(i).15.

⁵⁵ Switzerland, *Basic Military Manual* (1987), Article 119.

⁵⁶ Switzerland, *Basic Military Manual* (1987), Article 120.

⁵⁷ Switzerland, *Basic Military Manual* (1987), Article 121.

⁵⁸ Switzerland, *Basic Military Manual* (1987), Article 134.

⁵⁹ Togo, *Military Manual* (1996), Fascicule II, pp. 5 and 11.

54. The UK Military Manual provides that “belligerents who intern protected persons must provide, free of charge, for [their] maintenance (including that of their dependants if the latter are without adequate means of support or are unable to earn a living)”.⁶⁰ The manual also stipulates that “the state detaining prisoners of war is bound to provide free of charge for their maintenance and medical care”.⁶¹ It further specifies that prisoners of war and internees “are allowed to receive . . . relief shipments containing, in particular, foodstuffs, clothing, medical supplies, books and objects of a devotional, educational or recreational nature”.⁶²

55. The UK LOAC Manual provides that “PW must be provided with free maintenance and medical attention”.⁶³

56. The US Field Manual reproduces Articles 25–32, 72, 73 GC III and 76, 85, 87, 89–92 GC IV.⁶⁴

57. The US Air Force Pamphlet stresses “the obligations of the Detaining Power in furnishing quarters, food and clothing to POWs”. It points out that “food rations, for example, must be sufficient in quality, quantity and variety to keep POWs in good health and avoid loss of weight or nutritional deficiencies”.⁶⁵

58. The US Instructor’s Guide states that:

Even though you are a prisoner, you must receive sufficient daily rations to ensure your good health. In addition, you must have sanitary living quarters which provide protection from the weather. You are also entitled to medical care . . . You may also receive parcels containing foodstuffs, clothing and educational, religious or recreational materials.⁶⁶

59. The US Operational Law Handbook provides that “there is a legal obligation to provide adequate food, facilities and medical aid to POWs”.⁶⁷

National Legislation

60. Under Argentina’s Draft Code of Military Justice, depriving prisoners of war of indispensable food or necessary medical assistance is a punishable offence.⁶⁸

61. Australia’s War Crimes Act states that “the expression ‘war crime’ includes the following: . . . failure to provide prisoners of war or internees with proper medical care, food or quarters”.⁶⁹

62. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that “prisoners of war are entitled to the

⁶⁰ UK, *Military Manual* (1958), § 56. ⁶¹ UK, *Military Manual* (1958), § 136.

⁶² UK, *Military Manual* (1958), §§ 67 and 190.

⁶³ UK, *LOAC Manual* (1981), Section 8, p. 29, § 7.

⁶⁴ US, *Field Manual* (1956), §§ 101–109, 148–149, 292, 294, 296–299 and 446.

⁶⁵ US, *Air Force Pamphlet* (1976), § 13-4. ⁶⁶ US, *Instructor’s Guide* (1985), p. 11

⁶⁷ US, *Operational Law Handbook* (1993), p. Q-184.

⁶⁸ Argentina, *Draft Code of Military Justice as amended* (1998), Article 274, introducing a new Article 746 in the *Code of Military Justice as amended* (1951).

⁶⁹ Australia, *War Crimes Act* (1945), Section 3(xxx)(b).

following in all cases: . . . to have the opportunity to receive necessary medical care, food, clothes . . . and also to receive material assistance from outside".⁷⁰

63. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁷¹

64. Under Chile's Code of Military Justice, depriving prisoners of war of indispensable food or necessary medical assistance is an "offence against international law".⁷²

65. The Code of Military Justice of the Dominican Republic provides that any member of the armed forces who deprives POWs of necessary food shall be punished by imprisonment.⁷³

66. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 25–32, 72, 73 and 125 GC III and 76, 85, 87, 89–92, 108, 109 and 142 GC IV, as well as any "contravention" of AP II, including violations of Article 5(1)(b) and (c) AP II, are punishable offences.⁷⁴

67. Mexico's Code of Military Justice as amended states that persons who deprive detainees of necessary food or medical care may be imprisoned for up to two years.⁷⁵

68. Nicaragua's Military Penal Code provides that it is an offence not to provide indispensable food and necessary medical care to prisoners of war.⁷⁶

69. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁷⁷

70. Peru's Code of Military Justice provides that depriving prisoners of war of medical care and indispensable food is a punishable offence.⁷⁸

71. Rwanda's Prison Order provides that prisoners should receive food corresponding as far as possible to their usual diet and to their state of health.⁷⁹

72. Spain's Military Criminal Code provides that "military personnel who . . . do not provide indispensable food or necessary medical assistance" to prisoners of war commit a punishable offence against the laws and customs of war.⁸⁰

⁷⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 22(5).

⁷¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁷² Chile, *Code of Military Justice* (1925), Article 261.

⁷³ Dominican Republic, *Code of Military Justice* (1953), Article 201(1).

⁷⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁷⁵ Mexico, *Code of Military Justice as amended* (1933), Article 324(III).

⁷⁶ Nicaragua, *Military Penal Code* (1996), Article 55(4).

⁷⁷ Norway, *Military Penal Code as amended* (1902), § 108.

⁷⁸ Peru, *Code of Military Justice* (1980), Article 95(1).

⁷⁹ Rwanda, *Prison Order* (1961), Article 35.

⁸⁰ Spain, *Military Criminal Code* (1985), Article 77(5).

73. Uruguay's Military Penal Code as amended provides for the punishment of "the violation of the rights of prisoners of war... [such as] not providing necessary food".⁸¹

National Case-law

74. No practice was found.

Other National Practice

75. It is reported that, during the Algerian war of independence, "French prisoners never had any reason to complain about their stay in captivity. In case they were wounded, they received adequate care."⁸²

76. In 1993, Azerbaijan's Ministry of the Interior ordered that troops "in zones of combat, during military operations... must provide care to wounded prisoners".⁸³

77. According to the Report on the Practice of Malaysia, during the communist insurgency in Malaysia, all detainees were given medical examinations and provided with necessary medical treatment.⁸⁴

78. In a memorandum on the strict observance of human rights issued to the Philippine armed forces in 1982, the Philippine Ministry of National Defence provided that medical check-ups were mandatory for persons detained in connection with crimes against national security.⁸⁵

79. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that "Iraqi prisoners of war... will not be denied food, water or medical treatment".⁸⁶ In a subsequent diplomatic note, the US reminded the government of Iraq that "prisoners of war... must be afforded food, water, clothing and every guarantee of hygiene and healthfulness".⁸⁷

80. In a concurrent resolution adopted in 2000, the US Congress expressed its sense concerning the war crimes committed by the Japanese military during the Second World War, in particular the starvation of many US military and civilian prisoners.⁸⁸

81. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in

⁸¹ Uruguay, *Military Penal Code as amended* (1943), Article 58(8).

⁸² La révolution algérienne tient au respect de l'homme, *El Moudjahid*, Vol. 3, p. 57.

⁸³ Azerbaijan, Ministry of the Interior, Command of the Troops of the Interior, Order No. 42, Baku, 9 January 1993, § 3.

⁸⁴ Report on the Practice of Malaysia, 1997, Chapter 5.3.

⁸⁵ Philippines, Ministry of National Defence, Memorandum to the Chief of Staff on Strict Observance of Human Rights, Doc. AGA1 B2-29, 20 March 1982, § 2.

⁸⁶ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

⁸⁷ US, Department of State, Diplomatic Note to Iraq, Washington, 20 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex III, p. 4.

⁸⁸ US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON.RES. 357, 106th Congress, 2nd Session, 19 June 2000.

armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".⁸⁹

82. In 1991, in a document entitled "Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia", the Ministry of Defence of the SFRY (FRY) included the following example: "Accommodation in prisons is absolutely unacceptable: people sleep on concrete floors, are being kept hungry and without minimum conditions for personal hygiene."⁹⁰

83. In 1989, the government of a State involved in a non-international armed conflict assured the ICRC that all captured combatants had received the necessary medical care.⁹¹

84. A memorandum on the responsibilities and obligations applicable to contacts with the local population issued in 1992 by the Ministry of Defence of a State engaged in an international military operation stated that detainees (persons detained because they posed a threat to the armed forces or obstructed their operation and which were not POWs) should be supplied with "sufficient food, water and other necessities of life, including clothing, shelter and medical care".⁹²

85. In 1999, the exchange committees of the parties to a non-international armed conflict signed an agreement concerning the treatment of prisoners, which provided that:

2. Chains and handcuffs should be removed from the prisoners of both sides.
3. Prisoners should be provided with fresh and warm food two times on a daily basis.
4. Prisoners should be put in the detention rooms according to the capacity and spaces of each room, so that they can rest.
- ...
8. Sick prisoners must be taken to hospitals whenever necessary.⁹³

III. Practice of International Organisations and Conferences

United Nations

86. In a resolution adopted in 1992, the UN Security Council demanded that all detainees in camps, prisons and detention centres in Bosnia and Herzegovina "receive humane treatment, including adequate food, shelter and medical care".⁹⁴

⁸⁹ Report on US Practice, 1997, Chapter 5.3.

⁹⁰ SFRY (FRY), Ministry of Defence, Examples of violations of the rules of international law committed by the so-called armed forces of Slovenia, July 1991, § 3(iii).

⁹¹ ICRC archive document.

⁹² ICRC archive document. ⁹³ ICRC archive document.

⁹⁴ UN Security Council, Res. 770, 13 August 1992, § 3.

Other International Organisations

87. In a resolution adopted in 1995 on health and prison, the OAU Conference of African Ministers of Health stated that:

Recalling that there are established international standards for the treatment of detainees, recognised and accepted by States and constituting a useful reference framework for ensuring that detained persons are accorded humane treatment:

1. Urges Member States to be responsive to the health needs of detained persons;
2. Exhorts Member States to pursue their efforts towards a lasting solution to the serious problems posed by overcrowding at places of detention;
3. Calls on Member States to take appropriate measures to ensure that persons deprived of their liberty are given a balanced and adequate diet suited to their needs, as well as an adequate supply of drinking water;
4. Further calls on Member States to provide adequate premises for the accommodation of detained persons in conformity with the requirements of hygiene and housing standards, and to strengthen the health services destined for detained persons by ensuring that the penitentiary system is endowed with adequate food, nutritional conditions, sanitary facilities and medicine;
5. Requests the Secretary-General of OAU with technical support of ICRC to submit to the Conference of African Ministers of Health, a report on the progress made in the area of prison health care in Africa;
6. Urges Member States to ensure that persons deprived of liberty enjoy access to curative health care equal to that accorded to the rest of the population.⁹⁵

International Conferences

88. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that, irrespective of GC III, “the international community has consistently demanded humane treatment for prisoners of war, including . . . provision of an adequate diet and medical care”.⁹⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

89. In the *Krnjelac case* before the ICTY in 1997, the accused was charged with inhuman acts, wilfully causing great suffering and cruel treatment on the basis of inhumane conditions of detention consisting of locking detainees in their cells except when taken to eat or work duties, overcrowded cells with insufficient facilities for bedding and personal hygiene, starvation rations, lack of changes of clothing, absence of heating and lack of proper medical treatment.⁹⁷

90. In its judgement in the *Aleksovski case* in 1999, the ICTY Trial Chamber held, in relation to detention conditions, that:

⁹⁵ OAU, Conference of African Ministers of Health, Res. 7(V), 24–29 April 1995, preamble and §§ 1–6.

⁹⁶ 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.

⁹⁷ ICTY, *Krnjelac case*, Initial indictment, 17 June 1997, § 5.32.

158. The evidence clearly demonstrated that the premises were not appropriate for the number of detainees. The Trial Chamber finds that the inadequate space and heating which made the detention particularly difficult has been established . . .

164. The sanitary conditions could have been considered reasonable for a number of detainees proportional to its prison capacity. However, they were highly unsatisfactory in view of the number of individuals detained throughout the period covered by the indictment . . .

173. The testimony does not show serious food shortage in Kaonik prison. The detainees were fed and the relative lack of food was the result of shortages caused by the war and affected everyone, detainees and non-detainees alike. The testimony moreover in no way demonstrates a desire to starve the detainees or to differentiate the detainees from prison staff . . .

182. The testimony demonstrates that, in general, the detainees did receive [medical] treatment. Although it would probably be considered insufficient in ordinary times, the detainees' general conditions do not appear to have been so bad that they demonstrate a deliberate resolve to cause the persons concerned great suffering or serious injury to body or health. The testimony also demonstrates that the accused usually did whatever was in his power to ensure that the detainees received the necessary medical care or, at the very least, treatment available at the closest medical centre. In the result, the Trial Chamber finds the accused not culpable on this ground.⁹⁸

91. On numerous occasions, the HRC found violations of Article 7 of the 1966 ICCPR (prohibition of torture or cruel, inhuman or degrading treatment or punishment) in respect of prison conditions. For example, the overall approach seems to have been set in *Mukong v. Cameroon* in 1992:

As to the conditions of detention in general, the Committee observes that certain minimum standards regarding the conditions of detention must be observed regardless of a State party's level of development. These include, in accordance with rules 10, 12, 17, 19 and 20 of the Standard Minimum Rules for the Treatment of Prisoners, minimum floor space and cubic content of air for each prisoner, adequate sanitary facilities, clothing which shall be in no manner degrading or humiliating, provision of a separate bed and provision of food of nutritional value adequate for health and strength. It should be noted that these are minimum requirements which the Committee considers should always be observed, even if economic or budgetary considerations may make compliance with these obligations difficult.⁹⁹

92. In the section of its Annual Report 1990–1991 concerning El Salvador, the IACiHR expressed profound concern over the poor prison conditions in which political prisoners were held (overcrowded facilities in bad condition, poor food and medical attention).¹⁰⁰

93. In 1993, in a report on the situation of human rights in Peru, the IACiHR recommended, with reference to a prison to which members of the Tupac Amaru Revolutionary Movement were transferred, that Peru allow into the

⁹⁸ ICTY, *Aleksovski case*, Judgement, 25 June 1999, §§ 158, 164, 173 and 182.

⁹⁹ HRC, *Mukong v. Cameroon*, Views, 8 July 1992, § 9.3.

¹⁰⁰ IACiHR, *Annual Report 1990-1991*, Doc. OEA/Ser.L/V/II.79.rev.1 Doc. 12,22 February 1991, p. 440.

prison clothing, medicine, coats and toiletries required by the inmates to meet their vital needs.¹⁰¹

V. Practice of the International Red Cross and Red Crescent Movement

94. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the detaining power is bound to provide, free of charge, for the maintenance of prisoners of war and for the medical attention required by their state of health”. They further teach that “the daily food and the clothing shall be sufficient to keep prisoners of war in good health (e.g. quantity and quality adapted to climate)” and that “the medical service shall be adapted to the prisoners’ needs (e.g. cleanliness of camp, conditions of health and hygiene, adequate infirmary, monthly medical inspection of prisoners)”. Delegates also teach that POWs shall be allowed to “receive individual parcels or collective shipments”.¹⁰²

95. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that particular care should be taken to ensure that detained persons were provided “satisfactory material conditions with respect to hygiene, food and accommodation”.¹⁰³

96. Since 1995, the ICRC has supplemented the Rwandan government’s provision for the basic needs of detainees. For instance, in 1999, the ICRC provided 11,399 tonnes of food to detainees in civilian prisons and detainees in a military prison to supplement their government-supplied rations; supplied Nutriset-enriched milk to severely malnourished detainees and carried out Body Mass Index tests to assess inmates’ nutritional condition; distributed 321 tonnes of material assistance (mainly hygiene products) and basic medical supplies to detainees; and carried out repairs and renovation work to kitchens, firewood shelters, prison cells, sewers and waste-water and rainwater drainage systems to counter unhealthy conditions of detention.¹⁰⁴

VI. Other Practice

97. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle

¹⁰¹ IACiHR, Report on the Situation of Human Rights in Peru, Doc. OEA/Ser.L/V/II.83 Doc. 31, 12 March 1993, pp. 27–29.

¹⁰² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 668, 705, 706 and 716, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

¹⁰³ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

¹⁰⁴ ICRC, *Annual Report 1999*, Geneva, 2000, p. 93.

that “captured combatants and civilians under the authority of an adverse party . . . have the right . . . to receive relief”.¹⁰⁵

98. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “all persons deprived of their liberty shall be . . . provided with adequate food and drinking water, decent accommodation and clothing, and be afforded safeguards as regards health, hygiene, and working and social conditions”.¹⁰⁶

B. Accommodation for Women Deprived of Their Liberty

Note: For practice concerning the specific needs of women in general, see Chapter 39, section A.

I. Treaties and Other Instruments

Treaties

99. Article 25, fourth paragraph, and Article 29, second paragraph, GC III provide that in any camps in which men and women prisoners are accommodated together, separate dormitories and conveniences shall be provided for women.

100. Article 97, fourth paragraph, and Article 108, second paragraph, GC III provide that women POWs undergoing disciplinary punishment or convicted of an offence shall be confined in separate quarters from men and shall be under the immediate supervision of women.

101. Article 76, fourth paragraph, GC IV provides that women accused of an offence “shall be confined in separate quarters and shall be under the direct supervision of women”.

102. Article 82, third paragraph, GC IV provides that “wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life”.

103. Article 85, fourth paragraph, GC IV provides that:

Whenever it is necessary, as an exceptional and temporary measure, to accommodate women internees who are not members of a family unit in the same place of internment as men, the provision of separate sleeping quarters and sanitary conveniences for the use of such women internees shall be obligatory.

104. Article 124, third paragraph, GC IV provides that “women internees undergoing disciplinary punishment shall be confined in separate quarters from male internees and shall be under the immediate supervision of women”.

¹⁰⁵ ICRC archive document.

¹⁰⁶ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 4 (2), *IRRC*, No. 282, p. 332.

105. Article 75(5) AP I provides that:

Women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women. Nevertheless, in cases where families are detained or interned, they shall, whenever possible, be held in the same place and accommodated as family units.

Article 75 AP I was adopted by consensus.¹⁰⁷

106. Article 5(2)(a) AP II provides, with regard to persons deprived of their liberty for reasons related to the armed conflict, that whether they are interned or detained, "except when men and women of a family are accommodated together, women shall be held in quarters separated from those of men and shall be under the immediate supervision of women". Article 5 AP I was adopted by consensus.¹⁰⁸

Other Instruments

107. Rule 8(a) of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that "men and women shall so far as possible be kept in separate institutions. In institutions which receive both men and women the whole of the premises allocated to women shall be entirely separate."

108. Rule 11(2) of the 1987 European Prison Rules provides that "males and females shall in principle be detained separately, although they may participate together in organised activities as part of an established treatment programme".

109. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 75(5) AP I.

110. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 75(5) AP I.

111. Section 8(e) of the 1999 UN Secretary-General's Bulletin provides that "women whose liberty has been restricted shall be held in quarters separated from men's quarters, and shall be under the immediate supervision of women".

II. National Practice

Military Manuals

112. Argentina's Law of War Manual provides that "women [deprived of their liberty] shall be separated from men, unless they are from the same family".¹⁰⁹

¹⁰⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 250.

¹⁰⁸ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

¹⁰⁹ Argentina, *Law of War Manual* (1989), § 7.07.

113. Australia's Defence Force Manual provides that the sex of female prisoners "must be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities".¹¹⁰

114. Cameroon's Instructors' Manual provides that separate accommodation shall be provided to women prisoners.¹¹¹

115. Canada's LOAC Manual provides that in the treatment of female POWs, "their gender must also be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities".¹¹² Concerning internees, the manual states that "the treatment of internees [is] comparable to [the] provisions of GC III [including Articles 25 and 29] concerned with PWs".¹¹³ It further refers to AP I and specifies that "women whose liberty has been restricted for reasons related to the armed conflict shall be held in quarters separated from men's quarters. They shall be under the immediate supervision of women."¹¹⁴ The manual also provides that women undergoing sentences of imprisonment in occupied territories "must be confined in separate quarters and placed under the direct supervision of women".¹¹⁵ In addition, the manual states that "the authority responsible for the detention or internment of persons during a non-international armed conflict shall, unless family members are detained together, detain men and women separately, with women under the direct supervision of women".¹¹⁶

116. Italy's IHL Manual provides that POWs shall be separated, if possible, according to sex.¹¹⁷

117. The Military Manual of the Netherlands provides that "women must, if possible, be based in separate camps and barracks. In any case, separate dormitories shall be provided for them."¹¹⁸ With respect to non-international armed conflicts in particular, the manual states that "men and women [whose liberty has been restricted] must be separated".¹¹⁹

118. New Zealand's Military Manual provides that the sex of female detainees "must be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities".¹²⁰ It further states that "AP II provides that the authority responsible for detention or internment of persons during a non-international conflict shall, unless family members are detained together, detain men and women separately, with women under the direct supervision of women".¹²¹

¹¹⁰ Australia, *Defence Force Manual* (1994), § 1010.

¹¹¹ Cameroon, *Instructors' Manual* (1992), p. 117, § 431.

¹¹² Canada, *LOAC Manual* (1999), p. 10-3, § 21.

¹¹³ Canada, *LOAC Manual* (1999), p. 11-6, § 49.

¹¹⁴ Canada, *LOAC Manual* (1999), p. 11-8, § 66.

¹¹⁵ Canada, *LOAC Manual* (1999), p. 12, § 62(b).

¹¹⁶ Canada, *LOAC Manual* (1999), p. 17-3, § 26.

¹¹⁷ Italy, *IHL Manual* (1991), Vol. II, Chapter III, § 6.

¹¹⁸ Netherlands, *Military Manual* (1993), p. VII-7.

¹¹⁹ Netherlands, *Military Manual* (1993), p. XI-5.

¹²⁰ New Zealand, *Military Manual* (1992) § 916.

¹²¹ New Zealand, *Military Manual* (1992), § 1814(3).

119. Senegal's IHL Manual provides that one of the fundamental guarantees common to IHL conventions and the UDHR is that, in the treatment of persons deprived of their liberty, "except when men and women of the same family are accommodated together, women shall be held in separate quarters and under the immediate supervision of women".¹²²

120. Spain's LOAC Manual provides that detained women shall be housed separately.¹²³ According to the manual, the same rule applies to interned women.¹²⁴

121. Sweden's IHL Manual considers that "the fundamental guarantees for persons in the power of one party to the conflict", as contained in Article 75 AP I, is part of customary international law.¹²⁵

122. Switzerland's Basic Military Manual provides that "women shall be provided separate dormitories".¹²⁶

123. The UK Military manual provides that "when men and women prisoners of war are accommodated in the same camp, separate sleeping quarters must be provided".¹²⁷

124. The US Field Manual reproduces Articles 25 GC III and 76 and 124 GC IV.¹²⁸

125. The US Soldier's Manual provides that "it is particularly important to treat every captured or detained female with appropriate respect".¹²⁹

National Legislation

126. Argentina's Draft Code of Military Justice provides a penalty for members of the armed forces who, in the event of an armed conflict, "breach the provisions governing the accommodation of women or families".¹³⁰

127. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹³¹

128. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 25, 29, 97 and 108 GC III and 76, 82, 85 and 124 GC IV, and of API, including violations of Article 75(5) AP I, as well as any "contravention" of AP II, including violations of Article 5(2)(a) AP II, are punishable offences.¹³²

¹²² Senegal, *IHL Manual* (1999), pp. 3 and 24.

¹²³ Spain, *LOAC Manual* (1996), Vol. I, §§ 6.4.(b).1 and 6.4.(f).1.

¹²⁴ Spain, *LOAC Manual* (1996), Vol. I, § 6.8.(f).2.

¹²⁵ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

¹²⁶ Switzerland, *Basic Military Manual* (1987), Article 119.

¹²⁷ UK, *Military Manual* (1958), § 148. ¹²⁸ US, *Field Manual* (1956), §§ 101, 331 and 446.

¹²⁹ US, *Soldier's Manual* (1984), p. 14.

¹³⁰ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).

¹³¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹³² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

129. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".¹³³

130. Pakistan's Prisons Act stipulates that separate cells shall be provided for female prisoners.¹³⁴

131. Rwanda's Prison Order states that women are to be housed separately from men.¹³⁵

National Case-law

132. No practice was found.

Other National Practice

133. Indian regulations provide that detained women may not be housed with men, and that, where possible, women should be looked after by female police officers.¹³⁶

134. An Indian police order dating from 1984 states that detained women shall be looked after by female police officers.¹³⁷

135. The Report on the Practice of Jordan asserts that "Article 75 AP I embodies customary law".¹³⁸

136. Based on a memo on accommodation in detention camps dating from 1950, the Report on the Practice of Malaysia states that during the communist insurgency, women and children were detained in separate facilities. Women were guarded exclusively by female guards.¹³⁹

137. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".¹⁴⁰

¹³³ Norway, *Military Penal Code as amended* (1902), § 108.

¹³⁴ Pakistan, *Prisons Act* (1894), Article 27.

¹³⁵ Rwanda, *Prison Order* (1961), Articles 28–29.

¹³⁶ India, Ministry of Home Affairs, Circular on the treatment of women demonstrators by the police, Doc. No. VI-25013/4/81-GPA.II, 4 April 1981, Report on the Practice of India, 1997, Chapter 5.3.

¹³⁷ India, Commissioner of Police, Standing Order No. 93, Arrest of Women, Doc. No. 9609-9909/C&T-AC-II, 5 May 1984, Article 9, Report on the Practice of India, 1997, Chapter 5.3.

¹³⁸ Report on the Practice of Jordan, 1997, Chapter 5.6.

¹³⁹ Report on the Practice of Malaysia, 1997, Chapter 5.3, referring to Memo on Accommodation in Detention Camps, December 1950, Archives ref: (56) in DCHQ/187/50.

¹⁴⁰ Report on US Practice, 1997, Chapter 5.3.

*III. Practice of International Organisations and Conferences**United Nations*

138. In a resolution adopted in 1980 on measures to prevent the exploitation of prostitution, ECOSOC appealed to governments to pay particular attention to the conditions of detention of women, especially in relation to their physical security.¹⁴¹

139. In a resolution adopted in 1984 on physical violence against detained women that is specific to their sex, ECOSOC called on member States to take measures to eradicate physical violence against detained women and to submit their views on the matter to the UN Secretary-General.¹⁴² It repeated this request in resolutions adopted in 1986 and 1990.¹⁴³

Other International Organisations

140. No practice was found.

International Conferences

141. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

142. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

143. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “women’s quarters shall be separated from men’s quarters. They shall be under the immediate supervision of women.”¹⁴⁴

VI. Other Practice

144. No practice was found.

C. Accommodation for Children Deprived of Their Liberty

Note: For practice concerning the specific needs of children in general, see Chapter 39, section B.

¹⁴¹ ECOSOC, Res. 1980/4, 16 April 1980, §§ 3–4.

¹⁴² ECOSOC, Res. 1984/19, 24 May 1984, §§ 1–3.

¹⁴³ ECOSOC, Res. 1986/29, 23 May 1986, §§ 2–5; Res. 1990/5, 24 May 1990, §§ 1–4.

¹⁴⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 689, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

I. Treaties and Other Instruments

Treaties

145. Article 76, fifth paragraph, GC IV provides that, in the treatment of protected persons accused of an offence, “proper regard shall be paid to the special treatment due to minors” who are detained.

146. Article 82, second and third paragraphs, GC IV provides that:

Throughout the duration of their internment, members of the same family, and in particular parents and children, shall be lodged together in the same place of internment, except when separation of a temporary nature is necessitated for reasons of employment or health or for the purposes of enforcement of the provisions of Chapter IX of the present Section. Internees may request that their children who are left at liberty without parental care shall be interned with them.

Wherever possible, interned members of the same family shall be housed in the same premises and given separate accommodation from other internees, together with facilities for leading a proper family life.

147. Article 10(2)(b) of the 1966 ICCPR provides that “accused juveniles shall be separated from adults”. Article 10(3) provides that “juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status”.

148. Article 77(4) AP I provides that, “if arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5”. Article 77 AP I was adopted by consensus.¹⁴⁵

149. Article 37(c) of the 1989 UN Convention on the Rights of the Child provides that “every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so”.

150. Upon ratification of the 1989 Convention on the Rights of the Child, Australia stated that “the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families”.¹⁴⁶

151. Upon ratification of the 1989 Convention on the Rights of the Child, Canada reserved the right “not to detain children separately from adults where this is not appropriate or feasible”.¹⁴⁷

152. Upon ratification of the 1989 Convention on the Rights of the Child, Iceland stated that:

¹⁴⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

¹⁴⁶ Australia, Reservation made upon ratification of the Convention on the Rights of the Child, 17 December 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 12.

¹⁴⁷ Canada, Reservation made upon ratification of the Convention on the Rights of the Child, 13 December 1991, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 14.

The separation of juvenile prisoners from adult prisoners is not obligatory under Icelandic law. However, the law relating to prisons and imprisonment provides that when deciding in which penal institution imprisonment is to take place account should be taken of, *inter alia*, the age of the prisoner. In light of the circumstances prevailing in Iceland it is expected that decisions on the imprisonment of juveniles will always take account of the juvenile's best interests.¹⁴⁸

153. Upon ratification of the 1989 Convention on the Rights of the Child, Japan reserved the right not to apply Article 37(c) "considering the fact that in Japan as regards persons deprived of liberty, those who are below 20 years of age are to be generally separated from those who are of 20 years of age and over under its national law".¹⁴⁹

154. Upon ratification of the 1989 Convention on the Rights of the Child, New Zealand reserved the right not to apply Article 37(c) "in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable" and "where mixing is considered to be of benefit to the persons concerned".¹⁵⁰

155. Upon ratification of the 1989 Convention on the Rights of the Child, the UK reserved the right not to apply Article 37(c) "where at any time there is a lack of suitable accommodation or adequate facilities for a particular individual in any institution in which young offenders are detained, or where the mixing of adults and children is deemed to be mutually beneficial".¹⁵¹

Other Instruments

156. Rule 8(d) of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that "young prisoners shall be kept separate from adults".

157. Rule 11(4) of the 1987 European Prison Rules provides that "young prisoners shall be detained under conditions which as far as possible protect them from harmful influences and which take account of the needs peculiar to their age".

158. Rule 13.4 of the 1985 Standard Minimum Rules for the Administration of Juvenile Justice provides that "juveniles under detention pending trial shall be kept separate from adults and shall be detained in a separate institution or in a separate part of an institution also holding adults".

159. Rule 29 of the 1990 Rules for the Protection of Juveniles Deprived of their Liberty provides that "in all detention facilities juveniles should be separated from adults, unless they are members of the same family".

¹⁴⁸ Iceland, Declarations made upon ratification of the Convention on the Rights of the Child, 28 October 1992, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 20.

¹⁴⁹ Japan, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 22 April 1994, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 22.

¹⁵⁰ New Zealand, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 April 1993, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 27.

¹⁵¹ UK, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 16 December 1991, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 31.

160. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 77(4) AP I.

161. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 77(4) AP I.

162. According to Principles 17(4) of the 1998 Guiding Principles on Internal Displacement, “members of internally displaced families whose personal liberty has been restricted by internment or confinement in camps shall have the right to remain together”.

163. Section 8(f) of the 1999 UN Secretary-General’s Bulletin provides that:

In cases where children who have not attained the age of sixteen years take a direct part in hostilities and are arrested, detained or interned by the United Nations force, they shall continue to benefit from special protection. In particular, they shall be held in quarters separate from the quarters of adults, except when accommodated with their families.

II. National Practice

Military Manuals

164. Argentina’s Law of War Manual (1969) provides that:

During internment, members of the same family, and in particular parents and children, shall be held in the same place of internment . . .

Internees can request that their children, left at liberty without the supervision of their parents, shall be interned with them.

As much as possible, interned members of the same family shall be accommodated in the same place, and shall be housed separately from the other internees. They shall be afforded the necessary facilities for leading a normal family life.¹⁵²

165. Argentina’s Law of War Manual (1989) provides that arrested children shall be lodged together with their families in the same place of internment.¹⁵³

It further provides that, in non-international armed conflict, “children shall receive assistance . . . in order to reunite them with their families when they are temporarily separated from them”.¹⁵⁴

166. Australia’s Defence Force Manual specifies that “in case of arrest, children should be kept in separate quarters from those of adults”.¹⁵⁵

167. Cameroon’s Instructors’ Manual provides that separate accommodation shall be provided to children.¹⁵⁶

¹⁵² Argentina, *Law of War Manual* (1969), § 4.022.

¹⁵³ Argentina, *Law of War Manual* (1989), § 4.12.

¹⁵⁴ Argentina, *Law of War Manual* (1989), § 7.04.

¹⁵⁵ Australia, *Defence Force Manual* (1994), § 947.

¹⁵⁶ Cameroon, *Instructors’ Manual* (1992), p. 117, § 431.

168. Canada's LOAC Manual states that, wherever possible, interned "family members must be housed in the same place and premises".¹⁵⁷ With respect to non-international armed conflicts, the manual provides that "family members are detained together".¹⁵⁸

169. Germany's Military Manual provides that "the detaining power shall ensure that members of the same family are lodged together in the same place of internment".¹⁵⁹

170. Spain's LOAC Manual provides that children under six years shall be housed with their mothers.¹⁶⁰ It also states, regarding the placing of prisoners in camps, that "family sections" are provided "in order to house family groups".¹⁶¹

171. The UK Military Manual states that "the general provisions of [GC IV] lay down, *inter alia*, . . . that as far as possible families must not be separated but must be given separate accommodation as family units".¹⁶²

172. The US Field Manual reproduces Article 76 GC IV.¹⁶³

National Legislation

173. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹⁶⁴

174. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 76 and 82 GC IV, and of AP I, including violations of Article 77(4) AP I, are punishable offences.¹⁶⁵

175. Nicaragua's Constitution provides that minor offenders shall not be detained in "centres of criminal readaptation" but shall be accommodated in "centres under the responsibility of a special organism".¹⁶⁶

176. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".¹⁶⁷

177. Pakistan's Prisons Act provides that separate cells shall be provided for prisoners under 21 years of age.¹⁶⁸

¹⁵⁷ Canada, *LOAC Manual* (1999), p. 11-6, § 51.

¹⁵⁸ Canada, *LOAC Manual* (1999), p. 17-3, § 26.

¹⁵⁹ Germany, *Military Manual* (1992), § 593.

¹⁶⁰ Spain, *LOAC Manual* (1996), Vol. I, § 6.4.(f).1.

¹⁶¹ Spain, *LOAC Manual* (1996), Vol. I, § 6.8.f.(1).

¹⁶² UK, *Military Manual* (1958), § 56.

¹⁶³ US, *Field Manual* (1956), § 446.

¹⁶⁴ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹⁶⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁶⁶ Nicaragua, *Constitution* (1987), Article 35.

¹⁶⁷ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁶⁸ Pakistan, *Prisons Act* (1894), Article 27.

178. The Act on Child Protection of the Philippines states that any child involved in an armed conflict, whether as a spy, courier, guide or combatant, shall be entitled to separate detention facilities, free legal assistance, notice of arrest to parents and release of the child to the social services department for protective custody.¹⁶⁹

179. Rwanda's Prison Order states that prisoners under the age of 18 are to be held separately.¹⁷⁰

National Case-law

180. No practice was found.

Other National Practice

181. The Report on the Practice of Syria asserts that Syria considers Article 77 AP I to be part of customary international law.¹⁷¹

182. On the basis of a memo on accommodation in detention camps dating from 1950, the Report on the Practice of Malaysia states that during the period of the communist insurgency, women and children were detained in separate facilities.¹⁷²

183. In 1993, Peru informed the CRC that under Peruvian law, "children tried for terrorist activities must be detained separately from adults".¹⁷³

184. In 1993, in its initial report to the CRC, the Philippines stated that "in any case where a child is arrested for reasons related to armed conflict, he or she shall be entitled to separate detention from adults".¹⁷⁴

185. In presenting his government's report to the HRC in 1985, the UK representative explained that while a derogation from the provision on housing detained minors separately from adults had been necessitated by the large numbers of juveniles convicted of terrorist offences, the situation had been remedied by the construction of two new juvenile detention centres.¹⁷⁵

III. Practice of International Organisations and Conferences

186. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

187. In its General Comment on Article 10 of the 1966 ICCPR (humane treatment of persons deprived of their liberty), the HRC held that:

¹⁶⁹ Philippines, *Act on Child Protection* (1992), Article X.

¹⁷⁰ Rwanda, *Prison Order* (1961), Articles 28–29.

¹⁷¹ Report on the Practice of Syria, 1997, Chapter 5.3.

¹⁷² Report on the Practice of Malaysia, 1997, Chapter 5.3, referring to Memo on Accommodation in Detention Camps, December 1950, Archives ref: (56) in DCHQ/187/50.

¹⁷³ Peru, Statement before the CRC, UN Doc. CRC/C/SR.84, 30 September 1993, § 25.

¹⁷⁴ Philippines, Initial report to the CRC, UN Doc. CRC/C/3/Add.23, 3 November 1993, § 203.

¹⁷⁵ UK, Statement before the HRC, UN Doc. CCPR/C/SR.594, 9 April 1985, § 23.

Moreover, the Committee notes that in the reports of some States parties no information has been provided concerning the treatment accorded to accused juvenile persons and juvenile offenders. Article 10, paragraph 2 (b), provides that accused juvenile persons shall be separated from adults. The information given in reports shows that some States parties are not paying the necessary attention to the fact that this is a mandatory provision of the Covenant . . . Lastly, under article 10, paragraph 3, juvenile offenders shall be segregated from adults and be accorded treatment appropriate to their age and legal status in so far as conditions of detention are concerned, such as shorter working hours and contact with relatives, with the aim of furthering their reformation and rehabilitation.¹⁷⁶

188. In 1979, in a report on the situation of human rights in Nicaragua, the IACiHR censured the Nicaraguan government for its failure to adhere to the requirements of the Nicaraguan Constitution which provides that minors should not be incarcerated with adults.¹⁷⁷

V. Practice of the International Red Cross and Red Crescent Movement

189. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “children’s quarters shall be separated from adults’ quarters, except where families are accommodated as family units”.¹⁷⁸

VI. Other Practice

190. No practice was found.

D. Location of Internment and Detention Centres

I. Treaties and Other Instruments

Treaties

191. Article 22, first paragraph, GC III provides that “prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness”.

192. Article 23, first paragraph, GC III provides that “no prisoner of war may at any time be sent to, or detained in areas where he may be exposed to the fire of the combat zone”.

¹⁷⁶ HRC, General Comment No. 21 (Article 10 ICCPR), 10 April 1992, § 13.

¹⁷⁷ IACiHR, Report on the situation of human rights in Nicaragua, Doc. OEA/Ser.L/V/II.45 Doc. 16 rev. 1, 17 November 1979, p. 64.

¹⁷⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 690, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

193. Article 83, first paragraph, GC IV provides that “the Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war”.

194. Article 85, first paragraph, GC IV provides that:

The Detaining Power is bound to take all necessary and possible measures to ensure that protected persons shall, from the outset of their internment, be accommodated in buildings or quarters which afford every possible safeguard as regards hygiene and health, and provide efficient protection against the rigours of the climate and the effects of the war. In no case shall permanent places of internment be situated in unhealthy areas or in districts, the climate of which is injurious to the internees.

195. Article 5(1)(b) AP II provides that persons whose liberty has been restricted shall be “afforded safeguards as regards health and hygiene”. Article 5(2)(c) provides that “places of internment or detention shall not be located close to the combat zone”. Article 5 AP II was adopted by consensus.¹⁷⁹

Other Instruments

196. Article 4(6) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “all persons deprived of their liberty for reasons related to the armed conflict shall . . . be confined in a secure place”.

197. Section 8(b) of the 1999 UN Secretary-General’s Bulletin provides that detained persons “shall be held in secure and safe premises which provide all possible safeguards of hygiene and health, and shall not be detained in areas exposed to the dangers of the combat zone”.

II. National Practice

Military Manuals

198. Argentina’s Law of War Manual (1969) provides that “prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness”.¹⁸⁰

199. Argentina’s Law of War Manual (1989) provides that “prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness”. It adds that “no prisoners may be detained in areas where they may be exposed to the fire of the combat zone”.¹⁸¹

200. Australia’s Defence Force Manual states that “PW camps must not be located near military objectives with the intention of securing exemption from attack for those objectives”.¹⁸² It further states that “PWs may only be interned

¹⁷⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

¹⁸⁰ Argentina, *Law of War Manual* (1969), § 2.019.

¹⁸¹ Argentina, *Law of War Manual* (1989), § 3.12.

¹⁸² Australia, *Defence Force Manual* (1994), § 1014.

on land and centres of internment must be established in healthy areas, with prisoners having facilities guaranteeing hygiene and health".¹⁸³

201. Belgium's Law of War Manual provides that POWs shall be evacuated as soon as possible to camps located away from the combat zone so as to be out of danger.¹⁸⁴

202. Belgium's Teaching Manual for Soldiers provides that "to the extent possible, POWs must be kept away from combat zones and from possible violence by the hostile population".¹⁸⁵

203. Cameroon's Instructors' Manual provides that internment centres "shall be located at a sufficient distance between military objectives and civilian or sanitary objects". It also states that "prisoners of war camps shall not be improvised... and guarantee sufficient conditions of hygiene and healthfulness".¹⁸⁶

204. Canada's LOAC Manual provides that "POWs may only be interned on land. Centres of internment must be established in healthy areas, with POWs having facilities guaranteeing hygiene and healthfulness."¹⁸⁷ Concerning the treatment of internees, the manual stresses that "internment camps must not be located in areas particularly exposed to the dangers of war".¹⁸⁸ With respect to non-international armed conflicts, the manual provides that "places of internment or detention shall not be located close to the combat zone. When the place of detention becomes particularly exposed to danger from the conflict, persons held shall be evacuated."¹⁸⁹

205. Colombia's Basic Military Manual provides that, in both international and non-international armed conflicts, internment and detention centres shall be located in secure areas, away from the combat zones.¹⁹⁰

206. Croatia's Commanders' Manual states that POW and internment camps must not be situated in combat zones.¹⁹¹

207. France's LOAC Manual provides that "prisoners of war shall not be needlessly exposed to the dangers of combat".¹⁹² It also states that "the regulation of treatment of civilian internees is very similar to that of prisoners of war".¹⁹³

208. France's LOAC Summary Note provides that POW camps and civilian internment camps must not be exposed to the combat zone.¹⁹⁴

¹⁸³ Australia, *Defence Force Manual* (1994), § 1016.

¹⁸⁴ Belgium, *Law of War Manual* (1983), p. 45.

¹⁸⁵ Belgium, *Teaching Manual for Soldiers* (undated), p. 20.

¹⁸⁶ Cameroon, *Instructors' Manual* (1992), p. 117, § 431.

¹⁸⁷ Canada, *LOAC Manual* (1999), p. 10-3, § 32.

¹⁸⁸ Canada, *LOAC Manual* (1999), p. 11-6, § 52.

¹⁸⁹ Canada, *LOAC Manual* (1999), p. 17-3, § 26.

¹⁹⁰ Colombia, *Basic Military Manual* (1995), p. 21.

¹⁹¹ Croatia, *Commanders' Manual* (1992), §§ 99 and 100.

¹⁹² France, *LOAC Manual* (2001), p. 102. ¹⁹³ France, *LOAC Manual* (2001), p. 73.

¹⁹⁴ France, *LOAC Summary Note* (1992), § 2.1.

209. France's LOAC Teaching Note states that internment camps for POWs "must not be exposed to the combat zone".¹⁹⁵
210. Germany's Military Manual provides that "POW camps shall not be situated in danger zones".¹⁹⁶
211. Israel's Manual on the Laws of War provides that "the detaining state must evacuate the prisoners from the front as soon as possible, to get them out of harm's way".¹⁹⁷
212. Italy's IHL Manual provides that POWs shall be located far enough from the combat line and in healthy areas.¹⁹⁸
213. Madagascar's Military Manual provides that "PW camps shall not be situated in combat zones".¹⁹⁹
214. Mali's Army Regulations provides that "prisoners shall be evacuated as soon as possible to a gathering point located far enough from the combat zone. While waiting for their evacuation, they should not be unnecessarily exposed to danger."²⁰⁰
215. The Military Manual of the Netherlands provides that "camps must not be located in areas where they may be exposed to the fire of the combat zone".²⁰¹ With respect to non-international armed conflicts in particular, the manual states that "detention and internment camps must not be located too close to the combat zone".²⁰²
216. New Zealand's Military Manual provides that "camps must not be located near military objectives with the intention of securing exemption from attack for these objectives, and must be provided with the same protective measures against aerial attack as is the civilian population". It adds that "the practice, common during World War I, of placing camps near military objectives as prophylactic reprisals on the ground that the enemy's own forces had indulged in illegal activities is clearly forbidden".²⁰³ The manual further points out that "internment camps must not be located in areas particularly exposed to the dangers of war".²⁰⁴ With respect to non-international armed conflicts, the manual states that according to AP II, "places of internment or detention shall not be located close to the combat zone".²⁰⁵
217. Senegal's IHL Manual provides that one of the fundamental guarantees common to IHL conventions and the UDHR is that detention centres shall

¹⁹⁵ France, *LOAC Teaching Note* (2000), p. 3.

¹⁹⁶ Germany, *Military Manual* (1992), § 714.

¹⁹⁷ Israel, *Manual on the Laws of War* (1998), p. 52.

¹⁹⁸ Italy, *IHL Manual* (1991), Vol. II, Chapter III, § 6 and Chapter XVI, § 118.

¹⁹⁹ Madagascar, *Military Manual* (1994), No. 8-0, § 01.

²⁰⁰ Mali, *Army Regulations* (1979), Article 36.

²⁰¹ Netherlands, *Military Manual* (1993), p. VII-6, § 4.

²⁰² Netherlands, *Military Manual* (1993), p. XI-5.

²⁰³ New Zealand, *Military Manual* (1992), § 922(1), note 65.

²⁰⁴ New Zealand, *Military Manual* (1992), § 1123(3).

²⁰⁵ New Zealand, *Military Manual* (1992), § 1814(3).

not be located close to trouble zones. Persons deprived of their liberty shall be evacuated when the place becomes particularly dangerous.²⁰⁶

218. Spain's LOAC Manual provides that detention centres must be located in an area far enough from the combat zones.²⁰⁷

219. Switzerland's Basic Military Manual provides that "internment shall always take place in premises located on land, where the climate is favourable and where security conditions are sufficient".²⁰⁸

220. The UK Military Manual states that "internment camps must be outside the combat zone".²⁰⁹ It also provides that "prisoners of war may be interned only in premises which are on land and which are in every way healthy and hygienic".²¹⁰

221. The UK LOAC Manual states that "PW camps must be located on land, not in prison ships, and afford every guarantee of hygiene and health".²¹¹

222. The US Field Manual states that "the Detaining Power shall not set up places of internment in areas particularly exposed to the dangers of war".²¹² It also states that "prisoners of war may be interned only in premises located on land and affording every guarantee of hygiene and healthfulness".²¹³

223. The US Air Force Pamphlet requires "internment only on land and not in unhealthy areas".²¹⁴

National Legislation

224. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the Armed Forces of Azerbaijan, the appropriate authorities and governmental bodies are not allowed to keep prisoners of war in the territory of Azerbaijan in the zone of hostilities".²¹⁵ It further provides that prisoners of war are entitled "to be kept in buildings situated in a zone ensuring protection of security, hygiene and health".²¹⁶

225. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²¹⁷

226. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 22 and 23

²⁰⁶ Senegal, *IHL Manual* (1999), pp. 3 and 24.

²⁰⁷ Spain, *LOAC Manual* (1996), Vol. I, § 6.4.a.

²⁰⁸ Switzerland, *Basic Military Manual* (1987), Article 118.

²⁰⁹ UK, *Military Manual* (1958), § 147. ²¹⁰ UK, *Military Manual* (1958), § 146.

²¹¹ UK, *LOAC Manual* (1981), Section 8, p. 30, § 16(a).

²¹² US, *Field Manual* (1956), § 290. ²¹³ US, *Field Manual* (1956), § 98.

²¹⁴ US, *Air Force Pamphlet* (1976), § 13-4.

²¹⁵ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 19.

²¹⁶ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 22(4).

²¹⁷ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

GC III and 83 and 85 GC IV, as well as any “contravention” of AP II, including violations of Article 5(1)(b) and (2)(c) AP II, are punishable offences.²¹⁸

227. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment”.²¹⁹

National Case-law

228. No practice was found.

Other National Practice

229. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US advised the government of Iraq that “Iraqi prisoners of war... will not be exposed to danger... [and] will be safeguarded against harm during combat operations”.²²⁰

230. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that “Iraqi authorities have continued to ignore the standards of the Geneva conventions in blatant disregard for international law. They have... deliberately exposed [coalition prisoners of war] to combat danger.”²²¹

231. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.²²²

232. In 1977, in a meeting with the ICRC, a government official of a State involved in an internal armed conflict initially denied that the armed forces took prisoners, stating that combatants of the adverse party were simply disarmed and sent home. He subsequently admitted that a limited number of prisoners were detained in various areas throughout the combat zone. The ICRC pointed out that, according to the Geneva Conventions, prisoners must be located far enough from the dangers of war and interned in one or more safe areas.²²³

²¹⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²¹⁹ Norway, *Military Penal Code as amended* (1902), § 108.

²²⁰ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

²²¹ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 2; see also Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991.

²²² Report on US Practice, 1997, Chapter 5.3. ²²³ ICRC archive document.

III. Practice of International Organisations and Conferences

233. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

234. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

235. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

No prisoner of war may at any time be sent to or detained in areas where he may be exposed to combat actions. Prisoners of war interned in unhealthy areas, or where the climate is injurious for them, shall be removed as soon as possible to a more favourable climate . . . Prisoner of war camps shall not be located in areas exposed to combat action.²²⁴

236. In a press release in 1985, the ICRC stated that the closure of the Insar camp in southern Lebanon and the subsequent transfer by the Israeli occupation authorities of more than 1,000 of the inmates to Israel was a violation of Articles 49 and 76 GC IV.²²⁵

237. In 1992, in a letter to the authorities of a State involved in a non-international armed conflict, the ICRC recalled the obligation to detain prisoners in places protected from the hostilities.²²⁶

238. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "persons deprived of their freedom, both civilians and military personnel, . . . must not be detained in the vicinity of combat zones".²²⁷

239. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that particular care should be taken to ensure that persons are "detained at locations where their safety is guaranteed".²²⁸

²²⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 671, 672 and 675, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

²²⁵ ICRC, Press Release No. 1504, South Lebanon: Closure of Insar Camp, 4 April 1985.

²²⁶ ICRC archive document.

²²⁷ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

²²⁸ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

VI. Other Practice

240. Between 1985 and 1986, the leaders of several armed opposition groups involved in the same non-international armed conflict suggested at different times the creation of safe areas, either on national or third State territory, where captured combatants could be detained and their safety ensured.²²⁹

E. Pillage of the Personal Belongings of Persons Deprived of Their Liberty

Note: For practice concerning pillage in general, see Chapter 16, section D.

*I. Treaties and Other Instruments**Treaties*

241. Article 18 GC III provides that:

All effects and articles of personal use, except arms, horses, military equipment and military documents, shall remain in the possession of prisoners of war, likewise their metal helmets and gas masks and like articles issued for personal protection. Effects and articles used for their clothing or feeding shall likewise remain in their possession, even if such effects and articles belong to their regulation military equipment.

At no time should prisoners of war be without identity documents. The Detaining Power shall supply such documents to prisoners of war who possess none.

Badges of rank and nationality, decorations and articles having above all a personal or sentimental value may not be taken from prisoners of war.

Sums of money carried by prisoners of war may not be taken away from them except by order of an officer, and after the amount and particulars of the owner have been recorded in a special register and an itemized receipt has been given, legibly inscribed with the name, rank and unit of the person issuing the said receipt. Sums in the currency of the Detaining Power, or which are changed into such currency at the prisoner's request, shall be placed to the credit of the prisoner's account as provided in Article 64.

The Detaining Power may withdraw articles of value from prisoners of war only for reasons of security: when such articles are withdrawn, the procedure laid down for sums of money impounded shall apply.

Such objects, likewise sums taken away in any currency other than that of the Detaining Power and the conversion of which has not been asked for by the owners, shall be kept in the custody of the Detaining Power and shall be returned in their initial shape to prisoners of war at the end of their captivity.

242. Article 97 GC IV provides that:

Internees shall be permitted to retain articles of personal use. Monies, cheques, bonds, etc., and valuables in their possession may not be taken from them except in accordance with established procedure. Detailed receipts shall be given therefor.

²²⁹ ICRC archive documents.

The amounts shall be paid into the account of every internee as provided for in Article 98. Such amounts may not be converted into any other currency unless legislation in force in the territory in which the owner is interned so requires or the internee gives his consent.

Articles which have above all a personal or sentimental value may not be taken away.

A woman internee shall not be searched except by a woman.

On release or repatriation, internees shall be given all articles, monies or other valuables taken from them during internment and shall receive in currency the balance of any credit to their accounts kept in accordance with Article 98, with the exception of any articles or amounts withheld by the Detaining Power by virtue of its legislation in force. If the property of an internee is so withheld, the owner shall receive a detailed receipt.

Family or identity documents in the possession of internees may not be taken away without a receipt being given. At no time shall internees be left without identity documents. If they have none, they shall be issued with special documents drawn up by the detaining authorities, which will serve as their identity papers until the end of their internment.

Internees may keep on their persons a certain amount of money, in cash or in the shape of purchase coupons, to enable them to make purchases.

243. Article 4(2)(g) AP II provides for the prohibition of acts of pillage against “all persons who do not take a direct part or who have ceased to take part in hostilities”. Article 4 AP II was adopted by consensus.²³⁰

Other Instruments

244. Section 7.2 of the 1999 UN Secretary-General’s Bulletin states that pillage of persons *hors de combat* is prohibited.

II. National Practice

Military Manuals

245. Canada’s Code of Conduct provides that “the personal property of . . . detained persons . . . shall not be taken”.²³¹

246. The Military Manual of the Netherlands provides that the appropriation of personal property of POWs is an ordinary breach of IHL.²³²

247. The US Instructor’s Guide states that “in addition to the grave breaches of the Geneva Conventions, the following acts are further examples of war crimes: . . . taking and keeping a captured enemy soldier’s personal property”.²³³

²³⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

²³¹ Canada, *Code of Conduct* (2001), Rule 8, § 2.

²³² Netherlands, *Military Manual* (1993), p. IX-6.

²³³ US, *Instructor’s Guide* (1985), pp. 13 and 14.

National Legislation

248. Argentina's Draft Code of Military Justice punishes any soldier who "plunders the . . . prisoner of war or civilian internee".²³⁴

249. Australia's Defence Force Discipline Act, in an article on looting, provides that:

A person, being a defence member or a defence civilian, who, in the course of operations against the enemy, or in the course of operations undertaken by the Defence Force for the preservation of law and order or otherwise in aid of the civil authorities –

...
takes any property from the body of a person . . . captured in those operations . . . is guilty of [a punishable] offence.²³⁵

250. Bulgaria's Penal Code as amended provides that any "person who, on the battlefield, takes away objects from . . . a captive . . . person, with the intention to unlawfully appropriate them" commits a punishable crime.²³⁶

251. Under Chad's Code of Military Justice, taking property from prisoners of war is a criminal offence.²³⁷

252. Chile's Code of Military Justice provides for a prison sentence for "anyone who plunders the clothing or other objects belonging to . . . a prisoner of war in order to appropriate them".²³⁸

253. Colombia's Penal Code imposes a sanction on "anyone who, during an armed conflict, despoils . . . a protected person".²³⁹

254. Cuba's Military Criminal Code punishes "anyone who, in areas of military operations, for personal gain, plunders the money or other belongings of . . . prisoners".²⁴⁰

255. El Salvador's Code of Military Justice provides that "a soldier who plunders the clothes or other personal effects of . . . a prisoner of war in order to appropriate them" commits a punishable offence.²⁴¹

256. Under Greece's Military Penal Code, "the soldier who takes money or other belongings away from a prisoners of war" is to be punished.²⁴²

257. Iraq's Military Penal Code states that "every person who, with the intent to appropriate for himself or unjustifiably, . . . takes the property of the prisoner whom he is ordered to guard, shall be punished".²⁴³

²³⁴ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(8) in the *Code of Military Justice as amended* (1951).

²³⁵ Australia, *Defence Force Discipline Act* (1982), Section 48(1).

²³⁶ Bulgaria, *Penal Code as amended* (1968), Article 405.

²³⁷ Chad, *Code of Military Justice* (1962), Article 62.

²³⁸ Chile, *Code of Military Justice* (1925), Article 263.

²³⁹ Colombia, *Penal Code* (2000), Article 151.

²⁴⁰ Cuba, *Military Criminal Code* (1979), Article 43(1).

²⁴¹ El Salvador, *Code of Military Justice* (1934), Article 70.

²⁴² Greece, *Military Penal Code* (1995), Article 164.

²⁴³ Iraq, *Military Penal Code* (1940), Article 115(a).

258. Ireland's Geneva Conventions Act as amended provides that any "contravention" of AP II, including violations of Article 4(2)(g) AP II, is a punishable offence.²⁴⁴

259. Italy's Wartime Military Penal Code provides that the soldier who steals money or other objects from a prisoner of war, with the intent to appropriate them for himself or for others, is guilty of a punishable offence.²⁴⁵

260. New Zealand's Armed Forces Discipline Act provides that:

Every person subject to this Act commits the offence of looting, and is liable to imprisonment for life, who –

- (a) Steals from, or with intent to steal searches, the person of anyone . . . captured in the course of any war or warlike operations in which New Zealand is engaged, or . . . detained in the course of operations undertaken by any service of the Armed Forces for the preservation of law and order or otherwise in aid of the civil power.²⁴⁶

261. Nicaragua's Military Penal Law punishes "anyone who, in military operations, steals, for personal gain, the money or other belongings of . . . prisoners".²⁴⁷

262. Nicaragua's Military Penal Code provides for the punishment of the soldier who, in the zone of operations, "despoils . . . a prisoner of war of his or her clothes or other personal effects".²⁴⁸

263. Under Nigeria's Armed Forces Decree 105 as amended, looting is a punishable offence. A person is guilty of looting who "steals from, or with intent to steal, searches the body of a person . . . captured in the course of war-like operations, or . . . detained in the course of operations undertaken by any service of the Armed Forces for the preservation of law and order or otherwise in aid of the civil authorities".²⁴⁹

264. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁵⁰

265. Paraguay's Military Penal Code punishes "any soldier who has plundered . . . a prisoner of war".²⁵¹

266. Peru's Code of Military Justice provides that despoiling prisoners of war is punishable.²⁵²

²⁴⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁴⁵ Italy, *Wartime Military Penal Code* (1941), Article 214.

²⁴⁶ New Zealand, *Armed Forces Discipline Act* (1971), Section 31(a).

²⁴⁷ Nicaragua, *Military Penal Law* (1980), Article 81.

²⁴⁸ Nicaragua, *Military Penal Code* (1996), Article 56(1).

²⁴⁹ Nigeria, *Armed Forces Decree 105 as amended* (1993), Section 51(a).

²⁵⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁵¹ Paraguay, *Military Penal Code* (1980), Article 293.

²⁵² Peru, *Code of Military Justice* (1980), Article 95(5).

267. Singapore's Armed Forces Act as amended provides that:

Every person subject to military law who –

- (a) steals from or, with intent to steal, searches the person of anyone . . . captured in the course of warlike operations, or . . . detained in the course operations undertaken by the Singapore Armed Forces for the preservation of law and order or otherwise in aid of the civil authorities . . . shall be guilty of looting and shall be liable on conviction by a subordinate military court to imprisonment.²⁵³

268. Under Spain's Military Criminal Code, "the soldier who . . . strips . . . a prisoner of war of his personal effects in the area of operations, with the intent to appropriate them," commits a punishable offence against the laws and customs of war.²⁵⁴

269. Under Spain's Penal Code, "anyone who, on the occasion of an armed conflict . . . strips . . . a prisoner of war or an interned civilian of his personal effects" commits a punishable "offence against protected persons and objects in the event of armed conflict".²⁵⁵

270. The UK Army Act as amended provides that:

Any person subject to military law who –

- (a) steals from, or with intent to steal searches, the person of anyone . . . captured in the course of warlike operations, or . . . detained in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities, . . . shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.²⁵⁶

271. The UK Air Force Act as amended provides that:

Any person subject to air-force law who –

- (a) steals from, or with intent to steal searches, the person of anyone . . . captured in the course of warlike operations, or . . . detained in the course of operations undertaken by Her Majesty's forces for the preservation of law and order or otherwise in aid of the civil authorities, . . . shall be guilty of looting and liable, on conviction by court-martial, to imprisonment or any less punishment provided by this Act.²⁵⁷

272. Under Venezuela's Code of Military Justice as amended, it is a crime against international law to "plunder . . . prisoners of war".²⁵⁸

273. Under Yemen's Military Criminal Code, any person who despoils a prisoner is guilty, upon conviction, of a war crime.²⁵⁹

²⁵³ Singapore, *Armed Forces Act as amended* (1972), Section 18(a).

²⁵⁴ Spain, *Military Criminal Code* (1985), Article 77(2).

²⁵⁵ Spain, *Penal Code* (1995), Article 612(7).

²⁵⁶ UK, *Army Act as amended* (1955), Section 30(a).

²⁵⁷ UK, *Air Force Act as amended* (1955), Section 30(a).

²⁵⁸ Venezuela, *Code of Military Justice as amended* (1998), Article 474(11).

²⁵⁹ Yemen, *Military Criminal Code* (1998), Article 20.

National Case-law

274. No practice was found.

Other National Practice

275. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

276. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that “violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law . . . Under the Statute of the International Criminal Court (ICC), . . . they are recognized as war crimes”.²⁶⁰

Other International Organisations

277. No practice was found.

International Conferences

278. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

279. In the *Tadić case* before the ICTY in 1995, the accused was charged with participation in the plunder and destruction of personal and real property of non-Serbs and looting of valuables of non-Serbs both when they were captured and upon their arrival in camps and detention centres.²⁶¹ In its judgement in 1997, the ICTY Trial Chamber held that, in the absence of evidence, the accused could not be convicted of having taken part in the plunder and looting of valuables or personal property.²⁶²

280. In the *Jelisić case* before the ICTY in 1995, the accused was charged with violation of the laws and customs of war (plunder of private property).²⁶³ In its judgement in 1999, the ICTY Trial Chamber found the accused guilty of the plunder of private property under Article 3(e) of the 1993 ICTY Statute. It held that plunder was the “fraudulent appropriation of public or private funds belonging to the enemy or the opposing party perpetrated during an armed conflict and related thereto”. It further held that “the individual acts of plunder

²⁶⁰ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

²⁶¹ ICTY, *Tadić case*, Second Amended Indictment, 14 December 1995, §§ 4 and 4.2.

²⁶² ICTY, *Tadić case*, Judgement, 7 May 1997, §§ 448 and 464.

²⁶³ ICTY, *Jelisić case*, Initial Indictment, 21 July 1995, § 42.

perpetrated by people motivated by greed might entail individual criminal responsibility on the part of its perpetrators". The defendant pleaded guilty to the offence of having stolen money, watches, jewellery and other valuables from detainees on their arrival at Luka camp in Bosnia and Herzegovina.²⁶⁴

281. In the *Delalić case* before the ICTY in 1996, the accused were charged, *inter alia*, with violations of the laws and customs of war (plunder of private property) for having "participated in the plunder of money, watches and other valuable property belonging to persons detained at Čelebići camp".²⁶⁵ However, in its judgement in 1998, the ICTY eventually dismissed this count.²⁶⁶ It stated that:

... even when considered in the light most favourable to the Prosecution, the evidence before the Trial Chamber fails to demonstrate that any property taken from the detainees in the čelebići prison-camp was of sufficient monetary value for its unlawful appropriation to involve grave consequences for the victims. Accordingly, it is the Trial Chamber's opinion that the offences, as alleged, cannot be considered to constitute such serious violations of international humanitarian law that they fall within the subject matter jurisdiction of the International Tribunal pursuant to Article 1 of the Statute. Count 49 of the Indictment is thus dismissed.²⁶⁷

V. Practice of the International Red Cross and Red Crescent Movement

282. No practice was found.

VI. Other Practice

283. No practice was found.

F. Recording and Notification of Personal Details of Persons Deprived of Their Liberty

I. Treaties and Other Instruments

Treaties

284. Article 14, first paragraph, of the 1899 HR provides that:

A bureau for information relative to prisoners of war is instituted, on the commencement of hostilities, in each of the belligerent States, and, when necessary, in the neutral countries on whose territory belligerents have been received. This bureau is intended to answer all inquiries about prisoners of war, and is furnished by the various services concerned with all the necessary information to enable it to

²⁶⁴ ICTY, *Jelisić case*, Judgement, 14 December 1999, §§ 46–49.

²⁶⁵ ICTY, *Delalić case*, Initial Indictment, 21 March 1996, § 37.

²⁶⁶ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 584–592 and 1154, and Part VI (Judgement).

²⁶⁷ ICTY, *Delalić case*, Judgement, 16 November 1998, § 1154

keep an individual return for each prisoner of war. It is kept informed of internments and changes, as well as of admissions into hospital and death.

285. Article 14, first paragraph, of the 1907 HR provides that:

An inquiry office for prisoners of war is instituted on the commencement of hostilities in each of the belligerent States, and, when necessary, in the neutral countries which have received belligerents in their territory. It is the function of this office to reply to all inquiries about the prisoners. It receives from the various services concerned full information respecting internments and transfers, releases on parole, exchanges, escapes, admissions into hospital, deaths, as well as other information necessary to enable it to make out and keep up to date an individual return for each prisoner of war.

286. Article 122 GC III provides that each party shall institute an official Information Bureau for POWs whose function it is to collect detainees' details and location and forward them to the powers concerned.

287. Article 123 GC III provides that "a Central Information Agency shall be created in a neutral country. The International Committee of the Red Cross shall, if it deems necessary, propose to the Powers concerned the organization of such an Agency." Its function is to collect all information respecting detainees – notably the capture cards – and transmit it to the powers concerned.

288. With respect to civilian internees, Articles 136, 137 and 140 GC IV contain regulations that are analogous to those applicable to prisoners of war found in Articles 122 and 123 GC III.

289. Article XI of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that "States Parties shall establish and maintain official up-to-date registries of their detainees and shall make them available to relatives, judges, attorneys, any other person having a legitimate interest, and other authorities".

290. Article IX of the 1995 Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords stated that, in order to speed up the release process, the parties were to draw up comprehensive lists of prisoners, including details of their nationality, name, rank, and any internment or military serial number, and provide these to the ICRC, the other parties, the Joint Military Commission and the High Representative within 21 days.

Other Instruments

291. Rule 7 of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that:

In every place where persons are imprisoned there shall be kept a bound registration book with numbered pages in which shall be entered in respect of each prisoner received:

- (a) information concerning his identity;
- (b) the reasons for his commitment and authority therefor;
- (c) the day and hour of his admission and release.

292. Rule 8 of the 1987 European Prison Rules provides that:

In every place where persons are imprisoned a complete and secure record of the following information shall be kept concerning each prisoner received:

- a. information concerning the identity of the prisoner;
- b. the reasons for commitment and the authority therefor;
- c. the day and hour of admission and release.

293. Principle 16 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

Promptly after arrest and after each transfer from one place of detention or imprisonment to another, a detained or imprisoned person shall be entitled to notify or to require the competent authority to notify members of his family or other appropriate persons of his choice of his arrest, detention or imprisonment or of the transfer and of the place where he is kept in custody.

294. Paragraph 3 of the 1991 Agreement between Croatia and the SFRY on the Exchange of Prisoners provides that “both Parties shall exchange the lists of all prisoners, with precise indication of the place where these prisoners are detained, and copies of these lists shall be handed over to the representative of the ICRC”.

295. Paragraph 2 of Agreement No. 2 on the Implementation of the Agreement of 22 May 1992 between the Parties to the Conflict in Bosnia and Herzegovina provided that a Commission, consisting of four liaison officers appointed by the parties, would be created under the auspices of the ICRC and assume the exchange of lists of prisoners.

296. Section IV of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina provided that “the parties will notify the ICRC of the identity of all persons captured or detained”.

297. Article 6(2) of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provides that “each party will notify the ICRC . . . of the name and location of any other places where prisoners are being held on the territory under its control and of all prisoners held in those places”.

298. Article 3 of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that:

Shall remain prohibited at any time and in any place whatsoever with respect to persons [*hors de combat*] . . . failure to report the identity, personal condition and circumstances of a person deprived of his/her liberty for reasons related to the armed conflict to the Parties to enable them to perform their duties and responsibilities under this Agreement and under international humanitarian law.

299. Article 4(6) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “sufficient information shall be made available concerning persons who have been deprived of their liberty”.

300. Section 8(a) of the 1999 UN Secretary-General's Bulletin, regarding the treatment of detained persons, provides that "their capture and detention shall be notified without delay to the party on which they depend and to the Central Tracing Agency of the International Committee of the Red Cross (ICRC), in particular in order to inform their families".

II. National Practice

Military Manuals

301. Argentina's Law of War Manual provides that "upon the outbreak of a conflict and in all cases of occupation, each of the Parties to the conflict shall institute an official Information Bureau for prisoners of war who are in its power". It further notes that each of the Parties to the conflict shall give its Bureau the information regarding any enemy person who has fallen into its Power. The manual adds that:

The information shall include, in so far as available to the Information Bureau, in respect of each prisoner of war, his surname, first names, rank, army, regimental, personal or serial number, place and full date of birth, indication of the Power on which he depends, first name of the father and maiden name of the mother, name and address of the person to be informed and the address to which correspondence for the prisoner may be sent . . .

A Central Prisoners of War Information Agency shall be created in a neutral country . . . The function of the Agency shall be to collect all the information it may obtain through official or private channels respecting prisoners of war, and to transmit it as rapidly as possible to the country of origin of the prisoners of war or to the Power on which they depend.²⁶⁸

302. Australia's Commanders' Guide provides that "basic identifying information is required by the enemy to enable notification of capture to the Central PW Information Bureau".²⁶⁹

303. Burkina Faso's Disciplinary Regulations provides that "a list of evacuated prisoners shall be established as soon as possible".²⁷⁰

304. Cameroon's Instructors' Manual provides that all prisoners arriving in camps shall be identified, registered and recorded.²⁷¹ It further states that a list of prisoners shall be established and sent to the National Information Bureau.²⁷²

305. Cameroon's Disciplinary Regulations provides that "a list of prisoners must be established as soon as possible. When operations permit, the list must be communicated to the official organs of the Red Cross."²⁷³

²⁶⁸ Argentina, *Law of War Manual* (1969), §§ 2.101 and 2.102.

²⁶⁹ Australia, *Commanders' Guide* (1994), § 710.

²⁷⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 36(4).

²⁷¹ Cameroon, *Instructors' Manual* (1992), p. 118, § 431.

²⁷² Cameroon, *Instructors' Manual* (1992), p. 46, § 163.

²⁷³ Cameroon, *Disciplinary Regulations* (1975), Article 33.

306. Canada's LOAC Manual provides that an official information bureau shall be established at the outbreak of hostilities to gather and pass on all information concerning POWs.²⁷⁴ It further states that:

Each party is bound, as soon as possible, to give its bureau full particulars relating to the placing in custody for more than 2 weeks, the placing in assigned residence, or internment, of any protected person . . . It is the duty of each party to see that its various departments give the bureau prompt information concerning the protected persons, e.g., transfers, releases, repatriations, escape, admissions to hospital, births and deaths.²⁷⁵

307. Congo's Disciplinary Regulations states that "a list of evacuated prisoners must be established as soon as possible".²⁷⁶

308. El Salvador's Soldiers' Manual provides that "suspected civilian persons who have been detained must be listed in the register of accused persons, which has to be notified to the ICRC delegate on the day of his or her visit to the place of detention".²⁷⁷ It also states that "enemies who surrender must be captured [and] . . . their names must be listed in the register of accused persons".²⁷⁸

309. France's LOAC Summary Note provides that "the identity of POWs shall be established as soon as possible".²⁷⁹

310. France's LOAC Teaching Note provides that the identity of every prisoner of war "shall be established as soon as possible and be mentioned on an identity card which shall be given to him at this occasion".²⁸⁰

311. Germany's Military Manual provides that:

The Detaining Power is obliged to forward information regarding the fate of prisoners of war . . . For this purpose each of the Parties to the conflict shall institute a National Information Bureau upon the outbreak of a conflict and in all cases of occupation. The Bureau shall cooperate with the Central Tracing Agency of the ICRC.²⁸¹

312. India's Manual of Military Law provides that after arrest under the Armed Forces (Special Powers) Act, a list of persons arrested shall be prepared.²⁸²

313. Indonesia's Military Manual states that "the parties to the conflict should maintain a register of captured persons, imprisoned persons, detainees and those who have died after capture".²⁸³

314. According to Israel's Manual on the Laws of War, during the Yom Kippur War, "the Arab States deprived Israeli prisoners of war of their rights according

²⁷⁴ Canada, *LOAC Manual* (1999), p. 10-6, § 50.

²⁷⁵ Canada, *LOAC Manual* (1999), p. 11-7, § 59.

²⁷⁶ Congo, *Disciplinary Regulations* (1986), Article 33.

²⁷⁷ El Salvador, *Soldiers' Manual* (undated), p. 6.

²⁷⁸ El Salvador, *Soldiers' Manual* (undated), p. 9.

²⁷⁹ France, *LOAC Summary Note* (1992), § 2.1.

²⁸⁰ France, *LOAC Teaching Note* (2000), p. 3.

²⁸¹ Germany, *Military Manual* (1992), § 708.

²⁸² India, *Manual of Military Law* (1983), §§ 5/3 and 5/6.

²⁸³ Indonesia, *Military Manual* (1982), § 98.

to the Geneva Convention, and even refused to hand over lists of the prisoners held by them".²⁸⁴

315. Madagascar's Military Manual provides that to protect victims of armed conflict, the ICRC shall "record the prisoners of war to prevent their disappearance".²⁸⁵

316. Mali's Disciplinary Regulations provides that "the list of evacuated prisoners must be established as soon as possible".²⁸⁶

317. Morocco's Disciplinary Regulations provides that a list of evacuated prisoners must be established as soon as possible.²⁸⁷

318. The Military Manual of the Netherlands provides that:

Upon the outbreak of an armed conflict, each of the Parties to the conflict shall institute an Information Bureau. The Bureau shall be charged with the collecting and the forwarding of information concerning prisoners of war and other protected persons. The Bureau shall also make any enquiries to obtain the desired information about prisoners of war.²⁸⁸

319. New Zealand's Military Manual provides that an official information bureau shall be set up at the outbreak of hostilities in order to collect and transfer all information concerning POWs.²⁸⁹ According to the manual, the same rule applies to protected persons falling under GC IV.²⁹⁰

320. Senegal's IHL Manual provides that, in a situation of internal disturbances, a list of arrested persons shall be made and sent to the ICRC.²⁹¹

321. Spain's LOAC Manual provides that:

Each Party to a conflict is required to furnish the persons under its jurisdiction who are liable to become prisoners of war, with an identity card showing the owner's surname, first names, rank, serial number or equivalent, and date of birth. The identity card may, furthermore, bear any other information the party to the conflict may wish to add concerning persons belonging to its armed forces.²⁹²

Concerning interned persons, the manual states that "family or identity documents in the possession of internees may not be taken away without a receipt being given".²⁹³

322. Switzerland's Basic Military Manual states that "upon the outbreak of a conflict and in all cases of occupation, official bureaux of information shall be created on the territory of the Parties to the conflict and on those of the Neutral Powers having received members of foreign armed forces". It adds that "a Central Prisoners of War Information Agency shall be created in a neutral country by the ICRC. The Agency shall collect all the important information

²⁸⁴ Israel, *Manual on the Laws of War* (1998), p. 43.

²⁸⁵ Madagascar, *Military Manual* (1994), Fiche No. I-T, § 22.

²⁸⁶ Mali, *Disciplinary Regulations* (1979), Article 36.

²⁸⁷ Morocco, *Disciplinary Regulations* (1974), Article 25(3).

²⁸⁸ Netherlands, *Military Manual* (1993), pp. VII-12/VII-13.

²⁸⁹ New Zealand, *Military Manual* (1992), § 936.

²⁹⁰ New Zealand, *Military Manual* (1992), § 1134(1).

²⁹¹ Senegal, *IHL Manual* (1999), p. 15. ²⁹² Spain, *LOAC Manual* (1996), Vol. I, § 8.2.(d).2.

²⁹³ Spain, *LOAC Manual* (1996), Vol. I, § 6.8.(d).

on prisoners and transmit it as rapidly as possible to the country of origin of the prisoners of war."²⁹⁴

323. The UK Military Manual provides that:

At the beginning of hostilities, each belligerent is to set up an official information bureau for prisoners of war whom it holds . . .

A belligerent must inform its information bureau as soon as possible about all persons who have fallen into its power. The information bureau must be supplied with information as to transfers, releases, repatriations, escapes, admissions to hospital, and death. The bureau will then transmit all such information immediately to the Powers concerned through the intermediary of the Protecting Powers, and likewise through the Central Agency.²⁹⁵

324. The US Field Manual reproduces Articles 122 and 123 GC III.²⁹⁶

325. The US Air Force Pamphlet provides that "each party to the conflict must issue an identity card to every person under its jurisdiction liable to become a PW showing name, rank, serial number, and date of birth".²⁹⁷

National Legislation

326. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the Armed Forces of Azerbaijan Republic, the appropriate authorities and governmental organs shall ensure the registration of all prisoners of war of the adverse party by recording their name, surname, military rank, date of birth and place of permanent residence".²⁹⁸

327. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁹⁹

328. China's Martial Law Enforcement Act provides that, during periods of martial law, the provisions of the Code of Criminal Procedure relating to procedures and time limits for arrest and detention no longer apply. Nevertheless, it specifies that the personnel on duty shall register all those detained under the Act and shall immediately release those who no longer need to be detained.³⁰⁰

329. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 122 and 123 GC III and 136, 137 and 140 GC IV, is a punishable offence.³⁰¹

330. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".³⁰²

²⁹⁴ Switzerland, *Basic Military Manual* (1987), §§ 115–116.

²⁹⁵ UK, *Military Manual* (1958), § 269. ²⁹⁶ US, *Field Manual* (1956), §§ 203 and 204.

²⁹⁷ US, *Air Force Pamphlet* (1976), § 13-3.

²⁹⁸ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 20.

²⁹⁹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁰⁰ China, *Martial Law Enforcement Act* (1996), Article 27.

³⁰¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁰² Norway, *Military Penal Code as amended* (1902), § 108(a).

National Case-law

331. No practice was found.

Other National Practice

332. In 1995, during a debate in the UN Security Council regarding persons unaccounted for in Bosnia and Herzegovina, Botswana stressed that the Bosnian Serbs had an obligation under international law to facilitate the registration of all persons they held prisoner.³⁰³

333. The Report on the Practice of Israel states that “the IDF takes great care to ensure that all individuals detained or captured by it are meticulously documented, so as to enable their speedy identification and repatriation where feasible.”³⁰⁴

334. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that:

The Iraqi Ambassador was asked whether the Iraqi Government was holding any British prisoners of war and reminded of Iraq’s obligations under the Third Geneva Convention to notify the names of any prisoners held . . . The Iraqi Ambassador gave an assurance that any British prisoners of war would be treated in accordance with the Geneva Conventions and their names would be given to the ICRC.³⁰⁵

335. In 1990, in a meeting with the ICRC, a senior police official of a State engaged in a non-international armed conflict, commenting on the possibility that the police force might be engaged in hiding detainees, stated that all detainees were registered as required.³⁰⁶

336. In 1990, ICRC efforts in a State engaged in a non-international armed conflict resulted in the adoption of guidelines issued by the government to be followed when persons were in custody, including a requirement that detainees be registered immediately and their names transmitted to the central authorities within 24 hours.³⁰⁷

*III. Practice of International Organisations and Conferences**United Nations*

337. In a resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly demanded that the representatives of the FRY “provide an updated list of all persons detained and transferred from Kosovo to other parts of the FRY, specifying the charge, if any, under which each individual is detained”.³⁰⁸

³⁰³ Botswana, Statement before the UN Security Council, UN Doc. S/PV.3612, 21 December 1995, p. 5.

³⁰⁴ Report on the Practice of Israel, 1997, Chapter 5.2.

³⁰⁵ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1.

³⁰⁶ ICRC archive document. ³⁰⁷ ICRC archive document.

³⁰⁸ UN General Assembly, Res. 54/183, 17 December 1999, § 9.

338. In a resolution adopted in 1985 on the question of human rights of persons subjected to any form of detention or imprisonment, the UN Sub-Commission on Human Rights recommended the adoption of a Declaration against Unacknowledged Detention providing that governments shall:

disclose the identity, location and condition of all persons detained by members of their police, military or security authorities or others acting with their knowledge, together with the cause of such detention... In countries where legislation does not exist to this effect, steps shall be taken to enact such legislation as soon as possible.³⁰⁹

Other International Organisations

339. No practice was found.

International Conferences

340. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that irrespective of GC III, “the international community has consistently demanded humane treatment for prisoners of war, including identification and accounting for all prisoners”.³¹⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

341. In its report in *Kurt v. Turkey* in 1996, the ECiHR found that “the absence of holding data recording such matters as the date, time and location of detention, the name of the detainee as well as the reasons for the detention... [had to] be seen as incompatible with the very purpose of Article 5 of the Convention” on the right to liberty and security.³¹¹ In its judgement in this case in 1998, the ECtHR confirmed this view.³¹²

342. In the section of its Annual Report 1980–1981 concerning disappearance after detention, the IACiHR recommended that “central records be established to account for all persons that have been detained, so that their relatives and other interested persons may promptly learn of any arrests”.³¹³ Similar recommendations were made specifically in the contexts of Argentina in 1980,³¹⁴ Chile in 1985³¹⁵ and Peru in 1993.³¹⁶

³⁰⁹ UN Sub-Commission on Human Rights, Res. 1985/26, 29 August 1985, Article 2, p. 107.

³¹⁰ 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.

³¹¹ ECiHR, *Kurt v. Turkey*, Report, 5 December 1996, § 125.

³¹² ECtHR, *Kurt v. Turkey*, Judgement, 25 May 1998, § 125.

³¹³ IACiHR, *Annual Report 1980-1981*, Doc. OEA/Ser.L/V/II.54 Doc. 9 rev. 1, 16 October 1981, pp. 113 and 129.

³¹⁴ IACiHR, Report on the situation of human rights in Argentina, Doc. OEA/Ser.L/V/II.49 Doc. 19, 11 April 1980, p. 264.

³¹⁵ IACiHR, Report on the situation of human rights in Chile, Doc. OEA/Ser.L/V/II.66 Doc. 17, 9 September 1985, p. 72.

³¹⁶ IACiHR, Report on the situation of human rights in Peru, Doc. OEA/Ser.L/V/II.83 Doc. 31, 12 March 1993, p. 60.

343. In the section of its Annual Report 1987–1988 concerning Guatemala, the IACiHR made the following recommendation to the government of Guatemala:

To cause the Central Register of Detainees to function as originally proposed, that is, that every judicial, police, security and military authority competent to make arrests be required to inform this Central Register of the detention of any person within 24 hours of having done so, and that the record made thereof shall include the detainee's name, the date and hour of his detention, the identity of the detaining authority, the date on which the detainee was brought before a competent court, an itemized account of every transfer of the detainee from place to place and, if he is released, the date and place thereof and the reason thereof.³¹⁷

V. Practice of the International Red Cross and Red Crescent Movement

344. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that POWs shall be identified, listed and the location of camps given to the parties concerned.³¹⁸

345. According to the ICRC, all parties to an international armed conflict have the obligation to collect and forward information on protected persons. The detaining party must notify the adverse party, via the Protecting Power and the Central Tracing Agency, of all the details specified under IHL. In practice, the Tracing Agency does not always confine itself to playing the role of intermediary, but actively seeks to ensure that the parties collect and pass on such information; in some cases, it even does so itself. In non-international armed conflicts, international humanitarian treaty law does not provide for the collection of information on persons deprived of their liberty to the same extent as it does in international armed conflicts. However, it is essential that such information be gathered if detainees are to be followed individually, in some cases after their release. The ICRC therefore asks the authorities for lists of persons deprived of their liberty with whom it is concerned. If no lists are forthcoming, it draws them up itself when conducting its visits. By recording names and keeping track of the persons it visits, the ICRC can prevent extra-judicial executions and enforced disappearances and follow each person throughout his/her period of deprivation of liberty (arrest, transfer, release, etc.). Moreover, in cases where the authorities do not draw up lists or keep a register of names, the ICRC recommends that such a register be kept along with reliable information on the arrest, transfer, whereabouts and release of persons deprived of their liberty. In non-international armed conflicts, as opposed to international ones, the Tracing Agency does not notify the names of detainees to the adverse party. Whether an armed conflict is international or not, the

³¹⁷ IACiHR, *Annual Report 1987–1988*, Doc. OEA/Ser.L/V/II.74 Doc. 10 rev. 1, 16 September 1988, p. 302.

³¹⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 676, 682 and 683, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

ICRC never forwards information on persons deprived of their liberty if this could have adverse consequences for them or their families.

346. In 1992, the ICRC solemnly appealed to all parties to the conflict in Bosnia and Herzegovina to “notify [it] immediately of all places of detention in Bosnia and Herzegovina, and [to] supply accurate lists of all persons held in such places”.³¹⁹

347. In 1996, the ICRC requested that a separatist entity engaged in armed conflict provide it with details of all new detainees.³²⁰

VI. *Other Practice*

348. Section 24(1) of the SPLM/A Penal and Disciplinary Laws requires that “every Battalion Commander shall maintain a register” of military personnel and the keeping of records pertaining to such personnel in the SPLM/A headquarters, on the premise that this will facilitate the search for any persons who later go missing.³²¹ The Report on SPLM/A Practice notes that:

The SPLM/A also used to announce names of Government of Sudan Officers and men and any personnel that they captured from the government when Radio SPLA was operational. The SPLM/A today still publishes in their bulletins names and other particulars of officers and men and personnel that fall into the hands of the SPLA during military operations.³²²

349. In 1994, in a meeting with the ICRC, an armed opposition group agreed to notify the ICRC of all detained soldiers and officers.³²³

350. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “accurate information on . . . detention and whereabouts [of persons deprived of their liberty], including transfers, shall be made promptly available to their family members and counsel or other persons having a legitimate interest in the information”.³²⁴

G. ICRC Access to Persons Deprived of Their Liberty

I. *Treaties and Other Instruments*

Treaties

351. Article 126 GC III and Articles 76, sixth paragraph, and 143 GC IV provide that the representatives or delegates of the protecting powers and the delegates

³¹⁹ ICRC, Solemn Appeal to All Parties to the Conflict in Bosnia and Herzegovina, 13 August 1992, *IRRC*, No. 290, 1992, pp. 492–493.

³²⁰ ICRC archive document.

³²¹ SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 24, § 1.

³²² Report on SPLM/A Practice, 1998, Chapter 5.2. ³²³ ICRC archive document.

³²⁴ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 4(1), *IRRC*, No. 282, p. 332.

of the ICRC (whose appointment shall be submitted to the approval of the detaining power) shall have permission to go to all places where POWs and protected persons may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by them. They shall be able to interview the detainees, and in particular the detainees' representatives, without witnesses, either personally or through an interpreter. They shall have full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. The detaining power and the power on which the detainees depend may agree, if necessary, that compatriots of these detainees be permitted to participate in the visits.

352. Articles 56, third paragraph, GC III and Article 96 GC IV provide that delegates of the protecting power, the ICRC or other agencies giving relief to POWs may visit labour detachments.

353. Article 125 GC III provides that any organisation assisting prisoners of war shall receive "all necessary facilities for visiting the prisoners... The special position of the International Committee of the Red Cross in this field shall be recognized and respected at all times." Article 142 GC IV contains the same provision as in Article 125 GC III for protected persons.

354. Common Article 3 of the 1949 Geneva Conventions provides that, in the case of armed conflict not of an international character, "an impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict".

355. Article 9 of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel designated Red Cross Societies with the task of visiting all places of detention.

356. Article IX of the 1995 Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords provided that the ICRC was to enjoy "full and unimpeded access to all places where prisoners are kept and to all prisoners".

Other Instruments

357. In the 1969 Agreement between the Government of Greece and the ICRC, it was agreed that ICRC delegates shall have access:

to all places where administrative deportees are permanently or temporarily held, namely: camps for deportees, places of temporary detention pending transfer, infirmaries and hospitals...

... to all prisons and other premises within the country where persons accused of or condemned for political offences are detained...

... to all police stations where people are temporarily detained pending preliminary enquiries into political offences, so that they may form a personal opinion on the state of the premises and the conditions of detention.

358. Article 5(2) of the 1986 Statutes of the International Red Cross and Red Crescent Movement provides that it is the role of the ICRC “to undertake the tasks incumbent upon it under the Geneva Conventions” and “to endeavour at all times – as a neutral institution whose humanitarian work is carried out particularly in time of international and other armed conflicts or internal strife – to ensure the protection of and assistance to military and civilian victims of such events and of their direct results”. Article 5(3) provides that the ICRC “may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediary, and may consider any question requiring examination by such an institution”.

359. Principle 29 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that:

1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment.
2. A detained or imprisoned person shall have the right to communicate freely and in full confidentiality with the persons who visit the places of detention or imprisonment in accordance with paragraph 1 of the present principle, subject to reasonable conditions to ensure security and good order in such places.

360. Paragraph 4 of the 1991 Agreement between Croatia and the SFRY on the Exchange of Prisoners provides that “the signatories of the agreement agree to proceed to the exchange immediately after the ICRC has recorded and visited the prisoners in conformity with its specific criteria”.

361. Section IV of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina provided that:

- ICRC delegates will have free access to all persons captured or detained;
- ICRC delegates will be authorized to interview these persons without witnesses, to register them, to inform their families about their welfare and whereabouts, and to repeat such visits whenever necessary.

362. Article 8 of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provides that “the ICRC shall have free access to all prisoners and may make a census of the population of any place of detention with a view to drawing up a specific plan of operation as provided in Article 3”.

363. Paragraph 2.4 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “the ICRC

shall have free access to all captured combatants in order to fulfil its humanitarian mandate according to the third Geneva Convention of 12 August 1949".

364. In paragraph 5 of the 1996 Ashgabat Protocol on Prisoner Exchange in Tajikistan, the government of Tajikistan and the United Tajik Opposition agreed "to confirm their earlier commitment to ensure the unimpeded access by delegates of ICRC and members of the Joint Commission to places where the detainees and prisoners of war are being held, both during the present operation [of prisoner exchange] and in future".

365. Section 8(g) of the 1999 UN Secretary-General's Bulletin provides that the "ICRC's right to visit prisoners and detained persons shall be respected and guaranteed".

II. National Practice

Military Manuals

366. Argentina's Law of War Manual provides that:

Representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, particularly to places of internment, imprisonment and labour, and shall have access to all premises occupied by prisoners of war; they shall be allowed to go to the places of departure, passage and arrival of prisoners who are being transferred. They shall be able to interview the prisoners, and in particular the prisoners' representatives, without witnesses, either personally or through an interpreter . . .

Representatives and delegates of the Protecting Powers shall have full liberty to select the places they wish to visit. The duration and the frequency of these visits shall not be restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure . . .

The delegates of the ICRC shall enjoy the same prerogatives. The appointment of such delegates shall be submitted to the approval of the Power detaining the prisoners of war to be visited.³²⁵

367. Belgium's Law of War Manual provides that "Prisoners of War have the right to apply to the representative of the Protecting Power". It further states that "the Protecting Power and the ICRC shall have access to all premises occupied by prisoners of war".³²⁶

368. Benin's Military Manual provides that one of the functions of the ICRC is to protect and assist the victims by visiting prisoners of war, security detainees and interned persons.³²⁷

369. Canada's LOAC Manual provides that:

In accordance with GC III, delegates or representatives of Protecting Powers and of the ICRC shall be permitted to visit all places where PWs may be, including places

³²⁵ Argentina, *Law of War Manual* (1969), § 2.105.

³²⁶ Belgium, *Law of War Manual* (1983), p. 47.

³²⁷ Benin, *Military Manual* (1995), Fascicule I, p. 8.

of detention and labour, and may interview PWs and PWs' representatives without witnesses, either personally or through interpreters.³²⁸

Concerning persons undergoing sentence of imprisonment, the manual provides that "protected persons who are detained have the right to be visited by delegates of the Protecting Power and of the ICRC".³²⁹

370. Ecuador's *Naval Handbook* recognises the special status of the ICRC and recalls its specific tasks: visiting and interviewing prisoners of war.³³⁰

371. El Salvador's *Soldiers' Manual* provides that the prisoners' "control book", which contains the names of all civilian and combatant detainees, shall be notified to the ICRC the day of its visit to the detention centre.³³¹ It states that one of the principal functions of the ICRC is to visit prisoners and to talk with them without witnesses.³³²

372. Israel's *Manual on the Laws of War* provides that, during their captivity, prisoners are to be concentrated in internment camps and must be under Red Cross supervision.³³³

373. Madagascar's *Military Manual* provides that to protect the victims of war, the ICRC shall repeat its visits to prisoners of war.³³⁴

374. New Zealand's *Military Manual* stipulates that:

Delegates or representatives of Protecting Powers and of the ICRC shall be permitted to visit all places where prisoners of war may be, including places of detention and labour, and may interview prisoners and prisoners' representatives without witnesses, either personally or through interpreters.³³⁵

375. Spain's *LOAC Manual* provides that the ICRC shall be allowed to visit POWs and internees under the usual conditions.³³⁶

376. Sweden's *IHL Manual* provides that "inspection of prisoner of war camps under the III Geneva Convention has become one of the most important duties of a Protecting Power and of the ICRC".³³⁷

377. Switzerland's *Basic Military Manual* provides that:

The Protecting Powers and the ICRC shall ensure respect for the international rules established in favour of prisoners of war to protect their interests. To this effect, they shall cooperate with the Detaining Power, which shall facilitate their tasks. The prisoners of war shall always have the ability to lodge complaints to the Protecting Power.³³⁸

³²⁸ Canada, *LOAC Manual* (1999), p. 10-6, § 51.

³²⁹ Canada, *LOAC Manual* (1999), p. 12-7, § 62(c).

³³⁰ Ecuador, *Naval Manual* (1989), § 6.2.2.

³³¹ El Salvador, *Soldiers' Manual* (undated), p. 6.

³³² El Salvador, *Soldiers' Manual* (undated), p. 11.

³³³ Israel, *Manual on the Laws of War* (1998), p. 52.

³³⁴ Madagascar, *Military Manual* (1994), Fiche No. I-T, § 22.

³³⁵ New Zealand, *Military Manual* (1992), § 937.

³³⁶ Spain, *LOAC Manual* (1996), Vol. I, §§ 6.4.j and 6.8.j.

³³⁷ Sweden, *IHL Manual* (1991), Section 4.1, p. 92.

³³⁸ Switzerland, *Basic Military Manual* (1987), Article 108.

378. Togo's Military Manual provides that one of the functions of the ICRC is to protect and assist the victims by visiting prisoners of war, security detainees and interned persons.³³⁹ The manual, referring to the Geneva Conventions, further reaffirms the right of the ICRC to visit these persons.³⁴⁰

379. The UK Military Manual states that "if no protection can be arranged, the Detaining Power must request, or shall accept, the offer of the services of a humanitarian organisation, such as the International Committee of the Red Cross, to assume the humanitarian functions performed by the Protecting Power".³⁴¹ It further provides that representatives or delegates of the protecting powers or the ICRC shall be allowed to visit all POW camps. It points out that "delegates of the International Committee of the Red Cross enjoy the same privileges as those of Protecting Powers. Their appointment must be submitted to the Detaining Power for approval."³⁴² The manual specifies that "refusing prisoners of war access to the Protecting Power" is a war crime.³⁴³

380. The US Field Manual reproduces Articles 126 GC III and 142 and 143 GC IV.³⁴⁴

381. The UK LOAC Manual states that:

The Protecting Power has various functions, notably to inspect PW camps and to deal with prisoners' appeals for help in correcting any violations of the [Third Geneva] Convention by the Detaining Power. If no neutral Protecting Power has been appointed, its functions can be exercised by the ICRC or some other humanitarian organisation, subject to the consent of the parties to the conflict concerned.³⁴⁵

382. The US Operational Law Handbook provides that, subject to essential security needs and other reasonable requirements, the ICRC must be permitted to visit POWs and provide them with certain types of relief.³⁴⁶

383. The US Naval Handbook recognises the special status of the ICRC and recalls its specific tasks: visiting and interviewing prisoners of war.³⁴⁷

National Legislation

384. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁴⁸

385. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 56, 125 and 126 GC III and 76, 96, 142 and 143 GC IV, is a punishable offence.³⁴⁹

³³⁹ Togo, *Military Manual* (1995), Fascicule I, p. 8.

³⁴⁰ Togo, *Military Manual* (1995), Fascicule I, p. 11.

³⁴¹ UK, *Military Manual* (1958), § 277. ³⁴² UK, *Military Manual* (1958), § 278.

³⁴³ UK, *Military Manual* (1958), § 626. ³⁴⁴ US, *Field Manual* (1956), §§ 207 and 349–350.

³⁴⁵ UK, *LOAC Manual* (1981), Section 8, p. 33, § 20.

³⁴⁶ US, *Operational Law Handbook* (1993), p. Q-187.

³⁴⁷ US, *Naval Handbook* (1995), § 6.2.2.

³⁴⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁴⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

386. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... is liable to imprisonment".³⁵⁰

National Case-law

387. No practice was found.

Other National Practice

388. In 1982 and 1987, the government in Afghanistan allowed the ICRC to conduct visits to prisoners according to its criteria, but occasionally revoked that permission.³⁵¹

389. In 1989, in a statement before the HRC, Chile reported that Red Cross delegates had been able to visit all detainees including those held incommunicado.³⁵²

390. In 1983, in a statement before the HRC, El Salvador reported that an agreement had been signed by the Salvadoran government to enable the ICRC to be notified of the detention of prisoners and to visit and interview them with a doctor and without government witnesses.³⁵³ In 1987, it emphasised that the ICRC was informed of arrests and could visit detainees in any detention centre whatsoever.³⁵⁴

391. According to the Report on the Practice of France, access to prisoner camps, wherever they are, must be granted, in particular to the ICRC, to allow it to monitor the conditions of detention and bring humanitarian aid.³⁵⁵

392. In 1995, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, Germany expressed its full support for the ongoing efforts of the ICRC to gain access to detainees.³⁵⁶

393. The Lebanese authorities have permitted the ICRC to visit detained persons on several occasions, in accordance with ICRC procedures.³⁵⁷

394. In 1995, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, Oman stated that it was unacceptable to the international community that neither the UN nor the ICRC had been granted access in order to establish the whereabouts of detainees.³⁵⁸

³⁵⁰ Norway, *Military Penal Code as amended* (1902), § 108(a).

³⁵¹ ICRC, Press Release No. 1449, Afghanistan: the ICRC is authorized to visit prisoners, 27 August 1982; Press Release No. 1531, Resumption of ICRC Activities in Afghanistan, 3 February 1987.

³⁵² Chile, Statement before the HRC, UN Doc. CCPR/C/SR.943, 6 November 1989, § 42.

³⁵³ El Salvador, Statement before the HRC, UN Doc. CCPR/C/SR.468, 31 October 1983, § 37.

³⁵⁴ El Salvador, Statement before the HRC, UN Doc. CCPR/C/SR.719, 2 April 1987, § 3.

³⁵⁵ Report on the Practice of France, 1999, Chapter 5.3.

³⁵⁶ Germany, Statement before the UN Security Council, UN Doc. S/PV.3564, 10 August 1995, p. 4.

³⁵⁷ ICRC, *Annual Report 1990*, Geneva, 1991, p. 84.

³⁵⁸ Oman, Statement before the UN Security Council, UN Doc. S/PV.3564, 10 August 1995, p. 5.

395. In May 2000, visits to detainees in Northern Caucasus began after the ICRC received formal authorisation from the President of the Russian Federation granting access to “all persons held in connection with security operations” in Chechnya. The ICRC carried out visits to detainees held under the responsibility of the Ministries of Justice and the Interior and the Federal Security Service.³⁵⁹

396. In 1990, in a speech following the arrest of 2,500–3,000 persons on suspicion of collaboration with the RPF, the President of Rwanda declared that “the ICRC... had already visited all our prisons, according to its methods, ... without any impediment whatsoever, ... and in accordance with international agreements”.³⁶⁰

397. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK stated that:

On 19 January [1991] the Iraqi Ambassador was asked whether the Iraqi Government was holding any British prisoners of war and reminded of Iraq’s obligations under the Third Geneva Convention to ... arrange access by the ICRC. The Iraqi Ambassador gave an assurance that any British prisoners of war would be treated in accordance with the Geneva Conventions ... The British Government has made clear to the Iraqi Ambassador ... [that] the British Government will be allowing full access by the ICRC both to Iraqi prisoners of war and to Iraqi citizens detained in the United Kingdom.³⁶¹

398. In 1991, in another report submitted to the UN Security Council on operations in the Gulf War, the UK reported that:

We have made the strongest representations again to the International Committee of the Red Cross, the representatives of which have been here seeking access to Iraqis who have been detained to ensure that they are receiving proper treatment. They were naturally granted access we gave them every opportunity, to which they are entitled, to visit Iraqis to see whether they are receiving proper treatment. We have insisted that similar facilities must be available to representatives of the International Red Cross in Baghdad.³⁶²

399. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle ... that the ICRC and the relevant Red Cross or Red Crescent organizations be granted all necessary facilities and access to enable them to carry out their humanitarian functions”.³⁶³

³⁵⁹ ICRC, *Annual Report 2000*, Geneva, 2001, p. 168.

³⁶⁰ Rwanda, Speech by the President, 15 October 1990, p. 6.

³⁶¹ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1.

³⁶² UK, Letter dated 28 January 1991 to the President of the UN Security Council, UN Doc. S/22156, 28 January 1991, p. 2; see also Letter dated 13 February 1991 to the President of the UN Security Council, UN Doc. S/2221, 13 February 1991, p. 2.

³⁶³ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

400. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that it expected “the Government of Iraq . . . to provide the International Committee of the Red Cross with access to prisoners of war as will be done by the United States”.³⁶⁴

401. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the US stated that:

The coalition forces are granting ICRC timely access to all Iraqi prisoners of war. Iraqi authorities have continued to ignore the standards of the Geneva conventions in blatant disregard for international law. They have denied access to coalition prisoners of war by ICRC.³⁶⁵

402. In 1982, in a statement before the HRC, Uruguay stated that even at the height of the crisis, the government had invited the ICRC to visit the prisons in which all subversives had been incarcerated and they had been able to interview the prisoners in private.³⁶⁶

403. In a press release issued in 1994, the ICRC noted that the parties to the internal conflict in Yemen had agreed to allow it to visit interned combatants.³⁶⁷

404. In 1979, the Interior Minister of a State emphasised that the ICRC was not covered by the introduction of restrictions on visits to prisoners and that the government wanted to continue its collaboration with the organisation.³⁶⁸

405. In 1985, a third State on whose territory an armed opposition group held its prisoners agreed to allow the ICRC to visit all captured combatants.³⁶⁹

406. In 1987, in the context of a non-international armed conflict, the authorities stated that the ICRC did not have the right to visit persons deprived of their liberty, but later granted it access to detainees.³⁷⁰

407. In 1991, in the context of a non-international armed conflict, the authorities stated that the ICRC did not have the right to visit persons deprived of their liberty, but later granted it access to detainees.³⁷¹

408. In 1992, a State involved in a non-international armed conflict agreed to allow the ICRC to visit all detention facilities in accordance with the ICRC’s standard procedures.³⁷²

409. In 1994, a State denied charges by a separatist entity of impeding visits by ICRC delegates and issued in 1995 specific orders to allow the ICRC to conduct visits according to its criteria.³⁷³

³⁶⁴ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, Annex I, p. 2, see also Annex III, p. 4.

³⁶⁵ US, Letter dated 8 February 1991 to the President of the UN Security Council, UN Doc. S/22216, 13 February 1991, p. 2; see also Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991.

³⁶⁶ Uruguay, Statement before the HRC, UN Doc. CCPR/C/SR.355, 8 April 1982, § 10.

³⁶⁷ ICRC, Press Release No. 1775, Yemen: ICRC active on both sides appeals to belligerents, 12 May 1994.

³⁶⁸ ICRC archive document. ³⁶⁹ ICRC archive document. ³⁷⁰ ICRC archive document.

³⁷¹ ICRC archive document. ³⁷² ICRC archive document. ³⁷³ ICRC archive documents.

410. In 1995 and 1996, in the context of a non-international armed conflict, the governmental authorities permitted the ICRC to visit detained persons on several occasions, in accordance with ICRC procedures.³⁷⁴

III. Practice of International Organisations and Conferences

United Nations

411. In two resolutions adopted in 1992, the UN Security Council demanded that the relevant international humanitarian organisations, and in particular the ICRC, be granted immediate, unimpeded and continued access to camps, prisons and detention centres within the territory of the former Yugoslavia and appealed to the parties to the conflict to do all in their power to facilitate such access.³⁷⁵

412. In a resolution adopted in 1994, the UN Security Council called for unhindered access by the ICRC to all persons detained by all parties to the conflict in Tajikistan.³⁷⁶

413. In a resolution adopted in 1995, the UN Security Council reminded the government of Croatia of its responsibility to allow access by representatives of the ICRC to members of the local Serb forces detained by Croatian government forces.³⁷⁷

414. In a resolution adopted in 1995, the UN Security Council demanded that the Bosnian Serb party permit representatives of the ICRC to visit and register any persons detained against their will, including any members of the forces of Bosnia and Herzegovina.³⁷⁸

415. In two resolutions adopted in 1995 in the context of the conflicts in the former Yugoslavia, the UN Security Council reiterated "its strong support for the efforts of the International Committee of the Red Cross (ICRC) in seeking access to . . . persons detained" and condemned "in the strongest possible terms the failure of the Bosnian Serb party to comply with their commitments in respect of such access". It also reaffirmed its demand that:

the Bosnian Serb party give immediate and unimpeded access to representatives of . . . the ICRC and other international agencies . . . to persons detained . . . and permit representatives of the ICRC (i) to visit and register any persons detained against their will, whether civilians or members of the forces of Bosnia and Herzegovina.³⁷⁹

416. In 1995, in a statement by its President, the UN Security Council reiterated its demand that the Bosnian Serb party permit representatives of the

³⁷⁴ ICRC archive documents.

³⁷⁵ UN Security Council, Res. 770, 13 August 1992, preamble; Res. 771, 13 August 1992, § 4.

³⁷⁶ UN Security Council, Res. 968, 16 December 1994, § 10.

³⁷⁷ UN Security Council, Res. 1009, 10 August 1995, § 3.

³⁷⁸ UN Security Council, Res. 1010, 10 August 1995, § 1.

³⁷⁹ UN Security Council, Res. 1019, 9 November 1995, preamble and § 2; Res. 1034, 21 December 1995, preamble and §§ 2-5.

ICRC to visit and register any persons detained against their will, including any members of the forces of Bosnia and Herzegovina.³⁸⁰

417. In a resolution adopted in 1970 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties involved in armed conflicts to allow the ICRC to have access to POWs and to all places of detention.³⁸¹

418. In a resolution adopted in 1992, the UN General Assembly requested that the ICRC:

be granted immediate, unimpeded and continued access to all camps, prisons and to other places of detention within the territory of the former Yugoslavia and that all parties ensure complete safety and freedom of movement for the International Committee and otherwise facilitate such access.³⁸²

419. In a resolution adopted in 1998 on the question of human rights in Afghanistan, the UN Commission on Human Rights urged the parties to the Afghan conflict to provide the ICRC with access to all prisoners.³⁸³

420. In 1996, in a statement by its Chairman on the situation of human rights in Chechnya, the UN Commission on Human Rights called for "the International Committee of the Red Cross to be permitted to have regular access to all detainees, in conformity with its standard criteria, in order to verify the conditions of their detention and treatment".³⁸⁴

421. In 1999, in the context of the conflict in East Timor, the ICRC reported that the multinational force in East Timor, INTERFET:

arrests and detains, generally for short periods, persons suspected of engaging in militia activities. The ICRC was consulted by INTERFET in the development of detention procedures to ensure that they were in accordance with international standards. [The ICRC] has access to persons arrested and detained by INTERFET, and regularly visits them in accordance with standard ICRC working procedures.³⁸⁵

Other International Organisations

422. In a resolution adopted in 1985 on the deteriorating situation in Afghanistan, the Parliamentary Assembly of the Council of Europe urged "the governments of member states of the Council of Europe . . . to intervene with all

³⁸⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/43, 7 September 1995.

³⁸¹ UN General Assembly, Res. 2676 (XXV), 9 December 1970, § 1.

³⁸² UN General Assembly, Res. 46/242, 25 August 1992, § 9; see also Res. 48/153, 20 December 1993, §§ 14–16, Res. 49/10, 3 November 1994, § 25 and Res. 49/196, 23 December 1994, §§ 23–24.

³⁸³ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 5(f).

³⁸⁴ UN Commission on Human Rights, Chairman's statement on the situation of human rights in the Republic of Chechnya of the Russian Federation, UN Doc. E/CN.4/1996/L.10/Add.10, 24 April 1996, § 87.

³⁸⁵ ICRC, Update No. 99/05 on ICRC Activities in Indonesia/East Timor, 29 November 1999, § 4.

United Nations member states to grant free access facilities for the Red Cross and Red Crescent to all the places they wish to visit".³⁸⁶

423. In a resolution adopted in 1994, the Parliamentary Assembly of the Council of Europe asked the government of Rwanda to encourage the ICRC to continue to visit places of detention of POWs, as well as police stations, and to allow international observers to visit other places of detention.³⁸⁷

424. In a resolution adopted in 1995 on the situation in some parts of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe demanded that UNHCR, the ICRC and other humanitarian organisations be given access to Bosnian Serb prisoner camps.³⁸⁸

425. In a resolution on Kosovo adopted in 1996, the Parliamentary Assembly of the Council of Europe called upon the governments of the FRY and the Republic of Serbia "to allow the ICRC immediate access to detainees".³⁸⁹

426. In a resolution adopted in 1996 on the activities of the ICRC, the Parliamentary Assembly of the Council of Europe invited member States to "give representatives of the ICRC access to persons detained in international or internal armed conflicts".³⁹⁰

427. In a recommendation on Kosovo in 1998, the Parliamentary Assembly of the Council of Europe urged the parties to the conflict to provide access to humanitarian organisations to detained persons.³⁹¹

428. In a resolution adopted in 2000 on violations of human rights and humanitarian law in Chechnya, the European Parliament urged that "full access and appropriate conditions be ensured to enable international humanitarian assistance to be delivered and that access to detainees and internally displaced persons be granted".³⁹²

429. In 1995, in a statement before the OSCE Permanent Council, the EU requested that the ICRC be given unrestricted access to detainees in the context of the conflict in Chechnya.³⁹³

430. In a resolution adopted in 1997, the Council of the League of Arab States decided:

To urge the Member States of the League [of Arab States] to use their good offices in international organisations so that all necessary representations are made to government of Israel, the occupying power, to enable the International Committee of the Red Cross and other humanitarian organisations to visit the detainees in Khiam and Marj Uyun periodically and on a regular basis, and to ensure that the

³⁸⁶ Council of Europe, Parliamentary Assembly, Res. 854, 20 November 1985, § 6.

³⁸⁷ Council of Europe, Parliamentary Assembly, Res. 1050, 10 November 1994, § 6(i)(c).

³⁸⁸ Council of Europe, Parliamentary Assembly, Res. 1066, 27 September 1995, § 6(iv).

³⁸⁹ Council of Europe, Parliamentary Assembly, Res. 1077, 24 January 1996, § 5(i)(b).

³⁹⁰ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(f).

³⁹¹ Council of Europe, Parliamentary Assembly, Rec. 1385, 24 September 1998, § 7(iii)(a).

³⁹² European Parliament, Resolution on violations of human rights and humanitarian law in Chechnya, 16 March 2000, § 5.

³⁹³ EU, Statement by the Presidency before the OSCE Permanent Council concerning the situation in Chechnya, 2 February 1995, pp. 3–4.

conditions in which they are being kept are inspected, that they are provided with health and humanitarian care and that their relatives are allowed to visit them regularly.³⁹⁴

431. In 1995, the OSCE Permanent Council requested that the ICRC be given unrestricted access to detainees in the context of the conflict in Chechnya.³⁹⁵

432. In a decision on the OSCE Minsk Process adopted in 1995, the OSCE Ministerial Council urged the parties to the conflict in Nagorno-Karabakh "to provide the ICRC unimpeded access to all places of detention and all detainees".³⁹⁶

International Conferences

433. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the treatment of prisoners of war in which it called upon all authorities involved in an armed conflict "to ensure... that the International Committee of the Red Cross is enabled to carry out its traditional humanitarian functions to ameliorate the condition of prisoners of war".³⁹⁷

434. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it called upon all parties "to allow the Protecting Power or the International Committee of the Red Cross free access to prisoners of war and to all places of their detention".³⁹⁸

435. The 24th International Conference of the Red Cross in 1981 adopted a resolution on humanitarian activities of the ICRC for the benefit of victims of armed conflicts in which it deplored the fact that "the ICRC is refused access to the captured combatants and detained civilians in the armed conflicts of Western Sahara, Ogaden and later on Afghanistan". It urged all parties concerned to enable the ICRC "to protect and assist persons captured, detained, wounded or sick and civilians affected by these conflicts".³⁹⁹

436. The 25th International Conference of the Red Cross in 1986 adopted a resolution on respect for international humanitarian law in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions in which it appealed to parties involved in armed conflicts to "grant regular access to the ICRC to all prisoners in armed conflicts covered by international humanitarian law".⁴⁰⁰

437. In a resolution on Bosnia and Herzegovina adopted in 1992, the 88th Inter-Parliamentary Conference insisted that "appropriate international humanitarian organizations and, in particular, the International Committee of the Red

³⁹⁴ League of Arab States, Council, Res. 5635, 31 March 1997, § 4.

³⁹⁵ OSCE, Permanent Council, Resolution on Chechnya, 3 February 1995, §§ 6 and 11.

³⁹⁶ OSCE, Ministerial Council, Decision on the Minsk Process, Doc. MC(5).DEC/3, 8 December 1995, § 3.

³⁹⁷ 20th International Conference of the Red Cross, Vienna, 2-9 October 1965, Res. XXIV.

³⁹⁸ 21st International Conference of the Red Cross, Istanbul, 6-13 September 1969, Res. XI.

³⁹⁹ 24th International Conference of the Red Cross, Manila, 7-14 November 1981, Res. IV.

⁴⁰⁰ 25th International Conference of the Red Cross, Geneva, 23-31 October 1986, Res. I, § 3.

Cross, be granted immediate, unimpeded and continued access to all camps, prisons and other places of detention".⁴⁰¹

438. The Conclusions of the London Peace Implementation Conference for Bosnia and Herzegovina in 1995 state that fulfilment of the 1995 Dayton Accords will require "full and immediate access by the ICRC to all places where prisoners and detainees are kept, to interview and register all of them prior to their release".⁴⁰²

IV. Practice of International Judicial and Quasi-judicial Bodies

439. In the *Peruvian Prisons case (Provisional Measures)* in 1993, the IACiHR requested the IACtHR to indicate provisional measures with respect to the situation in four Peruvian prisons and noted in the description of the "grave and urgent nature" of the case that "the International Committee of the Red Cross is not currently authorized to inspect those prisons".⁴⁰³

V. Practice of the International Red Cross and Red Crescent Movement

440. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

Representatives of the Protecting Powers and of the International Committee of the Red Cross:

- a) have access to all places and premises where prisoners of war are located;
- b) are allowed to visit prisoners of war in transfer;
- c) are allowed to interview prisoners of war without witnesses;
- d) have full liberty so select the places they wish to visit.⁴⁰⁴

441. In international armed conflict, the Geneva Conventions give express competence to the ICRC as a protection mechanism (Article 126 GC III and Article 143 GC IV). According to these provisions, ICRC delegates shall have permission to go to all places where persons protected by the Third and Fourth Geneva Conventions may be held, have access to all premises occupied by them, and be able to interview them without witnesses, either personally or through an interpreter. In non-international armed conflict, according to common Article 3 of the 1949 Geneva Conventions and the 1986 Statutes of

⁴⁰¹ 88th Inter-Parliamentary Conference, Stockholm, 7–12 September 1992, Resolution on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, § 4.

⁴⁰² Peace Implementation Conference for Bosnia and Herzegovina, London, 8–9 December 1995, Conclusions, annexed to Letter dated 11 December 1995 from the UK to the UN Secretary-General, UN Doc. S/1995/1029, 12 December 1995, § 25.

⁴⁰³ IACtHR, *Peruvian Prisons case (Provisional Measures)*, Order, 27 January 1993, § 3.

⁴⁰⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 719, see also § 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

the International Red Cross and Red Crescent Movement (Article 5(2)), the ICRC may offer its services to ensure protection and assistance of military and civilian victims of such situations and of their direct results. Protection of the lives, physical and mental integrity and the dignity of persons deprived of their liberty are at the heart of the ICRC's action. The objective of ICRC visits to persons deprived of their liberty is basically to prevent and put a stop to such occurrences as enforced disappearances, extra-judicial executions, torture and other cruel, inhuman or degrading treatment or punishment, as well as to improve detention conditions and restore family links. Preliminary conditions are required for the development of an action aimed at protecting persons deprived of their liberty, namely:

- Access to all persons deprived of their liberty for reasons related to armed conflict or internal violence, at all stages of their detention and in all places where they are held.
- Possibility to talk freely and in private with the persons deprived of their liberty of its choice.
- Possibility to register the identity of the persons deprived of their liberty.
- Possibility to repeat its visits to persons deprived of their liberty on a regular basis.
- ICRC must be authorized to inform families of the detention of their relatives and to ensure family news between persons deprived of their liberty and their families, whenever necessary.

In practice, the authorities often restrict access by the ICRC to persons deprived of their liberty during the first stage of detention. Such restrictions are not acceptable to the ICRC, unless it is for a short period, and have been the subject of many representations by the ICRC to the authorities concerned.

442. In a press release in 1973, the ICRC responded to press reports which had erroneously stated that it was visiting detainees in Con Son prison in South Vietnam. The ICRC stated that it had ceased visiting the prison as it was only allowed to see "several dozen prisoners of war" and not the "civilian detainees who constituted the immense majority of the inmates" and that it was "precisely because of the restrictions imposed by the South Vietnam government – particularly the prohibition of private talks with detainees – that in March 1972 it discontinued visits to interned civilians".⁴⁰⁵

443. In an appeal launched in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC specifically requested that the Patriotic Front "allow the ICRC to visit captured enemy combatants and civilians regularly, and without witness, wherever they are detained".⁴⁰⁶

⁴⁰⁵ ICRC, Press Release No. 1152b, ICRC puts the Record Straight on Con Son, 21 March 1973.

⁴⁰⁶ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 7, *IRRC*, No. 209, 1979, p. 89.

444. On several occasions between 1992 and 1996, the ICRC reminded a State engaged in an internal armed conflict of its obligation to detain prisoners in places where ICRC delegates could visit them.⁴⁰⁷

445. In a press release issued in 1993 on the situation in eastern Bosnia and Herzegovina, the ICRC called on all parties "to facilitate ICRC access to all the victims".⁴⁰⁸

446. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "the visiting rights of the ICRC shall be respected and safeguarded".⁴⁰⁹

447. In a press release issued in 1995 concerning Turkey's military operations in northern Iraq, the ICRC requested "immediate access to Kurdish combatants and civilians detained by the Turkish armed forces".⁴¹⁰

448. In 1995, an article in the *Bangkok Post* stated that the ICRC had closed its delegation in Rangoon because it had "failed to get proper access to political prisoners in Burma". An ICRC statement quoted in the article said that the ICRC had first requested access to political prisoners in Burma in May 1994 but it did not receive a response from the ruling State Law and Order Restoration Council (SLORC) until March 1995. The ICRC stated in relation to the response received that "this reply was not satisfactory as it took no account of the customary procedures for visits to places of detention followed by the ICRC in all countries where it conducts such activities".⁴¹¹

449. In 1995, the ICTY President wrote to the President of the ICRC proposing that the ICRC:

undertake, in accordance with the modalities set out below, the inspection of conditions of detention and the treatment of persons awaiting trial or appeal before the Tribunal or otherwise detained on the authority of the Tribunal in the Penitentiary Complex or in the holding cells located at the premises of the Tribunal.

The "modalities" proposed included that the ICRC would be able to inspect and report on all aspects of conditions of detention; that it would have unlimited access to the detention facilities; and that it would be free to communicate with the detainees without witnesses being present.⁴¹² In response, the ICRC President stated that it was within the mandate of the ICRC to visit

⁴⁰⁷ ICRC archive documents.

⁴⁰⁸ ICRC, Press Release No. 1744, Eastern Bosnia: ICRC unable to assist conflict victims, 17 April 1993.

⁴⁰⁹ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § I, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1308.

⁴¹⁰ ICRC, Press Release No. 1797, ICRC calls for compliance with international law in Turkey and Northern Iraq, 22 March 1995.

⁴¹¹ *Bangkok Post*, Red Cross shuts office in Burma out of frustration, 20 June 1995.

⁴¹² ICTY, Letter from the President of the International Criminal Tribunal for the Former Yugoslavia to the President of the International Committee of the Red Cross, 28 April 1995, *IRRC*, No. 311, 1996, pp. 238-242.

persons detained in connection with armed conflicts and that the organisation was, therefore, ready to carry out visits to detainees held by the ICTY. The conditions outlined in the letter from the ICTY were described as corresponding to "the traditional modalities under which the ICRC assesses the conditions of detention and the treatment of detainees, in particular by interviewing them in private, and makes the appropriate recommendations to the authorities concerned".⁴¹³

450. In 1995, the ICRC reminded the parties to an internal armed conflict that "in order to be able to carry out its humanitarian mission, it has to have access to all persons captured or arrested and detained in connection with the conflict situation". The ICRC outlined the conditions for its visits and stated that "these customary working procedures are accepted by all States where the ICRC is conducting visits to prisoners/detainees. They help to provide the protection which the parties to a conflict expect for people from their side who are held by the adversary."⁴¹⁴

451. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that "the detaining authority must authorize the ICRC to have access to . . . persons [arrested], wherever they may be, so that its delegates may ascertain their well-being and forward news to their families".⁴¹⁵

VI. Other Practice

452. In 1977, an armed opposition group agreed to allow the ICRC to visit all detained combatants where the places of detention were not subject to security concerns. It also stated that it would not make visits conditional on the provision of information about its own missing combatants.⁴¹⁶

453. In 1979, an armed opposition group agreed to allow the ICRC to visit captured combatants.⁴¹⁷

454. In 1981, an armed opposition group permitted the ICRC to visit captured combatants of a third State in its power.⁴¹⁸

455. In 1982, a separatist entity agreed to allow the ICRC to visit its prisoners.⁴¹⁹

456. In 1987, an armed opposition group stated that it would in principle allow the ICRC to visit its prisoners, but that visits would be possible only if prisoners could be moved to a safe area.⁴²⁰

⁴¹³ ICRC, Letter from the President of the International Committee of the Red Cross to the President of the International Criminal Tribunal for the Former Yugoslavia, 5 May 1995, *IRRC*, No. 311, 1996, pp. 238–242.

⁴¹⁴ ICRC archive document.

⁴¹⁵ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

⁴¹⁶ ICRC archive documents. ⁴¹⁷ ICRC archive document. ⁴¹⁸ ICRC archive document.

⁴¹⁹ ICRC archive document. ⁴²⁰ ICRC archive documents.

457. In 1988, an armed opposition group allowed the ICRC to visit its prisoners.⁴²¹

458. In 1988, an armed opposition group accepted ICRC visits in principle, but in the end these visits were not carried out owing to geographical isolation.⁴²²

459. In 1988, after an initial refusal, an armed opposition group undertook to grant permission to the ICRC to visit all prisoners.⁴²³

460. In 1988, an armed opposition group accepted ICRC visits in principle.⁴²⁴

461. In 1988 and 1989, an armed opposition group accepted ICRC visits in principle.⁴²⁵

462. In 1992, an armed opposition group undertook to allow the ICRC to visit all captured combatants.⁴²⁶

463. In 1993 and 1996, a separatist entity allowed the ICRC to visit detainees, but refrained from allowing unlimited access owing to security concerns.⁴²⁷

464. In 1994, a separatist entity stated that it believed that granting permission to ICRC delegates to visit places of detention to be an obligation under international law and denounced a State's refusal to do so.⁴²⁸

465. In 1990, an armed opposition group expressed the intention to allow ICRC visits and undertook to inform the ICRC of all detained prisoners so as to enable visits to take place.⁴²⁹

H. Correspondence of Persons Deprived of Their Liberty

I. Treaties and Other Instruments

Treaties

466. Article 70 GC III provides that:

Immediately upon capture, or not more than one week after arrival at a camp, . . . every prisoner of war shall be enabled to write direct to his family, on the one hand, and to the Central Prisoners of War Agency . . . on the other hand, a card . . . informing his relatives of his capture, address and state of health.

Article 106 GC IV contains a similar provision for internees upon arrival in their place of internment.

467. Article 71, first paragraph, GC III provides that "prisoners of war shall be allowed to send and receive letters and cards. If the Detaining Power deems it necessary to limit the number of letters and cards sent by each prisoner of war, the said number shall not be less than two letters and four cards monthly". The second paragraph, provides that "prisoners of war who have been without news for a long period, or who are unable to receive news from their next of kin, or to give them news by the ordinary postal route, as well as those who

⁴²¹ ICRC archive document.

⁴²⁴ ICRC archive document.

⁴²⁷ ICRC archive document.

⁴²² ICRC archive document.

⁴²⁵ ICRC archive document.

⁴²⁸ ICRC archive document.

⁴²³ ICRC archive document.

⁴²⁶ ICRC archive document.

⁴²⁹ ICRC archive document.

are at a great distance from their home, shall be permitted to send telegrams". Article 107, first and second paragraphs, GC IV contains similar provisions for internees.

468. Article 25, first paragraph, GC IV provides for the right of all persons in the territory of a party to the conflict "to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them". According to the second paragraph, the Central Agency may play a role as a neutral intermediary in this respect. The third paragraph provides that:

If the Parties to the conflict deem it necessary to restrict family correspondence, such restrictions shall be confined to the compulsory use of standard forms containing twenty-five freely chosen words, and to the limitation of the number of these forms despatched to one each month.

469. Article 8 of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel states that all captured military personnel and captured civilians "shall be allowed to exchange post cards and letters with their families".

470. Article 5(2)(b) AP II provides that persons whose liberty has been restricted "shall be allowed to send and receive letters and cards, the number of which may be limited by competent authority if it deems necessary. Article 5 AP II was adopted by consensus.⁴³⁰

471. Article 37 of the 1989 Convention on the Rights of the Child provides that every child deprived of liberty "shall have the right to maintain contact with his or her family through correspondence . . . save in exceptional circumstances".

Other Instruments

472. Rule 37 of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that "prisoners shall be allowed under necessary supervision to communicate with their family and reputable friends at regular intervals . . . by correspondence".

473. Rule 43(1) of the 1987 European Prison Rules provides that "prisoners shall be allowed to communicate with their families and, subject to the needs of treatment, security and good order, persons or representatives of outside organisations".

474. Principle 15 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that "notwithstanding the exceptions contained in Principle 16, paragraph 4, and Principle 18, paragraph 3, communication of the detained or imprisoned person with the outside world, and in particular his family or counsel, shall not be denied for more than a matter of days".

⁴³⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

*II. National Practice**Military Manuals*

475. Argentina's Law of War Manual (1969) reproduces Articles 71 GC III and 25 GC IV.⁴³¹

476. Argentina's Law of War Manual (1989), referring to Articles 71, 72, 74, 75 and 76 GC III, provides that "prisoners of war shall be allowed to send and receive letters and cards".⁴³² It also provides that internees shall be enabled "to give news of a strictly personal nature to members of their families, wherever they may be, and to receive news from them".⁴³³

477. Australia's Commanders' Guide provides that POWs "have the right to send and receive letters".⁴³⁴ It further states that captured enemy combatants should be treated as being entitled to POW status.⁴³⁵

478. Belgium's Law of War Manual provides that "not more than one week after his arrival at a camp, even if it is a transit camp, every prisoner of war should be enabled to write, directly to his family and to the Central Prisoners of War Agency, a card of a special model". It adds that POWs should be allowed to send and receive cards.⁴³⁶

479. Benin's Military Manual provides that captured enemy combatants and civilians shall have the right to exchange news with their families.⁴³⁷

480. Cameroon's Instructors' Manual provides that the correspondence of POWs shall reach them regularly and shall not be interfered with.⁴³⁸

481. Cameroon's Disciplinary Regulations states that prisoners shall be authorised to send and receive correspondence by the intermediary of the ICRC.⁴³⁹

482. Canada's LOAC Manual provides that "POWs shall be allowed to send and receive letters and cards and, in exceptional circumstances, telegrams as well".⁴⁴⁰ With regard to non-international armed conflicts, the manual states that "detained persons shall be allowed to send and received letters and cards".⁴⁴¹

483. Colombia's Circular on Fundamental Rules of IHL provides that "captured combatants and civilian persons who are under the power of the adverse Party... have the right to exchange news with their families".⁴⁴²

⁴³¹ Argentina, *Law of War Manual* (1969), §§ 2.066 and 4.008.

⁴³² Argentina, *Law of War Manual* (1989), § 3.16.

⁴³³ Argentina, *Law of War Manual* (1989), § 4.14.

⁴³⁴ Australia, *Commanders' Guide* (1994), § 716.

⁴³⁵ Australia, *Commanders' Guide* (1994), § 719.

⁴³⁶ Belgium, *Law of War Manual* (1983), p. 47.

⁴³⁷ Benin, *Military Manual* (1995), Fascicule II, p. 5.

⁴³⁸ Cameroon, *Instructors' Manual* (1992), p. 154, § 541.

⁴³⁹ Cameroon, *Disciplinary Regulations* (1975), Article 33.

⁴⁴⁰ Canada, *LOAC Manual* (1999), p. 10-5, § 45.

⁴⁴¹ Canada, *LOAC Manual* (1999), p. 17-3, § 25.

⁴⁴² Colombia, *Circular on Fundamental Rules of IHL* (1992), § 4.

484. Colombia's Basic Military Manual provides that, in both international and non-international armed conflicts, detained persons shall have the right to communicate with their families and receive letters.⁴⁴³

485. Croatia's Instructions on Basic Rules of IHL provides that detainees have the right to correspond with their families.⁴⁴⁴

486. France's LOAC Summary Note provides that "captured combatants have the right to exchange news".⁴⁴⁵

487. France's LOAC Teaching Note provides that every prisoner of war "is entitled to exchange news, to send letters and to receive mail".⁴⁴⁶

488. Germany's Military Manual states that "not more than one week after the arrival at a camp, every prisoner of war shall be enabled to inform his family and the Central Prisoners of War Agency by letter of his captivity and to regularly correspond with his relatives henceforth".⁴⁴⁷

489. Israel's Manual on the Laws of War provides that:

One of the most important provisions in the Geneva Convention are the rules concerning the right of prisoners to maintain correspondence with their relatives. . . . The detaining State may censor the mail of detainees, so long as censorship is not used as a pretext for withholding mail from prisoners.⁴⁴⁸

490. Madagascar's Military Manual provides that captured combatants and civilians in the power of the adverse party "shall have the right to exchange news with their families".⁴⁴⁹ It also provides that POWs "shall be allowed to inform their families and the Central Tracing Agency of the ICRC so that they can correspond regularly with their families".⁴⁵⁰

491. The Military Manual of the Netherlands provides that "prisoners of war shall be allowed to send and receive letters and cards".⁴⁵¹

492. The Military Handbook of the Netherlands provides that "correspondence from and for prisoners of war can be limited and censored".⁴⁵²

493. New Zealand's Military Manual provides that:

Immediately upon capture and upon transfer from one place of detention to another, prisoners shall be allowed to send a card to their families and to the Central Prisoners of War Agency giving information of their capture, address and state of health. They shall be allowed to send and receive letters and cards and, in exceptional circumstances, telegrams as well.⁴⁵³

⁴⁴³ Colombia, *Basic Military Manual* (1995), p. 21.

⁴⁴⁴ Croatia, *Instructions on Basic Rules of IHL* (1993), § 4.

⁴⁴⁵ France, *LOAC Summary Note* (1992), § 2.1.

⁴⁴⁶ France, *LOAC Teaching Note* (2000), p. 3.

⁴⁴⁷ Germany, *Military Manual* (1992), § 721.

⁴⁴⁸ Israel, *Manual on the Laws of War* (1998), p. 53.

⁴⁴⁹ Madagascar, *Military Manual* (1994), p. 91, Rule 4.

⁴⁵⁰ Madagascar, *Military Manual* (1994), Fiche 2-T, § 26.

⁴⁵¹ Netherlands, *Military Manual* (1993), p. VII-10.

⁴⁵² Netherlands, *Military Handbook* (1995), p. 7-42.

⁴⁵³ New Zealand, *Military Manual* (1992), § 929.

The manual further states that “all persons in the territory of the belligerent or in territory occupied by him must be enabled to transmit to, and receive from, members of their families, wherever they may be, news of a strictly personal nature”.⁴⁵⁴ It also states that:

As soon as he is interned, transferred, or becomes sick, the internee is entitled to send a card to his family and to the Central Information Agency indicating his present location and his state of health. An internee is allowed to correspond frequently but letters may be limited in number, if the Detaining Power finds it necessary, and are subject to its censorship.⁴⁵⁵

Lastly, the manual specifies that in non-international armed conflicts, detained and interned persons “shall be allowed to send and receive letters and cards”.⁴⁵⁶

494. Nicaragua’s Military Manual provides that POWs have the right to send and receive letters.⁴⁵⁷

495. Nigeria’s Manual on the Laws of War provides that “POWs should be allowed to send and receive cards and letters, free of charge”.⁴⁵⁸

496. Romania’s Soldiers’ Manual provides that captured combatants and civilians in the hands of a party to the conflict shall have the right to communicate with their families.⁴⁵⁹

497. Senegal’s IHL Manual provides that one of the fundamental guarantees common to IHL conventions and the UDHR is the right of detained persons to send and receive letters and cards whose number may be limited by the competent authority if it deems necessary.⁴⁶⁰

498. Spain’s LOAC Manual provides that “prisoners of war shall be allowed to send and receive letters and cards. Such authorisation may be limited by the Detaining Power and correspondence may be censored.”⁴⁶¹ Referring to Article 71 GC III, the manual notes that if the detaining power decides to limit the correspondence sent by the prisoners, the number shall not be less than two letters and four cards monthly.⁴⁶² It also points out that further limitations on the correspondence may only be decided by the protecting power.⁴⁶³

499. Switzerland’s Basic Military Manual states that:

Each prisoner of war shall be enabled to inform immediately or as rapidly as possible his family and the Central Prisoners of War Agency in case of illness or transfer to another camp. The prisoner shall be allowed to receive and send correspondence, and in urgent cases it shall be permitted to send telegrams . . .

⁴⁵⁴ New Zealand, *Military Manual* (1992), § 1113.

⁴⁵⁵ New Zealand, *Military Manual* (1992), § 1127.

⁴⁵⁶ New Zealand, *Military Manual* (1992), § 1814(3).

⁴⁵⁷ Nicaragua, *Military Manual* (1996), Article 14(27) and (41).

⁴⁵⁸ Nigeria, *Manual on the Laws of War* (undated), § 43.

⁴⁵⁹ Romania, *Soldiers’ Manual* (1991), Part III, § 4.

⁴⁶⁰ Senegal, *IHL Manual* (1999), pp. 3 and 24.

⁴⁶¹ Spain, *LOAC Manual* (1996) Vol. I, § 8.4.(a).6, see also §§ 6.4.(g).1, 6.4.(g).3 and 6.4.(g).4.

⁴⁶² Spain, *LOAC Manual* (1996), Vol. I, § 6.4.(g).1.

⁴⁶³ Spain, *LOAC Manual* (1996), Vol. I, § 8.4.(a).6.

Any prohibition of correspondence ordered for military or political reasons shall be only temporary and its duration shall be as short as possible.⁴⁶⁴

The same rules are also applicable to internees.⁴⁶⁵

500. Togo's Military Manual provides that captured enemy combatants and civilians shall have the right to exchange news with their families.⁴⁶⁶

501. The UK Military Manual states that:

Internees must be permitted to send and receive letters and postcards. If the Detaining Power deems it necessary to impose limitations, the number permitted must not be less than two letters and four cards monthly. Letters and cards must be conveyed with reasonable dispatch and must not be held up as a disciplinary measure. Internees who have been a long time without news or cannot obtain news from their relatives and those who are a long distance from their homes must be allowed to send telegrams at their own expense.⁴⁶⁷

The manual further specifies that:

Prisoners of war must be allowed to send and receive letters and cards. In addition to the capture card, they must be allowed to send at least two letters and four cards every month. Limitations on correspondence addressed to prisoners of war may be imposed only by the state on which they depend. The Detaining Power may request such a limitation. All correspondence must be conveyed as rapidly as possible, and must not be delayed or retained for disciplinary reasons. Prisoners of war who have not been in touch with their families for a long time or who are at a great distance from their homes must be allowed to send telegrams at their own expense. The same applies in case of emergency. As a general rule they must be permitted to correspond in their native language. Bags containing prisoner of war mail must be labelled as such, sealed and addressed to offices of destination.⁴⁶⁸

In addition, the manual provides that "prisoners undergoing disciplinary punishment must be allowed to read and write and to send and receive letters".⁴⁶⁹

502. The UK LOAC Manual provides that "PW must be allowed to send a capture card to the Protecting Power and to their next of kin no later than the time of their arrival in a PW camp".⁴⁷⁰

503. The US Field Manual reproduces Articles 70 and 71 GC III and 25, 106 and 107 GC IV.⁴⁷¹

504. The US Instructor's Guide provides that "even though you are a prisoner (or internee), you are entitled to send and receive mail. Each prisoner must be allowed to write a minimum of two letters and four postal cards per month."⁴⁷²

⁴⁶⁴ Switzerland, *Basic Military Manual* (1987), Articles 133 and 137.

⁴⁶⁵ Switzerland, *Basic Military Manual* (1987), Article 182.

⁴⁶⁶ Togo, *Military Manual* (1996), Fascicule II, p. 5. ⁴⁶⁷ UK, *Military Manual* (1958), § 67.

⁴⁶⁸ UK, *Military Manual* (1958), § 189. ⁴⁶⁹ UK, *Military Manual* (1981), § 219.

⁴⁷⁰ UK, *LOAC Manual* (1981), Section 8, p. 31, § 16(f).

⁴⁷¹ US, *Field Manual* (1956), §§ 146, 147, 264, 313 and 314.

⁴⁷² US, *Instructor's Guide* (1985), p. 11.

505. The US Air Force Pamphlet provides that “the prisoner of war shall be permitted to send out a capture card addressed to the Central Prisoners of War Agency for its card index system”. The Pamphlet further specifies that Article 71 GC III entitles them “to mail a minimum of 2 letters and 4 cards each month”. It adds that “this minimum may be reduced if the protecting power finds that to be required by necessary censorship. POWs are also allowed to send telegrams under certain circumstances.”⁴⁷³

National Legislation

506. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that “prisoners of war are entitled to the following in all cases: . . . to write messages to their relatives (directly through the adverse party and points of exchange, or through the Protecting Powers or their substitute – ICRC)”.⁴⁷⁴

507. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁴⁷⁵

508. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 70 and 71 GC III and 25 and 107 GC IV, as well as any “contravention” of AP II, including violations of Article 5(2)(b) AP II, are punishable offences.⁴⁷⁶

509. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.⁴⁷⁷

510. Rwanda’s Prison Order provides that prisoners are entitled to correspond with their families.⁴⁷⁸

National Case-law

511. No practice was found.

Other National Practice

512. It is reported that, during the Algerian war of independence, “French prisoners never had any reason to complain about their stay in captivity . . . They had the right to write to their families via the Algerian Red Crescent.”⁴⁷⁹

⁴⁷³ US, *Air Force Pamphlet* (1976), § 13-7.

⁴⁷⁴ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 22(5).

⁴⁷⁵ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴⁷⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁷⁷ Norway, *Military Penal Code as amended* (1902), § 108.

⁴⁷⁸ Rwanda, *Prison Order* (1961), Article 51.

⁴⁷⁹ La révolution algérienne tient au respect de l’homme, *El Moudjahid*, Vol. 3, p. 57.

513. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that detainees “have the right to correspond with their families”.⁴⁸⁰

514. According to the Report on the Practice of Malaysia, during the communist insurgency, correspondence was allowed in detention camps.⁴⁸¹

515. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that no POW in the hands of Iraq “was permitted the rights otherwise afforded them by [GC III], such as the right of correspondence authorised by Article 70”.⁴⁸²

516. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.⁴⁸³

III. Practice of International Organisations and Conferences

United Nations

517. No practice was found.

Other International Organisations

518. No practice was found.

International Conferences

519. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the treatment of prisoners of war in which it recognised that “the international community has consistently demanded . . . the facilitation of communication between prisoners of war and the exterior”.⁴⁸⁴

520. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that, irrespective of GC III, “the international community has consistently demanded humane treatment for prisoners of war, including . . . authorisation for prisoners to communicate with each other and with the exterior”.⁴⁸⁵

⁴⁸⁰ France, Etat-major de la Force d’Action Rapide, Ordres pour l’Opération Mistral, 1995, Section 6, § 62.

⁴⁸¹ Report on the Practice of Malaysia, 1997, Chapter 5.3.

⁴⁸² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 630.

⁴⁸³ Report on US Practice, 1997, Chapter 5.3.

⁴⁸⁴ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXIV.

⁴⁸⁵ 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.

IV. Practice of International Judicial and Quasi-judicial Bodies

521. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

522. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “prisoner of war are allowed to send and receive letters and cards” and that “the censoring of correspondence . . . shall be done as quickly as possible.”⁴⁸⁶

523. In the context of the Iran–Iraq War, the ICRC had registered some 6,800 Iranian prisoners of war by 1 March 1983. The organisation stated that these prisoners had been able “to correspond with their families in a satisfactory manner”.⁴⁸⁷

VI. Other Practice

524. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that “captured combatants and civilians under the authority of an adverse party . . . have the right to correspond with their families”.⁴⁸⁸

I. Visits to Persons Deprived of Their Liberty

Note: For practice concerning visits by the ICRC, see section G of this chapter. For practice concerning visits by religious personnel, see section J of this chapter. For practice concerning visits of counsel, see Chapter 32, section M.

*I. Treaties and Other Instruments**Treaties*

525. Article 116, first paragraph, GC IV provides that “every internee shall be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible”.

526. Article 37 of the 1989 Convention on the Rights of the Child provides that every child deprived of liberty “shall have the right to maintain contact with his or her family through . . . visits, save in exceptional circumstances”.

⁴⁸⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 716–717, see also 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

⁴⁸⁷ ICRC, Conflict between Iraq and Iran: ICRC Appeal, *IRRC*, No. 235, 1983, p. 221.

⁴⁸⁸ ICRC archive document.

Other Instruments

527. Rule 37 of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that “prisoners shall be allowed to receive visits from their family and reputable friends”.

528. Rule 43(1) of the 1987 European Prison Rules provides that “prisoners shall be allowed to communicate with their families and, subject to the needs of treatment, security and good order, persons or representatives of outside organisations and to receive visits from these persons as often as possible”.

529. Principle 19 of the 1988 Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment provides that “a detained or imprisoned person shall have the right to be visited by . . . members of his family . . . subject to reasonable conditions and restrictions as specified by law or lawful regulations”.

530. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that “in the event of the use of force and in case of armed conflict . . . it is a duty to arrange visits or reunions of the families separated by the circumstances of war”.

*II. National Practice**Military Manuals*

531. Argentina’s Law of War Manual (1969) reproduces Article 116 GC IV.⁴⁸⁹

532. Argentina’s Law of War Manual (1989) reproduces Article 116 GC IV.⁴⁹⁰

533. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that “family members, relatives . . . of detainees or arrested persons must be granted free access to the detention center/jail where the detainees are held, in accordance with the law and [Armed Forces of the Philippines/Philippines National Police] policy”.⁴⁹¹

534. The UK Military Manual provides that:

Every internee must be allowed to receive visitors, especially near relatives, at regular intervals and as frequently as possible. When possible, internees must also be allowed to visit their homes in urgent cases, particularly in cases of death or serious illness of relatives.⁴⁹²

535. The US Field Manual reproduces Article 116 GC IV.⁴⁹³

National Legislation

536. Numerous pieces of domestic legislation and administrative regulations provide for the right of detainees to be visited by their relatives. For instance,

⁴⁸⁹ Argentina, *Law of War Manual* (1969), § 4.047.

⁴⁹⁰ Argentina, *Law of War Manual* (1989), § 4.35(5).

⁴⁹¹ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § b(2).

⁴⁹² UK, *Military Manual* (1958), § 70. ⁴⁹³ US, *Field Manual* (1956), § 323.

under Rwanda's Prison Order, detainees are entitled to have contacts with the outside world, including visits.⁴⁹⁴

537. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴⁹⁵

538. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 116 GC IV, is a punishable offence.⁴⁹⁶

539. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment".⁴⁹⁷

National Case-law

540. No practice was found.

Other National Practice

541. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

542. In a resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly demanded that the FRY government guarantee the families of persons detained and transferred from Kosovo to other parts of the FRY and NGOs and international observers unimpeded and regular access to those who remained in detention.⁴⁹⁸

Other International Organisations

543. No practice was found.

International Conferences

544. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

545. In the *Greek case* in 1969, the ECiHR concluded that "the extreme manner of separation of detainees from their families and in particular, the severe

⁴⁹⁴ Rwanda, *Prison Order* (1961), Article 50.

⁴⁹⁵ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴⁹⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁹⁷ Norway, *Military Penal Code as amended* (1902), § 108(a).

⁴⁹⁸ UN General Assembly, Res. 54/183, 17 December 1999, § 9.

limitations, both practical and administrative, on the family visits" constituted a breach of Article 3 of the 1950 ECHR.⁴⁹⁹

546. In its admissibility decision in *X. v. UK* in 1982, the ECiHR held that a general limitation of visiting facilities to relatives and close relatives of prisoners was reasonable and constituted no interference with the prisoners' right to respect for private life according to Article 8 ECHR. The test was whether the interference with the right to family life to which the detainee was also entitled went "beyond what would be normally accepted in the case of an ordinary detainee". If the restrictions could not stand this test, the Commission had allowed the national authorities a very wide margin of appreciation in the limitation of family contacts on the basis of one of the grounds of the second paragraph of Article 8 ECHR. The Commission accepted an Austrian practice according to which those who were serving a sentence of imprisonment of more than a year were on that ground alone denied visits from their children under age, for the protection of the morals of these minors. In addition to an examination by the Strasbourg authorities of whether the restrictions were reasonable in the particular case, they should see to it that the restriction was not imposed on the prisoner as a disguised sanction on his/her behaviour, which would constitute a breach of Article 18 ECHR.⁵⁰⁰

547. In 1993, with reference to a prison to which members of the Tupac Amaru Revolutionary Movement were transferred, the IACiHR recommended that Peru allow relatives to visit prisoners.⁵⁰¹

V. Practice of the International Red Cross and Red Crescent Movement

548. No practice was found.

VI. Other Practice

549. According to the Report on SPLM/A practice, the Penal and Disciplinary Laws of the SPLM/A "gives power to every officer in charge of any unit to arrest and detain accused persons". The report asserts that:

This has led to a practice in the SPLA where many people are detained for long periods. Between 1985 and 1991, many people remained detained without charges in the Ethiopian bushes of the SPLM/A. Detainees remained incommunicado, without visits from friends or relatives, no treatment and in most cases no trials.⁵⁰²

⁴⁹⁹ ECiHR, *Greek case*, Report, 5 November 1969, Part B, Chapter IV(B)(VI), Section D, § 21.

⁵⁰⁰ ECiHR, *X. v. UK*, Admissibility Decision, 8 October 1982, p. 115.

⁵⁰¹ IACiHR, Report on the situation of human rights in Peru, Doc. OEA/Ser.L/V/II.83 Doc. 31, 12 March 1993, p. 29.

⁵⁰² Report on SPLM/A Practice, 1998, Chapter 5.3, referring to SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 73.

J. Respect for Convictions and Religious Practices of Persons Deprived of Their Liberty

Note: For practice concerning respect for convictions and religious practices in general, see Chapter 32, section P.

I. Treaties and Other Instruments

Treaties

550. Article 18 of the 1899 HR provides that “prisoners of war shall enjoy every latitude in the exercise of their religion, including attendance at their own church services, provided only they comply with the regulations for order and police issued by the military authorities”.

551. Article 18 of the 1907 HR provides that “prisoners of war shall enjoy complete liberty in the exercise of their religion, including attendance at the services of whatever church they may belong to, on the sole condition that they comply with the measures of order and police issued by the military authorities”.

552. Articles 34 GC III and 93 GC IV provide that detainees “shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities”.

553. Articles 34 GC III and 86 GC IV provide that adequate premises shall be provided where religious services may be held.

554. Articles 35 GC III and 93 GC IV provide that retained chaplains shall be allowed to exercise freely their ministry.

555. Article 76, third paragraph, GC IV provides that protected persons accused or convicted of offences shall have the right to receive any spiritual assistance they may require.

556. Article 4(1) AP II states that “all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their . . . convictions and religious practices”. Article 4 AP II was adopted by consensus.⁵⁰³

557. Article 5(1)(d) AP II provides that persons whose liberty has been restricted “shall be allowed to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions”. Article 5 AP II was adopted by consensus.⁵⁰⁴

Other Instruments

558. Rule 6(2) of the 1955 Standard Minimum Rules for the Treatment of Prisoners provides that “it is necessary to respect the religious beliefs and moral precepts of the group to which a prisoner belongs”. Rules 41 and 42 further

⁵⁰³ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

⁵⁰⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

develop this rule by providing for the appointment of a qualified representative and the provision of services and readings in the institutions.

559. Rule 2 of the 1987 European Prison Rules provides that “the religious beliefs and moral precepts of the group to which a prisoner belongs shall be respected”. Rules 46 and 47 further develop this rule by providing for the appointment of a qualified representative and the provision of services and readings in the institutions.

560. Paragraph 3 of the 1990 Basic Principles for the Treatment of Prisoners provides that it is “desirable to respect the religious beliefs and cultural precepts of the group to which prisoners belong, whenever local conditions so require”.

II. National Practice

Military Manuals

561. Argentina’s Law of War Manual (1969) provides that prisoners of war and internees “shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities”.⁵⁰⁵

562. Argentina’s Law of War Manual (1989) provides that “prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith”. It adds that “adequate premises shall be provided where religious services may be held”.⁵⁰⁶

563. Australia’s Defence Force Manual provides that “PWs are completely free to exercise their religious duties and must be provided with adequate premises where religious services can be held”.⁵⁰⁷ The manual considers the infringement of the religious rights of prisoners of war as a war crime.⁵⁰⁸

564. Benin’s Military Manual provides that captured enemy combatants shall be entitled to respect for their religious beliefs.⁵⁰⁹

565. Canada’s LOAC Manual provides that POWs are to receive spiritual attention, if possible from chaplains attached to their own forces or of their own nationality. It adds that the detaining power must provide religious personnel with all the facilities necessary for the religious ministrations of the POWs.⁵¹⁰ Concerning the treatment of internees, the manual provides that “premises for the holding of religious services must be made available”.⁵¹¹ It also specifies that “internees shall enjoy complete freedom to practice their own religion”.⁵¹² The manual further states that persons undergoing sentences

⁵⁰⁵ Argentina, *Law of War Manual* (1969), §§ 2.030 and 4.031.

⁵⁰⁶ Argentina, *Law of War Manual* (1989), § 3.14.

⁵⁰⁷ Australia, *Defence Force Manual* (1994), § 1030.

⁵⁰⁸ Australia, *Defence Force Manual* (1994), § 1315.

⁵⁰⁹ Benin, *Military Manual* (1995), Fascicule II, p. 5.

⁵¹⁰ Canada, *LOAC Manual* (1999), p. 10-4, §§ 36-37.

⁵¹¹ Canada, *LOAC Manual* (1999), p. 11-6, § 53.

⁵¹² Canada, *LOAC Manual* (1999), p. 11-6, § 54.

of imprisonment “have the right to receive any spiritual assistance which they may require”.⁵¹³ With regard to non-international armed conflicts, the manual states that the persons whose liberty has been restricted “must be allowed to practise their religion and to receive spiritual assistance from those performing religious functions”.⁵¹⁴

566. Colombia’s Basic Military Manual provides that, in both international and non-international armed conflicts, all detained persons shall receive spiritual assistance.⁵¹⁵

567. Ecuador’s Naval Manual provides that “the following acts are representative war crimes: offences against prisoners of war, including . . . infringement of religious rights; . . . offences against civilian inhabitants of occupied territory including . . . infringement of religious rights”.⁵¹⁶

568. Germany’s Military Manual provides that “latitude in the exercise of religious duties of prisoners shall be ensured”.⁵¹⁷

569. Israel’s Manual on the Laws of War provides that during their captivity, “the detaining State must allow the prisoners freedom of religion, enable them to take part in religious ceremonies and set aside a place for conducting these ceremonies”.⁵¹⁸

570. Italy’s IHL Manual provides that “POWs shall have complete freedom in the exercise of their religion, including receiving spiritual assistance, and the commander of the camp shall facilitate such exercise so far as military discipline permits”.⁵¹⁹

571. Madagascar’s Military Manual provides that “prisoners of war shall be allowed to receive spiritual assistance”.⁵²⁰

572. The Military Manual of the Netherlands provides that “prisoners of war shall enjoy complete latitude in the exercise of their religious duties, including attendance at the service of their faith, on condition that they comply with the disciplinary routine prescribed by the military authorities”.⁵²¹ With respect to non-international armed conflicts in particular, the manual states that persons whose liberty has been restricted shall be allowed to practise their religion and to receive spiritual assistance”.⁵²²

573. New Zealand’s Military Manual provides that “prisoners of war are to receive spiritual attention, if possible from chaplains attached to their own forces or of their own nationality”.⁵²³ It further points out that “internees shall

⁵¹³ Canada, *LOAC Manual* (1999), p. 12-7, § 62(b).

⁵¹⁴ Canada, *LOAC Manual* (1999), p. 17-3, § 25.

⁵¹⁵ Colombia, *Basic Military Manual* (1995), p. 21.

⁵¹⁶ Ecuador, *Naval Manual* (1989), § 6.2.5.

⁵¹⁷ Germany, *Military Manual* (1992), § 718.

⁵¹⁸ Israel, *Manual on the Laws of War* (1998), p. 53.

⁵¹⁹ Italy, *IHL Manual* (1991), Vol. II, Chapter XIV, § 105.

⁵²⁰ Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 26.

⁵²¹ Netherlands, *Military Manual* (1993), p. VII-7.

⁵²² Netherlands, *Military Manual* (1993), p. XI-5.

⁵²³ New Zealand, *Military Manual* (1992), § 924(1).

enjoy complete freedom to practice their own religion".⁵²⁴ It specifies that "premises for the holding of religious services must be made available".⁵²⁵

With respect to non-international armed conflicts, the manual stresses that detainees "must be allowed to practise their religion and to receive spiritual assistance from those performing religions functions".⁵²⁶

574. Nicaragua's Military Manual provides that POWs shall have complete liberty in the exercise of their religion.⁵²⁷

575. Nigeria's Manual on the Laws of War provides that "POWs should enjoy religious freedom provided that it does not disrupt routine discipline".⁵²⁸

576. Romania's Soldiers' Manual provides that captured combatants and civilians in the hands of a party to the conflict shall have the right to practice their religion freely.⁵²⁹

577. Senegal's IHL Manual provides that one of the fundamental guarantees common to IHL conventions and the UDHR is the right of persons deprived of their liberty to receive spiritual assistance.⁵³⁰

578. Spain's LOAC Manual provides that "prisoners of war shall enjoy complete latitude in the exercise of their religion, including attendance at the service of their faith organised by the religious service of the camp".⁵³¹ The manual points out, however, the obligation of prisoners to "comply with the disciplinary routine prescribed by the Detaining Power".⁵³²

579. Switzerland's Basic Military Manual provides that "prisoners shall enjoy complete latitude in the exercise of their religion, including assistance at the service of their faith, on the condition that they comply with the disciplinary routine prescribed by the military authorities".⁵³³ The manual further emphasises that "religious convictions must be respected".⁵³⁴

580. Togo's Military Manual provides that captured enemy combatants shall be entitled to respect for their religious beliefs.⁵³⁵

581. The UK Military Manual states that:

Internees are to enjoy complete latitude in the exercise of their religious duties, provided that they comply with the disciplinary routine prescribed by the Detaining Powers. Ministers of religion when interned must be allowed to minister freely to the members of their community.⁵³⁶

⁵²⁴ New Zealand, *Military Manual* (1992), § 1123(3).

⁵²⁵ New Zealand, *Military Manual* (1992), § 1123(4).

⁵²⁶ New Zealand, *Military Manual* (1992), § 1814(2).

⁵²⁷ Nicaragua, *Military Manual* (1996), Article 14(26).

⁵²⁸ Nigeria, *Manual on the Laws of War* (undated), § 42.

⁵²⁹ Romania, *Soldiers' Manual* (1991), Part III, § 4.

⁵³⁰ Senegal, *IHL Manual* (1999), pp. 3 and 24.

⁵³¹ Spain, *LOAC Manual* (1996), Vol. I, § 6.4.(i).9.

⁵³² Spain, *LOAC Manual* (1996), Vol. I, § 8.5.(c).1.

⁵³³ Switzerland, *Basic Military Manual* (1987), Article 124.

⁵³⁴ Switzerland, *Basic Military Manual* (1987), Article 167.

⁵³⁵ Togo, *Military Manual* (1996), Fascicule II, p. 5.

⁵³⁶ UK, *Military Manual* (1958), § 63.

The manual further states that prisoners of war must be allowed complete freedom for the performance of their religious duties, and that adequate accommodation must be provided for religious services.⁵³⁷

582. The UK LOAC Manual provides that “prisoners must be allowed freedom in the exercise of their religious beliefs. Accommodation must be provided for religious services.”⁵³⁸

583. The US Field Manual reproduces Articles 34 and 35 GC III and 76, 86 and 93 GC IV.⁵³⁹

584. The US Air Force Pamphlet, referring to Articles 34–38 GC III, guarantees POWs enjoyment of religious activities.⁵⁴⁰

585. The US Instructor’s Guide provides that “even though you are a prisoner, you are entitled to practice your religious faith. All prisoners shall enjoy complete freedom in the exercise and observance of their religious faith.”⁵⁴¹

586. The US Naval Handbook provides that “the following acts are representative war crimes: offences against prisoners of war, including . . . infringement of religious rights; . . . offences against civilian inhabitants of occupied territory, including . . . infringement of religious rights”.⁵⁴²

National Legislation

587. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that “prisoners of war are entitled to the following in all cases: . . . respect for their habits, national customs and religious ceremonies”.⁵⁴³

588. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁵⁴⁴

589. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 34 and 35 GC III and 76, 86 and 93 GC IV, as well as any “contravention” of AP II, including violations of Articles 4(1) and 5(1)(d) AP II, are punishable offences.⁵⁴⁵

590. Italy’s Wartime Military Penal Code provides for the punishment of anyone who arbitrarily violates or restricts the freedom of religion or belief of prisoners of war.⁵⁴⁶

591. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to

⁵³⁷ UK, *Military Manual* (1958), § 156.

⁵³⁸ UK, *LOAC Manual* (1981), Section 8, p. 31, § 17(d).

⁵³⁹ US, *Field Manual* (1956), §§ 110, 111, 293, 300 and 446.

⁵⁴⁰ US, *Air Force Pamphlet* (1976), § 13-4. ⁵⁴¹ US, *Instructor’s Guide* (1985), p. 11.

⁵⁴² US, *Naval Handbook* (1995), § 6.2.5.

⁵⁴³ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 22(5).

⁵⁴⁴ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁵⁴⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁴⁶ Italy, *Wartime Military Penal Code* (1941), Article 213.

the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".⁵⁴⁷

National Case-law

592. No practice was found.

Other National Practice

593. According to the Report on the Practice of France, in December 1981, the French Minister of Foreign Affairs was asked in the National Assembly about two Soviet prisoners held by the Afghan faction, Hezb-i-Islami, who were being threatened with execution if they did not convert to Islam. In his reply, the Minister stated that, whatever the nature of the conflict, prisoners must be respected.⁵⁴⁸

594. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".⁵⁴⁹

595. In 1993, the army of a State issued instructions in the context of a UN operation, stating that detainees should be shown respect by making reasonable provisions for their religious practices.⁵⁵⁰

III. Practice of International Organisations and Conferences

United Nations

596. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary General stated that "violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law".⁵⁵¹

Other International Organisations

597. No practice was found.

⁵⁴⁷ Norway, *Military Penal Code as amended* (1902), § 108.

⁵⁴⁸ Report on the Practice of France, 1999, Chapter 5.3, Reply by the Minister of Foreign Affairs to a question in parliament, 28 December 1981, *Politique étrangère de la France*, February 1982, p. 390.

⁵⁴⁹ Report on US Practice, 1997, Chapter 5.3. ⁵⁵⁰ ICRC archive document.

⁵⁵¹ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

International Conferences

598. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

599. In its judgment in the *Aleksovski case* in 1999, the ICTY Trial Chamber held, in relation to detention conditions, that:

In sum, it was not established that the difficulties encountered by the detainees in respect of the observance of religious rites resulted from any deliberate policy of the accused or of the men placed under his authority. In this respect, the Trial Chamber notes that the Geneva Convention Relative to the Protection of Civilian Persons in Time of War, though not directly applicable, stipulates in Article 93 that “[i]nternees shall enjoy complete latitude in the exercise of their religious duties, including attendance at the services of their faith, on condition that they comply with the disciplinary routine prescribed by the detaining authorities”. In the present case, the practice of religion was not prohibited and most of the victims stated that they were able to practise their religion despite the difficult conditions. The Trial Chamber would thus reject the Prosecutor’s allegation on this point.⁵⁵²

600. In its General Comment on Article 18 of the 1966 ICCPR, the HRC held that “persons already subject to certain legitimate constraints, such as prisoners, continue to enjoy their rights to manifest their religion or belief to the fullest extent compatible with the specific nature of the constraint”.⁵⁵³

V. Practice of the International Red Cross and Red Crescent Movement

601. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “prisoners of war shall be allowed to exercise religious observance” and that “adequate premises shall be provided where religious services may be held”.⁵⁵⁴

602. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC stated that “religious customs must be respected, which implies access to places of worship to the fullest extent possible”.⁵⁵⁵

VI. Other Practice

603. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi

⁵⁵² ICTY, *Aleksovski case*, Judgement, 25 June 1999, § 168.

⁵⁵³ HRC, General Comment No. 22 (Article 18 ICCPR), 30 July 1993, § 8.

⁵⁵⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 709-710, see also 839 (application *mutatis mutandis* of the regulations for the treatment of POWs to civilian internees).

⁵⁵⁵ ICRC, Communication to the Press No. 00/42, ICRC Appeal to all involved in violence in the Near East, 21 November 2000.

University in Turku/Åbo, Finland in 1990, states that “all persons, even if their liberty has been restricted, are entitled to respect for their person, honour and convictions, freedom of thought, conscience and religious practices”.⁵⁵⁶

K. Release and Return of Persons Deprived of Their Liberty

Release and return without delay

Note: *For practice concerning amnesty for participation in armed conflict in general, see Chapter 44, section D.*

I. Treaties and Other Instruments

Treaties

604. Article 20 of the 1899 HR provides that “after the conclusion of peace, the repatriation of prisoners of war shall take place as speedily as possible”.

605. Article 20 of the 1907 HR provides that “after the conclusion of peace, the repatriation of prisoners of war shall be carried out as quickly as possible”.

606. Article 109, first paragraph, GC III provides that “Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war”. The second paragraph provides that “throughout the duration of hostilities, Parties to the conflict shall endeavour, with the co-operation of the neutral Powers concerned, to make arrangements for the accommodation in neutral countries of the sick and wounded prisoners of war”.

607. Article 118, first paragraph, GC III provides that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”. Article 119 contains the details of procedure.

608. Article 132 GC IV provides that:

Each interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist.

The Parties to the conflict shall, moreover, endeavour during the course of hostilities, to conclude agreements for the release, the repatriation, the return to places of residence or the accommodation in a neutral country of certain classes of internees, in particular children, pregnant women and mothers with infants and young children, wounded and sick, and internees who have been detained for a long time.

609. Article 133 GC IV provides that:

Internment shall cease as soon as possible after the close of hostilities.

Internees in the territory of a Party to the conflict, against whom penal proceedings are pending for offences not exclusively subject to disciplinary penalties, may be detained until the close of such proceedings and, if circumstances require, until

⁵⁵⁶ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 3(1), *IRRC*, No. 282, p. 331.

the completion of the penalty. The same shall apply to internees who have been previously sentenced to a punishment depriving them of liberty.

610. Article 134 GC IV provides that “the High Contracting Parties shall endeavour, upon the close of hostilities or occupation, to ensure the return of all internees to their last place of residence, or to facilitate their repatriation”. Article 135 deals with the costs of the return.

611. Article III(51)(a) of the 1953 Panmunjon Armistice Agreement provides that “within sixty (60) days after this Armistice Agreement becomes effective, each side shall, without offering any hindrance, directly repatriate and hand over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture”. Article III(53) adds that “all the sick and injured prisoners of war who insist upon repatriation shall be repatriated with priority”. Paragraph I(1) of the Annex to the Armistice Agreement further sets the terms of reference of a Neutral Nations Repatriation Commission established “in order to ensure that all prisoners of war have the opportunity to exercise their right to be repatriated following an armistice”.

612. Paragraph 5 of the 1956 Joint Declaration on Soviet-Japanese Relations states that:

On the entry into force of this Joint Declaration, all Japanese citizens convicted in the Union of Soviet Socialist Republics shall be released and repatriated to Japan. With regard to those Japanese whose fate is unknown, the USSR, at the request of Japan, will continue its effort to discover what has happened to them.

613. Article 4 of the Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Civilian Personnel provided that the return of all captured military personnel and civilians from the various parties concerned “shall be completed within 60 days of the signing of the Agreement . . . Persons who are seriously ill, wounded or maimed, old persons and women shall be returned first.” Article 6 provides that “each party shall return all captured persons . . . without delay”.

614. In the 1974 Agreement on Repatriation of Detainees between Bangladesh, India and Pakistan, the three governments agreed to facilitate the return of detainees in order to make further progress in the process of “reconciliation and normalisation among the countries of the sub-continent”.

615. Under Article 85(4)(b) AP I, an “unjustifiable delay in the repatriation of prisoners of war or civilians” is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.⁵⁵⁷

616. Upon ratification of AP I, South Korea made a declaration in relation to paragraph 4 (b) of Article 85 in which it stated that “a party detaining prisoners of war may not repatriate its prisoners [against] their openly and freely expressed

⁵⁵⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

will, which shall not be regarded as unjustifiable delay in the repatriation of prisoners of war constituting a grave breach of this Protocol".⁵⁵⁸

617. The 1987 Esquipulas II Accords stated that "simultaneously with the issuance of the decrees of amnesty, the irregular forces of the country concerned shall release all persons in their power".

618. Article 4 of the 1993 CIS Agreement on the Protection of Victims of Armed Conflicts provides that "the Parties will take immediate coordinated measures to protect people unlawfully detained for reasons related to the armed conflict, regardless of whether they are interned or detained, and also in order to ensure return of POWs and the unconditional release of hostages".

619. In Article IX of the 1995 Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords, the parties agreed to "release and transfer all combatants and civilians held in relation to the conflict . . . in conformity with international humanitarian law". All prisoners were to be released and transferred no later than 30 days after the passing of authority from UNPROFOR to IFOR.

620. Article 2(1) and (2) of the 2000 Peace Agreement between Ethiopia and Eritrea provides that:

In fulfilling their obligations under international humanitarian law, including the 1949 Geneva Conventions, and in cooperation with the International Committee of the Red Cross, the parties shall without delay, release and repatriate all prisoners of war, . . . release and repatriate or return to their last place of residence all other persons detained as a result of the armed conflict.

Other Instruments

621. Article 119 of the 1863 Lieber Code provides that "prisoners of war may be released from captivity by exchange, and, under certain circumstances, also by parole". Article 123 specifies, however, that "release of prisoners of war by exchange is the general rule; release by parole is the exception".

622. Article 75 of the 1880 Oxford Manual provides that "prisoners of war may be released in accordance with a cartel of exchange, agreed upon by the belligerent parties".

623. Article 76 of the 1880 Oxford Manual provides that "prisoners may be set at liberty on parole, if the laws of their country do not forbid it".

624. In paragraph 3 of the 1990 Government of El Salvador-FMLN Agreement on Human Rights, the parties agreed that, in the course of negotiations, appropriate legal procedures and timetables would be determined for the release of individuals who had been imprisoned for political reasons.

625. Pursuant to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, an "unjustifiable delay in the repatriation

⁵⁵⁸ South Korea, Declarations made upon ratification of AP I, 15 January 1982, § 2.

of prisoners of war after the cessation of hostilities" is an "exceptionally serious war crime".

626. Article 21 of the 1991 Final Act of the Paris Conference on Cambodia requested that the ICRC facilitate, in accordance with its principles, the release of POWs and civilian internees. The release of all prisoners and civilian internees was to be accomplished at the earliest possible date. Article 22 defined the expression "civilian internee" as "all persons who are not POWs and who, having contributed in any way whatsoever to the armed or political struggle, have been arrested or detained by any of the parties by virtue of their contribution thereto".

627. Under Paragraph II.3 of the 1991 Peace Accords between the Government of Angola and UNITA, all civilian and military prisoners held by either party were to be released.

628. Paragraph 1 of the 1992 Agreement between Croatia and the FRY on the Release and Repatriation of Prisoners provides that "all prisoners visited by the ICRC and mentioned on the ICRC list appearing in Annex A shall be released in an operation which will take place under ICRC supervision in Nemetin on August 14, 1992".

629. Agreement No. 2 on the Implementation of the Agreement of 22 May 1992 between the Parties to the Conflict in Bosnia and Herzegovina provided that a Commission, consisting of four liaison officers appointed by the parties, would be created under the auspices of the ICRC and "assume the following tasks: (a) exchange lists and take the necessary steps with a view to release prisoners".

630. Paragraph 2 of the Agreement on the Exchange of Prisoners between the FRY and Croatia (July 1992) provided that "the release and repatriation of all prisoners shall take place without delay".

631. Article 3(1) of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provides that "all prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law... will be unilaterally and unconditionally released". Article 10 provides that "any prisoner released in or transferred to an area other than that of his or her former residence retains the right to return home at a later stage if he or she wishes to do so".

632. Part III of the 1992 General Peace Agreement for Mozambique specified that all prisoners being held, except those convicted for ordinary crimes, should be released by the parties.

633. Article 4 of the 1992 N'sele Cease-fire Agreement provided that the cease-fire shall imply "the release of all prisoners-of-war; the effective release of all persons arrested because and as a result of this war within five days following the entry into force of the Cease-fire Agreement".

634. Article 10 of the 1993 Cotonou Agreement on Liberia provided that all POWs and detainees should immediately be released. Common-law criminals were not covered by this provision.

635. Article 5 of the 1993 Afghan Peace Accord provided that there should be immediate release of all detainees held by the government and different parties during the armed hostilities.

636. Under Article 20(c)(ii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, “unjustifiable delay in the repatriation of prisoners of war” is a war crime.

637. Under Article 2 of the 1996 Moscow Agreement on a Cease-fire in Chechnya, the parties to the conflict in Chechnya agreed on certain modalities of liberating all persons being retained by force. The term “persons being retained by force” was to be understood as participants in the armed conflict who had been arrested, hostages and other civilian persons who had been detained, including those arrested at roadblocks, without the presentation of charges of accusation, or those to whom up to 27 May 1996 (the date of the cease-fire agreement) no charges or accusation had been presented within the time periods established by law. The working groups were to exchange lists of forcibly detained persons within a day of the agreement and the release of unlawfully detained persons was to commence immediately.

II. National Practice

Military Manuals

638. Argentina’s Law of War Manual (1969), referring to Article 118 GC III, provides that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”.⁵⁵⁹ Referring to Article 109 GC III, the manual also states that “Parties to the conflict are bound to send back to their own country, regardless of number or rank, seriously wounded and seriously sick prisoners of war, after having cared for them until they are fit to travel”. According to the manual, the following should be repatriated directly:

- (1) Incurably wounded and sick whose mental or physical fitness seems to have been gravely diminished;
- (2) Wounded and sick who, according to medical opinion, are not likely to recover within one year, whose condition requires treatment and whose mental or physical fitness seems to have been gravely diminished;
- (3) Wounded and sick who have recovered, but whose mental or physical fitness seems to have been gravely and permanently diminished.⁵⁶⁰

639. Argentina’s Law of War Manual (1989) states that “prisoners of war shall be released and repatriated without any delay after the cessation of the hostilities”.⁵⁶¹ Referring to Articles 109 and 110 GC III, the manual also states that “the Parties to the conflict have the obligation, regardless of number or rank,

⁵⁵⁹ Argentina, *Law of War Manual* (1969), § 2.098.

⁵⁶⁰ Argentina, *Law of War Manual* (1969), § 2.091.

⁵⁶¹ Argentina, *Law of War Manual* (1989), § 3.32.

to repatriate seriously wounded and seriously sick prisoners of war".⁵⁶² The manual identifies grave breaches of Article 85 AP I as war crimes.⁵⁶³

640. Australia's Defence Force Manual provides that "PWs are to be repatriated immediately to their own country at the conclusion of the hostilities".⁵⁶⁴

641. Canada's LOAC Manual provides that "while all PWs are to be released and repatriated immediately upon cessation of active hostilities, parties to the conflict are to repatriate, regardless of rank or number, all seriously wounded and sick when fit to travel".⁵⁶⁵ It further states that "interned persons must be released by the detaining power as soon as the reasons which necessitated internment cease to exist. Internment must also cease as soon as possible after the close of hostilities."⁵⁶⁶ The manual also identifies "unjustifiable delay in repatriating prisoners of war or civilians" as a war crime.⁵⁶⁷

642. Cameroon's Instructors' Manual provides that release and repatriation of POWs must be obtained at the end of hostilities.⁵⁶⁸

643. Colombia's Basic Military Manual provides that all POWs must be repatriated at the end of hostilities.⁵⁶⁹

644. Croatia's LOAC Compendium states that "unjustified delay in repatriation of POWs" falls under "grave breaches (war crimes)".⁵⁷⁰

645. France's LOAC Summary Note provides that "retention of prisoners of war and civilians" constitutes a grave breach, which is a war crime.⁵⁷¹

646. Germany's Military Manual states that "all prisoners of war shall be released and repatriated without delay after the cessation of active hostilities. This requires neither a formal armistice agreement nor the conclusion of a peace treaty."⁵⁷² It further stresses that "seriously wounded and sick prisoners of war who are fit to travel and whose mental or physical fitness has been incurably or permanently diminished or whose recovery may not be expected within one year shall already be repatriated during the armed conflict".⁵⁷³ The manual specifies that "grave breaches of international humanitarian law are in particular: . . . unjustifiable delay in the repatriation of prisoners of war and civilians".⁵⁷⁴

647. Hungary's Military Manual provides that one of the measures required after a conflict is the repatriation of POWs and internees.⁵⁷⁵ It also states that

⁵⁶² Argentina, *Law of War Manual* (1989), § 3.31.

⁵⁶³ Argentina, *Law of War Manual* (1989), § 8.03.

⁵⁶⁴ Australia, *Defence Force Manual* (1994), § 1045.

⁵⁶⁵ Canada, *LOAC Manual* (1999), p. 10-5, § 49.

⁵⁶⁶ Canada, *LOAC Manual* (1999), p. 11-7, § 58.

⁵⁶⁷ Canada, *LOAC Manual* (1999), Section 16.3, §§ 8 and 17.

⁵⁶⁸ Cameroon, *Instructors' Manual* (1992), p. 154, § 541.

⁵⁶⁹ Colombia, *Basic Military Manual* (1995), p. 31.

⁵⁷⁰ Croatia, *LOAC Compendium* (1991), p. 56.

⁵⁷² Germany, *Military Manual* (1992), § 731.

⁵⁷⁴ Germany, *Military Manual* (1992), § 1209.

⁵⁷⁵ Hungary, *Military Manual* (1992), pp. 38 and 99.

⁵⁷¹ France, *LOAC Summary Note* (1992), § 3.4.

⁵⁷³ Germany, *Military Manual* (1992), § 732.

“unjustified delay in repatriation of POWs” falls under “grave breaches (war crimes)”.⁵⁷⁶

648. Israel’s Manual on the Laws of War provides that “in any event, at the end of hostilities, the prisoners must be returned to their State of nationality”.⁵⁷⁷

649. Italy’s IHL Manual provides that “unjustified delay in repatriation of prisoners of war” is considered a war crime.⁵⁷⁸

650. Madagascar’s Military Manual provides that “at the end of the hostilities, the prisoners of war must be released without delay”. It adds that “gravely wounded and sick prisoners shall be immediately repatriated”.⁵⁷⁹

651. The Military Manual of the Netherlands provides that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”. It also provides that “Parties to the conflict are bound to send back to their own country seriously wounded and seriously sick prisoners of war”.⁵⁸⁰

652. The Military Handbook of the Netherlands provides that “seriously wounded and seriously sick prisoners of war must be repatriated by the Detaining Power”.⁵⁸¹

653. New Zealand’s Military Manual provides that “prisoners of war must be released and repatriated without delay after the cessation of active hostilities”.⁵⁸² It further states that “unjustifiable delay in repatriating prisoners of war or civilians [is a grave breach when committed wilfully and in violation of the Conventions and Protocol].⁵⁸³ The manual also states that:

Parties to the conflict are to repatriate, regardless of rank or number, all seriously wounded and sick when fit to travel and, when possible, agreements should be made between the parties, with the cooperation of neutral states, for the detention of such persons in neutral territory pending such repatriation . . .

Interned persons must be released by the Detaining Power as soon as the reasons which necessitated internment cease to exist. Internment must also cease as soon as possible after the end of hostilities but internees, who are in the territory of a belligerent and who are undergoing a sentence of confinement or against whom judicial proceedings . . . are pending, may be detained until the end of the proceedings or, as the case requires, of the sentence. Each State which is a party to the IV GC must endeavour, at the end of hostilities or of the occupation, to ensure the return of all internees to their last place of residence, or at least to facilitate their repatriation.⁵⁸⁴

654. Nigeria’s Manual on the Laws of War provides that “prisoners of war must be released and repatriated upon the cessation of the hostilities”.⁵⁸⁵

⁵⁷⁶ Hungary, *Military Manual* (1992), p. 90.

⁵⁷⁷ Israel, *Manual on the Laws of War* (1998), p. 54.

⁵⁷⁸ Italy, *IHL Manual* (1991), Vol. I, § 85.

⁵⁷⁹ Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 26.

⁵⁸⁰ Netherlands, *Military Manual* (1993), p. VII-12, § 6.

⁵⁸¹ Netherlands, *Military Handbook* (1995), p. 7-42.

⁵⁸² New Zealand, *Military Manual* (1992), § 910.

⁵⁸³ New Zealand, *Military Manual* (1992), § 1703(4).

⁵⁸⁴ New Zealand, *Military Manual* (1992), §§ 935 and 1133.

⁵⁸⁵ Nigeria, *Manual on the Laws of War* (undated), § 44.

655. South Africa's Medical Services Military Manual makes specific reference to the obligations in Articles 118 and 119 GC III and provides that, after an armistice, POWs against whom no criminal proceedings are pending have a right to be released and repatriated without delay.⁵⁸⁶ The manual identifies as war crimes grave breaches of AP I.⁵⁸⁷

656. Spain's LOAC Manual provides that internees and POWs must be released and repatriated without delay after the cessation of hostilities. It specifies that certain categories of internees must be released as soon as the reasons for their internment no longer exist, regardless of whether their return to their place of residence can be authorised during the hostilities. These provisions apply to persons with incurable wounds or illnesses, who are not expected to recover within one year or those people who, although recovered, remain debilitated; children; expectant mothers or those with young children; and wounded, sick or interned persons who have been interned for long periods. It also specifies that when releasing and repatriating internees and POWs, priority should be given to the wounded and sick, the elderly and those who have been detained the longest.⁵⁸⁸ The manual further provides that "it is a grave breach which shall be qualified war crime . . . to delay without justification the repatriation of prisoners of war and civilian internees".⁵⁸⁹

657. Switzerland's Basic Military Manual states that "prisoners shall be released and repatriated without delay after the cessation of active hostilities. The Detaining Power shall establish a plan of repatriation and ensure its execution."⁵⁹⁰ It further provides that grave breaches of AP I include "the unjustified delay in repatriation of prisoners of war or civilians".⁵⁹¹ The manual also states that "seriously wounded and sick prisoners of war shall be repatriated as soon as their state of health permits it; the other wounded and sick may be hospitalised in neutral countries".⁵⁹² The manual stipulates that "Mixed Medical Commissions shall be appointed to examine sick and wounded prisoners to make all appropriate decisions regarding their repatriation or hospitalisation in a neutral country".⁵⁹³

658. The UK Military Manual states that "Prisoners of war must be released and repatriated without delay after the cessation of active hostilities".⁵⁹⁴

659. The UK LOAC Manual provides that "PW must be released and repatriated without delay after the cessation of active hostilities".⁵⁹⁵

⁵⁸⁶ South Africa, *Medical Services Military Manual* (undated), Article 36.

⁵⁸⁷ South Africa, *Medical Services Military Manual* (undated), § 41.

⁵⁸⁸ Spain, *LOAC Manual* (1996), Vol. I, § 6.5 and 6.9.

⁵⁸⁹ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1)

⁵⁹⁰ Switzerland, *Basic Military Manual* (1987), Article 141.

⁵⁹¹ Switzerland, *Basic Military Manual* (1987), Article 193(2).

⁵⁹² Switzerland, *Basic Military Manual* (1987), Article 142(1).

⁵⁹³ Switzerland, *Basic Military Manual* (1987), Article 142(2).

⁵⁹⁴ UK, *Military Manual* (1958), § 261. ⁵⁹⁵ UK, *LOAC Manual* (1981), Section 8, p. 33, § 22.

660. The US Field Manual reproduces Articles 109, 118 and 119 GC III and 132 and 134 GC IV.⁵⁹⁶

661. The US Air Force Pamphlet provides that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities”. It further stresses the obligation of the parties to the conflict to repatriate seriously wounded and sick POWs.⁵⁹⁷

National Legislation

662. Argentina’s Draft Code of Military Justice punishes members of the armed forces who, in the event of an armed conflict, “unreasonably hinder or delay the liberation or repatriation of prisoners of war or civilian persons”.⁵⁹⁸

663. Under Armenia’s Penal Code, “unjustified delay in the repatriation of prisoners of war or civilians” during an armed conflict constitutes a crime against the peace and security of mankind.⁵⁹⁹

664. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence”.⁶⁰⁰

665. Australia’s ICC (Consequential Amendments) Act incorporates grave breaches of AP I in the list of war crimes in the Criminal Code, including “unjustifiable delay in the repatriation of prisoners of war or civilians”.⁶⁰¹

666. Azerbaijan’s Criminal Code provides that “unfounded delay of repatriation of POW and civilian individuals to their native country” constitutes a war crime.⁶⁰²

667. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁶⁰³

668. The Criminal Code of Belarus provides that “unjustified delay in the repatriation of prisoners of war or civilians” is a war crime.⁶⁰⁴

669. Under Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, “unjustifiable delay in the repatriation of prisoners of war or civilians” is a grave breach and, as such, a criminal offence.⁶⁰⁵

670. The Amnesty Law as amended of the Federation of Bosnia and Herzegovina provided for the release and repatriation of POWs without delay

⁵⁹⁶ US, *Field Manual* (1956), §§ 188, 198, 200 and 339–431.

⁵⁹⁷ US, *Air Force Pamphlet* (1976), § 13-10.

⁵⁹⁸ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(7) in the *Code of Military Justice as amended* (1951).

⁵⁹⁹ Armenia, *Penal Code* (2003), Article 390.4(2).

⁶⁰⁰ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

⁶⁰¹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.99.

⁶⁰² Azerbaijan, *Criminal Code* (1999), Article 116.0.15.

⁶⁰³ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁶⁰⁴ Belarus, *Criminal Code* (1999), Article 136(15).

⁶⁰⁵ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(18).

upon cessation of active hostilities.⁶⁰⁶ The Law on Amnesty as amended of the Republika Srpska contains the same provision.⁶⁰⁷

671. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I] . . . is guilty of an indictable offence".⁶⁰⁸

672. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I]".⁶⁰⁹

673. Croatia's Criminal Code provides that "whoever in violation of the rules of international law, after the termination of a war or armed conflict, orders or imposes an unjustifiable delay in the repatriation of prisoners of war or civilians shall be punished".⁶¹⁰

674. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".⁶¹¹

675. The Czech Republic's Criminal Code as amended punishes "whoever in wartime . . . delays, without grounds, the return of civilians or prisoners of war".⁶¹²

676. According to the Draft Amendments to the Penal Code of El Salvador, "anyone who, in a situation of international armed conflict, delays without justification the repatriation of protected persons, shall be punished".⁶¹³

677. Estonia's Penal Code provides that "unjustified delay in the release or repatriation, if committed against a prisoner of war or an interned civilian" is a war crime.⁶¹⁴

678. Under Georgia's Criminal Code, "unjustifiable delay in the repatriation of prisoners of war or civilians" in an international or a non-international armed conflict is a crime.⁶¹⁵

679. Germany's Law Introducing the International Crimes Code punishes anyone, who, in connection with an international or non-international armed conflict, "unjustifiably delays the return home of a protected person".⁶¹⁶

⁶⁰⁶ Bosnia and Herzegovina, Federation, *Amnesty Law as amended* (1996), Article 5.

⁶⁰⁷ Bosnia and Herzegovina, Republika Srpska, *Law on Amnesty as amended* (1996), Article 5.

⁶⁰⁸ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

⁶⁰⁹ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

⁶¹⁰ Croatia, *Criminal Code* (1997), Article 166.

⁶¹¹ Cyprus, *AP I Act* (1979), Section 4(1).

⁶¹² Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(2)(b).

⁶¹³ El Salvador, *Draft Amendments to the Penal Code* (1998), Article on "Demora injustificada de repatriación".

⁶¹⁴ Estonia, *Penal Code* (2001), § 99.

⁶¹⁵ Georgia, *Criminal Code* (1999), Article 411(1)(h).

⁶¹⁶ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(3)(1).

680. Hungary's Criminal Code as amended provides that "unjustified delay in the repatriation of prisoners of war or civilians persons" is a punishable offence.⁶¹⁷

681. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.⁶¹⁸ It adds that any "minor breach" of the Geneva Conventions, including violations of Articles 109 and 118 GC III and 132–134 GC IV, are also punishable offences.⁶¹⁹

682. Jordan's Draft Military Criminal Code states that, when committed in a situation of armed conflict, unreasonably delaying the repatriation of POWs or civilians to their country of origin, is considered a war crime.⁶²⁰

683. Under the Draft Amendments to the Code of Military Justice of Lebanon, "unjustified delay in the repatriation of prisoners of war or civilians" is a war crime.⁶²¹

684. Under Lithuania's Criminal Code as amended, unjustified delay in the release or repatriation of prisoners of war and interned alien civilians after the termination of hostilities is a war crime.⁶²²

685. Moldova's Penal Code punishes "grave breaches of international humanitarian law committed during international and non-international armed conflicts".⁶²³

686. Under the International Crimes Act of the Netherlands, it is a crime to commit, in an international armed conflict, "the following acts if committed intentionally and in violation of the Geneva Conventions and Additional Protocol (I): . . . unjustifiable delay in the repatriation of prisoners of war or civilians".⁶²⁴

687. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".⁶²⁵

688. Nicaragua's Draft Penal Code provides that "whoever, in the circumstances of an international armed conflict, delays without justification the repatriation of a protected person" commits a punishable offence.⁶²⁶

689. According to Niger's Penal Code as amended, "unjustified delay in the repatriation of prisoners of war or civilians", protected under the 1949 Geneva Conventions or their Additional Protocols of 1977, constitutes a war crime.⁶²⁷

⁶¹⁷ Hungary, *Criminal Code as amended* (1978), Section 158(3)(c).

⁶¹⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

⁶¹⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶²⁰ Jordan, *Draft Military Criminal Code* (2000), Article 41(16).

⁶²¹ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(15).

⁶²² Lithuania, *Criminal Code as amended* (1961), Articles 342 and 343.

⁶²³ Moldova, *Penal Code* (2002), Article 391.

⁶²⁴ Netherlands, *International Crimes Act* (2003), Article 5(2)(d)(ii).

⁶²⁵ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

⁶²⁶ Nicaragua, *Draft Penal Code* (1999), Article 454.

⁶²⁷ Niger, *Penal Code as amended* (1961), Article 208.3(18).

690. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions...is liable to imprisonment".⁶²⁸

691. Slovakia's Criminal Code as amended punishes "whoever in wartime... delays, without grounds, the return of civilians or prisoners of war".⁶²⁹

692. Slovenia's Penal Code provides that "whoever, at the end of war or armed conflict and in violation of the rules of international law, orders the postponement of the repatriation of prisoners of war or civilians, or postpones it himself" shall be punished".⁶³⁰

693. Spain's Penal Code punishes anyone who unjustifiably prevents or delays the release or repatriation of POWs or civilians.⁶³¹

694. Tajikistan's Criminal Code punishes "wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict... [such as] unjustifiable delay in the repatriation of prisoners of war or civilians".⁶³²

695. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of... [AP I]".⁶³³

696. The Penal Code as amended of the SFRY (FRY) provides that "whoever, in violation of the rules of international law, once the war or an armed conflict is over, orders an unjustifiable delay in the repatriation of prisoners of war or civilians or conducts it himself shall be punished".⁶³⁴

697. Zimbabwe's Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of... [AP I]".⁶³⁵

National Case-law

698. No practice was found.

Other National Practice

699. The Report on the Practice of Algeria states that "according to the documentation published by the FLN, one can conclude that a large number of prisoners were eventually released and repatriated, often through the ICRC".⁶³⁶

⁶²⁸ Norway, *Military Penal Code as amended* (1902), § 108.

⁶²⁹ Slovakia, *Criminal Code as amended* (1961), Article 263(a)(2)(b).

⁶³⁰ Slovenia, *Penal Code* (1994), Article 383.

⁶³¹ Spain, *Penal Code* (1995), Article 611(7).

⁶³² Tajikistan, *Criminal Code* (1998), Article 403(1).

⁶³³ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

⁶³⁴ SFRY (FRY), *Penal Code as amended* (1976), Article 150-a.

⁶³⁵ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

⁶³⁶ Report on the Practice of Algeria, 1997, Chapter 5.4.

700. In 1992, during a debate in the UN Security Council concerning the situation in the former Yugoslavia, Bangladesh stated that a “strong signal should be conveyed to the Serbs that they must release all prisoners and detainees from the concentration camps and abolish all such camps immediately”.⁶³⁷

701. According to the Report on the Practice of Botswana, it is the *opinio juris* of Botswana that persons in the power of an adversary should be released as soon as the reasons for arrest or detention have ceased to exist.⁶³⁸

702. The Report on the Practice of Colombia states that “the Colombian Government has ordered the demilitarization of certain regions of the country in order to advance dialogue conducive to the demobilisation and reintegration of guerrilla groups and also to carry out humanitarian operations, such as those designed to secure the release of persons deprived of liberty, both military and civilian”.⁶³⁹

703. According to the Report on the Practice of Egypt, “Egypt always stresses on the search, repatriation and release of POWs, be they Egyptians or appertaining to the adverse party. This occurred on several occasions.”⁶⁴⁰

704. The Report on the Practice of France points out that France has insisted on the moral necessity of releasing prisoners in connection with the conflicts in Afghanistan, Bosnia and Herzegovina and Rwanda. It even mentioned the possibility of freeing prisoners from camps by force.⁶⁴¹

705. In 1989, in a reply to a question in parliament concerning the repatriation of Ethiopian prisoners of war, the German Minister of Foreign Affairs stated that:

The Federal Government will also in future urge the Ethiopian government to agree to a return of prisoners on humanitarian grounds. However, neither the Third Geneva Convention of 1949, to which Ethiopia is a party, nor customary international humanitarian law places any obligation on Ethiopia to repatriate or take back prisoners of war during a continuing armed conflict.⁶⁴²

706. In 1995, all political parties in the German parliament requested the release of injured and handicapped prisoners, as well as women, in the conflict in Nagorno-Karabakh.⁶⁴³

⁶³⁷ Bangladesh, Statement before the UN Security Council, UN Doc. S/PV.3137, 16 November 1992, p. 111.

⁶³⁸ Report on the Practice of Botswana, 1998, Chapter 5.4.

⁶³⁹ Report on the Practice of Colombia, 1998, Chapter 1.8, referring to President’s Office, Second Report on the Peace Process, 18 May 1995, pp. 3, 11 and 12; Circular of the Major General Miguel Vega Uribe, Commander of the Colombian Armed Forces, reprinted in Arturo Alape, *La paz, la violencia: testigos de excepción*, Bogotá, Editorial Planeta, 1985, pp. 503–508.

⁶⁴⁰ Report on the Practice of Egypt, 1997, Chapter 5.4.

⁶⁴¹ Report on the Practice of France, 1999, Chapter 5.4.

⁶⁴² Germany, Reply by the Federal Government to a written question submitted by a Bundestag member and the Parliamentary Green Party, Document 11/3841, Safety of 127 repatriated Ethiopian prisoners of war, Bundestag Document 11/4037, 11th legislative period, 20 February 1989.

⁶⁴³ Germany, Lower House of Parliament, Proposal by the CDU/CSU, SPD, alliance 90/the Greens and FDP, Initiative zum Karabach-Konflikt, *BT-Drucksache* 13/1029, 30 March 1995, p. 1.

707. According to the Report on the Practice of India, "it is very clear from the applicable law and judicial decisions that . . . when detention is no more justifiable by applicable laws, the executive authorities are bound to release the person detained".⁶⁴⁴

708. The Report on the Practice of Iraq refers to a military communiqué issued in 1980 during the Iran–Iraq War which pointed out that citizens of other countries who found themselves in Iraq were repatriated following evacuation.⁶⁴⁵

709. According to the Report on the Practice of Kuwait, "Kuwait, like the majority of States, considers he may detain POWs until the end of military operations, simply in order to neutralise them". The report states that the *opinio juris* of Kuwait is that "immediately following the conclusion of hostilities, the parties must engage in negotiations, possibly via a neutral intermediary, with a view to obtaining the release and return of all POWs and internees". The report specifies, however, that spies "may only be released when they have completed their prison sentences".⁶⁴⁶

710. According to the Report on the Practice of Nigeria, at the end of the Nigerian civil war in 1970, the inhabitants of the former Biafran enclave were released so that they could return to their respective towns.⁶⁴⁷

711. In 1995, the House of Representatives of the Philippines passed a resolution appealing to the President to release political prisoners detained throughout the country.⁶⁴⁸

712. Following the 1992 N'sele Cease-fire Agreement, the Rwandan government adopted two amnesty laws, which led to the release of most of the persons detained in connection with the conflict. The rebels also released prisoners. In October, both parties declared that they no longer detained any POWs.⁶⁴⁹

713. According to the Report on US Practice, it is the *opinio juris* of the US that persons detained for their participation in an internal armed conflict and who are not serving a sentence of imprisonment lawfully imposed should be released or repatriated without delay at the end of active hostilities. Priority in release should be given to prisoners with special needs, such as the elderly and the wounded and sick. The report further states that "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. It also notes that "it is the *opinio juris* of the US that

⁶⁴⁴ Report on the Practice of India, 1997, Chapter 5.4.

⁶⁴⁵ Report on the Practice of Iraq, 1998, Chapter 5.4 and 5.6, referring to Military Communiqué No. 65, 8 October 1980.

⁶⁴⁶ Report on the Practice of Kuwait, 1997, Chapter 5.4.

⁶⁴⁷ Report on the Practice of Nigeria, 1997, Chapter 5.4, referring to *New Nigerian*, 200 Ibos released, Lagos, 24 January 1970, p. 1.

⁶⁴⁸ Philippines, House of Representatives, Res. No. 27, 28 November 1995.

⁶⁴⁹ Association Rwandaise pour la défense des droits de la personne et des libertés publiques, *Rapport sur les droits de l'homme au Rwanda*, Kigali, 1993, pp. 45 and 51.

persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".⁶⁵⁰

714. According to the Report on the Practice of Zimbabwe, it is the *opinio juris* of Zimbabwe that persons detained by reason of their participation in an internal armed conflict should be released or repatriated without delay at the end of active hostilities.⁶⁵¹

715. In 1980, the President of the Military Commission of a State accepted to release elderly women and men, schoolgirls, women not involved with the State Research Bureau and all other non-combatants.⁶⁵²

716. In 1992, in a letter to the President of the ICRC, the President of a separatist entity agreed to release detained persons over the age of 60.⁶⁵³

717. In 1992, in a memorandum on the responsibilities and obligations applicable to contacts with the local population, the Ministry of Defence of a State engaged in an international military operation stated that detainees (persons detained because they posed a threat to the armed forces or obstructed their operation and which were not POWs) "will normally be released once they are no longer regarded as a threat to the mission or the general population".⁶⁵⁴

III. Practice of International Organisations and Conferences

United Nations

718. In two separate resolutions adopted in 1980, the UN Security Council called on the governments of South Africa and Zimbabwe to release all political prisoners.⁶⁵⁵

719. In a resolution on Tajikistan adopted in 1994, the UN Security Council welcomed the release of detainees and POWs which had taken place on 12 November 1994 and called for further similar measures.⁶⁵⁶

720. In 1996, in a statement by its President concerning the conflict in Bosnia and Herzegovina, the UN Security Council demanded that the parties "comply fully . . . and without any further delay with their commitments regarding the release of prisoners" and expressed particular concern at the failure to comply with the relevant provisions of the 1995 Dayton Accords.⁶⁵⁷

721. In 1998, in a statement by its President, the UN Security Council demanded that "the Taliban release other Iranians detained in Afghanistan and ensure their . . . passage out of Afghanistan without further delay".⁶⁵⁸

⁶⁵⁰ Report on US Practice, 1997, Chapters 5.3 and 5.4.

⁶⁵¹ Report on the Practice of Zimbabwe, 1998, Chapter 5.4.

⁶⁵² ICRC archive document. ⁶⁵³ ICRC archive document.

⁶⁵⁴ ICRC archive document.

⁶⁵⁵ UN Security Council, Res. 463, 2 February 1980, §§ 5(ii) and 7; Res. 473, 13 June 1980, § 8.

⁶⁵⁶ UN Security Council, Res. 968, 16 December 1994, § 10.

⁶⁵⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/15, 4 April 1996, pp. 1–2.

⁶⁵⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/27, 15 September 1998, p. 1.

722. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly strongly encouraged all parties:

to fulfil the commitments made at Dayton, Ohio, to release without delay all civilians and combatants held in prison or detention in relation to the conflict, in conformity with international humanitarian law and the provisions of the General Framework Agreement for Peace in Bosnia and Herzegovina.⁶⁵⁹

723. In a resolution adopted in 1996, the UN General Assembly welcomed the reported release of female detainees with children in Sudan.⁶⁶⁰

724. In resolutions adopted in 1994 and 1995, the UN Commission on Human Rights demanded the immediate, internationally supervised, release of all persons arbitrarily or otherwise illegally detained in connection with the conflict in the former Yugoslavia.⁶⁶¹

725. In a resolution adopted in 1996, the UN Commission on Human Rights acknowledged the release of prisoners in the former Yugoslavia and insisted that all parties continue to fulfil their commitments in conformity with the peace agreement to release without delay all civilians and combatants detained in connection with the conflict.⁶⁶²

726. In a resolution adopted in 1996, the UN Commission on Human Rights strongly urged the government of Myanmar "to release immediately . . . all detained political prisoners".⁶⁶³

727. In a resolution adopted in 1998, the UN Commission on Human Rights called upon the parties to the conflict in the former Yugoslavia "to release immediately any individuals held as a result of, or in relation to, any armed conflict between or among the parties".⁶⁶⁴

728. In 1996, in a statement by its Chairman on the situation of human rights in Chechnya, the UN Commission on Human Rights called for "the immediate release of all those who have been detained in connection with the conflict" in Chechnya.⁶⁶⁵

729. The Mission dispatched by the UN Secretary-General to investigate the situation of POWs in Iran and Iraq in 1988 reported that prisoners detained in Iran who were not Iraqi nationals were considered by Iran to be mercenaries and could therefore be executed according to custom. Iran promised, however, that they would also be released after the cessation of hostilities.⁶⁶⁶

⁶⁵⁹ UN General Assembly, Res. 50/193, 22 December 1995, § 19.

⁶⁶⁰ UN General Assembly, Res. 51/112, 12 December 1996, § 11.

⁶⁶¹ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 21; Res. 1995/89, 8 March 1995, § 25.

⁶⁶² UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 12.

⁶⁶³ UN Commission on Human Rights, Res. 1996/80, 23 April 1996, § 3.

⁶⁶⁴ UN Commission on Human Rights, Res. 1998/79, 22 April 1998, § 41(a).

⁶⁶⁵ UN Commission on Human Rights, Chairman's statement on the situation of human rights in the Republic of Chechnya of the Russian Federation, UN Doc. E/CN.4/1996/L.10/Add.10, 24 April 1996, § 87.

⁶⁶⁶ Mission dispatched by the UN Secretary-General on the situation of prisoners of war in the Islamic Republic of Iran and Iraq, Report, UN Doc. S/20147, 24 August 1988, § 65.

730. In 1991, in a report on the situation in the former Yugoslavia, the UN Secretary-General reported that between October and December 1991, the "ICRC has participated in a multilateral negotiating commission, meeting almost daily at Zagreb to discuss, among other issues, the release of prisoners" between Croatia and the YPA.⁶⁶⁷

731. In 1993, in a progress report on the situation in Somalia, the UN Secretary-General reported that, on 15 January 1993, as part of an informal preparatory meeting for a conference on national reconciliation in Somalia attended by 14 Somali political movements, it was agreed that "all POWs shall be freed and handed over to the International Committee of the Red Cross and/or UNITAF. This process shall commence immediately and be completed by 1 March 1993."⁶⁶⁸

732. In 1996, in relation to the 1994 Lusaka Protocol concluded between the government of Angola and UNITA, the UN Secretary-General highlighted as a positive development the release of additional prisoners registered with the ICRC.⁶⁶⁹ In 2001, in a report on the situation concerning Western Sahara, the UN Secretary-General stated that:

During the past two months, there has regrettably been no progress towards the repatriation of the remaining 1,481 Moroccan prisoners of war held in camps in the Tindouf area of Algeria. The plight of these men, most of whom have been held for more than 20 years, is a humanitarian and human rights issue that should be addressed on an urgent basis. I once again call on the parties to arrange for the early repatriation of all prisoners, under the auspices of the ICRC.⁶⁷⁰

733. In 1996, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina commented that the release of all POWs was an important part of the Agreement and expressed his serious concern at the unwillingness of the parties to fully comply with their obligations.⁶⁷¹ In another report later the same year, he reported that:

Intensive pressure has resulted in the release of most prisoners registered by the ICRC who were detained in connection with the conflict. For the remaining prisoners, a process was devised whereby case files on persons alleged to have committed war crimes were passed to the ICTY for review. The parties complied fully with this process, including release of all persons for whom ICTY determined that there was insufficient evidence to warrant further detention.⁶⁷²

⁶⁶⁷ UN Secretary-General, Report pursuant to Security Council resolution 721 (1991), UN Doc. S/23280, 11 December 1991, p. 7, § 18.

⁶⁶⁸ UN Secretary-General, Progress report on the situation in Somalia, UN Doc. S/25168, 26 January 1993, § 9 and Annex III, Agreement on implementing the cease-fire and on modalities of disarmament, § IV.

⁶⁶⁹ UN Secretary-General, Report on UNAVEM III, UN Doc. S/1996/171, 6 March 1996, § 3.

⁶⁷⁰ UN Secretary-General, Report on the situation concerning Western Sahara, UN Doc. S/2001/398, 24 April 2001, § 9.

⁶⁷¹ High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/190, 14 March 1996, Annex, § 74.

⁶⁷² High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/542, 10 July 1996, Annex, § 42.

Other International Organisations

734. In recommendation adopted in 1979 on the missing political prisoners in Chile, the Parliamentary Assembly of the Council of Europe called on member States to urge the Chilean authorities to release all detained political prisoners.⁶⁷³

735. In a resolution adopted in 1980 on the situation of human rights in Latin America, the Parliamentary Assembly of the Council of Europe invited member States "to make vigorous representations to the governments of all countries holding political prisoners, designed to secure their release, and, when release is conditional upon their leaving the country, to grant entry visas to such prisoners".⁶⁷⁴

736. In a recommendation adopted in 1996 on refugees, displaced persons and reconstruction in certain countries of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe invited member States to support the ICRC in the implementation of its tasks under the 1995 Dayton Accords, namely to organise the release of prisoners as quickly as possible.⁶⁷⁵

737. In 1996, the Committee of Ministers of the Council of Europe reported that, in a joint communiqué in April 1996, the Presidents of Armenia and Azerbaijan had stated that the immediate release by the parties of all hostages and POWs was essential.⁶⁷⁶

738. In a resolution adopted in 1988 on the situation in Cyprus, the European Parliament drew the Ministers' attention to the need to find a lasting solution to the problem of missing persons, particularly through the release of those missing who might be detained in prison.⁶⁷⁷

739. In a resolution adopted in 1994 on the situation in Chechnya, the European Parliament urged the parties to implement the agreement signed by the two parties that same month, providing in particular for the release of soldiers taken prisoner.⁶⁷⁸

740. In 1991, in the Final Communiqué of its 12th Session, the GCC Supreme Council stressed, in particular, "the need for the full and speedy implementation of the terms of the cease-fire and all the provisions of Security Council resolution 687 (1991), particularly those relating to the immediate release of all prisoners and detainees, both Kuwaitis and third-country nationals".⁶⁷⁹

⁶⁷³ Council of Europe, Parliamentary Assembly, Rec. 868, 5 June 1979, § 12(ii).

⁶⁷⁴ Council of Europe, Parliamentary Assembly, Res. 722, 28 January 1980, § 11(g).

⁶⁷⁵ Council of Europe, Parliamentary Assembly, Rec. 1287, 24 January 1996, § 19(viii)(d).

⁶⁷⁶ Council of Europe, Committee of Ministers, Doc. 7690, Supplementary reply to recommendation 1263 (1995) on the humanitarian situation of the refugee and displaced persons in Armenia and Azerbaijan, 29 October 1996, pp. 2–3.

⁶⁷⁷ European Parliament, Resolution on the situation in Cyprus, 27 June 1988, §§ 7–8.

⁶⁷⁸ European Parliament, Resolution on the situation in Chechnya, 15 December 1994, § 5.

⁶⁷⁹ GCC, Supreme Council, 12th Session, Kuwait, 23–25 December 1991, Final Communiqué, annexed to Letter dated 30 December 1992 from Kuwait to the UN Secretary-General, UN Doc. A/46/833-S/23336, 30 December 1991, p. 3.

741. In 1992, in the Final Communiqué of its 13th Session, the GCC Supreme Council took note of Iraq's "infringement of the conditions of the cease-fire through its refusal to release prisoners from Kuwait and from other countries" and called on the international community "to continue exercising pressure on the Iraqi Regime until it fully complies by implementing all the Security Council resolutions, especially those regarding the release of Kuwaiti and other nationals held prisoners".⁶⁸⁰

742. In 1993, in the Final Communiqué of its 14th Session, the GCC Supreme Council called for "the release of all prisoners and detainees, both Kuwaitis and third-country nationals" held by Iraq in the wake of the Gulf War.⁶⁸¹

743. In 1994, in the Final Communiqué of its 15th Session, the GCC Supreme Council appealed to the members of the UN Security Council to "continue their earnest efforts to compel Iraq to take . . . steps towards genuine implementation of all Security Council resolutions, especially those relating to the release of all Kuwaiti and other prisoners and detainees".⁶⁸²

744. In 1995, in the Final Communiqué of its 16th Session, the GCC Supreme Council called on the international community to maintain pressure on Iraq until it completed implementation of the pertinent UN resolutions, "in particular those relating to the release of prisoners and detainees, both Kuwaitis and nationals of other States, whose extended suffering was in blatant violation of resolution 687 (1991) and the third and fourth Geneva Conventions".⁶⁸³

745. In a resolution adopted in 1989 on the Iran–Iraq situation, the Council of the League of Arab States decided:

to intensify efforts on all fronts for both sides to release the prisoners of war and to repatriate them in conformity with the Security Council's Resolution no. 598/87 and the Third Geneva Convention, in order to end their sufferings and the social and humanitarian problems resulting from their sustained detention.⁶⁸⁴

746. In a resolution on Bosnia and Herzegovina adopted in 1992, the Council of the League of Arab States called upon the Serb forces "to release all the prisoners in accordance with International Charters and customs".⁶⁸⁵

⁶⁸⁰ GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, pp. 3–4.

⁶⁸¹ GCC, Supreme Council, 14th Session, Riyadh, 20–22 December 1993, Final Communiqué, annexed to Letter dated 29 December 1993 from the UAE to the UN Secretary-General, UN Doc. A/49/56-S/26926, 30 December 1993, p. 4.

⁶⁸² GCC, Supreme Council, 15th Session, Manama, 19–21 December 1994, Final Communiqué, annexed to Letter dated 22 December 1994 from Bahrain to the UN Secretary-General, UN Doc. A/49/815-S/1994/1446, 22 December 1994, p. 3.

⁶⁸³ GCC, Supreme Council, 16th Session, Muscat, 4–6 December 1995, Final Communiqué, annexed to Letter dated 29 December 1995 from Oman to the UN Secretary-General, UN Doc. A/51/56-S/1995/1070, 29 December 1995, p. 4.

⁶⁸⁴ League of Arab States, Council, Res. 4938, 13 September 1989, § 4.

⁶⁸⁵ League of Arab States, Council, Res. 5231, 13 September 1992, § 5.

747. In two resolutions adopted in 1992 and 1993, the Council of the League of Arab States decided to call for the “release of the Lebanese nationals detained by the Israeli authorities”.⁶⁸⁶

748. In a resolution adopted in 1994 on the follow-up of the Intifada’s developments, the Council of the League of Arab States decided “to ask the International Organisations concerned with Human Rights to exercise pressure on the Israeli authorities to release the Palestinian detainees immediately”.⁶⁸⁷

749. In a resolution adopted in 1997, the Council of the League of Arab States decided:

To request the International Community to adopt all measures for Israel to immediately release all the Lebanese prisoners and hostages from the prisons and places of detention controlled by its forces, as this constitutes a breach of the provisions of international law, the Fourth Geneva Convention of 1949, and the Hague Convention of 1907.⁶⁸⁸

750. In 1997, in a report on the situation in Angola, the OAU Secretary-General reported that, in accordance with the terms of the peace accords concluded between the two belligerents, the Angolan government and UNITA had both released, under ICRC auspices, all prisoners detained as a result of the conflict.⁶⁸⁹

751. In a resolution adopted in 1992 in the context of the conflict in the former Yugoslavia, the OIC Foreign Ministers requested the immediate release of prisoners in accordance with the agreement signed in Geneva under the auspices of the ICRC.⁶⁹⁰

752. In a resolution on Nagorno-Karabakh adopted in 1995, the OSCE Ministerial Council urged the parties to the conflict “to release immediately all POWs and persons detained in connection with the conflict”.⁶⁹¹

International Conferences

753. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that, irrespective of GC III, “the international community has consistently demanded humane treatment for prisoners of war, including . . . the prompt repatriation of seriously sick or wounded prisoners”.⁶⁹²

754. The 25th International Conference of the Red Cross in 1986 adopted a resolution on respect for international humanitarian law in armed conflicts

⁶⁸⁶ League of Arab States, Council, Res. 5169, 29 April 1992, § 2; Res. 5324, 21 September 1993, § 2.

⁶⁸⁷ League of Arab States, Council, Res. 5414, 15 September 1994, § 4.

⁶⁸⁸ League of Arab States, Council, Res. 5635, 31 March 1997, § 3.

⁶⁸⁹ OAU Secretary-General, Report on the situation in Angola, Doc. CM/2004 (LXVI)(e), 26 May 1997, § 13.

⁶⁹⁰ OIC, Islamic Conference of Foreign Ministers, Res. 1/6-EX, 2 December 1992, § 22.

⁶⁹¹ OSCE, Ministerial Council, Decision on the Minsk Process, Doc. MC(5).DEC/3, 8 December 1995, § 3.

⁶⁹² 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.

and action by the ICRC for persons protected by the Geneva Conventions in which it appealed to all parties involved in armed conflicts “to carry out the early repatriation by phases of prisoners of war in accordance with the Third Geneva Convention and further beyond its provisions as might be acceptable in the interest of humanitarian considerations”.⁶⁹³

755. The Conclusions of the London Peace Implementation Conference for Bosnia and Herzegovina in 1995 state that fulfilment of the 1995 Dayton Accords will require “full cooperation of the parties over the release of prisoners”.⁶⁹⁴

756. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that:

prisoners of war are released and repatriated without delay after the cessation of active hostilities, unless subject to due judicial process; the prohibition of taking hostages is strictly respected; the detention of prisoners and internees is not prolonged for bargaining purposes which practice is prohibited by the Geneva Conventions.⁶⁹⁵

IV. Practice of International Judicial and Quasi-judicial Bodies

757. In a report on Panama in 1989, the IACiHR recommended that the government take immediate steps to release individuals who had been detained for political reasons.⁶⁹⁶

V. Practice of the International Red Cross and Red Crescent Movement

758. According to the ICRC Commentary on the Additional Protocols, the grave breach specified in Article 85(4)(b) AP I consists in the failure to repatriate seriously sick or wounded prisoners during hostilities in accordance with Article 109 GC III and all prisoners at the end of hostilities as required by Article 118 GC III without valid and lawful reasons justifying the delay. The Commentary adds that, with regard to civilians, the breach consists in delaying the departure of foreign nationals who want to leave the territory in accordance with Articles 35 and 134 GC IV without valid and lawful reasons justifying such delay.⁶⁹⁷

⁶⁹³ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, § 3.

⁶⁹⁴ Peace Implementation Conference for Bosnia and Herzegovina, London, 8–9 December 1995, Conclusions, annexed to Letter dated 11 December 1995 from the UK to the UN Secretary-General, UN Doc. S/1995/1029, 12 December 1995, § 25.

⁶⁹⁵ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(d).

⁶⁹⁶ IACiHR, Report on the situation of human rights in Panama, Doc. OEA/Ser.L/V/II.76 Doc. 16 rev. 2, 9 November 1989, p. 61.

⁶⁹⁷ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 3508–3509.

759. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “prisoners of war shall be released and repatriated without delay after the cessation of active hostilities” and that “the internment of civilian persons shall cease as soon as possible after the end of active hostilities”. Delegates also teach that “unjustifiable delay in the repatriation of prisoners of war” constitutes a grave breach of the law of war.⁶⁹⁸

760. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of most of the grave breaches of AP I, listed the “unjustifiable delay in the repatriation of prisoners of war or civilians”, when committed wilfully and in violation of international humanitarian law, as a war crime to be subject to the jurisdiction of the ICC.⁶⁹⁹

VI. Other Practice

761. In the context of the conflict in Cuba, one commentator described witnessing “the surrender of hundreds of *Batistianos* from a small-town garrison”:

They were gathered within a hollow square of rebel Tommy-gunners and harangued by Raul Castro: “We hope that you will stay with us and fight against the master who so ill-used you. If you decide to refuse this invitation – and I am not going to repeat it – you will be delivered to the Cuban Red Cross tomorrow. Once you are under Batista’s orders again, we hope that you will not take arms against us. But, if you do, remember this: we took you this time. We can take you again. And when we do, we will not frighten or torture or kill you . . . If you are captured a second time or even a third . . . we will again return you exactly as we are doing now.”⁷⁰⁰

762. In 1981, in a meeting with the ICRC, an armed opposition group said that it preferred to release a number of detained combatants when it could no longer ensure their safety.⁷⁰¹

763. In 1982, in a meeting with the ICRC, an armed opposition group agreed to unilaterally release detained combatants using the ICRC as an intermediary.⁷⁰²

764. In 1987, in a meeting with the ICRC, an armed opposition group stated that 95 per cent of its prisoners were soldiers drafted by force and were therefore released after being advised never to fight against the resistance.⁷⁰³

⁶⁹⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 256, 257, 258, 723, 724 and 776(i).

⁶⁹⁹ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, p. 2.

⁷⁰⁰ D. Chapelle, How Castro Won, in T. N. Greene (ed.), *The Guerrilla - And How to Fight Him: Selections from the Marine Corps Gazette*, Frederick A. Praeger, New York, 1962, p. 233; also cited in Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, Basic Books, New York, 1977.

⁷⁰¹ ICRC archive document.

⁷⁰² ICRC archive document. ⁷⁰³ ICRC archive document.

765. In Colombia in 1996, a guerrilla group (FARC-EP) made public the list of 60 soldiers captured during an attack on a military base. It stated that it considered the soldiers to be prisoners of war and intended to return them safe and sound.⁷⁰⁴

766. The Report on SPLM/A Practice states that, with regard to sections of the population who have fallen under its administration or who have been captured as POWs, "the SPLM/A has followed the practice of allowing people to voluntarily return to the government side if they wish and to other areas held by rival factions". According to the report, "this practice of the SPLM/A with respect to release and return of POWs and other categories loyal to the enemy side is in accordance with SPLM/A legislation on the war".⁷⁰⁵

Unconditional release

I. Treaties and Other Instruments

Treaties

767. No practice was found.

Other Instruments

768. Paragraph 1 of the Agreement on the Exchange of Prisoners between the FRY and Croatia (July 1992) provided that prisoners "shall be released simultaneously by both parties, according to the principle 'all for all' and without conditions".

769. Pursuant to Article 3(v) of the 1992 London Programme of Action on Humanitarian Issues, the parties to the conflict in Bosnia and Herzegovina undertook "to abide by the following provision: . . . there should be unconditional and unilateral release under international supervision of all civilians currently detained".

770. Article 3 of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provided that "all prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law . . . will be unilaterally and unconditionally released".

771. Paragraph 5 of the 1993 Afghan Peace Accord provided that there should be "immediate and unconditional release of all Afghan detainees held by the Government and different parties during the armed hostilities".

772. In paragraph 4 of the 1996 Ashgabat Protocol on Prisoner Exchange in Tajikistan, the government of Tajikistan and the United Tajik Opposition agreed "to deliver with the assistance of ICRC and in the presence of 5 family

⁷⁰⁴ International Commission of the FARC-EP, Communiqué, 14 October 1996.

⁷⁰⁵ Report on SPLM/A Practice, 1998, Chapter 5.4, referring to SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 32.

representatives, to return 26 prisoners of war, freed earlier by the opposition without preconditions, to their homes”.

II. National Practice

Military Manuals

773. No practice was found.

National Legislation

774. No practice was found.

National Case-law

775. No practice was found.

Other National Practice

776. During the Algerian war of independence, it was reported that:

Since the proclamation of the Provisional Government of the Algerian Republic in September 1958, 40 French soldiers who had been taken prisoner were released by the ALN without any condition. 20 were released in Algeria and 20 others were released in Tunisia and Morocco, through the Algerian Red Crescent.⁷⁰⁶

777. In 1992, in a letter to the ICRC, a State involved in an international armed conflict insisted that prisoners with medical problems should be released unconditionally and not be the object of exchange.⁷⁰⁷

III. Practice of International Organisations and Conferences

United Nations

778. In 1996, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council stressed that “the obligation to release prisoners is unconditional. Failure to do so constitutes a serious case of non-compliance” and noted “the readiness of the High Representative to propose measures to be taken against any party that fails to comply”.⁷⁰⁸

779. In a resolution adopted in 1995, the UN Commission on Human Rights called for “the unconditional...release of all prisoners of war” in Afghanistan.⁷⁰⁹ This call was repeated in a resolution adopted in 1996.⁷¹⁰

⁷⁰⁶ “La révolution algérienne tient au respect de l’homme”, *El Moudjahid*, Vol. 3, p. 57.

⁷⁰⁷ ICRC archive document.

⁷⁰⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/15, 4 April 1996, p. 2.

⁷⁰⁹ UN Commission on Human Rights, Res. 1995/74, 8 March 1995, § 7.

⁷¹⁰ UN Commission on Human Rights, Res. 1996/75, 23 April 1996, § 7.

780. In a resolution adopted in 1996, the UN Commission on Human Rights strongly urged the government of Myanmar “to release . . . unconditionally all detained political prisoners”.⁷¹¹

781. In a resolution adopted in 1998, the UN Commission on Human Rights welcomed the release of POWs in Afghanistan and called for “the unconditional . . . release of all remaining prisoners of war”.⁷¹²

Other International Organisations

782. No practice was found.

International Conferences

783. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

784. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

785. In 1993, in a paper presented to the International Conference on the Former Yugoslavia, the ICRC reported that the agreed process for the release of detainees had come to a standstill when the Bosnian Serbs freed all prisoners and the other two parties did not release all their prisoners as promised during talks with the President of the ICRC. The Bosnian government indicated that it was “ready to release all prisoners, except war criminals, after an amnesty had been proclaimed”. The Bosnian Serbs claimed that they had made “enough unilateral gestures”. In response, the ICRC stated that the closure of places of detention could “no longer be contingent on considerations of reciprocity . . . [and that all prisoners should] be released under ICRC auspices in unilateral and unconditional operations”.⁷¹³

VI. Other Practice

786. In 1986, in a meeting with the ICRC, the commander of an armed opposition group stated that “the fate of prisoners would depend on their willingness to convert to [a specific religion] and on their behaviour during the detention”. He also mentioned that some could be released after six months, one year or

⁷¹¹ UN Commission on Human Rights, Res. 1996/80, 23 April 1996, § 3.

⁷¹² UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 7.

⁷¹³ ICRC, Paper presented to the International Conference on the Former Yugoslavia, UN Doc. S/25050, 6 January 1993, Annex IV, pp. 14–15.

two years maximum. He also stated that, if after two years of detention no result was obtained, they would be executed.⁷¹⁴

Exchange of prisoners

I. Treaties and Other Instruments

Treaties

787. Article IX of the 1995 Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords included detailed provisions on prisoner exchange.

Other Instruments

788. Article 109(1) of the 1863 Lieber Code provides that “the exchange of prisoners of war is an act of convenience to both belligerents. If no general cartel has been concluded, it cannot be demanded by either of them. No belligerent is obliged to exchange prisoners of war.”

789. Article 30 of the 1874 Brussels Declaration states that “the exchange of prisoners of war is regulated by a mutual understanding between the belligerent parties”.

790. Article 75 of the 1880 Oxford Manual provides that “prisoners of war may be released in accordance with a cartel of exchange, agreed upon by the belligerent parties”.

791. Article 3(a) of the 1990 Cairo Declaration on Human Rights in Islam provides that “in the event of the use of force and in case of armed conflict . . . it is a duty to exchange prisoners of war”.

792. The 1991 Agreement between Croatia and the SFRY on the Exchange of Prisoners provides that:

1. Both Parties commonly declare that they shall exchange all prisoners and all persons deprived of their liberty, according to the principle of “all for all”.
2. The word “prisoner” is understood as including all persons deprived of their liberty who are detained in detention centers or prisoner camps, regardless of whether a criminal or other procedure has been opened against them, an indictment drawn up or a condemnation, whether executory or not, pronounced, and regardless of the territory in which these persons are detained or the place where they were captured, or taken as hostages or deprived of their liberty or freedom of movement.

793. Under Article 2 of the Protocol to the 1996 Moscow Agreement on a Cease-fire in Chechnya, a mutual exchange of lists of persons being detained was to be effected, and the exchange itself was to take place within two weeks.

794. In paragraph 1 of the 1996 Ashgabat Protocol on Prisoner Exchange in Tajikistan, the government of Tajikistan and the United Tajik Opposition

⁷¹⁴ ICRC archive document.

agreed to conduct “a step-by-step exchange of an equal number of prisoners of war and detainees in accordance with the lists to be transmitted by the parties to the International Committee of the Red Cross (ICRC) before the end of the current round of inter-Tajik talks in Ashgabat”.

795. In the 1997 Bishkek Memorandum, concluded between the President of Tajikistan and the leader of the United Tajik Opposition, an agreement was reached “to resolve . . . the problem of the exchange of POW’s and prisoners in all its aspects and to work out the corresponding mechanism”.

II. National Practice

Military Manuals

796. Israel’s Manual on the Laws of War provides that “the parties to the conflict can reach an arrangement for the exchange of prisoners from both sides even before the war has ended. Exchanged prisoners of war may not return to active military service.”⁷¹⁵

797. The Military Handbook of the Netherlands provides that “exchange of prisoners may take place during the hostilities in accordance with agreements concluded between the Parties”.⁷¹⁶

798. The UK Military Manual provides that:

The exchange of prisoners of war is nowadays rare. The rule generally observed is to exchange man for man and rank for rank, with due allowance if titles of ranks or grades differ or if there is no exact equivalent. A condition is often made that the men exchanged shall not participate as soldiers in the war – in fact they are paroled.⁷¹⁷

The manual further specifies that:

The exchange of prisoners may be carried out by means of so-called “cartels”. Nothing more is required than a simple statement agreed by the commanders, such agreement being arrived at by parlementaires, that is, negotiations conducted during truce, or by the exchange of letters. But for exchanges on a large scale commissioners are usually appointed, and commanders ought not as a rule in such cases to act without having previously reported to their government and taken instructions. In modern war between civilised States, an exchange of prisoners will rarely be carried out except by agreement between the governments concerned.⁷¹⁸

799. The US Field Manual provides that:

Exchange of prisoners of war, other than those whose repatriation is required by . . . [GC III], may be effected by agreement between the belligerents. No belligerent is obliged to exchange prisoners of war, except if a general cartel requiring such exchange has been concluded. The conditions for exchange are as

⁷¹⁵ Israel, *Manual on the Laws of War* (1998), p. 54.

⁷¹⁶ Netherlands, *Military Handbook* (1995), p. 7-42.

⁷¹⁷ UK, *Military Manual* (1958), § 249. ⁷¹⁸ UK, *Military Manual* (1958), § 250.

prescribed by the parties thereto, and exchanges need not necessarily be on the basis of number for number or rank for rank.⁷¹⁹

National Legislation

800. No practice was found.

National Case-law

801. No practice was found.

Other National Practice

802. In 1994, during a debate in the UN Security Council on the situation in Tajikistan and along the Tajik-Afghan border, Argentina noted that the exchange of prisoners showed the will of the parties to cooperate in finding a solution to the crisis in Tajikistan.⁷²⁰

803. In 1995, during a debate in the UN Security Council on the situation in Tajikistan and along the Tajik-Afghan border, China welcomed the agreements on the exchange of detainees and POWs.⁷²¹

804. In 1995, during a debate in the UN Security Council on the situation in Tajikistan and along the Tajik-Afghan border, Honduras welcomed the agreements on the exchange of detainees and POWs.⁷²²

805. In 1995, during a debate in the UN Security Council on the situation in Tajikistan and along the Tajik-Afghan border, Indonesia drew particular attention to the provision asking parties to implement the agreed confidence-building measures, including the exchange of detainees and POWs.⁷²³

806. In 1994, during a debate in the UN Security Council on the situation in Tajikistan and along the Tajik-Afghan border, the US encouraged the parties to resume discussions with the intention of participating in additional exchanges of prisoners.⁷²⁴

807. In 1995, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, the US stated that an exchange of prisoners between the Bosnian Serb side and the Bosnian government gave reason for hope.⁷²⁵

808. In 1985, the government of a State declared that foreign combatants captured in international armed conflicts could only be exchanged after they were tried.⁷²⁶

⁷¹⁹ US, *Field Manual* (1956), § 197.

⁷²⁰ Argentina, Statement before the UN Security Council, UN Doc. S/PV.3482, 1 January 1994, p. 11.

⁷²¹ China, Statement before the UN Security Council, UN Doc. S/PV.3544, 16 June 1995, p. 5.

⁷²² Honduras, Statement before the UN Security Council, UN Doc. S/PV.3544, 16 June 1995, p. 4.

⁷²³ Indonesia, Statement before the UN Security Council, UN Doc. S/PV.3544, 16 June 1995, p. 4.

⁷²⁴ US, Statement before the UN Security Council, UN Doc. S/PV.3482, 1 January 1994, p. 9.

⁷²⁵ US, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 12.

⁷²⁶ ICRC archive document.

*III. Practice of International Organisations and Conferences**United Nations*

809. In a resolution on Tajikistan adopted in 1995, the UN Security Council urged the parties to cooperate fully with the ICRC in facilitating “the exchange of detainees and prisoners of war”.⁷²⁷

810. In a resolution adopted in 1995, the UN Security Council called upon the government of Angola and UNITA “to accelerate the exchange of prisoners”.⁷²⁸

811. In a resolution on Afghanistan adopted in 1996, the UN Security Council noted that proposals had been made for the “exchange of prisoners of war”.⁷²⁹

812. In 1998, in a statement by its President on the situation in Afghanistan, the UN Security Council called upon the parties to agree on an exchange of prisoners.⁷³⁰

813. In a resolution adopted in 1995, the UN Commission on Human Rights called for the “simultaneous release of all prisoners of war” in Afghanistan.⁷³¹ This call was repeated in a resolution adopted in 1996.⁷³²

814. In a resolution adopted in 1998, the UN Commission on Human Rights welcomed the release of POWs in Afghanistan and called for the “simultaneous release of all remaining prisoners of war”.⁷³³

815. In 1991, in a report concerning the former Yugoslavia, the UN Secretary-General reported that, on 9 November 1991, in the context of the conflict in Bosnia and Herzegovina, more than 700 prisoners were released simultaneously by the parties under ICRC supervision.⁷³⁴

816. In 1992, in a report concerning the former Yugoslavia, the UN Secretary-General reported that UNPROFOR had been involved in arranging and witnessing exchanges of POWs.⁷³⁵

817. In 1995, in a report on the situation in Tajikistan, the UN Secretary-General reported that it had been agreed during the fourth round of talks in May/June 1995 that both sides would exchange an equal number of detainees and POWs by 20 July 1995.⁷³⁶

818. In 1995, in a report on violations of IHL in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most in Bosnia and Herzegovina, the UN

⁷²⁷ UN Security Council, Res. 999, 16 June 1995, § 8.

⁷²⁸ UN Security Council, Res. 1008, 7 August 1995, § 7.

⁷²⁹ UN Security Council, Res. 1076, 22 October 1996, preamble.

⁷³⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998.

⁷³¹ UN Commission on Human Rights, Res. 1995/74, 8 March 1995, § 7.

⁷³² UN Commission on Human Rights, Res. 1996/75, 23 April 1996, § 7.

⁷³³ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 7.

⁷³⁴ UN Secretary-General, Report pursuant to Security Council resolution 721 (1991), UN Doc. S/23280, 11 December 1991, p. 7, § 18.

⁷³⁵ UN Secretary-General, Report pursuant to Security Council resolution 752 (1992), UN Doc. S/24000, 26 May 1992, p. 3, §§ 9–10.

⁷³⁶ UN Secretary-General, Report on the situation in Tajikistan, UN Doc. S/1995/472, 10 June 1995, pp. 2–3, § 8(b).

Secretary-General reported that a prisoner exchange between the Bosnian government and Bosnian Serb armies had occurred on 30 October 1995.⁷³⁷

819. In 1996, in a report on UNAVEM III in Angola, the UN Secretary-General, with reference to the Peace Accords concluded between the government of Angola and UNITA providing for the release of POWs based on lists presented to the ICRC, the UN Secretary-General highlighted as a positive development the release of additional prisoners registered with the ICRC.⁷³⁸

820. In 1996, in a report concerning the situation in Abkhazia, Georgia, the UN Secretary-General reported that, following a series of hostage-taking incidents, the two sides had agreed to exchange all hostages. In the space of one month, UNOMIG assisted in the exchange of 13 hostages, 11 held by the Abkhaz side, 2 by the Georgian side.⁷³⁹

821. In 1997, in a report on the situation of human rights in the Republic of Chechnya of the Russian Federation, the UN Secretary-General reported that the OSCE had provided the following information:

There are still wartime detainees on both sides. The cease-fire and initial peace process agreements called for the exchange of prisoners all against all, a principle rhetorically accepted by both side. In fact, many prisoners held by the Chechens had been released in the past months, but there have not been commensurate releases on the federal side.⁷⁴⁰

822. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) found, with respect to its investigation into prison camps, that civilians were often arrested and detained by both Bosnian government and Bosnian Croat forces, as well as Croat forces in Croatia, for the purpose of collecting prisoners for exchange. It was reported that the Bosnian Croats divided their prisoners at the Central Mostar Prison into five categories, one of which was prisoners held for the purposes of exchange.⁷⁴¹

823. In its report in 1993, the UN Commission on the Truth for El Salvador noted that, following the abduction of the President's daughter and a second woman by an FMLN commando in September 1985, several weeks of secret negotiations took place in which the Salvadoran Church and diplomats from the region acted as mediators. As a result, the two women were released in

⁷³⁷ UN Secretary-General, Report pursuant to Security Council resolution 1019 (1995) on violations of IHL in the areas of Srebrenica, Žepa, Banja Luka and Sanski Most, UN Doc. S/1995/988, 27 November 1995, p. 15, § 70.

⁷³⁸ UN Secretary-General, Report on UNAVEM III, UN Doc. S/1996/171, 6 March 1996, § 3.

⁷³⁹ UN Secretary-General, Report concerning the situation in Abkhazia, Georgia, UN Doc. S/1996/284, 15 April 1996, § 33.

⁷⁴⁰ UN Secretary-General, Report on the situation of human rights in the Republic of Chechnya of the Russian Federation, UN Doc. E/CN.4/1997/10, 20 March 1997, p. 6.

⁷⁴¹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, Annex Summaries and Conclusions, UN Doc. S/1994/674/Add.2 (Vol. I), 31 May 1995, §§ 235, 281, 289, 290, 387 and 456.

exchange for 22 political prisoners. Simultaneously, 25 mayors and local officials abducted by the FMLN were released in exchange for 101 war-wounded guerrillas, whom the government allowed to leave the country.⁷⁴²

Other International Organisations

824. In 1994, in a report on the situation in Bosnia and Herzegovina submitted to the Parliamentary Assembly of the Council of Europe, it was stated that 500 Muslim prisoners held by Bosnian Croat forces and 364 Croat prisoners held by the Bosnian governmental forces had been released simultaneously on 20 March 1994.⁷⁴³

825. In 1996, in an information report on the situation in Chechnya submitted to the Parliamentary Assembly of the Council of Europe, it was noted that the cease-fire signed by both parties included measures for the exchange of detainees and concluded that this was the first phase to be implemented.⁷⁴⁴

826. In a resolution adopted in 1987, the Council of the League of Arab States decided:

To invite Iran to respond to the call for peace and to agree to a peaceful solution of the conflict, in accordance with the UN Charter and International Law reflected in the Security Council Resolution No. 58 (1986), on the following bases: . . . A comprehensive and total exchange of prisoners.⁷⁴⁵

International Conferences

827. The 22nd International Conference of the Red Cross in 1973 adopted a resolution in which it stated that it "received with great satisfaction the welcome news concerning the exchange of prisoners of war in the Middle East".⁷⁴⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

828. In the section of its Annual Report 1986–1987 concerning the situation of human rights in El Salvador, the IACiHR noted that agreement was reached between the Salvadoran government and the rebel forces to release a colonel who had been kidnapped by the rebels as a POW in exchange for a number of trade unionists, members of an NGO and disabled FMLN militants.⁷⁴⁷

⁷⁴² UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 169–170.

⁷⁴³ Council of Europe, Parliamentary Assembly, Report on the situation in Bosnia and Herzegovina, Doc. 7065, 12 April 1994, p. 8.

⁷⁴⁴ Council of Europe, Parliamentary Assembly, Information report on the situation in Chechnya, Doc. 7560, 24 June 1996, Conclusions, § 6.

⁷⁴⁵ League of Arab States, Council, Res. 4646, 6 April 1987, § 1(3).

⁷⁴⁶ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. XIX.

⁷⁴⁷ IACiHR, *Annual Report 1986–1987*, Doc. OEA/Ser.L/V/II.71 Doc. 9 rev. 1, 22 September 1987, p. 225.

V. Practice of the International Red Cross and Red Crescent Movement

829. No practice was found.

VI. Other Practice

830. In 1984, in a letter to the ICRC, an armed opposition group denounced the refusal of other parties to conduct exchanges of prisoners and reiterated its readiness to do so.⁷⁴⁸

831. On two occasions in 1985 and 1988, the leader of an armed opposition group claimed that it was willing at any time to conduct prisoner exchanges with a State party to the conflict, and negotiated an exchange rate of one national of the State for 25 rebels.⁷⁴⁹

832. In 1986, in a letter to the ICRC, an armed opposition group asked the ICRC to encourage exchanges of captured combatants and stated that the failure of exchange negotiations had resulted in the execution of the prisoners owing to the group's inability to detain them.⁷⁵⁰

Voluntary nature of return*I. Treaties and Other Instruments**Treaties*

833. Article 109, third paragraph, GC III provides that "no sick or injured prisoner of war who is eligible for repatriation may be repatriated against his will during hostilities".

834. Article 118, third paragraph, GC III requires that POWs be informed of the measures adopted for their release and repatriation.

835. Article 45, fourth paragraph, GC IV provides that "in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".

836. Article 135, second paragraph, GC IV provides that an internee can elect to return to his/her country on his/her own responsibility.

837. Upon accession to the 1949 Geneva Conventions, South Korea stated that "the Republic of Korea interprets the provisions of Article 118 [GC III], paragraph 1, as not binding upon a Power detaining prisoners of war to forcibly repatriate its prisoners against their openly and freely expressed will".⁷⁵¹

838. Article III(51)(a) of the 1953 Panmunjon Armistice Agreement provides that "within sixty (60) days after this Armistice Agreement becomes effective, each side shall, without offering any hindrance, directly repatriate and hand

⁷⁴⁸ ICRC archive document. ⁷⁴⁹ ICRC archive documents.

⁷⁵⁰ ICRC archive document.

⁷⁵¹ South Korea, Interpretative declarations made upon accession to the 1949 Geneva Conventions, 16 August 1966.

over in groups all those prisoners of war in its custody who insist on repatriation to the side to which they belonged at the time of capture". Article III(53) adds that "all the sick and injured prisoners of war who insist upon repatriation shall be repatriated with priority". Paragraph I(3) of the Annex to the Armistice Agreement, establishing the terms of reference of a Neutral Nations Repatriation Commission, further provides that "no force or threat of force shall be used against the prisoners of war . . . to prevent or effect their repatriation".

839. Article IX of the 1995 Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords provided that:

The Parties shall take no reprisals against any prisoner or his/her family in the event that the prisoner refuses to be transferred. . . The Parties shall permit the ICRC to privately interview each prisoner at least forty-eight (48) hours prior to his or her release for the purpose of implementing and monitoring the plan, including determination of the onward destination of each prisoner.

Other Instruments

840. The 1991 Agreement between Croatia and the SFRY on the Exchange of Prisoners provides that:

6. The signatories of the present agreement agree that no prisoner shall be returned against his will and that each prisoner shall have the opportunity to express freely his will to the representative of the ICRC.
7. The signatories of the present agreement undertake not to exercise any pressure on the prisoners in order to persuade them to refuse or accept the return.
8. The signatories of the present agreement solemnly undertake not to take any reprisals against prisoners who refuse to return or their families.

841. Paragraph 3 of the Agreement between Croatia and the FRY on the Exchange of Prisoners (July 1992) provided that "each prisoner is interviewed in private by ICRC delegates and is entitled to refuse repatriation".

842. Article 1(4) of the 1992 Agreement between Croatia and the FRY on the Release and Repatriation of Prisoners provides that:

The prisoners present at this operation shall be interviewed in private by ICRC delegates on their will to be repatriated. Those who wish to be repatriated are immediately handed over by ICRC delegates to the other side. Those who refuse to be repatriated are released on the spot – except, until the amnesty provided for in Article 2(2) becomes available to them, if they are accused of or sentenced for a crime – and may reach, with the assistance of the ICRC, the place of their choice.

843. Article 3(6) of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provides that "each prisoner to be released has the right to express to the ICRC in a private interview his free will on whether he wishes to be released and transferred according to the specific ICRC plan of operation, or wishes to be released on the spot, or wishes to remain in detention".

II. National Practice

Military Manuals

844. Argentina's Law of War Manual (1969) and Law of War Manual (1989) provide that "no sick or injured prisoner who is eligible for repatriation may be repatriated against his will during hostilities".⁷⁵²

845. Australia's Defence Force Manual states that "seriously wounded and sick PWs must be repatriated as soon as they are fit to travel except that PWs cannot be involuntarily repatriated during the hostilities".⁷⁵³

846. Canada's LOAC Manual states that "PWs should not be repatriated against their wishes during hostilities".⁷⁵⁴

847. Germany's Military Manual states that "no prisoner of war may be repatriated against his will during the hostilities".⁷⁵⁵

848. Israel's Manual on the Laws of War states that "as a general rule, prisoners of war should not be required to return to their country if they do not wish to, and an attempt should be made to find a solution to their problem via third-party States".⁷⁵⁶

849. The Military Manual of the Netherlands provides that "no sick or injured prisoner of war who is eligible for repatriation may be repatriated against his will during hostilities".⁷⁵⁷

850. The Military Handbook of the Netherlands provides that "during the hostilities, repatriation of the wounded and sick may not take place against their will".⁷⁵⁸

851. Spain's LOAC Manual provides that "no prisoner of war may be repatriated against his will during the hostilities".⁷⁵⁹

852. Switzerland's Basic Military Manual provides that "no prisoner may be repatriated against his will during hostilities".⁷⁶⁰

853. The UK Military Manual provides that:

Prisoners of war who are seriously sick are entitled to be sent back to their own country, regardless of number or rank, after having been cared for until they are fit to travel. No sick or injured prisoner of war who is eligible for repatriation under this provision may, however, be repatriated against his will during hostilities.⁷⁶¹

854. The US Field Manual provides that "no sick or injured prisoner of war who is eligible for repatriation may be repatriated against his will during hostilities".⁷⁶²

⁷⁵² Argentina, *Law of War Manual* (1969), § 2.091; *Law of War Manual* (1989), § 3.31.

⁷⁵³ Australia, *Defence Force Manual* (1994), § 1046.

⁷⁵⁴ Canada, *LOAC Manual* (1999), p. 10-6, § 49.

⁷⁵⁵ Germany, *Military Manual* (1992), § 732.

⁷⁵⁶ Israel, *Manual on the Laws of War* (1998), p. 54.

⁷⁵⁷ Netherlands, *Military Manual* (1993), p. VII-12, § 6.

⁷⁵⁸ Netherlands, *Military Handbook* (1995), p. 7-42.

⁷⁵⁹ Spain, *LOAC Manual* (1996), Vol. I, § 8.8.(a).1.

⁷⁶⁰ Switzerland, *Basic Military Manual* (1987), Article 142(3).

⁷⁶¹ UK, *Military Manual* (1958), § 251. ⁷⁶² US, *Field Manual* (1956), § 188.

855. The US Air Force Pamphlet provides that “no wounded and sick PW eligible for repatriation may be repatriated against his will during hostilities”.⁷⁶³

National Legislation

856. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁷⁶⁴

857. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of the Geneva Conventions, including violations of Articles 109 and 118 GC III and 45 and 135 GC IV, is a punishable offence.⁷⁶⁵

858. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949... is liable to imprisonment”.⁷⁶⁶

National Case-law

859. No practice was found.

Other National Practice

860. A communiqué issued by the Croatian Ministry of Defence after the operation in Western Slavonia in 1995, stated that During the armed conflict in Croatia, the captured combatants of the adverse party entitled to amnesty were released and, depending on their choice, were “allowed to choose either to stay in Croatia as peaceful citizens or to leave the country”.⁷⁶⁷

861. In 1991, in the context of a non-international conflict, the ICRC noted that detained persons were sometimes exchanged against their will to remain on the territory controlled by the party which had detained them.⁷⁶⁸

III. Practice of International Organisations and Conferences

862. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

863. No practice was found.

⁷⁶³ US, *Air Force Pamphlet* (1976), § 13-10.

⁷⁶⁴ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁷⁶⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁷⁶⁶ Norway, *Military Penal Code as amended* (1902), § 108(a).

⁷⁶⁷ Croatia, Ministry of Defence Communiqué after the operation in Western Slavonia, 5 May 1995.

⁷⁶⁸ ICRC archive document.

V. Practice of the International Red Cross and Red Crescent Movement

864. The ICRC Commentary on the Third Geneva Convention states that “where the repatriation of a prisoner of war would be manifestly contrary to the general principles of international law for the protection of the human being, the Detaining Power may, so to speak, grant him asylum”. To this effect, “supervisory bodies must be able to satisfy themselves without any hindrance that the requests have been made absolutely freely and in all sincerity, and to give prisoners of war any information which may set at rest groundless fears”.⁷⁶⁹

865. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that seriously wounded and seriously sick POWs may not be repatriated against their will during hostilities.⁷⁷⁰

866. According to the ICRC, in every repatriation operation in which the ICRC has played the role of neutral intermediary, the parties to the conflict have accepted the ICRC’s conditions for participation. One of these conditions is that the ICRC be able to verify, during private interviews, that protected persons are not repatriated against their will.

867. In a communication to the press issued in 2000 in the context of the conflict in Western Sahara, the ICRC stated that on 14 December 2000 it had repatriated 201 Moroccan prisoners released by the Polisario Front. Before the repatriation, ICRC delegates interviewed the prisoners individually to make sure that they were being repatriated of their own free will.⁷⁷¹

868. In a communication to the press issued in 2002 in the context of the conflict in Western Sahara, the ICRC stated that on 7 July 2002 it had repatriated 101 Moroccan prisoners released by the Polisario Front. Before the operation, ICRC delegates had interviewed the prisoners individually to make sure that they were being repatriated of their own free will.⁷⁷²

VI. Other Practice

869. In a resolution adopted at its conference in Seoul in November 1997, the World Veterans Federation demanded that prisoners of war and persons who went missing during the Korean War be returned according to their freely expressed will.⁷⁷³

870. The Report on SPLM/A Practice states that, with regard to sections of the population who have fallen under its administration or who have been

⁷⁶⁹ Jean S. Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, Geneva, 1960, pp. 547–548.

⁷⁷⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 723.

⁷⁷¹ ICRC, Communication to the Press No. 00/46, Morocco/Western Sahara: 201 Moroccan prisoners released and repatriated, 14 December 2000.

⁷⁷² ICRC, Communication to the Press No. 02/38, Morocco/Western Sahara: 101 Moroccan prisoners released and repatriated, 7 July 2002.

⁷⁷³ World Veterans Federation, *Chosun Daily News*, Seoul, 15 November 1997, § 2.

captured as POWs, “the SPLM/A has followed the practice of allowing people to voluntarily return to the government side if they wish and to other areas held by rival factions”.⁷⁷⁴

Destination of returning persons

I. Treaties and Other Instruments

Treaties

871. Article 109 GC III provides that “Parties to the conflict are bound to send back to *their own country* . . . seriously wounded and seriously sick prisoners of war”. (emphasis added)

872. Article 118 GC III provides that “prisoners of war shall be released and *repatriated* without delay after the cessation of active hostilities”. (emphasis added)

873. Article 134 GC IV leaves the choice between return to the last place of residence and repatriation, while Article 135 provides that the internee can elect to return to his/her country on his/her own responsibility.

874. Article 45 GC IV provides that “in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs”.

Other Instruments

875. Pursuant to Article 2(d) of the 1992 London Programme of Action on Humanitarian Issues, the parties to the conflict in Bosnia and Herzegovina agreed that when the secure release and return of civilians to their homes was not immediately feasible, the following options should be adopted:

- repatriation to areas under the control of their respective ethnic authorities;
- choosing to stay temporarily in the area of detention;
- relocation in areas away from the conflict under international supervision;
- temporary refuge in third countries.

876. Article 10 of the 1993 Cotonou Agreement on Liberia provided that all POWs and detainees be immediately released to the Red Cross authority in an area where such prisoners or detainees were detained, for onward transmission to encampment sites or the authority of the POW or detainee.

II. National Practice

Military Manuals

877. No practice was found.

⁷⁷⁴ Report on SPLM/A Practice, 1998, Chapter 5.4.

National Legislation

878. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁷⁷⁵

879. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 109 and 118 GC III and 45, 134 and 135 GC IV, is a punishable offence.⁷⁷⁶

880. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... is liable to imprisonment".⁷⁷⁷

National Case-law

881. No practice was found.

Other National Practice

882. In 1992, the German Foreign Minister declared that Germany was willing to receive 6,000 detainees from Serb detention camps in order to make their release possible. A statement in favour of this measure was supported by all political parties in parliament.⁷⁷⁸

883. According to the Report on the Practice of Nigeria, at the end of the Nigerian civil war in 1970, the inhabitants of the former Biafran enclave were released so that they could return to their respective towns.⁷⁷⁹

*III. Practice of International Organisations and Conferences**United Nations*

884. In a resolution adopted in 1980 in the context of the independence struggle in Southern Rhodesia (Zimbabwe), the UN Security Council called upon the UK government to take all necessary steps to release any South African political prisoners, including captured freedom fighters in southern Rhodesia and to ensure their safe passage to any country of their choice.⁷⁸⁰

Other International Organisations

885. No practice was found.

⁷⁷⁵ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁷⁷⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁷⁷⁷ Norway, *Military Penal Code as amended* (1902), § 108(a).

⁷⁷⁸ Germany, Lower House of Parliament, Speech by Dr Kinkel, Minister of Defence, 10 December 1992, *Plenarprotokoll* 12/128, pp. 11102–11112; Speech by Representative Scharrenbroich, 10 December 1992, *Plenarprotokoll* 12/128, p. 11099.

⁷⁷⁹ Report on the Practice of Nigeria, 1997, Chapter 5.4.

⁷⁸⁰ UN Security Council, Res. 463, 2 February 1980, § 7.

International Conferences

886. No practice was found.

IV. International Judicial and Quasi-judicial Bodies

887. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

888. No practice was found.

VI. Other Practice

889. No practice was found.

Responsibility for safe return*I. Treaties and Other Instruments**Treaties*

890. Articles 46–48 GC III, which contain extensive provisions relating to the conditions in which transfer of POWs shall take place, are also applicable to the return of POWs.

891. Article 5(4) AP II provides that “if it is decided to release persons deprived of their liberty, necessary measures to ensure their safety shall be taken by those so deciding”. Article 5 AP II was adopted by consensus.⁷⁸¹

892. Under Article VII of the Agreement between Croatia and the FRY on the Exchange of Prisoners (March 1992) the parties pledged “to undertake the necessary measures to ensure safety in the places of exchange, for all phases of the exchange, as well as during the arrival and departure of all persons included in the exchange”.

Other Instruments

893. No practice was found.

*II. National Practice**Military Manuals*

894. Argentina’s Law of War Manual reproduces Articles 46–48 GC III.⁷⁸²

895. Canada’s LOAC Manual provides, with regard to non-international armed conflicts, that “when persons who have been detained or interned are released,

⁷⁸¹ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 92.

⁷⁸² Argentina, *Law of War Manual* (1969), §§ 2.042–2.044.

the detaining authority is obliged to take such steps as are necessary to ensure their safety".⁷⁸³

896. France's LOAC Manual provides that when POWs are released, their security must be ensured.⁷⁸⁴

897. New Zealand's Military Manual provides that, in both international and non-international armed conflicts, the detaining authority is obliged to take such steps as are necessary to ensure the safety of released detainees.⁷⁸⁵ The manual also provides that prisoners of war are to be fed and provided with sufficient provisions if released.⁷⁸⁶

898. The US Field Manual reproduces Articles 46–48 GC III.⁷⁸⁷

National Legislation

899. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁷⁸⁸

900. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 46–48 GC III, as well as any "contravention" of AP II, including violations of Article 5(4) AP II, are punishable offences.⁷⁸⁹

901. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".⁷⁹⁰

National Case-law

902. No practice was found.

Other National Practice

903. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".⁷⁹¹

⁷⁸³ Canada, *LOAC Manual* (1999), p. 17-3, § 27.

⁷⁸⁴ France, *LOAC Manual* (2001), p. 102.

⁷⁸⁵ New Zealand, *Military Manual* (1992), § 1814.

⁷⁸⁶ New Zealand, *Military Manual* (1992), § 919.

⁷⁸⁷ US, *Field Manual* (1956), §§ 122–125.

⁷⁸⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁷⁸⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁷⁹⁰ Norway, *Military Penal Code as amended* (1902), § 108.

⁷⁹¹ Report on US Practice, 1997, Chapter 5.3.

*III. Practice of International Organisations and Conferences**United Nations*

904. In a resolution adopted in 1992 in the context of the conflict in Bosnia and Herzegovina, the UN Security Council authorised UNPROFOR to engage in the protection of convoys of released detainees if requested by the ICRC.⁷⁹²

905. In 1998, in a statement by its President concerning Afghanistan, the UN Security Council demanded that “the Taliban release other Iranians detained in Afghanistan and ensure their safe and dignified passage out of Afghanistan without further delay”.⁷⁹³

Other International Organisations

906. No practice was found.

International Conferences

907. No practice was found.

IV. International Judicial and Quasi-judicial Bodies

908. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

909. No practice was found.

VI. Other Practice

910. No practice was found.

Role of neutral intermediaries in the return process*I. Treaties and Other Instruments**Treaties*

911. Articles III(51)(b) and III(57)(a) of the 1953 Panmunjon Armistice Agreement provide that:

Each side shall release all those remaining prisoners of war, who are not directly repatriated, from its military control and from its custody and hand them over to the Neutral Nations Repatriation Commission for disposition in accordance with the provisions in the Annex hereto: “Terms of Reference for Neutral Nations Repatriation Commission”.

...

⁷⁹² UN Security Council, Res. 776, 14 September 1992, § 2.

⁷⁹³ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/27, 15 September 1998, p. 1.

The joint Red Cross teams shall assist in the execution by both sides of those provisions of this Armistice Agreement relating to the repatriation of all the prisoners of war specified in Sub-paragraph 51a hereof, . . . by the performance of such humanitarian services as are necessary and desirable for the welfare of the prisoners of war.

912. In Article 2(1) of the 2000 Peace Agreement between Ethiopia and Eritrea, both States agreed, in accordance with IHL, including the 1949 Geneva Conventions, and in cooperation with the ICRC, to release and repatriate without delay all POWs and other persons detained as a result of the armed conflict.

Other Instruments

913. The 1991 Peace Accords between the Government of Angola and UNITA provided that the “cease-fire entails the release of all civilian and military prisoners who were detained as a consequence of the conflict . . . Verification of such release will be performed by the International Committee of the Red Cross”.

914. Paragraph 13 of the 1991 Final Act of the Paris Conference on Cambodia stated that “the States participating in the Conference requested the International Committee of the Red Cross to facilitate, in accordance with its principles, the release of prisoners of war and civilian internees. They express their readiness to assist the ICRC in this task.”

915. Paragraphs 3, 4, 5, 6 and 11 of the 1991 Agreement between Croatia and the SFRY on the Exchange of Prisoners provided that the ICRC were to be given the lists of prisoners before repatriation and to visit and record them. The parties also undertook to place all prisoners to be exchanged under the protection of the ICRC. Paragraph 9 also provided that EC observers were to be present during the exchange of prisoners.

916. Section IV of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the conflict in Bosnia and Herzegovina provided that “ICRC delegates will lend their good offices in order to help conclude agreements to release [all persons captured or detained]”.

917. Article 1(1) of the 1992 Agreement between Croatia and the FRY on the Release and Repatriation of Prisoners provided that “all prisoners visited by the ICRC and mentioned on the ICRC list appearing in Annex A shall be released in an operation which will take place under ICRC supervision in Nemetin on August 14, 1992”.

918. Pursuant to Article 2(f) of the 1992 London Programme of Action on Humanitarian Issues, the parties to the conflict in Bosnia and Herzegovina accepted that:

The international community will monitor the [release] . . . closely to ensure that the security and well being of those held in detention is assured. To this end, they undertake to give free access to representatives of the international community including the UN, ICRC, EC and the CSCE.

919. Article 3 of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provided that “the ICRC will draw up specific plans of operation” for the release and transfer of the prisoners and be granted “all the facilities necessary for the implementation of the specific plans”. It also provided that “the ICRC shall be given the lists of prisoners before repatriation, shall visit and record them, and verify whether the return is voluntary”.

920. The 1992 General Peace Agreement for Mozambique specified that arrangements for and verification of the release process were to be agreed on by the ICRC together with the parties.

921. Article II of the 1993 Agreement among the Parties to Halt the Conflict in Bosnia and Herzegovina provided that all detainees should be released on an all-for-all basis under the supervision of the Joint Commission which included the ICRC. On 9 November 1993, more than 700 prisoners were released simultaneously by the two parties to the conflict in Bosnia and Herzegovina under ICRC supervision.

922. Article 10 of the 1993 Cotonou Agreement on Liberia provided that all POWs and detainees were to be immediately released to the Red Cross authority in an area where such prisoners or detainees were held, for onward transmission to encampment sites or the authority of the POW or detainee.

923. In paragraph 2 of the 1996 Ashgabat Protocol on Prisoner Exchange in Tajikistan, the government of Tajikistan and the United Tajik Opposition agreed “to request ICRC to provide assistance in the implementation of this humanitarian operation [of prisoner exchange], on the understanding that it will be conducted in accordance with the rules and procedures of that organization”.

II. National Practice

Military Manuals

924. Argentina’s Law of War Manual provides that:

The Detaining Power, the Power on which the prisoners of war depend, and a neutral Power agreed upon by these two Powers, shall endeavour to conclude agreements which will enable prisoners of war to be interned in the territory of the said neutral Power agreed until the close of the hostilities.⁷⁹⁴

National Legislation

925. No practice was found.

National Case-law

926. No practice was found.

⁷⁹⁴ Argentina, *Law of War Manual* (1969), § 2.097.

Other National Practice

927. The Report on the Practice of Algeria states that, according to publications of the ALN, a large number of prisoners were eventually released during the Algerian war of independence, often through the intermediary of the ICRC.⁷⁹⁵

928. According to the Report on the Practice of Colombia, “the release and return of persons deprived of their liberty in the Colombian armed conflict are customarily guaranteed by the ICRC and sometimes other civilian social organizations such as the Church, State-controlled bodies, and journalists, subject to an accord between the parties or the exercise of the ICRC’s right of initiative”.⁷⁹⁶ In 1997, according to the Report, “to obtain the release of 70 soldiers, the Government and the guerrillas agreed to the demilitarization of an area measuring 13,161 square kilometres in the department of Caquetá. To guarantee the suspension of military operations so that the soldiers could be handed over, the two sides agreed to the presence in the demilitarized zone of representatives of the ICRC, the National Conciliation Commission, the national Government and other competent bodies”.⁷⁹⁷

929. In implementing the 1992 N’sele Cease-fire Agreement, the Rwandan government released 23 prisoners which were returned to the RPF camp in July 1992 in cooperation with the ICRC, the Neutral Military Observer Group and the OAU. Similarly, the RPF released 11 prisoners using the ICRC as an intermediary.⁷⁹⁸

930. In 1964, the parties to an internal armed conflict requested ICRC intervention in exchanging prisoners and gave it entire competence to fix the date and procedure of the exchange.⁷⁹⁹

931. In a letter to the President of the ICRC in 1995, a State involved in an international armed conflict enlisted the services of the ICRC to mediate in the release and simultaneous repatriation of prisoners of both sides.⁸⁰⁰

*III. Practice of International Organisations and Conferences**United Nations*

932. In a resolution on Tajikistan adopted in 1996, the UN Security Council urged the parties “to cooperate fully with the International Committee of the Red Cross to facilitate the exchange of prisoners and detainees between the two sides”.⁸⁰¹

⁷⁹⁵ Report on the Practice of Algeria, 1997, Chapter 5.4.

⁷⁹⁶ Report on the Practice of Colombia, 1998, Chapter 5.4.

⁷⁹⁷ Report on the Practice of Colombia, 1998, Chapter 1.8, referring to the Agreement of Remolinos de Caguán, 3 June 1997, reprinted in *El Colombiano*, 4 June 1997, p. 5B.

⁷⁹⁸ Association Rwandaise pour la défense des droits de la personne et des libertés publiques, *Rapport sur les droits de l’homme au Rwanda – Année 1992*, Kigali, 1993, pp. 45 and 51.

⁷⁹⁹ ICRC archive document. ⁸⁰⁰ ICRC archive document.

⁸⁰¹ UN Security Council, Res. 1089, 13 December 1996, § 10.

933. In a resolution adopted in 1999, the UN Security Council reiterated “the obligation of Iraq, in furtherance of its commitment, to facilitate the repatriation of all Kuwaiti and third country nationals . . . and to extend all necessary cooperation to the International Committee of the Red Cross”.⁸⁰²

934. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights acknowledged the release of prisoners and demanded that the parties cooperate fully with the ICRC in the matter of release.⁸⁰³

935. In 1991, the UN Secretary-General reported that, according to the Head of the EC/CSCE Monitoring Mission in the Former Yugoslavia, “the Mission sought to serve as a channel of communication between opposing forces, to assist in organizing cease-fire arrangements and certain humanitarian steps, such as exchanges of prisoners”.⁸⁰⁴

936. In 1992, the UN Secretary-General reported that one of the main activities of ICRC delegates in Bosnia and Herzegovina was participation in the release of prisoners, while UNPROFOR was involved in “arranging and witnessing exchanges of prisoners of war”.⁸⁰⁵

937. In 1992, in a report on UNAVEM II in Angola, the UN Secretary-General stated that:

Under the Peace Accords, all civilians and military prisoners held by the government of Angola and UNITA have to be released. ICRC confirmed that the first phase of this process, consisting of releases based on lists of prisoners presented to the ICRC by both sides, was concluded on 2 April 1992. By that time, in the presence of the ICRC, the government had released 940 prisoners and UNITA had released 3,099 prisoners.⁸⁰⁶

938. In 1993, in a progress report on the situation in Somalia, the UN Secretary-General reported that, as part of an informal preparatory meeting for a conference on national reconciliation in Somalia, it was agreed on 15 January 1993 that all POWs would be freed and handed over to the ICRC and/or UNITAF.⁸⁰⁷

939. In its report in 1993, the UN Commission on the Truth for El Salvador noted that the ICRC had frequently negotiated for and carried out the release and exchange of detainees by the different parties.⁸⁰⁸

⁸⁰² UN Security Council, Res. 1284, 17 December 1999, § 13.

⁸⁰³ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 12.

⁸⁰⁴ UN Secretary-General, Report pursuant to § 3 of Security Council resolution 713 (1991), UN Doc. S/23169, 25 October 1991, § 14.

⁸⁰⁵ UN Secretary-General, Report pursuant to Security Council resolution 752 (1992), UN Doc. S/24000, 26 May 1992, § 9.

⁸⁰⁶ UN Secretary-General, Further report on the UN Angola Verification Mission (UNAVEM II), UN Doc. S/24145, 24 June 1992, § 25.

⁸⁰⁷ UN Secretary-General, Progress report on the situation in Somalia, UN Doc. S/25168, 26 January 1993, Annex III, § IV.

⁸⁰⁸ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 170.

Other International Organisations

940. In a recommendation adopted in 1996 on refugees, displaced persons and reconstruction in certain countries of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe invited member States “to support the International Committee of the Red Cross (ICRC) for the implementation of the tasks conferred on it by the Dayton Agreement, namely to organise the liberation of prisoners as early as possible”.⁸⁰⁹

941. In 1997, in a report on the situation in Angola, the OAU Secretary-General reported that the Angolan government and UNITA had both released, under ICRC auspices, all the prisoners detained as a result of the conflict.⁸¹⁰

International Conferences

942. The Conclusions of the London Peace Implementation Conference for Bosnia and Herzegovina in 1995 state that fulfilment of the 1995 Dayton Accords will require “full and immediate access by the ICRC to all places where prisoners and detainees are kept, to interview and register all of them prior to their release”.⁸¹¹

IV. Practice of International Judicial and Quasi-judicial Bodies

943. In a case before the IACiHR in 1992, the Commission heard that in July 1989, the government of El Salvador had released a man who had been arrested on suspicion of membership of a terrorist group and remanded him to envoys from the ICRC.⁸¹²

V. Practice of the International Red Cross and Red Crescent Movement

944. In 1984, on the occasion of the release of the first three Soviet soldiers captured in Afghanistan by opposition movements and transferred to Switzerland by the ICRC on 28 May 1982 in order to serve out their internment period as agreed by the parties concerned, the ICRC issued a press release in which it made public its position regarding the victims of the Afghan conflict. The press release noted that eleven Soviet soldiers had accepted the proposal to serve their period of internment in Switzerland, stating that “the first three were transferred to Switzerland on 28 May 1982. Eight others arrived in August and October 1982, January and October 1983, and February and April 1984. One of them escaped to the Federal Republic of Germany in July 1983.” The

⁸⁰⁹ Council of Europe, Parliamentary Assembly, Rec. 1287, 24 January 1996, § 19(viii)(d).

⁸¹⁰ OAU, Council of Ministers, Report of the Secretary-General on the situation in Angola, Doc. CM/2004 (LXVI)(e), 26 May 1997, § 13.

⁸¹¹ Peace Implementation Conference for Bosnia and Herzegovina, London, 8–9 December 1995, Conclusions, annexed to Letter dated 11 December 1995 from the UK to the UN Secretary-General, UN Doc. S/1995/1029, 12 December 1995, § 25.

⁸¹² IACiHR, *Case No. 10447 (El Salvador)*, Report, 14 February 1992, p. 1.

press release added that upon reaching the end of their periods of internment, "in conformity with the spirit of the provisions of international humanitarian law in this respect, the Swiss authorities, under whose responsibility the soldiers are, have taken the measures necessary to repatriate those internees still wishing to return to their country of origin".⁸¹³

945. The ICRC's 1986 Annual Report detailed the release and repatriation of 14 Sudanese prisoners who had been detained in Chad for over two and a half years in connection with the conflict in Sudan. The report further noted that two Italian monks "who had been captured in March by the Sudanese People's Liberation Army (SPLA) were handed over to the ICRC delegation in Addis Ababa on 18 August. The ICRC subsequently entrusted them to representatives of the Holy See in Ethiopia."⁸¹⁴

946. The ICRC's 1988 Annual Report documented the release and repatriation of almost 4,000 people, most of whom had been detained in Ethiopia and Somalia for nearly 11 years. The ICRC had been trying since 1984 to persuade the two governments to repatriate all prisoners of war, with priority being given to the seriously wounded and sick in accordance with Articles 109, 110 and 118 GC III. After hearing that an agreement had been signed between the two parties on 3 April 1988, the ICRC offered its services to organise the repatriation operation and this offer was accepted, with the repatriation of prisoners who wished to return being carried out in August 1988.⁸¹⁵

947. The UN Secretary-General reported that between October and December 1991, the ICRC participated in a multilateral negotiating commission, meeting almost daily in Zagreb to discuss, among other issues, the release of prisoners between Croatia and the YPA.⁸¹⁶

948. In a communication to the press issued in 1992 in the context of the conflict in Bosnia and Herzegovina, the ICRC confirmed that it had "evacuated on 1 October [1992] 1,560 people from Trnopolje camp... to a reception centre... where they were handed over to staff of the United Nations High Commissioner for Refugees (UNHCR)".⁸¹⁷

949. Following the 2000 Agreement between Eritrea and Ethiopia, the ICRC repatriated 360 Ethiopian and 359 Eritrean prisoners of war on 23 and 24 December 2000. In addition, the ICRC repatriated to Ethiopia 1,414 civilian internees of Ethiopian origin.⁸¹⁸

950. In a communication to the press issued in 2000 in the context of the conflict in Western Sahara, the ICRC stated that it had repatriated 201 Moroccan

⁸¹³ ICRC, Conflict in Afghanistan, *IRRC*, No. 241, 1984, pp. 239-240.

⁸¹⁴ ICRC, *Annual Report 1986*, Geneva, 1987, pp. 24-27.

⁸¹⁵ ICRC, *Annual Report 1988*, Geneva, 1989, pp. 25-26.

⁸¹⁶ UN Secretary-General, Report pursuant to Security Council resolution 721 (1991), UN Doc. S/23280, 11 December 1991, p. 7, § 18.

⁸¹⁷ ICRC, Communication to the Press No. 92/27, Bosnia Herzegovina: ICRC evacuates 1,560 people from Trnopolje camp, 2 October 1992.

⁸¹⁸ ICRC, Communication to the Press No. 00/50, Ethiopia/Eritrea: the ICRC has repatriated prisoners of war and civilian internees, 24 December 2000.

prisoners released by the Polisario Front on 14 December 2000. It added, however, that it remained concerned by the plight of the 1,481 Moroccans still held captive and that it viewed the repatriation as a step towards the release of all prisoners.⁸¹⁹

951. In a communication to the press issued in 2002 in the context of the conflict in Western Sahara, the ICRC stated that on 7 July 2002, it had repatriated 101 Moroccan prisoners released by the Polisario Front. It added, however, that it remained concerned by “the plight of the 1,260 Moroccans still held captive and views the repatriation as a step towards the release of all prisoners”.⁸²⁰

VI. Other Practice

952. In 1994, in a meeting with the ICRC, an armed opposition group stated that it would be prepared to release detained soldiers and officers through the ICRC.⁸²¹

953. According to the Report on SPLM/A Practice, “because the Sudan Government does not recognize the SPLM/A and can’t negotiate with it directly, the SPLM/A has on many occasions and through third parties including the ICRC released prisoners of war and allowed them to go to Government areas”.⁸²²

⁸¹⁹ ICRC, Communication to the Press No. 00/46, Morocco/Western Sahara: 201 Moroccan prisoners released and repatriated, 14 December 2000.

⁸²⁰ ICRC, Communication to the Press No. 02/38, Morocco/Western Sahara: 101 Moroccan prisoners released and repatriated, 7 July 2002.

⁸²¹ ICRC archive document.

⁸²² Report on SPLM/A Practice, 1998, Chapter 5.4.

DISPLACEMENT AND DISPLACED PERSONS

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A. Act of Displacement

Forced displacement

I. Treaties and Other Instruments

Treaties

1. Article 6 of the 1945 IMT Charter (Nuremberg) provides that:

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- ...
- (b) "War crimes:" namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, . . . deportation to slave labour or for any other purpose of civilian population of or in occupied territory . . .
 - (c) "Crimes against humanity:" namely . . . deportation, and other inhumane acts committed against any civilian population, before or during the war.

2. Article 45, fourth paragraph, GC IV provides that "in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".

3. Article 49, first paragraph, GC IV provides that "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive".

4. Under Article 147 GC IV, "unlawful deportation or transfer . . . of a protected person" constitutes a grave breach of the Convention.

5. Article 3(1) of the 1963 Protocol 4 to the ECHR provides that "no one shall be expelled, by means either of an individual or of a collective measure, from the territory of the State of which he is a national".

6. Article 4 of the 1963 Protocol 4 to the ECHR provides that "collective expulsion of aliens is prohibited".

7. Article 13 of the 1966 ICCPR provides that:

An alien lawfully in the territory of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

8. Article 22(5) of the 1969 ACHR states that "no one can be expelled from the territory of the state of which he is a national or be deprived of the right to enter it." Article 22(9) states that "the collective expulsion of aliens is prohibited.

9. Under Article 85(4)(a) AP I, "the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory, in violation of Article 49 of the Fourth Convention" is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.¹

10. Article 17 AP II provides that:

1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

Article 17 AP II was adopted by consensus.²

11. Article 12(5) of the 1981 ACHPR states that “the mass expulsion of non-nationals shall be prohibited. Mass expulsion shall be that which is aimed at national, racial, ethnic or religious groups”.

12. Article 3 of the 1984 Convention against Torture provides that “no State party shall expel or return a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

13. Article 16 of the 1989 Indigenous and Tribal Peoples Convention states that:

1. Subject to the following paragraphs of this Article, the peoples concerned shall not be removed from the lands which they occupy.
2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.

14. Paragraph 6 of the 1992 Declaration on Humanitarian Assistance and Gradual Repatriation of Temporary Refugees and Displaced Persons from the War in Bosnia and Herzegovina and in Croatia urged States to set up safe zones and humanitarian corridors to prevent displacement.

15. Pursuant to Article 6(e) of the 1998 ICC Statute, “forcibly transferring children of the group to another group” constitutes genocide when “committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group”.

16. Pursuant to Article 7(1)(d) of the 1998 ICC Statute, deportation or forcible transfer of the population, when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, constitutes a crime against humanity.

17. Under Article 8(2)(a)(vii) of the 1998 ICC Statute, “unlawful deportation or transfer” constitutes a war crime in international armed conflicts.

18. Under Article 8(2)(b)(viii) of the 1998 ICC Statute, “the deportation or transfer [by the Occupying Power] of all or parts of the population of the occupied territory within or outside this territory”, constitutes a war crime in international armed conflicts.

19. Under Article 8(2)(e)(viii) of the 1998 ICC Statute, “ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand”, constitutes a war crime in non-international armed conflicts.

Other Instruments

20. Article 23 of the 1863 Lieber Code states that “private citizens are no longer . . . carried off to distant parts”.

² CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 144.

21. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility identified the deportation of civilians under inhuman conditions as a violation of the laws and customs of war.

22. Article II of the 1945 Allied Control Council Law No. 10 provides that:

1. Each of the following acts is recognized as a crime:

- ...
- (b) War crimes. Atrocities or offenses against persons or property constituting violations of the laws or customs of war, including but not limited to, . . . deportation to slave labour or for any other purpose, of civilian population from occupied territory . . .
 - (c) Crimes against humanity. Atrocities and offenses, including but not limited to . . . deportation . . . or other inhumane acts committed against any civilian population.

23. Article 5(c) of the 1946 IMT Charter (Tokyo) established individual responsibility for crimes against humanity, including "deportation, and other inhuman acts committed against any civilian population, before or during the war".

24. Principle VI of the 1950 Nuremberg Principles adopted by the ILC provides that "deportation to slave labour or for any other purpose of civilian population of or in occupied territory" is a war crime and that "deportation and other inhuman acts done against any civilian population" is a crime against humanity.

25. Paragraph 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict provides that "all forms of repression . . . of women and children, including . . . forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal".

26. Pursuant to Article 22(2)(a) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, the "deportation or transfer of the civilian population" is regarded as an "exceptionally serious war crime".

27. In the 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons, the parties agreed "to promote initiatives at the regional, municipal and local levels aimed at preventing . . . displacement".

28. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that "the displacement of the civilian population shall not be ordered unless the security of the civilians involved or imperative reasons so demand".

29. In Article 18(1) of the 1993 Cotonou Agreement on Liberia, the parties committed themselves "to bring to an end any further external or internal displacements".

30. Under Article 2(g) of the 1993 ICTY Statute, the Tribunal is competent to prosecute unlawful deportation or transfer of civilians as a grave breach of GC IV.

31. Article 5(d) of the 1993 ICTY Statute provides that deportation, when committed against any civilian population, constitutes a crime against humanity.

32. Under Article 3(d) of the 1994 ICTR Statute, deportation, when committed as part of a widespread and systematic attack against any civilian population on national, political, ethnic, racial or religious grounds, constitutes a crime against humanity.

33. Article 20(a)(vii) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind considers “the unlawful deportation or transfer . . . of protected persons” to be a war crime.

34. The 1998 Guiding Principles on Internal Displacement provide that:

Principle 5

All authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons.

Principle 6

1. Every human being shall have the right to be protected against being arbitrarily displaced from his or her home or place of habitual residence.
2. The prohibition of arbitrary displacement includes displacement:
 - ...
 - (b) in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
 - ...

Principle 9

States are under a particular obligation to protect against the displacement of indigenous peoples, minorities, peasants, pastoralists, and other groups with a special dependency on and attachment to their land.

35. Article 3(7) of Part IV of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that “practices that cause or allow the forcible evacuations or forcible reconcentration of civilians, unless the security of the civilians involved or imperative military reasons so demand; the emergence and increase of internally displaced families and communities” are and shall remain prohibited at any time and in any place whatsoever.

36. Paragraph 5 of the 1999 Agreement on the Protection and Provision of Humanitarian Assistance in Sudan provides that

The parties to the conflict agree and guarantee that no beneficiary [of humanitarian assistance] will be forcibly relocated from his or her legal or recognized place of residence . . . When communities may be relocated they will be consulted on an individual and community basis on alternatives to relocation. Where communities are to be relocated, they are guaranteed individual and community participation in the relocation process, particularly prior to relocation, and will be given a reasonable period of notice prior to relocation.

37. In paragraph 61 of the 2000 Cairo Declaration, African and EU heads of State and government condemned “the systematic tactic by parties to armed conflict of displacing the civilian population”.

38. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(a)(vii), “unlawful deportation or transfer” constitutes a war crime in international armed conflicts. According to Section 6(1)(b)(viii), “the deportation or transfer [by the Occupying Power] of all or parts of the occupied territory within or outside this territory” constitutes a war crime in international armed conflicts. According to Section 6(1)(e)(vii), “ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand”, constitutes a war crime in non-international armed conflicts.

II. National Practice

Military Manuals

39. Argentina’s Law of War Manual (1969) provides that “protected persons may not be transferred to a power which is not party to GC IV . . . In no case may a protected person be transferred to a State where he or she has reason to fear persecution on account of his or her political opinions or religious beliefs.”³ It also provides that “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the occupying Power or to that of another country, occupied or not, are prohibited, regardless of their motive”.⁴

40. Argentina’s Law of War Manual (1989) states that “illegal deportations and transfers” constitute grave breaches.⁵

41. Australia’s Commanders’ Guide provides that “civilians should not be relocated”.⁶ It further provides that “unlawfully deporting, transferring . . . a protected person” constitute “grave breaches or serious war crimes likely to warrant institution of criminal proceedings”.⁷

42. Australia’s Defence Force Manual provides that “unlawfully deporting, transferring . . . a protected person” constitute “grave breaches or serious war crimes likely to warrant institution of criminal proceedings”.⁸

43. Canada’s LOAC Manual provides that “in no circumstances may a protected person be transferred to a state where he or she has reason to fear persecution on account of his political opinions or religious beliefs”.⁹ It further states that “these core provisions which continue in effect preserve the right to a . . . protection against forced transfers, evacuations and deportations”.¹⁰ The manual specifies that “the following measures of population control are

³ Argentina, *Law of War Manual* (1969), § 4.019; see also *Law of War Manual* (1989), § 4.30(8).

⁴ Argentina, *Law of War Manual* (1969), § 5.008.

⁵ Argentina, *Law of War Manual* (1989), § 8.03.

⁶ Australia, *Commanders’ Guide* (1994), § 609.

⁷ Australia, *Commanders’ Guide* (1994), § 1305.

⁸ Australia, *Defence Force Manual* (1994), § 1315(d).

⁹ Canada, *LOAC Manual* (1999), p. 11-6, § 46. ¹⁰ Canada, *LOAC Manual* (1999), p. 12-2, § 14.

forbidden at all times: . . . deportations".¹¹ With respect to non-international armed conflicts in particular, the manual states that "it is forbidden to displace the civilian population for reasons connected with the conflict".¹² It also states that "in the case of civilians in the hands of the adverse party, it is also a grave breach: a. to unlawfully deport or transfer a protected person".¹³ Moreover, the manual considers that the "deportation or transfer of all or parts of the population of that territory within or out of the territory" is a grave breach of API and that deportation is a crime against humanity.¹⁴

44. Under Colombia's Basic Military Manual, it is prohibited for the parties to conflict to force the displacement of the civilian population.¹⁵ With respect to non-international armed conflicts in particular, the manual states that it is prohibited to "oblige civilian persons to move because of the conflict, except if security or imperative military reasons so demand".¹⁶

45. Croatia's LOAC Compendium prohibits "deportation or transfer out of or within an occupied territory".¹⁷ It also states that "unlawful deportation" falls under "grave breaches (war crimes)".¹⁸

46. Ecuador's Naval Manual provides that "the following acts are representative of war crimes: . . . Offenses against civilian inhabitants of occupied territory, including . . . deportation".¹⁹

47. France's LOAC Summary Note provides that "deportation or illegal transfer of population" constitutes a grave breach, which is a war crime.²⁰

48. France's LOAC Teaching Note provides that "illegal transfer of the population" constitutes a grave breach, which is a war crime.²¹

49. France's LOAC Manual provides that "the law of armed conflict prohibits forced displacement of populations".²²

50. Germany's Military Manual provides that "grave breaches of international humanitarian law are in particular: . . . deportation, illegal transfer or confinement of protected civilians".²³

51. Hungary's Military Manual prohibits "deportation or transfer out of or within an occupied territory".²⁴ It also states that "unlawful deportation" falls under "grave breaches (war crimes)".²⁵

52. Italy's IHL Manual provides that the occupying State has the duty "not to undertake forced transfers or to deport civilian persons outside the occupied

¹¹ Canada, *LOAC Manual* (1999), p. 12-5, § 41.

¹² Canada, *LOAC Manual* (1999), p. 17-5, § 41.

¹³ Canada, *LOAC Manual* (1999), p. 16-2, § 14.

¹⁴ Canada, *LOAC Manual* (1999), p. 16-3, § 17 and p. 16-1, § 4.

¹⁵ Colombia, *Basic Military Manual* (1995), p. 30, see also p. 46.

¹⁶ Colombia, *Basic Military Manual* (1995), p. 77.

¹⁷ Croatia, *LOAC Compendium* (1991), p. 62.

¹⁸ Croatia, *LOAC Compendium* (1991), p. 56.

¹⁹ Ecuador, *Naval Manual* (1989), p. 6-4, § 6.2.5.

²⁰ France, *LOAC Summary Note* (1992), § 3.4.

²¹ France, *LOAC Teaching Note* (2000), p. 7; see also *LOAC Manual* (2001), p. 43.

²² France, *LOAC Manual* (2001), p. 65. ²³ Germany, *Military Manual* (1992), § 1209.

²⁴ Hungary, *Military Manual* (1992), p. 98. ²⁵ Hungary, *Military Manual* (1992), p. 90.

territory".²⁶ The manual further states that "forced deportation of the civilian population of the occupied territory to accomplish forced labour" is one of the principal war crimes incorporated in national legislation.²⁷ It adds that grave breaches of the 1949 Geneva Conventions and their Additional Protocols are considered war crimes, including "transfer and deportation of the civilian population".²⁸

53. According to the Military Manual of the Netherlands, "individual or mass forcible transfers and deportations are forbidden".²⁹ It considers that "the deportation or transfer of all or parts of the population of the occupied territory" by the occupying power is a grave breach of AP I.³⁰ With respect to non-international armed conflicts in particular, the manual states that "forced displacement of civilians is forbidden... Civilians shall not be compelled to leave their own territory for reasons connected with the conflict."³¹

54. New Zealand's Military Manual provides that "in no circumstances may a protected person be transferred to a State where he has reasons to fear persecution on account of his political opinions or religious beliefs".³² It states that some provisions continue in effect until the occupation is in fact terminated, such as articles preserving "protection against forced transfers, evacuations and deportations".³³ The manual specifies that "impermissible measures of population control include:... e. deportations".³⁴ It also states that "in the case of civilians in the hands of the adverse Party... it is also a grave breach: a. unlawfully to deport or transfer a protected civilian".³⁵ With respect to non-international armed conflicts in particular, the manual states that "it is forbidden to displace the civilian population for reasons connected with the conflict".³⁶

55. Nigeria's Manual on the Laws of War states that "grave breaches of the Geneva Conventions are considered as serious war crimes when committed against:... (c) persons and property protected under the Civilian Convention [GC IV]: unlawful deportation or transfer".³⁷

56. The Military Instructions of the Philippines provides that emphasis should be placed on allowing the civilian population to remain in their homes, on the basis that the large-scale movement of civilians creates logistical and strategic difficulties for the military.³⁸

²⁶ Italy, *IHL Manual* (1991), Vol. I, § 48(8).

²⁷ Italy, *IHL Manual* (1991), Vol. I, § 84.

²⁸ Italy, *IHL Manual* (1991), Vol. I, § 85.

²⁹ Netherlands, *Military Manual* (1993), p. VIII-5, § 5.

³⁰ Netherlands, *Military Manual* (1993), p. IX-6.

³¹ Netherlands, *Military Manual* (1993), p. XI-7.

³² New Zealand, *Military Manual* (1992), § 1121(2).

³³ New Zealand, *Military Manual* (1992), § 1303(3).

³⁴ New Zealand, *Military Manual* (1992), § 1322(3).

³⁵ New Zealand, *Military Manual* (1992), § 1702(3).

³⁶ New Zealand, *Military Manual* (1992), § 1823(1).

³⁷ Nigeria, *Manual on the Laws of War* (undated), § 6.

³⁸ Philippines, *Military Instructions* (1989), § 3(c).

57. South Africa's LOAC Manual provides that "unlawful deportation or transfer . . . of a protected person" is a grave breach.³⁹

58. Spain's LOAC Manual provides that "mass or individual forced transfers, as well as deportations out of the occupied territory to the territory of the occupying Power or of another country (occupied or not), are prohibited, regardless of the motive".⁴⁰ It further states that it "is a grave breach which shall be qualified as a war crime . . . deportation or forced transfer of population".⁴¹

59. Sweden's Military Manual provides that "any form of deportation of civilians to the home country of the occupying power is forbidden".⁴²

60. Switzerland's Basic Military Manual provides that "individual or mass forcible transfers, as well as deportations of civilian persons out of the occupied territory, are prohibited, regardless of the motive".⁴³ According to the manual, "deportation and illegal transfers . . . constitute a grave breach".⁴⁴

61. The UK Military Manual provides that "in no circumstances may a protected person be transferred to a State where he has reason to fear persecution on account of his political opinions or religious beliefs".⁴⁵ It further states that "the Occupant is forbidden, regardless of motive, to carry out individual or mass forcible transfers or deportations of protected persons from occupied territory to his own territory or to that of any other country".⁴⁶ According to the manual, "unlawful deportation is a grave breach of the Convention".⁴⁷

62. The US Field Manual provides that "in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs".⁴⁸ It further states that "individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motives".⁴⁹ According to the manual, "unlawful deportation or transfer . . . of a protected person" constitutes a grave breach.⁵⁰

63. The US Air Force Pamphlet refers to Article 49 GC IV.⁵¹

³⁹ South Africa, *LOAC Manual* (1996), § 40.

⁴⁰ Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).

⁴¹ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

⁴² Sweden, *Military Manual* (1976), Section 6.1.3, p. 122.

⁴³ Switzerland, *Basic Military Manual* (1987), Article 176, see also Article 153 and *Military Manual* (1984), p. 38 and *Teaching Manual* (1986), p. 107.

⁴⁴ Switzerland, *Basic Military Manual* (1987), Articles 192 and 193(2).

⁴⁵ UK, *Military Manual* (1958), § 53.

⁴⁶ UK, *Military Manual* (1958), § 560.

⁴⁷ UK, *Military Manual* (1958), § 560, see also § 625.

⁴⁸ US, *Field Manual* (1956), § 284.

⁴⁹ US, *Field Manual* (1956), § 382.

⁵⁰ US, *Field Manual* (1956), § 502(c).

⁵¹ US, *Air Force Pamphlet* (1976), § 14-6(b).

64. The US Naval Handbook provides that “the following acts are representative of war crimes: . . . offenses against civilian inhabitants of occupied territory, including . . . deportation”.⁵²

National Legislation

65. Argentina’s Draft Code of Military Justice provides that members of the armed forces who deport, forcibly transfer, take as hostage or unlawfully detain any protected person shall be liable to punishment.⁵³

66. Under Armenia’s Penal Code, “unlawful deportation or transfer” during an armed conflict and the transfer within or outside an occupied territory of its population constitute crimes against the peace and security of mankind.⁵⁴

67. Under Australia’s War Crimes Act as amended, “the deportation of a person to, or the internment of a person in, a death camp, a slave labour camp, or a place where persons are subjected to treatment similar to that undergone in a death camp or slave labour camp, is a serious [war] crime”.⁵⁵

68. Australia’s Geneva Conventions Act as amended provides that “a person who, in Australia or elsewhere, commits a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence”.⁵⁶

69. Australia’s ICC (Consequential Amendments) Act incorporates in the Criminal Code the crimes defined in the 1998 ICC Statute, including “genocide by forcibly transferring children”; crimes against humanity, including “deportation or forcible transfer of population”; and war crimes, including “unlawful deportation or transfer” and “transfer of population” in international armed conflicts and “displacing civilians” in non-international armed conflicts.⁵⁷

70. Azerbaijan’s Criminal Code punishes the “driving away [of] the civilian population with other aims from the area where they legally live”.⁵⁸

71. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime. It also specifies that “war crimes: namely violation of law or custom of war include . . . deportation to slave labour or for any other purpose of civilian population in the territory of Bangladesh”.⁵⁹

⁵² US, *Naval Handbook* (1995), § 6.2.5.

⁵³ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(4) in the *Code of Military Justice as amended* (1951).

⁵⁴ Armenia, *Penal Code* (2003), Article 390.2(4) and Article 390.4(1), see also Article 392 (deportation as a crime against humanity) and Article 393 (forced displacement and enforced hand-over of children as parts of a genocide campaign).

⁵⁵ Australia, *War Crimes Act as amended* (1945), Section 6(4).

⁵⁶ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

⁵⁷ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.7, 268.11, 268.32, 268.45 and 268.89.

⁵⁸ Azerbaijan, *Criminal Code* (1999), Article 115.2, see also Article 107 (deportation or forcible transfer of population as a crime against humanity) and Article 103 (forcible transfer of children to another group as a part of a genocide campaign).

⁵⁹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Article 3(2)(d–e).

72. The Geneva Conventions Act of Barbados provides that “a person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados”.⁶⁰

73. Under the Criminal Code of Belarus, “the transfer” of protected persons or “the deportation of the civilian population to slave labour” is identified as a “violation of the laws and customs of war”.⁶¹

74. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended criminalises as a grave breach the “unlawful deportation [or] transfer” of protected persons.⁶²

75. Under the Criminal Code of the Federation of Bosnia and Herzegovina, “whoever in violation of rules of international law applicable in time of war, armed conflict or occupation . . . orders displacement” of the civilian population commits a war crime.⁶³ The Criminal Code of the Republika Srpska contains the same provision.⁶⁴

76. Botswana’s Geneva Conventions Act punishes “any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the [Geneva] conventions”.⁶⁵

77. Under Bulgaria’s Penal Code as amended, “unlawful deportations” are offences.⁶⁶

78. Under Burundi’s Draft Law on Genocide, Crimes against Humanity and War Crimes, deportation or illegal transfer of population constitutes a war crime.⁶⁷

79. Cambodia’s Law on the Khmer Rouge Trial provides that “the Extraordinary Chambers shall have the power to bring to trial all suspects who committed or ordered the commission of grave breaches of the Geneva Convention[s] of 12 August 1949 . . . which were committed during the period from 17 April 1975 to 6 January 1979”.⁶⁸

⁶⁰ Barbados, *Geneva Conventions Act* (1980), Section 3(2).

⁶¹ Belarus, *Criminal Code* (1999), Article 135(1), see also Article 127 (forcible transfer of children to another group as a part of a genocide campaign).

⁶² Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(6), see also Article 1(2)(1) (forcible transfer of children to another group as a part of a genocide campaign).

⁶³ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(1), see also Article 153 (forcible transfer of children to another group as a part of a genocide campaign).

⁶⁴ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(1), see also Article 432 (forcible transfer of children to another group as a part of a genocide campaign).

⁶⁵ Botswana, *Geneva Conventions Act* (1970), Section 3(1).

⁶⁶ Bulgaria, *Penal Code as amended* (1968), Article 412, see also Article 416(c) (forcible transfer of children to another group as a part of a genocide campaign).

⁶⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(A)(g) and (D)(h), see also Article 2(e) (forcible transfer of children to another group as a part of a genocide campaign).

⁶⁸ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 6.

80. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of the Geneva Conventions or of AP I] is guilty of an indictable offence".⁶⁹

81. Canada's Crimes against Humanity and War Crimes Act provides that genocide, crimes against humanity and war crimes defined in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁷⁰

82. China's Law Governing the Trial of War Criminals provides that "mass deportation of non-combatants" constitutes a war crime.⁷¹

83. According to Colombia's Law on Internally Displaced Persons, Colombians have the right not to be forcibly displaced.⁷²

84. Colombia's Penal Code punishes "anyone who, during an armed conflict, without military justification, deports, expels or carries out a forced transfer or displacement of the civilian population from its own territory".⁷³

85. The DRC Code of Military Justice as amended provides that "the deportation, for whatever reason, of a detained or interned individual, without a prior sentence in accordance with the laws and customs of war having been pronounced, shall be punished".⁷⁴

86. Under Congo's Genocide, War Crimes and Crimes against Humanity Act, "forcible transfer of children" of the members of an ethnical, racial or religious group, as such, with intent to destroy the group, in whole or in part, constitutes a crime of genocide.⁷⁵ Moreover, "deportation or forcible transfer of population", when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack, is a crime against humanity.⁷⁶ The Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁷⁷

87. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I]".⁷⁸

88. Côte d'Ivoire's Penal Code as amended punishes "any person who, in time of war or occupation, and in violation of . . . international conventions, makes an attack on the physical integrity of civilian populations or on their intellectual or

⁶⁹ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

⁷⁰ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁷¹ China, *Law Governing the Trial of War Criminals* (1946), Article 3(18).

⁷² Colombia, *Law on Internally Displaced Persons* (1997), Articles 2(7) and 10(5).

⁷³ Colombia, *Penal Code* (2000), Article 159.

⁷⁴ DRC, *Code of Military Justice as amended* (1972), Article 526.

⁷⁵ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 1.

⁷⁶ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 6.

⁷⁷ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁷⁸ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

moral rights... [by carrying out] their displacement or their forced dispersion, their deportation".⁷⁹

89. Croatia's Criminal Code provides, under the heading "War crimes against civilian population", that "whoever in violation of the rules of international law, in time of war, armed conflict or occupation, ... orders deportation or transfers [of the civilian population] ... shall be punished".⁸⁰

90. Cyprus's Geneva Conventions Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach or takes part, or assists or incites another person in the commission of grave breaches of the Geneva Conventions".⁸¹

91. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".⁸²

92. The Czech Republic's Criminal Code as amended punishes "whoever in wartime...groundlessly displaces the civil population of the occupied territory".⁸³

93. Under El Salvador's Penal Code, "anyone who, during an international or a civil war, ... deports to slave labour the civilian population in occupied territory" commits a crime.⁸⁴

94. Under the Draft Amendments to the Penal Code of El Salvador, "anyone who, in situations of international or internal armed conflict, orders the repatriation or forced displacement of the civilian population from its territory, for reasons related to the armed conflict" is punishable.⁸⁵

95. Under Estonia's Penal Code, persons responsible for the deportation or forced displacement of civilians commit a war crime.⁸⁶

96. Ethiopia's Penal Code punishes:

whosoever, in time of war, armed conflict or occupation, organises, orders or engages in, against the civilian population and in violation of the rules of public international law and of international humanitarian conventions:... the

⁷⁹ Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(3), see also Article 137 (3) (forcible transfer of children to another group as a part of a genocide campaign).

⁸⁰ Croatia, *Criminal Code* (1997), Article 158(1), see also Article 156 (forcible transfer of children to another group as a part of a genocide campaign).

⁸¹ Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

⁸² Cyprus, *AP I Act* (1979), Section 4(1).

⁸³ Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(2)(c), see also Article 259(1)(d) (forcible transfer of children to another group as a part of a genocide campaign).

⁸⁴ El Salvador, *Penal Code* (1997), Article 362, see also Article 361 (forced displacement as part of a genocide campaign).

⁸⁵ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Repatriación o desplazamiento forzado", see also Article entitled "Genocidio" (forcible transfer of children to another group as a part of a genocide campaign).

⁸⁶ Estonia, *Penal Code* (2001), § 97, see also § 89 (deportation as a crime against humanity) and § 90 (forcible transfer of children to another group as part of a genocide campaign).

compulsory movement or dispersion of the population, its systematic deportation, transfer.⁸⁷

97. Finland's Revised Penal Code provides that when committed as a part of a genocide campaign, "forcibly moving children from one group to another" is a crime.⁸⁸

98. France's Penal Code punishes deportation as a crime against humanity.⁸⁹

99. Under Georgia's Criminal Code, "deportation or other unlawful transfer... of protected persons" in an international or non-international armed conflict is a crime.⁹⁰

100. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "deports or forcibly transfers, by expulsion or other coercive acts, a person who is to be protected under international humanitarian law and lawfully present in an area to another State or another area in contravention of a general rule of international law".⁹¹

101. Under Hungary's Criminal Code as amended, the "settlement of the civilian population of the occupying power in the occupied territories, or resettlement of the population of the occupied territory" is a war crime.⁹²

102. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of, a grave breach of any of the [Geneva] Conventions he shall be punished".⁹³

103. Under India's Constitution, "all citizens shall have the right... (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India".⁹⁴ According to the Report on the Practice of India, this provision is reinforced during internal armed conflicts by constitutional provisions to the effect that freedom of movement may only be suspended where an emergency is proclaimed on account of an external aggression and not where an emergency is declared as the result of an internal armed rebellion.⁹⁵

⁸⁷ Ethiopia, *Penal Code* (1957), Article 282(c), see also Article 281 (forcible transfer as a part of a genocide campaign).

⁸⁸ Finland, *Revised Penal Code* (1995), Chapter 11, Section 6.

⁸⁹ France, *Penal Code* (1994), Article 212-1, see also Article 211-1 (forcible transfer of children as a part of a genocide campaign).

⁹⁰ Georgia, *Criminal Code* (1999), Article 411(2)(f), see also Article 407 (forcible transfer of children to another group as a part of a genocide campaign) and Article 408 (deportation of the population as a crime against humanity).

⁹¹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(6), see also Article 1, § 6(1)(5) (forcible transfer of children to another group as a part of a genocide campaign) and Article 1, § 7(1)(4) (deportation or forcible transfer of the civilian population as a crime against humanity).

⁹² Hungary, *Criminal Code as amended* (1978), Section 158(3)(a), see also Article 155(1)(e) (forcible transfer of children to another group as a part of a genocide campaign).

⁹³ India, *Geneva Conventions Act* (1960), Section 3(1).

⁹⁴ India, *Constitution* (1950), Article 19.

⁹⁵ Report on the Practice of India, 1997, Chapter 5.5.

104. Ireland's Geneva Conventions Act as amended provides that grave breaches of the Geneva Conventions and of AP I are punishable offences.⁹⁶ It adds that any "minor breach" of the Geneva Conventions, including violations of Articles 45 and 49 GC IV, as well as any "contravention" of AP II, including violations of Article 17 AP II, are also punishable offences.⁹⁷

105. Under Israel's Nazis and Nazi Collaborators (Punishment) Law, deportation to forced labour or for any other purpose of the civilian population of or in occupied territories is regarded as a war crime.⁹⁸

106. Italy's Law on Genocide prohibits the displacement of national, ethnic, racial or religious groups.⁹⁹

107. Jordan's Draft Military Criminal Code considers "the displacement or transfer of the whole or part of the inhabitants of occupied territories, within as well as outside the occupied territories", as a war crime.¹⁰⁰

108. Kazakhstan's Penal Code provides that the deportation of the civilian population is a crime.¹⁰¹

109. Kenya's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions".¹⁰²

110. Under Latvia's Criminal Code, deportation is a violation of the provisions and customs regarding the conduct of war forbidden by international agreements and constitutes a war crime.¹⁰³

111. Under the Draft Amendments to the Code of Military Justice of Lebanon, "the displacement or transfer of the whole or part of the inhabitants of occupied territories, within as well as outside the occupied territories", is a war crime.¹⁰⁴

112. Under Lithuania's Criminal Code as amended, "deportation, in time of war, during an international armed conflict or under the conditions of occupation or annexation, of civilians from the occupied or annexed territory to the territory of the country which effects the occupation or annexation or to a third country" is a war crime.¹⁰⁵

⁹⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

⁹⁷ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁹⁸ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b); deportation is also considered as a crime against humanity and the forcible transfer of children to another group as a crime against the Jewish people (same Section).

⁹⁹ Italy, *Law on Genocide* (1967), Article 2.

¹⁰⁰ Jordan, *Draft Military Criminal Code* (2000), Article 41(15).

¹⁰¹ Kazakhstan, *Penal Code* (1997), Article 159, see also Article 160 (forcible transfer of children as a part of a genocide campaign).

¹⁰² Kenya, *Geneva Conventions Act* (1968), Section 3(1).

¹⁰³ Latvia, *Criminal Code* (1998), Section 74, see also Section 71 (deliver children on a compulsory basis from one group of people into another as a part of a genocide campaign).

¹⁰⁴ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(15).

¹⁰⁵ Lithuania, *Criminal Code as amended* (1961), Article 334.

113. Under Luxembourg's Law on the Repression of War Crimes, every measure which leads to the deportation or expatriation, whatever the grounds, of persons who were not lawfully detained or interned is punishable.¹⁰⁶

114. Luxembourg's Law on the Punishment of Grave Breaches states that the following grave breaches constitute crimes under international law: "deportation of all persons protected by the Convention relative to the protection of civilian persons in time of war" and "the transfer of persons protected by the same Convention".¹⁰⁷

115. Malawi's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".¹⁰⁸

116. Malaysia's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the . . . [Geneva] conventions".¹⁰⁹

117. Mali's Penal Code provides that "deportation or unlawful transfer" of a population constitutes a war crime.¹¹⁰

118. The Geneva Conventions Act of Mauritius punishes "any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions".¹¹¹

119. Mexico's Penal Code as amended punishes the forcible transfer of children under the age of 16 years to another group, when committed as a part of a genocide campaign.¹¹²

120. Under Moldova's Penal Code, deportation of protected persons is an offence.¹¹³

121. The Definition of War Crimes Decree of the Netherlands includes "deportation of civilians" in its list of war crimes.¹¹⁴

122. Under the International Crimes Act of the Netherlands, "unlawful deportation or transfer" and "the deportation or transfer of all or part of the population of the occupied territory within or outside this territory" are crimes, when committed in an international armed conflict.¹¹⁵ "Giving instructions for the

¹⁰⁶ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(5).

¹⁰⁷ Luxembourg, *Law on the Punishment of Grave breaches* (1985), Article 1(6) and (7).

¹⁰⁸ Malawi, *Geneva Conventions Act* (1967), Section 4(1).

¹⁰⁹ Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

¹¹⁰ Mali, *Penal Code* (2001), Article 31(g) and (i)(8), see also Article 29(d) (deportation or illegal transfer of a population as a crime against humanity) and Article 30(e) (forcible transfer of children to another group as a part of a genocide campaign).

¹¹¹ Mauritius, *Geneva Conventions Act* (1970), Section 3(1).

¹¹² Mexico, *Penal Code as amended* (1931), Article 149 *bis*.

¹¹³ Moldova, *Penal Code* (2002), Article 137(2)(c), see also Article 135(d) (forcible transfer of children to another group as a part of a genocide campaign).

¹¹⁴ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

¹¹⁵ Netherlands, *International Crimes Act* (2003), Articles 5(1)(g), 5(2)(d)(i) and 5(5)(d), see also Article 3(1)(e) (forcible transfer of children of a group to another group as part of a genocide

transfer of the civilian population for reasons connected with the conflict, other than on account of the safety of the citizens or where imperatively demanded by the circumstances of the conflict" constitutes a crime in non-international armed conflict.¹¹⁶

123. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence".¹¹⁷

124. Under New Zealand's International Crimes and ICC Act, genocide includes the crimes defined in Article 6(e) of the 1998 ICC Statute, crimes against humanity include the crimes defined in Article 7(1)(d) of the Statute, and war crimes include the crimes defined in Article 8(2)(a)(vii), (b)(viii) and (e)(viii) of the Statute.¹¹⁸

125. Nicaragua's Military Penal Code provides that deportation and illegal transfer is a punishable offence.¹¹⁹

126. Nicaragua's Draft Penal Code provides that displacement of children from one group to another group as a part of a genocide campaign is punishable.¹²⁰

127. According to Niger's Penal Code as amended, "deportation, transfer or unlawful displacement" of persons protected under the 1949 Geneva Conventions or their Additional Protocols of 1977 constitutes a war crime.¹²¹

128. Nigeria's Geneva Conventions Act punishes any person who "whether in or outside the Federation, . . . whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva] Conventions".¹²²

129. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".¹²³

130. Papua New Guinea's Geneva Conventions Act punishes any "person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions".¹²⁴

campaign) and Article 4(d) (deportation or forcible transfer of population as a crime against humanity).

¹¹⁶ Netherlands, *International Crimes Act* (2003), Article 6(3)(i).

¹¹⁷ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹¹⁸ New Zealand, *International Crimes and ICC Act* (2000), Sections 9(2), 10(2) and 11(2).

¹¹⁹ Nicaragua, *Military Penal Code* (1996), Article 58.

¹²⁰ Nicaragua, *Draft Penal Code* (1999), Article 444(1).

¹²¹ Niger, *Penal Code as amended* (1961), Article 208.3(6), see also Article 208.2 (deportation as a crime against humanity) and Article 208.1 (forcible transfer of children as part of a genocide campaign).

¹²² Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

¹²³ Norway, *Military Penal Code as amended* (1902), § 108.

¹²⁴ Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

131. Paraguay's Penal Code punishes "anyone who, in violation of the international laws of war, armed conflict or military occupation, commits against the civilian population . . . acts of . . . deportation".¹²⁵

132. Under the War Crimes Trial Executive Order of the Philippines, applicable to acts committed during the Second World War, "violations of the laws or customs of war . . . [such as] deportation to slave labour or for any other purpose of civilian population of or in occupied territory" are war crimes.¹²⁶ It adds that "deportation [of] . . . civilian populations before or during the [Second World War] . . . whether or not in violation of the local laws" constitutes a war crime.¹²⁷

133. Poland's Penal Code punishes any person who, in violation of international law, carries out transfers of persons *hors de combat*.¹²⁸

134. Portugal's Penal Code punishes "anyone who, in violation of international law (humanitarian or common), in times of war, armed conflict or occupation, carries out . . . deportation".¹²⁹

135. Romania's Penal Code punishes the deportation of all persons in the hands of the adverse party.¹³⁰

136. Under Russia's Criminal Code, "deportation of the civilian population" is a crime against the peace and security of mankind.¹³¹

137. The Geneva Conventions Act of the Seychelles punishes "any person, whatever his nationality, who, whether in or outside Seychelles, commits, or aids, abets or procures the commission by any other person of any such grave breach of any of the [Geneva] Conventions".¹³²

138. Singapore's Geneva Conventions Act punishes "any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [Geneva] Convention".¹³³

139. Slovakia's Criminal Code as amended punishes "whoever in wartime . . . groundlessly displaces the civil population of the occupied territory".¹³⁴

140. Slovenia's Penal Code provides, under the heading "War Crimes against Civil Population", that "whoever, in time of war, armed conflict or occupation

¹²⁵ Paraguay, *Penal Code* (1997), Article 320, see also Article 319 (forcible transfer of children and adults to another group or places other than their habitual residence as a part of a genocide campaign).

¹²⁶ Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(2).

¹²⁷ Philippines, *War Crimes Trial Executive Order* (1947), Part II(b)(3).

¹²⁸ Poland, *Penal Code* (1997), Article 124, see also Article 118(2) (forcible transfer of children to another group as a part of a genocide campaign).

¹²⁹ Portugal, *Penal Code* (1996), Article 241.

¹³⁰ Romania, *Penal Code* (1968), Article 358(c); see also *Law on the Punishment of War Criminals* (1945), Article 1(c) (deportation of political or racial adversaries).

¹³¹ Russia, *Criminal Code* (1996), Article 356(1), see also Article 357 (forcible transfer of children as a part of a genocide campaign).

¹³² Seychelles, *Geneva Conventions Act* (1985), Section 3(1).

¹³³ Singapore, *Geneva Conventions Act* (1973), Section 3(1).

¹³⁴ Slovakia, *Criminal Code as amended* (1961), Article 263(a)(2)(c), see also Article 259(1)(c) (forcible transfer of children to another group as a part of a genocide campaign).

and in violation of international law, orders or commits against the civil population, the following criminal offences . . . deportation or displacement" shall be punished.¹³⁵

141. Spain's Military Criminal Code and Penal Code punish anyone who departs or forcibly transfers protected persons.¹³⁶

142. Sri Lanka's Draft Geneva Conventions Act provides that "a person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any other person to commit, . . . a grave breach of any of the [Geneva] Conventions . . . is guilty of an indictable offence".¹³⁷

143. Tajikistan's Criminal Code punishes:

- 1) Wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict . . . [such as] the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory . . .
- 2) Wilful breaches of norms of international humanitarian law committed in an international or non-international armed conflict against persons *hors de combat* or having no means of defence . . . consisting of:
 - ...
 - f) deportation or unlawful transfer.¹³⁸

144. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit genocide as defined in Article 6(e) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(d) of the Statute, and a war crime as defined in Article 8(2)(a)(vii), (b)(viii) and (e)(viii) of the Statute.¹³⁹

145. Uganda's Geneva Conventions Act punishes "any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of the [Geneva] Conventions".¹⁴⁰

146. Under Ukraine's Criminal Code, deportation of the civilian population to forced labour is an offence.¹⁴¹

147. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of, a grave breach of any of the [Geneva] conventions or of [AP I]".¹⁴²

¹³⁵ Slovenia, *Penal Code* (1994), Article 374(1), see also Article 373 (forcible transfer of children to another group as a part of a genocide campaign).

¹³⁶ Spain, *Military Criminal Code* (1985), Article 77(6); *Penal Code* (1995), Article 611(4), see also Article 607(4) (forcible transfer to another group as a part of a genocide campaign).

¹³⁷ Sri Lanka, *Draft Geneva Conventions Act* (2002), Section 3(1)(a).

¹³⁸ Tajikistan, *Criminal Code* (1998), Article 403(1) and (2), see also Article 398 (forcible transfer of children to another group as a part of a genocide campaign).

¹³⁹ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

¹⁴⁰ Uganda, *Geneva Conventions Act* (1964), Section 1(1).

¹⁴¹ Ukraine, *Criminal Code* (2001), Article 438(1), see also Article 442 (forcible transfer of children to another group as a part of a genocide campaign).

¹⁴² UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

148. Under the UK ICC Act, it is a punishable offence to commit genocide as defined in Article 6(e) of the 1998 ICC Statute, a crime against humanity as defined in Article 7(1)(d) of the Statute, and a war crime as defined in Article 8(2)(a)(vii), (b)(viii) and (e)(viii) of the Statute.¹⁴³

149. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established military commissions which had jurisdiction over offences such as “deportation to slave labour or for any other illegal purpose, of civilians of or in occupied territory”.¹⁴⁴

150. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established military commissions which had jurisdiction over offences such as “deportation to slave labour or for any other purpose of civilians of or in occupied territory”.¹⁴⁵

151. Under the US War Crimes Act as amended, grave breaches of the 1949 Geneva Conventions are war crimes.¹⁴⁶

152. Uzbekistan’s Criminal Code punishes the deportation of the civilian population to forced labour or for any other purpose.¹⁴⁷

153. Vanuatu’s Geneva Conventions Act provides that “any grave breach of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu”.¹⁴⁸

154. The Penal Code of SFRY (FRY) provides, under the heading “War crimes against civilian population”, that “any person who orders, in violation of the rules of international law during a war, an armed conflict or occupation, ... unlawful transfer of people to concentration camps [of the civilian population] ... shall be punished”.¹⁴⁹

155. Under the Criminal Offences against the Nation and State Act of the SFRY (FRY), “forced deportation or removal to concentration camps, or internment, or of forced labour of the population of Yugoslavia” is a war crime.¹⁵⁰

156. Zimbabwe’s Geneva Conventions Act as amended punishes “any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [any of the Geneva] Conventions or [AP I]”.¹⁵¹

¹⁴³ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

¹⁴⁴ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

¹⁴⁵ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b).

¹⁴⁶ US, *War Crimes Act as amended* (1996), Section 2441(c)(1).

¹⁴⁷ Uzbekistan, *Criminal Code* (1994), Article 152, see also Article 153 (forcible transfer of children to another group as a part of a genocide campaign).

¹⁴⁸ Vanuatu, *Geneva Conventions Act* (1982), Section 4(1).

¹⁴⁹ SFRY (FRY), *Penal Code as amended* (1976), Article 142(3), see also Article 141 (forcible transfer of children to another group as a part of a genocide campaign).

¹⁵⁰ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

¹⁵¹ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

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157. After the Second World War, a number of German industrialists were convicted of participation in the deportation to slave labour of the civilian inhabitants of occupied territories in conditions in which they were ill-treated, tortured and killed.¹⁵² Numerous high-ranking army and administrative officials were also convicted of war crimes for their participation in such deportations.¹⁵³

158. In the *Rudolph and Minister of Employment and Immigration case* in 1992, Canada's Federal Court of Appeal upheld an order for the removal from Canada of the accused, a German national who, during the Second World War, had requested and supervised the deportation and use of foreign civilians as slave labourers in the production of V-2 rockets, on the ground that he had committed outside Canada an act that constituted a war crime.¹⁵⁴

159. In the *Takashi Sakai case* in 1946, the War Crimes Military Tribunal of the Ministry of National Defence of China found the accused guilty of war crimes and crimes against humanity inasmuch as he had incited or permitted his subordinates to commit, *inter alia*, acts of deportation of civilians.¹⁵⁵

160. In analysing the constitutionality of AP II in 1995, Colombia's Constitutional Court found in relation to the rules on the protection of civilians and persons *hors de combat* that:

According to the statistics compiled by the Colombian Episcopacy, more than half a million Colombians have been displaced from their homes as a result of the violence . . . The principal cause of displacement involves violations of international humanitarian law associated with the armed conflict.¹⁵⁶

161. In its judgement in the *Eichmann case* in 1961, Israel's District Court of Jerusalem held that the following behaviour caused serious bodily or mental harm and, therefore, amounted to a violation of Israel's Nazis and Nazi Collaborators (Punishment) Law:

the enslavement, starvation, deportation and persecution . . . and . . . [the] detention [of Jewish people] in ghettos, transit camps and concentration camps in conditions which were designed to cause their degradation, deprivation of their rights as human beings and to suppress them and cause them inhumane suffering and torture.¹⁵⁷

¹⁵² France, General Tribunal at Rastadt of the Military Government for the French Zone of Occupation in Germany, *Roechling case*, 30 June 1948; US, Military Tribunal at Nuremberg, *Krauch (I. G. Farben Trial) case*, 29 July 1948; US, Military Tribunal at Nuremberg, *Krupp case*, 30 June 1948.

¹⁵³ Poland, Supreme National Tribunal at Poznan, *Greiser case*, Judgement, 7 July 1946; US, Military Tribunal at Nuremberg, *Milch case*, Judgement, 17 April 1947; US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 19 February 1948; US, Military Tribunal at Nuremberg, *Von Leeb case (The High Command Trial)*, Judgement, 28 October 1948.

¹⁵⁴ Canada, Federal Court of Appeal, *Rudolph and Minister of Employment and Immigration case*, Judgement, 1 May 1992.

¹⁵⁵ China, War Crimes Military Tribunal of the Ministry of National Defence, *Takashi Sakai case*, Judgement, 29 August 1946.

¹⁵⁶ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Constitutional revision of Additional Protocol II and the Law 171 of 16 December 1994 implementing this protocol, Judgement, 18 May 1995.

¹⁵⁷ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.

162. In its judgement in the *Abu Awad case* in 1979, Israel's High Court held that Article 49 GC IV was not meant to apply to the deportation of selected individuals for reasons of public order and security. It only prohibits Nazi-style mass deportations.¹⁵⁸

163. In its judgement in the *Kawasme and Others case* in 1980, Israel's High Court held that "all of Article 49 [GC IV] . . . does not form part of customary international law, and therefore the deportation orders [against the mayors of Hebron and Halhul] did not contravene the domestic law of the State of Israel . . . , according to which an Israeli court reaches its decision". The Court also stated that Article 49 was not meant to apply to the deportation of selected individuals, but only to Nazi-style mass deportation. In a dissenting opinion in the same case, Justice Cohn underlined that "the beginning of Article 49 . . . contains a nucleus of the customary law of nations, which has applied all over the world from time immemorial". According to his opinion, the prohibition contained in Article 49 applies to all inhabitants of an area and is an absolute one, so that the cause for deportation – whether military or security – is irrelevant.¹⁵⁹

164. In its judgement in the *Nazal and Others case* in 1985, Israel's High Court held that Article 49 GC IV did not form part of customary international law and that therefore deportation orders against individual citizens did not contravene the domestic law of Israel. President Shamgar ruled that Article 49 was not applicable to the deportation of Jordanian subjects to Jordan and that a deportation order under Regulation 112 of the Defence (Emergency) Regulations of 1945 can be issued only if the Military Commander is of the opinion that such an order is necessary or expedient for securing public peace, the protection of the region, the maintenance of public order, or the suppression of mutiny, rebellion or riot.¹⁶⁰

165. In its judgement in the *Affo and Others case* in 1988, a majority of four judges of Israel's High Court stated that deportations of individuals were not incompatible with Article 49 GC IV, the provision only barring Nazi-style mass deportations. However, in a dissenting opinion in the same case, Justice Bach held that deportations of individuals from occupied territories to a location outside the boundaries of those territories violate Article 49. Nevertheless, Article 49 being only conventional and not customary international law, it does not form part of Israeli law that can be directly invoked before Israeli courts. Justice Bach stated that:

The language of Article 49 is unequivocal and explicit. The combination of the words "Individual or mass forcible transfers as well as deportations" in conjunction with the phrase "regardless of their motive" . . . admits no room to doubt that the Article applies not only to mass deportations but to the deportation of individuals as well and that the prohibition was intended to be total, sweeping and unconditional – "regardless of their motive".¹⁶¹

¹⁵⁸ Israel, High Court, *Abu Awad case*, Judgement, 12 November 1979.

¹⁵⁹ Israel, High Court, *Kawasme and Others case*, Judgement, 4 December 1980.

¹⁶⁰ Israel, High Court, *Nazal and Others case*, Judgement, 29 September 1985.

¹⁶¹ Israel, High Court, *Affo and Others case*, Judgement, 10 April 1988.

166. In its judgement in the *Zimmerman case* in 1949, the Special Court of Cassation of the Netherlands held that the deportation of civilians of occupied territories was a war crime and rejected the accused's defence of superior orders as "the condemnation of these practices by public opinion must be deemed of general knowledge, and the accused must be deemed to have known they were illegal".¹⁶²

167. In its judgement in the *Situation in Chechnya case* in 1995, the Russian Constitutional Court held that several orders and decrees issued by the Russian government in 1994 which provided for the eviction of "persons posing threats to public security and to the personal safety of citizens out of the territory of the Chechen Republic" were unconstitutional.¹⁶³

Other National Practice

168. In 1997, in a letter to the UN Secretary-General and President of the UN Security Council, Afghanistan stated that "the heinous policy of coercive eviction and mass deportation of the civilian population . . . is a crime against humanity".¹⁶⁴

169. In 1995, during a debate in the UN Security Council, Botswana condemned the forced displacement in Georgia.¹⁶⁵

170. The Report on the Practice of Egypt states that Egypt has taken the position that forced displacement and expulsion "*en masse*" should be prohibited in internal as well as in international armed conflicts.¹⁶⁶

171. The Report on the Practice of France states that France especially censures the forcible displacement or deportation of the civilian population, when carried out in both international and non-international armed conflicts. It has even stated that it is its moral duty to react to protect displaced persons. France also clearly opposes the expulsion measures taken against the inhabitants of the territories occupied by Israel and considers them as contrary to GC IV. Representatives of France have described such measures as being of "exceptional gravity".¹⁶⁷

172. In 1987, all political parties in the German parliament agreed that the deportations carried out during the conflict in Afghanistan constituted serious violations of human rights.¹⁶⁸

173. In 1993, the German Chancellor stated that displacement was deeply inhumane.¹⁶⁹

¹⁶² Netherlands, Special Court of Cassation, *Zimmerman case*, Judgement, 21 November 1949.

¹⁶³ Russia, Constitutional Court, *Situation in Chechnya case*, Judgement, 31 July 1995.

¹⁶⁴ Afghanistan, Identical letters dated 19 January 1997 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/1997/54, 21 January 1997, Annex, p. 2.

¹⁶⁵ Botswana, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 9.

¹⁶⁶ Report on the Practice of Egypt, 1997, Chapter 5.5.

¹⁶⁷ Report on the Practice of France, 1999, Chapter 5.5 and 5.7.

¹⁶⁸ Germany, Lower House of Parliament, Proposal by the CDU/CSU, SPD, FDP and the Greens, *Acht Jahre Krieg in Afghanistan*, BT-Drucksache 11/1500, 9 December 1987, p. 1.

¹⁶⁹ Germany, Statement by the Chancellor, Helmut Kohl, Berlin, 24 May 1993, *Bulletin*, No. 45, Presse- und Informationsamt der Bundesregierung, Bonn, 29 May 1993, p. 488.

174. According to the Report on the Practice of Iran, Iran regarded the forcible transfer of civilians of occupied areas to Iraq during the Iran–Iraq War as a war crime.¹⁷⁰

175. In 1992, during a debate in the UN Security Council, Japan condemned forced displacement in Bosnia and Herzegovina.¹⁷¹

176. The Report on the Practice of Jordan states that Jordan has never ordered the forced movement of civilians nor compelled civilians to leave their own territory owing to internal armed conflict.¹⁷²

177. In 1992, in a statement before the Commission of Foreign Affairs of the Lower House of Parliament concerning the situation in Bosnia and Herzegovina, the Minister of Foreign Affairs of the Netherlands stated that “Serbia refuses to recognise the independence and territorial integrity of the Bosnian State and carries out a pure policy of conquest, combined with the deportation of populations. The international community should strongly condemn this policy.”¹⁷³

178. In 1995, in a letter to the Lower House of Parliament, the Minister of Defence of the Netherlands stated that “the forced evacuation of the local population of Srebrenica, and now also Žepa, must be strongly condemned”.¹⁷⁴

179. In 1996, in a note to the Lower House of Parliament concerning the refugee problem in Africa, the Minister for Development Cooperation of the Netherlands stated that “with respect to refugees and displaced persons, the Netherlands pays as much attention as possible, to prevent, in a comprehensive fashion, that people are displaced and have to flee”.¹⁷⁵

180. In 1993, during a debate in the UN Security Council, New Zealand condemned the forced displacement in the former Yugoslavia.¹⁷⁶

181. In 1994, during a debate in the UN Security Council, Nigeria condemned the forced displacement in Bosnia and Herzegovina.¹⁷⁷

182. In practice, the forced displacement of civilians during military operations in the Philippines has been widely reported.¹⁷⁸

¹⁷⁰ Report on the Practice of Iran, 1997, Chapter 6.5.

¹⁷¹ Japan, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 21.

¹⁷² Report on the Practice of Jordan, 1997, Chapter 5.5.

¹⁷³ Netherlands, Lower House of Parliament, Statement by the Minister of Foreign Affairs before the Commission on Foreign Affairs, 1991–1992 Session, Doc. 22 181, No. 22, p. 12.

¹⁷⁴ Netherlands, Letter from the Minister of Defence to the Lower House of Parliament, 1994–1995 Session, Doc. 22 181, No. 109, p. 6.

¹⁷⁵ Netherlands, Note by the Minister of Development Cooperation to the Lower House of Parliament concerning the refugee problem in Africa, 1995–1996 Session, Doc. 24 713, No. 1, p. 28.

¹⁷⁶ New Zealand, Statement before the UN Security Council, UN Doc. S/PV.3217, 25 May 1993, p. 22.

¹⁷⁷ Nigeria, Statement before the UN Security Council, UN Doc. S/PV.3344, 4 March 1994, p. 6.

¹⁷⁸ Philippines, Presidential Human Rights Committee, Resolution 91-001 Providing for Guidelines on Evacuations, 26 March 1991, preamble; Ecumenical Movement for Justice and Peace, Fact-Finding Missions: Reflecting the Human Rights Situation in 1988, *Justice and Peace Review*, 1990, p. 9; Philippine Human Rights Information Center, The Internal Refugees in Negros: the case of “Operation Thunderbolt”, published by *Human Rights Alliance in Negros* (HRAN), Bacolod City, Philippines, October 1989, pp. 12–14, 29–31 and 76–85; Philippine

183. In 1995, during a debate in the UN Security Council, Russia condemned the forced displacement in the former Yugoslavia.¹⁷⁹

184. According to the Report on the Practice of Russia, Russia considers forced displacement of the civilian population to be an “international crime”.¹⁸⁰

185. In 1993, during a debate in the UN Security Council, Spain condemned the forced displacement in Georgia.¹⁸¹

186. In 1988, the Swiss Federal Department of Foreign Affairs issued a note concerning the lawfulness of the Israeli authorities’ deportation to Lebanon of four Palestinian activists from the West Bank of Jordan. After deciding that GC IV applied to the situation in the region, the note concluded that Article 49 of the Convention:

expressly prohibits individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, regardless of their motive . . .

It would appear that by evacuating four Palestinian civilians – irrespective of whether or not they were agitators – Israel contravened the Fourth Convention. This represents a “grave breach” in the meaning of article 147 [GC IV].¹⁸²

187. In 1992 and 1993, during debates in the UN Security Council, the UK condemned the forced displacements in Bosnia and Herzegovina and in the former Yugoslavia.¹⁸³

188. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that it considered the individual and mass forcible deportation of Kuwaiti and third country nationals to Iraq, in violation of Articles 49 and 147 GC IV, to be a war crime.¹⁸⁴

189. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV in the former Yugoslavia, the US stated that mass forcible expulsion and deportation of civilians were listed as grave breaches of GC IV. The report collated information on 12 such instances of expulsion and deportation.¹⁸⁵

Alliance of Human Rights Advocates (PAHRA), Report on the Implementation by the Philippine Government of Articles 10, 11 and 12 ICESCR, 20 April 1995, pp. 1–4.

¹⁷⁹ Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8.

¹⁸⁰ Report on the Practice of Russia, 1997, Chapter 5.5.

¹⁸¹ Spain, Statement before the UN Security Council, UN Doc. S/PV.3325, 22 December 1993, p. 18.

¹⁸² Switzerland, Federal Department of Foreign Affairs, Directorate for Public International Law, Note on the prohibition to expel and deport the population of an occupied territory – Applicability of GC IV to the territories occupied by Israel, 20 January 1988, reprinted in *Annuaire suisse de droit international*, Vol. 46, 1989, pp. 248–249.

¹⁸³ UK, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 36; Statement before the UN Security Council, UN Doc. S/PV.3175, 22 February 1993, p. 14; Statement before the UN Security Council, UN Doc. S/PV.3217, 5 May 1993, p. 17.

¹⁸⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 618–619 and 634–635.

¹⁸⁵ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention, annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, p. 9.

190. In 1993, during a debate in the UN Security Council, the US condemned the forced displacement in the former Yugoslavia.¹⁸⁶

191. The Report on US Practice states that “Article 17 of Protocol II reflects general U.S. policy on displacement in internal armed conflicts”.¹⁸⁷

192. In 1989, in a meeting with the ICRC, the Minister of Defence of a State involved in an internal armed conflict expressed strong opposition to the forced displacement of the population within the country.¹⁸⁸

III. Practice of International Organisations and Conferences

United Nations

193. In a resolution adopted in 1992 on political conditions in Bosnia and Herzegovina, the UN Security Council called upon “all parties and others concerned to ensure that forcible expulsions of persons from the areas where they live and any attempts to change the ethnic composition of the population, anywhere in the former Socialist Federal Republic of Yugoslavia, cease immediately”.¹⁸⁹

194. In a resolution adopted in 1993, the UN Security Council condemned the forced “large-scale displacement of civilians” in Bosnia and Herzegovina.¹⁹⁰

195. In several resolutions adopted in 1993 concerning the conflict between Armenia and Azerbaijan over Nagorno-Karabakh, the UN Security Council expressed grave concern at “the displacement of a large number of civilians”.¹⁹¹

196. In a resolution on Rwanda adopted in 1994, the UN Security Council expressed deep concern that the situation had resulted in “the internal displacement of a significant percentage of the Rwandan population”.¹⁹²

197. In a resolution adopted in 1995, the UN Security Council demanded that Croatia “respect fully the rights of the local Serb population, including their rights to remain, leave or return in safety”.¹⁹³

198. In a resolution adopted in 1995 on violations of international humanitarian law in the former Yugoslavia, the UN Security Council referred to the unlawful deportation of civilians as a “grave violation of international humanitarian law”.¹⁹⁴

199. In a resolution adopted in 1995 on violations of international humanitarian law and of human rights in the territory of the former Yugoslavia, the

¹⁸⁶ US, Statement before the UN Security Council, UN Doc. S/PV.3175, 22 February 1993, p. 12.

¹⁸⁷ Report on US Practice, 1997, Chapter 5.5, referring to Message from the US President Transmitting AP II to the US Senate for Advice and Consent to Ratification, Treaty Doc. 100-2, 29 January 1987, Comment on Article 17.

¹⁸⁸ ICRC archive document.

¹⁸⁹ UN Security Council, Res. 752, 15 May 1992, § 6.

¹⁹⁰ UN Security Council, Res. 819, 16 April 1993, preamble.

¹⁹¹ UN Security Council, Res. 822, 30 April 1993, preamble; Res. 874, 14 October 1993, preamble; Res. 884, 12 November 1993, preamble.

¹⁹² UN Security Council, Res. 918, 17 May 1994, preamble.

¹⁹³ UN Security Council, Res. 1009, 10 August 1995, § 2.

¹⁹⁴ UN Security Council, Res. 1019, 9 November 1995, preamble.

UN Security Council, after reiterating the principle of individual responsibility, condemned in particular the “consistent pattern of massive expulsions”.¹⁹⁵

200. In 1994, in a statement by its President on the situation in Liberia, the UN Security Council expressed its deep concern “at the increased number of people that have . . . been displaced”.¹⁹⁶ The same year, in another statement by its President on the subject, the Security Council expressed its concern at the “large-scale displacement of persons”.¹⁹⁷

201. In 1995, in a statement by its President, the UN Security Council expressed its concerns about the forced displacement in Bosnia and Herzegovina.¹⁹⁸

202. In 1997, in a statement by its President on the situation in Afghanistan, the UN Security Council expressed its deep concern “at the worsening of the humanitarian situation, including the displacement of the civilian population”.¹⁹⁹

203. In 1997, in a statement by its President on the situation in Burundi, the UN Security Council expressed its deep concern “at the involuntary resettlement of rural populations”.²⁰⁰

204. In Resolution 2675 (XXV), adopted in 1970, the UN General Assembly affirmed that “civilian populations, or individual members thereof, should not be the object of . . . forcible transfers”.²⁰¹

205. In Resolution 3318 (XXIX), adopted in 1974, the UN General Assembly solemnly proclaimed that “forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal”.²⁰²

206. In a resolution adopted in 1981, the UN General Assembly demanded, on the basis of Articles 1 and 49 GC IV, that:

the Government of Israel, the occupying Power, rescind the illegal measures taken by the Israeli military occupation authorities in expelling and imprisoning the Mayors of Hebron and Halhul and in expelling the Sharia Judge of Hebron and that it facilitate the immediate return of the expelled Palestinian leaders so that they can resume the functions for which they were elected and appointed.²⁰³

This demand was reiterated in subsequent resolutions adopted in 1982, 1983, 1984 and 1985.²⁰⁴

¹⁹⁵ UN Security Council, Res. 1034, 21 December 1995, §§ 1 and 2.

¹⁹⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/9, 25 February 1994, p. 1.

¹⁹⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/33, 13 July 1994, p. 2.

¹⁹⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/32, 14 July 1995, p. 1.

¹⁹⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/20, 16 April 1997, p. 2.

²⁰⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/32, 30 May 1997, p. 1.

²⁰¹ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 7.

²⁰² UN General Assembly, Res. 3318 (XXIX), 14 December 1974, § 5.

²⁰³ UN General Assembly, Res. 36/147 D, 16 December 1981, § 1.

²⁰⁴ UN General Assembly, Res. 37/88 D, 9 December 1982, § 1; Res. 38/79 E, 15 December 1983, § 1; Res. 39/95 E, 14 December 1984, § 1; Res. 40/161 E, 16 December 1985, § 2.

207. In a resolution adopted in 1981, the UN General Assembly strongly condemned “evacuation, deportation, expulsion, displacement and transfer of Arab inhabitants of the occupied territories and denial of their right to return”.²⁰⁵ This condemnation was reiterated in subsequent resolutions adopted in 1982, 1983, 1984 and 1985.²⁰⁶

208. In a resolution adopted in 1991 on the situation of human rights in Iraq, the UN General Assembly expressed deep concern at “the forced displacement of hundreds of thousands of Kurds”.²⁰⁷ In another resolution adopted in 1992 on the same subject, the General Assembly expressed deep concern at “the forced displacement of hundreds of thousands of Iraqi civilians”.²⁰⁸

209. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly expressed “its outrage at . . . the acts of violence aimed at forcing individuals from their homes”.²⁰⁹

210. In a resolution adopted in 2000 on the situation of human rights in the Sudan, the UN General Assembly expressed its deep concern at “continuing serious violations of human rights and international humanitarian law by all parties, in particular . . . forced displacement of populations”.²¹⁰

211. In a resolution adopted in 1994, the UN Commission on Human Rights condemned the practice of forced displacement in Zaire and stated that the government authorities bore primary responsibility for the situation.²¹¹

212. In a resolution adopted in 1995, the UN Commission on Human Rights condemned the practice of forced displacement in Sudan.²¹²

213. In a resolution adopted in 1996 on the situation of human rights in the Sudan, the UN Commission on Human Rights called upon all parties to the hostilities to protect all civilians from violations of human rights and IHL, including forcible displacement.²¹³

214. In 1996, in a statement by its Chairman, the UN Commission on Human Rights stated that it strongly deplored the suffering inflicted on displaced persons resulting from severe destruction of Chechen towns.²¹⁴

215. In resolutions adopted in 1988 and 1989 on the situation in the Palestinian and Arab territories occupied by Israel, the UN Sub-Commission on Human Rights, after reaffirming that GC IV was applicable, considered that the

²⁰⁵ UN General Assembly, Res. 36/147 C, 16 December 1981, § 7(c).

²⁰⁶ UN General Assembly, Res. 37/88 C, 9 December 1982, § 7(d); Res. 38/79 D, 15 December 1983, § 7(d); Res. 39/95 D, 14 December 1984, § 7(e); Res. 40/161 D, 16 December 1985, § 8(e).

²⁰⁷ UN General Assembly, Res. 46/134, 17 December 1991, preamble.

²⁰⁸ UN General Assembly, Res. 47/145, 18 December 1992, preamble.

²⁰⁹ UN General Assembly, Res. 50/193, 22 December 1995, § 2.

²¹⁰ UN General Assembly, Res. 55/116, 4 December 2000, § 2(ii).

²¹¹ UN Commission on Human Rights, Res. 1994/87, 9 March 1994, § 4.

²¹² UN Commission on Human Rights, Res. 1995/77, 8 March 1995, preamble.

²¹³ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, § 15.

²¹⁴ UN Commission on Human Rights, Chairman’s statement, UN Doc. E/CN.4/1996/SR.61, 29 April 1996, p. 3.

expulsion and deportation of civilians from their homeland by force was a war crime under international law.²¹⁵

216. In 1998, in a report on MONUA in Angola, the UN Secretary-General stated that:

Over the past few months, indiscriminate as well as summary killings . . . have been reported in the course of attacks targeting entire villages . . . At such times, principles of humanitarian law are especially important as they seek to protect the most vulnerable groups – those who are not involved in military operations – from direct or indiscriminate attack or being forced to flee.²¹⁶

217. In a progress report submitted to the UN Sub-Commission on Human Rights in 1994, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements concluded that “forcible population transfer, save in areas when derogation or military necessity permits, are *prima facie* internationally wrongful acts”.²¹⁷

218. In his final report submitted to the UN Sub-Commission on Human Rights in 1997, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements stated that:

15. Specific rights which population transfers violate include the right to self-determination; the right to privacy, family life and home; the prohibition on forced labour; the right to work; the prohibition of arbitrary detention, including internment prior to expulsion; the right to nationality as well as the right of a child to a nationality; the right to property or peaceful enjoyment of possessions; the right to social security; and protection from incitement to racial hatred or religious intolerance (see the table at annex I).

16. The range of human rights violated by population transfers and the implantation of settlers place this phenomenon in the category of systematic or mass violations of human rights . . .

...

64. As affirmed in the Special Rapporteur’s progress report, international law prohibits the transfer of persons, including the implantation of settlers, as a general principle, and the governing principle is that any displacement of populations must have the consent of the population involved. Accordingly, the criteria governing forcible transfer rest on the absence of consent and also include the use of force, coercive measures, and inducement to flee.

...

70. Consideration must be given by the Sub-Commission to the possibility of preparing an international instrument to set or codify international standards which are applicable to the situation of population transfer and the implantation of settlers. Such an instrument should: provide for an express

²¹⁵ UN Sub-Commission on Human Rights, Res. 1988/10, 31 August 1988, § 3; Res. 1989/4, 31 August 1989, § 3.

²¹⁶ UN Secretary-General, Report on MONUA, UN Doc. S/1998/931, 8 October 1998, § 17.

²¹⁷ UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Progress report, UN Doc. E/CN.4/Sub.2/1994/18, 30 June 1994, § 132.

reaffirmation of the unlawfulness of population transfer and the implantation of settlers; define State responsibility in the matter of unlawful population transfer, including the implantation of settlers; provide for the criminal responsibility of individuals involved in population transfer, whether such individuals be private or officials of the State.²¹⁸

The Special Rapporteur proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights which provided that:

Article 4

1. Every person has the right to remain in peace, security and dignity in one's home, or on one's land and in one's country.
2. No person shall be compelled to leave his place of residence.
3. The displacement of the population or parts thereof shall not be ordered, induced or carried out . . .

...

Article 9

The above practices of population transfer constitute internationally wrongful acts giving rise to State responsibility and to individual criminal liability.²¹⁹

Other International Organisations

219. In a recommendation adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe considered that the expulsion of civilians was a crime against humanity and that persons responsible for such crimes should be held personally accountable.²²⁰

220. In 1991, in several reports concerning violations of IHL in areas of the former Yugoslavia, EU observers denounced various attacks on the civilian population aimed at forcing its displacement.²²¹

221. In the Final Communiqué of its 10th Session in 1989, the GCC Supreme Council demanded an end to Israel's "oppressive measures, including the

²¹⁸ UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, §§ 15, 16, 64 and 70.

²¹⁹ UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Articles 4 and 9.

²²⁰ Council of Europe, Parliamentary Assembly, Rec. 1198, 5 November 1992, § 6.

²²¹ Report by EU observers on statements about violations of the second protocol to the Geneva Conventions concerning Ilok and the surrounding villages of Bapska, Lova_ and _arengard, 1 November 1991, pp. 3-4; Report by EU observers on statements about violations of the second protocol to the Geneva Conventions concerning Slunj, the surrounding villages situated in the region south of Slunj and villages in the Municipality of Korenica, 10 November 1991; Report by EU observers on statements about violations of the second protocol to the Geneva Conventions concerning Drnić and the villages in the Municipality of Drnić, 19 November 1991, pp. 4-5; Report by EU observers on statements about violations of the second protocol to the Geneva Conventions concerning Slavonska Po_ega and villages in the Municipality of Slavonska Po_ega, 26 November 1991, p. 4.

deportation of Palestinians and the demolishing of houses, which run counter to the principles of human rights and international norms and conventions".²²²

222. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council reaffirmed its conviction that "the policy of mass expulsions . . . represent a total contravention of all the Charters, Laws and Conventions of the International Community of Nations" and strongly condemned "the arbitrary and unjust Israeli measures of expulsion as a contravention of Human Rights [and] a violation of the Fourth Geneva Convention". The Council stated that it followed with grave concern and deep regret the degradation of the situation in Bosnia and Herzegovina, including the "carrying out of the worst crimes of . . . mass expulsion".²²³

223. In a resolution adopted in 1985 on the Israeli occupation of parts of southern Lebanon and western Bekaa, the Council of the League of Arab States decided:

to call upon the International Community to exercise pressure on the Zionist entity to stop [arbitrary and inhuman] practices immediately, in accordance with the provisions of the Fourth Geneva Convention of 1949, especially as regards displacing nationals, destroying their houses and damaging their properties and belongings in these areas.²²⁴

224. In a resolution adopted in 1992 on the Israeli occupation of parts of southern Lebanon and western Bekaa, the Council of the League of Arab States decided:

to strongly condemn Israel for its deportation of Palestinian citizens from the occupied Palestinian territories to Lebanon, as this arbitrary and inhuman act is a blatant violation of Lebanon's sovereignty and a sustained aggression against the inviolability of its territories, as well as a clear violation of the Fourth Geneva Convention of 1949, so that these arbitrary and aggressive practices must be stopped immediately.²²⁵

225. In a resolution adopted in 1993 on the Israeli occupation of parts of southern Lebanon and western Bekaa, the Council of the League of Arab States decided "to strongly condemn Israel for . . . its inhuman practices against the peaceful people and for the deportation of a certain number of them, which are all breaches of the Fourth Geneva Convention of 1949, and to call for a stop of such arbitrary practices".²²⁶

²²² GCC, Supreme Council, 10th Session, Muscat, 18–21 December 1989, Final Communiqué, annexed to Letter dated 29 December 1989 from Oman to the UN Secretary-General, UN Doc. A/45/73-S/21065, 2 January 1990, p. 4.

²²³ GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, pp. 6 and 8.

²²⁴ League of Arab States, Council, Res. 4430, 28 March 1985, § 2.

²²⁵ League of Arab States, Council, Res. 5169, 29 April 1992, § 3.

²²⁶ League of Arab States, Council, Res. 5324, 21 September 1993, § 2.

International Conferences

226. The 25th International Conference of the Red Cross in 1986 adopted a resolution on respect for international humanitarian law in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions in which it deplored “the forceful displacement of civilian populations by occupation troops . . . in violation of the laws and customs of war”.²²⁷

227. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants declared, *inter alia*, that they “refuse to accept that . . . populations [are] illegally displaced”.²²⁸

228. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on the protection of the civilian population in period of armed conflict in which it stressed “the general prohibition on forced displacement of the civilian population, which often causes widespread famine”.²²⁹

229. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on principles and action in international humanitarian assistance and protection in which it called upon States to “respect and ensure respect for international humanitarian law, in particular the general prohibition of forced displacement of civilians”.²³⁰

230. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “actions provoking unwarranted population displacements are avoided”.²³¹

231. The Final Declaration adopted in 2002 by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict stated that it was “deeply concerned about the number and expansion of conflicts in Africa and alarmed by the spread of violence, in particular in the form of . . . forced displacement of persons and use of force to prevent their return . . . which seriously violate the rules of International Humanitarian Law”.²³²

²²⁷ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, preamble.

²²⁸ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I (1).

²²⁹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § E(b).

²³⁰ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. 4, § A(1)(a).

²³¹ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(c).

²³² African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble.

IV. Practice of International Judicial and Quasi-judicial Bodies

232. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber, in defining the constituent offences of crimes against humanity (other inhumane acts), held that:

Less broad parameters for the interpretation of “other inhumane acts” can instead be identified in international standards on human rights such as those laid down in the Universal Declaration on Human Rights of 1948 and the two United Nations Covenants on Human Rights of 1966. Drawing upon the various provisions of these texts, it is possible to identify a set of basic rights appertaining to human beings, the infringement of which may amount, depending on the accompanying circumstances, to a crime against humanity... Similarly, the expression at issue undoubtedly embraces the forcible transfer of groups of civilians (which is to some extent covered by Article 49 of the IVth Convention of 1949 and Article 17(1) of the Additional Protocol II of 1977)... In other words, they must be as serious as the other classes of crimes provided for in the other provisions of Article 5.²³³

233. In the *Krstić case* in 1999, the accused was charged with crimes against humanity for carrying out persecutions (deportation or forcible transfer of Bosnian Muslims from the Srebrenica enclave). The accused was also charged with “deportation” as constituting a crime against humanity or, alternatively, with “inhumane acts (forcible transfer)” also constituting a crime against humanity.²³⁴ In its judgement in 2001, the ICTY Trial Chamber stated that:

521. Both deportation and forcible transfer relate to the involuntary and unlawful evacuation of individuals from the territory in which they reside. Yet, the two are not synonymous in customary international law. Deportation presumes transfer beyond State borders, whereas forcible transfer relates to displacements within a State.

522. However, this distinction has no bearing on the condemnation of such practices in international humanitarian law...

523. In this regard, the Trial Chamber notes that any forced displacement is by definition a traumatic experience which involves abandoning one’s home, losing property and being displaced under duress to another location. As previously stated by the Trial Chamber in the *Kupreškić case*, forcible displacement within or between national borders is included as an inhumane act under Article 5(i) defining crimes against humanity. Whether, in this instance, the facts constitute forcible transfer or deportation is discussed below.²³⁵

The Trial Chamber found the accused guilty of “forcible transfer”.²³⁶

234. In the case of *Akdivar and Others v. Turkey* in 1996, the ECtHR held that:

It thus finds it established that security forces were responsible for the burning of the applicants’ houses on 10 November 1992 and that the loss of their homes

²³³ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 566.

²³⁴ ICTY, *Krstić case*, Amended Indictment, 27 October 1999, Counts 6, 7 and 8.

²³⁵ ICTY, *Krstić case*, Judgement, 2 August 2001, §§ 521–523.

²³⁶ ICTY, *Krstić case*, Judgement, 2 August 2001, § 727.

caused them to abandon the village and move elsewhere. However, it has not been established that the applicants were forcibly expelled from Kelekçi by the security forces.²³⁷

V. Practice of the International Red Cross and Red Crescent Movement

235. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “individual or mass transfers and deportation from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, are prohibited, regardless of their motive”.²³⁸ Delegates also teach that “unlawful deportation or transfer of all or parts of the population of the occupied territory within or outside this territory” constitutes a grave breach of the law of war.²³⁹

236. In an appeal launched in 1983 in the context of the Iran–Iraq War, the ICRC noted that “tens of thousands of Iranian civilians have been deported to Iraq by the Iraqi armed forces, in breach of the Fourth Geneva Convention”.²⁴⁰

237. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “under the [four Geneva] Conventions, . . . deportations . . . are specifically prohibited”.²⁴¹

238. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict in which it reminded “the authorities concerned and the armed forces under their command of their obligation to apply international humanitarian law, in particular . . . the prohibition on displacing civilians”.²⁴²

239. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on the Movement, refugees and displaced persons in which it invited “the components of the Movement, in accordance with their respective mandates: a) to call upon the parties to conflict to respect international humanitarian law and to ensure that it is respected in order to avert population movements”.²⁴³

²³⁷ ECtHR, *Akdivar and Others v. Turkey*, Judgement, 16 September 1996, §§ 81 and 88.

²³⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 833.

²³⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 776 (f).

²⁴⁰ ICRC, Conflict between Iraq and Iran: ICRC Appeal, *IRRC*, No. 235, 1983, p. 221.

²⁴¹ ICRC, Memorandum on the Applicability of International Humanitarian Law, 14 December 1990, § I, *IRRC*, No. 280, 1991, p. 24.

²⁴² International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 13, § 1.

²⁴³ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 7, § 1(a).

240. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated, in relation to civilians, that “forced displacements not justified by imperative reasons of security” are prohibited.²⁴⁴

241. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of the grave breaches of the Geneva Conventions and of most of the grave breaches of AP I, listed “the unlawful deportation or transfer . . . of protected persons” as war crimes to be subject to the jurisdiction of the ICC. It also considered that “ordering the displacement of the civilian population for reasons related to the conflict” is a serious violation of international law applicable in non-international armed conflicts and a war crime.²⁴⁵

VI. Other Practice

242. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “no persons shall be compelled to leave their own territory”.²⁴⁶

243. In 1992, in the context of the conflict in Rwanda, the RPF stated that “on several occasions, we condemned the use of the massive displacement of the population” carried out by governmental forces.²⁴⁷

Evacuation of the civilian population

Note: For practice concerning the removal of civilians from the vicinity of military objectives, see Chapter 6, section C. For practice concerning the establishment of hospital and safety zones, see Chapter 11, section A. For practice concerning the evacuation of children, see Chapter 39, section B.

I. Treaties and Other Instruments

Treaties

244. Article 17 GC IV provides that “the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas of wounded, sick, infirm, and aged persons . . . and maternity cases”.

²⁴⁴ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

²⁴⁵ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, §§ 1(a)(vi) and 3(xiii).

²⁴⁶ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 7(2), *IRRC*, No. 282, p. 333.

²⁴⁷ RPF, Press Release, Brussels, 28 February 1992, § 4.

245. Article 49, second paragraph, GC IV provides that “the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand”.

246. Article 17(1) AP II provides that “the displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand”. Article 17 AP II was adopted by consensus.²⁴⁸

247. Pursuant to Article 8(2)(e)(viii) of the 1998 ICC Statute, “ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand” constitutes a war crime in non-international armed conflicts.

Other Instruments

248. The 1998 Guiding Principles on Internal Displacement provide that:

Principle 6

- ...
2. The prohibition of arbitrary displacement includes displacement:
- ...
- (b) in situations of armed conflict, unless the security of the civilians involved or imperative military reasons so demand;
- ...

Principle 7

1. Prior to any decision requiring the displacement of persons, the authorities concerned shall ensure that all feasible alternatives are explored in order to avoid displacement altogether. Where no alternatives exist, all measures shall be taken to minimize displacement and its adverse effects.

249. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(e)(viii), “ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand”, constitutes a war crime in non-international armed conflicts.

II. National Practice

Military Manuals

250. Argentina’s Law of War Manual (1969) provides that “the belligerents shall endeavour to conclude agreements for the removal from besieged areas of wounded, sick, elderly [and] maternity cases”.²⁴⁹ It further states that:

²⁴⁸ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 144.

²⁴⁹ Argentina, *Law of War Manual* (1969), § 1.014.

Nevertheless, the occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Evacuations may involve the displacement of protected persons outside the bounds of the occupied territory only in case of material impossibility.²⁵⁰

251. Argentina's Law of War Manual (1989) provides that, with respect to non-international armed conflicts, "displacement of the population shall not be ordered unless their security or imperative military reasons so demand".²⁵¹

252. Australia's Commanders' Guide provides that "belligerents shall endeavour to conclude local arrangements for the removal from besieged or encircled areas of wounded, sick, infirm and aged persons . . . and maternity cases".²⁵²

253. Cameroon's Instructors' Manual provides that "civilian populations must be evacuated to the non combat zones".²⁵³

254. Canada's LOAC Manual provides that "if circumstances permit, the parties to a conflict must endeavour to conclude local agreements for the removal from besieged areas of wounded, sick, infirm, and aged persons . . . and maternity cases".²⁵⁴ It also states that in occupied territory, "permissible measures of population control include . . . evacuation".²⁵⁵ With respect to non-international armed conflicts in particular, the manual states that "it is forbidden to displace the civilian population for reasons connected with the conflict unless their security or imperative military reasons so demand".²⁵⁶

255. Croatia's LOAC Compendium allows "evacuation for security reasons", but "not outside the boundaries of the occupied territory".²⁵⁷

256. The Military Manual of the Dominican Republic provides that "it is lawful to displace or resettle civilians if it is urgently required for military reasons, such as clearing a combat zone".²⁵⁸

257. France's LOAC Manual provides that "some evacuations can be imposed for reasons of security of the population or imperative military necessity. These evacuations must always be temporary and undertaken respecting the population's interests."²⁵⁹

258. Germany's Military Manual provides that "a temporary evacuation of certain areas shall be permissible if the security of the population or imperative military reasons so demand. An evacuation of persons to areas outside the bounds of the occupied territory shall be permitted only in case of emergency."²⁶⁰

²⁵⁰ Argentina, *Law of War Manual* (1969), § 5.008.

²⁵¹ Argentina, *Law of War Manual* (1989), § 7.08.

²⁵² Australia, *Commanders' Guide* (1994), § 926; see also *Defence Force Manual* (1994), § 735.

²⁵³ Cameroon, *Instructors' Manual* (1992), p. 67, § 242(3).

²⁵⁴ Canada, *LOAC Manual* (1999), p. 6-4, § 35.

²⁵⁵ Canada, *LOAC Manual* (1999), p. 12-5, § 40.

²⁵⁶ Canada, *LOAC Manual* (1999), p. 17-5, § 41.

²⁵⁷ Croatia, *LOAC Compendium* (1991), p. 62.

²⁵⁸ Dominican Republic, *Military Manual* (1980), p. 10.

²⁵⁹ France, *LOAC Manual* (2001), p. 65.

²⁶⁰ Germany, *Military Manual* (1992), § 544.

259. Hungary's Military Manual allows "evacuation for security reasons", but "not outside the boundaries of the occupied territory".²⁶¹

260. Israel's Manual on the Laws of War provides that "it is obligatory to make an effort to evacuate citizens from military objectives to get them out of harm's way".²⁶²

261. Italy's IHL Manual provides that it is possible to undertake "total or partial evacuation of a given area of the occupied territory if the security of the population or imperative military reasons so demand".²⁶³

262. Kenya's LOAC Manual provides that "a local cease-fire may be arranged for the removal from the besieged or encircled areas of the wounded and sick, . . . old persons and maternity cases. Evacuation can also be ordered for military reasons or for the security of the population."²⁶⁴

263. Madagascar's Military Manual provides that "local agreements may be concluded for the removal from besieged or encircled areas of wounded, sick and shipwrecked".²⁶⁵

264. The Military Manual of the Netherlands provides that "the occupying power may undertake the evacuation of a given area if the security of the population or imperative military reasons so demand".²⁶⁶ With respect to non-international armed conflicts in particular, the manual states that "forced displacement . . . is only authorized if the security of the civilians involved or imperative military reasons so demand".²⁶⁷

265. New Zealand's Military Manual provides that in occupied territory, "permissible measures of population control include . . . evacuation".²⁶⁸ With respect to non-international armed conflicts in particular, the manual states that "it is forbidden to displace the civilian population for reasons connected with the conflict, unless their security or imperative military reasons so demand".²⁶⁹ The manual refers to Article 17 GC IV, which requires that "belligerents endeavour to conclude local agreements for the removal from besieged or encircled areas of wounded, sick, infirm and aged persons . . . and maternity cases".²⁷⁰

266. The Military Directive to Commanders of the Philippines provides that "emphasis should be placed on shelter or stay-put policy rather than on evacuation . . . Official orders to move large groups of civilians normally will be given where serious combat action is expected to occur between troops and hostile forces."²⁷¹

²⁶¹ Hungary, *Military Manual* (1992), p. 98.

²⁶² Israel, *Manual on the Laws of War* (1998), p. 57.

²⁶³ Italy, *IHL Manual* (1991), Vol. I, § 48(8).

²⁶⁴ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.

²⁶⁵ Madagascar, *Military Manual* (1994), Fiche No. 7-SO, § B.

²⁶⁶ Netherlands, *Military Manual* (1993), p. VIII-5, § 5.

²⁶⁷ Netherlands, *Military Manual* (1993), p. XI-7.

²⁶⁸ New Zealand, *Military Manual* (1992), § 1322(2).

²⁶⁹ New Zealand, *Military Manual* (1992), § 1823.

²⁷⁰ New Zealand, *Military Manual* (1992), § 508(3).

²⁷¹ Philippines, *Military Directive to Commanders* (1988), Article 3(c).

267. Spain's LOAC Manual provides that "the occupying Power can undertake a total or partial evacuation of a given occupied area if the security of the population or imperative military reasons so demand".²⁷² It adds that "evacuations may not involve the displacement of protected persons outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement".²⁷³

268. Sweden's IHL Manual provides that "the only circumstances under which the occupying power has the right to order removal of the civilian population is when evacuation is required to protect civilians from military attack, or when civilian safety otherwise requires this".²⁷⁴

269. Switzerland's Basic Military Manual provides that "belligerents shall conclude special agreements in order to evacuate the wounded, sick, infirm, elderly . . . and maternity cases . . . from besieged areas".²⁷⁵ It states, however, that "a total or partial evacuation of a given occupied area may be undertaken if the security of the population or imperative military reasons so demand . . . In principle, such transfers must only take place within the occupied territory."²⁷⁶

270. The UK Military Manual provides that:

The Occupant . . . is permitted to undertake total or partial evacuation of a given area, but only if the security of the population or imperative military reasons so require. Except when any other course is materially impossible, such evacuation must not involve the transfer of protected persons outside the limits of occupied territory".²⁷⁷

271. The UK LOAC Manual provides that "a local cease-fire may be arranged for the removal from besieged or encircled areas of the wounded and sick, . . . old persons and maternity cases. Evacuations can also be ordered for military reasons or for the security of the population."²⁷⁸

272. The US Field Manual reproduces Articles 17 and 49 GC IV.²⁷⁹

273. The US Air Force Pamphlet refers to Articles 17 and 49 GC IV.²⁸⁰

274. The US Soldier's Manual provides that "it is lawful to move or resettle civilians if it is urgently required for military reasons, such as clearing a combat zone".²⁸¹

National Legislation

275. Argentina's Constitution, as well as a number of decrees issued between 1974 and 1977, authorise the President, in cases where a state of emergency

²⁷² Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5), see also 2.4.a.(5).

²⁷³ Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).

²⁷⁴ Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.

²⁷⁵ Switzerland, *Basic Military Manual* (1987), Article 33.

²⁷⁶ Switzerland, *Basic Military Manual* (1987), Article 176.

²⁷⁷ UK, *Military Manual* (1958), § 560.

²⁷⁸ UK, *LOAC Manual* (1981), Section 9, p. 34, § 3.

²⁷⁹ US, *Field Manual* (1956), §§ 256 and 382.

²⁸⁰ US, *Air Force Pamphlet* (1976), §§ 14-3 and 14-6(b).

²⁸¹ US, *Soldier's Manual* (1984), p. 22.

has been declared, to arrest and transfer persons from one part of the territory to another, unless such persons choose instead to leave the country. In some cases, however, the option to leave the country may be suspended by invoking the need to safeguard essential State interests.²⁸²

276. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including ordering the "displacement of a civilian population" in non-international armed conflicts, if "the order is not justified by the security of the civilians involved or by imperative military necessity".²⁸³

277. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in international and non-international armed conflicts, "urgent measures to remove all the civilian persons from the besieged zone" must be taken.²⁸⁴

278. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.²⁸⁵

279. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.²⁸⁶

280. Cuba's National Defence Act, which governs civil defence activities for the protection of the civilian population, provides for the evacuation of the population to zones of safety.²⁸⁷

281. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 78(1) AP I, as well as any "contravention" of AP II, including violations of Article 17(1) AP II, are punishable offences.²⁸⁸

282. The Population Evacuation Act of the Netherlands provides that in the event of war or threat of war, a Royal Decree may be issued entitling government ministers to order the evacuation of the population in order to ensure its safety, ensure the continued functioning of society or to enable the armed forces to perform their tasks.²⁸⁹

283. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(e)(viii) of the 1998 ICC Statute.²⁹⁰

²⁸² Argentina, *Constitution* (1994), Article 23; *Decree on the State of Emergency* (1974), Article 1; *Decree on the State of Emergency* (1975), Article 1-4; *Decree on the State of Emergency* (1976), Article 3; *Law on the State of Emergency* (1977), Article 10.

²⁸³ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.89.

²⁸⁴ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.

²⁸⁵ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

²⁸⁶ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

²⁸⁷ Cuba, *National Defence Act* (1994), Article 116.

²⁸⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁸⁹ Netherlands, *Population Evacuation Act* (1988), Article 2(1).

²⁹⁰ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

284. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".²⁹¹

285. Peru's Constitution authorises the restriction or suspension of, *inter alia*, freedom of movement during "states of emergency" (cases of disturbance of the peace or internal order, of disasters, or serious circumstances affecting the life of the nation), but banishment remains prohibited at all times. During "states of siege" (cases of invasion, external war, civil war or imminent danger), on the other hand, fundamental rights cannot be suspended.²⁹²

286. The Report on the Practice of Rwanda states that Rwanda's State of Emergency Decree provides that the authorities may order the evacuation of the civilian population for security reasons and fix the modalities of their evacuation.²⁹³

287. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(e)(viii) of the 1998 ICC Statute.²⁹⁴

288. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(e)(viii) of the 1998 ICC Statute.²⁹⁵

289. Uruguay's Constitution as amended provides that the President of the Republic may take prompt security measures in serious and unforeseen cases of foreign attack or internal disturbance, including the transfer of persons from one point of the territory to another, unless they choose to leave the country.²⁹⁶

National Case-law

290. No practice was found.

Other National Practice

291. In June 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina appealed that the civilian population be displaced only if imperative military or security reasons so demanded.²⁹⁷

292. It has been reported that during the communist insurgency in Malaysia, squatters of Chinese origin who farmed the land on the edge of the jungle were resettled to areas called "New Villages".²⁹⁸ According to the Report on the Practice of Malaysia, this was done both for security objectives and for the

²⁹¹ Norway, *Military Penal Code as amended* (1902), § 108(b).

²⁹² Peru, *Constitution* (1993), Article 137.

²⁹³ Report on the Practice of Rwanda, 1997, Chapter 1.7, referring to *State of Emergency Decree* (1959), Article 4.

²⁹⁴ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

²⁹⁵ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

²⁹⁶ Uruguay, *Constitution as amended* (1996), Article 168(17).

²⁹⁷ Bosnia and Herzegovina, Republika Srpska, Appeal by the Presidency, 7 June 1992, § 4.

²⁹⁸ See, e.g., Dato' J. J. Raj, Jr., *The War Years and After: A Personal Account of Historical Relevance*, Pelanduk Publications, Kuala Lumpur, 1995, pp. 93–99.

protection of the squatters and has been recognised by officials as a form of displacement.²⁹⁹

293. Under Turkish emergency decrees dating from 1990, the Emergency Governor can order the temporary or permanent evacuation, change of place, re-grouping of villages, grazing fields and residential areas for reasons of public security.³⁰⁰

294. In 1988, in the context of a non-international armed conflict, a governmental military commander stated that the displacement of the civilian population, which was one of the tasks of its forces, was carried out with a view to gathering a maximum of civilians under governmental control and reducing the number of persons outside government-controlled areas. In the same context in 1990, a government minister countered ICRC concerns about this policy by stating that it might be necessary to temporarily displace civilians during military operations, but that they must not under any circumstance be obliged to remain displaced subsequently.³⁰¹

III. Practice of International Organisations and Conferences

United Nations

295. In 1997, in his final report submitted to the UN Sub-Commission on Human Rights, the Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights. Article 4(3) of the draft declaration provided that “the displacement of the population or parts thereof shall not be ordered, induced or carried out unless their safety or imperative military reasons so demand”.³⁰²

Other International Organisations

296. In a resolution adopted in 1985 in response to mass transfers of the population in Ethiopia, the European Parliament invited the Commission, the Council and member States to ask Ethiopia to put a stop to the transfers for a minimum of six months in order to assess under international supervision the degree of necessity for such actions and to establish minimum humanitarian conditions for their conduct should they prove necessary.³⁰³

²⁹⁹ Report on the Practice of Malaysia, 1997, Interview with the Ministry of Home Affairs, Chapter 5.5.

³⁰⁰ Turkey, Decrees No. 424 and 425, 10 May 1990.

³⁰¹ ICRC archive documents.

³⁰² UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Article 4(3).

³⁰³ European Parliament, Resolution on mass transfers of population in Ethiopia and the expulsion of Médecins sans frontières, 13 December 1985, § 1.

International Conferences

297. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

298. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

299. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the occupying power may undertake total or partial evacuation of a given area if the security of the population or other imperative reasons so demand”.³⁰⁴

300. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict in which it reminded “the authorities concerned and the armed forces under their command of their obligation to apply international humanitarian law, in particular . . . the prohibition on displacing civilians unless their security or imperative military reasons so demand”.³⁰⁵

301. In 1993, in a letter to a representative of a separatist entity, the ICRC stated that “persons forcibly evacuated from a conflict zone where fighting is going on must be immediately released, once brought to safer areas.”³⁰⁶

302. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of the grave breaches of the Geneva Conventions and of most of the grave breaches of AP I, considered that ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or military reasons so demanded, was a serious violation of international law applicable in non-international armed conflicts and a war crime.³⁰⁷

VI. Other Practice

303. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “the displacement of the

³⁰⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 834.

³⁰⁵ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 13, § 1.

³⁰⁶ ICRC archive document.

³⁰⁷ ICRC, Working paper submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 1(a)(vi) and 3(xiii).

population or parts thereof shall not be ordered unless their safety or imperative security reasons so demand".³⁰⁸

304. In 1993, in a meeting with the ICRC, a representative of a separatist entity stated that the forced displacement of civilians from a specific town was only carried out after timely warning of the possibility to flee and was only justified by the concern to keep the civilians away from the combat zone.³⁰⁹

Ethnic cleansing

I. Treaties and Other Instruments

305. No practice was found.

II. National Practice

Military Manuals

306. No practice was found.

National Legislation

307. No practice was found.

National Case-law

308. No practice was found.

Other National Practice

309. According to the Report on the Practice of France, the free return of refugees is a frequent preoccupation of French diplomacy. France often asks for this right be guaranteed and considers a contrary attitude to be "unacceptable" and implies a deliberate policy of "ethnic cleansing".³¹⁰

310. In 1993, the German Chancellor stated that ethnic cleansing was deeply inhumane and fell within the notion of genocide.³¹¹

311. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Tunisia stated that it was essential to "put an end to the reprehensible practice of 'ethnic cleansing'".³¹²

312. In 1992, during a debate in the UN General Assembly, the UK declared that "ethnic cleansing" in the former Yugoslavia was "inhuman and illegal"

³⁰⁸ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 7(1), *IRRC*, No. 282, p. 333.

³⁰⁹ ICRC archive document. ³¹⁰ Report on the Practice of France, 1999, Chapter 5.5.

³¹¹ Germany, Statement by the Chancellor, Helmut Kohl, Berlin, 24 May 1993, *Bulletin*, No. 45, Presse- und Informationsamt der Bundesregierung, Bonn, 29 May 1993, p. 488.

³¹² Tunisia, Statement before the UN Security Council, UN Doc. S/PV.3137, 16 November 1992, p. 66.

and added that “we reject as inhuman and illegal any expulsion of civilian communities from their homes in order to alter the ethnic character of the area”.³¹³

313. In 1994, during a debate in the UN Security Council on the situation in Bosnia and Herzegovina, the UK stated that it was undeniable that “the abhorrent practice of ‘ethnic cleansing’ . . . is a crime, and a most grievous one”.³¹⁴

314. In 1992, in a report submitted pursuant to paragraph 5 of UN Security Council Resolution 771 (1992) on grave breaches of GC IV committed in the former Yugoslavia, the US stated that:

The discrete incidents reported herein contain indications that they are part of a systematic campaign towards a single objective – the creation of an ethnically “pure” State. We have not identified “ethnic cleansing” . . . as a separate category of violations. Nevertheless, the rubric of ethnic cleansing may unite events that appear unconnected and may therefore prove useful in identifying persons and institutions that may be responsible for violations of established international humanitarian law.³¹⁵

315. In 1998, in reaction to the situation in Kosovo, but also referring to the conflicts in the former Yugoslavia, the US Congress adopted a resolution by unanimous consent stating that:

Whereas “ethnic cleansing” has been carried out in the former Yugoslavia in such a consistent and systematic way that it had to be directed by the senior political leadership in Serbia, and Slobodan Milošević has held such power within Serbia that he is responsible for the conception and direction of this policy;

it is the sense of Congress that . . .

the United States should publicly declare that it considers that there is reason to believe that Slobodan Milošević, President of the Federal Republic of Yugoslavia (Serbia and Montenegro), has committed war crimes, crimes against humanity and genocide.³¹⁶

III. Practice of International Organisations and Conferences

United Nations

316. In various resolutions adopted between 1992 and 1994 in connection with the conflicts in the former Yugoslavia, the UN Security Council condemned the practice of “ethnic cleansing” as a violation of IHL and reaffirmed that “those

³¹³ UK, Statement before the UN General Assembly, UN Doc. A/46/PV.89, 24 August 1992, p. 36.

³¹⁴ UK, Statement before the UN Security Council, UN Doc. S/PV.3428, 23 September 1994, pp. 32–33.

³¹⁵ US, Former Yugoslavia: Grave Breaches of the Fourth Geneva Convention (Second Submission), annexed to Letter dated 22 September 1992 to the UN Secretary-General, UN Doc. S/24583, 23 September 1992, Annex, § 4.

³¹⁶ US, Congress, Resolution 105 on the Sense of Congress Regarding the Culpability of Slobodan Milošević, 17 July 1998, *Congressional Record (Senate)*, pp. S8456–S8458.

that commit or order the commission of such acts will be held individually responsible in respect of such acts".³¹⁷

317. In a resolution on the former Yugoslavia adopted in 1993, the UN Security Council expressed its grave alarm at "continuing reports of widespread violations of international humanitarian law . . . including reports of mass killings and the continuance of the practice of ethnic cleansing".³¹⁸

318. In 1994, in a statement by its President, the UN Security Council stated that it deplored "recent acts of violence and terror including ethnic cleansing particularly in Prijedor and Banja Luka" and reaffirmed that "the International Tribunal was established . . . for the purpose of investigating crimes of this sort, and trying persons accused of committing such crimes".³¹⁹

319. In two resolutions adopted in 1992 in the context of the former Yugoslavia, the UN General Assembly stated that it considered that the practice of "ethnic cleansing" constituted a grave and serious violation of IHL and reiterated "its conviction that those who commit or order the commission of acts of 'ethnic cleansing' are individually responsible and should be brought to justice".³²⁰

320. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the UN General Assembly stated that it considered that "ethnic cleansing" was a form of genocide.³²¹

321. In two resolutions adopted in 1993 and 1994, the UN General Assembly addressed the issue of "ethnic cleansing" in the former Yugoslavia. It condemned violations of IHL:

most of which are committed in connection with "ethnic cleansing" and which include killings, torture, beatings, arbitrary searches, . . . disappearances, destruction of houses and other acts or threats of violence aimed at forcing individuals to leave their homes, as well as violations of human rights in connection with detention.³²²

322. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly expressed its outrage at "ethnic cleansing".³²³

323. In a resolution adopted in 1994 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights referred to the perpetrators of ethnic cleansing as "war criminals".³²⁴

³¹⁷ UN Security Council, Res. 771, 13 August 1992, § 2; Res. 787, 16 November 1992, § 7; Res. 819, 16 April 1993, § 7; Res. 820, 17 April 1993, § 6; Res. 941, 23 September 1994, § 2.

³¹⁸ UN Security Council, Res. 808, 22 February 1993, preamble.

³¹⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/14, 6 April 1994.

³²⁰ UN General Assembly, Res. 46/242, 25 August 1992, § 8; Res. 47/80, 16 December 1992, § 4.

³²¹ UN General Assembly, Res. 47/121, 18 December 1992, preamble.

³²² UN General Assembly, Res. 48/153, 20 December 1993, § 5; Res. 49/196, 23 December 1994, § 6.

³²³ UN General Assembly, Res. 50/193, 22 December 1995, §§ 2 and 15.

³²⁴ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 1.

324. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights condemned in the strongest terms:

all violations of human rights and international humanitarian law during the conflict... in particular, massive and systematic violations, including, *inter alia*, systematic ethnic cleansing... [and] illegal and forcible evictions and other acts of violence aimed at forcing individuals from their homes.

It reaffirmed that "all persons who plan, commit or authorize such acts will be held personally responsible and accountable".³²⁵

325. In a resolution adopted in 1993 on the situation in Bosnia and Herzegovina, the UN Sub-Commission on Human Rights condemned "ethnic cleansing" and stated that this practice had generated displacement on a massive scale.³²⁶

326. In 1993, in his comment on Article 5 of the 1993 ICTY Statute, which defines the crimes against humanity over which the Tribunal has jurisdiction, the UN Secretary-General noted that "in the conflict in the territory of the former Yugoslavia, such inhumane acts have taken the form of so-called 'ethnic cleansing' and widespread and systematic rape and other forms of sexual assault, including enforced prostitution".³²⁷

327. In his final report submitted to the UN Sub-Commission on Human Rights in 1997, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements stated that:

65. Acts such as ethnic cleansing, dispersal of minorities or ethnic populations from their homeland within or outside the State, and the implantation of settlers are unlawful, and engage State responsibility and the criminal responsibility of individuals.³²⁸

The Special Rapporteur proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights which provided that:

Article 6

Practices and policies having the purpose or effect of changing the demographic composition of the region in which a national, ethnic, linguistic, or other minority or an indigenous population is residing, whether by deportation, displacement, and/or the implantation of settlers, or a combination thereof, are unlawful.³²⁹

³²⁵ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 1.

³²⁶ UN Sub-Commission on Human Rights, Res. 1993/17, 20 August 1993, §§ 7–8.

³²⁷ UN Secretary-General, Report pursuant to paragraph 2 of Security Council resolution 808 (1993), UN Doc. S/25704, 3 May 1993, § 48.

³²⁸ UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, § 65.

³²⁹ UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN

Other International Organisations

328. In 1993, in a report on the situation of refugees and displaced persons in the former Yugoslavia, the Rapporteur of the Council of Europe stated that “ethnic cleansing” was a crime against humanity and that those committing those crimes should be searched for and brought to justice.³³⁰

329. In a resolution adopted in 1993, the Parliamentary Assembly of the Council of Europe declared “its profound consternation at the massive and flagrant violation of human rights in the territory of the former Yugoslavia and at the perpetration of crimes against humanity such as . . . ‘ethnic cleansing’ and the deportation of entire populations”.³³¹

330. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council stated that it followed with grave concern and deep regret the degradation of the situation in Bosnia and Herzegovina, including the “carrying out of the worst crimes of racial extermination”.³³²

331. In the Final Communiqué of its 14th Session in 1993, the GCC Supreme Council noted that “the international economic sanctions imposed on the Serbs have had no noticeable effect in . . . halting their systematic practices of ethnic cleansing”.³³³

332. In a resolution on Bosnia and Herzegovina adopted in 1992, the Council of the League of Arab States decided “to call upon the Serbian forces to put an immediate end to all activities aimed at changing the demographic structure of the Republic of Bosnia and Herzegovina”.³³⁴

333. In 1992, the OIC Ministers of Foreign Affairs stigmatised “with force” massive violations of IHL in Bosnia and Herzegovina and considered that the policy of “ethnic cleansing” and forced deportation of Muslims and Croats constituted a genocide and a crime against humanity.³³⁵

International Conferences

334. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed “its dismay at massive violations of human rights especially . . . ‘ethnic cleansing’ . . . creating mass exodus

Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Article 6.

³³⁰ Council of Europe, Parliamentary Assembly, Report on the situation of refugees and displaced persons in the former Yugoslavia, Doc. 6740, 19 January 1993, § 19.

³³¹ Council of Europe, Parliamentary Assembly, Res. 994, 3 February 1993, § 1.

³³² GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 8.

³³³ GCC, Supreme Council, 14th Session, Riyadh, 20–22 December 1993, Final Communiqué, annexed to Letter dated 29 December 1993 from the UAE to the UN Secretary-General, UN Doc. A/49/56-S/26926, 30 December 1993, p. 6.

³³⁴ League of Arab States, Council, Res. 5231, 13 September 1992, § 5.

³³⁵ OIC, Conference of Ministers of Foreign Affairs, Sixth Extraordinary Session, Res. 1/6-EX, § 5, 1–2 December 1992.

of refugees and displaced persons". It reiterated "the call that perpetrators of such crimes be punished and such practices immediately stopped".³³⁶

335. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants declared, *inter alia*, that they "refuse to accept that the civilian populations . . . are victims of the odious practise of 'ethnic cleansing'".³³⁷

336. The Eleventh Conference of Heads of State or Government of the Non-Aligned Countries in 1995 reiterated that those who committed or ordered to be committed practices of "ethnic cleansing" in the former Yugoslavia were personally responsible and that "the international community should make every effort to bring them to justice".³³⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

337. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

338. No practice was found.

VI. Other Practice

339. No practice was found.

B. Transfer of Own Civilian Population into Occupied Territory

Note: For practice concerning ethnic cleansing, see section A of this chapter.

I. Treaties and Other Instruments

Treaties

340. Article 49, sixth paragraph, GC IV provides that "the Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies".

341. Article 85(4)(a) AP I provides that "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies" is a grave breach of the Protocol. Article 85 AP I was adopted by consensus.³³⁹

³³⁶ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(28).

³³⁷ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § I(3).

³³⁸ Eleventh Conference of Heads of State or Government of the Non-Aligned Countries, Cartagena, 1995, Basic Documents, p. 46.

³³⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

342. Under Article 8(2)(b)(viii) of the 1998 ICC Statute, “unlawful deportation or transfer, in particular the transfer, directly or indirectly, by the occupying power of parts of its own civilian population into the territory it occupies” constitutes a war crime in international armed conflicts.

Other Instruments

343. Article 22(2)(b) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind considers “the establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory” as an “exceptionally serious war crime”.

344. Under Article 20(c)(i) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, the “transfer by the Occupying Power of parts of its own civilian population into the territory it occupies” is a war crime.

345. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(viii), “the transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies” constitutes a war crime in international armed conflicts.

II. National Practice

Military Manuals

346. Argentina’s Law of War Manual (1969) provides that “the occupying power shall not evacuate or transfer a part of its own civilian population into the territory it occupies”.³⁴⁰

347. Under Argentina’s Law of War Manual (1989), “the transfer by the occupying power of a part of its own civilian population to the territory it occupies” is a grave breach.³⁴¹

348. Australia’s Defence Force Manual provides that “the occupying power is forbidden to move parts of its own population into the occupied territory with the intention of changing the nature of the population or annexing or colonising the area”.³⁴²

349. Canada’s LOAC Manual provides that “the occupying power is forbidden to move parts of its own population into the occupied territory, with the intention of changing the nature of the population or annexing or colonizing the area”.³⁴³ It further states that “transfer by an occupying power of parts of its own civilian population into occupied territory” is a war crime.³⁴⁴

350. Croatia’s LOAC Compendium states that it is prohibited “to transfer one’s own civilians into the occupied territory”.³⁴⁵

³⁴⁰ Argentina, *Law of War Manual* (1969), § 5.008.

³⁴¹ Argentina, *Law of War Manual* (1989), § 8.03.

³⁴² Australia, *Defence Force Manual* (1994), § 1217.

³⁴³ Canada, *LOAC Manual* (1999), p. 12-4, § 33.

³⁴⁴ Canada, *LOAC Manual* (1999), p. 16-3, § 17.

³⁴⁵ Croatia, *LOAC Compendium* (1991), p. 62.

351. Hungary's Military Manual states that it is prohibited "to transfer one's own civilians into the occupied territory".³⁴⁶

352. Italy's IHL Manual provides that the occupying State is prohibited "to deport or transfer a part of its own population into the occupied territory".³⁴⁷

353. The Military Manual of the Netherlands considers that "the transfer by the occupying power of parts of its own civilian population into the territory it occupies" is a grave breach of AP I.³⁴⁸

354. New Zealand's Military Manual provides that "the Occupying Power is forbidden to move parts of its own population into the occupied territory with the intention of changing the nature of the population or annexing or colonizing the area".³⁴⁹ The manual considers such practice to be a grave breach.³⁵⁰

355. Spain's LOAC Manual provides that "the occupying Power can neither evacuate nor transfer a part of its own civilian population into the territory it occupies".³⁵¹

356. Sweden's IHL Manual provides that:

The occupying power may find it in its own interests to move sections of its own civilian population into the occupied area. Such movements of population can have very far-reaching negative consequences for the occupied population. It is important to stress that, according to the GC IV (Article 49), any movement of the occupying power's own civilian population is prohibited.³⁵²

357. Switzerland's Basic Military Manual provides that grave breaches of AP I include "the transfer by the occupying Power of parts of its own civilian population into occupied territory".³⁵³

358. The UK Military Manual provides that "the Occupant is not permitted to deport or transfer parts of its own civilian population to occupied territory".³⁵⁴

359. The US Field Manual reproduces Article 49 GC IV.³⁵⁵

National Legislation

360. Argentina's Draft Code of Military Justice considers the transfer by an occupying power or authority of parts of its own civilian population into occupied territory to be an offence.³⁵⁶

³⁴⁶ Hungary, *Military Manual* (1992), p. 98.

³⁴⁷ Italy, *IHL Manual* (1991), Vol. I, § 48(8).

³⁴⁸ Netherlands, *Military Manual* (1993), p. IX-6.

³⁴⁹ New Zealand, *Military Manual* (1992), § 1319(1).

³⁵⁰ New Zealand, *Military Manual* (1992), § 1703(4).

³⁵¹ Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).

³⁵² Sweden, *IHL Manual* (1991), Section 6.1.3, pp. 122–123.

³⁵³ Switzerland, *Basic Military Manual* (1987), Article 193(2).

³⁵⁴ UK, *Military Manual* (1958), § 560. ³⁵⁵ US, *Field Manual* (1956), § 382.

³⁵⁶ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(5) in the *Code of Military Justice as amended* (1951).

361. Under Armenia's Penal Code, the "transfer by the occupying power of part of its own population in the occupied territories", during an armed conflict, constitutes a crime against the peace and security of mankind.³⁵⁷

362. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits a grave breach . . . of [AP I] is guilty of an indictable offence".³⁵⁸

363. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "the transfer, directly or indirectly, of parts of the civilian population of the perpetrator's own country into territory that the country occupies" in international armed conflicts.³⁵⁹

364. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "the following actions are prohibited to be carried out against civilian persons . . . 6) to evacuate its population to the occupied territory".³⁶⁰

365. Azerbaijan's Criminal Code provides that the "transfer of any part of one's own civilian population to the occupied territory" is a war crime.³⁶¹

366. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁶²

367. The Criminal Code of Belarus provides that "the transfer of any part of one's own civilian population into the occupied territory" is a war crime.³⁶³

368. Under Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, "the transfer by the occupying power of parts of its own civilian population into the territory it occupies, in the case of an international armed conflict, or of the occupying authority, in the case of a non-international armed conflict," is criminalised as a grave breach.³⁶⁴

369. Under the Criminal Code of the Federation of Bosnia and Herzegovina, "whoever in violation of rules of international law applicable in time of war, armed conflict or occupation, orders or carries out as an occupier the resettlement of parts of his/her civilian population into the occupied territory" commits a war crime.³⁶⁵ The Criminal Code of the Republika Srpska contains the same provision.³⁶⁶

³⁵⁷ Armenia, *Penal Code* (2003), Article 390.4(1).

³⁵⁸ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

³⁵⁹ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, § 268.45(a)(1).

³⁶⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 17.

³⁶¹ Azerbaijan, *Criminal Code* (1999), Article 116.0.14.

³⁶² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁶³ Belarus, *Criminal Code* (1999), Article 136(14).

³⁶⁴ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3)(17).

³⁶⁵ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Article 154(3).

³⁶⁶ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Article 433(3).

370. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "transfer, direct or indirect, by the occupying power of parts of its own civilian population, into the territory it occupies" constitutes a war crime in international armed conflict.³⁶⁷

371. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach [of AP I]... is guilty of an indictable offence".³⁶⁸

372. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.³⁶⁹

373. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.³⁷⁰

374. The Geneva Conventions and Additional Protocols Act of the Cook Islands punishes "any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach" of AP I.³⁷¹

375. Croatia's Criminal Code provides, under the heading "War crimes against civilian population", that "whoever, as part of an occupying power, in violation of the rules of international law, in time of war, armed conflict or occupation, orders or performs the transfer of parts of the civilian population of the occupying force to the occupied territory shall be punished".³⁷²

376. Cyprus's AP I Act punishes "any person who, whatever his nationality, commits in the Republic or outside the Republic, any grave breach of the provisions of the Protocol, or takes part or assists or incites another person in the commission of such a breach".³⁷³

377. The Czech Republic's Criminal Code as amended punishes "a person who in war time... settles the occupied territory with the population of his own country".³⁷⁴

378. Under the Draft Amendments to the Penal Code of El Salvador, "repatriation or forced displacement of the civilian population of one's own territory", in both internal and international armed conflicts, is punishable.³⁷⁵

³⁶⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(B)(h).

³⁶⁸ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

³⁶⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

³⁷⁰ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁷¹ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

³⁷² Croatia, *Criminal Code* (1997), Article 158(3).

³⁷³ Cyprus, *AP I Act* (1979), Section 4(1).

³⁷⁴ Czech Republic, *Criminal Code as amended* (1961), Article 263(a)(2)(d).

³⁷⁵ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Repatriación o desplazamiento forzado".

379. Germany's Law Introducing the International Crimes Code punishes anyone, who, in connection with an international or non-international armed conflict, "transfers, as a member of an Occupying Power, parts of its own civilian population into the occupied territory".³⁷⁶

380. Under Georgia's Criminal Code, "the transfer by the Occupying Power of parts of its own civilian population into the territory it occupies, or deportation or transfer of all or parts of the population of the occupied territory within or outside this territory" in an international or non-international armed conflict is a crime.³⁷⁷

381. Ireland's Geneva Conventions Act as amended provides that grave breaches of AP I are punishable offences.³⁷⁸ In addition, any "minor breach" of the Geneva Conventions, including violations of Article 49 GC IV, is also a punishable offence.³⁷⁹

382. Jordan's Draft Military Criminal Code considers "the transfer, by the occupying Power, of a part of the civilian population to the territories occupied by this Power" as a war crime.³⁸⁰

383. Under the Draft Amendments to the Code of Military Justice of Lebanon, "the transfer, by the occupying Power, of a part of the civilian population to the territories occupied by this Power" is a war crime.³⁸¹

384. Mali's Penal Code provides that "the transfer, direct or indirect, by the occupying Power, of a part of its own civilian population, into the territories it occupies" constitutes a crime in international armed conflicts.³⁸²

385. Moldova's Penal Code punishes "grave breaches of international humanitarian law committed during international and non-international armed conflicts".³⁸³

386. Under the International Crimes Act of the Netherlands, it is a crime to commit, in an international armed conflict, "the following acts if committed intentionally and in violation of the Geneva Conventions and Additional Protocol (I): . . . the transfer by the occupying Power of parts of its own civilian population into the territory it occupies".³⁸⁴ Furthermore, "the transfer, directly or indirectly, by the occupying Power of parts of its own civilian population into the territory it occupies" is also a crime, when committed in an international armed conflict.³⁸⁵

387. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures

³⁷⁶ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(3)(2).

³⁷⁷ Georgia, *Criminal Code* (1999), Article 411(1)(g).

³⁷⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 3(1).

³⁷⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁸⁰ Jordan, *Draft Military Criminal Code* (2000), Article 41(15).

³⁸¹ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(15).

³⁸² Mali, *Penal Code* (2001), Article 31(i)(8).

³⁸³ Moldova, *Penal Code* (2002), Article 391.

³⁸⁴ Netherlands, *International Crimes Act* (2003), Article 5(2)(d)(i).

³⁸⁵ Netherlands, *International Crimes Act* (2003), Article 5(5)(d).

the commission by another person of, a grave breach . . . of [AP I] is guilty of an indictable offence".³⁸⁶

388. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(viii) of the 1998 ICC Statute.³⁸⁷

389. Nicaragua's Draft Penal Code provides that "whoever, during an international or internal armed conflict, orders repatriation or forced displacement of the civilian population of its own territory, for reasons related to the armed conflict," commits a punishable offence.³⁸⁸

390. According to Niger's Penal Code as amended, "the transfer into occupied territories of a part of the civilian population of the occupying power, in the case of an international armed conflict, or of the occupying authority, in the case of a non-international armed conflict," constitutes a war crime.³⁸⁹

391. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".³⁹⁰

392. Slovakia's Criminal Code as amended punishes "a person who in war time . . . settles the occupied territory with the population of his own country".³⁹¹

393. Slovenia's Penal Code provides, under the heading "War Crimes against the Civil Population", that "whoever, in violation of the principles of international law, orders or implements, as occupier in time of war, armed conflict or occupation, deportation of groups of civilians to the occupied territory" shall be punished.³⁹²

394. Spain's Penal Code punishes anyone who transfers and settles in occupied territory any part of the population of the occupying power, in order to remain there permanently.³⁹³

395. Tajikistan's Criminal Code punishes "the transfer by the occupying power of parts of its own civilian population into the territory it occupies".³⁹⁴

396. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(viii) of the 1998 ICC Statute.³⁹⁵

397. The UK Geneva Conventions Act as amended punishes "any person, whatever his nationality, who, whether in or outside the United Kingdom,

³⁸⁶ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

³⁸⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³⁸⁸ Nicaragua, *Draft Penal Code* (1999), Article 455.

³⁸⁹ Niger, *Penal Code as amended* (1961), Article 208.3(17).

³⁹⁰ Norway, *Military Penal Code as amended* (1902), § 108.

³⁹¹ Slovakia, *Criminal Code as amended* (1961), Article 263 (a)(2)(d).

³⁹² Slovenia, *Penal Code* (1994), Article 374(3).

³⁹³ Spain, *Penal Code* (1995), Article 611(5).

³⁹⁴ Tajikistan, *Criminal Code* (1998), Article 403(1).

³⁹⁵ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

commits, or aids, abets or procures the commission by any other person of, a grave breach of . . . [AP I]”.³⁹⁶

398. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(viii) of the 1998 ICC Statute.³⁹⁷

399. The Criminal Code of the SFRY (FRY) provides, under the heading “War crimes against civilian population”, that “whoever in violation of the rules of international law, in time of war, armed conflict or occupation, . . . orders the transfer of a part of the civilian population into the occupied territory . . . shall be punished”.³⁹⁸

400. Zimbabwe’s Geneva Conventions Act as amended punishes “any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of . . . [AP I]”.³⁹⁹

National Case-law

401. No practice was found.

Other National Practice

402. The Report on the Practice of Egypt states that:

Egypt has a firm position according to which displacement and all measures designed to change the demographic composition of the occupied territories are null and void. Such measures, if occurred, must be rescinded as soon as possible, particularly after the signature of the Treaty of peace . . . It is worth remembering that the aforementioned position adopted by Egypt had also been put forward with regard to Additional Protocol II. Additionally, Egypt condemned forcible transfers practised by Israel in 1967 vis-à-vis civilians.⁴⁰⁰

403. The Report on the Practice of France states that:

France is clearly opposed to the policy of *fait accompli* of the settlement colonies which modify the demographic structure of the territory. It is also opposed to expulsion measures directed at the inhabitants of the occupied territories which are equally contrary to the fourth Geneva Convention. In relation to these Israeli measures, the French representatives even talk of “banishment” and “exceptional gravity”.⁴⁰¹

404. Following the adoption by the UN Diplomatic Conference of the 1998 ICC Statute, Israel gave the following explanation of its vote:

Israel has reluctantly cast a negative vote. It fails to comprehend why it has been considered necessary to insert into the list of the most heinous and grievous war crimes the action of transferring population into occupied territory. The exigencies

³⁹⁶ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

³⁹⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

³⁹⁸ SFRY (FRY), *Penal Code as amended* (1976), Article 142(3).

³⁹⁹ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1).

⁴⁰⁰ Report on the Practice of Egypt, 1997, Chapter 5.5.

⁴⁰¹ Report on the Practice of France, 1999, Chapter 5.7.

of lack of time and intense political and public pressure have obliged the Conference to by-pass very basic sovereign prerogatives to which we are entitled in drafting international conventions, in favour of finishing the work and achieving a Statute on a come-what-may basis. We continue to hope that the Court will indeed serve the lofty objectives for the attainment of which it is being established.⁴⁰²

405. In a series of letters to the UN Secretary-General between August and October 1990, Kuwait complained about the following actions carried out by Iraqi authorities in occupied Kuwait:

- Iraqi forces arrested Kuwaiti nationals and others, and transferred them to Bagdad.⁴⁰³
- Transportation to Kuwait of large numbers or Iraqi families for the purposes of settlement and alteration of the country's demographic structure.⁴⁰⁴
- In its efforts to change the demographic structure of Kuwait and erase the very identity of the country, Iraqi occupation forces have embarked on the application and execution of a novel practice of: depopulating Kuwait from its own inhabitants, confiscating identification documents, and settling Iraqi families in Kuwaiti homes.⁴⁰⁵
- The invading Iraqi authorities have stepped up their campaign to change the demographic character of Kuwait by expanding their operation to expel Kuwaiti nationals from their homes in various areas of Kuwait and to replace them by Iraqi families brought to Kuwait from Iraq.⁴⁰⁶

Kuwait qualified these acts as crimes.⁴⁰⁷

406. In 1980, the US Secretary of State stated that "US policy toward the establishment of Israeli settlements in the occupied territories is unequivocal and has long been a matter of public record. We consider it to be contrary to international law and an impediment to the successful conclusion of the Middle East peace process."⁴⁰⁸ In 1991, the Secretary of State stated that Israeli settlement activity "does violate the United States policy".⁴⁰⁹

407. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense declared that it regarded the transfer of the Iraqi population into occupied Kuwait in violation of Article 49 GC IV as a war crime.⁴¹⁰

⁴⁰² Israel, Explanation of vote, UN Press Release L/2889, 20 July 1998, § 4.

⁴⁰³ Kuwait, Letter dated 7 August 1990 to the UN Secretary-General, UN Doc. S/21452, 7 August 1990.

⁴⁰⁴ Kuwait, Letter dated 2 September 1990 to the UN Secretary-General, UN Doc. S/21694, 2 September 1990.

⁴⁰⁵ Kuwait, Letter dated 15 September 1990 to the UN Secretary-General, UN Doc. S/21772, 15 September 1990.

⁴⁰⁶ Kuwait, Letter dated 4 October 1990 to the UN Secretary-General, UN Doc. S/21843, 4 October 1990.

⁴⁰⁷ Kuwait, Letter dated 4 October 1990 to the UN Secretary-General, UN Doc. S/21843, 4 October 1990.

⁴⁰⁸ US, Statement of the Secretary of State on behalf of the Carter Administration, 21 March 1980.

⁴⁰⁹ US, Testimony of the Secretary of State before the United States House of Representatives Committee on Appropriations, 102nd Congress, 22 May 1991.

⁴¹⁰ US, Department of Defense, Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 635.

*III. Practice of International Organisations and Conferences**United Nations*

408. In several resolutions adopted in 1979 and 1980, the UN Security Council stated that the measures taken by Israel to alter the demographic composition of the occupied territories, and in particular the establishment of settlers, were contrary to GC IV and constituted an obstacle to peace.⁴¹¹

409. In a resolution adopted in 1980 on Israeli settlement policies in the occupied territories, the UN Security Council determined that “all measures taken by Israel to change the physical character, demographic composition, institutional structure or status of the Palestinian and other Arab territories occupied since 1967, including Jerusalem, or any part thereof have no legal validity” and that:

Israel’s policy and practices of settling parts of its population and new immigrants in those territories constitute a flagrant violation of the Geneva Convention relative to the Protection of Civilian Persons in Time of War and also constitute a serious obstruction to achieving a comprehensive, just and lasting peace in the Middle East.⁴¹²

410. In a resolution on Iraq and Kuwait adopted in 1990, the UN Security Council condemned “the destruction of Kuwaiti demographic records, the forced departure of Kuwaitis, the relocation of population in Kuwait”.⁴¹³ In another resolution a month later, the Security Council condemned “the attempts by Iraq to alter the demographic composition of the population of Kuwait”.⁴¹⁴

411. In a resolution adopted in 1992, the UN Security Council called upon all parties to the conflict in the former Yugoslavia “to ensure that forcible expulsions of persons from the areas where they live and any attempt to change the ethnic composition of the population, anywhere in the former Socialist Federal Republic of Yugoslavia, cease immediately”.⁴¹⁵

412. In 1968, the UN General Assembly established a Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Palestinian People and Other Arabs of the Occupied Territories.⁴¹⁶ Following reports submitted by this Committee, the General Assembly adopted numerous resolutions expressing concern at the Israeli settlement activities in the occupied territories. For example, in a resolution adopted in 1981, the General Assembly strongly condemned the “establishment of new Israeli settlements and expansion of the existing settlements on private and public Arab lands, and transfer of an

⁴¹¹ UN Security Council, Res. 446, 22 March 1979, § 4; Res. 452, 20 July 1979, §§ 8–9; Res. 476, 30 June 1980, § 13.

⁴¹² UN Security Council, Res. 465, 1 March 1980, § 5.

⁴¹³ UN Security Council, Res. 674, 29 October 1990, preamble.

⁴¹⁴ UN Security Council, Res. 677, 28 November 1990, § 1.

⁴¹⁵ UN Security Council, Res. 752, 15 May 1992, § 6.

⁴¹⁶ UN General Assembly, Res. 2443 (XXIII), 19 December 1968, § 1.

alien population thereto".⁴¹⁷ This condemnation was reiterated in subsequent resolutions adopted in 1982, 1983, 1984 and 1985.⁴¹⁸

413. In a resolution adopted in 2000 on Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, and the occupied Syrian Golan, the UN General Assembly stated that it:

1. reaffirms that the Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, and the Occupied Syrian Golan are illegal and an obstacle to peace and economic and social development;
2. Calls upon Israel... to abide scrupulously by the provisions of the fourth Geneva Convention, in particular article 49;
3. Demands complete cessation of the construction of the new settlement at Jebel Abu-Ghneim and all Israeli settlement activities in the Occupied Palestinian Territory, including Jerusalem, and the Occupied Syrian Golan.⁴¹⁹

414. The UN Commission on Human Rights has adopted numerous resolutions expressing concern at the Israeli settlement activities in the occupied territories. For instance, in 2001, the Commission expressed:

its grave concern at the Israeli settlement activities in the occupied territories, including Jerusalem, such as the construction of new settlements and the expansion of existing ones, the expropriation of land, the biased administration of water resources, the construction of roads and house demolitions, all of which violate human rights and international humanitarian law, besides being major obstacles to peace.

It urged "the Government of Israel to implement the relevant United Nations resolutions as well as the recommendation of the Commission regarding the Israeli settlements".⁴²⁰

415. In his final report submitted to the UN Sub-Commission on Human Rights in 1997, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements stated that "the range of human rights violated by population transfer and the implantation of settlers place this phenomenon in the category of systematic or mass violations of human rights". He further stated that:

64. As affirmed in the Special Rapporteur's progress report, international law prohibits the transfer of persons, including the implantation of settlers, as a general principle, and the governing principle is that any displacement of populations must have the consent of the population involved. Accordingly, the criteria governing forcible transfer rest on the absence of consent and also include the use of force, coercive measures, and inducement to flee.

⁴¹⁷ UN General Assembly, Res. 36/147 C, 16 December 1981, § 7(b).

⁴¹⁸ UN General Assembly, Res. 37/88 C, 9 December 1982, § 7(c); Res. 38/79 D, 15 December 1983, § 7(c); Res. 39/95 D, 14 December 1984, § 7(d); Res. 40/161 D, 16 December 1985, § 8(d).

⁴¹⁹ UN General Assembly, Res. 54/78, 22 February 2000, §§ 1-3.

⁴²⁰ UN Commission on Human Rights, Res. 2001/7, 18 April 2001, § 6.

65. Acts such as ethnic cleansing, dispersal of minorities or ethnic populations from their homeland within or outside the State, and the implantation of settlers are unlawful, and engage State responsibility and the criminal responsibility of individuals.⁴²¹

The Special Rapporteur recommended that:

70. Consideration must be given by the Sub-Commission to the possibility of preparing an international instrument to set or codify international standards which are applicable to the situation of population transfer and the implantation of settlers. Such an instrument should: provide for an express reaffirmation of the unlawfulness of population transfer and the implantation of settlers; define State responsibility in the matter of unlawful population transfer, including the implantation of settlers; [and] provide for the criminal responsibility of individuals involved in population transfer, whether such individuals be private or officials of the State.⁴²²

The Special Rapporteur proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights which provided that:

Article 5

The settlement, by transfer or inducement, by the Occupying Power of parts of its own civilian population into the territory it occupies or by the Power exercising de facto control over a disputed territory is unlawful.

Article 6

Practices and policies having the purpose or effect of changing the demographic composition of the region in which a national, ethnic, linguistic, or other minority or an indigenous population is residing, whether by deportation, displacement, and/or the implantation of settlers, or a combination thereof, are unlawful.

...

Article 9

The above practices of population transfer constitute internationally wrongful acts giving rise to State responsibility and to individual criminal liability.⁴²³

Other International Organisations

416. In the Final Communiqué of its 12th Session in 1991, the GCC Supreme Council expressed “its deep concern and indignation at the fact that the Israeli

⁴²¹ UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, §§ 16, 64–65.

⁴²² UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, § 70.

⁴²³ UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Articles 5, 6 and 9.

occupation authorities are persisting in their policies aimed at establishing illegal settlements in the occupied Arab territories".⁴²⁴

417. In the Final Communiqué its 13th Session in 1992, the GCC Supreme Council reaffirmed its conviction that "the construction of settlements . . . represent a total contravention of all the Charters, Laws and Conventions of the International Community of Nations".⁴²⁵

418. In a resolution adopted in 1997 on the occupied Arab Syrian Golan Heights, the Council of the League of Arab States decided:

to adhere to resolutions of international legitimacy which prohibit the recognition or acceptance of any situation induced by any activities related to the establishment of Israeli settlements in the occupied Arab territories as an illegal measure that does not give any right or create any obligation, and to consider the establishment of settlements and the arrival of their settlers a violation of the Geneva Conventions and the Madrid framework, and an obstacle to the Peace Process which requires the end of all Israeli colonizing activities in the occupied Syrian Golan and Arab territories.⁴²⁶

International Conferences

419. The 24th International Conference of the Red Cross in 1981 adopted a resolution in which it reaffirmed that "the settlements in the occupied territories are incompatible with articles 27 and 49 of the Fourth Geneva Convention".⁴²⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

420. Count 3(J) (War Crimes) of the indictment in the *case of the Major War Criminals* before the IMT Nuremberg in 1945 provided, under the heading "Germanization of Occupied Territories", that:

In certain territories purportedly annexed to Germany the defendants methodically and pursuant to plan endeavored to assimilate those territories politically, culturally, socially and economically into the German Reich. The defendants endeavored to obliterate the former national character of these territories. In pursuance of these plans and endeavors, the defendants forcibly deported inhabitants who were predominantly non-German and introduced thousands of German colonists.

This plan included economic domination, physical conquest, installation of puppet Governments, purported *de jure* annexation and enforced conscription into the German Armed Forces.

This was carried out in most of the occupied countries including: Norway, France . . . Luxembourg, the Soviet Union, Denmark, Belgium, and Holland.

⁴²⁴ GCC, Supreme Council, 12th Session, Kuwait, 23–25 December 1991, Final Communiqué, annexed to Letter dated 30 December 1992 from Kuwait to the UN Secretary-General, UN Doc. A/46/833-S/23336, 30 December 1991, p. 5.

⁴²⁵ GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 6.

⁴²⁶ League of Arab States, Council, Res. 5633, 31 March 1997, § 6.

⁴²⁷ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. III, § 5.

...
 These acts violated Articles 43, 46, 55, and 56 of the Hague Regulations, 1907, the laws and customs of war, the general principles of criminal law as derived from criminal laws of all civilized nations, the internal penal laws of the countries in which such crimes were committed and Article 6(b) of the Charter [jurisdiction over war crimes].⁴²⁸

421. In its judgement in the *case of the Major War Criminals* in 1946, the IMT Nuremberg stated that:

Hitler discussed with Rosenberg, Göring, Keitel, and others his plan for the exploitation of the Soviet population and territory, which included among other things the evacuation of the inhabitants of the Crimea and its settlement by Germans.

A somewhat similar fate was planned for Czechoslovakia by the Defendant Von Neurath, in August 1940; the intelligentsia were to be “expelled”, but the rest of the population was to be Germanized rather than expelled or exterminated, since there was a shortage of Germans to replace them.

The Tribunal concluded that “the Leadership Corps [of the Nazi Party] was used for purposes which were criminal under the Charter and involved the Germanization of incorporated territory”. The Tribunal held the accused Rosenberg and Von Neurath responsible for their role in the policies of “Germanization”.⁴²⁹

422. In its report in 2001, the Sharm el-Sheikh Fact-Finding Committee stated, with respect to the Israeli settlements in occupied territories, that:

During the half-century of its existence, Israel has had the strong support of the United States. In international forums, the US has at times cast the only vote on Israel's behalf. Yet, even in such a close relationship there are some differences. Prominent among those differences is the US Government's long-standing opposition to the [Government of Israel's] policies and practices regarding settlements . . . [This] policy . . . has been, in essence, the policy of every American administration over the past quarter century.

Most other countries, including Turkey, Norway, and those of the European Union, have also been critical of Israeli settlement activity, in accordance with their views that such settlements are illegal under international law and not in compliance with previous agreements.⁴³⁰

V. Practice of the International Red Cross and Red Crescent Movement

423. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the occupying power may not deport or transfer part of its own civilian population into the territories it

⁴²⁸ IMT Nuremberg, *Case of the Major War Criminals*, Indictment, 20 November 1945, Count 3(J), pp. 63–65.

⁴²⁹ IMT Nuremberg, *Case of the Major War Criminals*, Judgement, 1 October 1946, pp. 238, 261, 295 and 335.

⁴³⁰ Sharm el-Sheikh Fact-Finding Committee created pursuant to the Sharm el-Sheikh summit of 16–17 October 2000, Report, 30 April 2001, pp. 15–16.

occupies" and that such a transfer would constitute a grave breach of the law of war.⁴³¹

424. In 1996, in a meeting with representatives of a State, the ICRC mentioned the prohibition contained in Article 49 GC IV. The representatives denied sending nationals to "these territories" and said they would "read the fourth Geneva Convention".⁴³²

425. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, emphasising the customary law nature of most grave breaches of AP I, listed "the transfer by an occupying power of part of its own population into the territory it occupies" as a war crime to be subject to the jurisdiction of the ICC.⁴³³

VI. Other Practice

426. In 2000, the Official Gazette of the Permanent Representation of the Republic of Nagorno-Karabakh in Armenia reported that following the memorandum between the governments of Armenia and the Republic of Nagorno-Karabakh, it was decided to increase the number of inhabitants in the Republic of Nagorno-Karabakh to 300,000.⁴³⁴

C. Treatment of Displaced Persons

Provision of basic necessities

I. Treaties and Other Instruments

Treaties

427. Article 49, third paragraph, GC IV provides that "the Occupying Power undertaking . . . transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health . . . and nutrition".

428. Article 17(1) AP II provides that "should . . . displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health . . . and nutrition". Article 17 AP II was adopted by consensus.⁴³⁵

⁴³¹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 831 and 776(g).

⁴³² ICRC archive document.

⁴³³ ICRC, Working paper submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, § 1(I).

⁴³⁴ Nagorno-Karabakh, Permanent Representation in Armenia, *Official Gazette*, No. 16, 27 September 2000.

⁴³⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 144.

Other Instruments

429. Paragraph III of Protocol III of the 1992 General Peace Agreement for Mozambique, the government of Mozambique and RENAMO were required to cooperate in order to organise the necessary assistance to displaced persons.

430. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “should . . . displacement [of the civilian population] have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health . . . and nutrition”.

431. Section A of the 1995 Agreement on Ground Rules for Operation Lifeline Sudan states that the fundamental objective of the cooperation is the provision of humanitarian assistance to populations in need throughout the territory of Sudan.

432. Principle 7(2) of the 1998 Guiding Principles on Internal Displacement provides that “the authorities undertaking . . . displacements shall ensure, to the greatest practicable extent, that proper accommodation is provided to the displaced persons [and] that . . . displacements are effected in satisfactory conditions of . . . nutrition, health and hygiene”. Principle 18 further stipulates that:

1. All internally displaced persons have the right to an adequate standard of living.
2. At the minimum, regardless of the circumstances, and without discrimination, competent authorities shall provide internally displaced persons with and ensure safe access to:
 - (a) essential food and potable water;
 - (b) basic shelter and housing;
 - (c) appropriate clothing; and
 - (d) essential medical services and sanitation.

433. Principle 25 of the 1998 Guiding Principles on Internal Displacement specifies that national authorities have the primary duty and responsibility to provide protection and humanitarian assistance to IDPs within their jurisdiction. IDPs, therefore, have a corresponding right to request and receive protection and humanitarian assistance from State authorities.

434. Paragraph 5 of the 1999 Agreement on the Protection and Provision of Humanitarian Assistance in Sudan provides that “where communities are to be relocated . . . [they] will be relocated to suitable sites with basic services and proper accommodation in place prior to relocation. Communities will only be relocated in a manner that preserves the right to life, dignity, liberty and security.”

435. In paragraph 70 of the 2000 Cairo Plan of Action, African and EU heads of State and government agreed “to continue to provide assistance to refugees and displaced persons”.

II. National Practice

Military Manuals

- 436.** Argentina's Law of War Manual (1969) reproduces Article 49 GC IV.⁴³⁶
- 437.** Argentina's Law of War Manual (1989) provides that, with respect to non-international armed conflicts, where civilians have been displaced for reasons of security or military necessity, "all possible measures are to be taken in order that [the displacement] is effected in satisfactory conditions".⁴³⁷
- 438.** Canada's LOAC Manual provides that, with respect to non-international armed conflicts, "if [civilians] do have to be displaced, arrangements must be made, if possible, for their shelter, hygiene, health . . . and nutrition".⁴³⁸
- 439.** Croatia's LOAC Compendium provides that civilian persons evacuated for security reasons shall receive "proper accommodation and proper conditions of health, hygiene . . . and nutrition".⁴³⁹
- 440.** The Military Manual of the Dominican Republic provides that:

Whenever the military situation necessitates moving or evacuating civilians, remember to use common sense. Treat civilian refugees as you would want your family to be treated under similar circumstances. Unless emergency conditions exist, as an unexpected attack, give them enough time to collect and move their goods and property.⁴⁴⁰

- 441.** Germany's Military Manual provides that "if an evacuation is necessary, the occupying power shall provide for sufficient accommodation and supply".⁴⁴¹
- 442.** Hungary's Military Manual provides that civilian persons evacuated for security reasons shall receive "proper accommodation and proper conditions of health, hygiene . . . and nutrition".⁴⁴²
- 443.** New Zealand's Military Manual provides that, with respect to non-international armed conflicts, "if [civilians] do have to be displaced, arrangements must be made, if possible, for their shelter, hygiene, health . . . and nutrition".⁴⁴³
- 444.** Spain's LOAC Manual reproduces Article 49 GC IV.⁴⁴⁴
- 445.** Switzerland's Basic Military Manual provides that the parties "shall ensure that proper accommodation is provided to receive the transferred persons and that displacements are effected in satisfactory conditions of hygiene, health . . . and nutrition".⁴⁴⁵

⁴³⁶ Argentina, *Law of War Manual* (1969), § 5.008.

⁴³⁷ Argentina, *Law of War Manual* (1989), § 7.08.

⁴³⁸ Canada, *LOAC Manual* (1999), p. 17-5, § 41.

⁴³⁹ Croatia, *LOAC Compendium* (1991), p. 62.

⁴⁴⁰ Dominican Republic, *Military Manual* (1980), p. 10.

⁴⁴¹ Germany, *Military Manual* (1992), § 545.

⁴⁴² Hungary, *Military Manual* (1992), p. 98.

⁴⁴³ New Zealand, *Military Manual* (1992), § 1823.

⁴⁴⁴ Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).

⁴⁴⁵ Switzerland, *Basic Military Manual* (1987), Article 176(2).

446. The UK Military Manual provides that “to the greatest practicable extent, removals of civil inhabitants must take place under satisfactory conditions of hygiene, health . . . and nutrition . . . and the transferred or evacuated protected persons must be provided with proper accommodation”.⁴⁴⁶

447. The US Field Manual reproduces Article 49 GC IV.⁴⁴⁷

National Legislation

448. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁴⁴⁸

449. Colombia’s Law on Internally Displaced Persons provides that once the displacement has occurred, the government shall take immediate action to guarantee emergency humanitarian aid with the aim of rescuing, assisting and protecting the displaced population and providing for its nutritional needs, personal hygiene, kitchen tools, medical and psychological care, emergency transport and temporary accommodation in humane conditions.⁴⁴⁹

450. Croatia’s Law on Displaced Persons and Directive on Displaced Persons provide that Croatia should ensure that displaced persons have the necessary accommodation, food, medical and financial assistance and assistance in social integration, as well as any other assistance necessary to satisfy their basic needs.⁴⁵⁰

451. Georgia’s Law on Displaced Persons provides a certain number of legal, economic and social guarantees for persons forced to leave their homes and displaced following threats to their lives, health or freedom on account of an aggression by another country, an internal conflict or massive violations of human rights. These guarantees include the right to free medical assistance and free provision of medicines.⁴⁵¹

452. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Article 49 GC IV, as well as any “contravention” of AP II, including violations of Article 17(1) AP II, are punishable offences.⁴⁵²

453. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.⁴⁵³

⁴⁴⁶ UK, *Military Manual* (1958), § 560. ⁴⁴⁷ US, *Field Manual* (1956), § 382.

⁴⁴⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴⁴⁹ Colombia, *Law on Internally Displaced Persons* (1997), Article 15.

⁴⁵⁰ Croatia, *Law on Displaced Persons* (1993), Article 2; *Directive on Displaced Persons* (1991), Articles 2 and 13.

⁴⁵¹ Georgia, *Law on Displaced Persons* (1996), Article 5.

⁴⁵² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁵³ Norway, *Military Penal Code as amended* (1902), § 108.

National Case-law

454. In 1996, in a case concerning the constitutionality of a decree which had ordered measures for the protection of the civilian population in military operations (Decree 2027 of 21 November 1995), Colombia's Constitutional Court held that displaced persons had the right to receive humanitarian assistance and to be accorded protection by the State.⁴⁵⁴

455. In the *Krupp case* in 1948, the US Military Tribunal at Nuremberg adopted the statement by Judge Phillips in his concurring opinion of 1947 in the *Milch case* according to which:

The third . . . condition under which deportation becomes illegal occurs whenever generally recognized standards of decency and humanity are disregarded. This flows from the established principle of law that an otherwise permissible act becomes a crime when carried out in a criminal manner. A close study of the pertinent parts of Control Council Law No. 10 strengthens the conclusions of the foregoing statements that deportation is criminal whenever there is no title in the deporting authority or whenever the purpose of the deportation is illegal or whenever the deportation is characterized by inhumane or illegal methods.⁴⁵⁵

Other National Practice

456. In 1992, the Presidency of the Republika Srpska of Bosnia and Herzegovina made an urgent appeal "to give . . . all possible aid to displaced persons".⁴⁵⁶

457. According to the Report on the Practice of Colombia, displaced persons have the right to receive humanitarian assistance, and the State's duty to protect the displaced population is permanent and cannot be renounced in normal times or in states of exception, in accordance with Article 17 AP II.⁴⁵⁷

458. In a set of guidelines for soldiers issued in 1996, the Chief of Staff of the Lebanese Army stated that it was the role of the army to protect displaced persons and to ensure that they were fed, housed and provided with medical care.⁴⁵⁸

459. In 1996, during a debate in the UN Commission on Human Rights, Mexico stated that internally displaced persons "must always be provided with the basic necessities". It also stated that "the primary responsibility for dealing with the problem [of displaced persons] rested . . . with the State concerned, and that the international community should simply assist and intervene only in cases of massive and systematic violations of human rights".⁴⁵⁹

⁴⁵⁴ Colombia, Constitutional Court, *Constitutional Case No. C-092*, Judgement, 7 March 1996.

⁴⁵⁵ US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 30 June 1948, adopting the concurring opinion by Judge Phillips in the *Milch case*, Judgement, 17 April 1947.

⁴⁵⁶ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

⁴⁵⁷ Report on the Practice of Colombia, 1998, Chapter 5.5.

⁴⁵⁸ Lebanon, Chief of Staff of the Lebanese Army, Note d'orientation pour les militaires, *Al Anwar*, 26 February 1996.

⁴⁵⁹ Mexico, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.39, 15 April 1996, § 21.

460. In May 1994, during a debate on Rwanda in the UN Security Council, Oman stated that the most urgent measure in response to mass displacement was to immediately extend humanitarian assistance to IDPs.⁴⁶⁰

461. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provide that “the government shall provide free transportation facilities to the evacuees during evacuation” and that “medicine and relief goods, whether coming from the government or non-government organisations, shall be given to the evacuees without delay”.⁴⁶¹

462. According to the Report on the Practice of Russia, “unfortunately, the party to a conflict that causes the displacement of persons [through its methods of warfare] does not bear any responsibility [for their care]. The material burden of providing assistance to these persons thus rests on the other party.”⁴⁶²

463. In 1991, during a debate in the UN Security Council on the repression of the Iraqi civilian population, including Kurds in Iraq, the US stated that its air force would drop food, blankets, clothing, tents and other relief-related items into northern Iraq. The US military would continue to help IDPs in southern Iraq and were willing to send a military medical unit to the border area to assist. The US expressed profound concern about the plight of displaced persons and noted that it had contributed generously to the care and maintenance of the displaced.⁴⁶³

III. Practice of International Organisations and Conferences

United Nations

464. In a resolution adopted in 1974 on emergency UN humanitarian assistance to Cyprus, the UN Security Council expressed grave concern at the plight of IDPs and urged parties to take appropriate measures to provide for their relief and welfare.⁴⁶⁴

465. In a resolution adopted in 1991 on repression of the Iraqi civilian population, including Kurds in Iraq, the UN Security Council requested that the UN Secretary-General “use all the resources at his disposal . . . to address urgently the critical needs of refugees and displaced Iraqi population”.⁴⁶⁵

466. In a resolution adopted in 1992 on political conditions in Bosnia and Herzegovina, the UN Security Council emphasised “the urgent need for humanitarian assistance, material and financial . . . [for] displaced persons”.⁴⁶⁶

⁴⁶⁰ Oman, Statement before the UN Security Council, UN Doc. S/PV.3377, 16 May 1994, p. 7.

⁴⁶¹ Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, §§ 3 and 6.

⁴⁶² Report on the Practice of Russia, 1997, Chapter 5.5.

⁴⁶³ US, Statement before the UN Security Council, UN Doc. S/PV.2982, 5 April 1991, pp. 58–60.

⁴⁶⁴ UN Security Council, Res. 361, 30 August 1974, § 4.

⁴⁶⁵ UN Security Council, Res. 688, 5 April 1991, § 5.

⁴⁶⁶ UN Security Council, Res. 752, 15 May 1992, § 7.

467. In a resolution on Bosnia and Herzegovina adopted in 1995, the UN Security Council expressed grave concern “at the very serious situation which confronts... a great number of displaced persons within the safe area at Potocari, especially the lack of essential food supplies and medical care”.⁴⁶⁷

468. In three separate resolutions adopted in 1995 in the context of the conflict in the former Yugoslavia, the UN Security Council condemned the failure of the Bosnian Serb party to comply with its commitments in respect of giving humanitarian agencies access to displaced persons.⁴⁶⁸

469. In a resolution adopted in 1996, the UN Security Council underlined the responsibility of the authorities in Burundi for the security of refugees and displaced persons in Burundi.⁴⁶⁹

470. In a resolution adopted in 1996 concerning the Great Lakes region, the UN Security Council requested:

the Secretary-General, in consultation with his Special Envoy and the coordinator of humanitarian affairs, with the United Nations High Commissioner for Refugees, with the OAU, with the Special Envoy of the European Union and with the States concerned:

- (a) to draw up a concept of operations... with the objectives of:
 - Delivering short-term humanitarian assistance... to refugees and displaced persons in eastern Zaire;
 - Assisting United Nations High Commissioner for Refugees with the protection...
 - Establishing humanitarian corridors for the delivery of humanitarian assistance.⁴⁷⁰

471. In a resolution adopted in 1997 concerning eastern Zaire, the UN Security Council endorsed a plan for the “facilitation of access for humanitarian assistance” to refugees and displaced persons.⁴⁷¹

472. In 1997, in a statement by its President concerning the DRC, the UN Security Council called for the facilitation of access to humanitarian assistance and for the rights of refugees and displaced persons to be fully respected.⁴⁷²

473. In 1994, the UNHCR Executive Committee emphasised that since IDPs remained within the territorial jurisdiction of their own countries, the primary responsibility for their welfare and protection lay with the State concerned.⁴⁷³

⁴⁶⁷ UN Security Council, Res. 1004, 12 July 1995, preamble.

⁴⁶⁸ UN Security Council, Res. 1010, 10 August 1995, preamble and § 1; Res. 1019, 9 November 1995, preamble and § 2; Res. 1034, 21 December 1995, preamble and §§ 4–5.

⁴⁶⁹ UN Security Council, Res. 1040, 29 January 1996, preamble.

⁴⁷⁰ UN Security Council, Res. 1078, 9 November 1996, § 10.

⁴⁷¹ UN Security Council, Res. 1097, 18 February 1997, § 1.

⁴⁷² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.

⁴⁷³ UNHCR, Executive Committee, Conclusion No. 75 (XLV): Internally Displaced Persons, 20 October 1994, § d.

474. In 1994, in a report on Rwanda, the UN Secretary-General stated that the immediate priorities with regard to the displaced population were to relieve suffering through the provision of adequate humanitarian assistance.⁴⁷⁴

475. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General noted that the Croatian government was caring for a large number of IDPs and that the government had stated that it was spending 17 million dollars per month on displaced persons.⁴⁷⁵

476. In 1997, in a report on Sierra Leone, the UN Secretary-General noted that the government of Sierra Leone and the RUF had made efforts to defuse tensions in certain areas by seeking ways to provide food to displaced persons.⁴⁷⁶

477. In 1997, in a report on his mission to Mozambique, the Representative of the UN Secretary-General on Internally Displaced Persons noted that "in the absence of health centres, an extended health-care network was set up in the form of 'flying brigades', which would provide medicines and carry out vaccination campaigns". He also reported that "in collaboration with programme partners, IOM provided the internally displaced persons with food, seeds, tools, medical assistance and transport of household belongings".⁴⁷⁷

478. In 1996, in a special report on minorities in the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported that "the Montenegrin authorities have . . . recognized the villagers in Plejvlja as displaced persons and distributed assistance covering their basic needs".⁴⁷⁸

Other International Organisations

479. In a resolution adopted in 1985 in response to mass transfers of the population in Ethiopia, the European Parliament invited the European Commission, the Council and member States to ask Ethiopia to put a stop to forced displacement for a minimum of six months. The resolution stated that the suspension of the displacement of the civilian population during this period was necessary in order for the Ethiopian government to assess, under international supervision, the necessity of the transfers, and to establish minimum humanitarian conditions for their conduct should they have proved necessary.⁴⁷⁹

⁴⁷⁴ UN Secretary-General, Report on the situation in Rwanda, UN Doc. S/1994/640, 31 May 1994, § 40.

⁴⁷⁵ UN Secretary-General, Further report on the situation of human rights in Croatia, UN Doc. S/1996/456, 21 June 1996, p. 9.

⁴⁷⁶ UN Secretary-General, Report on Sierra Leone, UN Doc. S/1997/80, 26 January 1997, § 20.

⁴⁷⁷ Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative's visit to Mozambique from 24 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, §§ 48–49 and 67.

⁴⁷⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Special report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, §§ 81–83.

⁴⁷⁹ European Parliament, Resolution on mass transfers of populations in Ethiopia and the expulsion of Médecins sans frontières, 13 December 1985, § 1.

International Conferences

480. The 24th International Conference of the Red Cross in 1981 adopted a Statement of Policy on International Red Cross Aid to Refugees, which provided that:

1. The Red Cross should at all times be ready to assist and protect refugees, displaced persons and returnees, when such victims are considered as protected persons under the Fourth Geneva Convention of 1949, or when they are considered as refugees under Article 73 of the 1977 Protocol I additional to the Geneva Conventions of 1949, or in conformity with the Statutes of the International Red Cross, especially when they cannot, in fact, benefit from any other protection or assistance, as in some cases of internally displaced persons.
- ...
8. As a neutral and independent humanitarian institution, the ICRC offers its services whenever refugees and displaced persons are in need of the specific protection which the ICRC may afford them.⁴⁸⁰

481. The 25th International Conference of the Red Cross in 1986 adopted a resolution on the Movement and refugees in which it urged National Societies to “spare no effort to ensure that refugees and asylum-seekers receive humane treatment and decent material conditions in host countries”.⁴⁸¹

482. The Comprehensive Plan of Action adopted by consensus at the International Conference on Indo-Chinese Refugees in 1989 provided that persons determined not to be refugees should be provided with care and assistance pending their repatriation.⁴⁸²

483. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on principles and action in international humanitarian assistance and protection in which it called upon States “to provide humanitarian assistance to internally displaced persons and to assist States having accepted refugees”.⁴⁸³

484. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that “if displacement occurs, ... appropriate assistance is provided” to displaced persons.⁴⁸⁴

⁴⁸⁰ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XXI, Annex, Statement of Policy on International Red Cross Aid to Refugees, §§ 1 and 8.

⁴⁸¹ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XVII, § 4.

⁴⁸² International Conference on Indo-Chinese Refugees, Geneva, 13–14 June 1989, Comprehensive Plan of Action, UN Doc. A/CONF.148/2, 26 April 1989, §§ 12, 14 and 15.

⁴⁸³ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. IV, § A(1)(c).

⁴⁸⁴ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(c).

IV. Practice of International Judicial and Quasi-judicial Bodies

485. In *Akdivar and Others v. Turkey* before the ECtHR in 1996, the Turkish government stated that under Turkish emergency legislation, persons who have had to leave their place of residence may be rehoused inside or outside the region covered by the state of emergency. It also stated that special funds were provided to assist those who needed to leave their homes.⁴⁸⁵

V. Practice of the International Red Cross and Red Crescent Movement

486. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the Occupying Power undertaking evacuation shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the evacuated persons, that the removals are effected in satisfactory conditions of hygiene, health . . . and nutrition”.⁴⁸⁶

487. In 1985, the ICRC refused to provide the government of a State with assistance in relation to meeting the needs of persons who had been forcibly displaced to areas where no infrastructure existed to support them.⁴⁸⁷

488. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the International Red Cross and Red Crescent Movement and refugees in which it requested the components of the Movement:

b) to pursue their efforts in disseminating international humanitarian law, human rights law, of which refugee law is part, and the Fundamental Principles of the Movement in order to enhance protection and humane treatment of refugees, asylum-seekers, displaced persons and returnees.

...

h) to actively seek the support of governments with a view:

...

iii) to ensure that, in all circumstances, refugees, asylum-seekers and displaced persons receive . . . decent material conditions.⁴⁸⁸

489. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on the protection of the civilian population against famine in situations of armed conflict in which it reminded the authorities concerned and the armed forces under their command of their obligation to apply IHL, in particular the rule that “should such displacements have to be carried out, the stipulation that all possible measures be taken to ensure that the civilians are

⁴⁸⁵ ECtHR, *Akdivar and Others v. Turkey*, Government Memorial, 11 April 1996, §§ 43 and 58.

⁴⁸⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 836.

⁴⁸⁷ ICRC archive document.

⁴⁸⁸ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 9, §§ b and h(iii).

received under satisfactory conditions of shelter, hygiene, health, safety and nutrition".⁴⁸⁹

VI. *Other Practice*

490. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that "should . . . displacements have to be carried out, all possible measures shall be taken in order that the population may be transferred and received under satisfactory conditions of shelter, hygiene, health . . . and nutrition".⁴⁹⁰

491. In a resolution adopted in 1991, the Politico-Military High Command of the SPLM/A stated that "the SPLM/SPLA considers relief assistance to innocent civilians caught up in the war situation and natural disasters as a human right, and the Movement shall facilitate passage of relief assistance to the areas of need in both SPLM/SPLA and Government administered areas".⁴⁹¹

Security of displaced persons

I. *Treaties and Other Instruments*

Treaties

492. Article 49, third paragraph, GC IV provides that "the Occupying Power undertaking . . . transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of . . . safety".

493. Article 17(1) AP II provides that "should . . . displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of . . . safety". Article 17 AP II was adopted by consensus.⁴⁹²

Other Instruments

494. Paragraph 3 of the 1992 Recommendation on the Tragic Situation of Civilians in Bosnia and Herzegovina provides that the security of the civilians who leave temporarily a territory shall be guaranteed by each party on the territory it controls.

⁴⁸⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 13, § 1.

⁴⁹⁰ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 7(1), *IRRC*, No. 282, p. 333.

⁴⁹¹ SPLM/A, PMHC Resolution No. 10: Relief Assistance, 9 September 1991, § 10.1, Report on SPLM/A Practice, 1998, Chapter 5.5.

⁴⁹² CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 144.

II. National Practice

Military Manuals

- 495.** Argentina's Law of War Manual reproduces Article 49 GC IV.⁴⁹³
- 496.** Canada's LOAC Manual provides that, with respect to non-international armed conflicts, "if [civilians] do have to be displaced, arrangements must be made, if possible, for their . . . safety".⁴⁹⁴
- 497.** Croatia's LOAC Compendium provides that civilian persons evacuated for security reasons shall receive "proper conditions of . . . safety".⁴⁹⁵
- 498.** The Military Manual of the Dominican Republic states that when civilians are moved or resettled, soldiers "should take action to ensure their safety".⁴⁹⁶
- 499.** Hungary's Military Manual provides that civilian persons evacuated for security reasons shall receive "proper conditions of . . . safety".⁴⁹⁷
- 500.** New Zealand's Military Manual provides that, with respect to non-international armed conflicts, "if [civilians] do have to be displaced, arrangements must be made, if possible, for their . . . safety".⁴⁹⁸
- 501.** Spain's LOAC Manual reproduces Article 49 GC IV.⁴⁹⁹
- 502.** Switzerland's Basic Military Manual provides that "displacements are effected in satisfactory conditions of . . . safety".⁵⁰⁰
- 503.** The UK Military Manual provides that "to the greatest practicable extent, removals of civil inhabitants must take place under satisfactory conditions of . . . safety".⁵⁰¹
- 504.** The US Field Manual reproduces Article 49 GC IV.⁵⁰²
- 505.** The US Soldier's Manual provides that, when civilians are moved or resettled, soldiers "should take action to ensure their safety".⁵⁰³

National Legislation

- 506.** Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵⁰⁴
- 507.** Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 49 GC IV,

⁴⁹³ Argentina, *Law of War Manual* (1969), § 5.008.

⁴⁹⁴ Canada, *LOAC Manual* (1999), p. 17-5, § 41.

⁴⁹⁵ Croatia, *LOAC Compendium* (1991), p. 62.

⁴⁹⁶ Dominican Republic, *Military Manual* (1980), p. 10.

⁴⁹⁷ Hungary, *Military Manual* (1992), p. 98.

⁴⁹⁸ New Zealand, *Military Manual* (1992), § 1823.

⁴⁹⁹ Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).

⁵⁰⁰ Switzerland, *Basic Military Manual* (1987), Article 176(2).

⁵⁰¹ UK, *Military Manual* (1958), § 560. ⁵⁰² US, *Field Manual* (1956), § 382.

⁵⁰³ US, *Soldier's Manual* (1984), p. 22.

⁵⁰⁴ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

as well as any “contravention” of AP II, including violations of Article 17 AP II, are punishable offences.⁵⁰⁵

508. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions...is liable to imprisonment”.⁵⁰⁶

National Case-law

509. No practice was found.

Other National Practice

510. In 1992, the Presidency of the Republika Srpska of Bosnia Herzegovina made an urgent appeal “to give protection...to displaced persons”.⁵⁰⁷

511. In 1994, during a debate in the UN Security Council on Rwanda, Brazil emphasised that part of the UNAMIR mandate was “to contribute to provid[e] security and protection for displaced persons, refugees and civilians at risk”.⁵⁰⁸

512. The Report on the Practice of France notes that France has stated that it would arrest and punish those responsible for attempts on the security of displaced persons in both international and non-international conflicts.⁵⁰⁹

513. The Report on the Practice of India notes that, in the context of the conflict in Jammu and Kashmir, the government of India has taken a number of steps to protect persons displaced by the conflict. Policy directives have reiterated that where persons are displaced, appropriate care should be taken to protect them.⁵¹⁰

514. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provides that “acts or threats of violence and various forms of inhuman treatment committed by the government forces, including para-military groups and other agents of authority, for the purpose of spreading terror among the evacuees are prohibited (Protocol II, Art. 13)”.⁵¹¹

515. In 1994, during a debate in the UN Security Council, Russia stated that a central element of the peacekeeping operation in Rwanda had to be the establishment of secure humanitarian areas for the protection of IDPs.⁵¹²

⁵⁰⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁰⁶ Norway, *Military Penal Code as amended* (1902), § 108.

⁵⁰⁷ Bosnia and Herzegovina, Republika Srpska, Appeal of the Presidency concerning the International Committee of the Red Cross Operations, Pale, 7 June 1992.

⁵⁰⁸ Brazil, Statement before the UN Security Council, UN Doc. S/PV.3388, 1 January 1994, pp. 4–8.

⁵⁰⁹ Report on the Practice of France, 1999, Chapter 5.5.

⁵¹⁰ Report on the Practice of India, 1997, Chapter 5.4 and 5.5.

⁵¹¹ Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 4.

⁵¹² Russia, Statement before the UN Security Council, UN Doc. S/PV.3377, 16 May 1994, p. 10.

516. A declaration by the government of Rwanda in February 1993 on the restoration of the cease-fire specified that "those displaced by the war will be installed in the demilitarized neutral zone and will receive the protection of the international force for maintaining the cease-fire".⁵¹³

517. In 1991, the UK put forward the idea of creating safe areas for displaced persons in Iraq, especially Kurds, in the aftermath of the Gulf War. The UK assisted in the establishment of these safe areas and supplied troops in order to ensure the security of the sites.⁵¹⁴

III. Practice of International Organisations and Conferences

United Nations

518. In a resolution adopted in 1994, the UN Security Council decided to expand UNAMIR's mandate "to contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance . . . of secure humanitarian areas".⁵¹⁵

519. In a resolution adopted in 1994, the UN Security Council reaffirmed that UNAMIR would "contribute to the security and protection of displaced persons, refugees and civilians at risk in Rwanda, including through the establishment and maintenance . . . of secure humanitarian areas".⁵¹⁶

520. In a resolution on Burundi adopted in 1996, the UN Security Council underlined "the responsibility of the authorities in Burundi for the security . . . of displaced persons".⁵¹⁷

521. In a resolution adopted in 1997 concerning eastern Zaire, the UN Security Council endorsed a protection plan to ensure the security of all refugees and displaced persons.⁵¹⁸

522. In 1993, in a statement by its President concerning the conflict in Liberia, the UN Security Council strongly condemned the "massacre of innocent displaced persons" and urged all parties to the conflict "to respect the rights of the civilian population and take all necessary measures to secure their safety".⁵¹⁹

523. In 1995, in a statement by its President, the UN Security Council stressed that the Rwandan government bore the primary responsibility for the security and safety of IDPs.⁵²⁰

⁵¹³ Rwanda, Declaration by the government on the restoration of the cease-fire, annexed to Letter dated 4 March 1993 to the President of the UN Security Council, UN Doc. S/25363, 4 March 1993, Annex III, p. 8, § 5.

⁵¹⁴ UK, Statement by the Prime Minister: A Safe Haven for the Kurds, FCO Press Office, 8 April 1991, p. 714.

⁵¹⁵ UN Security Council, Res. 918, 17 May 1994, § 3.

⁵¹⁶ UN Security Council, Res. 925, 8 June 1994, § 4.

⁵¹⁷ UN Security Council, Res. 1040, 29 January 1996, preamble.

⁵¹⁸ UN Security Council, Res. 1097, 18 February 1997, § 1.

⁵¹⁹ UN Security Council, Statement by the President, UN Doc. S/25918, 9 June 1993, §§ 2-3.

⁵²⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/22, 27 April 1995, pp. 1-2.

524. In January 1996, in a statement by its President on Burundi, the UN Security Council expressed grave concern at “attacks on personnel of international humanitarian organizations, which have led to the suspension of essential assistance to refugees and displaced persons” and stressed that “the authorities in Burundi are responsible for the security” of both.⁵²¹

525. In 1996 and 1997, in several statements by its President on the Great Lakes region/Zaire, the UN Security Council called on all parties to guarantee the safety of refugees and displaced persons.⁵²²

526. In 1997, in a statement by its President on the DRC, the UN Security Council called for attention to be paid to the protection and security needs of all refugees and displaced persons.⁵²³

527. In a resolution adopted in 1993 concerning refugees and displaced persons, the UN General Assembly expressed deep concern regarding serious threats to the security or well-being of refugees, including incidents of refoulement, unlawful expulsion, physical attacks and detention under unacceptable conditions. It called upon States to take all measures necessary to ensure respect for the principles of refugee protection.⁵²⁴

528. In a resolution adopted in 1994 on the situation of human rights in the Sudan, the UN General Assembly expressed alarm at the repeated instances of violence against displaced persons and other civilians.⁵²⁵

529. In a resolution adopted in 1995 on the situation of human rights in the Sudan, the UN Commission on Human Rights expressed alarm at the repeated instances of violence against displaced persons and other civilians.⁵²⁶

530. In a resolution adopted in 1995 on the situation of human rights in Rwanda, the UN Commission on Human Rights condemned “all attacks against persons in the refugee camps near the borders of Rwanda” and called upon States “to take appropriate steps to prevent such attacks”.⁵²⁷

531. In 1993, in its Conclusion on Personal Security of Refugees, the Executive Committee of UNHCR deplored “all violations of the right to personal security of refugees”, urged States “to take all measures necessary to prevent or remove threats to personal security of refugees” and called upon States “to provide effective physical protection to . . . refugees”.⁵²⁸

⁵²¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/1, 5 January 1996, pp. 1–2.

⁵²² UN Security Council, Statement by the President, UN Doc. S/PRST/1996/44, 1 November 1996; Statement by the President, UN Doc. S/PRST/1997/5, 7 February 1997, p. 1; Statement by the President, UN Doc. S/PRST/1997/11, 7 March 1997, p. 1.

⁵²³ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.

⁵²⁴ UN General Assembly, Res. 48/116, 20 December 1993, § 5.

⁵²⁵ UN General Assembly, Res. 49/198, 23 December 1994, preamble and § 10.

⁵²⁶ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, preamble.

⁵²⁷ UN Commission on Human Rights, Res. 1995/91, 8 March 1995, § 12.

⁵²⁸ UNHCR, Executive Committee, Conclusion No. 72 (XLIV): Personal Security of Refugees, 8 October 1993, § 20(a)–(d).

532. In May 1994, in a report on the situation in Rwanda, the UN Secretary-General stated that "it is very urgent that... 'secure humanitarian areas' be established where the estimated 2 million... unfortunate displaced persons can be provided both security and assistance".⁵²⁹

533. In 1996, in a report on extra-judicial, arbitrary or summary executions, the Special Rapporteur of the UN Commission on Human Rights recommended that the authorities in Burundi establish a national police force, stating that "one of the priority tasks of the national police force would be to ensure the security and the protection of people in... refugee camps".⁵³⁰

534. In 1996, the Special Rapporteur of the UN Commission on Human Rights on Extra-judicial, Summary or Arbitrary Executions intervened on behalf of displaced persons on several occasions, including one case in which a group of internally displaced persons was "to be transported... [to] an area of active armed conflict in Tajikistan, where their lives could have been at risk, especially because of the presence of landmines".⁵³¹

Other International Organisations

535. No practice was found.

International Conferences

536. The 25th International Conference of the Red Cross in 1986 adopted a resolution on the Movement and refugees in which it called on governments "to continue their efforts to find in the near future a solution to the problem of military or armed attacks on refugee camps and settlements".⁵³²

537. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that "in the conduct of hostilities, every effort is made to spare the life, protect and respect the civilian population, with particular protective measures for... groups with special vulnerabilities such as... displaced persons".⁵³³

IV. Practice of International Judicial and Quasi-judicial Bodies

538. No practice was found.

⁵²⁹ UN Secretary-General, Report on the situation in Rwanda, UN Doc. S/1994/640, 31 May 1994, § 16.

⁵³⁰ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report on the Special Rapporteur's mission to Burundi, 19–29 April 1995, UN Doc. E/CN.4/1996/4/Add.1, 24 July 1995, § 93.

⁵³¹ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1997/60, 24 December 1996, § 61.

⁵³² 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XVII, § 7.

⁵³³ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1[a].

V. Practice of the International Red Cross and Red Crescent Movement

539. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the occupying power undertaking evacuation shall ensure, to the greatest practicable extent, . . . that the removal is effected in satisfactory conditions of . . . safety”.⁵³⁴

VI. Other Practice

540. No practice was found.

Respect for family unity

Note: *For practice concerning family rights, see Chapter 32, section Q.*

*I. Treaties and Other Instruments**Treaties*

541. Article 49, third paragraph, GC IV provides that “the Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, . . . that members of the same family are not separated”.

542. Article 9 of the 1989 Convention on the Rights of the Child provides that:

1. States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.
2. In any proceedings pursuant to paragraph 1 of the present article, all interested parties shall be given an opportunity to participate in the proceedings and make their views known.
3. States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.
4. Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents or of the child, that State Party shall, upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned.

⁵³⁴ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 836.

543. Article 22 of the 1989 Convention on the Rights of the Child requires States parties “to protect and assist . . . [refugee children] and to trace the parents or other members of the family of any refugee children in order to obtain information necessary for reunification with his or her family”.

544. In the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that:

In accordance with the fundamental principle of preserving family unity, where it is not possible for families to repatriate as units, a mechanism shall be established for their reunification in Abkhazia. Measures shall also be taken for the identification and extra care/assistance for unaccompanied minors and other vulnerable persons during the repatriation process.

545. According to Article 1 of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, “the principle of the unity of the family shall be preserved”.

Other Instruments

546. Principle 17(3) of the 1998 Guiding Principles on Internal Displacement provides that:

Families which are separated by displacement should be reunited as quickly as possible. All appropriate steps shall be taken to expedite the reunion of such families, particularly when children are involved. The responsible authorities shall facilitate inquiries made by family members and encourage and cooperate with the work of humanitarian organizations engaged in the task of family reunification.

II. National Practice

Military Manuals

547. Argentina’s Law of War Manual (1969) reproduces Article 49 GC IV.⁵³⁵

548. Argentina’s Law of War Manual (1989) provides that “when there is an evacuation, measures shall be taken to facilitate the return of children to their families”.⁵³⁶

549. Canada’s LOAC Manual provides, with respect to non-international armed conflicts in particular, that “children are to receive such aid and protection as required including: . . . b. steps to reunite them with their families”.⁵³⁷

550. Colombia’s Basic Military Manual provides that in order to guarantee the rights of the civilian population, soldiers shall “facilitate the reuniting of families that have been dispersed by the conflict and permit the exchange of information”.⁵³⁸ It further states that it is a duty of the parties to “permit the

⁵³⁵ Argentina, *Law of War Manual* (1969), § 5.008.

⁵³⁶ Argentina, *Law of War Manual* (1989), § 4.12.

⁵³⁷ Canada, *LOAC Manual* (1999), p. 17-3, § 22.

⁵³⁸ Colombia, *Basic Military Manual* (1995), p. 22.

exchange of information within families".⁵³⁹ The manual specifies, regarding respect for the civilian population, that it is a duty "to facilitate the contact and reuniting of families".⁵⁴⁰ In addition, the manual provides that, when the conflict is over, parties shall "strengthen mechanisms dedicated to reuniting dispersed families".⁵⁴¹

551. Croatia's LOAC Compendium provides that in case of an evacuation of civilian persons, there shall be "no forced separation of families".⁵⁴²

552. Germany's Military Manual provides that in case of an evacuation, "members of the same family shall not be separated".⁵⁴³

553. Hungary's Military Manual provides that in case of an evacuation of civilian persons, there shall be "no forced separation of families".⁵⁴⁴

554. Spain's LOAC Manual reproduces Article 49 GC IV.⁵⁴⁵

555. Switzerland's Basic Military Manual provides that "displacements are effected in satisfactory conditions . . . and the members of the same family are not separated".⁵⁴⁶

556. The UK Military Manual provides that in case of transfer or evacuation, "members of the same family must not be separated".⁵⁴⁷

557. The US Field Manual reproduces Article 49 GC IV.⁵⁴⁸

National Legislation

558. Angola's Rules on the Resettlement of Internally Displaced Populations provides that:

It is the responsibility of the Provincial Governments, through the Sub-Groups on Displaced Persons and Refugees of the Provincial Humanitarian Coordination Groups, to carry out the following:

- ...
h) To take appropriate measures to ensure family reunification.⁵⁴⁹

559. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵⁵⁰

560. According to Colombia's Law on Internally Displaced Persons, the family of forcibly displaced persons must benefit from the right to family reunification.⁵⁵¹

⁵³⁹ Colombia, *Basic Military Manual* (1995), p. 28.

⁵⁴⁰ Colombia, *Basic Military Manual* (1995), p. 29.

⁵⁴¹ Colombia, *Basic Military Manual* (1995), p. 31.

⁵⁴² Croatia, *LOAC Compendium* (1991), p. 62.

⁵⁴³ Germany, *Military Manual* (1992), § 545. ⁵⁴⁴ Hungary, *Military Manual* (1992), p. 98.

⁵⁴⁵ Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).

⁵⁴⁶ Switzerland, *Basic Military Manual* (1987), Article 176(2).

⁵⁴⁷ UK, *Military Manual* (1958), § 560. ⁵⁴⁸ US, *Field Manual* (1956), § 382.

⁵⁴⁹ Angola, *Rules on the Resettlement of Internally Displaced Populations* (2001), Article 2[h].

⁵⁵⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)[e].

⁵⁵¹ Colombia, *Law on Internally Displaced Persons* (1997), Article 2[4].

561. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 49 GC IV, as well as any "contravention" of AP II, including violations of Article 4(3)(b) AP II, are punishable offences.⁵⁵²

562. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions...is liable to imprisonment".⁵⁵³

563. The Act on Child Protection of the Philippines provides that:

All appropriate steps shall be taken to facilitate the reunion of families temporarily separated due to armed conflict...

Whenever possible, members of the same family shall be housed in the same premises and given separate accommodation from other evacuees and be provided with facilities to lead a normal family life.⁵⁵⁴

National Case-law

564. No practice was found.

Other National Practice

565. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provides that "in case of evacuations members of the same family must not be separated from each other".⁵⁵⁵

III. Practice of International Organisations and Conferences

United Nations

566. In several resolutions on the rights of the child, the UN General Assembly has called upon all States and UN bodies and agencies "to ensure the early identification and registration of unaccompanied refugee and internally displaced children [and] to give priority to programmes for family tracing and reunification".⁵⁵⁶

567. In two resolutions adopted in 1997 and 1998 on the rights of the child, the UN Commission on Human Rights called upon all States "to give priority to programmes for family tracing and reunification, and to continue monitoring the care arrangements for unaccompanied refugee and internally displaced children".⁵⁵⁷

⁵⁵² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁵³ Norway, *Military Penal Code as amended* (1902), § 108.

⁵⁵⁴ Philippines, *Act on Child Protection* (1992), Sections 22(f) and 23.

⁵⁵⁵ Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 1.

⁵⁵⁶ UN General Assembly, Res. 51/77, 12 December 1996, Section III, § 42; Res. 52/107, 12 December 1997, Section V, § 3; Res. 53/128, 9 December 1998, Section V, § 3.

⁵⁵⁷ UN Commission on Human Rights, Res. 1997/78, 18 April 1997, § 16; Res. 1998/76, 22 April 1998, § 17(b).

568. In 1981, in its Conclusion on Family Reunification, the UNHCR Executive Committee stressed that every effort should be made to ensure the reunification of separated families.⁵⁵⁸

569. In 1997, in its Conclusion on Refugee Children and Adolescents, the UNHCR Executive Committee urged "States and concerned parties to take all possible measures to protect child and adolescent refugees, *inter alia*, by: (i) preventing separation of children and adolescent refugees from their families and promoting... family reunification".⁵⁵⁹

570. In 1998, in his report on unaccompanied refugee minors, which included a discussion on internally displaced children, the UN Secretary-General concluded that:

On a daily basis, in crisis settings such as those currently in Sierra Leone, Guinea-Bissau and Kosovo, children trapped in and fleeing from war zones were involuntarily separated from their families... Member States are urged to adhere to and promote the Convention on the Rights of the Child and to support measures that will avoid involuntary family separation.⁵⁶⁰

571. In 1996, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that the Croatian Office for Displaced Persons and Refugees had advised the Office of the High Commissioner for Human Rights "that emphasis in the immediate future will be placed on applications for return from relatives of elderly Serbs remaining in the former sectors, who required the assistance of younger family members to lead a normal life". The Special Rapporteur also noted that "some 12,000 Croatian Serb refugees have received the permission to return... mostly on the basis of family reunification or proof of citizenship".⁵⁶¹

572. In 1992, in two joint statements on the evacuation of children from the former Yugoslavia, UNHCR and UNICEF highlighted the needs of families during emergency evacuations, in particular the need to respect family unity as a guiding principle in all evacuation operations. They also stated that where families were separated during the process, "evacuations, reception and care should be planned with a view to the earliest possible reunification between parents and children".⁵⁶²

⁵⁵⁸ UNHCR, Executive Committee, Conclusion No. 24 (XXXII): Family Reunification, UN Doc. A/AC.96/60, 22 October 1981, § 1.

⁵⁵⁹ UNHCR, Executive Committee, Conclusion No. 84 (XLVIII): Refugee Children and Adolescents, UN Doc. A/AC.96/895, 20 October 1997, § b(i).

⁵⁶⁰ UN Secretary-General, Report on unaccompanied refugee minors, UN Doc. A/53/325, 26 August 1998, § 27.

⁵⁶¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/9, 22 October 1996, §§ 50-51; see also Special periodic report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, § 128.

⁵⁶² UNHCR and UNICEF, Joint statement on the evacuation of children from former Yugoslavia, 13 August 1992, § 5; Joint statement No. 2 supported by the ICRC and the Federation of Red Cross and Red Crescent Societies, 16 December 1992, § 2.

Other International Organisations

573. In a recommendation adopted in 1992 concerning displaced populations in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe called upon member States to take urgent measures “to assist unaccompanied children, victims of the crisis, to withstand the distress and reunite with their families”.⁵⁶³

574. In 1994, in a report on Rwanda, the Rapporteur of the Parliamentary Assembly of the Council of Europe emphasised that particular attention should be paid to the problems experienced by unaccompanied children during internal displacement. He recommended that schemes to register such children and to help them reunite with their families, such as the “Radio-Link BBC-Rwanda” established by the ICRC, be encouraged.⁵⁶⁴

International Conferences

575. The 24th International Conference of the Red Cross in 1981 adopted a Statement of Policy on International Red Cross Aid to Refugees, which provided that:

The Central Tracing Agency of the ICRC is also always ready in co-operation with National Societies to act in aid of refugees and displaced persons, for instance by facilitating the reuniting of dispersed families, by organizing the exchange of family news and by tracing missing persons. Where necessary, it offers its cooperation to the UNHCR, as well as its technical assistance to National Societies to enable them to set up and develop their own tracing and mailing services.⁵⁶⁵

576. The 25th International Conference of the Red Cross in 1986 adopted a resolution on the protection of children in armed conflicts in which it referred to the Geneva Conventions and the two Additional Protocols and recommended that “all necessary measures be taken to preserve the unity of the family and to facilitate the reuniting of families”.⁵⁶⁶

577. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it demanded that all parties to armed conflict avoid any action aimed at, or having the effect of, causing the separation of families in a manner contrary to international humanitarian law. In the same resolution, it also appealed to States to “do their utmost to solve the serious humanitarian issue of dispersed families without delay” and emphasised that “family reunification must begin with the tracing of separated family members at the request of one of them and end with their coming together as a family”.⁵⁶⁷

⁵⁶³ Council of Europe, Parliamentary Assembly, Rec. 1176, 5 February 1992, § iii.

⁵⁶⁴ Council of Europe, Parliamentary Assembly, Report on Rwanda, Doc. 7191, 4 November 1994, § 11.

⁵⁶⁵ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XXI, Annex, Statement of Policy on International Red Cross Aid to Refugees, § 9.

⁵⁶⁶ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. IX, § 5.

⁵⁶⁷ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § D(a), (b) and (c).

IV. Practice of International Judicial and Quasi-judicial Bodies

578. In 1997, in its concluding observations on the report of Myanmar, the CRC recommended that Myanmar “reinforce its central tracing agency to favour family reunification.”⁵⁶⁸

V. Practice of the International Red Cross and Red Crescent Movement

579. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the occupying power undertaking evacuation shall ensure, to the greatest practicable extent, . . . that members of the same family are not separated.”⁵⁶⁹

VI. Other Practice

580. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “every effort shall be made to enable those so displaced who wish to remain together to do so. Families whose members wish to remain together must be allowed to do so.”⁵⁷⁰

Specific needs of displaced women, children and elderly persons

Note: For practice concerning the specific needs of women in general, see Chapter 39, section A. For practice concerning the specific needs of children in general, including education for displaced children, see Chapter 39, section B. For practice concerning the specific needs of the elderly in general, see Chapter 39, section E.

I. Treaties and Other Instruments

Treaties

581. Article 78 AP I provides that:

No party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of health or medical treatment of the children or, except in occupied territory, their safety so require. Where the parents or the legal guardians can be found, their written consent to such evacuation is required . . . In each case,

⁵⁶⁸ CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add. 69, 24 January 1997, § 40.

⁵⁶⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 836.

⁵⁷⁰ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 7(1), *IRRC*, No. 282, p. 333.

all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation. Whenever an evacuation occurs . . . each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest continuity . . . [An identification card providing full details] shall be established for each child.

Article 78 AP I was adopted by consensus.⁵⁷¹

582. Article 22 of the 1989 Convention on the Rights of the Child provides that:

States Parties shall take appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law and procedures shall, whether unaccompanied or accompanied by his or her parents or by any other person, receive appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the present Convention and in other international human rights or humanitarian instruments to which the said States are Parties.

583. Article 23 of the 1990 African Charter on the Rights and Welfare of the Child provides that:

1. States Parties to the present Charter shall take all appropriate measures to ensure that a child who is seeking refugee status or who is considered a refugee in accordance with applicable international or domestic law shall, whether unaccompanied or accompanied by parents, legal guardians or close relatives, receive appropriate protection and humanitarian assistance in the enjoyment of the rights set out in this Charter and other international human rights and humanitarian instruments to which the States are Parties.
2. States Parties shall undertake to cooperate with existing international organizations which protect and assist refugees in their efforts to protect and assist such a child and to trace the parents or other close relatives of an unaccompanied refugee child in order to obtain information necessary for reunification with the family . . .
3. The provisions of this Article apply *mutatis mutandis* to internally displaced children whether through natural disaster, internal armed conflicts, civil strife, breakdown of economic and social order or howsoever caused.

584. Article 9 of the 1994 Inter-American Convention on Violence against Women provides that "States parties shall take special account of the vulnerability of women to violence by reason of . . . their status as . . . refugees or displaced persons . . . [and by reason of being] affected by armed conflict".

Other Instruments

585. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 78 AP I.

⁵⁷¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 254.

586. The 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons made specific reference to women, children and the elderly as forming particularly vulnerable segments of the displaced population.

587. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 78 AP I.

588. The preamble to the 1993 UN Declaration on the Elimination of Violence against Women expressed the UN General Assembly's concern that "some groups of women, such as... refugee women, elderly women and women in situations of armed conflict are especially vulnerable to violence".

589. Principle 4(2) of the 1998 Guiding Principles on Internal Displacement provides that:

Certain internally displaced persons, such as children, especially unaccompanied minors, expectant mothers, mothers with young children, female heads of households, persons with disabilities and elderly persons, shall be entitled to protection and assistance required by their condition, and to treatment which takes into account their special needs.

590. Principle 19(2) of the 1998 Guiding Principles on Internal Displacement provides that "special attention should be paid to the health needs of women, including access to female health care providers and services, such as reproductive health care, as well as appropriate counselling for victims of sexual abuse and other abuses".

II. National Practice

Military Manuals

591. Argentina's Law of War Manual provides that "no party to the conflict shall undertake the evacuation of children to a foreign country. If an evacuation has been undertaken, all the necessary measures shall be taken to facilitate the return of the children to their families and their country."⁵⁷²

592. Australia's Defence Force Manual provides that "children who are not nationals of the state may not be evacuated by that state to a foreign country unless the evacuation is temporary and accords to certain conditions set out in AP I".⁵⁷³

593. Indonesia's Military Manual states that parties to the conflict should ensure the protection of unaccompanied children under 15 years old. Such children should be educated and provided with adequate food. In hostile situations, children should be evacuated to neutral States, and children under 12 years old should wear an identity disc.⁵⁷⁴

⁵⁷² Argentina, *Law of War Manual* (1989), § 4.12.

⁵⁷³ Australia, *Defence Force Manual* (1994), § 947(e).

⁵⁷⁴ Indonesia, *Military Manual* (1982), § 68.

National Legislation

594. Angola's Rules on the Resettlement of Internally Displaced Populations provides that:

It is the responsibility of the Provincial Governments, through the Sub-Groups on Displaced Persons and Refugees of the Provincial Humanitarian Coordination Groups, to carry out the following:

- ...
 c) To identify the displaced persons who wish to be resettled or return to their areas of origin, giving particular attention to the most vulnerable (widows, children, elderly, disabled) who may require special assistance.⁵⁷⁵

595. The Law on the Rights of the Child of Belarus states that children of refugees must be protected and provided with material and medical assistance by the public authorities.⁵⁷⁶

596. Colombia's Law on Internally Displaced Persons has established a National Plan in order to, *inter alia*, pay special attention to women and children.⁵⁷⁷

597. Croatia's Law on Displaced Persons and Directive on Displaced Persons provide that Croatia shall ensure that displaced children are educated and that their basic needs in terms of accommodation, food, health care and social integration are met.⁵⁷⁸

598. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of AP I, including violations of Article 78 AP I, is a punishable offence.⁵⁷⁹

599. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁵⁸⁰

600. The Act on Child Protection of the Philippines provides that:

Children should be given priority during evacuation as a result of armed conflict. Existing community organizations shall be tapped to look after the safety and well-being of children during evacuation operations. Measures shall be taken to ensure that children evacuated are accompanied by persons responsible for their safety and well-being . . .

In places of temporary shelter, expectant and nursing mothers and children shall be given additional food in proportion to their physiological needs. Whenever possible, children shall be given opportunities for physical exercise, sports and outdoor games.⁵⁸¹

⁵⁷⁵ Angola, *Rules on the Resettlement of Internally Displaced Populations* (2001), Article 2(c), see also Article 8 (social assistance).

⁵⁷⁶ Belarus, *Law on the Rights of the Child* (1993), Article 30.

⁵⁷⁷ Colombia, *Law on Internally Displaced Persons* (1997), Article 10(7); see also *Criminal Code* (1999), Article 127 (for forcible transfer of children to another group as a part of a genocide campaign).

⁵⁷⁸ Croatia, *Law on Displaced Persons* (1993), Article 13; *Directive on Displaced Persons* (1991), Articles 2 and 13.

⁵⁷⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁸⁰ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁵⁸¹ Philippines, *Act on Child Protection* (1992), Sections 23–24.

National Case-law

601. No practice was found.

Other National Practice

602. In 1996, during a debate in the UN Commission on Human Rights concerning the conflict in Burundi, El Salvador identified the necessity of taking into account the needs of the “most vulnerable groups of displaced persons and, in particular, disabled persons, including those disabled by mine blasts as a result of the conflict”.⁵⁸²

603. In 1995, in its initial report to the CRC, Ghana stated that “the sole government agency responsible for abandoned and orphaned children, worked with the Save the Children Fund to provide care for the children affected by the conflict [in the northern part of the country]”. Family tracing and reunification assistance services were also established and unaccompanied displaced children were either placed in camps, in orphanages or with relatives.⁵⁸³

604. The Report on the Practice of Jordan states that special care is provided to children who have been orphaned or separated from their families, the elderly and the disabled.⁵⁸⁴

605. In May 1994, during a debate in the UN Security Council on the situation in Rwanda, Oman made specific reference to the special needs of internally displaced women, children and elderly people.⁵⁸⁵

606. In 1996, during a debate in the UN Commission on Human Rights, Peru reported that in response to the CRC’s concern about the displacement of almost 400,000 children, “the Government had established food aid programmes for displaced children, in particular orphans”.⁵⁸⁶

607. In 1993, in its report to the CRC, the Philippines stated that:

202. [The Special Protection Act of the Philippines provides that] during any evacuation resulting from armed conflict, children are to be given priority . . . Measures shall be taken to ensure that children who are evacuated are accompanied by persons responsible for their safety and well-being. Whenever possible, members of the same family are to be housed in the same premises.

...

206. Children who are lost, abandoned or orphaned as a result of an armed conflict are referred to the local Council for the Protection of Children or to the Department of Social Welfare and Development. All efforts are undertaken to locate the child’s parents and relatives. Arrangements are made for the temporary care of the child by a licensed foster family or a child-caring agency.⁵⁸⁷

⁵⁸² El Salvador, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.15, 30 May 1996, § 37.

⁵⁸³ Ghana, Initial report to the CRC, UN Doc. CRC/C/3/Add.39, 19 December 1995, § 126.

⁵⁸⁴ Report on the Practice of Jordan, 1997, Chapter 5.3.

⁵⁸⁵ Oman, Statement before the UN Security Council, UN Doc. S/PV.3377, 16 May 1994, p. 7.

⁵⁸⁶ Peru, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.55, 21 May 1996, p. 12, §§ 45–46.

⁵⁸⁷ Philippines, Initial report to the CRC, UN Doc. CRC/C/3/Add.23, 3 November 1993, §§ 202 and 206.

608. In 1994, in its initial report to the CRC, Sri Lanka noted that:

A special effort is being made to meet the needs of children in varying situations . . . These include health and nutritional needs of infants and pre-school children, education for children of school age, care and rehabilitation for children traumatized by violence and deprivation of parents, and restoration to homes and families in the case of children who have been separated from parents or who have lost them . . . The government has been working closely with NGOs to provide the basic needs of households including the special needs of children. Several programmes have been initiated to deal with problems of traumatized children and children separated from parents.⁵⁸⁸

609. In 1994, in its initial report to the CRC, the FRY stated that:

A refugee child is entitled to full health care, which covers prevention, emergency medical care, specialist check-ups, dental care, as well as medicaments, hospitalization, and check-ups in health care institutions, etc. . . .

Disabled children and youth – refugees up to the age of 18 and university students up to 26 – are entitled to specialized and rehabilitation care in institutions for rehabilitation and to orthopaedic and prosthetic appliances and aids.⁵⁸⁹

III. Practice of International Organisations and Conferences

United Nations

610. In a resolution adopted in 1993 concerning Bosnia and Herzegovina, the UN Security Council noted the particular vulnerability of women, children and the elderly in the large-scale forced displacement of civilians.⁵⁹⁰

611. In a resolution adopted in 1999, the UN Security Council strongly condemned the targeting of children in situations of armed conflict, including forced displacement.⁵⁹¹

612. In a resolution adopted in 2000 on the protection of children in situations of armed conflict, the UN Security Council urged member States and parties to armed conflict “to provide protection and assistance to refugees and internally displaced persons, as appropriate, the vast majority of whom are women and children”.⁵⁹²

613. In a resolution adopted in 2000 on women and peace and security, the UN Security Council called upon all parties to armed conflict “to respect the civilian and humanitarian character of refugee camps and settlements, and to take into account the particular needs of women and girls”.⁵⁹³

⁵⁸⁸ Sri Lanka, Initial report to the CRC, UN Doc. CRC/C/8/Add.13, 5 May 1994, § 146.

⁵⁸⁹ FRY, Initial report to the CRC, UN Doc. CRC/C/8/Add.16, 17 November 1994, §§ 354–355.

⁵⁹⁰ UN Security Council, Res. 819, 16 April 1993, preamble.

⁵⁹¹ UN Security Council, Res. 1261, 25 August 1999, § 2.

⁵⁹² UN Security Council, Res. 1314, 11 August 2000, § 6.

⁵⁹³ UN Security Council, Res. 1325, 31 October 2000, § 12.

614. In June 1998, in a statement by its President on children and armed conflict, the UN Security Council strongly condemned the forced displacement of children.⁵⁹⁴

615. In a resolution adopted in 1993 on the Office of the United Nations High Commissioner for Refugees, the UN General Assembly welcomed:

the High Commissioner's policy on refugee children and the activities undertaken to ensure its implementation, aimed at ensuring that the specific needs of refugee children, including in particular unaccompanied minors, are fully met within the overall protection and assistance activities of the Office, in cooperation with governments and other relevant organizations.⁵⁹⁵

616. In a resolution adopted in 1994, the UN General Assembly expressed alarm at the large number of displaced persons in Sudan and made specific reference to the vulnerable situation of displaced women, children and members of minorities.⁵⁹⁶

617. In a resolution adopted in 1982 on women and children refugees, ECOSOC "considered the special problems of refugees [and IDPs], particularly with regard to their physical safety" and expressed "grave concern at the plight of Kampuchean children and women".⁵⁹⁷

618. In a resolution adopted in 1991 on refugee and displaced women and children, ECOSOC stated that it:

Recalling that the majority of refugees and displaced persons are women and children and that a significant number of families are headed by women,

Expressing its deep concern about the widespread violations of the rights of refugee and displaced women and children and their specific needs regarding protection and assistance,

...

Recognizing that ensuring equal treatment of refugee and displaced women and men may require specific action in favour of the former,

...

2. *Calls upon* the international community to give priority to extending international protection to refugee women and children by implementing measures to ensure greater protection from physical violence, sexual abuse, abduction and circumstances that could force them into illegal activities;

...

5. *Encourages* Member States and relevant organizations to provide access to individual identification and registration documents, on a non-discriminatory basis, to all refugee women and, wherever possible, children, irrespective of whether the women and children were accompanied by male family members.⁵⁹⁸ [emphasis in original]

⁵⁹⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998, § 2.

⁵⁹⁵ UN General Assembly, Res. 48/116, 20 December 1993, § 7.

⁵⁹⁶ UN General Assembly, Res. 49/198, 23 December 1994, preamble and § 10.

⁵⁹⁷ ECOSOC, Res. 1982/25, 4 May 1982, preamble and § 1.

⁵⁹⁸ ECOSOC, Res. 1991/23, 30 May 1991, preamble and §§ 2 and 5.

619. In a resolution adopted in 1995, the UN Commission on Human Rights expressed alarm at the large number of displaced persons in Sudan and made specific reference to the vulnerable situation of displaced women, children and members of minorities.⁵⁹⁹

620. In a resolution adopted in 1998 on the rights of the child, the UN Commission on Human Rights called upon all States "to ensure the early identification and registration of unaccompanied refugee and internally displaced children". It also stressed "the importance of special attention for children in situations of armed conflict, in particular in the areas of health and nutrition, education and social reintegration".⁶⁰⁰

621. In a resolution adopted in 2001 on international protection for refugees and displaced persons, the UN Sub-Commission on Human Rights noted with alarm that "the situation of women and girl refugees has been grossly exacerbated, to the extent that it requires the urgent attention of the international community".⁶⁰¹

622. In 1985, in its Conclusion on Refugee Women and International Protection, the UNHCR Executive Committee noted that "refugee women and girls constitute the majority of the world refugee population and that many of them are exposed to special problems in the international protection field" and recommended that States take the specificity of refugee women into account and pay special attention to their needs.⁶⁰²

623. In 1990, in its Conclusion on Refugee Women and International Protection, UNHCR Executive Committee urged States to adopt a series of practical measures in order to take into account the specificity of refugee women.⁶⁰³

624. In 1997, in its Conclusion on Refugee Children and Adolescents, the UNHCR Executive Committee called upon States and relevant parties:

to respect and observe rights and principles that are in accordance with international human rights and humanitarian law . . . including:

- i) the principle of the best interests of the child;
- ...
- iii) the right of children and adolescents to education, adequate food, and the highest attainable standard of health.⁶⁰⁴

⁵⁹⁹ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, preamble.

⁶⁰⁰ UN Commission on Human Rights, Res. 1998/76, 22 April 1998, §§ 13(d) and 17(b).

⁶⁰¹ UN Sub-Commission on Human Rights, Res. 2001/16, 16 August 2001, § 3.

⁶⁰² UNHCR, Executive Committee, Conclusion No. 39 (XXXVI): Refugee Women and International Protection, 18 October 1985, §§ c and h.

⁶⁰³ UNHCR, Executive Committee, Conclusion No. 64 (XLI): Refugee Women and International Protection, 5 October 1990, § a.

⁶⁰⁴ UNHCR, Executive Committee, Conclusion No. 84 (XLVIII): Refugee Children and Adolescents, 17 October 1997, § (a)(i) and (iii); see also Conclusion No. 47 (XXXVIII): Refugee Children, 12 October 1987, § (c) and Conclusion No. 59 (XL): Refugee Children, 13 October 1989, § d.

625. In 1996, in a report on human rights and mass exoduses, the UN Secretary-General stated that “particular attention should be paid to vulnerable groups, including women, children and the elderly, in the areas of prevention, protection and assistance”.⁶⁰⁵

626. In 1997, in a report on his mission to Mozambique, the Representative of the UN Secretary-General on Internally Displaced Persons identified “female-headed households, unaccompanied children and the disabled [as] particularly vulnerable groups” requiring special attention during return.⁶⁰⁶

627. In a report in 1996, the UN Expert on the Impact of Armed Conflict on Children emphasised that “practical protection measures to prevent sexual violence [and] discrimination in delivery of relief materials . . . must be a priority in all assistance programmes in refugee and displaced camps”.⁶⁰⁷

628. In 1997, in a report on human rights and mass exoduses, the UN High Commissioner for Human Rights stated that “UNICEF noted that its activities focused on the protection and care of refugee and displaced women and children who were likely to become victims of gender-based discrimination, violence and exploitation”.⁶⁰⁸

629. In 1996, in a report on a mission to Burundi, the Special Rapporteur of the UN High Commission for Human Rights on Extrajudicial, Summary or Arbitrary Executions highlighted several of the special problems faced by internally displaced children, including separation from family members and the fact that “like their mothers, children are a vulnerable group subject to malnutrition, diseases and various forms of physical violence, including sexual abuse and rape”.⁶⁰⁹

630. In 1996, in a report on a mission to Rwanda, the Special Rapporteur of the UN High Commission on Human Rights for Zaire recommended that “the government must establish resettlement programmes for [IDPs] . . . covering housing, education, health and, above all, security for all, especially women and children”.⁶¹⁰

631. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur of

⁶⁰⁵ UN Secretary-General, Report on human rights and mass exoduses, UN Doc. E/CN.4/1996/42, 8 February 1996, § 119.

⁶⁰⁶ Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative’s visit to Mozambique from 23 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, § 87.

⁶⁰⁷ UN Expert on the Impact of Armed Conflict on Children, Report, UN Doc. A/51/306, 26 August 1996, Annex, §§ 90, 110, 165 and 203.

⁶⁰⁸ UN High Commissioner for Human Rights, Report on human rights and mass exoduses, UN Doc. E/CN.4/1997/42, 14 January 1997, p. 17, § 55.

⁶⁰⁹ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report on the Special Rapporteur’s mission to Burundi from 19 to 29 April 1995, UN Doc. E/CN.4/1996/4/Add.1, 24 July 1996, § 82.

⁶¹⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report on the Special Rapporteur’s visit to Rwanda from 6 to 14 July 1996, concerning ethnic conflict in the Northern Kivu region, UN Doc. E/CN.4/1997/6/Add.1, 16 September 1996, § 126(j).

UN Commission on Human Rights on Violence against Women, Its Causes and Consequences stated that:

Women and children face rape and other gender-based violence and abduction, not only during armed conflict but in flight, as well as once they have fled the conflict area. In her 1998 report, the Special Rapporteur discussed in detail the particular concerns of refugee women and the factors that impact their security differently from that of men. However, since 1997, the Special Rapporteur has become increasingly concerned with the problem of women who are internally displaced. With the epidemic of internal conflicts around the world, it has become abundantly clear that internally displaced persons (IDPs) – the majority of whom are women and children – are particularly vulnerable to violence and abuse. Unlike refugees, IDPs do not have access to legally binding international standards that are specifically designed for their protection and assistance, nor is there an international monitoring agency specifically mandated to provide protection and assistance to IDPs in the same way that UNHCR does for refugees.⁶¹¹

632. In 1998, in a report on regional development in the FRY, the UNHCR Executive Committee identified vulnerable groups such as internally displaced women, children and the elderly as policy priorities in determining the distribution of humanitarian assistance.⁶¹²

Other International Organisations

633. In a resolution adopted in 1998 on the situation of refugees, returnees, and internally displaced persons in the Americas, the OAS General Assembly emphasised the urgency of specifically addressing the needs of women, elderly persons and children.⁶¹³

634. In resolutions adopted in 1993 and 1995, the OAU Council of Ministers identified women, children, the elderly and the disabled as particularly vulnerable groups of displaced persons.⁶¹⁴

International Conferences

635. The 25th International Conference of the Red Cross in 1986 adopted a resolution on the Movement and refugees in which it asked governments, UNHCR, National Societies and NGOs “to give special attention to the problems of refugees, returnees and displaced persons, particularly the most vulnerable groups”.⁶¹⁵

⁶¹¹ UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on violence against women perpetrated and/or condoned by the State during times of armed conflict (1997–2000), UN Doc. E/CN.4/2001/73, 23 January 2001, § 54.

⁶¹² UNHCR, Executive Committee, Standing Committee update on regional development in the former Yugoslavia, UN Doc. EC/48/SC/CRP.10, 2 April 1998, §§ 68–69.

⁶¹³ OAS, General Assembly, Res. 1602 (XXVIII-O/98), 3 June 1998, § 4.

⁶¹⁴ OAU, Council of Ministers, Res. 1448 (LVIII), 21–26 June 1993, preamble; Res. 1588 (LXII), 21–23 June 1995, preamble.

⁶¹⁵ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XVII, § 8.

IV. Practice of International Judicial and Quasi-judicial Bodies

636. In 1998, in its consideration of the report of Peru, CEDAW expressed concern at the situation of displaced women in Peru and recommended that these women benefit from “programmes to promote their participation in the labour force together with access for them and their families to education, health care, housing, drinking water and other essential services”.⁶¹⁶

637. In 1999, CEDAW stated that “States parties should ensure that adequate protection and health services, including trauma treatment and counselling, are provided for women in especially difficult circumstances, such as . . . women refugees”. The Committee noted with concern “the persistence of widespread violence as a result of the armed conflict” in Colombia and that “women are the principal victims and that they . . . lack the resources needed for their survival in a situation in which they are called upon to assume greater responsibilities”.⁶¹⁷

638. In 1993, in its preliminary observations on the report of Sudan, the CRC expressed concern at the situation of internally displaced children.⁶¹⁸ In its concluding observations, the CRC expressed alarm at the problems faced by homeless and displaced children.⁶¹⁹

639. In 1997, in its concluding observations on the report of Uganda, the CRC recommended that Uganda direct special attention “to refugee and internally displaced children to ensure that they have equal access to basic facilities”. The Committee also recommended that, in accordance with IHL, “the State party take measures to stop the killing and abduction of children”.⁶²⁰

640. In 1997, in its concluding observations on the report of Myanmar, the CRC suggested that the government be proactive in preventing any type of involuntary population movement affecting the rights of children.⁶²¹

V. Practice of the International Red Cross and Red Crescent Movement

641. No practice was found.

VI. Other practice

642. The Bangkok NGO Declaration on Human Rights adopted in 1993 states that:

⁶¹⁶ CEDAW, Consideration of the report of Peru, UN Doc. CEDAW/C/1998/II/L.1/Add.7, 8 July 1998, §§ 23.

⁶¹⁷ CEDAW, Report of the Committee, 20th Session, 19 January–5 February 1999, UN Doc. A/54/38(Part I), 20 August 1999, §§ 16 and 358.

⁶¹⁸ CRC, Preliminary observations on the report of Sudan, UN Doc. CRC/C/15/Add.6, 18 February 1993, §§ 9–10.

⁶¹⁹ CRC, Concluding observations on the report of Sudan, UN Doc. CRC/C/15/Add.10, 18 October 1993, § 14.

⁶²⁰ CRC, Concluding observations on the report of Uganda, UN Doc. CRC/C/15/Add.80, 21 October 1997, §§ 34 and 37.

⁶²¹ CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, §§ 40–42.

Crimes against women, including rape, sexual slavery and trafficking, and domestic violence, are rampant . . . In crisis situations – ethnic violence, communal riots, armed conflicts, military conflicts, military occupation and displacement – women’s rights are specifically violated.⁶²²

643. In 1995, with regard to the Declaration of Minimum Humanitarian Standards, the IHL commented that:

Concerning categories of persons deserving special protection, we draw attention to the practice of forced displacement . . . of children into another territory, without leaving any trace, so that the identity of these children, when separated from their families, is not preserved. We propose:

In the case of the evacuation of children without their parents to a foreign country, such children should be registered with the appropriate impartial organization.⁶²³

International assistance to displaced persons

Note: *For practice concerning access for humanitarian relief to civilians in need, see Chapter 17, section C.*

I. Treaties and Other Instruments

Treaties

644. Article 8(b) of the 1950 Statute of the UNHCR provides that the High Commissioner shall promote the execution of any measures calculated to improve the situation of refugees.

645. Article 1(1)(b) of the 1953 Constitution of the IOM states that the purpose and functions of the IOM shall be “to concern itself with the organised transfer of refugees, displaced persons and other individuals in need of international migration services for whom arrangement may be made between the Organization and the States concerned, including those States undertaking to receive them”.

Other Instruments

646. The 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons expressed gratitude and firm support for the role of UNHCR in assisting and protecting the displaced and called for cooperation with UNHCR and other international humanitarian organisations.

647. Paragraph 5 of the 1992 Recommendation on the Tragic Situation of Civilians in Bosnia and Herzegovina provided that “persons temporarily transferred to areas other than their areas of origin should benefit, as vulnerable groups,

⁶²² World Conference on Human Rights, Regional Preparatory Meeting for Asia-Pacific, Bangkok, 24–28 March 1993, Bangkok NGO Declaration on Human Rights, UN Doc. A/CONF.157/PC/83, 19 April 1993, § 3.

⁶²³ IHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, 28 November 1995, p 10.

from international assistance, *inter alia*, in conformity with its mandate, by the ICRC”.

648. In the 1992 General Peace Agreement for Mozambique, in order to organise necessary assistance for IDPs, the parties agreed “to seek the involvement of competent United Nations agencies . . . [as well as] the International Red Cross and other organisations”.

649. Principle 25 of the 1998 Guiding Principles on Internal Displacement states that:

1. The primary duty and responsibility for providing humanitarian assistance to internally displaced persons lies with national authorities.
2. International humanitarian organisations and other appropriate actors have the right to offer their services in support of the internally displaced . . . Consent thereto shall not be arbitrarily withheld, particularly when authorities concerned are unable or unwilling to provide the required humanitarian assistance.
3. All authorities concerned shall grant and facilitate the free passage of humanitarian assistance and grant persons engaged in the provision of such assistance rapid and unimpeded access to the internally displaced.

II. National Practice

Military Manuals

650. No practice was found.

National Legislation

651. According to Colombia’s Law on Internally Displaced Persons, forcibly displaced persons have the right to ask for and receive international aid, the corollary of which is the right of the international community to provide humanitarian assistance.⁶²⁴

National Case-law

652. No practice was found.

Other National Practice

653. The Report on the Practice of France states that France considers humanitarian assistance to displaced persons to be a duty that goes beyond political structures and that humanitarian intervention is becoming an international duty, as long as it is non-discriminatory and focuses on the protection of life and health.⁶²⁵

654. In 1990, a number of government departments and NGOs in the Philippines signed a Memorandum of Agreement providing that an NGO medical

⁶²⁴ Colombia, *Law on Internally Displaced Persons* (1997), Article 2(1).

⁶²⁵ Report on the Practice of France, 1999, Chapter 5.4.

team would be given access in order to ensure the delivery of health services to IDPs located in evacuation centres or in other areas where health resources were inadequate.⁶²⁶

655. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provide that “non-Government health workers (e.g. doctors, nurses, dentists, trained community health workers and volunteer relief workers) shall be permitted to go to evacuation centres to render medical/relief assistance to evacuees”.⁶²⁷

656. In 1996, during a debate in the UN Commission on Human Rights, the representative of Sudan noted that:

his country was grappling with the problem of internally displaced persons and said that the authorities were making every effort to solve it, in particular by establishing specialized agencies and coordinating action by international humanitarian organizations.

As part of its search for solutions at the domestic level, the Government had concluded an agreement with two rebel movements in the southern part of the country, which would help to solve part of the problem . . .

Sudan would continue to cooperate with the International Committee of the Red Cross and voluntary organizations, including the regions to which displaced persons were returning.⁶²⁸

657. In 1994, during a debate in the UN Security Council on Rwanda, the UK welcomed the efforts being made by various UN agencies and NGOs to alleviate the suffering of IDPs. It noted that the UK government had made a “substantial commitment” to the work of these organisations.⁶²⁹

658. In 1991, during a debate in the UN Security Council, the US expressed profound concern about the plight of displaced persons and noted that the US had contributed generously to the care and maintenance of the displaced in Iraq.⁶³⁰

659. In a Joint Communiqué issued in 1992, the President and the Prime Minister of the FRY expressed strong support for “the efforts of all agencies, local and international, to relieve the plight of displaced persons in all territories of the former Yugoslavia”.⁶³¹

⁶²⁶ Philippines, Memorandum of Agreement, 10 December 1990, § 1, Report on the Practice of the Philippines, 1997, Chapter 5.5.

⁶²⁷ Philippines, Presidential Human Rights Committee, Res. No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 5.

⁶²⁸ Sudan, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.40, 20 May 1996, §§ 43–46.

⁶²⁹ UK, Statement before the UN Security Council, UN Doc. S/PV.3388, 8 June 1994, p. 8.

⁶³⁰ US, Statement before the UN Security Council, UN Doc. S/PV.2982, 5 April 1991, pp. 58–60.

⁶³¹ FRY, Joint Communiqué by the President and the Prime Minister, Belgrade, 11 September 1992, annexed to Report of the UN Secretary-General on the International Conference on the Former Yugoslavia, UN Doc. S/24795, 11 November 1992, p. 35, § 3(e).

*III. Practice of International Organisations and Conferences**United Nations*

660. In a resolution adopted in 1991 on repression of the Iraqi civilian population, including Kurds in Iraq, the UN Security Council asked the Secretary-General "to use all the resources at his disposal, including those of the relevant United Nations agencies, to address urgently the critical needs of the refugees and displaced Iraqi population".⁶³²

661. In a resolution on Tajikistan adopted in 1995, the UN Security Council noted the request "addressed to international organizations and States to provide substantial financial and material support to the refugees and internally displaced persons".⁶³³

662. In three resolutions adopted in 1995 in the context of the conflict in the former Yugoslavia, the UN Security Council reiterated its demand that immediate and unimpeded access to displaced people be given to representatives of UNHCR, the ICRC and other international agencies.⁶³⁴

663. In a resolution adopted in 1996 concerning the Great Lakes region, the UN Security Council requested:

the Secretary-General, in consultation with... the United Nations High Commissioner for Refugees, with the OAU, with the Special Envoy of the European Union...

- (a) to draw up a concept of operations... with the objectives of:
 - Delivering short-term humanitarian assistance and shelter to refugees and displaced persons in eastern Zaire;
 - Assisting the United Nations High Commissioner for Refugees with the protection...
 - Establishing humanitarian corridors for the delivery of humanitarian assistance.⁶³⁵

664. In a resolution adopted in 1997 concerning eastern Zaire, the UN Security Council endorsed a plan for the "facilitation of access to humanitarian assistance" for all refugees and displaced persons.⁶³⁶

665. In a resolution on Croatia adopted in 1997, the UN Security Council welcomed "the renewed mandate of the Organization for Security and Cooperation in Europe, in particular [its] focus on... return of all refugees and displaced persons [and] protection of their rights".⁶³⁷

666. In 1995, in a statement by its President on Croatia, the UN Security Council called on all the parties "to cooperate fully with UNCRO, UNHCR

⁶³² UN Security Council, Res. 688, 5 April 1991, § 5.

⁶³³ UN Security Council, Res. 999, 16 June 1995, § 14.

⁶³⁴ UN Security Council, Res. 1010, 10 August 1995, preamble and § 1; Res. 1019, 9 November 1995, preamble and § 2; Res. 1034, 21 December 1995, preamble and §§ 4–5.

⁶³⁵ UN Security Council, Res. 1078, 9 November 1996, § 10.

⁶³⁶ UN Security Council, Res. 1097, 18 February 1997, § 1.

⁶³⁷ UN Security Council, Res. 1120, 14 July 1997, § 17.

and the ICRC in protecting and assisting the local civilians and any displaced persons".⁶³⁸

667. In 1997, in a statement by its President on the Great Lakes region/Zaire, the UN Security Council called upon all parties "to allow access by United Nations High Commissioner for Refugees and humanitarian agencies to refugees and displaced persons".⁶³⁹ In further statements by its President the same year, the UN Security Council called upon the ADFL to ensure safe and unrestricted access by humanitarian relief agencies so as to guarantee humanitarian aid and the safety of displaced persons in the areas under its control.⁶⁴⁰

668. In 1997, in a statement by its President on Georgia, the UN Security Council "welcomed the continued efforts by United Nations agencies and humanitarian organizations to address the urgent needs of . . . internally displaced persons" and encouraged "further contributions to that end".⁶⁴¹

669. In 1997, in a statement by its President on the DRC, the UN Security Council called for access for humanitarian assistance to be facilitated and for the rights of refugees and displaced persons to be fully respected.⁶⁴²

670. In 1991, in a report to the UN Security Council concerning the situation in the former Yugoslavia, the UN Secretary-General reported that the ICRC had opened offices in affected areas and had been able "to provide assistance to about 60,000 displaced persons through its family parcels programme".⁶⁴³

671. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly requested the Secretary-General:

to pursue his humanitarian efforts in the Federal Republic of Yugoslavia (Serbia and Montenegro), working through the Office of the United Nations High Commissioner for Refugees, the World Food Programme, the United Nations Children's Fund, other appropriate humanitarian organizations and the Office of the United Nations High Commissioner for Human Rights, with a view to assist in the voluntary return of the displaced persons to their homes in conditions of safety and dignity.⁶⁴⁴

672. In 1994, in its Conclusion on Internally Displaced Persons, the Executive Committee of the UNHCR:

Calls upon the international community, in appropriate circumstances, to provide timely and speedy humanitarian assistance and support to countries affected by internal displacement to help them fulfil their responsibility towards the displaced . . .

⁶³⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/26, 4 May 1995.

⁶³⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/11, 7 March 1997, p. 1.

⁶⁴⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/19, 4 April 1997, p. 1; Statement by the President, UN Doc. S/PRST/1997/22, 24 April 1997, p. 1.

⁶⁴¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/25, 8 May 1997, p. 2.

⁶⁴² UN Security Council, Statement by the President, UN Doc. S/PRST/1997/31, 29 May 1997, p. 2.

⁶⁴³ UN Secretary-General, Report pursuant to paragraph 3 of Security Council resolution 713 (1991), UN Doc. S/23169, 25 October 1991, Annex IV, § 2.

⁶⁴⁴ UN General Assembly, Res. 53/164, 9 December 1998, § 26.

Recognizes that actions by the international community, in consultation and coordination with the concerned State, on behalf of the internally displaced may contribute to the easing of tensions and the resolution of problems resulting in displacement, and constitute important components of a comprehensive approach to the prevention and solution of refugee problems.⁶⁴⁵

673. In 1997, in a report on his visit to Mozambique, the Representative of the UN Secretary-General on Internally Displaced Persons stated that "realizing its limited capacity to deliver the necessary humanitarian assistance, the Government requested support from the international community, and several United Nations organizations became involved in the mid-1980s".⁶⁴⁶

674. In 1996, during a debate in the UN Commission on Human Rights, the Special Rapporteur on the Situation of Human Rights in Afghanistan stated that:

The international community was duty-bound to provide emergency assistance to the victims of the Afghan conflict . . . Minimum food, shelter and sanitation requirements must be provided immediately to those living in refugee camps and villages, and to returnees. The international community should continue to provide, and indeed increase, humanitarian assistance in the form of mine-clearance, support for voluntary repatriation, food, health, sanitation projects and other rehabilitation programmes.⁶⁴⁷

675. In 1996, the High Representative for the Implementation of the Peace Agreement in Bosnia and Herzegovina stated that "the leading role for implementation of [the Agreement] belongs to the Office of the United Nations High Commissioner for Refugees (UNHCR)", with the active support of the Office of the High Commissioner for Human Rights.⁶⁴⁸

Other International Organisations

676. In several resolutions adopted in 1996, the OAU called upon the international community to provide refugees and displaced persons with humanitarian assistance.⁶⁴⁹

International Conferences

677. No practice was found.

⁶⁴⁵ UNHCR, Executive Committee, Conclusion No. 75 (XLV): Internally Displaced Persons, 11 October 1994, §§ f and h.

⁶⁴⁶ Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative's visit to Mozambique from 23 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, § 49.

⁶⁴⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Statement before the UN Commission on Human Rights, 16 April 1996, UN Doc. E/CN.4/1996/SR.42, 22 April 1996, § 19.

⁶⁴⁸ High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/190, 14 March 1996, Annex, § 69.

⁶⁴⁹ OAU, Council of Ministers, Res. 1649 (LXIV), 1-5 July 1996, § 12; Res. 1650 (LXIV), 1-5 July 1996, § 11; Res. 1653 (LXIV), 1-5 July 1996, § 7.

IV. Practice of International Judicial and Quasi-judicial Bodies

678. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

679. No practice was found.

VI. Other Practice

680. No practice was found.

D. Return of Displaced Persons

Conditions for return

I. Treaties and Other Instruments

Treaties

681. Article 45 GC IV provides that “protected persons shall not be transferred to a Power which is not party to the Convention. This provision shall in no way constitute an obstacle to the repatriation of protected persons, or to their return to their country of residence after the cessation of hostilities.”

682. Article 49, second paragraph, GC IV provides that “persons . . . evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased”.

683. Article III(59)(a) of the 1953 Panmunjon Armistice Agreement provides that:

All civilians who, at the time this Armistice Agreement becomes effective, are in territory under the military control of the Commander-in-Chief, United Nations Command, and who, on 24 June 1950, resided north of the Military Demarcation Line established in this Armistice Agreement shall, if they desire to return home, be permitted and assisted by the Commander-in-Chief, United Nations Command, to return to the area north of the Military Demarcation Line; and all civilians who, at the time this Armistice Agreement becomes effective, are in territory under military control of the Supreme Commander of the Korean People’s Army and the Commander of the Chinese People’s Volunteers, and who, on 24 June 1950, resided south of the Military Demarcation Line established in this Armistice Agreement shall, if they desire to return home, be permitted and assisted by the Supreme Commander of the Korean People’s Army and the Commander of the Chinese People’s Volunteers to return to the area south of the Military Demarcation Line.

Article III(59)(b) contains similar provisions for civilians of foreign nationality.

684. Article 3 of the 1963 Protocol 4 to the ECHR provides that “no one shall be deprived of the right to enter the territory of the State of which he is a national”.

685. Article 12(4) of the 1966 ICCPR provides that “no one shall be arbitrarily deprived of the right to enter his own country”.

686. Article 5(1) of the 1969 Convention Governing Refugee Problems in Africa (which expressly applies in situations of armed conflict) provides that “the essentially voluntary character of repatriation shall be respected in all cases and no refugee shall be repatriated against his will”.

687. Article 22(5) of the 1969 ACHR provides that “no one shall be deprived of the right to enter the territory of the State of which he is a national”.

688. Article 12(2) of the 1981 ACHPR provides that “every individual shall have the right . . . to return to his country. This right may only be subject to restrictions, provided for by law for the protection of national security, law and order, public health or morality.”

689. Article 3 of the 1984 Convention against Torture provides that “no State Party shall expel or return . . . a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

690. Article 16 of the 1989 Indigenous and Tribal Peoples Convention states that “whenever possible, [displaced] peoples shall have the right to return to their traditional lands, as soon as the grounds for relocation cease to exist”.

691. Article 1 of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that:

All refugees and displaced persons have the right to freely return to their homes of origin . . . The early return of refugees and displaced persons is an important objective of the settlement of the conflict in Bosnia and Herzegovina . . . Choice of destination shall be up to the individual or family . . . The parties shall not interfere with the returnees’ choice of destination nor shall they compel them to remain in or move to situations of serious danger or insecurity, or to areas lacking the basic infrastructure necessary to resume a normal life.

Other Instruments

692. Article 13(2) of the 1948 UDHR states that “everybody has the right . . . to return to his country”.

693. The 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons affirms that “voluntary return with full guarantees of security and non-discrimination is the basic right of the displaced and the best means to achieve a lasting solution to their plight”.

694. Paragraph 4(b) of the 1992 Recommendation on the Tragic Situation of Civilians in Bosnia and Herzegovina provides that “each party to the conflict guarantees to those who leave temporarily the territory it controls . . . that they have the right to return home at a later stage if they wish so”.

695. In Paragraph 1 of the 1997 Protocol on Tajik Refugees, it was agreed “to step up mutual efforts to ensure the voluntary return, in safety and dignity, of all refugees and displaced persons to their homes”. The parties also called upon:

the United Nations, the Organization for Security and Cooperation in Europe (OSCE) and the Office of the United Nations High Commissioner for Refugees (UNHCR) to provide assistance in order to ensure the safety of returning refugees

and displaced persons and to establish and expand their presence at places where such persons are living.

696. Paragraph 3(a) of Chapter 4 of the 1997 Sudan Peace Agreement created several administrative structures designed, *inter alia*, “to assist, repatriate, resettle and rehabilitate the displaced and the returnees”. Under Paragraph 2 of Chapter 5 of the agreement, one of the functions of the proposed Coordinating Council for the Southern States was the “voluntary repatriation of the returnees and the displaced”.

697. Principle 6(3) of the 1998 Guiding Principles on Internal Displacement states that “displacement shall last no longer than required by the circumstances”.

698. Principle 15(d) of the 1998 Guiding Principles on Internal Displacement states that IDPs have “the right to be protected against forcible return to or resettlement in any place where their life, safety, liberty and/or health would be at risk”.

II. National Practice

Military Manuals

699. Argentina’s Law of War Manual reproduces Article 49 GC IV.⁶⁵⁰

700. Croatia’s LOAC Compendium provides that the evacuation of civilian persons should be “limited in time”, i.e. the return should be rapid.⁶⁵¹

701. Hungary’s Military Manual provides that the evacuation of civilian persons should be “limited in time”, i.e. the return should be rapid.⁶⁵²

702. Kenya’s LOAC Manual provides that “temporarily removed persons . . . must be allowed to return or be brought back to their previous location”.⁶⁵³

703. Madagascar’s Military Manual provides that “temporarily displaced persons . . . should be allowed to return to their previous location”.⁶⁵⁴

704. The Military Directive to Commanders of the Philippines provides that “displaced persons and evacuees shall be allowed and/or persuaded to return to their homes as quickly as tactical considerations permit”.⁶⁵⁵

705. Spain’s LOAC Manual reproduces Article 49 GC IV.⁶⁵⁶

706. The UK Military Manual provides that if the occupant does transfer protected persons outside the limits of occupied territories, then “as soon as hostilities in the area in question have ceased, they must be transferred back to their homes”.⁶⁵⁷

707. The US Field Manual reproduces Articles 45 and 49 GC IV.⁶⁵⁸

⁶⁵⁰ Argentina, *Law of War Manual* (1969), § 5.008.

⁶⁵¹ Croatia, *LOAC Compendium* (1991), p. 62. ⁶⁵² Hungary, *Military Manual* (1992), p. 98.

⁶⁵³ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 13.

⁶⁵⁴ Madagascar, *Military Manual* (1994), Fiche No. 8-SO, § A.

⁶⁵⁵ Philippines, *Military Directive to Commanders* (1988), § 3(e).

⁶⁵⁶ Spain, *LOAC Manual* (1996), Vol. I, § 5.5.c.(5).

⁶⁵⁷ UK, *Military Manual* (1958), § 560.

⁶⁵⁸ US, *Field Manual* (1956), §§ 284 and 382.

National Legislation

708. Angola's Rules on the Resettlement of Internally Displaced Populations provides that:

It is the responsibility of the Provincial Governments, through the Sub-Groups on Displaced Persons and Refugees of the Provincial Humanitarian Coordination Groups, to carry out the following:

...
f) To verify the voluntary nature of resettlement and return and the presence of the State Administration;

...
h) To take appropriate measures to ensure . . . the safety and dignity of populations during movements to return and resettlement sites.⁶⁵⁹

709. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁶⁶⁰

710. According to Colombia's Law on Internally Displaced Persons, forcibly displaced persons have the right to return to their places of origin.⁶⁶¹

711. Ethiopia's Transitional Period Charter provided that priority should be given to the rehabilitation of those sections of the population who had been forcibly uprooted by the previous regime's policy of villagisation and resettlement and that the rehabilitation would be carried out in accordance with their wishes.⁶⁶²

712. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 45 and 49 GC IV, is a punishable offence.⁶⁶³

713. Lithuania's Criminal Code as amended punishes anyone who, in situations of armed conflict, prevents civilians from returning to the territory of the State if they so wish after the termination of hostilities.⁶⁶⁴

714. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".⁶⁶⁵

National Case-law

715. No practice was found.

⁶⁵⁹ Angola, *Rules on the Resettlement of Internally Displaced Populations* (2001), Article 2(f) and (h), see also Article 4 (security of site) and Article 5 (voluntary resettlement and return).

⁶⁶⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁶⁶¹ Colombia, *Law on Internally Displaced Persons* (1997), Articles 2(6) and 10(6).

⁶⁶² Ethiopia, *Transitional Period Charter* (1991), Article 14, p. 4.

⁶⁶³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶⁶⁴ Lithuania, *Criminal Code as amended* (1961), Article 343.

⁶⁶⁵ Norway, *Military Penal Code as amended* (1902), § 108.

Other National Practice

716. In 1996, during a debate in the UN Commission on Human Rights in relation to Cyprus, Angola stated that “all restrictions preventing refugees and displaced persons from returning home should be lifted”.⁶⁶⁶

717. In 1994, during a debate in the UN Security Council on the situation in Abkhazia, Brazil stated that “the displaced persons and refugees have a right to return to their homes in conditions of safety”.⁶⁶⁷

718. In 1994, during a debate in the UN Security Council on the situation in the former Yugoslavia, Croatia welcomed “the pilot projects for the return of displaced persons to their homes in the occupied areas”.⁶⁶⁸

719. In 1994, during a debate in the UN Security Council on the situation in Abkhazia, the Czech Republic stated that “the right of refugees to return to their homes is a crucial right”.⁶⁶⁹

720. In 1996, during a debate in to the UN Commission on Human Rights in relation to Bosnia and Herzegovina, Egypt stated that “refugees and displaced persons must be allowed to return to their homes”.⁶⁷⁰

721. In 1993 and 1995, during debates in the UN Security Council on the situation in Georgia and in the former Yugoslavia respectively, France supported the right to return of refugees and displaced persons.⁶⁷¹

722. According to the Report on the Practice of France, the free return of refugees is a frequent preoccupation of French diplomacy. France often asks for this right to be guaranteed and considers a contrary attitude to be “unacceptable”.⁶⁷²

723. In 1995, during a debate in the UN Security Council on the situation in Abkhazia, Georgia supported the right of refugees and displaced persons to return in safety and emphasised that “nothing can change [its] resolve to achieve the unconditional and timely return of the refugees to their homes”.⁶⁷³

724. In 1995, during a debate in the UN Security Council on the situation in Tajikistan, the representative of Honduras stated that his government was “pleased to see that the Government of Tajikistan has committed itself to

⁶⁶⁶ Angola, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.46, 22 May 1996, § 6.

⁶⁶⁷ Brazil, Statement before the UN Security Council, UN Doc. S/PV.3354, 25 March 1994, p. 5.

⁶⁶⁸ Croatia, Statement before the UN Security Council, UN Doc. S/PV.3434, 30 September 1994, p. 3.

⁶⁶⁹ Czech Republic, Statement before the UN Security Council, UN Doc. S/PV.3354, 25 March 1994, p. 4.

⁶⁷⁰ Egypt, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.47, 17 April 1996, § 35.

⁶⁷¹ France, Statement before the UN Security Council, UN Doc. S/PV.3295, 19 October 1993, p. 4; Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 10.

⁶⁷² Report on the Practice of France, 1999, Chapter 5.5.

⁶⁷³ Georgia, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 3.

assisting the return and reintegration of refugees and displaced persons in dignity and safety".⁶⁷⁴

725. In 1995, during a debate in the UN Security Council on the situation in Tajikistan, Indonesia called upon the parties to intensify their efforts "to ensure the voluntary return, in dignity and safety, of all refugees and displaced persons to their homes".⁶⁷⁵

726. In 1995, during a debate in the UN Security Council on the situation in Abkhazia, Italy stressed "the need to guarantee the safe return of refugees".⁶⁷⁶

727. In 1994, in statements before the UN Security Council on the situation in Abkhazia, New Zealand stated that it understood "the concern of the Government of Georgia for the problems associated with the return of . . . refugees to their homes. Displaced persons must be able to resume their ordinary lives without fear of violence or intimidation."⁶⁷⁷

728. In 1994 and 1995, in statements before the UN Security Council on the situation in Abkhazia, Nigeria stated that:

The issue of the return of the refugees and displaced persons is crucial to the settlement of the Georgian-Abkhaz conflict. The current situation, in which both the Government of Georgia and the Abkhaz authorities are unable to guarantee the safety of the displaced persons and protection of the repatriated . . . is unfortunate and should be reversed.⁶⁷⁸

729. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provides that "evacuees shall be returned to their houses at government expense as soon as the reason for evacuation ceases".⁶⁷⁹

730. In 1995, during a debate in the UN Security Council on the situation in Croatia, Russia stated that "the Serbian inhabitants of Krajina must have the right to return in conditions of safety".⁶⁸⁰

731. In 1992, during a debate in the UN Security Council on the situation in the former Yugoslavia, Tunisia stated that it was essential to "enable all the displaced and deported persons to return to their homes".⁶⁸¹

⁶⁷⁴ Honduras, Statement before the UN Security Council, UN Doc. S/PV.3544, 16 June 1995, pp. 4-5.

⁶⁷⁵ Indonesia, Statement before the UN Security Council, UN Doc. S/PV.3544, 16 June 1995, pp. 4-5.

⁶⁷⁶ Italy, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 5.

⁶⁷⁷ New Zealand, Statement before the UN Security Council, UN Doc. S/PV.3332, 31 January 1994, p. 13.

⁶⁷⁸ Nigeria, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 8.

⁶⁷⁹ Philippines, Presidential Human Rights Committee, Res. No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 8.

⁶⁸⁰ Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8.

⁶⁸¹ Tunisia, Statement before the UN Security Council, UN Doc. S/PV.3137, 16 November 1992, p. 66.

732. In 1994, during a debate in the UN Security Council on the situation in Abkhazia, the UK stated that the “safe return [of displaced persons] will be a vital ingredient in restoring peace and stability in Georgia”.⁶⁸²

733. In 1995, during a debate in the UN Security Council on the situation in Abkhazia, the US supported the extension of UNOMIG’s mandate, which included the contribution “to conditions conducive to the safe and orderly return of refugees and displaced persons”.⁶⁸³

III. Practice of International Organisations and Conferences

United Nations

734. In a resolution adopted in 1974 on emergency UN humanitarian assistance to Cyprus, the UN Security Council urged the parties concerned to take measures “to permit persons who wish to do so to return to their homes in safety”.⁶⁸⁴

735. In a resolution adopted in 1992, the UN Security Council, strongly condemning the deportation of 12 Palestinian civilians from the occupied territories, requested that Israel refrain from deporting any more Palestinian civilians from the occupied territories and that it “ensure the safe and immediate return to the occupied territories of all those deported”.⁶⁸⁵

736. In a resolution adopted in 1992 in the context of the conflict in the former Yugoslavia, the UN Security Council endorsed the principles agreed by the Presidents of Croatia and the SFRY on 30 September 1992 that “all displaced persons have the right to return in peace to their former homes”.⁶⁸⁶ These principles were reaffirmed in a resolution adopted in 1993.⁶⁸⁷

737. In a resolution on Bosnia and Herzegovina adopted in 1993, the UN Security Council affirmed the continuing relevance of “the recognition and the right of all displaced persons to return to their homes in safety and honour”.⁶⁸⁸

738. In a resolution adopted in 1993 on the settlement of the conflict in and around Nagorno-Karabakh, the UN Security Council requested the Secretary-General and the relevant international agencies “to assist refugees and displaced persons to return to their homes in security and dignity”.⁶⁸⁹

739. In numerous resolutions adopted between 1994 and 1999 on the situation in Georgia, the UN Security Council affirmed “the right of all refugees and

⁶⁸² UK, Statement before the UN Security Council, UN Doc. S/PV.3332, 31 January 1994, p. 9.

⁶⁸³ US, Statement before the UN Security Council, UN Doc. S/PV.3535, 12 May 1995, p. 13.

⁶⁸⁴ UN Security Council, Res. 361, 30 August 1974, § 4.

⁶⁸⁵ UN Security Council, Res. 726, 6 January 1992, §§ 1, 3 and 4.

⁶⁸⁶ UN Security Council, Res. 779, 6 October 1992, § 5.

⁶⁸⁷ UN Security Council, Res. 820 A, 17 April 1993, § 7.

⁶⁸⁸ UN Security Council, Res. 859, 24 August 1993, § 6(d).

⁶⁸⁹ UN Security Council, Res. 874, 14 October 1993, § 11.

displaced persons affected by the conflict to return to their homes in secure conditions".⁶⁹⁰

740. In a resolution on the former Yugoslavia adopted in 1994, the UN Security Council affirmed "the right of all displaced persons to return voluntarily to their homes of origin in safety and dignity with the assistance of the international community".⁶⁹¹

741. In a resolution adopted in 1995, the UN Security Council welcomed:

the obligation assumed by the Government of the Republic of Tajikistan to assist the return and the reintegration of refugees as well as the obligations by the parties to cooperate in ensuring the voluntary return, in dignity and safety, of all refugees and displaced persons to their homes.⁶⁹²

742. In a resolution adopted in 1996 concerning the situation in the Great Lakes region, the UN Security Council underlined "the urgent need for the orderly and voluntary repatriation and resettlement of refugees, and the return of internally displaced persons, which are crucial elements for the stability of the region".⁶⁹³

743. In a resolution adopted in 1998 concerning the situation in Abkhazia, Georgia, the UN Security Council demanded in particular that the Abkhaz authorities "allow the unconditional and immediate return of all persons displaced since the resumption of hostilities in May 1998".⁶⁹⁴

744. In several resolutions on Kosovo adopted in 1998 and 1999, the UN Security Council reaffirmed the right of all refugees and displaced persons to return to their homes in safety.⁶⁹⁵

745. In a resolution adopted in 1999, the UN Security Council stressed that it was the responsibility of the Indonesian authorities "to take immediate and effective measures to ensure the safe return of refugees to East Timor".⁶⁹⁶

746. In 1994, in a statement by its President on Rwanda, the UN Security Council stated that "the rapid return of the refugees and displaced persons to their homes is essential for the normalization of the situation in Rwanda" and strongly condemned "attempts to intimidate refugees carried out by those who are seeking to prevent them from returning to Rwanda".⁶⁹⁷

747. In several statements by its President on the situation in Georgia between 1994 and 1996, the UN Security Council expressed its deep concerns "at the

⁶⁹⁰ UN Security Council, Res. 896, 31 January 1994, § 11; Res. 906, 25 March 1994, § 3; Res. 993, 12 May 1995, preamble; Res. 1036, 12 January 1996, preamble; Res. 1096, 30 January 1997, § 8; Res. 1124, 31 July 1997, § 11; Res. 1225, 28 January 1999, § 7.

⁶⁹¹ UN Security Council, Res. 947, 30 September 1994, § 7.

⁶⁹² UN Security Council, Res. 999, 16 June 1995, §§ 8 and 14.

⁶⁹³ UN Security Council, Res. 1078, 9 November 1996, preamble.

⁶⁹⁴ UN Security Council, Res. 1187, 30 July 1998, § 3.

⁶⁹⁵ UN Security Council, Res. 1199, 23 September 1998, preamble; Res. 1203, 24 October 1998, § 12; Res. 1239, 14 May 1999, § 4; Res. 1244, 10 June 1999, preamble.

⁶⁹⁶ UN Security Council, Res. 1272, 25 October 1999, § 12.

⁶⁹⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/42, 10 August 1994, pp. 1–2.

continued obstruction to the return of the refugees and displaced persons by the Abkhaz authorities" and reiterated its call to the Abkhaz authorities "to guarantee the safety of all returnees and to regularize the status of spontaneous returnees".⁶⁹⁸

748. In 1996, in a statement by its President, the UN Security Council urged the government of Croatia "to expand its programme to accelerate the return of [the displaced] persons without preconditions or delay".⁶⁹⁹

749. In 1996, in a statement by its President on the Great Lakes region/Zaire, the UN Security Council underlined "the urgent need for the orderly voluntary repatriation and resettlement of refugees, and the return of displaced persons".⁷⁰⁰

750. In 1997, in a statement by its President, the UN Security Council called upon "the Government of Burundi to allow the people to return to their homes without any hindrance".⁷⁰¹

751. In a resolution adopted in 1993 on the Office of the United Nations High Commissioner for Refugees, the UN General Assembly urged all States and relevant organizations "to support the High Commissioner's search for durable solutions to refugee problems, including voluntary repatriation, integration in the country of asylum and resettlement in a third country, as appropriate," and welcomed "in particular the ongoing efforts of her Office to pursue wherever possible opportunities to promote conditions conducive to the preferred solution of voluntary repatriation".⁷⁰²

752. In resolutions adopted in 1994 and 1995, the UN General Assembly reaffirmed the right of refugees and displaced persons from the areas of conflict in the territory of the former Yugoslavia "to return voluntarily to their homes in safety and dignity".⁷⁰³

753. In two resolutions adopted in 1998 and 1999 on the situation of human rights in Kosovo, the UN General Assembly called upon the authorities of the FRY (Serbia and Montenegro) and ethnic Albanian leaders "to allow for and facilitate the free and unhindered return to their homes, in safety and with dignity, of all internally displaced persons and refugees".⁷⁰⁴

754. In a resolution adopted in 1994 on assistance to Georgia in the field of human rights, the UN Commission on Human Rights appealed to those in

⁶⁹⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/78, 2 December 1994; Statement by the President, UN Doc. S/PRST/1995/39, 18 August 1995; Statement by the President, UN Doc. S/PRST/1996/43, 22 October 1996, p. 2.

⁶⁹⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/39, 20 September 1996.

⁷⁰⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/44, 1 November 1996.

⁷⁰¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/32, 30 May 1997.

⁷⁰² UN General Assembly, Res. 48/116, 20 December 1993, § 10.

⁷⁰³ UN General Assembly, Res. 49/10, 3 November 1994, § 9; Res. 50/193, 22 December 1995, § 12.

⁷⁰⁴ UN General Assembly, Res. 53/164, 9 December 1998, § 23; Res. 54/183, 17 December 1999, § 11.

control of the territory of Abkhazia “to implement and ensure law and order, to . . . ensure the right of displaced persons to return to Abkhazia”.⁷⁰⁵

755. In a resolution adopted in 1997 on human rights in the occupied Syrian Golan, the UN Commission on Human Rights emphasised that “the displaced persons of the population of the occupied Syrian Golan must be allowed to return to their homes”.⁷⁰⁶

756. In a resolution adopted in 1998 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN Commission on Human Rights called upon the government of Croatia to facilitate “the expeditious return, in safety and dignity, of all refugees and displaced persons to their homes”. It also insisted that the government of the FRY “allow the return in safety and dignity of ethnic Albanian refugees to Kosovo”.⁷⁰⁷ In a number of other resolutions adopted in the context of the conflict in the former Yugoslavia, the Commission stressed the right of IDPs to return to their homes.⁷⁰⁸

757. In a resolution adopted in 1999 on the situation of human rights in East Timor, the UN Commission on Human Rights called upon the government of Indonesia “to guarantee the voluntary return of all refugees and displaced persons, including those who have been forcibly displaced to camps in West Timor”.⁷⁰⁹

758. In a decision adopted in 1992 on the situation of human rights in Yugoslavia, the UN Sub-Commission on Human Rights demanded that “displaced people be given the opportunity to return to their homes”.⁷¹⁰

759. In a resolution adopted in 1995 on the situation in the territory of the former Yugoslavia, the UN Sub-Commission on Human Rights recommended that “the United Nations and all Governments take measures to enable all refugees, deportees and displaced persons to return safely to their homes”.⁷¹¹

760. In a resolution adopted in 1998 on housing and property restitution in the context of the return of refugees and internally displaced persons, the UN Sub-Commission on Human Rights reaffirmed “the right of all refugees, as defined in relevant international legal instruments, and internally displaced persons to return to their homes and places of habitual residence in their country and/or place of origin, should they so wish”.⁷¹²

761. In 1980, in its Conclusion on Voluntary Repatriation, the Executive Committee of the UNHCR recognized that “voluntary repatriation constitutes generally . . . the most appropriate solution for refugee problems” and stressed

⁷⁰⁵ UN Commission on Human Rights, Res. 1994/59, 4 March 1994, § 5.

⁷⁰⁶ UN Commission on Human Rights, Res. 1997/2, 26 March 1997, § 2.

⁷⁰⁷ UN Commission on Human Rights, Res. 1998/79, 22 April 1998, §§ 10(b), 14(a) and 25(c).

⁷⁰⁸ UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 4; Res. 1994/75, 9 March 1994, § 5; Res. 1995/89, 8 March 1995, § 8; Res. 1996/71, 23 April 1996, § 21.

⁷⁰⁹ UN Commission on Human Rights, Res. 1999/S-4/1, 27 September 1999, § 5(d).

⁷¹⁰ UN Sub-Commission on Human Rights, Decision 1992/103, UN Doc. E/CN.4/Sub.2/1992/58, 14 October 1992, § (c).

⁷¹¹ UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, § 5.

⁷¹² UN Sub-Commission on Human Rights, Res. 1998/26, 22 August 1998, § 1.

that “the essentially voluntary character of repatriation should always be respected”. It also called upon governments of countries of origin “to provide formal guarantees for the safety of returning refugees”.⁷¹³ The Committee completed these findings in other conclusions on voluntary repatriation in 1985 and further reaffirmed the necessity of removing the causes of refugee movements and to tackle this problem internationally.⁷¹⁴

762. In 1995, in its Conclusion on Voluntary Repatriation to Afghanistan, the Executive Committee of UNHCR urged the parties to the conflict in Afghanistan to come to a political settlement, “thus allowing for the return of Afghan refugees and displaced persons to their homes in safety and dignity”.⁷¹⁵

763. In 1994, in a report on the situation in Abkhazia, Georgia, the UN Secretary-General reported that “regarding the refugees and displaced persons, UNHCR seeks to maintain internationally accepted principles and practices for their voluntary repatriation and return, which do not allow screening mechanisms”.⁷¹⁶

764. In January 1995, in a report on the situation in Abkhazia, Georgia, the UN Secretary-General reported that “the Abkhaz side had refused to sign a declaration that would have allowed for a speedier return and in larger numbers [of refugees and IDPs]. It did, however, agree to reduce the review period for the consideration of application [for return] from four to two weeks.”⁷¹⁷ In a further report in May, the Secretary-General noted that a proposal by Abkhazia to register spontaneous returnees and to consider UNHCR-sponsored returnees at the rate of 200 per week was rejected by UNHCR as not meeting the requirements of the return timetable agreed to by all parties – except the Abkhaz side – during talks in February 1995.⁷¹⁸

765. In several reports between 1994 and 1997 on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stressed the right to voluntary return of IDPs.⁷¹⁹

766. In 1995, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human

⁷¹³ UNHCR, Executive Committee, Conclusion No. 18 (XXXI): Voluntary Repatriation, 16 October 1980, §§ (a), (b) and (f).

⁷¹⁴ UNHCR, Executive Committee, Conclusion No. 40 (XXXVI): Voluntary Repatriation, 18 October 1985, §§ (c), (d) and (k).

⁷¹⁵ UNHCR, Executive Committee, Conclusion on Voluntary Repatriation to Afghanistan, UN Doc. A/50/12/Add.1, 1 November 1995, § 29(d).

⁷¹⁶ UN Secretary-General, Report on the situation in Abkhazia, Georgia, UN Doc. S/1994/312, 18 March 1994, § 8.

⁷¹⁷ UN Secretary-General, Report on the situation in Abkhazia, Georgia, UN Doc. S/1995/10, 6 January 1995, § 3.

⁷¹⁸ UN Secretary-General, Report on the situation in Abkhazia, Georgia, UN Doc. S/1995/342, 1 May 1995, pp. 2–3.

⁷¹⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Seventh periodic report, UN Doc. E/CN.4/1995/4, 10 June 1994, § 23; Special report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, § 83; Periodic report, UN Doc. E/CN.4/1997/56, 29 January 1997, §§ 14–19.

Rights stated that the authorities should not make the return of refugees and IDPs conditional upon reciprocal returns being allowed in other areas.⁷²⁰

767. In 1996, in a special periodic report on minorities in the context of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights reported that in discussions with the authorities in the former Yugoslavia, she had stressed that the different government agencies had the responsibility of assisting displaced persons to return to their homes in safety and dignity.⁷²¹

768. In 1997, in his final report submitted to the UN Sub-Commission on Human Rights, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights. Article 4(3) of the draft declaration provided that "all persons thus displaced shall be allowed to return to their homes, lands, or places of origin immediately upon cessation of the conditions which made their displacement imperative". Article 8 provided that "every person has the right to return voluntarily, and in safety and dignity, to the country of origin and, within it, to the place of origin or choice".⁷²²

769. In a report in 1996, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina reiterated that "enabling refugees to return is important for a large number of reasons, including the creation of the conditions that will make the holding of free and fair elections possible".⁷²³

Other International Organisations

770. The Parliamentary Assembly of the Council of Europe has adopted several resolutions and recommendations emphasising the right of displaced persons to return voluntarily and in safety to their homes in Bosnia and Herzegovina, the Transcaucasian region, Serbia and Montenegro, the Former Yugoslav Republic of Macedonia, and Georgia.⁷²⁴ For example, in a recommendation adopted in 1996 in the context of the former Yugoslavia, the Assembly stated that "all

⁷²⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Eighth periodic report, UN Doc. E/CN.4/1995/10, 4 August 1994, § 10; Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Tenth periodic report, UN Doc. E/CN.4/1995/57, 16 January 1995, § 22.

⁷²¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Special periodic report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, §§ 81–83.

⁷²² UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Articles 4(3) and 8.

⁷²³ High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Report, UN Doc. S/1996/190, 14 March 1996, Annex, §§ 68–73.

⁷²⁴ Council of Europe, Parliamentary Assembly, Res. 1010, 28 September 1993, § 12(i)(c) and (vii); Res. 1047, 10 November 1994, § 6; Res. 1066, 27 September 1995, § 9; Rec. 1305, 24 September 1996, § 8(iii)(a); Res. 1119, 22 April 1997, §§ 5(iv) and 10.

displaced persons have the right to return to their original homes" and stressed that "such returns are an essential element of reconstruction, but that they must be voluntary".⁷²⁵

771. In a resolution adopted in 1996 on the situation in Abkhazia, the European Parliament stressed the importance of the right of all IDPs to return voluntarily to their places of origin or residence, irrespective of their ethnic, social or political affiliation, under conditions of complete safety and dignity.⁷²⁶

772. In 1996, during a debate in the UN Commission on Human Rights, Italy, speaking on behalf of the EU, called for "a peaceful settlement to the conflicts in Abkhazia and South Ossetia in order, *inter alia*, to allow the return of refugees and displaced persons".⁷²⁷

773. In 1995, during a debate in the OSCE Permanent Council on the situation in Chechnya, France stated, on behalf of the EU, that "civilians must have the choice to leave this hell if they wish, being understood that the right to return to their homes of these refugees and displaced persons shall not be later limited".⁷²⁸

774. In a declaration on Kosovo adopted in 1998, the European Council called upon the FRY President "to facilitate the full return to their homes of refugees and displaced persons".⁷²⁹

775. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council registered:

its appreciation for Resolution 799 adopted by the UN Security Council which strongly condemned the mass expulsion by the Israeli Occupation Forces of hundreds of Palestinian civilians . . . and called on the Israeli Authorities to ensure an immediate and safe return of all those expelled to the occupied territories.

It called on the UN Security Council "to do all that it deems necessary . . . to ensure a speedy return of the expelled civilians to their Homeland".⁷³⁰

776. In a resolution on Bosnia and Herzegovina adopted in 1992, the Council of the League of Arab States decided to call upon the Serb forces to make "all necessary arrangements to allow for the repatriation of the refugees to their homes".⁷³¹

777. In a decision on Georgia adopted in 1998, the OSCE Ministerial Council stated that, amongst others, "monitoring of the smooth and safe return of

⁷²⁵ Council of Europe, Parliamentary Assembly, Rec. 1287, 24 January 1996, §§ 2–3.

⁷²⁶ European Parliament, Resolution on the situation in Abkhazia, 20 November 1996, § 5.

⁷²⁷ EU, Statement by Italy on behalf of the EU before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.45, 17 April 1996, § 10.

⁷²⁸ EU, Statement by France on behalf of the EU before the Permanent Council of the OSCE, Vienna, 2 February 1995, *Politique étrangère de la France*, February 1995, p. 154.

⁷²⁹ European Council, Declaration on Kosovo, 15 June 1998.

⁷³⁰ GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, pp. 6–7.

⁷³¹ League of Arab States, Council, Res. 5231, 13 September 1992, § 5.

refugees" can contribute to a peaceful settlement of the conflict in Abkhazia, Georgia.⁷³²

International Conferences

778. The Comprehensive Plan of Action adopted by consensus by the International Conference on Indo-Chinese Refugees in 1989 provided that:

Persons determined not to be refugees should return to their country of origin in accordance with international practices reflecting the responsibilities of States towards their own citizens. In the first instance, every effort will be made to encourage the voluntary return of such persons.⁷³³

779. The governments represented at the International Conference on Central American Refugees in 1989 reaffirmed "their commitment to encourage the voluntary return of refugees and other persons displaced by the crisis, under conditions of personal security and dignity that would allow them to resume a normal life".⁷³⁴

780. The Chairman's Conclusions of the Florence Peace Implementation Conference for Bosnia and Herzegovina in 1996 stated that "the right of return home of people who have been either displaced or have fled the country is a basic principle of the Peace Agreement which cannot be abridged". The Conclusions further stated that "the creation of conditions for free and safe return, permitting the lifting of temporary protection, is now an urgent matter affecting political and economical viability of the country" and recommended urgent action with regard to "removal of legal and administrative obstacles to the return of refugees and displaced persons".⁷³⁵

IV. Practice of International Judicial and Quasi-judicial Bodies

781. In a general recommendation adopted in 1996, CERD emphasised that "States parties are obliged to ensure that the return of . . . refugees and displaced persons is voluntary".⁷³⁶

782. In a decision on the FRY adopted in 1998, CERD reaffirmed that "all people who have been displaced or have become refugees have the right to return safely to their homes".⁷³⁷

⁷³² OSCE, Ministerial Council, Seventh Meeting, Oslo, December 1998, Decision on Georgia, Doc. MC(7).DEC/1, fifth paragraph.

⁷³³ International Conference on Indo-Chinese Refugees, Geneva, 13–14 June 1989, Comprehensive Plan of Action, § 12, see also §§ 14–15.

⁷³⁴ International Conference on Central American Refugees (CIREFCA), Guatemala City, 29–31 May 1989, Declaration and Concerted Plan of Action, UN Doc. CIREFCA/89/14, 31 May 1989, § I(3), see also § II(10), (21), (28) and (30).

⁷³⁵ Peace Implementation Conference for Bosnia and Herzegovina, Florence, 13–14 June 1996, Chairman's Conclusions, annexed to Letter dated 9 July 1996 from the UN Secretary-General to the President of the UN Security Council, UN Doc. S/1996/542, 10 July 1996, Appendix I, §§ 11 and 13.

⁷³⁶ CERD, General Recommendation XXII (Article 5 of the Convention and refugees and displaced persons), 1996, § 2.

⁷³⁷ CERD, Decision 3(53) on the FRY, UN Doc. A/53/18 p. 19, 17 August 1998, § 3.

V. Practice of the International Red Cross and Red Crescent Movement

783. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “persons . . . evacuated must be transferred back to their homes as soon as hostilities in the concerned area have ceased” and that “temporarily removed persons must be allowed to return”.⁷³⁸

VI. Other Practice

784. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “persons or groups . . . displaced shall be allowed to return to their homes as soon as the conditions which made their displacement imperative have ceased”.⁷³⁹

785. In 1995, with respect to the Declaration of Minimum Humanitarian Standards, the IHL commented that “in no case shall [refugees and displaced persons] be expelled or return, in any manner whatsoever, to the frontiers where their lives or freedom would be threatened on account of their race, nationality, membership of a particular social group or political opinion”.⁷⁴⁰

Measures to facilitate return and reintegration*I. Treaties and Other Instruments**Treaties*

786. Article III(59)(d)(1) of the 1953 Panmunjon Armistice Agreement provides that:

[The Committee for Assisting the Return of Displaced Civilians] shall, under the general supervision and direction of the Military Armistice Commission, be responsible for coordinating the specific plans of both sides for assistance to the return of the above-mentioned civilians, and for supervising the execution by both sides of all of the provisions of this Armistice Agreement relating to all the return of the above-mentioned civilians. It shall be the duty of this Committee to make necessary arrangements, including those of transportation, for expediting and coordinating the movement of the above-mentioned civilians; to select the crossing point(s) through which the above-mentioned civilians will cross the Military Demarcation Line; to arrange for security at the crossing point(s); and to carry out such other functions as are required to accomplish the return of the above-mentioned civilians.

⁷³⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 835(2) and 546.

⁷³⁹ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 7(1), *IRRC*, No. 282, p. 333.

⁷⁴⁰ IHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General pursuant to UN Commission on Human Rights resolution 1995/29, 28 November 1995, p 10.

787. Article V of the 1969 Convention Governing Refugee Problems in Africa provides that:

2. The country of asylum, in collaboration with the country of origin, shall make adequate arrangements for the safe return of refugees who request repatriation.
3. The country of origin, on receiving back refugees, shall facilitate their resettlement and grant them the full rights and privileges of nationals of the country, and subject them to the same obligations.
4. Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made through national information media and through the Administrative Secretary-General of the OAU, inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin will enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished, and that the text of such appeal should be given to refugees and clearly explained to them by their country of asylum.
5. Refugees who freely decide to return to their homeland, as a result of such assurances or on their own initiative, shall be given every possible assistance by the country of asylum, the country of origin, voluntary agencies and international and intergovernmental organizations, to facilitate their return.

788. In paragraph 5 of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties decided that:

The principal tasks of the [Quadripartite] Commission shall be to formulate, discuss and approve plans to implement programmes for safe, orderly and voluntary repatriation of the refugees and displaced persons . . . and for their successful reintegration. Such plans should include registration, transport, basic material assistance for a period of up to six months and rehabilitation assistance.

789. The 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that:

Article I. Rights of Refugees and Displaced Persons

...

2. The Parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution, or discrimination . . .
3. The Parties shall take all necessary steps to prevent activities within their territories which would hinder or impede the safe and voluntary return of refugees and displaced persons . . .

Article II. Creation of Suitable Conditions for Return

1. The Parties undertake to create in their territories the political, economic and social conditions conducive to the voluntary return and harmonious reintegration of refugees and displaced persons. The Parties shall provide all possible assistance to refugees and displaced persons and work to facilitate their voluntary return in a peaceful, orderly and phased manner.

790. Article 7 of the 1996 Agreement on the Normalisation of Relations between Croatia and the FRY specifies that "the Contracting Parties shall ensure

conditions for a free and safe return of . . . displaced persons to their places of residence or other places that they freely choose”.

791. The 1997 Agreement of the Joint Working Group on Operational Procedures of Return, concluded between Croatia, UNTAES and UNHCR, provided that until conditions were created for the safe return of Croatian citizens to their places of origin, displaced persons could remain in the houses they were occupying. Under the agreement, all Croatian citizens wishing to return to their homes were first required to register with the Office of Displaced Persons and Refugees (ODPR). The agreement contained a number of detailed conditions that had to be fulfilled by returnees in cooperation with the ODPR, UNTAES and the UNHCR. The agreement made provision for expediting the process of return in principle and stipulated that the confirmation of arrangements for return would be issued within 15 calendar days of registration with the ODPR and that the return should take place as soon as possible thereafter.

Other Instruments

792. Article 9 of the 1950 Statute of the UNHCR provides that “the High Commissioner shall engage in such additional activities, including repatriation and resettlement, as the UN General Assembly may determine”.

793. In paragraphs 2 and 3 of the 1991 Memorandum of Understanding between Iraq and the UN, Iraq welcomed the efforts of the UN to promote the voluntary return home of Iraqi displaced persons and agreed that measures to be taken for the benefit of displaced persons should be based primarily on their personal safety and the provision of humanitarian assistance and relief for their return and normalisation of their lives in their places of origin.

794. Paragraph 2 of the Joint Declaration by the Presidents of the FRY and Croatia (September 1992) states that:

Authorities of the Republic of Croatia and the Federal Republic of Yugoslavia, in close collaboration with the United Nations Protection Force (UNPROFOR), will undertake urgent, joint measures to ensure the peaceful return to their homes in the United Nations protected areas of all persons displaced therefrom who so wish. To that end, they propose the prompt establishment of a quadripartite mechanism – consisting of authorities of the Government of Croatia, local Serb representatives, representatives of UNPROFOR and the Office of the United Nations High Commissioner for Refugees (UNHCR) – to ensure that this process moves forwards.

795. Paragraph 3 of the Joint Declaration by the Presidents of the FRY and Croatia (October 1992) reaffirmed that the priority task of the quadripartite mechanism established in Paragraph 2 of their Joint Declaration (September 1992) “should be to organize and facilitate the return and the resettlement, under humane conditions, of displaced persons and groups”.

796. In Article 18(1) of the 1993 Cotonou Agreement on Liberia, the parties committed themselves “to create the conditions that will allow all refugees and displaced persons to, respectively, voluntarily repatriate and return to Liberia

to their places of origin or habitual residence under conditions of safety and dignity”.

797. Article 23(D) of the 1993 Arusha Peace Accords and Articles 36 and 42 of the 1993 Arusha Protocol on Displaced Persons provide that displaced persons have a right to humanitarian assistance in order to facilitate their resettlement.

798. Paragraph 6 of the 1993 Afghan Peace Accord provides that “effective steps shall be taken to facilitate the return of displaced persons to their respective homes and locations”.

799. Paragraph 6(iii)(1) of Chapter 4 of the 1997 Sudan Peace Agreement created several administrative structures designed, *inter alia*, “to assist, repatriate, resettle and rehabilitate the displaced and the returnees”.

800. Principle 28 of the 1998 Guiding Principles on Internal Displacement states that:

1. Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.
2. Special efforts should be made to ensure the full participation of internally displaced persons in the planning and management of their return or resettlement and reintegration.

801. In paragraph 70 of the 2000 Cairo Plan of Action, African and EU heads of State and government, in order to address the problem of refugees and displaced persons, agreed “to continue to provide assistance to refugees and displaced persons and to participate in their reintegration in conformity with international law and relevant UN Conventions”.

II. National Practice

Military Manuals

802. Colombia’s Basic Military Manual provides that at the end of the conflict, the parties have a duty to “facilitate the return of the displaced population and to provide them with protection and humanitarian assistance”.⁷⁴¹

National Legislation

803. Angola’s Rules on the Resettlement of Internally Displaced Populations provides that:

It is the responsibility of the Provincial Governments, through the Sub-Groups on Displaced Persons and Refugees of the Provincial Humanitarian Coordination Groups, to carry out the following:

⁷⁴¹ Colombia, *Basic Military Manual* (1995), p. 31.

- a) To plan, organize and ensure the implementation of all resettlement and return processes for displaced persons;
- b) To receive new internally displaced persons and returnees and direct them to the reception centres;
- ...
- d) To identify resettlement and return sites;
- e) To monitor the overall resettlement and return process, ensuring the implementation of the norms on the resettlement of internally displaced populations;
- ...
- g) To guarantee adequate transportation to assist populations returning to their points of origin.⁷⁴²

804. Under Colombia's Law on Internally Displaced Persons, a National System of Integral Care for the Displaced Population on Account of Violence was created in order to facilitate the integration of displaced persons in Colombian society. A National Plan was also established in order to, *inter alia*, adopt means to facilitate the voluntary return of displaced persons.⁷⁴³

805. Ethiopia's Transitional Period Charter provided that priority should be given to the rehabilitation of those sections of the population that had been forcibly uprooted.⁷⁴⁴

National Case-law

806. No practice was found.

Other National Practice

807. In 1997, in identical letters to the UN Secretary-General and to President of the UN Security Council, Afghanistan called upon the UN "to immediately intervene to prepare the circumstances allowing all civilians who have been deported and forcibly displaced to return to their homes".⁷⁴⁵

808. In 1996, during a debate in the UN Commission on Human Rights in relation to Cyprus, Angola stated that "all restrictions preventing displaced persons and refugees from returning home should be lifted".⁷⁴⁶

809. In 1996, during a debate in the UN Commission on Human Rights on the issue of internal displacement, Peru reported that "the government [of Peru] was conducting a major resettlement programme, including specific projects

⁷⁴² Angola, *Rules on the Resettlement of Internally Displaced Populations* (2001), Article 2(a), (b), (d), (e) and (g), see also Article 3 (identification of land), Article 4 (security of site), Article 6 (state administration), Article 7 (rehabilitation of infrastructure), Article 8 (social assistance), Article 9 (water and sanitation), Article 10 (resettlement kits) and Article 11 (food).

⁷⁴³ Colombia, *Law on Internally Displaced Persons* (1997), Articles 2(6) and 10(6).

⁷⁴⁴ Ethiopia, *Transitional Period Charter* (1991), Article 14.

⁷⁴⁵ Afghanistan, Identical letters dated 19 January 1997 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/1997/54, 21 January 1997, Annex, pp. 2-3.

⁷⁴⁶ Angola, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.46, 22 May 1996, p. 3.

in the areas of health, education, communications and emergency assistance".⁷⁴⁷

810. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provide that "both the Government and Non-Government Organisations shall help in the rehabilitation of evacuees through socio-economic projects, skills formation and education".⁷⁴⁸

811. In a declaration in 1995, the Rwandan government stated that displaced persons had a right to humanitarian assistance in order to facilitate their resettlement.⁷⁴⁹

812. In its pleadings before the ECtHR in *Akdivar and Others v. Turkey* in 1996, the Turkish government submitted that it had introduced a programme in south-eastern Turkey to facilitate the return of displaced persons to their villages by providing the necessary infrastructure in rural areas.⁷⁵⁰

813. In 1992, in a meeting with the ICRC, two States recognised the right of displaced persons to return to their homes, insisting that certain minimum conditions had to be established to prompt people to return home, including meeting basic material needs, ensuring that villages had sanitary and water supply facilities, providing basic public services, establishing agreements on pension rights and education and settling employment issues.⁷⁵¹

III. Practice of International Organisations and Conferences

United Nations

814. In a resolution adopted in 1993 on the situation in Georgia, the UN Security Council affirmed "the right of refugees and displaced persons to return to their homes" and called on the parties "to facilitate this".⁷⁵²

815. In two resolutions adopted in 1993 and 1994, the UN Security Council called on all parties "to cooperate with the United Nations High Commissioner for Refugees (UNHCR) and other humanitarian agencies operating in Mozambique to facilitate the speedy repatriation and resettlement of refugees and displaced persons".⁷⁵³

816. In a resolution adopted in 1995, the UN Security Council demanded that the government of Croatia "create conditions conducive to the return of those persons who had left their homes".⁷⁵⁴

⁷⁴⁷ Peru, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.39, 15 April 1996, § 19.

⁷⁴⁸ Philippines, Presidential Human Rights Committee, Res. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 10.

⁷⁴⁹ Rwanda, Declaration of the Government of Rwanda on the decision to close the displaced camps of Gikongoro, 24 April 1995, p. 2.

⁷⁵⁰ Turkey, Pleadings before the ECtHR, *Akdivar and Others v. Turkey*, 16 September 1996, p. 20. ⁷⁵¹ ICRC archive document.

⁷⁵² UN Security Council, Res. 876, 19 October 1993, § 5.

⁷⁵³ UN Security Council, Res. 882, 5 November 1993, § 17; Res. 898, 23 February 1994, § 18.

⁷⁵⁴ UN Security Council, Res. 1009, 10 August 1995, § 2.

817. In a resolution adopted in 1995 on violations of international humanitarian law and of human rights in the territory of the former Yugoslavia, the UN Security Council urged all the parties “to fully cooperate with . . . efforts [to assist displaced persons], with a view to create conditions conducive to the repatriation and return of refugees and displaced persons in safety and dignity”.⁷⁵⁵

818. In a resolution on Angola adopted in 1996, the UN Security Council urged the international community “to fulfil expeditiously its pledges to provide assistance to facilitate . . . the resettlement of displaced persons”.⁷⁵⁶

819. In a resolution on Bosnia and Herzegovina adopted in 1996, the UN Security Council stressed “the importance of facilitating the return or resettlement of refugees and displaced persons” which it said “should be gradual and orderly and carried out through progressive, coordinated programmes that address the need for local security, housing and jobs”.⁷⁵⁷

820. In a resolution on Croatia adopted in 1997, the UN Security Council noted with concern that “the lack of conditions necessary for the return of displaced persons . . . prevents the return in any substantial number of those displaced seeking to return”. The Council urged the government of Croatia:

to create the necessary conditions of security, safety and social and economic opportunity for those returning to their homes in Croatia, including the prompt payment of pensions; and to foster the successful implementation of the Agreement on Operational Procedures of Return.⁷⁵⁸

821. In a resolution on Georgia adopted in 1997, the UN Security Council demanded that the Abkhaz side “guarantee the safety of spontaneous returnees already in the area and regularize their status in cooperation with UNHCR and in accordance with the 1994 Quadripartite Agreement”.⁷⁵⁹

822. In a resolution on Kosovo adopted in 1998, the UN Security Council underlined the responsibility of the FRY for creating the conditions which allow “refugees and displaced persons to return to their homes”.⁷⁶⁰ In another resolution adopted the same year, the Council demanded that the FRY “facilitate, in agreement with UNHCR and the International Committee of the Red Cross (ICRC), the safe return of refugees and displaced persons to their homes”.⁷⁶¹

823. In a resolution adopted in 1999, the UN Security Council expressed its deep concern about “the large-scale displacement and relocation of East Timorese civilians, including large numbers of women and children” and stressed that it was the responsibility of the Indonesian authorities “to take immediate

⁷⁵⁵ UN Security Council, Res. 1034, 21 December 1995, §§ 17–18.

⁷⁵⁶ UN Security Council, Res. 1075, 11 October 1996, § 22.

⁷⁵⁷ UN Security Council, Res. 1088, 12 December 1996, § 11.

⁷⁵⁸ UN Security Council, Res. 1120, 14 July 1997, preamble.

⁷⁵⁹ UN Security Council, Res. 1124, 31 July 1997, preamble, §§ 11–12.

⁷⁶⁰ UN Security Council, Res. 1199, 23 September 1998, § 4(c).

⁷⁶¹ UN Security Council, Res. 1203, 24 October 1998, § 12.

and effective measures to ensure the safe return of refugees in West Timor and other parts of Indonesia to East Timor".⁷⁶²

824. In 1994 and 1995, in statements by its President on the conflict in Georgia, the UN Security Council called upon the Abkhaz party "to take all necessary measures, in cooperation with UNHCR, to ensure a speedy and organized voluntary return of refugees and displaced persons".⁷⁶³

825. In 1995, in a statement by its President on Abkhazia, Georgia, the UN Security Council urged "the Abkhaz authorities to accelerate the return process significantly, to guarantee the safety of all returnees and to regularize the status of spontaneous returnees".⁷⁶⁴

826. In 1995, in a statement by its President, the UN Security Council called on the government of Rwanda and the international community to intensify efforts "to bring about a climate of trust and confidence which would assist in the early and safe return of refugees".⁷⁶⁵

827. In 1997, in a statement by its President on Georgia, the UN Security Council encouraged the UN Secretary-General "to take such steps as are necessary, in cooperation with the parties, in order to ensure a prompt and safe return of the refugees and displaced persons to their homes".⁷⁶⁶

828. In a resolution adopted in 1991, the UN General Assembly appealed to all parties to the conflict in Afghanistan "to cooperate fully especially on the subject of mine detection and clearance, in order to facilitate the return of refugees and displaced persons to their homes in safety and dignity, in conformity with the Agreements on the Settlement of the Situation Relating to Afghanistan".⁷⁶⁷

829. In a resolution adopted in 1993 on the Office of the United Nations High Commissioner for Refugees, the UN General Assembly urged all States and relevant organizations "to support the High Commissioner's search for durable solutions to refugee problems, including voluntary repatriation, integration in the country of asylum and resettlement in a third country, as appropriate," and welcomed "in particular the ongoing efforts of her Office to pursue wherever possible opportunities to promote conditions conducive to the preferred solution of voluntary repatriation".⁷⁶⁸

830. In a resolution adopted in 1994 on the situation of human rights in Rwanda, the UN General Assembly stressed "the need to create an environment conducive to the realization of civil, political, economic, social and cultural rights and to the return by refugees and displaced persons to their homes".⁷⁶⁹

⁷⁶² UN Security Council, Res. 1272, 25 October 1999, preamble and § 12.

⁷⁶³ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/78, 2 December 1994, p. 1; Statement by the President, UN Doc. S/PRST/1995/12, 17 March 1995, p. 2.

⁷⁶⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/39, 18 August 1995.

⁷⁶⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/22, 27 April 1995, pp. 1-2.

⁷⁶⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/25, 8 May 1997, p. 2.

⁷⁶⁷ UN General Assembly, Res. 46/136, 17 December 1991, § 16.

⁷⁶⁸ UN General Assembly, Res. 48/116, 20 December 1993, § 10.

⁷⁶⁹ UN General Assembly, Res. 49/206, 23 December 1994, § 8.

831. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly called upon the government of Croatia “to remove all legal and administrative hurdles which are preventing the return of refugees and displaced persons”.⁷⁷⁰

832. In a resolution adopted in 1998 on the situation of human rights in Kosovo, the UN General Assembly called upon the authorities of the FRY and ethnic Albanian leaders “to allow for and facilitate the free and unhindered return to their homes, in safety and dignity, of all internally displaced persons and refugees” and expressed “its concern about reports of continuing harassment or other impediments in this regard”.⁷⁷¹

833. In a resolution adopted in 1999 on the situation of human rights in Kosovo, the UN General Assembly stressed “the importance of and the responsibility of all parties to create a secure environment in Kosovo that will allow refugees and displaced persons to return”.⁷⁷²

834. In a resolution adopted in 2000, the UN General Assembly urged all parties to the continuing conflict in Sudan “to respect and protect human rights and fundamental freedoms and to respect fully international humanitarian law, thereby facilitating the voluntary return, repatriation and reintegration of refugees and internally displaced persons to their homes”.⁷⁷³

835. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights expressed its concern over continuing human rights violations in Bosnia and Herzegovina, including “actions that undermine the principle of the right to return, including . . . resettlement of displaced persons in homes which, under the agreement reached in Geneva on 18 March 1996, should remain vacant for six months”.⁷⁷⁴

836. In a resolution adopted in 1999 on the situation of human rights in Burundi, the UN Commission on Human Rights encouraged “continued efforts to dismantle the regroupment camps and the return of displaced persons to their villages as and when security conditions permit”.⁷⁷⁵

837. In a resolution adopted in 2001, the UN Commission on Human Rights urged all parties to the continuing conflict in the Sudan “to respect and protect human rights and fundamental freedoms, to respect fully international humanitarian law, thereby facilitating the voluntary return, repatriation and reintegration of refugees and internally displaced persons to their homes”.⁷⁷⁶

838. In a resolution adopted in 1992, the UN Sub-Commission on Human Rights exhorted the government of Guatemala “to adopt measures to facilitate the return to their places of origin of refugees and displaced persons within the

⁷⁷⁰ UN General Assembly, Res. 50/193, 22 December 1995, § 128(b).

⁷⁷¹ UN General Assembly, Res. 53/164, 9 December 1998, § 23.

⁷⁷² UN General Assembly, Res. 54/183, 17 December 1999, § 13.

⁷⁷³ UN General Assembly, Res. 55/116, 4 December 2000, § 3(b).

⁷⁷⁴ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 3(b).

⁷⁷⁵ UN Commission on Human Rights, Res. 1999/10, 23 April 1999, § 6.

⁷⁷⁶ UN Commission on Human Rights, Res. 2001/18, 20 April 2001, § 3(a).

country who wish to do so while at the same time extending all guarantees of security and full respect for human rights".⁷⁷⁷

839. In a resolution adopted in 1993, the UN Sub-Commission on Human Rights exhorted the government of Guatemala "to continue its constructive dialogue with refugees and internally displaced persons in order to resolve satisfactorily the question of their resettlement in Guatemala in conditions of dignity and security".⁷⁷⁸

840. In 1980, in its Conclusion on Voluntary Repatriation, the Executive Committee of the UNHCR "recognized the importance of refugees being provided with the necessary information regarding conditions in their country of origin in order to facilitate their decision to repatriate".⁷⁷⁹

841. In 1996, in its Conclusion on Humanitarian Issues in the Territory of the Former Yugoslavia, the Executive Committee of UNHCR called upon the governments of the countries of origin "to create conditions for and to ensure the organized return of refugees and displaced persons in safety and dignity in a phased and coordinated manner, in cooperation with and with the assistance of UNHCR, the host countries and the international community as a whole".⁷⁸⁰

842. In 1992, in a report on Cambodia, the UN Secretary-General reported that among the objectives set for repatriation and resettlement were the identification and provision of agricultural and settlement land, installation assistance, and food for an average of one year for up to 360,000 returnees, as well as the provision of limited reintegration assistance and infrastructural improvements. He noted that there was a need to identify and allocate land for resettlement and that this process would require detailed mine verification. Resettlement packages for returnees would include basic housing materials, sawn timber, poles, bamboo, plastic tarpaulin sheeting, construction tools, as well as household items and agricultural tools, and an allowance for local purchases. It was foreseen in the repatriation component of the report that food assistance would be provided for an average period of 12 months at distribution points close to the final destination of returning displaced persons.⁷⁸¹

843. In 1995, in a report on the situation in Tajikistan, the UN Secretary-General reported that "as a result of the fourth round of inter-Tajik talks . . . the parties agreed to step up their efforts to ensure the voluntary, safe and dignified return of all refugees and internally displaced persons to their places of permanent residence and adopted concrete measures to that end".⁷⁸²

⁷⁷⁷ UN Sub-Commission on Human Rights, Res. 1992/18, 27 August 1992, preamble and § 7.

⁷⁷⁸ UN Sub-Commission on Human Rights, Res. 1993/16, 20 August 1993, § 5.

⁷⁷⁹ UNHCR, Executive Committee, Conclusion No. 18 (XXXI): Voluntary Repatriation, 16 October 1980, § e.

⁷⁸⁰ UNHCR, Conclusion on Humanitarian Issues in the Territory of the Former Yugoslavia, UN Doc. A/50/12/Add.1, 1 January 1996, § 31(e).

⁷⁸¹ UN Secretary-General, Report on Cambodia, UN Doc. S/23613, 19 February 1992, pp. 33–35, §§ 132–146.

⁷⁸² UN Secretary-General, Report on the situation in Tajikistan, UN Doc. S/1995/472, 10 June 1995, § 8(c).

844. In 1996, in a report concerning the situation in Abkhazia, Georgia, the UN Secretary-General reported that:

The Office of the United Nations High Commissioner for Refugees (UNHCR), in close cooperation with non-governmental organizations, initiated . . . three major projects . . . to support the reintegration of those persons who have returned to their places of residence. The first project consists of the rehabilitation of 23 schools in the security zone, including the supply of school furniture. The second project supports the Gali hospital by providing medical equipment. The third project is intended to increase the corn harvest by distributing seeds, fertilizer and diesel oil.⁷⁸³

845. In 1997, in a report on his visit to Mozambique, the Representative of the UN Secretary-General on Internally Displaced Persons reported that:

A major rehabilitation programme was launched in 1993 in order to promote and support the return and reintegration process. It was considered that durable reintegration could only be effected if minimum conditions were put in place to reduce the vulnerability of the rural population to new displacements.⁷⁸⁴

846. In 1997, in a report on UNAVEM in Angola, the UN Secretary-General highlighted the need to coordinate the voluntary return of groups of internally displaced persons and to develop resettlement plans.⁷⁸⁵

847. In 1996, in a report on a mission to Burundi, the Special Rapporteur of the UN Commission on Human Rights on Extra-judicial, Arbitrary or Summary Executions stated that "the government of Burundi should elaborate and implement, without delay, a policy to improve security, which would enable the displaced . . . population . . . to return to their communes and would facilitate their reintegration and reinstallation".⁷⁸⁶

848. In 1996, in a report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights suggested that:

Food, shelter and the minimum requirements for basic living should be provided [to returnees]. Priority should be given to ensuring access to food and a safe environment, free from physical dangers. This will require continued implementing of the land-mines-clearance programmes, providing medical treatment, and locating safe sources of water.⁷⁸⁷

⁷⁸³ UN Secretary-General, Report concerning the situation in Abkhazia, Georgia, UN Doc. S/1996/507, 1 July 1996, § 16.

⁷⁸⁴ Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative's visit to Mozambique from 23 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, § 64.

⁷⁸⁵ UN Secretary-General, Progress report on the UNAVEM, UN Doc. S/1997/438, 5 June 1997, p. 6, § 21.

⁷⁸⁶ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report on the Special Rapporteur's mission to Burundi, 19–29 April 1995, UN Doc. E/CN.4/1996/4/Add.1, 24 July 1995, § 98.

⁷⁸⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Final report, UN Doc. E/CN.4/1996/64, 27 February 1996, § 110.

849. In 1996, in a report on a visit to Rwanda, the Special Rapporteur of the UN Commission on Human Rights for Zaire recommended that “the government establish resettlement programmes” to facilitate the return of internally displaced persons and that these programmes should cover “housing, education, health and, above all, security for all, especially women and children”.⁷⁸⁸

850. In 1996, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that, in spite of the provisions contained in the 1995 Dayton Accords, the authorities in the Republika Srpska had actively prevented displaced Bosniacs from returning to their villages.⁷⁸⁹

851. In 1998, in a report on developments in the former Yugoslavia, the UNHCR Standing Committee welcomed the “Open Cities” initiative, whereby municipalities agreed to facilitate the return of minorities in combination with assistance from the international community.⁷⁹⁰

852. In a report in 1996, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina stated that “a significant proportion of displaced persons and refugees will return voluntarily if, in practice, a secure and safe environment exists, and if adequate shelter and essential services are available or likely to become so soon”.⁷⁹¹

Other International Organisations

853. In several recommendations on Kosovo adopted in 1998, the Parliamentary Assembly of the Council of Europe emphasised that the authorities of the FRY and Serbia must create the material and security conditions necessary to enable IDPs and refugees to return voluntarily in safety and dignity to their own homes.⁷⁹²

854. In several resolutions and decisions adopted between 1995 and 1997, the OAU Council of Ministers urged member States to create conditions conducive to the voluntary return of displaced persons to their places of habitual residence and to facilitate this process.⁷⁹³

⁷⁸⁸ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report on the Special Rapporteur’s visit to Rwanda, 6–14 July 1996, concerning ethnic conflict in the Northern Kivu region, UN Doc. E/CN.4/1997/6/Add.1, 16 September 1996, § 126 (j).

⁷⁸⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/9, 22 October 1996, § 13.

⁷⁹⁰ UNHCR, Standing Committee Report: Update on Regional Developments in the Former Yugoslavia, UN Doc. EC/48/SC/CRP.10, 2 April 1998, §§ 5, 21 and 22.

⁷⁹¹ High Representative for the implementation of the Bosnian peace agreement, Report, UN Doc. S/1996/190, 14 March 1996, § 70.

⁷⁹² Council of Europe, Parliamentary Assembly, Rec. 1376, 24 June 1998, § 12(iv); Rec. 1384, 24 September 1998, § 2; Rec. 1385, 24 September 1998, § 2.

⁷⁹³ OAU, Council of Ministers, Res. 1589 (LXII), 21–23 June 1995, § 9; Res. 1653 (LXIV), 1–5 July 1996, § 4; Doc. CM/Draft/Dec. (LXV) Rev.1, 24–28 February 1997, p. 14; Decision 362 (LXVI), 28–31 May 1997, § e.

855. In the Final Declaration of the Kosovo International Human Rights Conference in 1999, the OSCE stated that “conditions have to be created to allow for the safe return of refugees and internally displaced persons across Kosovo”.⁷⁹⁴

International Conferences

856. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the implementation of GC IV, particularly in the occupied territories in the Middle East, in which it requested the authorities concerned “to fulfil their humanitarian obligations by facilitating the return of the people to their homes and their reintegration into their communities”.⁷⁹⁵

857. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the application of GC IV in the Middle East in which it requested the authorities concerned “to fulfil their humanitarian obligations in facilitating the return of people to their homes and their reintegration into their communities”.⁷⁹⁶

858. The Concerted Plan of Action adopted at the International Conference on Central American Refugees in 1989 stressed the necessity of according humanitarian treatment to internally and externally displaced persons, which presumed, in principle, facilitating the return to their homes and the reconstruction of their communities.⁷⁹⁷

859. In a resolution adopted in 1992 on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, the 88th Inter-Parliamentary Conference called on parties “to ensure conditions for the safe return to their homes of all refugees and displaced persons”.⁷⁹⁸

860. In a resolution adopted in 1993 on the need for urgent action in the former Yugoslavia, particularly as regards the protection of minorities and the prevention of further loss of life in order that peaceful co-existence and respect for human rights can be restored for all peoples, the 89th Inter-Parliamentary Conference urged “the creation of the necessary conditions for the safe repatriation of all displaced civilians and refugees to their homes as soon as possible”.⁷⁹⁹

⁷⁹⁴ OSCE, Kosovo International Human Rights Conference, Pristina, 10–11 December 1999, Final Declaration, § 4.

⁷⁹⁵ 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. X, § 3.

⁷⁹⁶ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. III.

⁷⁹⁷ International Conference on Central American Refugees (CIREFCA), Guatemala City, 29–31 May 1989, Declaration and Concerted Plan of Action, UN Doc. CIREFCA/89/14, 31 May 1989, § I(28–30).

⁷⁹⁸ 88th Inter-Parliamentary Conference, Stockholm, Resolution on support to the recent international initiatives to halt the violence and put an end to the violations of human rights in Bosnia and Herzegovina, 12 September 1992, § 3.

⁷⁹⁹ 89th Inter-Parliamentary Conference, New Delhi, Resolution on the need for urgent action in the former Yugoslavia, particularly as regards the protection of minorities and the prevention of further loss of life in order that peaceful co-existence and respect for human rights can be restored for all peoples, 17 April 1993, § 11.

861. The Chairman's Conclusions of the Florence Peace Implementation Conference for Bosnia and Herzegovina in 1996 reiterated the importance of the "free and safe return" of IDPs and refugees and laid out detailed provisions designed to facilitate such return.⁸⁰⁰

862. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that all the parties to an armed conflict take effective measures to ensure that displaced persons "are able to return voluntarily, in peaceful conditions and in safety to their homes or to resettle voluntarily elsewhere".⁸⁰¹

IV. Practice of International Judicial and Quasi-judicial Bodies

863. In 1995, in its consideration of the report of Russia, the HRC urged that "appropriate and effective measures be adopted to enable all persons displaced as a consequence of the events that occurred in North Ossetia in 1992 to return to their homeland" and that "adequate measures be adopted to alleviate the conditions of all displaced persons following the fighting in Chechnya, including measures aimed at facilitating their return to their towns and villages".⁸⁰²

864. In 1994, in its concluding observations on the report of Sudan, CERD recommended that "concrete steps be taken to encourage the voluntary return of all refugees and persons displaced in the conflict".⁸⁰³

V. Practice of the International Red Cross and Red Crescent Movement

865. No practice was found.

VI. Other Practice

866. The Report on SPLM/A Practice notes that the SPLM/A supported an appeal by the House of Bishops of Sudan in February 1998, which called upon donors, NGOs and other international organisations "to assist in the repatriation of 14,000 displaced citizens of Bor who are desperately waiting to go home".⁸⁰⁴

⁸⁰⁰ Peace Implementation Conference for Bosnia and Herzegovina, Florence, 13–14 June 1996, Chairman's Conclusions, annexed to Letter dated 9 July 1996 from the UN Secretary-General to the President of the UN Security Council, UN Doc. S/1996/542, 10 July 1996, Appendix I, §§ 11–15.

⁸⁰¹ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(c).

⁸⁰² HRC, Consideration of the report of the Russian Federation, UN Doc. CCPR/C/79/Add.54, 26 July 1995, §§ 41 and 45.

⁸⁰³ CERD, Concluding observations on the report of Sudan, UN Doc. A/49/18, 19 September 1994, p. 72, § 476.

⁸⁰⁴ Report on SPLM/A Practice, 1998, Chapter 5.5, referring to Appeal for repatriation of Bor displaced people by the House of Bishops meeting in Nairobi, 6 February 1998.

Assessment visits prior to return*I. Treaties and Other Instruments**Treaties*

867. In Paragraph 10 of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that “representatives of refugees and displaced persons will be provided with facilities to visit the areas of return and to see for themselves arrangements made for their return”.

Other Instruments

868. Principle 28(1) of the 1998 Guiding Principles on Internal Displacement stipulates that:

Competent authorities have the primary duty and responsibility to establish conditions, as well as provide the means, which allow internally displaced persons to return voluntarily, in safety and with dignity, to their homes or places of habitual residence, or to resettle voluntarily in another part of the country. Such authorities shall endeavour to facilitate the reintegration of returned or resettled internally displaced persons.

II. National Practice

869. No practice was found.

*III. Practice of International Organisations and Conferences**United Nations*

870. In 1980, in a Conclusion on Voluntary Repatriation, the Executive Committee of the UNHCR recognized that “visits by individual refugees or refugee representatives to their country of origin to inform themselves of the situation there... could also be of assistance” in facilitating the decision of repatriation.⁸⁰⁵

871. In September 1992, in a report concerning the former Yugoslavia, the UN Secretary-General reported “an encouraging development... involving daytime visits by refugees from one side of the Sector to the other to start work on the rehabilitation of their houses”.⁸⁰⁶ In a further report in November, the Secretary-General noted that a “programme for displaced persons to visit their villages and former homes has been accelerated with the cooperation of the two sets of local authorities”.⁸⁰⁷

⁸⁰⁵ UNHCR, Executive Committee, Conclusion No. 18 (XXXI): Voluntary Repatriation, 16 October 1980, § e.

⁸⁰⁶ UN Secretary-General, Further report pursuant to Security Council resolutions 743 (1992) and 762 (1992), UN Doc. S/24600, 28 September 1992, § 21.

⁸⁰⁷ UN Secretary-General, Further report pursuant to Security Council resolution 743 (1992), UN Doc. S/24848, 24 November 1992, § 18.

872. In 1996, in a report concerning Bosnia and Herzegovina, the UN Secretary-General reported that attempts by UNHCR to gain permission to organise visits by displaced persons to their homes in “non-majority areas” had largely been refused by the authorities of the Federation of Bosnia and Herzegovina and the Republika Srpska “on grounds of lack of security guarantees or clear instructions from the leadership concerned. In other instances, visits by one ethnic group are conditioned on the other ethnic group being able to visit their own homes on the other side.”⁸⁰⁸

873. In 1996, in a special periodic report on minorities in the context of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that groups of villagers were able to visit their homes in Montenegro with a view to returning there. Requests for a similar programme in Serbia had not been answered.⁸⁰⁹

874. In 1997, in a report on his visit to Mozambique, the Special Representative of the UN Secretary-General on Internally Displaced Persons reported that:

Return was normally initiated once information on the security situation in the home area had been received and initial preparations had been made for resettlement. Often, one or two family members would travel to the area of origin and assess the situation while the rest of the family remained in the area of flight.⁸¹⁰

Other International Organisations

875. No practice was found.

International Conferences

876. The Chairman’s Conclusions of the Florence Peace Implementation Conference for Bosnia and Herzegovina in 1996 called for “co-operation by the parties under UNHCR guidelines for visits by refugees and displaced persons to their localities (“assessment visits”)”.⁸¹¹

IV. Practice of International Judicial and Quasi-judicial Bodies

877. No practice was found.

⁸⁰⁸ UN Secretary-General, Report of pursuant to Security Council resolution 1035 (1995), UN Doc. S/1996/210, 29 March 1996, § 19.

⁸⁰⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Special periodic report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, § 83.

⁸¹⁰ Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative’s visit to Mozambique from 23 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, § 54.

⁸¹¹ Peace Implementation Conference for Bosnia and Herzegovina, Florence, 13–14 June 1996, Chairman’s Conclusions, annexed to Letter dated 9 July 1996 from the UN Secretary-General to the President of the UN Security Council, UN Doc. S/1996/542, 10 July 1996, Appendix I, § 13.

V. Practice of the International Red Cross and Red Crescent Movement

878. No practice was found.

VI. Other Practice

879. No practice was found.

Amnesty to encourage return

Note: *For practice concerning amnesty for participation in armed conflict in general, see Chapter 44, section D.*

I. Treaties and Other Instruments

Treaties

880. In paragraph 3(c) of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that:

Displaced persons/refugees shall have the right to return peacefully without risk of arrest, detention, imprisonment or legal criminal proceedings. Such immunity shall not apply to persons where there are serious evidences that they have committed war crimes and crimes against humanity as defined in international instruments and international practice as well as serious non-political crimes committed in the context of the conflict. Such immunity shall also not apply to persons who have previously taken part in the hostilities and are currently serving in armed formations... Persons falling into these categories should be informed through appropriate channels of the possible consequences they may face upon return.

881. The 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that "any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law... or a common-law crime unrelated to the conflict, shall upon return enjoy an amnesty".

Other Instruments

882. Paragraph 2 of the 1997 Protocol on Tajik Refugees provides that:

The Government of the Republic of Tajikistan assumes the obligation...not to institute criminal proceedings against returning refugees or displaced persons for their participation in the political confrontation and the civil war, in accordance with the legislation in force in the Republic.

II. National Practice

883. No practice was found.

III. Practice of International Organisations and Conferences

United Nations

884. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General noted that:

One potential obstacle to the return of young adult males is the requirement that they first undergo interrogations by Croatian authorities concerning their activities on behalf of the so-called "Republic of Serb Krajina". In the absence of broad amnesty legislation, these interrogations have caused widespread apprehension among potential returnees, as well as delays in the processing of applications.⁸¹²

885. In 1996, in a statement before the UN Commission on Human Rights, the UN High Commissioner for Refugees stated that "personal security was evidently of critical importance in the context of peaceful and dignified return. The amnesty adopted by the Bosnian parliament, covering, *inter alia*, draft evaders and deserters, was thus a very welcome step."⁸¹³

886. In 1996, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that:

The new Law on Amnesty passed by the Parliament [of Croatia]... has been hailed by most observers as a significant step towards both the return of Croatian Serb refugees and the peaceful reintegration of the region of Eastern Slavonia into the rest of the country. However, the Special Rapporteur's attention has been drawn to the need to scrutinize the Law's application in practice... The potential benefit of the new amnesty legislation in raising the confidence of Croatia's Serb population and encouraging returns would be substantially damaged if persons still found themselves the subject of criminal proceedings.⁸¹⁴

Other International Organisations

887. In a recommendation on Kosovo adopted in 1998, the Parliamentary Assembly of the Council of Europe urged the FRY authorities to create the conditions for displaced persons to return voluntarily in safety and dignity to their own homes, including "providing and respecting an amnesty for those wishing to return".⁸¹⁵

International Conferences

888. No practice was found.

⁸¹² UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council resolution 1019 (1995), UN Doc. S/1996/691, 23 August 1996, § 22.

⁸¹³ UN High Commissioner for Human Rights, Statement before the UN Commission on Human Rights, Summary Record, UN Doc. E/CN.4/1996/SR.4, 25 March 1996, § 54.

⁸¹⁴ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/9, 22 October 1996, §§ 54–57.

⁸¹⁵ Council of Europe, Parliamentary Assembly, Rec. 1385, 24 September 1998, § 7(b).

IV. Practice of International Judicial and Quasi-judicial Bodies

889. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

890. No practice was found.

VI. Other Practice

891. No practice was found.

Non-discrimination

Note: For practice concerning non-discrimination in general, see Chapter 32, section B.

I. Treaties and Other Instruments

Treaties

892. Article 5 of the 1969 Convention Governing Refugee Problems in Africa provides that:

Refugees who voluntarily return to their country shall in no way be penalized for having left it for any of the reasons giving rise to refugee situations. Whenever necessary, an appeal shall be made . . . inviting refugees to return home and giving assurance that the new circumstances prevailing in their country of origin would enable them to return without risk and to take up a normal and peaceful life without fear of being disturbed or punished.

893. In paragraph 3(a) of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that “displaced persons/refugees have the right to return voluntarily to their places of origin or residence irrespective of their ethnic, social or political affiliation under conditions of complete safety, freedom and dignity”.

894. Articles I and II of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords stated that:

The parties shall take immediately the following building measures: the repeal of domestic legislation and administrative practices with discriminatory intent or effect . . .

The parties shall ensure that refugees and displaced persons are permitted to return in safety, without risk of harassment, intimidation, persecution or discrimination, particularly on account of their ethnic origin, religious belief, or political opinion.

The parties shall not discriminate against returning displaced persons.

895. The 1997 Agreement of the Joint Working Group on Operational Procedures of Return stated that “the government of Croatia shall provide equal access and equal treatment for safe return, reconstruction, and other mechanisms specified . . . for all Croatian citizens who in 1991 resided in the Croatian Danube region . . . or who are currently living there”.

Other Instruments

896. The 1992 Sarajevo Declaration on Humanitarian Treatment of Displaced Persons affirmed that voluntary return with full guarantees of security and non-discrimination was the basic right of the displaced.

897. The 1992 General Peace Agreement for Mozambique provided that “Mozambican refugees and displaced persons shall not forfeit any of the rights and freedoms of other citizens for having left their original place of residence . . . [and] shall be registered and included in electoral rolls together with other citizens in their places of residence”.

898. In Article 18(2) of the 1993 Cotonou Agreement on Liberia, the parties called upon “Liberian refugees and displaced persons to return to Liberia and to their places of origin or habitual residence” and declared that “they shall not be jeopardized in any ethnic, political, religious, regional or geographical considerations”.

899. Principle 29(1) of the 1998 Guiding Principles on Internal Displacement provides that:

Internally displaced persons who have returned to their homes or places of habitual residence or who have resettled in another part of the country shall not be discriminated against as a result of their having been displaced. They shall have the right to participate fully and equally in public affairs at all levels and have equal access to public services.

II. National Practice

Military Manuals

900. No practice was found.

National Legislation

901. According to Colombia’s Law on Internally Displaced Persons, forcibly displaced persons have the right not to be discriminated against on account of their social condition, race, religion, political opinion, place of origin or physical disability.⁸¹⁶

National Case-law

902. No practice was found.

⁸¹⁶ Colombia, *Law on Internally Displaced Persons* (1997), Article 2(3).

Other National Practice

903. In 1997, in letters to the UN Secretary-General and the President of the UN Security Council, Afghanistan called upon the UN “to prepare the circumstances allowing all civilians who have been deported and forcibly displaced to return to their homes without being subjected to discrimination on the basis of gender, age or ethnic origin”.⁸¹⁷

*III. Practice of International Organisations and Conferences**United Nations*

904. In 1994, in a statement by its President, the UN Security Council called upon the government of Rwanda “to ensure that there are no reprisals against those wish[ing] to return to their homes and resume their occupation”.⁸¹⁸

905. In 1996, in a statement by its President, the UN Security Council called upon the government of Croatia “to stop all forms of discrimination against the Croatian Serb population in the provision of social benefits and reconstruction assistance”.⁸¹⁹

906. In 1980, in a Conclusion on Voluntary Repatriation, the Executive Committee of UNHCR stressed the importance “of returning refugees not being penalized for having left their country of origin for reasons giving rise to refugee situations”.⁸²⁰

907. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General noted that a law adopted by the Croatian parliament on areas of special national interest promised “various benefits, including lower taxes and the possibility of gaining ownership of property after 10 years of occupancy, to persons moving to the region”. The Secretary-General added, however, that “although the law by its terms applies equally to Serbs and Croats, the difficulties being encountered by Croatian Serbs wishing to return makes it likely that Croats rather than Serbs will be the main beneficiaries of these measures”.⁸²¹

908. In 1996, in a special report on minorities in the context of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that an “area of concern... involves difficulties which Croatian Serbs have encountered in acquiring documents necessary to obtain social benefits”.⁸²²

⁸¹⁷ Afghanistan, Identical letters dated 19 January 1997 to the UN Secretary-General and the President of the UN Security Council, UN Doc. S/1997/54, 21 January 1997, p. 3.

⁸¹⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/42, 10 August 1994, p. 2.

⁸¹⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/48, 20 December 1996, pp. 1–2.

⁸²⁰ UNHCR, Executive Committee, Conclusion No. 18 (XXXI): Voluntary Repatriation, 16 October 1980, § f.

⁸²¹ UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council Resolution 1019 (1995), UN Doc. S/1996/456, 21 June 1996, § 26.

⁸²² UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Special periodic report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, §§ 127–128.

Other International Organisations

909. No practice was found.

International Conferences

910. The Concerted Plan of Action adopted at the International Conference on Central American Refugees in 1989 stated that returning persons should not be subject to discrimination.⁸²³

IV. Practice of International Judicial and Quasi-judicial Bodies

911. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

912. No practice was found.

VI. Other Practice

913. No practice was found.

E. Property Rights of Displaced Persons**Safeguard of property rights***I. Treaties and Other Instruments**Treaties*

914. Article 1 of the 1952 Protocol to the ECHR provides that "every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."

915. Article 21(1) of the 1969 ACHR states that "everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society."

916. Article 14 of the 1981 ACHPR provides that "the right to property shall be guaranteed. It may only be encroached upon in the interest of public need or in the general interest of the community and in accordance with the provisions of appropriate laws."

⁸²³ International Conference on Central American Refugees (CIREFCA), Guatemala City, 29–31 May 1989, Declaration and Concerted Plan of Action, UN Doc. CIREFCA/89/14, 31 May 1989, § I(21).

Other Instruments

917. Paragraph 4(a) of the 1992 Recommendation on the Tragic Situation of Civilians in Bosnia and Herzegovina provides that each party to the conflict guarantees to those who leave temporarily the territory it controls that “their goods, assets and belongings will be respected and protected”.

918. Principle 21 of the 1998 Guiding Principles on Internal Displacement stipulates that:

1. No one shall be arbitrarily deprived of property and possessions.
2. The property and possessions of internally displaced persons shall in all circumstances be protected, in particular, against the following acts:
 - (a) Pillage;
 - (b) Direct or indiscriminate attacks or other acts of violence;
 - (c) Being used to shield military operations or objectives;
 - (d) Being made the object of reprisal; and
 - (e) Being destroyed or appropriated as a form of collective punishment.
3. Property and possessions left behind by internally displaced persons should be protected against destruction and arbitrary and illegal appropriation, occupation or use.

*II. National Practice**Military Manuals*

919. No practice was found.

National Legislation

920. Since 1997, the Federation of Bosnia and Herzegovina has adopted new property laws safeguarding property rights in order to implement the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords. These laws mainly deal with abandoned property and occupancy rights. It has also adopted instructions, claim forms and information sheets.⁸²⁴

921. In 1998, the Republika Srpska of Bosnia and Herzegovina adopted a new property law safeguarding property rights in order to implement the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords. This law mainly deals with abandoned property. It also adopted instructions, claim forms and information sheets.⁸²⁵

922. According to Colombia’s Law on Internally Displaced Persons, IDPs have the right to retain ownership and possession of abandoned property.⁸²⁶

⁸²⁴ Bosnia and Herzegovina, Federation, *Law on Sale of Apartments with Occupancy Rights* (1997); *Law on the Cessation of the Application of the Law on Temporary Abandoned Real Property Owned by Citizens* (1998); *Law on the Cessation of the Application of the Law on Abandoned Apartments* (1998).

⁸²⁵ Bosnia and Herzegovina, Republika Srpska, *Law on the Cessation of the Application of the Law on the Use of Abandoned Property* (1998).

⁸²⁶ Colombia, *Law on Internally Displaced Persons* (1997), Article 18.

National Case-law

923. According to Colombian case-law, IDPs have the right to retain ownership and possession of abandoned property.⁸²⁷

Other National Practice

924. In 1996, during a debate in the UN Commission on Human Rights in relation to Bosnia and Herzegovina, Egypt stated that “refugees and displaced persons must be allowed to . . . recover their possessions”.⁸²⁸

*III. Practice of International Organisations and Conferences**United Nations*

925. In February 1996, in a statement by its President on Croatia, the UN Security Council referred to the right of the local Serb population “to return to their homes . . . and to reclaim possession of property”.⁸²⁹ In another statement by its President in December on returning refugees and IDPs in Croatia, the UN Security Council deplored “the continued failure by the government of Croatia to effectively safeguard the property rights [of refugees and IDPs], especially the situation where many of the Serbs who had returned to the former sectors had been unable to regain possession of their properties”.⁸³⁰

926. In a resolution adopted in 1996, the UN Commission on Human Rights expressed its concern over continuing human rights violations within Bosnia and Herzegovina, including “actions that undermine the principle of the right to return, including enforcement of legislation which restricts rights to claim ‘socially owned’ property throughout the State of Bosnia and Herzegovina”.⁸³¹

927. In a resolution adopted in 1998 on housing and property restitution in the context of the return of refugees and internally displaced persons, the UN Sub-Commission on Human Rights confirmed that:

The adoption or application of laws by States which are designed to or result in the loss or removal of tenancy, use, ownership or other rights connected with housing or property, the active retraction of the right to reside within a particular place, or laws of abandonment employed against refugees or internally displaced persons pose serious impediments to the return and reintegration of refugees and internally displaced persons and to reconstruction and reconciliation.⁸³²

⁸²⁷ Colombia, Constitutional Court, *Constitutional Case No. C-092*, Judgement, 7 March 1996.

⁸²⁸ Egypt, Statement before the UN Commission on Human Rights, UN Doc. E/CN.4/1996/SR.47, 17 April 1996, § 35.

⁸²⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/8, 23 February 1996, p. 2.

⁸³⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/48, 20 December 1996, pp. 1–2.

⁸³¹ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 3(b).

⁸³² UN Sub-Commission on Human Rights, Res. 1998/26, 22 August 1998, § 3.

928. In 1996, in a report on the situation in Bosnia and Herzegovina, the UN Secretary-General noted that:

An independent Commission for Real Property Claims of Displaced Persons and Refugees has been established... Its function is to receive and decide any claims for real property in Bosnia and Herzegovina where the property has not voluntarily been sold or otherwise transferred since 1 April 1992, and where the claimant does not enjoy possession of the property.⁸³³

929. In 1996, in a special report on minorities in the context of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that "the Croatian authorities must act firmly to safeguard property rights of Serbs in the former sectors".⁸³⁴ In another report in 1997, the Special Rapporteur recommended that any "laws on the allocation of abandoned property inconsistent with the Dayton agreements and international law must immediately be repealed".⁸³⁵

930. Since September 1998, the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina has adopted numerous decisions in the field of property laws and return of displaced persons and refugees. These decisions mainly deal with occupancy rights, abandoned property, socially owned property and return of confiscated property.⁸³⁶

Other International Organisations

931. No practice was found.

International Conferences

932. The Chairman's Conclusions of the Florence Peace Implementation Conference for Bosnia and Herzegovina in 1996 called on:

the Commission on Real Property Claims for Refugees and Displaced Persons now established in Sarajevo with the assistance of the International Organisation for Migration (IOM), to proceed urgently with its task of registration so as to provide property owners with the assurance that their rights will be preserved on local authorities to cooperate with the Commission on the parties to repeal or appropriately amend property laws which are inconsistent with the right, as set out in the Peace Agreement, of return and to their property.⁸³⁷

⁸³³ UN Secretary-General, Report pursuant to resolution 1035 (1995), UN Doc. S/1996/210, 29 March 1996, § 20.

⁸³⁴ UN Commission on Human Rights, Special Rapporteur on the situation of Human Rights in the Former Yugoslavia, Special periodic report on minorities, UN Doc. E/CN.4/1997/8, 25 October 1996, § 127.

⁸³⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/56, 29 January 1997, § 55.

⁸³⁶ Office of the High Representative for the Implementation of the Peace Agreement on Bosnia and Herzegovina, Decisions in the field of property laws and return of displaced persons and refugees, available on www.ohr.int.

⁸³⁷ Peace Implementation Conference for Bosnia and Herzegovina, Florence, 13–14 June 1996, Chairman's Conclusions, annexed to Letter dated 9 July 1996 from the UN Secretary-General to the President of the UN Security Council, UN Doc. S/1996/542, 10 July 1996, Appendix I, § 15.

IV. Practice of International Judicial and Quasi-judicial Bodies

933. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

934. No practice was found.

VI. Other Practice

935. No practice was found.

Transfer of property under duress*I. Treaties and Other Instruments**Treaties*

936. Article 11 of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords established a Commission for Displaced Persons and Refugees which would "receive and decide any claim for real property in Bosnia and Herzegovina". Article 12(3) of the Agreement provided that:

in determining the lawful owner of any property, the Commission would not recognize as valid any illegal property transaction, including any transfer that was made under duress, in exchange for exit permission or documents, or that was otherwise in connection with ethnic cleansing.

Other Instruments

937. Paragraph 4(c) of the 1992 Recommendation on the Tragic Situation of Civilians in Bosnia and Herzegovina provided that each party to the conflict guaranteed to those who left temporarily the territory it controlled that "any document, including a document renouncing or transferring property rights, assets or claims signed by a person who is about to leave temporarily has no legal validity and does not affect in any way that person's rights or obligations".

938. According to Paragraph 6 of the Joint Declaration by the Presidents of the FRY and Croatia (September 1992), "all statements or commitments made under duress, particularly relating to land and property, are wholly null and void".

*II. National Practice**Military Manuals*

939. No practice was found.

National Legislation

940. No practice was found.

National Case-law

941. No practice was found.

Other National Practice

942. In 1992, during a debate in the UN Security Council on Bosnia and Herzegovina, Austria emphasised that where persons were forced to sign statements renouncing their property rights, there could be no doubt that such documents were null and void.⁸³⁸

*III. Practice of International Organisations and Conferences**United Nations*

943. In a resolution adopted in 1992 in the context of the conflict in the former Yugoslavia, the UN Security Council endorsed the principles agreed by the Presidents of Croatia and the SFRY on 30 September 1992 that "all statements or commitments made under duress, particularly those relating to land and property, are wholly null and void".⁸³⁹ These principles were reaffirmed in a resolution adopted in 1993.⁸⁴⁰

944. In two resolutions adopted in 1994 in the context of the conflict in the former Yugoslavia, the UN Security Council reaffirmed its support for the established principle that "all statements or commitments made under duress, particularly those regarding land ownership, are null and void".⁸⁴¹

945. In two resolutions adopted in 1993 and 1994 in the context of the conflict in the former Yugoslavia, the UN General Assembly considered "invalid all acts made under duress affecting ownership of property and other related questions".⁸⁴²

946. In a resolution on the former Yugoslavia adopted in 1994, the UN General Assembly reaffirmed that "the consequence of ethnic cleansing shall not be accepted by the international community and that those who have seized land and other property by ethnic cleansing and by the use of force must relinquish those lands, in conformity with norms of international law".⁸⁴³

947. In a resolution adopted in 1995 on the situation of human rights in the Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly, in relation to the property of refugees and displaced persons, considered "null any commitment made under duress".⁸⁴⁴

⁸³⁸ Austria, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 23.

⁸³⁹ UN Security Council, Res. 779, 6 October 1992, § 5.

⁸⁴⁰ UN Security Council, Res. 820 A, 17 April 1993, § 7.

⁸⁴¹ UN Security Council, Res. 941, 23 September 1994, § 3; Res. 947, 30 September 1994, § 8.

⁸⁴² UN General Assembly, Res. 48/153, 20 December 1993, § 13; Res. 49/196, 23 December 1994, § 13.

⁸⁴³ UN General Assembly, Res. 49/10, 3 November 1994, § 8.

⁸⁴⁴ UN General Assembly, Res. 50/193, 22 December 1995, § 12.

948. In a resolution adopted in 2000 on the situation in Bosnia and Herzegovina, the UN General Assembly reaffirmed “its support for the principle that all statements and commitments made under duress, particularly those regarding land and property, are wholly null and void”.⁸⁴⁵

949. In several resolutions adopted between 1992 and 1995, the UN Commission on Human Rights emphasised the invalidity of acts made under duress in relation to the forcible transfer of the property rights of displaced persons in the former Yugoslavia.⁸⁴⁶

950. In resolutions adopted in 1993 and 1995, the UN Sub-Commission on Human Rights recommended that the UN and the governments concerned take measures to enable the properties of returning displaced persons in the former Yugoslavia to be restored to them, any documents signed by them under duress being rejected.⁸⁴⁷

Other International Organisations

951. No practice was found.

International Conferences

952. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

953. In a General Recommendation adopted in 1996, CERD emphasised that “any commitments or statements relating to [the] property [of returning displaced persons] made under duress are null and void”.⁸⁴⁸

V. Practice of the International Red Cross and Red Crescent Movement

954. No practice was found.

VI. Other Practice

955. No practice was found.

⁸⁴⁵ UN General Assembly, Res. 55/24, 14 November 2000, § 19.

⁸⁴⁶ UN Commission on Human Rights, Res. 1992/S-2/1, 1 December 1992, § 4, Res. 1994/72, 9 March 1994, § 8; Res. 1994/75, 9 March 1994, § 5; Res. 1995/89, 8 March 1995, § 8.

⁸⁴⁷ UN Sub-Commission on Human Rights, Res. 1993/17, 20 August 1993, § 7; Res. 1995/8, 18 August 1995, § 5.

⁸⁴⁸ CERD, General Recommendation XXII (Article 5 of the Convention and refugees and displaced persons), 1996, § 2.

Return of property or compensation

Note: For practice concerning reparation for damage sustained as a result of violations of international humanitarian law in general, see Chapter 42, section B.

I. Treaties and Other Instruments

Treaties

956. Article 16 of the 1989 Indigenous and Tribal Peoples Convention states that:

4. When . . . return [to their traditional lands] is not possible, as determined by agreement or, in the absence of such agreement, through appropriate procedures, these peoples shall be provided in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied by them, suitable to provide for their present needs and future development. Where the peoples concerned express a preference for compensation in money or in kind, they shall be so compensated under appropriate guarantees.
5. Persons thus relocated shall be fully compensated for any resulting loss or injury.

957. In paragraph 3(g) of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed to the principle that:

Returnees, upon return, get back movable and immovable properties they left behind and should be helped to do so, or to receive wherever possible an appropriate compensation for their lost properties if return of property does not appear feasible. [A Quadripartite] Commission . . . will establish a mechanism for such property claims. Such compensation should be worked out in the framework of the reconstruction/rehabilitation programmes to be established with financial assistance through the United Nations Voluntary Fund.

958. Article I(1) of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that “all refugees and displaced persons . . . shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them”.

959. Article VII of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords established an independent Commission for Displaced Persons and Refugees, the mandate of which, according to Article XI, was to:

receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

960. Article XII(2) of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that “any person requesting the return

of property who is found by the Commission to be the lawful owner of that property shall be awarded its return".

Other Instruments

961. Article IV(e) of the 1992 General Peace Agreement for Mozambique provided that "refugees and displaced persons shall be guaranteed restitution of property owned by them which is still in existence and the right to take legal action to secure the return of such property from individuals in possession of it".

962. Paragraph 6 of the 1993 Afghan Peace Accord provided that "all public and private buildings, residential areas and properties occupied by different armed groups during the hostilities shall be returned to their original owners".

963. In Article 7 of the 1996 Agreement on the Normalisation of Relations between Croatia and the FRY, the parties agreed to ensure that displaced persons returned into possession of their property or a just compensation. It also specified that within six months from the date of entry into force of the Agreement, the contracting parties would conclude an agreement on compensation for all destroyed, damaged or lost property.

964. Principle 29(2) of the 1998 Guiding Principles on Internal Displacement provides that "when recovery of property and possessions [left behind by IDPs] is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation".

II. National Practice

Military Manuals

965. No practice was found.

National Legislation

966. No practice was found.

National Case-law

967. In the *Turundžić case* before the Human Rights Chamber of the Commission on Human Rights of Bosnia and Herzegovina in 2001, the applicants were citizens of the Federation of Bosnia and Herzegovina who held pre-war occupancy rights to apartments in Mostar, but left due to wartime hostilities. They thereafter filed repossession claims with the Commission for Real Property Claims of Displaced Persons and Refugees, which recognized the applicants' occupancy rights. The applicants' subsequent enforcement requests to the competent municipal organs went unanswered. The applicants consequently filed applications against the Federation with the Human Rights Chamber for Bosnia and Herzegovina, claiming under the 1950 ECHR respect for the home and peaceful enjoyment of property. The Chamber held that the authorities' failure

to enforce the Commission's decisions in question constituted an "ongoing interference" with the applicants' rights to respect for the home and peaceful enjoyment of property. The Chamber ordered the Federation to take all necessary steps to enforce the decisions without further delay, and further awarded compensation.⁸⁴⁹

Other National Practice

968. In 1992, during a debate in the UN Security Council on displaced persons in Bosnia and Herzegovina, Austria stated that compensation should be given for property that had been destroyed.⁸⁵⁰

969. In 1996, in a letter to the Chairman of the UN Commission on Human Rights, Croatia highlighted the fact that legislation relating to the property rights of IDPs and refugees had been amended. The legislation provided that "if the owner of a property returns to the Republic of Croatia he is entitled to use his or her property". The amendment had lifted "the time limit for the return of the persons who had abandoned their property".⁸⁵¹

970. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provide that:

The government shall indemnify the people of damages for the injuries they have suffered, in particular: (a) for all houses which were destroyed or which were ordered dismantled and demolished, and (b) for reasonable value of their personal properties as a result of the evacuation.⁸⁵²

971. In 1995, during a debate in the UN Security Council on the former Yugoslavia, Russia stated that "any attempt to introduce a time-limit for [Serbian inhabitants of Krajina] to reclaim their property is unacceptable".⁸⁵³

III. Practice of International Organisations and Conferences

United Nations

972. In a resolution adopted in November 1995, the UN Security Council reiterated its call upon the government of Croatia "to lift any time-limits placed on the return of refugees to Croatia to reclaim their property".⁸⁵⁴

973. In 1995, in a statement by its President, the UN Security Council asked the government of Croatia "as a matter of urgency... [to] lift any time limits

⁸⁴⁹ Bosnia and Herzegovina, Commission on Human Rights (Human Rights Chamber), *Turundžić case*, Decision, 8 February 2001.

⁸⁵⁰ Austria, Statement before the UN Security Council, UN Doc. S/PV.3106, 13 August 1992, p. 23.

⁸⁵¹ Croatia, Letter dated 15 April 1996 to the Chairman of the UN Commission on Human Rights, UN Doc. E/CN.4/1996/159, 15 April 1996, p. 10, § 22.

⁸⁵² Philippines, Presidential Human Rights Committee, Res. No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 9.

⁸⁵³ Russia, Statement before the UN Security Council, UN Doc. S/PV.3591, 9 November 1995, p. 8.

⁸⁵⁴ UN Security Council, Res. 1019, 9 November 1995, § 7.

placed on the return of refugees to reclaim their property" and noted that the deadline fixed by the Croatian authorities "constituted a virtually insurmountable obstacle for most Serb refugees".⁸⁵⁵

974. In 1996, in a statement by its President, the UN Security Council reiterated its appeal to Croatia to lift the time limits on return to reclaim property and stated that the decision to suspend the deadline constituted a step in the right direction which should be followed.⁸⁵⁶

975. In 1997, in a statement by its President, the UN Security Council called upon the government of Croatia "to promptly resolve the property issue by a return of property or just compensation".⁸⁵⁷

976. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN General Assembly recognized "the right of refugees and displaced persons . . . to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any such property that can not be restored to them".⁸⁵⁸

977. In a resolution adopted in 2000 on the situation in Bosnia and Herzegovina, the UN General Assembly called upon all sides "to implement the property laws imposed on 27 October 1999, in particular by evicting illegal occupants from the homes of returning refugees".⁸⁵⁹

978. In a resolution adopted in 1994, the UN Commission on Human Rights appealed to those in control of the territory of Abkhazia "to ensure the right of displaced persons and to recover their property".⁸⁶⁰

979. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN Commission on Human Rights noted the commitment made in the 1995 Dayton Accords that returning displaced persons would either "have their property restored or receive compensation for property that cannot be restored to them". It further expressed its concern over continuing human rights violations within Bosnia and Herzegovina, including actions that undermined the principle of the right to return, such as "unjustified evictions of persons from their homes".⁸⁶¹

980. In a resolution adopted in 1997 on human rights in the occupied Syrian Golan, the UN Commission on Human Rights emphasised that "the

⁸⁵⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/63, 22 December 1995, p. 1.

⁸⁵⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1996/2, 8 January 1996, p. 2.

⁸⁵⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/15, 19 March 1997, p. 1.

⁸⁵⁸ UN General Assembly, Res. 50/193, 22 December 1995, § 12.

⁸⁵⁹ UN General Assembly, Res. 55/24, 14 November 2000, § 19.

⁸⁶⁰ UN Commission on Human Rights, Res. 1994/59, 4 March 1994, § 5.

⁸⁶¹ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, preamble and § 3(b).

displaced persons of the population of the occupied Syrian Golan must be allowed to . . . recover their properties".⁸⁶²

981. In a decision on Yugoslavia adopted in 1992, the UN Sub-Commission on Human Rights demanded that "full reparation be made for losses suffered as a result of the displacement".⁸⁶³

982. In a resolution adopted in 1993 with regard to the situation in Bosnia and Herzegovina, the UN Sub-Commission on Human Rights called for "the effective eradication of the tragic consequences of the aggression and the human rights violations in the Republic of Bosnia and Herzegovina, through joint international efforts for the reconstruction of the country". It recommended that:

To this end, steps be taken through concerted international action and by the relevant international bodies to enable all refugees, deportees and displaced persons to return safely to their homes in the Republic of Bosnia and Herzegovina, and their properties to be restored to them, any documents signed by them under duress being rejected.⁸⁶⁴

983. In a resolution adopted in 1995 concerning the former Yugoslavia, the UN Sub-Commission on Human Rights recommended that the UN and the governments concerned take measures to enable the properties of returning displaced persons to be restored to them or, failing this, that compensation be paid.⁸⁶⁵

984. In a resolution adopted in 1998 on housing and property restitution in the context of the return of refugees and internally displaced persons, the UN Sub-Commission on Human Rights urged all States:

to ensure the free and fair exercise of the right to return to one's home and place of habitual residence by all refugees and internally displaced persons and to develop effective and expeditious legal, administrative and other procedures to ensure the free and fair exercise of this right, including fair and effective mechanisms designed to resolve outstanding housing and property problems.⁸⁶⁶

985. In 1994, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights emphasised that all displaced persons, "irrespective of their ethnic origins, have a fundamental right to return to their properties and that this has to be ensured".⁸⁶⁷

986. In a progress report submitted to the UN Sub-Commission on Human Rights in 1994, the UN Special Rapporteur on the Human Rights Dimensions

⁸⁶² UN Commission on Human Rights, Res. 1997/2, 26 March 1997, § 2.

⁸⁶³ UN Sub-Commission on Human Rights, Decision 1992/103, UN Doc. E/CN.4/Sub.2/1992/58, 14 October 1992, § (d).

⁸⁶⁴ UN Sub-Commission on Human Rights, Res. 1993/17, 20 August 1993, §§ 6–7.

⁸⁶⁵ UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, §§ 5–6.

⁸⁶⁶ UN Sub-Commission on Human Rights, Res. 1998/26, 22 August 1998, § 4.

⁸⁶⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Seventh periodic report, UN Doc. E/CN.4/1995/4, 10 June 1994, § 23.

of Population Transfer, including the Implantation of Settlers and Settlements stated that:

137. In situations where transfer is not unlawful, damage occurs nevertheless to the transferred group, and it ought, as a matter of equity, to receive compensation. An innocent victim should not be left to bear his loss alone . . .

138. The practice of international organs with regard to conflicts . . . confirms that restitution in kind is normally demanded in the form of reparation. Compensation is either explicitly mentioned, as in the case of the Palestinian refugees, or implicit in the language of the resolution referring to other conflicts.⁸⁶⁸

987. In 1997, in his final report submitted to the UN Sub-Commission on Human Rights, the UN Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements proposed a draft declaration on population transfer and the implantation of settlers for adoption by the UN Commission on Human Rights. Article 8 of the draft declaration provided that:

The exercise of the right to return does not preclude the victims' right to adequate remedies, including restoration of properties of which they were deprived in connection with or as a result of population transfers, compensation for any property that cannot be restored to them, and any other reparations provided for in international law.⁸⁶⁹

Other International Organisations

988. In an opinion adopted in 1996 on Croatia's request for membership of the Council of Europe, the Parliamentary Assembly of the Council of Europe stated that Croatia had undertaken among other things to allow displaced persons "effectively to exercise their rights to recover their property or receive compensation".⁸⁷⁰ The Parliamentary Assembly repeated its call for the authorities to ensure that returnees were allowed either to recover their property or to receive proper compensation in two separate recommendations in 1996 on the implementation of the 1995 Dayton Accords.⁸⁷¹

International Conferences

989. No practice was found.

⁸⁶⁸ UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Progress report, UN Doc. E/CN.4/Sub.2/1994/18, 30 June 1994, §§ 137–138.

⁸⁶⁹ UN Sub-Commission on Human Rights, Special Rapporteur on the Human Rights Dimensions of Population Transfer, including the Implantation of Settlers and Settlements, Final report, UN Doc. E/CN.4/Sub.2/1997/23, 27 June 1997, Annex II, Draft declaration on population transfer and the implantation of settlers, Article 8.

⁸⁷⁰ Council of Europe, Parliamentary Assembly, Opinion 195, 24 April 1996, § 9(viii).

⁸⁷¹ Council of Europe, Parliamentary Assembly, Rec. 1287, 24 January 1996, § 2; Rec. 1297, 25 April 1996, § 5(iii).

IV. Practice of International Judicial and Quasi-judicial Bodies

990. In a General Recommendation adopted in 1996, CERD emphasised that “refugees and displaced persons have, after their return to their homes of origin, the right to have restored to them property of which they were deprived in the course of the conflict and to be compensated appropriately for any such property that cannot be restored to them”.⁸⁷²

991. In a decision on the FRY adopted in 1998, CERD reaffirmed that “displaced persons have the right . . . to be compensated appropriately for [their homes and] properties that cannot be restored to them”.⁸⁷³

V. Practice of the International Red Cross and Red Crescent Movement

992. No practice was found.

VI. Other Practice

993. In a report submitted to ECOSOC in 1995, the Philippine Alliance of Human Rights Advocates asked the Committee to urge the Philippine government to provide IDPs with compensation for their losses.⁸⁷⁴

⁸⁷² CERD, General Recommendation XXII (Article 5 of the Convention and refugees and displaced persons), 1996, § 2.

⁸⁷³ CERD, Decision 3(53) on the FRY, UN Doc. A/53/18 (SUPPL), 17 August 1998, § 3.

⁸⁷⁴ Philippine Alliance of Human Rights Advocates (PAHRA), Report on the implementation by the Philippines government of Articles 10, 11 and 12 of the CESCRC on the occasion of the 12th Session of ECOSOC, Manila, 20 April 1995, pp. 15 and 16.

OTHER PERSONS AFFORDED SPECIFIC PROTECTION

A.	Women (practice relating to Rule 134)	§§ 1–138
	General	§§ 1–75
	Particular care for pregnant women and nursing mothers	§§ 76–117
	Death penalty on pregnant women and nursing mothers	§§ 118–138
B.	Children (practice relating to Rule 135)	§§ 139–377
	Special protection	§§ 139–250
	Education	§§ 251–309
	Evacuation	§§ 310–346
	Death penalty on children	§§ 347–377
C.	Recruitment of Child Soldiers (practice relating to Rule 136)	§§ 378–501
D.	Participation of Child Soldiers in Hostilities (practice relating to Rule 137)	§§ 502–602
E.	The Elderly, Disabled and Infirm (practice relating to Rule 138)	§§ 603–676
	The elderly	§§ 603–638
	The disabled and infirm	§§ 639–676

A. Women

Note: For practice concerning non-discrimination, see Chapter 32, section B. For practice concerning rape and other forms of sexual violence, see Chapter 32, section G. For practice concerning accommodation for women deprived of their liberty, see Chapter 37, section B. For practice concerning the specific needs of displaced women, see Chapter 38, section C.

General

I. Treaties and Other Instruments

Treaties

1. Articles 12, fourth paragraph, GC I and 12, fourth paragraph, GC II provide that “women shall be treated with all consideration due to their sex”.
2. Article 14, second paragraph, GC III provides that “women shall be treated with all the regard due to their sex”.

3. Article 27, second paragraph, GC IV provides that “women shall be especially protected against any attack on their honour”.
4. Article 119, second paragraph, GC IV provides in relation to disciplinary punishments that “account shall be taken of the internee’s age, sex and state of health”.
5. Article 76(1) AP I provides that “women shall be the object of special respect”. Article 76 AP I was adopted by consensus.¹
6. Article 2 of the 1979 Convention on the Elimination of Discrimination against Women provides that “States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women”.
7. Article 2(1) of the 2003 Protocol to the ACHPR on the Rights of Women in Africa provides that “States Parties shall combat all forms of discrimination against women through appropriate legislative, institutional and other measures”.

Other Instruments

8. Article 19 of the 1863 Lieber Code provides that “commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women . . . may be removed before the bombardment commences”.
9. Article 37 of the 1863 Lieber Code states that “the United States acknowledge and protect . . . the persons of the inhabitants, especially those of women”.
10. Paragraphs 4 and 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict state that:
 4. All the necessary steps shall be taken to ensure the prohibition of measures such as persecution, torture, punitive measures, degrading treatment and violence, particularly against that part of the civilian population that consists of women . . .
 5. All forms of repression and cruel and inhuman treatment of women . . . including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.
11. Article 3 of the 1990 Cairo Declaration on Human Rights in Islam provides that “in the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as . . . women”.
12. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 76(1) AP I.

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

13. Paragraph 2.3(2) of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 76(1) API.

14. Section 7.3 of the 1999 UN Secretary-General's Bulletin provides that "women shall be especially protected against any attack".

II. National Practice

Military Manuals

15. Argentina's Law of War Manual provides that, as POWs, "women shall be treated with due consideration to their sex and must in no case receive treatment less favourable than that granted to the men".² The manual further states that, as wounded and sick, "women shall be treated with all consideration due to their sex".³

16. Australia's Commanders' Guide states that "the Geneva Conventions provide particular protection for women".⁴

17. Australia's Defence Force Manual states that "women receive special protection under LOAC".⁵ It also states that "priority in medical treatment can only be determined on the basis of medical need, although women are to be treated with all consideration due to their sex".⁶ The manual further states that "female prisoners must be treated with due regard to their sex and must in no case be treated less favourably than male prisoners. Their sex must also be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities."⁷

18. Benin's Military Manual provides that "women . . . shall be treated with due respect to their sex".⁸

19. Cameroon's Instructors' Manual provides that at the approach of the enemy, "all persons shall be evacuated, with priority to women".⁹

20. Canada's LOAC Manual provides that "female POWs must be treated with due regard to their gender and must in no case be treated less favourably than male POWs. Their gender must also be taken into account in the allocation of labour and in the provision of sleeping and sanitary facilities".¹⁰

21. Ecuador's Naval Manual provides that "women . . . are entitled to special respect and protection".¹¹

² Argentina, *Law of War Manual* (1969), § 2.013(2); see also *Law of War Manual* (1989), § 3.09.

³ Argentina, *Law of War Manual* (1969), § 3.001.

⁴ Australia, *Commanders' Guide* (1994), § 603.

⁵ Australia, *Defence Force Manual* (1994), § 946.

⁶ Australia, *Defence Force Manual* (1994), § 992.

⁷ Australia, *Defence Force Manual* (1994), § 1010.

⁸ Benin, *Military Manual* (1995), Fascicule III, p. 4.

⁹ Cameroon, *Instructors' Manual* (1992), p. 67, § 242(1).

¹⁰ Canada, *LOAC Manual* (1999), p. 10-3, § 21.

¹¹ Ecuador, *Naval Manual* (1989), § 11.3.

22. El Salvador's *Soldiers' Manual* provides that it is prohibited to "attack and maltreat women".¹² It also states that "every act of violence against . . . mothers is a criminal, cowardly and dishonourable act, punishable by serious disciplinary sanctions".¹³

23. El Salvador's Human Rights Charter of the Armed Forces states that "women must be protected" and that "women must be respected".¹⁴

24. France's LOAC Manual states that "the law of armed conflicts provides for special protection of the following persons: . . . women".¹⁵

25. India's Army Training Note orders troops not to "ill treat any one, and in particular, women".¹⁶

26. Indonesia's Field Manual specifies that female POWs should be respected and that they should, in all circumstances, be treated as well as male prisoners.¹⁷

27. Madagascar's Military Manual provides that "women . . . shall be the object of a particular respect". It adds that, as POWs, "women must be treated with due regard to their sex".¹⁸

28. Morocco's Disciplinary Regulations provides that soldiers in combat are required to spare women.¹⁹

29. The Military Manual of the Netherlands provides that "women shall be the object of special respect".²⁰ It also provides that "women will be treated with all consideration due to their sex".²¹

30. New Zealand's Military Manual provides that:

Female prisoners must be treated with due regard to their sex and must in no case be treated less favourably than male prisoners. Their sex must also be taken into account in the allocation of labour and the provision of sleeping and sanitary facilities . . .

Only urgent medical requirements will justify any priority in treatment among those who are sick and wounded, although women are to be treated with all consideration due to their sex.²²

31. Nigeria's Manual on the Laws of War provides that "women should be respected".²³ It adds that "female prisoners of war must be treated with due consideration to their sex".²⁴

¹² El Salvador, *Soldiers' Manual* (undated), p. 3.

¹³ El Salvador, *Soldiers' Manual* (undated), p. 5.

¹⁴ El Salvador, *Human Rights Charter of the Armed Forces* (undated), pp. 7 and 13.

¹⁵ France, *LOAC Manual* (2001), p. 96.

¹⁶ India, *Army Training Note* (1995), p. 4/24, § 10.

¹⁷ Indonesia, *Field Manual* (1979), pp. 7 and 18.

¹⁸ Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 27.

¹⁹ Morocco, *Disciplinary Regulations* (1974), Article 25(4).

²⁰ Netherlands, *Military Manual* (1993), p. VIII-3.

²¹ Netherlands, *Military Manual* (1993), p. VI-2.

²² New Zealand, *Military Manual* (1992), §§ 916 and 1004(2).

²³ Nigeria, *Manual on the Laws of War* (undated), § 35.

²⁴ Nigeria, *Manual on the Laws of War* (undated), § 37.

32. The Rules for Combatants of the Philippines provides that “all civilians, particularly women, . . . must be respected”.²⁵
33. Spain’s LOAC Manual provides that, as POWs, “women shall be treated with all consideration due to their sex”.²⁶
34. According to Sweden’s IHL Manual, the “general protection of women” contained in AP I has the status of customary international law.²⁷ It further states that “women [in occupied territory] shall be especially protected against any form of insulting treatment”.²⁸
35. Switzerland’s Basic Military Manual provides that “women . . . shall be the object of particular respect”.²⁹
36. Togo’s Military Manual provides that “women . . . shall be treated with due respect to their sex”.³⁰
37. The UK LOAC Manual states that “priority in the order of medical treatment is decided only for urgent medical reasons. Women are to be treated with all consideration due to their sex.”³¹ The manual further provides that “PW are entitled in all circumstances to respect for their persons and their honour. Specific mention is made of women in this respect.”³²
38. The US Field Manual provides that “the commanders of United States ground forces will, when the situation permits, inform the enemy of their intention to bombard a place, so that the noncombatants, especially the women, . . . may be removed before the bombardment commences”.³³ It also states that, as POWs, “women shall be treated with all regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men”.³⁴ The manual further states that, as wounded and sick, “women shall be treated with all consideration due to their sex”.³⁵
39. The US Air Force Pamphlet provides that, as wounded and sick, “women are required to be treated with all consideration due their sex”.³⁶
40. The US Naval Handbook provides that “women . . . are entitled to special respect and protection”.³⁷
41. The YPA Military Manual of the SFRY (FRY) provides that only urgent medical reasons will determine priority of treatment among the wounded and sick, though women will be treated with all consideration due to their sex.³⁸

²⁵ Philippines, *Rules for Combatants* (1989), Rule 1.

²⁶ Spain, *LOAC Manual* (1996), Vol. I, § 8.4.a.(1).

²⁷ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

²⁸ Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.

²⁹ Switzerland, *Basic Military Manual* (1987), Article 146(3).

³⁰ Togo, *Military Manual* (1996), Fascicule III, p. 4.

³¹ UK, *LOAC Manual* (1981), Section 6, p. 22, § 2.

³² UK, *LOAC Manual* (1981), Section 8, p. 29, § 6.

³³ US, *Field Manual* (1956), § 43. ³⁴ US, *Field Manual* (1956), § 90.

³⁵ US, *Field Manual* (1956), § 215. ³⁶ US, *Air Force Pamphlet* (1976), § 12-2(a).

³⁷ US *Naval Handbook* (1995), § 11.3

³⁸ SFRY (FRY), *YPA Military Manual* (1988), Article 162.

National Legislation

- 42.** Argentina's Draft Code of Military Justice punishes "any soldier who, in the event of an armed conflict: ... [breaches the provisions governing] the special protection accorded to women".³⁹
- 43.** Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "special attention is given ... to women ... and they are taken great care of". It also states that "the following actions are prohibited to be carried out against civilian persons: ... 2) ... bad attitude towards women".⁴⁰
- 44.** Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁴¹
- 45.** Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 12 GC I, 12 GC II, 14 GC III and 27 and 119 GC IV, and of AP I, including violations of Article 76(1) AP I, are punishable offences.⁴²
- 46.** Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in ... the Geneva Conventions of 12 August 1949 ... [and in] the two additional protocols to these Conventions ... is liable to imprisonment".⁴³
- 47.** According to Venezuela's Code of Military Justice as amended, it is a crime against international law to "make a serious attempt on the life of ... women".⁴⁴

National Case-law

- 48.** No practice was found.

Other National Practice

- 49.** The Report on the Practice of Syria asserts that Syria considers Article 76 AP I to be part of customary international law.⁴⁵
- 50.** In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support ... the principle that women ... be the object of special respect and protection".⁴⁶

³⁹ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).

⁴⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 15 and 17.

⁴¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁴² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴³ Norway, *Military Penal Code as amended* (1902), § 108.

⁴⁴ Venezuela, *Code of Military Justice as amended* (1998), Article 474.

⁴⁵ Report on the Practice of Syria, 1997, Chapter 5.3.

⁴⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International

III. Practice of International Organisations and Conferences

United Nations

51. In a resolution adopted in 1996, the UN Security Council denounced “the discrimination against girls and women and other violations of human rights and international humanitarian law in Afghanistan”.⁴⁷

52. In two resolutions on Afghanistan adopted in 1998, the UN Security Council demanded that “the Afghan factions put an end to discrimination against girls and women and other violations of human rights and international humanitarian law”.⁴⁸

53. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council urged all parties to armed conflicts “to take into account the special needs of the girl child throughout armed conflicts and their aftermath, including in the delivery of humanitarian assistance”.⁴⁹

54. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council expressed its grave concern at the “particular impact that armed conflict has on women” and reaffirmed “the importance of fully addressing their special protection and assistance needs in the mandates of peacemaking, peacekeeping and peace-building operations”.⁵⁰

55. In a resolution adopted in 2000 on women and peace and security, the UN Security Council called upon all parties to armed conflicts to respect fully international law applicable to the rights and protection of women and girls, especially as civilians, in particular the Geneva Conventions and Additional Protocols, the 1951 Refugee Convention, the 1979 Convention on the Elimination of Discrimination against Women, the 1989 Convention on the Rights of the Child and the 1998 ICC Statute.⁵¹

56. In a resolution on Afghanistan adopted in 2000, the UN Security Council reiterated “its deep concern over the continuing violation of international humanitarian law and of human rights, particularly IHL and human rights, particularly discrimination against women and girls”.⁵²

57. In 1998, in several statements by its President, the UN Security Council expressed deep concern at the discrimination against girls and women and other abuses of human rights and IHL in Afghanistan.⁵³

Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

⁴⁷ UN Security Council, Res. 1076, 22 October 1996, preamble and § 11.

⁴⁸ UN Security Council, Res. 1193, 28 August 1998, § 14; Res. 1214, 8 December 1998, § 12.

⁴⁹ UN Security Council, Res. 1261, 25 August 1999, § 10.

⁵⁰ UN Security Council, Res. 1296, 19 April 2000, § 9.

⁵¹ UN Security Council, Res. 1325, 31 October 2000, § 9.

⁵² UN Security Council, Res. 1333, 19 December 2000, preamble.

⁵³ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998; Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998; Statement by the President, UN Doc. S/PRST/1998/24, 6 August 1998.

58. In a resolution adopted in 1998, ECOSOC condemned the continuing violations of the human rights of women and girls, including all forms of discrimination against them, throughout Afghanistan.⁵⁴

59. In a resolution adopted in 1998 on the situation of human rights in Myanmar, the UN Commission on Human Rights expressed concern at the widespread use of forced labour, including as porters for the army. It particularly condemned this practice in relation to women.⁵⁵

60. In a resolution adopted in 1998 on the question of human rights in Afghanistan, the UN Commission on Human Rights condemned "the widespread violations and abuses of human rights and humanitarian law . . . in particular, the human rights of women and girls".⁵⁶

61. In 1998, in a report on violence against women, the Special Rapporteur of the UN Commission of Human Rights on Violence against Women, its Causes and Consequences stated that "it has been posited that the military establishment is inherently masculine and misogynist, inimical to the notion of women's rights. The masculinity cults that pervade military institutions are intrinsically anti-female and therefore create a hostile environment for women." The Special Rapporteur recommended at the international level that:

95. Existing humanitarian legal standards should be evaluated and practices revised to incorporate developing norms on violence against women during armed conflict. The Torture and Genocide Conventions and the Geneva Conventions, in particular, should be re-examined and utilized in this light.
96. Since peacekeeping has become an important part of the activities of the United Nations, peacekeepers should be given necessary training in gender issues before they are sent to troubled areas. Offences committed by peacekeepers should also be considered international crimes and they should be tried accordingly.⁵⁷

The report also listed cases of violence against women in times of armed conflict in Afghanistan, Algeria, Guatemala, Haiti, India, Indonesia (East Timor), Japan (comfort women during the Second World War), Liberia, Mexico, China (Tibet), Peru, Rwanda, Sri Lanka and US.⁵⁸

62. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur of the UN

⁵⁴ ECOSOC, Res. 1998/9, 28 July 1998, § 1.

⁵⁵ UN Commission on Human Rights, Res. 1998/63, 21 April 1998, § 3.

⁵⁶ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, §§ 2(b) and 3(a).

⁵⁷ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1998/54, 26 January 1998, §§ 9, 95 and 96.

⁵⁸ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report, UN Doc. E/CN.4/1998/54, 26 January 1998, §§ 20 and 21 (Afghanistan), §§ 22 and 23 (Algeria), §§ 28 and 29 (Guatemala), §§ 30 and 31 (Haiti), §§ 32–36 (India), §§ 26 and 27 (Indonesia, East Timor), §§ 37 and 38 (Japan, comfort women during the Second World War), §§ 39–44 (Liberia), §§ 45 and 46 (Mexico), § 47 (China, Tibet), §§ 48 and 49 (Peru), §§ 50–52 (Rwanda), §§ 53–55 (Sri Lanka) and §§ 56 and 57 (US).

Commission on Human Rights on Violence against Women, its Causes and Consequences stated that:

48. It is now widely recognized that armed conflict has a different and more damaging long-term impact on children, and that female children may face specific risks that are different from those of boys. As is reflected throughout the case studies below, girls face many if not all of the risks that are experienced by women during armed conflict... And while they may find themselves responsible for the shelter and feeding of younger siblings, they encounter numerous obstacles that make these tasks difficult because of their age and gender...
52. Despite the specific needs and experiences of girls in armed conflict, girls are often the last priority when it comes to the distribution of humanitarian aid and their needs are often neglected in the formulation of demobilization and reintegration programmes. There is growing recognition that the specific needs of girls require special protective measures, both during armed conflicts and in post-conflict situations.⁵⁹

The report also listed cases of violence against women in times of armed conflict committed between 1997 and 2000 in Afghanistan, Burundi, Colombia, DRC, East Timor, FRY (Kosovo), India, Indonesia (West Timor), Japan (developments with regards to justice for comfort women), Myanmar, Russia (Chechnya), Sierra Leone and Sri Lanka. The report made detailed recommendations of measures to be taken at both the international and national levels.⁶⁰

Other International Organisations

63. In a recommendation adopted in 1995 on Turkey's military intervention in northern Iraq, the Parliamentary Assembly of the Council of Europe asked Turkey "to guarantee the fundamental rights of civilians, in particular those of the more vulnerable" groups, including women.⁶¹

64. In a resolution adopted in 1999, the European Parliament condemned the atrocities committed against the civilian population, and particularly women, in Sierra Leone.⁶²

International Conferences

65. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed deep concern about "violations of human

⁵⁹ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report on violence against women perpetrated and/or condoned by the State during times of armed conflict (1997–2000), UN Doc. E/CN.4/2001/73, 23 January 2001, §§ 48 and 52.

⁶⁰ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report on Violence against women perpetrated and/or condoned by the State during times of armed conflict (1997–2000), UN Doc. E/CN.4/2001/73, 23 January 2001, §§ 68–71 (Afghanistan), §§ 72 and 73 (Burundi), §§ 74 and 75 (Colombia), §§ 76–78 (DRC), §§ 79–81 (East Timor), §§ 82–84 (FRY, Kosovo), §§ 85–87, (India), §§ 89–91 (Indonesia, West Timor), §§ 92–96 (Japan), §§ 97–99 (Myanmar), §§ 100–103 (Russia, Chechnya), §§ 104–108 (Sierra Leone), §§ 109–113 (Sri Lanka) and §§ 114–135.

⁶¹ Council of Europe, Parliamentary Assembly, Rec. 1266, 26 April 1995, § 5.

⁶² European Parliament, Resolution on the situation in Sierra Leone, 14 January 1999, § G.

rights during armed conflicts, affecting the civilian population, especially women” and therefore called upon States and all parties to armed conflicts “strictly to observe international humanitarian law”.⁶³ It further stated that:

Violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of international human rights and humanitarian law. All violations of this kind, including in particular murder, systematic rape, sexual slavery, and forced pregnancy, require a particularly effective response.⁶⁴

66. The 26th International Conference of the Red Cross and Red Crescent in 1995 recognised “the fundamental link between assistance to and protection of women victims of conflict” and urged that “strong measures be taken to provide women with the protection and assistance to which they are entitled under national and international law”. The Conference further encouraged:

States, the Movement and other competent entities and organizations to develop preventive measures, assess existing programmes and set up new programmes to ensure that women victims of conflict receive medical, psychological and social assistance, provided if possible by qualified personnel who are aware of the specific issues involved.⁶⁵

67. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that “in the conduct of hostilities, every effort is made . . . to spare the life, protect and respect the civilian population, with particular protective measures for women and girls”.⁶⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

68. In 1992, in its General Recommendation on violence against women, the CEDAW stated that “gender-based violence . . . impairs or nullifies the enjoyment by women of human rights and fundamental freedoms [including] . . . the right to equal protection according to humanitarian norms in time of international or internal armed conflict”.⁶⁷

69. In 1998, in its concluding observations on the report of Mexico, the CEDAW expressed concern about the situation of indigenous women in Chiapas and

⁶³ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(29).

⁶⁴ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § II(38).

⁶⁵ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § B(b) and (e).

⁶⁶ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

⁶⁷ CEDAW, General Recommendation No. 19 (Violence against women), 30 January 1992, § 7(c).

recommended that “the government of Mexico pay special attention to safeguarding the human rights of women in conflict zones”.⁶⁸

70. In 1998, in its report to the UN General Assembly, the CEDAW stated in relation to Indonesia that it was:

concerned that the information provided on the situation of women in areas of armed conflict reflects a limited understanding of the problem. The Government’s remarks are confined to the participation of women in the armed forces and do not address the vulnerability of women to sexual exploitation in conflict situation, as well as a range of other human rights abuses affecting women in such contexts.⁶⁹

71. In 1999, in a report to the UN General Assembly, the CEDAW stated that “States parties should ensure that adequate protection and health services, including trauma treatment and counselling, are provided for women in especially difficult circumstances, such as those trapped in situations of armed conflict”. The Committee expressed concern at “the persistence of widespread violence as a result of the armed conflict” in Colombia, stating that “women are the principal victims” and that they “lack the resources needed for survival in a situation in which they are called upon to assume greater responsibilities”. In relation to Georgia, the Committee expressed concern that “the National Action Plan [had] not yet been implemented”. The plan addressed, *inter alia*, “making special efforts for women . . . victims of armed conflicts”.⁷⁰

72. In 2000, in a report to the UN General Assembly, the CEDAW stated that it was “concerned that women [in India] were exposed to high levels of violence, . . . humiliation and torture in areas where there are armed insurrections”. It recommended:

a review of prevention of terrorism legislation and the Armed Forces Special Provisions Acts, . . . so that special powers given to security forces do not prevent the investigation and prosecution of acts of violence against women in conflict areas and during detention and arrest.⁷¹

V. Practice of the International Red Cross and Red Crescent Movement

73. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “women . . . shall be treated with all regard due to their sex”.⁷²

74. In its pledge to promote the respect of women in armed conflicts, made at the 27th International Conference of the Red Cross and Red Crescent in 1999,

⁶⁸ CEDAW, Concluding observations on the report of Mexico, UN Doc. A/53/38, 14 May 1998, § 425.

⁶⁹ CEDAW, Report to the UN General Assembly, UN Doc. A/53/38/Rev.1, 14 May 1998, § 295.

⁷⁰ CEDAW, Report to the UN General Assembly, UN Doc. A/54/38/Rev.1, 20 August 1999, Part I, §§ 16 and 358 and Part II, § 96.

⁷¹ CEDAW, Report to the UN General Assembly, UN Doc. A/55/38, 17 August 2000, §§ 71 and 72.

⁷² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 666.

the ICRC pledged “to put emphasis throughout its activities on the respect which must be accorded to women and girl children” and furthermore “to ensure that the specific protection, health and assistance needs of women and girl children affected by armed conflicts are appropriately assessed in its operations with the aim to alleviate the plight of the most vulnerable”.⁷³

VI. Other Practice

75. The Bangkok NGO Declaration on Human Rights adopted in 1993 states that “in crisis situations – ethnic violence, communal riots, armed conflicts, military occupation and displacement – women’s rights are specifically violated”.⁷⁴

Particular care for pregnant women and nursing mothers

Note: *For practice concerning the establishment of hospital and safety zones to protect expectant mothers and mothers of children under seven, see Chapter 11, section A.*

I. Treaties and Other Instruments

Treaties

76. Article 16, first paragraph, GC IV provides that “expectant mothers, shall be the object of particular protection and respect”.

77. Article 38, fifth paragraph, GC IV provides that, as aliens in the territory of a party to the conflict, “pregnant women and mothers of children under seven years shall benefit by any preferential treatment to the same extent as the nationals of the State concerned”.

78. Article 50, fifth paragraph, Article 89, fifth paragraph, and Article 132, second paragraph, GC IV contain specific mentions in relation to the provision of food, clothing, medical assistance and evacuation for both pregnant women and nursing mothers.

79. Article 18, first paragraph, Article 21, Article 22, first paragraph, Article 23, first paragraph, Article 91, second paragraph, and Article 127, third paragraph, GC IV contain specific mentions in relation to medical assistance to and transport for pregnant women.

80. Article 17 GC IV provides that “the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of . . . maternity cases”.

⁷³ ICRC, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷⁴ World Conference on Human Rights, Regional Preparatory Meeting for Asia–Pacific, Bangkok, 24–28 March 1993, Bangkok NGO Declaration on Human Rights, UN Doc. A/CONF.157/PC/83, 19 April 1993, § 3.

81. Article 70(1) AP I provides that “in distribution of relief consignments, priority shall be given to . . . expectant mothers, maternity cases and nursing mothers, who under the fourth Geneva Convention or under this Protocol are to be accorded privileged treatment or special protection”. Article 70 AP I was adopted by consensus.⁷⁵

82. Article 76(2) AP I provides that “pregnant women and mothers having dependent infants who are arrested, detained or interned for reasons related to the armed conflict, shall have their cases considered with the utmost priority”. Article 76 AP I was adopted by consensus.⁷⁶

83. According to Article 8(a) AP I, the terms “wounded” and “sick” also cover maternity cases and expectant mothers. Article 8 AP I was adopted by consensus.⁷⁷

Other Instruments

84. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 76(2) AP I.

85. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 76(2) AP I.

II. National Practice

Military Manuals

86. Argentina’s Law of War Manual (1969) contains several specific rules intended to protect pregnant women and nursing mothers from the effects of war.⁷⁸

87. Argentina’s Law of War Manual (1989) provides that “maternity cases, pregnant women . . . are considered as” included in the concept of wounded and sick.⁷⁹ It further states that “pregnant women and mothers with dependent young children, who are arrested for reasons related to the armed conflict, shall be cared for with absolute priority”.⁸⁰

88. Australia’s Commanders’ Guide provides that the terms “wounded” and “sick” “also cover maternity cases . . . and expectant mothers”.⁸¹

⁷⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

⁷⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

⁷⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 68.

⁷⁸ Argentina, *Law of War Manual* (1969), §§ 1.014, 4.004[1] and 4.006; see also *Law of War Manual* (1989), §§ 4.05 and 4.11.

⁷⁹ Argentina, *Law of War Manual* (1989), § 2.02.

⁸⁰ Argentina, *Law of War Manual* (1989), § 4.13.

⁸¹ Australia, *Commanders’ Guide* (1994), glossary, p. xxiv.

89. Australia's Defence Force Manual provides specific rules "for the protection from the effects of war of . . . expectant mothers and mothers of children under seven years".⁸²
90. Canada's LOAC Manual contains several specific rules intended to protect maternity cases and expectant mothers.⁸³
91. Colombia's Basic Military Manual provides that "in these cases, the IHL rules favour especially the civilian population, so that the assistance and protection which the parties to the conflict shall bring are given in priority to the most vulnerable persons or groups of persons, who are: . . . pregnant women".⁸⁴
92. France's LOAC Teaching Note provides that "a particular attention shall be paid to the protection of . . . pregnant women and mothers accompanied by children under seven years old".⁸⁵
93. France's LOAC Manual contains specific rules intended to protect maternity cases and provides that "out of concern for their protection, pregnant women and maternity cases . . . are included in the same category as the wounded and sick under humanitarian law".⁸⁶
94. Germany's Military Manual contains specific rules intended to protect "expectant mothers and mothers of children under seven from any attack".⁸⁷
95. Kenya's LOAC Manual contains specific rules intended to protect expectant mothers and maternity cases.⁸⁸
96. Madagascar's Military Manual provides that maternity cases and pregnant women are included in the same category as the wounded and sick.⁸⁹
97. The Military Manual of the Netherlands provides that "pregnant women and mothers having dependent infants shall be respected".⁹⁰
98. New Zealand's Military Manual contains several specific rules intended to protect expectant mothers and mothers of children under seven.⁹¹
99. Nigeria's Operational Code of Conduct provides that "under no circumstances should pregnant women be ill-treated or killed".⁹²
100. Nigeria's Military Manual provides that "duly recognized civilian hospitals with their staff, as well as land, sea or air transport of wounded and sick persons, the infirm or maternity cases are entitled to similar respect and

⁸² Australia, *Defence Force Manual* (1994), §§ 735, 940, 946 and 1216; see also *Commanders' Guide* (1994), § 926.

⁸³ Canada, *LOAC Manual* (1999), p. 4-10, § 103, p. 6-4, § 35, p. 11-2, § 16, p. 11-3, § 23 and p. 12-4, § 32.

⁸⁴ Colombia, *Basic Military Manual* (1995), p. 25.

⁸⁵ France, *LOAC Teaching Note* (2000), pp. 4-5; see also *LOAC Manual* (2001), p. 125.

⁸⁶ France, *LOAC Manual* (2001), pp. 32 and 64.

⁸⁷ Germany, *Military Manual* (1992), § 512.

⁸⁸ Kenya, *LOAC Manual* (1997), Précis No. 4, pp. 5-6.

⁸⁹ Madagascar, *Military Manual* (1994), Fiche No. 4-SO, § B.

⁹⁰ Netherlands, *Military Manual* (1993), p. VIII-3.

⁹¹ New Zealand, *Military Manual* (1992), §§ 508(3), 1106(1), 1108, 1110, 1111(1), 1118, 1131(1), 1318(1) and 1405(4).

⁹² Nigeria, *Operational Code of Conduct* (1967), § 4(a).

protection as provided in the first and second conventions for their military counterparts".⁹³

101. Spain's LOAC Manual provides that "pregnant women and mothers of young children shall receive a particular attention".⁹⁴

102. Switzerland's Basic Military Manual contains several rules intended to protect specifically maternity cases and pregnant women.⁹⁵

103. The UK Military Manual contains several rules intended to protect specifically maternity cases and pregnant women.⁹⁶

104. The UK LOAC Manual contains specific rules intended to protect specifically expectant women and mothers with children under seven years of age.⁹⁷

105. The US Field Manual contains several rules intended to protect specifically maternity cases and pregnant women.⁹⁸

106. The US Air Force contains several rules intended to protect specifically maternity cases and pregnant women.⁹⁹

National Legislation

107. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "pregnant women and women with young children have to be assured of kind treatment and care".¹⁰⁰

108. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.¹⁰¹

109. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 14, 16, 17, 18, 21, 22, 23, 38, 50, 89, 91, 127 and 132 GC IV, and of AP I, including violations of Articles 70(1) and 76(2) AP I, are punishable offences.¹⁰²

110. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment".¹⁰³

111. The Act on Child Protection of the Philippines provides that "expectant mothers and nursing mothers shall be given additional food in proportion to their physiological needs".¹⁰⁴

⁹³ Nigeria, *Military Manual* (1994), p. 18, § 12.

⁹⁴ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1), see also §§ 4.5.b.(3), 9.4.a and 9.5.a.

⁹⁵ Switzerland, *Basic Military Manual* (1987), Articles 33, 36 and 37.

⁹⁶ UK, *Military Manual* (1958), §§ 28, 29, 32-35, 46 and 538.

⁹⁷ UK, *LOAC Manual* (1981), Section 9, p. 34, §§ 2, 3 and 5.

⁹⁸ US, *Field Manual* (1956), §§ 44, 253, 256, 257, 260-262, 277(5), 296, 383.

⁹⁹ US, *Air Force Pamphlet* (1976), §§ 14-3 and 14-5.

¹⁰⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.

¹⁰¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹⁰² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁰³ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁰⁴ Philippines, *Act on Child Protection* (1992), Sections 23-24.

National Case-law

112. No practice was found.

Other National Practice

113. The Report on the Practice of Syria asserts that Syria considers Article 76 AP I to be part of customary international law.¹⁰⁵

III. Practice of International Organisations and Conferences

114. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

115. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

116. No practice was found.

VI. Other Practice

117. No practice was found.

Death penalty on pregnant women and nursing mothers*I. Treaties and Other Instruments**Treaties*

118. Article 6(5) of the 1966 ICCPR provides that “sentence of death shall not . . . be carried out on pregnant women”.

119. Article 4(5) of the 1969 ACHR provides that “capital punishment shall not be . . . applied to pregnant women”.

120. Article 76(3) AP I provides that:

To the maximum extent feasible, the Parties to the conflict shall endeavour to avoid the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict. The death penalty for such offences shall not be executed on such women.

Article 76 AP I was adopted by consensus.¹⁰⁶

121. Article 6(4) AP II provides that “the death penalty shall not be pronounced . . . on pregnant women or mothers of young children”. Article 6 AP II was adopted by consensus.¹⁰⁷

¹⁰⁵ Report on the Practice of Syria, 1997, Chapter 5.3.

¹⁰⁶ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

¹⁰⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

Other Instruments

122. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 76(3) AP I.

123. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 76(3) AP I.

*II. National Practice**Military Manuals*

124. Argentina's Law of War Manual provides that "it is not possible to pronounce the death penalty against pregnant women or nursing mothers. If pronounced, it must not be executed."¹⁰⁸ With respect to non-international conflicts in particular, the manual states that "the death penalty shall not be pronounced against . . . pregnant women and mothers of young children".¹⁰⁹

125. Canada's LOAC Manual provides, with respect to non-international conflicts in particular, that "the death penalty shall not be carried out on pregnant women or mothers of young children".¹¹⁰

126. New Zealand's Military Manual provides, with respect to non-international conflicts, that "the death penalty shall not be carried out on pregnant women or mothers of young children".¹¹¹

127. Nigeria's Operational Code of Conduct provides that "under no circumstances should pregnant women be ill-treated or killed".¹¹²

128. Spain's LOAC Manual provides that if pregnant women and mothers of young children are condemned to death, the sentence shall not be executed on them.¹¹³

National Legislation

129. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 76(3) AP I, as well as any "contravention" of AP II, including violations of Article 6(4) AP II, are punishable offences.¹¹⁴

130. Under Jordanian legislation, it is prohibited to pronounce or carry out the death penalty on pregnant women and this prohibition is valid for the three months following the birth of the child.¹¹⁵

¹⁰⁸ Argentina, *Law of War Manual* (1989), § 3.28, see also § 5.11.

¹⁰⁹ Argentina, *Law of War Manual* (1989), § 7.10.

¹¹⁰ Canada, *LOAC Manual* (1999), p. 17-4, § 30.

¹¹¹ New Zealand, *Military Manual* (1992), § 1815(3).

¹¹² Nigeria, *Operational Code of Conduct* (1967), § 4(a).

¹¹³ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1).

¹¹⁴ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹¹⁵ Jordan, *Criminal Code* (1960), Article 17; *Code of Criminal Procedure as amended* (1961), Article 338.

131. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".¹¹⁶

National Case-law

132. No practice was found.

Other National Practice

133. The Report on the Practice of Syria asserts that Syria considers Article 76 AP I to be customary.¹¹⁷

134. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".¹¹⁸

III. Practice of International Organisations and Conferences

135. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

136. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

137. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "the pronouncement of the death penalty on pregnant women or mothers having dependent infants, for an offence related to the armed conflict, shall be avoided. The death penalty for those offences shall in no circumstances be executed on such women."¹¹⁹

VI. Other Practice

138. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi

¹¹⁶ Norway, *Military Penal Code as amended* (1902), § 108(b).

¹¹⁷ Report on the Practice of Syria, 1997, Chapter 5.3.

¹¹⁸ Report on US Practice, 1997, Chapter 5.3.

¹¹⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 203.

University in Turku/Åbo, Finland in 1990, states that “sentences of death shall not be carried out on pregnant women [or] mothers of young children”.¹²⁰

B. Children

Note: For practice concerning rape and other forms of sexual violence, see Chapter 32, section G. For practice concerning accommodation of children deprived of their liberty, see Chapter 37, section C. For practice concerning the specific needs of displaced children, see Chapter 38, section C.

Special protection

I. Treaties and Other Instruments

Treaties

139. Article 23, first paragraph, GC IV provides that “each High Contracting Party . . . shall permit the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen”.

140. Article 24, first paragraph, GC IV provides that “the Parties to the conflict shall take all necessary measures to ensure that children under fifteen, who are orphaned or are separated from their families as a result of the war, are not left to their own resources”.

141. Article 38, fifth paragraph, GC IV provides that children under 15 years, aliens in the territory of a party to the conflict, “shall benefit by any preferential treatment to the same extent as the nationals of the State concerned”.

142. Article 50 GC IV provides that “the Occupying Power shall not hinder the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favour of children under fifteen years”.

143. Article 76, fifth paragraph, GC IV provides that, in the treatment of detainees in occupied territory, “proper regard shall be paid to the special treatment due to minors”.

144. Article 89, fifth paragraph, GC IV provides that “children under fifteen years of age [who are interned] shall be given additional food, in proportion with their physiological needs”.

145. According to Article 8(a) AP I, the terms “wounded” and “sick” also cover new-born babies. Article 8 AP I was adopted by consensus.¹²¹

146. Article 70(1) AP I provides that “in the distribution of relief consignments, priority shall be given to . . . children”. Article 70 AP I was adopted by consensus.¹²²

¹²⁰ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 8(3), *IRRC*, No. 282, p. 333.

¹²¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 68.

¹²² CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 245.

147. Article 77(1) AP I provides that “children shall be the object of special respect”. Article 77 AP I was adopted by consensus.¹²³

148. Article 4(3) AP II provides that “children shall be provided with the care and aid they require”. Article 4 AP II was adopted by consensus.¹²⁴

149. Article 38 of the 1989 Convention on the Rights of the Child provides that:

1. States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child . . .
4. In accordance with their obligation under international humanitarian law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by armed conflict.

150. Upon ratification of the 1989 Convention on the Rights of the Child, the Netherlands stated that “in times of armed conflict, provisions shall prevail that are most conducive to guaranteeing the protection of children under international law”.¹²⁵

151. Article 22 of the 1990 African Charter on the Rights and Welfare of the Child provides that:

1. States Parties to this Charter shall undertake to respect and ensure respect for rules of international humanitarian law applicable in armed conflicts which affect the child . . .
3. States Parties to the present Charter shall, in accordance with their obligations under international humanitarian law, protect the civilian population in armed conflicts and shall take all feasible measures to ensure the protection and care of children who are affected by armed conflicts. Such rules shall also apply to children in situations of internal armed conflicts, tension and strife.

Other Instruments

152. Paragraphs 4 and 5 of the 1974 UN Declaration on the Protection of Women and Children in Emergency and Armed Conflict state that:

4. All the necessary steps shall be taken to ensure the prohibition of measures such as persecution, torture, punitive measures, degrading treatment and violence, particularly against that part of the civilian population that consists of . . . children.
5. All forms of repression and cruel and inhuman treatment of . . . children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.

¹²³ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

¹²⁴ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

¹²⁵ Netherlands, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 February 1995, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 27.

153. Rule 13.5 of the 1985 Standard Minimum Rules for the Administration of Juvenile Justice provides that “while in custody, juveniles shall receive care, protection and all necessary individual assistance . . . that they may require in view of their age, sex and personality”.

154. Rule 24.1 of the 1985 Standard Minimum Rules for the Administration of Juvenile Justice provides that “efforts shall be made to provide juveniles, at all stages of the proceedings, with necessary assistance . . . in order to facilitate the rehabilitative process”.

155. Article 3 of the 1990 Cairo Declaration on Human Rights in Islam provides that “in the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as . . . children”.

156. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 77(1) AP I.

157. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 77(1) AP I.

158. Article 2(24) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines states that the Agreement seeks to protect and promote “the right of children . . . to protection, care, and a home, especially against physical and mental abuse, prostitution, drugs, forced labour, homelessness, and other similar forms of oppression and exploitation”.

159. Section 7.4 of the 1999 UN Secretary-General’s Bulletin provides that “children shall be the object of special respect”.

160. In paragraph 26 of the United Nations Millennium Declaration, the heads of State and Government declared they would:

spare no effort to ensure that children and all civilian populations that suffer disproportionately the consequences of natural disasters, genocide, armed conflicts and other humanitarian emergencies are given every assistance and protection so that they can resume normal life as soon as possible.

161. Article 24 of the 2000 EU Charter of Fundamental Rights provides that “children shall have the right to such protection and care as is necessary for their well-being”.

II. National Practice

Military Manuals

162. Argentina’s Law of War Manual (1969) provides that “the belligerent parties shall take the necessary measures to ensure that children under the age of 7 who have been orphaned or separated from their families are not left to their own resources”.¹²⁶ It further states that “the occupying Power shall not hinder

¹²⁶ Argentina, *Law of War Manual* (1969), § 4.007; see also *Law of War Manual* (1989), § 4.12.

the application of any preferential measures in regard to food, medical care and protection against the effects of war, which may have been adopted prior to the occupation in favour of children under 15 years".¹²⁷

163. Argentina's Law of War Manual (1989) provides that new-born babies are considered as included in the concept of wounded and sick.¹²⁸ It further states that "children shall be the object of a special respect and shall be protected against any form of indecent assault" and that "they are to receive care and aid as they require on account of their age or any other reasons".¹²⁹ With respect to non-international conflicts in particular, the manual provides that "children shall receive the assistance and care they require".¹³⁰

164. Australia's Commanders' Guide states that the terms "wounded" and "sick" "also cover . . . new born babies".¹³¹

165. Australia's Defence Force Manual provides that "children are granted special protection under LOAC. Important rules are shown below: a. because of their age children should receive all the aid and care they require."¹³² The manual further states that "the occupying power must take necessary steps to ensure that children under 15 years of age and who are separated from their families are not left to their own resources".¹³³

166. Benin's Military Manual provides that "children shall be treated with respect due to their . . . age".¹³⁴

167. Canada's LOAC Manual provides that "belligerents must make provision for the care of children under 15 who have been orphaned or separated from their families as a result of the conflict. They must ensure the maintenance of such children."¹³⁵ With respect to non-international armed conflicts in particular, the manual states that "children are to receive such aid and protection as required".¹³⁶

168. Colombia's Basic military Manual provides that "IHL rules favour especially the civilian population so that assistance and protection, which the parties to the conflict shall bring, are given in priority to the most vulnerable persons or groups of persons, who are: children".¹³⁷ The manual further states that, with respect to non-international armed conflicts in particular, "care and aid shall be provided to children".¹³⁸

¹²⁷ Argentina, *Law of War Manual* (1969), § 5.009.

¹²⁸ Argentina, *Law of War Manual* (1989), § 2.02.

¹²⁹ Argentina, *Law of War Manual* (1989), § 4.12.

¹³⁰ Argentina, *Law of War Manual* (1989), § 7.04.

¹³¹ Australia, *Commanders' Guide* (1994), glossary, p. xxiv.

¹³² Australia, *Defence Force Manual* (1994), § 947.

¹³³ Australia, *Defence Force Manual* (1994), § 1215.

¹³⁴ Benin, *Military Manual* (1995), Fascicule III, p. 4.

¹³⁵ Canada, *LOAC Manual* (1999), p. 11-3, § 25.

¹³⁶ Canada, *LOAC Manual* (1999), p. 17-3, § 22.

¹³⁷ Colombia, *Basic Military Manual* (1995), p. 25.

¹³⁸ Colombia, *Basic Military Manual* (1995), p. 74.

169. Ecuador's Naval Manual provides that "children are entitled to special respect and protection".¹³⁹

170. El Salvador's Soldiers' Manual provides that it is prohibited to "attack and maltreat . . . children". The manual further states that "any act of violence against . . . children . . . is a criminal, cowardly and dishonourable act, punishable by serious disciplinary sanctions".¹⁴⁰

171. El Salvador's Human Rights Charter of the Armed Forces provides that children must be respected and protected.¹⁴¹

172. France's LOAC Teaching Note provides that "particular attention shall be paid to the protection of . . . children".¹⁴²

173. France's LOAC Manual provides that "with concern about protection, . . . new-born babies . . . are assimilate to wounded and sick under humanitarian law".¹⁴³ It further states that "the law of armed conflicts provides for special protection of the following persons: . . . children".¹⁴⁴

174. Germany's Military Manual provides that "children shall be the object of special respect and protection. They shall be provided with the care and aid they require, whether because of their youth or for any other reasons." It adds that "if they fall into the power of an adverse party, they shall be granted special protection".¹⁴⁵

175. India's Manual of Military Law provides that special care must be taken in respect of children.¹⁴⁶

176. India's Army Training Note orders troops not to "ill treat any one, and in particular, . . . children".¹⁴⁷

177. The Report on the Practice of Indonesia, with reference to the Military Manual, states that children under 15 years of age, orphaned or separated from their families as a result of conflict, shall be protected and given access to health care and food.¹⁴⁸

178. Italy's IHL Manual provides that the occupying power "shall take all necessary measures to ensure the care . . . of minors".¹⁴⁹

179. Kenya's LOAC Manual provides that "parties to the conflict are to care for children under 15 years of age who are orphaned and who are separated from their families. They are not to be subjected to political propaganda."¹⁵⁰

180. Madagascar's Military Manual provides that "children shall be the object of a particular respect and be protected against indecent assault". It adds that "the occupant must . . . ensure the welfare of children".¹⁵¹

¹³⁹ Ecuador, *Naval Manual* (1989), § 11.3.

¹⁴⁰ El Salvador, *Soldiers' Manual* (undated), pp. 3 and 5.

¹⁴¹ El Salvador, *Human Rights Charter of the Armed Forces* (undated), pp. 7 and 13.

¹⁴² France, *LOAC Teaching Note* (2000), p. 4; see also *LOAC Manual* (2001), pp. 62 and 96.

¹⁴³ France, *LOAC Manual* (2001), p. 32. ¹⁴⁴ France, *LOAC Manual* (2001), p. 96.

¹⁴⁵ Germany, *Military Manual* (1992), § 505.

¹⁴⁶ India, *Manual of Military Law* (1983), p. 5/3-5/6.

¹⁴⁷ India, *Army Training Note* (1995), p. 4/24, § 10.

¹⁴⁸ Report on the Practice of Indonesia, 1997, Chapter 5.3, referring to *Military Manual* (1982).

¹⁴⁹ Italy, *IHL Manual* (1991), Vol. I, § 48(9).

¹⁵⁰ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.

¹⁵¹ Madagascar, *Military Manual* (1994), Fiche No. 2-T, § 27.

181. Morocco's Disciplinary Regulations provides that soldiers in combat are required to spare children.¹⁵²

182. The Military Manual of the Netherlands states that "children shall be protected against any form of indecent assault. Children shall be provided with the care and aid they require, because of their age."¹⁵³

183. New Zealand's Military Manual provides that "the Occupying Power must take the necessary steps to ensure that children under fifteen separated from their families are not left to their own resources".¹⁵⁴ It further states that "belligerents must make provision for the care of children under 15 who have been orphaned or separated from their families as a result of war".¹⁵⁵ The manual then states that, as aliens in the territory of a party to the conflict, "children under 15 . . . must be given the benefit of any preferential treatment that is accorded to similar classes of nationals of the belligerent".¹⁵⁶ With respect to non-international armed conflicts in particular, the manual provides that children under 15 "are to receive such aid and protection as they require".¹⁵⁷

184. Nicaragua's Military Manual provides that "special measures for children under 15 who are orphaned or are separated from their families as a result of the war" shall be taken.¹⁵⁸

185. Nigeria's Operational Code of Conduct provides that "children must not be molested or killed. They will be protected and cared for."¹⁵⁹ It adds that "youths and school children must not be attacked unless they are engaged in open hostility against Federal Government Forces. They should be given all protection and care."¹⁶⁰

186. The Rules for Combatants of the Philippines provides that "all civilians, particularly . . . children . . . must be respected".¹⁶¹

187. Spain's LOAC Manual provides that "children are also the object of a special respect and they shall be protected against any form of indecent assault. If they are taken prisoner, they shall be protected under special provisions."¹⁶²

188. According to Sweden's IHL Manual, the "general protection of . . . children" contained in AP I has the status of customary international law.¹⁶³ The manual further provides that "the occupying power also has a particular responsibility in the area of child care".¹⁶⁴

189. Switzerland's Basic Military Manual provides that "children shall be the object of a particular respect. Children shall be protected against any form of

¹⁵² Morocco, *Disciplinary Regulations* (1974), Article 25(4).

¹⁵³ Netherlands, *Military Manual* (1993), p. VIII-3.

¹⁵⁴ New Zealand, *Military Manual* (1992), § 1317(2).

¹⁵⁵ New Zealand, *Military Manual* (1992), § 1112(1).

¹⁵⁶ New Zealand, *Military Manual* (1992), § 1118(1).

¹⁵⁷ New Zealand, *Military Manual* (1992), § 1813(1).

¹⁵⁸ Nicaragua, *Military Manual* (1996), Article 14(40).

¹⁵⁹ Nigeria, *Operational Code of Conduct* (1968), § 4(b).

¹⁶⁰ Nigeria, *Operational Code of Conduct* (1968), § 4(c).

¹⁶¹ Philippines, *Rules for Combatants* (1989), Rule 1.

¹⁶² Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1), see also § 5.2.a.(2).

¹⁶³ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

¹⁶⁴ Sweden, *IHL Manual* (1991), Section 6.1.3, p. 123.

indecent assault."¹⁶⁵ It also states that "children shall be the object of a particular protection and respect".¹⁶⁶ The manual further provides that "necessary measures must be taken so that children under 15 years of age, who are separated from their families as a result of war, are not left to their own resources".¹⁶⁷ In addition, the manual states that "transports of... children... effected by convoys of vehicles and hospital trains, shall be respected and protected in the same way as hospitals".¹⁶⁸

190. Togo's Military Manual provides that "children shall be treated with respect due to their... age".¹⁶⁹

191. The UK Military Manual provides that:

35. Belligerents must allow the free passage of... all consignments of essential foodstuffs, clothing and tonics intended for children under 15...
36. Belligerents must make provision for the care of children under 15 who have been orphaned or separated from their families as a result of the war. They must ensure the maintenance of such children... Belligerents must also facilitate the reception of these children by neutral countries for the duration of hostilities, with the consent of the Protecting Power, if any, and under due safeguards as above, and must endeavour to arrange for all children under 12 to be easily identifiable.¹⁷⁰

The manual further states that as aliens in the territory of a party to the conflict, "children under fifteen... must be given the benefit of any preferential treatment that is accorded to similar classes of nationals of the belligerents".¹⁷¹ It also provides that "the Occupant must not prevent the application of any measures which may have been adopted prior to the occupation in favour of children under fifteen... with regard to food, medical care and protection against the effects of war".¹⁷²

192. The UK LOAC Manual provides that "the free passage of medical and hospital stores and objects for religious worship is guaranteed as well as essential food and clothes for children".¹⁷³ It adds that "parties to the conflict are to care for children under 15, orphans and those separated from their families. They are not to be subject to political propaganda."¹⁷⁴

193. The US Field Manual reproduces Articles 23, 24, 38, 50 and 89 GC IV.¹⁷⁵

¹⁶⁵ Switzerland, *Basic Military Manual* (1987), Article 146(3).

¹⁶⁶ Switzerland, *Basic Military Manual* (1987), Article 36; see also *Military Manual* (1984), p. 39 and *Teaching Manual* (1986), p. 107.

¹⁶⁷ Switzerland, *Basic Military Manual* (1987), Article 157(1).

¹⁶⁸ Switzerland, *Basic Military Manual* (1987), Article 37.

¹⁶⁹ Togo, *Military Manual* (1996), Fascicule III, p. 4.

¹⁷⁰ UK, *Military Manual* (1958), §§ 35–36.

¹⁷¹ UK, *Military Manual* (1958), § 46. ¹⁷² UK, *Military Manual* (1958), § 538.

¹⁷³ UK, *LOAC Manual* (1981), Section 9, p. 34, § 5.

¹⁷⁴ UK, *LOAC Manual* (1981), Section 9, p. 34, § 6.

¹⁷⁵ US, *Field Manual* (1956), §§ 44, 262, 263, 277, 296 and 389.

194. The US Air Force Pamphlet states that “children under 15...enjoy the same preferential treatment provided for the nationals of the state concerned”.¹⁷⁶

195. The US Naval Handbook provides that “children are entitled to special respect and protection”.¹⁷⁷

National Legislation

196. Argentina’s Draft Code of Military Justice punishes “any soldier who, in the event of an armed conflict: ... [breaches the provisions governing] the special protection accorded to children”.¹⁷⁸

197. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in case of evacuation of civilian persons from a besieged zone, “special attention is given to children and they are taken great care of”.¹⁷⁹

198. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.¹⁸⁰

199. The Law on the Rights of the Child of Belarus states that children separated from their families as a result of armed conflict must be protected and provided with material and medical assistance by the public authorities.¹⁸¹

200. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 23, 24, 38, 50, 76 and 89 GC IV, and of AP I, including violations of Articles 70(1) and 77(1) AP I, as well as any “contravention” of AP II, including violations of Article 4(3) AP II, are punishable offences.¹⁸²

201. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in...the Geneva Conventions of 12 August 1949...[and in] the two additional protocols to these Conventions... is liable to imprisonment”.¹⁸³

202. According to Venezuela’s Code of Military Justice as amended, it is a crime against international law to “make a serious attempt on the life of ... children”.¹⁸⁴

¹⁷⁶ US, *Air Force Pamphlet* (1976), § 14-5, see also § 14-3.

¹⁷⁷ US, *Naval Handbook* (1995), § 11.3.

¹⁷⁸ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).

¹⁷⁹ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.

¹⁸⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

¹⁸¹ Belarus, *Law on the Rights of the Child* (1993), Article 30.

¹⁸² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

¹⁸³ Norway, *Military Penal Code as amended* (1902), § 108.

¹⁸⁴ Venezuela, *Code of Military Justice as amended* (1998), Article 474.

National Case-law

203. No practice was found.

Other National Practice

204. In a statement before the HRC in 1988, the Colombian representative reported that the child vaccination campaigns in Colombia had served as a model in other States, including El Salvador, where hostilities had been suspended in order to allow children to be vaccinated.¹⁸⁵

205. According to a statement by France's Permanent Representative to the UN in 1999, France considers that the age limit to be protected as a child (15 years) in the 1989 Convention on the Rights of the Child is not satisfactory and that it should be raised to 18 years to ensure a better and more effective protection of children during conflicts.¹⁸⁶

206. In 1995, its initial report to the CRC, Ghana reported that the "government agency responsible for abandoned and orphaned children worked with the Save the Children Fund to provide care for the children affected by the conflict" in the northern part of the country.¹⁸⁷

207. In 1992, in its initial report to the CRC, Indonesia reported that according to its national legislation, "in any circumstances... children should be protected first".¹⁸⁸

208. The Report on the Practice of Jordan states that special care is provided to children who have been orphaned or separated from their families.¹⁸⁹

209. In 1993, in its initial report to the CRC, the Philippines reported that:

200. The Special Protection Act declares children as "Zones of Peace". This Act provides that children shall not be the object of attack and shall be the object of special respect. They are to be protected from any form of threat, assault, torture or other cruel, inhuman or degrading treatment...

201. In any barangay where armed conflict occurs, the barangay chairperson shall submit to the municipal social welfare and development officer the names of all children residing in the barangay within 24 hours of the start of the conflict.

...

203. In any case where a child is arrested for reasons related to armed conflict, he or she shall be entitled to... immediate full legal assistance...

204. In support of the Special Protection Act, the Armed Forces of the Philippines issued in 1991 a memorandum order specifically on the protection of children during military operations.

...

206. Children who are lost, abandoned or orphaned as a result of an armed conflict are referred to the local Council for the Protection of Children or to the Department

¹⁸⁵ Colombia, Statement before the HRC, UN Doc. CCPR/C/SR.819, 14 July 1988, § 8.

¹⁸⁶ France, Statement of the Permanent Representative of France to the UN, "Protection of civilians affected by armed conflict", New York, 12 February 1999, *Politique étrangère de la France*, February 1999.

¹⁸⁷ Ghana, Report to the CRC, UN Doc. CRC/C/3/Add.39, 19 December 1995, § 126.

¹⁸⁸ Indonesia, Report to the CRC, UN Doc. CRC/C/3/Add.10, 14 January 1993, § 104.

¹⁸⁹ Report on the Practice of Jordan, 1997, Chapter 5.3.

of Social Welfare and Development. All efforts are undertaken to locate the child's parents and relative. Arrangements are made for the temporary care of the child by a licensed foster family or a child-caring agency.¹⁹⁰

210. In 1994, in its initial report to the CRC, Sri Lanka stated, with respect to child victims of armed conflict and refugees, that "there are several urgent needs that have to be met [including] the special health and nutritional needs of infants and pre-school children... [and the] care and rehabilitation of children traumatized by violence".¹⁹¹

211. In 1993, in a statement before the CRC, Sudan referred to "days of tranquillity and corridors of peace. The former had begun in 1985 and had continued ever since... The corridors had been used, for example, in vaccination campaigns run by UNICEF and in most cases the rebel movements had participated in those campaigns."¹⁹²

212. In 1993, in its initial report to the CRC, Sudan stated that:

3. In fact, the efforts made by the Government of the Sudan... are conclusive proof of its concern with and commitment to the rights and happiness of children; the Sudan is the country which introduced security corridors in areas of fighting and sought to cooperate with United Nations agencies... to ensure the delivery of relief supplies to children, mothers and all citizens throughout the whole of the Sudan, including the areas controlled by the rebel movement.

17.concerning the situation of children in areas of armed conflict,... "special" care is directed towards children and valuable efforts are being made... to protect children and respond to their needs.¹⁹³

213. The Report on the Practice of Syria asserts that Syria considers Article 77 AP I to be part of customary international law.¹⁹⁴

214. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that "we support... the principle that... children be the object of special respect and protection".¹⁹⁵

215. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions. The report also notes that "it is the *opinio juris* of the US that persons

¹⁹⁰ Philippines, Initial report to the CRC, UN Doc. CRC/C/3/Add.23, 3 November 1993, §§ 200, 201, 203, 204 and 206.

¹⁹¹ Sri Lanka, Initial report to the CRC, UN Doc. CRC/C/8/Add.13, 5 May 1994, § 146.

¹⁹² Sudan, Statement before the CRC, UN Doc. CRC/C/SR.70, 1 February 1993, §§ 13 and 20.

¹⁹³ Sudan, Initial report to the CRC, UN Doc. CRC/C/3/Add.20, 2 August 1993, §§ 3 and 17.

¹⁹⁴ Report on the Practice of Syria, 1997, Chapter 5.3.

¹⁹⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".¹⁹⁶

III. Practice of International Organisations and Conferences

United Nations

216. In a resolution adopted in 1998, the UN Security Council expressed concern at the plight of children affected by the conflict in Sierra Leone and welcomed "the efforts of the government of Sierra Leone to coordinate an effective national response to the needs of children affected by armed conflict".¹⁹⁷

217. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council called upon parties to armed conflicts "to undertake feasible measures during armed conflicts to minimize the harm suffered by children, such as 'days of tranquillity' to allow the delivery of basic necessary services and . . . to promote, implement and respect such measures".¹⁹⁸

218. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council reiterated its grave concern at "the particular impact that armed conflict has on children" and further reaffirmed in this regard "the importance of fully addressing their special protection and assistance needs in the mandates of peacemaking, peacekeeping and peace-building operations".¹⁹⁹

219. In a resolution adopted in 2000, the UN Security Council emphasised the need to provide special protection for children in armed conflict and listed in detail what practical measures could be taken.²⁰⁰

220. In 1998, in a statement by its President on Sierra Leone, the UN Security Council condemned as gross violations of IHL the "atrocities carried out against the civilian population, particularly . . . children".²⁰¹

221. In 1998, in a statement by its President on children and armed conflict, the UN Security Council strongly condemned "the targeting of children in armed conflicts . . . in violation of international humanitarian law".²⁰²

222. In 1999, in a statement by its President, the UN Security Council expressed particular concern at "the harmful impact of armed conflict on children".²⁰³

¹⁹⁶ Report on US Practice, 1997, Chapter 5.3.

¹⁹⁷ UN Security Council, Res. 1181, 13 July 1998, preamble.

¹⁹⁸ UN Security Council, Res. 1261, 25 August 1999, § 8.

¹⁹⁹ UN Security Council, Res. 1296, 19 April 2000, § 9.

²⁰⁰ UN Security Council, Res. 1314, 11 August 2000, §§ 1–16.

²⁰¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/13, 20 May 1998, § 1.

²⁰² UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998, § 2.

²⁰³ UN Security Council, Statement by the President, UN Doc. S/PRST/1999/6, 12 February 1999, § 5.

223. In a resolution adopted in 1993 on protection of children affected by armed conflicts, the UN General Assembly called upon States:

fully to respect the provisions of the Geneva Conventions of 12 August 1949 and the Additional Protocols thereto, of 1977, as well as those of the Convention on the Rights of the Child, which accord children affected by armed conflicts special protection and treatment.²⁰⁴

224. In a resolution adopted in 2000 on the situation of human rights in Sudan, the UN General Assembly urged all parties “to stop attacks on sites that usually have a significant presence of children as well as during the ‘days of tranquillity’ which had been agreed for the purpose of ensuring peaceful polio vaccination campaigns”.²⁰⁵

225. In two resolutions adopted in 1982, ECOSOC expressed concern about the plight of children in situations of armed conflict and called upon governments and organisations to observe the rights of children, intensify their actions in this field and make generous contributions in this respect.²⁰⁶

226. In a resolution adopted in 1998, the UN Commission on Human Rights expressed its deep concern at “the continuing violations of human rights in Myanmar . . . [including] the widespread use of forced child labour”.²⁰⁷

227. In a resolution adopted in 1998 on the rights of the child, the UN Commission on Human Rights reaffirmed “the importance of the special attention for children in situations of armed conflict, in particular in the areas of health and nutrition, education and social reintegration”.²⁰⁸

228. In 1997, in its Conclusion on Refugee Children and Adolescents, the Executive Committee of the UNHCR called upon States and relevant parties “to respect and observe rights and principles that are in accordance with international human rights and humanitarian law [including] . . . (iv) the right of children affected by armed conflict to special protection and treatment”.²⁰⁹

229. In 1998, in a report on assistance to unaccompanied refugee minors, which included a section on internally displaced children, the UN Secretary-General noted that UNICEF was “pressing for an end to the systematic abduction of children from northern Uganda . . . [to] camps in southern Sudan . . . [where] they were tortured, enslaved, raped and otherwise abused”.²¹⁰

230. In 1996, in a report on the impact of armed conflict on children, the UN Expert on the Situation of Children in Armed Conflicts recommended that “during conflicts, Governments should support the health of their population

²⁰⁴ UN General Assembly, Res. 48/157, 20 December 1993, § 2.

²⁰⁵ UN General Assembly, Res. 55/116, 4 December 2000, § 3(d).

²⁰⁶ ECOSOC, Res. 1982/24, 4 May 1982, §§ 3–4 and preamble; Res. 1982/25, 4 May 1982, §§ 1–2.

²⁰⁷ UN Commission on Human Rights, Res. 1998/63, 21 April 1998, § 3(a), (c) and (d).

²⁰⁸ UN Commission on Human Rights, Res. 1998/76, 22 April 1998, § 13(d).

²⁰⁹ UNHCR, Executive Committee, Conclusion No. 84(XLVIII): Refugee Children and Adolescents, 20 October 1997, § a(iv).

²¹⁰ UN Secretary-General, Report on assistance to unaccompanied refugee minors, UN Doc. A/53/325, 26 August 1998, § 20.

by facilitating 'days of tranquillity' or 'corridors of peace' to ensure continuity of basic child health measures and delivery of humanitarian relief".²¹¹

Other International Organisations

231. In a resolution adopted in 1987, the Parliamentary Assembly of the Council of Europe condemned the imprisonment and torture of children during armed conflicts.²¹²

232. In a recommendation adopted in 1991, the Parliamentary Assembly of the Council of Europe expressed shock at the hundreds of deaths daily in the Kurdish provinces of Iraq, with special reference to children.²¹³

233. In a recommendation adopted in 1995 on Turkey's military intervention in northern Iraq, the Parliamentary Assembly of the Council of Europe asked Turkey to guarantee the fundamental rights of civilians, with special reference to vulnerable groups, including children.²¹⁴

234. In a resolution adopted in 1989, the European Parliament expressed grave concern at the trial and imprisonment in Turkey of persons below adult age for political offences and called for their release.²¹⁵

235. In a resolution adopted in 1989, the European Parliament stated that it considered that the most serious negative developments in the world with regard to respect for human rights included large-scale detention and reported torture or ill-treatment of children and minors in areas of civil unrest.²¹⁶

International Conferences

236. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed deep concern about "violations of human rights during armed conflicts, affecting the civilian population, especially... children" and therefore called upon States and all parties to armed conflicts "strictly to observe international humanitarian law".²¹⁷

237. The 25th International Conference of the Red Cross in 1986 adopted a resolution on protection of children in armed conflicts in which it recalled that "according to the Geneva Conventions and the two Additional Protocols, children under the age of 15 years who have taken direct part in hostilities and

²¹¹ UN Expert on the Situation of Children in Armed Conflicts, Report on the impact of armed conflict on children, UN Doc. A/51/306, 26 August 1996, Annex, § 165(c), see also §§ 208 and 280.

²¹² Council of Europe, Parliamentary Assembly, Res. 881, 1 July 1987, § 13.

²¹³ Council of Europe, Parliamentary Assembly, Rec. 1150, 24 April 1991, § 3.

²¹⁴ Council of Europe, Parliamentary Assembly, Rec. 1266, 26 April 1995, § 5.

²¹⁵ European Parliament, Resolution on human rights violations in Turkey, 16 January 1989, § A(1).

²¹⁶ European Parliament, Resolution on the May Day events and continuing aggravation of the domestic political climate in Turkey, 26 June 1989, § 6(d).

²¹⁷ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(29), see also § II (50).

fall into the power of an adverse Party continue to benefit from special protection, whether or not they are prisoners of war" and invited "governments and the Movement to do their utmost to ensure that children who have taken part, directly or indirectly, in hostilities are systematically rehabilitated to normal life".²¹⁸

238. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on protection of the civilian population in period of armed conflict in which it urgently drew attention to "the obligation to take all requisite measures to provide children with the protection and assistance to which they are entitled under national and international law", strongly condemned "the deliberate killing and exploitation of, and abuse of and violence against, children", and called for "particularly stringent measures to prevent and punish such behaviour". The Conference further encouraged

States, the Movement and other competent entities and organizations to develop preventive measures, assess existing programmes and set up new programmes to ensure that child victims of conflict receive medical, psychological and social assistance, provided if possible by qualified personnel who are aware of the specific issues involved.²¹⁹

239. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that "in the conduct of hostilities, every effort is made . . . to spare the life, protect and respect the civilian population, with particular protective measures for . . . groups with special vulnerabilities such as children" and that "children receive the special protection, care and assistance . . . to which they are entitled under national and international law".²²⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

240. In 1993, in its preliminary observations on Sudan, the CRC expressed concern at "the effects of armed conflict on children . . . In emergency situations, all parties involved should do their utmost to facilitate humanitarian assistance to protect the lives of children."²²¹ In its concluding observations on the report of Sudan, the Committee stated that it continued to be alarmed at "the

²¹⁸ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. IX, §§ 1, 3 and 6.

²¹⁹ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § C(a), (b) and (g).

²²⁰ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a) and (f).

²²¹ CRC, Preliminary observations on Sudan, UN Doc. CRC/C/15/Add.6, 18 February 1993, § 9.

effects of emergency situations on children, as well as the problems faced by homeless . . . children. Reports on the forced labour and slavery of children give cause for the Committee's deepest concern."²²²

241. In 1993, in its concluding observations on the report of Peru, the CRC expressed concern that:

due to the internal violence [in Peru], several registration centres had been destroyed, adversely affecting the situation of thousands of children who are often without any identity documents, thus running the risk of their being suspected of involvement in terrorist activities . . .

The Committee deplors that, under [Peruvian law], children between 15 and 18 years of age who are suspected of being involved in terrorist activities do not benefit from safeguards and guarantees afforded by the system of administration of juvenile justice under normal circumstances . . .

The Committee also recommends that the provision of [the] law . . . be repealed or amended in order for children below 18 years of age to enjoy fully the rights guaranteed to [juveniles in non-emergency situations].²²³

242. In 1995, in its concluding observations on the report of the UK, the CRC stated that:

The Committee is concerned about the absence of effective safeguards to prevent the ill-treatment of children under emergency legislation. In this connection, the Committee observes that . . . it is possible to hold children as young as 10 for seven days without charge. It is also noted that the emergency legislation which gives the police and the army the power to stop, question and search people on the street has led to complaints of children being mistreated.²²⁴

243. In 1997, in its consideration of reports of Uganda, the CRC recommended that Uganda take "measures to stop the killing and abduction of children . . . in the area of the armed conflict".²²⁵ It also recommended that "special attention be directed to refugee and internally displaced children to ensure that they have equal access to basic facilities" such as health and social services.²²⁶

244. In 1995, in examining a case involving the house arrest of the wife of the former President of Peru and their children, the IACiHR considered that the detention of the minors required separate examination. In view of the special

²²² CRC, Concluding observations on the report of Sudan, UN Doc. CRC/C/15/Add.10, 18 October 1993, § 14.

²²³ CRC, Concluding observations on the report of Peru, UN Doc. CRC/C/15/Add.8, 18 October 1993, §§ 8, 9 and 17–18.

²²⁴ CRC, Concluding observations on the report of the United Kingdom of Great Britain and Northern Ireland, UN Doc. CRC/C/38, 20 February 1995, § 212.

²²⁵ CRC, Consideration of reports of Uganda, UN Doc. CRC/C/15/Add.80, 21 October 1997, §§ 19 and 34.

²²⁶ CRC, Consideration of reports of Uganda, UN Doc. CRC/C/15/Add.80, 21 October 1997, §§ 21 and 37.

protection required for children under international law, the Commission found the measures taken by the Peruvian armed forces depriving the children of their freedom to be “particularly repugnant”.²²⁷

V. Practice of the International Red Cross and Red Crescent Movement

245. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “children shall be treated with all regard due to their . . . age”.²²⁸

246. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on child soldiers in which it appealed to all parties to armed conflicts “strictly to observe the rules of international humanitarian law affording special protection to children” and invited National Red Cross and Red Crescent Societies “to do everything possible to protect children during armed conflicts, particularly by ensuring that their basic needs are met”.²²⁹

247. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “children and adolescents shall be granted favoured treatment at all times”.²³⁰

248. In 1994, in a joint statement, the ICRC, the International Federation of Red Cross and Red Crescent Societies, UNHCR and UNICEF reaffirmed that they “will continue to do their utmost to improve protection, medical and social conditions . . . so that the safety and the welfare of [unaccompanied] children can be ensured”.²³¹

249. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on children in armed conflicts, which recognised that “the 1949 Geneva Conventions and the 1977 Additional Protocols, as well as Articles 38 and 39 of the 1989 United Nations Convention on the Rights of the Child, accord children special protection and treatment”. The resolution also endorsed the Plan of Action for the Red Cross and Red Crescent Movement which aimed “to take concrete action to protect and assist child victims of armed conflicts”.²³²

²²⁷ IACiHR, *Case 11.006 (Peru)*, Report, 7 February 1995, Sections VI (B)(1) and VII (1).

²²⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 666.

²²⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 14, §§ 1 and 3.

²³⁰ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

²³¹ ICRC, International Federation of Red Cross and Red Crescent Societies, UNHCR and UNICEF, Joint statement on the evacuation of unaccompanied children from Rwanda, 27 June 1994, § 4.

²³² International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 5, preamble and § 2.

VI. *Other Practice*

250. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “every child has the right to the measures of protection required by his or her condition as a minor and shall be provided with the care and aid the child requires”.²³³

Education

I. Treaties and Other Instruments

Treaties

251. Article 24, first paragraph, GC IV provides that “the parties to the conflict shall take the necessary measures to ensure that [the education of] children under fifteen, who are orphaned or are separated from their families,” is facilitated.

252. Article 50 GC IV provides that:

The Occupying Power shall, with the co-operation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children.

...

Should the local institutions be inadequate for the purpose, the Occupying Power shall make arrangements for the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.

253. Article 94, second paragraph, GC IV provides that the education of interned children shall be ensured.

254. Article 13 of the 1966 ICESCR provides that “the States Parties to the present Covenant recognize the right of everyone to education”. It further provides that “primary education shall be compulsory and available free to all”.

255. Article 78(2) AP I provides that “whenever an evacuation occurs . . . each child’s education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity”. Article 78 AP I was adopted by consensus.²³⁴

256. Article 4(3)(a) AP II provides that children “shall receive education, including religious and moral education, in keeping with the wishes of their parents,

²³³ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 10, *IRRC*, No. 282, p. 334.

²³⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 254.

or in the absence of parents, of those responsible for their care". Article 4 AP II was adopted by consensus.²³⁵

257. Article 28 of the 1989 Convention on the Rights of the Child provides that "the States Parties recognize the right of the child to education".

258. Article 11 of the 1990 African Charter on the Rights and Welfare of the Child provides that "every child shall have the right to an education".

259. Article 1(12) of the 1995 Agreement on Human Rights annexed to the Dayton Accords states that "the Parties shall secure to all persons within their jurisdiction the right to education".

Other Instruments

260. Article 26 of the 1948 UDHR provides that "everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages."

261. Rule 13.5 of the 1985 Standard Minimum Rules for the Administration of Juvenile Justice states that "while in custody, juveniles shall receive... educational [assistance]".

262. Rule 24.1 of the 1985 Standard Minimum Rules for the Administration of Juvenile Justice states that "efforts shall be made to provide juveniles, at all stages of the proceedings, with... education".

263. Guideline 20 of the 1990 Guidelines for the Prevention of Juvenile Delinquency states that "governments are under an obligation to make public education accessible to all young persons".

264. Rule 38 of the 1990 Rules for the Protection of Juveniles Deprived of their Liberty states that "every juvenile of compulsory school age has the right to education suited to his or her needs and abilities and designed to prepare him or her for a return to society".

265. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 78(2) AP I.

266. Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 78(2) AP I.

267. Principle 23 of the 1998 Guiding Principles on Internal Displacement states that:

1. Every human being has the right to education.
2. To give effect to this right for internally displaced persons, the authorities concerned shall ensure that such persons, in particular displaced children, receive education which shall be free and compulsory at the primary level. Education should respect their cultural identity, language and religion.
3. Special efforts should be made to ensure the full and equal participation of... girls in educational programmes.

²³⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

II. National Practice

Military Manuals

268. Argentina's Law of War Manual (1969) provides that the parties to the conflict shall take the necessary measures for children under seven years of age to ensure "their maintenance, the exercise of their religion and their education are facilitated in all circumstances. The latter shall, as far as possible, be entrusted to persons of a similar cultural tradition."²³⁶ The manual also states that "the occupying Power shall, with the cooperation of the national and local authorities, facilitate the proper working of all institutions devoted to the care and education of children".²³⁷ It adds that:

Should the local institutions be inadequate for the purpose, the occupying Power shall make arrangements to ensure the maintenance and education, if possible by persons of their own nationality, language and religion, of children who are orphaned or separated from their parents as a result of the war and who cannot be adequately cared for by a near relative or friend.²³⁸

269. Argentina's Law of War Manual (1989) provides, with respect to non-international armed conflicts, that "children shall receive the assistance and care they require, in particular concerning their education, including their religious or moral education".²³⁹

270. Australia's Defence Force Manual provides that "the occupying power must ensure that... proper steps are taken to maintain [the] education and religious welfare" of children under 15 years of age.²⁴⁰

271. Canada's LOAC Manual provides that belligerents "must ensure the maintenance of [children under 15] and facilitate the exercise of their religion, while their education must as far as possible be entrusted to persons of a similar cultural tradition".²⁴¹ The manual further states that, with respect to non-international armed conflicts in particular, "children are to receive such aid and protection as required including: a. an education which makes provision for their religious and moral care".²⁴²

272. Colombia's Basic Military Manual provides that education shall be provided to children.²⁴³

273. The Report on the Practice of Indonesia, with reference to the Military Manual, states that children under 15 years of age, orphaned or separated from their families as a result of conflict, shall be given access to education.²⁴⁴

²³⁶ Argentina, *Law of War Manual* (1969), § 4.007; see also *Law of War Manual* (1989), § 4.12.

²³⁷ Argentina, *Law of War Manual* (1969), § 5.009; see also *Law of War Manual* (1989), § 6.06.

²³⁸ Argentina, *Law of War Manual* (1969), § 5.009.

²³⁹ Argentina, *Law of War Manual* (1989), § 7.04.

²⁴⁰ Australia, *Defence Force Manual* (1994), § 1215.

²⁴¹ Canada, *LOAC Manual* (1999), p. 11-3, § 25.

²⁴² Canada, *LOAC Manual* (1999), p. 17-3, § 22.

²⁴³ Colombia, *Basic Military Manual* (1995), p. 74.

²⁴⁴ Report on the Practice of Indonesia, 1997, Chapter 5.3, referring to *Military Manual* (1982).

274. Italy's IHL Manual provides that the occupying power "shall take all necessary measures to ensure . . . the education of minors".²⁴⁵

275. New Zealand's Military Manual provides that belligerents "must ensure the maintenance of [children under 15] and facilitate the exercise of their religion, while their education must as far as possible be entrusted to persons of a similar cultural tradition".²⁴⁶ It further states that "the Occupying Power must take the necessary steps to ensure that children under fifteen separated from their families are not left to their own resources and that proper steps are taken to maintain their education and religious welfare".²⁴⁷ With respect to non-international armed conflicts in particular, the manual states that children "are to receive such aid and protection as they require, including an education which makes provision for their religious and moral care".²⁴⁸

276. Switzerland's Basic Military Manual provides that "necessary measures must be taken for children under 15 years . . . in any circumstances, so that their care, religious practice and education are facilitated".²⁴⁹

277. The UK Military Manual provides that belligerents "must ensure the maintenance of [children under 15] and facilitate the exercise of their religion, while their education must as far as possible be entrusted to persons of similar cultural tradition".²⁵⁰ The manual further states that:

If the local institutions are not adequate for the purpose, the Occupant must make arrangements for the maintenance and education of children who are orphaned or separated from their parents as a result of the war and who can not be adequately looked after by a near relative or friend. The persons entrusted for the maintenance and education of such children shall, if possible, be persons of the children's own nationality, language and religion.²⁵¹

278. The US Field Manual reproduces Articles 24 and 50 GC IV.²⁵²

National Legislation

279. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.²⁵³

280. Croatia's Law on Displaced Persons and Directive on Displaced Persons provide that displaced children shall be educated.²⁵⁴

²⁴⁵ Italy, *IHL Manual* (1991), Vol. I, § 48(9).

²⁴⁶ New Zealand, *Military Manual* (1992), § 1112(1).

²⁴⁷ New Zealand, *Military Manual* (1992), § 1317(2).

²⁴⁸ New Zealand, *Military Manual* (1992), § 1813(1).

²⁴⁹ Switzerland, *Basic Military Manual* (1987), Article 157(1).

²⁵⁰ UK, *Military Manual* (1958), § 36. ²⁵¹ UK, *Military Manual* (1958), § 538.

²⁵² US, *Field Manual* (1956), §§ 263 and 383.

²⁵³ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

²⁵⁴ Croatia, *Law on Displaced Persons* (1993), Article 13; *Directive on Displaced Persons* (1991), Articles 2 and 13.

281. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Articles 24, 50 and 94 GC IV, and of AP I, including violations of Article 78(2) AP I, as well as any "contravention" of AP II, including violations of Article 4(3)(a) AP II, are punishable offences.²⁵⁵

282. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment".²⁵⁶

283. The Report on the Practice of Russia considers the 1997 Law on Refugees to be applicable to internally displaced persons. One of the principal rights contained in this law is the right of children to receive a primary education.²⁵⁷

National Case-law

284. No practice was found.

Other National Practice

285. According to the Report on the Practice of France, the French authorities consider the persistent closing of schools and universities in the West Bank to be a matter of serious concern.²⁵⁸

286. With reference to two memoranda on accommodation in detention camps, the Report on the Practice of Malaysia states that during the communist insurgency, children were detained in Advanced Approved Schools and were provided with an education.²⁵⁹

287. The Guidelines on Evacuations adopted by the Presidential Human Rights Committee of the Philippines in 1991 provide that "the government shall undertake appropriate measures so that the schooling of children evacuees shall not be prejudiced".²⁶⁰

288. In 1994, in its initial report to the CRC, Sri Lanka stated, with respect to child victims of armed conflict and refugees, that "there are several urgent needs that have to be met [including] . . . education for children of school age".²⁶¹

²⁵⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

²⁵⁶ Norway, *Military Penal Code as amended* (1902), § 108.

²⁵⁷ Report on the Practice of Russia, 1997, Chapter 5.5.

²⁵⁸ Report on the Practice of France, 1999, Chapter 5.7.

²⁵⁹ Report on the Practice of Malaysia, 1997, Chapter 5.5, referring to Memorandum on Accommodation in Detention Camps, 13 June 1950, Ref. (4) in DCHQ/87/50 and Memorandum on Accommodation in Detention Camps, 6 December 1950, Ref. (56) in DCHQ/187/50.

²⁶⁰ Philippines, Presidential Human Rights Committee, Resolution No. 91-001 Providing for Guidelines on Evacuations, Manila, 26 March 1991, § 12.

²⁶¹ Sri Lanka, Initial report to the CRC, UN Doc. CRC/C/8/Add.13, 5 May 1994, § 146.

289. In 1993, in a statement before the CRC, Sudan reported that “education for displaced children had been made available in the form of special schools in the camps”.²⁶²

290. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.²⁶³

III. Practice of International Organisations and Conferences

United Nations

291. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council strongly condemned “attacks on objects protected under international law, including places that usually have a significant presence of children such as . . . schools, and calls on all parties concerned to put an end to such practices”.²⁶⁴

292. In a resolution adopted in 2000 on the protection of children in situations of armed conflict, the UN Security Council reiterated “the importance of ensuring that children continue to have access to basic services during conflict and post-conflict periods, including, *inter alia*, education and health care”.²⁶⁵

293. In a resolution adopted in 1999, the UN General Assembly urged all parties involved in Kosovo “to support the efforts of the United Nations Children’s Fund to ensure that all children in Kosovo return to school as soon as possible and to contribute to the rebuilding and repair of schools destroyed or damaged during the conflict in Kosovo”.²⁶⁶

294. In a resolution adopted in 1999 on the rights of the child, the UN Commission on Human Rights reaffirmed “the importance of special attention for children in situations of armed conflict, particularly in the area of . . . education”.²⁶⁷

295. In 1997, in its Conclusion on Refugee Children and Adolescents, the Executive Committee of the UNHCR called upon States and relevant parties “to respect and observe rights and principles that are in accordance with international human rights and humanitarian law [including] . . . (iii) the right of children and adolescents to education”.²⁶⁸

²⁶² Sudan, Statement before the CRC, UN Doc. CRC/C/SR.90, 5 November 1993, § 28.

²⁶³ Report on US Practice, 1997, Chapter 5.3.

²⁶⁴ UN Security Council, Res. 1261, 25 August 1999, § 2.

²⁶⁵ UN Security Council, Res. 1314, 11 August 2000, § 14.

²⁶⁶ UN General Assembly, Res. 54/183, 17 December 1999, § 21.

²⁶⁷ UN Commission on Human Rights, Res. 1998/76, 22 April 1998, § 13(d).

²⁶⁸ UNHCR, Executive Committee, Conclusion No. 84(XLVIII): Refugee Children and Adolescents, 20 October 1997, § a(iii).

296. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that “violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law”.²⁶⁹

297. In 1996, in a report on the impact of armed conflict on children, the UN Expert on the Situation of Children in Armed Conflict recommended that, with respect to education, “all possible efforts should be made to maintain education systems during conflicts”, including “outside of formal school buildings” and in camps for displaced persons.²⁷⁰

298. In 1995, the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions reported that in some of the camps for displaced persons in northern Burundi, “a number of NGOs have attempted to provide some minimum educational facilities”.²⁷¹

299. In 1996, in a report on the situation of human rights in Zaire, the Special Rapporteur of the UN Commission on Human Rights recommended that the government establish resettlement programmes for IDPs, with special emphasis on the provision of education for children”.²⁷²

300. In 1997, in a report on his visit to Mozambique, the Representative of the UN Secretary-General on Internally Displaced Persons noted that “as regards education, displaced children were to some extent accommodated within the existing school system”. However, “education was severely interrupted and the quality remained poor for a number of years”.²⁷³

Other International Organisations

301. In a resolution adopted in 1993, the Parliamentary Assembly of the Council of Europe urged member States “to supply children in the former Yugoslavia affected by the conflict with a minimum of education and the educational and play materials (books, toys, etc.) which is vital for children’s development”.²⁷⁴

302. In a recommendation on the former Yugoslavia adopted in 1994, the Parliamentary Assembly of the Council of Europe stated that children and students who had been moved outside the areas of fighting should, “as far as possible, . . . be able to continue their education in refugee camps or at least

²⁶⁹ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

²⁷⁰ UN Expert on the Situation of Children in Armed Conflict, Report on the impact of armed conflict on children, UN Doc. A/51/306, 26 August 1996, § 203(a)–(d)

²⁷¹ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1996/4/Add.1, 24 July 1995, § 82.

²⁷² UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6/Add.1, 16 September 1996, p. 25, § (j).

²⁷³ Representative of the UN Secretary-General on Internally Displaced Persons, Report on the Representative’s visit to Mozambique from 24 November to 3 December 1996, UN Doc. E/CN.4/1997/43/Add.1, 24 February 1997, § 47.

²⁷⁴ Council of Europe, Parliamentary Assembly, Res. 1011, 28 September 1993, § 7(x).

in the neighbourhood, where tuition in their own language can more easily be provided".²⁷⁵

International Conferences

303. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that "children receive the special protection, care and assistance, including access to education and recreational facilities, to which they are entitled under national and international law".²⁷⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

304. In 1995, in discussing the question of children and armed conflict, the CRC recalled that provisions essential for the realisation of the rights of the child included access to education.²⁷⁷

305. In 1997, in its concluding observations on the report of Uganda, the CRC expressed concerns "about the difficulties encountered . . . by displaced children in securing access to basic education" and recommended that Uganda pay special attention to "internally displaced children to ensure that they have equal access to basic facilities".²⁷⁸

306. In 1999, in its General Comment on Article 13 of the 1966 ICESCR, the UN Committee on Economic, Social and Cultural Rights held that "education has to be within safe physical reach, either by attendance at some reasonably convenient geographic location . . . or via modern technology". It also held that "States parties have immediate obligations in relation to the right to education, such as the 'guarantee' that the right 'will be exercised without discrimination of any kind' and the obligation 'to take steps' towards the full realization of article 13". States must also "fulfil (provide) the availability of education by actively developing a system of schools, including building classrooms, delivering programmes, providing teaching materials and training teachers".²⁷⁹

307. In its judgement in the *Cyprus case* in 2001, the ECtHR found that "there has been a violation of Article 2 of Protocol No. 1 [to the 1950 ECHR (right to education)] in respect of Greek Cypriots living in northern Cyprus in so far as no appropriate secondary-school facilities were available to them".²⁸⁰

²⁷⁵ Council of Europe, Parliamentary Assembly, Rec. 1239, 14 April 1994, § 25.

²⁷⁶ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(f).

²⁷⁷ CRC, Report on the 8th Session, UN Doc. CRC/C/38, 20 February 1995, §§ 45, 70 and 135.

²⁷⁸ CRC, Concluding observations on the report of Uganda, UN Doc. CRC/C/15/Add.80, 21 October 1997, §§ 21 and 37.

²⁷⁹ UN Committee on Economic, Social and Cultural Rights, General Comment No. 13 (The right to education (Article 13 ICESCR)), 8 July 1999, §§ 6(b), 43 and 50.

²⁸⁰ ECtHR, *Cyprus case*, Judgement, 10 May 2001, § 280.

V. Practice of the International Red Cross and Red Crescent Movement

308. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on child soldiers in which it invited National Red Cross and Red Crescent Societies “to do everything possible to protect children during armed conflicts, particularly by . . . organizing educational activities for them”.²⁸¹

VI. Other Practice

309. No practice was found.

Evacuation

Note: *For practice concerning the establishment of hospital and safety zones to protect children, see Chapter 11, section A.*

I. Treaties and Other Instruments

Treaties

310. Article 17 GC IV provides that “the parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas . . . of children”.

311. Article 24, second paragraph, GC IV provides that “the Parties to the conflict shall facilitate the reception of such children [orphaned or separated from their families] in a neutral country for the duration of the conflict with the consent of the Protecting Power”.

312. Article 78(1) AP I provides that:

No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required . . .

In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

Article 78 AP I was adopted by consensus.²⁸²

313. Article 4(3)(e) AP II provides that:

Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking

²⁸¹ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 14, § 3.

²⁸² CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 254.

place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

Article 4 AP II was adopted by consensus.²⁸³

Other Instruments

314. Article 19 of the 1863 Lieber Code provides that “Commanders, whenever admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially . . . children, may be removed before the bombardment commences”.

315. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 78(1) AP I.

316. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 78(1) AP I.

II. National Practice

Military Manuals

317. Argentina’s Law of War Manual (1969) provides that “the belligerents shall endeavour to conclude agreements for the removal from besieged areas of . . . children”.²⁸⁴ The manual also provides that “the belligerent parties shall facilitate the reception of such children in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards”.²⁸⁵

318. Argentina’s Law of War Manual (1989) provides that “no party in conflict shall undertake the evacuation of children to a foreign country. If an evacuation has been undertaken, they shall take all the necessary measures to facilitate the return of the children to their families and their country.”²⁸⁶ With respect to non-international conflicts in particular, the manual states that “all the necessary measures shall be taken so that, with the consent of their parents or guardians, they [children under 15 years] are transferred from the area in which hostilities are taking place”.²⁸⁷

319. Australia’s Defence Force Manual states that “the opposing parties are required to try and conclude local agreements for the removal from besieged or encircled areas of . . . children”.²⁸⁸ It further states that:

As is the case with women, children are granted special protection under LOAC. Important rules are shown below . . .

²⁸³ CDDH, *Official Records*, Vol. VI, CDDH/SR.50, 3 June 1977, p. 90.

²⁸⁴ Argentina, *Law of War Manual* (1969), § 1.014.

²⁸⁵ Argentina, *Law of War Manual* (1969), § 4.007.

²⁸⁶ Argentina, *Law of War Manual* (1989), § 4.12.

²⁸⁷ Argentina, *Law of War Manual* (1989), § 7.04.

²⁸⁸ Australia, *Defence Force Manual* (1994), § 735; see also *Commanders’ Guide* (1994), § 926.

- e. children who are not nationals of the state may not be evacuated by that state to a foreign country unless the evacuation is temporary and accords to certain conditions set out in AP I.²⁸⁹

320. Cameroon's *Instructors' Manual* provides that at the approach of the enemy, "all persons shall be evacuated, with priority . . . children".²⁹⁰

321. Canada's *LOAC Manual* provides that "belligerents must also facilitate the reception of these children [children under 15 who have been orphaned or separated from their families] by neutral countries for the duration of hostilities, with the consent of the Protecting Power, if any".²⁹¹ It also states that "if circumstances permit, the parties to a conflict must endeavour to conclude local agreements for the removal from besieged areas of . . . children".²⁹² With respect to non-international armed conflicts in particular, the manual provides that "if the children's safety requires their removal from the area in which they are, this should be done, whenever possible, with the consent of their parents or guardians. Persons responsible for the safety and well-being of the children should also accompany them."²⁹³

322. Colombia's *Basic Military Manual* provides that, with respect to non-international armed conflicts in particular, "all measures shall be taken in order to temporarily transfer the children to safety zones, accompanied by persons responsible for their safety".²⁹⁴

323. France's *LOAC Manual* provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of . . . children".²⁹⁵

324. The *Report on the Practice of Indonesia*, with reference to the *Military Manual*, states that children under 15 years of age, orphaned or separated from their families as a result of conflict, should be evacuated to neutral States.²⁹⁶

325. The *Military Manual of the Netherlands* provides that "children shall not be evacuated without reason to a foreign country. Exception shall be made for a temporary evacuation where compelling reasons of the health and safety of the children so required."²⁹⁷

326. New Zealand's *Military Manual* provides that:

Belligerents must also facilitate the reception of these children [children under 15 who have been orphaned or separated from their families] by neutral States for the duration of hostilities, with the consent of the Protecting Power, if any, and under due safeguards as above.²⁹⁸

²⁸⁹ Australia, *Defence Force Manual* (1994), § 947.

²⁹⁰ Cameroon, *Instructors' Manual* (1992), p. 67, § 242(1).

²⁹¹ Canada, *LOAC Manual* (1999), p. 11-3, § 25.

²⁹² Canada, *LOAC Manual* (1999), p. 6-4, § 35.

²⁹³ Canada, *LOAC Manual* (1999), p. 17-3, § 23.

²⁹⁴ Colombia, *Basic Military Manual* (1995), p. 74.

²⁹⁵ France, *LOAC Manual* (2001), p. 64.

²⁹⁶ Report on the Practice of Indonesia, 1997, Chapter 5.3, referring to *Military Manual* (1982).

²⁹⁷ Netherlands, *Military Manual* (1993), p. VIII-3.

²⁹⁸ New Zealand, *Military Manual* (1992), § 1112(1), see also § 1405(5).

The manual refers to Article 17 GC IV, which “requires that belligerents endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . children”.²⁹⁹ With respect to non-international armed conflicts in particular, the manual provides that “if children’s safety requires their removal from the area in which they are, the consent of their parents or guardians should be obtained whenever possible and the children accompanied by persons responsible for their safety and well-being”.³⁰⁰

327. Spain’s LOAC Manual provides that “in besieged or encircled areas where there is a civilian population, it shall be endeavoured to conclude local agreements with the enemy to organise the evacuation of . . . children”.³⁰¹

328. Sweden’s IHL Manual provides that:

It is also possible for the parties to reach an agreement during a conflict that all acts of war shall cease temporarily within a given part of a conflict area. Such agreements are commonly made to afford protection to civilian populations, and specially to such exposed groups as children³⁰²

329. Switzerland’s Basic Military Manual provides that “belligerents shall conclude special agreements in order to evacuate . . . children . . . from besieged areas”.³⁰³ It further provides that it is prohibited to evacuate children into a foreign country, except with the temporary authorisation of the government.³⁰⁴

330. The UK Military Manual states that “the belligerents should endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . children”.³⁰⁵

331. The UK LOAC Manual states that “a local cease-fire may be arranged for the removal from besieged or encircled areas of . . . children”.³⁰⁶

332. The US Field Manual provides that “the commanders of United States ground forces will, when the situation permits, inform the enemy of their intention to bombard a place, so that the noncombatants, especially . . . children, may be removed before the bombardment commences”.³⁰⁷ It further states that “the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of . . . children”.³⁰⁸ The manual also provides that “the parties to the conflict shall facilitate the reception of such children [under fifteen, who are orphaned or are separated from their families as a result of the war] in a neutral country for the duration of the conflict with the consent of the Protecting Power, if any, and under due safeguards”.³⁰⁹

²⁹⁹ New Zealand, *Military Manual* (1992), § 508(3).

³⁰⁰ New Zealand, *Military Manual* (1992), § 1813(1).

³⁰¹ Spain, *LOAC Manual* (1996), Vol. I, § 9.4.a.

³⁰² Sweden, *IHL Manual* (1991), Section 3.4.1, p. 84.

³⁰³ Switzerland, *Basic Military Manual* (1987), Article 33.

³⁰⁴ Switzerland, *Basic Military Manual* (1987), Article 157.

³⁰⁵ UK, *Military Manual* (1958), § 29.

³⁰⁶ UK, *LOAC Manual* (1981), Section 9, p. 34, § 3.

³⁰⁷ US, *Field Manual* (1956), § 43.

³⁰⁸ US, *Field Manual* (1956), § 256, see also § 44.

³⁰⁹ US, *Field Manual* (1956), § 263.

333. The US Air Force Pamphlet states that “removal of . . . children . . . from besieged or encircled areas is encouraged”.³¹⁰

National Legislation

334. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.³¹¹

335. Ireland’s Geneva Conventions Act as amended provides that any “minor breach” of the Geneva Conventions, including violations of Articles 17 and 24 GC IV, and of AP I, including violations of Article 78(1) AP I, as well as any “contravention” of AP II, including violations of Article 4(3)(e) AP II, are punishable offences.³¹²

336. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . [and in] the two additional protocols to these Conventions . . . is liable to imprisonment”.³¹³

337. The Act on Child Protection of the Philippines provides that children should be given priority during evacuations resulting from armed conflict.³¹⁴

National Case-law

338. No practice was found.

Other National Practice

339. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support the principle that no state arrange for the evacuation of children except for temporary evacuation where compelling reasons of the health or medical treatment of the children or safety, except in occupied territory, so require”.³¹⁵

340. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons

³¹⁰ US, *Air Force Pamphlet* (1976), § 14-3.

³¹¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³¹² Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³¹³ Norway, *Military Penal Code as amended* (1902), § 108.

³¹⁴ Philippines, *Act on Child Protection* (1992), Sections 23–24.

³¹⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II".³¹⁶

III. Practice of International Organisations and Conferences

United Nations

341. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that "violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law".³¹⁷

Other International Organisations

342. No practice was found.

International Conferences

343. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

344. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

345. No practice was found.

VI. Other Practice

346. No practice was found.

Death penalty on children

I. Treaties and Other Instruments

Treaties

347. Article 68, fourth paragraph, GC IV provides that "in any case, the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence".

348. Article 6(5) of the 1966 ICCPR provides that "sentence of death shall not be imposed for crimes committed by persons below eighteen years of age".

³¹⁶ Report on US Practice, 1997, Chapter 5.3.

³¹⁷ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

349. Article 4(5) of the 1969 ACHR provides that “capital punishment shall not be imposed upon persons who, at the time the crime was committed, were under 18 years of age”.

350. Article 77(5) AP I provides that “the death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed”. Article 77 AP I was adopted by consensus.³¹⁸

351. Article 6(4) AP II provides that “the death penalty shall not be pronounced on persons who were under the age of eighteen years of age at the time of the offence”. Article 6 AP II was adopted by consensus.³¹⁹

352. Article 37(a) of the 1989 Convention on the Rights of the Child provides that:

No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age.

Other Instruments

353. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 77(5) AP I.

354. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 77(5) AP I.

II. National Practice

Military Manuals

355. Argentina’s Law of War Manual (1969) provides that “in any case, the death penalty may not be pronounced against a protected person who was under the age of 18 at the time of the offence”.³²⁰

356. Argentina’s Law of War Manual (1989) provides that, with respect to non-international armed conflicts in particular, “the death penalty shall not be pronounced against a person who is under the age of 18”.³²¹

357. Australia’s Defence Force Manual provides that “the death penalty must not be executed on children who are under the age of 18 at the time the offence was committed”.³²²

³¹⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

³¹⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 85.

³²⁰ Argentina, *Law of War Manual* (1969), § 5.028(1).

³²¹ Argentina, *Law of War Manual* (1989), § 7.10, see also §§ 3.28 and 5.11.

³²² Australia, *Defence Force Manual* (1994), § 947.

358. Canada's LOAC Manual provides that, with respect to non-international armed conflicts in particular, "regardless of the offence committed, no death penalty shall be pronounced upon persons under the age of eighteen at the time of the offence".³²³

359. According to the Report on the Practice of Jordan, national legislation provides that the death penalty may not be pronounced on a minor who was under 18 years of age at the time of the offence.³²⁴

360. The Military Manual of the Netherlands provides that "the death penalty shall not be pronounced on persons who were under the age of eighteen years of age at the time of the offence".³²⁵

361. New Zealand's Military Manual provides that "in any case, the death penalty may not be pronounced [by the Occupying Power] against a protected person who was under 18 years of age at the time of the offence".³²⁶

362. Switzerland's Basic Military Manual provides that the occupying power can only pronounce the death penalty when the accused is over the age of 18 years.³²⁷

363. The UK Military Manual provides that "in any case, the death penalty may not be pronounced against a protected person who was under 18 years of age at the time of the offence".³²⁸

364. The US Field Manual reproduces Article 68 GC IV.³²⁹

National Legislation

365. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³³⁰

366. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 68 GC IV, and of AP I, including violations of Article 77(5) AP I, as well as any "contravention" of AP II, including violations of Article 6(4) AP II, are punishable offences.³³¹

367. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment".³³²

³²³ Canada, *LOAC Manual* (1999), p. 17-4, § 30.

³²⁴ Report on the Practice of Jordan, 1998, Chapter 5.3

³²⁵ Netherlands, *Military Manual* (1993), p. XI-5.

³²⁶ New Zealand, *Military Manual* (1992), § 1327(1)(c).

³²⁷ Switzerland, *Basic Military Manual* (1987), Article 173.

³²⁸ UK, *Military Manual* (1958), § 566(c). ³²⁹ US, *Field Manual* (1956), § 438.

³³⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³³¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³³² Norway, *Military Penal Code as amended* (1902), § 108.

National Case-law

368. No practice was found.

Other National Practice

369. In 1993, Peru informed the CRC that “children convicted of committing terrorist activities could not receive life sentences” and that “even if the death penalty were introduced for terrorists, it would not be applied to adolescents under the age of 18 because the Convention [on the Rights of the Child] took precedence over all other legislation”.³³³

370. The Report on the Practice of Syria asserts that Syria considers Article 77 AP I to be part of customary international law.³³⁴

371. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.³³⁵

*III. Practice of International Organisations and Conferences**United Nations*

372. No practice was found.

Other International Organisations

373. No practice was found.

International Conferences

374. In the Maputo Declaration on the Use of Children as Soldiers, the participants at the African Conference on the Use of Children as Soldiers in 1999 called upon African States:

to respect fully the provisions of international humanitarian law, in particular in the case of captured child soldiers, especially by . . . ensuring that neither the death penalty nor life imprisonment without possibility of release is imposed for offences committed by persons below 18 years of age.³³⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

375. No practice was found.

³³³ Peru, Statement before the CRC, UN Doc. CRC/C/SR.84, 30 September 1993, §§ 25 and 39.

³³⁴ Report on the Practice of Syria, 1997, Chapter 5.3.

³³⁵ Report on US Practice, 1997, Chapter 5.3.

³³⁶ African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, § 5.

V. Practice of the International Red Cross and Red Crescent Movement

376. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the pronouncement of the death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed”.³³⁷

VI. Other Practice

377. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “sentences of death shall not be carried out on . . . children under 18 years of age at the time of the commission of the offence”.³³⁸

C. Recruitment of Child Soldiers

I. Treaties and Other Instruments

Treaties

378. Article 50, second paragraph, GC IV, provides that the occupying power may not enlist children “in formations or organizations subordinate to it”.

379. Article 77(2) AP I provides that:

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.

Article 77 AP I was adopted by consensus.³³⁹

380. Article 4(3)(c) AP II provides that “children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities”. Article 4 AP II was adopted by consensus.³⁴⁰

381. Article 38(3) of the 1989 Convention on the Rights of the Child provides that:

States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have

³³⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 204.

³³⁸ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 8 (3), *IRRC*, No. 282, p. 333.

³³⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

³⁴⁰ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

382. Upon ratification of the 1989 Convention on the Rights of the Child, Colombia stated that “the age [for recruitment] shall be understood to be 18 years, given the fact that, under Colombian law, the minimum age for recruitment into the armed forces of personnel called for military service is 18 years”.³⁴¹

383. Upon ratification of the 1989 Convention on the Rights of the Child, the Netherlands stated that “it is of the opinion that . . . the minimum age for the recruitment or incorporation of children in the armed forces should be above 15 years”.³⁴²

384. Upon ratification of the 1989 Convention on the Rights of the Child, Spain expressed its disagreement at the Convention “permitting the recruitment and participation in armed conflict of children having attained the age of 15 years”.³⁴³

385. Upon ratification of the 1989 Convention on the Rights of the Child, Uruguay stated that it “will not under any circumstances recruit persons who have not attained the age of 18 years”.³⁴⁴

386. Article 22(2) of the 1990 African Charter on the Rights and Welfare of the Child provides that “States Parties to the present Charter shall . . . refrain, in particular, from recruiting any child”.

387. Under Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute, “conscripting or enlisting children under the age of fifteen years” into armed forces or groups constitutes a war crime in both international and non-international armed conflicts.

388. Article 1 of the 1999 Convention on the Worst Forms of Child Labour states that each State party “shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency” Article 3(a) lists “forced or compulsory recruitment of children [under 18] for use in armed conflict” as one of the worst forms of child labour.

389. The 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that:

Article 2: States Parties shall ensure that persons who have not attained the age of 18 years are not compulsorily recruited into their armed forces.

³⁴¹ Colombia, Declaration made upon ratification of the Convention on the Rights of the Child, 28 January 1991, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 15.

³⁴² Netherlands, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 February 1995, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 27.

³⁴³ Spain, Declarations made upon ratification of the Convention on the Rights of the Child, 6 December 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 29.

³⁴⁴ Uruguay, Declarations made upon ratification of the Convention on the Rights of the Child, 20 November 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 32.

Article 3:

1. States Parties shall raise the minimum age for the voluntary recruitment of persons into their national armed forces from that set out in article 38, paragraph 3, of the Convention on the Rights of the Child, taking account of the principles contained in that article and recognizing that under the Convention persons under the age of 18 years are entitled to special protection.
2. Each State Party shall deposit a binding declaration upon ratification of or accession to the present Protocol that sets forth the minimum age at which it will permit voluntary recruitment into its national armed forces and a description of the safeguards it has adopted to ensure that such recruitment is not forced or coerced.
3. States Parties that permit voluntary recruitment into their national armed forces under the age of 18 years shall maintain safeguards to ensure, as a minimum, that:
 - (a) Such recruitment is genuinely voluntary;
 - (b) Such recruitment is carried out with the informed consent of the person's parents or legal guardians;
 - (c) Such persons are fully informed of the duties involved in such military service;
 - (d) Such persons provide reliable proof of age prior to acceptance into national military service...
5. The requirement to raise the age in paragraph 1 of the present article does not apply to schools operated by or under the control of the armed forces of the States Parties, in keeping with articles 28 and 29 of the Convention on the Rights of the Child.

Article 4:

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit... persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment... including the adoption of legal measures necessary to prohibit and criminalize such practices...

Article 6:

- ...
3. States Parties shall take all feasible measures to ensure that persons within their jurisdiction recruited or used in hostilities contrary to the present Protocol are demobilized or otherwise released from service. States Parties shall, when necessary, accord to such persons all appropriate assistance for their physical and psychological recovery and their social reintegration...

Article 7:

1. States Parties shall cooperate in the implementation of the present Protocol, including in the prevention of any activity contrary thereto and in the rehabilitation and social reintegration of persons who are victims of acts contrary thereto, including through technical cooperation and financial assistance. Such assistance and cooperation will be undertaken in consultation with the States Parties concerned and the relevant international organizations.

390. Article 4 of the 2002 Statute of the Special Court for Sierra Leone provides that "the Special Court shall have the power to prosecute persons who

committed the following serious violations of international humanitarian law: . . . conscripting or enlisting children under the age of 15 years into armed forces or groups”.

Other Instruments

391. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 77(1) AP I.

392. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 77(1) AP I.

393. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxvi) and (e)(vii), “conscripting or enlisting children under the age of fifteen years” into armed forces or groups constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

394. Argentina’s Law of War Manual provides that, with respect to non-international armed conflicts in particular, “children under the age of 15 shall not be recruited in the armed forces”.³⁴⁵

395. Cameroon’s Instructors’ Manual states that children under the age of 15 “should not be recruited into the armed forces”.³⁴⁶

396. Canada’s LOAC Manual provides that, with respect to non-international armed conflicts in particular, “children are to receive such aid and protection as required including: . . . a ban on their enlistment . . . while under the age of fifteen”.³⁴⁷

397. Colombia’s Basic Military Manual provides that, with respect to non-international armed conflicts in particular, it is prohibited to “recruit and allow direct participation in hostilities of children under the age of 15”.³⁴⁸

398. France’s LOAC Manual provides that “it is prohibited to recruit persons under 15 into the armed forces”.³⁴⁹ It considers such recruitment “a war crime”.³⁵⁰

399. Germany’s Military Manual provides that “the parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take direct part in hostilities and, in particular, they shall

³⁴⁵ Argentina, *Law of War Manual* (1989), § 7.04.

³⁴⁶ Cameroon, *Instructors’ Manual* (1992), p. 15, § 15.

³⁴⁷ Canada, *LOAC Manual* (1999), p. 17-3, § 22.

³⁴⁸ Colombia, *Basic Military Manual* (1995), p. 75.

³⁴⁹ France, *LOAC Manual* (2001), p. 40. ³⁵⁰ France, *LOAC Manual* (2001), p. 63.

refrain from recruiting them into their armed forces".³⁵¹ The manual further states that children under 15 "shall not be enlisted".³⁵²

400. Kenya's LOAC Manual states that "children under the age of 15 shall not be recruited into the armed forces".³⁵³

401. The Military Manual of the Netherlands provides that "children may not be recruited in armed forces".³⁵⁴

402. New Zealand's Military Manual provides that, with respect to non-international armed conflicts in particular, children "are to receive such aid and protection as they require, including... a ban on their enlistment... while under the age of fifteen".³⁵⁵

403. Nigeria's Military Manual states that "children under 15 years shall not be recruited".³⁵⁶

404. Spain's LOAC Manual provides that "all possible means shall be taken, within the limits of military necessity, to avoid recruiting children under 15".³⁵⁷

405. The US Field Manual reproduces Article 50 GC IV.³⁵⁸

National Legislation

406. Under Argentina's Draft Code of Military Justice, breaches of treaty provisions providing for special protection of children are war crimes.³⁵⁹

407. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including "using, conscripting or enlisting children" in both international and non-international armed conflicts.³⁶⁰

408. Azerbaijan's Criminal Code provides that "recruiting minors into the armed forces" constitutes a war crime.³⁶¹

409. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.³⁶²

410. The Law on the Rights of the Child of Belarus prohibits recruitment into the armed forces under the age of 18.³⁶³

411. The Criminal Code of Belarus provides that it is a war crime to "recruit into the armed forces children under the age of 15 years".³⁶⁴

³⁵¹ Germany, *Military Manual* (1992), § 306. ³⁵² Germany, *Military Manual* (1992), § 505.

³⁵³ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 8.

³⁵⁴ Netherlands, *Military Manual* (1993), p. III-2, § 1.

³⁵⁵ New Zealand, *Military Manual* (1992), § 1813.

³⁵⁶ Nigeria, *Military Manual* (1994), p. 38, § 4.

³⁵⁷ Spain, *LOAC Manual* (1996), Vol. I, § 1.3.c.(1). ³⁵⁸ US, *Field Manual* (1956), § 383.

³⁵⁹ Argentina, *Draft Code of Military Justice* (1998), Article 292, introducing a new Article 876(4) in the *Code of Military Justice as amended* (1951).

³⁶⁰ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.68 and 268.88.

³⁶¹ Azerbaijan, *Criminal Code* (1999), Article 116.0.5.

³⁶² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

³⁶³ Belarus, *Law on the Rights of the Child* (1993), Article 29.

³⁶⁴ Belarus, *Criminal Code* (1999), Article 136(5).

412. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, "conscripting or enrolling children under 15 years of age into national armed forces" constitutes a war crime in non-international armed conflicts.³⁶⁵

413. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.³⁶⁶

414. Colombia's Law on Judicial Cooperation states that children under 18 may not be recruited into the armed forces, unless their parents give their consent. A five-year term of imprisonment is imposed on anyone who recruits children under 18.³⁶⁷

415. Colombia's Penal Code imposes a criminal sanction on "anyone, who, in period of armed conflict, recruits minors under 18 years of age".³⁶⁸

416. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.³⁶⁹

417. Croatia's Defence Law imposes a military service obligation only for persons who are 19 years old in the year when they start their military service. In wartime or in case of direct peril to the independence and integrity of the Republic, the President may impose a military service obligation for persons who are 17 years old.³⁷⁰

418. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "conscripting or enlisting children under the age of fifteen years into the national armed forces" is a crime in both international and non-international armed conflicts.³⁷¹

419. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "conscripts children under the age of fifteen years into the armed forces, or enlists them in the armed forces or in armed groups".³⁷²

420. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of the Geneva Conventions, including violations of Article 50 GC IV, and of AP I, including violations of Article 77(2) AP I, as well as any

³⁶⁵ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(D)(g).

³⁶⁶ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

³⁶⁷ Colombia, *Law on Judicial Cooperation* (1997), Articles 13–14.

³⁶⁸ Colombia, *Penal Code* (2000), Article 162.

³⁶⁹ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

³⁷⁰ Croatia, *Defence Law* (1993), Article 98(1) and (5).

³⁷¹ Georgia, *Criminal Code* (1999), Article 413(d).

³⁷² Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(5).

“contravention” of AP II, including violations of Article 4(3)(c) AP II, are punishable offences.³⁷³

421. Jordan’s Military Service Law No. 2 provides that children under 16 years old may not be enlisted in the armed forces.³⁷⁴

422. Malawi’s National Service Act states that no person under the age of 18 years shall be liable for military service.³⁷⁵

423. Malaysia’s Armed Forces Act establishes a minimum age of 18 for anyone to be considered for enrolment or recruitment in the armed forces. Persons below the age of 18 may be appointed as apprentices, but they are not considered as recruits and are therefore not subjected to service law.³⁷⁶

424. Under Mali’s Penal Code, “conscripting or enlisting children under the age of fifteen years into the national armed forces or groups” constitutes a war crime in international armed conflicts.³⁷⁷

425. Under the International Crimes Act of the Netherlands, “conscripting or enlisting children under the age of fifteen years into the national armed forces or armed groups” is a crime, whether committed in an international or a non-international armed conflict.³⁷⁸

426. Under New Zealand’s International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.³⁷⁹

427. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... [and in] the two additional protocols to these Conventions... is liable to imprisonment”.³⁸⁰

428. The Act on Child Protection of the Philippines, in an article on “Children in situations of armed conflict”, provides that “children shall not be recruited to become members of the Armed Forces of the Philippines or its civilians units or other armed groups”.³⁸¹

429. Under Spain’s Penal Code, breaches of international treaty provisions providing for special protection of children are punished.³⁸²

430. Under Trinidad and Tobago’s Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.³⁸³

³⁷³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁷⁴ Jordan, *Military Service Law No. 2* (1972), Chapter 2, Article 5.

³⁷⁵ Malawi, *National Service Act* (1951), Article 4.

³⁷⁶ Malaysia, *Armed Forces Act* (1972), Section 18.

³⁷⁷ Mali, *Penal Code* (2001), Article 31(i)(26).

³⁷⁸ Netherlands, *International Crimes Act* (2003), Articles 5(5)(r) and 6(3)(f).

³⁷⁹ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

³⁸⁰ Norway, *Military Penal Code as amended* (1902), § 108.

³⁸¹ Philippines, *Act on Child Protection* (1992), Article X, Section 22(b).

³⁸² Spain, *Penal Code* (1995), Article 612(3).

³⁸³ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

431. Ukraine's Military Service Law states that 18 years is the recruitment age for the armed forces. Adolescents of 15 to 17 years old can enter military schools after having passed a medical examination. Military education and military service for persons who have not reached 15 years of age are forbidden.³⁸⁴

432. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.³⁸⁵

433. The FRY Army Act states that military conscription duty falls in the year when a draftee is to become 18, but a conscript may be recruited when he is turning 17 on personal request or under an order of the President in case of war.³⁸⁶

National Case-law

434. No practice was found.

Other National Practice

435. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Canada pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".³⁸⁷

436. According to the Report on the Practice of Chile, it is the *opinio juris* of Chile that persons under the age of 18 must not be recruited in any hostilities.³⁸⁸

437. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Denmark pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".³⁸⁹

438. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Finland pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".³⁹⁰

439. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Guinea pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".³⁹¹

³⁸⁴ Ukraine, *Military Service Law* (1992), Article 15.

³⁸⁵ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

³⁸⁶ FRY, *Army Act* (1994), Article 291.

³⁸⁷ Canada, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

³⁸⁸ Report on the Practice of Chile, 1997, Chapter 5.3.

³⁸⁹ Denmark, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

³⁹⁰ Finland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

³⁹¹ Guinea, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

440. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Iceland pledged “to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age”.³⁹²

441. In 1996, during a debate in the UN Security Council on the situation in Liberia, Italy described the warlords’ practice of recruiting children for combat as “one of the most despicable actions”. It insisted that the international community should use every means available to stop such behaviour immediately, notably the inclusion of a provision in the future ICC Statute aimed at “bring[ing] to justice the perpetrators of such intolerable acts”.³⁹³

442. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mexico pledged “to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age”.³⁹⁴

443. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mozambique pledged “to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age” and “to ensure non-conscription of teenagers under 18 years old to join the army”.³⁹⁵

444. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Norway pledged “to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age”.³⁹⁶

445. In 1993, in its initial report to the CRC, the Philippines stated that “children are not to be recruited into the Armed Forces of the Philippines or into any armed group”.³⁹⁷

446. At the 27th International Conference of the Red Cross and Red Crescent in 1999, South Africa pledged “to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age”.³⁹⁸

447. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Sweden pledged “to promote the adoption of national and international

³⁹² Iceland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

³⁹³ Italy, Statement before the UN Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 6.

³⁹⁴ Mexico, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

³⁹⁵ Mozambique, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

³⁹⁶ Norway, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

³⁹⁷ Philippines, Initial report to the CRC, UN Doc. CRC/C/3/Add.23, 3 November 1993, § 200.

³⁹⁸ South Africa, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".³⁹⁹

448. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Switzerland pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".⁴⁰⁰

449. The Report on the Practice of Syria asserts that Syria considers Article 77 AP I to be part of customary international law.⁴⁰¹

450. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Thailand pledged "to prevent the recruitment of children below the age of 18 years into the situation of armed conflict".⁴⁰²

451. In 1996, during a debate in the UN Security Council on the situation in Liberia, the US denounced the practice of recruiting children for combat and called it an "abhorrent practice".⁴⁰³

452. According to the Report on US Practice, "Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3" of the 1949 Geneva Conventions.⁴⁰⁴

453. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Uruguay pledged "to promote the adoption of national and international standards prohibiting the military recruitment . . . in armed conflicts of persons under 18 years of age".⁴⁰⁵

III. Practice of International Organisations and Conferences

United Nations

454. In a resolution adopted in 1996 concerning the situation in Liberia, the UN Security Council condemned "the practice of some factions of recruiting . . . children for combat". It referred to such practice as "inhumane and abhorrent".⁴⁰⁶ In a further resolution on the same subject adopted the same year, the Security Council condemned "in the strongest possible terms the practice of recruiting . . . children for combat" and demanded that "the warring parties

³⁹⁹ Sweden, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁰⁰ Switzerland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁰¹ Report on the Practice of Syria, 1997, Chapter 5.3.

⁴⁰² Thailand, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁰³ US, Statement before the UN Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 15.

⁴⁰⁴ Report on US Practice, 1997, Chapter 5.3.

⁴⁰⁵ Uruguay, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁰⁶ UN Security Council, Res. 1071, 30 August 1996, § 9.

immediately cease this inhumane and abhorrent activity and release all child soldiers for demobilization".⁴⁰⁷

455. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council strongly condemned "the targeting of children in situations of armed conflict, including . . . recruitment . . . of children in armed conflict in violation of international law".⁴⁰⁸

456. In a resolution adopted in 2000 on the protection of children in situations of armed conflict, the UN Security Council requested parties to armed conflict:

to include, where appropriate, provisions for the protection of children, including the disarmament, demobilization and reintegration of child combatants, in peace negotiations and in peace agreements and the involvement of children, where possible, in these processes.⁴⁰⁹

457. In 1998, in a statement by its President concerning children and armed conflict, the UN Security Council strongly condemned "the recruitment . . . of child soldiers" and called upon "all parties concerned to put an end to such practice". It also called upon all parties concerned "to comply strictly with their obligations under international law, in particular their obligations under the Geneva Conventions of 1949, the Additional Protocols of 1977 and the United Nations Convention on the Rights of the Child of 1989". The Security Council expressed its readiness "to support efforts aimed at obtaining commitments to put to an end the recruitment . . . of children in armed conflicts . . . [and] to give special consideration to the . . . demobilization of child soldiers".⁴¹⁰

458. In 1998, in a statement by its President, the UN Security Council condemned the recruitment of child soldiers in the DRC.⁴¹¹

459. In a resolution adopted in 2000 on the situation of human rights in Sudan, the UN General Assembly welcomed the commitments undertaken by the SPLM/A "not to recruit into its armed forces children under the age of eighteen and to demobilize all child soldiers still remaining in the military and hand them over to the competent civil authorities for reintegration."⁴¹²

460. In two resolutions adopted in 1993 and 1994, the UN Commission on Human Rights deplored "the continued practice of enlisting children in the armed forces".⁴¹³

461. In a resolution adopted in 1995, the UN Commission on Human Rights stated that it was "deeply worried by the continued practice of enlisting

⁴⁰⁷ UN Security Council, Res. 1083, 27 November 1996, § 6.

⁴⁰⁸ UN Security Council, Res. 1261, 25 August 1999, § 2.

⁴⁰⁹ UN Security Council, Res. 1314, 11 August 2000, § 11.

⁴¹⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998.

⁴¹¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998.

⁴¹² UN General Assembly, Res. 55/116, 4 December 2000, § 1(m).

⁴¹³ UN Commission of Human Rights, Res. 1993/83, 10 March 1993, preamble; Res. 1994/94, 9 March 1994, preamble.

children in armed forces, in contravention of the Convention on the Rights of the Child".⁴¹⁴

462. In two resolutions adopted in 1996 and 1998, the UN Commission on Human Rights urged all parties to the conflict in Afghanistan "to prohibit . . . the recruitment of children as para-combatants".⁴¹⁵

463. In a resolution adopted in 1998 on the elimination of violence against women, the UN Commission on Human Rights called upon States "to protect children, especially the girl child, in situations of armed conflict against . . . recruitment . . . through adherence to the applicable principles of international human rights and humanitarian law".⁴¹⁶

464. In a resolution adopted in 1998 on the situation of human rights in Myanmar, the UN Commission on Human Rights expressed "its deep concern . . . at continuing violations of the rights of children in contravention of the Convention on the Rights of the Child, in particular by . . . recruitment . . . into the armed forces".⁴¹⁷

465. In a resolution adopted in 1998 on the abduction of children from northern Uganda, the UN Commission on Human Rights acknowledged "the concern expressed in the concluding observations of the Committee on the Rights of Child . . . about . . . the recruitment of children as child soldiers in northern Uganda" and condemned in the strongest terms "all parties involved in . . . recruitment of children as child soldiers, particularly the Lord's Resistance Army".⁴¹⁸

466. In a resolution adopted in 1998 on the rights of the child, the UN Commission on Human Rights called upon all States and other parties to armed conflict "to end the use of children as soldiers and ensure their demobilization".⁴¹⁹

467. In a resolution adopted in 1998, the UN Commission on Human Rights expressed its concern at the forcible recruitment and kidnapping of children by non-governmental armed groups in Burundi and invited the government to take measures to combat these practices.⁴²⁰

468. In 1996, in a report on the impact of armed conflict on children, the UN Expert on the Situation of Children in Armed Conflict stated that "practical protection measures to prevent . . . the recruitment of children into armed forces must be a priority in all assistance programmes in refugee and displaced camps".⁴²¹

⁴¹⁴ UN Commission on Human Rights, Res. 1995/79, 8 March 1995, preamble.

⁴¹⁵ UN Commission on Human Rights, Res. 1996/75, 23 April 1996, § 4; Res. 1998/70, 21 April 1998, § 5(c).

⁴¹⁶ UN Commission on Human Rights, Res. 1998/52, 17 April 1998, § 9(g).

⁴¹⁷ UN Commission on Human Rights, Res. 1998/63, 21 April 1998, § 3(d).

⁴¹⁸ UN Commission on Human Rights, Res. 1998/75, 22 April 1998, preamble and § 3.

⁴¹⁹ UN Commission on Human Rights, Res. 1998/76, 22 April 1998, § 12(b).

⁴²⁰ UN Commission on Human Rights, Res. 1998/82, 24 April 1998, § 8.

⁴²¹ UN Expert on the Situation of Children in Armed Conflict, Report on the impact of armed conflict on children, UN Doc. A/51/306, 26 August 1996, Annex, § 90(c).

469. In 1998, in a report on the situation in Sierra Leone, the UN Secretary-General mentioned the important commitments resulting from the visit to Sierra Leone of his Special Representative for Children in Armed Conflict. He noted that the government agreed “not to recruit children under 18 years of age into a new national army. The Civil Defence Force committed to stop recruiting and initiating children under 18 and to begin the process of demobilization of child combatants within their ranks.”⁴²²

470. In 1998, in a report on the UNOMSIL in Sierra Leone, the UN Secretary-General collected allegations concerning the initiation, by the Civil Defence Force, of children between the ages of 15 and 17. He welcomed “the commitment of the government and the Civil Defence Force not to recruit children under the age of 18 as soldiers” and urged them “to implement their undertaking to demobilize any children currently under arms as soon as possible”.⁴²³

471. In 1998, in a report on protection for humanitarian assistance to refugees and others in conflict situations, the UN Secretary-General stated that compliance with IHL norms and principles had “worsened in recent years because of the changing pattern of conflicts” and gave as an illustration the fact that “young children are being recruited and trained to fight in violation of the Convention on the Rights of the Child and the Additional Protocols of the Geneva Conventions”.⁴²⁴

472. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General stated that he had “announced a minimum age requirement for United Nations peacekeepers . . . and asked contributing Governments to send in their national contingent’s troops preferably not younger than 21 years of age, and in no case less than 18”. He therefore recommended that the UN Security Council:

urge Member States to support the proposal to raise the minimum age for recruitment . . . to 18, and accelerate the drafting of an optional protocol on the situation of children in armed conflict to the Convention on the Rights of the Child for consideration by the General Assembly.⁴²⁵

473. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that “violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law”. He also stated that:

⁴²² UN Secretary-General, Fifth report on the situation in Sierra Leone, UN Doc. S/1998/486, 9 June 1998, § 23.

⁴²³ UN Secretary-General, First progress report on UNOMSIL, UN Doc. S/1998/750, 12 August 1998, §§ 43 and 59.

⁴²⁴ UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, pp. 2–3.

⁴²⁵ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 42 and Recommendation 8.

Other serious violations of international humanitarian law falling within the jurisdiction of the Court include: . . . abduction and forced recruitment of children under the age of 15 years into armed forces or groups for the purpose of using them to participate actively in hostilities . . .

The prohibition of child recruitment has by now acquired a customary international law status.⁴²⁶

474. In 1994, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that "it has been impossible to ascertain how many adolescents have been recruited – voluntarily or under duress – into various armies. In the Bihac pocket, there have been allegations that boys as young as 16 may have been forcibly drafted into the army." The Special Rapporteur also noted that in the United Nations Protected Areas, "many boys of 15 to 17 years of age have volunteered for, and sometimes been accepted, into the army of the so-called 'Serbian Republic of Krajina'".⁴²⁷

475. In 2001, in a report on violence against women perpetrated and/or condoned by the State during times of armed conflict, the Special Rapporteur on Violence against Women, its Causes and Consequences stated that "despite the specific needs and experiences of girls in armed conflict, girls are often the last priority when it comes to the distribution of humanitarian aid and their needs are often neglected in the formulation of demobilization and reintegration programmes".⁴²⁸

476. In 1992, in a report on El Salvador, the Director of the Human Rights Division of ONUSAL noted that:

60. . . . ONUSAL observers were able to verify that [a] huge number of children under 15 were in the FMLN ranks. When this situation was taken up with the Political and Diplomatic Commission of FMLN, it pledged to respect the international norms in force [Article 4(3)(c) AP II], which did not entirely prove to be the case. Although in several instances it was ascertained that the enlistments had been voluntary and in others it was not possible to establish the age of the minors, this prohibited recruitment practice was observed during the course of the conflict . . . [but] irregular recruitment, on the part of both the armed forces and FMLN, gradually ceased with the signing of the Peace Agreement on 16 January 1992.

...

101. . . . In regard to military recruitment, it was recommended that wide publicity be given to the Ministry of Defence regulations on recruitment procedures . . . FMLN was recommended to observe the rules of international humanitarian law

⁴²⁶ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, §§ 14, 15(c) and 17.

⁴²⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Sixth periodic report, UN Doc. E/CN.4/1994/110, 21 February 1994, § 241.

⁴²⁸ UN Commission on Human Rights, Special Rapporteur on Violence against Women, its Causes and Consequences, Report on violence against women perpetrated and/or condoned by the State during times of armed conflict (1997–2000), UN Doc. E/CN.4/2001/73, 23 January 2001, § 52.

concerning the prohibition of the recruitment of minors under the age of 15... in hostilities.⁴²⁹

Other International Organisations

477. In a resolution adopted in 1996, the OAU Council of Ministers “exhorted all African countries, in particular the warring parties in those countries embroiled in civil wars, . . . to refrain from recruiting children under the age of 18 in armed conflicts or violent activities of any kind whatsoever” and urged them to “release child combatants from the army”.⁴³⁰ In another resolution adopted at the same session, the Council of Ministers reiterated its appeal to member States and to all the parties engaged in armed conflict “to put an end to the recruitment of children in these conflicts”.⁴³¹

478. The statement adopted at the 1997 OAU/African Network for Prevention and Protection Against Child Abuse and Neglect (ANPPCAN) Continental Conference on Children in Situations of Armed Conflict noted that “the recruitment of children under the age of 18 years into armed forces, militias or rebel forces, should be outlawed as stipulated in the African Charter on the Rights and Welfare of the Child, and treated as a crime against humanity”.⁴³²

479. In the recommendations of the fifth OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1998, the participants “firmly condemned the recruitment of children into forces engaged in fighting”.⁴³³

480. In 1998, speaking on behalf of the SADC in the Sixth Committee of the UN General Assembly, South Africa declared that the 1998 ICC Statute

would also serve as a reminder that even during armed conflict the rule of law must be upheld. For example, it was unlawful for children under the age of 15 to be robbed of their childhood by being recruited to national armed forces . . . [This act] was a war crime and would be punished.⁴³⁴

International Conferences

481. The 25th International Conference of the Red Cross in 1986 recalled that, in accordance with Article 77 API, the parties to the conflict shall refrain from recruiting children who have not attained the age of fifteen into their armed forces and that “in recruiting among those persons who have attained the age of fifteen but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest”.⁴³⁵

⁴²⁹ ONUSAL, Director of the Human Rights Division, Report, UN Doc. A/46/955-S/24375, 12 August 1992, Annex, §§ 60 and 101.

⁴³⁰ OAU, Council of Ministers, Res. 1659 (LXIV), 1–5 July 1996, §§ 5–7.

⁴³¹ OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996, § 8.

⁴³² OAU/ANPPCAN Continental Conference on Children in Situations of Armed Conflict in Africa, Addis Ababa, 24–26 July 1997, Final Statement, § 10.

⁴³³ OAU/ICRC, Fifth seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 30–31 March 1998, Recommendations, § 3.

⁴³⁴ SADC, Statement by South Africa on behalf of SADC before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 13.

⁴³⁵ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. IX, § 2.

482. The 26th International Conference of the Red Cross and Red Crescent in 1995 strongly condemned “recruitment and conscription of children under the age of 15 years in the armed forces or armed groups, which constitute a violation of international humanitarian law” and demanded that “those responsible for such acts be brought to justice and punished”. The Conference further took note of “the efforts of the Movement to promote a principle of non-recruitment . . . of children under the age of 18 years”.⁴³⁶

483. In the Maputo Declaration on the Use of Children as Soldiers, the participants at the African Conference on the Use of Children as Soldiers in 1999 called upon all African States to end “the recruitment of all children under 18 years of age into the armed forces”, to prohibit “the recruitment of all children into militia forces under their jurisdiction” and to bring to justice “those who continue to recruit or use children as soldiers”. They also called upon armed opposition groups “to end the recruitment of children”.⁴³⁷

484. In a resolution adopted on the occasion of the 50th anniversary of the Geneva Conventions in 1999 on the contribution of parliaments to ensuring respect for and promoting international humanitarian law, the 102nd Inter-Parliamentary Conference requested all States “to take all feasible measures to ensure that children who have not attained the age of 18 years . . . are not recruited under compulsion into the armed forces; and to ensure the early adoption of the Optional Protocol on the Involvement of Children in Armed Conflict”.⁴³⁸

485. The Plan of Action for the years 2000–2003 adopted in 1999 at the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to respect and ensure respect for international humanitarian law and to ensure, in particular, that “all measures, including penal measures, are taken to stop . . . [the] recruitment [of children under the age of 15 years] into the armed forces or into armed groups which constitute[s] a violation of international humanitarian law”.⁴³⁹ The Conference stated that:

The International Federation, National Societies and the ICRC will continue their efforts in pursuance of decisions taken within the International Movement and notably the *Plan of Action for Children Affected by Armed Conflict* (CABAC), to

⁴³⁶ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § C(c) and (f).

⁴³⁷ African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, §§ 2–3.

⁴³⁸ 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on the contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the 50th anniversary of the Geneva Conventions, § 4.

⁴³⁹ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(f).

“promote the principle of non-recruitment . . . of children below the age of 18 years in armed conflicts”.⁴⁴⁰

486. In its Final Declaration in 2002, the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict pledged “to give particular attention to vulnerable groups to prevent all forms of recruitment for military purpose of children under 18 years old”.⁴⁴¹

IV. Practice of International Judicial and Quasi-judicial Bodies

487. In 1997, in its concluding observations on Myanmar, the CRC strongly recommended that “the army of the State party should absolutely refrain from recruiting under-aged children in the light of existing international human rights and humanitarian standards” and that “all forced recruitment of children should be abolished”.⁴⁴²

V. Practice of the International Red Cross and Red Crescent Movement

488. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces the rule that “children under the age of fifteen years shall not be recruited into the armed forces” and that “in recruiting among the persons having attained the age of fifteen years but not the age of eighteen years, priority shall be given to those who are the oldest”.⁴⁴³

489. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on child soldiers in which it stressed “the responsibility of recruiters and commanders in armed forces or groups to prevent the recruitment and enrolment of children” and requested the ICRC and the International Federation of Red Cross and Red Crescent Societies, in cooperation with the Henry Dunant Institute, “to draw up and implement a Plan of Action for the Movement aimed at promoting the principle of non-recruitment . . . of children below the age of eighteen in armed conflicts”.⁴⁴⁴

490. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that “those under the age of 15 shall not be recruited”.⁴⁴⁵

⁴⁴⁰ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 7.

⁴⁴¹ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, § 9.

⁴⁴² CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, § 42.

⁴⁴³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 38.

⁴⁴⁴ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 4, preamble and § 4.

⁴⁴⁵ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

491. In 1994, in a statement before the Third Committee of the UN General Assembly, the ICRC stated that IHL prohibits the recruitment of children in both international and non-international armed conflicts and referred to Article 77(2) API, Article 4(3) AP II and Article 38 of the 1989 Convention on the Rights of the Child. The ICRC observed that despite these clear prohibitions, an ever-increasing number of children were involved in combat, emphasised the need for full compliance with the existing rules and expressed full support for the adoption of an optional protocol to the 1989 Convention on the Rights of the Child to prohibit the recruitment of children under 18.⁴⁴⁶

492. In a document submitted to the CRC in 1995, the ICRC recalled that “in an international armed conflict, if children take part in the hostilities despite the prohibition against this in the Geneva Conventions, they are nevertheless entitled to prisoner-of-war status in the event of capture”.⁴⁴⁷

493. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on children in armed conflicts in which it endorsed “the Plan of Action for the Red Cross and Red Crescent Movement prepared by the International Federation and the ICRC, in cooperation with the Henry Dunant Institute, which aims to promote the principle of . . . non-recruitment of children below the age of 18 years in armed conflicts”.⁴⁴⁸

494. In 1996, in a statement before the Third Committee of the UN General Assembly, the ICRC condemned the recruitment of children in armed forces and considered that “legal standards must be raised with a view to prohibiting the recruitment of children below 18 years of age”.⁴⁴⁹

495. In a working paper on war crimes submitted in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC listed recruiting children under the age of 15 years in the armed forces as a serious violation of IHL in international and non-international armed conflicts that should be subject to the jurisdiction of the ICC.⁴⁵⁰

496. At its Seville Session in 1997, the Council of Delegates adopted a resolution on peace, IHL and human rights in which it appealed to all National Societies “to promote the Movement’s position on the 18-year age limit for recruitment . . . with a view to encouraging their respective governments to adopt national legislation and recruitment procedures in line with this position”. It

⁴⁴⁶ ICRC, Statement before the Third Committee of the UN General Assembly, 11 November 1994, p. 2.

⁴⁴⁷ ICRC, Document submitted to the CRC, Administration of Juvenile Justice, Geneva, 13 November 1995, p. 1.

⁴⁴⁸ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 5, § 2.

⁴⁴⁹ ICRC, Statement before the Third Committee of the UN General Assembly, 12 November 1996, p. 1.

⁴⁵⁰ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, §§ 2(v) and 3(xii).

asked National Societies that had already adopted the 18-year age limit for recruitment “to urge their governments to make their positions known to other governments, and to encourage their respective governments to participate in and support the process of drafting an optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts”.⁴⁵¹

497. In 1998, in a statement before the Third Committee of the UN General Assembly, the ICRC welcomed the adoption of the 1998 ICC Statute, “which lists as a war crime the conscription or enlistment of children under 15 into armed forces or groups”.⁴⁵²

498. At its Geneva Session in 1999, the Council of Delegates adopted a resolution on children affected by armed conflict in which it encouraged all National Societies:

to support, particularly through contacts with their government, the adoption of international instruments implementing the principle of non-participation... of children below the age of 18 in armed conflicts with a view to such instruments being applicable to all situations of armed conflict and to all armed groups.⁴⁵³

VI. Other Practice

499. In 1994, in a report on Angola, Human Rights Watch condemned the enrolment of children below the age of 15 in armed forces as a violation of human rights.⁴⁵⁴

500. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “children who have not yet attained the age of fifteen years shall not be recruited in or allowed to join armed forces or armed groups”.⁴⁵⁵

501. The Report on SPLM/A Practice alleges that “the SPLM/A still recruits into the army... children under the age of 15 years, which is against the Convention on the Rights of the Child”.⁴⁵⁶

⁴⁵¹ International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 8, §§ 5 and 6.

⁴⁵² ICRC, Statement before the Third Committee of the UN General Assembly, 21 October 1998, p. 2.

⁴⁵³ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 8, § 4.

⁴⁵⁴ Human Rights Watch, *Arms Project Angola: Arms Trade and Violations of the Laws of War since the 1992 Elections*, Luanda, 1994, pp. 83 ff.

⁴⁵⁵ Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 10, *IRRC*, No. 282, p. 334.

⁴⁵⁶ Report on SPLM/A Practice, 1998, Chapter 5.3.

D. Participation of Child Soldiers in Hostilities

I. Treaties and Other Instruments

Treaties

502. Article 77(2) AP I provides that “the Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities”. Article 77 AP I was adopted by consensus.⁴⁵⁷

503. Article 4(3)(c) AP II provides that “children who have not attained the age of 15 shall . . . [not be] allowed to take part in hostilities”. Article 4 AP II was adopted by consensus.⁴⁵⁸

504. Article 38(2) of the 1989 Convention on the Rights of the Child provides that “States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities”.

505. Upon ratification of the 1989 Convention on the Rights of the Child, Argentina stated that “it would have like the Convention categorically to prohibit the use of children in armed conflicts”.⁴⁵⁹

506. Upon ratification of the 1989 Convention on the Rights of the Child, Austria stated that “to determine an age limit of 15 years for taking part in hostilities . . . is incompatible with . . . the best interests of the child”.⁴⁶⁰

507. Upon signature of the 1989 Convention on the Rights of the Child, Colombia stated that “it would have been preferable to fix [the age for taking part in armed conflicts] at 18 years in accordance with the principles and norms prevailing in various regions and countries, including Colombia”.⁴⁶¹

508. Upon ratification of the 1989 Convention on the Rights of the Child, Germany stated that it “regrets the fact that . . . even 15-year-olds may take a part in hostilities as soldiers, because this age limit is incompatible with the consideration of a child’s best interests”.⁴⁶²

509. Upon ratification of the 1989 Convention on the Rights of the Child, the Netherlands stated that “it is of the opinion that States should not be allowed to involve children directly or indirectly in hostilities”.⁴⁶³

⁴⁵⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 251.

⁴⁵⁸ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 90.

⁴⁵⁹ Argentina, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 4 December 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 12.

⁴⁶⁰ Austria, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 August 1992, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 12.

⁴⁶¹ Colombia, Declaration made upon signature of the Convention on the Rights of the Child, 26 January 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 15.

⁴⁶² Germany, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 March 1992, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 19.

⁴⁶³ Netherlands, Reservations and declarations made upon ratification of the Convention on the Rights of the Child, 6 February 1995, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 27.

510. Upon ratification of the 1989 Convention on the Rights of the Child, Spain expressed its disagreement at the Convention “permitting the recruitment and participation in armed conflict of children having attained the age of 15 years”.⁴⁶⁴

511. Upon ratification of the 1989 Convention on the Rights of the Child, Uruguay stated that “it will not authorize any persons under its jurisdiction who have not attained the age of 18 years to take a direct part in hostilities”.⁴⁶⁵

512. Article 22(2) of the 1990 African Charter on the Rights and Welfare of the Child provides that “States Parties to the present Charter shall take all necessary measures to ensure that no child shall take a direct part in hostilities”.

513. According to Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute, “using [children under the age of fifteen years] to participate actively in hostilities” constitutes a war crime in both international and non-international armed conflicts. During the March–April 1998 session of the Preparatory Committee for the Establishment of an International Criminal Court, when the proposal for this war crime was developed, the words “using” and “participate” were explained in a footnote to provide guidance for the interpretation of the scope of this provision. This footnote read:

The words “using” and “participate” have been adopted in order to cover both direct participation in combat and also active participation in military activities linked to combat such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints. It would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s married accommodation. However, use of children in a direct support function such as acting as bearers to take supplies to the front line, or activities at the front line itself, would be included within the terminology.⁴⁶⁶

514. The 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that:

Article 1

States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities.

...

Article 4

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, ... use in hostilities persons under the age of 18 years.

⁴⁶⁴ Spain, Declarations made upon ratification of the Convention on the Rights of the Child, 6 December 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 29.

⁴⁶⁵ Uruguay, Declarations made upon ratification of the Convention on the Rights of the Child, 20 November 1990, reprinted in UN Doc. CRC/C/2/Rev.4, 28 July 1995, p. 32.

⁴⁶⁶ Roy S. Lee (ed.), *The International Criminal Court. The Making of the Rome Statute: Issues, Negotiations, Results*, Kluwer Law International, The Hague, 1999, p. 118.

2. States Parties shall take all feasible measures to prevent such . . . use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

515. Article 4(c) of the 2002 Statute of the Special Court for Sierra Leone provides that “the Special Court shall have the power to prosecute persons who committed the following serious violations of international humanitarian law: . . . using [children under the age of 15 years] . . . to participate actively in hostilities”.

Other Instruments

516. Paragraph 4 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that all civilians be treated in accordance with Article 77 AP I.

517. Paragraph 2.3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that all civilians be treated in accordance with Article 77(2) AP I.

518. In paragraph 16 of the 1999 Algiers Declaration, the OAU Assembly of Heads of State and Government reaffirmed its “determination to work relentlessly towards the promotion of the Rights and Welfare of the Child, and [its] commitment to combat all forms of child exploitation, and, in particular, put an end to the phenomenon of child soldiers”.

519. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. According to Section 6(1)(b)(xxvi) and (e)(vii), “using [children under the age of 15 years] to participate actively in hostilities” constitutes a war crime in both international and non-international armed conflicts.

II. National Practice

Military Manuals

520. Argentina’s Law of War Manual (1989) provides that “the belligerent parties shall take all measures to ensure that children under the age of 15 do not participate directly in hostilities”.⁴⁶⁷ With respect to non-international armed conflicts in particular, the manual states that “children under the age of 15 shall not . . . be authorized to participate in hostilities”.⁴⁶⁸

521. Australia’s Defence Force Manual provides that “children are granted special protection under LOAC. Important rules are shown below: . . . children under 15 years of age should not take a direct part in hostilities.”⁴⁶⁹

522. Canada’s LOAC Manual provides that, with respect to non-international armed conflicts in particular, “children are to receive such aid and protection

⁴⁶⁷ Argentina, *Law of War Manual* (1989), § 4.12.

⁴⁶⁸ Argentina, *Law of War Manual* (1989), § 7.04.

⁴⁶⁹ Australia, *Defence Force Manual* (1994), § 947.

as required including: . . . a ban on their . . . participation in the hostilities while under the age of fifteen".⁴⁷⁰ The manual adds that "children under fifteen who do take part in hostilities remain protected".⁴⁷¹

523. Colombia's Basic Military Manual provides that, with respect to non-international armed conflicts in particular, it is prohibited to "allow direct participation in hostilities of children under the age of 15".⁴⁷²

524. France's LOAC Manual provides that "only children aged at least 15 can participate in hostilities". It adds that "to make them participate directly in hostilities is a war crime". The manual states, however, that "a child who does take part in an armed conflict shall benefit, because of his military activity, from the status of combatant and of prisoner of war in case of capture".⁴⁷³

525. Germany's Military Manual provides that "the parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take direct part in hostilities".⁴⁷⁴

526. The Military Manual of the Netherlands provides that "the parties to the conflict shall take all feasible measures in order that children who have not attained the age of 15 years do not take a direct part in hostilities".⁴⁷⁵

527. New Zealand's Military Manual provides that, with respect to non-international armed conflicts in particular, children "are to receive such aid and protection as they require, including . . . a ban on their . . . participation in the hostilities while under the age of fifteen". Referring to Article 4(3) AP II, it adds that "children under the age of fifteen who do in fact take part in hostilities remain protected by the Article".⁴⁷⁶

528. Nigeria's Military Manual deplors the fact that in past and current armed conflicts, such as those in Liberia, Chad, the Middle East or in Biafra, "children below the ages of 12 and 13 were used for the prosecution of the conflicts".⁴⁷⁷

National Legislation

529. Australia's ICC (Consequential Amendments) Act incorporates in the Criminal Code the war crimes defined in the 1998 ICC Statute, including the use of one or more persons under the age of 15 years "to participate actively in hostilities" in both international and non-international armed conflicts.⁴⁷⁸

530. The Law on the Rights of the Child of Belarus provides that it is prohibited "to make children participate in hostilities and armed conflicts".⁴⁷⁹

⁴⁷⁰ Canada, *LOAC Manual* (1999), p. 17-3, § 22.

⁴⁷¹ Canada, *LOAC Manual* (1999), p. 17-3, § 23.

⁴⁷² Colombia, *Basic Military Manual* (1995), p. 75.

⁴⁷³ France, *LOAC Manual* (2001), p. 40, see also p. 63.

⁴⁷⁴ Germany, *Military Manual* (1992), § 306, see also § 505.

⁴⁷⁵ Netherlands, *Military Manual* (1993), p. VIII-3, see also p. III-2, § 1.

⁴⁷⁶ New Zealand, *Military Manual* (1992), § 1813(1).

⁴⁷⁷ Nigeria, *Military Manual* (1994), p. 33, § 11.

⁴⁷⁸ Australia, *ICC (Consequential Amendments) Act* (2002), Schedule 1, §§ 268.68 and 268.88.

⁴⁷⁹ Belarus, *Law on the Rights of the Child* (1993), Article 29.

531. The Criminal Code of Belarus provides that it is a war crime to allow children under the age of 15 years to take part in hostilities".⁴⁸⁰
532. Under Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes, using children under 15 years of age in national armed forces to participate actively in hostilities constitutes a war crime in non-international armed conflict.⁴⁸¹
533. Canada's Crimes against Humanity and War Crimes Act provides that the war crimes defined in Article 8(2) of the 1998 ICC Statute are "crimes according to customary international law" and, as such, indictable offences under the Act.⁴⁸²
534. Colombia's Law on Judicial Cooperation states that children under 18 may not be sent to participate in actual military activities.⁴⁸³
535. Colombia's Penal Code imposes a criminal sanction on "anyone, who, in period of armed conflict, . . . forces [minors under 18 years of age] to participate directly or indirectly in the hostilities or armed operations".⁴⁸⁴
536. Congo's Genocide, War Crimes and Crimes against Humanity Act defines war crimes with reference to the categories of crimes defined in Article 8 of the 1998 ICC Statute.⁴⁸⁵
537. Germany's Law Introducing the International Crimes Code punishes anyone who, in connection with an international or non-international armed conflict, "uses [children under the age of 15 years] to participate actively in hostilities".⁴⁸⁶
538. Under Georgia's Criminal Code, any war crime provided for by the 1998 ICC Statute, which is not explicitly mentioned in the Code, such as "using [children under the age of 15 years] to participate actively in hostilities", is a crime in both international and non-international armed conflicts.⁴⁸⁷
539. Ireland's Geneva Conventions Act as amended provides that any "minor breach" of AP I, including violations of Article 77(2) AP I, as well as any "contravention" of AP II, including violations of Article 4(3)(c) AP II, are punishable offences.⁴⁸⁸
540. According to the Report on the Practice of Jordan, the Military Service Law provides that children under 16 years old may not take a direct part in hostilities.⁴⁸⁹

⁴⁸⁰ Belarus, *Criminal Code* (1999), Article 136(5).

⁴⁸¹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4(D)(g).

⁴⁸² Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 4(1) and (4).

⁴⁸³ Colombia, *Law on Judicial Cooperation* (1997), Articles 13–14.

⁴⁸⁴ Colombia, *Penal Code* (2000), Article 162.

⁴⁸⁵ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁴⁸⁶ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 8(1)(5).

⁴⁸⁷ Georgia, *Criminal Code* (1999), Article 413(d).

⁴⁸⁸ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁴⁸⁹ Report on the Practice of Jordan, 1997, Chapter 5.3, referring to *Military Service Law* (1972), Article 2.

541. Malaysia's Armed Forces Act provides that persons below the age of 18 may be appointed as apprentices, but are not considered as recruits and therefore, not being subjected to service law, do not participate in hostilities.⁴⁹⁰

542. Under Mali's Penal Code, "using [children under the age of 15 years] to participate actively in hostilities" constitutes a war crime in international armed conflicts.⁴⁹¹

543. Under the International Crimes Act of the Netherlands, "using [children under the age of fifteen years] to participate actively in hostilities" is a crime, whether committed in an international or a non-international armed conflict.⁴⁹²

544. Under New Zealand's International Crimes and ICC Act, war crimes include the crimes defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.⁴⁹³

545. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment".⁴⁹⁴

546. The Act on Child Protection of the Philippines, in an article on "Children in situations of armed conflict", provides that "children shall not . . . take part in the fighting, or be used as guides, couriers or spies".⁴⁹⁵

547. Under Trinidad and Tobago's Draft ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.⁴⁹⁶

548. Under the UK ICC Act, it is a punishable offence to commit a war crime as defined in Article 8(2)(b)(xxvi) and (e)(vii) of the 1998 ICC Statute.⁴⁹⁷

National Case-law

549. No practice was found.

Other National Practice

550. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Belgium pledged "to prohibit in times of war any person under 18 to take part in any kind of armed operational engagement".⁴⁹⁸

551. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Canada pledged "to promote the adoption of national and international

⁴⁹⁰ Malaysia, *Armed Forces Act* (1972), Section 18.

⁴⁹¹ Mali, *Penal Code* (2001), Article 31(i)(26).

⁴⁹² Netherlands, *International Crimes Act* (2003), Articles 5(5)(r) and 6(3)(f).

⁴⁹³ New Zealand, *International Crimes and ICC Act* (2000), Section 11(2).

⁴⁹⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

⁴⁹⁵ Philippines, *Act on Child Protection* (1992), Article X, Section 22(b).

⁴⁹⁶ Trinidad and Tobago, *Draft ICC Act* (1999), Section 5(1)(a).

⁴⁹⁷ UK, *ICC Act* (2001), Sections 50(1) and 51(1) (England and Wales) and Section 58(1) (Northern Ireland).

⁴⁹⁸ Belgium, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".⁴⁹⁹

552. According to the Report on the Practice of Chile, it is the *opinio juris* of Chile that persons under the age of 18 must not participate in any hostilities.⁵⁰⁰

553. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Denmark pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".⁵⁰¹

554. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Finland pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".⁵⁰²

555. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Guinea pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".⁵⁰³

556. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Iceland pledged "to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age".⁵⁰⁴

557. The Report on the Practice of Iran emphasises that "Iraq denied using children at the battlefield and accused Iran of using children of Iraqi residents in Iran (sons of Iraqi dissidents) for propaganda".⁵⁰⁵

558. In 1988, during the Iran–Iraq War, the Iraqi President stated that "using children in war, without having the mature ability to make decisions, involves a violation of fundamental rights of the human being".⁵⁰⁶

559. In 1996, during a debate in the UN Security Council on the situation in Liberia, Italy described the warlords' practice of deploying children for combat as "one of the most despicable actions". It insisted that the international community should use every means available to stop such behaviour immediately, notably the inclusion of a provision in the future ICC Statute aimed at "bring[ing] to justice the perpetrators of such intolerable acts".⁵⁰⁷

⁴⁹⁹ Canada, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵⁰⁰ Report on the Practice of Chile, 1997, Chapter 5.3.

⁵⁰¹ Denmark, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵⁰² Finland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵⁰³ Guinea, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵⁰⁴ Iceland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵⁰⁵ Report on the Practice of Iran, 1997, Chapter 5.3.

⁵⁰⁶ Iraq, Speech by the President of Iraq, 1 December 1988, Report on the Practice of Iraq, 1998, Chapter 1.1.

⁵⁰⁷ Italy, Statement before the UN Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 6.

560. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mexico pledged “to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age”.⁵⁰⁸

561. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mozambique pledged “to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age”.⁵⁰⁹

562. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Norway pledged “to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age”.⁵¹⁰

563. In 1993, in its initial report to the CRC, the Philippines stated that “children are . . . not allowed to take part in the fighting and not to be used as guides, couriers and spies”.⁵¹¹

564. At the 27th International Conference of the Red Cross and Red Crescent in 1999, South Africa pledged “to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age”.⁵¹²

565. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Sweden pledged “to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age”.⁵¹³

566. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Switzerland pledged “to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age”.⁵¹⁴

567. The Report on the Practice of Syria asserts that Syria considers Article 77 AP I to be part of customary international law.⁵¹⁵

568. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that “we support . . . the principle that . . . all feasible measures be taken in order that children under the age of fifteen do not take a direct part in hostilities”.⁵¹⁶

⁵⁰⁸ Mexico, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵⁰⁹ Mozambique, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵¹⁰ Norway, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵¹¹ Philippines, Initial report to the CRC, UN Doc. CRC/C/3/Add.23, 3 November 1993, § 200.

⁵¹² South Africa, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵¹³ Sweden, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵¹⁴ Switzerland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵¹⁵ Report on the Practice of Syria, 1997, Chapter 5.3.

⁵¹⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International

569. In 1996, during a debate in the UN Security Council on the situation in Liberia, the US stated that “the era of the child soldier in Liberia must come to an end immediately” and that it “is an outrage by any standard of civilization that children under the age of 15, numbering between 4,000 and 6,000, are toting automatic weapons, slaughtering innocent civilians and ignoring the rule of law”.⁵¹⁷ It denounced again what it called this “abhorrent practice”.⁵¹⁸

570. According to the Report on US Practice, “Articles 4, 5 and 6 AP II reflect general US policy on treatment of persons in the power of an adverse party in armed conflicts governed by common Article 3” of the 1949 Geneva Conventions. The report also notes that “it is the *opinio juris* of the US that persons detained in connection with an internal armed conflict are entitled to humane treatment as specified in Articles 4, 5 and 6 AP II”.⁵¹⁹

571. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Uruguay pledged “to promote the adoption of national and international standards prohibiting the military . . . participation in armed conflicts of persons under 18 years of age”.⁵²⁰

III. Practice of International Organisations and Conferences

United Nations

572. In a resolution on Liberia adopted in 1996, the UN Security Council condemned the practice of some factions of “deploying children for combat”. It referred to such practice as “inhumane and abhorrent”.⁵²¹ In a further resolution on the same subject adopted the same year, the Security Council also condemned in the strongest possible terms the practice of “deploying children for combat” and demanded that the warring parties “immediately cease this inhumane and abhorrent activity”.⁵²²

573. In a resolution adopted in 1999 on children in armed conflicts, the UN Security Council strongly condemned “the targeting of children in situations of armed conflict, including . . . use of children in armed conflict in violation of international law”.⁵²³

574. In 1998, in a statement by its President, the UN Security Council expressed its grave concern at “the harmful impact of armed conflict on children” and strongly condemned “the use in hostilities” of child soldiers. It called

Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

⁵¹⁷ US, Statement before the UN Security Council, UN Doc. S/PV.3621, 25 January 1996, p. 5.

⁵¹⁸ US, Statement before the UN Security Council, UN Doc. S/PV.3694, 30 August 1996, p. 15.

⁵¹⁹ Report on US Practice, 1997, Chapter 5.3.

⁵²⁰ Uruguay, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵²¹ UN Security Council, Res. 1071, 30 August 1996, § 9.

⁵²² UN Security Council, Res. 1083, 27 November 1996, § 6.

⁵²³ UN Security Council, Res. 1261, 25 August 1999, § 2.

upon all parties concerned “to put an end to such practice” and “to comply strictly with their obligations under international law, in particular their obligations under the Geneva Conventions of 1949, the Additional Protocols of 1977 and the United Nations Convention on the Rights of the Child of 1989”. The UN Security Council expressed its readiness “to support efforts aimed at obtaining commitments to put to an end the... use of children in armed conflicts”.⁵²⁴

575. In 1998, in a statement by its President, the UN Security Council condemned the use of child soldiers in the DRC.⁵²⁵

576. In a resolution adopted in 1996 on the situation of human rights in the Sudan, the UN General Assembly expressed its deep concern about “the use of children as soldiers by all the parties, despite repeated calls from the international community to put an end to this practice”.⁵²⁶

577. In a resolution adopted in 1998 on the elimination of violence against women, the UN Commission on Human Rights called upon States “to protect children, especially the girl child, in situations of armed conflict against participation, ... through adherence to the applicable principles of international human rights and humanitarian law”.⁵²⁷

578. In a resolution adopted in 1998 on the abduction of children from northern Uganda, the UN Commission on Human Rights concurred with the comments of the CRC on “the involvement of children in the conflict in northern Uganda, in particular the recommendation on measures to stop ... the use of children as child soldiers”.⁵²⁸

579. In a resolution adopted in 1998 on the rights of the child, the UN Commission on Human Rights called upon all States and other parties to armed conflict “to end the use of children as soldiers”.⁵²⁹

580. In 1998, in a report on UNOMSIL in Sierra Leone, the UN Secretary-General welcomed the commitment of the government and the Civil Defence Force not to send children under the age of 18 into combat”.⁵³⁰

581. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General recommended that the UN Security Council:

urge Member States to support the proposal to raise the minimum age for ... participation in hostilities to 18, and accelerate the drafting of an optional protocol on the situation of children in armed conflict to the Convention on the Rights of the Child for consideration by the General Assembly.⁵³¹

⁵²⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/18, 29 June 1998.

⁵²⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998.

⁵²⁶ UN General Assembly, Res. 51/112, 12 December 1996, preamble.

⁵²⁷ UN Commission on Human Rights, Res. 1998/52, 17 April 1998, § 9(g).

⁵²⁸ UN Commission on Human Rights, Res. 1998/75, 22 April 1998, preamble and § 2.

⁵²⁹ UN Commission on Human Rights, Res. 1998/76, 22 April 1998, § 12(b).

⁵³⁰ UN Secretary-General, First progress report on the UNOMSIL, UN Doc. S/1998/750, 12 August 1998, §§ 43 and 59.

⁵³¹ UN Secretary-General, Report on the protection of civilians in armed conflicts, UN Doc. S/1999/957, 8 September 1999, § 42 and Recommendation 8.

582. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General stated that “violations of common Article 3 of the Geneva Conventions and of Article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law”.⁵³²

583. In 1992, in a report on El Salvador, the Director of the Human Rights Division of ONUSAL noted that:

60. . . . ONUSAL observers were able to verify that [a] huge number of children under 15 were in the FMLN ranks. When this situation was taken up with the Political and Diplomatic Commission of FMLN, it pledged to respect the international norms in force [Article 4(3)(c) AP II], which did not entirely prove to be the case.

...

101. . . . FMLN was recommended to observe the rules of international humanitarian law concerning the prohibition of . . . participation [of minors under the age of 15] in hostilities.⁵³³

Other International Organisations

584. In a resolution adopted in 1996 on the plight of African children in situation of armed conflicts, the OAU Council of Ministers exhorted “all African countries, in particular the warring parties in those countries embroiled in civil wars, to keep children out of war situation”. It also reaffirmed that “the use of children in armed conflicts constitutes a violation of their rights and should be considered as war crimes”.⁵³⁴ In another resolution adopted at the same session, the Council of Ministers expressed extreme “concern about the increasing use of children in armed conflicts”.⁵³⁵

International Conferences

585. The 25th International Conference of the Red Cross in 1986 adopted a resolution on protection of children in armed conflict in which it recalled that, in accordance with Article 77 AP I, “the Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen do not take a direct part in hostilities”. It also expressed “its deep concern that children under the age of 15 years are trained for military combat” and recommended that “in all circumstances children should be educated to respect humanitarian principles”.⁵³⁶

586. The 26th International Conference of the Red Cross and Red Crescent in 1995 recommended that “parties to conflict refrain from arming children under the age of 18 years and take every feasible step to ensure that children under the

⁵³² UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 14.

⁵³³ ONUSAL, Director of the Human Rights Division, Report, UN Doc. A/46/955-S/24375, 12 August 1992, Annex, §§ 60 and 101.

⁵³⁴ OAU, Council of Ministers, Res. 1659 (LXIV), 1–5 July 1996, §§ 5–7.

⁵³⁵ OAU, Council of Ministers, Res. 1662 (LXIV), 1–5 July 1996, § 8.

⁵³⁶ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. IX, § 4.

age of 18 years do not take part in hostilities". It took note of "the efforts of the Movement to promote a principle of . . . non-participation in armed conflicts of children under the age of 18 years".⁵³⁷

587. In the Maputo Declaration on the Use of Children as Soldiers, the participants at the African Conference on the Use of Children as Soldiers in 1999 solemnly declared that "the use of any child under 18 years of age by any armed force or armed group is wholly unacceptable, even where that child claims or is claimed to be a volunteer". They called upon all African States to bring to justice "those who continue to recruit or use children as soldiers". They also condemned "the use of children as soldiers by armed opposition groups" and called upon these groups "to demobilise or release into safety children already being used as soldiers".⁵³⁸

588. In a resolution adopted on the occasion of the 50th anniversary of the Geneva Conventions in 1999 on the contribution of parliaments to ensuring respect for and promoting International humanitarian law, the 102nd Inter-Parliamentary Conference requested all States "to take all feasible measures to ensure that children who have not attained the age of 18 years do not take part in hostilities or military action . . . and to ensure the early adoption of the Optional Protocol on the Involvement of Children in Armed Conflict".⁵³⁹

589. The Plan of Action for the years 2000–2003 adopted in 1999 at the 27th International Conference of the Red Cross and Red Crescent requested that:

All the parties to an armed conflict take effective measures to respect and ensure respect for international humanitarian law and to ensure, in particular . . .

[that] all measures, including penal measures, are taken to stop the participation of children under the age of 15 years in armed hostilities . . . which constitute[s] a violation of international humanitarian law . . .

The International Federation, National Societies and the ICRC will continue their efforts in pursuance of decisions taken within the International Movement and notably the *Plan of Action for Children Affected by Armed Conflict* (CABAC), to "promote the principle of . . . non-participation of children below the age of 18 years in armed conflicts".⁵⁴⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

590. In 1997, in its concluding observations on the report of Uganda, the CRC expressed its concern about the "involvement of children as child soldiers" in northern Uganda and recommended that:

⁵³⁷ 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, Res. II, § C(d) and (f).

⁵³⁸ African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, §§ 1–3.

⁵³⁹ 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on the contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the 50th anniversary of the Geneva Conventions, § 4.

⁵⁴⁰ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, §§ 1(f) and 7.

Awareness of the duty to fully respect the rules of international humanitarian law, in the spirit of article 38 of the Convention [on the Rights of the Child], *inter alia* with regard to children, should be made known to the parties to the armed conflict in the northern part of the State party's territory, and that violations of the rules of international humanitarian law entail responsibility being attributed to the perpetrators. Furthermore, the Committee recommends that the State party take measures to stop . . . the use of children as child soldiers in the area of the armed conflict.⁵⁴¹

V. Practice of the International Red Cross and Red Crescent Movement

591. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on child soldiers in which it invited "States and other parties to armed conflicts to strengthen the protection of children in armed conflicts through unilateral declarations or bilateral or regional instruments setting at eighteen the minimum age for participation in hostilities".⁵⁴²

592. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on child soldiers in which it expressed its deep concern about "the great number of children who bear arms in armed conflicts" and requested the ICRC and the International Federation of Red Cross and Red Crescent Societies, in cooperation with the Henry Dunant Institute, "to draw up and implement a Plan of Action for the Movement aimed at promoting the principle of . . . non-participation of children below the age of eighteen in armed conflicts".⁵⁴³

593. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "those under the age of 15 shall not be . . . authorized to take a direct or indirect part in hostilities".⁵⁴⁴

594. In 1994, in a statement before the Third Committee of the UN General Assembly, the ICRC recalled the relevant treaty provisions prohibiting the participation of children in hostilities. Underscoring the constant violations of these strict provisions, the ICRC pleaded for fuller compliance with the existing rules, and expressed the full support of the ICRC for the adoption of an optional protocol to the 1989 Convention on the Rights of the Child that would forbid any involvement in hostilities of children under 18.⁵⁴⁵

595. At its Geneva Session in 1995, the Council of Delegates adopted a resolution on children in armed conflicts which endorsed "the Plan of Action for the Red Cross and Red Crescent Movement, prepared by the International

⁵⁴¹ CRC, Concluding observations on the report of Uganda, UN Doc. CRC/C/15/Add.80, 21 October 1997, §§ 19 and 34.

⁵⁴² International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 14, § 2.

⁵⁴³ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 4, preamble and § 4.

⁵⁴⁴ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § I, *IRRC*, No. 320, 1997, p. 503.

⁵⁴⁵ ICRC, Statement before the Third Committee of the UN General Assembly, 11 November 1994, p. 2.

Federation and the ICRC, in cooperation with the Henry Dunant Institute, which aims to promote the principle of non-participation . . . of children below the age of 18 years in armed conflicts".⁵⁴⁶

596. In 1996, in a statement before the Third Committee of the UN General Assembly, the ICRC pointed out that "the shocking reality of armed conflicts is that, in many instances, children below the age of 15 take part in hostilities, in breach of existing international standards contained in IHL instruments and in the Convention on the Rights of the Child".⁵⁴⁷

597. In 1997, in a working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC listed allowing children under the age of 15 years to take part in hostilities as a serious violation of IHL in international and non-international armed conflicts that should be subject to the jurisdiction of the ICC.⁵⁴⁸

598. At its Seville Session in 1997, the Council of Delegates adopted a resolution on peace, IHL and human rights in which it appealed to all National Societies "to promote the Movement's position on the 18-year age limit for . . . participation in hostilities with a view to encouraging their respective governments to adopt national legislation . . . in line with this position". It asked National Societies that had already adopted the 18-year age limit for participation "to urge their governments to make their positions known to other governments, and to encourage their respective governments to participate in and support the process of drafting an optional protocol to the Convention on the Rights of the Child on involvement of children in armed conflicts".⁵⁴⁹

599. In 1998, in a statement before the Third Committee of the UN General Assembly, the ICRC welcomed the adoption of the ICC Statute, which included in its list of war crimes the use of children under 15 to participate actively in hostilities. The ICRC noted that:

The notion of participation must be understood to include both taking a direct part in the fighting and active participation in related activities, such as reconnaissance, espionage and sabotage. The same applies to the use of children as decoys, as messengers or at military checkpoints.⁵⁵⁰

600. At its Geneva Session in 1999, the Council of Delegates adopted a resolution on children affected by armed conflict in which it encouraged all National Societies:

⁵⁴⁶ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 1–2 December 1995, Res. 5, § 2.

⁵⁴⁷ ICRC, Statement before the Third Committee of the UN General Assembly, 12 November 1996, p. 1.

⁵⁴⁸ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 14 February 1997, §§ 2(v) and 3(xii).

⁵⁴⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 8, §§ 5 and 6.

⁵⁵⁰ ICRC, Statement before the Third Committee of the UN General Assembly, 21 October 1998, p. 2.

to support, particularly through contacts with their government, the adoption of international instruments implementing the principle of non-participation... of children below the age of 18 in armed conflicts with a view to such instruments being applicable to all situations of armed conflict and to all armed groups.⁵⁵¹

VI. Other Practice

601. The Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights of Åbo Akademi University in Turku/Åbo, Finland in 1990, states that “children who have not yet attained the age of fifteen years shall not be allowed to take part in acts of violence. All efforts shall be made not to allow persons below the age of 18 to take part in acts of violence.”⁵⁵²

602. The Report on SPLM/A Practice alleges that “the SPLM/A still... deploys in combat children under the age of 15 years, which is against the Convention on the Rights of the Child”.⁵⁵³

E. The Elderly, Disabled and Infirm

Note: For practice concerning the establishment of hospital and safety zones to protect the elderly, see Chapter 11, section A. For practice concerning the specific needs of displaced elderly persons, see Chapter 38, section C.

The elderly

I. Treaties and Other Instruments

Treaties

603. Article 17 GC IV provides that “the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of... aged persons”.

604. Articles 16, 44, 45 and 49 GC III and Articles 27, 85 and 119 GC IV state in relation to the treatment of detainees that the age of detained persons should be taken into account.

Other Instruments

605. Article 3 of the 1990 Cairo Declaration on Human Rights in Islam provides that “in the event of the use of force and in case of armed conflict, it is not permissible to kill non-belligerents such as old men”.

⁵⁵¹ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 8, § 4.

⁵⁵² Declaration of Minimum Humanitarian Standards, adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, Turku/Åbo, 30 November–2 December 1990, Article 10, *IRRC*, No. 282, p. 334.

⁵⁵³ Report on SPLM/A Practice, 1998, Chapter 5.3.

II. National Practice

Military Manuals

606. Argentina's Law of War Manual (1969) provides that "the belligerents shall endeavour to conclude agreements for the removal from a besieged area of . . . the elderly".⁵⁵⁴

607. Australia's Defence Force Manual provides that "the opposing parties are required to try and conclude local agreements for the removal from besieged or encircled areas of . . . aged persons".⁵⁵⁵

608. Canada's LOAC Manual provides that "if circumstances permit, the parties to a conflict must endeavour to conclude local agreements for the removal from besieged areas of . . . aged persons".⁵⁵⁶

609. Colombia's Basic Military Manual provides that "in these cases the IHL rules favour especially the civilian population so that assistance and protection, which the parties to the conflict shall bring, are given in priority to the most vulnerable persons or groups of persons, who are: . . . elderly".⁵⁵⁷

610. El Salvador's Soldiers' Manual provides that it is prohibited to "attack and maltreat . . . the elderly".⁵⁵⁸ It further states that "every act of violence against . . . the elderly . . . is a criminal, cowardly and dishonourable act, punishable by serious disciplinary sanctions".⁵⁵⁹

611. El Salvador's Human Rights Charter of the Armed Forces provides that "the elderly must be protected".⁵⁶⁰

612. France's LOAC Teaching Note provides that "particular attention shall be paid to the protection of . . . the elderly".⁵⁶¹ It further states that "hospital zones are created, by mutual agreement between the belligerents, in order to protect from the effects of war . . . aged persons".⁵⁶²

613. France's LOAC Manual provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of . . . aged persons".⁵⁶³

614. Kenya's LOAC Manual provides that "a local cease-fire may be arranged for the removal from the besieged or encircled areas of . . . old persons".⁵⁶⁴

615. Morocco's Disciplinary Regulations provides that soldiers in combat are required to spare the elderly.⁵⁶⁵

⁵⁵⁴ Argentina, *Law of War Manual* (1969), § 1.014.

⁵⁵⁵ Australia, *Defence Force Manual* (1994), § 735; see also *Commanders' Guide* (1994), § 926.

⁵⁵⁶ Canada, *LOAC Manual* (1999), p. 6-4, § 35.

⁵⁵⁷ Colombia, *Basic Military Manual* (1995), p. 25.

⁵⁵⁸ El Salvador, *Soldiers' Manual* (undated), p. 3.

⁵⁵⁹ El Salvador, *Soldiers' Manual* (undated), p. 4.

⁵⁶⁰ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 7.

⁵⁶¹ France, *LOAC Teaching Note* (2000), p. 4.

⁵⁶² France, *LOAC Teaching Note* (2000), p. 5; see also *LOAC Manual* (2001), p. 125.

⁵⁶³ France, *LOAC Manual* (2001), p. 64.

⁵⁶⁴ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 5.

⁵⁶⁵ Morocco, *Disciplinary Regulations* (1974), Article 25(4).

616. New Zealand's Military Manual refers to Article 17 GC IV, which "requires that belligerents endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . aged persons".⁵⁶⁶

617. The Rules for Combatants of the Philippines provides that all civilians, particularly the elderly, must be respected.⁵⁶⁷

618. Spain's LOAC Manual provides that "the law of armed conflicts provides a particular protection to . . . the elderly".⁵⁶⁸ In addition, the manual states that "in besieged or encircled areas where there is a civilian population, it shall be endeavoured to conclude local agreements with the enemy to organise the evacuation of . . . aged persons".⁵⁶⁹

619. Sweden's IHL Manual provides that:

It is also possible for the parties to reach an agreement during a conflict that all acts of war shall cease temporarily within a given part of a conflict area. Such agreements are commonly made to afford protection to civilian populations, and specially to such exposed groups as . . . old people.⁵⁷⁰

620. Switzerland's Basic Military Manual provides that "belligerents shall conclude special agreements in order to evacuate the . . . elderly . . . from besieged areas".⁵⁷¹ It further states that "transports of civilian . . . aged persons . . . effected by vehicles and hospital trains, shall be respected in the same way as hospitals".⁵⁷²

621. The UK Military Manual provides that "the belligerents should endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . old persons".⁵⁷³

622. The UK LOAC Manual provides that "a local cease-fire may be arranged for the removal from besieged or encircled areas of . . . old persons".⁵⁷⁴

623. The US Field Manual provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . aged persons".⁵⁷⁵

624. The US Air Force Pamphlet provides that "removal of . . . aged persons . . . from besieged or encircled areas is encouraged".⁵⁷⁶

National Legislation

625. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in case of evacuation of civilian persons

⁵⁶⁶ New Zealand, *Military Manual* (1992), § 508(3).

⁵⁶⁷ Philippines, *Rules for Combatants* (1989), Rule 1.

⁵⁶⁸ Spain, *LOAC Manual* (1996), Vol. I, § 5.2.a.(2).

⁵⁶⁹ Spain, *LOAC Manual* (1996), Vol. I, § 9.4.a.

⁵⁷⁰ Sweden, *IHL Manual* (1991), Section 3.4.1, p. 84.

⁵⁷¹ Switzerland, *Basic Military Manual* (1987), Article 33.

⁵⁷² Switzerland, *Basic Military Manual* (1987), Article 37.

⁵⁷³ UK, *Military Manual* (1958), § 29. ⁵⁷⁴ UK, *LOAC Manual* (1981), Section 9, p. 34, § 3.

⁵⁷⁵ US, *Field Manual* (1956), § 256, see also § 44. ⁵⁷⁶ US, *Air Force Pamphlet* (1976), § 14-3.

from a besieged zone, "special attention is given to the old people, and they are taken great care of".⁵⁷⁷

626. Bangladesh's International Crimes (Tribunal) Act states that the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" is a crime.⁵⁷⁸

627. Under Ireland's Geneva Conventions Act as amended, any "minor breach" of the Geneva Conventions, including violations of Articles 16, 44, 45 and 49 GC III and 14, 17, 27, 85 and 119 GC IV, is a punishable offence.⁵⁷⁹

628. Under Norway's Military Penal Code as amended, "anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in... the Geneva Conventions of 12 August 1949... is liable to imprisonment".⁵⁸⁰

629. According to Venezuela's Code of Military Justice as amended, it is a crime against international law to "make a serious attempt on the life of... elderly people".⁵⁸¹

National Case-law

630. No practice was found.

Other National Practice

631. The Report on the Practice of Jordan states that special care is provided for the elderly.⁵⁸²

III. Practice of International Organisations and Conferences

United Nations

632. In 1997, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that the Croatian Office for Displaced Persons and Refugees had advised the Office of the High Commissioner for Human Rights that "emphasis in the immediate future will be placed on applications for return from relatives of elderly Serbs remaining in the former sectors, who require the assistance of younger family members to lead a normal life".⁵⁸³

⁵⁷⁷ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.

⁵⁷⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁵⁷⁹ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁵⁸⁰ Norway, *Military Penal Code as amended* (1902), § 108(a).

⁵⁸¹ Venezuela, *Code of Military Justice as amended* (1998), Article 474.

⁵⁸² Report on the Practice of Jordan, 1997, Chapter 5.3.

⁵⁸³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/9, 22 October 1996, § 51.

Other International Organisations

633. In a recommendation adopted in 1995 on Turkey's military intervention in northern Iraq, the Parliamentary Assembly of the Council of Europe asked Turkey to guarantee the fundamental rights of civilians, with special reference to the more vulnerable, including the elderly.⁵⁸⁴

International Conferences

634. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed deep concern about "violations of human rights during armed conflicts, affecting the civilian population, especially . . . the elderly" and therefore called upon States and all parties to armed conflicts "strictly to observe international humanitarian law".⁵⁸⁵

635. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that "in the conduct of hostilities, every effort is made . . . to spare the life, protect and respect the civilian population, with particular protective measures for . . . groups with special vulnerabilities such as . . . the elderly".⁵⁸⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

636. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

637. No practice was found.

VI. Other Practice

638. No practice was found.

The disabled and infirm

Note: For practice concerning the establishment of hospital and safety zones to protect the infirm, see Chapter 11, section A.

⁵⁸⁴ Council of Europe, Parliamentary Assembly, Rec. 1266, 26 April 1995, § 5.

⁵⁸⁵ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I[29].

⁵⁸⁶ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

I. Treaties and Other Instruments

Treaties

639. Article 30, second paragraph, GC III provides that “special facilities shall be afforded for the care to be given to the disabled, in particular to the blind, and for their rehabilitation, pending repatriation”.

640. Article 110 GC III provides for special care for and evacuation of disabled POWs.

641. Article 16, first paragraph, GC IV provides that the infirm “shall be the object of particular protection and respect”.

642. Article 17 GC IV provides that “the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . infirm”.

643. Articles 21, 22, first paragraph, and 127, third paragraph, GC IV contain specific mentions of the infirm in relation to transport and evacuation.

644. Articles 16, 44, 45 and 49 GC III and 27, 85 and 119 GC IV state in relation to the treatment of detainees that the state of health of detained persons should be taken into account.

645. According to Article 8(a) AP I, the terms “‘wounded’ and ‘sick’ mean persons . . . who, because of . . . physical or mental disability, are in need of medical assistance or care . . . and other persons who may be in need of immediate medical assistance or care, such as the infirm”. Article 8 AP I was adopted by consensus.⁵⁸⁷

Other Instruments

646. Article 2(24) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines provides that:

This Agreement seeks . . . to protect and promote the full scope of human rights and fundamental freedoms, including: . . . the right of . . . the disabled to protection, care, and a home, especially against physical and mental abuse, prostitution, drugs, forced labour, homelessness, and other similar forms of oppression and exploitation.

II. National Practice

Military Manuals

647. Argentina’s Law of War Manual (1969) provides that “transports of . . . the infirm . . . effected by convoys of vehicles and hospital trains on land or on sea, shall be respected and protected”.⁵⁸⁸

⁵⁸⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 68.

⁵⁸⁸ Argentina, *Law of War Manual* (1969), §§ 4.004(1) and 4.006(1); see also *Law of War Manual* (1989), § 4.05.

648. Argentina's Law of War Manual (1989) states that "the infirm are considered as" included in the concept of wounded and sick.⁵⁸⁹
649. Australia's Commanders' Guide provides that the terms "wounded" and "sick" "also cover . . . other persons who may be in need of immediate medical assistance or care, such as the infirm".⁵⁹⁰
650. Australia's Defence Force Manual states that "the opposing parties are required to try and conclude local agreements for the removal from besieged or encircled areas of . . . [the] infirm".⁵⁹¹
651. Canada's LOAC Manual provides that "special protection and respect must be given to . . . the infirm".⁵⁹² It also states that "if circumstances permit, the parties to a conflict must endeavour to conclude local agreements for the removal from besieged areas of . . . [the] infirm".⁵⁹³
652. Colombia's Basic Military manual provides that the IHL rules favour especially the civilian population so that assistance and protection, which the parties in conflict shall bring, are given in priority to the most vulnerable persons or groups of persons, who are: . . . infirm".⁵⁹⁴
653. El Salvador's Soldiers' Manual provides that "every act of violence against . . . [the] infirm . . . is a criminal, cowardly and dishonourable act, punishable by serious disciplinary sanctions".⁵⁹⁵
654. France's LOAC Teaching Note provides that "particular attention shall be paid to the protection of the disabled".⁵⁹⁶
655. France's LOAC Manual provides that "the Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . [the] infirm".⁵⁹⁷ The manual also provides that "out of concern for their protection, . . . the disabled . . . are included in the same category as the wounded and sick under humanitarian law".⁵⁹⁸
656. Madagascar's Military Manual provides that "persons who could need immediate medical care such as the infirm . . . are included in" the terms "wounded" and "sick".⁵⁹⁹
657. New Zealand's Military Manual refers to Article 17 GC IV, which "requires that belligerents endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . [the] infirm".⁶⁰⁰ It further provides that "special protection must be given to . . . the infirm".⁶⁰¹ The manual also

⁵⁸⁹ Argentina, *Law of War Manual* (1989), § 2.02.

⁵⁹⁰ Australia, *Commanders' Guide* (1994), glossary, p. xxiv.

⁵⁹¹ Australia, *Defence Force Manual* (1994), § 735; see also *Commanders' Guide* (1994), § 926.

⁵⁹² Canada, *LOAC Manual* (1999), p. 11-2, § 16.

⁵⁹³ Canada, *LOAC Manual* (1999), p. 6-4, § 35.

⁵⁹⁴ Colombia, *Basic Military Manual* (1995), p. 25.

⁵⁹⁵ El Salvador, *Soldiers' Manual* (undated), pp. 4-5.

⁵⁹⁶ France, *LOAC Teaching Note* (2000), p. 4.

⁵⁹⁷ France, *LOAC Manual* (2001), p. 64. ⁵⁹⁸ France, *LOAC Manual* (2001), p. 32.

⁵⁹⁹ Madagascar, *Military Manual* (1994), Fiche No. 4-SO, § B.

⁶⁰⁰ New Zealand, *Military Manual* (1992), § 508(3).

⁶⁰¹ New Zealand, *Military Manual* (1992), § 1108.

provides that “infirm internees . . . must not be transferred if the journey would seriously prejudice their health, except when their safety imperatively so demands”.⁶⁰² According to the manual, “convoys of vehicles or hospital trains on land, and specially provided vessels at sea, conveying . . . the infirm . . . must be protected and respected in the same way as civilian hospitals”.⁶⁰³ In addition, it is forbidden to attack “aircraft used for the removal of . . . the infirm”.⁶⁰⁴

658. Nigeria’s Military Manual provides that “duly recognized civilian hospitals with their staff, as well as land, sea or air transport of . . . the infirm . . . are entitled to similar respect and protection as provided in the first and second conventions for their military counter parts”.⁶⁰⁵

659. Spain’s LOAC Manual provides that “in besieged or encircled areas where there is a civilian population, it shall be endeavoured to conclude local agreements with the enemy to organise the evacuation of . . . [the] infirm”.⁶⁰⁶

660. Switzerland’s Basic Military Manual provides that “belligerents shall conclude special agreements in order to evacuate the . . . infirm . . . from besieged areas”.⁶⁰⁷ It also states that “the infirm . . . shall be the object of a particular protection and respect”.⁶⁰⁸ The manual further provides that “transports of . . . the infirm . . . effected by vehicles and hospital trains, shall be respected in the same way as hospitals”.⁶⁰⁹

661. The UK Military Manual provides that:

Special protection and respect must be given to . . . the infirm . . .

The belligerents shall endeavour to conclude local agreements for the removal from besieged or encircled areas of . . . [the] infirm . . .

Convoys of vehicles or hospital trains on land, and specially provided vessels at sea, conveying . . . the infirm . . . must be protected and respected in the same way as civilian hospitals.⁶¹⁰

662. The US Field Manual provides that:

Special facilities shall be afforded for the care to be given to the disabled [POWS], in particular to the blind, and for their rehabilitation, pending repatriation . . .

The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of . . . [the] infirm . . .

Civilian hospitals organized to give care to . . . the infirm . . . may in no circumstances be the object of attack, but shall be respected and protected by the Parties to the conflict . . .

⁶⁰² New Zealand, *Military Manual* (1992), § 1131(1).

⁶⁰³ New Zealand, *Military Manual* (1992), § 1110(1).

⁶⁰⁴ New Zealand, *Military Manual* (1992), § 1110(2).

⁶⁰⁵ Nigeria, *Military Manual* (1994), p. 18, § 12.

⁶⁰⁶ Spain, *LOAC Manual* (1996), Vol. I, § 9.4.a.

⁶⁰⁷ Switzerland, *Basic Military Manual* (1987), Article 33.

⁶⁰⁸ Switzerland, *Basic Military Manual* (1987), Article 36.

⁶⁰⁹ Switzerland, *Basic Military Manual* (1987), Article 37.

⁶¹⁰ UK, *Military Manual* (1958), §§ 28, 29, 32 and 33.

Convoys of vehicles or hospital trains on land or specially provided vessels on sea, conveying . . . the infirm . . . shall be respected and protected in the same manner as the hospitals provided for in Article 18.⁶¹¹

663. The US Air Force Pamphlet provides that the “infirm . . . must be the object of particular protection and respect”.⁶¹²

National Legislation

664. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that, in case of evacuation of civilian persons from a besieged zone, “special attention is given to the invalids, and they are taken great care of”.⁶¹³

665. Bangladesh’s International Crimes (Tribunal) Act states that the “violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949” is a crime.⁶¹⁴

666. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of the Geneva Conventions, including violations of Articles 16, 30, 44, 45 and 49 GC III and 16, 17, 18, 21, 22, 27, 119 and 127 GC IV, is a punishable offence.⁶¹⁵

667. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the Geneva Conventions of 12 August 1949 . . . is liable to imprisonment”.⁶¹⁶

National Case-law

668. No practice was found.

Other National Practice

669. The Report on the Practice of Jordan states that special care is provided for the disabled.⁶¹⁷

III. Practice of International Organisations and Conferences

United Nations

670. In 1992, in a report submitted to the UN Security Council, the UN Secretary-General reported that ICRC delegates in Bosnia and Herzegovina

⁶¹¹ US, *Field Manual* (1956), §§ 107, 256, 257 and 260, see also § 44.

⁶¹² US, *Air Force Pamphlet* (1976), § 14-3.

⁶¹³ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 15.

⁶¹⁴ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(e).

⁶¹⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

⁶¹⁶ Norway, *Military Penal Code as amended* (1902), § 108(a).

⁶¹⁷ Report on the Practice of Jordan, 1997, Chapter 5.3.

were “involved in the evacuation of specially vulnerable groups, such as . . . handicapped people”.⁶¹⁸

Other International Organisations

671. No practice was found.

International Conferences

672. In the Vienna Declaration and Programme of Action, the World Conference on Human Rights in 1993 expressed deep concern about “violations of human rights during armed conflicts, affecting the civilian population, especially . . . the disabled” and therefore called upon States and all parties to armed conflicts “strictly to observe international humanitarian law”.⁶¹⁹

673. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent requested that all the parties to an armed conflict take effective measures to ensure that “in the conduct of hostilities, every effort is made . . . to spare the life, protect and respect the civilian population, with particular protective measures for . . . groups with special vulnerabilities such as . . . persons with disabilities”.⁶²⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

674. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

675. No practice was found.

VI. Other Practice

676. No practice was found.

⁶¹⁸ UN Secretary-General, Report pursuant to Security Council Resolution 752 (1992), UN Doc. S/24000, 26 May 1992, §§ 9 and 10.

⁶¹⁹ World Conference on Human Rights, Vienna, 14–25 June 1993, Vienna Declaration and Programme of Action, UN Doc. A/CONF.157/23, 12 July 1993, § I(29), see also § II(63).

⁶²⁰ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.1, § 1(a).

PART VI

IMPLEMENTATION

COMPLIANCE WITH INTERNATIONAL HUMANITARIAN LAW

A. Respect for International Humanitarian Law (practice relating to Rule 139)	§§ 1–194
General	§§ 1–147
Orders and instructions to ensure respect for international humanitarian law	§§ 148–194
B. Principle of Reciprocity (practice relating to Rule 140)	§§ 195–237
C. Legal Advisers for Armed Forces (practice relating to Rule 141)	§§ 238–281
D. Instruction in International Humanitarian Law within Armed Forces (practice relating to Rule 142)	§§ 282–610
General	§§ 282–557
Obligation of commanders to instruct the armed forces under their command	§§ 558–610
E. Dissemination of International Humanitarian Law among the Civilian Population (practice relating to Rule 143)	§§ 611–711

A. Respect for International Humanitarian Law

General

I. Treaties and Other Instruments

Treaties

1. Article 25 of the 1929 GC provides that “the provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances”.
2. Article 82 of the 1929 Geneva POW Convention provides that “the provisions of the present Convention shall be respected by the High Contracting Parties in all circumstances”.
3. Common Article 1 of the 1949 Geneva Conventions provides that “the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.

4. Article 1(1) AP I provides that “the High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances”. Article 1 AP I was adopted by 87 votes in favour, one against and 11 abstentions.¹

5. Article 38(1) of the 1989 Convention on the Rights of the Child provides that “States Parties undertake to respect and to ensure respect for rules of international humanitarian law applicable to them in armed conflicts which are relevant to the child”.

Other Instruments

6. Article 3(2) of the 1986 Statutes of the International Red Cross and Red Crescent Movement, dealing with tasks of the National Red Cross and Red Crescent Societies, provides that the National Societies “also co-operate with their governments to ensure respect for international humanitarian law and to protect the red cross and red crescent emblems”.

7. In the introductory paragraph to the 1991 Hague Statement on Respect for Humanitarian Principles, the Presidents of the six republics of the former Yugoslavia undertook “to respect and ensure respect for International Humanitarian Law”.

8. Paragraph 14 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “the parties will respect the provisions of the Geneva Conventions and will ensure that any paramilitary or irregular units not formally under their command, control or political influence respect the present agreement”.

9. Paragraph 1 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “the parties commit themselves to respect and to ensure respect for the Article 3 of the four Geneva Conventions”.

10. Article 3(i) and (ii) of the 1992 London Programme of Action on Humanitarian Issues provides that:

In carrying out the Programme of Action, the parties to the conflict undertook to abide by the following provisions:

- i) all parties to the conflict are bound to comply with their obligations under International Humanitarian Law and in particular the Geneva Conventions of 1949 and the Additional Protocols thereto . . .
- ii) all parties to the conflict have the responsibility to exercise full authority over undisciplined elements within their areas so as to avoid anarchy, breaches of international humanitarian law and human rights abuse.

11. Paragraph 16 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict states that “States shall respect and ensure respect for the obligations under international law applicable in armed conflict,

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.36, 23 May 1977, p. 41, § 58.

including the rules providing protection for the environment in times of armed conflict”.

12. Principle 5 of the 1998 Guiding Principles on Internal Displacement provides that “all authorities and international actors shall respect and ensure respect for their obligations under international law, including human rights and humanitarian law, in all circumstances, so as to prevent and avoid conditions that might lead to displacement of persons”.

13. Article 1 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that “every State has the obligation to respect, ensure respect for and enforce international human rights and humanitarian law norms”.

14. Article 3 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

The obligation to respect, ensure respect for and enforce international human rights and humanitarian law includes, *inter alia*, a State’s duty to:

- (a) Take appropriate legal and administrative measures to prevent violations;
- (b) Investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law;
- (c) Provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation;
- (d) Afford appropriate remedies to victims; and
- (e) Provide for or facilitate reparation to victims.

II. National Practice

Military Manuals

15. Argentina’s Law of War Manual states that “States have the responsibility to respect the treaties that they have ratified. The Geneva Conventions and Protocol I expressly oblige States not only to respect [those agreements], but also to ensure respect by issuing orders and instructions for that purpose.”²

16. Australia’s Commanders’ Guide states that “Australia is responsible for ensuring that its military forces comply with LOAC” and that “all ADF members are responsible for ensuring that their conduct complies with the LOAC.”³ It adds that:

Mission planners are responsible for ensuring that operations plans and ROE fully comply with LOAC. To discharge this responsibility, all operations plans and ROE should be reviewed by ADF legal advisers experienced in operations law. In addition, targeting lists and individual missions are to be carefully scrutinised by military planners and their operations law advisers.⁴

² Argentina, *Law of War Manual* (1989), § 8.01.

³ Australia, *Commanders’ Guide* (1994), §§ 1201–1202.

⁴ Australia, *Commanders’ Guide* (1994), § 1205.

17. Australia's Defence Force Manual states that "Australia is responsible for ensuring that its military forces comply with the laws of armed conflict (LOAC)... All ADF members are responsible for ensuring that their conduct complies with LOAC."⁵

18. Belgium's Law of War Manual states that "the States signatory to the [Geneva] Conventions have undertaken to take a series of measures to promote respect thereof".⁶

19. Belgium's LOAC Teaching Directive states that "the general aim to be reached is to ensure in all circumstances full respect for the law of armed conflicts and the rules of engagement by all members of the Armed Forces".⁷

20. Belgium's Teaching Manual for Soldiers states that the purpose of the instruction is "to bring the soldier in an armed conflict to react spontaneously in conformity with the elementary principles of humanity".⁸ The manual also provides the following rule for the combatant: "I must behave like a disciplined soldier and I respect humanitarian rules."⁹

21. Benin's Military Manual states that every combatant must "respect and ensure respect in all circumstances for the laws and customs of war, that means the law of war".¹⁰ It emphasises that "the commander of forces engaged in a military operation is responsible for ensuring respect for the law of war".¹¹ The manual further states that "if the duty of the commander is to ensure respect for and the application of the law of war in all circumstances, it is important for the soldier to know and to understand that this law aims to limit and alleviate to the greatest extent possible the calamities of war".¹²

22. Cameroon's Disciplinary Regulations states that action against the enemy must be conducted "within the framework of respect for the laws and customs of war".¹³ It also provides that "the Armed Forces shall conduct their operations... with the intent to respect sincerely... international humanitarian law".¹⁴ The manual further provides that "respect for the rules of international law must be a natural duty for a Cameroonian soldier".¹⁵

23. Cameroon's Instructors' Manual provides that "the Armed Forces shall be subject to a regime of internal discipline which ensures respect for the Law of War".¹⁶ It also states that "each commander ensures respect for the Law of War within his sphere of command... The Law of War is above all a question of order and discipline."¹⁷ The manual further specifies that "the State must respect

⁵ Australia, *Defence Force Manual* (1994), §§ 1301 and 1302.

⁶ Belgium, *Law of War Manual* (1983), p. 55.

⁷ Belgium, *LOAC Teaching Directive* (1996), Section 1.

⁸ Belgium, *Teaching Manual for Soldiers* (undated), p. 3.

⁹ Belgium, *Teaching Manual for Soldiers* (undated), p. 10.

¹⁰ Benin, *Military Manual* (1995), Fascicule I, preamble, p. 3.

¹¹ Benin, *Military Manual* (1995), Fascicule II, p. 14.

¹² Benin, *Military Manual* (1995), Fascicule II, p. 17.

¹³ Cameroon, *Disciplinary Regulations* (1975), Article 26.

¹⁴ Cameroon, *Disciplinary Regulations* (1975), Article 31.

¹⁵ Cameroon, *Disciplinary Regulations* (1975), Article 35.

¹⁶ Cameroon, *Instructors' Manual* (1992), p. 15, § 15.

¹⁷ Cameroon, *Instructors' Manual* (1992), p. 86, §§ 11 and 12.

and ensure respect for the Law of Geneva and its rules” and that “from the beginning of the hostilities, the parties to the conflict: . . . shall ensure respect for the Law of War in their sphere of authority”.¹⁸

24. Canada’s LOAC Manual states that:

The means for securing observance [of the law of armed conflict] depends upon the actions of the States which are bound by particular treaties in accordance with the terms of those treaties, or on their obligation to give effect to the requirements of customary international law.¹⁹

25. Canada’s Code of Conduct instructs soldiers: “You must obey the Law of Armed Conflict”.²⁰ It specifies that “it is CF policy to respect and abide by the Law of Armed Conflict in all circumstances”.²¹ It also states that “all CF personnel, allied and coalition personnel and opposing forces are required to abide by the Law of Armed Conflict and the basic principles these rules represent”.²² The manual further states that “it might appear that a momentary advantage may be gained from a breach of the Law of Armed Conflict or the Code of Conduct. However, experience has shown that even a momentary lapse in your duty may dishonour your country and also adversely affect the accomplishment of the overall mission.”²³ It adds that:

The obligation to obey these rules and the Law of Armed Conflict is a requirement under Canadian military law which includes the Criminal Code of Canada. Breaches of the Law of Armed Conflict or these rules by CF personnel will be dealt with regardless of which side is successful. Canada is committed to see that its forces conduct their operations in compliance with the Law of Armed Conflict. The Code of Service Discipline applies to CF members worldwide. As a result, your conduct must always be governed by the principles of Canadian law and society incorporated in the Code of Conduct.²⁴

26. Colombia’s Basic Military Manual notes that “States must . . . respect and ensure respect for the norms [of IHL] in all circumstances”.²⁵

27. Colombia’s Instructors’ Manual states that “the States which have ratified . . . international conventions and treaties on the law of war must respect them and ensure their respect in all circumstances”.²⁶

28. Congo’s Disciplinary Regulations provides that combatants must not “violate the laws and customs of war established by international conventions signed by the Congolese Government”.²⁷

¹⁸ Cameroon, *Instructors’ Manual* (1992), pp. 133 and 138, § 462.22.

¹⁹ Canada, *LOAC Manual* (1999), p. 15-1, § 2.

²⁰ Canada, *Code of Conduct* (2001), Introduction, § 14.

²¹ Canada, *Code of Conduct* (2001), Rule 11, § 1.

²² Canada, *Code of Conduct* (2001), Rule 11, § 2.

²³ Canada, *Code of Conduct* (2001), Rule 11, § 7.

²⁴ Canada, *Code of Conduct* (2001), Rule 11, § 8.

²⁵ Colombia, *Basic Military Manual* (1995), p. 37.

²⁶ Colombia, *Instructors’ Manual* (1999), p. 14.

²⁷ Congo, *Disciplinary Regulations* (1986), Article 30.

29. Croatia's *Commanders' Manual* notes that "each State undertakes to respect and to ensure respect for the law of war in all circumstances".²⁸

30. Ecuador's *Naval Manual* states that "during wartime or other periods of armed conflict, the rules of engagement reaffirm the right and responsibility of the operational commander to seek out, engage, and destroy enemy forces consistent with . . . the law of armed conflict".²⁹

31. El Salvador's *Human Rights Charter of the Armed Forces* begins with the order to "respect and ensure respect for human rights".³⁰

32. El Salvador's *Soldiers' Manual* begins by exhorting combatants to "always respect the rules stated in this manual".³¹

33. France's *LOAC Teaching Note* states that "combatants shall respect at any place and in all circumstances the rules of the law of armed conflicts. They may in no case release themselves from those rules, regardless of the framework and the mandate of their mission."³²

34. France's *LOAC Manual* provides that "combatants shall respect the law of armed conflict in all circumstances".³³

35. Germany's *Military Manual* provides that "the members of the Federal Armed Forces are obliged to comply and ensure compliance with all treaties of international humanitarian law binding upon the Federal Republic of Germany".³⁴ It further states that:

It shall be a natural duty for a member of the Federal Armed Forces to follow the rules of international humanitarian law. With whatever means wars are being conducted, the soldier will always be obliged to respect and observe the rules of international law and take them as a basis for his actions.³⁵

36. Israel's *Manual on the Laws of War* states that "the laws of war are binding on every IDF soldier, also by virtue of their legal validity *vis-à-vis* himself as an IDF soldier".³⁶ It further states that "it is incumbent on combatants to behave in compliance with the rules and customs of war. This is the most basic of conditions."³⁷ The manual also states that "GHQ regulations and the conduct code obligate IDF soldiers to observe the laws of war which Israel recognizes".³⁸

37. Italy's *LOAC Elementary Rules Manual* notes that "each State undertakes to respect and to ensure respect for the law of war in all circumstances".³⁹

²⁸ Croatia, *Commanders' Manual* (1992), Introduction.

²⁹ Ecuador, *Naval Manual* (1989), § 5.5.1.

³⁰ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 4.

³¹ El Salvador, *Soldiers' Manual* (undated), p. 2.

³² France, *LOAC Teaching Note* (2000), p. 7.

³³ France, *LOAC Manual* (2001), p. 14.

³⁴ Germany, *Military Manual* (1992), § 135.

³⁵ Germany, *Military Manual* (1992), § 139.

³⁶ Israel, *Manual on the Laws of War* (1998), p. 9.

³⁷ Israel, *Manual on the Laws of War* (1998), p. 48.

³⁸ Israel, *Manual on the Laws of War* (1998), p. 66.

³⁹ Italy, *LOAC Elementary Rules Manual* (1991), Introduction, p. 1.

38. Kenya's LOAC Manual states that:

The States and the belligerent Parties have to undertake to respect the law of armed conflict in all circumstances and to give full implementation to its provisions. This means that it has to be respected by the government at strategic level, by the military at operational and tactical levels, and by the civilians.⁴⁰

The manual also states that:

The armed forces have to behave correctly, that means in accordance with the international rules ratified by their respective governments, when facing the double responsibility of accomplishing a military mission and of managing the results or consequence of their action or behaviour.⁴¹

The manual also provides the following rule for behaviour in combat: "Be a disciplined soldier. Disobedience of the law of war dishonours your Armed Forces and yourself and causes unnecessary suffering; far from weakening the enemy's will to fight, it often strengthens it."⁴²

39. Madagascar's Military Manual states that "belligerent States and Parties undertake to respect and ensure respect for the law of war".⁴³ It also states that "military personnel . . . must strictly observe the rules and the laws established by the law of war".⁴⁴ It adds: "Be a disciplined soldier. Disobedience of the law of war dishonours your armed forces and yourself: it causes unnecessary suffering; far from weakening the enemy's will to fight, it often strengthens it."⁴⁵

40. The Military Manual of the Netherlands states that "the rules of the law of war must be respected. They must be respected in all circumstances . . . States parties to law of war treaties must take all necessary measures to ensure respect for their obligations under these treaties."⁴⁶

41. New Zealand's Military Manual states that "New Zealand is required to comply with the LOAC which is part of international law".⁴⁷ It further states that:

The law of armed conflict, like other branches of international law, possesses no permanent means to secure its observance or enforcement. Observance is secured by the States which are bound by particular treaties both themselves acting and persuading other States to act in accordance with the terms of those treaties, and themselves giving effect to and persuading other States to give effect to the requirements of the customary law.⁴⁸

⁴⁰ Kenya, *LOAC Manual* (1997), Précis No. 2, p. 7.

⁴¹ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 1.

⁴² Kenya, *LOAC Manual* (1997), Précis No. 3, p. 14.

⁴³ Madagascar, *Military Manual* (1994), Fiche No. 1-T, § 24(4).

⁴⁴ Madagascar, *Military Manual* (1994), Presentation, p. 69, § 1.

⁴⁵ Madagascar, *Military Manual* (1994), Fiche No. 5-T, § 1.

⁴⁶ Netherlands, *Military Manual* (1993), p. IX-1.

⁴⁷ New Zealand, *Military Manual* (1992), Introduction, p. ii, § 2.

⁴⁸ New Zealand, *Military Manual* (1992), § 1601.1.

42. Nigeria's Operational Code of Conduct tells troops that: "We are in honor bound to observe the rules of the Geneva Convention in whatever action you will be taking against the rebel".⁴⁹

43. The Rules for Combatants of the Philippines directs "all military personnel in the field [to] strictly observe and apply these humanitarian principles embodied in the aforementioned rules in the performance of their duties."⁵⁰

44. The Soldier's Rules of the Philippines instruct: "Be a disciplined soldier. Disobedience of the laws of war dishonours your army and yourself and causes unnecessary suffering; far from weakening the enemy's will to fight, it often strengthens it."⁵¹

45. Russia's Military Manual provides that:

Having declared that international law pre-empts national law and having ratified the Protocols additional to the Geneva Conventions on 4 August 1989, the Soviet Union has accepted the obligation to ensure respect for them by all State and public organisations and by its citizens, including the Armed Forces of the USSR.⁵²

The manual further provides that the "armed forces shall be subject to a disciplinary regime that ensures respect for the rules of IHL".⁵³ It also states that, in time of war, commanders must "ensure the strict application of the rules of IHL by military personnel".⁵⁴

46. Spain's LOAC Manual notes that "each State undertakes to respect and to ensure respect for the Law of War in all circumstances".⁵⁵

47. Switzerland's Basic Military Manual states that "Switzerland has undertaken to respect the rules of the law [of armed conflict]".⁵⁶ It further states that "the laws and customs of war must be observed by Governments, the civilian and military authorities as well as by individuals, military or civilian".⁵⁷ The manual also provides that commanders "are responsible for ensuring that their troops respect the Conventions".⁵⁸

48. Togo's Military Manual states that every combatant must "respect and ensure respect in all circumstances for the laws and customs of war, that means the law of the war".⁵⁹ It emphasises that "the commander of forces engaged in a military operation is responsible for ensuring respect for the law of war".⁶⁰ The manual further states that "if the duty of the commander is to ensure respect for and the application of the law of war in all circumstances, it is important for the soldier to know and to understand that this law aims to limit and alleviate to the greatest extent possible the calamities of war".⁶¹

⁴⁹ Nigeria, *Operational Code of Conduct* (1967), § 3.

⁵⁰ Philippines, *Rules for Combatants* (1989), § 2.

⁵¹ Philippines, *Soldier's Rules* (1989), § 1. ⁵² Russia, *Military Manual* (1990), § 3.

⁵³ Russia, *Military Manual* (1990), § 12. ⁵⁴ Russia, *Military Manual* (1990), § 14(b).

⁵⁵ Spain, *LOAC Manual* (1996), Vol. I, § 10.8, see also §§ 2.1, 10.1.a and 11.3.b.(1).

⁵⁶ Switzerland, *Basic Military Manual* (1987), p. III, § 1.

⁵⁷ Switzerland, *Basic Military Manual* (1987), Article 3.

⁵⁸ Switzerland, *Basic Military Manual* (1987), Article 196.

⁵⁹ Togo, *Military Manual* (1996), Fascicule I, preamble, p. 3.

⁶⁰ Togo, *Military Manual* (1996), Fascicule II, p. 14.

⁶¹ Togo, *Military Manual* (1996), Fascicule II, p. 17.

49. The UK LOAC Manual contains Rules for Soldiers, which include: "I must . . . comply with military discipline and the laws of war which are made for my protection and to reduce unnecessary suffering."⁶²

50. The US Field Manual states that "the treaty provisions quoted herein will be strictly observed and enforced by United States forces without regard to whether they are legally binding upon this country" and that "the unwritten or customary law of war is binding upon all nations. It will be strictly observed by United States forces."⁶³

51. The US Air Force Pamphlet states that "compliance [with the law of armed conflict] is important because states have reciprocal interests in the law's continued application".⁶⁴ It also recognises that "States have important customary and treaty obligations to observe the law of armed conflict, as a matter of national policy, and to insure its implementation, observance and enforcement by [their] own armed forces".⁶⁵ The Pamphlet further provides that "Article 1 [common to the 1949 Geneva Conventions] requires all parties to respect and insure respect for the Conventions in all circumstances".⁶⁶ It also states that "the US . . . ensures observance and enforcement through a variety of national means including close command control, military regulations, rules of engagement, the Uniform Code of Military Justice and other national enforcement techniques".⁶⁷

52. The US Naval Handbook states that "during wartime or other periods of armed conflict, U.S. rules of engagement reaffirm the right and responsibility of the operational commander to seek out, engage, and destroy enemy forces consistent with . . . the law of armed conflict".⁶⁸ The Handbook quotes Navy Regulations which provide that "at all times, commanders shall observe, and require their commands to observe, the principles of international law". It adds that "it is the responsibility of the Chief of Naval Operations and the Commandant of the Marine Corps . . . to ensure that: 1. The U.S. Navy and Marine Corps observe and enforce the law of armed conflict at all times."⁶⁹

National Legislation

53. Russia's Law on Status of Members of Armed Forces as amended provides that:

Protection of the State sovereignty and territorial integrity of the Russian Federation . . . constitutes the essence of the soldier's duty, which obliges military servicemen: . . . to observe universally recognised principles and legal regulations of international law and international treaties [ratified] by the Russian Federation.⁷⁰

⁶² UK, *LOAC Manual* (1981), Annex A, p. 44, § 1. ⁶³ US, *Field Manual* (1956), § 7.

⁶⁴ US, *Air Force Pamphlet* (1976), § 1-4(d). ⁶⁵ US, *Air Force Pamphlet* (1976), § 10-3.

⁶⁶ US, *Air Force Pamphlet* (1976), § 11-3, see also § 10-1(b).

⁶⁷ US, *Air Force Pamphlet* (1976), § 15-2(e).

⁶⁸ US, *Naval Handbook* (1995), § 5.5. ⁶⁹ US, *Naval Handbook* (1995), § 6.1.2.

⁷⁰ Russia, *Law on Status of Members of Armed Forces as amended* (1993), Article 26.

54. Russia's Service Regulations of the Armed Forces provides that "a serviceman is obliged to know and pronouncedly observe international rules regarding the conduct of military operations and the treatment of the wounded, sick, shipwrecked and the civilian population in the military operations area, as well as prisoners of war".⁷¹

National Case-law

55. In its ruling in the *Jenin (Mortal Remains) case* in 2002 dealing with the question of when, how and by whom the mortal remains of Palestinians who died in a battle in Jenin refugee camp should be identified and buried, Israel's High Court of Justice stated that "of course, the rules of the law apply always and immediately... Even during combat one should uphold the laws that govern combat."⁷²

Other National Practice

56. Many countries have created national commissions to assist them in ensuring respect for their obligations under IHL.⁷³

57. A working paper prepared by the Colombian Ministry of Foreign Affairs in October 1996 for a meeting of experts on commissions and other bodies entrusted with proposing national measures for the application of IHL stated that:

The Colombian Government reaffirms its inescapable commitment to respect and ensure respect for the rules of International Humanitarian Law, especially the norms of the four Geneva Conventions of 1949 and of their Additional Protocols of 1977 which are in force for Colombia.⁷⁴

58. In comments on the text of the Declaration of Minimum Humanitarian Standards, submitted in 1995 to the UN Commission on Human Rights, Mexico mentioned "the principle that States parties to the Geneva Conventions are under an obligation to respect and ensure respect for international humanitarian law".⁷⁵

⁷¹ Russia, *Service Regulations of the Armed Forces* (1993), Article 19.

⁷² Israel, High Court of Justice, *Jenin (Mortal Remains) case*, Ruling, 14 April 2002, § 12.

⁷³ Examples include Albania, Argentina, Azerbaijan, Belarus, Belgium, Benin, Bolivia, Burkina Faso, Canada, Chad, Chile, Colombia, Côte d'Ivoire, Croatia, Dominican Republic, Egypt, El Salvador, Ethiopia, France, Gambia, Georgia, Guatemala, Hungary, Indonesia, Iran, Italy, Kazakhstan, Kyrgyzstan, Mali, Moldova, New Zealand, Panama, Paraguay, Poland, Portugal, Senegal, Slovenia, South Africa, Tajikistan, Togo, Ukraine, Uruguay, Uzbekistan, Venezuela, Yemen.

⁷⁴ Colombia, Ministry of Foreign Affairs, Working paper prepared for the meeting of experts on commissions and other bodies entrusted with developing national measures for the application of International Humanitarian Law, 19 October 1996, p. 4, § 2.

⁷⁵ Mexico, Comments of 15 November 1995 on the Declaration of Minimum Humanitarian Standards included in the Report of the UN Secretary-General prepared pursuant to UN Commission on Human Rights resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, § 10.

59. At the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, Niger declared that:

We reiterate our determination to do everything in our power in order that our States and all parties to armed conflicts honour their duties as regards International Humanitarian Law and international instruments related to human rights and refugee law and respect, in all circumstances, the rights of the victims of armed conflicts and the dignity of the human person.⁷⁶

60. In 1997, at a seminar on national implementation of IHL in Russia, a Russian Major-General of Justice and Deputy Chief for Training and Research Activities, stated that:

Given that the 1993 Constitution of the Russian Federation recognized that the commonly accepted principles and norms of international law and international treaties to which the Russian Federation is a party are an integral part of its legal system (Article 15, Part 4), we can assert that in Russia there is a constitutional guarantee of respect of rules of international humanitarian law.⁷⁷

61. In 1999, during a debate on the UN Decade of International Law in the Sixth Committee of the UN General Assembly, South Africa stated that “the rules of international humanitarian law should also be subject to constant revision, in the sense not of making new laws but of ensuring compliance with existing ones. States should work to instil a culture of compliance.”⁷⁸

62. In a declaration adopted in 2002 with regard to respect for the Geneva Conventions in the context of the fight against terrorism, the Swiss National Council stated that:

The Swiss National Council calls upon all States to respect the Geneva Conventions, in particular today with regard to the “war against terrorism”:

- in practical terms (treatment of combatants, of prisoners, of civilians);
- in legal terms (application *de jure*: unconditional and non-selective).

The Swiss National Council calls upon the authorities of all States in no way to question the legitimacy and legal force of the humanitarian rules which are established in the Geneva Conventions.⁷⁹

⁷⁶ Niger, Declaration made at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18-20 February 2002, § 4.

⁷⁷ Russia, Mikhail Mikhailovich Korneev, Major-general of Justice, Deputy Chief for Training and Research Activities, cited in Ministry of Foreign Affairs of Russia and ICRC, *National seminar on the implementation of international humanitarian law in the Russian Federation*, Military University, Moscow, 2-3 December 1997, p. 84.

⁷⁸ South Africa, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/54/SR.10, 19 October 1999, § 76.

⁷⁹ Switzerland, National Council, Declaration concerning respect for the Geneva Conventions, 6 March 2002, Spring Session 2002, Third Session, *Official Bulletin*, No. 02.9100 (provisional version of the text).

63. In a resolution adopted in 2002 on the occasion of the 25th Anniversary of the Additional Protocols, the Swiss Conseil des Etats solemnly recalled “the importance to have and to respect universal humanitarian rules” and expressed its firm belief in “the essential role which the national Parliaments can play in order to protect the victims of armed conflicts”.⁸⁰

64. The 1979 version of the US Department of Defense Directive on the Law of War Program stated that “it is the policy of the Department of Defense to ensure that: . . . the law of war and the obligations of the U.S. Government under that law are observed and enforced by the U.S. Armed Forces”.⁸¹ It also stated that “the Armed Forces of the United States shall comply with the law of war in the conduct of military operations and related activities in armed conflict, however such conflicts are characterized”.⁸²

65. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Common Article 1 of the four 1949 Geneva Conventions for the Protection of War Victims requires that parties to those treaties “respect and ensure respect” for each of those treaties. The obligation to “respect and ensure respect” was binding upon all parties to the Persian Gulf War. It is an affirmative requirement to take all reasonable and necessary steps to bring individuals responsible for war crimes to justice.⁸³

Under “Observations”, the report stated that:

DOD-mandated instruction and training in the law of war were reflected in US operations, which were in keeping with historic US adherence to the precepts of the law of war. Adherence to the law of war impeded neither Coalition planning nor execution; Iraqi violations of the law of war provided Iraq no advantage.

...

The willingness of commanders to seek legal advice at every stage of operational planning ensured US respect for the law of war throughout Operations Desert Shield and Desert Storm.⁸⁴

66. The 1998 version of the US Department of Defense Directive on the Law of War Program, which aimed “to ensure DoD compliance with the law of war obligations of the United States”, stated that “it is the DoD policy to

⁸⁰ Switzerland, Council of States, Declaration concerning the Protocols additional to the Geneva Conventions, 12 June 2002, Summer Session 2002, Seventh Session, *Official Bulletin*, No. 02.048 (provisional version of the text).

⁸¹ US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, Section C(1).

⁸² US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, Section E (1)(a).

⁸³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 633.

⁸⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 644.

ensure that: . . . the law of war obligations of the United States are observed and enforced by the DoD Components".⁸⁵ It further stated that:

The Heads of the DoD Components shall: . . . ensure that the members of their Components comply with the law of war during all armed conflicts, however such conflicts are characterized, and with the principles and spirit of the law of war during all other operations.⁸⁶

67. In 1991, the Federal Executive Council of the SFRY (FRY), in a "Statement regarding the need for respect of the norms of international humanitarian law in the armed conflict in Yugoslavia", called on all the participants in the armed conflicts on the territory of Yugoslavia:

to respect the fundamental rules and principles of international humanitarian law in conformity with the international conventions signed by Yugoslavia and which constitute a part of its legal system . . . The Federal Executive Council wishes once again to underline the importance of the observance of international humanitarian law for all the participants in the armed conflicts.⁸⁷

68. In the *Legality of Use of Force* cases in 1999, the FRY initiated proceedings before the ICJ against ten NATO member States (Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, UK and US) on the ground, *inter alia*, that:

- by taking part in attacks on civilian targets, [the respective States had] acted against the Federal Republic of Yugoslavia in breach of [their] obligation to spare the civilian population, civilians and civilian objects;
- by taking part in destroying or damaging monasteries, monuments of culture, [the respective States had] acted against the Federal Republic of Yugoslavia in breach of [their] obligation not to commit any act of hostility directed against historical monuments, works of art or places of worship which constitute cultural or spiritual heritage of people;
- by taking part in the use of cluster bombs, [the respective States had] acted against the Federal Republic of Yugoslavia in breach of [their] obligation not to use prohibited weapons, i.e. weapons calculated to cause unnecessary suffering;
- by taking part in the bombing of oil refineries and chemical plants, [the respective States had] acted against the Federal Republic of Yugoslavia in breach of [their] obligation not to cause considerable environmental damage;
- by taking part in the use of weapons containing depleted uranium, [the respective States had] acted against the Federal Republic of Yugoslavia in breach of

⁸⁵ US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Sections 1(1) and 4(1).

⁸⁶ US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(3)(1).

⁸⁷ SFRY (FRY), Federal Executive Council, Statement regarding the need for the respect of the norms of international humanitarian law in the armed conflicts in Yugoslavia, Belgrade, 31 October 1991.

[their] obligation not to use prohibited weapons and not to cause far-reaching health and environmental damage.⁸⁸

III. Practice of International Organisations and Conferences

United Nations

69. In a resolution on Liberia adopted in 1992, the UN Security Council called upon "all parties to the conflict and all others concerned to respect strictly the provisions of international humanitarian law".⁸⁹

70. In a resolution adopted in 1993 concerning the conflict between Armenia and Azerbaijan, the UN Security Council reaffirmed that "all parties are bound to comply with the principles and rules of international humanitarian law".⁹⁰

71. In a resolution on Angola adopted in 1993, the UN Security Council reiterated "its appeal to both parties strictly to abide by applicable rules of international humanitarian law".⁹¹

72. In a resolution adopted in 1993 "recalling the statement made by the President of the Security Council" regarding the conflict in Angola, the UN Security Council reiterated its appeal "to both parties to abide by applicable rules of international humanitarian law".⁹²

73. In a resolution adopted in 1993 concerning the conflict between Armenia and Azerbaijan, the UN Security Council reaffirmed that "all parties are bound to comply with the principles and rules of international humanitarian law".⁹³

74. In a resolution adopted in 1993 concerning the conflict in Angola, the UN Security Council reiterated "its appeal to both parties [to the conflict] . . . strictly to abide by applicable rules of international humanitarian law".⁹⁴

75. In a resolution adopted in 1994 following the massacre of Palestinians in a mosque in Hebron, the UN Security Council called upon Israel "to continue to take and implement measures, including, *inter alia*, confiscation of arms, with the aim of preventing illegal acts of violence by Israeli settlers". The Security Council called "for measures to be taken to guarantee the safety and protection of the Palestinian civilians throughout the occupied territory".⁹⁵

76. In two resolutions adopted in 1995 on the situation in Liberia, the UN Security Council demanded that "all factions in Liberia . . . strictly abide by applicable rules of international humanitarian law".⁹⁶

77. In a resolution on the former Yugoslavia adopted in 1995, the UN Security Council strongly condemned "all violations of international humanitarian law

⁸⁸ FRY, Applications instituting proceedings submitted to the ICJ, *Legality of Use of Force cases*, 29 April 1999.

⁸⁹ UN Security Council, Res. 788, 19 November 1992, § 5.

⁹⁰ UN Security Council, Res. 822, 30 April 1993, § 3.

⁹¹ UN Security Council, Res. 834, 1 June 1993, § 13.

⁹² UN Security Council, Res. 851, 15 July 1993, § 19.

⁹³ UN Security Council, Res. 853, 29 July 1993, § 11.

⁹⁴ UN Security Council, Res. 864, 15 September 1993, § 15.

⁹⁵ UN Security Council, Res. 904, 18 March 1994, preamble and §§ 2 and 3.

⁹⁶ UN Security Council, Res. 985, 13 April 1995, § 6; Res. 1001, 30 June 1995, § 13.

and of human rights in the territory of the former Yugoslavia" and demanded that "all concerned comply fully with their obligations in this regard".⁹⁷

78. In a resolution on UNOMIL adopted in 1996, the UN Security Council demanded that all factions in Liberia "strictly abide by the relevant rules of international humanitarian law".⁹⁸ This demand was reiterated in another resolution adopted the same year.⁹⁹

79. In a resolution on Liberia adopted in 1996, the UN Security Council demanded that "the factions and their leaders... strictly abide by the relevant principles and rules of international humanitarian law".¹⁰⁰

80. In a resolution adopted in 1996 on the situation in Liberia, the UN Security Council demanded that the factions in the conflict in Liberia "strictly abide by the principles and rules of international humanitarian law".¹⁰¹

81. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council reaffirmed that "all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of 12 August 1949".¹⁰²

82. In a resolution adopted in 1998, the UN Security Council called on the government of Angola and in particular UNITA "to respect international humanitarian, refugee and human rights law".¹⁰³

83. In 1993, in a statement by its President following the death of persons detained by Bosnian Serb forces when the vehicle transporting them for work at the front was ambushed, the UN Security Council stated that "the ICRC had already repeatedly called on all parties to the conflict in the Republic of Bosnia and Herzegovina strictly to observe the provisions of international humanitarian law".¹⁰⁴

84. In 1993, in a statement by its President regarding Angola, the UN Security Council strongly condemned an attack by UNITA on a train carrying civilians and urged "UNITA leaders to make sure that its forces abide by the rules of international humanitarian law".¹⁰⁵

85. In 1993, in a statement by its President, the UN Security Council requested that the UN Secretary-General investigate the massacre of displaced civilians in Liberia and demanded that "the leaders of any faction responsible for such acts effectively control their forces and take decisive steps to ensure that such deplorable tragedies do not happen again".¹⁰⁶

86. In 1993, in a statement by its President with respect to the situation in Bosnia and Herzegovina, the UN Security Council reiterated that "all the

⁹⁷ UN Security Council, Res. 1034, 21 December 1995, § 1.

⁹⁸ UN Security Council, Res. 1041, 29 January 1996, § 6.

⁹⁹ UN Security Council, Res. 1059, 31 May 1996, § 7.

¹⁰⁰ UN Security Council, Res. 1071, 30 August 1996, § 10.

¹⁰¹ UN Security Council, Res. 1083, 27 November 1996, § 8.

¹⁰² UN Security Council, Res. 1193, 28 August 1998, § 12.

¹⁰³ UN Security Council, Res. 1213, 3 December 1998, § 7.

¹⁰⁴ UN Security Council, Statement by the President, UN Doc. S/25557, 8 April 1993.

¹⁰⁵ UN Security Council, Statement by the President, UN Doc. S/25899, 8 June 1993.

¹⁰⁶ UN Security Council, Statement by the President, UN Doc. S/25918, 9 June 1993.

parties in the former Yugoslavia comply with their obligations under international humanitarian law".¹⁰⁷

87. In November 1993, in a statement by its President on Angola, the UN Security Council called upon all the parties "strictly to abide by applicable rules of international humanitarian law".¹⁰⁸

88. In 1997, in a statement by its President with respect to the situation in the Great Lakes region, the UN Security Council underlined "the obligation of all concerned to respect the relevant provisions of international humanitarian law".¹⁰⁹

89. In 1998, in a statement by its President on the situation in the DRC, the UN Security Council urged all parties to "respect humanitarian law, in particular the Geneva Conventions of 1949 and the Additional Protocols of 1977, as applicable to them".¹¹⁰

90. In a resolution adopted in 1970 on respect for human rights in armed conflicts, the UN General Assembly considered that "the principles of the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949 should be strictly observed by all States and that States violating these international instruments should be condemned and held responsible to the world community".¹¹¹

91. In a resolution adopted in 1970 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to any armed conflict "to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925, the Geneva Conventions of 1949 and other humanitarian rules applicable in armed conflicts".¹¹²

92. In a resolution adopted in 1971 on respect for human rights in armed conflicts, the UN General Assembly called upon "all parties to any armed conflict to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925, the Geneva Conventions of 1949 and other humanitarian rules applicable in armed conflicts". It also called upon "all States... to take all the necessary measures to ensure full compliance by their armed forces of humanitarian rules applicable in armed conflicts".¹¹³

93. In a resolution adopted in 1971 on respect for human rights in armed conflicts, the UN General Assembly reiterated its call upon all parties to any armed conflict "to observe the rules laid down in the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925, the Geneva Conventions of 1949 and other humanitarian rules applicable in armed conflicts".¹¹⁴

¹⁰⁷ UN Security Council, Statement by the President, UN Doc. S/26661, 28 October 1993.

¹⁰⁸ UN Security Council, Statement by the President, UN Doc. S/26677, 1 November 1993.

¹⁰⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/5, 7 February 1997, p. 1.

¹¹⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, p. 1.

¹¹¹ UN General Assembly, Res. 2674 (XXV), 9 December 1970, § 3.

¹¹² UN General Assembly, Res. 2677 (XXV), 9 December 1970, § 1.

¹¹³ UN General Assembly, Res. 2852 (XXVI), 20 December 1971, §§ 1 and 6.

¹¹⁴ UN General Assembly, Res. 2853 (XXVI), 20 December 1971, § 1.

94. In a resolution adopted in 1972 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts “to observe the international humanitarian rules which are applicable, in particular, the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949”.¹¹⁵

95. In a resolution adopted in 1973 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts:

to acknowledge and to comply with their obligations under the humanitarian instruments and to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949.¹¹⁶

96. In a resolution adopted in 1974 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts:

to acknowledge and to comply with their obligations under the humanitarian instruments and to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949.¹¹⁷

97. In a resolution adopted in 1975 on respect for human rights in armed conflicts, the UN General Assembly called upon:

all parties to armed conflicts to acknowledge and to comply with their obligations under the humanitarian instruments and to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949.¹¹⁸

98. In a resolution adopted in 1977 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts:

to acknowledge and to comply with their obligations under the existing instruments of international humanitarian law and to observe the international humanitarian rules which are applicable, in particular the Hague Conventions of 1899 and 1907, the Geneva [Gas] Protocol of 1925 and the Geneva Conventions of 1949.¹¹⁹

99. In a resolution adopted in 1985 on the situation in Afghanistan, the UN General Assembly called upon the parties to the conflict “to apply fully the principles and rules of international humanitarian law”.¹²⁰

¹¹⁵ UN General Assembly, Res. 3032 (XXVII), 18 December 1972, § 2.

¹¹⁶ UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, § 4.

¹¹⁷ UN General Assembly, Res. 3319 (XXIX), 14 December 1974, § 3.

¹¹⁸ UN General Assembly, Res. 3500 (XXX), 15 December 1975, § 1; see also Res. 31/19, 24 November 1976, § 1.

¹¹⁹ UN General Assembly, Res. 32/44, 8 December 1977, § 6.

¹²⁰ UN General Assembly, Res. 40/137, 13 December 1985, § 8.

100. In a resolution adopted in 1992, the UN General Assembly urged "States to take all measures to ensure compliance with the existing international law applicable to the protection of the environment in times of armed conflict".¹²¹

101. In a resolution adopted in 1993 on the United Nations Decade of International Law, the UN General Assembly reminded "all States of their responsibility to respect and ensure respect for international humanitarian law in order to protect the victims of war".¹²²

102. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly reaffirmed "the obligation of all to respect international humanitarian law".¹²³

103. In a resolution adopted in 1991 on the situation of human rights in El Salvador, the UN Commission on Human Rights called upon the parties to the conflict:

to guarantee respect for the humanitarian rules applicable to non-international armed conflicts such as that in El Salvador, particularly with regard to the evacuation of the war wounded and maimed... and the non-use of explosive devices affecting the civilian population.¹²⁴

104. In a resolution adopted in 1994, the UN Commission on Human Rights invited the government of Myanmar "to fully respect its obligations under the [1949] Geneva Conventions... in particular their common article 3".¹²⁵

105. In resolutions adopted in 1995 and 1996, the UN Commission on Human Rights invited the government of Myanmar "to respect fully its obligations under the [1949] Geneva Conventions".¹²⁶

106. In a resolution adopted in 1998, the UN Commission on Human Rights urged all the parties to the conflict in Afghanistan "to respect fully international humanitarian law".¹²⁷

107. In a resolution adopted in 1989 on the situation of human rights in El Salvador, the UN Sub-Commission on Human Rights expressed:

its deep concern at the continuing increase in the number of human rights violations being committed in El Salvador and at the persistent failure to observe the fundamental norms of humanitarian law proclaimed in the Geneva Conventions and in the Additional Protocols thereto.¹²⁸

¹²¹ UN General Assembly, Res. 47/37, 25 November 1992, § 1.

¹²² UN General Assembly, Res. 48/30, 9 December 1993, § 4.

¹²³ UN General Assembly, Res. 50/193, 22 December 1995, preamble.

¹²⁴ UN Commission on Human Rights, Res. 1991/75, 6 March 1991, § 9.

¹²⁵ UN Commission on Human Rights, Res. 1994/85, 9 March 1994, § 17.

¹²⁶ UN Commission on Human Rights, Res. 1995/72, 8 March 1995, § 20; Res. 1996/80, 23 April 1996, § 18.

¹²⁷ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 5(c); see also Res. 1990/53, 6 March 1990, § 5, Res. 1992/68, 4 March 1992, § 6, Res. 1995/74, 8 March 1995, § 6, Res. 1996/75, 23 April 1996, § 4 and Res. 1997/65, 16 April 1997, § 13.

¹²⁸ UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, § 1.

The Sub-Commission also strongly urged the government of El Salvador “to take all necessary measures to ensure . . . that human rights are respected by all military, paramilitary and police forces”.¹²⁹

108. In a resolution adopted in 2000 on the role of universal or extraterritorial competence in preventive action against impunity, the UN Sub-Commission on Human Rights recalled “the obligation of States parties to respect and to ensure respect for humanitarian law under the Geneva Conventions . . . an obligation explicitly provided for in common article 1 thereof”.¹³⁰

109. In 1998, in a report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, the UN Secretary-General stated that “adherence to international humanitarian and human rights norms by all parties to a conflict must be insisted upon, and I intend to make this a priority in the work of the United Nations”.¹³¹

110. In 1997, in his second report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights stated that:

It would . . . be unfair to put the rebel groups, no matter what their role in the violence and massacres has been, on the same footing as a State which has ratified the major international instruments on human rights and international humanitarian law and is therefore bound by strict obligations. While these obligations are not, technically speaking, binding to the same extent for the rebels or armed gangs, these groups do, nevertheless, also have an obligation to respect certain humanitarian principles that are part of international customary law and are recognized by all civilized nations.¹³²

Other International Organisations

111. In a resolution adopted in 1987, the Parliamentary Assembly of the Council of Europe invited “all sides in the conflict [in Sri Lanka] to respect the Geneva Conventions of 1949 and the international humanitarian law applicable to armed conflicts”.¹³³

112. In a resolution adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe invited “the governments of member states: . . . to launch an appeal to the conflicting parties to respect the four Geneva conventions of 1949 which provide protection to wounded military personnel, to prisoners of war and to civilian persons in time of war”.¹³⁴

113. In a resolution adopted in 1993 on the massive and flagrant violations of human rights in the territory of the former Yugoslavia, the Parliamentary Assembly of the Council of Europe launched “a solemn appeal to all parties

¹²⁹ UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, § 5.

¹³⁰ UN Sub-Commission on Human Rights, Res. 2000/24, 18 August 2000, preamble.

¹³¹ UN Secretary-General, Report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, UN Doc. A/52/871-S/1998/318, 13 April 1998, § 50.

¹³² UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Second report, UN Doc. E/CN.4/1997/12, 10 February 1997, § 11.

¹³³ Council of Europe, Parliamentary Assembly, Res. 881, 1 July 1987, § 16.

¹³⁴ Council of Europe, Parliamentary Assembly, Res. 984, 30 June 1992, § 13(iii).

involved in the conflict in the territory of the former Yugoslavia to respect the Geneva conventions on humanitarian law".¹³⁵

114. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited governments to "ensure that the Geneva Conventions of 1949, their 1977 protocols and other provisions of international humanitarian law are respected strictly and in all circumstances".¹³⁶

115. In 2000, the Rapporteur of the Council of Europe on the human rights situation in Chechnya called on the Chechen fighters to respect IHL.¹³⁷

116. In a resolution on respect for IHL adopted in 1996, the OAS General Assembly urged all members to "observe and fully enforce... the customary principles and norms contained in the 1977 Additional Protocols".¹³⁸

International Conferences

117. The 20th International Conference of the Red Cross in 1965 adopted a resolution in which it recommended that "appropriate arrangements be made to ensure that armed forces placed at the disposal of the United Nations observe the provisions of the Geneva Conventions and be protected by them".¹³⁹

118. The 24th International Conference of the Red Cross in 1981 adopted a resolution on the application of GC IV "to the occupied territories in the Middle East" in which it called upon "the occupying power to acknowledge and comply with its obligations under the Fourth Geneva Convention, and to this effect cease forthwith all policies and practices in violation of any article of this Convention".¹⁴⁰

119. The 24th International Conference of the Red Cross in 1981 adopted a resolution in which it solemnly appealed that "the rules of international humanitarian law and the universally recognized humanitarian principles be safeguarded at all times and in all circumstances".¹⁴¹

120. The 25th International Conference of the Red Cross in 1986 adopted a resolution in which it appealed to all parties involved in armed conflicts "to fully respect their obligations under international humanitarian law".¹⁴²

121. In 1992, at the Helsinki Summit of the CSCE, the participating States declared that they would "in all circumstances respect and ensure respect for international humanitarian law including the protection of the civilian population".¹⁴³

¹³⁵ Council of Europe, Parliamentary Assembly, Res. 994, 3 February 1993, § 5(i).

¹³⁶ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(a).

¹³⁷ Council of Europe, Parliamentary Assembly, Opinion on Russia's request for membership in the light of the situation in Chechnya, Doc. 7231, 2 February 1995, § 75.

¹³⁸ OAS, General Assembly, Res. 1408 (XXVI-O/96), 7 June 1996, § 4.

¹³⁹ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXV, § 1.

¹⁴⁰ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. III, § 4.

¹⁴¹ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. VI.

¹⁴² 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, § 2.

¹⁴³ CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 48.

122. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants declared that:

We undertake to act in cooperation with the UN and in conformity with the UN Charter to ensure full compliance with international humanitarian law in the event of genocide and other serious violations of this law . . .

We affirm our responsibility, in accordance with Article 1 common to the Geneva Conventions, to respect and ensure respect for international humanitarian law in order to protect the victims of war.¹⁴⁴

123. In 1994, at the Budapest Summit of the CSCE, the participating States reaffirmed “their commitment to respect and ensure respect for general international humanitarian law and in particular for their obligations under the relevant international instruments, including the 1949 Geneva Conventions and their additional protocols, to which they are a party”.¹⁴⁵

124. In a resolution adopted in 1995 on challenges posed by calamities arising from armed conflict, the 93rd Inter-Parliamentary Conference stressed States’ “obligation to respect and enforce international humanitarian law, in particular by strengthening mechanisms for its implementation”.¹⁴⁶

125. In the Maputo Declaration on the Use of Children as Soldiers, the African Conference on the Use of Children as Soldiers in 1999 called upon African States “to respect fully the provisions of international human rights and humanitarian law, in particular in the case of captured child soldiers”.¹⁴⁷

126. In a resolution adopted in 1999 on the contribution of parliaments to ensuring respect for and promoting IHL, the 102nd Inter-Parliamentary Conference urged the States concerned “to comply strictly and ensure compliance with their obligations under international humanitarian law”.¹⁴⁸

127. In 2001, the Conference of High Contracting Parties to the Fourth Geneva Convention adopted a declaration stating that:

- 4 The participating High Contracting Parties call upon all parties, directly involved in the conflict [between Israel and Palestinians] or not, to respect and to ensure respect for the Geneva Conventions in all circumstances . . .

¹⁴⁴ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, §§ I(6) and II.

¹⁴⁵ CSCE, Budapest Summit of Heads of State or Government, 5–6 December 1994, Budapest Document 1994: Towards a Genuine Partnership in a New Area, Decisions, Chapter VIII: The Human Dimension, § 33.

¹⁴⁶ 93rd Inter-Parliamentary Conference, Madrid, 27 March–1 April 1999, Resolution on the International Community in the Face of the Challenges posed by Calamities Arising from Armed Conflicts and by Natural or Man-made Disasters: The Need for a Coherent and Effective Response through Political and Humanitarian Assistance Means and Mechanisms Adapted to the Situation, § 13.

¹⁴⁷ African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, § 5.

¹⁴⁸ 102nd Inter-Parliamentary Conference, Berlin, 10–15 October 1999, Resolution on the contribution of parliaments to ensuring respect for and promoting international humanitarian law on the occasion of the 50th anniversary of the Geneva Conventions, § 2.

- 5 The participating High Contracting Parties stress that the Fourth Geneva Convention, which takes fully into account imperative military necessity, has to be respected in all circumstances.
- ...
- 12 The participating High Contracting Parties call upon the Occupying Power to fully and effectively respect the Fourth Geneva Convention in the Occupied Palestinian Territory, including East Jerusalem, and to refrain from perpetrating any violation of the Convention.
- ...
- 17 The participating High Contracting Parties welcome and encourage the initiatives by States Parties, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring the respect of the Convention, and they underline the need for the Parties, to follow up on the implementation of the present Declaration.¹⁴⁹

128. In the Final Declaration adopted in 2002 by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, the participants stated that:

1. We pledge our commitment to further uphold humanitarian principles and to the respect for international humanitarian law.
2. To this end, we resolve to ensure that our parliaments fully play their role in the process of acceding to the instruments of International Humanitarian Law and adjust national legislation in order to ensure the effective application thereof.
3. We undertake also, as men and women elected by the people, to contribute to promote awareness of the relevant humanitarian values, norms and rules.
4. We reaffirm our determination to see to it that our States and all parties to an armed conflict honor their obligations under International Humanitarian Law, International Human Rights Law and International Refugee Law and respect, under all circumstances, the rights of the victims of armed conflict as well as the dignity of the human person.¹⁵⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

129. In its judgement in the *Nicaragua case (Merits)* in 1986, the ICJ stated with respect to common Article 1 of the 1949 Geneva Conventions:

The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to "respect" the Conventions and even "to ensure respect" for them "in all circumstances", since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.¹⁵¹

¹⁴⁹ Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, §§ 4–5, 12 and 17.

¹⁵⁰ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, §§ 1–4.

¹⁵¹ ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 220.

130. In its order in the *Application of the Genocide Convention case (Provisional Measures)* in 1993 concerning a case brought by Bosnia and Herzegovina against the FRY (Serbia and Montenegro), the ICJ stated that:

The Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) should in particular ensure that any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of direct and public incitement to commit genocide, or in complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group.¹⁵²

131. In its order in the *Armed Activities on the Territory of the DRC case (Provisional Measures)* in 2000, the ICJ unanimously stated that “both Parties must, forthwith, take all measures necessary to ensure full respect within the zone of conflict for . . . the applicable provisions of humanitarian law”.¹⁵³

132. In a resolution adopted in 1993, the ACiHPR invited “all African States Parties to the African Charter on Human and Peoples’ Rights to adopt appropriate measures at the national level to ensure the promotion of the provisions of international humanitarian law”.¹⁵⁴

133. In *Loizidou v. Turkey* in 1995, the ECtHR addressed the issue of whether a State party to the 1950 ECHR was obliged to ensure respect for the Convention even in territories that it was occupying. The Court held that:

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control over an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention, derives from the fact of such control whether it be exercised directly, through its armed forces, or through subordinate local administration.¹⁵⁵

V. Practice of the International Red Cross and Red Crescent Movement

134. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the States and belligerent Parties undertake to respect the law of war and to ensure respect for it in all circumstances. The law of war must be respected by governments, by military and civilian authorities as well as by military and civilian persons.”¹⁵⁶ Delegates

¹⁵² ICJ, *Application of the Genocide Convention case (Provisional Measures)*, Order, 8 April 1993, § 52(A)(2).

¹⁵³ ICJ, *Armed Activities on the Territory of the DRC case (Provisional Measures)*, Order, 1 July 2000, § 47(3).

¹⁵⁴ ACiHPR, Addis Ababa, 1–10 December 1993, Res. 2 (XIV), § 1.

¹⁵⁵ ECtHR, *Loizidou v. Turkey*, Preliminary Objections, Judgement, 23 March 1995, § 62, see also IACiHR, *Case 11.589 (Cuba)*, 29 September 1999, §§ 24–25.

¹⁵⁶ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 25–26.

also teach that "as with order and discipline, the law of war must be respected and enforced in all circumstances".¹⁵⁷

135. In an appeal issued in 1991 in the context of the conflict in the former Yugoslavia, the ICRC urged "the military and civilian authorities of the parties involved to take all necessary steps to ensure compliance with the obligations contained in the provisions of international humanitarian law".¹⁵⁸

136. In a joint statement issued in 1991, the Yugoslav Red Cross and the Hungarian Red Cross expressed their deep concern about "the protracting internal conflict in Yugoslavia" and stated that they "consider it of utmost importance that the parties to the conflict respect the provisions of humanitarian law applicable in armed conflicts, especially in non-international armed conflicts".¹⁵⁹

137. In a press release issued in 1992 with respect to the conflict in Bosnia and Herzegovina, the ICRC appealed "to the parties involved to take all necessary steps to ensure compliance with the basic rules of international humanitarian law".¹⁶⁰

138. In a press release issued in 1992 with respect to the conflict in Afghanistan, the ICRC appealed "to all the parties to respect international humanitarian law and to ensure respect for its rules by everyone involved in the fighting".¹⁶¹ This appeal was repeated later the same year.¹⁶²

139. In a communication to the press issued in 1993 with respect to the conflict in Somalia, the ICRC appealed "to all forces involved to respect international humanitarian law and to ensure respect for its rules by all of their members".¹⁶³

140. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on the International Conference for the Protection of War Victims in which it welcomed "the reaffirmation by States of their responsibility under Article 1 common to the Geneva Conventions of 1949 to respect and ensure respect for international humanitarian law".¹⁶⁴

141. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "the parties to the conflict must take all necessary steps to respect and ensure respect for international humanitarian law".¹⁶⁵

¹⁵⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 269.

¹⁵⁸ ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

¹⁵⁹ Yugoslav Red Cross and Hungarian Red Cross, Joint Statement, Subotica, 25 October 1991.

¹⁶⁰ ICRC, Press Release No. 1705, Bosnia-Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

¹⁶¹ ICRC, Press Release No. 1712, Afghanistan: ICRC appeals for compliance with humanitarian rules, 5 May 1992.

¹⁶² ICRC, Press Release No. 1726, Afghanistan: New ICRC appeal for compliance with humanitarian rules, 14 August 1992.

¹⁶³ ICRC, Communication to the Press No. 93/17, Somalia: ICRC appeals for compliance with international humanitarian law, 17 June 1993.

¹⁶⁴ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 2, preamble.

¹⁶⁵ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, preamble, *IRRC*, No. 320, 1997, p. 502.

142. In a press release issued in 1994 in the context of the conflict in Bosnia and Herzegovina, the ICRC appealed to all parties involved in hostilities in and around Bihać “to respect international humanitarian law and to ensure that it is respected in all circumstances”.¹⁶⁶

143. In a press release in 1995, the ICRC appealed to all the parties involved in Turkey’s military operations in northern Iraq “to respect international humanitarian law” and stated that it had sent the Turkish government a note “reminding it of its obligation to comply with international humanitarian law”.¹⁶⁷

144. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC appealed “to all those involved in the violence or in a position to influence the situation to respect and to ensure respect for international humanitarian law and its underlying principles in all circumstances”.¹⁶⁸

145. In a communication to the press issued in 2001 in the context of the conflict in Afghanistan, the ICRC stated that:

In view of the situation in and around the besieged town of Kunduz and in other parts of the country where fighting continues, the ICRC feels it necessary to impress upon all parties concerned that the rules governing armed conflict must be respected at all times and in all circumstances.¹⁶⁹

VI. Other Practice

146. In 1979, an armed opposition group wrote to the ICRC to confirm its commitment to IHL in a letter entitled “Engagement . . . to comply with international humanitarian laws in times of armed conflict”. It also asked the ICRC “to call upon the [enemy] and his allies . . . to respect the Geneva Conventions and international law applicable in case of armed conflicts”.¹⁷⁰

147. In a resolution adopted at its Berlin Session in 1999, the Institute of International Law stated that:

All parties to armed conflicts in which non-State entities are parties, irrespective of their legal status, as well as the United Nations, and competent regional and other international organizations have the obligation to respect international humanitarian law as well as fundamental human rights. The application of such principles rules and does not affect the legal status of the parties to the conflict and is not dependent on their recognition as belligerents or insurgents.¹⁷¹

¹⁶⁶ ICRC, Press Release No. 1792, Bihać: Urgent ICRC Appeal, 26 November 1994.

¹⁶⁷ ICRC, Press Release No. 1797, ICRC calls for compliance with international law in Turkey and northern Iraq, 22 March 1995.

¹⁶⁸ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

¹⁶⁹ ICRC, Communication to the Press No. 01/58, Afghanistan: ICRC calls on all parties to comply with international humanitarian law, 23 November 2001.

¹⁷⁰ ICRC archive document.

¹⁷¹ Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, § II.

Orders and instructions to ensure respect for international humanitarian law

I. Treaties and Other Instruments

Treaties

148. Article 1 of the 1899 Hague Convention (II) provides that “the High Contracting Parties shall issue instructions to their armed land forces, which shall be in conformity with the ‘Regulations respecting the laws and customs of war on land’ annexed to the present Convention”.

149. Article 1 of the 1907 Hague Convention (IV) provides that “the Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the laws and customs of war on land, annexed to the present Convention”.

150. Article II(17) of the 1953 Panmunjon Armistice Agreement provides that:

Responsibility for compliance with and enforcement of the terms and provisions of this Armistice Agreement is that of signatories hereto and their successors in command. The Commanders of the opposing sides shall establish within their respective commands all measures and procedures necessary to insure complete compliance with all the provisions hereof by all elements of their commands.

151. Article 7(1) of the 1954 Hague Convention provides that:

The High Contracting Parties undertake to introduce in time of peace into their military regulations or instructions such provisions as may ensure observance of the present Convention, and to foster in the members of their armed forces a spirit of respect for the culture and cultural property of all peoples.

152. Article 80(2) AP I provides that “the High Contracting Parties and the Parties to the conflict shall give orders and instructions to ensure observance of the Conventions and this Protocol, and shall supervise their execution”. Article 80 AP I was adopted by consensus.¹⁷²

153. Article 14(3) of the 1996 Amended Protocol II to the CCW provides that “each High Contracting Party shall . . . require that its armed forces issue relevant military instructions and operating procedures . . . to comply with the provisions of this Protocol”.

Other Instruments

154. No practice was found.

II. National Practice

Military Manuals

155. Argentina’s Law of War Manual provides that “the Geneva Conventions and Protocol I expressly oblige States not only to respect [those agreements], but also to ensure respect by issuing orders and instructions for that purpose”.¹⁷³

¹⁷² CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 256.

¹⁷³ Argentina, *Law of War Manual* (1989), § 8.01.

156. Australia's Defence Force Manual provides that "Rules of Engagement (ROE) provide authoritative guidance on the use of military force by the ADF... ROE will include legal considerations and so will comply with the law of armed conflict."¹⁷⁴

157. Belgium's LOAC Teaching Directive provides that the General Staff of the Forces and the Medical Service "shall give the necessary instructions [to ensure in all circumstances full respect for the law of armed conflicts and the rules of engagement by all members of the Armed Forces]".¹⁷⁵

158. Benin's Military Manual states that missions assigned to subordinates "shall contain the details necessary to ensure respect for the law of war".¹⁷⁶

159. Cameroon's Instructors' Manual provides that "the main responsibility of members of the 'Etats-Majors' consists of verifying that their contribution to orders and instructions are in conformity with the Law of War".¹⁷⁷

160. Canada's LOAC Manual defines the rules of engagement as "orders issued by competent military authority which delineate the circumstances and limitations within which force may be applied by the CF to achieve military objectives in furtherance of national policy".¹⁷⁸

161. Canada's Code of Conduct provides that "the purpose of the Code... is to provide simple and understandable instructions to ensure that CF members apply as a minimum, the spirit and principles of the Law of Armed Conflict in all CF operations other than Canadian domestic operations".¹⁷⁹

162. Colombia's Directive on IHL defines its own aim as "defining general principles and giving instructions towards the strict respect of the rules of International Humanitarian Law".¹⁸⁰ It also states that:

The Ministry of National Defence gives instructions aimed at intensifying the development of capacity-building programmes of the members of the public force, on themes referring to the respect for Human Rights and the application of the rules of International Humanitarian Law, with a view to prevent and correct conduct which violates those rules...

The General Command of the Military Forces and the Direction of the National Police [g]ive the Commanders of the public force the necessary instructions for each Force to intensify, develop and complete, in the corresponding formation and capacity-building courses of their personnel, the relevant studies on the respect for Human Rights and ensure the obligatory application of International Humanitarian Law.¹⁸¹

163. France's LOAC Manual defines rules of engagement as "instructions established by the competent political or military authority to determine the circumstances of and the limitations to the use of force by the armed

¹⁷⁴ Australia, *Defence Force Manual* (1994), § 211.

¹⁷⁵ Belgium, *LOAC Teaching Directive* (1996), Section 1.

¹⁷⁶ Benin, *Military Manual* (1995), Fascicule III, p. 10.

¹⁷⁷ Cameroon, *Instructors' Manual* (1992), p. 133, § 461.1.

¹⁷⁸ Canada, *LOAC Manual* (1999), Glossary, p. GL-17.

¹⁷⁹ Canada, *Code of Conduct* (2001), Introduction, § 5.

¹⁸⁰ Colombia, *Directive on IHL* (1993), Section I.(A).

¹⁸¹ Colombia, *Directive on IHL* (1993), Sections IV.(A) and IV.(B)(1).

forces when, confronted with other forces, they undertake or continue armed engagement".¹⁸²

164. Germany's Military Manual states that "superiors shall only issue orders which are in conformity with international law".¹⁸³

165. Germany's IHL Manual, referring to common Article 1 of the 1949 Geneva Conventions and Article 1(1) AP I, states that "it necessarily follows that each soldier of the [German Armed Forces] must know the rules of international humanitarian law in armed conflicts. This is relevant especially for superiors who may give orders only by respecting the rules of public international law."¹⁸⁴

166. Hungary's Military Manual emphasises that the commander of the forces engaged must provide "guidance to subordinates".¹⁸⁵ It also states that each mission "has to be consistent with the L.O.W. [law of war]".¹⁸⁶

167. The Military Manual of the Netherlands states that "States parties to law of war treaties must take all necessary measures to ensure respect for their obligations under these treaties. They must give orders and instructions which ensure their respect and must supervise their execution."¹⁸⁷

168. Nigeria's Operational Code of Conduct directs "all officers and men to observe strictly the following rules during operations. (These instructions must be read in conjunction with the Geneva Convention)".¹⁸⁸ It also states that "to be successful in our tasks as soldiers these rules must be carefully observed. I will not be proud of any member of the Armed Forces under my command who fails to observe them."¹⁸⁹

169. The Joint Circular on Adherence to IHL and Human Rights of the Philippines was issued "to effectively pursue the intents and purposes of Presidential Memorandum Order No. 393 dated September 9, 1991, directing the Armed Forces and National Police to reaffirm their adherence to the Principles of Humanitarian Law and Human Rights in the conduct of security/police operations" and "for strict compliance of every member of the AFP and PNP in all levels of command/office".¹⁹⁰

170. Spain's LOAC Manual states that:

The 1907 Hague Convention IV already provided that "the high contracting parties shall issue instructions to their Armed Forces which shall be in conformity with the rules that have been adopted", rules that were contained in the [Hague] Conventions of 1899 and 1907. This obligation takes shape in the existence of military manuals which include the norms applicable to armed conflicts.¹⁹¹

¹⁸² France, *LOAC Manual* (2001), p. 107.

¹⁸³ Germany, *Military Manual* (1992), § 141.

¹⁸⁴ Germany, *IHL Manual* (1996), §§ 107 and 108.

¹⁸⁵ Hungary, *Military Manual* (1992), p. 39.

¹⁸⁶ Hungary, *Military Manual* (1992), p. 49.

¹⁸⁷ Netherlands, *Military Manual* (1993), p. IX-1.

¹⁸⁸ Nigeria, *Operational Code of Conduct* (1967), § 4.

¹⁸⁹ Nigeria, *Operational Code of Conduct* (1967), § 5.

¹⁹⁰ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2.

¹⁹¹ Spain, *LOAC Manual* (1996), Vol. I, Annex A.

171. Sweden's IHL Manual notes that "the [1907] IV Hague Convention... provides that contracting powers shall give their land forces instructions that comply with the Convention".¹⁹² It adds that "for the Swedish defence forces, the commander-in-chief has laid down eight servicemen's rules pointing out what every combatant must bear in mind in combat situations".¹⁹³

172. Togo's Military Manual states that missions assigned to subordinates "shall contain the details necessary to ensure respect for the law of war".¹⁹⁴

173. The US Air Force Pamphlet emphasises that "the US... ensures observance and enforcement through a variety of national means including... military regulations [and] rules of engagement".¹⁹⁵

National Legislation

174. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that "if [the] Azerbaijan Republic is one of the parties to the conflict, then necessary instruction is given to [the] civilian population in such a conflict area and to the personnel staff of the Armed Forces of [the] Azerbaijan Republic involved in the solution of this conflict".¹⁹⁶

175. In its Order on the Publication of the Geneva Conventions and Protocols, the Russian Ministry of Defence required "the implementation of the instructions concerning the application of the rules of international humanitarian law by the armed forces of the USSR" annexed to the said order, i.e. Russia's Military Manual.¹⁹⁷

National Case-law

176. No practice was found.

Other National Practice

177. During the Algerian war of independence, the leaders of the ALN emphasised that:

The laws of war have always been respected by our side. Formal instructions have been given to the combatants during their political education already at the beginning of the Algerian Revolution and have been made the object of directives... These directives have been repeated, clarified and codified since the Congress of 20 August 1956.¹⁹⁸

178. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of

¹⁹² Sweden, *IHL Manual* (1991), Section 4.1, p. 91.

¹⁹³ Sweden, *IHL Manual* (1991), Section 4.2, p. 95.

¹⁹⁴ Togo, *Military Manual* (1996), Fascicule III, p. 10.

¹⁹⁵ US, *Air Force Pamphlet* (1976), § 15-2(e).

¹⁹⁶ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 1 and 30.

¹⁹⁷ Russia, *Order on the Publication of the Geneva Conventions and Protocols* (1990), § 1.

¹⁹⁸ *El Moudjahid*, Vol. 1, p. 440.

self-defence or a mandate of the UN Security Council, in a part dealing with the “eight fundamental rules of international humanitarian law”, state that “the parties to the conflict shall give the necessary orders and instructions in order to insure the respect of these rules and will supervise the execution thereof”.¹⁹⁹

179. An Israeli Chief of Staff Order of 1982 refers to the Geneva Conventions and states that “IDF soldiers are obliged to conduct themselves in accordance with the directives contained in the above[-mentioned Geneva] Conventions”.²⁰⁰ The Order also refers to the 1954 Hague Convention and provides that “IDF soldiers are obliged to observe the directives of the said [1954 Hague] Convention, as well as the Regulations and attendant Protocols”.²⁰¹

180. In 1972, the General Counsel of the US Department of Defense considered that:

Rules of engagement are directives issued by competent military authority which delineate the circumstances and limitations under which United States Forces will initiate and/or continue combat engagement with the enemy.

These rules are the subject of constant review and command emphasis. They are changed from time to time to conform to changing situations and the demands of military necessity. One critical and unchanging factor is their conformity to existing international law as reflected in the Hague Conventions of 1907 and the Geneva Conventions of 1949, as well as with the principles of customary international law of which UNGA Resolution 2444 (XXIII) is deemed to be a correct restatement.²⁰²

181. In Order No. 985-1/91 issued in 1991, the YPA Chief of General Staff stated that “YPA units have the duty to secure in the area of their operations full and unconditional implementation of rules of international law of armed conflicts and suppress violations of those rules”.²⁰³

182. In 1991, the YPA Chief of General Staff issued Order No. 579 aiming “to completely eliminate violations of international humanitarian law in armed conflicts in Croatia” according to which “YPA units shall ensure full and consistent respect of norms of international humanitarian law in all areas under its jurisdiction”.²⁰⁴

¹⁹⁹ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1 June 1995, Section 6, § 67.

²⁰⁰ Israel, IDF Order of the Chief of Staff No. 33.0133, Discipline – Conduct in accordance with the international conventions to which the State of Israel is a party, 20 July 1982, § 3.

²⁰¹ Israel, IDF Order of the Chief of Staff No. 33.0133, Discipline – Conduct in accordance with the international conventions to which the State of Israel is a party, 20 July 1982, § 8.

²⁰² US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, 1973, p. 124.

²⁰³ SFRY (FRY), Chief of General Staff of the YPA, Legal Department, Order No. 985-1/91, 3 October 1991, § 1.

²⁰⁴ SFRY (FRY), Chief of General Staff of the YPA, Political Department, Order No. 579, 14 October 1991, preamble and § 1.

*III. Practice of International Organisations and Conferences**United Nations*

183. In a resolution adopted in 1999 on systematic rape, sexual slavery and slavery-like practices, the UN Sub-Commission on Human Rights called upon States “to make possible respect for their obligations in situations of conflict by, inter alia: . . . adopting suitable instructions for and training of their armed forces so that they know that all forms of sexual violence and sexual slavery are criminal and will be prosecuted”.²⁰⁵

184. In 1995, in his first report concerning the conflict in Guatemala, the Director of MINUGUA stated that:

The Mission recommends to URNG that it should issue precise instructions to its combatants to refrain from placing at risk persons wounded in the armed conflict and from endangering ambulances and duly identified health workers who assist such wounded persons.²⁰⁶

185. In 1995, in his second report concerning the conflict in Guatemala, the Director of MINUGUA observed that:

Verification has uncovered cases in which the Government failed to guarantee the right to integrity and security of person in terms of freedom from torture or cruel, inhuman or degrading treatment, or the threat of such treatment . . . The Mission reiterates its recommendation that the Government transmit specific instructions to military and police officers in order to prevent these acts, warning them that such acts are crimes subject to disciplinary, administrative and criminal penalties.²⁰⁷

He further stated that:

The Mission recommends that URNG issue precise instructions to its combatants to refrain from causing unnecessary harm to individuals and property, to take due care not to create additional risks to life in attacking military targets and, in particular, to end the practice of laying mines or explosives in areas where civilians work, live or circulate.²⁰⁸

Other International Organisations

186. No practice was found.

International Conferences

187. The 20th International Conference of the Red Cross in 1965 adopted a resolution on application of the Geneva Conventions by the United Nations

²⁰⁵ UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, § 11(a).

²⁰⁶ MINUGUA, Director, First report, UN Doc. A/49/856, 1 March 1995, § 194.

²⁰⁷ MINUGUA, Director, Second report, UN Doc. A/49/929, 29 June 1995, § 179.

²⁰⁸ MINUGUA, Director, Second report, UN Doc. A/49/929, 29 June 1995, § 197.

Emergency Forces in which it recommended that “the Governments of countries making contingents available to the United Nations give their troops – in view of the paramount importance of the question – . . . orders to comply with [the 1949 Geneva Conventions]”.²⁰⁹

188. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants urged all States to make every effort to “adopt and implement, at the national level, all appropriate regulations, laws and measures to ensure respect for international humanitarian law applicable in the event of armed conflict and to punish violations thereof”.²¹⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

189. In 1980, in a report on the situation of human rights in Argentina, the IACiHR recommended that the Argentine government:

instruct all the officials and agents responsible for the maintenance of public order, the security of the state, and the custody of detainees, with respect to the rights of detainees, particularly as regards the prohibition of all cruel, inhuman and degrading treatment, and . . . inform them of the sanctions to which they become liable in the event that they violate these rights.²¹¹

V. Practice of the International Red Cross and Red Crescent Movement

190. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that instructions and orders shall be given to ensure respect for the law of war including those for the supervision of its execution.²¹²

191. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that “it is extremely important for the members of the armed forces stationed in the Gulf to be aware of their obligations under international humanitarian law. Proper instructions must be issued to this effect.”²¹³

192. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that:

²⁰⁹ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXV, § 2.

²¹⁰ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(5).

²¹¹ IACiHR, Report on the Situation of Human Rights in Argentina, Doc. OEA/Ser.L/V/II.49 Doc. 19 corr.1, 11 April 1980, p. 265.

²¹² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 154.

²¹³ ICRC, Memorandum on the Applicability of International Humanitarian Law, Geneva, 14 December 1990, § IV, *IRRC*, No. 280, 1991, p. 25

The parties to the conflict must ensure that the members of their armed forces as well as all military and paramilitary forces acting under their responsibility are aware of their obligations under international humanitarian law. To that effect, it is essential that specific instructions to ensure respect for such obligations be issued.²¹⁴

193. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that:

The parties concerned must ensure that all the military and paramilitary forces and other militias for whose actions they are responsible are aware of their obligations under international humanitarian law. It is essential that instructions calculated to safeguard respect for those obligations are reiterated.²¹⁵

VI. Other Practice

194. In 1989, in the context of the conflict in El Salvador, following a period of resurgence of violence marked by bomb explosions in a central market and attacks on political figures, military officers and municipal employees, the Chief of Staff of the FMLN publicly recognised that “numerous civilians had fallen victim to its actions and accordingly recommended to its officers and combatants measures to avoid these occurrences in the future”.²¹⁶

B. Principle of Reciprocity

I. Treaties and Other Instruments

Treaties

195. Common Article 1 of the 1949 Geneva Conventions requires parties to respect the provisions of the Geneva Conventions “in all circumstances”.

196. Common Article 2(3) of the 1949 Geneva Conventions provides that:

Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.

197. Article 60(5) of the 1969 Vienna Convention on the Law of Treaties states that:

²¹⁴ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § V, *IRRC*, No. 320, 1997, p. 505.

²¹⁵ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § V, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

²¹⁶ IACiHR, *Annual Report 1988–1989*, Doc. OEA/Ser.L/V/II.76 Doc. 10, 18 September 1989, Chapter IV (El Salvador), p. 166.

Paragraphs 1 to 3 [laying down the principle of reciprocity] do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

198. Article 1(1) AP I requires parties to respect the provisions of AP I “in all circumstances”. Article 1 AP I was adopted by 87 votes in favour, one against and 11 abstentions.²¹⁷

Other Instruments

199. No practice was found.

II. National Practice

Military Manuals

200. Australia’s Commanders’ Guide and Defence Force Manual note that “the ADF obligation to comply with LOAC is not conditional upon an enemy’s compliance; unilateral compliance by the ADF is required”.²¹⁸

201. Belgium’s Law of War Manual states that “the conventional law of war remains, in principle, obligatory between signatory parties, even if one of them violates it”.²¹⁹

202. Canada’s LOAC Manual provides that “the principle of reciprocity refers to the premise that all should be treated as you would like to be treated. Compliance with the LOAC is not only required by law, it is also to our operational advantage.”²²⁰ It further states that “a party to an international armed conflict is bound to comply with the LOAC even if an adverse party breaches the law. Compliance with the law by one party is a strong inducement for the adverse party to comply with the law.”²²¹

203. Canada’s Code of Conduct provides that “CF personnel will treat detained persons properly regardless of how CF personnel may have been treated while in the hands of opposing forces”.²²² It further stresses that “there is no exception to your obligation to follow Canadian law even when confronted with an opposing force which refuses to comply with the Law of Armed Conflict”.²²³

204. Colombia’s Basic Military Manual states that “it is important to note that in IHL the principle of reciprocity does not exist, which means that none of the parties to the conflict can put forward the violations of the enemy as a reason to stop implementing humanitarian norms”.²²⁴

²¹⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.36, 23 May 1977, p. 41.

²¹⁸ Australia, *Commanders’ Guide* (1994), § 1209; *Defence Force Manual* (1994), § 1308.

²¹⁹ Belgium, *Law of War Manual* (1983), p. 18.

²²⁰ Canada, *LOAC Manual* (1999), p. 2-3, § 18, see also Glossary, p. GL-16.

²²¹ Canada, *LOAC Manual* (1999), p. 15-1, § 5.

²²² Canada, *Code of Conduct* (2001), Rule 6, § 12.

²²³ Canada, *Code of Conduct* (2001), Rule 11, § 8.

²²⁴ Colombia, *Basic Military Manual* (1995), p. 35.

205. Ecuador's Naval Manual provides that:

Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them. A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to the rules of humanitarian law that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions.²²⁵

206. Germany's Military Manual states that:

People complying with the provisions of international humanitarian law themselves can expect the adversary to observe the dictates of humanity in an armed conflict. No one shall be guided by the suspicion that soldiers of the other party to the conflict might not observe the rules. Soldiers must treat their opponents in the same manner as they themselves want to be treated.²²⁶

207. Germany's IHL Manual notes that "only those who respect themselves the regulations of international humanitarian law may expect that the adversary also respects them (so-called principle of reciprocity)".²²⁷

208. France's LOAC Teaching Note states that "combatants shall respect at any place and in all circumstances the rules of the law of armed conflict... They may in no case release themselves from those rules, regardless of the framework and the mandate of their mission, even if the enemy does not respect those rules."²²⁸

209. France's LOAC Manual provides that combatants must respect in all circumstances the rules of the law of armed conflict "even if the adversary does not respect these rules".²²⁹

210. Israel's Manual on the Laws of War states that "mutuality is the cardinal basis for the existence of the laws of war. The breakdown of rules anywhere would lead to a deterioration in which each side would respond to the acts of the other."²³⁰

211. The Military Manual of the Netherlands states that "the rules of the law of war must be respected. They must be respected under all circumstances. This means that respect must not be made conditional on the behaviour of the adverse party. In other words: reciprocity may not be used as a measure for respect."²³¹

212. New Zealand's Military Manual states that "generally speaking, a Party to an international armed conflict is bound to comply with the customary law of armed conflict and with its treaty obligations even if an adverse Party breaches the law".²³²

²²⁵ Ecuador, *Naval Manual* (1989), § 6.2.4. ²²⁶ Germany, *Military Manual* (1992), § 1204.

²²⁷ Germany, *IHL Manual* (1996), § 109.

²²⁸ France, *LOAC Teaching Note* (2000), p. 7. ²²⁹ France, *LOAC Manual* (2001), p. 14.

²³⁰ Israel, *Manual on the Laws of War* (1998), p. 4.

²³¹ Netherlands, *Military Manual* (1993), p. IX-1.

²³² New Zealand, *Military Manual* (1992), § 1601.3

213. Spain's LOAC Manual notes that "international treaties and agreements are made up of imperative norms of law . . . They do not lose their validity because one of the opposing parties does not respect them."²³³

214. The UK Military Manual provides that "a belligerent is not justified in declaring itself freed altogether from the obligation to observe the laws of war or any of them on account of their suspected or ascertained violation by his adversary"²³⁴

215. The US Air Force Pamphlet notes that:

The most important relevant treaties, the 1949 Geneva Conventions for the Protection of War Victims, are not formally conditioned on reciprocity. Parties to each Convention "undertake to respect and ensure respect for the present Convention in all circumstances" under Article 1 common to the Conventions. The Vienna Convention On the Law of Treaties, Article 60(5), also recognizes that the general law on material breaches, as a basis for suspending the operation of treaties, does not apply to provisions protecting persons in treaties of a humanitarian character. Yet reciprocity is an implied condition in other rules and obligations including generally the law of armed conflict. It is moreover a critical factor in actual *observance* of the law of armed conflict. Reciprocity is also explicitly the basis for the doctrine of reprisals. Additionally, a few obligations, such as those contained in the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, are even formally conditioned on reciprocal adherence.²³⁵ [emphasis in original]

The Pamphlet further states that "the UN Resolutions and the Geneva Conventions set forth standards regardless of whether observance is reciprocated. Hence, reciprocity is neither a formal condition precedent qualifying the obligation to observe the Conventions, nor does lack of reciprocity excuse failures to comply."²³⁶

216. The US Naval Handbook states that:

Some obligations under the law of armed conflict are reciprocal in that they are binding on the parties only so long as both sides continue to comply with them. A major violation by one side will release the other side from all further duty to abide by that obligation. The concept of reciprocity is not applicable to humanitarian rules of law that protect the victims of armed conflict, that is, those persons protected by the 1949 Geneva Conventions. The decision to consider the United States released from a particular obligation following a major violation by the enemy will be made by the [National Command Authorities].²³⁷

National Legislation

217. No practice was found.

²³³ Spain, *LOAC Manual* (1996), Vol. I, § 1.1.d.(2).

²³⁴ UK, *Military Manual* (1958), § 121.

²³⁵ US, *Air Force Pamphlet* (1976), § 10-1(b).

²³⁶ US, *Air Force Pamphlet* (1976), § 11-5. ²³⁷ US, *Naval Handbook* (1995), § 6.2.4.

National Case-law

218. In the *Rauter case* in 1948, a Special Court in the Netherlands rejected the argument of the defence that the Dutch government in exile and the Dutch population had themselves, previously to the committing of the acts by the accused, violated the laws and customs of war and had thereby relieved the accused of the obligation to abide by such laws and rules.²³⁸ On appeal by the accused, the Special Court of Cassation, in the relevant parts, confirmed the judgement of the trial of first instance and again rejected the defence, which had repeated its plea that the German Reich, and the accused as its executive organ, were relieved of the obligation of abiding by the laws and customs of war and were entitled to commit the acts because they were directed – as “reprisals” – against the Dutch civilian population by individuals of which, previously to the taking of the acts by the accused, violations of the laws of war would have been committed.²³⁹

219. In the *Von Leeb (The High Command Trial) case* in 1948, the US Military Tribunal at Nuremberg stated that “under general principles of law, an accused does not exculpate himself from a crime by showing that another committed a similar crime, either before or after the alleged commission of the crime by the accused”.²⁴⁰

Other National Practice

220. In a report on a symposium on IHL held in Belgium in 1974, a representative of the Belgian Ministry of Justice noted that:

The notion of reciprocity, which has recently again been rejected by the Committee of Experts on Human Rights of the Council of Europe, has several times been mentioned, which appears to be somewhat shocking. In fact, it is difficult to imagine how one could justify “inhumane treatments” under the pretext that the adversary has recourse to them.²⁴¹

221. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India cited Fitzmaurice and stated that:

Reprisals or retaliation under international law are also governed by certain specific principles . . . Reprisals could not involve acts which are *malum in se* such as certain violations of human rights, certain breaches of the laws of war and rules in the nature of *ius cogens*, that is to say obligations of an absolute character compliance with which is not dependent on corresponding compliance by others but is requisite in all circumstances unless under stress of literal *vis major* . . . In other words . . . even where a wrongful act involved the use of a nuclear weapon the reprisal

²³⁸ Netherlands, Special Court (War Criminals) at The Hague, *Rauter case*, Judgement, 4 May 1948.

²³⁹ Netherlands, Special Court of Cassation, *Rauter case*, Judgement, 12 January 1949.

²⁴⁰ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 30 December 1947–28 October 1948.

²⁴¹ Belgium, Ministry of Justice, Note for the Minister of Justice, 18 December 1974, Report on the Practice of Belgium, 1997, Chapter 5.7.

action cannot involve [the] use of a nuclear weapon without violating certain fundamental principles of humanitarian law. In this sense, prohibition of the use of a nuclear weapon in an armed conflict is an absolute one, compliance with which is not dependent on corresponding compliance by others but is a requisite in all circumstances.²⁴²

222. The Report on the Practice of Iraq states that “for the activities which constitute a violation of human rights or the humanitarian law, this can never be reciprocated”. The report cites a speech by the Iraqi President during the Iran–Iraq War, in which he declared that “we do not react in the same way despite the bitterness of their behaviour. We stick to our values and let them stick to their methods, and as a result, history will record our special known values and record their heinous methods.”²⁴³

223. At the CDDH, Mexico stated that “the mandatory nature of humanitarian law does not depend on the observance of its rules by the adverse Party, but stems from the inherently wrongful nature of the act prohibited by international humanitarian law”.²⁴⁴

224. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the Solomon Islands stated that:

The rule elaborated in Art. 1 [common to the 1949 Geneva Conventions] also indicates that reciprocity has no place in the law of armed conflicts . . . The principle of non-reciprocity excludes *a fortiori* recourse to reprisals in relation to the use of nuclear weapons, even against combatants.²⁴⁵

225. On 21 January 1991, in the context of the Gulf War, the UK Minister of Foreign Affairs summoned the Iraqi Ambassador to discuss Iraq’s obligations under international law. According to a statement by an FCO spokesperson following the meeting, “the Ambassador said that Iraq would abide by the Convention and treat POWs well if the Allies avoided civilian targets. Mr Hogg said that we expected unconditional observance of the requirements of the Convention.”²⁴⁶

226. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Central Command . . . forces adhered to . . . fundamental law of war proscriptions in conducting military operations during Operation Desert Storm through discriminating target selection and careful matching of available forces and weapons

²⁴² India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

²⁴³ Report on the Practice of Iraq, 1998, Chapter 2.9, referring to a speech of the President of Iraq, 4 January 1983.

²⁴⁴ Mexico, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, pp. 449–450.

²⁴⁵ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.78.

²⁴⁶ UK, Statement by FCO spokesperson, 21 January 1991, *BYIL*, Vol. 62, 1991, p. 680.

systems to selected targets and Iraqi defenses, without regard to Iraqi violations of its law of war obligations toward the civilian population and civilian objects.²⁴⁷

227. In 1987, an official of a State party to a non-international armed conflict asserted that, as international law had been breached by all the parties to the conflict, it did not have any value.²⁴⁸

III. Practice of International Organisations and Conferences

United Nations

228. In 1994, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights stated that:

The idea of a “linkage” between the provision of humanitarian aid to Srebrenica and the evacuation of Serbs from Tuzla is to be condemned. Compliance with human rights and humanitarian law obligations by one party is not conditional upon compliance by others with their obligations: such obligations are absolute for each party and do not depend on reciprocity.²⁴⁹

Other International Organisations

229. No practice was found.

International Conferences

230. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on activities of the ICRC in which it recalled that the Geneva Conventions “provide essential protection for the human person, constitute solemn commitments *vis-à-vis* the whole international community” and that “the application of the provisions contained therein cannot therefore be subject to reciprocity or to political or military considerations”.²⁵⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

231. In its advisory opinion in the *Namibia case* in 1971, the ICJ noted:

the general principle of law that a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character (as indicated in Art. 60, para. 5, of the [1969] Vienna Convention [on the Law of Treaties]).²⁵¹

²⁴⁷ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 622.

²⁴⁸ ICRC archive document.

²⁴⁹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1994/3, 5 May 1993, § 91.

²⁵⁰ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. I.

²⁵¹ ICJ, *Namibia case*, Advisory Opinion, 21 June 1971, § 96.

232. In its review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber stated that:

The prohibition against attacking the civilian population as such as well as individual civilians must be respected in all circumstances regardless of the behaviour of the other party. The opinion of the great majority of legal authorities permits the Trial Chamber to assert that no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party. The exclusion of the application of the principle of reprisals in the case of such fundamental humanitarian norms is confirmed by Article 1 Common to all Geneva Conventions.²⁵²

233. In its judgement in the *Kupreškić case* in 2000, the ICTY held that:

515. Defence counsel have indirectly or implicitly relied upon the *tu quoque* principle, i.e. the argument whereby the fact that the adversary has also committed similar crimes offers a valid defence to the individuals accused. This is an argument resting on the allegedly reciprocal nature of obligations created by the humanitarian law of armed conflict. This argument may amount to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent. Or it may amount to saying that such breaches, having been perpetrated by the adversary, legitimise similar breaches by a belligerent in response to, or in retaliation for, such violations by the enemy. Clearly, this second approach to a large extent coincides with the doctrine of reprisals, and is accordingly assessed below. Here the Trial Chamber will confine itself to briefly discussing the first meaning of the principle at issue.

516. It should first of all be pointed out that although *tu quoque* was raised as a defence in war crimes trials following the Second World War, it was universally rejected. The US Military Tribunal in the *High Command* trial, for instance, categorically stated that under general principles of law, an accused does not exculpate himself from a crime by showing that another has committed a similar crime, either before or after the commission of the crime by the accused. Indeed, there is in fact no support either in State practice or in the opinions of publicists for the validity of such a defence.

517. Secondly, the *tu quoque* argument is flawed in principle. It envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations. Instead, the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity. This concept is already encapsulated in Common Article 1 of the 1949 Geneva Conventions, which provides that "The High Contracting Parties undertake to respect... the present Convention *in all circumstances*" [emphasis added]. Furthermore, attention must be drawn to a common provision (respectively Articles 51, 52, 131 and 148) which provides that "No High Contracting party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article (i.e. grave breaches)". Admittedly, this provision only refers to State responsibility for grave breaches committed by State agents or *de facto* State agents, or at any rate for grave breaches generating State responsibility (e.g. for an omission by the State to prevent or punish such breaches). Nevertheless, the general notion

²⁵² ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 15.

underpinning those provisions is that liability for grave breaches is absolute and may in no case be set aside by resort to any legal means such as derogating treaties or agreements. *A fortiori* such liability and, more generally, individual criminal responsibility for serious violations of international humanitarian law may not be thwarted by recourse to arguments such as reciprocity.

518. The absolute nature of most obligations imposed by rules of international humanitarian law reflects the progressive trend towards the so-called “humanisation” of international legal obligations, which refers to the general erosion of the role of reciprocity in the application of humanitarian law over the last century. After the First World War, the application of the laws of war moved away from a reliance on reciprocity between belligerents, with the consequence that, in general, rules came to be increasingly applied by each belligerent despite their possible disregard by the enemy. The underpinning of this shift was that it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals *qua* human beings. Unlike other international norms, such as those of commercial treaties which can legitimately be based on the protection of reciprocal interests of States, compliance with humanitarian rules could not be made dependent on a reciprocal or corresponding performance of these obligations by other States. This trend marks the translation into legal norms of the “categorical imperative” formulated by Kant in the field of morals: one ought to fulfil an obligation regardless of whether others comply with it or disregard it.²⁵³

V. Practice of the International Red Cross and Red Crescent Movement

234. The ICRC Commentary on the First Geneva Convention states that IHL treaties are not:

an engagement concluded on a basis of reciprocity, binding each party to the contract only in so far as the other party observes its obligations. [They are] rather a series of unilateral engagements solemnly contracted before the world as represented by the other Contracting Parties. Each State contracts obligations “vis-à-vis” itself and at the same time “vis-à-vis” the others.²⁵⁴

235. In a communication to the press in 2000, the ICRC condemned grave breaches of IHL in Colombia and stated that “international law expressly states that a violation committed by one party does not legitimize similar action by the adversary”.²⁵⁵

VI. Other Practice

236. In 1992, when the issue of the protection of civilians was raised by an ICRC delegate, the representative of an armed opposition group replied: “We

²⁵³ ICTY, *Kupreškić case*, Judgement, 14 January 2000, §§ 515–518.

²⁵⁴ Jean S. Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, p. 25.

²⁵⁵ ICRC, Communication to the Press No. 00/36, Colombia: ICRC condemns grave breaches of international humanitarian law, suspends medical evacuations of wounded combatants, 3 October 2000.

are not the first to start these violations of humanitarian law. It's simply our reply."²⁵⁶

237. In 1993, when the ICRC reminded the parties to an armed conflict that a violation of IHL could not be justified by invoking a violation committed by the enemy, the representative of the authorities of a separatist entity party to an armed conflict replied that it agreed that violations of the laws of war were unacceptable, even if the adversary had itself committed violations.²⁵⁷

C. Legal Advisers for Armed Forces

I. *Treaties and Other Instruments*

Treaties

238. Article 82 AP I provides that:

The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.

Article 82 AP I was adopted by consensus.²⁵⁸

Other Instruments

239. No practice was found.

II. *National Practice*

Military Manuals

240. Australia's Commanders' Guide states that:

In some situations, legal advisers are available to assist commanders in ensuring compliance. In contrast, an aircraft pilot, a company commander or a commander of a RAN vessel does/may not have this direct access; consequently, it is essential that they be adequately trained in LOAC issues.²⁵⁹

The manual also states that "all operations plans and ROE should be reviewed by ADF legal advisers experienced in operations law. In addition, targeting lists and individual missions are to be carefully scrutinised by military planners and their operations law advisers."²⁶⁰

241. Australia's Defence Force Manual states that:

²⁵⁶ ICRC archive document. ²⁵⁷ ICRC archive document.

²⁵⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 256.

²⁵⁹ Australia, *Commanders' Guide* (1994), § 1206.

²⁶⁰ Australia, *Commanders' Guide* (1994), § 1205.

As appropriate, legal advisers should be available to assist commanders in ensuring compliance. In contrast, an aircraft pilot, a company commander or a commander of a RAN vessel may not have this direct access; consequently, it is essential that they have a sound knowledge and understanding of LOAC issues.²⁶¹

242. Australia's Defence Training Manual states that:

In accordance with the requirements of Article 82 of Additional Protocol One, the ADF is to ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the [Geneva] Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject.²⁶²

It further states that:

The role of the legal adviser is to provide advice which will assist the commander to execute his mission in compliance with LOAC. It is concerned with the application and the respect for the rules of LOAC. The legal adviser will be called upon to:

- a. actively participate in the preparation of exercises, the development of plans for military operations, to give his evaluation of the legal consequences of their execution, particularly with respect to the methods planned and the means to be used;
- b. supervise the organisation of instruction in subordinate units, and to ensure that the levels of understanding are obtained;
- c. ensure that instruction on the subject of LOAC is carried out on a continuous basis;
- d. provide expertise on particular problems (for example, by developing a legal profile which will assist with weapons and target selection);
- e. ensure the functioning of the procedure of legal consultation, particularly at subordinate levels; and
- f. advise commanders of their obligations under the terms of Article 87 of Additional Protocol I.²⁶³

243. Belgium's Law of War Manual, referring to Articles 47 and 49 GC I, 48 and 50 GC II, 127 and 129 GC III, 144 and 146 GC IV and 82 API, provides that "the States signatory to the [Geneva] Conventions undertook to take a series of measures to promote respect thereof", among which it lists "the appointment of legal advisers to military commands".²⁶⁴

244. Cameroon's Instructors' Manual states that:

The profile of a legal adviser is defined as follows:

- having undergone thorough training in International Humanitarian Law and the Law of War for legal advisers,
- holding a degree in public law (or, as a minimum, be well versed in legal matters),
- possessing a sound knowledge of public international law,

²⁶¹ Australia, *Defence Force Manual* (1994), § 1305.

²⁶² Australia, *Defence Training Manual* (1994), § 16.

²⁶³ Australia, *Defence Training Manual* (1994), § 17.

²⁶⁴ Belgium, *Law of War Manual* (1983), p. 55.

- having undergone high-level military training and holding a senior military rank.

Within the General Staff, legal advisers provide high-level training for senior officers.

They may also carry out normal General Staff duties and, in particular, ensure the legality of orders related to property that enjoys special protection.

In addition to their General Staff duties, legal advisers may be assigned special tasks.²⁶⁵

245. Canada's LOAC Manual provides that:

As a party to AP I, Canada has the obligation to ensure that legal advisers are available to advise military commanders on the application of the LOAC and the appropriate instruction to be given to the CF. Legal officers with the Office of the Judge Advocate General fulfil this mandate.²⁶⁶

246. France's LOAC Manual provides that "legal advisers present in external areas of operations are required to assist the command in order to take into account these legal parameters [i.e. of the law of armed conflict] in the planning and conduct of operations".²⁶⁷

247. Germany's Military Manual states that:

A lawyer who is qualified to exercise the function of a judge is assigned to every military commander at the division level and above to perform the following tasks:

- to advise the commander (and his subordinate disciplinary superiors) in all matters pertinent to the military law and the international law;
- to examine military orders and instructions on the basis of legal criteria;
- to participate in military exercises (in his wartime assignment) as a legal officer whose duties include giving advice on matters pertinent to international law; and
- to give legal instruction to soldiers of all ranks, particularly including the further education of officers . . .

The Legal Adviser has direct access to the commander to whom he is assigned.²⁶⁸

248. Hungary's Military Manual provides for a series of administrative measures including translation of legal texts and the presence of legal advisers, because "everybody must know the rules".²⁶⁹

249. Italy's Peace Operations Manual states that the availability of a legal adviser is always necessary and useful in national detachments of peacekeeping operations in order to dissipate any doubt on the interpretation or applicability of international law.²⁷⁰

²⁶⁵ Cameroon, *Instructors' Manual* (1992), p. 134, § 461.3.

²⁶⁶ Canada, *LOAC Manual* (1999), p. 15-2, § 8.

²⁶⁷ France, *LOAC Manual* (2001), preamble, p. 7.

²⁶⁸ Germany, *Military Manual* (1992), §§ 146 and 147.

²⁶⁹ Hungary, *Military Manual* (1992), p. 31.

²⁷⁰ Italy, *Peace Operations Manual* (1994), Part III, No. 1a(4).

250. The Military Manual of the Netherlands notes that “States must ensure that legal advisers are available to advise military commanders concerning the application of the law of war”.²⁷¹

251. New Zealand’s Military Manual states that “the purpose of this . . . Manual is to provide interim guidance to members of the New Zealand Defence Force, particularly to legal officers engaged in advising commanders, on the customary and treaty law applicable in armed conflict”.²⁷² It also states that:

Some armed forces have trained legal advisers attached to their higher echelons and these officers are competent to indicate what the law is as it affects a particular operation or whether a particular operation or whether a particular act is legally acceptable. By AP I Art. 82 the parties to the Protocol are obliged to ensure that such advisers are available . . .

The Protocol does not indicate the level of command to which these advisers are to be attached, merely providing that, “when necessary”, they will be available to advise “military commanders at the appropriate level”. The requirement only relates to advice concerning the application of the Geneva Conventions and the Protocol. Art. 82 also provides for these legal advisers being employed to advise on “the appropriate instruction to be given to the armed forces” on these documents.²⁷³

252. Nigeria’s Military Manual notes that Part V Section I of API “recommends for legal advisers to be assigned to Commanders at all time[s]”.²⁷⁴ It also states that “[Article 82] of Protocol I provides that Commanders may be assisted by special legal advisers . . . where there’s need”.²⁷⁵

253. Russia’s Military Manual states that:

As far as questions of application of the rules of IHL are concerned, the Commanders . . . shall, when necessary, turn to the assistance of legal advisers (art. 82 of Additional Protocol I). The officers of the Legal Service have been entrusted to perform this function by an order of the USSR Ministry of Defence.²⁷⁶

254. Spain’s LOAC Manual, referring to Article 82 AP I, provides that “the State must ensure that Military Commanders, at the appropriate level, can count on the legal advice necessary for the application of the Law of War and its instruction to the Armed Forces”.²⁷⁷ It further states that “when legal advisers are available, they shall cooperate in the work of the Chiefs of Staff and, if necessary, perform specific tasks”.²⁷⁸ Annex A to the manual, referring to the 1907 Hague Convention IV and the Nuremberg trials, adds the following:

²⁷¹ Netherlands, *Military Manual* (1993), p. IX-1

²⁷² New Zealand, *Military Manual* (1992), Introduction, p. xxxiv.

²⁷³ New Zealand, *Military Manual* (1992), § 1604, including footnote 11, see also § 1710.1, footnote 68.

²⁷⁴ Nigeria, *Military Manual* (1994), p. 9, § 9e.

²⁷⁵ Nigeria, *Military Manual* (1994), p. 31, § 4.

²⁷⁶ Russia, *Military Manual* (1990), § 16.

²⁷⁷ Spain, *LOAC Manual* (1996), Vol. I, § 11.3.b.(4).

²⁷⁸ Spain, *LOAC Manual* (1996), Vol. I, § 10.4.c.(5).

Protocol I additional to the 1949 Geneva Conventions, specifically Article 82 thereof, provides that legal advisers shall be available to the Armed Forces. That obligation is binding at all times on the High Contracting Parties and in time of armed conflict on those involved in the conflict in particular.

This Article represents an innovation in terms of the previous conventions governing the law of armed conflicts. The origins of the obligation imposed in Article 82 can nevertheless be traced back to previous treaties.

...

As has been demonstrated... Article 82 [AP I] obliges the contracting parties to ensure that legal advisers are available within the Armed Forces with a view to the application of the Geneva Conventions and the Additional Protocols and to the instruction to be given in the Army on the subject. Although the article is vaguely worded, the competent authorities have discretion only with regard to the terms and conditions on which the advice is given, the hierarchical level of the advisers and the method by which they are recruited. As has been pointed out by one author, "the article in question creates the obligation for the high contracting parties to adopt the adequate rules to ensure that legal advisers are available to the armed forces".

...

In the case of Spain, the following formula has been adopted within the limits of the methods to implement the terms of Article 82:

1. Existence of a specific technical corps of legal experts specifically belonging to the Armed Forces.

...

3. The existence of a military legal corps has undeniable advantages, since advice is not provided only in the command decision-making phase but also with regard to the disciplinary and penal repression of violations of the Law of Armed Conflict.²⁷⁹

255. Sweden's IHL Manual states that:

A generally accepted opinion is that proper application of the humanitarian legal rules depends to a large degree on the states' genuinely following the rules laid down in Article 82 of Additional Protocol I.

Article 82 states that "The High Contracting Parties at all times, and the Parties to the conflict in time of armed conflict, shall ensure that legal advisers are available, when necessary, to advise military commanders at the appropriate level on the application of the [Geneva] Conventions and this Protocol and on the appropriate instruction to be given to the armed forces on this subject". This is an obligation that Sweden through her ratification of the Protocol has undertaken to put into practice.

The legal advisers associated with the armed forces shall thus act both in peace and in war at appropriate military levels. They shall give general advice concerning instruction in international law within military defence. In this way they will also play a not unimportant part in such training within the civilian parts of the total defence system. Further, they shall give special guidance concerning the application of the rules of international law in both preparations for and the execution of military operations...

²⁷⁹ Spain, *LOAC Manual* (1996), Vol. I, Annex A.

It is . . . crucial that legal advisers, even in peacetime, can ensure that international law is included in instruction and planning.²⁸⁰

The manual also quotes a decision of the Swedish government of 1990 concerning advisers on international law and the text of the Total Defence Ordinance relating to International Humanitarian Law, containing similar provisions, notably that:

The wartime organization of the armed forces shall have appointments for advisers on international law . . . They shall be stationed at high-level staffs and shall have the task of advising military leaders as to how the rules of international law in war . . . shall be applied . . .

The peacetime organization of the armed forces shall have an adviser on international law with the Supreme Commander and one with every General Officer commanding Military Command Area.

The advisers on international law shall participate in the instruction of personnel of the armed forces as to how the rules of international law in war . . . are to be applied.²⁸¹

256. The US Operational Law Handbook states that “a successful deployment legal assistance program will generally involve: 1. Advance planning by the legal assistance officer(s) and other judge advocates that may become involved in providing assistance to deploying soldiers.”²⁸² Appendix 4 to Annex E to CJTF Tandem Thrust-92 Explan 1-92 (U) Legal (U) states that:

The CJTF Staff Judge Advocate will:

- (1) (U) Provide legal assistance to CJTF and his staff.
- (2) (U) Serve as a single point of contact for operational law matters within the JTF AOR [Area of Responsibility].
- (3) (U) Monitor foreign criminal jurisdiction matters with respect to U.S. personnel with the JTF AOR.
- (4) (U) Ensure that all plans, policies, directives, rules of engagement, and targeting are consistent with the DoD Law of War Program and domestic international law.²⁸³

The document further states that “the CJTF SJA [Staff Judge Advocate] is the Commander’s principle advisor in all matters pertaining to the LOAC”.²⁸⁴ The deployment checklist, dealing with “international law considerations” at the post-alert stage, states that “the International/Operational Law Officer should be the SJA office’s point of contact at the EOC [Emergency Operations Center]

²⁸⁰ Sweden, *IHL Manual* (1991), Section 9, pp. 163 and 164.

²⁸¹ Sweden, *IHL Manual* (1991), Section 9, p. 166 and Appendix (Sections 27 and 28), p. 185.

²⁸² US, *Operational Law Handbook* (1993), p. R-195.

²⁸³ US, *Operational Law Handbook* (1993), Appendix 4 to Annex E to CJTF Tandem Thrust-92 Explan 1-92 (U), Legal (U), § 1(b).

²⁸⁴ US, *Operational Law Handbook* (1993), Appendix 4 to Annex E to CJTF Tandem Thrust-92 Explan 1-92 (U) Legal (U), § 2(b)(3)(a).

and should keep the office advised at all times. He should attend all EOC briefings.”²⁸⁵ The post-deployment checklist states that:

The early stages of a deployment will usually have a multitude of issues of International/OPLAW [operational law] concern. Close coordination/contact must be maintained with the operational section . . . Trial counsel or legal advisers assigned to each subordinate unit (usually Brigade size units) should watch for potential International/OPLAW issues in their units.²⁸⁶

Regarding Special Operations Forces, the Handbook provides for the assignment of a Judge Advocate to each Special Forces Group, a Psychological Operations Group, a Ranger Regiment and a Special Operations Aviation Regiment, stating that “these attorneys are responsible for providing the legal advice a SO [Special Operations] unit commander requires to perform his assigned mission”.²⁸⁷ It adds that:

SO missions are politically sensitive, particularly in a peacetime or low-intensity conflict environment, and thus, the area of SO is fraught with potential legal pitfalls. The commander must consider not only the effect of traditional law of war requirements on his operation, but also the requirements of US law, such as security assistance and intelligence statutes, and international law in the form of mutual defence treaties and host nation support agreements.²⁸⁸

257. The US Naval Handbook provides that “Navy and Marine Corps judge advocates responsible for advising operational commanders are especially trained to provide officers in command with advice and assistance in the law of armed conflict on an independent and expeditious basis”.²⁸⁹

National Legislation

258. The Order on Study and Dissemination of IHL of Belarus, with reference to Article 82 API, entrusts the military law section of the Ministry of Defence’s legal department with the coordination of the activities of the legal advisers of the armed forces.²⁹⁰

259. Sweden’s Total Defence Ordinance relating to IHL provides that:

The wartime organization of the Armed Forces shall have appointments for advisers on international law of the number decided by the Armed Forces. They shall be stationed at high-level staffs and shall have the task of advising military leaders as to how the rules of international law in war and during neutrality shall be applied. The advisers shall also take part in the planning work of the military staffs.

The Ordinance further states that “the peacetime organization of the Armed Forces shall have an adviser on international law within the Armed Forces and

²⁸⁵ US, *Operational Law Handbook* (1993), p. Mc-12.

²⁸⁶ US, *Operational Law Handbook* (1993), p. Mc-14.

²⁸⁷ US, *Operational Law Handbook* (1993), p. N-146.

²⁸⁸ US, *Operational Law Handbook* (1993), p. N-146.

²⁸⁹ US, *Naval Handbook* (1995), § 6.1.2.

²⁹⁰ Belarus, *Order on Study and Dissemination of IHL* (1997), § 4.

two with every Commander [and] Joint Command". Moreover, the Ordinance provides for two appointments of advisers on international law for the wartime organization of every director of a regional civil defence and for two appointments of advisers on international law for the wartime organization of every county administrative board. It stipulates that the advisers on international law shall be lawyers.²⁹¹

260. Russia's Order on the Publication of the Geneva Conventions and Protocols requires that Vice-Ministers of Defence and commanders at several levels "charge the officers of the Legal Service of the Ministry of Defence with the duty of legal advisers foreseen by art. 82 of Protocol I".²⁹²

National Case-law

261. No practice was found.

Other National Practice

262. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Austria pledged to "strengthen and review the system of legal advisers established under Article 82 of [AP I] and to undertake to include such advisers in Austrian units participating in international peace-support operations".²⁹³

263. In 1999, the Ministry of Foreign Affairs of Burkina Faso and the ICRC, in cooperation with the Burkinabé Red Cross Society, held the first national seminar on implementation of IHL. The seminar, *inter alia*, urged Burkina Faso to appoint legal advisers to the armed forces.²⁹⁴

264. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Burkina Faso pledged to "appoint legal advisers in the armed forces".²⁹⁵

265. In 1999, at a seminar on national implementation of IHL, organised by the ICRC, the Gambia Red Cross Society and the Gambian Department of State for Justice, the participants encouraged the authorities, *inter alia*, to appoint legal advisers to the armed forces.²⁹⁶

266. The Report on the Practice of India states that:

As regards the legal advice on matters regarding international humanitarian law, it is the responsibility of [the] Judge Advocate General. He is supposed to advise the higher military authorities on military, martial and international law related issues referred to him. The Army Rules also provide for reference of legal questions including questions involving [the] interpretation and application of humanitarian

²⁹¹ Sweden, *Total Defence Ordinance relating to IHL* (1990), Sections 27–32.

²⁹² Russia, *Order on the Publication of the Geneva Conventions and Protocols* (1990), § 2.

²⁹³ Austria, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

²⁹⁴ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 16.

²⁹⁵ Burkina Faso, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

²⁹⁶ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 28.

law to Deputy Judges Advocate General as well as other subordinate legal personnel within the armed forces.²⁹⁷

267. According to the Report on the Practice of Israel, the International Law Department of the IDF is responsible for advising all military commanders on the application of the laws of war in the field.²⁹⁸

268. In 1999, at a seminar on implementation of IHL organised by the Kenyan Attorney-General's chambers and the ICRC, the participants encouraged the authorities, *inter alia*, to step up IHL training for legal advisers to the armed forces.²⁹⁹

269. In 1999, at a seminar on national implementation of IHL organised by Malawi's Ministry of Defence, the Law Commissioner, the ICRC and the National Red Cross Society, the participants urged the authorities, *inter alia*, to provide for the appointment and training of personnel qualified in IHL, including legal advisers to the armed forces.³⁰⁰

270. On the basis of an interview with high-ranking officers of the army of the Netherlands, the Report on the Practice of the Netherlands states that the Royal Netherlands Army has legal advisers at all levels higher than brigade level.³⁰¹

271. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Niger pledged to "appoint legal advisers at all levels of the armed forces".³⁰²

272. The 1979 version of the US Department of Defense Directive on the Law of War Program states that:

The DoD General Counsel shall provide overall legal guidance within the Department of Defense pertaining to the DoD law of war program, to include review of policies developed in connection with the program and coordination of special legislative proposals and other legal matters with other Federal departments and agencies.³⁰³

273. In 1987, a Deputy Legal Adviser of the US Department of State, referring to Articles 80–85 AP I, affirmed that "we support the principle that legal advisers be made available, when necessary, to advise military commanders at the appropriate level on the application of these principles".³⁰⁴

²⁹⁷ Report on the Practice of India, 1997, Chapter 6.11.

²⁹⁸ Report on the Practice of Israel, 1997, Chapter 6.6.

²⁹⁹ ICRC, Advisory Service, 1999 Annual Report, Geneva, 2000, p. 42.

³⁰⁰ ICRC, Advisory Service, 1999 Annual Report, Geneva, 2000, p. 44.

³⁰¹ Report on the Practice of Netherlands, 1997, Interview with two high-ranking officers of the Royal Netherlands Army staff, both legal advisers, 15 April 1997, Chapter 6.6.

³⁰² Niger, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

³⁰³ US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, Section E(2)(d).

³⁰⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols

274. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

The Office of General Counsel of the Department of Defense (DOD), as the chief DOD legal office, provided advice to the Secretary of Defense, the Deputy Secretary of Defense, the Under Secretary of Defense for Policy, other senior advisers to the Secretary and to the various components of the Defense legal community on all matters relating to Operations Desert Shield and Desert Storm, including the law of war. For example, the Secretary of Defense tasked the General Counsel to review and opine on such diverse issues as the means of collecting and obligating for defense purposes contributions from third countries; the War Powers Resolution; DOD targetting policies; the rules of engagement; the rules pertinent to maritime interception operations; issues relating to the treatment of prisoners of war; sensitive intelligence and special access matters; and similar matters of the highest priority to the Secretary and DOD. In addition, military judge advocates and civilian attorneys with international law expertise provided advice on the law of war and other legal issues at every level of command in all phases of Operations Desert Shield and Desert Storm. Particular attention was given to the review of target lists to ensure the consistency of targets selected for attack with United States law of war obligations.³⁰⁵

275. The 1998 version of the US Department of Defense Directive on the Law of War Program provides that the General Counsel of the Department of Defense shall "establish a DoD Law of War Working Group" which shall "provide advice to the General Counsel on legal matters covered by this Directive".³⁰⁶ It also states that the Heads of the Department of Defense Components shall "ensure that qualified legal advisers are immediately available at all levels of command to provide advice about law of war compliance during planning and execution of exercises and operations".³⁰⁷ The Directive further provides that the Commanders of the Combatant Commands shall "designate the command legal adviser to supervise the administration of those aspects of this program dealing with possible, suspected, or alleged enemy violations of the law of war".³⁰⁸ Moreover, the Commanders of the Combatant Commands shall "ensure all plans, policies, directives, and rules of engagement issued by the command and its subordinate commands and components are reviewed by legal advisers to ensure their consistency with this Directive and the law of war".³⁰⁹

Additional to the 1949 Geneva Conventions, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

³⁰⁵ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 617.

³⁰⁶ US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(1)(2).

³⁰⁷ US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(3)(3).

³⁰⁸ US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(8)(3).

³⁰⁹ US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(8)(6).

276. In 1993, during a debate in the Sixth Committee of the UN General Assembly on the UN programme of assistance in the teaching, study, dissemination and wider appreciation of international law, the representative of Trinidad and Tobago stated that “her delegation noted the growing interest in the legal aspects of peacekeeping operations. Legal advisers attached to such operations should be equipped to tackle the legal problems that might arise.”³¹⁰

III. Practice of International Organisations and Conferences

277. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

278. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

279. The ICRC Commentary on the Additional Protocols states with respect to Article 82 AP I that:

The obligatory character of the present provision was maintained [at the adoption of the Article at the CDDH]. The word “ensure” is a term sometimes used in the Conventions; it means that the Party in question must make sure that the task is executed. There is therefore no justification for thinking that the task itself might be optional. To be more precise, Article 82 creates the obligation for the Parties to the Protocol to adopt all appropriate regulations to ensure that legal advisers are available to the armed forces. The fact that the conditions for the use and allocation of these advisers are regulated in particularly flexible terms (“when necessary”, “at the appropriate level”) does not in any way alter the fact that the creation of the post of legal adviser is obligatory.³¹¹

280. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that legal advisers shall be available, when necessary, to advise military commanders at the appropriate level on the application of the law of war.³¹² They also teach that:

To solve specific problems, the superior can:

- a) ask for legal advice;
- b) seek the participation of a legal adviser in the theoretical training;

³¹⁰ Trinidad and Tobago, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/48/SR.33, 19 November 1993, § 11.

³¹¹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 3344.

³¹² Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 156.

- c) make a legal adviser participate in normal staff work (e.g. for drafting and/or reviewing orders and instructions, for advice with regard to specifically protected objects).³¹³

VI. Other Practice

281. No practice was found.

D. Instruction in International Humanitarian Law within Armed Forces

General

I. Treaties and Other Instruments

Treaties

282. Article 26 of the 1906 GC provides that “the signatory governments shall take the necessary steps to acquaint their troops, and particularly the protected personnel, with the provisions of this convention and to make them known to the people at large”.

283. Article 27 of the 1929 GC provides that “the High Contracting Parties shall take the necessary steps to instruct their troops, and in particular the personnel protected, in the provisions of the present Convention, and to bring them to the notice of the civil population”.

284. Articles 47 GC I, 48 GC II, 127 GC III and 144 GC IV provide that:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military . . . instruction, so that the principles thereof may become known to the entire population, in particular the armed fighting forces, the medical personnel and the chaplains.

285. Article 25 of the 1954 Hague Convention provides that:

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Convention and the Regulations for its execution as widely as possible in their respective countries. They undertake, in particular, to include the study thereof in their programmes of military . . . training, so that its principles are made known . . . especially the armed forces and personnel engaged in the protection of cultural property.

286. Article 83 AP I provides that:

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction.

³¹³ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 285.

Article 83 AP I was adopted by consensus.³¹⁴

287. Article 19 AP II provides that “this Protocol shall be disseminated as widely as possible”. Article 19 AP II was adopted by consensus.³¹⁵

288. Article 6 of the 1980 CCW provides that:

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate this Convention and those of its annexed Protocols by which they are bound as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction, so that those instruments may become known to their armed forces.

289. Article 14(3) of the 1996 Amended Protocol II to the CCW provides that:

Each High Contracting Party shall also require that its armed forces issue relevant military instructions and operating procedures and that armed forces personnel receive training commensurate with their duties and responsibilities to comply with the provisions of this Protocol.

290. Article 30 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

2. The Parties shall disseminate this Protocol, as widely as possible, both in time of peace and in time of armed conflict.
3. Any military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to the application of this Protocol, shall be fully acquainted with the text thereof. To this end the Parties shall, as appropriate:
 - (a) incorporate guidelines and instructions on the protection of cultural property in their military regulations;
 - (b) develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes;
 - (c) communicate to one another, as soon as possible, through the Director-General, information on the laws, administrative provisions and measures taken under sub-paragraphs (a) and (b).

Other Instruments

291. Article 20 of the 1956 New Delhi Draft Rules provides that “all States or Parties concerned shall make the terms of the provisions of the present rules known to their armed forces”.

292. Article 3(2) of the 1986 Statutes of the International Red Cross and Red Crescent Movement, dealing with tasks of the National Red Cross and Red Crescent Societies, provides that the National Societies “disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect”.

293. Article 5(2)(g) of the 1986 Statutes of the International Red Cross and Red Crescent Movement, in the context of the tasks of the ICRC, provides that

³¹⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 27 May 1977, p. 260.

³¹⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.53, 6 June 1977, p. 151.

“the role of the International Committee, in accordance with its Statutes, is in particular: . . . to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof”.

294. Paragraph 19 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

Governments and law enforcement agencies shall ensure that all law enforcement officials are provided with training and are tested in accordance with appropriate proficiency standards in the use of force. Those law enforcement officials who are required to carry firearms should be authorized to do so only upon completion of special training in their use.

295. Paragraph 20 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

In the training of law enforcement officials, Governments and law enforcement agencies shall give special attention to issues of police ethics and human rights, especially in the investigative process, to alternatives to the use of force and firearms, including the peaceful settlement of conflicts, the understanding of crowd behaviour, and the methods of persuasion, negotiation and mediation, as well as to technical means, with a view to limiting the use of force and firearms. Law enforcement agencies should review their training programmes and operational procedures in the light of particular incidents.

296. Paragraph 13 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that:

The parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law and the terms of the present agreement, especially among combatants. This shall be done in particular:

- by providing appropriate instruction on the rules of international humanitarian law to all units under their command, control or political influence, and to paramilitary or irregular units not formally under their command, control or influence;
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
- via articles in the press, and radio and television programmes prepared also in cooperation with the ICRC and broadcast simultaneously;
- by distributing ICRC publications.

297. Paragraph 4 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that:

The parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law and the terms of the present agreement, especially among combatants. This shall be done in particular:

- by providing appropriate instruction on the rules of international humanitarian law to all units under their command, control or political influence;
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
- by distributing ICRC publications.

298. In Paragraph II(10) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina, the ICRC requested that the parties “undertake to ensure that the principles and rules of international humanitarian law and, in particular, [the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina] are known to all combatants”.

299. Paragraph IV of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina states that “the ICRC considers it essential to launch a major *information campaign* without delay in order to ensure that all combat units are aware of the humanitarian rules governing the conduct of hostilities”. (emphasis in original)

300. Paragraph 17 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that “States shall disseminate these rules, make them known as widely as possible in their respective countries and include them in their programmes of military . . . instruction”.

301. Paragraph 29 of the 1994 CSCE Code of Conduct provides that “the participating States will make widely available in their respective countries the international humanitarian law of war. They will reflect, in accordance with national practice, their commitments in this field in their military training programmes and regulations”.

302. Paragraph 30 of the 1994 CSCE Code of Conduct provides that “each participating State will instruct its armed forces personnel in international humanitarian law, rules, conventions and commitments governing armed conflict”.

303. Paragraph 34 of the 1994 CSCE Code of Conduct provides that:

Each participating State will ensure that its armed forces are, in peace and in war, commanded, manned, trained and equipped in ways that are consistent with the provisions of international law and its respective obligations and commitments related to the use of armed forces in armed conflict, including as applicable the Hague Conventions of 1907 and 1954, the Geneva Conventions of 1949 and the 1977 Protocols Additional thereto, as well as the 1980 Convention on the Use of Certain Conventional Weapons.

304. Section 3 of the 1999 UN Secretary-General’s Bulletin provides that “the United Nations also undertakes to ensure that members of the military personnel of the force are fully acquainted with the principles and rules of those international instruments [principles and rules of the general conventions applicable to the conduct of military personnel]”.

305. Paragraph 52 of the 2000 Cairo Plan of Action urges States “to implement international humanitarian law in full, in particular by... ensuring that international humanitarian law is fully integrated into the training programmes and operational procedures of armed forces and the police force”.

II. National Practice

Military Manuals

306. Numerous States have issued military manuals as an educational tool for their armed forces, including Argentina, Australia, Belgium, Benin, Bosnia and Herzegovina, Burkina Faso, Cameroon, Canada, China, Colombia, Congo, Croatia, Dominican Republic, Ecuador, El Salvador, France, Germany, Hungary, India, Indonesia, Israel, Italy, Japan, Kenya, South Korea, Kuwait, Kyrgyzstan, Lebanon, Madagascar, Mali, Morocco, Netherlands, New Zealand, Nicaragua, Nigeria, Peru, Philippines, Romania, Russia, Rwanda, Senegal, South Africa, Spain, Sweden, Switzerland, Tajikistan, Togo, Uganda, UK, Uruguay, US and SFRY (FRY).³¹⁶

307. Argentina’s Navy Regulations state that “an adequate knowledge of the relevant rules of international law, as well as of relevant conventions, must be demanded at all levels”.³¹⁷

308. Argentina’s Law of War Manual states that its objectives include to:

1. Disseminate lawful methods and means of warfare.
2. Disseminate the rules regulating the conduct of the military forces in operation.
3. Disseminate the rules that the military forces must observe in their relations with the enemy populations and the occupied territories.³¹⁸

The manual also points out that the duty to disseminate the Additional Protocols and to train qualified persons applies already in peacetime.³¹⁹

309. Australia’s Commanders’ Guide stipulates that ADF members “are to be trained in [LOAC] basic principles and therefore avoid breaches of these laws”.³²⁰ It also states that “the training adviser for LOAC training in the ADF is the Director-General of Defence Force Legal Services”.³²¹

310. Australia’s Defence Force Manual states that ADF members “are to be trained in [LOAC] basic principles and avoid breaches of these laws”.³²²

³¹⁶ The full references for the military manuals of these States can be found in the list of Military Manuals at the end of this publication.

³¹⁷ Argentina, *Navy Regulations* (1986), Article 11.702.014.

³¹⁸ Argentina, *Law of War Manual* (1989), Introduction, p. IX.

³¹⁹ Argentina, *Law of War Manual* (1989), Annex 9, § 9.

³²⁰ Australia, *Commanders’ Guide* (1994), § 1202.

³²¹ Australia, *Commanders’ Guide* (1994), § 109.

³²² Australia, *Defence Force Manual* (1994), § 1302.

311. Australia's Defence Training Manual states that:

4. ... the Government of Australia is required to disseminate the text of the conventions [Geneva Conventions, AP I and AP II, and 1907 Hague Convention (IV)] as widely as possible, so that the principles become known to the members of the ADF...
5. The aim of this Instruction is to set out LOAC training policy and objectives for the ADF...
6. The training adviser for LOAC training is the Director-General of Defence Force Legal Services...
7. The requirement for training in LOAC in the Australian Defence Force is based on the following considerations:
 - a. Australia is bound by the Hague and Geneva Conventions and their Additional Protocols to disseminate their texts for study by the military.³²³

312. Belgium's Law of War Manual states that "the study [of the law of war] is required for those who may be concerned by its provisions".³²⁴ It further states that "States signatory to the [Geneva] Conventions undertook to take a series of measures to promote the respect thereof", among which it lists "the widest dissemination possible of the content of the Conventions... among military personnel".³²⁵

313. Belgium's LOAC Teaching Directive states that "the dissemination of the LOAC is a legal obligation fulfilled by incorporating its instruction in military teaching programmes and by training the personnel".³²⁶ The Directive refers to the teaching of the Geneva Conventions, AP I and AP II.³²⁷

314. Belgium's Teaching Manual for Soldiers states that "every soldier must know the essential rules of the law of war... and their meaning in order to be able to apply them".³²⁸ It further states that "since respect for humanitarian rules depends on the degree of discipline of a unit, their instruction is logically included in general military instruction".³²⁹

315. Benin's Military Manual provides that "the law of war must be incorporated in the military instruction programmes in the different military units".³³⁰ It adds that "the instruction of individual combatants is a priority. The aim is to develop automatic behaviours. Such automatic behaviours shall: be obtained by an individual instruction and practice; be controlled during combat exercises."³³¹

316. Cameroon's Disciplinary Regulations states that:

The military commander must incorporate in his programmes the legal problems that shall permit all members of the Armed Forces not only to realistically complete

³²³ Australia, *Defence Training Manual* (1994), §§ 4-7.

³²⁴ Belgium, *Law of War Manual* (1983), p. 2.

³²⁵ Belgium, *Law of War Manual* (1983), p. 55.

³²⁶ Belgium, *LOAC Teaching Directive* (1996), Section 1.

³²⁷ Belgium, *LOAC Teaching Directive* (1996), preamble.

³²⁸ Belgium, *Teaching Manual for Soldiers* (undated), p. 1.

³²⁹ Belgium, *Teaching Manual for Soldiers* (undated), p. 4.

³³⁰ Benin, *Military Manual* (1995), Fascicule II, p. 15.

³³¹ Benin, *Military Manual* (1995), Fascicule II, p. 16.

their knowledge of the international law of war, but also to solve, in time of peace, problems he will face in case of armed conflict. This instruction, in addition to military training, must be the object of instruction sessions in all military units and schools.³³²

317. Cameroon's *Instructors' Manual* states that "the teaching and dissemination of the Law of War is of prime importance to Cameroon, in civilian as well as military circles".³³³ It further states that "each member [of the armed forces] shall receive an instruction in accordance with . . . his function . . . Instruction in the law of war must be specific, simple and must refer to concrete situations."³³⁴

318. Canada's *Unit Guide* states that:

1. The aim of this manual is to acquaint all ranks with the principles of the Geneva Conventions for the Protection of War Victims signed on August 12, 1949.
2. Each of the 1949 Geneva Conventions contains a provision requiring participating nations to distribute the text of the Convention as widely as possible and, in particular, to include a study of these texts in programmes of military instruction.³³⁵

319. Canada's *LOAC Manual* notes that it is designed "to be used as the main source for the preparation of lesson plans required for the training of all members of the CF on the LOAC".³³⁶ It also states that:

The most important factor in ensuring that the LOAC is applied by all parties to an armed conflict is knowledge of the law. Canada has the obligation, as a party to the Additional Protocol I to the Geneva Conventions (AP I), to instruct the CF on the LOAC, in time of peace as well as in time of armed conflict. Canada also has the obligation to include the study of LOAC in military instruction programmes.³³⁷

320. Canada's *Code of Conduct* states that:

CF members are not expected to know all the details of the various treaties and international customs that make up the Law of Armed Conflict. They are, however, expected to know at least the basic principles which, when followed, will ensure CF members carry out their duties in accordance with the spirit and principles of the Law of Armed Conflict. These principles of the Law of Armed Conflict are set out in the CF Code of Conduct.³³⁸

The Code of Conduct further states that "it is CF policy to respect and abide by the Law of Armed Conflict in all circumstances. To meet this commitment, every CF member must know and understand, as a minimum, the basic principles of the Law of Armed Conflict."³³⁹

³³² Cameroon, *Disciplinary Regulations* (1975), Article 35.

³³³ Cameroon, *Instructors' Manual* (1992), p. 2.

³³⁴ Cameroon, *Instructors' Manual* (1992), p. 71, §§ 251.2 and 253.

³³⁵ Canada, *Unit Guide* (1990), § 101.

³³⁶ Canada, *LOAC Manual* (1999), Introduction, p. i, § 5.

³³⁷ Canada, *LOAC Manual* (1999), p. 15-1, § 6.

³³⁸ Canada, *Code of Conduct* (2001), Introduction, § 8.

³³⁹ Canada, *Code of Conduct* (2001), Rule 11, § 1.

321. Colombia's Directive on IHL issued in 1993 by the Colombian Ministry of National Defence stated that:

The Ministry of National Defence is issuing instructions intended to intensify the development of training programmes for members of the police in subjects pertaining to respect for human rights and compliance with the rules of international humanitarian law, with the aim of preventing and rectifying conduct that violates those rules.³⁴⁰

322. In Colombia's Basic Military Manual, the Minister of National Defence defined various priorities, including:

We are trying to firmly establish within the Armed Forces and the National Police a culture and an ethic of respect, and to this end, activities of dissemination, instruction and capacity building with respect to human rights and humanitarian law have been started and developed.³⁴¹

He added that:

The publication today of this Manual is intended to increase the dissemination and application of the instruments of international humanitarian law to which we are party. With it, we are fulfilling the obligation contained in the four Geneva Conventions and the Additional Protocols to disseminate their content as widely as possible, in time of peace as well as in time of war, and to incorporate their study in the programmes of military instruction.³⁴²

The manual stresses that, before conflicts occur, there is an obligation "to adopt plans and programmes of dissemination and capacity building through which IHL is made known to . . . the Armed Forces".³⁴³ It further states that this obligation to instruct also binds organised armed opposition groups.³⁴⁴ Lastly, in a chapter dealing with AP II, the manual states that "it is important to underline the obligation incumbent upon States to organise periodical and systematic instruction on the content of the Protocol, so that the Public Force . . . can apply and insist on respect for its norms".³⁴⁵

323. Colombia's Instructors' Manual states that it "aims to serve as a tool, as a guiding instrument by which the instructor presents in a simple form to the soldiers and seamen the minimum rules regarding persons, objects, the wounded and others, in times of peace, war and conflict".³⁴⁶

324. Croatia's Commanders' Manual states that "law of war training has to be integrated into normal military activity".³⁴⁷

³⁴⁰ Colombia, *Directive on IHL* (1993), Section IV(A).

³⁴¹ Colombia, *Basic Military Manual* (1995), p. XIV.

³⁴² Colombia, *Basic Military Manual* (1995), pp. XIV and XV.

³⁴³ Colombia, *Basic Military Manual* (1995), pp. 27 and 28.

³⁴⁴ Colombia, *Basic Military Manual* (1995), p. 37.

³⁴⁵ Colombia, *Basic Military Manual* (1995), p. 46.

³⁴⁶ Colombia, *Instructors' Manual* (1999), p. 15.

³⁴⁷ Croatia, *Commanders' Manual* (1992), § 22.

325. The Military Manual of the Dominican Republic notes that “although all [Dominicans] – soldiers, citizens, and leaders – have a legal obligation to know, understand and abide by these laws of war, soldiers must be especially aware of them . . . This publication is intended to help you, today’s soldier, know and understand these laws.”³⁴⁸

326. France’s LOAC Teaching Note provides that “combatants . . . must be made aware of the rules of the law of armed conflicts, which essentially includes the Geneva Conventions and the Hague Conventions”.³⁴⁹

327. France’s LOAC Manual notes that it “is to be used for the instruction of any military personnel of the French armed forces, in the context of the instruction given in schools”.³⁵⁰

328. Germany’s Military Manual notes that it “shall serve soldiers and civilian personnel of all command levels in training courses, military exercises and in general training”.³⁵¹ It also states that:

The four Geneva Conventions and [AP I] oblige all contracting parties to disseminate the text of the conventions as widely as possible . . . This shall particularly be accomplished through programmes of instruction for the armed forces . . . Considering their responsibility in times of armed conflict, military . . . authorities shall be fully acquainted with the text of the Conventions and the Protocol Additional to them.³⁵²

It further states that:

All soldiers of the Federal Armed Forces shall receive instruction in international law. It is conducted in the military units by the superiors and the legal advisers and at the armed forces schools by teachers of law . . . This instruction has the purpose not only of disseminating knowledge, but also and primarily of developing an awareness of what is right and what is wrong.³⁵³

Lastly, the manual stresses that:

Effective implementation is depending on dissemination of humanitarian law. Providing information about it is the necessary basis to create common consciousness and to further the attitude of the peoples towards a greater acceptance of these principles as an achievement of the social and cultural development of mankind.³⁵⁴

329. Germany’s IHL Manual states that “all enforcement methods of international humanitarian law are . . . incomplete without extensive dissemination of the basic principles of international humanitarian law and the personal sense of the individual to take responsibility for their respect”.³⁵⁵ Referring to common

³⁴⁸ Dominican Republic, *Military Manual* (1980), p. 2.

³⁴⁹ France, *LOAC Teaching Note* (2000), p. 1.

³⁵⁰ France, *LOAC Manual* (2001), preamble, p. 7.

³⁵¹ Germany, *Military Manual* (1992), § 1.

³⁵² Germany, *Military Manual* (1992), § 136.

³⁵³ Germany, *Military Manual* (1992), § 137.

³⁵⁴ Germany, *Military Manual* (1992), § 1223.

³⁵⁵ Germany, *IHL Manual* (1996), § 806.

Article 1 of the 1949 Geneva Conventions and Article 1(1) AP I, the manual states that:

It necessarily follows that each soldier of the [German Armed Forces] must know the rules of international humanitarian law in armed conflicts... Therefore, the four Geneva Conventions and the Additional Protocols oblige all Contracting Parties to disseminate the content of the Conventions in their countries and to incorporate it in the programmes of military education.³⁵⁶

330. Hungary's Military Manual provides that "everybody must know the rules [of war]".³⁵⁷

331. India's Army Training Note states that its aim is "to educate all ranks in maintaining and upholding Human Dignity and protecting Human Rights in accordance with the law of the land and National and International conventions, during peace and war".³⁵⁸ It also states that "a soldier is trained to do only the correct and proper things from the time he is enrolled into the Service. Any violation is strictly dealt with by the superior authorities."³⁵⁹

332. Israel's Manual on the Laws of War states that "there is room for and importance to being familiar with the laws of war and directing our conduct in accordance therewith".³⁶⁰

333. Italy's LOAC Elementary Rules Manual states that "law of war training has to be integrated into normal military activity".³⁶¹

334. Kenya's LOAC Manual notes that:

The need for dissemination is as old as International Humanitarian Law itself. The law can only be respected if it is known.

To be effective, dissemination must take place in peacetime. It is too late for dissemination once a conflict has started since the authorities concerned have by then turned to questions of greater priority that may overwhelm any argument in favour of humanitarian conduct.

It is not enough for States to ratify the Geneva Conventions and their Additional Protocols; besides the legal obligation for dissemination they contain, there must also be a genuine political will to apply them. Their content and "directions for use" must be known so that those responsible for their implementation take the appropriate steps at the proper time. For this reason, their dissemination is mandatory, as ignorance of International Humanitarian Law can cost human lives.³⁶²

The manual further explains that "behaviour is the reflection of training. This means that all members of a fighting force must undergo training such as to ensure the enforcement of the existing rules at all levels of the military hierarchy".³⁶³

³⁵⁶ Germany, *IHL Manual* (1996), §§ 107 and 108.

³⁵⁷ Hungary, *Military Manual* (1992), p. 31.

³⁵⁸ India, *Army Training Note* (1995), p. 1/2.

³⁵⁹ India, *Army Training Note* (1995), p. 5/1.

³⁶⁰ Israel, *Manual on the Laws of War* (1998), p. 9.

³⁶¹ Italy, *LOAC Elementary Rules Manual* (1991), § 22.

³⁶² Kenya, *LOAC Manual* (1997), Précis No. 1, p. vi.

³⁶³ Kenya, *LOAC Manual* (1997), Précis No. 3, p. 1.

335. South Korea's Military Regulation 187 provides that all members of the armed forces must have training in the laws of war.³⁶⁴

336. Madagascar's Military Manual notes that:

Madagascar ratified the Geneva Conventions in 1963 and their two Additional Protocols [API and AP II] in 1992 and has the obligation to promote the instruction [and] dissemination of international humanitarian law, in particular within the Armed Forces, and to ensure their application, if needed . . .

In the framework of dissemination of international humanitarian law (IHL), the law of armed conflict or law of war shall from now on be included in the general programme of instruction of the military personnel of the Armed Forces . . .

The Geneva Conventions of 1949 and Additional Protocol I of 1977 stipulate in some of their articles that "all States parties to the conventions and/or to the Additional Protocols are obliged to disseminate IHL in their respective countries".

The ultimate goal of the dissemination of International Humanitarian Law is to create through a wide knowledge of its principles, inherent rights and duties, a true humanitarian consciousness, imperatively guiding troops' behaviour in conflict situations.³⁶⁵

The manual also provides that "law of war training has to be integrated into normal military activity".³⁶⁶

337. The Military Manual of the Netherlands states that "States must disseminate the treaties as widely as possible in time of peace and include the law of war in their military training".³⁶⁷

338. New Zealand's Military Manual states that:

1. The first step to ensuring observance of the law is to make the law known to those whose conduct it is intended to regulate. With this in view, the various Conventions relating to the law of armed conflict impose an obligation upon their parties to disseminate the particular Convention among their armed forces.
2. The manner in which dissemination is effected is left to the various States, but is normally carried out by means of instruction courses or through the medium of commentaries upon particular Conventions or manuals devoted to the law of armed conflict.³⁶⁸

The manual further states that in the armed forces, in addition to courses conducted at various rank levels, "the publications of the International Committee of the Red Cross are available for reference".³⁶⁹

339. Nicaragua's Military Manual states that the objective of the manual is "to give Commanders, Officers, Troops, Soldiers and Seamen of the Army of Nicaragua knowledge of how to behave in situations of peace, war, internal disturbances . . . in the theatre of military operations and in their relations with

³⁶⁴ South Korea, *Military Regulation 187* (1991), Article 5.1.

³⁶⁵ Madagascar, *Military Manual* (1994), preamble, pp. 2–4, see also presentation, p. 9.

³⁶⁶ Madagascar, *Military Manual* (1994), Fiche No. 4-O, § 22.

³⁶⁷ Netherlands, *Military Manual* (1993), p. IX-1.

³⁶⁸ New Zealand, *Military Manual* (1992), § 1602.

³⁶⁹ New Zealand, *Military Manual* (1992), § 1602.2, footnote 6.

the civilian population".³⁷⁰ It further states that "the study of and respect for the Constitution of the Republic, Military Laws, other Laws, Directives, Norms and Ordinances, especially those that regulate the actions of the Armed Forces in the fulfilment of their missions, are obligatory".³⁷¹

340. Nigeria's Military Manual incorporates the content of Article 47 GC I and adds that "dissemination simply means that in the law of armed conflict, the obligation is that States make the principles of the law known to its armed forces . . . by teaching them in military training programmes".³⁷² The manual further states that:

[AP I] in its Article 6 further provides that the High Contracting Parties with the assistance of the various national Red Cross Societies and under the guidance and general superintendence of the International Committee of the Red Cross (ICRC), shall train qualified personnel to facilitate the application of the [Geneva] conventions and the protocols [AP I and AP II] . . . Furthermore the ICRC shall hold at the disposal of the High Contracting Parties the lists of the persons so trained which the High Contracting Parties may have established and may have transmitted to it for that purpose.

...

The dissemination of the [Geneva] conventions and the protocols therefore must be as orderly as possible in the respective countries and in particular to include the study thereof in their programmes of military instruction . . . The purpose therefore is that any military . . . authorities, who in time of armed conflict, assume responsibilities in respect of the application of the [Geneva] conventions and the protocols, shall be fully acquainted with the text thereof.³⁷³

In addition, the manual states that "the law of war training is aimed at ensuring full respect for the law of war by all members of the armed forces irrespective of their function, time, location and situation".³⁷⁴

341. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that "these provisions [among which the relevant provisions of the Geneva Conventions] shall be integrated into the regular Program of Instructions for AFP and PNP troops/police information and education sessions in all levels of command/office".³⁷⁵

342. Russia's Military Manual states that, in time of peace, commanders must:

- promote among the members of the USSR Armed Forces knowledge of IHL, to study it within the system of military . . . training, to distribute among subordinates texts of international legal instruments and legislative acts defining the conduct of the members of the army and the navy during an armed conflict.³⁷⁶

³⁷⁰ Nicaragua, *Military Manual* (1996), Objetivo, p. 1.

³⁷¹ Nicaragua, *Military Manual* (1996), Article 5.

³⁷² Nigeria, *Military Manual* (1994), p. 29, § 1.

³⁷³ Nigeria, *Military Manual* (1994), pp. 29–30, §§ 2–3.

³⁷⁴ Nigeria, *Military Manual* (1994), p. 41, § 8.

³⁷⁵ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 3(d).

³⁷⁶ Russia, *Military Manual* (1990), § 14(a).

343. South Africa's LOAC Manual provides that it is "imperative that every member of the SANDF has a good knowledge of, and is able to apply, the law of armed conflict (LOAC)".³⁷⁷ It also states that "in the circumstances of combat, soldiers may often not have time to consider the principles of the LOAC before acting. Soldiers must therefore not only know these principles but must be trained so that the proper response to specific situations is second nature."³⁷⁸

344. Spain's Order 60/1992 on Military Instruction for High-Ranking Officers includes the subjects "international law of war", "law of armed conflicts" and "humanitarian principles" in the instruction plan of high-ranking officers.³⁷⁹

345. Spain's Order 63/1993 on Military Instruction for Other Officers includes the subjects "the International Conventions of the Hague and Geneva" and "Public International Law" in the instruction plan of the Military Intervention Corps and of the specialised branches of the Army Medical Service, and the subject "International Law and the Law of War" and "the International Conventions of Geneva and the Hague" in the instruction plan of the Military Legal Corps.³⁸⁰

346. Spain's LOAC Manual states that "the instruction and dissemination of [IHL] are established as obligatory, so that the State has the duty to introduce it in its programmes of military . . . instruction".³⁸¹ Thus, the Ministry of Defence "shall programme courses on the Law regulating Armed Conflicts at different levels for the various Commanding Officers".³⁸² The manual also states that "law of war training has to be integrated into normal military activity".³⁸³ A chapter of the manual devoted to "Dissemination of the Law of Armed Conflict" establishes a detailed programme including instructional methods, guidelines, priorities based on hierarchical levels within the military sector, a general framework for the instruction of the law of armed conflict, norms and models of instruction according to hierarchical levels, a summary of the law of armed conflict for non-commissioned officers, officers and superior officers, model curricula and a model course for the national and international levels.³⁸⁴ The manual further stresses that "it is very important to include the Law of War in instruction courses for the military personnel who are going to take part in [peacekeeping] operations".³⁸⁵

347. Sweden's IHL Manual notes that:

The undertaking of the parties concerning information and instruction in international humanitarian law is stressed in Additional Protocol I to the 1949 Geneva

³⁷⁷ South Africa, *LOAC Manual* (1996), § 4. ³⁷⁸ South Africa, *LOAC Manual* (1996), § 14.

³⁷⁹ Spain, *Order 60/1992 on Military Instruction for High-Ranking Officers* (1992), Article 1 and Annex.

³⁸⁰ Spain, *Order 63/1993 on Military Instruction for Other Officers* (1993), Article 1 and Annex.

³⁸¹ Spain, *LOAC Manual* (1996), Vol. I, § 10.1.a, see also §§ 1.1.d.(7) and 11.3.b.(2) (which add that the instruction must take place in time of peace as well as in time of war) and § 6.2.a.(1).

³⁸² Spain, *LOAC Manual* (1996), Vol. I, § 6.2.a.(5).

³⁸³ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.c.(2).

³⁸⁴ Spain, *LOAC Manual* (1996), Vol. I, §§ 10.1–10.11.

³⁸⁵ Spain, *LOAC Manual* (1996), Vol. I, Annex B.

Conventions (AP I, Art. 83), which, however, goes further than the earlier conventions. According to the Protocol, the military and civilian authorities responsible for their application during a conflict shall possess full knowledge of the texts both of the Protocol and of the Conventions. Thus a definite tightening of the demands has been introduced.³⁸⁶

The manual further states that “by its ratification in 1977 of the Additional Protocols to the Geneva 1949 Conventions, Sweden pledged herself to inform and instruct the authorities and personnel responsible for total defence . . . on the rules of international humanitarian law”.³⁸⁷

348. In Order No. 148 on Law of Armed Conflict Courses, Tajikistan’s Minister of Defence decided “to include in the curricula . . . of the S. Safarov Tajik Higher Military College and of the Military Lycees of the Republic of Tajikistan, the subject ‘Law of Armed Conflict’”.³⁸⁸

349. Togo’s Military Manual provides that “the law of war must be incorporated in the military instruction programmes in the different military units”.³⁸⁹

It adds that “the instruction of individual combatants is a priority. The aim is to develop automatic behaviours. Such behaviours shall: be obtained by individual instruction and practice; be controlled during exercises of combat.”³⁹⁰

The manual also contains the text of a Note de Service of Togo’s Armed Forces, which states that “the follow up committee of the ICRC activities within the FAT [Togo’s Armed Forces], in charge of the instruction of [IHL], shall elaborate in collaboration with the ICRC delegation in Lomé programmes adapted to each training level of the personnel of the FAT”.³⁹¹

350. The UK Military Manual notes that:

Violations of the law of war have often been shown to have been the deeds of subordinates who acted through ignorance or excess of zeal or the result of orders issued by superiors who acted either in ignorance or disregard of the laws of war. Care must therefore be taken that all ranks are acquainted with the laws of war and that they endeavour to observe them. Under the 1949 [Geneva] Conventions the parties are bound, both in time of peace and in war, to disseminate the text of the Conventions in their countries and to include the study of them in their programmes of military instruction.³⁹²

351. The UK LOAC Manual states that the manual “is designed for use by personnel of all ranks who need to study or give instruction in the law of armed conflict”.³⁹³

352. The US Field Manual states that “the purpose of this Manual is to provide authoritative guidance to military personnel on the customary and treaty law

³⁸⁶ Sweden, *IHL Manual* (1991), Section 4.1, pp. 91 and 92.

³⁸⁷ Sweden, *IHL Manual* (1991), Section 10.1, p. 168.

³⁸⁸ Tajikistan, *Order No. 148 on Law of Armed Conflict Courses* (1997), § II.

³⁸⁹ Togo, *Military Manual* (1996), Fascicule II, p. 15.

³⁹⁰ Togo, *Military Manual* (1996), Fascicule II, p. 16.

³⁹¹ Togo, *Military Manual* (1996), Fascicule I, p. 24, Fascicule II, p. 23 and Fascicule III, p. 23.

³⁹² UK, *Military Manual* (1958), § 120.

³⁹³ UK, *LOAC Manual* (1981), p. iii, § 1.

applicable to the conduct of warfare on land".³⁹⁴ It further incorporates the content of Articles 47 GC I, 48 GC II, 127 GC III and 144 GC IV.³⁹⁵

353. The US Air Force Pamphlet quotes a directive of the Department of Defense which provides that:

The Armed Forces of the United States will insure that programs to prevent violations of the law of war to include training and dissemination as required by the Geneva Conventions . . . and by [the 1907] Hague Convention IV . . . are instituted and implemented . . .

The Secretaries of the Military Departments will develop internal policies and procedures consistent with this Directive in support of the [Department of Defense] law of war program in order to:

1. Provide publications, instructions, and training so that the principles and rules of the law of war will be known to members of their respective departments, the extent of such knowledge to be commensurate with each individual's duties and responsibilities.³⁹⁶

The Pamphlet also stipulates that "all states must include the text of the Conventions in programs of military . . . instruction".³⁹⁷

354. The US Soldier's Manual notes that "although all Americans – soldiers, citizens, and leaders – have a legal obligation to know and abide by these laws of war, soldiers must be especially aware of them . . . This publication is intended to help you, today's soldier, know and understand these laws of war."³⁹⁸

355. The US Instructor's Guide states that "all soldiers must know about [the 1907 Hague Conventions and the 1949 Geneva Conventions] and customary laws and understand how they work".³⁹⁹ It also specifies that "this circular provides guidance, lesson outlines, and courses for required training in the law of war which includes the Hague Convention Number IV of 1907, the Geneva Conventions of 1949, and the customary law of war".⁴⁰⁰

356. The US Naval Handbook provides that:

It is the responsibility of the Chief of Naval Operations and the Commandant of the Marine Corps . . . to ensure that:

...

All service members of the Department of the Navy, commensurate with their duties and responsibilities, receive, through publications, instructions, training programs and exercises, training and education in the law of armed conflict.⁴⁰¹

National Legislation

357. Argentina's National Committee on the Implementation of International Humanitarian Law (CADIH) was established by a national decree to undertake studies on the teaching and dissemination of the rules of IHL.⁴⁰²

³⁹⁴ US, *Field Manual* (1956), § 1. ³⁹⁵ US, *Field Manual* (1956), § 14.

³⁹⁶ US, *Air Force Pamphlet* (1976), § 1-4(c).

³⁹⁷ US, *Air Force Pamphlet* (1976), § 15-2(b).

³⁹⁸ US, *Soldier's Manual* (1984), p. 3. ³⁹⁹ US, *Instructor's Guide* (1985), p. 5.

⁴⁰⁰ US, *Instructor's Guide* (1985), p. ii. ⁴⁰¹ US, *Naval Handbook* (1995), § 6.1.2.

⁴⁰² Argentina, *Decree on the Creation of the National Committee on IHL* (1994), Article 1(b).

358. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War states that:

The appropriate authorities and governmental bodies of [the] Azerbaijan Republic insure . . . [the] preparation of the military servicemen of all categories within the framework of training programmes.

If [the] Azerbaijan Republic is one of the parties to the conflict, then necessary instruction is given . . . to the personnel staff of the Armed Forces of [the] Azerbaijan Republic involved in the solution of this conflict.⁴⁰³

359. The Order on Study and Dissemination of IHL of Belarus, whose aim is "the implementation of international obligations of the Republic of Belarus with respect to the study and dissemination of international humanitarian law", provides for the adoption of an annexed "Regulation on the application of the rules of international humanitarian law for the officers of the Belarussian armed forces".⁴⁰⁴ It further provides for the establishment, within the Ministry of Defence, of a commission on the study and the dissemination of IHL in charge of, *inter alia*, the preparation of measures for the study of IHL within the armed forces.⁴⁰⁵ The Order also provides for the preparation of manuals on IHL designed for the armed forces.⁴⁰⁶

360. By a decree in 1999, Côte d'Ivoire set up a national IHL bureau in charge of dissemination and training for the armed forces.⁴⁰⁷

361. Croatia's Emblem Law provides that:

In accordance with the commitments made on [the] international level concerning the promotion of [the] Geneva Conventions, it is necessary to elaborate adequate programmes and ensure their implementation among:

- ...
 - members of [the] armed forces of the Republic of Croatia – Ministry of Defence.⁴⁰⁸

362. Germany's Law on the Legal Status of Military Personnel provides that "soldiers are to be instructed with regard to their duties and rights under . . . public international law in times of peace and in times of war".⁴⁰⁹

363. Peru's Law on Compulsory Human Rights Education, provides for the establishment of a national plan on the teaching of human rights and IHL in establishments for military and police training. It states that "the duty to teach human rights and international humanitarian law must aim at full implementation and strict compliance with the international treaties and conventions as

⁴⁰³ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 1 and 30.

⁴⁰⁴ Belarus, *Order on Study and Dissemination of IHL* (1997), preamble and Article 1.

⁴⁰⁵ Belarus, *Order on Study and Dissemination of IHL* (1997), Articles 2 and 3(d).

⁴⁰⁶ Belarus, *Order on Study and Dissemination of IHL* (1997), Article 4(b).

⁴⁰⁷ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 22, referring to Côte d'Ivoire, *Decree on Dissemination and Training for the Armed Forces* (1999).

⁴⁰⁸ Croatia, *Emblem Law* (1993), Article 14.

⁴⁰⁹ Germany, *Law on the Legal Status of Military Personnel* (1995), § 33(2).

well as the protection of fundamental rights in the national and international arena".⁴¹⁰

364. Russia's Order on the Publication of the Geneva Conventions and Protocols requires the Vice-Ministers of Defence and commanders at several levels

- to ensure, in the context of the legal preparation of the personnel, the study of the Geneva Conventions . . . the Protocols and the instructions on the application of the rules of international humanitarian law by the armed forces of the USSR;
- to take into account the provisions of the [above-]mentioned documents during studies and teaching.⁴¹¹

365. Russia's Draft Law on the Red Cross Society and Emblem states that:

Familiarisation of the members of the federal bodies of executive power, where military service is provided for by the legislation of the Russian Federation, with the norms of international humanitarian law (including the texts of the Geneva Conventions) shall be carried out by the competent bodies of the appropriate organisations.⁴¹²

366. Sweden's Total Defence Ordinance relating to IHL states that:

The [Armed Forces and the authorities having functional responsibilities under the Emergency Preparedness Ordinance] shall ensure that the personnel in this field receive satisfactory instruction and information about the rules of international humanitarian law in war and during neutrality. The Swedish Agency for Civil Emergency Planning shall co-ordinate the training in the civil part of the Total Defence.⁴¹³

367. Uruguay's Law on the National Armed Forces provides that "the personnel of the National Armed Forces shall know and strictly comply with all the principles and rules provided for in the Conventions and Conferences on the International Law of War which have been ratified by the Republic".⁴¹⁴

National Case-law

368. No practice was found.

Other National Practice

369. Many countries have created national committees to assist them in ensuring respect for the obligations of IHL, among which are the following: Argentina, Belarus, Belgium, Benin, Bolivia, Canada, Cape Verde, Chile, Colombia, Côte d'Ivoire, Croatia, Denmark, Dominican Republic, Egypt, El Salvador, Finland, France, Gambia, Georgia, Germany, Guatemala, Hungary, Indonesia, Iran, Italy, Japan, Jordan, Kazakhstan, Kenya, South Korea, Kyrgyzstan,

⁴¹⁰ Peru, *Law on Compulsory Human Rights Education* (2002), Article 3.

⁴¹¹ Russia, *Order on the Publication of the Geneva Conventions and Protocols* (1990), § 2.

⁴¹² Russia, *Draft Law on the Red Cross Society and Emblem* (1998), Article 5.

⁴¹³ Sweden, *Total Defence Ordinance relating to IHL* (1990), Section 20.

⁴¹⁴ Uruguay, *Law on the National Armed Forces* (1983), Article 362, see also Article 363.

Lesotho, Lithuania, Malawi, Mali, Mauritius, Moldova, Namibia, New Zealand, Nicaragua, Norway, Panama, Paraguay, Peru, Philippines, Seychelles, Slovakia, Slovenia, Sri Lanka, Sweden, Tajikistan, Togo, Trinidad and Tobago, Ukraine, UK, Uruguay and Yemen.⁴¹⁵ The tasks of these committees usually include dissemination of IHL or the promotion of such dissemination.

370. According to the Report on the Practice of Algeria, introductory lectures in IHL are given at the largest military academies for the armed forces. The teaching is based on the study of the Geneva Conventions and their Additional Protocols.⁴¹⁶

371. Article 10 of the Internal Rules of Procedure of the Argentine National Committee on the Implementation of International Humanitarian Law (CADIH) states that “the CADIH will establish its working methods with regard to legal measures of application and teaching and dissemination, in the civil and military fields respectively”.⁴¹⁷

372. In 1997, at the first meeting of the Argentine and Chilean national committees on the implementation of IHL, a legal adviser of the Argentine Ministry of Foreign Affairs stated that Argentina recognised the importance of efforts made by States to disseminate IHL in peacetime and that persons be trained to apply the law in situations described in the Geneva Conventions and Additional Protocols.⁴¹⁸

373. The Report on the Practice of Argentina contains, as annexes, documents which aim to provide teaching material for the armed forces in which rules of IHL have been incorporated.⁴¹⁹

374. In 1984, in an assessment of the military implications of AP I and AP II, Australia’s Joint Military Operations and Plans Division of the ADF stated that:

In recognition of the requirement for training in the laws of armed conflict, COSC [Chiefs of Staff Committee], in February 1983, agreed to the introduction of a formal training programme in the laws of armed conflict in the ADF to meet the provisions of The Hague and Geneva Conventions, Protocols I and II and customary law . . .

However, the requirement for the Convention and Protocols to be disseminated “as widely as possible in respective countries” has not been addressed by Defence, as this is not a Defence responsibility.⁴²⁰

⁴¹⁵ ICRC, Advisory Service, Table of National Committees on International Humanitarian Law, 30 June 2002.

⁴¹⁶ Report on the Practice of Algeria, 1998, Chapter 6.6.

⁴¹⁷ Argentina, Committee on the Implementation of International Humanitarian Law (CADIH), Internal Rules of Procedure, Article 10.

⁴¹⁸ Argentina, Ministry of Foreign Affairs, International Trade and Religion, Statement by a Legal Adviser, First Meeting of the Argentine and Chilean Committees on the Implementation of International Humanitarian Law, Buenos Aires, 17–18 April 1997, p. 5.

⁴¹⁹ Argentina, Model curriculum for instruction in the law of war for the armed forces (undated); Curriculum for Senior Officers at the Escuela Superior de Guerra (Higher College of War), 1997; Curriculum for the course on international law applicable in armed conflicts, Escuela Superior de Guerra (Higher College of War), 1996; Programme on International Law, Escuela de Guerra Naval (Naval War College), 1996; Report on the Practice of Algeria, 1997, Chapter 6.6.

⁴²⁰ Australia, Joint Military Operations and Plans Division of the ADF, Assessment of the Military Implications of the Protocols Additional to the Geneva Conventions of 1949, September 1984, Series No. AA-A1838/376, File No. AA-1710/10/3/1 Pt 2, §§ 12 and 15, see also § 23.

375. Enumerating the matters which Australia believed must receive priority attention in the outcomes of the 26th International Conference of the Red Cross and Red Crescent in 1995, the head of the Australian delegation noted that:

All States must take effective action to disseminate the law [of armed conflict] within their armed forces . . . States and relevant international organizations must work together to ensure that dissemination programs are given the highest priority in terms of funding and materials.⁴²¹

376. In 2000, during a debate in the UN Security Council concerning the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, Australia stated that:

Practical measures can be taken by Governments to promote understanding and observance of international humanitarian law within their own communities, especially among military and security forces . . . including by disseminating information about international humanitarian law.⁴²²

377. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Austria pledged to “strengthen its efforts to provide internationally deployed members of the armed forces with training in international humanitarian law”.⁴²³

378. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Belarus pledged to “continue the dissemination of information on the fundamental norms and principles of [IHL] among the population of the Republic of Belarus as well as among military forces personnel and attached to them medical and religious staff”.⁴²⁴

379. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Belgium, jointly with the Belgian Red Cross, pledged to:

implement training programmes in international humanitarian law targeted at those who are most directly concerned by the application of and respect for this body of law, namely . . . the armed forces:

- ...
2. The armed forces not only have advisers in the law of armed conflict, but training in international humanitarian law is given at every level. Because of the increasing number of international operations under way, in particular those relating to peace-keeping and peace-making, it has become necessary to supplement the training already given with practical experience in applying international humanitarian law and improved knowledge of relations between

⁴²¹ Australia, Statement at the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, reprinted in *Australian Year Book of International Law*, Vol. 17, 1996, p. 787.

⁴²² Australia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 6.

⁴²³ Austria, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴²⁴ Belarus, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

the military and humanitarian workers. Accordingly, instruction in this subject will be given as part of the preparations for each departure on such an operation, and exercises on this material will be systematically included in training and manoeuvres.⁴²⁵

380. In 1987, Benin's Ministry of Defence and Popular Armed Forces established a committee for the supervision of the dissemination of IHL in the armed forces, the task of which being "the promotion and supervision of the dissemination of the principles of the law of war in the units of the Popular Armed Forces".⁴²⁶

381. In 1991, by way of a service note, the Ministry of National Defence of Benin instituted the teaching of IHL in the school and training centres of the armed forces of Benin.⁴²⁷

382. In 1999, the Bolivian military authorities began to provide instruction in IHL for the armed forces as part of the teaching programmes at military academies and other institutions.⁴²⁸

383. It is reported that in 1993 the new Herzegovinan Chief of Staff, in response to international criticism of the destruction of the Mostar Bridge by the Bosnian Croat forces, distributed to his officers and soldiers a brochure describing international provisions regarding IHL, war crimes and the protection of cultural heritage and POWs.⁴²⁹

384. According to the Report on the Practice of Bosnia and Herzegovina, the "training of all members of armed forces should be organized on a regular basis in order to disseminate the rules of international law of war".⁴³⁰

385. According to the Report on the Practice of Brazil, the government of Brazil has distributed an ICRC booklet on the essential rules of IHL to the members of its armed forces.⁴³¹

386. In a decree in 1994, Burkina Faso's Ministry of State and of Defence stated that "the teaching of international humanitarian law (IHL) in the Armed Forces is mandatory. It is disseminated at all levels of military hierarchy and forms an integral part of every programme of instruction, training or instruction."⁴³²

⁴²⁵ Belgium, Pledge made together with the Belgian Red Cross at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴²⁶ Benin, Ministry of Defence and Popular Armed Forces, Service Note No. 468/MDFAP/DGM/DEP, 13 July 1987.

⁴²⁷ Benin, Ministry of National Defence, Service Note No. 91-0034/EMA/BESS, 22 February 1991.

⁴²⁸ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 15.

⁴²⁹ Council of Europe, Parliamentary Assembly, Committee on Culture and Education, Fourth information report on war damage to the cultural heritage in Croatia and Bosnia-Herzegovina, Doc. 6999, 19 January 1994, p. 23, § 71.

⁴³⁰ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.6.

⁴³¹ Report on the Practice of Brazil, 1997, Chapter 6.6, referring to Folheto de difusão das normas essenciais do direito internacional humanitário (DIH) entre as Forças Armadas, 30 March 1995.

⁴³² Burkina Faso, Ministry of State and of Defence, Decree No. 94-0125/DEF/CAB, 26 December 1994.

387. In a decree in 1995, Burkina Faso's Ministry of State and of Defence established a unit for the dissemination of IHL with the task, *inter alia*, of teaching and disseminating IHL within the armed forces.⁴³³

388. In 1999, Burkina Faso's Ministry of Foreign Affairs and the ICRC, in cooperation with the Burkinabé Red Cross Society, held the first national seminar on implementation of IHL. The seminar, *inter alia*, urged Burkina Faso to step up IHL training for the armed forces. A workshop was also held by the ICRC Advisory Service and the Ministry of Foreign Affairs for government officials on specific issues, such as the application of IHL to non-international armed conflict, the 1997 Ottawa Convention and the 1998 ICC Statute. Another workshop organised the same year by the ICRC and the Ministry of Foreign Affairs was held on the obligation of States to adopt legislation giving effect to the Geneva Conventions, their Additional Protocols and the 1997 Ottawa Convention.⁴³⁴

389. In a directive in 1994, Cameroon's Ministry of Defence stated that:

Military instruction must . . . fully integrate this new topic [IHL and LOAC] which it is imperative to teach . . . This instruction must figure . . . on the table of jobs of the units. A wider dissemination of the [Instructors' Manual] will be carried out so that every unit possesses it.⁴³⁵

390. The 1997 Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia stated that:

The training plan for Operation Cordon did not adequately provide for sufficient and appropriate training in relation to several non-combat skills that are essential for peacekeeping, including: . . . the Law of Armed Conflict, including arrest and detention procedures . . . The failure of the training plan to provide adequately for these non-combat skills arose primarily from the lack of any doctrine recognizing the need for such training, and the lack of supporting training materials and standards.⁴³⁶

The report also stated that:

The CF is obliged under international law to provide training in the LOAC . . . Documents that we have received indicate that in the mid-1980s, individual non-commissioned members within the CF were expected to have a "basic knowledge" of the Geneva Conventions, including treatment of prisoners of war and civilian detainees. Field officers attending the Command and Staff College would have received three hours of training in the LOAC in the mid-1980s, and some majors and most lieutenant-colonels would receive a full day session on the LOAC and ROE.

⁴³³ Burkina Faso, Ministry of State and of Defence, Decree No. 95-0026/DEF/CAB, Articles 1 and 3, 1 March 1995.

⁴³⁴ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 16.

⁴³⁵ Cameroon, Ministry of Defence, Directive No. 00280/DV/MINDEF/1043, 14 February 1994.

⁴³⁶ Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 586 and ES-27.

According to the CF, there is considerable LOAC training taking place within the CF but it is not well co-ordinated.

- ...
- In 1992, there was insufficient training in the CF generally on the Law of Armed Conflict (LOAC). This in turn resulted from a lack of institutional commitment within the CF regarding a systematic and thorough dissemination of the LOAC to all its members...
 - There was a serious lack of training on the LOAC during the pre-deployment training for Somalia, as evidenced by the soldier's confusion in theatre over how to treat detainees once they were captured.
 - The lack of attention to the LOAC and its dissemination demonstrates a profound failure of the CF leadership, both in adequate preparation of Canadian troops sent to Somalia, and in Canada's obligation to respect the elementary principles of international law in the field of armed conflict.⁴³⁷

However, the report further stated that:

In making recommendations on training, we are mindful of the developments that have occurred in the Canadian Forces since the incidents in Somalia in March 1993... We... certainly endorse the specific attention being given to the Law of Armed Conflict and rules of engagement, and the increased emphasis on humanitarian and legal aspects of operations.⁴³⁸

391. The Commission of Inquiry into the Deployment of Canadian Forces to Somalia, recommended with respect to the training of the armed forces for peacekeeping missions, *inter alia*, that:

21.8 The Chief of the Defence Staff oversee the development of specialist expertise within the Canadian Forces in training in the Law of Armed Conflict and the rules of engagement...

21.9 The Chief of the Defence Staff ensure that the time and resources necessary for training a unit to a state of operational readiness be assessed before committing that unit's participation in a peace support operation.

...

21.14 The Chief of the Defence Staff establish mechanisms to ensure that all members of units preparing for deployment on peace support operations receive sufficient and appropriate training on the local culture, history, and politics of the theatre of operations, together with refresher training on negotiation and conflict resolution and the Law of Armed Conflict.

21.15 The Chief of the Defence Staff establish in doctrine and policy that no unit be declared operationally ready unless all its members have received sufficient and appropriate training on mission-specific rules of engagement and steps have been taken to establish that the rules of engagement are fully understood.

⁴³⁷ Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 613–615.

⁴³⁸ Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 625–626.

21.16 The Chief of Defence Staff ensure that training standards and programs provide that training in the Law of Armed Conflict, rules of engagement, cross-cultural relations, and negotiation and conflict resolution be scenario-based and integrated into training exercises, in addition to classroom instruction or briefings, to permit the practice of skills and to provide a mechanism for confirming that instructions have been fully understood.⁴³⁹

392. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Chile pledged to “maintain and develop the study of international humanitarian law as part of regular armed forces instruction”.⁴⁴⁰

393. In 1999, training in IHL was provided to the Chilean armed forces as part of the curricula at military academies and other institutions.⁴⁴¹

394. According to the Report on the Practice of Chile, official correspondence was exchanged in the 1990s between Chile’s National Committee on Humanitarian Law, an interministerial committee established with the aim of studying and proposing measures for the concrete application of the Geneva Conventions and Additional Protocols, and the Ministry of National Defence reporting on the teaching of IHL within the armed forces.⁴⁴²

395. The Report on the Practice of China notes that the PLA has published manuals and collections since 1954 compiling the main international conventions relative to the law of war and has distributed them to the armed forces. According to the report, regulations and orders of the PLA in China provide that officers and soldiers must be organised to study international law and the Geneva Conventions and must be familiar with the principles and rules of the Geneva Conventions.⁴⁴³

396. A directive issued in 1995 by the Colombian Ministry of National Defence stated, under the heading “Initial measures”, that “to achieve these objectives the Ministry of National Defence has taken the following action: . . . Training and instruction in human rights and international humanitarian law within the Armed Forces and the National Police are being substantially increased.”⁴⁴⁴ It further stated that:

The Armed Forces and the National Police shall draw up, by 30 September 1995, a national programme of training and instruction in human rights and international humanitarian law for all their members, for civilian personnel attached to them and

⁴³⁹ Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 628–631, Recommendations No. 21(8), 21(9), 21(14), 21(15) and 21(16).

⁴⁴⁰ Chile, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁴¹ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 20.

⁴⁴² Report on the Practice of Chile, 1997, Chapter 6.6.

⁴⁴³ Report on the Practice of China, 1997, Chapter 6.6.

⁴⁴⁴ Colombia, Ministry of National Defence, Permanent Directive No. 024, Development of Government Policy relating to Human Rights and International Humanitarian Law at the Ministry of National Defence, 5 July 1995, Section 3(C)(5).

for military Judge Advocates, in coordination with the Human Rights Secretariat of this Ministry.⁴⁴⁵

In addition, the directive stated that:

Directors of training schools for the Armed Forces and National Police shall be responsible for the education of their students in human rights and international humanitarian law and shall conduct all the activities necessary for implementation of the national training programme referred to in [Section 4(B)(1) above].⁴⁴⁶

397. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Congo pledged to “promote the basic principles of international humanitarian law in the training of military personnel (in partnership)”.⁴⁴⁷

398. In 1999, the Croatian Ministry of Defence, in conjunction with the ICRC, held a seminar on the law of armed conflict for senior officers.⁴⁴⁸

399. According to the Report on the Practice of Croatia, training in IHL is provided in the Military Academy and during military service.⁴⁴⁹

400. According to the Report on the Practice of Cuba, the Centre for International Humanitarian Law Studies was established in November 1994. Since then, the Ministry of the Armed Forces has supported its operations by providing graduates of the IIHL in San Remo as instructors and by authorising and requiring senior officers to take part in the courses. IHL is also taught in military academies for officers and cadets and is the subject of courses for privates and sergeants. The Ministry of Internal Order sends officials to these courses systematically.⁴⁵⁰

401. In 1999, the Egyptian government, in cooperation with the National Red Crescent Society, the League of Arab States and the ICRC, organised a regional seminar commemorating the 50th anniversary of the Geneva Conventions. The seminar adopted the Cairo Declaration, which urges Arab countries to implement IHL and set up national committees on IHL.⁴⁵¹

402. According to the Report on the Practice of Egypt, IHL is taught in military camps and military institutions in cooperation with the ICRC. The report also notes that in 1991, the Egyptian Ministry of Defence published a manual entitled “Basic Principles of the Law of War and International Humanitarian Law”.⁴⁵²

⁴⁴⁵ Colombia, Ministry of National Defence, Permanent Directive No. 024, Development of Government Policy relating to Human Rights and International Humanitarian Law at the Ministry of National Defence, 5 July 1995, Section 4(B)(1).

⁴⁴⁶ Colombia, Ministry of National Defence, Permanent Directive No. 024, Development of Government Policy relating to Human Rights and International Humanitarian Law at the Ministry of National Defence, 5 July 1995, Section 4(C)(4).

⁴⁴⁷ Congo, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁴⁸ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 23.

⁴⁴⁹ Report on the Practice of Croatia, 1997, Chapter 6.6.

⁴⁵⁰ Report on the Practice of Cuba, 1998, Chapter 6.6.

⁴⁵¹ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 24.

⁴⁵² Report on the Practice of Egypt, 1997, Chapter 6.6.

403. In 1999, efforts were made by El Salvador to encourage the inclusion of IHL in training programmes for the armed and security forces of El Salvador.⁴⁵³

404. According to the Report on the Practice of El Salvador, a small handbook on basic rules of IHL was distributed by the National Red Cross Society to members of the armed forces of El Salvador.⁴⁵⁴

405. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Estonia pledged to “continue dissemination of IHL in armed forces”.⁴⁵⁵

406. In 1996, in a report on the implementation of IHL in Ethiopia, the Ethiopian Ministry of Foreign Affairs stated that:

After the formation of a Federal Government the Federal army had taken steps to disseminate and educate the rules of International Humanitarian Laws to its members on a regular basis. To this effect the preparation of a new army training curriculum has been finalized and is in the implementation phase, with rules of international humanitarian law at its centrepiece.⁴⁵⁶

407. In a note in 1992, the French Ministry of Defence highlighted its cooperation with the ICRC in the production of an audio-visual document on the Geneva Conventions intended for distribution among the armed forces.⁴⁵⁷

408. In a directive issued in 2000 on the dissemination of the law of armed conflict within the armed forces, the French Ministry of Defence stated that “since... 1991, significant efforts have been made. The fundamental basics of the law of armed conflict figure systematically in the cursus of military education, during both initial training and advanced courses”. The directive also provides that further measures, such as the production of videos and CD-Roms and training at the IIHL in San Remo, must be taken in order to reinforce the implementation of IHL within the framework of the armed forces. In the same instrument, the Ministry of Defence, with respect to the LOAC Teaching Note (2000) attached to the directive, asks that it be disseminated within the French armed forces, as widely as possible and down to the most basic level.⁴⁵⁸

409. In 1999, at a seminar on national implementation of IHL, organised by the ICRC, the Gambia Red Cross Society and the Gambian Department of State for Justice, the participants encouraged the authorities to increase IHL training for the armed forces.⁴⁵⁹

410. In 1973, during a debate in the Sixth Committee of the UN General Assembly on the protection of human rights in times of armed conflict, the FRG

⁴⁵³ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 25.

⁴⁵⁴ Report on the Practice of El Salvador, 1997, Chapter 6.6.

⁴⁵⁵ Estonia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁵⁶ Ethiopia, Ministry of Foreign Affairs, *General Information on Measures Taken at National Level to Implement International Humanitarian Law Instruments in Ethiopia*, 1996, p. 19.

⁴⁵⁷ France, Ministry of Defence, Note No. 432/DEF/EMA/OL.2/NP, 16 March 1992.

⁴⁵⁸ France, Ministry of Defence, Directive No. 147, 4 January 2000.

⁴⁵⁹ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 28.

stated that it thought "it necessary to promote the wider dissemination of international humanitarian law".⁴⁶⁰

411. At the CDDH, the FRG stated that:

The development of international humanitarian law would be merely theoretical unless vigorous efforts for a better dissemination, application and enforcement of international humanitarian law were undertaken at the same time. His government believed that it was by no means unrealistic to demand that armed forces and civil defence organizations should be thoroughly familiar with the rules of international law applicable in armed conflicts.⁴⁶¹

412. At the International Conference for the Protection of War Victims in 1993, Germany stated that "international humanitarian law must become the basis for the training of all members of armed forces".⁴⁶²

413. In reply to a formal question from a member of parliament in 1996, a German Minister of State, referring to Article 83(1) AP I and Article 19 AP II, stated that:

The Federal Government supports the dissemination of International Humanitarian Law in all areas and at all levels of state. It hereby fulfils its duties resulting from international public law. The four Geneva Conventions and the two Additional Protocols oblige all contracting parties to disseminate the wording of the Conventions as widely as possible. . . This shall be done in particular by [providing] training programmes for the armed forces. . . Military and civil offices shall, in times of an armed conflict [and] with regard to their responsibilit[ies], be entirely familiar with the wording of the Conventions and the Additional Protocols. . . Since the [coming into] existence of the *Bundeswehr* [the Federal armed forces], the transmission of knowledge about International Humanitarian Law has formed an integral part of the training and further education of all soldiers.⁴⁶³

The Minister went on to outline the different levels of training provided for the armed forces: troops received instructions as laid down in the Military Manual; trainee sergeants and officers received IHL education as one of the main parts of their training; special training was given to members of the armed forces who participated in UN contingents, conducted immediately before the deployment of the troops; and teachers of law and legal advisers also participated in seminars on IHL, often held in cooperation with international partners. The Minister also listed a number of official regulations and teaching materials used for the education of soldiers.⁴⁶⁴

⁴⁶⁰ FRG, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/28/SR.1452, 3 December 1973, § 43.

⁴⁶¹ FRG, Statement at the CDDH, *Official Records*, Vol. V, CDDH/SR.13, 6 March 1974, § 28.

⁴⁶² Germany, Statement at the International Conference for the Protection of War Victims, Geneva, 30 August 1–September 1993, *Bulletin*, No. 69, Presse- und Informationsamt der Bundesregierung, Bonn, 4 September 1993, p. 733.

⁴⁶³ Germany, Lower House of Parliament, Reply of a Minister of State to a parliamentary question, 20 November 1996, *BT-Drucksache* 13/6197, 22 November 1996, p. 2.

⁴⁶⁴ Germany, Lower House of Parliament, Reply of a Minister of State to a parliamentary question, 20 November 1996, *BT-Drucksache* 13/6197, 22 November 1996, pp. 2–4.

414. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Greece pledged:

To enhance dissemination of international humanitarian law:

- by reviewing existing educational and training curricula so as to integrate international humanitarian law into the Hellenic armed forces, security forces, universities, schools, media and public administration.
- by providing training in international humanitarian law, the role and the mandate of the humanitarian organizations to military and security forces, administration and member[s] of NGO's or volunteers participating in international missions.⁴⁶⁵

415. In 1999, various national Greek authorities, including the Hellenic Armed Forces and the Ministries of Foreign Affairs, of Justice and of Education, made commitments to enhance awareness and knowledge of IHL among various groups (the military, diplomats, judges, lawyers, detention personnel, students and youth in general).⁴⁶⁶

416. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Guatemala pledged to “pursue its policy to train armed forces members in international humanitarian law, with the help of the ICRC’s training guidelines and material”.⁴⁶⁷

417. In 1977, during a debate in the Sixth Committee of the UN General Assembly, Honduras stated that “equally important [was Resolution] 21 . . . of the [CDDH], relating to the dissemination of knowledge of international humanitarian law”.⁴⁶⁸

418. The Report on the Practice of India notes that a Military Law Institute was established in 1996 and states that:

The members of the armed forces are adequately trained in humanitarian law and human rights law at the time of recruitment as well as while in service. The Geneva Conventions form part of training manuals. In addition, they are trained in human rights norms especially in view of the fact that they may be required to deal with civilians in times of internal conflicts . . . The police personnel are trained in human rights while undergoing training in police academies . . . The police personnel are not specifically trained in humanitarian law.⁴⁶⁹

419. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Indonesia pledged to “intensify the dissemination and education in

⁴⁶⁵ Greece, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁶⁶ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 32.

⁴⁶⁷ Guatemala, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁶⁸ Honduras, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/32/SR.16, 13 October 1977, § 60.

⁴⁶⁹ Report on the Practice of India, 1997, Chapter 6.6.

International Humanitarian Law and the works of humanitarian organizations to . . . military forces".⁴⁷⁰

420. According to the Report on the Practice of Indonesia, teaching of IHL is offered at all levels of training and education of the Indonesian armed forces.⁴⁷¹

421. According to the Report on the Practice of Iraq, IHL is taught in Iraqi military colleges.⁴⁷²

422. In 1999, during a debate in the UN Security Council, Israel stated that:

There are practical steps that every signatory to the Fourth Geneva Convention can adopt in order to ensure greater respect and adherence to its provisions. First, States have a responsibility to educate their peoples regarding the importance of international humanitarian law in general. This should not be confined to the small community of legal experts in foreign ministries and universities who write on this subject. States should disseminate information about the Fourth Geneva Convention even before they became involved in armed conflicts. For example, the Fourth Geneva Convention should be included in military training. In fact, the provisions of the Convention should be included in the staff orders of every soldier, which is the practice of the Israel Defence Forces.⁴⁷³

423. According to the Report on the Practice of Israel, the IDF carries out extensive training of military personnel in the field of the laws of war, with the aim of ensuring that "all IDF personnel have at least a basic understanding of the humanitarian principles and other principles governing armed conflict". All such instruction is the responsibility of the IDF's Military Advocate-General's Corps and is carried out by the IDF's International Law Department and the International Law Section of the IDF Military Law School. The report also notes that "the IDF has a policy of cooperating with the ICRC in the dissemination of the Laws of War. In this context, the IDF enables representatives of the ICRC to present lectures in various IDF schools and courses."⁴⁷⁴

424. In 1997, in its final report on the events in Somalia, the Italian Government Commission of Inquiry emphasised the need for special training in IHL and human rights law for the forces participating in peacekeeping operations.⁴⁷⁵

425. According to the Report on the Practice of Jordan, IHL is taught to the Jordanian armed forces and to the Jordanian contingents engaged in UN peacekeeping missions.⁴⁷⁶

426. At the 27th International Conference of the Red Cross and Red Crescent in 1999, South Korea pledged to "continue and enhance our International

⁴⁷⁰ Indonesia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁷¹ Report on the Practice of Indonesia, 1997, Chapter 6.6.

⁴⁷² Report on the Practice of Iraq, 1998, Chapter 6.6.

⁴⁷³ Israel, Statement before the UN Security Council, UN Doc. S/PV.3980 (Resumption 1) (Provisional), 22 February 1999, p. 11.

⁴⁷⁴ Report on the Practice of Israel, 1997, Chapter 6.6.

⁴⁷⁵ Italy, Government Commission of Inquiry, Final Report on the Events in Somalia, 8 August 1997, pp. 44–45.

⁴⁷⁶ Report on the Practice of Jordan, 1997, Chapter 6.6.

Humanitarian Law education of military forces, especially those being sent on missions abroad".⁴⁷⁷

427. According to the Report on the Practice of Kuwait, the Kuwaiti armed forces have allowed the ICRC to organise several seminars and conferences on IHL. The report, which refers to a notice of the National Guard General Headquarters (Military Authority) and a note of the Kuwaiti Ministry of Defence, also states that brochures on IHL have been disseminated within the armed forces of Kuwait.⁴⁷⁸

428. The Report on the Practice of Kuwait refers to a commentary on the draft Final Declaration of the International Conference for the Protection of War Victims made in 1993 by the Kuwaiti Ministry of Justice which states that "instruction of IHL should be comprehensive, not restricted to the fundamental or essential rules only".⁴⁷⁹

429. At the 27th International Conference of the Red Cross and Red Crescent in 1999, the government of Laos, jointly with the Lao Red Cross Society, pledged "to conduct National workshop/seminars in giving orientation/dissemination on International Humanitarian Law".⁴⁸⁰

430. According to the Report on the Practice of Lebanon, which refers to a speech of the Director General of the Lebanese Ministry of Justice made at a regional meeting in 1997, IHL is taught in Lebanese military schools.⁴⁸¹

431. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Madagascar pledged "to use all means available to improve dissemination of international humanitarian law at the national level".⁴⁸²

432. In 1999, Malawi's Ministry of Defence, the Law Commissioner, the ICRC and the National Red Cross Society held a seminar on national implementation of IHL. Among other things, the seminar encouraged Malawi to intensify IHL instruction for members of the Malawi Defence Force and include the subject in training programmes for the police, prison and immigration services and in university curricula.⁴⁸³

433. According to the Report on the Practice of Malaysia, no national legislation imposes a duty on the Malaysian authorities to teach IHL to every member of the security forces. However, the report, referring to an interview with the

⁴⁷⁷ South Korea, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁷⁸ Report on the Practice of Kuwait, 1997, Chapter 6.6.

⁴⁷⁹ Report on the Practice of Kuwait, 1997, Chapter 6.6, referring to Remarks and proposals of the Ministry of Justice concerning the Project of the Final Declaration of the International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993.

⁴⁸⁰ Laos, Pledge made together with the Lao Red Cross at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁸¹ Report on the Practice of Lebanon, 1998, Chapter 6.6, referring to a Speech of the Director General of the Ministry of Justice, Regional meeting on the implementation of IHL, Amman, 21–22 December 1997.

⁴⁸² Madagascar, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁸³ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 44.

Ministry of Home Affairs, states that efforts have been made by the armed forces to disseminate knowledge of the Geneva Conventions, that the armed forces organise courses on the LOAC to train “selected members of the Armed Forces to enable these members to brief or give lectures to other members of the Armed Forces” and that selected members of the armed forces are sent to attend courses in IHL in international institutions such as the IHL in San Remo. The report further states that some dissemination activities are also carried out by the Malaysian National Red Crescent Society and that Malaysian officers of the armed forces sent on peacekeeping operations are taught the principles of the Geneva Conventions at a Malaysian Armed Forces Peacekeeping Centre.⁴⁸⁴

434. In 1999, IHL training was included in the programmes of Mali’s military academies, and a Military Code of Conduct adopted by the Ministry of Defence was distributed to members of the armed forces.⁴⁸⁵

435. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mozambique pledged to “undertake efforts aimed at disseminating and promoting the International Humanitarian Law in the Army, Security Forces [and] Police”.⁴⁸⁶

436. According to high-ranking officers of the army of the Netherlands, soldiers are required to study IHL in theory and in practice during their entire career. During operational training, attention is devoted to IHL and theory is repeated. Courses are given to senior personnel of all units of the armed forces (army, air force and navy) at brigade level. The courses consist of case studies. Considerable attention is devoted to the study of norms and ethics, as it is supposed that IHL should be instinctive.⁴⁸⁷

437. In an explanatory memorandum submitted to the Dutch Parliament in the context of the ratification procedure of the CCW, the government of the Netherlands stated that every soldier in the Netherlands received training in IHL.⁴⁸⁸

438. In 1999, during a debate in the UN Security Council, New Zealand noted that “the dissemination of international humanitarian law needs our fullest support, so that the knowledge of the basic rules governing armed conflict and human rights spreads to all those who bear arms” and stressed that this was of “fundamental importance”.⁴⁸⁹

439. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Niger pledged to “ensure that armed forces taking part in international

⁴⁸⁴ Report on the Practice of Malaysia, 1997, Chapter 6.6.

⁴⁸⁵ ICRC, Advisory Service, 1999 *Annual Report*, Geneva, 2000, p. 45.

⁴⁸⁶ Mozambique, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁸⁷ Report on the Practice of Netherlands, 1997, Interview with two high-ranking officers of the Royal Netherlands Army staff, both legal advisors, Chapter 6.6.

⁴⁸⁸ Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the CCW, 1983–1984 Session, Doc. 18 278 (R 1248), Nos. 1–3, p. 9.

⁴⁸⁹ New Zealand, Statement before the UN Security Council, UN Doc. S/PV.3980 (Provisional), 22 February 1999, p. 15.

missions receive instruction in international humanitarian law and the activities of humanitarian organizations".⁴⁹⁰

440. In 1999, the ICRC and the Ministry of Justice of Niger held a training seminar for government officials on IHL and its implementation.⁴⁹¹

441. According to an academic report on the level of implementation of IHL in Nigeria, the Directorate of Legal Services of the army is responsible for dissemination, education and advice on matters relating to IHL. This report also states that, in 1996, the Nigerian army was in the process of producing a series of instruction manuals on various aspects of IHL intended to be incorporated and used at the training courses of officers at various levels. It also notes that the Nigerian army sponsors officers to participate in courses in IHL abroad, such as at the IIHL in San Remo.⁴⁹²

442. The Report on the Practice of Nigeria states that no normative practice relative to the duty to instruct members of the armed forces in IHL was found. However, it mentions brochures/manuals on IHL published by the Nigerian armed forces.⁴⁹³

443. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Norway and the Norwegian Red Cross pledged:

to co-operate on the development of new IHL training programmes for the Norwegian Armed Forces . . . with the aim to:

- Further motivate the integration of IHL as an obligatory component in military exercises, maneuvers, and training programs on all levels
- Ensure that the Norwegian armed forces hold the highest possible standards with regard to respect for and integration of IHL and
- Contribute to the development of model IHL training concepts with potential international applications.⁴⁹⁴

444. According to the Report on the Practice of Pakistan, IHL is taught in Pakistani military colleges. The report also states that cooperation has been established between the ICRC local mission and the Pakistani Army General Headquarters for the dissemination of IHL.⁴⁹⁵

445. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Peru pledged to "strengthen and gradually expand the incorporation of international humanitarian law into the instruction provided to armed and police forces members".⁴⁹⁶

⁴⁹⁰ Niger, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁹¹ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 51.

⁴⁹² Itse E. Sagay, Evaluation/Assessment of the Level of Implementation of International Humanitarian Law in Nigeria, Paper presented at the National Seminar on the implementation of humanitarian law in Nigeria, Lagos, 13 August 1996, pp. 20–21.

⁴⁹³ Report on the Practice of Nigeria, 1997, Chapter 6.6.

⁴⁹⁴ Norway, Pledge made together with the Norwegian Red Cross at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁴⁹⁵ Report on the Practice of Pakistan, 1998, Chapter 6.6.

⁴⁹⁶ Peru, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

446. According to the Report on the Practice of Peru, which refers to Peru's military manuals and other teaching materials for the armed forces produced by the Peruvian Ministry of Defence in the 1990s, principles of IHL applicable to international and non-international conflicts are taught to the Peruvian armed forces.⁴⁹⁷

447. The Guidelines on Human Rights and Improvement of Discipline in the AFP, issued in 1989 by the Office of the Chief of Staff of the armed forces of the Philippines, states that:

The nature of human rights violations including its legal implications and consequences should be inculcated repeatedly to the troops. The rule of law and respect for the dignity of man which are the foundations of human rights should be emphasized in conferences, seminars, dialogues, troop information sessions, and regular training courses.⁴⁹⁸

448. An order issued in 1995 by the President of the Philippines provides that:

The Department of Interior and Local Government, the Department of Justice and the Department of National Defence are hereby directed to include, as an integral part of the continuing education and training of their personnel, the study of human rights as conducted by the Commission on Human Rights. Said human rights education and training shall also include the various international treaties and conventions on human rights to which the Philippines is a party.⁴⁹⁹

449. According to the Report on the Practice of the Philippines, which refers to a publication of 1996, subjects or courses dealing with international conventions, agreements, declarations or covenants on human rights and IHL ratified by the Philippines or of which the Philippines is a signatory are to be included in the curriculum of the armed forces of the Philippines and of the Philippine National Police.⁵⁰⁰

450. In 1999, Poland held several seminars and courses for military officers. The Polish Ministry of Defence issued new material for teaching the international law of armed conflict to non-commissioned officers and private soldiers. In addition, an agreement on dissemination of IHL was signed between the Ministry of Defence of Poland and the ICRC.⁵⁰¹

451. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Russia pledged to "broaden the campaign of dissemination of the

⁴⁹⁷ Report on the Practice of Peru, 1998, Chapter 6.6.

⁴⁹⁸ Philippines, Ministry of National Defence, Office of the Chief of Staff, Guidelines on Human Rights and Improvement of Discipline in the AFP, 2 January 1989, § 2(3).

⁴⁹⁹ Philippines, The President, Memorandum Order No. 259, Requiring Human Rights Education and Training of Law Enforcement, Police, Military and Prison Personnel, 7 February 1995.

⁵⁰⁰ Report on the Practice of the Philippines, 1997, Chapter 6.6, referring to Human Rights Curriculum for AFP/PNP, Unit 2 Course No. 8: Your Rights and the Rights of Others in Times of Armed Conflict, cited in R. P. Claude, *Educating for Human Rights: The Philippines and Beyond*, 1996, p. 256.

⁵⁰¹ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 54.

International Humanitarian Law and, in particular, among the military who participate in the international peace-keeping operations".⁵⁰²

452. On the basis of replies by army officers to a questionnaire, the Report on the Practice of Rwanda, states that, during the period 1990–1994, soldiers of the RPF received basic instruction in IHL, and a military manual was issued. The report also notes that, with the agreement of the Rwandan authorities, training of officers of the armed forces in IHL is carried out by the ICRC.⁵⁰³

453. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Slovenia pledged "support to the dissemination of the Geneva Conventions with Additional Protocols and other instruments of International Humanitarian Law within armed and security forces".⁵⁰⁴

454. In 1999, a course on IHL was organised in Slovenia, in cooperation with the ICRC's regional delegation, for officers and instructors of the Centre for Military Academies and the Staff College of the Republic of Slovenia.⁵⁰⁵

455. South Africa's White Paper on National Defence of 1996, which presents the defence policy of the Government of National Unity, provides that:

31. Education and training programmes within the SANDF are a cardinal means of building and maintaining a high level of professionalism. In this regard, the [interim] Constitution [of 1994] provides that all members of the SANDF "shall be properly trained in order to comply with international standards of competency".

...

35. Education and training will also play an essential role in developing the political and ethical dimensions of military professionalism. To this end, the Minister will oversee the design and implementation of a civic education programme on "defence in a democracy" ...

36. The mission of the civic education programme is to instil respect amongst military personnel and other members of the DOD for the core values of a democratic South Africa through appropriate education and training. These values derive principally from the Constitution. They include respect for human rights, the rights and duties of soldiers, the rule of law, international law, non-partisanship, non-discrimination, and civil supremacy over the armed forces.

37. The programme will cover the following subjects: ... international law on armed conflicts ...

38. This programme will extend to all members of the DOD but will necessarily be tailored according to function and rank ...

...

⁵⁰² Russia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵⁰³ Report on the Practice of Rwanda, 1997, Replies by army officers to a questionnaire, Chapter 6.6.

⁵⁰⁴ Slovenia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵⁰⁵ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 57.

41. The SANDF, together with the International Committee of the Red Cross, is currently developing a comprehensive curriculum on international humanitarian law and international law on armed conflict.⁵⁰⁶

456. In a paper entitled "Presentation of the South African Approach to International Humanitarian Law" produced in the late 1990s, the South African government emphasised that:

It is acknowledged today that the armed formations which now comprise the South African National Defence Force (SANDF) were all guilty, to a greater or lesser extent, of human rights abuses during the apartheid era. None of these forces were trained and orientated to serve a democracy, nor to apply International Humanitarian Law in their operations . . .

One of the major initiatives was a clear commitment by the Government in its White Paper on Defence . . . [One of the statements therein] was the Government's undertaking . . . that it was prepared to institutionalise International Humanitarian Law in the military's training.

The other initiative was the process to ensure that the SANDF incorporated International Humanitarian Law into its training. This initiative was in fact launched during the transitional period just prior to the April 1994 elections . . .

The SA Army has . . . held a successful instructor's course during August 1997 where 55 instructors were qualified, using material supplied originally by the ICRC. This was followed by an instruction for all Commanders and formations to start training in IHL. Furthermore, the SA Army has drawn up curricula for all the personnel development courses, starting from the basic military course up to the senior staff course. Training has already commenced on most of these courses.⁵⁰⁷

457. In a training order issued in 1997, the South African Department of Defence stated that:

In September 1997, the Minister of Defence authorised the Civic Education Guidelines and programme, after the Parliamentary Standing Committee on Defence had reviewed the contents and provided their approval . . . All members of the Department of Defence are to receive training in civic education as contained in the Guidelines, as approved by Parliament . . . The introduction of [the LOAC Manual (1996)] has already been commenced with under separate instruction and with the assistance of the representative of the International Committee of the Red Cross (ICRC). The training in International Humanitarian Law/Law of Armed Conflict which has already been introduced is to be harmonized with the complete civic education programme . . . Arms of the Service are also to introduce International Humanitarian Law/Law of Armed Conflict on those courses, other than formative courses, where it is appropriate, such as operational courses.⁵⁰⁸

⁵⁰⁶ South Africa, Minister of Defence, *Defence in a Democracy*, White Paper on National Defence for the Republic of South Africa, 8 May 1996, Chapter 3, §§ 31, 35–38 and 41.

⁵⁰⁷ South Africa, SANDF, *Presentation on the South African Approach to International Humanitarian Law*, CPERS/DPD/103/1/B (undated), Report on the Practice of South Africa, 1997, Chapter 6.6, Annex.

⁵⁰⁸ South Africa, Department of Defence, *Training Order 1/1/97: Introduction of Civic Education in the Department of Defence*, C PERS/DPD/R/103/1/B, C PERS/DPD/R/103/2, September 1997, §§ 2–3 and 7–8.

458. In a speech in 1998, the South African Minister of Defence stated that “[1998] sees the implementation of our Civic Education Programme. The programme will assist our members in becoming familiar with: . . . International Humanitarian Law”.⁵⁰⁹

459. In 1999, during a debate in the Sixth Committee of the UN General Assembly on the UN Decade of International Law, South Africa stated that “States should work to instil a culture of compliance [with rules of IHL], in particular by training soldiers in humanitarian law”.⁵¹⁰

460. The Report on the Practice of South Africa refers to an opening address at a UN human rights seminar by the South African Deputy Minister of Defence in which he emphasised that training for the armed forces should cover both international human rights standards as well as IHL, since the armed forces were likely to intervene in situations not covered by the Geneva Conventions or the Additional Protocols. He referred to the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.⁵¹¹

461. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Spain pledged to “continue organising training courses in international humanitarian law, in cooperation with the Committee of the Spanish Red Cross, for the leaders and officers of the armed forces of Iberoamerican, African and eastern European countries”.⁵¹²

462. The Report on the Practice of Spain notes that IHL disseminated and taught in the Spanish armed forces includes the rules applicable in both international and internal armed conflicts.⁵¹³

463. In 1999, members of the Swedish Defence Force received thorough instruction in IHL.⁵¹⁴

464. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Switzerland pledged to “produce learning materials (CD-ROMs) on the law of armed conflicts, with the aim of facilitating instruction carried out by armed-forces commanders, whether of army corps, battalions or brigades” and to “improve the defence ministry’s Website on the international law of armed conflict, in order to disseminate international humanitarian law more broadly”.⁵¹⁵

⁵⁰⁹ South Africa, Minister of Defence, Speech delivered during the Parliamentary Media Briefing Week, 12 February 1998, Part III.

⁵¹⁰ South Africa, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/54/SR.10, 19 October 1999, § 76.

⁵¹¹ Report on the Practice of South Africa, 1997, Chapter 6.6, referring to Deputy Minister of Defence, Presentation at the opening of a UN Human Rights Seminar, p. 3.

⁵¹² Spain, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵¹³ Report on the Practice of Spain, 1998, Chapter 6.6.

⁵¹⁴ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 61.

⁵¹⁵ Switzerland, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

465. The Report on the Practice of Syria states that Syria has cooperated with the National Red Crescent Society on a programme of intensive IHL courses for the armed forces since 1994.⁵¹⁶

466. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Thailand pledged “to ensure that International Humanitarian Law and its Principles are integrated into the educational and training programme of armed forces”.⁵¹⁷

467. In 1993, during a debate in the Sixth Committee of the UN General Assembly on the UN programme of assistance in the teaching, study, dissemination and wider appreciation of international law, the representative of Trinidad and Tobago stated that:

11. Her delegation noted the growing interest in the legal aspects of peace-keeping operations . . . International humanitarian law had not yet been fully developed and greater emphasis should be placed on that issue during training programmes. Other issues, such as procurement of goods and services, privileges and immunities of members of the peace-keeping operations, personal injury, deaths and damage to property, could also be considered.
12. . . . She agreed that instead of codifying [the rules on the protection of the environment in times of armed conflict], it would be more productive to ensure increased compliance with and wider dissemination of existing rules on the subject. Accordingly lectures and seminars had been organised in Trinidad and Tobago to familiarize members of the armed forces with the relevant provisions of the Geneva Conventions of 1949.⁵¹⁸

468. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Turkey pledged to “provide training in International Humanitarian Law and the work of humanitarian organisations to the Turkish Military Forces and through the ‘Partnership for peace (PFP) Training Center’ in Ankara to the other countries’ armed forces participating in PFP”.⁵¹⁹

469. The UK Ministry of Defence has produced a training video for UK soldiers containing a summary of basic principles of IHL.⁵²⁰

470. In a decree issued in 1992, the government of Uruguay entrusted the administration of IHL courses, in coordination with the National Committee on Humanitarian Law of the Ministry of National Defence, to the country’s main military academy, Instituto Militar de Estudios Superiores, and in coordination with the Ministry of Foreign Affairs, to the Instituto Artigas de

⁵¹⁶ Report on the Practice of Syria, 1997, Chapter 6.6.

⁵¹⁷ Thailand, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵¹⁸ Trinidad and Tobago, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/48/SR.33, 19 November 1993, §§ 11–12.

⁵¹⁹ Turkey, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁵²⁰ UK, Ministry of Defence, Training Video: The Geneva Conventions, 1986, Report on UK Practice, 1997, Chapter 6.6.

Relaciones Exteriores – Escuela Diplomática.⁵²¹ Courses on the law of war and public international law (including the law of armed conflict) are taught at the Instituto Militar de Estudios Superiores (courses for first-year students in the programme that trains officers), at the Escuela de Armas y Servicios (training and finishing programme for officers) and at the Escuela Militar (courses for future officers).⁵²² IHL instruction is also included in the law programme of the Escuela de Policía.⁵²³

471. The 1979 version of the US Department of Defense Directive on the Law of War Program stated that “the Armed Forces of the U.S. shall institute and implement programs to prevent violations of the law of war to include training and dissemination, as required, by the Geneva Conventions”.⁵²⁴

472. In 1987, a Deputy Legal Adviser of the US Department of State, referring to Articles 80–85 API, affirmed that “we support the principle that their study be included in programs of military instruction”.⁵²⁵

473. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that “the U.S. strongly supports [dissemination of IHL]. DoD Directive 5100.77, in implementation of U.S. law of war obligations, requires that all military personnel receive law of war training commensurate with their duties and responsibilities.”⁵²⁶

474. The 1998 version of the US Department of Defense Directive on the Law of War Program, reissuing the one of 1979 and aiming “to ensure DoD compliance with the law of war obligations of the United States”, provided that “the Heads of the DoD Components shall: . . . institute and implement effective programs to prevent violations of the law of war, including law of war training and dissemination, as required by [the 1907 Hague Convention (IV) and the 1949 Geneva Conventions]”.⁵²⁷

475. In an Order of 1988, on the basis of which the YPA Military Manual was issued, the Presidency of the SFRY stated that:

⁵²¹ Uruguay, Executive Decree No. 678 del PEN, Cométesa la instrumentación de Cursos en coordinación con la Comisión Nacional de Derecho Humanitario, 24 November 1992, *Diario Oficial*, 1 March 1993, pp. 498-A and 499-A.

⁵²² Uruguay, Instituto Militar de Estudios Superiores, Law of War Syllabus; Escuela de Armas y Servicios del Ejército, Public International Law Syllabus; Escuela Militar, Public International Law Syllabus; Report on the Practice of Uruguay, 1997, Chapter 6.6.

⁵²³ Uruguay, Escuela de Policía Juan Carlos Gómez Folle, Human Rights Syllabus, Report on the Practice of Uruguay, 1997, Chapter 6.6.

⁵²⁴ US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, p. 2, Section E(1)(b).

⁵²⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

⁵²⁶ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(S), Report on US Practice, 1997, Chapter 6.6.

⁵²⁷ US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(3)(2).

Regular training of all personnel of the armed forces should be organised with the aim of learning the rules of international humanitarian law.

Plans for exercises, manoeuvres and other activities of the armed forces, the objective of which is to prepare them for combat action, should include activities and behaviour related to the implementation of rules of international humanitarian law.⁵²⁸

476. According to an academic report on the implementation of IHL in Zaire (DRC), in 1996, officers of the armed forces of Zaire (DRC) were trained in IHL within the framework of the training programme established in military training centres and schools or in seminars. Security seminars had also been provided by the FAZ for officers who operated in refugee camps.⁵²⁹

477. A ministerial directive of Zimbabwe requires the inclusion of IHL in all the Zimbabwean armed forces' training courses.⁵³⁰

478. In 1980 and again in 1994, the Ministry of Foreign Affairs of a State formally committed itself to support the efforts of the ICRC in the dissemination of IHL among the armed forces. ICRC delegates had several meetings with governmental authorities on the means and methods of dissemination of IHL to the armed forces and to the civilian population.⁵³¹

479. In 1990, an officer of a peacekeeping force undertook to introduce the "Rules for combatants" to his troops in an area concerned with an armed conflict. He added that he preferred using "Rules for peacekeeping forces". He did not, however, accept the organisation of dissemination sessions.⁵³²

480. In 1994, in the context of a military operation authorised by the UN, a high-ranking official of a State participating in the operation confirmed that its troops would respect IHL and stated that training in IHL, in cooperation with the ICRC, was provided for officers.⁵³³

481. In 1995, a spokesman for the General Staff of the Armed Forces of a State party to a non-international armed conflict acknowledged that field commanders did not have the time to teach IHL to the troops under their command. He emphasised that it was also difficult to change entrenched reflexes. The ICRC proposed setting up basic courses for new recruits, a proposal that was well received. Another officer considered that a series of simple rules posted in barracks and repeated each morning should be enough.⁵³⁴

482. In 1995, an official of the Ministry of Interior of a State stated – with respect to an armed conflict to which his country was a party – that he was not in favour of more or less permanent dissemination in the region of the conflict.

⁵²⁸ SFRY (FRY), Presidency, Order on the implementation of the rules of international humanitarian law in the armed forces of the Socialist Federal Republic of Yugoslavia, 13 April 1988, § 4.

⁵²⁹ Mavungu Mvumbi-di-Ngoma, Report on the Promotion and Implementation of International Humanitarian Law in the Republic of Zaire, September 1996, p. 20.

⁵³⁰ ICRC, Advisory Service, *2001 Annual Report*, Geneva, 2002, p. 137.

⁵³¹ ICRC archive documents. ⁵³² ICRC archive document.

⁵³³ ICRC archive document. ⁵³⁴ ICRC archive documents.

He would rather favour dissemination only to security forces of a certain level, and not to operational units.⁵³⁵

483. In 1996, the government of a State concerned by an internal armed conflict agreed to introduce IHL teaching in schools and among police forces.⁵³⁶

III. Practice of International Organisations and Conferences

United Nations

484. In a resolution adopted in 1998 on the protection of refugees, the UN Security Council requested that the UN Secretary-General:

respond, as appropriate, to requests from African States, the OAU and subregional organizations for advice and technical assistance in the implementation of international refugee, human rights and humanitarian law relevant to the present resolution, including through appropriate training programmes and seminars.⁵³⁷

The Security Council also encouraged the Secretary-General and member States involved in efforts to enhance Africa's peacekeeping capacity:

to continue to ensure that training gives due emphasis to international refugee, human rights and humanitarian law and in particular to the security of refugees and the maintenance of the civilian and humanitarian character of refugee camps and settlements.⁵³⁸

485. In a resolution adopted in 1999, the UN Security Council underlined:

the importance of the widest possible dissemination of international humanitarian, human rights and refugee law and of relevant training for, inter alia, civilian police, armed forces, members of the judicial and legal professions, civil society and personnel of international and regional organizations.⁵³⁹

486. In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council reiterated "the importance . . . of providing appropriate training in [IHL], including child and gender-related provisions, . . . to personnel involved in peacemaking, peacekeeping and peace-building activities". It also requested the UN Secretary-General "to disseminate appropriate guidance and to ensure that such United Nations personnel have the appropriate training" and urged "relevant Member States, as necessary and feasible, to disseminate appropriate instructions and to ensure that appropriate training is included in their programmes for personnel involved in similar activities".⁵⁴⁰

487. In a resolution adopted in 1971 on respect for human rights in armed conflicts, the UN General Assembly called upon all States "to disseminate widely

⁵³⁵ ICRC archive document. ⁵³⁶ ICRC archive document.

⁵³⁷ UN Security Council, Res. 1208, 19 November 1998, § 8.

⁵³⁸ UN Security Council, Res. 1208, 19 November 1998, § 10.

⁵³⁹ UN Security Council, Res. 1265, 17 September 1999, preamble.

⁵⁴⁰ UN Security Council, Res. 1296, 19 April 2000, § 19.

information and to provide instruction concerning human rights in armed conflicts" and requested that the UN Secretary-General "encourage the study and teaching of principles of respect for human rights applicable in armed conflicts by the means at his disposal".⁵⁴¹

488. In a resolution adopted in 1972 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts "to provide instruction concerning [the international humanitarian rules which are applicable] to their armed forces". It requested that the UN Secretary-General "encourage the study and teaching of principles of respect for international humanitarian law applicable in armed conflict".⁵⁴²

489. In a resolution adopted in 1973 on respect for human rights in armed conflicts, the UN General Assembly urged that "instruction concerning [international humanitarian] rules be provided to armed forces . . . with a view to securing their strict observance" and requested that the UN Secretary-General "encourage the study and teaching of principles of international humanitarian rules applicable in armed conflicts".⁵⁴³

490. In a resolution adopted in 1975 on respect for human rights in armed conflicts, the UN General Assembly called "the attention of the [CDDH], and of the Governments and organizations participating in it, to the need for measures to promote on a universal basis the dissemination of and instruction in the rules of international humanitarian law applicable in armed conflicts".⁵⁴⁴

491. In a resolution adopted in 1977 on respect for human rights in armed conflicts, the UN General Assembly called upon all States "to take effective steps for the dissemination of humanitarian rules applicable in armed conflicts".⁵⁴⁵

492. In a resolution adopted in 1992 on protection of the environment in times of armed conflict, the UN General Assembly urged States "to take steps to incorporate the provisions of international law applicable to the protection of the environment into their military manuals and to ensure that they are effectively disseminated".⁵⁴⁶

493. In a resolution adopted in 1994, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict and invited:

all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.⁵⁴⁷

⁵⁴¹ UN General Assembly, Res. 2852 (XXVI), 20 December 1971, §§ 6 and 7.

⁵⁴² UN General Assembly, Res. 3032 (XXVII), 18 December 1972, §§ 2–3.

⁵⁴³ UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, §§ 5 and 6.

⁵⁴⁴ UN General Assembly, Res. 3500 (XXX), 15 December 1975, § 2; see also Res. 31/19, 24 November 1976, § 2.

⁵⁴⁵ UN General Assembly, Res. 32/44, 8 December 1977, § 7.

⁵⁴⁶ UN General Assembly, Res. 47/37, 25 November 1992, § 3.

⁵⁴⁷ UN General Assembly, Res. 49/50, 9 December 1994, § 11.

494. In a resolution adopted in 1987, the UN Commission on Human Rights invited the government of Sri Lanka to “intensify its co-operation with the International Committee of the Red Cross in the fields of dissemination and promotion of international humanitarian law”.⁵⁴⁸

495. In a resolution adopted in 1994, the UN Commission on Human Rights encouraged the government of Guatemala to include in the curricula and training programmes for personnel of the armed forces and security forces the international commitments of Guatemala in the field of human rights.⁵⁴⁹

496. In resolutions adopted in 1994, 1995 and 1996 on the situation of human rights in Myanmar, the UN Commission on Human Rights welcomed “the first measures taken by the Government of Myanmar to provide for the training of military personnel in international humanitarian law” and requested it “to intensify its efforts in that regard and to extend them to police and prison personnel”.⁵⁵⁰

497. In a resolution adopted in 1995, the UN Commission on Human Rights encouraged:

Governments, United Nations bodies and organs, the specialized agencies and intergovernmental and non-governmental organizations, as appropriate, to initiate, coordinate or support programmes designed to train and educate military forces, law enforcement officers and government officials, as well as members of the United Nations peace-keeping or observer missions, on human rights and humanitarian law issues connected with their work.

It appealed “to the international community to support endeavours to that end”.⁵⁵¹

498. In a resolution adopted in 2000 concerning the situation in Chechnya, the UN Commission on Human Rights requested that the Russian government “disseminate, and ensure that the military at all levels has a knowledge of basic principles of human rights and international humanitarian law”.⁵⁵²

499. In a resolution adopted in 1989 on human rights in times of armed conflict, the UN Sub-Commission on Human Rights recommended that the UN Commission on Human Rights adopt a resolution calling upon all governments “to give particular attention to the education of all members of security and other armed forces, and all law enforcement agencies, in the international law of human rights and of humanitarian law applicable in armed conflicts”.⁵⁵³

500. In a resolution adopted in 1997 on respect for humanitarian and human rights law provisions in United Nations peacekeeping operations, the UN

⁵⁴⁸ UN Commission on Human Rights, Res. 1987/61, 12 March 1987, § 3.

⁵⁴⁹ UN Commission on Human Rights, Res. 1994/58, 4 March 1994, § 8.

⁵⁵⁰ UN Commission on Human Rights, Res. 1994/85, 9 March 1994, § 19; Res. 1995/72, 8 March 1995, § 22; Res. 1996/80, 23 April 1996, § 20.

⁵⁵¹ UN Commission on Human Rights, Res. 1995/73, 8 March 1995, § 13.

⁵⁵² UN Commission on Human Rights, Res. 2000/58, 25 April 2000, § 5.

⁵⁵³ UN Sub-Commission on Human Rights, Res. 1989/24, 31 August 1989, § 1.

Sub-Commission on Human Rights requested “the Secretary-General to disseminate the Guidelines for United Nations Forces Regarding Respect for International Humanitarian Law of 1996 drafted by the United Nations in consultation with the International Committee of the Red Cross”.⁵⁵⁴

501. In a resolution adopted in 1999 on systematic rape, sexual slavery and slavery-like practices, the UN Sub-Commission on Human Rights called upon States “to make possible respect for their obligations in situations of conflict by, *inter alia*: . . . adopting suitable instructions for and training of their armed forces so that they know that all forms of sexual violence and sexual slavery are criminal and will be prosecuted”.⁵⁵⁵

502. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General, referring, *inter alia*, to the Geneva Conventions and Additional Protocols, stated that:

In order to promote a “climate of compliance”, Member States should take advantage of the technical services of United Nations bodies and other appropriate organizations, including the International Committee of the Red Cross, . . . to develop strong national institutions charged with the dissemination, monitoring and enforcement of these instruments and to establish systematic training programmes for armed forces and police in international humanitarian, human rights and refugee law, including child rights and gender related provisions.⁵⁵⁶

The Secretary-General recommended that the UN Security Council:

underscore the importance of compliance with international humanitarian and human rights law in the conduct of all peacekeeping operations by urging that Member States disseminate instructions among their personnel serving in United Nations peacekeeping operations and among those participating in authorized operations conducted under national or regional command and control.⁵⁵⁷

503. In 1999, in a report on the United Nations Decade of International Law, the UN Secretary-General stated that:

The guidelines for United Nations forces regarding respect for international humanitarian law proposed by ICRC contain fundamental principles of humanitarian law and, as such, constitute a very good training tool for forces engaged in peacekeeping and enforcement missions.⁵⁵⁸

504. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General urged Member States and donors “to support efforts to disseminate information on international humanitarian and human rights law

⁵⁵⁴ UN Sub-Commission on Human Rights, Res. 1997/34, 28 August 1997, § 3.

⁵⁵⁵ UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, § 11(a).

⁵⁵⁶ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 36.

⁵⁵⁷ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 61, Recommendation 30.

⁵⁵⁸ UN Secretary-General, Report on the United Nations Decade of International Law, UN Doc. A/54/362, 21 September 1999, § 48.

to armed groups and initiatives to enhance their practical understanding of the implications of those rules".⁵⁵⁹

505. In 1997, in a report on the question of human rights in Myanmar, the Special Rapporteur of the UN Commission on Human Rights recommended that in Myanmar:

military and law enforcement personnel, including prison guards, should be thoroughly informed and trained as to their responsibilities towards all persons in full accord with international human rights norms and humanitarian law. Such standards should be incorporated into Myanmar law, including the new constitution to be drafted.⁵⁶⁰

A similar recommendation had already been made in 1996.⁵⁶¹

506. In 2000, in a report on the situation of human rights in Rwanda, the Special Representative of the UN Commission on Human Rights stated that:

The Prosecutor [of Rwanda] has held seminars for officers on the promotion of humanitarian law and human rights with the help of the ICRC. He would like to hold more, but is constrained by a lack of funds. His office also publishes a monthly bulletin, *Military Justice Gazette*, six issues of which had appeared by June 2000 with all Articles in three languages. . . . These important initiatives help to ensure the accountability of the armed forces.⁵⁶²

507. In 1996, in a report entitled "Making human rights a reality", the UN High Commissioner on Human Rights reported that in 1995, the UN Human Rights Field Operation in Rwanda (HRFOR) set up several programmes of dissemination, such as a consulting service for the administration of justice, human rights seminars and training in human rights and IHL for military and police forces.⁵⁶³

Other International Organisations

508. In a recommendation adopted in 1982, the Parliamentary Assembly of the Council of Europe stressed that "past experience in armed conflict has established the need for the Geneva Conventions and the two protocols to be disseminated as widely as possible in the armed forces". It recommended that the Committee of Ministers invite the governments of member States "to ensure that international humanitarian law becomes known by disseminating

⁵⁵⁹ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, Recommendation 10.

⁵⁶⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Myanmar, Report, UN Doc. E/CN.4/1997/64, 6 February 1997, § 108, Recommendation 17.

⁵⁶¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Myanmar, Report, UN Doc. E/CN.4/1996/65, 5 February 1996, § 180, Recommendation (o).

⁵⁶² UN Commission on Human Rights, Special Representative on the Situation of Human Rights in Rwanda, Report, UN Doc. A/55/269, 4 August 2000, Annex, § 155.

⁵⁶³ UN High Commissioner for Human Rights, Report entitled "Making human rights a reality", UN Doc. E/CN.4/1996/103, 18 March 1996, §§ 125–137.

and teaching the Geneva Conventions . . . and their protocols among the armed forces".⁵⁶⁴

509. In a resolution adopted in 1989, the Parliamentary Assembly of the Council of Europe stressed "the importance, as laid down in the Geneva Conventions, of making known as widely as possible, within states involved in conflict and most notably in their armed forces, the basic provisions and fundamental principles of international humanitarian law".⁵⁶⁵

510. In a resolution adopted in 1996, the Parliamentary Assembly of the Council of Europe invited governments to "promote the dissemination of international humanitarian law in their own countries, particularly among the armed forces and police".⁵⁶⁶

511. The Final Declaration of the Second Summit of Heads of State and Government of the Council of Europe in 1997 recalled "the protection due to victims of conflicts, as well as the importance of the respect for humanitarian international law and the knowledge of its rules at national level, in particular among the armed forces and the police".⁵⁶⁷

512. In a recommendation adopted in 1999 on respect for IHL in Europe, the Parliamentary Assembly of the Council of Europe affirmed that States were responsible for disseminating the principles of IHL. It further pointed out that "those which have not yet done so should establish national interministerial commissions responsible for monitoring and implementing international humanitarian law, a task in which they are ably assisted by the ICRC". The Assembly recommended that the Committee of Ministers "invite the governments of the member states . . . to increase resources devoted to the dissemination of the principles of international humanitarian law, particularly among the armed forces, police and prison staff".⁵⁶⁸

513. The first OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1994, concluded that:

1. It is necessary to make an important effort in order to provide NGO's and soldiers in the armed forces of OAU Member States with appropriate teaching, many countries having already integrated the teaching of IHL in their programmes at officers level. This effort should not await the outbreak of hostilities.
2. There is need to ensure that the teaching of IHL is extended to all combatants, including the guerilla movements.⁵⁶⁹

The OAU Council of Ministers took note of the recommendations of the seminar.⁵⁷⁰

⁵⁶⁴ Council of Europe, Parliamentary Assembly, Rec. 945, 2 July 1982, §§ 10 and 11(b).

⁵⁶⁵ Council of Europe, Parliamentary Assembly, Res. 921, 6 July 1989, § 18.

⁵⁶⁶ Council of Europe, Parliamentary Assembly, Res. 1085, 24 April 1996, § 8(h).

⁵⁶⁷ Council of Europe, Second Summit of Heads of State and Government, Strasbourg, 10–11 October 1997, Final Declaration.

⁵⁶⁸ Council of Europe, Parliamentary Assembly, Rec. 1427, 23 September 1999, §§ 4 and 8.

⁵⁶⁹ OAU/ICRC, First seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 7 April 1994, Conclusions and Recommendations, §§ 1 and 2.

⁵⁷⁰ OAU, Council of Ministers, Res. 1526 (LX), 11 June 1994, § 1.

514. In a resolution adopted in 1995, the OAU Conference of African Ministers of Health called upon member States “to implement the educational and information programmes intended to popularize the International Humanitarian Law and the specific problems of armed conflicts”.⁵⁷¹

515. In a resolution adopted in 1995 on refugees, returnees and displaced persons, the OAU Council of Ministers urged member States “to uphold principles of good governance and promote the teaching and dissemination of International Humanitarian Law”.⁵⁷²

516. The third OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1996, recommended “compilations, study and application of African traditional humanitarian norms especially through education and the adoption of legislations at national level” and “translation and popularization of the Geneva Conventions and their Additional Protocols into local languages”.⁵⁷³ The OAU Council of Ministers took note of the recommendations of the seminar.⁵⁷⁴

517. In the recommendations of the fourth OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1997, the participants reiterated:

the need for the teaching of International Humanitarian Law and its wide dissemination more especially as the principles which subtended that IHL were the same as those which constitute the basis of the values of the African societies. In this connection, the need for a sustained action for the youths and culture of peace was unanimously stressed. The “culture of peace” and the dissemination of the IHL should be carried out.⁵⁷⁵

518. In the recommendations of the fifth OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1998, the participants:

stressed the need for the teaching of International Humanitarian Law, for its widespread dissemination and implementation, notably since this could facilitate conflict prevention. Special emphasis was placed on the need to promote education at all levels taking due account of traditional African humanitarian norms and values.⁵⁷⁶

519. In 1999, speaking on behalf of the OAU during a UN Security Council debate on the distinction between combatants and non-combatants, Burkina Faso emphasised that the OAU, as a possible solution “to avoid the growing recurrence of violations of international humanitarian law”, had formulated, *inter*

⁵⁷¹ OAU, Conference of African Ministers of Health, 26–28 April 1995, Res. 14 (V), § 5.

⁵⁷² OAU, Council of Ministers, 21–23 June 1995, Res. 1588 (LXII), § 9.

⁵⁷³ OAU/ICRC, Third seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 2–3 May 1996, Recommendations, § 1(e) and (f).

⁵⁷⁴ OAU, Council of Ministers, 1–5 July 1996, Res. 1662 (LXIV), § 1.

⁵⁷⁵ OAU/ICRC, Fourth seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 29–30 April 1997, Recommendations, § 1.

⁵⁷⁶ OAU/ICRC, Fifth seminar on IHL for diplomats accredited to the OAU, 30–31 March 1998, Recommendations, § 2.

alia, “the need to teach, publicize and implement international humanitarian law”.⁵⁷⁷

520. In 2001, the OSCE Supplementary Human Dimension Meeting recommended to the OSCE institutions and field operations that “training on humanitarian law and human rights should be organised”.⁵⁷⁸

International Conferences

521. The 4th International Conference of the Red Cross in 1887 adopted a resolution on measures which have been or should be taken by the Societies in order to spread knowledge of the 1864 Geneva Convention in the army, in circles especially interested in its implementation and among the general public. The resolution stated that:

It falls within the competence of Governments to spread knowledge of the [1864] Geneva Convention within the army. The Government must ensure that the Convention is taught to all military personnel, like all other military laws and rules . . . One of the best means of bringing the Convention to the knowledge of the army seems to be its reproduction in the service booklet of each soldier.⁵⁷⁹

522. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the implementation and dissemination of the Geneva Conventions stating that it considered that the application of Articles 47 GC I, 48 GC II, 127 GC III and 144 GC IV was “of the greatest importance in ensuring the observance of these Conventions” and that “it is essential that all members of the armed forces have adequate knowledge of the Geneva Conventions”. The Conference appealed “to all States parties to the Geneva Conventions to make increased efforts to disseminate and apply these Conventions, in particular by including the essential principles of the Conventions in the instruction given to officers and troops”.⁵⁸⁰

523. The 20th International Conference of the Red Cross in 1965 adopted a resolution on application of the Geneva Conventions by the United Nations Emergency Forces in which it recommended that “the Governments of countries making contingents available to the United Nations give their troops – in view of the paramount importance of the question – adequate instruction in the Geneva Conventions before they leave the country of origin”.⁵⁸¹

524. The 21st International Conference of the Red Cross in 1969 adopted a resolution on dissemination of the Geneva Conventions in which it made reference to Resolution 2412 (XXIII) of 17 December 1968 by which the UN General Assembly had declared that 1970 would be “International Education Year”.

⁵⁷⁷ OAU, Statement by Burkina Faso on behalf of the OAU before the UN Security Council, UN Doc. S/PV.3980 (Provisional), 22 February 1999, p. 6.

⁵⁷⁸ OSCE, Supplementary Human Dimension Meeting, Human Rights: Advocacy and Defenders, Vienna, 22–23 October 2001, Final report, p. 8.

⁵⁷⁹ 4th International Conference of the Red Cross, Karlsruhe, 22–27 September 1887, Res. VIII.

⁵⁸⁰ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXI.

⁵⁸¹ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXV, § 2.

The Conference expressed its hope that “the United Nations and in particular [UNESCO] will provide for events devoted to education and the dissemination of the Geneva Conventions during 1970” and requested “for that purpose, that a World Day be devoted to such events, with the use of the audio-visual aids made available by the most modern techniques”.⁵⁸²

525. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the implementation and dissemination of the Geneva Conventions in which it called “upon governments and National Societies to intensify their efforts with a view . . . to imparting clear concepts regarding the Geneva Conventions to specialized spheres such as the armed forces”. It requested that the ICRC “support the efforts of governments and National Societies in their dissemination of and instruction in the Geneva Conventions”.⁵⁸³

526. In a resolution adopted in 1977 on dissemination of knowledge of international humanitarian law applicable in armed conflicts, the CDDH invited:

the signatory States to take all appropriate measures to ensure that knowledge of international humanitarian law applicable in armed conflicts, and of the fundamental principles on which that law is based, is effectively disseminated, particularly by:

- ... encouraging the authorities concerned to plan and give effect, if necessary with the assistance and advice of the International Committee of the Red Cross, to arrangements to teach international humanitarian law, particularly to the armed forces and to appropriate administrative authorities, in a manner suited to national circumstances.⁵⁸⁴

The resolution was adopted by 63 votes in favour, 2 against and 21 abstentions.⁵⁸⁵

527. The 23rd International Conference of the Red Cross in 1977 adopted a resolution in which it noted with interest “the *Red Cross Teaching Guide* prepared jointly by the [ICRC] and the League of Red Cross Societies in consultation with National Societies, mainly for the use of school teachers” and urged “the appropriate authorities to support their respective National Society’s efforts to disseminate the *Teaching Guide*”. The Conference further called upon:

the League and the ICRC to help National Societies to make the *Teaching Guide* a success in particular by:

- (a) assisting with the training of persons responsible for disseminating the *Teaching Guide* in their respective countries,
- (b) co-operating with National Societies and with the competent authorities in adapting the *Teaching Guide* to the sections of the population to be reached.⁵⁸⁶

⁵⁸² 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. IX.

⁵⁸³ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. XII.

⁵⁸⁴ CDDH, *Official Records*, Vol. I, CDDH/446, 7 June 1977, Res. 21, Dissemination of knowledge of international humanitarian law applicable in armed conflicts, Article 2(a).

⁵⁸⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.55, 7 June 1977, § 48.

⁵⁸⁶ 23rd International Conference of the Red Cross, Bucharest, 15–21 October 1977, Res. XVIII.

528. In 1992, at the Helsinki Summit of the CSCE, the participating States committed themselves "to fulfilling their obligation to teach and disseminate information about their obligations under international humanitarian law".⁵⁸⁷

529. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to make every effort to:

Organise the teaching of international humanitarian law in the public administrations responsible for its application and incorporate the fundamental rules in military training programmes, as well as military code books, handbooks and regulations, so that each combatant is aware of his or her obligation to observe and help enforce these rules.⁵⁸⁸

530. In 1993, the 90th Inter-Parliamentary Conference adopted a resolution in which it called on governments "to promote awareness of international humanitarian law among the armed forces".⁵⁸⁹

531. In 1994, at the Budapest Summit of Heads of State or Government, CSCE participating States committed themselves "to ensure adequate information and training within their military services with regard to the provisions of international humanitarian law" and considered, in this context, "that relevant information should be made available".⁵⁹⁰

532. The 26th International Conference of the Red Cross and Red Crescent in 1995 adopted a resolution on international humanitarian law in which it endorsed:

the Final Declaration of the [1993] International Conference for the Protection of War Victims... [and] the recommendations drawn up by the Intergovernmental Group of Experts... which aim at translating the Final Declaration of the Conference into concrete and effective measures.

It also encouraged States and National Red Cross and Red Crescent Societies "to organize meetings, workshops and other activities on a regional basis to enhance the understanding and implementation of international humanitarian law".⁵⁹¹

533. In 1999, the Report on the Outcome of the Celebrations of the Centennial of the First International Peace Conference, drafted on the basis of an expert meeting and the international conference entitled "Centennial of the Russian Initiative: from the First Peace Conference, 1899 – to the Third, 1999", was

⁵⁸⁷ CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 52.

⁵⁸⁸ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(2), *ILM*, Vol. 33, 1994, pp. 299–300.

⁵⁸⁹ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, § 2(d).

⁵⁹⁰ CSCE, Budapest Summit of Heads of State or Government, 5–6 December 1994, Budapest Document 1994: Towards a Genuine Partnership in a New Area, Decisions, Chapter VIII: The Human Dimension, § 34.

⁵⁹¹ 26th International Conference of the Red Cross, Geneva, 3–7 December 1995, Res. I, preamble and §§ 3, 4 and 6.

presented to the UN General Assembly by the governments of the Netherlands and Russia. The report concluded that:

Important practical steps which would contribute to enhancing compliance with international humanitarian law and which all states and other relevant entities should be encouraged to take included the following [in discussions during the meetings]:

1. Measures of education and training designed to ensure that the principles of international humanitarian law are widely understood and to create a "culture of compliance" with international law.⁵⁹²

534. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that "States examine their educational and training curricula to ensure that international humanitarian law is integrated in an appropriate manner in their programmes for armed and security forces".⁵⁹³

535. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration calling upon "all parties, directly involved in the conflict [between Israel and Palestinians] or not, to . . . disseminate and take measures necessary for the prevention and suppression of breaches of the [1949 Geneva] Conventions".⁵⁹⁴

536. In the Final Declaration of the Second Review Conference of States Parties to the CCW in 2001, the participants underlined "the importance of the High Contracting Parties' obligation to disseminate this Convention and its annexed Protocols, and, in particular to include the content in their programmes of military instruction at all levels".⁵⁹⁵

IV. Practice of International Judicial and Quasi-judicial Bodies

537. In a resolution adopted in 1993, the ACiHPR stressed "the need for specific instruction of military personnel and the training of the forces of law and order in international humanitarian law and human and peoples' rights respectively".⁵⁹⁶

⁵⁹² Outcome of the Celebrations of the Centennial of the First International Peace Conference: Report on the Conclusions of the expert discussions on the three "Centennial themes", The Hague, 18–19 May 1999 and St. Petersburg, 22–25 June 1999, annexed to Letter dated 10 September 1999 from the Netherlands and Russia to the UN Secretary-General, UN Doc. A/54/381, 21 September 1999.

⁵⁹³ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.4, § 16.

⁵⁹⁴ Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, § 4.

⁵⁹⁵ Second Review Conference of States Parties to the CCW, Geneva, 11–21 December 2001, Final Declaration, UN Doc. CCW/CONF.II/2, 25 January 2002, p. 15.

⁵⁹⁶ ACiHPR, Addis Ababa, 1–10 December 1993, Res. 2 (XIV), § 2.

V. Practice of the International Red Cross and Red Crescent Movement

538. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

274. The overall aim of law of war training is to ensure full respect for the law of war by all members of the armed forces, irrespective of their function, time, location and situation . . .

275. The law of war has to be included in the programmes for military instruction . . .

276. It is not possible to teach everything to everybody. The trainer must only teach what the trainees need to know for their function. *Need to know* comes before *nice to know* . . .

277. Law of war problems shall be integrated into the normal exercise of military activities. Integrated training requires no time and no special material, but it does require the active participation of the trainees . . .

278. Combat reality requires automatic responses resulting in instinctively correct behaviour. Thus law of war training is part of the basic training . . .

279. Lectures, which leave the audience passive, should be delivered only as an introduction and given at times when trainees are receptive (e.g. not after training in the field or after lunch).⁵⁹⁷ [emphasis in original]

Delegates also teach that:

As commanders hold full responsibility for the respect of the law of war in their sphere of authority, they shall be trained so that they, in turn, can train their subordinates. Emphasis shall be put on conduct of combat and, as far as necessary, also on logistics and rear-area problems related to the law of war.⁵⁹⁸

539. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC appealed "to all the parties that they: . . . disseminate, or allow the ICRC to disseminate, to their armed forces the basic humanitarian rules for conduct of warfare".⁵⁹⁹

540. At its Rio de Janeiro Session in 1987, the Council of Delegates adopted a resolution on information and dissemination of IHL in which it encouraged National Societies:

which have not already done so to appoint officers to disseminate international humanitarian law and the Fundamental Principles and to make approaches to the authorities with a view to setting up joint committees composed of representatives of the relevant ministries and National Societies.

The Council of Delegates also invited the entire Movement "to continue and expand its activities for the dissemination of knowledge of international

⁵⁹⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 274–279.

⁵⁹⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 288.

⁵⁹⁹ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 5, *IRRC*, No. 209, 1979, p. 88.

humanitarian law and the Fundamental Principles in various circles, ... nationally, regionally and internationally".⁶⁰⁰

541. In a Memorandum on the Applicability of International Humanitarian Law sent in 1990 to all States party to the Geneva Conventions in the context of the Gulf War, the ICRC stated that:

It is extremely important for the members of the armed forces stationed in the Gulf to be aware of their obligations under international humanitarian law . . . The teaching of the law to the armed forces is, moreover, an obligation expressly stipulated by the Geneva Conventions and their Additional Protocols.⁶⁰¹

542. In an appeal issued in 1991 in the context of the conflict in the former Yugoslavia, the ICRC appealed to the parties in the former Yugoslavia "to ensure that combat units are aware of the humanitarian rules governing the conduct of hostilities and to facilitate ICRC efforts in that respect".⁶⁰²

543. In a press release issued in 1992 with respect to the conflict in Bosnia and Herzegovina, the ICRC enjoined the parties involved in the conflict "to ensure that combat units are aware of the humanitarian rules governing the conduct of hostilities".⁶⁰³

544. In 1993, in a report to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

45. The treaties of international humanitarian law provide various mechanisms . . . for implementing their substantive provisions. Among these mechanisms it is worth mentioning the following: . . . (c) the obligation of States to ensure that the provisions of the Geneva Conventions and their Additional Protocols are known as widely as possible.

...

51. Each State Party to the Geneva Conventions or to their Additional Protocols must ensure that the text of these treaties is disseminated as widely as possible throughout its territory in both peacetime and wartime. The States must, *inter alia*, incorporate study of the subject into their programmes of military . . . instruction.⁶⁰⁴

545. At its Budapest Session in 1991, the Council of Delegates adopted a resolution on dissemination of international humanitarian law and of the principles and ideals of the Movement in which it stressed that "responsibility for the dissemination and teaching of international humanitarian law lies mainly

⁶⁰⁰ International Red Cross and Red Crescent Movement, Council of Delegates, Rio de Janeiro Session, 27 November 1987, Res. 4, §§ 1 and 2.

⁶⁰¹ ICRC, Memorandum on the Applicability of International Humanitarian Law, Geneva, 14 December 1990, § IV, *IRRC*, No. 280, 1991, p. 25

⁶⁰² ICRC, Appeal in behalf of civilians in Yugoslavia, Geneva, 4 October 1991.

⁶⁰³ ICRC, Press Release No. 1705, Bosnia-Herzegovina: ICRC calls for protection of civilians, 10 April 1992.

⁶⁰⁴ ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the 48th Session of the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, §§ 45 and 51.

with the States, by virtue of the obligations set out in the four Geneva Conventions of 1949 and their two Additional Protocols". It also urged States "fully to discharge their treaty obligations so that international humanitarian law may be known, understood and respected at all times". The Council of Delegates further reiterated its earlier recommendation that "National Societies appoint and train dissemination experts, and cooperate with their countries' authorities, particularly within the framework of joint dissemination committees".⁶⁰⁵

546. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on the International Conference for the Protection of War Victims in which it underlined "in particular the States' determination: to disseminate systematically international humanitarian law, especially among the armed forces".⁶⁰⁶

547. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on armed protection of humanitarian assistance in which it appealed to "the United Nations and governments when employing military forces in order to ensure the implementation of United Nations Resolutions to employ military personnel which have as part of their training been properly educated in international humanitarian law".⁶⁰⁷

548. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on respect for and dissemination of the Fundamental Principles in which it requested "the National Societies, in cooperation with the ICRC and the Federation, to intensify and develop their activities to spread knowledge of the Fundamental Principles at the national, regional and international levels".⁶⁰⁸

549. In 1994, in a Memorandum on Respect for International Humanitarian Law in Angola, the ICRC stated that "the parties to the conflict must ensure that the members of their armed forces as well as all military and paramilitary forces acting under their responsibility are aware of their obligations under international humanitarian law".⁶⁰⁹

550. In 1994, in a Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise in the Great Lakes region, the ICRC stated that "the parties concerned must ensure that all the military and paramilitary forces and other militias for whose actions they

⁶⁰⁵ International Red Cross and Red Crescent Movement, Council of Delegates, Budapest Session, 28–30 November 1991, Res. 8, preamble and §§ 2 and 3.

⁶⁰⁶ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 2, preamble.

⁶⁰⁷ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 5, § 1.

⁶⁰⁸ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham Session, 29–30 October 1993, Res. 9, § 3.

⁶⁰⁹ ICRC, Memorandum on Respect for International Humanitarian Law in Angola, 8 June 1994, § V, *IRRC*, No. 320, 1997, p. 505.

are responsible are aware of their obligations under international humanitarian law".⁶¹⁰

551. In 2001, in Zimbabwe, the ICRC continued to contribute to the UN Military Observer Course at the Regional Peacekeeping Training Centre in Harare.⁶¹¹

VI. Other Practice

552. In a resolution adopted at its Zagreb Session in 1971, the Institute of International Law stated that:

In order to secure effective compliance with the humanitarian rules of armed conflict by United Nations Forces, it is necessary that the individuals who may be called upon to participate in such Forces receive adequate and previous instruction on the law of armed conflict in its entirety, and especially on the meaning and the scope of the Geneva Conventions of 12 August 1949.

It is desirable that the United Nations, as well as those of its specialized agencies which are concerned with furthering education and health, take all steps within their power in order to co-ordinate the measures which the states parties to the Geneva Conventions have been invited to take in this field by the International Committee of the Red Cross.⁶¹²

553. In 1979, an armed opposition group agreed with the ICRC to take steps to educate its armed forces pursuant to its intention to respect the rules of IHL.⁶¹³

554. In 1980, an armed opposition group agreed with the ICRC to educate its combatants in the rules of IHL as part of its obligation to respect and ensure respect for that law.⁶¹⁴

555. According to the Report on SPLM/A Practice, following a national convention of the SPLM/A in 1994, at which resolutions calling for a human rights awareness campaign were adopted, a campaign led by local NGOs to disseminate principles of IHL was launched.⁶¹⁵

556. In 1995, the IIHL, commenting on the Declaration of Minimum Humanitarian Standards, stated that:

The importance of making known, disseminating and teaching these minimum humanitarian standards should be underlined. A clause on that subject could form a special article at the end of the declaration, which could read:

⁶¹⁰ ICRC, Memorandum on Compliance with International Humanitarian Law by the Forces Participating in Opération Turquoise, Geneva, 23 June 1994, § V, reprinted in Marco Sassòli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, p. 1309.

⁶¹¹ ICRC, Advisory Service, *2001 Annual Report*, Geneva, 2002, p. 137.

⁶¹² Institute of International Law, Zagreb Session, Resolution on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in Which United Nations Forces May Be Engaged, 3 September 1971, Article 4.

⁶¹³ ICRC archive document. ⁶¹⁴ ICRC archive document.

⁶¹⁵ Report on SPLM/A Practice, 1998, Chapter 6.6.

“The minimum humanitarian standards, defined in this Declaration, should be made known and disseminated to all the authorities concerned, and to individuals who may be potential victims”.⁶¹⁶

557. In a resolution adopted at its Berlin Session in 1999, the Institute of International Law stated that “all States and non-State entities must disseminate the principles and rules of humanitarian law and fundamental human rights which are applicable in internal armed conflicts”.⁶¹⁷

Obligation of commanders to instruct the armed forces under their command

I. Treaties and Other Instruments

Treaties

558. Article 87(2) AP I provides that:

In order to prevent and suppress breaches, High Contracting Parties and the Parties to the conflict shall require that, commensurate with their level of responsibility, commanders ensure that members of the armed forces under their command are aware of their obligations under the Conventions and this Protocol.

Article 87 AP I was adopted by consensus.⁶¹⁸

Other Instruments

559. No practice was found.

II. National Practice

Military Manuals

560. Australia’s Commanders’ Guide provides that “military commanders of all Services and at all levels bear responsibility for ensuring that forces under their control comply with LOAC”.⁶¹⁹

561. Australia’s Defence Force Manual states that “military commanders of all Services and at all levels bear responsibility for ensuring that forces under their control comply with LOAC”.⁶²⁰

562. Australia’s Defence Training Manual states that one of the tasks of the legal adviser of the armed forces is to “supervise the organisation of instruction

⁶¹⁶ IHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, § 23, reprinted in Report of the UN Secretary-General prepared pursuant to Commission resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, p. 11.

⁶¹⁷ Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, § XII.

⁶¹⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR. 45, 30 May 1977, p. 307.

⁶¹⁹ Australia, *Commanders’ Guide* (1994), § 1204.

⁶²⁰ Australia, *Defence Force Manual* (1994), § 1304.

in subordinate units, and to ensure that the levels of understanding are obtained".⁶²¹

563. Belgium's LOAC Teaching Directive states that "each commander is responsible for ensuring that the personnel placed under his authority have sufficient knowledge of their obligations [under the law of armed conflict] and that they have . . . received appropriate instruction and training".⁶²²

564. Belgium's Teaching Manual for Soldiers states that "every soldier must know the essential rules of the law of war . . . and their meaning in order to be able to apply them. The command must ensure this knowledge by means of an appropriate instruction."⁶²³

565. Benin's Military Manual states that:

Each military commander is responsible for respect for the law of war within his sphere of command. Within his unit, he is in particular responsible for the instruction of the law of war in order to induce his troops to adopt a behaviour in conformity with the law and above all *vis-à-vis* specifically protected persons and objects.⁶²⁴

The manual adds that "the military commander must take all measures so that: the subordinates know their obligations arising from the law of war and respect them".⁶²⁵

566. Cameroon's Disciplinary Regulations states that:

The military commander must incorporate in his programmes the legal problems that shall permit all members of the Armed Forces not only to realistically complete their knowledge of the international law of war, but also to solve, in time of peace, problems he will face in case of armed conflict. This instruction, in addition to military training, must be the object of instruction sessions in all military units and schools.⁶²⁶

567. Cameroon's Instructors' Manual states that "in the Armed Forces, every Commander is responsible for the instruction of his soldiers and their behaviour in action".⁶²⁷ It adds that "instruction in the Law of War constitutes an essential part of the activity of commanding".⁶²⁸

568. Canada's LOAC Manual provides that "commanders have a responsibility to ensure that forces under their command are aware of their responsibilities related to the LOAC and that they behave in a manner consistent with the LOAC".⁶²⁹ It further notes that "in order to prevent and suppress breaches,

⁶²¹ Australia, *Defence Training Manual* (1994), § 17.

⁶²² Belgium, *LOAC Teaching Directive* (1996), Section 1.

⁶²³ Belgium, *Teaching Manual for Soldiers* (undated), p. 1.

⁶²⁴ Benin, *Military Manual* (1995), Fascicule II, p. 14, see also p. 15.

⁶²⁵ Benin, *Military Manual* (1995), Fascicule II, pp. 14 and 15.

⁶²⁶ Cameroon, *Disciplinary Regulations* (1975), Article 35.

⁶²⁷ Cameroon, *Instructors' Manual* (1992), p. 15, § 14.

⁶²⁸ Cameroon, *Instructors' Manual* (1992), p. 133, see also p. 86, § 13.

⁶²⁹ Canada, *LOAC Manual* (1999), p. 15-1, § 7.

commanders are responsible for ensuring that members of the armed forces under their command are aware of their obligations under the LOAC".⁶³⁰

569. Canada's Code of Conduct states that "a military unit that obeys the Law of Armed Conflict is one that demonstrates discipline and leadership. This requires training. The responsibility for this training rests with leaders at all levels."⁶³¹

570. Colombia's Directive on IHL states that:

The Ministry of National Defence gives instructions aimed at intensifying the development of capacity-building programmes of the members of the public force, on themes referring to respect for Human Rights and the application of the rules of International Humanitarian Law, with the view to prevent and correct conduct which violates those rules . . .

The General Command of the Military Forces and the Directorate of the National Police [g]ive the commanders of the public force the necessary instructions for each force to intensify, develop and complete, in the corresponding courses of training and capacity-building of their personnel, the relevant studies on respect for Human Rights and ensure the obligatory application of International Humanitarian Law.⁶³²

571. Colombia's Soldiers' Manual states that it is useful for commanders, especially officers in charge of the instruction of troops, to be able to "count on an efficient instrument of practical and daily use to educate and train Colombian soldiers".⁶³³

572. Croatia's Commanders' Manual states that "the commander himself ensures that his subordinates are aware of their obligations under the law of war and respect them".⁶³⁴ It adds that "the commander is responsible for proper law of war training" and that "the superior is the normal instructor of his subordinates also for law of war training".⁶³⁵

573. France's LOAC Summary Note provides that "the commander must ensure that subordinates know their obligations [under IHL] and respect them. He is . . . responsible for their instruction."⁶³⁶

574. France's LOAC Teaching Note states that "the commander . . . must ensure that members of the armed forces know their rights, but also their obligations under the law of armed conflicts. As such, he is responsible for their instruction."⁶³⁷

575. France's LOAC Manual, referring to respect for IHL, provides that "the commander . . . must ensure that the members of the armed forces know their rights and discharge the corresponding obligations. As such, he is responsible for their instruction."⁶³⁸

⁶³⁰ Canada, *LOAC Manual* (1999), p. 16-7, § 50.

⁶³¹ Canada, *Code of Conduct* (2001), Introduction, § 15.

⁶³² Colombia, *Directive on IHL* (1993), Sections IV.(A) and IV.(B)(1).

⁶³³ Colombia, *Soldiers' Manual* (1999), p. i.

⁶³⁴ Croatia, *Commanders' Manual* (1992), § 19.

⁶³⁵ Croatia, *Commanders' Manual* (1992), §§ 21 and 23.

⁶³⁶ France, *LOAC Summary Note* (1992), § 5.1.

⁶³⁷ France, *LOAC Teaching Note* (2000), p. 7. ⁶³⁸ France, *LOAC Manual* (2001), p. 14.

576. Germany's Military Manual provides that "the superior has to ensure that his subordinates are aware of their duties and rights under international law".⁶³⁹

577. Hungary's Military Manual provides that it is the "responsibility of every commander . . . [to] ensure knowledge of [the law of war]".⁶⁴⁰ It further provides that, in order to ensure respect for the law of war, every commander shall organise training on the law of war for all members of the armed forces.⁶⁴¹

578. Italy's LOAC Elementary Rules Manual states that "the commander himself ensures that his subordinates are aware of their obligations under the law of war and respect them".⁶⁴² It further states that "the commander is responsible for proper training" and that "the superior is the normal instructor of his subordinates also for law of war training".⁶⁴³

579. South Korea's Military Regulation 187 provides that it is a duty of the commander to teach the principles and rules of the laws of war.⁶⁴⁴

580. Madagascar's Military Manual states that "the commander himself shall ensure that his subordinates know their obligations arising from the law of war and respect them".⁶⁴⁵ It further provides that "the commander is responsible for proper law of war training" and that "the superior is the normal instructor of his subordinates also for law of war training".⁶⁴⁶ In addition, the manual states that "the aim of instruction is: . . . to ensure true respect for this law of war by all combatants".⁶⁴⁷

581. The Military Manual of the Netherlands, referring to Article 87 AP I, states that "commanders must first of all ensure that their people know the rules of the law of war".⁶⁴⁸

582. The Military Handbook of the Netherlands states that "commanders must ensure that their people know the rules of the law of war".⁶⁴⁹

583. New Zealand's Military Manual states that "it is incumbent upon a commanding officer to ensure that the forces under his command behave in a manner consistent with the laws and customs of war . . . and it is part of his responsibility to ensure that the troops under his command are aware of their obligations".⁶⁵⁰

584. Nigeria's Military Manual recalls that "commanders are . . . enjoined to ensure that members of the armed forces under their command are aware of

⁶³⁹ Germany, *Military Manual* (1992), § 138. ⁶⁴⁰ Hungary, *Military Manual* (1992), p. 40.

⁶⁴¹ Hungary, *Military Manual* (1992), p. 41.

⁶⁴² Italy, *LOAC Elementary Rules Manual* (1991), § 19.

⁶⁴³ Italy, *LOAC Elementary Rules Manual* (1991), §§ 21 and 23.

⁶⁴⁴ South Korea, *Military Regulation 187* (1991), Article 6.6.1.

⁶⁴⁵ Madagascar, *Military Manual* (1994), Fiche No. 4-O, § 19, see also Presentation, p. 9 and p. 69, § 1.

⁶⁴⁶ Madagascar, *Military Manual* (1994), Fiche No. 4-O, §§ 21 and 23.

⁶⁴⁷ Madagascar, *Military Manual* (1994), Fiche No. 4-O, § I.

⁶⁴⁸ Netherlands, *Military Manual* (1993), p. IX-7.

⁶⁴⁹ Netherlands, *Military Handbook* (1995), p. 7-44.

⁶⁵⁰ New Zealand, *Military Manual* (1992), § 1603.2, see also § 1710.1, footnote 68.

their obligations under the [Geneva] conventions and the Protocols [AP I and AP II]".⁶⁵¹ In addition, it states that "every commander . . . holds full responsibility for proper law of war training within his sphere of authority and it is his duty to determine the needs of his subordinate which shall be integrated into the normal exercise of military activities".⁶⁵²

585. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that "commanders shall ensure that all participants in security/police operations shall be briefed and de-briefed before and after every operation to insure proper behavior of personnel and understanding of their mission"⁶⁵³ It adds that "commanders shall ensure that . . . pertinent provisions of . . . the Geneva Conventions and United Nations declarations on Humanitarian Law and Human Rights . . . are understood by every member of the AFP and PNP personnel".⁶⁵⁴

586. Spain's LOAC Manual states that "the commander himself ensures that his subordinates are aware of their obligations under the law of war and respect them".⁶⁵⁵ It also states that "the commander is responsible for proper law of war training" and that "the superior is the normal instructor of his subordinates also for law of war training".⁶⁵⁶

587. Sweden's IHL Manual provides that "there is . . . a clear responsibility for a senior commander to check his subordinates' knowledge of the Conventions".⁶⁵⁷

588. Switzerland's Basic Military Manual states that "commanders must inform the troops of their obligations under the Conventions".⁶⁵⁸

589. Togo's Military Manual provides that:

Each military commander is responsible for respect for the law of war within his sphere of command. Within his unit, he is in particular responsible for the instruction of the law of war in order to induce his troops to adopt a behaviour in conformity with the law and above all *vis-à-vis* specifically protected persons and objects.⁶⁵⁹

The manual adds that "the military commander must take all measures so that: the subordinates know their obligations arising from the law of war and respect them".⁶⁶⁰

⁶⁵¹ Nigeria, *Military Manual* (1994), p. 30, § 3.

⁶⁵² Nigeria, *Military Manual* (1994), p. 41, § 8.

⁶⁵³ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 3(b).

⁶⁵⁴ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 3(d).

⁶⁵⁵ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.c.(1), see also § 2.2.b.

⁶⁵⁶ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.c.(2), see also § 11.4.b.

⁶⁵⁷ Sweden, *IHL Manual* (1991), Section 4.2, p. 94.

⁶⁵⁸ Switzerland, *Basic Military Manual* (1987), Article 196.

⁶⁵⁹ Togo, *Military Manual* (1996), Fascicule II, p. 14, see also p. 15.

⁶⁶⁰ Togo, *Military Manual* (1996), Fascicule II, pp. 14 and 15.

590. The US Instructor's Guide states that, as a commander, "you must ensure your troops receive instruction in the law of war. You should ensure that they know and follow the applicable rules of engagement."⁶⁶¹

591. The US Naval Handbook provides that "officers in command of operational units are encouraged to utilize this publication as a training aid for assigned personnel".⁶⁶²

National Legislation

592. The Order on Study and Dissemination of IHL of Belarus provides that the Vice-Ministers of Defence as well as commanders must, within the framework of the training of commanders, guarantee the study of the Geneva Conventions, the Additional Protocols and Belarussian regulations on the application of IHL and that they must take into account these instruments and documents during military training.⁶⁶³

593. Spain's Royal Ordinance for the Armed Forces provides that a soldier "shall know the rights and duties incumbent on him and the penal laws affecting him, which shall be read out and periodically explained at unit level with a view to guiding his conduct and preventing him from committing faults or offences".⁶⁶⁴

National Case-law

594. No practice was found.

Other National Practice

595. According to the Report on the Practice of Bosnia and Herzegovina, it is the *opinio juris* of Bosnia and Herzegovina that "commanders of units and each individual member of armed forces are responsible for the implementation of the international law of war".⁶⁶⁵

596. The 1997 Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia stated that:

Training is one of the fundamental elements of preparing troops for operations . . . It is therefore to be expected that commanders at all levels of the chain of command, even the highest, pay particular attention to the training of a contingent, both to supervise and assess the preparations and, through their presence, to demonstrate their personal interest in and commitment to the operation that their troops are about to undertake.

⁶⁶¹ US, *Instructor's Guide* (1985), p. 19.

⁶⁶² US, *Naval Handbook* (1995), Preface, p. 21

⁶⁶³ Belarus, *Order on Study and Dissemination of IHL* (1997), Article 5.

⁶⁶⁴ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 57.

⁶⁶⁵ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.6.

In its findings with respect to this statement, the Commission noted that “leaders at all levels of the chain of command, with the notable exception of the Brigade Commander during the initial stages of training, failed to provide adequate supervision of the training preparations undertaken by the CAR for Operation Cordon”.⁶⁶⁶ Regarding the Rules of Engagement (ROE) established with respect to the Somalia mission, the Commission further noted that:

The . . . briefing provided by LCol Watkin on December 10th [1992] included information on the ROE . . . The officers were then supposed to pass the information on to their subordinates. However, there were no efforts made to ensure that this information was properly understood before being passed down the chain of command to the troops, nor even that it was in fact passed down . . . While the need to systematically reinforce the ROE training once in theatre was recognized by senior commanders who testified before us, this did not translate into effective ROE training throughout the deployment period. Maj Pomet showed great concern for the understanding of the ROE by his commando and took steps to train his soldiers, but he did so on his own initiative. On several occasions he verified his troops’ knowledge of the ROE by presenting them with scenarios and asking them to respond. Although there may have been some discussion and briefings on the ROE, there was no organized and structured scenario-based training done in theatre. In our view, and notwithstanding the obvious need for it, the leaders failed to ensure that all of the soldiers had a comprehensive understanding of the use of force in Somalia through accessible and systematic training.⁶⁶⁷

597. The Commission of Inquiry into the Deployment of Canadian Forces to Somalia, in its recommendations with respect to training of the armed forces, stated that:

We recommend that: . . . Canadian Forces doctrine recognize the personal supervision of training by commanders, including the most senior, as an irreducible responsibility and an essential expression of good leadership. Canadian Forces should also recognize that training provides the best opportunity, short of operations, for commanders to assess the attitude of troops and gauge the readiness of a unit and affords a unique occasion for commanders to impress upon their troops, through their presence, the standards expected of them, as well as their own commitment to the mission on which the troops are about to be sent.⁶⁶⁸

⁶⁶⁶ Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 592–593, see also p. ES-28.

⁶⁶⁷ Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, pp. 616–617.

⁶⁶⁸ Canada, Commission of Inquiry into the Deployment of Canadian Forces to Somalia, *Dishonoured Legacy: The Lessons of the Somalia Affair. Report of the Commission of Inquiry into the Deployment of Canadian Forces to Somalia*, Public Works and Government Services Canada – Publishing, Ottawa, 1997, p. 631, Recommendation No. 21(18).

598. An Order of the Israeli Chief of Staff requires that “all operational directive or order which precedes action by the soldiers has to include a directive requiring that the provisions of the Conventions be taught to the soldiers”. The Order refers to the Geneva Conventions and the 1954 Hague Convention.⁶⁶⁹

599. On the basis of an interview with high-ranking officers of the army of the Netherlands, the Report on the Practice of the Netherlands states that commanders are responsible for training in IHL.⁶⁷⁰

600. The 1979 version of the US Department of Defense Directive on the Law of War Program provided that:

The Secretaries of the Military Departments shall develop internal policies and procedures consistent with this Directive in support of the DoD law of war program in order to:

- (1) Provide publications, instructions, and training so that the principles and rules of the law of war will be known to members of their respective Departments, the extent of such knowledge to be commensurate with each individual's duties and responsibilities.⁶⁷¹

601. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army stated that “[IHL] training is a command responsibility”.⁶⁷²

602. The 1998 version of the US Department of Defense Directive on the Law of War Program provided that the Secretaries of the Military Departments shall “provide directives, publications, instructions, and training so that the principles and rules of the law of war will be known to members of their respective Departments, the extent of such knowledge to be commensurate with each individual's duties and responsibilities”. Furthermore, they shall “ensure that programs are implemented in their respective Military Departments to prevent violations of the law of war, emphasizing any types of violations that have been reported”.⁶⁷³

603. According to the Report on the Practice of Zimbabwe, an official of the armed forces of Zimbabwe stated that he was of the view that “Zimbabwe accepts the practice that commanders [should] ensure that their [subordinates] are aware of their obligations”.⁶⁷⁴

⁶⁶⁹ Israel, IDF Order of the Chief of Staff No. 33.0133, Discipline – Conduct in accordance with the international conventions to which the State of Israel is a party, 20 July 1982, § 10.

⁶⁷⁰ Report on the Practice of the Netherlands, 1997, Interview with two high-ranking officers of the Royal Netherlands Army staff, both legal advisors, Chapter 6.6.

⁶⁷¹ US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, Section E(2)(e)(1).

⁶⁷² US, Letter from the Department of the Army to the legal adviser of the US Army deployed in the Gulf region, 11 January 1991, § 8(S), Report on US Practice, 1997, Chapter 6.6.

⁶⁷³ US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Sections 5(5)(1) and 5(5)(2).

⁶⁷⁴ Report on the Practice of Zimbabwe, 1998, Chapter 6.7.

*III. Practice of International Organisations and Conferences**United Nations*

604. No practice was found.

Other International Organisations

605. In 1995, the Rapporteur of the Parliamentary Assembly of the Council of Europe on the conflict in Chechnya noted that the Russian federal command, after having originally adopted a policy of trying to brand the Chechen as the cruel enemy, was apparently trying to make amends by strengthening discipline. It was to be achieved “by directives and recommendations to officers to explain the rules of international law to their soldiers”.⁶⁷⁵

International Conferences

606. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference called on “all States to remind military commanders that they are required to make their subordinates aware of obligations under international humanitarian law [and] to make every effort to ensure that no violations are committed”.⁶⁷⁶

IV. Practice of International Judicial and Quasi-judicial Bodies

607. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

608. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that “the commander himself must ensure that: a) his subordinates are aware of their obligations under the law of war”.⁶⁷⁷ Delegates also teach that:

275. . . . Every commander holds full responsibility for proper law of war training within his sphere of authority. Thus, law of war training is an essential part of command activity . . .

282. The superior is the normal instructor of his subordinates, also for law of war training. Thus, every commander must be acquainted with those parts of the law of war that are relevant for him and to those under his command . . .

292. Commanders shall issue instructions and organize appropriate training for specific circumstances, such as:

⁶⁷⁵ Council of Europe, Parliamentary Assembly, Opinion on procedure on Russia’s request for membership of the Council of Europe, Doc. 7384, 15 September 1995, § 67.

⁶⁷⁶ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, § 2(e).

⁶⁷⁷ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 270.

- a) commando and other small units with independent missions;
- b) combat in unusual environment;
- c) warfare between dissimilar forces (e.g. a modern high technology force opposing a more or less organized group fighting with primitive weapons).⁶⁷⁸

609. In a communication to the press in 2002, the ICRC called upon the parties to the conflict in Colombia to respect IHL and stated that “commanders must supervise their men so as to ensure that their conduct towards civilians complies at all times with the . . . rules and principles [of IHL]”.⁶⁷⁹

VI. Other Practice

610. No practice was found.

E. Dissemination of International Humanitarian Law among the Civilian Population

I. Treaties and Other Instruments

Treaties

611. Article 26 of the 1906 GC provides that “the signatory governments shall take the necessary steps . . . to make [the provisions of this convention] known to the people at large”.

612. Article 27 of the 1929 GC provides that “the High Contracting Parties shall take the necessary steps . . . to bring [the provisions of the present Convention] to the notice of the civil population”.

613. Articles 47 GC I, 48 GC II, 127 GC III and 144 GC IV provide that:

The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries and, in particular, to include the study thereof [if possible] in their programmes of . . . civilian instruction, so that the principles thereof may become known to the entire population.

614. Article 25 of the 1954 Hague Convention states that:

The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the text of the present Convention and the Regulations for its execution as widely as possible in their respective countries. They undertake, in particular, to include the study thereof [if possible] in their programmes of . . . civilian training, so that its principles are made known to the whole population.

⁶⁷⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 275, 282 and 292.

⁶⁷⁹ ICRC, Communication to the Press No. 02/16, Colombia: ICRC calls on all parties to conflict to respect international humanitarian law, 21 February 2002.

615. Article 83 AP I provides that:

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, . . . to encourage the study thereof by the civilian population, so that those instruments may become known . . . to the civilian population.
2. Any . . . civilian authorities who, in time of armed conflict, assume responsibilities in respect of the application of the Conventions and this Protocol shall be fully acquainted with the text thereof.

Article 83 AP I was adopted by consensus.⁶⁸⁰

616. Article 30 of the 1999 Second Protocol to the 1954 Hague Convention provides that:

1. The Parties shall endeavour by appropriate means, and in particular by educational and information programmes, to strengthen appreciation and respect for cultural property by their entire population.
2. The Parties shall disseminate this Protocol, as widely as possible, both in time of peace and in time of armed conflict.
3. Any military or civilian authorities who, in time of armed conflict, assume responsibilities with respect to the application of this Protocol, shall be fully acquainted with the text thereof. To this end, the Parties shall, as appropriate:
 - ...
 - (b) develop and implement, in cooperation with UNESCO and relevant governmental and non-governmental organizations, peacetime training and educational programmes.

Other Instruments

617. Article 3(2) of the 1986 Statutes of the International Red Cross and Red Crescent Movement, dealing with tasks of the National Red Cross and Red Crescent Societies, provides that the National Societies “disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect”.

618. Paragraph 13 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY states that:

The parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law . . . this shall be done in particular:

- ...
 - via articles in the press, and radio and television programmes prepared also in cooperation with the ICRC and broadcast simultaneously;
 - by distributing ICRC publications.

619. Paragraph 4 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that:

⁶⁸⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.43, 30 May 1977, p. 307.

The parties undertake to spread knowledge of and promote respect for the principles and rules of international humanitarian law . . . [T]his shall be done in particular:

- ...
- by facilitating the dissemination of ICRC appeals urging respect for international humanitarian law;
 - by distributing ICRC publications.

620. In Paragraph II (10) of the 1992 Agreement No. 3 on the ICRC Plan of Action between the Parties to the Conflict in Bosnia and Herzegovina the ICRC requested the parties to “undertake to ensure that the principles and rules of international humanitarian law and, in particular, [the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina] are known . . . to the civilian population”.

621. Section 17 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that “States shall disseminate these rules and make them known as widely as possible in their respective countries and include them in their programmes of . . . civil instruction”.

II. National Practice

Military Manuals

622. Australia’s Defence Training Manual provides that “the Government of Australia is required to disseminate the text of the conventions [Geneva Conventions, API and AP II, and 1907 Hague Convention (IV)] as widely as possible, so that the principles become known . . . to the civilian population”.⁶⁸¹

623. Belgium’s Law of War Manual provides that:

States signatory to the [Geneva] Conventions undertook to take a series of measures to promote the respect thereof.

These measures can be summarised as follows:

- 1) the widest dissemination possible of the content of the Conventions among the civilian population.⁶⁸²

624. Canada’s LOAC Manual states that “Canada . . . has the obligation to . . . encourage the study of the LOAC by the civilian population”.⁶⁸³

625. Cameroon’s Instructors’ Manual states that “the teaching and dissemination of the Law of War is of capital importance for Cameroon, on the civilian . . . level”.⁶⁸⁴

626. Colombia’s Basic Military Manual states that, before conflicts occur, there is an obligation “to adopt plans and programmes of dissemination and capacity building through which IHL is made known to . . . the civil society (. . . public servants, students and the community in general)”.⁶⁸⁵ In a chapter dealing with

⁶⁸¹ Australia, *Defence Training Manual* (1994), § 4.

⁶⁸² Belgium, *Law of War Manual* (1983), p. 55.

⁶⁸³ Canada, *LOAC Manual* (1999), p. 15-1, § 6.

⁶⁸⁴ Cameroon, *Instructors’ Manual* (1992), p. 2.

⁶⁸⁵ Colombia, *Basic Military Manual* (1995), pp. 27 and 28.

AP II, the manual further states that “it is important to underline the obligation incumbent upon States to organise periodical and systematic instruction on the content of the Protocol, so that . . . civilian society in general can apply and insist on respect for its norms”.⁶⁸⁶

627. Germany’s Military Manual states that:

The four Geneva Conventions and [AP I] oblige all contracting parties to disseminate the text of the conventions as widely as possible . . . This shall particularly be accomplished . . . by encouraging the civilian population to study these conventions . . . Considering their responsibility in times of armed conflict, . . . civilian authorities shall be fully acquainted with the text of the Conventions and the Protocol Additional to them.⁶⁸⁷

The manual further states that:

Effective implementation is depending on dissemination of humanitarian law. Providing information about it is the necessary basis to create a common consciousness and to further the attitude of peoples towards greater acceptance of these principles as an achievement of the social and cultural development of mankind.⁶⁸⁸

628. Hungary’s Military Manual stresses that “everybody must know the rules”.⁶⁸⁹

629. New Zealand’s Military Manual notes that “the parties [to the Geneva Conventions] are . . . encouraged to disseminate the Conventions as widely as possible among their civilian populations”.⁶⁹⁰

630. Nigeria’s Military Manual incorporates the content of Article 47 GC I and adds that “dissemination simply means that in the law of armed conflict, the obligation is that States make the principles of the law known to . . . the civilian population by . . . encouraging the civilian population to study them”.⁶⁹¹ The manual further states that:

The dissemination of the conventions and the protocols therefore must be as orderly as possible in the respective countries and in particular to encourage the study thereof by the civilian population. The purpose therefore is that any . . . civilian authorities, who in time of armed conflict, assume responsibilities in respect of the application of the [Geneva] conventions and the protocols, shall be fully acquainted with the text thereof.⁶⁹²

631. Sweden’s IHL Manual notes that:

I Geneva Convention (GC I, Art. 47) states that the contracting parties shall undertake, both in peace and in war, to ensure the widest possible dissemination of the convention texts and to introduce study thereof into programmes of . . . civilian instruction. The III Geneva Convention (GC III, Art. 127) states that the principles

⁶⁸⁶ Colombia, *Basic Military Manual* (1995), p. 46.

⁶⁸⁷ Germany, *Military Manual* (1992), § 136.

⁶⁸⁸ Germany, *Military Manual* (1992), § 1223.

⁶⁸⁹ Hungary, *Military Manual* (1992), p. 31.

⁶⁹⁰ New Zealand, *Military Manual* (1992), § 1602.1, footnote 5.

⁶⁹¹ Nigeria, *Military Manual* (1994), p. 29, § 1.

⁶⁹² Nigeria, *Military Manual* (1994), p. 30, § 3.

of the conventions shall be made known to . . . the entire population. Similarly, the IV Geneva Convention (GC IV, Art. 144) states that the principles for protection of civilians shall be made known to the entire population. The undertaking of the parties concerning information and instruction in international humanitarian law is stressed in Additional Protocol I to the 1949 Geneva Conventions (API, Art. 83), which, however, goes further than the earlier conventions. According to the Protocol, the military and civilian authorities responsible for their application during a conflict shall possess full knowledge of the texts both of the Protocol and of the Conventions. Thus a definite tightening of the demands has been introduced.⁶⁹³

The manual further states that “by its ratification in 1977 of the Additional Protocols to the Geneva 1949 Conventions, Sweden pledged herself to inform and instruct . . . the civilian population . . . on the rules of international humanitarian law”.⁶⁹⁴

632. Spain’s LOAC Manual provides that “the instruction and dissemination of [IHL] are established as obligatory, so that the State has the duty to introduce it in its programmes of . . . civil instruction”.⁶⁹⁵ The manual identifies the sectors of the public that should be targeted in priority: National Societies, universities, schools, medical circles, communication media, and the general public, particularly young people and teachers.⁶⁹⁶

633. In the Order on Law of Armed Conflict Curriculum, Tajikistan’s Minister of Education decided “to include in the curriculum of the Republican Specialised Boarding School No. 1 for the Intensive Study of the Russian Language and for Military-Physical Training in Dushanbe the subject ‘Law of Armed Conflict’”.⁶⁹⁷

634. In the Order No. 148 on Law of Armed Conflict Courses, Tajikistan’s Minister of Defence decided “to include in the curricula of the Military Chairs of civilian Institutions of Higher Education . . . the subject ‘Law of Armed Conflict’”.⁶⁹⁸

635. In the Order No. 554 on Law of Armed Conflict Courses, Tajikistan’s Minister of Education decided “to include in the curricula of the Military Chairs of civilian Institutions of Higher Education the subject ‘Law of Armed Conflict’”.⁶⁹⁹

636. The UK Military Manual notes that:

Under the 1949 [Geneva] Conventions the parties are bound, both in time of peace and in war, to disseminate the text of the Conventions in their countries and to include the study of them in their programmes . . . if possible (*i.e.*, according to the constitution of the country concerned) of civilian instruction.⁷⁰⁰

⁶⁹³ Sweden, *IHL Manual* (1991), Section 4.1, pp. 91 and 92.

⁶⁹⁴ Sweden, *IHL Manual* (1991), Section 10.1, p. 168.

⁶⁹⁵ Spain, *LOAC Manual* (1996), Vol. I, § 10.1.a, see also §§ 1.1.d.(7) and 11.3.b.(2) (which add that the instruction must take place in time of peace as well as in time of war).

⁶⁹⁶ Spain, *LOAC Manual* (1996), Vol. I, § 10.2.b.(3).

⁶⁹⁷ Tajikistan, *Order on Law of Armed Conflict Curriculum* (1997), § 1.

⁶⁹⁸ Tajikistan, *Order No. 148 on Law of Armed Conflict Courses* (1997), § II.

⁶⁹⁹ Tajikistan, *Order No. 554 on Law of Armed Conflict Courses* (1997), § 2.

⁷⁰⁰ UK, *Military Manual* (1958), § 120.

637. The US Field Manual reproduces Articles 47 GC I, 48 GC II, 127 GC III and 144 GC IV.⁷⁰¹

638. The US Air Force Pamphlet quotes a directive of the Department of Defense which provides that “the Armed Forces of the United States will insure that programs to prevent violations of the law of war to include training and dissemination as required by the Geneva Conventions . . . and by [the 1907] Hague Convention IV . . . are instituted and implemented”.⁷⁰² The Pamphlet adds that “all states must include the text of the Conventions in programs of . . . if possible, civil instruction”.⁷⁰³

National Legislation

639. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that “the appropriate authorities and governmental bodies of [the] Azerbaijan Republic insure [that] all the citizens always learn the provisions of this law on civil defence”.⁷⁰⁴ It further provides that “if [the] Azerbaijan Republic is one of the parties to the conflict, then necessary instruction is given to [the] civilian population in such a conflict area”.⁷⁰⁵

640. Croatia’s Emblem Law provides that:

In accordance with the commitments made on [the] international level concerning the promotion of [the] Geneva Conventions, it is necessary to elaborate adequate programmes and ensure their implementation among:

- [the] civilian population of the Republic of Croatia – Croatian Red Cross;
- ⋮
- high schools and university students – Ministry of Culture and Education.⁷⁰⁶

641. Peru’s Law on Compulsory Human Rights Education, providing, *inter alia*, for the establishment of a national plan on the teaching of human rights and IHL in universities and higher education establishments, states that “the duty to teach human rights and international humanitarian law must aim at full implementation and strict compliance with the international treaties and conventions as well as the protection of fundamental rights in the national and international arenas”.⁷⁰⁷

642. Russia’s Ordinance regarding Ratification of the Additional Protocols recommends that the Executive Committee of the Union of the Red Cross and Red Crescent Societies of the USSR take measures for the publication and dissemination of the texts of the Additional Protocols among the civilian population.⁷⁰⁸

⁷⁰¹ US, *Field Manual* (1956), § 14. ⁷⁰² US, *Air Force Pamphlet* (1976), § 1-4(c).

⁷⁰³ US, *Air Force Pamphlet* (1976), § 15-2(b).

⁷⁰⁴ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 1.

⁷⁰⁵ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 30.

⁷⁰⁶ Croatia, *Emblem Law* (1993), Article 14.

⁷⁰⁷ Peru, *Law on Compulsory Human Rights Education* (2002), Article 3.

⁷⁰⁸ Russia, *Ordinance regarding Ratification of the Additional Protocols* (1989), § 3.

643. Russia's Order on the Publication of the Geneva Conventions and Protocols contains a provision for the teaching of these treaties during studies and education.⁷⁰⁹

644. Russia's Draft Law on the Red Cross Society and Emblem provides that:

The Russian Red Cross Society shall interact with the bodies of state power and local self-government bodies in carrying out the following tasks: . . . dissemination of international humanitarian law, including the provisions of the Geneva Conventions, of the principles and ideals of the International Movement of the Red Cross and Red Crescent.⁷¹⁰

The Draft Law also provides that:

The dissemination of international humanitarian law among the population is carried out by the Russian Red Cross Society in cooperation with the bodies of State power and local self-government.

The dissemination of international humanitarian law in the educational establishments is carried out by the Russian Red Cross Society in cooperation with the appropriate administrative bodies.⁷¹¹

645. Slovakia's Law on the Red Cross Society and Emblem provides that:

The Slovak Red Cross fulfils in accordance with the Geneva Conventions and their Additional Protocols and the conclusions of the International Conferences of the Red Cross and Red Crescent during the peace and war period primarily the following tasks:

- ...
- it familiarises the population with the basic principles of the Red Cross, with the principles of international humanitarian law, disseminates the ideas of peace, mutual respect and understanding among people and nations.⁷¹²

National Case-law

646. No practice was found.

Other National Practice

647. According to the Report on the Practice of Algeria, courses in IHL are organized at Algerian universities and at the École Nationale d'Administration at postgraduate level. The report also mentions the activities of the Algerian Red Crescent Society, stating, however, that they consist mainly of first-aid training.⁷¹³

⁷⁰⁹ Russia, *Order on the Publication of the Geneva Conventions and Protocols* (1990), § 2.

⁷¹⁰ Russia, *Draft Law on the Red Cross Society and Emblem* (1998), Article 2.

⁷¹¹ Russia, *Draft Law on the Red Cross Society and Emblem* (1998), Article 5.

⁷¹² Slovakia, *Law on the Red Cross Society and Emblem* (1994), Section 2[h].

⁷¹³ Report on the Practice of Algeria, 1997, Chapter 6.6.

648. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Argentina pledged to “incorporate the study of international humanitarian law into the curricula of secondary schools and universities”.⁷¹⁴

649. The rules of procedure of the Argentine Committee on the Implementation of International Humanitarian Law (CADIH), established to undertake studies on the teaching and dissemination of the rules of IHL, make specific reference to the teaching and dissemination of the law among the civilian population.⁷¹⁵

650. According to the Report on the Practice of Argentina, which refers to several annexed university curricula, IHL is part of some university programmes in Argentina. The report further notes that the CADIH also plans to introduce courses on IHL in secondary school curricula.⁷¹⁶

651. In its report to UNESCO on measures to implement the 1954 Hague Convention, the Australian government noted that it provided funds to the Australian Red Cross to enable it to conduct IHL dissemination activities throughout Australia, which included a description of the contents of the 1954 Hague Convention.⁷¹⁷

652. Enumerating the matters which Australia believed must receive priority attention in the outcomes of the 26th International Conference of the Red Cross and Red Crescent in 1995, the head of the Australian delegation noted that:

All States must take effective action to disseminate the law [of armed conflict] ... because of the growth of irregular conflict, to their general populations. States and relevant international organizations must work together to ensure that dissemination programs are given the highest priority in terms of funding and materials.⁷¹⁸

653. In 2002, during a debate in the UN Security Council concerning the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, Australia stated that “practical measures can be taken by Governments to promote understanding and observance of international humanitarian law within their own communities...also among civilian

⁷¹⁴ Argentina, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷¹⁵ Argentina, Committee on the Implementation of International Humanitarian Law (CADIH), Internal Rules of Procedure, Article 10.

⁷¹⁶ Argentina, Curricula for the courses on Human Rights and Humanitarian Law, Law Faculty, University of Buenos Aires, 1986; Curriculum for the course on International Public Law as part of the Political Science degree, Pontifical Catholic University of Argentina; Curriculum for the course on International Public Law, Faculty of Law, Austral University; Statement by the Legal Adviser to the Argentine Ministry of Foreign Affairs, First Meeting of the Argentine and Chilean Committees on the Implementation of International Humanitarian Law, 1997; Report on the Practice of Argentina, 1997, Chapter 6.6.

⁷¹⁷ Australia, Report to UNESCO on Australian Measures to Implement the 1954 Hague Convention, 1994, § 2.

⁷¹⁸ Australia, Statement at the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995, reprinted in *Australian Year Book of International Law*, Vol. 17, 1996, p. 787.

populations, including by disseminating information about international humanitarian law".⁷¹⁹

654. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Belarus pledged "to continue the dissemination of information on the fundamental norms and principles of [IHL] among the population of the Republic of Belarus".⁷²⁰

655. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Belgium pledged "to implement training programmes in international humanitarian law targeted at those who are most directly concerned by the application of and respect for this body of law, namely the judiciary . . .".⁷²¹

656. The Report on the Practice of Belgium notes that, although the Belgian government does not itself conduct dissemination activities for the civilian population, it actively supports such activities undertaken by the Belgian Red Cross, by institutions of higher education and by NGOs.⁷²²

657. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Chile pledged to "incorporate study of [international humanitarian] law's fundamental principles into Ministry of Education programmes".⁷²³

658. At the 27th International Conference of the Red Cross and Red Crescent in 1999, China pledged that it would promote and strengthen "the wide dissemination and education of international humanitarian law among the people of China".⁷²⁴

659. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Colombia solemnly pledged to "promote and spread knowledge of international humanitarian law through training courses for all sectors of Colombian society and through general education programmes for trade schools, universities and schools".⁷²⁵

660. According to a report on the promotion and implementation of IHL in the DRC (Zaire), IHL is taught in the law and political science faculties of universities.⁷²⁶

661. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Cuba solemnly pledged to "continue promoting dissemination of the

⁷¹⁹ Australia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 6.

⁷²⁰ Belarus, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷²¹ Belgium, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷²² Report on the Practice of Belgium, 1997, Chapter 6.6.

⁷²³ Chile, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷²⁴ China, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷²⁵ Colombia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷²⁶ Mavungu Mvumbi-di-Ngoma, Report on the Promotion and Implementation of International Humanitarian Law in the Republic of Zaire, September 1996, p. 22.

norms and principles governing international humanitarian law, with a view to heightening the population's awareness thereof".⁷²⁷

662. According to the Report on the Practice of Cuba, IHL is taught in the law faculties' departments of international law and is included in postgraduate courses in Cuba.⁷²⁸

663. According to the Report on the Practice of Egypt, IHL is taught to second-year and postgraduate university students.⁷²⁹

664. In 1996, in reply to a formal question from a member of parliament, a German Minister of State, referring to Articles 83(1) AP I and 19 AP II, stated that:

The Federal Government supports the dissemination of International Humanitarian Law in all areas and at all levels of state. It hereby fulfils its duties resulting from international public law. The four Geneva Conventions and the two Additional Protocols oblige all contracting parties to disseminate the wording of the Conventions as widely as possible... This shall be done in particular by... stimulating the civilian population to study the Conventions. Military and civil offices shall, in times of an armed conflict [and] with regard to their responsibilit[ies], be entirely familiar with the wording of the Conventions and the Additional Protocols.⁷³⁰

The Minister of State further stated that, in addition to members of the armed forces, civil defence personnel, fire brigades and border guards receive instruction in IHL. According to the Minister, "aspects of international humanitarian law" are part of the general instruction in first aid given to the civilian population by aid organisations. He also pointed out the commitment of the German Red Cross Society with respect to the dissemination of IHL among the civilian population and stated that the material for the teaching of soldiers is, within certain limits, available free of charge for interested citizens.⁷³¹

665. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Greece pledged to "enhance dissemination of international humanitarian law... by reviewing existing educational and training curricula so as to integrate international humanitarian law into... universities, schools, media and public administration".⁷³²

666. In 1999, the Greek authorities, namely the Hellenic Armed Forces and the Ministries of Foreign Affairs, Justice and Education, made commitments

⁷²⁷ Cuba, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷²⁸ Report on the Practice of Cuba, 1998, Chapter 6.6.

⁷²⁹ Report on the Practice of Egypt, 1997, Chapter 6.6.

⁷³⁰ Germany, Lower House of Parliament, Reply of a Minister of State to a parliamentary question, 20 November 1996, *BT-Drucksache* 13/6197, 22 November 1996, p. 2.

⁷³¹ Germany, Lower House of Parliament, Reply of a Minister of State to a parliamentary question, 20 November 1996, *BT-Drucksache* 13/6197, 22 November 1996, pp. 2–4.

⁷³² Greece, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

to enhance awareness and knowledge of IHL among various groups (the military, diplomats, judges, lawyers, detention personnel, students and youth in general).⁷³³

667. At the 27th International Conference of the Red Cross and Red Crescent in 1999, the Holy See pledged "to take suitable initiatives in favour of instruction in international humanitarian law for religious personnel in the armed forces (Catholic military chaplains)".⁷³⁴

668. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Iceland, jointly with the Icelandic Red Cross, pledged "to cooperate on disseminating international humanitarian law together by... organizing seminars and workshops for relevant government officials and other groups".⁷³⁵

669. According to the Report on the Practice of India, there is no dissemination activity for the civilian population in general. IHL is taught at graduate level in Indian universities.⁷³⁶

670. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Indonesia pledged to "intensify the dissemination and education in International Humanitarian Law and the works of humanitarian organizations to the civilian community".⁷³⁷

671. According to the Report on the Practice of Indonesia, IHL is part of the curriculum of some academic institutions in Indonesia.⁷³⁸

672. According to the Report on the Practice of Iraq, IHL is taught at university in Iraq.⁷³⁹

673. In 1997, in its Final Report on the Events in Somalia, the Italian Government Commission of Inquiry stated that it was necessary to establish a compulsory course on IHL and on human rights not only for the armed forces but also for civilians, and that instruction in these subjects should be introduced in military and non-military schools.⁷⁴⁰

674. According to the Report on the Practice of Kuwait, IHL is taught at Kuwait University.⁷⁴¹

675. According to the Report on the Practice of Malaysia, Malaysian legislation does not provide specifically for the dissemination of IHL among the civilian population. According to the report, which refers to an interview conducted

⁷³³ ICRC, Advisory Service, *1999 Annual Report*, Geneva, 2000, p. 32.

⁷³⁴ Holy See, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷³⁵ Iceland, Pledge made together with the Icelandic Red Cross at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷³⁶ Report on the Practice of India, 1997, Chapter 6.6.

⁷³⁷ Indonesia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷³⁸ Report on the Practice of Indonesia, 1997, Chapter 6.6

⁷³⁹ Report on the Practice of Iraq, 1998, Chapter 6.6.

⁷⁴⁰ Italy, Government Commission of Inquiry, Final Report on the Events in Somalia, 8 August 1997, pp. 44–46.

⁷⁴¹ Report on the Practice of Kuwait, 1997, Chapter 6.6.

with the Ministry of Home Affairs, in practice efforts to disseminate IHL among the civilian population have been undertaken by the Malaysian Red Crescent Society and by the law faculty of the University of Malaya.⁷⁴²

676. In 1999, a seminar on implementation of IHL organised by Malawi's Ministry of Defence, the Law Commissioner, the ICRC and the National Red Cross Society encouraged Malawi to include IHL in training programmes for the police, prison and immigration services and in university curricula.⁷⁴³

677. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Mozambique pledged to "undertake efforts aimed at disseminating and promoting the International Humanitarian Law in . . . educational institutions particularly at the university level".⁷⁴⁴

678. In an explanatory memorandum submitted to the Dutch Parliament in the context of the ratification procedure of the CCW, both the Minister for Foreign Affairs and the Minister of Defence expressed themselves in favour of information on IHL being given not only to soldiers, but also to a broader group of people. However, it was stressed that to support governmental activities in this field, non-governmental activities were also needed.⁷⁴⁵

679. In 2002, at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, the President of the National Assembly of Niger committed the National Assembly and the deputies of Niger:

- 3) To observe that the government disseminates international humanitarian law through the education of the Forces of Defence and Security and the sensitisation of the population.
- 4) To fully engage in the process of sensitisation, information and education of the citizens.⁷⁴⁶

680. According to the Report on the Practice of Peru, which refers to various university programmes and curricula, IHL is taught at university level.⁷⁴⁷

681. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Slovenia pledged to give "support to the dissemination of the Geneva Conventions with the Additional Protocols and other instruments of International Humanitarian Law within . . . educational, health and other institutions".⁷⁴⁸

⁷⁴² Report on the Practice of Malaysia, 1997, Chapter 6.6.

⁷⁴³ ICRC, Advisory Service, 1999 *Annual Report*, Geneva, 2000, p. 44.

⁷⁴⁴ Mozambique, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷⁴⁵ Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the CCW, 1983–1984 Session, Doc. 18 278 (R 1248), Nos. 1–3, p. 9.

⁷⁴⁶ Niger, Pledge made at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, §§ 3–4.

⁷⁴⁷ Report on the Practice of Peru, 1998, Chapter 6.6.

⁷⁴⁸ Slovenia, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

682. At the 27th International Conference of the Red Cross and Red Crescent in 1999, Thailand pledged “to raise awareness of and promote respect for International Humanitarian Law and Principles in Thai society”.⁷⁴⁹

683. According to the Report on the Practice of Uruguay, which contains, as annexes, several syllabi of courses of the faculty of law of the University of Uruguay, IHL is part of the teaching in public international law and human rights law in the university’s law faculty.⁷⁵⁰

684. By a ministerial decree, a national committee on humanitarian law was created within the Ministry of Foreign Affairs of Uruguay to study and formulate recommendations on the dissemination of the Geneva Conventions and Additional Protocols at all levels of public and private education, and on the implementation of IHL through legislation, regulations, and measures guaranteeing the effective application of the Conventions.⁷⁵¹

685. At the 27th International Conference of the Red Cross and Red Crescent in 1999, the US pledged that “the United States will work to broaden and enhance efforts for dissemination of IHL, including in co-operation with the American Red Cross”.⁷⁵²

686. The Report on the Practice of the SFRY (FRY) notes that dissemination activities should be carried out in a much more systematic manner and that the curricula of law faculties and faculties of political sciences, which include subjects on international law, do not pay sufficient attention to IHL.⁷⁵³

687. The Report on the Practice of Zimbabwe notes that “little has been done to educate civilians [in IHL]”.⁷⁵⁴

III. Practice of International Organisations and Conferences

United Nations

688. In a resolution adopted in 1999 on protection of civilians in armed conflicts, the UN Security Council underlined the importance of the widest possible dissemination of IHL and of relevant training for civilian police, armed forces, members of the judicial and legal professions, civil society and personnel of international and regional organisations.⁷⁵⁵

689. In a resolution adopted in 1972 on respect for human rights in armed conflicts, the UN General Assembly called upon all parties to armed conflicts

⁷⁴⁹ Thailand, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷⁵⁰ Uruguay, Syllabi of the courses in Public International Law and Human Rights, Faculty of Law, University of the Republic, 1990, Report on the Practice of Uruguay, 1997, Chapter 6.6.

⁷⁵¹ Uruguay, Ministry of Foreign Affairs, Decree No. 677/1992 creating the National Commission of Humanitarian Law, 24 November 1992, Article 1, *Diario Oficial*, 1 March 1993, p. 498-A.

⁷⁵² US, Pledge made at the 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999.

⁷⁵³ Report on the Practice of the SFRY (FRY), 1997, Chapter 6.6.

⁷⁵⁴ Report on the Practice of Zimbabwe, 1998, Chapter 6.6.

⁷⁵⁵ UN Security Council, Res. 1265, 17 September 1999, preamble. (The resolution was adopted unanimously.)

“to provide...instruction concerning [the international humanitarian rules which are applicable] to the civilian population”. It also requested that the UN Secretary-General “encourage the study and teaching of principles of respect for international humanitarian law applicable in armed conflict”.⁷⁵⁶

690. In a resolution adopted in 1973 on respect for human rights in armed conflicts, the UN General Assembly urged that “information concerning the [rules of IHL] be given to civilians everywhere, with a view to securing their strict observance”.⁷⁵⁷

Other International Organisations

691. In a recommendation adopted in 1982, the Parliamentary Assembly of the Council of Europe stressed that “past experience in armed conflict has established the need for the Geneva Conventions and the two protocols to be disseminated as widely as possible... among the civilian population”. It recommended that the Committee of Ministers invite the governments of member States “to ensure that international humanitarian law becomes known by disseminating and teaching the Geneva Conventions... and their protocols among the... civilian population”.⁷⁵⁸

692. In a resolution adopted in 1994, the OAU Council of Ministers requested that member States “educate their population on the fundamental rules and principles of the International Humanitarian Law”.⁷⁵⁹

693. The first OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1994, concluded that “it is necessary to lay emphasis on the creation and improvement of the teaching materials [of IHL], particularly in the field of teaching even to the civilian education starting with primary schools”.⁷⁶⁰ The OAU Council of Ministers took note of the recommendations of the seminar.⁷⁶¹

694. The second OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1995, recommended the “implementation of specific sensitization and information activities on the International Humanitarian Law... for the people in general”.⁷⁶²

International Conferences

695. The 15th International Conference of the Red Cross in 1934 adopted a resolution in which it asked the ICRC and the League of Red Cross Societies to prepare a small booklet designed for youth – children between 10 and 14 years

⁷⁵⁶ UN General Assembly, Res. 3032 (XXVII), 18 December 1972, §§ 2–3.

⁷⁵⁷ UN General Assembly, Res. 3102 (XXVIII), 12 December 1973, § 5.

⁷⁵⁸ Council of Europe, Parliamentary Assembly, Rec. 945, 2 July 1982, §§ 10 and 11(b).

⁷⁵⁹ OAU, Council of Ministers, 6–11 June 1994, Res. 1526 (LX), § 7.

⁷⁶⁰ OAU/ICRC, First seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 7 April 1994, Conclusions and Recommendations, § 3.

⁷⁶¹ OAU, Council of Ministers, Res. 1526 (LX), 11 June 1994, § 1.

⁷⁶² OAU/ICRC, Second seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 11–12 April 1995, Recommendations, § 1(b).

of age – with respect to the Geneva Convention and the activity of the Red Cross.⁷⁶³

696. The 19th International Conference of the Red Cross in 1957 adopted a resolution on young people and the Geneva Conventions stating that it considered that Article 144 GC IV “makes it incumbent on the Governments which have ratified that Convention to make known the letter and spirit thereof to the whole population”. It recommended that “in negotiations with the Governments, the National Societies endeavour to obtain space in the school curricula for the history and aims of [the] Red Cross and for the basic principles of the Geneva Conventions”.⁷⁶⁴

697. The 19th International Conference of the Red Cross in 1957 adopted a resolution on practical means of spreading knowledge of the Geneva Conventions among young people in which it stated that “the Geneva Conventions constitute a sound basis for social education”. The Conference recommended that “radio and television broadcasts dealing with the questions [of the history of the Red Cross and the Geneva Conventions] be regularly organized” and invited the ICRC and the League of Red Cross Societies to “examine, with National Societies, the possibilities of producing one or more films for Juniors covering the history, subject matter and aims of the Geneva Conventions”. The Conference further recommended that the ICRC and the League of Red Cross Societies “issue informative publications suitable for children and young people, dealing with the history of the Red Cross and the fundamental principles of the Geneva Conventions”.⁷⁶⁵

698. The 20th International Conference of the Red Cross in 1965 adopted a resolution on instruction of medical personnel in the Geneva Conventions in which it urged:

the Governments and National Societies to intensify and co-ordinate their efforts to disseminate the 1949 Geneva Conventions among the medical personnel of their country, by introducing this subject in the compulsory syllabi of nursing and assistant nurses’ schools, and including it in all courses for Red Cross voluntary auxiliaries and first aiders.⁷⁶⁶

699. The 22nd International Conference of the Red Cross in 1973 adopted a resolution on the implementation and dissemination of the Geneva Conventions in which it called upon governments and National Societies:

to intensify their efforts with a view, on the one hand, to making known to the population as a whole the basic principles of the Red Cross and international humanitarian law by all effective means available to competent authorities at all

⁷⁶³ 15th International Conference of the Red Cross, Tokyo, 20–29 October 1934, Res. IX.

⁷⁶⁴ 19th International Conference of the Red Cross, New Delhi, 28 October–7 November 1957, Res. XXIX.

⁷⁶⁵ 19th International Conference of the Red Cross, New Delhi, 28 October–7 November 1957, Res. XXX.

⁷⁶⁶ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXXIII.

levels, and on the other hand, to imparting clear concepts regarding the Geneva Conventions to specialized spheres such as... civil administrations, institutes of higher learning, the medical and para-medical professions, etc.

It requested that the ICRC "support the efforts of governments and National Societies in their dissemination of and instruction in the Geneva Conventions".⁷⁶⁷

700. In a resolution adopted in 1977 on dissemination of knowledge of international humanitarian law applicable in armed conflicts, the CDDH invited:

the signatory States to take all appropriate measures to ensure that knowledge of international humanitarian law applicable in armed conflicts, and of the fundamental principles on which that law is based, is effectively disseminated, particularly by:

- ...
- (c) recommending that the appropriate authorities intensify the teaching of international humanitarian law in universities (faculties of law, political science, medicine, etc.);
 - (d) recommending to educational authorities the introduction of courses on the principles of international humanitarian law in secondary and similar schools.⁷⁶⁸

The resolution was adopted by 63 votes in favour, 2 against and 21 abstentions.⁷⁶⁹

701. The 23rd International Conference of the Red Cross in 1977 adopted a resolution stating that it considered that "the dissemination of knowledge of international humanitarian law applicable in armed conflicts is one of the vital conditions for its observance". The Conference invited "National Societies to intensify their efforts, in collaboration with their governments, for the dissemination of knowledge of international humanitarian law and of its principles as widely as possible among the population and especially among youth". It also recognised "the role of UNESCO in the dissemination of knowledge of international humanitarian law" and invited "the ICRC and the League [of Red Cross Societies] to intensify their collaboration with UNESCO with a view in particular to the award of training fellowships at specialized institutes".⁷⁷⁰

702. The 25th International Conference of the Red Cross in 1986 adopted a resolution on protection of the civilian population in armed conflicts in which it recommended "a universal campaign to make known to all, not only to the armed forces, but to the civilians, the rights of the latter according to international law".⁷⁷¹

⁷⁶⁷ 22nd International Conference of the Red Cross, Teheran, 8–15 November 1973, Res. XII.

⁷⁶⁸ CDDH, *Official Records*, Vol. I, CDDH/446, 7 June 1977, Resolution 21, Dissemination of knowledge of international humanitarian law applicable in armed conflicts, Article 2.

⁷⁶⁹ CDDH, *Official Records*, Vol. VII, CDDH/SR.55, 7 June 1977, § 48.

⁷⁷⁰ 23rd International Conference of the Red Cross, Bucharest, 15–21 October 1977, Res. VII, preamble and §§ 2 and 4.

⁷⁷¹ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. VIII, § 3.

703. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 urged all States to make every effort to:

disseminate international humanitarian law in a systematic way by teaching its rules to the general population, including incorporating them in education programmes and by increasing media awareness, so that people may assimilate that law and have the strength to react in accordance with these rules to violations thereof.⁷⁷²

704. In 1993, the 90th Inter-Parliamentary Conference adopted a resolution in which it called on all States “to increase public awareness of and to promote respect for international humanitarian law through education and information programmes”.⁷⁷³

705. The Plan of Action for the years 2000–2003 adopted in 1999 by the 27th International Conference of the Red Cross and Red Crescent proposed that:

States examine their educational and training curricula to ensure that international humanitarian law is integrated in an appropriate manner in their programmes for . . . relevant civil servants. States promote knowledge of international humanitarian law among decision-makers and the media and work for the inclusion of international humanitarian law in the general educational programmes of relevant organizations, professional bodies and educational institutions.⁷⁷⁴

706. In the Final Declaration adopted in 2002 by the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, the participants stated that:

15. We undertake to promote knowledge of International Humanitarian Law and humanitarian norms as well as International Refugee Law among parliamentarians at national, regional and sub-regional levels.
16. We wish that seminars and workshops be organized for parliamentarians on these issues at the national, regional and sub-regional levels with the cooperation of competent organizations, particularly through the APU and other African parliamentary organizations.
17. We encourage the ICRC and National Societies of the Red Cross and Red Crescent to intensify their efforts to disseminate the rules of International Humanitarian Law in our States.⁷⁷⁵

IV. Practice of International Judicial and Quasi-judicial Bodies

707. No practice was found.

⁷⁷² International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(1), *ILM*, Vol. 33, 1994, p. 299.

⁷⁷³ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, § 2(c).

⁷⁷⁴ 27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999, Res. I, Annex 2, Plan of Action for the years 2000–2003, Actions proposed for final goal 1.4, § 16.

⁷⁷⁵ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Final Declaration, Niamey, 18–20 February 2002, §§ 15–17.

V. Practice of the International Red Cross and Red Crescent Movement

708. The ICRC Commentary on the First Geneva Convention notes with respect to Article 47 GC I that:

The provision is, however, qualified by the words “if possible”, not because the Diplomatic Conference of 1949 thought civilian instruction any less imperative than military instruction, but because education comes under the provincial authorities in certain countries with federal constitutions, and not under the central Government. Constitutional scruples, the propriety of which is open to question, led some delegations to safeguard the freedom of provincial decisions.⁷⁷⁶

709. At its Rio de Janeiro Session in 1987, the Council of Delegates adopted a resolution on information and dissemination of IHL in which it invited the entire Movement “to continue and expand its activities for the dissemination of knowledge of international humanitarian law and the Fundamental Principles in various circles, including young people, nationally, regionally and internationally”.⁷⁷⁷

710. In 1993, in its report to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

The treaties of international humanitarian law provide various mechanisms . . . for implementing their substantive provisions. Among these mechanisms it is worth mentioning the following:

- ...
 (c) the obligation of States to ensure that the provisions of the Geneva Conventions and their Additional Protocols are known as widely as possible . . .

Each State Party to the Geneva Conventions or to their Additional Protocols must ensure that the text of these treaties is disseminated as widely as possible throughout its territory in both peacetime and wartime. The States must, *inter alia*, incorporate study of the subject [if possible] into their programmes of . . . civilian instruction.⁷⁷⁸

VI. Other Practice

711. In 1995, the IIHL, commenting on the Declaration of Minimum Humanitarian Standards, stated that:

⁷⁷⁶ Jean S. Pictet *et al.* (eds.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, p. 349.

⁷⁷⁷ International Red Cross and Red Crescent Movement, Council of Delegates, Rio de Janeiro, 27 November 1987, Res. 4, §§ 1 and 2.

⁷⁷⁸ ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the 48th Session of the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, §§ 45 and 51.

The importance of making known, disseminating and teaching these minimum humanitarian standards should be underlined. A clause on that subject could form a special article at the end of the declaration, which could read:

“The minimum humanitarian standards, defined in this Declaration, should be made known and disseminated to all the authorities concerned, and to individuals who may be potential victims”.⁷⁷⁹

⁷⁷⁹ IHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, § 23, reprinted in Report of the UN Secretary-General prepared pursuant to Commission resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, p. 11.

ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW

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A. Ensuring Respect for International Humanitarian Law Erga Omnes

I. Treaties and Other Instruments

Treaties

1. Common Article 1 of the 1949 Geneva Conventions states that “the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances”.

2. Article 1(1) AP I provides that “the High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances”. Article 1 AP I was adopted by 87 votes in favour, 1 against and 11 abstentions.

3. Article 89 AP I provides that “in situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter”. Article 89 AP I was adopted by 50 votes in favour, 3 against and 40 abstentions.¹

4. Upon ratification of AP I, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation. In this context it wishes to assert that military commanders planning or executing attacks make their decisions on the basis of their assessment of all kinds of information available to them at the time of the military operations.²

5. In communications in relation to the declarations made in the instruments of accession by Oman, Syria and UAE to AP I and, in the case of Oman, also AP II, Israel stated that:

The Instrument deposited by the Sultanate of Oman includes a hostile declaration of a political character regarding Israel . . . The statement by the Sultanate of Oman cannot in any way affect whatever obligations are binding upon it under general international law or under particular conventions. In so far as the substance of the matter is concerned, the Government of Israel will adopt towards the Sultanate of Oman an attitude of complete reciprocity.

...

The Instrument deposited by the Government of the Arab Republic of Syria contains a hostile statement of a political character in respect of Israel . . . This statement by the Government of the Arab Republic of Syria cannot in any way affect whatever obligations are binding upon the Arab Republic of Syria under general international law or under particular conventions. The Government of the State of Israel will, in so far as concerns the substance of the matter, adopt towards the Government of the Arab Republic of Syria an attitude of complete reciprocity.

...

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.36, 23 May 1977, p. 41.

² Egypt, Declaration made upon ratification of AP I, 9 October 1992.

The Instrument deposited by the Government of the United Arab Emirates contains a statement of a political character in respect of Israel... This statement by the Government of the United Arab Emirates cannot in any way affect whatever obligations are binding upon the United Arab Emirates under general international law or under particular conventions. The Government of the State of Israel will, in so far as concerns the substance of the matter, adopt towards the Government of the United Arab Emirates an attitude of complete reciprocity.³

6. Upon accession to AP I and AP II, Oman declared that "while depositing these instruments, the Government of the Sultanate of Oman declares that these accessions shall in no way amount to recognition of nor the establishment of any relations with Israel with respect to the application of the provisions of the said protocols".⁴

7. Upon accession to AP I, Syria made a reservation to the effect that "this accession in no way constitutes recognition of Israel nor the establishment of relations with Israel as regards the application of the provisions of the aforementioned Protocol".⁵

8. Upon accession to AP I, the UAE declared that "on accepting the said protocol, the Government of the United Arab Emirates takes the view that its acceptance of the said protocol does not, in any way, imply its recognition of Israel, nor does it oblige it to apply the provisions of the protocol in respect of the said country".⁶

9. Article 31 of the 1999 Second Protocol to the 1954 Hague Convention provides that "in situations of serious violations of this Protocol, the Parties undertake to act, jointly through the Committee, or individually, in cooperation with UNESCO and the United Nations and in conformity with the Charter of the United Nations".

Other Instruments

10. Article 16 of the 2001 ILC Draft Articles on State Responsibility, entitled "Aid or assistance in the commission of an internationally wrongful act", states that:

A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if:

- (a) That State does so with knowledge of the circumstances of the internationally wrongful act; and
- (b) The act would be internationally wrongful if committed by that State.

³ Israel, Communications made in relation to the declarations made in the instruments of accession by Oman, Syria and the UAE to AP I and, in the case of Oman, also AP II, reprinted in Dietrich Schindler and Jiri Toman, *The Law of Armed Conflicts*, Martinus Nijhoff Publishers/Henry Dunant Institute, Dordrecht/Geneva, 1988, pp. 711–712.

⁴ Oman, Declaration made upon accession to AP I and AP II, 29 March 1984.

⁵ Syria, Declaration made upon accession to AP I, 14 November 1983.

⁶ UAE, Declaration made upon accession to AP I, 9 March 1983.

*II. National Practice**Military Manuals*

11. No practice was found.

National Legislation

12. No practice was found.

National Case-law

13. In the *Sinnappu case* before a Canadian Federal Court in 1997, the applicants, unsuccessful claimants for refugee status, argued that, *inter alia*, their deportation to Sri Lanka would violate Canada's obligations under the Geneva Conventions Act of 1985. The judge held that:

I cannot agree that common Article 1 of the Geneva Conventions of 1949 imposes upon Canada an obligation not to return unsuccessful refugee claimants to Sri Lanka. In my opinion, Sri Lanka is engaged in an internal armed conflict to which common Article 3 of the Geneva Conventions, 1949 and customary law on armed conflicts apply. Since Canada has no involvement whatsoever in that dispute, common Article 1 of the Geneva Conventions, 1949 does not impose upon our country an obligation to ensure that the parties to that conflict respect common Article 3. Furthermore, even if Canada does have such an obligation under common Article 1, I cannot accept that it would affect the application of our laws pertaining to immigration. Alternatively, even if I am wrong in determining that the armed conflict in Sri Lanka is internal in nature, I have nevertheless concluded that nothing in common Article 1 of the Geneva Conventions, 1949 would prevent Canada from removing a person, who had exhausted all of his avenues of recourse under the Act and Regulations, to the territory of a state engaged in an international armed conflict.⁷

14. In 1985, in the case of a Salvadoran citizen who had fled El Salvador in 1980 and applied for asylum in the US, it was argued on behalf of the applicant that the US was precluded from deporting her to El Salvador, as that would mean exposing her to violations of common Article 3 of the 1949 Geneva Conventions and thus, by virtue of common Article 1 of the 1949 Geneva Conventions, involved the responsibility of the US to ensure respect for GC IV, notably its Article 3. An Immigration Court in the US held that the applicant, "a Salvadoran citizen who is not taking active part in the hostilities, is a protected person under the minimum provisions set forth in Article 3" common to the 1949 Geneva Conventions and that GC IV "provides a potential basis for relief from deportation within the jurisdiction of the immigration judge".⁸ However, on appeal, the US Board of Immigration Appeals reversed these findings and concluded that it was unclear "what obligations, if any, Article 1 [common to the 1949 Geneva Conventions] was intended to impose with

⁷ Canada, Federal Court Trial Division, *Sinnappu case*, Judgement, 14 February 1997.

⁸ US, Executive Office for Immigration Review, Harlingen, Texas, *Case No. A26 949 415: In the Matter of Jesus del Carmen Medina, in Deportation Proceedings*, Decision, 25 July 1985, referred to in Frits Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", *YIHL*, Vol. 2, 1999, pp. 4-5.

respect to violations of the Conventions by other States" and that, in any event, the said provision was not self-executing.⁹

15. In the *Baptist Churches case* in 1989, a US District Court considered an application for an injunction to prevent the deportation of Central American nationals seeking temporary refuge based on, *inter alia*, Articles 1, 3 and 45 GC IV. The plaintiffs argued that "by deporting Salvadorans and Guatemalans to countries where Article 3 violations are occurring, the United States . . . failed to 'respect and ensure respect' for the Convention within the meaning of Article 1".¹⁰ Reiterating criteria that had to be met by a treaty in order to be self-executing and applying them to Article 1 GC IV, the Court stated that:

Article 1 of the Geneva Conventions is not a self-executing treaty provision. The language used does not impose any specific obligations on the signatory nations, nor does it provide any intelligible guidelines for judicial enforcement . . . The treaty provision is "phrased in broad generalities" . . . and contains no "rules by which private rights may be determined".¹¹

Other National Practice

16. In 1995, in reply to a question from members of parliament concerning Russian action in Chechnya, the German government stated that:

The Federal Government has repeatedly reminded Russia of the latter's duty to abide by its obligations under Protocol II additional to the 1949 Geneva Conventions, which provides for the protection of victims of non-international armed conflicts and thus applies to the conflict in Chechnya.¹²

17. In 1980, during a debate in the Special Political Committee of the UN General Assembly on Israeli practices in the occupied territories, Oman stated that the obligations imposed by Article 1 GC IV on all State parties involved "collective action to ensure adherence to the Convention, non-recognition of measures taken in contravention of its provisions and refraining from offering any aid to the occupying Power which might encourage it in its obstinacy".¹³

18. The Report on the Practice of Jordan states that Jordan has:

always protested against the Israeli breaches of Human Rights and of International Humanitarian Law in the occupied territories and it always asked Israel to refrain from further breaches. Jordan used also to request the ICRC to urge Israel to observe

⁹ US, Board of Immigration Appeals, *Case No. A26 949 415 – Harlingen, In re Jesus del Carmen Medina, in Deportation Proceedings: Certification*, Decision of 7 October 1988, referred to in Frits Kalshoven, "The Undertaking to Respect and Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit", *YIHL*, Vol. 2, 1999, p. 5.

¹⁰ US, District Court for the Northern District of California, *Baptist Churches case*, Judgement, 24 March 1989, § 9.

¹¹ US, District Court for the Northern District of California, *Baptist Churches case*, Judgement, 24 March 1989, § 12.

¹² Germany, Lower House of Parliament, Reply of the Federal Government to a question from members of the Federal Parliament, *BT-Drucksache 13/718*, 9 March 1995, p. 3.

¹³ Oman, Statement before the Special Political Committee of the UN General Assembly, UN Doc. A/SPC/35/SR.27, 11 November 1980, § 4.

the rules of I.H.L. and to appeal to the UN and through it to the whole community of States.¹⁴

19. In 1979, in reaction to the appeal made by the ICRC to ensure respect for international humanitarian law with regard to the conflict in Rhodesia/Zimbabwe, the UK stated that “we give our wholehearted support” to the ICRC Appeal.¹⁵

20. In 1979, in reaction to the appeal made by the ICRC to ensure respect for international humanitarian law with regard to the conflict in Rhodesia/Zimbabwe, the US stated that “we... wish to endorse the appeal issued by the International Committee of the Red Cross”.¹⁶

III. Practice of International Organisations and Conferences

United Nations

21. In a resolution adopted in 1990 following Israel’s decision to deport four Palestinians from the occupied territories, the UN Security Council called upon “the high contracting parties to the Fourth Geneva Convention of 1949 to ensure respect by Israel, the occupying Power, for its obligations under the Convention in accordance with Article 1 thereof” and requested:

the Secretary-General, in co-operation with the International Committee of the Red Cross, to develop further the idea expressed in his report of convening a meeting of the high contracting parties to the Fourth Geneva Convention and to discuss possible measures that might be taken by them under the Convention and for this purpose to invite these parties to submit their views on how the idea could contribute to the goals of the Convention, as well as on other relevant matters, and to report thereon to the Council.¹⁷

22. In a resolution adopted in 1977, the UN General Assembly, considering that GC IV was applicable to the territories occupied by Israel, urged all parties thereto “to exert all efforts in order to ensure respect for and compliance with the provisions thereof in all the Arab territories occupied by Israel”.¹⁸

23. In a resolution adopted in 1982 on the situation in the Middle East, the UN General Assembly called upon “the parties [to the 1907 Hague Convention IV and GC IV] to respect and ensure respect of their obligations under these instruments in all circumstances”.¹⁹

¹⁴ Report on the Practice of Jordan, 1997, Chapter 6.2.

¹⁵ UK, Secretary of State (FCO), Speech given by Mr. David Owen at the Bow Group meeting, House of Commons, 26 March 1979.

¹⁶ US, Department of State, Statement by the Spokesperson for the Department of State, Mr. Hodding Carter, 21 March 1979.

¹⁷ UN Security Council, Res. 681, 20 December 1990, §§ 5 and 6.

¹⁸ UN General Assembly, Res. 32/91 A, 13 December 1977, § 4; see also Res. 33/113 A, 18 December 1978, § 4, Res. 34/90 A, 12 December 1979, § 4, Res. 34/90 C, 12 December 1979, § 5, Res. 35/122 A, 11 December 1980, § 4, Res. 35/122 B, 11 December 1980, § 5, Res. 36/147 A, 16 December 1981, § 5, Res. 36/147 B, 16 December 1981, § 5, Res. 37/88 A, 9 December 1982, § 4, Res. 37/88 B, 9 December 1982, § 5, Res. 38/79 A, 15 December 1983, § 4, Res. 38/79 B, 15 December 1983, § 5, Res. 39/95 A, 14 December 1984, § 4, Res. 39/95 B, 14 December 1984, § 5, Res. 40/161 B, 16 December 1985, § 4 and Res. 40/161 C, 16 December 1985, § 5.

¹⁹ UN General Assembly, Res. 37/123 A, 16 December 1982, § 6.

24. In a resolution adopted in 1983 on the situation in the Middle East, the UN General Assembly called upon "parties [to the 1907 HR and GC IV] to respect and ensure respect of their obligations under these instruments in all circumstances".²⁰

25. In a resolution adopted in 1988 on the uprising (*intifadah*) of the Palestinian people, the UN General Assembly called upon "all the High Contracting Parties to [GC IV] to take appropriate measures to ensure respect by Israel, the occupying Power, for the Convention in all circumstances, in conformity with their obligation under article 1 thereof".²¹

26. In a resolution adopted in 1990 on the situation in the Palestinian and other Arab territories occupied by Israel, the UN Sub-Commission on Human Rights called upon the States parties to GC IV "to apply article 1 of the Convention and to ensure respect by Israel for the Convention".²² This appeal was reiterated in 1991 and 1992.²³

27. In a resolution adopted in 1993 on the situation in the Palestinian and other Arab territories occupied by Israel, the UN Sub-Commission on Human Rights called upon "the States parties to [GC IV] to implement article 1 of the Convention, to ensure respect by Israel for the Convention and to secure protection for the Palestinian people under occupation, until the end of this occupation".²⁴

28. In 1984, in reaction to the appeals made by the ICRC to ensure respect for international humanitarian law in the Iran-Iraq war, the UN Secretary-General stated that he remained "deeply concerned that serious infringements of the terms of the Geneva Conventions may bring into discredit those rules of law and universal principles" and underscored "the vital importance of ensuring the observance of the principles embodied in the Geneva Conventions".²⁵

29. In 1988, in a report on the situation in the Palestinian and other Arab territories, the UN Secretary-General recommended that:

The Security Council should consider making a solemn appeal to all the High Contracting Parties to the Fourth Geneva Convention that have diplomatic relations with Israel, drawing their attention to their obligation under article 1 of the Convention to "... ensure respect for the present Convention in all circumstances" and urging them to use all the means at their disposal to persuade the Government of Israel to change its position as regards the applicability of the Convention.²⁶

²⁰ UN General Assembly, Res. 38/180 A, 19 December 1983, § 6.

²¹ UN General Assembly, Res. 43/21, 3 November 1988, § 5.

²² UN Sub-Commission on Human Rights, Res. 1990/12, 30 August 1990, § 4.

²³ UN Sub-Commission on Human Rights, Res. 1991/6, 23 August 1991, § 4; Res. 1992/10, 26 August 1992, § 4.

²⁴ UN Sub-Commission on Human Rights, Res. 1993/15, 20 August 1993, § 4.

²⁵ UN Secretary-General, Note verbale dated 26 June 1984 addressed to the member States and observer States that are States Parties to the Geneva Conventions of 1949, UN Doc. S/16648, 26 June 1984, p. 2.

²⁶ UN Secretary-General, Report on the situation in the territories occupied by Israel submitted in accordance with UN Security Council Resolution 605 (1987), UN Doc. S/19443, 21 January 1988, § 27.

Other International Organisations

30. In a resolution adopted in 1984 on the activities of the ICRC, the Parliamentary Assembly of the Council of Europe noted that “all the High Contracting Parties to the [1949] Geneva Conventions share an equal burden of responsibility to ensure respect for the principle of humanitarian protection, which is the cornerstone of the said conventions”.²⁷

31. In a resolution adopted in 1987 on the activities of the ICRC, the Parliamentary Assembly of the Council of Europe recalled that “the members of the Council of Europe, as parties to the [1949] Geneva Conventions, have a particular responsibility and must exert their influence to ensure respect for the rules of international humanitarian law at all times and in all circumstances”.²⁸ It invited the governments of member States “to help to ensure respect in all circumstances for the 1949 Geneva Conventions and the international humanitarian law applicable to armed conflicts”.²⁹

32. In a resolution adopted in 1989 on the activities of the ICRC, the Parliamentary Assembly of the Council of Europe invited the governments of member States “to respect and to help to ensure respect in all circumstances for the 1949 Geneva Conventions and their Additional Protocols of 1977, and the international humanitarian law applicable to armed conflicts”.³⁰

33. In a resolution adopted in 1992 on the crisis in the former Yugoslavia, the Parliamentary Assembly of the Council of Europe invited the governments of member States “to launch an appeal to the conflicting parties to respect the four Geneva conventions of 1949”.³¹

34. In a declaration adopted in 1993 on the rape of women and children in the territory of the former Yugoslavia, the Committee of Ministers of the Council of Europe, “having regard to the specific responsibility of the Council of Europe to safeguard human rights and fundamental freedoms”, appealed “to member States and the international community at large to ensure that these atrocities cease and that their instigators and perpetrators are prosecuted by an appropriate national or international penal tribunal”.³²

35. In a resolution adopted in 1999, the NATO Parliamentary Assembly reminded all States of their obligation, under the Geneva Conventions, not only to respect but to ensure respect for IHL in all circumstances.³³

36. In a resolution on health and war adopted in 1995, the OAU Conference of African Ministers of Health, after urging member States to accede to the Geneva Conventions and the Additional Protocols, stressed “the obligation for them to

²⁷ Council of Europe, Parliamentary Assembly, Res. 823, 28 June 1984, § 8.

²⁸ Council of Europe, Parliamentary Assembly, Res. 881, 1 July 1987, § 21.

²⁹ Council of Europe, Parliamentary Assembly, Res. 881, 1 July 1987, § 23(iii).

³⁰ Council of Europe, Parliamentary Assembly, Res. 921, 6 July 1989, § 20(i).

³¹ Council of Europe, Parliamentary Assembly, Res. 984, 30 June 1992, § 13(iii).

³² Council of Europe, Committee of Ministers, Declaration on the rape of women and children in the territory of former Yugoslavia, 18 February 1993, § 4.

³³ NATO, Parliamentary Assembly, Civilian Affairs Committee Resolution, Amsterdam, 15 November 1999, § 7.

respect and have the International Humanitarian Law respected, particularly by the strengthening of the implementation mechanisms".³⁴

37. In a resolution on respect for IHL adopted in 1996, the OAS General Assembly urged all members to "observe and fully enforce . . . the customary principles and norms contained in the 1977 Additional Protocols".³⁵

International Conferences

38. The World Conference on Human Rights in 1968 adopted a resolution in which it noted that "States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict". It further requested:

the Secretary-General, after consultation with the [ICRC], to draw the attention of all States members of the United Nations system to the existing rules of international law on the subject and urge them, pending the adoption of new rules of international law relating to armed conflicts, to ensure that in all armed conflicts the inhabitants and belligerents are protected in accordance with "the principles of the law of nations derived from the usages established among civilized peoples, from the laws of humanity and from the dictates of the public conscience".³⁶

39. The 24th International Conference of the Red Cross in 1981 adopted a resolution on the application of GC IV "to the occupied territories in the Middle East" in which it expressed its consciousness "of the fact that the Parties to the Geneva Conventions have undertaken, not only to respect, but also to ensure respect for the Conventions in all circumstances".³⁷

40. The 24th International Conference of the Red Cross in 1981 adopted a resolution in which it recalled that "pursuant to the Geneva Conventions, the States have the obligation not only to respect but to ensure respect for these Conventions" and made "a solemn appeal that the rules of international humanitarian law and the universally recognized humanitarian principles be safeguarded at all times and in all circumstances".³⁸

41. The 25th International Conference of the Red Cross in 1986 adopted a resolution in which it appealed "to Parties to the Geneva Conventions to fully carry out their obligations under the Fourth Geneva Convention" and reminded "all parties to the Geneva Conventions of their common obligation to respect and ensure respect for those Conventions in all circumstances".³⁹

³⁴ OAU, Conference of African Ministers of Health, 24–29 April 1995, Res. 14 (V), § 2.

³⁵ OAS, General Assembly, Res. 1408 (XXVI-O/96), 7 June 1996, § 4.

³⁶ World Conference on Human Rights, Res. XXIII on Human Rights in Armed Conflicts, Teheran, 12 May 1968, preamble and § 2.

³⁷ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. III, preamble.

³⁸ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. VI.

³⁹ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. I, §§ 4–5.

42. In 1992, at the Helsinki Summit of Heads of State or Government, CSCE participating States declared that they would “in all circumstances respect and ensure respect for international humanitarian law including the protection of the civilian population”.⁴⁰

43. In the Final Declaration adopted by the International Conference for the Protection of War Victims in 1993, the participants undertook “to act in cooperation with the UN and in conformity with the UN Charter to ensure full compliance with international humanitarian law in the event of genocide and other serious violations of this law”, affirmed their responsibility, “in accordance with Article 1 common to the Geneva Conventions, to respect and ensure respect for international humanitarian law in order to protect the victims of war” and urged all States to make every effort to “ensure the effectiveness of international humanitarian law and take resolute action, in accordance with that law, against States bearing responsibility for violations of international humanitarian law with a view to terminating such violations”.⁴¹

44. In 1994, at the Budapest Summit of Heads of State or Government, CSCE participating States reaffirmed “their commitment to respect and ensure respect for general international humanitarian law and in particular for their obligations under the relevant international instruments, including the 1949 Geneva Conventions and their additional protocols, to which they are a party”.⁴²

45. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration stating that:

4. The participating High Contracting Parties call upon all parties, directly involved in the conflict [between Israel and Palestinians] or not, to respect and to ensure respect for the Geneva Conventions in all circumstances. . . .
5. The participating High Contracting Parties stress that the Fourth Geneva Convention, which takes fully into account imperative military necessity, has to be respected in all circumstances.
- ...
17. The participating High Contracting Parties welcome and encourage the initiatives by States Parties, both individually and collectively, according to art. 1 of the Convention and aimed at ensuring the respect of the Convention, and they underline the need for the Parties to follow up on the implementation of the present Declaration.⁴³

⁴⁰ CSCE, Helsinki Summit of Heads of State or Government, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 48.

⁴¹ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, §§ I(6), II and II(11), *ILM*, Vol. 33, 1994, pp. 299 and 301.

⁴² CSCE, Budapest Summit of Heads of State or Government, 5–6 December 1994, Budapest Document 1994: Towards a Genuine Partnership in a New Area, Decisions, Chapter VIII: The Human Dimension, § 33.

⁴³ Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, §§ 4–5 and 17.

IV. Practice of International Judicial and Quasi-judicial Bodies

46. In the *Nicaragua case (Merits)* in 1986, the ICJ addressed the issue of US responsibilities under IHL. It considered that:

There is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.⁴⁴

The ICJ also stated that “the US is bound to refrain from encouragement of persons or groups engaged in the conflict in Nicaragua to commit violations of Article 3 which is common to all four Geneva Conventions of 12 August 1949”. The Court then went on to consider some of the activities allegedly carried out by the US, in particular, the publication and dissemination of a manual on “psychological operations”, which provided advice on how to “neutralize” certain “carefully selected and planned targets” such as judges, police officers and State security officials. The Court held that:

When considering whether the publication of such a manual, encouraging the commission of acts contrary to general principles of humanitarian law, is unlawful, it is material to consider whether that encouragement was offered to persons in circumstances where the commission of such acts was likely or foreseeable. The Court has however found . . . that at the relevant time those responsible for the issue of the manual were aware of, at the least, the allegations that the behaviour of the *contras* in the field was not consistent with humanitarian law . . . The publication and dissemination of a manual in fact containing the advice quoted above must therefore be regarded as an encouragement, which was likely to be effective, to commit acts contrary to general principles of international humanitarian law reflected in treaties.⁴⁵

47. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber held that:

Furthermore, the prohibition of torture imposes upon States obligations *erga omnes*, that is, obligations owed towards all the other members of the international community, each of which then has a correlative right. In addition, the violation of such an obligation simultaneously constitutes a breach of the correlative right of all members of the international community and gives rise to a claim for compliance accruing to each and every member, which then has the right to insist on fulfilment of the obligation or in any case to call for the breach to be discontinued.⁴⁶

48. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber, in rejecting the defence’s arguments based on the *tu quoque* principle (whereby

⁴⁴ ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 220.

⁴⁵ ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, §§ 255 and 256.

⁴⁶ ICTY, *Furundžija case*, Judgement, 10 December 1998, § 151.

the fact that the adversary has also committed similar crimes offers a valid defence to the accused), held that:

As a consequence of their absolute character, these norms of international humanitarian law do not pose synallagmatic obligations, i.e. obligations of a State vis-à-vis another State. Rather – as was stated by the International Court of Justice in the Barcelona Traction case (which specifically referred to obligations concerning fundamental human rights) – they lay down obligations towards the international community as a whole, with the consequence that each and every member of the international community has a “legal interest” in their observance and consequently a legal entitlement to demand respect for such obligations.⁴⁷

V. Practice of the International Red Cross and Red Crescent Movement

49. The ICRC Commentary on the Third Geneva Convention states with respect to Article 1 GC III that:

In the event of a Power failing to fulfil its obligations, each of the Contracting Parties (neutral, allied or enemy) should endeavour to bring it back to an attitude of respect for the Convention. The proper working of the system of protection provided by the Convention demands in fact that the States which are parties to it should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that it is respected universally.⁴⁸

50. The ICRC Commentary on the Additional Protocols states with respect to Article 1 AP I that by including the express reference to the duty to ensure respect for IHL, as well as articles on specific methods of implementing this duty, the CDDH “clearly demonstrated that humanitarian law creates for each State obligations towards the international community as a whole (*erga omnes*); in view of the importance of the rights concerned, each State can be considered to have a legal interest in the protection of such rights”.⁴⁹

51. The ICRC Commentary on the Additional Protocols states with respect to Article 89 AP I that:

The article prescribes for all Contracting Parties, and not only those who are Members of the United Nations, that they should act in those situations in co-operation with the Organization and in conformity with its Charter . . .

The wording of this article follows *mutatis mutandis* Article 56 of the United Nations Charter which is aimed at co-operation for the achievement of universal respect for, and observance of, human rights and fundamental freedoms for all with a view to ensuring peaceful and friendly relations among nations . . .

Acting for the protection of man, also in time of armed conflict, accords with the aims of the United Nations no less than does the maintenance of international peace and security.⁵⁰

⁴⁷ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 519.

⁴⁸ Jean S. Pictet (ed.), *Commentary on the Third Geneva Convention*, ICRC, Geneva, 1960, p. 18.

⁴⁹ Yves Sandoz et al. (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 45.

⁵⁰ Yves Sandoz et al. (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 3594–3596.

52. In an appeal issued in 1979 with respect to the conflict in Rhodesia/Zimbabwe, the ICRC stated that:

2. . . . Fundamental humanitarian rules accepted by all nations – such as the obligation to distinguish between combatants and civilians, and to refrain from violence against the latter – have been largely ignored. . . .
3. Since the end of 1976, the ICRC has on several occasions launched formal appeals to the authorities in Salisbury and to the leaders of the nationalist movements in order that they respect and apply the basic humanitarian rules in their conduct of warfare. The Front-Line States as well as the United Kingdom have been informed of the launching of these appeals and invited to support them. . . .
8. The ICRC points out that ultimate responsibility for respecting and applying the provisions of humanitarian law lies, not with the ICRC, but with the parties to the conflict and with all States which have ratified or adhered to the Geneva Conventions and have thereby committed themselves to respect and to *ensure respect* for these Conventions in all circumstances. It therefore also appeals to:
 - all the States parties to the Geneva Conventions, and in particular the United Kingdom,
 - the Front-Line States (Angola, Botswana, Mozambique, Tanzania, Zambia),
 - the members of the United Nations Security Council,
 - the Chairman of the Organization of African Unity,
 - the Secretary-General of the United Nations,
 - to fully support its appeal to the warring parties in Rhodesia/Zimbabwe in order that an end be put to all the suffering there and that all the victims of the conflict receive the humanitarian protection and assistance to which they are entitled and which they so urgently need.⁵¹

53. In an appeal issued in 1983 concerning the Iran–Iraq War, the ICRC asked:

the States parties to the [1949] Geneva Conventions to make every effort – in discharge of the obligation they assumed under article 1 of the Conventions not only to respect but to ensure respect for the Conventions – to see that international humanitarian law is applied and these violations affecting tens of thousands of persons cease. . . . Every means provided for in the Geneva Conventions to ensure their respect must be used to effect, especially the Protecting Powers which should be appointed to represent the belligerents' interests in their enemy's territory.⁵²

54. In an appeal issued in 1984 concerning the Iran–Iraq War, the ICRC stated that it wished “the States to take up in their dealings with the two belligerents the humanitarian issues it has brought to their attention, and to that effect it submitted a new memorandum to the States party to the [1949] Geneva Conventions on 13 February 1984”. It further stated that “it is convinced that the States, conscious of what is at stake, will have the desire and determination

⁵¹ ICRC, Conflict in Southern Africa: ICRC appeal, 19 March 1979, § 8, *IRRC*, No. 209, 1979, pp. 87–90.

⁵² ICRC, Conflict between Iraq and Iran: ICRC Appeal, 7 May 1983, *IRRC*, No. 235, 1983, p. 222.

to act in accordance with the commitment they made of their own volition to respect and ensure respect for the Geneva Conventions".⁵³

55. In a speech to all permanent Representatives of States in Geneva in late 1984 concerning the Iran–Iraq War, the ICRC stated that:

The ICRC, in its resolve to use all means to ensure the respect for international humanitarian law in the conflict between Iraq and Iran, has already approached the international community in order to denounce violations of the [1949] Geneva Conventions, and this in two memoranda dated 7 May 1983 and 10 February 1984... The states signatory to the Geneva Conventions, who have undertaken to ensure that countries at war respect these Conventions, hold in their hands the fate of... threatened people, whom the ICRC alone is unable to save.⁵⁴

56. In a letter to two UK Members of Parliament in 1989, the ICRC Director of Principles, Law and Relations within the Movement wrote that:

The ICRC considers it vital that the States party to the Geneva Conventions take all possible steps to ensure respect for [IHL]... It is moreover a legal obligation for them to do so because, in becoming party to the Geneva Conventions, those States have undertaken not only to respect the said Conventions themselves, but also to ensure respect for them by other States in all circumstances. This is the tenor of Article 1 common to the four Conventions... [It is] a matter of direct responsibility for the States. The ICRC therefore cannot but encourage them to make every effort to ensure that international humanitarian law is duly respected.⁵⁵

57. At its Birmingham Session in 1993, the Council of Delegates adopted a resolution on the International Conference for the Protection of War Victims in which it underlined the determination of States "to take firm action with respect to those States which are responsible for serious violations of international humanitarian law".⁵⁶

58. At the Conference of High Contracting Parties to the Fourth Geneva Convention in 2001, the ICRC stated that:

10. Article 1 common to the four Geneva Conventions stipulates that the "High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances". This conference is to be viewed within that context. The ICRC has always welcomed all individual and joint efforts made by States party to the Geneva Conventions to fulfil this obligation and ensure respect for international humanitarian law. These efforts are all the more vital as violations of humanitarian law are far too common around the globe.

⁵³ ICRC, Conflict between Iran and Iraq: Second ICRC Appeal, 10 February 1984, *IRRC*, No. 239, 1984, p. 113.

⁵⁴ ICRC, Press Release No. 1498, The ICRC appeals to governments: its work halted in Iran, 23 November 1984.

⁵⁵ ICRC, Letter dated 18 October 1989 from the ICRC Director of Principles, Law and Relations within the Movement to two UK Members of Parliament, reprinted in Labour Middle East Council and Conservative Middle East Council (eds.), *Towards a Strategy for the Enforcement of Human Rights in the Israeli Occupied West Bank and Gaza*, A Working Symposium, London, 25 July 1989, pp. vii–viii.

⁵⁶ International Red Cross and Red Crescent Movement, Council of Delegates, Birmingham, 29–30 October 1993, Res. 2, preamble.

11. The means used to meet these legal and political responsibilities are naturally a matter to be decided upon by States. Whatever the means chosen, however, the ICRC wishes to emphasize that any action States may decide to take at international level must be aimed at achieving practical results and at ensuring application of and compliance with international humanitarian law, in the interests of the protected population.⁵⁷

VI. *Other Practice*

59. In a resolution adopted during its Berlin Session in 1999, the Institute of International Law stated that:

- V. Every State and every non-State entity participating in an armed conflict are legally bound *vis-à-vis* each other as well as all other members of the international community to respect international humanitarian law in all circumstances, and any other State is legally entitled to demand respect for this body of law. No State or non-State entity can escape its obligations by denying the existence of an armed conflict.
- ...
- VII. Without prejudice to the functions and powers which the Charter attributes to the organs of the United Nations, in case of systematic and massive violations of humanitarian law or fundamental human rights, States, acting individually or collectively, are entitled to take diplomatic, economic and other measures towards any party to the armed conflict which has violated its obligations, provided such measures are permitted under international law.⁵⁸

B. Definition of Reprisals

Note: For practice concerning the principle of reciprocity in the application of international humanitarian law, see Chapter 40, section B. For practice concerning collective punishment, see Chapter 32, section O.

Purpose of reprisals

I. *Treaties and Other Instruments*

Treaties

60. Neither the Geneva Conventions nor the Additional Protocols provide a definition of "reprisal". They are also silent on the requirements for legitimate reprisals in cases where they are not explicitly prohibited.

61. Common Article 1 of the 1949 Geneva Conventions provides that "the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".

⁵⁷ ICRC, Statement at the Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, §§ 10–11.

⁵⁸ Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, §§ V and VII.

62. Article 60(5) of the 1969 Vienna Convention on the Law of Treaties states that the principle of reciprocity does not apply “to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties”.

63. Article 1(1) AP I provides that “the High Contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances”. Article 1 AP I was adopted by 87 votes in favour, one against and 11 abstentions.⁵⁹

64. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that this would be true “to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles”.⁶⁰

Other Instruments

65. Article 28 of the 1863 Lieber Code provides that:

Retaliation will, therefore, never be resorted to as a measure of mere revenge, but only as a means of protective retribution, and moreover, cautiously and unavoidably; that is to say, retaliation shall only be resorted to after careful inquiry into the real occurrence, and the character of the misdeeds that may demand retribution.

Unjust or inconsiderate retaliation removes the belligerents farther and farther from the mitigating rules of regular war, and by rapid steps leads them nearer to the internecine wars of savages.

66. Article 49 of the 2001 ILC Draft Articles on State Responsibility, entitled “Object and limits of countermeasures”, provides that:

1. An injured State may only take countermeasures against a State which is responsible for an internationally wrongful act in order to induce that State to comply with its obligations under Part Two [Articles 28–41].
2. Countermeasures are limited to the non-performance for the time being of international obligations of the State taking the measures towards the responsible State.
3. Countermeasures shall, as far as possible, be taken in such a way as to permit the resumption of performance of the obligations in question.

II. National Practice

Military Manuals

67. Australia’s Commanders’ Guide defines a reprisal as “an act, otherwise unlawful under the international law regulating armed conflict, utilised for the purpose of coercing an adversary to stop violating the recognised rules of

⁵⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.36, 23 May 1977, p. 41.

⁶⁰ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

armed conflict".⁶¹ It further states that "reprisals are otherwise illegal actions that are taken by one nation for the sole purpose of persuading another nation to comply with LOAC. Nevertheless, because there is a risk that the conflict may escalate as a result, reprisals are rarely employed."⁶²

68. Australia's Defence Force Manual, in its table of definitions, defines the term "reprisal" as "an act, otherwise unlawful under the international law regulating armed conflict, utilised for the purpose of coercing an adversary to stop violating the recognised rules of armed conflict".⁶³ It also states that "a reprisal is an otherwise illegal act done in response to a prior illegal act by the enemy. A reprisal aims to counter unlawful acts of warfare and to force the enemy to comply with the LOAC."⁶⁴ The manual further states that "reprisals are otherwise illegal actions that are taken by one nation for the sole purpose of persuading another nation to comply with the LOAC. Nevertheless, because there is a risk that the conflict may escalate as a result, reprisals are rarely employed."⁶⁵

69. Belgium's Law of War Manual states that "belligerent reprisals are actions which in themselves are contrary to the law of armed conflict but which are taken in response to violations committed by the adversary and to oblige him to comply with the law of armed conflict". It adds that, when recourse is made to reprisals, "the following conditions must be fulfilled: 1) the adversary must have committed a violation duly established by the law of armed conflict".⁶⁶

70. Benin's Military Manual states that "as far as reprisals are concerned, under customary law, they are permitted to counter an unlawful act of warfare".⁶⁷ It also states that "acts of vengeance are prohibited".⁶⁸

71. Canada's LOAC Manual defines a reprisal as "an act, otherwise unlawful under the LOAC . . . utilized for the purpose of coercing an adversary to stop violating the recognized rules of armed conflict".⁶⁹ It also states that:

In the event of serious or persistent breaches of the LOAC it may be necessary for the adverse party to resort to a reprisal in an attempt to terminate the illegality. A reprisal is an illegal act resorted to after the adverse party has performed illegal acts and has refused to stop after being called upon to do so.⁷⁰

The manual further states that a reprisal "is not a retaliatory act or a simple act of vengeance".⁷¹ It goes on to say that:

To qualify as a reprisal, an act must satisfy the following conditions:

⁶¹ Australia, *Commanders' Guide* (1994), Glossary, p. xxiii.

⁶² Australia, *Commanders' Guide* (1994), § 1211.

⁶³ Australia, *Defence Force Manual* (1994), § 804.

⁶⁴ Australia, *Defence Force Manual* (1994), § 920.

⁶⁵ Australia, *Defence Force Manual* (1994), § 1310.

⁶⁶ Belgium, *Law of War Manual* (1983), p. 35.

⁶⁷ Benin, *Military Manual* (1995), Fascicule III, p. 13.

⁶⁸ Benin, *Military Manual* (1995), Fascicule I, p. 17.

⁶⁹ Canada, *LOAC Manual* (1999), Glossary, p. GL-17.

⁷⁰ Canada, *LOAC Manual* (1999), p. 15-2, § 12.

⁷¹ Canada, *LOAC Manual* (1999), p. 15-2, § 14.

- a. It must respond to serious violations and manifestly unlawful acts, committed by an adversary government, its military commanders, or combatants for whom the adversary is responsible;
- b. It must be accomplished for the purpose of compelling the adversary to observe the LOAC. Reprisals can not be undertaken for revenge or punishment. They are directed against an adversary in order to induce compliance with LOAC. Thus, reprisals serve as a law enforcement mechanism. Above all, reprisals are justifiable only to force an adversary to stop its illegal activity. If, for example, a party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, and even takes steps to punish those responsible, then the action taken by another party to "redress" the situation cannot be justified as a lawful reprisal;
- c. There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend upon the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be taken;
...
- g. It must be publicized. Since reprisals are undertaken to induce an adversary's compliance with the recognized rules of LOAC, any action taken as a reprisal must be announced as a reprisal and publicized so that the adversary is aware of its obligation to abide by the law.⁷²

72. Congo's Disciplinary Regulations states that "it is prohibited [to military personnel in combat] to commit reprisals".⁷³

73. Croatia's LOAC Compendium defines a reprisal as a "direct law enforcement procedure" and as a "breach of the L.O.W. [laws of war] for the purpose of terminating enemy violations". It also states that a condition for a reprisal is that it is directed "against [a] serious, manifest and deliberate breach of [the] L.O.W.".⁷⁴

74. Ecuador's Naval Manual states that:

A reprisal is an enforcement measure under the law of armed conflict consisting of an act which would otherwise be unlawful but which is justified as a response to the unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict.⁷⁵

It further states that:

To be valid, a reprisal action must conform to the following criteria:

- ...
2. It must respond to illegal acts of warfare committed by an adversary government, its military commanders, or combatants for which the adversary is responsible. Anticipatory reprisal is not authorized.
- ...

⁷² Canada, *LOAC Manual* (1999), p. 15-2, § 17.

⁷³ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁷⁴ Croatia, *LOAC Compendium* (1991), p. 19. ⁷⁵ Ecuador, *Naval Manual* (1989), § 6.2.3.

4. Its purpose must be to cause the enemy to cease its unlawful activity. Therefore, acts taken in reprisal should be brought to the attention of the enemy in order to achieve maximum effectiveness. Reprisal must never be taken for revenge.⁷⁶

75. France's LOAC Manual states that:

Reprisals aim to obtain the cessation of a violation committed by the enemy . . . The United Nations Charter permitting the use of force only in case of aggression, reprisals are permitted only in response to a previous attack. They must always aim at a military objective and be preceded by a warning. One must not confuse reprisals, retaliation and vengeance. Vengeance is always prohibited.⁷⁷

76. Germany's Soldiers' Manual states that "reprisals are measures of retaliation, as such adverse to international public law, which a State may, as an exception, use against another State in order to induce the latter to stop the violation of international public law".⁷⁸

77. Germany's Military Manual states that "reprisals are retaliatory measures normally contrary to international law taken by one party to the conflict in order to stop the adversary from violating international law".⁷⁹ It further states that "the use of reprisals can cause an adversary acting contrary to international law to stop his violations of the law. Reprisals are permissible only in exceptional cases and only for the purpose of enforcing compliance with international law."⁸⁰

78. Germany's IHL Manual provides that "reprisals are compulsory measures which one State may exceptionally use against another State in order to cause the latter to stop violations of international public law".⁸¹

79. Hungary's Military Manual defines a reprisal as a "direct law enforcement procedure" and as a "breach of the L.O.W. [laws of war] for the purpose of terminating enemy violations". It also provides that a condition for a reprisal is that it is directed "against [a] serious, manifest and deliberate breach of [the] L.O.W.". ⁸²

80. Indonesia's Air Force Manual provides that:

In principle, reprisals in warfare are prohibited, i.e. an act which categorize[s] against the laws of war and aim[s] to [answer to] the breach of the laws of war treaties committed by the adverse party. The reprisal could be allowed if, although it has been warned, the adverse party still continue[s] to violate the laws of war.⁸³

81. Italy's IHL Manual states that:

The purpose of a reprisal is to induce the enemy to respect its obligations under international law and can be carried out either by means of acts similar to those illegally committed or by means of acts of a different nature. Therefore, a reprisal does not have the nature of a punishment, but is only a measure of direct coercion in

⁷⁶ Ecuador, *Naval Manual* (1989), § 6.2.3.1.

⁷⁸ Germany, *Soldiers' Manual* (1991), p. 2.

⁸⁰ Germany, *Military Manual* (1992), § 1206.

⁸² Hungary, *Military Manual* (1992), p. 35.

⁷⁷ France, *LOAC Manual* (2001), pp. 108 and 109.

⁷⁹ Germany, *Military Manual* (1992), § 476.

⁸¹ Germany, *IHL Manual* (1996), § 318.

⁸³ Indonesia, *Air Force Manual* (1990), § 15(c).

inducing the enemy to respect its obligations towards [Italy] . . . Given the nature and scope of a reprisal, it can, as a general rule, only be directed against the belligerent that violated the laws of war with regard to [Italy].⁸⁴

The manual further states that the Italian government has declared in international fora that, in response to grave and systematic violations of the obligations relative to the protection of the civilian population and civilian objects, Italy will react by every measure permitted under international law to prevent the recurrence of such violations.⁸⁵

82. Kenya's LOAC Manual states that:

Under customary law, reprisals are permitted to counter unlawful acts of warfare. They can only be taken if:

- they are intended to secure legitimate warfare;
- ...
- ... they are carried out only against combatants and military objectives.

Reprisals are an unsatisfactory way of enforcing the law. They tend to be used as an excuse for illegal methods of warfare and carry a danger of escalation through repeated reprisals and counter reprisals.⁸⁶

83. Mali's Army Regulations states that it is prohibited for military personnel in combat "to commit reprisals".⁸⁷

84. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".⁸⁸

85. The Military Manual of the Netherlands states that "a reprisal is a measure which by itself constitutes a violation of the rules of humanitarian law of war but which is justified by the fact that it aims to force a state to put an end to previously committed violations of humanitarian law of war and to comply with the law".⁸⁹ The manual, referring to customary law, further states that reprisals are in principle allowed, provided that a number of conditions are fulfilled:

- Reprisals are only lawful when they aim at a violation previously committed by the adverse party the existence of which must be properly determined.
- ...
- Reprisals against reprisals are prohibited.⁹⁰

The manual concludes that "the freedom of states which have ratified Additional Protocol I to take recourse to reprisals is very limited".⁹¹

⁸⁴ Italy, *IHL Manual* (1991), Vol. I, § 23. ⁸⁵ Italy, *IHL Manual* (1991), Vol. I, § 26.

⁸⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

⁸⁷ Mali, *Army Regulations* (1979), Article 36.

⁸⁸ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁸⁹ Netherlands, *Military Manual* (1993), p. IV-5, see also p. IX-2.

⁹⁰ Netherlands, *Military Manual* (1993), p. IV-5.

⁹¹ Netherlands, *Military Manual* (1993), p. IV-6.

86. New Zealand's Military Manual states that "a reprisal is an illegal act resorted to after the adverse Party has himself indulged in illegal acts and refused to desist from them after being called upon to do so. The reprisal is not a retaliatory act or simple act of vengeance."⁹² The manual further states that:

In order to be considered a reprisal, an act must have certain characteristics:

- a) It must respond to grave and manifestly unlawful acts committed by an adverse government, its military commanders, or combatants for whom the adversary is responsible.
- b) It must be for the purpose of compelling the adverse Party to observe the law of armed conflict. Reprisals cannot be undertaken for the law of armed revenge, spite or punishment. Rather, they are directed against an adverse Party in order to induce him to refrain from further violations of the law of armed conflict. Thus, reprisals serve as an ultimate legal sanction or law enforcement mechanism. Above all, they are justifiable only to force an adverse Party to stop its illegal activity. If, for example, one Party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, and even takes steps to punish those immediately responsible, the other Party cannot justify a lawful reprisal as the appropriate action to "right" the situation.
- c) There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend on the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adverse Party that reprisals will be undertaken.
...
- g) It must be publicized. Since reprisals are undertaken to induce an adverse Party's compliance with the recognized rules of armed conflict, any action taken as a reprisal must be announced as a reprisal and publicized so that the adverse Party is aware of its obligation to abide by the law.⁹³

87. Nigeria's Military Manual, in a section dealing with GC I and those upon whom reprisals are prohibited, states that "[in the cases where reprisals are prohibited], a belligerent party cannot claim a right to set aside the rules of the convention in order to induce the enemy to return to an attitude of respect for the law of armed conflict".⁹⁴

88. The Soldier's Rules of the Philippines states that a soldier must "abstain from all acts of vengeance".⁹⁵

89. South Africa's LOAC Manual states that "a reprisal is an otherwise illegal act in response to a *prior* illegal act by the enemy. The purpose of a reprisal is to get the enemy to adhere to the law of war. Reprisals are only permitted according to strict criteria."⁹⁶ (emphasis in original)

⁹² New Zealand, *Military Manual* (1992), § 1606(1).

⁹³ New Zealand, *Military Manual* (1992), § 1606(4).

⁹⁴ Nigeria, *Military Manual* (1994), p. 14, § 5.

⁹⁵ Philippines, *Soldier's Rules* (1989), §§ 8 and 9.

⁹⁶ South Africa, *LOAC Manual* (1996), § 34(e).

90. Spain's LOAC Manual defines a reprisal as "a violation of the law of war, committed in response to the violation of the said law committed by the enemy".⁹⁷ Among the conditions which must be fulfilled for the lawful taking of reprisals, the manual states that "the action of the enemy must constitute a grave, manifest and deliberate violation of the law of war". It further emphasises that reprisals are only permitted if authorisation is given by the international conventions.⁹⁸ In another chapter, the manual states that "the fear of reprisals can influence belligerent parties and induce them to respect the International Conventions. Reprisals are authorized only in case of a violation of the law of war."⁹⁹

91. Sweden's IHL Manual states that:

Reprisals very seldom achieve their intended aim – the return of a wrongdoer to compliance with international law. In most cases, use of reprisals has, instead, led to a serious increase of suffering and losses among civilians. For these reasons, Sweden has, during the [CDDH] and elsewhere, worked for a strict limitation to the right to reprisal. Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.¹⁰⁰

92. Switzerland's Basic Military Manual states that "reprisals are measures contrary to international law taken by one of the belligerents to punish unlawful acts committed by the enemy Power and to bring them to a halt".¹⁰¹

93. Togo's Military Manual states that "as far as reprisals are concerned, under customary law, they are permitted to counter an unlawful act of warfare".¹⁰² It also states that "acts of vengeance are prohibited".¹⁰³

94. The UK Military Manual states that "reprisals between belligerents are acts of retaliation for illegitimate acts of warfare. One of their objects is to cause the enemy to comply in future with the recognised laws of war. Reprisals are by custom admissible as a means of securing legitimate warfare."¹⁰⁴ It further states that "the illegitimate acts in respect of which reprisals are admissible may be committed by a government, by its military commanders, or by some person or persons whom it is impossible, for the time being, to apprehend, try and punish".¹⁰⁵ The manual also notes that:

Reprisals are an extreme measure of coercion, because in most cases they inflict suffering upon innocent individuals. Nevertheless, in the circumstances of war, they often provide the only remedy as a punishment, as a deterrent and as a means of inducing the enemy to desist from his unlawful conduct.¹⁰⁶

⁹⁷ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c(5)(a).

⁹⁸ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c(5)(a).

⁹⁹ Spain, *LOAC Manual* (1996), Vol. I, § 11.10.c.

¹⁰⁰ Sweden, *IHL Manual* (1990), Section 3.5, p. 89.

¹⁰¹ Switzerland, *Basic Military Manual* (1987), Article 197(1).

¹⁰² Togo, *Military Manual* (1996), Fascicule III, p. 13.

¹⁰³ Togo, *Military Manual* (1996), Fascicule I, p. 18. ¹⁰⁴ UK, *Military Manual* (1958), § 642.

¹⁰⁵ UK, *Military Manual* (1958), § 643. ¹⁰⁶ UK, *Military Manual* (1958), § 644.

In addition, in a footnote on a provision regarding the procedure before recourse to reprisals is made, the manual states that “a certain caution should be exercised before deciding to institute reprisals, as in some cases counter-reprisals may follow, thus defeating the purpose of the original reprisals”.¹⁰⁷

95. The UK LOAC Manual states that “under customary law reprisals are permitted to counter unlawful acts of warfare. They can only be taken if: a. they are intended to secure legitimate warfare.”¹⁰⁸ It also states that “reprisals are an unsatisfactory way of enforcing the law. They tend to be used as an excuse for illegal methods of warfare with a danger of escalation through repeated reprisals and counter-reprisals.”¹⁰⁹ However, the manual also states that “the United Kingdom reserves the right to take proportionate reprisals against an enemy’s civilian population or civilian objects where the enemy has attacked our own civilians or civilian objects in violation of [AP I]”.¹¹⁰

96. The US Field Manual states that:

Reprisals are acts of retaliation in the form of conduct which would otherwise be unlawful, resorted to by one belligerent against enemy personnel or property for acts of warfare committed by the other belligerent in violation of the law of war, for the purpose of enforcing future compliance with the recognized rules of civilized warfare.¹¹¹

The manual further states that “reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from unlawful practices”.¹¹² It goes on to say that “the rule requiring careful inquiry into the real occurrence will always be followed unless the safety of the troops requires immediate drastic action and the persons who actually committed the offence cannot be ascertained”.¹¹³ Furthermore, the manual notes that “the taking of prisoners by way of reprisal for acts previously committed (so-called “reprisal prisoners”) is likewise forbidden (See GC [IV], art. 33).”¹¹⁴

97. The US Air Force Pamphlet states that:

In order to be considered as a reprisal, an act must have the following characteristics when employed:

- (1) It must respond to grave and manifestly unlawful acts, committed by an adversary government, its military commanders, or combatants for whom the adversary is responsible.
- (2) It must be for the purpose of compelling the adversary to observe the law of armed conflict. Reprisals cannot be undertaken for revenge, spite or punishment. Rather, they are directed against an adversary in order to induce him to refrain from further violations of the law of armed conflict. Thus, reprisals serve as an ultimate legal sanction or law enforcement mechanism. Above all, they are justifiable only to force an adversary to stop its extra-legal activity.

¹⁰⁷ UK, *Military Manual* (1958), § 646, footnote 2.

¹⁰⁸ UK, *LOAC Manual* (1981), Section 4, p. 17, § 14.

¹⁰⁹ UK, *LOAC Manual* (1981), Section 4, p. 17, § 15.

¹¹⁰ UK, *LOAC Manual* (1981), Section 4, p. 17, § 17.

¹¹¹ US, *Field Manual* (1956), § 497(a). ¹¹² US, *Field Manual* (1956), § 497(d).

¹¹³ US, *Field Manual* (1956), § 497(f). ¹¹⁴ US, *Field Manual* (1956), § 497(g).

If, for example, one party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, and even takes steps to punish those immediately responsible, then any action taken by another party to “right” the situation cannot be justified as a lawful reprisal.

- (3) There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend upon the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be undertaken.¹¹⁵

The Pamphlet also states that:

If an act is a lawful reprisal, then as a legal measure it cannot lawfully be the excuse for a counter-reprisal. Under international law, as under domestic law, there can be no reprisal against a lawful reprisal. In fact, reprisals have frequently led to counter-reprisals, and the escalation of the conflicts through reprisals and counter-reprisals is one of the reasons for decline in the use of reprisals.¹¹⁶

It further states that:

[The reprisal] must be publicized. Since reprisals are undertaken to induce an adversary’s compliance with the recognized rules of armed conflict, any action taken as a reprisal must be announced as a reprisal and publicized so that the adversary is aware of its obligation to abide by the law.¹¹⁷

98. The US Air Force Commander’s Handbook states that:

A reprisal is an otherwise illegal act committed to persuade the enemy to cease some illegal activity on their part . . .

- (1) While it is both lawful and proper to plan reprisal actions, as a practical matter, reprisals are often subject to abuse and merely result in escalation of the conflict.
- ...
- (3) In most twentieth century conflicts, the United States has, as a matter of national policy, chosen not to carry out reprisals against the enemy, both because of the potential for escalation and because it is generally in our national interest to follow the law even if the enemy does not.
- (4) The term “reprisal” is sometimes used to refer to any act or retaliation between the parties to a conflict. In law, however, the term should be limited to otherwise illegal acts done in reply to prior illegal acts of the enemy, as described in this paragraph.¹¹⁸

99. The US Naval Handbook states that:

A reprisal is an enforcement measure under the law of armed conflict consisting of an act which would otherwise be unlawful but which is justified as a response

¹¹⁵ US, *Air Force Pamphlet* (1976), § 10-7(c)(1), (2) and (3).

¹¹⁶ US, *Air Force Pamphlet* (1976), § 10-7(a).

¹¹⁷ US, *Air Force Pamphlet* (1976), § 10-7(c)(7).

¹¹⁸ US, *Air Force Commander’s Handbook* (1980), § 8-4(b).

to the unlawful acts of an enemy. The sole purpose of a reprisal is to induce the enemy to cease its illegal activity and to comply with the law of armed conflict.¹¹⁹

It further states that:

To be valid, a reprisal action must conform to the following criteria:

- ...
2. It must respond to illegal acts of warfare committed by an adversary government, its military commanders, or combatants for which the adversary is responsible. Anticipatory reprisal is not authorized. . . .
 4. Its purpose must be to cause the enemy to cease its unlawful activity. Therefore, acts taken in reprisal should be brought to the attention of the enemy in order to achieve maximum effectiveness. Reprisal must never be taken for revenge.¹²⁰

The Handbook also provides that “although reprisal is lawful when the foregoing requirements are met, there is always the risk that it will trigger retaliatory escalation (counter-reprisals) by the enemy. The United States has historically been reluctant to resort to reprisal for just this reason.”¹²¹

100. The Annotated Supplement to the US Naval Handbook states that:

A careful inquiry by the injured belligerent into the alleged violating conduct should precede the authorization of any reprisal measure. This is subject to the important qualification that, in certain circumstances, an offended belligerent is justified in taking immediate reprisals against illegal acts of warfare, particularly in those situations where the safety of his armed forces would clearly be endangered by a continuance of the enemy’s illegal acts.¹²²

It also states that:

Acts taken in reprisal may also be brought to the attention of neutrals if necessary to achieve maximum effectiveness. Since reprisals are undertaken to induce an adversary’s compliance with the recognized rules of armed conflict, any action taken as a reprisal must be announced as a reprisal and publicized so that the adversary is aware of its obligation to abide by the law and to ensure that the reprisal action is not, itself, viewed as an unlawful act.¹²³

The Annotated Supplement further states that “if an act is a lawful reprisal, it cannot lawfully be a basis for a counter-reprisal. Under international law, there can be no reprisal against a lawful reprisal.”¹²⁴ In another note, it states that “although it is not prohibited to issue . . . an order [that no quarter will be given or that no prisoners will be taken] as a reprisal, this form of reprisal offers little military advantage”.¹²⁵

101. The YPA Military Manual of the SFRY (FRY) states that:

¹¹⁹ US, *Naval Handbook* (1995), § 6.2.3.

¹²⁰ US, *Naval Handbook* (1995), § 6.2.3.1. ¹²¹ US, *Naval Handbook* (1995), § 6.2.3.3.

¹²² US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 38.

¹²³ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 40.

¹²⁴ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 43.

¹²⁵ US, *Annotated Supplement to the Naval Handbook* (1997), § 11.7, footnote 45.

Reprisal, under the provisions of this military manual, means an act which is contrary to the laws of war, but whose unlawfulness is abolished because it is undertaken in response to acts of the enemy who does not respect the laws of war, in order to force him to stop such violations, and to respect the laws of war in future.¹²⁶

In another provision entitled “Aim and duration of reprisals”, the manual states that “the aim of reprisals is to prevent the enemy from repeating violations of the laws of war and to force him to respect the laws of war”.¹²⁷ It further provides that “the armed forces of the SFRY shall undertake reprisals against the enemy exceptionally and temporarily . . . Reprisals shall not be undertaken for every violation of the laws of war by the enemy but only in response to preceding, serious and repeated violations.”¹²⁸ Moreover, it states that “the taking of hostages is prohibited in reprisal as well”.¹²⁹

National Legislation

102. Under the DRC Code of Military Justice as amended, killing as a means of reprisal is prohibited.¹³⁰

103. Italy’s Law of War Decree as amended states that “reprisals have the aim of inducing the enemy to observe the obligations deriving from international law and can be carried out either by means of acts similar to those committed [by the enemy] or by means of acts of a different nature”.¹³¹

104. Italy’s Wartime Military Penal Code provides for the punishment of a commander who orders the taking of acts of reprisal – other than those permitted under the law or international conventions – or who does not order them to be stopped.¹³²

105. Luxembourg’s Law on the Repression of War Crimes states that putting a person to death by means of reprisal is considered to be murder.¹³³

106. Niger’s Penal Code as amended, under a chapter entitled “Crimes against humanity and war crimes”, states that “no interest and no political, military or national necessity whatsoever can justify [war crimes under the 1949 Geneva Conventions and both AP I and AP II], not even as a means of reprisal”.¹³⁴

107. Under Spain’s Penal Code “anyone who . . . carries out or orders . . . reprisals or violent acts or threats in order to terrify [the civilian population]” is punishable.¹³⁵

¹²⁶ SFRY (FRY), *YPA Military Manual* (1988), § 27.

¹²⁷ SFRY (FRY), *YPA Military Manual* (1988), § 28.

¹²⁸ SFRY (FRY), *YPA Military Manual* (1988), § 29.

¹²⁹ SFRY (FRY), *YPA Military Manual* (1988), § 31.

¹³⁰ DRC, *Code of Military Justice as amended* (1972), Article 523.

¹³¹ Italy, *Law of War Decree as amended* (1938), Article 8.

¹³² Italy, *Wartime Military Penal Code* (1941), Article 176.

¹³³ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 2(3)

¹³⁴ Niger, *Penal Code as amended* (1961), Article 208.6.

¹³⁵ Spain, *Penal Code* (1995), Article 611.

National Case-law

108. In the *Priebke case* in 1996, the Military Tribunal of Rome stated that reprisals “are to carry out an act in order to bring a violation to an end or to deter the commission of other violations [of international law]”. It went on to state that “a reprisal is based on the need to recognise the injured State a means of self-help allowing it to attack any interest of the offending State”. The Tribunal further stated that:

It is useful to underline that a reprisal must have as its objective prevention or repression, but not revenge. It must aim for the cessation or non-repetition of an illegitimate injurious act, and must be carried out in a direct manner for this purpose and must not be more serious as the [initial] violation. Otherwise it becomes an act which is itself unjust and illegitimate, giving rise to an endless spiral of disproportionate reactions.¹³⁶

109. In the *Hass and Priebke case* in 1997, the Military Tribunal of Rome made a similar statement to the one made in its judgement in the *Priebke case* in 1996 and added that “reprisals basically are a sanction, that is a reaction to an unlawful act. The unlawfulness of the act to which it is replying gives lawfulness to the sanctional activities.” It further recalled the definition of reprisals contained in Italy’s Law of War Decree as amended.¹³⁷ In its relevant parts, this judgement was confirmed by Italy’s Military Appeals Court and the Supreme Court of Cassation.¹³⁸

110. In its judgement in the *Rauter case* in 1948, the Special Court (War Criminals) at The Hague observed that “it is in fact generally accepted that a belligerent has the right to take reprisals as a requital for unlawful acts of war committed by the opponent”. Referring to the judgement of the US Military Tribunal at Nuremberg in the *List (Hostages Trial) case* as well as to the conditions required for reprisals in general by the UK and US military regulations, the Court stated, however, that reprisals may never be taken for revenge but only as a means of inducing the enemy to desist from unlawful practices of warfare.¹³⁹ Nevertheless, on appeal, the Special Court of Cassation of the Netherlands stated that:

In the proper sense one can speak of reprisals only when a State resorts, by means of its organs, to measures at variance with International Law, on account of the fact that its opponent – in this case the State with which it is at war – had begun, by means of one or more of its organs, to commit acts contrary to International Law, quite irrespective of the question as to what organ this may have been,

¹³⁶ Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996, Section 7.

¹³⁷ Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in Trial of First Instance, 22 July 1997, Section 4.

¹³⁸ Italy, Military Appeals Court, *Hass and Priebke case*, Judgement on Appeal, 7 March 1998; Supreme Court of Cassation, *Hass and Priebke case*, Judgement in Trial of Third Instance, 16 November 1998.

¹³⁹ Netherlands, Special Court (War Criminals) at The Hague, *Rauter case*, Judgement, 4 May 1948.

Government or legislator, Commander of the Fleet, Commander of the Land Forces, or of the Air Force, diplomat or colonial governor. The measures which the appellant describes . . . as "reprisals" bear an entirely different character, they are indeed retaliatory measures taken in time of war by the occupant of enemy territory as a retaliation not of unlawful acts of the State with which it is at war, but of hostile acts of the population of the territory in question or of individual members thereof.¹⁴⁰

111. In the *Bruns case* before the Norwegian Eidsivating Court of Appeal (sitting as the Tribunal of first instance) in 1946, the Counsel for Defence claimed that the Norwegian military organisation and its activities were at variance with international law and that the Germans in fighting the organisation were, therefore, justified in using methods contrary to international law. The German methods of carrying out interrogations had to be regarded as constituting reprisals. However, the Court held that the Norwegian underground military movement did not constitute a breach of international law and therefore the Germans were not justified in using torture against its members as a means of reprisal.¹⁴¹ In the same case, the Norwegian Supreme Court stated that it could not be established that the acts of torture had been carried out as reprisals. Reprisals were generally understood to aim at changing the adversary's conduct and forcing him to keep to the generally accepted rules of lawful warfare. If this aim were to be achieved, the reprisals must be made public and announced as such. During the whole of the occupation there was no indication from the German side to the effect that their acts of torture were to be regarded as reprisals against the Norwegian military organisation. They appeared to be German police measures designed to extort during interrogations information which could be used to punish people or could eventually have led to real reprisals to stop activities about which information was gained. The method applied to the interrogatories ("*verschärfte Vernehmung*") was nothing but a German routine police method and could, therefore, not be regarded as a reprisal.¹⁴²

112. In the *Flesch case* in 1946 in which a German national was charged with having ordered the killing of Norwegian citizens who had allegedly been members of the Norwegian underground movement, the Frostating Court of Appeal stated that whatever the legal position, an act of reprisal can in no circumstances be pleaded in exculpation unless it was, at the time, announced publicly as such, or it appeared from the act itself that it was intended as a reprisal and showed clearly against what unlawful acts it was directed. None of the incidents in question fulfilled any of these minimum demands. As the defendant maintained that the acts were acts of reprisal directed against a number of subversive acts, the Frostating Court of Appeal did not regard the alleged acts of sabotage carried out by soldiers in uniform as constituting a breach of international law and therefore concluded that the acts committed by the

¹⁴⁰ Netherlands, Special Court of Cassation, *Rauter case*, Judgement, 12 January 1949.

¹⁴¹ Norway, Eidsivating Court of Appeal, *Bruns case*, Judgement, 20 March 1946.

¹⁴² Norway, Supreme Court, *Bruns case*, Judgement, 3 July 1946.

accused could not be regarded as reprisals but must be considered as acts solely intended to terrorise the population in order to stem the underground movement.¹⁴³ In the same case, the Norwegian Supreme Court agreed with the view held by the Frostating Court of Appeal to the effect that the execution of the Norwegian citizens without previous trial could not be regarded as constituting justifiable reprisals and made reference to what had been held by the Supreme Court in the *Bruns case*.¹⁴⁴

113. In the *List (Hostages Trial) case* in the late 1947/48, the US Military Tribunal at Nuremberg held that “a reprisal is a response to an enemy’s violation of the laws of war which would otherwise be a violation on one’s own side”.¹⁴⁵ As to the difference between the taking of hostages and measures of reprisal, the Tribunal stated that:

Where innocent individuals are seized and punished for a violation of the laws of war which has already occurred, no question of hostages is involved. It is nothing more than the infliction of a reprisal. Throughout the evidence in the present case, we find the term hostage applied where a reprisal only was involved.

However, it stated that “the term ‘reprisal prisoners’ will be considered as those individuals who are taken from the civilian population to be killed in retaliation for offences committed by unknown persons within the occupied area”. It also stated that:

Where legality of action is absent, the shooting of innocent members of the population as a measure of reprisal is not only criminal but it has the effect of destroying the basic relationship between the occupant and the population. Such a condition can progressively degenerate into a reign of terror. Unlawful reprisals may bring on counter reprisals and create an endless cycle productive of chaos and crime. To prevent a distortion of the right into a barbarous method of repression, International Law provides a protective mantle against the abuse of the right.¹⁴⁶

Other National Practice

114. During the Algerian war of independence, the FLN denounced violations of IHL by French forces, stating that “it will be impossible for the FLN to respect the laws of war, if France persists in ignoring them”.¹⁴⁷

115. During discussions on reprisals in Committee I of the CDDH, Argentina welcomed the efforts of the French delegation with regard to the introduction of a provision on the prohibition of reprisals in AP I.¹⁴⁸ It further noted that the French proposal “should perhaps be completed so as to ensure that excessive reprisals did not lead to counter-reprisals”.¹⁴⁹

¹⁴³ Norway, Frostating Court of Appeal, *Flesch case*, Judgement, 2 December 1946.

¹⁴⁴ Norway, Supreme Court, *Flesch case*, Decision, 12 February 1948.

¹⁴⁵ US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, 8 July 1947–19 February 1948.

¹⁴⁶ US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, 8 July 1947–19 February 1948.

¹⁴⁷ *El Moudjahid*, Vol. 1, p. 372.

¹⁴⁸ Argentina, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.46, 28 April 1976, p. 61, § 32.

¹⁴⁹ Argentina, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.46, 28 April 1976, p. 61, § 35.

116. The Report on the Practice of Australia states that “Australia’s *opinio juris* is, with certain exceptions, supportive of a prohibition against belligerent reprisals”.¹⁵⁰

117. During discussions on reprisals in Committee I of the CDDH, Austria stated that the French proposal on a prohibition of reprisals “gave a good definition of what a reprisal was”, stating, however, that Austria “had great difficulty with the idea of introducing into humanitarian law a legal sanction of the law of war always regarded as incompatible with the very principle of humanity”.¹⁵¹

118. During discussions on reprisals in Committee I of the CDDH, Belarus, opposing the French proposal on a prohibition of reprisals and referring to a number of international instruments, stated that “there was a clearly expressed general trend towards the prohibition of reprisals”. It went on to say that “any toleration of the possibility of taking reprisals . . . would be in radical conflict with the spirit and meaning of the Geneva Conventions . . . Furthermore, it would run counter to a number of resolutions of the United Nations General Assembly.”¹⁵²

119. In 1981, in a memorandum on Canada’s attitude to possible reservations with regard to AP I, the Canadian Ministry of Foreign Affairs noted that AP I “has so effectively limited the areas of permissible reprisals as to virtually constitute a total ban on them”.¹⁵³ As a counter-argument against a reservation on reprisals, it noted, *inter alia*, that “reprisals are punitive rather than protective in character and therefore do not belong within the framework of a humanitarian agreement” and that “they cannot be controlled and contribute to counter-reprisals and a general escalation of violence”.¹⁵⁴ It further stated that:

A reservation on reprisals would also affect the operation of the general obligation contained in Article 1 of [AP I], viz, “The High Contracting Parties undertake to respect and ensure respect for this Protocol in all circumstances”. The phrase “in all circumstances” can be taken to include circumstances in which the adverse party is violating the Protocol.¹⁵⁵

The memorandum also stated that:

The “material breach” provision of the Vienna Convention on the Law of the Treaties (Article 60) cannot be invoked to permit a party to the Protocol to suspend

¹⁵⁰ Report on the Practice of Australia, 1998, Chapter 2.9.

¹⁵¹ Austria, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 78, § 52.

¹⁵² Belarus, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, pp. 80 and 81, §§ 61 and 62.

¹⁵³ Canada, Ministry of Foreign Affairs, Memorandum of the Legal Operations Division on the ratification of the 1977 Protocol I to the Geneva Red Cross Convention: Canada’s attitude to possible reservations, Doc. FLO-830, 16 June 1981, § 6.

¹⁵⁴ Canada, Ministry of Foreign Affairs, Memorandum of the Legal Operations Division on the ratification of the 1977 Protocol I to the Geneva Red Cross Convention: Canada’s attitude to possible reservations, Doc. FLO-830, 16 June 1981, § 8.

¹⁵⁵ Canada, Ministry of Foreign Affairs, Memorandum of the Legal Operations Division on the ratification of the 1977 Protocol I to the Geneva Red Cross Convention: Canada’s attitude to possible reservations, Doc. FLO-830, 16 June 1981, § 12.

the operation of the prohibition of reprisals in the face of e.g. enemy bombardment of the civilian population. The fifth paragraph of the Article 60 of the Convention . . . was expressly introduced in the Treaty to reinforce the already existing prohibitions against reprisals contained in the Geneva Conventions. It could therefore be argued that to enter a reservation on reprisals with respect to [AP I] defeats the object of the Conventions and Protocol and also the object of the relevant provision of the Vienna Convention. In other words, the reserving State would be attempting to do by reservation what it could not do by suspension of the agreement on the grounds of material breach.¹⁵⁶

With regard to the compatibility of a possible reservation regarding reprisals in respect of AP I and Principle II of the Declaration on Principles Guiding Relations between Participating States of the Final Act of the CSCE Helsinki Summit of 1975, the memorandum noted that "the Final Act does not of course have the force of law except to the extent that it incorporates already binding obligations. Nevertheless, it comprises commitments undertaken at the highest political level on the part of the thirty-five states participating in the CSCE." It therefore stated that "a reservation regarding reprisals under [AP I] is thus likely to provoke allegations of non-compliance with the CSCE Final Act".¹⁵⁷

120. In 1986, in an annex to a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence noted that:

The expression "reprisal" is not defined in any international agreement. An acceptable definition would be as follows:

A reprisal is an otherwise illegal act of retaliation committed by one belligerent against another belligerent after that belligerent has violated the laws of war which is intended to cause that belligerent to comply in future with the laws of war. The act of reprisal must be proportional to the illegal act or acts committed by the other belligerent.¹⁵⁸

It further noted that:

Under the [1949] Geneva Conventions, reprisals are permissible when directed against enemy military or civilian property or personnel behind the enemy's lines. Under [AP I], the only legitimate reprisal targets are enemy armed forces or military objectives. Since these are already legitimate targets, the only means for carrying out reprisals would be the use of unlawful methods of combat, such as denial of quarter, or the use of unlawful weapons, such as biological weapons or lethal gases . . . The use of such methods or weapons would be more likely to increase the scale or

¹⁵⁶ Canada, Ministry of Foreign Affairs, Memorandum of the Legal Operations Division on the ratification of the 1977 Protocol I to the Geneva Red Cross Convention: Canada's attitude to possible reservations, Doc. FLO-830, 16 June 1981, § 13.

¹⁵⁷ Canada, Ministry of Foreign Affairs, Memorandum of the Legal Operations Division on the ratification of the 1977 Protocol I to the Geneva Red Cross Convention: Canada's attitude to possible reservations, Doc. FLO-830, 16 June 1981, §§ 14–15.

¹⁵⁸ Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, Annex A, § 1.

intensity of the conflict than a response to a violation which is proportional and similar in kind.¹⁵⁹

The Ministry of Defence also stated that “it is difficult to point out individual cases where the possibility of reprisal deterred the commission of breaches of the law of armed conflict”.¹⁶⁰

121. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it “was opposed to any kind of reprisals and expressed regret that the term had not been adequately defined”.¹⁶¹

122. During discussions on reprisals in Committee I of the CDDH, the representative of Czechoslovakia said that “his delegation was in favour of the absolute prohibition of all measures of reprisal”.¹⁶²

123. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

Add a new Article 74 bis [to AP I]:

1. Reprisals shall be prohibited under the present Protocol.
2. Nevertheless, in the event of a belligerent State infringing the regulations laid down by the present Protocol and the State victim of that breach considering the violation to be so serious and deliberate as to render it imperative to call upon its perpetrator to respect the law, the prohibition referred to in paragraph 1 of the present Article may be waived on condition . . .¹⁶³

124. At the CDDH, France made another proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

Add a new Article 74 bis [to AP I]:

1. In the event that the Party to a conflict commits serious, manifest and deliberate breaches of its obligations under this Protocol, and a Party victimized by these breaches considers it imperative to take action to compel the Party violating its obligations to cease doing so, the victimized Party shall be entitled, subject to the provisions of this Article, to resort to certain measures which are designed to repress the breaches and induce compliance with the Protocol, but which would otherwise be prohibited by the Protocol.¹⁶⁴

125. During discussions in the First Committee of the CDDH with respect to its delegation’s draft provisions on reprisals in AP I, France noted that “many delegations had, in fact, felt that the effect of the proposal was to justify

¹⁵⁹ Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, Annex A, § 8.

¹⁶⁰ Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, Annex A, § 14.

¹⁶¹ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

¹⁶² Czechoslovakia, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 94, § 52.

¹⁶³ France, Draft Article 74 bis AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221, 19 February 1975, p. 323.

¹⁶⁴ France, Draft Article 74 bis AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

reprisals" but that "that was not the true aim of the proposal and in drafting it the French delegation had had in mind only the cause of humanitarian law".¹⁶⁵ It further noted that:

The purpose of its proposal was not to allow the victim [of a breach of the law] to react with violence, but to give it the possibility under the Conventions of deterring the party committing the breach from continuing its action, of obliging it to respect the law. Such a threat . . . should of course arise from "serious, manifest and deliberate" breaches not requiring recourse to a commission of inquiry. They would clearly not just be the individual breaches mentioned in [draft] article 74. Such a possibility of deterrence sanctioned by a convention would have to be limited by strict conditions.¹⁶⁶

France also noted that "generally speaking, the French proposal was designed to cover cases in which, as the Oxford Manual stated, there was an urgent need to recall the party committing the breach to a respect for the rules to which it had subscribed".¹⁶⁷

126. In 1973, during a debate in the Sixth Committee of the UN General Assembly on the protection of human rights in times of armed conflict, the FRG stated that "it supported proposals for a restriction on the right to resort to reprisals".¹⁶⁸

127. During discussions on reprisals in Committee I of the CDDH, the GDR stated that his delegation felt that the French proposal on a prohibition of reprisals "would not help to implement [AP I] but would rather tend to weaken it; and he therefore strongly opposed it".¹⁶⁹

128. The Report on the Practice of Germany states that the Rules of Engagement for the German Composite Force in Somalia provided that when it became necessary to open fire, "retaliation is forbidden".¹⁷⁰

129. During discussions on reprisals in Committee I of the CDDH, Hungary, opposing the French proposal on a prohibition of reprisals, stated that "if the parties to the conflict were evenly balanced, reprisals would lead to counter-reprisals and thus to escalation, rather than to respect for law. When the forces were not evenly balanced, reprisals would merely increase the advantage of the stronger power."¹⁷¹

¹⁶⁵ France, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/1/SR.46, 28 April 1976, p. 58, § 15.

¹⁶⁶ France, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/1/SR.46, 28 April 1976, p. 58, § 24.

¹⁶⁷ France, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/1/SR.46, 28 April 1976, p. 58, § 27.

¹⁶⁸ FRG, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/28/SR.1452, 3 December 1973, § 43.

¹⁶⁹ GDR, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/1/SR.47, 29 April 1976, p. 72, § 27.

¹⁷⁰ Report on the Practice of Germany, 1997, Chapter 2.9, referring to Rules of Engagement for the German Composite Force in Somalia.

¹⁷¹ Hungary, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/1/SR.47, 29 April 1976, p. 79, § 56.

130. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that:

Reprisals or retaliation under international law are also governed by certain specific principles. First, reprisals to be valid and admissible could only be taken in response to a prior delict or wrongful act by a State . . . In other words, a nuclear weapon could not be used by way of reprisal against another State if that State did not commit any wrongful act or delict involving use of force.¹⁷²

After pointing out the principle of proportionality and the obligation to respect “certain fundamental principles of humanitarian law”, India stated that:

In view of the above, use of nuclear weapons even by way of reprisal or retaliation, appears to be unlawful. In any case, if the wrongful use of force in the first instance did not involve the use of nuclear weapons, it is beyond doubt that even in response by way of retaliation States do not have the right to use nuclear weapons because of their special quality as weapons of mass destruction.¹⁷³

131. According to the Report on the Practice of Iran, the *opinio juris* of Iran is supportive of the right to take reprisals. It states that in practice during the Iran–Iraq War, Iran resorted to reprisals. However, it also notes that in most cases, Iran stopped carrying out reprisals after Iraq had ceased attacking civilian objects.¹⁷⁴

132. According to the Report on the Practice of Iraq, a reprisal is “a reaction from one party to the adverse party which undertook an act that led to damages thereto with the aim of revenge and deterrence”.¹⁷⁵

133. During discussions on reprisals in Committee I of the CDDH, the representative of Italy stated that “from the standpoint of the required conditions laid down, he could accept the [French] proposal [on a prohibition of reprisals] in principle”.¹⁷⁶

134. At the CDDH, in an explanation of vote, Mexico stated that:

The delegation of Mexico could not have accepted that a Protocol intended to strengthen the law concerning warlike activities should authorize reprisals, even if it were claimed that the intention was to force the enemy to respect humanitarian law . . . Experience shows that reprisals do not lead the enemy to respect humanitarian law, but result in an increase in violations and hostilities.

Legalization of reprisals, as proposed by France, would have enabled belligerents who were in breach of humanitarian law to claim every time that their breach was a legitimate reprisal sanctioned by international law. The delegation of Mexico believes that the mandatory nature of humanitarian law does not depend from the observance of its rules by the adverse Party, but stems from the inherently wrongful nature of the act prohibited by international humanitarian law. The Declaration on

¹⁷² India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

¹⁷³ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, pp. 2–3.

¹⁷⁴ Report on the Practice of Iran, 1997, Chapter 2.9.

¹⁷⁵ Report on the Practice of Iraq, 1998, Chapter 2.9.

¹⁷⁶ Italy, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 77, § 48.

Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, unanimously adopted by the United Nations General Assembly in its resolution 2625 (XXV) of 24 October 1970, prohibits reprisals involving the use of force. The delegation of Mexico maintains that this Declaration is a valid interpretation of the United Nations Charter, so that the prohibition in question is legally binding.¹⁷⁷

135. During discussions on reprisals in Committee I of the CDDH, the Netherlands stated that “reprisals were a very questionable means of securing respect for humanitarian law”. It further stated that “reprisals should remain a measure of last resort by which to induce an enemy to respect the law, provided that certain strict conditions and safeguards were observed”.¹⁷⁸

136. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that “a reprisal is a means of sanction, consisting in an act that itself is prohibited by international law, to which a State resorts in order to compel another State to cease a violation which that other State is committing”. It further stated that:

In practice, it will often be very difficult to fulfil all the requirements that make a reprisal a justified action. Moreover, reprisals can lead to counter-reprisals and create a risk of a fast escalation of violations of humanitarian law. Finally, reprisals are objectionable because, even if all conditions are met, they create victims among persons who have no fault in the immediate causes of the reprisals.¹⁷⁹

It also noted that under API, only the section on means and methods of warfare did not contain any prohibition on reprisals. Adopting an *a contrario* reasoning resulting from this, it took the view that reprisals could only be taken in the event of the use of prohibited weapons or of acts of perfidy.¹⁸⁰

137. During discussions on reprisals in Committee I of the CDDH, Norway stated that “it was doubtful whether a victim State or party would be helped by resorting to actions directed against the innocent, even if it had done so in the past. Reprisals might well have the opposite effect, and lead to counter-reprisals.”¹⁸¹

138. The Report on the Practice of the Philippines states that “reprisals are generally prohibited”.¹⁸²

¹⁷⁷ Mexico, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, pp. 449–450.

¹⁷⁸ Netherlands, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 86, § 14.

¹⁷⁹ Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, p. 40.

¹⁸⁰ Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, p. 41.

¹⁸¹ Norway, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 76, § 45.

¹⁸² Report on the Practice of the Philippines, 1997, Chapter 2.9.

139. During discussions on reprisals in Committee I of the CDDH, the representative of Poland noted that:

To admit reprisals, even on a limited or exceptional scale, would be a backward step. All reprisals against persons and objects were prohibited by the Hague and Geneva Conventions, and . . . prohibition should be confirmed and extended by the Protocol. Moreover, reprisals would be contrary to the spirit of both the United Nations Charter and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (General Assembly Resolution 2625 (XXV)) . . . His delegation did not share the view of those who held that reprisals might help to ensure respect for international law. They could only lead to counter-reprisals, even if the strictest conditions were laid down . . . The Second World War had shown that it was completely possible to refrain from taking reprisals.¹⁸³

140. During discussions on reprisals in Committee I of the CDDH, Switzerland stated that it supported the French amendment on a prohibition of reprisals “in principle”.¹⁸⁴

141. In 1988, in a note on the prohibition on the use of chemical weapons, the Swiss Federal Department of Foreign Affairs stated that “the 1925 Protocol declares a custom”. It added that “the 1925 Protocol and custom prohibit the first use of chemical weapons and accept the lawfulness of second use only in the case of reprisals in kind”.¹⁸⁵

142. During discussions on reprisals in Committee I of the CDDH, the representative of the USSR, opposing the French proposal on a prohibition of reprisals, stated that his delegation was “really concerned with reprisals, and analysis revealed that they contravened the meaning and spirit of the Geneva Conventions of 1949 and draft [AP I]”. He also stated that the implementation of the French proposal “could in practice lead to far-reaching consequences and could even undermine the basis of international humanitarian law” and that “his delegation took the view that reprisals were inhumane and unjust. They inevitably involved persons who had not participated in the original violation alleged to have taken place, and they mainly affected the civilian population.”¹⁸⁶

143. During discussions on reprisals in Committee I of the CDDH, the UK stated that it was “not true that at the present time [in 1976] the old system of lawful counter-measures was excluded; it still existed under customary law,

¹⁸³ Poland, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.46, 28 April 1976, p. 63, §§ 42 and 43.

¹⁸⁴ Switzerland, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.46, 28 April 1976, p. 65, § 50.

¹⁸⁵ Switzerland, Note of the Directorate for Public International Law of the Federal Department of Foreign Affairs, 15 December 1988, reprinted in *Annuaire Suisse de Droit International*, Vol. 46, 1989, pp. 244–247 (in French) and in Marco Sassóli and Antoine A. Bouvier, *How Does Law Protect in War?*, ICRC, Geneva, 1999, pp. 608–610 (in English).

¹⁸⁶ USSR, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, pp. 74 and 75, §§ 39 and 40.

and any exclusion must be expressed, as in the Geneva Conventions". It also stated that it would "support the principle embodied in [the French proposal on a prohibition of reprisals]".¹⁸⁷

144. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

A belligerent reprisal is an action, taken by a party to an armed conflict, which would normally constitute a violation of the laws of armed conflict but which is lawful because it is taken in response to a prior violation of that law by an adversary . . . To be lawful, a belligerent reprisal must meet two conditions . . . It must meet the criteria for the regulation of reprisals, namely that it is taken in response to a prior wrong . . . is undertaken for the purpose of putting an end to the enemy's unlawful conduct and for preventing further illegalities.¹⁸⁸

145. In 1980, in a footnote to a memorandum of law on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", a legal adviser of the US Department of State noted that "reprisals are permitted under the laws of war only for the limited purpose of compelling the other belligerent to observe the laws of war".¹⁸⁹

146. In 1987, a Legal Adviser of the US Department of State, explaining "the position of the United States on current law of war agreements", stated with regard to Article 51 AP I that "[this provision] prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy's own violations of the law and are intended to deter future violations".¹⁹⁰

147. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

For the purpose of the law of armed conflict, reprisals are lawful acts of retaliation in the form of conduct that would otherwise be unlawful, resorted to by one belligerent in response to violations of the law of war by another belligerent. Such reprisals would be lawful if conducted in accordance with the applicable principles governing belligerent reprisals. Specifically, the reprisals must be taken with the intent to cause the enemy to cease violations of the law of armed conflict . . . As in the case of other requirements of the law of armed conflict, a judgment about compliance of any use of nuclear weapons with these requirements would have to be made on the

¹⁸⁷ UK, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 74, § 38.

¹⁸⁸ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, p. 58.

¹⁸⁹ US, Department of State, Memorandum of law by a Legal Adviser on the "Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea", 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., December 1986, pp. 1034 and 1041, footnote 38.

¹⁹⁰ US, Remarks of Judge Abraham D. Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 22 January 1987, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 469.

basis of the actual circumstances in each case, and could not be made in advance or in the abstract.¹⁹¹

148. During discussions on reprisals in Committee I of the CDDH, the representative of Venezuela stated that the French proposal on a prohibition of reprisals “was excellent”. However, he suggested that the final text “should also include a formal prohibition of counter-reprisals so as to avoid situations in which the parties to a conflict become involved in a vicious circle and also because counter-reprisals were a negation of the law”.¹⁹²

149. In 1991, notwithstanding the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, according to which these States agreed that hostilities should be conducted in accordance with, *inter alia*, Articles 48–58 AP I, the YPA issued a general warning to the attention of the Croatian authorities to the effect that “a number of impudent crimes has been committed against the members of the Y.P.A. . . . Family members of the Y.P.A. are being maltreated, persecuted and destroyed in many different ways. This cannot be tolerated any longer.” The YPA therefore warned that:

1. For every attacked and seized object of the [YPA] – an object of vital importance for the Republic of Croatia will be destroyed immediately.
2. For every attacked and occupied garrison – an object of vital importance to the town in which the garrison is located will be destroyed. This is, at the same time, a warning to civilian persons to abandon such settlement in time.¹⁹³

According to the Report on the Practice of the SFRY (FRY), “this warning calls for detailed analysis, but arguably it can be classified as a threat of the use of belligerent reprisals”.¹⁹⁴

III. Practice of International Organisations and Conferences

United Nations

150. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 49 entitled “Object and limits of countermeasures”, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.¹⁹⁵

¹⁹¹ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 30.

¹⁹² Venezuela, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 72, §§ 30 and 32.

¹⁹³ SFRY, Headquarters of the Supreme Command of the Armed Forces of the S.F.R.Y, Warning to the attention of the President of Croatia, the Government of Croatia and the General Staff of the Croatian Army, 1 October 1991.

¹⁹⁴ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.9.

¹⁹⁵ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

151. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that:

63. A reprisal must be distinguished from a simple act of retaliation or vengeance. An unlawful act committed under the guise of retaliation or vengeance remains unlawful, and the claim of retaliation or vengeance is no defence.
64. A reprisal is an otherwise illegal act resorted to after the adverse party has himself indulged in illegal acts and refused to desist therefrom after being called upon to do so. The purpose of a reprisal is to compel the adverse party to terminate its illegal activity.¹⁹⁶

Other International Organisations

152. No practice was found.

International Conferences

153. The Declaration on Principles Guiding Relations between Participating States of the Final Act of the CSCE Helsinki Summit of 1975 provides, *inter alia*, that the participating States “will also refrain in their mutual relations from any act of reprisal by force”.¹⁹⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

154. In its advisory opinion in the *Namibia case* in 1971, the ICJ considered it to be a general principle of law that “a right of termination on account of breach must be presumed to exist in respect of all treaties, except as regards provisions relating to the protection of the human person contained in treaties of a humanitarian character”.¹⁹⁸

155. In the *Naulilaa case* in 1928 regarding acts taken by Germany against Portugal in reprisal for the killing of three German officials by Portuguese soldiers, the Special Arbitral Tribunal stated that:

The latest doctrine, and more particularly German doctrine, defines reprisals in these terms:

Reprisals are an act of taking the law into its own hands . . . by the injured State, an act carried out – after an unfulfilled demand – in response to an act contrary to the law of nations by the offending State. Their effect is to suspend temporarily, in the relations between the two States, the observance of a particular rule of the law of nations. They are limited by the experiences of mankind and the rules of good faith, applicable in relations between States. They would be illegal if an earlier act, contrary to the law of nations, had not furnished the motive.¹⁹⁹

¹⁹⁶ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 63–64.

¹⁹⁷ CSCE, Final Act of the 1975 Summit, Declaration on Principles Guiding Relations between Participating States, Helsinki, 1 August 1975, Principle II.

¹⁹⁸ ICJ, *Namibia case*, Advisory Opinion, 21 June 1971, § 96.

¹⁹⁹ Special Arbitral Tribunal, *Naulilaa case*, Decision, 31 July 1928, pp. 1025–1026.

156. In the *Cysne case* in 1930 dealing with the destruction of a Portuguese vessel by Germany in reprisal for violations of international law by the UK, the Special Arbitral Tribunal stated that:

As the respondent maintains, an act contrary to international law may be justified, by way of reprisals, if motivated by a like act . . . However, the German argument, which is sound up to this point, overlooks an essential question which can be put in the following terms: Could the measure which the German Government was entitled to take, by way of reprisals against Great Britain and its allies, be applied to neutral vessels and specifically to Portuguese vessels?

The answer must be in the negative, even according to the opinion of German scholars. This answer is the logical consequence of the rule that reprisals, which constitute an act in principle contrary to the law of nations, are defensible only in so far as they were provoked by some other act likewise contrary to that law. Only reprisals taken against the provoking State are permissible. Admittedly, it can happen that legitimate reprisals taken against an offending State may affect the nationals of an innocent State. But that would be an indirect and unintentional consequence which, in practice, the injured State will always endeavor to avoid or to limit as far as possible. By contrast, the measures taken by the German State in 1915 against neutral merchant vessels were aimed directly and deliberately against the nationals of States innocent of the violations of the London Declaration attributed to Great Britain and its allies. Consequently, not being in conformity with the Declaration, they constituted acts contrary to the law of nations, unless one of the neutral States had committed against Germany an act contrary to the law of nations that could make it liable to reprisals. There is no evidence of any such act having been committed by Portugal, and the German claim relies exclusively on the acts committed by Great Britain and its allies. Hence, in the absence of any Portuguese provocation warranting reprisals, the German State must be held not to have been entitled to violate article 23 of the Declaration in respect of Portuguese nationals. Accordingly, it was contrary to the law of nations to treat the cargo of the *Cysne* as absolute contraband.²⁰⁰

V. Practice of the International Red Cross and Red Crescent Movement

157. No practice was found.

VI. Other Practice

158. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that:

- (1) Subject to Subsection (2), a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures
 - (a) are necessary to terminate the violation or prevent further violation, or to remedy the violation; and
 - (b) are not out of proportion to the violation and the injury suffered.

²⁰⁰ Special Arbitral Tribunal, *Cysne case*, Decision, 30 June 1930, pp. 1956–1057.

- (2) The threat or use of force in response to a violation of international law is subject to prohibitions on the threat or use of force in the United Nations Charter, as well as to Subsection (1).²⁰¹

159. Greenwood states that:

It has never been doubted that reprisals may only be taken in response to a violation of international law by the party against which they are directed (or its ally). In the case of belligerent reprisals, however, a question arises about the nature of the prior violation which provides the justification for the reprisal. Belligerent reprisals consist of acts which, if they could not be justified as reprisals, would constitute violations of the law which regulates the conduct of war or armed conflict . . . The better view is . . . that belligerent reprisals may lawfully be taken only in response to a prior violation of the law of armed conflict and not in retaliation for an unlawful resort to force.

...

The prior violation to which the reprisals are a response must be imputable to the State against which the reprisals are directed, or perhaps to an ally of that State . . . Allies of a State which is responsible for a violation of the laws of armed conflict may also be subjected to reprisals where they are themselves implicated in the violation and probably even where they have no direct involvement if the violation takes the form of a policy of conducting hostilities in a particular way. Thus, the United Kingdom extended the maritime reprisals adopted against Germany to Italy and Japan when they entered the Second World War. The United Kingdom maintained that, in allying themselves with Germany, Italy and Japan had made themselves "party to the methods of waging war adopted by Germany" and would "share in any advantages derived therefrom".²⁰²

Measure of last resort

I. Treaties and Other Instruments

Treaties

160. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that this would be true "only after [a] formal warning to the adverse party requiring cessation of the violations has been disregarded".²⁰³

Other Instruments

161. Article 52 of the 2001 ILC Draft Articles on State Responsibility, entitled "Conditions relating to resort to countermeasures", states that:

²⁰¹ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 905.

²⁰² Christopher Greenwood, "The Twilight of the Law of Belligerent Reprisals", *Netherlands Yearbook of International Law*, Vol. 20, 1989, pp. 40–43. On the extension by the UK of maritime reprisals adopted against Germany to Italy, see also Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, pp. 120 and 156.

²⁰³ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

1. Before taking countermeasures, an injured State shall:
 - (a) Call on the responsible State... to fulfil its obligations under Part Two [Articles 28–41];
 - (b) Notify the responsible State of any decision to take countermeasures and offer to negotiate with that State.
2. Notwithstanding paragraph 1(b), the injured State may take such urgent countermeasures as are necessary to preserve its rights.

II. National Practice

Military Manuals

162. Australia's Defence Force Manual states that "some nations may not comply with LOAC in the conduct of armed conflict. Where this occurs, and all methods of persuasion and diplomatic pressure have failed, reprisals may be justified but only against military objectives."²⁰⁴ It adds that "in any case, reprisals must... only be resorted to after lesser forms of redress have been tried".²⁰⁵

163. Belgium's Law of War Manual states that, when recourse is made to reprisals, the following conditions must be fulfilled: "2) attempts must first be made to stop [the violation of the LOAC by the adversary] or to prevent its repetition by peaceful means".²⁰⁶

164. Benin's Military Manual states that reprisals "may only be used if: ... a prior warning is given".²⁰⁷

165. Canada's LOAC Manual provides that:

To qualify as a reprisal, an act must satisfy the following conditions:

- ...
- c. There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend upon the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be undertaken;
 - d. The victim of a violation must first exhaust other reasonable means of securing compliance in order to justify taking a reprisal.²⁰⁸

166. Croatia's LOAC Compendium states that a condition for a reprisal is that it is a "last resort" and that "prior warning" be given.²⁰⁹

167. Ecuador's Naval Manual provides that:

To be valid, a reprisal action must conform to the following criteria:

- ...
3. When circumstances permit, reprisal must be preceded by a demand for redress by the enemy of his unlawful acts.

²⁰⁴ Australia, *Defence Force Manual* (1994), § 1309; see also *Commanders' Guide* (1994), § 1210.

²⁰⁵ Australia, *Defence Force Manual* (1994), § 1310; see also *Commanders' Guide* (1994), § 1211.

²⁰⁶ Belgium, *Law of War Manual* (1983), p. 35.

²⁰⁷ Benin, *Military Manual* (1995), Fascicule III, p. 13.

²⁰⁸ Canada, *LOAC Manual* (1999), p. 15-3, § 17.

²⁰⁹ Croatia, *LOAC Compendium* (1991), p. 19.

- ...
5. Reprisal must only be used as a last resort when other enforcement measures have failed or would be of no avail.²¹⁰

168. France's LOAC Manual states that reprisals must always be preceded by a warning.²¹¹

169. Germany's Military Manual provides that "reprisals... shall be the last resort, if all other means to stop the illegal behaviour have failed and the warning has not been heeded".²¹²

170. Hungary's Military Manual states that a condition for a reprisal is that it is a "last resort" and that "prior warning" be given.²¹³

171. Indonesia's Air Force Manual provides that:

In principle, reprisals in warfare are prohibited, i.e. an act which categorize[s] against the laws of war and aim[s] to [answer to] the breach of the laws of war treaties committed by the adverse party. The reprisal could be allowed if, although it has been warned, the adverse party still continue[s] to violate the laws of war.²¹⁴

172. Kenya's LOAC Manual states that reprisals "can only be taken if... prior warning is given".²¹⁵

173. The Military Manual of the Netherlands, referring to customary law, states that reprisals are in principle allowed, provided that a number of conditions are fulfilled. Among these conditions it lists that "it must first have been tried to stop the violation of humanitarian law of war by other means (for example by the intervention of a protecting power)".²¹⁶

174. New Zealand's Military Manual states that:

There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend on the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adverse Party that reprisals will be undertaken.

The victim of a violation must first exhaust other reasonable means of securing compliance in order to justify taking reprisal.²¹⁷

175. South Africa's LOAC Manual states that "reprisals are only permitted according to strict criteria".²¹⁸

176. Spain's LOAC Manual, in the chapter dealing with the exercise of command and its restrictions with regard to reprisals, states that "reprisals must be the ultimate resort to re-establish respect for the law of war and may not

²¹⁰ Ecuador, *Naval Manual* (1989), § 6.2.3.1.

²¹¹ France, *LOAC Manual* (2001), p. 109.

²¹² Germany, *Military Manual* (1992), § 478.

²¹³ Hungary, *Military Manual* (1992), p. 35.

²¹⁴ Indonesia, *Air Force Manual* (1990), § 15(c).

²¹⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

²¹⁶ Netherlands, *Military Manual* (1993), p. IV-5.

²¹⁷ New Zealand, *Military Manual* (1992), § 1606(4)(c) and (d).

²¹⁸ South Africa, *LOAC Manual* (1996), § 34(e).

lose sight of this aim".²¹⁹ In the chapter dealing with methods of combat, the manual lists among the conditions which must be fulfilled for the lawful taking of reprisals that: "they must be a last resort to re-establish respect for the laws of war"; that the State which takes reprisals "has unsuccessfully tried to make the enemy respect the law of war or that such attempts would be of no use"; and that the enemy has been formally warned of the measure that would be taken if it failed to comply with or repeated its violations of the law of war.²²⁰

177. Togo's Military Manual states that reprisals "may only be used if: ... a prior warning is given".²²¹

178. The UK Military Manual states that:

An infraction of the laws of war having been definitely established, every effort should first be made to detect and punish the actual offenders. Only if this is impossible may recourse be had to reprisals, if the injured belligerent is of the opinion that the facts warrant them. As a rule, the injured party must not at once resort to reprisals, but must first lodge a complaint with the enemy (or with a neutral Power, for transmission to the enemy) with a view to preventing any repetition of the offence and to securing the punishment of the guilty. This course should always be pursued unless the safety of the troops requires immediate drastic action and the persons who actually committed the offences cannot be secured.²²²

179. The UK LOAC Manual states that reprisals can only be taken if "prior warning is given".²²³

180. The US Field Manual states that:

Priority to Other Remedies. Other measures of securing compliance with the law of war should normally be exhausted before resort is had to reprisals. This course should be pursued unless the safety of the troops requires immediate drastic action and the persons who actually committed the offences cannot be secured. Even when appeal to the enemy for redress has failed, it may be a matter of policy to consider, before resorting to reprisals, whether the opposing forces are not more likely to be influenced by a steady adherence to the law of war on the part of their adversary.²²⁴

The manual stresses that "reprisals are never adopted merely for revenge, but only as an unavoidable last resort to induce the enemy to desist from unlawful practices".²²⁵

181. The US Air Force Pamphlet, in explaining reprisals, states that "the action is taken in the last resort, in order to prevent the adversary from behaving illegally in the future".²²⁶ It further states that:

In order to be considered a reprisal, an act must have the following characteristics when employed:

²¹⁹ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(6).

²²⁰ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)[a].

²²¹ Togo, *Military Manual* (1996), Fascicule III, p. 13.

²²² UK, *Military Manual* (1958), § 646.

²²³ UK, *LOAC Manual*, Section 4, p. 17, § 14(b). ²²⁴ US, *Field Manual* (1956), § 497(b).

²²⁵ US, *Field Manual* (1956), § 497(d). ²²⁶ US, *Air Force Pamphlet* (1976), § 10-7[a].

- ...
- (3) There must be reasonable notice that reprisals will be taken. What degree of notice is required will depend upon the particular circumstances of each case. Notice is normally given after the violation but may, in appropriate circumstances, predate the violation. An example of notice is an appeal to the transgressor to cease its offending conduct and punish those responsible. Thus, such an appeal may serve both as a plea for compliance and a notice to the adversary that reprisals will be undertaken.
- (4) Other reasonable means to secure compliance must be attempted. The victim of a violation in order to justify taking a reprisal must first exhaust other reasonable means of securing compliance. This may involve appeals or notice... Finally, even if an appeal or other methods fail, reprisals should not be undertaken automatically since there are various other factors governing their employment.²²⁷

182. The US Air Force Commander's Handbook states that "the taking of reprisals should be preceded by a request for redress of the wrong".²²⁸

183. The US Naval Handbook provides that:

To be valid, a reprisal action must conform to the following criteria:

- ...
3. When circumstances permit, reprisal must be preceded by a demand for redress by the enemy of his unlawful acts.
- ...
5. Reprisal must only be used as a last resort when other enforcement measures have failed or would be of no avail.²²⁹

184. The YPA Military Manual of the SFRY (FRY) states that "before they undertake reprisals, the armed forces of the SFRY shall try to force the enemy to respect the laws of war by means of other methods for preventing violations of such laws".²³⁰

National Legislation

185. No practice was found.

National Case-law

186. In its judgement in the *Hass and Priebke case* in 1997, the Military Tribunal of Rome stated that, according to the unanimous views of writers, reprisals were legitimate only when they appeared as the only possible reaction because all possible means of identification and capture of the author of the unlawful act had been exhausted.²³¹ In its relevant parts, this judgement was confirmed by the Military Appeals Court and the Supreme Court of Cassation.²³²

²²⁷ US, *Air Force Pamphlet* (1976), § 10-7(c).

²²⁸ US, *Air Force Commander's Handbook* (1980), § 8-4(b)(2).

²²⁹ US, *Naval Handbook* (1995), § 6.2.3.1. ²³⁰ SFRY (FRY), *YPA Military Manual* (1988), § 29.

²³¹ Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in the Trial of First Instance, 22 July 1997, Section 4.

²³² Italy, Military Appeals Court, *Hass and Priebke case*, Judgement on Appeal, 7 March 1998; Supreme Court of Cassation, *Hass and Priebke case*, Judgement in Trial of Third Instance, 16 November 1998.

187. In its judgement in the *Rauter case* in 1948, the Special Court (War Criminals) at The Hague referred to the judgement of the US Military Tribunal at Nuremberg in the *List (Hostages Trial) case*, as well as to the conditions required for reprisals in general by the UK and US military regulations, and stated that, accordingly, reprisals were admitted only as a measure of last resort.²³³

188. In its judgement in the *List (Hostages Trial) case* in the late 1940s, the US Military Tribunal at Nuremberg, discussing the taking of hostages in occupied territories, noted that “the occupant is required to use every available method to secure order and tranquillity before resort may be had to the taking and execution of hostages”. However, the Tribunal had previously stated that:

Where innocent individuals are seized and punished for a violation of the laws of war which has already occurred, no question of hostages is involved. It is nothing more than the infliction of a reprisal. Throughout the evidence in the present case, we find the term hostage applied where a reprisal only was involved.²³⁴

Other National Practice

189. The Report on the Practice of Australia states that “Australia’s *opinio juris* is, with certain exceptions, supportive of a prohibition against belligerent reprisals”. It adds, however, that “Australian *opinio juris* does not consider that exceptions to the prohibition against reprisals, where these represent measures of last resort, will place it in breach of its customary obligations”.²³⁵

190. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

2. ... The prohibition [of the taking of reprisals] may be waived on condition:
 - (a) that the Party victim of the breach clearly has no means of putting an end to the breach other than by considering recourse to reprisals,
...
 - (c) that the Party responsible for the violation shall be given due warning that such measures will be taken if the violation is continued or renewed.²³⁶

191. At the CDDH, France made another proposal for a draft Article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

2. The measures [which are designed to repress the breaches of and induce compliance with the Protocol] may be taken only when the following conditions are met:
 - (a) The measures may be taken only when other efforts to induce the adverse Party to comply with the law have failed or are not feasible, and the victimized Party clearly has no other means of ending the breach;
...

²³³ Netherlands, Special Court (War Criminals) at The Hague, *Rauter case*, Judgement, 4 May 1948.

²³⁴ US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 8 July 1947–19 February 1948.

²³⁵ Report on the Practice of Australia, 1997, Chapter 2.9.

²³⁶ France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221, 19 February 1975, p. 323.

- (c) The Party committing the breach must be given specific, formal, and prior warning that such measures will be taken if the breach is continued or renewed.²³⁷

192. During discussions on reprisals at the CDDH, the representative of the Netherlands that “reprisals were a very questionable means of securing respect for humanitarian law”. He also said that his delegation felt that “reprisals should remain a measure of last resort”.²³⁸

193. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that for a reprisal to be lawful “the taking of the reprisal as such must be announced [and] other attempts to force the other party to comply with international law must have failed”.²³⁹

194. In a written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that:

The Netherlands Government . . . believes that even if it were to be assumed that the (first) use of nuclear weapons by a State were unlawful *per se* under present international law – *quod non* –, this would not necessarily exclude the permissibility of the use of nuclear weapons by way of belligerent reprisal against an unlawful use of (nuclear) weapons, provided of course the retaliating State observed the conditions set by international law for the taking of lawful reprisals, i.e. satisfies, *inter alia*, the requirement that the retaliation . . . serves as an *ultimum remedium*.²⁴⁰ [emphasis in original]

195. In a written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that “to be lawful, a belligerent reprisal must meet two conditions . . . It must meet the criteria for the regulation of reprisals, namely that it is . . . a means of last resort.”²⁴¹

196. In 1980, in a footnote to a memorandum of law on the “Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea”, a legal adviser of the US Department of State stated that “reprisals are permitted under the laws of war . . . only after other means of achieving this objective [i.e. “the limited purpose of compelling the other belligerent to observe the laws of war”] have been exhausted (including diplomatic protest)”.²⁴²

²³⁷ France, Draft Article 74 *bis* API submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

²³⁸ Netherlands, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 86, § 14.

²³⁹ Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, pp. 40.

²⁴⁰ Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 29.

²⁴¹ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, p. 58.

²⁴² US, Department of State, Memorandum of law by a Legal Adviser on the “Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea”, 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., December 1986, pp. 1034 and 1041, footnote 38.

197. In a written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

Reprisals would be lawful if conducted in accordance with the applicable principles governing belligerent reprisals. Specifically . . . other means of securing compliance [of the enemy with the law of armed conflict] should be exhausted . . . As in the case of other requirements of the law of armed conflict, a judgment about compliance of any use of nuclear weapons with these requirements would have to be made on the basis of the actual circumstances in each case, and could not be made in advance or in the abstract.²⁴³

III. Practice of International Organisations and Conferences

United Nations

198. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 52 entitled “Conditions relating to resort to countermeasures”, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.²⁴⁴

199. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that “a reprisal is an otherwise illegal act resorted to after the adverse party has himself indulged in illegal acts and refused to desist therefrom after being called upon to do so”.²⁴⁵

Other International Organisations

200. No practice was found.

International Conferences

201. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

202. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by . . . the principle whereby they must be a last resort in attempts to impose compliance by the adversary with legal standards (which entails, amongst

²⁴³ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 30.

²⁴⁴ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

²⁴⁵ UN Commission of Experts established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 63–64.

other things, that they may be exercised only after a prior warning has been given which has failed to bring about the discontinuance of the adversary's crimes).²⁴⁶

203. In the *Naulilaa case* in 1928 regarding acts taken by Germany against Portugal in reprisal for the killing of three German officials by Portuguese soldiers, the Special Arbitral Tribunal stated that "reprisals . . . are an act carried out – after an unfulfilled demand" and that "reprisals are only lawful when preceded by an unsatisfied demand. The use of force is only satisfied by its character of necessity."²⁴⁷

V. Practice of the International Red Cross and Red Crescent Movement

204. No practice was found.

VI. Other Practice

205. Kalshoven states that:

The requirement of subsidiarity has generally been taken to mean that recourse to belligerent reprisals is an exceptional measure which must be regarded as an ultimate remedy, after other available means of a less exceptional character have failed. Applying this criterion to inter-State belligerent reprisals (as opposed to State-to-population or quasi-reprisals), it would imply that protests, warnings appeals to third parties and other suitable means must have remained without effect, or so obviously been doomed to failure that there was no need to attempt them first. Nor is this an unreasonable requirement even in time of war: the practice of belligerents shows a frequent recourse to such comparatively innocent means as protests, appeals to international public opinion, complaints lodged with appropriate international bodies, threats to punish individual war criminals, and so on. Indeed, it would seem that in no instance have belligerent reprisals been taken without previous attempts to obtain satisfaction in other ways, or in any event without its having been considered that these would have been possible. However, on theoretical considerations the possibility cannot be excluded of situations where the fruitlessness of any other remedy but reprisals is apparent from the outset. In such exceptional situations, too, recourse to reprisals can be regarded as an ultimate remedy and, hence, as meeting the requirement of subsidiarity.²⁴⁸

206. Greenwood notes that "reprisals are a subsidiary means of redress and thus should be used only as a last resort. This principle is often expressed in terms of a requirement that a State must actually employ all other methods of securing redress before recourse is had to reprisals." With regard to the exceptional cases referred to by Kalshoven, he states that:

While the availability of other sanctions for violations of the law of armed conflict should not be underestimated, it is likely that there will be occasions when the

²⁴⁶ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 535.

²⁴⁷ Special Arbitral Tribunal, *Naulilaa case*, Decision, 31 July 1928, pp. 1026–1027.

²⁴⁸ Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, p. 340.

possibility to which Kalshoven refers will be more than theoretical... However, the use of reprisals in an armed conflict is such a serious step and may have such disastrous consequences that the requirement that all reasonable steps be taken to achieve redress by other means before reprisals are ordered is probably one which should be strictly insisted upon, unless delay will endanger the safety of troops or civilians.²⁴⁹

Proportionality of reprisals

I. Treaties and Other Instruments

Treaties

207. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that “any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto”.²⁵⁰

Other Instruments

208. Article 86 of the 1880 Oxford Manual provides that “in grave cases in which reprisals appear to be absolutely necessary, their nature and scope shall never exceed the measure of the infraction of the laws of war committed by the enemy”.

209. Article 51 of the 2001 ILC Draft Articles on State Responsibility, entitled “Proportionality”, provides that “countermeasures must be commensurate with the injury suffered, taking into account the gravity of the internationally wrongful act and the rights in question”.

II. National Practice

Military Manuals

210. Australia’s Defence Force Manual and Commanders’ Guide state that “in any case, reprisals must be timely, responsive to the enemy’s conduct [and] proportional”.²⁵¹

211. Belgium’s Law of War Manual states that, when recourse is made to reprisals, the following conditions must be fulfilled: “3) the damage suffered by the adversary must be proportionate to the damage that he has caused”.²⁵²

²⁴⁹ Christopher Greenwood, “The Twilight of the Law of Belligerent Reprisals”, *Netherlands Yearbook of International Law*, Vol. 20, 1989, p. 47.

²⁵⁰ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

²⁵¹ Australia, *Defence Force Manual* (1994), § 1310; *Commanders’ Guide* (1994), § 1211.

²⁵² Belgium, *Law of War Manual* (1983), p. 35.

212. Benin's Military Manual states that reprisals "may only be used if: . . . they are proportional to the violation of the law of war committed by the enemy".²⁵³

213. Canada's LOAC Manual states that:

[The reprisal] must be proportionate to the original wrongdoing, and must be terminated as soon as the original wrongdoer ceases the illegal actions. Proportionality is not strict, for, if the reprisal is to be effective, it may often be greater than the original wrongdoing. Nevertheless, there must be a reasonable relationship between the original wrong and the reprisal measure.²⁵⁴

The manual further provides that:

To qualify as a reprisal, an act must satisfy the following conditions:

...

f. A reprisal must be proportional to the original violation. Although a reprisal need not conform in kind to the same type of acts complained of (bombardment for bombardment, weapon for weapon) it may not significantly exceed the adversary's violation either in violence or effect.²⁵⁵

214. Croatia's LOAC Compendium states that a condition for reprisals is that they be "proportionate".²⁵⁶

215. Ecuador's Naval Manual provides that "to be valid, a reprisal action must conform to the following criteria: . . . 6. Each reprisal must be proportional to the original violation".²⁵⁷

216. Germany's Military Manual provides that "reprisals shall not be excessive in relation to the offence committed by the adversary".²⁵⁸

217. Hungary's Military Manual states that a condition for reprisals is that they be "proportionate".²⁵⁹

218. Italy's IHL Manual provides that "the reprisal must be sufficiently proportionate to the gravity of the offence suffered and may not consist, except in cases of absolute necessity, in belligerent acts directed against the civilian population".²⁶⁰

219. Kenya's LOAC Manual states that "under customary law, reprisals are permitted to counter unlawful acts of warfare. They can only be taken if: . . . they are proportionate to the breach of the law of war committed by the enemy."²⁶¹

220. The Military Manual of the Netherlands, referring to customary law, states that reprisals are in principle allowed, provided that a number of conditions are fulfilled. Among these conditions, it states that "the damage

²⁵³ Benin, *Military Manual* (1995), Fascicule III, p. 13.

²⁵⁴ Canada, *LOAC Manual* (1999), p. 15-2, § 14.

²⁵⁵ Canada, *LOAC Manual* (1999), p. 15-3, § 17.

²⁵⁶ Croatia, *LOAC Compendium* (1991), p. 19.

²⁵⁷ Ecuador, *Naval Manual* (1989), § 6.2.3.1.

²⁵⁸ Germany, *Military Manual* (1992), § 478.

²⁵⁹ Hungary, *Military Manual* (1992), p. 35.

²⁶⁰ Italy, *IHL Manual* (1991), Vol. I, § 23.

²⁶¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

to be caused to the adversary and the damage unlawfully suffered must be proportional".²⁶²

221. New Zealand's Military Manual states that:

[The reprisal] must be proportionate to the original wrongdoing . . . The proportionality is not strict: if the reprisal is to be effective, it will often be greater than the original wrongdoing. Nevertheless, there must be a reasonable relationship between the original wrong and the reprisal measure.²⁶³

The manual further states that:

In order to be considered a reprisal, an act must have certain characteristics: . . . A reprisal must be proportional to the original violation. Although a reprisal need not conform in kind to the same type of acts complained of (bombardment for bombardment, weapon for weapon) it may not significantly exceed the adverse Party's violation either in violence or in effect. Effective but disproportionate reprisals cannot be justified by the argument that only an excessive response will forestall further transgressions.²⁶⁴

222. South Africa's LOAC Manual states that "reprisals are only permitted according to strict criteria".²⁶⁵

223. Spain's LOAC Manual states that "the action must be in proportion to the violation committed by the enemy".²⁶⁶

224. Togo's Military Manual states that reprisals "may only be used if: . . . they are proportional to the violation of the law of war committed by the enemy".²⁶⁷

225. The UK Military Manual states that "what kinds of acts should be resorted to as reprisals is a matter for consideration by the injured party. Acts done by way of reprisals must not, however, be excessive. They must bear a reasonable relation to the degree of violation committed by the enemy."²⁶⁸ In a footnote relating to this provision, the manual refers to the Nuremberg trials and states that:

Acts of reprisal that are grossly excessive against non-protected persons . . . constitute a war crime. During the Second World War German forces applied a "hundred to one" order in occupied territories, whereby one hundred civilians would be seized at random and shot as a reprisal for the killing of one German. On occasions civilians already held as prisoners were shot in the same proportion.²⁶⁹

226. The UK LOAC Manual states that reprisals can only be taken if "they are in proportion to the violation complained of".²⁷⁰

²⁶² Netherlands, *Military Manual* (1993), p. IV-5.

²⁶³ New Zealand, *Military Manual* (1992), § 1606(1).

²⁶⁴ New Zealand, *Military Manual* (1992), § 1606(4)(f).

²⁶⁵ South Africa, *LOAC Manual* (1996), § 34(e).

²⁶⁶ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(a).

²⁶⁷ Togo, *Military Manual* (1996), Fascicule III, p. 13.

²⁶⁹ UK, *Military Manual* (1958), § 648, footnote 1.

²⁷⁰ UK, *LOAC Manual* (1981), Section 4, p. 17, § 14(c).

²⁶⁸ UK, *Military Manual* (1958), § 648.

227. The US Field Manual states that “what kinds of acts should be resorted to as reprisals is a matter for consideration by the injured party. Acts done by way of reprisals must not, however, be excessive. They must bear reasonable relation to the degree of violation committed by the enemy.”²⁷¹

228. The US Air Force Pamphlet states that:

A reprisal must be proportional to the original violation. Although a reprisal need not conform in kind to the same type of acts complained of (bombardment for bombardment, weapon for weapon) it may not significantly exceed the adversary's violation either in violence or effect. Effective but disproportionate reprisals cannot be justified by the argument that only an excessive response will forestall further transgressions.²⁷²

229. The US Naval Handbook provides that “to be valid, a reprisal action must conform to the following criteria: . . . 6. Each reprisal must be proportional to the original violation.”²⁷³

230. The Annotated Supplement to the US Naval Handbook states that:

This rule [that a reprisal must be proportional to the original violation] is not of strict equivalence because the reprisal will usually be somewhat greater than the initial violation that gave rise to it. However, care must be taken that the extent of the reprisal is measured by some degree of proportionality and not solely by effectiveness. Effective but disproportionate reprisals cannot be justified by the argument that only an excessive response will forestall a further transgression . . . The acts resorted to by way of reprisal need not conform in kind to those complained of by the injured belligerent. The reprisal action taken may be quite different from the original act which justified it, but should not be excessive or exceed the degree of harm required to deter the enemy from continuance of his initial unlawful conduct.²⁷⁴

231. The YPA Military Manual of the SFRY (FRY) states that “reprisals may be undertaken by application of the same or similar measures. The consequences of such measures must be proportionate to the consequences that the enemy caused by violating the laws of war.”²⁷⁵ The manual further states that:

When reprisals are undertaken, care must be taken that they be in proportion to the seriousness of the violations committed by the enemy, that is, that the seriousness of the reprisals undertaken corresponds to the seriousness of the violations of the laws of war committed by the enemy.²⁷⁶

National Legislation

232. No practice was found.

²⁷¹ US, *Field Manual* (1956), § 497(e).

²⁷² US, *Air Force Pamphlet* (1976), § 10-7(c)(6). ²⁷³ US, *Naval Handbook* (1995), § 6.2.3.1.

²⁷⁴ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 43.

²⁷⁵ SFRY (FRY), *YPA Military Manual* (1988), § 27.

²⁷⁶ SFRY (FRY), *YPA Military Manual* (1988), § 29.

National Case-law

233. In its judgement in the *Kappler case* in 1948, Italy's Military Tribunal of Rome found that the massacre of 335 prisoners in the Ardeatine Caves, ordered as a reprisal for a bomb attack by the Italian resistance which killed 33 German military policemen, was disproportionate, because of the ratio of 10:1 and because of the ranks of the executed Italian prisoners.²⁷⁷

234. In its judgement in the *Priebke case* in 1996 in connection with the Ardeatine Caves massacre during the Second World War, Italy's Military Tribunal of Rome stated that "the principle of proportionality has never been questioned by international law scholars, as it finds its origin in the unquestionable axioms of rationality". The Tribunal found that the executions were grossly disproportionate.²⁷⁸

235. In its judgement in the *Hass and Priebke case* in 1997 concerning the Ardeatine Caves massacre during the Second World War, Italy's Military Tribunal of Rome, with respect to the conditions required for a reprisal, stated that "also such a reaction must be proportionate to the damage suffered". It found unacceptable the disproportion between the deaths of 33 German soldiers and the execution of 335 persons.²⁷⁹ In its relevant parts, the decision was confirmed by the Military Appeals Court and the Supreme Court of Cassation.²⁸⁰

236. In its judgement in the *Rauter case* in 1948, the Special Court (War Criminals) at The Hague referred to the judgement of the US Military Tribunal at Nuremberg in the *List (Hostages Trial) case*, as well as to the conditions required for reprisals in general by the UK and US military regulations and stated that, accordingly, the taking of reprisals required a due proportion between the acts undertaken in reprisals and the original offence. It found, *inter alia*, that by killing several hostages at a time for the death of one member of the German authorities, the accused had committed excessive reprisals in violation of the rule requiring due proportion.²⁸¹ In its judgement on appeal in 1949, the Special Court of Cassation of the Netherlands also stated, *inter alia*, that genuine reprisals may be taken, "provided they are taken within certain limits and provided attention is paid to a certain proportion".²⁸²

237. In its judgement in the *List (Hostages Trial) case* in the late 1940s, the US Military Tribunal at Nuremberg stated that "it is a fundamental rule that a reprisal may not exceed the degree of the criminal act it is designed to correct.

²⁷⁷ Italy, Military Tribunal of Rome, *Kappler case*, Judgement, 20 July 1948.

²⁷⁸ Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996, Section 7.

²⁷⁹ Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in Trial of First Instance, 22 July 1997, Section 4.

²⁸⁰ Italy, Military Appeals Court, *Hass and Priebke case*, Judgement on Appeal, 7 March 1998; Supreme Court of Cassation, *Hass and Priebke case*, Judgement in Trial of Third Instance, 16 November 1998.

²⁸¹ Netherlands, Special Court (War Criminals) at The Hague, *Rauter case*, Judgement, 4 May 1948.

²⁸² Netherlands, Special Court of Cassation, *Rauter case*, Judgement, 12 January 1949.

Where an excess is knowingly indulged, it in turn is criminal and may be punished."²⁸³

Other National Practice

238. In 1967, a Belgian Senator stated with respect to bombardments of North Vietnam by the US that "it is recognised today that [reprisals] must be proportionate to the injury suffered. In case one has not suffered any damage, as it was the case, it is incomprehensible to pretend to start a period of bombardments on North Vietnam, as reprisals for attacks on the high sea."²⁸⁴

239. In 1986, in an annex to a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence noted that "the act of reprisal must be proportional to the illegal act or acts committed by the other belligerent"²⁸⁵

240. According to the Report on the Practice of China, in 1972, during the conflict in the Middle East, China condemned Israeli reprisals allegedly "not in conformity with the principle of proportionality"²⁸⁶

241. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

2. ... The prohibition [of the taking of reprisals] may be waived on condition:

...

(d) that the means of application and the extent of such measures, if it proves imperative to take them, shall in no case exceed the extent of the breach which they are designed to end.²⁸⁷

242. At the CDDH, France made another proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "3. If it proves imperative to take these measures, their extent and their means of application shall in no case exceed the extent of the breach which they are designed to end. The measures may not involve any actions prohibited by the Geneva Conventions of 1949."²⁸⁸

243. At the CDDH, the FRG, with regard to the French proposal for a draft article on reprisals, held that the principle of proportionality laid down therein was based on "precedents established in 1928 and 1930, which were now universally recognised"²⁸⁹

²⁸³ US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 8 July 1947–19 February 1948.

²⁸⁴ Belgium, Parliamentary Debates, 30 November 1967, *Annales Parlementaires*, Senate, p. 95, reprinted in *RBDI*, Vol. 6, 1970, pp. 656–657.

²⁸⁵ Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, Annex A, § 1.

²⁸⁶ Report on the Practice of China, 1997, Chapter 2.9, referring to a Statement on the Middle East made by the Vice Foreign Minister, 5 December 1972.

²⁸⁷ France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221, 19 February 1975, p. 323.

²⁸⁸ France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

²⁸⁹ FRG, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 84, § 6.

244. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India stated that:

Reprisals or retaliation under international law are also governed by certain specific principles . . . Reprisals must remain within reasonable bounds of proportionality to the effect created by the original wrongful act . . . In other words . . . when a State commits . . . a wrongful act or delict, the use of force by way of reprisal would have to be proportionate and as such if the wrongful act did not involve the use of a nuclear weapon, the reprisal could also not involve the use of a nuclear weapon . . . In view of the above, use of nuclear weapons, even by way of reprisal or retaliation, appears to be unlawful. In any case, if the wrongful use of force in the first instance did not involve the use of nuclear weapons, it is beyond doubt that even in response by way of retaliation States do not have the right to use nuclear weapons because of their special quality as weapons of mass destruction.²⁹⁰

245. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Mexico stated that “in the opinion of my country the use of nuclear weapons in reprisal – or any other pretext – against a non-nuclear attack is contrary to the principle of proportionality”.²⁹¹

246. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that for the reprisal to be lawful, “the violation of the law caused by the reprisal must be proportionate with the violation(s) committed by the adverse party”.²⁹²

247. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Netherlands stated that:

The Netherlands Government . . . believes that even if it were to be assumed that the (first) use of nuclear weapons by a State were unlawful *per se* under present international law – *quod non* –, this would not necessarily exclude the permissibility of the use of nuclear weapons by way of belligerent reprisal against an unlawful use of (nuclear) weapons, provided of course the retaliating State observed the conditions set by international law for the taking of lawful reprisals, i.e. satisfies, *inter alia*, the requirement that the retaliation is proportionate and serves as an *ultimum remedium*.²⁹³ [emphasis in original]

248. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions . . . It must meet the criteria for the regulation of reprisals, namely that it is . . . proportionate . . . It has been argued that the use of nuclear weapons could never satisfy the requirements of proportionality . . . This argument, however, suffers from the same flaws as the

²⁹⁰ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

²⁹¹ Mexico, Oral pleadings before the ICJ, *Nuclear Weapons case*, CR 95/25, 3 November 1995, p. 51.

²⁹² Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, pp. 40.

²⁹³ Netherlands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 29.

argument that the use of nuclear weapons could never satisfy the requirements of self-defence. Whether the use of nuclear weapons would meet the requirements of proportionality cannot be answered in the abstract: it would depend upon the nature and circumstances of the wrong which prompted the taking of reprisal action.²⁹⁴

249. In 1980, in a footnote to a memorandum of law on the “Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea”, a legal adviser of the US Department of State noted that “reprisals are permitted under the laws of war . . . only in proportion to the original violations”.²⁹⁵

250. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

Reprisals would be lawful if conducted in accordance with the applicable principles governing belligerent reprisals. Specifically . . . the reprisals must be proportionate to the violations [of the law of armed conflict by the enemy] . . . As in the case of other requirements of the law of armed conflict, a judgment about compliance of any use of nuclear weapons with these requirements would have to be made on the basis of the actual circumstances in each case, and could not be made in advance or in the abstract.²⁹⁶

III. Practice of International Organisations and Conferences

United Nations

251. In 2001, the UN General Assembly adopted a resolution on responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 51 entitled “Proportionality”, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.²⁹⁷

252. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that a reprisal “must be proportionate to the original wrongdoing”. It added that “the proportionality is not strict, for if the reprisal is to be effective, it will often be greater than the original wrongdoing. Nevertheless, there must be a reasonable relationship between the original wrong and the reprisal measure.”²⁹⁸

²⁹⁴ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–60.

²⁹⁵ US, Department of State, Memorandum of law by a Legal Adviser on the “Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea”, 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., December 1986, pp. 1034 and 1041, footnote 38.

²⁹⁶ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 30.

²⁹⁷ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

²⁹⁸ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 64.

Other International Organisations

253. No practice was found.

International Conferences

254. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

255. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ observed that “in any case any right of recourse to such reprisals would, like self-defence, be governed *inter alia* by the principle of proportionality”.²⁹⁹

256. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by . . . the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued).³⁰⁰

257. In its judgement in the *Naulilaa case* in 1928 regarding acts taken by Germany against Portugal in reprisal for the killing of three German officials by Portuguese soldiers, the Special Arbitral Tribunal stated that:

The definition of reprisals does not require that the reprisal be proportionate to the offence. On this issue, the writers, unanimous until recently, start being divided in their opinions. In a certain proportionality between offence and reprisal the majority sees a necessary condition for the legitimacy of [reprisals]. Other writers, among the most modern ones, do not require this condition any more. As regards international law . . . it certainly tends to limit the notion of legitimate reprisals and prohibit excess.

The Tribunal went on to say that:

Even if one should assume that the law of nations does not require that the reprisal is approximatively measured with relation to the offence, one must certainly consider as being excessive and . . . illicit reprisals out of any proportion to the act which has caused them and that, even if it had been admitted that the conduct of the Portuguese authorities had been internationally wrongful, the German reprisals would still have been wrongful, for, *inter alia*, they were disproportionate to the alleged wrong.³⁰¹

V. Practice of the International Red Cross and Red Crescent Movement

258. No practice was found.

²⁹⁹ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 46.

³⁰⁰ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 535.

³⁰¹ Special Arbitral Tribunal, *Naulilaa case*, Decision, 31 July 1928, pp. 1026 and 1028.

VI. *Other Practice*

259. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that “a state victim of a violation of an international obligation by another state may resort to countermeasures that might otherwise be unlawful, if such measures . . . (b) are not out of proportion to the violation and the injury suffered”.³⁰²

260. Kalshoven states that:

[The requirement of proportionality] . . . can be clarified to a certain degree. In particular, it can confidently be stated that the proportionality envisaged here is proportionality to the preceding illegality, not to such future illegal acts as the reprisal may (or may not) prevent. Expectations with respect to such future events will obviously play a part in the decision-making process; thus, a prognosis that the enemy, unless checked, will commit increasingly grave breaches of the laws of war, will tend to make the reaction to the breaches already committed still more severe. Whilst, however, this psychological mechanism may be of interest from the point of view of theories of escalation, it cannot influence a legal judgement of the retaliatory action, which can take account only of its proportionality to the act against which it constitutes retaliation.

Furthermore, it can be stated with equal confidence that proportionality in this context means the absence of obvious disproportionality, as opposed to strict proportionality. In other words, belligerents are left with a certain freedom of appreciation; a freedom which in law is restricted by the requirement of reasonableness, but which in practice can easily lead to arbitrariness and excessive reactions . . . But . . . in the absence of a more precise rule . . . there is no alternative but to accept the flexibility and relative vagueness of the requirement of proportionality.³⁰³

Order at the highest authority of government

I. *Treaties and Other Instruments*

Treaties

261. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that such measures would be taken “only after a decision taken at the highest level of government”.³⁰⁴

Other Instruments

262. Article 86 of the 1880 Oxford Manual states that reprisals “can only be resorted to with the authorization of the commander in chief”.

³⁰² The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, § 905.

³⁰³ Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, pp. 341–342; see also Christopher Greenwood, “The Twilight of the Law of Belligerent Reprisals”, *Netherlands Yearbook of International Law*, Vol. 20, 1989, pp. 43–45, with more references.

³⁰⁴ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

II. National Practice

Military Manuals

263. Australia's *Commanders' Guide* states that "reprisal action by ADF members requires prior approval at the highest level".³⁰⁵

264. Australia's *Defence Force Manual* provides that "reprisal action by the ADF members requires prior approval at government level".³⁰⁶

265. Belgium's *Law of War Manual* states that "although no precise rules exist on the subject, reprisals may only be ordered by the government or commanders-in-chief, because of the importance of the political and/or military consequences they may entail".³⁰⁷

266. Benin's *Military Manual* states that reprisals "may only be used if: . . . they are ordered at a high level".³⁰⁸

267. Burkina Faso's *Disciplinary Regulations*, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".³⁰⁹

268. Cameroon's *Disciplinary Regulations* states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".³¹⁰

269. Canada's *LOAC Manual* provides that "the use of reprisals has great political and strategic implications. The decision to take reprisal action must therefore be authorized at the highest political level. Operational commanders on their own initiative are not authorized to carry out reprisals."³¹¹ The manual further states that:

To qualify as a reprisal, an act must satisfy the following conditions:

- ...
- h. It must be authorized by national authorities at the highest political level as it entails full state responsibility. Therefore, military commanders are not on their own authorized to carry out reprisals.³¹²

270. Congo's *Disciplinary Regulations*, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".³¹³

271. Croatia's *LOAC Compendium* states that a condition for reprisals is that the "decision [is] taken at [the] highest governmental level".³¹⁴

³⁰⁵ Australia, *Commanders' Guide* (1994), § 1211.

³⁰⁶ Australia, *Defence Force Manual* (1994), § 1310.

³⁰⁷ Belgium, *Law of War Manual* (1983), p. 35.

³⁰⁸ Benin, *Military Manual* (1995), Fascicule III, p. 13.

³⁰⁹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

³¹⁰ Cameroon, *Disciplinary Regulations* (1975), Article 32.

³¹¹ Canada, *LOAC Manual* (1999), p. 15-2, § 13.

³¹² Canada, *LOAC Manual* (1999), p. 15-3, § 17.

³¹³ Congo, *Disciplinary Regulations* (1986), Article 32(2).

³¹⁴ Croatia, *LOAC Compendium* (1991), p. 19.

272. Ecuador's Naval Manual provides that "to be valid, a reprisal action must conform to the following criteria: . . . 1. Reprisal must be ordered by the highest authority of the belligerent government."³¹⁵

273. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: . . . it is prohibited [to soldiers in combat] . . . to take hostages, to engage in reprisals or collective punishments"³¹⁶

274. Germany's Soldiers' Manual states that "because of their political and military consequences reprisals on the part of the German Military Forces may only be ordered by the Federal Government"³¹⁷

275. Germany's Military Manual provides that "because of their political and military significance, reprisals shall be ordered by the supreme political level, which would be in the Federal Republic of Germany the Federal Government. No soldier is entitled to order reprisals on his own accord."³¹⁸ The manual further states that reprisals "require a decision to be taken by the supreme political level"³¹⁹

276. Hungary's Military Manual states that a condition for reprisals is that the "decision [is] taken at [the] highest governmental level"³²⁰

277. Italy's IHL Manual provides that "a reprisal is ordered by the Head of Government or by the authorities to which the power to order them has been lawfully delegated"³²¹

278. Kenya's LOAC Manual states that "under customary law, reprisals are permitted to counter unlawful acts of warfare. They can only be taken if: . . . they are ordered at a high level."³²²

279. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments"³²³

280. The Military Manual of the Netherlands, referring to customary law, states that reprisals are in principle allowed, provided that a number of conditions are fulfilled, including that "because of its important political and military consequences, the power to decide on a reprisal belongs to the government"³²⁴

281. New Zealand's Military Manual states that "in order to be considered a reprisal, an act must have certain characteristics: . . . It must be authorized

³¹⁵ Ecuador, *Naval Manual* (1989), § 6.2.3.1.

³¹⁶ France, *Disciplinary Regulations as amended* (1975), Article 10 *bis* (2).

³¹⁷ Germany, *Soldiers' Manual* (1991), p. 2; see also *IHL Manual* (1996), § 319.

³¹⁸ Germany, *Military Manual* (1992), § 477. ³¹⁹ Germany, *Military Manual* (1992), § 1206.

³²⁰ Hungary, *Military Manual* (1992), p. 35. ³²¹ Italy, *IHL Manual* (1991), Vol. I, § 27.

³²² Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

³²³ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

³²⁴ Netherlands, *Military Manual* (1993), p. IV-5.

by national authorities at the highest political level and involve full State responsibility."³²⁵

282. South Africa's LOAC Manual states that "reprisals are only permitted according to strict criteria. Decisions must be made at the highest level. Soldiers cannot take reprisals at their own initiative."³²⁶

283. Spain's LOAC Manual, in the chapter dealing with the exercise of command and its restrictions with regard to reprisals, states that:

The taking of measures which constitute violations of the law of war, as a response to violations previously committed by the enemy with the aim of making such violations cease, is decided at the highest governmental level, because of the politico-military consequences to which they give rise.³²⁷

The manual further states that reprisals "require a decision taken at the highest political level".³²⁸

284. Sweden's IHL Manual states that:

Ultimately, responsibility for observance of the system of rules of international humanitarian law, among them the conventions, lies with the government. If in special circumstances the question arises of the use of prohibited means or methods as a measure of reprisal, or even the making of significant exceptions from international humanitarian law for reasons of military necessity, the responsibility for this would fall upon the government.³²⁹

285. Switzerland's Basic Military Manual, in its introductory remarks, states that:

In case an adversary should not respect these international rules ["rules of international public law in times of armed conflict"], only the *Conseil fédéral* [Federal Council] would be competent to decide which measures would be opportune, especially possible reprisals, or to give the necessary instructions to the command of the army.³³⁰

In a provision dealing with reprisals, the manual further states that "only the *Conseil fédéral* [Federal Council] is competent to order possible reprisals".³³¹

286. Togo's Military Manual states that reprisals "may only be used if: . . . they are ordered at a high level".³³²

287. The UK Military Manual states that "although there is no clear rule of international law on the matter, reprisals should be resorted to only by order of a commander and never on the responsibility of an individual soldier".³³³

³²⁵ New Zealand, *Military Manual* (1992), § 1606(4)(h).

³²⁶ South Africa, *LOAC Manual* (1996), § 34(e).

³²⁷ Spain, *LOAC Manual* (1996), Vol. I, § 2.3.b.(6).

³²⁸ Spain, *LOAC Manual* (1996), Vol. I, § 11.10.c.

³²⁹ Sweden, *IHL Manual* (1991), Section 4.1, p. 91.

³³⁰ Switzerland, *Basic Military Manual* (1987), Introductory remarks, p. III.

³³¹ Switzerland, *Basic Military Manual* (1987), Article 197(1).

³³² Togo, *Military Manual* (1996), Fascicule III, p. 13.

³³³ UK, *Military Manual* (1958), § 645.

288. The UK LOAC Manual states that reprisals can only be taken if “they are ordered at a high level”.³³⁴ For cases in which the UK should have recourse to reprisals against the enemy’s civilian population or civilian objects, the manual states that “the decision to do so will be taken at Government level”.³³⁵

289. The US Field Manual stipulates that:

[Reprisals] should never be employed by individual soldiers except by direct orders of a commander, and the latter should give such orders only after careful inquiry into the alleged offence. The highest accessible military authority should be consulted unless immediate action is demanded, in which event a subordinate commander may order appropriate reprisals upon his own initiative. Ill-considered action may subsequently be found to have been wholly unjustified and will subject the responsible officer himself to punishment for a violation of the law of war. On the other hand, commanders must assume responsibility for retaliative measures when an unscrupulous enemy leaves no other recourse against repetition of unlawful acts.³³⁶

290. The US Air Force Pamphlet states that:

In order to be considered a reprisal, an act must have the following characteristics when employed:

- ...
- (8) It must be authorized by national authorities at the highest political level and entails full state responsibility.³³⁷

291. The US Air Force Commander’s Handbook states that “a decision to violate the law in reprisal for enemy violations must be taken at the highest levels of the US government”.³³⁸ It further states that “only the national command authorities may authorize the execution of reprisals or other reciprocal violations of the law of armed conflict by US armed forces”.³³⁹

292. The US Instructor’s Guide states that “the individual soldier must never decide to make a reprisal. The decision to make a reprisal must be made at the highest command level.”³⁴⁰

293. The US Naval Handbook provides that “to be valid, a reprisal action must conform to the following criteria: 1. Reprisal must be ordered by an authorized representative of the belligerent government.”³⁴¹ It further provides that “the President alone may authorize the taking of reprisal action by U.S. Forces”.³⁴²

294. The Annotated Supplement to the US Naval Handbook, in a part dealing with the necessity for the US that the President alone may authorize the taking

³³⁴ UK, *LOAC Manual* (1981), Section 4, p. 17, § 14(e).

³³⁵ UK, *LOAC Manual* (1981), Section 4, p. 17, § 17.

³³⁶ US, *Field Manual* (1956), § 497(d).

³³⁷ US, *Air Force Pamphlet* (1976), § 10-7(c)(8).

³³⁸ US, *Air Force Commander’s Handbook* (1980), § 1-3(a)(2).

³³⁹ US, *Air Force Commander’s Handbook* (1980), § 8-4(b)(2).

³⁴⁰ US, *Instructor’s Guide* (1985), p. 27.

³⁴¹ US, *Naval Handbook* (1995), § 6.2.3.1. ³⁴² US, *Naval Handbook* (1995), § 6.2.3.3.

of reprisal action by US forces, states that there is “always the risk that it will trigger retaliatory escalation (counter-reprisals) by the enemy”. It adds that:

Other factors which governments will usually consider before taking of reprisals include the following:

1. Reprisals may have an adverse influence on the attitudes of governments not participating in an armed conflict.
2. Reprisals may only strengthen enemy morale and underground resistance.
3. Reprisals may only lead to counter-reprisals by an enemy, in which case the enemy's ability to retaliate is an important factor.
4. Reprisals may render enemy resources less able to contribute to the rehabilitation of an area after the cessation of hostilities.
5. The threat of reprisals may be more effective than their actual use.
6. Reprisals, to be effective, should be carried out speedily and should be kept under control. They may be ineffective if random, excessive, or prolonged.
7. In any event, the decision to employ reprisals will generally be reached as a matter of strategic policy. The immediate advantage sought must be weighed against the possible long-range military and political consequences.

...

In addition to the legal requirements which regulate resort to reprisals, there are various practical factors which governments will consider before taking reprisals. For example, when appeal to the enemy for redress has failed, it may be a matter of policy to consider before resorting to reprisals, whether the opposing forces are not more likely to be influenced by a steady adherence to the law of armed conflict.³⁴³

295. The YPA Military Manual of the SFRY (FRY) states that “the armed forces of the SFRY shall undertake reprisals against the enemy . . . only by order of a commander who is competent to determine reprisals”.³⁴⁴ In another provision, the manual specifies that reprisals must be ordered by a competent commander (corps commander and equal or higher rank responsible for the sector in which the violation of the adversary took place), except when a commander of a lesser rank cannot establish contact with higher command. Reprisals against an entire enemy force can only be ordered by the Supreme Command.³⁴⁵

National Legislation

296. Argentina's Constitution provides for the competence of the President to order reprisals, with the authorisation and approbation of the National Congress.³⁴⁶

297. Italy's Law of War Decree as amended provides that:

Reprisals . . . are ordered by means of a “decree” of il Duce or by a delegated authority from him.

³⁴³ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.3, footnote 52.

³⁴⁴ SFRY (FRY), *YPA Military Manual* (1988), § 29.

³⁴⁵ SFRY (FRY), *YPA Military Manual* (1988), § 30.

³⁴⁶ Argentina, *Constitution* (1994), Articles 75(26) and 99(15).

Reprisals . . . inasmuch as they consist of military operations, can also be ordered by the supreme commander, or, when an immediate or exemplary action is necessary, by any other commander.³⁴⁷

National Case-law

298. No practice was found.

Other National Practice

299. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

2. . . . The prohibition [of the taking of reprisals] may be waived on condition:

- ...
 (b) that the decision to have recourse to such measures shall be taken by the Government of the Party alleging the violation.³⁴⁸

300. At the CDDH, France made another proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

The measures [which are designed to repress the breaches and induce compliance with the Protocol] may be taken only when the following conditions are met:

- ...
 (b) The decision to have recourse to such measures must be taken at the highest level of the government of the victimized Party.³⁴⁹

III. Practice of International Organisations and Conferences

301. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

302. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by . . . (b) the obligation to take special precautions before implementing them (they may be taken only after a decision to this effect has been made at the highest political or military level; in other words they may not be decided by local commanders).³⁵⁰

V. Practice of the International Red Cross and Red Crescent Movement

303. No practice was found.

³⁴⁷ Italy, *Law of War Decree as amended* (1938), Article 10.

³⁴⁸ France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221, 19 February 1975, p. 323.

³⁴⁹ France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

³⁵⁰ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 535.

VI. *Other Practice*

304. No practice was found.

Termination of reprisals as soon as the adversary complies again with the law*I. Treaties and Other Instruments**Treaties*

305. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that “such measures [will not] be continued after the violations have ceased”.³⁵¹

Other Instruments

306. Article 85 of the 1880 Oxford Manual provides that “reprisals are formally prohibited in case the injury complained of has been repaired”.

307. Article 53 of the 2001 ILC Draft Articles on State Responsibility, entitled “Termination of countermeasures”, provides that “countermeasures shall be terminated as soon as the responsible State has complied with its obligations under Part Two [Articles 28–41] in relation to the internationally wrongful act”.

*II. National Practice**Military Manuals*

308. Benin’s Military Manual states that reprisals “may only be used if: . . . they cease as soon as the violation [of the law of war] which has triggered them ceases”.³⁵²

309. Canada’s LOAC Manual provides that a reprisal “must be terminated as soon as the original wrongdoer ceases the illegal actions”.³⁵³ In another provision, the manual states that:

Above all, reprisals are justifiable only to force an adversary to stop its illegal activity. If, for example, a party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, and even takes steps to punish those responsible, then any action taken by another party to “redress” the situation cannot be justified as a lawful reprisal.³⁵⁴

310. Croatia’s LOAC Compendium states that a condition for reprisals is that they “cease when [the] purpose [is] achieved”.³⁵⁵

³⁵¹ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

³⁵² Benin, *Military Manual* (1995), Fascicule III, p. 13.

³⁵³ Canada, *LOAC Manual* (1999), p. 15-2, § 14.

³⁵⁴ Canada, *LOAC Manual* (1999), p. 15-2, § 17(b).

³⁵⁵ Croatia, *LOAC Compendium* (1991), p. 19.

311. Ecuador's Naval Manual provides that "to be valid, a reprisal action must conform to the following criteria: . . . 7. A reprisal action must cease as soon as the enemy is induced to desist from its unlawful activities and to comply with the law of armed conflict."³⁵⁶

312. Hungary's Military Manual states that a condition for reprisals is that they "cease when [the] purpose [is] achieved".³⁵⁷

313. Italy's IHL Manual states that "when the belligerent enemy who committed the unlawful act . . . has given proper satisfaction, each justification to continue or take [measures of reprisal] stops".³⁵⁸

314. Kenya's LOAC Manual states that "under customary law, reprisals are permitted to counter unlawful acts of warfare. They can only be taken if: . . . they cease when the violation complained of ceases."³⁵⁹

315. New Zealand's Military Manual states that "a reprisal . . . must be terminated as soon as the original wrongdoer ceases his illegal actions".³⁶⁰

316. South Africa's LOAC Manual states that "reprisals are only permitted according to strict criteria".³⁶¹

317. Spain's LOAC Manual specifies, among the conditions which must be fulfilled for the lawful taking of reprisals, that the action must cease once its objective has been met.³⁶²

318. Togo's Military Manual states that reprisals "may only be used if: . . . they cease as soon as the violation [of the law of war] which has triggered them ceases".³⁶³

319. The UK Military Manual states that "if the enemy ceases to commit the acts complained of, reprisals must not be resorted to; if reprisals have already begun, they must at once cease".³⁶⁴

320. The UK LOAC Manual states that reprisals can only be taken if "they cease when the violation complained of ceases".³⁶⁵

321. The US Naval Handbook states that "to be valid, a reprisal action must conform to the following criteria: . . . 7. A reprisal action must cease as soon as the enemy is induced to desist from its unlawful activities and to comply with the law of armed conflict."³⁶⁶

322. The Annotated Supplement to the US Naval Handbook, with reference to the rule that a reprisal must cease as soon as the enemy is induced to desist from its unlawful activities, states that "when, for example, one party to an armed conflict commits a breach of law but follows that violation with an expression of regret and promise that it will not be repeated, then any action

³⁵⁶ Ecuador, *Naval Manual* (1989), § 6.2.3.1.

³⁵⁷ Hungary, *Military Manual* (1992), p. 35. ³⁵⁸ Italy, *IHL Manual* (1991), Vol. I, § 24.

³⁵⁹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

³⁶⁰ New Zealand, *Military Manual* (1992), § 1606(1).

³⁶¹ South Africa, *LOAC Manual* (1996), § 34(e).

³⁶² Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(a).

³⁶³ Togo, *Military Manual* (1996), Fascicule III, p. 13.

³⁶⁵ UK, *LOAC Manual* (1981), Section 4, p. 17, § 14(d).

³⁶⁶ US, *Naval Handbook* (1995), § 6.2.3.1.

³⁶⁴ UK, *Military Manual* (1958), § 649.

taken by another party to 'right' the situation cannot be justified as a lawful reprisal".³⁶⁷

323. The YPA Military Manual of the SFRY (FRY), in a provision entitled "Aim and duration of reprisals", states that "when the enemy stops violating the rules of the international laws of war, the party to the conflict undertaking reprisals is obliged to terminate reprisals".³⁶⁸ The manual further provides that "the armed forces of the SFRY shall undertake reprisals against the enemy exceptionally and temporarily".³⁶⁹

National Legislation

324. No practice was found.

National Case-law

325. No practice was found.

Other National Practice

326. According to the Report on the Practice of Iran, Iran reacted to violations by Iraq of the 1984 agreement relative to the cessation of attacks on cities by resorting to reprisals against Iraqi cities. The report notes, however, that Iran declared that it was ready to end these attacks and respect the agreement as soon as Iraq complied with it.³⁷⁰

327. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "3. ... The measures must cease, in all events, when they have achieved their objective, namely, cessation of the breach which prompted the measures."³⁷¹

328. In an explanatory memorandum submitted to the Dutch parliament in the context of the ratification procedure of the Additional Protocols, the government of the Netherlands stated that for the reprisal to be lawful, "as soon as the adverse party behaves in compliance with the law the reprisal must end".³⁷²

III. Practice of International Organisations and Conferences

United Nations

329. In 2001, the UN General Assembly adopted a resolution on responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles

³⁶⁷ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 44.

³⁶⁸ SFRY (FRY), *YPA Military Manual* (1988), § 28.

³⁶⁹ SFRY (FRY), *YPA Military Manual* (1988), § 29.

³⁷⁰ Report on the Practice of Iran, 1997, Chapter 1.3.

³⁷¹ France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

³⁷² Netherlands, Lower House of Parliament, Explanatory memorandum for the ratification of the Additional Protocols, 1983–1984 Session, Doc. 18 277 (R 1247), No. 3, p. 40.

on State Responsibility, and thus Article 53 entitled "Termination of counter-measures", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".³⁷³

330. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that "a reprisal... must be terminated as soon as the original wrongdoer ceases his illegal actions".³⁷⁴

Other International Organisations

331. No practice was found.

International Conferences

332. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

333. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

It should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by... the principle of proportionality (which entails not only that the reprisals must not be excessive compared to the precedent unlawful act of warfare, but also that they must stop as soon as that unlawful act has been discontinued).³⁷⁵

V. Practice of the International Red Cross and Red Crescent Movement

334. No practice was found.

VI. Other Practice

335. No practice was found.

Limitation of reprisals by principles of humanity

I. Treaties and Other Instruments

Treaties

336. No practice was found.

³⁷³ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

³⁷⁴ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 64.

³⁷⁵ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 535.

Other Instruments

337. Article 86 of the Oxford Manual provides that reprisals “must conform in all cases to the laws of humanity and morality”.

338. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility states that:

Countermeasures shall not affect:

- ...
- (b) Obligations for the protection of fundamental human rights;
- ...
- (d) Other obligations under peremptory norms of general international law.

*II. National Practice**Military Manuals*

339. Belgium’s Law of War Manual, regarding the circumstances in which reprisals may be taken against individuals, cites a writer’s opinion and states that “putting to death innocent persons to impose order by terror is a violation of both written law and the basic principles of humanity”.³⁷⁶

340. Italy’s IHL Manual, in the part dealing with reprisals, states that:

The Italian laws of war, which are modelled upon the principles of civilisation and humanity as much as it is permitted by military necessity, provides for the humane treatment of enemy combatants, wounded or prisoners, as well as of the civilian population, even in cases in which there is no special obligation under international law to do so.³⁷⁷

341. Sweden’s IHL Manual states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.

The possibility just recounted – for a party to Additional Protocol I suffering a breach of international law to employ reprisals – is to be considered as a hypothetical case. The Committee strongly discourages such application in view of its manifestly inhuman effect.³⁷⁸

342. The YPA Military Manual of the SFRY (FRY) states that “Yugoslav military officers competent to determine reprisals cannot order the application of dishonourable methods of reprisals”.³⁷⁹

National Legislation

343. No practice was found.

³⁷⁶ Belgium, *Law of War Manual* (1983), p. 36, referring to Lord Wright, *BYIL*, Vol. 25, 1954, p. 296–310.

³⁷⁷ Italy, *IHL Manual* (1991), Vol. I, § 28. ³⁷⁸ Sweden, *IHL Manual* (1990), Section 3.5, p. 89.

³⁷⁹ SFRY (FRY), *YPA Military Manual* (1988), § 29.

National Case-law

344. In the *Priebke case* in 1995, Argentina's Public Prosecutor of First Instance, dealing with Italy's request to extradite the accused, stated, *inter alia*, that writers had condemned the killing in reprisal of 330 civilians and POWs carried out by German soldiers in the Ardeatine Caves in Italy during the Second World War and qualified this act as "a reprisal which violated the fundamental principles of humanity".³⁸⁰

345. In the *Kappler case* in 1948, dealing with the Ardeatine Caves massacre during the Second World War, the Military Tribunal of Rome stated that:

Reprisals are subject to a general limitation which consists in the duty not to violate those rights intended to safeguard fundamental needs. This principle . . . now finds clear expression in the preamble of the Hague Convention . . . where the activities of States are set a limit by "the principles of the law of nations, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience".³⁸¹

346. In its judgement in the *Priebke case* in 1996, the Military Tribunal of Rome, with regard to the principle of proportionality to which reprisals were subject, stated that:

This is confirmed by the general limit on States' freedom to act, fixed by international custom and recalled in the preamble to the Hague Convention of 1907 which prohibits injuring fundamental rights established by "ius gentium", by the customs of civilized States, by the laws of humanity and by the exigencies of public conscience.³⁸²

347. In its judgement in the *Hass and Priebke case* in 1997, the Military Tribunal of Rome stated that actions taken by way of reprisals could never violate the fundamental and primary requirements of humanity and public conscience.³⁸³

Other National Practice

348. At the CDDH, during the discussions on Draft AP II, Finland stated that "there was universal agreement that reprisals of an inhumane nature were inadmissible".³⁸⁴

349. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India cited G. Fitzmaurice and stated that:

³⁸⁰ Argentina, Hearing of the Public Prosecutor of the First Instance, *Priebke case*, 1995, Section V.2.

³⁸¹ Italy, Military Tribunal of Rome, *Kappler case*, Judgement, 20 July 1948.

³⁸² Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996, Section 7.

³⁸³ Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in Trial of First Instance, 22 July 1997, Section 4.

³⁸⁴ Finland, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 324, § 8.

Reprisals or retaliation under international law are also governed by certain specific principles . . . Reprisals could not involve acts which are *malum in se* such as certain violations of human rights, certain breaches of the laws of war and rules in the nature of *ius cogens*, that is to say obligations of an absolute character compliance with which is not dependent on corresponding compliance by others but is requisite in all circumstances unless under stress of literal *vis major* . . . In other words . . . even where a wrongful act involved the use of a nuclear weapon the reprisal action cannot involve [the] use of a nuclear weapon without violating certain fundamental principles of humanitarian law. In this sense, prohibition of the use of a nuclear weapon in an armed conflict is an absolute one, compliance with which is not dependent on corresponding compliance by others but is a requisite in all circumstances. In view of the above, [the] use of nuclear weapons even by way of reprisal or retaliation, appears to be unlawful.³⁸⁵

350. The Report on the Practice of Iraq, in the chapter dealing with reprisals and with reference to a speech of the Iraqi President in 1983, notes that “as for the activities which constitute a violation to the human rights or the humanitarian law, this can never be reciprocated”.³⁸⁶

351. The Report on the Practice of Italy, having discussed the decisions in the *Schintlholzer*, *Priebke*, and *Hass and Priebke* cases, concludes that it is the *opinio juris* of Italy that States acting by way of reprisal could never violate the general limit fixed to their actions by customary law and by the preamble to the 1907 Hague Convention (IV).³⁸⁷

352. In its written statement submitted to the ICJ in the Nuclear Weapons case in 1995, Malaysia stated that reprisals “must conform in all cases to the laws of humanity and morality”. It referred to Article 86 of the Oxford Manual.³⁸⁸

III. Practice of International Organisations and Conferences

United Nations

353. In 2001, the UN General Assembly adopted a resolution on responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(b) and (d) stating that countermeasures shall not affect obligations for the protection of fundamental human rights or other obligations under peremptory norms of general international law, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.³⁸⁹

³⁸⁵ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 2.

³⁸⁶ Report on the Practice of Iraq, 1998, Chapter 2.9.

³⁸⁷ Report on the Practice of Italy, 1997, Chapter 2.9.

³⁸⁸ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 18.

³⁸⁹ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

Other International Organisations

354. No practice was found.

International Conferences

355. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

356. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that “it should also be pointed out that at any rate, even when considered lawful, reprisals are restricted by . . . ‘elementary considerations of humanity’”.³⁹⁰

V. Practice of the International Red Cross and Red Crescent Movement

357. No practice was found.

VI. Other Practice

358. No practice was found.

C. Reprisals against Protected Persons**Captured combatants and prisoners of war***I. Treaties and Other Instruments**Treaties*

359. Article 2, third paragraph, of the 1929 Geneva POW Convention provides that “measures of reprisal against [POWs] are forbidden”.

360. Article 13, third paragraph, GC III provides that “measures of reprisal against prisoners of war are prohibited”.

Other Instruments

361. Section 7.2 of the 1999 UN Secretary-General’s Bulletin which deals under Section 7.1 with the protection of “persons not, or no longer, taking part in military operations, including civilians, members of armed forces who have laid down their weapons and persons placed *hors de combat* by reason of . . . detention”, states that “the following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: . . . reprisals”.

³⁹⁰ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 535.

362. Section 8 of the 1999 UN Secretary-General's Bulletin, dealing with "Treatment of detained persons", states that "without prejudice to their legal status, they shall be treated in accordance with the relevant provisions of the Third Geneva Convention of 1949, as may be applicable to them *mutatis mutandis*".

363. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) obligations of a humanitarian character prohibiting reprisals".

II. National Practice

Military Manuals

364. Argentina's Law of War Manual (1969), in a provision dealing with the treatment of POWs, refers to Article 13 GC III and provides that "measures of reprisal with respect to them remain prohibited".³⁹¹

365. Argentina's Law of War Manual (1989), in an annex containing a list of "Fundamental rules of International Humanitarian Law applicable in armed conflict", provides that "captured combatants . . . will be protected against all acts of violence and reprisals".³⁹²

366. Australia's Commanders' Guide states that "protected from the moment of their surrender or capture, PW and PW camps must not be made the objects of . . . reprisals".³⁹³ The Guide further refers to Article 13 GC III and states that "protected persons . . . should not be the subject of reprisals".³⁹⁴

367. Australia's Defence Force Manual, in a provision dealing with POWs, provides that "protected from the moment of their surrender or capture, prisoners of war must not be made the object of attack or reprisals".³⁹⁵ In a chapter entitled "Prisoners of war and detained persons", the manual further states that "the fundamental rules for the treatment of [a] PW are: . . . reprisals against them are prohibited".³⁹⁶ It also states that "reprisals may be justified but only against military objectives".³⁹⁷ In another provision, the manual states that "protected persons . . . should not be the subject of reprisals".³⁹⁸

368. Belgium's Law of War Manual, citing several examples of jurisprudence, states that "the persons protected by the Geneva Conventions (. . . prisoners of war . . .) . . . may not be made the object of reprisals. Therefore, [reprisals] may

³⁹¹ Argentina, *Law of War Manual* (1969), § 2.013(1).

³⁹² Argentina, *Law of War Manual* (1989), Annex 10, § 4.

³⁹³ Australia, *Commanders' Guide* (1994), § 414.

³⁹⁴ Australia, *Commanders' Guide* (1994), § 1212.

³⁹⁵ Australia, *Defence Force Manual* (1994), § 519.

³⁹⁶ Australia, *Defence Force Manual* (1994), § 1002(c).

³⁹⁷ Australia, *Defence Force Manual* (1994), § 1309.

³⁹⁸ Australia, *Defence Force Manual* (1994), § 1311.

be directed only against combatants, non-protected property and a restricted group of non-protected civilians."³⁹⁹

369. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".⁴⁰⁰ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".⁴⁰¹

370. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".⁴⁰²

371. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".⁴⁰³

372. Canada's LOAC Manual, in the section dealing with the treatment of POWs, provides that "reprisals against PWs are prohibited".⁴⁰⁴ In the section dealing with enforcement measures, the manual further states that "reprisals are permitted against combatants and against objects constituting military objectives".⁴⁰⁵ In the same section, it also states that "reprisals against the following categories of persons and objects are prohibited: . . . c. prisoners of war (PWs)".⁴⁰⁶

373. Canada's Code of Conduct provides that "no reprisals will be taken against PWs or detainees".⁴⁰⁷

374. Colombia's Circular on Fundamental Rules of IHL provides that "captured combatants . . . shall be protected against . . . reprisals".⁴⁰⁸

375. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".⁴⁰⁹

376. Croatia's Instructions on Basic Rules of IHL states that captured combatants and civilians must be protected against all acts of violence and reprisals.⁴¹⁰

377. Croatia's LOAC Compendium states that reprisals are prohibited against POWs. It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".⁴¹¹

³⁹⁹ Belgium, *Law of War Manual* (1983), p. 36.

⁴⁰⁰ Benin, *Military Manual* (1995), Fascicule III, p. 12.

⁴⁰¹ Benin, *Military Manual* (1995), Fascicule III, p. 13.

⁴⁰² Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁴⁰³ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁴⁰⁴ Canada, *LOAC Manual* (1999), p. 10-3, § 25, see also p. 15-2, § 15(c).

⁴⁰⁵ Canada, *LOAC Manual* (1999), p. 15-2, § 16.

⁴⁰⁶ Canada, *LOAC Manual* (1999), p. 15-3, § 15.

⁴⁰⁷ Canada, *Code of Conduct* (2001), Rule 6, § 12.

⁴⁰⁸ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 4.

⁴⁰⁹ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁴¹⁰ Croatia, *Instructions on Basic Rules of IHL* (1993), Instruction No. 4.

⁴¹¹ Croatia, *LOAC Compendium* (1991), p. 19.

378. The Military Manual of the Dominican Republic, under the heading “Treat all captives and detainees humanely”, states that “you must never carry out reprisals or acts of vengeance against any person, enemy or civilian, you have taken prisoner or detained during the fighting”.⁴¹²

379. Ecuador’s Naval Manual provides that “reprisals are forbidden to be taken against: 1. Prisoners of war . . .”.⁴¹³ It also provides that “prisoners of war may not be subjected to collective punishment nor may reprisal action be taken against them”.⁴¹⁴

380. France’s Disciplinary Regulations as amended, in a provision entitled “Respect for the rules of international law applicable in armed conflicts” dealing with the duties of and prohibitions for combatants, states that “by virtue of the international conventions ratified or approved: . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments”.⁴¹⁵

381. France’s LOAC Summary Note provides that “captured combatants . . . must be protected against violence and reprisals”.⁴¹⁶

382. France’s LOAC Manual, in the chapter dealing with means and methods of warfare, states that “the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives”.⁴¹⁷ The manual refers to Article 13 GC III and states that “reprisals are prohibited against . . . prisoners of war”.⁴¹⁸

383. Germany’s Soldiers’ Manual states that “reprisals against prisoners of war are forbidden”.⁴¹⁹

384. Germany’s Military Manual, referring to Article 13 GC III, provides that “it is expressly prohibited by agreement to make reprisals against: . . . prisoners of war (Art. 13 para 3 GC III)”.⁴²⁰ In the part dealing with the protection of POWs, and under a provision entitled “Fundamental rules for the treatment of prisoners of war”, the manual refers to Article 13 GC III and provides that “reprisals against prisoners of war are prohibited”.⁴²¹

385. Germany’s IHL Manual provides that “reprisals are expressly prohibited against . . . prisoners of war”.⁴²²

386. Hungary’s Military Manual states that reprisals are prohibited against POWs. It further provides for the prohibition of taking reprisals against “specifically protected persons and objects”.⁴²³

⁴¹² Dominican Republic, *Military Manual* (1980), p. 7.

⁴¹³ Ecuador, *Naval Manual* (1989), § 6.2.3.2.

⁴¹⁴ Ecuador, *Naval Manual* (1989), § 11.8.1.

⁴¹⁵ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁴¹⁶ France, *LOAC Summary Note* (1992), § 2.1.

⁴¹⁷ France, *LOAC Manual* (2001), p. 85. ⁴¹⁸ France, *LOAC Manual* (2001), p. 108.

⁴¹⁹ Germany, *Soldiers’ Manual* (1991), p. 7. ⁴²⁰ Germany, *Military Manual* (1992), § 479.

⁴²¹ Germany, *Military Manual* (1992), § 704.

⁴²² Germany, *IHL Manual* (1996), § 320.

⁴²³ Hungary, *Military Manual* (1992), p. 35.

387. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".⁴²⁴

388. Italy's IHL Manual, providing for the prohibition of reprisals against POWs, states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals, such as, for instance, the rules regarding prisoners of war".⁴²⁵

389. Kenya's LOAC Manual states that "it is forbidden:...(e) to carry out reprisals against protected persons or property".⁴²⁶ In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives...The Geneva Conventions and [AP I] prohibit reprisals against prisoners of war".⁴²⁷

390. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.⁴²⁸ In the attached list of "Fundamental rules of international humanitarian law applicable in armed conflicts", the manual states that "captured combatants... will be protected against any act of violence and reprisals".⁴²⁹

391. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat:... to take hostages, to engage in reprisals or collective punishments".⁴³⁰

392. The Military Manual of the Netherlands, in the chapter dealing with the protection of POWs, states that "reprisals against prisoners of war are forbidden".⁴³¹

393. The Military Handbook of the Netherlands states that "protected persons under the laws of war are:... prisoners of war... Reprisals against them must not be taken."⁴³²

394. New Zealand's Military Manual, in the chapter dealing with POWs and referring to Article 13 GC III, states that "reprisals against prisoners of war are prohibited".⁴³³ In the footnote relative to this provision, the manual states that:

Since prisoners of war are in the Power of the Detaining Power, they are among the easiest victims for reprisal action and are, of themselves, unable to affect the conduct of their national government. The [1907] HR made no reference to this matter and during World War I prisoners were often made the object of reprisals.

⁴²⁴ Indonesia, *Air Force Manual* (1990), § 15(c).

⁴²⁵ Italy, *IHL Manual* (1991), Vol. I, § 25.

⁴²⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

⁴²⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

⁴²⁸ Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

⁴²⁹ Madagascar, *Military Manual* (1994), p. 91, Rule 4.

⁴³⁰ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁴³¹ Netherlands, *Military Manual* (1993), p. VII-3.

⁴³² Netherlands, *Military Handbook* (1995), p. 7-38.

⁴³³ New Zealand, *Military Manual* (1992), § 918(1).

The ban on such action first appeared in the 1929 Geneva Convention on Prisoners of War, Art. 2. In accordance with the provisions of AP I, reprisals are forbidden against all persons who are hors de combat, as well as against protected objects, the destruction of which would primarily affect such persons. During World War II the Germans fettered British prisoners of war claiming it as a reprisal for a raid on Sark in 1942, when five German captives had their hands tied so that they could be linked to their captors while being escorted to the boats of the raiding party. During the Dieppe raid, the Germans captured a Canadian order authorising the tying of prisoners' hands, the Germans protested about the order, which was subsequently described as unauthorized and countermanded.⁴³⁴

In the chapter dealing with reprisals and referring to Articles 13 GC I and 44 AP I, the manual further states that "reprisals against the following categories of persons and objects are prohibited . . . prisoners of war".⁴³⁵

395. Nicaragua's Military Manual, in the part dealing with international armed conflict, states that "prisoners of war . . . must be protected against . . . measures of reprisal".⁴³⁶

396. Nigeria's Military Manual, in a part dealing with GC III, states that "reprisals directed against prisoner[s] of war are prohibited".⁴³⁷

397. Nigeria's Manual on the Laws of War provides that "it is prohibited to take measures of reprisal against prisoners of war as a retaliation for violation of the Laws of War by the enemy".⁴³⁸

398. South Africa's LOAC Manual states that "soldiers who have surrendered or who are in the control of the enemy cannot be made the object of reprisal and must be protected".⁴³⁹ It further provides that "reprisals against the persons and property of prisoners of war . . . are prohibited".⁴⁴⁰

399. Spain's LOAC Manual, referring to Article 13 GC III, lists POWs among the persons against whom the taking of reprisals is prohibited.⁴⁴¹

400. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.⁴⁴²

401. Switzerland's Basic Military Manual, in the chapter dealing with the "Fundamental protection of prisoners of war", contains a provision entitled

⁴³⁴ New Zealand, *Military Manual* (1992), § 918(1), footnote 51.

⁴³⁵ New Zealand, *Military Manual* (1992), § 1606(2)(c).

⁴³⁶ Nicaragua, *Military Manual* (1996), Article 14(18).

⁴³⁷ Nigeria, *Military Manual* (1994), p. 16, § 9.

⁴³⁸ Nigeria, *Manual on the Laws of War* (undated), § 37.

⁴³⁹ South Africa, *LOAC Manual* (1996), § 30.

⁴⁴⁰ South Africa, *LOAC Manual* (1996), § 34(e).

⁴⁴¹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

⁴⁴² Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

“Prohibition of reprisals” which refers to Article 13, third paragraph, GC III and states that “measures of reprisal are prohibited with regard to prisoners of war”.⁴⁴³ In the provision dealing with reprisals, referring, *inter alia*, to Article 13 GC III, the manual further states that “by virtue of the Geneva Conventions and their Additional Protocols, [reprisals] are prohibited with regard to . . . prisoners of war”.⁴⁴⁴

402. Togo’s Military Manual states that “the following prohibitions must be respected: . . . to launch reprisals against protected persons and property”.⁴⁴⁵ It adds that reprisals “may only be used if: . . . they are carried out only against combatants and military objectives”.⁴⁴⁶

403. The UK Military Manual, which in a footnote to the relevant provision refers to Article 2 of the 1929 Geneva POW Convention and Article 13 of GC III, states that:

Measures of reprisal against prisoners of war are prohibited. This prohibition is of an absolute character, so that reprisals against prisoners of war are prohibited even if intended to be adopted as a measure of retaliation against the violation of provisions of [GC III] by the other party. Reprisals against such violations of the Convention are permissible, but they must not be directed against prisoners of war or any other persons protected by the 1949 Conventions.⁴⁴⁷

In the part dealing with reprisals, the manual refers to Article 13 GC III and states that “reprisals against prisoners of war . . . are . . . prohibited”.⁴⁴⁸ In a footnote relating to this provision, the manual further notes that “reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons”.⁴⁴⁹ In a footnote relating to another provision, the manual moreover states that “reprisals against . . . prisoners of war . . . constitute war crimes”.⁴⁵⁰

404. The UK LOAC Manual provides that “the Geneva Conventions and [AP I] prohibit reprisals against prisoners of war”.⁴⁵¹

405. The US Field Manual, referring to Article 13 GC III, stipulates that “reprisals against the persons or property of prisoners of war, including the wounded and sick, . . . are forbidden . . . However, reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals.”⁴⁵²

406. The US Air Force Pamphlet, referring to Article 13 GC III, provides that “reprisals against prisoners of war are prohibited . . . No protected person may

⁴⁴³ Switzerland, *Basic Military Manual* (1987), Article 98.

⁴⁴⁴ Switzerland, *Basic Military Manual* (1987), Article 197(2).

⁴⁴⁵ Togo, *Military Manual* (1996), Fascicule III, p. 12.

⁴⁴⁶ Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁴⁴⁷ UK, *Military Manual* (1958), § 133(b) and footnotes 4 and 5.

⁴⁴⁸ UK, *Military Manual* (1958), § 644. ⁴⁴⁹ UK, *Military Manual* (1958), § 644, footnote 2.

⁴⁵⁰ UK, *Military Manual* (1958), § 647, footnote 1.

⁴⁵¹ UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.

⁴⁵² US, *Field Manual* (1956), § 497(c).

be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited."⁴⁵³ The Pamphlet further states that:

Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted.⁴⁵⁴

In the chapter dealing with GC III, the Pamphlet reiterates that "measures of reprisal against prisoners of war are prohibited".⁴⁵⁵

407. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", states that "under the 1949 Geneva Conventions, reprisals may not be directed against... prisoners of war. (The reprisals against British prisoners of war that the US threatened during the Revolution would thus be illegal today, though at the time, reprisals against PWs were lawful.)"⁴⁵⁶

408. The US Soldier's Manual, under the heading "Treat all captives and detainees humanely", tells soldiers that "you must never engage in reprisals or acts of revenge against any persons, enemy or civilian, whom you capture or detain in combat".⁴⁵⁷

409. The US Operational Law Handbook provides that:

The following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity:

- ...
- m. Reprisals against persons or property protected by the Geneva Conventions, to include... prisoners of war, detained personnel...⁴⁵⁸

410. The US Naval Handbook states that "reprisals are forbidden to be taken against: 1. Prisoners of war...".⁴⁵⁹ It also provides that "prisoners of war may not be subjected to collective punishment nor may reprisal action be taken against them".⁴⁶⁰

411. The Annotated Supplement to the US Naval Handbook, with regard to the prohibition of taking reprisals against POWs, states that "in light of the wide acceptance of the 1949 Geneva Conventions by the nations of the world today, this prohibition is part of customary law... The taking of prisoners by

⁴⁵³ US, *Air Force Pamphlet* (1976), § 10-7(b)(1). ⁴⁵⁴ US, *Air Force Pamphlet* (1976), § 10-7(b)(2).

⁴⁵⁵ US, *Air Force Pamphlet* (1976), § 13-2.

⁴⁵⁶ US, *Air Force Commander's Handbook* (1980), § 8-4(c).

⁴⁵⁷ US, *Soldier's Manual* (1984), p. 15.

⁴⁵⁸ US, *Operational Law Handbook* (1993), p. Q-182.

⁴⁵⁹ US, *Naval Handbook* (1995), § 6.2.3.2.

⁴⁶⁰ US, *Naval Handbook* (1995), § 11.7.1.

way of reprisal for acts previously committed (so-called 'reprisal prisoners') is likewise forbidden."⁴⁶¹

412. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . prisoners of war".⁴⁶²

National Legislation

413. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.⁴⁶³

414. Italy's Law of War Decree as amended provides that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".⁴⁶⁴

National Case-law

415. In the *Priebke case* in 1995, Argentina's Public Prosecutor of First Instance, dealing with a Italy's request to extradite the accused, held that the alleged killing in reprisal of 330 civilians and POWs committed by German soldiers in the Ardeatine Caves in Italy during the Second World War was "an act which must be qualified as a war crime".⁴⁶⁵

416. In its judgement in the *Rauter case* in 1949, the Special Court of Cassation of the Netherlands, dealing with the limits to reprisals, stated that "among the limits referred to, the prohibition should especially be mentioned of taking reprisals against prisoners of war, as this was expressly prohibited by Art. 2 of the 1929 [Geneva POW] Convention".⁴⁶⁶

417. In its judgement in the *Dostler case* in 1945, in which a German commander had been accused of having ordered, in March 1944, the shooting of 15 American POWs in violation of the 1907 HR, the US Military Commission at Rome referred to Article 2, third paragraph, of the 1929 Geneva POW Convention and held that from this provision followed that under the law as codified by this Convention there can be no legitimate reprisals against prisoners of war. No soldier, and still less a Commanding General, could be heard to say that he considered the summary shooting of prisoners of war legitimate even as a reprisal. Referring to the decision of the German Reichsgericht in the *Dover Castle case*, the US Military Commission of Rome stated that through the express provision of Article 2, third paragraph, of the 1929 Geneva POW Convention the decision of the German Reichsgericht in the said case had lost

⁴⁶¹ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.2, footnote 45.

⁴⁶² SFRY (FRY), *YPA Military Manual* (1988), § 31(1).

⁴⁶³ Colombia, *Penal Code* (2000), Article 158.

⁴⁶⁴ Italy, *Law of War Decree as amended* (1938), Article 8.

⁴⁶⁵ Argentina, Hearing of the Public Prosecutor of the First Instance, *Priebke case*, 1995, Section V.2.

⁴⁶⁶ Netherlands, Special Court of Cassation, *Rauter case*, Judgement, 12 January 1949.

even such little persuasive authority as it may have had at the time it was rendered.⁴⁶⁷

Other National Practice

418. In 1986, in a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence noted that "the Geneva Conventions of 1949 prohibit reprisals against certain categories of persons such as . . . prisoners of war".⁴⁶⁸

419. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".⁴⁶⁹

420. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that "reprisals are prohibited against . . . prisoners of war . . . The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."⁴⁷⁰

421. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.⁴⁷¹

422. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "3. . . . The measures may not involve any actions prohibited by the Geneva Conventions of 1949."⁴⁷²

423. At the CDDH, the FRG, with respect to the French proposal on reprisals according to which "the measures may not involve any actions prohibited by the Geneva Conventions of 1949", stated that this provision "was the most important in the whole of the proposal since it really did protect prisoners of war".⁴⁷³

⁴⁶⁷ US, Military Commission at Rome, *Dostler case*, Judgement, 8–12 October 1945.

⁴⁶⁸ Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, § 2.

⁴⁶⁹ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

⁴⁷⁰ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.

⁴⁷¹ Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

⁴⁷² France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

⁴⁷³ FRG, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 84, § 6.

424. On the basis of the reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that reprisals "must not be directed, in any way, against . . . prisoners of war . . . , but [have] to be confined to purely military targets".⁴⁷⁴
425. According to the Report on the Practice of Israel, the IDF does not condone nor conduct reprisals against persons or objects protected by the Geneva Conventions.⁴⁷⁵
426. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal".⁴⁷⁶
427. In 1984, during a debate in the UN Security Council, Lebanon stated with respect to Israeli practices that it deplored the fact that the "occupying authorities often resort to inhuman reprisals . . . against the detainees, practices which are in violation of articles 27 and 32 of the fourth Geneva Convention and article 46 of [the 1907 HR]".⁴⁷⁷
428. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".⁴⁷⁸
429. At the CDDH, Poland made a proposal for a draft article on reprisals within API – which it later withdrew – which read, *inter alia*, as follows: "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the [Geneva] Conventions and by the present Protocol are prohibited'".⁴⁷⁹
430. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions.⁴⁸⁰

431. In April 1965, when a North Vietnamese prisoner was sentenced to death by a South Vietnamese court, the communist rebel group announced that if the sentence was carried out, it would kill an American aid officer in their hands. Neither of the executions was carried out. Three months later, a North Vietnamese prisoner was executed apparently after having been tried, convicted and sentenced by a South Vietnamese special military tribunal. A few days

⁴⁷⁴ Report on the Practice of Iraq, 1998, Chapter 2.9, referring to the reply from the Ministry of Defense to a questionnaire, July 1997.

⁴⁷⁵ Report on the Practice of Israel, 1997, Chapter 2.9.

⁴⁷⁶ Report on the Practice of Jordan, 1997, Chapter 2.9.

⁴⁷⁷ Lebanon, Statement before the UN Security Council, UN Doc. S/PV.2552, 29 August 1984, § 22.

⁴⁷⁸ Report on the Practice of the Philippines, 1997, Chapter 2.9.

⁴⁷⁹ Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

⁴⁸⁰ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

later, it was announced that an American sergeant held as a POW had been executed in reprisal. In September 1965, three North Vietnamese prisoners were executed, again apparently after having been tried, convicted and sentenced. The execution of two American POWs in reprisal was announced a few days later.⁴⁸¹ The US refused to accept that the executions were justified as reprisals and the acts were denounced as “two more acts of brutal murder”. The ICRC was asked to take all possible action with respect to these violations.⁴⁸² North Vietnam also threatened to treat captured US pilots as war criminals subject to trial. The US charged that the threat was to justify reprisals for executions by the South Vietnamese of North Vietnamese prisoners as terrorists.⁴⁸³

432. An instruction card issued to all US troops engaged in Vietnam directed soldiers always to treat prisoners humanely, adding that “all persons in your hands, whether suspects, . . . or combat captives, must be protected against violence, insults, curiosity, and reprisals of any kind”.⁴⁸⁴

433. At the 20th International Conference of the Red Cross in 1965, the US delegate declared that his government had been “shocked and deeply saddened by the brutal murder of prisoners of war as acts of reprisals” in the Vietnam War and that it was “profoundly concerned that other prisoners may be executed in violation of international law”.⁴⁸⁵

434. According the Report on US Practice, “the United States does not regard the summary execution of persons in custody as a lawful means of reprisals”.⁴⁸⁶

III. Practice of International Organisations and Conferences

United Nations

435. In 1980, in a statement by its President regarding the capture and killing of two UNIFIL soldiers by the *de facto* forces in southern Lebanon after the UN had been warned that reprisals would be taken if there were any victims following UNIFIL actions, the UN Security Council stated that “the members of the Security Council are shocked and outraged at the report that the Council has received on . . . the cold-blooded murder of peace-keeping soldiers” and denounced the “unprecedented, barbaric act”.⁴⁸⁷

436. In a resolution adopted in 1991 on the situation of human rights in Afghanistan, the UN General Assembly urged all parties to the conflict “to

⁴⁸¹ Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, pp. 295–305.

⁴⁸² US, *Department of State Bulletin*, Vol. LIII, No. 1373, 18 October 1965, p. 635.

⁴⁸³ *N.Y. Times Index*, 1965, p. 1098.

⁴⁸⁴ US, *The enemy in your hands*, Reproduction of 3x5 instruction card issued to all troops, reprinted in George. S. Prugh, *Law at War: Vietnam 1964–1973*, Department of the Army, Vietnam Studies, 1975, Appendix H. III.

⁴⁸⁵ US, *Department of State Bulletin*, Vol. LIII, No. 1375, 1 November 1965, p. 725.

⁴⁸⁶ Report on US Practice, 1997, Chapter 2.9.

⁴⁸⁷ UN Security Council, Statement by the President, UN Doc. S/PV.2217, 18 April 1980, § 15.

protect all prisoners of war from acts of reprisals".⁴⁸⁸ It reiterated this appeal in 1992.⁴⁸⁹

437. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".⁴⁹⁰

438. In a resolution adopted in 1989 on the question of human rights and fundamental freedoms in Afghanistan, the UN Commission on Human Rights urged all parties to the conflict "to treat all prisoners in their custody in accordance with the internationally recognized principles of humanitarian law and to protect them from all acts of reprisal and violence".⁴⁹¹ It reiterated these appeals in 1990, 1991 and 1992.⁴⁹²

439. In 1980, the UN Secretary-General reported to the Security Council that two UNIFIL soldiers had been captured and killed by the *de facto* forces in southern Lebanon. UNIFIL had been warned that if there were any victims following UNIFIL actions, reprisals would be taken.⁴⁹³ A few days later, the UN Under Secretary-General for Special Political Affairs told the Security Council that "this murder of unarmed soldiers can only be described as a killing in cold blood, following on repeated threats by the *de facto* forces against the lives of members of UNIFIL".⁴⁹⁴

440. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Articles 13 GC III and 44 AP I, stated that "reprisals against the following categories of persons and objects are specifically prohibited: . . . (c) Prisoners of war".⁴⁹⁵ It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in

⁴⁸⁸ UN General Assembly, Res. 46/136, 17 December 1991, § 6.

⁴⁸⁹ UN General Assembly, Res. 47/141, 18 December 1992, § 5.

⁴⁹⁰ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

⁴⁹¹ UN Commission on Human Rights, Res. 1989/67, 8 March 1989, § 11.

⁴⁹² UN Commission on Human Rights, Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6.

⁴⁹³ UN Secretary-General, Oral report before the UN Security Council, UN Doc. S/PV.2212, 13 April 1980, § 8.

⁴⁹⁴ UN Under Secretary-General, Statement before the UN Security Council, UN Doc. S/PV.2217, 18 April 1980, § 14.

⁴⁹⁵ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.⁴⁹⁶

Other International Organisations

441. No practice was found.

International Conferences

442. The 21st International Conference of the Red Cross in 1969 adopted a resolution on the protection of prisoners of war in which it recognised that irrespective of GC III,

the international community has consistently demanded humane treatment for prisoners of war, including identification and accounting for all prisoners, provision of an adequate diet and medical care, authorization for prisoners to communicate with each other and with the exterior, the prompt repatriation of seriously sick or wounded prisoners, and protection at all times from physical and mental torture, abuse and reprisals.⁴⁹⁷

IV. Practice of International Judicial and Quasi-judicial Bodies

443. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

444. The US protest against the execution of two American POWs during the Vietnam War, which had been justified as a reprisal, was forwarded to the adversary by the ICRC.⁴⁹⁸

445. In 1980, the ICRC reminded an armed opposition group of its commitment to respect the fundamental rules of IHL, in particular that “nobody will be held responsible for acts he didn’t commit”, which according to the ICRC, “excludes from the outset every recourse to acts of reprisals”.⁴⁹⁹

VI. Other Practice

446. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle

⁴⁹⁶ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

⁴⁹⁷ 21st International Conference of the Red Cross, Istanbul, 6–13 September 1969, Res. XI.

⁴⁹⁸ ICRC, *Annual Report 1965*, Geneva, 1966, pp. 8–17; *Annual Report 1966*, Geneva, 1967, pp. 16–28.

⁴⁹⁹ ICRC archive document.

that “captured combatants . . . shall be protected against all acts of violence and reprisals”.⁵⁰⁰

447. Kalshoven notes that “none of the parties to the conflict in Vietnam have so much hinted at the argument that common Article 3 [of the 1949 Geneva Conventions] would not prohibit reprisals”.⁵⁰¹

Wounded, sick and shipwrecked in the power of the adversary

I. Treaties and Other Instruments

Treaties

448. Article 46 GC I states that “reprisals against the wounded [and] sick . . . protected by the Convention are prohibited”.

449. Article 47 GC II provides that “reprisals against the wounded, sick and shipwrecked persons . . . protected by the Convention are prohibited”.

450. Article 20 AP I, figuring in a part of AP I which gives a more extensive definition of the terms “wounded”, “sick” and “shipwrecked”, provides that “reprisals against the persons and objects protected by this Part are prohibited”. Article 20 AP I was adopted by consensus.⁵⁰²

451. Upon ratification of AP I and AP II, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.⁵⁰³

452. Upon ratification of AP I, Germany stated that “the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation”.⁵⁰⁴

453. Upon ratification of AP I, Italy stated that “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation”.⁵⁰⁵

454. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that “any

⁵⁰⁰ ICRC archive document.

⁵⁰¹ Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, p. 305.

⁵⁰² CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

⁵⁰³ Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.

⁵⁰⁴ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.

⁵⁰⁵ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.

measures thus taken by the United Kingdom... will not involve any action prohibited by the Geneva Conventions of 1949".⁵⁰⁶

Other Instruments

455. Section 7.2 of the 1999 UN Secretary-General's Bulletin, which deals under Section 7.1 with the protection of "persons placed *hors de combat* by reason of sickness [or] wounds...", states that "the following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: ... reprisals".

456. Section 9.6 of the 1999 UN Secretary-General's Bulletin states that "the United Nations force shall not engage in reprisals against the wounded [and] the sick...".

457. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: ... (c) obligations of a humanitarian character prohibiting reprisals".

II. National Practice

Military Manuals

458. Australia's Commanders' Guide, referring to Articles 46 GCI, 47 GC II and 20 AP I, states that "protected persons, such as ... wounded and sick ... should not be the subject of reprisals".⁵⁰⁷

459. Australia's Defence Force Manual provides that "reprisals against the wounded, sick, shipwrecked... are forbidden".⁵⁰⁸ It further states that "protected persons, such as ... wounded and sick... should not be the subject of reprisals".⁵⁰⁹

460. Belgium's Law of War Manual, citing several examples of jurisprudence, states that "the persons protected by the Geneva Conventions (wounded and sick, shipwrecked...)... may not be made the object of reprisals. Therefore, [reprisals] may be directed only against combatants, non-protected property and a restricted group of non-protected civilians."⁵¹⁰

461. Benin's Military Manual states that "the following prohibitions must be respected: ... to launch reprisals against protected persons and property".⁵¹¹ It adds that reprisals "may only be used if: ... they are carried out only against combatants and military objectives".⁵¹²

⁵⁰⁶ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

⁵⁰⁷ Australia, *Commanders' Guide* (1994), § 1212.

⁵⁰⁸ Australia, *Defence Force Manual* (1994), § 985.

⁵⁰⁹ Australia, *Defence Force Manual* (1994), § 1311.

⁵¹⁰ Belgium, *Law of War Manual* (1983), p. 36.

⁵¹¹ Benin, *Military Manual* (1995), Fascicule III, p. 12.

⁵¹² Benin, *Military Manual* (1995), Fascicule III, p. 13.

462. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".⁵¹³

463. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".⁵¹⁴

464. Canada's LOAC Manual, in a section dealing with the treatment of the wounded, sick and shipwrecked, states that "reprisals against the wounded, sick, and shipwrecked are forbidden".⁵¹⁵ In a section dealing with enforcement measures, the manual further provides that "reprisals are permitted against combatants and against objects constituting military objectives".⁵¹⁶ It adds that "reprisals against the following categories of persons and objects are prohibited: . . . a. the wounded, sick . . . protected by [G]C I; b. the wounded, sick and shipwrecked persons . . . protected by [G]C II".⁵¹⁷

465. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".⁵¹⁸

466. Croatia's LOAC Compendium states that reprisals are prohibited against the sick, wounded and shipwrecked. It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".⁵¹⁹

467. Ecuador's Naval Manual provides that "reprisals are forbidden to be taken against: . . . 2. Wounded, sick and shipwrecked persons."⁵²⁰

468. France's Disciplinary Regulations as amended, in a provision entitled "Respect for the rules of international law applicable in armed conflicts" dealing with the duties of and prohibitions for combatants, states that "by virtue of the international conventions ratified or approved: . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".⁵²¹

469. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".⁵²² The manual further refers to Articles 46 GC I, 47 GC II and 20 AP I and states that "reprisals are prohibited against . . . the wounded, sick and shipwrecked".⁵²³

⁵¹³ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁵¹⁴ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁵¹⁵ Canada, *LOAC Manual* (1999), p. 9-1, § 7.

⁵¹⁶ Canada, *LOAC Manual* (1999), p. 15-2, § 16.

⁵¹⁷ Canada, *LOAC Manual* (1999), p. 15-2, § 15.

⁵¹⁸ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁵¹⁹ Croatia, *LOAC Compendium* (1991), p. 19. ⁵²⁰ Ecuador, *Naval Manual* (1989), § 6.2.3.2.

⁵²¹ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁵²² France, *LOAC Manual* (2001), p. 85.

⁵²³ France, *LOAC Manual* (2001), p. 108.

470. Germany's Soldiers' Manual states that "reprisals against [the wounded, sick and shipwrecked] are prohibited".⁵²⁴
471. Germany's Military Manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, provides that "it is expressly prohibited by agreement to make reprisals against: the wounded, sick and shipwrecked".⁵²⁵ In a chapter dealing with the "Protection of the Wounded, Sick and Shipwrecked", the manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, provides that "reprisals against the wounded, sick and shipwrecked are prohibited".⁵²⁶
472. Germany's IHL Manual provides that "reprisals are expressly prohibited against the wounded, sick and shipwrecked".⁵²⁷
473. Hungary's Military Manual states that reprisals against the "wounded, sick and shipwrecked" are prohibited. It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".⁵²⁸
474. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".⁵²⁹
475. Italy's IHL Manual, providing for the prohibition of reprisals against the wounded, sick and shipwrecked, states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals, such as, for instance, the rules regarding... the wounded and the sick".⁵³⁰
476. Kenya's LOAC Manual states that "it is forbidden:...(e) to carry out reprisals against protected persons or property".⁵³¹ In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives... The Geneva Conventions and [AP I] prohibit reprisals against... the wounded, sick and shipwrecked".⁵³²
477. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.⁵³³
478. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: ... to take hostages, to engage in reprisals or collective punishments".⁵³⁴
479. The Military Manual of the Netherlands, in the chapter dealing with the protection of the wounded and sick and referring to Article 20 AP I, states that "measures of reprisal are prohibited against... the wounded, sick... in short against all protected persons and objects".⁵³⁵

⁵²⁴ Germany, *Soldiers' Manual* (1991), p. 5.

⁵²⁵ Germany, *Military Manual* (1992), § 479. ⁵²⁶ Germany, *Military Manual* (1992), § 604.

⁵²⁷ Germany, *IHL Manual* (1996), § 320. ⁵²⁸ Hungary, *Military Manual* (1992), p. 35.

⁵²⁹ Indonesia, *Air Force Manual* (1990), § 15(c). ⁵³⁰ Italy, *IHL Manual* (1991), Vol. I, § 25.

⁵³¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

⁵³² Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

⁵³³ Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

⁵³⁴ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁵³⁵ Netherlands, *Military Manual* (1993), p. VI-9.

480. The Military Handbook of the Netherlands states that “protected persons under the laws of war are: the wounded, sick and shipwrecked, regardless of whether they are military personnel or civilians . . . Reprisals against them must not be taken.”⁵³⁶ In the chapter dealing with the wounded and sick, the Handbook further states that “reprisals against [wounded and sick military personnel who have laid down their arms] are prohibited”.⁵³⁷

481. New Zealand’s Military Manual, in the chapter dealing with the wounded, sick and shipwrecked and referring to Articles 46 GC I, 47 GC II and 20 AP I, states that “reprisals against the wounded, sick, shipwrecked . . . are forbidden”.⁵³⁸ In the chapter dealing with reprisals, the manual states that “reprisals against the following categories of persons and objects are prohibited: a) the wounded, sick . . . protected by [Article 46 GC I]; b) the wounded, sick and shipwrecked persons . . . protected by [Article 47 GC II]”.⁵³⁹

482. Nigeria’s Military Manual, in a part dealing with GC I, states that reprisals “are prohibited ‘against the wounded, sick . . . protected by the convention’ (Art. 46)”.⁵⁴⁰

483. South Africa’s LOAC Manual states that “reprisals against . . . the persons and objects of . . . the wounded and sick . . . are prohibited”.⁵⁴¹

484. Spain’s LOAC Manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, lists among the persons against whom the taking of reprisals is prohibited “the wounded, sick and shipwrecked as well as specially protected persons”.⁵⁴²

485. Sweden’s IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.⁵⁴³

486. Switzerland’s Basic Military Manual referring, *inter alia*, to Article 46 GC I, states that “by virtue of the Geneva Conventions and their Additional Protocols, [reprisals] are prohibited with regard to the wounded and sick”.⁵⁴⁴

487. Togo’s Military Manual states that “the following prohibitions must be respected: . . . to launch reprisals against protected persons and property”.⁵⁴⁵ It

⁵³⁶ Netherlands, *Military Handbook* (1995), p. 7-38.

⁵³⁷ Netherlands, *Military Handbook* (1995), p. 7-40.

⁵³⁸ New Zealand, *Military Manual* (1992), § 1002(7).

⁵³⁹ New Zealand, *Military Manual* (1992), § 1606(2).

⁵⁴⁰ Nigeria, *Military Manual* (1994), p. 14, § 5.

⁵⁴¹ South Africa, *LOAC Manual* (1996), § 34(e).

⁵⁴² Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

⁵⁴³ Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

⁵⁴⁴ Switzerland, *Basic Military Manual* (1987), Article 197(2).

⁵⁴⁵ Togo, *Military Manual* (1996), Fascicule III, p. 12.

adds that reprisals “may only be used if: . . . they are carried out only against combatants and military objectives”.⁵⁴⁶

488. The UK Military Manual, in the part dealing with the sick, wounded and dead, refers to the provisions which GC I and GC II have in common with GC III and states that “the provisions of [GC I] are substantially the same as in the other 1949 [Geneva] Conventions. This applies in particular to such questions as . . . the prohibition of reprisals.”⁵⁴⁷ In the part dealing with reprisals, and referring to Articles 14 and 46 GC I and 16 and 47 GC II, the manual states that “reprisals against . . . sick, and wounded and against shipwrecked members of the enemy armed forces . . . protected by [GC I and GC II] . . . are . . . prohibited”.⁵⁴⁸ In a footnote relating to this provision, the manual notes that “the effect of this rule is that reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons”.⁵⁴⁹ In a footnote relating to another provision, the manual moreover states that “reprisals against wounded and sick . . . constitute war crimes”.⁵⁵⁰

489. The UK LOAC Manual provides that “the Geneva Conventions and [AP I] prohibit reprisals against . . . the wounded, sick and shipwrecked”.⁵⁵¹

490. The US Field Manual, referring to Articles 13 GC III and 33 GC IV, provides that “reprisals against the persons or property of prisoners of war, including the wounded and sick, . . . are forbidden . . . However, reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals.”⁵⁵²

491. The US Air Force Pamphlet, referring to Articles 46 GC I and 47 GC II, provides that:

Reprisals against the wounded [and] sick . . . protected by [GC I] are prohibited . . .

Reprisals against the wounded, sick and shipwrecked persons . . . protected by [GC II] are prohibited . . .

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.⁵⁵³

The Pamphlet further states that:

Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For

⁵⁴⁶ Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁵⁴⁷ UK, *Military Manual* (1958), § 385.

⁵⁴⁸ UK, *Military Manual* (1958), § 644. ⁵⁴⁹ UK, *Military Manual* (1958), § 644, footnote 2.

⁵⁵⁰ UK, *Military Manual* (1958), § 647, footnote 1.

⁵⁵¹ UK, *LOAC Manual* (1981), Section 4, p. 17, § 16. ⁵⁵² US, *Field Manual* (1956), § 497(c).

⁵⁵³ US, *Air Force Pamphlet* (1976), § 10-7(b)(1).

definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted.⁵⁵⁴

492. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", states that "under the 1949 Geneva Conventions, reprisals may not be directed against... the sick and wounded [and] the shipwrecked".⁵⁵⁵

493. The US Operational Law Handbook provides that "the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . m. Reprisals against persons or property protected by the Geneva Conventions, to include the wounded, sick, or shipwrecked."⁵⁵⁶

494. The US Naval Handbook states that "reprisals are forbidden to be taken against: . . . 2. Wounded, sick and shipwrecked persons."⁵⁵⁷

495. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . the sick, the wounded and the shipwrecked".⁵⁵⁸

National Legislation

496. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.⁵⁵⁹

497. Italy's Law of War Decree as amended provides that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".⁵⁶⁰

National Case-law

498. No practice was found.

Other National Practice

499. At the CDDH, following the adoption of Article 20 API, Colombia stated that it "was opposed to any kind of reprisals".⁵⁶¹

500. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that "reprisals are prohibited against the wounded, sick and shipwrecked . . . The prohibition applies in respect of all weapons. In

⁵⁵⁴ US, *Air Force Pamphlet* (1976), § 10-7(b)(2).

⁵⁵⁵ US, *Air Force Commander's Handbook* (1980), § 8-4(c).

⁵⁵⁶ US, *Operational Law Handbook* (1993), p. Q-182.

⁵⁵⁷ US, *Naval Handbook* (1995), § 6.2.3.2.

⁵⁵⁸ SFRY (FRY), *YPA Military Manual* (1988), § 31(1).

⁵⁵⁹ Colombia, *Penal Code* (2000), Article 158.

⁵⁶⁰ Italy, *Law of War Decree as amended* (1938), Article 8.

⁵⁶¹ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."⁵⁶²

501. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.⁵⁶³

502. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read as follows “3. . . . The measures may not involve any actions prohibited by the Geneva Conventions of 1949.”⁵⁶⁴

503. On the basis of the reply by Iraq’s Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that reprisals “must not be directed, in any way, against the injured, sick . . . , but [have] to be confined to purely military targets”.⁵⁶⁵

504. According to the Report on the Practice of Israel, the IDF does not condone or conduct reprisals against persons or objects protected by the Geneva Conventions.⁵⁶⁶

505. According to the Report on the Practice of Jordan, “the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal.”⁵⁶⁷

506. The Report on the Practice of the Philippines states that “reprisals are generally prohibited”.⁵⁶⁸

507. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read as follows: “Insert a new article after [draft] Article 70 worded as follows: ‘Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited’.”⁵⁶⁹

⁵⁶² Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.

⁵⁶³ Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

⁵⁶⁴ France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

⁵⁶⁵ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.9.

⁵⁶⁶ Report on the Practice of Israel, 1997, Chapter 2.9.

⁵⁶⁷ Report on the Practice of Jordan, 1997, Chapter 2.9.

⁵⁶⁸ Report on the Practice of the Philippines, 1997, Chapter 2.9.

⁵⁶⁹ Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

508. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1994, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

During hostilities, it is forbidden to resort to reprisals against . . . the injured [and] the infirm . . . The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.⁵⁷⁰

509. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions.⁵⁷¹

510. In 1987, the Deputy Legal Adviser of the US Department of State, mentioning that the protection of the wounded, sick and shipwrecked was an area in which AP I “does contain some useful codifications or improvements of existing rules”, affirmed that “we support the principle that all the wounded, sick, and shipwrecked be respected and protected, and not be made the object of attacks or reprisals, regardless of the party to the conflict to which they belong”.⁵⁷²

511. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US noted that it considered that the provisions of AP I regarding reprisals were “new rules”.⁵⁷³

III. Practice of International Organisations and Conferences

United Nations

512. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft

⁵⁷⁰ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

⁵⁷¹ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

⁵⁷² US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

⁵⁷³ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

Articles on State Responsibility, and thus Article 50(1)(c) stating that “Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals”, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.⁵⁷⁴

513. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Articles 46 GC I and 47 GC II, stated that “reprisals against the following categories of persons and objects are specifically prohibited: (a) The wounded [and] sick . . . protected by the First Geneva Convention . . .; (b) The wounded, sick and shipwrecked persons . . . protected by the Second Geneva Convention.”⁵⁷⁵ It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.⁵⁷⁶

Other International Organisations

514. No practice was found.

International Conferences

515. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

516. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

517. No practice was found.

VI. Other Practice

518. No practice was found.

⁵⁷⁴ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

⁵⁷⁵ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

⁵⁷⁶ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

Medical and religious personnel in the power of the adversary

I. Treaties and Other Instruments

Treaties

519. Articles 46 GC I and 47 GC II provide that “reprisals against the... personnel... protected by the Convention are prohibited”.

520. Article 20 AP I, figuring in a part of AP I which extends the category of persons who cannot be the object of reprisals to the wider range of personnel and objects involved in the care of the wounded, the sick and the shipwrecked, states that “reprisals against the persons and objects protected by this Part are prohibited”. Article 20 AP I was adopted by consensus.⁵⁷⁷

521. Upon ratification of AP I and AP II, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.⁵⁷⁸

522. Upon ratification of AP I, Germany stated that “the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation”.⁵⁷⁹

523. Upon ratification of AP I, Italy stated that “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation”.⁵⁸⁰

524. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that “any measures thus taken by the United Kingdom... will not involve any action prohibited by the Geneva Conventions of 1949”.⁵⁸¹

Other Instruments

525. Section 9.6 of the 1999 UN Secretary-General’s Bulletin which deals under Section 9.4 with the protection of “medical personnel exclusively engaged in the search for, transport or treatment of the wounded or sick, as well as religious personnel”, states that “the United Nations force shall not engage in reprisals against... the personnel... protected under this section”.

⁵⁷⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

⁵⁷⁸ Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.

⁵⁷⁹ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.

⁵⁸⁰ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.

⁵⁸¹ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

526. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with “Obligations not affected by countermeasures”, states that “countermeasures shall not affect: . . . (c) obligations of a humanitarian character prohibiting reprisals”.

II. National Practice

Military Manuals

527. Australia’s Commanders’ Guide, referring to Articles 46 GC I, 47 GC II and 20 AP I, states that “protected persons, such as medical personnel . . . should not be the subject of reprisals”.⁵⁸²

528. Australia’s Defence Force Manual provides that “reprisals against . . . medical personnel . . . are forbidden”.⁵⁸³ It also states that “protected persons, such as medical personnel . . . should not be the subject of reprisals”.⁵⁸⁴

529. Belgium’s Law of War Manual, citing several examples of jurisprudence, states that “the persons protected by the Geneva Conventions . . . may not be made the object of reprisals. Therefore, [reprisals] may be directed only against combatants, non-protected property and a restricted group of non-protected civilians.”⁵⁸⁵

530. Benin’s Military Manual states that “the following prohibitions must be respected: . . . to launch reprisals against protected persons and property”.⁵⁸⁶ It adds that reprisals “may only be used if: . . . they are carried out only against combatants and military objectives”.⁵⁸⁷

531. Burkina Faso’s Disciplinary Regulations, in a provision entitled “Laws and customs of war” dealing with the duties of and prohibitions for combatants, states that “it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments”.⁵⁸⁸

532. Cameroon’s Disciplinary Regulations states that “it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments”.⁵⁸⁹

533. Canada’s LOAC Manual, in a section dealing with enforcement measures, provides that “reprisals are permitted against combatants and against objects constituting military objectives”.⁵⁹⁰ In the same section, the manual states that “reprisals against the following categories of persons and objects are prohibited: a. the . . . medical personnel . . . protected by [G]C I; b. the . . . personnel . . . protected by [G]C II”.⁵⁹¹

⁵⁸² Australia, *Commanders’ Guide* (1994), § 1212.

⁵⁸³ Australia, *Defence Force Manual* (1994), § 985.

⁵⁸⁴ Australia, *Defence Force Manual* (1994), § 1311.

⁵⁸⁵ Belgium, *Law of War Manual* (1983), p. 36.

⁵⁸⁶ Benin, *Military Manual* (1995), Fascicule III, p. 12.

⁵⁸⁷ Benin, *Military Manual* (1995), Fascicule III, p. 13.

⁵⁸⁸ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁵⁸⁹ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁵⁹⁰ Canada, *LOAC Manual* (1999), p. 15-2, § 16.

⁵⁹¹ Canada, *LOAC Manual* (1999), p. 15-2, § 15.

534. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo, . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".⁵⁹²

535. Croatia's LOAC Compendium provides for the prohibition of taking reprisals against "specifically protected persons and objects".⁵⁹³

536. Ecuador's Naval Manual provides that "reprisals are forbidden to be taken against: . . . 4. Hospitals and medical facilities, personnel, and equipment."⁵⁹⁴

537. France's Disciplinary Regulations as amended, in a provision entitled "Respect for the rules of international law applicable in armed conflicts" dealing with the duties of and prohibitions for combatants, states that "by virtue of the international conventions ratified or approved: . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".⁵⁹⁵

538. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".⁵⁹⁶ The manual refers to Articles 46 GC I, 47 GC II and 20 AP I and states that "reprisals are prohibited against . . . the persons and objects particularly protected".⁵⁹⁷

539. Germany's Military Manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, provides that "it is expressly prohibited by agreement to make reprisals against: . . . medical and religious personnel".⁵⁹⁸ Referring to Articles 46 GC I and 47 GC II, the manual further provides that "reprisals against chaplains are prohibited. This prohibition shall protect chaplains from any restriction of the rights assigned to them."⁵⁹⁹

540. Germany's IHL Manual provides that "reprisals are expressly prohibited against . . . medical and religious personnel".⁶⁰⁰

541. Hungary's Military Manual provides for the prohibition of reprisals against "specifically protected persons and objects".⁶⁰¹

542. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".⁶⁰²

543. Italy's IHL Manual, providing for the prohibition of reprisals against protected medical personnel and protected persons, states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".⁶⁰³

⁵⁹² Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁵⁹³ Croatia, *LOAC Compendium* (1991), p. 19. ⁵⁹⁴ Ecuador, *Naval Manual* (1989), § 6.2.3.2.

⁵⁹⁵ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁵⁹⁶ France, *LOAC Manual* (2001), p. 85. ⁵⁹⁷ France, *LOAC Manual* (2001), p. 108.

⁵⁹⁸ Germany, *Military Manual* (1992), § 479. ⁵⁹⁹ Germany, *Military Manual* (1992), § 814.

⁶⁰⁰ Germany, *IHL Manual* (1996), § 320. ⁶⁰¹ Hungary, *Military Manual* (1992), p. 35.

⁶⁰² Indonesia, *Air Force Manual* (1990), § 15(c). ⁶⁰³ Italy, *IHL Manual* (1991), Vol. I, § 25.

544. Kenya's LOAC Manual states that "it is forbidden: ... (e) to carry out reprisals against protected persons or property".⁶⁰⁴ In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives... The Geneva Conventions and [AP I] prohibit reprisals against... medical and religious personnel".⁶⁰⁵

545. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.⁶⁰⁶

546. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: ... to take hostages, to engage in reprisals or collective punishments".⁶⁰⁷

547. The Military Manual of the Netherlands, in the chapter dealing with the protection of the wounded and sick, states that "measures of reprisal are prohibited against... medical and religious personnel... in short against all protected persons and objects".⁶⁰⁸

548. The Military Handbook of the Netherlands states that "protected persons under the laws of war are: ... medical personnel, both military and civil; religious personnel with the armed forces... Reprisals against them must not be taken."⁶⁰⁹

549. New Zealand's Military Manual, in the chapter dealing with the wounded, sick and shipwrecked and referring to Articles 46 GC I, 47 GC II and 20 AP I, states that "reprisals against medical personnel, buildings and equipment are forbidden".⁶¹⁰ In the chapter dealing with reprisals, the manual further states that "reprisals against the following categories of persons and objects are prohibited... a) the... personnel... protected by [Article 46 GC I]; b) the... personnel... protected by [Article 47 GC II]".⁶¹¹

550. Nigeria's Military Manual, in a part dealing with GC I, states that reprisals "are prohibited 'against the... personnel... protected by the convention' (Art. 46)".⁶¹²

551. Nigeria's Manual on the Laws of War, which states that "it is prohibited to take measures of reprisal against prisoners of war as a retaliation for [a] violation of the Laws of War by the enemy", also provides for the same protection and benefits to be granted, as a minimum, to medical personnel and military chaplains captured by the enemy.⁶¹³

⁶⁰⁴ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

⁶⁰⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

⁶⁰⁶ Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

⁶⁰⁷ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁶⁰⁸ Netherlands, *Military Manual* (1993), p. VI-9.

⁶⁰⁹ Netherlands, *Military Handbook* (1995), p. 7-38.

⁶¹⁰ New Zealand, *Military Manual* (1992), § 1002(7).

⁶¹¹ New Zealand, *Military Manual* (1992), § 1606(2).

⁶¹² Nigeria, *Military Manual* (1994), p. 14, § 5.

⁶¹³ Nigeria, *Manual on the Laws of War* (undated), §§ 33 and 37.

552. Spain's LOAC Manual, referring to Articles 46 GC I, 47 GC II and 20 API, lists among the persons against whom the taking of reprisals is prohibited "specially protected persons".⁶¹⁴

553. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.⁶¹⁵

554. Switzerland's Basic Military Manual, referring, *inter alia*, to Article 46 GC I, states that "by virtue of the Geneva Conventions and their Additional Protocols, [reprisals] are prohibited with regard to . . . medical personnel".⁶¹⁶

555. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".⁶¹⁷ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".⁶¹⁸

556. The UK Military Manual, in a footnote relating to a provision which refers to Articles 14 and 46 GC I and 16 and 47 GC II, notes that "reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons".⁶¹⁹

557. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against . . . medical and religious personnel".⁶²⁰

558. The US Air Force Pamphlet, referring to Articles 46 GC I and 47 GC II, provides that:

Reprisals against the . . . personnel . . . protected by [GC I] are prohibited . . .

Reprisals against . . . the persons protected by [GC II] are prohibited . . .

No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.⁶²¹

The Pamphlet further states that:

Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For

⁶¹⁴ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

⁶¹⁵ Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

⁶¹⁶ Switzerland, *Basic Military Manual* (1987), Article 197(2).

⁶¹⁷ Togo, *Military Manual* (1996), Fascicule III, p. 12.

⁶¹⁸ Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁶¹⁹ UK, *Military Manual* (1958), § 644, footnote 2.

⁶²⁰ UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.

⁶²¹ US, *Air Force Pamphlet* (1976), § 10-7(b)(1).

definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted.⁶²²

559. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", states that "under the 1949 Geneva Conventions, reprisals may not be directed against . . . medical personnel".⁶²³

560. The US Operational Law Handbook provides that "the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . m. Reprisals against persons or property protected by the Geneva Conventions."⁶²⁴

561. The US Naval Handbook states that "reprisals are forbidden to be taken against: . . . 4. Hospitals and medical facilities, personnel, and equipment."⁶²⁵

562. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . medical personnel, medical units".⁶²⁶

National Legislation

563. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning . . . medical organisations and their personnel . . . During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.⁶²⁷

564. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.⁶²⁸

565. Italy's Law of War Decree as amended provides that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".⁶²⁹

National Case-law

566. No practice was found.

⁶²² US, *Air Force Pamphlet* (1976), § 10-7(b)(2).

⁶²³ US, *Air Force Commander's Handbook* (1980), § 8-4(c).

⁶²⁴ US, *Operational Law Handbook* (1993), p. Q-182.

⁶²⁵ US, *Naval Handbook* (1995), § 6.2.3.2.

⁶²⁶ SFRY (FRY), *YPA Military Manual* (1988), § 31(2).

⁶²⁷ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.

⁶²⁸ Colombia, *Penal Code* (2000), Article 158.

⁶²⁹ Italy, *Law of War Decree as amended* (1938), Article 8.

Other National Practice

567. At the CDDH, Australia proposed an amendment to Article 20 of draft AP I which read: "Measures in the nature of reprisals against the persons and objects protected by this Part are prohibited."⁶³⁰ However, the Australian delegation noted that "the law concerning reprisals was far from settled and it might be found not to be applicable to peoples fighting wars of self-determination to which draft [AP I] had now been extended".⁶³¹

568. In 1986, in a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence noted that "the Geneva Conventions of 1949 prohibit reprisals against certain categories of persons such as medical personnel".⁶³²

569. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".⁶³³

570. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that "reprisals are prohibited against . . . medical services and personnel . . . The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."⁶³⁴

571. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.⁶³⁵

572. According to the Report on the Practice of Egypt, military communiqués issued during the Middle East War in 1973 and Egypt's declaration upon ratification of AP I highlight Egypt's position according to which reprisals should not be directed against protected persons and objects, but that this would not prevent Egypt from resorting to reprisals "in the most strict limits possible".⁶³⁶

573. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "3. . . . The

⁶³⁰ Australia, New proposal concerning Article 20 draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/II/214, 13 February 1975, p. 97.

⁶³¹ Australia, Statement at the CDDH, *Official Records*, Vol. XI, CDDH/II/SR.23, 24 February 1975, § 13.

⁶³² Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, § 2.

⁶³³ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

⁶³⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.

⁶³⁵ Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

⁶³⁶ Report on the Practice of Egypt, 1997, Chapter 2.9.

measures may not involve any actions prohibited by the Geneva Conventions of 1949."⁶³⁷

574. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that reprisals should not be directed against civilians and civilian objects, but only against military targets.⁶³⁸

575. According to the Report on the Practice of Israel, the IDF does not condone or conduct reprisals against persons or objects protected by the Geneva Conventions.⁶³⁹

576. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law... In practice, Jordan never resorted to attacks by way of reprisal".⁶⁴⁰

577. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".⁶⁴¹

578. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'".⁶⁴²

579. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands in 1994, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

During hostilities, it is forbidden to resort to reprisals against medical installations, transportation and units... The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties... A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV)... The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.⁶⁴³

580. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

⁶³⁷ France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

⁶³⁸ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.9.

⁶³⁹ Report on the Practice of Israel, 1997, Chapter 2.9.

⁶⁴⁰ Report on the Practice of Jordan, 1997, Chapter 2.9.

⁶⁴¹ Report on the Practice of the Philippines, 1997, Chapter 2.9.

⁶⁴² Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

⁶⁴³ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions.⁶⁴⁴

581. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Articles 12–20 AP I, affirmed that “we . . . support the principle that medical units, including properly authorized civilian medical units, be respected and protected at all times and not be the object of attacks or reprisals”.⁶⁴⁵

582. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US noted that it considered that the provisions of AP I regarding reprisals were “new rules”.⁶⁴⁶

III. Practice of International Organisations and Conferences

United Nations

583. In 2001, the UN General Assembly adopted a resolution on responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that “Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals”, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.⁶⁴⁷

584. In 1994 in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Articles 46 GC I and 47 GC II, stated that “reprisals against the following categories of persons and objects are specifically prohibited: (a) The . . . personnel . . . protected by the First Geneva Convention . . .; (b) The . . . personnel . . . protected by the Second Geneva Convention.”⁶⁴⁸ It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in

⁶⁴⁴ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

⁶⁴⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

⁶⁴⁶ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

⁶⁴⁷ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

⁶⁴⁸ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.⁶⁴⁹

Other International Organisations

585. No practice was found.

International Conferences

586. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

587. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

588. No practice was found.

VI. Other Practice

589. No practice was found.

Civilians in the power of the adversary

I. Treaties and Other Instruments

Treaties

590. Article 33, third paragraph, GC IV provides that “reprisals against protected persons . . . are prohibited”.

591. In its reservations and declarations made upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that “any measures thus taken by the United Kingdom . . . will not involve any action prohibited by the Geneva Conventions of 1949”.⁶⁵⁰

⁶⁴⁹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

⁶⁵⁰ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

Other Instruments

592. Section 7.2 of the 1999 UN Secretary-General's Bulletin which deals under Section 7.1 with the protection of "persons not, or no longer, taking part in military operations, including civilians . . . and persons placed *hors de combat* by reason of . . . detention", states that "the following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: . . . reprisals".

593. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) obligations of a humanitarian character prohibiting reprisals".

*II. National Practice**Military Manuals*

594. Argentina's Law of War Manual (1969), in the chapter dealing with the "Protection of civilian persons in times of war", which contains "provisions common to the territories of the belligerent parties and occupied territories", states that "measures of reprisal with respect to protected persons and their property remain equally prohibited".⁶⁵¹

595. Argentina's Regulation for the Treatment of POWs, in a part dealing with interned civilians, states that "reprisals against innocent interned [persons] are prohibited".⁶⁵²

596. Argentina's Law of War Manual (1989), in a part dealing with the "Treatment given to protected persons", which contains "provisions common to the territories of the belligerent parties and occupied territories", refers to Article 33 GC IV and provides that "remain absolutely prohibited: . . . measures of reprisal against protected persons and their objects".⁶⁵³ In an annex containing a list of "Fundamental rules of International Humanitarian Law applicable in armed conflict", the manual provides that "civilian persons who find themselves in the hands of the adversary . . . will be protected against all acts of violence and reprisals".⁶⁵⁴

597. Australia's Commanders' Guide refers to Article 33 GC IV and states that "protected persons, such as . . . civilians . . . should not be the subject of reprisals".⁶⁵⁵

598. Australia's Defence Force Manual, in a provision entitled "Effects of occupation on the population", provides that "measures for the control of the population which are prohibited include: . . . reprisals or collective penalties".⁶⁵⁶

⁶⁵¹ Argentina, *Law of War Manual* (1969), § 4.012(3).

⁶⁵² Argentina, *Regulation for the Treatment of POWs* (1985), § 4.02(5).

⁶⁵³ Argentina, *Law of War Manual* (1989), § 4.29(5).

⁶⁵⁴ Argentina, *Law of War Manual* (1989), Annex 10, § 4.

⁶⁵⁵ Australia, *Commanders' Guide* (1994), § 1212.

⁶⁵⁶ Australia, *Defence Force Manual* (1994), § 1221(c).

599. Belgium's Law of War Manual, citing several examples of jurisprudence and referring to Articles 4 and 33 GC IV, states that "the persons protected by the Geneva Conventions (. . . civilians) . . . may not be made the object of reprisals. Therefore, [reprisals] may be directed only against combatants, non-protected property and a restricted group of non-protected civilians."⁶⁵⁷

600. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property"⁶⁵⁸ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives"⁶⁵⁹

601. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments"⁶⁶⁰

602. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments"⁶⁶¹

603. Canada's LOAC Manual, in a chapter entitled "Treatment of civilians in the hands of a party to the conflict or an occupying power" and, more specifically, in a section containing "Provisions common to the territories of the parties to the conflict and to occupied territories", refers to GC IV and states that "the following are expressly prohibited: . . . the taking of reprisals against protected persons and their property"⁶⁶² In a section dealing with enforcement measures, the manual further provides that "reprisals are permitted against combatants and against objects constituting military objectives"⁶⁶³ In the same section, it also states that "reprisals against the following categories of persons and objects are prohibited: . . . d. civilians in the hands of a party to the conflict of which they are not nationals, including inhabitants of occupied territory"⁶⁶⁴

604. Colombia's Circular on Fundamental Rules of IHL provides that "civilian persons under the authority of the adversary . . . shall be protected against . . . reprisals"⁶⁶⁵

605. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments"⁶⁶⁶

⁶⁵⁷ Belgium, *Law of War Manual* (1983), p. 36.

⁶⁵⁸ Benin, *Military Manual* (1995), Fascicule III, p. 12.

⁶⁵⁹ Benin, *Military Manual* (1995), Fascicule III, p. 13.

⁶⁶⁰ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁶⁶¹ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁶⁶² Canada, *LOAC Manual* (1999), p. 11-4, § 33.

⁶⁶³ Canada, *LOAC Manual* (1999), p. 15-2, § 16.

⁶⁶⁴ Canada, *LOAC Manual* (1999), p. 15-2, § 15.

⁶⁶⁵ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 4.

⁶⁶⁶ Congo, *Disciplinary Regulations* (1986), Article 32(2).

606. The Military Manual of the Dominican Republic, under the heading “Treat all captives and detainees humanely”, states that “you must never carry out reprisals or acts of vengeance against any person, enemy or civilian, you have taken prisoner or detained during the fighting”. It also provides that “the Geneva Convention prohibits reprisals against civilians for the acts of enemy soldiers”.⁶⁶⁷

607. Ecuador’s Naval Manual provides that “reprisals may be taken against enemy armed forces, [and] enemy civilians other than those in occupied territory”.⁶⁶⁸

608. Ecuador’s Naval Manual further provides that “reprisals are forbidden to be taken against: . . . 3. Civilians in occupied territory.”⁶⁶⁹ The manual also provides that “interned civilians . . . may not be subjected to collective punishment or acts of reprisal”.⁶⁷⁰

609. France’s Disciplinary Regulations as amended, in a provision entitled “Respect for the rules of international law applicable in armed conflicts” dealing with the duties of and prohibitions for combatants, states that “by virtue of the international conventions ratified or approved: . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments”.⁶⁷¹

610. France’s LOAC Summary Note provides that “civilians in the power of the adversary must be protected against violence and reprisals”.⁶⁷²

611. France’s LOAC Manual, in the chapter dealing with means and methods of warfare, states that “the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives”.⁶⁷³ The manual further refers to Articles 33 GC IV and 20 AP I and states that “reprisals are prohibited against civilian persons”.⁶⁷⁴

612. Germany’s Military Manual, in the chapter dealing with reprisals, refers to Articles 33 GC IV and 51 AP I and provides that “it is expressly prohibited by agreement to make reprisals against: . . . civilians”.⁶⁷⁵ Referring to Articles 33 GC IV and 20 and 51 AP I, the manual further states that “reprisals against the civilian population . . . are prohibited”.⁶⁷⁶ In a chapter entitled “Belligerent occupation”, the manual, referring to Articles 33 GC IV and 20 and 51 AP I, states that “reprisals against civilians . . . are prohibited”.⁶⁷⁷

613. Hungary’s Military Manual provides for the prohibition of taking reprisals against “specifically protected persons and objects”.⁶⁷⁸

⁶⁶⁷ Dominican Republic, *Military Manual* (1980), pp. 7 and 10.

⁶⁶⁸ Ecuador, *Naval Manual* (1989), § 6.2.3.

⁶⁶⁹ Ecuador, *Naval Manual* (1989), § 6.2.3.2. ⁶⁷⁰ Ecuador, *Naval Manual* (1989), § 11.9.

⁶⁷¹ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁶⁷² France, *LOAC Summary Note* (1992), § 2.1. ⁶⁷³ France, *LOAC Manual* (2001), p. 85.

⁶⁷⁴ France, *LOAC Manual* (2001), p. 108. ⁶⁷⁵ Germany, *Military Manual* (1992), § 479.

⁶⁷⁶ Germany, *Military Manual* (1992), § 507. ⁶⁷⁷ Germany, *Military Manual* (1992), § 535.

⁶⁷⁸ Hungary, *Military Manual* (1992), p. 35.

614. India's Manual of Military Law prohibits reprisals. This provision is in a section relative to the action by a commander acting in aid of civil authorities for the handling of crowds and mobs. It adds that action is preventive and not punitive and that no soldier can punish a civilian, except under martial law.⁶⁷⁹

615. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".⁶⁸⁰

616. Italy's IHL Manual, in a chapter dealing with occupied territory, states that "in occupied territories, civilian persons have the following rights: . . . they may not be . . . made the object of reprisals".⁶⁸¹

617. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".⁶⁸² In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . civilians".⁶⁸³

618. Madagascar's Military Manual, in the part dealing with civilian persons, instructs soldiers to "protect them against ill-treatment". It states that "acts of vengeance . . . are prohibited".⁶⁸⁴ The manual further instructs soldiers to refrain from all acts of revenge.⁶⁸⁵ In its attached list of "Fundamental rules of international humanitarian law applicable in armed conflicts", the manual states that "captured combatants and civilians who are under the authority of the adverse party . . . will be protected against any act of violence and reprisals".⁶⁸⁶

619. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".⁶⁸⁷

620. The Military Manual of the Netherlands, in the chapter dealing with the protection of the civilian population and referring to Article 33 GC IV, states that "a protected person cannot be punished for acts which he/she has not personally committed. Collective punishments are also prohibited."⁶⁸⁸

621. New Zealand's Military Manual, in the chapter dealing with civilians and referring to Articles 32–34 GC IV, states that "the following are . . . prohibited: . . . the taking of reprisals against protected persons and their property".⁶⁸⁹ In the chapter dealing with reprisals and referring to Articles 33 GC IV and 73 AP I, the manual states that "reprisals against the following categories of persons and objects are prohibited . . . d) civilians in the hands of a

⁶⁷⁹ India, *Manual of Military Law* (1983), Vol. 1, Chapter VII, § 8.

⁶⁸⁰ Indonesia, *Air Force Manual* (1990), § 15(c). ⁶⁸¹ Italy, *IHL Manual* (1991), Vol. I, § 41(f).

⁶⁸² Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

⁶⁸³ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

⁶⁸⁴ Madagascar, *Military Manual* (1994), Fiche No. 4-T, § 23(3).

⁶⁸⁵ Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

⁶⁸⁶ Madagascar, *Military Manual* (1994), p. 91, Rule 4.

⁶⁸⁷ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁶⁸⁸ Netherlands, *Military Manual* (1993), p. VIII-2.

⁶⁸⁹ New Zealand, *Military Manual* (1992), § 1116(2)(d).

Party to the conflict of which they are not nationals, including inhabitants of occupied territory".⁶⁹⁰

622. South Africa's LOAC Manual states that "reprisals against the persons and property of . . . protected civilians are prohibited".⁶⁹¹

623. Spain's LOAC Manual lists among the persons against whom the taking of reprisals is prohibited "civilian persons and objects". It refers, however, to Article 46 GC I.⁶⁹²

624. Sweden's IHL Manual, referring to Article 33 GC IV, states that:

Protected persons may not be punished for actions they have not themselves performed. Collective punishment of a whole group is also prohibited. Also, the occupying power may not punish protected persons . . . in reprisal for some action directed against the occupying power. If disturbances occur, the occupant may not attempt to restore order by taking innocent persons hostage.⁶⁹³

625. Switzerland's Basic Military Manual, in the part dealing with "Hostilities and their limits" refers, *inter alia*, to Articles 33 GC IV and 51, 54 and 55 AP I and states that "reprisals against the civilian population are prohibited".⁶⁹⁴ In the part dealing with civilian persons and, more specifically, "civilian persons who are in the power of the troops at the moment of combat", refers to Article 33 GC IV and states that "measures of reprisal or attacks [carried out] as measures of reprisal are prohibited".⁶⁹⁵ In the provision dealing with reprisals, the manual, referring to Article 33 GC IV, states that "by virtue of the Geneva Conventions and their Additional Protocols, [reprisals] are prohibited with regard to . . . the civilian population".⁶⁹⁶

626. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".⁶⁹⁷ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".⁶⁹⁸

627. The UK Military Manual, in a chapter dealing with the "treatment of enemy alien civilians" and referring to Articles 32–34 GC IV, states that "the following are prohibited: . . . the taking of reprisals against protected persons and their property".⁶⁹⁹ In a chapter dealing with "the occupation of enemy territory", the manual states that "[Article 33 GC IV] effected a change in the law by laying down expressly that no protected person may be punished for an offence he or she has not personally committed and that collective penalties and all measures of intimidation or of terrorism are prohibited".⁷⁰⁰ It

⁶⁹⁰ New Zealand, *Military Manual* (1992), § 1606(2).

⁶⁹¹ South Africa, *LOAC Manual* (1996), § 34(e).

⁶⁹² Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

⁶⁹³ Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.

⁶⁹⁴ Switzerland, *Basic Military Manual* (1987), Article 25(2).

⁶⁹⁵ Switzerland, *Basic Military Manual* (1987), Article 149.

⁶⁹⁶ Switzerland, *Basic Military Manual* (1987), Article 197(2).

⁶⁹⁷ Togo, *Military Manual* (1996), Fascicule III, p. 12.

⁶⁹⁸ Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁶⁹⁹ UK, *Military Manual* (1958), § 42. ⁷⁰⁰ UK, *Military Manual* (1958), § 553.

goes on to say, with reference to Articles 33 and 34 GC IV, that “[GC IV], provides . . . that ‘Reprisals against protected persons and their property are prohibited’.”⁷⁰¹ Moreover, in the part dealing with reprisals, the manual states that “reprisals against . . . civilian protected persons and their property in occupied territory and in the belligerent’s own territory, are . . . prohibited”.⁷⁰² In a footnote relating to this provision, the manual, referring to Articles 4 and 33 GC IV, notes that “the effect of this rule is that reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons”.⁷⁰³ In a footnote relating to another provision, the manual states that “reprisals against . . . civilians protected under [GC IV], constitute war crimes”.⁷⁰⁴

628. The UK LOAC Manual, in a part dealing with the protection of civilians, states that “it is forbidden: . . . to carry out reprisals against protected persons or property”.⁷⁰⁵ It further states that “the Geneva Conventions and [AP I] prohibit reprisals against . . . enemy civilians in territory controlled by a belligerent”.⁷⁰⁶

629. The US Field Manual, referring to Article 33 GC IV, stipulates that “reprisals against . . . protected civilians are forbidden . . . However, reprisals may still be visited on enemy troops who have not yet fallen into the hands of the forces making the reprisals.”⁷⁰⁷

630. The US Air Force Pamphlet, referring to Article 33 GC IV, provides that “no protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Reprisals against protected persons . . . are prohibited.”⁷⁰⁸ The Pamphlet further states that:

Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted. Also, the prohibition in Article 33, GC [IV], protecting civilians includes all those who . . . at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. (Article 4, GC [IV]).⁷⁰⁹

631. The US Soldier’s Manual, under the heading “Treat all captives and detainees humanely”, tells soldiers that “you must never engage in reprisals or acts of revenge against any persons, enemy or civilian, whom you capture or detain in combat”. In a part dealing with the treatment of civilians and private

⁷⁰¹ UK, *Military Manual* (1958), § 554. ⁷⁰² UK, *Military Manual* (1958), § 644.

⁷⁰³ UK, *Military Manual* (1958), § 644, footnote 2.

⁷⁰⁴ UK, *Military Manual* (1958), § 647, footnote 1.

⁷⁰⁵ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(e).

⁷⁰⁶ UK, *LOAC Manual* (1981), Section 4, p. 17, § 16. ⁷⁰⁷ US, *Field Manual* (1956), § 497(c).

⁷⁰⁸ US, *Air Force Pamphlet* (1976), § 10-7(b)(1). ⁷⁰⁹ US, *Air Force Pamphlet* (1976), § 10-7(b)(2).

property, the manual further states that “the Geneva Conventions forbid retaliating against civilians for the actions of enemy soldiers”.⁷¹⁰

632. The US Air Force Commander’s Handbook, under the heading “Persons and Things Not Subject to Reprisals”, states that “under the 1949 Geneva Conventions, reprisals may not be directed against . . . the inhabitants of occupied territory”.⁷¹¹

633. The US Operational Law Handbook provides that “the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . m. Reprisals against persons or property protected by the Geneva Conventions, to include . . . civilians.”⁷¹²

634. The US Naval Handbook states that “reprisals are forbidden to be taken against: 1. . . . interned civilians . . . 3. Civilians in occupied territory.”⁷¹³ It also provides that “all interned civilians . . . may not be subjected to reprisal action or collective punishment”.⁷¹⁴

635. The YPA Military Manual of the SFRY (FRY) states that “the laws of war prohibit reprisals against the following persons and objects: . . . civilian persons and their property”.⁷¹⁵

National Legislation

636. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don’t give opportunity to carry out any action which is considered to be [a] measure of pressure concerning civilian persons, medical organisations and their personnel, civilian objectives, civilian property . . . During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can’t be considered as such measures of pressure.⁷¹⁶

637. Under Colombia’s Penal Code, reprisals against protected persons and objects taken “in the event and during armed conflict” are punishable offences.⁷¹⁷

638. Italy’s Law of War Decree as amended provides that “respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended”.⁷¹⁸

⁷¹⁰ US, *Soldier’s Manual* (1984), pp. 15 and 23.

⁷¹¹ US, *Air Force Commander’s Handbook* (1980), § 8-4(c).

⁷¹² US, *Operational Law Handbook* (1993), p. Q-182.

⁷¹³ US, *Naval Handbook* (1995), § 6.2.3.2. ⁷¹⁴ US, *Naval Handbook* (1995), § 11.8.

⁷¹⁵ SFRY (FRY), *YPA Military Manual* (1988), § 31(1).

⁷¹⁶ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.

⁷¹⁷ Colombia, *Penal Code* (2000), Article 158.

⁷¹⁸ Italy, *Law of War Decree as amended* (1938), Article 8.

National Case-law

639. In its judgement in the *Schintlholzer case* in 1988 dealing with the killing of Italian civilians by German soldiers in 1944, Italy's Military Tribunal of Verona stated that the acts

definitely cannot be seen as falling within the limited system of reprisals or collective punishments; a system which, in any case, refers to the conditions and procedures provided for in international law. However, it seems difficult to deny that systematic violence against the defenceless constitutes a completely unjustified corollary of a military operation carried out by German troops [which had the aim to combat the partisans].⁷¹⁹

640. In the *Priebke case* in 1995, Argentina's Public Prosecutor of First Instance, dealing with Italy's request to extradite the accused, held that the alleged killing in reprisal of 330 civilians and POWs committed by German soldiers in the Ardeatine Caves in Italy during the Second World War was "an act which must be qualified as a war crime".⁷²⁰

641. In the *Calley case* in 1973, a US army officer was convicted of murder for killing South Vietnamese civilians. The US Army Court of Military Review dismissed the argument that the acts were lawful reprisals for illegal acts of the enemy and held that "slaughtering many for the presumed delicts of a few is not a lawful response to the delicts . . . Reprisal by summary execution of the helpless is forbidden in the laws of land warfare."⁷²¹

Other National Practice

642. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".⁷²²

643. In its written comments on other written statements concerning the *Nuclear Weapons case* before the ICJ in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.⁷²³

644. At the CDDH, France made a proposal for a draft Article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows:

⁷¹⁹ Italy, Military Tribunal of Verona, *Schintlholzer case*, Judgement, 15 November 1988.

⁷²⁰ Argentina, Hearing of the Public Prosecutor of the First Instance, *Priebke case*, 1995, Section V.2.

⁷²¹ US, Army Court of Military Review, *Calley case*, Judgement, 16 February 1973.

⁷²² Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

⁷²³ Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

"3... The measures may not involve any actions prohibited by the Geneva Conventions of 1949."⁷²⁴

645. At the CDDH, the FRG, with regard to a French proposal on reprisals according to which "the measures may not involve any actions prohibited by the Geneva Conventions of 1949", stated that this provision "was the most important in the whole of the proposal since it really did protect... the civilian population in occupied territory".⁷²⁵

646. According to the Report on the Practice of Israel, the IDF does not condone or conduct reprisals against persons or objects protected by the Geneva Conventions.⁷²⁶

647. According to the Report on the Practice of Jordan, "the prohibition of belligerent reprisals against protected persons and property is viewed as customary law... In practice, Jordan never resorted to attacks by way of reprisal."⁷²⁷

648. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".⁷²⁸

649. At the CDDH, Poland made a proposal for a draft article on reprisals within API – which it later withdrew – which read, *inter alia*, as follows "Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'."⁷²⁹

650. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited... The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions.⁷³⁰

651. An instruction card issued to all US troops engaged in Vietnam directed soldiers always to treat prisoners humanely, adding that "all persons in your hands, whether suspects [or] civilians... must be protected against violence, insults, curiosity, and reprisals of any kind".⁷³¹

⁷²⁴ France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

⁷²⁵ FRG, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 84, § 6.

⁷²⁶ Report on the Practice of Israel, 1997, Chapter 2.9.

⁷²⁷ Report on the Practice of Jordan, 1997, Chapter 2.9.

⁷²⁸ Report on the Practice of the Philippines, 1997, Chapter 2.9.

⁷²⁹ Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

⁷³⁰ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

⁷³¹ US, The enemy in your hands, Reproduction of 3x5 instruction card issued to all troops, reprinted in George. S. Prugh, *Law at War: Vietnam 1964–1973*, Department of the Army, Vietnam Studies, 1975, Appendix H. III.

652. In 1980, in a footnote to a memorandum of law on the “Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea”, a legal adviser of the US Department of State stated that:

In theory, an attempt might also be made to justify the use of chemical weapons in Afghanistan as a lawful reprisal against violations of the general laws of war by Afghan insurgents (such as the summary execution of Soviet prisoners). However, such an argument would face several serious problems. First, the prohibition in the [1925 Geneva Gas] Protocol and in customary international law apparently itself precludes use of chemical weapons in reprisal except in response to enemy use of weapons prohibited by the [1925 Geneva Gas] Protocol. . . . Second, reprisals against the civilian population of occupied territories are expressly precluded by the law of war, and this would apply to reprisals against Afghan villages in areas occupied by Soviet forces. See Article 33 of [GC IV].⁷³²

III. Practice of International Organisations and Conferences

United Nations

653. In 2001, the UN General Assembly adopted a resolution on responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that “Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals”, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.⁷³³

654. In a resolution adopted in 1989 on the question of human rights and fundamental freedoms in Afghanistan, the UN Commission on Human Rights urged all parties to the conflict “to treat all prisoners in their custody in accordance with the internationally recognized principles of humanitarian law and to protect them from all acts of reprisal and violence”.⁷³⁴ It reiterated these appeals in 1990, 1991 and 1992.⁷³⁵

655. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 33 GC IV and Article 73 AP I, stated that “reprisals against the following categories of persons and objects are specifically prohibited: . . . (d) Civilians in the hands of a party to the conflict of which they are

⁷³² US, Department of State, Memorandum of law by a Legal Adviser on the “Reported Use of Chemical Agents in Afghanistan, Laos, and Kampuchea”, 9 April 1980, reprinted in Marian Nash Leich, *Digest of United States Practice in International Law, 1980*, Department of State Publication 9610, Washington, D.C., December 1986, pp. 1034 and 1041, footnote 38.

⁷³³ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

⁷³⁴ UN Commission on Human Rights, Res. 1989/67, 8 March 1989, § 11.

⁷³⁵ UN Commission on Human Rights, Res. 1990/53, 6 March 1990, § 5; Res. 1991/78, 6 March 1991, § 6; Res. 1992/68, 4 March 1992, § 6.

not nationals, including inhabitants of occupied territory."⁷³⁶ It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals... must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.⁷³⁷

Other International Organisations

656. No practice was found.

International Conferences

657. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration calling upon "the Occupying Power [in the conflict between Israel and Palestinians] to refrain from perpetrating any other violation of [GC IV], in particular reprisals against protected persons and their property".⁷³⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

658. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that "as for reprisals against civilians, under customary international law they are prohibited as long as civilians find themselves in the hands of the adversary".⁷³⁹

V. Practice of the International Red Cross and Red Crescent Movement

659. In 1980, an armed opposition group expressed its acceptance of the fundamental principles of IHL as formulated by the ICRC, including the principle that "civilians under the authority of an adverse party... shall be protected against all acts of violence and reprisals".⁷⁴⁰

660. In a communication to the press issued in 2000 in connection with the hostilities in the Near East, the ICRC reminded all those involved in the violence and those in a position to influence the situation that "terrorist acts

⁷³⁶ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

⁷³⁷ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

⁷³⁸ Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, § 14.

⁷³⁹ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 527. ⁷⁴⁰ ICRC archive document.

are absolutely and unconditionally prohibited, as are reprisals against the civilian population, indiscriminate attacks and attacks directed against the civilian population".⁷⁴¹

VI. Other Practice

661. No practice was found.

Civilians in general

I. Treaties and Other Instruments

Treaties

662. Article 51(6) AP I provides that "attacks against the civilian population or civilians by way of reprisals are prohibited". Article 51 AP I was adopted by 77 votes in favour, one against and 16 abstentions.⁷⁴²

663. Upon ratification of the 1949 Geneva Conventions, China declared that "Although [GC IV] does not apply to civilian persons outside enemy-occupied areas and consequently does not completely meet humanitarian requirements, it is found to be in accord with the interest of protecting civilian persons in occupied territory and in certain other cases".⁷⁴³

664. Upon ratification of AP I and AP II, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.⁷⁴⁴

665. Upon ratification of AP I, France stated that it would:

apply the provisions of [Article 51(8)] to the extent that their interpretation does not hinder, in conformity with international law, the use of such means as it considers indispensable for the protection of its civilian population from grave, manifest and deliberate violations of the Conventions and the Protocol by the enemy.⁷⁴⁵

666. Upon ratification of AP I, Germany stated that "the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation".⁷⁴⁶

⁷⁴¹ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

⁷⁴² CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163.

⁷⁴³ China, Reservations made upon ratification of the 1949 Geneva Conventions, 28 December 1956, § 4.

⁷⁴⁴ Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.

⁷⁴⁵ France, Reservations and declarations made upon ratification of AP I, 11 April 2001, § 11.

⁷⁴⁶ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.

667. Upon ratification of AP I, Italy stated that “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation”.⁷⁴⁷

668. Upon signature of the 1949 Geneva Conventions, the USSR stated that “[GC IV] does not cover the civilian population in territory not occupied by the enemy and does not, therefore, completely meet humanitarian requirements”. The USSR upheld its reservations upon ratification of the said instruments.⁷⁴⁸

669. Upon ratification of AP I, the UK stated that:

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.⁷⁴⁹

670. Article 3(2) of the 1980 Protocol II to the CCW provides that “it is prohibited in all circumstances to direct [mines, booby-traps and other devices], either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians”.

671. Article 3(7) of the 1996 Amended Protocol II to the CCW provides that “it is prohibited in all circumstances to direct [mines, booby-traps and other devices], either in offence, defence or by way of reprisals, against the civilian population as such or against individual civilians or civilian objects”.

Other Instruments

672. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

⁷⁴⁷ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.

⁷⁴⁸ USSR, Reservations made upon signature and maintained upon ratification of the 1949 Geneva Conventions, 12 December 1949 and 10 May 1954, § 4.

⁷⁴⁹ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

673. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

674. Section 5.6 of the 1999 UN Secretary-General's Bulletin provides that "the United Nations force shall not engage in reprisals against civilians".

675. Section 7.2 of the 1999 UN Secretary-General's Bulletin which deals in Section 7.1 with the protection of, *inter alia*, "persons not, or no longer, taking part in military operations, including civilians", states that "the following acts against any of the persons mentioned in section 7.1 are prohibited at any time and in any place: . . . reprisals".

676. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) obligations of a humanitarian character prohibiting reprisals".

II. National Practice

Military Manuals

677. Australia's Commanders' Guide provides that "specific prohibitions dictate that civilians are not to be made the express object of an attack or reprisal".⁷⁵⁰ In another provision, the manual refers to Articles 51–56 AP I and states that "protected persons, such as . . . civilians . . . should not be the subject of reprisals".⁷⁵¹

678. Australia's Defence Force Manual provides that "reprisal actions against civilians are . . . prohibited".⁷⁵² In another provision, the manual states that "reprisals against civilians . . . are prohibited".⁷⁵³ It further provides that "protected persons, such as . . . civilians . . . should not be the subject of reprisals".⁷⁵⁴

679. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".⁷⁵⁵ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".⁷⁵⁶

680. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".⁷⁵⁷

⁷⁵⁰ Australia, *Commanders' Guide* (1994), § 604.

⁷⁵¹ Australia, *Commanders' Guide* (1994), § 1212.

⁷⁵² Australia, *Defence Force Manual* (1994), § 531.

⁷⁵³ Australia, *Defence Force Manual* (1994), § 920.

⁷⁵⁴ Australia, *Defence Force Manual* (1994), § 1311.

⁷⁵⁵ Benin, *Military Manual* (1995), Fascicule III, p. 12.

⁷⁵⁶ Benin, *Military Manual* (1995), Fascicule III, p. 13.

⁷⁵⁷ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

681. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".⁷⁵⁸
682. Cameroon's Instructors' Manual, in a part listing the rules of conduct in combat and referring to "civilian persons", provides that "protect them against ill treatment [and] acts of vengeance. The taking of hostages is prohibited."⁷⁵⁹
683. Canada's LOAC Manual provides that "reprisals against civilians . . . are prohibited".⁷⁶⁰ In a part dealing with enforcement measures, the manual states that "reprisals against the following categories of persons and objects are prohibited: . . . e. civilians".⁷⁶¹
684. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".⁷⁶²
685. Croatia's LOAC Compendium provides for the prohibition of reprisals against "civilian persons and objects". It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".⁷⁶³
686. Croatia's Soldiers' Manual, in a part dealing with civilians, provides that "measures of reprisal and the taking of hostages are prohibited".⁷⁶⁴
687. Ecuador's Naval Manual provides that "reprisals may be taken against enemy armed forces, [and] enemy civilians other than those in occupied territory".⁷⁶⁵
688. France's Disciplinary Regulations as amended, in a provision entitled "Respect for the rules of international law applicable in armed conflicts" dealing with the duties of and prohibitions for combatants, states that "by virtue of the international conventions ratified or approved: . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".⁷⁶⁶
689. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".⁷⁶⁷ The manual further refers to Articles 51–56 AP I and states that "reprisals are prohibited against civilians".⁷⁶⁸
690. Germany's Soldiers' Manual states that "reprisals against the civilian population are prohibited".⁷⁶⁹

⁷⁵⁸ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁷⁵⁹ Cameroon, *Instructors' Manual* (1992), p. 151.

⁷⁶⁰ Canada, *LOAC Manual* (1999), p. 4-5, § 39.

⁷⁶¹ Canada, *LOAC Manual* (1999), p. 15-2, § 15.

⁷⁶² Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁷⁶³ Croatia, *LOAC Compendium* (1991), p. 19.

⁷⁶⁴ Croatia, *Soldiers' Manual* (1992), p. 5, § 3.

⁷⁶⁵ Ecuador, *Naval Manual* (1989), § 6.2.3.

⁷⁶⁶ France, *Disciplinary Regulations as amended* (1975), Article 9 bis (2).

⁷⁶⁷ France, *LOAC Manual* (2001), p. 85.

⁷⁶⁸ France, *LOAC Manual* (2001), p. 108.

⁷⁶⁹ Germany, *Soldiers' Manual* (1991), p. 4.

691. Germany's Military Manual, in a chapter dealing with "Certain Conventional Weapons" and referring to Article 3(2) of the 1980 Protocol II to the CCW, provides that "it is prohibited to direct the above-mentioned munitions – neither by way of reprisals – against the civilian population as such or against individual civilians".⁷⁷⁰ In the chapter dealing with reprisals, the manual, referring to Articles 33 GC IV and 51 AP I, provides that "it is expressly prohibited by agreement to make reprisals against: . . . civilians".⁷⁷¹ Referring to Articles 33 GC IV and 20 and 51 AP I, the manual further states that "reprisals against the civilian population . . . are prohibited".⁷⁷² In a chapter entitled "Belligerent occupation", the manual, referring to Articles 33 GC IV and 20 and 51 AP I, further states that "reprisals against civilians . . . are prohibited".⁷⁷³

692. Germany's IHL Manual provides that "reprisals are expressly prohibited against . . . civilians".⁷⁷⁴

693. Hungary's Military Manual provides for the prohibition of reprisals against "civilian persons and objects". It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".⁷⁷⁵

694. India's Manual of Military Law prohibits reprisals. This provision is in a section relative to the action by a commander acting in aid of civil authorities for the handling of crowds and mobs. It adds that action is preventive and not punitive and that no soldier can punish a civilian, except under martial law.⁷⁷⁶

695. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".⁷⁷⁷ According to the Report on the Practice of Indonesia,

The meaning of protected persons is not exclusively referring to the Geneva Conventions . . . but also referring to the customary sources, such as the moral values which are generally recognized and exist among the international community, and other Conventions . . . Reprisals against civilian[s] other than protected civilians under Geneva Convention IV [are] prohibited as far as they are not engage[d in] the conflict and [do] not violate the law[s] and customs of war. The civilian[s] other than protected civilians under Geneva Convention IV will [be] protected . . . as necessary.⁷⁷⁸

696. Italy's IHL Manual provides that reprisals cannot be directed against the civilian population, except in case of absolute necessity.⁷⁷⁹ However, providing for the prohibition of reprisals against, *inter alia*, protected civilian persons and protected persons, the manual also states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".⁷⁸⁰

⁷⁷⁰ Germany, *Military Manual* (1992), § 410.

⁷⁷¹ Germany, *Military Manual* (1992), § 479.

⁷⁷² Germany, *Military Manual* (1992), § 507.

⁷⁷³ Germany, *Military Manual* (1992), § 535.

⁷⁷⁴ Germany, *IHL Manual* (1996), § 320.

⁷⁷⁵ Hungary, *Military Manual* (1992), p. 35.

⁷⁷⁶ India, *Manual of Military Law* (1983), Vol. 1, Chapter VII, § 8.

⁷⁷⁷ Indonesia, *Air Force Manual* (1990), § 15(c).

⁷⁷⁸ Report on the Practice of Indonesia, 1997, Chapter 2.9.

⁷⁷⁹ Italy, *IHL Manual* (1991), Vol. I, § 23.

⁷⁸⁰ Italy, *IHL Manual* (1991), Vol. I, § 25.

697. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".⁷⁸¹ In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . civilians."⁷⁸²

698. Lebanon's Teaching Manual prohibits reprisals against civilians.⁷⁸³

699. Madagascar's Military Manual, in the part of its instructions dealing with civilian persons, instructs soldiers to "protect them against ill treatment". It states that "acts of vengeance and the taking of hostages are prohibited".⁷⁸⁴ The manual further instructs soldiers not to take hostages and to refrain from all acts of revenge.⁷⁸⁵

700. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring to Article 51 AP I, states that "attacking the civilian population by measures of reprisal is forbidden".⁷⁸⁶

701. The Military Handbook of the Netherlands states that "protected persons under the laws of war are: . . . personnel of civil defence organisations such as the fire brigade . . . civilians . . . Reprisals against them must not be taken."⁷⁸⁷ It further states that "reprisals against the civilian population are prohibited".⁷⁸⁸

702. New Zealand's Military Manual, referring to Article 52(6) AP I, states that "reprisals against the following categories of persons and objects are prohibited . . . e) civilians".⁷⁸⁹

703. South Africa's LOAC Manual states that "reprisals against the persons and property of . . . protected civilians are prohibited".⁷⁹⁰

704. Spain's LOAC Manual lists among the persons against whom the taking of reprisals is prohibited "civilian persons and objects". It refers, however, to Article 46 GC I (relative to the prohibition of reprisals against the wounded, the sick and medical personnel protected under GC I).⁷⁹¹

705. Sweden's IHL Manual, referring to Article 51(6) AP I and stating that this provision "contains another rule prohibiting reprisal attacks on civilian populations and individual civilians", states that:

It may appear remarkable that not until the advent of the Additional Protocol was it possible to obtain general protection for civilians against reprisals. Protection for civilians in this respect remains inadequate, however, as long as the majority of states have not ratified the Protocol.

⁷⁸¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

⁷⁸² Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

⁷⁸³ Lebanon, *Teaching Manual* (1997), p. 78.

⁷⁸⁴ Madagascar, *Military Manual* (1994), Fiche No. 4-T, § 23(3).

⁷⁸⁵ Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

⁷⁸⁶ Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-5.

⁷⁸⁷ Netherlands, *Military Handbook* (1995), p. 7-38.

⁷⁸⁸ Netherlands, *Military Handbook* (1995), p. 7-43.

⁷⁸⁹ New Zealand, *Military Manual* (1992), § 1606(2).

⁷⁹⁰ South Africa, *LOAC Manual* (1996), § 34(e).

⁷⁹¹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

The [Swedish] International Humanitarian Law Committee considers that Article 51 can be of great importance in improving protection for civilian populations and civilian objects. It is of the greatest importance for the article to be applied in such a way that the intended humanitarian purpose is achieved as far as possible.⁷⁹²

While noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, the manual further states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.⁷⁹³

706. Switzerland's Basic Military Manual, in the part dealing with "Hostilities and their limits", refers, *inter alia*, to Articles 33 GC IV and 51, 54 and 55 AP I and states that "reprisals against the civilian population are prohibited".⁷⁹⁴ In the part entitled "Civilian persons", the manual refers to Articles 33 GC IV and 51 AP I and states that "measures of reprisal or attacks [carried out] as measures of reprisal are prohibited". The provision is placed in the part dealing with civilian persons and, more specifically, "civilian persons who are in the power of the troops at the moment of combat".⁷⁹⁵

707. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".⁷⁹⁶ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".⁷⁹⁷

708. The UK LOAC Manual, in a part dealing with the protection of civilians, states that "it is forbidden: . . . to carry out reprisals against protected persons or property".⁷⁹⁸ It further states that "the Geneva Conventions and [AP I] prohibit reprisals against . . . enemy civilians in territory controlled by a belligerent".⁷⁹⁹ However, the manual also states that "the United Kingdom reserves the right to take proportionate reprisals against an enemy's civilian population or civilian objects where the enemy has attacked our own civilians or civilian objects in violation of [AP I]".⁸⁰⁰

709. The US Air Force Pamphlet, referring to Articles 4 and 33 GC IV, states that "the protection against reprisals expressed in the Conventions . . . does not protect civilians who are under the control of their own country".⁸⁰¹

⁷⁹² Sweden, *IHL Manual* (1991), Section § 3.2.1.5, pp. 50 and 51.

⁷⁹³ Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

⁷⁹⁴ Switzerland, *Basic Military Manual* (1987), Article 25(2).

⁷⁹⁵ Switzerland, *Basic Military Manual* (1987), Article 149.

⁷⁹⁶ Togo, *Military Manual* (1996), Fascicule III, p. 12.

⁷⁹⁷ Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁷⁹⁸ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(e).

⁷⁹⁹ UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.

⁸⁰⁰ UK, *LOAC Manual* (1981), Section 4, p. 17, § 17.

⁸⁰¹ US, *Air Force Pamphlet* (1976), § 10-7(b)(2).

710. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", lists a number of persons and objects protected under the Geneva Conventions against which it is prohibited to take reprisals, among which are "inhabitants of occupied territory". The Handbook adds, however, that "a Protocol to the 1949 Geneva Conventions would expand this list to include all civilians... The United States signed this Protocol in 1977, but has not yet ratified it. Consult the Staff Judge Advocate for further guidance."⁸⁰²

711. The US Naval Handbook provides that "reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property".⁸⁰³

712. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: ... civilian persons and their property".⁸⁰⁴

National Legislation

713. Argentina's Draft Code of Military Justice punishes any soldier who carries out reprisals or orders the carrying out of reprisals against the civilian population.⁸⁰⁵

714. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning civilian persons, medical organisations and their personnel, civilian objectives, civilian property... During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.⁸⁰⁶

715. Under Colombia's Penal Code, reprisals against "the civilian population" and against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.⁸⁰⁷

716. Under Côte d'Ivoire's Penal Code as amended, organising, ordering or implementing reprisals, in times of war or occupation, is punishable when resulting in grave injury to the physical integrity of the civilian population.⁸⁰⁸

⁸⁰² US, *Air Force Commander's Handbook* (1980), § 8-4(c).

⁸⁰³ US, *Naval Handbook* (1995), § 6.2.3.

⁸⁰⁴ SFRY (FRY), *YPA Military Manual* (1988), § 31(1).

⁸⁰⁵ Argentina, *Draft Code of Military Justice* (1998), Article 291, introducing a new Article 875(1) in the *Code of Military Justice as amended* (1951).

⁸⁰⁶ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.

⁸⁰⁷ Colombia, *Penal Code* (2000), Articles 144 and 158.

⁸⁰⁸ Côte d'Ivoire, *Penal Code as amended* (1981), Article 138(5).

717. Under the Czech Republic's Criminal Code as amended, "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: (a) . . . leads an attack against [the civilian population or civilians] for the reason of reprisals" is punishable.⁸⁰⁹

718. Italy's Law of War Decree as amended provides that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".⁸¹⁰

719. Under Slovakia's Criminal Code as amended, "a commander who, contrary to the provisions of international law on means and methods of warfare, intentionally: (a) . . . leads an attack against [the civilian population or civilians] for the reason of reprisals" is punishable.⁸¹¹

720. Spain's Penal Code provides for the punishment of "anyone who [in the event of armed conflict] should . . . carry out or order . . . reprisals or violent acts or threats in order to terrify [the civilian population]".⁸¹²

National Case-law

721. No practice was found.

Other National Practice

722. At the CDDH, during a discussion in Committee I on a French proposal regarding a provision on reprisals within AP I, Belarus, opposing the French proposal and referring to a number of international instruments, stated that:

Any toleration of the possibility of taking reprisals, especially against the civilian population, would be in radical conflict with the spirit and meaning of the Geneva Conventions . . . Furthermore, it would run counter to a number of resolutions of the United Nations General Assembly . . . Thus, any attempt to commit reprisals against the civilian population represented . . . a serious blow against the Geneva Conventions, Protocol I . . . and a whole series of international instruments already adopted.⁸¹³

723. At the CDDH, Belarus stated that "the taking of reprisals against a civilian population must be prohibited".⁸¹⁴

724. At the CDDH, the representative of Canada, with respect to paragraph 4 of draft Article 46 (which became Article 51 AP I), stated that "his delegation could accept a prohibition on reprisals against civilians or the civilian population".⁸¹⁵

⁸⁰⁹ Czech Republic, *Criminal Code as amended* (1961), Article 262(2)(a).

⁸¹⁰ Italy, *Law of War Decree as amended* (1938), Article 8.

⁸¹¹ Slovakia, *Criminal Code as amended* (1961), Article 262(2)(a).

⁸¹² Spain, *Penal Code* (1995), Article 611.

⁸¹³ Belarus, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.47, 29 April 1976, p. 81, § 62.

⁸¹⁴ Belarus, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.48, 30 April 1976, p. 94, § 55.

⁸¹⁵ Canada, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.15, 7 February 1975, p. 117, § 2.

725. In 1986, in a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence noted that:

Under [the 1949 Geneva Conventions] . . . reprisals directed against the enemy civilian population or property in enemy controlled areas are permissible. [AP I] goes beyond the Geneva Conventions and prohibits reprisals directed against the enemy civilian population or civilian property under all circumstances.⁸¹⁶

726. In 1973, during a debate in the Sixth Committee of the UN General Assembly relative to respect for human rights in times of armed conflict, China stated that civilians should not be the object of reprisals.⁸¹⁷

727. At the CDDH, following the adoption of Article 20 API, Colombia stated that it "was opposed to any kind of reprisals".⁸¹⁸

728. In 1972, during a debate in the Sixth Committee of the UN General Assembly on a resolution relative to measures to prevent international terrorism, Denmark stated that "the legitimacy of the use of force in international life did not in itself legitimize the use of certain forms of violence, especially against the innocent. That principle had long been recognized even in the customary law of war." It concluded that:

Consequently, even in time of war, acts of a terrorist nature were not a legitimate means of combat. Personally, he was convinced that acts such as the taking of hostages, reprisals and murder aimed at innocent persons had never truly served the struggle for independence and fundamental freedoms.⁸¹⁹

729. In its written statement before the ICJ in the *Nuclear Weapons case* before the ICJ in 1995, Egypt stated that "reprisals are prohibited against . . . civilians . . . The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."⁸²⁰

730. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.⁸²¹

⁸¹⁶ Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, § 2.

⁸¹⁷ China, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1450, 29 November 1973, § 32.

⁸¹⁸ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

⁸¹⁹ Denmark, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1364, 17 November 1972, § 15.

⁸²⁰ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.

⁸²¹ Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

731. At the CDDH, Finland stated that “the main intention of paragraph 4 [of draft Article 46 which became Article 51 of AP I] was to extend the protection to the civilian population as a whole. That was desirable.”⁸²²

732. At the CDDH, France voted against Article 46 of draft AP I (now Article 51), stating, however, that it considered that:

The provisions of paragraphs 4, 5 and 7 were of a type which by their very complexity would seriously hamper the conduct of defensive military operations against an invader and prejudice the exercise of the inherent right of legitimate defence recognized in Article 51 of the Charter of the United Nations.⁸²³

733. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, in a part dealing with the “eight fundamental rules of international humanitarian law”, state that “reprisal attacks against the civilian population are prohibited”.⁸²⁴

734. At the CDDH, in its explanations of vote on Article 46 of draft AP I (which became Article 51 AP I), the representative of the GDR stated that his delegation:

gave particular support to paragraph 4 [which became paragraph 6 of Article 51 of AP I], which contained a clear prohibition on attacks against the civilian population or civilians by way of reprisals. That prohibition, he was convinced, had the same importance, and was of the same absolute nature, as the prohibition of reprisals against prisoners of war, the wounded and the sick, which were already contained in the Geneva Conventions. His delegation would therefore regard any reservation on the prohibition as incompatible with the humanitarian object and purpose of the Protocol.⁸²⁵

735. In 1990, during a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in AP I “newly introduced rules”.⁸²⁶

736. In 1983, in a letter to the UN Secretary-General, Iran deplored the fact that Iraqi television had announced “a statement by the Iraqi minister of culture and information to the effect that Iraq will bombard Iranian cities in retaliation to Iranian shelling of Iraqi cities”.⁸²⁷

737. In 1987, in a letter to the UN Secretary-General, Iran stated that:

⁸²² Finland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 13 March 1974, p. 54, § 29.

⁸²³ France, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 163, § 118.

⁸²⁴ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1 June 1995, Section 6, § 66.

⁸²⁵ GDR, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 167, § 137.

⁸²⁶ Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.

⁸²⁷ Iran, Letter dated 5 May 1983 to the UN Secretary-General, UN Doc.S/15747, 5 May 1983.

Because of the polite acquiescence of the relevant international bodies with regard to Iraqi acts of lawlessness . . . Iran has had to take symbolic retaliatory and preventive measures in response to the Iraqi bombardment of civilian areas. Such measures have been adopted with great reluctance and self-restraint. However, should the Iraqi régime persist in its war crimes . . . the armed forces of . . . Iran will be obliged to inflict unprecedented heavy and deadly blows in retaliation. Clearly, the responsibility for the consequences of such retaliatory and preventive measures lies with the aggressor régime of Iraq.⁸²⁸

738. In 1987, after an Iraqi Command had stated that the Iraqi forces were ready for reprisal attacks, Iran stated in a letter to the UN Secretary-General that:

While the high-ranking Iraqi officials have openly declared their criminal policies of attacking our civilian areas, the Islamic Republic of Iran adheres to strict observance of all norms of international humanitarian law and continues to remain committed to refraining from attacks on purely civilian quarter . . . Iran has been forced to resort to retaliatory measures against its desire . . . The number of civilian casualties on both sides is a testament to the degree of self-restraint exercised by . . . Iran in taking retaliatory measures . . . We have been consistently asking the international body to take serious action against those attacking civilians.⁸²⁹

739. In 1987, in a letter to the UN Secretary-General, the Iranian Minister of Foreign Affairs stated that:

The reluctant but unavoidable retaliatory fire of our Islamic combatants were directed against economic and industrial quarters of Iraq and with ample prior warning to the civilian occupants of the adjacent areas to leave the scene of our intended attacks. The comparatively very low number of civilian casualties in Iraq is testimony to the humanitarian consideration of . . . Iran even in its retaliatory exercises. Nevertheless . . . Iran, based on its position of principle which is in compliance with the universally recognized norms of international law believes in the necessity for strict observance of the rules of law governing the conduct of hostilities.⁸³⁰

740. In 1987, in a letter to the UN Secretary-General, Iran stated with respect to Iraqi warplanes allegedly bombarding villages inhabited by civilians in June 1987 that:

The Government of . . . Iran, faced with an enemy who so easily and frequently resorts to illegal tactics, has in the past found it necessary to take, however reluctantly, limited retaliatory measures as the only method of compelling the rulers of Baghdad to respect their international obligations. Should the régime of Baghdad continue its attacks against civilian centres of . . . Iran, the Iranian Government will once again be left with no option other than retaliation in kind.⁸³¹

⁸²⁸ Iran, Letter dated 2 February 1987 to the UN Secretary-General, UN Doc. S/18648, 2 February 1987.

⁸²⁹ Iran, Letter dated 24 February 1987 to the UN Secretary-General, UN Doc. S/18721, 25 February 1987.

⁸³⁰ Iran, Minister of Foreign Affairs, Letter dated 27 February 1987 to the UN Secretary-General, UN Doc. S/18728, 27 February 1987.

⁸³¹ Iran, Letter dated 24 June 1987 to the UN Secretary-General, UN Doc. S/18945, 24 June 1987.

741. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran did not resort to reprisals against Iraqi cities until Iraqi bombardments of an Iranian city in 1982. The report refers to military communiqués and a message from the commander of the Joint Staff, which stated that Iran did not consider attacking the cities as being “in conformity with the notion of real war”, but after three and a half years of Iraqi attacks on civilian objects and cities, Iran had no option but to resort to reprisals against these attacks. The report also notes that in resorting to reprisals, Iran had always issued statements and asked the Iraqi people to evacuate their city. Furthermore, the report states that the real reason for Iran’s attacks on Iraqi cities was Iraq’s attacks on civilian centres and that, when Iraqi attacks on civilian targets ceased, Iran stopped its reprisals.⁸³² The report notes that, in February 1984, Iran announced that it had changed its policy and that Iraqi cities would be attacked as a reprisal measure and that only four holy cities were left immune from such action. Virtually all official communiqués reporting the results of these military operations named military and economic objectives, not civilian objects.⁸³³

742. In 1983, in a letter to the UN Secretary-General in response to Iranian allegations relative to attacks on civilians and civilian objects by Iraq, Iraq recalled its position according to which the bombardment of cities and economic installations had been initiated by Iran in 1980. It also questioned Iran’s statement that “although the Iraqi cities are well within the range of our artillery . . . Iran has no intention of retaliation against civilians”.⁸³⁴

743. In 1987, in a letter to the UN Secretary-General following a meeting between officials of both parties to the Iran–Iraq War, Iraq stated that:

Iraq has long hesitated before responding to the cruel and deliberate bombardments of Iraqi towns contemptuously carried out by the Iranian régime; over a period of several months that régime had on numerous occasions fired missiles on Baghdad and pounded Basra, Sulaymaniyah and other Iraqi towns with its heavy artillery. Iraq had not retaliated for those acts of aggression, choosing instead to issue repeated warnings that had gone unheeded. [These acts had forced] Iraq to deter the aggressor . . . The following decisions were taken . . . First: Iraq will halt its bombardment of Iranian towns for two weeks as of . . . Iraq will consider itself released from this commitment and will resume its bombings forcefully and on greater scale if the forces of the Iranian régime shell Iraqi towns and residential areas and if the Iranian régime launches a new assault against Iraqi territory and Iraq’s international borders. Secondly: This temporary halt in the bombing of towns is contingent upon the position of the Iranian régime with regard to peace; that régime must unequivocally espouse a new position consistent with international law.⁸³⁵

⁸³² Report on the Practice of Iran, 1997, Chapter 2.9.

⁸³³ Report on the Practice of Iran, 1997, Chapter 1.3.

⁸³⁴ Iraq, Letter dated 2 May 1983 to the UN Secretary-General, UN Doc.S/15743, 4 May 1983.

⁸³⁵ Iraq, Letter dated 18 February 1987 to the UN Secretary-General, UN Doc. S/18704, 18 February 1987.

744. On the basis of a reply by Iraq's Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that reprisals "must not be directed, in any way, against . . . civilians . . . but [have] to be confined to purely military targets".⁸³⁶

745. According to the Report on the Practice of Jordan, "the prohibition of beligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal."⁸³⁷

746. The Report on the Practice of Lebanon notes that an advisor to the Lebanese Ministry of Foreign Affairs stated in an interview that the protection of civilians was not compatible with the principle of reprisals.⁸³⁸

747. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Malaysia stated that "civilian populations . . . should not be the object of reprisals" and that "attacks against the civilian population or civilians by way of reprisals are prohibited". It referred to paragraph 7 of UN General Assembly Resolution 2675 (XXV) and Article 51(6) AP I.⁸³⁹

748. At the CDDH, the Netherlands, introducing an amendment to draft AP I on behalf of its sponsors (Austria, Egypt, Mexico, Netherlands, Norway, Philippines and USSR),⁸⁴⁰ stated that:

In fact, reprisals could rarely be confined to civilian objects alone and the infliction of suffering on the civilian population would be virtually inevitable . . . The sponsors of the amendment were in favour of extending [the prohibition of reprisals against civilians] to a complete ban on all reprisals against the civilian population and civilian objects alike.⁸⁴¹

749. At the CDDH, during discussions on the protection of civilian objects, the Netherlands stated that "reprisals on civilian populations were prohibited by international law".⁸⁴²

750. In 1973, during a debate in the Sixth Committee of the UN General Assembly relative to respect for human rights in times of armed conflict, Peru recalled that the General Assembly had reaffirmed in various resolutions that "civilian populations and individual civilians must not be subjected to attacks against their persons as reprisals".⁸⁴³

⁸³⁶ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.9.

⁸³⁷ Report on the Practice of Jordan, 1997, Chapter 2.9.

⁸³⁸ Report on the Practice of Lebanon, 1998, Chapter 2.9.

⁸³⁹ Malaysia, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, p. 18.

⁸⁴⁰ Austria, Egypt, Mexico, Netherlands, Norway, Philippines and USSR, New proposal concerning Article 47 draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/57, 19 March 1974, p. 210.

⁸⁴¹ Netherlands, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.14, 6 February 1975, pp. 113–114, § 26.

⁸⁴² Netherlands, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 128, § 8.

⁸⁴³ Peru, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1453, 4 December 1973, § 15.

751. The Report on the Practice of the Philippines states that “reprisals are generally prohibited”.⁸⁴⁴

752. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: “Insert a new article after [draft] Article 70 worded as follows: ‘Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited’.”⁸⁴⁵

753. At the CDDH, in its explanation of vote, the representative of Poland stated that the adopted provision of AP I on the protection of civilians (Article 46 of draft AP I which became Article 51 AP I):

contained the most important provision of the Protocol, such as the prohibition... of attacks by way of reprisals. The latter often affected the most innocent persons and those who were least able to defend themselves, and gave rise to a mood of desperation which led to counter-reprisals and to chain reactions which became increasingly difficult to stop.

His delegation therefore welcomed the clear and categorical prohibition of reprisals in [the adopted provision]. The whole article, with its general rules, would fill some of the gaps in existing rules of a more specific character...⁸⁴⁶

754. In 1973, during a debate in the Sixth Committee of the UN General Assembly relative to respect for human rights in times of armed conflict, Romania stated that:

International humanitarian law should be developed in two main directions. First, there should be increased protection for the civilian population and non-military objectives... To that end, it was essential to adopt the broadest possible definition of the civilian population and non-military objectives and to take steps to ensure their effective protection. Such steps should include: ... the prohibition... of reprisals... and of any other act of terror directed against the civilian population.⁸⁴⁷

755. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

During hostilities, it is forbidden to resort to reprisals against... civilian populations, property and various categories of civilian property which are subject to special protection... The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties... A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV)... The prohibition of reprisals in these situations appears also in Principle 1,

⁸⁴⁴ Report on the Practice of the Philippines, 1997, Chapter 2.9.

⁸⁴⁵ Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

⁸⁴⁶ Poland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 166, §§ 129 and 130.

⁸⁴⁷ Romania, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.1451, 1 December 1973, § 8.

paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.⁸⁴⁸

756. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited. . . . The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions. . . . The Conventions do not preclude the taking of reprisals against the enemy's civilian population. . . . Additional Protocol I prohibits the taking of reprisals against the civilian population (Article 51(6)). . . . The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.⁸⁴⁹

757. At the CDDH, the US stated that:

[AP I] had gone far to remove the deterrent of reprisals, for understandable and commendable reasons and in view of past abuses. In the event of massive and continuing violations of the [1949 Geneva] Conventions and [AP I], however, the series of prohibitions on reprisals might prove unworkable. Massive and continuing attacks directed against a nation's civilian population could not be absorbed without a response in kind. By denying the possibility of such response and not offering any workable substitute, [AP I] was unrealistic and, in that respect, could not be expected to withstand the test of future armed conflicts.⁸⁵⁰

758. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I "fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions".⁸⁵¹

759. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US did not support "the prohibition on reprisals in article 51 and subsequent articles" and did not consider it part of customary law.⁸⁵² On the same occasion, another Legal Adviser of the US Department of State, explaining

⁸⁴⁸ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

⁸⁴⁹ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

⁸⁵⁰ US, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.58, 9 June 1977, p. 294, § 81.

⁸⁵¹ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

⁸⁵² US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

“the position of the United States on current law of war agreements”, stated that:

Article 51 of Protocol I prohibits any reprisal attacks against the civilian population, that is, attacks that would otherwise be forbidden but that are in response to the enemy’s own violations of the law and are intended to deter future violations. Historically, reciprocity has been the major sanction underlying the laws of war. If article 51 were to come into force for the United States, an enemy could deliberately carry out attacks against friendly civilian populations, and the United States would be legally forbidden to reply in kind. As a practical matter, the United States might, for political or humanitarian reasons, decide in a particular case not to carry out retaliatory or reprisal attacks involving unfriendly civilian populations. To formally renounce even the option of such attacks, however, removes a significant deterrent that presently protects civilians and other war victims on all sides of a conflict.⁸⁵³

760. According to an army lawyer who participated in the review of AP I by the US Joint Chiefs of Staff:

Article 51, paragraph 6, and article 52, paragraph 1, of [AP I] prohibit reprisals against the civilian population or civilian objects of an enemy nation, respectively. These provisions are not a codification of customary international law, but, in fact, a reversal of that law. The military review considered whether surrender of these rights would advance the law of war, or threaten the continued respect for the rule of law in war. It was concluded that removal of this legal right placed any further respect for the rule of law by certain nations in jeopardy . . .

The American review recognized the historic pattern for abuse of U.S. and allied prisoners of war by their enemies, and concluded that a broad reservation to the prohibition of reprisals contained in articles 51 and 52 of [AP I] was essential as a legitimate enforcement mechanism in order to ensure respect for the law of war.⁸⁵⁴

761. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including the civilian population or individual civilians (Article 51(6)) . . . These are among the new rules established by the Protocol that . . . do not apply to nuclear weapons.⁸⁵⁵

762. According to the Report on US Practice, during the review of AP I by the US government prior to the decision on whether to seek its ratification, the discussion of the reprisal issue shifted from the need to deter attacks on civilians to the need to protect US POWs by enforcing GC III.⁸⁵⁶

⁸⁵³ US, Remarks of Judge Abraham D. Sofaer, Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, 22 January 1987, *American University Journal of International Law and Policy*, Vol. 2, 1987, p. 469.

⁸⁵⁴ W. Hays Parks, “Air War and the Law of War”, *Air Force Law Review*, Vol. 32, 1990, pp. 94 and 97.

⁸⁵⁵ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

⁸⁵⁶ Report on US Practice, 1997, Chapter 2.9.

III. Practice of International Organisations and Conferences

United Nations

763. In 1986, in a statement by its President, the UN Security Council deplored “the violation of international humanitarian law and other laws of armed conflict” and expressed its deepening concern over the widening of the conflict [between Iran and Iraq] through the escalation of attacks on purely civilian targets”.⁸⁵⁷

764. In 1988, in a statement by its President, the UN Security Council strongly deplored “the escalation of hostilities between these two countries [Iran and Iraq], particularly the attacks against civilian targets and cities”. The members of the Security Council also insisted that “Iran and Iraq immediately cease all such attacks and desist forthwith from all acts that lead to the escalation of the conflict”.⁸⁵⁸

765. General Assembly Resolution 2444 (XXIII) adopted in 1968 affirmed Resolution XXVIII of the 20th International Conference of the Red Cross and the basic humanitarian principle applicable in all armed conflicts laid down therein that “it is prohibited to launch attacks against the civilian population as such”.⁸⁵⁹ This phrase was interpreted by some government experts at the CE (1971) as including a prohibition of reprisals against the civilian population.⁸⁶⁰

766. In Resolution 2675 (XXV) on basic principles for the protection of civilian populations in armed conflicts, unanimously adopted in 1970, the UN General Assembly stated that “civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity”.⁸⁶¹

767. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that “Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals”, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.⁸⁶²

768. In a resolution adopted in 1995 on assistance to Somalia in the field of human rights, the UN Commission on Human Rights deplored “continued

⁸⁵⁷ UN Security Council, Statement by the President, UN Doc. S/PV.2730, 22 December 1986, p. 3.

⁸⁵⁸ UN Security Council, Statement by the President, UN Doc. S/PV.2798, 16 March 1988, p. 2.

⁸⁵⁹ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(b).

⁸⁶⁰ ICRC, *Protection of the Civilian Population against the Dangers of Hostilities*, Documents submitted to the First Session of the Conference of Government Experts, Geneva, 24 May–12 June 1971, Vol. III, January 1971, p. 38.

⁸⁶¹ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 7.

⁸⁶² UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

attacks, acts of reprisal, abductions and other acts of violence committed against United Nations personnel, personnel of other humanitarian organizations and non-governmental organizations and representatives of the international media in Somalia, sometimes resulting in serious injury or death".⁸⁶³

769. In 1984, in a message addressed to the Presidents of Iran and of Iraq, the UN Secretary-General stated that he:

was profoundly distressed on learning of the heavy civilian casualties caused by the aerial attack on the town of Banesh on 5 June 1984... and the retaliatory and counter-retaliatory attacks that followed on towns in Iran and Iraq.

Deliberate military attacks on civilian areas cannot be condoned by the international community. The initiation of such attacks in the past, and the reprisals and counter-reprisals they provoke, have resulted in mounting loss of life and suffering to innocent and defenceless civilian populations. It is imperative that this immediately cease.⁸⁶⁴

770. In 1993, in a periodic report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that:

The Special Rapporteur also received allegations of individual murders inspired by ethnic revenge. One concerned Radislav and Marina Komjenac, two elderly civilians – said to be Bosnian Serbs – who were taken from their homes in Sarajevo and summarily executed on 26 June 1993. The killings appear to have been in retaliation for a mortar attack which killed seven Muslim civilians in the old town. Government militia were alleged to be responsible. The Special Rapporteur wrote to the Government on 14 August 1993 expressing concern about the report and asking what steps had been taken to punish the perpetrators.⁸⁶⁵

The Special Rapporteur also noted that in the Serb Krajina, Croats "have frequently been the victims of retaliations for actions of the Croatian armed forces".⁸⁶⁶

771. In 1994, in an interim report on the situation of human rights in Afghanistan, the Special Rapporteur of the UN Commission on Human Rights noted that "in July 1994, some 50 civilians were reportedly killed in an act of revenge for the murder of a prominent commander".⁸⁶⁷

772. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN

⁸⁶³ UN Commission on Human Rights, Res. 1995/56, 3 March 1995, preamble.

⁸⁶⁴ UN Secretary-General, Message dated 9 June 1984 to the Presidents of the Islamic Republic of Iran and the Republic of Iraq, UN Doc. S/16611, 11 June 1984.

⁸⁶⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, § 32.

⁸⁶⁶ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Fifth periodic report, UN Doc. E/CN.4/1994/47, 17 November 1993, § 145.

⁸⁶⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Afghanistan, Interim report, UN Doc. A/49/650, 8 November 1994, § 75.

Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 51(6) AP I, stated that “reprisals against the following categories of persons and objects are specifically prohibited: . . . (e) Civilians.”⁸⁶⁸ It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.⁸⁶⁹

Other International Organisations

773. No practice was found.

International Conferences

774. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

775. In the *Tadić case* (Interlocutory Appeal) in 1995, the ICTY Trial Chamber stated that UN General Assembly Resolution 2444 (XXIII) of 1968 and Resolution 2675 (XXV) of 1970 were “declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind”.⁸⁷⁰

776. In the review of the indictment in the *Martić case* in 1996 in which the accused was held accountable for having knowingly and wilfully ordered the shelling of Zagreb in May 1995, the ICTY Trial Chamber I held that:

15. . . . Does the fact that the attack was carried out as a reprisal reverse the illegality of the attack? The prohibition against attacking the civilian population as such as well as individual civilians must be respected in all circumstances regardless of the behaviour of the other party. The opinion of the great majority of legal authorities permits the Trial Chamber to assert that no circumstances would legitimise an attack against civilians even if it were a response proportionate to a similar violation perpetrated by the other party. The exclusion of the application of the principle of reprisals in the case of such fundamental humanitarian norms is confirmed by Article 1 Common to all Geneva Conventions. Under this provision, the High Contracting Parties undertake to respect and ensure respect for the Conventions in all circumstances, even when the behaviour of the other party might be considered

⁸⁶⁸ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

⁸⁶⁹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

⁸⁷⁰ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 112.

- wrongful. The [ICJ] considered that this obligation does not derive only from the Geneva Conventions themselves but also from the general principles of humanitarian law . . .
16. The prohibition on reprisals against the civilian population or individual civilians which is applicable to all armed conflicts, is reinforced by the texts of various instruments. General Assembly resolution 2675, underscoring the need for measures to ensure better protection of human rights in armed conflicts of all types, posits that "civilian populations, or individual members thereof, should not be the object of reprisals". Furthermore, Article 51(6) of Protocol I . . . states an unqualified prohibition because "in all circumstances, attacks against the civilian population or civilians by way of reprisals are prohibited" . . .
 17. Therefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.⁸⁷¹

777. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that:

527. . . . With regard to civilians in combat zones, reprisals against them are prohibited by Article 51(6) of the First Additional Protocol of 1977 . . . The question nevertheless arises as to whether these provisions, assuming that they were not declaratory of customary international law, have subsequently been transformed into general rules of international law. In other words, are those States which have not ratified the First Protocol . . . nevertheless bound by general rules having the same purport as those two provisions? Admittedly, there does not seem to have emerged recently a body of State practice consistently supporting the proposition that one of the elements of custom, namely *usus* or *diuturnitas* has taken shape. This is however an area where *opinio iuris sive necessitatis* may play a much greater role than *usus*, as a result of the . . . Martens Clause. In the light of the way States and courts have implemented it, this Clause clearly shows that principles of international humanitarian law may emerge through a customary process under the pressure of the demands of humanity or the dictates of public conscience, even where State practice is scant or inconsistent. The other element, in the form of *opinio necessitatis*, crystallising as a result of the imperatives of humanity or public conscience, may turn out to be the decisive element heralding the emergence of a general rule or principle of humanitarian law.

528. The question of reprisals against civilians is a case in point. It cannot be denied that reprisals against civilians are inherently a barbarous means of seeking compliance with international law. The most blatant reason for the universal revulsion that usually accompanies reprisals is that they may not only be arbitrary but are also not directed specifically at the individual authors of the initial violation. Reprisals typically are taken in situations where the individuals personally responsible for the breach are either unknown or out of reach. These retaliatory measures are aimed instead at other more vulnerable individuals or groups. They are individuals or groups who may not even have any degree of solidarity with the presumed authors of the initial violation; they may share with them only the links of nationality and allegiance to the same rulers.

⁸⁷¹ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, §§ 15–17.

529. In addition, the reprisal killing of innocent persons, more or less chosen at random, without any requirement of guilt or any form of trial, can safely be characterized as a blatant infringement of the most fundamental principles of human rights. It is difficult to deny that a slow but profound transformation of humanitarian law under the pervasive influence of human rights has occurred. As a result belligerent reprisals against civilians and fundamental rights of human beings are absolutely inconsistent legal concepts. This trend towards the humanisation of armed conflict is amongst other things confirmed by the works of the United Nations International Law Commission on State Responsibility . . .

530. It should be added that while reprisals could have had a modicum of justification in the past, when they constituted practically the only effective means of compelling the enemy to abandon unlawful acts of warfare and to comply in future with international law, at present they can no longer be justified in this manner . . .

531. Due to the pressure exerted by the requirements of humanity and the dictates of public conscience, a customary rule of international law has emerged on the matter under discussion.⁸⁷²

Considering practice of States, international organisations, the ILC and ICRC, as well as previous practice of the ICTY, the Trial Chamber then stated that:

The aforementioned elements seem to support the contention that the demands of humanity and the dictates of public conscience, as manifested in *opinio necessitatis*, have by now brought about the formation of a customary rule also binding upon those few States that at some stage did not intend to exclude the abstract legal possibility of resorting to the reprisals under discussion.⁸⁷³

V. Practice of the International Red Cross and Red Crescent Movement

778. In a press release issued in 1983 concerning the Iran–Iraq War, the ICRC stressed that “civilians must not be the object of attack, nor of reprisals”.⁸⁷⁴

779. In a press release issued in 1984 concerning the Iran–Iraq War, the ICRC, after the bombardment of the Iranian town of Baneh “during which hundreds of civilians were killed or injured”, stated that “this murderous raid with its tragic consequences has provoked a spiral of reprisals and counter-reprisals against the inhabitants of Iraqi and Iranian towns”. The ICRC called upon “Iran and Iraq to cease immediately their current bombardment of defenceless civilians”.⁸⁷⁵

780. In a communication to the press in 2000 in connection with the hostilities in the Near East, the ICRC reminded all those taking active part in the violence that “reprisals against the civilian population” are absolutely and unconditionally prohibited.⁸⁷⁶

⁸⁷² ICTY, *Kupreškić case*, Judgement, 14 January 2000, §§ 527–531.

⁸⁷³ ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 533.

⁸⁷⁴ ICRC, Press Release No. 1479, Iran/Iraq: ICRC appeals to belligerents, 15 December 1983.

⁸⁷⁵ ICRC, Press Release No. 1489, Bombing of Iraqi and Iranian Cities, 7 June 1984.

⁸⁷⁶ ICRC, Communication to the Press No. 00/42, ICRC appeal to all involved in violence in the Near East, 21 November 2000.

VI. Other Practice

781. In 1990, in a meeting with the ICRC, an armed opposition group denounced reprisals against the civilian population by soldiers and militiamen of a State.⁸⁷⁷

782. Oppenheim states that:

In the War of 1914–1918 the illegality, except by way of reprisals, of aerial bombardment directed exclusively against the civilian population for the purpose of terrorisation or otherwise seems to have been generally admitted by the belligerents, – although this fact did not actually prevent attacks on centres of civilian population in the form either of reprisals or of attack against military objectives situated therein.⁸⁷⁸

D. Reprisals against Protected Objects

Civilian objects in general

I. Treaties and Other Instruments

Treaties

783. Article 33, third paragraph, GC IV provides that “reprisals against protected persons and their property are prohibited”.

784. Article 52(1) AP I provides that “civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives.” Article 52 AP I was adopted by 79 votes in favour, 0 against and 7 abstentions.⁸⁷⁹

785. Upon ratification of AP I and AP II, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.⁸⁸⁰

786. Upon ratification of AP I, Germany stated that “the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation”.⁸⁸¹

⁸⁷⁷ ICRC archive document.

⁸⁷⁸ Lassa Oppenheim, *International Law. A Treatise*, Vol. II, *Disputes, War and Neutrality*, Sixth edition, revised, Hersch Lauterpacht (ed.), Longmans, Green and Co., London/New York/Toronto, 1944, p. 414, § 214*ea*.

⁸⁷⁹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 168.

⁸⁸⁰ Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.

⁸⁸¹ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.

787. Upon ratification of AP I, Italy stated that “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I and in particular its Articles 51 and 52 with all means admissible under international law in order to prevent any further violation”.⁸⁸²

788. Upon ratification of AP I, the UK stated that:

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.⁸⁸³

789. Article 3(7) of the 1996 Amended Protocol II to the CCW provides that “it is prohibited in all circumstances to direct [mines, booby-traps and other devices], either in offence, defence or by way of reprisals, against . . . civilian objects”.

Other Instruments

790. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

791. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

792. Section 5.6 of the 1999 UN Secretary-General’s Bulletin states that “the United Nations force shall not engage in reprisals against civilians or civilian objects”.

793. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with “Obligations not affected by countermeasures”, states that “countermeasures shall not affect: . . . (c) Obligations of a humanitarian character prohibiting reprisals.”

⁸⁸² Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.

⁸⁸³ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

II. National Practice

Military Manuals

794. Argentina's Law of War Manual (1969), in the chapter dealing with the "Protection of civilian persons in times of war", which contains "provisions common to the territories of the belligerent parties and occupied territories", states that "measures of reprisal with respect to protected persons and their property remain equally prohibited".⁸⁸⁴

795. Argentina's Regulation for the Treatment of POWs states that "reprisals against the property of innocent interned [civilians] are prohibited".⁸⁸⁵

796. Argentina's Law of War Manual (1989), in a part dealing with the "Treatment given to protected persons", which contains "provisions common to the territories of the belligerent parties and occupied territories", refers, *inter alia*, to Article 33 GC IV and provides that "remain absolutely prohibited: . . . measures of reprisal against protected persons and their objects".⁸⁸⁶ In a part dealing with "property of a civilian character", the manual states that "property of civilian character cannot be made the object of . . . reprisals".⁸⁸⁷

797. Australia's Commanders' Guide, referring, *inter alia*, to Articles 51–56 AP I, states that "protected persons, such as . . . civilians . . . as well as protected buildings and facilities should not be the subject of reprisals".⁸⁸⁸

798. Australia's Defence Force Manual provides that "reprisals are prohibited against . . . civilian objects".⁸⁸⁹

799. Belgium's Law of War Manual, citing several examples of jurisprudence and referring to Articles 4 and 33 GC IV, states that "the persons protected by the Geneva Conventions (. . . civilians) may not be made the object of reprisals. Therefore, [reprisals] may be directed only against combatants, non-protected property and a restricted group of non-protected civilians."⁸⁹⁰

800. Belgium's Teaching Manual for Soldiers, in the part containing exercises (questions and answers) for the training of soldiers, gives a negative response to the question as to whether civilian property may be destroyed in reprisal.⁸⁹¹

801. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".⁸⁹² It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".⁸⁹³

⁸⁸⁴ Argentina, *Law of War Manual* (1969), § 4.012(3).

⁸⁸⁵ Argentina, *Regulation for the Treatment of POWs* (1985), § 4.02(5).

⁸⁸⁶ Argentina, *Law of War Manual* (1989), § 4.29(5).

⁸⁸⁷ Argentina, *Law of War Manual* (1989), § 4.45.

⁸⁸⁸ Australia, *Commanders' Guide* (1994), § 1212; see also *Defence Force Manual* (1994), § 1311.

⁸⁸⁹ Australia, *Defence Force Manual* (1994), § 920.

⁸⁹⁰ Belgium, *Law of War Manual* (1983), p. 36.

⁸⁹¹ Belgium, *Teaching Manual for Soldiers* (undated), p. 86.

⁸⁹² Benin, *Military Manual* (1995), Fascicule III, p. 12.

⁸⁹³ Benin, *Military Manual* (1995), Fascicule III, p. 13.

802. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".⁸⁹⁴

803. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".⁸⁹⁵

804. Canada's LOAC Manual, in a part dealing with targeting, provides that "reprisals against civilians and civilian objects are prohibited".⁸⁹⁶ It further provides that "civil defence buildings and *materiel*, as well as shelters provided for the civilian population, are considered 'civilian objects' and shall not be attacked or subjected to reprisals".⁸⁹⁷ In a chapter entitled "Treatment of civilians in the hands of a party to the conflict or an occupying power" and, more specifically, in a section containing "provisions common to the territories of the parties to the conflict and to occupied territories", the manual refers to GC IV and states that "the following are expressly prohibited: . . . the taking of reprisals against protected persons and their property".⁸⁹⁸ In the part dealing with enforcement measures, the manual also states that "reprisals against the following categories of persons and objects are prohibited: . . . f. civilian objects".⁸⁹⁹

805. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".⁹⁰⁰

806. Croatia's LOAC Compendium provides for the prohibition of reprisals against "civilian persons and objects". It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".⁹⁰¹

807. The Military Manual of the Dominican Republic, under a provision entitled "No theft or arson against civilian property", states that "the Geneva Convention prohibits reprisals against civilians for acts of enemy soldiers".⁹⁰²

808. Ecuador's Naval Manual provides that "reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property".⁹⁰³ However, it also states that "reprisals are forbidden to be taken against: . . . 3. Civilians in occupied territory."⁹⁰⁴ The manual further provides that "interned civilians . . . may not be subjected to collective punishment or acts of reprisal".⁹⁰⁵

⁸⁹⁴ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

⁸⁹⁵ Cameroon, *Disciplinary Regulations* (1975), Article 32.

⁸⁹⁶ Canada, *LOAC Manual* (1999), p. 4-5, § 39.

⁸⁹⁷ Canada, *LOAC Manual* (1999), p. 4-10, § 95.

⁸⁹⁸ Canada, *LOAC Manual* (1999), p. 11-4, § 33.

⁸⁹⁹ Canada, *LOAC Manual* (1999), p. 15-2, § 15.

⁹⁰⁰ Congo, *Disciplinary Regulations* (1986), Article 32(2).

⁹⁰¹ Croatia, *LOAC Compendium* (1991), p. 19.

⁹⁰² Dominican Republic, *Military Manual* (1980), p. 10.

⁹⁰³ Ecuador, *Naval Manual* (1989), § 6.2.3.

⁹⁰⁴ Ecuador, *Naval Manual* (1989), § 6.2.3.2. ⁹⁰⁵ Ecuador, *Naval Manual* (1989), § 11.9.

809. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: . . . it is prohibited [to soldiers in combat] . . . to take hostages, to engage in reprisals or collective punishments".⁹⁰⁶

810. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".⁹⁰⁷ It further refers, *inter alia*, to Articles 20 and 51–56 API and states that "reprisals are prohibited against . . . civilian property".⁹⁰⁸

811. Germany's Military Manual, in the chapter dealing with reprisals, referring to Articles 33 GC IV and 51 AP I, provides that "it is expressly prohibited by agreement to make reprisals against: . . . civilians . . . private property of civilians on occupied territory and of enemy foreigners on friendly territory".⁹⁰⁹ Referring to Articles 33 GC IV and 20 and 51 AP I, the manual further states that "reprisals against the civilian population and its property . . . are prohibited".⁹¹⁰ In a chapter entitled "Belligerent occupation", the manual, referring to Articles 33 GC IV and 20 and 51 AP I, states that "reprisals against civilians and their property are prohibited".⁹¹¹

812. Germany's IHL Manual provides that "reprisals are expressly prohibited against . . . the private property of civilians in occupied territories".⁹¹²

813. Hungary's Military Manual provides for the prohibition of reprisals against "civilian persons and objects". It further provides for the prohibition of taking reprisals against "specifically protected persons and objects".⁹¹³

814. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".⁹¹⁴

815. Italy's IHL Manual, providing for the prohibition of reprisals against, *inter alia*, "protected civilian persons" and "protected persons and property", states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".⁹¹⁵

816. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".⁹¹⁶ In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . civilians."⁹¹⁷

817. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.⁹¹⁸

⁹⁰⁶ France, *Disciplinary Regulations as amended* (1975), Article 10 bis (2).

⁹⁰⁷ France, *LOAC Manual* (2001), p. 85. ⁹⁰⁸ France, *LOAC Manual* (2001), p. 108.

⁹⁰⁹ Germany, *Military Manual* (1992), § 479. ⁹¹⁰ Germany, *Military Manual* (1992), § 507.

⁹¹¹ Germany, *Military Manual* (1992), § 535. ⁹¹² Germany, *IHL Manual* (1996), § 320.

⁹¹³ Hungary, *Military Manual* (1992), p. 35. ⁹¹⁴ Indonesia, *Air Force Manual* (1990), § 15(c).

⁹¹⁵ Italy, *IHL Manual* (1991), Vol. I, § 25.

⁹¹⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

⁹¹⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

⁹¹⁸ Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

818. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".⁹¹⁹

819. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring to, *inter alia*, Article 52 AP I, states that "no reprisals may be undertaken against civilian property".⁹²⁰

820. New Zealand's Military Manual, in the chapter dealing with civilians and referring to Articles 32–34 GC IV, states that "the following are . . . prohibited: . . . the taking of reprisals against protected persons and their property".⁹²¹ In the chapter dealing with reprisals and referring to Article 52(1) AP I, the manual further states that "reprisals against the following categories of persons and objects are prohibited . . . civilian objects".⁹²²

821. South Africa's LOAC Manual states that "reprisals against the persons and property of . . . protected civilians are prohibited".⁹²³

822. Spain's LOAC Manual lists among the persons against whom the taking of reprisals is prohibited "civilian persons and objects". It refers, however, to Article 46 GC I (relative to the prohibition of reprisals against the wounded, the sick and medical personnel protected under GC I).⁹²⁴ It also refers to Article 52 AP I with regard to the prohibition of reprisals against cultural objects. In another provision, the manual, also referring to Article 52 AP I, states that "property of a civilian character will not be made the object of attacks nor of reprisals".⁹²⁵

823. Sweden's IHL Manual, referring to Article 52 AP I, states that:

The basic rule in Article 52 is that civilian objects and civilian property may not constitute objectives for attack or be subjected to reprisals. The article does not represent any new thinking: but is, rather, a clarification of humanitarian principles established in older conventions.⁹²⁶

While noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, the manual states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.⁹²⁷

⁹¹⁹ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

⁹²⁰ Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-5.

⁹²¹ New Zealand, *Military Manual* (1992), § 1116(2)(d).

⁹²² New Zealand, *Military Manual* (1992), § 1606(2)(f).

⁹²³ South Africa, *LOAC Manual* (1996), § 34(e).

⁹²⁴ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

⁹²⁵ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.b.(1).

⁹²⁶ Sweden, *IHL Manual* (1991), Section § 3.2.1.5, p. 53.

⁹²⁷ Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

Referring to Article 33 GC IV, the manual further states that “protected persons may not be punished for actions they have not themselves performed. Collective punishment of a whole group is also prohibited. Also, the occupying power may not . . . destroy civilian property in reprisal for some action directed against the occupying power.”⁹²⁸

824. Togo’s Military Manual states that “the following prohibitions must be respected: . . . to launch reprisals against protected persons and property”.⁹²⁹ It adds that reprisals “may only be used if: . . . they are carried out only against combatants and military objectives”.⁹³⁰

825. The UK Military Manual, in a chapter dealing with the “treatment of enemy alien civilians” and referring to Articles 32–34 GC IV, states that “the following are prohibited: . . . the taking of reprisals against protected persons and their property”.⁹³¹ In the chapter dealing with “the occupation of enemy territory”, the manual, referring to Articles 33 and 34 GC IV, states that “[GC IV] provides . . . that ‘Reprisals against protected persons and their property are prohibited’”.⁹³² In the chapter dealing with the “treatment of enemy property”, the manual further states that:

The custom of war formerly permitted as an act of reprisal the destruction, by burning or otherwise, of a house whose inmates, though not possessing the rights of combatants, have fired on enemy troops. However, this practice is no longer lawful. [Article 33 GC IV] prohibits reprisals against protected persons and their property.⁹³³

Moreover, the manual, in the part dealing with reprisals, states that “reprisals against . . . civilian protected persons and their property in occupied territory and in the belligerent’s own territory, are . . . prohibited”.⁹³⁴ In a footnote relating to this provision, the manual, referring to Articles 4 and 33 GC IV, notes that “the effect of this rule is that reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons”.⁹³⁵

826. The UK LOAC Manual, in a part dealing with the protection of civilians, states that “it is forbidden: . . . to carry out reprisals against protected persons or property”.⁹³⁶ It further states that “the Geneva Conventions and [AP I] prohibit reprisals against . . . enemy civilians in territory controlled by a belligerent”.⁹³⁷ However, the manual also states that “the United Kingdom reserves the right to take proportionate reprisals against an enemy’s civilian population or civilian

⁹²⁸ Sweden, *IHL Manual* (1991), Section 6.1.3, p. 122.

⁹²⁹ Togo, *Military Manual* (1996), Fascicule III, p. 12.

⁹³⁰ Togo, *Military Manual* (1996), Fascicule III, p. 13.

⁹³¹ UK, *Military Manual* (1958), § 42. ⁹³² UK, *Military Manual* (1958), § 554.

⁹³³ UK, *Military Manual* (1958), § 596. ⁹³⁴ UK, *Military Manual* (1958), § 644.

⁹³⁵ UK, *Military Manual* (1958), § 644, footnote 2.

⁹³⁶ UK, *LOAC Manual* (1981), Section 4, p. 14, § 5(e).

⁹³⁷ UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.

objects where the enemy has attacked our own civilians or civilian objects in violation of [AP I]".⁹³⁸

827. The US Field Manual, referring to Articles 13 GC III and 33 GC IV, stipulates that "reprisals against the persons or property of prisoners of war, including the wounded and sick, and protected civilians are forbidden".⁹³⁹

828. The US Air Force Pamphlet, referring to Article 33 GC IV, provides that "no protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Reprisals against protected persons and their property are prohibited."⁹⁴⁰ The Pamphlet further provides that:

Reprisals are forbidden, under all circumstances, against the persons or objects referred above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted.⁹⁴¹

829. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", lists a number of persons and objects protected under the Geneva Conventions against whom reprisals are prohibited. It adds, however, that "a Protocol to the 1949 Geneva Conventions would expand this list to include all civilians and civilian property on land... The United States signed this Protocol in 1977, but has not yet ratified it. Consult the Staff Judge Advocate for further guidance."⁹⁴²

830. The US Soldier's Manual, in the part which deals with the treatment of civilians and private property, states that "the Geneva Conventions forbid retaliating against civilians for the actions of enemy soldiers".⁹⁴³

831. The US Operational Law Handbook provides that:

The following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity:

- ...
- m. Reprisals against persons or property protected by the Geneva Conventions, to include the wounded, sick, or shipwrecked, prisoners of war, detained personnel, civilians [and] their property.⁹⁴⁴

832. The US Naval Handbook provides that "reprisals may be taken against enemy armed forces, enemy civilians other than those in occupied territory, and enemy property".⁹⁴⁵ It states, however, that "reprisals are forbidden

⁹³⁸ UK, *LOAC Manual* (1981), Section 4, p. 17, § 17.

⁹³⁹ US, *Field Manual* (1956), § 497(c).

⁹⁴⁰ US, *Air Force Pamphlet* (1976), § 10-7(b)(1). ⁹⁴¹ US, *Air Force Pamphlet* (1976), § 10-7(b)(2).

⁹⁴² US, *Air Force Commander's Handbook* (1980), § 8-4(c).

⁹⁴³ US, *Soldier's Manual* (1984), p. 23. ⁹⁴⁴ US, *Operational Law Handbook* (1993), p. Q-182.

⁹⁴⁵ US, *Naval Handbook* (1995), § 6.2.3.

to be taken against: 1....interned civilians...3. Civilians in occupied territory."⁹⁴⁶

833. The Annotated Supplement to the US Naval Handbook, referring to Article 33 GC IV, states that "also immune from reprisals under the Geneva Conventions are the property of such inhabitants [i.e. of occupied territory], enemy civilians in a belligerent's own territory, and the property of such civilians"⁹⁴⁷

834. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . civilian persons and their property"⁹⁴⁸

National Legislation

835. Argentina's Draft Code of Military Justice punishes any soldier who carries out reprisals or orders the carrying out of reprisals against civilian objects, causing their destruction, provided that the said acts do not offer a definite military advantage in the circumstances ruling at the time, and that the said objects do not make an effective contribution to the adversary's military action.⁹⁴⁹

836. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning civilian persons, medical organisations and their personnel, civilian objectives, civilian property . . . During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.⁹⁵⁰

837. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.⁹⁵¹

838. Italy's Law of War Decree as amended states that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended"⁹⁵²

839. Spain's Penal Code provides that:

⁹⁴⁶ US, *Naval Handbook* (1995), § 6.2.3.2.

⁹⁴⁷ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.1, footnote 43.

⁹⁴⁸ SFRY (FRY), *YPA Military Manual* (1988), § 31(1).

⁹⁴⁹ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(2) in the *Code of Military Justice as amended* (1951).

⁹⁵⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.

⁹⁵¹ Colombia, *Penal Code* (2000), Article 158.

⁹⁵² Italy, *Law of War Decree as amended* (1938), Article 8.

[Shall be punished] whoever, in the event of an armed conflict: . . . attacks or makes the object of reprisals or the object of hostilities civilian objects of the adverse party, causing extensive destruction, provided that the said acts do not offer a definite military advantage in the circumstances of the case or that the said objects do not make an effective contribution to the adverse party's military effort.⁹⁵³

National Case-law

840. No practice was found.

Other National Practice

841. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia's House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

The extension in [AP I of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.⁹⁵⁴

842. The Report on the Practice of Australia expressly names open towns, undefended areas, demilitarised zones and humanitarian corridors among the protected objects against which reprisals are prohibited.⁹⁵⁵

843. At the CDDH, Bulgaria stated that "his delegation favoured [an] amendment which sought to prohibit reprisals against civilian objects".⁹⁵⁶

844. At the CDDH, the representative of Canada, with respect to paragraph 4 of draft Article 46 (which became Article 51 AP I), stated that:

His delegation did not wish an unenforceable provision to be adopted, disrespect for which would lead to disrespect for the whole Protocol. His delegation could accept a prohibition on reprisals against civilians or the civilian population, but not on reprisals against civilian objects.⁹⁵⁷

845. At the CDDH, Canada, reverting to a proposed amendment on the prohibition of reprisals against protected objects (sponsored by Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Qatar, Syria, United Arab Emirates and Yemen),⁹⁵⁸ stated that:

⁹⁵³ Spain, *Penal Code* (1995), Article 613(1)(b).

⁹⁵⁴ Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.

⁹⁵⁵ Report on the Practice of Australia, 1998, Chapter 2.9.

⁹⁵⁶ Bulgaria, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 134, § 31.

⁹⁵⁷ Canada, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 13 March 1974, p. 55, § 38.

⁹⁵⁸ Egypt, Democratic Yemen, Iraq, Jordan, Kuwait, Lebanon, Libya, Mauritania, Morocco, Qatar, Syria, United Arab Emirates and Yemen, New proposal concerning Article 47 draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/63, 19 March 1974, p. 211.

If it attempted to provide for a total prohibition of reprisals, the Committee would be drawing up a theoretically ideal document at the humanitarian level, but that such a prohibition would be based on the assumption that the Party or State in question would not retaliate, and it was doubtful whether such would be the case; there had been in fact abuses, not only on the pretext of reprisals, but also on the pretext of the law of war. The question was whether an attempt should be made to curb the victim's desire for vengeance by formulating a rule, or whether that aspect could be left undecided. He thought it was better to lay down a rule.⁹⁵⁹

846. In 1986, in a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Foreign Affairs noted that:

Under [the 1949 Geneva Conventions] . . . reprisals directed against the enemy civilian population or property in enemy controlled areas are permissible. [AP I] goes beyond the Geneva Conventions and prohibits reprisals directed against . . . civilian property under all circumstances.⁹⁶⁰

847. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".⁹⁶¹

848. In its written statement before the ICJ in the *Nuclear Weapons case* before the ICJ in 1995, Egypt stated that "reprisals are prohibited against . . . civilians . . . The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."⁹⁶²

849. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.⁹⁶³

850. At the CDDH, Finland stated that:

The main intention of paragraph 4 [of draft Article 46 which became Article 51 of AP I] was to extend the protection to the civilian population as a whole. That was desirable, but it was not sufficient. Civilian objects should also be protected from reprisals everywhere, even in the field of hostilities.⁹⁶⁴

⁹⁵⁹ Canada, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 13 March 1974, p. 55, § 38.

⁹⁶⁰ Canada, Ministry of Foreign Affairs, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, § 2.

⁹⁶¹ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

⁹⁶² Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.

⁹⁶³ Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

⁹⁶⁴ Finland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.7, 13 March 1974, p. 54, § 29.

851. At the CDDH, Finland, with regard to amendments made by other States concerning the prohibition of reprisals, stated that it “accepted [those amendments] which would prohibit reprisals against civilian objects”.⁹⁶⁵

852. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: “3. . . . The measures may not involve any actions prohibited by the Geneva Conventions of 1949.”⁹⁶⁶

853. At the CDDH, during discussions on amendments made by other States concerning the prohibition of reprisals against civilian objects, the GDR stated that it “supported . . . the amendments concerning reprisals”.⁹⁶⁷

854. In 1990, during a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in AP I “newly introduced rules”.⁹⁶⁸

855. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iranian authorities, including the Ministry of Foreign Affairs and the parliament, condemned Iraqi attacks on civilian objects, which Iran always regarded as war crimes. The report points out that Iran always insisted that war must be limited to battlefronts and that it had no intention of attacking civilian objects. When Iraq accused Iran of bombarding civilian targets, Iranian military communiqués denied these allegations and claimed that Iranian attacks were limited to military or economic facilities.⁹⁶⁹

856. On the basis of a reply by Iraq’s Ministry of Defence to a questionnaire, the Report on the Practice of Iraq states that reprisals “must not be directed, in any way, against . . . civilian objects, but [have] to be confined to purely military targets”.⁹⁷⁰

857. According to the Report on the Practice of Israel, the IDF does not condone nor conduct reprisals against persons or objects protected by the Geneva Conventions.⁹⁷¹

858. According to the Report on the Practice of Jordan, “the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal”.⁹⁷²

859. At the CDDH, the Netherlands, introducing an amendment to draft AP I which read that “attacks against civilian objects by way of reprisals are

⁹⁶⁵ Finland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.15, 7 February 1975, p. 118, § 7.

⁹⁶⁶ France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/I/221/Rev.1, 22 April 1976, p. 324.

⁹⁶⁷ GDR, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 130, § 19.

⁹⁶⁸ Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.

⁹⁶⁹ Report on the Practice of Iran, 1997, Chapter 1.3.

⁹⁷⁰ Report on the Practice of Iraq, 1998, Reply by the Ministry of Defence to a questionnaire, July 1997, Chapter 2.9.

⁹⁷¹ Report on the Practice of Israel, 1997, Chapter 2.9.

⁹⁷² Report on the Practice of Jordan, 1997, Chapter 2.9.

prohibited" on behalf of its sponsors (Austria, Egypt, Mexico, Netherlands, Norway, Philippines, USSR),⁹⁷³ stated that:

In fact, reprisals could rarely be confined to civilian objects alone and the infliction of suffering on the civilian population would be virtually inevitable . . . The sponsors of the amendment were in favour of extending [the prohibition of reprisals against civilians] to a complete ban on all reprisals against the civilian population and civilian objects alike.⁹⁷⁴

860. At the CDDH, the Netherlands, during discussions on the protection of civilian objects, stated that "reprisals on civilian populations were prohibited by international law".⁹⁷⁵

861. The Report on the Practice of the Philippines states that "reprisals are generally prohibited".⁹⁷⁶

862. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: Insert a new article after [draft] Article 70 worded as follows: 'Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited'.⁹⁷⁷

863. At the CDDH, Poland, referring to an amendment on the prohibition of attacks against civilian objects by way of reprisals sponsored by other States, stated that it supported the amendment and pointed out that "it was impossible to carry out reprisals against civilian objects without injuring civilians".⁹⁷⁸

864. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

During hostilities, it is forbidden to resort to reprisals against . . . civilian populations, property and various categories of civilian property which are subject to special protection . . . The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*,

⁹⁷³ Austria, Egypt, Mexico, Netherlands, Norway, Philippines and USSR, New proposal concerning Article 47 draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/57, 19 March 1974, p. 210.

⁹⁷⁴ Netherlands, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.14, 6 February 1975, pp. 113–114, § 26.

⁹⁷⁵ Netherlands, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 128, § 8.

⁹⁷⁶ Report on the Practice of the Philippines, 1997, Chapter 2.9.

⁹⁷⁷ Poland, Proposal on a new Article 70 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

⁹⁷⁸ Poland, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 129, § 15.

it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.⁹⁷⁹

865. At the CDDH, Sweden, with respect to amendments made by other States concerning the prohibition of attacks against civilian objects by way of reprisals, stated that it was “in favour of such a ban”.⁹⁸⁰

866. At the CDDH, the UK, with respect to an amendment concerning the protection of civilian objects, stated that:

The amendment proposed no ban on reprisals, the intention being to leave intact the existing ban on reprisals against civilian objects in occupied territory which were contained in the [1907 HR] and [GC IV], and to retain the right of reprisal against such objects in enemy territory subject to the existing restraints in customary law, which were considerable. His delegation shared the misgivings expressed by the representative of Canada concerning the proposed ban on reprisals and agreed that such bans would have to be conditional on the improvement of the means of enforcement and supervision of the provisions on protection of the civilian population . . . If a ban was introduced, it should not, in his view, be absolute but qualified, so that the right should be retained, subject to strict legal restraint on its exercise, in the circumstances where a Party to the conflict was subjected to persistent attacks on its own civilians and civilian objects which did not cease despite repeated protests. In such circumstances a Party to the conflict would undoubtedly take reprisal measures.⁹⁸¹

867. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions . . . The Conventions do not preclude the taking of reprisals against . . . civilian objects in enemy territory. Additional Protocol I prohibits the taking of reprisals against . . . civilian objects (Article 52(1)) . . . The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.⁹⁸²

868. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I “fails to improve substantially the compliance and

⁹⁷⁹ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

⁹⁸⁰ Sweden, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.15, 7 February 1975, p. 125, § 39.

⁹⁸¹ UK, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, pp. 139–140, §§ 57–58.

⁹⁸² UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions".⁹⁸³

869. In 1987, the Deputy Legal Adviser of the US Department of State affirmed that the US did not support "the prohibition on reprisals in article 51 AP I and subsequent articles" and did not consider it part of customary law.⁹⁸⁴

870. According to an army lawyer who participated in the review of AP I by the US Joint Chiefs of Staff:

Article 51, paragraph 6, and article 52, paragraph 1, of [AP I] prohibit reprisals against the civilian population or civilian objects of an enemy nation, respectively. These provisions are not a codification of customary international law, but, in fact, a reversal of that law. The military review considered whether surrender of these rights would advance the law of war, or threaten the continued respect for the rule of law in war. It was concluded that removal of this legal right placed any further respect for the rule of law by certain nations in jeopardy . . .

The American review recognized the historic pattern for abuse of U.S. and allied prisoners of war by their enemies, and concluded that a broad reservation to the prohibition of reprisals contained in articles 51 and 52 of [AP I] was essential as a legitimate enforcement mechanism in order to ensure respect for the law of war.⁹⁸⁵

871. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including . . . civilian objects (Article 52(1)) . . . These are among the new rules established by the Protocol that . . . do not apply to nuclear weapons.⁹⁸⁶

872. At the CDDH, the SFRY stated that "reprisals against civilian objects . . . should be prohibited".⁹⁸⁷

III. Practice of International Organisations and Conferences

United Nations

873. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting

⁹⁸³ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

⁹⁸⁴ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

⁹⁸⁵ W. Hays Parks, Air War and the Law of War, *Air Force Law Review*, Vol. 32, No. 1, 1990, pp. 94 and 97.

⁹⁸⁶ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

⁹⁸⁷ SFRY, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 127, § 5.

reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".⁹⁸⁸

874. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 52(1) AP I, stated that "reprisals against the following categories of persons and objects are specifically prohibited: . . . (f) Civilian objects."⁹⁸⁹ It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.⁹⁹⁰

Other International Organisations

875. No practice was found.

International Conferences

876. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration calling upon "the Occupying Power [in the conflict between Israel and Palestinians] to refrain from perpetrating any other violation of [GC IV], in particular reprisals against protected persons and their property".⁹⁹¹

IV. Practice of International Judicial and Quasi-judicial Bodies

877. In its judgement in the *Kupreškić case* in 2000, the ICTY Trial Chamber stated that "reprisals against civilian objects are outlawed by Article 52(1) of [AP I]".⁹⁹²

V. Practice of the International Red Cross and Red Crescent Movement

878. No practice was found.

⁹⁸⁸ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

⁹⁸⁹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

⁹⁹⁰ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

⁹⁹¹ Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, § 14.

⁹⁹² ICTY, *Kupreškić case*, Judgement, 14 January 2000, § 527.

VI. Other Practice

879. No practice was found.

Medical objects

I. Treaties and Other Instruments

Treaties

880. Article 46 GC I provides that “reprisals against the . . . buildings or equipment protected by the Convention are prohibited”.

881. Article 47 GC II provides that “reprisals against . . . the vessels or the equipment protected by the Convention are prohibited”.

882. Article 20 AP I, which refers, *inter alia*, to Article 12 AP I dealing with the protection of medical units, provides that “reprisals against the persons and objects protected by this Part are prohibited”. Article 20 AP I was adopted by consensus.⁹⁹³

883. Upon ratification of the Additional Protocols, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.⁹⁹⁴

884. Upon ratification of AP I, Germany declared that “the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation”.⁹⁹⁵

885. Upon ratification of AP I, Italy stated that “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I . . . with all means admissible under international law in order to prevent any further violation”.⁹⁹⁶

886. Upon ratification of AP I, the UK stated that in the event of violations of Articles 51–55 AP I by the adversary, the UK would regard itself entitled to take measures otherwise prohibited by these Articles, noting, however, that “any measures thus taken by the United Kingdom . . . will not involve any action prohibited by the Geneva Conventions of 1949.”⁹⁹⁷

⁹⁹³ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 71.

⁹⁹⁴ Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.

⁹⁹⁵ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.

⁹⁹⁶ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.

⁹⁹⁷ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

Other Instruments

887. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

888. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

889. Section 9.6 of the 1999 UN Secretary-General's Bulletin, which deals under Section 9.3 and 9.5 with the protection of "medical establishments or mobile medical units" and "medical equipment [and] mobile medical units", states that "the United Nations force shall not engage in reprisals against . . . establishments and equipment protected under this section".

890. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) Obligations of a humanitarian character prohibiting reprisals."

*II. National Practice**Military Manuals*

891. Australia's Commanders' Guide, referring, *inter alia*, to Articles 46 GC I, 47 GC II and Article 20 AP I, states that "protected buildings and facilities should not be the subject of reprisals".⁹⁹⁸

892. Australia's Defence Force Manual provides that "reprisals against . . . medical personnel, buildings and equipment are forbidden".⁹⁹⁹ In another provision, the manual further states that "protected buildings and facilities . . . should not be the subject of reprisals".¹⁰⁰⁰

893. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".¹⁰⁰¹ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".¹⁰⁰²

894. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".¹⁰⁰³

895. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".¹⁰⁰⁴

⁹⁹⁸ Australia, *Commanders' Guide* (1994), § 1212.

⁹⁹⁹ Australia, *Defence Force Manual* (1994), § 985.

¹⁰⁰⁰ Australia, *Defence Force Manual* (1994), § 1311.

¹⁰⁰¹ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹⁰⁰² Benin, *Military Manual* (1995), Fascicule III, p. 13.

¹⁰⁰³ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹⁰⁰⁴ Cameroon, *Disciplinary Regulations* (1975), Article 32.

896. Canada's LOAC Manual, in the part dealing with enforcement measures, states that "reprisals against the following categories of persons and objects are prohibited: a. the... medical buildings or equipment protected by G[C] I; b. the... vessels and equipment protected by G[C] II".¹⁰⁰⁵

897. Croatia's LOAC Compendium provides for the prohibition of taking reprisals against "specifically protected persons and objects".¹⁰⁰⁶

898. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo... it is prohibited [to soldiers in combat]:... to take hostages, to engage in reprisals or collective punishments".¹⁰⁰⁷

899. Ecuador's Naval Manual states that "reprisals are forbidden to be taken against:...4. Hospitals and medical facilities...and equipment, including [hospital] ships, hospitals, [medical] aircraft and medical vehicles."¹⁰⁰⁸

900. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved:... it is prohibited [to soldiers in combat]...to take hostages, to engage in reprisals or collective punishments".¹⁰⁰⁹

901. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits... the methods of warfare which consist in the recourse:... to reprisals against non-military objectives".¹⁰¹⁰ The manual refers, *inter alia*, to Articles 46 GC I, 47 GC II and 20 AP I and states that "reprisals are prohibited against... the property particularly protected".¹⁰¹¹

902. Germany's Military Manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, provides that "it is expressly prohibited by agreement to make reprisals against:... medical facilities and supplies".¹⁰¹²

903. Germany's IHL Manual provides that "reprisals are expressly prohibited against... medical establishments and material".¹⁰¹³

904. Hungary's Military Manual provides for the prohibition of taking reprisals against "specifically protected persons and objects".¹⁰¹⁴

905. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".¹⁰¹⁵

906. Italy's IHL Manual, providing for the prohibition of reprisals against, *inter alia*, "protected persons, medical buildings and material", states that "the observance of international rules which expressly provide for the

¹⁰⁰⁵ Canada, *LOAC Manual* (1999), p. 15-2, § 15.

¹⁰⁰⁶ Croatia, *LOAC Compendium* (1991), p. 19.

¹⁰⁰⁷ Congo, *Disciplinary Regulations* (1986), Article 32(2).

¹⁰⁰⁸ Ecuador, *Naval Manual* (1989), § 6.2.3.2.

¹⁰⁰⁹ France, *Disciplinary Regulations as amended* (1975), Article 10 bis (2).

¹⁰¹⁰ France, *LOAC Manual* (2001), p. 85. ¹⁰¹¹ France, *LOAC Manual* (2001), p. 108.

¹⁰¹² Germany, *Military Manual* (1992), § 479. ¹⁰¹³ Germany, *IHL Manual* (1996), § 320.

¹⁰¹⁴ Hungary, *Military Manual* (1992), p. 35.

¹⁰¹⁵ Indonesia, *Air Force Manual* (1990), § 15(c).

obligation to abide by them in any circumstances cannot be suspended by way of reprisals".¹⁰¹⁶

907. Kenya's LOAC Manual states that "it is forbidden: ... (e) to carry out reprisals against protected persons or property".¹⁰¹⁷ In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives... The Geneva Conventions and [AP I] prohibit reprisals against... medical... buildings and equipment."¹⁰¹⁸

908. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.¹⁰¹⁹

909. Morocco's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: ... to take hostages, to engage in reprisals or collective punishments".¹⁰²⁰

910. The Military Manual of the Netherlands, in the chapter dealing with the protection of the wounded and sick and referring to Article 20 AP I, states that "measures of reprisal are prohibited against... medical units and medical means of transportation, in short against all protected persons and objects".¹⁰²¹

911. New Zealand's Military Manual states that "reprisals against the following categories of persons and objects are prohibited. a) the... buildings or equipment protected by [Article 46 GC I]; b) the... vessels and equipment protected by [Article 47 GC II]".¹⁰²²

912. Nigeria's Military Manual, in a part dealing with GC I, states that reprisals "are prohibited 'against the... buildings or equipment protected by the convention' (Art. 46)".¹⁰²³

913. Spain's LOAC Manual, referring to Articles 46 GC I, 47 GC II and 20 AP I, lists among the persons and objects against whom/which the taking of reprisals is prohibited "the wounded, sick and shipwrecked, as well as specially protected persons and property".¹⁰²⁴

914. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.¹⁰²⁵

¹⁰¹⁶ Italy, *IHL Manual* (1991), Vol. I, § 25.

¹⁰¹⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

¹⁰¹⁸ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

¹⁰¹⁹ Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

¹⁰²⁰ Morocco, *Disciplinary Regulations* (1974), Article 25(2).

¹⁰²¹ Netherlands, *Military Manual* (1993), p. VI-9.

¹⁰²² New Zealand, *Military Manual* (1992), § 1606(2).

¹⁰²³ Nigeria, *Military Manual* (1994), p. 14, § 5.

¹⁰²⁴ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

¹⁰²⁵ Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

915. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".¹⁰²⁶ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".¹⁰²⁷

916. The UK Military Manual, in the part dealing with reprisals and referring, *inter alia*, to Articles 14 and 46 GC I and 16 and 47 GC II, states that "reprisals against . . . buildings, equipment and vessels protected by [GC I and GC II] . . . are . . . prohibited".¹⁰²⁸ In a footnote relating to this provision, the manual notes that "the effect of this rule is that reprisals are unlawful against all persons except enemy combatants and those few classes of civilians who are not protected persons".¹⁰²⁹

917. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against . . . medical and religious . . . buildings and equipment".¹⁰³⁰

918. The US Air Force Pamphlet, referring to Articles 46 GC I and 47 GC III, provides that:

Reprisals against the . . . buildings or equipment protected by [GC I] are prohibited. . . . Reprisals against . . . the vessels or the equipment protected by [GC II] are prohibited. No protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited.¹⁰³¹

The Pamphlet further states that:

Reprisals are forbidden, under all circumstances, against the persons or objects referenced above in accordance with the 1949 Geneva Conventions. At least some, and possibly all, of these prohibitions are regarded as customary law and are binding regardless of whether the adversary is a party to the Geneva Conventions. For definitions as to persons or objects protected under the 1949 Geneva Conventions, applicable articles of those documents must be consulted.¹⁰³²

919. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", states that "under the 1949 Geneva Conventions, reprisals may not be directed against hospitals".¹⁰³³

920. The US Operational Law Handbook provides that "the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . m. Reprisals against persons or property protected by the Geneva Conventions."¹⁰³⁴

¹⁰²⁶ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹⁰²⁷ Togo, *Military Manual* (1996), Fascicule III, p. 13.

¹⁰²⁸ UK, *Military Manual* (1958), § 644.

¹⁰²⁹ UK, *Military Manual* (1958), § 644, footnote 2.

¹⁰³⁰ UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.

¹⁰³¹ US, *Air Force Pamphlet* (1976), § 10-7(b)(1).

¹⁰³² US, *Air Force Pamphlet* (1976), § 10-7(b)(2).

¹⁰³³ US, *Air Force Commander's Handbook* (1980), § 8-4(c).

¹⁰³⁴ US, *Operational Law Handbook* (1993), p. Q-182.

921. The US Naval Handbook states that “reprisals are forbidden to be taken against: . . . 4. Hospitals and medical facilities . . . and equipment, including hospital ships, medical aircraft, and medical vehicles.”¹⁰³⁵

922. The Annotated Supplement to the US Naval Handbook, referring to Articles 46 GC I and 47 GC II, states that “fixed establishments and mobile medical units of the medical service, hospital ships, coastal rescue craft and their installations, medical transports, and medical aircraft are immune from reprisal”.¹⁰³⁶

923. The YPA Military Manual of the SFRY (FRY) states that “the laws of war prohibit reprisals against the following persons and objects: . . . medical units, medical establishments, medical transports and medical material”.¹⁰³⁷

National Legislation

924. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don’t give opportunity to carry out any action which is considered to be [a] measure of pressure concerning . . . medical organisations . . . During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can’t be considered as such measures of pressure.¹⁰³⁸

925. Under Colombia’s Penal Code, reprisals against protected persons and objects taken “in the event of and during armed conflict” are punishable offences.¹⁰³⁹

926. Italy’s Law of War Decree as amended states that “respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended”.¹⁰⁴⁰

National Case-law

927. In its judgement in the *Dover Castle case* in 1921, the German Reichsgericht held that the accused, the commander of a submarine from which a British hospital ship had been torpedoed, was in the circumstances of the case entitled to hold the opinion that the measures taken by the German authorities against foreign hospital ships were not contrary to international law but were legitimate reprisals. The accused had pleaded that in sinking the ship he had merely carried out an order of the German Admiralty, which, in the belief

¹⁰³⁵ US, *Naval Handbook* (1995), § 6.2.3.2.

¹⁰³⁶ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2.3.2, footnote 50.

¹⁰³⁷ SFRY (FRY), *YPA Military Manual* (1988), § 31(2).

¹⁰³⁸ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.

¹⁰³⁹ Colombia, *Penal Code* (2000), Article 158.

¹⁰⁴⁰ Italy, *Law of War Decree as amended* (1938), Article 8.

that the enemy utilised their hospital ships for military purposes in violation of the 1907 Hague Convention (X), issued a number of orders instructing the submarines to attack hospital ships as vessels of war.¹⁰⁴¹

Other National Practice

928. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia's House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

The extension in [API of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.¹⁰⁴²

929. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".¹⁰⁴³

930. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that "reprisals are prohibited against . . . medical services and personnel . . . The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks."¹⁰⁴⁴

931. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.¹⁰⁴⁵

932. At the CDDH, France made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: "3. . . . The measures may not involve any actions prohibited by the Geneva Conventions of 1949."¹⁰⁴⁶

¹⁰⁴¹ Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921.

¹⁰⁴² Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.

¹⁰⁴³ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

¹⁰⁴⁴ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.

¹⁰⁴⁵ Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

¹⁰⁴⁶ France, Draft Article 74 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/1/221/Rev.1, 22 April 1976, p. 324.

933. In 1990, during a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in API “newly introduced rules”.¹⁰⁴⁷

934. According to the Report on the Practice of Israel, the IDF does not condone nor conduct reprisals against persons or objects protected by the Geneva Conventions.¹⁰⁴⁸

935. According to the Report on the Practice of Jordan, “the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal.”¹⁰⁴⁹

936. The Report on the Practice of the Philippines states that “reprisals are generally prohibited”.¹⁰⁵⁰

937. At the CDDH, Poland made a proposal for a draft article on reprisals within API – which it later withdrew – which read, *inter alia*, as follows: “Insert a new article after [draft] Article 70 worded as follows: ‘Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited’.”¹⁰⁵¹

938. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

During hostilities, it is forbidden to resort to reprisals against medical installations, transportation and units . . . The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.¹⁰⁵²

939. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . The Geneva Conventions of 1949 prohibit the taking of reprisals against persons or objects protected by the Conventions.¹⁰⁵³

¹⁰⁴⁷ Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.

¹⁰⁴⁸ Report on the Practice of Israel, 1997, Chapter 2.9.

¹⁰⁴⁹ Report on the Practice of Jordan, 1997, Chapter 2.9.

¹⁰⁵⁰ Report on the Practice of Philippines, 1997, Chapter 2.9.

¹⁰⁵¹ Poland, Proposal on a new Article 70 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

¹⁰⁵² Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

¹⁰⁵³ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

940. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I “fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions”.¹⁰⁵⁴

941. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Articles 12–20 AP I, affirmed that:

We . . . support the principle that medical units, including properly authorized civilian medical units, be respected and protected at all times and not be the object of attacks or reprisals . . . Further, we support the principle that the relevant provisions of the 1949 Geneva Conventions be applied to all properly authorized medical vehicles, hospital ships, and other medical ships and craft, regardless of the identity of the wounded, sick, and shipwrecked that they serve. This is, in effect, a distillation of much of what appears in articles 18 through 23 [AP I].¹⁰⁵⁵

942. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US noted that it considered that the provisions of AP I regarding reprisals were “new rules”.¹⁰⁵⁶

III. Practice of International Organisations and Conferences

United Nations

943. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that “Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals”, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.¹⁰⁵⁷

944. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Articles 46 GC I and 47 GC II, stated that “reprisals against the following categories of persons and objects are specifically prohibited: (a) The . . . buildings or equipment protected by the First Geneva

¹⁰⁵⁴ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

¹⁰⁵⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 423.

¹⁰⁵⁶ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

¹⁰⁵⁷ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

Convention... (b) The... vessels and equipment protected by the Second Geneva Convention."¹⁰⁵⁸ It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals... must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.¹⁰⁵⁹

Other International Organisations

945. No practice was found.

International Conferences

946. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

947. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

948. No practice was found.

VI. Other Practice

949. No practice was found.

Cultural property

I. Treaties and Other Instruments

Treaties

950. Article 4(4) of the 1954 Hague Convention provides that "[The High Contracting Parties] shall refrain from any act directed by way of reprisals against cultural property".

951. Article 53 AP I provides that:

Without prejudice to the provisions of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 14 May 1954, and of other relevant international instruments, it is prohibited:

¹⁰⁵⁸ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

¹⁰⁵⁹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

- ...
- (c) to make such objects [historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples] the object of reprisals.

Article 53 AP I was adopted by consensus.¹⁰⁶⁰

952. Upon ratification of the Additional Protocols, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.¹⁰⁶¹

953. Upon ratification of AP I, Germany declared that “the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation”.¹⁰⁶²

954. Upon ratification of AP I, Italy stated that “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation”.¹⁰⁶³

955. Upon ratification of AP I, the UK stated that:

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.¹⁰⁶⁴

¹⁰⁶⁰ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 206.

¹⁰⁶¹ Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.

¹⁰⁶² Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.

¹⁰⁶³ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.

¹⁰⁶⁴ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

Other Instruments

956. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

957. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

958. Section 6.9 of the 1999 UN Secretary-General's Bulletin, which deals under Section 6.6 with the protection of "monuments of art, architecture or history, archeological sites, works of art, places of worship and museums and libraries which constitute the cultural or spiritual heritage of peoples", states that "the United Nations force shall not engage in reprisals against objects and installations protected under this section".

959. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: . . . (c) Obligations of a humanitarian character prohibiting reprisals."

*II. National Practice**Military Manuals*

960. Argentina's Law of War Manual refers to Articles 53 AP I and 16 AP II, as well as to the 1954 Hague Convention, and provides that "it remains absolutely prohibited . . . to make [cultural property] the object of reprisals".¹⁰⁶⁵

961. Australia's Commanders' Guide, under the heading "Protection of Cultural Objects and Places of Worship", provides that:

LOAC . . . extends immunity [from attack] to cultural property of great importance to cultural heritage. This is irrelevant of origin, ownership or whether the property is movable or immovable. LOAC requires such property to be protected, safeguarded and respected and not made the object of reprisals.¹⁰⁶⁶

Referring, *inter alia*, to Articles 51–56 AP I, as well as to Article 4 of the 1954 Hague Convention, the manual further states that "protected buildings and facilities . . . should not be the subject of reprisals".¹⁰⁶⁷

962. Australia's Defence Force Manual states that "historic monuments, places of worship and works of art, which constitute the cultural and spiritual heritage of peoples, are protected from acts of hostility. These objects must not be . . . the subject of reprisals."¹⁰⁶⁸ The manual further states that "protected buildings and facilities . . . should not be the subject of reprisals".¹⁰⁶⁹

¹⁰⁶⁵ Argentina, *Law of War Manual* (1989), § 4.44.

¹⁰⁶⁶ Australia, *Commanders' Guide* (1994), § 961.

¹⁰⁶⁷ Australia, *Commanders' Guide* (1994), § 1212.

¹⁰⁶⁸ Australia, *Defence Force Manual* (1994), § 928.

¹⁰⁶⁹ Australia, *Defence Force Manual* (1994), § 1311.

963. Belgium's Law of War Manual, citing several examples of jurisprudence, states that the "property protected by the [1954 Hague Convention] may not be made the object of reprisals. Therefore, [reprisals] may be directed only against combatants, non-protected property and a restricted group of non-protected civilians."¹⁰⁷⁰

964. Benin's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property"¹⁰⁷¹ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives"¹⁰⁷²

965. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments"¹⁰⁷³

966. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments"¹⁰⁷⁴

967. Canada's LOAC Manual, in the part dealing with targeting, provides that "reprisals against cultural objects and places of worship are forbidden"¹⁰⁷⁵ In the part dealing with enforcement measures, the manual states that "reprisals against the following categories of persons and objects are prohibited: . . . g. cultural objects and places of worship"¹⁰⁷⁶

968. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments"¹⁰⁷⁷

969. Croatia's LOAC Compendium provides for the prohibition of taking reprisals against "specifically protected . . . objects"¹⁰⁷⁸

970. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: . . . it is prohibited [to soldiers in combat] . . . to take hostages, to engage in reprisals or collective punishments"¹⁰⁷⁹

971. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military

¹⁰⁷⁰ Belgium, *Law of War Manual* (1983), p. 36.

¹⁰⁷¹ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹⁰⁷² Benin, *Military Manual* (1995), Fascicule III, p. 13.

¹⁰⁷³ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹⁰⁷⁴ Cameroon, *Disciplinary Regulations* (1975), Article 32.

¹⁰⁷⁵ Canada, *LOAC Manual* (1999), p. 4-7, § 71.

¹⁰⁷⁶ Canada, *LOAC Manual* (1999), p. 15-2, § 15.

¹⁰⁷⁷ Congo, *Disciplinary Regulations* (1986), Article 32(2).

¹⁰⁷⁸ Croatia, *LOAC Compendium* (1991), p. 19.

¹⁰⁷⁹ France, *Disciplinary Regulations as amended* (1975), Article 10 bis (2).

objectives".¹⁰⁸⁰ The manual refers, *inter alia*, to Articles 51–56 AP I and states that "reprisals are prohibited against . . . property particularly protected".¹⁰⁸¹

972. Germany's Soldiers' Manual states that "cultural property may never be made the object of reprisals".¹⁰⁸²

973. Germany's Military Manual, referring to Articles 52(1) and 53(c) AP I, as well as to Article 4(4) of the 1954 Hague Convention, provides that "it is expressly prohibited by agreement to make reprisals against: . . . cultural objects".¹⁰⁸³ In another provision, the manual, referring to Articles 52(1) and 53(c) AP I, as well as to Article 4(4) of the 1954 Hague Convention, provides that "it is prohibited to make cultural property the object of reprisals".¹⁰⁸⁴

974. Germany's IHL Manual provides that "reprisals are expressly prohibited against . . . cultural property".¹⁰⁸⁵

975. Hungary's Military Manual provides for the prohibition of reprisals against "specifically protected . . . objects".¹⁰⁸⁶

976. Indonesia's Air Force Manual provides that a "reprisal is absolutely prohibited against protected persons and objects".¹⁰⁸⁷ According to the Report on the Practice of Indonesia,

The meaning of . . . the protected objects is not only referring to the Geneva Conventions . . . but also referring to the customary sources, such as the moral values which are generally recognized and exist among the international community, and other Conventions such as the Convention for the protection of the cultural property which [has] already [been] ratified by Indonesia.¹⁰⁸⁸

977. Italy's IHL Manual, providing for the prohibition of reprisals, *inter alia*, against "cultural property", states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".¹⁰⁸⁹

978. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".¹⁰⁹⁰ In the chapter dealing with reprisals, the manual provides that reprisals "are carried out only against combatants and military objectives. . . The Geneva Conventions and [AP I] prohibit reprisals against . . . religious . . . buildings and equipment . . . cultural objects."¹⁰⁹¹

979. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring, *inter alia*, to Article 53 AP I, states that "no reprisals

¹⁰⁸⁰ France, *LOAC Manual* (2001), p. 85.

¹⁰⁸¹ France, *LOAC Manual* (2001), p. 108.

¹⁰⁸² Germany, *Soldiers' Manual* (1991), p. 8.

¹⁰⁸³ Germany, *Military Manual* (1992), § 479.

¹⁰⁸⁴ Germany, *Military Manual* (1992), § 909.

¹⁰⁸⁵ Germany, *IHL Manual* (1996), § 320.

¹⁰⁸⁶ Hungary, *Military Manual* (1992), p. 35.

¹⁰⁸⁷ Indonesia, *Air Force Manual* (1990), § 15(c).

¹⁰⁸⁸ Report on the Practice of Indonesia, 1997, Chapter 2.9.

¹⁰⁸⁹ Italy, *IHL Manual* (1991), Vol. I, § 25.

¹⁰⁹⁰ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

¹⁰⁹¹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

may be undertaken against cultural objects (historical monuments, works of art, places of worship, etc.)".¹⁰⁹²

980. The Military Handbook of the Netherlands states that "reprisals against cultural property are prohibited".¹⁰⁹³

981. New Zealand's Military Manual, referring to Article 53(c) AP I, states that "reprisals against the following categories of persons and objects are prohibited: . . . cultural objects and places of worship".¹⁰⁹⁴

982. Spain's LOAC Manual, referring to Articles 52 and 53 AP I and Article 4 of the 1954 Hague Convention, lists "cultural objects" among the persons and objects against whom/which the taking of reprisals is prohibited.¹⁰⁹⁵ In another provision, the manual states that "combatants must remember that it is prohibited to commit acts of hostility, to execute reprisals . . . against the property which constitutes the cultural or spiritual heritage of peoples, regardless of whether it is public or private property".¹⁰⁹⁶

983. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.¹⁰⁹⁷

984. Switzerland's Basic Military Manual, referring, *inter alia*, to Articles 53 AP I and 4 of the 1954 Hague Convention, states that "by virtue of the Geneva Conventions and their Additional Protocols, [reprisals] are prohibited with regard to . . . cultural property".¹⁰⁹⁸

985. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".¹⁰⁹⁹ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".¹¹⁰⁰

986. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against . . . cultural objects".¹¹⁰¹

987. The US Air Force Pamphlet provides that "reprisals against protected cultural property are not taken because of their questionable legality".¹¹⁰²

¹⁰⁹² Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-7.

¹⁰⁹³ Netherlands, *Military Handbook* (1995), p. 7-43.

¹⁰⁹⁴ New Zealand, *Military Manual* (1992), § 1606(2)(g).

¹⁰⁹⁵ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

¹⁰⁹⁶ Spain, *LOAC Manual* (1996), Vol. I, § 7.3.b.(2).

¹⁰⁹⁷ Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

¹⁰⁹⁸ Switzerland, *Basic Military Manual* (1987), Article 197(2).

¹⁰⁹⁹ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹¹⁰⁰ Togo, *Military Manual* (1996), Fascicule III, p. 13.

¹¹⁰¹ UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.

¹¹⁰² US, *Air Force Pamphlet* (1976), § 10-7(b)(2).

988. The US Air Force Commander's Handbook, under the heading "Persons and Things Not Subject to Reprisals", lists a number of persons and objects protected under the Geneva Conventions against whom reprisals are prohibited. It adds, however, that "a Protocol to the 1949 Geneva Conventions would expand this list to include . . . cultural property . . . The United States signed this Protocol in 1977, but has not yet ratified it. Consult the Staff Judge Advocate for further guidance."¹¹⁰³

989. The US Operational Law Handbook provides that "the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . m. Reprisals against . . . religious or cultural edifices."¹¹⁰⁴

990. The YPA Military Manual of the SFRY (FRY) states that "the laws of war prohibit reprisals against the following persons and objects: . . . cultural monuments, historical monuments and buildings, establishments used for science, the arts, education or humanitarian purposes".¹¹⁰⁵

National Legislation

991. Argentina's Draft Code of Military Justice provides for the punishment of making cultural property or places of worship which constitute the cultural or spiritual heritage of peoples the object of reprisals.¹¹⁰⁶

992. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don't give opportunity to carry out any action which is considered to be [a] measure of pressure concerning . . . civilian objectives, civilian property, historical monuments, art works, places of worship . . . During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can't be considered as such measures of pressure.¹¹⁰⁷

993. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.¹¹⁰⁸

994. Italy's Law of War Decree as amended states that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".¹¹⁰⁹

¹¹⁰³ US, *Air Force Commander's Handbook* (1980), § 8-4(c).

¹¹⁰⁴ US, *Operational Law Handbook* (1993), p. Q-182.

¹¹⁰⁵ SFRY (FRY), *YPA Military Manual* (1988), § 31(3).

¹¹⁰⁶ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(1) in the *Code of Military Justice as amended* (1951).

¹¹⁰⁷ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.

¹¹⁰⁸ Colombia, *Penal Code* (2000), Article 158.

¹¹⁰⁹ Italy, *Law of War Decree as amended* (1938), Article 8.

995. Spain's Penal Code provides that:

[Shall be punished] whoever, in the event of an armed conflict: a) attacks or makes the object of reprisals or the object of hostilities clearly recognizable cultural objects or places of worship which constitute the cultural or spiritual heritage of peoples and upon which, by virtue of special agreements, protection is conferred, causing, as a consequence, extensive destruction of such objects, and provided that such objects are not situated in the immediate proximity of military objectives or are not used in support of the military effort of the adversary.¹¹¹⁰

996. Switzerland's Law on the Protection of Cultural Property contains a provision which stipulates, *inter alia*, that "respect for cultural property involves . . . the prohibition of reprisals with regard to cultural property".¹¹¹¹

National Case-law

997. No practice was found.

Other National Practice

998. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia's House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

The extension in [API of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.¹¹¹²

999. At the CDDH, following the adoption of Article 20 AP I, Colombia stated that it "was opposed to any kind of reprisals".¹¹¹³

1000. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.¹¹¹⁴

¹¹¹⁰ Spain, *Penal Code* (1995), Article 613(1)(a).

¹¹¹¹ Switzerland, *Law on the Protection of Cultural Property* (1966), Article 2(3).

¹¹¹² Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.

¹¹¹³ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

¹¹¹⁴ Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

1001. In 1990, during a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in API “newly introduced rules”.¹¹¹⁵

1002. In 1995, in response to a private inquiry, the Department of Legal Affairs of the German Ministry of Defence stated that “according to international conventional law, reprisals are expressly prohibited against . . . cultural property”.¹¹¹⁶

1003. At the CDDH, Greece, with regard to an amendment sponsored by Greece, Jordan and Spain which read that “historic monuments and . . . works of art which constitute the cultural heritage of a country . . . shall not be made the object of reprisals”,¹¹¹⁷ stated that “the principle of the prohibition of reprisals incorporated in the amendment only reaffirmed Article 33 [GC IV]”.¹¹¹⁸

1004. According to the Report on the Practice of Iran, during the Iran–Iraq War, Iran offered a special protection to four Iraqi holy cities. Each time Iran resorted to reprisals against Iraqi cities, it issued a statement asking Iraqi people to leave the cities to be attacked and go to the protected holy cities. According to the report, it committed itself not to attack these historic sites.¹¹¹⁹

1005. According to the Report on the Practice of Jordan, “the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal.”¹¹²⁰

1006. The Report on the Practice of the Philippines states that “reprisals are generally prohibited”.¹¹²¹

1007. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: “Insert a new article after [draft] Article 70 worded as follows: ‘Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited’.”¹¹²²

1008. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

During hostilities, it is forbidden to resort to reprisals against . . . various categories of civilian property which are subject to special protection . . . The prohibition

¹¹¹⁵ Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.

¹¹¹⁶ Germany, Ministry of Defence, Response of the Department of Legal Affairs to a private inquiry, 19 December 1995, Doc. VR II 3-Az 39-61-18.

¹¹¹⁷ Greece, Jordan and Spain, Amendment concerning a new Article 47(3) draft AP I, CDDH, *Official Records*, Vol. III, CDDH/III/17/Rev.1, 18 March 1974, p. 213.

¹¹¹⁸ Greece, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.15, 7 February 1975, p. 118, § 6.

¹¹¹⁹ Report on the Practice of Iran, 1997, Chapter 4.3.

¹¹²⁰ Report on the Practice of Jordan, 1997, Chapter 2.9.

¹¹²¹ Report on the Practice of the Philippines, 1997, Chapter 2.9.

¹¹²² Poland, Proposal on a new Article 70 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *ius ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.¹¹²³

1009. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . Additional Protocol I prohibits the taking of reprisals against historic monuments (Article 53(c)) . . . The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.¹¹²⁴

1010. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I “fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions”.¹¹²⁵

1011. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US did not support “the prohibition on reprisals in article 51 AP I and subsequent articles” and did not consider it part of customary law.¹¹²⁶

1012. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including . . . cultural objects and places of worship (Article 53(c)) . . . These are among the new rules established by the Protocol that . . . do not apply to nuclear weapons.¹¹²⁷

¹¹²³ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

¹¹²⁴ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

¹¹²⁵ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

¹¹²⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

¹¹²⁷ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

III. Practice of International Organisations and Conferences

United Nations

1013. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that “Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals”, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.¹¹²⁸

1014. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 53(c) AP I, stated that “reprisals against the following categories of persons and objects are specifically prohibited: . . . (g) Cultural objects and places of worship.”¹¹²⁹ It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.¹¹³⁰

Other International Organisations

1015. No practice was found.

International Conferences

1016. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1017. In the *Tadić case* in 1995, the ICTY Appeals Chamber stated that Article 19 of the 1954 Hague Convention was part of customary law.¹¹³¹

V. Practice of the International Red Cross and Red Crescent Movement

1018. No practice was found.

¹¹²⁸ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

¹¹²⁹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

¹¹³⁰ UN Commission of Experts established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

¹¹³¹ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 98.

VI. Other Practice

1019. No practice was found.

Objects indispensable to the survival of the civilian population*I. Treaties and Other Instruments**Treaties*

1020. Article 54(4) AP I provides that “objects [indispensable to the survival of the civilian population] shall not be made the object of reprisals”. Article 54 AP I was adopted by consensus.¹¹³²

1021. Upon ratification of the Additional Protocols, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.¹¹³³

1022. Upon ratification of AP I, Germany declared that “the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation”.¹¹³⁴

1023. Upon ratification of AP I, Italy stated that “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation”.¹¹³⁵

1024. Upon ratification of AP I, the UK stated that:

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the

¹¹³² CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 208.

¹¹³³ Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.

¹¹³⁴ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.

¹¹³⁵ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.

violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.¹¹³⁶

Other Instruments

1025. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1026. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1027. Section 6.9 of the 1999 UN Secretary-General's Bulletin, which deals under Section 6.7 with the protection of "objects indispensable to the survival of the civilian population, such as foodstuff, crops, livestock and drinking-water installations and supplies", states that "the United Nations force shall not engage in reprisals against objects and installations protected under this section".

1028. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect: ... (c) Obligations of a humanitarian character prohibiting reprisals."

II. National Practice

Military Manuals

1029. Australia's Commanders' Guide, referring, *inter alia*, to Articles 51–65 AP I, states that "protected buildings and facilities ... should not be the subject of reprisals".¹¹³⁷

1030. Australia's Defence Force Manual states that "protected buildings and facilities ... should not be the subject of reprisals".¹¹³⁸

1031. Benin's Military Manual states that "the following prohibitions must be respected: ... to launch reprisals against protected persons and property".¹¹³⁹ It adds that reprisals "may only be used if: ... they are carried out only against combatants and military objectives".¹¹⁴⁰

1032. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: ... to take hostages, to engage in reprisals or collective punishments".¹¹⁴¹

¹¹³⁶ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

¹¹³⁷ Australia, *Commanders' Guide* (1994), § 1212.

¹¹³⁸ Australia, *Defence Force Manual* (1994), § 1311.

¹¹³⁹ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹¹⁴⁰ Benin, *Military Manual* (1995), Fascicule III, p. 13.

¹¹⁴¹ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

1033. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".¹¹⁴²

1034. Canada's LOAC Manual, in the part dealing with targeting, provides that "objects indispensable to the survival of the civilian population shall not be made subject to reprisals".¹¹⁴³ In the part dealing with enforcement measures, the manual states that "reprisals against the following categories of persons and objects are prohibited: . . . h. objects indispensable to the survival of the civilian population".¹¹⁴⁴

1035. Croatia's LOAC Compendium provides for the prohibition of reprisals against "objects indispensable to the survival of the civilian population".¹¹⁴⁵

1036. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".¹¹⁴⁶

1037. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: . . . it is prohibited [to soldiers in combat] . . . to take hostages, to engage in reprisals or collective punishments".¹¹⁴⁷

1038. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".¹¹⁴⁸ The manual refers, *inter alia*, to Articles 51–56 AP I and states that "reprisals are prohibited against . . . objects indispensable to the survival of the civilian population".¹¹⁴⁹

1039. Germany's Military Manual, referring, however, to Article 55(2) AP I, provides that "it is expressly prohibited by agreement to make reprisals against: . . . objects indispensable to the survival of the civilian population".¹¹⁵⁰

1040. Germany's IHL Manual provides that "reprisals are expressly prohibited against . . . objects indispensable to the survival of the civilian population".¹¹⁵¹

1041. Hungary's Military Manual provides for the prohibition of reprisals against "objects for [the] survival of [the] civilian population".¹¹⁵²

1042. Italy's IHL Manual, providing for the prohibition of reprisals, *inter alia*, against "objects indispensable for the survival of the civilian population", states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".¹¹⁵³

¹¹⁴² Cameroon, *Disciplinary Regulations* (1975), Article 32.

¹¹⁴³ Canada, *LOAC Manual* (1999), p. 4-8, § 81.

¹¹⁴⁴ Canada, *LOAC Manual* (1999), p. 15-2, § 15.

¹¹⁴⁵ Croatia, *LOAC Compendium* (1991), p. 19.

¹¹⁴⁶ Congo, *Disciplinary Regulations* (1986), Article 32(2).

¹¹⁴⁷ France, *Disciplinary Regulations as amended* (1975), Article 10 *bis* (2).

¹¹⁴⁸ France, *LOAC Manual* (2001), p. 85. ¹¹⁴⁹ France, *LOAC Manual* (2001), p. 108.

¹¹⁵⁰ Germany, *Military Manual* (1992), § 479. ¹¹⁵¹ Germany, *IHL Manual* (1996), § 320.

¹¹⁵² Hungary, *Military Manual* (1992), p. 35. ¹¹⁵³ Italy, *IHL Manual* (1991), Vol. I, § 25.

1043. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".¹¹⁵⁴ In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . objects indispensable for the survival of the civilian population."¹¹⁵⁵

1044. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.¹¹⁵⁶

1045. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring, *inter alia*, to Article 54 AP I, states that "no reprisals may be undertaken against objects indispensable for the survival of the civilian population (*inter alia*, foodstuffs, crops, livestock and drinking water installations)".¹¹⁵⁷

1046. New Zealand's Military Manual, referring to Article 54(4) AP I, states that "reprisals against the following categories of persons and objects are prohibited: . . . objects indispensable to the survival of the civilian population".¹¹⁵⁸

1047. Spain's LOAC Manual lists "objects indispensable to the survival of the civilian population" among the persons and objects against whom/which the taking of reprisals is prohibited.¹¹⁵⁹

1048. Sweden's IHL Manual, referring to Article 54 AP I, provides that "the article also states . . . that the property [i.e. "such property as is essential for the survival of a civilian population"] may not be subjected to reprisal attacks".¹¹⁶⁰ While noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, the manual states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.¹¹⁶¹

1049. Switzerland's Basic Military Manual, in the part dealing with "Hostilities and their limits" and, more specifically, in a provision regarding the prohibition of the taking of reprisals against the civilian population, refers, *inter alia*, to Article 54 AP I.¹¹⁶² It further provides that "objects vital to the civilian population, such as drinking water, foodstuffs, crops and livestock as well as agricultural areas, must not . . . be made the object of reprisals".¹¹⁶³

¹¹⁵⁴ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

¹¹⁵⁵ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

¹¹⁵⁶ Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

¹¹⁵⁷ Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-8.

¹¹⁵⁸ New Zealand, *Military Manual* (1992), § 1606(2)(h).

¹¹⁵⁹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

¹¹⁶⁰ Sweden, *IHL Manual* (1991), Section § 3.2.1.5, p. 60.

¹¹⁶¹ Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

¹¹⁶² Switzerland, *Basic Military Manual* (1987), Article 25(2).

¹¹⁶³ Switzerland, *Basic Military Manual* (1987), Article 35.

1050. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".¹¹⁶⁴ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".¹¹⁶⁵

1051. The UK LOAC Manual provides that "the Geneva Conventions and [AP I] prohibit reprisals against . . . objects indispensable for the survival of the civilian population".¹¹⁶⁶

1052. The US Operational Law Handbook provides that "the following measures are expressly prohibited by the law of war and are not excusable on the basis of military necessity: . . . m. Reprisals against . . . items such as food stuffs and livestock essential to the survival of the civilian population."¹¹⁶⁷

National Legislation

1053. Under Colombia's Penal Code, reprisals against protected persons and objects taken "in the event of and during armed conflict" are punishable offences.¹¹⁶⁸

1054. Italy's Law of War Decree as amended states that "respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended".¹¹⁶⁹

National Case-law

1055. No practice was found.

Other National Practice

1056. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia's House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

The extension in [API of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.¹¹⁷⁰

1057. At the CDDH, following the adoption of Article 20 API, Colombia stated that it "was opposed to any kind of reprisals".¹¹⁷¹

¹¹⁶⁴ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹¹⁶⁵ Togo, *Military Manual* (1996), Fascicule III, p. 13.

¹¹⁶⁶ UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.

¹¹⁶⁷ US, *Operational Law Handbook* (1993), p. Q-182.

¹¹⁶⁸ Colombia, *Penal Code* (2000), Article 158.

¹¹⁶⁹ Italy, *Law of War Decree as amended* (1938), Article 8.

¹¹⁷⁰ Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.

¹¹⁷¹ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

1058. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.¹¹⁷²

1059. In 1990, in a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in AP I “newly introduced rules”.¹¹⁷³

1060. According to the Report on the Practice of Jordan, “the prohibition of beligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal.”¹¹⁷⁴

1061. The Report on the Practice of the Philippines states that “reprisals are generally prohibited”.¹¹⁷⁵

1062. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: “Insert a new article after [draft] Article 70 worded as follows: ‘Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited’.”¹¹⁷⁶

1063. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

During hostilities, it is forbidden to resort to reprisals against . . . various categories of civilian property which are subject to special protection . . . The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.¹¹⁷⁷

¹¹⁷² Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

¹¹⁷³ Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.

¹¹⁷⁴ Report on the Practice of Jordan, 1997, Chapter 2.9.

¹¹⁷⁵ Report on the Practice of the Philippines, 1997, Chapter 2.9.

¹¹⁷⁶ Poland, Proposal on a new Article 70 *bis* AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

¹¹⁷⁷ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

1064. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited... Additional Protocol I prohibits the taking of reprisals against... objects indispensable to the survival of the civilian population (Article 54(4))... The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.¹¹⁷⁸

1065. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I “fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions”.¹¹⁷⁹

1066. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US did not support “the prohibition on reprisals in article 51 AP I and subsequent articles” and did not consider it part of customary law.¹¹⁸⁰

1067. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including... objects indispensable to the survival of the civilian population (Article 54(4))... These are among the new rules established by the Protocol that... do not apply to nuclear weapons.¹¹⁸¹

III. Practice of International Organisations and Conferences

United Nations

1068. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that “Countermeasures shall not affect... obligations of a humanitarian character prohibiting reprisals”, were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments

¹¹⁷⁸ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

¹¹⁷⁹ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

¹¹⁸⁰ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

¹¹⁸¹ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

“without prejudice to the question of their future adoption or other appropriate action”.¹¹⁸²

1069. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 54(4) AP I, stated that “reprisals against the following categories of persons and objects are specifically prohibited: . . . (h) Objects indispensable to the survival of the civilian population.”¹¹⁸³ It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.¹¹⁸⁴

Other International Organisations

1070. No practice was found.

International Conferences

1071. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1072. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

1073. No practice was found.

VI. Other Practice

1074. No practice was found.

¹¹⁸² UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

¹¹⁸³ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

¹¹⁸⁴ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

Natural environment

I. Treaties and Other Instruments

Treaties

1075. Article 55(2) AP I provides that “attacks against the natural environment by way of reprisals are prohibited”. Article 55 AP I was adopted by consensus.¹¹⁸⁵

1076. Upon ratification of the AP I and AP II, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.¹¹⁸⁶

1077. Upon ratification of AP I, Germany declared that “the Federal Republic of Germany will react against serious and systematic violations of the obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation”.¹¹⁸⁷

1078. Upon ratification of AP I, Italy stated that “Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation”.¹¹⁸⁸

1079. Upon ratification of AP I, the UK stated that:

The obligations of Articles 51 and 55 are accepted on the basis that any adverse party against which the United Kingdom might be engaged will itself scrupulously observe those obligations. If an adverse party makes serious and deliberate attacks, in violation of Article 51 or Article 52 against the civilian population or civilians or against civilian objects, or, in violation of Articles 53, 54 and 55, on objects or items protected by those Articles, the United Kingdom will regard itself as entitled to take measures otherwise prohibited by the Articles in question to the extent that it considers such measures necessary for the sole purpose of compelling the adverse party to cease committing violations under those Articles, but only after formal warning to the adverse party requiring cessation of the violations has been disregarded and then only after a decision taken at the highest level of government. Any measures thus taken by the United Kingdom will not be disproportionate to the violations giving rise thereto and will not involve any action prohibited by the Geneva Conventions of 1949 nor will such measures be continued after the violations have ceased. The United Kingdom will notify the Protecting Powers of any such formal warning given to an adverse party, and if that warning has been disregarded, of any measures taken as a result.¹¹⁸⁹

¹¹⁸⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 209.

¹¹⁸⁶ Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.

¹¹⁸⁷ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.

¹¹⁸⁸ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.

¹¹⁸⁹ UK, Reservations and declarations made upon ratification of AP I, 28 January 1998, § (m).

Other Instruments

1080. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1081. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1082. Section 13 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict states that “attacks against the natural environment by way of reprisals are prohibited for States party to Protocol I additional to the Geneva Conventions”.

1083. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with “Obligations not affected by countermeasures”, states that “countermeasures shall not affect:...(c) Obligations of a humanitarian character prohibiting reprisals”.

*II. National Practice**Military Manuals*

1084. Australia’s Defence Force Manual states that “attacks against the environment by way of reprisals are prohibited”.¹¹⁹⁰

1085. Benin’s Military Manual states that “the following prohibitions must be respected: . . . to launch reprisals against protected persons and property”.¹¹⁹¹ It adds that reprisals “may only be used if: . . . they are carried out only against combatants and military objectives”.¹¹⁹²

1086. Burkina Faso’s Disciplinary Regulations, in a provision entitled “Laws and customs of war” dealing with the duties of and prohibitions for combatants, states that “it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments”.¹¹⁹³

1087. Cameroon’s Disciplinary Regulations states that “it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments”.¹¹⁹⁴

1088. Canada’s LOAC Manual, in a part dealing with targeting, provides that “attacks against the natural environment by way of reprisals are prohibited”.¹¹⁹⁵ In the part dealing with enforcement measures, the manual further states that “reprisals against the following categories of persons and objects are prohibited: . . . i. the natural environment”.¹¹⁹⁶

¹¹⁹⁰ Australia, *Defence Force Manual* (1994), § 545(f).

¹¹⁹¹ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹¹⁹² Benin, *Military Manual* (1995), Fascicule III, p. 13.

¹¹⁹³ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹¹⁹⁴ Cameroon, *Disciplinary Regulations* (1975), Article 32.

¹¹⁹⁵ Canada, *LOAC Manual* (1999), p. 4-9, § 85.

¹¹⁹⁶ Canada, *LOAC Manual* (1999), p. 15-2, § 15.

1089. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo... it is prohibited [to soldiers in combat]:... to take hostages, to engage in reprisals or collective punishments".¹¹⁹⁷

1090. Croatia's LOAC Compendium provides for the prohibition of reprisals against the "natural environment".¹¹⁹⁸

1091. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved:... it is prohibited [to soldiers in combat]... to take hostages, to engage in reprisals or collective punishments".¹¹⁹⁹

1092. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits... the methods of warfare which consist in the recourse:... to reprisals against non-military objectives".¹²⁰⁰ The manual further refers, *inter alia*, to Articles 51–56 AP I and states that "reprisals are prohibited against... the natural environment".¹²⁰¹

1093. Germany's Military Manual, referring to Article 55(2) AP I, provides that "it is expressly prohibited by agreement to make reprisals against:... the natural environment".¹²⁰²

1094. Germany's IHL Manual provides that "reprisals are expressly prohibited against... the natural environment".¹²⁰³

1095. Hungary's Military Manual provides for the prohibition of reprisals against the "natural environment".¹²⁰⁴

1096. Italy's IHL Manual, providing for the prohibition of reprisals, *inter alia*, against "the natural environment", states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".¹²⁰⁵

1097. Kenya's LOAC Manual states that "it is forbidden:... (e) to carry out reprisals against protected persons or property".¹²⁰⁶ In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives... The Geneva Conventions and [AP I] prohibit reprisals against... the natural environment."¹²⁰⁷

1098. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.¹²⁰⁸

¹¹⁹⁷ Congo, *Disciplinary Regulations* (1986), Article 32(2).

¹¹⁹⁸ Croatia, *LOAC Compendium* (1991), p. 19.

¹¹⁹⁹ France, *Disciplinary Regulations as amended* (1975), Article 10 *bis* (2).

¹²⁰⁰ France, *LOAC Manual* (2001), p. 85. ¹²⁰¹ France, *LOAC Manual* (2001), p. 108.

¹²⁰² Germany, *Military Manual* (1992), § 479. ¹²⁰³ Germany, *IHL Manual* (1996), § 320.

¹²⁰⁴ Hungary, *Military Manual* (1992), p. 35. ¹²⁰⁵ Italy, *IHL Manual* (1991), Vol. I, § 25.

¹²⁰⁶ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

¹²⁰⁷ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

¹²⁰⁸ Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

1099. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring, *inter alia*, to Article 55 API, states that “attacks against the natural environment by way of reprisal are prohibited”.¹²⁰⁹

1100. New Zealand’s Military Manual, referring to Article 55(2) AP I, states that “reprisals against the following categories of persons and objects are prohibited: . . . the natural environment”.¹²¹⁰

1101. Spain’s LOAC Manual lists among the persons and objects against whom/which the taking of reprisals is prohibited “the natural environment” and refers to Article 55 AP I.¹²¹¹

1102. Sweden’s IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.¹²¹²

1103. Switzerland’s Basic Military Manual, in the part dealing with “Hostilities and their limits” and, more specifically, in a provision regarding the prohibition of the taking of reprisals against the civilian population, refers, *inter alia*, to Article 55 AP I.¹²¹³ The manual further states, with reference to, *inter alia*, Article 55 AP I, that “by virtue of the Geneva Conventions and their additional Protocols, [reprisals] are prohibited with regard to . . . the environment”.¹²¹⁴

1104. Togo’s Military Manual states that “the following prohibitions must be respected: . . . to launch reprisals against protected persons and property”.¹²¹⁵ It adds that reprisals “may only be used if: . . . they are carried out only against combatants and military objectives”.¹²¹⁶

1105. The UK LOAC Manual provides that “the Geneva Conventions and [AP I] prohibit reprisals against . . . the natural environment”.¹²¹⁷

1106. The US Air Force Commander’s Handbook, under the heading “Persons and Things Not Subject to Reprisals”, lists a number of persons and objects protected under the Geneva Conventions against whom reprisals are prohibited. It adds, however, that “a Protocol to the 1949 Geneva Conventions would expand this list to include . . . the natural environment. The United States signed this

¹²⁰⁹ Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-9.

¹²¹⁰ New Zealand, *Military Manual* (1992), § 1606(2)(i).

¹²¹¹ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

¹²¹² Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

¹²¹³ Switzerland, *Basic Military Manual* (1987), Article 25(2).

¹²¹⁴ Switzerland, *Basic Military Manual* (1987), Article 197(2).

¹²¹⁵ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹²¹⁶ Togo, *Military Manual* (1996), Fascicule III, p. 13.

¹²¹⁷ UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.

Protocol in 1977, but has not yet ratified it. Consult the Staff Judge Advocate for further guidance.”¹²¹⁸

1107. The YPA Military Manual of the SFRY (FRY) states that “the laws of war prohibit reprisals against the following persons and objects: . . . the natural environment”.¹²¹⁹

National Legislation

1108. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don’t give opportunity to carry out any action which is considered to be [a] measure of pressure concerning . . . [the] natural environment . . . During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can’t be considered as such measures of pressure.¹²²⁰

1109. Under Colombia’s Penal Code, reprisals against protected persons and objects taken “in the event of and during armed conflict” are punishable offences.¹²²¹

1110. Italy’s Law of War Decree as amended states that “respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended”.¹²²²

National Case-law

1111. No practice was found.

Other National Practice

1112. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia’s House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

The extension in [API of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.¹²²³

¹²¹⁸ US, *Air Force Commander’s Handbook* (1980), § 8-4(c).

¹²¹⁹ SFRY (FRY), *YPA Military Manual* (1988), § 31(5).

¹²²⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.

¹²²¹ Colombia, *Penal Code* (2000), Article 158.

¹²²² Italy, *Law of War Decree as amended* (1938), Article 8.

¹²²³ Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.

1113. At the CDDH, following the adoption of Article 20 API, Colombia stated that it “was opposed to any kind of reprisals”.¹²²⁴

1114. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that “reprisals are prohibited against . . . the natural environment. The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks.”¹²²⁵

1115. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.¹²²⁶

1116. In 1990, in a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in API “newly introduced rules”.¹²²⁷

1117. In 1992, prior to the adoption of a UN General Assembly resolution on the protection of the environment in times of armed conflict, Jordan and the US submitted a memorandum entitled “International Law Providing Protection to the Environment in Times of Armed Conflict” which provided, *inter alia*, that:

For States parties the following principles of international law, as applicable, provide additional protection for the environment in times of armed conflict: Article 55(2) of Additional Protocol I prohibits States parties from attacking the natural environment by way of reprisals.¹²²⁸

1118. According to the Report on the Practice of Jordan, “the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal.”¹²²⁹

1119. The Report on the Practice of the Philippines states that “reprisals are generally prohibited”.¹²³⁰

¹²²⁴ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

¹²²⁵ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.

¹²²⁶ Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

¹²²⁷ Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.

¹²²⁸ Jordan and US, International Law Providing Protection to the Environment in Times of Armed Conflict, annexed to Letter dated 28 September 1992 to the Chairman of the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/3, 28 September 1992, § 2(d).

¹²²⁹ Report on the Practice of Jordan, 1997, Chapter 2.9.

¹²³⁰ Report on the Practice of the Philippines, 1997, Chapter 2.9.

1120. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: “Insert a new article after [draft] Article 70 worded as follows: ‘Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited’.”¹²³¹

1121. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

During hostilities, it is forbidden to resort to reprisals against . . . various categories of civilian property which are subject to special protection . . . The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.¹²³²

1122. At the CDDH, Ukraine stated that it “agreed with those who had mentioned the need to prohibit reprisals and damage to the natural environment”.¹²³³

1123. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited. . . . Additional Protocol I prohibits the taking of reprisals against . . . the natural environment (Article 55(2)) . . . The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.¹²³⁴

1124. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I “fails to improve substantially the compliance and verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions”.¹²³⁵

¹²³¹ Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

¹²³² Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

¹²³³ Ukraine, Statement at the CDDH, *Official Records*, Vol. XIV, CDDH/III/SR.16, 10 February 1975, p. 140, § 59.

¹²³⁴ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

¹²³⁵ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

1125. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US did not support “the prohibition on reprisals in article 51 AP I and subsequent articles” and did not consider it part of customary law.¹²³⁶

1126. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including . . . the natural environment (Article 55(2)) . . . These are among the new rules established by the Protocol that . . . do not apply to nuclear weapons.¹²³⁷

III. Practice of International Organisations and Conferences

United Nations

1127. In a resolution adopted in 1992 on the protection of the environment in times of armed conflict, the UN General Assembly recognised the importance of the provisions of international law applicable to the protection of the environment in times of armed conflict, referring, *inter alia*, to the provisions of AP I. Moreover, it urged “all States to take all measures to ensure compliance with the existing international law applicable to the protection of the environment in times of armed conflict” and appealed “to all States that have not yet done so to consider becoming parties to the relevant international conventions”.¹²³⁸

1128. In a resolution adopted in 1994 on the United Nations Decade on International Law, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict. The General Assembly invited:

all States to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.¹²³⁹

1129. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that “Countermeasures shall not affect . . . (o)bligations of a humanitarian character prohibiting reprisals”, were annexed. In the resolution, the General Assembly took note

¹²³⁶ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 426.

¹²³⁷ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

¹²³⁸ UN General Assembly, Res. 47/37, 25 November 1992, preamble and §§ 1 and 2.

¹²³⁹ UN General Assembly, Res. 49/50, 9 December 1994, § 11.

of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.¹²⁴⁰

1130. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 55(2) AP I, stated that “reprisals against the following categories of persons and objects are specifically prohibited: . . . (i) The natural environment.”¹²⁴¹ It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.¹²⁴²

Other International Organisations

1131. No practice was found.

International Conferences

1132. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1133. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ observed that any right of recourse to reprisals would, like self-defence, be governed by the principle of proportionality. The Court noted that:

Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions.¹²⁴³

¹²⁴⁰ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

¹²⁴¹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

¹²⁴² UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

¹²⁴³ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, § 31.

V. Practice of the International Red Cross and Red Crescent Movement

1134. The ICRC Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict provides that “attacks against the natural environment by way of reprisals are prohibited”.¹²⁴⁴

VI. Other Practice

1135. No practice was found.

Works and installations containing dangerous forces

I. Treaties and Other Instruments

Treaties

1136. Article 56(4) AP I provides that “it is prohibited to make any of the works, installations or military objectives mentioned in paragraph 1 [namely dams, dykes and nuclear electrical generating stations] the object of reprisals”. Article 56 AP I was adopted by consensus.¹²⁴⁵

1137. Upon ratification of the AP I and AP II, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.¹²⁴⁶

1138. Upon ratification of AP I, France made a reservation concerning works and installations containing dangerous forces, in which it stated that:

The Government of France cannot guarantee absolute protection for works and installations containing dangerous forces, which can contribute to the war effort of the adverse party, or for the defenders of such installations. It will nevertheless take all necessary precautions in conformity with the provisions of Article 56, Article 57 paragraph 2 (a) (iii) and Article 85 paragraph 3 (c), in order to avoid severe collateral losses among the civilian population, including in the case of eventual direct attacks.¹²⁴⁷

1139. Upon ratification of AP I, Germany declared that “the Federal Republic of Germany will react against serious and systematic violations of the

¹²⁴⁴ ICRC, Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict, § 13, annexed to UN Doc. A/48/269, Report of the UN Secretary-General on the protection of the environment in times of armed conflict, 29 July 1993, p. 26.

¹²⁴⁵ CDDH, *Official Records*, Vol. VI, CDDH/SR.42, 27 May 1977, p. 209.

¹²⁴⁶ Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.

¹²⁴⁷ France, Reservation made upon ratification of AP I, 11 April 2001, § 15.

obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation".¹²⁴⁸

1140. Upon ratification of AP I, Italy stated that "Italy will react to serious and systematic violations by an enemy of the obligations imposed by Additional Protocol I... with all means admissible under international law in order to prevent any further violation".¹²⁴⁹

Other Instruments

1141. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1142. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1143. Section 6.9 of the 1999 UN Secretary-General's Bulletin, which deals under Section 6.8 with the protection of "installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations", states that "the United Nations force shall not engage in reprisals against objects and installations protected under this section".

1144. Article 50(1) of the 2001 ILC Draft Articles on State Responsibility, dealing with "Obligations not affected by countermeasures", states that "countermeasures shall not affect:...(c) Obligations of a humanitarian character prohibiting reprisals."

II. National Practice

Military Manuals

1145. Australia's Commanders' Guide provides that "no reprisals may be taken against the works or installations [containing dangerous forces]".¹²⁵⁰ Referring, *inter alia*, to Articles 51–56 AP I, the manual further provides that "protected buildings and facilities... should not be the subject of reprisals".¹²⁵¹

1146. According to Australia's Defence Force Manual "protected buildings and facilities... should not be the subject of reprisals".¹²⁵²

1147. Benin's Military Manual states that "the following prohibitions must be respected:... to launch reprisals against protected persons and property".¹²⁵³ It adds that reprisals "may only be used if:... they are carried out only against combatants and military objectives".¹²⁵⁴

¹²⁴⁸ Germany, Declarations made upon ratification of AP I, 14 February 1991, § 6.

¹²⁴⁹ Italy, Declarations made upon ratification of AP I, 27 February 1986, § 10.

¹²⁵⁰ Australia, *Commanders' Guide* (1994), § 962.

¹²⁵¹ Australia, *Commanders' Guide* (1994), § 1212.

¹²⁵² Australia, *Defence Force Manual* (1994), § 1311.

¹²⁵³ Benin, *Military Manual* (1995), Fascicule III, p. 12.

¹²⁵⁴ Benin, *Military Manual* (1995), Fascicule III, p. 13.

1148. Burkina Faso's Disciplinary Regulations, in a provision entitled "Laws and customs of war" dealing with the duties of and prohibitions for combatants, states that "it is prohibited to soldiers in combat: . . . to take hostages, to engage in reprisals or collective punishments".¹²⁵⁵

1149. Cameroon's Disciplinary Regulations states that "it is prohibited to soldiers in combat: . . . to engage in reprisals or collective punishments".¹²⁵⁶

1150. Canada's LOAC Manual, in the part dealing with targeting, provides that "no reprisals may be taken against dams, dykes, nuclear electrical generating stations, or legitimate targets located at or in the vicinity of such installations".¹²⁵⁷ In the part dealing with enforcement measures, the manual further states that "reprisals against the following categories of persons and objects are prohibited: . . . j. works and installations containing dangerous forces".¹²⁵⁸

1151. Congo's Disciplinary Regulations, in a provision entitled "International conventions, laws and customs of war", states that "according to the conventions adhered to by the Congo . . . it is prohibited [to soldiers in combat]: . . . to take hostages, to engage in reprisals or collective punishments".¹²⁵⁹

1152. Croatia's LOAC Compendium provides for the prohibition of reprisals against "specifically protected . . . objects".¹²⁶⁰

1153. France's Disciplinary Regulations as amended states that "by virtue of international conventions regularly ratified or approved: . . . it is prohibited [to soldiers in combat] . . . to take hostages, to engage in reprisals or collective punishments".¹²⁶¹

1154. France's LOAC Manual, in the chapter dealing with means and methods of warfare, states that "the law of armed conflict prohibits . . . the methods of warfare which consist in the recourse: . . . to reprisals against non-military objectives".¹²⁶² The manual refers, *inter alia*, to Articles 51–56 AP I and states that "reprisals are prohibited against . . . objects particularly protected".¹²⁶³

1155. Germany's Military Manual, referring to Article 56(4) AP I, provides that "it is expressly prohibited by agreement to make reprisals against: . . . works and installations containing dangerous forces".¹²⁶⁴

1156. Germany's IHL Manual provides that "reprisals are expressly prohibited against . . . works and installations which constitute a source of danger".¹²⁶⁵

1157. Hungary's Military Manual prohibits reprisals against "specifically protected . . . objects".¹²⁶⁶

¹²⁵⁵ Burkina Faso, *Disciplinary Regulations* (1994), Article 35(2).

¹²⁵⁶ Cameroon, *Disciplinary Regulations* (1975), Article 32.

¹²⁵⁷ Canada, *LOAC Manual* (1999), p. 4-8, § 77.

¹²⁵⁸ Canada, *LOAC Manual* (1999), p. 15-2, § 15.

¹²⁵⁹ Congo, *Disciplinary Regulations* (1986), Article 32(2).

¹²⁶⁰ Croatia, *LOAC Compendium* (1991), p. 19.

¹²⁶¹ France, *Disciplinary Regulations as amended* (1975), Article 10 bis (2).

¹²⁶² France, *LOAC Manual* (2001), p. 85. ¹²⁶³ France, *LOAC Manual* (2001), p. 108.

¹²⁶⁴ Germany, *Military Manual* (1992), § 479. ¹²⁶⁵ Germany, *IHL Manual* (1996), § 320.

¹²⁶⁶ Hungary, *Military Manual* (1992), p. 35.

1158. Italy's IHL Manual, providing for the prohibition of reprisals against, *inter alia*, "works and installations containing dangerous forces", states that "the observance of international rules which expressly provide for the obligation to abide by them in any circumstances cannot be suspended by way of reprisals".¹²⁶⁷

1159. Kenya's LOAC Manual states that "it is forbidden: . . . (e) to carry out reprisals against protected persons or property".¹²⁶⁸ In the chapter dealing with reprisals, the manual further provides that reprisals "are carried out only against combatants and military objectives . . . The Geneva Conventions and [AP I] prohibit reprisals against . . . works or installations containing dangerous forces".¹²⁶⁹

1160. Madagascar's Military Manual instructs soldiers not to take hostages and to refrain from all acts of revenge.¹²⁷⁰

1161. The Military Manual of the Netherlands, in the chapter dealing with reprisals and referring, *inter alia*, to Article 56 AP I, states that "reprisals against dams, dikes and nuclear power plants are forbidden".¹²⁷¹

1162. New Zealand's Military Manual, referring to Article 56(4) AP I, states that "reprisals against the following categories of persons and objects are prohibited: . . . works and installations containing dangerous forces".¹²⁷²

1163. Spain's LOAC Manual lists "works and installations containing dangerous forces" among the persons and objects against whom/which the taking of reprisals is prohibited and refers to Article 56 AP I.¹²⁷³

1164. Sweden's IHL Manual, while noting that the Swedish IHL Committee strongly discourages even this possibility in view of its manifestly inhuman effect, states that:

Under Additional Protocol I, reprisals are permitted only against military personnel. A state acceding to Additional Protocol I thereby accepts a limitation of its freedom to employ reprisals. The [Swedish International Humanitarian Law] Committee believes that this involves a considerable humanitarian advance.¹²⁷⁴

1165. Togo's Military Manual states that "the following prohibitions must be respected: . . . to launch reprisals against protected persons and property".¹²⁷⁵ It adds that reprisals "may only be used if: . . . they are carried out only against combatants and military objectives".¹²⁷⁶

¹²⁶⁷ Italy, *IHL Manual* (1991), Vol. I, § 25.

¹²⁶⁸ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 2.

¹²⁶⁹ Kenya, *LOAC Manual* (1997), Précis No. 4, p. 4.

¹²⁷⁰ Madagascar, *Military Manual* (1994), Fiche No. 5-T, §§ 8 and 9.

¹²⁷¹ Netherlands, *Military Manual* (1993), p. IV-6, see also p. V-10.

¹²⁷² New Zealand, *Military Manual* (1992), § 1606(2)(j).

¹²⁷³ Spain, *LOAC Manual* (1996), Vol. I, § 3.3.c.(5)(b).

¹²⁷⁴ Sweden, *IHL Manual* (1991), Section 3.5, p. 89.

¹²⁷⁵ Togo, *Military Manual* (1996), Fascicule III, p. 12.

¹²⁷⁶ Togo, *Military Manual* (1996), Fascicule III, p. 13.

1166. The UK LOAC Manual provides that “the Geneva Conventions and [AP I] prohibit reprisals against . . . works containing dangerous forces”.¹²⁷⁷

1167. The YPA Military Manual of the SFRY (FRY) states that “the laws of war prohibit reprisals against the following persons and objects: . . . buildings and installations containing dangerous forces (dams, dykes, nuclear power stations and similar)”.¹²⁷⁸

National Legislation

1168. Argentina’s Draft Code of Military Justice provides for the punishment of:

making works or installations containing dangerous forces the object of reprisals, if such attacks may cause the release of such [dangerous] forces and consequent severe losses among the civilian population, except if such works or installations are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.¹²⁷⁹

1169. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War provides that:

The Armed Forces of [the] Azerbaijan Republic, the appropriate authorities and governmental bodies, as an answer to the same actions of the adverse party to the conflict or to put an end to these all, don’t give opportunity to carry out any action which is considered to be [a] measure of pressure concerning . . . dangerous installations. During military operations in the condition of final necessity the measures taken compulsorily by the Armed Forces of [the] Azerbaijan Republic can’t be considered as such measures of pressure.¹²⁸⁰

1170. Under Colombia’s Penal Code, reprisals against protected persons and objects taken “in the event of and during armed conflict” are punishable offences.¹²⁸¹

1171. Italy’s Law of War Decree as amended states that “respect for rules adopted in order to comply with international conventions which expressly exclude reprisals cannot be suspended”.¹²⁸²

1172. Spain’s Penal Code provides that:

[Shall be punished] whoever, in the event of an armed conflict: . . . attacks or makes the object of reprisals works or installations containing dangerous forces, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population, except if such works or installations are used in regular,

¹²⁷⁷ UK, *LOAC Manual* (1981), Section 4, p. 17, § 16.

¹²⁷⁸ SFRY (FRY), *YPA Military Manual* (1988), § 31(4).

¹²⁷⁹ Argentina, *Draft Code of Military Justice* (1998), Article 293, introducing a new Article 877(4) in the *Code of Military Justice as amended* (1951).

¹²⁸⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Article 16.

¹²⁸¹ Colombia, *Penal Code* (2000), Article 158.

¹²⁸² Italy, *Law of War Decree as amended* (1938), Article 8.

significant and direct support of military operations and if such attack is the only feasible way to terminate such support.¹²⁸³

National Case-law

1173. No practice was found.

Other National Practice

1174. In 1991, in briefing notes prepared for a debate on the Geneva Convention Amendment Bill in Australia's House of Representatives, the Australian Department of Foreign Affairs and Trade expressed the view that:

The extension in [API of the prohibition of reprisals] is to civilian, cultural and other non-military objects. It was felt that an Australian reservation on this point, while leaving the way open for us to use such reprisals, would not only allow Australia to be portrayed as barbaric but also leave such Australian objects open to attack in enemy reprisals, in return for very little military advantage. This is now a settled Australian Defence Force view.¹²⁸⁴

1175. At the CDDH, following the adoption of Article 20 API, Colombia stated that it "was opposed to any kind of reprisals".¹²⁸⁵

1176. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that "reprisals are prohibited against . . . installations containing dangerous forces . . . The prohibition applies in respect of all weapons. In consequence, they (i.e. protected persons and objects) can never become targets of any attack, including nuclear attacks".¹²⁸⁶

1177. In its written comments on other written statements submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

Reprisals are prohibited against protected persons and objects according to the Geneva Conventions of 1949 and their additional Protocols. This prohibition of reprisal is absolute and applies to the use of all weapons. In consequence, the protected persons and objects can never become targets of any attack, including nuclear attacks. The provisions of the Conventions and the Protocols carrying this prohibition of reprisals against protected persons and objects are considered declaratory of customary law.¹²⁸⁷

1178. In 1990, in a parliamentary debate on the ratification of the Additional Protocols, a member of the German parliament called the prohibition of reprisals as contained in AP I "newly introduced rules".¹²⁸⁸

¹²⁸³ Spain, *Penal Code* (1995), Article 613(1)(d).

¹²⁸⁴ Australia, Department of Foreign Affairs and Trade, Minute on the Geneva Protocols, 13 February 1991, File 1710/10/3/1, § 5.

¹²⁸⁵ Colombia, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, § 34.

¹²⁸⁶ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 46.

¹²⁸⁷ Egypt, Written comments submitted to the ICJ, *Nuclear Weapons case*, September 1995, § 43.

¹²⁸⁸ Germany, Lower House of Parliament, Speech by Günter Verheugen, Member of Parliament, 20 September 1990, *Plenarprotokoll* 11/226, p. 17919.

1179. According to the Report on the Practice of Jordan, “the prohibition of belligerent reprisals against protected persons and property is viewed as customary law . . . In practice, Jordan never resorted to attacks by way of reprisal.”¹²⁸⁹

1180. The Report on the Practice of the Philippines states that “reprisals are generally prohibited”.¹²⁹⁰

1181. At the CDDH, Poland made a proposal for a draft article on reprisals within AP I – which it later withdrew – which read, *inter alia*, as follows: “Insert a new article after [draft] Article 70 worded as follows: ‘Measures of reprisal against persons and objects protected by the Conventions and by the present Protocol are prohibited’.”¹²⁹¹

1182. In 1994, in its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case*, the Solomon Islands, referring to Articles 20, 51(6), 52(1), 53, 54(4), 55(2) and 56(4) AP I, stated that:

During hostilities, it is forbidden to resort to reprisals against . . . various categories of civilian property which are subject to special protection . . . The prohibition applies in respect of all weapons, including nuclear weapons. This rule had previously been established in a general manner by Art. 60(5) of the 1969 Vienna Convention of the Law of Treaties . . . A similar provision is set forth in paragraph 7 of the UN General Assembly resolution 2675 (XXV) . . . The prohibition of reprisals in these situations appears also in Principle 1, paragraph 6 of UN General Assembly resolution 2625 (XXV) on friendly relations. Even if, in that case, it relates to *jus ad* (or *contra*) *bellum* rather than *jus in bello*, it is nonetheless applicable to the second. It follows from the above that reprisals can, in no circumstances, be lawful against this category of targets.¹²⁹²

1183. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that:

To be lawful, a belligerent reprisal must meet two conditions. First, it must not be directed against persons or objects against which the taking of reprisals is specifically prohibited . . . Additional Protocol I prohibits the taking of reprisals against . . . works and installations containing nuclear forces (Article 56(4)). The application of these provisions would have a greater effect on the retaliatory use of nuclear weapons. Again, however, these provisions are correctly regarded as innovative and thus as inapplicable to the use of nuclear weapons.¹²⁹³

1184. In 1987, in submitting AP II to the US Senate for advice and consent to ratification, the US President announced his decision not to ratify AP I, stating, *inter alia*, that AP I “fails to improve substantially the compliance and

¹²⁸⁹ Report on the Practice of Jordan, 1997, Chapter 2.9.

¹²⁹⁰ Report on the Practice of Philippines, 1997, Chapter 2.9.

¹²⁹¹ Poland, Proposal on a new Article 70 *bis* draft AP I submitted to the CDDH, *Official Records*, Vol. III, CDDH/III/103, 1 October 1974, p. 313.

¹²⁹² Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 9 June 1994, § 3.75.

¹²⁹³ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, pp. 58–59.

verification mechanisms of the 1949 Geneva Conventions and eliminates an important sanction against violations of those Conventions".¹²⁹⁴

1185. In 1987, the Deputy Legal Adviser of the US Department of State stated that the US did not support "the prohibition on reprisals in article 51 AP I and subsequent articles" and did not consider it part of customary law. He added that it did not support Article 56 AP I and that the US did not consider it to be customary law.¹²⁹⁵

1186. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the US stated that:

Various provisions of Additional Protocol I contain prohibitions on reprisals against specific types of persons or objects, including . . . works and installations containing dangerous forces (Article 56(4)). These are among the new rules established by the Protocol that . . . do not apply to nuclear weapons.¹²⁹⁶

III. Practice of International Organisations and Conferences

United Nations

1187. In 2001, the UN General Assembly adopted a resolution on the responsibility of States for internationally wrongful acts, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 50(1)(c) stating that "Countermeasures shall not affect . . . obligations of a humanitarian character prohibiting reprisals", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".¹²⁹⁷

1188. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), referring to Article 65(4) AP I, stated that "reprisals against the following categories of persons and objects are specifically prohibited: . . . (j) Works and installations containing dangerous forces."¹²⁹⁸ It further stated that:

In international armed conflicts to which the four Geneva Conventions and Additional Protocol I apply, lawful reprisals . . . must be directed exclusively against combatants or other military objectives subject to the limitations contained in the

¹²⁹⁴ US, Message from the US President transmitting AP II to the US Senate for advice and consent to ratification, Treaty Doc. 100-2, 29 January 1987.

¹²⁹⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 426 and 427.

¹²⁹⁶ US, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 31.

¹²⁹⁷ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

¹²⁹⁸ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 65.

Geneva Conventions, Protocol I and customary international law of armed conflicts. In international armed conflicts where Additional Protocol I does not apply, reprisals may be directed against a much wider category of persons and objects, but subject to the limitations of customary international law of armed conflicts.¹²⁹⁹

Other International Organisations

1189. No practice was found.

International Conferences

1190. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1191. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

1192. No practice was found.

VI. Other Practice

1193. No practice was found.

E. Reprisals in Non-international Armed Conflicts

I. Treaties and Other Instruments

Treaties

1194. Article 4(4) of the 1954 Hague Convention provides that the High Contracting Parties “shall refrain from any act directed by way of reprisals against cultural property”. Article 19(1) of the same Convention states that:

In the event of an armed conflict not of an international character occurring within the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the provisions of the present Convention which relate to respect for cultural property.

1195. Article 8(4) of draft AP II submitted by the ICRC to the CDDH provided that “measures of reprisals against [all persons whose liberty has been restricted by capture or arrest for reasons in relation to the armed conflict] are prohibited”.¹³⁰⁰

¹²⁹⁹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 66.

¹³⁰⁰ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 36.

1196. Article 19 of draft AP II submitted by the ICRC to the CDDH provided that “measures of reprisals against the wounded, the sick, and the shipwrecked as well as against medical personnel, medical units and means of medical transport are prohibited”.¹³⁰¹

1197. Article 26(4) of draft AP II submitted by the ICRC to the CDDH provided that “attacks against the civilian population or civilians by way of reprisals are prohibited”.¹³⁰²

1198. Upon ratification of AP I and AP II, Egypt stated that:

The Arab Republic of Egypt, while declaring its commitment to respecting all the provisions of Additional Protocols I and II, wishes to emphasize, on the basis of reciprocity, that it upholds the right to react against any violation by any party of the obligations imposed by Additional Protocols I and II with all means admissible under international law in order to prevent any further violation.¹³⁰³

Other Instruments

1199. Paragraph 6 the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Articles 48–58 AP I.

1200. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Articles 48–58 AP I.

II. National Practice

Military Manuals

1201. Cameroon’s Instructors’ Manual, in a part dealing with “victims of civil war”, states that “during all military operations, offensive or defensive, certain forms of conduct are prohibited and remain contrary to the law of war. Examples [are] . . . to carry out reprisals against populations.”¹³⁰⁴

1202. India’s Manual of Military Law prohibits reprisals. The provision is in a section relative to the actions of a commander acting in aid of civil authorities for the handling of crowds and mobs. The manual adds that action is preventive and not punitive and that no soldier can punish a civilian, except under martial law.¹³⁰⁵

National Legislation

1203. No practice was found.

¹³⁰¹ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 38.

¹³⁰² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 40.

¹³⁰³ Egypt, Declaration made upon ratification of AP I and AP II, 9 October 1992, § 3.

¹³⁰⁴ Cameroon, *Instructors’ Manual* (1992), p. 150, § 532(1).

¹³⁰⁵ India, *Manual of Military Law* (1983), Vol. 1, Chapter VII, § 8.

National Case-law

1204. No practice was found.

Other National Practice

1205. At the CDDH, in its explanation of vote concerning draft Article 10 *bis* AP II, the Australian delegation stated that it had abstained from voting because it considered that the article “did no more than prohibit in internal conflicts acts that violate the provisions of the Protocol and that the article was not concerned with reprisals”, whereas “many delegations interpreted the article as a prohibition of reprisals, which they claimed found no place in the law applicable to internal armed conflicts”. Australia further stated that delegations of other States “also saw the article as an interference with the sovereignty of the State”. The Australian delegation expressed its disappointment that the provision had not been acceptable to a majority of States.¹³⁰⁶

1206. At the CDDH, the representative of the Belarus said that he fully supported the opinion of GDR and Poland in favour of draft Article 10 *bis* AP II.¹³⁰⁷

1207. At the CDDH, the Belgian delegation stated that it “regretted that [draft] Articles 6 to 8 [of draft AP II] did not include a strict prohibition of reprisals. The term was doubtless less important than the deed”. The Belgian delegation also stated that “the words ‘are, and shall remain prohibited at any time and at any place whatsoever’ which already appeared in Article 3 common to the four Geneva Conventions of 1949 . . . should serve as a rule of conduct and an absolute prohibition of recourse to reprisals in the Articles of Part II.”¹³⁰⁸ It announced that it would abstain from voting on draft Article 10 *bis* AP II. However, as to the fundamental guarantees within draft AP II, the Belgian delegation stated that “the question of reprisals could not arise, since under the terms of that article, persons who did not take a direct part or who had ceased to take part in hostilities, were in all circumstances to be treated humanely”.¹³⁰⁹

1208. At the CDDH, in its explanation of vote on draft Article 10 *bis* AP II, the delegation of Cameroon stated that it had:

voted for this provision in the belief that a blanket prohibition of reprisals would not be feasible. No State could reasonably be asked to stand by and allow grave and repeated breaches of the Conventions or the Protocols by its adversary. The

¹³⁰⁶ Australia, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 119.

¹³⁰⁷ Belarus, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 429, § 16.

¹³⁰⁸ Belgium, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.40, 14 April 1975, p. 425, §§ 21–22.

¹³⁰⁹ Belgium, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109, § 11.

prohibition of reprisals should... be limited to certain well-defined cases, restrictively enumerated.¹³¹⁰

1209. At the CDDH, Canada proposed an amendment to draft AP II which read, *inter alia*, that “measures of reprisal against [persons whose liberty has been restricted by capture or otherwise for reasons relative to the armed conflict] are prohibited”.¹³¹¹

1210. At the CDDH, the Canadian delegation submitted a proposal for a new Article 9(4) AP II which read: “Acts of retaliation comparable to reprisals against [all persons who do not take a direct part or who have ceased to take a part in hostilities, whether or not their liberty has been restricted] are prohibited.”¹³¹² It further proposed a new Article 17 which read: “Acts of retaliation comparable to reprisals against the wounded and sick and the shipwrecked as well as against medical personnel, medical units and means of medical transports are prohibited.”¹³¹³ A proposal for a new Article 22(3) read: “Attacks against the civilian population or civilians by way of acts of retaliation comparable to reprisals are prohibited.”¹³¹⁴

1211. At the CDDH, Canada made another draft proposal for an article to be inserted in AP II, which provided that:

If a Party to the conflict persistently violates the provisions of the Protocol and refuses to comply with those provisions after being called upon to do so, then, except concerning the persons protected by articles... [footnote: these would be the articles that concern, in particular, the protection of persons within the power of one of the Parties to the conflict], the adverse Party may nevertheless resort to measures which are in breach of the Protocol, provided it had warned the offending party that such action will be resorted to if the offensive acts are not terminated within a specific time [footnote: As is clear from the language of the proposal, this is intended to be of general application affecting the entire Protocol].¹³¹⁵

1212. At the CDDH, during discussions on Article 10 *bis* of draft AP II, the Canadian representative stated that:

As his delegation regarded the concept of reprisals as appertaining to international law, it considered that there was no place for that concept in Protocol II. There was a risk that the introduction of such a concept in Protocol II might increase the danger of reprisals followed by counter-reprisals and result in an escalation of

¹³¹⁰ Cameroon, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 455.

¹³¹¹ Canada, Article 8 draft AP II submitted to the CDDH, *Official Records*, Vol. IV, CDDH/I/37, 14 March 1974, pp. 23–24.

¹³¹² Canada, Article 9(4) of draft amendment concerning AP II as a whole submitted to the CDDH, *Official Records*, Vol. IV, CDDH/212, 4 April 1975, p. 196.

¹³¹³ Canada, Article 17 of draft amendment concerning AP II as a whole submitted to the CDDH, *Official Records*, Vol. IV, CDDH/212, 4 April 1975, p. 199.

¹³¹⁴ Canada, Article 22(3) of draft amendment concerning AP II as a whole submitted to the CDDH, *Official Records*, Vol. IV, CDDH/212, 4 April 1975, p. 201.

¹³¹⁵ Canada, New proposal concerning an Article to be introduced in AP II submitted to the CDDH, *Official Records*, Vol. X, CDDH/I/287/Rev. 1, 3 February–18 April 1975, p. 109.

hostilities. Its conclusion might also inhibit some States from becoming Parties to the Protocol.¹³¹⁶

1213. In 1986, in an annex to a memorandum on Canada's attitude to possible reservations with regard to AP I, the Canadian Ministry of Defence stated that:

It should be noted that the . . . limitations on the use of reprisals apply only in the event of an international armed conflict. Common Article 3 of the [1949] Geneva Conventions, which is the only treaty law concerning internal armed conflict other than [AP II], does not make any explicit reference to reprisals . . .

[AP II], concerned with internal armed conflicts, does not contain the word "reprisal" or any similar expression.¹³¹⁷

1214. At the CDDH, Colombia, supported by a representative of the delegation of Indonesia, supported the view that draft Article 10 *bis* AP II should be deleted.¹³¹⁸

1215. At the CDDH, Finland proposed an amendment concerning the provision of fundamental guarantees within AP II (Part II, Article 6) according to which "measures of reprisal" should have been prohibited.¹³¹⁹ With respect to this proposal, the delegation of Finland declared that:

[A] reference to measures of reprisals should be included in [AP II], so that civilian populations would have at least minimum guarantees against inhumane treatment by the parties to non-international armed conflicts . . . The amendment by the Finnish delegation was aimed at adding a new subparagraph [in the draft provision of AP II dealing with fundamental guarantees] in order to place a general prohibition on reprisals, as had been done in Article 33 of [GC IV].¹³²⁰

The representative of Finland explained further that:

Contrary to what was often stated, reprisals were not limited to times of war or other types of armed conflict, but were also exercised in times of peace. Reprisals should never in any circumstances be used against the civilian populations. They could possibly be employed between States or Parties to a conflict. For example, they could be regarded as legitimate in the event of destruction of public property or a violation of international law by one or other Party to a conflict. But there was universal agreement that reprisals of an inhumane nature were inadmissible. That was why innocent civilians should be protected against such acts in times both of war and peace.¹³²¹

¹³¹⁶ Canada, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 428, § 9.

¹³¹⁷ Canada, Ministry of Defence, Memorandum on Ratification of AP I, Reprisals Reservation, Operational Considerations, Doc. 3440-13-2 (D Law/I), 14 March 1986, Annex A, §§ 5 and 9.

¹³¹⁸ Colombia (supported by Indonesia), Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 429, § 14.

¹³¹⁹ Finland, New proposal concerning Article 6 draft AP II submitted to the CDDH, *Official Records*, Vol. IV, CDDH/I/93, 4 October 1974, p. 18.

¹³²⁰ Finland, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 324, § 7.

¹³²¹ Finland, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 324, § 8.

The representative of Finland also stated that:

With regard to the word "reprisals", he still considered that there was no reason why it should not be used also in connexion with non-international armed conflicts; but his delegation would be willing to accept another word, provided that the content [i.e. of the proposal prohibiting reprisals] was not changed.¹³²²

1216. At the CDDH, in its explanation of vote concerning draft Article 10 *bis* AP II, the delegation of Finland stated that "as the article was put to the vote...the Finnish delegation had to cast a favourable vote in view of its consistent support throughout the Conference for the prohibition of reprisals or measures in kind in armed conflicts, whether international or non-international".¹³²³

1217. At the CDDH, the delegation of France, in its explanation of vote concerning draft Article 10 *bis* AP II, stated that it had voted against the retention of the provision, without, however, expressing any views on the substance of the provision.¹³²⁴

1218. At the CDDH, the FRG proposed an amendment to Article 8 of draft AP II which read, *inter alia*: "Amend Article 8 to read: . . . 2. . . . (b) measures of reprisals against [all persons whose liberty has been restricted by capture or arrest for reasons in relation to the armed conflict] are prohibited".¹³²⁵

1219. At the CDDH, in discussing the Finnish proposal to introduce an explicit prohibition of reprisals in AP II, the FRG stated:

Was it advisable to use the word "reprisal" in draft Protocol II? Perhaps it would be possible to find another term where non-international armed conflicts were concerned. There were no objections from the legal point of view to the use of the word "reprisal", but from the political point of view it could be inferred that its use gave the Parties to a conflict a status under international law which they had no right to claim. He suggested that another formulation, for example "measures of retaliation comparable to reprisals", might not meet with the same objections.¹³²⁶

1220. At the CDDH, the GDR delegation expressed its strong support for draft Article 10 *bis* AP II.¹³²⁷

1221. At the CDDH, in the run-up to the vote on draft Article 10 *bis* AP II, Greece supported the views expressed by the representative of Mexico, whose

¹³²² Finland, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 339, § 79.

¹³²³ Finland, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 119.

¹³²⁴ France, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 120.

¹³²⁵ FRG, New proposal concerning Article 8 draft AP II submitted to the CDDH, *Official Records*, Vol. IV, CDDH/I/236, 13 March 1975, p. 25.

¹³²⁶ FRG, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 325, § 11.

¹³²⁷ GDR, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 428, § 10.

delegation objected to any provision that would authorise reprisals either directly or *a contrario*.¹³²⁸

1222. At the CDDH, the Holy See expressed its favourable position concerning the inclusion of draft Article 10 *bis* in AP II.¹³²⁹ In its explanation of vote concerning the draft Article, the Holy See declared that it had voted for the retention of the article, "because it provided for the prohibition of reprisals".¹³³⁰

1223. At the CDDH, India said that it supported the view of a US representative according to which Article 10 *bis* should be deleted and also prepared to vote against the provision. Nevertheless, it expressed the opinion that while compromises were to be appreciated, they tended to jeopardise the national sovereignty of States.¹³³¹

1224. At the CDDH, a representative of Indonesia supported the view of the delegation of Colombia that draft Article 10 *bis* AP II should be deleted.¹³³²

1225. At the CDDH, Iran submitted a new proposal to be included in draft AP II, according to which "acts of vengeance likely to affect the humanitarian rights conferred upon persons protected by this Part are prohibited".¹³³³

1226. At the CDDH, Iran stated that "it had reservations concerning the addition of the word 'reprisals', which was not appropriate in a protocol concerning non-international armed conflicts".¹³³⁴

1227. At the CDDH, Iran stated that it "supported the Canadian representative's view that the concept of reprisals should not be included in Protocol II".¹³³⁵

1228. At the CDDH, Iraq, considering draft Article 19 AP II, stated that "in any case, the question of reprisals had no place in Protocol II, for the Conference was not entitled to legislate for the treatment of citizens of sovereign States".¹³³⁶

1229. At the CDDH, Italy submitted the following proposal to be included in draft AP II to the effect that "the provisions of the present Part must be observed at all times and in all circumstances, even if the other Party to the conflict is guilty of violating the provisions of the present Protocol".¹³³⁷

¹³²⁸ Greece, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 429, § 20.

¹³²⁹ Holy See, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 428, § 12.

¹³³⁰ Holy See, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 120.

¹³³¹ India, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 108, § 8.

¹³³² Indonesia, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 429, § 14.

¹³³³ Iran, New proposal concerning an Article of draft AP II submitted to the CDDH, *Official Records*, Vol. X, CDDH/I/287/Rev. 1, 3 February–18 April 1975, p. 109.

¹³³⁴ Iran, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 330, § 37.

¹³³⁵ Iran, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, § 15, p. 429.

¹³³⁶ Iraq, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 326, § 16.

¹³³⁷ Italy, New proposal concerning an Article of draft AP II submitted to the CDDH, *Official Records*, Vol. X, CDDH/I/287/Rev. 1, 3 February–18 April 1975, p. 110.

1230. At the CDDH, when Article 10 *bis* was rejected, Italy, in its explanation of vote, stated that:

The Italian delegation abstained in the vote leading to the deletion of Article 10 *bis*, which provided that certain articles of Protocol II “shall not, in any circumstances or for any reason whatsoever, be violated, even in response to a violation of the provisions of the Protocol”.

A majority of delegations decided to delete Article 10 *bis* because of the widely felt need to simplify Protocol II as far as possible, in order to render it clear, to the point, well balanced and thus acceptable to a large number of countries . . .

...

. . . Protocol II contains many provisions mentioning obligations which must be respected “in all circumstances”, or rules which must be followed “as a minimum”. The language is very clear, highlighting the need for unconditional respect for those obligations and rules, even if the other Party to the conflict does not respect them. This is to be expected, since what is involved are elementary human rights, to which a basic morality (much older than the legal rule) ascribes absolute value . . .

...

Moreover, everything in Protocol II which represents a development of the common Article 3 of the 1949 Geneva Conventions, is subject to the conditions and rules set out in that article. And that article specifically mentions rules which must be applied “as a minimum” or “at any time and in any place whatsoever”; this clearly shows that these rules (and thence the rules derived from them in the present Protocol) must be understood as requiring unconditional respect.¹³³⁸

1231. At the CDDH in 1976, in an explanation of vote concerning Article 10 *bis* AP II, Mexico stated that it “had opposed the adoption of article 10 *bis*, because it introduced the notion of reprisals in internal conflicts, which was unacceptable”.¹³³⁹

1232. At the CDDH in 1977, Mexico reiterated “its formal objection to any provision that would authorize reprisals either directly or *a contrario*”.¹³⁴⁰ With regard to draft Article 10 *bis* of draft AP II, Mexico re-emphasised that it “objected to any provision that would authorize reprisals either directly or indirectly”.¹³⁴¹ In its explanation of vote on draft Article 74 of draft AP I and draft Article 10 *bis* of draft AP II, Mexico explained that it had voted against draft Article 10 *bis* AP II on the basis of its conviction that “experience shows that reprisals do not lead the enemy to respect humanitarian law, but result in an increase in violations and hostilities”. Mexico believed that the draft provision, as well as the French and Polish proposals, would have authorised reprisals (the Polish in an *a contrario sensu*) and that “the mandatory nature of humanitarian law does not depend on the observance of its rules by the adverse Party, but

¹³³⁸ Italy, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, pp. 120–121.

¹³³⁹ Mexico, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.64, 7 June 1976, p. 318, § 80.

¹³⁴⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. X, CDDH/I/349/Rev.1, published as CDDH/405/Rev.1, 17 March–10 June 1977, p. 231, § 43.

¹³⁴¹ Mexico, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 429, § 13.

stems from the inherently wrongful nature of the act prohibited by international humanitarian law", and therefore voted against these provisions.¹³⁴²

1233. At the CDDH, a representative of New Zealand suggested that the Finnish amendment concerning reprisals in Part II of draft AP II should be accepted.¹³⁴³

1234. At the CDDH, the representative of Nigeria stated that "he was unhappy about the use of the word 'reprisals', but might endorse the Finnish amendment if another term were found, as for example 'retaliation' or 'vengeance'".¹³⁴⁴ In its explanation of vote concerning draft Article 10 *bis* AP II, Nigeria stated that:

This article is no less and no more than a disguised article on reprisals. Right from the beginning . . . the Nigerian delegation had repeatedly opposed the inclusion of an article on reprisals in this additional Protocol II. We are of the firm conviction that reprisals as a legal notion properly belongs to international legal relations as between sovereign States and should have no place in a Protocol dealing with internal armed conflicts. Also, the inclusion of an article on reprisals in this Protocol could lead Governments and States into embarrassing situations. This is because it is not inconceivable that in the course of an internal conflict, rebels may deliberately commit acts to which the normal reaction would be in the nature of reprisals but because of a prohibitory article such as this, Governments would feel bound to fold their arms while dissident groups go on a rampage killing and maiming innocent civilians and burning dwellings and food crops. No responsible Government can allow such a situation to develop, but if this article had been adopted this is the kind of scenario that would repeat itself time and again.¹³⁴⁵

1235. In introducing Resolution 2675 (XXV) (providing for the prohibition of reprisals against civilian populations or individual members thereof), which it cosponsored, in the Third Committee of the UN General Assembly in 1970, Norway explained that as used in the resolution, "the term 'armed conflicts' was meant to cover armed conflicts of all kinds, an important point, since the provisions of the Geneva Conventions and the Hague Regulations did not extend to all conflicts".¹³⁴⁶

1236. At the CDDH, Pakistan made the following new proposal in order to prohibit reprisals:

Isolated cases of disrespect of the provisions of the present Protocol by one party shall not in any circumstances authorize the non-compliance by the other party

¹³⁴² Mexico, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, pp. 449–450.

¹³⁴³ New Zealand, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 331, § 44.

¹³⁴⁴ Nigeria, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 327, § 21.

¹³⁴⁵ Nigeria, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 122.

¹³⁴⁶ Norway, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1785, 11 November 1970, p. 281.

with the provisions of [the relevant Part], even for the purpose of inducing the adverse party to comply with its obligations.¹³⁴⁷

In a later statement, Pakistan stated that “after consultations between various delegations, groups and inter-regional groups, it had been proposed, as a compromise, that [draft] Article 10 bis should be deleted”.¹³⁴⁸

1237. At the CDDH, the Philippines made the following new proposal for an Article in draft AP II concerning the prohibition of “reprisals” in the context of non-international armed conflicts which read: “Failure of one Party to the conflict to comply with the provisions of the present Protocol shall not authorize the other party to employ counter measures for the purpose of enforcing the provisions”.¹³⁴⁹

1238. At the CDDH, the delegation of Poland, in its explanation of vote on articles of draft Protocols I and II relating to reprisals, stated that it had withdrawn an earlier proposed amendment which envisaged a general prohibition of reprisals, while stressing that if a group of persons should not be covered by specific provisions prohibiting reprisals, “there should be no attempt to prove by an *a contrario* argument that such a group is outside the prohibition of reprisals” and that this would be, in its understanding, “an argument in bad faith directed against the very spirit of the Geneva Law”.¹³⁵⁰

1239. At the CDDH, in her comments on the Finnish proposal to prohibit all measures of reprisal in draft Article 6 AP II, the Swedish representative recalled approvingly a statement by the UK representative expressing the view that the phrase “at any time and in any place whatsoever” excluded the possibility of reprisals against the categories of persons in question. Questioning why this should not be stated explicitly, she supported the Finnish proposal.¹³⁵¹

1240. At the CDDH, the delegation of Syria, in its explanation of vote on draft Article 10 *bis* AP II, expressed regret that Poland had withdrawn an amendment prohibiting reprisals. It stated that “the reasons of expediency should not be interpreted, by an *a contrario* reasoning, as opening up the possibility of such measures”. It further stated that “humanitarian law is dependent on *jus cogens* and it is therefore unthinkable that an inhuman act should provoke a similar act involving innocent persons”.¹³⁵²

¹³⁴⁷ Pakistan, New proposal concerning an Article of draft AP II submitted to the CDDH, *Official Records*, Vol. X, CDDH/I/287/Rev. 1, 3 February–18 April 1975, p. 109.

¹³⁴⁸ Pakistan, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 107, § 4.

¹³⁴⁹ Philippines, New proposal concerning an Article of draft AP II submitted to the CDDH, *Official Records*, Vol. X, CDDH/I/287/Rev. 1, 3 February–18 April 1975, p. 109.

¹³⁵⁰ Poland, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 452.

¹³⁵¹ Sweden, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 331, § 45.

¹³⁵² Syria, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, p. 453.

1241. At the CDDH, a representative of the UK stated that the provision of draft Article 6(2) "'at any time and in any place whatsoever' was so comprehensive that it would probably not leave room for the operation of reprisals in any form". Draft Article 6(2) contained a detailed list of specially prohibited acts directed against persons in the power of the parties to the conflict.¹³⁵³

1242. At the CDDH, a representative of the US stated that "he hoped that . . . Article 10 bis would be rejected, since the whole concept of reprisals had no place in Protocol II".¹³⁵⁴

1243. In 1987, the Deputy Legal Adviser of the US Department of State stated that:

The basic core of Protocol II is, of course, reflected in common article 3 of the 1949 [Geneva] Conventions and therefore is, and should be, a part of generally accepted customary law. This specifically includes its prohibitions on violence toward persons taking no active part in hostilities, hostagetaking, degrading treatment, and punishment without due process.¹³⁵⁵

1244. At the CDDH, the delegation of the SFRY, in its explanation of vote on draft Article 10 *bis* AP II, stated that "it goes without saying . . . that reprisals are already forbidden against protected persons and objects, that is to say, against persons and objects in the power of the adversary". Moreover, it expressed its view that "this rule of customary law . . . was codified in 1949 in the Geneva Conventions". Nevertheless, it stated that the SFRY still felt that "reprisals on the field of battle against an unscrupulous adversary who uses illicit methods and means of combat remain permissible under customary law, as a last resort against lawless conduct". Nonetheless, the representative stated that "it seems both unjust and pointless to make non-combatants, women and children, pay for breaches for which they are in no way responsible".¹³⁵⁶

1245. Notwithstanding the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, according to which these States agreed to abide by the prohibition of reprisals contained in Articles 51 and 52 API, in 1991, the YPA issued a general warning to the attention of the Croatian authorities, stating that "a number of impudent crimes has been committed against the members of the Y.P.A. . . . Family members of the Y.P.A. are being maltreated, persecuted and destroyed in many different ways. This cannot be tolerated any longer." The YPA therefore warned that:

¹³⁵³ UK, Statement at the CDDH, *Official Records*, Vol. VIII, CDDH/I/SR.32, 19 March 1975, p. 330, § 40.

¹³⁵⁴ US, Statement at the CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 108, § 7.

¹³⁵⁵ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, pp. 430–431.

¹³⁵⁶ SFRY, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.73, 16 May 1977, pp. 456 and 457.

1. For every attacked and seized object of the [YPA] – an object of vital importance for the Republic of Croatia will be destroyed immediately.
2. For every attacked and occupied garrison – an object of vital importance to the town in which the garrison is located will be destroyed. This is, at the same time, a warning to civilian persons to abandon such settlement in time.¹³⁵⁷

According to the Report on the Practice of the SFRY (FRY):

This warning calls for detailed analysis, but arguably it can be classified as a threat of the use of belligerent reprisals. In any event, a question may be raised whether the approach of the YPA Supreme Command reflected the position that belligerent reprisals may be freely carried out in internal conflicts as well, without the IHL restrictions that apply to international conflicts. The text of the Supreme Command warning leads to this conclusion.¹³⁵⁸

III. Practice of International Organisations and Conferences

United Nations

1246. UN General Assembly Resolution 2444 (XXIII) adopted in 1968 affirmed Resolution XXVIII of the 20th International Conference of the Red Cross and the basic humanitarian principle applicable in all armed conflicts laid down therein that “it is prohibited to launch attacks against the civilian population as such”.¹³⁵⁹ This phrase was interpreted by some government experts at the CE (1971) as including a prohibition of reprisals against the civilian population.¹³⁶⁰

1247. In 1970, the UN General Assembly, “bearing in mind the need for measures to ensure the better protection of human rights in armed conflicts of all types”, adopted Resolution 2675 (XXV) on basic principles for the protection of civilian populations in armed conflicts in which it is stated that “civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity”.¹³⁶¹

1248. In a resolution on Afghanistan adopted in 1993, the UN General Assembly urged all the Afghan parties “to protect all civilians from acts of reprisal”.¹³⁶² It reiterated this appeal in another resolution in 1994.¹³⁶³

1249. In a resolution adopted in 1993 on the situation of human rights in Afghanistan, the UN Commission on Human Rights urged all the Afghan parties “to respect accepted humanitarian rules, as set out in the [1949] Geneva

¹³⁵⁷ SFRY, Headquarters of the Supreme Command of the Armed Forces of the SFRY, Warning to the attention of the President of Croatia, the Government of Croatia and the General Staff of the Croatian Army, 1 October 1991.

¹³⁵⁸ Report on the Practice of the SFRY (FRY), 1997, Chapter 2.9.

¹³⁵⁹ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(b).

¹³⁶⁰ ICRC, *Protection of the Civilian Population against the Dangers of Hostilities*, Documents submitted to the First Session of the Conference of Government Experts, 24 May–12 June 1971, Vol. III, Geneva, January 1971, p. 38.

¹³⁶¹ UN General Assembly, Res. 2675 (XXV), 9 December 1970, preamble and § 7.

¹³⁶² UN General Assembly, Res. 48/152, 20 December 1993, § 8.

¹³⁶³ UN General Assembly, Res. 49/207, 23 December 1994, § 9.

Conventions... and the Additional Protocols thereto..., [and] to protect all civilians from acts of reprisal and violence".¹³⁶⁴ The same appeal was reiterated in 1994.¹³⁶⁵

1250. In a resolution adopted in 1995 on the situation of human rights in Afghanistan, the UN Commission on Human Rights noted "with deep concern that the civilian population is still the target of... acts of reprisal". It urged "all Afghan parties fully to respect accepted humanitarian rules, as set out in the [1949] Geneva Conventions... and the Additional Protocols thereto... to halt the use of weapons against the civilian population and to protect all civilians".¹³⁶⁶

1251. In 1993, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights noted, with respect to Chad, that:

Numerous killings were said to have taken place during counter-insurgency operations and reprisal attacks against persons perceived by government security forces as members or supporters of rebel groups because of their ethnic origin or place of residence.

The Special Rapporteur received alarming reports about massive killings of civilians by security forces in the regions of Moyen-Chari and Logone Oriental during the first half of 1993. A number of these killings were said to have been committed in retaliation for earlier attacks on security forces by armed opposition groups.¹³⁶⁷

In a subsequent report in 1994, the Special Rapporteur noted that:

The Special Rapporteur continued to receive alarming reports of extrajudicial, summary or arbitrary executions of civilians by members of the Chadian army. According to the information received, the authorities did not take any steps to prevent such acts. On 26 August 1994, the Special Rapporteur sent an urgent appeal to the Government after receiving reports of the extrajudicial execution of more than 25 villagers in the Kaga district between 12 and 14 August 1994. The victims were said to have included at least two minors, Justin Helkom (15) and Raymond Ekoudjewa (16). According to the reports received, the killings were reprisal actions by the army after the death of five soldiers during armed confrontations between the security forces and the rebel Forces Armées pour la République Fédérale (Armed Forces for the Federal Republic, FARF).¹³⁶⁸

1252. In 1994, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission stated with respect to Turkey that:

¹³⁶⁴ UN Commission on Human Rights, Res. 1993/66, 10 March 1993, § 6.

¹³⁶⁵ UN Commission on Human Rights, Res. 1994/84, 9 March 1994, § 8.

¹³⁶⁶ UN Commission on Human Rights, Res. 1995/74, 8 March 1995, preamble and § 6.

¹³⁶⁷ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1994/7, 7 December 1993, §§ 190 and 192.

¹³⁶⁸ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1995/61, 14 December 1994, § 88.

The reports and allegations received by the Special Rapporteur indicate that violations of the right to life continued to occur during 1994 in the context of the armed conflict between government security forces and guerrillas of the Partiya Karkeren Kurdistan (Kurdish Workers' Party, PKK) in the south-eastern parts of Turkey...

The Special Rapporteur sent four urgent appeals to the Government. Fears had been expressed for the lives of [individuals], who were said to have been detained during a raid by the security forces at their village, allegedly in reprisal for the refusal of the villagers to participate in the village guard system for fear of reprisal attacks from the PKK.¹³⁶⁹

The report also noted that, following the urgent appeals, "the Government [of Turkey] replied to the [Special Rapporteur], informing him that shots had been fired from within the village of Payamli against gendarmes performing a field operation in the vicinity of the village".¹³⁷⁰

1253. In 1994, in a report on extrajudicial, summary or arbitrary executions, the Special Rapporteur of the UN Commission on Human Rights stated with respect to Mali that:

The Special Rapporteur transmitted to the Government allegations he had received according to which... civilians and members of the Tuareg ethnic group... were killed in April 1994 by members of the Malian armed forces, reportedly in reprisal for the killing on the previous day of two soldiers by former Tuareg fighters who had joined the army...

On 4 August 1994, the Government informed the Special Rapporteur that [s]ome of the former MFUA combatants, who had been integrated into the army in 1991, reportedly deserted and committed acts of violence against their former colleagues and civilians.¹³⁷¹

1254. In 1994, in a report on the situation of human rights in Rwanda, the Special Rapporteur of the UN Commission on Human Rights noted that "the new Government [of Rwanda] pledges not only to refrain from taking measures or acts of reprisal but also to punish any persons engaging in such acts".¹³⁷²

1255. In 1995, in a report on the situation of human rights in Rwanda, the Special Rapporteur of the UN Commission on Human Rights deplored the fact that "in Rwanda, genocide and reprisals are dialectically linked: genocide seems inevitably to lead to reprisals... All the acts committed [violations of property rights, of the right to personal safety and of the right to life] taken together would appear to constitute reprisals by the victims of genocide".¹³⁷³

¹³⁶⁹ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1995/61, 14 December 1994, §§ 308–309.

¹³⁷⁰ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1995/61, 14 December 1994, § 311.

¹³⁷¹ UN Commission on Human Rights, Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Report, UN Doc. E/CN.4/1995/61, 14 December 1994, §§ 213–214.

¹³⁷² UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Rwanda, Report, UN Doc. E/CN.4/1995/12, 12 August 1994, § 30.

¹³⁷³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Rwanda, Report, UN Doc. E/CN.4/1995/71, 17 January 1995, §§ 29–34.

1256. In 1995, in a joint report on the situation in Colombia, the Special Rapporteurs of the UN Commission on Human Rights on Torture and on Extrajudicial, Summary or Arbitrary Executions reported that:

One of the most salient recent cases of human rights violations by members of the security forces was the killing of 10 civilians, mostly fishermen, from the village of Puerto Lleras by soldiers from the Artillery Group No. 19 Revéiz Pizarro of the Colombian Army on 3 January 1994. The massacre was said to have been carried out in reprisal for a guerrilla attack against a military base earlier on the same day, in which three soldiers had died.¹³⁷⁴

1257. In 1997, in a report on the situation of human rights in Zaire (DRC), the Special Rapporteur of the UN Commission on Human Rights reported that, in Lutabura, “FAZ, with the help of civilians, killed some 100 Banyamulenge as a reprisal for [a] massacre . . . in Epombo”.¹³⁷⁵

1258. In 1995, in a report concerning the conflict in Guatemala, MINUGUA recommended to the URNG that “it should also prevent any retaliatory attacks against civilian persons or property”.¹³⁷⁶ In a subsequent report, MINUGUA urged the URNG “to refrain from attacks on civilian property, such as its destruction of installations on rural estates in retaliation against agricultural producers who refuse to pay the so-called ‘war tax’, and any other kind of reprisal”.¹³⁷⁷ In two further reports, MINUGUA reiterated its denunciations of actions against civilian property or reprisals as violations of the commitment to end the suffering of the civilian population. These statements were made in the context of the collection of so-called “war taxes”.¹³⁷⁸

Other International Organisations

1259. No practice was found.

International Conferences

1260. At the CDDH, the ICRC suggested an amendment which contained two proposals on draft Article 6(3) (entitled “Fundamental guarantees”). Proposal I stated that “measures comparable with reprisals and violating the provisions of this Protocol against the persons referred to in paragraph 1 are prohibited”. Proposal II stated that “countermeasures violating the provisions of this Protocol

¹³⁷⁴ UN Commission on Human Rights, Special Rapporteur on Torture and Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Joint report on the visit by the Special Rapporteurs to Colombia from 17 to 26 October 1994, UN Doc. E/CN.4/1995/111, 16 January 1995, § 59.

¹³⁷⁵ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Zaire, Report, UN Doc. E/CN.4/1997/6, 28 January 1997, § 191.

¹³⁷⁶ MINUGUA, Director, First report, UN Doc. A/49/856, 1 March 1995, Annex, § 194.

¹³⁷⁷ MINUGUA, Director, Second report, UN Doc. A/49/929, 29 June 1995, Annex, § 198.

¹³⁷⁸ MINUGUA, Director, Third report, UN Doc. A/50/482, 12 October 1995, Annex, §§ 145 and 206; Fourth report, UN Doc. A/50/878, 24 February 1996, Annex, §§ 156 and 170(b).

and taken against the persons referred to in paragraph 1, even when intended to make the adverse Party respect his own obligations, are prohibited".¹³⁷⁹

1261. At the CDDH, the ICRC submitted a suggested amendment to AP II containing a draft Article 10 *bis* provisionally entitled "Prohibition of reprisals", which read:

Failure by a Party to the conflict to observe the provisions of this Protocol shall not entitle the adverse Party to take countermeasures infringing the provisions of this Protocol against persons who do not take a direct part or who have ceased to take a part in hostilities, whether or not their liberty has been restricted, and against medical units and transports, even if the aim of such countermeasures is to make the adverse Party respect his own obligations.¹³⁸⁰

This draft provision was rejected in the plenary session by 41 votes in favour, 20 against and 22 abstentions.¹³⁸¹

1262. At the CDDH, the report of the sub-group on reprisals of Working Group B of Committee I on draft AP II contained the following suggested provision: "The provisions of Parts II and III and of articles . . . shall not, in any circumstances or for any reason whatsoever, be violated, even in response to a violation of the provisions of the Protocol".¹³⁸² Committee I of the CDDH subsequently adopted a draft Article 10 *bis* AP II in Part II entitled "Humane treatment of persons in the power of the Parties to the conflict". The provision read: "The provisions of Parts II and III and of Articles 26, 26 *bis* and 28 shall not, in any circumstances or for any reason whatsoever, be violated, even in response to a violation of the provisions of the Protocol".¹³⁸³

IV. Practice of International Judicial and Quasi-judicial Bodies

1263. In a decision in the *Tadić case* (Interlocutory Appeal) in 1995, the ICTY stated that:

The emergence of international rules governing internal strife has occurred at two different levels: at the level of customary law and at that of treaty law. Two bodies of rules have thus crystallised, which are by no means conflicting or inconsistent, but instead mutually support and supplement each other. Indeed, the interplay between these two sets of rules is such that some treaty rules have gradually become part of customary law. This holds true for common Article 3 of the 1949 Geneva Conventions . . . but also applies to Article 19 of the Hague Convention for the Protection

¹³⁷⁹ ICRC, Suggested amendment to Article 6 draft AP II submitted to the CDDH, *Official Records*, Vol. IV, CDDH/I/302, 23 April 1976, p. 19.

¹³⁸⁰ ICRC, Suggested amendment to Article 10 *bis* draft AP II submitted to the CDDH, *Official Records*, Vol. IV, CDDH/I/302, 23 April 1976, p. 37.

¹³⁸¹ CDDH, *Official Records*, Vol. VII, CDDH/SR.51, 3 June 1977, p. 109.

¹³⁸² CDDH, *Official Records*, Vol. X, CDDH/405/Rev. 1, Annex II (circulated as Working Group document CDDH/I/GT/95), 17 March–10 June 1977, p. 234.

¹³⁸³ CDDH, *Official Records*, Vol. X, CDDH/405/Rev. 1, Annex IV, 17 March–10 June 1977, p. 283.

of Cultural Property in the Event of Armed Conflict of 14 May 1954, and ... to the core of Additional Protocol II of 1977.¹³⁸⁴

According to the ICTY, UN General Assembly Resolutions 2444 (XXIII) of 1968 and 2675 (XXV) of 1970 "were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind".¹³⁸⁵ As to the customary character of the provisions of AP II, the ICTY stated that "many provisions of this Protocol can now be regarded as declaratory of existing rules or as having crystallised emerging rules of customary law or else as having been strongly instrumental in their evolution as general principles".¹³⁸⁶

1264. In the review of the indictment in the *Martić case* in 1996 in which the accused was held accountable for having knowingly and wilfully ordered the shelling of Zagreb in May 1995, the ICTY Trial Chamber stated that:

16. ... Although [AP II] does not specifically refer to reprisals against civilians, a prohibition against such reprisals must be inferred from its Article 4. Reprisals against civilians are contrary to the absolute and non-derogable prohibitions enumerated in this provision. Prohibited behaviour must remain so "at any time and in any place whatsoever". The prohibition of reprisals against civilians in non-international armed conflicts is strengthened by the inclusion of the prohibition of "collective punishments" in [Article 4(2)(b) AP II].
17. Therefore, the rule which states that reprisals against the civilian population as such, or individual civilians, are prohibited in all circumstances, even when confronted by wrongful behaviour of the other party, is an integral part of customary international law and must be respected in all armed conflicts.¹³⁸⁷

V. Practice of the International Red Cross and Red Crescent Movement

1265. In 1980, the ICRC reminded an armed opposition group of its commitment to respect the fundamental rules of IHL, in particular that "nobody will be held responsible for acts he didn't commit", which according to the ICRC, "excludes from the outset every recourse to acts of reprisals".¹³⁸⁸

1266. In a declaration issued in 1994 in the context of the conflict between the Mexican government and the EZLN, the Mexican Red Cross reminded the parties of their obligation to protect the life, dignity and human rights of combatants and civilians under their authority from all acts of violence or reprisals, on the basis of the Geneva Conventions and AP I.¹³⁸⁹

¹³⁸⁴ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 98.

¹³⁸⁵ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 112.

¹³⁸⁶ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 117.

¹³⁸⁷ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, §§ 16–17.

¹³⁸⁸ ICRC archive document.

¹³⁸⁹ Mexican Red Cross, Declaración en torno a los acontecimientos que se han presentado en el estado de Chiapas a partir del 1o. de enero de 1994, 3 January 1994.

VI. Other Practice

1267. In 1990, the Committee on Justice and Human Rights of the Senate of the Philippines reported that members of the media viewed some military counterinsurgency operations as having been carried out as wanton reprisals, with little or no regard to the social and human costs. These views were expressed in the context of the internal situation.¹³⁹⁰

1268. According to the Report on the Practice of the Philippines, Human Rights Advocates of Negroes, a Philippine NGO, reported in 1990 that reprisals were frequent in the conduct of counterinsurgency operations. An operation carried out in response to an attack on a military detachment had caused destruction of property and the evacuation and deaths of civilians.¹³⁹¹

1269. Kalshoven stated that:

The question of whether retaliatory actions in the context of armed conflict constitute belligerent reprisals will . . . depend on the status of the parties to such actions, that is on whether these can be regarded as a State or similar autonomous entity. This is already apparent in the event of civil war, where the concept of belligerent reprisals can only find application to the extent that the insurgents have succeeded in establishing themselves as an essentially autonomous party, for instance by bringing part of the territory under their effective control.¹³⁹²

With regard to the taking of white hostages by an armed opposition group that occurred in the armed conflict in the Congo (DRC) (Stanleyville) in 1964, Kalshoven stated that:

[The] episode involving measures on the part of a belligerent . . . could at first sight be taken for belligerent reprisals . . . The scope of the rebellion and the nature of the actions on both sides were such that the situation could without any doubt be classified as an internal armed conflict . . . [The central Government] resorted to the employment of white mercenaries and of bombing aircraft manned by foreign pilots . . . On the other hand, the insurgents (who likewise received outside support) took to holding as hostages the white residents whom they found in the areas under their control . . . The rebels announced that they would hold all the whites as hostages so long as [the adversary] would not desist from the use of mercenaries.¹³⁹³

However, Kalshoven, further developing the facts, concluded that:

The taking of hostages, far from serving to enforce the law of war, in reality was designed to exert influence on the progress of the military operations . . . Thus, the policy of keeping hostages as applied by the insurgents in Stanleyville lacked the characteristic feature of a belligerent reprisal: it was not so much a means to enforce

¹³⁹⁰ Philippines, Senate, Report of the Committee on Justice and Human Rights, 1990, Report on the Practice of the Philippines, 1997, Chapter 2.9.

¹³⁹¹ Report on the Practice of the Philippines, 1997, Chapter 2.9, referring to Report of the Human Rights Advocates of Negroes, 1990.

¹³⁹² Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, p. 36.

¹³⁹³ Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, pp. 305–306.

the law of war as to guarantee the insurgents a degree of safety and to further their policy objectives.¹³⁹⁴

Therefore, Kalshoven considered that the actions taken were a violation of common Article 3 of the 1949 Geneva Conventions.¹³⁹⁵

¹³⁹⁴ Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, p. 311.

¹³⁹⁵ Frits Kalshoven, *Belligerent Reprisals*, A. W. Sijthof, Leyden, 1971, p. 315.

RESPONSIBILITY AND REPARATION

A. Responsibility for Violations of International Humanitarian Law (practice relating to Rule 149)	§§ 1–76
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A. Responsibility for Violations of International Humanitarian Law*I. Treaties and Other Instruments**Treaties*

1. Article 3 of the 1907 Hague Convention (IV) provides that “a belligerent Party which violates the provisions of the [1907 Hague Regulations] shall . . . be responsible for all acts committed by persons forming part of its armed forces”.
2. Articles 51 GC I, 52 GC II, 131 GC III and 148 GC IV provide that “no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of [grave breaches of these Conventions]”.
3. Article 91 AP I provides that “a Party to the conflict which violates the provisions of the Conventions or of this Protocol . . . shall be responsible for all acts committed by persons forming part of its armed forces”. Article 91 AP I was adopted by consensus.¹
4. Article 38 of the 1999 Second Protocol to the 1954 Hague Convention provides that “no provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation”.

Other Instruments

5. Article 5 of the 1991 ILC Draft Code of against the Peace and Security of Mankind, entitled “Responsibility of States”, provides that “prosecution of an individual for a crime against the peace and security of mankind does not relieve

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.46, 31 May 1977, p. 344.

a State of any responsibility under international law for an act or omission attributable to it".

6. Article 4 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Responsibility of States", provides that "the fact that the present Code provides for the responsibility of individuals for crimes against the peace and security of mankind is without prejudice to any question of the responsibility of States under international law".

7. Article 1 of the 2001 ILC Draft Articles on State Responsibility, entitled "Responsibility of a State for its internationally wrongful acts", provides that "every internationally wrongful act of a State entails the international responsibility of that State".

8. Article 2 of the 2001 ILC Draft Articles on State Responsibility, entitled "Elements of an internationally wrongful act of a State", provides that:

There is an internationally wrongful act of a State when conduct consisting of an act or omission:

- a) Is attributable to the State under international law; and
- b) Constitutes a breach of an international obligation of the State.

This "wrongful act of a State" can be the consequence of the conduct of any State organ (Article 4). The conduct is attributed to the State even if the organ is acting in exceeding its authority or contravening instructions (Article 7). Furthermore, attribution to the State can also be made in the case of the conduct of other entities empowered to exercise elements of the government authority (Article 5), of persons acting in fact under the instructions or, in case of absence or default of the official authorities, on behalf of the State (Articles 8 and 9), of organs placed at its disposal by another State (Article 6), or of the act of an insurrectional movement which becomes the new government of a State or which results in the formation of a new State (Article 10). Moreover, conduct which is not attributable to a State "shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own" (Article 11).

II. National Practice

Military Manuals

9. Argentina's Law of War Manual, referring to Articles 51 GC I, 52 GC II, 131 GC III and 148 GC IV, provides that "the contracting States cannot absolve themselves nor absolve any other contracting party of the liabilities incurred with respect to [grave breaches in the meaning of the Geneva Conventions]".² Referring to Article 91 AP I, the manual further provides that "the party which violates the Conventions or Protocol I shall . . . be responsible for all acts committed by the members of its armed forces".³

² Argentina, *Law of War Manual* (1989), § 8.04.

³ Argentina, *Law of War Manual* (1989), § 8.10.

10. Canada's LOAC Manual provides that "parties to the conflict are responsible for all acts committed by persons forming part of its armed forces".⁴ It further states that "no state is allowed to absolve itself of any liability in respect to the Geneva Conventions".⁵

11. Colombia's Basic Military Manual states that:

As subjects of international law, the States answer to the international community for the violations or failures to act of their agents or civil servants when they have impunity. They are also subject to the political, economic and legal sanctions imposed on them by the international community.⁶

12. Germany's Military Manual, referring to Article 91 AP I and Article 3 of the 1907 Hague Convention (IV), provides that "a party to a conflict which does not comply with the provisions of international humanitarian law . . . shall be responsible for all acts committed by persons forming part of its armed forces".⁷

13. The Military Manual of the Netherlands refers to Article 91 AP I and states that:

A party to the conflict is responsible for all acts committed by persons who are members of their armed forces. The responsibility applies not only towards those who have suffered damage and towards other parties to the conflict, but also towards the public opinion. This responsibility can result in pressure to respect the accepted rules of humanitarian law of war.⁸

14. New Zealand's Military Manual, referring to Articles 51 GC I, 52 GC II, 131 GC III and 148 GC IV, states that "insofar as the liability of the State is concerned, it is important to note that the Geneva Conventions provide that no Contracting Party is able to absolve itself of liability for any grave breach of those Conventions".⁹

15. Nigeria's Manual on the Laws of War provides that "belligerent states are responsible for all acts committed by persons forming part of their armed forces".¹⁰

16. Russia's Military Manual notes that "IHL lays down: . . . the responsibility of States . . . as regards violations of the rules of IHL".¹¹

17. Spain's LOAC Manual, referring to Article 91 AP I, provides that "the State is responsible for all acts committed by persons who are part of its Armed Forces".¹² In another provision, referring to Article 3 of the 1907 Hague Convention (IV) and Article 91 AP I, the manual states that a belligerent party "will be held responsible for the acts committed by persons who are part of its armed forces".¹³

⁴ Canada, *LOAC Manual* (1999), p. 15-2, § 9.

⁵ Canada, *LOAC Manual* (1999), p. 15-2, § 11.

⁶ Colombia, *Basic Military Manual* (1995), p. 35.

⁷ Germany, *Military Manual* (1992), § 1214.

⁸ Netherlands, *Military Manual* (1993), p. IX-3.

⁹ New Zealand, *Military Manual* (1992), § 1605(2).

¹⁰ Nigeria, *Manual on the Laws of War* (undated), § 7.

¹¹ Russia, *Military Manual* (1990), § 1.

¹² Spain, *LOAC Manual* (1996), Vol. I, § 11.2. ¹³ Spain, *LOAC Manual* (1996), Vol. I, § 11.10.f.

18. Switzerland's Basic Military Manual provides that "violations of the laws and customs of war, commonly called war crimes, engage . . . the responsibility of the State to which the authors of the violation belong".¹⁴

19. The UK Military Manual reproduces Article 3 of the 1907 Hague Convention (IV).¹⁵

20. The US Field Manual refers to Articles 51 GC I, 52 GC II, 131 GC III and 148 GC IV and states that "no High Contracting Party shall be allowed to absolve itself or any other High Contracting Party of any liability incurred by itself or by another High Contracting Party in respect of breaches referred to in the preceding Article [war crimes]".¹⁶

21. The US Air Force Pamphlet, in a provision stating the obligation of States to pay compensation for violations of IHL, states that:

However, as a general rule, in the absence of some cause for fault such as inadequate supervision or training, no obligation for compensation arises on the part of a state for other violations of the law of armed conflict committed by individual members outside their general area of responsibility.¹⁷

22. The YPA Military Manual of the SFRY (FRY) establishes the responsibility of parties to conflicts for violations of the law of war regardless of whether the violations were carried out on instructions or with the knowledge of the government or supreme command.¹⁸

National Legislation

23. No practice was found.

National Case-law

24. In its judgement in the *Reparation Payments case* in 1963 relating to claims for compensation for slave labour during the Second World War, Germany's Federal Supreme Court held that no decision could be reached on the merits of the claim until there was a final reparations agreement between the plaintiff's government and Germany, as it found that the London Agreement on German External Debts of 27 February 1953 had postponed the question of indemnification of individuals to when the issue of reparations more generally had been settled.¹⁹

25. In the *Distomo case* in 2003, the German Federal Supreme Court stated that the responsibility of States for internationally wrongful acts committed during hostilities "comprises liability for the acts of all persons belonging to the armed forces, and this not only in case these persons commit acts falling

¹⁴ Switzerland, *Basic Military Manual* (1987), Article 191.

¹⁵ UK, *Military Manual* (1958), § 618. ¹⁶ US, *Field Manual* (1956), § 503.

¹⁷ US, *Air Force Pamphlet* (1976), § 10-3.

¹⁸ SFRY (FRY), *YPA Military Manual* (1988), § 19.

¹⁹ Germany, Federal Supreme Court, *Reparation Payments case*, Judgement, 26 February 1963.

within their sphere of competence, but also in case they act without or against orders".²⁰

26. In the *Eichmann case* in 1961, Israel's District Court of Jerusalem stated that "it is true that under international law Germany bears not only moral, but also legal, responsibility for all the crimes that were committed as its own 'acts of State', including the crimes attributed to the accused".²¹

27. In its judgement in the *Priebke case* (Trial of First Instance) in 1996, Italy's Military Tribunal of Rome held that Italy had been responsible for an attack in 1944 perpetrated against German soldiers by Italian partisans. It stated that although the partisans were not legitimate combatants, Italy had encouraged their actions during the war and had officially recognised them after the conflict. Accordingly, the Tribunal concluded, their actions could be ascribed to the State which was thus internationally responsible for the attack.²²

28. In its judgement in the *J. T. case* in 1949 in which an individual had sued the State for repayment of money taken by the police during the arrest of the claimant during the occupation of the Netherlands by the German army, the District Court of The Hague held that the State of the Netherlands must repay the money to the plaintiff. It held that it was true that the State was not liable for all acts committed by the resistance movement (Binnenlandse Strijdkrachten) which had been organized with the consent of the government in exile during the Second World War, but since it was definitely established that the money had come into the hands of the police, restitution had to be made.²³

Other National Practice

29. In 1992, during a debate in the UN General Assembly, Argentina recommended that "belligerents engaged in an armed conflict, whether international or non-international, should... use those means which were least apt to cause damage to the environment, damage for which they would then be responsible".²⁴

30. In 1991, during a debate in the UN General Assembly on the environmental impact of the Gulf War, Austria stated that "there could be no doubt as to the illegality of the acts committed by Iraq, entailing international responsibility of that State".²⁵

²⁰ Germany, Federal Supreme Court, *Distomo case*, Judgement, 26 June 2003.

²¹ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 28.

²² Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996.

²³ Netherlands, District Court of The Hague, *J. T. case*, Judgement, 13 April 1949.

²⁴ Argentina, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/47/SR.8, 1 October 1992, § 23.

²⁵ Austria, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.19, 23 October 1991, § 5.

31. In 1983, during a debate in the Sixth Committee of the UN General Assembly on the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, the representative of China stated that:

In his delegation's view, such crimes could be committed by both individuals and States and the responsibility of either would vary only as to its character or extent. The 1954 draft Code did not exclude the responsibility of States... In addition, that type of crime could not be prevented unless the responsibility of States was established. The argument that it would be repetitive to attribute responsibility to States in the draft Code was not valid, because the Code dealt exclusively with offences against the peace and security of mankind and should be complete on that score.²⁶

32. The Report on the Practice of Indonesia, referring to an interview with a senior officer of the armed forces, states that "in case of violations of international humanitarian law incurred by the State or by individuals compatible with the State, the Government of Indonesia will take over such responsibility".²⁷

33. In 1991, during a debate in the UN General Assembly on the environmental impact of the Gulf War, Iran stated that "there were well-established rules of both customary and treaty law which held a party to a conflict responsible for unnecessary damage to the environment".²⁸

34. In 1997, during a debate concerning UNIFIL in the Fifth Committee of the UN General Assembly, Israel stated that "Israel's action in providing medical assistance to injured members of UNIFIL had been a purely humanitarian gesture which should under no circumstances be interpreted as an admission of any responsibility" for Israel's attack on a UNIFIL compound at Qana and the costs resulting therefrom.²⁹

35. According to the Report on the Practice of Israel, "Israel acknowledges and supports the view that States bear a responsibility under international law, for all violations of the laws of war perpetrated by them or by individuals under their responsibility".³⁰

36. At the CDDH, Mexico stated that "the State was responsible for all acts committed by its bodies and not only for acts committed by persons forming part of its armed forces".³¹

37. In 2000, during a debate in the UN Security Council on the protection of UN personnel, associated personnel and humanitarian personnel in conflict

²⁶ China, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/38/SR.52, 23 November 1983, § 25.

²⁷ Report on the Practice of Indonesia, 1997, Interview with a senior officer of the armed forces, Chapter 6.2.

²⁸ Iran, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, § 32.

²⁹ Israel, Statement before the Fifth Committee of the UN General Assembly, UN Doc. A/C.5/51/SR.70, 6 June 1997, § 25.

³⁰ Report on the Practice of Israel, 1997, Chapter 6.2.

³¹ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.46, 31 May 1977, p. 344, § 23.

areas, Norway stated that “States need to hold States . . . accountable for their attacks on humanitarian workers operating in territory under their control”.³²

38. In 1993, in a debate in the UN Security Council on draft Resolution 824 on Bosnia and Herzegovina, Pakistan stated that:

We believe that the Security Council must take immediate appropriate measures, including the authorization of the use of force under Chapter VII of the United Nations Charter, to ensure: . . . the institution of appropriate measures for reparations for the Government of Bosnia and Herzegovina by Serbia and Montenegro; that Serbia and Montenegro is liable, under international law, for any direct loss or damage, including environmental damage, or injury to foreign Governments, nationals and corporations as a result of its aggression against the Republic of Bosnia and Herzegovina.³³

39. At the First CCW Review Conference in 1995, the observer for Peru, with respect to certain conventional weapons including anti-personnel landmines, stated that “provisions were needed to determine the responsibility of States for injuries suffered by non-combatant victims and for environmental damage”.³⁴

40. In its written statement submitted to the ICJ in the *Nuclear Weapons (WHO) case* in 1995, commenting on the UN Security Council’s finding that Iraq was internationally responsible for environmental damage as a result of its invasion of Kuwait, the Solomon Islands observed that this finding “can only have been based on general international law, as it has evolved following the adoption” of the Additional Protocols, being as Iraq was not a party to the 1976 ENMOD Convention or to AP I.³⁵

41. The Report on the Practice of Spain refers to a number of bilateral treaties concluded in the second part of the 19th century between Spain and South American republics which include clauses concerning responsibility in armed conflict. The report states that:

All these treaties allow either Government of the States Parties to invoke the other Government’s responsibility for damages suffered in the territory of the latter and caused by rebels in the case of insurrection, civil war, or sedition or by savage tribes or hordes, if the authorities of the country can be shown . . . to have been at fault or negligence.³⁶

³² Norway, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 10.

³³ Pakistan, Statement before the UN Security Council, UN Doc. S/PV.3208 (Provisional), 6 May 1993, p. 16.

³⁴ Peru, Statement at the First CCW Review Conference, Vienna, 25 September–13 October 1995, UN Doc. CCW/CONF.I/SR.5, 27 September 1995, § 40.

³⁵ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 19 June 1995, § 4.92.

³⁶ Report on the Practice of Spain, 1998, Chapter 6.2, referring to Agreement renewing the suspended relations between Spain and Venezuela, signed in Santander on 12 August 1861, bases 1–6, the Treaty supplementing the treaty of peace and friendship (28 January 1885) between Spain and Ecuador, signed in Madrid on 23 May 1888, Article III, the Treaty supplementing the treaty of peace and friendship (30 January 1881) between Spain and Colombia, signed in Bogotá on 28 April 1894, Article IV and the Treaty supplementing the treaty of peace and friendship (14 August 1879) between Spain and Peru, signed in Lima on 16 July 1897, Article IV.

42. In *France and Others v. Turkey* before the ECiHR in 1983, Turkey argued that:

For a State to be liable, a violation must . . . continue to exist after the exhaustion of domestic remedies, and so become an act of the State itself. If the State has set up effective machinery to prosecute offences committed by its officials, these offences cannot be imputed to it. It is not correct that incidents which do not amount to administrative practices should be imputed to the Turkish Government. The persons committing such acts are personally responsible.³⁷

43. In 1991, in a report to submitted to the UN Security Council on operations in the Gulf War, the UK stated, with respect to the treatment of British POWs by Iraq, that “the Iraqi Ambassador was reminded of the responsibility of his Government . . . for any grave breach of the [Geneva] Conventions”.³⁸

44. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense referred to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV and stated that “in a separate article common to the four 1949 Geneva Conventions, no nation has the authority to absolve itself or any other nation party to those treaties of any liability incurred by the commission of a Grave Breach”.³⁹ The report also noted that:

On 15 October [1990], the [US] President warned Iraq of its liability for war crimes. The United States was successful in incorporating into [UN Security Council] Resolution 674 . . . language regarding Iraq’s accountability for its war crimes, in particular its potential liability for Grave Breaches of the GC, and inviting States to collect relevant information regarding Iraqi Grave Breaches and provide it to the Security Council.⁴⁰

45. According to the Report on US Practice, it is the *opinio juris* of the US that “in principle, a state is responsible for any unlawful act of its armed forces in the course of an armed conflict, but not for private acts of members of its armed forces”.⁴¹

46. In the *Application of Genocide Convention case (Provisional Measures)* in 1993 brought by Bosnia and Herzegovina against the FRY (Serbia and Montenegro), the latter, in its written observations on the request for the indication of provisional measures, requested the ICJ “to establish the responsibility of the authorities’ of Bosnia-Herzegovina for acts of genocide against the Serb people in Bosnia-Herzegovina”.⁴²

³⁷ Turkey, Arguments submitted to the ECiHR, *France and Others v. Turkey*, Decision on the admissibility of the applications, 6 December 1983, Facts II(6).

³⁸ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1.

³⁹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 633.

⁴⁰ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 634.

⁴¹ Report on US Practice, 1997, Chapter 6.3.

⁴² FRY, Written observations on the request for the indication of provisional measures submitted to the ICJ, *Application of Genocide Convention case (Provisional Measures)*, Order, 8 April 1993, § 43.

*III. Practice of International Organisations and Conferences**United Nations*

47. In a resolution adopted in 1990, the UN Security Council reminded Iraq that “under international law it is liable for any loss, damage, or injury arising in regard to Kuwait and third States and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq.”⁴³

48. In a resolution adopted in March 1991, the UN Security Council, acting explicitly under Chapter VII of the UN Charter, demanded that:

Iraq implement its acceptance of all twelve resolutions noted above and in particular that Iraq . . .

- (b) accept in principle its liability under international law for any loss, damage or injury arising in regard to Kuwait and third States and their nationals and corporations, as a result of the invasion and illegal occupation of Kuwait by Iraq.⁴⁴

49. In Resolution 687 adopted in April 1991, the UN Security Council reaffirmed that:

Iraq, without prejudice to its debts and obligations arising prior to 2 August 1990, which will be addressed through the normal mechanisms, is liable under international law for any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait.⁴⁵

50. In a resolution adopted in 1993 in the context of the conflict in the former Yugoslavia, the UN General Assembly reaffirmed that “States are to be held accountable for violations of human rights which their agents commit on their own territory or on the territory of another State”.⁴⁶

51. In 2001, the UN General Assembly adopted a resolution entitled “Responsibility of States for internationally wrongful acts”, to which the 2001 ILC Draft Articles on State Responsibility were annexed. In the resolution, the UN General Assembly noted that “the subject of responsibility of States for internationally wrongful acts is of major importance in the relations of States”. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.⁴⁷

52. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General noted that:

⁴³ UN Security Council, Res. 674, 29 October 1990, § 8.

⁴⁴ UN Security Council, Res. 686, 2 March 1991, § 2(b).

⁴⁵ UN Security Council, Res. 687, 3 April 1991, § 16.

⁴⁶ UN General Assembly, Res. 48/153, 20 December 1993, § 12.

⁴⁷ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

Armed groups have a direct responsibility, according to Article 3 common to the four Geneva Conventions of 1949 and to customary international humanitarian law, to protect civilian populations in armed conflict. International instruments require not only Governments but also armed groups to behave responsibly in conflict situations, and to take measures to ensure the basic needs and protection of civilian populations. Where Governments do not have resources and capacities to do this unaided, it is incumbent on them to invoke the support of the international system.⁴⁸

The Secretary-General recommended that "in its resolutions the Security Council should emphasize the direct responsibility of armed groups under international humanitarian law".⁴⁹

53. In 1995, in a report on the situation of human rights in the Sudan, the Special Rapporteur of the UN Commission on Human Rights, having described several cases of killing, abduction and looting committed by SPLA soldiers, referred to a report of Operation Lifeline Sudan (OLS) noting that "responsibility for the attack clearly lies with SPLA/M and, as such, is a clear violation of the new ground rules". In his conclusions and recommendations, the Special Rapporteur also noted that:

Most of the reported gross violations and atrocities, especially killings and abduction of civilians, looting and hostage taking of relief workers, were committed during 1995 by dissident commanders, mainly those who had split from SSIA in previous years. SPLA bears responsibility for the violations and atrocities committed in 1995 by local commanders from its own ranks, although it has not been proved that they committed these actions on orders from the senior leadership, nor is it known whether they have been or will be pardoned by superiors.⁵⁰

54. In 1996, in a report on a mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, Its Causes and Consequences recommended, *inter alia*, that, at the national level:

The Government of Japan should:

- (a) Acknowledge that the system of comfort stations set up by the Japanese Imperial Army during the Second World War was a violation of its obligations under international law and accept legal responsibility for that violation.⁵¹

55. In its report in 1993, the UN Commission on the Truth for El Salvador stated that:

⁴⁸ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 7.

⁴⁹ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, Recommendation 9.

⁵⁰ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Sudan, Interim report, UN Doc. A/50/569, 16 October 1995, Annex, §§ 65–67 and 73.

⁵¹ UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on the mission to the North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, § 137(a).

The State of El Salvador, through the activities of members of the armed forces and/or civilian officials, is responsible for having taken part in, encouraged and tolerated the operations of the death squads which illegally attacked members of the civilian population.⁵²

56. In its Commentary on Article 5 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, the ILC stated that “the State may thus remain responsible and be unable to exonerate itself from responsibility by invoking the prosecution or punishment of the individuals who committed the crime. It could be obliged to make reparation for injury caused by its agents.”⁵³

57. Article 14(3) of the 1996 version of the Draft Articles on State Responsibility of the ILC, provisionally adopted on first reading, stated that the fact that the conduct of an organ of an insurrectional movement was not to be considered an act of State “is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international law”.⁵⁴ As to the subsequent deletion of this Article, the ILC’s Special Rapporteur stated that:

Turning to the substance of the rules stated in the two articles, the first point to note in that article 14, paragraph 3 deals with the international responsibility of liberation movements which are, *ex hypothesi*, not States. It therefore falls outside the scope of the draft articles and should be omitted. The responsibility of such movements, for example, for breaches of international humanitarian law, can certainly be envisaged, but this can be dealt with in the commentary.⁵⁵

58. In 2001, in its commentary on Article 7 of the Draft Articles on State Responsibility, the ILC stated that:

- (7) The central issue to be addressed in determining the applicability of article 7 to unauthorized conduct of official bodies is whether the conduct was performed by the body in an official capacity or not. Cases where officials acted in their capacity as such, albeit unlawfully or contrary to instructions, must be distinguished from cases where the conduct is so removed from the scope of their official functions that it should be assimilated to that of private individuals, not attributable to the State. In the words of the Iran-United States Claims Tribunal, the question is whether the conduct has been “carried out by persons cloaked with governmental authority”.
- (8) The problem of drawing the line between unauthorized but still “official” conduct, on the one hand, and “private” conduct on the other, may be avoided if the conduct complained of is systematic or recurrent, such that the State knew or ought to have known of it and should have taken steps to prevent it. However, the distinction between the two situations still needs to be made

⁵² UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 137.

⁵³ ILC, Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the work of its forty-third Session, *Yearbook of the International Law Commission*, 1991, Vol. II, Part 2, Commentary on Article 5, § 2.

⁵⁴ ILC, 1996 Draft Articles on State Responsibility, UN Doc. A/CN.4/L.524, 21 June 1996, p. 4.

⁵⁵ ILC, First report on State responsibility by the Special Rapporteur, Addendum, UN Doc. A/CN.4/490/Add.5, 22 July 1998, § 275.

in some cases, for example when considering isolated instances of outrageous conduct on the part of persons who are officials. That distinction is reflected in the expression “if the organ, person or entity acts in that capacity” in article 7. This indicates that the conduct referred to comprises only the actions and omissions of organs purportedly or apparently carrying out their official functions, and not the private actions or omissions of individuals who happen to be organs or agents of the State. In short, the question is whether they were acting with apparent authority.⁵⁶

In its Commentary on Article 8, the ILC further underlines that “in any event it is a matter for appreciation in each case whether particular conduct was or was not carried out under the control of a State, to such an extent that the conduct controlled should be attributed to it”.⁵⁷

Other International Organisations

59. No practice was found.

International Conferences

60. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration stating that “the participating High Contracting Parties recall that according to art. 148 [GC IV] no High Contracting Party shall be allowed to absolve itself of any liability incurred by itself in respect to grave breaches”.⁵⁸

IV. Practice of International Judicial and Quasi-judicial Bodies

61. In the *Nicaragua case (Merits)* in 1986, the ICJ, with respect to a possible responsibility of the US for the activities of the *contras*, stated that:

United States participation, even if preponderant and decisive, in the financing, organizing, training, supplying and equipping of the *contras*, the selection of its military or paramilitary targets, and the planning of the whole of its operations, is still insufficient in itself, on the basis of the evidence in the possession of the Court, for the purpose of attributing to the United States the acts committed by the *contras* in the course of their military or paramilitary operations in Nicaragua. All the forms of United States participation mentioned above, and even the general control by the respondent State over a force with a high degree of dependency on it, would not in themselves mean, without further evidence, that the United States directed or enforced the perpetration of the acts contrary to human rights and humanitarian law alleged by the applicant State. Such acts could well be committed by members of the *contras* without the control of the United States. For this conduct to give rise

⁵⁶ ILC, Commentary on Article 7 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd session, UN Doc. A/56/10, New York, 2001, p. 102.

⁵⁷ ILC, Commentary on Article 8 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, p. 107.

⁵⁸ Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, § 13.

to legal responsibility of the United States, it would in principle have to be proved that that State had effective control of the military or paramilitary operations in the course of which the alleged violations were committed.⁵⁹

The ICJ concluded that it did not consider that the assistance given by the US to the *contras* warranted the conclusion that these forces were subject to the US to such an extent that the acts they committed were imputable to the latter.⁶⁰

62. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber held that:

Under current international humanitarian law, in addition to individual criminal liability, State responsibility may ensue as a result of State officials engaging in torture or failing to prevent torture or to punish torturers. If carried out as an extensive practice of State officials, torture amounts to a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, thus constituting a particularly grave wrongful act generating State responsibility.⁶¹

63. In its judgement on appeal in the *Tadić case* in 1999, the ICTY Appeals Chamber discussed the issue of State responsibility for the actions of irregular troops in great detail, not in order to reach any conclusion concerning the actual responsibility of any State, but in order to determine whether the conflict in Bosnia and Herzegovina was international and, therefore, whether GC IV applied. During its discussion on the topic, the Appeals Chamber had to determine the type of relationship that had to exist between the irregular troops and the State in question for the latter to be considered responsible for the acts of the former. The Appeals Chamber was of the view that:

137. ... international rules do not always require the same degree of control over armed groups or private individuals for the purpose of determining whether an individual not having the status of a State official under internal legislation can be regarded as a *de facto* organ of the State. The extent of the requisite State control varies. Where the question at issue is whether a *single* private individual or a *group that is not militarily organised* has acted as a *de facto* State organ when performing a specific act, it is necessary to ascertain whether specific instructions concerning the commission of that particular act had been issued by that State to the individual or group in question; alternatively, it must be established whether the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue. By contrast, control by a State over subordinate *armed forces or militias or paramilitary units* may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations

⁵⁹ ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 115.

⁶⁰ ICJ, *Nicaragua case (Merits)*, Judgement, 27 June 1986, § 116.

⁶¹ ICTY, *Furundžija case*, Judgement, 10 December 1998, § 142.

of international humanitarian law. The control required by international law may be deemed to exist when a State (or, in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

138. Of course, if, as in *Nicaragua*, the controlling State is *not the territorial State* where the armed clashes occur or where at any rate the armed units perform their acts, more extensive and compelling evidence is required to show that the State is genuinely in control of the units or groups not merely by financing and equipping them, but also by generally directing or helping plan their actions.

139. The same substantial evidence is required when, although the State in question is the territorial State where armed clashes occur, the general situation is one of turmoil, civil strife and weakened State authority.

140. Where the controlling State in question is an adjacent State with territorial ambitions on the State where the conflict is taking place, and the controlling State is attempting to achieve its territorial enlargement through the armed forces which it controls, it may be easier to establish the threshold.

141. It should be added that international law does not provide only for a test of overall control applying to armed groups and that of specific instructions (or subsequent public approval), applying to single individuals or militarily unorganised groups. The Appeals Chamber holds the view that international law also embraces a third test. This test is the assimilation of individuals to State organs on account of their actual behaviour within the structure of a State (and regardless of any possible requirement of State instructions) . . .

145. In the light of the above discussion, the following conclusion may be safely reached. In the case at issue, given that the Bosnian Serb armed forces constituted a "military organization", the control of the FRY authorities over these armed forces required by international law for considering the armed conflict to be international was overall control going beyond the mere financing and equipping of such forces and involving also participation in the planning and supervision of military operations. By contrast, international rules do not require that such control should extend to the issuance of specific orders or instructions relating to single military actions, whether or not such actions were contrary to international humanitarian law.⁶² [emphasis in original]

Applying this test to the facts before it, the Appeals Chamber concluded that in 1992 the YPA exercised the requisite measure of control over the Bosnian Serb army. Such control manifested itself not only by financial, logistical and other assistance and support, but also, and more importantly, in terms of participation in the general direction, coordination and supervision of the activities of the army of the Republika Srpska ("VRS").⁶³

64. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber, referring to the *Tadić case* (Judgement on Appeal), stated that:

⁶² ICTY, *Tadić case*, Judgement on Appeal, 15 July 1999, §§ 137–145.

⁶³ ICTY, *Tadić case*, Judgement on Appeal, 15 July 1999, §§ 147–157.

95. Aside from the direct intervention by HV forces, the Trial Chamber observes that Croatia exercised indirect control over the HVO and HZHB.

96. ... Some degree of control exercised by a Party to a conflict over the perpetrators of the breaches is needed for them to be held criminally responsible on the basis of Article 2 of the Statute. The question of determining the degree of control required then arises.

...

99. The Appeals Chamber clearly laid out the three control criteria which allow the acts of individuals or groups to be ascribed to a foreign State, circumstances which transform what at first sight is an internal armed conflict into an international one

...

100. The matter is one of possibly imputing the acts of the HVO to the Republic of Croatia which would then confer an international nature upon the conflict played out in the Lasva Valley. It is the third criterion which applies in this instance. This criterion allows the degree of State control required by international law to be determined in order to be able to ascribe to a foreign State the acts of armed forces, militia and paramilitary units (hereinafter "organised groups"). The Appeals Chamber characterised it as a criterion of overall control...

101. ... The factors which permit the existence of overall control to be proved may vary depending on the circumstances.

102. In this instance, the direct intervention of the HV in Bosnia and in the CBOZ has already been demonstrated above. Mention may be made of several other indications of Croatia's involvement in the conflict which rebut the Defence argument that the HV did indeed direct HVO operations, but only between March and June 1992 before the HVO became organised and prior to the outbreak of the conflict in central Bosnia between the Croatian and Muslim forces. The Trial Chamber concurs that the involvement of the HV and Croatia may appear more clear-cut at the start of the period under consideration but deems that it persisted throughout the conflict.

103. This involvement does not seem to be the result only of the particular circumstances prevailing at the time...

...

112. Croatia was ... directly involved in the control of the HVO forces which were created on 8 April by the HZHB presidency...

...

114. The Defence furthermore did not challenge the fact that the HVO shared personnel, often from BH, with the HV...

...

118. The Bosnian Croat leaders followed the directions given by Zagreb or, at least, co-ordinated their decisions with the Croatian government. Co-ordination was manifest at various levels...

119. ... The evidence demonstrates that there were regular meetings with President Tudjman and that the Bosnian Croat leaders, appointed by Croatia or with its consent, continued to direct the HZHB and the HVO well after June 1992.

120. Apart from providing manpower, Croatia also lent substantial material assistance to the HVO in the form of financial and logistical support... Croatia supplied the HVO with large quantities of arms and materiel in 1992, 1993 and 1994... Equipment was also supplied to the ABiH but this ceased in 1993 during the conflict between the HVO and the ABiH. HVO troops were trained in Croatia.

...

122. In the light of all the foregoing and, in particular, the Croatian territorial ambitions in respect of Bosnia-Herzegovina detailed above, the Trial Chamber finds that Croatia, and more specifically former President Tudjman, was hoping to partition Bosnia and exercised such a degree of control over the Bosnian Croats and especially the HVO that it is justified to speak of overall control. Contrary to what the Defence asserted, the Trial Chamber concluded that the close ties between Croatia and the Bosnian Croats did not cease with the establishment of the HVO.

123. Croatia's indirect intervention would therefore permit the conclusion that the conflict was international.⁶⁴

65. In its judgement on appeal in the *Aleksovski* case in 2000, the ICTY Appeals Chamber, referring to the *Tadić* and *Nicaragua* cases, stated that:

137. In the *Aleksovski* case, the question was whether the HVO forces, while not being official agents of the Croatian government, could be said to be acting as *de facto* agents of the Croatian State. In seeking to answer this question, the Majority Opinion made the following reference to the decision of the Appeals Chamber in the *Tadić* Jurisdiction Decision:

The Appeals Chamber in the *Tadić Interlocutory Decision* did not specify the requisite degree of intervention by a foreign State in the territory of another State to internationalise an armed conflict. However, it did provide some guidance on the matter by indicating that the clashes between the Government of Bosnia and Herzegovina and the Bosnian Serb forces should be considered as internal, unless a "direct involvement" of the JNA could be proved, in which case the conflict should be considered to be an international one.

Further indication of the majority's reasoning is garnered from the following paragraph:

A State can act in international law directly through governmental authorities and officials, or indirectly through individuals or organisations who, while not being official agents of the government, receive from it some power or assignment to perform acts on its behalf such that they become *de facto* agents.

138. The phrase "receive from it some power or assignment to perform acts on its behalf such that they become *de facto* agents," does, in the opinion of the Appeals Chamber, indicate that the position of the majority was that some kind of instruction was required in order for the requisite relationship between the Bosnian Croats and the Croatian State to be established. This is what the Prosecution refers to as the "specific instructions" test.

139. The Majority Opinion then referred to the ICJ decision in *Nicaragua* in this way:

According to the International Court of Justice ("the ICJ"), where the relationship of a rebel force to a foreign State is one of such dependence on the one side and control on the other that it would be appropriate to equate the rebel force, for legal purposes, with an organ of that State,

⁶⁴ ICTY, *Blaškić* case, Judgement, 3 March 2000, §§ 95–123.

or as acting on behalf of that State, then in such a case the conflict can be seen to be an international one, even if it is *prima facie* internal and there is no direct involvement of the armed forces of the State.

It made further reference to the reliance placed by the majority Judgement of Judge Stephen and Judge Vohrah in the *Tadić* case (first instance), "on the high standard expounded by the ICJ in the *Nicaragua* case in the sense that the international responsibility of a State can arise only if control is exercised ("directed and enforced") with respect to specific military or paramilitary operations."

140. In dealing with the relationship between the HV and HVO forces, the majority commented on a particular aspect of the evidence of the expert witness:

The expert witness presented an order from the HVO (not the HV) – this distinction is very important – to their soldiers to remove the HV insignias (November–December 1992) because of potential problems to Croatia. While there is a document dated May 1993 which allowed the transfer/promotion of soldiers from the HVO to the HV, this does not in itself prove the dependency of the HVO on the HV.

141. The Appeals Chamber makes two observations about this paragraph. First, the fact that the Majority Opinion goes out of its way to mention that the order came from the HVO, and not the HV, and that the distinction was very important, highlights the weight the Trial Chamber attached to an order or instruction of the controlling State as a prerequisite for the attribution of acts of members of a military group to a State. Secondly, to the extent that the Majority Opinion uses dependency as a criterion, it is not consistent with the decision in the *Tadić* Judgement.
142. Significantly, the Majority Opinion concludes by finding that "the Prosecution failed to discharge its burden of proving that, during the time-period and in the place of the indictment, the HVO was in fact acting under the overall control of the HV in carrying out the armed conflict against Bosnia and Herzegovina."
143. The Appeals Chamber finds that, notwithstanding the express reference to "overall control", the *Aleksovski* Judgement did not in fact apply the test of overall control. Instead, the passages cited show that the majority gave prominence to the need for specific instructions or orders as a prerequisite for attributing the acts of the HVO to the State of Croatia, a showing that is not required under the test of overall control.
144. The test set forth in the *Tadić* Judgement of "overall control" and what is required to meet it constitutes a different standard from the "specific instructions" test employed by the majority in *Aleksovski*, or the reference to "direct involvement" in the *Tadić* Jurisdiction Decision.
145. The "overall control" test calls for an assessment of all the elements of control taken as a whole, and a determination to be made on that basis as to whether there was the required degree of control. Bearing in mind that the Appeals Chamber in the *Tadić* Judgement arrived at this test against the background of the "effective control" test set out by the decision of the ICJ in *Nicaragua*, and the "specific instructions" test used by the Trial Chamber in *Tadić*, the Appeals Chamber considers it appropriate to say that the standard established by the "overall control" test is not as rigorous as those tests.

146. To the extent that it provides for greater protection of civilian victims of armed conflicts, this different and less rigorous standard is wholly consistent with the fundamental purpose of Geneva Convention IV, which is to ensure “protection of civilians to the maximum extent possible.”⁶⁵

66. In its judgement on appeal in the *Delalić case* in 2001, the ICTY Appeals Chamber, referring to the *Tadić*, *Aleksovski* and *Nicaragua cases*, stated that:

13. The Appeals Chamber saw the question of internationality as turning on the issue of whether the Bosnian Serb forces “could be considered as *de iure* or *de facto* organs of a foreign power, namely the FRY”. The important question was “*what degree of authority or control* must be wielded by a foreign State over armed forces fighting on its behalf in order to render international an armed conflict which is *prima facie* internal”. The Chamber considered, after a review of various cases including *Nicaragua*, that international law does not always require the same degree of control over armed groups or private individuals for the purpose of determining whether they can be regarded as a *de facto* organ of the State. The Appeals Chamber found that there were three different standards of control under which an entity could be considered *de facto* organ of the State, each differing according to the nature of the entity. Using this framework, the Appeals Chamber determined that the situation with which it was concerned fell into the second category it identified, which was that of the acts of armed forces or militias or paramilitary units.
14. The Appeals Chamber determined that the legal test which applies to this category was the “overall control” test:

In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields *overall control* over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the general planning of its military activity. [...] However, it is not necessary that, in addition, the State should also issue, either to the head or to members of the group, instructions for the commission of specific acts contrary to international law.

15. Overall control was defined as consisting of more than “the mere provision of financial assistance or military equipment or training”. Further, the Appeals Chamber adopted a flexible definition of this test, which allows it to take into consideration the diversity of situations on the field in present-day conflicts:

This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation. Under international law it is by no means necessary that the controlling authorities should plan all the operations of the units dependent on them, choose their targets, or give specific instructions concerning the conduct of military operations and any alleged violations of international humanitarian law. The control required by international law may be deemed to exist when a State (or in the context of an armed conflict, the Party to the conflict) *has a role in organising, coordinating or planning the military actions* of the military group, in addition to financing,

⁶⁵ ICTY, *Aleksovski case*, Judgement on Appeal, 24 March 2000, §§ 137–146.

training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto* State organs regardless of any specific instruction by the controlling State concerning the commission of each of those acts.

16. The Appeals Chamber in *Tadić* considered *Nicaragua* in depth, and based on two grounds, held that the “effective control” test enunciated by the ICJ was not persuasive.
17. Firstly, the Appeals Chamber found that the *Nicaragua* “effective control” test did not seem to be consonant with the “very logic of the entire system of international law on State responsibility”, which is “not based on rigid and uniform criteria”. In the Appeals Chamber’s view, “the whole body of international law on State responsibility is based on a realistic concept of accountability, which disregards legal formalities”. Thus, regardless of whether or not specific instructions were issued, the international responsibility of the State may be engaged.
18. Secondly, the Appeals Chamber considered that the *Nicaragua* test is at variance with judicial and State practice. Relying on a number of cases from claims tribunals, national and international courts, and State practice, the Chamber found that, although the “effective control” test was upheld by the practice in relation to individuals or unorganised groups of individuals acting on behalf of States, it was not the case in respect of military or paramilitary groups.
19. The Appeals Chamber found that the armed forces of the Republika Srpska were to be regarded as acting under the overall control of, and on behalf of, the FRY, sharing the same objectives and strategy, thereby rendering the armed conflict international.
20. The Appeals Chamber, after considering in depth the merits of the *Nicaragua* test, thus rejected the “effective control” test, in favour of the less strict “overall control” test. This may be indicative of a trend simply to rely on the international law on the use of force, *jus ad bellum*, when characterising the conflict. The situation in which a State, the FRY, resorted to the indirect use of force against another State, Bosnia and Herzegovina, by supporting one of the parties involved in the conflict, the Bosnian Serb forces, may indeed be also characterised as a proxy war of an international character. In this context, the “overall control” test is utilised to ascertain the foreign intervention, and consequently, to conclude that a conflict which was *prima facie* internal is internationalised.
- ...
21. Applying the principle enunciated in the *Aleksovski* Appeal Judgement, this Appeals Chamber is unable to conclude that the decision in the *Tadić* was arrived at on the basis of the application of a wrong legal principle, or arrived at *per incuriam*. After careful consideration of the arguments put forward by the appellants, this Appeals Chamber is unable to find cogent reasons in the interests of justice to depart from the law as identified in the *Tadić* Appeal Judgement. The “overall control” test set forth in the *Tadić* Appeal Judgement is thus the applicable criteria for determining the existence of an international armed conflict.⁶⁶ [emphasis in original]

⁶⁶ ICTY, *Delalić case*, Judgement on Appeal, 20 February 2005, §§ 13–20 and 26.

67. In 1995, in *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, the ACiHPR stated that:

21. The African Charter, unlike other human rights instruments, does not allow for states parties to derogate from their treaty obligations during emergency situations. Thus, even a civil war in Chad cannot be used as an excuse by the State violating or permitting violations of rights in the African Charter.
22. In the present case, Chad has failed to provide security and stability in the country, thereby allowing serious and massive violations of human rights. The national armed forces are participants in the civil war and there have been several instances in which the Government has failed to intervene to prevent the assassination and killing of specific individuals. Even where it cannot be proved that violations were committed by government agents, the government had a responsibility to secure the safety and the liberty of its citizens, and to conduct investigations into murders. Chad therefore is responsible for the violations of the African Charter.⁶⁷

68. In 1993, in a decision concerning the imputability to Turkey of acts committed in the northern part of Cyprus, the ECiHR, with respect to the arrest of the applicants, held that:

96. As regards overall control of the arrest operation by Turkey, the Commission recalls that, in its decision on admissibility . . . it was held that the application of the [1950 ECHR] extends beyond national frontiers of the Contracting States and includes acts of State organs abroad. The term "jurisdiction" in Article 1 is not equivalent to or limited to the national territory . . . Authorized agents of a State, including armed forces, not only remain under its jurisdiction when abroad but also bring any other persons "within the jurisdiction" of that State to the extent that they exercise authority over such persons.
97. The Commission notes that the Turkish armed forces have entered Cyprus and that they operate under the direction of the Turkish Government and under established rules governing the structure and command of these armed forces. It follows that these armed forces are authorised agents of Turkey and that they bring any other persons in Cyprus "within the jurisdiction" of Turkey, in the sense of Article 1 of the [1950 ECHR], to the extent that they exercise control over such persons. Therefore, in so far as these armed forces, by their acts or omissions, affect such persons' rights or freedoms under the Convention, the responsibility of Turkey is engaged.⁶⁸

However, in its decision as to the applicants' detention and the proceedings against them after their arrest, the Commission stated that:

169. The Commission considers that the factual situation is different as regards the subsequent detention of the applicants and the proceedings against them. The Commission has found no indication of control exercised by Turkish

⁶⁷ ACiHPR, *Commission Nationale des Droits de l'Homme et des Libertés v. Chad*, 2 October 1995, §§ 21–22.

⁶⁸ ECiHR, *Chrysostomos and Papachrysostomou v. Turkey*, Report, 8 July 1993, §§ 96–97; see also *W. v. Ireland*, Admissibility Decision, 28 February 1983, § 14.

authorities over the prison administration or the administration of justice by Turkish Cypriot authorities in the applicants' case . . .

170. The Commission, . . . finding no indication of direct involvement of Turkish authorities in the applicants' detention, and the proceedings against them, after their arrest . . ., sees no basis under the Convention for imputing these acts to Turkey.⁶⁹

69. In 1988, in the *Velásquez Rodríguez case*, the IACtHR stated that:

176. The State is obligated to investigate every situation involving a violation of the rights protected by the Convention. If the State apparatus acts in such a way that the violation goes unpunished and the victim's full enjoyment of such rights is not restored as soon as possible, the State has failed to comply with its duty to ensure the free and full exercise of those rights to the persons within its jurisdiction. The same is true when the State allows private persons or groups to act freely and with impunity to the detriment of the rights recognized by the Convention.

177. In certain circumstances, it may be difficult to investigate acts that violate an individual's rights. The duty to investigate, like the duty to prevent, is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, it must be undertaken in a serious manner and not as a mere formality preordained to be ineffective. An investigation must have an objective and be assumed by the State as its own legal duty, not as a step taken by private interests that depends upon the initiative of the victim or his family or upon their offer of proof, without an effective search for the truth by the government. This is true regardless of what agent is eventually found responsible for the violation. Where the acts of private parties that violate the Convention are not seriously investigated, those parties are aided in a sense by the government, thereby making the State responsible on the international plane.⁷⁰

70. In its decision in the *Case of the Riofrío massacre (Colombia)* in 2001, the IACiHR stated that:

48. . . . It must be ascertained whether the acts of the individuals implicated in the incident in violating such fundamental rights as the rights to life and humane treatment are attributable to the State of Colombia and therefore call into question its responsibility in accordance with international law. In this regard, the Inter-American Court has noted that it is sufficient to show that the infringement of the rights recognized in the Convention has been supported or tolerated by the government.

49. First, it should be said that, as noted by the [IACiHR] in its Third Report on the Human Rights Situation in Colombia, the State has played a leading role in developing the paramilitary or self-defense groups, that it allowed them to act legitimately with the protection of the law during the 1970s and 1980s, and that it is generally responsible for their existence and for strengthening them.

50. These groups sponsored or accepted by branches of the armed forces were created mainly to combat armed groups of dissidents. As a result of their

⁶⁹ ECiHR, *Chrysostomos and Papachrysostomou v. Turkey*, Report, 8 July 1993, §§ 169–170. (The Council of Ministers agreed with the Commission's findings, Council of Europe, Council of Ministers, Resolution DH (95) 245, 19 October 1995.)

⁷⁰ IACtHR, *Velásquez Rodríguez case*, Judgement, 29 July 1988, §§ 176–177.

counterinsurgency purposes, the paramilitaries established links with the Colombian army that became stronger over a period of more than twenty years. Eventually, on May 25, 1989, the Supreme Court of Justice declared Decree 3398 unconstitutional, thereby removing all legal support for their ties to national defense. In the wake of this action, the State passed a number of laws to criminalize the activities of these groups and of those that supported them. Despite these measures, the State did little to dismantle the structure it had created and promoted, particularly in the case of groups that carried out counterinsurgency activities and, in fact, the ties remained in place at different levels, which in some instances requested or permitted paramilitary groups to carry out certain illegal acts on the understanding that they would not be investigated, prosecuted, or punished. The toleration of these groups by certain branches of the army has been denounced by agencies within the State itself.

51. As a result of this situation, the Commission has established, for the purposes of determining the international responsibility of the State in accordance with the American Convention, that in cases in which members of paramilitary groups and the army carry out joint operations with the knowledge of superior officers, the members of the paramilitary groups act as agents of the State.
52. In the present case, according to analysis of the facts mentioned above, there is evidence to show that agents of the State helped to coordinate the massacre, to carry it out, and, as discovered by domestic courts, to cover it up. Therefore, the only conclusion is that the State is liable for the violations of the American Convention resulting from the acts of commission or omission by its own agents and by private individuals involved in the execution of the victims.⁷¹

V. Practice of the International Red Cross and Red Crescent Movement

71. The ICRC Commentary on the Additional Protocols notes that the responsibility of the State:

can be imputed not only for acts committed by a person or persons who form part of the armed forces . . . but also for possible omissions. As regards damages which may be caused by private individuals, i.e., by persons who are not part of the armed forces (nor of any other organ of the State), legal writings and case-law show that the responsibility of the State is involved if it has not taken such preventive or repressive measures as could reasonably be expected to have been taken in the circumstances. In other words, responsibility is incurred if the Party to the conflict has not acted with due diligence to prevent such acts from taking place, or to ensure their repression once they have taken place.⁷²

72. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

⁷¹ IACiHR, *Case of the Riofrío massacre (Colombia)*, Report, 6 April 2001, §§ 48–52.

⁷² Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 3660–3661.

The treaties of international humanitarian law provide various mechanisms . . . for implementing their substantive provisions. Among these mechanisms it is worth mentioning the following:

(a) the international responsibility of States . . .

Article 1, common to the four Geneva Conventions and to Protocol I, stipulates that the contracting States are under an obligation "to respect and ensure respect for" those instruments. Beyond that, and on a more general level, a State is responsible for every act or omission attributable to it and amounting to a breach of an international obligation incumbent on it, including in the field of the international protection of the environment. States affected by such a breach are entitled to insist on the implementation of such rules of State responsibility, including cessation of the unlawful conduct, restitution and reparation.⁷³

73. In a communication to the press issued in 1993 with respect to the conflict in Bosnia and Herzegovina, the ICRC reminded "all the parties to the conflict that they bear full responsibility for all abuses [of IHL] committed by the forces on the territory under their control".⁷⁴

74. In 1996, in a summary report submitted to a State, the ICRC accepted that the use by security forces of auxiliary armed groups was not in itself a contravention of IHL. It emphasised, however, that regular forces bore responsibility for acts committed by these groups. The ICRC asked the State in question "to assume full authority over these groups, in particular by adopting legal measures that clearly specify their subordination to the security forces".⁷⁵

VI. Other Practice

75. In 1987, in the context of an internal armed conflict, an official of a local organisation recognised the problems regarding the tribal militia armed by the government. He admitted that the same rules of conduct should apply to all governmental forces, whether regular forces or militia, on the basis of common Article 3 of the 1949 Geneva Conventions and that the government bore legal, moral and political responsibility each time it distributed arms to civilians to participate in the maintenance of law and order.⁷⁶

76. In 1995, in its comments submitted to the UN Secretary-General on the Declaration of Minimum Humanitarian Standards, the IHL stated that "it would be important to underline the responsibility for acts which cause suffering". It suggested that an article be inserted which could read: "Any de jure or de facto authority is responsible for the acts committed by their agents,

⁷³ ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, §§ 45 and 47.

⁷⁴ ICRC, Communication to the Press No. 93/16, Bosnia-Herzegovina: The ICRC appeals for humanity, 16 June 1993.

⁷⁵ ICRC archive document.

⁷⁶ ICRC archive document.

including acts which adversely affect the basic human rights of any person in emergency situations".⁷⁷

B. Reparation

General

I. Treaties and Other Instruments

Treaties

77. Article 21 of the 1955 Austrian State Treaty, which in its preamble considers that "on 13 March 1938, Hitlerite Germany annexed Austria by force and incorporated its territory in the German Reich", provides that "no reparation shall be exacted from Austria arising out of the existence of a state of war in Europe after 1 September 1939".

78. Article 6 of the 1956 Joint Declaration on Soviet-Japanese Relations stipulates that:

The Union of Soviet Socialist Republics renounces all reparation claims against Japan. The USSR and Japan agree to renounce all claims by either State, its institutions or citizens, against the other State, its institutions or citizens, which have arisen as a result of the war since 9 August 1945.

79. Article 75 of the 1998 ICC Statute provides that "the Court shall establish principles relating to reparations to, or in respect of, victims" and that "nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law."

80. Article 38 of the 1999 Second Protocol to the 1954 Hague Convention provides that "no provision in this Protocol relating to individual criminal responsibility shall affect the responsibility of States under international law, including the duty to provide reparation".

Other Instruments

81. The 1946 Paris Agreement on Reparation from Germany was concluded:

in order to obtain an equitable distribution among [the signatory governments] of the total assets which . . . are or may be declared to be available as reparation from Germany . . . in order to establish an Inter-Allied Reparation Agency, and to settle an equitable procedure for the restitution of monetary gold.

82. Article 2(A) of Part I of the 1946 Paris Agreement on Reparation from Germany states that:

⁷⁷ IHL, Comments on the Declaration of Minimum Humanitarian Standards submitted to the UN Secretary-General, § 22, reprinted in Report of the UN Secretary-General prepared pursuant to Commission resolution 1995/29, UN Doc. E/CN.4/1996/80, 28 November 1995, p. 11.

The Signatory Governments agree among themselves that their respective shares of reparation, as determined by the present Agreement, shall be regarded by each of them as covering all its claims and those of its nationals against the former German Government and its Agencies, of a governmental or private nature, arising out of the war (which are not otherwise provided for).

83. Article 8 of Part I of the 1946 Paris Agreement on Reparation from Germany contains provisions regarding the allocation of a reparation share to non-repatriable victims of German action. Article 8(I) of Part I provides that “nothing in this Article shall be considered to prejudice the claims which individual refugees may have against a future German Government, except to the amount of the benefits that such refugees may have received from the sources referred to . . . above”.

84. Article 2 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that “States shall ensure that domestic law is consistent with international legal obligations by: . . . making available adequate, effective and prompt reparation”.

85. Article 3 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

The obligation to respect, ensure respect for and enforce international . . . humanitarian law includes, *inter alia*, a State’s duty to:

- ...
- (d) Afford appropriate remedies to victims; and
 - (e) Provide for or facilitate reparation to victims.

86. Article 31 of the 2001 ILC Draft Articles on State Responsibility provides that:

1. The responsible State is under an obligation to make full reparation for the injury caused by the internationally wrongful act.
2. Injury includes any damage, whether material or moral, caused by the internationally wrongful act of a State.

II. National Practice

Military Manuals

87. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that “if, in the course of legitimate security/police operations, private properties are damaged, measures shall be undertaken whenever practicable, utilizing available unit’s manpower and equipment, to repair the damage caused as a matter of AFP/PNP Civic Action Policy”.⁷⁸

⁷⁸ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a)(4).

National Legislation

88. No practice was found.

National Case-law

89. No practice was found.

Other National Practice

90. In its views and comments on the 1997 Draft Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, as they were then called, Croatia stated that:

It is clear that the right to claim reparation for violations of human rights and international humanitarian law should be given primarily to the direct victim; in cases where the direct victim is unable to claim or precluded from claiming reparation, such right should be enjoyed by the descendants of the direct victim, and subsidiarily to the persons closely connected with the direct victim.⁷⁹

91. In 1995, in reply to a question from members of the Lower House of Parliament with respect to reparation payments to Greek victims of the German National Socialist regime, the German government stated that:

The . . . alleged claims of Greece with regard to Germany are claims for reparation . . . After 50 years have passed since the end of the war and [after] decades of peaceful, trustingly and fruitful co-operation of the Federal Republic of Germany with the international community of States, the issue of reparations has lost its legitimacy. Since the end of the Second World War, Germany has made reparations to a high degree, which, according to general public international law, the States concerned should use to compensate their nationals. . . Additionally, reparations [made] 50 years after the end of hostilities would constitute an exception without precedence in the practice of public international law.⁸⁰

92. According to the Report on the Practice of Kuwait, it is Kuwait's *opinio juris* that States that cause damage to the environment are under a duty to remedy such damage.⁸¹

93. In 2001, a draft concurrent resolution was put before the US Congress for it to call upon the government of Japan to "immediately pay reparations to the victims of [sexual enslavement of young women during colonial occupation of Asia and the Pacific Islands during the Second World War, known to the world as 'comfort women']".⁸²

⁷⁹ Croatia, Views and Comments on the note and revised Draft Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, 19 August 1997, UN Doc. E/CN.4/1998/34, 22 December 1997, § 6.

⁸⁰ Germany, Lower House of Parliament, Response by the federal government to a question from members of parliament, Payments in compensation to Greek victims of the National Socialist regime, *BT-Drucksache* 13/2878, 7 November 1995.

⁸¹ Report on the Practice of Kuwait, 1997, Chapter 4.4.

⁸² US, House of Representatives, 107th Congress, 1st Session, Concurrent Resolution 195, HCON 195 IH, 24 July 2001.

*III. Practice of International Organisations and Conferences**United Nations*

94. In a resolution adopted in 1993 concerning the conflict in the former Yugoslavia, the UN General Assembly recognized “the right of victims of ‘ethnic cleansing’ to receive just reparation for their losses” and urged all parties “to fulfil their agreements to this end”.⁸³

95. In a resolution adopted in 1994 concerning the conflict in the former Yugoslavia, the UN General Assembly recognized “the right of victims of ethnic cleansing to receive just reparation for their losses” and urged all parties “to fulfil their agreements to this end”.⁸⁴

96. In a resolution on Afghanistan adopted in 1996, the UN General Assembly urged the Afghan authorities “to provide efficient and effective remedies to the victims of grave violations of human rights and of accepted humanitarian rules”.⁸⁵

97. In 2001, the UN General Assembly adopted a resolution entitled “Responsibility of States for internationally wrongful acts”, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 31 entitled “Reparation”, was annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.⁸⁶

98. In a resolution adopted in 1998, the UN Commission on Human Rights urged all parties to the conflict in Afghanistan to respect IHL and “to provide sufficient and effective remedies to the victims of grave violations and abuses of human rights and of accepted humanitarian rules”.⁸⁷

99. In a resolution adopted in 1993 on the situation in Bosnia and Herzegovina, the UN Sub-Commission on Human Rights recommended that “steps be taken to ensure full reparation for losses suffered as a consequence of aggression and religious and ethnic cleansing”.⁸⁸

Other International Organisations

100. No practice was found.

International Conferences

101. No practice was found.

⁸³ UN General Assembly, Res. 48/153, 20 December 1993, § 13.

⁸⁴ UN General Assembly, Res. 49/196, 23 December 1994, § 13.

⁸⁵ UN General Assembly, Res. 51/108, 12 December 1996, § 11.

⁸⁶ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

⁸⁷ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 5(d); see also Res. 1996/75, 23 April 1996, § 10.

⁸⁸ UN Sub-Commission on Human Rights, Res. 1993/17, 20 August 1993, § 8; see also Res. 1995/8, 18 August 1995, § 6.

IV. Practice of International Judicial and Quasi-judicial Bodies

102. In the *Chorzów Factory case (Merits)* in 1928, the PCIJ ruled that:

It is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation . . . Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself.⁸⁹

103. In 2001, in the *Case of the Riofrío massacre (Colombia)*, the IACiHR stated that:

48. Before turning to the analysis of the alleged violations of the standards of the American Convention, it must be ascertained whether the acts of the individuals implicated in the incident in violating such fundamental rights as the rights to life and humane treatment are attributable to the State of Colombia and therefore call into question its responsibility in accordance with international law. In this regard, the Inter-American Court has noted that it is sufficient to show that the infringement of the rights recognized in the Convention has been supported or tolerated by the government.
49. First, it should be said that, as noted by the IACHR in its *Third Report on the Human Rights Situation in Colombia*, the State has played a leading role in developing the paramilitary or self-defense groups, that it allowed them to act legitimately with the protection of the law during the 1970s and 1980s, and that it is generally responsible for their existence and for strengthening them.
50. These groups sponsored or accepted by branches of the armed forces were created mainly to combat armed groups of dissidents. As a result of their counterinsurgency purposes, the paramilitaries established links with the Colombian army that became stronger over a period of more than twenty years. Eventually, on May 25, 1989, the Supreme Court of Justice declared Decree 3398 unconstitutional, thereby removing all legal support for their ties to national defense. In the wake of this action, the State passed a number of laws to criminalize the activities of these groups and of those that supported them. Despite these measures, the State did little to dismantle the structure it had created and promoted, particularly in the case of groups that carried out counterinsurgency activities and, in fact, the ties remained in place at different levels, which in some instances requested or permitted paramilitary groups to carry out certain illegal acts on the understanding that they would not be investigated, prosecuted, or punished. The toleration of these groups by certain branches of the army has been denounced by agencies within the State itself.
51. As a result of this situation, the Commission has established, for the purposes of determining the international responsibility of the State in accordance with the American Convention, that in cases in which members of paramilitary groups and the army carry out joint operations with the knowledge of superior officers, the members of the paramilitary groups act as agents of the State.
52. In the present case, according to analysis of the facts mentioned above, there is evidence to show that agents of the State helped to coordinate the

⁸⁹ PCIJ, *Chorzów Factory case (Merits)*, Judgement, 13 September 1928, p. 29.

massacre, to carry it out, and, as discovered by domestic courts, to cover it up. Therefore, the only conclusion is that the State is liable for the violations of the American Convention resulting from the acts of commission or omission by its own agents and by private individuals involved in the execution of the victims.⁹⁰

V. Practice of the International Red Cross and Red Crescent Movement

104. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

Article 1, common to the four Geneva Conventions and to Protocol I, stipulates that the contracting States are under an obligation "to respect and ensure respect for" those instruments. Beyond that, and on a more general level, a State is responsible for every act or omission attributable to it and amounting to a breach of an international obligation incumbent on it, including in the field of the international protection of the environment. States affected by such a breach are entitled to insist on the implementation of such rules of State responsibility, including . . . reparation.⁹¹

105. In 1993, in its report on the protection of war victims, the ICRC, referring to Article 91 AP I, stated that "this article confirms a rule which is today accepted as being part of customary law and was already stated, in almost identical terms, in Article 3 of the Hague Convention No. IV of 1907". Referring to Articles 51 GC I, 52 GC II, 131 GC IV and 148 GC IV, the ICRC further stated that "this provision . . . also implies that, irrespective of the outcome of an armed conflict, no decision or agreement can dispense a State from the responsibility to make reparation for damages caused to the victims of breaches of international humanitarian law".⁹² It recommended that:

The International Conference for the Protection of War Victims should make it clear that it wishes procedures to be set up to provide reparation for damage inflicted on the victims of violations of international humanitarian law . . . so as to enable them to receive the benefits to which they are entitled.⁹³

VI. Other Practice

106. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make

⁹⁰ IACiHR, *Case of the Riofrío massacre (Colombia)*, Report, 6 April 2001, §§ 48–52.

⁹¹ ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 47.

⁹² ICRC, Report on the Protection of War Victims, Geneva, June 1993, Section 4.3, *IRRC*, No. 292, 1993, pp. 391–445.

⁹³ ICRC, Report on the Protection of War Victims, Geneva, June 1993, Section 4.3, *IRRC*, No. 292, 1993, pp. 391–445.

reparation, including in appropriate circumstances restitution or compensation for loss or injury".⁹⁴

107. The Restatement (Third) further provides that:

A private person, whether natural or juridical, injured by a violation of an international obligation by a state, may bring a claim against that state or assert that violation as a defense

- (a) in a competent international forum when the state has consented to the jurisdiction of that forum with respect to such private claims;
- (b) in a court or other tribunal of that state pursuant to its law; or
- (c) in a court or other tribunal of the injured person's state of nationality or of a third state, pursuant to the law of such state, subject to limitations under international law.⁹⁵

108. The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery recommended that the United Nations and all the states and people thereof "take all steps necessary to ensure that the government of Japan provides full reparations to the victims and survivors and those entitled to recover on account of the violations committed against them".⁹⁶

Compensation

I. Treaties and Other Instruments

Treaties

109. Article 41 of the 1899 HR provides that "a violation of the terms of the armistice by private individuals acting on their own initiative, only confers the right of demanding the punishment of the offenders, and, if necessary, indemnity for the losses sustained".

110. Article 3 of the 1907 Hague Convention (IV) provides that "a belligerent Party which violates the provisions of the [1907 HR] shall, if the case demands, be liable to pay compensation".

111. Article 41 of the 1907 HR provides that "a violation of the terms of the armistice by private persons acting on their own initiative only entitles the injured party to demand the punishment of the offenders or, if necessary, compensation for the losses sustained".

112. Article 5(5) of the 1950 ECHR provides that "everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation".

⁹⁴ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 901.

⁹⁵ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 906.

⁹⁶ Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, *The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan*, Final Judgement, 4 December 2001, Recommendations, § 149(i).

113. Article 14(a) of the 1951 Peace Treaty for Japan provides that:

It is recognized that Japan should pay reparations to the Allied Powers for the damage and suffering caused by it during the war. Nevertheless it is also recognized that the resources of Japan are not presently sufficient, if it is to maintain a viable economy, to make complete reparation for all such damage and suffering and at the same time meet its other obligations . . .

Except as otherwise provided in the present Treaty, the Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.

114. Under Article 16 of the 1951 Peace Treaty for Japan, Japan undertook, *inter alia*, to compensate former POWs, in the following terms:

As an expression of its desire to indemnify those members of the armed forces of the Allied Powers who suffered undue hardships while prisoners of war of Japan, Japan will transfer its assets and those of its nationals in countries which were neutral during the war, or which were at war with any of the Allied Powers or, at its option, the equivalent of such assets, to the International Committee of the Red Cross which shall liquidate such assets and distribute the resultant fund to appropriate national agencies for the benefit of former prisoners of war and their families on such basis as it may determine to be equitable.

115. The 1951 Yoshida-Stikker Protocol, concluded between the Netherlands and Japan with respect to Japan's occupation of the Dutch East Indies and the 1951 Peace Treaty for Japan, states that:

The Government of Japan does not consider that the Government of the Netherlands by signing the [1951 Peace Treaty for Japan] has itself expropriated the private claims of its nationals so that, as a consequence thereof, after the Treaty comes into force these claims would be non-existent.

116. Article 1(1) of Chapter Four ("Compensation for Victims of Nazi Persecution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

The Federal Republic [of Germany] acknowledges the obligation to assure . . . adequate compensation to persons persecuted for their political convictions, race, faith or ideology, who thereby have suffered damage to life, limb, health, liberty, property, their possessions or economic prospects (excluding identifiable property subject to restitution). Furthermore, persons persecuted by reason of nationality, in disregard of human rights, who are now political refugees and no longer enjoy the protection of their former home country shall receive adequate compensation where permanent injury has been inflicted on their health.

117. Article 4(1) of Chapter Five ("External Restitution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

If property to be restituted has, after identification in Germany, either been utilised or consumed in Germany before return to the claimant or been destroyed, stolen or otherwise disposed before receipt by the claimant Government or by an appropriate agency of one of the Three Powers for despatch to the claimant, the Federal Republic shall compensate claimants who would otherwise be entitled to restitution . . . or who, at the entry into force of the present Convention, have had their claims for restitution approved by one of the Three Powers.

118. Article 5 of Chapter Six ("Reparation") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

The Federal Republic [of Germany] shall ensure that the former owners of property seized pursuant to measures referred to in Articles 2 and 3 of this Chapter [i.e. of the Three Powers with regard to German external assets or other property for the purpose of reparation] shall be compensated.

119. The 1952 Luxembourg Agreement between Germany and Israel provides that:

Whereas unspeakable criminal acts were perpetrated against the Jewish people during the National-Socialist regime of terror

And whereas by a declaration in the Bundestag on 27th September, 1951, the Government of the Federal Republic of Germany made known their determination, within the limits of their capacity, to make good the material damage caused by these acts,

And whereas the State of Israel has assumed the heavy burden of resettling so great a number of uprooted and destitute Jewish refugees from Germany and from territories formerly under German rule and has on this basis advanced a claim against the Federal Republic of Germany for global recompense for the cost of the integration of these refugees

Now therefore the State of Israel and the Federal Republic of Germany have agreed as follows: –

Article 1

- (a) The Federal Republic of Germany shall, in view of the considerations here-inbefore recited, pay to the State of Israel the sum of 3,000 million Deutsche Mark.
- (b) In addition, the Federal Republic of Germany shall, in compliance with the obligation undertaken in Article 1 of the [1952 Luxembourg Agreement between Germany and the CJMC], pay to Israel for the benefit of the said [CJMC] the sum of 450 million Deutsche Mark . . .
- (c) The provisions hereinafter contained in the present Agreement shall apply to the total sum of 3,450 million Deutsche Mark so arising . . .

Article 2

The Federal Republic of Germany will make available the amount referred to in Article 1, paragraph (c) of the present Agreement for the purchase . . . of such commodities and services as shall serve the purpose of expanding opportunities for the settlement and rehabilitation of Jewish refugees in Israel.

120. By Letter No. 1a of the 1952 Luxembourg Agreement between Germany and Israel, which, according to Article 16(a)(ii) constitutes an integral part of the Agreement, the Israeli Minister for Foreign Affairs conveyed the following to the representatives of Germany:

1. Considering that the Federal Republic of Germany has in the Agreement signed today undertaken the obligation to pay recompense for the expenditure already incurred or to be incurred by the State of Israel in the resettlement of Jewish refugees, the claim of the State of Israel for such recompense shall, in so far as it has been put forward against the Federal Republic of Germany, be regarded by the Government of Israel as having been settled with the coming into force of the said Agreement. The State of Israel will advance no further claims against the Federal Republic of Germany arising out of or in connection with losses which have resulted from National-Socialist persecution.
2. The Government of Israel are here proceeding on the assumption that claims of Israel nationals under legislation in force in the Federal Republic of Germany on internal restitution, compensation, or other redress for National-Socialist wrongs, and the automatic accrual of rights to Israel nationals from any future legislation of this nature, will not be prejudiced by reason of the conclusion of the Agreement.

By Letter No. 1b of the 1952 Luxembourg Agreement between Germany and Israel, which constitutes an integral part of the Agreement, the German Chancellor took note of the content of paragraph 1 of Letter No. 1a and confirmed, with regard to paragraph 2 of this Letter, that the assumption of the government of Israel was correct.

121. Article 26 of the 1955 Austrian State Treaty, which in its preamble considers that "on 13 March 1938, Hitlerite Germany annexed Austria by force and incorporated its territory in the German Reich", provides that:

1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13 March 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories. Where return or restoration is impossible, compensation shall be granted for losses incurred by reason of such measures to the same extent as is, or may be, given to Austrian nationals generally in respect of war damage.
2. Austria agrees to take under its control all property, legal rights and interests in Austria of persons, organizations or communities which, individually or as members of groups, were the object of racial, religious or other Nazi measures of persecution where, in the case of persons, such property, rights and interests remain heirless or unclaimed for six months after the coming into force of the present Treaty, or where in the case of organizations and communities such organizations or communities have ceased to exist. Austria shall transfer such property, rights and interests to appropriate agencies or organizations to be designated by the Four Heads of Mission in Vienna by agreement with the Austrian Government to be used for the relief and rehabilitation of victims

of persecution by the Axis Powers, it being understood that these provisions do not require Austria to make payments in foreign exchange or other transfers to foreign countries which would constitute a burden on the Austrian economy.

Part IV ("Claims arising out of the War", Articles 21–24) and Part V ("Property, Rights and Interests", Articles 25–28) provide for detailed and comprehensive settlement of all property claims on a State-to-State level.

122. The 1956 Yoshida-Stikker Protocol between Japan and the Netherlands states that:

Desiring to settle the problem concerning certain types of private claims of Netherlands nationals which the government of Japan might wish voluntarily to deal with, as referred to in the letters of 7th and 8th of September, 1951, exchanged between Minister of Foreign Affairs of the Kingdom of The Netherlands, Dirk U. Stikker, and Prime Minister of Japan, Shigeru Yoshida, Have agreed as follows:

Article I. For the purpose of expressing sympathy and regret for the suffering inflicted during the Second World War by agencies of the Government of Japan upon Netherlands nationals, the Government of Japan shall voluntarily tender as a solatium the amount of Pounds Sterling equivalent to U.S. \$ 10,000,000 to the Government of the Kingdom of The Netherlands on behalf of those Netherlands nationals.

...

Article III. The Government of the Kingdom of The Netherlands confirms that neither itself nor any Netherlands nationals will raise against the Government of Japan any claim concerning the sufferings inflicted during the Second World War by agencies of the Government of Japan upon Netherlands nationals.

123. Article 1(1) of the 1959 Agreement concerning Payments on behalf of Norwegian Nationals Victimized by National Socialist Persecution, concluded between Germany and Norway, provides that:

The Federal Republic of Germany shall pay the Kingdom of Norway 60 million Deutsche Mark on behalf of Norwegian nationals who were victimized by National Socialist persecution because of their race, beliefs or opinions and whose freedom or health was in consequence impaired, and also on behalf of the survivors of persons who died as a result of such persecution.

124. Article 63(1) of the 1969 ACHR states that:

If the [IACtHR] finds that there has been a violation of a right or freedom protected by this Convention, the Court... shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

125. Article 91 AP I provides that "a Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation". Article 91 AP I was adopted by consensus.⁹⁷

⁹⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.46, 31 May 1977, p. 344.

126. Upon ratification of AP I, South Korea declared that:

In relation to Article 91 of Protocol I, a party to the conflict which violates the provisions of the Conventions or of this Protocol shall take the responsibility for paying compensation to the party damaged from the acts of violation, whether the damaged party is a legal party to the conflict or not.⁹⁸

127. Article 2 of the 1990 Implementation Agreement to the German Unification Treaty provides that:

The Federal Government is prepared, in continuation of the policy of the German Federal Republic, to enter into agreements with the Claims Conference [CJMC] for additional Fund arrangements in order to provide hardship payments to persecutees who thus far received no or only minimal compensation according to the legislative provisions of the German Federal Republic.

128. In 1995, Germany and the US concluded the US-Germany Agreement concerning Final Benefits to Certain US Nationals Who Were Victims of National Socialist Measures of Persecution (also known as the Princz Agreement), which provides that:

Article 1

This Agreement shall settle compensation claims by certain United States nationals who suffered loss of liberty or damage to body or health as a result of National Socialist measures of persecution conducted directly against them. This Agreement shall cover only the claims of persons who, at the time of their persecution, were already nationals of the United States of America and who have to date received no compensation from the Federal Republic of Germany. This Agreement shall, *inter alia*, not cover persons who were subjected to forced labor alone while not being detained in a concentration camp as victims of National Socialist measures of persecution.

Article 2

1. For the prompt settlement of known cases of compensation claims covered by Article 1, the Government of the Federal Republic of Germany shall pay to the Government of the United States of America three million Deutsche Mark . . .
2. For any possible future cases not known at the present moment, both Governments intend to negotiate two years after the entry into force of this Agreement, an additional lump sum payment based on the same criteria as set forth in Article 1 and derived on the same basis as the amount under paragraph 1.

Article 3

The distribution of the amounts . . . to the individual beneficiaries shall be left to the discretion of the Government of the United States of America.

129. In a diplomatic note relative to the 1995 US-Germany Agreement concerning Final Benefits to Certain US Nationals Who Were Victims of National Socialist Measures of Persecution, the government of Germany stated that “any payment by the Government of the Federal Republic of Germany under this Agreement will be only for the benefit of United States nationals who were

⁹⁸ South Korea, Declarations made upon ratification of AP I, 15 January 1982, § 3.

victims of national socialist measures of persecution by reason of their race, their faith or their ideology". In its response, the US government acknowledged receipt of the diplomatic note.

130. Article 1(1) of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that "all refugees and displaced persons... shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them".

131. By Article VII of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina was established. According to Article XI, the mandate of the Commission was to:

receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

132. Article XII(2) and (6) of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that:

Any person requesting compensation in lieu of return who is found by the Commission to be the lawful owner of that property shall be awarded just compensation as determined by the Commission.

...

In cases in which the claimant is awarded compensation in lieu of return of the property, the Commission may award a monetary grant or a compensation bond for the future purchase of real property. The Parties welcome the willingness of the international community assisting in the construction and financing of housing in Bosnia and Herzegovina to accept compensation bonds awarded by the Commission as payment, and to award persons holding such compensation bonds priority in obtaining that housing.

133. By Article 1 of the 1999 US-Chinese Agreement on the Settlement of Chinese Claims resulting from the Bombardment of the Chinese Embassy in Belgrade, the parties agreed that the US was to pay US\$28 million to China. Article 2 provides that "the agreed amount... will constitute a full and final settlement of any and all claims for the property loss and damage suffered by the Chinese side as a result of the U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia".

134. By Article 1 of the 1999 US-Chinese Memorandum of Understanding on the Settlement of US Claims resulting from the Bombardment of the Chinese Embassy in Belgrade, the parties agreed that China was to pay US\$2.87 million to the US. Article 2 provides that "the agreed amount... will constitute a full and final settlement of any and all claims for the property loss and damage suffered by the U.S. side after the U.S. bombing of the Chinese Embassy in the Federal Republic of Yugoslavia".

135. The 2000 Agreement on the Foundation “Remembrance, Responsibility and the Future”, concluded between Germany and the US, aims to complement the creation of a foundation established under the German Law on the Creation of a Foundation “Remembrance, Responsibility and Future” (as amended) of 2000. Article 1(1) provides that:

The parties agree that the Foundation “Remembrance, Responsibility and the Future” covers, and that it would be in their interests for the Foundation to be the exclusive remedy and forum for the resolution of, all claims that have been or may be asserted against German companies arising from the National Socialist era and World War II.

136. Article 2(1) of the 2000 Agreement on the Foundation “Remembrance, Responsibility and the Future” provides that:

The United States shall, in all cases in which the United States is notified that a claim described in article 1 (1) has been asserted in a court in the United States, inform its courts through a Statement of Interest . . . that it would be in the foreign policy interests of the United States for the Foundation to be the exclusive remedy and forum for resolving such claims asserted against German companies . . . and that dismissal of such cases would be in its foreign policy interest.

137. Article 3 of the 2000 Agreement on the Foundation “Remembrance, Responsibility and the Future” provides that:

- (2) This agreement shall not affect unilateral decisions or bilateral or multilateral agreements that dealt with the consequences of the National Socialist era and World War II.
- (3) The United States will not raise any reparations claims against the Federal Republic of Germany.

138. In 2000, Austria and the US concluded the Austrian-US Executive Agreement concerning the Austrian Reconciliation Fund, which is intended “to complement the creation of the [Austrian Reconciliation] Fund”. In the preamble, the two States recognize:

that Austria has, by adopting legislation approved by the Allied Forces or building on international agreements to which the United States is a party, and in close cooperation with victims’ associations and interested governments, provided restitution and compensation to victims of National Socialist persecution, [and note] that, by means of the Austrian Fund for Reconciliation, Peace, and Cooperation (“Fund”), formed under Austrian federal law as an instrumentality of Austria and funded by contributions from Austria and Austrian companies, Austria and Austrian companies wish to respond to and acknowledge the moral responsibility for all claims involving or related to the use of slave or forced labor during the National Socialist era or World War II.

139. In 2000, Austria concluded bilateral agreements with six Central and Eastern European States in order to fulfil the conditions necessary for the coming into force of the Austrian Reconciliation Fund Law: the Austrian-Belarussian Agreement concerning the Austrian Reconciliation Fund, the

Austrian-Czech Agreement concerning the Austrian Reconciliation Fund, the Austrian-Hungarian Agreement concerning the Austrian Reconciliation Fund, the Austrian-Polish Agreement concerning the Austrian Reconciliation Fund, the Austrian-Ukrainian Agreement concerning the Austrian Reconciliation Fund, and the Austrian-Russian Agreement concerning the Austrian Reconciliation Fund, all of which provided for cooperation between the respective States in the payment of compensation to former slave labourers and forced labourers by the Austrian Reconciliation Fund via national foundations which were to be established by the respective States.

140. Article 5 of the 2000 Peace Agreement between Eritrea and Ethiopia provides that:

1. Consistent with the 1998 OAU Framework Agreement on Eritrea and Ethiopia, in which the parties commit themselves to addressing the negative socio-economic impact of the crisis on the civilian population, including the impact on those persons who have been deported, a neutral Claims Commission shall be established. The mandate of the Commission is to decide through binding arbitration all claims for loss, damage or injury by one Government against the other, and by nationals (including both natural and juridical persons) of one party against the Government of the other party or entities owned or controlled by the other party that are (a) related to the conflict that was the subject of the Framework Agreement, the Modalities for its Implementation and the Cessation of Hostilities Agreement, and (b) result from violations of international humanitarian law, including the 1949 Geneva Conventions, or other violations of international law. The Commission shall not hear claims arising from the cost of military operations, preparing for military operations, or the use of force, except to the extent that such claims involve violations of international humanitarian law.

141. In the preamble to the 2001 Washington Agreement between France and the US Concerning Payments for Certain Losses Suffered during World War II, the parties recognize that "France, following the end of World War II, enacted legislation that provided restitution and compensation for victims of anti-Semitic persecution during World War II under the authority of the occupying German authorities or the Vichy Government". They also welcomed the various efforts of the French government to legislate with respect to compensation programmes for victims of the French occupation during Second World War, as well as the establishment of a fund of US\$ 22.5 million, contributed by the banks, and another commitment of the banks to contribute 100 million Euro to the Foundation for the Memory of the Shoah.

142. Article 1(1) of the 2001 Washington Agreement between France and the US Concerning Payments for Certain Losses Suffered during World War II, the parties agreed that:

The Commission [for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force During the Occupation], the [Fund of US\$22.5 million, contributed by the banks], and the [Foundation for the Memory of the

Shoah] cover, and that it would be in the interest of all concerned for these entities to be the exclusive remedies and fora for the resolution of, any and all claims that have been or may be asserted against the Banks.

By Article 1(4), France agreed “to ensure that the Banks will promptly pay, in full, all claims approved by the [Commission for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force During the Occupation]”. In turn, by Article 2 of the Agreement, the US, with respect to pending and future cases concerning claims against one of the banks involved, committed itself to inform its courts through Statements of Interest that:

It would be in the foreign policy interests of the United States for the [Commission for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force During the Occupation], the [Foundation for the Memory of the Shoah], and the [Fund of US\$22.5 million, contributed by the banks] to be the exclusive remedies and fora for resolving such claims.

It added that “dismissal of such cases would be in its foreign policy interest”.

143. Paragraph 1 of the 2001 Annex A to the Austrian-US Agreement concerning the Austrian General Settlement Fund, reflecting “key elements of the General Settlement Fund (‘GSF’) . . . and the additional measures for victims of National Socialism that form the basis for the Exchange of Notes between the United States and Austria”, provides that:

Immediate Compensation for Survivors: The Austrian Government will make a US \$150 million contribution to the National Fund, which will be distributed in its entirety on an expedited basis to all Holocaust survivors originating from or living in Austria . . . This amount will cover 1) apartment and small business leases; 2) household property; 3) personal valuables and effects. This amount will not cover potential claims against Dorotheum . . . or *in rem* claims for works of art. This amount will be credited against the final cap for the GSF.

144. Paragraph 2 of the 2001 Annex A to the Austrian-US Agreement concerning the Austrian General Settlement Fund provides that:

Establishment of a General Settlement Fund: The Austrian Federal Government will propose the necessary legislation to the National Council by April 30, 2001 to establish a GSF. Austria will undertake its best efforts to ensure that this legislation is passed by June 30, 2001. The legislation will enter into force once all contributions have been made available. The GSF will be a voluntary fund that will provide *ex gratia* payments to certain applicants. The GSF will include both a “claims-based” and an “equity-based” component. The GSF will be capped at US \$210 million plus interest, at the Euribor rate, accruing to it beginning 30 days after all claims, pending as of June 30, 2001, against Austria and/or Austrian companies arising out of or related to the National Socialist era or World War II are dismissed with prejudice, and such interest shall continue to accrue on the funds available at any given time until the GSF has paid all approved claims. The US \$210 million contribution by Austria and Austrian companies (including the Austrian insurance industry) + interest, under the terms described *supra*, will be in addition to the

US \$150 million referred to *supra* in para. 1. The distribution of payments by the GSF will be based on decisions of the independent Claims Committee.

145. Article 27(1) of the 2003 Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights states that "if the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation."

Other Instruments

146. Article 24(5) of the 1923 Hague Rules of Air Warfare contains a provision requiring a belligerent State "to pay compensation for injuries to person or to property caused by the violation by any of its officers or forces of the provisions of this article [on aerial bombardment]".

147. Article 29 of the 1938 ILA Draft Convention for the Protection of Civilian Populations against New Engines of War provides that "any State committing a breach of this Convention is liable to pay compensation for all damage caused by such breach to a State injured thereby or any of its nationals".

148. Protocol No. 1 of the 1952 Luxembourg Agreement between Germany and the CJMC, concluded at a meeting between the representatives of the FRG and the CJMC at which "the extension of the legislation existing in the Federal Republic of Germany for the redress of National-Socialist wrongs" was discussed and at which the representatives of both parties "agreed on a number of principles for the improvement of the existing legislation as well as on other measures", provides that:

The Government of the Federal Republic of Germany declare that they will take as soon as possible all steps within their constitutional competence to ensure the carrying out of the following programme:

I. Compensation

1. The Government of the Federal Republic of Germany is resolved to supplement and amend the existing compensation legislation by a Federal Supplementing and Coordinating Law (*Bundesergänzungs- und rahmengesetz*) so as to ensure that the legal position of the persecutees throughout the Federal territory be no less favourable than under the General Claims Law now in force in the US Zone.
- ...
3. Where residence and date-line requirements are applicable under compensation legislation, compensation payments for the deprivation of liberty shall be granted to persons who emigrated before the date-line and had their last German domicile or residence within the Federal territory.
4. Persecutees who were subject to compulsory labour and lived under conditions similar to incarceration shall be treated as if they had been deprived of liberty by reason of persecution.
5. A persecutee who, within the boundaries of the German Reich as of December 31, 1937, lived "underground" under conditions similar to incarceration

or unworthy of human beings shall be treated as if he had been deprived of liberty by reason of persecution, in the meaning of that term under compensation legislation.

6. Where a persecutee died after March 8, 1945, his heirs (children, spouse or parents) shall be entitled to assert his claim for compensation for deprivation of liberty . . .
- ...
 9. The Government of the Federal Republic of Germany will provide compensation to persons who suffered losses as officials or employees of Jewish communities or public institutions within the boundaries of the German Reich as of December 31, 1937.
 - ...
 12. Persons who were persecuted because of their political convictions, race, faith or ideology and who settled in the Federal Republic or emigrated abroad from expulsion areas . . . shall receive compensation for deprivation of liberty and damage to health and limb . . . Compensation in accordance with Paragraph 1 shall also be paid to persecutees who emigrated abroad or settled in the Federal Republic during or after the time the general expulsion took place.
 - ...
 14. Persons who were persecuted for their political convictions, race, faith or ideology during the National-Socialist regime of terror and who are at present stateless or political refugees and who were deprived of liberty by National-Socialist terror acts shall receive appropriate compensation for deprivation of liberty and damage to health and limb.

149. Protocol No. 2 of the 1952 Luxembourg Agreement between Germany and the CJMC provides that:

Whereas the National-Socialist regime of terror confiscated vast amounts of property and other assets from Jews in Germany and in territories formerly under German rule;

And whereas part of the material losses suffered by the persecutees of National-Socialism is being made good by means of internal German legislation in the fields of restitution and indemnification and whereas an extension of this internal German legislation, in particular in the field of indemnification, is intended;

And whereas considerable values, such as those spoliated in the occupied territories, cannot be returned, and that indemnification for many economic losses which have been suffered cannot be made because, as a result of the policy of extermination pursued by National-Socialism, claimants are no longer in existence;

And whereas [a] considerable number of Jewish persecutees of National-Socialism are needy as a result of their persecution . . .

And having regard to [the 1952 Luxembourg Agreement between Germany and Israel] . . .

[Germany and the CJMC] therefore . . . concluded the following Agreement:

Article 1

In view of the considerations hereinbefore recited the Government of the Federal Republic of Germany hereby undertakes the obligation towards the [CJMC] to enter, in the Agreement with the State of Israel, into a contractual undertaking to pay the sum of 450 million Deutsche Mark to the State of Israel for the benefit of the [CJMC].

Article 2

The Federal Republic of Germany will discharge their obligation undertaken for the benefit of the [CJMC], in the [1952 Luxembourg Agreement between Germany and Israel], by payments made to the State of Israel... The amounts so paid and transmitted by the State of Israel to the [CJMC] will be used for the relief, rehabilitation and resettlement of Jewish victims of National-Socialist persecution... Such amounts will, in principle, be used for the benefit of victims who at the time of the conclusion of the present Agreement were living outside Israel.

150. Article 19 of the 1992 UN Declaration on Enforced Disappearance provides that:

The victims of acts of enforced disappearance and their family shall obtain redress and shall have the right to adequate compensation, including the means for as complete a rehabilitation as possible. In the event of the death of the victim as a result of an act of enforced disappearance, their dependants shall also be entitled to compensation.

151. Article 3 of the 1993 CIS Agreement on the Protection of Victims of Armed Conflicts requires States to adopt national measures granting “social security and compensation for material losses to people afflicted by armed conflicts”.

152. Article VIII of the 1994 Comprehensive Agreement on Human Rights in Guatemala provides that:

The Parties recognize that it is a humanitarian duty to compensate and/or assist victims of human rights violations. Said compensation and/or assistance shall be effected by means of government measures and programmes of a civilian and socio-economic nature addressed, as a matter of priority, to those whose need is greatest, given their economic and social position.

153. According to Article XI of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords which establishes the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina,

The Commission shall receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

154. Article 2(3) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines states that the right of the victims and their families to seek justice for violations of human rights includes “adequate compensation”.

155. Article 23 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

Compensation should be provided for any economically assessable damage resulting from violations of international human rights and humanitarian law, such as:

- (a) Physical or mental harm, including pain, suffering and emotional distress;
- (b) Lost opportunities, including education;
- (c) Material damages and loss of earnings, including loss of earning potential;
- (d) Harm to reputation or dignity; and
- (e) Costs required for legal or expert assistance, medicines and medical services, and psychological and social services.

156. Sections 2(2), (5) and (6) of UNMIK Regulation No. 2000/60 provide that:

2.2 Any person whose property right was lost between 23 March 1989 and 24 March 1999 as a result of discrimination has a right to restitution in accordance with the present regulation. Restitution may take the form of restoration of the property right (hereafter “restitution in kind”) or compensation.

...

2.5 Any refugee or displaced person with a right to property has a right to return to the property, or to dispose of it in accordance with the law, subject to the present regulation.

2.6 Any person with a property right on 24 March 1999, who has lost possession of that property and has not voluntarily disposed of the property right, is entitled to an order from the Commission for repossession of the property. The Commission shall not receive claims for compensation for damage to or destruction of property.

157. Article 34 of the 2001 ILC Draft Articles on State Responsibility, dealing with “Forms of reparation”, provides that “full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter”.

158. Article 36 of the 2001 ILC Draft Articles on State Responsibility, dealing with compensation as a form of reparation, provides that:

1. The State responsible for an internationally wrongful act is under an obligation to compensate for the damage caused thereby, insofar as such damage is not made good by restitution.
2. The compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

II. National Practice

Military Manuals

159. Argentina’s Law of War Manual (1969), in a provision dealing with the violation of the terms of an armistice by an individual, refers to Article 41 of the 1907 HR and provides that “the violation of the terms of the armistice by private persons acting on their own initiative only entitles [the injured party] to demand the punishment of the offenders or, if necessary, compensation for the damages sustained”.⁹⁹

⁹⁹ Argentina, *Law of War Manual* (1969), § 6.013.

160. Argentina's Law of War Manual (1989), referring to Article 91 AP I, provides that "the party which violates the Conventions or Protocol I shall, if the case demands, be liable to pay compensation".¹⁰⁰

161. Canada's LOAC Manual, states that the means of securing observance of the LOAC "include protest and demand for compensation by a belligerent or neutral power".¹⁰¹ It further provides that "a state which violates the LOAC shall, if the case demands, be liable to pay compensation".¹⁰²

162. Colombia's Basic Military Manual, after mentioning the possibility of taking political, economic and legal sanctions against a State whose agents or civil servants have committed violations of international law, provides that "for the States and their governments, the sanctions entail high costs which represent compensations". After discussing the responsibility of individual members of the armed forces who have committed violations of international law, the manual states that "furthermore, apart from the individual sanctions, the nation can be sentenced, by its highest tribunals, to compensate for the damages and prejudices caused to individuals by arbitrary and illegal conduct of its authorities".¹⁰³

163. Ecuador's Naval Manual, under a provision entitled "Observance of the law of armed conflict", states that "in the event of a clearly established violation of the law of armed conflict, the aggrieved nation may: . . . 2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid."¹⁰⁴

164. Germany's Military Manual, referring to Article 91 AP I and Article 3 of the 1907 Hague Convention (IV), provides that "a party to a conflict which does not comply with the provisions of international humanitarian law shall be liable to pay compensation".¹⁰⁵

165. South Korea's Military Law Manual provides that any party injured by a violation of IHL by the enemy can ask for remedies.¹⁰⁶

166. The Military Manual of the Netherlands, under a provision stating the responsibility of States for violations of IHL committed by members of their armed forces, refers to Article 91 AP I and provides that "a party to a conflict may be obliged to pay compensation" for violations of IHL.¹⁰⁷

167. New Zealand's Military Manual states that "the only remedy against a State for breaches of the law of armed conflict committed by its authority or by its personnel is by way of compensation".¹⁰⁸

¹⁰⁰ Argentina, *Law of War Manual* (1989), § 8.10.

¹⁰¹ Canada, *LOAC Manual* (1999), p. 15-1, § 3.

¹⁰² Canada, *LOAC Manual* (1999), p. 15-2, § 9.

¹⁰³ Colombia, *Basic Military Manual* (1995), p. 36.

¹⁰⁴ Ecuador, *Naval Manual* (1989), § 6.2.

¹⁰⁵ Germany, *Military Manual* (1992), § 1214.

¹⁰⁶ South Korea, *Military Law Manual* (1996), pp. 89 and 90.

¹⁰⁷ Netherlands, *Military Manual* (1993), p. IX-3.

¹⁰⁸ New Zealand, *Military Manual* (1992), § 1605(1).

168. Nigeria's Manual on the Laws of War provides that "if the State contravenes the rules of the laws of War, it has to pay compensation".¹⁰⁹

169. Spain's LOAC Manual, in a chapter dealing with the consequences of "incorrect behaviour" of members of the armed forces, notes that:

In the event of non-compliance with the rules [of the LOAC], the State is liable insofar as it has the obligation to pay compensation in accordance with any resolutions condemning the acts in question or to adopt any other measures agreed on by the international community.¹¹⁰

The manual also states that "the State and . . . international organizations may commit illicit acts. However, the responsibility which they incur is not of a criminal nature but compensatory, and is materialized in the obligation to pay an indemnification (art. 91 AP I)."¹¹¹ In a further provision entitled "Payment of compensation for war", the manual states that "the belligerent party which violates the rules of the LOAC can be obliged to compensate where appropriate".¹¹²

170. Switzerland's Basic Military Manual provides that "the belligerent State that is the victim of violations of the Convention can take the following measures: . . . if need be it can demand compensation".¹¹³

171. The UK Military Manual, in a chapter dealing with "Means of securing legitimate warfare", quotes Article 3 of the 1907 Hague Convention (IV).¹¹⁴ In addition to other means of securing legitimate warfare, the manual lists "compensation" and refers to Article 3 of the 1907 Hague Convention (IV).¹¹⁵

172. The US Field Manual, quoting Article 3 of the 1907 Hague Convention (IV), states that:

In the event of violation of the law of war, the injured party may legally resort to remedial action of the following types: . . . Protest or demand for compensation . . . Such communications may be sent through the protecting power, a humanitarian organization performing the duties of a protecting power, or a neutral state, or by parlementaire direct to the commander of the offending forces.¹¹⁶

173. The US Air Force Pamphlet, quoting Article 3 of the 1907 Hague Convention (IV) and Articles 29 GC I and 12 GC III, states that:

Under international law, states which violate their obligations are responsible, in appropriate cases, for payment of monetary damages to compensate states for injuries suffered. This principle applies to law of armed conflict violations. State responsibility to compensate victims of violations is an important feature in

¹⁰⁹ Nigeria, *Manual on the Laws of War* (undated), § 7.

¹¹⁰ Spain, *LOAC Manual* (1996), Vol. I, § 7.6.a.

¹¹¹ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.a.

¹¹² Spain, *LOAC Manual* (1996), Vol. I, § 11.10.f.

¹¹³ Switzerland, *Basic Military Manual* (1987), Article 195(a).

¹¹⁴ UK, *Military Manual* (1958), § 618. ¹¹⁵ UK, *Military Manual* (1958), § 620.

¹¹⁶ US, *Field Manual* (1956), § 495(b).

enforcement measures. Claims for compensation are frequently combined with protests about violations... Thus, the violator state's obligation to compensate for violations of the Hague Regulations applies regardless of whether the acts constituting violations were authorized by competent authorities of the violator state... However, as a general rule, in the absence of some cause for the fault such as inadequate supervision or training, no obligation for compensation arises on the part of the state for other violations of the law of armed conflict committed by individual members outside of their general area of responsibility.¹¹⁷

The Pamphlet further states that "Article 3 [of the 1907 Hague Convention (IV)] concerns a state's obligation to pay compensation for acts committed by its Armed Forces which violate the Hague Regulations. The 1949 Geneva Conventions contain a variety of such obligations."¹¹⁸

174. The US Naval Handbook, under a provision dealing with "Enforcement of the law of armed conflict", states that "in the event of a *clearly established violation* of the law of armed conflict, the aggrieved nation may: . . . 2. Protest to the offending nation and demand that those responsible be punished and/or that compensation be paid."¹¹⁹ (emphasis in original)

175. The Annotated Supplement to the US Naval Handbook, which contains a list of cases of demands for compensation involving US forces, states that "it is now generally established that the principle laid down in art. 3 [of the 1907 Hague Convention (IV)] is applicable to the violation of any rule regulating the conduct of hostilities and not merely to violations of the [1907] Hague Regulations".¹²⁰

National Legislation

176. Argentina's Law on Compensation for Political Prisoners provides that:

Article 1 – Persons who, during a state of siege, were put at the disposal of the national executive power, by decree thereof, or civilians who were detained on the basis of orders issued by a military court – whether or not they have undertaken legal proceedings for damage or prejudice suffered – come within the purview of this law, provided they have not already received compensation in accordance with a prior legal ruling concerning the events in question.

Article 2 – In order to come within the purview of this law, the above-mentioned persons must fulfil one of the following conditions:

- (a) They must have been put at the disposal of the national executive power prior to 10 December 1983.
- (b) In the case of civilians, they must have been deprived of their freedom on the basis of orders issued by a military court, regardless of whether or not they were convicted by that court.¹²¹

¹¹⁷ US, *Air Force Pamphlet* (1976), § 10-3.

¹¹⁸ US, *Air Force Pamphlet* (1976), § 15-2(b). ¹¹⁹ US, *Naval Handbook* (1995), § 6.2.

¹²⁰ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.2, footnote 21.

¹²¹ Argentina, *Law on Compensation for Political Prisoners* (1991), Articles 1-2.

177. Argentina's Law on Compensation for Enforced Disappearances provides that:

Article 1 – Persons who, at the time of the enactment of this law, are the victims of enforced disappearance, shall be entitled to receive, by proxy, special damages equal to the monthly salary of a level-A civil servant (coefficient 100), as provided by Decree No. 993/91.¹²²

178. In 1995, by its National Fund Law, Austria established a national fund “for the provision of benefits to the victims of National Socialism”.¹²³ The Law provides that:

The Fund shall render benefits to persons

- (1) who were persecuted by the National Socialist regime for political reasons, for reasons of birth, religion, nationality, sexual orientation, because of physical or mental disability or on the basis of accusations of allegedly antisocial attitudes, or who in other ways fell victim to typically National Socialist injustice or left the country to escape such persecution,

...

- (4) The Fund shall render one-time-only or recurrent financial benefits.¹²⁴

In its 2001 amendment, the Law further provides that:

- (1) Without prejudice to [previous contributions], the Federal Government shall contribute to the Fund an amount the total of which shall correspond to the equivalent in Schillings as of 24 October 2000 of 150 million US Dollars and be allocated [to the Fund]. This amount shall be accounted for by the Fund in a special account for benefits paid under Paragraph 2.
- (2) This amount shall be used for benefits to be paid to victims of National Socialism . . . as a final compensation for the following categories of losses of property:
 - a) apartment and small business leases;
 - b) household property;
 - c) personal valuables and effects.

The present Federal Law shall be without prejudice to the *in rem* return of works of art according to statutory provisions.

- (3) Persons . . . who were persecuted by the National Socialist regime on political grounds, on grounds of origin, religion, nationality, sexual orientation, or of physical or mental handicap, or who left the country to escape such persecution, and who themselves, or whose parents, suffered a loss of property in one of the categories mentioned in Paragraph 2 as a result of, or in connection with, events in the territory of the present-day Republic of Austria between 13 March 1938 and 9 May 1945 shall be entitled to such benefits. There is no legal right to benefits by the Fund.

...

¹²² Argentina, *Law on Compensation for Enforced Disappearances* (1994), Article 1.

¹²³ Austria, *National Fund Law as amended* (1995), Article 1(1)(1).

¹²⁴ Austria, *National Fund Law as amended* (1995), Article 1(2).

- (6) The amount mentioned in Paragraph 1 shall be distributed in equal parts among those entitled to benefits.¹²⁵

179. In 2000, Austria adopted the Reconciliation Fund Law establishing a national fund, the goal of which was “to make a contribution toward reconciliation, peace, and cooperation through a voluntary gesture of the Republic of Austria to natural persons who were coerced into slave labor or forced labor by the National Socialist regime on the territory of the present day Republic of Austria”.¹²⁶ The Law provides that “the Fund shall have moneys in the amount of 6 billion Austrian schillings to carry out its tasks”.¹²⁷ It further provides that the amounts (one-time payments) are to be paid as follows:

1. 105,000 Austrian schillings to [slave labourers].
2. 35,000 Austrian schillings to [forced labourers] who had to perform forced labor in industry, business, construction, power companies and other commercial enterprises, public institutions, rail transportation or postal service.
3. 20,000 Austrian schillings to [forced labourers] who had to do forced labor exclusively in agriculture or forestry or in the form of personal services (housekeeping, hotel work, etc).
4. Children and minors [who were transported under the age of 12 with one or both parents into the territory of the present day Republic of Austria or who were born here during the mother’s period of forced labor] are to receive the amount to which the parent is entitled or would be entitled . . .
5. A supplementary payment of 5,000 Austrian schillings may be made to women who during their time as forced labourers gave birth to children in maternity facilities for eastern workers or who were forced to undergo abortions.¹²⁸

Under another provision, “if the eligible person has died on or after February 15, 2000, then the heirs . . . shall succeed”.¹²⁹ The Law further provides that “payment of an award is made under the condition that the recipient make a declaration that with the receipt of an award under this federal law he renounces irrevocably any claim for slave labor or forced labor against the Republic of Austria or against Austrian business”.¹³⁰ The Austrian Reconciliation Fund Law came into force on 27 November 2000 after the signing of bilateral agreements between Austria and six Central and Eastern European countries (Belarus, Czech Republic, Hungary, Poland, Russia, Ukraine), as well as the Executive Agreement with the US, and the securing of the financial resources for the Reconciliation Fund, in fulfilment of the requirements of the law.¹³¹

180. In 2001, Austria adopted the General Settlement Fund Law by which it established the General Settlement Fund, the purpose of which was “to comprehensively resolve open questions of compensation of victims of National

¹²⁵ Austria, *National Fund Law as amended* (1995), Article 1(2b)(1), (2), (3) and (6).

¹²⁶ Austria, *Reconciliation Fund Law as amended* (2000), Section 1(2).

¹²⁷ Austria, *Reconciliation Fund Law as amended* (2000), Section 6(1).

¹²⁸ Austria, *Reconciliation Fund Law as amended* (2000), Section 3(1).

¹²⁹ Austria, *Reconciliation Fund Law as amended* (2000), Section 4(2).

¹³⁰ Austria, *Reconciliation Fund Law as amended* (2000), Section 5(1).

¹³¹ Austria, *Reconciliation Fund Law as amended* (2000), Section 17.

Socialism for losses and damages as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era". The Law provides that:

The Fund's purpose shall be to acknowledge, through voluntary payments, the moral responsibility for losses and damages inflicted upon Jewish citizens and other victims of National Socialism as a result of or in connection with the National Socialist Regime. The return of works of art shall be governed by the special legislation presently in force.¹³²

The Law further provides that:

To carry out its tasks, the Fund shall be endowed with an amount of 210 million US Dollars. This amount shall be made available, at the latest, 30 days after all claims in the United States pending as of June 30, 2001 against Austria or Austrian companies arising out or related to the National Socialist era or World War II have been dismissed. Excepted therefrom are claims covered by the Reconciliation Fund . . . claims for the return of works of art, as well as claims *in rem* restitution against provinces or municipalities.¹³³

In addition , the Law provides that:

- (1) Persons (under the claims-based process also associations), who/which were persecuted by the National Socialist regime on political grounds or origin, religion, nationality, sexual orientation, or of physical or mental handicap or of accusations of so-called asociality, or who left the country to escape such persecution, and who suffered losses or damages as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era shall be eligible to file an application.
- (2) In addition . . . heirs of eligible claimants as defined in Paragraph 1 shall also be eligible to file an application. In case of a defunct association, an association which the Claims Committee regards as the legal successor shall be entitled to file an application as well.¹³⁴

The Law expressly states that:

The payments shall be awarded as a final compensation for losses and damages as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era. There shall be no legal right to these payments.¹³⁵

181. Canada's Crimes against Humanity and War Crimes Act provides that:

There is hereby established a fund, to be known as the Crimes Against Humanity Fund, into which shall be paid

¹³² Austria, *General Settlement Fund Law as amended* (2001), Article 1(1)(1) and (2).

¹³³ Austria, *General Settlement Fund Law as amended* (2001), Article 1(2)(1).

¹³⁴ Austria, *General Settlement Fund Law as amended* (2001), Article 1(6).

¹³⁵ Austria, *General Settlement Fund Law as amended* (2001), Article 1(7).

- (a) all money obtained through enforcement in Canada of orders of the International Criminal Court for reparation or forfeiture or orders of that Court imposing a fine;
- (b) all money obtained in accordance with section 31; and
- (c) any money otherwise received as a donation to the Crimes Against Humanity Fund.

The Attorney General of Canada may make payments out of the Crimes Against Humanity Fund, with or without a deduction for costs, to the International Criminal Court, the Trust Fund established under article 79 of the Rome Statute, victims of offences under this Act or of offences within the jurisdiction of the International Criminal Court, and to the families of those victims, or otherwise as the Attorney General of Canada sees fit.¹³⁶

The Act goes on to say that:

The Minister of Public Works and Government Services shall pay into the Crimes Against Humanity Fund

- (a) the net proceeds received from the disposition of any property referred to in subsections 4(1) to (3) of the Seized Property Management Act that is forfeited to Her Majesty and disposed of by that Minister, if the property was derived as the result of the commission of an offence under this Act; and
- (b) amounts paid or recovered as a fine imposed under subsection 462.37(3) of the Criminal Code in relation to proceedings for an offence under this Act.¹³⁷

182. Since the end of Second World War, Germany has adopted several laws relative to the indemnification of victims of the war and the Holocaust, such as: the Law on the Equalization of Burdens as amended (1952); the Law for the Compensation of the Victims of National Socialist Persecution as amended (1953); the Federal Restitution Law as amended (1957) which provides for compensation in case restitution was not possible; the Law on the Reparation of Losses as amended (1969); the Law on the Settlement of Open Property Matters as amended (1990); and the Law on Indemnification of Victims of Nazism as amended (1994).¹³⁸

183. In 2000, the German Bundestag (Lower House of Parliament), with the concurrence of the Bundesrat (Upper House of Parliament), adopted the Law on the Creation of a Foundation "Remembrance, Responsibility and Future", thereby establishing a foundation responsible for making payments to entitled claimants and setting maximum amounts to be awarded to different categories

¹³⁶ Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 30.

¹³⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 31.

¹³⁸ Germany, *Law on the Equalization of Burdens as amended* (1952); *Law for the Compensation of the Victims of National Socialist Persecution as amended* (1953); *Federal Restitution Law as amended* (1957); *Law on the Reparation of Losses as amended* (1969); *Law on the Settlement of Open Property Matters as amended* (1990); *Law on Indemnification of Victims of Nazism as amended* (1994).

of claimants.¹³⁹ The Law states that “the purpose of the Foundation is to make financial compensation available through partner organizations to former forced laborers and those affected by other injustices from the National Socialist period”.¹⁴⁰ Eligible for compensation under this Law are the following persons:

1. persons who were held in a concentration camp... or in another place of confinement outside the territory of what is now the Republic of Austria or a ghetto under comparable conditions and were subjected to forced labor;
2. persons who were deported from their homelands into the territory of the German Reich within the borders of 1937 or to a German-occupied area, subjected to forced labor in a commercial enterprise or for public authorities there, and held under conditions other than those mentioned in Number 1, or were subjected to conditions resembling imprisonment or similar extremely harsh living conditions;
- ...
3. persons who suffered property loss as a consequence of racial persecution with essential, direct, and harm-causing collaboration of German businesses... The partner organizations may also award compensation from the funds provided to them... to those victims of National Socialist crimes who are not members of one of the groups mentioned in Sentence 1, Numbers 1 and 2, particularly forced laborers in agriculture... The funds provided for in Section 9, Paragraph 4, Sentence 2, Number 2 are intended to compensate property damage inflicted during the National Socialist regime with the essential, direct, and harm-causing participation of German enterprises, but not inflicted for reasons of National Socialist persecution. The funds referred to in Section 9, Paragraph 3, shall be awarded in cases of medical experiments or in the event of the death of or severe damage to the health of a child lodged in a home for children of forced laborers; in cases of other personal injuries they may be awarded.

...

(3) Eligibility cannot be based on prisoner-of-war status.¹⁴¹

184. Russia’s Constitution provides that “the rights of persons who have sustained harm from crimes and abuses of power shall be protected by the law. The state shall guarantee the victims access to justice and compensation for damage” and that “everyone shall have the right to compensation by the state for the damage caused by unlawful actions (or inaction) of state organs, or their officials”.¹⁴² Other Russian legislation of relevance to the question of compensation for victims of violations of IHL are: the Law on Rehabilitation of Victims of Political Persecution as amended; the Law on Rehabilitation of the Repressed Nations; the Decree on the Law on Rehabilitation of the Repressed

¹³⁹ Germany, *Law on the Creation of a Foundation “Remembrance, Responsibility and Future” as amended* (2000).

¹⁴⁰ Germany, *Law on the Creation of a Foundation “Remembrance, Responsibility and Future” as amended* (2000), Section 2(1).

¹⁴¹ Germany, *Law on the Creation of a Foundation “Remembrance, Responsibility and Future” as amended* (2000), Section 11.

¹⁴² Russia, *Constitution* (1993), Articles 52 and 53.

Nations in Relation to the Cossacks; the Resolution on Compensation for Persons Having Suffered Nazi Persecution; the Resolution on Return of Property and Compensation for Victims of Political Persecution; and the Resolution on Compensation for Destruction of Property for Citizens Having Suffered from the Settling of the Crisis in Chechnya and Having Left Chechnya Irrevocably.¹⁴³

185. Spain's Military Criminal Code provides that "the State is the civil authority with subsidiary liability for any offences that are committed by members of the armed forces in the line of duty and that are considered as such by the court".¹⁴⁴

186. Spain's Penal Code provides that:

The State, the autonomous community, the province, the island, the municipality or another public authority, depending on the case, has subsidiary liability for damage caused by a person who has committed a fraudulent or culpable act, provided that the person in question is a representative, agent or employee of said authority, or an official acting in the line of duty, that the damage caused was a direct consequence of running the public services entrusted to that person, and that there can be no duplication of the compensation awarded. The aforesaid is without prejudice to the liability associated with the normal or faulty functioning of such services, in keeping with the rules of administrative procedure.¹⁴⁵

The Code also provides that "if the civil liability of a representative, agent or employee of a public authority, or of an official, is being examined in legal proceedings, a claim must be lodged simultaneously against the administration or public authority presumed to have subsidiary liability".¹⁴⁶

187. Switzerland's Law on (State) Responsibility as amended provides that "the Confederation shall be liable for any damage unlawfully caused to a third party by an official in the exercise of his or her official duties, regardless of the fault committed by the official".¹⁴⁷ It further provides that:

If the official has committed a fault resulting in death or bodily harm, the competent authority may, taking into consideration the special circumstances of the case, award the victim or the relatives of the victim adequate moral damages.

Whoever suffers unlawful moral injury has the right, if the official has committed a fault, to be paid damages therefor, provided that this is justified by the gravity of the injury and that compensation has not otherwise been given by the official concerned.¹⁴⁸

¹⁴³ Russia, *Law on Rehabilitation of Victims of Political Persecution as amended* (1991); *Law on Rehabilitation of the Repressed Nations* (1991); *Decree on the Law on Rehabilitation of the Repressed Nations in Relation to the Cossacks* (1992); *Resolution on Compensation for Persons Having Suffered Nazi Persecution* (1994); *Resolution on Return of Property and Compensation for Victims of Political Persecution* (1994); *Resolution on Compensation for Destruction of Property for Citizens Having Suffered from the Settling of the Crisis in Chechnya and Having Left Chechnya Irrevocably* (1997).

¹⁴⁴ Spain, *Military Criminal Code* (1985), Article 48.

¹⁴⁵ Spain, *Penal Code* (1995), Article 121. ¹⁴⁶ Spain, *Penal Code* (1995), Article 121.

¹⁴⁷ Switzerland, *Law on (State) Responsibility as amended* (1958), Article 3(1).

¹⁴⁸ Switzerland, *Law on (State) Responsibility as amended* (1958), Article 6.

188. In 1988, the US passed the Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended) containing a Statement of Congress to the effect that:

(a) With regard to individuals of Japanese ancestry

The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, a grave injustice was done to both citizens and permanent resident aliens of Japanese ancestry by the evacuation, relocation, and internment of civilians during World War II . . . The excluded individuals of Japanese ancestry suffered enormous damages, both material and intangible, and there were incalculable losses in education and job training, all of which resulted in significant human suffering for which appropriate compensation has not been made . . .

(b) With respect to the Aleuts

The Congress recognizes that, as described by the Commission on Wartime Relocation and Internment of Civilians, the Aleut civilian residents of the Pribilof Islands and the Aleutian Islands west of Unimak Island were relocated during World War II to temporary camps in isolated regions of southeast Alaska where they remained, under United States control and in the care of the United States, until long after any potential danger to their home villages had passed. The United States failed to provide reasonable care for the Aleuts, and this resulted in widespread illness, disease, and death among the residents of the camps; and the United States further failed to protect Aleut personal and community property while such property was in its possession or under its control. The United States has not compensated the Aleuts adequately for the conversion or destruction of personal property, and the conversion or destruction of community property caused by the United States military occupation of Aleut villages during World War II. There is no remedy for injustices suffered by the Aleuts during World War II except an Act of Congress providing appropriate compensation for those losses which are attributable to the conduct of United States forces and other officials and employees of the United States.¹⁴⁹

Title I ("United States Citizens of Japanese Ancestry and Resident Japanese Aliens", also known as "Civil Liberties Act") of the Law establishes the Civil Liberties Public Education Fund and, under a provision entitled "Restitution", provides that "the Attorney General shall, subject to the availability of funds appropriated to the Fund for such purpose, pay out of the Fund to each eligible individual the sum of \$20,000, unless such individual refuses . . . to accept the payment".¹⁵⁰ Title II ("Aleutian and Pribilof Islands Restitution") establishes the Aleutian and Pribilof Islands Restitution Fund and, under a provision entitled "Compensation for community losses", provides that "subject to the availability of funds appropriated to the Fund, the Secretary shall make payments from the Fund, in accordance with this section, as restitution for certain Aleut

¹⁴⁹ US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Statement of the Congress, Section 1989a.

¹⁵⁰ US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Title I, §§ 1989b-3(a) and 1989b-4(a)(1).

losses sustained in World War II".¹⁵¹ Under a provision entitled "Individual compensation of eligible Aleuts", Title II further provides that "the Secretary shall, in accordance with this section, make per capita payments out of the Fund to eligible Aleuts. The Secretary shall pay, subject to the availability of funds appropriated to the Fund for such payments, to each eligible Aleut the sum of \$12,000."¹⁵² With respect to Attu Island, Title II also provides that:

The public lands on Attu Island, Alaska, within the National Wildlife Refuge System have been designated as wilderness . . . In order to make restitution for the loss of traditional Aleut lands and village properties on Attu Island, while preserving the present designation of Attu Island lands as part of the National Wilderness Preservation System, compensation to the Aleut people, in lieu of the conveyance of Attu Island, shall be provided.¹⁵³

189. A provision of the California Code of Civil Procedure as amended dealing with compensation for slave and forced labour states that:

Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.¹⁵⁴

National Case-law

190. In 1952, the German Administrative Court of Appeal of Münster heard a claim for compensation for injuries suffered by a German national as a result of a road accident with a vehicle belonging to the occupying powers. The Court held that the liability of occupying powers for injuries caused by their personnel was strict and that:

The plaintiff's claim for damages derives not only from public municipal law but also from international law. By virtue of Article 3 of the [1907 Hague Convention (IV)] a State is liable for all acts committed by persons belonging to its armed forces. According to the wide wording of Article 3, which has been chosen in the interests of the protection of the civilian population, fault on the part of the person who has caused the damage is not a prerequisite of liability. It is therefore an undisputed principle of the doctrine of international law that Article 3 provides for the absolute liability of the Occupant in respect of acts committed by members of its armed forces. Within the framework of this absolute liability for which international law provides, a State is under a duty – according to the views of writers on international

¹⁵¹ US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Title II, §§ 1989c-2(a) and 1989c-4(a).

¹⁵² US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Title II, § 1989c-5(a).

¹⁵³ US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Title II, § 1989c-6(a).

¹⁵⁴ US, *California Code of Civil Procedure as amended* (1873), Section 354.6(b).

law which have, however, not yet been universally accepted – to pay compensation for “incorporeal” damage.¹⁵⁵

191. In the *Reparation Payments case* in 1963 relating to claims for compensation for slave labour during Second World War, Germany’s Federal Supreme Court stated that the claims were in the nature of reparations claims and that “with regard to the inextricable connection with the question of reparations under international public law . . . it is not possible to deny the right to compensation based on civil law from the outset”.¹⁵⁶ However, the Court held that no decision could be reached on the merits of the claim until there was a final reparations agreement between the plaintiff’s government and Germany, as it found that the London Agreement on German External Debts of 27 February 1953 had postponed the question of indemnification of individuals to when the issue of reparations more generally had been settled.¹⁵⁷

192. In the *Forced Labour case* in 1996, Germany’s Constitutional Court held *obiter* that there did not exist a rule of general international law preventing the payment of compensation to individuals for violations of international law. The Court added that it was therefore not prohibited for a State that has violated international law to allow individuals to bring claims for compensation for events during Second World War through its national courts.¹⁵⁸

193. In the *Distomo case* in 2003 dealing with killings committed by German soldiers in Greece during the Second World War, Germany’s Federal Supreme Court stated that, due to a concept of war as a “relationship from State to State” as it existed during the Second World War, a State which was responsible for crimes committed at that time was only liable to pay compensation vis-à-vis another State but not vis-à-vis the individual victims. According to the Court, international law conferred the right upon States to exercise diplomatic protection of their nationals, and the right to claim compensation was the right of the State. With reference to Articles 2 and 3 of the Hague Convention (IV) and declaring the 1907 HR as being directly applicable, it stated that this was true “at least for the period in question”, i.e. for the time of the Second World War.¹⁵⁹

194. A decision of the Court of First Instance of Leivadia in Greece in 1997 related to a claim for compensation against Germany brought by the prefecture of Voiotia and a number of individual claimants. The claims were based on acts – wilful murder and destruction of private property – committed by German occupation forces in June 1944. The Court rejected the German government’s assertion of sovereign immunity on the ground that if a State acted in violation

¹⁵⁵ Germany, Administrative Court of Appeal of Münster, *Personal Injuries case*, Judgement, 9 April 1952.

¹⁵⁶ Germany, Federal Supreme Court, *Reparation Payments case*, Judgement, 26 February 1963.

¹⁵⁷ Germany, Federal Supreme Court, *Reparation Payments case*, Judgement, 26 February 1963.

¹⁵⁸ Germany, Second Chamber of the Constitutional Court, *Forced Labour case*, Judgement, 13 May 1996.

¹⁵⁹ Germany, Federal Supreme Court, *Distomo case*, Judgement, 26 June 2003.

of a rule of *jus cogens*, it lost its right to invoke sovereign immunity. As the Court had previously concluded that the rules of IHL relating to belligerent occupation protecting, *inter alia*, the right to life, family honour, property and religious convictions were part of *jus cogens*, it found that Germany could not claim sovereign immunity. Having rejected Germany's claim of immunity, the Court then determined that the suit was lawful under Article 3 of the 1907 Hague Convention (IV) and Article 46 of the 1907 HR. It also considered that, in the absence of a rule of international law prohibiting this, the claims could be made by the plaintiffs in their individual capacity and not necessarily by their State of nationality. It also held that the words "if the case demands" in Article 3 of the 1907 Hague Convention (IV) specifically underlined that material damage must have been caused as a result of the violations of the conventions. The Court then reviewed the claims, rejecting those which lacked sufficient evidence of the property destroyed or of its value, and made awards of compensation in other cases.¹⁶⁰ In May 2000, the Supreme Court upheld the lower court's decisions, basing its conclusion that Germany was not entitled to sovereign immunity both on a finding that there existed a customary "tort law" exception to the doctrine of sovereign immunity and that as the acts in question violated peremptory norms of international law, they did not attract immunity.¹⁶¹ However, with regard to the same case, the Greek government refused to give its consent necessary for the execution of the judgement against Germany for reasons of State immunity.¹⁶²

195. In the *Shimoda case* in 1963, the first case in which compensation was sought in Japan for violations of the laws of war, the plaintiffs, residents of Hiroshima and Nagasaki in 1945, brought proceedings against the Japanese government on the ground that, by signing the 1951 Peace Treaty with the Allies, it had waived their right to seek compensation from the US for its use of atomic bombs in violation of the laws of war. The plaintiffs argued, *inter alia*, that the government's waiver of their claims obliged the government to pay them compensation itself. The Tokyo District Court ruled that, even though the aerial bombardment was an illegal act of war, individuals could be considered the subjects of rights under international law only in so far as they had been recognised as such in specific instances, such as, for example, in cases of mixed arbitral tribunals. In light of this determination, the Court concluded that "there is in general no way open to an individual who suffers injuries from an act of hostilities contrary to international law to claim damages on the level of international law, except for the cases mentioned above". The Court went on to consider the question of whether the plaintiffs could seek redress before

¹⁶⁰ Greece, Court of First Instance of Leivadia, *Prefecture of Voiotia case*, Judgement, 30 October 1997.

¹⁶¹ Greece, Supreme Court, *Prefecture of Voiotia case*, Judgement, 4 May 2000.

¹⁶² Greece, Statement before the ECtHR, *Kalogeropoulou and Others case*, Decision on admissibility, 12 December 2002, A; see also Athens News Agency, Justice minister will not sign order to confiscate German properties in Athens, 15 September 2001.

the municipal courts of either of the belligerent parties and concluded that considerations of sovereign immunity precluded proceedings against the US either before Japanese or US courts.¹⁶³

196. In the *Siberian Detainees case* in 1989, Japan's Tokyo District Court dismissed claims of former soldiers and civilian employees who had been detained and put into involuntary labour in Siberia for a long time after the end of Second World War. The claimants were seeking compensation for their labour from Japan as "power on which prisoners of war depend" on the basis of the Geneva Conventions and customary international law, but the Court dismissed the case for a lack of standing.¹⁶⁴ The judgement was upheld on appeal.¹⁶⁵

197. In the *Apology for the Kamishisuka Slaughter of Koreans case* before Japan's Tokyo District Court in 1996, three Korean plaintiffs claimed compensation for the arrest and execution of their father and brother by the Japanese military police on charges of spying in August 1945. They argued that, as the employer of the military police, Japan was under a duty to provide compensation. The claim was based on the Japanese Civil Code and international law. The Court found that:

Regarding the existence of international customary law as alleged by the plaintiffs, neither the general practice nor the conviction (*opinio juris*) that the state has a duty to pay damages to each individual when that state infringes its obligations under international human rights law or international humanitarian law can be said to exist. As international customary law as alleged by the plaintiffs cannot be determined, therefore, the plaintiffs' claim based on international law is also without grounds.¹⁶⁶

The judgement was upheld on appeal in 1996, when the Tokyo High Court approved the statement of the lower court but limited its finding of the absence of a rule of customary law entitling individuals to compensation in the law as it was at the time of the incident. The Court emphasised that:

When the incident occurred, there was no evidence of any general practice, nor the existence of *opinio juris* that when a State acts in violation of the obligation of international human rights law or international humanitarian law, that State has the responsibility of compensating for damages any individual who was a victim.

Therefore, the international customary law against which the appellants claim did not exist at the time of the incident, and there are no grounds for the allegation of the appellants based upon international law.¹⁶⁷

¹⁶³ Japan, Tokyo District Court, *Shimoda case*, Judgement, 7 December 1963.

¹⁶⁴ Japan, Tokyo District Court, *Siberian Detainees case*, Judgement in Trial of First Instance, 4 April 1989.

¹⁶⁵ Japan, Tokyo High Court, *Siberian Detainees case*, Judgement in Trial of Second Instance, 5 March 1993; Supreme Court, *Siberian Detainees case*, Judgement in Trial of Third Instance, 13 March 1997.

¹⁶⁶ Japan, Tokyo District Court, *Apology for the Kamishisuka Slaughter of Koreans case*, Judgement in Trial of First Instance, 27 July 1995.

¹⁶⁷ Japan, Tokyo High Court, *Apology for the Kamishisuka Slaughter of Koreans case*, Judgement on Appeal, 7 August 1996.

198. In 1998, Japan's Tokyo District Court considered three further cases in which groups of individuals sought compensation from the government of Japan for violations of IHL: the *Ex-Allied Nationals Claims case*, the *Dutch Nationals Claims case* and the *Filippino "Comfort Women" Claims case*. The first two cases dealt with claims of former POWs and civilian internees, the third with claims of Filipino women who were allegedly assaulted, confined and raped as "comfort women" during the Japanese occupation of the Philippines during Second World War. The cases were based principally on Article 3 of the 1907 Hague Convention (IV) and customary international law. The Court dismissed all three cases for lack of standing by the individuals. The Court reviewed the precise wording of Article 3 of the 1907 Hague Convention (IV) and concluded that it did not specify the methods for enforcing liability for violations nor provided that individuals had a right to claim compensation against a State in national courts. Having reached this conclusion on the basis of the language of Article 3 of the 1907 Hague Convention (IV), the Court pointed out that international law only exceptionally recognised the right of individuals to enforce their rights under international law directly and that usually this had to be done by their State of nationality by means of diplomatic protection. The Court confirmed this conclusion by a review of the drafting history of Article 3 of the 1907 Hague Convention (IV) and of its application by other States, and concluded that Article 3 could not be interpreted so as to provide a right to individuals who had suffered damages because of violations of the laws of war to bring direct claims for compensation against the violating State in domestic courts.¹⁶⁸ In the *Filippino "Comfort Women" case*, the Court stated that:

To summarize, according to the ordinary meaning to be given to the terms in their context, Article 3 of the Hague Convention cannot be understood as a clause that entitles individual victims to bring a claim for compensation directly against a wrongdoing State. Accordingly, it is impossible to recognize that the article is a codification of a rule of customary international law.

Having considered the reconfirmation of the principle of Article 3 of the 1907 Hague Convention (IV) since Second World War, the Court further stated that:

Consequently, throughout its close examination of texts and the drafting process of Article 3 of the Hague Convention, the Court has been unable to recognize the alleged rule of customary international law that provides individual residents in an occupied territory the right to claim compensation directly against the occupying State for damages resulting from a violation of the Hague Regulations committed by members of the occupying forces.

¹⁶⁸ Japan, Tokyo District Court, *Ex-Allied Nationals Claims case*, Judgement, 26 November 1998; *Dutch Nationals Claims case*, Judgement, 30 November 1998; *Filippino "Comfort Women" Claims case*, Judgement, 9 October 1998.

In addition, throughout its careful survey of all records of the case, the Court was unable to find any rule of customary international law apart from Article 3 of the Hague Convention that provides the principle mentioned above.¹⁶⁹

199. In the *Zhang Baoheng and Others case* in 2002, Japan's Fukuoka District Court awarded US\$ 1.29 million to 15 Chinese men who had been forced to work in Japan during Second World War and who had filed a lawsuit against the Japanese government and a mining company for compensation and a public apology. The Court ruled that the company should be held liable, but not the Japanese government, finding that the company and the government "jointly committed an illegal act" but that the Constitution barred the Court from ordering the government to pay compensation.¹⁷⁰

200. In the *Ko Otsu Hei Incidents case* in 1998, Japan's Yamaguchi Lower Court ordered the Japanese government to pay 300,000 yen each to three South Korean "comfort women" for their enforced prostitution during Second World War. It considered that the acts in question constituted severe violations of human rights and human dignity on the basis of the sex and race of the plaintiffs. As the Japanese government had been aware of the violations but had not adopted legislation to compensate the plaintiffs, it was at fault and in violation of the Constitution. The Court rejected the claim for an official apology from the Japanese government before the Japanese parliament and the UN General Assembly on the ground that it did not have jurisdiction to make such orders. Regarding the claims of Korean women who had worked as slave labourers in Japanese factories during the war, the Court found that, unlike the situation of the "comfort women", the suffering of the forced labourers was not so great when compared to the hardships suffered by members of the civilian population generally during the war as to have required the Japanese government to adopt legislation to compensate them. The Court added that the labourers' claim was within the scope of war reparation, responsibility for which was vested in the executive and the legislature and not the courts.¹⁷¹ However, in March 2001, the Hiroshima High Court reversed the 1998 judgement and dismissed the claims for the reasons that the Japanese Constitution did not oblige the State to apologize or to legislate laws concerning the compensation as such. Referring to the State's obligation to compensate for its omission, which had been admitted at the trial of first instance, the Court stated that a decision on the modalities of post-war compensation was a policy decision within the discretionary power of the legislature. However, it stated that "considering the serious damage the applicants have suffered, we understand their dissatisfaction caused by the State's omission of legislation".¹⁷²

¹⁶⁹ Japan, Tokyo District Court, *Filippino "Comfort Women" Claims case*, Judgement, 9 October 1998.

¹⁷⁰ Japan, Fukuoka District Court, *Zhang Baoheng and Others case*, Judgement, 26 April 2002.

¹⁷¹ Japan, Yamaguchi Lower Court, *Ko Otsu Hei Incidents case*, Judgement, 27 April 1998.

¹⁷² Japan, Hiroshima High Court, *Ko Otsu Hei Incidents case*, Judgement, 29 March 2001.

201. In the *Khamzaev case* in 2001, a Russian District Court rejected the claim of a private person against the Russian government for material and moral compensation for the damages sustained in the aerial bombardment of Urus-Martan in October 1999 by Russian aviation. During the trial, the government denied that bombings had taken place in the relevant part of the town. However, the representative of the Ministry of Finance of the Russian Federation declared that:

We think that the damage was caused by the Federal armed forces. The house was destroyed. But, if the generals assert that they had not given the order to attack residential areas of Urus-Martan, then the pilot(s) exceeded the limits of the order. Hence, there are no grounds for compensation for damages from the State treasury.¹⁷³

202. In its judgement in the *Spring case* in 2000 dealing with the claim of a Jewish Auschwitz survivor against the Swiss Confederation for 100,000 Swiss francs in compensation for having been handed over, in November 1943, to German troops by Swiss border guards, Switzerland's Federal Court referred to a possible right to compensation on the ground of Switzerland's Law on (State) Responsibility as amended. It stated, however, that, as a condition for the applicability of this law, the right to compensation would not have to be barred by statutes of limitation or by laches. The Federal Court, stating that the claimant based his right to compensation, *inter alia*, on the alleged illegal handing over to the German authorities which he had qualified as complicity in genocide, referred to Article 75(1) *bis* of the Swiss Penal Code and Article 56 *bis* of the Swiss Military Criminal Code. It stated that even under these provisions, which excluded the applicability of statutes of limitation to, *inter alia*, genocide and grave breaches of the Geneva Conventions or other international agreements on the protection of victims of war if the offence was particularly serious given the circumstances, the alleged criminal acts were barred. The Federal Court also referred to the principle according to which statutes of limitation under penal law could also be applicable to the right under civil law. It further stated that the claim was also barred by statutes of limitation under (the applicable national) public law. Therefore, in the merits, the Federal Court dismissed the claim. Nevertheless, it awarded the claimant 100,000 Swiss francs in compensation for the procedural costs.¹⁷⁴

203. In the *Goldstar case* in 1992, a US Court of Appeals rejected a claim brought against the US government by Panamanian nationals whose business establishments had been looted during the US intervention in Panama. The plaintiffs argued, *inter alia*, that Article 3 of 1907 Hague Convention (IV) provided them with a remedy which could be enforced before the US courts and that the US had waived its sovereign immunity under this self-executing

¹⁷³ Russia, Basmanny District Court, *Khamzaev case*, Judgement, 11 May 2001.

¹⁷⁴ Switzerland, Federal Court, *Spring case*, Judgement, 21 January 2000.

provision. The Court rejected this argument, holding that the Hague Convention was not self-executing and stating that:

International treaties are not presumed to be self-executing . . . Courts will only find a treaty to be self-executing if the document, as a whole, evidences an intent to provide a private right of action . . . The Hague Convention does not explicitly provide for a privately enforceable cause of action. Moreover, we find that a reasonable reading as a whole does not lead to the conclusion that the signatories intended to provide such a right.¹⁷⁵

204. In the *Princz case* in 1992 in which the plaintiff had brought an action for damages against Germany based on his internment by the Nazi regime during Second World War, a US District Court affirmed its subject matter jurisdiction and rejected the claim of sovereign immunity by Germany. It held that Germany was stopped from relying on State immunity and that:

Under the circumstances of this case, a nation that does not respect the civil and human rights of an American citizen is barred from invoking United States law [i.e. immunity under the Foreign Sovereign Immunities Act of 1976] to block the citizen in his effort to vindicate his rights. In such a case, Plaintiff has a right to have his claim heard by a U.S. court.¹⁷⁶

However, in 1994, the decision of the District Court was overruled by the Court of Appeals which held that “none of the exceptions to sovereign immunity provided in the [Foreign States Immunity Act of 1976] applies to the facts alleged by [the plaintiff]”. It therefore dismissed the claim for lack of jurisdiction.¹⁷⁷ In his dissenting opinion, one of the judges stated that he believed that “Germany’s treatment of [the plaintiff] violated *jus cogens* norms of the law of nations, and that by engaging in such conduct, Germany implicitly waived its immunity from suit”.¹⁷⁸

205. In the *Mochizuki case* in 1998, a class action brought by Latin American nationals of Japanese ancestry who had been arrested in various Latin American countries during Second World War and who had been brought to the US and interned, and who were not entitled to benefit from the terms of the 1988 Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended) because they were not US nationals, the US Court of Federal Claims preliminarily approved the settlement agreement entered by the parties shortly before which grants each member of the group of plaintiffs US\$ 5,000 in

¹⁷⁵ US, Court of Appeals (Fourth Circuit), *Goldstar case*, Judgement, 16 June 1992.

¹⁷⁶ US, District Court for the District of Columbia, *Princz case*, Judgement, 23 December 1992.

¹⁷⁷ US, Court of Appeals for the District of Columbia, *Princz case*, Judgement, 1 July 1994. This conclusion was based on the retrospective application of the Foreign Sovereign Immunities Act. The Court also concluded that if the Act were considered not to apply retrospectively it would lack jurisdiction in any event because the type of claim in question was not within the post-Act jurisdiction of District Courts.

¹⁷⁸ US, Court of Appeals for the District of Columbia, *Princz case*, Dissenting opinion of Judge Wald, 1 July 1994.

compensation to be paid by the US.¹⁷⁹ In its final order of 1999, the same Court stated that “the Settlement Agreement executed by the parties on June 10, 1998, is adjudged to be fair, reasonable, and adequate, and its terms are hereby approved”.¹⁸⁰

206. In July 1999, Barclays Bank, having been sued before a US District Court along with various other banks with branches, operations or predecessors in France during Second World War by families of Jewish customers in France who had lost their assets during the German occupation, agreed to the so-called Barclays French Bank Settlement which provided for the establishment of a US\$ 3,612,500 fund to compensate the victims.¹⁸¹ The US District Court approved the Settlement Agreement.¹⁸²

207. In 2000, J. P. Morgan agreed to settle compensation claims by the so-called J. P. Morgan Settlement Agreement which provided for the establishment of a settlement fund of US\$ 2,750,000 to compensate Jewish victims of the Holocaust who had seen their bank accounts seized during Second World War in France.¹⁸³ The Settlement Agreement was approved by the US District Court.¹⁸⁴

208. In the *Holocaust Victims Assets case* in 2000, a US District Court approved a class-action Settlement Agreement between Holocaust victims and Swiss banks agreed in August 1998, finding it fair, reasonable and adequate. The Agreement set up a US \$1.25 billion fund to be created in four annual instalments over three years. In addition, it released, with few exceptions, “the Swiss Confederation, the Swiss National Bank, all other Swiss banks, and other members of Swiss industry”. In its final order and judgement of 2000, the District Court approved the Settlement Agreement.¹⁸⁵

209. In the *Comfort Women case* in 2001 dealing with the claim of 15 Asian women seeking compensation from Japan for having been used, during Second World War, by Japanese military as so-called “comfort women”, a US District Court dismissed the complaint for lack of subject matter jurisdiction and, additionally, nonjusticiability on the ground of the political question doctrine.

¹⁷⁹ US, Court of Federal Claims, *Mochizuki case*, Settlement Agreement, 10 June 1998; Order Granting Preliminary Approval of Settlement Agreement, 11 June 1998, § 3.

¹⁸⁰ US, Court of Federal Claims, *Mochizuki case*, Opinion and Order, 25 January 1999, § 2.

¹⁸¹ US, District Court of the Eastern District of New York, *Barclays French Bank Settlement case*, Settlement Agreement, 8 July 1999.

¹⁸² US, District Court of the Eastern District of New York, *Barclays French Bank Settlement case*, Preliminary Order, 10 April 2000, and Supplemental Order, 4 June 2001; Notice of pendency of class action, proposed settlement of class action and settlement hearing, 4 June 2001.

¹⁸³ US, District Court of the Eastern District of New York, *J. P. Morgan French Bank Settlement case*, Settlement Agreement, 29 September 2000.

¹⁸⁴ US, District Court of the Eastern District of New York, *J. P. Morgan French Bank Settlement case*, Preliminary Order, 10 April 2000 and Supplemental Order, 4 June 2001; Notice of pendency of class action, proposed settlement of class action and settlement hearing, 4 June 2001.

¹⁸⁵ US, District Court for the Eastern District of New York, *Holocaust Victims Assets case*, Memorandum and Order, 26 July 2000; Final Order and Judgement approving the Settlement Agreement, 9 August 2000.

It stated, however, that “for [these] reasons, this court is unable to provide plaintiffs the redress they seek and surely deserve”.¹⁸⁶

Other National Practice

210. In 1988, the Canadian government concluded an agreement with the National Association of Japanese Canadians, the so-called Japanese-Canadian Redress Agreement, under which the government officially acknowledged that the forced removal and internment of Canadian nationals of Japanese descent during Second World War was unjust and violated human rights. The Agreement also provided that:

As symbolic redress for those injustices, the Government offers:

- a) [CAN]\$21,000 individual redress, subject to application by eligible persons of Japanese ancestry who, during this period, were subjected to internment, relocation, deportation, loss of property or otherwise deprived of the full enjoyment of fundamental rights and freedoms based solely on the fact that they were of Japanese ancestry; each payment would be made in a tax-free lump sum, as expeditiously as possible;
- b) [CAN]\$12 million to the Japanese-Canadian community, through the National Association of Japanese Canadians, to undertake educational, social and cultural activities or programmes that contribute to the well-being of the community or that promote human rights;
- c) [CAN]\$12 million, on behalf of Japanese Canadians and in commemoration of those who suffered these injustices, and matched by a further \$12 million from the Government of Canada, for the creation of a Canadian Race Relations Foundation that will foster racial harmony and cross-cultural understanding and help to eliminate racism.
- ...
- f) to provide, through contractual arrangements, up to [CAN]\$3 million to the National Association of Japanese Canadians for their assistance, including community liaison, in administration of redress over the period of implementation.¹⁸⁷

211. In 1991, during a debate in the UN General Assembly on the environmental impact of the Gulf War, Canada deduced the illegality of Iraq’s conduct of war from the fact that “a mechanism had been put in place [by the relevant UN Security Council resolutions] to obtain compensation for the damage done and the clean-up involved”.¹⁸⁸

212. In 1991, in its official report on violation of human rights during the military regime, Chile’s National Commission for Truth and Reconciliation recommended that reparations be paid by the State in respect of disappearances,

¹⁸⁶ US, District Court of Columbia, *Comfort Women case*, Memorandum Opinion and Judgement, 4 October 2001.

¹⁸⁷ Canada, Prime Minister, *Agreement between the Government of Canada and the National Association of Japanese Canadians (Japanese-Canadian Redress Agreement)*, 22 September 1988.

¹⁸⁸ Canada, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, § 11.

and concluded that Chile should grant the families of disappeared persons a pension for life as material recompense.¹⁸⁹

213. In its views and comments on the 1997 Draft Basic Principles and Guidelines on the Right to Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law – as they were then called – Chile stated that “it seems appropriate to include in the set of basic principles and guidelines a specific provision establishing the State’s immediate, direct liability for compensation, without prejudice to its right to attempt to recover from the offenders the amount paid”.¹⁹⁰

214. In 1955, the Chinese Minister of Foreign Affairs stated that:

During the war in which Japanese militarists invaded China, millions of Chinese people were killed, Chinese public and private property worth billions of dollars was damaged, thousands of Chinese people were forcibly moved to Japan and were enslaved and killed. The Japanese Government should understand that the Chinese people have the right to ask the Japanese Government to compensate for all the damages suffered by the Chinese people.¹⁹¹

215. In 1979, a special committee set up by the government of El Salvador to investigate the whereabouts of missing persons recommended that action be taken to compensate the families of missing political prisoners whose deaths could be either confirmed or presumed. The Ministry of the Presidency consequently announced that the families would be compensated.¹⁹²

216. In 1999, the French government created by a decree a “Commission for the Compensation of Victims of Spoliation Resulting from Anti-Semitic Legislation in Force During the Occupation” (also known as “Commission Drai”).¹⁹³ Furthermore, in 2000, the French government established a special compensation programme for orphans whose parents were victims of anti-Semitic persecution.¹⁹⁴

¹⁸⁹ Chile, National Commission for Truth and Reconciliation, Official Report on Violations of Human Rights During the Military Regime, *International Commission of Jurists Review*, No. 46/1991, p. 6.

¹⁹⁰ Chile, Views and Comments on the note and revised Draft Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of [Gross] Violations of Human Rights and International Humanitarian Law, 7 October 1997, UN Doc. E/CN.4/1998/34, 22 December 1997, § 21.

¹⁹¹ China, Minister of Foreign Affairs, Statement on the issue of so-called withdrawal of Japanese Nationals in China put forward by the Japanese Government, 16 August 1955, *Documents on Foreign Affairs of the People’s Republic of China*, World Knowledge Press, Beijing, Vol. 3, pp. 338–339.

¹⁹² IACiHR, *Annual Report 1979–1980*, Doc. OEA/Ser.L/V/II.50 Doc. 13 rev.1, 2 October 1980, p. 138.

¹⁹³ France, First Minister and other ministries, Decree No. 99-778 Creating a Commission for the Compensation of Victims of Spoliation Resulting from the Anti-Semitic Legislation in force during the Occupation, 10 September 1999, *Journal Officiel de la République française*, No. 211, 11 September 1999, p. 13633.

¹⁹⁴ France, First Minister and other ministries, Decree No. 2000-657 Establishing a Special Compensation Program for Orphans whose Parents were Victims of Anti-Semitic Persecution, 13 July 2000, *Journal Officiel de la République française*, No. 162, 14 July 2000, p. 10838.

217. In 1951, the German Chancellor made a declaration before the German Bundestag (Lower House of Parliament), which was then endorsed by this body. The declaration stated that:

However, unspeakable crimes have been committed in the name of the German people, crimes that impose a duty to make moral and material amends, both as regards the individual damage that Jews have suffered and as regards Jewish property for which individual claimants no longer exist... The Federal Government is prepared to work with representatives of Jews and the State of Israel, which has received so many homeless Jewish refugees, to find a solution to the problem of making amends in a material sense.¹⁹⁵

218. In 1995, the German government, in reply to a question from members of the Lower House of Parliament with regard to payments in reparation for Greek victims of the German National Socialist regime, stated that:

With regard to a concluding settlement of the claims of Greece resulting from National Socialist measures of persecution against Greek nationals who have suffered damages to their freedom and health, the Federal Republic of Germany has paid, on the basis of the treaty of 18 March 1960 "concerning obligations in favour of Greek nationals who were concerned by national socialist measures of persecution", DM 115 million.¹⁹⁶

219. In 1995, the German government, in reply to a question from members of the Lower House of Parliament regarding the amount of payments made by the FRG in compensation to former East and West European inmates of concentration camps, stated that "including... payments in the field of reparations through the social insurance, the total amount of payments up to now are significantly more than DM100 billion".¹⁹⁷

220. In 1996, in a letter to the UN Secretary-General, Iraq reported that "a number of United States warplanes dropped 10 heat flares in the Saddam Dam area of Ninawa Governorate in northern Iraq" and affirmed "the legally established right of the Republic of Iraq to seek compensation for the damage caused by these unwarranted actions by the United States, in accordance with the principle of international responsibility".¹⁹⁸

221. In 1998, during a debate in the Fifth Committee of the UN General Assembly in which several States had referred to a resolution of the General Assembly

¹⁹⁵ Germany, Lower House of Parliament, Declaration by the Federal Chancellor entitled "Germany is obliged to make moral and material amends", *BT-Drucksache* 6697, 27 September 1951.

¹⁹⁶ Germany, Lower House of Parliament, Reply by the Government to a question on payments in compensation for victims of the National Socialist regime from Greece, *BT-Drucksache* 13/2878, 7 November 1995, p. 2.

¹⁹⁷ Germany, Lower House of Parliament, Response by the federal government to a question from members of parliament on payments made by the Federal Republic of Germany in compensation to the US citizen and survivor of the concentration camp Mr Hugo Prinz, *BT-Drucksache* 13/3190, 4 December 1995, p. 3.

¹⁹⁸ Iraq, Letter dated 14 August 1996 to the UN Secretary-General, UN Doc. S/1996/657, 14 August 1996.

and stated that Israel was obliged to pay the costs resulting from its attack on the UNIFIL compound at Qana, Israel replied that “defensive military operations against terrorists who had shamelessly used a UNIFIL outpost as cover for their provocative attacks had been, and continued to be, justified and necessary”.¹⁹⁹

222. In an exchange of letters in 1951 between the Minister of Foreign Affairs of the Netherlands, Dirk U. Stikker, and the Prime Minister of Japan, Shigeru Yoshida, with respect to Japan’s occupation of the Dutch East Indies and the 1951 Peace Treaty for Japan it is stated that:

The Government of Japan does not consider that the Government of the Netherlands by signing the [1951 Peace Treaty for Japan] has itself expropriated the private claims of its nationals so that, as a consequence thereof, after the Treaty comes into force these claims would be non-existent.²⁰⁰

223. In 1998, the South Korean government established a trust fund to provide compensation to 155 women used as sex slaves by the former Japanese Imperial Army. The South Korean government indicated that it planned to collect the value of the fund (5 million yen) as compensation from the Japanese government.²⁰¹

224. In a memorandum issued in 1994 on “practical means to fully support international humanitarian law and apply its rules”, the Kuwaiti Ministry of Justice stated that a belligerent was “responsible for the acts committed by its armed forces’ personnel, and [obliged] to make up for these damages, and pay compensation for wrongful acts”.²⁰²

225. According to the Report on the Practice of Kuwait, Kuwait has demanded compensation for the damage to its environment during the Gulf War. The report further states that it is Kuwait’s *opinio juris* that States which cause damage to the environment are under a duty to remedy such damage.²⁰³

226. In 1998, during a debate in the Fifth Committee of the UN General Assembly, Lebanon, speaking on behalf of the Group of Arab States, stated that:

[The Group of Arab States] wished to convey their regret and displeasure at the fact that Israel had failed to meet its obligation, under paragraph 8 of General Assembly resolution 51/233, to pay the sum of US\$ 1,773,618 to cover the costs resulting from its attack on the UNIFIL compound at Qana in 1996. The international community,

¹⁹⁹ Israel, Statement before the Fifth Committee of the UN General Assembly, UN Doc. A/C.5/52/SR.62, 18 May 1998, § 67.

²⁰⁰ Japan and the Netherlands, Exchange of letters between the Minister of Foreign Affairs of the Netherlands, Dirk U. Stikker, and the Prime Minister of Japan, Shigeru Yoshida, 6–7 September 1951.

²⁰¹ “Seoul to compensate ‘comfort women’, get refund from Tokyo”, BBC News, 11 March 1998.

²⁰² Kuwait, Ministry of Justice, Memorandum concerning the discussion of practical means to fully support international humanitarian law and apply its rules, 5 June 1994.

²⁰³ Report on the Practice of Kuwait, 1997, Chapter 4.4.

as represented in the General Assembly, should compel Israel to pay the costs in question.²⁰⁴

227. At the CDDH, Mexico, with respect to Article 91 AP I, stated that “the article did not rule out the possibility of a State incurring liability, and consequently being required to pay compensation, if it had not taken steps to prevent its nationals from committing the offences covered by the Geneva Conventions, Protocol I and its domestic legislation”.²⁰⁵

228. When in 1996 the question of whether victims of violations of IHL could seek compensation from Japan was raised in the Dutch parliament, the government of the Netherlands stated that it could not claim financial compensation from Japan for damage incurred during the occupation of the former Dutch East Indies because of the 1951 Peace Treaty for Japan and the 1956 Yoshida-Stikker Protocol. The government added that its position would be the same even in the event of an individual invoking the international law rules regulating compensation for damage caused by war.²⁰⁶

229. In 1998, the Norwegian Ministry of Justice drafted a White Paper for parliament with the conclusion that in addition to an official apology to Norwegian Jewry, the government should pay out 450 million Norwegian Kroner in settlement of anti-Jewish measures such as confiscation of Jewish property taken by the Nazi occupation authorities and the Quisling regime during Second World War. This amount reflected the share of the total loss that was confiscated by the Norwegian treasury during Second World War. On 11 March 1999, the White Paper was unanimously adopted by all political parties in parliament. The compensation was divided into two main categories: individual compensation, the fixed sum of 200,000 Norwegian Kroner (US\$28,000) to be given to those persons in Norway who suffered from anti-Jewish measures during the war; and collective compensation of 250 million Norwegian Kroner (US\$35 million) to be divided among Jewish communities in Norway. Under the White Paper, contributions were also to be made to establish a research centre for Holocaust studies and minority research in Norway.²⁰⁷

230. In 1970, during a debate in the Special Political Committee of the UN General Assembly on measures carried out by Israel in the occupied territories, Poland stated that:

²⁰⁴ Lebanon, Statement on behalf of the Group of Arab States before the Fifth Committee of the UN General Assembly, UN Doc. A/C.5/52/SR.62, 18 May 1998, § 63. This statement was endorsed by Saudi Arabia (§ 64), Indonesia (§ 66), and Egypt (§ 72).

²⁰⁵ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.46, 31 May 1977, p. 344, § 23.

²⁰⁶ Netherlands, Lower House of Parliament, Reply by the Minister of Public Health to a question in parliament, 1996–1997 Session, Appendix, Doc. 1031, pp. 2107–2108.

²⁰⁷ Norway, Ministry of Justice and the Police, White Paper No. 82 to the Storting, “Historical and moral settlement for the treatment in Norway of the economic liquidation of the Jewish minority during World War II”, 26 June 1998, approved by The King in Council on 26 June 1998, *Stortingsproposisjon* No. 82 (1997–1998).

The destruction of houses and the confiscation of property, which were designed to demoralize the inhabitants of certain areas and to force them to abandon their homes, were in violation of the basic principles of international law and contrary to the provisions of article 46 of the [1907 HR] and article 53 of the fourth Geneva Convention. Since such acts were illegal, the Government of Israel was liable for full compensation for destroyed property.²⁰⁸

231. The Report on the Practice of Russia notes that a number of victims of the conflict in Chechnya have filed claims and “are entitled to get a reimbursement for their homes demolished by federal troops, *i.e.*, for the lost property”.²⁰⁹

232. In 1996, during the preparatory work in the Rwandan parliament on a law for the punishment of acts of genocide and crimes against humanity in 1996, the issue of the responsibility of the State and the duty to compensate victims was raised. The government spokesman declared that the Rwandan State recognised its responsibility and that a compensation scheme had been adopted.²¹⁰

233. In its final report in 1997, the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, established by the Sri Lankan government, recommended that:

- (i) Expeditious payment of fair and adequate compensation be made to dependants of disappeared persons within a time-frame in all the districts. Such payment should cover dependants of employees of the public sector, corporations and other state-owned institutions. The idea of introducing a new tax similar to the Defence Levy may be considered in order to generate funds for this purpose.
- (ii) A scheme to provide monetary assistance to affected families who had suffered loss and damage to property be initiated. A forum be created to receive complaints of successors of disappeared persons.
- (iii) Legislative provision be made exempting whatever amount paid as compensation for being made the subject matter of a civil claim and seizure.²¹¹

234. In its final report in 1997, the Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces, established by the Sri Lankan government, noted that:

The Commission has worked out a Compensation Scheme in accordance with the circular issued by the Ministry of Public Administration No. 21/88 of 13th July, 1988 and this is only a token of the concern of the Government for deprivation

²⁰⁸ Poland, Statement before the Special Political Committee of the UN General Assembly, UN Doc. A/SPC/SR.748, 10 December 1970, § 9.

²⁰⁹ Report on the Practice of Russia, 1997, Chapter 6.2.

²¹⁰ Rwanda, Travaux préparatoires of the Parliamentary Committees on the organic law of 30 August 1996, Report of the meeting of 9 July 1996 (original in Kinyarwanda), p. 54, Report on the Practice of Rwanda, 1997, Chapter 6.2.

²¹¹ Sri Lanka, Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Western, Southern and Sabaragamuwa Provinces, Final report, Sessional Paper No. V – 1997, September 1997, Chapter 14, Section I(1).

suffered by the affected families. Money in any quantity will not compensate the absence of the bread-winner, the love of the father, the duty of the son for the family. But money helps in some way to cushion the blow.²¹²

235. In 1998, during a debate in the Fifth Committee of the UN General Assembly, Syria stated that:

Israel's financial obligations under General Assembly resolution 51/233 represented only a minute part of the consequences of the Israeli attack on the UNIFIL compound at Qana, and were nothing compared with the lives of the victims, namely the United Nations soldiers and the Lebanese civilians seeking protection at the compound. In accordance with the principles of international law, Israel . . . must be forced to comply with resolution 51/233 so as to avoid establishing a precedent.²¹³

236. The Report on the Practice of Syria asserts that Syria considers Article 91 AP I to be part of customary international law.²¹⁴

237. In 1991, during a debate in the House of Commons on the subject of compensation for Allied POWs in the hands of Japan during Second World War, the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, referring to Articles 14 and 16 of the 1951 Peace Treaty for Japan, stated that:

The [1951 Peace Treaty for Japan] contained a specific provision for compensation for prisoners of war. We had insisted on that provision, which had not been included in the original treaty, because we thought it important that the treaty should recognise the cruel and barbaric treatment to which allied service men in the far east had been subjected . . . No one could dispute that the issue of compensation was crucial . . . From the disposal of Japanese property within its jurisdiction, the United Kingdom received just over £3 million. The United Kingdom's share of the £4.5 million that the Japanese Government placed at the disposal of the International Red Cross in accordance with article 16 of the treaty was just over £1.6 million.

It was agreed in a minute between the Japanese and the allied powers that the payment of the £4.5 million would be recognised as a full discharge by the Japanese Government of their obligations under article 16 of the peace treaty . . . I sympathise with my right hon. Friend's contention that the settlement was unsatisfactory but . . . the provisions of the treaty remove any possibility of the British Government claiming further compensation or reparations from the Japanese Government.²¹⁵

238. In 1991, during a debate in the UN General Assembly on the environmental impact of the Gulf War, the US maintained that:

²¹² Sri Lanka, Commission of Inquiry into Involuntary Removal or Disappearance of Persons in the Northern and Eastern Provinces, Final report, Sessional Paper No. VII – 1997, September 1997, Chapter 10, Section G.

²¹³ Syria, Statement before the Fifth Committee of the UN General Assembly, UN Doc. A/C.5/52/SR.62, 18 May 1998, § 65.

²¹⁴ Report on the Practice of Syria, 1997, Chapter 6.2.

²¹⁵ UK, House of Commons, Statement by the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, 6 June 1991, *Hansard*, Vol. 192, cols. 479–82.

Under Security Council resolution 687 (1991), Iraq was financially liable for the environmental damage it had caused. Thus, existing international law not only prohibited the type of acts committed by Iraq, but also provided important remedies to address and deter such acts, in particular with respect to... official financial liability.²¹⁶

239. In 1996, the US, with regard to funding provided by the US Agency for International Development (USAID) for the construction of a new hospital and satisfactory compensation in favour of petitioners before the IACiHR who had allegedly suffered an US military aircraft attack on an asylum in Grenada, formally noted:

its long-standing position that its actions were entirely in conformance with the law of armed conflict, and that therefore the US had no legal liability for any damages claimed. For these reasons, the US categorically rejects as inaccurate and misleading the petitioners' statement as an alleged settlement of this case and compensation paid in this matter.²¹⁷

240. In a concurrent resolution adopted in 2000 concerning the war crimes committed by the Japanese military during Second World War, the US Congress expressed its sense that:

the Government of Japan should –

- ...
- (2) immediately pay reparations to the victims of those crimes, including United States military and civilian prisoners of war, survivors of the "Rape of Nanjing" from December, 1937, until February, 1938, and the women who were forced into sexual slavery and known by the Japanese military as "comfort women".²¹⁸

241. According to media reports, in October 1999, the President of Zimbabwe apologised for the atrocities committed by the Five Brigade army unit which killed an estimated 25,000 people in an opposition stronghold during the civil war in the early 1980s and announced that the government was ready to compensate the families of the victims.²¹⁹

III. Practice of International Organisations and Conferences

United Nations

242. In a resolution adopted in 1976 on South Africa's military activities against Angola, the UN Security Council called upon the government of South Africa

²¹⁶ US, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, § 39.

²¹⁷ US, Note for the record of the IACiHR concerning *Case 9213 (US)*, referred to in IACiHR, Report No. 3/96, Doc. OEA/Ser.L/V/II.91 Doc. 7, 1 March 1996, p. 201.

²¹⁸ US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON. RES. 357, 106th Congress, 2nd Session, 19 June 2000.

²¹⁹ "Zimbabwe – Mugabe offers compensation for 25,000 civil war killings", *The Independent*, 19 October 1999.

“to meet the just claims of the People’s Republic of Angola for a full compensation for the damage and destruction inflicted on its State”.²²⁰

243. In a resolution adopted in 1979 following an incursion into Zambia of troops from southern Rhodesia, the UN Security Council called for “the payment of full and adequate compensation to the Republic of Zambia by the responsible authorities for the damage to life and property resulting from the acts of aggression”.²²¹

244. In a resolution adopted in 1980, the UN Security Council, after recalling the applicability of GC IV “to the Arab territories occupied by Israel since 1967, including Jerusalem” and, in particular, Article 27 thereof, condemned “the assassination attempts on the lives of the mayors of Nablus, Ramallah and Al Bireh” and called upon Israel “to provide the victims with adequate compensation for the damages suffered as a result of these crimes”.²²²

245. In a resolution adopted in 1982 on South Africa’s military actions against Lesotho, the UN Security Council demanded “the payment by South Africa of full and adequate compensation to the Kingdom of Lesotho for the damage to life and property resulting from [its] aggressive act”.²²³

246. In a resolution adopted in 1985 on South Africa’s military activities against Angola, the UN Security Council stated that Angola should be entirely and adequately compensated for the loss of human life and the material damages resulting from the acts of aggression of South Africa. It decided to appoint a Commission of Investigation comprised of three members of the Security Council to evaluate the damage resulting from the invasion of Angola by South African forces.²²⁴

247. In Resolution 687 adopted in 1991 in the context of the Iraqi invasion and occupation of Kuwait, the UN Security Council decided:

to create a fund to pay compensation for claims [resulting from its liability “under international law for any direct loss, damage – including environmental damage and the depletion of natural resources – or injury to foreign Governments, nationals and corporations as a result of its unlawful invasion and occupation of Kuwait”] and to establish a commission that will administer the fund.²²⁵

248. By Resolution 692 adopted in 1991, the UN Security Council, “acting under Chapter VII of the Charter of the United Nations”, decided “to establish the Fund and Commission referred to in paragraph 18 of resolution 687 (1991) in accordance with Part I of the Secretary-General’s report”, i.e. the United

²²⁰ UN Security Council, Res. 387, 31 March 1976, § 4; see also Res. 475, 27 June 1980, § 6, Res. 546, 6 January 1984, § 7 and Res. 567, 20 June 1985, § 4.

²²¹ UN Security Council, Res. 455, 23 November 1979, § 5.

²²² UN Security Council, Res. 471, 5 June 1980, §§ 1 and 3.

²²³ UN Security Council, Res. 527, 15 December 1982, § 2; see also Res. 572, 30 September 1985, § 4 and Res. 580, 30 December 1985, § 2.

²²⁴ UN Security Council, Res. 571, 20 September 1985, §§ 6 and 7.

²²⁵ UN Security Council, Res. 687, 3 April 1991, §§ 16 and 18.

Nations Compensation Fund and the United Nations Compensation Commission (UNCC).²²⁶ Although the UNCC deals principally with losses arising from Iraq's unlawful use of force, it is also responsible for awarding compensation for violations of IHL suffered by individuals.²²⁷

249. In Resolution 827 of May 1993 establishing the ICTY, the UN Security Council decided that "the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law".²²⁸

250. In a resolution adopted in 1996, the UN General Assembly condemned "the Israeli military attacks against the civilian population in Lebanon, especially against the United Nations base at Qana, which violate the rules of international humanitarian law pertaining to the protection of civilians" and stated that "Lebanon is entitled to appropriate redress for the destruction it has suffered and that Israel is responsible for such compensation".²²⁹

251. In a resolution adopted in 1997 concerning, *inter alia*, the attack by Israel against the UNIFIL compound in Qana, the UN General Assembly decided that "the total amount mentioned . . . above, namely 1,773,618 dollars [i.e. the amount to cover the costs resulting from the incident at the headquarters of the Force at Qana on 18 April 1996], shall be borne by Israel".²³⁰

252. In 2001, the UN General Assembly adopted a resolution entitled "Responsibility of States for internationally wrongful acts", to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 36 entitled "Compensation", were annexed. In the resolution, the General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".²³¹

253. In a resolution on Sudan adopted in 1995, the UN Commission on Human Rights called:

once more upon the Government of the Sudan to ensure a full and thorough investigation by the independent judicial inquiry commission of the killings of Sudanese employees of foreign relief organizations, to bring to justice those responsible for the killings and to provide just compensation to the families of the victims.²³²

²²⁶ UN Security Council, Res. 692, 20 May 1991, preamble and § 3.

²²⁷ See, e.g., UNCC, Governing Council, Decision 3: Personal injury and mental pain and anguish, 18 October 1991, UN Doc. S/AC.26/1991/3, 23 October 1991; Decision 11: Eligibility for compensation of members of the Allied Coalition Armed Forces, 26 June 1992, UN Doc. S/AC.26/1992/11, 26 June 1992.

²²⁸ UN Security Council, Res. 827, 25 May 1993, § 7.

²²⁹ UN General Assembly, Res. 50/22 C, 25 April 1996, §§ 3 and 7.

²³⁰ UN General Assembly, Res. 51/233, 13 June 1997, §§ 7 and 8.

²³¹ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

²³² UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 17.

254. In a resolution adopted in 1993 on the situation in Peru, the UN Sub-Commission on Human Rights, after condemning the violations of human rights by the Sendero Luminoso (Shining Path) and the MRTA, and regretting the violations of human rights “by some members of the forces of law and order”, urged the Peruvian authorities “to compensate the victims of such [human rights] violations”.²³³

255. In a resolution adopted in 1995, the UN Sub-Commission on Human Rights called “for the individuals implicated in the war crimes, crimes against humanity and genocide in Rwanda who have already been identified to be punished in order to guarantee the victims or their heirs fair compensation in accordance with the principles of international law”.²³⁴

256. In a resolution adopted in 1998 on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, the UN Sub-Commission on Human Rights reiterated that “States must respect their international obligations to . . . compensate victims of human rights and humanitarian law violations”.²³⁵

257. In a resolution adopted in 1999 on systematic rape, sexual slavery and slavery-like practices, the UN Sub-Commission on Human Rights stated that it was:

aware that the provision of the Hague Convention (IV) of 1907 Respecting the Laws and Customs of War on Land which states that States “shall be responsible for all acts committed by persons forming part of [their] armed forces” and “shall, if the case demands, be liable to pay compensation” for violations of the rules is part of customary international law.²³⁶

The Sub-Commission reiterated that “States must respect their international obligations to . . . compensate all victims of human rights and humanitarian law violations” and called upon States “to provide effective . . . compensation for unremedied violations in order to end the cycle of impunity with regard to sexual violence committed during armed conflicts”.²³⁷

258. In 1998, in his report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, the UN Secretary-General stated that:

Adherence to international humanitarian and human rights norms by all parties to a conflict must be insisted upon, and I intend to make this a priority in the work of the United Nations. In order to make warring parties more accountable for their actions, I recommend that combatants be held financially liable to their victims under international law where civilians are made the deliberate target of aggression. I further recommend that international legal machinery be developed

²³³ UN Sub-Commission on Human Rights, Res. 1993/23, 23 August 1993, §§ 2, 3 and 8.

²³⁴ UN Sub-Commission on Human Rights, Res. 1995/5, 18 August 1995, § 9.

²³⁵ UN Sub-Commission on Human Rights, Res. 1998/18, 21 August 1998, § 9.

²³⁶ UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, § 4.

²³⁷ UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, §§ 9 and 12.

to facilitate efforts to find, attach and seize the assets of transgressing parties and their leaders.²³⁸

259. In 1996, in a report on a mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, Its Causes and Consequences recommended that:

137. The Government of Japan should:

...

- (b) Pay compensation to individual victims of Japanese military sexual slavery according to principles outlined by the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on the right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms. A special administrative tribunal for this purpose should be set up with a limited time-frame since many of the victims are of a very advanced age.

...

139. The Governments of the Democratic People's Republic of Korea and the Republic of Korea may consider requesting the International Court of Justice to help resolve the legal issues concerning Japanese responsibility and payment of compensation for the "comfort women".²³⁹

260. In 1998, in a report on systematic rape, sexual slavery and slavery-like practices during armed conflict, the Special Rapporteur of the UN Commission on Human Rights recommended that:

108. ... Peace treaties must not seek to extinguish the rights of victims of human rights violations with respect to claims of compensation and other forms of legal redress unless appropriate administrative schemes for compensation and prosecution are incorporated into the substantive peace agreement ...

109. ... By incorporating an understanding of gender into the legal framework for responding to systematic rape and sexual slavery, the full range of the obligations and legal accountability of all parties to a conflict may be carefully articulated and concrete steps may be outlined to ensure adequate prevention, investigation and criminal and civil redress, including compensation of victims.

...

112. When the necessary elements exist to establish that sexual violence constitutes an international crime such as slavery, crimes against humanity, genocide, torture or war crimes, it must be charged, prosecuted and redressed as such. Concrete steps must be taken immediately, including in those countries currently experiencing

²³⁸ UN Secretary-General, Report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, UN Doc. A/52/871-S/1998/318, 13 April 1998, § 50; see also Report on the Protection of Civilians in Armed Conflict, UN Doc. S/1999/957, 8 September 1999, § 38.

²³⁹ UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on the mission to the North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, §§ 137(b) and 139.

internal armed conflict or violence, to ensure that... (c) victims of such abuses receive full redress under both criminal and civil laws, including compensation where appropriate.²⁴⁰

261. The conclusions of UNEP's Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities presented in a report in 1996 stressed, *inter alia*, that:

- (19) thresholds of damage established under instruments relating to the laws of war should not be a defence against claims arising in relation to the illegal use of force . . .
- (21) where compensation is due for damage caused by a wrongful act, the basis for that compensation under international law is reflected in the approach of the Permanent Court of International Justice in the Chorzów Factory (Indemnity) case . . .
- (22) that approach relates to the standard of compensation but does not provide guidance as to how to value the damage which has occurred . . .
- (26) the environmental as well as the economic costs of clean-up measures should be considered, in accordance with the basic requirement of mitigation or avoidance of damage . . .
- (27) the basic aim of restoration should be to reinstate the ecologically significant functions of injured resources and the associated public uses and amenities supported by such functions.²⁴¹

262. In its report in 1993, the UN Commission on the Truth for El Salvador stated with respect to an incident which had occurred at El Junquillo that:

On 12 March 1981, soldiers and members of the Cacaopera military defence unit attacked the population, consisting solely of women, young children and old people. They killed the inhabitants and raped a number of women and little girls under the age of 12. They set fire to houses, cornfields and barns.

The Commission finds that: . . . the Government and the judiciary of El Salvador failed to conduct investigations into the incident. The State thus failed in its duty under international human rights law to . . . compensate the victims or their families.²⁴²

263. In its commentary on Article 36 of the 2001 ILC Draft Articles on State Responsibility, the ILC stated that:

Restitution, despite its primacy as a legal principle, is frequently unavailable or inadequate . . . The role of compensation is to fill gaps so as to ensure full reparation for damage suffered. . . . As compared with satisfaction, the function of compensation is to address the actual losses incurred as a result of the internationally

²⁴⁰ UN Sub-Commission on Human Rights, Special Rapporteur on the Situation of Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, §§ 108–109 and 112.

²⁴¹ UNEP, Conclusions by the Working Group of Experts on Liability and Compensation for Environmental Damage Arising from Military Activities, UN Doc. UNEP/Env.Law/3/Inf.1, 15 October 1996, *Liability and Compensation for Environmental Damage*, Nairobi, 1998, §§ 87(19), (21), (22), (26) and (27).

²⁴² UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, p. 67.

wrongful act... Monetary compensation is intended to offset, as far as may be, the damage suffered by the injured State as a result of the breach... Within the field of diplomatic protection, a good deal of guidance is available as to appropriate compensation standards and methods of valuation, especially as concerns personal injury and takings of, or damage to, tangible property. It is well-established that a State may seek compensation in respect of personal injuries suffered by its officials or nationals, over and above any direct injury it may itself have suffered in relation to the same event. Compensable personal injury encompasses not only associated material losses, such as loss of earnings and earning capacity, medical expenses and the like, but also non-material damage suffered by the individual (sometimes, though not universally, referred to as moral damage in national legal systems). Non-material damage is generally understood to encompass loss of loved ones, pain and suffering as well as the affront to sensibilities associated with an intrusion on the person, home or private life. No less than material injury sustained by the injured State, non-material damage is financially assessable and may be the subject of a claim of compensation, as stressed in the "*Lusitania*" case.²⁴³

Other International Organisations

264. In a resolution adopted in 1983 on missing persons in Argentina, the European Parliament insisted that "the good future relations of the Community with Argentina require that effective steps be taken by the Argentinean authorities to establish the fate of citizens of Member States who have disappeared and to provide financial compensation for them or their dependants".²⁴⁴

International Conferences

265. The 24th International Conference of the Red Cross in 1981 adopted a resolution on assistance to victims of torture in which it welcomed the efforts within the UN to "establish a Voluntary Fund for victims of torture... to extend humanitarian, legal and financial aid to individuals whose fundamental rights have been severely violated as a result of torture and to relatives of such victims" and urged governments to "consider responding favourably to requests for contributions to such a fund".²⁴⁵

266. The 25th International Conference of the Red Cross in 1986 adopted a resolution on assistance to victims of torture in which it urged "National Societies to take the initiative to give, either independently or in co-operation with their governments, humanitarian, legal, medical, psychological and social assistance to victims of torture in exile and, whenever possible, in their own countries".²⁴⁶

²⁴³ ILC, Commentary on Article 36 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, pp. 244–252.

²⁴⁴ European Parliament, Resolution on the situation in Argentina, 13 October 1983, § 3.

²⁴⁵ 24th International Conference of the Red Cross, Manila, 7–14 November 1981, Res. XV, §§ 1 and 2.

²⁴⁶ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XI.

267. The 25th International Conference of the Red Cross in 1986 adopted a resolution on assistance to victims of torture in which it appealed to “governments in a position to do so to respond favourably to requests for further contributions to the United Nations’ Voluntary Fund for victims of torture”.²⁴⁷

268. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference called on “all States to review procedures on compensation for damages caused to victims of violations of international humanitarian law and the payment of indemnities so as to allow the victims to derive real benefit from the assistance to which they are entitled”.²⁴⁸

269. The Final Declaration adopted by the International Conference for the Protection of War Victims in 1993 reaffirmed that “States which violate international humanitarian law shall, if the case demands, be liable to pay compensation.”²⁴⁹

270. The Hague Agenda for Peace and Justice for the Twenty-first Century, adopted by the Hague Appeal for Peace Conference in May 1999, addressed the issue of reparation to victims of armed conflict and concluded that:

The Hague Appeal will demand that victims of armed conflict and human rights violations be made whole through the establishment of national, regional and international victim compensation funds and other reparation measures, which address the need of victims in a timely way.²⁵⁰

271. In the Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the participants committed themselves to see that “any party to an armed conflict which violates International Humanitarian Law shall, if the case demands, be liable to pay compensation”.²⁵¹

IV. Practice of International Judicial and Quasi-judicial Bodies

272. Decision 1 of the UNCC Governing Council in August 1991 stressed Iraq’s responsibility for five particular causes of loss:

(a) military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991, (b) departure from or inability to leave Iraq or Kuwait (or a decision not to return) during that period, (c) actions by officials, employees or agents of the Government of Iraq or its controlled entities during that

²⁴⁷ 25th International Conference of the Red Cross, Geneva, 23–31 October 1986, Res. XII, § 1.

²⁴⁸ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, § 2(n).

²⁴⁹ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(7), *ILM*, Vol. 33, 1994, pp. 300–301.

²⁵⁰ Hague Appeal for Peace Conference, The Hague Agenda for Peace and Justice for the Twenty-first Century, 12–15 May 1999, UN Doc. A/54/98, Point 17, p. 10.

²⁵¹ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niger, 18–20 February 2002, Final Declaration, § 11.

period in connection with the invasion or occupation, (d) the breakdown of civil order in Kuwait or Iraq during that period, and (e) hostage-taking or other illegal detention.²⁵²

In a number of other decisions, the UNCC Governing Council admitted the following types of claims for compensation: (a) serious personal injury and mental pain and anguish; (b) business claims; (c) embargo losses; (d) contract losses; (e) losses involving tangible property; (f) losses relating to income-producing properties; and (g) claims by members of coalition forces.²⁵³

273. In Decision 7 of November 1991 and revised in March 1992, the UNCC Governing Council held that payments were in principle available

with respect to any direct loss, damage, or injury to Governments or international organizations as a result of Iraq's unlawful invasion and occupation of Kuwait. This will include any loss suffered as a result of: (a) military operations or threat of military action by either side during the period 2 August 1990 to 2 March 1991;... (c) actions by officials, employees or agents of the Government of Iraq or its controlled entities during that period in connection with the invasion or occupation.²⁵⁴

With regard to environmental claims, the UNCC Governing Council decided that:

These payments are available with respect to direct environmental damage and the depletion of natural resources as a result of Iraq's unlawful invasion and occupation of Kuwait: This will include losses or expenses resulting from: (a) abatement and prevention of environmental damage, including expenses directly relating to fighting oil fires and stemming the flow of oil in coastal and international waters; (b) reasonable measures already taken to clean and restore the environment or future measures which can be documented as reasonably necessary to clean and restore the environment; (c) reasonable monitoring and assessment of the environmental damage for the purposes of evaluating and abating the harm and restoring the environment; (d) reasonable monitoring of public health and performing medical screenings for the purposes of investigation and combating increased health risks

²⁵² UNCC, Governing Council, Decision 1: Criteria for expedited processing of urgent claims, UN Doc. S/AC.26/1991/1, 2 August 1991, § 18.

²⁵³ UNCC, Governing Council, Decision 3: Personal injury and mental pain and anguish, 18 October 1991, UN Doc. S/AC.26/1991/3, 23 October 1991; Decision 4: Business losses of individuals eligible for consideration under the expedited procedures, 18 October 1991, UN Doc. S/AC.26/1991/4, 23 October 1991; Decision 7: Criteria for additional categories of claims, 18 November 1991 as revised on 16 March 1992, UN Doc. S/AC.26/1991/7/Rev.1, 17 March 1992; Decision 9: Propositions and conclusions on compensation for business losses: types of damages and their valuation, 6 March 1992, UN Doc. S/AC.26/1992/9, 6 March 1992; Decision 11: Eligibility for compensation of members of the Allied Coalition Armed Forces, 26 June 1992, UN Doc. S/AC.26/1992/11, 26 June 1992; Decision 15: Compensation for business losses resulting from Iraq's unlawful invasion and occupation of Kuwait where the trade embargo and related measures were also a cause, 18 December 1992, UN Doc. S/AC.26/1992/15.*, 4 January 1993; J. R. Crook, "The United Nations Compensation Commission – A New Structure to Enforce State Responsibility", *AJIL*, Vol. 87, 1993, pp. 153–156.

²⁵⁴ UNCC, Governing Council, Decision 7: Criteria for additional categories of claims, 18 November 1991, as revised on 16 March 1992, UN Doc. S/AC.26/1991/7/Rev.1, 17 March 1992, § 34.

as a result of environmental damage; and (e) depletion of or damage to natural resources.²⁵⁵

274. In Decision 11 of June 1992, the UNCC Governing Council provided that:

Members of the Allied Coalition Armed Forces are not eligible for compensation for loss or injury arising as a consequence of their involvement in Coalition military operations against Iraq, except if the following three conditions are met:

- a. The compensation is awarded in accordance with the general criteria already adopted; and
- b. They were prisoners of war as a consequence of their involvement in Coalition military operations against Iraq in response to its unlawful invasion and occupation of Kuwait; and
- c. The loss or injury resulted from mistreatment in violation of international humanitarian law (including the Geneva Conventions of 1949).²⁵⁶

275. In 1994, the Panel of Commissioners appointed by the UNCC recommended in relation to claims from individuals who suffered serious personal injury or whose spouse, child or parent died as a direct result of Iraq's invasion of Kuwait that:

c) Claims submitted for detained persons

... Compensation, if any, would be awarded for claims for serious personal injury submitted by the detainee personally after his/her release, or for claims for death submitted by the family after it has been determined by the detainee's Government that the detainee is deceased.

d) Missing persons

compensation be awarded where from the documentation submitted it could be presumed that the "missing" person is deceased. In instances where it could not conclude that the "missing" person is deceased, the Panel holds that compensation cannot be recommended at this stage and that a new claim can be submitted if the family ever receives confirmation of the death.²⁵⁷

276. The 1994 report and recommendations made by the Panel of Commissioners concerning Part One of the Second Instalment of Claims for Serious Personal Injury or Death (Category "B" Claims) of the UNCC state that:

Among the claims for "serious personal injury" or "death" were those involving members of the Allied Coalition Armed Forces which in principle are not recommended for compensation by the Panel pursuant to Decision 11 of the Governing

²⁵⁵ UNCC, Governing Council, Decision 7: Criteria for additional categories of claims, UN Doc. S/AC.26/1991/7/Rev.1, 18 November 1991, as revised on 16 March 1992, 17 March 1992, § 35.

²⁵⁶ UNCC, Governing Council, Decision 11: Eligibility for compensation of members of the Allied Coalition Armed Forces, 26 June 1992, UN Doc. S/AC.26/1992/11, 26 June 1992. (At its twentieth Session, in October 1998, the Governing Council extended the application of its Decision 11 to members of forces that were not part of the Allied Coalition Forces, UN Doc. S/AC.26/SR.81, 12 October 1998.)

²⁵⁷ UNCC, Governing Council, Recommendations made by the Panel of Commissioners concerning individual claims for serious personal injury or death (category "B" claims), 14 April 1994, UN Doc. S/AC.26/1994/1, 26 May 1994, § II(A)(2)(c) and (d).

Council. However, the Panel had before it claims by members of the Allied Coalition Armed Forces that fall within the exceptional conditions stated in the same decision. These members of the Allied Forces were taken prisoners of war during coalition military operations against Iraq and their claims contain extensive medical documentation explaining the torture and injuries that were inflicted upon them by Iraqi authorities during their captivity. Many of the personal statements attached to the claim forms explain that beatings were administered to members of the Allied Forces so as to coerce them into releasing information. The Panel accordingly recommends that these claims be awarded compensation.²⁵⁸

277. On 30 July 1993, Kuwait Oil Company filed with the UNCC the "Well Blowout Control Claim" (also known as "WBC Claim")

in the amount of US\$951,630,871 for costs it allegedly incurred in (a) the planning for the work anticipated on the return of the oil fields of Kuwait... (b) the work performed to extinguish the well-head fires that were burning upon the withdrawal of Iraqi forces from Kuwait; (c) the initial sealing of the wells to stop the flow of oil and gas; and (d) the making safe of the wellheads so that work on the reinstatement of production could be started.²⁵⁹

278. On 22 March 1995, the UNCC Governing Council appointed a Panel of Commissioners.²⁶⁰ During the proceedings, regarding the categorisation of the claim (category "E" or category "F" claim), the Panel referred to Decision 7 of the Governing Council. It also noted that, in its view, "the categorization of a claim as an 'E' or 'F' claim does not necessarily entail substantive consequences in terms of the law applicable to such claim" and that UN Security Council Resolution 687 provided "for the compensability of, inter alia, 'environmental damage and the depletion of natural resources', without making any qualifications as to the legal subject or entity eligible to make such claims".²⁶¹ On the question of a direct link between actions taken by Iraq and damage incurred by Kuwait, the Panel of Commissioners found that "although part of the damage for which compensation is being sought in the WBC Claim may be a result of the Allied bombing, the bulk of the oil-well fires was directly caused by the explosives placed on the wellheads and detonated by Iraqi armed forces". Referring to Decision 7 of the Governing Council, it added that "Iraq is liable for any direct loss, damage or injury whether caused by its own or by the coalition armed forces. Iraq's contention that the Allied air raids broke the

²⁵⁸ UNCC, Report and Recommendations made by the Panel of Commissioners concerning Part One of the Second Instalment of Claims for Serious Personal Injury or Death (Category "B" Claims), UN Doc. S/AC.26/1994/4, 15 December 1994, § 14.

²⁵⁹ UNCC, Governing Council, UN Doc. S/AC.26/1996/5/Annex, Report and Recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC Claim"), 18 December 1996, § 1.

²⁶⁰ UNCC, Governing Council, Report and recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC Claim"), UN Doc. S/AC.26/1996/5/Annex, 18 December 1996, § 9.

²⁶¹ UNCC, Governing Council, Report and recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim (the "WBC Claim"), UN Doc. S/AC.26/1996/5/Annex, 18 December 1996, §§ 49 and 51.

chain of causation therefore cannot be upheld.”²⁶² The Panel included in its recommendations that:

(a) the Claimant KUWAIT OIL COMPANY (the “Claimant”) is to be paid the amount of US\$ 610,048,547 as compensation for the costs incurred in the execution of the Well Blowout Control Exercise as a direct result of Iraq’s invasion and occupation of Kuwait; ... (c) the claim for the costs incurred in connection with the work performed by the Claimant’s own firefighting team ... is rejected; (d) the claim for the indirect costs incurred in fighting oil-well fires ... is rejected.²⁶³

279. In December 1996, the UNCC Governing Council approved the recommendations of the Panel of Commissioners in the “WBC Claim” and decided “to approve the amount of the recommended award of US\$610,048,547 ... to Kuwait Oil Company on behalf of Kuwait’s public oil sector as a whole”.²⁶⁴

280. In its judgement in *Akdivar and Others v. Turkey* in 1998, the ECtHR stated that:

45. The applicants further submitted that the Court should confirm ... that the government should (1) bear the costs of necessary repairs in [their village] to enable the applicants to continue their way of life there; and (2) remove any obstacle preventing the applicants from returning to their village.

In their view, such confirmation was necessary to prevent future and continuing violations of the Convention, in particular the *de facto* expropriation of their property.

46. The government maintained that the restoration of rights is not feasible due to the emergency conditions prevailing in the region. However, resettlement will take place when the local inhabitants feel themselves to be safe from terrorist atrocities.

47. The Court recalls that a judgement in which it finds a breach imposes on the respondent State a legal obligation to put an end to such breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible, the respondent States are free to choose the means whereby they will comply with a judgement in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard.

The Court awarded damages for pecuniary and non-pecuniary losses but dismissed the remainder of the claim for just satisfaction.²⁶⁵

281. In 2003, in two partial awards dealing with claims brought by Eritrea and Ethiopia on behalf of their nationals respectively, the Eritrea-Ethiopia Claims

²⁶² UNCC, Governing Council, Report and recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim (the “WBC Claim”), UN Doc. S/AC.26/1996/5/Annex, 18 December 1996, §§ 85 and 86.

²⁶³ UNCC, Governing Council, Report and recommendations made by the Panel of Commissioners appointed to review the Well Blowout Control Claim (the “WBC Claim”), UN Doc. S/AC.26/1996/5/Annex, 18 December 1996, § 233.

²⁶⁴ UNCC, Governing Council, Decision 40: Well Blowout Control Claim, 17 December 1996, UN Doc. S/AC.26/Dec.40, 18 December 1996, §§ 1 and 2.

²⁶⁵ ECtHR, *Akdivar and Others v. Turkey*, Judgement, 1 April 1998, §§ 45–47.

Commission awarded compensation related to the treatment of former prisoners of war by the two governments.²⁶⁶

282. In 1983, in a report on the situation of human rights of a segment of the Nicaraguan population of Miskito origin, the IACiHR recommended that a conference should be held by representatives of the government of Nicaragua and persons representing the people of the Miskitos. For the agenda of the conference, the IACiHR suggested, *inter alia*, the “establishment of procedures and mechanisms to compensate the Miskito for the loss of their homes, crops, livestock or other belongings when they were evacuated from their villages”.²⁶⁷

283. In 1983, a petition filed before the IACiHR alleged that an asylum in Grenada had been bombed by US military aircraft. Before a settlement could be reached with the US on the matter, the Commission declared the petition admissible, *inter alia*, given the “unwillingness of the US Government to compensate these victims subsequent to the expiration of the *ad hoc* compensation program”.²⁶⁸

284. In a case concerning Colombia in 1992, the IACiHR concluded that the Colombian government had failed to comply with its obligation under the 1969 ACHR (right to life, right to humane treatment, right to personal liberty and judicial protection) and concluded that “Colombia must pay the victim’s next-of-kin compensatory damages”.²⁶⁹

V. Practice of the International Red Cross and Red Crescent Movement

285. The ICRC Commentary on the Fourth Geneva Convention states with respect to Article 148 GC IV that:

As regards material compensation for breaches of the Convention, it is inconceivable, at least as the law stands today, that claimants should be able to bring a direct action for damages against the State in whose service the person committing the breach was working. Only a State can make such claims on another State, and they form part, in general, of what is called “war reparations”. It would seem unjust for individuals to be punished while the State in whose name or on whose instructions they acted was released from all liability.²⁷⁰

286. The ICRC Commentary on the Additional Protocols states that:

Article 91 literally reproduces Article 3 of the Hague Convention Concerning the Laws and Customs of War on Land of 1907, and does not abrogate it in any way, which means that it continues to be customary law for all nations.

²⁶⁶ Eritrea-Ethiopia Claims Commission, *Prisoners of War, Eritrea’s Claim*, Partial Award, 1 July 2003; *Prisoners of War, Ethiopia’s Claim*, Partial Award, 1 July 2003.

²⁶⁷ IACiHR, Report on the situation of human rights of a segment of the Nicaraguan population of Miskito origin, Doc. OEA/Ser.L/V/II.62 Doc. 10 rev. 3, 29 November 1983, Part Three, § B(3)(i).

²⁶⁸ IACiHR, *Case 9213 (US)*, Report on the admissibility of the petition, 22 September 1987.

²⁶⁹ IACiHR, *Case 10.581 (Colombia)*, Report, 25 September 1992, Conclusions, § 2.

²⁷⁰ Jean S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, Geneva, 1958, p. 603.

...

In fact [the principle contained in Articles 51 GC I, 52 GC II, 131 GC III and 148 GC IV] is the same principle as that contained in the present Article 91 and in Article 3 of Hague Convention IV of 1907. The purpose of this provision is specifically to prevent the vanquished from being compelled in an armistice agreement or peace treaty to renounce all compensation due for breaches committed by persons in the service of the victor.²⁷¹

287. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that during expert meetings on the issue, a list of the most important matters to be discussed had been drawn up.²⁷² Under one of these specific issues (“When should damage to the environment be qualified as a ‘grave breach’? State Responsibility and compensation”), it was stated that:

Any violation of either treaty-based or customary rules attributable to a State would create an obligation on the part of the offending State towards the State or States whose environment suffered damage.

According to article 3 of the Hague Convention IV of 1907 and to article 91 of Protocol I of 1977, a State violating an international obligation must be liable to pay compensation.²⁷³

288. In 1993, in a report on the protection of war victims, the ICRC, referring to Article 91 AP I, stated that “this article confirms a rule which is today accepted as being part of customary law and was already stated, in almost identical terms, in Article 3 of the Hague Convention No. IV of 1907”. Referring to Articles 51 GC I, 52 GC II, 131 GC IV and 148 GC IV, the ICRC moreover stated that “this provision . . . also implies that, irrespective of the outcome of an armed conflict, no decision or agreement can dispense a State from the responsibility to make reparation for damages caused to the victims of breaches of international humanitarian law or to pay compensation for those damages”.²⁷⁴ It recommend that:

The International Conference for the Protection of War Victims should make it clear that it wishes procedures to be set up to provide reparation for damage inflicted on the victims of violations of international humanitarian law and award compensation to them, so as to enable them to receive the benefits to which they are entitled.²⁷⁵

²⁷¹ Yves Sandoz *et al.* (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, §§ 3645 and 3649.

²⁷² ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in UN Doc. A/48/269, Report of the UN Secretary-General on the protection of the environment in times of armed conflict, 29 July 1993, §§ 65–72.

²⁷³ ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in UN Doc. A/48/269, Report of the UN Secretary-General on the protection of the environment in times of armed conflict, 29 July 1993, §§ 86 and 87.

²⁷⁴ ICRC, Report on the Protection of War Victims, Geneva, June 1993, Section 4.3, *IRRC*, No. 292, 1993, pp. 391–445.

²⁷⁵ ICRC, Report on the Protection of War Victims, Geneva, June 1993, Section 4.3, *IRRC*, No. 292, 1993, pp. 391–445.

VI. *Other Practice*

289. In 1936, during the Spanish Civil War, in a note to the Portuguese Minister of Foreign Negotiations, the President of the Spanish Junta de Defensa Nacional, while denouncing and condemning certain acts of assassination, mistreatment and damage allegedly committed against his side and non-belligerent third parties by members of the adverse party (the “Red Forces Armed by the Government of Madrid”), expressed his intention to pay compensation to the victims of the alleged offences and to repair the damage caused.²⁷⁶

290. In a resolution on the application of the rules of IHL in hostilities in which UN forces are engaged, adopted at its Zagreb Session in 1971, the Institute of International Law stated that:

Without prejudice to the individual or collective responsibility which derives from the very fact that the party opposing the United Nations Forces has committed aggression, that party shall make reparation for injuries caused in violation of the humanitarian rules of armed conflict. The United Nations is entitled to demand compliance with these rules for the benefit of its Forces and to claim damages for injuries suffered by its Forces in violation of these rules.²⁷⁷

291. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that “under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury”.²⁷⁸

292. The Restatement (Third) further provides that:

A private person, whether natural or juridical, injured by a violation of an international obligation by a state, may bring a claim against that state or assert that violation as a defense

- (a) in a competent international forum when the state has consented to the jurisdiction of that forum with respect to such private claims;
- (b) in a court or other tribunal of that state pursuant to its law; or
- (c) in a court or other tribunal of the injured person’s state of nationality or of a third state, pursuant to the law of such state, subject to limitations under international law.²⁷⁹

²⁷⁶ Spain, Note from the President of the Spanish Junta de Defensa Nacional to the Portuguese Minister of Foreign Negotiations, concerning a supposed incursion into Portuguese territory of “Red forces armed by the Government of Madrid” resulting in the death of a commander of the “National” army, mistreatment of Spanish and Portuguese subjects, and damage to Portuguese property, Burgos, 17 September 1936, reprinted in *Ministério dos Negócios Estrangeiros, Dez anos de política externa (1936–1947), A Nação portuguesa e a segunda Guerra Mundial*, 1964, pp. 285–287.

²⁷⁷ Institute of International Law, Zagreb Session, Resolution on Conditions of Application of Humanitarian Rules of Armed Conflict to Hostilities in which United Nations Forces May be Engaged, 3 September 1971, § 7.

²⁷⁸ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 901.

²⁷⁹ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 906.

293. In a joint statement in 1987, several factions involved in the conflict in Afghanistan declared that the USSR could not securely leave Afghanistan without paying war compensation.²⁸⁰

294. In 1992, in the context of the conflict in Georgia, Abkhazia denounced acts of pillage committed by Georgian troops and considered the leadership of the Republic of Georgia responsible for them. It further considered that Georgia was obliged to compensate the damage caused to the Republic of Abkhazia and to each victim in particular.²⁸¹

295. The SPLM Human Rights Charter provides that “the victims of human rights abuses shall receive compensation. In the case of victims who have been killed, the compensation should go to their kin in accordance with the customary law of the victim.”²⁸²

296. In an expert opinion on Article 3 of the 1907 Hague Convention (IV) prepared in the context of cases seeking compensation for individual victims before Japanese courts, Kalshoven asserted that the adoption of Article 91 AP I which, in his words, “contains a slightly modernised version of Article 3 [1907 Hague Convention IV]” at the CDDH without much discussion and without any dissent “reflected and indeed reaffirmed the general acceptance of the contents of the Article as established customary law”.²⁸³ In the same opinion, he added that:

Although the first sentence of Article 3 does not state in so many words that individual persons, including persons resident in occupied territory, have a right to claim the compensation due under the Article, the drafting history of the Article leaves no room for doubt that this was precisely its purpose.²⁸⁴

297. An expert opinion prepared by Christopher Greenwood took into account military manuals (from the UK and Germany), which stated that the laws of war were binding not only upon governments but also upon every individual, and the position of the IMT, which insisted on punishing individuals responsible for violations of the laws of war, to state that:

The international law of war thus clearly imposes *duties* upon individuals and subjects those who violate their obligations to criminal penalties. There is, therefore, no reason why the *rights* created by the international law of war should be confined

²⁸⁰ *Afghan News*, 15 August 1987, Vol. III, Nos. 15 and 16, pp. 8 and 9.

²⁸¹ Supreme Council of Abkhazia, Statement of the Press-Service of the Supreme Soviet of Abkhazia, No. 10-86, August 1992.

²⁸² SPLM, Human Rights Charter, May 1996, Article 10.

²⁸³ Frits Kalshoven, Expert opinion, Article 3 of the Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, reprinted in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano (eds.), *War and the Rights of Individuals. Renaissance of Individual Compensation*, Nippon Hyoron-sha Co., Tokyo, 1999, p. 37.

²⁸⁴ Frits Kalshoven, Expert opinion, Article 3 of the Convention (IV) Respecting the Laws and Customs of War on Land, signed at The Hague, 18 October 1907, reprinted in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano (eds.), *War and the Rights of Individuals. Renaissance of Individual Compensation*, Nippon Hyoron-sha Co., Tokyo, 1999, p. 38.

to states. To confine them in that way would create a wholly illogical asymmetry in the law for which there would be no justification.²⁸⁵ [emphasis in original]

Referring to the debates on what became Article 3 of the 1907 Hague Convention (IV), which led to the conclusion that the “liability on the part of the State is additional to the criminal liability of the individual wrongdoer” and to Security Council Resolution 687 (1991) creating a Compensation Commission to hear claims for compensation in Kuwait after the Gulf War, Greenwood added:

It is my opinion, therefore, that Article 3 of the Hague Convention, the Hague Regulations and customary international law of war confer rights upon individuals, including rights to compensation, in the event of a violation, which the individual can assert against the State of the wrongdoer. The right exists under international law. While it is obviously a matter of Japanese law . . . whether the Japanese courts have jurisdiction to give effect to that right, for them to do so would clearly be in accordance with international law and would enable the Japanese State to comply with its obligations under international law.²⁸⁶

298. In the late 1990s, five European Insurance companies (Generali, Allianz, Axa, Winterthur Leben and Zurich) sued by Holocaust survivors in the US formed and funded, in co-operation with the United States National Association of Insurance Commissioners, representatives of Jewish organizations and the State of Israel, the International Commission on Holocaust Era Insurance Claims (ICHEIC) in order to settle the claims of Holocaust survivors and/or their heirs for non-payment of pre-Second-World War policies.²⁸⁷ In this context, the Italian insurer Assicurazioni Generali, for example, agreed to pay US\$100 million.²⁸⁸

299. In 1999, the French Banking Association (AFB), long accused of benefiting from unclaimed accounts confiscated or frozen by French banks during Second World War, announced compensation measures for survivors of the Holocaust and their heirs. Some 76,000 French Jews were sent to Nazi death camps in Second World War, and the banks are accused of making no effort to return the funds from their accounts since then.²⁸⁹

²⁸⁵ Christopher Greenwood, Expert opinion, Rights to Compensation of Former Prisoners of War and Civilian Internees under Article 3 of Hague Convention No. IV 1907, reprinted in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano (eds.), *War and the Rights of Individuals. Renaissance of Individual Compensation*, Nippon Hyoron-sha Co., Tokyo, 1999, pp. 66–67, §§ 21, 22 and 23.

²⁸⁶ Christopher Greenwood, Expert opinion, Rights to Compensation of Former Prisoners of War and Civilian Internees under Article 3 of Hague Convention No. IV 1907, reprinted in Hisakazu Fujita, Isomi Suzuki and Kantaro Nagano (eds.), *War and the Rights of Individuals. Renaissance of Individual Compensation*, Nippon Hyoron-sha Co., Tokyo, 1999, pp. 67 and 69, §§ 24 and 30.

²⁸⁷ See, e.g., Michael J. Bazylar, “The Holocaust Restitution Movement in Comparative Perspective”, Paper presented at the Association of Genocide Scholars, 4th Biennial Conference, Minneapolis, June 2001.

²⁸⁸ “Payment for Past: Survivors May Finally Collect Claims”, *The Christian Science Monitor*, 21 August 1998.

²⁸⁹ “News in Brief”, *The Christian Science Monitor*, 25 March 1999.

300. The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery stated in its first findings that:

In examining the government of Japan's obligation to provide reparations, we refer to the longstanding principle of international law that the state must provide a remedy for its international wrongs. The state's responsibility is to provide compensation, restitution, rehabilitation, satisfaction and guarantees of non-repetition. Reparation includes any or all forms that are applicable to the situation and cover all injuries suffered by the victim . . .

Under international law, compensation must come from the government and must be adequate to the material harm, lost opportunities and emotional suffering of the victims, their families and close associates.²⁹⁰

The Women's International War Crimes Tribunal therefore recommended that:

The government of Japan . . . enact legislation and take all necessary and appropriate measures to compensate the victims and survivors and those entitled to recover as a result of the violations declared herein through the government and in amounts adequate to redress the harm and deter its future occurrence.²⁹¹

Forms of reparation other than compensation

Note: *For practice concerning investigation of enforced disappearance, see Chapter 32, section K.*

I. Treaties and Other Instruments

Treaties

301. The 1946 Paris Agreement on Reparation from Germany was concluded:

in order to obtain an equitable distribution among [the signatory governments] of the total assets which . . . are or may be declared to be available as reparation from Germany . . . in order to establish an Inter-Allied Reparation Agency, and to settle an equitable procedure for the restitution of monetary gold.

302. The single Article of Part III of the 1946 Paris Agreement on Reparation from Germany, entitled "Restitution of monetary gold", provides that:

- A. All the monetary gold found in Germany by the Allied Forces . . . shall be pooled for distribution as restitution among the countries participating in the pool in proportion to their respective losses of gold through looting or by wrongful removal to Germany.

²⁹⁰ Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, *The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan*, Summary of Findings, 12 December 2000, § 32 and 35.

²⁹¹ Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, *The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan*, Summary of Findings, 12 December 2000, Preliminary Recommendations.

- B. Without prejudice to claims by way of reparation for unrestored gold, the portion of monetary gold thus accruing to each country participating in the pool shall be accepted by that country in full satisfaction of all claims against Germany for restitution of monetary gold.
- C. A proportional share of the gold shall be allocated to each country concerned which adheres to this arrangement for the restitution of monetary gold and which can establish that a definite amount of monetary gold belonging to it was looted by Germany or, at any time after 12 March 1938, was wrongfully removed into German territory.

303. Article 41 of the 1950 ECHR provides that:

If the [ECtHR] finds that there has been a violation of the Convention or the protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the [ECtHR] shall, if necessary, afford just satisfaction to the injured party.

304. Article 2 of Chapter Three ("Internal Restitution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

The Federal Republic [of Germany] hereby acknowledges the need for, and assumes the obligation to implement fully and by every means in its power, the legislation . . . and the programmes for restitution and re-allocation thereunder provided. The Federal Republic shall entrust a Federal Agency with ensuring the fulfilment of the obligation undertaken under this Article, paying due regard to the provisions of the [German] Basic Law.

305. Article 4 of Chapter Three ("Internal Restitution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

- 1. The Federal Republic [of Germany] hereby undertakes
 - (a) . . . to ensure the payment to restitutees of all judgments or awards which have been or hereafter shall be given or made against the former German Reich . . .
 - (b) to assume forthwith, by appropriate arrangements with the City of Berlin, liability for the payment . . . of all judgments and awards against the former German Reich under the internal restitution legislation in the Western Sector of Berlin.
- ...
- 3. The obligation of the Federal Republic to the Three Powers with respect to money judgments and awards under paragraph 1 of this Article shall be satisfied when such judgments and awards shall have been paid or shall, if the Federal Republic so requests, be considered to have been satisfied when the Federal Republic shall have paid a total of DM 1,500,000,000 thereon.

306. By Article 6 of Chapter Three ("Internal Restitution") of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation, a "Supreme Restitution Court" was established.

307. Article 1, first paragraph, of Chapter Five (“External Restitution”) of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

Upon the entry into force of the present Convention, the Federal Republic [of Germany] shall establish, staff and equip an administrative agency which shall... search for, recover, and restitute jewellery, silverware and antique furniture... and cultural property, if such articles or cultural property were, during the occupation of any territory, removed therefrom by the forces or authorities of Germany or its Allies or their individual members (whether or not pursuant to orders) after acquisition by duress (with or without violence), by larceny, by requisitioning or by other forms of dispossession by force.

308. Paragraph 1 of Article 3 of Chapter Five (“External Restitution”) of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that:

Notwithstanding provisions of German law to the contrary, any person who, or whose predecessor in title, during the occupation of a territory, has been dispossessed of his property by larceny or by duress (with or without violence) by the forces or authorities of Germany or its Allies, or their individual members (whether or not pursuant to orders), shall have a claim against the present possessor of such property for its restitution.

309. Paragraph 1 of Article 3 of Chapter Six (“Reparation”) of the 1952 Convention on the Settlement of Matters Arising out of the War and the Occupation provides that “the Federal Republic [of Germany] shall in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property, seized for the purpose of... restitution”.

310. Paragraphs 1, 3 and 4 of the 1954 Hague Protocol provide that:

1. Each High Contracting Party undertakes to prevent the exportation, from a territory occupied by it during an armed conflict, of cultural property as defined in Article 1 of the [1954 Hague Convention].
- ...
3. Each High Contracting Party undertakes to return, at the close of hostilities, to the competent authorities of the territory previously occupied, cultural property which is in its territory, if such property has been exported in contravention of the principle laid down in the first paragraph. Such property shall never be retained as war reparations.
4. The High Contracting Party whose obligation it was to prevent the exportation of cultural property from the territory occupied by it, shall pay an indemnity to the holders in good faith of any cultural property which has to be returned in accordance with the preceding paragraph.

311. Article 26 of the 1955 Austrian State Treaty, which in its preamble considers that “on 13 March 1938, Hitlerite Germany annexed Austria by force and incorporated its territory in the German Reich”, states that:

1. In so far as such action has not already been taken, Austria undertakes that, in all cases where property, legal rights or interests in Austria have since 13 March 1938, been subject of forced transfer or measures of sequestration, confiscation or control on account of the racial origin or religion of the owner, the said property shall be returned and the said legal rights and interests shall be restored together with their accessories . . .
2. Austria agrees to take under its control all property, legal rights and interests in Austria of persons, organizations or communities which, individually or as members of groups, were the object of racial, religious or other Nazi measures of persecution where, in the case of persons, such property, rights and interests remain heirless or unclaimed for six months after the coming into force of the present Treaty, or where in the case of organizations and communities such organizations or communities have ceased to exist. Austria shall transfer such property, rights and interests to appropriate agencies or organizations to be designated by the Four Heads of Mission in Vienna by agreement with the Austrian Government to be used for the relief and rehabilitation of victims of persecution by the Axis Powers.

Part IV ("Claims arising out of the War", Articles 21–24) and Part V ("Property, Rights and Interests", Articles 25–28) provide for more detailed and comprehensive settlement of all property claims on a State-to-State level.

312. Article 63(1) of the 1969 ACHR provides that:

If the [IACtHR] finds that there has been a violation of a right or freedom protected by this Convention, the Court shall . . . also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation be paid to the injured party.

313. Article 75(1) of the 1998 ICC Statute provides that "the Court shall establish principles relating to reparations to, or in respect of, victims, including restitution . . . and rehabilitation".

314. Article 27(1) of the 2003 Protocol to the ACHPR on the Establishment of an African Court on Human and Peoples' Rights which was signed in 1998 provides that "if the Court finds that there has been violation of a human or peoples' right, it shall make appropriate orders to remedy the violation, including the payment of fair compensation or reparation".

Other Instruments

315. Protocol No. 1 of the 1952 Luxembourg Agreement between Germany and the CJMC, concluded at a meeting between the representatives of the FRG and the CJMC at which "the extension of the legislation existing in the Federal Republic of Germany for the redress of National-Socialist wrongs" was discussed and at which the representatives of both parties "agreed on a number of principles for the improvement of the existing legislation as well as on other measures", states that:

II. Restitution

1. The legislation now in force in the territory of the Federal Republic of Germany concerning restitution of identifiable property to victims of National-Socialist persecution shall remain in force without any restrictions...
2. The Federal Government will see to it that the Federal Republic of Germany accepts liability also for confiscation of household effects in transit which were seized by the German Reich in European ports outside of the Federal Republic, in so far as the household effects belonged to persecutees who emigrated from the territory of the Federal Republic.
3. The Government of the Federal Republic of Germany will see to it that payments shall be ensured to restitutees – private persons and successor organizations appointed pursuant to law – of all judgments or awards which have been or hereafter shall be given or made against the former German Reich under restitution legislation. The same shall apply to amicable settlements...

In accordance with Article 4, paragraph 3 of Chapter Three of the Convention on the Settlement of Matters arising out of the War and the Occupation, the obligation of the Federal Republic of Germany shall be considered to have been satisfied when the judgments and awards shall have been paid or when the Federal Republic of Germany shall have paid a total of DM 1,500 million. Payments on the basis of amicable settlements shall be included in this sum.

316. Article 1(1) of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that “all refugees and displaced persons... shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them”.

317. By Article VII of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords, the Commission for Real Property Claims of Displaced Persons and Refugees in Bosnia and Herzegovina was established. According to Article XI, the mandate of the Commission was to:

receive and decide any claims for real property in Bosnia and Herzegovina, where the property has not voluntarily been sold or otherwise transferred since April 1, 1992, and where the claimant does not now enjoy possession of that property. Claims may be for return of the property or for just compensation in lieu of return.

318. Article 2(3) of Part III of the 1998 Comprehensive Agreement on Respect for Human Rights and IHL in the Philippines states that the right of the victims and their families to seek justice for violations of human rights includes “adequate compensation or indemnification, restitution and rehabilitation”.

319. In 1999, Section 2 of UNMIK Regulation No. 1999/23 established the Housing and Property Claims Commission in Kosovo. According to Section 2 of UNMIK Regulation No. 2000/60, the Commission is given the power to decide on claims for restitution, repossession and return to the property brought by certain categories of persons, among which persons who lost their property right as a result of discrimination and refugees or displaced persons.

320. Article 21 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

In accordance with their domestic law and international obligations, and taking account of individual circumstances, States should provide victims of violations of international human rights and humanitarian law the following forms of reparation: restitution, . . . rehabilitation, and satisfaction and guarantees of non-repetition.

321. Article 22 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

Restitution should, whenever possible, restore the victim to the original situation before the violations of international human rights or humanitarian law occurred. Restitution includes: restoration of liberty, legal rights, social status, family life and citizenship; return to one's place of residence; and restoration of employment and return of property.

322. Article 25 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

Satisfaction and guarantees of non-repetition should include, where applicable, any or all of the following:

- (a) Cessation of continuing violations;
- (b) Verification of the facts and full and public disclosure of the truth to the extent that such disclosure does not cause further unnecessary harm or threaten the safety of the victim, witnesses, or others;
- (c) The search for the bodies of those killed or disappeared and assistance in the identification and reburial of the bodies in accordance with the cultural practices of the families and communities;
- (d) An official declaration or a judicial decision restoring the dignity, reputation and legal and social rights of the victim and of persons closely connected with the victim;
- (e) Apology, including public acknowledgement of the facts and acceptance of responsibility;
- (f) Judicial or administrative sanctions against persons responsible for the violations;
- (g) Commemorations and tributes to the victims;
- (h) Inclusion of an accurate account of the violations that occurred in international human rights and humanitarian law training and in educational material at all levels;
- (i) Preventing the recurrence of violations.

323. Article 34 of the 2001 ILC Draft Articles on State Responsibility, dealing with "Forms of reparation", provides that "full reparation for the injury caused by the internationally wrongful act shall take the form of restitution, compensation and satisfaction, either singly or in combination, in accordance with the provisions of this Chapter".

324. Article 35 of the 2001 ILC Draft Articles on State Responsibility, entitled “Restitution”, provides that:

A State responsible for an internationally wrongful act is under an obligation to make restitution, that is, to re-establish the situation which existed before the wrongful act was committed, provided and to the extent that restitution:

- a) Is not materially impossible;
- b) Does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation.

325. Article 37 of the 2001 ILC Draft Articles on State Responsibility, entitled “Satisfaction”, provides that:

1. The State responsible for an internationally wrongful act is under an obligation to give satisfaction for the injury caused by that act insofar as it cannot be made good by restitution or compensation.
2. Satisfaction may consist in an acknowledgement of the breach, an expression of regret, a formal apology or another appropriate modality.
3. Satisfaction shall not be out of proportion to the injury and may not take a form humiliating to the responsible State.

II. National Practice

Military Manuals

326. Hungary’s Military Manual, in a section entitled “Measures required after a conflict”, requires the restoration of “normal conditions” and provides for the “return [of] . . . objects” and the “return [of] cultural objects”.²⁹² In a section entitled “After combat”, the manual repeats the instruction to “restore normal conditions” and provides for the “return of civilian . . . objects” and the “restitution of requisitioned objects”.²⁹³

327. The Joint Circular on Adherence to IHL and Human Rights of the Philippines states that in the case of damage to private property in the course of legitimate security or police operations, “measures shall be undertaken whenever practicable . . . to repair the damage caused”.²⁹⁴

328. The US Field Manual, under the heading “Remedies of Injured Belligerent”, provides that:

In the event of [a] violation of the law of war, the injured party may legally resort to remedial action of the following types:

- a) Publication of the facts, with a view to influencing public opinion against the offending belligerent.
- b) Protest . . . and/or punishment of the individual offenders. Such communications may be sent through the protecting power, a humanitarian organization performing the duties of a protecting power, or a neutral state, or by parlementaire direct to the commander of the offending forces . . .

²⁹² Hungary, *Military Manual* (1992), p. 38. ²⁹³ Hungary, *Military Manual* (1992), p. 80.

²⁹⁴ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(a.4).

- c) Solicitation of the good offices, mediation, or intervention of neutral States for the purpose of making the enemy observe the law of war.
- d) Punishment of captured offenders as war criminals.²⁹⁵

National Legislation

329. In 2001, Austria adopted the General Settlement Fund Law (which was later amended) which provides that “an Arbitration Panel for the examination of applications for *in rem* restitution of publicly-owned property shall be established with the fund”.²⁹⁶ The Law further provides that:

- (1) Persons and associations who/which were persecuted by the National Socialist regime on political grounds, on grounds of origin, religion, sexual orientation, or of physical or mental handicap, or of accusations of so-called asociality, or who left the country to escape such persecution, and who suffered losses or damages as a result of or in connection with events having occurred on the territory of the present-day Republic of Austria during the National Socialist era shall be eligible to file an application.
- (2) In addition . . . heirs of eligible claimants as defined in Paragraph 1 shall also be eligible to file an application. In case of a defunct association, an association which the Arbitration Panel regards as the legal successor shall be entitled to file an application as well.²⁹⁷

As to restitutable publicly-owned property, the Law provides that:

- (1) For the purposes of *in rem* restitution, the notion of “publicly-owned property” shall cover . . . real estate (land) and buildings (superstructures) . . .
- (2) For the purposes of *in rem* restitution to Jewish communal organizations, the notion “publicly-owned property” shall furthermore cover tangible movable property, particularly cultural and religious items.²⁹⁸

330. Since the end of the Second World War, Germany has adopted several laws related to reparation and restitution for victims of the war and the holocaust, for example the Federal Restitution Law as amended.²⁹⁹

331. In 1988, the US passed the Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended), the purpose of which was, *inter alia*, to:

- (1) acknowledge the fundamental injustice of the evacuation, relocation, and internment of United States citizens and permanent resident aliens of Japanese ancestry during World War II;
- (2) apologize on behalf of the people of the United States [for these acts];
- (3) provide for a public education fund to finance efforts to inform the public about the internment of such individuals so as to prevent the recurrence of any similar event;

²⁹⁵ US, *Field Manual* (1956), § 495.

²⁹⁶ Austria, *General Settlement Fund Law as amended* (2001), Article 1(23)(1).

²⁹⁷ Austria, *General Settlement Fund Law as amended* (2001), Article 1(27).

²⁹⁸ Austria, *General Settlement Fund Law as amended* (2001), Article 1(28).

²⁹⁹ Germany, *Federal Restitution Law as amended* (1957).

- (4) make restitution to those individuals of Japanese ancestry who were interned;
- (5) make restitution to Aleut residents of the Pribilof Islands and the Aleutian Islands west of Unimark Island, in settlement of United States obligations in equity and at law, for –
 - (A) injustices suffered and unreasonable hardships endured while those Aleut residents were under United States control during World War II;
 - (B) personal property taken or destroyed by the United States forces during World War II;
 - (C) community property, including community church property, taken or destroyed by United States forces during World War II; and
 - (D) traditional village islands on Attu Island not rehabilitated after World War II for Aleut occupation or other productive use;
- (6) discourage the occurrence of similar injustices and violations of civil liberties in the future; and
- (7) make more credible and sincere any declaration of concern by the United States over violations of human rights committed by other nations.³⁰⁰

Title I of the Law, entitled “United States Citizens of Japanese Ancestry and Resident Japanese Aliens”, provides that:

Each department and agency of the United States Government shall review with liberality, giving full consideration to the findings of the Commission and the statement of the Congress set forth in section 2(a) [section 1989a(a) of this Appendix], any application by an eligible individual for the restitution of any position, status, or entitlement lost in whole or in part because of any discriminatory act of the United States Government against such individual which was based upon the individual’s Japanese ancestry and which occurred during the evacuation, relocation, and internment period.³⁰¹

National Case-law

332. In its judgement in the *J. T. case* in 1949 in which an individual had sued the State for repayment of money taken by the police during the arrest of the claimant during the occupation of the Netherlands by the German army, the District Court of The Hague held that the State of the Netherlands must repay the money to the plaintiff. The Court held that it was true that the State was not liable for all acts committed by the resistance movement (*Binnenlandse Strijdkrachten*) which had been organized with the consent of the government in exile during Second World War, but since it was definitely established that the money had come into the hands of the police, restitution had to be made.³⁰²

³⁰⁰ US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Purposes, Section 1989.

³⁰¹ US, *Law on Restitution for WWII Internment of Japanese-Americans and Aleuts (as amended)* (1988), Title I, Section 1989b-2.

³⁰² Netherlands, District Court of The Hague, *J. T. case*, Judgement, 13 April 1949.

Other National Practice

333. In 1988, the Canadian government concluded an agreement with the National Association of Japanese Canadians, the so-called Japanese-Canadian Redress Agreement, the terms of which provided that:

Despite perceived military necessities at the time, the forced removal and internment of Japanese Canadians during World War II and their deportation and expulsion following the war, was unjust. In retrospect, government policies of disenfranchisement, detention, confiscation and sale of private and community property, expulsion, deportation and restriction of movement, which continued after the war, were influenced by discriminatory attitudes. Japanese Canadians who were interned had their property liquidated and the proceeds of sale were used to pay for their own internment.

...

Therefore, the Government of Canada, on behalf of all Canadians, does hereby:

- 1) acknowledge that the treatment of Japanese Canadians during and after World War II was unjust and violated principles of human rights as they are understood today;
- 2) pledge to ensure, to the full extent that its powers allow, that such events will not happen again; and
- 3) recognize, with great respect, the fortitude and determination of Japanese Canadians who, despite great stress and hardship, retain their commitment and loyalty to Canada and contribute so richly to the development of the Canadian nation.³⁰³

334. In 1997, the French government, created by a decree a "Study Mission on the Spoliation of Jews in France" (also known as the "Mattéoli Mission") with the task of conducting a study of the various forms of spoliation visited upon the Jews of France during Second World War, and of the scope and effect of post-war restitution efforts.³⁰⁴

335. According to the Report on the Practice of Kuwait, Kuwait insisted, before the UN, on the restitution by Iraq of the cultural objects that were taken from Kuwaiti institutions during the occupation, or that compensation be paid.³⁰⁵

336. In 1993, the Chief Cabinet Secretary of the Japanese Ministry of Foreign Affairs stated, with respect to the recruitment and abuse during Second World War of the so-called "comfort women" by the Japanese military, that "the Government of Japan would like . . . to extend its sincere apologies and remorse to all those, irrespective of place of origin, who suffered immeasurable pain and incurable physical and psychological wounds as comfort women".³⁰⁶

³⁰³ Canada, Prime Minister, *Agreement between the Government of Canada and the National Association of Japanese Canadians (Japanese-Canadian Redress Agreement)*, 22 September 1988.

³⁰⁴ France, First Minister, Decree regarding the Study Mission on the Spoliation of Jews during World War II in France, 25 March 1997, *Journal Officiel de la République française*, 26 March 1997, p. 4721.

³⁰⁵ Report on the Practice of Kuwait, 1997, Chapter 6.2.

³⁰⁶ Japan, Ministry of Foreign Affairs, Statement by the Chief Cabinet Secretary on the result of the study on the issue of "comfort women", 4 August 1993.

337. In 1994, the Prime Minister of Japan stated that “on the issue of wartime ‘comfort women’ [recruited and abused by the Japanese military during Second World War], which seriously stained the honour and dignity of many women, I would like to . . . express my profound and sincere remorse and apologies”.³⁰⁷

338. In 1995, the Chief Cabinet Secretary of the Japanese Ministry of Foreign Affairs made a statement to the effect that:

Based on our remorse for the past . . . the project of the “Asian Peace and Friendship Foundation for Women” will be undertaken as follows.

1. The following activities will be conducted for the former wartime comfort women, through the cooperation of the Japanese People and the Government:
 - i. The Foundation will raise funds in the private sector as a means to enact the Japanese people’s atonement for former wartime comfort women.
 - ii. The Foundation will support those conducting medical and welfare projects and other similar projects which are of service to former wartime comfort women, through the use of government funding and other funds.
 - iii. When these projects are implemented, the Government will express the nation’s feelings of sincere remorse and apology to the former wartime comfort women.³⁰⁸

339. In 1995, the Prime Minister of Japan, with respect to the Asian Women’s Fund established in July 1995 by the proponents from the legal, academic and NGO sectors in Japan with the support of the government of Japan to the benefit of the victims recruited and abused as “comfort women” by the Japanese military during Second World War, offered his “profound apology to all those who, as wartime comfort women, suffered emotional and physical wounds that can never be closed”. The Prime Minister further stated that:

Established on this occasion and involving the cooperation of the Government and citizens of Japan, the “Asian Women’s Fund” is an expression of atonement on the part of the Japanese people toward these women and supports medical, welfare, and other projects. As articulated in the proponents’ Appeal, the Government will do its utmost to ensure that the goals of the Fund are achieved.³⁰⁹

340. In 1970, during a debate in the Special Political Committee of the UN General Assembly on measures carried out by Israel in the occupied territories, Poland stated that:

The destruction of houses and the confiscation of property, which were designed to demoralize the inhabitants of certain areas and to force them to abandon their homes, were in violation of the basic principles of international law and contrary to the provisions of article 46 of the [1907 HR] and article 53 of the fourth Geneva Convention. Since such acts were illegal, the Government of Israel was liable . . . for the restitution of confiscated property.³¹⁰

³⁰⁷ Japan, Statement by the Prime Minister on the “Peace, Friendship, and Exchange Initiative”, 3 August 1994.

³⁰⁸ Japan, Ministry of Foreign Affairs, Statement by the Chief Cabinet Secretary, 14 June 1995.

³⁰⁹ Japan, Statement by the Prime Minister on the occasion of the establishment of the “Asian Women’s Fund”, July 1995.

³¹⁰ Poland, Statement before the Special Political Committee of the UN General Assembly, UN Doc. A/SPC/SR.748, 10 December 1970, § 9.

341. In a concurrent resolution adopted in 2000 concerning the war crimes committed by the Japanese military during Second World War, the US Congress expressed its sense that “the Government of Japan should – (1) formally issue a clear and unambiguous apology for the atrocious war crimes committed by the Japanese military during World War II”.³¹¹

342. In 2001, a draft concurrent resolution was put before the US Congress for it to call upon the government of Japan to “formally issue a clear and unambiguous apology for the sexual enslavement of young women during colonial occupation of Asia and the Pacific Islands during World War II, known to the world as ‘comfort women’”.³¹²

III. Practice of International Organisations and Conferences

United Nations

343. In a resolution adopted in 1976 on South Africa’s military activities against Angola, the UN Security Council called upon the government of South Africa “to meet the just claims of the People’s Republic of Angola . . . for the restoration of the equipment and materials which its invading forces seized”.³¹³

344. In a resolution adopted in 1980, the UN Security Council, recalling Articles 1 and 49 GC IV, called upon the government of Israel:

to rescind the illegal measures taken by the Israeli military occupation authorities in expelling the mayors of Hebron and Halhoul and the Sharia Judge of Hebron, and to facilitate the immediate return of the expelled Palestinian leaders so that they can resume the functions for which they were elected and appointed.³¹⁴

345. In Resolution 687 of 1991 on Iraq, the UN Security Council noted that “despite the progress being made in fulfilling the obligations of resolution 686 (1991), many Kuwaiti and third-State nationals are still not accounted for and property remains unreturned”. It requested the UN Secretary-General “to report to the Council on the steps taken to facilitate the return of all Kuwaiti property seized by Iraq, including a list of any property that Kuwait claims has not been returned or which has not been returned intact”.³¹⁵

346. In a resolution on Liberia adopted in 1996, the UN Security Council condemned the looting of the equipment, supplies and personal property of members of ECOMOG, UNOMIL and international organisations and agencies delivering humanitarian assistance and called upon “the leaders of the factions to ensure the immediate return of looted property”. It requested that the UN

³¹¹ US, House of Representatives (Senate concurring), Concurrent Resolution, H.CON. RES. 357, 106th Congress, 2nd Session, 19 June 2000.

³¹² US, House of Representatives, 107th Congress, 1st Session, Concurrent Resolution 195, HCON 195 IH, 24 July 2001.

³¹³ UN Security Council, Res. 387, 31 March 1976, § 4.

³¹⁴ UN Security Council, Res. 469, 20 May 1980, § 2.

³¹⁵ UN Security Council, Res. 687, 8 April 1991, preamble and § 15.

Secretary-General provide “information on how much of the stolen property has been returned”.³¹⁶

347. In 2001, the UN General Assembly adopted a resolution entitled “Responsibility of States for internationally wrongful acts”, to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 34 (“Forms of reparation”), Article 35 (“Restitution”) and Article 37 (“Satisfaction”), were annexed. In the resolution, the UN General Assembly took note of the Draft Articles and commended them to the attention of governments “without prejudice to the question of their future adoption or other appropriate action”.³¹⁷

348. In a resolution adopted in 1998 on the situation of human rights in Afghanistan, the UN Commission on Human Rights urged all parties to the conflict to respect IHL and “to provide sufficient and effective remedies to the victims of grave violations and abuses of human rights and of accepted humanitarian rules and to bring the perpetrators to trial”.³¹⁸

349. In 1996, in a report on a mission to the North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, Its Causes and Consequences recommended, *inter alia*, that, at the national level:

The Government of Japan should:

(a) Acknowledge that the system of comfort stations set up by the Japanese Imperial Army during the Second World War was a violation of its obligations under international law and accept legal responsibility for that violation.

...

(d) Make a public apology in writing to individual women who have come forward and can be substantiated as women victims of Japanese military sexual slavery.³¹⁹

350. In 2001, in its commentary on Article 33 of the 2001 ILC Draft Articles on State Responsibility, the ILC stated that:

When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State’s benefit. For instance, a State’s responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.³²⁰

³¹⁶ UN Security Council, Res. 1071, 30 August 1996, § 8.

³¹⁷ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

³¹⁸ UN Commission on Human Rights, Res. 1998/70, 21 April 1998, § 5(d); see also Res. 1996/75, 23 April 1996, § 10.

³¹⁹ UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on the mission to the North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, § 137(a) and (d).

³²⁰ ILC, Commentary on Article 33 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, p. 234.

351. In 2001, in its commentary on Article 35 of the 2001 ILC Draft Articles on State Responsibility, the ILC noted that:

- (1) In accordance with article 34, restitution is the first of the forms of reparation available to a State injured by an internationally wrongful act. Restitution involves the re-establishment as far as possible of the situation which existed prior to the commission of the internationally wrongful act, to the extent that any changes that have occurred in that situation may be traced to that act. In its simplest form, this involves such conduct as the release of persons wrongly detained or the return of property wrongly seized. In other cases, restitution may be a more complex act . . .
- (3) Nonetheless, because restitution most closely conforms to the general principle that the responsible State is bound to wipe out the legal and material consequences of its wrongful act by re-establishing the situation that would exist if that act had not been committed, it comes first among the forms of reparation. The primacy of restitution was confirmed by the Permanent Court in the *Factory at Chorzów* case when it said that the responsible State was under "the obligation to restore the undertaking and, if this be not possible, to pay its value at the time of the indemnification, which value is designed to take the place of restitution which has become impossible" . . .
- (5) Restitution may take the form of material restoration or return of territory, persons or property, or the reversal of some juridical act, or some combination of them. Examples of material restitution include the release of detained individuals, the handing over to a State of an individual arrested in its territory, the handing over to a State of . . . other types of property, including documents, works of art . . .³²¹

352. In 2001, in its commentary on Article 36 of the 2001 ILC Draft Articles on State Responsibility, the ILC noted that:

Satisfaction is concerned with non-material injury, specifically non-material injury to the State, on which a monetary value can be put only in a highly approximate and notional way . . . Satisfaction . . . is the remedy for those injuries, not financially assessable, which amount to an affront [of the State].³²²

353. In 2001, in its commentary to Article 37 of the 2001 ILC Draft Articles on State Responsibility, the ILC stated that:

Satisfaction . . . is not a standard form of reparation . . . It is only in those cases where [restitution or compensation] have not provided full reparation that satisfaction may be required . . . Satisfaction . . . is the remedy for those injuries, not financially assessable, which amount to an affront to the State . . . The appropriate form of satisfaction will depend on the circumstances and cannot be prescribed in advance.

³²¹ ILC, Commentary on Article 35 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, pp. 238–240.

³²² ILC, Commentary on Article 36 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, pp. 246 and 264.

Many possibilities exist, including due inquiry into the causes of an accident resulting in harm or injury . . . , disciplinary or penal action against the individuals whose conduct caused the intentionally wrongful act or the award of symbolic damages for non-pecuniary injury. Assurances or guarantees of non-repetition, which are dealt with in the Articles in the context of cessation, may also amount to a form of satisfaction.³²³

Other International Organisations

354. No practice was found.

International Conferences

355. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

356. In its judgement in *Akdivar and Others v. Turkey* in 1998, the ECtHR stated that:

45. The applicants further submitted that the Court should confirm . . . that the government should (1) bear the costs of necessary repairs in [their village] to enable the applicants to continue their way of life there; and (2) remove any obstacle preventing the applicants from returning to their village.

In their view, such confirmation was necessary to prevent future and continuing violations of the Convention, in particular the *de facto* expropriation of their property.

46. The government maintained that the restoration of rights is not feasible due to the emergency conditions prevailing in the region. However, resettlement will take place when the local inhabitants feel themselves to be safe from terrorist atrocities.

47. The Court recalls that a judgement in which it finds a breach imposes on the respondent State a legal obligation to put an end to such breach and make reparation for its consequences in such a way as to restore as far as possible the situation existing before the breach (*restitutio in integrum*). However, if *restitutio in integrum* is in practice impossible, the respondent States are free to choose the means whereby they will comply with a judgement in which the Court has found a breach, and the Court will not make consequential orders or declaratory statements in this regard.

The Court awarded damages for pecuniary and non-pecuniary losses but dismissed the remainder of the claim for just satisfaction.³²⁴

357. In 2000, in *Monsignor Oscar Arnulfo Romero y Galdámez (El Salvador)*, the IACiHR stated that:

122. . . . The IACHR concludes that El Salvador has violated, to the prejudice of the victim's relatives, the right to judicial guarantees established in Article 8(1) of the

³²³ ILC, Commentary on Article 37 of the Draft Articles on State Responsibility, Report of the International Law Commission, 53rd Session, UN Doc. A/56/10, New York, 2001, pp. 263–266.

³²⁴ ECtHR, *Akdivar and Others v. Turkey*, Judgement, 1 April 1998, §§ 45–47.

American Convention and the right to judicial protection, set forth at Article 25 of the Convention. The Commission also concludes that the Salvadoran State, by virtue of the conduct of the authorities and institutions identified in this report, is responsible for failing to carry out its duty to investigate seriously and in good faith the violation of rights recognized by the American Convention; to identify the persons responsible for that violation, place them on trial, punish them, and make reparations for the human rights violations; and for failing in its duty to guarantee rights as established in Article 1(1)

...

147. For its part, the Human Rights Committee of the United Nations has established, on several occasions, and specifically with respect to violations of the right to life, that the victims' next-of-kin have a right to be compensated for those violations due, among other things, to the fact that they do not know the circumstances of the death and the persons responsible for the crime. The UN human rights organs have clarified and insisted that the duty to make reparations for damage is not satisfied merely by offering a sum of money to the victims' next-of-kin. First, an end must be brought to their uncertainty and ignorance, i.e. they must be given the complete and public knowledge of the truth.

148. The right that all persons and society have to know the full, complete, and public truth as to the events transpired, their specific circumstances, and who participated in them is part of the right to reparation for human rights violations, with respect to satisfaction and guarantees of non-repetition. The right of a society to have full knowledge of its past is not only a mode of reparation and clarification of what has happened, but is also aimed at preventing future violations.³²⁵

358. In 2001, in the case of the *Street Children v. Guatemala*, the IACtHR, referring to other judgements which it had rendered, stated that:

100. On many occasions, this Court has referred to the right of the next of kin of the victims to know what happened and the identity of the State agents responsible for the acts. "[W]henever there has been a human rights violation, the State has a duty to investigate the facts and punish those responsible, [...] and this obligation must be complied with seriously and not as a mere formality". Moreover, this Court has indicated that the State "is obliged to combat [impunity] by all available legal means, because [impunity] encourages the chronic repetition of human rights violations and the total defenselessness of the victims and their next of kin".

101. Accordingly, the Court reiterates that Guatemala is obliged to investigate the facts that generated the violations of the American Convention in the instant case, identify those responsible and punish them.³²⁶

V. Practice of the International Red Cross and Red Crescent Movement

359. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

Article 1, common to the four Geneva Conventions and to Protocol I, stipulates that the contracting States are under an obligation "to respect and ensure respect

³²⁵ IACiHR, *Monsignor Oscar Arnulfo Romero y Galdámez (El Salvador)*, Report, 13 April 2000, §§ 122 and 147–148.

³²⁶ IACtHR, *Street Children v. Guatemala*, Judgement, 26 May 2001, §§ 100–101.

for" those instruments. Beyond that, and on a more general level, a State is responsible for every act or omission attributable to it and amounting to a breach of an international obligation incumbent on it, including in the field of the international protection of the environment. States affected by such a breach are entitled to insist on the implementation of such rules of State responsibility, including cessation of the unlawful conduct [and] restitution.³²⁷

VI. Other Practice

360. In 1936, during the Spanish Civil War, in a note to the Portuguese Minister of Foreign Negotiations, the President of the Spanish Junta de Defensa Nacional, while denouncing and condemning certain acts of assassination, mistreatment and damage allegedly committed against his side and non-belligerent third parties by members of the adverse party (the "Red Forces Armed by the Government of Madrid"), apologised to the offended foreign government on the ground that the opposite side had not been able to enforce border security because it lacked the most elemental attributes of a territorial power. The President of the Spanish Junta de Defensa Nacional gave a guarantee to the Portuguese authorities that in no case would such acts be repeated and that the culprits would be prosecuted and punished. Moreover, he expressed his intention to repair the damage caused.³²⁸

361. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that "under international law, a state that has violated a legal obligation to another state is required to terminate the violation and, ordinarily, to make reparation, including in appropriate circumstances restitution or compensation for loss or injury".³²⁹

362. The Restatement (Third) further provides that:

A private person, whether natural or juridical, injured by a violation of an international obligation by a state, may bring a claim against that state or assert that violation as a defense

- (a) in a competent international forum when the state has consented to the jurisdiction of that forum with respect to such private claims;
- (b) in a court or other tribunal of that state pursuant to its law; or

³²⁷ ICRC, Report on the protection of the environment in time of armed conflict submitted to the UN General Assembly, reprinted in UN Doc. A/48/269, Report of the UN Secretary-General on the protection of the environment in times of armed conflict, 29 July 1993, § 47.

³²⁸ Spain, Note from the President of the Spanish Junta de Defensa Nacional to the Portuguese Minister of Foreign Negotiations concerning a supposed incursion into Portuguese territory of "Red forces armed by the Government of Madrid" resulting in the death of a commander of the "National" army, mistreatment of Spanish and Portuguese subjects, and damage to Portuguese property, Burgos, 17 September 1936, reprinted in *Ministério dos Negócios Estrangeiros, Dez anos de política externa (1936-1947), A Nação portuguesa e a segunda Guerra Mundial*, 1964, pp. 285-287.

³²⁹ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 901.

- (c) in a court or other tribunal of the injured person's state of nationality or of a third state, pursuant to the law of such state, subject to limitations under international law.³³⁰

363. It was reported that, in the period from the beginning of its operations in March 1996 to the end of February 1999, the Commission for Displaced Persons and Refugees, established by Article VII of the Agreement on Refugees and Displaced Persons annexed to the 1995 Dayton Accords, had registered over 126,000 claims relating to almost 160,000 properties. It is expected that up to 500,000 claims may be submitted.³³¹

364. The Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery stated that "reparation includes any or all forms that are applicable to the situation and cover all injuries suffered by the victim".³³²

365. In 2001, a provincial arm of the ELN in Colombia publicly apologised for the death of three children and the destruction of civilian houses which resulted from an attack with explosives which members of the ELN had conducted against a police station in the district of San Francisco, Oriente Antioqueño (Industrial Area). The ELN, which itself defined the attack as an "action of war", expressed its deep and sincere condolences to all those who had been affected by the explosion and expressed its willingness to collaborate in the recuperation of the remaining objects.³³³

³³⁰ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 906.

³³¹ Hans van Houtte, "Mass Property Claim Resolution in a Post-War Society: the Commission for Real Property Claims in Bosnia and Herzegovina", *ICLQ*, Vol. 48, 1999, p. 632.

³³² Women's International War Crimes Tribunal 2000 for the Trial of Japanese Military Sexual Slavery, *The Prosecutors and the Peoples of the Asia-Pacific Region v. Emperor Hirohito et al. and the Government of Japan*, Summary of Findings, 12 December 2000, § 32.

³³³ ELN, Head Office, Area Industrial, Communiqué relative to the events of 9 August 2001.

INDIVIDUAL RESPONSIBILITY

A. Individual Responsibility (practice relating to Rule 151)	§§ 1–456
Individual criminal responsibility	§§ 1–408
Individual civil liability	§§ 409–456
B. Command Responsibility for Orders to Commit War Crimes (practice relating to Rule 152)	§§ 457–564
C. Command Responsibility for Failure to Prevent, Repress or Report War Crimes (practice relating to Rule 153)	§§ 565–758
Prevention and repression of war crimes	§§ 565–720
Reporting of war crimes	§§ 721–759
D. Obedience to Superior Orders (practice relating to Rule 154)	§§ 760–854
E. Defence of Superior Orders (practice relating to Rule 155)	§§ 855–1023

A. Individual Responsibility**Individual criminal responsibility***I. Treaties and Other Instruments**Treaties***1. Article 227 of the 1919 Treaty of Versailles provides that:**

The Allied and Associated Powers publicly arraign William II of Hohenzollern, formerly German Emperor, for a supreme offence against international morality and the sanctity of treaties.

A special tribunal will be constituted to try the accused.

2. Article 228 of the 1919 Treaty of Versailles provides that:

The German Government recognises the right of the Allied and Associated Powers to bring before military tribunals persons accused of having committed acts in violation of the laws and customs of war. Such persons shall, if found guilty, be sentenced to punishments laid down by law.

3. Article 1 of the 1945 London Agreement provided that the IMT (Nuremberg) be established “for the trial of war criminals . . . whether they be accused

individually or in their capacity as members of organizations or groups or in both capacities”.

4. Article 6 of the 1945 IMT Charter (Nuremberg) provides that:

The Tribunal . . . shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) Crimes against peace: . . .
- (b) War crimes: . . .
- (c) Crimes against humanity: . . .

Leaders, organizers, instigators and accomplices participating in the formulation or execution of a common plan or conspiracy to commit any of the foregoing crimes are responsible for all acts performed by any persons in execution of such plan.

5. Article 7 of the 1945 IMT Charter (Nuremberg) provides that “the official position of defendants, whether as Heads of State or responsible officials in Government Departments, shall not be considered as freeing them from responsibility or mitigating punishment”.

6. Article 1 of the 1948 Genocide Convention provides that “the Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish”.

7. Article 49 GC I provides that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in the following Article.

Corresponding provisions are contained in Articles 50 GC II, 129 GC III and 146 GC IV. The grave breaches to which the obligations of paragraphs 1 and 2 apply are defined in Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV.

8. Article 28 of the 1954 Hague Convention requires States “to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit . . . a breach of the present Convention”.

9. Article 2(2) of the 1973 Convention on Crimes against Internationally Protected Persons provides that “each State Party shall make these crimes punishable by appropriate penalties which take into account their grave nature”.

10. Article 85(1) AP I provides that “the provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol”. Article 85 AP I was adopted by consensus.¹ The grave breaches of AP I are defined in Articles 11(4) and 85(3) and (4) AP I.

11. Article 4 of the 1977 OAU Convention against Mercenarism, entitled “Scope of criminal responsibility”, states that “a mercenary is responsible both for the crime of mercenarism and all related offences, without prejudice to any other offences for which he may be prosecuted”.

12. Article 4 of the 1984 Convention against Torture requires each State to “ensure that all acts of torture are offences under its criminal law” and to “make these offences punishable by appropriate penalties which take into account their grave nature”.

13. Article 9 of the 1994 Convention on the Safety of UN Personnel provides that:

1. The intentional commission of:
 - (a) A murder, kidnapping or other attack upon the person or liberty of any United Nations or associated personnel;
 - (b) A violent attack upon the official premises, the private accommodation or the means of transportation of any United Nations or associated personnel likely to endanger his or her person or liberty;
 - (c) A threat to commit any such attack with the objective of compelling a physical or juridical person to do or to refrain from doing any act;
 - (d) An attempt to commit any such attack; and
 - (e) An act constituting participation as an accomplice in any such attack, or in an attempt to commit such attack, or in organizing or ordering others to commit such attack, shall be made by each State Party a crime under its national law.
2. Each State Party shall make the crimes set out in paragraph 1 punishable by appropriate penalties which shall take into account their grave nature.

Article 2(2) underlines that:

this Convention shall not apply to a United Nations operation authorized by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.

14. Article 14 of the 1996 Amended Protocol II to the CCW provides that:

1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction or control.

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

2. The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.

15. Article 9 of the 1997 Ottawa Convention provides that:

Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

16. Article 2(1) of the 1998 Draft Convention on Forced Disappearance provides that:

The perpetrators or other participants in a constituent element of the offence as defined in article 1 of this Convention shall be punished for a forced disappearance where they knew or ought to have known that the offence was about to be or was in the process of being committed. The perpetrator of and other participants in the following acts shall also be punished:

- (a) Instigation, incitement or encouragement of the commission of the offence of forced disappearance;
- (b) Conspiracy or collusion to commit an offence of forced disappearance;
- (c) Attempt to commit an offence of forced disappearance; and
- (d) Concealment of an offence of forced disappearance.

2. Nonfulfilment of the legal duty to act to prevent a forced disappearance shall also be punished.

17. Article 1 of the 1998 ICC Statute provides for the establishment of an International Criminal Court with “the power to exercise jurisdiction over persons for the most serious crimes of international concern”.

18. Article 5(1) of the 1998 ICC Statute provides for the jurisdiction of the Court over the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

19. Article 8(2)(c) and (e) of the 1998 ICC Statute gives the Court jurisdiction over violations of common Article 3 of the 1949 Geneva Conventions and “other serious violations of the laws and customs applicable in armed conflicts not of an international character”.

20. Article 25 of the 1998 ICC Statute, entitled “individual criminal responsibility”, provides that:

1. The Court shall have jurisdiction over natural persons pursuant to this Statute.
2. A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.

3. In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:
 - (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
 - (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
 - (c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
 - (d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
 - (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
 - (ii) Be made in the knowledge of the intention of the group to commit the crime;
 - (e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;
 - (f) Attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this Statute for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

21. Article 30(1) of the 1998 ICC Statute provides that “unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge”.

22. Article 15(1) of the 1999 Second Protocol to the 1954 Hague Convention provides a list of acts being considered as offences within the meaning of the Protocol. Article 15(2) provides that:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention provides that “this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties”.

23. Article 4 of the 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that:

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.
2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

24. Article 1(1) of the 2002 Agreement on the Special Court for Sierra Leone, concluded pursuant to Security Council Resolution 1315 (2000), provides for the establishment of a Special Court for Sierra Leone “to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”.

25. Article 1(1) of the 2002 Statute of the Special Court for Sierra Leone provides that “the Special Court shall . . . have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996”.

26. Article 6 of the 2002 Statute of the Special Court for Sierra Leone, entitled “Individual criminal responsibility”, provides that:

1. A person who planned, instigated, . . . committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute [i.e. crimes against humanity, violations of common Article 3 of the 1949 Geneva Conventions and of AP II, and other serious violations of international humanitarian law] shall be individually responsible for the crime.
2. The official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

Other Instruments

27. Article 44 of the 1863 Lieber Code provides that:

All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.

28. Article 47 of the 1863 Lieber Code provides that:

Crimes punishable by all penal codes, such as arson, murder, maiming, assaults, highway robbery, theft, burglary, fraud, forgery, and rape, if committed by an American soldier in a hostile country against its inhabitants, are not only punishable as at home, but in all cases in which death is not inflicted, the severer punishment shall be preferred.

29. Article 84 of the 1880 Oxford Manual provides that “offenders against the laws of war are liable to the punishments specified in the penal law”.

30. The 1919 Commission on Responsibility was mandated, *inter alia*, to investigate individual responsibility for breaches of the laws of war and to draft proposals for the establishment of a tribunal to try these offences. The Commission identified a non-exhaustive list of 30 categories of violations of the laws and customs of war.

31. In the 1943 Moscow Declaration, the UK, US and USSR, “speaking in the interest of the thirty-two United Nations”, expressed their determination that:

Those German officers and men and members of the Nazi party who have been responsible for or have taken a consenting part in the above atrocities, massacres and executions will be sent back to the countries in which their abominable deeds were done in order that they may be judged and punished . . . Thus, Germans who take part in . . . [such acts] will know they will be brought back to the scene of their crimes and judged on the spot by the peoples whom they have outraged.

32. Article II, Section 4(a) of the 1945 Allied Control Council Law No. 10 provides that “the official position of any person, whether as Head of State or as a responsible official in a Government Department, does not free him from responsibility for a crime or entitle him to mitigation of punishment”.

33. Article 5 of the 1946 IMT Charter (Tokyo), entitled “Jurisdiction over Persons and Offences”, provides that:

The Tribunal shall have the power to try and punish Far Eastern war criminals who as individuals or as members of organizations are charged with offences which include Crimes against Peace.

The following acts, or any of them, are crimes coming within the jurisdiction of the Tribunal for which there shall be individual responsibility:

- (a) Crimes against Peace: . . .
- (b) Conventional War Crimes: Namely, violations of the laws or customs of war;
- (c) Crimes against Humanity.

34. Article 6 of the 1946 IMT Charter (Tokyo), entitled “Responsibility of Accused”, provides that:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

35. Principle I of the 1950 Nuremberg Principles provides that “any person who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment”.

36. Principle II of the 1950 Nuremberg Principles provides that “the fact that internal law does not impose a penalty for an act which constitutes a crime

under international law does not relieve the person who committed the act from responsibility under international law”.

37. Principle III of the 1950 Nuremberg Principles provides that “the fact that a person who committed an act which constitutes a crime under international law acted as Head of State or responsible Government official does not relieve him from responsibility under international law”.

38. Principle VI of the 1950 Nuremberg Principles provides that:

The crimes hereinafter set out are punishable as crimes under international law:

- (a) Crimes against peace: . . .
- (b) War crimes: . . .
- (c) Crimes against humanity.

39. Article 1 of the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind provides that “offences against the peace and security of mankind, as defined in this Code, are crimes under international law, for which the responsible individuals shall be punished”.

40. Article 3 of the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind provides that “the fact that a person acted as Head of State or as responsible government official does not relieve him of responsibility for committing any of the offences defined in this Code”.

41. Paragraph 11 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that:

Each party undertakes, when it is officially informed of such an allegation made or forwarded by the ICRC, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

42. Article 3 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that:

1. An individual who commits a crime against the peace and security of mankind is responsible therefor and is liable to punishment.
2. An individual who aids, abets or provides the means for the commission of a crime against the peace and security of mankind or conspires in or directly incites the commission of such a crime is responsible therefor and is liable to punishment.
3. An individual who commits an act constituting an attempt to commit a crime against the peace and security of mankind . . . is responsible therefor and is liable to punishment. Attempt means any commencement of execution of a crime that failed or was halted only because of circumstances independent of the perpetrator’s intention.

43. Article 4 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “responsibility for a crime against the peace

and security of mankind is not affected by any motives invoked by the accused which are not covered by the definition of the crime”.

44. Article 13 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “the official position of an individual who commits a crime against the peace and security of mankind, and particularly the fact that he acts as head of State or Government, does not relieve him of criminal responsibility”.

45. Article 3(i) of the 1992 London Programme of Action on Humanitarian Issues provides that:

In carrying out the Programme of Action, the parties to the conflict undertook to abide by the following provisions:

- i) all parties to the conflict are bound to comply with their obligations under International Humanitarian Law and in particular the Geneva Conventions of 1949 and the Additional Protocols thereto, and that persons who commit or order the commission of grave breaches are individually responsible.

46. Articles 2–5 of the 1993 ICTY Statute give the ICTY the power to prosecute grave breaches of the Geneva Conventions (Article 2), violations of the laws or customs of war (Article 3), genocide (Article 4) and crimes against humanity (Article 5). Article 5 expressly states that the Tribunal has jurisdiction over such crimes “when committed in armed conflict, whether international or internal in character”.

47. Article 6 of the 1993 ICTY Statute provides that the ICTY has jurisdiction over natural persons.

48. Article 7 of the 1993 ICTY Statute provides that:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

49. Article 20 of the 1994 ILC Draft Statute for an International Criminal Tribunal provides for the jurisdiction of an International Criminal Court with respect to the following crimes:

- (a) the crime of genocide;
- (b) the crime of aggression;
- (c) serious violations of the laws and customs applicable in armed conflict;
- (d) crimes against humanity;
- (e) crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct of the alleged, constitute exceptionally serious crimes of international concern.

50. The Annex to the 1994 ILC Draft Statute for an International Criminal Tribunal, entitled "Crimes pursuant to Treaties (see art. 20 (e))" refers, *inter alia*, to grave breaches of the Geneva Conventions, API, the crimes defined by Article 2 of the 1973 Convention on Crimes against Internationally Protected Persons, and the crime of torture made punishable by Article 4 of the 1984 Convention against Torture.

51. The 1994 ICTR Statute grants the Tribunal the power to prosecute persons accused of genocide (Article 2), crimes against humanity (Article 3), and serious violations of common Article 3 of the 1949 Geneva Conventions and of AP II (Article 4).

52. Article 5 of the 1994 ICTR Statute provides that the ICTR shall have jurisdiction over natural persons.

53. Article 6 of the 1994 ICTR Statute provides that:

1. A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime.
2. The official position of any accused person, whether as Head of State or Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.

54. Section 20 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that "in the event of breaches of rules of international humanitarian law protecting the environment, measures shall be taken to stop any such violation and to prevent further breaches... In serious cases, offenders shall be brought to justice."

55. Paragraph 30 of the 1994 CSCE Code of Conduct provides that "each participating State... will ensure that [armed forces personnel] are aware that they are individually accountable under national and international law for their actions".

56. Article 2 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Individual responsibility", provides that:

1. A crime against the peace and security of mankind entails individual responsibility.
...
3. An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:
 - (a) intentionally commits such a crime;
...
 - (d) knowingly aids, abets or otherwise assists, directly and substantially, in the commission of such a crime, including providing the means for its commission;
 - (e) directly participates in planning or conspiring to commit such a crime which in fact occurs;

- (f) directly and publicly incites another individual to commit such a crime which in fact occurs;
- (g) attempts to commit such a crime by taking action commencing the execution of a crime which does not in fact occur because of circumstances independent of his intentions.

57. Article 7 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “the official position of an individual who commits a crime against the peace and security of mankind, even if he acted as head of State or Government, does not relieve him of criminal responsibility or mitigate punishment”.

58. Article 16 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled “Crime of aggression”, provides that “an individual who, as leader or organizer, actively participates in . . . the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression”.

59. Section 4 of the 1999 UN Secretary-General’s Bulletin provides that “in case of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts”.

60. Section 1(1) and (2) of the 2000 UNTAET Regulation No. 2000/15 “on the establishment of panels with exclusive jurisdiction over serious criminal offences” establishes “panels of judges . . . within the District Court in Dili with exclusive jurisdiction to deal with serious criminal offences” and “panels within the Court of Appeal in Dili to hear and decide an appeal”.

61. Section 1(3) of the 2000 UNTAET Regulation No. 2000/15 provides that:

[The panels of judges] . . . shall exercise jurisdiction in accordance with Section 10 of UNTAET Regulation No. 2000/11 and with the provisions of the present regulation with respect to the following serious criminal offences:

- (a) Genocide;
- (b) War Crimes;
- (c) Crimes against Humanity;
- (d) Murder;
- (e) Sexual Offences; and
- (f) Torture.

62. Section 14 of the 2000 UNTAET Regulation No. 2000/15 provides that:

14.1 The panels shall have jurisdiction over natural persons pursuant to the present regulation.

14.2 A person who commits a crime within the jurisdiction of the panels shall be individually responsible and liable for punishment in accordance with the present regulation.

14.3 In accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person:

- (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;
- (c) for the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;
- (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose . . .
- (e) in respect of the crime of genocide, directly and publicly incites others to commit genocide;
- (f) attempts to commit such a crime by taking action that commences its execution by means of a substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under the present regulation for the attempt to commit that crime if that person completely and voluntarily gave up the criminal purpose.

63. Article 58 of the 2001 ILC Draft Articles on State Responsibility, entitled "Individual responsibility", states that "these articles are without prejudice to any question of the individual responsibility under international law of any person acting on behalf of a State".

II. National Practice

Military Manuals

64. Argentina's Law of War Manual reiterates the provisions of the Geneva Conventions requiring States to take the necessary legislative measures to provide effective penal sanctions for persons committing grave breaches.² It further notes that "offences under the laws of war do not constitute 'acts of war' and thus may be punished under the Military Penal Code or the Penal Code . . . All violations of the laws of war are offences which affect the international relations of the Nation and, as such, are subject to sanction."³

65. Australia's Defence Force Manual provides that "ADF members are open to prosecution for breaches of LOAC. Individual responsibility for compliance cannot be avoided and ignorance is not a justifiable excuse. ADF members will be held to account for any unlawful action that leads to a serious breach of LOAC."⁴

66. Australia's Defence Training Manual states that members of the ADF "are to be aware of the rules which, if violated, make an individual personally liable for breaches of LOAC".⁵

² Argentina, *Law of War Manual* (1989), § 8.02.

³ Argentina, *Law of War Manual* (1989), § 8.05.

⁴ Australia, *Defence Force Manual* (1994), § 1306; see also *Commanders' Guide* (1994), § 1207.

⁵ Australia, *Defence Training Manual* (1994), § 8(d).

67. Benin's Military Manual provides that "the soldier shall know that respect for these rules [of the law of war] is a part of military discipline and that any violation will lead to disciplinary or criminal sanctions".⁶

68. Cameroon's Disciplinary Regulations provides that the violation of the rules of the law of war renders members of the armed forces war criminals, liable to prosecution under military jurisdiction.⁷

69. Canada's LOAC Manual states that "heads of state as well as members of the administration may be held personally and criminally responsible for illegalities committed in the performance of their official duties".⁸ The manual further notes that "any person who planned, instigated, . . . committed or otherwise aided and abetted in the planning, preparation or execution of a war crime . . . may be held criminally responsible for the crime".⁹ It adds that "the official position of any accused person, whether as Head of State or as a responsible government official, does not relieve such person of criminal responsibility nor mitigate punishment".¹⁰

70. Colombia's Basic Military Manual states that "under the terms of Chapter IX of the First Geneva Convention relative to the repression of abuses and infractions, IHL establishes the principle of individual responsibility".¹¹

71. The Military Manual of the Dominican Republic tells soldiers: "If you violate any of the laws of war, you commit a crime and are subject to punishment under the . . . laws and the Code of Military Justice".¹²

72. Ecuador's Naval Manual states that "acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population".¹³

73. El Salvador's Human Rights Charter of the Armed Forces provides that "nobody shall escape the law, when a violation of human rights has been committed".¹⁴ It adds that "the committed violations shall not go unpunished".¹⁵

74. France's LOAC Manual states that "each individual is responsible for the violations of the law of armed conflict he has committed, whatever the circumstances".¹⁶

75. Germany's Military Manual provides that "each member of the armed forces who has violated the rules of international humanitarian law must be aware of the fact that he can be prosecuted according to penal or disciplinary provisions".¹⁷ A commentary on the manual notes that:

⁶ Benin, *Military Manual* (1995), Fascicule II, p. 15.

⁷ Cameroon, *Disciplinary Regulations* (1975), Article 35.

⁸ Canada, *LOAC Manual* (1999), p. 15-2, § 10.

⁹ Canada, *LOAC Manual* (1999), p. 16-4, § 24.

¹⁰ Canada, *LOAC Manual* (1999), p. 16-4, § 25.

¹¹ Colombia, *Basic Military Manual* (1995), p. 37.

¹² Dominican Republic, *Military Manual* (1980), p. 12.

¹³ Ecuador, *Naval Manual* (1989), § 6.2.5.

¹⁴ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 16.

¹⁵ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 17.

¹⁶ France, *LOAC Manual* (2001), p. 113.

¹⁷ Germany, *Military Manual* (1992), § 1207.

The Second Additional Protocol (AP II) does not mention grave breaches. Article 6 nevertheless regulates the prosecution and punishment of criminal offences connected with armed conflict. The AP II presumes application of domestic criminal law, whereby the domestic power of sentence is subordinate to the demands of the Protocol.¹⁸

76. Italy's IHL Manual states that individual criminal responsibility for those who commit a war crime is provided for under Italian law.¹⁹

77. The Military Manual of the Netherlands contains a provision entitled "Individual responsibility", which refers to the detailed provisions on the suppression and punishment of war crimes contained in the manual.²⁰

78. Peru's Human Rights Charter of the Security Forces provides that "nobody shall escape the law when a violation of human rights has been committed. There shall be no impunity when a violation of human rights has been committed."²¹

79. South Africa's LOAC Manual states that "the conventions and protocols place specific obligations on individual members of the SANDF; breaches thereof may lead to personal liability".²² It further states that "signatory States are required to treat as criminals under domestic law anyone who commits or orders a grave breach".²³

80. Spain's LOAC Manual provides that "each person is subject to personal responsibility for the acts he is committing in breach of the rules of armed conflicts and which are qualified as disciplinary offences, criminal offences or war crimes".²⁴

81. Sweden's IHL Manual provides that "individual servicemen also bear a responsibility for the observance of international humanitarian law".²⁵

82. Switzerland's Basic Military Manual provides that "the violations of the laws and customs of war, commonly known as war crimes, engage the individual responsibility of those who committed them".²⁶

83. Togo's Military Manual provides that "the soldier shall know that respect for these rules [of the law of war] is a part of military discipline and that any violation will lead to disciplinary or criminal sanctions".²⁷

84. The UK LOAC Manual states that "although international law is aimed mainly at regulating the conduct of States and their Governments, individual combatants are required to comply with the law of armed conflict".²⁸

¹⁸ Rüdiger Wolfrum, "Enforcement of International Humanitarian Law", in Dieter Fleck (ed.), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 524.

¹⁹ Italy, *IHL Manual* (1991), Vol. I, § 83.

²⁰ Netherlands, *Military Manual* (1993), p. IX-3.

²¹ Peru, *Human Rights Charter of the Security Forces* (1991), p. 21, see also p. 27.

²² South Africa, *LOAC Manual* (1996), § 4. ²³ South Africa, *LOAC Manual* (1996), § 35.

²⁴ Spain, *LOAC Manual* (1996), Vol. I, § 7.6.b.

²⁵ Sweden, *IHL Manual* (1991), Section 4.2, p. 95.

²⁶ Switzerland, *Basic Military Manual* (1987), Article 191.

²⁷ Togo, *Military Manual* (1996), Fascicule II, p. 15.

²⁸ UK, *LOAC Manual* (1981), Section 2, p. 7, § 7.

85. The US Field Manual states that:

Any person, whether a member of the armed forces or a civilian, who commits an act which constitutes a crime under international law is responsible therefor and liable to punishment. Such offences in connection with war comprise:

- a. Crimes against peace.
- b. Crimes against humanity.
- c. War crimes.

Although this manual recognizes the criminal responsibility of individuals for those offences which may comprise any of the foregoing types of crimes, members of the armed forces will normally be concerned only with those offences constituting "war crimes".²⁹

The manual also states that "conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, crimes against peace, crimes against humanity, and war crimes are punishable".³⁰ After quoting the common articles of the Geneva Conventions on penal measures (Articles 49 GCI, 50 GC II, 129 GC III and 146 GC IV), the manual states that these provisions "are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own forces".³¹ It adds that:

"Grave breaches" of the Geneva Conventions of 1949 and other war crimes which are committed by enemy personnel or persons associated with the enemy are tried and punished by United States tribunals as violations of international law. If committed by persons subject to US military law, the "grave breaches" constitute acts punishable under the Uniform Code of Military Justice. Moreover, most of the acts designated as "grave breaches" are, if committed within the United States, violations of domestic law over which the civil courts can exercise jurisdiction.³²

86. The US Air Force Pamphlet states that "combatants individually are responsible for following the law of armed conflict which obligates their nation".³³ It further states that "individual criminal responsibility is another mechanism to enforce the law of armed conflict".³⁴ The Pamphlet also contains a list of "acts [in addition to the grave breaches of the Geneva Conventions of 1949]... representative of situations involving individual criminal responsibility".³⁵

87. The US Soldier's Manual tells soldiers that "if you violate any of the laws of war, you commit a crime and are subject to punishment under US law, which includes the Uniform Code of Military Justice (UCMJ)".³⁶

²⁹ US, *Field Manual* (1956), § 498.

³⁰ US, *Field Manual* (1956), § 500.

³¹ US, *Field Manual* (1956), § 506(b).

³² US, *Field Manual* (1956), § 506(c).

³³ US, *Air Force Pamphlet* (1976), § 1-4(d).

³⁴ US, *Air Force Pamphlet* (1976), § 10-6.

³⁵ US, *Air Force Pamphlet* (1976), § 15-3(c).

³⁶ US, *Soldier's Manual* (1984), p. 26.

88. The US Naval Handbook provides that “acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population”.³⁷

89. The YPA Military Manual of the SFRY (FRY) provides that “parties to the conflict . . . are authorised and have the duty to invoke criminal responsibility” with respect to personnel of their own and enemy armed forces who commit violations of IHL.³⁸

National Legislation

90. Numerous States have adopted instruments criminalising serious violations of IHL. This has been done in a number of ways. Because of their dualist approach to treaties, after ratifying the Geneva Conventions and the Additional Protocols, many States with a common-law tradition had to adopt implementing legislation, usually called Geneva Conventions Acts, to give national effect to these instruments and, in this implementing legislation, laid down the principle of criminal responsibility. Other States adopted provisions in their codes penalising the violations. Some States adopted specific legislation criminalising the violations.

91. Argentina’s Penal Code provides that the penalty applied to the perpetrator of a crime shall also be applied to persons who cooperate with the perpetrator of the crime, which would not have taken place without such cooperation, and to those who “directly caused another person to commit the crime”.³⁹

92. Argentina’s Draft Code of Military Justice provides for the introduction of the title “Offences against protected persons and objects in case of armed conflict” in the Code of Military Justice as amended.⁴⁰ This title provides for the punishment of specified prohibited acts “committed in the event of armed conflict”.⁴¹ As to this title’s scope of application, the Draft Code states that:

[The present title applies to the following protected persons:]

- 1) The wounded, sick and shipwrecked and medical or religious personnel protected by [GC I and II or AP I];
- 2) Prisoners of war protected by [GC III or AP I];
- 3) The civilian population and [individual] civilian persons protected by [GC IV or AP I];
- 4) Persons *hors de combat* and the personnel of the protecting power and of its substitute, protected by [the Geneva Conventions or AP I];
- 5) *Parlementaires* and the persons accompanying them, protected by [the 1899 Hague Convention II];

³⁷ US, *Naval Handbook* (1995), § 6.2.5.

³⁸ SFRY (FRY), *YPA Military Manual* (1988), § 32.

³⁹ Argentina, *Penal Code* (1984), Article 45.

⁴⁰ Argentina, *Draft Code of Military Justice* (1998), Article 287, introducing a new Title XVIII, Chapter I in the *Code of Military Justice as amended* (1951).

⁴¹ Argentina, *Draft Code of Military Justice* (1998), Articles 289–296, introducing new Articles 873–880 in the *Code of Military Justice as amended* (1951).

- 6) Any other person [to which AP II] or any other international treaty to which Argentina is a party applies.⁴²

The Draft Code further provides that:

A soldier who, at the occasion of an armed conflict, commits . . . any other violation or act contrary to the provisions of the international treaties to which Argentina is a party and relating to the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property in case of armed conflict, will be punished.⁴³

93. In its Chapter 33 entitled "Crimes against the peace and security of mankind", Armenia's Penal Code provides for the punishment of certain acts, committed during armed conflicts, which violate the laws and customs of war, including "Serious breaches of international humanitarian law during armed conflict", crimes against humanity and genocide.⁴⁴

94. Australia's War Crimes Act as amended provides that:

A person who:

- (a) on or after 1 September 1939 and on or before 8 May 1945; and
- (b) whether as an individual or as a member of an organisation;

committed a war crime is guilty of an indictable offence against this Act.⁴⁵

A "serious crime" constitutes a "war crime" when committed "in the course of hostilities in a war", "in the course of an occupation", "in pursuing a policy associated with the conduct of a war or with an occupation" or, "on behalf of, or in the interests of, a power conducting a war or engaged in an occupation". War itself is defined as "(a) a war, whether declared or not; (b) any other armed conflict between countries; or (c) a civil war or similar armed conflict (whether or not involving Australia or a country allied or associated with Australia) in so far as it occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945".⁴⁶

95. Australia's Geneva Conventions Act as amended provides that "a person who, in Australia or elsewhere, commits, or aids, abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of Protocol I is guilty of an indictable offence".⁴⁷

96. Australia's ICC (Consequential Amendments) Act contains a list of acts qualified as "Genocide" (Sections 268.3–268.7), "Crimes against humanity"

⁴² Argentina, *Draft Code of Military Justice* (1998), Article 288, introducing a new Article 872 in the *Code of Military Justice as amended* (1951).

⁴³ Argentina, *Draft Code of Military Justice* (1998), Article 296, introducing a new Article 880 in the *Code of Military Justice as amended* (1951).

⁴⁴ Armenia, *Penal Code* (2003), Articles 383, 386–387 and 390–397.

⁴⁵ Australia, *War Crimes Act as amended* (1945), Section 9(1).

⁴⁶ Australia, *War Crimes Act as amended* (1945), Sections 5 and 7(1).

⁴⁷ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1).

(Sections 268.8–268.23), “War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions” (Sections 268.24–268.34), “Other serious war crimes that are committed in the course of an international armed conflict” (Sections 268.35–268.68), “War crimes that are serious violations of article 3 common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict” (Sections 268.69–268.76), “War crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict” (Sections 268.77–268.94), “War crimes that are grave breaches of Protocol I to the Geneva Conventions” (Sections 268.95–268.101). The Act also includes the penalty to be imposed for each of these crimes.⁴⁸

97. Under Austria’s Penal Code, “not only the immediate perpetrator commits a crime, but also anybody who is instigating another to commit a crime, as well as anybody who makes any contribution to somebody else’s criminal act”.⁴⁹

98. Azerbaijan’s Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War is applicable “in case Azerbaijan is a participant of intergovernmental armed conflict (war) or in case of internal armed conflict in its territory, between Azerbaijan Republic and two or more parties, even if one of these parties does not confirm the existence of such a conflict” and provides for the protection of civilian persons, POWs, the wounded and the sick as well as the missing and the dead. It states that “for the violation of the provisions of this law, accused persons are subject to disciplinary, administrative or criminal liability in accordance with the legislation of Azerbaijan Republic”.⁵⁰

99. Azerbaijan’s Criminal Code provides for punishment, *inter alia*, in case of war crimes (Article 57). In the chapter entitled “War crimes”, the Code contains further provisions criminalising: the use of “mercenaries” (Article 114); “violations of [the] laws and customs of war” (Article 115); “violations of the norms of international humanitarian law in time of armed conflict” (Article 116); “negligence or giving criminal orders in time of armed conflict” (Article 117); “pillage” (Article 118); and “abuse of protected signs” (Article 119).⁵¹

100. Bangladesh’s International Crimes (Tribunal) Act provides that:

The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely: –

- (a) Crimes against humanity . . .
- (b) Crimes against peace . . .
- (c) Genocide . . .
- (d) War Crimes . . .
- (e) violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949;

⁴⁸ Australia, *ICC (Consequential Amendments) Act* (2002), Sections 268.3–268.101.

⁴⁹ Austria, *Penal Code* (1974), Article 12.

⁵⁰ Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 1 and 31.

⁵¹ Azerbaijan, *Criminal Code* (1999), Articles 57 and 114–119.

- (f) any other crimes under international law;
- (g) attempt, abatement or conspiracy to commit any such crimes;
- (h) complicity in or failure to prevent commission of any such crimes.⁵²

101. The Geneva Conventions Act of Barbados provides that:

- (1) A grave breach of any of the Geneva Conventions of 1949 that would, if committed in Barbados, be an offence under any law of Barbados, constitutes an offence under that law when committed outside Barbados.
- (2) A person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished.⁵³

102. The Criminal Code of Belarus, in a chapter entitled “War crimes and other violations of the laws and customs of war”, provides, *inter alia*, for the punishment of specified acts, such as “mercenary activities” (Article 133), “use of weapons of mass destruction” (Article 134), “violations of the laws and customs of war” (Article 135), “criminal offences against the norms of international humanitarian law during armed conflicts” (Article 136), or “abuse of signs protected by international treaties” (Article 138).⁵⁴

103. Article 1 of Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides a list of punishable acts or omissions (“grave breaches”) committed against persons protected by the Geneva Conventions and both AP I and AP II.⁵⁵ The 1993 law was amended in 1999 to expand the range of crimes to which it applied. Since then, the crime of genocide and crimes against humanity also constitute punishable crimes under this Law.⁵⁶

104. The Criminal Code of the Federation of Bosnia and Herzegovina contains provisions regarding the punishment of certain acts, some of them committed “in time of war or armed conflict”, such as: “war crimes against civilians” (Article 154); “war crimes against the wounded and sick” (Article 155); “war crimes against prisoners of war” (Article 156); “organizing a group and instigating the commission of genocide and war crimes” (Article 157); “unlawful killing or wounding of the enemy” (Article 158); “marauding” (Article 159); “using forbidden means of warfare” (Article 160); “violating the protection granted to bearers of flags of truce” (Article 161); “cruel treatment of the wounded, sick and prisoners of war” (Article 163); “destruction of cultural and historical monuments” (Article 164); and “misuse of international emblems” (Article 166).⁵⁷ The Criminal Code of the Republika Srpska contains the same provisions.⁵⁸

⁵² Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2).

⁵³ Barbados, *Geneva Conventions Act* (1980), Section 3(1) and (2).

⁵⁴ Belarus, *Criminal Code* (1999), Articles 132–138.

⁵⁵ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3).

⁵⁶ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(1) and (2).

⁵⁷ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154–161 and 163–166.

⁵⁸ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433–445.

105. Botswana's Geneva Conventions Act provides that:

Any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions, that is to say [Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV] shall be guilty of an offence and [be punished].⁵⁹

106. Bulgaria's Penal Code as amended provides for the punishment of a list of specified acts entitled "Crimes against the laws and customs of waging war".⁶⁰

107. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that:

Whosoever conceives, plans, plots, orders, instigates to commit, attempts to commit or commits one of the infringements aimed at in articles 2, 3 and 4 respectively of this law [i.e. genocide, crimes against humanity and war crimes] is guilty of a crime of genocide, a crime against humanity [and/or] a war crime.⁶¹

War Crimes are defined as the grave breaches of the 1949 Geneva Conventions, "other serious violations of the laws and customs applicable to international armed conflicts" "serious violations of article 3 common to the four Geneva Conventions" or "other serious violations of the laws and customs applicable to armed conflicts not of an international character".⁶²

108. Cambodia's Law on the Khmer Rouge Trial provides that:

Any Suspect who planned, instigated, ordered, aided and abetted, or committed the crimes referred to in Articles 3, 4, 5, 6, 7, and 8 of this law shall be individually responsible for the crime.

The position or rank of any Suspect shall not relieve such person of criminal responsibility or mitigate punishment.

The Articles referred to deal with "any of the crimes set forth in the 1956 Penal Code", such as: homicide, torture and religious persecution (Article 3); genocide (Article 4); crimes against humanity (Article 5); grave breaches of the Geneva Conventions (Article 6); destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention (Article 7); and crimes against internationally protected persons as set forth in the Convention on Crimes against Internationally Protected Persons (Article 8), all of these acts having been committed during the period from 1975 to 1979.⁶³

109. Canada's Geneva Conventions Act as amended provides that "every person who, whether within or outside Canada, commits a grave breach referred

⁵⁹ Botswana, *Geneva Conventions Act* (1970), Section 3(1).

⁶⁰ Bulgaria, *Penal Code as amended* (1968), Articles 410–415.

⁶¹ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 5.

⁶² Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4.

⁶³ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 29.

to in Article 50 [GC I], Article 51 [GC II], Article 130 [GC III], Article 147 [GC IV] or Article 11 or 85 [AP I] is guilty of an indictable offence and [is liable to punishment]".⁶⁴

110. Canada's Crimes against Humanity and War Crimes Act states that for offences within Canada, "every person is guilty of an indictable offence who commits (a) genocide; (b) a crime against humanity; or (c) a war crime".⁶⁵ It also states that "every person who, either before or after coming into force of this section, commits outside Canada (a) genocide, (b) a crime against humanity, or (c) a war crime is guilty of an indictable offence and may be prosecuted".⁶⁶ It further adds that "war crime means an act or omission committed during an armed conflict that . . . constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts" and it specifies that the crimes described in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law".⁶⁷

111. Chile's Code of Military Justice, under the heading "Offences against international law", provides, *inter alia*, for the punishment of certain war crimes.⁶⁸

112. China's Law Governing the Trial of War Criminals contains a list of punishable offences such as war crimes.⁶⁹

113. Colombia's Penal Code, under the heading "Crimes against persons and objects protected by international humanitarian law", contains a list of provisions concerning the punishment of specified crimes committed "in the event and during an armed conflict". The persons protected are: the civilians, the persons not taking part in the hostilities and the civilians in the power of the adverse party, the wounded, sick and shipwrecked placed *hors de combat*, the combatants who have laid down their arms, because of capture, surrender, or any similar reason, the persons considered as stateless or refugees before the beginning of the conflict, and the persons protected under the 1949 Geneva Conventions and AP I and AP II.⁷⁰

114. The DRC Code of Military Justice as amended contains provisions for the punishment of a list of offences such as war crimes which are applicable "in time of war or in an area where a state of siege or a state of emergency has been proclaimed".⁷¹

115. Congo's Genocide, War Crimes and Crimes against Humanity Act provides for the punishment of the authors and perpetrators of acts such as:

⁶⁴ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1).

⁶⁵ Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 4(1).

⁶⁶ Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 6.

⁶⁷ Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 4(3) and (4).

⁶⁸ Chile, *Code of Military Justice* (1925), Articles 261–264.

⁶⁹ China, *Law Governing the Trial of War Criminals* (1946), Article 3.

⁷⁰ Colombia, *Penal Code* (2000), Articles 135–164.

⁷¹ DRC, *Code of Military Justice as amended* (1972), Articles 436, 455, 472 and 522–526.

- a) grave breaches of the Geneva Conventions . . .
- b) other grave breaches of the laws and customs applicable to international armed conflicts in the scope established by international law;
- c) grave breaches of article 3 common to the four Geneva Conventions . . .
- d) and other grave breaches recognized as applicable to armed conflicts which are not of an international character, within the scope established by international law.⁷²

116. The Geneva Conventions and Additional Protocols Act of the Cook Islands, referring to Articles 50 GC I, 51 GC II, 130 GC III, 147 GC IV and Articles 11(4) and 85(2), (3) and (4) AP I, provides that “any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the Conventions or of [AP I] is guilty of an offence”.⁷³

117. Costa Rica’s Penal Code as amended provides for the punishment of offences such as acts of genocide and “other punishable acts against human rights and international humanitarian law, provided for in the treaties adhered to by Costa Rica or in this Code”.⁷⁴ Under another provision entitled “War crimes”, it also provides for the punishment of:

Whoever, in the event of an armed conflict, commits or orders to be committed acts which can be qualified as grave breaches or war crimes, in conformity with the provisions of international treaties to which Costa Rica is a party, regarding the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property, [applicable] in cases of armed conflict, and under any other instrument of international humanitarian law.⁷⁵

The Penal Code as amended further provides for the punishment of crimes against humanity.⁷⁶

118. Côte d’Ivoire’s Penal Code as amended, in a chapter dealing with offences against the law of nations, provides for the punishment of certain acts committed “in time of war or occupation”, such as “crimes against the civilian population (Article 138) and “crimes against prisoners of war” (Article 139). It further provides for the punishment of the illegal use of distinctive signs and emblems (Article 473).⁷⁷

119. Croatia’s Criminal Code, in a chapter entitled “Criminal offences against values protected by international law”, provides for a list of punishable acts committed by “whoever” and some of them “during war, armed conflict (or occupation)”, such as: “war crimes against the civilian population” (Article 158);

⁷² Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Articles 4, 5, 10 and 11.

⁷³ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1).

⁷⁴ Costa Rica, *Penal Code as amended* (1970), Article 7.

⁷⁵ Costa Rica, *Penal Code as amended* (1970), Article 378.

⁷⁶ Costa Rica, *Penal Code as amended* (1970), Article 379.

⁷⁷ Côte d’Ivoire, *Penal Code as amended* (1981), Articles 138–139 and 473.

“war crimes against the wounded and sick” (Article 159); “war crimes against prisoners of war” (Article 160); “unlawful killing and wounding of the enemy” (Article 161); “unlawful taking of the belongings of those killed or wounded on the battlefield” (Article 162); “forbidden means of combat” (Article 163); “injury of an intermediary” (Article 164); “brutal treatment of the wounded, sick and prisoners of war” (Article 165); “unjustified delay in the repatriation of prisoners of war” (Article 166); “destruction of cultural objects or of facilities containing cultural objects” (Article 167); and “misuse of international symbols” (Article 168).⁷⁸

120. Cuba’s Military Criminal Code, in a chapter entitled “Offences committed during combat actions”, provides for the punishment of certain acts such as: “mistreatment of prisoners of war” (Article 42); “plundering” (Article 43); “violence against the population of the area of military activities” (Article 44); and “prohibited use of banners or symbols of the Red Cross” (Article 45).⁷⁹

121. Cyprus’s Geneva Conventions Act, referring to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, provides that:

Any person who, in spite of nationality, commits in the Republic or outside the Republic, any serious violation or takes part, or assists or incites another person in the commission of serious violations of the Geneva Conventions . . . shall be guilty of an offence and in case of conviction . . . be liable [to punishment].⁸⁰

122. Cyprus’s AP I Act provides that:

Any person who, in spite of nationality, commits in the Republic or outside the Republic any serious violation of the provisions of [AP I], or takes part or assists or incites another person in the commission of such a violation, shall be guilty of an offence and in case of conviction . . . be liable [to punishment].⁸¹

123. The Czech Republic’s Criminal Code as amended, under the heading “Crimes against humanity”, provides for the punishment of certain offences such as: “genocide” (Article 259); “torture and other inhuman and cruel treatment” (Article 259a); “use of a forbidden weapon or an unpermitted form of combat” (Article 262); “wartime cruelty” (Article 263); “persecution of a population” (Article 263a); “plunder in a theatre of war” (Article 264); and “misuse of internationally recognised insignia and state insignia” (Article 265).⁸²

124. The Code of Military Justice of the Dominican Republic provides for the punishment of a soldier who infringes certain rules of the LOAC, notably against prisoners of war, hospitals, temples or parlementaires.⁸³

⁷⁸ Croatia, *Criminal Code* (1997), Articles 158–168.

⁷⁹ Cuba, *Military Criminal Code* (1979), Articles 42–45.

⁸⁰ Cyprus, *Geneva Conventions Act* (1966), Section 4(1).

⁸¹ Cyprus, *AP I Act* (1979), Section 4(1).

⁸² Czech Republic, *Criminal Code as amended* (1961), Articles 259–259(a) and 262–265.

⁸³ Dominican Republic, *Code of Military Justice* (1953), Article 201.

125. El Salvador's Code of Military Justice provides for the punishment of various offences committed "in time of international or civil war", such as arson, destruction of property, plundering of inhabitants or acts of violence against persons (Article 68). It also provides for the punishment of other acts committed "in time of international war", including offences against prisoners of war, attacks on medical units, transports or personnel, abuse of the red cross, destruction of cultural property, offences against parlementaires (Article 69), despoliation of the wounded or prisoners (Article 70), despoliation of the dead (Article 71), and unnecessary requisition of buildings and objects (Article 72).⁸⁴

126. El Salvador's Penal Code provides for the punishment of acts of "Genocide" (Article 361), "Violations of the laws and customs of war" committed "during an international or a civil war" (Article 362), "Violations of the duties of humanity" (Article 363), and "Enforced disappearance of persons" (Article 364).⁸⁵

127. The Draft Amendments to the Penal Code of El Salvador provide for the punishment of a list of crimes committed during an international or internal armed conflict.⁸⁶

128. Estonia's Penal Code provides that the author of crimes against humanity (paragraph 89), genocide (paragraph 90), crimes against peace (paragraphs 91–93) or war crimes (paragraphs 94–109) shall be punished.⁸⁷ It further provides that:

- (1) Offences committed in times of war which are not provided for under this section [dealing with war crimes] are punishable on the basis of other provisions of the special part of this Code.
- (2) A person who has committed an offence provided for under this section shall be punished only for the commission of a war crime even if the offence comprises the necessary elements of other offences provided for in the special part of this Code.⁸⁸

129. Ethiopia's Penal Code, under the heading "Offences against the law of nations", provides for a list of punishable acts committed by "whosoever" such as: "war crimes against the civilian population" (Article 282); "war crimes against wounded, sick or shipwrecked persons" (Article 283); "war crimes against prisoners and interned persons" (Article 284); "pillaging, piracy and looting" (Article 285); "provocation and preparation [of the above-mentioned acts]" (Article 286); "dereliction of duty towards the enemy" (Article 287); "use of illegal means of combat" (Article 288); "maltreatment of, or dereliction of duty towards, wounded, sick or prisoners" (Article 291); "denial of justice" (Article 292); "hostile acts against international humanitarian organizations" (Article 293); "abuse of international emblems and insignia" (Article 294); and

⁸⁴ El Salvador, *Code of Military Justice* (1934), Articles 68–72.

⁸⁵ El Salvador, *Penal Code* (1997), Articles 361–364.

⁸⁶ El Salvador, *Draft Amendments to the Penal Code* (1998), Title XIX.

⁸⁷ Estonia, *Penal Code* (2001), §§ 89–109.

⁸⁸ Estonia, *Penal Code* (2001), § 94.

“hostile acts against the bearer of a flag of truce” (Article 295). Some of these provisions specify that the acts concerned be committed “in time of war, armed conflict (or occupation)” and/or “in violation of the rules of public international law”.⁸⁹ According to the Report on the Practice of Ethiopia, acts which constitute “war crimes in the context of [an] international armed conflict would also be crimes in the context of [an] internal armed conflict”.⁹⁰

130. In 1992, the transitional government of Ethiopia adopted the Special Public Prosecutor’s Office Establishment Proclamation which provides that:

Whereas . . . it is essential that higher officials of the WPE and members of the security and armed forces who have been detained at the time the EPRDF assumed control of the Country and thereafter and who are suspected of having committed offences . . . must be brought to trial;

...

Whereas it is necessary to provide for the establishment of a Special Public Prosecutor’s Office that shall conduct prompt investigation and bring to trial detainees as well as those persons who are responsible for having committed offences and are at large both within and without the Country;

Now therefore . . . it is hereby proclaimed as follows:

...

The Special Public Prosecutor’s Office . . . is hereby established.

...

The Office shall, in accordance with the law, have the power to conduct investigation and institute proceedings in respect of any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organization under the Dergue-WPE regime.⁹¹

131. Finland’s Revised Penal Code contains a chapter entitled “War crimes and crimes against humanity” and therein provides for the punishment of individuals who commit acts listed under the chapter. In some of the provisions in this chapter the Revised Penal Code specifies that the acts be committed “in an act of war” (Section 1) or punishes “violations of human rights in a state of emergency”, defined as violations of “the rules on the protection of the wounded, the sick or the distressed, the treatment of prisoners of war and the protection of the civilian population, which . . . are to be followed during war, armed conflict or occupation” (Section 4).⁹²

132. France’s Ordinance on Repression of War Crimes provides for the prosecution of certain persons having committed specific acts from the opening of hostilities.⁹³

⁸⁹ Ethiopia, *Penal Code* (1957), Articles 282–288 and 291–295.

⁹⁰ Report on the Practice of Ethiopia, 1998, Chapter 6.4.

⁹¹ Ethiopia, *Special Public Prosecutor’s Office Establishment Proclamation* (1992), preamble and Articles 2(1) and 6.

⁹² Finland, *Revised Penal Code* (1995), Chapter 11, Sections 1–4.

⁹³ France, *Ordinance on Repression of War Crimes* (1944), Article 1.

133. France's Code of Military Justice provides for the punishment of acts of pillage (Articles 427 and 428) and illegal use, in times of war, of "distinctive signs and emblems defined by international conventions" (Article 439).⁹⁴

134. France's Penal Code provides for the punishment of a list of certain acts such as genocide and crimes against humanity and also provides for a special provision in case such crimes are committed "in times of war".⁹⁵

135. France's Laws on Cooperation with the ICTY and with the ICTR provide for the punishment of authors and accomplices of serious violations of IHL.⁹⁶

136. Georgia's Criminal Code, in a part entitled "Crimes against peace and security of mankind and international humanitarian law", provides a list of punishable offences such as: "genocide" (Article 407); "crimes against humanity" (Article 408); "mercenaries" (Article 410); "wilful breaches of norms of international humanitarian law committed in armed conflict" (Article 411); "wilful breaches of norms of international humanitarian law committed in international or internal armed conflict with the threat to health or causing bodily injury" (Article 412); and "other breaches of norms of international humanitarian law" (Article 413), the latter including "any other war crime provided for in the [1998 ICC Statute]".⁹⁷ For some of these offences, the Code specifies that the acts be committed "in an international or internal armed conflict".⁹⁸

137. Germany's Law Introducing the International Crimes Code provides for the punishment of, *inter alia*, genocide (Article 1, paragraph 6), crimes against humanity (Article 1, paragraph 7) and war crimes, including "War crimes against persons" (Article 1, paragraph 8), "War crimes against property and other rights" (Article 1, paragraph 9), "War crimes against humanitarian operations and emblems" (Article 1, paragraph 10), "War crimes consisting in the use of prohibited methods of warfare" (Article 1, paragraph 11) and "War crimes consisting in employment of prohibited means of warfare" (Article 1, paragraph 12).⁹⁹ Some of these crimes must be punished when committed "in connection with an international armed conflict or with an armed conflict not of an international character", some others when committed "in connection with an international armed conflict".¹⁰⁰

138. Guatemala's Penal Code provides for the punishment of certain war crimes, namely those committed against prisoners of war, the civilian population and certain objects.¹⁰¹

⁹⁴ France, *Code of Military Justice* (1982), Articles 427, 428 and 439.

⁹⁵ France, *Penal Code* (1994), Articles 211(1)–212(3).

⁹⁶ France, *Law on Cooperation with the ICTY* (1995), Article 2; *Law on Cooperation with the ICTR* (1996), Article 2.

⁹⁷ Georgia, *Criminal Code* (1999), Articles 407–408 and 410–413.

⁹⁸ Georgia, *Criminal Code* (1999), Articles 411–412.

⁹⁹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, §§ 6–12.

¹⁰⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, §§ 8(1)–(2), 9(1), 10(1)–(2), 11(1)–(2) and 12 (international and non-international armed conflict); Article 1, §§ 8(3), 9(2) and 11(3) (international armed conflict).

¹⁰¹ Guatemala, *Penal Code* (1973), Article 378.

139. Guinea's Criminal Code provides for the punishment of certain acts constitutive of violations of IHL, such as pillage, the despoliation of the dead, wounded, sick and shipwrecked in a zone of military operations and the use, in an area of military operations and in violation of the laws and customs of war, of distinctive insignia or emblems defined under international conventions.¹⁰²

140. Hungary's Criminal Code as amended, under the title "Crimes against humanity", provides for the punishment of a list of certain acts including genocide and war crimes, such as "Violence against the civilian population" (Article 158), "War-time looting" (Article 159), "Wanton warfare" (Article 160), "Use of weapons prohibited by international treaty" (Article 160/A), "Battlefield looting" (Article 161), "Violence against a war emissary" (Article 163) and "Misuse of the red cross" (Article 164), some of them when committed "in an operational or occupied area" or "violating the rules of the international law of warfare".¹⁰³

141. India's Geneva Conventions Act provides that "if any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the [Geneva] Conventions, he shall be punished".¹⁰⁴

142. Ireland's Geneva Conventions Act as amended provides that:

Any person, whatever his or her nationality, who, whether in or outside the State, commits or aids, abets or procures the commission by any other person of a grave breach of any of the [Geneva] Conventions or Protocol I shall be guilty of an offence and on conviction on indictment [be liable to punishment].¹⁰⁵

The Act also provides that:

Any person, whatever his nationality, who, in the State, commits, or aids, or abets or procures the commission in the State by any other person of any other minor breach of any of the [Geneva] Conventions or of Protocol I or Protocol II shall be guilty of an offence.

...

Any person, whatever his nationality, who, outside the State, commits, or aids, or abets or procures the commission outside the State by any other person of any other minor breach of any of the [Geneva] Conventions or of Protocol I or Protocol II shall be guilty of an offence.

Any person who is guilty of an offence under this section shall be liable [to punishment].¹⁰⁶

143. Israel's Nazis and Nazi Collaborators (Punishment) Law provides that:

A person who has committed one of the following offences –

¹⁰² Guinea, *Criminal Code* (1998), Articles 569, 570 and 579.

¹⁰³ Hungary, *Criminal Code as amended* (1978), Sections 155–165.

¹⁰⁴ India, *Geneva Conventions Act* (1960), Section 3.

¹⁰⁵ Ireland, *Geneva Conventions Act as amended* (1962), Section 3.

¹⁰⁶ Ireland, *Geneva Conventions Act as amended* (1962), Section 4.

- (1) done, during the period of the Nazi régime, in an enemy country, an act constituting a crime against the Jewish people;
- (2) done, during the period of the Nazi régime, in an enemy country, an act constituting a crime against humanity;
- (3) done, during the period of the Second World War, in an enemy country, an act constituting a war crime,

is liable to the death penalty.¹⁰⁷

144. Italy's Wartime Military Penal Code provides for the punishment of a list of various offences related to wartime activity.¹⁰⁸

145. Jordan's Draft Military Criminal Code, in a part entitled "War crimes", provides for the punishment of a series of offences "committed in time of armed conflicts".¹⁰⁹

146. Kazakhstan's Penal Code, in a special part entitled "Crimes against the peace and security of mankind", provides for the punishment of a list of acts such as: "the use of prohibited means and methods of warfare" in an armed conflict (Article 159); "genocide" (Article 160); "ecocide" (Article 161); "mercenaries" (Article 162); and "attacks against persons or organisations beneficiaries of an international protection" (Article 163).¹¹⁰

147. Kenya's Geneva Conventions Act provides that:

Any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the Conventions such as is referred to in the following Articles [i.e. Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV] is guilty of an offence and [shall be sentenced].¹¹¹

148. Kyrgyzstan's Criminal Code provides for the punishment of persons committing acts such as: "intentional destruction of historical and cultural monuments" (Article 172); "capture of hostages" (Article 224); "ecocide" (Article 374); the participation of mercenaries "in an armed conflict or in hostilities" (Article 375); and "attacks against persons or institutions under international protection" (Article 376).¹¹²

149. Latvia's Criminal Code, in a chapter entitled "Crimes against humanity and peace, war crimes and genocide", provides for the punishment of persons who commit certain offences such as "genocide" (Section 71), "war crimes" (Section 74), "pillaging" (Section 76) and "destruction of cultural and national heritage" (Section 79).¹¹³

¹⁰⁷ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(a).

¹⁰⁸ Italy, *Wartime Military Penal Code* (1941), Articles 167–230.

¹⁰⁹ Jordan, *Draft Military Criminal Code* (2000), Article 41.

¹¹⁰ Kazakhstan, *Penal Code* (1997), Articles 156–164.

¹¹¹ Kenya, *Geneva Conventions Act* (1968), Section 3.

¹¹² Kyrgyzstan, *Criminal Code* (1997), Articles 172, 224 and 374–376.

¹¹³ Latvia, *Criminal Code* (1998), Sections 71–79.

150. The Draft Amendments to the Code of Military Justice of Lebanon provide for the punishment of persons committing acts listed under a new article 146 on war crimes. Referring to the 1949 Geneva Conventions and AP I, this article should be incorporated under new section 7 entitled “Offences against persons and objects protected under the Geneva Conventions applicable in time of armed conflicts”.¹¹⁴

151. Lithuania’s Criminal Code as amended, in a chapter entitled “War crimes”, contains a list of punishable offences. Some of these offences are to be punished when committed in “violation of humanitarian law in time of war, during an international armed conflict or occupation”. Some others are to be punished when committed “in time of war, during an armed conflict or occupation”.¹¹⁵

152. Luxembourg’s Law on the Repression of War Crimes provides for the prosecution and sentencing of non-nationals of Luxembourg who have committed war crimes, “if such infringements have been committed at the occasion or under the pretext of war and if they are not justified by the laws and customs of war”.¹¹⁶ It also provides for the prosecution, as co-authors or accomplices, of persons who, “without being superiors in rank of the principal authors, have aided those crimes or offences”.¹¹⁷

153. Luxembourg’s Law on the Punishment of Grave Breaches provides for the punishment of perpetrators of grave breaches of the 1949 Geneva Conventions as well as of persons who build, hold or transport instruments or other devices in the knowledge that they are intended to be used in the commission of a grave breach.¹¹⁸ It also provides for the punishment of persons who, “without being superiors in rank of the principal authors, have aided those crimes or offences”.¹¹⁹

154. Malawi’s Geneva Conventions Act provides that:

Any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by another person of any such grave breach of any of the Conventions as is referred to in [Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV] shall without prejudice to his liability under any other written law be guilty of an offence and [be liable to imprisonment].¹²⁰

155. Malaysia’s Geneva Conventions Act provides that:

Any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by another person

¹¹⁴ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146.

¹¹⁵ Lithuania, *Criminal Code as amended* (1961), Articles 333–344.

¹¹⁶ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 1.

¹¹⁷ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 3.

¹¹⁸ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Articles 1–3.

¹¹⁹ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 5.

¹²⁰ Malawi, *Geneva Conventions Act* (1967), Section 4(1).

of any such grave breach of [Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV], shall be guilty of an offence and on conviction thereof [be punished].¹²¹

156. Mali's Penal Code provides for the punishment of the perpetrators of certain crimes such as "crimes against humanity" (Article 29), "genocide" (Article 30) and a list of "war crimes" covering the grave breaches of the 1949 Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict (Article 31).¹²²

157. The Geneva Conventions Act of Mauritius provides that:

Any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions shall commit an offence . . . Any person who commits an offence against this section shall, on conviction, be liable [to punishment].¹²³

158. Mexico's Penal Code as amended, under the heading "Offences against the duties of humanity", provides for the punishment of a number of offences committed against certain protected persons and objects.¹²⁴

159. Mexico's Code of Military Justice, under the headings "Crimes against the laws of nations" and "Crimes committed in the exercise of military duties or in relation to them", provides for the punishment of perpetrators of a number of offences related to war operations.¹²⁵ Under a separate provision, the Code also provides that "those who immediately commit any act of murder, physical injury or damage to property outside the fighting will be held responsible".¹²⁶

160. Moldova's Penal Code contains provisions which provide for the punishment of perpetrators of certain acts such as: "abusive use of the emblem and signs of the Red Cross and the Red Crescent" (Article 217); "violence against the civilian population in areas of military operations" (Article 268); "bad treatment of prisoners of war" (Article 269); and "illegal wearing and abusive use of signs of the Red Cross and Red Crescent in areas of military action" (Article 270).¹²⁷

161. Moldova's Penal Code provides for the punishment of certain offences such as "genocide" (Article 135), "ecocide" (Article 136), "inhuman treatments" (Article 137), "violations of international humanitarian law" committed "during an armed conflict or hostilities" (Article 138), "mercenary activity . . . in an armed conflict or military hostilities" (Article 141), "use of prohibited means and methods of warfare . . . during an armed conflict" (Article 143), "unlawful use of the red cross signs" (Article 363), "pillage of the dead on the battlefield" (Article 389), "acts of violence against the civilian population in

¹²¹ Malaysia, *Geneva Conventions Act* (1962), Section 3(1).

¹²² Mali, *Penal Code* (2001), Articles 29–31.

¹²³ Mauritius, *Geneva Conventions Act* (1970), Section 3.

¹²⁴ Mexico, *Penal Code as amended* (1931), Article 149.

¹²⁵ Mexico, *Code of Military Justice as amended* (1933), Articles 208–215 and 324–337.

¹²⁶ Mexico, *Code of Military Justice as amended* (1933), Article 222.

¹²⁷ Moldova, *Penal Code* (1961), Articles 217 and 268–270.

the area of military hostilities" (Article 390), "grave breaches of international humanitarian law . . . committed during international and internal armed conflicts" (Article 391) and "perfidious use of the red cross emblem as a protective sign during armed conflict" (Article 392).¹²⁸

162. Mozambique's Military Criminal Law provides for the punishment of persons committing crimes listed thereunder, some of them when committed "in an armed confrontation [and in violation of] generally accepted international rules" or "in times of war" and/or "in the theatre of operations".¹²⁹

163. The Criminal Law in Wartime Act as amended of the Netherlands establishes provisions "concerning offences committed in the event of war and their prosecution", expressly stating that the term "war" shall include civil war.¹³⁰

164. The International Crimes Act of the Netherlands provides for the punishment of: "anyone who commits any of the crimes defined in this Act outside the Netherlands, if the suspect is present in the Netherlands . . . [or] if the crime is committed against a Dutch national; [or] any Dutch national who commits any of the crimes defined in this Act outside the Netherlands." The crimes defined in the Act are genocide (Article 3), crimes against humanity (Article 4), war crimes committed in international armed conflicts (Article 5) or non-international armed conflicts (Article 6), and torture (Article 8). The Act also punishes "anyone who, in the case of an international or non-international armed conflict, commits a violation of the laws and customs of war other than as referred to in Articles 5 and 6".¹³¹

165. New Zealand's Geneva Conventions Act as amended provides that "any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of [AP I] is guilty of an indictable offence".¹³²

166. New Zealand's International Crimes and ICC Act provides that "every person is liable on conviction on indictment to the penalty specified in subsection (3) who, in New Zealand or elsewhere, commits a war crime". The Act includes similar provisions with respect to genocide and crimes against humanity. War crimes, genocide and crimes against humanity are defined as the acts specified in the 1998 ICC Statute.¹³³

167. Nicaragua's Military Penal Law provides for the punishment of persons who commit "mistreatment of prisoners of war (Article 80), "looting" (Article 81), "abuses at the occasion of military activities" (Article 82) and "unlawful use of the symbols of the Red Cross" (Article 83).¹³⁴

168. Nicaragua's Military Penal Code, under the headings "Crimes against international humanitarian law" and "Specific crimes against the laws and

¹²⁸ Moldova, *Penal Code* (2002), Articles 135–138, 141, 143, 363 and 389–392.

¹²⁹ Mozambique, *Military Criminal Law* (1987), Articles 83–89.

¹³⁰ Netherlands, *Criminal Law in Wartime Act as amended* (1952), preamble and Article 1(3).

¹³¹ Netherlands, *International Crimes Act* (2003), Articles 2(1) and 3–8.

¹³² New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1).

¹³³ New Zealand, *International Crimes and ICC Act* (2000), Sections 9–11.

¹³⁴ Nicaragua, *Military Penal Law* (1980), Articles 80–83.

customs of war”, provides for the punishment of certain offences. Article 47, which is subsidiary to the other articles dealing with violations of IHL, punishes any “military who, during an international or civil war commits serious violations of the international conventions ratified by Nicaragua”.¹³⁵

169. Nicaragua’s Revised Penal Code provides for the punishment of “anyone who, during an international or a civil war, commits serious violations of the international conventions relating to the use of prohibited weapons, the treatment of prisoners and other norms related to war”.¹³⁶

170. Nicaragua’s Draft Penal Code, in a part entitled “Crimes against the international order”, provides for the punishment of a list of offences, for most of which it specifies that they be committed “at the occasion”, “in times of” and/or “during” an international or internal armed conflict.¹³⁷

171. Niger’s Penal Code as amended, in a chapter entitled “Crimes against humanity and war crimes”, provides for the punishment of a list of offences such as genocide, crimes against humanity, and war crimes defined as serious offences against the persons and objects protected under the 1949 Geneva Conventions, AP I and AP II.¹³⁸

172. Nigeria’s Geneva Conventions Act provides that “if, whether in or outside the Federation, any person, whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva Conventions]... he shall, on conviction thereof, [be punished]”.¹³⁹

173. Norway’s Military Penal Code provides for the punishment of “anyone who uses a weapon or means of combat which is prohibited by any international agreement to which Norway has acceded, or who is accessory thereto”. It also provides for the punishment of:

anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in

- a) the Geneva Conventions of 12 August 1949 concerning the amelioration of the conditions of the wounded and sick in armed forces in the field, the amelioration of the conditions of wounded, sick and shipwrecked members of armed forces at sea, the treatment of prisoners of war, and the protection of civilian persons in time of war,
- b) the two additional protocols to these conventions of 10 June 1977.¹⁴⁰

174. Papua New Guinea’s Geneva Conventions Act provides that “a person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions is guilty of an offence”.¹⁴¹

¹³⁵ Nicaragua, *Military Penal Code* (1996), Articles 47–61.

¹³⁶ Nicaragua, *Revised Penal Code* (1997), Article 551.

¹³⁷ Nicaragua, *Draft Penal Code* (1999), Articles 444–472.

¹³⁸ Niger, *Penal Code as amended* (1961), Article 208.1–208.8.

¹³⁹ Nigeria, *Geneva Conventions Act* (1960), Section 3(1).

¹⁴⁰ Norway, *Military Penal Code* (1902), Articles 107–108.

¹⁴¹ Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

175. Paraguay's Military Penal Code, under the heading "Provisions with regard to times of war", contains a list of offences for which it provides punishment.¹⁴²

176. Paraguay's Penal Code provides for the punishment of offences such as "torture" (Article 309), "genocide" (Article 319) and a list of "war crimes" (Article 320), specifying with respect to "war crimes" that they be committed "in violation of international laws of war, armed conflict or military occupation".¹⁴³

177. Peru's Code of Military Justice, in a part entitled "Violations of the law of nations", provides for the punishment of a list of offences, specifying that some of them be committed "in times of war".¹⁴⁴

178. The War Crimes Trial Executive Order of the Philippines provides for the punishment of offenders having committed certain acts, including "violations of the laws and customs of war" and other more specified acts committed "before or during the war . . . whether or not in violation of the local laws".¹⁴⁵

179. Poland's Penal Code, in a special part entitled "Offences against peace, humanity and war offences", provides for the punishment of certain acts, some of them when committed "during hostilities" or "in violation of international law", such as internationally prohibited acts against certain specific protected persons – including persons "who, during hostilities, enjoy international protection" – and objects, as well as the use of means or methods of combat prohibited by international law.¹⁴⁶

180. Portugal's Penal Code, under the headings "War crimes against civilians" and "Destruction of monuments", provides for the punishment of certain offences committed "in times of war, of armed conflict or occupation".¹⁴⁷

181. Romania's Law on the Punishment of War Criminals provides for the punishment of more precisely defined "criminals of war".¹⁴⁸

182. Romania's Penal Code, in provisions entitled "[Unlawful] use of the emblem of the Red Cross" (Article 294), "Use of the emblem of the Red Cross during military operations" (Article 351), "Inhuman treatment" (Article 358) and "Destruction of objects and appropriation of property" (Article 359), provides for the punishment of offences listed thereunder, stating for some of those offences that they be committed "in times of war and in relation with military operations" or "in times of war".¹⁴⁹

183. Russia's Decree on the Punishment of War Criminals states that:

¹⁴² Paraguay, *Military Penal Code* (1980), Articles 282–296.

¹⁴³ Paraguay, *Penal Code* (1997), Articles 309 and 319–320.

¹⁴⁴ Peru, *Code of Military Justice* (1980), Articles 91–96.

¹⁴⁵ Philippines, *War Crimes Trial Executive Order* (1947), § II(b)(2) and (3).

¹⁴⁶ Poland, *Penal Code* (1997), Articles 117–126.

¹⁴⁷ Portugal, *Penal Code* (1996), Articles 241–242.

¹⁴⁸ Romania, *Law on the Punishment of War Criminals* (1945), Articles I and III.

¹⁴⁹ Romania, *Penal Code* (1968), Articles 294, 351 and 358–359.

The peoples of the Soviet Union that suffered losses during the war cannot let fascist barbarians go unpunished. The Soviet State has always proceeded from the universally recognised rules of international law that provide for the inevitable prosecution of Nazi criminals, no matter where and for how long they have been hiding from justice.¹⁵⁰

It also provides that “Nazi criminals, guilty of most serious crimes against peace and humanity and war crimes, are subject to prosecution and punishment”.¹⁵¹

184. Russia’s Criminal Code provides that “persons who have committed crimes shall . . . be held criminally responsible”.¹⁵² In a chapter entitled “Crimes against the peace and security of mankind” and under a provision entitled “Use of banned means and methods of warfare”, the Code provides for the punishment of “cruel treatment of prisoners of war, deportation of the civilian population, plunder of the national property in the occupied territory and use in a military conflict of means and methods of warfare banned by [international treaties to which Russia is a party]”.¹⁵³ The Code further provides for the punishment of offences such as genocide, ecocide, use of, and participation by, mercenaries in an armed conflict or hostilities and assaults on persons or institutions enjoying international protection.¹⁵⁴

185. Rwanda’s Law Setting up Gacaca Jurisdictions aims:

to organize the putting on trial of persons prosecuted for having, between 1 October 1990 and 31 December 1994, committed acts qualified and punished by the Penal Code and which constitute:

- a) . . . crimes of genocide or crimes against humanity as defined by the [1948 Genocide Convention], by the [1949 GC IV and the 1977 Additional Protocols], as well as in the [1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity].¹⁵⁵

It further provides that:

Following acts of participation in offences in question in Article one of this organic law and committed between 1 October 1990 and 31 December 1994, the prosecuted person can be classified in one of the following categories:

Category 1:

- a) The person whose criminal acts or criminal participation place among planners, organisers, incitators, supervisors of the crime of genocide or crime against humanity;
- b) The person who, acting in a position of authority at the national, provincial or district level, within political parties, army, religious denominations or militia, has committed these offences or encouraged others to commit them;

¹⁵⁰ Russia, *Decree on the Punishment of War Criminals* (1965), preamble.

¹⁵¹ Russia, *Decree on the Punishment of War Criminals* (1965).

¹⁵² Russia, *Criminal Code* (1996), Article 4.

¹⁵³ Russia, *Criminal Code* (1996), Article 356.

¹⁵⁴ Russia, *Criminal Code* (1996), Articles 357–360.

¹⁵⁵ Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 1.

- c) The well-known murderer who distinguished himself in the location where he lived or wherever he passed, because of zeal which has characterised him in killings or excessive wickedness with which they were carried out;
- d) The person who has committed rape or acts of torture against person's sexual parts.
- ...

Category 2:

- a) The person whose criminal acts or criminal participation place among authors, co-authors or accomplices of deliberate homicides or serious attacks against persons which caused death.
- b) The person who, with intention of giving death, has caused injuries or committed other serious violence, but from which the victims have not died.

Category 3:

The person who has committed criminal acts or has become accomplice of serious attacks, without the intention of causing death to victims.

Category 4:

The person having committed offences against assets.¹⁵⁶

The Law adds that:

The persons in the position of authority at the level of Sector or Cell at the time of genocide are classified in the category corresponding to offences they have committed, but their quality of leaders expose them to the most severe penalty for the defendants who are in the same category.¹⁵⁷

Moreover, the Law provides that "for the implementation of this organic law, the accomplice is the person who will have, by any means, assisted to commit offences to persons referred to in Article 51 of this organic law".¹⁵⁸

186. The Geneva Conventions Act of the Seychelles provides that:

Any person, whatever his nationality, who, whether in or outside Seychelles, commits, or aids, abets or procures the commission by another person of, any such grave breach of any of the [Geneva] Conventions . . . is guilty of an offence and . . . shall on conviction [be punished].¹⁵⁹

187. Singapore's Geneva Conventions Act provides that:

Any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [of the Geneva Conventions] shall be guilty of an offence under this Act and on conviction thereof . . . [be punished].¹⁶⁰

188. Slovakia's Criminal Code as amended, under the heading "Crimes against humanity", provides for the punishment of certain offences such as: "genocide"

¹⁵⁶ Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 51.

¹⁵⁷ Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 52.

¹⁵⁸ Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 53(1).

¹⁵⁹ Seychelles, *Geneva Conventions Act* (1985), Section 3(1).

¹⁶⁰ Singapore, *Geneva Conventions Act* (1973), Section 3(1).

(Article 259); "torture and other inhuman and cruel treatment" (Article 259a); "use of a forbidden weapon or an unpermitted form of combat" (Article 262); "wartime cruelty" (Article 263); "persecution of a population" (Article 263a); "plunder in a theatre of war" (Article 264); and "misuse of internationally recognised insignia and state insignia" (Article 265).¹⁶¹

189. Slovenia's Penal Code, in a chapter entitled "Criminal offences against humanity and international law", provides for a list of punishable acts committed by "whoever" and some of them "during war, armed conflict (or occupation)", such as: "war crimes against the civilian population" (Article 374); "war crimes against the wounded and sick" (Article 375); "war crimes against prisoners of war" (Article 376); "use of unlawful weapons" (Article 377); "unlawful killing and wounding of the enemy" (Article 379); "unlawful plundering on the battlefield" (Article 380); "infringement of the rights of parlementaires" (Article 381); "maltreatment of the sick and wounded, and of prisoners of war" (Article 382); "unjustified delay in the repatriation of prisoners of war" (Article 383); "destruction of cultural and historical monuments and natural sites" (Article 384); and "abuse of international symbols" (Article 386).¹⁶²

190. Under Spain's Law on Judicial Power, Spanish criminal courts have jurisdiction over offences committed by Spanish nationals and aliens, on Spanish territory or outside it, which constitute genocide or any other offence that, according to international treaties or conventions, must be prosecuted in Spain.¹⁶³

191. Spain's Military Criminal Code contains a part on "Crimes against the laws and customs of war" and provides for the punishment of soldiers committing acts listed thereunder.¹⁶⁴

192. Spain's Penal Code contains chapters entitled "Genocide" and "Offences against protected persons and objects in the event of armed conflict" and provides for the punishment of offences listed thereunder. Protected persons in the meaning of the latter are those protected by the Geneva Conventions and both Additional Protocols, as well as those falling within the scope of "whatever other international treaty to which Spain is a party". The chapter contains several provisions regarding the punishment of certain acts "committed in the event of an armed conflict".¹⁶⁵

193. Sri Lanka's Draft Geneva Conventions Act provides that:

A person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any person to commit,

- (a) a grave breach of any of the [Geneva] Conventions; or
- (b) a breach of common Article 3 of the [Geneva] Conventions

is guilty of an indictable offence.¹⁶⁶

¹⁶¹ Slovakia, *Criminal Code as amended* (1961), Articles 259–259(a) and 262–265.

¹⁶² Slovenia, *Penal Code* (1994), Articles 374–386.

¹⁶³ Spain, *Law on Judicial Power* (1985), Article 23(4).

¹⁶⁴ Spain, *Military Criminal Code* (1985), Articles 69–78.

¹⁶⁵ Spain, *Penal Code* (1995), Articles 607–614.

¹⁶⁶ Sri Lanka, *Draft Geneva Conventions Act* (2002), Article 3(1).

It further provides that such a person “is liable to [punishment]”.¹⁶⁷

194. Sweden’s Penal Code as amended provides for the punishment of “a person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts”.¹⁶⁸

195. Switzerland’s Military Criminal Code as amended states that the provisions of its chapter dealing with “Offences committed against the law of nations in case of armed conflict” are “applicable in case of declared war and other armed conflicts between two or more States”, and also provide for “the punishment of violations of international agreements if these agreements provide for a wider scope of application” (Article 108). The Code provides for the punishment of offences listed under this chapter, and especially – among other more specific offences – of “anyone who contravenes the prescriptions of international conventions relating to the conduct of hostilities, as well as to the protection of persons and objects, [and] anyone who violates other recognised laws and customs of war”.¹⁶⁹ Other offences, such as pillage committed in time of war or marauding on the battlefield are also to be punished.¹⁷⁰

196. Tajikistan’s Criminal Code provides for the punishment of: “illegal use of emblems and signs of the Red Cross and Red Crescent” (Article 333); “genocide” (Article 398); “biocide” (Article 399); “ecocide” (Article 400); “mercenarism” (Article 401); “attacks against persons and establishments under international protection” (Article 402); “wilful breaches of norms of international humanitarian law committed in [an international or internal] armed conflict” (Article 403); “wilful breaches of norms of international humanitarian law committed in international or internal armed conflict with the threat to health or causing bodily injury” (Article 404); and “other breaches of the norms of international humanitarian law” (Article 405).¹⁷¹

197. Thailand’s Prisoners of War Act provides for the punishment of persons committing offences listed under the heading “Offences with respect to prisoners of war” and offences listed under the heading “Offences in the case of armed conflict not of an international character”.¹⁷²

198. Trinidad and Tobago’s Draft ICC Act provides that:

Any person who commits any of the crimes specified in Articles 6 [of the 1998 ICC Statute – genocide], 7 [of the 1998 ICC Statute – crimes against humanity] and 8 [of the 1998 ICC Statute – war crimes] outside Trinidad and Tobago, may be prosecuted and punished for that crime in Trinidad and Tobago as if the crime had been committed in Trinidad and Tobago.¹⁷³

199. Uganda’s Geneva Conventions Act provides that:

¹⁶⁷ Sri Lanka, *Draft Geneva Conventions Act* (2002), Article 4(1).

¹⁶⁸ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

¹⁶⁹ Switzerland, *Military Criminal Code as amended* (1927), Articles 108–114.

¹⁷⁰ Switzerland, *Military Criminal Code as amended* (1927), Articles 139–140.

¹⁷¹ Tajikistan, *Criminal Code* (1998), Articles 333 and 398–405.

¹⁷² Thailand, *Prisoners of War Act* (1955), Sections 12–19.

¹⁷³ Trinidad and Tobago, *Draft ICC Act* (1999), Part II, Section 5(2).

Any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions... commits an offence and on conviction thereof [shall be punished].¹⁷⁴

200. Ukraine's Criminal Code provides for the punishment of offenders having committed an act described in a list of punishable offences such as, *inter alia*: "looting" (Article 432); "violence against the civilian population in areas of war operations" (Article 433); "bad treatment of prisoners of war" (Article 434); "unlawful use or misuse of the Red Cross and Red Crescent symbols" (Article 435); "violations of the laws and customs of war", notably those provided for in international instruments to which Ukraine is a party (Article 438); "use of weapons of mass destruction" (Article 439); "ecocide" (Article 441); "genocide" (Article 442); "illegal use of the symbols of the red cross and red crescent" (Article 445); and "mercenarism" (Article 447).¹⁷⁵

201. The UK Geneva Conventions Act as amended provides that:

Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the [Geneva] conventions or [AP I] shall be guilty of an offence and on conviction on indictment [shall be punished].¹⁷⁶

202. The UK UN Personnel Act provides that:

If a person commits, outside the United Kingdom, any act to or in relation to a UN worker which, if he had done it in any part of the United Kingdom, would have made him guilty of [murder, manslaughter, culpable homicide, rape, assault causing injury, kidnapping, abduction or false imprisonment], he shall in that part of the United Kingdom be guilty of that offence.¹⁷⁷

This Act does not apply to any UN operation "which is authorised by the Security Council of the United Nations as an enforcement action under Chapter VII of the Charter of the United Nations, . . . in which UN workers are engaged as combatants against organised armed forces, and . . . to which the law of international armed conflict applies".¹⁷⁸

203. The UK War Crimes Act grants the UK courts jurisdiction over murder, manslaughter or culpable homicide committed in Germany or German-occupied territory during the Second World War, provided that the offence "constituted a violation of the laws and customs of war". The Act applies to a person who was, in 1990, a British citizen or resident in the UK, the Isle of Man or any of the Channel Islands, "irrespective of his nationality at the time of the alleged offence".¹⁷⁹

¹⁷⁴ Uganda, *Geneva Conventions Act* (1964), Section 1(1).

¹⁷⁵ Ukraine, *Criminal Code* (2001), Articles 432–447.

¹⁷⁶ UK, *Geneva Conventions Act as amended* (1957), Section 1(1).

¹⁷⁷ UK, *UN Personnel Act* (1997), Section 1.

¹⁷⁸ UK, *UN Personnel Act* (1997), Section 4(3).

¹⁷⁹ UK, *War Crimes Act* (1991), Section 1.

204. The UK ICC Act includes as offences under domestic law the acts of genocide, crimes against humanity and war crimes as defined in the 1998 ICC Statute. Thus, it provides that “it is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime”. There is a similar provision for Northern Ireland.¹⁸⁰

205. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established provisions for the punishment of the perpetrators of a list of specified offences and also of “all other offences against the laws or customs of war”, to be pronounced by the military commissions.¹⁸¹

206. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established provisions for the punishment of the perpetrators of a list of “violations of the laws and customs of war” and other specified acts committed “against any civilian population before or during the war”, to be pronounced by the military commissions.¹⁸²

207. The US War Crimes Act as amended provides that:

- (a) Offense. – Whoever, whether inside or outside the United States, commits a war crime . . . shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
- ...
- (c) Definition. – As used in this section the term “war crime” means any conduct –
 - (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
 - (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
 - (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
 - (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.¹⁸³

208. Uruguay’s Military Penal Code as amended, under the heading “Crimes which affect the moral strength of the army and of the naval forces”, lists a number of acts, such as the violation of the rule of humane treatment of POWs,

¹⁸⁰ UK, *ICC Act* (2001), Part 5, Sections 50, 51 and 58.

¹⁸¹ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

¹⁸² US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b) and (c).

¹⁸³ US, *War Crimes Act as amended* (1996), Section 2441.

looting and attacks against certain specified objects, for which it provides punishment.¹⁸⁴

209. Uzbekistan's Criminal Code, in a chapter entitled "Crimes against the peace and security of mankind", provides for the punishment of, *inter alia*, "violations of laws and customs of war" (Article 152), "genocide" (Article 153) and the participation of "mercenaries" in "armed conflict or military actions" (Article 154).¹⁸⁵

210. Vanuatu's Geneva Conventions Act provides that:

Any grave breach of any of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu.¹⁸⁶

211. Venezuela's Code of Military Justice as amended, under a chapter dealing with "Crimes against international law", provides for the punishment of the offenders of a list of certain war crimes.¹⁸⁷

212. Venezuela's Revised Penal Code provides for the punishment of Venezuelan nationals and foreigners who have committed certain acts "during a war between Venezuela and another nation" or who "violate the conventions or treaties [to which Venezuela is a party] in a way which entails the responsibility of the latter".¹⁸⁸

213. Vietnam's Penal Code provides for the punishment of anyone who commits, *inter alia*, one of the offences listed under the following headings: "Violation of policy concerning soldiers killed or wounded in combat" (Article 271); "Theft or destruction of war booty" (Article 272); "Harassment of civilians" (Article 273); "Exceeding military need in performance of a mission" (Article 274); "Mistreatment of a prisoner of war or of a soldier who has surrendered" (Article 275); "Crimes against humanity" committed in time of peace or in time of war (Article 278); "War crimes", such as "acts seriously breaching international norms contained in the treaties to which Vietnam is a party" (Article 279); and "Recruitment of mercenaries and service as a mercenary" (Article 280).¹⁸⁹

214. Yemen's Military Criminal Code provides for the punishment of a list of offences such as war crimes committed in a "zone of military operations" (Article 20) or "during a war [and] against persons and objects protected under the international conventions to which the Republic of Yemen is a party" (Article 21).¹⁹⁰

¹⁸⁴ Uruguay, *Military Penal Code as amended* (1943), Article 58.

¹⁸⁵ Uzbekistan, *Criminal Code* (1994), Articles 152–154.

¹⁸⁶ Vanuatu, *Geneva Conventions Act* (1982), Section 4.

¹⁸⁷ Venezuela, *Code of Military Justice as amended* (1998), Article 474.

¹⁸⁸ Venezuela, *Revised Penal Code* (2000), Article 156.

¹⁸⁹ Vietnam, *Penal Code* (1990), Articles 271–280.

¹⁹⁰ Yemen, *Military Criminal Code* (1998), Articles 5 and 20–23.

215. The Criminal Offences against the Nation and State Act of the SFRY (FRY) provides for the punishment of “any person who commits a war crime, i.e., who during the war or the enemy occupation acted as an instigator or organiser, or who . . . assisted or otherwise was the direct executor of [one of the acts listed thereunder]”.¹⁹¹

216. The Penal Code as amended of the SFRY (FRY), in a chapter entitled “Criminal acts against humanity and international law”, provides for a list of punishable acts committed by “any person” and some of them “during war, armed conflict (or occupation)”, such as: “war crimes against civilians” (Article 142); “war crimes against the wounded and the ill” (Article 143); “war crimes against prisoners of war” (Article 144); “unlawful killing and wounding of the enemy” (Article 146); “unlawful seizure of belongings from the killed and wounded in a theatre of war” (Article 147); “use of prohibited means of combat” (Article 148); “harming a parlementaires” (Article 149); “cruel treatment of the wounded, the ill and prisoners of war” (Article 150); “unjustified delay in the repatriation of prisoners of war” (Article 150-a); “destruction of cultural and historic monuments” (Article 151); and “misuse of international emblems” (Article 153).¹⁹² A commentary on these Code’s provisions emphasises that these crimes can be committed in time of war, armed conflict (or occupation).¹⁹³ The Report on the Practice of the SFRY (FRY) notes that the term “armed conflict” in this context should be interpreted as including internal conflicts.¹⁹⁴

217. Zimbabwe’s Geneva Conventions Act as amended provides that:

Any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [the Geneva Conventions or AP I] shall be guilty of an offence.

A person guilty of an offence in terms of [the above] shall be liable [to punishment].¹⁹⁵

National Case-law

218. In the *Violations of IHL in Somalia and Rwanda case* in 1997, a Belgian Military Court acquitted two Belgian soldiers accused of having injured and threatened, in 1993, the civilian population whilst performing duties as part of the UNOSOM II peacekeeping operation in Somalia. The Court came to the conclusion that the Geneva Conventions and their Additional Protocols were not applicable to the armed conflict in Somalia and that, therefore, the civilian population could not be granted protection on this basis. The Court held that even common Article 3 of the 1949 Geneva Conventions did not apply to the

¹⁹¹ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

¹⁹² SFRY (FRY), *Penal Code as amended* (1976), Articles 142–153.

¹⁹³ SFRY (FRY), *Penal Code as amended* (1976), Commentary to Articles 142–144, 146, 148–151 and 153.

¹⁹⁴ Report on the Practice of the SFRY (FRY), 1997, Chapter 6.4.

¹⁹⁵ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1) and (2).

situation, as the Somali militia did not have an organised military structure, a responsible leadership or exercise authority over a specific part of the territory. Consequently, the Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols (as amended) was also inapplicable. The Court further stated that the members of the UNOSOM II mission could not be considered as "combatants" since their primary task was not to fight against any of the factions, nor could they fall into the category of an "occupying force".¹⁹⁶

219. In *The Four from Butare case* in 2001, a Belgian court found the accused individually responsible and guilty of war crimes during the 1994 genocide in Rwanda. The four Rwandans had been arrested under the Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols (as amended). They had been charged with violations of grave breaches of provisions of the Geneva Conventions and AP I, as well as violations of common Article 3 of the 1949 Geneva Conventions and Articles 1, 2 and 4 AP II.¹⁹⁷ In 2002, the judgement was confirmed by the Belgian Court of Cassation.¹⁹⁸

220. In the *Brocklebank case* before the Canadian Court Martial Appeal Court in 1996 involving the question of criminal responsibility of a Canadian soldier serving on a peacekeeping mission in Somalia for having negligently performed a military duty, the Court of Appeal (majority) stated that:

I see no basis in law for the inference that the [1949] Geneva Conventions or the relevant provisions of the [*Unit Guide* (1990)] impose on service members the obligation, not otherwise found in Canadian law, to take positive steps to prevent or arrest the mistreatment or abuse of prisoners in Canadian Forces custody by other members of the forces, particularly other members of superior rank. I do not wish to comment on the duty that a superior officer might have in similar circumstances, but assert that a military duty in the sense of [Section 124 of the *National Defence Act* (1985)], to protect civilian prisoners not under one's custody cannot be inferred from the broad wording of the relevant sections of the [*Unit Guide* (1990)] or of [GC IV]. I agree with the prosecution . . . that Canadian soldiers should conduct themselves when engaged in operations abroad in an accountable manner consistent with Canada's international obligations, the rule of law and simply humanity. There was evidence in this case to suggest that the respondent could readily have reported the misdeeds of his comrades. However, absent specific wording in the relevant international conventions and more specifically, the [*Unit Guide* (1990)], I simply cannot conclude that a member of the Canadian Forces has a penally enforceable obligation to intervene whenever he witnesses mistreatment of a prisoner who is not in his custody.

...

In closing, I would remark that . . . it remains open to the chief of defence staff to define in more explicit terms the standards of conduct expected of soldiers in

¹⁹⁶ Belgium, Military Court, *Violations of IHL in Somalia and Rwanda case*, Judgement, 17 December 1997.

¹⁹⁷ Belgium, Cour d'Assises de Bruxelles, *The Four from Butare case*, Judgement, 7-8 June 2001.

¹⁹⁸ Belgium, Court of Cassation, *The Four from Butare case*, Judgement, 9 January 2002.

respect of prisoners who are in Canadian Forces custody. It is open to the chief of defence staff to . . . impose a military duty on Canadian Forces members either to report or take reasonable steps to prevent or arrest the abuse of prisoners not in their charge . . . This might prove a useful undertaking.¹⁹⁹

221. In the *Sarić case* in 1994, the Danish High Court found a Bosnian Croat refugee guilty on numerous charges of war crimes committed in a Croat-run prison camp in Bosnia in 1993. The Court based its judgement namely on the grave breaches provisions in Articles 129 and 130 GC III and Articles 146 and 147 GC IV.²⁰⁰ In 1995, Denmark's Supreme Court upheld his conviction.²⁰¹

222. In the *Mengistu and Others case* in 1995 concerning the prosecution and trial of Col. Mengistu Haile Mariam and former members of the Derg for allegedly committing crimes against humanity and war crimes during the former regime between 1974 and 1991, the Special Prosecutor of Ethiopia, in a reply to the objection filed by counsels for the defendants, referred, *inter alia*, to the 1919 Treaty of Versailles, to the 1945 IMT Charter (Nuremberg) and Nuremberg trials and to the 1993 ICTY Statute. He stated that:

Whosoever commits an international criminal offence in a capacity as a Head of State or responsible government official shall always be accountable for his acts and the punishment shall always be aggravated. Heads of State and other higher responsible government officials in any form of government are all required and obliged to know international crimes thereunder . . . By the same token, they must also be equally responsible and severely punished whenever they are found guilty of the commission of these acts.²⁰²

The Special Prosecutor further noted that "it is also known that there is a Geneva Convention which regulates the protection of the right of life of a person in time of war by providing for an effective means of penalty".²⁰³

223. In the *Javor case* in 1994, a civil suit filed in France by Bosnian nationals alleging ill-treatment in a Serb-run detention camp, the Paris High Court found that it had jurisdiction over the claims of war crimes. In its consideration of the charge, the Court focused on the grave breaches of the Geneva Conventions.²⁰⁴ The Court of Appeal of Paris reversed this decision and held, *inter alia*, the absence of direct applicability of the Geneva Conventions.²⁰⁵

¹⁹⁹ Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996; see also Court Martial Appeal Court, *Brown case*, Judgement, 6 January 1995 and *Boland case*, Judgement, 16 May 1995; *Seward case*, Judgement, 16 May 1995.

²⁰⁰ Denmark, High Court, *Sarić case*, Judgement, 25 November 1994.

²⁰¹ Denmark, Supreme Court, *Sarić case*, Judgement, 15 August 1995.

²⁰² Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, § 1.6.

²⁰³ Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, § 1.13.

²⁰⁴ France, Tribunal de Grande Instance de Paris, *Javor case*, Order establishing partial lack of jurisdiction and the admissibility of a civil suit, 6 May 1994.

²⁰⁵ France, Court of Appeal of Paris, *Javor case*, Judgement, 24 November 1994.

224. In the *Djajić case* in 1997, Germany's Supreme Court of Bavaria tried a national of the former Yugoslavia. In its judgement, the Court referred to GC IV and the grave breaches regime. It considered the conflict to be an international conflict (in June 1992) and regarded the victims as "protected persons" in the meaning of Article 4 GC IV. The accused was found guilty of complicity in 14 counts of murder and 1 count of attempted murder.²⁰⁶

225. In the *Jorgić case* before Germany's Higher Regional Court at Düsseldorf in 1997, the accused, a Bosnian Serb, was tried for acts committed in 1992 in Bosnia and Herzegovina which were punishable under the German Penal Code. The Court referred, *inter alia*, to Article 147 GC IV. It considered the conflict to be an international conflict in 1992, and the victims to be "protected persons" in the meaning of Article 4 GC IV. The accused was found guilty of complicity in genocide, in conjunction with murder, dangerous bodily harm and deprivation of liberty.²⁰⁷ In 1999, the Federal Supreme Court upheld the conviction in the *Jorgić case* for the most part.²⁰⁸ In 2000, the German Federal Constitutional Court confirmed that the accused could be tried by German courts and under German penal law.²⁰⁹

226. In the *Kusljić case* in 1999, Germany's Supreme Court of Bavaria a national of Bosnia and Herzegovina for crimes committed during 1992 in the territory of Bosnia and Herzegovina. The accused was sentenced to life imprisonment for, *inter alia*, genocide in conjunction with six counts of murder.²¹⁰ In 2001, the German Federal Supreme Court revised this judgement into a life sentence for, *inter alia*, six counts of murder. It considered the acts of the accused to be grave breaches in the meaning of Articles 146 and 147 GC IV.²¹¹

227. In the *Sokolović case* before Germany's Higher Regional Court at Düsseldorf in 1999, a Bosnian Serb accused of acts committed in 1992 in Bosnia and Herzegovina was sentenced for complicity in genocide, deprivation of liberty and dangerous bodily injury.²¹² In 2001, the Federal Supreme Court upheld this judgement and referred, *inter alia*, to Articles 146 and 147 GC IV and provisions of the German Penal Code. The situation in 1992 in Bosnia and Herzegovina was qualified as an international armed conflict and the victims were considered to be "protected persons" in the meaning of Article 4 GC IV.²¹³

228. In its judgement in the *Eichmann case* in 1961, Israel's District Court of Jerusalem rejected arguments that the acts of which Eichmann was accused constituted acts of State for which Germany alone was responsible. The Court relied on the repudiation of the doctrine of act of State, stating that this had

²⁰⁶ Germany, Supreme Court of Bavaria, *Djajić case*, Judgement, 23 May 1997.

²⁰⁷ Germany, Higher Regional Court at Düsseldorf, *Jorgić case*, Judgement, 26 September 1997.

²⁰⁸ Germany, Federal Supreme Court, *Jorgić case*, Judgement, 30 April 1999.

²⁰⁹ Germany, Federal Constitutional Court, *Jorgić case*, Decision, 12 December 2000.

²¹⁰ Germany, Supreme Court of Bavaria, *Kusljić case*, Judgement, 15 December 1999.

²¹¹ Germany, Federal Supreme Court, *Kusljić case*, Decision, 21 February 2001.

²¹² Germany, Higher Regional Court at Düsseldorf, *Sokolović case*, Judgement, 29 November 1999.

²¹³ Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2001.

been acknowledged by, *inter alia*, the 1945 IMT Charter (Nuremberg) and the Nuremberg judgements, by the US Military Tribunal's decision in the *Altstötter (The Justice Trial) case*, by UN General Assembly Resolution 96 (I) and by Article 4 of the 1948 Genocide Convention.²¹⁴ The Court quoted the US Supreme Court judgement in the *Quirin case*, stating that "the principle of international law which, under certain circumstances, protects the representatives of a State, cannot be applied to acts which are condemned as criminal by international law". It went on to state that:

It is true that under international law Germany bears not only moral, but also legal, responsibility for all the crimes that were committed as its own "acts of State", including the crimes attributed to the accused. But that responsibility does not detract one iota from the personal responsibility of the accused for his acts.²¹⁵

Referring to Article 4 of the 1948 Genocide Convention, the Court noted that:

This Article affirms a principle recognized by all civilized nations . . . and inasmuch as Germany, also, has adhered to this Convention, it is possible that even according to Kelsen – who requires an international convention or the consent of the State concerned – there is no longer any basis for pleading "act of State". But the rejection of this plea does not depend on the affirmation of this principle by Germany, for the plea had already been invalidated by the law of nations. For these reasons we reject the plea of "act of State".²¹⁶

229. In the *Eichmann case* in 1962, Israel's Supreme Court upheld the lower court's decision. In a part of the judgement dealing with the question of whether Israel's Nazis and Nazi Collaborators (Punishment) Law of 1950 was in conformity with principles of international law, the Supreme Court held that "the crimes created by the Law and of which the appellant was convicted must be deemed today as having always borne the stamp of international crimes, banned by the law of nations and entailing individual criminal responsibility".²¹⁷ In the part of the judgement dealing with the character of international crimes, it went on to affirm its "view that the crimes in question must today be regarded as crimes which were also in the past banned by the law of nations and entailed individual criminal responsibility" and stated as to the "features which identify crimes that have long been recognized by customary international law" that:

These include, among others, the following features: these crimes constitute acts which damage vital international interests; they impair the foundations and security of the international community; they violate the universal moral values and humanitarian principles that lie hidden in the criminal law systems adopted by civilized nations. The underlying principle in international law regarding such crimes

²¹⁴ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.

²¹⁵ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 28.

²¹⁶ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 28.

²¹⁷ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 10.

is that the individual who has committed any of them and who, when doing so, may be presumed to have fully comprehended the heinous nature of this act, must account for his conduct.²¹⁸

As to individual responsibility for war crimes “in the conventional sense”, the Supreme Court held that:

It will be recalled that the reference here is to a group of acts committed by members of the armed forces of the enemy which are contrary to the “laws and customs of war”. These acts are deemed to constitute in essence *international* crimes; they involve the violation of the provisions of customary international law which obtained before the Hague Conventions of 1907, the latter merely “declaring” the rules of warfare as dictated by recognized humanitarian principles. Those crimes entail individual criminal responsibility because they challenge the foundations of international society and affront the conscience of civilized nations. When a belligerent State punishes for such acts, it does so not only because persons who were its nationals – be they soldiers taken prisoner by the enemy or members of the civilian population – suffered bodily harm or material damage, but also, and principally, because they involve the perpetration of an international crime which all the nations of the world are interested in preventing.

...

The [1945 IMT Charter (Nuremberg)], with all the principles embodied in it – including that of individual responsibility – must be seen as “the expression of international law existing at the time of its creation; and to that extent (the Charter) is itself a contribution to international law”.

...

The outcome... is that the crimes set out in the Law of 1950... must be seen today as acts that have always been forbidden by customary international law – acts which are of a “universal” criminal character and entail individual criminal responsibility.²¹⁹

In another part of the judgement dealing with the submission of the defendant that his acts had constituted acts of State, the Supreme Court held that:

The contention of counsel for the appellant is . . . that the acts done by his client for the realization of the “Final Solution” had their origin in Hitler’s decision to put that plan into effect and consequently they were purely “Acts of State”, responsibility for which does not rest on the appellant.

We utterly reject this contention, as did the District Court . . . There is no basis for the doctrine when the matter pertains to acts prohibited by the law of nations, especially when they are international crimes of the class of “crimes against humanity” (in the wide sense). Of such odious acts it must be said that in point of international law they are completely outside the “sovereign” jurisdiction of the State that ordered or ratified their commission, and therefore those who participated in such acts must personally account for them and cannot shelter behind the official character of their task or mission, or behind the “Laws” of the State by virtue of which they purported to act. Their position may be compared with that of a person who, having committed an offence in the interests of a corporation

²¹⁸ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 11.

²¹⁹ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 11.

which he represents, is not permitted to hide behind the collective responsibility of the corporation therefor. In other words, international law postulates that it is impossible for a State to sanction an act that violates its severe prohibitions, and from this follows the idea which forms the core of the concept of "international crime", that a person who was a party to such a crime must bear individual responsibility for it. If it were otherwise, the penal provisions of international law would be a mockery . . . Indeed, even before the Second World War the defence of "Act of State" was not regarded as an adequate defence to the charge of an offence against the "laws of war" (a "conventional" war crime) . . . The plea of "Act of State" is rejected.²²⁰

230. In the *Priebke case* in 1996, Italy's Military Tribunal of Rome found a German soldier and former member of the "SS" guilty of multiple first-degree murder charges, acts which it qualified as war crimes, for his role and participation in the 1944 Ardeatine caves killings when 335 persons (both civilians and members of the armed forces) were killed in reprisal for the killing of 33 German soldiers. The Tribunal considered the reprisal to be disproportionate to the acts which had led to the reprisal, and Priebke was found responsible for having drawn up a list of the names of the victims to be killed, for having checked the identity of the victims being transferred to the place of the killings, and for having shot two of the victims himself. However, the Tribunal found that the accused could not be punished for reasons of statute of limitations.²²¹ On appeal, the judgement was annulled by the Supreme Court of Cassation and another trial ordered.²²²

231. In the *Hass and Priebke case* in 1997 dealing with the same events as in the *Priebke case*, Italy's Military Tribunal of Rome found the accused guilty of multiple charges of aggravated murder for their respective roles in the reprisal killings. It sentenced the accused for war crimes to imprisonment.²²³ In its relevant parts, the judgement was confirmed by the Military Appeals Court and the Supreme Court of Cassation, although the Courts settled on life imprisonment.²²⁴

232. In the *Ercole case* in 2000, Italy's Tribunal of Livorno tried and sentenced a former paratrooper to 18 months' suspended imprisonment for abusing his authority during his participation in a multinational peacekeeping operation in Somalia and, pending the outcome of connected civil proceedings, made him provisionally liable to the payment of 30,000,000 Italian lire to a Somali

²²⁰ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 14.

²²¹ Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996.

²²² Italy, Supreme Court of Cassation, *Priebke case*, Judgement Cancelling Verdict of First Instance, 15 October 1996.

²²³ Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in Trial of First Instance, 22 July 1997.

²²⁴ Italy, Military Appeals Court, *Hass and Priebke case*, Judgement on Appeal, 7 March 1998; Supreme Court of Cassation, *Hass and Priebke case*, Judgement in Trial of Third Instance, 16 November 1998.

citizen who had been tortured.²²⁵ However, in 2001, the Court of Appeals at Florence declared that a crime of abuse of authority was covered by statutory limitations.²²⁶

233. In the *Grabež case* in 1997, a person born in the former Yugoslavia was prosecuted by a Swiss Military Tribunal for violations of the laws and customs of war under the Swiss Military Criminal Code as amended on charges of beating and injuring civilian prisoners in the camps of Omarska and Keraterm in Bosnia and Herzegovina. The Tribunal held that it had jurisdiction under Articles 108(2) and 109 of the Swiss Military Criminal Code as amended over violations of the laws and customs of war, grave breaches of GC III, GC IV and AP I and violations of AP II, but acquitted the accused for lack of sufficient evidence.²²⁷

234. In the *Niyonteze case* in 1999, a Swiss Military Tribunal convicted a Rwandan national and former burgomaster for, *inter alia*, grave breaches of IHL committed in Rwanda on the basis of common Article 3 of the 1949 Geneva Conventions and AP II. The defendant had been charged, in the context of the Rwandan genocide in 1994, with inciting the population to kill Tutsis and moderate Hutus and with exhorting refugees to go back to their homes, with the intention of having them killed and taking their property. The Tribunal sentenced the accused to life imprisonment.²²⁸ In 2000, the Military Court of Appeals partially upheld the judgement, reducing the sentence to 14 years' imprisonment. It found that the defendant was guilty under Article 109 of the Swiss Penal Code relating to violations of the laws of war, common Article 3 of the Geneva Conventions and Article 4 AP II.²²⁹ At the final instance, the Military Court of Cassation, partially dismissing the previous judgement, confirmed the findings on the guilt of the defendant.²³⁰

235. In the *Auschwitz and Belsen case* in 1945, the UK Military Tribunal at Lüneberg admitted that:

There has not been universal agreement on the extent to which an individual can be held personally liable for breaches of such international agreements as the Hague Convention No. IV (Rules of Land Warfare) and the Geneva Prisoners of War Convention of 1929, according to the strict letter of which the responsibility for breach thereof lies on the State authority to which the perpetrator owes allegiance.

However, quoting the IMT's opinion on the enforcement of the 1907 Hague Convention (IV) personally against its violators, the Court went on to state that:

²²⁵ Italy, Tribunal at Livorno, *Ercole case*, 13 April 2000.

²²⁶ Italy, Court of Appeals at Florence, *Ercole case*, 22 February 2001.

²²⁷ Switzerland, Military Tribunal at Lausanne, *Grabež case*, Judgement, 18 April 1997.

²²⁸ Switzerland, Military Tribunal at Lausanne, *Niyonteze case*, Judgement, 30 April 1999.

²²⁹ Switzerland, Military Court of Appeals, *Niyonteze case*, Judgement, 26 May 2000.

²³⁰ Switzerland, Military Court of Cassation, *Niyonteze case*, Judgement, 27 April 2001.

The trend of opinion and the practice followed by the Courts, however, has been to make the individual responsible for his acts in breach of international conventions, and this trend was illustrated on a high level by the decision pronounced by the International Military Tribunal at Nuremberg, that certain accused had made themselves criminals by waging war in breach of the terms of an inter-governmental agreement renouncing war undertaken as an instrument of national policy, the Briand-Kellogg Pact.²³¹

236. In the *Essen Lynching case* in 1945 dealing with the liability of two soldiers and several civilians for the alleged killing of unarmed POWs during the Second World War in violation of the laws and usages of war, the UK Military Court at Essen (Germany) found the accused guilty, stating with regard to the latter that every one of them had in one form or another taken part in the ill-treatment which eventually led to the death of the victims. With regard to one of the soldiers, a Captain in the German army who had not been physically involved in the killing but had allegedly given instructions that the POWs should be taken to a certain place and that he had given the order in a loud voice so that it could be heard by a crowd gathering nearby, the Court found that he was guilty of being concerned in the killing for his positive utterances.²³²

237. In the *Quirin case* in 1942, dealing with the trial, by a military commission, of German soldiers who had landed on US territory in 1942 and were charged, *inter alia*, with war crimes, the US Supreme Court, stating, however, that it was not “concerned with any question of the guilt or innocence of petitioners”, held that:

From the very beginning of its history this Court has recognized and applied the law of war as including that part of the law of nations which prescribes, for the conduct of war, the status, rights and duties of enemy nations as well as of enemy individuals. By the Articles of War . . . Congress has explicitly provided, so far as it may constitutionally do so, that military tribunals shall have jurisdiction to try offenders or offences against the law of war in appropriate cases.

In its ruling, the Supreme Court gave a list of cases in which individual offenders had been charged with offences against the law of war.²³³

238. In the *Yamashita case* in 1946, in which the US Supreme Court was called upon to decide whether the accused, the military governor and commanding general of Japan in the Philippines between 9 October 1944 and 2 September 1945, was responsible for the violations of IHL committed by the troops under his command, the accused was tried for his responsibility as a commander.²³⁴ However, one of the judges, in his dissenting opinion, referred to US military law and stated that “from this the conclusion seems inescapable that the United

²³¹ UK, Military Tribunal at Lüneberg, *Auschwitz and Belsen case*, Judgement, 17 September 1945.

²³² UK, Military Court at Essen, *Essen Lynching case*, Judgement, 21–22 December 1945.

²³³ US, Supreme Court, *Quirin case*, Judgement, 31 July 1942.

²³⁴ US, Supreme Court, *Yamashita case*, Judgement, 4 February 1946.

States recognizes individual criminal responsibility for violations of the laws of war only as to those who commit the offences or who order or direct their commission".²³⁵

239. In the *Altstötter (the Justice Trial) case* in 1947, the US Military Tribunal at Nuremberg held that:

As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognised that tribunals may be established and punishment imposed by the State in whose hands the perpetrators fall

...

It must be admitted that Germans were not the only ones who were guilty of committing war crimes; other violators of international law could, no doubt, be tried and punished by the State of which they were nationals, by the offended State if it can secure jurisdiction of the person, or by an International Tribunal if of competent authorised jurisdiction...

The very essence of the prosecution case is that the laws, the Hitlerian decrees and the draconic, corrupt, and perverted Nazi judicial system themselves constituted the substance of war crimes and crimes against humanity and that participation in the enactment and enforcement of them amounts to complicity in crime. We have pointed out that governmental participation is a material element of the crime against humanity. Only when official organs of sovereignty participated in atrocities and persecutions did those crimes assume international proportions. It can scarcely be said that governmental participation, the proof of which is necessary for conviction, can also be a defense to the charge.²³⁶

240. In its judgement in the *Flick case* in 1947, the US Military Tribunal at Nuremberg noted that "it can no longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals". The Tribunal also rejected the argument that the fact that the defendants were private individuals rather than public officials representing the State meant that they could not be criminally responsible for a violation of international law. Instead, it held that "international law... binds every citizen just as does ordinary municipal law... The application of international law to individuals is no novelty."²³⁷

241. In its judgements in the *Krauch (I. G. Farben Trial) case* and in the *Von Leeb case (The High Command Trial)* in 1948, the US Military Tribunal at Nuremberg reiterated the principle of individual responsibility.²³⁸

242. In its decision in the *Karadžić case* in 1995, the US Court of Appeals for the Second Circuit referred, *inter alia*, to the recognition, by the Executive Branch, of the liability of private persons for certain violations of customary

²³⁵ US, Supreme Court, *Yamashita case*, Dissenting Opinion of Mr Justice Murphy, 4 February 1946.

²³⁶ US, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case*, Judgement, 4 December 1947.

²³⁷ US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947.

²³⁸ US, Military Tribunal at Nuremberg, *Krauch (I. G. Farben Trial) case*, Judgement, 27 August 1947–30 July 1948; *Von Leeb case (The High Command Trial)*, Judgement, 30 December 1947–28 October 1948.

international law and the availability of the Alien Tort Claims Act to remedy such violations. It held that:

We do not agree that the law of nations, as understood in the modern era, confines its reach to state action. Instead, we hold that certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals . . . The liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II.²³⁹

243. In the *Ademi case* in 2000, the Communal Court of Mitrovica in Kosovo (FRY) convicted the accused, a member of the local security force of Albanian origin, for “violating the Rules of International Law during the war conflict against the civilian population” in joint action with members of the armed forces.²⁴⁰

244. In the *Trajković case* before the District Court of Gnjilan in Kosovo (FRY) in 2001, a Kosovo Serb and former chief of police, was convicted, *inter alia*, for having participated in crimes committed against the civilian population in 1999, acts which the District Court found had to be qualified as war crimes under Article 142 of the Penal Code of the FRY, as well as crimes against humanity. The Court also found that the acts had been committed “in time of war”.²⁴¹ However, on appeal, the Supreme Court of Kosovo overruled this judgement and ordered that the case be returned to the same court for retrial. The Supreme Court found, *inter alia*, that:

The state of facts was erroneously established in relation to all charges as there is no direct or conclusive evidence that the accused acted personally or gave orders leading to the alleged crimes or that he should be held liable under command responsibility duties concerning the above-mentioned crimes . . . During the retrial, the court of first instance should therefore assess . . . the issue of the accused’s personal responsibility for participation in the crimes alleged.²⁴²

245. In a written opinion in the *Trajković case* before the District Court of Gnjilan in Kosovo (FRY) in 2001, the International Prosecutor for the Office of the Public Prosecutor of Kosovo stated that:

This Opinion has concluded that [the accused] was not properly found guilty of any of the crimes under individual liability (the direct giving of orders to commit the crimes, or committing them as a co-perpetrator, or under accomplice liability) . . . Individual responsibility subsumes command responsibility. Because of this “subsuming rule”, we must first evaluate whether individual responsibility might attach, as a finding that a defendant is individually responsible for a war crime or crime against humanity will preclude the need to analyse his culpability under command responsibility. The rule is stated in the statute and decisions of the ICTY . . . As to any particular criminal act found to be a war crime or crime against

²³⁹ US, Court of Appeals for the Second Circuit, *Karadžić case*, Decision, 13 October 1995.

²⁴⁰ SFRY (FRY), Communal Court of Mitrovica, *Ademi case*, Judgement, 30 August 2000.

²⁴¹ SFRY (FRY), District Court of Gnjilan, *Trajković case*, Judgement, 6 March 2001.

²⁴² SFRY (FRY), Supreme Court of Kosovo, *Trajković case*, Decision Act, 30 November 2001.

humanity sanctioned under international law, command responsibility can only attach where the accused cannot be found individually responsible for the crime. Therefore an individual responsibility analysis must precede and may preclude a command responsibility analysis. It is this Opinion that any liability for the war crimes enumerated by the Verdict must be through command responsibility, and not through individual responsibility.²⁴³

Other National Practice

246. In 1998, at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, the Afghan Vice-Minister for Foreign Affairs declared that:

Since the second World War in the framework of the United Nations we have been witnessing an unprecedented expansion in the international protection of Human Rights. This expansion could be ascribed to an ever-increasing sharing of fundamental values and expectation among nations. Consequently the World community now acknowledges the need to protect the individual from different varieties of human depredations by creating an International Permanent Criminal Court, which should prosecute and punish those who are escaping national jurisdiction under different circumstances.²⁴⁴

247. In 1994, in a report to UNESCO on measures to implement the 1954 Hague Convention, Australia noted that at the most elementary level of training provided for all members of the armed forces, it was emphasised that “individual officers and soldiers will be held accountable for any violations [of the rules of the LOAC]”.²⁴⁵

248. In 2000, during a debate in the UN Security Council regarding the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, Australia stated that:

Governments must also denounce – and denounce strongly – attacks against United Nations personnel and humanitarian workers and take all measures to bring perpetrators of violence to justice. Impunity, as so many of my colleagues have emphasized in this discussion, cannot be allowed.

...

The enforcement of international humanitarian law must also be strengthened in order to bring those responsible to justice and to send a clear message of the international community’s intolerance of this violence.²⁴⁶

²⁴³ SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Sections IV and IV(A).

²⁴⁴ Afghanistan, Statement by the Vice-Minister for Foreign Affairs at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 16 June 1998.

²⁴⁵ Australia, Department of Foreign Affairs and Trade, Report to UNESCO on Australian measures to implement the 1954 Hague Convention and associate regulations, 13 July 1994, § 1(b).

²⁴⁶ Australia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, pp. 6 and 7.

249. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the environmental impact of the Gulf War, Austria stated that “there could be no doubt as to the illegality of the acts committed by Iraq, entailing . . . personal criminal liability of those responsible for those acts”.²⁴⁷

250. In 1998, at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court held in Rome, the Chilean Under-Secretary of Justice declared that crimes such as genocide, war crimes, which he defined as crimes committed in international armed conflicts or conflicts of an internal character, and crimes against humanity should be included in the competence of the Court.²⁴⁸

251. According to the Report on the Practice of China, which refers to a statement made in 1955 by a representative of the Chinese Ministry of Foreign Affairs, in 1954, China remitted 410 Japanese military personnel who had committed various crimes during the Japanese invasion of China and the Chinese war of liberation. The report notes that this clearly indicates that the Chinese government does not make a distinction between international armed conflicts and internal armed conflicts, and that China “consistently holds that foreigners also shall take criminal responsibility for committing war crimes in internal armed conflicts”.²⁴⁹

252. In 1983, during a debate in the Sixth Committee of the UN General Assembly on the ILC Draft Code of Offences against the Peace and Security of Mankind, China stated that “such crimes could be committed by both individuals and States and the responsibility of either would vary only as to its character or extent”.²⁵⁰

253. In 1992, the Office of the Special Public Prosecutor (SPO) was established in Ethiopia after the fall of the regime of Colonel Mengistu Haile Mariam in 1991. In a letter to the Assistant Secretary-General for Human Rights, Ethiopia explained that the SPO had “the power to conduct investigations and institute proceedings against those it suspects of committing crimes and/or abusing their positions of authority in the former [Mengistu] regime”.²⁵¹

254. In 1994, in a statement before the UN Commission on Human Rights, the Chief Special Prosecutor of the Ethiopian Transitional Government stated

²⁴⁷ Austria, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.19, 23 October 1991, § 5.

²⁴⁸ Chile, Statement by the Under-Secretary of Justice at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 16 June 1998.

²⁴⁹ Report on the Practice of China, 1997, Chapters 6.3 and 6.5, referring to Statement by the Ministry of Foreign Affairs on the issue of the “so-called withdrawal of Japanese nationals in China put forward by the Japanese government”, 16 August 1995, *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, Vol. 3, p. 338.

²⁵⁰ China, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/38/SR.52, 23 November 1983, § 25.

²⁵¹ Ethiopia, Transitional government, Letter dated 28 January 1994 to the Assistant UN Secretary-General for Human Rights, UN Doc. E/CN.4/1994/103, 3 February 1994, § 3.

that the SPO was established "to compile a list of all the abuses committed by the previous regime and to bring those responsible to justice".²⁵²

255. According to a statement made in 1997 by Ethiopia's Office of the Special Public Prosecutor (SPO), which is in charge of prosecuting persons who allegedly committed crimes of genocide, crimes against humanity and war crimes between 1974 and 1991, since its establishment in 1992 by Proclamation 22/1992 of the transitional government of Ethiopia, a total of 5,198 persons had been charged by 1997, 54 of them with war crimes and most of the others with genocide, the defendants being classified into three major groups: policy- and decision-makers; field commanders; and the perpetrators of the crimes. The charges were based on Ethiopia's Penal Code.²⁵³

256. In 1993, the French Ministers of State and Foreign Affairs wrote a letter to the Chairman of the Committee of French Jurists entrusted to study the establishment of an international criminal tribunal for the former Yugoslavia, stating that:

Unfortunately there is no longer any doubt that particularly serious crimes are being committed in the territory of the former Yugoslavia that constitute war crimes, crimes against humanity or serious violations of certain international conventions.

Such actions cannot go unpunished, and the absence of real penalties, in addition to being an affront to public conscience, could encourage the perpetrators of these crimes to pursue their regrettable course of action.²⁵⁴

257. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, France stated that:

In adopting resolution 827 (1993), the Security Council has just established an International Tribunal that will prosecute, judge and punish people from any community who have committed or continue to commit crimes in the territory of the former Yugoslavia . . .

The expression "laws or customs of war" used in Article 3 of the [1993 ICTY Statute] covers specifically, in the opinion of France, all the obligations that flow from the humanitarian law agreements in force on the territory of the former Yugoslavia at the time when the offences were committed".²⁵⁵

258. In 1993, during a debate in the Sixth Committee of the UN General Assembly on the report of the ILC, France referred to the draft statute for an international criminal tribunal for the former Yugoslavia and stated that:

²⁵² Ethiopia, Transitional Government, Statement by the Chief Special Prosecutor before the UN Commission on Human Rights, 17 February 1994, UN Doc. E/CN.4/1994/SR.28, 22 January 1996, § 2.

²⁵³ Ethiopia, Office of the Special Public Prosecutor, Statement of the Chief Special Public Prosecutor, Addis Ababa, 13 February 1997.

²⁵⁴ France, Minister of State and Minister of Foreign Affairs, Letter dated 16 January 1993 to the Procurator-General of the Court of Cassation and Chairman of the Committee of French Jurists, annexed to Letter dated 10 February 1993 to the UN Secretary-General, UN Doc. S/25266, 10 February 1993, p. 52.

²⁵⁵ France, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, pp. 10-11.

Although it was true that barbarity had always existed, it was no less true that impunity for the guilty was no longer acceptable. Therefore, the establishment of an international criminal jurisdiction, although it would not fully satisfy those with the most exacting consciences, was a step forward in achieving respect for the rule of law and a better lot for the victims of the conflicts.²⁵⁶

259. In 1993, during a debate in the Sixth Committee of the UN General Assembly on the question of responsibility for attacks on UN and associated personnel and measures to ensure that those responsible for such attacks were brought to justice, Germany, referring to a draft of the Convention on the Safety of UN Personnel which had been introduced by New Zealand, stated that:

[This draft convention] also established the personal responsibility of the perpetrators by making such acts crimes punishable under the national laws of States parties. That was especially important when the United Nations was operating in areas of the world where there was no effective authority to guarantee that the perpetrators were actually punished. The draft convention would fill a vacuum.²⁵⁷

260. According to a representative of the German Central Office for the Investigation of National-Socialist Atrocities at Ludwigsburg (*Zentrale Stelle zur Aufklärung nationalsozialistischer Gewaltverbrechen*), established by the judicial administrations of the German States in 1958, by September 1999, Germany had investigated the cases against more than 100,000 accused and suspected persons for crimes committed during the Nazi regime. In all, 7,225 of the proceedings were handed over to the public prosecution and about 6,500 individuals were convicted. The representative stated that "it is important that [even the elderly persons accused of having committed such crimes] must be held responsible for their deeds".²⁵⁸

261. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, Hungary noted that:

This is the first time that the United Nations established an international criminal jurisdiction to prosecute persons who commit grave violations of international humanitarian law . . . We note . . . the importance of the fact that the jurisdiction of the [ICTY] covers the whole range of international humanitarian law and the entire duration of the conflict throughout the territory of former Yugoslavia.²⁵⁹

262. In 1996, during a debate in the Parliamentary Assembly of the Council of Europe on the report of the Committee on Migration, Refugees and Demography on refugees, displaced persons, and reconstruction in certain countries

²⁵⁶ France, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/48/SR.18, 26 October 1993, § 35.

²⁵⁷ Germany, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/48/SR.16, 21 October 1993, § 65.

²⁵⁸ Willi Dressen, "Eine Behörde gegen das Vergessen", *Die Welt*, 2 September 1999.

²⁵⁹ Hungary, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, p. 20.

in the former Yugoslavia, Hungary declared that “those who committed war crimes or crimes against humankind should be prosecuted and held responsible for their acts before an international court, namely the International Criminal Tribunal for the Former Yugoslavia”.²⁶⁰

263. In 1996, during a debate in the UN Security Council on the report of the UN Secretary-General on the situation in Burundi, Indonesia stated that:

We would like to recall that all persons who committed or authorized the commission of serious violations of international humanitarian law are individually responsible for such violations and should be held accountable. Those responsible for crimes against humanity and, in this case, their fellow countrymen should be brought to justice.²⁶¹

264. In 1950, during a debate in the Sixth Committee of the UN General Assembly on the ILC’s work on the Nuremberg Principles, Israel declared that the principles in question “had become a constituent part not only of universal international law, but also of the law of the United Nations”.²⁶²

265. In 1950, during a debate in the Sixth Committee of the UN General Assembly on the ILC’s work on the Nuremberg Principles, and in reply to a statement by the UK “that the concept of the direct responsibility of the individual under international law without the interposition of the national State was ‘convenient and picturesque’ but unscientific”, the Netherlands emphasised that it was apparent from the judgement of the 1945 IMT (Nuremberg) that “there were rules of international law which applied directly to individuals, without passing through the intermediary of national law, and that some obligations of international law transcended the obligations imposed by the national administration”.²⁶³

266. In 2000, during a debate in the UN Security Council regarding the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, and specifically with regard to the alleged shooting down of two UN aircraft in Angola in December 1998 and January 1999 respectively, New Zealand stated that:

The premeditated destruction of those aircraft would be one of the most flagrant crimes against this Organization and its personnel ever recorded. . . It is essential that the perpetrators be brought to justice, however long it takes. There can be no impunity for crimes of such nature.²⁶⁴

²⁶⁰ Hungary, Statement before the Parliamentary Assembly of the Council of Europe, Ordinary Session (First part), 24 January 1996, *Official Report of Debates*, Vol. I, p. 181.

²⁶¹ Indonesia, Statement before the UN Security Council, UN Doc. S/PV.3692, 28 August 1996, p. 21.

²⁶² Israel, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.236, 9 November 1950, § 55.

²⁶³ Netherlands, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.236, 9 November 1950, § 24.

²⁶⁴ New Zealand, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 9.

During the same debate, New Zealand stated, with regard to the “inclusion of deliberate attacks on personnel involved in a humanitarian situation or peace-keeping mission in the [1998 ICC Statute] as a war crime over which the International Criminal Court will have jurisdiction”, that “we hope that the [International Criminal] Court . . . will contribute towards ending the impunity enjoyed by perpetrators of such attacks in the past”.²⁶⁵

267. In 2000, during a debate in the UN Security Council regarding the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, Norway stated that “States need to hold . . . non-State actors accountable for their attacks on humanitarian workers operating in territory under their control”.²⁶⁶

268. In 1950, during a debate in the Sixth Committee of the UN General Assembly on the ILC’s work on the Nuremberg Principles, Pakistan stated that:

The Nürnberg principles, involving as they did the grave problems of war and peace, were of great importance and deep significance to international law. They proclaimed that . . . those who violated the laws [and] customs of war or committed inhuman acts against civilian populations thereby rendered themselves guilty of international crimes and liable to judgment and punishment.²⁶⁷

269. In 2001, in a statement before the UN Commission on Human Rights, the Rwandan Minister of Justice stated that his government “was also committed to doing its utmost to prosecute and sentence those responsible for the genocide and other serious violations of human rights and international humanitarian law”.²⁶⁸

270. In 1996, during a debate in the UN Security Council on the report of the UN Secretary-General on the situation in Burundi, South Africa stated that:

The international community can no longer allow acts of unbridled violence to continue with impunity. Those who commit serious violations of international humanitarian law should be made to realize that they are individually responsible for such violations and will be held accountable.²⁶⁹

271. In 1990, during a debate in the Sixth Committee of the UN General Assembly, the UK stated that:

Recent events in the Persian Gulf demonstrated all too clearly the relevance of the topic of the draft Code of crimes against the peace and security of mankind.

²⁶⁵ New Zealand, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 9.

²⁶⁶ Norway, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 10.

²⁶⁷ Pakistan, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.236, 9 November 1950, § 38.

²⁶⁸ Rwanda, Statement by the Minister of Justice before the UN Commission on Human Rights, 30 March 2001, UN Doc. E/CN.4/2001/SR.25, 6 May 2002, § 73.

²⁶⁹ South Africa, Statement before the UN Security Council, UN Doc. S/PV.3692, 28 August 1996, p. 12.

The catalogue of the international legal obligations which had been violated was endless. It must be clear that individuals were personally responsible for crimes of that nature, since the responsibility of the State, if there was such responsibility, was not in itself a sufficient response.²⁷⁰

272. In 1990, during a debate in the UN Security Council concerning the application of GC IV in Kuwait following its occupation by Iraq, the UK representative stated that:

I should also recall the terms of paragraph 13 of resolution 670 (1990), under which individuals are held individually responsible for grave breaches of the Geneva Convention. We should also hold personally responsible those involved in violations of the laws of armed conflict, including the prohibition against initiating the use of chemical or biological weapons contrary to the [1925 Gas Protocol], to which Iraq is a party.²⁷¹

273. On 21 January 1991, in the context of the Gulf War, the UK Minister of Foreign Affairs summoned the Iraqi Ambassador to discuss Iraq's obligations under international law. According to a statement by an FCO spokesperson following the meeting, the UK Minister had "also reminded the Iraqi Ambassador of the personal liability of those individuals who broke the Conventions . . . He again reminded the Ambassador of the personal liability of those who authorised [the] use [of chemical and biological weapons]".²⁷²

274. In 1991, in a report submitted to the UN Security Council on operations in the Gulf War, the UK, with regard to the treatment of British POWs by Iraq, stated that "the Iraqi Ambassador was reminded of the responsibility of . . . individual Iraqis for any grave breach of the [Geneva] Conventions".²⁷³

275. In 1991, in a written reply to a question in the House of Commons, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that "we have consistently stated that individuals bear personal responsibility for crimes under international law. This position is reflected in Security Council resolution 674."²⁷⁴

276. In 1991, during a debate in the House of Lords on the subject of peace and security in the Middle East, a UK government spokesperson stated that:

We have made it clear that anyone who breaks the provisions of the Geneva Conventions may be held liable, and that remains the case. That will not be a decision for the [UK] alone. Machinery already exists under the [Geneva Conventions Act as

²⁷⁰ UK, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/45/SR.35, 8 November 1990, § 27.

²⁷¹ UK, Statement before the UN Security Council, UN Doc., S/PV.2963, 29 November 1990, p. 82.

²⁷² UK, Statement by a FCO spokesperson, 21 January 1991, reprinted in *BYIL*, Vol. 62, 1991, p. 680.

²⁷³ UK, Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22117, 21 January 1991, p. 1.

²⁷⁴ UK, House of Commons, Reply to a written question by Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 28 February 1991, Vol. 186, Written Answers, col. 583.

amended (1957)] for prosecuting grave breaches. The Kuwaiti Government intends to establish a commission to catalogue war crimes, which we welcome.²⁷⁵

277. In 1991, during a debate in the House of Commons on the subject of peace and security in the Middle East, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that:

Anyone who breaks the provisions of the Geneva conventions may be held liable. Thus, individual Iraqis now bear personal responsibility for breaches of them. That position was reaffirmed in Security Council resolutions 670 and 674 . . . Machinery already exists under [the Geneva Conventions Act as amended (1957)] for prosecuting grave breaches of them.²⁷⁶

278. In 1993, during a debate in the UN Security Council on the establishment of the ICTY, the UK, with regard to “continued reports of massive breaches of international humanitarian law and human rights in Bosnia”, declared that:

The perpetrators must be called to account, whoever is responsible, throughout the territory of the former Yugoslavia. Those who have perpetrated these shocking breaches of international humanitarian law should be left in no doubt that they will be held individually responsible for their actions.²⁷⁷

279. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, the UK stated that:

It is essential that those who commit [violations of IHL in the former Yugoslavia] be in no doubt that they will be held individually responsible. It is essential that these atrocities be investigated and the perpetrators called to account, whoever and wherever they may be. . . Articles 2 to 5 of the draft [ICTY] statute describe the crimes within the jurisdiction of the Tribunal. The Statute does not, of course, create new law, but reflects existing international law in this field. In this connection, it would be our view that the reference to the laws or customs of war in Article 3 is broad enough to include applicable international conventions and that Article 5 covers acts committed in time of armed conflict.²⁷⁸

280. In 1994, during a debate in the UN Security Council on acts committed in Rwanda, the UK stated that:

[Resolution 935] of the UN Security Council sends a clear message to those responsible for grave violations of international humanitarian law, or acts of genocide, that they will be held individually responsible for those acts. The international community is determined that they be brought to justice; it is our duty to ensure that this is done.²⁷⁹

²⁷⁵ UK, House of Lords, Statement by a government spokesperson, *Hansard*, 6 March 1991, Vol. 526, cols. 1484–1485.

²⁷⁶ UK, House of Commons, Statement by the Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 28 March 1991, Vol. 188, col. 1100.

²⁷⁷ UK, Statement before the UN Security Council, UN Doc. S/PV.3175, 22 February 1993, p. 14.

²⁷⁸ UK, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, p. 19.

²⁷⁹ UK, Statement before the UN Security Council, UN Doc. S/PV.3400, 1 July 1994, p. 8.

281. In 1994, during a debate in the UN Security Council, the UK reiterated that the establishment of the ICTR “is a signal of the international community’s determination that offenders must be brought to justice” and that “it is also a matter of the greatest importance to the British Government that the perpetrators of the genocide be brought to justice”.²⁸⁰

282. In 1991, in a diplomatic note to Iraq concerning operations in the Gulf War, the US stated that:

The Government of the United States reminds the Government of Iraq that under International Law, violations of the Geneva Conventions, the Geneva [Gas] Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials.²⁸¹

In another such diplomatic note a few days later, the US reiterated that “Iraqi individuals who are guilty of . . . war crimes . . . are personally liable and subject to prosecution at any time”.²⁸²

283. In 1991, during a debate in the Sixth Committee of the UN General Assembly on the environmental impact of the Gulf War and the environmental damage caused, the US maintained that “existing international law not only prohibited the type of acts committed by Iraq, but also provided important remedies to address and deter such acts, in particular with respect to personal criminal liability”.²⁸³

284. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, the US stated that:

Truth is the cornerstone of the rule of law, and it will point towards individuals, not peoples, as perpetrators of war crimes . . . And to those who committed [violations of IHL in the former Yugoslavia], we have a clear message: war criminals will be prosecuted and justice will be rendered.

The crimes being committed . . . are not just isolated acts of drunken militiamen, but often are the systematic and orchestrated crimes of Government officials, military commanders, and disciplined artillerymen and foot soldiers. The men and women behind these crimes are individually responsible for the crimes of those they purport to control; the fact that their power is often self-proclaimed does not lessen their culpability.

...

²⁸⁰ UK, Statement before the UN Security Council, UN Doc. S/PV.3453, 8 November 1994, p. 6; see also Statement before the UN Security Council, UN Doc. S/PV.3605, 12 December 1995, p. 5.

²⁸¹ US, Department of State, Diplomatic note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

²⁸² US, Department of State, Diplomatic note to Iraq, Washington, 21 January 1991, annexed to Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 4.

²⁸³ US, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/46/SR.18, 22 October 1991, § 39.

It is understood that the “laws or customs of war” referred to in Article 3 [of the 1993 ICTY Statute] include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions.

...

With respect to paragraph 1 of Article 7, it is our understanding that individual liability arises in the case of a conspiracy to commit a crime referred to in Articles 2 through 5.²⁸⁴

285. In 1995, in its *amicus curiae* brief presented to the ICTY in the *Tadić case* on the issue of the Tribunal’s jurisdiction, the US stated that:

We believe that the “grave breaches” provisions of Article 2 of the [1993 ICTY] Statute apply to armed conflicts of a non-international character as well as those of an international character ...

Insofar as Common Article 3 [of the 1949 Geneva Conventions] prohibits certain acts with respect to “[p]ersons taking no active part in hostilities” in cases of armed conflict not of an international character, it is consistent with the ordinary meaning of the Geneva Conventions to treat such persons as persons protected by the Conventions ...

... Article 3 of the [1993 ICTY] Statute authorizes the prosecution of “persons violating the laws or customs of war. Such violations shall include, but not be limited to ...” a series of specific acts that would constitute such violations. This is only an exemplary and not an exhaustive list, and the language of Article 3 is otherwise broad enough to cover all relevant violations of the laws or customs of war, whether applicable in international or non-international armed conflict”.²⁸⁵

286. The 1998 version of the US Department of Defense Directive on the Law of War Program stated that “all reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action”. A “reportable incident” is defined as “a possible, suspected, or alleged violation of the law of war”.²⁸⁶

287. In 1950, during a debate in the Sixth Committee of the UN General Assembly on the ILC’s work on the Nuremberg Principles, the SFRY stated that “all civilized nations considered that the principles recognized in the Charter of the Nürnberg Tribunal were principles of positive international law which all States should respect”.²⁸⁷

²⁸⁴ US, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, pp. 13–16.

²⁸⁵ US, *Amicus Curiae* brief presented to the ICTY, *Tadić case*, Motion Hearing, 25 July 1995, pp. 35–37.

²⁸⁶ US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Sections 3.2 and 4.3.

²⁸⁷ SFRY, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.234, 6 November 1950, § 7.

288. In Order No. 985-1/91 issued in 1991, the YPA Chief of General Staff stated that “war crimes and other grave breaches of norms of law on warfare are serious criminal offences and call for criminal liability of all perpetrators”.²⁸⁸

III. Practice of International Organisations and Conferences

United Nations

289. In a resolution adopted in 1980, the UN Security Council, after recalling “the applicability of GC IV to the Arab territories occupied by Israel” and, in particular, Article 27 thereof, stated that it was:

deeply concerned that the Jewish settlers in the occupied Arab territories are allowed to carry arms thus enabling them to perpetrate crimes against the civilian Arab population,

1. condemns the assassination attempts on the lives of the mayors of Nablus, Ramallah and Al Bireh and calls for the immediate apprehension and prosecution of the perpetrators of these crimes.²⁸⁹

290. In a resolution adopted in 1990 in the context of the Iraqi occupation of Kuwait, the UN Security Council stated that:

The Fourth Geneva Convention applies to Kuwait and... as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and, in particular, is liable under the Convention in respect of the grave breaches committed by it, as are individuals who commit... grave breaches.²⁹⁰

291. In a resolution adopted in 1992 on violations of humanitarian law in the territory of the former Yugoslavia and in Bosnia and Herzegovina, the UN Security Council reaffirmed that “persons who commit... grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches”.²⁹¹

292. In a resolution adopted in 1992 establishing the Commission of Experts to examine and analyse evidence of grave breaches of the Geneva Conventions and other violations of IHL in the former Yugoslavia, the UN Security Council recalled that “persons who commit... grave breaches of the Conventions are individually responsible in respect of such breaches”.²⁹²

293. In a resolution on Somalia adopted in 1992, the UN Security Council strongly condemned “all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery

²⁸⁸ SFRY (FRY), Chief of General Staff of the YPA, Legal Department, Order No. 985-1/91, 3 October 1991, § 2.

²⁸⁹ UN Security Council, Res. 471, 5 June 1980, § 1.

²⁹⁰ UN Security Council, Res. 670, 25 September 1990, § 13.

²⁹¹ UN Security Council, Res. 771, 13 August 1992, § 1.

²⁹² UN Security Council, Res. 780, 6 October 1992, preamble; see also Res. 764, 13 July 1992, § 10.

of food and medical supplies essential for the survival of the civilian population" and affirmed that "those who commit . . . such acts will be held individually responsible in respect of such acts".²⁹³

294. In a resolution adopted in 1993 on the establishment of the ICTY, the UN Security Council recalled that "persons who commit . . . grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches" and expressed itself "determined to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for [violations of international humanitarian law]".²⁹⁴

295. In a resolution on Somalia adopted in 1993, the UN Security Council reiterated its demand that "all Somali parties, including movements and factions, immediately cease and desist from all breaches of international humanitarian law" and reaffirmed that "those responsible for such acts be held individually accountable".²⁹⁵

296. In a resolution adopted in 1993 with respect to the former Yugoslavia, the UN Security Council reaffirmed that "those who commit or have committed [massive, organized and systematic detention and rape of women] will be held individually responsible in respect of such acts".²⁹⁶

297. By Resolution 827 of May 1993, the UN Security Council established the ICTY as an *ad hoc* international tribunal "for the sole purpose of prosecuting the persons responsible for serious violations of international humanitarian law in the territory of the former Yugoslavia". To the same end, it decided to adopt the ICTY Statute.²⁹⁷

298. In a resolution on Bosnia and Herzegovina adopted in 1993, the UN Security Council recalled "the principle of individual responsibility for the perpetration of war crimes and other violations of international humanitarian law and its decision in resolution 827 (1993) to establish an International Tribunal".²⁹⁸

299. In a resolution adopted in 1994 with respect to the former Yugoslavia, the UN Security Council reiterated that "any persons committing violations of international humanitarian law will be held individually responsible".²⁹⁹

300. In a resolution on Rwanda adopted in 1994, the UN Security Council recalled a statement by its President in which it "*inter alia*, condemned all breaches of international humanitarian law in Rwanda, particularly those perpetrated against the civilian population and recalled that persons who instigate or participate in such acts are individually responsible". The Security Council also recalled that "all persons who commit or authorize the commission of

²⁹³ UN Security Council, Res. 794, 3 December 1992, § 5.

²⁹⁴ UN Security Council, Res. 808, 22 February 1993, preamble.

²⁹⁵ UN Security Council, Res. 814, 26 March 1993, § 13.

²⁹⁶ UN Security Council, Res. 820, 17 April 1993, § 6.

²⁹⁷ UN Security Council, Res. 827, 25 May 1993, § 2.

²⁹⁸ UN Security Council, Res. 859, 24 August 1993, § 7.

²⁹⁹ UN Security Council, Res. 913, 22 April 1994, preamble.

serious violations of international humanitarian law are individually responsible for those violations and should be brought to justice".³⁰⁰

301. By Resolution 955 of November 1994, the UN Security Council established the ICTR as an *ad hoc* tribunal

for the sole purpose of prosecuting persons responsible for genocide and other serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994.

To this end, the Security Council decided to adopt the ICTR Statute, annexed to the resolution.³⁰¹

302. In a resolution adopted in 1995 concerning the conflict in the former Yugoslavia, the UN Security Council reiterated that "all those who commit violations of international humanitarian law will be held individually responsible in respect of such acts".³⁰²

303. By Resolution 1012 of 1995, the UN Security Council established the International Commission of Inquiry in Burundi, *inter alia*, to recommend measures to bring to justice persons responsible for the assassination of the President of Burundi, the massacres and other related serious acts of violence which followed, to prevent any repetition of deeds similar to those investigated by the commission and, in general, to eradicate impunity. The Security Council recalled that "all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for these violations and should be held accountable".³⁰³

304. In a resolution on the former Yugoslavia adopted in 1995, the UN Security Council strongly condemned "all violations of international humanitarian law and of human rights in the territory of the former Yugoslavia" and reiterated that "all those who commit violations of international humanitarian law will be held individually responsible in respect of such acts".³⁰⁴

305. In a resolution on Burundi adopted in 1996, the UN Security Council recalled that "all persons who commit or authorize the commission of serious violations of international humanitarian law are individually responsible for such violations and should be held accountable" and reaffirmed "the need to put an end to impunity for such acts and the climate that fosters them".³⁰⁵

306. In a resolution on Angola adopted in 1996, the UN Security Council stressed "the need for the Angolan parties to give greater attention to

³⁰⁰ UN Security Council, Res. 935, 1 July 1994, preamble.

³⁰¹ UN Security Council, Res. 955, 8 November 1994, § 1.

³⁰² UN Security Council, Res. 1009, 10 August 1995, § 4; see also Res. 1010, 10 August 1995, § 3.

³⁰³ UN Security Council, Res. 1012, 28 August 1995, preamble and § 1.

³⁰⁴ UN Security Council, Res. 1034, 21 December 1995, § 1.

³⁰⁵ UN Security Council, Res. 1072, 30 August 1996, preamble.

preventing incidents of human rights abuse, investigating alleged human rights violations, and punishing those found guilty by due process of law".³⁰⁶

307. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council reaffirmed that "persons who commit . . . grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches".³⁰⁷

308. In a resolution on East Timor adopted in 1999, the UN Security Council expressed "its concern at reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor" and stressed that "persons committing such violations bear individual responsibility". It also demanded that "those responsible for . . . acts [of violence in East Timor] be brought to justice".³⁰⁸

309. In the resolution establishing UNTAET in 1999 in the context of the situation in East Timor, the UN Security Council expressed "its concern at reports indicating that systematic, widespread and flagrant violations of international humanitarian and human rights law have been committed in East Timor" and stressed that "persons committing such violations bear individual responsibility". It also demanded that "those responsible for . . . violence [in East Timor] be brought to justice".³⁰⁹

310. By Resolution 1315 of 2000, the UN Security Council established the Special Court for Sierra Leone. In the resolution, it reaffirmed that "persons who commit or authorize serious violations of international humanitarian law are individually responsible and accountable for those violations and that the international community will exert every effort to bring those responsible to justice".³¹⁰ It also recommended that:

The special court should have personal jurisdiction over persons who bear the greatest responsibility for the commission of the crimes referred to in paragraph 2 [notably crimes against humanity, war crimes and other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law committed within the territory of Sierra Leone].³¹¹

311. In 1992, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council condemned attacks on the UNPROFOR position in Sarajevo and stated that "the members of the Council call upon all parties to ensure that those responsible for these intolerable acts are quickly called to account".³¹²

312. In February 1993, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council declared that:

³⁰⁶ UN Security Council, Res. 1087, 11 December 1996, preamble.

³⁰⁷ UN Security Council, Res. 1193, 28 August 1998, § 12.

³⁰⁸ UN Security Council, Res. 1264, 15 September 1999, preamble and § 1.

³⁰⁹ UN Security Council, Res. 1272, 25 October 1999, preamble and § 16.

³¹⁰ UN Security Council, Res. 1315, 14 August 2000, preamble.

³¹¹ UN Security Council, Res. 1315, 14 August 2000, § 3.

³¹² UN Security Council, Statement by the President, UN Doc. S/24379, 4 August 1992.

The deliberate impeding of the delivery of food and humanitarian relief essential for the survival of the civilian population in Bosnia and Herzegovina constitutes a violation of the Geneva Conventions of 1949 and the Council is committed to ensuring that individuals responsible for such acts are brought to justice.³¹³

313. In March 1993, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed that "those guilty of crimes against international humanitarian law will be held individually responsible by the world community".³¹⁴

314. In April 1993, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed that "those guilty of crimes against international humanitarian law will be held individually responsible by the world community".³¹⁵

315. In April 1993, in a statement by its President following the death of persons detained by Bosnian Serb forces when the vehicle transporting them for work at the front was ambushed, the UN Security Council condemned all violations of GC III and IV and reaffirmed that "those who commit . . . such acts will be held personally responsible".³¹⁶

316. In June 1993, in a statement by its President regarding the conflict in Angola, the UN Security Council strongly condemned an attack by UNITA on a train carrying civilians, qualifying it "as a clear violation of . . . international humanitarian law" and stressing that "those responsible must be held accountable".³¹⁷

317. In October 1993, in a statement by its President following a reported "massacre of the civilian population . . . by troops of the Croatian Defence Council" and "accounts of attacks against UNPROFOR by armed persons bearing uniforms of the Bosnian Government forces, and of an attack to which an humanitarian convoy under the protection of UNPROFOR was subjected" in central Bosnia, the UN Security Council reiterated that "those responsible for such violations of international humanitarian law should be held accountable in accordance with the relevant resolutions of the Council".³¹⁸

318. In January 1994, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council condemned "the flagrant violations of international humanitarian law which have occurred for which it holds the perpetrators individually responsible".³¹⁹

³¹³ UN Security Council, Statement by the President, UN Doc. S/25334, 25 February 1993, p. 1.

³¹⁴ UN Security Council, Statement by the President, UN Doc. S/25361, 3 March 1993, p. 1.

³¹⁵ UN Security Council, Statement by the President, UN Doc. S/25520, 3 April 1993, p. 1.

³¹⁶ UN Security Council, Statement by the President, UN Doc. S/25557, 8 April 1993.

³¹⁷ UN Security Council, Statement by the President, UN Doc. S/25899, 8 June 1993.

³¹⁸ UN Security Council, Statement by the President, UN Doc. S/26661, 28 October 1993.

³¹⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/1, 7 January 1994, p. 1.

319. In March 1994, in a statement by its President regarding the conflict in Afghanistan, the UN Security Council recalled that “those who violate international humanitarian law bear individual responsibility”.³²⁰

320. In April 1994, in a statement by its President concerning the situation in Rwanda, the UN Security Council condemned the killing of “Government leaders, many civilians and at least ten Belgian peace-keepers as well as the reported kidnapping of others” and stated that the perpetrators of these “horrific attacks . . . must be held responsible”.³²¹

321. In August 1994, in a statement by its President concerning the situation in Rwanda, the UN Security Council stated that:

The Council encourages the Government of Rwanda to cooperate with the United Nations, in particular with the Commission of Experts established by the Council in its resolution 935 (1994), in ensuring that those guilty of the atrocities committed in Rwanda, in particular the crime of genocide, are brought to justice through an appropriate mechanism or mechanisms which will ensure fair and impartial trials in accordance with international standards of justice.³²²

322. In September 1994, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council condemned “all violations of international humanitarian law in the conflict in the Republic in Bosnia and Herzegovina, for which those who commit them are personally responsible”.³²³

323. In October 1994, in a statement by its President concerning the situation in Rwanda, the UN Security Council reaffirmed its view that “those responsible for serious breaches of international humanitarian law and acts of genocide must be brought to justice”.³²⁴

324. In 1994, in a statement by its President concerning the situation in Burundi, the UN Security Council reaffirmed “the importance of bringing to justice those responsible for the coup of 21 October 1993 and subsequent inter-ethnic massacres and other violations of international humanitarian law”.³²⁵

325. In July 1995, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed “its condemnation of all violations of international humanitarian law” and reiterated “to all concerned that those who have committed . . . such acts will be held individually responsible in respect of such acts”.³²⁶

326. In 1995, in a statement by its President regarding the situation in Croatia, the UN Security Council reminded “the parties of their responsibilities under

³²⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/12, 23 March 1994.

³²¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/16, 7 April 1994.

³²² UN Security Council, Statement by the President, UN Doc. S/PRST/1994/42, 10 August 1994.

³²³ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/50, 2 September 1994.

³²⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/59, 14 October 1994, p. 2.

³²⁵ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/60, 21 October 1994.

³²⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/33, 20 July 1995.

international humanitarian law" and reiterated that "those who commit violations of international humanitarian law will be held individually responsible in respect of such acts".³²⁷

327. In September 1995, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reiterated that "those who commit violations of international humanitarian law will be held individually responsible in respect of such acts".³²⁸ The same message was conveyed by the Security Council in a subsequent statement by its President.³²⁹

328. In October 1995, in a statement by its President regarding the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed that "those who have committed... violations of international humanitarian law will be held individually responsible for them".³³⁰

329. In 1998, in a statement by its President concerning the situation in the DRC, the UN Security Council stated that it:

recognizes the necessity to investigate further the massacres, other atrocities and violations of international humanitarian law and to prosecute those responsible. It deplores the delay in the administration of justice. The Council calls on the Governments of the Democratic Republic of the Congo and Rwanda to investigate without delay, in their respective countries, the allegations contained in the report of the Investigative Team and to bring to justice any persons found to have been involved in these or other massacres, atrocities and violations of international humanitarian law. The Council takes note of the stated willingness of the Government of the Democratic Republic of the Congo to try any of its nationals who are guilty of or were implicated in the alleged massacres... Such action is of great importance in helping to bring an end to impunity and to foster lasting peace and stability in the region. It urges Member States to cooperate with the Governments of the Democratic Republic of the Congo and Rwanda in the investigation and prosecution of these persons.³³¹

The UN Security Council further expressed its

readiness to consider, as necessary in light of actions by the Governments of the Democratic Republic of the Congo and Rwanda, additional steps to ensure that the perpetrators of the massacres, other atrocities and violations of international humanitarian law are brought to justice.³³²

330. In 1998, in a statement by its President concerning the situation in the DRC, the UN Security Council reaffirmed that "all persons who

³²⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/38, 4 August 1995.

³²⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/43, 7 September 1995, p. 1.

³²⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/44, 7 September 1995, p. 2.

³³⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/52, 12 October 1995, p. 2.

³³¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/20, 13 July 1998, pp. 1-2.

³³² UN Security Council, Statement by the President, UN Doc. S/PRST/1998/20, 13 July 1998, p. 2.

commit...grave breaches of the [Geneva Conventions of 1949 and the Additional Protocols of 1977] are individually responsible in respect of such breaches".³³³

331. In a resolution adopted in 1946, the UN General Assembly affirmed "the principles of international law recognized by the Charter of the Nuremberg Tribunal and the judgment of the Tribunal". It also called upon the Committee on the Progressive Development of International Law and its Codification (a predecessor of the ILC)

to treat as a matter of primary importance plans for the formation, in the context of a general codification of offences against the peace and security of mankind, or of an International Criminal Code, of the principles recognized in the Charter of the Nuremberg Tribunal and in the judgment of the Tribunal.³³⁴

332. By Resolution 177 (II) of 1947, the UN General Assembly established the ILC which was directed, *inter alia*, to "formulate the principles of international law recognized in the Charter of the Nuremberg Tribunal and in the judgement of the Tribunal".³³⁵ However, after the ILC had formulated the 1950 Nuremberg Principles, the General Assembly did not formally adopt them by a resolution.

333. In a resolution adopted in 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly stated that "persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they have committed those crimes".³³⁶

334. In a resolution adopted in 1981 regarding the conflict in the Near East, the UN General Assembly expressed "deep concern that Israel, the occupying Power, has failed so far to apprehend and prosecute the perpetrators of the assassination attempts" which had been carried out against the Mayors of Nablus, Ramallah and Al Birh. It referred to Article 27 GC IV.³³⁷

335. In a resolution adopted in 1992 on the situation in Bosnia and Herzegovina, the UN General Assembly urged the UN Security Council "to consider recommending the establishment of an ad hoc international war crimes tribunal to try and punish those who have committed war crimes in the Republic of Bosnia and Herzegovina".³³⁸

336. In a resolution adopted in 1993 in the context of the conflict in the former Yugoslavia, the UN General Assembly, "welcoming the establishment of

³³³ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, pp. 1-2.

³³⁴ UN General Assembly, Res. 95 (II), 11 December 1946.

³³⁵ UN General Assembly, Res. 177 (II), 21 November 1947, § (a).

³³⁶ UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, § 5.

³³⁷ UN General Assembly, Res. 36/147 G, 16 December 1981, preamble and § 1.

³³⁸ UN General Assembly, Res. 47/121, 18 December 1992, § 10.

the [ICTY]”, reaffirmed that “all persons who perpetrate or authorize crimes against humanity and other violations of international humanitarian law are individually responsible for those violations”.³³⁹

337. In a resolution on the former Yugoslavia adopted in 1993, the UN General Assembly, “welcoming the convening of the [ICTY] and the naming of its Chief Prosecutor”, stated that it supported “the determination of the Security Council that all persons who perpetrate or authorize violations of international humanitarian law are individually responsible for those breaches and that the international community shall exert every effort to bring them to justice”.³⁴⁰

338. In a resolution adopted in 1994 on the situation in Bosnia and Herzegovina, the UN General Assembly, “welcoming the establishment of the [ICTY]”, affirmed “individual responsibility for the perpetration of crimes against humanity and other serious violations of international humanitarian law committed in Bosnia and Herzegovina”.³⁴¹

339. In a resolution adopted in 1994 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN General Assembly noted that “all serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991 are within the jurisdiction of the [ICTY], and that persons who commit such acts in the context of the existing conflict will be held accountable”.³⁴²

340. In a resolution adopted in 1994 on the rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly reaffirmed that “all persons who perpetrate or authorize crimes against humanity or other violations of international law are individually responsible for those violations”.³⁴³

341. In a resolution adopted in 1994 on the situation of human rights in Rwanda, the UN General Assembly reaffirmed that:

All persons who commit or authorize genocide or other grave violations of international humanitarian law or those who are responsible for grave violations of human rights are individually responsible and accountable for those violations and . . . the international community will exert every effort to bring those responsible to justice in accordance with international principles of due process.³⁴⁴

The General Assembly also welcomed the establishment of the ICTR.³⁴⁵

342. In a resolution adopted in 1995 on rape and abuse of women in areas of armed conflict in the former Yugoslavia, the UN General Assembly reaffirmed that “all persons who perpetrate or authorize crimes against humanity or other

³³⁹ UN General Assembly, Res. 48/143, 20 December 1993, preamble and § 5.

³⁴⁰ UN General Assembly, Res. 48/153, 20 December 1993, preamble and § 7.

³⁴¹ UN General Assembly, Res. 49/10, 3 November 1994, preamble and § 26.

³⁴² UN General Assembly, Res. 49/196, 23 December 1994, § 11.

³⁴³ UN General Assembly, Res. 49/205, 23 December 1994, § 6.

³⁴⁴ UN General Assembly, Res. 49/206, 23 December 1994, § 4; see also Res. 50/200, 22 December 1995, § 6 and Res. 51/114, 12 December 1996, § 4.

³⁴⁵ UN General Assembly, Res. 49/206, 23 December 1994, § 5.

violations of international humanitarian law are individually responsible for those violations".³⁴⁶

343. In a resolution on the former Yugoslavia adopted in 1995, the UN General Assembly condemned "in the strongest terms all violations of human rights and international humanitarian law by the parties to the conflict" and stated that "persons who commit such acts will be held personally responsible and accountable".³⁴⁷

344. In a resolution adopted in 1996 on the situation of human rights in Afghanistan, the UN General Assembly urged "the Afghan authorities . . . to bring perpetrators [of grave violations of human rights and of accepted humanitarian rules] to trial in accordance with internationally accepted standards".³⁴⁸

345. In a resolution adopted in 1996 on rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly reaffirmed that "all persons who perpetrate or authorize crimes against humanity or other violations of international humanitarian law are individually responsible for those violations".³⁴⁹

346. In a resolution adopted in 2001 entitled "Responsibility of States for internationally wrongful acts", to which the 2001 ILC Draft Articles on State Responsibility, and thus Article 58 concerning "Individual responsibility", was annexed, the UN General Assembly took note of the Draft Articles and commended them to the attention of governments "without prejudice to the question of their future adoption or other appropriate action".³⁵⁰

347. In a resolution adopted in 1993 on the situation of human rights in the territory of the former Yugoslavia, the UN Commission on Human Rights affirmed that:

All persons who perpetrate or authorize violations of international humanitarian law, including the above-mentioned acts, are individually responsible and accountable for those violations and . . . the international community will exert every effort to bring those responsible for such violations to justice in accordance with internationally recognized principles of due process.³⁵¹

348. In a resolution adopted in 1993 on rape and abuse of women in the territory of the former Yugoslavia, the UN Commission on Human Rights reaffirmed that:

All persons who perpetrate or authorize crimes against humanity and other violations of international humanitarian law are individually responsible for those violations, and . . . those in positions of authority who have failed adequately to

³⁴⁶ UN General Assembly, Res. 50/192, 22 December 1995, § 4.

³⁴⁷ UN General Assembly, Res. 50/193, 22 December 1995, § 3.

³⁴⁸ UN General Assembly, Res. 51/108, 12 December 1996, § 11.

³⁴⁹ UN General Assembly, Res. 51/115, 12 December 1996, § 4.

³⁵⁰ UN General Assembly, Res. 56/83, 12 December 2001, § 3 and Annex.

³⁵¹ UN Commission on Human Rights, Res. 1993/7, 23 February 1993, § 18.

ensure that persons under their control comply with the relevant international instruments are accountable along with the perpetrators.³⁵²

349. In a resolution adopted in 1994 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights reaffirmed that “all persons who perpetrate or authorize violations of international humanitarian law are individually responsible and accountable”.³⁵³

350. In a resolution adopted in 1994 on rape and abuse of women in the territory of the former Yugoslavia, the UN Commission on Human Rights reaffirmed that:

All persons who perpetrate or authorize crimes against humanity and other violations of international humanitarian law are individually responsible for those violations, and that those in positions of authority who have failed adequately to ensure that persons under their control comply with the relevant international instruments are accountable together with the perpetrators.³⁵⁴

351. In a resolution adopted in 1995 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights reaffirmed that “all persons who perpetrate or authorize violations of international humanitarian law are individually responsible and accountable”.³⁵⁵

352. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY, the UN Commission on Human Rights reaffirmed that “all persons who plan, commit or authorize [violations of human rights and IHL] will be held personally responsible and accountable” and called upon the government of Croatia “to pursue vigorously prosecutions against those suspected of past violations of international humanitarian law and human rights”.³⁵⁶

353. In resolutions on Rwanda adopted in 1995 and 1996, the UN Commission on Human Rights reaffirmed the principle that “all persons who commit or authorize genocide or other grave violations of international humanitarian law and those who are responsible for grave violations of human rights are individually responsible and accountable for those violations”.³⁵⁷

354. In a resolution on East Timor adopted in 1999, the UN Commission on Human Rights affirmed that:

All persons who commit or authorize violations of human rights or international humanitarian law are individually responsible and accountable for those violations and... the international community will exert every effort to ensure that those

³⁵² UN Commission on Human Rights, Res. 1993/8, 23 February 1993, § 5.

³⁵³ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 17.

³⁵⁴ UN Commission on Human Rights, Res. 1994/77, 9 March 1994, § 5.

³⁵⁵ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 19.

³⁵⁶ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, §§ 1 and 22.

³⁵⁷ UN Commission on Human Rights, Res. 1995/91, 8 March 1995, § 4; Res. 1996/76, 23 April 1996, § 4.

responsible are brought to justice, while affirming that the primary responsibility for bringing perpetrators to justice rests with national judicial systems.³⁵⁸

The Commission also called upon the government of Indonesia "to ensure, in cooperation with the Indonesian National Commission on Human Rights, that the persons responsible for acts of violence and flagrant and systematic violations of human rights are brought to justice". It requested the UN Secretary-General "to establish an international commission of inquiry . . . in order . . . to gather and compile systematically information on possible violations of human rights and acts which may constitute breaches of international humanitarian law committed in East Timor since the announcement in January 1999 of the vote".³⁵⁹

355. In a resolution on Sierra Leone adopted in 1999, the UN Commission on Human Rights reminded all factions and forces in Sierra Leone that "in any armed conflict, including an armed conflict not of an international character, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international humanitarian law".³⁶⁰

356. In a resolution on impunity adopted in 2002, the UN Commission on Human Rights emphasised "the importance of taking all necessary and possible steps to hold accountable perpetrators, including their accomplices, of violations of international human rights and humanitarian law". It also recognised that "crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law and that perpetrators of such crimes should be prosecuted . . . by States".³⁶¹

357. In a resolution adopted in 1993 on punishment of the crime of genocide, the UN Sub-Commission on Human Rights affirmed that "all persons who perpetrate or authorize the commission of genocide and related crimes are individually responsible for such actions".³⁶²

358. In a resolution adopted in 2000 on the role of universal or extraterritorial competence in preventive action against impunity, the UN Sub-Commission on Human Rights stated that it believed that "the highest priority should be given, independently of the circumstances in which these violations were committed, to legal proceedings against all individuals responsible for war crimes and crimes against humanity, including former heads of State or Government".³⁶³

359. In 1993, in his report on the draft Statute of the ICTY, the UN Secretary-General stated that:

³⁵⁸ UN Commission on Human Rights, Res. 1999/S-4/1, 27 September 1999, § 4.

³⁵⁹ UN Commission on Human Rights, Res. 1999/S-4/1, 27 September 1999, §§ 5(a) and 6.

³⁶⁰ UN Commission on Human Rights, Res. 1999/1, 6 April 1999, § 2.

³⁶¹ UN Commission on Human Rights, Res. 2002/79, 25 April 2002, §§ 2 and 11.

³⁶² UN Sub-Commission on Human Rights, Res. 1993/8, 20 August 1993, § 1.

³⁶³ UN Sub-Commission on Human Rights, Res. 2000/24, 18 August 2000, § 2.

53. An important element in relation to the competence *ratione personae* (personal jurisdiction) of the [ICTY] is the principle of individual criminal responsibility. . . The Security Council has reaffirmed in a number of resolutions that persons committing serious violations of international humanitarian law in the former Yugoslavia are individually responsible for such violations.
54. The Secretary-General believes that all persons who participate in the planning, preparation or execution of serious violations of international humanitarian law in the former Yugoslavia contribute to the commission of the violation and are, therefore, individually responsible.³⁶⁴

360. In 2001, in the recommendations in his report on the protection of civilians in armed conflict, the UN Secretary-General urged:

the Security Council and the General Assembly to provide, from the outset, reliable, sufficient and sustained funding for international efforts, whether existing or future international tribunals, arrangements established in the context of United Nations peace operations or initiatives undertaken in concert with individual Member States, to bring to justice perpetrators of grave violations of international humanitarian and human rights law.³⁶⁵

361. In 2000, during a debate in the UN Security Council regarding the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, the UN Deputy Secretary-General stated, *inter alia*, that "the perpetrators of attacks against United Nations and humanitarian personnel must be brought to justice".³⁶⁶

362. In 1997, in his second report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights stated that:

In requesting the de facto authorities to take steps to punish the blunders and the massacres, the Special Rapporteur is seeking, not to single them out, but rather to encourage them to honour the commitments made earlier by the Burundi Government. As he said in his previous report to the General Assembly . . . the violence and the unrest which prevail in Burundi can be attributed to several actors or parties, first and foremost to the armed forces and the security forces, next, to the militias, which are related to them, and, lastly, to an armed opposition that itself comprises various groups. All these actors are responsible, although to varying degrees, for the grave violations of human rights and international humanitarian law which are being perpetrated.³⁶⁷

363. In 2000, in a report on the situation of human rights in Rwanda, the Special Representative of the UN Commission on Human Rights stated that, as at 30 November 1999, 2,406 of the 121,500 persons in detention had been tried in Rwanda before a special genocide court. Of these, 348 (14.4 per cent)

³⁶⁴ UN Secretary-General, Report pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, §§ 53–54.

³⁶⁵ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, Recommendation 1.

³⁶⁶ UN Deputy Secretary-General, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 11.

³⁶⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Second report, UN Doc. E/CN.4/1997/12, 10 February 1997, § 11.

were condemned to death, 30.3 per cent were sentenced to life imprisonment, 34 per cent received jail terms of between 1 and 20 years, and 19 per cent were acquitted. The Special Representative also noted and applauded the introduction of a new system of community justice for genocide suspects known as *gacaca*.³⁶⁸

364. In 1998, in a report submitted to the UN Sub-Commission on Human Rights on systematic rape, sexual slavery and slavery-like practices during armed conflict, the Special Rapporteur concluded that:

Individual perpetrators of slavery, crimes against humanity, genocide, torture and war crimes – whether State or non-State actors – must be held responsible for their crimes at the international level, depending on the circumstances of the case and on the capacity and availability of forums to adjudicate fairly and dispense justice adequately.³⁶⁹

365. In 1999, in a report on the situation in East Timor, the UN High Commissioner for Human Rights stated that:

4. It has become a widely accepted principle of contemporary international law and practice that wherever human rights are being grossly violated... the facts must be gathered with a view to shedding light on what has taken place and with a view to bringing those responsible to justice; and that the perpetrators of gross violations must be made accountable and justice rendered to the victims.

...
48. The High Commissioner has urged the Indonesian authorities to cooperate in the establishment of an international commission of inquiry into the violations so that those responsible are brought to justice.³⁷⁰

366. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted that “there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes”.³⁷¹ Referring to common Article 3 of the 1949 Geneva Conventions, AP II and Article 19 of the 1954 Hague Convention, the Commission noted that these provisions did not use the terms “grave breaches” or “war crimes”. It added that “the content of customary law applicable to internal armed conflict is debatable”, and as a result, “in general, unless the parties to an internal armed conflict agree otherwise, the only offences committed in internal armed

³⁶⁸ UN Commission on Human Rights, Special Representative on the Situation of Human Rights in Rwanda, Report, UN Doc. A/55/269, 4 August 2000, §§ 144 and 156–176.

³⁶⁹ UN Sub-Commission on Human Rights, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 113.

³⁷⁰ UN High Commissioner for Human Rights, Report on the situation of human rights in East Timor, UN Doc. E/CN.4/2000/44, 24 March 2000, §§ 4 and 48.

³⁷¹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 42.

conflict for which universal jurisdiction exists are 'crimes against humanity' and genocide, which apply irrespective of the conflicts' classification".³⁷²

367. In 1994, in its preliminary report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994) strongly recommended that "the Security Council take all necessary and effective action to ensure that the individuals responsible for the serious violations of human rights in Rwanda during armed conflict... are brought to justice before an independent and impartial international criminal tribunal".³⁷³

368. In 1994, in its final report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994) noted that it had been informed by the Rwandan Minister of Defence that the government had detained 70 FPR soldiers and intended to try and punish them for private acts of revenge exacted against Hutus. The government emphasised that these acts were not only unauthorised, but subject to heavy military discipline and punishment. The Commission of Experts considered that "the armed conflict between 6 April and 15 July 1994 qualifies as a non-international armed conflict".³⁷⁴

369. In 1996, in its final report, the International Commission of Inquiry in Burundi stated with regard to the assassination of Burundi's President Ndadaye as well as that of the person constitutionally entitled to succeed him that "it is not in a position to identify the person that should be brought to justice for this crime".³⁷⁵ It also stated that "evidence is sufficient to establish that acts of genocide... took place in Burundi", noting, however, that "with the evidence at hand, it is not in a position to identify by name the persons that should be brought to justice for the acts to which the conclusions refer".³⁷⁶

370. In a report in 1947, the UN Committee on the Progressive Development of International Law and its Codification concluded that the ILC should be established which would have to formulate the Nuremberg Principles within a Code of Offences against the Peace and Security of Mankind.³⁷⁷

371. The ILC Commentary on Principle I of the 1950 Nuremberg Principles notes that "the general rule underlying Principle I is that international law

³⁷² UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 52.

³⁷³ UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Preliminary report, UN Doc. S/1994/1125, 4 October 1994, § 150.

³⁷⁴ UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Final report, UN Doc. S/1994/1405, 9 December 1994, §§ 99 and 108.

³⁷⁵ International Commission of Inquiry in Burundi, Final report, UN Doc. S/1996/682, 22 August 1996, Annex, § 213.

³⁷⁶ International Commission of Inquiry in Burundi, Final report, UN Doc. S/1996/682, 22 August 1996, Annex, § 487.

³⁷⁷ UN Committee on the Progressive Development of International Law and its Codification, Report, UN Doc. A/332, 21 July 1947.

may impose duties on individuals directly without any interposition of internal law".³⁷⁸

372. The ILC Commentary on Principle II of the 1950 Nuremberg Principles notes that:

This Principle is a corollary to Principle I. Once it is admitted that individuals are responsible for crimes under international law, it is obvious that they are not relieved from their international responsibility by the fact that their acts are not held to be crimes under the law of any particular country... The principle that a person who has committed an international crime is responsible therefor and liable to punishment under international law, independently of the provisions of internal law, implies what is commonly called the "supremacy" of international law over national law.³⁷⁹

Other International Organisations

373. In a resolution adopted in 1991, the Parliamentary Assembly of the Council of Europe called for a war crimes tribunal to be established to deal with crimes committed by the Iraqi authorities during the Gulf War.³⁸⁰

374. In a recommendation adopted in 1992, the Parliamentary Assembly of the Council of Europe called for the establishment of a permanent international court to try war criminals generally.³⁸¹

375. In 1993 and 1995, the Parliamentary Assembly of the Council of Europe welcomed the establishment of the ICTY, condemning all human rights violations committed during the conflicts in the former Yugoslavia and insisting that "the perpetrators of such offences be brought to justice".³⁸²

376. In a declaration adopted in 1991, the EC Ministers of Foreign Affairs expressed their determination that "those responsible for the unprecedented violence in Yugoslavia, with its ever-increasing loss of life, should be held accountable under international law for their actions".³⁸³

377. In 1994, in a statement contained in a EU Council decision related to a EU common position adopted on Rwanda, the Council of the EU stressed:

the importance of bringing to justice those responsible for the grave violations of humanitarian law, including genocide. In this respect the European Union considers

³⁷⁸ ILC, Report of the International Law Commission Covering its Second Session, UN Doc. A/1316, 5 June–29 July 1950, § 99.

³⁷⁹ ILC, Report of the International Law Commission Covering its Second Session, UN Doc. A/1316, 5 June–29 July 1950, §§ 100–102.

³⁸⁰ Council of Europe, Parliamentary Assembly, Res. 954, 29 January 1991, § 11.

³⁸¹ Council of Europe, Parliamentary Assembly, Rec. 1189, 1 July 1992.

³⁸² Council of Europe, Parliamentary Assembly, Rec. 1218, 27 September 1993; Res. 1066, 27 September 1995, § 7.

³⁸³ EC, Declaration on Yugoslavia, Haarzuilens, 6 October 1991, annexed to Letter dated 7 October 1991 from the Netherlands to the UN Secretary-General, UN Doc. A/46/533, 7 October 1991, Annex II.

the establishment of an international tribunal as an essential element to stop a tradition of impunity and to prevent future violations of human rights.³⁸⁴

378. In the Final Communiqué of its 13th Session in 1992, the GCC Supreme Council demanded, with regard to the “Serb Aggression on the Republic of Bosnia and Herzegovina”, that the UN Security Council bring to account “all those responsible for crimes committed against humanity, in accordance with the Geneva Conventions”.³⁸⁵

379. In a resolution adopted in 1983, the Council of the League of Arab States invited the UN Secretary-General to send a fact-finding committee to investigate the occurrence in the territories occupied by Israel of “crimes which breach international charters, conventions and resolutions on the protection of civilian populations in times of occupation and to organize the trials of those who perpetrate such crimes against humanity”.³⁸⁶

380. In a resolution on Liberia adopted in 1996, the OAU Council of Ministers warned the warring faction leaders that:

Should the ECOWAS assessment of the Liberian peace process... turn out to be negative, the OAU will help sponsor a draft resolution in the UN Security Council for the imposition of severe sanctions on them including the possibility of the setting up of a war crime tribunal to try the leadership of the Liberian warring factions on the gross violation of the human rights of Liberians.³⁸⁷

International Conferences

381. In 1992, at the Helsinki Summit of Heads of State or Government, CSCE participating States recalled that “those who violate international humanitarian law are held personally accountable”.³⁸⁸

382. In a decision adopted in 1993, the Ministerial Council of the CSCE stated that “the Ministers focused attention on the need for urgent action to enforce the strict observance of the norms of international humanitarian law, including the prosecution and punishment of those guilty of war crimes and other crimes against humanity”.³⁸⁹

³⁸⁴ EU, Council, Decision 94/697/CFSP concerning the common position adopted on the basis of Article J.2 of the Treaty of the European Union on the objectives and priorities of the European Union *vis-à-vis* Rwanda, 24 October 1994, *Official Journal* L 283, 29 October 1994, pp. 1–2, Article 1 and Annex.

³⁸⁵ GCC, Supreme Council, 13th Session, Abu Dhabi, 21–23 December 1992, Final Communiqué, annexed to Letter dated 24 December 1992 from the UAE to the UN Secretary-General, UN Doc. A/47/845-S/25020, 30 December 1992, p. 9.

³⁸⁶ League of Arab States, Council, Res. No. 4238, 31 March 1993, § 3.

³⁸⁷ OAU, Council of Ministers, Sixty-Fourth Ordinary Session, Yaoundé, 1–5 July 1996, Res. 1650 (LXIV), § 12, reprinted in UN Doc. A/51/524, 18 October 1996, p. 15.

³⁸⁸ CSCE, Helsinki Summit of Heads of State or Government, Helsinki, 9–10 July 1992, Helsinki Document 1992: The Challenges of Change, Decisions, Chapter VI: The Human Dimension, § 49.

³⁸⁹ CSCE, Ministerial Council, Fourth Meeting: CSCE and the New Europe – Our Security is Indivisible, Rome, 30 November 1993–1 December 1993, Decisions, Chapter X: Declaration on Aggressive Nationalism, Racism, Chauvinism, Xenophobia and Anti-Semitism, § 4.

383. In the Maputo Declaration on the Use of Children as Soldiers, the participants at the African Conference on the Use of Children as Soldiers in 1999 called upon all African States to bring to justice “those who continue to recruit or use children as soldiers”.³⁹⁰

384. In the Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the participants committed themselves to see “that individuals responsible for violations of [IHL] be brought to justice and punished”.³⁹¹

IV. Practice of International Judicial and Quasi-judicial Bodies

385. In its judgement of 1946, the IMT (Nuremberg) asserted that the Charter which had established it, inasmuch as it provided for individual responsibility for crimes against the peace, war crimes and crimes against humanity, “is not an arbitrary exercise of power on the part of the victorious Nations, but in the view of the Tribunal . . . is the expression of international law existing at the time of its creation”.³⁹² Still on the subject of individual responsibility, the Tribunal rejected arguments that international law was exclusively concerned with the actions of sovereign States and provided no punishment for individuals. The Tribunal held that it was long established that international law imposed duties and liabilities on individuals as well as on States and referred to a number of authorities which showed that individuals could be punished for violations of international law. It added that “crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced”.³⁹³

386. In its judgement in the *Application of Genocide Convention case* (Preliminary Objections) in 1996, the ICJ addressed the FRY’s contention that the 1948 Genocide Convention was not applicable in internal conflicts. The Court referred to Article 1 of the Convention, which provides that “genocide, whether committed in time of peace or in time of armed war, is a crime under international law which [the Contracting Parties] undertake to prevent and punish”. The ICJ determined that there was nothing in this provision “which would make the applicability of the Convention subject to the condition that the acts contemplated by it should have been committed within the framework of a particular type of conflict”.³⁹⁴

³⁹⁰ African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, § 2.

³⁹¹ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, Final Declaration, preamble and § 11.

³⁹² IMT (Nuremberg), Judgement, 1 October 1946, § 2.

³⁹³ IMT (Nuremberg), Judgement, 1 October 1946, pp. 218, 222 and 223.

³⁹⁴ ICJ, *Application of Genocide Convention case* (Preliminary Objections), Judgement, 11 July 1996, § 31.

387. In its judgement in the *Akayesu case* in 1998, the ICTR quoted Article 6(1) of the 1994 ICTR Statute and stated that:

472. . . . Thus, in addition to responsibility as principal perpetrator, the Accused can be held responsible for the criminal acts of others where he plans with them, instigates them, . . . or aids and abets them to commit those acts.
473. Thus, Article 6(1) covers various stages of the commission of a crime, ranging from its initial planning to its execution, through its organization. However, the principle of individual criminal responsibility as provided for in Article 6(1) implies that the planning or preparation of the crime actually leads to its commission. Indeed, the principle of individual criminal responsibility for an attempt to commit a crime obtained only in case of genocide. Conversely, this would mean that with respect to any other form of criminal participation and, in particular, those referred to in Article 6(1), the perpetrator would incur criminal responsibility only if the offence were completed.
474. Article 6(1) thus appears to be in accord with the Judgments of the Nuremberg Tribunal which held that persons other than those who committed the crime . . . could incur individual criminal responsibility.³⁹⁵

Making a distinction between Article 6(1) and Article 6(3) of the 1994 ICTR Statute, the ICTR further stated that:

479. . . . As can be seen, the forms of participation referred to in Article 6(1), cannot render their perpetrator criminally liable where he did not act knowingly, and even where he should have had such knowledge. This greatly differs from Article 6(3) . . . which does not necessarily require that the superior acted knowingly to render him criminally liable . . .
480. The first form of liability set forth in Article 6(1) is *planning* of a crime. Such planning is similar to the notion of *complicity* in Civil law, or *conspiracy* under Common law, as stipulated in Article 2(3) of the Statute. But the difference is that planning, unlike complicity or plotting, can be an act committed by one person. Planning can thus be defined as implying that one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases.
481. The second form of liability is "*incitation*" (in the French version of the Statute) to commit a crime, reflected in the English version of Article 6(1) by the word *instigated*. In English, it seems the words incitement and instigation are synonymous. Furthermore, the word "*instigated*" or "*instigation*" is used to refer to incitation in several other instruments. However, in certain legal systems and, under Civil law, in particular, the two concepts are very different. Furthermore, and even assuming that the two words were synonymous, the question would be to know whether instigation under Article 6(1) must include the direct and public elements, required for incitement, particularly, incitement to commit genocide (Article 2(3)(c) of the Statute) which, in this instance, translates *incitation* into English as "*incitement*" and no longer "*instigation*". Some people are of that opinion. The Chamber also accepts this interpretation.

³⁹⁵ ICTR, *Akayesu case*, Judgement, 2 September 1998, §§ 472–474.

482. That said, the form of participation through instigation stipulated in Article 6(1) of the Statute, involves prompting another to commit an offence; but this is different from incitement in that it is punishable only where it leads to the actual commission of an offence desired by the instigator.³⁹⁶ [emphasis in original]

The ICTR further added that:

611. For the purposes of an international criminal Tribunal which is trying individuals, it is not sufficient merely to affirm that Common Article 3 [of the Geneva Conventions] and parts of Article 4 of Additional Protocol II – which comprise the subject-matter jurisdiction of Article 4 of the Statute – form part of international customary law. Even if Article 6 of the Statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby. Otherwise, it might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried.
612. As regards individual criminal responsibility for serious violations of Common Article 3, the ICTY has already affirmed this principle in the *Tadić* case. In the ICTY Appeals Chamber, the problem was posed thus:

“Even if customary international law includes certain basic principles applicable to both internal and international armed conflicts, Appellant argues that such provisions do not entail individual criminal responsibility when breaches are committed in internal armed conflicts; these provisions cannot, therefore, fall within the scope of the International Tribunal’s jurisdiction.”

613. Basing itself on rulings of the Nuremberg Tribunal, on “elements of international practice which show that States intend to criminalise serious breaches of customary rules and principles on internal conflicts”, as well as on national legislation designed to implement the Geneva Conventions, the ICTY Appeals Chamber reached the conclusion:

“All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.”

614. This was affirmed by the ICTY Trial Chamber when it rendered in the *Tadić* judgment.
615. The Chamber considers this finding of the ICTY Appeals Chamber convincing and dispositive of the issue, both with respect to serious violations of Common Article 3 and of Additional Protocol II.³⁹⁷

³⁹⁶ ICTR, *Akayesu case*, Judgement, 2 September 1998, §§ 479–482.

³⁹⁷ ICTR, *Akayesu case*, Judgement, 2 September 1998, §§ 611–615.

388. In its judgement in the *Kayishema and Ruzindana case* in 1999, the ICTR, quoting Article 6(1) of the 1994 ICTR Statute, stated that:

197. . . . If any of the modes of participation delineated in Article 6(1) can be shown, and the necessary *actus reus* and *mens rea* are evidenced, then that would suffice to adduce criminal responsibility under this Article.

198. The Trial Chamber is of the opinion that . . . there is a further two stage test which must be satisfied in order to establish individual criminal responsibility under Article 6(1). This test required the demonstration of (i) participation, that is that the accused's conduct contributed to the commission of an illegal act, and (ii) knowledge or intent, that is awareness by the actor of his participation in a crime.

...

202. This jurisprudence extends naturally to give rise to responsibility when the accused failed to act in breach of a clear duty to act . . . Individual responsibility pursuant to Article 6(1) is based, in this instance, not on the duty to act, but from the encouragement and support that might be afforded to the principals of the crime from such an omission.³⁹⁸

389. In its judgement in the *Rutaganda case* in 1999, the ICTR stated that:

86. . . . In establishing the ICTY, the Secretary-General dealt with this issue by asserting that in the application of the principle of *nullum crimen sine lege* the International Tribunal should apply rules of international humanitarian law which are beyond any doubt part of customary law. However, in the case of this Tribunal, it was incumbent on the Chambers to decide whether or not the said principle had been adhered to, and whether individuals incurred individual criminal responsibility for violations of these international instruments.

87. In the *Akayesu Judgement*, the Chamber expressed its opinion that the "norms of Common Article 3 [of the Geneva Conventions] had acquired the status of customary law in that most States, by their domestic penal codes, have criminalized acts which, if committed during internal armed conflict, would constitute violations of Common Article 3". The finding of the Trial Chamber in this regard followed the precedents set by the ICTY, which established the customary nature of Common Article 3. Moreover, the Chamber in the *Akayesu Judgement* held that, although not all of Additional Protocol II could be said to be customary law, the guarantees contained in Article 4(2) (Fundamental Guarantees) thereof, which reaffirm and supplement Common Article 3, form part of existing international law. All of the norms reproduced in Article 4 of the Statute are covered by Article 4(2) of Additional Protocol II.

88. Furthermore, the Trial Chamber in the *Akayesu Judgement* concluded that violations of these norms would entail, as a matter of customary international law, individual responsibility for the perpetrator. It was also recalled that as Rwanda had become a party to the 1949 Geneva Conventions and their 1977 Additional Protocols, on 5 May 1964 and 19 November 1984, respectively, these instruments were in any case in force in the territory of Rwanda in 1994, and formed part of Rwandan law. Thus, Rwandan nationals who violated these international instruments incorporated into national law,

³⁹⁸ ICTR, *Kayishema and Ruzindana case*, Judgement, 21 May 1999, §§ 197–198 and 202.

including those offences as incorporated in Article 4 of the Statute, could be tried before the Rwandan national courts.

89. In the *Kayishema and Ruzindana Judgement*, Trial Chamber II deemed it unnecessary to delve into the question as to whether the instruments incorporated in Article 4 of the Statute should be considered as customary international law. Rather the Trial Chamber found that the instruments were in force in the territory of Rwanda in 1994 and that persons could be prosecuted for breaches thereof on the basis that Rwanda had become a party to the Geneva Conventions and their Additional Protocols. The offences enumerated in Article 4 of the Statute, said the Trial Chamber, also constituted offences under Rwandan law.
90. Thus it is clear that, at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the guarantees provided for by the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute. Violations thereof, as a matter of custom and convention, incurred individual responsibility, and could result in the prosecution of the authors of the offences.³⁹⁹

390. In its judgement in the *Musema case* in 2000, the ICTR stated that:

The Chamber therefore concludes that, at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the Statute. Violations thereof, as a matter of custom and convention, attracted individual criminal responsibility and could result in the prosecution of the authors of the offences.⁴⁰⁰

391. In the *Tadić case* (Interlocutory Appeal) in 1995, the ICTY Appeals Chamber addressed the issue of whether the Tribunal had jurisdiction over violations committed in non-international armed conflicts. The Appeals Chamber concluded that Article 2 of the Statute which gave the Tribunal jurisdiction over grave breaches of the Geneva Conventions was limited to violations committed in international conflicts.⁴⁰¹ Despite this conclusion, the Appeals Chamber nevertheless referred to the agreement between the conflicting parties in Bosnia and Herzegovina of 1 October 1992, which provided for the prosecution and punishment of those responsible for grave breaches of the Geneva Conventions and, noting that the agreement “was clearly concluded within a framework of an internal armed conflict”, accepted that the agreement “could be taken as an important indication of the present trend to extend the grave breaches provisions to such category of conflicts”.⁴⁰² Turning to Article 3 of the 1993 ICTY Statute on violations of the laws or customs of war, the Appeals Chamber stated that “Article 3 is intended to cover *all violations* of international humanitarian law other than the ‘grave breaches’ of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered

³⁹⁹ ICTR, *Rutaganda case*, Judgement, 6 December 1999, §§ 86–90.

⁴⁰⁰ ICTR, *Musema case*, Judgement, 27 January 2000, § 242.

⁴⁰¹ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 81.

⁴⁰² ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 83.

by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap)".⁴⁰³ (emphasis in original) The Appeals Chamber then laid down a number of conditions that would have to be met for a violation of IHL to be subject to Article 3, the last of which was that "the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule".⁴⁰⁴ Under a special heading entitled "Individual Criminal Responsibility in Internal Armed Conflict", the Appeals Chamber stated that:

128. . . . It is true that, for example, common Article 3 of the Geneva Conventions contains no explicit reference to criminal liability for violation of its provisions. Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches . . .

129. Applying the [criteria set fourth by the IMT (Nuremberg)] to the violations at issue here, we have no doubt that they entail individual criminal responsibility, regardless of whether they are committed in internal or international armed conflicts. Principles and rules of humanitarian law reflect "elementary considerations of humanity" widely recognized as the mandatory minimum for conduct in armed conflicts of any kind. No one can doubt the gravity of the acts at issue, nor the interest of the international community in their prohibition.

130. Furthermore, many elements of international practice show that States intend to criminalize serious breaches of customary rules and principles on internal conflicts . . . During the Nigerian Civil War, both members of the Federal Army and rebels were brought before Nigerian courts and tried for violations of principles of international humanitarian law.⁴⁰⁵

Moreover, referring to, *inter alia*, military manuals of Germany, New Zealand, UK and US, as well as to certain provisions of the Penal Code as amended of the SFRY (FRY), to Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, and to two UN Security Council resolutions on Somalia, the Appeals Chamber stated that:

134. All of these factors confirm that customary international law imposes criminal liability for serious violations of common Article 3 [of the 1949 Geneva Conventions], as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

135. It should be added that, in so far as it applies to offences committed in the former Yugoslavia, the notion that serious violations of international humanitarian law governing internal armed conflicts entail individual criminal responsibility is also fully warranted from the point of view of substantive justice and equity . . . Such violations were punishable under the [SFRY (FRY) Penal Code as amended] . . . Nationals of the former Yugoslavia as well as, at present, those of Bosnia-Herzegovina were therefore aware, or should have been aware, that they

⁴⁰³ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 87.

⁴⁰⁴ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 94.

⁴⁰⁵ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, §§ 128–130.

were amenable to the jurisdiction of their national criminal courts in cases of violation of international humanitarian law.⁴⁰⁶

The Appeals Chamber further referred to the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina and to the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners and stated that:

As both Agreements referred to in the above paragraphs were clearly intended to apply in the context of an internal armed conflict, the conclusion is warranted that the conflicting parties in Bosnia-Herzegovina had clearly agreed at the level of treaty law to make punishable breaches of international humanitarian law occurring within the framework of that conflict.⁴⁰⁷

The Appeals Chamber concluded that:

in the light of the intent of the Security Council and the logical and systematic interpretation of Article 3 [of the 1993 ICTY Statute] as well as customary international law, . . . , under Article 3, the International Tribunal has jurisdiction over the acts alleged in the indictment, regardless of whether they occurred within an internal or an international armed conflict.⁴⁰⁸

392. In a separate opinion in the *Tadić case* (Interlocutory Appeal) in 1995, Judge Abi-Saab asserted that “a strong case can be made for the application of Article 2 [of the 1993 ICTY Statute], even when the incriminated act takes place in an internal conflict”. With regard to the position under customary law, he added that:

A growing practice and *opinio juris*, both of States and international organisations, has established the principle of personal criminal responsibility for the acts figuring in the grave breaches articles as well as for the other serious violations of the *jus in bello*, even when they are committed in the course of an internal armed conflict.⁴⁰⁹

393. In the indictment in the *Mrkšić case* before the ICTY in 1996, the Prosecutor, with regard to the individual responsibility of the accused for the killing of 260 persons, stated that:

Each of the accused is individually responsible for the crimes alleged against him in this indictment pursuant to Article 7(1) of the Tribunal Statute. Individual criminal responsibility includes committing, planning, instigating, ordering or otherwise aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2 to 5 of the Tribunal Statute.⁴¹⁰

394. In its sentencing judgement in the *Erdemović case* in 1998, the ICTY Trial Chamber found the accused guilty of the “violation of the laws and customs

⁴⁰⁶ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, §§ 131–135.

⁴⁰⁷ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 136.

⁴⁰⁸ ICTY, *Tadić case*, Interlocutory Appeal, Decision, 2 October 1995, § 137.

⁴⁰⁹ ICTY, *Tadić case*, Interlocutory Appeal, Separate Opinion of Judge Abi-Saab, 2 October 1995, p. 5.

⁴¹⁰ ICTY, *Mrkšić case*, Review of the Indictment, 3 April 1996, § 24.

of war" to which the accused himself had pleaded guilty, stating, however, that "there is nothing to substantiate Defence Counsel's submission to Trial Chamber (which was not raised again before this Trial Chamber) that when the accused committed the killings, he 'lacked mental responsibility because he suffered a temporary mental disorder or, at best, his mental responsibility was significantly diminished also'".⁴¹¹

395. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber, referring to Article 7(1) of the 1993 ICTY Statute, held that "this recognition that individuals may be held criminally responsible for their participation in the commission of offences in any of several capacities is in clear conformity with general principles of criminal law".⁴¹² The Trial Chamber further stated that:

It is . . . the view of the Trial Chamber that, in order for there to be individual criminal responsibility for degrees of involvement in a crime under the Tribunal's jurisdiction which do not constitute a direct performance of the acts which make up the offence, a showing must be made of both a physical and a mental element. The requisite *actus reus* for such responsibility is constituted by an act of participation which in fact contributes to, or has an effect on, the commission of the crime. Hence, this participation must have "a direct and substantial effect on the commission of the illegal act". The corresponding intent, or *mens rea*, is indicated by the requirement that the act of participation be performed with knowledge that it will assist the principal in the commission of the criminal act. Thus, there must be "awareness of the act of participation coupled with a conscious decision to participate by planning, instigating, ordering, committing, or otherwise aiding and abetting in the commission of a crime".⁴¹³

396. In the *Furundžija case* in 1998, the ICTY Trial Chamber found the accused guilty of "violations of the laws and customs of war" (torture and outrages upon personal dignity, including rape) under Article 3 of the 1993 ICTY Statute.⁴¹⁴ It stated that:

Article 3 [of the 1993 ICTY Statute] has a very broad scope. It covers any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule. It is immaterial whether the breach occurs within the context of an international or internal armed conflict.⁴¹⁵

As to the count of torture, the Trial Chamber held that:

Both customary rules and treaty provisions applicable in times of armed conflict prohibit any act of torture. Those who engage in torture are personally accountable at the criminal level for such acts . . . Individuals are personally responsible,

⁴¹¹ ICTY, *Erdemović case*, Sentencing Judgement bis, 5 March 1998, §§ 16 and 23.

⁴¹² ICTY, *Delalić case*, Judgement, 16 November 1998, § 321.

⁴¹³ ICTY, *Delalić case*, Judgement, 16 November 1998, § 326.

⁴¹⁴ ICTY, *Furundžija case*, Judgement, 10 December 1998, Chapter IX.

⁴¹⁵ ICTY, *Furundžija case*, Judgement, 10 December 1998, § 132.

whatever their official position, even if they are heads of State or government ministers: Article 7(2) of the [1993 ICTY] Statute and article 6(2) of the [1994 ICTR Statute] . . . are indisputably declaratory of customary international law.⁴¹⁶

Examining the count of “rape and other serious sexual assaults in international law”, the Trial Chamber, referring to numerous instances of case-law, noted that:

In sum, the Trial Chamber holds the legal ingredients of aiding and abetting in international criminal law to be the following: the *actus reus* consists of practical assistance, encouragement, or moral support which has a substantial effect on the perpetration of the crime. The *mens rea* required is the knowledge that these acts assist the commission of the offence. This notion of aiding and abetting is to be distinguished from the notion of common design, where the *actus reus* consists of participation in a joint criminal enterprise and the *mens rea* required is intent to participate.⁴¹⁷

397. In its judgement in the *Aleksovski case* in 1999, the ICTY Trial Chamber noted that “the accused was held responsible under Article 7(1) [of the 1993 ICTY Statute] not for the crimes that he allegedly committed himself but for those committed by others which he is said to have personally ordered, instigated or otherwise aided and abetted”.⁴¹⁸ Referring to previous judgements of both the ICTR and the ICTY, it stated that:

62. The forms of participation recognised as sufficient in customary international law are not limited to physical assistance provided while the unlawful act is being committed . . . Participation may occur before, during or after the act is committed. It can, for example, consist of providing the means to commit the crime or promising to perform certain acts once the crime has been committed, that is, behaviour which may in fact clearly constitute instigation or abetment of the perpetrators of the crime . . .
63. Such participation need not be manifested through physical assistance. Moral support or encouragement expressed in words or even by the mere presence at the site of the crime have at times been considered sufficient to conclude that the accused participated.
64. Mere presence constitutes sufficient participation under some circumstances so long as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required *mens rea* . . .
65. . . . An individual’s position of authority is not sufficient to lead to the conclusion that his mere presence constitutes a sign of encouragement which had a significant effect on the perpetration of the crime. It must be noted in fact that the aforementioned cases did not establish an individual’s responsibility on this basis alone. Admittedly, the presence of an individual with uncontested authority over the perpetrators of the unlawful act may, in some

⁴¹⁶ ICTY, *Furundžija case*, Judgement, 10 December 1998, § 140.

⁴¹⁷ ICTY, *Furundžija case*, Judgement, 10 December 1998, § 249.

⁴¹⁸ ICTY, *Aleksovski case*, Judgement, 25 June 1999, § 59.

circumstances, be interpreted as approval of that conduct. The aforementioned cases moreover took into account the accused's prior or concomitant behaviour or statements in order to interpret his presence as an act of abetting. Moreover, it can hardly be doubted that the presence of an individual with authority will frequently be perceived by the perpetrators of the criminal act as a sign of encouragement likely to have a significant or even decisive effect on promoting its commission. The *mens rea* may be deduced from the circumstances, and the position of authority constitutes one of the circumstances which can be considered when establishing that the person against whom the claim is directed knew that his presence would be interpreted by the perpetrator of the wrongful act as a sign of support or encouragement. An individual's authority must therefore be considered to be an important indicium as establishing that his mere presence constitutes an act of intentional participation under Article 7(1) of the [1993 ICTY] Statute. Nonetheless, responsibility is not automatic and merits consideration against the background of the factual circumstances.⁴¹⁹

398. In its judgement in the *Jelisić case* in 1999, the ICTY Trial Chamber stated that "as a rule of customary international law, Article 3 common to the Geneva Conventions is covered by Article 3 of the [1993 ICTY] Statute" and, besides considering acts of murder and cruel treatment, with regard to Article 3(e) of the 1993 ICTY Statute found that "the individual acts of plunder perpetrated by people motivated by greed might entail individual criminal responsibility on the part of its perpetrators".⁴²⁰ It found the accused guilty on various counts of "violations of the laws and customs of war" and crimes against humanity.⁴²¹

399. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber stated, with regard to Article 3 of the 1993 ICTY Statute, that:

Violations of Article 3 of the [1993 ICTY] Statute which include violations of the [1907 HR] and those of Common Article 3 are by definition serious violations of international humanitarian law within the meaning of the Statute. They are thus likely to incur individual criminal responsibility in accordance with Article 7 of the Statute.

...

The Trial Chamber is of the opinion that ... customary international law imposes criminal responsibility for serious violations of Common Article 3 [of the 1949 Geneva Conventions].⁴²²

Drawing a clear distinction between Article 7(1) and Article 7(3) of the 1993 ICTY Statute, the Trial Chamber noted that:

Whilst Article 7(1) deals with the commander's participation in the commission of a crime, Article 7(3) enshrines the principle of command responsibility in the strict sense which entails the commander's individual criminal responsibility if he did

⁴¹⁹ ICTY, *Aleksovski case*, Judgement, 25 June 1999, §§ 62–65.

⁴²⁰ ICTY, *Jelisić case*, Judgement, 14 December 1999, §§ 34 and 48.

⁴²¹ ICTY, *Jelisić case*, Judgement, 14 December 1999, § 138.

⁴²² ICTY, *Blaškić case*, Judgement, 3 March 2000, § 176.

not prevent crimes from being committed by his subordinates or, where applicable, punish them.⁴²³

The Trial Chamber further stated that:

The Trial Chamber concurs with the views deriving from the Tribunal's case-law, that is, that individuals may be held responsible for their participation in the commission of offences under any of the heads of individual criminal responsibility in Article 7(1) of the Statute. This approach is consonant with the general principles of criminal law and customary international law.⁴²⁴

400. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber stated that:

168. As to the argument that Additional Protocol I does not entail individual criminal responsibility, the Trial Chamber recalls a statement in the *Tadić* Jurisdiction Decision:

Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches. . . . because, as the Nuremberg Tribunal concluded "[c]rimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

The Appeals Chamber in that case had no difficulty in finding that customary law "imposes criminal liability for serious violations of Common Article 3" of the Geneva Conventions, an article that contains no reference to individual responsibility. This finding was reaffirmed by the Appeals Chamber in *Čelebići [Delalić case]*.

169. By analogy, violations of Additional Protocol I incur individual criminal liability in the same way that violations of Common Article 3 give rise to individual criminal liability.⁴²⁵

The Trial Chamber further held that:

364. Article 7 [of the 1993 ICTY Statute] is clearly intended to assign individual criminal responsibility at different levels, both subordinate and superior, for the commission of crimes listed in Articles 2 to 5 of the Statute. Article 7 gives effect to a general principle of criminal law that an individual is responsible for his acts and omissions. It provides that an individual may be held criminally responsible for the direct commission of a crime, whether as an individual or jointly, or through his omissions for the crimes of his subordinates when under an obligation to act.

...

⁴²³ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 261.

⁴²⁴ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 264.

⁴²⁵ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, §§ 168–169.

371. The Trial Chamber is of the view that in cases where the evidence presented demonstrates that a superior would not only have been informed of subordinates' crimes committed under his authority, but also exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the type of criminal responsibility incurred may be better characterised by Article 7(1). Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).⁴²⁶

401. In its judgement in the *Krstić case* in 2001, the ICTY Trial Chamber stated that:

The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) [of the 1993 ICTY Statute] are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by "planning", "instigating" or "ordering" the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.⁴²⁷ [emphasis in original]

With regard to General Krstić's individual criminal responsibility under Article 7(1) of the 1993 ICTY Statute, the Trial Chamber stated, *inter alia*, that:

610. In light of these facts, the Trial Chamber is of the view that the issue of General Krstić's criminal responsibility for the crimes against the civilian population of Srebrenica occurring at Potocari is most appropriately determined under Article 7(1) by considering whether he participated, along with General Mladić and key members of the VRS Main Staff and the Drina Corps, in a joint criminal enterprise to forcibly "cleanse" the Srebrenica enclave of its Muslim population and to ensure that they left the territory otherwise occupied by Serbian forces.

611. According to the Appeals Chamber in the *Tadić Appeal Judgement*, for joint criminal enterprise liability to arise, three *actus reus* elements require proof:

- (i) A plurality of persons;
- (ii) The existence of a common plan, which amounts to or involves the commission of a crime provided for in the Statute; . . .
- (iii) Participation of the accused in the execution of the common plan, otherwise formulated as the accused's "membership" in a particular joint criminal enterprise.⁴²⁸

402. In its judgement in the *Kvočka case* in 2001, the ICTY Trial Chamber considered that:

participation in a crime under a theory of joint criminal enterprise liability is included within the scope of Article 7(1) of the [1993 ICTY] Statute . . .

⁴²⁶ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, §§ 364 and 371.

⁴²⁷ ICTY, *Krstić case*, Judgement, 2 August 2001, § 605.

⁴²⁸ ICTY, *Krstić case*, Judgement, 2 August 2001, §§ 610–611.

It is possible to co-perpetrate and aid or abet a joint criminal enterprise, depending primarily on whether the level of participation rises to that of sharing the intent of the criminal enterprise. An aider or abettor of a joint criminal enterprise, whose acts originally assist or otherwise facilitate the criminal endeavor, may become so involved in its operations that he may graduate to the status of a co-perpetrator of that enterprise.⁴²⁹

With regard to individual criminal responsibility for a possible participation in a joint criminal enterprise, the Trial Chamber stated that:

308. The Trial Chamber considers that persons who work in a job or participate in a system in which crimes are committed on such a large scale and systematic basis incur individual criminal responsibility if they knowingly participate in the criminal endeavor, and their acts or omissions significantly assist or facilitate the commission of the crimes.

309. The Trial Chamber wishes to stress that this does not mean that anyone who works in a detention camp where conditions are abusive automatically becomes liable as a participant in a joint criminal enterprise. The participation in the enterprise must be significant. By significant, the Trial Chamber means an act or omission that makes an enterprise efficient or effective; e.g., a participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution. In general, participation would need to be assessed on a case by case basis, especially for low or mid level actors who do not physically perpetrate crimes. It may be that a person with significant authority or influence who knowingly fails to complain or protest automatically provides substantial assistance or support to criminal activity by their approving silence, particularly if present at the scene of criminal activity. In most situations, the aider or abettor or co-perpetrator would not be someone readily replaceable, such that any "body" could fill his place. He would typically hold a higher position in the hierarchy or have special training, skills, or talents. The Trial Chamber notes, however, that much of the post World War II caselaw discussed above did attribute criminal liability to mere drivers or ordinary soldiers made to stand guard while others performed an execution. In addition, many of the post war cases did not entail repeated participation in a system of criminality, as the accused typically participated on an isolated occasion only. Domestic laws too hold individuals accountable for directly or indirectly participating in a single joint criminal endeavor.

310. In situations of armed conflict or mass violence, it is all too easy for individuals to get caught up in the violence or hatred. During such violent periods, law abiding citizens commit crimes they would ordinarily never have committed. Nonetheless, the presence of mass violence or conflict cannot be used to shield or excuse persons who commit, assist or facilitate or otherwise participate in crimes from incurring liability. Whether the joint criminal enterprise is broadly defined, such as the Nazi persecution of millions of Jews, or it is limited to a specific time and location, such as the three month operation of Omarska camp, a participant in the criminal enterprise must make a substantial contribution to the enterprise's functioning or endeavors before he or she may be held criminally liable.

311. The Trial Chamber finds that during periods of war or mass violence, the threshold required to impute criminal responsibility to a mid or low level

⁴²⁹ ICTY, *Kvočka case*, Judgement, 2 November 2001, §§ 246 and 249.

participant in a joint criminal enterprise as an aider and abettor or co-perpetrator of such an enterprise normally requires a more substantial level of participation than simply following orders to perform some low level function in the criminal endeavor on a single occasion. The level of participation attributed to the accused and whether that participation is deemed significant will depend on a variety of factors, including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed and the efficiency, zealotry or gratuitous cruelty exhibited in performing the actor's function. It would also be important to examine any direct evidence of a shared intent or agreement with the criminal endeavor, such as repeated, continuous, or extensive participation in the system, verbal expressions, or physical perpetration of a crime. Perhaps the most important factor to examine is the role the accused played vis-à-vis the seriousness and scope of the crimes committed: even a lowly guard who pulls the switch to release poisonous gas into the gas chamber holding hundreds of victims would be more culpable than a supervising guard stationed at the perimeter of the camp who shoots a prisoner attempting to escape.

312. In sum, an accused must have carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise. The culpable participant would not need to know of each crime committed. Merely knowing that crimes are being committed within a system and knowingly participating in that system in a way that substantially assists or facilitates the commission of a crime or which allows the criminal enterprise to function effectively or efficiently would be enough to establish criminal liability. The aider or abettor or co-perpetrator of a joint criminal enterprise contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning.⁴³⁰

403. In 1997, in its concluding observations on the report of Uganda, the CRC recommended to the government of Uganda that:

Awareness of the duty to fully respect the rules of international humanitarian law, in the spirit of article 38 of the Convention, *inter alia* with regard to children, should be made known to the parties to the armed conflict in the northern part of the State party's territory, and that violations of the rules of international humanitarian law entail responsibility being attributed to the perpetrators.⁴³¹

V. Practice of the International Red Cross and Red Crescent Movement

404. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

⁴³⁰ ICTY, *Kvočka case*, Judgement, 2 November 2001, §§ 308–312.

⁴³¹ CRC, Concluding observations on the report of Uganda, UN Doc. CRC/C/15/Add.80, 10 October 1997, § 34.

The treaties of international humanitarian law provide various mechanisms . . . for implementing their substantive provisions. Among these mechanisms it is worth mentioning the following: . . . (b) the principle of individual criminal responsibility . . . The principle of the individual criminal responsibility of the perpetrator of certain breaches of international law, including those bearing on the environment in times of armed conflict, as well as of the persons ordering the commission of such acts, is of critical importance. It is firmly rooted in both customary and treaty law, such as the [1907 HR] and the provisions of the Geneva Conventions relating to grave breaches.⁴³²

405. In 1995, at the 9th UN Congress on the Prevention of Crimes and the Treatment of Offenders, the ICRC expressed the view that “according to the terms of the Geneva Conventions and Additional Protocol I, international criminal responsibility for certain violations of humanitarian law . . . has been established only in respect of international armed conflict”.⁴³³

406. In 1997, in its commentary on the definition of war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC, referring to the decision of the ICTY Appeals Chamber in the *Tadić case* (Interlocutory Appeal), noted that “the emergence of *opinio juris* on a customary rule on criminal liability for violations of international humanitarian law committed in non-international armed conflicts has recently been recognised”.⁴³⁴

407. In 1997, during a debate in the Sixth Committee of the UN General Assembly on the establishment of an international criminal court, the ICRC declared that:

It was important to set up mechanisms to combat impunity for those responsible for violations of the laws . . . The establishment of an efficient, widely accepted court offering maximum guarantees of fair trial, free of any political pressure and designated to complement national justice systems would send a clear message to both the perpetrators of serious international crimes and their victims that immunity from prosecution would no longer be tolerated.

The ICRC added that the ICC “must have jurisdiction over war crimes committed in international and non-international conflicts alike” and that “the objective was clear: the atrocities must cease and those responsible for them must be held accountable”.⁴³⁵

⁴³² ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, §§ 45 and 48.

⁴³³ ICRC, Statement at the 9th UN Congress on the Prevention of Crimes and Treatment of Offenders, UN Doc. A/CONF.169/NGO/ICRC/1, 30 April 1995, Topic IV, p. 4.

⁴³⁴ ICRC, Commentary on the definition of war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, 1–12 December 1997, p. 24.

⁴³⁵ ICRC, Statement before the Sixth Committee of the UN General Assembly, 24 October 1997, UN Doc. A/C.6/52/SR.15, 12 February 1998, §§ 12 and 15–16.

VI. Other Practice

408. In a resolution adopted at its Berlin Session in 1999, the Institute of International Law stated that:

Any serious violation of international humanitarian law in armed conflicts in which non-State entities are parties entails the individual responsibility of the persons involved, regardless of their status or official position, in accordance with international instruments that entrust the repression of these acts to national or international jurisdictions.⁴³⁶

Individual civil liability*I. Treaties and Other Instruments**Treaties*

409. Article 75 of the 1998 ICC Statute, entitled “Reparations to victims”, provides that:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.

Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

The Trust Fund referred to was established for the benefit of victims of crimes within the Court’s jurisdiction and will be financed, *inter alia*, by money or other property collected through fines or forfeiture which the Court might order to be transferred to the fund.

410. Chapter 4, Section III, Subsection 4 (Rules 94–99) of the 2000 ICC Rules of Procedure and Evidence contains detailed provisions concerning reparations to be made in favour of the victim(s). Rule 94 provides that victims of violations can lodge requests for compensation directly before the Court. Rule 95 grants the Court the power to proceed with regard to the award of compensation on its own motion. Rule 97, entitled “Assessment of reparations”, provides that:

⁴³⁶ Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, § VIII.

1. Taking into account the scope and extent of any damage, loss or injury, the Court may award reparations on an individualized basis or, where it deems it appropriate, on a collective basis or both.
2. At the request of victims or their legal representatives, or at the request of the convicted person, or on its own motion, the Court may appoint appropriate experts to assist it in determining the scope, extent of any damage, loss and injury to, or in respect of victims and to suggest various options concerning the appropriate types and modalities of reparations. The Court shall invite, as appropriate, victims or their legal representatives, the convicted person as well as interested persons and interested States to make observations on the reports of the experts.
3. In all cases, the Court shall respect the rights of victims and the convicted person.

Other Instruments

411. Article 24(3) of the 1993 ICTY Statute provides that “in addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners”.

412. Article 23(3) of the 1994 ICTR Statute provides that “in addition to imprisonment, the Trial Chambers may order the return of any property and proceeds acquired by criminal conduct, including by means of duress, to their rightful owners”.

413. Rule 105 of the 2000 ICTY Rules of Procedure and Evidence established procedures for the restoration of property:

- (A) After a judgement of conviction containing a specific finding... the Trial Chamber shall, at the request of the Prosecutor, or may, *proprio motu*, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof.
- ...
- (D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.
- (E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.
- (F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

414. Rule 106(B) of the 2000 ICTY Rules of Procedure and Evidence provides that “pursuant to the relevant national legislation, a victim or persons claiming through the victim may bring an action in a national court or other competent body to obtain compensation”.

415. Paragraph 17 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of Human Rights and International Humanitarian Law provides that “in cases where the violation

is not attributable to the State, the party responsible for the violation should provide reparation to the victim or to the State if the State has already provided reparation to the victim”.

416. Paragraph 19 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of Human Rights and International Humanitarian Law provides that:

A State shall enforce its domestic judgements for reparation against private individuals or entities responsible for the violations. States shall endeavour to enforce valid foreign judgements for reparation against private individuals or entities responsible for the violations.

417. According to Section 49(1) of the 2000 UNTAET Regulation No. 2000/30, “independent from the commencement or completion of a criminal proceeding, an alleged victim may claim compensation for damages or losses suffered or inflicted by a suspected crime by filing a civil action before a competent court”. Section 49(2) states that:

As a part of its disposition of a criminal case in which the accused is convicted of an offense as to which there are victims, and notwithstanding any separate civil action which goes forward pursuant to Section 49.1 of the present regulation, the Court may include in its disposition an order that requires the accused to pay compensation or reparations to the victim in an amount determined by the Court. Any payment made by an accused to a victim in compliance with such an order shall be credited toward satisfaction of any civil judgment also rendered in the matter.

418. Rule 105 of the 2001 ICTR’s Rules of Procedure and Evidence provides that:

- (A) After a judgement of conviction containing a specific finding as provided in Rule 88 (B), the Trial Chamber shall, at the request of the Prosecutor, or may, at its own initiative, hold a special hearing to determine the matter of the restitution of the property or the proceeds thereof.
- ...
- (D) Should the Trial Chamber be able to determine the rightful owner on the balance of probabilities, it shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.
- (E) Should the Trial Chamber not be able to determine ownership, it shall notify the competent national authorities and request them so to determine.
- (F) Upon notice from the national authorities that an affirmative determination has been made, the Trial Chamber shall order the restitution either of the property or the proceeds or make such other order as it may deem appropriate.

419. Rule 106(B) of the 2001 ICTR’s Rules of Procedure and Evidence provides that “pursuant to the relevant national legislation, a victim or persons claiming through him may bring an action in a national court or other competent body to obtain compensation”.

II. National Practice

Military Manuals

420. Colombia's Basic Military Manual provides that "the nation can exact from the public servant who caused the injury the amount of the injured party's indemnification".⁴³⁷

421. France's LOAC Teaching Note, in a part dealing with "grave breaches of the rules of the law of armed conflict", states that "each violation of the law of armed conflicts . . . gives a right to reparation at the civil level".⁴³⁸

422. France's LOAC Manual restates Article 1382 of the French Civil Code on civil liability and provides that "this implies that someone who has not been held criminally liable must nevertheless provide reparation for the damage caused".⁴³⁹

National Legislation

423. Some pieces of domestic legislation, apart from granting the victim of a criminal act the possibility of filing a claim for compensation before a civil court, provide for the possibility for the victim of obtaining compensation on the occasion of the criminal proceedings against the offender. Examples include France ("*partie civile*"), Germany and US.⁴⁴⁰

424. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that:

Where a breach provided for in the present Act [i.e. genocide, crimes against humanity and a list of war crimes] falls under the competence of a military court, public prosecution shall be instituted through a summons issued by the Public Prosecutor's Office for the accused to appear before the trial court or through a complaint filed by any person claiming to have suffered injury as a result of the breach and bringing a suit for damages before the president of the judicial commission at the *Conseil de Guerre* [Court Martial] under the conditions provided for in Article 66 of the Code of Criminal Investigation.⁴⁴¹

425. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes states that "persons aimed at in article 24 [i.e. victims, their heirs, their representatives, every individual person or legal entity who have been injured or who have a direct interest] may become a civil party [*partie civile*] according to the provisions of the criminal procedure code".⁴⁴²

⁴³⁷ Colombia, *Basic Military Manual* (1995), p. 36.

⁴³⁸ France, *LOAC Teaching Note* (2000), p. 7.

⁴³⁹ France, *LOAC Manual* (2001), p. 112.

⁴⁴⁰ France, *Code of Criminal Procedure* (1994); Germany, *Criminal Procedure Code as amended* (1987); US, *Victim and Witness Protection Act* (1982).

⁴⁴¹ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 9(3).

⁴⁴² Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 31.

426. France's Law on Cooperation with the ICTY, which allows French courts to try and punish individuals found in France and being accused of having committed the violations of IHL over which the ICTY has jurisdiction, provides that "any person claiming to have been injured by one of those offences can, by filing a complaint, bring indemnification proceedings [*"partie civile"*] in the conditions set forth in Article 85 ff. of the Code of Penal Procedure".⁴⁴³ The same principle is set forth in the Law on Cooperation with the ICTR.⁴⁴⁴

427. Germany's Criminal Procedure Code as amended provides that:

The aggrieved person or his heir may, in criminal proceedings, bring a property claim against the accused arising out of the criminal offence if the claim falls under the jurisdiction of the ordinary courts and is not yet pending before another court, in proceedings before the local court irrespective of the value of the matter in dispute.⁴⁴⁵

428. Luxembourg's Law on the Punishment of Grave Breaches states that a civil action against the perpetrator of offences provided for in this law can only be undertaken before a civil court. However, it provides for the possibility for the (criminal) court to order the restitution of seized objects and exhibits to the entitled person if they are not to be confiscated.⁴⁴⁶

429. Russia's Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya provides that "persons covered by the law on the declaration of amnesty are not exempted from making reparations for the injuries caused by their unlawful acts".⁴⁴⁷

430. Rwanda's Law on the Prosecution of the Crime of Genocide and Crimes against Humanity provides that "the court having jurisdiction over the civil action shall rule on damages even where the accused has died during the course of the proceedings or has benefited from an amnesty".⁴⁴⁸

431. The UK Regulations for the Trial of War Criminals as amended provides that "in a case where the war crime consists wholly or partly of the taking, distribution or destruction of money or other property, the Court may as part of the sentence order the restitution of such money or other property".⁴⁴⁹

432. The US Victim and Witness Protection Act provides that:

- (a) (1)(A) The court, when sentencing a defendant convicted of an offense . . . may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim

⁴⁴³ France, *Law on Cooperation with the ICTY* (1995), Article 2.

⁴⁴⁴ France, *Law on Cooperation with the ICTR* (1996), Article 2.

⁴⁴⁵ Germany, *Criminal Procedure Code as amended* (1987), § 403(1).

⁴⁴⁶ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 14.

⁴⁴⁷ Russia, *Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya* (1997), § 4.

⁴⁴⁸ Rwanda, *Law on the Prosecution of the Crime of Genocide and Crimes against Humanity* (1996), Article 31.

⁴⁴⁹ UK, *Regulations for the Trial of War Criminals as amended* (1945), Regulation 9.

of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense . . .

- (3) The court may also order restitution in any criminal case to the extent agreed to by the parties in a plea agreement.⁴⁵⁰

For cases where restitution is impossible, impractical or inadequate, especially in the case of an offence resulting in bodily injury, the Act provides for the possibility of the paying of an amount of money.⁴⁵¹

433. The US Alien Tort Claims Act provides that "the district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States".⁴⁵²

434. The US Torture Victim Protection Act, under a provision entitled "Establishment of civil action", states that:

- (a) Liability. – An individual who, under actual or apparent authority, or color of law, of any foreign nation –
- (1) subjects an individual to torture shall, in a civil action, be liable for damages to that individual; or
 - (2) subjects an individual to extrajudicial killing shall, in a civil action, be liable for damages to the individual's legal representative, or to any person who may be a claimant in an action for wrongful death.⁴⁵³

435. A provision of the California Code of Civil Procedure as amended dealing with compensation for slave and forced labour states that:

Any Second World War slave labor victim, or heir of a Second World War slave labor victim, Second World War forced labor victim, or heir of a Second World War forced labor victim, may bring an action to recover compensation for labor performed as a Second World War slave labor victim or Second World War forced labor victim from any entity or successor in interest thereof, for whom that labor was performed, either directly or through a subsidiary or affiliate.⁴⁵⁴

436. Yemen's Military Criminal Code requires individuals who have been found guilty of despoiling POWs or the sick, wounded or dead to return that which they took or its equivalent.⁴⁵⁵

National Case-law

437. In the *Ercole case* in 2000, Italy's Tribunal of Livorno tried and sentenced a former paratrooper to 18 months' suspended imprisonment for abusing his authority during his participation in a multinational peacekeeping operation in Somalia and, pending the outcome of connected civil proceedings, made him provisionally liable to the payment of 30,000,000 Italian lire to a Somali citizen

⁴⁵⁰ US, *Victim and Witness Protection Act* (1982), Subsection (a)(1)(A) and (3)

⁴⁵¹ US, *Victim and Witness Protection Act* (1982), Subsection (b).

⁴⁵² US, *Alien Tort Claims Act* (1789).

⁴⁵³ US, *Torture Victim Protection Act* (1991), Section 1350(2)(a)(1) and (2).

⁴⁵⁴ US, *California Code of Civil Procedure as amended* (1873), Section 354.6(b).

⁴⁵⁵ Yemen, *Military Criminal Code* (1998), Article 20.

who had been tortured.⁴⁵⁶ In 2001, the Court of Appeals at Florence confirmed the judgement in this part.⁴⁵⁷

438. In the *Karadžić case* in 1995, a US Court of Appeals considered a civil action brought by Bosnian victims of atrocities and their representatives against Radovan Karadžić under, *inter alia*, the US Alien Tort Claims Act. This Act “creates federal court jurisdiction for suits alleging torts committed anywhere in the world against aliens in violation of the law of nations” (or US treaty). The Court, considering the responsibility of Karadžić for genocide, rape, forced prostitution, torture and other cruel, inhuman and degrading treatment, summary executions and disappearances committed during the conflict in the former Yugoslavia, emphasised that individuals could be held responsible, both criminally, and, as in this case, civilly, for violations of international law. It further noted that “the liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, and remains today an important aspect of international law”. It also stated that:

The liability of private persons for certain violations of customary international law and the availability of the Alien Tort Act to remedy such violations was early recognized by the Executive Branch in an opinion of Attorney General Bradford . . . The Executive Branch has emphatically restated in this litigation its position that private persons may be found liable under the Alien Tort Act for acts of genocide, war crimes, and other violations of international humanitarian law.⁴⁵⁸

439. In a class action verdict in the *Karadžić case* before a US District Court in 2000, Radovan Karadžić was sentenced to pay US\$ 265 million in compensatory damages and US\$ 480 million in punitive damages to the claimants.⁴⁵⁹ In another verdict, he was sentenced to US\$ 407 million in compensatory damages and US\$ 3.8 billion in punitive damages. As acts for which the damages were owed, the Court, in the latest verdict, listed, *inter alia*, rape and gang rape, forced pregnancy, sexual slavery, beating and other torture, genocide, war crimes, crimes against humanity, assault and battery, and disappearance of relatives.⁴⁶⁰

440. The *FIS case* before a US District Court in 1998, in which a group of Algerian women sought compensation from a high-ranking official of the Islamic Salvation Front (FIS) for his participation in crimes against humanity, war crimes and various violations of human rights committed in Algeria, successfully relied upon the US Torture Victim Protection Act and the US Alien Tort Claims Act as a basis for the jurisdiction of US courts. With regard to the claim based on the Alien Tort Claims Act, the Court found that:

⁴⁵⁶ Italy, Tribunal at Livorno, *Ercole case*, 13 April 2000.

⁴⁵⁷ Italy, Court of Appeals at Florence, *Ercole case*, 22 February 2001.

⁴⁵⁸ US, Court of Appeals for the Second Circuit, *Karadžić case*, Decision, 13 October 1995.

⁴⁵⁹ US, District Court, Southern District of New York, *Karadžić case*, Judgement, 16 August 2000.

⁴⁶⁰ US, District Court, Southern District of New York, *Karadžić case*, Judgement, 4 October 2000.

The alleged acts of the FIS are clearly in violation of international law as it stands today. Common Article 3 of the [1949] Geneva Conventions . . . applies to “armed conflicts not of an international character” and protects civilians not participating in the conflict by requiring that they be “treated humanely, without any adverse distinction founded on race, color, religion, faith, sex, birth or wealth, or any other similar criteria”. It prohibits, among other things, “murder of all kinds, mutilation, cruel treatment and torture”, kidnapping, and summary executions. The Karadžić court held that Common Article 3 applies to all parties to a conflict, not merely to official governments. This Court concludes that the acts of the FIS alleged by Plaintiffs are proscribed by international law against other state and private actors, as evidenced by Common Article 3. Accordingly plaintiffs have properly alleged subject matter jurisdiction under the ATCA.⁴⁶¹

Other National Practice

441. At the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998, the Belgian Minister of Foreign Affairs stated that Belgium was in favour of inserting in the ICC Statute provisions that would permit the Court to rule on reparation claims.⁴⁶²

442. In 1993, the Committee of French Jurists set up by the French government to study the establishment of a criminal tribunal for the former Yugoslavia stated that:

It does not seem reasonable to admit civil actions before the [ICTY]. That would lead to a flood of claims, which the international court would not be in a position to process effectively. It seems preferable to proceed from the principle that it will be for the national courts to rule on claims for reparation by victims or their beneficiaries.⁴⁶³

443. At the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court in 1998, the French Minister of Foreign Affairs declared that “my country has also urged close cooperation with NGOs to ensure that the statute contains precise provisions concerning victim access at all stages of proceedings . . . and their right to reparation”.⁴⁶⁴

444. In 1993, during a debate in the UN Security Council following the adoption of the 1993 ICTY Statute, Morocco stated that “the [ICTY] should hand down deterrent sentences both for those who commit crimes and for their accomplices, and should not ignore appropriate compensation for victims and their families”.⁴⁶⁵

⁴⁶¹ US, District Court for the District of Columbia, *FIS case*, Judgement, 2 February 1998.

⁴⁶² Belgium, Statement by the Minister of Foreign Affairs at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 June 1998.

⁴⁶³ France, Committee of French Jurists, Report on the setting up of a criminal tribunal for the former Yugoslavia, UN Doc. S/25266, 10 February 1993, § 100.

⁴⁶⁴ France, Statement by the Minister of Foreign Affairs at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 June 1998.

⁴⁶⁵ Morocco, Statement before the UN Security Council, UN Doc. S/PV.3217, 25 May 1993, pp. 27–28.

445. In 1998, during a debate in the Sixth Committee of the UN General Assembly on the establishment of an international criminal court, the UK stated that it “took particular satisfaction” at two of the aspects of the 1998 ICC Statute. One of these aspects was that:

The Statute of the Court gave the Court power, under article 75, to order the payment of reparations to victims. Accordingly, the Court would serve not just the interests of society in repressing crime, but also those of the victims of crime. The provision would also bolster the Court’s role in deterrence.⁴⁶⁶

446. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, the US stated that “with respect to Article 24 [of the 1993 ICTY Statute], it is our understanding that compensation to victims by a convicted person may be an appropriate part of decisions on sentencing, reduction of sentences, parole or commutation”.⁴⁶⁷

447. According to the Report on US Practice, it is the *opinio juris* of the US that “universal jurisdiction over war crimes applies not only to penal proceedings, but also to suits for damages against individual war criminals by or on behalf of their victims”.⁴⁶⁸

III. Practice of International Organisations and Conferences

United Nations

448. In Resolution 827 of May 1993 establishing the ICTY, the UN Security Council decided that “the work of the International Tribunal shall be carried out without prejudice to the right of the victims to seek, through appropriate means, compensation for damages incurred as a result of violations of international humanitarian law”.⁴⁶⁹

449. In a resolution adopted in 1993 on the situation in Bosnia and Herzegovina, the UN Sub-Commission on Human Rights recommended that:

steps be taken to ensure full reparation for losses suffered as a consequence of aggression and religious and ethnic cleansing . . . it being understood that those responsible for causing destruction and other losses shall be held personally responsible for the repayment of the losses incurred.⁴⁷⁰

450. In 1998, in a report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, the UN Secretary-General stated that “in order to make warring parties more accountable for their actions, I

⁴⁶⁶ UK, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.12, 19 December 1998, § 42.

⁴⁶⁷ US, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, p. 17.

⁴⁶⁸ Report on US Practice, 1997, Chapter 6.12.

⁴⁶⁹ UN Security Council, Res. 827, 25 May 1993, § 7.

⁴⁷⁰ UN Sub-Commission on Human Rights, Res. 1993/17, 20 August 1993, § 8; see also Res. 1995/8, 18 August 1995, § 6.

recommend that combatants be held financially liable to their victims under international law where civilians are made the deliberate target of aggression".⁴⁷¹
451. In 2000, in a report on the situation of human rights in Rwanda, which dealt, *inter alia*, with the *gacaca* trials instituted in Rwanda to try genocide suspects, the Special Representative of the UN Commission on Human Rights stated that "those convicted of crimes against property will be expected to pay restitution for the damage they caused".⁴⁷²

Other International Organisations

452. In a resolution adopted in 1993, the European Parliament declared that it believed that the ICTY "should... consider acts of violence against women committed in former Yugoslavia and require those who committed them to provide economic assistance for the children born as a result of rape and pay compensation to the victims of such crimes".⁴⁷³

International Conferences

453. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

454. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

455. No practice was found.

VI. Other Practice

456. No practice was found.

B. Command Responsibility for Orders to Commit War Crimes

I. Treaties and Other Instruments

Treaties

457. The second paragraphs of Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV provide that "each High Contracting Party shall be under the obligation

⁴⁷¹ UN Secretary-General, Report on the causes of conflict and the promotion of durable peace and sustainable development in Africa, UN Doc. A/52/871-S/1998/318, 13 April 1998, § 50; see also Report on the Protection of Civilians in Armed Conflict, UN Doc. S/1999/957, 8 September 1999, § 38.

⁴⁷² UN Commission on Human Rights, Special Representative on the situation of human rights in Rwanda, Report, UN Doc. A/55/269, 4 August 2000, § 163.

⁴⁷³ European Parliament, Resolution on Human Rights in the world and Community human rights policy for the years 1991/1992, 12 March 1993, §§ 7 and 8.

to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts".

458. Article 28 of the 1954 Hague Convention requires States "to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who...order to be committed a breach of the present Convention".

459. Article 9(1) of the 1998 Draft Convention on Forced Disappearance provides that "each State shall prohibit orders or instructions commanding, authorizing or encouraging a forced disappearance".

460. Article 25(3) of the 1998 ICC Statute provides that "a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person: ... (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted".

461. Article 15 of the 1999 Second Protocol to the 1954 Hague Convention, which also contains a list of acts considered as offences within the meaning of the Protocol, provides that:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

462. Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention provides that "this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties".

463. Article 6 of the 2002 Statute of the Special Court for Sierra Leone, entitled "Individual criminal responsibility", provides that:

1. A person who...ordered...the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute [i.e. crimes against humanity, violations of common Article 3 of the 1949 Geneva Conventions and of AP II, and other serious violations of international humanitarian law] shall be individually responsible for the crime.

Other Instruments

464. Paragraph 3 of the 1989 Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions provides that "Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extralegal, arbitrary or summary executions... Training of law enforcement officials shall emphasize the above provisions."

465. Paragraph 26 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that “in any case, responsibility also rests on the superiors who gave the unlawful orders [to use force and firearms resulting in the death or serious injury of a person]”.

466. Article 3(i) of the 1992 London Programme of Action on Humanitarian Issues provides that “in carrying out the Programme of Action, the parties to the conflict undertook to abide by the following provisions: . . . that persons who . . . order the commission of grave breaches [of IHL] are individually responsible”.

467. Article 7(1) of the 1993 ICTY Statute provides that “a person who . . . ordered, . . . or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present Statute, shall be individually responsible for the crime”.

468. Article 6(1) of the 1994 ICTR Statute provides that a “person who . . . ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute, shall be individually responsible for the crime”.

469. Paragraph 31 of the 1994 CSCE Code of Conduct provides that:

The participating States will ensure that armed forces personnel vested with command authority exercise it in accordance with relevant national as well as international law and are made aware that they can be held individually accountable under those laws for the unlawful exercise of such authority and that orders contrary to national and international law must not be given.

470. Article 2(3) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that:

An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 [crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, war crimes] if that individual:

...
(b) orders the commission of such a crime which in fact occurs or is attempted.

471. Article 16 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled “Crime of aggression”, provides that “an individual who, as leader or organizer, . . . orders the planning, preparation, initiation or waging of aggression committed by a State shall be responsible for a crime of aggression”.

472. Section 14(3) of the 2000 UNTAET Regulation No. 2000/15 provides that “in accordance with the present regulation, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the panels if that person: . . . (b) orders, solicits or induces the commission of such a crime which in fact occurs or is attempted”.

II. National Practice

Military Manuals

473. Argentina's Law of War Manual provides that "the persons accused of having committed or ordered the commission of these [grave] violations, including those resulting from an omission rather than an action, must be searched for".⁴⁷⁴

474. Australia's Defence Force Manual states that "specifically, a commander will be held accountable if an order is given to a subordinate to commit a breach of LOAC or knows that a breach is occurring and fails to intervene".⁴⁷⁵

475. Belgium's Disciplinary Regulations states that "superiors . . . are liable for the orders they give".⁴⁷⁶

476. Cameroon's Disciplinary Regulations states that "the commander is personally responsible for the orders he gives. He looks after their execution and engages his responsibility for their consequences."⁴⁷⁷ It adds that:

The commander has the right and the duty to require absolute obedience from his subordinates. However, he can not require them to accomplish acts, the execution of which would engage their penal responsibility. These acts are the following: . . . acts contrary to the laws and customs of war.⁴⁷⁸

477. Canada's LOAC Manual provides that:

Any person who . . . ordered . . . a war crime described in Sections 2 and 3 [crimes against peace, crimes against humanity, genocide, grave breaches of the Geneva Conventions, grave breaches of AP I, violations of the Hague Conventions and customary law] may be held criminally responsible for the crime.⁴⁷⁹

478. Canada's Code of Conduct provides that "the issuance of a manifestly unlawful order is a crime in itself".⁴⁸⁰ It also states that "the importance of leadership and discipline cannot be overstated. Good leaders do not issue manifestly unlawful commands. They give clear orders which will not be misunderstood."⁴⁸¹

479. Congo's Disciplinary Regulations provides that in the exercise of his authority, "the commander . . . bears full responsibility for orders given and for their execution; this responsibility can not be relieved by the responsibility borne by his subordinates . . . He cannot order the commission of acts . . . which constitute crimes."⁴⁸²

⁴⁷⁴ Argentina, *Law of War Manual* (1989), § 8.02.

⁴⁷⁵ Australia, *Defence Force Manual* (1994), § 1304; see also *Commanders' Guide* (1994), § 1204.

⁴⁷⁶ Belgium, *Disciplinary Regulations* (1991), § 402(b).

⁴⁷⁷ Cameroon, *Disciplinary Regulations* (1975), Article 16.

⁴⁷⁸ Cameroon, *Disciplinary Regulations* (1975), Article 17.

⁴⁷⁹ Canada, *LOAC Manual* (1999), p. 16-4, § 24.

⁴⁸⁰ Canada, *Code of Conduct* (2001), Rule 11, § 5.

⁴⁸¹ Canada, *Code of Conduct* (2001), Rule 11, § 6.

⁴⁸² Congo, *Disciplinary Regulations* (1986), Article 20.

480. France's Disciplinary Regulations as amended states that the commander "bears full responsibility for the orders given and for their execution, and is not relieved thereof by the responsibility borne by his subordinates".⁴⁸³

481. France's LOAC Manual provides that "each individual is responsible for the violations of the law of armed conflicts for which he/she has made himself/herself guilty, whatever the circumstances may be . . . The commanders are responsible . . . for the acts they commit [themselves] and for the orders they give."⁴⁸⁴

482. Germany's Military Manual provides that "superiors shall only issue orders which are in conformity with international law. A superior who issues an order contrary to international law exposes not only himself but also the subordinate obeying to the risk of being prosecuted."⁴⁸⁵

483. Italy's IHL Manual states that Italian law provides for individual criminal responsibility for those who order a war crime.⁴⁸⁶

484. New Zealand's Military Manual states that "a commander giving an order to commit a war crime or grave breach is equally guilty of that offence with the person actually committing it".⁴⁸⁷

485. Nigeria's Manual on the Laws of War provides that commanders are responsible for war crimes committed by their subordinates "when the acts in question have been committed in pursuance of an order of the commander".⁴⁸⁸

486. South Africa's LOAC Manual provides that "signatory States are required to treat as criminals under domestic law anyone who commits or orders a grave breach".⁴⁸⁹ It further states that "an order to commit a war crime is an unlawful order . . . The person giving such an order would also be guilty of a war crime."⁴⁹⁰

487. Spain's LOAC Manual states that "the law of war provides that governments take all legislative measures necessary to determine the penal and disciplinary sanctions for the persons who commit or who give the order to commit violations of the laws and customs of war".⁴⁹¹

488. Switzerland's Basic Military Manual provides that "if the execution of an order constitutes a crime, the commander or superior who has given this order is punishable as well as the author of the breach".⁴⁹²

489. The UK Military Manual states that the responsibility of military commanders for war crimes "arises directly when the acts in question have been committed in pursuance of an order of the commander concerned".⁴⁹³

⁴⁸³ France, *Disciplinary Regulations as amended* (1975), Article 7; see also *LOAC Manual* (2001), p. 113.

⁴⁸⁴ France, *LOAC Manual* (2001), p. 113. ⁴⁸⁵ Germany, *Military Manual* (1992), § 141.

⁴⁸⁶ Italy, *IHL Manual* (1991), Vol. I, § 83.

⁴⁸⁷ New Zealand, *Military Manual* (1992), § 1706(1).

⁴⁸⁸ Nigeria, *Manual on the Laws of War* (undated), § 8.

⁴⁸⁹ South Africa, *LOAC Manual* (1996), § 35. ⁴⁹⁰ South Africa, *LOAC Manual* (1996), § 44.

⁴⁹¹ Spain, *LOAC Manual* (1996), Vol. I, § 1.1.d.(6).

⁴⁹² Switzerland, *Basic Military Manual* (1987), Article 199(1).

⁴⁹³ UK, *Military Manual* (1958), § 631.

490. The UK LOAC Manual provides that “if a soldier carries out an illegal order, both he and the person giving that order are responsible”.⁴⁹⁴

491. The US Field Manual provides that the responsibility of military commanders for war crimes “arises directly when the acts in question have been committed in pursuance of an order of the commander concerned”.⁴⁹⁵

492. The US Air Force Pamphlet states that “command responsibility for acts committed by subordinates arises when the specific wrongful acts in question are knowingly ordered or encouraged”.⁴⁹⁶

493. The YPA Military Manual of the SFRY (FRY) states that “each individual is personally responsible – military personnel and civilians alike – if he commits such violation or *orders* its commission”.⁴⁹⁷ (emphasis in original)

National Legislation

494. Argentina’s Decree on Trial before the Supreme Council of the Armed Forces, issued in connection with the situation in Argentina under the military juntas, states that:

The existence of plans for orders renders the members of the military junta in office at the time, as well as the officers of the armed forces at the decision-making level, responsible in their capacity as indirect perpetrators for the criminal acts committed in compliance with the plans drawn up and overseen by the superiors (Article 514 of the Code of Military Justice) . . . [The] responsibility of these perpetrators does not exclude the responsibility that devolves upon the authors of the operative plan.⁴⁹⁸

Accordingly, the decree states that the members of the first three military juntas be examined by pre-trial proceedings before the Supreme Court of the Armed Forces.⁴⁹⁹

495. Argentina’s Draft Code of Military Justice provides that:

A soldier who, at the occasion of an armed conflict, . . . orders to be committed any other violation or act contrary to the provisions of the international treaties to which Argentina is a party and relating to the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property in case of armed conflict, will be punished.⁵⁰⁰

496. Under Armenia’s Penal Code, giving, during an armed conflict, an “obviously criminal order, aimed at the commission of the crimes defined in Articles 387 [Application of prohibited methods of warfare] and 390 [Serious breaches

⁴⁹⁴ UK, *LOAC Manual* (1981), Section 10, p. 38, § 1.

⁴⁹⁵ US, *Field Manual* (1956), § 501.

⁴⁹⁶ US, *Air Force Pamphlet* (1976), § 15-2(d).

⁴⁹⁷ SFRY (FRY), *YPA Military Manual* (1988), § 20.

⁴⁹⁸ Argentina, *Decree on Trial before the Supreme Council of the Armed Forces* (1983), preamble.

⁴⁹⁹ Argentina, *Decree on Trial before the Supreme Council of the Armed Forces* (1983), Article 1.

⁵⁰⁰ Argentina, *Draft Code of Military Justice* (1998), Article 296, introducing a new Article 880 in the *Code of Military Justice as amended* (1951).

of international humanitarian law during armed conflict]" constitutes a crime against the peace and security of mankind.⁵⁰¹

497. Azerbaijan's Criminal Code, in a provision entitled "Negligence or giving criminal orders in time of armed conflict", provides that:

Wilfully giving a criminal order or instruction directed to the commission of the crimes considered in Articles 115–116 of this Code ["violations of [the] laws and customs of war" and "violations of the norms of international humanitarian law in time of armed conflict"] or declaring that no quarter will be given to the subordinate persons . . . will be punished.⁵⁰²

498. Bangladesh's International Crimes (Tribunal) Act provides that:

Any commander or superior officer who orders, permits, acquiesces or participates in the commission of any of the crimes specified in section 3 [crimes against humanity, crimes against peace, genocide, war crimes, the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" or any other crimes under international law] or is connected with any plans and activities involving the commission of such crimes . . . is guilty of such crimes.⁵⁰³

499. The Criminal Code of Belarus provides that:

If, in a situation of armed conflict, a superior or officer gives an order to his subordinate not to give quarter or any other order or instruction known to be criminal and which permits the commission of crimes set out in articles 134, 135 and 136 of this Code ["use of weapons of mass destruction", "violations of the laws and customs of war" and "criminal infringement of the norms of international humanitarian law during armed conflicts"] he is punishable.⁵⁰⁴

500. Belgium's Law on Discipline in the Armed Forces states that commanders are responsible for the orders they issue.⁵⁰⁵

501. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, which applies to both international and non-international conflicts, provides that: "the following shall be punishable by the penalty provided for completed breaches: an order, even where it is not carried out, to commit one of the breaches listed in Article 1 [crime of genocide, crime against humanity and grave breaches]".⁵⁰⁶

502. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that "whosoever . . . orders [or] instigates to commit . . . one of the infringements aimed at in articles 2, 3 and 4 respectively of this law

⁵⁰¹ Armenia, *Penal Code* (2003), Article 391(3).

⁵⁰² Azerbaijan, *Criminal Code* (1999), Article 117(2).

⁵⁰³ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 4(2).

⁵⁰⁴ Belarus, *Criminal Code* (1999), Article 137(2).

⁵⁰⁵ Belgium, *Law on Discipline in the Armed Forces* (1975), Article 11.

⁵⁰⁶ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Articles 3(3) and 4.

[genocide, crimes against humanity and war crimes] is guilty of a crime of genocide, a crime against humanity [and/or] a war crime".⁵⁰⁷

503. Cambodia's Law on the Khmer Rouge Trial, in the provision dealing with individual responsibility, provides that "any Suspect who... ordered... the crimes referred to in Articles 3, 4, 5, 6, 7, and 8 of this law shall be individually responsible for the crime". The articles referred to deal with "any of the crimes set forth in the 1956 Penal Code" such as: homicide, torture and religious persecution (Article 3); genocide (Article 4); crimes against humanity (Article 5); grave breaches of the Geneva Conventions (Article 6); destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention (Article 7); and crimes against internationally protected persons as set forth in the 1973 Convention on Crimes against Internationally Protected Persons (Article 8), all of these acts being committed during the period 1975–1979.⁵⁰⁸

504. Costa Rica's Penal Code as amended provides for the punishment of:

whoever, in the event of an armed conflict, ... orders to be committed acts which can be qualified as grave breaches or war crimes, in conformity with the provisions of international treaties to which Costa Rica is a party, regarding the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property, [applicable] in cases of armed conflict, and under any other instrument of international humanitarian law.⁵⁰⁹

505. Ethiopia's Penal Code provides that:

In case of an offence under this Code committed on the express order of a person of higher rank whether administrative or military to a subordinate, the person who gave the order is responsible for the act performed by his subordinate and is liable to punishment so far as the subordinate's act did not exceed the order given.⁵¹⁰

506. Germany's Law on the Legal Status of Military Personnel provides that a superior "may give orders only for official purposes and only in observance of the rules of international public law... He bears responsibility for his orders."⁵¹¹

507. Germany's Penal Code provides that "whoever commits the crime himself or through another shall be punished as a perpetrator". As regards incomplete crimes such as an illegal order given but not carried out by the subordinate, it also states that "an attempt to commit a serious criminal offence is always punishable".⁵¹²

⁵⁰⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 5.

⁵⁰⁸ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 29.

⁵⁰⁹ Costa Rica, *Penal Code as amended* (1970), Article 378.

⁵¹⁰ Ethiopia, *Penal Code* (1957), Article 69.

⁵¹¹ Germany, *Law on the Legal Status of Military Personnel* (1995), § 10(4) and (5).

⁵¹² Germany, *Penal Code* (1998), §§ 23(1) and 25(1).

508. Under Iraq's Military Penal Code, a commander is criminally responsible for orders that contemplate the commission of a crime.⁵¹³

509. Jordan's Draft Military Criminal Code, in a part entitled "War crimes", states that "the person who orders war crimes to be committed... will be punished in the same way as the author [of the war crimes] himself".⁵¹⁴

510. The Draft Amendments to the Code of Military Justice of Lebanon, in a part dealing with the punishment for war crimes, provides that "the superior and the subordinate will both be held responsible in case of the perpetration of any of the infringements mentioned".⁵¹⁵

511. Luxembourg's Law on the Punishment of Grave Breaches provides for the punishment of an individual for ordering an act which is defined as a grave breach of the Geneva Conventions, even if this order is not executed.⁵¹⁶

512. Mexico's Code of Military Justice as amended provides that "anyone who orders... any act of murder, physical injury or damage to property outside the fighting will be held responsible".⁵¹⁷

513. The Military Criminal Code as amended of the Netherlands provides that:

- (1) A soldier who intentionally gives an order to a subordinate to commit a crime will be punished as the author of that crime, if the order has been executed.
- (2) If the order as meant in paragraph (1) has not been executed, the superior is punished with imprisonment of maximum five years or a fine of the fourth category, but never with a more severe punishment than would apply to the attempt of the ordered crime, or, in case such attempt is not punishable, to the crime itself.⁵¹⁸

The Report on the Practice of the Netherlands notes that this provision does not require that the order be manifestly criminal.⁵¹⁹

514. The Military Discipline Act of the Netherlands provides that giving an illegal order is contrary to discipline.⁵²⁰

515. Nicaragua's Draft Penal Code, in a part dealing with "crimes against the international order", which contains a list of punishable offences, most of them being committed "at the occasion", "in times of" and/or "during" an international or internal armed conflict, also provides for the punishment of "anyone who orders the commission of any of the crimes set out under this title".⁵²¹

516. Under Russia's Criminal Code, superiors are responsible for their orders, their consequences and their conformity with current legislation.⁵²²

⁵¹³ Iraq, *Military Penal Code* (1940), Articles 43 and 98.

⁵¹⁴ Jordan, *Draft Military Criminal Code* (2000), Article 42.

⁵¹⁵ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 148.

⁵¹⁶ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Articles 1 and 4.

⁵¹⁷ Mexico, *Code of Military Justice as amended* (1933), Article 222.

⁵¹⁸ Netherlands, *Military Criminal Code as amended* (1964), Article 150.

⁵¹⁹ Report on the Practice of Netherlands, 1997, Chapter 6.7.

⁵²⁰ Netherlands, *Military Discipline Act* (1990), Article 28.

⁵²¹ Nicaragua, *Draft Penal Code* (1999), Article 472(1).

⁵²² Russia, *Criminal Code* (1996), Article 332.

517. Under Switzerland's Criminal Code as amended, if the execution of an order is a punishable act, the superior who issued the order is punishable as the perpetrator of the act.⁵²³

518. The Criminal Offences against the Nation and State Act of the SFRY (FRY) provides for the punishment of "any person who commits a war crime, i.e., who during the war or the enemy occupation acted as an instigator or organiser, or who ordered, assisted or otherwise was the direct executor of [a war crime]".⁵²⁴

National Case-law

519. In its judgement in the *Military Junta case* in 1985, Argentina's Court of Appeal found that the responsibility of the accused stemmed from the orders they gave, in their capacity as commanders-in-chief of the various forces, both to seize the victims and to keep the clandestine system of detention in operation, rather than from the fact that they failed to put a halt to the illegal restrictions of freedom organised by other parties. It found that subordinates of the accused arrested a large number of people, detained them clandestinely in military barracks, held them in captivity under inhumane conditions, turned them over to the Executive Branch or physically eliminated them. These procedures were undertaken in accordance with plans approved and ordered by the military commanders. Since it was proven that the acts were committed by members of the armed and security forces, which were organised in a hierarchical and disciplinary fashion, the Court ruled out the possibility that such acts could have occurred without the express orders of the supervisors. Since the members of these forces never denounced acts they must have known about, such acts could only be explained by the fact that the members knew that the acts, though illegal, had been ordered by their superiors.⁵²⁵

520. In the *Abbaye Ardenne case* before a Canadian Military Court at Aurich, Germany, in 1945, the Judge Advocate considered that all circumstances had to be taken into account in order to determine if an officer was responsible for acts committed by his subordinates. He stated that "it is not necessary for you to be convinced that a particular or formal order was given but you must be satisfied, before you convict, that some words were uttered or some clear indication was given to the accused that prisoners were put to death".⁵²⁶

521. In the *Seward case* in 1996, the Canadian Court Martial Appeal Court considered an appeal with regard to the sentence imposed by a General Court Martial on the officer commanding the 2 Commando unit of the Canadian Airborne Regiment present in Somalia as part of Operation Deliverance. The accused had been charged, *inter alia*, for having "negligently performed a military duty [imposed on him] in that he, ... by issuing an instruction to his

⁵²³ Switzerland, *Criminal Code as amended* (1927), Article 18.

⁵²⁴ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

⁵²⁵ Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.

⁵²⁶ Canada, Military Court at Aurich, *Abbaye Ardenne case*, Judgement, 10-28 December 1945.

subordinates that prisoners could be abused, failed to properly exercise command over his subordinates, as it was his duty to do so". The Court stated that:

This count addressed a failure in command. The evidence . . . demonstrates that this failure resulted in, at best, confusion in 2 Commando and must be taken to have led ultimately to excesses by some of the respondent's subordinates. This not only contributed to the death [of a Somali prisoner in the custody of the Command], of which the respondent was acquitted of being a party, but also contributed to several members of the Canadian Armed Forces committing serious lapses of discipline and ultimately finding themselves facing serious charges. Some have gone to prison as a result. These matters all properly related to the charge, as particularized, that the respondent "failed to properly exercise command over his subordinates".⁵²⁷

The Court decided to increase the sentence from a "severe reprimand" to three months imprisonment with dismissal. The Court stated that this sentence was merited by:

the perilous circumstances in which this relatively senior officer deliberately pronounced what was an ambiguous, and a dangerously ambiguous, order. He not only pronounced it but essentially repeated it when questioned as to his meaning. While it was found that he had no direct personal connection with the beating and death of [the prisoner], . . . [the accused] was of a much superior rank as an officer and commander of the whole of 2 Commando. His education, training, and experience and his much greater responsibilities as commanding officer put him on a higher standard of care, a standard which he did not meet . . . What the evidence did show was the existence of a difficult situation for the maintenance of morale and discipline in which the giving of orders required particular care. Any sentence must provide a deterrent to such careless conduct by commanding officers which in the final analysis is a failure in meeting their responsibilities both to their troops and to Canada.⁵²⁸

522. In the *Perišić and Others case* in 1997, the District Court of Zadar in Croatia found the accused

guilty of issuing orders . . . in 1991 . . . during the armed clashes between the former so-called Yugoslav Army and the armed forces of the Republic of Croatia (National Guard forces, members of the police forces) as the officers in the aforementioned Yugoslav Army, who were in a position to issue orders for combat, orders which violated the [1907 Hague Convention IV] and the annexed [1907 HR] (Article 25), Article 3 [GC IV] and Articles 13 and 14 [AP II] . . . [The accused] gave and transmitted the orders to the subordinate commanders . . . All the accused violated the rules of international law, and in a situation of armed conflict, gave orders for attacks . . . in a manner that cannot be explained by military necessity.⁵²⁹

523. In its judgement in the *Dover Castle case* in 1921, the German Reichsgericht held that:

⁵²⁷ Canada, Court Martial Appeal Court, *Seward case*, Judgement, 27 May 1996.

⁵²⁸ Canada, Court Martial Appeal Court, *Seward case*, Judgement, 27 May 1996.

⁵²⁹ Croatia, District Court of Zadar, *Perišić and Others case*, Judgement, 24 April 1997.

It is a military principle that the subordinate is bound to obey the orders of his superiors. This duty of obedience is of considerable importance from the point of view of criminal law. Its consequence is that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible.⁵³⁰

524. In its judgement in the *Dostler case* in 1945, in which a German commander was accused of having ordered, in March 1944, the shooting of 15 American POWs in violation of the 1907 HR, the US Military Commission at Rome held that commanders were responsible for the orders they gave and therefore if the orders were unlawful they were responsible in law as those who carried out the orders.⁵³¹

525. In its judgement in the *Von Leeb case (The High Command Trial)* in 1945, the US Military Tribunal at Nuremberg noted that the principles established in the *Yamashita case* were not entirely applicable, since many of the alleged war crimes were committed in accordance with the policies and orders of their superiors. Noting that field commanders were soldiers and not lawyers, and that they may “presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance”, the Tribunal held that:

It is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which is shown to have [been] known was criminal.⁵³²

526. In the *Ford v. García case* in 2000, a civil lawsuit dealing with acts of torture and extrajudicial killing committed in 1980 in El Salvador, the US Federal Court of Florida gave instructions to the jury as follows:

A commander may be held liable for torture and extrajudicial killing committed by troops under his command under two separate legal theories. The first applies when a commander takes a positive act, *i.e.*, he orders torture and extrajudicial killing or actually participates in it.⁵³³

527. In the *Trajković case* before the District Court of Gnjilan in Kosovo (FRY) in 2001, a Kosovo Serb and former chief of police was convicted, *inter alia*, for having participated in crimes committed against the civilian population in 1999, acts which the District Court found had to be qualified as war crimes under Article 142 of the Penal Code of the FRY, as well as crimes against humanity. The Court also found that the acts had been committed “in time of war”.⁵³⁴

⁵³⁰ Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921.

⁵³¹ US, Military Commission at Rome, *Dostler case*, Judgement, 8–12 October 1945.

⁵³² US, Military Tribunal at Nuremberg, *Von Leeb (High Command Trial) case*, 30 December 1947–28 October 1948.

⁵³³ US, Federal Court of Florida, *Ford v. García case*, Judgement, 3 November 2000.

⁵³⁴ SFRY (FRY), District Court of Gnjilan, *Trajković case*, Judgement, 6 March 2001.

However, on appeal, the Supreme Court of Kosovo overruled this judgement and ordered that the case be returned to the same court for retrial. The Supreme Court found, *inter alia*, that:

The state of facts was erroneously established in relation to all charges as there is no direct or conclusive evidence that the accused acted personally or gave orders leading to the alleged crimes . . . During the retrial, the court of first instance should therefore assess . . . the issue of the accused's personal responsibility for participation in the crimes alleged.⁵³⁵

528. In a written opinion in the *Trajković case* before the District Court of Gnjilan in Kosovo (FRY) in 2001, the International Prosecutor for the Office of the Public Prosecutor of Kosovo stated that:

This Opinion has concluded that [the accused] was not properly found guilty of any of the crimes under individual liability (the direct giving of orders to commit the crimes . . .) . . . Individual responsibility subsumes command responsibility. Because of this "subsuming rule", we must first evaluate whether individual responsibility might attach, as a finding that a defendant is individually responsible for a war crime or crime against humanity will preclude the need to analyse his culpability under command responsibility. The rule is stated in the statute and decisions of the ICTY.⁵³⁶

Other National Practice

529. The Report on the Practice of Germany states that:

By giving a criminal order, the superior violates his obligations under the [Law on the Legal Status of Military Personnel] . . . If the order is executed, the superior can be punished for having committed a war crime according to general rules on perpetration as stated in section 25 of the German Penal Code. If the order has not been followed the superior can be punished according to the concept of incomplete crimes . . . embodied in section 22 of the German Penal Code.⁵³⁷

530. According to the Report on the Practice of Pakistan, a decision of the Pakistani Federal Sharia Court "has placed a greater degree of responsibility on a Muslim commander for violations of humanitarian law after summing up various instructions of various Caliphs from Muslim history".⁵³⁸

531. In 1992, in a note verbale with respect to the implementation of UN Security Council Resolution 780 (1992), Slovenia stated that:

Not only those who have directly committed the crimes ["crimes committed against humanity and international humanitarian law"], but also those who gave orders or were otherwise engaged, should be prosecuted as perpetrators. Such consistent approach of the United Nations Commission of Experts would also include

⁵³⁵ SFRY (FRY), Supreme Court of Kosovo, *Trajković case*, Decision Act, 30 November 2001.

⁵³⁶ SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Sections IV and IV(A).

⁵³⁷ Report on the Practice of Germany, 1997, Chapter 6.8.

⁵³⁸ Report on the Practice of Pakistan, 1998, Chapter 6.2.

the question of the criminal responsibility of numerous high military officers and politicians; this would be in accordance with international criminal law and to date practice, especially the one applied in the Nuremberg trials, following the rule that also those who had given orders should be punished for the committed crimes.⁵³⁹

532. In 1991, a UK FCO spokesperson stated that the Minister of State, FCO, had summoned the Iraqi ambassador and had reminded him “of the personal liability of those who authorised [the] use [of chemical or biological weapons] and asked that Iraq would not use them”.⁵⁴⁰

533. In 1993, in a “Non-Paper” discussing the 1993 ICTY Statute transmitted to the UN Legal Counsel, the UK FCO stated that “under the Geneva Conventions those who order the commission of a grave breach are as responsible for it as the actual perpetrators”.⁵⁴¹

534. In 1992, a report on Iraqi war crimes (Desert Shield/Desert Storm) prepared under the auspices of the US Secretary of the Army noted that “criminal responsibility for violations of the law of war rests with a commander, including the national leadership, who . . . orders or permits the offenses to be committed”.⁵⁴²

535. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Criminal responsibility for violations of the law of war rests with a commander, including the national leadership, if he (or she):

- Orders or permits the offence to be committed . . .

The crimes committed against Kuwaiti civilians and property, and against third party nationals, are offences for which Saddam Hussein, officials of the Ba’ath Party, and his subordinates bear direct responsibility. However, the principal responsibility rests with Saddam Hussein. Saddam Hussein’s C2 of Iraqi military and security forces appeared to be total and unequivocal. There is substantial evidence that each act alleged was taken as a result of his orders, or was taken with his knowledge and approval, or was an act which he should have known.⁵⁴³

III. Practice of International Organisations and Conferences

United Nations

536. In a resolution adopted in 1990 in the context of the Iraqi occupation of Kuwait, the UN Security Council stated that:

⁵³⁹ Slovenia, Note verbale dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24789, 9 November 1992, p. 2.

⁵⁴⁰ UK, Statement by a FCO spokesperson, 21 January 1991, reprinted in *BYIL*, Vol. 62, 1991, p. 680.

⁵⁴¹ UK, FCO, Non-Paper, Former Yugoslavia: War Crimes Implementation of Resolution 808, 22 March 1993, reprinted in *BYIL*, Vol. 64, 1993, p. 700.

⁵⁴² US, Secretary of the Army, Report on Iraqi war crimes (Desert Shield/Desert Storm), unclassified version, 8 January 1992, p. 13.

⁵⁴³ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 633–634.

The Fourth Geneva Convention applies to Kuwait and . . . as a High Contracting Party to the Convention Iraq is bound to comply fully with all its terms and, in particular, is liable under the Convention in respect of the grave breaches committed by it, as are individuals who . . . order the commission of grave breaches.⁵⁴⁴

537. In a resolution adopted in 1992 on violations of humanitarian law in the territory of the former Yugoslavia and in Bosnia and Herzegovina, the UN Security Council reaffirmed that “persons who . . . order the commission of grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches”.⁵⁴⁵

538. In a resolution adopted in 1992 establishing the UN Commission of Experts to examine and analyse evidence of grave breaches of the Geneva Conventions and other violations of IHL in the former Yugoslavia, the UN Security Council recalled its Resolution 764 (1992) in which it had reaffirmed that “persons who . . . order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches”.⁵⁴⁶

539. In a resolution adopted in 1992, the UN Security Council strongly condemned “all violations of international humanitarian law occurring in Somalia, including in particular the deliberate impeding of the delivery of food and medical supplies essential for the survival of the civilian population” and affirmed that “those who . . . order the commission of such acts will be held individually responsible in respect of such acts”.⁵⁴⁷

540. In a resolution adopted 1993 on the establishment of the ICTY, the UN Security Council recalled a previous resolution in which it had reaffirmed that “persons who . . . order the commission of grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches” and expressed its determination “to put an end to such crimes and to take effective measures to bring to justice the persons who are responsible for [violations of international humanitarian law]”.⁵⁴⁸

541. In a resolution adopted in 1993 with respect to the former Yugoslavia, the UN Security Council reaffirmed that “those who . . . order or have ordered the commission of [massive, organized and systematic detention and rape of women] will be held individually responsible in respect of such acts”.⁵⁴⁹

542. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council reaffirmed that “persons who . . . order the commission of grave breaches of the [Geneva] Conventions are individually responsible in respect of such breaches”.⁵⁵⁰

⁵⁴⁴ UN Security Council, Res. 670, 25 September 1990, § 13.

⁵⁴⁵ UN Security Council, Res. 771, 13 August 1992, § 1.

⁵⁴⁶ UN Security Council, Res. 780, 6 October 1992, preamble; see also Res. 764, 13 July 1992, § 10.

⁵⁴⁷ UN Security Council, Res. 794, 3 December 1992, § 5.

⁵⁴⁸ UN Security Council, Res. 808, 22 February 1993, preamble.

⁵⁴⁹ UN Security Council, Res. 820, 17 April 1993, § 6.

⁵⁵⁰ UN Security Council, Res. 1193, 28 August 1998, § 12.

543. In 1993, in a statement by its President following the death of persons detained by Bosnian Serb forces when the vehicle transporting them for work at the front was ambushed, the UN Security Council condemned all violations of GC III and IV and reaffirmed that “those who . . . order the commission of such acts will be held personally responsible”.⁵⁵¹

544. In July 1995, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed “its condemnation of all violations of international humanitarian law” and reiterated “to all concerned that those who have committed or ordered the commission of such acts will be held individually responsible in respect of such acts”.⁵⁵²

545. In October 1995, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council reaffirmed that “those who have committed or have ordered the commission of violations of international humanitarian law will be held individually responsible for them”.⁵⁵³

546. In 1998, in a statement by its President on the situation in the DRC, the UN Security Council reaffirmed that “all persons who . . . order the commission of grave breaches of the [Geneva Conventions of 1949 and the Additional Protocols of 1977] are individually responsible in respect of such breaches”.⁵⁵⁴

547. In a resolution on the former Yugoslavia adopted in 1995, the UN General Assembly, reaffirming that persons who committed violations of IHL would be held personally responsible and accountable, pointed out that:

The leadership in territories under the control of Serbs in the Republic of Bosnia and Herzegovina and formerly Serb-held areas of the Republic of Croatia, the commanders of Serb paramilitary forces and political and military leaders in the Federal Republic of Yugoslavia (Serbia and Montenegro) bear primary responsibility for most of those violations [of human rights and IHL].⁵⁵⁵

548. In 1993, in his report on the draft Statute of the ICTY, the UN Secretary-General’s stated that “a person in a position of superior authority should . . . be held individually responsible for giving the unlawful order to commit a crime under the [ICTY Statute]”.⁵⁵⁶

549. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) recalled that it had addressed the issue of command responsibility in its first interim report as follows:

⁵⁵¹ UN Security Council, Statement by the President, UN Doc. S/25557, 8 April 1993.

⁵⁵² UN Security Council, Statement by the President, UN Doc. S/PRST/1995/33, 20 July 1995.

⁵⁵³ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/52, 12 October 1995, p. 2.

⁵⁵⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/26, 31 August 1998, pp. 1–2.

⁵⁵⁵ UN General Assembly, Res. 50/193, 22 December 1995, § 3.

⁵⁵⁶ UN Security Council, UN Doc. S/25704, Report of the UN Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 3 May 1993, § 56.

A person who gives the order to commit a war crime or crime against humanity is equally guilty of the offence with the person actually committing it. This principle, expressed already in the Geneva Conventions of 1949, applies to both the military superiors, whether of regular or irregular armed forces, and to civilian authorities.⁵⁵⁷

The Commission noted with satisfaction that Article 7 of the 1993 ICTY Statute used an essentially similar formulation.⁵⁵⁸

550. In 1994, in its final report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994) noted that “it is a well-established principle of international law that a person who orders a subordinate to commit a violation for which there is individual responsibility is as responsible as the individual that actually carries it out”. It referred to the 1950 Nuremberg Principles, the 1948 Genocide Convention, Article 86 AP I and the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind.⁵⁵⁹

Other International Organisations

551. No practice was found.

International Conferences

552. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

553. In its judgement in the *Akayesu case* in 1998, the ICTR quoted Article 6(1) of the 1994 ICTR Statute and stated that:

472. ... Thus, in addition to responsibility as principal perpetrator, the Accused can be held responsible for the criminal acts of others where he ... orders them ...

473. Thus, Article 6(1) covers various stages of the commission of a crime, ranging from its initial planning to its execution, through its organization. However, the principle of individual criminal responsibility as provided for in Article 6(1) implies that the planning or preparation of the crime actually leads to its commission. Indeed, the principle of individual criminal responsibility for an attempt to commit a crime obtained only in case of genocide. Conversely, this would mean that with respect to any other form of criminal participation and, in particular, those referred to in Article 6(1), the perpetrator would incur criminal responsibility only if the offence were completed.

474. Article 6(1) thus appears to be in accord with the Judgments of the Nuremberg Tribunal which held that persons other than those who committed the crime, especially those who ordered it, could incur individual criminal responsibility.

⁵⁵⁷ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 55.

⁵⁵⁸ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 56.

⁵⁵⁹ UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Final report, UN Doc. S/1994/1405, 9 December 1994, § 173.

...

483. By *ordering* the commission of one of the crimes referred to in Articles 2 to 4 of the [1994 ICTR] Statute, a person also incurs individual criminal responsibility. Ordering implies a superior-subordinate relationship between the person giving the order and the one executing it. In other words, the person in a position of authority uses it to convince another to commit an offence.⁵⁶⁰ [emphasis in original]

554. In its judgement in the *Kayishema and Ruzindana case* in 1999, the ICTR, with regard to Article 6(3) of the 1994 ICTR Statute and a possible responsibility thereunder of one of the accused, a former *prefet*, stated that:

Where it can be shown that the accused was the *de jure* or *de facto* superior and that pursuant to his orders the atrocities were committed, then the Chamber considers that this must suffice to found command responsibility... If the Chamber is satisfied beyond a reasonable doubt that the accused ordered the alleged atrocities then it becomes unnecessary to consider whether he tried to prevent; and irrelevant whether he tried to punish.⁵⁶¹

555. In the indictment in the *Mrkšić case* before the ICTY in 1996, the Prosecutor stated, with respect to the responsibility of the accused for the killing of 260 persons, that:

Each of the accused is individually responsible for the crimes alleged against him in this indictment pursuant to Article 7(1) of the [1993 ICTY] Statute. Individual criminal responsibility includes committing, planning, instigating, ordering or otherwise aiding and abetting in the planning, preparation or execution of any crimes referred to in Articles 2 to 5 of the Tribunal Statute.⁵⁶²

556. In the review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber stated that:

20. ... The principle of criminal responsibility, restated in Article 7(1) of the [1993 ICTY Statute], covers the person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime. International law thus permits the prosecution of individuals who acted in an official capacity, as stated in Article 7(2) of the Statute.

21. The Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes... Since the criminal intent is formulated at a high level of the administrative hierarchy, the violation of the norm of international humanitarian law is part of a system of criminality specifically justifying the intervention of the Tribunal.⁵⁶³

⁵⁶⁰ ICTR, *Akayesu case*, Judgement, 2 September 1998, §§ 472–474 and 483.

⁵⁶¹ ICTR, *Kayishema and Ruzindana case*, Judgement, 21 May 1999, § 223.

⁵⁶² ICTY, *Mrkšić case*, Initial Indictment, 26 October 1995, § 23.

⁵⁶³ ICTY, *Martić case*, Review of the Indictment, 8 March 1996, §§ 20–21.

557. In the review of the indictments in the *Karadžić and Mladić case* in 1996, the ICTY Trial Chamber stated, with respect to the accused's possible responsibility under Article 7(1) of the 1993 ICTY Statute, that:

According to the two indictments, the offences charged were committed by the military and police personnel obeying the orders of the Bosnian Serb administration. Both indictments indicate that the perpetrators were acting under the control, command and direction of Radovan KARADŽIĆ and Ratko MLADIĆ. All of the charges would therefore involve the individual criminal responsibility of those in superior authority . . .

The evidence and testimony tendered all concur in demonstrating that Radovan KARADŽIĆ and Ratko MLADIĆ would not only have been informed of the crimes allegedly committed under their authority, but also and, in particular, that they exercised their power in order to plan, instigate, order or otherwise aid and abet in the planning, preparation or execution of the said crimes.⁵⁶⁴

558. In the review of the indictment in the *Rajić case* in 1996, the ICTY Trial Chamber stated that the accused "is charged with ordering" several grave breaches of the 1949 Geneva Conventions and violations of the laws and customs of war. It also noted that "in the alternative, he is charged with . . . command responsibility" for the same acts. It further stated that "there is proof [the accused] knew about the attack and actually ordered it".⁵⁶⁵ In addition, the Trial Chamber stated that:

Based on the evidence produced and the testimony heard, the Trial Chamber is satisfied that the Prosecutor has presented reasonable grounds for believing that, on 23 October 1993, the civilian village of Stupni Do was attacked by HVO forces who were acting with [the accused's] aid and assistance or on his orders. The attack appears to have been aimed at the civilian population of the village, many of whom were killed during it. The village, which had no military significance, was devastated and the civilian property in it was destroyed.⁵⁶⁶

559. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber, examining individual criminal responsibility under Article 7(3) of the 1993 ICTY Statute, stated that:

333. That military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law. This criminal liability may arise . . . out of the positive acts of the superior (sometimes referred to as "direct" command responsibility) . . . Thus, a superior may be held criminally responsible . . . for ordering, instigating or planning criminal acts carried out by his subordinates . . .

334. . . The criminal liability of a superior for positive acts follows from general principles of accomplice liability, as set out in the discussion of Article 7(1) [of the 1993 ICTY Statute] above.⁵⁶⁷

⁵⁶⁴ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 65 and 83.

⁵⁶⁵ ICTY, *Rajić case*, Review of the Indictment, 13 September 1996, §§ 1 and 59.

⁵⁶⁶ ICTY, *Rajić case*, Review of the Indictment, 13 September 1996, § 71.

⁵⁶⁷ ICTY, *Delalić case*, Judgement, 16 November 1998, § 333.

560. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber, commenting upon a possible responsibility of the accused under Article 7(1) of the 1993 ICTY Statute and referring to the judgement of the ICTR in the *Akayesu case*, stated that:

It is not necessary that an order be given in writing or in any particular form. It can be explicit or implicit. The fact that an order was given can be proved through circumstantial evidence.

...

The Trial Chamber agrees that an order does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence. Furthermore, what is important is the commander's *mens rea*, not that of the subordinate executing the order. Therefore, it is irrelevant whether the illegality of the order was apparent on its face.⁵⁶⁸

561. In its judgement in the *Kordić and Čerkez case* in 2000, the ICTY Trial Chamber II stated that:

Article 7(1) [of the 1993 ICTY Statute] is concerned with persons directly responsible for planning, instigating, ordering, committing, or aiding and abetting in the planning, preparation or execution of a crime. Thus, both the individual who himself carries out the unlawful conduct and his superior who is involved in the conduct not by physical participation, but for example by ordering or instigating it, are covered by Article 7(1). For instance, a superior who orders the killing of a civilian may be held responsible under Article 7(1), as might a political leader who plans that certain civilians or groups of civilians should be executed, and passes these instructions on to a military commander. The criminal responsibility of such superiors, either military or civilian, in these circumstances is personal or direct, as a result of their direct link to the physical commission of the crime. The criminal responsibility of a superior for such positive acts, except where the superior orders the crime in which case he may be more appropriately referred to as primarily responsible for its commission, may be regarded as "follow(ing) from general principles of accomplice liability".⁵⁶⁹

The ICTY Trial Chamber went on to say that:

The Trial Chamber is of the view that no formal superior-subordinate relationship is required for a finding of "ordering" so long as it is demonstrated that the accused possessed the authority to order. The Trial Chamber agrees with the *Blaškić* finding that there is no requirement that an order be given in writing or in any particular form, and that the existence of an order may be proven through circumstantial evidence. In relation to ordering, the *Blaškić* Trial Chamber further held that the order "does not need to be given by the superior directly to the person(s) who perform(s) the *actus reus* of the offence. Furthermore, what is important is the commander's *mens rea*, not that of the subordinate executing the order."⁵⁷⁰

⁵⁶⁸ ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 281–282.

⁵⁶⁹ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 367.

⁵⁷⁰ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 388.

562. In its judgement in the *Krstić case* in 2001, the ICTY Trial Chamber stated that:

The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) [of the 1993 ICTY Statute] are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by “planning”, “instigating” or “ordering” the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.⁵⁷¹ [emphasis in original]

V. Practice of the International Red Cross and Red Crescent Movement

563. In 1993, in a report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that:

The treaties of international humanitarian law provide various mechanisms . . . for implementing their substantive provisions. Among these mechanisms it is worth mentioning the following: . . . (b) the principle of individual criminal responsibility . . . The principle of the individual criminal responsibility of the perpetrator of certain breaches of international law, including those bearing on the environment in times of armed conflict, as well as of the persons ordering the commission of such acts, is of critical importance. It is firmly rooted in both customary and treaty law, such as the [1907 HR] and the provisions of the Geneva Conventions relating to grave breaches.⁵⁷²

VI. Other Practice

564. No practice was found.

C. Command Responsibility for Failure to Prevent, Repress or Report War Crimes

Prevention and repression of war crimes

I. Treaties and Other Instruments

Treaties

565. Article 1(1) of the 1899 HR lays down as a condition which an armed force must fulfil in order to be accorded the rights of belligerents “to be commanded by a person responsible for his subordinates”.

⁵⁷¹ ICTY, *Krstić case*, Judgement, 2 August 2001, § 605.

⁵⁷² ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, §§ 45 and 48.

566. Article 1(1) of the 1907 HR lays down as a condition which an armed force must fulfil in order to be accorded the rights of belligerents "to be commanded by a person responsible for his subordinates".

567. Article 19 of the 1907 Hague Convention (X) provides that:

The commanders-in-chief of the belligerent fleets must see that the above articles are properly carried out; they will have also to see to cases not covered thereby, in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

568. Article 26 of the 1929 GC provides that:

The Commanders-in-Chief of belligerent armies shall arrange the details for carrying out the preceding articles as well as for cases not provided for in accordance with the instructions of their respective Governments and in conformity with the general principles of the present Convention.

569. Article 86(2) AP I provides that:

The fact that a breach of the Conventions or this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.

Article 86 AP I was adopted by consensus.⁵⁷³

570. Article 87 AP I provides that:

1. The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.
- ...
3. The High Contracting Parties and Parties to the conflict shall require any commander who is aware that subordinates or other persons under his control are going to commit or have committed a breach of the Conventions or of this Protocol, to initiate such steps as are necessary to prevent such violations of the Conventions or this Protocol, and, where appropriate, to initiate disciplinary or penal action against violators thereof.

Article 87 AP I was adopted by consensus.⁵⁷⁴

571. Upon ratification (or signature) of AP I, Italy, Canada, Germany, Netherlands, Spain and UK expressed their understanding of the term "feasible" used in AP I as being what is "practicable or practically possible". These statements are quoted in detail in Chapter 5, section A, and are not repeated here.

⁵⁷³ CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 307.

⁵⁷⁴ CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 307.

572. Article 76(2) of draft AP I (now Article 86(2)) submitted by the ICRC to the CDDH provided that:

The fact that a breach of the Conventions or of the present Protocol was committed by a subordinate does not absolve his superiors from penal responsibility if they knew or should have known that he was committing or would commit such a breach and if they did not take measures within their power to prevent or repress the breach.⁵⁷⁵

This proposal was subject to amendments and referred to Working Group A of Committee I.⁵⁷⁶ Working Group A of Committee I adopted draft Article 76(2) AP I with the following wording:

The fact that a breach of the Conventions or of the present Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility as the case may be, if they knew or had the possibility of knowing in the circumstances at the time that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.⁵⁷⁷

573. Article 9(3) of the 1998 Draft Convention on Forced Disappearance provides that:

Forced disappearance committed by a subordinate shall not relieve his superiors of criminal responsibility if the latter failed to exercise the powers vested in them to prevent or halt the commission of the crime, if they were in possession of information that enabled them to know that the crime was being or was about to be committed.

574. Article 28 of the 1998 ICC Statute provides that:

In addition to other grounds of criminal responsibility under this Statute for crimes within the jurisdiction of the Court:

- (a) A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:
 - (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
 - (ii) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

⁵⁷⁵ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 25.

⁵⁷⁶ CDDH, *Official Records*, Vol. X, CDDH/234/Rev.1, 21 April–11 June 1976, p. 119, § 24.

⁵⁷⁷ CDDH, *Official Records*, Vol. X, CDDH/1/321/Rev.1, 21 April–11 June 1976, p. 153. (After the meetings some delegations informed the Chairman of Committee I that they wished to have the words “or had possibility of knowing” replaced by the words “or had information on the basis of which he should have concluded”.)

- (b) With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:
- (i) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;
 - (ii) The crimes concerned activities that were within the effective responsibility and control of the superior; and
 - (iii) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

575. Article 15 of the 1999 Second Protocol to the 1954 Hague Convention, which also contains a list of the acts considered as offences within the meaning of the Protocol, provides that:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

576. Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention provides that "this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties".

577. Article 6(3) of the 2002 Statute of the Special Court for Sierra Leone, dealing with "Individual criminal responsibility", provides that:

The fact that any of the acts referred to in articles 2 to 4 of the present Statute [crimes against humanity, violations of common Article 3 of the Geneva Conventions and of AP II, and other serious violations of international humanitarian law] was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Other Instruments

578. Article 22 of the 1954 Agreement on Cessation of Hostilities in Viet-Nam provides that "the Commanders of the Forces of the two parties shall ensure that persons under their respective commands who violate any provisions of the present Agreement are suitably punished".

579. Paragraph 24 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

Governments and law enforcement agencies shall ensure that superior officers are held responsible if they know, or should have known, that law enforcement officials under their command are resorting, or have resorted, to the unlawful use of force and firearms, and they did not take all measures in their power to prevent, suppress or report such use.

580. Article 12 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Responsibility of the superior", provides that:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had information enabling them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all feasible measures within their power to prevent or repress the crime.

581. Article 7(3) of the 1993 ICTY Statute provides that:

The fact that any of the acts referred to in articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

582. Article 6(3) of the 1994 ICTR Statute provides that:

The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

583. Article 2(3) of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Individual responsibility", provides that:

An individual shall be responsible for a crime set out in article 17, 18, 19 or 20 if that individual:

- ...
- (c) fails to prevent or repress the commission of such a crime in the circumstances set out in article 6.

584. Article 6 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Responsibility of the superior", provides that:

The fact that a crime against the peace and security of mankind was committed by a subordinate does not relieve his superiors of criminal responsibility, if they knew or had reason to know, in the circumstances at the time, that the subordinate was committing or was going to commit such a crime and if they did not take all necessary measures within their power to prevent or repress the crime.

585. Section 16 of the 2000 UNTAET Regulation No. 2000/15 provides that:

In addition to other grounds of criminal responsibility under the present regulation for serious criminal offences referred to in Sections 4 to 7 of the present regulation [i.e. genocide, crimes against humanity, war crimes and torture], the fact that any of the acts referred to in the said Sections 4 to 7 was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

II. National Practice

Military Manuals

586. Argentina's Law of War Manual states that "military commanders must ensure the prevention of breaches of the [Geneva] Conventions and [AP I] and, when necessary, report them to the competent authority and repress them".⁵⁷⁸ It further refers to Article 86 AP I and states that:

Breaches [of the Geneva Conventions or of AP I] committed by a subordinate do not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew that the subordinate was committing or was going to commit the breach and if they did not take the measures within their power to prevent or repress the breach.⁵⁷⁹

587. Australia's Defence Force Manual refers to the "Yamashita principles" and states that:

The principles of this doctrine are that the commander will be held responsible if the commander:

- a. knows subordinates are going to commit war crimes and does not prevent them,
- b. knows subordinates have committed war crimes and does not punish them,
- c. should know subordinates are going to commit war crimes and does not prevent them, or
- d. should know subordinates have committed war crimes and does not punish them.⁵⁸⁰

The manual further states that "specifically, a commander will be held accountable if [he] knows that a breach is occurring and fails to intervene. A commander is also liable for prosecution if the commander fails to act to prevent a breach of LOAC of which the commander should have known."⁵⁸¹

588. Belgium's Disciplinary Regulations states that "superiors may be criminally or disciplinarily liable if they knew or should have known that a

⁵⁷⁸ Argentina, *Law of War Manual* (1989), § 8.02.

⁵⁷⁹ Argentina, *Law of War Manual* (1989), § 8.07.

⁵⁸⁰ Australia, *Defence Force Manual* (1994), § 1303; see also *Commanders' Guide* (1994), § 1203.

⁵⁸¹ Australia, *Defence Force Manual* (1994), § 1304; see also *Commanders' Guide* (1994), § 1204.

subordinate was committing or going to commit an offence and failed to take all measures to prevent, suppress or punish this offence".⁵⁸²

589. Benin's Military Manual provides that "each military commander is responsible for respect for the law of war in his sphere of command".⁵⁸³ It adds that:

In case of breach of the law of war, [the military commander] shall ensure that the breach ceases and that a disciplinary or criminal action is engaged. In any case, the responsibility of the military commander regarding violations committed by his subordinates is total if it is established that he has not taken any measure to prevent or repress these violations.⁵⁸⁴

590. Cameroon's Instructors' Manual provides that "any act contrary to respect for the Law of War must be punished. Any commander who shows weakness or indulgence in that field shoulders the responsibility."⁵⁸⁵

591. Canada's LOAC Manual states that the "commanders may be held personally and criminally liable in respect of illegal acts committed by those under their command, especially if they knew or should have known that such acts were being committed or were likely to be committed".⁵⁸⁶ It also states that "heads of state as well as members of the administration may be held personally and criminally responsible for illegalities committed . . . by persons under their authority if they knew, should have known or acquiesced in such behaviour".⁵⁸⁷ The manual further states that:

The fact that any such crime [i.e. a war crime] was committed by a subordinate does not relieve a superior of criminal responsibility if the superior knew or had reason to believe that the subordinate was about to commit a war crime, and the superior failed to take the necessary and reasonable measures to prevent or to punish the crime.⁵⁸⁸

According to the manual:

A commander who is aware that subordinates or other persons under his control are about to commit or have committed a breach of the LOAC is required to initiate such steps as are necessary to prevent violations of the LOAC and, where appropriate, to initiate disciplinary or penal action against these persons.⁵⁸⁹

The manual also states that:

The fact that a subordinate committed a breach of the LOAC does not absolve superiors from penal or disciplinary responsibility. Superiors are guilty of an offence if they knew, or had information which should have enabled them to conclude, in

⁵⁸² Belgium, *Disciplinary Regulations* (1991), § 404, see also § 402.

⁵⁸³ Benin, *Military Manual* (1995), Fascicule II, p. 14.

⁵⁸⁴ Benin, *Military Manual* (1995), Fascicule II, p. 15.

⁵⁸⁵ Cameroon, *Instructors' Manual* (1992), p. 25, § 121(1).

⁵⁸⁶ Canada, *LOAC Manual* (1999), p. 15-1, § 7.

⁵⁸⁷ Canada, *LOAC Manual* (1999), p. 15-2, § 10.

⁵⁸⁸ Canada, *LOAC Manual* (1999), p. 16-4, § 27.

⁵⁸⁹ Canada, *LOAC Manual* (1999), p. 16-7, § 51.

the circumstances ruling at the time, that the subordinate was committing or about to commit a breach of the LOAC, and they did not take all feasible measures within their power to prevent or repress the breach.⁵⁹⁰

592. Croatia's *Commanders' Manual* provides that "the commander makes sure that violations of the law of war cease and ensures that disciplinary action is taken".⁵⁹¹

593. France's *LOAC Summary Note* provides that "the commander shall ensure, by exerting his control, that violations of the law of war cease and that disciplinary or penal action is initiated when necessary".⁵⁹²

594. France's *LOAC Manual* provides that:

Each individual is responsible for the violations of the law of armed conflicts for which he/she is guilty, whatever the circumstances may be... The commanders are responsible both for the acts they commit [themselves] and for the orders they give, as well as for the breaches which they allow their subordinates to perform, knowingly, for lack of control or for not having taken the necessary measures to oppose them.⁵⁹³

595. Hungary's *Military Manual* provides that it is the "responsibility of every commander [to] ensure knowledge of the law of war". It adds that "in cases of breaches [the commander] shall ensure that they cease and take disciplinary or penal action".⁵⁹⁴

596. Italy's *LOAC Elementary Rules Manual* provides that "the commander makes sure that violations of the law of war cease and ensures that disciplinary action is taken".⁵⁹⁵

597. South Korea's *Military Operations Law of War Compliance Regulation* states that commanders of UNC/CFC are responsible for securing respect for the laws of war.⁵⁹⁶

598. Madagascar's *Military Manual* provides that "the commander shall ensure that breaches of the law of war cease and that disciplinary or penal action is initiated".⁵⁹⁷

599. The *Military Manual of the Netherlands* refers to Article 86 AP I and states that "a superior is not automatically criminally liable for every criminal behaviour of his subordinates. He must have known about it or at least have had the necessary information about it and he must have neglected to do all in his power to prevent or suppress the criminal behaviour".⁵⁹⁸ Referring to Article 87 AP I, it further states that:

⁵⁹⁰ Canada, *LOAC Manual* (1999), p. 16-7, § 53.

⁵⁹¹ Croatia, *Commanders' Manual* (1992), § 20.

⁵⁹² France, *LOAC Summary Note* (1992), § 5.1.

⁵⁹³ France, *LOAC Manual* (2001), p. 113. ⁵⁹⁴ Hungary, *Military Manual* (1992), p. 40.

⁵⁹⁵ Italy, *LOAC Elementary Rules Manual* (1991), § 20.

⁵⁹⁶ South Korea, *Military Operations Law of War Compliance Regulation* (1988), p. 230, § E.

⁵⁹⁷ Madagascar, *Military Manual* (1994), Fiche No. 4-O, § 20.

⁵⁹⁸ Netherlands, *Military Manual* (1993), p. IX-6.

Commanders are also obliged to take measures in order to prevent their subordinates from committing war crimes. They must take measures to stop the committing of war crimes . . . This can involve criminal or disciplinary proceedings against the acts committed, but also administrative measures (for example suspension or transfer).⁵⁹⁹

600. The Military Handbook of the Netherlands states that:

Commanders . . . are obliged to take measures to prevent that their subordinates commit war crimes. Every soldier has the duty to prevent the commission of war crimes, to stop them and to report them.⁶⁰⁰

601. New Zealand's Military Manual provides that:

The commander is personally liable in respect of illegal acts committed by those under his command if he knew or should have known that such acts were being committed or were likely to be committed, and it is part of his responsibility to ensure that the troops under his command are aware of their obligations.⁶⁰¹

The manual further states that:

[The commander] is also liable to punishment if he knew or had information which should have enabled him to conclude, in the circumstances at the time, that a subordinate was committing or going to commit a breach of the law, and failed to take all feasible steps to prevent or repress that breach.⁶⁰²

602. Nigeria's Military Manual provides that "Article 87 [AP I] thereby enjoins the parties and the parties to the conflict to request Commanders of their troops under control to prevent, and where necessary, to suppress and to report to competent authorities breaches of the conventions and the Protocols".⁶⁰³

The manual further states that commanders "should initiate such steps as are necessary to prevent any violations and, where appropriate, to initiate disciplinary or penal action against violators thereof".⁶⁰⁴

603. Nigeria's Manual on the Laws of War provides that:

In some cases, commanders are responsible for war-crimes committed by their subordinates. For example, when soldiers commit acts of massacre against the civilian population of an occupied territory or against prisoners of war the responsibility for such acts may rest not only with the actual perpetrators but also with the commander. Such responsibility arises when the acts in question have been committed in pursuance of an order of the commander, when the act is done with the commander's knowledge or when the commander ought to have known about the act and failed to use all necessary means at his disposal to ensure compliance with the Laws of War.⁶⁰⁵

⁵⁹⁹ Netherlands, *Military Manual* (1993), p. IX-7.

⁶⁰⁰ Netherlands, *Military Handbook* (1995), p. 7-44.

⁶⁰¹ New Zealand, *Military Manual* (1992), § 1603(2).

⁶⁰² New Zealand, *Military Manual* (1992), § 1706(1).

⁶⁰³ Nigeria, *Military Manual* (1994), p. 30, § 3. ⁶⁰⁴ Nigeria, *Military Manual* (1994), p. 30, § 3.

⁶⁰⁵ Nigeria, *Manual on the Laws of War* (undated), § 8.

604. The Handbook on Discipline of the Philippines states that:

The immediate CO of errant military personnel is held accountable either as conduct unbecoming pursuant to AW 96, or as accessory after the fact in cases where he refuses to act, delays or otherwise aids or abets the wrong doing of his subordinates which is the subject of a valid complaint or duly issued warrant of arrest.⁶⁰⁶

605. The Code of Ethics of the Philippines provides that “commanders shall exercise their authority over their subordinates with prudence and shall accept responsibility for their actions”.⁶⁰⁷

606. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that:

- a. Commanders shall be responsible for the conduct and behavior of AFP and PNP personnel under their control and supervision. They will be held accountable under pertinent provisions of the Articles of War in the case of military personnel and PNP Rules and Regulations and the Revised Penal Code for PNP personnel, or as accessory after the fact in cases where they refuse to act, delay or otherwise aid or abet the wrongdoing of their subordinate, the subject of a valid complaint or warrant of arrest.
- b. Commanders shall ensure that all participants in security/police operations shall be briefed and de-briefed before and after every operation to insure proper behavior of personnel and understanding of their mission as well as to assess the over-all impact of the operation to AFP/PNP goals and objectives and whenever necessary immediately undertake corrective legal measures on any misconduct committed by AFP/PNP personnel.⁶⁰⁸

607. Russia’s Military Manual provides that, during an armed conflict, a commander is obliged “to put an end to any violation of the rules of IHL; to prosecute persons having committed a violation of the rules of IHL”.⁶⁰⁹

608. South Africa’s Medical Services Military Manual refers to Article 87 AP I, providing that “commanders will prevent [and] suppress . . . breaches of humanitarian law”.⁶¹⁰

609. Spain’s LOAC Manual provides that “the commander must ensure that the violations cease and that disciplinary or penal action is taken”.⁶¹¹ It further imposes on commanding officers the obligation “not to order or tolerate breaches of the humanitarian rules of war”.⁶¹²

610. Sweden’s IHL Manual provides that:

The fact that a breach of the [Geneva] Conventions or of [AP I] was committed by a subordinate does not absolve his superior from penal or disciplinary responsibility. This applies, however, only if the superiors knew, or had received intelligence enabling them to deduce, that the subordinate had committed or was about to commit

⁶⁰⁶ Philippines, *Handbook on Discipline* (1989), Part IV, p. 7.

⁶⁰⁷ Philippines, *Code of Ethics* (1991), Section 2.3.

⁶⁰⁸ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 3(a)–(b).

⁶⁰⁹ Russia, *Military Manual* (1990), § 14(b).

⁶¹⁰ South Africa, *Medical Services Military Manual* (undated), p. 5.

⁶¹¹ Spain, *LOAC Manual* (1996), Vol. I, § 10.8.c.(1).

⁶¹² Spain, *LOAC Manual* (1996), Vol. I, § 11.4.b.

such a breach, and if they had not taken all feasible steps in their power to prevent or punish the breach.

The Additional Protocol further clearly states that military commanders shall prevent breaches and if necessary punish and report such cases.⁶¹³

611. Switzerland's Basic Military Manual provides that commanders "are responsible to ensure that their troops respect the Conventions as well as for the punishment of possible breaches".⁶¹⁴

612. Togo's Military Manual states that "each military commander is responsible for respect for the law of war in his sphere of command".⁶¹⁵ It adds that:

In case of breach of the law of war [the military commander] shall ensure that the breach ceases; that a disciplinary or criminal action is engaged. In any case, the responsibility of the military commander regarding violations committed by his subordinates is total if it is established that he has not taken any measure to prevent or repress these violations.⁶¹⁶

613. The UK Military Manual provides that:

In some cases military commanders may be responsible for war crimes committed by subordinate members of the armed forces or other persons subject to their control. Thus, for example, when troops commit, or assist in the commission of, massacres and atrocities against the civilian inhabitants of occupied territory, or against prisoners of war, the responsibility may rest not only with the actual perpetrator but also with the commander.

...

The commander is also responsible, if he has actual knowledge or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and if he fails to use the means at his disposal to ensure compliance with the law of war.⁶¹⁷

614. The US Field Manual states that:

In some cases, military commanders may be responsible for war crimes committed by subordinate members of the armed forces, or other persons subject to their control. Thus, for instance, when troops commit massacres and atrocities against the civilian population of occupied territory or against prisoners of war, the responsibility may rest not only with the actual perpetrators but also with the commander . . . The commander is also responsible if he has actual knowledge, or should have knowledge, through reports received by him or through other means, that troops or other persons subject to his control are about to commit or have committed a war crime and he fails to take the necessary and reasonable steps to insure compliance with the law of war or to punish violators thereof.⁶¹⁸

⁶¹³ Sweden, *IHL Manual* (1991), Section 4.2, p. 94.

⁶¹⁴ Switzerland, *Basic Military Manual* (1987), Article 196(2).

⁶¹⁵ Togo, *Military Manual* (1995), Fascicule II, p. 14.

⁶¹⁶ Togo, *Military Manual* (1995), Fascicule II, p. 15.

⁶¹⁷ UK, *Military Manual* (1958), § 631. ⁶¹⁸ US, *Field Manual* (1956), § 501.

615. The US Air Force Pamphlet states that:

An important illustration of the *mens rea* requirement relates to a commander's responsibility to maintain discipline and preclude violations by members of his command . . .

Command responsibility for acts committed by subordinates arises when the specific wrongful acts in question are knowingly ordered or encouraged. In addition, the Commander is responsible if he has the actual knowledge, or should have had knowledge through reports received by him or through other means, that combatants under his control have or are about to commit criminal violations, and he culpably fails to take reasonably necessary steps to ensure compliance with the law and punish violators thereof.⁶¹⁹

616. The US Air Force Pamphlet provides that "an important illustration of the *mens rea* requirement relates to a commander's responsibility to maintain discipline and preclude violations by members of his command".⁶²⁰

617. The US Naval Handbook provides that:

Officers in command are not only responsible for ensuring that they conduct all combat operations in accordance with the law of armed conflict; they are also responsible for the proper performance of their subordinates. While a commander may delegate some or all of his authority, he cannot delegate responsibility for the conduct of the forces he commands. The fact that a commander did not order, authorize, or knowingly acquiesce in a violation of the law of armed conflict by a subordinate will not relieve him of responsibility for its occurrence if it is established that he failed to exercise properly his command authority or failed otherwise to take reasonable measures to discover and correct violations that may occur.⁶²¹

The Handbook further states that "all members of the naval service have a duty to comply with the law of armed conflict and, to the utmost of their ability and authority, to prevent violations by others".⁶²²

618. The Annotated Supplement to the US Naval Handbook states that:

A commander at any level is personally responsible for the criminal acts of warfare committed by a subordinate if the commander knew in advance of the breach about to be committed and had the ability to prevent it, but failed to take the appropriate action to do so. In determining the personal responsibility of the commander, the element of knowledge may be presumed if the commander had information which should have enabled him or her to conclude under the circumstances that such a breach was to be expected. Officers in command are also personally responsible for unlawful acts of warfare performed by subordinates when such acts are committed by order, authorization, or acquiescence of a superior. Those acts will each be determined objectively.⁶²³

The Annotated Supplement also states that:

⁶¹⁹ US, *Air Force Pamphlet* (1976), § 15-2(d). ⁶²⁰ US, *Air Force Pamphlet* (1976), § 15-2(d).

⁶²¹ US, *Naval Handbook* (1995), § 6.1.3. ⁶²² US, *Naval Handbook* (1995), § 6.1.4.

⁶²³ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.1.3, footnote 13.

Where U.S. personnel are involved, military personnel with supervisory authority have a duty to prevent criminal acts. Any person in the naval service who sees a criminal act about to be committed must act to prevent it to the utmost of his or her ability and to the extent of his or her authority . . . Possible actions include moral arguments to dissuade, threatening to report the criminal act, repeating orders of superiors, stating personal disagreement, and asking the senior individual on scene to intervene as a means of preventing the criminal act. In the event the criminal act directly and imminently endangers a person's life (including the life of another person lawfully under his or her custody), force may be used to the extent necessary to prevent the crime. However, the use of deadly force is rarely justified; it may be used only to protect life and only under conditions of extreme necessity as a last resort when lesser means are clearly inadequate to protect life.⁶²⁴

619. Uruguay's Disciplinary Regulations states that "no superior shall be absolved of his responsibility by his subordinates' omission or carelessness in matters that he must and can supervise himself".⁶²⁵

620. The YPA Military Manual of the SFRY (FRY) states that a superior who was aware of preparations for acts that would violate certain norms and did not prevent their occurrence or carry out appropriate disciplinary measures is personally responsible. A superior officer shall especially be responsible as an accomplice or instigator in case of repeated violations by subordinates.⁶²⁶

National Legislation

621. Argentina's Draft Code of Military Justice provides that a superior shall not be relieved of responsibility "if he knew or possessed information leading him to conclude, in the circumstances at the time, that a subordinate had committed, or was about to commit, an offence and did not take the feasible means at his disposal to prevent or repress the offence".⁶²⁷

622. Under Armenia's Penal Code, a commander or an official commits a crime against the peace and security of mankind

if he knew, or had information which should have enabled him to conclude in the circumstances at the time, that his subordinate was committing or was going to commit an offence [the use of a prohibited method of warfare or a serious breach of international humanitarian law, as defined in Articles 387 and 390 of the Code] and if he did not take all feasible measures within his power to prevent or repress the offence.⁶²⁸

623. Azerbaijan's Criminal Code, in a provision entitled "Negligence or giving criminal orders in time of armed conflict", states that:

⁶²⁴ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.1.4, footnote 14.

⁶²⁵ Uruguay, *Disciplinary Regulations* (1980), Article 26.

⁶²⁶ SFRY (FRY), *YPA Military Manual* (1988), § 20.

⁶²⁷ Argentina, *Draft Code of Military Justice* (1998), Article 193, introducing a new Article 514 *bis* in the *Code of Military Justice as amended* (1951).

⁶²⁸ Armenia, *Penal Code* (2003), Article 391(1).

Failure to use in time of armed conflict all the opportunities by the commander or the person in charge in the framework of their responsibilities in order to prevent that persons under their command commit crimes considered in articles 115–116 of the present Code [i.e. “violations of [the] laws and customs of war” and “violations of the norms of international humanitarian law in time of armed conflict”] . . . will be punished.⁶²⁹

624. Bangladesh’s International Crimes (Tribunal) Act provides that:

The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely: –

...

- (h) . . . failure to prevent commission of any such crimes [i.e. crimes against humanity, crimes against peace, genocide, war crimes, “violations of any humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949” or any other crimes under international law].⁶³⁰

625. Bangladesh’s International Crimes (Tribunal) Act provides that:

Any commander or superior officer . . . who fails or omits to discharge his duty to maintain discipline, or to control or supervise the actions of the persons under his command or his subordinates, whereby such persons or subordinates or any of them commit any such crimes [crimes against humanity, crimes against peace, genocide, war crimes, “violations of any humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949” or any other crimes under international law], or who fails to take necessary measures to prevent the commission of such crimes, is guilty of such crimes.⁶³¹

626. The Criminal Code of Belarus provides that:

If, in a situation of armed conflict, a superior or officer intentionally does not take all the measures possible in his power in order to prevent or repress the commission by his subordinates of the crimes set out in articles 134, 135 and 136 of this Code [i.e. “use of weapons of mass destruction”, “violations of the laws and customs of war” and “criminal infringement of the norms of international humanitarian law during armed conflicts”] he is punishable . . .⁶³²

627. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, which applies to both international and non-international armed conflicts, provides that:

The following shall be punishable by the penalty provided for completed breaches:

...

- failure to act to the extent available to them by persons who had knowledge of the orders given to commit such a breach or of acts initiating the commission thereof and who were able to prevent or put an end to such breach.⁶³³

⁶²⁹ Azerbaijan, *Criminal Code* (1999), Articles 117(1).

⁶³⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2).

⁶³¹ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 4(2).

⁶³² Belarus, *Criminal Code* (1999), Article 137(1).

⁶³³ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Articles 3(3) and 4.

628. Cambodia's Law on the Khmer Rouge Trial, in the provision dealing with individual responsibility, states that:

The fact that any of the acts referred to in Articles 3 through 8 of this law was committed by a subordinate does not relieve the superior of personal criminal responsibility if the superior had effective command and control or authority and control over the subordinate, and the superior knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators.

The articles referred to deal with "any of the crimes set forth in the 1956 Penal Code" such as: homicide, torture and religious persecution (Article 3); genocide (Article 4); crimes against humanity (Article 5); grave breaches of the Geneva Conventions (Article 6); destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention (Article 7); and crimes against internationally protected persons as set forth in the 1973 Convention on Crimes against Internationally Protected Persons (Article 8), all of these acts being committed during the period 1975–1979.⁶³⁴

629. Canada's Crimes against Humanity and War Crimes Act provides that military commanders and "superiors" may commit indictable offences if they meet all of the following conditions: (a) fail to "exercise control properly over a person under their effective command and control" and as a result that person commits a war crime; (b) know or are "criminally negligent in failing to know, that the person is about to commit or is committing such an offence"; and (c) subsequently fail to take "as soon as practicable, all necessary and reasonable measures within their power to prevent or repress the commission of the offence, or the further commission of offences" or fail "to take, as soon as practicable, all necessary and reasonable measures within their power to submit the matter to the competent authorities for investigation and prosecution".⁶³⁵

630. Under Egypt's Military Criminal Code, commanders have the duty to investigate allegations of military offences.⁶³⁶

631. The Draft Amendments to the Penal Code of El Salvador provide that:

In the case in which a subordinate has committed any of the crimes set out in this title [i.e. title XIX on "Crimes against humanity" and therein genocide and war crimes], his superiors are not relieved from penal responsibility if they knew or had information that permitted them to conclude, in the circumstances of the time, that the subordinate was committing or was about to commit such crimes and did not take all possible measures which were at their disposal in order to prevent or repress the said act.⁶³⁷

⁶³⁴ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 29.

⁶³⁵ Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 7(1) and (2).

⁶³⁶ Egypt, *Military Criminal Code* (1966), Article 23.

⁶³⁷ El Salvador, *Draft Amendments to the Penal Code* (1998), Article entitled "Punibilidad de la comisión por acción y por omisión en delitos contra la humanidad".

632. Estonia's Penal Code provides that:

Besides the author of one of the crimes set out in this chapter [i.e. crimes against humanity, crimes against peace and war crimes], the representative of the public administration or the military commander who has issued the order to commit such crime, with the consent of whom it has been committed or who has failed to prevent it although it was in his or her power to do so, shall also be punished.⁶³⁸

633. France's Code of Military Justice provides that "when a subordinate is tried as the chief actor in an offence . . . and his hierarchical superiors cannot be sought as co-actors, they are considered to be accessories in that they organized or tolerated the criminal acts of their subordinate".⁶³⁹

634. Germany's Law Introducing the International Crimes Code contains a provision entitled "Responsibility of military commanders and other superiors" which states that:

- (1) A military commander or civilian superior who omits to prevent his or her subordinate from committing an offence pursuant to this Law [*inter alia*, genocide, crimes against humanity and war crimes] shall be punished in the same way as a perpetrator of the offence committed by that subordinate . . .
- (2) Any person effectively giving orders or exercising command and control in a unit shall be deemed equivalent to a military commander. Any person effectively exercising command and control in a civil organisation or in an enterprise shall be deemed equivalent to a civilian superior.⁶⁴⁰

The Law contains a further provision entitled "Violation of the duty of supervision" which states that:

- (1) A military commander who intentionally or negligently omits properly to supervise a subordinate under his or her command or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Law, where the imminent commission of such an offence was discernible to the commander and he or she could have prevented it.
- (2) A civilian superior who intentionally or negligently omits properly to supervise a subordinate under his or her authority or under his or her effective control shall be punished for violation of the duty of supervision if the subordinate commits an offence pursuant to this Law, where the imminent commission of such an offence was discernible to the superior without more and he or she could have prevented it.
- (3) [Article 1, § 4(2)] shall apply *mutatis mutandis*.⁶⁴¹

⁶³⁸ Estonia, *Penal Code* (2001), § 88(1).

⁶³⁹ France, *Code of Military Justice* (1982), Article 71.

⁶⁴⁰ Germany, *Law Introducing the International Crimes Code* (2002), Article 1(4).

⁶⁴¹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1(13).

635. Under Italy's Penal Code, a person who fails to prevent someone from committing an act that he or she had the duty to prevent may incur criminal responsibility.⁶⁴²

636. Jordan's Draft Military Criminal Code, in a part entitled "War crimes", provides that "the person who orders war crimes to be committed or who is involved therein will be punished in the same way as the author [of the war crimes] himself".⁶⁴³

637. The Draft Amendments to the Code of Military Justice of Lebanon, in a part dealing with the punishment for war crimes, provide that "the superior and the subordinate will both be held responsible in case of the perpetration of any of the infringements mentioned".⁶⁴⁴

638. Luxembourg's Law on the Repression of War Crimes provides that:

Without prejudice to the provisions of Articles 66 and 67 of the Penal Code, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes and offences set out in Article 1 of the present law [i.e. war crimes]: superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being superiors in rank of the principal authors, have aided those crimes or offences.⁶⁴⁵

639. Luxembourg's Law on the Punishment of Grave Breaches provides that:

Without prejudice to the provisions of Articles 66 and 67 of the Penal Code, the following may be charged, according to the circumstances, as co-authors or as accomplices in the crimes set out in Articles 1 and 3 of the present law [i.e. grave breaches of the 1949 Geneva Conventions and acts related thereto]: superiors in rank who have tolerated the criminal activities of their subordinates, and those who, without being superiors in rank of the principal authors, have aided those crimes.⁶⁴⁶

It further provides for the punishment of persons

who, having knowledge of orders given with regard to the commission of crimes set out in Articles 1 and 3 [i.e. grave breaches of the 1949 Geneva Conventions and acts related thereto] or of facts being at the beginning of the commission thereof, and who could have prevented the completion or could have terminated it, did not act within their scope of action.⁶⁴⁷

640. The Military Criminal Code as amended of the Netherlands provides that:

Art. 148. A soldier who intentionally allows a subordinate to commit a crime, or who witnesses a crime committed by a subordinate and intentionally omits to take measures, to the extent they are necessary and required from him, will be punished as an accomplice.

⁶⁴² Italy, *Penal Code* (1930), Article 40.

⁶⁴³ Jordan, *Draft Military Criminal Code* (2000), Article 42.

⁶⁴⁴ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 148.

⁶⁴⁵ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 3.

⁶⁴⁶ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 5.

⁶⁴⁷ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 6.

Art. 149. A soldier who intentionally omits to take measures, to the extent they are necessary and required from him, [will be punished] when his subordinate commits, or plans to commit a crime, which he reasonably must have presumed.⁶⁴⁸

641. The International Crimes Act of the Netherlands provides that:

1. A superior shall be liable to the penalties prescribed for the offences referred to in [Article] 2 [genocide, crimes against humanity, war crimes and torture] if he:
 - (a) intentionally permits the commission of such an offence by a subordinate;
 - (b) intentionally fails to take measures, in so far as these are necessary and can be expected of him, if one of his subordinates has committed or intends to commit such an offence.
2. Anyone who culpably neglects to take measures, in so far as these are necessary and can be expected of him, where he has reasonable grounds for suspecting that a subordinate has committed or intends to commit such an offence, shall be liable to no more than two-thirds of the maximum of the principal sentences prescribed for the offences referred to in [Article] 2.⁶⁴⁹

642. Rwanda's Law Setting up Gacaca Jurisdictions aims:

to organize the putting on trial of persons prosecuted for having, between 1 October 1990 and 31 December 1994, committed acts qualified and punished by the Penal Code and which constitute: a) . . . crimes of genocide or crimes against humanity as defined by the [1948 Genocide Convention], by the [1949 GC IV and the Additional Protocols], as well as in the [1968 UN Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity].⁶⁵⁰

It provides that:

The fact that any of the acts aimed at by this organic law has been committed by a subordinate does not free his superior from his criminal responsibility if he knew or could know that his subordinate was getting ready to commit this act or had done it and that the superior has not taken necessary and reasonable measures to punish the authors or prevent that the mentioned act be not committed when he had means.⁶⁵¹

643. Spain's Military Criminal Code imposes a prison sentence on any military officer who does not maintain due discipline in the forces under his command, who tolerates any abuse of authority or power in his subordinates, or who does not take the necessary steps to prevent a military offence among those listed under "Offences against the Laws and Customs of War".⁶⁵²

644. According to the Report on the Practice of Spain, Article 11 of Spain's Penal Code, which provides for responsibility by omission, would be

⁶⁴⁸ Netherlands, *Military Criminal Code as amended* (1964), Articles 148–149.

⁶⁴⁹ Netherlands, *International Crimes Act* (2003), Article 9.

⁶⁵⁰ Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 1.

⁶⁵¹ Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 53(2).

⁶⁵² Spain, *Military Criminal Code* (1985), Article 137.

applicable in regard to the commander's duty to prevent breaches of the Geneva Conventions and AP I.⁶⁵³

645. Sweden's Penal Code as amended provides that "if a crime against international law has been committed by a member of the armed forces, his lawful superior shall also be sentenced in so far as he was able to foresee the crime but failed to perform his duty to prevent it".⁶⁵⁴

646. Ukraine's Criminal Code provides for a fine or imprisonment for the "intentional non-stopping of a crime committed by a subordinate", as well as for the failure by a military service official, who is an investigation authority, of carrying out investigations against a subordinate for alleged crimes.⁶⁵⁵

647. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I, establishing provisions for the punishment of a list of more specific offences and also of "all other offences against the laws or customs of war", provided for the punishment of "participation in a common plan or conspiracy to accomplish any of [these acts]" and stated that "leaders, organizers, instigators, accessories and accomplices participating in the formulation or execution of any such common plan or conspiracy will be held responsible for all acts performed by any person in execution of that plan or conspiracy."⁶⁵⁶

648. Yemen's Military Criminal Code states that:

In the case of the commission of any of the crimes set out under this chapter [i.e. war crimes], the commander . . . will be held responsible for the crime and will not be released from the punishment provided for, except if the acts have been committed against [his] choice, or without [his] knowledge, or if [he] did not have the possibility to prevent them.⁶⁵⁷

National Case-law

649. In the appeal in the *Military Junta case* in 1985, Argentina's Court of Appeal drew attention to the lack of investigations into and punishment of numerous proven acts, even though such acts had been the object of claims. Referring to the Geneva Conventions, the Court further pointed out that it was the responsibility of the commanders-in-chief of each party to ensure observance of the Conventions.⁶⁵⁸

650. In the *Boland case* in 1995 involving the beating and killing of a Somali detainee by two Canadian soldiers, a Canadian Court Martial Appeal Court, increasing the sentence upon the accused who had been the superior of the soldiers who directly committed the acts, stated that:

⁶⁵³ Report on the Practice of Spain, 1998, Chapter 6.7, referring to *Penal Code* (1995), Article 11.

⁶⁵⁴ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁶⁵⁵ Ukraine, *Criminal Code* (2001), Article 426.

⁶⁵⁶ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

⁶⁵⁷ Yemen, *Military Criminal Code* (1998), Article 23.

⁶⁵⁸ Argentina, Court of Appeal, *Military Junta case* (Appeal), 9 December 1985.

In his own examination in chief [the accused] confirmed on several occasions that he had been negligent. The sad but unalterable fact is that negligence led to the death of a prisoner. Even taking the view of the evidence most favorable to the respondent, the panel was bound to conclude that [the accused] had strong reason to be concerned about the conduct of [his subordinates] in respect of a helpless prisoner. Even if the panel believed he did not see [one of the subordinates] strike the prisoner on the first occasion and even if it concluded that [the accused] disbelieved [the] statement [of one of the subordinates] that [the other subordinate] had struck the prisoner after he, [the accused], had left, [the accused] had admitted that he considered [one of the subordinates] to be a "weak" soldier who could surely not be counted on to resist the initiatives [of the other subordinate]. He admitted having seen [one of the subordinates] do life-threatening acts to the prisoner by covering his nose and pouring water on him. He had subsequently heard [one of the subordinates] speak of intending to burn the prisoners with cigarettes. He thus had good grounds for apprehension as to [the] conduct [of one of the subordinates]. There was also evidence from even some defence witnesses that [the] reputation [of one of the subordinates] was well known. Yet, it was clear that [the accused] had said at least once and probably twice in the presence of [one of the subordinates]: "I don't care what you do, just don't kill the guy". He gave no proper order to [one of the subordinates] as to safeguarding the prisoner and left him unsupervised. Nor was it in dispute that it was [the accused's] responsibility to take all reasonable steps to see that the prisoner was held in a proper manner. [The accused] failed in the duty, with grave consequences.

I see nothing in the instructions of the Judge Advocate, nor in the sentence, to indicate the General Court Martial had a proper regard to the fundamental public policy which underlies the duty of a senior non-commissioned officer to safeguard the person or life of a civilian who is a prisoner of Canadian Forces, particularly from apprehended brutality or torture at the hands of our own troops. That is this case . . . No one can dispute the difficult and sometimes hazardous circumstances under which Canadian Forces were operating in Somalia in general, nor the physical problems which [the accused] himself was experiencing at this time. Nevertheless these circumstances call for the exercise of greater rather than less discipline particularly on the part of those in command of others.⁶⁵⁹

651. In the *Brocklebank case* before the Canadian Court Martial Appeal Court in 1996 involving the question of criminal responsibility of a Canadian soldier serving on a peacekeeping mission in Somalia for having negligently performed a military duty, the majority of the Court of Appeal stated that:

The standard of care applicable to the charge of negligent performance of a military duty is that of the conduct expected of the reasonable person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred. In the context of a military operation, the standard of care will vary considerably in relation to the degree of responsibility exercised by the accused, the nature and purpose of the operation, and the exigencies of a particular situation. An emergency, or the heightened state of apprehension or urgency caused by the threats to the security of Canadian Armed Forces personnel or their material might mandate a more flexible standard than that expected in relatively non-threatening

⁶⁵⁹ Canada, Court Martial Appeal Court, *Boland case*, Judgement, 16 May 1995.

scenarios. Furthermore, in the military context, where discipline is the linchpin of the hierarchical command structure and insubordination attracts the harshest censure, a soldier cannot be held to the same exacting standard of care as a senior officer when faced with a situation where the discharge of his duty might bring him into direct conflict with the authority of a senior officer.

...

In closing, I would remark that...it remains open to the chief of defence staff to define in more explicit terms the standards of conduct expected of soldiers in respect of prisoners who are in Canadian Forces custody. It is open to the chief of defence staff to...impose a military duty on Canadian Forces members either to report or take reasonable steps to prevent or arrest the abuse of prisoners not in their charge... This might prove a useful undertaking.⁶⁶⁰

652. In its judgement in the *Superior Orders case* in 1953, the German Federal Supreme Court held that the superior giving an illegal order would be primarily responsible for it.⁶⁶¹

653. In the *Mengistu and Others case* in 1995 concerning the prosecution and trial of Colonel Mengistu Haile Mariam and former members of the Derg for allegedly committing crimes against humanity and war crimes during the former regime between 1974 and 1991, the Special Prosecutor of Ethiopia, in a reply to the objection filed by counsels for the defendants, referred, *inter alia*, to the 1919 Treaty of Versailles, to the 1945 IMT Charter (Nuremberg) and Nuremberg trials and to the 1993 ICTY Statute. He stated that:

Heads of State and other higher responsible government officials in any form of government are all required and obliged to know international crimes thereunder. They are also obliged to prevent the commission of these acts [i.e. of international crimes] and to ensure the observance of the international norms.⁶⁶²

654. In the indictment in the *Abilio Soares case* in 2002 dealing with events that occurred in East Timor in 1999 before the creation of the Ad Hoc Human Rights Tribunal for East Timor in Indonesia, the defendant, the former governor of East Timor, was charged with knowing about or deliberately ignoring

information that obviously showed that his subordinates...were committing or had just committed serious human rights abuses in the form of murder committed in a widespread or systematic fashion, and directed against pro-independence civilians. In this case, the defendant, as Governor and Head of Government in East Timor Province... who was responsible for all aspects of social, political, economic, and cultural life as well as for upholding law and maintaining order, did not conduct or did not take any appropriate steps such as to coordinate with security forces in preventing or quelling the actions of his subordinates, nor did he turn them over to

⁶⁶⁰ Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996.

⁶⁶¹ Germany, Federal Supreme Court, *Superior Orders case*, Judgement, 19 March 1953.

⁶⁶² Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, § 1.6.

responsible authorities to be investigated, questioned, and prosecuted, which then resulted in attack against civilians.⁶⁶³

In its sentencing judgement, the Tribunal, assuming that “in East Timor there was an internal armed conflict so [that] the rules regarding war crimes as stipulated in common article 3 of the Geneva Conventions can be applied”, stated that:

Having considered that according to Article 86 [API] a superior is obliged to make an effective reporting system to ensure that his/her subordinate is conducting his/her duties in accordance with the international humanitarian law rules, and if he/she knows that there is a potential violation, or if there is an actual violation that just had been committed by the subordinate, so the superior should be held responsible for gross violations of Human Rights that are committed by his/her subordinate, if:

- the superior knows that his/her subordinate has committed or is going to commit gross violations of human rights; or
- the superior had the information which enabled him/her to conclude that his/her subordinate has committed or was going to commit gross violations of human rights; or
- the superior did not take action under his/her authority to prevent the said gross violations of human rights.⁶⁶⁴

655. In its judgement in the *Schintlholzer case* in 1988, Italy's Military Tribunal at Verona, with regard to the accused's responsibility for the acts committed by soldiers under his command, stated that these acts were in conformity with:

systematic activity which cannot as such be explained as the unusual and unforeseeable outcome of spontaneous actions by the combatants, but only as the expression of acts which specifically comply with (and put into effect) orders issued by the Commander [the accused] of the combat unit.

It should therefore be considered that in this case the person of the Commander who has operational and not hierarchical responsibility is a necessary point of reference and reflects the ad hoc organizational structure of composite combat units which, like the “Schintlholzer” combat unit, appear to be formed, used and intended solely for the purpose of a single military operation. This is perfectly consistent with the conviction that evidence of the effective causal contribution which can be attributed to Schintlholzer, at least on the conceptual level, has been obtained, as regards the undoubted contribution of the accused to the decision as to how the distressing facts to which the case relates should be put into effect . . .

It is . . . hardly necessary to point out even in this connection that if it was ever possible to establish any collateral responsibility by known or unknown SS officials at an operating level, this would not in any way raise any questions about the responsibility of Schintlholzer, which has been proven at this level and in the context which has to be assessed here and now. Thus, as far as criminal intent is

⁶⁶³ Indonesia, Ad Hoc Tribunal on Human Rights for East Timor, *Abilio Soares case*, Indictment, 19 February 2002.

⁶⁶⁴ Indonesia, Ad Hoc Tribunal on Human Rights for East Timor, *Abilio Soares case*, Judgement, 14 August 2002.

concerned, evidence of awareness of the unlawful nature of the conduct involved in the barbaric images described in the preliminary reconstruction of the facts would appear to have been acquired.⁶⁶⁵

656. In the *Rauer case* in 1946, the British Military Court at Wuppertal found that none of the accused, among which were Major Rauer and other commanding officers, could be tried for having given an order to kill POWs for lack of evidence. However, it tried the accused for being guilty of “being concerned in the killing of the prisoners”.⁶⁶⁶

657. In its judgement in the *Von Leeb (The High Command Trial) case* in 1947/48 relative to the duty of commanders in occupied territory, the US Military Tribunal at Nuremberg, under the heading “Responsibility of a Commanding Officer for Acts not Ordered by Him”, stated that:

Criminality does not attach to every individual in [the] chain of command from that fact alone. There must be a personal dereliction. That can occur only where the act is directly traceable to [the commander] or where his failure to properly supervise his subordinates constitutes criminal negligence on his part. In the latter case, it must be a personal neglect amounting to a wanton, immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of International Law would go far beyond the basic principles of criminal law as known to civilized nations.⁶⁶⁷

However, the Tribunal also noted that:

It is the opinion of this Tribunal that a State can, as to certain matters, under International Law, limit the exercise of sovereign powers by a military commander in an occupied area, but we are also of the opinion that under International Law and accepted usages of civilized nations, that he has certain responsibilities which he cannot set aside or ignore by reason of activities of his own State within his area . . . The situation is somewhat analogous to the accepted principle of International Law that the army which captures the soldiers of its adversary has certain fixed responsibilities as to their care and treatment.⁶⁶⁸

658. In its judgement in the *List (Hostages Trial) case* in 1947/48, the US Military Tribunal at Nuremberg stated that:

We have herein before pointed out that it is the duty of the commanding general in occupied territory to maintain peace and order, punish crimes and protect lives and property. This duty extends not only to inhabitants of the occupied territory but to his own troops and auxiliaries as well . . . The duty and responsibility for maintaining peace and order, and the prevention of crime rests upon the commanding general. He cannot ignore obvious facts and plead ignorance as a defence . . . Those responsible for such crimes [i.e. violations of the 1907 HR] by ordering or authorising

⁶⁶⁵ Italy, Military Tribunal at Verona, *Schintlholzer case*, Judgement, 15 November 1988.

⁶⁶⁶ UK, Military Court at Wuppertal, *Rauer case*, Judgement, 18 February 1946.

⁶⁶⁷ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 30 December 1947–28 October 1948.

⁶⁶⁸ US, Military Tribunal at Nuremberg, *Von Leeb (The High Command Trial) case*, Judgement, 30 December 1947–28 October 1948.

their commission, or by a failure to take effective steps to prevent their execution or recurrence, must be held to account if International Law is to be anything more than an ethical code, barren of any practical coercive deterrent.⁶⁶⁹

With regard to the accused, a high-ranking officer charged with murder and deportation of civilians, the Tribunal stated that:

Not once did he condemn such acts as unlawful. Not once did he call to account those responsible for these inhumane and barbarous acts. His failure to terminate these unlawful killings and to take adequate steps to prevent their recurrence constitutes a serious breach of duty and imposes criminal responsibility... [A] commanding general of occupied territory cannot escape responsibility by a claim of a want of authority. The authority is inherent in his position as commanding general of occupied territory. The primary responsibility for the prevention and punishment of crime lies with the commanding general, a responsibility from which he cannot escape by denying his authority over the perpetrators.⁶⁷⁰

659. In the *Yamashita case* in 1946 involving the trial of the military governor and commanding general of Japan in the Philippines between 9 October 1944 and 2 September 1945, the US Supreme Court was called upon to decide whether the accused could be held responsible for the violations of IHL committed by the troops under his command. The charge alleged that the accused, even though he did not commit or direct the commission of the acts,

while commander of armed forces of Japan at war with the United States of America and its allies, unlawfully disregarded and failed to discharge his duty as commander to control the operations of the members of his command, permitting them to commit brutal atrocities and other high crimes against the people of the United States and of its allies and dependencies, particularly the Philippines; and he... thereby violated the laws of war.⁶⁷¹

The Court, in upholding the finding of guilt by the Military Commission in Manila, emphasised that:

It is evident that the conduct of military operations by troops whose excesses are unrestrained by the orders or efforts of their commander would almost certainly result in violations which it is the purpose of the law of war to prevent. Its purpose to protect civilian populations and prisoners of war from brutality would largely be defeated if the commander of an invading army could with impunity neglect to take reasonable measures for their protection. Hence, the law of war presupposes that its violation is to be avoided through the control of the operations of war by commanders who are to some extent responsible for their subordinates.⁶⁷²

⁶⁶⁹ US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 8 July 1947–19 February 1948.

⁶⁷⁰ US, Military Tribunal at Nuremberg, *List (Hostages Trial) case*, Judgement, 8 July 1947–19 February 1948.

⁶⁷¹ US, Supreme Court, *Yamashita case*, Judgement, 4 February 1946.

⁶⁷² US, Supreme Court, *Yamashita case*, Judgement, 4 February 1946.

The Court based its decision on Article 1 of the 1907 HR, Article 19 of the 1907 Hague Convention (X), Article 26 of the 1929 GC and Article 43 of the 1907 HR and stated that:

These provisions plainly imposed on petitioner, who at the time specified was military governor of the Philippines, as well as commander of the Japanese forces, an affirmative duty to take such measures as were within his power and appropriate in the circumstances to protect prisoners of war and the civilian population.⁶⁷³

One of the judges, in his dissenting opinion, discussed the problem of finding upon a commander's guilt in the case where the troops of a commander commit war crimes while under heavily adverse battle conditions. The judge stated that:

There are numerous instances, especially with reference to the Philippines insurrection in 1900 and 1901, where commanding officers were found to have violated the laws of war by specifically ordering members of their command to commit atrocities and other war crimes . . . And in other cases officers have been held liable where they knew that a crime was to be committed, had the power to prevent it and failed to exercise that power . . . In no recorded instance, however, has the mere inability to control troops under fire or attack by superior forces been made the basis of a charge of violating the laws of war . . . No one denies that inaction or negligence may give rise to liability, civil or criminal. But it is quite another thing to say that the inability to control troops under highly competitive and disastrous battle conditions renders one guilty of a war crime in the absence of personal culpability. Had there been some element of knowledge or direct connection with the atrocities the problem would be entirely different . . . The only conclusion I can draw is that the charge made against the petitioner is clearly without precedent in international law or in the annals of recorded military history. This is not to say that enemy commanders may escape punishment for clear and unlawful failures to prevent atrocities. But that punishment should be based upon charges fairly drawn in light of established rules of international law and recognized concepts of justice.⁶⁷⁴

Another judge, in his dissenting opinion, referred to the first dissenting opinion and stated that he had "discussed the charge with respect to the substance of the crime. With his conclusions in this respect I agree." He further stressed that the findings on evidence did not suffice legal requirements:

There is no suggestion in the findings that petitioner personally participated in, was present at the occurrence of, or ordered any of these incidents . . . Nor is there any express finding that he knew of any one of the incidents in particular or of all taken together. The only inferential findings that he had knowledge, or that the commission so found, are in the statement that "crimes alleged to have been permitted by the accused in violation of the laws of war may be grouped into three categories" set out below. In the further statement that "the prosecution presented evidence to show that the crimes were so extensive and widespread, both as to time and area, that they must either have been wilfully permitted by the accused, or secretly ordered by" him; and in the conclusions of guilt and the sentence. Indeed, the

⁶⁷³ US, Supreme Court, *Yamashita case*, Judgement, 4 February 1946.

⁶⁷⁴ US, Supreme Court, *Yamashita case*, Dissenting opinion of Mr. Justice Murphy, 4 February 1946.

commission's ultimate findings draw no express conclusion of knowledge, but state only two things: (1) the fact of widespread atrocities and crimes; (2) that petitioner "failed to provide effective control . . . as was required by the circumstances" . . . In the state of things petitioner has been convicted of a crime in which knowledge is an essential element.⁶⁷⁵

660. In its judgement in the *Karadžić case* in 1995, the US Court of Appeals for the Second Circuit, recalling the judgement in the *Yamashita case*, stated that "international law imposes an affirmative duty on military commanders to take appropriate measures within their power to control troops under their command for the prevention of such atrocities [i.e. war crimes]".⁶⁷⁶

661. In the *Ford v. García case* in 2000, a civil lawsuit dealing with acts of torture and extrajudicial killing committed in 1980 in El Salvador, the US Federal Court of Florida gave instructions to the jury on the issue of the responsibility of commanders which read as follows:

A commander may be held liable for torture and extrajudicial killing committed by troops under his command under two separate legal theories. The first applies when a commander takes a positive act, *i.e.*, he orders torture and extrajudicial killing or actually participates in it. The second legal theory applies when a commander fails to take appropriate action to control his troops. This is called the doctrine of command responsibility . . . The doctrine of command responsibility is founded on the principle that a military commander is obligated, under international law and United States law, to take appropriate measures within his power to control the troops under his command and prevent them from committing torture and extrajudicial killing . . .

To hold a specific defendant/commander liable under the doctrine of command responsibility, each plaintiff must prove all of the following elements by a preponderance of the evidence.

- (1) That persons under defendant's effective command *had committed*, were committing, or were about to commit torture and extrajudicial killing, and
- (2) The defendant knew, or owing to the circumstances at the time, should have known, that persons under his effective command *had committed*, were committing, or were about to commit torture and extrajudicial killing; and
- (3) The defendant failed to take all necessary and reasonable measures within his power to prevent or repress the commission of torture and extrajudicial killing, or failed to investigate the events in an effort to punish the perpetrators.

"Effective command" means the commander has the legal authority and the practical ability to exert control over his troops. A commander cannot, however, be excused from his duties where his own actions cause or significantly contribute to the lack of effective control.

A commander may be relieved of the duty to investigate or to punish wrongdoers if a higher military or civilian authority establishes a mechanism to identify and punish the wrongdoers. In such a situation, the commander must do nothing to impede nor frustrate the investigation.

⁶⁷⁵ US, Supreme Court, *Yamashita case*, Dissenting opinion of Mr. Justice Rutledge, 4 February 1946.

⁶⁷⁶ US, Court of Appeals for the Second Circuit, *Karadžić case*, Judgement, 13 October 1995.

A commander may fulfil his duty to investigate and punish wrongdoers if he delegates this duty to a responsible subordinate. A commander has the right to assume that assignments entrusted to a responsible subordinate will be properly executed. On the other hand, the duty to investigate and punish will not be fulfilled if the commander knows or reasonably should know that the subordinate will not carry out his assignment in good faith, or if the commander impedes or frustrates the investigation.⁶⁷⁷ [emphasis in original]

662. In the *Trajković case* in 2001, a Kosovo Serb and former chief of police was convicted, *inter alia*, of war crimes “against the civilian population and within a concerted plan aiming at systematic atrocities of which he had a complete knowledge”. The Court based its judgement on Article 142 of the Penal Code of the SFRY (FRY) and noted that the acts had been committed “in time of war”.⁶⁷⁸ However, on appeal of the accused, the Supreme Court of Kosovo overruled this judgement and ordered that the case be returned to the same court for retrial. The Supreme Court found that:

The state of facts was erroneously established in relation to all charges as there is no direct or conclusive evidence that the accused acted personally or gave orders leading to the alleged crimes or that he should be held liable under command responsibility duties concerning the above-mentioned crimes . . . During the retrial, the court of first instance should therefore assess . . . the issue of the accused[’s] personal responsibility [for] participation in the crimes alleged.⁶⁷⁹

In a written opinion concerning this case, the International Prosecutor for the Office of the Public Prosecutor of Kosovo stated that:

Trajković’s war crimes conviction [at the District Court of Gnjilan] based upon murder was apparently through his command responsibility, since there was no credible evidence based on any factual basis that he gave direct orders to do, or personally participated in, these acts . . . Trajković could be found guilty of war crimes under international law through his command responsibility. [Furthermore,] Trajković could have been found guilty through the doctrine of command influence of violating international law for the “grave” injuries to . . . non-combatants . . . [Furthermore,] the trial court found Trajković guilty of a war crime for arson [as a direct result of the police and military attack on the village] committed against the home . . . and bus of . . . but again it must be implied that the liability was from command responsibility . . .

The issue of command responsibility must be dealt with alongside that of individual/personal responsibility (“The Subsuming Rule”) . . . This Opinion assumes the court below relied on the command responsibility coming directly from being at the top of a hierarchy of police officers, even if the giving of orders to murder and shoot did not occur. This Opinion then concludes that as to his being responsible under the type of command responsibility – based on evidence of control over subordinates, knowledge of their crimes, and ability and failure to prevent

⁶⁷⁷ US, Federal Court of Florida, *Ford v. García case*, Judgement, 3 November 2000.

⁶⁷⁸ SFRY (FRY), District Court of Gnjilan, *Trajković case*, Judgement, 6 March 2001.

⁶⁷⁹ SFRY (FRY), Supreme Court of Kosovo, *Trajković case*, Decision Act, 30 November 2001.

or punish them – Momcilo Trajković may be liable under such command responsibility. His official position of authority over subordinate . . . policemen, buttressed by evidence of his actual authority over them and in the community in general; his possible knowledge of subordinates' crimes; and his obvious failure to prevent and punish them bolster a finding of command responsibility for the acts of policemen under him.⁶⁸⁰

The International Prosecutor for the Office of the Public Prosecutor of Kosovo further pointed out the relation between individual responsibility and command responsibility and set forth, in a detailed way, the “requirements for findings of some individual responsibility in the context of determining command responsibility”.⁶⁸¹

Other National Practice

663. At the CDDH, Argentina stated that “a superior, indeed, should always have knowledge of any breach committed by his subordinates, in order to repress it” and that “if a superior knew of preparations for an act liable to constitute a breach, he was obviously responsible”.⁶⁸²

664. The Report on the Practice of Argentina notes that in the trial of the commanders which was brought to determine responsibility for the 1982 events in the Falkland/Malvinas Islands, the National Court for Criminal and Correctional Cases “emphasized that the powers accorded to the command by the Code of Military Justice to enhance organisation within the military, including the authority to decide when immediate punishment for crimes is necessary, are [optional] in nature”.⁶⁸³

665. In 1984, in an assessment of the military implications of the Additional Protocols, Australia's Joint Military Operations and Plans Division, stated that Article 87(1) AP I:

imposes upon commanders the additional responsibility to prevent and, where necessary, to suppress and to report all breaches of the Geneva Conventions and its Protocols. This requires that the constraints imposed by the Protocols and the law of armed conflict generally are understood and reflected in the conduct of operations by every level of military authority.⁶⁸⁴

⁶⁸⁰ SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Sections III(B)(2)(a), (b) and (c) and IV.

⁶⁸¹ SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Section IV.

⁶⁸² Argentina, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.50, 4 May 1976, §§ 56 and 57.

⁶⁸³ Report on the Practice of Argentina, 1997, Chapter 6.7, referring to the action brought by Decree 2971/83 for Presumed Infractions, as stipulated by the *Code of Military Justice* and described in the legal proceedings and report by the Commission for the analysis and evaluation of the political responsibilities and military strategy of the armed conflict in the South Atlantic, National Court for Criminal and Correctional Cases in full session, 4 November 1988, Sheet 11.360.

⁶⁸⁴ Australia, Joint Military Operations and Plans Division, Assessment of the Military Implications of the Protocols Additional to the Geneva Conventions of 1949, Series No. AA-A1838/376, File No. AA-1710/10/3/1 Pt 2, September 1984, § 10.

666. A Belgian manual containing directives for commanders notes that military discipline “grants respect for human rights and especially for the obligations required by the Geneva Convention”.⁶⁸⁵

667. The Report on the Practice of Bosnia and Herzegovina states that “the superior officer is obliged to instigate proceedings for taking legal sanctions against the persons violating the rules of the international law of war”.⁶⁸⁶

668. According to Ethiopia’s Office of the Special Public Prosecutor (SPO), which is in charge of prosecuting persons who allegedly committed crimes of genocide, crimes against humanity and war crimes between 1974 and 1991, since its establishment in 1992 by Proclamation 22/1992 of the transitional government of Ethiopia, by 1997 a total of 5,198 persons had been charged, of whom 2,433 were field commanders, “those who transmitted the orders of the [policy- and decision-makers] and also originated fresh orders of their own”. The charges were based on Ethiopia’s Penal Code.⁶⁸⁷

669. In 1997, the final report of the Italian Government Commission of Inquiry into the events in Somalia referred to a provision of the Italian Penal Code in recalling that an officer who failed to control dutifully his subordinates could be responsible not only under disciplinary law, but also under criminal law.⁶⁸⁸

670. According to the Report on the Practice of Jordan, under Jordanian law, “no sanctions are envisaged against a commander who neglects to give the necessary instruction or permits shortcomings in the required supervisions, if grave breaches occur in his area of command”.⁶⁸⁹

671. At the CDDH, the Netherlands stated that:

Recognition in written international law of individual responsibility of superiors who, without excuse, failed to do all in their power to prevent the commission of war crimes by their subordinates supplemented the principle contained in article 77 [of draft AP I], according to which subordinates were individually responsible for war crimes which they had committed, even when acting under superior orders.

...

The principle set out in article 76 [of draft AP I] was not a new one. Although it did not appear in the Charter and the Judgement of the Nürnberg tribunal it had nevertheless played an important part in post-war jurisprudence.

...

Nevertheless, it was difficult to specify the limits of responsibility in cases of failure to act, and the courts would reach their decision in each case only after taking into account all the relevant facts, even though the principle of individual responsibility was now recognized by a great number of States.⁶⁹⁰

⁶⁸⁵ Belgium, Etat-major Général, *L'exercice du commandement. Directives pour un leadership moderne dans les forces armées*, 1998, p. 41.

⁶⁸⁶ Report on the Practice of Bosnia and Herzegovina, 2000, Chapter 1.6.

⁶⁸⁷ Ethiopia, Office of the Special Public Prosecutor, Statement of the Chief Special Public Prosecutor, Addis Ababa, 13 February 1997.

⁶⁸⁸ Italy, Government Commission of Inquiry, Final report into the events in Somalia, 8 August 1997, p. 34.

⁶⁸⁹ Report on the Practice of Jordan, 1997, Chapter 6.7.

⁶⁹⁰ Netherlands, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.50, 4 May 1976, §§ 31–32 and 35.

672. In 1988, in a memorandum on "Respect for Human Rights and Improvement of Discipline in the AFP" addressed to the AFP Chief of Staff, the Department of National Defence of the Philippines reiterated that:

The [Department of National Defence's] long standing directive to take the necessary bold steps to weed out and punish, as warranted by proper investigation, not only the military personnel who directly commit the acts complained, but also, with equal vigor, the commanders who countenance such abuse by way of summarily dropping the case, intimidating the complainant and his witnesses "cover-up" of the incidents, failure to report to superior authorities, and/or sheer inaction on the complaint. I would also like to re-stress the instruction that "the commanding officer of an erring military personnel shall be similarly held accountable either as conduct unbecoming an officer or as accessory after the fact in cases where he refuses to act, delays action or otherwise aids and abets the wrongdoing of his subordinate which is the subject of a valid complaint."⁶⁹¹

673. The Guidelines on Human Rights and Improvement of Discipline in the AFP, issued in 1989 by the Office of the Chief of Staff of the armed forces of the Philippines, provides that:

Commanders who are proven through due process to have countenanced human rights abuses by way of summarily dropping complaints, intimidating the complainant and/or witnesses, "cover-up" of the incidents, failure to report to superiors, and/or shows inaction on the complaint, shall be held accountable either as conduct unbecoming an officer or as accessory.

Commanders of Major Services, Area Commanders and AFPWSSUS shall devise a system which offers investigators and prosecutors convenient means of identifying and prosecuting personnel engaged in gun-for-hire or protection racket, extortion, condonation of vices, and other felonious activities designed to discredit the government in general and the AFP in particular.⁶⁹²

674. The Philippine press has reported several cases in which commanding officers were relieved of their duties or accused on the basis of command responsibility.⁶⁹³

⁶⁹¹ Philippines, Department of National Defence, Secretary, Memorandum to the AFP Chief of Staff on Respect for Human Rights and Improvement of Discipline in the AFP, 1 December 1988.

⁶⁹² Philippines, Ministry of National Defence, Office of the Chief of Staff, Guidelines on Human Rights and Improvement of Discipline in the AFP, 2 January 1989, § 2(1) and (2).

⁶⁹³ *Manila Bulletin*, "Basilan Officer Relieved", 29 September 1995; *Today*, "Cotabato Folk Denounce Slay of Non-combatants", 20 March 1997; *Today*, "Prosecution of Army Brass Involved in Shelling Urged", 30 March 1997; *Today*, "Relieve Buldon Officers", 2 April 1997 (as a result of the CHR's investigation, a Vice Governor demanded the relief of military commanders responsible for the death of 11 civilians); *Today*, "Military Washes its Hands of Buldon Carnage: CHR Stung by AFP Rejection", 12 April 1997, p. 12. (The report on the incident by the Philippine Commission on Human Rights (CHR) blamed the military for the bombing of a school. The armed forces, however, rejected these findings. To finally resolve the issue, the CHR and the AFP agreed to form an independent body to conduct an investigation.)

675. In 1992, in a note verbale with respect to the implementation of Security Council Resolution 780 (1992), Slovenia stated that:

Not only those who have directly committed the crimes [i.e. “crimes committed against humanity and international humanitarian law”], but also those who gave orders or were otherwise engaged, should be prosecuted as perpetrators. Such consistent approach of the United Nations Commission of Experts would also include the question of the criminal responsibility of numerous high military officers and politicians; this would be in accordance with international criminal law and to date practice, especially the one applied in the Nuremberg trials.⁶⁹⁴

676. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

Criminal responsibility for violations of the law of war rests with a commander, including the national leadership, if he (or she):

- Orders or permits the offence to be committed, or
 - Knew or should have known of the offence(s), had the means to prevent or halt them, and failed to do all which he was capable of doing to prevent the offences or their recurrence.
- ...

The crimes committed against Kuwaiti civilians and property, and against third party nationals, are offences for which Saddam Hussein, officials of the Ba’ath Party, and his subordinates bear direct responsibility. However, the principal responsibility rests with Saddam Hussein. Saddam Hussein’s C2 of Iraqi military and security forces appeared to be total and unequivocal. There is substantial evidence that each act alleged was taken as a result of his orders, or was taken with his knowledge and approval, or was an act which he should have known.⁶⁹⁵

677. In 1992, the US report on Iraqi war crimes (Desert Shield/Desert Storm), prepared under the auspices of the US Secretary of the Army, noted that “criminal responsibility for violations of the law of war rests with a commander, including the national leadership, who . . . knew or should have known of the offences, had the means to prevent or halt them, and failed to do all which he or she was capable of doing to prevent the offences or their recurrence”.⁶⁹⁶

678. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, the US stated that:

With respect to paragraph 1 of Article 7 [of the 1993 ICTY Statute], it is our understanding that individual responsibility arises in the case of . . . the failure of a

⁶⁹⁴ Slovenia, Note verbale dated 5 November 1992 to the UN Secretary-General, UN Doc. S/24789, 9 November 1992, p. 2.

⁶⁹⁵ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, pp. 633–634.

⁶⁹⁶ US, Secretary of the Army, Report on Iraqi war crimes (Desert Shield/Desert Storm), unclassified version, 8 January 1992, p. 13.

superior – whether political or military – to take reasonable steps to prevent or punish [violations of IHL] by persons under his or her authority.⁶⁹⁷

III. Practice of International Organisations and Conferences

United Nations

679. In 1995, in a statement by its President regarding the conflict in Bosnia and Herzegovina, the UN Security Council reaffirmed “its condemnation of all violations of international humanitarian law” and reiterated “to all concerned that those who have committed or ordered the commission of such acts will be held individually responsible in respect of such acts”. It reminded “the military and political leaders of the Bosnian Serb party that this responsibility extends to any such acts committed by forces under their command”.⁶⁹⁸

680. In a resolution adopted in 1993 with respect to the former Yugoslavia, the UN General Assembly stated that “those in positions of authority who have failed adequately to ensure that persons under their control comply with the relevant international instruments are accountable together with the perpetrators”.⁶⁹⁹ In subsequent resolutions on the same subject adopted in 1995 and 1996, the UN General Assembly reiterated this view.⁷⁰⁰

681. In a resolution adopted in 1994 on rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly reaffirmed that:

All persons who perpetrate or authorize crimes against humanity or other violations of international law are individually responsible for those violations and . . . those in positions of authority who have failed to ensure that persons under their control comply with the relevant international instruments are accountable, together with the perpetrators.⁷⁰¹

682. In a resolution on civil defence forces adopted in 1994, the UN Commission on Human Rights recommended that:

whenever armed civil defence forces are created to protect the civilian population, Governments establish, where appropriate, minimum legal requirements for them, within the framework of domestic law, including the following:

- ...
- (d) Commanders shall have clear responsibility for their activities;
 - (e) Civil defence forces and their commanders shall be clearly accountable for their activities.⁷⁰²

⁶⁹⁷ US, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, p. 16.

⁶⁹⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/33, 20 July 1995.

⁶⁹⁹ UN General Assembly, Res. 48/143, 20 December 1993, § 5.

⁷⁰⁰ UN General Assembly, Res. 50/192, 22 December 1995, § 4, Res. 51/115, 12 December 1996, § 4.

⁷⁰¹ UN General Assembly, Res. 49/205, 23 December 1994, § 6.

⁷⁰² UN Commission on Human Rights, Res. 1994/67, 9 March 1994, § 2.

683. In a resolution adopted in 1994 on the rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN Commission on Human Rights reaffirmed that:

All persons who perpetrate or authorize crimes against humanity and other violations of international humanitarian law are individually responsible for those violations, and . . . those in positions of authority who have failed adequately to ensure that persons under their control comply with the relevant international instruments are accountable together with the perpetrators.⁷⁰³

684. In a resolution adopted in 1993 on punishment of the crime of genocide, the UN Sub-Commission on Human Rights affirmed that:

All persons who perpetrate or authorize the commission of genocide and related crimes are individually responsible for such actions and . . . those in positions of authority who have failed adequately to ensure that persons under their control comply with the relevant principles of international law are accountable along with the perpetrators.⁷⁰⁴

685. In 1993, in his report on the draft Statute of the ICTY, the UN Secretary-General's stated that a person in a position of superior authority

should also be held responsible for failure to prevent a crime or to deter the unlawful behaviour of his subordinates. This imputed responsibility or criminal negligence is engaged if the person in superior authority knew or had reason to know that his subordinates were about to commit crimes or had committed crimes and yet failed to take the necessary and reasonable steps to prevent or repress the commission of such crimes or to punish those who had committed them.⁷⁰⁵

686. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General noted, on the issue of the personal jurisdiction of the Court, that:

While those "most responsible" obviously include the political and military leadership, others in command authority down the chain of command may also be regarded "most responsible" judging by the severity of the crime or its massive scale. "Most responsible", therefore, denotes both a leadership or authority position of the accused, and a sense of the gravity, seriousness or massive scale of the crime.⁷⁰⁶

687. In 1997, in the recommendations of his second report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights called upon the *de facto* authorities in Burundi:

⁷⁰³ UN Commission on Human Rights, Res. 1994/77, 9 March 1994, § 5.

⁷⁰⁴ UN Sub-Commission on Human Rights, Res. 1993/8, 20 August 1993, § 1.

⁷⁰⁵ UN Secretary-General, Report pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, § 56.

⁷⁰⁶ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, § 30.

to establish a firm chain of command within the army and the security forces, so that senior officers bear real responsibility for abusive acts committed by their subordinates. Military personnel, whether commissioned or noncommissioned officers, should be stripped of their rank when their involvement in such acts has been proved.⁷⁰⁷

688. In 1998, in her final report submitted to the UN Sub-Commission on Human Rights on systematic rape, sexual slavery and slavery-like practices during armed conflict, the Special Rapporteur of the UN Commission on Human Rights concluded that:

Individual perpetrators of slavery, crimes against humanity, genocide, torture and war crimes – whether State or non-State actors – must be held responsible for their crimes at the international level, depending on the circumstances of the case and on the capacity and availability of forums to adjudicate fairly and dispense justice adequately. A strict application of the international legal standards for command responsibility, which apply to all authorities within a given chain of command, may prevent future sexual or gender violence in conflict situations and will serve the goals of protection, enforcement and deterrence.⁷⁰⁸

689. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) recalled that it had addressed the issue of command responsibility in its first interim report as follows:

Superiors are . . . individually responsible for a war crime or crime against humanity committed by a subordinate if they knew, or had information which should have enabled them to conclude, in the circumstances at the time, that the subordinate was committing or was going to commit such an act and they did not take all feasible measures within their power to prevent or repress the act.⁷⁰⁹

The Commission noted with satisfaction that Article 7 of the 1993 ICTY Statute used an essentially similar formulation.⁷¹⁰ It further stated that:

58. It is the view of the Commission that the mental element necessary when the commander has not given the offending order is (a) actual knowledge, (b) such serious personal dereliction on the part of the commander as to constitute wilful and wanton disregard of the possible consequences, or (c) an imputation of constructive knowledge, that is, despite pleas to the contrary, the commander, under the facts and circumstances of the particular case, must have known of the offences charged and acquiesced therein . . .

⁷⁰⁷ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Second report, UN Doc. E/CN.4/1997/12, 10 February 1997, § 93.

⁷⁰⁸ UN Sub-Commission on Human Rights, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Final report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 113.

⁷⁰⁹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 55.

⁷¹⁰ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 56.

59. The military commander is not absolutely responsible for all offences committed by his subordinates. Isolated offences may be committed of which he has no knowledge or control whatsoever . . . The arguments that a commander has a weak personality or that the troops assigned to him are uncontrollable are invalid. In particular, a military commander who is assigned command and control over armed combatant groups which have engaged in war crimes in the past should refrain from employing such groups in combat, until they clearly demonstrate their intention and capability to comply with the law in the future.
60. Lastly, a military commander has the duty to punish or discipline those under his command whom he knows or has reasonable grounds to know committed a violation.⁷¹¹

With respect to practices of “ethnic cleansing”, sexual assault and rape during the conflict in the former Yugoslavia which, according to the Commission, would seem to have been carried out by some parties to the conflict “so systematically that they strongly appear to be the product of a policy”, the Commission noted that:

313. . . . The consistent failure to prevent the commission of such crimes and the consistent failure to prosecute and punish the perpetrators of these crimes, clearly evidences the existence of a policy by omission. The consequence of this conclusion is that command responsibility can be established.

314. Knowledge of these grave breaches and violations of international humanitarian law can reasonably be inferred from consistent and repeated practices.⁷¹²

690. In its 1993 report, the UN Commission on the Truth for El Salvador examined a case involving the execution of ten detained persons. The Commission found that:

7. There is sufficient evidence that [the superiors] knew about the order to execute the detainees and did nothing to prevent their execution.
8. There is substantial evidence that the Honour Commission of the armed forces, the Commission for the Investigation of Criminal Acts and the judge of the Criminal Court of First Instance of the city of San Sebastián failed to take steps to determine the responsibility of [the superiors].⁷¹³

Other International Organisations

691. In a resolution adopted in 1992, the OIC Conference of Ministers of Foreign Affairs stated that it held

the Serb leaders, those in Belgrade as well as those in the Republic of Bosnia-Herzegovina, responsible for the atrocities committed by the Yugoslav

⁷¹¹ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 58–59.

⁷¹² UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 313–314.

⁷¹³ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 86.

National Army and Serb irregular forces against Muslims and Croats of Bosnia-Herzegovina . . . and recalls that they will be considered guilty of war crimes.⁷¹⁴

International Conferences

692. In a resolution adopted in 1993, the 90th Inter-Parliamentary Conference called on “all States to remind military commanders that they are required . . . to make every effort to ensure that no violations [of IHL] are committed and, where necessary, to punish or report any violations to the authorities”.⁷¹⁵

IV. Practice of International Judicial and Quasi-judicial Bodies

693. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), with respect to responsibility for war crimes against prisoners, stated that:

Responsibility for the care of prisoners of war and of civilians internees (all of whom we will refer to as “prisoners”) . . . is not limited to the duty of mere maintenance but extends to the prevention of mistreatment. In particular, acts of inhumanity to prisoners which are forbidden by the customary law of nations as well as by conventions are to be prevented by the Government having responsibility for the prisoners.

In the discharge of these duties to prisoners Governments must have resort to persons. Indeed the Governments responsible, in this sense, are those persons who direct and control the functions of Government. In this case and in the above regard we are concerned with the members of the Japanese Cabinet. The duty to prisoners is not a meaningless obligation cast upon a political abstraction. It is a specific duty to be performed in the first case by those persons who constitute the Government. In the multitude of duties and tasks involved in modern government there is of necessity an elaborate system of subdivision and delegation of duties. In the case of the duty of Governments to prisoners held by them in time of war those persons who constitute the Government have the principal and continuing responsibility for their prisoners, even though they delegate the duties of maintenance and protection to others.

In general, the responsibility for prisoners held by Japan may be stated to have rested upon:

- (1) Members of the Government;
- (2) Military or Naval Officers in command of formations having prisoners in their possession;
- (3) Officials in those departments which were concerned with the well-being of prisoners;
- (4) Officials, whether civilian, military, or naval, having direct and immediate control of prisoners.

It is the duty of all those on whom responsibility rests to secure proper treatment of prisoners and to prevent their ill-treatment by establishing and securing the

⁷¹⁴ OIC, Conference of Ministers of Foreign Affairs, Fifth Extraordinary Session, 17–18 June 1992, Res. 1/5-EX, § 15.

⁷¹⁵ 90th Inter-Parliamentary Conference, Canberra, 13–18 September 1993, Resolution on Respect for International Humanitarian Law and Support for Humanitarian Action in Armed Conflicts, § 2(e).

continuous and efficient working of a system appropriate for these purposes. Such persons fail in this duty and become responsible for ill-treatment of prisoners, if:

- (1) They fail to establish such a system.
- (2) If having established such a system, they fail to secure its continued and efficient working.

Each of such persons has a duty to ascertain that the system is working and if he neglects to do so he is responsible. He does not discharge his duty by merely instituting an appropriate system and thereafter neglecting to learn of its application. An Army Commander or a Minister of War, for example, must be at the same pains to ensure obedience to his orders in this respect as he would in respect of other orders he has issued on matters of the first importance.

Nevertheless, such persons are not responsible if a proper system and its continuous efficient functioning be provided for and conventional war crimes be committed unless:

- (1) They had knowledge that such crimes were being committed, and having such knowledge they failed to take such steps as were within their power to prevent the commission of such crimes in the future, or
- (2) They are at fault in having failed to acquire such knowledge.

If, such a person had, or should, but for negligence or supineness, have had such knowledge he is not excused for inaction if his Office required or permitted him to take any action to prevent such crimes. On the other hand it is not enough for the exculpation of a person, otherwise responsible, for him to show that he accepted assurances from others more directly associated with the control of the prisoners if having regard to the position of those others, to the frequency of reports of such crimes, or to any other circumstances he should have been put upon further inquiry as to whether those assurances were true or untrue. That crimes are notorious, numerous and widespread as to time and place are matters to be considered in imputing knowledge.

A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible for the care of prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes . . . and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.

Army or Navy Commanders can, by order, secure proper treatment and prevent ill-treatment of prisoners. So can Ministers of War and of the Navy. If crimes are committed against prisoners under their control, of the likely occurrence of which they had, or should have had knowledge in advance, they are responsible for those crimes. If, for example, it be shown that within the units under his command conventional war crimes have been committed of which he knew or should have known, a commander who takes no adequate steps to prevent the occurrence of such crimes in the future will be responsible for such future crimes.⁷¹⁶

⁷¹⁶ IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter II(b).

In the part of the judgement dealing with “conventional war crimes (atrocities)”, the IMT (Tokyo) stated that:

The Japanese Government condoned ill-treatment of prisoners of war and civilian internees by failing and neglecting to punish those guilty of ill-treating them or by prescribing trifling and inadequate penalties for the offence. [Various examples] are evidence that the War Ministry knew there was ill-treatment of prisoners. The trifling nature of the punishments imposed implies condonation. The Government actively concealed the ill-treatment to which prisoners of war and civilian internees were subjected by refusing visits by representatives of the Protecting Power designated by the Allies.⁷¹⁷

694. In the *case of the Major War Criminals* before the IMT (Tokyo) in 1948, the then Japanese Foreign Minister, Koki Hirota, was held criminally responsible in relation to the so-called “Rape of Nanking” or “Nanking massacre” which had occurred in 1937/1938. The IMT stated that:

As Foreign Minister [Hirota] received reports of these atrocities immediately after the entry of Japanese forces into Nanking. According to the Defence evidence credence was given to these reports and the matter was taken up with the War Ministry. Assurances were accepted from the War Ministry that the atrocities would be stopped. After these assurances had been given reports of atrocities continued to come in for at least a month. The Tribunal is of the opinion that HIROTA was derelict in his duty in not insisting before the Cabinet that immediate action be taken to put an end to the atrocities, failing any other action open to him to bring about the same result. He was content to rely on assurances which he knew were not being implemented while hundreds of murders, violations of women, and other atrocities were being committed daily. His inaction amounted to criminal negligence.⁷¹⁸

695. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on a Japanese commander during the Second World War, Heitaro Kimura, stated that:

With knowledge of the extent of the atrocities committed by Japanese troops in all theatres of war, in August 1944 KIMURA took over command of the Burma Area Army. From the date of his arrival at his Rangoon Headquarters and later... the atrocities continued to be committed on an undiminished scale. He took no disciplinary measures or other steps to prevent the commission of atrocities by the troops under his command.

It has been urged in KIMURA's defence that when he arrived in Burma he issued orders to his troops to conduct themselves in a proper soldierly manner and to refrain from ill-treating prisoners. In view of the nature and extent of the ill-treatment of prisoners, in many cases on a large scale within a few miles of his headquarters, the Tribunal finds that KIMURA was negligent in his duty to enforce the Rules of

⁷¹⁷ IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter VIII.

⁷¹⁸ IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).

War. The duty of an Army commander in such circumstances is not discharged by the mere issue of routine orders, if indeed such orders were issued. His duty is to take such steps and issue such orders as will prevent thereafter the commission of war crimes and to satisfy himself that such orders are being carried out. This he did not do. Thus he deliberately disregarded his legal duty to take adequate steps to prevent breaches of the laws of war.⁷¹⁹

696. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on a Japanese Prime Minister during the Second World War, Kuniaki Koiso, stated that:

When KOISO became Prime Minister in 1944 atrocities and other war crimes being committed by the Japanese troops in every theatre of war had become so notorious that it is improbable that a man in KOISO's position would not have been well-informed either by reason of their notoriety or from interdepartmental communications. The matter is put beyond doubt by the fact that in October 1944 the Foreign Minister reported to a meeting of the Supreme Council for the Direction of War, which KOISO attended, that according to recent information from enemy sources it was reported that the Japanese treatment of prisoners of war "left much to be desired". He further stated that this was a matter of importance from the point of view of Japan's international reputation and future relations. He asked that directions be issued to the competent authorities so that the matters might be fully discussed. Thereafter KOISO remained Prime Minister for six months during which the Japanese treatment of prisoners and internees showed no improvement whatever. This amounted to a deliberate disregard of duty.⁷²⁰

697. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on the Japanese Commander-in-Chief of the Central China Area Army, Iwane Matsui during the "Rape of Nanking" or "Nanking massacres", stated that:

From his own observations and from the reports of his staff he must have been aware of what was happening. He admits he was told of some degree of misbehaviour of his Army... Daily reports of these atrocities were made to Japanese diplomatic representatives in Nanking who, in turn, reported them to Tokyo. The tribunal is satisfied that MATSUI knew what was happening. He did nothing, or nothing effective to abate these horrors. He did issue orders before the capture of the City enjoining propriety of conduct upon his troops and later he issued further orders to the same purport. These orders were of no effect as is now known, and as he must have known. It was pleaded on his behalf that at this time he was ill. His illness was not sufficient to prevent his conducting the military operations of his command nor to prevent his visiting the City for days while these atrocities were occurring. He was in command of the Army responsible for these happenings. He knew of them. He had the power, as he had the duty, to control his troops and to protect

⁷¹⁹ IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).

⁷²⁰ IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).

the unfortunate citizens of Nanking. He must be held criminally responsible for his failure to discharge his duty.⁷²¹

698. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on an officer of staff of the Japanese Commander-in-Chief of the Central China Area Army during the "Rape of Nanking" or "Nanking massacres", Akira Muto, stated that:

It was during [his period as an officer of staff of MATSUI] that shocking atrocities were committed by the Army of MATSUI in and about Nanking. We have no doubt that MUTO knew, as MATSUI knew, that these atrocities were being committed over a period of many weeks. His superior did take no adequate steps to stop them. MUTO is not responsible for this dreadful affair.

[Later] MUTO commanded the Second Imperial Guards Division in Northern Sumatra. During this period in the area occupied by his troops widespread atrocities were committed for which MUTO shares responsibility. Prisoners of war and civilian internees were starved, neglected, tortured and murdered and civilians were massacred.

[Later], MUTO became Chief-of-Staff to Yamashita in the Philippines . . . His position was now very different from that which he held during the so-called "Rape of Nanking". He was now in a position to influence policy. During his tenure of office as such Chief-of-Staff a campaign of massacre, torture and other atrocities was waged by the Japanese troops on the civilian population, and prisoners of war and civilian internees were starved, tortured and murdered. MUTO shares responsibility for these gross breaches of the Laws of War. We reject his defense that he knew nothing of these occurrences.⁷²²

699. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on one of the Japanese Foreign Ministers during the Second World War, Mamoru Shigemitsu, stated that:

We do no injustice to SHIGEMITSU when we hold that the circumstances, as he knew them made him suspicious that the treatment of the prisoners was not as it should have been. Indeed a witness gave evidence for him to that effect. Thereupon he took no adequate steps to have the matter investigated, although he, as a member of the government, bore overhead responsibility for the welfare of the prisoners. He should have pressed the matter, if necessary to the point of resigning, in order to quit himself of a responsibility which he suspected was not being discharged.⁷²³

700. In the *case of the Major War Criminals* in 1948, the IMT (Tokyo), in its verdict passed on one of the Japanese Prime Ministers during the Second World War, Hideki Tojo, stated, *inter alia*, that:

The barbarous treatment of prisoners and internees was well known to TOJO. He took no adequate steps to punish offenders and to prevent the commission of similar

⁷²¹ IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).

⁷²² IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).

⁷²³ IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).

offences in the future. His attitude towards the Bataan Death March gives the key to his conduct towards these captives. He knew in 1942 something of the conditions of the march and that many prisoners had died as a result of these conditions. He did not call for a report on the incident. When in the Philippines in 1943 he made perfunctory inquiries about the march but took no action. No one was punished. His explanation is that the commander of a Japanese Army in the field is given a mission in the performance of which he is not subject to specific orders from Tokyo. Thus the head of the Government of Japan knowingly and wilfully refused to perform the duty which lay upon that Government of enforcing performance of the Laws of War.⁷²⁴

701. In the *Toyoda case* in 1949, an International Military Tribunal at Tokyo considered the essential elements of command responsibility to be:

1. That offenses, commonly recognized as atrocities, were committed by troops of his command;
2. The ordering of such atrocities.

In the absence of proof beyond reasonable doubt of the issuance of orders then the essential elements of command responsibility are:

1. As before, that atrocities were actually committed;
2. Notice of the commission thereof. This notice may be either:
 - a. Actual, . . .
 - b. Constructive . . .
3. Power of command. That is, the accused must be proved to have had actual authority over the offenders to issue orders to them not to commit illegal acts, and to punish offenders.
4. Failure to take such appropriate measures as are within his power to control the troops under his command and to prevent acts which are violations of the laws of war.
5. Failure to punish offenders.

In the simplest language, it may be said that this Tribunal believes the principle of command responsibility to be that, if this accused knew, or should by the exercise of ordinary diligence have learned, of the commission by his subordinates, immediate or otherwise, of the atrocities proved beyond a shadow of a doubt before this Tribunal or of the existence of a routine which would countenance such, and, by his failure to take any action to punish the perpetrators, permitted the atrocities to continue, he has failed in his performance of his duty as a commander and must be punished.⁷²⁵

702. In its judgement in the *Akayesu case* in 1998, the ICTR Trial Chamber stated that:

Article 6 (3) [of the 1994 ICTR Statute] . . . does not necessarily require that the superior acted knowingly to render him criminally liable; it suffices that he had reason to know that his subordinates were about to commit or had committed a crime and failed to take the necessary or reasonable measures to prevent such

⁷²⁴ IMT (Tokyo), *Case of the Major War Criminals*, Judgement, 4–12 November 1948, Chapter X (Verdicts).

⁷²⁵ International Military Tribunal at Tokyo, *Toyoda case*, Judgement, 6 September 1949.

acts or punish the perpetrators thereof. In a way, this is liability by omission or abstention.⁷²⁶

The Trial Chamber further stated that:

Article 6 (3) of the [1994 ICTR] Statute deals with the responsibility of the superior, or command responsibility. This principle, which derives from the principle of individual criminal responsibility as applied in the Nuremberg and Tokyo trials, was subsequently codified in Article 86 of the Additional Protocol I to the Geneva Conventions of 8 June 1977.⁷²⁷

With regard to Article 6(3) of the 1994 ICTR Statute and referring to the ICRC Commentary on the Additional Protocols, the judgement of the IMT (Tokyo) in the *case of the Major War Criminals* (verdict against the Japanese Foreign Minister Koki Hirota) and the dissenting opinion of one of the judges in the same case, the Trial Chamber held that:

488. There are varying views regarding the *Mens rea* required for command responsibility. According to one view it derives from a legal rule of strict liability, that is, the superior is criminally responsible for acts committed by his subordinate, without it being necessary to prove the criminal intent of the superior. Another view holds that negligence which is so serious as to be tantamount to consent or criminal intent, is a lesser requirement . . .

489. The Chamber holds that it is necessary to recall that criminal intent is the moral element required for any crime and that, where the objective is to ascertain the individual criminal responsibility of a person accused of crimes falling within the jurisdiction of the Chamber, such as genocide, crimes against humanity and violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II thereto, it is certainly proper to ensure that there has been malicious intent, or, at least, ensure that negligence was so serious as to be tantamount to acquiescence or even malicious intent.

490. As to whether the form of individual criminal responsibility referred to Article 6 (3) of the Statute applies to persons in positions of both military and civilian authority, it should be noted that during the Tokyo trials, certain civilian authorities were convicted of war crimes under this principle . . .

491. The Chamber . . . finds that in the case of civilians, the application of the principle of individual criminal responsibility, enshrined in Article 6 (3), to civilians remains contentious. Against this background, the Chamber holds that it is appropriate to assess on a case by case basis the power of authority actually devolved upon the Accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof.⁷²⁸

703. In its judgement in the *Kayishema and Ruzindana case* in 1999, the ICTR Trial Chamber stated that:

⁷²⁶ ICTR, *Akayesu case*, Judgement, 2 September 1998, § 479.

⁷²⁷ ICTR, *Akayesu case*, Judgement, 2 September 1998, § 486.

⁷²⁸ ICTR, *Akayesu case*, Judgement, 2 September 1998, §§ 488–491.

The question of responsibility arising from a duty to act, and any corresponding failure to execute such a duty is a question that is inextricably linked with the issue of command responsibility. This is because under Article 6(3) [of the 1994 ICTR Statute] a clear duty is imposed upon those in authority, with the requisite means at their disposal, to prevent or punish the commission of a crime.⁷²⁹

With regard to Article 6(3) of the 1994 ICTR Statute and a possible responsibility thereunder of one of the accused, a former *prefet*, the Trial Chamber further stated that:

209. The principle of command responsibility is firmly established in international law, and its position as a principle of customary international law has recently been delineated by the ICTY in the [Judgement of 16 November 1998 in the *Delalić case*]. The clear recognition of this doctrine is now reflected in Article 28 of the [1998 ICC Statute].

210. The finding of responsibility under Article 6(1) of the Statute does not prevent the Chamber from finding responsibility additionally, or in the alternative, under Article 6(3). The two forms of responsibility are not mutually exclusive...

Responsibility of a Non-Military Commander

...

216. ... The Chamber accepts the submission made by the Prosecution that a civilian in a position of authority may be liable under the doctrine of command responsibility. The Chamber will turn, therefore, to consider in what instances a civilian can be considered a superior for the purposes of Article 6(3), and the requisite "degree of authority" necessary to establish individual criminal culpability pursuant to this doctrine of superior responsibility.

Concept of Superior: de Jure and de Facto Control

217. This superior-subordinate relationship lies at the heart of the concept of command responsibility. The basis under which he assumes responsibility is that, if he knew or had reason to know that a crime may or had been committed, then he must take all measures necessary to prevent the crime or punish the perpetrators. If he does not take such actions that are within his power then, accordingly, he is culpable for those crimes committed...

218. In order to "pierce the veils of formalism" therefore, the Chamber must be prepared to look beyond the *de jure* powers enjoyed by the accused and consider the *de facto* authority he exercised within Kibuye during April to July 1994. The position expounded by the ILC that an individual should only be responsible for those crimes that were within his legitimate legal powers to prevent, does not assist the Trial Chamber in tackling the "realities of any given situation". Therefore, in view of the chaotic situation that which prevailed in Rwanda in these pivotal months of 1994, the Chamber must be free to consider whether Kayishema had the requisite control over those committing the atrocities to establish individual criminal liability under Article 6(3), whether by *de jure* or *de facto* command.

...

222. Article 6 of this Tribunal's Statute is formulated in a broad manner. By including responsibility of all government officials, all superiors and all those acting pursuant to orders, it is clearly designed to ensure that those who are culpable for

⁷²⁹ ICTR, *Kayishema and Ruzindana case*, Judgement, 21 May 1999, § 202.

the commission of a crime under Articles 2 to 4 of the Statute cannot escape responsibility through legalistic formalities. Therefore, the Chamber is under a duty, pursuant to Article 6(3), to consider the responsibility of all individuals who exercised effective control, whether that control be *de jure* or *de facto*.

223. Where it can be shown that the accused was the *de jure* or *de facto* superior and that pursuant to his orders the atrocities were committed, then the Chamber considers that this must suffice to found command responsibility. The Chamber need only consider whether he knew or had reason to know and failed to prevent or punish the commission of the crimes if he did not in fact order them. If the Chamber is satisfied beyond a reasonable doubt that the accused ordered the alleged atrocities then it becomes unnecessary to consider whether he tried to prevent; and irrelevant whether he tried to punish.

224. However, in all other circumstances, the Chamber must give full consideration to the elements of "knowledge" and "failure to prevent and punish" that are set out in Article 6(3) of the Statute.

Knowledge of Subordinates' Actions

225. The *mens rea* in Article 6(3) requires that for a superior to be held criminally responsible for the conduct of his subordinates he must have known, or had reason to know, of their criminal activities . . .

...

228. The Trial Chamber agrees with this view insofar that it does not demand a *prima facie* duty upon a non-military commander to be seized of every activity of all persons under his or her control. In light of the objective of Article 6(3) which is to ascertain the individual criminal responsibility for crimes as serious as genocide, crimes against humanity and violations of Common Article 3 to the Geneva Conventions and [AP II], the Chamber finds that the Prosecution must prove that the accused in this case either knew, or consciously disregarded information which clearly indicated or put him on notice that his subordinates had committed, or were about to commit acts in breach of Articles 2 to 4 of this Tribunal's Statute.

Effective Control: Failure to Prevent or Punish a Crime

229. The principle of command responsibility must only apply to those superiors who exercise effective control over their subordinates. This material ability to control the actions of subordinates is the touchstone of individual responsibility under Article 6(3) . . .

...

231. . . . The ability to prevent and punish a crime is a question that is inherently linked with the given factual situation. Thus, only in light of the findings which follow and an examination of the overall conditions in which Kayishema had to operate as Prefect, can the Chamber consider who were the subordinates to Kayishema from April to July 1994 and whether he exercised the requisite degree of control over them in order to conclude whether he is individually criminally responsible for the atrocities committed by them.⁷³⁰

704. In the indictment in the *Mrkšić case* before the ICTY in 1995, the Prosecutor stated, with respect to the responsibility of the accused for the killing of 260 persons, that:

⁷³⁰ ICTR, *Kayishema and Ruzindana case*, Judgement, 21 May 1999, §§ 209–231.

Each of the accused is also or alternatively criminally responsible as a commander for the acts of his subordinates pursuant to Article 7(3) of the [1993 ICTY] Statute. Command criminal responsibility is the responsibility of a superior officer for the acts of his subordinate if he knew or had reason to know that his subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁷³¹

705. In the review of the indictment in the *Martić case* in 1996, the ICTY Trial Chamber stated that:

The Tribunal has particularly valid grounds for exercising its jurisdiction over persons who, through their position of political or military authority, are able to order the commission of crimes falling within its competence *ratione materiae* or who knowingly refrain from preventing or punishing the perpetrators of such crimes.⁷³²

706. In the review of the indictments in the *Karadžić and Mladić case* in 1996, the ICTY Trial Chamber found, in the light of the analysis of the institutional functions and the effective exercise of power by the two accused, that:

The conditions for the responsibility of superiors under Article 7(3) of the Statute, that is those constituting criminal negligence of superiors, have unquestionably been fulfilled:

- the Bosnian Serb military and police forces committing the offences alleged were under the control, command and direction of Radovan KARADŽIĆ and Ratko MLADIĆ during the whole period covered in the indictment;
- through their position in the Bosnian Serb Administration, Radovan KARADŽIĆ and Ratko MLADIĆ knew or had reasons to know that their subordinates committed or were about to commit the offences in question;
- lastly, it has established that Radovan KARADŽIĆ and Ratko MLADIĆ failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁷³³

707. In its judgement in the *Delalić case* in 1998, the ICTY Trial Chamber stated that:

333. Military commanders and other persons occupying positions of superior authority may be held criminally responsible for the unlawful conduct of their subordinates is a well-established norm of customary and conventional international law. This criminal liability may arise either out of the positive acts of the superior (sometimes referred to as “direct” command responsibility) or from his culpable omissions (“indirect” command responsibility or command responsibility *strictu sensu*). Thus, a superior may be held criminally responsible... also for failing to take measures to prevent or repress the unlawful conduct of his subordinates.

334. The distinct legal character of the two types of superior responsibility must be noted. While the criminal liability of a superior for positive acts follows from general principles of accomplice liability, as set out in the discussion of Article 7(1) above, the criminal responsibility of superiors for failing to take measures to prevent

⁷³¹ ICTY, *Mrkšić case*, Initial Indictment, 26 October 1995, § 24.

⁷³² ICTY, *Martić case*, Review of the Indictment, 8 March 1996, § 21.

⁷³³ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, §§ 81–82.

or repress the unlawful conduct of their subordinates is best understood when seen against the principle that criminal responsibility for omissions is incurred only where there exists a legal obligation to act. As is most clearly evidenced in the case of military commanders by article 87 [AP I], international law imposes an affirmative duty on superiors to prevent persons under their control from committing violations of international humanitarian law, and it is ultimately this duty that provides the basis for, and defines the contours of, the imputed criminal responsibility under Article 7(3) of the Statute.

335. Although historically not without recognition in domestic military law, it is often suggested that the roots of the modern doctrine of command responsibility may be found in the Hague Conventions of 1907 . . .

340. In the period following the Second World War until the present time, the doctrine of command responsibility has not been applied by any international judicial organ. Nonetheless, there can be no doubt that the concept of the individual criminal responsibility of superiors for failure to act is today firmly placed within the corpus of international humanitarian law. Through the adoption of Additional Protocol I, the principle has now been codified and given a clear expression in international conventional law. Thus, article 87 [AP I] gives expression to the duty of commanders to control the acts of their subordinates and to prevent or, where necessary, to repress violations of the Geneva Conventions or the Protocol. The concomitant principle under which a superior may be held criminally responsible for the crimes committed by his subordinates where the superior has failed to properly exercise this duty is formulated in article 86 [AP I]. A survey of the *travaux préparatoires* of these provisions reveals that, while their inclusion was not uncontested during the drafting of the Protocol, a number of delegations clearly expressed the view that the principles expressed therein were in conformity with pre-existing law . . .

343. On the basis of the foregoing, the Trial Chamber concludes that the principle of individual criminal responsibility of superiors for failure to prevent or repress the crimes committed by subordinates forms part of customary international law.⁷³⁴

As to the elements of individual criminal responsibility of commanders under Article 7(3) of the 1993 ICTY Statute, the Trial Chamber stated that:

From the text of Article 7(3) it is thus possible to identify the essential elements of command responsibility for failure to act as follows:

- (i) the existence of a superior-subordinate relationship;
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.⁷³⁵

Affirming the responsibility of non-military superiors under Article 7(3) of the 1993 ICTY Statute, the Trial Chamber noted that:

⁷³⁴ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 333–335, 340 and 343.

⁷³⁵ ICTY, *Delalić case*, Judgement, 16 November 1998, § 346.

357. This interpretation of the scope of Article 7(3) is in accordance with the customary law doctrine of command responsibility . . .

...

363. Thus, it must be concluded that the applicability of the principle of superior responsibility in Article 7(3) extends not only to military commanders but also to individuals in non-military positions of superior authority.⁷³⁶

Turning to “the concept of superior”, the Trial Chamber stated that:

370. While the matter is, thus, not undisputed, it is the Trial Chamber’s opinion that a position of command is indeed a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person’s *de facto*, as well as *de jure*, position as a commander.

371. . . . It is clear that the term “superior” is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control . . .

...

377. While it is, therefore, the Trial Chamber’s conclusion that a superior, whether military or civilian, may be held liable under the principle of superior responsibility on the basis of his *de facto* position of authority, the fundamental considerations underlying the imposition of such responsibility must be borne in mind. The doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates. A duty is placed upon the superior to exercise this power so as to prevent and repress the crimes committed by his subordinates, and a failure by him to do so in a diligent manner is sanctioned by the imposition of individual criminal responsibility in accordance with the doctrine. It follows that there is a threshold at which persons cease to possess the necessary powers of control over the actual perpetrators of offences and, accordingly, cannot properly be considered their “superiors” within the meaning of Article 7(3) of the Statute . . . [However,] great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.

378. Accordingly, it is the Trial Chamber’s view that, in order for the principle of superior responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences. With the caveat that such authority can have a *de facto* as well as a *de jure* character, the Trial Chamber accordingly shares the view expressed by the International Law Commission that the doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders.⁷³⁷

⁷³⁶ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 357 and 363.

⁷³⁷ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 370–371 and 377–378.

Discussing the mental element necessary for the establishment of criminal responsibility of commanders, the ICTY Trial Chamber stated that:

383. The doctrine of superior responsibility does not establish a standard of strict liability for superiors for failing to prevent or punish the crimes committed by their subordinates. Instead, Article 7(3) [of the 1993 ICTY Statute] provides that a superior may be held responsible only where he knew or had reason to know that his subordinates were about to or had committed the acts referred to under Articles 2 to 5 of the Statute. A construction of this provision in light of the content of the doctrine under customary law leads the Trial Chamber to conclude that a superior may possess the *mens rea* required to incur criminal liability where: (1) he had actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Article 2 to 5 of the Statute, or (2) where he had in his possession information of a nature, which at the least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates.

...

393. An interpretation of the terms of [Article 86 AP I] in accordance with their ordinary meaning thus leads to the conclusion, confirmed by the *travaux préparatoires*, that a superior can be held criminally responsible only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates. This standard, which must be considered to reflect the position of customary law at the time of the offences alleged in the Indictment, is accordingly controlling for the construction of the *mens rea* standard established in Article 7(3).⁷³⁸

With regard to the “necessary and reasonable measures” to be taken by a commander, the Trial Chamber stated that:

394. The legal duty which rests upon all individuals in positions of superior authority requires them to take all necessary and reasonable measures to prevent the commission of offences by their subordinates or, if such crimes have been committed, to punish the perpetrators thereof. It is the view of the Trial Chamber that any evaluation of the action taken by a superior to determine whether this duty has been met is so inextricably linked to the facts of each particular situation that any attempt to formulate a general standard *in abstracto* would not be meaningful.

395. It must, however, be recognised that international law cannot oblige a superior to perform the impossible. Hence, a superior may only be held criminally responsible for failing to take such measures that are within his powers. The question then arises of what actions are to be considered to be within the superior’s powers in this sense. As the corollary to the standard adopted by the Trial Chamber with respect to the concept of superior, we conclude that a superior should be held responsible for failing to take such measures that are within his material possibility. The Trial Chamber accordingly does not adopt the position taken by the ILC on this point,

⁷³⁸ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 383 and 393.

and finds that the lack of formal legal competence to take the necessary measures to prevent or repress the crime in question does not necessarily preclude the criminal responsibility of the superior.⁷³⁹

708. In its judgement in the *Aleksovski case* in 1999, the ICTY Trial Chamber stated that:

67. The doctrine of superior responsibility makes a superior responsible not for his acts sanctioned by Article 7(1) of the [1993 ICTY] Statute but for his failure to act. A superior is held responsible for the acts of his subordinates if he did not prevent the perpetration of the crimes of his subordinates or punish them for the crimes.
68. The responsibility for failure to act, sometimes known as “indirect superior responsibility” is provided for in Article 7(3) of the [1993 ICTY] Statute . . .
69. Article 7 makes clear that superior responsibility may be invoked if three concurrent elements are proved:
 - (i) a superior–subordinate relationship between the person against whom the claim is directed and the perpetrators of the offence;
 - (ii) the superior knew or had reason to know that a crime was about to be committed or had been committed;
 - (iii) the superior did not take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof.
70. The three constituent elements which are evident from the wording of Article 7(3) clearly draw from Article 86, paragraph 2, of [AP I] and Article 6 of the [1996 ILC Draft Code of Crimes against the Peace and Security of Mankind]. They are repeated in Article 28 of the [1998 ICC Statute].
- ...
72. ... Superior responsibility covered in Article 7(3) of the [1993 ICTY] Statute must not be seen as responsibility for the act of another person. Superior responsibility derives directly from the failure of the person against whom the complaint is directed to honour an obligation . . . Within the meaning of Article 7(3), a person is obliged to act only if it has been established that he was a superior of the perpetrators of the offence and also knew or had reasons to know that a crime was about to be committed or had been committed. Should such be the case, the person against whom the claim is directed is obliged to take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof.
 - a) The superior-subordinate relationship
 - ...
 75. ... The generic term “superior” in Article 7(3) of the [1993 ICTY] Statute can be interpreted only to mean that superior responsibility is not limited to military commanders but may apply to the civilian authorities as well.
 76. Superior responsibility is thus not reserved for official authorities. Any person acting *de facto* as a superior may be held responsible under Article 7(3). The decisive criterion in determining who is a superior according to customary international law is not only the accused’s formal legal status but also his ability, as demonstrated by his duties and competence, to exercise control . . .

⁷³⁹ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 394–395.

78. ... Hierarchical power constitutes the very foundation of responsibility under the terms of Article 7(3) of the [1993 ICTY] Statute. In order to entail his responsibility under Article 7(3), whatever his status, the accused must first have superior authority... In the opinion of the Trial Chamber, a civilian must be characterised as a superior pursuant to Article 7(3) if he has the ability *de jure* or *de facto* to issue orders to prevent an offence and to sanction the perpetrators thereof. A civilian's sanctioning power must however be interpreted broadly. It should be stated that the doctrine of superior responsibility was originally intended only for the military authorities. Although the power to sanction is the indissociable corollary of the power to issue orders within the military hierarchy, it does not apply to the civilian authorities. It cannot be expected that a civilian authority will have disciplinary power over his subordinate equivalent to that of the military authorities in an analogous command position. To require a civilian authority to have sanctioning powers similar to those of a member of the military would so limit the scope of the doctrine of superior authority that it would hardly be applicable to civilian authorities. The Trial Chamber therefore considers that the superior's ability *de jure* or *de facto* to impose sanctions is not essential. The possibility of transmitting reports to the appropriate authorities suffices once the civilian authority, through its position in the hierarchy, is expected to report whenever crimes are committed, and that, in the light of this position, the likelihood that those reports will trigger an investigation or initiate disciplinary or even criminal measures is extant.

b) The superior knew or had reason to know that a crime was about to be committed or had been committed

...

80. ... Admittedly, as regards "indirect" responsibility, the Trial Chamber is reluctant to consider that a "presumption" of knowledge about a superior exists which would somehow automatically entail his guilt whenever a crime was allegedly committed. The Trial Chamber deems however that an individual's superior position *per se* is a significant indicium that he had knowledge of the crimes committed by his subordinates. The weight to be given to that indicium however depends *inter alia* on the geographical and temporal circumstances. This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them. Conversely, the commission of a crime in the immediate proximity of the place where the superior ordinarily carried out his duties would suffice to establish a significant indicium that he had knowledge of the crime, *a fortiori* if the crimes were repeatedly committed.

(c) Necessary and reasonable measures

81. The [ICRC] Commentary on Additional Protocol I and the [1996 ILC Draft Code of Crimes against the Peace and Security of Mankind] limit the notion of "necessary and reasonable measures" to the measures which the superior can actually take... Such a material possibility must not be considered abstractly but must be evaluated on a case by case basis depending on the circumstances.⁷⁴⁰

⁷⁴⁰ ICTY, *Aleksovski case*, Judgement, 25 June 1999, §§ 67–81.

709. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber drew a clear distinction between Article 7(1) and Article 7(3) of the 1993 ICTY Statute, noting that:

Whilst Article 7(1) deals with the commander's participation in the commission of a crime, Article 7(3) enshrines the principle of command responsibility in the strict sense which entails the commander's individual criminal responsibility if he did not prevent crimes from being committed by his subordinates or, where applicable, punish them.⁷⁴¹

With regard to Article 7(3) of the 1993 ICTY Statute, the Trial Chamber first held that "the principle of command responsibility *strictu sensu* forms part of customary international law".⁷⁴² It went on to say that:

294. ... For a conviction under Article 7(3) of the [1993 ICTY] Statute in the present case, proof is required that:

- (1) there existed a superior-subordinate relationship between the commander (the accused) and the perpetrator of the crime;
- (2) the accused knew or had reason to know that the crime was about to be or had been committed; and
- (3) the accused failed to take the necessary and reasonable measures to prevent the crime or punish the perpetrator thereof.

...

300. ... This principle [that in order for Article 7(3) of the 1993 ICTY Statute to apply, the accused must be in a position of command] is not limited to individuals formally designated commander but also encompasses both *de facto* and *de jure* command...

301. ... A commander may incur criminal responsibility for crimes committed by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them.

302. ... The commander need not have any legal authority to prevent or punish acts of his subordinates. What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper measures to be taken.⁷⁴³

As regards the *mens rea* ("knew or had reason to know") of the accused, the Trial Chamber agreed that knowledge "may be proved through either direct or circumstantial evidence". With regard to circumstantial evidence, the Trial Chamber held that

in determining whether in fact a superior must have had the requisite knowledge it may consider *inter alia* the following indicia enumerated by the Commission of Experts in its Final Report: the number, type and scope of the illegal acts; the time during which the illegal acts occurred; the number and type of troops involved; the logistics involved, if any; the geographical location of the acts; the widespread occurrence of the acts; the speed of the operations; the *modus operandi* of similar

⁷⁴¹ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 261.

⁷⁴² ICTY, *Blaškić case*, Judgement, 3 March 2000, § 290.

⁷⁴³ ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 294 and 300–302.

illegal acts; the officers and staff involved; and the location of the commander at the time.⁷⁴⁴

Referring to numerous instances of case-law and quoting a writer's opinion, the Trial Chamber stated that:

322. From this analysis of jurisprudence, the Trial Chamber concludes that after World War II, a standard was established according to which a commander may be liable for crimes by his subordinates if "he failed to exercise the means available to him to learn of the offence and, under the circumstances, he should have known and such failure to know constitutes criminal dereliction".

...

324. The Trial Chamber now turns to codification at the international level, namely the adoption of Additional Protocol I in 1977. The pertinent question is this: was customary international law altered with the adoption of Additional Protocol I, in the sense that a commander can be held accountable for failure to act in response to crimes by his subordinates only if some specific information was in fact available to him which would provide notice of such offences? Based on the following analysis, the Trial Chamber is of the view that this is not so.

...

328. In the Trial Chamber's view, the words "had information" in Article 86(2) [AP I] must be interpreted broadly ...

329. ... Given the essential responsibilities of military commanders under international humanitarian law, the Trial Chamber holds, ... in the words of the [ICRC Commentary on the Additional Protocols], that "their role obliges them to be constantly informed of the way in which their subordinates carry out the tasks entrusted them, and to take the necessary measures for this purpose".

...

332. ... In conclusion, the Trial Chamber finds that if a commander has exercised due diligence in the fulfilment of his duties yet lacks knowledge that crimes are about to be or have been committed, such lack of knowledge cannot be held against him. However, taking into account his particular position of command and the circumstances prevailing at the time, such ignorance cannot be a defence where the absence of knowledge is the result of negligence in the discharge of his duties: this commander had reason to know within the meaning of the [1993 ICTY] Statute.⁷⁴⁵

With regard to "necessary and reasonable measures to prevent or punish", the Trial Chamber held that:

335. The Trial Chamber has already characterised a "superior" as a person exercising "effective control" over his subordinates. In other words, the Trial Chamber holds that where a person has the material ability to prevent or punish crimes committed by others, that person must be considered a superior. Accordingly, it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator. As stated above in

⁷⁴⁴ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 307.

⁷⁴⁵ ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 322, 324, 328–329 and 332.

the discussion of the definition of “superior”, this implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities.

336. Lastly, the Trial Chamber stresses that the obligation to “prevent or punish” does not provide the accused with two alternative and equally satisfying options. Obviously, where the accused knew or had reason to know that subordinates were about to commit crimes and failed to prevent them, he cannot make up for the failure to act by punishing the subordinates afterwards.⁷⁴⁶

With respect to the concurrent application of Article 7(1) and 7(3) of the 1993 ICTY Statute, the Trial Chamber stated that:

337. It would be illogical to hold a commander criminally responsible for planning, instigating or ordering the commission of crimes and, at the same time, reproach him for not preventing or punishing them. However, as submitted by the Prosecution, the failure to punish past crimes, which entails the commander’s responsibility under Article 7(3), may, pursuant to Article 7(1) and subject to the fulfilment of the respective *mens rea* and *actus reus* requirements, also be the basis for his liability for either aiding and abetting or instigating the commission of *further* crimes.

...

339. As stated earlier in this Judgement, in the case of instigation, proof is required of a causal connection between the instigation, which may entail an omission, and the perpetration of the act. In the scenario under discussion, this means it must be proved that the subordinates would not have committed the subsequent crimes if the commander had not failed to punish the earlier ones. However, with respect to the Defence’s submission that under Article 7(3) of the [1993 ICTY] Statute proof is required that the commander’s omission caused the commission of the crime by the subordinate, the Trial Chamber is of the view that such a causal link may be considered inherent in the requirement that the superior failed to prevent the crimes which were committed by the subordinate.⁷⁴⁷ [emphasis in original]

710. In its judgement on appeal in the *Delalić case* in 2001, the ICTY Appeals Chamber upheld the interpretation of Article 7(3) of the 1993 ICTY Statute given by the Trial Chamber to the standard “had reason to know” and stated that:

A superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of *mens rea* as existing at the time of the offences charged in the indictment.⁷⁴⁸

711. In its judgement in the *Kunarac case* in 2001, the ICTY Trial Chamber, under the heading “Command responsibility under Article 7(3) of the [1993 ICTY] Statute”, stated that:

395.... The following three conditions must be met before a commander can be held responsible for the acts of his or her subordinates:

⁷⁴⁶ ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 335–336.

⁷⁴⁷ ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 337 and 339.

⁷⁴⁸ ICTY, *Delalić case*, Judgement of Appeal, 20 February 2001, § 241.

- (i) the existence of a superior-subordinate relationship;
- (ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
- (iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

396. Because of the findings of the Trial Chamber, it need only deal with the first of those elements. A superior-subordinate relationship must exist for the recognition of this kind of responsibility. However, such a relationship cannot be determined by reference to formal status alone. Accordingly, formal designation as a commander is not necessary for establishing command responsibility, as such responsibility may be recognised by virtue of a person's *de facto*, as well as *de jure*, position as a commander. What must be established is that the superior had effective control over subordinates. That means that he must have had the material ability to exercise his powers to prevent and punish the commission of the subordinates' offences.

397. The relationship between the commander and his subordinates need not have been formalized; a tacit or implicit understanding between them as to their positioning *vis-à-vis* one another is sufficient. The giving of orders or the exercise of powers generally attached to a military command are strong indications that an individual is indeed a commander. But these are not the sole relevant factors.

...

399. Both those permanently under an individual's command and those who are so only temporarily or on an *ad hoc* basis can be regarded as being under the effective control of that particular individual. The temporary nature of a military unit is not, in itself, sufficient to exclude a relationship of subordination between the members of a unit and its commander. To be held liable for the acts of men who operated under him on an *ad hoc* or temporary basis, it must be shown that, *at the time when the acts charged in the Indictment were committed*, these persons were under the effective control of that particular individual.⁷⁴⁹ [emphasis in original]

712. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber held that:

Article 7 [of the 1993 ICTY Statute] is clearly intended to assign individual criminal responsibility at different levels, both subordinate and superior, for the commission of crimes listed in Articles 2 to 5 of the Statute. Article 7 gives effect to a general principle of criminal law that an individual is responsible for his acts and omissions. It provides that an individual may be held criminally responsible for the direct commission of a crime, whether as an individual or jointly, or through his omissions for the crimes of his subordinates when under an obligation to act. Article 7(3) of the Statute sets forth the principle governing the responsibility of superiors commonly referred to as "command responsibility".⁷⁵⁰

The Trial Chamber also noted that:

369. The type of responsibility provided for in Article 7(3) [of the 1993 ICTY Statute] may be described as "indirect" as it does not stem from a "direct" involvement by the superior in the commission of a crime but rather from his omission to prevent or punish such offence, i.e., of his failure to act in spite of knowledge. This

⁷⁴⁹ ICTY, *Kunarac case*, Judgement, 22 February 2001, §§ 395–399.

⁷⁵⁰ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, § 364.

responsibility arises only where the superior is under a legal obligation to act . . . The duty that rests on military commanders properly to supervise their subordinates is for instance expressed in Article 87 of Additional Protocol I, entitled "Duty of commanders", which imposes an affirmative duty on them to prevent persons under their control from committing violations of international humanitarian law, and to punish the perpetrators if violations occur. Liability under Article 7(3) is based on an omission as opposed to positive conduct. It should be emphasised that the doctrine of command responsibility does not hold a superior responsible merely because he is in a position of authority as, for a superior to be held liable, it is necessary to prove that he "knew or had reason to know" of the offences and failed to act to prevent or punish their occurrence. Superior responsibility, which is a type of imputed responsibility, is therefore not a form of strict liability.

371. The Trial Chamber is of the view that in cases where the evidence presented demonstrates that a superior would not only have been informed of subordinates' crimes committed under his authority, but also exercised his powers to plan, instigate or otherwise aid and abet in the planning, preparation or execution of these crimes, the type of criminal responsibility incurred may be better characterised by Article 7(1) [of the 1993 ICTY Statute]. Where the omissions of an accused in a position of superior authority contribute (for instance by encouraging the perpetrator) to the commission of a crime by a subordinate, the conduct of the superior may constitute a basis for liability under Article 7(1).⁷⁵¹

713. In its judgement in the *Krstić case* in 2001, the ICTY Trial Chamber stated that:

604. According to the case law, the following three conditions must be met before a person can be held responsible for the acts of another person under Article 7(3) of the [1993 ICTY] Statute:

- The existence of a superior-subordinate relationship;
- The superior knew or had reason to know that the criminal act was about to be or had been committed; and
- The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.

605. The facts pertaining to the commission of a crime may establish that the requirements for criminal responsibility under both Article 7(1) and Article 7(3) [of the 1993 ICTY Statute] are met. However, the Trial Chamber adheres to the belief that where a commander participates in the commission of a crime *through his subordinates*, by "planning", "instigating" or "ordering" the commission of the crime, any responsibility under Article 7(3) is subsumed under Article 7(1). The same applies to the commander who incurs criminal responsibility under the joint criminal enterprise doctrine through the physical acts of his subordinates.⁷⁵² [emphasis in original]

As to General Krstić's possible individual criminal responsibility, the Trial Chamber stated, *inter alia*, that:

⁷⁵¹ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, §§ 369 and 371.

⁷⁵² ICTY, *Krstić case*, Judgement, 2 August 2001, §§ 604–605.

647. The evidence also satisfies the three-pronged test established by the jurisprudence for General Krstic to incur command responsibility under Article 7(3) [of the 1993 ICTY Statute] for the participation of Drina Corps personnel in the killing campaign.

648. First, General Krstic exercised effective control over Drina Corps troops involved in the killings. Second, in terms of *mens rea*, not only was General Krstic fully aware of the ongoing killing campaign and of its impact on the survival of the Bosnian Muslim group at Srebrenica, as well as the fact that it was related to a widespread or systematic attack against Srebrenica's Bosnian Muslim civilian population, but the Drina Corps (and Main Staff) officers and troops involved in conducting the executions had to have been aware of the genocidal objectives. Third, General Krstic failed to prevent his Drina Corps subordinates from participating in the crimes or to punish them thereafter.⁷⁵³

714. In its judgement in the *Kvočka case* in 2001, the ICTY Trial Chamber considered that:

313. Article 7(3) of the [1993 ICTY] Statute imposes liability upon a superior for the criminal acts of his subordinates if the superior had reason to know that the subordinate was about to commit a crime and failed to prevent it or, knowing that a crime had been committed, failed to take steps to punish the subordinate for the crime. Fulfilling the first obligation does not preclude incurring liability for failing to fulfil the second. The superior is also responsible if he or she fails to halt or suppress crimes that are being committed if the superior knew or had reason to know of their commission.

314. The caselaw of the Tribunal establishes that three elements must be proved before a person may be held responsible as a superior for the crimes committed by subordinates: (1) the existence of a superior-subordinate relationship between the accused and perpetrator(s) of the underlying offence; (2) knowledge of the superior that his or her subordinate had committed, was committing, or was about to commit, a crime; and (3) failure of the superior to prevent or halt the commission of the crime and to punish the perpetrators.⁷⁵⁴

Referring to the judgement of the ICTY Appeals Chamber in the *Delalić case*, the Trial Chamber further stated that:

315. . . . This Judgement [i.e. the judgement of the Appeals Chamber in the *Delalić case*] accepted that a civilian leader may incur responsibility in the same way as a military commander, provided that the civilian has effective control over subordinates. Effective control necessarily involves "the power or authority in either a *de jure* or a *de facto* form to prevent a subordinate's crime or to punish the perpetrators of the crime after the crime is committed." Effective control means "the material ability to prevent or punish criminal conduct, however that control is exercised." The requirement that control must be effective makes clear that *de jure* authority alone is insufficient. The Prosecution must show that the superior had the ability to prevent, halt, or punish the crime.

316. The superior does not have to be the person who dispenses the punishment, but he must take an important step in the disciplinary process . . .

⁷⁵³ ICTY, *Krstić case*, Judgement, 2 August 2001, §§ 647–648.

⁷⁵⁴ ICTY, *Kvočka case*, Judgement, 2 November 2001, §§ 313–314.

317. Action is required on the part of the superior from the point at which he “knew or had reason to know” of the crimes committed or about to be committed by subordinates. The [judgement of the Appeals Chamber in the *Delalić case*] found that Article 7(3) [of the 1993 ICTY Statute] does not impose a duty upon a superior to go out of his way to obtain information about crimes committed by subordinates, unless he is in some way put on notice that criminal activity is afoot.

318. The [judgement of the Appeals Chamber in the *Delalić case*] upheld the Trial Chamber’s interpretation of “had reason to know”, concluding that the superior is responsible if information was available which would have put the superior on notice of crimes committed by subordinates. The information available to the superior may be written or oral. It need not be explicit or specific, but it must be information – or the absence of information – that would suggest the need to inquire further. Information that would make a superior suspicious that crimes might be committed includes past behavior of subordinates or a history of mistreatment: “For instance, a military commander who has received information that some of the soldiers under his command have a violent or unstable character, or have been drinking prior to being sent on a mission, may be considered as having the required knowledge.” Similarly, if a superior has prior knowledge that women detained by male guards in detention facilities are likely to be subjected to sexual violence, that would put him on sufficient notice that extra measures are demanded in order to prevent such crimes.⁷⁵⁵

715. In the amended indictment in the *Hadžihasanović and Others case* before the ICTY in 2002, the Prosecutor stated with respect to one of the accused that:

58. [The accused] is also criminally responsible in relation to those crimes [i.e. violations of the laws or customs of war] that were committed by troops of the ABiH... Brigade prior to his assignment... as the substitute for [the then commanding officer]. [He] knew or had reason to know about these crimes. After he assumed command, he was under the duty to punish the perpetrators.

60. [The accused] knew or had reason to know that ABiH forces under their command and control were about to commit such acts [i.e. violations of the laws or customs of war] or had done so, in the following villages on or about the dates indicated, and they failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.⁷⁵⁶

716. In its decision on a joint challenge to jurisdiction in the *Hadžihasanović and Others case* in 2002, the ICTY Trial Chamber stated that “the doctrine of command responsibility already in – and since – 1991 was applicable in the context of an internal armed conflict under customary international law. Article 7(3) [of the Statute of the International Criminal Tribunal for the Former Yugoslavia] constitutes a declaration of existing law under customary international law and does not constitute new law.”⁷⁵⁷

⁷⁵⁵ ICTY, *Kvočka case*, Judgement, 2 November 2001, §§ 315–318.

⁷⁵⁶ ICTY, *Hadžihasanović and Others case*, Amended Indictment, 11 January 2002, §§ 58 and 60, see also §§ 61, 65 and 66.

⁷⁵⁷ ICTY, *Hadžihasanović and Others case*, Decision on Joint Challenge to Jurisdiction, 12 November 2002, § 179.

V. Practice of the International Red Cross and Red Crescent Movement

717. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The commander of all forces engaged in a military operation has the general responsibility for ensuring respect for the law of war.

...

Respect for the law of war is a matter of order and discipline.

As with order and discipline, the law of war must be respected and enforced in all circumstances.

...

The commander himself must ensure that:

...

- b) the necessary measures are taken to prevent violations of the law of war.

The commander himself must ensure that his subordinates respect the law of war.

The commander must ensure that in case of a breach of the law of war:

- a) the breach ceases;
- b) disciplinary or penal action is taken.

The commander's responsibility extends to breaches of the law of war resulting from a failure to act when under a duty to do so.⁷⁵⁸

Delegates also teach that:

Every commander who is aware that subordinates or other persons under his control/command are going to commit or have committed a breach of the law of war, shall initiate:

- a) the necessary steps to prevent such a breach; and/or
- b) disciplinary or penal action against the authors of the breach.⁷⁵⁹

718. In a press release issued in 1992 in the context of the conflict in Nagorno-Karabakh, the ICRC stated that "it is the responsibility of the region's political leaders and military commanders to ensure . . . respect [for the red cross and red crescent emblem] and prevent misuse of the emblem".⁷⁶⁰

VI. Other Practice

719. In 1990, an armed opposition group undertook to refrain from torturing prisoners and stressed that commanders responsible for such actions had been sanctioned.⁷⁶¹

⁷⁵⁸ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 263 and 269–273.

⁷⁵⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, § 781.

⁷⁶⁰ ICRC, Press Release No. 1670, Nagorno-Karabakh: ICRC calls for respect for humanitarian law, 12 March 1992.

⁷⁶¹ ICRC archive document.

720. In 1993, in a communication on violations of IHL in Somalia during UNOSOM operations, MSF stated that the UN Security Council, the UN military commander and the commanders of the various national contingents are to be held responsible for an attack by UNOSOM II troops on the MSF compound in Somalia.⁷⁶²

Reporting of war crimes

I. Treaties and Other Instruments

Treaties

721. Article 87(1) AP I provides that:

The High Contracting Parties and the Parties to the conflict shall require military commanders, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and report to competent authorities breaches of the Conventions and of this Protocol.

Article 87 AP I was adopted by consensus.⁷⁶³

722. Article 9(2) of the 1998 Draft Convention on Forced Disappearance provides that “law enforcement officials who have reason to believe that a forced disappearance has occurred or is about to occur shall communicate the matter to their superior authorities and, when necessary, to competent authorities or organs with reviewing or remedial power”.

Other Instruments

723. Section 20 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that:

In the event of breaches of rules of international humanitarian law protecting the environment, measures shall be taken to stop any such violation and to prevent further breaches. Military commanders are required to prevent and, where necessary, to suppress and to report to competent authorities breaches of these rules.

II. National Practice

Military Manuals

724. Argentina’s Law of War Manual states that “military commanders must ensure the prevention of breaches of the [Geneva] Conventions and [AP I] and, when necessary, report them to the competent authority and repress them”.⁷⁶⁴

725. Australia’s Commanders’ Guide states that:

⁷⁶² MSF, Communication on the violations of humanitarian law in Somalia during UNOSOM operations, 20 July 1993, Part II.

⁷⁶³ CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 307.

⁷⁶⁴ Argentina, *Law of War Manual* (1989), § 8.02.

ADF members are obliged to report LOAC breaches to their superior commanders and, where available, ADF legal advisers. Commanders must ensure that processes for reporting LOAC breaches are detailed in standing operating procedures. ADF members who receive reports about alleged breaches are responsible for ensuring that the suspected breach is properly recorded, documented, investigated and any relevant evidence preserved.⁷⁶⁵

726. Australia's Defence Force Manual states that:

Each ADF member is also responsible for ensuring that breaches are properly reported and documented. Reporting of LOAC breaches, whether committed by the enemy or ADF members, should be made to superiors. Commanders must ensure that processes for reporting LOAC breaches are detailed in standard operating procedures.⁷⁶⁶

727. Benin's Military Manual instructs soldiers to "prevent any breach of these instructions. Report to your superior any violation [of IHL] of which you are aware. Any breach of the laws of war is punishable."⁷⁶⁷

728. Canada's LOAC Manual provides that "commanders are responsible, with respect to members of the armed forces under their command and other persons under their control, to prevent and, where necessary, to suppress and to report to competent authorities, breaches of the LOAC".⁷⁶⁸

729. Canada's Code of Conduct contains the rule: "Report and take appropriate steps to stop breaches of the Law of Armed Conflict and these rules. Disobedience of the Law of Armed Conflict is a crime."⁷⁶⁹ It goes on to say that "it is also of the utmost importance that any breach of the Code of Conduct or other provision of the Law of Armed Conflict be reported without delay. A failure to comply with the Code of Conduct represents a failure in the 'habit of obedience', the cornerstone of discipline."⁷⁷⁰ It adds that:

If a CF member believes that the Law of Armed Conflict or these rules are being breached, the member must take the appropriate steps to stop the illegal action. If the CF member is not in a position to stop the breach, then the member shall report to the nearest military authority who can take appropriate action. It is recognized that it may sometimes be difficult to report a breach, for example when a junior believes a breach has been committed by a higher ranking member. However, there is always a way to report a breach. The member can report to his or her superiors in the chain of command, the military police, a chaplain, a legal officer or any other person in authority. If a breach of the Law of Armed Conflict or these rules has already occurred, the member shall report that breach. The old adage "bad news doesn't get better with time" definitely applies to these types of breaches. Any attempt to cover up a breach of the Law of Armed Conflict or these rules is in itself

⁷⁶⁵ Australia, *Commanders' Guide* (1994), § 1301.

⁷⁶⁶ Australia, *Defence Force Manual* (1994), § 1307; see also *Commanders' Guide* (1994), § 1208.

⁷⁶⁷ Benin, *Military Manual* (1995), Fascicule II, p. 19.

⁷⁶⁸ Canada, *LOAC Manual* (1999), p. 16-7, § 49.

⁷⁶⁹ Canada, *Code of Conduct* (2001), Rule 11.

⁷⁷⁰ Canada, *Code of Conduct* (2001), Rule 11, § 1.

an offence under the Code of Service Discipline. Experience has shown that isolated breaches committed by a few members of the force, even a momentary lapse in one's duty, could dishonour the country and adversely affect the accomplishment of the overall mission.

...

It is essential that any alleged breaches of these rules and the Law of Armed Conflict be investigated rapidly in as impartial a manner as possible. An impartial investigation will not only assist in bringing violators to justice, thereby maintaining discipline, but will also provide the best opportunity to clear anyone who has not acted improperly. In most cases that investigation will be carried out by the military police or National Investigation Service.⁷⁷¹

730. Colombia's *Instructors' Manual* states that to prevent violations of human rights, it is necessary "to report to the superior any irregularity which may constitute a violation of Human Rights [and] to report violations of Human Rights to the superior".⁷⁷²

731. The *Military Manual of the Dominican Republic* tells soldiers that:

You must report crimes immediately through your chain of command. If the crime involves your immediate superiors, report to their superior. You may also report violations of the laws of war to the inspector general, provost marshal, chaplain or judge advocate. In any case, the law requires that you report actual or suspected violations immediately so that evidence will not be misplaced or disappear.⁷⁷³

732. El Salvador's *Human Rights Charter of the Armed Forces* provides that "all violations must be reported to the immediate superior".⁷⁷⁴

733. Germany's *Military Manual* states that the superior "is obliged to prevent and, where necessary, to suppress or to report to competent authorities breaches of international law".⁷⁷⁵ It further states that:

When a disciplinary superior learns about incidents substantiating suspicion that international humanitarian law has been violated, he shall clear up the facts and consider as to whether disciplinary measures are to be taken. If the disciplinary offence constitutes a criminal offence, he shall refer the case to the appropriate criminal prosecution authority when criminal prosecution seems to be indicated.⁷⁷⁶

734. The *Military Manual of the Netherlands*, referring to Article 87 AP I, states that:

Commanders... must take measures to stop the committing of war crimes and report them for action to the competent authorities. This can involve criminal or disciplinary proceedings against the acts committed, but also administrative measures (for example suspension or transfer).⁷⁷⁷

⁷⁷¹ Canada, *Code of Conduct* (2001), Rule 11, §§ 2-3.

⁷⁷² Colombia, *Instructors' Manual* (1999), p. 13.

⁷⁷³ Dominican Republic, *Military Manual* (1980), p. 12.

⁷⁷⁴ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 16.

⁷⁷⁵ Germany, *Military Manual* (1992), § 138. ⁷⁷⁶ Germany, *Military Manual* (1992), § 1213.

⁷⁷⁷ Netherlands, *Military Manual* (1993), p. IX-7.

735. The Military Handbook of the Netherlands stipulates that:

Every soldier has the duty to prevent the commission of war crimes, to stop them and to report them. The report shall be made to the Royal Military Police. In addition, report should be made to the commander.⁷⁷⁸

736. Nigeria's Military Manual provides that "Article 87 [AP I] thereby enjoins the parties and the parties to the conflict to request Commanders of their troops under control to prevent, and where necessary, to suppress and to report to competent authorities breaches of the conventions and the Protocols".⁷⁷⁹

737. Peru's Human Rights Charter of the Security Forces provides that "all alleged violations must immediately be reported to the superior".⁷⁸⁰

738. The Soldier's Rules of the Philippines, providing a list of the most basic principles of behaviour for soldiers, states that a soldier must "endeavour to prevent any breach of the above rules. Report any violations to your superior."⁷⁸¹

739. South Africa's LOAC Manual states that "all soldiers must be aware of their responsibility to report war crimes which are breaches of the LOAC. Normally the report should be made to the next superior in the chain of command. A report may also be made to the Military Police, a Legal Officer or a Chaplain."⁷⁸²

740. South Africa's Medical Services Military Manual refers to Article 87 AP I, providing that "commanders will... report breaches of humanitarian law".⁷⁸³

741. Sweden's IHL Manual refers to AP I and provides that "military commanders shall prevent breaches and if necessary punish and report such cases... Naturally, it is also very important that both commanders and men discover and report transgressions committed by units of the adversary."⁷⁸⁴

742. Togo's Military Manual instructs soldiers to "prevent any breach of these instructions. Report to your superior any violation [of IHL] of which you are aware. Any breach of the laws of war is punishable."⁷⁸⁵

743. The US Soldier's Manual tells soldiers that:

You must report crimes immediately through your chain of command. If the crime involves your immediate superiors, report to their superior. You may also report violations of the laws of war to the inspector general, provost marshal, chaplain, or judge advocate. In any case, the law requires that you report actual or suspected violations immediately so that evidence will not be misplaced or disappear.⁷⁸⁶

744. The US Naval Handbook states that:

⁷⁷⁸ Netherlands, *Military Handbook* (1995), p. 7-44.

⁷⁷⁹ Nigeria, *Military Manual* (1994), p. 30, § 3.

⁷⁸⁰ Peru, *Human Rights Charter of the Security Forces* (1991), p. 21.

⁷⁸¹ Philippines, *Soldier's Rules* (1989), § 12. ⁷⁸² South Africa, *LOAC Manual* (1996), § 43.

⁷⁸³ South Africa, *Medical Services Military Manual* (undated), p. 5.

⁷⁸⁴ Sweden, *IHL Manual* (1991), Section 4.2, p. 94.

⁷⁸⁵ Togo, *Military Manual* (1995), Fascicule II, p. 19.

⁷⁸⁶ US, *Soldier's Manual* (1984), p. 27, see also p. 25.

It is the responsibility of the Chief of Naval Operations and the Commandant of the Marine Corps to ensure that:

- ...
3. alleged violations of the law of armed conflict, whether committed by or against United States or enemy personnel, are promptly reported, thoroughly investigated, and where appropriate, remedied by corrective actions.⁷⁸⁷

The manual further states that "all members of the naval service... have an affirmative obligation to report promptly violations of which they become aware."⁷⁸⁸

National Legislation

745. Germany's Law Introducing the International Crimes Code contains a provision entitled "Omission to report a crime" which provides that:

- (1) A military commander or a civilian superior who omits immediately to draw the attention of the agency responsible for the investigation or prosecution of any offence pursuant to this Law [*inter alia*, genocide, crimes against humanity and war crimes], to such an offence committed by a subordinate, shall be punished...
- (2) [Article 1(4)(2)] shall apply mutatis mutandis.⁷⁸⁹

746. India's Army Act provides that it is an offence for a commander "receiving a complaint that any one under his command has beaten or otherwise maltreated or oppressed any person... [to] fail to have due reparation made to the injured person or to report the case to the proper authority".⁷⁹⁰

National Case-law

747. In the *Brocklebank case* before the Canadian Court Martial Appeal Court in 1996 involving the question of criminal responsibility of a Canadian soldier serving on a peacekeeping mission in Somalia for having negligently performed a military duty, the Court of Appeal (majority) stated that:

I agree with the prosecution... that Canadian soldiers should conduct themselves when engaged in operations abroad in an accountable manner consistent with Canada's international obligations, the rule of law and simply humanity. There was evidence in this case to suggest that the respondent could readily have reported the misdeeds of his comrades. However, absent specific wording in the relevant international conventions and more specifically, the [*Unit Guide (1990)*], I simply cannot conclude that a member of the Canadian Forces has a penally enforceable obligation to intervene whenever he witnesses mistreatment of a prisoner who is not in his custody.

...

⁷⁸⁷ US, *Naval Handbook* (1995), § 6.1.2.

⁷⁸⁸ US, *Naval Handbook* (1995), § 6.1.4.

⁷⁸⁹ Germany, *Law Introducing the International Crimes Code* (2002), Article 1(14).

⁷⁹⁰ India, *Army Act* (1950), Section 64(a).

In closing, I would remark that...it remains open to the chief of defence staff to define in more explicit terms the standards of conduct expected of soldiers in respect of prisoners who are in Canadian Forces custody. It is open to the chief of defence staff to...impose a military duty on Canadian Forces members either to report or take reasonable steps to prevent or arrest the abuse of prisoners not in their charge... This might prove a useful undertaking.⁷⁹¹

Other National Practice

748. In 1984, in an assessment of the military implications of the Additional Protocols, Australia's Joint Military Operations and Plans Division, stated that Article 87(1) AP I:

imposes upon commanders the additional responsibility to prevent and, where necessary, to suppress and to report all breaches of the Geneva Conventions and its Protocols. This requires that the constraints imposed by the Protocols and the law of armed conflict generally are understood and reflected in the conduct of operations by every level of military authority.⁷⁹²

749. The Guidelines on Human Rights and Improvement of Discipline in the AFP, issued in 1989 by the Office of the Chief of Staff of the armed forces of the Philippines, provides that:

Commanders who are proven through due process to have countenanced human rights abuses by way of summarily dropping complaints, intimidating the complainant and/or witnesses, "cover-up" of the incidents, failure to report to superiors, and/or shows inaction on the complaint, shall be held accountable either as conduct unbecoming an officer or as accessory.⁷⁹³

750. The 1979 version of the US Department of Defense Directive on the Law of War Program stated that:

It is the policy of the Department of Defense to ensure that:

...

3. Alleged violations of the law of war, whether committed by or against U.S. or enemy personnel, are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.
4. Violations of the law of war alleged to have been committed by or against allied military or civilian personnel shall be reported through appropriate command channels for ultimate transmission to appropriate agencies of allied governments.⁷⁹⁴

⁷⁹¹ Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996.

⁷⁹² Australia, Joint Military Operations and Plans Division, Assessment of the Military Implications of the Protocols Additional to the Geneva Conventions of 1949, Series No. AA-A1838/376, File No. AA-1710/10/3/1 Pt 2, September 1984, § 10.

⁷⁹³ Philippines, Ministry of National Defence, Office of the Chief of Staff, Guidelines on Human Rights and Improvement of Discipline in the AFP, 2 January 1989, § 2(1) and (2).

⁷⁹⁴ US, Department of Defense Directive on the Law of War Program No. 5100.77, 10 July 1979, Section C(3) and (4).

751. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

[Department of Defense Directive on the Law of War Program No. 5100.77] is the foundation for the US military law of war program. It contains four policies:

- ...
- Alleged violations of the law of war, whether committed by or against US or enemy personnel, ... [will/shall be] promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.
 - Violations of the law of war alleged to have been committed by or against allied military or civilian personnel shall be reported through appropriate military command channels for ultimate transmission to appropriate agencies of allied governments.
- ...

Army Chief of Staff Regulation 11-2 assigns to the Army Judge Advocate General (JAG) responsibility for investigating, collecting, collating, evaluating, and reporting in connection with war crimes alleged to have been committed against US personnel.⁷⁹⁵

752. The 1998 version of the US Department of Defense Directive on the Law of War Program stated that:

It is DoD policy to ensure that:

- ...
- 4.3. All reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, when appropriate, remedied by corrective action.
 - 4.4. All reportable incidents committed by or against allied persons, or by or against other persons during a conflict to which the U.S. is not a party, are reported through command channels for ultimate transmission to appropriate U.S. Agencies, allied governments, or other appropriate authorities.⁷⁹⁶

A "reportable incident" is defined as "a possible, suspected, or alleged violation of the law of war".⁷⁹⁷ As to responsibilities, the Directive provides that:

The Secretaries of the Military Departments shall develop internal policies and procedures consistent with this Directive in support of the DoD Law of War Program to: ... [p]rovide for the prompt reporting and investigation of reportable incidents committed by or against members of their respective Military Departments, or persons accompanying them.⁷⁹⁸

The Directive further states that the Commanders of the Combatant Commands shall "issue directives to ensure that reportable incidents involving

⁷⁹⁵ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 633.

⁷⁹⁶ US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 4(4)(3) and (4)(4).

⁷⁹⁷ US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 3(2).

⁷⁹⁸ US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(5)(3).

U.S. or enemy persons are reported promptly to appropriate authorities, are thoroughly investigated, and the results of such investigations are promptly forwarded to the applicable Military Department or other appropriate authorities".⁷⁹⁹ Under a provision entitled "Reports of incidents", the Directive states that:

All military and civilian personnel assigned to or accompanying a DoD Component shall report reportable incidents through their chain of command. Such reports . . . may also be made through other channels, such as the military police, a judge advocate, or an Inspector General. Reports that are made to officials other than those specified in this subsection shall, nonetheless, be accepted and immediately forwarded through the recipient's chain of command.⁸⁰⁰

753. In Order No. 985-1/91 issued in 1991, the YPA Chief of General Staff stated that "command structures and units have the duty to inform immediately their commanding officers on any violation of international law of warfare. Any information in this regard that may appear should be forwarded to the General Staff in regular reports."⁸⁰¹

III. Practice of International Organisations and Conferences

United Nations

754. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) recalled that it had addressed the issue of command responsibility in its first interim report as follows: "Military commanders are under a special obligation, with respect to members of the armed forces under their command or other persons under their control, to prevent and, where necessary, to suppress such acts and to report them to competent authorities."⁸⁰² The Commission noted with satisfaction that Article 7 of the 1993 ICTY Statute used an essentially similar formulation.⁸⁰³

Other International Organisations

755. No practice was found.

⁷⁹⁹ US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(8)(4).

⁸⁰⁰ US, Department of Defence Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 6(1).

⁸⁰¹ SFRY (FRY), Chief of General Staff of the YPA, Legal Department, Order No. 985-1/91, 3 October 1991, § 4.

⁸⁰² UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 55.

⁸⁰³ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 56.

International Conferences

756. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

757. In its judgement in the *Blaškić case* in 2000, the ICTY Trial Chamber held that:

335... Where a person has the material ability to prevent or punish crimes committed by others, that person must be considered a superior. Accordingly, it is a commander's degree of effective control, his material ability, which will guide the Trial Chamber in determining whether he reasonably took the measures required either to prevent the crime or to punish the perpetrator... This implies that, under some circumstances, a commander may discharge his obligation to prevent or punish by reporting the matter to the competent authorities.⁸⁰⁴

V. Practice of the International Red Cross and Red Crescent Movement

758. No practice was found.

VI. Other Practice

759. No practice was found.

D. Obedience to Superior Orders*I. Treaties and Other Instruments**Treaties*

760. Article 77(1) of draft AP I submitted by the ICRC to the CDDH provided that "no person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol".⁸⁰⁵ This proposal was subject to amendments and referred to Working Group A of Committee I where it was adopted by 38 votes in favour, 22 against and 15 abstentions.⁸⁰⁶ The approved text provided that "the High Contracting Parties undertake to ensure that their internal law penalizing disobedience to orders shall not apply to orders that would constitute grave breaches of the Conventions and this Protocol".⁸⁰⁷ Eventually, however, it was deleted in the plenary, because it

⁸⁰⁴ ICTY, *Blaškić case*, Judgement, 3 March 2000, § 335.

⁸⁰⁵ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 25.

⁸⁰⁶ CDDH, *Official Records*, Vol. X, CDDH/234/Rev.1, 21 April–11 June 1976, p. 120, §§ 26–27; *Official Records*, Vol. X, CDDH/405/Rev. 1, 17 March–10 June 1977, p. 188, § 38, and p. 262; *Official Records*, Vol. IX, CDDH/1/SR.65, 9 June 1976, p. 332, § 30.

⁸⁰⁷ CDDH, *Official Records*, Vol. X, CDDH/405/Rev. 1, 17 March–10 June 1977, p. 262.

failed to obtain the necessary two-thirds majority (36 in favour, 25 against and 25 abstentions).⁸⁰⁸

761. Article VIII of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that “all persons who receive [orders or instructions that stipulate, authorize, or encourage forced disappearance] have the right and duty not to obey them”. However, Article XV excludes its application in international armed conflicts governed by the 1949 Geneva Conventions and their Additional Protocols.

762. Article 9(1) of the 1998 Draft Convention on Forced Disappearance provides that “no order or instruction of any public authority – civilian, military or other – may be invoked to justify a forced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it”.

Other Instruments

763. Paragraph 3 of the 1989 Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions provides that:

Governments shall prohibit orders from superior officers or public authorities authorizing or inciting other persons to carry out any such extralegal, arbitrary or summary executions. All persons shall have the right and the duty to defy such orders. Training of law enforcement officials shall emphasize the above provisions.

764. Paragraph 25 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that:

Governments and law enforcement agencies shall ensure that no criminal or disciplinary sanction is imposed on law enforcement officials who, in compliance with the Code of Conduct for Law Enforcement Officials and these basic principles, refuse to carry out an order to use force and firearms, or who report such use by other officials.

765. Article 6(1) of the 1992 UN Declaration on Enforced Disappearance stresses that “no order or instruction from any public authority, civilian, military or other, may be invoked to justify an enforced disappearance. Any person receiving such an order or instruction shall have the right and duty not to obey it.”

II. National Practice

Military Manuals

766. Australia's Defence Force Manual provides that “if an order is ambiguous, clarification should be sought. If clarification is unavailable, any action taken must comply with LOAC.”⁸⁰⁹

⁸⁰⁸ CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 308.

⁸⁰⁹ Australia, *Defence Force Manual* (1994), § 1306; see also *Commanders' Guide* (1994), § 1207.

767. Belgium's Disciplinary Regulations provides that "soldiers must loyally execute . . . orders given by their superiors in the interest of the service".⁸¹⁰ However, it adds that "an order must not be executed if this execution can manifestly lead to the perpetration of a crime or an offence".⁸¹¹

768. Burkina Faso's Disciplinary Regulations provides that "the subordinate loyally executes orders he receives". It also states that "the subordinate is responsible for the execution of the order received. He is liable to penal and/or disciplinary sanctions for refusing to obey when he wrongly invokes a motive of any sort."⁸¹²

769. Cameroon's Disciplinary Regulations provides that "obedience is the first duty of the subordinate and he shall loyally execute the orders he receives".⁸¹³ However, the manual also states that:

The subordinate [is released from] his penal responsibility when he obeys orders of his superior . . .

If the order is manifestly illegal or stipulates the commission of an illegal act [in the meaning of Article 17 of the Disciplinary Regulations which provides for criminal responsibility, *inter alia*, for acts in violation of the laws and customs of war], the subordinate engages his penal responsibility . . .

The subordinate who believes he is being confronted with an illegal order has the duty to communicate his objections to the authority which gives them . . . If the order is maintained . . . concerning acts contrary to the laws and customs of war, the subordinate has the absolute right not to execute the order.⁸¹⁴

770. Cameroon's Instructors' Manual provides that "it is forbidden for a soldier to obey orders constituting a crime".⁸¹⁵

771. Canada's Code of Conduct tells soldiers that:

Orders must be followed. Military effectiveness depends on the prompt obedience to orders. Virtually all orders you will receive from your superiors will be lawful, straightforward and require little clarification. What happens, however, if you receive an order that you believe to be questionable? Your first step of course must be to seek clarification. Then, if after doing so the order still appears to be questionable, in accordance with military custom you should still obey and execute the order – unless – the order is manifestly unlawful.⁸¹⁶

The Code of Conduct further states that:

It is recognized that the lower you are in rank, the more difficult it will be to question orders. However, every member of the CF has an obligation to disobey a manifestly unlawful order regardless of rank or position. A manifestly unlawful order is one which shocks the conscience of every reasonable, right-thinking person.

⁸¹⁰ Belgium, *Disciplinary Regulations* (1991), § 304(a), see also § 403(d).

⁸¹¹ Belgium, *Disciplinary Regulations* (1991), § 304(b).

⁸¹² Burkina Faso, *Disciplinary Regulations* (1994), Article 20(3) and (4).

⁸¹³ Cameroon, *Disciplinary Regulations* (1975), Article 19.

⁸¹⁴ Cameroon, *Disciplinary Regulations* (1975), Article 21.

⁸¹⁵ Cameroon, *Instructors' Manual* (1992), p. 26, § 121(3).

⁸¹⁶ Canada, *Code of Conduct* (2001), Rule 11, § 4.

For example, mistreating someone who has surrendered or beating a detainee is manifestly unlawful.⁸¹⁷

772. Congo's Disciplinary Regulations provides that "obedience is the first duty of the subordinate. He loyally executes orders he receives." However, it adds that "the subordinate must not execute an order to commit an act manifestly . . . contrary to the customs of war and to the international conventions".⁸¹⁸

773. The Military Manual of the Dominican Republic tells soldiers that although "you are responsible for promptly obeying all legal orders issued by your leader . . . you are obligated to disobey an order to commit a crime".⁸¹⁹

774. El Salvador's Human Rights Charter of the Armed Forces instructs members of military forces to "execute orders as far as possible in the scope of the law. If orders are a crime against human rights, do not execute them because they violate the law".⁸²⁰

775. France's Disciplinary Regulations as amended states that members of the military "have the duty to obey lawful orders".⁸²¹ It further provides that "the subordinate shall not carry out an order to do something that is manifestly unlawful or contrary to the customs of war, the rules of international law applicable in armed conflicts, or duly ratified or approved international treaties".⁸²²

776. Germany's Military Manual provides that:

According to German law an order is not binding if:

- it violates the human dignity of the third party concerned or the recipient of the order;
- it is not of any use for service; or
- in a definite situation, the soldier cannot reasonably be expected to execute it.

Orders which are not binding need not be executed by the soldier.⁸²³

The manual further stresses that "moreover, it is expressly prohibited to obey orders whose execution would be a crime" and that "punishment for disobedience or refusal to obey shall be impossible if the order is not binding (§ 22 of the Military Penal Code)".⁸²⁴

777. Italy's IHL Manual states that:

Concerning the norm and the consequent disciplinary rule, "the soldier who is requested to obey an order which manifestly violates State institutions or an order whose execution would anyway constitute a manifest crime, is under the obligation not to execute that order and inform his superiors as soon as possible."⁸²⁵

⁸¹⁷ Canada, *Code of Conduct* (2001), Rule 11, § 5.

⁸¹⁸ Congo, *Disciplinary Regulations* (1986), Article 21.

⁸¹⁹ Dominican Republic, *Military Manual* (1980), p. 12.

⁸²⁰ El Salvador, *Human Rights Charter of the Armed Forces* (undated), p. 11.

⁸²¹ France, *Disciplinary Regulations as amended* (1975), Article 6.

⁸²² France, *Disciplinary Regulations as amended* (1975), Article 8(3).

⁸²³ Germany, *Military Manual* (1992), § 142.

⁸²⁴ Germany, *Military Manual* (1992), §§ 143 and 145.

⁸²⁵ Italy, *IHL Manual* (1991), Vol. I, § 83.

778. According to the Military Handbook of the Netherlands, an order issued in time of war that would lead to a war crime if complied with should be refused. It explains that soldiers have a duty to refuse to obey an order if they know or if it is manifest, given the facts known to them, that it constitutes a war crime.⁸²⁶

779. New Zealand's Military Manual provides that "one such obligation, and the one which clearly sets a member of a military force apart from his civilian counterparts, is the obligation to obey lawful commands of a superior officer".⁸²⁷ It adds, however, that, "if a command is unlawful and is obeyed, the person who obeys it could find himself charged with a criminal offence or a war crime".⁸²⁸ The manual also states that:

If it is obvious that an order is unlawful, then it should not be obeyed. Orders which are obviously unlawful are extremely rare. An order to torture or kill prisoners of war or innocent civilians or to loot civilian property would be obviously unlawful. This kind of order should never be obeyed and it should never be assumed that it will provide a defence if a charge results from its obedience.⁸²⁹

The manual further points out that:

If . . . an unclear order is received, and especially if one of the possible meanings of the order appears to be unlawful, then clarification should be sought immediately. Blind obedience, in such cases, is not what is required. In . . . cases of unclear orders, blind obedience could lead to unfortunate and perhaps unforeseen results. In our example, both the sergeant and the superior whom we infer meant to convey nothing in any way illegal, could find themselves the subject of serious charges, simply because an unclear order was not clarified or questioned.⁸³⁰

780. Peru's Human Rights Charter of the Security Forces provides that, if they believe an order violates human rights, members of the armed and police forces are required to seek more justifications for its execution.⁸³¹

781. The Code of Ethics of the Philippines provides that "every officer and soldier shall obey the lawful orders of his immediate superior. Anyone who shall refuse or fail to carry out a lawful order from the military chain of command shall be subject to military discipline."⁸³²

782. Rwanda's Disciplinary Regulations provides that a subordinate may not execute a manifestly unlawful order.⁸³³

783. South Africa's LOAC Manual states that:

Every soldier has a duty to obey lawful orders of superiors. Failure to do so is a serious offence. However, an order to commit a war crime is an unlawful order. A

⁸²⁶ Netherlands, *Military Handbook* (1995), p. 7-45.

⁸²⁷ New Zealand, *Military Manual* (1992), Annex C, § C14(1).

⁸²⁸ New Zealand, *Military Manual* (1992), Annex C, § C14(2).

⁸²⁹ New Zealand, *Military Manual* (1992), Annex C, § C14(4).

⁸³⁰ New Zealand, *Military Manual* (1992), Annex C, § C14(5).

⁸³¹ Peru, *Human Rights Charter of the Security Forces* (1991), p. 13.

⁸³² Philippines, *Code of Ethics* (1991), Section 2.3, pp. 16-17.

⁸³³ Rwanda, *Disciplinary Regulations* (undated), Article 15.

person who commits a war crime pursuant to an order is guilty of a war crime if that person knew or should have known that the order was unlawful.⁸³⁴

The manual further recalls that “the Constitution of the Republic of South Africa, 1996, provides that ‘no member of any security service may obey a manifestly illegal order’ [Section 199(6)]”.⁸³⁵

784. South Africa’s Medical Services Military Manual provides that “when an order is manifestly illegal the subordinate has the duty to refuse to obey”.⁸³⁶

785. The UK LOAC Manual provides that “military personnel are required to obey lawful commands but must not obey unlawful commands”.⁸³⁷ It further states that “illegal orders are not to be given nor carried out”.⁸³⁸

786. The US Field Manual states that “members of the armed forces are bound to obey only lawful orders”.⁸³⁹

787. The US Air Force Pamphlet states that “members of the armed forces are bound to obey only lawful orders”.⁸⁴⁰

788. The US Soldier’s Manual tells the soldier that “although you are responsible for promptly obeying all legal orders issued by your leader, you are obligated to disobey an order to commit a crime”.⁸⁴¹

789. The US Naval Handbook provides that:

Members of the naval service, like military members of all nations, must obey readily and strictly all *lawful* orders issued by a superior. Under both international law and U.S. law, an order to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an *unlawful* order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict.⁸⁴² [emphasis in original]

790. Uruguay’s Disciplinary Regulations provides that “no subordinate shall hesitate to challenge the orders of his commanding officer when he deems it necessary”.⁸⁴³

National Legislation

791. Argentina’s Code of Military Justice as amended applies disciplinary sanctions to military personnel who refuse to obey a military order given by a superior (insubordination). Similarly, it defines the crime of disobedience, which includes actions by military personnel who, while not ostensibly or expressly refusing to obey, fail without any just cause to carry out a military order. It adds

⁸³⁴ South Africa, *LOAC Manual* (1996), § 44.

⁸³⁵ South Africa, *LOAC Manual* (1996), § 44.

⁸³⁶ South Africa, *Medical Services Military Manual* (undated), p. 5.

⁸³⁷ UK, *LOAC Manual* (1981), Section 10, p. 38, § 1.

⁸³⁸ UK, *LOAC Manual* (1981), Annex A, p. 46, § 2.

⁸³⁹ US, *Field Manual* (1956), § 509(b).

⁸⁴⁰ US, *Air Force Pamphlet* (1976), § 15-4(d).

⁸⁴¹ US, *Soldier’s Manual* (1984), p. 26.

⁸⁴² US, *Naval Handbook* (1995), § 6.1.4.

⁸⁴³ Uruguay, *Disciplinary Regulations* (1980), Article 40.

that no excuse shall justify disobedience or the failure to carry out a military order.⁸⁴⁴

792. Under Armenia's Penal Code, failing to carry out in time of war a "properly given legitimate order" is a punishable offence.⁸⁴⁵ However, "refusal to execute an obviously illegal order or instruction is an exemption from criminal liability".⁸⁴⁶

793. Under Australia's Defence Force Discipline Act, disobedience to a "lawful command" is a punishable military offence.⁸⁴⁷

794. Austria's Military Penal Code as amended provides for the punishment, in principle, of the non-execution of orders.⁸⁴⁸ However, it also provides that a soldier is not punishable if he/she does not execute an order which consists in the commission of a punishable offence.⁸⁴⁹

795. Under the Criminal Code of Belarus, the failure to execute an order is a punishable offence.⁸⁵⁰

796. Belgium's Law on Discipline in the Armed Forces provides that "soldiers must faithfully execute the orders given to them by their superiors in the interest of service. However, an order must not be executed if its execution could clearly result in the perpetration of a crime or an offence".⁸⁵¹

797. Under Brazil's Military Penal Code, disobedience to a lawful order is a punishable offence.⁸⁵²

798. Chile's Code of Military Justice provides that:

All military personnel are obliged to obey an operational order given them by a superior in the exercise of his legitimate powers . . . The right to demand that the acts of a superior yield to the statutes or regulations does not exempt the subordinate from obedience nor does it suspend the fulfilment of an operational order.⁸⁵³

The Code further provides that:

Where the order is clearly conducive to the perpetration of an offence, then the subordinate may suspend the performance of the said order and, in urgent cases, modify it, immediately reporting this to the superior . . . If the superior insists on maintaining the order, it shall be carried out under the terms of the previous article.⁸⁵⁴

⁸⁴⁴ Argentina, *Code of Military Justice as amended* (1951), Articles 667, 674 and 675.

⁸⁴⁵ Armenia, *Penal Code* (2003), Article 356(1) and (3).

⁸⁴⁶ Armenia, *Penal Code* (2003), Article 47(3).

⁸⁴⁷ Australia, *Defence Force Discipline Act* (1982), Section 27.

⁸⁴⁸ Austria, *Military Penal Code as amended* (1970), Articles 12–16.

⁸⁴⁹ Austria, *Military Penal Code as amended* (1970), Articles 17.

⁸⁵⁰ Belarus, *Criminal Code* (1999), Article 439.

⁸⁵¹ Belgium, *Law on Discipline in the Armed Forces* (1975), Article 11(2).

⁸⁵² Brazil, *Military Penal Code* (1969), Article 163.

⁸⁵³ Chile, *Code of Military Justice* (1925), Article 334.

⁸⁵⁴ Chile, *Code of Military Justice* (1925), Article 335.

799. Under Croatian law, soldiers have the duty to obey orders, unless an order would lead to a war crime or any other serious crime. Members of the armed forces are required to report unlawful orders they may have received.⁸⁵⁵

800. Under Cuba's Military Criminal Code, disobedience or failure to obey an order is a punishable offence, but if the order is regarded as an excessive requirement, the court may apply special mitigation of the sanction.⁸⁵⁶

801. Under Egypt's Military Criminal Code, failure to execute orders is punishable if the order in question is "legal". However, it also provides for the punishment of persons who do not obey "military orders".⁸⁵⁷

802. El Salvador's Law on the Armed Forces provides that "the duty to obey is limited to those orders that do not transgress statutory or regulatory provisions in force".⁸⁵⁸

803. Germany's Law on the Legal Status of Military Personnel stipulates that it is not to be regarded as disobedience if the subordinate does not carry out an order which would violate human dignity.⁸⁵⁹ It also provides that "an order may not be complied with if, by that, a criminal act would be committed".⁸⁶⁰

804. Under India's Army Act and under other laws applicable to coast guards and border police forces, disobedience to a lawful order is an offence.⁸⁶¹

805. Under Jordan's Military Criminal Code, disobedience to a lawful order is a punishable offence.⁸⁶²

806. Under Kenya's Armed Forces Act, disobedience to a lawful command is an offence.⁸⁶³

807. Malaysia's Armed Forces Act provides that:

Every person subject to service law under this Act who in such manner as to show wilful defiance of authority disobeys any lawful command of his superior officer shall on conviction by court-martial be liable [to punishment].

Every person subject to service law under this Act who, whether wilfully or through neglect, disobeys any lawful command of his superior officer shall on conviction by court-martial be liable [to punishment].⁸⁶⁴

However, in a footnote related to the foregoing provision, the Act states with respect to "lawful command" that "the command must not be contrary to Malaysian or international law . . . If a command is manifestly illegal the person

⁸⁵⁵ Croatia, *Code of Criminal Procedure* (1993), Article 190; *Law on Military Service* (1995), Article 27(1); *Criminal Code* (1997), Article 388.

⁸⁵⁶ Cuba, *Military Criminal Code* (1979), Article 5.

⁸⁵⁷ Egypt, *Military Criminal Code* (1966), Articles 151, 152 and 153.

⁸⁵⁸ El Salvador, *Law on the Armed Forces* (1998), Article 25.

⁸⁵⁹ Germany, *Law on the Legal Status of Military Personnel* (1995), § 11(1).

⁸⁶⁰ Germany, *Law on the Legal Status of Military Personnel* (1995), § 11(2)(1).

⁸⁶¹ India, *Army Act* (1950), Section 41; *Coast Guards Act* (1978), Section 20; *Indo-Tibetan Border Police Force Act* (1992), Section 23.

⁸⁶² Jordan, *Military Criminal Code* (1952), Article 17.

⁸⁶³ Kenya, *Armed Forces Act* (1968), Article 28.

⁸⁶⁴ Malaysia, *Armed Forces Act* (1972), Section 50.

to whom it is given would be justified in questioning and even refusing to execute it."⁸⁶⁵

808. Nigeria's Army Act and Armed Forces Decree 105 as amended provide that military personnel have the duty to obey lawful orders.⁸⁶⁶

809. Under Pakistan's Army Act, a soldier is liable to punishment if he disobeys a "lawful command".⁸⁶⁷

810. Pakistan's Frontier Corps Ordinance provides for the punishment of "every member of the Frontier Corps who –... while on active service –... disobeys the lawful command of his superior officer".⁸⁶⁸

811. Under Peru's Code of Military Justice, refusal or failure to execute a military order in wartime constitutes a punishable offence. Failure to carry out an order in the course of duty without justifiable cause constitutes disobedience.⁸⁶⁹

812. Poland's Penal Code provides that "a soldier who does not execute or refuses to execute an order or executed an order in a way inconsistent with its contents, shall be punished".⁸⁷⁰ However, it also states that:

1. A soldier who refuses to execute an order consisting in committing an offence or does not execute it, does not commit an offence described in Art. 343.
2. In case of the execution of an order mentioned in § 1 in a way inconsistent with its contents in order to diminish the harmfulness of the acts, the court may apply an extraordinary mitigation of punishment or desist from inflicting it.⁸⁷¹

813. Under Russia's Criminal Code, failure to execute an order is a punishable offence.⁸⁷²

814. South Africa's Code of Military Discipline as amended, in a provision entitled "Disobeying lawful commands or orders", provides that "any person who in wilful defiance of authority disobeys any lawful command given personally by his superior officer in execution of his duty, whether orally, in writing or by signal, shall be guilty of an offence and liable on conviction".⁸⁷³

815. South Africa's Constitution provides that "no member of any security service [i.e. defence force, police force and intelligence services] may obey a manifestly illegal order".⁸⁷⁴

816. Spain's Royal Ordinance for the Armed Forces provides that "where an order would entail the execution of acts which are manifestly contrary to the

⁸⁶⁵ Malaysia, *Armed Forces Act* (1972), Section 50, footnote 4.

⁸⁶⁶ Nigeria, *Army Act* (1960), Section 40; *Armed Forces Decree 105 as amended* (1993), Sections 56 and 57.

⁸⁶⁷ Pakistan, *Army Act* (1952), Section 33.

⁸⁶⁸ Pakistan, *Frontier Corps Ordinance* (1959), Section 8(e)(i).

⁸⁶⁹ Peru, *Code of Military Justice* (1980), Articles 78(24), 158, 159, 161, 162 and 172.

⁸⁷⁰ Poland, *Penal Code* (1997), Article 343(1).

⁸⁷¹ Poland, *Penal Code* (1997), Article 344.

⁸⁷² Russia, *Criminal Code* (1996), Article 332.

⁸⁷³ South Africa, *Code of Military Discipline as amended* (1957), § 19(1).

⁸⁷⁴ South Africa, *Constitution* (1996) Section 199(1) and (6).

laws and customs of war or constitute a crime . . . no soldier is bound to obey it".⁸⁷⁵

817. Spain's Penal Code provides that criminal liability is not incurred by authorities or public employees who do not comply with an order constituting a clear, manifest and definite breach of a precept of law or any other general provision.⁸⁷⁶

818. Tajikistan's Criminal Code provides that "non-execution of a knowingly unlawful order or instruction excludes criminal responsibility".⁸⁷⁷

819. Uruguay's Organisational Law of Armed Forces states that military status imposes a fundamental "duty of obedience, respect, and subordination to the superior at all times and in all places, in accordance with the laws and regulations in force".⁸⁷⁸

National Case-law

820. In the *Sergeant W. case* in 1966, Belgium's Court-Martial of Brussels sentenced a sub-officer to three years' imprisonment for the wilful killing of a civilian. The accused, who at the time of the event was chasing rebels, was serving in the Congolese army within the framework of military technical co-operation between Congo (DRC) and Belgium. The Court held that, the accused's interpretation of the order he had received, i.e. to kill an unarmed person in his power, was manifestly unlawful; the accused therefore had a duty to disobey this order.⁸⁷⁹

821. In his dissenting opinion in the *Finta case* before the Canadian Supreme Court in 1994, one of the judges recognised that "military orders can and must be obeyed unless they are manifestly unlawful". He added that an order was manifestly unlawful when it "offends the conscience of every reasonable, right thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong."⁸⁸⁰

822. In its judgement in the *Guzmán and Others case* in 1974, Chile's Santiago Council of War stated that:

The provisions of Article 335 of the Code of Military Justice [which provides for the right to disobey an unlawful order] require that: a) an order be received from a hierarchical superior; b) that this order be related to the military service; and c) that the subordinate has explained the illegality of the order to the superior, and that the latter has insisted on the order's performance.⁸⁸¹

⁸⁷⁵ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 34.

⁸⁷⁶ Spain, *Penal Code* (1995), Article 410.2.

⁸⁷⁷ Tajikistan, *Criminal Code* (1998), Article 45(3).

⁸⁷⁸ Uruguay, *Organisational Law of Armed Forces* (1974), Article 61.

⁸⁷⁹ Belgium, Court-Martial of Brussels, *Sergeant W. case*, Judgement, 18 May 1966.

⁸⁸⁰ Canada, Supreme Court, *Finta case*, Dissenting opinion of one of the judges, 24 March 1994.

⁸⁸¹ Chile, Santiago Council of War (FACH), *Guzmán and Others case*, Judgement, 30 July 1974.

823. In a case relating to conscientious objection in 1992, the Colombian Constitutional Court considered that a superior's order that would consist of occasioning death outside combat would clearly lead to a violation of human rights and of the Constitution. As such it should be disobeyed.⁸⁸² In another case in 1995, in which the Court was examining the constitutionality of a military regulation that provided that a subaltern was obliged to obey a superior's order that he/she thought unlawful, if the order was confirmed in writing, the Court took the same approach.⁸⁸³

824. In its judgement in the *Dover Castle case* in 1921, Germany's Reichsgericht held that "it is a military principle that the subordinate is bound to obey the orders of his superiors".⁸⁸⁴

825. In the *Ofer, Malinki and Others case* in 1958, Israel's District Military Court for the Central Judicial District ruled that "the rule is that a soldier must obey every order (subject to the exception) given him by his commander while fulfilling his duty . . . The exception is that he need not execute an order that is manifestly illegal." As to the term "manifestly illegal", the Court went on to explain that:

The identifying mark of a "manifestly unlawful" order must wave like a black flag above the order given, as a warning saying: "forbidden". It is not formal unlawfulness, hidden or halfhidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces the eye and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of "manifest" illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.⁸⁸⁵

The Military Court of Appeal adopted these words and added that the legislator's solution to the problem of conflict between law and obedience is, as it were, a golden mean between giving complete preference to one of those factors over the other, because it recognised

the impossibility of reconciling these two values through purely formal law, and therefore foregoes the attempt to resolve the problem by these means alone; it bursts out of the confines, as it were, of the purely judicial categories, calling for help on the sense of lawfulness that lies deep within the conscience of every human being as such, even if he is not expert in the law.⁸⁸⁶

⁸⁸² Colombia, Constitutional Court, *Constitutional Case No. T-409*, Judgement, 8 June 1992.

⁸⁸³ Colombia, Constitutional Court, *Constitutional Case No. C-578*, Judgement, 4 December 1995.

⁸⁸⁴ Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921.

⁸⁸⁵ Israel, District Military Court for the Central Judicial District, *Ofer, Malinki and Others case*, Judgement, 13 October 1958.

⁸⁸⁶ Israel, Military Court of Appeal, *Ofer, Malinki and Others case*, Judgement, 3 April 1959.

826. In its judgement in the *Hass and Priebke case* in 1997, Italy's Military Tribunal of Rome stated that the duty to disobey an openly criminal order was independent from the fact that the subordinate could or could not prevent the event. The Tribunal further stated that "it is evident, indeed, that a member of the armed forces must not obey an unlawful order given to him even if he is aware that other persons may be willing to carry it out".⁸⁸⁷ In its relevant parts, this judgement was confirmed by the Military Appeals Court and the Supreme Court of Cassation.⁸⁸⁸

827. In its judgement in the *Zühlke case* in 1948, a Special Court in Amsterdam (Netherlands), with regard to the accused's plea of superior orders, stated that:

The Court rejects this plea. Indeed . . . there was no need for him in the given circumstances to carry out such orders. An order to commit actions forbidden by international law may not be carried out, and a mistaken idea as to the validity or existence of such prohibitive provisions does not carry with it exclusion from penal liability. The detention in prison of persons who were incarcerated on the ground of their origin, or the ill-treatment and humiliation of prisoners, does not belong to the sphere of military subordination. The accused, who was not only a prison warder by occupation but had also been trained as a non-commissioned officer, must have known this.⁸⁸⁹

828. In its judgement in the *Margen case* in 1950, the Supreme Court of the Philippines held that "obedience to an order of a superior gives rise to exemption from criminal liability only when the order is for some lawful purpose . . . [In this case] the order was illegal, and appellant was not bound to obey it."⁸⁹⁰

829. In the *Calley case* in 1973, the US Army Court of Military Appeals approved the following instructions given to the panel by the trial judge in a case where the accused invoked an order to kill unresisting detainees:

A determination that an order is illegal does not, of itself, assign criminal responsibility to the person following the order for acts done in compliance with it. Soldiers are taught to follow orders, and special attention is given to obedience of orders on the battlefield. Military effectiveness depends upon obedience to orders. On the other hand, the obedience of a soldier is not the obedience of an automaton. A soldier is a reasoning agent, obliged to respond, not as a machine, but as a person. The law takes these factors into account in assessing criminal responsibility for acts done in compliance with illegal orders.⁸⁹¹

The Court cited a writer's opinion to the effect that:

For the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination,

⁸⁸⁷ Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement in Trial of First Instance, 22 July 1997.

⁸⁸⁸ Italy, Military Appeals Court, *Hass and Priebke case*, Judgement on Appeal, 7 March 1998; Supreme Court of Cassation, *Hass and Priebke case*, Judgement in Trial of Third Instance, 16 November 1998.

⁸⁸⁹ Netherlands, Special Court in Amsterdam, *Zühlke case*, Judgement, 3 August 1948.

⁸⁹⁰ Philippines, Supreme Court, *Margen case*, Judgement, 30 March 1950.

⁸⁹¹ US, Army Court of Military Appeals, *Calley case*, Judgement, 21 December 1973.

and such an assumption carried into practice would subvert military discipline. Where the order is apparently regular and *lawful on its face*, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, *the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness* . . .

Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it can scarcely fail to be held justified by a military court.⁸⁹² [emphasis in original]

Other National Practice

830. According to a statement by Argentina's Chief of Staff of the Army in 1995, nobody is obliged to carry out an order which is unethical or which contravenes military laws and regulations.⁸⁹³

831. At the CDDH, Australia stated that it "supported the objectives sought in the ICRC text of article 77 [of draft AP I]. Since the article should relate solely to grave breaches, paragraph 1 could be approved without reservation."⁸⁹⁴

832. According to the Report on the Practice of Chile, "Chile adheres to the principle of reasoned obedience".⁸⁹⁵

833. The Report on the Practice of Cuba states that:

In practice, there is no record of military personnel giving orders violating international humanitarian law, but in accordance with the interpretation of [Article 25(3) of the Penal Code providing for mitigation in case of excessive order], obeying an illegal order is comparable with excessive requirement to obey, and the possibility of not obeying can therefore be envisaged.⁸⁹⁶

834. The Report on the Practice of Egypt, referring to an explanatory memorandum relative to Article 15 of Egypt's Military Criminal Code which provides for the punishment of not executing legal orders, notes "the fact that the order of a superior should be a 'legal one'". The report further states that "clearly, this may open the door for a defence of non-execution of an order to commit a violation of IHL".⁸⁹⁷

835. The Report on the Practice of India, referring to provisions of the Army Act, Coast Guard Act and Indo-Tibetan Boarder Police Force Act, states that it is "possible to deduce from these provisions a right to disobey unlawful orders given by superior officials/authorities because the relevant provisions

⁸⁹² US, Army Court of Military Appeals, *Calley case*, Judgement, 21 December 1973, referring to Col. William Winthrop, *Military Law and Precedents*, pp. 296–297, 2nd edition 1920 (reprint).

⁸⁹³ Argentina, Chief of Staff of the Army, Statement of 25 April 1995, *Revista de la Escuela Superior de Guerra*, July–September 1995, p. V; see also Chief of Staff of the Army, Statement of 29 May 1995, *Revista de la Escuela Superior de Guerra*, April–June 1995, p. I.

⁸⁹⁴ Australia, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.51, 5 May 1976, p. 128, § 26.

⁸⁹⁵ Report on the Practice of Chile, 1997, Chapter 6.8.

⁸⁹⁶ Report on the Practice of Cuba, 1998, Chapter 6.8.

⁸⁹⁷ Report on the Practice of Egypt, 1997, Chapter 6.8.

very clearly provide that a person is not supposed to wilfully defy 'lawful' orders or commands given by the superiors".⁸⁹⁸

836. At the CDDH, Israel stated that it had voted in favour of Article 77 of draft AP I and that:

The article is a reflection of existing customary international law clearly enunciated in the Nürnberg principles and embodied in [Israeli law].

We regret that Article 77 was not adopted... and wish to state that the rule [initially providing, *inter alia*, that "no person shall be punished for refusing to obey an order of his government or of a superior which, if carried out, would constitute a grave breach of the provisions of the Conventions or of the present Protocol"] continues to be governed by customary international law.⁸⁹⁹

837. The Report on the Practice of Israel states that:

Under general Israeli law and IDF internal regulations, there exists a differentiation between an "unlawful order" and a "manifestly unlawful order". Based on the understanding that clarity of command is a required element in any military organization, all IDF soldiers are required to comply with "unlawful orders"... As regards "manifestly unlawful orders"... IDF soldiers are required by law to refuse any such order.⁹⁰⁰

838. On the basis of the decisions of the Military Tribunal of Rome in the *Priebke case* and in the *Hass and Priebke case*, the Report on the Practice of Italy concludes that "the *opinio juris* of Italy is that a soldier has the duty to disobey an order to commit a violation of international humanitarian law".⁹⁰¹

839. According to the Report on the Practice of Jordan, Article 17 of the Military Criminal Code of Jordan, which provides for the imposition of a penalty upon a subordinate who disobeys a lawful order, "means that if a subordinate knows that the order given by a superior would result in a breach of the law he must disobey it".⁹⁰²

840. In an article published in a military review, a member of the Kuwaiti armed forces stated that:

If a soldier receives an illegal order, he should draw the attention of his commander to the illegality of the same. If the commander insists on his opinion, the soldier should abide by the order and implement it, unless the illegality is clear, and the order forms a crime, e.g. if the military commander orders to forge papers, embezzle funds, murder a human being or torture him. Here the duty of obedience is turned into the duty of refusal.⁹⁰³

⁸⁹⁸ Report on the Practice of India, 1997, Chapter 6.8.

⁸⁹⁹ Israel, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 336.

⁹⁰⁰ Report on the Practice of Israel, 1997, Chapter 6.8.

⁹⁰¹ Report on the Practice of Italy, 1997, Chapter 6.8.

⁹⁰² Report on the Practice of Jordan, 1997, Chapter 6.8.

⁹⁰³ Fellah Awad Al-Anzi, "The accomplishment of duties and the execution of military orders, their limits and constraints", *Homat Al-Watan*, No. 149, p. 61.

841. According to the Report on the Practice of Kuwait, under Kuwait's military laws, soldiers take the oath to obey rightful orders.⁹⁰⁴

842. The Report on the Practice of Pakistan states that:

Although the text of the oath [for soldiers] merely refers to obedience to "all commands", still it is to be understood that the text of the oath . . . cannot be read beyond the provisions of [section 33 of the Army Act (1952) which provides that a soldier is liable to punishment if he disobeys a "lawful command"]. It is to be noted that although there is no provision explicitly stating that unlawful command should be disobeyed, still the section 33 can be interpreted to mean that there will be no punishment under the Army Act if the soldier has disobeyed the command which is illegal . . . Thus the *opinio juris* and the practice in Pakistan is that unlawful command can be refused.⁹⁰⁵

843. The Report on the Practice of the Philippines, referring to a provision of the Revised Penal Code which provides that "any person who acts in obedience to an order issued by a superior for some lawful purpose" does not incur any criminal liability, states that "however, if the order is obviously illegal, the person has the duty to disobey it".⁹⁰⁶

844. According to the Report on the Practice of Russia, "no document of the CIS countries [contains] a provision that a superior's order can be omitted if it would mean a violation of the rules of IHL". However, the report also notes that "the right of a subordinate to disobey a superior's order violating the rules of IHL can be inferred from the provision that a violation of the rules of IHL is considered to be a war crime and is prosecuted as a penal offence".⁹⁰⁷

845. The Report on the Practice of Spain states that "since the subordinate is not protected [from penal responsibility under the Military Criminal Code] by the defence of hierarchical obedience, he is bound to disobey any order manifestly contrary to the laws and customs of war, a phrase that covers breaches of international humanitarian law".⁹⁰⁸

846. According to the Report on US Practice, it is the *opinio juris* of the US that the law of war obliges all persons not to commit war crimes. The duty to obey the law of war prevails over the duty to obey a manifestly unlawful order.⁹⁰⁹

847. During a debate in Committee I of the CDDH, Uruguay, although criticising Article 77 of draft AP I submitted by the ICRC, stated that it "supported the principles underlying Article 77, which undoubtedly had its place in the section of draft Protocol I dealing with the repression of breaches".⁹¹⁰

⁹⁰⁴ Report on the Practice of Kuwait, 1997, Chapter 6.8.

⁹⁰⁵ Report on the Practice of Pakistan, 1998, Chapter 6.8.

⁹⁰⁶ Report on the Practice of Philippines, 1997, Chapter 6.9, referring to *Revised Penal Code* (1930), Article 11(6).

⁹⁰⁷ Report on the Practice of Russia, 1997, Chapter 6.8.

⁹⁰⁸ Report on the Practice of Spain, 1998, Chapter 6.8.

⁹⁰⁹ Report on US Practice, 1997, Chapter 6.8.

⁹¹⁰ Uruguay, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.52, 6 May 1976, p. 144, § 45.

III. Practice of International Organisations and Conferences

United Nations

848. In 1997, in the recommendations of his second report on the situation of human rights in Burundi, the Special Rapporteur of the UN Commission on Human Rights stated that “the members of the armed forces should know that they have the right to refuse to carry out orders that will result in slaughter”.⁹¹¹

Other International Organisations

849. No practice was found.

International Conferences

850. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

851. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

852. No practice was found.

VI. Other Practice

853. The SPLM Human Rights Charter provides that “all persons have the right and duty to refuse to carry out orders that would involve them abusing the above principles, without fear of punishment”.⁹¹²

854. The Penal and Disciplinary Laws of the SPLM/A state that:

The following offences shall be punishable under this Law and shall pertain only to members of the Sudan People’s Liberation Army and its affiliated organizations.

...

d) Disobedience of Lawful Orders from a Superior.⁹¹³

E. Defence of Superior Orders

I. Treaties and Other Instruments

Treaties

855. Article 8 of the 1945 IMT Charter (Nuremberg) provides that “the fact that the Defendant acted pursuant to order of his Government or of a superior

⁹¹¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in Burundi, Second report, UN Doc. E/CN.4/1997/12, 10 February 1997, § 93.

⁹¹² SPLM, Human Rights Charter, May 1996, § 11.

⁹¹³ SPLM/A, Penal and Disciplinary Laws, 4 July 1984, Section 26(d).

shall not free him from responsibility, but may be considered in mitigation of punishment if the Tribunal determines that justice so requires”.

856. Article 77(2) of draft AP I submitted by the ICRC to the CDDH provided that “the fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from penal responsibility if it be established that, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the Conventions or of the present Protocol and that he had the possibility of refusing to obey the order”.⁹¹⁴ This proposal was subject to amendments and referred to Working Group A of Committee I where it was adopted by 38 votes in favour, 22 against and 15 abstentions.⁹¹⁵ The approved text provided that:

The mere fact of having acted pursuant to an order of an authority or a superior does not absolve an accused person from penal responsibility, if it be established that in the circumstances at the time he knew or should have known that he was committing a grave breach of the Conventions or of this Protocol. It may, however, be taken into account in mitigation of punishment.⁹¹⁶

Eventually, however, the whole Article was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 25 against and 25 abstentions).⁹¹⁷

857. Article 2 of the 1984 Convention against Torture provides that “an order from a superior officer or a public authority may not be invoked as a justification of torture”.

858. Article VIII of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that “the defense of due obedience to superior orders or instructions that stipulate, authorize, or encourage forced disappearance shall not be admitted”. However, Article XV excludes its application in international armed conflicts governed by the 1949 Geneva Conventions and their Additional Protocols.

859. Article 9(1) of the 1998 Draft Convention on Forced Disappearance provides that “no order or instruction of any public authority – civilian, military or other – may be invoked to justify a forced disappearance”.

860. Article 33 of the 1998 ICC Statute provides that:

1. The fact that a crime within the jurisdiction of the Court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;

⁹¹⁴ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 25.

⁹¹⁵ CDDH, *Official Records*, Vol. X, CDDH/234/Rev.1, 21 April–11 June 1976, p. 120, §§ 26–27; *Official Records*, Vol. X, CDDH/405/Rev. 1, 17 March–10 June 1977, p. 188, § 38, and p. 262; *Official Records*, Vol. IX, CDDH/1/SR.65, 9 June 1976, p. 332, § 30.

⁹¹⁶ CDDH, *Official Records*, Vol. X, CDDH/405/Rev. 1, 17 March–10 June 1977, p. 262.

⁹¹⁷ CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 308.

- (b) The person did not know that the order was unlawful; and
- (c) The order was not manifestly unlawful.

2. For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.

861. Article 6(4) of the 2002 Statute of the Special Court for Sierra Leone, dealing with “Individual criminal responsibility”, provides that “the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires”.

Other Instruments

862. Article II, Section 4(b), of the 1945 Allied Control Council Law No. 10 provides that “the fact that any person acted pursuant to the order of his Government or of a superior does not free him from responsibility for a crime, but may be considered in mitigation”.

863. Article 6 of the 1946 IMT Charter (Tokyo), entitled “Responsibility of Accused”, provides that:

Neither the official position, at any time, of an accused, nor the fact that an accused acted pursuant to order of his government or of a superior shall, of itself, be sufficient to free such accused from responsibility for any crime with which he is charged, but such circumstances may be considered in mitigation of punishment if the Tribunal determines that justice so requires.

864. Principle IV of the 1950 Nuremberg Principles provides that “the fact that a person acted pursuant to order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact possible to him”.

865. Article 4 of the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind provides that “the fact that a person charged with an offence defined in this Code acted pursuant to an order of his Government or of a superior does not relieve him of responsibility in international law if, in the circumstances at the time, it was possible for him not to comply with that order”.

866. Article 5 of the 1979 Code of Conduct for Law Enforcement Officials provides that:

No law enforcement official may invoke superior orders or exceptional circumstances such as a state of war or a threat of war, a threat to national security, internal political instability or any other public emergency as a justification of torture or other cruel, inhuman or degrading treatment or punishment.

867. Paragraph 26 of the 1990 Basic Principles on the Use of Force and Firearms by Law Enforcement Officials provides that “obedience to superior orders shall be no defence if law enforcement officials knew that an order to use force and

firearms resulting in the death or serious injury of a person was manifestly unlawful and had a reasonable opportunity to refuse to follow it".

868. Article 11 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Order of a Government or a superior", provides that "the fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility if, in the circumstances at the time, it was possible for him not to comply with that order".

869. Article 7(4) of the 1993 ICTY Statute provides that "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal determines that justice so requires".

870. Article 6(4) of the 1994 ICTR Statute provides that "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the International Tribunal for Rwanda determines that justice so requires".

871. Paragraph 31 of the 1994 CSCE Code of Conduct states that "the responsibility of superiors does not exempt subordinates from any of their individual responsibilities".

872. Article 5 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Order of a Government or a superior", provides that "the fact that an individual charged with a crime against the peace and security of mankind acted pursuant to an order of a Government or a superior does not relieve him of criminal responsibility, but may be considered in mitigation of punishment if justice so requires".

873. Section 21 of the 2000 UNTAET Regulation No. 2000/15 provides that "the fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him of criminal responsibility, but may be considered in mitigation of punishment if a panel determines that justice so requires".

II. National Practice

Military Manuals

874. Australia's Defence Force Manual provides that:

ADF members are open to prosecution for breaches of LOAC. Individual responsibility for compliance cannot be avoided and ignorance is not a justifiable excuse. ADF members will be held to account for any unlawful action that leads to a serious breach of LOAC. If such acts are committed, compliance with unlawful orders of a superior officer is not a justifiable excuse.⁹¹⁸

⁹¹⁸ Australia, *Defence Force Manual* (1994), § 1306; see also *Commanders' Guide* (1994), § 1207.

875. Cameroon's Disciplinary Regulations provides that "the subordinate is relieved from his penal responsibility when he obeys his commander's orders and in conformity with the provisions of Article 83-1 of the Penal Code".⁹¹⁹ It adds, however, that "if the order is manifestly illegal . . . the subordinate engages his penal responsibility according to the provisions of Articles 82-b and 83-2 of the Penal Code".⁹²⁰ The manual further states that "if the subordinate is constrained by force or physical threat, he shall be totally relieved of his penal responsibility".⁹²¹

876. Canada's LOAC Manual, referring to the *Finta case*, provides that "the fact that an accused person acted pursuant to an order of a Government or a superior does not relieve this person of criminal responsibility . . . However, in some cases the fact that an accused acted pursuant to a superior order may be considered in mitigation of punishment."⁹²² The manual further states that "it is no defence to a war crime that the act was committed in compliance with an order".⁹²³ It adds that "an act . . . performed in compliance with an order which is manifestly unlawful to a reasonable soldier given the circumstances prevailing at the time does not constitute a defence and cannot be pleaded in mitigation of punishment".⁹²⁴

877. Canada's Code of Conduct provides that "it must be remembered that if you are charged for carrying out a manifestly unlawful order, it will not be a defence to say that you were only following orders. This is why leaders have an obligation to provide clear lawful commands."⁹²⁵ It adds that "disciplined personnel do not commit war crimes or breach the Law of Armed Conflict. They understand the nature of a lawful command and are always conscious that they must carry out their orders in a manner consistent with the law and the goal of the overall mission."⁹²⁶

878. Colombia's Basic Military Manual states that "under the terms of Chapter IX of the First Geneva Convention relative to the repression of abuses and infractions, IHL establishes the principle of individual responsibility, that is to say, that acting pursuant to superior orders does not relieve the person of his responsibility for the grave breaches he may commit".⁹²⁷

879. The Military Manual of the Dominican Republic tells soldiers that "even if you had orders to commit the act, it is no defence if it was a manifestly criminal act".⁹²⁸

⁹¹⁹ Cameroon, *Disciplinary Regulations* (1975), Article 21(I).

⁹²⁰ Cameroon, *Disciplinary Regulations* (1975), Article 21(II).

⁹²¹ Cameroon, *Disciplinary Regulations* (1975), Article 21(III).

⁹²² Canada, *LOAC Manual* (1999), p. 16-4, § 28.

⁹²³ Canada, *LOAC Manual* (1999), p. 16-5, § 33.

⁹²⁴ Canada, *LOAC Manual* (1999), p. 16-5, § 34.

⁹²⁵ Canada, *Code of Conduct* (2001), Rule 11, § 5.

⁹²⁶ Canada, *Code of Conduct* (2001), Rule 11, § 6.

⁹²⁷ Colombia, *Basic Military Manual* (1995), p. 37.

⁹²⁸ Dominican Republic, *Military Manual* (1980), p. 12.

880. France's LOAC Manual states that "each individual is responsible for the violations of the law of armed conflicts for which he/she has made himself/herself guilty, whatever the circumstances may be, and even if he/she acted in execution of an order emanating from a superior".⁹²⁹

881. Germany's Military Manual provides that "a plea of superior orders shall not be acknowledged if the subordinate realized or, according to the circumstances known to him, obviously could have realized that the action ordered was a crime (§ 5 of the Military Penal Code)".⁹³⁰

882. South Korea's Operational Law Manual states that the fact that a soldier obeyed an unlawful order cannot relieve him of responsibility.⁹³¹

883. New Zealand's Military Manual states that "it is no defence to a war crimes charge that the act was committed in compliance with an order".⁹³² It further states that:

An act which is performed in compliance with an unlawful order which, to a reasonable member of the armed forces in the circumstances prevailing at the time of the order, is obviously, palpably or manifestly unlawful, does not constitute a defence to a war crimes charge: nor can it be pleaded in mitigation of punishment.⁹³³

The manual then states that "if the order involves the commission of an act which is unlawful, though not manifestly so, the fact that it was committed in compliance with an order may be taken into consideration for the purpose of mitigation of punishment".⁹³⁴ It adds that:

If it is obvious that an order is unlawful, then it should not be obeyed. Orders which are obviously unlawful are extremely rare. An order to torture or kill prisoners of war or innocent civilians or to loot civilian property would be obviously unlawful. This kind of order should never be obeyed and it should never be assumed that it will provide a defence if a charge results from its obedience.⁹³⁵

In one of its annexes, the manual also states that "if a command is unlawful and is obeyed, the person who obeys it could find himself charged with a criminal offence or a war crime".⁹³⁶

884. Nigeria's Manual on the Laws of War provides that "obedience to an order of a government or of a superior, whether military or civil, or to a municipal law or regulation, affords no defence to a charge of committing a war-crime but may be considered in mitigation of punishment".⁹³⁷

⁹²⁹ France, *LOAC Manual* (2001), p. 113. ⁹³⁰ Germany, *Military Manual* (1992), § 144.

⁹³¹ South Korea, *Operational Law Manual* (1996), p. 189, § 3.

⁹³² New Zealand, *Military Manual* (1992), § 1710(1).

⁹³³ New Zealand, *Military Manual* (1992), § 1710(2).

⁹³⁴ New Zealand, *Military Manual* (1992), § 1710(3).

⁹³⁵ New Zealand, *Military Manual* (1992), Annex C, § C14(4).

⁹³⁶ New Zealand, *Military Manual* (1992), Annex C, § C14(2).

⁹³⁷ Nigeria, *Manual on the Laws of War* (undated), § 9.

885. Peru's Human Rights Charter of the Security Forces provides that "the execution of a manifestly illegal order is no exemption from penal responsibility".⁹³⁸

886. South Africa's LOAC Manual, referring to the South African Constitution (1996), provides that "a person who commits a war crime pursuant to an order is guilty of a war crime if that person knew or should have known that the order was unlawful".⁹³⁹

887. South Africa's Medical Services Military Manual provides that "when an order is manifestly illegal the subordinate has the duty to refuse to obey. The order will not be a ground of justification in such a case, it will not justify his/her acts."⁹⁴⁰

888. Sweden's IHL Manual recalls that "according to the so-called Nuremberg principles, the fact that a person has acted upon the orders of a government or a superior shall not free him from liability in international law, provided that he had a genuine possibility of avoiding the act in question".⁹⁴¹

889. Switzerland's Basic Military Manual provides that "the subordinate or inferior is also punishable if he realised while executing the order that he was participating in the perpetration of a crime. The fact that the subordinate or inferior acted pursuant to an order can constitute a mitigating circumstance."⁹⁴²

890. The UK Military Manual states that "obedience to the order of a government or of a superior, whether military or civil, or to a national law or regulation, affords no defence to a charge of committing a war crime but may be considered in mitigation of punishment".⁹⁴³

891. The UK LOAC Manual provides that "there is no defence of 'superior orders'. If a soldier carries out an illegal order, both he and the person giving that order are responsible."⁹⁴⁴

892. The US Field Manual provides that:

The fact that the law of war has been violated pursuant to an order of a superior authority, whether military or civil, does not deprive the act in question of its character of a war crime, nor does it constitute a defense in the trial of an accused individual, unless he did not know and could not reasonably have been expected to know that the act ordered was unlawful. In all cases where the order is held not to constitute a defense to an allegation of war crime, the fact that the individual was acting pursuant to orders may be considered in mitigation of punishment.⁹⁴⁵

893. The US Air Force Pamphlet provides that:

⁹³⁸ Peru, *Human Rights Charter of the Security Forces* (1991), p. 13.

⁹³⁹ South Africa, *LOAC Manual* (1996), § 44.

⁹⁴⁰ South Africa, *Medical Services Military Manual* (undated), p. 5.

⁹⁴¹ Sweden, *IHL Manual* (1991), Section 4.2, p. 95.

⁹⁴² Switzerland, *Basic Military Manual* (1987), Article 199(2).

⁹⁴³ UK, *Military Manual* (1958), § 627.

⁹⁴⁴ UK, *LOAC Manual* (1981), Section 10, p. 38, § 1.

⁹⁴⁵ US, *Field Manual* (1956), § 509(a).

The fact that an act was committed pursuant to military orders is an acceptable defense only if the accused did not know or could not reasonably have been expected to know that the act ordered was unlawful. . . . Nevertheless, in all cases, the fact that an individual was acting pursuant to orders may be considered a mitigating factor in determining punishment.⁹⁴⁶

The manual gives the example of the Manual for Courts-Martial, which states that:

An order requiring the performance of a military duty may be inferred to be legal. An act performed manifestly beyond the scope of authority, or pursuant to an order that a man of ordinary sense and understanding would know to be illegal, or in a wanton manner discharge of a lawful duty, is not excusable.⁹⁴⁷

894. The US Soldier's Manual tells soldiers that:

Even if you had orders to commit the act, you are personally responsible. Orders are not a defense.

...

Soldiers who kill captives or detainees cannot excuse themselves from the acts by claiming that an order to "take care of" a captive or detainee was understood to mean "execution". Common sense and the laws of war will help you recognize what is clearly criminal.⁹⁴⁸

895. The US Naval Handbook states that:

Under both international law and US law, an order to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an *unlawful* order and will not relieve a subordinate of his responsibility to comply with the law of armed conflict. Only if the unlawfulness of an order is not known by the individual, and he could not reasonably be expected under the circumstances to recognize the order as unlawful, will the defense of obedience of an order protect a subordinate from the consequences of violation of the law of armed conflict.⁹⁴⁹ [emphasis in original]

The manual further states that:

The fact that a person committed a war crime under orders of his military or civilian superior does not relieve him from responsibility under international law. It may be considered in mitigation of punishment. To establish responsibility, the person must know (or have reason to know) that an act he is ordered to perform is unlawful under international law. Such an order must be manifestly illegal. The standard is whether under the same or similar circumstances a person of ordinary sense and understanding would know the order to be unlawful. If the person knows the act is unlawful and only does it under duress, this circumstance may be taken into consideration either by way of defense or in mitigation of punishment.⁹⁵⁰

⁹⁴⁶ US, *Air Force Pamphlet* (1976), § 15-4(d). ⁹⁴⁷ US, *Air Force Pamphlet* (1976), § 15-4(d).

⁹⁴⁸ US, *Soldier's Manual* (1984), p. 26. ⁹⁴⁹ US, *Naval Handbook* (1995), § 6.1.4.

⁹⁵⁰ US, *Naval Handbook* (1995), § 6.2.5.5.1.

896. The Annotated Supplement to the US Naval Handbook states that “under both international law and U.S. law, an order to commit an obviously criminal act . . . is an unlawful order and will not relieve the subordinate of his responsibility to comply with the law of armed conflict”. It specifies that “the order may be direct or indirect, explicit or implied”.⁹⁵¹

897. Under the YPA Military Manual of the SFRY (FRY), a member of the armed forces is responsible if he commits a violation of the laws of war in execution of a superior order if he knew that such order involved the commission of a criminal act.⁹⁵²

National Legislation

898. Under Albania’s Military Penal Code, a person is not relieved from personal criminal responsibility if the act was committed pursuant to a manifestly unlawful order.⁹⁵³

899. Under Argentina’s Code of Military Justice as amended, in the event that a crime is committed through the execution of a military order, only the superior officer who gave the order shall be held responsible for the crime, and the subordinate shall only be considered an accomplice to the crime if the order is carried out to excess.⁹⁵⁴

900. Argentina’s Decree on Trial before the Supreme Council of the Armed Forces, issued in connection with the trial of the military junta, stated that:

The existence of plans for orders renders the members of the military junta in office at the time, as well as the officers of the armed forces at the decision-making level, responsible in their capacity as indirect perpetrators for the criminal acts committed in compliance with the plans drawn up and overseen by the superiors (Article 514 of the Code of Military Justice). The text of this rule mitigates the responsibility of the subordinates, in particular because in many cases the subordinates may well have failed to understand the moral and legal significance of their acts owing to the psychological tactics used and the coercive context in which they found themselves.⁹⁵⁵

901. Australia’s War Crimes Act as amended provides that:

The fact that, in doing an act alleged to be an offence against this Act, a person acted under orders of his or her government or of a superior is not a defence in a proceeding for the offence, but may, if the person is convicted of the offence, be taken into account in determining the proper sentence.⁹⁵⁶

⁹⁵¹ US, *Annotated Supplement to the Naval Handbook* (1997), § 6.1.4, footnote 16.

⁹⁵² SFRY (FRY), *YPA Military Manual* (1988), § 22.

⁹⁵³ Albania, *Military Penal Code* (1995), Article 21.

⁹⁵⁴ Argentina, *Code of Military Justice as amended* (1951), Article 514.

⁹⁵⁵ Argentina, *Decree on Trial before the Supreme Council of the Armed Forces* (1983), preamble.

⁹⁵⁶ Australia, *War Crimes Act as amended* (1945), Section 16.

902. Austria's Military Penal Code as amended provides that a soldier is responsible for punishable acts even if he committed them in execution of an order.⁹⁵⁷

903. Bangladesh's International Crimes (Tribunal) Act, which provides for individual responsibility for, *inter alia*, crimes against humanity, crimes against peace, genocide, war crimes, "violations of any humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949", as well as "any other crimes under international law", states that "the fact that [the] accused acted pursuant to his domestic law or to order of his Government or of a superior shall not free him from responsibility but may be considered in mitigation of punishment if the Tribunal deems that justice so requires".⁹⁵⁸

904. Under the Criminal Code of Belarus, a person who intentionally commits an offence pursuant to an order that he/she knows to be illegal is criminally responsible.⁹⁵⁹

905. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that:

The fact that the defendant acted on the order of his/her government or a superior shall not absolve him/her from responsibility where, in the prevailing circumstances, the order could clearly result in the commission of a crime of genocide or of a crime against humanity . . . or a grave breach of the Geneva Conventions . . . and their Additional Protocol I.⁹⁶⁰

906. Under Brazil's Military Penal Code, obedience to a manifestly unlawful order is not a valid defence.⁹⁶¹

907. Cambodia's Law on the Khmer Rouge Trial, in the provision dealing with individual responsibility, states that "the fact that a Suspect acted pursuant to an order of the Government of Democratic Kampuchea or of a superior shall not relieve the Suspect of individual criminal responsibility".⁹⁶²

908. Chile's Code of Military Justice provides that a subordinate who receives an illegal order and who does not follow a special procedure of questioning it before performing it, will receive mitigation of punishment.⁹⁶³ It also gives as a general rule, except the case mentioned above, that the commission of a criminal act in complying with the order of a superior in rank can be taken into account in mitigation of punishment.⁹⁶⁴

909. Congo's Genocide, War Crimes and Crimes against Humanity Act states that:

⁹⁵⁷ Austria, *Military Penal Code as amended* (1970), Article 3(1).

⁹⁵⁸ Bangladesh, *International Crimes (Tribunal) Act* (1973), Sections 3(2) and 5(2).

⁹⁵⁹ Belarus, *Criminal Code* (1999), Article 40.

⁹⁶⁰ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 5(2).

⁹⁶¹ Brazil, *Military Penal Code* (1969), Article 38.

⁹⁶² Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 29.

⁹⁶³ Chile, *Code of Military Justice* (1925), Articles 214(2) and 335.

⁹⁶⁴ Chile, *Code of Military Justice* (1925), Article 211.

The author or accomplice of a crime hereunder cannot be exonerated of his/her responsibility only because he/she has executed an act... ordered by the legal authority. However, the court will take these circumstances into consideration when determining the punishment and its duration.⁹⁶⁵

910. Egypt's Penal Code provides that a public officer is not liable for acts committed pursuant to the order of a superior if he/she could reasonably believe that the order was lawful and if he has made necessary investigations and assured himself of the legitimacy of the order.⁹⁶⁶

911. Egypt's Military Criminal Code, which is silent on the defence of superior orders, provides that in case of silence, general rules should be applied.⁹⁶⁷

912. Estonia's Penal Code provides that "the fact that the offence provided for in the present chapter [i.e. crimes against humanity, crimes against peace and war crimes] was committed pursuant to the order of a representative of public administration or of a military commander shall not preclude the punishment of the author of the crime".⁹⁶⁸

913. Ethiopia's Penal Code provides that:

The subordinate who has carried out an order to commit an offence . . . shall be liable to punishment if he was aware of the illegal nature of the order or knew that the order was given without authority or knew the criminal nature of the act ordered, such as in cases of homicide, arson or any other grave offence against persons or property, essential public interests or international law.

The Court may, without restriction, reduce the penalty when the person who performed the act ordered was moved by a sense of duty dictated by discipline or obedience; the Court shall take into account the compelling nature of the duty.

The Court may impose no punishment where, having regard to all the circumstances and in particular to the stringent exigencies of State or military discipline, the person concerned could not discuss the order received and act otherwise than he did.⁹⁶⁹

914. France's Ordinance on Repression of War Crimes provided that:

Laws, decrees and regulations emanating from the enemy authority, orders or authorizations given by this authority or by authorities depending thereupon or having depended thereupon cannot be invoked as justifying facts in the meaning of the [Penal Code], but only, if ever, as attenuating circumstances or as absolutive excuses.⁹⁷⁰

915. France's Penal Code provides that a person who executes an act pursuant to a command by a legitimate authority shall not be criminally responsible,

⁹⁶⁵ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 13.

⁹⁶⁶ Egypt, *Penal Code* (1937), Article 63.

⁹⁶⁷ Egypt, *Military Criminal Code* (1966), Article 10.

⁹⁶⁸ Estonia, *Penal Code* (2001), § 88(2).

⁹⁶⁹ Ethiopia, *Penal Code* (1957), Article 70.

⁹⁷⁰ France, *Ordinance on Repression of War Crimes* (1944), Article 3.

provided the act was not manifestly illegal.⁹⁷¹ However, in the chapter dealing with crimes against humanity, the Code provides that:

The author of or accomplice to a crime . . . cannot be released from his/her responsibility for the sole reason of having committed an act . . . ordered by the legitimate authority. However, [the court] will take into account such circumstance when determining the punishment.⁹⁷²

916. Under Germany's Military Penal Code as amended, a person acting pursuant to an order of a superior is not relieved of criminal responsibility if he/she realised or, according to the circumstances known to him, should have realised that the order was a crime. The court can mitigate punishment if, taking circumstances into account, the personal liability of the subordinate is limited.⁹⁷³

917. Germany's Law on the Legal Status of Military Personnel stipulates that:

An order may not be complied with if, by that, a criminal act would be committed. If the subordinate nevertheless complies with the order, he/she is guilty only if he/she realises or if, under the circumstances known to him/her, it is obvious to him/her, that, by that, a criminal act would be committed.⁹⁷⁴

918. Germany's Law Introducing the International Crimes Code provides that:

Whoever commits an offence [consisting of a war crime, a violation of the duty of supervision or the omission to report a crime] in execution of a military order or of an order comparable in its actual binding effect shall have acted without guilt in so far as the perpetrator does not realise that the order is unlawful and in so far as it is also not manifestly unlawful.⁹⁷⁵

919. Under Iraq's Military Penal Code, a person remains criminally responsible if he/she knew the order he/she received aims at committing a crime.⁹⁷⁶

920. Israel's Nazis and Nazi Collaborators (Punishment) Law excludes certain defences otherwise existing under the Israeli Criminal Code of the time, *inter alia*, for cases dealing with crimes against the Jewish people, war crimes and crimes against humanity.⁹⁷⁷ However, it also states that:

In determining the punishment of a person convicted of an offence under this Law, the court may take into account, as grounds for mitigating the punishment, the following circumstances:

- (a) that the person committed the offence under conditions which, but for section 8, would have exempted him from criminal responsibility or constituted a reason for pardoning the offence, and that he did his best to reduce the gravity of the consequences of the offence;

⁹⁷¹ France, *Penal Code* (1994), Article 122-4.

⁹⁷² France, *Penal Code* (1994), Article 213-4.

⁹⁷³ Germany, *Military Penal Code as amended* (1957), Section 5.

⁹⁷⁴ Germany, *Law on the Legal Status of Military Personnel* (1995), § 11(2).

⁹⁷⁵ Germany, *Law Introducing the International Crimes Code* (2002), Article 1(3).

⁹⁷⁶ Iraq, *Military Penal Code* (1940), Articles 43 and 98.

⁹⁷⁷ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 8, excluding the applicability of Articles 16–19 of the Israeli Criminal Code of the time.

- (b) that the offence was committed with intent to avert, and was indeed calculated to avert, consequences more serious than those which resulted from the offence;

however, in the case of an offence under section 1 [a crime against the Jewish people, a crime against humanity or a war crime], the court shall not impose on the offender a lighter punishment than imprisonment for a term of ten years.⁹⁷⁸

921. Israel's Penal Law as amended states that:

- (a) A person is not criminally responsible for an act or omission done or made either –
- (1) in execution of the law or
 - (2) in obedience to the order of a competent authority, which he is bound by law to obey, unless the order is manifestly unlawful.
- (b) Whether an order is manifestly unlawful is a question of law.⁹⁷⁹

922. The Draft Amendments to the Code of Military Justice of Lebanon, in a part dealing with the punishment for war crimes, provide that “the superior and the subordinate will both be held responsible in case of the perpetration of any of the infringements mentioned”.⁹⁸⁰

923. Luxembourg's Law on the Punishment of Grave Breaches provides that “the fact that the accused has acted under the order of his Government or of a superior in rank does not relieve him of his responsibility if, under the circumstances at the time, he should have realised the criminal character of the order and had the possibility not to comply with it”.⁹⁸¹

924. Article 42 of the Penal Code as amended of the Netherlands provides that a person performing an act in execution of a legal requirement shall not be liable to punishment. Article 43 provides that a person shall not be liable to punishment “for acts committed in performance of an official order issued by an authorised authority” and that “an official order that has been given without authority does not relieve from punishment, unless the subordinate believes in good faith that the order is authorized and obedience to the order is inherent to his or her subordinate position”.⁹⁸²

925. The International Crimes Act of the Netherlands provides that:

1. The fact that a crime as defined in this Act [genocide, crimes against humanity, war crimes, torture] was committed pursuant to a regulation issued by the legal power of a State or pursuant to an order of a superior does not make that act lawful.
2. A subordinate who commits a crime referred to in this Act in pursuance of an order by a superior shall not be criminally responsible if the order was believed by the subordinate in good faith to have been given lawfully and the execution of the order came within the scope of his competence as a subordinate.

⁹⁷⁸ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Sections 10 and 11.

⁹⁷⁹ Israel, *Penal Law as amended* (1977), Section 24.

⁹⁸⁰ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 148.

⁹⁸¹ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 8.

⁹⁸² Netherlands, *Penal Code as amended* (1881), Articles 42 and 43.

3. For the purposes of subsection 2, an order to commit genocide or a crime against humanity is deemed to be manifestly unlawful.⁹⁸³

According to this Act, "superior" means: "(i) a military commander, or a person effectively acting as such, who has effective command or authority over or exercises effective control over one or more subordinates; (ii) a person who exercises effective authority, in a civilian capacity, over or exercises effective control over one or more subordinates".⁹⁸⁴

926. Niger's Penal Code as amended, under a chapter entitled "Crimes against humanity and war crimes" providing for the punishment of a list of offences such as genocide, crimes against humanity, and war crimes in the meaning of the 1949 Geneva Conventions and both Additional Protocols, provides that:

The author or accomplice of one of the crimes set out in this chapter cannot be exonerated from his or her responsibility for the only reason that he or she committed an act stipulated or authorised by legal provisions or an act ordered by the legal authority. However, the court shall take these circumstances into consideration at the determination of the punishment.⁹⁸⁵

927. Under Peru's Code of Military Justice, obedience to a superior's order is a valid defence, if the order is not manifestly unlawful.⁹⁸⁶

928. The Revised Penal Code of the Philippines, in a provision entitled "Justifying circumstances", states that "the following do not incur any criminal liability: . . . any person who acts in obedience to an order issued by a superior for some lawful purpose".⁹⁸⁷

929. Poland's Penal Code provides that "a member of the armed forces who commits a prohibited act in carrying out an order does not commit an offence unless, while carrying out the order, he commits an offence intentionally".⁹⁸⁸

930. Rwanda's Penal Code provides, as a general rule, that an illegal act done in pursuance of the law or of a superior's order does not entail liability. The Code further provides, however, that the execution of a manifestly illegal order does not relieve the subordinate of responsibility.⁹⁸⁹

931. Slovenia's Penal Code provides that:

A subordinate shall not be punished if he commits a criminal offence by order or command of a superior issued in the course of military service, unless he has committed a war crime or any other grave criminal offence or if he knew that the carrying out of the order or command constituted a criminal offence.⁹⁹⁰

⁹⁸³ Netherlands, *International Crimes Act* (2003), Article 11.

⁹⁸⁴ Netherlands, *International Crimes Act* (2003), Article 1(1)(b).

⁹⁸⁵ Niger, *Penal Code as amended* (1961), Article 208.6.

⁹⁸⁶ Peru, *Code of Military Justice* (1980), Article 19(7).

⁹⁸⁷ Philippines, *Revised Penal Code* (1930), Article 11(6).

⁹⁸⁸ Poland, *Penal Code* (1997), Article 318.

⁹⁸⁹ Rwanda, *Penal Code* (1977), Articles 70 and 229.

⁹⁹⁰ Slovenia, *Penal Code* (1994), Article 283.

932. Spain's Royal Ordinance for the Armed Forces provides that "where an order would entail the execution of acts which are manifestly contrary to the laws and customs of war or constitute a crime . . . no soldier is bound to obey it; in any case, he must assume serious responsibility for his act or omission".⁹⁹¹

933. Spain's Military Criminal Code states that obeying any order involving the commission of acts manifestly contrary to the laws or customs of war does not constitute an exonerating or mitigating circumstance.⁹⁹²

934. Spain's Law on Security Forces provides that under no circumstances may a defence of due obedience be applied to orders involving the execution of acts that manifestly constitute offences or are contrary to Spain's Constitution or laws.⁹⁹³

935. Sweden's Penal Code as amended provides that "an act committed by a person on the order of someone to whom he owes obedience shall not result in his being liable to punishment, if in view of the nature of obedience due, the nature of the act and the circumstances in general, it was his duty to obey the order".⁹⁹⁴

936. Under Switzerland's Military Criminal Code as amended, a subordinate who participates in the commission of a punishable offence while carrying out a superior's order is not relieved of responsibility if he/she knew that the act was a punishable offence. However, the judge may mitigate or exempt from punishment.⁹⁹⁵

937. Tajikistan's Criminal Code provides that:

It does not constitute a crime . . . if a person acts in execution of an order or an instruction which was obligatory for him/her and which was duly made.

A person who committed a wilful crime in executing an unlawful order or instruction shall be criminally liable on general grounds.⁹⁹⁶

938. Uruguay's Penal Code as amended, in a provision referring to compliance with the law, provides that "anyone who performs an act, ordered or permitted by law, on account of his public functions, his profession, [or] his authority . . . shall be exempt from liability".⁹⁹⁷ It further provides that:

Anyone performing an act out of due obedience shall not be liable for it.

A determination of due obedience requires the following:

- a) The order comes from an authority.
- b) Said authority is competent to issue it.
- c) The agent has the obligation to carry it out.

⁹⁹¹ Spain, *Royal Ordinance for the Armed Forces* (1978), Article 34.

⁹⁹² Spain, *Military Criminal Code* (1985), Article 21.

⁹⁹³ Spain, *Law on Security Forces* (1986), Article 5.1(d).

⁹⁹⁴ Sweden, *Penal Code as amended* (1962), Chapter 24, § 8.

⁹⁹⁵ Switzerland, *Military Criminal Code as amended* (1927), Article 18(2).

⁹⁹⁶ Tajikistan, *Criminal Code* (1998), Article 45(1)–(2).

⁹⁹⁷ Uruguay, *Penal Code as amended* (1933), Article 28.

The agent's error as to the existence of this requirement shall be determined by the judge, taking into account his position in the administrative hierarchy, his level of education, and the seriousness of the act.⁹⁹⁸

939. Uruguay's Military Penal Code as amended states that "when a soldier commits an offence in the course of duty on orders from a superior, the conditions specified in Article 29 of the ordinary Penal Code [as amended] are presumed to apply in the absence of proof of the contrary".⁹⁹⁹

940. Yemen's Military Criminal Code states that:

In the case of the commission of any of the crimes set out under this chapter [i.e. war crimes], the . . . the subordinate will be held responsible for the crime and will not be released from the punishment provided for, except if the acts have been committed against [his] choice, or without [his] knowledge, or if [he] did not have the possibility to prevent them.¹⁰⁰⁰

941. Under the provision of the Penal Code as amended of the SFRY (FRY) entitled "Responsibility for criminal acts committed under superior orders", the commission of a war crime is treated as an exception to the general rule that a subordinate will not be punished for a criminal act committed under superior order in execution of official duties, if he/she knew that such an act was a crime.¹⁰⁰¹

National Case-law

942. In its judgement in the *Military Junta case* in 1985, Argentina's National Court of Appeals held that the legal rule that exempted subordinates from responsibility for the crimes they committed on military orders was none other than the application of the "duty to obey" principle (Article 514, Code of Military Justice, according to which only the superior bears criminal responsibility in the event that a crime is committed through the execution of an order, *supra*). It found that the unlawful orders had been given by the accused for the purpose of carrying out military acts to combat terrorist subversion, an activity that was part of the functions they performed. Under the terms of Article 11 of Law 23.049, which provides a genuine interpretation of the text contained in Article 514, the subordinate shall be held responsible for the crime committed if he had decision-making powers, knew the order was illegal, or if the order involved committing atrocities or aberrant acts. The Court found that, owing to their position in the chain of command, some individuals knew of the unlawfulness of the system, and that others had committed atrocities. It also stated that some subordinates would not be covered by the defence of duty to obey, and that they

⁹⁹⁸ Uruguay, *Penal Code as amended* (1933), Article 29.

⁹⁹⁹ Uruguay, *Military Penal Code as amended* (1943), Article 17.

¹⁰⁰⁰ Yemen, *Military Criminal Code* (1998), Article 23.

¹⁰⁰¹ SFRY (FRY), *Penal Code as amended* (1976), Article 239.

were responsible for the acts committed, together with those who had given the orders.¹⁰⁰²

943. In the *Military Junta case* in 1986, Argentina's Supreme Court found, however, that, where a crime is committed through its execution, the relevant regulation (Article 514 of the Code of Military Justice) transferred responsibility for the crime to the superior, on the principle that responsibility lay in the allocation of duties for the purpose of ensuring discipline. This was not a transfer of the capacity of the perpetrator, but a transfer of penal responsibility for the purpose of imposing discipline. Consequently, the Court found that in peacetime only Article 514 of the Code of Military Justice applied within the framework of military orders, and that the object of the trial was the unlawful acts committed outside the scope of military operations, and that therefore the rules of the Penal Code (Article 45) should apply. According to the Court, those who gave the orders and made the material means available participated as necessary collaborators and not as perpetrators under the terms of Article 45 of the Penal Code, since the subordinates had ample opportunity to determine the fate of the detainees. The Court questioned the degree of "subjugation" to which, according to the Court of Appeals, those executing the acts were subjected. It distinguished perpetrators or co-perpetrators "who took part in the execution of the act" from other types of involvement entailing cooperation, aid or assistance. For this reason, the Court modified the Court of Appeals' designation of the perpetrators' commanders, referring to them instead as "participating as necessary collaborators".¹⁰⁰³

944. In its judgement in the *Leopold case* in 1967, in which the accused was convicted of the murder of several POWs in Poland during the Second World War, Austria's Supreme Court held that under the principles laid down in the Nuremberg judgement, obedience to an order of a superior neither justified an offence nor in general excused it. Only "absolute coercion" could constitute such an excuse.¹⁰⁰⁴

945. In the *Sergeant W. case* in 1966, Belgium's Court-Martial of Brussels sentenced a sub-officer to three years' imprisonment for the wilful killing of a civilian. The accused, who at the time of the event was chasing rebels, was serving in the Congolese army within the framework of military technical co-operation between Congo (DRC) and Belgium. He invoked the defence of superior orders. The Court held that, the accused's interpretation of the order he had received, i.e. to kill an unarmed person in his power, was manifestly unlawful; the accused therefore had a duty to disobey this order.¹⁰⁰⁵

946. In its judgement in the *V.C. case* in 1983, in which the accused, a mercenary in Katanga (Congo/DRC), was ordered to kill a wounded person, Belgium's

¹⁰⁰² Argentina, National Court of Appeals, *Military Junta case*, Judgement, 9 December 1985.

¹⁰⁰³ Argentina, Supreme Court, *Military Junta case*, Judgement, 30 December 1986.

¹⁰⁰⁴ Austria, Supreme Court, *Leopold case*, Judgement, 10 May 1967.

¹⁰⁰⁵ Belgium, Court-Martial of Brussels, *Sergeant W. case*, Judgement, 18 May 1966.

Court of Cassation held that there was no general principle of law that allowed the killing of a wounded person because he was “mortally wounded”. An order to kill a wounded person for that sole reason was manifestly criminal. Consequently, the justification of a superior’s order could not be raised.¹⁰⁰⁶

947. In its judgement in the *Kalid case* in 1995, a Belgian Military Court, with respect to the requirements for relying on a superior’s order as grounds for justification, stated that in accordance with domestic and international law, to be able to claim a superior’s order as grounds for justification:

- (a) the cited order must be given beforehand, and its implementation must correspond to the purpose of that order,
- (b) the cited order must be issued by a legitimate superior acting within the limits of his authority,
- (c) the order issued must be legitimate, i.e., in conformity with the law and regulations;

... in connection with this last point, it may generally be assumed that a soldier of the lowest rank may base his actions on the assumption that the order was legitimate.¹⁰⁰⁷

948. In the *Halilović case* in 1998, the Doboj District Court (Republika Srpska of Bosnia and Herzegovina) upheld a Municipal Court decision to sentence Ferid Halilović, a member of the Croatian Defence Council (HVO), to 15 years’ imprisonment for war crimes committed in 1992 against the civilian population during his time as a prison guard at detention centres in Odzak, Novi Grad and Bosanski Brod where mainly Serb civilians were held. In its findings concerning mitigating circumstances, the District Court noted that “one also has to keep in mind that the accused was working in camps as a guard, so he did some forbidden acts at orders of superiors and especially at orders of the camp warden”.¹⁰⁰⁸

949. In its judgement on appeal in the *Finta case* in 1994, Canada’s Supreme Court recognised that:

The defence of obedience to superior orders and the peace officer defence are available to members of the military or police forces in prosecutions for war crimes and crimes against humanity. Those defences are subject to the manifest illegality test: the defences are not available where the orders in question were manifestly unlawful. Even where the orders were manifestly unlawful, the defence of obedience to superior orders and the peace officer defence will be available in those circumstances where the accused had no moral choice as to whether to follow the orders. There can be no moral choice where there was such an air of compulsion and threat to the accused that he or she had no alternative but to obey the orders.¹⁰⁰⁹

¹⁰⁰⁶ Belgium, Court of Cassation (Second Chamber), *V.C. case*, Judgement, 12 January 1983.

¹⁰⁰⁷ Belgium, Military Court, *Kalid case*, Judgement, 24 May 1995.

¹⁰⁰⁸ Bosnia and Herzegovina, Republika Srpska, Modrića Municipal Court, *Halilović case*, Decision, 23 October 1997; Doboj District Court, *Halilović case*, Decision, 10 August 1998.

¹⁰⁰⁹ Canada, Supreme Court, *Finta case*, Judgement on Appeal, 24 March 1994.

950. In his dissenting opinion in the *Finta case* in 1994, one of the judges referred to the judgement in the *case of the Major War Criminals* rendered by the IMT (Nuremberg) which relied on Article 8 of the 1945 IMT Charter (Nuremberg) to quote a part of the judgement according to which “the true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible”. The judge added that:

The element of moral choice was, I believe, added to the superior orders defence for those cases where, although it can readily be established that the orders were manifestly illegal and that the subordinate was aware of their illegality, nonetheless, due to the circumstances such as compulsion, there was no choice for the accused but to comply with the orders. In those circumstances the accused would not have the requisite culpable intent.¹⁰¹⁰

951. In the *Brocklebank case* before the Canadian Court Martial Appeal Court in 1996 dealing with the criminal responsibility of a Canadian soldier serving on a peacekeeping mission in Somalia for the torture and death of a Somali prisoner, one of the judges, in her dissenting opinion, stated that “if the accused had been ordered to assist in abusing the prisoner, it would have been a manifestly unlawful order with the result that there was no evidentiary foundation for the defence of obedience to superior orders”.¹⁰¹¹

952. In its judgement in the *Guzmán and Others case* in 1974, Chile’s Santiago Council of War stated that:

The provisions of Article 335 of the Code of Military Justice [which provides that, under certain circumstances, a soldier disobeying an unlawful order is not punishable] require that: a) an order be received from a hierarchical superior; b) that this order be related to the military service; and c) that the subordinate has explained the illegality of the order to the superior, and that the latter has insisted on the order’s performance. Where this last formality is lacking, or where the subordinate has exceeded the requirements of the order in executing it, this shall be considered as mitigating.¹⁰¹²

953. In its judgement in the *Dover Castle case* in 1921, Germany’s Reichsgericht held that:

It is a military principle that the subordinate is bound to obey the orders of his superiors. This duty of obedience is of considerable importance from the point of view of criminal law. Its consequence is that, when the execution of a service order involves an offence against the criminal law, the superior giving the order is alone responsible.¹⁰¹³

¹⁰¹⁰ Canada, Supreme Court, *Finta case*, Dissenting opinion of one of the judges, 24 March 1994.

¹⁰¹¹ Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, Dissenting opinion of Judge Weiler, 2 April 1996.

¹⁰¹² Chile, Santiago Council of War, *Guzmán and Others case*, Judgement, 30 July 1974.

¹⁰¹³ Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921.

The Court further held that the punishment of a subordinate, who had acted in conformity with his orders, could, under German military criminal law at the time, arise (1) if he had exceeded the order given to him, (2) he was aware that his superior's orders directed action which involved a civil or military crime or misdemeanour. In the relevant case, the Court did not consider that either of these elements was present and the accused, the commander of a submarine from which a British hospital ship had been torpedoed, was acquitted.¹⁰¹⁴

954. In the *Llandovery Castle case* in 1921, in which a British hospital ship had been torpedoed and destroyed and her lifeboats fired on, Germany's Reichsgericht rejected the plea of superior orders forwarded by two of the accused. It stated that the accused should be deemed to have had knowledge of the unlawful character of the order they carried out and stated that the defence could not be brought forward "if such an order is universally known to everybody, including also the accused, to be without any doubt whatever against the law . . . In the present case it was perfectly clear to the accused that killing defenceless people in the lifeboats could be nothing but a breach of law".¹⁰¹⁵

955. In its judgement in the *Subordinate's Responsibility case* in 1986, Germany's Federal Supreme Court held that a subordinate who had recognised an order as unlawful would not be relieved from his responsibility even if his superior was ignorant of the illegality of the order.¹⁰¹⁶

956. In its judgement in the *Ofer, Malinki and Others case* in 1958, Israel's District Military Court for the Central Judicial District stated that:

The rule is that obedience to an officer's order, which by law a soldier is bound to obey, constitutes justification for the act, that is, exempts him from criminal responsibility. The exemption is that a manifestly illegal order does not constitute justification for the soldier's actions; a soldier need not . . . obey a manifestly illegal order, and if he does obey it, he must bear . . . criminal responsibility for his actions.¹⁰¹⁷

957. In its judgement in the *Ofer, Malinki and Others case* in 1959, Israel's Military Court of Appeal adopted these words and added that:

These provisions are aimed at encouraging the moral and human conscience of our soldiers. A reasonable soldier can distinguish a manifestly illegal order on the face of it, without requiring legal counsel and without perusing the law books. These provisions impose moral and legal responsibility on every soldier, irrespective of rank.¹⁰¹⁸

¹⁰¹⁴ Germany, Reichsgericht, *Dover Castle case*, Judgement, 4 June 1921.

¹⁰¹⁵ Germany, Reichsgericht, *Llandovery Castle case*, Judgement, 16 July 1921.

¹⁰¹⁶ Germany, Federal Supreme Court, *Subordinate's Responsibility case*, Judgement, 22 January 1986.

¹⁰¹⁷ Israel, District Military Court for the Central Judicial District, *Ofer, Malinki and Others case*, Judgement, 13 October 1958.

¹⁰¹⁸ Israel, Military Court of Appeal, *Ofer, Malinki and Others case*, Judgement, 3 April 1959.

958. In its judgement in the *Eichmann case* in 1962, Israel's Supreme Court, in response to the accused's defence that it was "the oath of allegiance taken by [him] on joining the S.S. organization and the compelling force of Hitler's order to destroy the Jews completely which guided him in acting as he did", pointed to the distinction to be made between the defence of "obedience to superior orders" and "act of State" and stated that:

The defence that the act was done in obedience to superior orders means *ex hypothesi* that the person who performed it had no alternative – either under the law or under the regulations of the disciplinary body (army etc.) of which he was a member – but to carry out the order he received from his superior . . . [This] makes it clear that the "superior orders" doctrine cannot, by its very nature, serve the appellant because, when we come to analyze the facts, it will be found that within the framework of the order to carry out the "Final Solution" the appellant acted independently and even exceeded the duties imposed on him through the service channels of the official chain of command . . .

The problem whether it is desirable to sanction this defence depends on the answer to the question whether, and to what extent, the mental state of the accused at the time of the offence ought to be taken into consideration – the fact that he did not then know that the order he carried out was contrary to the law. The *via media* solution provided by the general criminal law of this country . . . is that such defence is admissible where there was obedience to an order not manifestly unlawful . . . However, in Section 8 of the Nazis and Nazi Collaborators (Punishment) Law the legislature has provided that the defence of "superior orders" – and the same is true of the defences of "constraint" and "necessity" – shall not apply with respect to the offences covered by the Law, while in Section 11 it has provided that it is permissible, in certain circumstances, to take it into account as a factor in mitigation of sentence. We certainly agree with the District Court that even if it had to decide the case on the basis of the provisions of the general criminal law, it would also have had to reject that defence not only because the order for physical extermination was manifestly unlawful (and all the other orders to persecute the Jews were equally contrary to the "basic ideas of law and justice"), but also because the appellant was fully conscious at the same time that he was a party to the perpetration of the most grave and horrible crimes.¹⁰¹⁹

As to the conformity of the relevant provision of Israel's Nazis and Nazi Collaborators (Punishment) Law of 1950 with principles of international law, the Supreme Court ruled that:

Our first answer to this question is that until the Second World War there was no agreed rule in the law of nations which recognized the defence of "superior orders", not even with regard to the charge of committing an act contrary to "the laws of war" . . . There was . . . no departure from the provisions of international law – and this will be our second answer to the above question – when Article 8 of the [1945 IMT Charter (Nuremberg)] provided . . . that the fact that the accused acted pursuant to an order of a superior shall not free him from responsibility but that the Tribunal may take it into consideration in mitigation of punishment, should it find that justice so requires. It must be understood that this express provision

¹⁰¹⁹ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962.

was designed to defeat in advance any attempt by the Nazi criminals so to resort to the plea of *respondeat superior* as to reduce it to an absurdity, in view of the *Fuehrerprinzip* which dominated Nazi Germany and in the last analysis made it possible to identify Hitler alone as the source of the satanic orders in consequence of which the frightful Nazi crimes, including that of the "Final Solution", were committed.¹⁰²⁰

Referring to the judgement of the IMT (Nuremberg) in the *case of the Major War Criminals*, the Supreme Court went on to state that:

It was there observed that the true test was not whether a superior order existed but "whether moral choice was in fact possible". In other words, the mere plea of obedience to the order of a superior – as distinct from the plea that he could not avoid committing the crime because he had no "moral choice" to pursue any other course – will not avail the accused. . . . As stated, the applicability of these defences as relieving from responsibility in respect of the offences the subject of the Law of 1950 has been excluded by Section 11 thereof. But even had the Law permitted the accused to rely on the defence that in carrying out the order to commit the crime he was acting in circumstances of "constraint" or "necessity", he would still not succeed unless the following two facts were provided (1) that the danger to his life was imminent; (2) that he carried out the criminal assignment out of a desire to save his own life and because he found no other possibility of doing so. . . . Neither of the said conditions has been met in this case.¹⁰²¹

959. In its judgement in the *Schintlholzer case* in 1988, Italy's Military Tribunal at Verona stated that:

It is not possible to assert that [the accused's] responsibility should be zero by simply transferring it to Schintlholzer's superiors, such as the SS Major Rudolf Thyrolf or other officers in the hierarchy of the command chain, which if followed back would reach to the senior officer of the Joint Bolzano Command. . . .

It is therefore hardly necessary to point out even in this connection that if it was ever possible to establish any collateral responsibility by known or unknown SS officials at an operating level, this would not in any way raise any questions about the responsibility of Schintlholzer, which has been proven at this level and in the context which has to be assessed here and now.

Thus, as far as criminal intent is concerned, evidence of awareness of the unlawful nature of the conduct involved in the barbaric images described in the preliminary reconstruction of the facts would appear to have been acquired.

Taking this together with the considerations just described concerning the possibility of collateral responsibility, it should be added that this awareness, and therefore awareness of the manifestly criminal nature of the massacre of non-combatants, cannot in fact be denied or justified through appeal to the orders of a superior. But this should in any event likewise be pursued if particulars emerge.

However, as things stand, the only order of which there is any trace in the documents relating to this case is the order for war against the partisans from the

¹⁰²⁰ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962.

¹⁰²¹ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962.

German Military Command in Bolzano, which in fact has nothing to do with the inhuman activities then engaged in by the "Schintlholzer" combat unit.¹⁰²²

960. In its judgement in the *Priebke case* in 1996, Italy's Military Tribunal of Rome stated that a subordinate who commits a crime acting on the basis of superior orders could not invoke it as a defence, except in the case of a real impending danger of losing his life. However, the Tribunal recalled that "the threat of exemplary and immediate punishment by death: in such a case, he could have stepped back from his refusal and participated in the execution only to save his own life relying upon the excuse of state of necessity which is foreseen in all legal systems". Nevertheless, the Tribunal considered that superior orders could be considered in mitigation of punishment, pursuant to a provision of the 1930 Military Criminal Code. However, the Tribunal found that the accused could not be punished for reasons of statute of limitations.¹⁰²³ On appeal, this judgement was annulled by the Supreme Court of Cassation and another trial ordered.¹⁰²⁴

961. In its judgement in the *Zühlke case* in 1948, a Special Court in Amsterdam (Netherlands), with regard to Article 8 of the 1945 IMT Charter (Nuremberg), stated that:

The accused has pleaded that official orders were given him by his superiors. The chief Prosecutor does not consider this plea to be admissible, himself referring to Art. 8 of the [1945 IMT] Charter whereby an official order was declared to be non-exculpatory. This provision, however, . . . has no direct application in the present case, but could apply indirectly if it were to be regarded as a rule concerning a special instance of an express general rule of international criminal law. It is the opinion of the Court that this is not so, and it cannot be understood why the exonerating effect of an official order, which is recognised in one form or another in practically all national legislations, should not be valid in the sphere of international criminal law. It must be assumed that its operation has been excluded with regard to the "major" criminals, because they were considered a priori to have wanted to take part in the criminal system of Germany and were, therefore, made individually responsible for the crimes they committed in this system. Consequently the accused has ground for his plea.¹⁰²⁵

However, in the case in question, the Court found that the plea of superior orders could not exonerate the accused from the charges. It based its findings on the opinion that subordinates were under an obligation not to carry out orders relating to "acts forbidden by international law" and that ignorance of the relevant rules did not "carry with it exclusion from penal liability" of the subordinates.¹⁰²⁶

¹⁰²² Italy, Military Tribunal at Verona, *Schintlholzer case*, Judgement, 15 November 1988.

¹⁰²³ Italy, Military Tribunal of Rome, *Priebke case*, Judgement in Trial of First Instance, 1 August 1996.

¹⁰²⁴ Italy, Supreme Court of Cassation, *Priebke case*, Judgement in Trial of Second Instance, 15 October 1996.

¹⁰²⁵ Netherlands, Special Court in Amsterdam, *Zühlke case*, Judgement, 3 August 1948.

¹⁰²⁶ Netherlands, Special Court in Amsterdam, *Zühlke case*, Judgement, 3 August 1948.

962. In its judgement in the *Zühlke case* in 1948, the Special Court of Cassation of the Netherlands stated that:

If during the Second World War the doctrine “Befehl ist Befehl” (orders are orders) was sometimes carried out by the German forces to the extreme of its logical consequences for obviously criminal purposes, no longer compatible with the human dignity of the subordinates, there is no legal basis to do so, and an appeal to duress on the part of the subordinate concerned can at the most be admitted if actual requirements concerning such duress were present. The [appellant’s] plea of duress . . . is rejected on the sufficient grounds that it does not appear that any pressure was brought to bear upon him.¹⁰²⁷

963. In the *Nwaoga case* before Nigeria’s Supreme Court in 1972, the appellant and two officers of the rebel Biafran army disguised in civilian clothes went to a town under the control of federal troops and killed an unarmed person. The appellant was convicted of murder. With respect to the plea of superior orders, the Court quoted with approval another judgement, stating that:

It was held that a soldier is responsible by military and civil law and it is monstrous to suppose that a soldier could be protected when the order is grossly and manifestly illegal. Of course, there is the other proposition that a soldier is only bound to obey lawful orders and is responsible if he obeys an order not strictly lawful.

...

In the case before me that order to eliminate the deceased was given by an officer of an illegal regime, his orders therefore are necessarily unlawful and obedience to them involves a violation of the law and the defence of superior orders is untenable.¹⁰²⁸

The Court, however, chose to base its decision on the fact that the accused committed an offence under the Criminal Code, and was liable like any civilian would be, whether or not he was acting under orders. It held that, in the circumstances (operation in disguise, not in the rebel army uniform but in plain clothes, appearing to be members of the peaceful private population), he was liable to punishment since the “deliberate and intentional killing of an unarmed person living peacefully inside the Federal territory . . . is a crime against humanity, and even if committed during a civil war is in violation of the domestic law of the country, and must be punished”.¹⁰²⁹

964. In its judgement in the *Margen case* in 1950, the Supreme Court of the Philippines held that “obedience to an order of a superior gives rise to exemption from criminal liability only when the order is for some lawful purpose”.¹⁰³⁰

965. In the *Werner case* in 1947, a South African Court of Appeal rejected a plea of superior orders in a case in which the accused, himself a prisoner of war, was convicted for the murder of another prisoner. It held that “[the German

¹⁰²⁷ Netherlands, Special Court of Cassation, *Zühlke case*, Judgement, 6 December 1948.

¹⁰²⁸ Nigeria, Supreme Court, *Nwaoga case*, Judgement, 3 March 1972.

¹⁰²⁹ Nigeria, Supreme Court, *Nwaoga case*, Judgement, 3 March 1972.

¹⁰³⁰ Philippines, Supreme Court, *Margen case*, Judgement, 30 March 1950.

officer] had no authority to give orders, and the appellants were under no duty to obey them, even if those orders had not been so obviously illegal that they should have known them to be illegal".¹⁰³¹

966. In the *Auschwitz and Belsen case* in 1945, the British Military Court at Lüneberg rejected the defence of superior orders. It referred to Article 8 of the 1945 IMT Charter (Nuremberg) and quoted a comment of the IMT, which stated that "the true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible".¹⁰³²

967. In the *Krupp case* in 1947/48, in which Alfried Krupp and eleven others were charged with having employed POWs, forced labour and inmates of concentration camps in the German war industry, the US Military Tribunal at Nuremberg, in response to the argument of the defence that the accused had acted according to the Reich policies and to an order requiring certain production quota and that, if they had refused to do so, they would have suffered dire consequences, stated that:

The real defense in this case . . . is that of necessity . . . Under the rule of necessity, the contemplated compulsion must actually operate upon the will of the accused to the extent he is thereby compelled to do what otherwise he would not have done . . . Here we are not dealing with necessity brought about by circumstances independent of human agencies or by circumstances due to accident or misadventure. On the contrary, the alleged compulsion relied upon is said to have been exclusively due to the certainty of loss or injury at the hands of an individual or individuals if their orders were not obeyed. In such cases, if, in the execution of the illegal act, the will of the accused be not thereby overpowered but instead coincides with the will of those from whom the alleged compulsion emanates, there is no necessity justifying the illegal act.¹⁰³³

968. In its judgement in the *Krauch (I.G. Farben Trial) case* in 1947/48 in which leading German industrials were charged with employment of POWs, forced labour and concentration camp inmates in illegal work and under inhuman conditions, the US Military Tribunal at Nuremberg stated that:

The IMT recognized that while an order emanating from a superior officer or from the government is not, of itself, a justification for the violation of an international law (though it may be considered in mitigation), nevertheless, such an order is a complete defense where it is given under such circumstances as to afford the one receiving it no other moral choice than to comply therewith. As applied to the facts here, we do not think there can be much uncertainty as to what the words "moral choice" mean.¹⁰³⁴

¹⁰³¹ South Africa, Appeal Division, *Werner case*, Judgement, 20 May 1947.

¹⁰³² UK, Military Court at Lüneberg, *Auschwitz and Belsen case*, Judgement, 17 November 1945.

¹⁰³³ US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 17 November 1947–30 June 1948.

¹⁰³⁴ US, Military Tribunal at Nuremberg, *Krauch (I.G. Farben Trial) case*, Judgement, 14 August 1947–29 July 1948.

969. In its judgement in the *Von Leeb case (The High Command Trial)* in 1947/48, the US Military Tribunal at Nuremberg, dealing with the plea of superior orders, stated that:

International Common Law must be superior to and, where it conflicts with, take precedence over National Law or directives issued by any national governmental authority. A directive to violate International Criminal Common Law is therefore void and can afford no protection to one who violates such law in reliance on such a directive . . . The defendants in this case who received obviously criminal orders were placed in a difficult position but servile compliance with orders clearly criminal for fear of some disadvantage or punishment not immediately threatened cannot be recognized as a defence. To establish the defence of coercion or necessity in the face of danger there must be a showing of circumstances such that a reasonable man would apprehend that he was in such imminent physical peril as to deprive him of freedom to choose the right and refrain from the wrong. No such situation has been shown in this case.¹⁰³⁵

However, turning to the specific problem of responsibility for passing on illegal orders, the Tribunal held that even a commander can be by-passed by a superior command and that in this case he “has the right to presume, in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance”. It further stated that: “it is therefore considered that to find a field commander criminally responsible for the transmittal of such an order, he must have passed the order to the chain of command and the order must be one that is criminal upon its face, or one which he is shown to have known was criminal”.¹⁰³⁶

970. In its judgement in the *Hadamar Sanatorium case* in 1945, the US Military Commission in Wiesbaden applied to the relationship of civilian employees to their superiors the doctrine that individuals who violate the laws and customs of war are criminally liable in spite of their acting under a superior order, if the order was illegal.¹⁰³⁷

971. In the *Griffen case* in 1968, a US Army Board of Review approved the decision of the trial law officer who refused to give an instruction to the panel on the defence of obedience of orders, considering that an order to kill an unarmed and unresisting prisoner was “so palpably illegal on its face” that this defence was not an issue.¹⁰³⁸

972. In the *Calley case* in 1973, the US Army Court of Military Appeals approved the following instructions given to the panel by the trial judge in a case where the accused invoked an order to kill unresisting detainees:

¹⁰³⁵ US, Military Tribunal at Nuremberg, *Von Leeb case (The High Command Trial)*, 30 December 1947–28 October 1948.

¹⁰³⁶ US, Military Tribunal at Nuremberg, *Von Leeb case (The High Command Trial)*, Judgement, 30 December 1947–28 October 1948.

¹⁰³⁷ US, Military Commission in Wiesbaden, *Hadamar Sanatorium case*, Judgement, 8–15 October 1945.

¹⁰³⁸ US, Army Board of Review, *Griffen case*, Judgement, 2 July 1968.

The acts of a subordinate done in compliance with an unlawful order given him by his superior are excused and impose no criminal liability upon him unless the superior's order is one which a man of *ordinary sense and understanding* would, under the circumstances, know to be unlawful, or if the order in question is actually known to the accused to be unlawful.¹⁰³⁹ [emphasis in original]

Citing a writer's opinion, the Court stated that:

For the inferior to assume to determine the question of the lawfulness of an order given him by a superior would of itself, as a general rule, amount to insubordination, and such an assumption carried into practice would subvert military discipline. Where the order is apparently regular and *lawful on its face*, he is not to go behind it to satisfy himself that his superior has proceeded with authority, but is to obey it according to its terms, *the only exceptions recognized to the rule of obedience being cases of orders so manifestly beyond the legal power or discretion of the commander as to admit of no rational doubt of their unlawfulness* . . .

Except in such instances of palpable illegality, which must be of rare occurrence, the inferior should presume that the order was lawful and authorized and obey it accordingly, and in obeying it can scarcely fail to be held justified by a military court.¹⁰⁴⁰ [emphasis in original]

973. In his dissenting opinion in the *Calley case* in 1973, one of the judges stated that:

My impression is that the weight of authority . . . supports a more liberal approach to the defense of superior orders. Under this approach, superior orders should constitute a defense except "in a plain case of excess of authority, where at first blush it is apparent and palpable to the commonest understanding that the order is illegal".

While this test is phrased in language that now seems "somewhat archaic and ungrammatical", the test recognizes that the essential ingredient of discipline in any armed force is obedience to orders and that this obedience is so important it should not be penalized unless the order would be recognized as illegal, not by what some hypothetical reasonable soldier would have known, but also by "those persons at the lowest end of the scale of intelligence and experience in service". This is the real purpose in permitting superior orders to be a defense, and it ought not to be restricted by the concept of a fictional reasonable man so that, regardless of his personal characteristics, an accused judged after the fact may find himself punished for either obedience or disobedience, depending on whether the evidence will support the finding of simple negligence on his part . . .

Because the original case language is archaic and somewhat ungrammatical, I would rephrase it to require that the military jury be instructed that, despite his asserted defense of superior orders, an accused may be held criminally accountable for his acts, allegedly committed pursuant to such orders, if the court members are convinced beyond a reasonable doubt (1) that almost every member of the armed forces would have immediately recognized that the order was unlawful, and (2) that

¹⁰³⁹ US, Army Court of Military Appeals, *Calley case*, Judgement, 21 December 1973.

¹⁰⁴⁰ US, Army Court of Military Appeals, *Calley case*, Judgement, 21 December 1973, referring to Col. William Winthrop, *Military Law and Precedents*, pp. 296–297, 2nd edition 1920 (reprint).

the accused should have recognized the order's illegality as a consequence of his age, grade, intelligence, experience, and training.¹⁰⁴¹

Other National Practice

974. At the CDDH, with respect to Article 77 of draft AP I submitted by the ICRC, Argentina explained its negative vote by referring to a great difficulty rooted in the determination of the degree of scrutiny of the orders required from the subordinate, which also varied according to his hierarchical rank.¹⁰⁴² However, in the debates in Committee I of the CDDH, Argentina had stated that "on the whole, [it] supported the ICRC text of article 77, which retained [the principle of due obedience]" and that it "accepted what might be termed 'the human function of due obedience', in other words that in case of the flagrant breach of a fundamental humanitarian principle exoneration on account of due obedience did not apply".¹⁰⁴³

975. At the CDDH, Australia submitted an amendment concerning Article 77 of draft AP I which read: "In paragraph 2 delete the words 'and that he had the possibility of refusing to obey the order'".¹⁰⁴⁴ Later at the CDDH, Australia stated that it "supported the objectives sought in the ICRC text of article 77 [of draft AP I]".¹⁰⁴⁵ With respect to its amendment submitted in 1975, it also stated that in this text "there was no provision which would give immunity to a soldier if he had had no opportunity of refusing to obey an order".¹⁰⁴⁶

976. In an explanatory memorandum submitted to the Belgian Senate in the context of the adoption of the Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols in 1991, which excludes the defence of superior orders in cases "where, in the prevailing circumstances, the order could clearly result in the commission of a crime of genocide or of a crime against humanity... or a grave breach of the Geneva Conventions... and their Additional Protocol I", it is stated that the words "if he had the option of not obeying" were omitted since this would necessarily be deduced from general principles of penal law regarding compulsion.¹⁰⁴⁷

¹⁰⁴¹ US, Army Court of Military Appeals, *Calley case*, Dissenting opinion of Judge Darden, 21 December 1973.

¹⁰⁴² Argentina, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 329.

¹⁰⁴³ Argentina, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.52, 6 May 1976, pp. 141–142, §§ 31 and 33.

¹⁰⁴⁴ Australia, Amendment submitted to the CDDH concerning Article 77 of draft AP I, *Official Records*, Vol. III, CDDH/I/255, 24 March 1975, p. 331.

¹⁰⁴⁵ Australia, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.51, 5 May 1976, p. 128, § 26.

¹⁰⁴⁶ Australia, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.51, 5 May 1976, p. 128, § 28.

¹⁰⁴⁷ Belgium, Senate, Explanatory Memorandum, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1990–1991 Session, Doc. 1317-1, 30 April 1991, p. 15.

977. At the CDDH, Canada, which voted against the deletion of Article 77 of draft AP I submitted by the ICRC, in its explanation of vote stated that:

We agree that under customary international law an accused is unable to plead as a defence that the criminal act with which he was charged was in compliance with superior orders that had been given to him. While denying this avenue of defence, the Canadian delegation is aware that compliance with an order to commit an act which the accused knew or should have known was clearly unlawful may be taken into consideration by way of mitigation of punishment.

...

While we would have liked to see Article 77 adopted as part of the Protocol, we can console ourselves with the knowledge that the article was in fact broadly in accordance with existing international law, which continues to operate in so far as breaches of the Conventions and the Protocol are concerned.¹⁰⁴⁸

978. In 1997, in reply to a report of the Special Rapporteur of the UN Commission on Human Rights on Torture, the Colombian government referred to its decision to present to Congress the reform of the military criminal justice system beginning in March 1997. As to the defence of obedience to superior orders, it stated that it "could only be invoked when the act was the result of a legitimate order and did not infringe fundamental rights".¹⁰⁴⁹

979. According to the Report on the Practice of Croatia, "the position of the Croatian criminal law is that the superior order is not a valid defence against violations of international humanitarian law nor any other crime in general. To be found guilty for the offence it is not required that [the] subordinate . . . knows that he has the right to disobey 'unlawful' order[s], but that he has to know that an act committed constitutes a crime or that the criminal character of the act must be obvious from the circumstances".¹⁰⁵⁰

980. In 1994, in a statement before the UN Commission on Human Rights, the Chief Special Prosecutor of the Ethiopian Transitional Government stated that "the Ethiopian Government . . . was aware that democracy could not allow criminals to go unpunished on the pretext that they had acted on government orders".¹⁰⁵¹

981. According to the Report on the Practice of India, in cases where armed force is used, "the police action or action of the armed forces will be questioned before a court of law. During such proceedings the person charged will not be

¹⁰⁴⁸ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, pp. 330-331.

¹⁰⁴⁹ Colombia, Reply of the government to a report of the Special Rapporteur on Torture of the UN Commission on Human Rights, referred to in UN Commission on Human Rights, Special Rapporteur on Torture, Fifth report, UN Doc. E/CN.4/1998/38, 24 December 1997, § 66.

¹⁰⁵⁰ Report on the Practice of Croatia, 1997, Chapter 6.9.

¹⁰⁵¹ Ethiopia, Transitional Government, Chief Special Prosecutor, Statement before the UN Commission on Human Rights, 17 February 1994, UN Doc. E/CN.4/1994/SR.28, 22 January 1996, § 3.

[held] liable if it is established that he obeyed the superior orders which were lawful".¹⁰⁵² However, the report states that:

In view of the right and duty to disobey illegal superior orders . . . it is possible to suggest that the defence of superior orders will not be available in cases where lawfulness of police and military action is challenged as violative of humanitarian standards. The defence will be available only when the superior orders were lawful.¹⁰⁵³

982. At the CDDH, Iran stated that it was opposed to the insertion of Article 77 of draft AP I.¹⁰⁵⁴

983. In 1950, during a debate in the Sixth Committee of the UN General Assembly, Israel, with respect to the interpretation of the 1945 IMT Charter (Nuremberg), stated that:

There did not, however, appear to be any justification for asserting that the fact of having acted under orders might lessen the responsibility of the defendant, instead of considering that factor as having a bearing only on the punishment, or in omitting any reference in principle IV [of the Nuremberg Principles] to the authority of the Court to mitigate punishment.¹⁰⁵⁵

984. During a debate in Committee I of the CDDH, Israel stated that it "favoured the inclusion of Article 77 of draft Protocol I" and that:

Although refusal to obey an order might strike against military discipline, the choice was one between, on the one hand, carrying out a manifestly illegal order – in other words perpetrating a violation of humanitarian law – and, on the other hand, respect for military discipline. But since it was a question of grave breaches, any violation of humanitarian law was far more dangerous in its effects than a possible failure to observe military discipline. Article 77 reflected fairly faithfully international criminal law as defined by the international military tribunals at the end of the Second World War.¹⁰⁵⁶

985. At the CDDH, Israel stated that it had voted in favour of Article 77 of draft AP I and that:

The article is a reflection of existing customary international law clearly enunciated in the Nürnberg principles and embodied in [Israeli law].

We regret that Article 77 was not adopted . . . and wish to state that the rule continues to be governed by customary international law.¹⁰⁵⁷

¹⁰⁵² Report on the Practice of India, 1997, Chapter 6.8.

¹⁰⁵³ Report on the Practice of India, 1997, Chapter 6.9.

¹⁰⁵⁴ Iran, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 307, § 3.

¹⁰⁵⁵ Israel, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.236, 9 November 1950, § 60.

¹⁰⁵⁶ Israel, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.52, 6 May 1976, p. 143, § 40.

¹⁰⁵⁷ Israel, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 336.

986. In 1994, in its first periodical report to the UN Committee against Torture, Israel stated that:

Regarding article 2(3) of the [1984 Convention against Torture], we refer to section 24(1)(a) of the Penal Law, 5737-1977 which allows the defence of acting under superior orders only where the orders are lawful. Where an order is manifestly illegal, as would be the case with an order to commit acts of torture, acting under such order would clearly not constitute a defence for a person accused of committing such acts. On this, we would refer to the decision of the Supreme Court, sitting as High Court of Justice (27.12.89) to make absolute decree against the chief Military Advocate, the chief of the General Staff and others, requiring them to commit an army officer for trial before a court martial for committing acts of torture against residents of certain Arab villages in Samaria (administered territories) during the course of putting down the Arab uprising (intifada) at its inception in January 1988. According to the findings of an investigation instituted at the request of the International Red Cross, the residents had been bound and severely beaten by orders of the said army officer. The court characterized such acts as repugnant to civilized standards of behaviour and rejected the plea that they were carried out as a result of the "uncertainty" that prevailed as to orders for quelling the intifada. (High Court case No. 425/89 Piskei Din (Supreme Court Judgements), vol. 43, Part IV, p. 718).¹⁰⁵⁸

987. In an article published in a military review, a member of the Kuwaiti armed forces stated that if a soldier received a clearly illegal order, he had the duty to disobey it,

otherwise, the soldier will be subject to penal and civil responsibility for his solidarity with the commander, unless the violation of the law is unclear, to the extent that the commanded is deceived by the same. Then, only the commander will be questioned. If the inferior knows the crime in advance, he shall be totally responsible. He would not be exempted unless it was indicated that he was in a state of moral obligation by a leader, or in case of necessity or force majeure.¹⁰⁵⁹

988. At the CDDH, Mexico stated that it would abstain from the vote on Article 77 of draft AP I "because it considered that Article 77 should apply not merely to grave breaches, but to all breaches".¹⁰⁶⁰

989. In 1982, during a debate in the Sixth Committee of the UN General Assembly on the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, Mongolia stated that:

In considering and improving the text of the 1954 draft, the International Law Commission should seek to eliminate the ambiguities in some provisions and to reflect more fully the principles of the [IMT] Charters and judgements of the Nürnberg and Tokyo Tribunals. In that connection, the wording of [article 4] of the draft Code

¹⁰⁵⁸ Israel, Initial report of 25 January 1994 submitted to the CAT under Article 19 of the 1984 Convention against Torture, UN Doc. CAT/C/16/Add.4, 4 February 1994, § 9.

¹⁰⁵⁹ Fellah Awad Al-Anzi, "The accomplishment of duties and the execution of military orders, their limits and constraints", *Homat Al-Watan*, No. 149, p. 61.

¹⁰⁶⁰ Mexico, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 308, § 7.

should be brought into line with that of [article 8] of the Charter of the International Military Tribunal.¹⁰⁶¹

990. According to the Report on the Practice of the Netherlands, Article 10 of the Criminal Law in Wartime Act as amended, Article 3 of the Genocide Convention Act and Article 3 of the Torture Convention Act (which have been repealed by the International Crimes Act) at first glance seem to provide that acting on superior orders can neither serve as a justification nor as an excuse. However, the report states that this certainly was not parliament's intention. Parliament only intended to provide that superior orders as such cannot justify a violation of the laws and customs of armed conflict, genocide or torture, thereby acknowledging the possibility of having complied with superior orders serving as an excuse. The report further states that, pursuant to Article 10(1) of the Criminal Law in Wartime Act as amended, violations of the laws and customs of armed conflict would have to be judged according to the general principles of criminal law, including the defences of compulsion and necessity.¹⁰⁶²

991. At the CDDH, Norway considered that "the rejection of Article 77 [of draft AP I] did not weaken the validity of the Nürnberg principles and of the rules of international law".¹⁰⁶³

992. At the CDDH, Poland expressed its regret that Article 77 of draft AP I had not been adopted and stated that "despite the rejection of the article, the Nürnberg principles remained important norms of international law".¹⁰⁶⁴

993. In 1982, during a debate in the Sixth Committee of the UN General Assembly on the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, Poland stated that:

[Its] delegation had serious objections to article 4 of the 1954 draft, and in particular to the words "if, in the circumstances at the time, it was possible for him not to comply with that order". That formulation was a fundamental departure from the principle of article 8 of the [1945 IMT Charter (Nuremberg)] which stated that action taken pursuant to an order of a Government or of a superior did not free an individual from responsibility, but could be considered in mitigation of punishment if the Tribunal determined that justice so required.¹⁰⁶⁵

994. The Report on the Practice of Rwanda, referring to a paper drafted by a military writer, states that during the training of Rwandan military officers it is taught that "most of the countries support the effective application of the

¹⁰⁶¹ Mongolia, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/37/SR.54, 24 November 1982, § 19.

¹⁰⁶² Report on the Practice of the Netherlands, 1997, Chapter 6.9.

¹⁰⁶³ Norway, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 309, § 13.

¹⁰⁶⁴ Poland, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 309, § 12.

¹⁰⁶⁵ Poland, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/37/SR.52, 22 November 1982, § 6.

system of manifestly illegal orders according to which a subordinate cannot be justified in executing a manifestly illegal order".¹⁰⁶⁶

995. At the CDDH, Spain stated with respect to Article 77(2) of draft AP I that:

Responsibility exists when the circumstances in which the penal offence takes place do not prevent the realization that the order received implies the commission of a grave offence, although the fact must be considered, as an attenuating circumstance, that it is rationally impossible to disobey orders received. For that reason the principle affirmed in paragraph 2 is a valid one.¹⁰⁶⁷

996. At the CDDH, Switzerland proposed an amendment concerning Article 77 of draft AP I which aimed at deleting the Article.¹⁰⁶⁸

997. At the CDDH, Syria submitted the following amendment concerning Article 77 draft AP I submitted by the ICRC:

Amend Article 77 as follows:

...

2. The fact of having acted pursuant to an order does not absolve an accused from penal responsibility if it be established that, in the circumstances at the time, he should have reasonably known that he was committing a grave breach of the Conventions or of the present Protocol and that he had the possibility of not carrying out the order.¹⁰⁶⁹

Later at the CDDH, Syria stated that it had voted against Article 77 of draft AP I "because it contravened international law". It added that:

The article rules on a matter of discipline between the individual concerned and the Government or authority to which he was subordinate, a matter which came under exclusive competence of the internal laws of States. Moreover, Article 77 was based on the rather dubious hypothesis that any subordinate would be able, in delicate circumstances, to distinguish between a legal and an illegal act and to make a valid appreciation of the legality of the order received. That hypothesis was pure fiction, for it was rarely that subordinates were acquainted with the legal nuances of often very lengthy texts, while any elementary knowledge that they might have of them would not enable them to make a valid judgement. In addition, Article 77 might well give rise to abuses under the screen of humanitarian law. It entailed incitement to disobedience or orders, which ran counter to the military codes of most States.¹⁰⁷⁰

998. At the CDDH, Sudan stated that it had voted against Article 77 of draft AP I because of the provisions contained in its paragraph 1, but that "if the

¹⁰⁶⁶ Report on the Practice of Rwanda, 1997, Chapter 6.9, referring to 2 Lt. C. Bizimungu, *Synthèse de l'exposé sur la justice militaire, E.S.M.*, 12–13 November 1996, pp. 11–12.

¹⁰⁶⁷ Spain, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 338.

¹⁰⁶⁸ Switzerland, Amendment submitted to the CDDH concerning Article 77 of draft AP I, CDDH, *Official Records*, Vol. III, CDDH/I/303, 27 April 1976, p. 331.

¹⁰⁶⁹ Syria, Amendment submitted to the CDDH concerning Article 77 of draft AP I, CDDH, *Official Records*, Vol. III, CDDH/I/74, 20 March 1974, p. 331.

¹⁰⁷⁰ Syria, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, pp. 308–309, § 9.

article had been put to the vote paragraph by paragraph, [Sudan] would have voted . . . in favour of paragraph 2".¹⁰⁷¹

999. At the CDDH, the UK, which opposed Article 77 of draft AP I submitted by the ICRC, stated that it:

could not accept that there ought to be one system of law which related to grave breaches of the Conventions and Protocols, while other breaches, including breaches of customary law and of other Conventions, were subjected to an entirely different system. That state of affairs would clearly lead only to confusion in an area where it was vital to have simply rules which could be readily understood by soldiers.

...
Much the best would be the omission of the article, leaving the situation to be regulated by the existing rules of international law concerning superior orders.¹⁰⁷²

1000. In 1991, during a debate in the House of Commons, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that:

Anyone who breaks the provisions of the Geneva conventions may be held liable. Thus, individual Iraqis now bear personal responsibility for breaches of them. That position was reaffirmed in Security Council resolutions 670 and 674. The superior orders defence will not be accepted as an excuse. Machinery already exists under [the Geneva Conventions Act as amended (1957)] for prosecuting grave breaches of them.¹⁰⁷³

1001. In 1993, in a "Non-Paper" discussing the 1993 ICTY Statute and transmitted to the UN Legal Counsel, the UK FCO stated that:

We do not believe one should depart from the principle in Article 8 of the [1945 IMT Charter (Nuremberg)] . . . A similar provision is found in Article 2(3) of the [1984 Convention against Torture]. These provisions are preferable to that in Article 11 of the [1991 ILC] draft Code of Crimes [against the Peace and Security of Mankind]. Under that an individual would not be relieved of criminal responsibility if "in the circumstances at the time, it was possible for him not to comply with an order of a superior". This language, drawn from the 1954 Draft Code [of Offences against the Peace and Security of Mankind] would seem to make a large inroad into the Nuremberg rule and go against the general trend internationally towards the expansion of individual responsibility.¹⁰⁷⁴

1002. At the CDDH, the US submitted an amendment relative to Article 77 of draft AP I which read:

¹⁰⁷¹ Sudan, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 339.

¹⁰⁷² UK, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, pp. 307–308, §§ 4 and 6.

¹⁰⁷³ UK, House of Commons, Statement by the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 28 March 1991, Vol. 188, col. 1100.

¹⁰⁷⁴ UK, FCO, Non-Paper, Former Yugoslavia: War Crimes Implementation of Resolution 808, 22 March 1993, reprinted in *BYIL*, Vol. 64, 1993, p. 701.

Delete the word "grave" from paragraph 1.

Amend paragraph 2 to read:

"The fact of having acted pursuant to an order of his government or of a superior does not absolve an accused person from responsibility if it be established that, in the circumstances at the time, he knew or should have known that he was committing a breach of the Conventions or of the present Protocol. The fact that the individual was acting pursuant to orders may, however, be taken into account in mitigation of punishment."¹⁰⁷⁵

1003. In 1993, during a debate in the UN Security Council following the unanimous vote on Resolution 827 (1993) establishing the ICTY, the US stated that under Article 7 of the 1993 ICTY Statute "it is, of course, a defence that the accused was acting pursuant to orders where he or she did not know the orders were unlawful and a person of ordinary sense and understanding would not have known the orders to be unlawful".¹⁰⁷⁶

1004. During a debate in Committee I of the CDDH, Uruguay, although criticising Article 77 of draft AP I submitted by the ICRC, stated that it "supported the principles underlying Article 77, which undoubtedly had its place in the section of draft Protocol I dealing with the repression of breaches".¹⁰⁷⁷

1005. A commentary relative to the Military Penal Code (as amended) of Uruguay states that:

Article 29 exempts from liability anyone who executes an act of due obedience. The defence of due obedience is allowable for military personnel only under the following conditions: The illicit act must be the result of an order; the order must correspond to an act committed in the course of duty; it must have been issued by one who is competent to give it; and the subordinate must have a legal obligation to carry it out. It is considered that in the military system the subordinate must be fully protected when acting in accordance with due obedience, because in this way discipline is asserted and the prestige of the superior's authority is strengthened... One of the problems [is], if the rule functions, when the order is clearly unlawful; in other words, if the subordinate agent of the offence has the obligation to analyse the order and determine its lawfulness or unlawfulness... The solution adopted by our law code therefore establishes *a priori* the presumption that all the elements required to absolve the agent of liability on grounds of due obedience are present, without prejudice to the judge's authority to analyse the evidence in the light of the subordinate's personal characteristics, the seriousness and appropriateness of the act, and whether it was carried out in peacetime or wartime, and, on the basis of this analysis, to decide whether liability may properly be transferred completely from the agent to the superior, or whether, on the contrary, there has been certain unlawful conduct on the agent's part that would make him partially

¹⁰⁷⁵ US, Amendment submitted to the CDDH concerning Article 77 of draft API, CDDH, *Official Records*, Vol. III, CDDH/1/308, 27 April 1976, p. 332.

¹⁰⁷⁶ US, Statement before the UN Security Council, UN Doc. S/PV.3217 (Provisional), 25 May 1993, p. 16.

¹⁰⁷⁷ Uruguay, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/1/SR.52, 6 May 1976, p. 144, § 45.

liable, or whether the order was twisted and the agent's exoneration from liability is therefore unjustified.¹⁰⁷⁸

1006. At the CDDH, Yemen, which voted against Article 77 of draft AP I submitted by the ICRC, in its explanation of vote stated that "in the article there is a certain imbalance between international humanitarian law and the internal law on which all military discipline is based. That principle is confirmed by the constitutional regulations of all countries and by the principles of international law."¹⁰⁷⁹

1007. In 1950, during a debate in the Sixth Committee of the UN General Assembly, the SFRY delegation commented on Principle IV of the 1950 Nuremberg Principles to the effect that:

It felt that the [ILC] had departed here from the charter and judgement of Nürnberg. According to those instruments, the fact that a person who committed a criminal act had acted pursuant to an order of his government or of a superior, did not relieve him from responsibility but in exceptional cases might be considered in mitigation of punishment. If this position was supplemented by the criterion of "possible moral choice", the number of cases in which the court could acquit the guilty would be increased. Moreover, the courts might consider that the very fact that a person was in a subordinate position limited the moral choice possible to him. It was to be feared that the modification of the principle would give rise to ambiguity, and prejudice in application. Apart from that, the Yugoslav delegation fully understood the feelings of the members of the [ILC] which made them want to avoid having the penalty automatically applied to subordinates and to place the responsibility upon superiors. Even though the question was left to discretion of the court, it could give rise to abuse.¹⁰⁸⁰

1008. The Report on the Practice of Zimbabwe states that "the defence of superior orders is recognized in Zimbabwean criminal law and would be applicable even where breaches of international humanitarian law are concerned but only if the orders given are not manifestly illegal".¹⁰⁸¹

III. Practice of International Organisations and Conferences

United Nations

1009. In 1993, in his report to the UN Security Council on the draft Statute of the ICTY, the UN Secretary-General stated that:

Acting upon an order of a Government or a superior cannot relieve the perpetrator of the crime of his criminal responsibility and should not be a defence. Obedience to

¹⁰⁷⁸ Néstor J. Bolentini, *Commentary and Annotations on the Military Penal Code as amended (1943)*, *Biblioteca General Artigas*, Vol. 57, Centro Militar, 1979, Article 17, pp. 25–26.

¹⁰⁷⁹ Canada, Statement at the CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, pp. 330–331.

¹⁰⁸⁰ SFRY, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.234 (1950), 6 November 1950, § 14.

¹⁰⁸¹ Report on the Practice of Zimbabwe, 1998, Chapter 6.9.

superior orders may, however, be considered a mitigating factor, should the [ICTY] determine that justice so requires. For example, the [ICTY] may consider the factor of superior orders in connection with other defences such as coercion or lack of moral choice.¹⁰⁸²

1010. In 1997, the Special Rapporteur of the UN Commission on Human Rights on Torture recommended to the government of Colombia that a reform of the Code of Military Justice should include, *inter alia*, the “elimination of the principle of obedience to superior orders in connection with executions, torture and enforced disappearances”.¹⁰⁸³

1011. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) recalled that it had made the following statement in its first interim report:

A subordinate who has carried out an order of a superior or acted under government instructions and thereby has committed a war crime or a crime against humanity, may raise the so-called defence of superior orders, claiming that he cannot be held criminally liable for an act he was ordered to commit. The Commission notes that the applicable treaties unfortunately are silent on the matter. The Commission’s interpretation of the customary international law, particularly as stated in the Nuremberg principles, is that the fact that a person acted pursuant to an order of his Government or of a superior does not relieve him from responsibility under international law, provided a moral choice was in fact available to him.¹⁰⁸⁴

The Commission noted with satisfaction that Article 7(4) of the 1993 ICTY Statute had adopted an essentially similar approach on this subject.¹⁰⁸⁵ With regard to the “type, range and duration of the violations” committed during the conflict in the former Yugoslavia, the Commission further noted that:

[They] indicate that the absolute defence of obedience to superior orders is invalid and unfounded. . . This is particularly evident in view of the loose command and control structure where unlawful orders could have been disobeyed without individuals risking personal harm. Indeed, some did. A moral choice usually existed.¹⁰⁸⁶

1012. In 1994, in its final report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution

¹⁰⁸² UN Secretary-General, Report pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UN Doc. S/25704, 3 May 1993, § 57.

¹⁰⁸³ UN Commission on Human Rights, Special Rapporteur on Torture, Fifth report, UN Doc. E/CN.4/1998/38, 24 December 1997, § 65.

¹⁰⁸⁴ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 61.

¹⁰⁸⁵ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 62.

¹⁰⁸⁶ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, § 318.

935 (1994), referring to Article 8 of the 1945 IMT Charter (Nuremberg), noted that "since the inception of the Nuremberg Charter it has been recognized that the existence of superior orders does not provide an individual with an exculpatory defence. Nevertheless, the existence of superior orders may be taken into account with respect to mitigation of punishment."¹⁰⁸⁷

1013. In its Commentary on Article 11 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, the ILC referred to the decisions of the military tribunals after the Second World War and stated that:

It is... recognized that, if a superior order is also to entail the responsibility of the subordinate, he must have had a choice in the matter and a genuine possibility of not carrying out the order. Such circumstances would not exist in cases of irresistible moral or physical coercion, state of necessity and obvious and acceptable error.¹⁰⁸⁸

1014. In its commentary on Article 5 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, the ILC, referring to various international instruments and judgements, noted that:

- (3) Article 5 addresses the criminal responsibility of a subordinate who commits a crime while acting pursuant to an order of a Government or a superior... The culpability and the indispensable role of the subordinate who actually commits the criminal act cannot be ignored. Otherwise the legal force and effect of the prohibition of crimes under international law would be substantially weakened by the absence of any responsibility or punishment on the part of the actual perpetrators of the heinous crimes and thus of any deterrence on the part of the potential perpetrators thereof.
- (4) The plea of superior orders is most frequently claimed as a defence by subordinates who are charged with the type of criminal conduct covered by the Code. Since the Second World War the fact that a subordinate acted pursuant to an order of a Government or a superior has been consistently rejected as a basis for relieving a subordinate of responsibility for a crime under international law...
- (5) Notwithstanding the absence of any defence based on superior orders, the fact that a subordinate committed a crime while acting pursuant to an order of his superior was recognized as a possible mitigation factor which could result in a less severe punishment in the [1945 IMT Charter (Nuremberg)] and the subsequent legal instruments... The mere existence of superior orders will not automatically result in the imposition of a lesser penalty. A subordinate is subject to a lesser punishment only when a superior order in fact lessens the degree of his culpability... A subordinate who unwillingly commits a crime pursuant to an order of a superior because of the fear of serious consequences for himself or his family resulting from a failure to carry out that order does

¹⁰⁸⁷ UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Final report, UN Doc. S/1994/1405, 9 December 1994, § 175.

¹⁰⁸⁸ ILC, Commentary on Article 11 of the 1991 Draft Code of Crimes against the Peace and Security of Mankind, included in Report of the International Law Commission on the work of its Forty-third Session, UN Doc. A/CN.4/SER.A/1991/Add.1 (Part 2), 1991, §§ 2 and 3.

not incur the same degree of culpability as a subordinate who willingly participates in the commission of a crime . . .

- (6) Article 5 reaffirms the principle of individual criminal responsibility under which a subordinate is held accountable for a crime against the peace and security of mankind notwithstanding the fact that he committed such a crime while acting under the orders of a Government or a superior.¹⁰⁸⁹

Other International Organisations

1015. No practice was found.

International Conferences

1016. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1017. In its judgement in the *case of the Major War Criminals* in 1946, the defence of superior orders was dismissed by the IMT (Nuremberg), which stated that:

The provisions of this Article [i.e. Article 8 of the 1945 IMT Charter (Nuremberg)] are in conformity with the law of all nations. That a soldier was ordered to kill or torture in violation of the international law of war has never been recognised as a defence to such acts of brutality, though, as the Charter here provides, the order may be urged in mitigation of the punishment. The true test, which is found in varying degrees in the criminal law of most nations, is not the existence of the order, but whether moral choice was in fact possible.¹⁰⁹⁰

1018. In the *Erdemović case* in 1997, the ICTY Appeals Chamber found that “duress does not afford a complete defence to a soldier charged with a crime against humanity and/or a war crime involving the killing of innocent human beings”.¹⁰⁹¹

1019. In their joint separate opinion in the *Erdemović case* in 1997, Judge McDonald and Judge Vohrah stated that:

Superior orders and duress are conceptually distinct and separate issues and often the same factual circumstances engage both notions, particularly in armed conflict situations. We subscribe to the view that obedience to superior orders does not amount to a defence *per se* but is a factual element which may be taken into consideration in conjunction with other circumstances of the case in assessing whether the defences of duress or mistake of fact are made out.¹⁰⁹²

¹⁰⁸⁹ ILC, Commentary on Article 5 of the 1996 Draft Code of Crimes against the Peace and Security of Mankind, included in Report of the International Law Commission on the work of its Forty-eighth Session, UN Doc. A/CN.4/SER.A/1996/Add.1 (Part 2), §§ 3–6.

¹⁰⁹⁰ IMT (Nuremberg), *Case of the Major War Criminals*, Judgement, 1 October 1946.

¹⁰⁹¹ ICTY, *Erdemović case*, Judgement on Appeal, 7 October 1997, Part IV, Disposition, § 4.

¹⁰⁹² ICTY, *Erdemović case*, Judgement on Appeal, Joint Separate Opinion of Judge McDonald and Judge Vohrah, 7 October 1997, § 34.

1020. In its judgement in the *Erdemović case* in 1998, the ICTY Trial Chamber accepted that “the accused committed the offence in question [i.e. a violation of the laws and customs of war] under threat of death”. However, it sentenced the accused for “the violation of the laws and customs of war” to which the accused himself had pleaded guilty.¹⁰⁹³ It applied the ruling of the Appeals Chamber in the same case and stated that:

Duress may be taken into account only by way of mitigation . . . The evidence reveals the extremity of the situation faced by the accused. The Trial Chamber finds that there was a real risk that the accused would have been killed had he disobeyed the order. He voiced his feelings, but realised that he had no choice in the matter: he had to kill or be killed.¹⁰⁹⁴

1021. In 1994, in its concluding observations, the Committee against Torture, reacting against the recommendation of the Landau Commission that “psychological forms of pressure be used predominantly and that only ‘moderate physical pressure’ be sanctioned in limited cases where the degree of anticipated danger is considerable” considered that “it is a matter of deep concern that Israeli law pertaining to the defences of ‘superior orders’ and ‘necessity’ are in clear breach of that country’s obligations under Article 2 of the [1984 Convention against Torture]”.¹⁰⁹⁵

V. Practice of the International Red Cross and Red Crescent Movement

1022. No practice was found.

VI. Other Practice

1023. No practice was found.

¹⁰⁹³ ICTY, *Erdemović case*, Sentencing Judgement bis, 5 March 1998, §§ 16 and 23.

¹⁰⁹⁴ ICTY, *Erdemović case*, Sentencing Judgement bis, 5 March 1998, § 17.

¹⁰⁹⁵ UN Committee against Torture, Report, UN Doc. A/49/44, 24 April 1994, § 167.

WAR CRIMES

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A. Definition of War Crimes*I. Treaties and Other Instruments**Treaties*

1. Article 6(b) of the 1945 IMT Charter (Nuremberg) established jurisdiction of the IMT (Nuremberg) over, *inter alia*, “war crimes: namely, violations of the laws or customs of war”.
2. Article 85(5) AP I provides that grave breaches of the 1949 Geneva Conventions and of the Protocol “shall be regarded as war crimes”. Article 85 AP I was adopted by consensus.¹
3. Article 8(2) of the 1998 ICC Statute provides that:

For the purpose of this Statute, “war crimes” means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: . . .

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . .
- (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: . . .
- ...
- (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: . . .

4. Article 30(1) of the 1998 ICC Statute provides that “unless otherwise provided, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court only if the material elements are committed with intent and knowledge”.

5. Article 1(1) of the 2002 Statute of the Special Court for Sierra Leone provides that:

The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

Other Instruments

6. Based on several documents supplying evidence of outrages committed during the First World War, the 1919 Report of the Commission on Responsibility lists violations of the laws and customs of war which should be subject to criminal prosecution. At the end of the list, it is stated that “the Commission desires to draw attention to the fact that the offences enumerated . . . are not regarded as complete and exhaustive; to these such additions can from time to time be made as may seem necessary”.

7. Article II of the 1945 Allied Control Council Law No. 10 defines war crimes as:

atrocities or offences against persons or property constituting violations of the laws or customs of war, including but not limited to, murder, ill treatment or deportation to slave labour or any other purpose of civilian population from occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

8. Article 5(b) of the 1946 IMT Charter (Tokyo) gave the Tribunal jurisdiction over, *inter alia*, “Conventional War Crimes: Namely, violations of the laws or customs of war”.

9. Article 2(12) of the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind states that “the following acts are offences against the peace and security of mankind: . . . acts in violation of the laws and customs of war”.

10. Article 22(2) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind provides that “for the purposes of this Code, an exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict”.

11. Article 1 of the 1993 ICTY Statute provides that “the [ICTY] shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute”.

12. Article 2 of the 1993 ICTY Statute, entitled “Grave breaches of the Geneva Conventions of 1949”, provides that the Tribunal “shall have the power to prosecute persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949, namely the following acts against persons or property protected under the provisions of the relevant Geneva Convention: . . .”

13. Article 3 of the 1993 ICTY Statute, entitled “Violations of the laws or customs of war”, provides that the Tribunal “shall have the power to prosecute persons violating the laws or customs of war”.

14. Article 1 of the 1994 ICTR Statute provides that:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

15. Article 4 of the 1994 ICTR Statute, entitled “Violations of Article 3 common to the Geneva Conventions and of Additional Protocol II”, provides that the Tribunal “shall have the power to prosecute persons committing or ordering to be committed serious violations of Article 3 common to the Geneva Conventions . . . and of Additional Protocol II thereto”.

16. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including war crimes. Section 6(1) provides that:

For the purposes of the present regulation, “war crimes” means:

- (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: . . .
- (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts: . . .
- (c) In the case of an armed conflict not of an international character, serious violations of Article 3 common to the four Geneva Conventions of 12 August

1949, namely, any of the following acts committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause: . . .

- ...
 (e) Other serious violations of the laws and customs applicable in armed conflicts not of an international character, within the established framework of international law, namely, any of the following acts: . . .

II. National Practice

Military Manuals

17. Argentina's Law of War Manual states that "grave breaches are considered as war crimes" and provides a list of grave breaches.²

18. Australia's Defence Force Manual states that "war crimes are illegal actions relating to the inception or conduct of armed conflict. They may be viewed as any violation of LOAC (either customary or treaty law which is committed by any person)."³ The manual adds that "war crimes which are directed against protected persons or facilities under the Geneva Conventions or the Additional Protocols fall within two main categories. The more serious violations are termed grave breaches and the less serious are simple breaches."⁴

19. Belgium's Law of War Manual defines as a war crime "any violation of the laws of war . . . or of the laws of the belligerents, during or on the occasion of war". However, it criticises this definition, saying that "it includes not only crimes against peace and against humanity . . . and violations of the laws of war as such . . . but also violations of the internal legislation of the adversary" which, according to the manual, do not necessarily merit being considered as war crimes.⁵ It states, therefore, that "it would be preferable to restrict the term 'war crime' to violations that cause outrage to the public conscience owing to their 'brutality', their 'inhuman character' or the wilful refusal to recognise rights of property having no connection with military necessity".⁶ Under the heading "Grave breaches of the Geneva Conventions", the manual lists a number of war crimes which are clearly defined and listed as "grave breaches" in the Conventions. It refers to Articles 50–51 GC I, 51 GC II, 130 GC III and 147 GC IV, as well as to Articles 11, 85 and 86 AP I.⁷

20. Canada's LOAC Manual explains that:

Broadly speaking, "war crimes" include all violations of International Law in relation to an armed conflict for which individuals may be prosecuted and punished, including crimes against peace, crimes against humanity and genocide. In the narrow, technical sense "war crimes" are violations of the laws and customs of war.⁸

² Argentina, *Law of War Manual* (1989), § 8.03.

³ Australia, *Defence Force Manual* (1994), § 1312; see also *Commanders' Guide* (1994), § 1302.

⁴ Australia, *Defence Force Manual* (1994), § 1314; see also *Commanders' Guide* (1994), § 1304.

⁵ Belgium, *Law of War Manual* (1983), p. 54.

⁶ Belgium, *Law of War Manual* (1983), p. 55.

⁷ Belgium, *Law of War Manual* (1983), p. 55.

⁸ Canada, *LOAC Manual* (1999), p. 16-1, § 2.

The manual further states that:

The term “war crime” in its narrower meaning is a technical expression for a violation of the laws or customs of war. This includes:

- a. grave breaches of the Geneva Conventions or Additional Protocols to the Geneva Conventions;
- b. violations of the Hague Conventions; and
- c. violations of the customs of war.⁹

At the end of the section dealing with “War crimes in the narrow sense”, which lists “Grave breaches of the 1949 Geneva Conventions”, “Grave breaches of Additional Protocol I” and “Violations of [the] Hague Conventions and customary law”, the manual also states that “the fact that a particular act is not listed here as a war crime does not preclude its being treated as a war crime if it is a violation of the laws and customs of war (LOAC)”.¹⁰ With respect to non-international armed conflicts, the manual notes that “when AP II was adopted, States refused to make violations of its provisions criminal offences”.¹¹ It adds that “today, however, many provisions of AP II are nevertheless recognized under customary International Law as prohibitions that entail individual criminal responsibility when breaches are committed during internal armed conflicts”¹² and that “violations of many provisions of AP II committed by individual members of a party to an internal conflict are thus criminal offences under International Law”.¹³

21. Colombia’s Basic Military Manual provides that “grave breaches of IHL committed by the parties to the conflict constitute war crimes or crimes against humanity”.¹⁴

22. Croatia’s LOAC Compendium, in a provision entitled “Grave Breaches (War Crimes)”, contains a list of punishable acts (“among others”).¹⁵

23. Ecuador’s Naval Manual provides that:

War crimes are defined as those acts which violate the law of armed conflict, that is, the rules established by customary and conventional international law regulating the conduct of warfare, and which have been generally recognized as war crimes. Acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population.¹⁶

24. France’s LOAC Summary Note gives a detailed list of war crimes and provides that “grave breaches of the law of war are war crimes”.¹⁷

⁹ Canada, *LOAC Manual* (1999), p. 16-2, § 8.

¹⁰ Canada, *LOAC Manual* (1999), p. 16-4, § 22.

¹¹ Canada, *LOAC Manual* (1999), p. 17-5, § 42.

¹² Canada, *LOAC Manual* (1999), p. 17-5, § 43.

¹³ Canada, *LOAC Manual* (1999), p. 17-5, § 44.

¹⁴ Colombia, *Basic Military Manual* (1995), p. 31.

¹⁵ Croatia, *LOAC Compendium* (1991), p. 56.

¹⁶ Ecuador, *Naval Manual* (1989), § 6.2.5.

¹⁷ France, *LOAC Summary Note* (1992), § 3.4.

25. France's LOAC Teaching Note states that "every grave breach of the rules of the law of armed conflicts represents a war crime."¹⁸

26. France's LOAC Manual, under the heading "War crimes", cites, *inter alia*, Article 212(1) of the French Penal Code (which provides for life imprisonment for such acts as deportation, enslavement, massive and systematic summary executions, abductions of persons followed by their disappearance, torture and inhuman acts) and Article 75 AP I. It also refers to Articles 41 and 56 of the 1907 HR, Articles 3, 49 and 50 GC I, Articles 3, 50 and 51 GC II, Articles 3, 80–88, 105–108, 129 and 130 GC III, Articles 3, 146 and 147 GC IV and Articles 11, 75 and 85 AP I. The manual further states that:

Article 8 of the [1998 ICC Statute] defines as war crimes "grave breaches of the Geneva Conventions of 12 August 1949, [committed] against persons or property protected under the provisions of the relevant Geneva Convention" and "grave breaches of the laws and customs of war in an international or non-international armed conflict".¹⁹

27. Germany's Military Manual provides a list of grave breaches ("in particular") of IHL.²⁰

28. Hungary's Military Manual, in a provision entitled "Grave Breaches (War Crimes)", contains a list of punishable acts ("among others").²¹

29. Israel's Manual on the Laws of War states that "the violation of the laws and customs of war is termed a 'war crime'".²²

30. Italy's IHL Manual does not define war crimes as such, but includes a non-exhaustive list of acts that are considered war crimes and/or grave breaches under national and international law.²³ In the section on "Grave breaches of the international Conventions and the Protocols additional thereto", the manual lists, *inter alia*, "the violation of fundamental guarantees of respect and protection of the person".²⁴

31. South Korea's Military Regulation 187 contains a list of war crimes.²⁵

32. According to the Military Manual of the Netherlands, a war crime is a violation of the rules of the law of war. The manual uses the term "war crime" both in a broad and in a narrow sense. It explains that war crimes in the broad sense include violations of the laws and customs of war, crimes against peace and crimes against humanity. In the narrow sense, they are defined as violations of the laws and customs of war. As to the difference between war crimes and crimes against humanity, the manual states that crimes against humanity can also be committed outside the context of armed conflict and can be directed against one's own population. Furthermore, the manual recalls that the Geneva

¹⁸ France, *LOAC Teaching Note* (2000), p. 7.

¹⁹ France, *LOAC Manual* (2001), pp. 44–46.

²⁰ Germany, *Military Manual* (1992), § 1209. ²¹ Hungary, *Military Manual* (1992), p. 90.

²² Israel, *Manual on the Laws of War* (1998), p. 64.

²³ Italy, *IHL Manual* (1991), Vol. I, § 84. ²⁴ Italy, *IHL Manual* (1991), Vol. I, § 85.

²⁵ South Korea, *Military Regulation 187* (1991), Article 4.2.

Conventions and AP I provide for the distinction between (ordinary) breaches and grave breaches. As to the latter, it states that they must be subject to criminal sanction. According to the manual, grave breaches of treaty law are violations of the most fundamental rules of IHL. In addition, there are ordinary breaches. These concern acts which constitute grave breaches but which lack the intent of the actor or cases in which neither death nor serious bodily injuries are caused. As other examples of such ordinary breaches, the manual lists cases of appropriation of property of POWs, insulting internees and unnecessary damaging of civilian objects. According to the manual, war crimes can also take place by negligence. Lastly, the manual refers to Article 86 AP I, noting the duty to repress grave breaches and to take measures necessary to suppress all other breaches which result from a failure to act when under a duty to do so.²⁶

33. New Zealand's Military Manual states that:

The term "war crime" is the generic expression for large and small violations of the laws of warfare, whether committed by members of the armed forces or by civilians. It includes "grave breaches". These are war crimes which are also major violations of the Geneva Conventions of 1949 or of AP I. "War crimes", in the broadest sense, include crimes against peace and crimes against humanity of the type prosecuted before the International Military Tribunal at Nuremberg following World War II.²⁷

The manual further provides a long list of "grave breaches" and other war crimes.²⁸ It also states that "the fact that a particular act is not listed in this Manual as a war crime or grave breach does not preclude its being treated as a war crime if it is in breach of any rule of the customary or treaty law of armed conflict".²⁹ With respect to non-international armed conflicts in particular, the manual states that:

Although breaches of AP II would amount to war crimes if committed in international armed conflict, both the governmental and rebel authority should treat them as breaches of the national criminal law, since the law concerning war crimes relates to international armed conflicts.³⁰

34. Nigeria's Manual on the Laws of War states that:

"War crime" is the technical term for violation of the Laws of war. It includes plotting, incitement or attempt to commit such crimes, as well as participation in the execution of these crimes. Grave breaches of the Geneva Conventions are considered as serious war crimes when committed against [a number of protected persons and objects listed within the provision].³¹

²⁶ Netherlands, *Military Manual* (1993), pp. IX-3/IX-6.

²⁷ New Zealand, *Military Manual* (1992), § 1701(1).

²⁸ New Zealand, *Military Manual* (1992), §§ 1702, 1703 and 1704.

²⁹ New Zealand, *Military Manual* (1992), § 1704(6).

³⁰ New Zealand, *Military Manual* (1992), § 1824(1).

³¹ Nigeria, *Manual on the Laws of War* (undated), § 6.

35. According to South Africa's LOAC Manual, "any breach of the law of armed conflict is considered a war crime".³² Referring to AP I, the manual further distinguishes between two separate categories of grave breaches and states that "the first category relates to combat activities and medical experimentation. It requires both willfulness and the death or serious injury to body or health is caused. The second category requires only willfulness."³³ The manual then lists certain acts defined as "grave breaches", stating however, that grave breaches are "not limited" to those listed.³⁴ Lastly, the manual expressly states that "grave breaches of the law of war are regarded as war crimes".³⁵

36. Spain's LOAC Manual contains a list of grave breaches which it considers to be "typified as war crimes". It also states that "grave breaches are considered war crimes" and then sets out a list of acts considered to be grave breaches.³⁶

37. Sweden's IHL Manual, in a provision dealing with penal responsibility for violations of IHL, states that:

The Conventions distinguish between grave breaches and other transgressions. A grave breach in the meaning of the conventions exists where the breach has been directed at persons or property protected by the conventions and has also included any of certain specially listed acts.³⁷

38. Switzerland's Basic Military Manual provides that "violations of the laws and customs of war, commonly called war crimes, engage the individual responsibility of the persons who committed them as well as the responsibility of the States to which the perpetrators of the violation are nationals".³⁸ The manual then provides a list of grave breaches of the Geneva Conventions and of AP I.³⁹

39. The UK Military Manual states that:

The term "war crime" is the technical expression for violations of the law of warfare, whether committed by members of the armed forces or by civilians. It has also been customary to describe as war crimes such acts as espionage and so-called war treason which, although not prohibited by international law, are properly liable to punishment by the belligerent against which they are directed. However, the accuracy of the description of such acts as war crimes is doubtful.⁴⁰

The manual identifies a number of offences as war crimes, some of which are listed as grave breaches and some of which, under the heading "Other war crimes", it describes as "examples of punishable violations of the laws of war, or war crimes".⁴¹ Under the same heading, it adds that "similarly, all other

³² South Africa, *LOAC Manual* (1996), § 35. ³³ South Africa, *LOAC Manual* (1996), § 36.

³⁴ South Africa, *LOAC Manual* (1996), §§ 37 and 38.

³⁵ South Africa, *LOAC Manual* (1996), § 41.

³⁶ Spain, *LOAC Manual* (1996), Vol. I, §§ 9.2.a.(2) and 11.8.b.(1).

³⁷ Sweden, *IHL Manual* (1991), Section 4.2, p. 93.

³⁸ Switzerland, *Basic Military Manual* (1987), Article 191.

³⁹ Switzerland, *Basic Military Manual* (1987), Articles 192 and 193.

⁴⁰ UK, *Military Manual* (1958), § 624.

⁴¹ UK, *Military Manual* (1958), §§ 625 and 626.

violations of the [1949 Geneva] Conventions not amounting to 'grave breaches' are also war crimes".⁴²

40. The US Field Manual provides that "the term 'war crime' is the technical expression for a violation of the law of war by any person or persons, military or civilian. Every violation of the law of war is a war crime."⁴³ It then states that "conspiracy, direct incitement, and attempts to commit, as well as complicity in the commission of, . . . war crimes are punishable".⁴⁴ The manual further provides a list of "Grave Breaches of the Geneva Conventions of 1949 as War Crimes"⁴⁵ and a list of "Other Types of War Crimes" which it describes as being "representative of violations of the law of war ('war crimes)".⁴⁶

41. The US Air Force Pamphlet emphasises the importance of criminal intent as an element of any war crime.⁴⁷

42. The US Instructor's Guide provides that "under the Geneva Conventions the most serious offenses are called grave breaches of the law of war".⁴⁸

43. The US Naval Handbook provides that:

War crimes are defined as those acts which violate the law of armed conflict, that is, the rules established by customary and conventional international law regulating the conduct of warfare, and which have been generally recognized as war crimes. Acts constituting war crimes may be committed by the armed forces of a belligerent or by individuals belonging to the civilian population.⁴⁹

The Handbook then provides a list of acts which it characterizes as "representative war crimes".⁵⁰

National Legislation

44. Argentina's Draft Code of Military Justice, after listing various more precisely defined violations of the LOAC, provides that it is an offence

in the event of an armed conflict, to commit or order to commit any other breaches or acts contrary to the provisions of international treaties to which [Argentina] is a party, with regard to the conduct of hostilities, the protection of the wounded, sick or shipwrecked, the treatment owed to prisoners of war, the protection of the civilian population and of cultural objects.⁵¹

45. Australia's War Crimes Act considers that:

Unless the contrary intention appears, . . .

"war crime" means –

- (a) a violation of the laws and usages of war; or
- (b) any war crime within the instrument of appointment of the Board of Inquiry [set up to investigate war crimes committed by enemy subjects]

⁴² UK, *Military Manual* (1958), § 626.

⁴³ US, *Field Manual* (1956), § 499; see also *Operational Law Handbook* (1993), p. Q-183.

⁴⁴ US, *Field Manual* (1956), § 500. ⁴⁵ US, *Field Manual* (1956), § 502.

⁴⁶ US, *Field Manual* (1956), § 504. ⁴⁷ US, *Air Force Pamphlet* (1976), § 15-2(c).

⁴⁸ US, *Instructor's Guide* (1985), p. 13. ⁴⁹ US, *Naval Handbook* (1995), § 6.2.5.

⁵⁰ US, *Naval Handbook* (1995), § 6.2.5.

⁵¹ Argentina, *Draft Code of Military Justice* (1998), Article 296, introducing a new Article 880 in the Code of Military Justice as amended (1951).

committed in any place whatsoever, whether within or beyond Australia, during any war.⁵²

46. Australia's War Crimes Act as amended, under the heading "War crimes", states that:

- (1) A serious crime is a war crime if it was committed:
 - (a) in the course of hostilities in a war;
 - (b) in the course of an occupation;
 - (c) in pursuing a policy associated with the conduct of a war or with an occupation; or
 - (d) on behalf of, or in the interests of, a power conducting a war or engaged in an occupation.
- (2) For the purposes of subsection (1), a serious crime was not committed:
 - (a) in the course of hostilities in a war; or
 - (b) in the course of an occupation; merely because the serious crime had with the hostilities or occupation a connection (whether in time, in time and place, or otherwise) that was only incidental or remote.
- (3) A serious crime is a war crime if it was:
 - (a) committed:
 - (i) in the course of political, racial or religious persecution; or
 - (ii) with intent to destroy in whole or in part a national, ethnic, racial or religious group, as such; and
 - (b) committed in the territory of a country when the country was involved in a war or when territory of the country was subject to an occupation.
- (4) Two or more serious crimes together constitute a war crime if:
 - (a) they are of the same or a similar character;
 - (b) they form, or are part of, a single transaction or event; and
 - (c) each of them is also a war crime by virtue of either or both of subsections (1) and (3).⁵³

47. Azerbaijan's Criminal Code provides for punishment, *inter alia*, in case of war crimes (Article 57) and contains provisions criminalising: the use of "mercenaries" (Article 114); "violations of [the] laws and customs of war" (Article 115); "violations of the norms of international humanitarian law in time of armed conflict" (Article 116); "negligence or giving criminal orders in time of armed conflict" (Article 117); "pillage" (Article 118); and "abuse of protected signs" (Article 119). In a remark relating to the part entitled "War crimes", the Code states that "any of [the] acts considered in the present part and committed with regard to [the] planning, preparation, beginning or conduct of hostilities during either international or internal armed conflict, are considered as war crimes".⁵⁴

48. Bangladesh's International Crimes (Tribunal) Act, under a norm providing for the punishment of prohibited acts, lists "war crimes: namely, violation of laws or customs of war which include, but are not limited to... [a list of

⁵² Australia, *War Crimes Act* (1945), Section 3.

⁵³ Australia, *War Crimes Act as amended* (1945), Section 7.

⁵⁴ Azerbaijan, *Criminal Code* (1999), Articles 57 and 114–119 and remark 1 relating to Part 17.

offences]". The Act also provides for the punishment of the "violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Conventions of 1949" and "any other crimes under international law".⁵⁵

49. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended states that:

The grave breaches listed below which cause injury or damage, by act or omission, to persons or objects protected by the Conventions signed at Geneva on 12 August 1949 and approved by the Act of 3 September 1952, and by Protocols I and II additional to those Conventions adopted at Geneva on 8 June 1977 and approved by the Act of 16 April 1986, shall – without prejudice to the criminal provisions applicable to other breaches of the Conventions referred to in the present Act and without prejudice to criminal provisions applicable to breaches committed out of negligence – constitute crimes under international law and be punishable in accordance with the provisions of the present Act.⁵⁶

50. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes provides that:

As war crimes are considered:

- A. Grave breaches of the Geneva Conventions . . . which means any of the acts listed hereafter if they aim at persons or objects protected by the provisions of the Geneva Conventions . . .
- B. Other grave breaches of the laws and customs applicable to international armed conflicts within the framework established by international law . . .
- C. In case of armed conflict which is not of an international nature, the grave breaches of common article 3 of the four Geneva Conventions, which means any of the acts listed hereunder committed against persons who do not directly participate in the hostilities, including the members of the armed forces who have laid down their weapons and persons who have been placed *hors de combat* because of sickness, wounds, detention or any other reason . . .
- D. Other grave breaches of the laws and customs applicable to armed conflicts which are not of an international nature within the framework established by international law.⁵⁷

51. Canada's Criminal Code states that:

"War crime" means an act or omission that is committed during an international armed conflict, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission, and that, at that time and in that place, constitutes a contravention of the customary international law or conventional international law applicable in international armed conflicts.⁵⁸

52. Canada's Crimes against Humanity and War Crimes Act defines a war crime as:

⁵⁵ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(2)(d), (e) and (f).

⁵⁶ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3).

⁵⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 4.

⁵⁸ Canada, *Criminal Code* (1985), Article 3.76.

an act or omission committed during an armed conflict that, at the time and in the place of its commission, constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts, whether or not it constitutes a contravention of the law in force at the time and in the place of its commission.⁵⁹

53. Chile's Code of Military Justice, under the heading "Treason, espionage and offences against the sovereignty and external security of the State", provides a list of certain crimes directed against specific protected persons and objects, including misuse of the red cross flag and emblem in times of war.⁶⁰

54. China's Law Governing the Trial of War Criminals contains a list of offences regarded as war crimes and provides for the punishment of "other acts violating the law or usages of war, or acts whose cruelty or destructiveness exceeds their military necessity, forcing people to do things beyond their obligation, or acts hampering the exercise of legal rights".⁶¹

55. According to the DRC Code of Military Justice as amended, war crimes are "all offences against the laws of the Republic which are not justified by the laws and customs of war".⁶²

56. Congo's Genocide, War Crimes and Crimes against Humanity Act states that:

By "war crimes" is meant:

- a) grave breaches of the Geneva Conventions of 12 August 1949;
- b) other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law;
- c) serious violations of article 3 common to the four Geneva Conventions of 12 August 1949;
- d) other serious violations recognised as being applicable to armed conflicts not representing an international character, within the established framework of international law.⁶³

57. Estonia's Penal Code states that:

- (1) Offences committed in times of war which are not provided for under this section [dealing with war crimes] are punishable on the basis of other provisions of the special part of this Code.
- (2) A person who has committed an offence provided for under this section shall be punished only for the commission of a war crime even if the offence comprises the necessary elements of other offences provided for in the special part of this Code.⁶⁴

⁵⁹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Sections 4 and 6.

⁶⁰ Chile, *Code of Military Justice* (1925), Articles 261–264.

⁶¹ China, *Law Governing the Trial of War Criminals* (1946), Article 3.

⁶² DRC, *Code of Military Justice as amended* (1972), Article 502.

⁶³ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 4.

⁶⁴ Estonia, *Penal Code* (2001), § 94.

58. According to the Report on the Practice of Ethiopia, acts which, in the meaning of Ethiopia's Penal Code, constitute "war crimes in the context of [an] international armed conflict would also be crimes in the context of [an] internal armed conflict".⁶⁵

59. Finland's Revised Penal Code provides that:

A person who in an act of war

- 1) uses a prohibited means of warfare or weapon;
- 2) abuses an international symbol designated for the protection of the wounded or the sick; or
- 3) otherwise violates the provisions of an international agreement on warfare binding on Finland or the generally acknowledged and established rules and customs of war under public international law

shall be sentenced for a *war crime*.⁶⁶ [emphasis in original]

60. France's Ordinance on Repression of War Crimes, relating to offences committed during the Second World War, provided for the prosecution of:

Enemy nationals or non-French agents . . . guilty of crimes or offences committed since the opening of hostilities either in France or in a territory under French authority, either against a French national or a person protected by France, a soldier serving or having served under the French flag, a stateless person residing on French territory . . . or a refugee on French territory, or to the prejudice of the property of any of these persons mentioned above and of any French legal entity, provided that these offences, even if committed at the occasion or under the pretext of the state of war, are not justified by the laws and customs of war.⁶⁷

61. Israel's Nazis and Nazi Collaborators (Punishment) Law defines war crimes as:

murder, ill-treatment or deportation to forced labour or for any other purpose of the civilian population of or in occupied territory; murder or ill-treatment of prisoners of war or persons on the seas; killing of hostages; plunder of public or private property; wanton destruction of cities, towns or villages; and devastation not justified by military necessity.⁶⁸

62. Jordan's Draft Military Criminal Code contains a list of acts which it considers to be "war crimes" and which are committed "in times of armed conflict", emphasizing that "the provisions of [the part on war crimes] will apply to civilians who commit any war crime".⁶⁹

63. Latvia's Criminal Code provides for the punishment of "the committing of war crimes, that is, of violating provisions and customs regarding the conduct

⁶⁵ Report on the Practice of Ethiopia, 1998, Chapter 6.4.

⁶⁶ Finland, *Revised Penal Code* (1995), Chapter 11, Section 1.

⁶⁷ France, *Ordinance on Repression of War Crimes* (1944), Article 1.

⁶⁸ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(b).

⁶⁹ Jordan, *Draft Military Criminal Code* (2000), Articles 41 and 44.

of war forbidden by international agreements binding upon the Republic of Latvia".⁷⁰

64. The Draft Amendments to the Code of Military Justice of Lebanon provides a list of punishable acts, some of which it describes as "grave breaches committed against protected persons or protected objects . . . considered to be war crimes" (Article 146(1)–(8)). Other offences in the list "are considered to be war crimes when committed wilfully and causing death or serious injury to body or health" (Article 146(9)–(14)) or "considered to be war crimes when committed wilfully and in violation of the [Geneva] Conventions or [AP I]" (Article 146(15)–(20)).⁷¹

65. Luxembourg's Law on the Punishment of Grave Breaches criminalises and identifies as "international law crimes" the grave breaches of the Geneva Conventions.⁷²

66. Moldova's Penal Code, at the end of a list of punishable acts related to armed conflict, states that:

The provisions of Articles 389–391 [entitled "Pillage of the dead on the battlefield" (Article 389), "Acts of violence against the civilian population in the area of military hostilities" (Article 390) and "Grave breach of international humanitarian law committed during armed conflict" (Article 391)] also apply to the civilian population.⁷³

67. The Extraordinary Penal Law Decree as amended of the Netherlands, relating to offences committed during the Second World War, provided that:

He who during the time of the . . . war and while in the forces or service of the enemy state is guilty of a war crime or any crime against humanity as defined in Article 6 under (b) or (c) of the [1945 IMT Charter (Nuremberg)] shall, if such crime contains at the same time the elements of an act punishable according to Netherlands Law, receive the punishment prescribed for such act.

If such crime does not at the same time contain the elements of an act punishable according to the Netherlands law, the perpetrator shall receive the punishment prescribed by Netherlands law for the act with which it shows the greatest similarity.⁷⁴

68. The Decree Instituting the Commission for the Investigation of War Crimes of the Netherlands, relating to offences committed during the Second World War, stated that "under war crimes shall be understood . . . facts which constitute crimes considered as such according to Dutch law and which are forbidden by the laws and customs of war and have been committed during the present war by other than Dutchmen or Dutch subjects".⁷⁵

⁷⁰ Latvia, *Criminal Code* (1998), Section 74.

⁷¹ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146(1)–(8), (9)–(14) and (15)–(20).

⁷² Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 1.

⁷³ Moldova, *Penal Code* (2002), Article 393.

⁷⁴ Netherlands, *Extraordinary Penal Law Decree as amended* (1943), Article 27-a.

⁷⁵ Netherlands, *Decree Instituting the Commission for the Investigation of War Crimes* (1945).

69. The Definition of War Crimes Decree of the Netherlands states that “under war crimes are understood acts which constitute a violation of the laws and usages of war committed in time of war by subjects of an enemy power or by foreigners in the service of the enemy”.⁷⁶

70. New Zealand’s International Crimes and ICC Act defines war crimes as grave breaches of the 1949 Geneva Conventions, other serious violations of the laws and customs of war applicable in international armed conflict, serious violations of common Article 3 of the 1949 Geneva Conventions and other serious violations of the laws and customs applicable in armed conflict not of an international character.⁷⁷

71. Nicaragua’s Revised Penal Code provides that a person who during an international war or civil war commits serious violations of international treaties on the use of weapons, the treatment of prisoners or other rules of war, shall be guilty of an offence against the international order.⁷⁸

72. Norway’s Act on the Punishment of Foreign War Criminals provided that acts forbidden by Norwegian criminal law which had been committed against Norwegian nationals or interests or in Norway during the Second World War and were in violation of the laws and customs of war could be tried according to Norwegian law.⁷⁹

73. Spain’s Penal Code, after listing “crimes against protected persons and objects in the event of an armed conflict”, provides that it is an offence in the event of an armed conflict, to commit or order to commit any other breaches or acts contrary to the provisions of international treaties to which [Spain] is a party, with regard to the conduct of hostilities, the protection of the wounded, sick or shipwrecked, the treatment owed to prisoners of war, the protection of the civilian population and of cultural objects.⁸⁰

74. The UK Regulations for the Trial of War Criminals as amended states that “‘war crime’ means a violation of the laws and usages of war committed during any war in which His Majesty has been or may be engaged at any time since the 2nd September, 1939”.⁸¹

75. The US War Crimes Act as amended provides that:

As used in this section the term “war crime” means any conduct –

- (1) defined as a grave breach in any of the [1949 Geneva Conventions], or any protocol to such convention to which the United States is a party;
- (2) prohibited by Article 23, 25, 27, or 28 of the [1907 HR];
- (3) which constitutes a violation of common Article 3 of the [1949 Geneva Conventions], or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or

⁷⁶ Netherlands, *Definition of War Crimes Decree* (1946), Article 1.

⁷⁷ New Zealand, *International Crimes and ICC Act* (2000), Section 11.

⁷⁸ Nicaragua, *Revised Penal Code* (1997), Article 551.

⁷⁹ Norway, *Act on the Punishment of Foreign War Criminals* (1946).

⁸⁰ Spain, *Penal Code* (1995), Article 614.

⁸¹ UK, *Regulations for the Trial of War Criminals as amended* (1945), Regulation 1.

- (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.⁸²

National Case-law

76. In its judgement in the *Enigster case* in 1952, Israel's District Court of Tel Aviv held with respect to the Israeli Nazis and Nazi Collaborators (Punishment) Law that "at all events the victims of a war crime must be nationals of an occupied territory, while this is not necessary in the case of a crime against humanity which may be committed against any civilian population". However, it also stated that "true, it is possible to find a man guilty of a war crime even though he is of the population of occupied territory and possesses the same national character as his victims, if his actions show that he identified himself with the Occupant".⁸³

77. In the *Pilz case* in 1949, the Special Criminal Chamber of the District Court of The Hague (Netherlands) and, on appeal in 1950, the Special Court of Cassation of the Netherlands agreed that the 1907 HR had not been violated, since the object of the 1907 HR, and in particular of Article 46, was to protect the inhabitants of an enemy-occupied country and not members of the occupying forces. With respect to the 1929 GC, the Special Court of Cassation stated that the 1929 GC only protected members of an army against acts by members of the opposing army. Therefore, the acts of a German military doctor with respect to an escaping member of the German army did not constitute war crimes, but were crimes in the domestic sphere of German military law and jurisdiction.⁸⁴

78. In a number of post-Second World War decisions, UK and US courts held that war crimes could be committed by civilians. The cases included prosecutions against the staff of a State sanatorium for the extermination of civilians deported from occupied territories; officials of companies which supplied the gas used for the extermination of concentration camp detainees; and high-ranking officials in private corporations for, *inter alia*, deportation of the civilian populations of occupied territories to slave labour and plunder of public and private property in occupied territories. For example, in the *Flick case* in 1947, the US Military Tribunal at Nuremberg stated that:

Acts adjudged criminal when done by an officer of the government are criminal also when done by a private individual. The guilt differs only in magnitude, not in quality. The offender in either case is charged with personal wrong and punishment

⁸² US, *War Crimes Act as amended* (1996), Section 2441(c).

⁸³ Israel, District Court of Tel Aviv, *Enigster case*, Judgement, 4 January 1952.

⁸⁴ Netherlands, District Court of The Hague (Special Criminal Chamber), *Pilz case*, Judgement, 21 December 1949; Special Court of Cassation, *Pilz case*, Judgement, 5 July 1950.

falls on the offender *in propria persona*. The application of international law to individuals is not a novelty.⁸⁵

79. In its judgement in the *Leo Handel case* in 1985, a US District Court held that:

“War crimes” refers to criminal actions taken against the soldiers or civilians of another country rather than against the defendant’s fellow citizens. This limitation on the meaning of “war crimes” is reflected in the [1945 IMT Charter (Nuremberg)] annexed to the Agreement for the Establishment of an International Military Tribunal.⁸⁶ [emphasis in original]

However, the Court also stated that “by contrast, crimes against humanity include ‘murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population’”.⁸⁷ (emphasis in original)

80. In a written opinion in the *Trajković case* in 2001, the International Prosecutor for the Office of the Public Prosecutor of Kosovo (FRY) referred to Articles 146 and 147 GC IV and stated that:

The cited provisions of Geneva Convention IV establish that, in general, a person commits a crime of war only if:

- (1) during armed conflict, whether or not international,
- (2) he commits a prohibited act against a protected person or population.

... ICTY jurisprudence makes explicit the third element, a nexus between the armed conflict and the prohibited act.⁸⁸

Other National Practice

81. In 1973, during a debate in the Third Committee of the UN General Assembly, the representative of Belgium stated that “with regard to the definition of the concept of war crimes and crimes against humanity, his Government based its position on the Charter of the International Military Tribunal, Nuremberg, and the body of judicial practice to which it had given rise”.⁸⁹

82. In an explanatory memorandum submitted in 1992 to the Belgian Senate in the context of the adoption of the Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, it

⁸⁵ US, Military Tribunal at Nuremberg, *Flick case*, Judgement of 22 December 1947; see also US, Military Commission in Wiesbaden, *Hadamard Sanatorium case*, Judgement, 8–15 October 1945, US, Military Tribunal at Nuremberg, *Krupp case*, Judgement, 17 December 1947–30 June 1948, US, Military Tribunal at Nuremberg, *Krauch (I. G. Farben Trial) case*, Judgement, 14 August 1947–29 July 1948 and UK, Military Court at Hamburg, *Zyklon B case*, Judgement, 1–8 March 1946.

⁸⁶ US, District Court, Central District, California, *Leo Handel case*, Judgement, 31 January 1985.

⁸⁷ US, District Court, Central District, California, *Leo Handel case*, Judgement, 31 January 1985.

⁸⁸ SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Section II(D).

⁸⁹ Belgium, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.2022, 9 November 1973, § 40.

was stated that the law reserved the application of other criminal provisions applicable to other breaches of the conventions to which it referred. It further stated that, because of this reservation, “the repression of all violations of the laws and customs of war is covered by ‘ordinary’ national penal law” insofar as the violations correspond to offences punishable under national (penal) law.⁹⁰ An early draft of this law was amended in order to include acts committed in the context of non-international conflicts that corresponded to the grave breaches of the Geneva Conventions and AP I. Among the reasons for the inclusion of acts committed in the context of non-international conflicts, members of the Senate who submitted the amendment mentioned, *inter alia*, that international law did not prohibit such criminalisation. The amendment was ultimately supported by the Belgian government, which noted that although the proposals “go further than required by the Conventions and Protocols, they remain within the scope of the – admittedly extensive – application of an international instrument ratified by Belgium”.⁹¹

83. The Report on the Practice of Belgium notes that the Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols shows that Belgium believes that the grave breaches aimed at by the Geneva Conventions and AP I are also war crimes when committed in a non-international armed conflict. It further states that the above-mentioned reservation, as well as Belgian practice in the aftermath of the Second World War, when courts, lacking specific legislation in this regard, applied national law to “war crimes”, show that it is Belgium’s *opinio juris* that the term “war crime” can be a broader one than the technical term of “grave breach” in the meaning of the Geneva Conventions and AP I.⁹²

84. According to the Report on the Practice of Chile, the provisions of Chile’s Code of Military Justice dealing with certain offences directed against protected persons and objects define what the national law “considers to be crimes of war”. The report further states that:

This definition predates the Geneva Conventions of 1949 and is fundamentally based on the Law of The Hague that originated in the Peace Conferences of 1899 and 1907 . . . The definitions laid down by the Code of Military Justice are understood to form part of customary international law.⁹³

⁹⁰ Belgium, Senate, Explanatory Memorandum, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1990–1991 Session, Doc. 1317-1, 30 April 1991, p. 6.

⁹¹ Belgium, Senate, Complementary report submitted on behalf of the Commission of Justice, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1991–1992 Extraordinary Session, Doc. 481-5, 22 December 1992, pp. 2 ff.

⁹² Report on the Practice of Belgium, 1997, Chapter. 6.5.

⁹³ Report on the Practice of Chile, 1997, Chapter 6.5.

85. In 1998, during a debate in the Sixth Committee of the UN General Assembly on the establishment of an international criminal court, China stated that:

As far as war crimes are concerned, China has doubts about the inclusion of war crimes in domestic armed conflicts in the Court's jurisdiction, because provisions in international law concerning war crimes in such conflicts are still incomplete... The definition of war crimes in domestic armed conflicts in the present [Rome] Statute has far exceeded not only customary international law but also the provisions of [AP II].⁹⁴

86. In 1950, during a debate in the Sixth Committee of the UN General Assembly on the Nuremberg Principles established by the ILC, France stated that:

The offences listed by the [IMT (Nuremberg)] were based on already existing principles of international law; they were principles "recognized" by the [1945 IMT Charter (Nuremberg)], as was stated in the General Assembly resolution, and not principles "laid down" by that charter.

... The list of war crimes in article 6(b) of the [1945 IMT Charter (Nuremberg)] was based on the definitions of traditional international law contained in the Hague Conventions of 1907, the Treaty of Versailles of 1919 and the Geneva Conventions of 1929. Thus, the concept of war crimes as it was recognized in the [1945 IMT Charter (Nuremberg)] had already existed in 1939.⁹⁵

87. In a speech before the French National Consultative Commission on Human Rights in 1998, the Director of the Legal Department of the French Ministry of Foreign Affairs noted with regard to the definition of war crimes to be included in the 1998 ICC Statute that the provisions in the "war crimes" section covered what the French referred to as the laws of war, namely the Geneva Conventions and their Additional Protocols. He added that it was agreed that in practice the Statute would reflect existing law.⁹⁶

88. In 1998, the French National Consultative Commission on Human Rights recommended that:

As regards the definition of war crimes, endorsement must be made [in the 1998 ICC Statute] of the grave breaches of international humanitarian law committed in international as well as in internal armed conflicts, as defined by the Geneva Conventions and their two additional Protocols.⁹⁷

89. In 1998, at the UN Conference of Plenipotentiaries on the Establishment of an International Criminal Court, the French Minister of Foreign Affairs declared that "some States are entirely opposed to the idea that the definition

⁹⁴ China, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/53/SR.9, 21 October 1998, § 36.

⁹⁵ France, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/SR.236, 9 November 1950, §§ 9–10.

⁹⁶ France, National Consultative Commission on Human Rights, Statement by the Director of the Legal Department of the Ministry of Foreign Affairs, 22 April 1998, p. 3.

⁹⁷ France, National Consultative Commission on Human Rights, Opinion on the establishment of an international criminal court, 14 May 1998, § 3.

of war crimes may apply to internal conflicts. But accepting this restriction would be a retrograde step. Here in Rome we must find a workable solution to this problem."⁹⁸

90. In 1993, during a debate in the Sixth Committee of the UN General Assembly, Germany stated that:

Articles 22 and 26 of the draft statute [for an international criminal court] contained criteria for jurisdiction. First, the court would have jurisdiction over the crimes defined in international treaties as set forth in article 22 [containing a list of crimes including, *inter alia*, genocide, grave breaches of the 1949 Geneva Conventions and AP I, apartheid and related crimes, crimes against internationally protected persons and hostage-taking and related crimes]. The treaties listed in article 22 covered most of the crimes which called for international prosecution. It was somewhat surprising, however, that the crime of torture as defined in article 1 of the [1984 Convention against Torture] was not included in the list. Second, the court would be competent to try crimes under general international law as stipulated in Article 26(2)(a) of the draft statute [providing for the possibility of special acceptance of jurisdiction by States in respect of other international crimes not covered by Article 22]. The German Government shared the Working Group's concern that the prosecution of certain crimes which were outlawed by international customary law but not covered by article 22 might be excluded from the jurisdiction of the Court. However, the principle *nullum crimen sine lege* required clarity and precision in the definition of crimes in the statute.⁹⁹

91. The Report on the Practice of Iran notes that, with regard to the Iran-Iraq war, Iran used the terms "violating international law" and "crimes" interchangeably when referring to acts committed in violation of IHL.¹⁰⁰

92. The Report on the Practice of South Korea refers to the list of war crimes provided for in the Military Regulation 187 and states that "other acts not illustrated here can be classified as war crimes. This means that definitions of war crimes in the Geneva Conventions become customary."¹⁰¹

93. The Report on the Practice of the Netherlands, referring to an interview with a legal advisor of the Ministry of Justice of the Netherlands, states that:

Section 8 of the Criminal Law in Wartime Act [as amended, according to which "violations of the laws and customs of war" are offences] cannot be construed as a definition of war crimes. A violation [of IHL other than a grave breach] has to be as severe as is required for a grave breach in order to be a war crime. The Ministry of Justice does not make a distinction between international and internal armed conflicts regarding the grave breaches regime.¹⁰²

⁹⁸ France, Minister of Foreign Affairs, Statement at the Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 June 1998.

⁹⁹ Germany, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/48/SR.19, 27 October 1993, § 4.

¹⁰⁰ Report on the Practice of Iran, 1997, Chapter 6.5.

¹⁰¹ Report on the Practice of South Korea, 1997, Chapter 6.5.

¹⁰² Report on the Practice of the Netherlands, 1997, Interview with a legal advisor at the Ministry of Justice, 18 March 1997, Chapter 6.5.

94. In 1991, in a diplomatic note to Iraq, the US reminded Iraq that “under International Law, violations of the Geneva Conventions, the Geneva [Gas] Protocol of 1925, or related International Laws of armed conflict are war crimes”.¹⁰³

95. In 1993, during a debate in the UN Security Council following the adoption of the 1993 ICTY Statute, the US stated that:

It is understood that the “laws and customs of war” referred to in Article 3 [of the 1993 ICTY Statute which aims at the prosecution of “violations of the laws and customs of war] include all obligations under humanitarian law agreements in force in the territory of the former Yugoslavia at the time the acts were committed, including common article 3 of the 1949 Geneva Conventions, and the 1977 Additional Protocols to these Conventions.¹⁰⁴

96. According to the Report on US Practice, the US considers any violation of the law of war a war crime, provided the accused had the requisite criminal intent at the time of his or her participation in the violation. The report adds that conspiracy to violate the laws of war, inciting violations and aiding and abetting violations of the laws of war are also punishable as war crimes.¹⁰⁵

97. In an order issued in 1991, the YPA Chief of General Staff stated that “war crimes and other grave breaches of norms of law on warfare are serious criminal offences”.¹⁰⁶

III. Practice of International Organisations and Conferences

United Nations

98. In resolutions adopted in 1982 and 1983, the UN Commission on Human Rights declared that “Israel’s continuous grave breaches of the Geneva Convention relative to the Protection of Civilian Persons in Time of War . . . and of the Additional Protocols . . . are war crimes”.¹⁰⁷

99. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) noted that “there does not appear to be a customary international law applicable to internal armed conflicts which includes the concept of war crimes”. Referring to common Article 3 of the 1949 Geneva Conventions, AP II and

¹⁰³ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

¹⁰⁴ US, Statement before the UN Security Council, UN Doc. S/PV.3217, 25 May 1993, p. 15.

¹⁰⁵ Report on US Practice, 1997, Chapter 6.6.

¹⁰⁶ SFRY (FRY), Chief of General Staff of the YPA, Legal Department, Order No. 985-1/91, 3 October 1991, § 2.

¹⁰⁷ UN Commission on Human Rights, Res. 1982/1, 11 February 1982, § 3; Res. 1983/1, 15 February 1983, § 3.

Article 19 of the 1954 Hague Convention, the Commission noted that these provisions did not use the terms “grave breaches” or “war crimes”. It added that “the content of customary law applicable to internal armed conflict is debatable”, and as a result, “in general, unless the parties to an internal armed conflict agree otherwise, the only offences committed in internal armed conflict for which universal jurisdiction exists are ‘crimes against humanity’ and genocide, which apply irrespective of the conflicts’ classification”.¹⁰⁸

100. In 1993, the ILC Working Group on a draft statute for an international criminal court commented with regard to Article 22 of the draft statute that “subparagraph (b) of article 22 [which includes grave breaches of the 1949 Geneva Conventions and AP I in the list of crimes defined by treaties] does not include [AP II] because this protocol contains no provision concerning grave breaches”.¹⁰⁹

Other International Organisations

101. No practice was found.

International Conferences

102. In the working paper on war crimes submitted by the ICRC in 1997 to the Preparatory Committee for the Establishment of an International Criminal Court contains lists of “Grave breaches of international humanitarian law applicable in international armed conflicts”, “Other serious violations of international law applicable in international armed conflicts” and “Serious violations of international humanitarian law applicable in non-international armed conflicts”.¹¹⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

103. In its judgement in the *Akayesu case* in 1998, the ICTR stated that:

For the purposes of an international criminal Tribunal which is trying individuals, it is not sufficient merely to affirm that Common Article 3 [of the Geneva Conventions] and parts of Article 4 of Additional Protocol II – which comprise the subject-matter jurisdiction of Article 4 of the [1994 ICTR] Statute – form part of international customary law. Even if Article 6 of the Statute provides for individual criminal responsibility as pertains to Articles 2, 3 and 4 of the Statute, it must also be shown that an individual committing serious violations of these customary norms incurs, as a matter of custom, individual criminal responsibility thereby.

¹⁰⁸ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 42 and 52.

¹⁰⁹ ILC, Working Group on a draft statute for an international criminal court, Report, *Yearbook of the International Law Commission*, 1993, Vol. II, Part Two, UN Doc. A/CN.4/SER.A/1993/Add.1 (Part 2), Commentary on Article 22, § 3, p. 107.

¹¹⁰ ICRC, Working paper on war crimes submitted to the Preparatory Committee for the Establishment of an International Criminal Court, New York, 14 February 1997, §§ 1–3.

Otherwise, it might be argued that these instruments only state norms applicable to States and Parties to a conflict, and that they do not create crimes for which individuals may be tried.¹¹¹

104. In its judgement in the *Rutaganda case* in 1999, the ICTR stated that:

Furthermore, the Trial Chamber in the Akayesu Judgement concluded that violations of these norms would entail, as a matter of customary international law, individual responsibility for the perpetrator. It was also recalled that as Rwanda had become a party to the 1949 Geneva Conventions and their 1977 Additional Protocols, on 5 May 1964 and 19 November 1984, respectively, these instruments were in any case in force in the territory of Rwanda in 1994, and formed part of Rwandan law. Thus, Rwandan nationals who violated these international instruments incorporated into national law, including those offences as incorporated in Article 4 of the Statute, could be tried before the Rwandan national courts.¹¹²

105. In its judgement in the *Musema case* in 2000, the ICTR stated that:

The Chamber therefore concludes that, at the time the crimes alleged in the Indictment were perpetrated, persons were bound to respect the provisions of the 1949 Geneva Conventions and their 1977 Additional Protocols, as incorporated in Article 4 of the [1994 ICTR] Statute. Violations thereof, as a matter of custom and convention, attracted individual criminal responsibility and could result in the prosecution of the authors of the offences.¹¹³

106. In its decision on the Defence Motion for Interlocutory Appeal in the *Tadić case* in 1995, the ICTY Appeals Chamber, with regard to the expression of the “violations of the laws and customs of war” aimed at in Article 3 of the 1993 ICTY Statute, stated that:

A literal interpretation of Article 3 shows that: (i) it refers to a broad category of offences, namely all “violations of the laws or customs of war”; and (ii) the enumeration of some of these violations provided in Article 3 is merely illustrative, not exhaustive.

...

Indeed, Article 3, before enumerating the violations, provides that they “shall include but not be limited to” the list of offences. Considering this list in the general context of the Secretary-General’s discussion of the [1907 HR] and international humanitarian law, we conclude that this list may be construed to include other infringements of international humanitarian law. The only limitation is that such infringements must not be already covered by Article 2 (lest this latter provision should become superfluous). Article 3 may be taken to cover *all violations* of international humanitarian law other than the “grave breaches” of the four Geneva Conventions falling under Article 2 (or, for that matter, the violations covered by Articles 4 and 5, to the extent that Articles 3, 4 and 5 overlap).¹¹⁴ [emphasis in original]

¹¹¹ ICTR, *Akayesu case*, Judgement, 2 September 1998, § 611.

¹¹² ICTR, *Rutaganda case*, Judgement, 6 December 1999, § 88.

¹¹³ ICTR, *Musema case*, Judgement, 27 January 2000, § 242.

¹¹⁴ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 87.

The ICTY Appeals Chamber further stated that:

The Appeals Chamber deems it fitting to specify the conditions to be fulfilled for Article 3 [of the 1993 ICTY Statute relative to “violations of the laws and customs of war”] to become applicable. The following requirements must be met for an offence to be subject to prosecution before the International Tribunal under Article 3:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met . . .
- (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. Thus, for instance, the fact of a combatant simply appropriating a loaf of bread in an occupied village would not amount to a “serious violation of international humanitarian law” although it may be regarded as falling foul of the basic principle laid down in Article 46, paragraph 1, of the Hague Regulations (and the corresponding rule of customary international law) whereby “private property must be respected” by any army occupying an enemy territory;
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

It follows that it does not matter whether the “serious violation” has occurred within the context of an international or an internal armed conflict, as long as the requirements set out above are met.¹¹⁵

107. In its judgement in the *Tadić case* in 1997, the ICTY Trial Chamber, with regard to the expression of the “violations of the laws and customs of war” aimed at in Article 3 of the 1993 ICTY Statute, stated that:

610. According to the Appeals Chamber [*Tadić case* (Interlocutory Appeal)], the conditions that must be satisfied to fulfil the requirements of Article 3 of the Statute are:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be “serious”, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim . . . ; and
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

Those requirements apply to any and all laws or customs of war which Article 3 covers.

611. In relation to requirements (i) and (ii), it is sufficient to note that the Appeals Chamber has held, on the basis of the *Nicaragua case*, that Common Article 3 [of

¹¹⁵ ICTY, *Tadić case*, Interlocutory Appeal, 2 October 1995, § 94.

the 1949 Geneva Conventions] satisfies these requirements as part of customary international humanitarian law.

612. While, for some laws or customs of war, requirement (iii) may be of particular relevance, each of the prohibitions in Common Article 3: against murder; the taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and the passing of sentences and the carrying-out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples, constitute, as the Court put it, "elementary considerations of humanity", the breach of which may be considered to be a "breach of a rule protecting important values" and which "must involve grave consequences for the victim". Although it may be possible that a violation of some of the prohibitions of Common Article 3 may be so minor as to not involve "grave consequences for the victim", each of the violations with which the accused has been charged clearly does involve such consequences.

613. Finally, in relation to the fourth requirement, namely that the rule of customary international humanitarian law imposes individual criminal responsibility, the Appeals Chamber held in the *Appeals Chamber Decision* that

customary international law imposes criminal liability for serious violations of common Article 3, as supplemented by other general principles and rules on the protection of victims of internal armed conflict, and for breaching certain fundamental principles and rules regarding means and methods of combat in civil strife.

Consequently, this Trial Chamber has the competence to hear and determine the charges against the accused under Article 3 of the Statute relating to violations of the customary international humanitarian law applicable to armed conflicts, as found in Common Article 3.¹¹⁶

108. In the judgement on appeal in the *Tadić case* in 1999, the ICTY Appeals Chamber stated with respect to violations committed "against the persons or property protected under the provisions of the relevant Geneva Conventions" that:

Article 4(1) of Geneva Convention IV (protection of civilians), applicable to the case at issue, defines "protected persons" – hence possible victims of grave breaches – as those "in the hands of a Party to the conflict or Occupying Power of which they are not nationals". In other words, subject to the provisions of Article 4(2), the Convention intends to protect civilians (in enemy territory, occupied territory or the combat zone) who do not have the nationality of the belligerent in whose hands they find themselves, or who are stateless persons. In addition, as is apparent from the preparatory work, the Convention also intends to protect those civilians in occupied territory who, while having the nationality of the Party to the conflict in whose hands they find themselves, are refugees and thus no longer owe allegiance to this Party and no longer enjoy its diplomatic protection.¹¹⁷

109. In the judgement in the *Delalić case* in 1998, the ICTY Trial Chamber, as regards Article 3 of the 1993 ICTY Statute, referred to the decision in the *Tadić case* (Interlocutory Appeal) and stated that:

¹¹⁶ ICTY, *Tadić case*, Judgement, 7 May 1997, §§ 610–613.

¹¹⁷ ICTY, *Tadić case*, Judgement on Appeal, 15 July 1999, § 164.

279. The Appeals Chamber, in its discussion of Article 3, proceeded further to enunciate four requirements that must be satisfied in order for an offence to be considered as within the scope of this Article. These requirements are the following:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met (...);
- (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. (...);
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

280. This Trial Chamber finds no reason to depart from the position taken by the Appeals Chamber on this matter...¹¹⁸

110. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber, referring to the *Tadić case*, stated that:

As interpreted by the Appeals Chamber in the *Tadić* Jurisdiction Decision, Article 3 [of the 1993 ICTY Statute] has a very broad scope. It covers any serious violation of a rule of customary international humanitarian law entailing, under international customary or conventional law, the individual criminal responsibility of the person breaching the rule. It is immaterial whether the breach occurs within the context of an international or internal armed conflict.¹¹⁹

111. In the judgement on appeal in the *Delalić case* in 2001, the ICTY Appeals Chamber, as regards Article 3 of the 1993 ICTY Statute, referred to the decision in the *Tadić case* (Interlocutory Appeal) and stated that:

131... The Appeals Chamber is of the view that the [UN] Secretary-General's Report and the statements made by State representatives in the [UN] Security Council at the time of the adoption of the Statute... clearly support a conclusion that the list of offences listed in Article 3 was meant to cover violations of *all* of the laws or customs of war, understood broadly, in addition to those mentioned in the Article by way of example...

...

133... The Appeals Chamber thus confirms the view expressed in the [*Tadić case*, Judgement on Appeal] that the expression "laws and customs of war" has evolved to encompass violations of Geneva law at the time the alleged offences were committed, and that consequently, Article 3 of the Statute may be interpreted as intending the incorporation of Geneva law rules.¹²⁰ [emphasis in original]

112. In its judgement in the *Blažkić case* in 2000, the ICTY Trial Chamber, referring to the *Tadić case*, stated that:

175. The Prosecution contended that the provisions of the Regulations annexed to the Hague Convention IV of 1907 constitute international customary rules

¹¹⁸ ICTY, *Delalić case*, Judgement, 16 November 1998, §§ 279–280.

¹¹⁹ ICTY, *Furundžija case*, Judgement, 10 December 1998, § 132.

¹²⁰ ICTY, *Delalić case*, Judgement on Appeal, 2 February 2001, §§ 131 and 133.

which were restated in Article 6(b) of the Nuremberg Statute. Violations of these provisions incur the individual criminal responsibility of the person violating the rule. Conversely, the Defence did not acknowledge that violations of the laws or customs of war within the meaning of Common Article 3 of the Geneva Conventions had ever been upheld to impose criminal sanctions upon individuals.

176. The Trial Chamber recalls that violations of Article 3 of the Statute which include violations of the Regulations of The Hague and those of Common Article 3 are by definition serious violations of international humanitarian law within the meaning of the Statute. They are thus likely to incur individual criminal responsibility in accordance with Article 7 of the Statute. The Trial Chamber observes moreover that the provisions of the criminal code of the SFRY, adopted by Bosnia-Herzegovina in April 1992, provide that war crimes committed during internal or international conflicts incur individual criminal responsibility. The Trial Chamber is of the opinion that, as was concluded in the *Tadić* Appeal Decision, customary international law imposes criminal responsibility for serious violations of Common Article 3.¹²¹

113. In the judgement in the *Kunarac case* in 2001, the ICTY Trial Chamber, as regards Article 3 of the 1993 ICTY Statute, referred to the decision in the *Tadić case* (Interlocutory Appeal) and stated that:

The Appeals Chamber in the Jurisdiction Decision further identified four requirements specific to Article 3:

(i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...]; (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim. [...]; (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.¹²²

114. In the judgement in the *Kvočka case* in 2001, the ICTY Trial Chamber, as regards Article 3 of the 1993 ICTY Statute, stated that:

For a successful prosecution under Article 3:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature, or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.¹²³

¹²¹ ICTY, *Blaškić case*, Judgement, 3 March 2000, §§ 175–176.

¹²² ICTY, *Kunarac case*, Judgement, 22 February 2001, § 403.

¹²³ ICTY, *Kvočka case*, Judgement, 2 November 2001, § 123.

115. In the judgement in the *Krnjelac case* in 2002, the ICTY Trial Chamber, with regard to the expression of the “violations of the laws and customs of war” aimed at in Article 3 of the 1993 ICTY Statute, stated that:

In addition, four requirements specific to Article 3 must be satisfied, namely,

(i) the violation must constitute an infringement of a Rule of international humanitarian law; (ii) the Rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [. . .]; (iii) the violation must be “serious”, that is to say, it must constitute a breach of a Rule protecting important values, and the breach must involve grave consequences for the victim. [. . .]; (iv) the violation of the Rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.¹²⁴

116. In the judgement in the *Vasiljević case* in 2002, the ICTY Trial Chamber stated that:

In addition, there are four conditions which must be fulfilled before an offence may be prosecuted under Article 3 of the Statute:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.¹²⁵

117. In the judgement in the *Naletilić case* in 2003, the ICTY Trial Chamber, as regards Article 3 of the 1993 ICTY Statute, stated that:

In view of the jurisprudence of the Tribunal, the Chamber must be satisfied of four additional requirements:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature, or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim;
- (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.¹²⁶

118. In the judgement in the *Stakić case* in 2003, the ICTY Trial Chamber stated that:

¹²⁴ ICTY, *Krnjelac case*, Judgement, 15 March 2002, § 52.

¹²⁵ ICTY, *Vasiljević case*, Judgement, 29 November 2002, § 26.

¹²⁶ ICTY, *Naletilić case*, Judgement, 31 March 2003, § 226.

As argued by the parties, in addition to the requirements common to Articles 3 and 5 of the Statute, four additional requirements specific to Article 3 must be satisfied in respect of the crime of murder as a violation of the laws or customs of war:

The violation must constitute an infringement of a rule of international humanitarian law;

The rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met [...];

The violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim [...];

The violation of the rule must entail, under customary or conventional law, the individual responsibility of the person breaching the rule.¹²⁷

119. In the judgement in the *Galić case* in 2003, the ICTY Trial Chamber, as regards Article 3 of the 1993 ICTY Statute, referred to the decision in the *Tadić case* (Interlocutory Appeal) and stated that:

According to the same Appeals Chamber Decision, for criminal conduct to fall within the scope of Article 3 of the Statute, the following four conditions ("the *Tadić* conditions") must be satisfied:

- (i) the violation must constitute an infringement of a rule of international humanitarian law;
- (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met;
- (iii) the violation must be "serious", that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and
- (iv) the violation must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule.

The *Tadić* conditions limit the jurisdiction of the Tribunal to violations of the laws or customs of war that are at once recognized as criminally punishable and are "serious" enough to be dealt with by the Tribunal.¹²⁸

120. In its judgement in the *Kordić and Čerkez case* in 2001, the ICTY Trial Chamber, referring to the *Tadić case*, stated that:

168. As to the argument that Additional Protocol I does not entail individual criminal responsibility, the Trial Chamber recalls a statement in the *Tadić* Jurisdiction Decision:

Faced with similar claims with respect to the various agreements and conventions that formed the basis of its jurisdiction, the International Military Tribunal at Nuremberg concluded that a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches . . . because, as the Nuremberg Tribunal concluded "[c]rimes against international law are

¹²⁷ ICTY, *Stakić case*, Judgement, 31 July 2003, § 580.

¹²⁸ ICTY, *Galić case*, Judgement, 5 December 2003, § 11.

committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."

The Appeals Chamber in that case had no difficulty in finding that customary law "imposes criminal liability for serious violations of Common Article 3" of the Geneva Conventions, an article that contains no reference to individual responsibility. This finding was reaffirmed by the Appeals Chamber in [*Delalić*].

169. By analogy, violations of Additional Protocol I incur individual criminal liability in the same way that violations of Common Article 3 give rise to individual criminal liability.¹²⁹

V. Practice of the International Red Cross and Red Crescent Movement

121. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that "grave breaches of the law of war are regarded as war crimes. They shall be repressed by penal sanctions." Delegates also teach that "other breaches of the law of war shall be repressed by disciplinary or penal sanctions".¹³⁰

122. The ICRC Commentary on the Fourth Geneva Convention states that "the Geneva Conventions form part of what are generally called the laws and customs of war, violations of which are commonly called 'war crimes'".¹³¹

VI. Other Practice

123. No practice was found.

B. Jurisdiction over War Crimes

I. Treaties and Other Instruments

Treaties

124. Article VI of the 1948 Genocide Convention provides that:

Persons charged with genocide or any of the other acts enumerated in Article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

125. Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV provide that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in the following Article.

¹²⁹ ICTY, *Kordić and Čerkez case*, Judgement, 26 February 2001, §§ 168–169.

¹³⁰ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 775 and 780.

¹³¹ Jean S. Pictet (ed.), *Commentary on the Fourth Geneva Convention*, ICRC, Geneva, 1958, p. 583.

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed [grave breaches of 1949 Geneva Conventions], and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

126. Article 28 of the 1954 Hague Convention provides that:

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

127. Article 85(1) AP I incorporates the provisions set forth in the second paragraph of Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV by reference. Article 85 AP I was adopted by consensus.¹³²

128. Article 5 of the 1984 Convention against Torture provides that:

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate.

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.¹³³

129. Article 10 of the 1994 Convention on the Safety of UN Personnel provides that:

1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 [Crimes against United Nations and associated personnel] in the following cases:
 - (a) When the crime is committed in the territory of that State or on board a ship or aircraft registered in that State;
 - (b) When the alleged offender is a national of that State.
 2. A State Party may also establish its jurisdiction over any such crime when it is committed:
 - (a) By a stateless person whose habitual residence is in that State; or
 - (b) With respect to a national of that State; or
 - (c) In an attempt to compel that State to do or to abstain from doing any act.
- ...

¹³² CDDH, *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

¹³³ Similar requirements to prosecute or extradite are also found in Article IV of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, and numerous conventions for the prevention of terrorism.

4. Each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in article 9 [Crimes against United Nations and associated personnel] in cases where the alleged offender is present in its territory and it does not extradite such person pursuant to article 15 [Extradition of alleged offenders] to any of the States Parties which have established their jurisdiction in accordance with paragraph 1 or 2.

130. Article IV of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that:

The acts constituting the forced disappearance of persons shall be considered offenses in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases in the following instances:

- a. When the forced disappearance of persons or any act constituting such offense was committed within its jurisdiction;
- b. When the accused is a national of that state;
- c. When the victim is a national of that state and that state sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.

131. Article 15(2) of the 1994 Inter-American Convention on the Forced Disappearance of Persons states that:

This Convention shall not apply to the international armed conflicts governed by the 1949 Geneva Conventions and their Protocols, concerning protection of wounded, sick, and shipwrecked members of the armed forces; and prisoners of war and civilians in time of war.

132. Article 14 of the 1996 Amended Protocol II to the CCW provides that:

- (1) Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons on territory under its jurisdiction and control.
- (2) The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol, wilfully kill or cause serious injury to civilians and to bring such persons to justice.

133. Article 9 of the 1997 Ottawa Convention provides that:

Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons on territory under its jurisdiction or control.

134. The preamble to the 1998 ICC Statute provides that:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be

ensured by taking measures at the national level and by enhancing international co-operation,

...

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

135. Article 12 of the 1998 ICC Statute provides that:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

136. Article 13 of the 1998 ICC Statute provides that:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

137. Upon signature of the 1998 ICC Statute, Egypt declared that “no war criminal shall escape justice or escape prosecution in other legal jurisdictions”.¹³⁴

138. Article 15(2) of the 1999 Second Protocol to the 1954 Hague Convention concerning “Serious violations of this Protocol”, which, according to its Article 22(1), also applies to armed conflicts not of an international character, provides that:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article [serious violations of the Protocol] and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

¹³⁴ Egypt, Declarations made upon signature of the ICC Statute, 26 December 2000, § 5.

139. Article 16(1) of the 1999 Second Protocol to the 1954 Hague Convention concerning "Jurisdiction" provides that:

Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases:

- (a) when such an offence is committed in the territory of that State;
- (b) when the alleged offender is a national of that State;
- (c) in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.

Other Instruments

140. Article 8 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled "Establishment of jurisdiction", provides that:

Without prejudice to the jurisdiction of an international criminal court, each State Party shall take such measures as may be necessary to establish its jurisdiction over the crimes set out in articles 17, 18, 19 and 20 [i.e. genocide, crimes against humanity, crimes against UN and associated personnel and war crimes], irrespective of where or by whom those crimes were committed. Jurisdiction over the crime set out in article 16 [i.e. crime of aggression] shall rest with an international criminal court. However, a State referred to in article 16 is not precluded from trying its nationals for the crime set out in that article.

141. Section 4 of the 1999 UN Secretary-General's Bulletin provides that "in cases of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts".

142. Article 5 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

[To fulfil their duty to prosecute persons alleged to have committed violations of international human rights and international humanitarian law norms that constitute crimes under international law, to punish perpetrators adjudged to have committed these violations, and to cooperate with and assist States and appropriate international judicial organs in the investigation and prosecution of these violations under Article 4 of the same instrument], States shall incorporate within their domestic law appropriate provisions providing for universal jurisdiction over crimes under international law and appropriate legislation to facilitate extradition or surrender of offenders to other States and to international judicial bodies and to provide judicial assistance and other forms of cooperation in the pursuit of international justice, including assistance to and protection of victims and witnesses.

143. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including genocide, war crimes, crimes against humanity and torture. Section 2 provides that:

- 2.1 With regard to the serious criminal offences listed under Section [10(1)(a), (b), (c) and (f)] of UNTAET Regulation No. 2000/11 [i.e. genocide, war crimes, crimes against humanity and torture]... the panels shall have universal jurisdiction.
- 2.2 For purposes of the present regulation, "universal jurisdiction" means jurisdiction irrespective of whether:
 - (a) the serious criminal offence at issue was committed within the territory of East Timor;
 - (b) the serious criminal offence was committed by an East Timorese citizen; or
 - (c) the victim of the serious criminal offence was an East Timorese citizen.

II. National Practice

Military Manuals

144. Australia's Commanders' Guide states that:

War crimes jurisdiction is universal. This means that any nation may prosecute any person who is suspected of committing a major war crime and no statute of limitations applies for such prosecutions. Trial of a suspected war criminal may take place at any time that the individual is located or evidence of a war crimes commission is unearthed. Australia has vested its war crime jurisdiction in the State Supreme Courts...

Where there is widespread evidence of war crimes having been committed, the international community may elect to establish a world forum or war crimes tribunal to conduct trials. The Nuremberg and Tokyo war crimes tribunals conducted after WW II are examples of this approach.¹³⁵

145. Belgium's Law of War Manual states that:

The States signatory to the [1949 Geneva] Conventions undertook to take a series of measures to promote respect thereof.

These measures can be summarised as follows:

...

- 3) search for, identification of and prosecution by the national courts of the authors of grave breaches, regardless of their nationality, or delivery (extradition) of those authors to the State asking for them, within the limits of the legislation in force.¹³⁶

146. Canada's LOAC Manual states that:

If a breach [of GC III] amounts to a grave breach all persons responsible therefor, or having ordered such acts, shall, regardless of their nationality, be liable to be tried by any party to [GC III]. They may also be handed over by the latter for trial by any other party to [GC III] able to prosecute effectively.¹³⁷

¹³⁵ Australia, *Commanders' Guide* (1994), §§ 1307–1308.

¹³⁶ Belgium, *Law of War Manual* (1983), p. 55.

¹³⁷ Canada, *LOAC Manual* (1999), p. 10-6, § 52.

The manual further provides that:

The Criminal Code of Canada contains several provisions that allow Canadian courts to assume jurisdiction over and try alleged war criminals in a wide variety of circumstances.

... Any state into whose hands a person who has allegedly committed a grave breach falls is entitled to institute criminal proceedings, even though that state was neutral during the conflict in which the offence was alleged to have been committed.¹³⁸

147. Ecuador's Naval Manual states that "international law... provides that belligerent States have the right to punish enemy armed forces personnel and enemy civilians who fall under their control for such offences".¹³⁹

148. France's LOAC Teaching Note, in a part dealing with "grave breaches of the rules of the law of armed conflict", states that:

On the criminal level, persons charged with [grave breaches of the 1949 Geneva Conventions] may be prosecuted before French judicial courts, but also before foreign courts or international criminal courts having jurisdiction over war crimes: today this means the International Criminal Tribunals for the Former Yugoslavia and Rwanda for the crimes committed solely on the occasion of these two conflicts; tomorrow, this will mean... the International Criminal Court which will have jurisdiction over all war crimes and crimes against humanity in case of the failure of national tribunals.¹⁴⁰

149. South Korea's Operational Law Manual states that not only international tribunals but also national military courts or military committees have jurisdiction to try persons accused of committing war crimes. It adds that war crimes which are not punishable under national law remain punishable under the laws of war.¹⁴¹

150. The Military Manual of the Netherlands states that:

Each country is competent to prosecute and try war crimes, irrespective of the nationality of the perpetrator, or of the country where the war crime was committed or against whose interest it was committed. The rules on extradition of persons suspected of having committed, or ordered the commission of, a war crime are closely connected to the principle of universality...

The Criminal Law in Wartime Act [as amended] has not entirely incorporated the principle of universality as foreseen in the law of war treaties. It requires that the Netherlands be involved in an armed conflict (Article 1). A Dutch judge is not competent in case the Netherlands is neutral or not a party to the conflict.¹⁴²

151. The Military Handbook of the Netherlands provides that "hostile persons who have committed a war crime and fall into the hands of [our] own troops must be tried".¹⁴³

¹³⁸ Canada, *LOAC Manual* (1999), pp. 16-5/16-6, §§ 37-38.

¹³⁹ Ecuador, *Naval Manual* (1989), § 6.2.5. ¹⁴⁰ France, *LOAC Teaching Note* (2000), p. 7.

¹⁴¹ South Korea, *Operational Law Manual* (1996), p. 193, § 4.

¹⁴² Netherlands, *Military Manual* (1993), pp. IX-8 and IX-9.

¹⁴³ Netherlands, *Military Handbook* (1995), p. 7-45.

152. New Zealand's Military Manual states that:

The [1949 Geneva] Conventions make one further departure of significance. For the first time they provide in treaty form a clear obligation upon States to punish what the Conventions describe as "grave breaches", even if those States are not parties to the conflict, the offenders and the victims not their nationals, and even though the offences were committed outside the territorial jurisdiction of the State concerned. In other words, the Conventions have introduced the concept of universal jurisdiction in so far as grave breaches are concerned, and if the State in question is unwilling to try an offender found within its territory, it is obliged to hand him over for trial to any party to the Convention making out a *prima facie* case.¹⁴⁴

The manual also provides that:

Any State into whose hands a person who has allegedly committed a grave breach falls is entitled to institute criminal proceedings, even though the holding State was neutral during the conflict in which the offence was alleged to have been committed. Since 1945, it has been generally accepted that if the holding State is unwilling to institute its own proceedings, it may if it wishes hand the offender over to a claimant State on presentation of *prima facie* evidence that the alleged offender has committed the offence in question.¹⁴⁵

In addition, the manual states that:

According to customary international law, war crimes, including grave breaches, may be tried by a military tribunal including officers of forces of States other than that establishing the tribunal, provided those forces may claim to be particularly affected or interested in the trial in question . . .

Such interest would arise if the accused is a member of an allied force, if the victims of the offence are nationals of the State of such force, or if the offence had been committed in the territory of such a State.¹⁴⁶

153. South Africa's LOAC Manual states that "signatory States [of the 1949 Geneva Conventions] are required to treat as criminals under domestic law anyone who commits or orders a grave breach [of the 1949 Geneva Conventions]".¹⁴⁷

154. Spain's LOAC Manual provides that "States have the obligation to search for persons accused of having committed, or having ordered to be committed, grave breaches, being obliged to make them appear before their own tribunals, regardless of their nationality".¹⁴⁸

155. Sweden's IHL Manual states that:

Each state is obliged to search for persons accused of committing or ordering a grave breach and shall bring them, regardless of their nationality, before its own courts. A permitted alternative is to hand over the wanted person to another contracting

¹⁴⁴ New Zealand, *Military Manual* (1992), § 117.5.

¹⁴⁵ New Zealand, *Military Manual* (1992), § 1711.1.

¹⁴⁶ New Zealand, *Military Manual* (1992), § 1714.1, including footnote 85.

¹⁴⁷ South Africa, *LOAC Manual* (1996), § 35.

¹⁴⁸ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

party, provided that this state has an interest in punishing the breach and has made out a *prima facie* case.¹⁴⁹

156. Switzerland's Basic Military Manual provides that:

1. Violations of the laws and customs of war must be punished. The guilty persons may be brought either before the courts of their own country or before the courts of the injured State, or before an international tribunal.
2. Each Contracting Party is also bound to search for and prosecute in its own courts persons who have committed grave breaches of the provisions of the law of nations in time of war.¹⁵⁰

157. The UK Military Manual states that:

Those who commit [acts of marauding], whether civilians who have never been lawful combatants, or persons who have belonged to a military unit, an organised resistance movement or a *levée en masse*, and have deserted and so ceased to be lawful combatants, are liable to be punished as war criminals. They may be tried and sentenced by the courts of either belligerents.¹⁵¹

The manual also provides that:

Charges of war crimes are subject to the jurisdiction of military courts, whether national or international, or of such other courts as the belligerent concerned may determine. With regard to the trial of civilians for "grave breaches" of the 1949 [Geneva] Conventions which include the most serious war crimes, jurisdiction can only be conferred upon the ordinary courts of the Power concerned or upon the courts set up by the Occupant. Prisoners of war charged with "grave breaches" and of all other war crimes must be tried by the same courts and in the same manner as in the case of crimes committed whilst in captivity. The courts, whether military or civil, of neutral States may also exercise jurisdiction in respect of war crimes. This jurisdiction is independent of any agreement made between neutral and belligerent States. War crimes are crimes *ex jure gentium* and are thus triable by the courts of all States. . . . British military courts have jurisdictions outside the United Kingdom over war crimes committed not only by members of the enemy armed forces but also by enemy civilians and other persons of any nationality, including those of British nationality or the nationals of allied or neutral States. It is not necessary that the victim of the war crime be a British subject.¹⁵²

The manual further emphasises that "parties [to the 1949 Geneva Conventions] are also bound . . . regardless of their nationality, to bring [persons alleged to have committed grave breaches] to trial in their own courts".¹⁵³

158. The UK LOAC Manual states that "UK courts are entitled to deal with certain violations of the [1949] Geneva Conventions (wherever occurring) under the Geneva Conventions Act 1957".¹⁵⁴

¹⁴⁹ Sweden, *IHL Manual* (1991), Section 4.2, p. 93.

¹⁵⁰ Switzerland, *Basic Military Manual* (1987), Article 198(1) and (2).

¹⁵¹ UK, *Military Manual* (1958), § 636.

¹⁵² UK, *Military Manual* (1958), § 637. ¹⁵³ UK, *Military Manual* (1958), § 639.

¹⁵⁴ UK, *LOAC Manual* (1981), Section 2, p. 5, § 2(a).

159. The US Field Manual provides that “war crimes are within the jurisdiction of general courts-martial . . . military commissions, provost courts, military government courts, and other military tribunals . . . of the United States, as well as of international tribunals”.¹⁵⁵ The manual adds that:

Each High Contracting Party [to the 1949 Geneva Conventions] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches [of the said Conventions] and shall bring such persons, regardless of their nationality, before its own courts . . .

[These] principles . . . are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent’s own armed forces . . .

The jurisdiction of United States military tribunals in connection with war crimes is not limited to offenses committed against nationals of the United States but extends also to all offenses of this nature committed against nationals of allies and of cobelligerents and stateless persons . . .

The United States normally punishes war crimes as such only if they are committed by enemy nationals or by persons serving the interests of the enemy State. Violations of the law of war committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code. Violations of the law of war committed within the United States by other persons will usually constitute violations of federal or state criminal law and preferably will be prosecuted under such law . . . Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.¹⁵⁶

160. The US Air Force Pamphlet states that:

Domestic tribunals have the competence and, under the grave breaches articles of the [1949] Geneva Conventions, the strict obligation to punish certain violations . . . Ad hoc international tribunals, such as those established in Germany and Japan following World War II, did punish individuals for their personal actions violating the law of armed conflict. However, the importance of criminal responsibility . . . primarily relates to a state’s own efforts to enforce the law of armed conflict with respect to its *own* armed forces.¹⁵⁷ [emphasis in original]

It further states that:

Within the [1949] Geneva Conventions system, state responsibility to repress breaches is stressed, and no provision is made for international tribunals within the Conventions . . .

In the United States, jurisdiction is not limited to offenses against US nationals but extends to offenses against victims of other nationalities. Violations by adversary personnel, when appropriate, are tried as offenses against international law which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in regular military courts, military commissions, provost courts, military government

¹⁵⁵ US, *Field Manual* (1956), § 505(d).

¹⁵⁶ US, *Field Manual* (1956), §§ 506(a) and (b) and 507(a) and (b).

¹⁵⁷ US, *Air Force Pamphlet* (1976), § 10-6.

courts, and other military tribunals of the United States, as well as in international tribunals.¹⁵⁸

161. The US Naval Handbook provides that:

3.11.1 . . . International law generally recognizes five bases for the exercise of criminal jurisdiction: (a) territorial, (b) nationality, (c) passive personality, (d) protective, and (e) universal. It is important to note that international law governs the rights and obligations between nations. While individuals may benefit from the application of that body of law, its alleged violation cannot usually be raised by an individual defendant to defeat a criminal prosecution.

3.11.1.1 Territorial Principle. This principle recognizes the right of a nation to proscribe conduct within its territorial borders, including its internal waters, archipelagic waters, and territorial sea.

3.11.1.1.1 Objective Territorial Principle. This variant of the territorial principle recognizes that a nation may apply its laws to acts committed beyond its territory which have their effect in the territory of that nation . . .

3.11.1.2 Nationality Principle. This principle is based on the concept that a nation has jurisdiction over objects and persons having the nationality of that nation . . . Under the nationality principle a nation may apply its laws to its nationals wherever they may be . . . As a matter of international comity and respect for foreign sovereignty, the United States refrains from exercising that jurisdiction in foreign territory.

3.11.1.3 Passive Personality Principle. Under this principle, jurisdiction is based on the nationality of the victim, irrespective of where the crime occurred or the nationality of the offender . . .

3.11.1.4 Protective Principle. This principle recognizes the right of a nation to prosecute acts which have a significant adverse impact on its national security or governmental functions . . .

3.11.1.5 Universal Principle. This principle recognizes that certain offenses are so heinous and so widely condemned that any nation may apprehend, prosecute and punish that offender on behalf of the world community regardless of the nationality of the offender or victim. Piracy and the slave trade have historically fit these criteria. More recently, genocide, certain war crimes, hostage taking, and aircraft hijacking have been added to the list of such universal crimes.¹⁵⁹

The Handbook also states that “international law also provides that belligerents have the right to punish enemy armed forces personnel and enemy civilians who fall under their control for [war crimes]”.¹⁶⁰ It further states that:

Except for war crimes trials conducted by the Allies after World War II, the majority of prosecutions for violations of the law of armed conflict have been trials of one’s own forces for breaches of military discipline. Violations of the law of armed conflict committed by persons subject to the military law of the United States will usually constitute violations of the Uniform Code of Military Justice and, if so, will be prosecuted under that Code.

¹⁵⁸ US, *Air Force Pamphlet* (1976), §§ 15-3(a) and 15-4(a).

¹⁵⁹ US, *Naval Handbook* (1995), §§ 3.11.1–3.11.1.5.

¹⁶⁰ US, *Naval Handbook* (1995), § 6.2.5.

Although jurisdiction extends to enemy personnel, trials have almost exclusively been against unlawful combatants, such as persons who take part in combat operations without distinguishing themselves clearly from the civilian population during battle or those acting without state sanction for private ends.

In the United States, its territories and possessions, jurisdiction is not limited to offenses against U.S. nationals, but extends to offenses against persons of other nationalities. Violations by enemy nationals may be tried as offenses against international law, which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in military courts, military commissions, provost courts, military government courts, and other military tribunals.¹⁶¹

162. The YPA Military Manual of the SFRY (FRY) provides that “the parties to a conflict have a duty . . . to call to account and punish perpetrators [of violations of the laws of war], regardless of their nationality”.¹⁶² It adds that:

Persons who commit a war crime or other serious violations of the laws of war shall be brought to justice before their own national courts or, if they fall into enemy hands, before its courts. The perpetrators of such criminal acts may also be brought to justice before an international court if such court is established.¹⁶³

National Legislation

163. Argentina’s Code of Military Justice as amended provides that:

When operational troops are on enemy territory, all the inhabitants of the occupied zone are subject to the jurisdiction of the military tribunals, no matter which ordinary crime or offence they are accused of, except if the military authority provides that they are to be prosecuted by the ordinary courts of the occupied zone.¹⁶⁴

164. Armenia’s Penal Code provides that:

Foreign citizens and stateless persons not permanently residing in the Republic of Armenia, who have committed a crime outside the territory of the Republic of Armenia, are subject to criminal liability under the Penal Code of the Republic of Armenia, if they have committed:

- (1) such crimes which are provided for in an international treaty of the Republic of Armenia . . .¹⁶⁵

165. Australia’s War Crimes Act as amended gives the Australian courts jurisdiction over persons accused of certain “serious crimes” and “war crimes” committed either within or outside Australia during the Second World War. However, it states that “a person shall not be charged with an offence against this Act unless he or she is: (a) an Australian citizen; or (b) a resident of Australia or of an external Territory”.¹⁶⁶

¹⁶¹ US, *Naval Handbook* (1995), § 6.2.5.3.

¹⁶² SFRY (FRY), *YPA Military Manual* (1988), § 18.

¹⁶³ SFRY (FRY), *YPA Military Manual* (1988), § 20.

¹⁶⁴ Argentina, *Code of Military Justice as amended* (1951), Article 111.

¹⁶⁵ Armenia, *Penal Code* (2003), Article 15(3).

¹⁶⁶ Australia, *War Crimes Act as amended* (1945), Sections 6, 7 and 11.

166. Australia's Geneva Conventions Act as amended, which provides for the punishment of grave breaches of the Geneva Conventions and AP I committed "in Australia or elsewhere", states that "this section applies to persons regardless of their nationality or citizenship".¹⁶⁷

167. Austria's Penal Code provides that:

The following crimes committed abroad are punished under Austrian criminal law irrespective of the criminal law of the scene of the crime:

...

- (6) other punishable acts which Austria is under an obligation to punish even when they have been committed abroad, irrespective of the criminal law of the scene of the crime.¹⁶⁸

168. Azerbaijan's Criminal Code provides that:

12.1. Citizens of the Azerbaijan Republic and stateless persons who permanently reside on the territory of Azerbaijan shall be held criminally responsible under the present Code for an act (action or inaction) committed outside the territory of the Azerbaijan Republic, if this act is considered as a crime by the legislation of the Azerbaijan Republic, as well as by the legislation of the foreign state where the crime was committed and if they have not been tried in a foreign State for this crime.

12.2. Foreigners and stateless persons might be held criminally responsible under the present Code in case of the commission of a crime outside the territory of the Azerbaijan Republic against the citizens of the Azerbaijan Republic, against the interests (advantages) of the Azerbaijan Republic, as well as in cases covered by international treaties to which the Azerbaijan Republic is a party and if they have not been tried in a foreign State for this crime.

12.3. Foreigners and stateless persons who have committed crimes against peace and humanity, war crimes, terrorism, hijacking an aircraft, taking hostages, torture, marine piracy, ... directing attacks against the persons of international organizations who enjoy international protection, crimes related to radioactive materials, other crimes punishment of which results from the international treaties to which the Azerbaijan Republic is a party, regardless of where the crime was committed, shall be held criminally responsible and punished under the present Code.

12.4. Servicemen of military units of the Armed Forces of the Azerbaijan Republic, being members of the peacekeeping military units, shall be held criminally responsible under the present Code for the crimes committed outside the territory of the Azerbaijan Republic, if not provided for otherwise by the international treaties to which the Azerbaijan Republic is a party.¹⁶⁹

169. Bangladesh's International Crimes (Tribunal) Act provides that:

A Tribunal shall have power to try and punish any person irrespective of his nationality who, being a member of any armed, defence or auxiliary forces commits or has committed in the territory of Bangladesh, whether before or after the commencement of this act, any of the following crimes [crimes against humanity, crimes against peace, genocide, war crimes, "violations of any humanitarian rules

¹⁶⁷ Australia, *Geneva Conventions Act as amended* (1957), Section 7(3).

¹⁶⁸ Austria, *Penal Code* (1974), Article 64.

¹⁶⁹ Azerbaijan, *Criminal Code* (1999), Article 12(1)-(4).

applicable in armed conflicts laid down in the Geneva Conventions of 1949" or "any other crimes under international law".¹⁷⁰

170. The Geneva Conventions Act of Barbados provides that "a person who commits a grave breach of any of the Geneva Conventions of 1949... may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados".¹⁷¹

171. The Criminal Code of Belarus provides for universal jurisdiction for the crime of genocide, crimes against humanity, the use of prohibited means and methods of warfare, violations of the laws and customs of war and grave breaches of IHL, which are included in the special section of the Code, as well as for offences under treaties to which Belarus is a party.¹⁷²

172. Belgium's Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended, which provides for the punishment of genocide (Article 1(1)), crimes against humanity (Article 1(2)) and grave breaches of the 1949 Geneva Conventions and Additional Protocols (Article 1(3)), states that "the Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed".¹⁷³

173. The Criminal Code of the Federation of Bosnia and Herzegovina punishes several war crimes and provides that:

- (1) Criminal legislation of the Federation applies to a foreigner who has committed a criminal offence against the Federation or its citizens in the territory of Bosnia and Herzegovina or abroad, when the offence in question is some other than the one referred to under Article 131 of this Code, provided that he/she is found on the territory of the Federation or has been extradited.
- (2) Criminal legislation of the Federation applies to a foreigner who commits a criminal offence abroad against another country or a foreigner, for which the law of that country prescribes imprisonment for a term of five years or a heavier penalty, provided the perpetrator is found on the territory of the Federation.¹⁷⁴

The Criminal Code of the Republika Srpska contains the same provision.¹⁷⁵

174. Botswana's Geneva Conventions Act provides that:

In the case of an offence under this section [i.e. a grave breach in the meaning of Articles 50 GC I, 51 GC II, 130 GC and 147 GC IV] committed outside Botswana, a person may be proceeded against, indicted, tried and punished therefor in any place in Botswana as if the offence had been committed in that place.¹⁷⁶

¹⁷⁰ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3(1).

¹⁷¹ Barbados, *Geneva Conventions Act* (1980), Section 3(2).

¹⁷² Belarus, *Criminal Code* (1999), Article 6.

¹⁷³ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 7.

¹⁷⁴ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 133 and 154–166.

¹⁷⁵ Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 123 and 433–445.

¹⁷⁶ Botswana, *Geneva Conventions Act* (1970), Section 3(2).

175. Bulgaria's Penal Code as amended, which contains a section on "Crimes against the Laws and Customs of Waging War" (Articles 410–415), provides that:

- (1) the Penal Code shall also apply to foreign citizens who have committed abroad crimes against peace and humanity, whereby the interests of another state or foreign citizens have been affected . . .
- (2) the Penal Code shall also apply to other crimes committed by foreign citizens abroad, where this is stipulated in an international agreement, to which the Republic of Bulgaria is a party.¹⁷⁷

176. Canada's Geneva Conventions Act as amended, which provides for the punishment of grave breaches of the Geneva Conventions and AP I, provides that:

Where a person is alleged to have committed an offence [in the meaning of Article 50 GC I, Article 51 GC II, Article 130 GC III, Article 147 GC IV or Articles 11 or 85 AP I], proceedings in respect of that offence may, whether or not the person is in Canada, be commenced in any territorial division in Canada and that person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.

For greater certainty, any legal requirements that the accused appear at and be present during proceedings and any exceptions to those requirements apply to proceedings commenced in any territorial division pursuant to [the above].¹⁷⁸

177. Canada's Criminal Code provides that:

Every person who . . . commits an act or omission outside Canada that constitutes a war crime or a crime against humanity and that, if committed in Canada, would constitute an offence against the laws of Canada in force at the time of the act or omission shall be deemed to commit that act or omission in Canada at the time if,

- (a) at the time of the act or omission,
 - (i) that person is a Canadian citizen or is employed by Canada in a civilian or military capacity,
 - (ii) that person is a citizen of, or is employed in a civilian or military capacity by, a state that is engaged in an armed conflict against Canada, or
 - (iii) the victim of the act or omission is a Canadian citizen or a citizen of a state that is allied with Canada in an armed conflict; or
- (b) at the time of the act or omission, Canada could, in conformity with international law, exercise jurisdiction over the persons with respect to the act or omission on the basis of the person's presence in Canada and, subsequent to the time of the act or omission, the person is present in Canada.¹⁷⁹

178. Canada's Crimes against Humanity and War Crimes Act provides that any person who has committed genocide, war crimes or crimes against humanity within or outside Canada may be prosecuted for such offences if:

¹⁷⁷ Bulgaria, *Penal Code as amended* (1968), Articles 6(1)–(2).

¹⁷⁸ Canada, *Geneva Conventions Act as amended* (1985), Section 3(2) and (3).

¹⁷⁹ Canada, *Criminal Code* (1985), Article 3.71.

- (a) at the time the offence is alleged to have been committed,
 - (i) the person was a Canadian citizen or was employed by Canada in a civilian or military capacity,
 - (ii) the person was a citizen of a state that was engaged in an armed conflict against Canada, or was employed in a civilian or military capacity by such a state,
 - (iii) the victim of the alleged offence was a Canadian citizen, or
 - (iv) the victim of the alleged offence was a citizen of a state that was allied with Canada in an armed conflict; or
- (b) after the time the offence is alleged to have been committed, the person is present in Canada.¹⁸⁰

179. Chile's Code of Military Justice provides that:

The Military Courts of the Republic have jurisdiction over Chileans and foreigners in order to pass judgement on all matters of military jurisdiction which might arise within the national territory. They also have jurisdiction to try the same matters when they arise outside national territory in the following cases:

1. When they occur within a territory which is militarily occupied by the Chilean armed forces;
2. When they concern offences by soldiers in the course of duty or when undertaking military assignments;
3. When they concern offences against the sovereignty of the State and its external or internal security.¹⁸¹

180. Colombia's Penal Code, which criminalises a number of war crimes under the 1949 Geneva Conventions and Additional Protocols, provides that:

The Colombian Penal Code shall apply to: . . .

any foreigner who has committed an offence outside Colombia against a foreigner, as long as the following conditions are met:

- (a) that he is present on Colombian territory;
- (b) that the crime is punishable in Colombia by a minimum prison sentence of not less than three years;
- (c) that the crime is not a political offence; and
- (d) that if extradition has been requested, it has not been granted by the Colombian Government.¹⁸²

181. The Geneva Conventions and Additional Protocols Act of the Cook Islands, referring to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV as well as to Articles 11(4) and 85(2), (3) and (4) AP I, provides that:

- (1) Any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the Conventions or of [AP I] is guilty of an offence.

...

- (3) This section applies to persons regardless of their nationality or citizenship.¹⁸³

¹⁸⁰ Canada, *Crimes against Humanity and War Crimes Act* (2000), Section 8(a)–(b).

¹⁸¹ Chile, *Code of Military Justice* (1925), Article 3.

¹⁸² Colombia, *Penal Code* (2000), Articles 16(6)(a)–(d) and 135–164.

¹⁸³ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1) and (3).

182. Costa Rica's Penal Code as amended provides that:

Regardless of the regulations in force in the place where the punishable act is committed and of the nationality of the perpetrator, punishment under Costa Rican law shall be applicable to . . . anyone who commits other punishable acts against human rights covered by treaties signed by Costa Rica or by this Code.¹⁸⁴

183. Côte d'Ivoire's Code of Military Penal Procedure extends the jurisdiction of military courts to:

crimes and offences not justified by the laws and customs of war committed by foreign nationals and their agents during hostilities and anywhere in the territory of the Republic or zone of military operations, and directed against or to the prejudice of Ivorian nationals, soldiers serving under the national flag, stateless persons or refugees.¹⁸⁵

184. Cuba's Penal Code grants Cuban courts jurisdiction over, *inter alia*, crimes against humanity, human dignity or collective health or prosecutable under international treaties regardless of the nationality of the accused or the place where the crimes were committed as long as the acts in question also constitute crimes where they were committed.¹⁸⁶

185. Cyprus's Geneva Conventions Act, referring to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, provides for the prosecution and punishment of "any person who, in spite of nationality, commits in the Republic or outside the Republic, any serious violation . . . of the [1949] Geneva Conventions". It states that:

In case an offence provided by this Article has been committed outside the Republic, a person may be prosecuted, charged with the offence, be tried and punished anywhere within the territory of the Republic, as if the offence had been committed in this territory; for all purposes relative or relevant to the trial or punishment, the offence is considered being committed in this territory.¹⁸⁷

186. Cyprus's AP I Act states with respect to "any serious violation of the provisions of the [AP I]" that:

In case an offence provided by this Article has been committed outside the Republic, a person may be prosecuted, charged with the offence, be tried and punished anywhere within the territory of the Republic as if the offence had been committed in this territory; for all purposes relevant to the trial or punishment, the offence is considered being committed in this territory.¹⁸⁸

187. Denmark's Penal Code provides that:

The following acts committed outside of the territory of the Danish state shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator:

¹⁸⁴ Costa Rica, *Penal Code as amended* (1970), Article 7.

¹⁸⁵ Côte d'Ivoire, *Code of Military Penal Procedure* (1974), Article 11(1).

¹⁸⁶ Cuba, *Penal Code* (1987), Article 5(3).

¹⁸⁷ Cyprus, *Geneva Conventions Act* (1966), Section 4(1) and (2).

¹⁸⁸ Cyprus, *AP I Act* (1979), Section 4(1) and (2).

- ...
- 5) where the act is covered by an international convention in pursuance of which Denmark is under an obligation to start judicial proceedings;
 - 6) where transfer of the accused for legal proceedings in another country is rejected, and the act, provided it is committed within the territory recognized by international law as belonging to a foreign state, is punishable according to the law of this state, and provided that according to Danish law the act is punishable with a sentence more severe than one year of imprisonment.¹⁸⁹

188. Ecuador's Code of Criminal Procedure provides that the following persons fall under the jurisdiction of Ecuador: "Ecuadorians or foreign nationals who commit offences against international law or offences under international conventions or treaties which are in force, provided that such persons have not been prosecuted in another State".¹⁹⁰

189. El Salvador's Penal Code provides that:

Criminal legislation shall also apply to offences committed by anyone whosoever in a place not subject to Salvadoran jurisdiction, provided that they affect property internationally protected by specific agreements or rules of international law or seriously undermine universally recognised human rights.¹⁹¹

190. Ethiopia's Penal Code provides with respect to a range of war crimes that:

Any person who has committed in a foreign country:

- (a) an offence against international law or an international offence specified in Ethiopian legislation, or an international treaty or a convention to which Ethiopia has adhered;

...

shall be liable to trial in Ethiopia in accordance with the provisions of this Code and subject to the general conditions mentioned hereinafter... unless he has been prosecuted in the foreign country.¹⁹²

191. Finland's Revised Penal Code, providing for the punishment of "war crimes", "aggravated war crimes" and "petty war crimes",¹⁹³ states that:

Finnish law shall apply to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement binding on Finland or on another statute or regulation internationally binding on Finland (international offence).¹⁹⁴

192. Under France's Code of Military Justice, military tribunals have jurisdiction over acts committed by enemy nationals or any agents in the service of the administration or interests of the enemy on territory under French jurisdiction, or acts committed abroad against French nationals or refugees or stateless persons residing on French territory.¹⁹⁵

¹⁸⁹ Denmark, *Penal Code* (1978), Article 8(5) and (6).

¹⁹⁰ Ecuador, *Code of Criminal Procedure* (2000), Article 18(6).

¹⁹¹ El Salvador, *Penal Code* (1997), Article 10.

¹⁹² Ethiopia, *Penal Code* (1957), Article 17(a).

¹⁹³ Finland, *Revised Penal Code* (1995), Chapter 11, Sections 1–3.

¹⁹⁴ Finland, *Revised Penal Code* (1995), Chapter 11, Section 7.

¹⁹⁵ France, *Code of Military Justice* (1982), Article 70.

193. France's Penal Code provides that:

French criminal law is applicable to any felony committed by a French national outside the territory of the Republic. It is applicable to misdemeanours committed by French nationals outside the territory of the Republic if the conduct is punishable by the legislation of the country where it has been committed. This present article applies even though the accused acquired French nationality subsequent to the conduct imputed to him or her.¹⁹⁶

194. France's Code of Criminal Procedure provides that:

The authors of and accomplices in offences committed outside the territory of the Republic may be prosecuted and tried in French courts when, pursuant to the provisions of the Criminal Code, Book 1, or of another legislative instrument, French law is applicable or when an international convention gives French courts jurisdiction to deal with the matter.¹⁹⁷

The Code adds that "pursuant to the international conventions referred to below, any person who renders himself guilty outside the territory of the Republic of any of the offences enumerated in those articles may, if in France, be prosecuted and tried by French courts".¹⁹⁸ The provisions that follow give jurisdiction over persons who violate certain specific treaties.¹⁹⁹

195. France's Law on Cooperation with the ICTY provides that:

The authors of or accessories to the offences mentioned in Article 1 [serious violations of IHL] can be prosecuted and tried by the French courts, in application of French law, if they are found in France. These provisions apply to attempted offences whenever such attempts are punishable... The international tribunal shall be informed of any ongoing proceedings relating to facts that may be of its competence.²⁰⁰

France's Law on Cooperation with the ICTR includes a similar provision for the acts of genocide and serious violations of IHL committed in Rwanda.²⁰¹

196. Germany's Criminal Procedure Code as amended, as foreseen by the Law Introducing the International Crimes Code, states with regard to acts committed outside the territorial field of application of this law that:

- (1) ... The public prosecution office may dispense with prosecuting an offence punishable pursuant to [Article 1] paragraphs 6 to 14 of the [Law Introducing the International Crimes Code] [namely genocide, crimes against humanity and war crimes], if the accused is not present in Germany and such presence is not to be anticipated. If ... the accused is a German, this shall however apply only where the offence is being prosecuted before an international court or by a state on whose territory the offence was committed or whose national was harmed by the offence.

¹⁹⁶ France, *Penal Code* (1994), Article 113(6).

¹⁹⁷ France, *Code of Criminal Procedure* (1994), Article 689.

¹⁹⁸ France, *Code of Criminal Procedure* (1994), Article 689(1).

¹⁹⁹ France, *Code of Criminal Procedure* (1994), Article 689(2)–(7).

²⁰⁰ France, *Law on Cooperation with the ICTY* (1995), Article 2.

²⁰¹ France, *Law on Cooperation with the ICTR* (1996), Article 2.

- (2) ... The public prosecution office can, in particular, dispense with prosecuting an offence punishable pursuant to [Article 1] paragraphs 6 to 14 of the [Law Introducing the International Crimes Code], if
1. there is no suspicion of a German having committed such offence,
 2. such offence was not committed against a German,
 3. no suspect in respect of such offence is residing in Germany and such residence is not to be anticipated, and
 4. the offence is being prosecuted before an international court or by a state on whose territory the offence was committed, whose national is suspected of its commission or whose national was harmed by the offence.
- The same shall apply if a foreigner accused of an offence committed abroad is residing in Germany but the requirements pursuant to the first sentence, numbers 2 and 4, have been fulfilled and transfer to an international court or extradition to the prosecuting state is permissible and intended.²⁰²

197. Under Germany's Penal Code, German courts have jurisdiction to try persons accused of war crimes, even if committed on the territory of a foreign State, because of an international treaty binding on Germany.²⁰³ Under the Code, German criminal law also applies to the crime of genocide when committed abroad.²⁰⁴

198. Germany's Law Introducing the International Crimes Code provides that "this Law shall apply to all criminal offences against international law designated under this Law, to serious criminal offences designated therein even when the offence was committed abroad and bears no relation to Germany".²⁰⁵

199. Guatemala's Penal Code provides that Guatemalan criminal law applies to "any offence which, by virtue of a treaty or convention, is punishable in Guatemala, even if the offence is not committed in Guatemalan territory".²⁰⁶ The Code includes several war crimes as crimes under national law.²⁰⁷

200. Guatemala's Code of Criminal Procedure provides that courts and other authorities responsible for trials must fulfil the obligations imposed on them by international treaties in the matter of respect for human rights.²⁰⁸

201. India's Geneva Conventions Act provides that "when an offence under this chapter [i.e. a grave breach of the Geneva Conventions] is committed by any person outside India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found".²⁰⁹

202. Ireland's Geneva Conventions Act as amended provides for the punishment of grave breaches of the Geneva Conventions and AP I committed by "any person, whatever his or her nationality" and "whether in or outside the State". It further provides for jurisdiction of Irish courts over "minor breaches"

²⁰² Germany, *Law Introducing the International Crimes Code* (2002), Article 3(5); *Criminal Procedure Code as amended* (1987), § 153(f).

²⁰³ Germany, *Penal Code* (1998), § 6(9). ²⁰⁴ Germany, *Penal Code* (1998), § 6(1).

²⁰⁵ Germany, *Law Introducing the International Crimes Code* (2002), Article 1(1).

²⁰⁶ Guatemala, *Penal Code* (1973), Article 5(5).

²⁰⁷ Guatemala, *Penal Code* (1973), Article 378.

²⁰⁸ Guatemala, *Code of Criminal Procedure* (1992), Article 16.

²⁰⁹ India, *Geneva Conventions Act* (1960), Section 4.

of the Geneva Conventions and both Additional Protocols if committed by “any person, whatever his nationality . . . in the State” or by “any citizen of Ireland . . . outside the State”.²¹⁰

203. Israel’s Penal Law as amended, under Section 16 entitled “Offences against the Law of Nations”, states that:

- a) The penal laws of Israel shall apply in respect of external offences for the committing of which the State of Israel has undertaken, in multilateral international treaties open to accession, to penalise; this will also apply even where the person committing the offence is not an Israeli citizen or resident, and irrespective of the place of committing of the offence.
- b) The qualifications specified in Section 14(b)(2) and (3), and (c), shall also apply in respect of the applicability of the penal laws of Israel under this Section.²¹¹

Section 14 of the Law states that:

- (b) . . . (2) A qualification for penal liability under the laws of that State [i.e. another State] does not apply; (3) The person has not yet been acquitted of that offence in that State or, having been convicted, he has not served the sentence imposed on him in respect of that offence. (c) No penalty more grave than what could have been imposed under the laws of the State where the offence was committed shall be imposed in respect of the offence.²¹²

204. Kenya’s Geneva Conventions Act, which provides for the punishment of grave breaches of the Geneva Conventions committed “whether within or outside Kenya” by “any person, whatever his nationality”, states that:

Where an offence under this section is committed outside Kenya, a person may be proceeded against, indicted, tried and punished therefor in any place in Kenya, as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.²¹³

205. Kyrgyzstan’s Criminal Code, in an article concerning “Action of Criminal Law with Regard to Persons who have Committed a Crime outside the Borders of the Kyrgyz Republic”, provides that:

- (1) Citizens of the Kyrgyz Republic, as well as stateless persons permanently residing in the Kyrgyz Republic, shall be liable under the present Code if they have not been punished by the judgement of a court of a foreign state.
- (2) Citizens of the Kyrgyz Republic who have committed a crime within the territory of another state can not be extradited to this state.
- (3) Foreigners and stateless persons who have committed a crime outside the borders of the Kyrgyz Republic and who are within its territory can be extradited to a foreign state to be tried or to serve their sentence in accordance with an international treaty.²¹⁴

²¹⁰ Ireland, *Geneva Conventions Act as amended* (1962), Sections 3 and 4.

²¹¹ Israel, *Penal Law as amended* (1977), Section 16.

²¹² Israel, *Penal Law as amended* (1977), Section 14.

²¹³ Kenya, *Geneva Conventions Act* (1968), Section 3(2).

²¹⁴ Kyrgyzstan, *Criminal Code* (1997), Article 6.

206. The Draft Amendments to the Code of Military Justice of Lebanon, in a part dealing with the punishment of war crimes, provide that “the Lebanese tribunals have jurisdiction for the war crimes provided for in this law, regardless of the nationality of the author and the place where they have been committed”.²¹⁵

207. Luxembourg’s Code of Criminal Investigation provides that:

Every foreigner who outside the territory of the Grand-Duché is responsible, whether as a principal or an accomplice, for the following:

- ...
- (2) in wartime, abduction of minors; attacks on modesty or rape; prostitution or corruption of youth; murder or intentional bodily injury; attacks on individual liberty committed against a Luxembourg national or a national of an allied country,

can be prosecuted and tried according to the provisions of Luxembourg laws if he is found either in the Grand-Duché, an enemy country or if the government obtains his extradition.²¹⁶

208. Luxembourg’s Law on the Repression of War Crimes provides for the prosecution of non-Luxembourg nationals having committed war crimes “if such infringements have been committed at the occasion or under the pretext of war and if they are not justified by the laws and customs of war, these agents either being found within the Grand-Duché or on enemy territory, or the Government having obtained their extradition”.²¹⁷

209. Luxembourg’s Law on the Punishment of Grave Breaches provides that “any individual who has committed an offence under this law outside the territory of the Grand-Duché can be prosecuted in the Grand-Duché even though he may not be present there”.²¹⁸

210. Malawi’s Geneva Conventions Act, which provides for the punishment of grave breaches of the Geneva Conventions by “any person, whatever his nationality”, states that:

Where an offence under this section is committed without Malawi a person may be proceeded against, tried and punished therefor in any place in Malawi as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.²¹⁹

211. Malaysia Geneva Conventions Act, which provides for the punishment of grave breaches of the Geneva Conventions by “any person, whatever his citizenship or nationality”, states that:

In the case of an offence under this section committed outside the Federation, a person may be proceeded against, charged, tried and punished therefor in any place

²¹⁵ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 150.

²¹⁶ Luxembourg, *Code of Criminal Investigation* (1944), Article 7.

²¹⁷ Luxembourg, *Law on the Repression of War Crimes* (1947), Article 1.

²¹⁸ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 10.

²¹⁹ Malawi, *Geneva Conventions Act* (1967), Section 4(1) and (2).

in the Federation as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.²²⁰

212. The Geneva Conventions Act of Mauritius provides for the punishment of grave breaches of the Geneva Conventions committed “in Mauritius or elsewhere” and states that “this section applies to persons regardless of their nationality or citizenship”.²²¹

213. Mexico’s Penal Code as amended provides that offences committed in a foreign territory and against foreigners or Mexicans by a Mexican national, or by a foreigner against Mexican nationals, shall be prosecuted in Mexico provided that the following conditions are met:

- I. the accused is in the territory of the Republic;
- II. the case was not finally judged in the country where the offence took place; and
- III. the offence of which he is accused is an offence in the country where it took place and in the Republic.²²²

214. The Criminal Law in Wartime Act as amended of the Netherlands stipulates that Dutch criminal law shall apply:

- (1) to any person who commits an offence described in Articles 4–7 outside the Kingdom but within Europe, if that offence is committed against or in connection with a Dutch citizen or a Dutch legal entity or if any Dutch interest is or may be adversely affected thereby;
- (2) to any person who commits an offence described in Articles 131-134 *bis*, 189 and 416-417 *bis* of the Penal Code outside the Kingdom but within Europe, if the offence in those Articles is an offence within the meaning of (1) above;
- (3) to a Dutch citizen who commits an offence described in Article 1 outside the Kingdom but within Europe.²²³

215. The International Crimes Act of the Netherlands provides that:

1. Without prejudice to the relevant provisions of the [Penal Code as amended] and the [Military Criminal Law as amended], Dutch criminal law shall apply to:
 - (a) anyone who commits any of the crimes defined in this Act [genocide, crimes against humanity, war crimes and torture] outside the Netherlands, if the suspect is present in the Netherlands;
 - (b) anyone who commits any of the crimes defined in this Act outside the Netherlands, if the crime is committed against a Dutch national;
 - (c) a Dutch national who commits any of the crimes defined in this Act outside the Netherlands.

...
3. Prosecution on the basis of subsection 1 (c) may also take place if the suspect becomes a Dutch national only after committing the crime.²²⁴

²²⁰ Malaysia, *Geneva Conventions Act* (1962), Section 3(1) and (2).

²²¹ Mauritius, *Geneva Conventions Act* (1970), Section 3.

²²² Mexico, *Penal Code as amended* (1931), Article 4.

²²³ Netherlands, *Criminal Law in Wartime Act as amended* (1952), Article 3.

²²⁴ Netherlands, *International Crimes Act* (2003), Article 2.

216. New Zealand's Geneva Conventions Act as amended, which provides for the punishment of grave breaches of the 1949 Geneva Conventions and AP I committed by "any person . . . in New Zealand or elsewhere", states that "this section applies to persons regardless of their nationality or citizenship".²²⁵

217. New Zealand's International Crimes and ICC Act provides that:

- (1) Proceedings may be brought for an offence
 - (a) against section 9 [genocide] or section 10 [crimes against humanity], if the act constituting the offence charged is alleged to have occurred
 - (i) on or after the commencement of this section; or
 - (ii) on or after the applicable date but before the commencement of this section; and would have been an offence under the law of New Zealand in force at the time the act occurred, had it occurred in New Zealand; and
 - (b) against section 11 [war crimes], if the act constituting the offence charged is alleged to have occurred on or after the commencement of this section; and
 - (c) against section 9 or section 10 or section 11 regardless of
 - (i) the nationality or citizenship of the person accused; or
 - (ii) whether or not any act forming part of the offence occurred in New Zealand; or
 - (iii) whether or not the person accused was in New Zealand at the time that the act constituting the offence occurred or at the time a decision was made to charge the person with an offence.²²⁶

218. Nicaragua's Draft Penal Code provides that:

Nicaraguan Penal Law shall be applicable to Nicaraguan nationals and foreigners who have committed within the national territory the following crimes: . . . other crimes which, under international treaties and conventions, must be prosecuted in Nicaragua in accordance with constitutional provisions.²²⁷

219. Niger's Penal Code as amended, under a chapter entitled "Crimes against humanity and war crimes" in which it provides for the punishment of a list of offences such as genocide, crimes against humanity, and war crimes in the meaning of the 1949 Geneva Conventions and both AP I and AP II, states that:

The courts of Niger have jurisdiction over the crimes set out in this chapter, regardless of the place where these might have been committed. For the crimes committed abroad by a national of Niger against a foreigner, the action of the foreigner or his family or the official notice of the authority of the State where the crime has been committed are not required.²²⁸

220. Nigeria's Geneva Conventions Act, which provides for the punishment of grave breaches of the Geneva Conventions "whether in or outside the

²²⁵ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1)–(3).

²²⁶ New Zealand, *International Crimes and ICC Act* (2000), Part 2, Section 8(1).

²²⁷ Nicaragua, *Draft Penal Code* (1999), Article 16(p).

²²⁸ Niger, *Penal Code as amended* (1961), Article 208.8.

Federation" and committed by "any person, whatever his nationality", states that:

A person may be proceeded against, tried and sentenced in the Federal territory of Lagos for an offence under this section committed outside the Federation as if the offence had been committed in Lagos, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in Lagos.²²⁹

221. Papua New Guinea's Geneva Conventions Act, which provides for the punishment of grave breaches of the Geneva Conventions "in Papua New Guinea or elsewhere", states that "this section [on the "punishment of offenders against the Geneva Conventions"] applies to persons regardless of their nationality or citizenship".²³⁰

222. Paraguay's Penal Code, in the section on "Acts against universally protected interests committed in a foreign country", provides that "Paraguayan penal law shall also be applied to the following acts committed in a foreign country: . . . other acts that according to an international treaty the Paraguayan State is obliged to prosecute, even if they were committed in a foreign country".²³¹

223. Poland's Penal Code includes a special section on "Offences against peace and humanity, and war crimes" and provides that:

Notwithstanding regulations in force in the place of commission of the offence, the Polish penal law shall be applied to a Polish citizen or an alien, with respect to whom no decision on extradition has been taken, in the case of the commission abroad of an offence which the Republic of Poland is obligated to prosecute under international agreements.²³²

224. Russia's Criminal Code provides that:

1. Nationals of the Russian Federation and stateless persons permanently residing in the Russian Federation who have committed a crime outside the borders of the Russian Federation shall incur criminal responsibility under the present Code if the act they have committed is recognised as a crime in the state where it has been committed and if these persons have not been convicted in a foreign state. When convicting such persons the punishment cannot exceed the highest limit of the sanction specified in the law of the foreign state where the crime has been committed.
2. Members of the armed units of the Russian Federation located outside the borders of the Russian Federation for crimes committed within the territory of a foreign state shall incur criminal responsibility under the present Code if not provided for otherwise by an international treaty to which the Russian Federation is a party.

²²⁹ Nigeria, *Geneva Conventions Act* (1960), Section 3(1) and (2).

²³⁰ Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2).

²³¹ Paraguay, *Penal Code* (1997), Article 8(1).

²³² Poland, *Penal Code* (1997), Chapter XVIII, Article 113.

3. Foreigners and stateless persons who are not permanent residents of the Russian Federation who have committed a crime outside the borders of the Russian Federation shall incur criminal responsibility under the present Code in cases when the crime was directed against the interests of the Russian Federation and in cases provided for by an international treaty to which the Russian Federation is a party if they have not been convicted in a foreign state and if criminal proceedings against them are instituted within the territory of the Russian Federation.²³³

225. Rwanda's Law Setting up Gacaca Jurisdictions was enacted:

to organize the putting on trial of persons prosecuted for having, between October 1, 1990 and December 31, 1994, committed acts qualified and punished by the penal code and which constitute . . . crimes of genocide or crimes against humanity as defined by the [1948 Genocide Convention], by [GC IV and the Additional Protocols], as well as in the [1968 UN Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity].²³⁴

It states that:

Jurisdictions called on to try, by virtue of this law, offences of genocide and massacres, may try public actions filed against persons who have neither had address nor residence in Rwanda or who are outside Rwanda, when there is conclusive evidence or serious guilt clues, whether or not they have previously been cross-examined.²³⁵

226. The Geneva Conventions Act of the Seychelles, which provides for the prosecution of "any person, whatever his nationality" having committed any grave breach under the Geneva Conventions "whether in or outside Seychelles", provides that:

Where an offence under this section is committed outside Seychelles, a person may be proceeded against, charged, tried and punished therefor in any place in Seychelles, as if the offence had been committed in that place, and the offence is, for all purposes incidental to or consequential on the trial or punishment thereof, deemed to have been committed in that place.²³⁶

227. Singapore's Geneva Conventions Act provides that:

Any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [of the 1949 Geneva Conventions] shall be guilty of an offence under this Act and on conviction thereof . . . [be punished].

In the case of an offence under this section committed outside Singapore, a person may be proceeded against, charged, tried and punished therefor in any place in Singapore as if the offence had been committed in that place, and the offence shall, for the purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.²³⁷

²³³ Russia, *Criminal Code* (1996), Article 12(1)–(3).

²³⁴ Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 1(a).

²³⁵ Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 93.

²³⁶ Seychelles, *Geneva Conventions Act* (1985), Section 3(1) and (2).

²³⁷ Singapore, *Geneva Conventions Act* (1973), Section 3(1) and (2).

228. Slovenia's Penal Code criminalises genocide and war crimes broadly defined and applies to Slovenian nationals who have committed offences abroad; to non-nationals who have committed offences against Slovenian nationals abroad; and to non-nationals who have committed a criminal offence against a third country or any of its citizens abroad.²³⁸

229. Under Spain's Law on Judicial Power, Spanish criminal courts have jurisdiction over offences committed by Spanish nationals and foreigners, whether on Spanish territory or abroad, in particular genocide or other offences which according to international treaties or conventions, must be prosecuted in Spain.²³⁹

230. Sri Lanka's Draft Geneva Conventions Act provides that:

A person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any person to commit,

- (a) a grave breach of any of the [1949 Geneva] Conventions; or
- (b) a breach of common Article 3 of the [1949 Geneva] Conventions

is guilty of an indictable offence.²⁴⁰

231. Sweden's Penal Code as amended provides that:

Crimes committed outside the Realm shall be adjudged according to Swedish law and by a Swedish court where the crime has been committed:

1. by a Swedish citizen or an alien domiciled in Sweden,
2. by an alien not domiciled in Sweden who, after having committed the crime, has become a Swedish citizen or has acquired domicile in the Realm or who is a Danish, Finnish, Icelandic, or Norwegian citizen and is present in the Realm, or
3. by any other alien, who is present in the Realm, and the crime under Swedish Law can result in imprisonment for more than six months.²⁴¹

The Code further provides that:

Even in cases other than those listed in Section 2, crimes committed outside the Realm shall be adjudged according to Swedish Law and by a Swedish court: . . . if the crime is . . . a crime against international law, unlawful dealings with chemical weapons, unlawful dealings with mines or false or careless statement before an international court.²⁴²

Moreover, the Code provides that:

A person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts shall be sentenced for a crime against international law to imprisonment.²⁴³

²³⁸ Slovenia, *Penal Code* (1994), Articles 122 and 123.

²³⁹ Spain, *Law on Judicial Power* (1985), Article 23(4).

²⁴⁰ Sri Lanka, *Draft Geneva Conventions Act* (2002), Article 3(1).

²⁴¹ Sweden, *Penal Code as amended* (1962), Chapter 2, § 2.

²⁴² Sweden, *Penal Code as amended* (1962), Chapter 2, § 3(6).

²⁴³ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

232. Switzerland's Military Criminal Code as amended gives Swiss military tribunals jurisdiction over violations of IHL, regardless of the international or non-international character of an armed conflict, whether the crime has been committed on Swiss territory or abroad, whether the perpetrator or the victim is of Swiss nationality or of a foreign nationality and whether the perpetrator had military or civil status, even if there exists no link to the Swiss legal system other than the presence of the accused on Swiss territory.²⁴⁴

233. Switzerland's Penal Code as amended is applicable also with regard to acts committed abroad which the State is obliged to prosecute by an international treaty, provided that the act is also punishable in the State where it was committed and that the author of the crime is found on the territory of Switzerland and not extradited to another State.²⁴⁵

234. Tajikistan's Criminal Code provides for jurisdiction over stateless permanent residents who commit crimes under Tajikistan law outside the country and over foreigners and stateless persons not resident in Tajikistan who commit crimes under the Code when the crime is prohibited by norms of international law or treaties.²⁴⁶ The Code provides that several war crimes are crimes under national law.²⁴⁷

235. Trinidad and Tobago's Draft ICC Act provides that:

Any person who commits any of the crimes specified in Articles 6 [of the 1998 ICC Statute – genocide], 7 [of the 1998 ICC Statute – crimes against humanity] and 8 [of the 1998 ICC Statute – war crimes] outside Trinidad and Tobago, may be prosecuted and punished for that crime in Trinidad and Tobago as if the crime had been committed in Trinidad and Tobago.²⁴⁸

236. Uganda's Geneva Conventions Act provides that:

Any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of any of the [1949 Geneva] Conventions . . . commits an offence and on conviction thereof [shall be punished].

Where an offence under this section is committed without Uganda a person may be proceeded against, indicted, tried and punished therefor in any place in Uganda as if the offence had been committed in that place, and the offence shall, for all purposes incidental or consequential on the trial or punishment thereof, be deemed to have been committed in that place.²⁴⁹

237. The UK Geneva Conventions Act as amended provides that:

Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the [1949 Geneva] conventions or the first protocol

²⁴⁴ Switzerland, *Military Criminal Code as amended* (1927), Articles 2(1) and (9), 6, 9, 108 and 109.

²⁴⁵ Switzerland, *Penal Code as amended* (1937), Article 6 *bis*.

²⁴⁶ Tajikistan, *Criminal Code* (1998), Article 15.

²⁴⁷ Tajikistan, *Criminal Code* (1998), Articles 397–405.

²⁴⁸ Trinidad and Tobago, *Draft ICC Act* (1999), Part II, Section 5(2).

²⁴⁹ Uganda, *Geneva Conventions Act* (1964), Section 1(1) and (2).

shall be guilty of an offence and on conviction on indictment [shall be punished]. In the case of an offence under this section committed outside the United Kingdom, a person may be proceeded against, indicted, tried and punished therefor in any place in the United Kingdom as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.²⁵⁰

238. The UK UN Personnel Act provides that “a person is guilty of an offence under, or by virtue of, section 1 [attacks on UN workers], 2 [attacks in connection with premises and vehicles] or 3 [threats of attacks on UN workers] regardless of his nationality”.²⁵¹

239. The UK War Crimes Act states that:

- (1) Subject to the provisions of this section, proceedings for murder, manslaughter or culpable homicide may be brought against a person in the United Kingdom irrespective of his nationality at the time of the alleged offence if that offence –
 - a) was committed during the period beginning with 1 September 1939 and ending with 5 June 1945 in a place which at the time was part of Germany or under German occupation; and
 - b) constituted a violation of the laws and customs of war.
- (2) No proceedings shall by virtue of this section be brought against any person unless he was on 8 March 1990, or has subsequently become, a British citizen or resident of the United Kingdom.²⁵²

240. The UK ICC Act includes as offences under domestic law the acts of genocide, crimes against humanity and war crimes as defined in the 1998 ICC Statute.²⁵³ Thus it provides that:

- (1) It is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime.
- (2) This section applies to acts committed
 - (a) in England or Wales, or
 - (b) outside the United Kingdom by a United Kingdom national, a United Kingdom resident or a person subject to UK service jurisdiction.²⁵⁴

There is a similar provision for Northern Ireland without the reference to “a person subject to UK service jurisdiction”.²⁵⁵

241. The US Convention on Genocide Implementation Act includes the following conditions as a required circumstance for the alleged offences:

- (1) the offense is committed within the United States; or
- (2) the alleged offender is a national of the United States (as defined in section 101 of the Immigration and Nationality Act (8 U.S.C. 1101)).²⁵⁶

²⁵⁰ UK, *Geneva Conventions Act as amended* (1957), Section 1(1) and (2).

²⁵¹ UK, *UN Personnel Act* (1997), Section 5(3).

²⁵² UK, *War Crimes Act* (1991), Articles 1 and 2.

²⁵³ UK, *ICC Act* (2001), Part 5, Section 50. ²⁵⁴ UK, *ICC Act* (2001), Part 5, Section 51.

²⁵⁵ UK, *ICC Act* (2001), Part 5, Section 58.

²⁵⁶ US, *Convention on Genocide Implementation Act* (1987), Section 1091(d).

242. The US Convention against Torture Implementation Act, which provides for the punishment of acts of torture committed outside the US, provides that:

There is jurisdiction over [acts of torture] if –

- (1) the alleged offender is a national of the United States; or
- (2) the alleged offender is present in the United States, irrespective of the nationality of the victim or alleged offender.²⁵⁷

243. The US War Crimes Act as amended provides that:

- (a) Offense. – Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be fined under this title or imprisoned for life or any term of years, or both, and if death results to the victim, shall also be subject to the penalty of death.
- (b) Circumstances. – The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).²⁵⁸

244. Vanuatu's Geneva Conventions Act provides that:

Any grave breach of any of the [1949] Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu.

Where a person has committed an act or omission that is an offence by virtue of [the above], the offence is within the competence of and may be tried and punished by the court having jurisdiction in respect of similar offences in Vanuatu.²⁵⁹

245. Zimbabwe's Geneva Conventions Act as amended provides that:

Any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [the Geneva Conventions or AP I] shall be guilty of an offence.

... Where an offence in terms of this section has been committed outside Zimbabwe, the person concerned may be proceeded against, indicted, tried and punished therefore in any place in Zimbabwe as if the offence had been committed in that place and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.²⁶⁰

National Case-law

246. In his legal opinion in the *Schwammberger case* before the Cámara Federal de la Plata in 1989, the Attorney-General of Argentina stated that:

States that have endured and suffered genocide have the right by means of their laws to assess the extent of the crimes and to punish in their courts of law those accused

²⁵⁷ US, *Convention against Torture Implementation Act* (1994), Section 2340A(b).

²⁵⁸ US, *War Crimes Act as amended* (1996), Section 2441(a) and (b).

²⁵⁹ Vanuatu, *Geneva Conventions Act* (1982), Sections 4 and 5.

²⁶⁰ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1) and (3).

of participating in such aberrant and cruel behaviour. Neither time, nor borders, nor the laws of any given country shall prevent the just advance of punitive law in the face of such repugnant acts, which are so deeply debasing for mankind and which undermine civilised coexistence.²⁶¹

247. In the *Polyukhovich case* before Australia's High Court in 1991 in which the accused was charged with crimes committed during the Second World War, certain judges addressed the question of the customary law obligation to prosecute and extradite persons accused of war crimes committed during the Second World War. Judge Brennan considered that:

As the material drawn from international agreements and UNGA resolutions acknowledges, international law recognizes a State to have universal jurisdiction to try suspected war criminals whether or not that State is under an obligation to do so and whether or not there is any international concern that the State should do so.²⁶²

Judge Toohey held that the "universality of jurisdiction is in fact a permissive doctrine".²⁶³ He also discussed the relationship between war crimes and universal jurisdiction and held that "the question whether the crimes existed as such at that time is basic. If such conduct amounted, then, to customary international crimes, their very nature leads to the conclusion that they were the subject of universal jurisdiction."²⁶⁴

248. In its judgement in the *Cvjetković case* in 1994, Austria's Supreme Court held that the Austrian courts were entitled to exercise jurisdiction over the accused under Article 6 of the 1948 Genocide Convention.²⁶⁵

249. In *The Four from Butare case* in 2001, a Belgian Court found four Rwandans guilty of war crimes during the 1994 genocide in Rwanda. The accused were arrested under the Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended and charged with grave breaches of the Geneva Conventions and AP I, as well as violations of common Article 3 of the 1949 Geneva Conventions and Articles 1, 2 and 4 AP II.²⁶⁶ The judgement was confirmed by the Belgian Court of Cassation in 2002.²⁶⁷

250. In the *Finta case* in 1989, in which the accused was prosecuted for war crimes and crimes against humanity committed during the Second World War, Canada's High Court of Justice rejected the defence's arguments that the law on

²⁶¹ Argentina, Cámara Federal de la Plata, *Schwammburger case*, Legal opinion of the Attorney-General, 30 August 1989, Point V.

²⁶² Australia, High Court, *Polyukhovich case*, Legal Reasoning of Judge Brennan, 14 August 1991, § 33.

²⁶³ Australia, High Court, *Polyukhovich case*, Legal Reasoning of Judge Toohey, 14 August 1991, § 27.

²⁶⁴ Australia, High Court, *Polyukhovich case*, Legal Reasoning of Judge Toohey, 14 August 1991, § 35.

²⁶⁵ Austria, Supreme Court, *Cvjetković case*, Judgement, 13 July 1994.

²⁶⁶ Belgium, Cour d'Assises de Bruxelles, *The Four from Butare case*, Judgement, 7–8 June 2001.

²⁶⁷ Belgium, Court of Cassation, *The Four from Butare case*, Judgement, 9 January 2002.

which the prosecution was based was unlawful inasmuch as it gave the courts extraterritorial jurisdiction. The Court held that one of the bases of jurisdiction which it considered were applicable to the case in question was the “‘universal principle’ of jurisdiction”. The Court went on to explain that “this principle recognizes that with respect to certain types of international crimes a country has the right to prosecute an offender irrespective of the fact that the offence was not committed on its territory”.²⁶⁸ In its judgement in 1994, the Supreme Court, with reference to the relevant provision of the Canadian Criminal Code, stated that:

Canadian courts have jurisdiction to try individuals living in Canada for crimes which they allegedly committed on foreign soil only when the conditions specified [enumerated within the judgement] are satisfied. The most important of those requirements, for the purposes of the present case, is that the alleged crime must constitute a war crime or a crime against humanity.

...

The war crimes and crimes against humanity provision stands as an exception to the general rule regarding the territorial ambit of criminal law. Parliament intended to extend the arm of Canada’s criminal law in order to be in a position to prosecute these extraterritorial acts if the alleged perpetrators were discovered here.²⁶⁹

In their dissenting opinion, three of the judges stated that:

Extraterritorial prosecution is thus a practical necessity in the case of war crimes and crimes against humanity. Not only is the state where the crime took place unlikely to prosecute; following the cessation of hostilities or other conditions that fostered their commission, there also is a tendency for the individuals who perpetrated them to scatter to the four corners of the earth. Thus, war criminals would be able to elude punishment simply by fleeing the jurisdiction where the crime was committed. The international community has rightly rejected this prospect.²⁷⁰

251. In the *Sarić case* in 1994, Denmark’s High Court tried a Bosnian Muslim refugee arrested in Denmark on charges of torture of POWs in violation of the 1949 Geneva Conventions. The accused was convicted and sentenced to eight years’ imprisonment.²⁷¹ Jurisdiction was based on the grave breaches provisions of Articles 129 and 130 GC III and Articles 146 and 147 GC IV in conjunction with Article 8(5) of the Danish Penal Code which provides Danish Courts with jurisdiction to try perpetrators of certain crimes when Denmark is bound by a treaty to do so. The verdict was confirmed by the Supreme Court in 1995.²⁷²

252. In the *Javor case* before Frances’s Tribunal de Grande Instance of Paris in 1994 and relative to events in Bosnia and Herzegovina, the investigating

²⁶⁸ Canada, High Court of Justice, *Finta case*, Judgement, 10 July 1989.

²⁶⁹ Canada, Supreme Court, *Finta case*, Judgement, 24 March 1994.

²⁷⁰ Canada, Supreme Court, *Finta case*, Dissenting opinion of judges La Forest, L’Heureux-Dubé and McLachlin, 24 March 1994.

²⁷¹ Denmark, High Court, *Sarić case*, Judgement, 25 November 1994.

²⁷² Denmark, Supreme Court, *Sarić case*, Judgement, 15 August 1995.

magistrate at first instance considered that the principles of international cooperation regarding the search and punishment of war criminals referred to in UN General Assembly Resolution 3074 (1973) were binding and were directly applicable in French national law. The investigating magistrate had also considered that he had jurisdiction on the basis of the 1949 Geneva Conventions and the 1984 UN Convention against Torture.²⁷³ The Court of Appeal of Paris reversed the decision and held that the investigating magistrate had wrongly considered that the principles of international cooperation provided in UN General Assembly Resolution 3074 were legally binding as a treaty.²⁷⁴ In 1996, the Court of Cassation confirmed the absence of direct applicability of the jurisdictional provisions of the 1949 Geneva Conventions. The Court also rejected the jurisdiction in respect to torture because the accused was not on French territory at the time of the alleged acts.²⁷⁵

253. In the *Munyeshyaka case* in 1996, France's Court of Appeal of Nîmes considered a case concerning a Rwandan priest accused of an alleged role in the 1994 massacres in Kigali and held that there was no basis in French law for universal jurisdiction in respect to the imputed crime of genocide.²⁷⁶ In 1998, the Court of Cassation reversed the judgement and found that jurisdiction was established on the basis of the Law on Cooperation with the ICTR of 1996, which allowed perpetrators of grave breaches of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide and crimes against humanity who were present in France to be prosecuted in France by the application of French law. The Court added that the relevant bases in French law could be found in Article 689 of the Code of Criminal Procedure (torture) and Article 211 of the Penal Code (genocide).²⁷⁷

254. In the *Djajić case* in 1997, Germany's Supreme Court of Bavaria based its jurisdiction on Article 6(9) of the German Penal Code, which extended the jurisdiction of German courts to acts committed abroad by non-nationals if this was provided for in an international treaty binding upon Germany. The Court referred to GC IV and the grave breaches regime. It stated that Article 6(9) of the Penal Code contained an additional implicit requirement of a link to Germany. This necessary link with Germany, so as not to infringe the principle of non-intervention, was found in the fact that the accused had established his domicile in Germany and had lived in Germany for some time. The Court added that the prosecution of war criminals was "in the interest of the international community as a whole", and not only in the particular interest of Germany. It further noted that "Article 146 [GC IV], in its paragraph 2, obliges

²⁷³ France, Tribunal de Grande Instance of Paris, *Javor case*, Order establishing partial lack of jurisdiction and the admissibility of civil suit, 6 May 1994.

²⁷⁴ France, Court of Appeal of Paris, *Javor case*, Judgement, 24 November 1994.

²⁷⁵ France, Court of Cassation, *Javor case*, Judgement, 26 March 1996.

²⁷⁶ France, Court of Appeal of Nîmes, *Munyeshyaka case*, Judgement, 20 March 1996.

²⁷⁷ France, Court of Cassation, *Munyeshyaka case*, Judgement, 6 January 1998.

each State party to the Convention 'to search for persons alleged to have committed . . . such grave breaches'. It had to 'bring such persons, regardless of their nationality, before its own courts'.²⁷⁸

255. In the *Jorgić case* in 1997, Germany's Higher Regional Court at Düsseldorf based its jurisdiction on Article 6(1) and (9) of the German Penal Code, which provided for the prosecution by German authorities of genocide and other acts for which there is a compulsory prosecution under the terms of an international treaty. The Court stated that GC IV was a "basis for criminal prosecution" and held that the fact that the accused had lived for many years in Germany, was married to a German citizen and was voluntarily coming back to Germany met the requirement of a "specific link" with Germany. The Court considered the conflict to be an international conflict and the victims to be "protected persons" in the meaning of Article 4 GC IV. It stated that Article VI of the 1948 Genocide Convention, "according to today's predominant international opinion, does not contain a prohibition of [applying] the principle of universal jurisdiction to genocide". According to the Court, its jurisdiction would also result from Article 9(1) of the 1993 ICTY Statute. Moreover, the Court referred to Article 146, second paragraph, GC IV under which, as the Court confirmed, the States party to GC IV "have engaged to bring persons who are alleged to have committed, or to have ordered to be committed, such grave breaches, before their own courts, regardless of their nationality". The accused was found guilty of complicity in genocide, in conjunction with dangerous bodily harm, deprivation of liberty and murder.²⁷⁹ In 1999, the Federal Supreme Court of Germany upheld the conviction for the most part and confirmed that the relevant provision of the German Penal Code establishing jurisdiction for genocide was in conformity with the 1948 Genocide Convention. The Court agreed with the initial judgement in that there was a sufficient link with Germany.²⁸⁰ In its decision in 2000, the Federal Constitutional Court stated that:

A norm of international customary law prohibiting the extension of German competence to legislate in criminal matters . . . was at variance with Art. VI of the [1948] Genocide Convention. With regard to the principle of non-interference recognized in international customary and international treaty law (Art. 2(1) of the United Nations Charter), the Federal Constitutional Court required that jurisdiction over events occurring in the territory of another State and therefore outside German territorial sovereignty be predicated on a meaningful link . . . Whether such a link exists depends on the subject matter. In criminal law, a meaningful link is constituted not only by the principles of territoriality, protection, active and passive personality, and criminal representation, but also by the principle of universal jurisdiction . . . The principle of universal jurisdiction applies to conduct deemed to constitute a threat to protected interests of the international community. It therefore differs from the principle of criminal representation, codified in Article 7, para. 2(2)

²⁷⁸ Germany, Supreme Court of Bavaria, *Djajić case*, Judgement, 23 May 1997.

²⁷⁹ Germany, Higher Regional Court at Düsseldorf, *Jorgić case*, Judgement, 26 September 1997.

²⁸⁰ Germany, Federal Supreme Court, *Jorgić case*, Judgement, 30 April 1999.

of the German Penal Code, in that the conduct does not need to be punishable by the law of the place where it occurred and no failure to extradite is required.²⁸¹

256. In the *Sokolović case* in 1999, Germany's Higher Regional Court at Düsseldorf held that, according to Article 6(9) of the German Penal Code and in connection with the provisions of the 1949 Geneva Conventions, German domestic courts had jurisdiction over grave breaches of the 1949 Geneva Conventions committed during the conflict in the former Yugoslavia.²⁸² In its judgement in 2000, the Federal Supreme Court agreed with the qualification of "international armed conflict" given to the 1992 situation in the former Yugoslavia and upheld the initial judgement against the accused, stating that "a duty to prosecute arises from [GC IV] at least when an international armed conflict takes place and when the criminal offences fulfil the requirements of a 'grave breach' in the meaning of Article 147 of [GC IV]".²⁸³ Referring to the requirement of a specific link to Germany which had been established in the judgement at first instance, the Court noted that the Higher Regional Court at Düsseldorf had correctly found such link to be established. However, it stated that:

[The Supreme Court] is nevertheless inclined not to require such additional link, in any case with regard to [Article 6 para. 9 of the German Penal Code]. . . Indeed, the prosecution and punishment in accordance with German penal law by the Federal Republic of Germany, acting in fulfilment of an internationally binding obligation accepted under agreement between States, of an act committed abroad by a foreigner against foreigners, can hardly be said to be an infringement of the principle of non-interference.²⁸⁴

257. In the *Kusljić case* in 1999, Germany's Supreme Court of Bavaria tried a Bosnian national for crimes committed in 1992 in the territory of Bosnia and Herzegovina. The accused was sentenced to life imprisonment for, *inter alia*, genocide in conjunction with six counts of murder. The Court found that a specific link to Germany, necessary for the prosecution under German penal law of acts committed abroad by a non-German actor and against non-German victims, was established.²⁸⁵ In its revising decision in 2001, the Federal Supreme Court stated that the accused – the specific intentional element to commit genocide not being established – could however be convicted for homicide in six cases committed in 1992 in Bosnia and Herzegovina. Referring to its judgement of the same day in the *Sokolović case*, the Court ruled that German courts, on the ground of Article 6(9) of the German Penal Code, had jurisdiction over grave breaches in the meaning of Articles 146 and 147 GC IV.²⁸⁶

²⁸¹ Germany, Federal Constitutional Court, *Jorgić case*, Decision, 12 December 2000.

²⁸² Germany, Higher Regional Court at Düsseldorf, *Sokolović case*, Judgement, 29 November 1999.

²⁸³ Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2000.

²⁸⁴ Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2000.

²⁸⁵ Germany, Supreme Court of Bavaria, *Kusljić case*, Judgement, 15 December 1999.

²⁸⁶ Germany, Federal Supreme Court, *Kusljić case*, Decision, 21 February 2001.

258. In its judgement in the *Eichmann case* in 1961, Israel's District Court of Jerusalem stated with respect to the acts for which Eichmann was accused that:

The abhorrent crimes defined in this Law [Nazis and Nazi Collaborators (Punishment) Law of 1950] are not crimes under Israel law alone. These crimes, which struck at the whole of mankind and shocked the conscience of nations, are grave offences against the law of nations itself (*delicta juris gentium*). Therefore, so far from international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring the criminals to trial. The jurisdiction to try crimes under international law is *universal*.

...

In view of the repeated affirmation by the United Nations in the resolution of the General Assembly of 1946 and in the Convention of 1948, and also in view of the Advisory Opinion of the International Court of Justice, there is no doubt that genocide has been recognized as a crime under international law in the full legal meaning of this term, *ex tunc*; that is to say, the crimes of genocide which were committed against the Jewish people and other peoples during the period of the Hitler régime were crimes under international law. It follows, therefore, in accordance with the accepted principles of international law, that the jurisdiction to try such crimes is *universal*.²⁸⁷ [emphasis in original]

With respect to Article 6 of the 1948 Genocide Convention, the Court noted that:

It is clear that Article 6 [of the 1948 Genocide Convention], like all other articles which determine the conventional obligations of the contracting parties, is intended for cases of genocide which will occur in the future after the ratification of the treaty or the adherence thereto by the State or States concerned . . . It is certain that it [the obligation arising from Article 6 of the 1948 Genocide Convention] constitutes no part of the principles of customary international law, which are also binding outside the conventional application of the Convention.

Moreover, even with regard to the conventional application of the Convention, it is not to be assumed that Article 6 is designed to limit the jurisdiction of countries to crimes of genocide by the principle of territoriality.²⁸⁸

...

In the [1948 Genocide Convention] the Members of the United Nations . . . contented themselves with the determination of territorial jurisdiction as a *compulsory minimum* . . . But there is nothing . . . to lead us to deduce any rule against the principle of universal jurisdiction with respect to the crime in question. It is clear that the reference in Article 6 to territorial jurisdiction . . . is not exhaustive. Every sovereign State may exercise its existing powers within the limits of customary international law.²⁸⁹ [emphasis in original]

²⁸⁷ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, §§ 12 and 19.

²⁸⁸ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, §§ 22 and 23.

²⁸⁹ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 25.

With respect to the provisions of Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV, the Court stated that:

Here the principle of “universality of jurisdiction with respect to war crimes” is laid down as the obligatory jurisdiction of the High Contracting Parties, from which none of them may withdraw and which none of them may waive (as expressly stated in the [1949 Geneva Conventions]). That obligation is binding not only on the belligerents, but also on the neutral parties to the [1949 Geneva] Conventions.²⁹⁰

Moreover, with respect to the protective principle and a specific territorial link, the Court affirmed the existence of a “linking point” in the case in question, stating that “indeed, this crime [‘the killing of millions of Jews with intent to exterminate the Jewish people’] very deeply concerns the ‘vital interests’ of the State of Israel, and under the ‘protective principle’ this State has the right to punish the criminals”.²⁹¹

259. In the *Eichmann case* in 1962, Israel’s Supreme Court, dealing with the question of the conformity of Israel’s Nazis and Nazi Collaborators (Punishment) Law of 1950 with principles of international law and States’ criminal jurisdiction over acts committed by foreign nationals abroad, quoted parts of the judgement of the PCIJ in the *Lotus case* and stated that:

This argument [of the defendant] is to the effect that the enactment of a criminal law applicable to an act committed in a foreign country by a national conflicts with the principle of territorial sovereignty. But here too we must hold that there is no such rule in customary international law, and that to this day it has not obtained general international agreement. Evidence of this is to be found in the Judgement of the [PCIJ] in the *Lotus case* . . .

Our principal object [is] to make it clear . . . that under international law no *prohibition* whatsoever falls upon the enactment of the Law of 1950 either because it created *ex post facto* offences or because such offences are of an extra-territorial character . . . The two propositions on which we propose to rely will . . . be as follows:

- (1) The crimes created by the Law and of which the appellant was convicted must be deemed today as having always borne the stamp of international crimes, banned by the law of nations and entailing individual responsibility.
- (2) It is the peculiarly universal character of these crimes that vests in every State the authority to try and punish anyone who participated in their commission.²⁹² [emphasis in original]

Under a part of the judgement dealing with universal jurisdiction, the Supreme Court further stated that:

One of the principles whereby States assume, in one degree or another, the power to try and punish a person for an offence is the principle of universality. Its meaning is substantially that such power is vested in every State regardless of the fact that the

²⁹⁰ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 24.

²⁹¹ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961, § 35.

²⁹² Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, §§ 9 and 10.

offence was committed outside its territory by a person who did not belong to it, provided he is in its custody when brought to trial . . . But while general agreement exists as to [the offence of piracy], the question of the scope of its application is in dispute.

...

There is full justification for applying here the principle of universal jurisdiction, since the international character of "crimes against humanity" (in the wide meaning of the term) dealt with in this case is no longer in doubt, while the unprecedented extent of their injurious and murderous effects is not to be disputed at the present time. In other words, the basic reason for which international law recognizes the right of each State to exercise such jurisdiction in piracy offences – notwithstanding the fact that its own sovereignty does not extend to the scene of the commission of the offence (the high seas) and the offender is a national of another State or is stateless – applies with even greater force to the above-mentioned crimes.

...

The truth is – and this further supports our conclusion – that the application of this principle has for some time been moving beyond the international crime of piracy. We have in mind its application to conventional war crimes as well . . . Whenever a "belligerent" country tries and punishes a member of the armed forces of the enemy for an act contrary to "the laws and customs of war", it does so because the matter involves an international crime in the prevention of which the countries of the whole world have an interest.²⁹³

Referring to a writer's opinion concerning the *Zyklon B case* decided by the British Military Court at Hamburg in 1946, and another British Military Court's decision in a case where a member of the Japanese army had been tried for unlawfully killing American POWs in what was then French Indo-China, the Supreme Court stated that:

Although the fact that the victims of the crimes in these cases were nationals of countries in alliance with the prosecuting State derogates in some degree from the universal character of the jurisdiction exercised, nevertheless, on the other hand, the cases indicate that substantial strides were made towards extending the use of the said principle . . . Moreover, according to [a writer's] opinion, even a neutral country has jurisdiction to try a person for a war crime.²⁹⁴

The Supreme Court also discussed "the limitation upon the exercise of universal jurisdiction imposed by most of those who support this principle, namely, that the State which has apprehended the offender must first offer to extradite him to the State in which the offence was committed", as well as the contention of the appellant that Israel was obliged to offer his extradition to Germany as his country of national origin, and stated that:

The requirement of making an offer to extradite the offender to the State of his national origin is supported neither by international law nor by the practice of States . . . The idea behind the above-mentioned limitation is not that the requirement to offer the offender to the State in which the offence was committed was

²⁹³ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 12.

²⁹⁴ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 12.

designed to prevent the violation of its territorial sovereignty. Its basis is rather a purely practical one. Normally, the great majority of the witnesses and the greater part of the evidence are concentrated in that State and it is therefore the most convenient place (*forum conveniens*) for the conduct of the trial . . . It is clear . . . that it is the State of Israel – not the State of Germany – that must be regarded as the *forum conveniens* for the conduct of the trial . . . It follows that the *aut dedere* rule cannot assist the appellant in the circumstances of this case.²⁹⁵

Referring to Article VI of the 1948 Genocide Convention, the Supreme Court held that:

Article 6 imposes upon the parties contractual obligations with future effect, that is to say, obligations which bind them to prosecute for crimes of genocide which may be committed within their territories in the future. This obligation, however, has nothing to do with the universal *power* vested in every State to prosecute for crimes of this type committed in the past – a power which is based on *customary* international law.²⁹⁶ [emphasis in original]

The Supreme Court concluded that:

We sum up our views on this subject as follows: Not only are all the crimes attributed to the Appellant of an international character, but they are crimes whose evil and murderous effects were so widespread as to shake the stability of the international community to its very foundations. The State of Israel, therefore, was entitled, pursuant to the principle of universal jurisdiction, and acting in the capacity of guardian of international law and agents for its enforcement, to try the Appellant. This being the case, it is immaterial that the State of Israel did not exist at the time the offences were committed.

In regard to the crimes directed against the Jews the District Court found additional support for its jurisdiction in the connecting link between the State of Israel and the Jewish people – including that between the State of Israel and the Jewish victims of the holocaust – and the National Home in Palestine, as is explained in its judgement. It therefore upheld its criminal and penal jurisdiction by virtue also of the “protective” principle and the principle of “passive personality”. It should be made clear that we fully agree with every word said by the Court on this subject.²⁹⁷

260. In the *Cavallo extradition case* in 2001, on the request of a Spanish judge, a Mexican court decided to allow the extradition of Ricardo Miguel Cavallo, a former Argentinean military officer, charged with genocide and acts of terrorism during the 1976–1983 “dirty war” in Argentina and based its decision on, *inter alia*, the principle of universal jurisdiction.²⁹⁸

261. In 2001, the Ministry of Foreign Affairs of Mexico issued a directive concerning the *Cavallo extradition case* stating that:

Based on Article 28, part XI, of the Federal Public Administration Law and in conformity with articles 30 of the International Law of Extradition, and articles 1, 9,

²⁹⁵ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 12.

²⁹⁶ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 12.

²⁹⁷ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962, § 12.

²⁹⁸ Mexico, Federal Court of the First Circuit, *Cavallo case*, Decision, 11 January 2001.

14 and 25 of the Treaty of Extradition and Mutual Assistance on Criminal Matters between the United Mexican States and the Kingdom of Spain, it is resolved . . . to grant the extradition of the individual in question, Ricardo Miguel Cavallo, known as Miguel Angel Cavallo, requested by the government of Spain through its embassy in Mexico, to face charges of genocide.²⁹⁹

262. In the *Ahlbrecht case* in 1947, the Special Court of Cassation of the Netherlands quashed the conviction of the accused imposed by the Lower Court on the ground that the latter lacked jurisdiction over war crimes alleged to have been committed by members of the enemy forces.³⁰⁰ The Court reviewed the practice relating to trials of war criminals since the end of the First World War, including the relevant provisions of the Treaty of Versailles, the Declarations of St. James and Moscow and the Charters of the International Military Tribunals and concluded that it could no longer be said that the Netherlands lacked jurisdiction over enemy war criminals. It added, however, that it did not follow from this conclusion that in the actual state of legislation in the Netherlands any particular court would automatically have jurisdiction over enemy war criminals. For this, the Court considered, something more was required, such as a directly applicable international convention or national legislation conferring the jurisdiction which the State possessed under international law upon a municipal court. In the absence of such measures, no local courts had the necessary jurisdiction. As a result of the Special Court of Cassation's decision, an amendment was made to the Extraordinary Penal Law Decree which criminalised war crimes and crimes against humanity as defined in the 1945 IMT Charter (Nuremberg) committed during the Second World War regardless of the nationality of the offender, the victim or the place where the crime was perpetrated.³⁰¹

263. The jurisdiction given to the courts of the Netherlands by the above-mentioned amendment formed the basis of the decision of the Special Court of Cassation in the *Rohrig and Others case* in 1950.³⁰² Here the Court rejected the arguments of the accused that the amendment limited the jurisdiction of the courts to crimes committed on the territory of the Netherlands. The Court also upheld the validity of the amendment on the ground that:

There was a rule of customary international law by which those who violate the rules of war can be punished by those into whose hands they have fallen (the so called theory of detention). This rule has the same universality as that applied internationally in the rule which treats pirates as enemies of mankind.³⁰³

264. In the *Knesević case* in 1997 involving a Bosnian Serb accused of having committed war crimes (murder, deportation to a concentration camp,

²⁹⁹ Mexico, Ministry of Foreign Affairs, Communication No. 021/01, The Ministry of Foreign Affairs grants Spain's Request to extradite Ricardo Miguel Cavallo, Directive of 2 February 2001, § 2.

³⁰⁰ Netherlands, Special Court of Cassation, *Ahlbrecht case*, Judgement, 17 February 1947.

³⁰¹ Netherlands, Special Court of Cassation, *Ahlbrecht case*, Judgement, 17 February 1947.

³⁰² Netherlands, Special Court of Cassation, *Rohrig and Others case*, Judgement, 15 May 1950.

³⁰³ Netherlands, Special Court of Cassation, *Rohrig and Others case*, Judgement, 15 May 1950.

attempted rape) in the territory of the former Yugoslavia (Bosnia and Herzegovina), the Supreme Court of the Netherlands acknowledged universal criminal jurisdiction irrespective of whether the Netherlands was involved in the conflict. The Court referred to the explanatory memorandum submitted to the Dutch parliament in the context of the adoption of the Criminal Law in Wartime Act, which interpreted Article 3 of the Act so as to give the Dutch courts competence to try war crimes (including grave breaches and violations of common Article 3 of the 1949 Geneva Conventions), regardless of where or by whom they had been committed.³⁰⁴

265. In its judgement in the *Kuroda case* in 1949, the Supreme Court of the Philippines held that the government had the power to grant the jurisdiction to prosecute Japanese citizens accused of war crimes committed in the Philippines during the Second World War, since “the rules and regulations of the Hague and [the 1949] Geneva Conventions form part and were wholly based on the principles of international law”.³⁰⁵

266. In the *Hissène Habré case* in 2000, Senegal’s Dakar Regional Court indicted Chad’s exiled former president on charges of torture and crimes against humanity, and placed him under house arrest.³⁰⁶ In 2001, however, the Court of Cassation confirmed the ruling of the Dakar Court of Appeal that Habré could not be tried in Senegal for crimes allegedly committed in Chad. It stated that Senegalese courts lacked jurisdiction to prosecute and try aliens present on the territory of Senegal who had allegedly committed acts of torture outside Senegal. The decision was based on the absence of any legislative measure establishing such jurisdiction over torture-related offences, as required by Article 5(2) of the 1984 Convention against Torture, to which Senegal was a party.³⁰⁷

267. In the *Grabež case* in 1997, a person born in the former Yugoslavia was prosecuted by Switzerland’s Military Tribunal at Lausanne for violations of the laws and customs of war under the Swiss Military Criminal Code as amended on charges of beating and injuring civilian prisoners in the camps of Omarska and Keraterm in Bosnia and Herzegovina. The Tribunal held that it had jurisdiction under Articles 108(2) and 109 of the Military Criminal Code as amended over violations of the laws and customs of war, grave breaches of GC III, GC IV and AP I and violations of AP II, but acquitted the accused for lack of sufficient evidence.³⁰⁸

268. In the *Musema case* in 1997, Switzerland agreed to surrender to the ICTR an accused of Rwandan nationality, arrested in Switzerland in 1995 for violations of the laws of war in Rwanda. The decision was taken, *inter alia*, pursuant

³⁰⁴ Netherlands, Supreme Court, *Knesević case*, Judgement, 11 November 1997.

³⁰⁵ Philippines, Supreme Court, *Kuroda case*, Judgement, 26 March 1949.

³⁰⁶ Senegal, Dakar Regional Court, *Hissène Habré case*, Indictment, 3 February 2000.

³⁰⁷ Senegal, Dakar Court of Appeal *Hissène Habré case*, Judgement on Appeal, 4 July 2000; Court of Cassation (First Chamber for Criminal Matters), *Hissène Habré case*, Judgement, 20 March 2001.

³⁰⁸ Switzerland, Military Tribunal at Lausanne, *Grabež case*, Judgement, 18 April 1997.

to Article 109 of the Swiss Military Criminal Code as amended providing for the punishment of war crimes.³⁰⁹

269. In the *Niyonteze case* in 1999, Switzerland's Military Tribunal at Lausanne found a Rwandan citizen guilty of murder, incitement to murder and crime by omission in the context of the conflict in Rwanda in 1994. The Tribunal based its decision on Articles 2(9), 108(2) and 109 of the Swiss Military Penal Code as amended. However, the Tribunal refused to consider charges of genocide and crimes against humanity on the grounds that these crimes were not recognised as being subject to universal jurisdiction under Swiss law.³¹⁰ In its judgement in 2000, the Military Court of Appeals stated that:

According to Article 2 § 9 of the Military Penal Code, civilians are subjected to the military criminal law if they are found guilty of violations of public international law during an armed conflict. (Articles 108 to 114 Military Penal Code)

Switzerland adopted Article 2 § 9 of the Military Penal Code in order to meet its international obligations and to allow the application of international law. In this specific context, even if Switzerland is not in a state of war or in a danger of imminent war, it engaged in prosecuting individuals, regardless of their nationality, who are found [outside Switzerland] guilty of grave breaches of the [1949] Geneva Conventions.³¹¹

In its relevant parts, the Military Court of Cassation confirmed the judgement of the Military Court of Appeals.³¹²

270. In the *Pinochet extradition case* in 1999 before the UK House of Lords, Lord Millett stated that:

In my opinion, crimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order. Isolated offences, even if committed by public officials, would not satisfy these criteria.

...

In my opinion, the systematic use of torture on a large scale and as an instrument of state policy had joined piracy, war crimes and crimes against peace as an international crime of universal jurisdiction well before 1984.³¹³

Lord Phillips of Worth Matravers stated that:

It is still an open question whether international law recognises universal jurisdiction in respect of international crimes – that is the right, under international law, of the courts of any state to prosecute for such crimes wherever they occur. In relation to war crimes, such a jurisdiction has been asserted by the State of Israel,

³⁰⁹ Switzerland, Federal Court, *Musema case*, Judgement, 28 April 1997.

³¹⁰ Switzerland, Military Tribunal at Lausanne, *Niyonteze case*, Judgement, 30 April 1999.

³¹¹ Switzerland, Military Court of Appeals (Geneva), *Niyonteze case*, Judgement, 26 May 2000.

³¹² Switzerland, Military Court of Cassation (Yverdon-les-Bains), *Niyonteze case*, Judgement, 27 April 2001.

³¹³ UK, House of Lords, *Pinochet extradition case*, Opinion of Lord Millett, 24 March 1999.

notably in the prosecution of Adolf Eichmann, but this assertion of jurisdiction does not reflect any general state practice in relation to international crimes. Rather, states have tended to agree, or attempt to agree, on the creation of international tribunals to try international crimes. They have however, on occasion, agreed by conventions, that their national courts should enjoy jurisdiction to prosecute for a particular category of international crime wherever occurring.³¹⁴

271. In the *Sawoniuk case* in 1999, a person was sentenced to life imprisonment at the Old Bailey in London for having murdered in 1942 two Jews in what is now Belarus. The sentence was laid down by virtue of the UK War Crimes Act of 1991.³¹⁵ In 2000, this judgement was confirmed by the Court of Appeal (Criminal Division), which stated, however, that:

The criminal jurisdiction of the English court is, generally speaking, territorial. Until enactment of the War Crimes Act 1991 the appellant could not be tried here for an offence of murder or manslaughter committed in Belorussia since he has never been a British subject and the exception made by section 9 of the Offences against the Person Act 1861 to the ordinary rule of territoriality was confined to offences of murder or manslaughter committed outside the United Kingdom by British subjects. It remains the law that the appellant could not be tried here for acts of violence committed in Belorussia if not causing death.³¹⁶

272. In its judgement in the *Altstötter (The Justice Trial) case* in 1947, the US Military Tribunal at Nuremberg stated that:

As to the punishment of persons guilty of violating the laws and customs of war (war crimes in the narrow sense), it has always been recognised that tribunals may be established and punishment imposed by the State in whose hands the perpetrators fall. Those rules of international law were recognised as paramount, and jurisdiction to enforce them by the injured belligerent government, whether within the territorial boundaries of the State or in occupied territory, has been unquestioned . . . However, enforcement of international law has been traditionally subject to practical limitations. Within territorial boundaries of a State having a recognised, functioning government presently in the exercise of sovereign power throughout its territory, a violator of the rules of international law could be punished only by the authority of the officials of that State. The law is universal, but such a State reserves unto itself the exclusive power within its boundaries to apply or withhold sanctions.

Thus, notwithstanding the paramount authority of the substantive rules of common international law the doctrines of national sovereignty have been preserved through the control of enforcement machinery. It must be admitted that Germans were not the only ones who were guilty of committing war crimes; other violators of international law could, no doubt, be tried and punished by the State of which they were nationals, by the offended State if it can secure jurisdiction of the person, or by an International Tribunal if of competent authorised jurisdiction.

³¹⁴ UK, House of Lords, *Pinochet extradition case*, Opinion of Lord Phillips of Worth Matravers, 24 March 1999.

³¹⁵ UK, Old Bailey (London), *Sawoniuk case*, Judgement, 1 April 1999.

³¹⁶ UK, Supreme Court of Judicature, Court of Appeal (Criminal Division), *Sawoniuk case*, Judgement on Appeal, 10 February 2000.

Applying these principles, it appears that the power to punish violators of international law in Germany is not solely dependent on the enactment of rules of substantive penal law applicable only in Germany. Nor is the apparent immunity from prosecution of criminals in other States based on the absence there of the rules of international law which we enforce here. Only by giving consideration to the extraordinary and temporary situation in Germany can the procedure here be harmonised with established principles of national sovereignty. In Germany an international body (the Control Council) has assumed and exercised the power to establish judicial machinery for the punishment of those who have violated the rules of common international law, a power which no international authority without consent could assume or exercise within a State having a national government presently in the exercise of its sovereign powers.³¹⁷

273. In the *Demjanjuk case* in 1985, a US Court of Appeals recognised Israel's right to try a person accused of war crimes on the basis of universal jurisdiction and rejected an appeal to overturn an extradition order. The Court held that:

The universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offences... Israel or any other nation... may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.³¹⁸

Other National Practice

274. In its oral pleadings before the ICJ in the *Arrest Warrant case* in 2000, Belgium addressed the issues of compatibility of its law containing the principle of universality with international law as well as universal jurisdiction as such and stated that:

Article 7 of the Law enshrines the universal jurisdiction of the Belgian courts. They may deal with the offences referred to in the Law irrespective of the nationality of the perpetrator or where the offence was committed.

...

This jurisdiction is entirely consistent with the second paragraph of the Article common to the four 1949 Geneva Conventions (Articles 49, 50, 129 and 146 respectively)... The jurisdiction that the State must therefore exercise is a universal jurisdiction, which can today be regarded as generally accepted, as it is found in a number of international criminal law conventions.³¹⁹

In later pleadings in the same case, Belgium stated that in its contention, "the permissive rules concerning the exercise of universal jurisdiction... in circumstances in which serious violations of international humanitarian law

³¹⁷ US, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case*, Judgement, 4 December 1947.

³¹⁸ US, Court of Appeals, *Demjanjuk case*, Judgement, 31 October 1985.

³¹⁹ Belgium, Oral pleadings before the ICJ, *Arrest Warrant case*, 21 November 2000, Verbatim Record CR 2000/33, § I.A (7).

are alleged, permit Belgium to take the course that it has followed".³²⁰ Referring to Articles 49, 50, 129 and 146 of the 1949 Geneva Conventions, Belgium further stated that these provisions contained the obligation of States to prosecute the authors of crimes defined by the Conventions, regardless of their nationality and of the place of the crime, as long as they were present on the territory of the State exercising its jurisdiction. According to Belgium, such an obligation also existed as regards crimes against humanity, resulting from customary and treaty law.³²¹

275. According to the Report on the Practice of Belgium, it is the *opinio juris* of Belgium that it has the right to consider "grave breaches" committed also in the context of non-international conflicts as punishable under Belgian penal law, regardless of the nationality of the alleged perpetrator or the victim or of the place where the act was committed, on the basis of universal jurisdiction.³²²

276. In a report in 1987, the Canadian Commission of Inquiry on War Criminals ("Commission Deschênes") held that "neither conventional international law nor customary international law *stricto sensu* could support the prosecution of [Second World War] war criminals in Canada".³²³ The Commission added that:

Prosecution of war criminals can, however, be launched on the basis of customary international law *lato sensu* inasmuch as war crimes are violations of the general principles of law recognized by the community of nations, which article 11(g) of the *Canadian Charter of Rights and Freedoms* has enshrined in the Constitution of Canada.³²⁴

277. In 1987, in parliamentary debates on the proposed amendment to Canada's Criminal Code, the Canadian Minister of Justice referred to changes already made in legislation in order to bring Canada in line with its international obligations and stated that "these amendments have also recognized the increasing acceptance in international law of the principle of according universal jurisdiction to the national courts in respect of internationally acknowledged offences".³²⁵

278. In 2000, in its application instituting proceedings in the *Arrest Warrant case* before the ICJ, the DRC requested that the ICJ "declare that (Belgium) shall annul the international arrest warrant".³²⁶ The latter had been issued *in absentia* by a Belgian judge against the Minister for Foreign Affairs of the DRC on the basis of Belgium's Law concerning the Repression of Grave Breaches of the

³²⁰ Belgium, Oral pleadings before the ICJ, *Arrest Warrant case*, 17 October 2001, Verbatim Record CR 2001/8, p. 50.

³²¹ Belgium, Oral pleadings before the ICJ, *Arrest Warrant case*, 18 October 2001, Verbatim Record CR 2001/9, § 10(6).

³²² Report on the Practice of Belgium, 1997, Chapter 6.4.

³²³ Canada, Commission of Inquiry on War Criminals, Report, 1987, p. 132, § 20.

³²⁴ Canada, Commission of Inquiry on War Criminals, Report, 1987, p. 132, § 21.

³²⁵ Canada, Minister of Justice, Statement in the House of Commons, 12 March 1987, *Parliamentary Debates*, Vol. VII, 1987, pp. 8265–8266.

³²⁶ DRC, Application instituting proceedings before the ICJ, *Arrest Warrant case*, 17 October 2000, § II, p. 3.

Geneva Conventions and their Additional Protocols as amended. In its application, the DRC criticised the fact that, under the terms of the arrest warrant, “the investigating judge claims jurisdiction in respect of offences purportedly committed on the territory of the DRC by a national of that State, without any allegation that the victims were of Belgian nationality or that these acts constituted violations of the security or dignity of the Kingdom of Belgium”.³²⁷ It further stated that the arrest warrant constituted a “violation of the principle that a State may not exercise [its authority] on the territory of another State and of the principle of sovereign equality among all Members of the United Nations”.³²⁸ The DRC further stated that:

The universal jurisdiction . . . contravenes the international jurisprudence established by the judgement of the Permanent Court of International Justice (PCIJ) in the *Lotus* case . . . According to the judgement, this principle means that a State may not exercise its authority on the territory of another State. This rule is now corroborated by Article 2, § 1 of the Charter of the United Nations . . . The only instances in which general international law allows, exceptionally, that a State may prosecute acts committed on the territory of another State by a foreigner are, first, cases involving violation of the security or dignity of the first State and, second, cases involving serious offences committed against its nationals.³²⁹

In its oral pleadings, the DRC further stated that “universal jurisdiction – in so far as domestic courts have such jurisdiction – can apply only if the person prosecuted is present on the territory of the prosecuting State. This is a well-established principle.”³³⁰ In later pleadings, the DRC made the point that:

The real test of the concept of universal jurisdiction is the genuine universalization of the prosecution of crime. Further, that is precisely the meaning intended by those who drafted Article 146 [GC IV]. The idea was not that a single State should take responsibility for prosecuting and trying all international crimes. It was that all States should fulfil their obligation to search for, each on its own territory, the guilty parties, so that there is no territory left where they can escape judgment for their crimes . . . Yes, States do have an obligation of universal jurisdiction, which arises in response to another obligation, that of contributing to the suppression of international crimes. Naturally, however, there must be identifiable grounds for the latter obligation . . . We shall merely say that Article 146 [GC IV] imposes a clear obligation on all States both to enact appropriate legislation and to search for persons having committed grave breaches of the said Conventions . . . The DRC takes note of the fact that Belgium does not claim that it indicted the DRC’s Minister for Foreign Affairs when he was not present in the territory of Belgium as a result of an obligation on Belgium to do so. It is evident that the obligation of States to extend

³²⁷ DRC, Application instituting proceedings before the ICJ, *Arrest Warrant case*, 17 October 2000, § III(A), p. 5.

³²⁸ DRC, Application instituting proceedings before the ICJ, *Arrest Warrant case*, 17 October 2000, § IV(A), p. 7.

³²⁹ DRC, Application instituting proceedings before the ICJ, *Arrest Warrant case*, 17 October 2000, § IV(A)(1), p. 7–9.

³³⁰ DRC, Oral pleadings before the ICJ, *Arrest Warrant case*, 22 November 2000, Verbatim Record CR 2000/34, § 1.4.

their universal jurisdiction to encompass the punishment of some international crimes does not go so far as to include such an eventuality. Neither legislation nor practice provides grounds for such an extension. Article 146 [GC IV] without being fully explicit, would appear to confirm our view . . . It is therefore indeed the logic of international law which prevents the obligation on a State to establish its universal jurisdiction for the punishment of international crimes from being extended to encompass an obligation to exercise jurisdiction in all cases, including those in which the suspect is not present in its territory . . . Belgium agrees with the Democratic Republic of the Congo that in the present case universal jurisdiction is a freedom, not an obligation.³³¹

In its final oral pleadings, the DRC stated that:

When it comes to the international scope of domestic jurisdictions in criminal matters for acts committed abroad by foreigners, in particular in cases of international crimes, their competencies will necessarily run against the sovereignty of another State; such procedure must have a conventional or customary foundation authorising its action . . . [and that] the extension of such a competence to the hypothesis that the person concerned is not in the territory lacks a confirmed legal basis.³³²

279. According to the Report on the Practice of Cuba, under Cuban law, criminal jurisdiction generally extends to offences committed by Cuban nationals abroad.³³³

280. In 1999, in its initial report to the CAT, the government of El Salvador, explained the reasons for universal jurisdiction over persons responsible for human rights violations and stated that:

El Salvador accepts the general interest of the international community in seeking and prosecuting criminal offenders who commit acts against property protected internationally by specific agreements or rules of international law or acts seriously undermining universally recognized human rights. It therefore considers it permissible to seek this type of criminal within the national territory, thereby avoiding the difficulties which would ensue were El Salvador to become a country of asylum for criminals from other countries, and to prosecute offences against internationally recognized human rights, as occur in cases of torture when they are committed elsewhere.³³⁴

281. In 1973, during a debate in the Sixth Committee of the UN General Assembly on the protection of human rights in times of armed conflict, the FRG declared that “the principle of universal jurisdiction should be reaffirmed

³³¹ DRC, Oral pleadings before the ICJ, *Arrest Warrant case*, 16 October 2001, Verbatim Record CR 2001/6.

³³² DRC, Oral pleadings before the ICJ, *Arrest Warrant case*, 19 October 2001, Verbatim Record CR 2001/10 (unofficial translation).

³³³ Report on the Practice of Cuba, 1998, Chapter 6.4.

³³⁴ El Salvador, Initial Report to CAT of 5 July 1999, UN Doc. CAT/C/37/Add.4, 12 October 1999, § 151.

in cases of grave breaches of the international rules applicable in armed conflicts".³³⁵

282. In an explanatory memorandum on ratification of the 1984 Convention against Torture presented during the 1986–1987 Session of the Dutch parliament, the Ministers of Justice and of Foreign Affairs of the Netherlands declared that the mere fact that very severe offences that caused indignation and anxiety were involved could not in themselves justify the application of the principle of universal jurisdiction to such offences. Repression of these violations should be left to the States that had a tie with the person or the place where the crime was committed. If not, a tendency to interfere could emerge and criminal law was not considered to be the most suitable instrument to resolve political conflicts.³³⁶

283. In 1999, in its third periodic report to the CAT, the Netherlands referred to its Criminal Law in Wartime Act as amended and to the 1997 ruling of the Supreme Court of the Netherlands in the *Knesevic case*, and stated that:

Anyone in the Netherlands who is suspected of war crimes can be prosecuted [there]. A special National War Criminals Investigation Team – the NOVO – has been set up to target not only crimes under the Criminal Law in Wartime Act, but other crimes against humanity as well, such as torture.³³⁷

284. In 2001, during a meeting of the UN Commission on Human Rights, Senegal, in exercise of its right to reply, stated with regard to the *Hissène Habré case* that:

Mr. Habré, who was in Senegal as a refugee, had been arrested and charged on 3 February 2000. He had been released, however, and the prosecution had not been pursued because it was found that the Senegalese courts were not competent to deal with the matter. The acts with which Mr. Habré was charged had been committed abroad and [the relevant provision of Senegalese criminal law] did not apply when an act was committed by a foreigner abroad, except where certain conditions were fulfilled. In the case in question, none of those conditions was fulfilled. . . The case in question did not . . . fall under article 5, paragraph 1, of [the 1984 Convention against Torture]. The [1968] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity . . . was inapplicable to Senegal, which had not ratified it. The Indictment Division had withdrawn the prosecution on the basis of [the relevant provisions of Senegalese criminal law] according to which the national courts were not competent. That judgement had been confirmed by the Court of Cassation.³³⁸

³³⁵ FRG, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/28/SR.1452, 3 December 1973, § 43.

³³⁶ Netherlands, Lower House of Parliament, Explanatory memorandum by the Minister of Justice and the Minister of Foreign Affairs on the ratification of the 1984 Convention against Torture, 1986–1987 Session, Doc. 20 042, No. 3, pp. 5 and 6.

³³⁷ Netherlands, Third periodic report to the CAT, 27 December 1999, UN Doc. CAT/C/44/Add.8, 5 January 2000, § 15.

³³⁸ Senegal, Statement of 6 April 2001 before the UN Commission on Human Rights, UN Doc. E/CN.4/2001/SR.43, 17 April 2001, §§ 78–79.

285. In 1990, during a debate in the House of Commons on the subject of Cambodia, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that:

Under the auspices of the United Nations, a tribunal could be established [to try the Khmer Rouge]... Alternatively, Pol Pot and others could be brought to trial under the genocide convention, but the only courts with jurisdiction under that convention would be the Cambodian courts.³³⁹

286. In 1991, during a debate in the House of Commons on the prosecution of crimes committed during the Gulf War, the UK Minister of State, Home Office, stated that "all the states involved in the Gulf conflict are parties to the Geneva convention of 1949. We took that convention into our own law in 1957. So we have a wide jurisdiction over war crimes committed anywhere in the world after 1957 under international law."³⁴⁰

287. In 1991, during a debate in the House of Commons on the Middle East, the UK Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs stated that:

Anyone who breaks the provisions of the Geneva conventions may be held liable... Machinery already exists under [the Geneva Conventions Act as amended (1957)] for prosecuting grave breaches of them. The three avenues are: first, a trial before Iraqi courts; secondly, extradition for trial before courts of another party to the conventions, including other Arab states; and thirdly, the possibility of special international tribunals.³⁴¹

288. In 1993, in a written reply to a question in the House of Commons on the subject of the possibility of a war crimes tribunal or special genocide commission to investigate the actions of the Khmer Rouge in Cambodia, the UK Secretary of State for Foreign and Commonwealth Affairs stated that:

In the absence of an international tribunal with jurisdiction to try Pol Pot and the Khmer Rouge for genocide, Pol Pot and his associates would have to be brought before a competent Cambodian court. It is therefore for the new Cambodian Government to decide whether to bring them to trial.³⁴²

III. Practice of International Organisations and Conferences

United Nations

289. In a resolution adopted in 1946 on extradition and punishment of war criminals, the UN General Assembly recommended that:

³³⁹ UK, House of Commons, Statement by the Parliamentary Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 26 October 1990, Vol. 178, col. 690.

³⁴⁰ UK, House of Commons, Statement by the Minister of State, Home Office, *Hansard*, 18 March 1991, Vol. 188, col. 112.

³⁴¹ UK, House of Commons, Statement by the Under-Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 28 March 1991, Vol. 188, col. 1100.

³⁴² UK, House of Commons, Reply to a question by the Secretary of State for Foreign and Commonwealth Affairs, *Hansard*, 5 May 1993, Vol. 224, Written Answers, cols. 138–139.

Members of the United Nations forthwith take all the necessary measures to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in [war crimes], and to cause them to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries.³⁴³

The General Assembly called upon:

the governments of States which are not Members of the United Nations also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed for the purpose of trial and punishment according to the laws of those countries.³⁴⁴

290. In a resolution adopted in 1970 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly called upon:

all States to take measures, in accordance with recognized principles of international law, to arrest such persons and extradite them to the countries where they have committed war crimes and crimes against humanity, so that they can be brought to trial and punished in accordance with the laws of those countries.³⁴⁵

291. In a resolution adopted in 1973 on principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly proclaimed that "persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they have committed those crimes".³⁴⁶

292. In a resolution adopted in 1996 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights expressed its concern over the:

continuing unauthorized arrests by all parties of persons suspected of serious violations of international humanitarian law, despite the parties' agreement in Rome on 18 February 1996 that such arrests would be made only after the [ICTY] had reviewed and approved orders of arrest as consistent with international legal standards.³⁴⁷

293. In a resolution adopted in 1999, the UN Commission on Human Rights reminded all factions and forces in Sierra Leone that:

In any armed conflict, including an armed conflict not of an international character, the taking of hostages, wilful killing and torture or inhuman treatment of persons taking no active part in the hostilities constitute grave breaches of international

³⁴³ UN General Assembly, Res. 3 (I), 13 February 1946.

³⁴⁴ UN General Assembly, Res. 3 (I), 13 February 1946.

³⁴⁵ UN General Assembly, Res. 2712 (XXV), 15 December 1970, § 2.

³⁴⁶ UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, § 5.

³⁴⁷ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 6.

humanitarian law, and that all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches and to bring such persons, regardless of their nationality, before their own courts.³⁴⁸

294. In a resolution on Rwanda adopted in 1995, the UN Sub-Commission on Human Rights deplored the fact that the efforts of the international community were still inadequate, “whereas the duty of trying those responsible for the genocide and war crimes does not devolve solely on the Government of Rwanda”.³⁴⁹

295. In a resolution on Rwanda adopted in 1996, the UN Sub-Commission on Human Rights urged all States in whose territory there were persons allegedly responsible for acts of genocide to arrest those persons so that they could be tried by their own competent courts or extradited at the request of the ICTR or the Rwandan authorities.³⁵⁰

296. In a resolution adopted in 2000 on the role of universal or extraterritorial competence in preventive action against impunity, the UN Sub-Commission on Human Rights recalled “the principle of universal jurisdiction for crimes against humanity and for war crimes as recognized in international law and practice”.³⁵¹

297. In 1999, in a report on the protection of civilians in armed conflict, the UN Secretary-General recommended that the UN Security Council urge member States:

to adopt national legislation for the prosecution of individuals responsible for genocide, crimes against humanity and war crimes. Member States should initiate prosecution of persons under their authority or on their territory for grave breaches of international humanitarian law on the basis of the principle of universal jurisdiction and report thereon to the Security Council.³⁵²

298. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General pointed out that “a growing number of States have started to apply the principle of universal jurisdiction”.³⁵³

299. In 1998, in the conclusions and recommendations of his report on the question of the human rights of all persons subjected to any form of detention or imprisonment, in particular, torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur of the UN Commission on Human Rights on Torture stated that:

229. . . . In respect of the crimes under consideration, such as torture, universal jurisdiction is applicable, that is, jurisdiction exercised on the basis simply of custody.

³⁴⁸ UN Commission on Human Rights, Res. 1999/1, 6 April 1999, § 2.

³⁴⁹ UN Sub-Commission on Human Rights, Res. 1995/5, 18 August 1995, § 3.

³⁵⁰ UN Sub-Commission on Human Rights, Res. 1996/3, 19 August 1996, § 6.

³⁵¹ UN Sub-Commission on Human Rights, Res. 2000/24, 18 August 2000, preamble.

³⁵² UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/1999/957, 8 September 1999, § 6.

³⁵³ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 12.

230. As regards grave breaches of the Geneva Conventions of 12 August 1949 and acts of torture committed in a State party to the [1984 Convention against Torture], States are required to bring to justice any perpetrators they find within their jurisdiction, regardless of their nationality or that of their victim(s) or of where they committed the crime, if they do not extradite them to another country wishing to exercise jurisdiction.

231. In respect of other pertinent crimes under international law, States are in any event permitted to exercise such jurisdiction . . .

232. The Special Rapporteur, therefore, urges all States to review their legislation with a view to ensuring that they can exercise criminal jurisdiction over any person in their hands suspected of torture or, indeed, of any crime falling within the notions of war crimes or crimes against humanity as understood above.³⁵⁴

300. In 1996, in a presentation to the sessional Working Group of the UN Sub-Commission on Human Rights on the Administration of Justice and the Question of Compensation, the Special Rapporteur of the UN Commission on Human Rights on the (then still draft) Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law stated that “the notion of and term ‘universal jurisdiction’ contained in principle 5 related to crimes under international law, namely crimes of genocide, crimes against humanity and war crimes. Relevant instruments provided for universal jurisdiction.”³⁵⁵

301. In 1994, in its final report on grave breaches of the Geneva Conventions and other violations of IHL committed in the former Yugoslavia, the UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992) stated that:

42. . . . In general, unless the parties to an internal armed conflict agree otherwise, the only offences committed in internal armed conflict for which universal jurisdiction exists are “crimes against humanity” and genocide, which apply irrespective of the conflict’s classification.

...
45. “Grave breaches” are specified major violations of international humanitarian law which may be punished by any State on the basis of universal jurisdiction. Grave breaches are listed in article 50 [GC I], article 51 [GC II], article 130 [GC III], and article 147 [GC IV]. Grave breaches are also listed in articles 11, paragraph 4, and 85 [AP I].³⁵⁶

Other International Organisations

302. In a resolution on enforced disappearances adopted in 1984, the Parliamentary Assembly of the Council of Europe called on the governments of member

³⁵⁴ UN Commission on Human Rights, Special Rapporteur on Torture, Fifth report, UN Doc. E/CN.4/1998/38, 24 December 1997, §§ 229–232.

³⁵⁵ UN Sub-Commission on Human Rights, Sessional Working Group on the Administration of Justice and the Question of Compensation, Report, UN Doc. E/CN.4/Sub.2/1996/16, 13 August 1996, § 28.

³⁵⁶ UN Commission of Experts Established pursuant to Security Council Resolution 780 (1992), Final report, UN Doc. S/1994/674, 27 May 1994, §§ 42 and 45.

States to support the preparation and adoption by the UN of a declaration on enforced disappearances setting forth the following principle: "persons responsible for enforced disappearance may be prosecuted not only in the country in which the offence was committed, but in any country in which they have been arrested".³⁵⁷

303. In a recommendation adopted in 1999 concerning respect for IHL in Europe, the Parliamentary Assembly of the Council of Europe stated that:

6. ... No international tribunal can take the place of states in meeting their obligation to ensure the proper enforcement of international humanitarian law in regard to persons committing violations of that law, ordering others to commit them or condoning these actions, wherever they take place and irrespective of the nationality of their author.³⁵⁸

International Conferences

304. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

305. In its decision in the *Arrest Warrant case* in 2002, the ICJ did not rule on the issue of universal jurisdiction as such in the operative part of the judgement because of the final form of the DRC's submissions and because Belgium had referred to the *non ultra petita* principle.³⁵⁹ However, in various separate and dissenting opinions and declarations, judges of the Court expressed their own opinion on the matter. As far as universal jurisdiction *in absentia* for war crimes and crimes against humanity was concerned, except for the question of possible immunities, five of the judges giving a separate or dissenting opinion thereby clearly expressed themselves in favour of the right of States to prosecute persons even if they were not present on their territory.³⁶⁰ Four others took the view that a right of States to exercise such a universal jurisdiction without any territorial link did not (yet) exist.³⁶¹ In his separate opinion, President Guillaume stated that "universal jurisdiction *in absentia* is unknown to international conventional law" and that the same would be true for international customary law.³⁶² In his declaration, Judge Ranjeva stated that, even if the text of the judgement left the question open, it did not seem to him

³⁵⁷ Council of Europe, Parliamentary Assembly, Res. 828, 26 September 1984, § 13.

³⁵⁸ Council of Europe, Parliamentary Assembly, Rec. 1427, 23 September 1999, § 6.

³⁵⁹ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, § 43.

³⁶⁰ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of Judge Koroma, §§ 7 and 9; Joint and separate opinion of Judges Higgins, Kooijmans and Buergenthal, §§ 52 and 61; Dissenting opinion of Judge *ad hoc* Van den Wyngaert, § 51.

³⁶¹ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of President Guillaume, §§ 9 and 12; Declaration of Judge Ranjeva, §§ 5 and 9; Separate opinion of Judge Rezek, § 6; Separate opinion of Judge *ad hoc* Bula-Bula, § 74.

³⁶² ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of President Guillaume, §§ 9 and 12.

that the law permitted the exercise of universal jurisdiction in the absence of a territorial or personal active or passive connection. However, he also stated that “without any doubt, the evolution in the contemporary world of political ideas and conditions were favourable to the weakening of the territorial approach to the jurisdiction and to the emergence of a more functional approach in the meaning of serving a superior common goal”.³⁶³ In his separate opinion, Judge Rezek stated that universal jurisdiction without any territorial link was not authorised by today’s international law. He stated that there would be no customary law “in formation” deriving from the isolated action of one State.³⁶⁴ Judge *ad hoc* Bula-Bula, while stating that the principle of so-called universal jurisdiction could not seriously be contested in the terms of the relevant provisions of the 1949 Geneva Conventions, was of the same opinion and furthermore found that Article 129, second paragraph, GC III did not envisage jurisdiction *in absentia*.³⁶⁵ In his dissenting opinion, Judge Oda stated that:

It is one fundamental principle that a State cannot exercise its jurisdiction outside its territory. However, the past few decades have seen a gradual widening in the scope of the jurisdiction to prescribe law . . . The scope of extraterritorial criminal jurisdiction has been expanded over the past few decades . . . Belgium is known for taking the lead in this field and its [Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended (1993)] may well be at the forefront of a trend. There is some national case law and some treaty-made law evidencing such a trend.

He stated, however, that “the law is not sufficiently developed”.³⁶⁶ In their joint separate opinion, Judges Higgins, Kooijmans and Buergenthal stated that:

There are . . . certain indications that a universal criminal jurisdiction for certain international crimes is clearly not regarded as unlawful. The duty to prosecute under those treaties which contain the *aut dedere aut prosequi* provisions opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility, and are widely regarded as today reflecting customary international law.³⁶⁷

These judges also found that the ICJ judgement in the *Lotus case* supported the lawfulness of the exercise of universal jurisdiction *in absentia*. However, they found that it was necessary that “universal criminal jurisdiction be exercised only over those crimes regarded as the most heinous by the international

³⁶³ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Declaration of Judge Ranjeva, §§ 2, 5 and 9.

³⁶⁴ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of Judge Rezek, § 6.

³⁶⁵ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of Judge *ad hoc* Bula-Bula, §§ 74 and 75.

³⁶⁶ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Dissenting opinion of Judge Oda, §§ 12 and 13.

³⁶⁷ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, § 46.

community". Besides piracy, "war crimes . . . may be added to the list".³⁶⁸ In addition, the judges considered that crimes against humanity as defined in the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind fell within this "small category [of acts] in respect of which an exercise of universal jurisdiction is not precluded under international law".³⁶⁹ Judge Koroma, in his separate opinion, stated that "the judgement implies that while Belgium can initiate criminal proceedings in its jurisdiction against anyone", it would have to abide by the rules on immunities. He further stated that "in my considered opinion, today, together with piracy, universal jurisdiction is available for certain crimes, such as war crimes and crimes against humanity, including the slave trade and genocide".³⁷⁰ Judge *ad hoc* Van den Wyngaert stated in her dissenting opinion that "it follows from the 'Lotus' case that a State has the right to provide extraterritorial jurisdiction on its territory unless there is a prohibition under international law". She stated that neither conventional nor customary law prohibited the exercise of universal jurisdiction *in absentia* and concluded that:

International law clearly permits universal jurisdiction for war crimes and crimes against humanity . . . For crimes *against humanity*, there is no clear treaty provision on the subject but it is accepted that, at least in the case of genocide, States are entitled to assert extraterritorial jurisdiction. In the case of *war crimes*, however, there is specific conventional international law in support of the proposition that States are entitled to assert jurisdiction over acts committed abroad: the relevant provision is Article 146 [GC IV], which lays down the principle *aut dedere aut judicare* for war crimes committed against civilians.³⁷¹ [emphasis in original]

306. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber held that:

Furthermore, at the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States, and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad. This legal basis for States' universal jurisdiction over torture bears out and strengthens the legal foundation for such jurisdiction found by other

³⁶⁸ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, §§ 49 and 60–61.

³⁶⁹ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, § 65.

³⁷⁰ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Separate opinion of Judge Koroma, §§ 7 and 9.

³⁷¹ ICJ, *Arrest Warrant case*, Judgement, 14 February 2002, Dissenting opinion of Judge *ad hoc* Van den Wyngaert, §§ 51–59.

courts in the inherently universal character of the crime. It has been held that international crimes being universally condemned wherever they occur, every State has the right to prosecute and punish the authors of such crimes.³⁷²

V. Practice of the International Red Cross and Red Crescent Movement

307. In 1997, in a statement before the Preparatory Committee for the Establishment of an International Criminal Court, the ICRC stated that:

Under the existing principle of universal jurisdiction, any State has the right to prosecute persons alleged to have committed war crimes and no consent is required from any other States. This principle simply reaffirms the fundamental notion that war criminals are not immune from prosecution; those responsible for the commission of war crimes are accountable for their acts and must be brought to justice.³⁷³

VI. Other Practice

308. The Restatement (Third) of the Foreign Relations Law of the United States, adopted and promulgated by the American Law Institute in 1986, provides that:

A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 [Bases of Jurisdiction to Prescribe] is present.³⁷⁴

309. In 1993, in a memorandum on the war crimes tribunal for the former Yugoslavia, Human Rights Watch considered that the establishment of the Ad Hoc International Tribunal solely on the basis of the UN Security Council's mandate and not on universal jurisdiction would undermine the recognition of the Tribunal in the future.³⁷⁵

310. The Hague Agenda for Peace and Justice for the 21st Century, adopted at the Hague Appeal for Peace Conference in 1999, states that:

15. ... It is now generally recognized that war crimes, crimes against the peace and violations of universally recognized human rights principles are matters of global rather than merely national concern ... Civil society and domestic courts must do their part, as those of Spain are endeavoring to do in the case

³⁷² ICTY, *Furundžija case*, Judgement, 10 December 1998, § 156.

³⁷³ ICRC, Statement before the Preparatory Committee for the Establishment of an International Criminal Court, New York, 4–15 August 1997.

³⁷⁴ The American Law Institute, *Restatement Third. Restatement of the Foreign Relations Law of the United States*, American Law Institute Publishers, St. Paul, 1987, § 404.

³⁷⁵ Human Rights Watch, Memorandum on the War Crimes Tribunal for Former Yugoslavia, New York, 26 April 1993, pp. 5 and 6.

of Pinochet. The Hague Appeal will call upon national legislative and judicial systems worldwide to incorporate the principle of universal jurisdiction for such crimes as well as torts into their laws in order to ensure that serious violations of human rights, especially against children, are not treated with impunity.

...

20. Recent trends in national and regional litigation and prosecution make it possible for victims of gross human rights and humanitarian law violations to hold abusers accountable. This right exists in some domestic courts and regional tribunals, including the European and Inter-American Courts of Human Rights, and has led to litigation against members of the private sector, such as mercenaries and arms manufacturing and other corporations. The Hague Appeal for Peace will advocate for the extension of this right throughout the international legal order.³⁷⁶

311. In 2000, in a report entitled “The *Pinochet* Precedent. How Victims Can Pursue Human Rights Criminals Abroad”, Human Rights Watch identified the crimes in respect of which international law recognised universal jurisdiction. In its discussion of war crimes, the report stated that:

Serious violations of the laws and customs applicable in international armed conflict, even if not considered “grave breaches” of the [1949] Geneva Conventions, probably also give rise to universal jurisdiction, allowing but not always requiring a state to prosecute those responsible . . . In recent years, the concept of war crimes has been extended to internal conflicts as well, giving third states the right (but not necessarily the duty) to exercise universal jurisdiction.³⁷⁷

312. In a resolution adopted at its Berlin Session in 1999, the Institute of International Law stated that:

The competent authorities of a State on the territory of which is found a person against whom is alleged a serious violation of international humanitarian law committed in a non-international armed conflict are entitled to prosecute and try such a person before their courts; they are urged to do so.³⁷⁸

313. In 2000, in its Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, the ILA’s Committee on International Human Rights Law and Practice stated that:

Parties to the Geneva Conventions are required to enact legislation to enable them to try persons alleged to have committed such offences, regardless of their nationality, to search for and prosecute such offenders and to assist each other in criminal

³⁷⁶ Hague Appeal for Peace Conference, Hague Agenda for Peace and Justice for the 21st Century, May 1999, Points 15 and 20.

³⁷⁷ Human Rights Watch, *The Pinochet Precedent: How Victims Can Pursue Human Rights Criminals Abroad*, New York, March 2000, p. 7.

³⁷⁸ Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, § VIII.

proceedings in connection with these offences. The exercise of universal jurisdiction is not permissive but clearly mandatory... [Serious violations of Common Article 3 of the 1949 Geneva Conventions and other serious violations of the laws and customs applicable in armed conflicts not of an international character] have traditionally not been considered as criminal offences that are subject to universal jurisdiction. However, there is increasing support for the view that this position is no longer tenable. The atrocities committed during the armed conflicts in the former Yugoslavia and Rwanda have obviously contributed to this shift... It is difficult to see why domestic courts would not have the competence to try these same offences on the basis of universal jurisdiction... It is fair to assume... that [Article 8 of the 1998 ICC Statute] will also be regarded as an authoritative pronouncement on the violations of the law of war that qualify as war crimes under customary international law. A corollary then is that these offences are covered by the principle of universal jurisdiction.³⁷⁹

314. The Princeton Principles on Universal Jurisdiction, adopted by an expert meeting convened by the Princeton Project on Universal Jurisdiction at Princeton University in 2001, states that:

1. For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.
2. Universal jurisdiction may be exercised by a competent and ordinary judicial body of any state in order to try a person duly accused of committing serious crimes under international law as specified in Principle 2(1), provided the person is present before such judicial body.
3. A state may rely on universal jurisdiction as a basis for seeking the extradition of a person accused or convicted of committing a serious crime under international law as specified in Principle 2(1) provided that it has established a prima facie case of the person's guilt and that the person sought to be extradited will be tried or the punishment carried out in accordance with international norms and standards on the protection of human rights in the context of criminal proceedings.
4. In exercising universal jurisdiction or in relying upon universal jurisdiction as a basis for seeking extradition, a state and its judicial organs shall observe international due process norms including but not limited to those involving the rights of the accused and victims, the fairness of the proceedings, and the independence and impartiality of the judiciary (hereinafter referred to as "international due process norms").
5. A state shall exercise universal jurisdiction in good faith and in accordance with its rights and obligations under international law.³⁸⁰

³⁷⁹ ILA, Committee on International Human Rights Law and Practice, Final Report on the Exercise of Universal Jurisdiction in Respect of Gross Human Rights Offences, Report of the 69th Conference, London, 25–29 July 2000, pp. 408–409.

³⁸⁰ Princeton Principles on Universal Jurisdiction, adopted by an expert meeting convened by the Princeton Project on Universal Jurisdiction, Princeton University, 27 January 2001, Principle 1.

C. Prosecution of War Crimes

General

I. Treaties and Other Instruments

Treaties

315. Article 6 of the 1945 IMT Charter (Nuremberg) provides that:

The Tribunal established by the Agreement referred to in Article 1 hereof for the trial and punishment of the major war criminals of the European Axis countries shall have the power to try and punish persons who, acting in the interests of the European Axis countries, whether as individuals or as members of organizations, committed any of the following crimes.

316. Article VI of the 1948 Genocide Convention provides that:

Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

317. Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV provide that:

The High Contracting Parties undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the present Convention defined in [Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV].

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case. Each High Contracting Party shall take measures necessary for the suppression of all acts contrary to the provisions of the present Convention other than the grave breaches defined in [Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV].

318. Article 28 of the 1954 Hague Convention provides that:

The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention.

319. Article 85(1) AP I provides that “the provisions of the Conventions relating to the repression of breaches and grave breaches, supplemented by this Section, shall apply to the repression of breaches and grave breaches of this Protocol”. The grave breaches of AP I are defined in Articles 11(4), 85(3) and 85(4) AP I. Articles 11 and 85 AP I were adopted by consensus.³⁸¹

³⁸¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.37, 24 May 1977, p. 69; *Official Records*, Vol. VI, CDDH/SR.44, 30 May 1977, p. 291.

320. Article 8(1) of the 1979 International Convention against the Taking of Hostages provides that:

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a grave nature under the law of that State.

However, Article 12 of the Convention states that:

In so far as the [1949] Geneva Conventions . . . or the Additional Protocols to those Conventions are applicable to a particular act of hostage-taking, and in so far as States Parties to this Convention are bound under those conventions to prosecute or hand over the hostage-taker, the present Convention shall not apply to an act of hostage-taking committed in the course of armed conflicts as defined in the [1949] Geneva Conventions . . . and the Protocols thereto, including armed conflicts mentioned in [Article 1(4) AP I], in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.

321. Article 5 of the 1984 Convention against Torture provides that:

Each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences referred to in article 4 in the following cases:

- (a) When the offences are committed in any territory under its jurisdiction or on board a ship or aircraft registered in that State;
- (b) When the alleged offender is a national of that State;
- (c) When the victim is a national of that State if that State considers it appropriate.

Each State Party shall likewise take such measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him pursuant to article 8 to any of the States mentioned in paragraph 1 of this article.³⁸²

322. Article 7 of the 1984 Convention against Torture emphasises States' duty to prosecute or extradite alleged offenders, stating that:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases

³⁸² Similar requirements to prosecute or extradite are also found in: 1970 Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Article 4; 1971 Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Article 7; 1971 Convention on Psychotropic Substances, Article 22(2)(a)(iv); 1971 OAS Convention to Prevent and Punish Acts of Terrorism, Article 5; 1972 Protocol Amending the 1961 Single Convention on Narcotic Drugs, Article 14; 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid, Article V; 1973 Convention on Crimes against Internationally Protected Persons, Article 7; 1977 European Convention on the Suppression of Terrorism, Article 7; 1979 Convention on the Physical Protection of Nuclear Material, Article 9; 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Article 10; 1989 UN Mercenary Convention, Article 12.

contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

323. Article 7(1) of the 1993 CWC provides that:

Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention. In particular, it shall:

- (a) Prohibit natural and legal persons anywhere on its territory or in any other place under its jurisdiction as recognized by international law from undertaking any activity prohibited to a State Party under this Convention, including enacting penal legislation with respect to such activity;
- (b) Not permit in any place under its control any activity prohibited to a State Party under this Convention; and
- (c) Extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons, possessing its nationality, in conformity with international law.

324. Article 9(2) of the 1994 Convention on the Safety of UN Personnel provides that “each State Party shall make the crimes set out in paragraph 1 [of Article 9] punishable by appropriate penalties which shall take into account their grave nature”.

325. Article IV of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that:

The acts constituting the forced disappearance of persons shall be considered offenses in every State Party. Consequently, each State Party shall take measures to establish its jurisdiction over such cases in the following instances:

- a. When the forced disappearance of persons or any act constituting such offense was committed within its jurisdiction;
- b. When the accused is a national of that state;
- c. When the victim is a national of that state and that state sees fit to do so.

Every State Party shall, moreover, take the necessary measures to establish its jurisdiction over the crime described in this Convention when the alleged criminal is within its territory and it does not proceed to extradite him.

However, Article XV excludes the application of the Convention in international armed conflicts governed by the 1949 Geneva Conventions and their Additional Protocols.

326. Article 14 of the 1996 Amended Protocol II to the CCW provides that:

1. Each High Contracting Party shall take all appropriate steps, including legislative and other measures, to prevent and suppress violations of this Protocol by persons or on territory under its jurisdiction and control.
2. The measures envisaged in paragraph 1 of this Article include appropriate measures to ensure the imposition of penal sanctions against persons who, in relation to an armed conflict and contrary to the provisions of this Protocol,

wilfully kill or cause serious injury to civilians and to bring such persons to justice.

327. Article 9 of the 1997 Ottawa Convention provides that:

Each State Party shall take all appropriate legal, administrative and other measures, including the imposition of penal sanctions, to prevent and suppress any activity prohibited to a State Party under this Convention undertaken by persons or on territory under its jurisdiction or control.

328. The preamble to the 1998 ICC Statute provides that:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international co-operation,

...

Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes.

329. Article 12 of the 1998 ICC Statute provides that:

1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5.
2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
 - (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
 - (b) The State of which the person accused of the crime is a national.
3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

330. Article 13 of the 1998 ICC Statute provides that:

The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

- (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
- (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
- (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.

331. Article 15(2) of the 1999 Second Protocol to the 1954 Hague Convention concerning "Serious violations of this Protocol" provides that:

Each Party shall adopt such measures as may be necessary to establish as criminal offences under its domestic law the offences set forth in this Article [i.e. serious violations of the Protocol] and to make such offences punishable by appropriate penalties. When doing so, Parties shall comply with general principles of law and international law, including the rules extending individual criminal responsibility to persons other than those who directly commit the act.

332. Article 16(1) of the 1999 Second Protocol to the 1954 Hague Convention concerning "Jurisdiction" provides that:

Without prejudice to paragraph 2, each Party shall take the necessary legislative measures to establish its jurisdiction over offences set forth in Article 15 in the following cases:

- (a) when such an offence is committed in the territory of that State;
- (b) when the alleged offender is a national of that State;
- (c) in the case of offences set forth in Article 15 sub-paragraphs (a) to (c), when the alleged offender is present in its territory.

333. Article 17(1) of the 1999 Second Protocol to the 1954 Hague Convention concerning "Prosecution" provides that:

The Party in whose territory the alleged offender of an offence set forth in Article 15 subparagraphs 1(a) to (c) is found to be present shall, if it does not extradite that person, submit, without exception whatsoever and without undue delay, the case to its competent authorities, for the purpose of prosecution, through proceedings in accordance with its domestic law or with, if applicable, the relevant rules of international law.

334. Article 21 of the 1999 Second Protocol to the 1954 Hague Convention concerning "Measures regarding other violations" provides that:

Each Party shall adopt such legislative, administrative or disciplinary measures as may be necessary to suppress the following acts when committed intentionally:

- (a) any use of cultural property in violation of the Convention or this Protocol;
- (b) any illicit export, other removal or transfer of ownership of cultural property from occupied territory in violation of the Convention or this Protocol.

335. Article 22(1) of the 1999 Second Protocol to the 1954 Hague Convention provides that "this Protocol shall apply in the event of an armed conflict not of an international character, occurring within the territory of one of the Parties".

336. Article 1 of the 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that "States Parties shall take all feasible measures to ensure that members of their armed forces who have not attained the age of 18 years do not take a direct part in hostilities".

337. Article 4(1) and (2) of the 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that:

1. Armed groups that are distinct from the armed forces of a State should not, under any circumstances, recruit or use in hostilities persons under the age of 18 years.

2. States Parties shall take all feasible measures to prevent such recruitment and use, including the adoption of legal measures necessary to prohibit and criminalize such practices.

338. Article 6(1) of the 2000 Optional Protocol on the Involvement of Children in Armed Conflicts provides that “each State Party shall take all necessary legal, administrative and other measures to ensure the effective implementation and enforcement of the provisions of the present Protocol within its jurisdiction”.

Other Instruments

339. Article 19 of the 1956 New Delhi Draft Rules provides that:

All States or Parties concerned are under the obligation to search for and bring to trial any person having committed, or ordered to be committed, an infringement of the present rules, unless they prefer to hand the person over for trial to another State or Party concerned with the case.

340. Paragraph 18 of the 1989 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides that:

Governments shall ensure that persons identified by the investigation as having participated in extra-legal, arbitrary or summary executions in any territory under their jurisdiction are brought to justice. Governments shall either bring such persons to justice or cooperate to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespectively of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

341. Article 6(1) of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, dealing with the “Obligation to try or extradite”, provides that “a State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him”.

342. Article 10 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that “the Parties . . . shall repress any misuse of the [red cross] emblem and attacks on persons or property under its protection”.

343. Article 11 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY provides that:

Each party undertakes, when it is officially informed of [an allegation of violations of IHL] made or forwarded by the ICRC, to open an inquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

344. Article 3 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that “the Parties...shall repress any misuse of the [red cross] emblem or attacks on persons or property under its protection”.

345. Article 5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina provides that:

Each party undertakes, when it is informed, in particular by the ICRC, of an allegation of violations of international humanitarian law, to open an enquiry promptly and pursue it conscientiously, and to take the necessary steps to put an end to the alleged violations or prevent their recurrence and to punish those responsible in accordance with the law in force.

346. Article 1 of the 1993 ICTY Statute provides that “the International Tribunal shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991 in accordance with the provisions of the present Statute”.

347. Article III(1) of the 1994 Comprehensive Agreement on Human Rights in Guatemala provides that “the Parties agree on the need for a firm action against impunity. The Government shall not sponsor the adoption of legislative or any other type of measures designed to prevent the prosecution and punishment of persons responsible for human rights violations”. Article III(3) provides that “no special law or exclusive jurisdiction may be invoked to uphold impunity in respect of human rights violations”.

348. Paragraph 20 of the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict provides that “in the event of breaches of rules of international humanitarian law protecting the environment, measures shall be taken to stop any such violation and to prevent further breaches”.

349. Article 1 of the 1994 ICTR Statute provides that:

The International Tribunal for Rwanda shall have the power to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994, in accordance with the provisions of the present Statute.

350. Article 9 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled “Obligation to extradite or prosecute”, provides that:

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 [crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, war crimes] is found shall extradite or prosecute that individual.

351. Section 4 of the 1999 UN Secretary-General's Bulletin states that "in cases of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts".

352. Article 3 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

The obligation to respect, ensure respect for and enforce international human rights and humanitarian law includes, *inter alia*, a State's duty to:

- (a) Take appropriate legal and administrative measures to prevent violations;
- (b) Investigate violations and, where appropriate, take action against the violator in accordance with domestic and international law;
- (c) Provide victims with equal and effective access to justice irrespective of who may be the ultimate bearer of responsibility for the violation;
- (d) Afford appropriate remedies to victims; and
- (e) Provide for or facilitate reparation to victims.

353. Article 4 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that "violations of international... humanitarian law norms that constitute crimes under international law carry the duty to prosecute persons alleged to have committed these violations, to punish the perpetrators adjudged to have committed these violations".

354. Paragraph 52 of the 2000 Cairo Plan of Action urges States "to implement international humanitarian law in full, in particular by adopting national legislation to tackle the culture of impunity and to bring to justice the perpetrators of war crimes, crimes against humanity and genocide".

II. National Practice

Military Manuals

355. Argentina's Law of War Manual states that:

In the [Geneva] Conventions and [AP I], it is provided that the governments shall take such legislative measures as may be necessary to determine adequate penal sanctions to be applied to persons committing or ordering the commission of any of the grave breaches; the persons accused of having committed, or of having ordered to commit, those breaches... shall be searched for.

... It is also possible to hand the author of the violations over to an international tribunal, in case such a tribunal has been established.³⁸³

The manual also provides that:

At the request of one of the parties to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested parties, concerning any alleged

³⁸³ Argentina, *Law of War Manual* (1989), § 8.02.

violation of the [Geneva] Conventions. If an agreement is not reached as to the procedure of investigation, the parties shall agree to elect an arbitrator who shall decide the procedure to be followed.

If a violation is established, the parties to the conflict must put an end to it and repress it with the least possible delay.³⁸⁴

In addition, the manual states that “the contracting parties and the parties to the conflict shall repress grave breaches and adopt the measures necessary to ensure that any violation of the Conventions or of Protocol I cease”.³⁸⁵

356. Australia’s Commanders’ Guide states that:

Nations are required to search out, prosecute, and if necessary, extradite individuals who are suspected of breaches of LOAC. Other war crimes may be so serious as to warrant or justify instituting criminal prosecutions. In some cases serious war crimes will result in a formal war crimes trial.³⁸⁶

The manual further states that:

Notwithstanding the practical difficulties that may be experienced in bringing enemy war criminals to trial, ADF members should not underestimate the resolve of the Australian Government to vigorously prosecute war criminals. Given Australia’s demonstrated support for human rights, ADF members can expect that appropriate action will be taken should they violate LOAC. An international fact-finding commission has been established to investigate LOAC breaches. Australia has accepted the operation of this commission.³⁸⁷

357. Belgium’s Law of War Manual states that “the Nuremberg and Tokyo trials, following the Second World War, . . . only confirmed what had happened after the First World War, i.e., prosecution of foreigners before national tribunals for violations of the law of war”.³⁸⁸ It adds that “the application of the criminal law of war remains in the hands of national communities . . . Since the Second World War, national tribunals have . . . judged members of their own armed forces for ‘war crimes’ or other punishable acts which cannot be justified by the situation of war.”³⁸⁹ The manual further states that:

The States signatory to the [Geneva] Conventions undertook to take a series of measures to promote respect thereof.

These measures can be summarized as follows:

- . . .
- 2) criminalisation of grave breaches of the Geneva Conventions . . .
- 3) search for, identification of and prosecution by the national courts of the authors of grave breaches, regardless of their nationality, or delivery (extradition) of those authors to the State asking for them, within the limits of the legislation in force.³⁹⁰

³⁸⁴ Argentina, *Law of War Manual* (1989), § 8.06.

³⁸⁵ Argentina, *Law of War Manual* (1989), § 8.07.

³⁸⁶ Australia, *Commanders’ Guide* (1994), § 1306.

³⁸⁷ Australia, *Commanders’ Guide* (1994), § 1310.

³⁸⁸ Belgium, *Law of War Manual* (1983), p. 18, see also p. 54.

³⁸⁹ Belgium, *Law of War Manual* (1983), p. 19.

³⁹⁰ Belgium, *Law of War Manual* (1983), p. 55.

358. Cameroon's Disciplinary Regulations provides that violators of IHL are "war criminals who may be brought before military tribunals".³⁹¹

359. Cameroon's Instructors' Manual states that "any act contrary to respect for the Law of War must be sanctioned".³⁹²

360. Canada's Unit Guide notes that the Geneva Conventions "impose an obligation on all nations which have ratified them to search for and try all persons who committed or ordered to be committed grave breaches of the Conventions".³⁹³

361. Canada's LOAC Manual provides that:

Parties to the conflict shall take such measures as may be necessary to suppress and punish all breaches of [GC III]. If a breach amounts to a grave breach all persons responsible therefor, or having ordered such acts, shall, regardless of their nationality, be liable to be tried by any party to [GC III]. They may also be handed over by the latter for trial by any other party to [GC III] able to prosecute effectively.³⁹⁴

The manual also provides that:

At the request of a party to the conflict, an enquiry shall be instituted in a manner to be decided between the interested parties, concerning any alleged violation of the Geneva Conventions. If a violation is established, parties to the conflict must put an end to it and punish those responsible with the least possible delay.³⁹⁵

The manual further states that "States have the obligation to repress grave breaches (i.e., ensure perpetrators are accused and tried) and to take measures necessary to suppress (i.e., bring to an end) all other violations".³⁹⁶ In addition, it states that:

37. The Criminal Code of Canada contains several provisions that allow Canadian courts to assume jurisdiction over and try alleged war criminals in a wide variety of circumstances.
38. Any state into whose hands a person who has allegedly committed a grave breach falls is entitled to institute criminal proceedings, even though that state was neutral during the conflict in which the offence was alleged to have been committed. Since 1945, it has been generally accepted that if a state is unwilling to institute its own proceedings, it may hand the person over to a claimant state on presentation of *prima facie* evidence that the alleged offender has committed the offence in question . . .
43. The four Geneva Conventions obligate the parties thereto to enact such legislation as may be necessary to provide effective sanctions for persons committing or ordering any of the acts which would constitute grave breaches under the Conventions. They also provide that the parties will take the measures

³⁹¹ Cameroon, *Disciplinary Regulations* (1975), Article 35.

³⁹² Cameroon, *Instructors' Manual* (1992), p. 25, § 121.1.

³⁹³ Canada, *Unit Guide* (1990), § 702.1.

³⁹⁴ Canada, *LOAC Manual* (1999), p. 10-6, § 52.

³⁹⁵ Canada, *LOAC Manual* (1999), p. 15-3, § 18.

³⁹⁶ Canada, *LOAC Manual* (1999), p. 16-2, § 11.

necessary to suppress any violation of the Conventions not amounting to grave breaches.³⁹⁷

362. Canada's Code of Conduct states that:

It is essential that any alleged breaches of these rules [of the Code of Conduct] and the Law of Armed Conflict be investigated rapidly in as impartial a manner as possible. An impartial investigation will not only assist in bringing violators to justice, thereby maintaining discipline, but will also provide the best opportunity to clear anyone who has not acted improperly. In most cases that investigation will be carried out by the military police or National Investigation Service.³⁹⁸

363. Colombia's Basic Military Manual provides that "war crimes shall be repudiated and sanctioned by the international community, by States through their legislation and by civil society".³⁹⁹ It specifies that, before conflicts, States are obliged "to establish in national legislation, especially in criminal law, rules which define and punish crimes . . . against IHL".⁴⁰⁰ The manual further states that "violations committed by officials [of the State or] . . . soldiers . . . shall be sanctioned in compliance with the disciplinary, administrative and criminal legislation of the State".⁴⁰¹ This is also the case for violations committed by members of organised armed groups.⁴⁰²

364. The Military Manual of the Dominican Republic reminds soldiers that they "may be tried and convicted for crimes committed in combat even after they have left the service. Furthermore, criminal acts may make your mission harder and thereby endanger your life."⁴⁰³

365. Ecuador's Naval Manual states that "in the event of a clearly established violation of the law of armed conflict, the aggrieved State may: . . . punish individual offenders either during the conflict or upon cessation of hostilities".⁴⁰⁴ It adds that:

Belligerent States have the obligation, under international law, to punish their own nationals, whether members of the armed forces or civilians, who commit war crimes. International law also provides that belligerent States have the right to punish enemy armed forces personnel and enemy civilians who fall under their control for such offences.⁴⁰⁵

366. France's LOAC Summary Note provides that "grave breaches of the law of war are war crimes which must be investigated, brought before each party's courts and punished under criminal law".⁴⁰⁶

³⁹⁷ Canada, *LOAC Manual* (1999), pp. 16-5 and 16-6, §§ 37-38 and 43.

³⁹⁸ Canada, *Code of Conduct* (2001), Rule 11, § 3.

³⁹⁹ Colombia, *Basic Military Manual* (1995), p. 31.

⁴⁰⁰ Colombia, *Basic Military Manual* (1995), p. 27.

⁴⁰¹ Colombia, *Basic Military Manual* (1995), p. 36.

⁴⁰² Colombia, *Basic Military Manual* (1995), p. 37.

⁴⁰³ Dominican Republic, *Military Manual* (1980), p. 12.

⁴⁰⁴ Ecuador, *Naval Manual* (1989), § 6.2. ⁴⁰⁵ Ecuador, *Naval Manual* (1989), § 6.2.5.

⁴⁰⁶ France, *LOAC Summary Note* (1992), § 3.4.

367. France's LOAC Teaching Note, in a part dealing with "grave breaches of the rules of the law of armed conflict", states that:

On the criminal level, persons charged with [grave breaches of the Geneva Conventions] may be prosecuted before French judicial courts, but also before foreign courts or international criminal courts having jurisdiction over war crimes: today this means the International Criminal Tribunals for the Former Yugoslavia and Rwanda for the crimes committed solely on the occasion of these two conflicts; tomorrow, this will mean . . . the International Criminal Court which will have jurisdiction over all war crimes and crimes against humanity in case of the failure of national tribunals.⁴⁰⁷

368. Germany's Military Manual provides that "each member of the armed forces who has violated the rules of international humanitarian law must be aware of the fact that he can be prosecuted according to penal or disciplinary provisions".⁴⁰⁸ The manual refers to Articles 49 and 50 GC I, 50 and 51 GC II, 129 and 130 GC III, 146 and 147 GC IV and 85 AP I and states that "the four Geneva Conventions and Additional Protocol I oblige the contracting parties to make grave breaches of the protective provisions liable to punishment and to take all suitable measures to ensure compliance with the Conventions".⁴⁰⁹

369. Germany's IHL Manual provides that "under public international law, every State has the duty to hold responsible, in a criminal and in a disciplinary way, the members even of its own armed forces who have violated the rules of international humanitarian law".⁴¹⁰

370. Italy's IHL Manual provides that "war crimes . . . are punished by the military penal code applicable in times of war, and international cooperation for the pursuit, arrest, extradition and punishment of the persons who have allegedly committed [such crimes] is established".⁴¹¹

371. South Korea's Operational Law Manual provides that persons who have committed a grave breach of IHL "shall be tried or extradited".⁴¹²

372. The Military Manual of the Netherlands refers to Article 86 AP I, noting the duty to repress grave breaches and to take measures necessary to suppress all other breaches which result from a failure to act when under a duty to do so.⁴¹³

373. The Military Handbook of the Netherlands provides that "hostile persons who have committed a war crime and fall into the hands of [one's] own troops must be tried".⁴¹⁴

374. New Zealand's Military Manual states that:

⁴⁰⁷ France, *LOAC Teaching Note* (2000), p. 7.

⁴⁰⁸ Germany, *Military Manual* (1992), § 1207.

⁴⁰⁹ Germany, *Military Manual* (1992), § 1208.

⁴¹⁰ Germany, *IHL Manual* (1996), § 803. ⁴¹¹ Italy, *IHL Manual* (1991), Vol. I, § 86.

⁴¹² South Korea, *Operational Law Manual* (1996), p. 193, § 4.

⁴¹³ Netherlands, *Military Manual* (1993), pp. IX-3/IX-6.

⁴¹⁴ Netherlands, *Military Handbook* (1995), p. 7-45.

The [Geneva] Conventions make one further departure of significance. For the first time they provide in treaty form a clear obligation upon States to punish what the Conventions describe as “grave breaches”, even if those States are not parties to the conflict, the offenders and the victims not their nationals, and even though the offences were committed outside the territorial jurisdiction of the State concerned. In other words, the Conventions have introduced the concept of universal jurisdiction in so far as grave breaches are concerned, and if the State in question is unwilling to try an offender found within its territory, it is obliged to hand him over for trial to any party to the Convention making out a *prima facie* case.⁴¹⁵

The manual also notes that “in the event of ‘any alleged violations’ of the 1949 [Geneva] Conventions an enquiry must be instituted at the request of a Party to the conflict. If a violation be established, the Parties to the conflict must put an end to it and punish it with the least possible delay.”⁴¹⁶ It further provides that:

The four Geneva Conventions require the parties to them to enact such legislation as may be necessary to provide effective sanctions for persons committing or ordering any of the acts which would constitute grave breaches under the Conventions. They also provide that the parties will take the measures necessary to suppress any violation of the Convention not amounting to grave breaches.⁴¹⁷

The manual adds that “any grave breach described as such in the [Geneva] Conventions and the first protocol [AP I] shall be an indictable offence”.⁴¹⁸

375. Nigeria’s Military Manual recalls that “the High Contracting Parties [to AP I] and the parties to the conflict shall repress breaches, and take measures necessary to suppress all other breaches of the [Geneva] conventions or of [AP I] which result from a failure to act when under a duty to do so”.⁴¹⁹

376. According to Nigeria’s Manual on the Laws of War, “the Geneva Conventions stipulate that a contracting party shall enact all necessary legislation to prohibit acts which contravene their provisions”.⁴²⁰

377. The Joint Circular on Adherence to IHL and Human Rights of the Philippines provides that:

All human rights-related incidents allegedly committed by members of the AFP and PNP in the course of security/police operations shall be immediately investigated and if evidence warrants, charges shall be filed in the proper courts. Reports of investigation as well as actions taken shall be submitted to GHQ or PNP HQs fifteen (15) days after receipt of information about the alleged human rights violation. [The] same shall be forwarded to the Department of National Defense or Department of Interior and Local Government.⁴²¹

⁴¹⁵ New Zealand, *Military Manual* (1992), § 117.5.

⁴¹⁶ New Zealand, *Military Manual* (1992), § 1609.

⁴¹⁷ New Zealand, *Military Manual* (1992), §§ 1711.1 and 1711.4.

⁴¹⁸ New Zealand, *Military Manual* (1992), § 1712.

⁴¹⁹ Nigeria, *Military Manual* (1994), p. 9, § 9e.

⁴²⁰ Nigeria, *Manual on the Laws of War* (undated), § 7.

⁴²¹ Philippines, *Joint Circular on Adherence to IHL and Human Rights* (1991), § 2(b)(1).

378. South Africa's LOAC Manual states that "signatory States [of the Geneva Conventions] are required to treat as criminals under domestic law anyone who commits or orders a grave breach [of the Geneva Conventions]".⁴²² It adds that:

Grave breaches of the law of war are regarded as war crimes. They shall be repressed by penal sanctions . . .

Grave breaches are indictable offence[s] under Section 7 of the Geneva Conventions Act, RSA, 1957. South Africa is obliged to search out and prosecute or extradite those who have committed a grave breach. For all breaches (i.e. violations of the law of war), South Africa has an obligation to take steps to ensure that the offences do not happen again . . . If breaches went unpunished, it would signify the degradation of human values and the regression of the entire concept of humanity.⁴²³

379. Spain's LOAC Manual states that "the Geneva Conventions and Additional Protocol I impose on States parties the obligation to adopt in their domestic legislation all the legislative measures necessary to determine adequate penal sanctions against those who commit, or order to be committed, any kind of grave breaches".⁴²⁴ It states that "Spain has complied with the obligation undertaken when ratifying the Geneva Conventions and dedicated Title II of Volume II of the Military Criminal Code to categorize and sanction the offences against the laws and customs of war".⁴²⁵ The manual also provides that:

States have the obligation to search for persons accused of having committed, or having ordered to be committed, grave breaches, being obliged to make them appear before their own tribunals, regardless of their nationality. They can also agree to the extradition of those persons in order for them to be judged by other States, in accordance with the legal obligations which regulate the said extradition.

...

With regard to breaches that are not of a grave nature, the necessary measures must be taken for their immediate cessation.⁴²⁶

380. Sweden's IHL Manual provides that:

It is incumbent upon parties to the Conventions to enact legislation necessary to apply effective sanctions to persons committing, or ordering to be committed, breaches of the Conventions. Each State is obliged to search for persons accused of committing or ordering a grave breach and shall bring them, regardless of their nationality, before its own courts. A permitted alternative is to hand over the wanted person to another contracting party, provided that this state has an interest in punishing the breach and has made out a *prima facie* case.

For breaches not considered as grave, the contracting parties' obligations are limited to taking any steps needed to ensure that the transgressions cease.⁴²⁷

⁴²² South Africa, *LOAC Manual* (1996), § 35.

⁴²³ South Africa, *LOAC Manual* (1996), §§ 41 and 42.

⁴²⁴ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1), see also § 1.1.d.(6).

⁴²⁵ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1)

⁴²⁶ Spain, *LOAC Manual* (1996), Vol. I, §§ 11.8.b.(1) and 11.8.b.(2).

⁴²⁷ Sweden, *IHL Manual* (1991), Section 4.2, pp. 93 and 94.

381. Switzerland's Basic Military Manual provides that:

1. Violations of the laws and customs of war must be punished. Those responsible may be brought either before the courts of their own country or before the courts of the injured State, or before an international tribunal.
2. Each Contracting Party is also bound to search for and prosecute in its own courts persons who have committed grave breaches of the provisions of the law of nations in time of war.⁴²⁸

382. The UK Military Manual notes that "the Regulations [1907 HR] themselves... provide that the perpetrators of the particular offences of seizure, damage or wilful destruction of churches, hospitals, schools, museums, historic monuments, works of art, *etc.*, shall be prosecuted".⁴²⁹ It also states that:

In the case of "any alleged violations" of the 1949 [Geneva] Conventions an inquiry must be instituted at the request of a party to the conflict. If a violation be established, the parties to the conflict must put an end to it and punish it with the least possible delay. These provisions form an important method of ensuring that the laws of war are observed by belligerents.⁴³⁰

The manual further states that:

All parties to the 1949 [Geneva] Conventions undertook to enact any legislation necessary to provide effective penal sanctions for persons committing or ordering to be committed any of the "grave breaches" of the Conventions. Parties are also bound to search for persons alleged to have committed, or ordered, "grave breaches", and regardless of their nationality, to bring them to trial in their own courts. If a party so prefers, and in accordance with the provisions of its own legislation, it may hand such persons over for trial to another State concerned which is a party to the Conventions, provided that that other State has made out a *prima facie* case against those persons.⁴³¹

383. The US Field Manual states that:

At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the [Geneva] Convention[s]... Once the violation has been established, the Parties to the conflict shall put an end to it and shall repress it with the least possible delay.⁴³²

The manual adds that:

The High Contracting Parties [to the Geneva Conventions] undertake to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the [Geneva] Conventions...

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, ... grave breaches

⁴²⁸ Switzerland, *Basic Military Manual* (1987), Article 198.

⁴²⁹ UK, *Military Manual* (1958), § 618.

⁴³⁰ UK, *Military Manual* (1958), § 621.

⁴³¹ UK, *Military Manual* (1958), § 639.

⁴³² US, *Field Manual* (1956), § 496.

and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case . . .

[These] principles . . . are declaratory of the obligations of belligerents under customary international law to take measures for the punishment of war crimes committed by all persons, including members of a belligerent's own armed forces . . .

Commanding officers of United States troops must insure that war crimes committed by members of their forces against enemy personnel are promptly and adequately punished.⁴³³

384. The US Air Force Pamphlet states that:

Domestic tribunals have the competence and, under the grave breaches articles of the Geneva Conventions, the strict obligation to punish certain violations . . . Ad hoc international tribunals, such as those established in Germany and Japan following World War II, did punish individuals for their personal actions violating the law of armed conflict. However, the importance of criminal responsibility . . . primarily relates to a state's own efforts to enforce the law of armed conflict with respect to its *own* armed forces.⁴³⁴ [emphasis in original]

It further states that:

There are express obligations to search for persons alleged to have committed grave breaches, to bring them to trial or extradite them, to take all measures necessary to suppress all acts contrary to the Conventions and to implement all obligations . . . The United States has for many years urged measures on the international scene to improve the implementation and better observance of the law of armed conflict . . .

Within the Geneva Conventions system, state responsibility to repress breaches is stressed, and no provision is made for international tribunals within the Conventions . . .

In the United States, jurisdiction is not limited to offenses against US nationals but extends to offenses against victims of other nationalities. Violations by adversary personnel, when appropriate, are tried as offenses against international law which forms part of the law of the United States. In occupied territories, trials are usually held under occupation law. Trials of such personnel have been held in regular military courts, military commissions, provost courts, military government courts, and other military tribunals of the United States, as well as in international tribunals.⁴³⁵

385. The US Soldier's Manual reminds soldiers that they "may be tried and convicted for crimes committed in combat even after they have left the service. Furthermore, criminal acts may make your mission harder and thereby endanger your life".⁴³⁶

386. The US Instructor's Guide notes that "nearly all nations have signed the Geneva Conventions and have agreed in doing so to search out, to bring to trial,

⁴³³ US, *Field Manual* (1956), §§ 506(a) and (b) and 507(b).

⁴³⁴ US, *Air Force Pamphlet* (1976), § 10-6.

⁴³⁵ US, *Air Force Pamphlet* (1976), §§ 15-2(b), 15-3(a) and 15-4(a).

⁴³⁶ US, *Soldier's Manual* (1984), p. 27.

and to punish all persons who commit a grave breach of the conventions. You may be tried and convicted even after leaving the service".⁴³⁷

387. The US Naval Handbook provides that "in the event of a clearly established violation of the law of armed conflict, the aggrieved nation may: . . . punish individual offenders either during the conflict or upon cessation of hostilities".⁴³⁸ (emphasis in original) The Handbook further states that:

Belligerents have the obligation under international law to punish their own nationals, whether members of the armed forces or civilians, who commit war crimes. International law also provides that belligerents have the right to punish enemy armed forces personnel and enemy civilians who fall under their control for such offenses.⁴³⁹

388. The YPA Military Manual of the SFRY (FRY) provides that:

The parties to a conflict have a duty to prevent violations of the laws of war by all available means and to call to account and punish perpetrators, regardless of their nationality. States are obliged, in peace time, to provide in their legislation that serious violations of the laws of war are crimes.⁴⁴⁰

The manual also states that "parties to a conflict are authorised and obliged to determine the criminal responsibility of members of their own or enemy armed forces, that is, their own or enemy citizens who ordered the commission or committed war crimes or other serious violations of the laws of war".⁴⁴¹ It further states that:

Persons who commit a war crime or other serious violations of the laws of war shall be brought to justice before their own national courts or, if they fall into enemy hands, before his courts. The perpetrators of such criminal acts may also be brought to justice before an international court if such court is established.⁴⁴²

National Legislation

389. Argentina's Law on the Creation of a National Committee to Investigate War Crimes Committed during the War in the South Atlantic establishes:

within the Ministry of National Defence the National Committee to investigate War Crimes which aims at clarifying the facts related to the possible commission of war crimes during the period of the belligerent incidents which occurred in the South Atlantic between the months of April and June of [1982].⁴⁴³

390. Argentina's Draft Code of Military Justice provides for the introduction of the title "Offences against protected persons and objects in case of armed conflict" in the Code of Military Justice as amended.⁴⁴⁴ This title provides for

⁴³⁷ US, *Instructor's Guide* (1985), p. 13. ⁴³⁸ US, *Naval Handbook* (1995), § 6.2.

⁴³⁹ US, *Naval Handbook* (1995), § 6.2.5. ⁴⁴⁰ SFRY (FRY), *YPA Military Manual* (1988), § 18.

⁴⁴¹ SFRY (FRY), *YPA Military Manual* (1988), § 32.

⁴⁴² SFRY (FRY), *YPA Military Manual* (1988), § 20.

⁴⁴³ Argentina, *Law on the Creation of a National Committee to Investigate War Crimes Committed during the War in the South Atlantic* (1995), Article 1.

⁴⁴⁴ Argentina, *Draft Code of Military Justice* (1998), Article 287, introducing a new Title XVIII, Chapter I in the *Code of Military Justice as amended* (1951).

the punishment of specified prohibited acts “committed in the event of armed conflict”.⁴⁴⁵ As to this title scope of application, the Draft Code states that:

- [The present title applies to the following protected persons:]
- 1) The wounded, sick and shipwrecked and medical or religious personnel protected by [GC I and II or AP I];
 - 2) Prisoners of war protected by [GC III or AP I];
 - 3) The civilian population and [individual] civilian persons protected by [GC IV or AP I];
 - 4) Persons *hors de combat* and the personnel of the protecting power and of its substitute, protected by [the Geneva Conventions or AP I];
 - 5) *Parlementaires* and the persons accompanying them, protected by [the 1899 Hague Convention II];
 - 6) Any other person [to which AP II] or any other international treaty to which Argentina is a party applies.⁴⁴⁶

The Draft Code further provides that:

A soldier who, at the occasion of an armed conflict, commits . . . any other violation or act contrary to the provisions of the international treaties to which Argentina is a party and relating to the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property in case of armed conflict, will be punished.⁴⁴⁷

391. In its Chapter 33 entitled “Crimes against the peace and security of mankind”, Armenia’s Penal Code provides for the punishment of certain acts, committed during armed conflicts, which violate the laws and customs of war, including “Serious breaches of international humanitarian law during armed conflict”, crimes against humanity and genocide.⁴⁴⁸

392. Australia’s War Crimes Act as amended gives Australian courts jurisdiction over individuals accused of war crimes committed during the Second World War. The Act defines a war crime as a serious crime committed “in the course of hostilities in a war”, “in the course of an occupation”, “in pursuing a policy associated with the conduct of a war or with an occupation” or, “on behalf of, or in the interests of, a power conducting a war or engaged in an occupation”. War is defined as “a) a war, whether declared or not; b) any other armed conflict between countries; or c) a civil war or similar armed conflict (whether or not involving Australia or a country allied or associated with Australia) in so far as it occurred in Europe in the period beginning on 1 September 1939 and ending on 8 May 1945”.⁴⁴⁹

⁴⁴⁵ Argentina, *Draft Code of Military Justice* (1998), Articles 289-296, introducing new Articles 873-880 in the *Code of Military Justice as amended* (1951).

⁴⁴⁶ Argentina, *Draft Code of Military Justice* (1998), Article 288, introducing a new Article 872 in the *Code of Military Justice as amended* (1951).

⁴⁴⁷ Argentina, *Draft Code of Military Justice* (1998), Article 296, introducing a new Article 880 in the *Code of Military Justice as amended* (1951).

⁴⁴⁸ Armenia, *Penal Code* (2003), Articles 383, 386-387 and 390-397.

⁴⁴⁹ Australia, *War Crimes Act as amended* (1945), Sections 5, 7 and 9.

393. Australia's Geneva Conventions Act as amended provides for the punishment of grave breaches of the Geneva Conventions and AP I. It states that:

A person who, in Australia or elsewhere, commits, or aids, abets or procures the commission by another person of a grave breach of any of the Conventions or of Protocol I is guilty of an indictable offence.

...

This section applies to persons regardless of their nationality or citizenship.⁴⁵⁰

394. Australia's ICC (Consequential Amendments) Act contains a list of acts qualified as "Genocide" (Sections 268.3-268.7), "Crimes against humanity" (Sections 268.8-268.23), "War crimes that are grave breaches of the Geneva Conventions and of Protocol I to the Geneva Conventions" (Sections 268.24-268.34), "Other serious war crimes that are committed in the course of an international armed conflict" (Sections 268.35-268.68), "War crimes that are serious violations of article 3 common to the Geneva Conventions and are committed in the course of an armed conflict that is not an international armed conflict" (Sections 268.69-268.76), "War crimes that are other serious violations of the laws and customs applicable in an armed conflict that is not an international armed conflict" (Sections 268.77-268.94), "War crimes that are grave breaches of Protocol I to the Geneva Conventions" (Sections 268.95-268.101). The Act also includes the penalty to be imposed by Australian courts for each of these crimes.⁴⁵¹

395. Azerbaijan's Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War, which establishes disciplinary, administrative and criminal liability, is applicable in international and non-international armed conflicts.⁴⁵²

396. Azerbaijan's Criminal Code provides for punishment, *inter alia*, in case of war crimes (Article 57). In the chapter entitled "War crimes", the Code contains further provisions criminalising: the use of "mercenaries" (Article 114); "violations of [the] laws and customs of war" (Article 115); "violations of the norms of international humanitarian law in time of armed conflict" (Article 116); "negligence or giving criminal orders in time of armed conflict" (Article 117); "pillage" (Article 118); and "abuse of protected signs" (Article 119).⁴⁵³

397. Bangladesh's International Crimes (Tribunal) Act provides that:

- (1) A Tribunal shall have the power to try and punish any person irrespective of his nationality who, being a member of any armed, defence or auxiliary forces commits or has committed in the territory of Bangladesh, whether before or after the commencement of this act, any of the following crimes.

⁴⁵⁰ Australia, *Geneva Conventions Act as amended* (1957), Section 7(1) and (3).

⁴⁵¹ Australia, *ICC (Consequential Amendments) Act* (2002), Sections 268.3-268.101.

⁴⁵² Azerbaijan, *Law concerning the Protection of Civilian Persons and the Rights of Prisoners of War* (1995), Articles 8 and 31.

⁴⁵³ Azerbaijan, *Criminal Code* (1999), Articles 57 and 114-119.

- (2) The following acts or any of them are crimes within the jurisdiction of a Tribunal for which there shall be individual responsibility, namely: –
- (a) Crimes against Humanity . . .
 - (b) Crimes against Peace . . .
 - (c) Genocide . . .
 - (d) War Crimes . . .
 - (e) Violation of any humanitarian rules applicable in armed conflicts laid down in the Geneva Convention of 1949 . . .
 - (f) Any other crimes under international law;
 - (g) Attempt abatement or conspiracy to commit any such crimes;
 - (h) Complicity in or failure to prevent commission of any such crimes.⁴⁵⁴

398. The Geneva Conventions Act of Barbados provides that:

A grave breach of any of the Geneva Conventions of 1949 that would, if committed in Barbados, be an offence under any law of Barbados, constitutes an offence under that law when committed outside Barbados.

. . . A person who commits a grave breach of any of the Geneva Conventions of 1949 . . . may be tried and punished by any court in Barbados that has jurisdiction in respect of similar offences in Barbados as if the grave breach had been committed in Barbados.⁴⁵⁵

399. The Criminal Code of Belarus, in a chapter entitled “War crimes and other violations of the laws and customs of war”, provides, *inter alia*, for the punishment of specified acts, such as “mercenary activities” (Article 133), “use of weapons of mass destruction” (Article 134), “violations of the laws and customs of war” (Article 135), “criminal offences against the norms of international humanitarian law during armed conflicts” (Article 136), or “abuse of signs protected by international treaties” (Article 138).⁴⁵⁶

400. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides for the punishment of genocide and crimes against humanity.⁴⁵⁷ It further provides that acts defined as:

grave breaches . . . which cause injury or damage, by act or omission, to persons or objects protected by the [Geneva Conventions] and by Protocols I and II additional to those Conventions . . . shall . . . constitute crimes under international law and be punishable in accordance with the provisions of the present Act.⁴⁵⁸

The Law lists such grave breaches, stating, however, that this list is “without prejudice to the criminal provisions applicable to other breaches of the Conventions referred to in the present Act and without prejudice to criminal provisions

⁴⁵⁴ Bangladesh, *International Crimes (Tribunal) Act* (1973), Section 3.

⁴⁵⁵ Barbados, *Geneva Conventions Act* (1980), Section 3(1)–(2).

⁴⁵⁶ Belarus, *Criminal Code* (1999), Articles 132–138.

⁴⁵⁷ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Articles 1(1) and 1(2).

⁴⁵⁸ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3).

applicable to breaches committed out of negligence".⁴⁵⁹ In addition, it provides that:

Belgian courts shall be competent to deal with breaches provided for in the present Act, irrespective of where such breaches have been committed.

In respect of breaches committed abroad by a Belgian national against a foreigner, no filing of complaint by the foreigner or his family or official notice by the authority of the country in which the breach was committed shall be required.⁴⁶⁰

401. The Criminal Code of the Federation of Bosnia and Herzegovina contains provisions regarding the punishment of certain acts, some of them committed "in time of war or armed conflict", such as: "war crimes against civilians" (Article 154); "war crimes against the wounded and sick" (Article 155); "war crimes against prisoners of war" (Article 156); "organizing a group and instigating the commission of genocide and war crimes" (Article 157); "unlawful killing or wounding of the enemy" (Article 158); "marauding" (Article 159); "using forbidden means of warfare" (Article 160); "violating the protection granted to bearers of flags of truce" (Article 161); "cruel treatment of the wounded, sick and prisoners of war" (Article 163); "destruction of cultural and historical monuments" (Article 164); and "misuse of international emblems" (Article 166).⁴⁶¹ The Criminal Code of the Republika Srpska contains the same provisions.⁴⁶²

402. Botswana's Geneva Conventions Act provides that:

Any person, whatever his nationality, who, whether in or outside Botswana, commits, or aids, abets or procures the commission by any other person of, any such grave breach of any of the scheduled conventions as is referred to in the following articles respectively of those conventions, that is to say [Article 50 GC I, Article 51 GC II, Article 130 GC III, Article 147 GC IV] shall be guilty of an offence and [be punished].

In the case of an offence under this section [i.e. a grave breach in the meaning of Articles 50 GC I, 51 GC II, 130 GC and 147 GC IV] committed outside Botswana, a person may be proceeded against, indicted, tried and punished therefor in any place in Botswana as if the offence had been committed in that place.⁴⁶³

403. Bulgaria's Penal Code as amended provides for the punishment of a list of specified acts entitled "Crimes against the laws and customs of waging war".⁴⁶⁴

404. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes aims at "integrating into Burundian legislation the crime of genocide, the crimes against humanity and war crimes, and to organize the procedure of

⁴⁵⁹ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(3).

⁴⁶⁰ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 7.

⁴⁶¹ Bosnia and Herzegovina, Federation, *Criminal Code* (1998), Articles 154–161 and 163–166.

⁴⁶² Bosnia and Herzegovina, Republika Srpska, *Criminal Code* (2000), Articles 433–445.

⁴⁶³ Botswana, *Geneva Conventions Act* (1970), Section 3(1) and (2).

⁴⁶⁴ Bulgaria, *Penal Code as amended* (1968), Articles 410–415.

prosecution and of bringing to trial of persons accused for such crimes".⁴⁶⁵ It provides for the punishment of a list of acts defined as genocide, crimes against humanity and war crimes.⁴⁶⁶ The Draft Law also provides that:

The crime of genocide, crimes against humanity and war crimes shall be the subject of an inquiry, and the persons against whom clues of guilt exist are searched for, arrested, brought before the competent courts and, if they are found guilty, punished in conformity with the procedure foreseen by the criminal procedure code or by other specific provisions foreseen by the law.⁴⁶⁷

405. The express purpose of Cambodia's Law on the Khmer Rouge Trial is to:

bring to trial senior leaders of Democratic Kampuchea and those who were responsible for crimes and serious violations of Cambodian penal law, international law and custom, and international conventions recognized by Cambodia, and which were committed during the period from April 17, 1975 to January 6, 1979.⁴⁶⁸

It therefore provides for the establishment of "Extraordinary Chambers . . . in the existing courts, namely the trial court, the appeals court, and the supreme court" (Article 2) in order to permit the prosecution and punishment of persons having committed "any of the crimes set forth in the 1956 Penal Code" such as: homicide, torture and religious persecution (Article 3); genocide (Article 4); crimes against humanity (Article 5); grave breaches of the Geneva Conventions (Article 6); destruction of cultural property during armed conflict pursuant to the 1954 Hague Convention (Article 7); and crimes against internationally protected persons as set forth in the Convention on Crimes against Internationally Protected Persons (Article 8), committed during the relevant period.⁴⁶⁹

406. Canada's Geneva Conventions Act as amended provides that:

Every person who, whether within or outside Canada, commits a grave breach referred to in Article 50 [GC I], Article 51 [GC II], Article 130 [GC III] Article 147 [GC IV] or Article 11 or 85 [AP I] is guilty of an indictable offence and [is liable to punishment].

Where a person is alleged to have committed an offence [in the meaning of the above], proceedings in respect of that offence may, whether or not the person is in Canada, be commenced in any territorial division in Canada and that person may be tried and punished in respect of that offence in the same manner as if the offence had been committed in that territorial division.⁴⁷⁰

407. Canada's Crimes against Humanity and War Crimes Act provides that for offences within Canada "every person is guilty of an indictable offence who

⁴⁶⁵ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 1.

⁴⁶⁶ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Articles 2-5 and 8-19.

⁴⁶⁷ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 22.

⁴⁶⁸ Cambodia, *Law on the Khmer Rouge Trial* (2001), Article 1.

⁴⁶⁹ Cambodia, *Law on the Khmer Rouge Trial* (2001), Articles 2-8.

⁴⁷⁰ Canada, *Geneva Conventions Act as amended* (1985), Section 3(1) and (2).

commits (a) genocide; (b) a crime against humanity; or (c) a war crime".⁴⁷¹ It adds that for offences outside Canada, "every person who, either before or after coming into force of this section, commits outside Canada (a) genocide, (b) a crime against humanity, or (c) a war crime is guilty of an indictable offence and may be prosecuted".⁴⁷² It further adds that "war crime means an act or omission committed during an armed conflict that . . . constitutes a war crime according to customary international law or conventional international law applicable to armed conflicts" and it specifies that the crimes described in Articles 6, 7 and 8(2) of the 1998 ICC Statute are "crimes according to customary international law".⁴⁷³

408. Chile's Code of Military Justice, under the heading "Offences against international law", provides, *inter alia*, for the punishment of certain war crimes.⁴⁷⁴

409. China's Law Governing the Trial of War Criminals contains a list of offences regarded as war crimes and also provides for the punishment of "other acts violating the law or usages of war, or acts whose cruelty or destructiveness exceeds their military necessity, forcing people to do things beyond their obligation, or acts hampering the exercise of legal rights".⁴⁷⁵

410. Colombia's Penal Code, under the heading "Crimes against persons and objects protected by international humanitarian law", contains a list of provisions concerning the punishment of specified crimes committed "in the event and during an armed conflict". The persons protected are: the civilians, the persons not taking part in the hostilities and the civilians in the power of the adverse party, the wounded, sick and shipwrecked placed *hors de combat*, the combatants who have laid down their arms, because of capture, surrender, or any similar reason, the persons considered as stateless or refugees before the beginning of the conflict, and the persons protected under the 1949 Geneva Conventions and AP I and AP II.⁴⁷⁶

411. The DRC Code of Military Justice as amended contains provisions for the punishment of a list of offences such as war crimes which are applicable "in time of war or in an area where a state of siege or a state of emergency has been proclaimed".⁴⁷⁷

412. Congo's Genocide, War Crimes and Crimes against Humanity Act provides for the punishment of the authors and perpetrators of acts such as:

- a) grave breaches of the Geneva Conventions . . .
- b) other grave breaches of the laws and customs applicable to international armed conflicts in the scope established by international law;

⁴⁷¹ Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 4.

⁴⁷² Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 6.

⁴⁷³ Canada, *Crimes against Humanity and War Crimes Act* (2000), Article 4(3) and (4).

⁴⁷⁴ Chile, *Code of Military Justice* (1925), Articles 261–264.

⁴⁷⁵ China, *Law Governing the Trial of War Criminals* (1946), Article 3.

⁴⁷⁶ Colombia, *Penal Code* (2000), Articles 135–164.

⁴⁷⁷ DRC, *Code of Military Justice as amended* (1972), Articles 436, 455, 472 and 522–526.

- c) grave breaches of article 3 common to the four Geneva Conventions . . .
- d) and other grave breaches recognized as applicable to armed conflicts which are not of an international character, within the scope established by international law.⁴⁷⁸

413. The Geneva Conventions and Additional Protocols Act of the Cook Islands, referring to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV and Articles 11(4) and 85(2), (3) and (4) AP I, provides that:

- (1) Any person who in the Cook Islands or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the Conventions or of the First [1977 Additional] Protocol is guilty of an offence.

- ...
 - (3) This section applies to persons regardless of their nationality or citizenship.⁴⁷⁹

414. Costa Rica's Penal Code as amended provides for the punishment of offences such as acts of genocide and "other punishable acts against human rights and international humanitarian law, provided for in the treaties adhered to by Costa Rica or in this Code".⁴⁸⁰ Under another provision entitled "War crimes", it also provides for the punishment of:

Whoever, in the event of an armed conflict, commits or orders to be committed acts which can be qualified as grave breaches or war crimes, in conformity with the provisions of international treaties to which Costa Rica is a party, regarding the conduct of hostilities, the protection of the wounded, sick and shipwrecked, the treatment of prisoners of war, the protection of civilian persons and the protection of cultural property, [applicable] in cases of armed conflict, and under any other instrument of international humanitarian law.⁴⁸¹

The Code as amended further provides for the punishment of crimes against humanity.⁴⁸²

415. Côte d'Ivoire's Penal Code as amended, in a chapter dealing with offences against the law of nations, provides for the punishment of certain acts committed "in time of war or occupation", such as "crimes against the civilian population (Article 138) and "crimes against prisoners of war" (Article 139). It further provides for the punishment of the illegal use of distinctive signs and emblems (Article 473).⁴⁸³

416. Croatia's Criminal Code, in a chapter entitled "Criminal offences against values protected by international law", provides for a list of punishable acts committed by "whoever" and some of them "during war, armed conflict (or occupation)", such as: "war crimes against the civilian population" (Article 158);

⁴⁷⁸ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Articles 4, 5, 10 and 11.

⁴⁷⁹ Cook Islands, *Geneva Conventions and Additional Protocols Act* (2002), Section 5(1) and (3).

⁴⁸⁰ Costa Rica, *Penal Code as amended* (1970), Article 7.

⁴⁸¹ Costa Rica, *Penal Code as amended* (1970), Article 378.

⁴⁸² Costa Rica, *Penal Code as amended* (1970), Article 379.

⁴⁸³ Côte d'Ivoire, *Penal Code as amended* (1981), Articles 138–139 and 473.

“war crimes against the wounded and sick” (Article 159); “war crimes against prisoners of war” (Article 160); “unlawful killing and wounding of the enemy” (Article 161); “unlawful taking of the belongings of those killed or wounded on the battlefield” (Article 162); “forbidden means of combat” (Article 163); “injury of an intermediary” (Article 164); “brutal treatment of the wounded, sick and prisoners of war” (Article 165); “unjustified delay in the repatriation of prisoners of war” (Article 166); “destruction of cultural objects or of facilities containing cultural objects” (Article 167); and “misuse of international symbols” (Article 168).⁴⁸⁴

417. Cuba’s Military Criminal Code, in a chapter entitled “Offences committed during combat actions”, contains provisions criminalising certain acts such as “mistreatment of prisoners of war” (Article 42), “plundering” (Article 43), “violence against the population of the area of military activities” (Article 44) and “prohibited use of banners or symbols of the Red Cross” (Article 45).⁴⁸⁵

418. Cyprus’s Geneva Conventions Act, referring to Articles 50 GC I, 51 GC II, 130 GC III and 147 GC IV, provides for the prosecution and punishment of “any person who, in spite of nationality, commits any serious violation . . . of the Geneva Conventions in or outside of the Republic”. It further provides that:

In case an offence provided by this Article has been committed outside the Republic, a person may be prosecuted, charged with the offence, be tried and punished anywhere within the territory of the Republic, as if the offence had been committed in this territory; for all purposes relative or relevant to the trial or punishment, the offence is considered being committed in this territory.⁴⁸⁶

419. Cyprus’s AP I Act, with respect to “a serious violation of the provisions of the [AP I]”, contains a provision similar to the one in the Geneva Conventions Act.⁴⁸⁷

420. The Czech Republic’s Criminal Code as amended, under the heading “Crimes against humanity”, provides for the punishment of certain offences such as: “genocide” (Article 259); “torture and other inhuman and cruel treatment” (Article 259a); “use of a forbidden weapon or an unpermitted form of combat” (Article 262); “wartime cruelty” (Article 263); “persecution of a population” (Article 263a); “plunder in a theatre of war” (Article 264); and “misuse of internationally recognized insignia and state insignia” (Article 265).⁴⁸⁸

421. The Code of Military Justice of the Dominican Republic provides for the punishment of a soldier who infringes certain rules of the LOAC, notably against prisoners of war, hospitals, temples or parlementaires.⁴⁸⁹

⁴⁸⁴ Croatia, *Criminal Code* (1997), Articles 158-168.

⁴⁸⁵ Cuba, *Military Criminal Code* (1979), Articles 42-45.

⁴⁸⁶ Cyprus, *Geneva Conventions Act* (1966), Sections 4 (1) and (2).

⁴⁸⁷ Cyprus, *AP I Act* (1979), Sections 4 (1) and (2).

⁴⁸⁸ Czech Republic, *Criminal Code as amended* (1961), Articles 259-259(a) and 262-265.

⁴⁸⁹ Dominican Republic, *Code of Military Justice* (1953), Article 201.

422. El Salvador's Code of Military Justice provides for the punishment of various offences committed "in time of international or civil war", such as arson, destruction of property, plundering of inhabitants or acts of violence against persons (Article 68). It also provides for the punishment of other acts committed "in time of international war", including offences against prisoners of war, attacks on medical units, transports or personnel, abuse of the red cross, destruction of cultural property, offences against parlementaires (Article 69), despoliation of the wounded or prisoners (Article 70), despoliation of the dead (Article 71), and unnecessary requisition of buildings and objects (Article 72).⁴⁹⁰

423. El Salvador's Penal Code provides for the punishment of acts of "Genocide" (Article 361), "Violations of the laws and customs of war" committed "during an international or a civil war" (Article 362), "Violations of the duties of humanity" (Article 363), and "Enforced disappearance of persons" (Article 364).⁴⁹¹

424. The Draft Amendments to the Penal Code of El Salvador provide for the punishment of a list of crimes committed during an international or internal armed conflict.⁴⁹²

425. Estonia's Penal Code provides for the punishment of a list of crimes, including crimes against humanity (paragraph 89), genocide (paragraph 90), crimes against peace (paragraphs 91-93) or war crimes (paragraphs 94-109).⁴⁹³

426. Ethiopia's Penal Code, under the heading "Offences against the law of nations", provides for a list of punishable acts committed by "whosoever" such as: "war crimes against the civilian population" (Article 282); "war crimes against wounded, sick or shipwrecked persons" (Article 283); "war crimes against prisoners and interned persons" (Article 284); "pillage, piracy and looting" (Article 285); "provocation and preparation [of the above-mentioned acts]" (Article 286); "dereliction of duty towards the enemy" (Article 287); "use of illegal means of combat" (Article 288); "maltreatment of, or dereliction of duty towards, wounded, sick or prisoners" (Article 291); "denial of justice" (Article 292); "hostile acts against international humanitarian organizations" (Article 293); "abuse of international emblems and insignia" (Article 294); and "hostile acts against the bearer of a flag of truce" (Article 295). Some of these provisions specify that the acts concerned be committed "in time of war, armed conflict (or occupation)" and/or "in violation of the rules of public international law".⁴⁹⁴

427. In 1992, the transitional government of Ethiopia adopted the Special Public Prosecutor's Office Establishment Proclamation which provides that "it is essential that higher officials of the WPE and members of the security and armed forces who have been detained at the time the EPRDF assumed control

⁴⁹⁰ El Salvador, *Code of Military Justice* (1934), Articles 68-72.

⁴⁹¹ El Salvador, *Penal Code* (1997), Articles 361-364.

⁴⁹² El Salvador, *Draft Amendments to the Penal Code* (1998), Title XIX.

⁴⁹³ Estonia, *Penal Code* (2001), §§ 89-109.

⁴⁹⁴ Ethiopia, *Penal Code* (1957), Articles 282-288 and 291-295.

of the Country and thereafter and who are suspected of having committed offences . . . must be brought to trial". Furthermore, the proclamation provides that "it is necessary to provide for the establishment of a Special Public Prosecutor's Office that shall conduct prompt investigation and bring to trial detainees as well as those persons who are responsible for having committed offences".⁴⁹⁵

428. Finland's Revised Penal Code, in a chapter dealing with "War crimes and offences against humanity", provides that:

Any person who in an act of war

- (1) uses a prohibited means of warfare or weapon;
- (2) abuses an international symbol designated for the protection of the wounded and sick; or
- (3) otherwise violates the provisions of an international agreement on warfare binding on Finland or the generally acknowledged and established rules and customs of war under public international law

shall be sentenced for a war crime.⁴⁹⁶

429. France's Ordinance on Repression of War Crimes provides for the prosecution of certain persons having committed specific acts from the opening of hostilities.⁴⁹⁷

430. France's Code of Military Justice provides for the punishment of acts of pillage (Articles 427 and 428) and illegal use, in times of war, of "distinctive signs and emblems defined by international conventions" (Article 439).⁴⁹⁸

431. France's Penal Code provides for the punishment of a list of certain acts such as genocide and crimes against humanity and also provides for a special norm in case such crimes are committed "in times of war".⁴⁹⁹

432. France's Laws on Cooperation with the ICTY and ICTR provide for the punishment of authors and accomplices of serious violations of IHL.⁵⁰⁰

433. Georgia's Criminal Code, in a part entitled "Crimes against peace and security of mankind and international humanitarian law", provides for a list of punishable offences such as: "genocide" (Article 407); "crimes against humanity" (Article 408); "mercenaries" (Article 410); "wilful breaches of norms of international humanitarian law committed in armed conflict" (Article 411); "wilful breaches of norms of international humanitarian law committed in international or internal armed conflict with the threat to health or causing bodily injury" (Article 412); and "other breaches of norms of international humanitarian law" (Article 413), the latter including "any other war crime provided for in the [1998 ICC Statute]".⁵⁰¹ For some of these offences, the Code

⁴⁹⁵ Ethiopia, *Special Public Prosecutor's Office Establishment Proclamation* (1992), preamble

⁴⁹⁶ Finland, *Revised Penal Code* (1995), Chapter 11, Section 1(1).

⁴⁹⁷ France, *Ordinance on Repression of War Crimes* (1944), Article 1.

⁴⁹⁸ France, *Code of Military Justice* (1982), Articles 427, 428 and 439.

⁴⁹⁹ France, *Penal Code* (1994), Articles 211(1)–212(3).

⁵⁰⁰ France, *Law on Cooperation with the ICTY* (1995), Article 2; *Law on Cooperation with the ICTR* (1996), Article 2.

⁵⁰¹ Georgia, *Criminal Code* (1999), Articles 407–408 and 410–413.

specifies that the acts be committed “in an international or internal armed conflict”.⁵⁰²

434. Germany’s Law Introducing the International Crimes Code applies “to all criminal offences against international law designated under this Act, to serious offences designated therein even when the offence was committed abroad and bears no relation to Germany”.⁵⁰³ It provides for the punishment of, *inter alia*, genocide (Article 1, paragraph 6), crimes against humanity (Article 1, paragraph 7) and war crimes, including “War crimes against persons” (Article 1, paragraph 8), “War crimes against property and other rights” (Article 1, paragraph 9), “War crimes against humanitarian operations and emblems” (Article 1, paragraph 10), “War crimes consisting in the use of prohibited methods of warfare” (Article 1, paragraph 11) and “War crimes consisting in employment of prohibited means of warfare” (Article 1, paragraph 12).⁵⁰⁴ Some of these crimes must be punished when committed “in connection with an international armed conflict or with an armed conflict not of an international character”, some others when committed “in connection with an international armed conflict”.⁵⁰⁵ It further provides that “the prosecution of serious criminal offences pursuant to this Act [*inter alia*, genocide, crimes against humanity and war crimes] and the execution of sentences imposed on their account shall not be subject to any statute of limitations”.⁵⁰⁶

435. Guatemala’s Penal Code provides for the punishment of certain war crimes, namely those committed against prisoners of war, the civilian population and certain objects.⁵⁰⁷

436. Guinea’s Criminal Code provides for the punishment of certain acts constitutive of violations of IHL, such as pillage, the despoliation of the dead, wounded, sick and shipwrecked in a zone of military operations and the use, in an area of military operations and in violation of the laws and customs of war, of distinctive insignia or emblems defined under international conventions.⁵⁰⁸

437. Hungary’s Criminal Code as amended, under the title “Crimes against humanity”, provides for the punishment of a list of certain acts including genocide and war crimes, such as “Violence against the civilian population” (Article 158), “War-time looting” (Article 159), “Wanton warfare” (Article 160), “Use of weapons prohibited by international treaty” (Article 160/A), “Battlefield looting” (Article 161), “Violence against a war emissary” (Article 163) and “Misuse

⁵⁰² Georgia, *Criminal Code* (1999), Articles 411–412.

⁵⁰³ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, § 1.

⁵⁰⁴ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, §§ 6–12.

⁵⁰⁵ Germany, *Law Introducing the International Crimes Code* (2002), Article 1, §§ 8(1)–(2), 9(1), 10(1)–(2), 11(1)–(2) and 12 (international and non-international armed conflict); Article 1, §§ 8(3), 9(2) and 11(3) (international armed conflict).

⁵⁰⁶ Germany, *Law introducing the International Crimes Code* (2002), Article 1, § 5.

⁵⁰⁷ Guatemala, *Penal Code* (1973), Article 378.

⁵⁰⁸ Guinea, *Criminal Code* (1998), Articles 569, 570 and 579.

of the red cross" (Article 164), some of them when committed "in an operational or occupied area" or "violating the rules of the international law of warfare".⁵⁰⁹

438. India's Geneva Conventions Act provides that:

If any person within or without India commits or attempts to commit, or abets or procures the commission by any other person of a grave breach of any of the Conventions [i.e. the 1949 Geneva Conventions] he shall be punished . . .

When an offence under this chapter [i.e. a grave breach of the 1949 Geneva Conventions] is committed by any person outside India, he may be dealt with in respect of such offence as if it had been committed at any place within India at which he may be found.⁵¹⁰

439. Ireland's Geneva Conventions Act as amended provides that:

Any person, whatever his or her nationality, who, whether in or outside the State, commits or aids, abets or procures the commission by any other person of a grave breach of any of the [Geneva] Conventions or [AP I] shall be guilty of an offence and on conviction on indictment [be liable to punishment].⁵¹¹

It also provides for the punishment of "minor breaches" of the Geneva Conventions and Additional Protocols in the following terms:

Any person, whatever his nationality, who, in the State, commits, or aids, or abets or procures the commission in the State by any other person of any other minor breach of any of the [Geneva] Conventions or of Protocol I or Protocol II shall be guilty of an offence.

...

Any person, whatever his nationality, who, outside the State, commits, or aids, or abets or procures the commission outside the State by any other person of any other minor breach of any of the [Geneva] Conventions or of [AP I] or [AP II] shall be guilty of an offence.

Any person who is guilty of an offence under this section shall be liable [to punishment].⁵¹²

440. Israel's Nazis and Nazi Collaborators (Punishment) Law provides for the punishment of:

a person who has committed one of the following offences –

- (1) done, during the period of the Nazi régime, in an enemy country, an act constituting a crime against the Jewish people;
- (2) done, during the period of the Nazi régime, in an enemy country, an act constituting a crime against humanity;
- (3) done, during the period of the Second World War, in an enemy country, an act constituting a war crime.⁵¹³

⁵⁰⁹ Hungary, *Criminal Code as amended* (1978), Sections 155–165.

⁵¹⁰ India, *Geneva Conventions Act* (1960), Sections 3 and 4.

⁵¹¹ Ireland, *Geneva Conventions Act as amended* (1962), Section 3.

⁵¹² Ireland, *Geneva Conventions Act as amended* (1962), Section 4.

⁵¹³ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 1(a).

441. Italy's Wartime Military Penal Code provides for the punishment of various offences related to wartime activity.⁵¹⁴

442. Jordan's Draft Military Criminal Code, in a part entitled "War crimes", contains a list of offences "committed in time of armed conflicts" with respect to which it provides for punishment.⁵¹⁵

443. Kazakhstan's Penal Code, in a special part entitled "Crimes against the peace and security of mankind", provides a list of punishable acts such as: "the use of prohibited means and methods of warfare" in an armed conflict (Article 159); "genocide" (Article 160); "ecocide" (Article 161); "mercenaries" (Article 162); and "attacks against persons or organisations beneficiaries of an international protection" (Article 163).⁵¹⁶

444. Kenya's Geneva Conventions Act provides that:

Any person, whatever his nationality, who, whether within or outside Kenya commits, or aids, abets or procures the commission by any other person of any grave breach of any of the Conventions such as is referred to in the following Articles [i.e. Article 50 GC I, Article 51 GC II, Article 130 GC III and Article 147 GC IV] is guilty of an offence and [shall be sentenced].

Where an offence under this section is committed outside Kenya, a person may be proceeded against, indicted, tried and punished therefor in any place in Kenya, as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.⁵¹⁷

445. Kyrgyzstan's Criminal Code provides for the punishment of acts such as: "intentional destruction of historical and cultural monuments" (Article 172); "capture of hostages" (Article 224); "ecocide" (Article 374); the participation of mercenaries "in an armed conflict or in hostilities" (Article 375); and "attacks against persons or institutions under international protection" (Article 376).⁵¹⁸

446. Latvia's Criminal Code contains a chapter entitled "Crimes against humanity and peace, war crimes and genocide" in which it provides for certain punishable offences such as "genocide" (Section 71), "war crimes" (Section 74), "pillage" (Section 76) and "destruction of cultural and national heritage" (Section 79).⁵¹⁹

447. The Draft Amendments to the Code of Military Justice of Lebanon provide for the punishment of persons committing acts listed under a new article on war crimes. They also provide that "the crimes provided for in this law are not subject to statutes of limitation". Furthermore, they state that "the Lebanese tribunals have jurisdiction for the war crimes provided for in this

⁵¹⁴ Italy, *Wartime Military Penal Code* (1941), Articles 167–230.

⁵¹⁵ Jordan, *Draft Military Criminal Code* (2000), Article 41.

⁵¹⁶ Kazakhstan, *Penal Code* (1997), Articles 156–164.

⁵¹⁷ Kenya, *Geneva Conventions Act* (1968), Section 3(1) and (2).

⁵¹⁸ Kyrgyzstan, *Criminal Code* (1997), Articles 172, 224 and 374–376.

⁵¹⁹ Latvia, *Criminal Code* (1998), Sections 71–79.

law, regardless of the nationality of the author and the place where they have been committed".⁵²⁰

448. Lithuania's Criminal Code as amended, in a chapter entitled "War crimes", contains a list of punishable offences. Some of these offences are to be punished when committed in "violation of humanitarian law in time of war, during an international armed conflict or occupation". Some others are to be punished when committed "in time of war, during an armed conflict or occupation".⁵²¹

449. Luxembourg's Law on the Repression of War Crimes provides for the prosecution and sentencing of non-Luxembourg nationals having committed war crimes

if such infringements have been committed at the occasion or under the pretext of war and if they are not justified by the laws and customs of war, these agents either being found within the Grand-Duché or on enemy territory, or the Government having obtained their extradition.⁵²²

450. Luxembourg's Law on the Punishment of Grave Breaches provides for the prosecution and punishment of persons having committed or being involved in the commission of grave breaches of the 1949 Geneva Conventions.⁵²³ It also provides that "any individual who has committed an offence under this law outside the territory of the Grand-Duché can be prosecuted in the Grand-Duché even though he may not be present there".⁵²⁴

451. Malawi's Geneva Conventions Act provides that:

Any person, whatever his nationality, who, whether within or without Malawi commits or aids, abets or procures the commission by another person of any such grave breach of any of the Conventions as is referred to in [Article 50 GC I, Article 51 GC II, Article 130 GC III and Article 147 GC IV] shall without prejudice to his liability under any other written law be guilty of an offence and [be liable to imprisonment].

Where an offence under this section is committed without Malawi a person may be proceeded against, tried and punished therefor in any place in Malawi as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.⁵²⁵

452. Malaysia's Geneva Conventions Act provides that:

Any person, whatever his citizenship or nationality, who, whether in or outside the Federation, commits, or aids, abets or procures the commission by another person of any such grave breach of [Article 50 GC I, Article 51 GC II, Article 130 GC III

⁵²⁰ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 146 and 149–150.

⁵²¹ Lithuania, *Criminal Code as amended* (1961), Articles 333–344.

⁵²² Luxembourg, *Law on the Repression of War Crimes* (1947), Article 1.

⁵²³ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Articles 1–8.

⁵²⁴ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 10.

⁵²⁵ Malawi, *Geneva Conventions Act* (1967), Section 4(1) and (2).

and Article 147 GC IV], shall be guilty of an offence and on conviction thereof [be punished].

In the case of an offence under this section committed outside the Federation, a person may be proceeded against, charged, tried and punished therefor in any place in the Federation as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.⁵²⁶

453. Mali's Penal Code provides for the punishment of the perpetrators of certain crimes such as "crimes against humanity" (Article 29), "genocide" (Article 30) and a list of "war crimes" covering the grave breaches of the 1949 Geneva Conventions and other serious violations of the laws and customs applicable in international armed conflict (Article 31).⁵²⁷

454. The Geneva Conventions Act of Mauritius provides that:

Any person who in Mauritius or elsewhere commits, or is an accomplice in the commission by another person of, a grave breach of any of the [Geneva] Conventions shall commit an offence . . .

This section applies to persons regardless of their nationality or citizenship.

Any person who commits an offence against this section shall, on conviction, be liable [to punishment].⁵²⁸

455. Mexico's Penal Code as amended, under the heading "Offences against the duties of humanity", provides for the punishment of a number of offences committed against certain protected persons and objects.⁵²⁹

456. Mexico's Code of Military Justice, under the headings "Crimes against the laws of nations" and "Crimes committed in the exercise of military duties or with relation to them" provides for the punishment of perpetrators of a number of offences related to war operations.⁵³⁰

457. Moldova's Penal Code provides sanctions for perpetrators of certain acts such as "genocide" (Article 135), "ecocide" (Article 136), "inhuman treatments" (Article 137), "violations of international humanitarian law" committed "during an armed conflict or hostilities" (Article 138), "mercenary activity . . . in an armed conflict or military hostilities" (Article 141), "use of prohibited means and methods of warfare . . . during an armed conflict" (Article 143), "unlawful use of the red cross signs" (Article 363), "pillage of the dead on the battlefield" (Article 389), "acts of violence against the civilian population in the area of military hostilities" (Article 390), "grave breaches of international humanitarian law . . . committed during international and internal armed conflicts" (Article 391) and "perfidious use of the red cross emblem as a protective sign during armed conflict" (Article 392).⁵³¹

⁵²⁶ Malaysia, *Geneva Conventions Act* (1962), Section 3(1) and (2).

⁵²⁷ Mali, *Penal Code* (2001), Articles 29–31.

⁵²⁸ Mauritius, *Geneva Conventions Act* (1970), Section 3(1), (3) and (4).

⁵²⁹ Mexico, *Penal Code as amended* (1931), Article 149.

⁵³⁰ Mexico, *Code of Military Justice as amended* (1933), Articles 208–215 and 324–337.

⁵³¹ Moldova, *Penal Code* (2002), Articles 135–138, 141, 143, 363 and 389–392.

458. Mozambique's Military Criminal Law provides for the punishment of persons committing crimes listed thereunder, some of them being committed "in an armed confrontation [and in violation of] generally accepted international rules" or "in times of war" and/or "in the theatre of operations".⁵³²

459. The aim of the Criminal Law in Wartime Act as amended of the Netherlands is "to establish provisions concerning offences committed in the event of war and their prosecution".⁵³³ The term "war" is considered to include civil war.⁵³⁴ According to the Act, "the special courts may . . . take cognisance of crimes defined in the International Crimes Act [genocide, crimes against humanity, war crimes and torture]".⁵³⁵

460. The International Crimes Act of the Netherlands provides for the punishment of genocide (Article 3), crimes against humanity (Article 4), war crimes committed in international armed conflicts (Article 5) or non-international armed conflicts (Article 6), and torture (Article 8). The Act also punishes "anyone who, in the case of an international or non-international armed conflict, commits a violation of the laws and customs of war other than as referred to in Articles 5 and 6".⁵³⁶

461. New Zealand's Geneva Conventions Act as amended provides that:

Any person who in New Zealand or elsewhere commits, or aids or abets or procures the commission by another person of, a grave breach of any of the [Geneva] Conventions or of the First Protocol is guilty of an indictable offence.

...

This section applies to persons regardless of their nationality or citizenship.⁵³⁷

462. New Zealand's International Crimes and ICC Act provides that "every person is liable on conviction on indictment to the penalty specified in subsection (3) who, in New Zealand or elsewhere, commits a war crime". The Act includes similar provisions with respect to genocide and crimes against humanity. War crimes, genocide and crimes against humanity are defined as the acts specified in the 1998 ICC Statute.⁵³⁸

463. Nicaragua's Military Penal Law provides for the punishment of persons who commit "mistreatment of prisoners of war (Article 80), "looting" (Article 81), "abuses at the occasion of military activities" (Article 82) and "unlawful use of the symbols of the Red Cross" (Article 83).⁵³⁹

464. Nicaragua's Military Penal Code, under the headings "Crimes against international humanitarian law" and "Specific crimes against the laws and customs of war", provides for the punishment of certain offences, for some of

⁵³² Mozambique, *Military Criminal Law* (1987), Articles 83–89.

⁵³³ Netherlands, *Criminal Law in Wartime Act as amended* (1952), preamble.

⁵³⁴ Netherlands, *Criminal Law in Wartime Act as amended* (1952), Article 1, § 3.

⁵³⁵ Netherlands, *Criminal Law in Wartime Act as amended* (1952), Article 12, § 3.

⁵³⁶ Netherlands, *International Crimes Act* (2003), Articles 3–8.

⁵³⁷ New Zealand, *Geneva Conventions Act as amended* (1958), Section 3(1) and (3).

⁵³⁸ New Zealand, *International Crimes and ICC Act* (2000), Sections 9–11.

⁵³⁹ Nicaragua, *Military Penal Law* (1980), Articles 80–83.

them specifying that they be committed “during an international or civil war” and/or “in times of war”.⁵⁴⁰

465. Nicaragua’s Revised Penal Code provides for the punishment of “anyone who, during an international or a civil war, commits serious violations of the international conventions relating to the use of prohibited weapons, the treatment of prisoners and other norms related to war”.⁵⁴¹

466. Nicaragua’s Draft Penal Code, in a part entitled “Crimes against the international order”, provides for the punishment of a list of offences, stating in the case of most of them that they be committed “at the occasion”, “in times of” and/or “during an international or internal armed conflict”.⁵⁴²

467. Niger’s Penal Code as amended, under a chapter entitled “Crimes against humanity and war crimes”, provides for the punishment of a list of offences such as genocide, crimes against humanity, and war crimes defined as serious offences against the persons and objects protected under the 1949 Geneva Conventions, AP I and AP II.⁵⁴³

468. Nigeria’s Geneva Conventions Act provides that:

If, whether in or outside the Federation, any person, whatever his nationality, commits, or aids, abets or procures any other person to commit any such grave breach of any of the [Geneva Conventions] . . . he shall, on conviction thereof [be punished].

A person may be proceeded against, tried and sentenced in the Federal territory of Lagos for an offence under this section committed outside the Federation as if the offence had been committed in Lagos, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in Lagos.⁵⁴⁴

469. Norway’s Military Penal Code as amended provides for the punishment of “anyone who uses a weapon or means of combat which is prohibited by any international agreement to which Norway has acceded, or who is accessory thereto” and of “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property” laid down in the 1949 Geneva Conventions or AP I or AP II.⁵⁴⁵

470. Papua New Guinea’s Geneva Conventions Act provides that:

A person who, in Papua New Guinea or elsewhere, commits a grave breach of any of the Geneva Conventions is guilty of an offence.

This section applies to persons regardless of their nationality or citizenship.⁵⁴⁶

471. Paraguay’s Military Penal Code, under the heading “Provisions with regard to times of war”, provides for the punishment of a list of offences.⁵⁴⁷

⁵⁴⁰ Nicaragua, *Military Penal Code* (1996), Articles 47–61.

⁵⁴¹ Nicaragua, *Revised Penal Code* (1997), Article 551.

⁵⁴² Nicaragua, *Draft Penal Code* (1999), Articles 444–472.

⁵⁴³ Niger, *Penal Code as amended* (1961), Articles 208.1–208.8.

⁵⁴⁴ Nigeria, *Geneva Conventions Act* (1960), Section 3(1) and (2).

⁵⁴⁵ Norway, *Military Penal Code as amended* (1902), §§ 107–108.

⁵⁴⁶ Papua New Guinea, *Geneva Conventions Act* (1976), Section 7(2) and (3).

⁵⁴⁷ Paraguay, *Military Penal Code* (1980), Articles 282–296.

472. Paraguay's Penal Code provides for the punishment of offences such as "torture" (Article 309), "genocide" (Article 319) and a list of "war crimes" (Article 320), stating in the case of "war crimes" that they be committed "in violation of international laws of war, armed conflict or military occupation".⁵⁴⁸

473. Peru's Code of Military Justice, in a part entitled "Violations of the law of nations", provides for the punishment of a list of offences, some of them when committed "in times of war".⁵⁴⁹

474. The War Crimes Trial Executive Order of the Philippines provides for a list of punishable offences including "violations of the laws and customs of war" and other specified acts committed "before or during the war . . . whether or not in violation of the local laws".⁵⁵⁰

475. Poland's Penal Code, in a specific part entitled "Offences against peace, humanity and war offences", provides for the punishment of certain acts, some of them when committed "during hostilities" or "in violation of international law", such as internationally prohibited acts against certain specific protected persons – including persons "who, during hostilities, enjoy international protection" – and objects, as well as the use of means or methods of combat prohibited by international law.⁵⁵¹

476. Portugal's Penal Code, under the headings "War crimes against civilians" and "Destruction of monuments", provides for the punishment of certain offences when committed "in times of war, of armed conflict or occupation".⁵⁵²

477. Romania's Law on the Punishment of War Criminals provides for the punishment of precisely defined "criminals of war".⁵⁵³

478. Romania's Penal Code, in provisions entitled "[Unlawful] use of the emblem of the Red Cross" (Article 294), "Use of the emblem of the Red Cross during military operations" (Article 351), "Inhuman treatment" (Article 358) and "Destruction of objects and appropriation of property" (Article 359), provides for the punishment of offences listed thereunder, stating for some of those offences that they be committed "in times of war and in relation with military operations" or "in times of war".⁵⁵⁴

479. Russia's Decree on the Punishment of War Criminals states that:

The peoples of the Soviet Union that suffered losses during the war cannot let fascist barbarians go unpunished. The Soviet State has always proceeded from the universally recognised rules of international law that provide for the inevitable prosecution of Nazi criminals, no matter where and for how long they have been hiding from justice.⁵⁵⁵

⁵⁴⁸ Paraguay, *Penal Code* (1997), Articles 309 and 319–320.

⁵⁴⁹ Peru, *Code of Military Justice* (1980), Articles 91–96.

⁵⁵⁰ Philippines, *War Crimes Trial Executive Order* (1947), § II(b)(2) and (3).

⁵⁵¹ Poland, *Penal Code* (1997), Articles 117–126.

⁵⁵² Portugal, *Penal Code* (1996), Articles 241–242.

⁵⁵³ Romania, *Law on the Punishment of War Criminals* (1945), Articles I and III.

⁵⁵⁴ Romania, *Penal Code* (1968), Articles 294, 351 and 358–359.

⁵⁵⁵ Russia, *Decree on the Punishment of War Criminals* (1965), preamble.

It also provides that “Nazi criminals, guilty of most serious crimes against peace and humanity and war crimes, are subject to prosecution and punishment”.⁵⁵⁶

480. Russia’s Criminal Code, in a chapter entitled “Crimes against the peace and security of mankind” and under a provision entitled “Use of banned means and methods of warfare”, provides for the punishment of “cruel treatment of prisoners of war, deportation of the civilian population, plunder of the national property in the occupied territory and use in a military conflict of means and methods of warfare banned by [international treaties to which Russia is a party]”.⁵⁵⁷ The Code further provides for the punishment of offences such as genocide, ecocide, use of, and participation by, mercenaries in an armed conflict or hostilities and assaults on persons or institutions enjoying international protection.⁵⁵⁸

481. Rwanda’s Law Setting up Gacaca Jurisdictions aims:

to organize the putting on trial of persons prosecuted for having, between 1 October 1990 and 31 December 1994, committed acts qualified and punished by the Penal Code and which constitute:

- a) ... crimes of genocide or crimes against humanity as defined by the [1948 Genocide Convention], by the [1949 GC IV and the 1977 Additional Protocols], as well as in the [1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity].⁵⁵⁹

482. The Geneva Conventions Act of the Seychelles provides that:

Any person, whatever his nationality, who, whether in or outside Seychelles, commits, or aids, abets or procures the commission by another person of, any such grave breach of any of the [Geneva] Conventions ... is guilty of an offence and ... shall on conviction [be punished].

Where an offence under this section is committed outside Seychelles, a person may be proceeded against, charged, tried and punished therefor in any place in Seychelles, as if the offence had been committed in that place, and the offence is, for all purposes incidental to or consequential on the trial or punishment thereof, deemed to have been committed in that place.⁵⁶⁰

483. Singapore’s Geneva Conventions Act provides that:

Any person, whatever his citizenship or nationality, who, whether in or outside Singapore, commits, aids, abets or procures the commission by any other person of any such grave breach of any [of the Geneva Conventions] shall be guilty of an offence under this Act and on conviction thereof ... [be punished].

In the case of an offence under this section committed outside Singapore, a person may be proceeded against, charged, tried and punished therefor in any place in Singapore as if the offence had been committed in that place, and the offence shall,

⁵⁵⁶ Russia, *Decree on the Punishment of War Criminals* (1965).

⁵⁵⁷ Russia, *Criminal Code* (1996), Article 356.

⁵⁵⁸ Russia, *Criminal Code* (1996), Articles 357–360.

⁵⁵⁹ Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 1.

⁵⁶⁰ Seychelles, *Geneva Conventions Act* (1985), Section 3(1) and (2).

for the purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.⁵⁶¹

484. Slovakia's Criminal Code as amended, under the heading "Crimes against humanity", provides for the punishment of certain offences such as: "genocide" (Article 259); "torture and other inhuman and cruel treatment" (Article 259a); "use of a forbidden weapon or an unpermitted form of combat" (Article 262); "wartime cruelty" (Article 263); "persecution of a population" (Article 263a); "plunder in a theatre of war" (Article 264); and "misuse of internationally recognised insignia and state insignia" (Article 265).⁵⁶²

485. Slovenia's Penal Code, in a chapter entitled "Criminal offences against humanity and international law", criminalises certain acts, committed by "whoever" and some of them "during war, armed conflict (or occupation)", such as: "war crimes against the civilian population" (Article 374); "war crimes against the wounded and sick" (Article 375); "war crimes against prisoners of war" (Article 376); "use of unlawful weapons" (Article 377); "unlawful killing and wounding of the enemy" (Article 379); "unlawful plundering on the battlefield" (Article 380); "infringement of the rights of parlementaires" (Article 381); "maltreatment of the sick and wounded, and of prisoners of war" (Article 382); "unjustified delay in the repatriation of prisoners of war" (Article 383); "destruction of cultural and historical monuments and natural sites" (Article 384); and "abuse of international symbols" (Article 386).⁵⁶³

486. Under Spain's Law on Judicial Power, Spanish criminal courts have jurisdiction over offences committed by Spanish nationals and aliens, on Spanish territory or outside it, which constitute genocide or any other offence that, according to international treaties or conventions, must be prosecuted in Spain.⁵⁶⁴

487. Spain's Military Criminal Code contains a part on "Crimes against the laws and customs of war" and provides for the punishment of soldiers committing acts listed thereunder.⁵⁶⁵

488. Spain's Penal Code, in chapters entitled "Genocide" and "Offences against protected persons and objects in the event of armed conflict", criminalises offences listed thereunder. Protected persons in the meaning of the chapter on "Offences against protected persons and objects in the event of armed conflict" are those protected by the 1949 Geneva Conventions and both Additional Protocols, as well as those falling within the scope of "whatever other international treaty to which Spain is a party". The chapter contains several provisions regarding the punishment of certain acts "committed in the event of an armed conflict".⁵⁶⁶

⁵⁶¹ Singapore, *Geneva Conventions Act* (1973), Section 3(1) and (2).

⁵⁶² Slovakia, *Criminal Code as amended* (1961), Articles 259–259(a) and 262–265.

⁵⁶³ Slovenia, *Penal Code* (1994), Articles 374–386.

⁵⁶⁴ Spain, *Law on Judicial Power* (1985), Article 23(4).

⁵⁶⁵ Spain, *Military Criminal Code* (1985), Articles 69–78.

⁵⁶⁶ Spain, *Penal Code* (1995), Articles 607–614.

489. Sri Lanka's Draft Geneva Conventions Act provides that:

A person, whatever his nationality, who, in Sri Lanka or elsewhere, commits or aids, abets or procures any person to commit

- (a) a grave breach of any of the [Geneva] Conventions; or
- (b) a breach of common Article 3 of the [Geneva] Conventions

is guilty of an indictable offence.⁵⁶⁷

It further provides that such a person "is liable to [punishment]".⁵⁶⁸

490. Sweden's Penal Code as amended provides for the punishment of "a person guilty of a serious violation of a treaty or agreement with a foreign power or an infraction of a generally recognised principle or tenet relating to international humanitarian law concerning armed conflicts".⁵⁶⁹

491. Switzerland's Military Criminal Code as amended states that the provisions of its chapter dealing with "Offences committed against the law of nations in case of armed conflict" are "applicable in case of declared war and other armed conflicts between two or more States", and also provide for "the punishment of violations of international agreements if these agreements provide for a wider scope of application" (Article 108). The Code provides for the punishment of offences listed under this chapter, and especially – among other more specific offences – of "anyone who contravenes the prescriptions of international conventions relating to the conduct of hostilities, as well as to the protection of persons and objects, [and] anyone who violates other recognised laws and customs of war".⁵⁷⁰ Other offences, such as pillage committed in time of war or marauding on the battlefield are also to be punished.⁵⁷¹

492. Tajikistan's Criminal Code provides for the punishment of: "illegal use of emblems and signs of the Red Cross and Red Crescent" (Article 333); "genocide" (Article 398); "biocide" (Article 399); "ecocide" (Article 400); "mercenarism" (Article 401); "attacks against persons and establishments under international protection" (Article 402); "wilful breaches of norms of international humanitarian law committed in [an international or internal] armed conflict" (Article 403); "wilful breaches of norms of international humanitarian law committed in international or internal armed conflict with the threat to health or causing bodily injury" (Article 404); and "other breaches of the norms of international humanitarian law" (Article 405).⁵⁷²

493. Thailand's Prisoners of War Act provides for the punishment of persons committing offences listed under the heading "Offences with respect to prisoners of war" and offences specified under the heading "Offences in the case of armed conflict not of an international character".⁵⁷³

⁵⁶⁷ Sri Lanka, *Draft Geneva Conventions Act* (2002), Article 3(1).

⁵⁶⁸ Sri Lanka, *Draft Geneva Conventions Act* (2002), Article 4(1).

⁵⁶⁹ Sweden, *Penal Code as amended* (1962), Chapter 22, § 6.

⁵⁷⁰ Switzerland, *Military Criminal Code as amended* (1927), Articles 108–114.

⁵⁷¹ Switzerland, *Military Criminal Code as amended* (1927), Articles 139–140.

⁵⁷² Tajikistan, *Criminal Code* (1998), Articles 333 and 398–405.

⁵⁷³ Thailand, *Prisoners of War Act* (1955), Sections 12–19.

494. Trinidad and Tobago's Draft ICC Act states that:

Any person who commits any of the crimes specified in Articles 6 [of the ICC Statute – genocide], 7 [of the ICC Statute – crimes against humanity] and 8 [of the ICC Statute – war crimes] outside Trinidad and Tobago, may be prosecuted and punished for that crime in Trinidad and Tobago as if the crime had been committed in Trinidad and Tobago.⁵⁷⁴

495. Uganda's Geneva Conventions Act provides that:

Any person, whatever his nationality, who, whether within or without Uganda commits or aids, abets or procures the commission by any other person of any grave breach of any of the [Geneva] Conventions . . . commits an offence and on conviction thereof [shall be punished].

Where an offence under this section is committed without Uganda a person may be proceeded against, indicted, tried and punished therefor in any place in Uganda as if the offence had been committed in that place, and the offence shall, for all purposes incidental or consequential on the trial or punishment thereof, be deemed to have been committed in that place.⁵⁷⁵

496. Ukraine's Criminal Code provides for a list of punishable offences such as, *inter alia*: "looting" (Article 432); "violence against the civilian population in areas of war operations" (Article 433); "bad treatment of prisoners of war" (Article 434); "unlawful use or misuse of the Red Cross and Red Crescent symbols" (Article 435); "violations of the laws and customs of war", notably those provided for in international instruments to which Ukraine is a party (Article 438); "use of weapons of mass destruction" (Article 439); "ecocide" (Article 441); "genocide" (Article 442); "illegal use of the symbols of the red cross and red crescent" (Article 445); and "mercenarism" (Article 447).⁵⁷⁶

497. The UK Geneva Conventions Act as amended provides that:

Any person, whatever his nationality, who, whether in or outside the United Kingdom, commits, or aids, abets or procures the commission by any other person of a grave breach of any of the [Geneva] conventions or the first protocol shall be guilty of an offence and on conviction on indictment [shall be punished].

In the case of an offence under this section committed outside the United Kingdom, a person may be proceeded against, indicted, tried and punished therefor in any place in the United Kingdom as if the offence had been committed in that place, and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.⁵⁷⁷

498. The UK War Crimes Act grants the UK courts jurisdiction over war crimes committed in Germany or German-occupied territory during the Second World War by persons who are now UK citizens or residents, irrespective of their nationality at the time of the alleged offence. The act only applies to crimes such as murder and manslaughter, which "constituted a violation of the laws

⁵⁷⁴ Trinidad and Tobago, *Draft ICC Act* (1999), Part II, Section 5(2).

⁵⁷⁵ Uganda, *Geneva Conventions Act* (1964), Section 1(1) and (2).

⁵⁷⁶ Ukraine, *Criminal Code* (2001), Articles 432–447.

⁵⁷⁷ UK, *Geneva Conventions Act as amended* (1957), Section 1(1) and (2).

and customs of war", and were considered war crimes during the Second World War.⁵⁷⁸

499. The UK UN Personnel Act provides that:

If a person commits, outside the United Kingdom, any act to or in relation to a UN worker which, if he had done it in any part of the United Kingdom, would have made him guilty of [murder, manslaughter, culpable homicide, rape, assault causing injury, kidnapping, abduction or false imprisonment], he shall in that part of the United Kingdom be guilty of that offence.⁵⁷⁹

This Act does not apply to any UN operation "which is authorised by the Security Council of the United Nations as an enforcement action under Chapter VII of the Charter of the United Nations, . . . in which UN workers are engaged as combatants against organised armed forces, and . . . to which the law of international armed conflict applies".⁵⁸⁰

500. The UK ICC Act includes as offences under domestic law, the acts of genocide, crimes against humanity and war crimes as defined in the 1998 ICC Statute.⁵⁸¹ Thus, it provides that "it is an offence against the law of England and Wales for a person to commit genocide, a crime against humanity or a war crime".⁵⁸² There is a similar provision for Northern Ireland.⁵⁸³

501. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region I established provisions for the punishment of the perpetrators of a list of specific offences and also of "all other offences against the laws or customs of war", to be pronounced by the military commissions.⁵⁸⁴

502. The US Regulations Governing the Trials of Accused War Criminals in the Pacific Region II established provisions for the punishment of the perpetrators of a list of "violations of the laws and customs of war" and other more specific acts committed "against any civilian population before or during the war", to be pronounced by the military commissions.⁵⁸⁵

503. The US War Crimes Act as amended provides that:

- (a) Offence. – Whoever, whether inside or outside the United States, commits a war crime, in any of the circumstances described in subsection (b), shall be [punishable].
- (b) Circumstances. – The circumstances referred to in subsection (a) are that the person committing such war crime or the victim of such war crime is a member of the Armed Forces of the United States or a national of the United States (as defined in section 101 of the Immigration and Nationality Act).

⁵⁷⁸ UK, *War Crimes Act* (1991), Section 1; see also annexed Report of the War Crimes Inquiry, which preceded the 1991 Act, and related documents.

⁵⁷⁹ UK, *UN Personnel Act* (1997), Section 1.

⁵⁸⁰ UK, *UN Personnel Act* (1997), Section 4(3).

⁵⁸¹ UK, *ICC Act* (2001), Part 5, Section 50.

⁵⁸² UK, *ICC Act* (2001), Part 5, Section 51. ⁵⁸³ UK, *ICC Act* (2001), Part 5, Section 58.

⁵⁸⁴ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region I* (1945), Regulation 5.

⁵⁸⁵ US, *Regulations Governing the Trials of Accused War Criminals in the Pacific Region II* (1945), Regulation 2(b) and (c).

- (c) Definition. – As used in this section the term “war crime” means any conduct –
- (1) defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party;
 - (2) prohibited by Article 23, 25, 27, or 28 of the Annex to the Hague Convention IV, Respecting the Laws and Customs of War on Land, signed 18 October 1907;
 - (3) which constitutes a violation of common Article 3 of the international conventions signed at Geneva, 12 August 1949, or any protocol to such convention to which the United States is a party and which deals with non-international armed conflict; or
 - (4) of a person who, in relation to an armed conflict and contrary to the provisions of the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended at Geneva on 3 May 1996 (Protocol II as amended on 3 May 1996), when the United States is a party to such Protocol, willfully kills or causes serious injury to civilians.⁵⁸⁶

504. Uruguay’s Military Penal Code as amended, under the heading “Crimes which affect the moral strength of the army and of the naval forces”, lists a number of acts, such as the violation of the rule of humane treatment of POWs, looting, attacks against certain specific objects, for which it provides punishment.⁵⁸⁷

505. Uzbekistan’s Criminal Code, in a chapter entitled “Crimes against the peace and security of mankind”, criminalises “violations of laws and customs of war” (Article 152), “genocide” (Article 153) and the participation of “mercenaries” in “armed conflict or military actions” (Article 154).⁵⁸⁸

506. Vanuatu’s Geneva Conventions Act provides that:

Any grave breach of any of the Geneva Conventions that would, if committed in Vanuatu, be an offence under any provision of the Penal Code Act Cap. 135 or any other law shall be an offence under such provision of the Penal Code or any other law if committed outside Vanuatu.

Where a person has committed an act or omission that is an offence by virtue of [the above], the offence is within the competence of and may be tried and punished by the court having jurisdiction in respect of similar offences in Vanuatu.⁵⁸⁹

507. Venezuela’s Code of Military Justice as amended, under a chapter dealing with “crimes against international law”, provides for the punishment of the offenders of a list of certain war crimes.⁵⁹⁰

508. Venezuela’s Revised Penal Code provides for the punishment of Venezuelan nationals and foreigners who have committed certain acts “during a war

⁵⁸⁶ US, *War Crimes Act as amended* (1996), Section 2441.

⁵⁸⁷ Uruguay, *Military Penal Code as amended* (1943), Article 58.

⁵⁸⁸ Uzbekistan, *Criminal Code* (1994), Articles 152–154.

⁵⁸⁹ Vanuatu, *Geneva Conventions Act* (1982), Sections 4 and 5.

⁵⁹⁰ Venezuela, *Code of Military Justice as amended* (1998), Article 474.

between Venezuela and another nation" or who "violate the conventions or treaties [to which Venezuela is a party] in a way which entails the responsibility of the latter".⁵⁹¹

509. Vietnam's Penal Code provides for the punishment of anyone who commits, *inter alia*, one of the offences listed under the following headings: "Violation of policy concerning soldiers killed or wounded in combat" (Article 271); "Theft or destruction of war booty" (Article 272); "Harassment of civilians" (Article 273); "Exceeding military need in performance of a mission" (Article 274); "Mistreatment of a prisoner of war or of a soldier who has surrendered" (Article 275); "Crimes against humanity" committed in time of peace or in time of war (Article 278); "War crimes", such as "acts seriously breaching international norms contained in the treaties to which Vietnam is a party" (Article 279); and "Recruitment of mercenaries and service as a mercenary" (Article 280).⁵⁹²

510. Yemen's Military Criminal Code provides for the punishment of a list of offences such as war crimes committed in a "zone of military operations" (Article 20) or "during a war [and] against persons and objects protected under the international conventions to which the Republic of Yemen is a party" (Article 21).⁵⁹³

511. The Criminal Offences against the Nation and State Act of the SFRY (FRY) provides for the punishment of "any person who commits a war crime, *i.e.*, who during the war or the enemy occupation acted as an instigator or organiser, or who . . . assisted or otherwise was the direct executor of [one of the acts listed thereunder]".⁵⁹⁴

512. The Penal Code as amended of the SFRY (FRY), in a chapter entitled "Criminal acts against humanity and international law", provides for a list of punishable acts committed by "any person" and some of them "during war, armed conflict (or occupation)", such as: "war crimes against civilians" (Article 142); "war crimes against the wounded and the ill" (Article 143); "war crimes against prisoners of war" (Article 144); "unlawful killing and wounding of the enemy" (Article 146); "unlawful seizure of belongings from the killed and wounded in a theatre of war" (Article 147); "use of prohibited means of combat" (Article 148); "harming a parlementaires" (Article 149); "cruel treatment of the wounded, the ill and prisoners of war" (Article 150); "unjustified delay in the repatriation of prisoners of war" (Article 150-a); "destruction of cultural and historic monuments" (Article 151); and "misuse of international emblems" (Article 153).⁵⁹⁵ A commentary on these Code's provisions emphasises that these crimes can be committed in time of war, armed conflict (or

⁵⁹¹ Venezuela, *Revised Penal Code* (2000), Article 156.

⁵⁹² Vietnam, *Penal Code* (1990), Articles 271–280.

⁵⁹³ Yemen, *Military Criminal Code* (1998), Articles 5 and 20–23.

⁵⁹⁴ SFRY (FRY), *Criminal Offences against the Nation and State Act* (1945), Article 3(3).

⁵⁹⁵ SFRY (FRY), *Penal Code as amended* (1976), Articles 142–153.

occupation).⁵⁹⁶ The Report on the Practice of the SFRY (FRY) notes that the term “armed conflict” in this context should be interpreted as including internal conflicts.⁵⁹⁷

513. Zimbabwe’s Geneva Conventions Act as amended provides that:

Any person, whatever his nationality, who, whether in or outside Zimbabwe, commits any such grave breach of [the Geneva Conventions or AP I]... shall be guilty of an offence.

A person guilty of an offence in terms of [the above] shall be liable...[to punishment].

Where an offence in terms of this section has been committed outside Zimbabwe, the person concerned may be proceeded against, indicted, tried and punished therefor in any place in Zimbabwe as if the offence had been committed in that place and the offence shall, for all purposes incidental to or consequential on the trial or punishment thereof, be deemed to have been committed in that place.⁵⁹⁸

National Case-law

514. In the *Priebke case* in 1995, Argentina’s Public Prosecutor of First Instance pointed out that owing to the far-reaching implications of war crimes, the international community was obliged to hunt down and punish war criminals.⁵⁹⁹

515. In the *Polyukhovich case* before Australia’s High Court in 1991, in which the accused, charged with crimes committed during the Second World War, challenged the validity of the War Crimes Act to the imputed crimes, the Australian government argued that the War Crimes Act codified the customary law obligation to search for persons suspected of having committed serious war crimes, to bring them to trial and, if found guilty, to punish them.⁶⁰⁰

516. In the *Violations of IHL in Somalia and Rwanda case* in 1997, a Belgian Military Court acquitted two Belgian soldiers accused of having injured and threatened the civilian population whilst performing duties as part of the UNOSOM II peacekeeping operation in Somalia. The Court concluded that the 1949 Geneva Conventions and their Additional Protocols were not applicable to the armed conflict in Somalia and that, therefore, the civilian population could not be granted protection on this basis. The Court also held that common Article 3 of the 1949 Geneva Conventions did not apply to the situation, as the Somali militia did not have an organised military structure, a responsible leadership or exercise authority over a specific part of the territory. Consequently, Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended was also inapplicable. The Court further stated that the members of the UNOSOM II mission could

⁵⁹⁶ SFRY (FRY), *Penal Code as amended* (1976), Commentary to Articles 142–144, 146, 148–151 and 153.

⁵⁹⁷ Report on the Practice of the SFRY (FRY), 1997, Chapter 6.4.

⁵⁹⁸ Zimbabwe, *Geneva Conventions Act as amended* (1981), Section 3(1), (2) and (3).

⁵⁹⁹ Argentina, Court of Bariloche, *Priebke case*, Judgement, 23 August 1995, Point V.3.

⁶⁰⁰ Australia, High Court, *Polyukhovich case*, Judgement, 14 August 1991.

not be considered as “combatants” since their primary task was not to fight against any of the factions, nor could they fall into the category of an “occupying force”.⁶⁰¹

517. In *The Four from Butare case* in 2001, a Belgian court found four Rwandan nationals individually responsible and guilty of war crimes during the 1994 genocide in Rwanda. The four Rwandans were arrested under Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended. They were charged with violations or grave breaches of provisions of the 1949 Geneva Conventions and AP I, as well as with violations of common Article 3 of the 1949 Geneva Conventions and Articles 1, 2 and 4 AP II.⁶⁰² The judgement was confirmed by the Belgian Court of Cassation in 2002.⁶⁰³

518. In the *Brocklebank case* in 1996, Canada’s Court Martial Appeal Court acquitted a Canadian soldier accused of torture and negligent performance of a military duty in respect of acts committed while serving as a member of the peacekeeping mission in Somalia. The Court held that there was no evidence that the soldier had formed the necessary *mens rea* to commit the offences charged. It was further held that no armed conflict existed in Somalia at the relevant time, nor were the Canadian forces to be considered as a party to the conflict, as they were engaged in a peacekeeping mission. As a result, the Court concluded that neither the 1949 Geneva Conventions nor the Canadian Unit Guide to the Geneva Conventions were applicable.⁶⁰⁴

519. In the *Sarić case* in 1994, a Danish court found a Bosnian Croat guilty on numerous charges of war crimes.⁶⁰⁵

520. In the *Javor case* in 1994, in a civil suit filed by Bosnian nationals alleging ill-treatment in a Serb-run detention camp, France’s Tribunal de Grande Instance of Paris found that it had jurisdiction over the claims of war crimes. In its consideration of the charge, the Court focused on the grave breaches provisions of the 1949 Geneva Conventions.⁶⁰⁶ The Court of Appeal reversed this decision and held, *inter alia*, the absence of direct applicability of the 1949 Geneva Conventions.⁶⁰⁷

521. In the *Djajić case* in 1997 involving a national of the former Yugoslavia, Germany’s Supreme Court of Bavaria referred to GC IV and the grave breaches regime. It considered the conflict to be an international conflict (in June 1992)

⁶⁰¹ Belgium, Military Court, *Violations of IHL in Somalia and Rwanda case*, Judgement, 17 December 1997.

⁶⁰² Belgium, Cour d’Assises de Bruxelles, *The Four from Butare case*, Judgement, 7/8 June 2001.

⁶⁰³ Belgium, Court of Cassation, *The Four from Butare case*, Judgement, 9 January 2002.

⁶⁰⁴ Canada, Court Martial Appeal Court, *Brocklebank case*, Judgement, 2 April 1996; see also Court Martial Appeal Court, *Brown case*, Judgement, 6 January 1995, *Boland case*, Judgement, 16 May 1995 and *Seward case*, Judgement, 16 May 1995.

⁶⁰⁵ Denmark, High Court, *Sarić case*, Judgement, 25 November 1994.

⁶⁰⁶ France, Tribunal de Grande Instance of Paris, *Javor case*, Order establishing partial lack of jurisdiction and the admissibility of a civil suit, 6 May 1994.

⁶⁰⁷ France, Court of Appeal of Paris, *Javor case*, Judgement, 24 November 1994.

and regarded the victims as “protected persons” in the meaning of Article 4 GC IV. The accused was found guilty of complicity in 14 counts of murder and 1 count of attempted murder.⁶⁰⁸ The Court based its jurisdiction on Article 6(9) of the German Penal Code which extends the jurisdiction of German courts to acts which are committed abroad and which are prosecuted in Germany on the basis of an international agreement binding on Germany. It also stated that the prosecution of war criminals was “in the interest of the international community as a whole” and not only in the particular interest of Germany. It further noted that “Article 146 [GC IV], in its paragraph 2, obliges each State party to the Convention ‘to search for persons alleged to have committed . . . such grave breaches’. It has to ‘bring such persons, regardless of their nationality, before its own courts’”.⁶⁰⁹

522. In the *Jorgić case* in 1997, Germany’s Higher Regional Court at Düsseldorf, a Bosnian Serb was tried for acts committed in 1992 in Bosnia and Herzegovina which were punishable under the German Penal Code. In its judgment, the Court referred, *inter alia*, to Article 147 GC IV. It based its jurisdiction on Article 6(1) and (9) of the Penal Code, which criminalises genocide and acts the prosecution of which was made compulsory under the terms of an international agreement, and stated that “Geneva Convention IV serves as a basis for penal prosecution”. Moreover, the Court referred to Article 146, second paragraph, GC IV under which, as the Court confirmed, the States party to the Convention “have engaged to bring persons who are alleged to have committed, or to have ordered to be committed, such grave breaches, before their own courts, regardless of their nationality”. The accused was found guilty of complicity in genocide, in conjunction with dangerous bodily harm, deprivation of liberty and murder.⁶¹⁰ In 1999, the Federal Supreme Court upheld the conviction for the most part.⁶¹¹ In its judgement in 2000, the Federal Constitutional Court confirmed that the accused could be tried by German courts and under German penal law. Moreover, it stated that:

A norm of international customary law prohibiting the extension of German competence to legislate in criminal matters . . . was at variance with Art. VI of the [1948] Genocide Convention. With regard to the principle of non-interference recognised in international customary and international treaty law (Art. 2(1) of the United Nations Charter), the Federal Constitutional Court required that jurisdiction over events occurring in the territory of another State and therefore outside German territorial sovereignty be predicated on a meaningful link . . . Whether such a link exists depends on the subject matter. In criminal law, a meaningful link is constituted not only by the principles of territoriality, protection, active and passive personality, and criminal representation, but also by the principle of universal jurisdiction . . . The principle of universal jurisdiction applied to conduct deemed

⁶⁰⁸ Germany, Supreme Court of Bavaria, *Djajić case*, Judgement, 23 May 1997.

⁶⁰⁹ Germany, Supreme Court of Bavaria, *Djajić case*, Judgement, 23 May 1997.

⁶¹⁰ Germany, Higher Regional Court at Düsseldorf, *Jorgić case*, Judgement, 26 September 1997.

⁶¹¹ Germany, Federal Supreme Court, *Jorgić case*, Judgement, 30 April 1999.

to constitute a threat to the protected interests of the international community. It therefore differs from the principle of criminal representation, codified in Article 7(2)(2) of the [German Penal Code], in that the conduct does not need to be punishable by the law of the place where it occurred and no failure to extradite is required.⁶¹²

523. In the *Sokolović case* before Germany's Higher Regional Court at Düsseldorf in 1999, a Bosnian Serb accused of acts committed in 1992 in Bosnia and Herzegovina was sentenced for complicity in genocide, deprivation of liberty and dangerous bodily injury. The Court held that, according to Article 6(9) of the German Penal Code and in connection with the provisions of the Geneva Conventions, German domestic courts had jurisdiction over grave breaches of the Geneva Conventions committed in the course of the conflict in the former Yugoslavia.⁶¹³ In 2001, the Federal Supreme Court upheld this judgement and referred, *inter alia*, to Articles 146 and 147 GC IV and provisions of the German Penal Code. It held that "a duty to prosecute arises from [GC IV] at least when an international armed conflict takes place and when the criminal offences fulfil the requirements of a 'grave breach' in the meaning of Article 147 of this Convention".⁶¹⁴ Referring to the apparent requirement of a specific link to Germany which, according to the judgement in the trial of first instance, had been established in the case and therefore gave it jurisdiction, the Federal Supreme Court moreover noted that not only had the Higher Regional Court at Düsseldorf correctly found such link to be established, but that:

The Senate is nevertheless inclined not to require such additional link, in any case with regard to [Article 6(9) of the German Penal Code]... Indeed, the prosecution and punishment in accordance with German penal law by the Federal Republic of Germany, acting in fulfilment of an internationally binding obligation accepted under agreement between States, of an act committed abroad by a foreigner against foreigners, can hardly be said to be an infringement of the principle of non-interference.⁶¹⁵

However, the Federal Supreme Court stated that in this case it did not fall to it to reach a decision in the matter.⁶¹⁶

524. In the *Kusljić case* in 1999, Germany's Supreme Court of Bavaria tried a Bosnian national for crimes committed during 1992 in the territory of Bosnia and Herzegovina. The accused was sentenced to life imprisonment for, *inter alia*, genocide in conjunction with six counts of murder. The Court found that a specific link to Germany, necessary for the prosecution under German penal law of acts committed abroad by a non-German national and against non-German victims, was established.⁶¹⁷ In 2001, the German Federal Supreme

⁶¹² Germany, Federal Constitutional Court, *Jorgić case*, Decision, 12 December 2000.

⁶¹³ Germany, Higher Regional Court at Düsseldorf, *Sokolović case*, Judgement, 29 November 1999.

⁶¹⁴ Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2001.

⁶¹⁵ Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2001.

⁶¹⁶ Germany, Federal Supreme Court, *Sokolović case*, Judgement, 21 February 2001.

⁶¹⁷ Germany, Supreme Court of Bavaria, *Kusljić case*, Judgement, 15 December 1999.

Court revised this judgement into a life sentence for, *inter alia*, six counts of murder. It considered the acts of the accused to be grave breaches in the meaning of Articles 146 and 147 GC IV. Referring to its judgement of the same day in the *Sokolović case*, the Court ruled that German courts, on the ground of Article 6(9) of the German Penal Code, had jurisdiction over grave breaches in the meaning of Articles 146 and 147 GC IV.⁶¹⁸

525. In the *Eichmann case* in 1961, Israel's District of Court of Jerusalem rejected arguments that the acts of which Eichmann was accused constituted acts of State for which Germany alone was responsible. The Court held that the repudiation of the doctrine of act of State was one of the principles of international law acknowledged by the IMT Charter and Judgement in Nuremberg as well as by the UN General Assembly in Resolution 96(I).⁶¹⁹ The Supreme Court upheld the lower court's decision, holding, *inter alia*, that there was no scope for the application of the doctrine in respect of acts prohibited by the law of nations, and especially with regard to international crimes.⁶²⁰

526. In the *Grabež case* in 1997, a person born in the former Yugoslavia was prosecuted by a Swiss Military Tribunal for violations of the laws and customs of war under the Swiss Military Penal Code as amended on charges of beating and injuring civilian prisoners in the camps of Omarska and Keraterm in Bosnia and Herzegovina. The Tribunal held that it had jurisdiction under Articles 108(2) and 109 of the Military Penal Code as amended over violations of the laws and customs of war, grave breaches of GC III, GC IV and AP I, and violations of AP II, but acquitted the accused for lack of sufficient evidence.⁶²¹

527. In the *Niyonteze case* in 1999, a Swiss Military Tribunal convicted a Rwandan national for, *inter alia*, grave breaches of IHL committed in Rwanda on the basis of common Article 3 of the 1949 Geneva Conventions and AP II.⁶²²

528. In the *Quirin case* in 1942, the US Supreme Court held that "from the very beginning of its history this Court has applied the law of war, including that part of the law of nations which prescribes for the conduct of war, the status, rights and duties of enemy nations as well as enemy individuals". It then went on to give a list of cases in which individual offenders had been charged with offences against the law of nations.⁶²³

529. In the *Altstötter (The Justice Trial) case* in 1947, the US Military Tribunal at Nuremberg rejected arguments by the defendants that international law was concerned with the actions of sovereign States and did not provide punishment for individuals, holding that it had long been established that international law imposed duties and liabilities upon individuals as well as upon States.⁶²⁴

⁶¹⁸ Germany, Federal Supreme Court, *Kušljic case*, Decision, 21 February 2001.

⁶¹⁹ Israel, District Court of Jerusalem, *Eichmann case*, Judgement, 12 December 1961.

⁶²⁰ Israel, Supreme Court, *Eichmann case*, Judgement, 29 May 1962.

⁶²¹ Switzerland, Military Tribunal at Lausanne, *Grabež case*, Judgement, 18 April 1997.

⁶²² Switzerland, Military Tribunal at Lausanne, *Niyonteze case*, Judgement, 30 April 1999.

⁶²³ US, Supreme Court, *Quirin case*, Judgement, 31 July 1942; see also Supreme Court, *Yamashita case*, Judgement, 4 February 1946.

⁶²⁴ US, Military Tribunal at Nuremberg, *Altstötter (The Justice Trial) case*, Judgement, 4 December 1947.

530. In the *Flick case* in 1947, the US Military Tribunal at Nuremberg noted that “it can no longer be successfully maintained that international law is concerned only with the actions of sovereign states and provides no punishment for individuals”. The Tribunal also rejected the argument that the fact that the defendants were private individuals rather than public officials representing the State meant that they could not be criminally responsible for a violation of international law. Instead, it held that “international law . . . binds every citizen just as does ordinary municipal law . . . The application of international law to individuals is no novelty.”⁶²⁵

531. In the *Karadžić case* in 1995, a US Court of Appeals considered a civil action brought by Bosnian victims of atrocities against Radovan Karadžić under, *inter alia*, the US Alien Tort Claims Act which gives the US courts jurisdiction over claims by aliens for torts committed in violation of the law of nations or treaties to which the US is party. The Court emphasised that individuals could be held responsible, both criminally, and, as in this case, civilly, for violations of international law and noted that “the liability of private individuals for committing war crimes has been recognized since World War I and was confirmed at Nuremberg after World War II, and remains today an important aspect of international law”.⁶²⁶

532. In the *Trajković case* in 2001, a Kosovan Serb and former chief of police, was convicted, *inter alia*, of having participated in crimes committed against the civilian population in 1999, acts which the District Court of Gnjilan in Kosovo (FRY) found had to be qualified as war crimes under Article 142 of the FRY Penal Code as well as crimes against humanity. The Court also found that the acts had been committed “in time of war”.⁶²⁷ However, on appeal, the Supreme Court of Kosovo overruled this judgement and ordered that the case be returned to the same court for retrial.⁶²⁸ In a written opinion, the International Prosecutor for the Office of the Public Prosecutor of Kosovo stated that:

Article 146 of Geneva Convention IV requires states party to the Convention to criminalize the commission and ordering of grave breaches of the Convention during armed conflict . . . Article 142 of the Yugoslav Penal Code appears most directly derived from this provision of international law.⁶²⁹

Other National Practice

533. During the Algerian war of independence, it is reported that the ALN Command had stigmatised and punished acts deemed to be contrary to the

⁶²⁵ US, Military Tribunal at Nuremberg, *Flick case*, Judgement, 22 December 1947. (Similar statements were made by the Tribunal in *Krauch (I. G. Farben Trial) case*, Judgement, 14 August 1947–29 July 1948, and in *Von Leeb case (The High Command Trial)*, Judgement, 30 December–28 October 1948.)

⁶²⁶ US, Court of Appeals for the Second Circuit, *Karadžić case*, Decision, 13 October 1995.

⁶²⁷ SFRY (FRY), District Court of Gnjilan, *Trajković case*, Judgement, 6 March 2001.

⁶²⁸ SFRY (FRY), Supreme Court of Kosovo, *Trajković case*, Decision Act, 30 November 2001.

⁶²⁹ SFRY (FRY), International Prosecutor for the Office of the Public Prosecutor of Kosovo, *Trajković case*, Opinion on Appeals of Convictions, 30 November 2001, Sections IV and IV(A).

laws of war.⁶³⁰ In the same context, it commented on the execution of three French prisoners after their trial for war crimes by an ALN military tribunal. The ALN Command reiterated that it would continue to try French prisoners accused of war crimes and execute the sentences of those convicted.⁶³¹

534. In 2000, during a debate in the UN Security Council on the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, the representative of Australia stated that:

Governments must also denounce – and denounce strongly – attacks against United Nations personnel and humanitarian workers and take all measures to bring perpetrators of violence to justice. Impunity, as so many of my colleagues have emphasized in this discussion, cannot be allowed.⁶³²

535. An explanatory memorandum submitted to the Belgian Senate in 1991 in the context of the adoption of the Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols stated that the draft law extended to the grave breaches enunciated in the 1949 Geneva Conventions and AP I, in accordance with Belgium's obligations. However, it also stated that IHL contained other infringements which it did not qualify as "grave breaches", but which had to be suppressed nevertheless. The memorandum therefore stated that such offences would be dealt with in a separate law, noting, however, that in the meantime, "the repression of all violations of the laws and customs of war is covered by 'ordinary' national penal law" insofar as the violations corresponded to offences punishable under national (penal) law.⁶³³ An early draft of this law was amended in order to include acts committed in the context of non-international conflicts and which corresponded to the grave breaches of the 1949 Geneva Conventions and AP I. The authors of the amendment mentioned that one of the reasons for the inclusion of acts committed in the context of non-international conflicts was the fact that international law did not prohibit such criminalisation. The Belgian government supported the amendment and noted that although the proposals "go further than required by the Conventions and Protocols, they remain within the scope of the – admittedly extensive – application of an international instrument ratified by Belgium".⁶³⁴

536. It is reported that the Chief of Staff of the armed forces of Bosnia and Herzegovina, in response to the international reaction to the destruction of the

⁶³⁰ *El Moudjahid*, Vol. 1, p. 440.

⁶³¹ "Le problème des prisonniers de guerre", *El Moudjahid*, Vol. 1, pp. 474 and 476.

⁶³² Australia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 6.

⁶³³ Belgium, Senate, Explanatory Memorandum, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1990–1991 Session, Doc. 1317-1, 30 April 1991, p. 6.

⁶³⁴ Belgium, Senate, Complementary report submitted on behalf of the Commission of Justice, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1991–1992 Extraordinary Session, Doc. 481-5, 22 December 1992, pp. 2 ff.

Mostar Bridge by HVO forces in 1993, had distributed a brochure describing international provisions regarding IHL, war crimes, cultural heritage and POWs, and promised the severest punishment to members of the armed forces who did not respect the laws of war.⁶³⁵

537. According to the Report on the Practice of Canada, following the report of the Canadian Commission of Inquiry on War Criminals in 1987, a section for war crimes was created in the Canadian Police and in the Ministry of Justice. A special unit was also established in the Ministry of Immigration to search for immigrants alleged to have committed war crimes or crimes against humanity. The report states that this reflects the belief held by the Canadian authorities in the necessity of setting up appropriate legal mechanisms to meet Canadian obligations regarding the search for war criminals on Canadian territory.⁶³⁶

538. In 1981, during a debate in the Sixth Committee of the UN General Assembly in relation to the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, the GDR stated that "in connexion with the enforcement of individual criminal responsibility, States were obliged under international law to take appropriate measures and enact legislation ensuring prosecution and punishment of persons guilty of international offences". It added that "it was therefore necessary to establish a universal duty to prosecute offences, which included the obligation to co-operate in combating international offences".⁶³⁷

539. In a statement at the International Conference for the Protection of War Victims in 1993, Germany's Minister of State stated that "crimes against international humanitarian law are mostly war crimes. Crimes against international humanitarian law are internationally banned. These crimes must have criminal prosecution as consequences." He added that guaranteeing prosecution was the task not only of individual States but of the international community as a whole.⁶³⁸

540. According to a representative of the German Central Office for the Investigation of National-Socialist Atrocities at Ludwigsburg (*Zentrale Stelle zur Aufklärung nationalsozialistischer Gewaltverbrechen*) established by the judicial administrations of the German States in 1958, by September 1999, Germany had investigated against more than 100,000 accused and suspected persons for crimes committed during the Nazi regime. In all, 7,225 of the proceedings were handed over to the public prosecution and about 6,500 individuals were convicted.⁶³⁹

⁶³⁵ Council of Europe, Parliamentary Assembly, Committee on Culture and Education, Fourth information report on war damage to the cultural heritage in Croatia and Bosnia and Herzegovina, Doc. 6999, 19 January 1994, § 71.

⁶³⁶ Report on the Practice of Canada, 1998, Chapter 6.3.

⁶³⁷ GDR, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/36/SR.60, 26 November 1981, § 26.

⁶³⁸ Germany, Minister of State, Statement at the International Conference for the Protection of War Victims, Geneva, 30 August 1–September 1993, *Bulletin*, No. 69, Presse- und Informationsamt der Bundesregierung, Bonn, 4 September 1993, p. 733.

⁶³⁹ Willi Dressen, "Eine Behörde gegen das Vergessen", *Die Welt*, 2 September 1999.

541. In its third periodic report to the CAT in 1998, Italy referred to allegations of violations committed by members of Italian armed forces participating in a multinational peacekeeping operation in Somalia in 1993 and 1994, and stated that:

76. Thorough and complex investigations are currently being carried out by various Italian judicial authorities in connection with the acts of violence committed by Italian soldiers in Somalia. Four such investigations are currently in progress at the Public Prosecutor's Office attached to the Court of Livorno.
77. As regards the proceedings for alleged torture suffered by a Somali man arrested at Jhoar and the alleged rape of a Somali woman by soldiers at a roadblock in Mogadishu, a probatory hearing was arranged so as to have the testimonies of the victims and a witness collected directly by the judge. Expert examinations are being carried out to ascertain the after-effects of the violence on the victims and also to see whether they corresponded to the photographs published by a weekly journal. The expert work is now in progress. Investigations are also being continued in the other two proceedings.
78. The Public Prosecutor's Office attached to the Court of Milan, for its part, is diligently continuing its investigations regarding an alleged case of carnal violence committed by an Italian soldier in Mogadishu.
79. By means of a decree dated 9 February 1997, the Preliminary Examination Judge of the Court of Leghorn ordered that the case based on the facts denounced by Abdi Hasn Addò be filed. Addò had accused Italian soldiers of having shot and killed three Somalis in a car on 3 June 1993. But the investigations showed that on the day in question the soldiers had been engaged in a military operation known as "Illach 26" that was taking place in another part of Somalia from that indicated by Addò.⁶⁴⁰

542. At the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the President of the National Assembly of Niger committed the National Assembly and the deputies of Niger:

- 1) To make approaches to the government in order that Niger:
 - a) becomes a party to the following treaties in 2002: the Statute of the International Criminal Court (1998);
 - ...
- 2) To ensure that legislative measures required by International Humanitarian Law be adopted... in particular for punishment of violations of International Humanitarian Law treaties and of protection of the emblem of the Red Cross and the Red Crescent.⁶⁴¹

543. In 2000, during a debate in the UN Security Council on the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, Slovenia stated that:

⁶⁴⁰ Italy, Third periodic report to the CAT, UN Doc. CAT/C/44/Add.2, 15 December 1998, §§ 77–79.

⁶⁴¹ Niger, Pledge made on 20 February 2002 at the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Niamey, 18–20 February 2002, §§ 1–2.

States have the primary responsibility to ensure the safety and security of all personnel [i.e. UN personnel, associated personnel and humanitarian personnel in conflict areas]. The Security Council for its part should insist on the responsibility of all parties to a conflict to respect international humanitarian law, and should take appropriate action in that regard. Attacks against such personnel clearly represent breaches of norms of international law. Every incident must be fully investigated, and the perpetrators must be brought to justice.⁶⁴²

544. In 1998, in its report on “gross violations of human rights” committed between 1960 and 1993, South Africa’s Truth and Reconciliation Commission stated that:

Those combatants who were killed or seriously injured while they were unarmed or out of combat, executed after they had been captured, or wounded when they clearly could have been arrested were held to be victims of gross violations of human rights, and those responsible were held accountable.⁶⁴³

545. In a resolution adopted on the occasion of the 25th Anniversary of the Additional Protocols in 2002, Switzerland’s Conseil des Etats invited “national parliaments to examine the totality of the most appropriate legislative and judicial means in order to . . . better prevent and repress violations of this law”.⁶⁴⁴

546. According to the Report on the Practice of Syria, Syria considers that the duty to try or extradite persons alleged to have committed grave breaches, as defined in the Geneva Conventions and AP I, is part of customary law. It considers that no such duty exists in regard to violations committed in non-international conflicts.⁶⁴⁵

547. In the aftermath of the war in the South Atlantic, the UK Metropolitan Police investigated allegations according to which criminal offences had been committed by UK soldiers during that conflict. However, in 1994, in reply to a question in the House of Lords, the Lord Chancellor stated that:

The Director of Public Prosecution has . . . announced that she has concluded her consideration of the inquiries carried out by the Metropolitan Police into allegations that criminal offences had been committed by members of the Parachute Regiment during their operations in the Falkland Islands in 1982 . . . She has concluded that the evidence is not such as to afford a realistic prospect of conviction of any person for any criminal offence and has therefore decided that no criminal proceedings should be instituted.⁶⁴⁶

⁶⁴² Slovenia, Statement before the UN Security Council, UN Doc. S/PV.4100 (Resumption 1), 9 February 2000, p. 8.

⁶⁴³ South Africa, Report of the Truth and Reconciliation Commission, 1998, Vol. 1, p. 76, § 102.

⁶⁴⁴ Switzerland, Conseil des Etats, Declaration concerning the Protocols additional to the Geneva Conventions, 12 June 2002, Summer Session 2002, Seventh Session, *Official Bulletin*, No. 02.048 (provisional version of the text).

⁶⁴⁵ Report on the Practice of Syria, 1997, Chapter 6.3.

⁶⁴⁶ UK, House of Lords, Reply by the Lord Chancellor to a question, *Hansard*, 14 July 1994, Vol. 556, col. 1961.

548. In July 1997, UK special forces arrested a leading Bosnian war crime suspect, in order to bring him before the ICTY.⁶⁴⁷

549. At the CDDH, the US stated with respect to a proposal to characterise the use of certain prohibited weapons as a grave breach under Article 85 AP I that “grave breaches were meant to be the most serious type of crime; Parties have an obligation to punish or extradite those guilty of them”.⁶⁴⁸

550. The 1979 version of the US Department of Defense Directive on the Law of War Program stated that:

It is the policy of the Department of Defense to ensure that:

- ...
2. A program, designed to prevent violations of the law of war, is implemented by the U.S. Armed Forces.
 3. Alleged violations of the law of war, whether committed by or against U.S. or enemy personnel, are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.⁶⁴⁹

The Directive also stated that “the Armed Forces of the U.S. shall institute and implement programs to prevent violations of the law of war”.⁶⁵⁰

551. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Articles 80–85 AP I, affirmed that “we support the principle that all necessary measures for the implementation of the rules of humanitarian law be taken without delay”. Referring to Articles 85–89 AP I, he added that “we support the principle that the appropriate authorities take all reasonable measures to prevent acts contrary to the applicable rules of humanitarian law, take all appropriate steps to bring to justice any persons who have wilfully committed such acts”.⁶⁵¹

552. In 1991, in a diplomatic note to Iraq, the US stated that:

The Government of the United States reminds the Government of Iraq that under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time . . . This includes members of the Iraqi armed forces and civilian government officials.⁶⁵²

⁶⁴⁷ Marcus Tanner and Fran Abrams, “Commando swoop on Serbs”, *The Independent*, 11 July 1997, p. 1.

⁶⁴⁸ US, Statement at the CDDH, *Official Records*, Vol. VI, Doc. CDDH/SR.44, 30 May 1977, p. 280, § 7.

⁶⁴⁹ US, Department of Defense, Directive on the Law of War Program No. 5100.77, 10 July 1979, Section C(2) and (3).

⁶⁵⁰ US, Department of Defense, Directive on the Law of War Program No. 5100.77, 10 July 1979, Section E(b).

⁶⁵¹ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

⁶⁵² US, Department of State, Diplomatic note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

In another such diplomatic note, the US reiterated that "Iraqi individuals who are guilty of . . . war crimes . . . are . . . subject to prosecution at any time".⁶⁵³

553. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that:

[Department of Defense Directive on the Law of War Program No. 5100.77] is the foundation for the US military law of war program. It contains four policies:

- ...
- A program, designed to prevent violations of the law of war...[will be] implemented by the US Armed Forces.
 - Alleged violations of the law of war, whether committed by or against US or enemy personnel . . . [will be] promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.⁶⁵⁴

The report also stated that "each service has issued directives to implement [Department of Defense Directive on the Law of War Program No. 5100.77] with respect to the reporting and investigation of suspected violations of the law of war committed by or against its personnel".⁶⁵⁵

554. The 1998 version of the US Department of Defense Directive on the Law of War Program, reissuing the one of 1979, provides that:

It is the DoD policy to ensure that:

- ...
- 4.2 An effective program to prevent violations of the law of war is implemented by the DoD Components.
 - 4.3 All reportable incidents committed by or against U.S. or enemy persons are promptly reported, thoroughly investigated, and, where appropriate, remedied by corrective action.⁶⁵⁶

It further stated that "the Heads of the DoD Components shall . . . institute and implement effective programs to prevent violations of the law of war".⁶⁵⁷

555. The Report on US Practice states that:

It is the *opinio juris* of the US that all nations are obligated to punish members of their armed forces guilty of serious violations of the laws of war. As to other persons suspected of war crimes, there is a general obligation to try them or to cooperate with another state willing to try them in accordance with international fair trial standards.⁶⁵⁸

⁶⁵³ US, Department of State, Diplomatic note to Iraq, Washington, 21 January 1991, annexed to Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 22 January 1991, p. 4.

⁶⁵⁴ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 633.

⁶⁵⁵ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 633.

⁶⁵⁶ US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 4(2) and (3).

⁶⁵⁷ US, Department of Defense Directive on the Law of War Program No. 5100.77, 9 December 1998, Section 5(3)(2).

⁶⁵⁸ Report on US Practice, 1997, Chapter 6.3.

The report also states that it is the *opinio juris* of the US that “there is a general obligation to try [persons suspected of war crimes other than members of its own armed forces] or to cooperate with another state willing to try them in accordance with international fair trial standards”.⁶⁵⁹

556. In Order No. 985-1/91 issued in 1991, the YPA Chief of General Staff stated that:

1. YPA units have the duty to secure in the area of their operations full and unconditional implementation of rules of international humanitarian law of armed conflicts and suppress violations of those rules.
2. War crimes and other grave breaches of norms of law on warfare are serious criminal offences and call for criminal liability of all perpetrators. Appropriate measures should be carried out immediately against all perpetrators aimed at suppressing unnecessary and excessive suffering of [the] civilian population, wounded, prisoners and all other persons affected by military operations.
3. In order to prevent violations of international law of warfare, officers and all other members of [the] YPA are authorized to apply all measures, including use of force, against all perpetrators, regardless of their affiliation to different existing forces.⁶⁶⁰

557. In 1995, the Presidential Adviser for Military Affairs of a State party to a non-international armed conflict explained to the ICRC that there were problems of discipline in the armed forces. In his view, the absence of a credible system of military justice and, consequently, of sanctions, explained the conduct of members of the armed forces during military operations. The Military Penal Code of this State did not contain provisions expressly prohibiting certain types of conduct which violated IHL. The adviser added that, to end these multiple and serious violations, there had to be a threat of sanction. As long as there was a “climate of impunity” it was not likely that IHL would be respected.⁶⁶¹

III. Practice of International Organisations and Conferences

United Nations

558. In a resolution on Rwanda adopted in 1995, the UN Security Council expressed its determination “to put an end to violations of international humanitarian law and serious acts of violence directed against refugees, and that effective measures be taken to bring to justice the persons who are responsible for such crimes”. It therefore urged States:

to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against

⁶⁵⁹ Report on US Practice, 1997, Chapter 6.4.

⁶⁶⁰ SFRY (FRY), Chief of General Staff of the YPA, Legal Department, Order No. 985-1/91, 3 October 1991, §§ 1–3.

⁶⁶¹ ICRC archive document.

whom there is sufficient evidence that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda.⁶⁶²

The Security Council also urged States on whose territory serious acts of violence in the refugee camps had taken place

to arrest and detain, in accordance with their national law and relevant standards of international law, and submit to the appropriate authorities for the purpose of prosecution persons against whom there is sufficient evidence that they have incited or participated in such acts.⁶⁶³

559. In a resolution adopted in 1998 on the situation in Afghanistan, the UN Security Council called upon the Taliban:

to investigate urgently [the attacks on the United Nations personnel in the Taliban-held territories of Afghanistan, including the killing of the two Afghan staff members of the World Food Programme and of the United Nations High Commissioner for Refugees in Jalalabad, and of the Military Adviser to the United Nations Special Mission to Afghanistan in Kabul], and to keep the United Nations informed about the results of the investigation.⁶⁶⁴

560. In a resolution adopted in 1998 on the situation in Kosovo, the UN Security Council underlined "the need for the authorities of the Federal Republic of Yugoslavia to bring to justice those members of the security forces who have been involved in the mistreatment of civilians and the deliberate destruction of property".⁶⁶⁵

561. In April 1994, a statement by its President on the situation in Rwanda, the UN Security Council required that "the interim Government of Rwanda and the Rwandese Patriotic Front take effective measures to prevent any attacks on civilians in areas under their control". It called on "the leadership of both parties to condemn publicly such attacks and to commit themselves to ensuring that persons who instigate or participate in such attacks are prosecuted and punished".⁶⁶⁶

562. In October 1994, in a statement by its President on the situation in Rwanda, the UN Security Council welcomed "the speed with which the United Nations and the Government of Rwanda responded to allegations that some RPA soldiers might have been responsible for systematic killings" and underlined "the importance it attaches to the thorough and expeditious investigation of these allegations". The Security Council further reaffirmed its view that "those responsible for serious breaches of international humanitarian law and acts of genocide must be brought to justice".⁶⁶⁷

⁶⁶² UN Security Council, Res. 978, 27 February 1995, preamble and § 1.

⁶⁶³ UN Security Council, Res. 978, 27 February 1995, § 5.

⁶⁶⁴ UN Security Council, Res. 1193, 28 August 1998, § 6.

⁶⁶⁵ UN Security Council, Res. 1199, 23 September 1998, § 14.

⁶⁶⁶ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/21, 30 April 1994.

⁶⁶⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/59, 14 October 1994.

563. In 1994, in a statement by its President in connection with events in Burundi, the UN Security Council stated that it fully supported the efforts of the Burundian authorities “in seeking to ensure that those committing or inciting the commission of acts of violence are held accountable for their actions”.⁶⁶⁸

564. In September 1995, in a statement by its President on the situation in Croatia, the UN Security Council demanded that the Croatian government “immediately investigate all [reports of human rights violations including the burning of houses, looting of property and killings] and take appropriate measures to put an end to such acts”.⁶⁶⁹

565. In September 1995, in a statement by its President on the situation in Croatia, the UN Security Council demanded that the Croatian government “investigate all reports of human rights violations and take appropriate measures to put an end to such acts”.⁶⁷⁰

566. In 1997, in a statement by its President, the UN Security Council voiced its deep concern at “continuing reports of massacres, other atrocities and violations of IHL in eastern Zaire” and pointed out that it attached great importance to the “commitment of the leader of the ADFL to take appropriate action against members of the ADFL who violate the rules of international humanitarian law concerning the treatment of refugees and civilians”.⁶⁷¹

567. In 1998, in a statement by its President concerning the conflict in the DRC, the UN Security Council stated that it:

recognizes the necessity to investigate further the massacres, other atrocities and violations of international humanitarian law and to prosecute those responsible. It deplores the delay in the administration of justice. The Council calls on the Governments of the Democratic Republic of the Congo and Rwanda to investigate without delay, in their respective countries, the allegations contained in the report of the Investigative Team and to bring to justice any persons found to have been involved in these or other massacres, atrocities and violations of international humanitarian law. The Council takes note of the stated willingness of the Government of the Democratic Republic of the Congo to try any of its nationals who are guilty of or were implicated in the alleged massacres . . . Such action is of great importance in helping to bring an end to impunity and to foster lasting peace and stability in the region.⁶⁷²

568. In 1998, in two statements by its President concerning the situation in Afghanistan, the UN Security Council stated that it supported “the steps of

⁶⁶⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1994/82, 22 December 1994.

⁶⁶⁹ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/44, 7 September 1995, p. 1.

⁶⁷⁰ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/49, 17 September 1995.

⁶⁷¹ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/24, 30 April 1997.

⁶⁷² UN Security Council, Statement by the President, UN Doc. S/PRST/1998/20, 13 July 1998, pp. 1-2.

the Secretary-General to launch investigations into alleged mass killings of prisoners of war and civilians in Afghanistan".⁶⁷³

569. In 2000, in a statement by its President on the protection of UN personnel, associated personnel and humanitarian personnel in conflict zones, the UN Security Council urged "States to fulfil their responsibility to act promptly and effectively in their domestic legal systems to bring to justice all those responsible for attacks and other acts of violence against such personnel, and to enact effective national legislation as required for that purpose".⁶⁷⁴

570. In a resolution adopted in 1946 on the extradition and punishment of war criminals, the UN General Assembly recommended that members of the UN take all the necessary measures:

to cause the arrest of those war criminals who have been responsible for or have taken a consenting part in [crimes as defined, *inter alia*, in the Moscow Declaration of 1943 and the Charter of the International Military Tribunal of 1945], and to cause them to be sent back to the countries to which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries.

It also called upon governments of non-member States to take all necessary measures for the apprehension and removal of war criminals.⁶⁷⁵

571. In a resolution adopted in 1969 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly called upon the States concerned:

to take the necessary measures for the thorough investigation of war crimes and crimes against humanity . . . and for the detection, arrest, extradition and punishment of all war criminals and persons guilty of crimes against humanity who have not yet been brought to trial or punished.⁶⁷⁶

572. In a resolution adopted in 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly urged States "to take measures to ensure the punishment of all persons guilty of war crimes and crimes against humanity, including their extradition to those countries where they have committed such crimes".⁶⁷⁷

573. In a resolution adopted in 1973 on principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly declared that "war crimes and crimes against humanity, wherever they are committed, shall

⁶⁷³ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/9, 6 April 1998, p. 2; Statement by the President, UN Doc. S/PRST/1998/22, 14 July 1998, p. 3.

⁶⁷⁴ UN Security Council, Statement by the President, UN Doc. S/PRST/2000/4, 9 February 2000.

⁶⁷⁵ UN General Assembly, Res. 3 (I), 13 February 1946, § 3.

⁶⁷⁶ UN General Assembly, Res. 2583 (XXIV), 15 December 1969, § 1; see also Res. 2712 (XXV), 15 December 1970, §§ 2 and 5.

⁶⁷⁷ UN General Assembly, Res. 2840 (XXVI), 18 December 1971, § 1.

be subject to investigation and the persons against whom there is evidence that they have committed such crimes shall be subject to tracing, arrest, trial and, if found guilty, to punishment".⁶⁷⁸

574. In a resolution adopted in 1994, the UN General Assembly referred to the 1994 Guidelines on the Protection of the Environment in Times of Armed Conflict and invited all States:

to disseminate widely the revised guidelines for military manuals and instructions on the protection of the environment in times of armed conflict received from the International Committee of the Red Cross and to give due consideration to the possibility of incorporating them into their military manuals and other instructions addressed to their military personnel.⁶⁷⁹

575. In a resolution adopted in 1995 on rape and abuse of women in the former Yugoslavia, the UN General Assembly reaffirmed that rape in the conduct of armed conflict constituted a war crime and called upon "States to take all measures required for the protection of women and children from such acts and to strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice".⁶⁸⁰

576. In a resolution adopted in 1997 on the rights of the child, the UN General Assembly called upon all States to:

take all measures required for the protection of women and children from all acts of gender-based violence, including rape, sexual exploitation and forced pregnancy, and to strengthen mechanisms to investigate and punish all those responsible and bring the perpetrators to justice.⁶⁸¹

577. In a resolution adopted in 1994 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights reaffirmed that "the international community will exert all efforts to bring them [all persons who perpetrate or authorize violations of international humanitarian law] to justice in accordance with internationally recognized principles of due process".⁶⁸²

578. In a resolution adopted in 1994 on the rape and abuse of women in the territory of the former Yugoslavia, the UN Commission on Human Rights urged UN member States "to exert every effort to bring to justice, in accordance with internationally recognized principles of due process, all those individuals directly or indirectly involved in these outrageous international crimes".⁶⁸³

579. In a resolution adopted in 1995 in the context of the conflict in the former Yugoslavia, the UN Commission on Human Rights demanded "immediate, firm and resolute action by all concerned parties and the international

⁶⁷⁸ UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, § 1.

⁶⁷⁹ UN General Assembly, Res. 49/50, 9 December 1994, § 11.

⁶⁸⁰ UN General Assembly, Res. 50/192, 22 December 1995, § 3, see also Res. 51/77, 12 December 1996, § 28.

⁶⁸¹ UN General Assembly, Res. 52/107, 12 December 1997, § 12.

⁶⁸² UN Commission on Human Rights, Res. 1994/72, 9 March 1994, § 17.

⁶⁸³ UN Commission on Human Rights, Res. 1994/77, 9 March 1994, § 6.

community" to bring to trial those responsible for human rights violations and breaches of international law. It also reaffirmed that "all persons who perpetrate or authorize violations of international humanitarian law . . . should be brought to justice in accordance with internationally recognized principles of due process".⁶⁸⁴

580. In a resolution adopted in 1996 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN Commission on Human Rights recognised that the practice of rape as a weapon of war constituted a war crime and called for the "protection and care of rape victims, respect for the special needs of victims of sexual violence in the investigation and prosecution of alleged violations, and punishment of those responsible".⁶⁸⁵ The Commission also expressed "its outrage over the failure of parties to arrest and surrender persons indicted by the [ICTY] in violation of the peace agreement".⁶⁸⁶

581. In a resolution on the situation of human rights in 1996, the UN commission on Human Rights reaffirmed that "the international community will exert every effort, in cooperation with national and International tribunals, to bring those responsible [for grave violations of international humanitarian law] to justice in accordance with international principles of due process."⁶⁸⁷

582. In resolutions adopted in 1994, 1995 and 1996, the UN Commission on Human Rights reminded the government of Myanmar of its obligations:

to put an end to the impunity of perpetrators of violations of human rights, including members of the military, and its responsibility to investigate alleged cases of human rights violations committed by its agents on its territory, to bring them to justice, prosecute them and punish those found guilty, in all circumstances.⁶⁸⁸

583. In a resolution adopted in 1995, the UN Commission on Human Rights called "once more upon the Government of the Sudan to ensure a full and thorough investigation by the independent judicial inquiry commission of the killings of Sudanese employees of foreign relief organizations, to bring to justice those responsible for the killings".⁶⁸⁹

584. In a resolution adopted in 1995, the UN Commission on Human Rights welcomed the commitments made by the government of Rwanda "to protect and promote respect for human rights and fundamental freedoms and to eliminate impunity by investigating and prosecuting those responsible for acts of retribution".⁶⁹⁰ In a further resolution adopted in 1996, the Commission encouraged the government of Rwanda to ensure investigation and prosecution

⁶⁸⁴ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, §§ 13 and 19.

⁶⁸⁵ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 2.

⁶⁸⁶ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 6.

⁶⁸⁷ UN Commission on Human Rights, Res. 1996/76, 23 April 1996, § 4.

⁶⁸⁸ UN Commission on Human Rights, Res. 1994/85, 9 March 1994, § 8; Res. 1995/72, 8 March 1995, § 12; Res. 1996/80, 23 April 1996, § 12.

⁶⁸⁹ UN Commission on Human Rights, Res. 1995/77, 8 March 1995, § 17.

⁶⁹⁰ UN Commission on Human Rights, Res. 1995/91, 8 March 1995, preamble and § 6

of those responsible for genocide and other serious violations of international law.⁶⁹¹

585. In a resolution on Sierra Leone adopted in 1999, the UN Commission on Human Rights reminded “all factions and forces in Sierra Leone that in any armed conflict, including an armed conflict not of an international character . . . all countries are under the obligation to search for persons alleged to have committed, or to have ordered to be committed, . . . grave breaches [of IHL] and to bring such persons, regardless of their nationality, before their own courts”.⁶⁹²

586. In a resolution adopted in 1999, the UN Commission on Human Rights invited the government of Burundi “to take more measures, including in the judicial sphere, to put an end to impunity, in particular by bringing to trial those responsible for violations of human rights and of international humanitarian law”.⁶⁹³

587. In a resolution on Chechnya adopted in 2000, the UN Commission on Human Rights called upon the Russian government to:

establish urgently, according to recognized international standards, a national, broad-based and independent commission of inquiry to investigate promptly alleged violations of human rights and breaches of international humanitarian law committed in the Republic of Chechnya in order to establish the truth and identify those responsible, with a view to bringing them to justice and preventing impunity.⁶⁹⁴

588. In a resolution on Chechnya adopted in 2001, the UN Commission on Human Rights called upon the Russian government to:

ensure that all necessary measures are taken to investigate and solve all cases of forced disappearance as recorded and reported, *inter alia*, by the Office of the Special Representative of the President of the Russian Federation, and to ensure where necessary that criminal prosecutions are undertaken.⁶⁹⁵

589. In a resolution on impunity adopted in 2002, the UN Commission on Human Rights stated that it:

Emphasizes the importance of combating impunity to the prevention of violations of international human rights and humanitarian law and urges States to give necessary attention to the question of impunity for violations of international human rights and humanitarian law, including those perpetrated against women and children, and to take appropriate measures to address this important issue;

...

Emphasizes the importance of taking all necessary and possible steps to hold accountable perpetrators, including their accomplices, of violations of international human rights and humanitarian law, recognizes that amnesties should not be

⁶⁹¹ UN Commission on Human Rights, Res. 1996/76, 23 April 1996, § 6.

⁶⁹² UN Commission on Human Rights, Res. 1999/1, 6 April 1999, § 2.

⁶⁹³ UN Commission on Human Rights, Res. 1999/10, 23 April 1999, § 8.

⁶⁹⁴ UN Commission on Human Rights, Res. 2000/58, 25 April 2000, § 4.

⁶⁹⁵ UN Commission on Human Rights, Res. 2001/24, 20 April 2001, § 10.

granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes and urges States to take action in accordance with their obligations under international law;

...

Recognizes that crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law and that perpetrators of such crimes should be prosecuted or extradited by States, and urges all States to take effective measures to implement their obligations to prosecute or extradite perpetrators of such crimes.⁶⁹⁶

590. In a resolution adopted in 1989 on the situation of human rights in El Salvador, the UN Sub-Commission on Human Rights, "dismayed at the continued extremely unsatisfactory capacity of the judicial system to punish those guilty of violations of human rights", strongly urged the government of El Salvador "to take all necessary measures to ensure that those responsible for the murder of Monsignor Romero, Archbishop of San Salvador, be brought to trial".⁶⁹⁷

591. In a resolution adopted in 1993 on the punishment of the crime of genocide, the UN Sub-Commission on Human Rights urged States "to make every effort to bring to justice . . . all those individuals directly or indirectly involved in the unspeakable crimes committed in Bosnia and Herzegovina, elsewhere in the territory of the former Yugoslavia or in any other part of the world".⁶⁹⁸

592. In a resolution adopted in 1993 on the situation in Peru, the UN Sub-Commission on Human Rights, condemning the violations of human rights by the Sendero Luminoso (Shining Path) and the MRTA and regretting the violations of human rights by some members of the forces of law and order, urged the Peruvian authorities "to adopt the necessary measures to guarantee full compliance with the State's obligations to investigate and penalize those responsible for human rights violations".⁶⁹⁹

593. In a resolution on Rwanda adopted in 1994, the UN Sub-Commission on Human Rights called for "action to investigate, identify and establish the responsibilities, both national and international, of the individuals implicated in the war crimes, including . . . crimes against humanity and genocide in the tragedy of Rwanda, for the purpose of punishing those responsible".⁷⁰⁰

594. In a resolution on Rwanda adopted in 1995, the UN Sub-Commission on Human Rights deplored the fact that the efforts of the international community were still inadequate, "whereas the duty of trying those responsible for the genocide and war crimes does not devolve solely on the Government of Rwanda".⁷⁰¹

⁶⁹⁶ UN Commission on Human Rights, Res. 2002/79, 25 April 2002, §§ 1, 2 and 11.

⁶⁹⁷ UN Sub-Commission on Human Rights, Res. 1989/9, 31 August 1989, preamble and § 5.

⁶⁹⁸ UN Sub-Commission on Human Rights, Res. 1993/8, 20 August 1993, § 4.

⁶⁹⁹ UN Sub-Commission on Human Rights, Res. 1993/23, 23 August 1993, §§ 2, 3 and 8.

⁷⁰⁰ UN Sub-Commission on Human Rights, Res. 1994/1, 9 August 1994, § 7.

⁷⁰¹ UN Sub-Commission on Human Rights, Res. 1995/5, 19 August 1995, § 3.

595. In a resolution adopted in 1998 on systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict, the UN Sub-Commission on Human Rights stated that it:

5. Calls upon all States to enact and enforce legislation incorporating relevant international criminal law into their municipal legal systems to allow for the effective prosecution in municipal courts of all acts of sexual violence committed during armed conflict;
6. Also calls upon all States to consider enacting legislation as required by the Geneva Conventions of 12 August 1949 to provide jurisdiction in their municipal courts for serious international crimes committed in other States, thereby increasing the potential venues in which acts of sexual violence may be prosecuted;
7. Affirms at the same time that all States must ensure that their legal systems at all levels conform to their international obligations and are capable of adjudicating international crimes and administering justice without gender bias;
- ...
9. Reiterates that States must respect their international obligations to prosecute perpetrators . . . of human rights and humanitarian law violations.⁷⁰²

596. In a resolution adopted in 1999 on systematic rape, sexual slavery and slavery-like practices, the UN Sub-Commission on Human Rights stated that it:

6. Calls upon all States to enact and enforce legislation incorporating relevant international criminal law into their national legal systems to allow for the effective prosecution in national courts of acts of sexual violence committed during armed conflicts;
7. Affirms at the same time that all States must ensure that their legal systems at all levels conform to their international obligations and are capable of adjudicating international crimes and administering justice without gender bias;
- ...
9. Reiterates that States must respect their international obligations to prosecute perpetrators and compensate all victims of human rights and humanitarian law violations;
10. Recognizes that to give effect to rules applicable in conflict situations requires the adoption and implementation of measures in peacetime;
11. Calls upon States to make possible respect for their obligations in situations of conflict by, inter alia:
 - ...
 - (b) Putting in place effective mechanisms for the investigation and prosecution of such offences by their own armed forces and for the protection of the victims of such offences;
 - ...
12. Calls upon States to provide effective criminal penalties . . . in order to end the cycle of impunity with regard to sexual violence committed during armed conflicts.⁷⁰³

⁷⁰² UN Sub-Commission on Human Rights, Res. 1998/18, 21 August 1998, §§ 5–7 and 9.

⁷⁰³ UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, §§ 6–7 and 9–12.

597. In 1996, in a report concerning UNAMIR in Rwanda, the UN Secretary-General stated that:

The [Rwandan] authorities took some significant steps to address reported human rights violations. Four soldiers were tried and convicted by a military court in late December 1995 for their involvement in an incident in which four civilians were shot, and three killed. The Rwandan Patriotic Army cooperated with the Field Operation in its investigation of the 25 November killings by soldiers of civilians at a temporary settlement in Nyungwe forest. The official investigation is now in the hands of the Military Prosecutor . . . However, the Field Operation remained concerned that official investigations were carried out only in some of the cases of possible human rights violations reported to it, including killings of civilians allegedly by members of the security forces.⁷⁰⁴

598. In 2001, in a recommendation in his report on the protection of civilians in armed conflict, the UN Secretary-General encouraged member States “to introduce or strengthen domestic legislation and arrangements providing for the investigation, prosecution and trial of those responsible for the systematic and widespread violations of international criminal law”.⁷⁰⁵

599. In 1996, in a report on a mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, the Special Rapporteur of the UN Commission on Human Rights on Violence against Women, its Causes and Consequences recommended, *inter alia*, that, at the national level the government of Japan should “identify and punish, as far as possible, perpetrators involved [during the Second World War] in the recruitment and institutionalization of comfort stations”.⁷⁰⁶

600. In 1998, in a report on systematic rape, sexual slavery and slavery-like practices during armed conflict submitted to the UN Sub-Commission of Human Rights, the Special Rapporteur recommended that:

States should enact special legislation incorporating international criminal law into their municipal legal systems. Domestic law codifications of international criminal law should specifically criminalize slavery and acts of sexual violence, including rape, as grave breaches of the Geneva Conventions, war crimes, torture and constituent acts of crimes against humanity and genocide. Military regulations, codes of conduct, and training materials for the uniformed and armed services must explicitly address the prohibition of sexual violence and sexual slavery during armed conflict. States should search for and bring to justice all perpetrators of grave breaches of the Geneva Conventions, pursuant to article 146 of the Fourth Geneva Convention. States should, for example, follow the examples of Belgium and Canada and enact legislation providing universal jurisdiction for violations of

⁷⁰⁴ UN Secretary-General, Progress report on the UN Assistance Mission for Rwanda, UN Doc. A/50/868-S/1996/61, 30 January 1996, § 11.

⁷⁰⁵ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, Recommendation 3.

⁷⁰⁶ UN Commission on Human Rights, Special Rapporteur on Violence against Women, Its Causes and Consequences, Report on the mission to North Korea, South Korea and Japan on the issue of military sexual slavery in wartime, UN Doc. E/CN.4/1996/53/Add.1, 4 January 1996, § 137(f).

jus cogens norms and other international crimes including sexual slavery and sexual and gender violence committed by State and non-State actors, including armed groups not under State authority.⁷⁰⁷

601. In 1994, in its final report on grave violations of IHL in Rwanda, the UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994) noted that it had been informed by the Rwandan Minister of Defence that the government had detained 70 FPR soldiers and intended to try and punish them for private acts of revenge exacted against Hutus. The government emphasised that these acts were not only unauthorised, but subject to heavy military discipline and punishment. The Commission of Experts considered that “the armed conflict between 6 April and 15 July 1994 qualifies as a non-international armed conflict”.⁷⁰⁸

602. In 1995, in his second report concerning the conflict in Guatemala, the Director of MINUGUA observed that:

Verification has uncovered cases in which the Government failed to guarantee the right to integrity and security of person in terms of freedom from torture or cruel, inhuman or degrading treatment, or the threat of such treatment. Cases have been verified in which State officials appear to be implicated, but they have not been promptly or thoroughly investigated and the guilty parties have not been prosecuted.⁷⁰⁹

603. In its report in 1993, the UN Commission on the Truth for El Salvador stated with respect to an incident which had occurred at El Junquillo that:

On 12 March 1981, soldiers and members of the Cacaopera military defence unit attacked the population, consisting solely of women, young children and old people. They killed the inhabitants and raped a number of women and little girls under the age of 12. They set fire to houses, cornfields and barns.

The Commission finds that: . . . the Government and the judiciary of El Salvador failed to conduct investigations into the incident. The State thus failed in its duty under international human rights law to investigate, bring to trial and punish those responsible and to compensate the victims or their families.⁷¹⁰

With respect to the killing of more than 200 civilians committed by units of the Atlacatl Battalion of the armed forces of El Salvador, the Commission deplored the fact that:

Although it received news of the massacre, which would have been easy to corroborate because of the profusion of unburied bodies, the Armed Forces High Command

⁷⁰⁷ UN Sub-Commission on Human Rights, Special Rapporteur on Systematic Rape, Sexual Slavery and Slavery-like Practices during Wartime, Report, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, § 102.

⁷⁰⁸ UN Commission of Experts Established pursuant to Security Council Resolution 935 (1994), Final report, UN Doc. S/1994/1405, 9 December 1994, §§ 99 and 108.

⁷⁰⁹ MINUGUA, Director, Second report, UN Doc. A/49/929, 29 June 1995, § 179.

⁷¹⁰ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 67.

did not conduct or did not give any word of an investigation and repeatedly denied that the massacre had occurred. There is full evidence that General José Guillermo García, then Minister of Defence, initiated no investigations that might have enabled the facts to be established. There is sufficient evidence that General Rafael Flórez Lima, Chief of the Armed Forces Joint Staff at the time, was aware that the massacre had occurred and also failed to undertake any investigation.

The High Command also took no steps whatsoever to prevent the repetition of such acts, with the result that the same units were used in other operations and followed the same procedures.

The El Mozote massacre was a serious violation of international humanitarian law and international human rights law.

The President of the Supreme Court of Justice of El Salvador, Mr. Mauricio Gutiérrez Castro, has interfered unduly and prejudicially, for biased political reasons, in the ongoing judicial proceedings on the case.⁷¹¹

Referring to the massacre of more than 300 unarmed civilians on the banks of the Sumpul river by troops of a military detachment, members of the National Guard and members of the paramilitary Organización Nacional Democrática (ORDEN) for which it found sufficient evidence, the Commission stated that:

The Commission believes that the Salvadorian military authorities were guilty of a cover-up of the incident. There is sufficient evidence that Colonel Ricardo Augusto Peña Arbaiza, Commander of Military Detachment No. 1 in May 1980, made no serious investigation of the incident.

The Sumpul river massacre was a serious violation of international humanitarian law and international human rights law.⁷¹²

Turning to the activities of the death squads in El Salvador, the Commission stated that:

It is especially important to call attention to the repeated abuses committed by the intelligence services of the security forces and the armed forces . . . Any investigation must result both in an institutional clean-up of the intelligence services and in the identification of those responsible for this aberrant practice.

The lack of effective action by the judicial system was a factor that reinforced the impunity that shielded and continues to shield members and promoters of the death squads in El Salvador.

...

The issue of the death squads in El Salvador is so important that it requires special investigation. More resolute action by national institutions, with the cooperation and assistance of foreign authorities who have any information on the subject, is especially needed. In order to verify a number of specific violations and ascertain who was responsible, it will be necessary to investigate the serious acts of violence committed by the death squads on a case-by-case basis.⁷¹³

⁷¹¹ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 121.

⁷¹² UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, p. 124.

⁷¹³ UN Commission on the Truth for El Salvador, Report, UN Doc. S/25500, 1 April 1993, Annex, pp. 137–138.

604. In 1993, in its report to the UN General Assembly, the ILC recognised the creation of the ICTY as a step towards the creation of a system of universal penal jurisdiction.⁷¹⁴

Other International Organisations

605. In a declaration adopted in 1993 on the rape of women and children in the territory of former Yugoslavia, the Council of Ministers of the Council of Europe appealed to “member States and the international community at large to ensure that these atrocities cease and that their instigators and perpetrators are prosecuted by an appropriate national or international penal tribunal”.⁷¹⁵

606. In a recommendation adopted in 1979 calling for the ratification of the 1974 European Convention on the Non-applicability of Statutory Limitations to Crimes against Humanity and War Crimes, the Parliamentary Assembly of the Council of Europe stated that it believed that: “Council of Europe member states should do everything they can, both individually and in close co-operation, to search for and prosecute the most serious of the surviving criminals of the Second World War, and to bring them to trial”.⁷¹⁶

607. In 1995, in a report on the human rights situation in Chechnya, the Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe noted that violations of IHL and/or human rights law committed by members of the Russian troops had not been prosecuted. Referring to acts such as robbery and looting, wanton destruction, extortion, arson, rape, disappearances and hostage-taking, he concluded that:

It can be summarised that in principle there seems to be no investigation or prosecution of human rights abuses committed by Russian federal troops against the Chechen population, either through military discipline, or through the ordinary judicial system. This is an unacceptable situation.⁷¹⁷

The Rapporteur recommended that the Russian authorities “tighten military discipline and introduce the principle of accountability into the armed forces” and “prosecute individual criminal acts committed during the last six months . . . through the judicial system”.⁷¹⁸

608. In a recommendation adopted in 1999 concerning respect for IHL in Europe, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers “invite the governments of the member

⁷¹⁴ ILC, Report to the UN General Assembly, UN Doc. A/48/10, 1 November 1993, p. 1.

⁷¹⁵ Council of Europe, Council of Ministers, Declaration on the rape of women and children in the territory of former Yugoslavia, 18 February 1993.

⁷¹⁶ Council of Europe, Parliamentary Assembly, Rec. 855, 2 February 1979, § 9.

⁷¹⁷ Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report on the Human Rights Situation in Chechnya, Doc. 7384, 15 September 1995, Appendix I, §§ 40–41 and 68–69.

⁷¹⁸ Council of Europe, Parliamentary Assembly, Committee on Legal Affairs and Human Rights, Report on the Human Rights Situation in Chechnya, Doc. 7384, 15 September 1995, Appendix I, §§ 69 and 75.

states: . . . to introduce the *aut dedere aut iudicare* principle in their criminal law".⁷¹⁹

609. In a resolution adopted in 1982 on the situation in Lebanon, the European Parliament noted "the establishing, albeit belated, of an official Israeli inquiry into the [killings of Palestinians] in the camps in Sabra and Chatila and hopes that responsibility for them is to be fully and clearly established".⁷²⁰

610. In a resolution adopted in 1993, the European Parliament affirmed that "there should be no question of impunity for those responsible for war crimes in the former Yugoslavia".⁷²¹

611. At the first OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1994, the participants concluded that "it is necessary to bring to the attention of OAU Member States the importance of improving national legislation, particularly in integrating penal and disciplinary measures to repress violation[s] of International Humanitarian Law (IHL)".⁷²² The OAU Council of Ministers took note of the recommendations of the seminar.⁷²³

612. At the fourth OAU/ICRC seminar on IHL for diplomats accredited to the OAU, held in 1997, the participants noted that they appreciated "the national measures taken by the Government of Ethiopia, launched toward repression of war crimes and crimes against humanity" and called upon "the International Community to render appropriate support with a view to make them more effective".⁷²⁴

613. Addressing the President of the UN Security Council as members of the Contact Group of OIC in 1992, Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey stated that:

Steps should be taken to bring before an international tribunal those responsible for the abhorrent practice of "ethnic cleansing", for mass killings and the commission of other grave breaches of international humanitarian law and in particular the Geneva Conventions of 12 August 1949.⁷²⁵

International Conferences

614. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the application of the Geneva Conventions by the United Nations Emergency Forces in which it recommended that "the authorities

⁷¹⁹ Council of Europe, Parliamentary Assembly, Rec. 1427, 23 September 1999, § 8(ii)(i).

⁷²⁰ European Parliament, Resolution on the situation in the Lebanon, 15 October 1982, § 3.

⁷²¹ European Parliament, Resolution on Human Rights in the world and Community human rights policy for the years 1991/92, 26 April 1993, §§ 7 and 8.

⁷²² OAU/ICRC, First seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 7 April 1994, Conclusions and Recommendations, § 7.

⁷²³ OAU, Council of Ministers, Res. 1526 (LX), 11 June 1994, § 1.

⁷²⁴ OAU/ICRC, Fourth seminar on IHL for diplomats accredited to the OAU, Addis Ababa, 29–30 April 1997, Recommendations, § 6.

⁷²⁵ OIC, Contact Group on Bosnia and Herzegovina, Letter dated 5 October 1992 from Egypt, Iran, Pakistan, Saudi Arabia, Senegal and Turkey to the President of the UN Security Council, UN Doc. S/24620, 6 October 1992, p. 2.

responsible for the contingents [made available to the UN] agree to take all the necessary measures to prevent and suppress any breaches of the [1949 Geneva] Conventions".⁷²⁶

615. The 20th International Conference of the Red Cross in 1965 adopted a resolution on the repression of violations of the Geneva Conventions in which it appealed "to Governments which have so far not done so to complete their legislation so as to ensure adequate penal sanctions for violations of these Conventions".⁷²⁷

616. In the Final Declaration of the International Conference for the Protection of War Victims in 1993, the participants urged all States to:

5. Adopt and implement, at the national level, all appropriate regulations, laws and measures to ensure respect for international humanitarian law applicable in the event of armed conflict and to punish violations thereof.
6. Contribute to an impartial clarification of alleged violations of international humanitarian law . . .
7. Ensure that war crimes are duly prosecuted and do not go unpunished, and accordingly implement the provisions on the punishment of grave breaches of international humanitarian law and encourage the timely establishment of appropriate international legal machinery, and in this connection acknowledge the substantial work accomplished by the International Law Commission on an international criminal court.⁷²⁸

617. The Conference of High Contracting Parties to the Fourth Geneva Convention in 2001 adopted a declaration calling upon "all parties, directly involved in the conflict [between Israel and Palestinians] or not, to . . . take measures necessary for the prevention and suppression of breaches of the [1949 Geneva] Conventions".⁷²⁹

618. In the Final Declaration of the African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict in 2002, the participants stated that:

Wherever necessary, we commit ourselves to work towards the inclusion of these humanitarian norms in our national legislation with a view to guarantee their full implementation.

. . . We commit ourselves to see that our States have the legislative means of repressing violations of International Humanitarian Law . . .

We consider that a multidisciplinary committee bringing together all the State branches concerned and the various organisations, including the national Red Cross and Red Crescent Society, can be a useful and efficient mechanism to ensure the implementation of International Humanitarian Law. We therefore encourage our Parliaments to facilitate the setting up of such a structure if it is not yet in existence,

⁷²⁶ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXV, § 3.

⁷²⁷ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVI.

⁷²⁸ International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, Final Declaration, § II(5), (6) and (7).

⁷²⁹ Conference of High Contracting Parties to the Fourth Geneva Convention, Geneva, 5 December 2001, Declaration, § 4.

and take necessary measures to be represented on it and to be kept informed about its proceedings and recommendations.⁷³⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

619. In 1993, in the *Application of Genocide Convention case* (Provisional Measures) brought by Bosnia and Herzegovina against the FRY (Serbia and Montenegro), the ICJ called upon the FRY (Serbia and Montenegro) to ensure that:

any military, paramilitary or irregular armed units which may be directed or supported by it, as well as any organizations and persons which may be subject to its control, direction or influence, do not commit any acts of genocide, of direct and public incitement to commit genocide, or in complicity in genocide, whether directed against the Muslim population of Bosnia and Herzegovina or against any other national, ethnical, racial or religious group.⁷³¹

620. In 1997, in its concluding observations on the report of Myanmar, the CRC strongly recommended that:

All reported cases of abuse, rape and/or violence against children committed by members of the armed forces be rapidly, impartially, thoroughly and systematically investigated. Appropriate judicial sanctions should be applied to perpetrators and wide publicity should be given to such sanctions.⁷³²

621. In its admissibility decision in *X v. FRG* in 1976 regarding the right to be tried within a reasonable time for war crimes committed during the Second World War, the ECiHR noted that:

The international community requires the competent authorities of the Federal Republic of Germany to investigate and prosecute [war crimes committed during the Second World War] despite the difficulties encountered by reason of the long time that has elapsed since the commission of the acts concerned.⁷³³

622. In 1993, in a report on the situation of human rights in Peru, the IACiHR recommended that the Peruvian government adopt “legislation to regulate offenses committed in connection with the performance of duties, in order to punish crimes committed by members of security forces in emergency areas”.⁷³⁴

⁷³⁰ African Parliamentary Conference on International Humanitarian Law for the Protection of Civilians during Armed Conflict, Final Declaration, Niamey, 18–20 February 2002, preamble and §§ 7 and 11–12.

⁷³¹ ICJ, *Application of Genocide Convention case (Provisional Measures)*, Order, 8 April 1993, § 52.

⁷³² CRC, Concluding observations on the report of Myanmar, UN Doc. CRC/C/15/Add.69, 24 January 1997, § 41.

⁷³³ ECiHR, *X v. FRG*, Admissibility Decision, 6 July 1976, p. 116.

⁷³⁴ IACiHR, Report on the Situation of Human Rights in Peru, Doc. OEA/Ser.L/V/II.83 Doc. 31, 12 March 1993, p. 61.

V. *Practice of the International Red Cross and Red Crescent Movement*

623. According to the ICRC Commentary on the First Geneva Convention, there is an inconsistency between the English and the French text in the third paragraph of Articles 49 GC I, 50 GC II, 129 GC III and 149 GC IV in that the English text uses the term “suppression”, while the French text uses the wider expression “faire cesser”:

The expression “*faire cesser*”, employed in the French text, is open to various interpretations. In our opinion it covers everything a State can do to prevent the commission, or the repetition, of acts contrary to the Convention . . . The English word “suppression” corresponds more or less exactly to the French word “*répression*” (though not to the French word “*suppression*”). The French and English texts do not therefore correspond exactly. There can, however, be no doubt that the primary purpose of the paragraph is the *repression* of infractions other than “grave breaches”, and that the administrative measures which may be taken to ensure respect for the provisions of the Convention on the part of the armed forces and the civilian population are only a secondary consideration . . . It is thus clear that *all* breaches of the present Convention should be repressed by national legislation. At the very least, the Contracting Powers, having arranged for the repression of the various grave breaches and fixed an appropriate penalty for each, must include a general clause in their national legislative enactments, providing for the punishment of other breaches of the Convention. Furthermore, under the present paragraph the authorities of the Contracting Parties should issue instructions in accordance with the Convention and arrange for judicial or disciplinary proceedings to be taken in all cases of failure to comply with such instructions.⁷³⁵ [emphasis in original]

624. In 1993, in its report submitted to the UN General Assembly on the protection of the environment in time of armed conflict, the ICRC stated that “under international law, States have a clear duty to bring to justice all persons suspected of having committed or ordered the commission of such acts [‘certain breaches of international law, including those bearing on the environment in time of armed conflict’]”.⁷³⁶

625. In 1993, in a communication to the information services of National Red Cross and Red Crescent Societies, the ICRC stated that:

The parties to a conflict and all the states party to the 1949 Geneva Conventions are under the obligation to repress grave breaches of international humanitarian law and to put an end to any violations thereof. The obligation to repress applies whatever the nationality of the offender and whenever the offence is committed.

...

Nothing prevents states from collectively exercising powers that they possess on an individual basis . . . The setting-up of [the ICTY] . . . does not release states from

⁷³⁵ Jean S. Pictet (ed.), *Commentary on the First Geneva Convention*, ICRC, Geneva, 1952, pp. 367–368.

⁷³⁶ ICRC, Report on the Protection of the Environment in Time of Armed Conflict submitted to the UN General Assembly, reprinted in Report of the UN Secretary-General on the protection of the environment in times of armed conflict, UN Doc. A/48/269, 29 July 1993, § 49.

their obligation to take all other measures intended to ensure respect for international humanitarian law, to prevent and, where necessary, repress any violations thereof.⁷³⁷

626. In 1993, the ICRC informed the authorities of a State of an event involving the abuse of the remains of a dead person. The purpose of the notification was to enable the authorities “to conduct an inquiry into this violation of international humanitarian law and to avoid the repetition of such acts in the future”. The ICRC expressed its hope that this might facilitate the work of the authorities, reminding them that they were “mandated to make prevail law and order”.⁷³⁸

627. At its Seville Session in 1997, the Council of Delegates adopted a resolution in which it invited National Societies to promote the creation of an international criminal court, “while at the same time encouraging States to comply with their existing obligation under international humanitarian law to repress violations of this law and of the Convention relating to the crime of genocide”.⁷³⁹

628. At its Geneva Session in 1999, the Council of Delegates adopted a resolution on the international criminal court in which it invited National Societies: to promote the ratification of the Rome Statute without making the declaration under Art. 124 of the Rome Statute, while at the same time encouraging States to comply with their existing obligation under international humanitarian law to suppress and repress violations of this law.⁷⁴⁰

VI. *Other Practice*

629. In 1988, in report on human rights in Nicaragua, Americas Watch stated that:

We learned of another rape, however, that did result in punishment. Four Sandinista soldiers were tried for the rape on January 27, 1988 in Yacapuca, Jinotega, of four women in their house. In addition, they were charged with theft. The soldiers, apparently conducting a recruitment sweep, accused the women of being *contra* collaborators.⁷⁴¹

630. In 1993, the authorities of a separatist entity stated that it was impossible for the armed forces to prevent acts of pillage by civilians, since the troops were needed in another region. They added, however, that they had encouraged local television and radio stations to broadcast messages calling on the civilian population to stop the pillage of homes.⁷⁴²

631. In an appeal in 1996, Amnesty International stated that “IFOR should provide adequate security for grave sites to ensure that those responsible

⁷³⁷ ICRC archive document ⁷³⁸ ICRC archive document.

⁷³⁹ International Red Cross and Red Crescent Movement, Council of Delegates, Seville Session, 25–27 November 1997, Res. 5, § 1.

⁷⁴⁰ International Red Cross and Red Crescent Movement, Council of Delegates, Geneva Session, 29–30 October 1999, Res. 11, § 1.

⁷⁴¹ Americas Watch, *Human Rights in Nicaragua: 1987–1988*, New York, August 1998, p. 98.

⁷⁴² ICRC archive document.

for grave breaches of the [1949] Geneva Conventions can be brought to justice".⁷⁴³

632. In a resolution adopted at its Berlin Session in 1999, the Institute of International Law stated that:

The competent authorities of a State on the territory of which is found a person against whom is alleged a serious violation of international humanitarian law committed in a non-international armed conflict are entitled to prosecute and try such a person before their courts; they are urged to do so.⁷⁴⁴

633. In 1995, the Groupe écoute et réconciliation dans l'Afrique des Grands Lacs – a group of private individuals from the Great Lakes region that met under the auspices of the Graduate Institute of Development Studies in Geneva – stated in a declaration on ending the reign of impunity in Rwanda and Burundi that the absence of an extradition treaty should not be used as an excuse to prevent the arrest and surrender of persons suspected of acts of genocide. In cases where States could not or would not extradite the suspects, they should be tried under the laws of the country where they resided.⁷⁴⁵

Granting of asylum to suspected war criminals

I. Treaties and Other Instruments

Treaties

634. Article 1(F)(a) of the 1951 Refugee Convention provides that:

The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that . . . he has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.

Other Instruments

635. No practice was found.

II. National Practice

Military Manuals

636. Australia's Defence Force Manual provides that:

Where an individual seeking asylum in a neutral state is alleged to have committed grave breaches of LOAC, and a prima facie case can be established, the neutral state

⁷⁴³ Amnesty International, Amnesty International renews calls for IFOR to comply with international law, April 1996.

⁷⁴⁴ Institute of International Law, Berlin Session, Resolution on the Application of International Humanitarian Law and Fundamental Human Rights in Armed Conflicts in which Non-State Entities are Parties, 25 August 1999, § VIII.

⁷⁴⁵ Institut Universitaire d'études du développement, Groupe écoute et réconciliation dans l'Afrique des Grands Lacs, Pour en terminer avec la "culture de l'impunité" au Rwanda et Burundi, January 1995, p. 3.

is obligated either to place the individual on trial or hand them over to another party to the Geneva Conventions for trial.⁷⁴⁶

National Legislation

637. No practice was found.

National Case-law

638. In the *Ahmed case* in 1996, the Administrative Law Division of the Council of State of the Netherlands ruled that a Somali national could not be granted the protection of the 1951 Refugee Convention since he was suspected of having been involved in committing crimes against humanity and, being a high-ranking soldier and acting on behalf of the Somali government, was thus guilty of acts contrary to common Article 3 of the 1949 Geneva Conventions.⁷⁴⁷ Similar judgements were pronounced by the same body in the *Hamoud case* and in the *Chantirakumar case* in 1997.⁷⁴⁸

639. In the *Demjanjuk case* in 1985, proceedings before the US Court of Appeals led to the revocation of the citizenship of the accused who was subsequently extradited to stand trial in Israel on accusations of having committed war crimes during the Second World War.⁷⁴⁹

Other National Practice

640. The Report on the Practice of the Netherlands, with respect to the 1984 Convention against Torture and its ratification procedure in the Netherlands, and referring to decisions of the Dutch Administrative Law Division of the Council of State to refuse protection under the 1951 Refugee Convention to persons suspected of having been involved in committing crimes against humanity and crimes in violation of common Article 3 of the 1949 Geneva Conventions, states that "the Dutch government completely complied with the treaty requirements".⁷⁵⁰

641. The Report on US Practice states that "over the last 20 years, the US Department of Justice has engaged in extensive investigations and litigation to denaturalise and expel war criminals from the Second World War era. It has also sought to exclude such persons from entry into the United States." The report concludes that "this reflects a broader *opinio juris* that no nation should provide sanctuary to persons guilty of war crimes".⁷⁵¹

⁷⁴⁶ Australia, *Defence Force Manual* (1994), § 1114.

⁷⁴⁷ Netherlands, Council of State (Raad van State), Administrative Law Division, *Ahmed case*, Judgement, 20 December 1996.

⁷⁴⁸ Netherlands, Council of State (Raad van State), Administrative Law Division, *Hamoud case*, Judgement, 11 September 1997; *Chantirakumar case*, Judgement, 2 September 1997.

⁷⁴⁹ US, Court of Appeals, *Demjanjuk case*, Judgement, 31 October 1985.

⁷⁵⁰ Report on the Practice of the Netherlands, 1997, Chapter 6.4.

⁷⁵¹ Report on US Practice, 1997, Chapter 6.12. (For a list of denaturalisation and deportation cases for which the US has sought judicial assistance from the Soviet Union, see Marian Nash

III. Practice of International Organisations and Conferences

United Nations

642. In 1994, in a statement by its President on Rwanda, the UN Security Council, after reaffirming its view that those responsible for serious breaches of IHL and acts of genocide must be brought to justice, stressed that “persons involved in such acts cannot achieve immunity from prosecution by fleeing the country” and noted that “the provisions of the Convention relating to the status of refugees do not apply to such persons”.⁷⁵²

643. In a resolution adopting the Declaration on Territorial Asylum in 1967, the UN General Assembly stated that:

The right to seek and to enjoy asylum may not be invoked by any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes.⁷⁵³

644. In a resolution adopted in 1973 on principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly stated that “States shall not grant asylum to any person with respect to whom there are serious reasons for considering that he has committed a crime against peace, a war crime or a crime against humanity”.⁷⁵⁴

Other International Organisations

645. No practice was found.

International Conferences

646. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

647. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

648. No practice was found.

(Leich), *Cumulative Digest of the United States Practice in International Law, 1981–1988*, US Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 1404–1405.)

⁷⁵² UN Security Council, Statement by the President, UN Doc. S/PRST/1994/59, 14 October 1994, p. 2.

⁷⁵³ UN General Assembly, Res. 2312 (XXII), 14 December 1967, Article 1(2).

⁷⁵⁴ UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, § 7.

VI. *Other Practice*

649. In its summary findings of the project dealing with safeguarding the rights of refugees under the exclusion clauses provided in the 1951 Refugee Convention, the Lawyers Committee for Human Rights stated that:

Once an individual has been excluded, the Legal Advisory Group found that States are under a twofold duty. They must ensure that (a) those who have committed serious crimes are brought to justice and held responsible and (b) that the individual concerned continues to benefit from international human rights protection.

Some excludable crimes are crimes so serious under international law that any state may investigate, try and punish their perpetrators on the basis of the principle of universal jurisdiction. This is the case in particular for crimes within the purview of Article 1F(a) [of the 1951 Refugee Convention] including genocide, war crimes and crimes against humanity. Simply excluding the perpetrators of such crimes is not sufficient: States have a duty to prosecute such persons before a national or an international court.

There are three broad ways to ensure that those who have committed serious human rights violations are brought to justice:

- States may prosecute an excluded individual under the principle of universal jurisdiction
- States may extradite the excluded individual to face trial in the country in which the crimes were committed or a third State, if all requirements under binding international human rights law regarding the integrity of the person and fair trial guarantees can be assured
- States may extradite the excluded individual to face trial before an international tribunal. Where an International Tribunal, such as the International Criminal Tribunal for Rwanda (ICTR) or a future International Criminal Court (ICC), has sought the extradition of an excluded individual States have an obligation to comply with this request.⁷⁵⁵

650. In a report in 2002, the Lawyers Committee for Human Rights analysed the issue of preventing presumed criminals from acquiring the status of a refugee and stated that:

International refugee law contained a mechanism – exclusion – that, at least in theory, provided a foundation for effective action: individuals who have committed serious international crimes are not permitted to avail themselves of the protection of the refugee regime. In many ways exclusion can be viewed as a permanent valve which mediates between the obligation to protect those threatened with serious human rights violations (refugees) and the goal of combating the impunity of the authors of such violations. Serving as a reminder that criminals may not be unjustly sheltered, exclusion can play a role in triggering a State's obligation to search out those who have committed the most serious crimes and ensure that they are held accountable for their actions under international law.⁷⁵⁶

⁷⁵⁵ Lawyers Committee for Human Rights, "Safeguarding the Rights of Refugees under the Exclusion Clauses: Summary Findings of the Project and a Lawyers Committee for Human Rights Perspective", *International Journal of Refugee Law*, Special Supplementary Issue, Winter 2000, Vol. 12, p. 322.

⁷⁵⁶ Lawyers Committee for Human Rights, *Refugees, Rebels and the Quest for Justice*, New York, 2002, pp. viii–ix

D. Amnesty

Note: For practice concerning fair trial guarantees, see Chapter 32, section M. For practice concerning release and return of persons deprived of their liberty, see Chapter 37, section K.

I. Treaties and Other Instruments

Treaties

651. Article 6(5) AP II provides that:

At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.

Article 6 AP II was adopted by consensus.⁷⁵⁷

652. Section 1(b) of the 1987 Esquipulas II Accords provides that:

In each Central American country, except those where the International Verification and Follow-up Commission determines this to be unnecessary, amnesty decrees shall be issued which establish all necessary provisions guaranteeing the inviolability of life, freedom in all its forms, property and security of person of those to whom such decrees are applicable. Simultaneously with the issue of amnesty decrees, the irregular forces of the countries in question shall release anyone that they are holding prisoner.

653. In Article 3(c) of the 1994 Quadripartite Agreement on Georgian Refugees and IDPs, the parties agreed that:

Displaced persons/refugees shall have the right to return peacefully without risk of arrest, detention, imprisonment or legal criminal proceedings.

Such immunity shall not apply to persons where there are serious evidences that they have committed war crimes and crimes against humanity as defined in international instruments and international practice as well as serious non-political crimes committed in the context of the conflict. Such immunity shall also not apply to persons who have previously taken part in the hostilities and are currently serving in armed formations, preparing to fight in Abkhazia.

Persons falling into these categories should be informed through appropriate channels of the possible consequences they may face upon return.

654. Article VI of the 1995 Agreement on Refugees and Displaced Persons annexed to the Dayton Accords provides that:

Any returning refugee or displaced person charged with a crime, other than a serious violation of international humanitarian law as defined in the Statute of the International Tribunal for the Former Yugoslavia since January 1, 1991 or a common crime unrelated to the conflict, shall upon return enjoy an amnesty. In no case shall charges for crimes be imposed for political or other inappropriate reasons or to circumvent the application of the amnesty.

⁷⁵⁷ CDDH, *Official Records*, Vol. VII, CDDH/SR.50, 3 June 1977, p. 97.

655. Article 10 of the 2002 Statute of the Special Court for Sierra Leone provides that:

An amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute [crimes against humanity, violations of common Article 3 of the 1949 Geneva Conventions and of AP II, and other serious violations of IHL] shall not be a bar to prosecution.

Other Instruments

656. Article 3(1) of the 1992 Agreement between the Parties to the Conflict in Bosnia and Herzegovina on the Release and Transfer of Prisoners provides that:

All prisoners not accused of, or sentenced for, grave breaches of International Humanitarian Law as defined in Art. 50 of the First, Art. 51 of the Second, Art. 130 of the Third and Art. 147 of the Fourth Geneva Convention, as well as in Art. 85 of Additional Protocol I, will be unilaterally and unconditionally released.

657. Article 19 of the 1993 Cotonou Agreement on Liberia provides that:

The Parties . . . agree that . . . there shall be a general amnesty granted to all persons and parties involved in the Liberian civil conflict in the course of actual military engagements. Accordingly, acts committed by the Parties or by their forces while in actual combat or on the authority of any of the Parties in the course of actual combat are hereby granted amnesty.

658. The preamble to the General Amnesty Proclamation Order concerning Sudan, annexed to the 1997 Sudan Peace Agreement, provides that “the parties agree that the President of the Republic of the Sudan shall declare a general and unconditional amnesty for all offences committed . . . in accordance with the common will of the people of the Sudan”.

659. Articles 1 and 2 of the General Amnesty Proclamation Order concerning Sudan, annexed to the 1997 Sudan Peace Agreement, provide that:

1. The general and unconditional amnesty shall cover the period from 16 May 1983 to . . . 1997 to all (SSDF) forces, to the effect that nobody shall be prosecuted or punished for acts or omissions committed during this period.
2. No action or other legal proceedings whatsoever, civil or criminal, shall be instituted against any persons in any court of law or any place for, or on account of, any act, omission or matter done inside or outside Sudan as from . . . if such act or omission or matter was committed by any member of (the SSDF).

660. Article 6 of the General Amnesty Proclamation Order concerning Sudan, annexed to the 1997 Sudan Peace Agreement, established a Joint Amnesty Commission in order to follow up on its implementation. Article 7 established a Joint Amnesty Tribunal in order to “receive, examine and determine cases which are covered by this Amnesty Proclamation”.

661. The 1996 Moscow Agreement on Tajikistan, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in

Tajikistan, states that “there is a need to implement a universal amnesty and reciprocal pardoning of persons who took part in the military and political confrontation from 1992 up to the time of adoption of the Amnesty Act”.

662. The 1996 Protocol on the Commission on National Reconciliation in Tajikistan, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, provides that:

During the transition period the President and the Commission on National Reconciliation will exercise the following functions and powers: . . . adoption of a Reciprocal Pardon Act and drafting of an Amnesty Act to be adopted by Parliament and the Commission on National Reconciliation.

663. Paragraph 2 of the 1997 Protocol on Tajik Refugees, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, provides that:

The Government of the Republic of Tajikistan assumes the obligation . . . not to institute criminal proceedings against returning refugees or displaced persons for their participation in the political confrontation and the civil war, in accordance with the legislative acts in force in the Republic.

664. Paragraph 7 of the 1997 Statute of the Tajik Commission on National Reconciliation, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, provides that “the Commission shall have the following functions and powers: . . . Adoption of a Reciprocal Pardon Act and drafting of an Amnesty Act to be adopted by the Parliament and the Commission on National Reconciliation.”

665. Paragraph 1 of the 1997 Protocol on Political Questions concerning Tajikistan, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, provides that:

The President and the Commission on National Reconciliation shall adopt the reciprocal-pardon act as the first political decision to be taken during the initial days of the Commission’s work. No later than one month after the adoption of the reciprocal-pardon act, the amnesty act shall be adopted.

666. The 1997 Bishkek Memorandum, referring to the 1997 Protocol on Political Questions concerning Tajikistan, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, recalls that “a protocol on political questions was signed, which includes agreements on such basic issues as the adoption of the reciprocal-pardon act and the amnesty act”.

667. Paragraph 1 of the 1997 Protocol on the Guarantees of Implementation of the General Agreement on the Establishment of Peace and National Accord in Tajikistan, forming part of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, recalls that the parties to the conflict agreed “to provide amnesty for persons who took part in the civil conflict and political confrontation”.

668. Article IX of the 1999 Peace Agreement between the Government of Sierra Leone and the RUF, entitled “Pardon and Amnesty”, provides that:

1. In order to bring lasting peace to Sierra Leone, the Government of Sierra Leone shall take appropriate legal steps to grant Corporal Foday Sankoh absolute and free pardon.
2. After the signing of the present Agreement, the Government of Sierra Leone shall also grant absolute and free pardon and reprieve to all combatants and collaborators in respect of anything done by them in pursuit of their objectives, up to the time of the signing of the present Agreement.
3. To consolidate the peace and promote the cause of national reconciliation, the Government of Sierra Leone shall ensure that no official or judicial action is taken against any member of the RUF/SL, ex-AFRC, ex-SLA or CDF in respect of anything done by them in pursuit of their objectives as members of those organisations, since March 1991, up to the time of the signing of the present Agreement. In addition, legislative and other measures necessary to guarantee immunity to former combatants, exiles and other persons, currently outside the country for reasons related to the armed conflict shall be adopted ensuring the full exercise of their civil and political rights, with a view to their reintegration within a framework of full legality.

669. By Article 22(2)(c) of Protocol II to the 2000 Arusha Peace and Reconciliation Agreement for Burundi, which forms an integral part of the Agreement, the National Assembly of Burundi agreed “pending the installation of a transnational Government [to] adopt such legislation as is necessary for the granting of temporary immunity against prosecution for politically motivated crimes prior to the signature of the Agreement”.

II. National Practice

Military Manuals

670. Canada’s LOAC Manual provides, with respect to non-international armed conflicts, that:

At the end of hostilities, and in order to facilitate a return to peaceful conditions, the authorities in power are to endeavour to grant the broadest possible amnesty to those who have participated in the conflict or been deprived of their liberty for reasons related thereto, whether they are interned or detained.⁷⁵⁸

671. New Zealand’s Military Manual, with respect to non-international armed conflicts, provides that:

In order to facilitate a return to peaceful conditions, the authorities in power at the end of the hostilities are to endeavour to grant the broadest possible amnesty to those who have participated in the conflict or been deprived of their liberty for reasons related to it, whether they were interned or detained . . .

⁷⁵⁸ Canada, *LOAC Manual* (1999), p. 17-4, § 31.

This terminology is used to apply to whichever Party is in power at the end of the conflict, whether it be the former government or its opponents . . .

This would seem to include persons tried for treason, but not those sentenced for common crimes, including assassination.⁷⁵⁹

672. The UK Military Manual states that:

Having regard to the duty of belligerents to try those who have committed grave breaches of the 1949 [Geneva] Conventions, it may now be open to doubt whether a treaty of peace would operate, as was often the case in the past, as an amnesty. It is, on the other hand, open to two or more belligerents to agree in a peace treaty, or even in a general armistice, that no further war crimes trials will be instituted by them after a certain agreed date or as from the date of the treaty of the armistice.⁷⁶⁰

National Legislation

673. Algeria's Law on National Reconciliation, proposed by the government for persons involved in terrorist activities who say they wish to stop, provides, *inter alia*, for immunity from prosecution for anyone:

who has not committed or participated in the commission of one of the offences set forth in Article 87 bis of the Penal Code [i.e. acts qualifying as "terrorist or subversive"], leading to death or permanent disability, rape, or who has not used explosives in public places or places frequented by the public and who, within six months of the date of promulgation of this law, has advised the competent authorities that he will stop any terrorist or subversive activity and has given himself up to the competent authorities.⁷⁶¹

674. Argentina's Amnesty Law provides that amnesty shall be granted for acts committed before 25 May 1973 and relating to political, social, trade union or student activities, and for acts committed by civilians prosecuted by military courts or military commanders. Under this law, all sentences for such acts should be discontinued.⁷⁶²

675. Argentina's Self-Amnesty Law, in connection with the armed confrontations which occurred in the fight against subversive terrorism, discontinued the penal actions resulting from crimes committed for the purpose of terrorist or subversive activities between 25 May 1973 and 17 June 1982. It also applied to all unlawful acts undertaken on the occasion of, or for the purpose of developing, actions to prevent, thwart or put an end to terrorist or subversive activities.⁷⁶³ However, this law was found to be unconstitutional and declared void by the Law Repealing the Self-Amnesty Law which declared it to be "without any juridical effect as regards the judgement of the penal, civil, administrative and military responsibilities for the acts it claims to cover. In particular, the

⁷⁵⁹ New Zealand, *Military Manual* (1992), § 1816, including footnotes 55 and 56.

⁷⁶⁰ UK, *Military Manual* (1958), § 641, footnote 1.

⁷⁶¹ Algeria, *Law on National Reconciliation* (1999), Article 3.

⁷⁶² Argentina, *Amnesty Law* (1973), Articles 1 and 5.

⁷⁶³ Argentina, *Self-Amnesty Law* (1983), Articles 1, 2 and 6.

principle of least harsh punishment, stipulated in Article 2 of the Penal Code, is inapplicable."⁷⁶⁴

676. The Constitution of the City of Buenos Aires (Argentina) provides that the functions of the head of government of the autonomous City of Buenos Aires shall include the authority to "pardon or commute penalties individually and in exceptional cases following a plea by a competent court. However, at no time may he pardon or commute, *inter alia*, penalties for crimes against humanity, or crimes committed by public officials during the course of their duties."⁷⁶⁵

677. Argentina's Draft Code of Military Justice provides that "in no case shall amnesty or pardon be granted with respect to the offences contained in Chapter I (offences against protected persons and objects in the event of armed conflict)"⁷⁶⁶

678. The Amnesty Law as amended of the Federation of Bosnia and Herzegovina provides that:

Amnesty is granted to all persons who committed, until 22 December 1995 [14 December 1995 in the original version before the amendment], criminal offences against the basic principles of the social system and security of Bosnia and Herzegovina . . . criminal offences against the armed forces . . . illegal possession of weapons and explosive material . . . as well as the criminal offence of failing to respond to a call and avoiding the military service by incapacitation or deceit and deliberate withdrawal or escape from the armed forces . . . if this Law or other related provisions applied in the territory of the Federation foresees penal sanctions against the persons who commit these criminal acts.⁷⁶⁷

679. The Law on Amnesty of the Federation of Bosnia and Herzegovina provides that:

Exemption from criminal prosecution or full exemption from pronounced sentence or part of the sentence that has not been served (hereinafter: the amnesty) are granted to all persons who committed, in the period between 1 January 1991 and 22 December 1995, any criminal act stipulated in appropriate criminal laws that were applied in the territory of the Federation of Bosnia and Herzegovina (hereinafter: the Federation), except for criminal acts against humanity and international law as stipulated in Section XVI of the [Criminal Code] of the SFRY that has been taken over, and following criminal acts: murder . . . rape . . . criminal acts against a person's dignity and moral . . . as well as serious cases of robbery . . . if this Law or other related provisions applied in the territory of the Federation foresees penal sanctions against the persons who commit these criminal acts.⁷⁶⁸

680. The Law on Amnesty as amended of the Republika Srpska provides that:

Exemption from criminal prosecution or partial or full exemption from pronounced sentence or a part of the sentence that has not been served (hereinafter: the amnesty)

⁷⁶⁴ Argentina, *Law Repealing the Self-Amnesty Law* (1983), Articles 1 and 2.

⁷⁶⁵ Argentina, *Constitution of the City of Buenos Aires* (1996), Article 104(18).

⁷⁶⁶ Argentina, *Draft Code of Military Justice* (1998), Article 184, amending Article 478 of the *Code of Military Justice as amended* (1951).

⁷⁶⁷ Bosnia and Herzegovina, Federation, *Amnesty Law as amended* (1996), Article 1.

⁷⁶⁸ Bosnia and Herzegovina, Federation, *Law on Amnesty* (1999), Article 1.

are granted to all persons who committed, in the period between 1 January 1991 and 14 December 1995, any criminal act against basic principles of the social system of the Republika Srpska as stipulated in Section XV, and criminal acts against the armed forces of Republika Srpska as stipulated in the Criminal law of Republika Srpska, as well as the following acts: . . . illegal possession of weapons and explosive material.⁷⁶⁹

681. In line with the provisions of Protocol II to the 2000 Arusha Peace and Reconciliation Agreement for Burundi providing for the interim period and transitional institutions, a Draft Law on Provisional Immunity for Political Leaders (2001) is being discussed in Burundi, according to which members of political parties and movements signatory of the said agreement returning from exile shall be granted provisional immunity from penal prosecution for politically motivated offences committed during the period of 1 July 1962–28 August 2000. The Draft Law states that “this immunity does not concern crimes of genocide, crimes against humanity and war crimes”.⁷⁷⁰ However, in early 2002, the Draft Law failed to be adopted by the National Assembly (parliament) of Burundi.⁷⁷¹

682. In Chile, during the military government, the Decree-Law on General Amnesty extended an amnesty to:

all persons who have been the authors, accomplices, or accessories of unlawful deeds during the period in which the state of siege was in force, between 11 September 1973 and 10 March 1978, unless they are currently being tried or have been sentenced and to those persons who as of the date that this decree-law took effect have been sentenced by military tribunals since 11 September 1973.⁷⁷²

683. Colombia’s Amnesty Decree states that:

The National Government can grant, in every particular case, the benefits of a pardon or an amnesty [to Colombian nationals] for offences or acts which constitute crimes of rebellion, sedition, putsch, conspiracy and related acts, committed before the promulgation of the [Constitution], when, in its opinion, the guerrilla group of which the person asking for [the pardon or amnesty] is a member has demonstrated its intention to reintegrate into civil life.

...

The benefits provided for in this decree can neither be granted with respect to atrocities nor with respect to murder committed outside a situation of combat or in taking advantage of the defenselessness of the victim.⁷⁷³

684. Croatia’s General Amnesty Law “grants general amnesty from criminal prosecution and proceedings for perpetrators of criminal offences committed during the aggression, armed rebellion or armed conflicts and in connection [therewith] in the Republic of Croatia”. The Law provides, however, that “from

⁷⁶⁹ Bosnia and Herzegovina, Republika Srpska, *Law on Amnesty* as amended (1996), Article 1.

⁷⁷⁰ Burundi, *Draft Law on Provisional Immunity for Political Leaders (2001)*, Articles 1–2.

⁷⁷¹ International Crisis Group (ICG), Burundi after six months of transition: Continuing the war or winning peace?, ICG Africa Report No. 46, Nairobi/Brussels, 24 May 2002, p. 3.

⁷⁷² Chile, *Decree-Law on General Amnesty (1978)*, Article 1.

⁷⁷³ Colombia, *Amnesty Decree (1991)*, Article 1.

the amnesty for criminal offences stated in . . . this law are exempted" perpetrators of crimes (under Articles 120–122 of the Criminal Code), genocide (under Article 119 of the Criminal Code) and any other act which under the Criminal Code constitutes a violation of the laws and customs of war.⁷⁷⁴

685. In 1987, El Salvador adopted the Law on Amnesty to Achieve National Reconciliation in conformity with the 1987 Esquipulas II Accords. The Law grants "absolute and exclusive legal amnesty" to all persons, national and foreign, who have acted as the immediate or proximate perpetrators or accomplices in the commission of political crimes or common crimes related to political or common crimes perpetrated prior to 22 October 1987 in which no fewer than 20 persons were involved. The Law also extends to those who have taken up arms if they come forward and state their wish to renounce violence and receive amnesty within 15 days of the date the law enters into effect. Those who took part in the assassinations of Mgr Romero and Herbert Anaya, committed kidnapping for personal gain or engaged in drug trafficking cannot benefit from the amnesty.⁷⁷⁵

686. Article 1 of El Salvador's General Amnesty Law for Consolidation of Peace gives full, absolute and unconditional amnesty to all persons who in any way have participated in the commission of political crimes, related common crimes and common crimes committed before 1 January 1992 by persons numbering no less than 20. In Article 2, the law extends the definition of a political crime to include "crimes against the public peace", "crimes against judicial activity" and crimes "committed because, or as a result of armed conflict, without taking into consideration political status, militancy, affiliation or ideology". Article 4 provides, *inter alia*, that "the amnesty granted by this law extinguishes all civil liability".⁷⁷⁶

687. Ethiopia's Constitution provides that:

The legislature or any other organ of state shall have no power to pardon or give amnesty with regard to [acts qualified as "crimes against humanity" such as] inhuman punishment, forcible disappearances, summary executions, acts of genocide. Crimes against humanity shall not be subject to amnesty or pardon by any act of government.⁷⁷⁷

688. Guatemala's National Reconciliation Law foresees the "total release from penal responsibility for political crimes committed during the armed internal confrontation" and "the total release from penal responsibility for common crimes . . . connected to" such political crimes.⁷⁷⁸ However, it states that:

The release from penal responsibility . . . does neither apply to crimes of genocide, torture and forced disappearance nor to the crimes which are not subject

⁷⁷⁴ Croatia, *General Amnesty Law* (1996), Articles 1 and 3.

⁷⁷⁵ El Salvador, *Law on Amnesty to Achieve National Reconciliation* (1987).

⁷⁷⁶ El Salvador, *General Amnesty Law for Consolidation of Peace* (1993), Articles 1, 2 and 4.

⁷⁷⁷ Ethiopia, *Constitution* (1994), Article 28(1).

⁷⁷⁸ Guatemala, *National Reconciliation Law* (1996), Articles 2 and 4.

to limitations or which, in conformity with internal law or international treaties ratified by Guatemala, do not allow the release from penal responsibility.⁷⁷⁹

689. Between 1987 and 1993, the Peruvian Congress adopted the Law on Terrorism (1987), the Law on the Mitigation, Exemption or Remission of Punishment of Terrorism (1989), the Decree on Terrorism (1991), the Decree-Law on the Conditions for Mitigation, Exemption, Remission or Reduction of Punishment for Terrorism (1992) and the Decree on Repentance for Terrorism (1993). In principle these laws excluded the commutation of sentences for offences related to acts of terrorism, foreseeing, however, sentence reductions or exemptions if there had been subsequent “repentance”.⁷⁸⁰

690. In 1996, Peru adopted the Law on Amnesty for Retired Officers of the Armed Forces and the Law on Amnesty for Military and Civil Personnel by which it granted a general amnesty to military and civilian personnel investigated or tried for acts related to insults to the armed forces, disobedience, etc.⁷⁸¹

691. In 1997, the Russian State Duma adopted the Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya. The Law aims at “re-enforcing the civil peace and understanding within the Russian Federation” and provides for the refraining from or ending of criminal procedures against persons who have committed “socially dangerous acts” in relation to the armed conflict in the Chechen Republic. It also provides for the exemption of such persons from the execution of punishment.⁷⁸² However, referring to a number of articles of Russia’s Criminal Code, the law expressly excludes from the amnesty persons who committed specific acts such as spying, terrorism, banditry, intentional homicide, rape, kidnapping, robbery, etc., as well as foreigners.⁷⁸³ According to the Law on the Execution of the Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya, the amnesty applies to persons who committed crimes within the territory of the Chechen Republic, Ingushetia, Daghestan, North Ossetia – Alanya and Stavropolsky Kraj – between 9 December 1994 and 31 December 1996, and to persons who committed one of the following acts, irrespective of the place of its committal: evasion of regular military duty; unwarranted absence and unwarranted abandonment of unit or duty station; desertion; and evasion of military service by maiming or by other

⁷⁷⁹ Guatemala, *National Reconciliation Law* (1996), Article 8.

⁷⁸⁰ Peru, *Law on Terrorism* (1987); *Law on the Mitigation, Exemption or Remission of Punishment of Terrorism* (1989); *Decree on Terrorism* (1991); *Decree-Law on the Conditions for Mitigation, Exemption, Remission or Reduction of Punishment for Terrorism* (1992); *Decree on Repentance for Terrorism* (1993).

⁷⁸¹ Peru, *Law on Amnesty for Retired Officers of the Armed Forces* (1996); *Law on Amnesty for Military and Civil Personnel* (1996).

⁷⁸² Russia, *Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya* (1997), preamble and Articles 1–3.

⁷⁸³ Russia, *Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya* (1997), Article 4.

means. Nevertheless, the amnesty does not release persons from the duty to repair the damage caused by the illicit acts.⁷⁸⁴

692. Rwanda's Law on the Prosecution of the Crime of Genocide and Crimes against Humanity provides that "the court having jurisdiction over the civil action shall rule on damages even where the accused . . . has benefited from an amnesty".⁷⁸⁵

693. South Africa's Promotion of National Unity and Reconciliation Act provides that one of the functions of the Truth and Reconciliation Commission is to:

facilitate and promote the granting of amnesty in respect of acts associated with political objectives, by receiving from persons desiring to make a full disclosure of all the relevant facts, applications for the granting of amnesty in respect of such acts, and transmitting such applications to the Committee on Amnesty for its decision, and by publishing decisions granting amnesty, in the Gazette.⁷⁸⁶

694. Tajikistan's Constitution gives the Supreme Assembly (parliament) the power to declare a general amnesty.⁷⁸⁷ The Draft Amnesty Act, signed by the Tajik President in July 1997, provides for the annulment of the convictions and the discontinuation of all criminal cases under investigation with regard to persons who took part in the political and military confrontation from 1992 to the time of adoption of the law.⁷⁸⁸ Certain crimes are excluded.⁷⁸⁹

695. In 1998, the Tajik parliament, in honour of the 7th anniversary of Tajikistan's independence and the anniversary of the signing of the 1997 General Agreement on the Establishment of Peace and National Accord in Tajikistan, adopted the General Amnesty Law which provides for the release from prison of convicted persons, such as, *inter alia*, "participants and veterans of the Great Patriotic War and persons equated with them, participants and veterans of armed conflicts on the territory of other States". The Law also provides for the stopping of criminal investigations against such persons. However, referring to a number of provisions of the Criminal Code of Tajikistan, it excludes from the granting of amnesty persons who have committed crimes such as pillage and violations against the civilian population in the area of armed clashes. Nor does it extend to acts such as murder, kidnapping, rape, terrorism, robbery and other similar crimes.⁷⁹⁰

696. In 1999, the Tajik parliament adopted a Resolution on Amnesty for Opposition Fighters, initiated by the President of Tajikistan, based on a resolution of

⁷⁸⁴ Russia, *Law on the Execution of the Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya* (1997), Articles 1 and 4.

⁷⁸⁵ Rwanda, *Law on the Prosecution of the Crime of Genocide and Crimes against Humanity* (1996), Article 31.

⁷⁸⁶ South Africa, *Promotion of National Unity and Reconciliation Act* (1995), Article 4(c).

⁷⁸⁷ Tajikistan, *Constitution* (1994), Article 49(24).

⁷⁸⁸ Tajikistan, *Draft Amnesty Act* (1997), Articles 1-2.

⁷⁸⁹ Tajikistan, *Draft Amnesty Act* (1997), Article 4.

⁷⁹⁰ Tajikistan, *General Amnesty Law* (1998), Articles 1, 6 and 8(b) and (c).

the Commission on National Reconciliation, and on the request of the UTO. This resolution expressly aims at “facilitating the process of peace building and national reconciliation in Tajikistan” and is “guided by the principle of humanity”. It provides for the release of members of the armed forces of the UTO in accordance with a list approved by the Commission on National Reconciliation, as well as for the stopping of criminal investigations against such persons, and applies to acts committed before adoption of the resolution.⁷⁹¹

697. Under its Amnesty Law of 1985, Uruguay granted amnesty with respect to all political offences and criminal and military offences related thereto committed after 1 January 1962. “Political offences” are defined as those committed directly or indirectly for political motives. The amnesty extends to all persons accused of committing these offences as authors, co-authors or accomplices and accessories, whether or not they have been convicted or tried. Offences committed by police or military personnel, *equiparados*, and others who have subjected individuals to inhuman, cruel or degrading treatment or detained individuals who subsequently disappeared are excluded, as are offences committed by persons of these categories who acted as accomplices for or covered up those offences. Penalties and sanctions imposed for the amnestied offences were also declared null and void *ab initio*.⁷⁹²

698. In 1986, Uruguay adopted an Amnesty Law for offences committed between 1984 and 1985 by military and police personnel for political motives or in the course of discharging their functions, and for offences committed on orders received during the “*de facto* period” when a situation of internal violence prevailed.⁷⁹³

699. Zimbabwe’s Amnesty Act provides that “no legal proceedings whatsoever, whether civil or criminal, shall be instituted in any court of law in respect of any act to which this section applies, done within Southern Rhodesia or elsewhere before the 21st December, 1979”.⁷⁹⁴ The Amnesty (General Pardon) Act provides that “a free pardon is hereby granted to every person in respect of any act committed by him, being an act which constitutes a criminal offence, to which this Act applies”.⁷⁹⁵

National Case-law

700. In the *Cavallo case* in 2001, Argentina’s Federal Judge nullified two 1987 laws that had amnestied hundreds of military officers for human rights violations during the country’s 1976–1983 dictatorship. The judge stated that these laws did not respect States’ obligations under international law to investigate and punish human rights violations and crimes against humanity.⁷⁹⁶

⁷⁹¹ Tajikistan, *Resolution on Amnesty of Opposition Fighters* (1999), preamble and Articles 1–3.

⁷⁹² Uruguay, *Amnesty Law* (1985), Articles 1–7. ⁷⁹³ Uruguay, *Amnesty Law* (1986), Article 1.

⁷⁹⁴ Zimbabwe, *Amnesty Act* (1979), Article 2.

⁷⁹⁵ Zimbabwe, *Amnesty (General Pardon) Act* (1980), Article 2.

⁷⁹⁶ Argentina, Federal Judge, *Cavallo case*, Decision, 6 March 2001.

701. In the *Saavedra case* in 1993 concerning the application of Chile's 1978 Decree-Law on Amnesty to serious violations of the 1949 Geneva Conventions, the Supreme Court of Chile ruled that:

The appellant claims in the writ of appeal that the ruling appealed from is contrary to the Conventions of Geneva of 1949, because the decree-law of amnesty by definition does not apply to persons accused of serious infractions of the aforementioned Conventions. In this connection, it should be stated that Articles 2 and 3 common to the four Conventions establish the scope of their application to international conflicts and armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties. Concerning armed conflicts not of an international character, it is the opinion of this Court that disturbances or other situations of internal order, usually accompanied by terrorist or unlawful actions such as the one in question, do not constitute conflicts governed by what is known as the Law of Geneva, and the appellant's argument in this case is invalid. The facts of this case are not congruent with the characteristics of the situations of internal war referred to by Article 3 common to the said Conventions.⁷⁹⁷

702. In the *Videla case* in 1994 concerning the abduction, torture and murder of a Chilean woman in 1974, Chile's Appeal Court of Santiago held that the acts charged constituted grave breaches under Article 147 GC IV, which it found applicable, and that:

Such offences as constitute grave breaches of the Convention are . . . unamenable to amnesty; . . . [it is not] appropriate to apply amnesty as a way of extinguishing criminal liability. Any attempt by a State to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the rights of persons in wartime is beyond the State's competence while it is a Party to the Geneva Conventions on humanitarian law.⁷⁹⁸

703. In 1995, Colombia's Constitutional Court examined the constitutionality of AP II. As part of its consideration of Article 6(5) AP II, the Court stated that:

In internal armed conflicts . . . those who have taken up arms do not in principle enjoy prisoner-of-war status and are consequently subject to penal sanctions imposed by the State, since they are not legally entitled to fight or to take up arms. In so doing they are guilty of an offence, such as rebellion or sedition, which is punishable under domestic legislation . . . It is easy to understand the purpose of a provision designed to ensure that the authorities in power will grant the broadest

⁷⁹⁷ Chile, Supreme Court, *Saavedra case*, Judgement, 19 November 1993; see also Supreme Court, *Bascuñán case*, Judgement, 24 August 1990, where it is stated that "it can be concluded that the Geneva Conventions are not applicable to the unlawful acts investigated in the case giving rise to the appeal; and so although these acts did take place during the state of siege covered by the amnesty, they have not been shown to be the consequence or result of a state of internal conflict of the nature described [in the Geneva Conventions]. Consequently, the provisions of the aforementioned Conventions are unaffected by the legal precept that granted the amnesty of 1978."

⁷⁹⁸ Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994.

possible amnesty for reasons related to the conflict, once hostilities are over, as this can pave the way towards national reconciliation.⁷⁹⁹

704. In the *Mengistu and Others case* in 1995 concerning the prosecution and trial of Colonel Mengistu Haile Mariam and former members of the Derg for allegedly committing genocide, crimes against humanity and war crimes during the former regime between 1974 and 1991, the Special Prosecutor of Ethiopia, in a reply submitted in response to the objection filed by counsels for defendants, stated that "it is . . . a well established custom and belief that war crimes and crimes against humanity are not subject to amnesty".⁸⁰⁰ Referring to a statement made in 1991 by a high-ranking US peace negotiator at the London Conference as well as to a decision of the Transitional Government of Ethiopia, the Special Prosecutor further quoted the following: "The Transitional Government should consider an appropriate amnesty or indemnity for past acts not constituting violations of the laws of war or international human rights."⁸⁰¹

705. In the *Azapo case* in 1996 in which the appellants challenged the constitutionality of the Promotion of National Unity and Reconciliation Act of 1995, which granted amnesties from personal criminal and civil liability for the covered unlawful activities, a South African Court stated that:

It is however, unnecessary, in our judgment, to consider further the applicability of the *jus cogens* to the interpretation of the Constitution. That is because there is an exception to the peremptory rule prohibiting an amnesty in relation to crimes against humanity contained in Additional Protocol II.

...

In our judgment this subarticle [Article 6(5) AP II] indicates that there is no peremptory rule of international law which prohibits the granting of the broadest possible amnesty in the case of conflicts of the kind which existed in South Africa prior to the firm "cut-off date" referred to in the post-amble to the Constitution.⁸⁰²

In the same case in 1996, South Africa's Constitutional Court was asked to decide upon the constitutionality of a provision of the Promotion of National Unity and Reconciliation Act of 1995 according to which amnesty can be granted to persons prepared to make "full disclosure of all the relevant facts relating to acts associated with a political objective". The Azanian People's Organisation argued that the State was obliged by international law to prosecute those responsible for gross human rights violations and that the relevant provision authorising amnesty for such offenders constituted a breach of international law including Articles 49 GC I, 50 GC II, 129 GC III and 146 GC IV. In considering this argument, the Court stated that it was "doubtful whether the

⁷⁹⁹ Colombia, Constitutional Court, *Constitutional Case No. C-225/95*, Judgement, 18 May 1995.

⁸⁰⁰ Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, Conclusion.

⁸⁰¹ Ethiopia, Special Prosecutor's Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, Conclusion.

⁸⁰² South Africa, Cape Provincial Division, *Azapo case*, Judgement, 6 May 1996.

Geneva Conventions of 1949 read with the relevant Protocols thereto apply at all to the situation in which this country found itself during the years of the conflict". The Court referred to Article 6(5) AP II and stated that in situations of internal armed conflict, "there is no obligation on the part of a contracting state to ensure the prosecution of those who might have performed acts of violence or other acts which would ordinarily be characterised as serious invasions of human rights". In conclusion, the Court held that the wording of the provision in question did not violate the South African Constitution.⁸⁰³

706. In the *Pinochet case* in 1998, Spain's Sala de lo Penal de la Audiencia Nacional, sitting in full bench, held that Chile's Decree-Law on General Amnesty of 1978 did not preclude the exercise of universal jurisdiction by Spanish courts. It stated that:

Regardless of the fact that Decree-Law 2.191 of 1978 can be considered contrary to international *ius cogens*, said Decree-Law is not tantamount to a true pardon in accordance with the Spanish rules applicable in this case and can be considered a rule that waives punishment for reasons of political expediency; it therefore does not apply in the case of someone who has been acquitted or pardoned abroad . . . but rather in the case of conduct . . . that is not punishable in the country in which the offence was committed . . . which has no effect on Spain's extraterritorial jurisdiction in application of the principles of protection and universal persecution.⁸⁰⁴

Other National Practice

707. In 1993, in the context of peace talks between the three parties to the conflict in Bosnia and Herzegovina, the ICRC reported that "the Bosnian Government says it stands ready to release all prisoners, except war criminals, after an amnesty has been proclaimed".⁸⁰⁵

708. A decision taken in 1956 by the Chinese National People's Congress adopted as policy for the prosecution of Japanese war criminals that those Japanese whose criminal acts were of secondary importance or who showed good signs of repentance would be dealt with leniently and spared prosecution. Those Japanese war criminals who had committed serious crimes would be sentenced on an individual basis according to the crimes they had committed and their behaviour during detention.⁸⁰⁶

709. In October 2001, the government of the FYROM confirmed its intention "to grant amnesty to the members of the so-called NLA (UCK) who

⁸⁰³ South Africa, Constitutional Court, *Azapo case*, Judgement, 25 July 1996.

⁸⁰⁴ Spain, Sala de lo Penal de la Audiencia Nacional, *Pinochet case*, Judgement, 5 November 1998.

⁸⁰⁵ ICRC, Paper on unconditional and unilateral release of all prisoners presented during talks among the three sides to the conflict in Bosnia and Herzegovina, Geneva, 2-4 January 1993, annexed to Report of the UN Secretary-General on the activities of the International Conference on the Former Yugoslavia, UN Doc. S/25050, 6 January 1993, Annex IV, § 2(a).

⁸⁰⁶ China, Decision on the handling of Japanese war criminals under detention who committed crimes during the Japanese Invasion War by the Standing Committee of the National People's Congress, 25 April 1956, *Documents on Foreign Affairs of the People's Republic of China*, World Knowledge Press, Beijing, Vol. 4, pp. 58-59.

voluntarily surrendered their weapons during the NATO operation 'Essential Harvest'. The President of FYROM stated that this would initiate a process of reintegration of those who did not commit crimes and that the amnesty would allow the process of return of the security forces of FYROM in the regions that were temporarily out of their control. However, he stressed that "the amnesty does not refer to those who committed war crimes and crimes against humanity, torture and murder of civilians, ethnic cleansing, demolition of religious buildings and other acts for which the International Tribunal for former Yugoslavia is responsible".⁸⁰⁷ Members of the NLA welcomed the amnesty but added that it should be given force of law, and demanded the release of rebel prisoners.⁸⁰⁸

710. According to the Report on the Practice of Malaysia, communist insurgents have been encouraged to surrender, and declarations of amnesty have been issued regularly. One of these was issued in September 1955.⁸⁰⁹

711. In 1991, the President of Rwanda offered a general amnesty to FPR combatants accepting to lay down their weapons between 14 and 29 March 1991, provided they fulfilled certain conditions such as entering the country at a certain checkpoint and depositing their weapons at a specific place.⁸¹⁰

712. According to a report by a Rwandan human rights organisation, the application of two amnesty laws in Rwanda in 1992 led to the release from prison of approximately 60 persons accused or detained for acts committed during the war or other politically motivated acts.⁸¹¹

713. In 1992, the President of the Philippines issued a proclamation amending a previous proclamation by which the National Unification Commission was established and which states that:

[The previous Proclamation] is hereby amended to read as follows: . . . Amnesty is hereby granted in favor of those who have applied for amnesty under Executive Order No. 350, and whose applications had already been processed and are ready for final action as of date hereof, and whosoever may want to apply for amnesty under Executive Order No. 350 from the date of this Proclamation up to December 31, 1992, who have committed any act covered under Section 2 of Executive Order No. 350, series of 1989.⁸¹²

714. In 1994, the President of the Philippines issued a proclamation granting amnesty to rebels, insurgents and other persons according to which:

⁸⁰⁷ FYROM, Statement by the President, 8 October 2001. ⁸⁰⁸ BBC News, 12 October 2001.

⁸⁰⁹ Report on the Practice of Malaysia, 1997, Chapter 6.10.

⁸¹⁰ Rwanda, Amnesty Offer by the President, Ruhengeri, 14 March 1991, reprinted in Agence Rwandaise de Presse, Daily Bulletin No. 003931, 16th Year, 15 March 1991, pp. 1–2.

⁸¹¹ Association Rwandaise pour la défense des droits de l'homme et des libertés publiques, Report on Human Rights in Rwanda, October 1992–October 1993, p. 45.

⁸¹² Philippines, President, Proclamation No. 10-A Amending Proclamation No. 10 Granting Amnesty in favor of Persons Who Have Filed Applications for Amnesty under Executive Order No. 350, Series of 1989 and Creating the National Unification Commission, Manila, 28 July 1992, Section 4 amending Section 1 of the original version of the Proclamation, and Section 5 introducing a new Section 2 in the original version of the Proclamation.

Amnesty is hereby granted to all personnel of the APF and the PNP who shall apply therefor and who have or may have committed crimes, on or before thirty (30) days following the publication of this Proclamation in two (2) newspapers of general circulation, in pursuit of political beliefs, whether punishable under the Revised Penal Code or special laws, including but not limited to the following: rebellion or insurrection; coup d'état; conspiracy and proposal to commit rebellion, insurrection or coup d'état; disloyalty of public officers or employees; inciting to rebellion or insurrection; sedition; conspiracy to commit sedition; inciting to sedition; illegal assembly; illegal association; direct assault; indirect assault; resistance and disobedience to a person in authority or the agents of such person; tumults and other disturbances of public order; unlawful means of publication and unlawful utterances; alarms and scandals; illegal possession of firearms, ammunition or explosives, committed in furtherance of, incident to, or in connection with the crimes of rebellion or insurrection; and violations of Articles 59 (desertion), 62 (absence without leave), 67 (mutiny or sedition), 68 (failure to suppress mutiny or sedition), 94 (various crimes), 96 (conduct unbecoming an officer and a gentlemen), and 97 (general article) of the Articles of War; *Provided*, that the amnesty shall not cover crimes against chastity and other crimes committed for personal ends.⁸¹³ [emphasis in original]

By the same proclamation, the President also established the National Amnesty Commission in charge with receiving and processing applications for amnesty and determining whether the applicants were entitled to amnesty under the proclamation.⁸¹⁴

715. In 1994, the President of the Philippines issued a proclamation granting amnesty to certain members of the AFP and PNP which stated that:

Amnesty is hereby granted to all personnel of the APF and the PNP who shall apply therefor and who have or may have committed, as of the date of this Proclamation, acts or omissions punishable under the Revised Penal Code, the Articles of War or other special laws, in furtherance of, incident to, or in connection with counter-insurgency operations; *Provided*, that such acts or omissions do not constitute acts of torture, arson, massacre, rape, other crimes against chastity, or robbery of any form; and *Provided*, that the acts were not committed for personal ends.⁸¹⁵ [emphasis in original]

716. At the CDDH, the USSR, in its explanation of vote on Article 10 of Draft AP II (which later became Article 6 AP II), stated that it "was convinced that

⁸¹³ Philippines, President, Proclamation No. 347 Granting Amnesty to Rebels, Insurgents, and All Other Persons Who Have or May Have Committed Crimes against Public Order, Other Crimes Committed in furtherance of Political Ends, and Violations of the Articles of War, and Creating a National Amnesty Commission, Manila, 25 March 1994, Section 1.

⁸¹⁴ Philippines, President, Proclamation No. 347 Granting Amnesty to Rebels, Insurgents, and All Other Persons Who Have or May Have Committed Crimes against Public Order, Other Crimes Committed in furtherance of Political Ends, and Violations of the Articles of War, and Creating a National Amnesty Commission, Manila, 25 March 1994, Section 4.

⁸¹⁵ Philippines, President, Proclamation No. 348 Granting Amnesty to Certain Personnel of the AFP and PNP Who Have or May Have Committed Certain Acts or Omissions Punishable under the Revised Penal Code, the Articles of War, or Other Special Laws, Committed in furtherance of, incident to or in connection with Counter-Insurgency Operations, Manila, 25 March 1994, Section 1.

the text elaborated by Committee I could not be construed as enabling war criminals, or those guilty of crimes against peace and humanity, to evade severe punishment in any circumstances whatsoever".⁸¹⁶

717. In 1981, a high-ranking government official informed the ICRC that his government had given a complete amnesty to all prisoners captured during the war that year and that no prosecution for war crimes or other crimes had been undertaken.⁸¹⁷

718. In 1988, in a meeting with the ICRC, the official of a State party to an armed conflict stated that all death penalties imposed on prisoners had been commuted to 20-year sentences under an amnesty law adopted in 1987.⁸¹⁸

III. Practice of International Organisations and Conferences

United Nations

719. In a resolution adopted in 1964 on the policies of apartheid of the government of South Africa, the UN Security Council urged the South African government "to grant an amnesty to all persons already imprisoned, interned or subjected to other restrictions for having opposed the policy of *apartheid*".⁸¹⁹ In another resolution adopted the same year, the Security Council urged the South African government "to grant immediate amnesty to all persons detained or on trial, as well as clemency to all persons sentenced for their opposition to the Government's racial policies".⁸²⁰

720. In a resolution adopted in 1980, the UN Security Council called upon the South African regime to take measures immediately to eliminate the policy of apartheid, including "granting of an unconditional amnesty to all persons imprisoned, restricted or exiled for their opposition to apartheid".⁸²¹

721. In a resolution adopted in 1986, the UN Security Council demanded that South Africa "unconditionally release all persons imprisoned, detained or restricted for their opposition to *apartheid*".⁸²²

722. In a resolution adopted in 1996, the UN Security Council welcomed "the proclamation by the National Assembly of Angola of amnesty arrangements, as agreed in Libreville, for offences resulting from the Angolan conflict, in order to facilitate the formation of a joint military command".⁸²³

723. In a resolution adopted in 1996, the UN Security Council commended the government of Angola for the promulgation of an amnesty law.⁸²⁴

⁸¹⁶ USSR, Statement at the CDDH, *Official Records*, Vol. IX, CDDH/I/SR.64, 7 June 1976, p. 319, § 85.

⁸¹⁷ ICRC archive document. ⁸¹⁸ ICRC archive document.

⁸¹⁹ UN Security Council, Res. 190, 9 June 1964, § 1(c).

⁸²⁰ UN Security Council, Res. 191, 18 June 1964, § 4(b).

⁸²¹ UN Security Council, Res. 473, 13 June 1980, § 7.

⁸²² UN Security Council, Res. 581, 13 February 1986, § 8.

⁸²³ UN Security Council, Res. 1055, 8 May 1996, § 9.

⁸²⁴ UN Security Council, Res. 1064, 11 July 1996, § 9.

724. In a resolution adopted in 1997, the UN Security Council urged Croatia:

to eliminate ambiguities in implementation of the Amnesty Law, and to implement it fairly and objectively in accordance with international standards, in particular by concluding all investigations of crimes covered by the amnesty and undertaking an immediate and comprehensive review with United Nations and local Serb participation of all charges outstanding against individuals for serious violations of international humanitarian law which are not covered by the amnesty in order to end proceedings against all individuals against whom there is insufficient evidence.⁸²⁵

725. In a resolution adopted in 2000 on the establishment of a Special Court for Sierra Leone, the UN Security Council recalled that:

The Special Representative of the Secretary-General appended to his signature of the Lomé Agreement a statement that the United Nations holds the understanding that the amnesty provisions of the Agreement shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law.⁸²⁶

726. In 1997, in a statement by its President, the UN Security Council encouraged the government of Croatia “to take such steps as are needed to promote goodwill, build confidence, and provide assurances of a safe, secure and stable environment to all people in the region. These steps should include full implementation of its Law on Amnesty.”⁸²⁷

727. In 1997, in a statement by its President, the UN Security Council called upon the government of Croatia “to remove uncertainty about the implementation of its amnesty law, in particular by finalizing without delay the list of war crime suspects on the basis of existing evidence and in strict accordance with international law”.⁸²⁸

728. In a resolution adopted in 1991, the UN General Assembly called upon the Afghan authorities “to apply amnesty decrees equally to foreign detainees”.⁸²⁹

729. In a resolution on Afghanistan adopted in 1992, the UN General Assembly welcomed “the [1992] declaration of general amnesty issued by the Islamic State of Afghanistan, which should be applied in a strictly non-discriminatory manner” and called upon the Afghan authorities “to apply amnesty decrees equally to all detainees”.⁸³⁰

730. In a resolution on Kosovo adopted in 1998, the UN General Assembly called upon the authorities of the FRY (Serbia and Montenegro) “to mitigate

⁸²⁵ UN Security Council, Res. 1120, 14 July 1997, § 7.

⁸²⁶ UN, Security Council, Res. 1315, 14 August 2000, preamble.

⁸²⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/4*, 6 March 1997, p. 2.

⁸²⁸ UN Security Council, Statement by the President, UN Doc. S/PRST/1997/15, 19 March 1997, p. 2.

⁸²⁹ UN General Assembly, Res. 46/136, 17 December 1991, § 9.

⁸³⁰ UN General Assembly, Res. 47/141, 18 December 1992, preamble and § 8; see also Res. 48/152, 20 December 1993, preamble and § 12; Res. 49/207, 23 December 1994, preamble and § 14.

the punishments of and where appropriate to amnesty the ethnic Albanians in Kosovo sentenced for criminal offences motivated by political aims".⁸³¹

731. In a resolution adopted in 1987, the UN Commission on Human Rights emphasised the need for the government of Chile "to investigate and clarify without further delay the fate of persons arrested for political reasons who have subsequently disappeared, without the granting of amnesty which creates an obstacle for the identification of those responsible and the administration of justice".⁸³²

732. In a resolution adopted in 1996, the UN Commission on Human Rights called upon the Republika Srpska and the Federation of Bosnia and Herzegovina "to adopt amnesty laws" and deplored "reported arrests inconsistent with the amnesty law adopted by the State of Bosnia and Herzegovina".⁸³³

733. In a resolution adopted in 1996, the UN Commission on Human Rights welcomed the announcement by the government of Sudan of a national amnesty in 1995.⁸³⁴

734. In a resolution on impunity adopted in 2002, the UN Commission on Human Rights recognised that "amnesties should not be granted to those who commit violations of international humanitarian and human rights law that constitute serious crimes".⁸³⁵

735. In a resolution in 1995 on the situation in the territory of the former Yugoslavia, the UN Sub-Commission on Human Rights emphasised that no provision for impunity for any act of genocide, "ethnic cleansing" or other serious war crimes, including rape, must be made in the peace plan.⁸³⁶

736. In a resolution adopted in 1999 on systematic rape, sexual slavery and slavery-like practices, the UN Sub-Commission on Human Rights noted that "the rights and obligations of States and individuals with respect to the violations referred to in the present resolution cannot, as a matter of international law, be extinguished by peace treaty, peace agreement, amnesty or by any other means".⁸³⁷

737. In 1996, in a report on the situation of human rights in Croatia, the UN Secretary-General stated that:

One potential obstacle to the return of young adult males is the requirement that they first undergo interrogations by Croatian authorities concerning their activities on behalf of the so-called "Republic of Serb Krajina". In the absence of broad amnesty legislation, these interrogations have caused widespread apprehension among potential returnees, as well as delays in the processing of applications.⁸³⁸

⁸³¹ UN General Assembly, Res. 53/164, 9 December 1998, § 14(d).

⁸³² UN, Commission on Human Rights, Res. 1987/60, 12 March 1987, § 10(e).

⁸³³ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, § 24.

⁸³⁴ UN Commission on Human Rights, Res. 1996/73, 23 April 1996, preamble.

⁸³⁵ UN Commission on Human Rights, Res. 2002/79, 25 April 2002, § 2.

⁸³⁶ UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, § 7; see also Res. 1993/17, 20 August 1993, § 3.

⁸³⁷ UN Sub-Commission on Human Rights, Res. 1999/16, 26 August 1999, § 13.

⁸³⁸ UN Secretary-General, Further report on the situation of human rights in Croatia pursuant to Security Council resolution 1019 (1995), UN Doc. S/1996/691, 23 August 1996, § 22.

738. In 2000, in his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General noted that:

While recognizing that amnesty is an accepted legal concept and a gesture of peace and reconciliation at the end of a civil war or an internal armed conflict, the United Nations has consistently maintained the position that amnesty cannot be granted in respect of international crimes, such as genocide, crimes against humanity or other serious violations of international humanitarian law.

At the time of the signature of the Lomé Peace Agreement, the Special Representative of the Secretary-General for Sierra Leone was instructed to append to his signature on behalf of the United Nations a disclaimer to the effect that the amnesty provision contained in article IX of the Agreement (“absolute and free pardon”) shall not apply to international crimes of genocide, crimes against humanity, war crimes and other serious violations of international humanitarian law . . .

In the negotiations on the Statute of the Special Court, the Government of Sierra Leone concurred with the position of the United Nations and agreed to the inclusion of an amnesty clause which would read as follows: “an amnesty granted to any person falling within the jurisdiction of the Special Court in respect of the crimes referred to in articles 2 to 4 of the present Statute shall not be a bar to prosecution.”⁸³⁹

739. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General pointed out that “the granting of amnesties to those who committed serious violations of international humanitarian and criminal law is not acceptable. The experience of Sierra Leone has confirmed that such amnesties do not bring about lasting peace and reconciliation.”⁸⁴⁰

740. In 1996, in a report on the situation of human rights in the territory of the former Yugoslavia, the Special Rapporteur of the UN Commission on Human Rights noted that:

54. The new Law on Amnesty, passed by the Parliament on 25 September 1996, has been hailed by most observers as a significant step towards both the return of Croatian Serb refugees and the peaceful reintegration of the region of Eastern Slavonia into the rest of the country. However, the Special Rapporteur’s attention has been drawn to the need to scrutinize the Law’s application in practice.

55. The Law, which became effective on 3 October 1996, applies to criminal acts referred to in Croatian legislation as “participation in armed rebellion”, and specifically excludes war crimes. The Law stipulates that all current investigations and trials shall be stopped, all completed trials annulled and all prisoners sentenced for “armed rebellion” released.

56. Some 100 prisoners reportedly were released between 5 and 7 October 1996 from various detention centres in Croatia. The Special Rapporteur has received reliable information, however, that at least seven of these persons were rearrested only a few days after their release in connection with an

⁸³⁹ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone, UN Doc. S/2000/915, 4 October 2000, §§ 22–24.

⁸⁴⁰ UN Secretary-General, Report of the on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 10.

investigation of alleged involvement in war crimes by the Karlovac Public Prosecutor's Office, although they had not previously been charged with war crimes. The remainder of those released reportedly were to be transported at their request to the FRY for resettlement.

57. The rearrest of several Croatian Serbs is of great concern to the Special Rapporteur, and she will seek to monitor this situation closely. The potential benefit of the new amnesty legislation in raising the confidence of Croatia's Serb population and encouraging returns will be substantially damaged if persons still find themselves the subject of criminal proceedings.⁸⁴¹

741. In 1997, in a report on assistance to Guatemala in the field of human rights, the Independent Expert of the UN Commission on Human Rights stated that:

The National Reconciliation Act [of Guatemala], which came into force on 29 December 1996 with the signing of the Agreement on a Firm and Lasting Peace, leaves it to the courts to determine which acts committed by members of the army and the URNG in the course of the armed conflict will be pardoned. Crimes against humanity are excluded from this. The burden of proof is being turned upside down, since it will be for the victim to demonstrate that the injury suffered was not a reasonable consequence of the conflict.⁸⁴²

742. In 1998, in the conclusions and recommendations of his fifth report question of the human rights of all persons subjected to any form of detention or imprisonment, in particular, torture and other cruel, inhuman or degrading treatment or punishment, the Special Rapporteur of the UN Commission on Human Rights stated with respect to the Draft Statute for an International Criminal Court that:

In this connection, the Special Rapporteur is aware of suggestions according to which nationally granted amnesties could be introduced as a bar to the proposed court's jurisdiction. He considers any such move subversive not just of the project at hand, but of international legality in general. It would gravely undermine the purpose of the proposed court, by permitting States to legislate their nationals out of the jurisdiction of the court. It would undermine international legality, because it is axiomatic that States may not invoke their own law to avoid their obligations under international law. Since international law requires States to penalize the types of crime contemplated in the draft statute of the court in general, and torture in particular, and to bring perpetrators to justice, the amnesties in question are, ipso facto, violations of the concerned States' obligations to bring violators to justice.⁸⁴³

743. In 1996, in a statement before the UN Commission on Human Rights, the UN High Commissioner for Refugees stated with respect to the situation

⁸⁴¹ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Periodic report, UN Doc. E/CN.4/1997/9, 22 October 1996, §§ 54–57.

⁸⁴² UN Commission on Human Rights, Independent Expert on the Situation of Human Rights in Guatemala, UN Doc. E/CN.4/1997/90, 22 January 1997, § 100.

⁸⁴³ UN Commission on Human Rights, Special Rapporteur on Torture, Fifth report, UN Doc. E/CN.4/1998/38, 24 December 1997, § 228.

in Bosnia and Herzegovina that “personal security was evidently of critical importance in the context of peaceful and dignified return. The amnesty adopted by the Bosnian Parliament, covering inter alia, draft evaders and deserters, was thus a very welcome step.”⁸⁴⁴

Other International Organisations

744. In a resolution adopted in 1984 on enforced disappearances, the Parliamentary Assembly of the Council of Europe called upon the governments of member States “to support the preparation and adoption by the United Nations of a declaration setting forth the following principles: . . . enforced disappearance is a crime against humanity which . . . may not be covered by amnesty laws”.⁸⁴⁵

745. In a recommendation on Kosovo adopted in 1998, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers urge the government of the FRY “to take practical steps to facilitate the voluntary return of refugees and displaced persons to their homes before the winter . . . ceasing the practice of interrogating male returnees; [and] providing and respecting an amnesty for those wishing to return”.⁸⁴⁶

746. In a resolution adopted in 1993, the European Parliament stated that it believed that “the problem of impunity . . . can take the form of amnesty, immunity, extraordinary jurisdiction and constrains democracy by effectively condoning human rights infringements and distressing victims”. It stressed that “there should be no question of impunity for those responsible for war crimes in the former Yugoslavia”.⁸⁴⁷

747. In 2002, the EU Secretary General/High Representative CFSP stated that:

I warmly welcome the adoption yesterday of a Law on Amnesty by the Assembly of the former Yugoslav Republic of Macedonia (FYROM).

With its adoption, the elected representatives of the citizens have taken a courageous step forward, towards peace, stability and reconciliation.⁸⁴⁸

748. In 2001, NATO welcomed the acceptance by members of the NLA of an amnesty issued by the government of the FYROM, adding, however, that the challenge was to show that the amnesty worked in practice.⁸⁴⁹

749. In 2001, the OSCE welcomed the decision of the President and parliament of Tajikistan to grant a general amnesty to more than 19,000 detainees. It also

⁸⁴⁴ UN High Commissioner on Refugees, Statement before the UN Commission on Human Rights, 20 March 1996, UN Doc. E/CN.4/1996/SR.4, 25 March 1996, § 54.

⁸⁴⁵ Council of Europe, Parliamentary Assembly, Res. 828, 26 September 1984, § 13(a)(i)(3).

⁸⁴⁶ Council of Europe, Parliamentary Assembly, Rec. 1385, 24 September 1998, § 7(i)(b).

⁸⁴⁷ European Parliament, Resolution on human rights in the world and Community human rights policy for the years 1991/1992, 12 March 1993, §§ 7 and 8.

⁸⁴⁸ EU, Secretary General/High Representative CFSP, Communiqué No. 0039/02, Dr. Javier Solana, EU High Representative for the Common Foreign and Security Policy (CFSP), welcomes the adoption of the Law on Amnesty in the Former Yugoslav Republic of Macedonia (FYROM), 8 March 2002.

⁸⁴⁹ BBC News, 12 October 2001.

“noted with appreciation the humanitarian character of the General Amnesty Law”.⁸⁵⁰

International Conferences

750. In the Maputo Declaration on the Use of Children as Soldiers, the participants at the African Conference on the Use of Children as Soldiers in 1999 called upon African States “to respect fully the provisions of international human rights and humanitarian law, in particular in the case of captured child soldiers, especially by . . . considering the broadest possible amnesty”.⁸⁵¹

IV. Practice of International Judicial and Quasi-judicial Bodies

751. In its judgement in the *Furundžija case* in 1998, the ICTY Trial Chamber stated that:

The fact that torture is prohibited by a peremptory norm of international law has other effects at the inter-state and individual levels. At the inter-state level, it serves to internationally de-legitimise any legislative, administrative or judicial act authorising torture. It would be senseless to argue, on the one hand, that on account of the *jus cogens* value of the prohibition against torture, treaties or customary rules providing for torture would be null and void *ab initio*, and then be unmindful of a State say, taking national measures authorising or condoning torture or absolving its perpetrators through an amnesty law. If such a situation were to arise, the national measures, violating the general principle and any relevant treaty provision, would produce the legal effects discussed above and in addition would not be accorded international legal recognition. Proceedings could be initiated by potential victims if they had *locus standi* before a competent international or national judicial body with a view to asking it to hold the national measure to be internationally unlawful; or the victim could bring a civil suit for damage in a foreign court, which would therefore be asked *inter alia* to disregard the legal value of the national authorising act. What is even more important is that perpetrators of torture acting upon or benefiting from those national measures may nevertheless be held criminally responsible for torture, whether in a foreign State, or in their own State under a subsequent regime. In short, in spite of possible national authorisation by legislative or judicial bodies to violate the principle banning torture, individuals remain bound to comply with that principle. As the International Military Tribunal at Nuremberg put it: “individuals have international duties which transcend the national obligations of obedience imposed by the individual State”.⁸⁵²

752. In 1992, in its General Comment on the prohibition of torture and cruel treatment or punishment, the HRC noted that:

⁸⁵⁰ OSCE, Press Release, OSCE welcomes granting of amnesty to detainees in Tajikistan, 3 September 2001.

⁸⁵¹ African Conference on the Use of Children as Soldiers, Maputo, 19–22 April 1999, Maputo Declaration on the Use of Children as Soldiers, § 5.

⁸⁵² ICTY, *Furundžija case*, Judgement, 10 December 1998, § 155.

Some States have granted amnesty in respect of acts of torture. Amnesties are generally incompatible with the duty of States to investigate such acts; to guarantee freedom from such acts within their jurisdiction; and to ensure that they do not occur in the future. States may not deprive individuals of the right to an effective remedy, including compensation and such full rehabilitation as may be possible.⁸⁵³

753. In its admissibility decision in *Dujardin and Others v. France* in 1991 concerning the killing of four disarmed gendarmes by about 50 assailants in New Caledonia, in the aftermath of which an amnesty law had been adopted preventing the public authorities from prosecuting the assailants, the ECiHR held that:

The Commission considers . . . that the amnesty law, which is entirely exceptional in character, was adopted in the context of a process designed to resolve conflicts between the various communities of the islands.

It is not for the Commission to assess the advisability of the measures taken by France to that end. The State is justified in adopting, in the context of its criminal policy, any amnesty laws it might consider necessary, with the proviso, however, that a balance is maintained between the legitimate interests of the State and the interests of individual members of the public in having the right to life protected by law.⁸⁵⁴

754. In 1983, in a report on the situation of a segment of the Nicaraguan population of Miskito origin, the IACiHR recommended that the government of Nicaragua “declare a pardon or amnesty to cover all Indian Nicaraguans who have been accused of committing crimes against public order and security or any other connected crime and who are currently in prison . . . or who are at liberty, within or outside of Nicaragua”.⁸⁵⁵

755. In 1992, in a report on a case with respect to the Las Hojas massacres in El Salvador in 1983, during which about 74 persons were allegedly killed by members of the Salvadoran armed forces with the participation of members of the Civil Defence and which had led to a petition before the IACiHR, the IACiHR held that the application of El Salvador’s 1987 Law on Amnesty to Achieve National Reconciliation

constitutes a clear violation of the obligation of the Salvadoran Government to investigate and punish the violations of the rights of the Las Hojas victims, and to provide compensation for damages resulting from the violations . . . The present amnesty law, as applied in these cases, by foreclosing the possibility of judicial relief in cases of murder, inhumane treatment and absence of judicial guarantees, denies the fundamental nature of the most basic human rights. It eliminates perhaps the single most effective means of enforcing such rights, the trial and punishment of offenders.⁸⁵⁶

⁸⁵³ HRC, General Comment No. 20 (Article 7 ICCPR), 10 March 1992, § 15.

⁸⁵⁴ ECiHR, *Dujardin and Others v. France*, Admissibility Decision, 2 September 1991.

⁸⁵⁵ IACiHR, Report on the situation of human rights of a segment of the Nicaraguan population of Miskito origin, Doc. OEA/Ser.L/V/II.62 Doc. 10 rev. 3, 29 November 1983, Part Three, B(1).

⁸⁵⁶ IACiHR, *Case 10.287 (El Salvador)*, Report, 24 September 1992.

756. In 1994, in a report on the situation of human rights in El Salvador, the IACiHR stated with respect to El Salvador's General Amnesty Law for Consolidation of Peace that:

Regardless of any necessity that the peace negotiations might pose and irrespective of purely political considerations, the very sweeping General Amnesty Law [for Consolidation of Peace] passed by El Salvador's Legislative Assembly constitutes a violation of the international obligations it undertook when it ratified the American Convention on Human Rights, because it makes possible a "reciprocal amnesty" without first acknowledging responsibility . . . because it applies to crimes against humanity, and because it eliminates any possibility of obtaining adequate pecuniary compensation, primarily for victims.⁸⁵⁷

757. In 1999, in a report of a case concerning El Salvador's 1993 General Amnesty Law for Consolidation of Peace, the IACiHR stated that:

The Commission should emphasize that [this law] was applied to serious human rights violations in El Salvador between January 1, 1980, and January 1, 1992, including those examined and established by the Truth Commission. In particular, its effect was extended, among other things, to crimes such as summary executions, torture, and the forced disappearance of persons. Some of these crimes are considered of such gravity as to have justified the adoption of special conventions on the subject and the inclusion of specific measures for preventing impunity in their regard, including universal jurisdiction and inapplicability of the statute of limitations . . . The Commission also notes that Article 2 of [this law] was apparently applied to all violations of common Article 3 [of the 1949 Geneva Conventions] and of [AP II], committed by agents of the State during the armed conflict which took place in El Salvador.⁸⁵⁸

The Commission concluded that:

In approving and enforcing the General Amnesty Law, the Salvadoran State violated the right to judicial guarantees enshrined in Article 8(1) of the [1969 ACHR], to the detriment of the surviving victims of torture and of the relatives of . . . who were prevented from obtaining redress in the civil courts; all of this in relation to Article 1(1) of the Convention . . . In promulgating and enforcing the Amnesty Law, El Salvador has violated the right to judicial protection enshrined in Article 25 of the [the 1969 ACHR], to the detriment of the surviving victims and those with legal claims on behalf of . . .⁸⁵⁹

In its conclusions, the IACiHR stated that El Salvador "has also violated, with respect to the same persons, common Article 3 of the Four Geneva Conventions of 1949 and Article 4 of [AP II]".⁸⁶⁰ Moreover, in order to safeguard the rights of the victims, it recommended that El Salvador should, "if need be, . . . annul that law *ex-tunc*".⁸⁶¹

⁸⁵⁷ IACiHR, Report on the Situation of Human Rights in El Salvador, Doc. OEA/Ser/L/V/II.86 Doc.5 rev. 1, June 1994.

⁸⁵⁸ IACiHR, *Case 10.480 (El Salvador)*, Report, 27 January 1999, §§ 112 and 115.

⁸⁵⁹ IACiHR, *Case 10.480 (El Salvador)*, Report, 27 January 1999, §§ 123 and 129.

⁸⁶⁰ IACiHR, *Case 10.480 (El Salvador)*, Report, 27 January 1999, Chapter XI, § 2.

⁸⁶¹ IACiHR, *Case 10.480 (El Salvador)*, Report, 27 January 1999, Chapter XII, § 1.

758. In its judgement in the *Barrios Altos case* in 2001 involving the question of the legality of Peruvian amnesty laws, the IACtHR stated that:

41. This Court considers that all amnesty provisions, provisions on prescription and the establishment of measures designed to eliminate responsibility are inadmissible, because they are intended to prevent the investigation and punishment of those responsible for serious human rights violations such as torture, extrajudicial, summary or arbitrary execution and forced disappearance, all of them prohibited because they violate non-derogable rights recognized by international human rights law.
42. The Court, in accordance with the arguments put forward by the Commission and not contested by the State, considers that the amnesty laws adopted by Peru prevented the victims' next of kin and the surviving victims in this case from being heard by a judge . . . they violated the right to judicial protection . . . they prevented the investigation, capture, prosecution and conviction of those responsible for the events that occurred in Barrios Altos, thus failing to comply with Article 1(1) of the [1969 ACHR], and they obstructed clarification of the facts of this case. Finally, the adoption of self-amnesty laws that are incompatible with the [1969 ACHR] meant that Peru failed to comply with the obligation to adapt internal legislation that is embodied in Article 2 of the [1969 ACHR].
43. The Court considers that it should be emphasized that, in the light of the general obligations established in Articles 1(1) and 2 of the [1969 ACHR], the States Parties are obliged to take all measures to ensure that no one is deprived of judicial protection and the exercise of the right to a simple and effective recourse, in the terms of Articles 8 and 25 of the [1969 ACHR]. Consequently, States Parties to the [1969 ACHR] which adopt laws that have the opposite effect, such as self-amnesty laws, violate Articles 8 and 25, in relation to Articles 1(1) and 2 of the [1969 ACHR]. Self-amnesty laws lead to the defenselessness of victims and perpetuate impunity; therefore, they are manifestly incompatible with the aims and spirit of the Convention. This type of law precludes the identification of the individuals who are responsible for human rights violations, because it obstructs the investigation and access to justice and prevents the victims and their next of kin from knowing the truth and receiving the corresponding reparation.
44. Owing to the manifest incompatibility of self-amnesty laws and the American Convention on Human Rights, the said laws lack legal effect and may not continue to obstruct the investigation of the grounds on which this case is based or the identification and punishment of those responsible, nor can they have the same or a similar impact with regard to other cases that have occurred in Peru, where the rights established in the [1969 ACHR] have been violated.⁸⁶²

In his concurring opinion, one of the judges added that:

The international responsibility of the State for violations of internationally recognized human rights, – including violations which have taken place by means of the adoption and application of laws of self-amnesty, – and the individual penal

⁸⁶² IACtHR, *Barrios Altos case*, Judgment, 14 March 2001, §§ 41–44.

responsibility of agents perpetrators of grave violations of human rights and of International Humanitarian Law, are two faces of the same coin, in the fight against atrocities, impunity, and injustice. It was necessary to wait many years to come to this conclusion, which, if it is possible today, is also due, – may I insist on a point which is very dear to me, – to the *awakening of the universal juridical conscience*, as the *material source par excellence* of International Law itself.⁸⁶³ [emphasis in original]

V. Practice of the International Red Cross and Red Crescent Movement

759. In 1995, in a meeting of the Humanitarian Liaison Working Group on the role of mechanisms for accountability in resolving humanitarian emergencies, the issue of amnesty at the end of a conflict was discussed, in particular Article 6 AP II. The ICRC noted that, given “the preparatory works and the context”, this provision could not be invoked in favour of impunity of war criminals, since it only applied to prosecution for the sole participation in hostilities.⁸⁶⁴

760. In a letter from the Head of the ICRC Legal Division to the Department of Law at the University of California in 1997, the ICRC stated that:

The “*travaux préparatoires*” of Article 6(5) [AP II] indicate that this provision aims at encouraging amnesty, i.e., a sort of release at the end of hostilities. It does not aim at an amnesty for those having violated international humanitarian law . . . Anyway States did not accept any rule in Protocol II obliging them to criminalize its violations . . . Conversely, one cannot either affirm that international humanitarian law absolutely excludes any amnesty including persons having committed violations of international humanitarian law, as long as the principle that those having committed grave breaches have to be either prosecuted or extradited is not voided of its substance.⁸⁶⁵

VI. Other Practice

761. According to Amnesty International, Article 19 of the 1993 Cotonou Agreement on Liberia providing for a general amnesty would appear to violate the obligation of States to take the necessary measures to suppress violations of IHL under the 1949 Geneva Conventions, in particular, in respect of violations of common Article 3.⁸⁶⁶

762. With respect to Russia’s Law on Amnesty for Acts Committed in the Context of the Conflict in Chechnya and the Law on the Execution of the Law on

⁸⁶³ IACtHR, *Barrios Altos case*, Concurring Opinion of Judge Cançado Trindade, 14 March 2001, § 13.

⁸⁶⁴ ICRC, Statement at the Humanitarian Liaison Working Group (HLWG), Geneva, 19 June 1995.

⁸⁶⁵ ICRC, Letter from the Head of the ICRC Legal Division to the Department of Law at the University of California and the Prosecutor of the International Criminal Tribunal for the former Yugoslavia, 15 April 1997.

⁸⁶⁶ Amnesty International, Letter from to the ICRC, 28 September 1993.

Amnesty for Acts Committed in the Context of the Conflict in Chechnya, both of 1997, the Russian human rights group Memorial, together with the Soldiers' Mothers Committee and families of Russian soldiers detained in Chechnya, called for the revision of the amnesty law as it would jeopardise the life and security of the detainees and halt the exchange process of POWs.⁸⁶⁷

E. Statutes of Limitation

I. *Treaties and Other Instruments*

Treaties

763. The preamble to the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity recognises that "it is necessary and timely to affirm in international law, through this Convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application".

764. Article 1 of the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity provides that:

No statutory limitation shall apply to the following crimes, irrespective of the date of their commission:

- (a) War crimes as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3(1) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, particularly the "grave breaches" enumerated in the Geneva Conventions of 12 August 1949 for the protection of war victims;
- (b) Crimes against humanity whether committed in time of war or in time of peace as they are defined in the Charter of the International Military Tribunal, Nürnberg, of 8 August 1945 and confirmed by resolutions 3(I) of 13 February 1946 and 95(I) of 11 December 1946 of the General Assembly of the United Nations, eviction by armed attack or occupation and inhuman acts resulting from the policy of apartheid, and the crime of genocide as defined in the 1948 Convention on the Prevention and Punishment of the Crime of Genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed.

765. Article 1 of the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes provides that:

Each Contracting State undertakes to adopt any necessary measures to secure that statutory limitation shall not apply to the prosecution of the following offences, or to the enforcement of the sentences imposed for such offences, in so far as they are punishable under its domestic law:

⁸⁶⁷ "Exchange or deception? The Amnesty is unlikely to help the Chechens who are in the hands of the Russian military", *Izvestiya*, Moscow, 28 March 1997.

1. the crimes against humanity specified in the Convention on the Prevention and Punishment of the Crime of Genocide adopted on 9 December 1948 by the General Assembly of the United Nations;
2. (a) the violations specified in Article 50 of the 1949 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Article 51 of the 1949 Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Article 130 of the 1949 Geneva Convention relative to the Treatment of Prisoners of War and Article 147 of the 1949 Geneva Convention relative to the Protection of Civilian Persons in Time of War, (b) any comparable violations of the laws of war having effect at the time when this Convention enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions, when the specific violation under consideration is of a particularly grave character by reason either of its factual and intentional elements or of the extent of its foreseeable consequences;
3. any other violation of a rule or custom of international law which may hereafter be established and which the Contracting State concerned considers according to a declaration under Article 6 as being of a comparable nature to those referred to in paragraph 1 or 2 of this article.

As of 1 February 2004, four States (Belgium, France, Netherlands and Romania) had signed the Convention, and three (Belgium, Netherlands and Romania) had ratified it. Article 3(2) states that “the Convention shall enter into force three months after the date of deposit of the third instrument of ratification or acceptance”.

766. Article 2 of the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes provides that:

1. The present Convention applies to offences committed after its entry into force in respect of the Contracting State concerned.
2. It applies also to offences committed before such entry into force in those cases where the statutory limitation period had not expired at that time.

767. Article 29 of the 1998 ICC Statute provides that “the crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”.

768. Upon signature of the 1998 ICC Statute, Egypt declared that:

The Arab Republic of Egypt declares that the principle of the non-retroactivity of the jurisdiction of the Court, pursuant to articles 11 and 24 of the Statute, shall not invalidate the well established principle that no war crime shall be barred from prosecution due to the statute of limitations.⁸⁶⁸

Other Instruments

769. Article 7 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled “Non-applicability of statutory limitations”, provides

⁸⁶⁸ Egypt, Declarations made upon signature of the ICC Statute, 26 December 2000, § 5.

that “no statutory limitation shall apply to crimes against the peace and security of mankind”.

770. Article 6 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that “statutes of limitations shall not apply for prosecuting violations of international human rights and humanitarian law norms that constitute crimes under international law”.

771. Article 7 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that:

Statutes of limitations for prosecuting other violations or pursuing civil claims should not unduly restrict the ability of a victim to pursue a claim against the perpetrator, and should not apply with respect to periods during which no effective remedies exist for violations of human rights and international humanitarian law norms.

772. The 2000 UNTAET Regulation No. 2000/15 establishes panels with exclusive jurisdiction over serious criminal offences, including genocide, war crimes, crimes against humanity and torture. Section 17(1) provides that these offences “shall not be subject to any statute of limitations”.

II. National Practice

Military Manuals

773. Australia’s Commanders’ Guide states that:

Any nation may prosecute any person who is suspected of committing a major war crime and no statute of limitation applies for such prosecutions. Trial of a suspected war criminal may take place any time that the individual is located or evidence of a war crimes commission is unearthed.⁸⁶⁹

774. France’s LOAC Manual states that “Article 29 of the [1998 ICC Statute] provides that crimes within the jurisdiction of the Court shall not be subject to any statute of limitations”.⁸⁷⁰

775. Italy’s IHL Manual provides that “war crimes are not subject to statutes of limitation”.⁸⁷¹

776. The UK Military Manual states that it is “open to two or more belligerents to agree in a peace treaty, or even in a general armistice, that no further war crimes trials will be instituted by them after a certain agreed date or as from the date of the treaty of the armistice”.⁸⁷²

777. The US Instructor’s Guide provides that “there is no statute of limitations on the prosecution of a war crime”.⁸⁷³

⁸⁶⁹ Australia, *Commanders’ Guide* (1994), § 1307.

⁸⁷⁰ France, *LOAC Manual* (2001), p. 45. ⁸⁷¹ Italy, *IHL Manual* (1991), Vol. I, § 86.

⁸⁷² UK, *Military Manual* (1958), § 641, footnote 1. ⁸⁷³ US, *Instructor’s Guide* (1985), p. 13.

778. The US Naval Handbook provides that “there is no statute of limitations on the prosecution of a war crime”.⁸⁷⁴

National Legislation

779. Albania’s Military Penal Code provides that statutory limitations will not apply to war crimes and crimes against humanity.⁸⁷⁵

780. Argentina’s Law concerning the Imprescriptibility of War Crimes and Crimes against Humanity approved the 1968 UN Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity.⁸⁷⁶

781. Argentina’s Draft Code of Military Justice provides for the introduction of a new provision in the Code of Military Justice as amended according to which “the penal action with respect to [offences against protected persons and objects in the event of an armed conflict] are not subject to statutory limitations”.⁸⁷⁷

782. Armenia’s Penal Code provides that crimes such as “Application of prohibited methods of warfare”, “Serious breaches of international humanitarian law during armed conflict” or genocide are not subject to statutes of limitation.⁸⁷⁸

783. Austria’s Penal Code, which provides for possible life imprisonment for, *inter alia*, acts such as murder (Article 75), specific cases of rape (Article 201(3)) and genocide (Article 321), states that “acts which are punishable with life imprisonment, or which are punishable with imprisonment for a period between ten and twenty years or life imprisonment, are not subject to statutory limitations”.⁸⁷⁹

784. Azerbaijan’s Criminal Code excludes statutory limitations with regard to war crimes.⁸⁸⁰

785. The Criminal Code of Belarus provides that “the exoneration from criminal responsibility or punishment . . . in relation with the expiration of statutory limitation is inapplicable to crimes against peace, [crimes against] the security of mankind and war crimes”.⁸⁸¹

786. Belgium’s Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended provides that “Article 21 of the Introductory Part of the Code of Penal Procedure and Article 91 of the Penal Code, relative to the statutory limitation of public prosecutions and penalties, shall not be applicable to the breaches listed in

⁸⁷⁴ US, *Naval Handbook* (1995), § 6.2.5.3.

⁸⁷⁵ Albania, *Military Penal Code* (1995), Article 67.

⁸⁷⁶ Argentina, *Law concerning the Imprescriptibility of War Crimes and Crimes against Humanity* (1995).

⁸⁷⁷ Argentina, *Draft Code of Military Justice* (1998), Article 236, introducing a new Article 601 *bis* in the *Code of Military Justice as amended* (1951).

⁸⁷⁸ Armenia, *Penal Code* (2003), Article 75(6).

⁸⁷⁹ Austria, *Penal Code* (1974), Article 57(1).

⁸⁸⁰ Azerbaijan, *Criminal Code* (1999), Article 75.

⁸⁸¹ Belarus, *Criminal Code* (1999), Article 85.

Article 1 of the present Act".⁸⁸² Article 1 provides for the punishment of the crime of genocide (paragraph 1), crimes against humanity (paragraph 2) and "grave breaches . . . which cause injury, by act or omission, to persons or objects protected by the [1949 Geneva Conventions] and by Protocols I and II additional to those Conventions" (paragraph 3).⁸⁸³

787. Burundi's Draft Law on Genocide, Crimes against Humanity and War Crimes states that "the prosecution and punishment of infringements constituent of genocide, crimes against humanity or war crimes are not subject to statutes of limitation".⁸⁸⁴

788. Under Colombia's Penal Code, the period of limitation for penal action with regard to genocide, forced disappearance, torture and forced displacement is 30 years.⁸⁸⁵

789. Congo's Genocide, War Crimes and Crimes against Humanity Act states that statutes of limitation do not apply with regard to the prosecution and repression of war crimes or with regard to the pronounced penalty.⁸⁸⁶

790. Croatia's Criminal Code provides that:

The non-applicability of the criminal legislation of the Republic of Croatia [because of the statute of limitations] does not apply to the criminal offences of genocide, as referred to in Article 156, a war of aggression, as referred to in Article 157, war crimes, as referred to in Articles 158, 159 and 160 of this Code, or other criminal offences which, pursuant to international law, are not subject to the statute of limitations.⁸⁸⁷

The Code further provides that:

No statutory limitation shall apply to the execution of punishment pronounced on a perpetrator of the criminal offence of genocide as specified in Article 156, of a war of aggression as specified in Article 157, of war crimes as specified in Articles 158, 159 and 160 of this Code, or of other criminal offences which, pursuant to international law, are not subject to the statute of limitations.⁸⁸⁸

791. Cuba's Penal Code states that its provisions regarding statutes of limitation for penal action "do not apply to cases for which the law foresees the death penalty and to crimes against humanity".⁸⁸⁹ It adds that its provisions regarding statutes of limitation for punishment "do not apply with respect to crimes against humanity".⁸⁹⁰

⁸⁸² Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 8.

⁸⁸³ Belgium, *Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols as amended* (1993), Article 1(1), (2) and (3).

⁸⁸⁴ Burundi, *Draft Law on Genocide, Crimes against Humanity and War Crimes* (2001), Article 28.

⁸⁸⁵ Colombia, *Penal Code* (2000), Article 83.

⁸⁸⁶ Congo, *Genocide, War Crimes and Crimes against Humanity Act* (1998), Article 14.

⁸⁸⁷ Croatia, *Criminal Code* (1997), Article 18(2).

⁸⁸⁸ Croatia, *Criminal Code* (1997), Article 24. ⁸⁸⁹ Cuba, *Penal Code* (1987), Article 64(5).

⁸⁹⁰ Cuba, *Penal Code* (1987), Article 65(5).

792. Estonia's Criminal Code as amended provides that there is no statutory limitation for war crimes.⁸⁹¹

793. In 1992, the transitional government of Ethiopia adopted the Special Public Prosecutor's Office Establishment Proclamation which has "the power to conduct investigation and institute proceedings in respect of any person having committed or responsible for the commission of an offence by abusing his position in the party, the government or mass organization under the Derg-WPE regime".⁸⁹² The Proclamation states, *inter alia*, that "the provisions concerning limitation of criminal action and the time limit concerning the submission of charges, evidence and pleading to charges shall not be applicable to proceedings instituted by the Office".⁸⁹³

794. Ethiopia's Constitution provides that "there shall be no period of limitation on persons charged with crimes against humanity [i.e. "inhuman punishment, forcible disappearances, summary executions, acts of genocide"] as provided by international conventions ratified by Ethiopia and other laws of Ethiopia".⁸⁹⁴

795. Under France's Penal Code, "the public action with regard to [genocide and "other crimes against humanity"], as well as the sentences imposed [on genocide and "other crimes against humanity"], are not subject to statutory limitations".⁸⁹⁵

796. Under Germany's Penal Code, genocide and murder are explicitly excluded from the general provisions relative to statutory limitation.⁸⁹⁶

797. Germany's Law Introducing the International Crimes Code provides that "the prosecution of serious criminal offences pursuant to this Act [*inter alia*, genocide, crimes against humanity and war crimes] and the execution of sentences imposed on their account shall not be subject to any statute of limitations".⁸⁹⁷

798. Hungary's Criminal Code as amended provides that statutory limitations will not apply to war crimes and crimes against humanity.⁸⁹⁸

799. Under Israel's Criminal Procedure Law, the period of limitation for the most serious crimes is 20 years and for other crimes 10 years.⁸⁹⁹

800. Israel's Nazis and Nazi Collaborators (Punishment) Law provides that there shall be no period of limitation for the crimes dealt with therein (crimes against the Jewish people, crimes against humanity and war crimes).⁹⁰⁰

⁸⁹¹ Estonia, *Criminal Code as amended* (1992), Section 53.

⁸⁹² Ethiopia, *Special Public Prosecutor's Office Establishment Proclamation* (1992), Articles 2(1) and 6.

⁸⁹³ Ethiopia, *Special Public Prosecutor's Office Establishment Proclamation* (1992), Article 7(2).

⁸⁹⁴ Ethiopia, *Constitution* (1994), Article 28(1).

⁸⁹⁵ France, *Penal Code* (1994), Article 213(5).

⁸⁹⁶ Germany, *Penal Code* (1998), Section 78(2).

⁸⁹⁷ Germany, *Law Introducing the International Crimes Code* (2002), Article 1(5).

⁸⁹⁸ Hungary, *Criminal Code as amended* (1978), Article 33(2).

⁸⁹⁹ Israel, *Criminal Procedure Law* (1982), Article 9.

⁹⁰⁰ Israel, *Nazis and Nazi Collaborators (Punishment) Law* (1950), Section 12.

- 801.** Israel's Crime of Genocide (Prevention and Punishment) Law excludes the applicability of the provision of the Penal Code dealing with limitations.⁹⁰¹
- 802.** Jordan's Draft Military Criminal Code, in a part entitled "war crimes", states that "the provisions with regard to statutes of limitation of the common law do not apply to war crimes nor to the sanctions incurred".⁹⁰²
- 803.** The Draft Amendments to the Code of Military Justice of Lebanon, in a part dealing with the punishment of war criminals, provide that "the crimes provided for in this law are not subject to statutes of limitation".⁹⁰³
- 804.** Lithuania's Criminal Code as amended provides that "there is no prescription for genocide and war crimes".⁹⁰⁴
- 805.** Luxembourg's Law on the Non-Applicability of Statutory Limitations to War Crimes provides that "war crimes . . . are, by their nature, not subject to statutes of limitation".⁹⁰⁵
- 806.** Malaysia's Armed Forces Act provides for a general three-year limitation period for offences under service law, except for offences relative to mutiny and desertion.⁹⁰⁶
- 807.** Mali's Penal Code provides that "any of the crimes provided for under the present title [i.e. crimes against humanity, genocide and war crimes] . . . just as any punishment pronounced in repression of such crimes are not subject to statutes of limitation".⁹⁰⁷
- 808.** Moldova's Draft Penal Code, under a provision dealing with statutes of limitation for crimes, provides that "the statutes of limitation do not apply with regard to persons having committed crimes against the peace and security of mankind or war crimes". It also states that "the statutes of limitation do not apply to the principal penalties which are applied with regard to crimes against the security of mankind or to war crimes provided for in this Code".⁹⁰⁸
- 809.** According to the International Crimes Act of the Netherlands, the expiration of the right to institute criminal proceedings or to impose a sentence, as defined in Articles 70 and 76 of the Penal Code as amended, "shall not apply to the crimes defined in this Act [genocide, crimes against humanity, war crimes and torture]".⁹⁰⁹
- 810.** Niger's Penal Code as amended, under a chapter entitled "Crimes against humanity and war crimes" in which it provides for the punishment of a list of offences such as genocide, crimes against humanity, and war crimes in the

⁹⁰¹ Israel, *Crime of Genocide (Prevention and Punishment) Law* (1950), Section 6.

⁹⁰² Jordan, *Draft Military Criminal Code* (2000), Article 43.

⁹⁰³ Lebanon, *Draft Amendments to the Code of Military Justice* (1997), Article 149.

⁹⁰⁴ Lithuania, *Criminal Code as amended* (1961), Article 49.

⁹⁰⁵ Luxembourg, *Law on the Non-Applicability of Statutory Limitations to War Crimes* (1974).

⁹⁰⁶ Malaysia, *Armed Forces Act* (1972), Section 144.

⁹⁰⁷ Mali, *Penal Code* (2001), Article 32.

⁹⁰⁸ Moldova, *Draft Penal Code* (1999), Articles 61(8) and 95(4).

⁹⁰⁹ Netherlands, *International Crimes Act* (2003), Article 13.

meaning of the 1949 Geneva Conventions and both AP I and AP II, states that “the prosecution with regard to the crimes set out under this chapter, as well as the penalties pronounced, are not subject to statutes of limitation”.⁹¹⁰

811. Poland’s Penal Code provides for the non-application of statutory limitations to war offences and crimes against peace and humanity.⁹¹¹

812. Russia’s Decree on the Punishment of War Criminals states that “Nazi criminals, guilty of most serious crimes against peace and humanity and war crimes, are subject to prosecution and punishment, irrespective of the time elapsed after the crimes committed”.⁹¹²

813. Russia’s Criminal Code, with respect to possible release from criminal responsibility owing to the expiry of statutes of limitation, provides that:

The periods of limitation shall not be applied to persons who have committed crimes against peace and the security of mankind, provided for by Articles 353 [planning, preparing, unleashing or waging an aggressive war], 356 [use of banned means and methods of warfare], 357 [genocide] and 358 [ecocide] of this Code.⁹¹³

With respect to possible release from punishment owing to the expiry of the limitation period of the Court’s sentence, the Code provides that:

Limitation periods shall not be applicable to persons convicted for the commission of crimes against peace and the security of mankind, provided for by Articles 353 [planning, preparing, unleashing or waging an aggressive war], 356 [use of banned means and methods of warfare], 357 [genocide] and 358 [ecocide] of this Code.⁹¹⁴

814. Rwanda’s Law on the Prosecution of the Crime of Genocide and Crimes against Humanity provides that “prosecutions and penalties for offences constituting the crime of genocide or crimes against humanity are not subject to a limitation period”.⁹¹⁵

815. Rwanda’s Law Setting up Gacaca Jurisdictions provides that “the public action and penalties related to offences of the crime of genocide or crimes against humanity are imprescriptible”.⁹¹⁶

816. Slovenia’s Penal Code provides that:

Criminal prosecution and the implementation of a sentence shall not be prevented for criminal offences from Articles 373–378 of the Present Code [i.e. genocide; war crimes against the civilian population; war crimes against the wounded and sick; war crimes against prisoners of war; war crimes of use of unlawful weapons; association with and incitement to genocide and war crimes] as well as for criminal

⁹¹⁰ Niger, *Penal Code as amended* (1961), Article 208.8.

⁹¹¹ Poland, *Penal Code* (1997), Article 109.

⁹¹² Russia, *Decree on the Punishment of War Criminals* (1965).

⁹¹³ Russia, *Criminal Code* (1996), Article 78(5).

⁹¹⁴ Russia, *Criminal Code* (1996), Article 83(4).

⁹¹⁵ Rwanda, *Law on the Prosecution of the Crime of Genocide and Crimes against Humanity* (1996), Article 37.

⁹¹⁶ Rwanda, *Law Setting up Gacaca Jurisdictions* (2001), Article 92.

offences the prosecution of which may not be prevented under international agreements.⁹¹⁷

817. Spain's Military Criminal Code provides for periods of limitation for military offences punishable thereunder, including offences against the laws and customs of war, and for the penalties imposed for such offences.⁹¹⁸

818. Spain's Penal Code provides that "in no case shall the crime of genocide be subject to statutory limitations" and that the same is valid for the punishment imposed therefore.⁹¹⁹ Periods of limitation are provided for other offences punishable under the Code.⁹²⁰

819. Switzerland's Military Criminal Code as amended provides that:

[The following acts] are not subject to statutes of limitation:

1. Crimes aiming at the extermination or oppression of a group of the population because of its nationality, race, religion or because of its ethnic, social or political affiliation;
2. Serious crimes under the Geneva Conventions of 12 August 1949 and other international agreements relating to the protection of victims of war to which Switzerland is a party, if the offence under examination is particularly serious because of the conditions under which it was committed;
3. Crimes committed with the aim of exercising duress or extortion and which put in danger or threaten to put in danger the life and physical integrity of persons, in particular by the use of means of massive destruction, the triggering of a catastrophe or the taking of hostages.⁹²¹

Switzerland's Penal Code as amended contains an identical provision.⁹²²

820. Tajikistan's Criminal Code provides that "crimes against the peace and security of mankind are not subject to statutes of limitation".⁹²³

821. Uzbekistan's Criminal Code provides that statutory limitations are not applicable to crimes against the peace and security of mankind, including genocide and violations of the laws and customs of war.⁹²⁴

822. Yemen's Military Criminal Code states that "with regard to the crimes set out under this chapter [i.e. war crimes], the right to prosecution is not subject to statutes of limitation".⁹²⁵

823. Zimbabwe's Criminal Procedure and Evidence Act as amended provides that:

⁹¹⁷ Slovenia, *Penal Code* (1994), Article 116.

⁹¹⁸ Spain, *Military Criminal Code* (1985), Articles 45 and 46.

⁹¹⁹ Spain, *Penal Code* (1995), Articles 131(4) and 133(2).

⁹²⁰ Spain, *Penal Code* (1995), Article 133.

⁹²¹ Switzerland, *Military Criminal Code as amended* (1927), Article 56 *bis*.

⁹²² Switzerland, *Penal Code as amended* (1937), Article 75 *bis*.

⁹²³ Tajikistan, *Criminal Code* (1998), Articles 75 and 81.

⁹²⁴ Uzbekistan, *Criminal Code* (1994), Articles 64 and 69.

⁹²⁵ Yemen, *Military Criminal Code* (1998), Article 22.

- (1) The right of prosecution for murder shall not be barred by any lapse of time.
- (2) The right of prosecution for any offence other than murder . . . shall, unless some other period is expressly provided by law, be barred by the lapse of twenty years from the time when the offence was committed.⁹²⁶

National Case-law

824. In the *Bohne case* in 1966, Argentina's Supreme Court of Justice found that in fact there had been no verification that prescription applied to penal action under the laws of the requesting State (FRG), and that the decision in question remained unchanged even in the light of the argument put forward by the defence to the effect that prescription of penal action for the crimes attributed to the accused applied after 15 years because the case was one of participation in simple homicide. The accused had been requisitioned for widespread and systematic execution of mentally ill persons in 1939 and 1940.⁹²⁷

825. In the *Priebke case* in 1995 dealing with the question of the possible extradition of the accused to Italy for acts committed during the Second World War (Ardeatine caves massacre), Argentina's Court of Appeal found that, under the terms of Argentine legislation, the charge of homicide was prescribed and therefore the extradition request should be rejected.⁹²⁸ The Supreme Court revoked the decision of the Court of Appeal and allowed the extradition, stating that the fact that Priebke was required for trial in Italy established *prima facie* the crime of genocide "for killing 75 Jews out of 335 dead". It added that "the classification of offences as crimes against humanity does not depend on whether the requesting or requested States agree with the extradition process, but instead on the principles of *jus cogens* of international law" and that "there is no prescription for crimes under this law".⁹²⁹ One of the Court magistrates referred to the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and concluded that the Argentine Republic's practice undeniably contributed to the development of an international custom that favoured the non-applicability of statutory limitations, and that express acceptance of such non-applicability through adherence to or ratification of the Convention was not the only means of determining the existence of *jus cogens*. In his opinion, Argentina's Executive and Legislative Branches had already expressed their agreement with the contents of the text, which had already been approved by both the Argentine Senate and House of Deputies.⁹³⁰ Other magistrates also found that Priebke's conduct had all the characteristics of crimes against humanity committed against civilians and prisoners of war

⁹²⁶ Zimbabwe, *Criminal Procedure and Evidence Act as amended* (1927), Section 23.

⁹²⁷ Argentina, Supreme Court of Justice, *Bohne case*, 24 August 1966.

⁹²⁸ Argentina, Court of Appeal of General Roca, *Priebke case* (Appeal), 23 August 1995.

⁹²⁹ Argentina, Supreme Court, *Priebke case* (Supreme Court), 2 November 1995.

⁹³⁰ Argentina, Supreme Court, *Priebke case* (Supreme Court), 2 November 1995, Opinion by Dr Bossert.

in wartime, and that this classification was in line with the principles of *jus cogens*, and that such crimes were not subject to limitations.⁹³¹ However, other judges casting dissenting votes found that, since the crimes were homicides in terms of Article 62 of the Argentine Penal Code, the time limit after which prescription would apply had already elapsed. They found that even if the acts were to be considered crimes against humanity, they would be subject to a period of limitation since the UN Convention had yet to enter into force in Argentina.⁹³²

826. In the *Schwammburger case* in 1989, a magistrate of Argentina's Cámara Federal de La Plata found the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity to be an indisputable factor in the non-applicability of statutory limitations to war crimes as a principle of international law, and despite the absence of ratification by Argentina, held that Argentina was bound by the principle according to Article 102 of its Constitution.⁹³³ Similarly, another magistrate rejected the position that prescription was covered by Article 18 of the National Constitution.⁹³⁴ The Attorney-General argued that in the case in question it must be verified whether penal action was not prescribed under the laws of the requesting State (FRG) rather than the laws of Argentina.⁹³⁵ Similarly, in 1990, the Supreme Court found that under German law there was no prescription.⁹³⁶

827. In its judgement in the *Videla case* in 1994 concerning the abduction, torture and murder of a Chilean woman in 1974, Chile's Appeal Court of Santiago held that the acts charged constituted grave breaches under Article 147 GC IV, which it found applicable, and that:

Such offences as constitute grave breaches of the Convention are imprescriptible . . . the ten-year prescription of legal action in respect of the crimes provided for in Article 94 of the Penal Code cannot apply . . . Any attempt by a State to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the rights of persons in wartime is beyond the State's competence while it is a Party to the Geneva Conventions on humanitarian law.⁹³⁷

828. In the *Mengistu and Others case* in 1995 concerning the prosecution and trial of Colonel Mengistu Haile Mariam and former members of the Derg for allegedly committing genocide, crimes against humanity and war crimes during

⁹³¹ Argentina, Supreme Court, *Priebke case* (Supreme Court), 2 November 1995, Opinion by Drs Nazareno and Moliné O'Connor.

⁹³² Argentina, Supreme Court, *Priebke case* (Supreme Court), 2 November 1995, Dissenting vote by Drs Belluscio and Levene.

⁹³³ Argentina, Cámara Federal de La Plata, *Schwammburger case* (First Instance), 30 August 1989, Opinion by Dr Schiffrin.

⁹³⁴ Argentina, Cámara Federal de La Plata, *Schwammburger case* (First Instance), 30 August 1989, Opinion by Dr Garro.

⁹³⁵ Argentina, Legal opinion of the Procurator-general of the Nation, *Schwammburger case* (Legal Opinion), 21 January 1989.

⁹³⁶ Argentina, Supreme Court of Justice, *Schwammburger case* (Supreme Court), 20 March 1990.

⁹³⁷ Chile, Appeal Court of Santiago (Third Criminal Chamber), *Videla case*, Judgement, 26 September 1994.

the former regime between 1974 and 1991, the Special Prosecutor of Ethiopia, in a reply submitted in response to the objection filed by counsels for defendants, stated that “the UN General Assembly, in article 1 of its Resolution on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity, has clearly stated that these offences are imprescriptible”.⁹³⁸ In his conclusions, the Special Prosecutor noted that “it is . . . a well established custom and belief that war crimes and crimes against humanity are not . . . barred by limitation”.⁹³⁹

829. In the *Barbie case* in 1984, France’s Court of Cassation held that:

The judgement under appeal conforms with the official interpretation of the London Agreement given on 15 June 1979 by the Minister of Foreign Affairs, who was consulted on the occasion of other proceedings but whose opinion on questions relating to international public policy (*ordre public international*) is of general scope and binding on the judiciary. The Court held that “the only principle with regard to the statutory limitation of prosecution of crimes against humanity which is to be considered as deducible from the Charter of the International Military Tribunal is that prosecution of such crimes is not subject to statutory limitation”. The Court of Appeal stated correctly that, within the meaning of Article 60 of the European Convention on Human Rights, “the right to benefit of statutory limitation of prosecution” cannot constitute a human right or fundamental freedom. The Court of Appeal then referred to Article 7(2) of the Convention, as well as to Article 15(2) of the [1966 ICCPR]. In fact, neither of these provisions give rise to any derogation or restriction on the rule that prosecution is not subject to statutory limitation. This rule is applicable to crimes against humanity by virtue of the principles of law recognized by the community of nations.⁹⁴⁰

In a later judgement in the same case, the Court of Cassation held that war crimes, in contrast to crimes against humanity, were subject “to the time-limits imposed by statute” and stated that:

Following the termination of hostilities, it is necessary that the passage of time should be allowed to blur acts of brutality which might have been committed in the course of armed conflict, even if those acts constituted violations of the laws and customs of war or were not justified by military necessity, provided that those acts were not of such a nature as to deserve the qualification of crimes against humanity. There is no principle of law with an authority superior to that of French law which would allow war crimes, either within the meaning of the London Agreement of 8 August 1945 or as defined in the Ordinance of 28 August 1944 which preceded it, to be declared not subject to statutory limitation.⁹⁴¹

830. In 1996, the Constitutional Court of Hungary held that the provision of Hungary’s Penal Code on the imprescriptibility of war crimes and crimes

⁹³⁸ Ethiopia, Special Prosecutor’s Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, § 6.1.1.

⁹³⁹ Ethiopia, Special Prosecutor’s Office, *Mengistu and Others case*, Reply submitted in response to the objection filed by counsels for defendants, 23 May 1995, Conclusion.

⁹⁴⁰ France, Court of Cassation, *Barbie case*, Judgement, 26 January 1984.

⁹⁴¹ France, Cour de Cassation, *Barbie case*, 20 December 1985.

against humanity could only be applied to grave breaches in international conflicts and prohibited acts under common Article 3 of the 1949 Geneva Conventions.⁹⁴²

831. At the Trial of First Instance in the *Priebke case* in 1996, Italy's Military Tribunal of Rome held that the criminal prosecution prescribed period of 20 years had elapsed. The charge laid against the accused was "violence and murder of Italian citizens" under Italy's Military Criminal Code, a war crime but not a crime against humanity according to the Tribunal. Since the sentence would not be life imprisonment – the only crimes (with crimes against humanity and genocide) not subject to limitation under Italian law – the Tribunal held that the prosecution was prescribed. However, this verdict was annulled by the Supreme Court of Cassation, which ordered a new trial.⁹⁴³

832. At the Trial of First Instance in the *Hass and Priebke case* in 1997, Italy's Military Tribunal of Rome held that the charge was both a war crime and a crime against humanity and that, under Italian law and under customary international law (which prevailed over national law), they were not subject to limitations.⁹⁴⁴ The Military Court of Appeals, as well as the Supreme Court of Cassation, confirmed this judgement in the relevant parts.⁹⁴⁵

833. In the *Spring case* in 2001 dealing with the claim of an Auschwitz survivor against the Swiss Confederation for compensation for having been handed over, in November 1943, to German troops by Swiss border guards, Switzerland's Federal Court, in the part of the judgement concerning the question whether the right to compensation was barred by statutes of limitation, referred to Article 75(1) *bis* of the Swiss Penal Code and Article 56 *bis* of the Swiss Military Criminal Code as amended and stated that these provisions excluded the applicability of statutes of limitation to, *inter alia*, genocide and grave breaches of the Geneva Conventions or other international agreements on the protection of victims of war if the offence was particularly serious given the circumstances. However, the Federal Court pointed out that Article 75 *bis* of the Swiss Penal Code had been adopted under the premise that the provision be applicable "only if the prosecution of the crime or the punishment was not yet barred by statutes of limitation under the then applicable law at the time of the coming into force of this change" and that this would not be valid only for the cases of extradition and other forms of international cooperation in criminal matters. As to the alleged punishable act – the claimant referring, *inter alia*,

⁹⁴² Hungary, Constitutional Court of Hungary, *Judgement No. 36/1996*, 4 September 1996.

⁹⁴³ Italy, Military Tribunal of Rome, *Priebke case*, Judgement (Trial of First Instance), 1 August 1996; Supreme Court of Cassation, *Priebke case*, Judgement (Cancelling Verdict of First Instance), 15 October 1997.

⁹⁴⁴ Italy, Military Tribunal of Rome, *Hass and Priebke case*, Judgement (Trial of First Instance), 22 July 1997.

⁹⁴⁵ Italy, Military Appeals Court, *Hass and Priebke case*, Judgement (Trial of Second Instance), 7 March 1998; Supreme Court of Cassation, *Hass and Priebke case*, Judgement (Trial of Third Instance), 16 November 1998.

to complicity in genocide – the Court stated that, if the handing over of the claimant to the German authorities should in fact be relevant under penal law, the relevant acts would, at the time of the coming into force of Article 75 *bis* of the Swiss Penal Code in 1983, have been barred by absolute statutes of limitation, which would be the reason why the applicant could not deduce a right in his favour from the principle that statutes of limitation under penal law can also be applicable to the right under civil law.⁹⁴⁶

Other National Practice

834. On the occasion of a possible request for the extradition of a Belgian national from Spain for acts committed during the Second World War, it was noted in the Commission of Justice of the Belgian parliament that Belgium did not want to ratify the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity because it could be applied to acts committed before its entry into force, in contradiction with general principles of Belgian penal law. Belgium would, however, be willing to ratify the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes since it only applied to acts for which the limitation period had not elapsed.⁹⁴⁷

835. In an explanatory memorandum submitted to the Belgian Senate in 1991 in the context of the adoption procedure of the Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols (as amended), the Belgian government noted that the principle of the non-application of statutory limitations to war crimes was now generally accepted and that several States had modified their legislation in accordance with the principle. It referred to the UN and European Conventions on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, although Belgium had ratified neither of them at the time.⁹⁴⁸

836. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who had committed crimes against humanity, the representative of Brazil stated that “the principle of non-applicability of statutory limitation to war crimes and crimes against humanity was a new principle for many countries, including his own, where the law recognized statutory limitations in criminal matters”.⁹⁴⁹

⁹⁴⁶ Switzerland, Federal Court, *Spring case*, Judgement, 21 January 2001.

⁹⁴⁷ Belgium, House of Representatives, Commission of Justice, Debates on a proposal for a resolution on the request for extradition of the war criminal Léon Degrelle and on the ratification of the 1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, 1982–1983 Session, *Débats parlementaires*, Chambre, Vol. 540, No. 2, pp. 6–9, reprinted in part in *RBDI*, Vol. 19, 1986, pp. 463–464.

⁹⁴⁸ Belgium, Senate, Explanatory Memorandum, Draft Law concerning the Repression of Grave Breaches of the Geneva Conventions and their Additional Protocols, 1990–1991 Session, Doc. 1317-1, 30 April 1991, p. 16.

⁹⁴⁹ Brazil, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, § 28.

837. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who had committed crimes against humanity, the representative of Bulgaria stated that:

He was convinced of the need to adopt a convention on the non-applicability of statutory limitation to war crimes in order to prevent new crimes . . . In resolution 1158 (XLI) the Economic and Social Council had urged all States to take "any measures necessary to prevent the application of statutory limitation to war crimes and crimes against humanity". The Committee's task was therefore very simple and essentially a technical one: it had to adopt a convention which was of the nature of a declaration and brought together principles that already existed in international law. Statutory limitation with respect to war crimes did not exist in Bulgaria, nor in the legislation of many countries . . . Although statutory limitation was known in the domestic law of many countries, it had always been very controversial, and in some countries applied to some crimes but not to others. All international documents dealing with international criminal law, moreover, pass over the question of the non-applicability of statutory limitation in silence . . . No moral considerations could justify the application of statutory limitation to such crimes . . . What should be done . . . was to take all necessary measures to confirm a principle which already existed in international law.⁹⁵⁰

838. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of Chile stated that:

His country had voted in favour of the draft convention [on the non-applicability of statutory limitations to war crimes and crimes against humanity] because it considered it essential to adopt an instrument establishing the non-applicability of statutory limitation to war crimes and crimes against humanity.⁹⁵¹

839. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Congo stated that "there could be no statutory limitation in the case of war crimes and crimes against humanity".⁹⁵²

840. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Côte d'Ivoire stated that:

It was particularly important, by adopting a convention, to embody in international law the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity at a time when the policy of aggression, intervention and

⁹⁵⁰ Bulgaria, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, § 5.

⁹⁵¹ Chile, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1568, 10 October 1968, § 29.

⁹⁵² Congo, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, § 21.

hegemony pursued by certain countries was giving rise to new crimes of that kind in various parts of the world. He would therefore support any steps aimed at ensuring that such crimes were punished.⁹⁵³

841. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Cyprus stated that:

The last paragraph of the preamble and article I of the [preliminary draft convention on the non-applicability of statutory limitations to war crimes and crimes against humanity], as well as Economic and Social Council resolution 1158 (XLI), took it for granted that the non-applicability of statutory limitation to war crimes and crimes against humanity was a principle. If, however, the new notion of the non-applicability of statutory limitation to war crimes was, as a necessary evil, made applicable to the past, it would not be possible to speak of a principle; whereas it was elevated to the status of a principle by a process of creating international law, it would be difficult to understand why certain offences against property, included in the available definition of war crimes, should be considered of such gravity as to be exempt from statutory limitation, while more serious crimes at the national level were subject to limitation. Statements that the non-applicability of statutory limitation to war crimes became a principle because there was no statutory limitation in international law were inadmissible; for the absence of any provision on that point did not mean that the principle was accepted or recognized.⁹⁵⁴

In a later meeting on the same issue in 1967, the representative of Cyprus stated that:

23. ... There had indeed been no precise definition of [the crimes such as those committed during the Second World War] in international law at the time when they were committed, nor had there been any provision relating to the applicability or non-applicability of the rules of statutory limitation. The absence of any reference to that in international law was regarded by some as proof of the existence of the principle of the non-applicability in international law. In his opinion, that was not the case, for international law was not yet as developed as domestic law, and it was to the characteristics and weaknesses of international law that its silence on that point was due ...
- ...
25. While the principle of statutory limitation was well established in domestic criminal law, the non-applicability of statutory limitation to war crimes and crimes against humanity, on the other hand, did not constitute an established principle of international law.⁹⁵⁵

842. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons

⁹⁵³ Côte d'Ivoire, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1568, 10 October 1968, § 6.

⁹⁵⁴ Cyprus, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1516, 15 November 1967, § 15.

⁹⁵⁵ Cyprus, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, §§ 23 and 25.

who have committed crimes against humanity, the representative of Czechoslovakia stated that:

35. ... Her government fully supported the drafting of a binding legal instrument which would incorporate the principle of non-applicability of statutory limitation to war crimes and crimes against humanity.
- ...
37. ... To apply statutory limitation to [war crimes and crimes against humanity] would be contrary to the provisions of the international instruments which she had mentioned [i.e. the 1945 London Agreement, the 1945 IMT Charter (Nuremberg) and UN General Assembly resolutions 3 (I), 95 (I) and 170 (II)] and to the spirit of the [1943 Moscow Declaration]... A number of countries, including the Czechoslovak Socialist Republic, had enacted legislation under which, in accordance with the rules of international law, statutory limitation did not apply to persons who had committed war crimes or crimes against humanity. Czechoslovakia's Act No. 184, adopted in 1964, was based on the principles of international law and was aimed at assuring the Czechoslovak people... that no war criminal would escape punishment. It embodied the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity, a principle which had more recently been confirmed by resolution 3 (XXI) of the [UN] Commission on Human Rights and resolution 1158 (XLI) of the Economic and Social Council and by the study submitted by the Secretary-General...
38. ... The principle of non-applicability of statutory limitation was universally recognized as constituting one of the fundamental principles of international law...
39. ... The non-applicability of statutory limitation to war crimes and crimes against humanity followed directly from international law... [C]onsequently, the application to such crimes of the rules of domestic law concerning statutory limitation would constitute a flagrant violation of the principles of international law.⁹⁵⁶

In a later meeting of the Third Committee on the same issue in 1968, Czechoslovakia stated that "the non-applicability of statutory limitation to war crimes and crimes against humanity constituted a valid and acknowledged principle of international law".⁹⁵⁷

843. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, France stated that:

While the statutory limitation of crimes was a principle of domestic law, the very nature of war crimes, as defined in the [1945 IMT Charter (Nuremberg)], made it inapplicable to them; that had been recognized by France by the Act of 26 December 1964, and was a tenet which should be recognized at the international level,

⁹⁵⁶ Czechoslovakia, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1514, 14 November 1967, §§ 35–39.

⁹⁵⁷ Czechoslovakia, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1567, 10 October 1968, § 22.

with retroactivity as an essential corollary, for without it the non-applicability of statutory limitation would be meaningless.⁹⁵⁸

844. In 1981, during a debate in the Sixth Committee of the UN General Assembly in relation to the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, the GDR stated that “the draft code should include a clear provision on the non-applicability of the statute of limitations to such offences”.⁹⁵⁹

845. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of Greece stated that:

12. ... The non-applicability of statutory limitation to [war crimes and crimes against humanity] was said to be a principle of international law which the [preliminary draft convention on the non-applicability of statutory limitations to war crimes and crimes against humanity] only affirmed. Hence the subtitle of article I of the draft convention: “Affirmation of the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity”. What was actually involved, in her delegation’s opinion, was a new legal concept ...

...
15. ... The convention before the Committee did not meet current needs: society no longer felt the same resentment towards crimes committed twenty or thirty years ago, and the criminals who had committed those crimes were no longer the same men. They should therefore have the benefit of statutory limitation, particularly since limitation statutes applying to crimes committed in time of peace extended to even the most hideous crimes ...

...
19. It was thus inadvisable to exclude war crimes from statutory limitation.⁹⁶⁰

In a later meeting on the same issue in 1967, Greece stated that “the draft convention before the Committee [on the non-applicability of statutory limitations to war crimes and crimes against humanity] was intended to establish a new principle, the non-applicability of statutory limitation to war crimes and crimes against humanity”.⁹⁶¹

846. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Honduras stated that:

⁹⁵⁸ France, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1515, 15 November 1967, § 19.

⁹⁵⁹ GDR, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/36/SR.60, 26 November 1981, § 26.

⁹⁶⁰ Greece, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1515, 15 November 1967, §§ 12–19.

⁹⁶¹ Greece, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, § 5.

War criminals should have the benefit of statutory limitation for humanitarian reasons. Many countries' constitutions established that principle and made it part of their law . . . It was . . . reasonable that when the period of statutory limitation expired [a war criminal] should gain a certain degree of relief.⁹⁶²

847. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Hungary stated that:

21. . . . The recent adoption . . . in the Federal Republic of Germany of an Act under which statutory limitation would be applied to war crimes was a setback to the development of international law . . .
22. It was impossible to accept the arguments of those who favoured the application of statutory limitation to war crimes on the grounds that that principle was recognized in domestic legislation, for it was not ordinary crimes that were in question . . . Legal technicalities could not . . . be allowed to prevent the punishment of those who were responsible for war crimes and still not been brought to justice . . . The Hungarian Government had therefore established the non-applicability of statutory limitation to war crimes by legislation decree, in 1964.⁹⁶³

848. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, India stated that its legislation did not provide for statutory limitation in the case of grave breaches of the 1949 Geneva Conventions and that:

It was in the light of that legislation that her delegation had voted in the [UN] Commission on Human Rights and the Economic and Social Council in favour of the resolution requesting the principle that there would be no period of limitation for war crimes and crimes against humanity . . . She would like to reiterate her delegation's view that since that principle was not yet universally recognized the elaboration of an international convention on the matter would help to promote uniformity in national legislations.⁹⁶⁴

849. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of Israel stated that:

The Government of Israel had no difficulty in accepting the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity, which was consistent with its legislation on the matter . . . As his delegation had stated at the 874th meeting of the [UN] Commission on Human Rights, on

⁹⁶² Honduras, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, § 7.

⁹⁶³ Hungary, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1516, 15 November 1967, §§ 21–22.

⁹⁶⁴ India, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1516, 15 November 1967, §§ 1–2.

24 March 1966, the principle was an established principle of international law and corresponded to a need of the international community. Since the draft convention [on the non-applicability of statutory limitations to war crimes and crimes against humanity] restated that principle in more formal terms, it could be accepted.⁹⁶⁵

850. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Italy stated that it “favoured the adoption of a convention on the non-applicability of statutory limitation to war crimes”.⁹⁶⁶

851. In 1971, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Norway stated that “it could not accept the principle of non-applicability of statutory limitations”.⁹⁶⁷

852. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Peru stated that:

It would... be advisable to find a legal formula which combined respect for the principles of statutory limitation and non-retroactivity with the non-applicability of statutory limitation to war crimes and crimes against humanity. His delegation thought that a happy balance would be struck if the [draft] Convention [on the non-applicability of statutory limitations to war crimes and crimes against humanity] were made applicable only to future cases.⁹⁶⁸

853. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Poland stated that:

17. The preliminary draft convention on the non-applicability of statutory limitation to war crimes and crimes against humanity... which the Committee had before it deserved its support...
18. The principle of the non-applicability of statutory limitation to war crimes and crimes against humanity, which was one of the basic principles of international law, was properly formulated, confirmed and sanctioned in the preamble to the preliminary draft convention. The responsibility of war criminals and of persons guilty of crimes against humanity was defined by instruments of international law where application of statutory limits was not provided for. The judgement of the International Military Tribunal of Nürnberg had not been an arbitrary decision by the victorious Powers: it had been an application of international law already in force on 8 August 1945, when the

⁹⁶⁵ Israel, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, § 1.

⁹⁶⁶ Italy, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1568, 10 October 1968, § 34.

⁹⁶⁷ Norway, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1902, 9 December 1971, § 80.

⁹⁶⁸ Peru, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1517, 16 November 1967, § 3.

charter of the Tribunal had been adopted. The responsibility of war criminals and of persons guilty of crimes against humanity was based on instruments and principles of international law which took precedence over any country's domestic laws. National legislation therefore could not apply statutory limitation to crimes which international law specifically excluded from such limitation. Many States whose internal legislation provided for such limitation in respect of offences under the ordinary law had borne that out by reaffirming the non-applicability of statutory limitation to war crimes.

...

25. No one seemed to question the basic principle of the non-applicability of statutory limitation to war crimes. The crimes committed during the Second World War had been particularly barbarous and cruel, and the memory of the millions of victims of the Nazi terror made it imperative to adopt all necessary measures so that those who had perpetrated the crimes would not go unpunished.⁹⁶⁹

854. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of Romania stated that "war crimes and crimes against humanity, because of their exceptional gravity, must be given special treatment. Her delegation therefore supported the principle of the non-applicability of statutory limitation to such crimes."⁹⁷⁰

855. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Sweden stated that:

18. ... Statutory limitation applied in Sweden to all kinds of crimes, from the most petty to the gravest... The statutory limitation on [the most serious crimes punished by life imprisonment] was fixed at twenty-five years from the date on which the crime was committed. The principle of statutory limitation had been recognized in his country for more than 150 years and was an integral part of the Swedish Penal Code. His government therefore had no intention of renouncing that principle with regard to a certain category of crimes, even if they were war crimes or crimes against humanity...
19. Since that was the case, his Government had no intention of acceding to the convention adopted by the Committee. He felt that, except as regarded those States which became parties to the [draft] convention [on the non-applicability of statutory limitations to war crimes and crimes against humanity], there was no principle of international law which sanctioned the non-applicability of statutory limitation to war crimes and crimes against humanity.⁹⁷¹

⁹⁶⁹ Poland, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1514, 14 November 1967, §§ 17–25.

⁹⁷⁰ Romania, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, § 4.

⁹⁷¹ Sweden, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1549, 13 December 1967, §§ 18–19.

856. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the Ukraine stated that:

The Committee's task was not to establish a new system of judicial procedure, but to confirm in a multilateral international treaty a generally recognized principle of international law, namely, the non-applicability of statutory limitation to war crimes and crimes against humanity... Statutory limitation... was of an exceptional nature and could only apply when the law so indicated. War crimes and crimes against humanity did not come in the category of ordinary crimes and because of the social dangers involved the principle of statutory limitation was not equally applicable to them.⁹⁷²

857. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the USSR stated that:

6. In the whole history of criminal law there had never been a code or law envisaging the monstrous crimes committed by the Nazis. There could accordingly be no question of fixing a period of limitation for such crimes. It should also be noted that modern international law did not recognize the institution of statutory limitation. On the contrary, international law affirmed the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity, and honest people the world over hoped that the United Nations would enshrine that principle in an international instrument, a convention. It was therefore the duty of the United Nations to draw up such a convention without delay
7. ...The [UN] Secretary-General's earlier study "Question of the non-applicability of statutory limitation to war crimes and crimes against humanity" ... based on the relevant international instruments, national legislation, the doctrines of international law and international practice, clearly demonstrated the existence of the legal principle of the non-applicability of statutory limitation to war crimes and crimes against humanity... That the principle in question was not unknown in international law was demonstrated by various important documents, such as the London Declaration of 13 January 1942, the [1943 Moscow Declaration], the Potsdam Agreements of 1945, the [1945 London Agreement], the [1945 IMT Charter (Nuremberg)] and the [1946 IMT Charter (Tokyo)]... The same principle was embodied in various United Nations documents, including General Assembly resolutions 3 (I), 95 (I) and 170 (II), and it was not merely a fortuitous circumstance that none of them mentioned the possibility of statutory limitation in respect of such crimes.
8. The same principle of international law found expression in the domestic legislation of many countries – Bulgaria, the German Democratic Republic, Poland, France, Hungary, Austria, and Czechoslovakia, among others. It was also embodied in the domestic legislation of the Soviet Union; a decree by the

⁹⁷² Ukraine, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1517, 16 November 1967, § 5.

Presidium of the Supreme Soviet of the Union dated 4 March 1965 stipulated that war crimes and crimes against humanity were not subject to statutory limitation.

9. Her delegation considered that such precedents indicated quite clearly that the principle of the non-applicability of statutory limitation to war crimes had long been established and recognized in international law.⁹⁷³

858. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of the UK stated that:

As her Government had explained in its reply to the [UN] Secretary-General's questionnaire, there was no prescription or statute of limitation under the criminal law of the United Kingdom which would preclude persons from being tried for war crimes or crimes against humanity because of the date on which the crime was committed.⁹⁷⁴

In a later meeting on the same issue, the UK representative stated that:

30. ... Her Government was in favour of a convention to the effect that no statutory limitation should apply to war crimes and crimes against humanity irrespective of the date of their commission...

...

34. Her delegation was... in favour of a general definition [of war crimes and crimes against humanity] and suggested that article I [of the draft convention on the non-applicability of statutory limitations to war crimes and crimes against humanity] should be replaced by the following text:
 "No statutory limitation shall apply to war crimes of a grave nature and to crimes against humanity as defined in international law, irrespective of the date of their commission".⁹⁷⁵

859. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of the US stated that:

Her delegation supported the basic human rights objectives sought through the adoption of a convention on the non-applicability of statutory limitation to the kinds of crimes of which Nazi criminals were prosecuted and convicted at Nürnberg, namely war crimes and crimes against humanity and would co-operate with other delegations which wished to approach the question in a constructive manner.⁹⁷⁶

⁹⁷³ USSR, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1516, 15 November 1967, §§ 6-9.

⁹⁷⁴ UK, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, § 14.

⁹⁷⁵ UK, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1547, 12 December 1967, §§ 30 and 34.

⁹⁷⁶ US, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1517, 16 November 1967, § 9.

860. In 1977, in reply to a question from the Embassy of France, the US Department of State stated that:

It is the view of the United States Government that neither the [1945 London Agreement], with the [1945 IMT Charter (Nuremberg)] annexed, nor [the 1945 Allied Control Council Law No. 10]... contain any provisions setting a time limit for prosecution or punishment. The United States further regards [the 1945 Allied Control Council Law No. 10] as revoking the benefits of any statute of limitation in respect of the period specified; and in light of the absence of any provision to the contrary, the offenses covered in these instruments are considered not to be subject to limitation concerning their prosecution and punishment.

United States Federal law contains no statute of limitations on war crimes and crimes against humanity.⁹⁷⁷

861. In 1991, in a diplomatic note to Iraq, the US stated that:

The Government of the United States reminds the Government of Iraq that under International Law, violations of the Geneva Conventions, the Geneva Protocol of 1925, or related International Laws of armed conflict are war crimes, and individuals guilty of such violations may be subject to prosecution at any time, without any statute of limitations. This includes members of the Iraqi armed forces and civilian government officials.⁹⁷⁸

In another such diplomatic note, the US reiterated that "Iraqi individuals who are guilty of... war crimes... are personally liable and subject to prosecution at any time".⁹⁷⁹

862. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of Uruguay stated that:

Under Uruguayan legislation, statutory limitation would be applied to all crimes, the period of limitation depending on the severity of the punishment. He recognized, however, that in the present instance, since international law prevailed over domestic law, war crimes and crimes against humanity could be excluded from the range of applicability of the rules regarding statutory limitation, or at least that the periods of limitation could be prolonged in the case of such crimes.⁹⁸⁰

⁹⁷⁷ US, Department of State, Note addressed to the Embassy of France, 19 May 1977, Department of State File No. P77 0090-522, reprinted in John A. Boyd, *Digest of United States Practice in International Law, 1977*, US Department of State Publication 8960, Washington, D.C., 1979, p. 927.

⁹⁷⁸ US, Department of State, Diplomatic Note to Iraq, Washington, 19 January 1991, annexed to Letter dated 21 January 1991 to the President of the UN Security Council, UN Doc. S/22122, 21 January 1991, Annex I, p. 2.

⁹⁷⁹ US, Department of State, Diplomatic Note to Iraq, Washington, 21 January 1991, annexed to Letter dated 22 January 1991 to the President of the UN Security Council, UN Doc. S/22130, 21 January 1991, p. 4.

⁹⁸⁰ Uruguay, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, § 12.

863. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Venezuela stated that it “had no difficulty in recognizing the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity”.⁹⁸¹

864. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of the SFRY stated that:

27. . . . Yugoslavia, like many other countries, was most anxious to see all those responsible for war crimes and crimes against humanity punished, without exception, and to see the adoption of an international convention which would reaffirm once again, the principle of the non-applicability of statutory limitation to war crimes and crimes against humanity, ensuring that all States would acknowledge and respect that principle . . .

28. Although the principle of the non-applicability of statutory limitation to prosecution and punishment for war crimes [and crimes] against humanity had been universally accepted since the end of the Second World War, some countries had not yet adapted their legislation to that principle . . . His delegation . . . considered that the adoption of a convention on the non-applicability of statutory limitation to the prosecution and punishment of those guilty of war crimes and crimes against humanity was an urgent necessity and a duty.

. . .

34. In his delegation’s view, there should be no particular difficulty in adopting the convention [on the non-applicability of statutory limitations to war crimes and crimes against humanity], for it would merely be a solemn reaffirmation of principles which, since the Second World War, had already become positive norms of international law and should therefore prompt all States to adapt their national legislation to positive international law.⁹⁸²

865. In 1993, in a letter to the UN Secretary-General concerning the establishment of the ICTY, the FRY stated that “war crimes . . . are not subject to the statute of limitations”.⁹⁸³

866. In 1967, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Zaire stated that it “welcomed with enthusiasm the principle of non-applicability of statutory limitation to war crimes and crimes against humanity”.⁹⁸⁴

⁹⁸¹ Venezuela, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1568, 10 October 1968, § 4.

⁹⁸² SFRY, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1514, 14 November 1967, §§ 27–34.

⁹⁸³ FRY, Deputy Prime Minister and Minister of Foreign Affairs, Letter dated 17 May 1993 to the UN Secretary-General, UN Doc. A/48/170*-S/25801*, 21 May 1993, p. 2.

⁹⁸⁴ Zaire, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1518, 17 November 1967, § 1.

*III. Practice of International Organisations and Conferences**United Nations*

867. In a resolution adopted in 1967, the UN General Assembly, noting “that none of the solemn declarations, instruments or conventions relating to prosecution and punishment for war crimes and crimes against humanity makes provision for a period of limitation”, stated that:

The application to war crimes and crimes against humanity of the rules of municipal law relating to the period of limitation for ordinary crimes is a matter of serious concern to world public opinion, since it prevents the prosecution and punishment of persons responsible for those crimes.⁹⁸⁵

The General Assembly recognised that “it is necessary and timely to affirm in international law, through a convention, the principle that there is no period of limitation for war crimes and crimes against humanity, and to secure its universal application” and recommended that “no legislative or other action be taken which may be prejudicial to the aims and purposes of a convention on the non-applicability of statutory limitation to war crimes and crimes against humanity”.⁹⁸⁶

868. In a resolution adopted in 1969 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly invited States concerned “which had not yet signed or ratified the [1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity] to do so as soon as possible”.⁹⁸⁷

869. In a resolution adopted in 1970 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly welcomed “with satisfaction the fact that the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity entered into force on 11 November 1970” and requested States which had not yet become parties to this Convention “to do so as soon as possible”.⁹⁸⁸

870. In a resolution adopted in 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly called upon all States which had not yet done so “to become as soon as possible parties to the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity”.⁹⁸⁹

871. In 1973, the UN General Assembly adopted a resolution on principles of international cooperation in the detection, arrest, extradition and punishment

⁹⁸⁵ UN General Assembly, Res. 2338 (XXII), 18 December 1967, preamble.

⁹⁸⁶ UN General Assembly, Res. 2338 (XXII), 18 December 1967, preamble and § 5.

⁹⁸⁷ UN General Assembly, Res. 2583 (XXIV), 15 December 1969, § 2.

⁹⁸⁸ UN General Assembly, Res. 2712 (XXV), 15 December 1970, preamble and § 6.

⁹⁸⁹ UN General Assembly, Res. 2840 (XXVI), 18 December 1971, § 3.

of persons guilty of war crimes and crimes against humanity in which it recalled its resolution 2583 (XXIV) of 1969 and in which it stated that:

States shall not take any legislative or other measures which may be prejudicial to the international obligations they have assumed in regard to the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity.⁹⁹⁰

872. In a resolution adopted in 1966 on the question of punishment of war criminals and of persons who have committed crimes against humanity, the UN Economic and Social Council urged all States “to prevent the application of statutory limitation to war crimes and crimes against humanity”.⁹⁹¹

873. In a resolution adopted in 1965 on the question of punishment of war criminals and of persons who have committed crimes against humanity, the UN Commission on Human Rights considered that:

The United Nations must contribute to the solution of the problems raised by war crimes and crimes against humanity, which are serious violations of the law of nations, and that it must, in particular, study possible ways and means of establishing the principle that there is no period of limitation for such crimes in international law.⁹⁹²

The Commission requested the UN Secretary-General “to undertake a study of the problems raised in international law by war crimes and crimes against humanity, and by priority a study of legal procedures to ensure that no period of limitation shall apply to such crimes”.⁹⁹³

874. In a resolution adopted in 2001 on the Convention on the Prevention and Punishment of the Crime of Genocide, the UN Commission on Human Rights noted “the Convention on the Non-Applicability of Statutory Limitation to War Crimes and Crimes against Humanity of 26 November 1968”.⁹⁹⁴

Other International Organisations

875. In a recommendation adopted in 1979, the Parliamentary Assembly of the Council of Europe expressed “its keen disappointment at the fact that none of Council of Europe member states has ratified the [1974 European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes], and that it has been signed only by France” and recommended that the Committee of Ministers:

⁹⁹⁰ UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, preamble and § 8.

⁹⁹¹ ECOSOC, Res. 1158 (XLI), 5 August 1966, § 1.

⁹⁹² UN Commission on Human Rights, Res. 3 (XXI), 9 April 1965, preamble.

⁹⁹³ UN Commission on Human Rights, Res. 3 (XXI), 9 April 1965, § 2.

⁹⁹⁴ UN Commission on Human Rights, Res. 2001/66, 25 April 2001, preamble.

- i. invite member governments to sign and ratify the European Convention on the non-applicability of statutory limitation to crimes against humanity and war crimes of 1974;
- ii. invite member governments to take whatever steps may be necessary to ensure that neither the application of statutory limitation nor the implementation of any other legal measures should enable crimes against humanity and other very serious crimes to escape punishment.⁹⁹⁵

876. In a resolution adopted in 1984 on enforced disappearances, the Parliamentary Assembly of the Council of Europe called upon the governments of the member States “to support the preparation and adoption by the United Nations of a declaration setting forth the following principles: . . . enforced disappearance is a crime against humanity which . . . is not subject to limitation”.⁹⁹⁶

877. In a recommendation adopted in 1993 on establishing an international court to try serious violations of international humanitarian law, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers “invite member states which have not yet done so to sign and ratify the 1974 European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes”.⁹⁹⁷

878. In 1979, in his presentation of a report on the statutory limitations of war crimes and crimes against humanity prepared by the Legal Affairs Committee of the Parliamentary Assembly of the Council of Europe’s, the Rapporteur stated that:

We studied the legislation in the member states [with regard to statutory limitation applying to war crimes and crimes against humanity] and have come to certain conclusions. There is no statutory limitation of war crimes, including World War II crimes, and crimes against humanity, in Austria, Denmark, France, Ireland, Italy, Liechtenstein, the Netherlands and the United Kingdom. In the Federal Republic of Germany the statutory limitation period for Second World War crimes will expire on 31 December 1979, but there will be no statutory limitation for future crimes.

In Luxembourg, the situation is reverse. There is statutory limitation in Belgium, Greece, Malta, Norway, Portugal, Spain, Sweden, Switzerland and Turkey. But in Switzerland there is a proposal for the abolition of this limitation.⁹⁹⁸

The Rapporteur further stated that:

We ask that the statutory limitation be stopped. Sign and ratify the [1974 European Convention on the Non-applicability of Statutory Limitations to Crimes

⁹⁹⁵ Council of Europe, Parliamentary Assembly, Rec. 855 on statutory limitation of war crimes and crimes against humanity, 2 February 1979, §§ 4 and 10(i) and (ii).

⁹⁹⁶ Council of Europe, Parliamentary Assembly, Res. 828 on enforced disappearances, 26 September 1984, § 13(a)(i)(2).

⁹⁹⁷ Council of Europe, Parliamentary Assembly, Rec. 1218 (1993) on establishing an international court to try serious violations of international humanitarian law, 27 September 1993, § 6(iii).

⁹⁹⁸ Council of Europe, Parliamentary Assembly, Legal Affairs Committee, Rapporteur, Report on the statutory limitation of war crimes and crimes against humanity, 30th Ordinary Session, Twenty-fifth Sitting, 2 February 1979, Official Report of Debates, p. 959.

against Humanity and War Crimes], take whatever steps may be necessary to ensure that neither the application of statutory limitation nor the implementation of any other legal measures should enable crimes against humanity and other very serious crimes to escape punishment.⁹⁹⁹

879. In 1993, a motion for a recommendation on the systematic gang rape of women and children on the territory of the former Yugoslavia presented by 37 members of the Parliamentary Assembly of the Council of Europe contained the following part:

The [Parliamentary] Assembly . . . recommends that the Committee of Ministers of the Council of Europe and the governments of the member states: . . . re-affirm without delay that these violations of the integrity and dignity of women and children are unquestionably war crimes and even crimes against humanity and are not, therefore, subject to limitation.¹⁰⁰⁰

International Conferences

880. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

881. In its judgement in the *Tadić case* in 1997, the ICTY referred to the judgements of the French courts in the *Barbie case* and stated that:

641. In this case the *Chambre d'accusation* of the Court of Appeal of Lyons ordered that an indictment for crimes against humanity be issued against Klaus Barbie, head of the Gestapo of Lyons during the Second World War, but only for "persecutions against innocent Jews", and held that prosecution was barred by the statute of limitations for crimes committed by Barbie against combatants who were members of the Resistance or whom Barbie thought were members of the Resistance, even if they were Jewish, because these acts could only constitute war crimes and not crimes against humanity . . .

642. While instructive, it should be noted that the court [of Cassation] in the *Barbie case* was applying national legislation that declared crimes against humanity not subject to statutory limitation, although the national legislation defined crimes against humanity by reference to the United Nations resolution of 13 February 1946, which referred back to the Nürnberg Charter (law of 26 December 1964); and the fact that a crime against humanity is an international crime was relied upon to deny the accused's appeal on the bases of disguised extradition and an elapsed statute of limitations.¹⁰⁰¹

⁹⁹⁹ Council of Europe, Parliamentary Assembly, Legal Affairs Committee, Rapporteur, Report on the statutory limitation of war crimes and crimes against humanity, 30th Ordinary Session, Twenty-fifth Sitting, 2 February 1979, Official Report of Debates, p. 960.

¹⁰⁰⁰ Council of Europe, Parliamentary Assembly, Motion for a Recommendation on the systematic gang rape of women and children on the territory of the former Yugoslavia, Doc. 6770, Forty-fourth Ordinary Session, Fifth Part, Documents, Vol. VIII, 5 February 1993, § 3(i). (The motion was referred to the Committee on Legal Affairs and Human Rights.)

¹⁰⁰¹ ICTY, *Tadić case*, Judgement, 7 May 1997, §§ 641–642.

882. In its admissibility decision in *X v. FRG* in 1976 concerning an application relative to the right to be tried for crimes committed during the Second World War within a reasonable time in criminal matters, the ECiHR stated that:

The Commission had regard to the fact that the rules of prescription do not apply to war crimes and that the international community requires the competent authorities of the Federal Republic of Germany to investigate and prosecute these crimes despite the difficulties encountered by reason of the long time that has elapsed since the commission of the acts concerned.

In this situation the Commission considers that the criteria determining reasonableness of the length of ordinary criminal proceedings are not applicable to proceedings concerning war crimes.¹⁰⁰²

V. Practice of the International Red Cross and Red Crescent Movement

883. No practice was found.

VI. Other Practice

884. No practice was found.

F. International Cooperation in Criminal Proceedings

Cooperation between States

I. Treaties and Other Instruments

Treaties

885. Under Article 1(1) of the 1959 European Convention on Mutual Assistance in Criminal Matters, the parties undertake:

to afford each other, in accordance with the provisions of this Convention, the widest measure of mutual assistance in proceedings in respect of offences the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting Party.

According to Article 1(2), the Convention does not apply, however, to “arrests, the enforcement of verdicts or offences under military law which are not offences under ordinary criminal law”.

886. Article 88(1) AP I provides that “the High Contracting Parties shall afford one another the greatest measure of assistance in connexion with criminal proceedings brought in respect of grave breaches of the Conventions or of this Protocol”. Article 88 AP I was adopted by consensus.¹⁰⁰³

¹⁰⁰² ECiHR, *X v. FRG*, Decision, 6 July 1976, § 1.

¹⁰⁰³ CDDH, *Official Records*, Vol. VI, CDDH/SR.45, 30 May 1977, p. 309.

887. Article 10 of the 1977 OAU Convention against Mercenarism provides that “the contracting States shall afford one another the greatest measure of assistance in connection with the investigation and criminal proceedings brought in respect of the offence and other acts connected with the activities of the offender”.

888. Article 13 of the 1989 UN Mercenary Convention provides that:

States Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences set forth in the present Convention, including the supply of all evidence at their disposal necessary for the proceedings. The law of the State whose assistance is requested shall apply in all cases.

The provisions of paragraph 1 of this article shall not affect obligations concerning mutual judicial assistance embodied in any other treaty.

889. Article 1 of the 1989 US-Soviet Memorandum of Understanding on the Pursuit of Nazi War Criminals provides that the Office of the Procurator General of the USSR and the US Department of Justice “agree to provide legal assistance on a reciprocal basis in the investigation of individuals who are suspected of having committed Nazi war crimes or of having assisted in the commission of such crimes”.

890. Article 19 of the 1999 Second Protocol to the 1954 Hague Convention concerning “Mutual legal assistance”, which, according to its Article 22(1), also applies to armed conflicts not of an international character, provides that:

1. Parties shall afford one another the greatest measure of assistance in connection with investigations or criminal or extradition proceedings brought in respect of the offences set forth in Article 15, including assistance in obtaining evidence at their disposal necessary for the proceedings.
2. Parties shall carry out their obligations under paragraph 1 in conformity with any treaties or other arrangements on mutual legal assistance that may exist between them. In the absence of such treaties or arrangements, Parties shall afford one another assistance in accordance with their domestic law.

Other Instruments

891. In paragraphs 11 and 12 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, the parties agreed to institute, with the cooperation of the ICRC, a confidential enquiry system regarding allegations of violations of IHL.

892. Article 4 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law states that “violations of international... humanitarian law norms that constitute crimes under international law carry the duty to... cooperate with and assist States... in the investigation and prosecution of these violations”.

II. National Practice

Military Manuals

893. Argentina's Law of War Manual, referring to Article 88 AP I, states that "the contracting parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the [Geneva] Conventions and of [AP I]".¹⁰⁰⁴

894. Belgium's Law of War Manual states that:

The States Signatory to the [1949 Geneva] Conventions have engaged to take a series of measures in order to promote their respect. These measures can be summarized as follows:

- ...
- 3) search for, identification and prosecution before the own courts of the authors of grave breaches, whatever their nationality may be, or extradition of these authors to the State which requests for it, within the limits of the legislation in force.¹⁰⁰⁵

895. Hungary's Military Manual states that "the judicial procedure [in case of breaches or violations of IHL] also comprises: assistance between belligerent parties".¹⁰⁰⁶

896. Italy's IHL Manual notes that "international cooperation for the search, arrest, extradition and punishment of persons who have committed [war crimes] is established".¹⁰⁰⁷

897. South Korea's Operational Law Manual provides that each party to the Geneva Conventions shall cooperate to extradite persons who have committed grave breaches of IHL.¹⁰⁰⁸

898. The Military Manual of the Netherlands states that "in general, States are obliged to provide judicial assistance to each other to the maximum extent possible with respect to penal procedures concerning grave breaches".¹⁰⁰⁹

899. New Zealand's Military Manual provides that "AP I Art. 88 requires the parties to assist one another in connection with grave breaches, including cooperation in matters of extradition".¹⁰¹⁰

900. Spain's LOAC Manual provides that "States shall provide each other with the greatest possible mutual assistance for the penal repression of violations, at national and international level".¹⁰¹¹

901. Sweden's IHL Manual notes that AP I "states that the contracting parties shall to the greatest extent possible assist each other in connection with

¹⁰⁰⁴ Argentina, *Law of War Manual* (1989), § 8.08.

¹⁰⁰⁵ Belgium, *Law of War Manual* (1983), p. 55, § 3(3).

¹⁰⁰⁶ Hungary, *Military Manual* (1992), p. 91 ¹⁰⁰⁷ Italy, *IHL Manual* (1991), Vol. I, § 86.

¹⁰⁰⁸ South Korea, *Operational Law Manual* (1996), p. 193, § 4.

¹⁰⁰⁹ Netherlands, *Military Manual* (1993), p. IX-8.

¹⁰¹⁰ New Zealand, *Military Manual* (1992), § 1711.4, footnote 76.

¹⁰¹¹ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(4).

penal procedures instituted as a consequence of grave breaches of the Geneva Conventions or [AP I]".¹⁰¹²

National Legislation

902. Argentina's Law on International Cooperation on Criminal Matters stipulates that "Argentina shall do its utmost to assist in the investigation, conviction and punishment" of crimes corresponding to the jurisdiction of any State requesting such assistance, and shall act "most diligently" in such procedures. As regards the investigation and conviction of such crimes, the law provides that "assistance shall be provided even if the act in question is not a crime in Argentina", although under such circumstances there would be some exceptions to the types of assistance provided.¹⁰¹³

903. According to Germany's Law on International Legal Assistance in Criminal Matters as amended, "the legal assistance in criminal matters with foreign countries is based on this law". However, the Law also states that "provisions of international agreements have priority insofar as they have become directly applicable domestic law".¹⁰¹⁴

904. Portugal's Law on International Judicial Cooperation in Criminal Matters as amended applies to the following forms of international cooperation in criminal matters: extradition; transfer of proceedings in criminal matters; enforcement of criminal judgements; transfer of persons sentenced to any punishment, or measure, involving deprivation of liberty; supervision of conditionally sentenced or conditionally released persons; and mutual legal assistance in criminal matters.¹⁰¹⁵ These "shall apply, as appropriate, to the cooperation between Portugal and any international judicial entities established within the framework of treaties or conventions that bind the Portuguese State".¹⁰¹⁶

National Case-law

905. No practice was found.

Other National Practice

906. In 1971, the French delegation explained its abstention in the vote on UN General Assembly Resolution 2840 (XXVI) stating that it:

abstained in the vote on the draft resolution because we consider that all the work of the United Nations in connexion with this matter is vitiated by the faulty definition of a number of crimes contained in the Convention on the Non-Applicability

¹⁰¹² Sweden, *IHL Manual* (1991), Section 4.2, p. 97.

¹⁰¹³ Argentina, *Law on International Cooperation on Criminal Matters* (1997), Articles 1 and 67.

¹⁰¹⁴ Germany, *Law on International Legal Assistance in Criminal Matters as amended* (1982), Section 1.

¹⁰¹⁵ Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 1(1).

¹⁰¹⁶ Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 1(2).

of Statutory Limitations to War Crimes and Crimes against Humanity, to which France is not a party. Indeed this definition is based on theoretical and practical considerations which are too imprecise for a convention of a penal nature and which are at any rate contrary to the principles of the French Penal Code.¹⁰¹⁷

907. In 1981, during a debate in the Sixth Committee of the UN General Assembly in relation to the 1954 ILC Draft Code of Offences against the Peace and Security of Mankind, the GDR stated that “it was necessary to establish a universal duty to prosecute offences, which included the obligation of States to co-operate in combating international offences”.¹⁰¹⁸

908. In 1979, in a diplomatic note addressed to the USSR embassy, the US Department of State stated that:

The Department of State requests the cooperation of the Embassy of the USSR in bringing to the attention of the appropriate officials and organs the essential need for... witnesses to testify in the prosecution of war crimes cases in the United States. Without firm assurances on the availability of witnesses the United States Government will be unable to continue these prosecutions. In many cases, therefore, individuals accused of committing serious crimes during 1941–1945 will be allowed to remain free without a proper trial.

We believe that it is in the mutual best interest of the United States and the Union of Soviet Socialist Republics to cooperate to ensure that this result is avoided and that justice is done in these cases.¹⁰¹⁹

909. In 1987, the Deputy Legal Adviser of the US Department of State, referring to Articles 85–89 AP I, affirmed that “we support the principle that the appropriate authorities... make good faith efforts to cooperate with one another”.¹⁰²⁰

910. In 1989, a study prepared by the Deputy Director of the US Office of Special Investigations summarized the Office’s assistance in investigations involving three Second World War Nazi war criminals outside the US. The study reported that:

At the time of [Klaus Barbie’s] extradition [from Bolivia to France], OSI [Office of Special Investigations] was asked by Attorney General William French Smith to investigate and report on allegations concerning Barbie’s post-war relationship

¹⁰¹⁷ France, Statement before the UN General Assembly, UN Doc. A/PV.2025, 18 December 1971, § 102.

¹⁰¹⁸ GDR, Statement before the Sixth Committee of the UN General Assembly, UN Doc. A/C.6/36/SR.60, 26 November 1981, § 26.

¹⁰¹⁹ US, Department of State, Note addressed to the USSR Embassy, 21 March 1979, Department of State File No. P79 0046–0132, reprinted in Marian Lloyd Nash, *Digest of United States Practice in International Law, 1979*, US Department of State Publication 9374, Washington, D.C., 1983, pp. 883–884.

¹⁰²⁰ US, Remarks of Michael J. Matheson, Deputy Legal Adviser, US Department of State, The Sixth Annual American Red Cross-Washington College of Law Conference on International Humanitarian Law: A Workshop on Customary International Law and the 1977 Protocols Additional to the 1949 Geneva Conventions, *American Journal of International Law and Policy*, Vol. 2, 1987, p. 428.

with American military intelligence and the latter's efforts to prevent his arrest by French authorities...

In 1985, OSI strongly supported an effort with West German and Israeli authorities to locate [Josef] Mengele's whereabouts...

Prompted by a request from the Anti-Defamation League of B'nai B'rith, OSI undertook a formal inquiry into the relationship between the United States government and convicted criminal Robert Jan Verbelen.¹⁰²¹

911. In 1992, a report on Iraqi war crimes (Desert Shield/Desert Storm) prepared under the auspices of the US Secretary of the Army noted that "the obligation to investigate violations of the law of war committed against allied personnel is subject to the consent of the ally in question, particularly if the alleged violations occurred within the territory of the ally".¹⁰²² As regards alleged Iraqi war crimes, the report noted that to carry out US directives dealing with the investigation and prosecution of war crimes:

An interagency meeting was held on 30 August 1990... [The participants] understood that any formal war crimes investigation would depend upon authorization by appropriate authority and, depending on the scope of the investigation, might also require the consent of the host nation...

Detachments selected for mobilization were the 199th Judge Advocate Detachment... and the 208th Judge Advocate Detachment... Elements of the 199th arrived in Kuwait City on 1 March 1991, and upon arrival, reestablished contact with the Kuwaiti Ministry of Justice. Then, with the consent of the Ministry, they contacted members of Kuwaiti resistance groups... The Ministry of Justice was also investigating Iraqi actions during the occupation, To avoid duplicate effort, and in the spirit of cooperation, the mission of the 199th evolved into establishing the nature and extent of Iraqi offences rather than building cases for prosecution. One of the goals was to accumulate and organize the evidence in a fashion that would facilitate preparation of criminal cases should prosecution of war criminals at a later date become an option.¹⁰²³

912. According to the Report on US Practice, it is the *opinio juris* of the US that "there is a general obligation to try [persons suspected of war crimes other than members of its own armed forces] or to cooperate with another state willing to try them in accordance with international fair trial standards".¹⁰²⁴ It also states that "the United States appears to recognize a general obligation on all states to assist each other in the investigation and prosecution of war crimes".¹⁰²⁵

¹⁰²¹ US, Office of Special Investigations, Deputy Director, Study on "The Purpose and History of the Office of Special Investigations", 1989, Department of State File Nos. P90 0015-0882, 0932/0935, reprinted in Marian Nash (Leich), *Cumulative Digest of the United States Practice in International Law, 1981-1988*, US Department of State Publication 10120, Washington, D.C., 1993-1995, pp. 1408-1409.

¹⁰²² US, Secretary of the Army, Report on Iraqi war crimes (Desert Shield/Desert Storm), unclassified version, 8 January 1992, p. 4.

¹⁰²³ US, Secretary of the Army, Report on Iraqi war crimes (Desert Shield/Desert Storm), unclassified version, 8 January 1992, pp. 4-8.

¹⁰²⁴ Report on US Practice, 1997, Chapter 6.4.

¹⁰²⁵ Report on US Practice, 1997, Chapter 6.10.

III. Practice of International Organisations and Conferences

United Nations

913. In a resolution adopted in 1989 on hostage-taking and abduction, the UN Security Council, considering that “the taking of hostages and abduction are offences of grave concern to all States and serious violations of international humanitarian law”, urged:

the further development of international co-operation among States in devising and adopting effective measures which are in accordance with the rules of international law to facilitate the prevention, prosecution and punishment of all acts of hostage-taking and abduction as manifestations of terrorism.¹⁰²⁶

914. In 1998, in a statement by its President concerning the conflict in the DRC, the UN Security Council urged member States “to cooperate with the Governments of the Democratic Republic of the Congo and Rwanda in the investigation and prosecution of [any persons found to have been involved in . . . massacres, atrocities and violations of international humanitarian law]”.¹⁰²⁷

915. In a resolution adopted in 1970 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly called upon all the States concerned “to intensify their co-operation in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity”.¹⁰²⁸

916. In a resolution adopted in 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly stated that it was “firmly convinced of the need for international co-operation in the thorough investigation of war crimes and crimes against humanity . . . and in bringing about the detection, arrest, extradition and punishment of all war criminals and persons guilty of crimes against humanity who have not yet been brought to trial or punished”.¹⁰²⁹ The General Assembly went on to state that it:

2. *Further urges* all States to co-operate in particular in the collection and exchange of information which will contribute to the detection, arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity.
- ...
4. *Affirms* that refusal by States to co-operate in the arrest, extradition, trial and punishment of persons guilty of war crimes and crimes against humanity is contrary to the purposes and principles of the Charter of the United Nations and to generally recognized norms of international law.¹⁰³⁰ [emphasis in original]

¹⁰²⁶ UN Security Council, Res. 683, 31 July 1989, preamble and § 6.

¹⁰²⁷ UN Security Council, Statement by the President, UN Doc. S/PRST/1998/20, 13 July 1998, p. 2.

¹⁰²⁸ UN General Assembly, Res. 2712 (XXV), 15 December 1970, § 4.

¹⁰²⁹ UN General Assembly, Res. 2840 (XXVI), 18 December 1971, preamble.

¹⁰³⁰ UN General Assembly, Res. 2840 (XXVI), 18 December 1971, §§ 2 and 4.

917. In a resolution adopted in 1971 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly requested the UN Commission on Human Rights “to submit to the General Assembly . . . draft principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity”.¹⁰³¹

918. In a resolution adopted in 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly declared that:

The United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and the maintenance of international peace and security, proclaims the following principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity:

- ...
3. States shall co-operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.
 4. States shall assist each other in detecting, arresting and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.
- ...
6. States shall co-operate with each other in the collection of information and evidence which would help to bring to trial [persons against whom there is evidence that they have committed war crimes and crimes against humanity] and shall exchange such information.¹⁰³²

919. In a resolution adopted in 1965 on the question of punishment of war criminals and of persons who have committed crimes against humanity, the UN Commission on Human Rights requested ECOSOC:

to urge all States to continue their efforts to ensure that, in accordance with international law and national laws, the criminals responsible for war crimes and crimes against humanity are traced, apprehended and equitably punished by the competent courts. For this purpose they should co-operate, in particular, by making available any documents in their possession, relating to such crimes.¹⁰³³

920. In a resolution adopted in 1988 on prosecution and punishment of all war criminals and persons who have committed crimes against humanity, the UN Commission on Human Rights urged:

¹⁰³¹ UN General Assembly, Res. 3020 (XXVII), 18 December 1972, § 3.

¹⁰³² UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, preamble and §§ 3–6.

¹⁰³³ UN Commission on Human Rights, Res. 3 (XXI), 9 April 1965, § 1(a).

all States to take the necessary measures, in accordance with their national constitutional systems, to ensure full international co-operation for the purpose of securing, preferably in the place where they committed their deeds, the prosecution and just punishment of all those who have committed war crimes and crimes against humanity.¹⁰³⁴

921. In a resolution adopted in 2001 on international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN Sub-Commission on Human Rights stated that:

The Sub-Commission on the Promotion and Protection of Human Rights . . .

Convinced that maximum international cooperation among States is needed in order to ensure a thorough investigation of war crimes and crimes against humanity, as well as to bring to trial their perpetrators . . .

1. Affirms that within the framework of international cooperation in the search for, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the highest priority should be given, independently of the circumstances in which these violations are committed, to legal proceedings against all individuals responsible for such crimes, including former heads of State or Government whose exile serves as a pretext for their impunity;
2. Urges all States to cooperate in order to search for, arrest, extradite, bring to trial and punish persons found guilty of war crimes and crimes against humanity;
3. Reaffirms the principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity recorded in General Assembly resolution 3074 (XXVIII) of 3 December 1973 . . .
4. Affirms that States have an obligation to cooperate in the arrest, extradition, trial and punishment of persons found guilty of war crimes and crimes against humanity, including former heads of State or Government, keeping in mind the purposes and principles of the Charter of the United Nations and generally recognized norms of international law.¹⁰³⁵

922. In 2001, in a report on the protection of civilians in armed conflict, the UN Secretary-General pointed out that "consistent enforcement depends primarily on the commitment and cooperation of national jurisdictions. The prosecution of individuals is, first and foremost, a responsibility of the State concerned."¹⁰³⁶

Other International Organisations

923. In a recommendation adopted in 1979 on statutory limitation of war crimes and crimes against humanity, the Parliamentary Assembly of the Council of Europe recommended that the Committee of Ministers:

¹⁰³⁴ UN, Commission on Human Rights, Res. 1988/47, 8 March 1988.

¹⁰³⁵ UN Sub-Commission on Human Rights, Res. 2001/22, 16 August 2001, preamble and §§ 1–4

¹⁰³⁶ UN Secretary-General, Report on the protection of civilians in armed conflict, UN Doc. S/2001/331, 30 March 2001, § 12.

iii. invite member governments to improve their co-operation, co-ordination and exchange of information for the purpose of prosecuting the perpetrators of [crimes against humanity and war crimes] by:

- a. providing rapidly all relevant information on these crimes to the competent authorities of the member states concerned;
- b. providing facilities for rapid direct contacts between the authorities responsible for the search for and prosecution of the perpetrators of these crimes in member states;
- c. studying further possibilities for co-operation and co-ordination in respect of these crimes;
- d. preparing a special wanted persons' list in respect of these crimes;
- e. considering the possibility of appointing a special public prosecutor in charge of the prosecution of these crimes.¹⁰³⁷

924. In 1979, during his presentation of a report by the Legal Affairs Committee on the statutory limitation of war crimes and crimes against humanity, the Rapporteur of the Parliamentary Assembly of the Council of Europe stated that "we beg member governments to improve their co-operation, their co-ordination and exchange of information for the purpose of prosecuting the perpetrators of [crimes against humanity and other very serious crimes]".¹⁰³⁸

International Conferences

925. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

926. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

927. To fulfil its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that:

The [High Contracting] Parties shall afford one another the greatest measure of assistance with penal proceedings relative to grave breaches of the law of war.

The [High Contracting] Parties shall benefit by the same assistance from neutral States.¹⁰³⁹

VI. Other Practice

928. No practice was found.

¹⁰³⁷ Council of Europe, Parliamentary Assembly, Rec. 855, 2 February 1979, § 10(iii).

¹⁰³⁸ Council of Europe, Parliamentary Assembly, Legal Affairs Committee, Rapporteur, Report on the statutory limitation of war crimes and crimes against humanity, 30th Ordinary Session, Twenty-fifth Sitting, 2 February 1979, *Official Report of Debates*, p. 960.

¹⁰³⁹ Frédéric de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva, 1987, §§ 783–784.

Extradition

I. Treaties and Other Instruments

Treaties

929. Article 49, second paragraph, GC I, Article 50, second paragraph, GC II, Article 129, second paragraph, GC III and Article 146, second paragraph, GC IV provide that:

Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting Party concerned, provided such High Contracting Party has made out a *prima facie* case.

930. Under Article 1 of the 1957 European Convention on Extradition, the parties undertake:

to surrender to each other, subject to the provisions and conditions laid down in this Convention, all persons against whom the competent authorities of the requesting Party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

931. Article 2(1) of the 1957 European Convention on Extradition provides that “extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or under a detention order for a maximum period of at least one year or by a more severe penalty”.

932. According to Article 4 of the 1957 European Convention on Extradition, “extradition for offences under military law which are not offences under ordinary criminal law is excluded from the application of this Convention”.

933. Article 11 of the 1957 European Convention on Extradition provides for the possibility to refuse extradition if the offence for which it is requested is punishable by death under the law of the requesting party.

934. Article 3 of the 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity provides that:

The States Parties to the present Convention undertake to adopt all necessary domestic measures, legislative or otherwise, with a view to making possible the extradition in accordance with international law, of the persons referred to in Article 2 of this Convention [i.e. representatives of the State authority and private individuals who, as principals or accomplices, participate in or who directly incite others to the commission of war crimes or crimes against humanity, or who conspire to commit them, irrespective of the degree of completion, and representatives of the State authority who tolerate their commission].

935. Article 78 of draft AP I, entitled “Extradition”, submitted by the ICRC to the CDDH provided that:

Grave breaches of the Conventions or of the present Protocol, whatever the motives for which they were committed, shall be deemed to be included as extraditable offences in any extradition treaty existing between the High Contracting Parties. The High Contracting Parties undertake to include the said grave breaches as extraditable offences in every extradition treaty to be concluded between them.

If a High Contracting Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another High Contracting Party with which it has no extradition treaty, the Conventions and the present Protocol shall be considered as the legal basis for extradition in respect of the said grave breaches. Extradition shall be subject to the other conditions provided by the law of the requested High Contracting Party.

High Contracting Parties which do not make extradition conditional on the existence of a treaty shall recognize the said grave breaches as extraditable offences between themselves subject to the conditions provided by the law of the requested High Contracting Party.¹⁰⁴⁰

After several proposals of amendment, paragraph 1 of Article 78 was rejected in Committee I of the CDDH by 27 votes in favour, 7 against and 39 abstentions; paragraph 2 was rejected by 41 votes in favour, one against and 29 abstentions; Article 78 was consequently rejected as a whole.¹⁰⁴¹

936. Article 88(2) AP I provides that:

Subject to the rights and obligations established in the [1949 Geneva] Conventions and in Article 85, paragraph 1 of this Protocol, and when circumstances permit, the High Contracting Parties shall co-operate in the matter of extradition. They shall give due consideration to the request of the State in whose territory the alleged offence has occurred.

937. Upon accession to AP I, China stated that “at present [i.e. in 1983], Chinese legislation has no provisions concerning extradition, and deals with this matter on a case-by-case basis. For this reason China does not accept the stipulations of Article 88, paragraph 2, of Protocol I”.¹⁰⁴²

938. Article 7 of the 1977 OAU Convention against Mercenarism states that:

1. A request for extradition cannot be rejected, unless the State from which it is sought undertakes to prosecute the offender in accordance with the provisions of Article Five of the present Convention.
2. When a national is the subject of the request for extradition, the State from which it is sought must, if it refuses, undertake prosecution of the offence committed.
3. If, in accordance with sections 1 and 2 of this Article, prosecution is undertaken, the State from which extradition is sought will notify the outcome of such prosecution to the state seeking extradition and to any other interested Member State of the Organization of African Unity.

¹⁰⁴⁰ CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 25.

¹⁰⁴¹ CDDH, *Official Records*, Vol. IX, CDDH/I/SR.70, 28 April 1977, pp. 396–397, § 54.

¹⁰⁴² China, Reservation made upon accession to AP I, 14 September 1983.

4. A state will be regarded as an interested party for the outcome of a prosecution as defined in section 3 of this Article if the offence has some connection with its territory or militates against its interests.

939. Article 3 of the 1978 Second Additional Protocol to the European Convention on Extradition provides that extradition may be refused, under certain conditions, in case it is requested for the purpose of carrying out a sentence or detention order imposed by a decision rendered against a person *in absentia*.

940. Article 4 of the 1978 Second Additional Protocol to the European Convention on Extradition provides that “extradition shall not be granted for an offence in respect of which an amnesty has been declared in the requested State and which that State had competence to prosecute under its own criminal law”.

941. Article 3(1) of the 1984 Convention against Torture states that “no State Party shall expel, return (“refouler”) or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture”.

942. Article 7(1) of the 1984 Convention against Torture provides that:

The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution.

943. Article 15 of the 1989 UN Mercenary Convention provides that:

1. The offences set forth in articles 2, 3 and 4 of the present Convention shall be deemed to be included as extraditable offences in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Convention as the legal basis for extradition in respect of those offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
3. States Parties which do not make extradition conditional on the existence of a treaty shall recognize those offences as extraditable offences between themselves, subject to the conditions provided by the law of the requested State.
4. The offences shall be treated, for the purpose of extradition between States Parties, as if they had been committed not only in the place in which they occurred but also in the territories of the State required to establish their jurisdiction in accordance with article 9 of the present Convention.

944. Article 1 of the 1997 Extradition Treaty between Argentina and the US provides that “the Parties agree to extradite to each other, pursuant to the provisions of this Treaty, persons whom the authorities in the Requesting State have charged with or found guilty of an extraditable offense”.

945. Article 2 of the 1997 Extradition Treaty between Argentina and the US provides that:

1. An offense shall be an extraditable offense if it is punishable under the laws in both Parties by deprivation of liberty for a maximum period of more than one year or by a more severe penalty . . .
- ...
4. In accordance with the provisions of this Treaty, extradition shall be granted for offenses committed in whole or in part within the Requesting State's territory, which, for the purposes of this Article, includes all places subject to that State's criminal jurisdiction. Extradition shall also be granted for offenses committed outside the territory of the Requesting State if:
 - (a) the act or acts that constitute the offense have effects in the territory of the Requesting State; or
 - (b) the laws in the Requested State provide for punishment of an offense committed outside its territory in similar circumstances.

946. Article 7 of the 1997 Extradition Treaty between Argentina and the US provides that "extradition shall not be denied on the ground that the prosecution or the penalty would be barred under the statute of limitations in the Requested State".

947. Article 18 of the 1999 Second Protocol to the 1954 Hague Convention, which, according to its Article 22(1), also applies to armed conflicts not of an international character, provides that:

1. The offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be deemed to be included as extraditable offences in any extradition treaty existing between any of the Parties before the entry into force of this Protocol. Parties undertake to include such offences in every extradition treaty to be subsequently concluded between them.
2. When a Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another Party with which it has no extradition treaty, the requested Party may, at its option, consider the present Protocol as the legal basis for extradition in respect of offences as set forth in Article 15 sub-paragraphs 1 (a) to (c).
3. Parties which do not make extradition conditional on the existence of a treaty shall recognise the offences set forth in Article 15 sub-paragraphs 1 (a) to (c) as extraditable offences between them, subject to the conditions provided by the law of the requested Party.
4. If necessary, offences set forth in Article 15 sub-paragraphs 1 (a) to (c) shall be treated, for the purposes of extradition between Parties, as if they had been committed not only in the place in which they occurred but also in the territory of the Parties that have established jurisdiction in accordance with Article 16 paragraph 1.

Other Instruments

948. Paragraph 18 of the 1989 Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions provides that:

Governments shall either bring . . . persons [identified by the investigation as having participated in extra-legal, arbitrary or summary executions] to justice or cooperate

to extradite any such persons to other countries wishing to exercise jurisdiction. This principle shall apply irrespectively of who and where the perpetrators or the victims are, their nationalities or where the offence was committed.

949. Article 6 of the 1991 ILC Draft Code of Crimes against the Peace and Security of Mankind, dealing with the “Obligation to try or extradite”, provides that:

1. A State in whose territory an individual alleged to have committed a crime against the peace and security of mankind is present shall either try or extradite him.
2. If extradition is requested by several States, special consideration shall be given to the request of the State in whose territory the crime was committed.
3. The provisions of paragraphs 1 and 2 do not prejudice the establishment and the jurisdiction of an international criminal court.

950. Article 9 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled “Obligation to extradite or prosecute”, provides that:

Without prejudice to the jurisdiction of an international criminal court, the State Party in the territory of which an individual alleged to have committed a crime set out in articles 17, 18, 19 or 20 [crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, war crimes] is found shall extradite or prosecute that individual.

951. Article 10 of the 1996 ILC Draft Code of Crimes against the Peace and Security of Mankind, entitled “Extradition of alleged offenders”, provides that:

1. To the extent that the crimes set out in articles 17, 18, 19 and 20 [crime of genocide, crimes against humanity, crimes against United Nations and associated personnel, war crimes] are not extraditable offences in any extradition treaty existing between States Parties, they shall be deemed to be included as such therein. States Parties undertake to include those crimes as extraditable offences in every extradition treaty to be concluded between them.
2. If a State Party which makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may at its option consider the present Code as the legal basis for extradition in respect of those crimes. Extradition shall be subject to the conditions provided in the law of the requested State.
3. State Parties which do not make extradition conditional on the existence of a treaty shall recognize those crimes as extraditable offences between themselves subject to the conditions provided in the law of the requested State.
4. Each of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party.

952. Article 5 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International Human Rights and Humanitarian Law provides that “States shall incorporate within their domestic law . . . appropriate legislation to facilitate extradition or surrender of offenders to other States and to international judicial bodies”.

II. National Practice

Military Manuals

953. Belgium's Law of War Manual states that:

The States Signatory to the [1949 Geneva] Conventions have engaged to take a series of measures in order to promote their respect. These measures can be summarized as follows:

- ...
- 3) search for, identification and prosecution before the own courts of the authors of grave breaches, whatever their nationality may be, or extradition of these authors to the State which requests for it, within the limits of the legislation in force.¹⁰⁴³

954. Italy's IHL Manual notes that "international cooperation for the search, arrest, extradition and punishment of persons who have committed [war crimes] is established".¹⁰⁴⁴

955. South Korea's Operational Law Manual provides that each party to the Geneva Conventions shall cooperate to extradite persons who have committed grave breaches of IHL.¹⁰⁴⁵

956. The Military Manual of the Netherlands states that "in general, States . . . must cooperate as much as possible with respect to the extradition of war criminals".¹⁰⁴⁶

957. New Zealand's Military Manual states that "AP I Art. 88 requires the parties to assist one another in connection with grave breaches, including cooperation in matters of extradition".¹⁰⁴⁷

958. Spain's LOAC Manual provides that:

The States have the obligation to search for persons accused of having committed, or having ordered to be committed, grave breaches, being obliged to make them appear before their own tribunals, regardless of their nationality. They can also agree to the extradition of those persons in order for them to be judged by other States, in accordance with the legal obligations which regulate the said extradition.¹⁰⁴⁸

The manual adds that "States shall provide each other with the greatest possible mutual assistance for the penal repression of violations, at national and international level. Such cooperation shall also be accorded in extradition matters."¹⁰⁴⁹

959. Sweden's IHL Manual notes that:

¹⁰⁴³ Belgium, *Law of War Manual* (1983), p. 55, § 3(3).

¹⁰⁴⁴ Italy, *IHL Manual* (1991), Vol. I, § 86.

¹⁰⁴⁵ South Korea, *Operational Law Manual* (1996), p. 193, § 4.

¹⁰⁴⁶ Netherlands, *Military Manual* (1993), p. IX-8.

¹⁰⁴⁷ New Zealand, *Military Manual* (1992), § 1711.4, footnote 76.

¹⁰⁴⁸ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(1).

¹⁰⁴⁹ Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(4).

Additional Protocol I . . . states that the contracting parties shall to the greatest extent possible assist each other in connection with penal procedures instituted as a consequence of grave breaches of the Geneva Conventions or the Protocol. The States shall also cooperate in extradition cases . . .

In the extradition request the government can refer to the article in Additional Protocol I concerning mutual assistance in criminal proceedings (AP I, Art. 88:2), according to which due consideration shall be given to a request for extradition from the state in whose territory the alleged offence has occurred.¹⁰⁵⁰

National Legislation

960. Armenia's Penal Code provides that:

In accordance with an international treaty of the Republic of Armenia, the foreign citizens and stateless persons who committed a crime outside the territory of the Republic of Armenia and who find themselves in the Republic of Armenia can be extradited to a foreign State, for criminal liability or to serve a sentence.¹⁰⁵¹

961. Germany's Law on International Legal Assistance in Criminal Matters as amended provides that "a foreign person who is searched for or convicted by a foreign State for an offence which is punishable in that State, can, on the request of a competent authority of that State, . . . be extradited to that State".¹⁰⁵²

962. Ireland's Geneva Conventions Act as amended provides that:

The restriction on granting extradition contained in section 12 of the Extradition Act, 1965 [which states that "extradition shall not be granted for offences under military law which are not offences under ordinary criminal law"], does not apply in the case of an offence involving a grave or minor breach of any of the [Geneva] Conventions or Protocol I or a minor breach of Protocol II.¹⁰⁵³

963. Lithuania's Criminal Code as amended provides that:

Foreigners who have committed a crime shall be extradited for committing offences in accordance with corresponding international and interstate agreements, or, if there are no such agreements, in accordance with the laws of the Republic of Lithuania.

...

Foreign nationals shall not be extradited if the acts committed by them are not considered criminal under the criminal laws of the Republic of Lithuania.

Persons shall not be . . . extradited to foreign countries for committing acts which have been ground for granting asylum in the Republic of Lithuania.¹⁰⁵⁴

964. Luxembourg's Law on the Punishment of Grave Breaches states that, under certain conditions,

¹⁰⁵⁰ Sweden, *IHL Manual* (1991), Section 4.2, p. 97.

¹⁰⁵¹ Armenia, *Penal Code* (2003), Article 16(2).

¹⁰⁵² Germany, *Law on International Legal Assistance in Criminal Matters as amended* (1982), Section 2(1).

¹⁰⁵³ Ireland, *Geneva Conventions Act as amended* (1962), Section 11.

¹⁰⁵⁴ Lithuania, *Criminal Code as amended* (1961), Article 7.

Luxembourg can hand over to governments of States parties to the [1949 Geneva Conventions] every foreign person being prosecuted or convicted in these States for an offence provided for in the Geneva Conventions and in Article 1 of this law, provided that sufficient charges are held against [him or her] and that the statutes of limitation for the public prosecution or for the sentencing have not yet been reached under Luxembourg's law.¹⁰⁵⁵

965. Under the Act on the Surrender of Persons Suspected of War Crimes as amended of the Netherlands, individuals can be surrendered to another power for trial if they are suspected of having committed one of the crimes defined in Articles 3 (genocide), 5 to 8 (war crimes committed in an international or a non-international armed conflict, and torture) and, in so far as it is connected with the offences referred to in those articles, Article 9 of the International Crimes Act.¹⁰⁵⁶

966. Portugal's Law on International Judicial Cooperation in Criminal Matters as amended provides that:

1. Extradition may be granted only for the purpose either of instituting criminal proceedings or of executing a sanction or measure involving deprivation of liberty, for an offence that the courts of the requesting State have jurisdiction to try.
2. For any such purpose, surrender of a person shall be possible only in respect of offences, including attempted offences, that are punishable under both the Portuguese law and the law of the requesting State by a sanction or measure involving deprivation of liberty for a maximum period of at least one year . . .¹⁰⁵⁷

967. The US Military Extraterritorial Jurisdiction Act, under a provision entitled "Delivery to authorities of foreign countries", provides that:

(a) Any person designated and authorized . . . may deliver a person described in section 3261(a) ["whoever engages in conduct outside the United States that would constitute an offence punishable by imprisonment for more than 1 year if the conduct had been engaged in within the special maritime and territorial jurisdiction of the United States – (1) while employed by or accompanying the Armed Forces outside the United States; or (2) while a member of the Armed Forces"] to the appropriate authorities of a foreign country in which such person is alleged to have violated section 3261(a) if

- (1) appropriate authorities of that country request the delivery of the person to such country for trial for such conduct as an offence under the laws of that country; and
- (2) the delivery of such person to that country is authorized by a treaty or other international agreement to which the United States is a party.¹⁰⁵⁸

¹⁰⁵⁵ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 11.

¹⁰⁵⁶ Netherlands, *Act on the Surrender of Persons Suspected of War Crimes as amended* (1954), Article 1.

¹⁰⁵⁷ Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 31.

¹⁰⁵⁸ US, *Military Extraterritorial Jurisdiction Act* (2000), § 3263.

968. Zimbabwe's Extradition Act provides that:

- (1) Subject to this Act, a person may be arrested, detained and extradited from Zimbabwe to a designated country . . . for an offence in respect of which in the designated country he is accused or has been convicted and is required to be sentenced or to undergo punishment, whether the offence was committed before or after the declaration of the country concerned as a designated country.
- (2) This part shall apply to any offence which –
 - (a) is punishable in the law of the designated country concerned by imprisonment for a period of twelve months or by any more severe punishment; and
 - (b) would constitute an offence punishable in Zimbabwe if the act or omission constituting the offence took place in Zimbabwe or, in the case of an extraterritorial offence, in corresponding circumstances outside Zimbabwe.¹⁰⁵⁹

National Case-law

969. In the *Bohne case* in 1966, in which extradition was requested for crimes related to the execution of mentally ill patients during Germany's Nazi regime, Argentina's Supreme Court of Justice emphasised that it was "a duty under international law to provide mutual support in the pursuit of criminals that represent a danger to all". It added that the extradition process was founded on the common interest of all States for offenders to be tried, and possibly punished, "by the country whose jurisdiction had cognisance of the criminal acts concerned".¹⁰⁶⁰

970. In the *Schwammlberger case* in 1989 concerning a request for extradition by the FRG, Argentina's Cámara Federal de La Plata referred to the prosecution and punishment of the major war criminals. The public prosecutor referred to the lawfulness of an extradition for an act committed outside the territory of the requesting State. The Court, invoking the various commitments made at the international level regarding the handing over of individuals accused of war crimes, rejected the request of the defendant to be tried by Argentine courts, an option provided by Argentine law, and affirmed the lower court's decision granting the request for extradition.¹⁰⁶¹ In the same case before the Supreme Court of Justice in 1990, both the Attorney-General and the Court considered that:

The prosecution and punishment of crimes committed prior to changes in sovereignty constitutes a discretionary decision for the new power rather than an obligation, but as the new power has expressed an interest in exercising penal authority against such crimes, the international community has no legitimate reason to oppose such measures.¹⁰⁶²

¹⁰⁵⁹ Zimbabwe, *Extradition Act* (1982), Section 14.

¹⁰⁶⁰ Argentina, Supreme Court of Justice, *Bohne case*, 24 August 1966.

¹⁰⁶¹ Argentina, Cámara Federal de La Plata, *Schwammlberger case* (First Instance), 30 August 1989.

¹⁰⁶² Argentina, Supreme Court of Justice, *Schwammlberger case* (Supreme Court), 20 March 1990.

971. At the hearing of the Public Prosecutor of the First Instance in the *Priebke case* in Argentina in 1995, the public prosecutor qualified the alleged acts of the requested person as war crimes and stated that the refusal to extradite him to Italy would trigger the international responsibility of Argentina, even if such refusal would be based on a rule of internal law.¹⁰⁶³ The extradition request was granted by the Court of first instance which stated that there could be no statutory limitation with regard to the alleged acts and therefore rejected the argument raised by the defence that extradition could not be granted because the acts were prescribed under Argentine law.¹⁰⁶⁴ However, the Court of Appeal found that under the terms of Argentine legislation, penal action was extinguished and that, therefore, extradition had to be refused.¹⁰⁶⁵ The Supreme Court of Justice found in favour of the requested person's extradition and considered that the acts for which extradition was sought were *prima facie* genocide. It added that "the classification of offences as crimes against humanity does not depend on whether the requesting or requested State agrees with the extradition process, but instead of the principles of *jus cogens* of international law".¹⁰⁶⁶

972. In the *Barbie extradition case* in 1974, Bolivia's Supreme Court turned down France's request for the extradition of Klaus Barbie, the head of the Gestapo in Lyon during the Second World War, who had been found guilty of war crimes *in absentia*. The rejection was based on the absence of an extradition treaty between the two States.¹⁰⁶⁷

973. In the *Barbie case* in 1983, France's Court of Cassation quoted the Court of Appeal which had stated that it was competent to examine the submissions made in the application by Barbie, according to which his detention was a nullity since there did not exist any extradition treaty between France and Bolivia and it was the result of a "disguised extradition":

In the absence of any extradition request, the execution of an arrest warrant on national territory, against a person who has previously taken refuge abroad, is not subject to his voluntary return to France or to the institution of extradition proceedings. Furthermore, by reason of their nature, the crimes against humanity do not simply fall within the scope of French municipal law but are subject to an international criminal order to which the notions of frontiers and extradition rules arising therefrom are completely foreign.¹⁰⁶⁸

The Court of Cassation stated that "in giving this ruling . . . the Court of Appeal gave a proper legal basis to its decision, without inadequacy or contradiction". Referring to the 1945 London Agreement and UN General Assembly Resolution

¹⁰⁶³ Argentina, Court of Bariloche, *Priebke case*, Hearing of the Public Prosecutor of the First Instance, 1995.

¹⁰⁶⁴ Argentina, Court of Bariloche, *Priebke case* (First Instance), Judgement, 31 May 1995.

¹⁰⁶⁵ Argentina, Court of Appeal of General Roca, *Priebke case*, Judgement, 23 August 1995.

¹⁰⁶⁶ Argentina, Supreme Court of Justice, *Priebke case*, Judgement, 2 November 1995.

¹⁰⁶⁷ Bolivia, Supreme Court, *Barbie extradition case*, 11 December 1974.

¹⁰⁶⁸ France, Court of Cassation, *Barbie case*, Judgement, 6 October 1983.

3(I) of 1946 on extradition and punishment of war criminals, the Court ruled that:

It results from these provisions that “all necessary measures” are to be taken by the Member States of the United Nations to ensure that war crimes, crimes against peace and crimes against humanity are punished and that those persons suspected of being responsible for such crimes are sent back “to the countries in which their abominable deeds were done in order that they may be judged and punished according to the laws of those countries”. By reasons of the nature of those crimes, these provisions are in accordance with the general principles of law recognized by the community of nations.¹⁰⁶⁹

974. In the decision in the trial of first instance in the *Cavallo case* in 2001, a Mexican court allowed the extradition, on the request of a Spanish judge, of Ricardo Miguel Cavallo, a former military officer of Argentine citizenship charged with committing acts of genocide, torture and terrorism during the 1976–1983 “dirty war” in Argentina. The Court’s decision was based, *inter alia*, on the principle of universal jurisdiction.¹⁰⁷⁰

Other National Practice

975. According to the Report on the Practice of Croatia, Croatia has concluded treaties on extradition with a number of States. The report also notes that:

According to Article 134 of the Croatian Constitution [which provides that “international agreements concluded and ratified in accordance with the Constitution and made public are part of the Republic’s internal legal order and are in terms of legal effect above law”], Croatian courts should directly apply the European Convention on Extradition with its two additional protocols and also existing bilateral agreements on extradition.¹⁰⁷¹

976. According to the Report on the Practice of Israel, Israel has signed extradition agreements with numerous countries. It has also cooperated with other countries for the extradition, mainly for trial in Israel, of suspected Nazi war criminals.¹⁰⁷²

977. At the International Conference for the Protection of War Victims in 1993, Kuwait expressed the view that States should cooperate for the extradition of war criminals.¹⁰⁷³

978. According to the Report on the Practice of Malaysia, the extradition of persons having committed grave breaches of the 1949 Geneva Conventions is governed by Malaysia’s Extradition Act. Under this act, if there is no extradition

¹⁰⁶⁹ France, Court of Cassation, *Barbie case*, Judgement, 6 October 1983.

¹⁰⁷⁰ Mexico, Federal Court of the First Circuit, *Cavallo case*, Decision, 11 January 2001.

¹⁰⁷¹ Report on the Practice of Croatia, 1997, Chapter 6.3.

¹⁰⁷² Report on the Practice of Israel, 1997, Chapter 6.11.

¹⁰⁷³ Kuwait, Remarks and Proposals of the Ministry of Justice concerning the draft Declaration of the International Conference for the Protection of War Victims, Geneva, 30 August–1 September 1993, § 4.

treaty with the requesting State, the Minister of Home Affairs may permit the extradition if he/she deems fit.¹⁰⁷⁴

979. In 2001, with regard to the *Cavallo case*, the Mexican Foreign Relations Secretariat issued a directive on this matter, stating that:

Based on Article 28, part XI, of the Federal Public Administration Law and in conformity with articles 30 of the International Law of Extradition, and articles 1, 9, 14 and 25 of the Treaty of Extradition and Mutual Assistance on Criminal Matters between the United Mexican States and the Kingdom of Spain, it is resolved: . . . to grant the extradition of the individual in question, Ricardo Miguel Cavallo, known as Miguel Angel Cavallo, requested by the government of Spain through its embassy in Mexico, to face charges of genocide, torture and terrorism.¹⁰⁷⁵

III. Practice of International Organisations and Conferences

United Nations

980. In a resolution adopted in 1946 on extradition and punishment of war criminals, the UN General Assembly stated that it:

Recommends that Members of the United Nations forthwith take all the necessary measures . . . to cause [war criminals who have been responsible for or have taken a consenting part in war crimes, crimes against peace and against humanity] to be sent back to the countries in which their abominable deeds were done, in order that they may be judged and punished according to the laws of those countries;

and calls upon the governments of States which are not Members of the United Nations also to take all necessary measures for the apprehension of such criminals in their respective territories with a view to their immediate removal to the countries in which the crimes were committed.¹⁰⁷⁶

981. In a resolution adopted in 1947 on surrender of war criminals and traitors, the UN General Assembly

Recommends Members of the United Nations, which desire the surrender of alleged war criminals or traitors (that is to say nationals of any State accused of having violated their national law by treason or active collaboration with the enemy during the war) by other Members in whose jurisdiction they are believed to be, to request surrender as soon as possible and to support their request with sufficient evidence to establish that a reasonable prima facie case exists as to identity and guilt.¹⁰⁷⁷

982. In a resolution adopted in 1969 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly stated that it was convinced:

¹⁰⁷⁴ Report on the Practice of Malaysia, 1997, Chapter 6.4, referring to the *Extradition Act* (1992), Sections 1 to 6.

¹⁰⁷⁵ Mexico, Ministry of Foreign Affairs, Communication No. 021/01, The Ministry of Foreign Affairs grants Spain's Request to extradite Ricardo Miguel Cavallo, Directive of 2 February 2001, § 2.

¹⁰⁷⁶ UN General Assembly, Res. 3 (I), 13 February 1946.

¹⁰⁷⁷ UN General Assembly, Res. 170 (II), 31 October 1947.

that the . . . extradition and punishment of persons responsible for war crimes and crimes against humanity . . . constitute an important element in the prevention of such crimes, the protection of human rights and fundamental freedoms, the encouragement of confidence, the furtherance of co-operation among peoples, and the promotion of international peace and security.¹⁰⁷⁸

983. In a resolution adopted in 1970 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly stated that it was convinced:

that . . . the . . . extradition and punishment of persons guilty of [war crimes and crimes against humanity] – wherever they may have been committed – . . . are important elements in the prevention of similar crimes now and in the future, and also in the protection of human rights and fundamental freedoms, the strengthening of confidence and the development of co-operation between peoples, and the safeguarding of international peace and security.¹⁰⁷⁹

The General Assembly called upon all States:

to take measures, in accordance with recognized principles of international law, to arrest such persons and extradite them to the countries where they have committed war crimes and crimes against humanity, so that they can be brought to trial and punished in accordance with the laws of those countries.¹⁰⁸⁰

984. In a resolution adopted in 1971 on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the UN General Assembly urged all States:

to implement the relevant resolutions of the General Assembly and to take measures in accordance with international law . . . to ensure the punishment of all persons guilty of [war crimes and crimes against humanity], including their extradition to those countries where they have committed such crimes.¹⁰⁸¹

985. In a resolution adopted in 1973 on principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN General Assembly declared that:

The United Nations, in pursuance of the principles and purposes set forth in the Charter concerning the promotion of co-operation between peoples and the maintenance of international peace and security, proclaims the following principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity:

- ...
5. Persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to

¹⁰⁷⁸ UN General Assembly, Res. 2583 (XXIV), 15 December 1969, preamble.

¹⁰⁷⁹ UN General Assembly, Res. 2712 (XXV), 15 December 1970, preamble.

¹⁰⁸⁰ UN General Assembly, Res. 2712 (XXV), 15 December 1970, § 2.

¹⁰⁸¹ UN General Assembly, Res. 2840 (XXVI), 18 December 1971, § 1.

punishment, as a general rules in the country in which they have committed those crimes. In that connexion, States shall co-operate on questions of extraditing such persons.¹⁰⁸²

986. In a resolution adopted in 1988 on prosecution and punishment of all war criminals and persons who have committed crimes against humanity, the UN Commission on Human Rights noted “with satisfaction the spirit of co-operation shown by several Member States in facilitating the extradition of war criminals who, in the aftermath of the Second World War, attempted to elude responsibility for their deeds by taking refuge in other countries”. It welcomed “the interest shown in this problem by numerous Member States regarding alleged war criminals residing in their territories and the assistance given by other Member States in providing evidence making possible the extradition and prosecution of such individuals”.¹⁰⁸³

987. In a resolution on impunity adopted in 2002, the UN Commission on Human Rights recognised that “crimes such as genocide, crimes against humanity, war crimes and torture are violations of international law and that perpetrators of such crimes should be prosecuted or extradited by States”.¹⁰⁸⁴

988. In a resolution adopted in 2001 on international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, the UN Sub-Commission on Human Rights urged all governments:

to implement the relevant resolutions of the General Assembly and other United Nations bodies and to take measures in accordance with international law to . . . ensure the punishment of all persons found guilty of [war crimes and crimes against humanity], or their extradition to those countries where they have committed such crimes, even when there is no treaty to facilitate that task.¹⁰⁸⁵

Other International Organisations

989. No practice was found.

International Conferences

990. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

991. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

992. No practice was found.

¹⁰⁸² UN General Assembly, Res. 3074 (XXVIII), 3 December 1973, preamble and § 5.

¹⁰⁸³ UN, Commission on Human Rights, Res. 1988/47, 8 March 1988.

¹⁰⁸⁴ UN Commission on Human Rights, Res. 2002/79, 25 April 2002, § 11.

¹⁰⁸⁵ UN Sub-Commission on Human Rights, Res. 2001/22, 16 August 2001, § 5

VI. Other Practice

993. In 1994, in a report on Ethiopia, Human Rights Watch noted that:

The SPO [Special Prosecutor's Office] believes that some 300 government and military officials fled Ethiopia when the Mengistu regime collapsed. Other Dergue officials guilty of human rights violations may have left the country earlier, having fallen out of favor with the regime. The SPO has investigated the whereabouts of at least sixty fugitive officials. The largest number of fugitives are believed to be in the United States and Kenya, with others in Europe and Djibouti . . . Ethiopia does not have extradition treaties in force with the countries where the fugitives are believed to be.¹⁰⁸⁶

Extradition of own nationals

I. Treaties and Other Instruments

Treaties

994. The following bilateral treaties provide, for example, that in a case where extradition is requested for one of its own nationals, the State has a choice to extradite or try the person itself: the 1874 Extradition Treaty between Peru and France (Article 1); the 1881 Extradition Treaty between Argentina and Spain; the 1886 Extradition Treaty between Argentina and Belgium; the 1886 Extradition Treaty between Argentina and Italy; the 1889 Extradition Treaty between Argentina and the UK; the 1893 Extradition Treaty between Argentina and the Netherlands; the 1904 Extradition Treaty between Peru and the UK (Article 3); the 1932 Extradition Treaty between Peru and Chile (Articles 1 and 4); the 1972 Extradition Treaty between Argentina and the US; the 1987 Extradition Treaty between Argentina and Italy; the 1988 Extradition Treaty between Argentina and Australia; and the 1994 Extradition Treaty between Peru and Italy (Articles 2, 5 and 7).

995. Under Article 20 of the 1889 Montevideo Treaty on International Criminal Law concluded between Argentina, Bolivia, Paraguay and Uruguay, extradition is granted regardless of the nationality of the person for whom it is requested.

996. Article 1 of the 1919 Extradition Treaty between Brazil and Peru provides that "the High Contracting Parties are obliged to reciprocally hand over criminals of whatever nationality, including their own nationals".

997. Article 228 of the 1919 Treaty of Versailles provides that:

The German Government shall hand over to the Allied and Associated Powers, or to such one of them as shall so request, all persons accused of having committed an act in violation of the laws and customs of war, who are specified either by name or by the rank, office or employment which they held under the German authorities.

¹⁰⁸⁶ Human Rights Watch, *Reckoning under the Law*, Series Human Rights Watch/Africa, Vol. 6, No. 11, New York, December 1994, p. 16.

In the end, however, the German government refused to extradite its nationals. Instead, prosecutions were instituted before the court of Leipzig.¹⁰⁸⁷

998. Article 345 of the 1928 Bustamante Code – a convention on private international law concluded between 21 States of South, Central and North America – provides that “the States parties are not obliged to extradite their own nationals”. However, the same provision states that a State which refuses to extradite is obliged to try the individual.

999. Article 7(1) of the 1933 Inter-American Convention on Extradition provides that “the nationality of the person sought may not be invoked as a ground for denying extradition, except when the law of the requested State otherwise provides”.

1000. Article 6(1)(a) of the 1957 European Convention on Extradition provides that “a Contracting Party shall have the right to refuse extradition of its nationals”. However, according to Article 6(2), “if the requested Party does not extradite its national, it shall at the request of the requesting Party submit the case to its competent authorities in order that proceedings may be taken if they are considered appropriate”.

1001. Article 4 of the 1973 Extradition Treaty between Uruguay and the US provides that “the Requested Party will not refuse the request for extradition on the ground that the person is a national of the Requested Party”.

1002. Article 7 of the 1977 OAU Convention against Mercenarism provides that:

2. When a national is the subject of the request for extradition, the State from which it is sought must, if it refuses, undertake prosecution of the offence committed.
3. If, in accordance with sections 1 and 2 of this Article, prosecution is undertaken, the State from which extradition is sought will notify the outcome of such prosecution to the state seeking extradition and to any other interested Member State of the Organization of African Unity.

1003. Upon ratification of AP I, Mongolia declared that:

In regard of Article 88, paragraph 2 of the Additional Protocol to the Protection of Victims in the International Armed Conflicts (“Protocol I”) which states [that] “The High Contracting Parties shall co-operate in the matter of extradition”, the Mongolian law which prohibits deprivation and extradition of its citizens from Mongolia shall be respected.¹⁰⁸⁸

1004. Article 3 of the 1997 Extradition Treaty between Argentina and the US provides that “the extradition and surrender of the person sought shall not be refused on the ground that such person is a national of the Requested Party”.

Other Instruments

1005. No practice was found.

¹⁰⁸⁷ M. Cherif Bassiouni, *Crimes against Humanity in International Criminal Law*, Kluwer, Dordrecht, 1992, pp. 200 and 201.

¹⁰⁸⁸ Mongolia, Reservation made upon ratification of AP I, 6 December 1995.

II. National Practice

Military Manuals

1006. The YPA Military Manual states that nationals would be tried in the SFRY at the request of a foreign country if reliable evidence of serious violations of IHL were provided.¹⁰⁸⁹

National Legislation

1007. Argentina's Law on International Cooperation in Criminal Matters provides that if the person for whom extradition is sought has been an Argentine national since the time the crime was committed (and is still an Argentine national at the time of the option), such person may opt to be tried by Argentine courts, unless a treaty obliging the extradition of its nationals applies. If the Argentine national chooses to exercise this right, extradition is denied and the case is tried in Argentina under Argentine penal law, so long as the requesting State gives its consent and renounces its jurisdiction, and hands over the relevant records and evidence.¹⁰⁹⁰

1008. Armenia's Penal Code provides that "the citizens of the Republic of Armenia who have committed a crime in another State are not extradited to that State".¹⁰⁹¹

1009. According to the Report on the Practice of Chile, Chilean law does not, in general, prohibit the extradition of Chilean nationals.¹⁰⁹²

1010. Croatia's Constitution and Code of Criminal Procedure prohibit the extradition of a Croatian national.¹⁰⁹³

1011. Georgia's Constitution provides that "the extradition of a citizen of Georgia to another State is prohibited, except in cases provided for by international agreements. A decision on extradition may be appealed in court."¹⁰⁹⁴

1012. Germany's Law on International Legal Assistance in Criminal Matters as amended, which provides for the possibility of the extradition of "a foreign person who is searched for or convicted by a foreign State for an offence which is punishable in that State", provides that "a foreign person in the terms of this law is a person who is not a German national in the meaning of . . . the Basic Law [of the Federal Republic of Germany]".¹⁰⁹⁵

1013. Ireland's Extradition Act as amended provides that "extradition shall not be granted where a person claimed is a citizen of Ireland, unless the relevant extradition provisions otherwise provide".¹⁰⁹⁶

¹⁰⁸⁹ SFRY (FRY), *YPA Military Manual* (1988), Point 35.

¹⁰⁹⁰ Argentina, *Law on International Cooperation in Criminal Matters* (1997), Article 12.

¹⁰⁹¹ Armenia, *Penal Code* (2003), Article 16(1).

¹⁰⁹² Report on the Practice of Chile, 1997, Chapter 6.3.

¹⁰⁹³ Croatia, *Constitution* (1990), Article 9(2); *Code of Criminal Procedure* (1993), Article 13.

¹⁰⁹⁴ Georgia, *Constitution* (1995), Article 13(4).

¹⁰⁹⁵ Germany, *Law on International Legal Assistance in Criminal Matters as amended* (1982), Section 2(1) and (3).

¹⁰⁹⁶ Ireland, *Extradition Act as amended* (1965), Section 14.

1014. Italy's Constitution as amended provides that:

- (1) The extradition of a citizen may be permitted only in such cases as are expressly provided for in international conventions.
- (2) In no instance shall it be permitted for political offences.¹⁰⁹⁷

1015. Lithuania's Criminal Code as amended provides that "citizens of the Republic of Lithuania shall not be extradited to foreign states for committing offences".¹⁰⁹⁸

1016. Portugal's Law on International Judicial Cooperation in Criminal Matters as amended provides that:

1. Extradition shall be excluded . . . in the following cases:
 - a) where the offence was committed on Portuguese territory;
 - b) where the person claimed is a Portuguese national, without prejudice to the provisions of the following paragraph.
2. The extradition of Portuguese nationals shall however not be excluded where: extradition of nationals is provided for in a treaty, convention or agreement to which Portugal is a Party, and extradition is sought for offences of terrorism or international organised crime, and the legal system of the requesting State embodies guarantees of a fair trial.¹⁰⁹⁹

1017. Under Russia's Constitution, the extradition of Russian citizens is prohibited.¹¹⁰⁰ Russia's Criminal Code also provides that Russian citizens who have committed crimes in the territory of a foreign State shall not be extradited to that State.¹¹⁰¹

1018. Under Rwanda's Penal Code, Rwandan nationals cannot be extradited.¹¹⁰²

1019. Spain's Law on Passive Extradition provides that "extradition of Spanish nationals will not be granted".¹¹⁰³

1020. Under Yemen's Constitution as amended, the extradition of nationals is prohibited.¹¹⁰⁴

1021. The Constitution as amended of the SFRY (FRY) provides that a Yugoslav citizen "may not be . . . deported from the country, or extradited to another state".¹¹⁰⁵

National Case-law

1022. No practice was found.

¹⁰⁹⁷ Italy, *Constitution as amended* (1947), Article 26.

¹⁰⁹⁸ Lithuania, *Criminal Code as amended* (1961), Article 7.

¹⁰⁹⁹ Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 32.

¹¹⁰⁰ Russia, *Constitution* (1993), Article 61. ¹¹⁰¹ Russia, *Criminal Code* (1996), Article 13.

¹¹⁰² Rwanda, *Penal Code* (1977), Article 16.

¹¹⁰³ Spain, *Law on Passive Extradition* (1985), Article 3(1).

¹¹⁰⁴ Yemen, *Constitution as amended* (1994), Article 44.

¹¹⁰⁵ SFRY, *Constitution as amended* (1992), Article 17(3).

Other National Practice

1023. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Austria stated that “it was a principle recognized in international law that States were not bound to consent to the extradition of their own nationals”.¹¹⁰⁶

1024. In 1973, during a debate in the Third Committee of the UN General Assembly, Belgium noted that Belgian law prohibited the extradition of Belgian nationals.¹¹⁰⁷

1025. In 1968, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, Chile stated that “the principle whereby the requested State was not bound to accede to the extradition of its own nationals was recognized by only a minority of States in international law”.¹¹⁰⁸

III. Practice of International Organisations and Conferences

1026. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1027. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

1028. No practice was found.

VI. Other Practice

1029. No practice was found.

Political offence exception to extradition

I. Treaties and Other Instruments

Treaties

1030. Article IV of the 1919 Extradition Treaty between Brazil and Peru provides that “extradition for political offences” shall not take place. Under the

¹¹⁰⁶ Austria, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1570, 14 October 1968, § 22.

¹¹⁰⁷ Belgium, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.2022, 9 November 1973, § 40.

¹¹⁰⁸ Chile, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1570, 14 October 1968, § 27.

same provision, “acts committed during insurrection or civil war” are not extraditable offences, unless they constitute “barbarous acts or acts of vandalism prohibited by the laws of war”.

1031. Article 7 of the 1948 Genocide Convention provides that:

Genocide and the other acts enumerated in Article III shall not be considered as political crimes for the purpose of extradition.

The Contracting parties pledge themselves in such cases to grant extradition in accordance with their laws and treaties in force.

1032. Article 3(1) of the 1957 European Convention on Extradition provides that “extradition shall not be granted if the offence in respect of which it is requested is regarded by the requested Party as a political offence or as an offence connected with a political offence”.

1033. Upon signature of the 1959 European Convention on Mutual Assistance in Criminal Matters, the USSR declared that it would not consider a grave breach, as defined in the 1949 Geneva Conventions and AP I, or a violation of Articles 1–4 AP II, as a “political offence” or “offences connected with a political offence”.¹¹⁰⁹

1034. Article 4(5) of the 1962 Extradition Treaty between Venezuela and Chile provides that “in no case may genocide [and] acts of terrorism . . . be considered political crimes”.

1035. Article 11 of the 1973 International Convention on the Suppression and Punishment of the Crime of Apartheid provides that practices of apartheid “shall not be considered political crimes for the purpose of extradition”.

1036. Article 1 of the 1975 Additional Protocol to the European Convention on Extradition specifies that:

For the application of Article 3 of the Convention, political offences shall not be considered to include the following:

- a. the crimes against humanity specified in the [1948 Genocide Convention];
- b. the violations specified in Article 50 of [GC I], Article 51 of [GC II], Article 130 of [GC III] and Article 147 of [GC IV];
- c. any comparable violations of the laws of war having effect at the time when this Protocol enters into force and of customs of war existing at that time, which are not already provided for in the above-mentioned provisions of the Geneva Conventions.

1037. Article 5(1) of the 1987 Extradition Treaty between Spain and Argentina stipulates that “extradition shall not be granted for political offences or offences related to offences of such a nature”. It provides, however, that “b) acts of terrorism [and] c) war crimes and crimes which are committed against the peace and security of mankind” shall not be considered political crimes.

¹¹⁰⁹ USSR, Reservations and declarations made upon signature of the 1959 European Convention on Mutual Assistance in Criminal Matters, 7 November 1996, Article 3.

1038. According to Article 5 of the 1989 Extradition Treaty between Peru and Spain, extradition shall not be granted “with regard to offences considered to be political or connected with offences of such a nature”. It provides, however, that “in no case shall . . . b) acts of terrorism, c) war crimes and crimes committed against the peace and security of mankind” be deemed political offences.

1039. Article 5(1) of the 1992 Extradition Treaty between Chile and Spain provides that “extradition shall not be granted for political offences or offences related to offences of such a nature”. It provides, however, that “b) acts of terrorism [and] c) war crimes and crimes which are committed against the peace and security of mankind, in conformity with international law” shall in no case be considered political crimes.

1040. Article IV(1) of the 1993 Extradition Treaty between Australia and Chile provides that:

Extradition shall not be granted: . . . if the offence for which extradition is requested is a political offence . . . To the effect of this paragraph, reference to political offences does not include: . . . b) war crimes and crimes committed against the peace and security of mankind, in conformity with international law.

1041. Article V of the 1994 Inter-American Convention on the Forced Disappearance of Persons provides that “the forced disappearance of persons shall not be considered a political offense for purposes of extradition” and “shall be deemed to be included among the extraditable offenses in every extradition treaty entered into between States Parties”.

1042. Article 4 of the 1997 Extradition Treaty between Argentina and the US provides that:

1. Extradition shall not be granted if the offense for which extradition is requested is a political offense.
2. For the purposes of this Treaty, the following offenses shall not be considered to be political offenses:
 - ...
 - (b) an offense for which both Parties have the obligation, pursuant to a multilateral international agreement on genocide, acts of terrorism, . . . or other crimes, to extradite the person sought or to submit the case to their competent authorities for decision as to prosecution;
3. Notwithstanding the terms of paragraph 2 of this Article, extradition shall not be granted if the competent authority of the Requested State determines that the request was politically motivated.
4. The Requested State may refuse extradition for offenses under military law that are not offenses under ordinary criminal law.

1043. Article 20 of the 1999 Second Protocol to the 1954 Hague Convention, concerning “Grounds for refusal” of extradition and mutual legal assistance, which, according to its Article 22(1), also applies to armed conflicts not of an international character, provides that:

1. For the purpose of extradition, offences set forth in Article 15 sub-paragraphs 1 (a) to (c), and for the purpose of mutual legal assistance, offences set forth in Article 15 shall not be regarded as political offences nor as offences connected with political offences nor as offences inspired by political motives. Accordingly, a request for extradition or for mutual legal assistance based on such offences may not be refused on the sole ground that it concerns a political offence or an offence connected with a political offence or an offence inspired by political motives.
2. Nothing in this Protocol shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance if the requested Party has substantial grounds for believing that the request for extradition for offences set forth in Article 15 sub-paragraphs 1 (a) to (c) or for mutual legal assistance with respect to offences set forth in Article 15 has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion or that compliance with the request would cause prejudice to that person's position for any of these reasons.

Other Instruments

1044. No practice was found.

II. National Practice

Military Manuals

1045. New Zealand's Military Manual states with respect to the prosecution of alleged war criminals that:

If the Party concerned does not institute proceedings against offenders, it may, subject to the provisions of its own law, hand such persons over for trial by any party to the Conventions which has made out a prima facie case. This reference to the local law makes the procedure subject to local extradition legislation and some countries are likely to argue that war criminals acting on governmental instruction are political offenders immune from extradition. This argument was expressly rejected by the Ghana Court of Appeal in *Ex p. Schumann* (1949) . . . when put forward to contest an extradition application in respect of a doctor involved in the extermination programme at the Auschwitz concentration camp. AP I Art. 88 requires the parties to assist one another in connection with grave breaches, including cooperation in matters of extradition.¹¹¹⁰

1046. The UK Military Manual, in a footnote related to the provision on extradition of war criminals, states that "an accused person is not to be surrendered if the offence in respect of which his surrender is demanded is one of a political character or if he proves that the request for surrender has been made with a view to try or punish him for an offence of a political nature".¹¹¹¹

¹¹¹⁰ New Zealand, *Military Manual* (1992), § 1711.4, footnote 76.

¹¹¹¹ UK, *Military Manual* (1958), § 639, footnote 5.

National Legislation

1047. Argentina's Law on International Cooperation in Criminal Matters provides that extradition shall not take place in case of political offences.¹¹¹² However, it also states that the following crimes are not considered to be political offences: war crimes and crimes against humanity or illegal acts against internationally protected persons; illegal acts against the population or innocent civilians not involved in the violence caused by an armed conflict; and crimes for which Argentina, as a signatory to an international convention, has assumed the obligation to extradite or prosecute.¹¹¹³

1048. Colombia's Penal Code provides that "extradition proceedings will not be taken with regard to political offences".¹¹¹⁴

1049. Under Croatia's Code of Criminal Procedure, the Minister of Justice will not allow extradition for a political offence.¹¹¹⁵

1050. Germany's Law on International Legal Assistance in Criminal Matters as amended provides that "extradition is not permissible if requested for a political offence or an offence connected with such an offence. It is permissible if the person searched for is prosecuted or convicted for . . . genocide, murder or homicide or the participation therein."¹¹¹⁶

1051. Ireland's Extradition Act as amended states that "*extradition* shall not be granted for an offence which is a *political offence* or an offence connected with a *political offence*".¹¹¹⁷ (emphasis in original)

1052. Luxembourg's Law on the Punishment of Grave Breaches, in the part dealing with the conditions for a possible extradition of war criminals, states that "the crimes provided for in Article 1 [i.e. grave breaches of the 1949 Geneva Conventions] are neither considered to be political crimes nor acts connected with similar crimes".¹¹¹⁸

1053. According to the International Crimes Act of the Netherlands, "the crimes defined in this Act [genocide, crimes against humanity, war crimes and torture] shall be deemed not to be offences of a political nature for the purposes of the Extradition Act or the [Act on the Surrender of Persons Suspected of War Crimes as amended]".¹¹¹⁹

1054. Under Peru's Constitution, political offences are not extraditable offences. Acts of terrorism, murder of high-ranking officials (*magnicidio*) and acts of genocide are not to be considered as political offences.¹¹²⁰

¹¹¹² Argentina, *Law on International Cooperation in Criminal Matters* (1997), Article 8(a).

¹¹¹³ Argentina, *Law on International Cooperation in Criminal Matters* (1997), Article 9.

¹¹¹⁴ Colombia, *Penal Code* (2000), Article 18.

¹¹¹⁵ Croatia, *Code of Criminal Procedure* (1993), Article 520(2).

¹¹¹⁶ Germany, *Law on International Legal Assistance in Criminal Matters as amended* (1982), Section 6(1).

¹¹¹⁷ Ireland, *Extradition Act as amended* (1965), Section 11(1).

¹¹¹⁸ Luxembourg, *Law on the Punishment of Grave Breaches* (1985), Article 11.

¹¹¹⁹ Netherlands, *International Crimes Act* (2003), Article 12.

¹¹²⁰ Peru, *Constitution* (1979), Article 109; *Constitution* (1993), Article 37.

1055. Portugal's Law on International Judicial Cooperation in Criminal Matters as amended provides that extradition and other forms of cooperation are excluded "where there are well-founded reasons for believing that cooperation is sought for the purpose of persecuting or punishing a person on account of that person's . . . political or ideological beliefs".¹¹²¹ It further provides that:

1. A request for co-operation shall also be refused where the proceedings concern:
 - a) Any facts that, according to the concepts of Portuguese law, constitute a political offence or an offence connected with a political offence;
 - b) any facts that constitute a military offence and do not constitute an offence under ordinary criminal law.
2. The following shall not be regarded as political offences:
 - a) genocide, crimes against humanity, war crimes and serious offences under the [Geneva Conventions];
 - b) the offences mentioned in Article 1 of the [1977 European Convention on the Suppression of Terrorism];
 - c) the acts mentioned in the [1984 Convention against Torture];
 - d) any other offences that ought not to be regarded as political under the terms of an international treaty, convention or agreement to which Portugal is a Party.¹¹²²

1056. Rwanda's Penal Code does not permit extradition for political offences.¹¹²³

1057. Spain's Law on Passive Extradition provides that:

Extradition will not be granted in the following cases:

1. When it concerns offences of a political character, which does not include acts of terrorism [and] crimes against humanity aimed at in the Convention on the Prevention and Punishment of the Crime of Genocide adopted by the General Assembly of the United Nations . . .
2. When it concerns military offences classified as such by Spanish legislation, without prejudice, however, to what is established by International Conventions signed and ratified by Spain.¹¹²⁴

1058. Zimbabwe's Extradition Act provides that "no extradition to a designated country shall take place . . . if the offence for which the extradition is requested is an offence of a political character".¹¹²⁵

National Case-law

1059. In the *Bohne case* in 1966, in which extradition was requested for crimes related to the execution of mentally ill patients during Germany's Nazi regime,

¹¹²¹ Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 6(1)(b).

¹¹²² Portugal, *Law on International Judicial Cooperation in Criminal Matters as amended* (1999), Article 7.

¹¹²³ Rwanda, *Penal Code* (1977), Article 15.

¹¹²⁴ Spain, *Law on Passive Extradition* (1985), Article 4(1) and (2).

¹¹²⁵ Zimbabwe, *Extradition Act* (1982), Section 15(b).

Argentina's Supreme Court of Justice emphasised that "neither claims for political reasons nor arguments based on supposed military necessity shall be admitted as grounds for the denial of extradition for criminal acts which clearly contravene the common opinion of civilized peoples".¹¹²⁶

Other National Practice

1060. The Report on the Practice of Croatia, with regard to the Code of Criminal Procedure's provision prohibiting extradition for political offences, states that:

The European Convention on Extradition and its Protocols are directly applicable in the Croatian legal system, judges as well as the Minister of Justice are bound by their provisions. Consequently war crimes, genocide and violations of the laws of war and customs of war should not be considered as political offences.¹¹²⁷

1061. In 1971, during a debate in the Third Committee of the UN General Assembly on the question of the punishment of war criminals and of persons who have committed crimes against humanity, the representative of France stated that "in France war crimes were not regarded as political crimes and that perpetrators could be extradited in the same way as common offenders".¹¹²⁸

1062. In 1996, in a diplomatic communiqué issued in reaction to the events linked with the operation by the MRTA at the residence of the Japanese Ambassador in Peru, and to the release of two Peruvians whose extradition was requested, the President of Uruguay declared that:

The release of the Peruvians Luis Samaniego and Silvia Gora, decided by the Third Criminal Appeals Court, was exclusively the act of the Judicial Power... [The appellate court] upheld the same criterion applied in previous court decisions concerning the application of the 1889 Montevideo Treaty on International Penal Law.¹¹²⁹

He recognised the limitations of the extradition treaties, concluded over a century ago, that had governed Uruguay's relations with third parties in this respect. He stated that the Executive Power had brought these rules up to date by signing new extradition treaties in 1996 with Argentina, Chile, Spain, France and Mexico, and by pursuing negotiations with other countries. These treaties excluded terrorism from the category of political offences.¹¹³⁰

III. Practice of International Organisations and Conferences

United Nations

1063. No practice was found.

¹¹²⁶ Argentina, Supreme Court of Justice, *Bohne case*, 24 August 1966.

¹¹²⁷ Report on the Practice of Croatia, 1997, Chapter 6.4.

¹¹²⁸ France, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1902, 9 December 1971, § 76.

¹¹²⁹ Uruguay, Communiqué issued by the President of Uruguay, 26 December 1996, § 2.

¹¹³⁰ Uruguay, Communiqué issued by the President of Uruguay, 26 December 1996, § 3.

Other International Organisations

1064. In a resolution adopted in 1984 on enforced disappearances, the Parliamentary Assembly of the Council of Europe called on the governments of member States:

to support the preparation and adoption by the United Nations of a declaration setting forth the following principles: . . . enforced disappearance is a crime against humanity which . . . cannot be considered a political offence and is therefore subject to the extradition laws.¹¹³¹

International Conferences

1065. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1066. No practice was found.

V. Practice of the International Red Cross and Red Crescent Movement

1067. No practice was found.

VI. Other Practice

1068. No practice was found.

Cooperation with international criminal tribunals*I. Treaties and Other Instruments**Treaties*

1069. Article 3 of the 1945 London Agreement provides with regard to the IMT (Nuremberg) that:

Each of the Signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The Signatories shall also use their best endeavors to make available for investigation of the charges against and the trial before the International Military Tribunal such of the major war criminals as are not in the territories of any of the Signatories.

1070. Articles 86–101 of the 1998 ICC Statute deal with “International Cooperation and Judicial Assistance”. Article 86 provides that “States Parties shall, in accordance with the provisions of this Statute, cooperate fully with the Court

¹¹³¹ Council of Europe, Parliamentary Assembly, Res. 828 on enforced disappearances, 26 September 1984, § 13(a)(i)(1).

in its investigation and prosecution of crimes within the jurisdiction of the Court". Article 88 provides that "States Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part".

1071. Article 93 of the 1998 ICC Statute provides that:

1. States Parties shall, in accordance with the provisions of this Part and under procedures of national law, comply with requests by the Court to provide the following assistance in relation to investigations or prosecutions:
 - (a) The identification and whereabouts of persons or the location of items;
 - (b) The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the Court;
 - (c) The questioning of any person being investigated or prosecuted;
 - (d) The service of documents, including judicial documents;
 - (e) Facilitating the voluntary appearance of persons as witnesses or experts before the Court;
 - (f) The temporary transfer of persons as provided in paragraph 7;
 - (g) The examination of places or sites, including the exhumation and examination of grave sites;
 - (h) The execution of searches and seizures;
 - (i) The provision of records and documents, including official records and documents;
 - (j) The protection of victims and witnesses and the preservation of evidence;
 - (k) The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and
 - (l) Any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the Court.
- ...
4. In accordance with article 72, a State Party may deny a request for assistance, in whole or in part, only if the request concerns the production of any documents or disclosure of evidence which relates to its national security.
5. Before denying a request for assistance under paragraph 1(l), the requested State shall consider whether the assistance can be provided subject to specified conditions, or whether the assistance can be provided at a later date or in an alternative manner, provided that if the Court or the Prosecutor accepts the assistance subject to conditions, the Court or the Prosecutor shall abide by them.

1072. Upon ratification of the 1998 ICC Statute, Argentina declared that:

With regard to article 87, paragraph 2, of the [1998 ICC] Statute, the Argentine Republic hereby declares that requests for cooperation coming from the Court, and any accompanying documentation, shall be in Spanish or shall be accompanied by a translation into Spanish.¹¹³²

¹¹³² Argentina, Declaration made upon ratification of the ICC Statute, 8 February 2001.

1073. Upon ratification of the 1998 ICC Statute, Austria declared that “pursuant to article 87, paragraph 2 of the [1998 ICC] Statute the Republic of Austria declares that requests for cooperation and any documents supporting the request shall either be in or be accompanied by a translation into the German language”.¹¹³³

1074. Upon ratification of the 1998 ICC Statute, Belgium stated that:

With reference to article 87, paragraph 1, of the [1998 ICC] Statute, the Kingdom of Belgium declares that the Ministry of Justice is the authority competent to receive requests for cooperation.

...

With reference to article 87, paragraph 2 [of the 1998 ICC Statute], the Kingdom of Belgium declares that requests by the Court for cooperation and any documents supporting the request shall be in an official language of the Kingdom.¹¹³⁴

1075. Upon ratification of the 1998 ICC Statute, Belize declared that “pursuant to Article 87 (1) (a) of the Statute of the International Criminal Court, Belize declares that all requests made to it in accordance with Chapter 9 be sent through diplomatic channels”.¹¹³⁵

1076. Upon ratification of the 1998 ICC Statute, Finland stated that:

Pursuant to article 87 (1) (a) of the [1998 ICC] Statute, the Republic of Finland declares that requests for cooperation shall be transmitted either through the diplomatic channel or directly to the Ministry of Justice, which is the authority competent to receive such requests. The Court may also, if need be, enter into direct contact with other competent authorities of Finland. In matters relating to requests for surrender the Ministry of Justice is the only competent authority.

Pursuant to article 87 (2) of the [1998 ICC] Statute, the Republic of Finland declares that requests from the Court and any documents supporting such requests shall be submitted either in Finnish or Swedish, which are the official languages of Finland, or in English which is one of the working languages of the Court.¹¹³⁶

1077. Upon ratification of the 1998 ICC Statute, France stated that “pursuant to article 87, paragraph 2, of the [1998 ICC] Statute, the French Republic declares that requests for cooperation, and any documents supporting the request, addressed to it by the Court must be in the French language”.¹¹³⁷

1078. Upon ratification of the 1998 ICC Statute, Germany stated that:

The Federal Republic of Germany declares, pursuant to article 87 (1) of the [1998 ICC] Statute, that requests from the Court can also be transmitted directly to the Federal Ministry of Justice or an agency designated by the Federal Ministry of Justice in an individual case. Requests to the Court can be transmitted directly from the Federal Ministry of Justice or, with the Ministry’s agreement, from another competent agency to the Court.

¹¹³³ Austria, Declaration made upon ratification of the ICC Statute, 28 December 2000.

¹¹³⁴ Belgium, Declarations made upon ratification of the ICC Statute, 28 June 2000.

¹¹³⁵ Belize, Declaration made upon ratification of the ICC Statute, 5 April 2000.

¹¹³⁶ Finland, Declarations made upon ratification of the ICC Statute, 29 December 2000.

¹¹³⁷ France, Declarations made upon ratification of the ICC Statute, 9 June 2000, § II.

The Federal Republic of Germany further declares, pursuant to article 87 (2) of the [1998 ICC] Statute, that requests for cooperation to Germany and any documents supporting the request must be accompanied by a translation into German.¹¹³⁸

1079. Upon signature of the 1998 ICC Statute, Israel stated that:

Being an active consistent supporter of the concept of an International Criminal Court, and its realization in the form of the [1998 ICC] Statute, the Government of the State of Israel is proud to thus express its acknowledgment of the importance, and indeed indispensability, of an effective court for the enforcement of the rule of law and the prevention of impunity.¹¹³⁹

1080. Upon ratification of the 1998 ICC Statute, Norway stated that:

1. With reference to Article 87, paragraph 1 (a) [of the 1998 ICC Statute], the Kingdom of Norway hereby declares that the Royal Ministry of Justice is designated as the channel for the transmission of requests from the Court.
2. With reference to Article 87, paragraph 2 [of the 1998 ICC Statute], the Kingdom of Norway hereby declares that requests from the Court and any documents supporting the request shall be submitted in English, which is one of the working languages of the Court.¹¹⁴⁰

1081. Upon ratification of the 1998 ICC Statute, Spain stated that:

In relation to article 87, paragraph 1, of the [1998 ICC] Statute, the Kingdom of Spain declares that, without prejudice to the fields of competence of the Ministry of Foreign Affairs, the Ministry of Justice shall be the competent authority to transmit requests for cooperation made by the Court or addressed to the Court.

In relation to article 87, paragraph 2, of the [1998 ICC] Statute, the Kingdom of Spain declares that requests for cooperation addressed to it by the Court and any supporting documents must be in Spanish or accompanied by a translation into Spanish.¹¹⁴¹

1082. Article 17 of the 2002 Agreement on the Special Court for Sierra Leone, entitled "Cooperation with the Special Court", provides that:

1. The Government shall cooperate with all organs of the Special Court at all stages of the proceedings. It shall, in particular, facilitate access to the Prosecutor to sites, persons and relevant documents required for the investigation.
2. The Government shall comply without undue delay with any request for assistance by the Special Court or an order issued by the Chambers, including, but not limited to:
 - (a) Identification and location of persons;
 - (b) Service of documents;
 - (c) Arrest or detention of persons;
 - (d) Transfer of an indictee to the Court.

¹¹³⁸ Germany, Declarations made upon ratification of the ICC Statute, 11 December 2000.

¹¹³⁹ Israel, Declaration made upon signature of the ICC Statute, 31 December 2000, § 1.

¹¹⁴⁰ Norway, Declarations made upon ratification of the ICC Statute, 16 February 2000, §§ 1 and 2.

¹¹⁴¹ Spain, Declarations made upon ratification of the ICC Statute, 24 October 2000.

Other Instruments

1083. Article 29 of the 1993 ICTY Statute, entitled “Cooperation and judicial assistance”, provides that:

1. States shall cooperate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) the identification and location of persons;
 - (b) the taking of testimony and the production of evidence;
 - (c) the service of documents;
 - (d) the arrest or detention of persons;
 - (e) the surrender or the transfer of the accused to the International Tribunal.

1084. Article 54 of the 1994 ILC Draft Statute for an International Criminal Tribunal, entitled “Obligation to extradite or prosecute”, provides that:

In a case of a crime referred to in article 20 (e) [“crimes, established under or pursuant to the treaty provisions listed in the Annex, which, having regard to the conduct of the alleged, constitute exceptionally serious crimes of international concern”], a custodial State party to this Statute which is a party to the treaty in question but which has not accepted the Court’s jurisdiction with respect to the crime for the purposes of article 21 (1) (b) (i) . . . shall either take all necessary steps to extradite the suspect to a requesting State for the purpose of prosecution or refer the case to its competent authorities for that purpose.

1085. The Annex to the 1994 ILC Draft Statute for an International Criminal Tribunal, entitled “Crimes pursuant to Treaties (see art. 20 (e))”, refers, *inter alia*, to grave breaches of the 1949 Geneva Conventions; grave breaches of AP I; crimes defined by Article 2 of the 1973 Convention on Crimes against Internationally Protected Persons; and the crime of torture made punishable by Article 4 of the 1984 Convention against Torture.

1086. Article 28 of the 1994 ICTR Statute provides that:

1. States shall cooperate with the International Tribunal for Rwanda in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law.
2. States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to:
 - (a) The identification and location of persons;
 - (b) The taking of testimony and the production of evidence;
 - (c) The service of documents;
 - (d) The arrest or detention of persons;
 - (e) The surrender or the transfer of the accused to the International Tribunal for Rwanda.

1087. Article 4 of the 2000 Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Violations of International

Human Rights and Humanitarian Law states that “violations of international . . . humanitarian law norms that constitute crimes under international law carry the duty to . . . cooperate with and assist . . . appropriate international judicial organs in the investigation and prosecution of these violations”.

II. National Practice

Military Manuals

1088. Argentina’s Law of War Manual states that:

In the [Geneva] Conventions and Protocol I, it is provided that the governments shall take such legislative measures as may be necessary to determine adequate penal sanctions to be applied to persons committing or ordering any of the grave breaches; the persons accused of having committed, or of having ordered to commit, those breaches . . . shall be searched for.

. . . It is also possible to hand the author of the violations over to an international tribunal, in case such a tribunal has been established.¹¹⁴²

The manual also states that “in the event of grave breaches of the [Geneva] Conventions or of Protocol I, the contracting parties shall cooperate, jointly or individually, with the United Nations and in accordance with the UN Charter”.¹¹⁴³

1089. Australia’s Commanders’ Guide states that:

Where there is widespread evidence of war crimes having been committed, the international community may elect to establish a world forum or war crimes tribunal to conduct trials. The Nuremberg and Tokyo war crimes tribunals conducted after WW II are examples of this approach.¹¹⁴⁴

1090. France’s LOAC Teaching Note, in a part dealing with “Grave breaches of the rules of the law of armed conflict”, states that:

On the criminal level, persons charged with [grave breaches of the Geneva Conventions] may be prosecuted before . . . international criminal courts having jurisdiction over war crimes: today this means the International Criminal Tribunals for the Former Yugoslavia and Rwanda for the crimes committed solely on the occasion of these two conflicts; tomorrow, this will mean . . . the International Criminal Court which will have jurisdiction over all war crimes and crimes against humanity in case of the failure of national tribunals.¹¹⁴⁵

1091. France’s LOAC Manual states that the ICTY and the ICTR, “having concurrent jurisdiction with national tribunals of each State, have, however, primary jurisdiction and may request national tribunals to hand over cases to [them]”.¹¹⁴⁶ Regarding the ICC, the manual also states that:

¹¹⁴² Argentina, *Law of War Manual* (1989), § 8.02.

¹¹⁴³ Argentina, *Law of War Manual* (1989), § 8.09.

¹¹⁴⁴ Australia, *Commanders’ Guide* (1994), § 1308.

¹¹⁴⁵ France, *LOAC Teaching Note* (2000), p. 7.

¹¹⁴⁶ France, *LOAC Manual* (2001), pp. 77–78.

The Court has jurisdiction as soon as the national State of the alleged perpetrator(s), or the State on the territory of which the crime occurred, is party to the [1998 ICC Statute] or gives its express consent. This Court is additional to national jurisdiction. It intervenes only if national jurisdictions are incapable, or refuse to, try the perpetrators.¹¹⁴⁷

1092. Israel's Manual on the Laws of War recalls the experiences of the Nuremberg and Tokyo trials, stating that "the central importance of the Nuremberg Trials . . . is in creating a precedent for the execution of judgement against war criminals by the whole of humanity, without leaving the work to prejudiced internal courts".¹¹⁴⁸ It also mentions the ICTY and the ICTR. Referring to the ICC, it states that:

One of the biggest difficulties faced by the Hague court for judging Yugoslavia's war criminals is the extradition of war criminals. The permanent court has been empowered to demand extradition of war criminals into its hands, so that such criminals will not find a haven . . .

Israel is in a dilemma regarding the Rome Constitution. On the one hand, in light of the Holocaust experience, Israel has a special interest in seeing war criminals brought to justice. On the other hand, there is a fear that the court will serve as a lever for demanding the extradition and trial of IDF soldiers.¹¹⁴⁹

1093. New Zealand's Military Manual, regarding the prosecution of alleged war criminals, states that "by Art. 89 [AP I] they [States parties] are obliged to act jointly or individually in cooperation with the United Nations in regard to serious 'violations' of the [Geneva] Conventions or [AP I]".¹¹⁵⁰

1094. Spain's LOAC Manual states that:

Historically . . . International Tribunals established to judge alleged war criminals have existed (such as the Nuremberg and Tokyo Tribunals), and this possibility remains nowadays and seems to be a developing trend for the action of the International Community, an example of which is the creation by the Security Council of . . . [the ICTY]. To cooperate with [this Tribunal], Spain has adopted Organic Law No. 15/94 of 1 June.¹¹⁵¹

The manual further states that "the obligation devolving on the States to cooperate in the penal repression of grave breaches of the [Geneva] Conventions is not limited to cooperation with other States but also comprises cooperation with the United Nations, in conformity with the United Nations Charter".¹¹⁵²

1095. The UK Military Manual, in a footnote related to the provision on extradition of war criminals, states that the handing over of a person suspected of war crimes "can be made with the consent of the States concerned to an international court if one should be established".¹¹⁵³

¹¹⁴⁷ France, *LOAC Manual* (2001), pp. 76–77.

¹¹⁴⁸ Israel, *Manual on the Laws of War* (1998), pp. 66–67.

¹¹⁴⁹ Israel, *Manual on the Laws of War* (1998), pp. 68–69.

¹¹⁵⁰ New Zealand, *Military Manual* (1992), § 1711.4, footnote 76.

¹¹⁵¹ Spain, *LOAC Manual* (1996), Vol. I, § 7.6.b.(2).

¹¹⁵² Spain, *LOAC Manual* (1996), Vol. I, § 11.8.b.(5).

¹¹⁵³ UK, *Military Manual* (1958), § 639, footnote 5.

1096. The YPA Military Manual of the SFRY (FRY) provides that “the perpetrators of such criminal acts [war crimes or serious violations of the laws and customs of war] may also be brought to justice before an international court if such court is established”.¹¹⁵⁴

National Legislation

1097. Many States have adopted legislation providing for cooperation with both the ICTY and ICTR, including: Australia, Austria, Belgium, Denmark, France, Germany, Greece, Ireland, Luxembourg, New Zealand, Norway, Sweden, Switzerland, UK and US.¹¹⁵⁵ Other States have adopted legislation providing for cooperation with the ICTY, including: Bosnia and Herzegovina, Croatia, Finland, Hungary, Iceland, Italy, Netherlands, Romania and Spain.¹¹⁵⁶

1098. Many States have adopted special legislation providing for cooperation with the ICC. Examples are Australia, Canada, Denmark, Finland, France, Germany, Netherlands, New Zealand, Norway, South Africa, Switzerland and UK.¹¹⁵⁷

1099. In October 2001, the Republika Srpska adopted the Law on Cooperation with the ICTY in which it provides that both the ICTY and the national courts are competent for the criminal prosecution of persons responsible for violations of IHL in the territory of the former Yugoslavia, the ICTY, however, being given precedence (Article 1). Article 2 provides that:

Cooperation with the Tribunal is related to prosecution of persons only for crimes referred to in Article 2, namely grave violations of the Geneva Conventions of 1949, article 3, pertaining to the violations of laws and customs of war, article 4, pertaining to genocide, and article 5 of the Statute of the Tribunal, pertaining to the

¹¹⁵⁴ SFRY (FRY), *YPA Military Manual* (1988), § 20.

¹¹⁵⁵ Australia, *International War Crimes Tribunal Act* (1995); Austria, *Law on Cooperation with the International Tribunals* (1996); Belgium, *Law on Recognition of and Cooperation with the International Tribunals* (1996); Denmark, *International Tribunals Act* (1994); France, *Law on Cooperation with the ICTY* (1995); France, *Law on Cooperation with the ICTR* (1996); Germany, *Law on Cooperation with the ICTY* (1995); Germany, *Law on Cooperation with the ICTR* (1998); Greece, *Law on Cooperation with the International Tribunals* (1998); Ireland, *War Crimes Tribunal Act* (1998); Luxembourg, *Law on Cooperation with the International Tribunals* (1999); New Zealand, *International War Crimes Act* (1995); Norway, *Law on the Incorporation of UN Resolutions on International Tribunals* (1994); Sweden, *Cooperation with the International Tribunals Act as amended* (1995); Switzerland, *Decree on Cooperation with the International Tribunals Act* (1995); UK, *ICTY Order* (1996); UK, *ICTR Order* (1996); US, *Law on Judicial Assistance to the ICTY and ICTR* (1996).

¹¹⁵⁶ Bosnia and Herzegovina, *Decree on Deferral upon Request by the ICTY* (1995); Croatia, *Cooperation with the ICTY Act* (1996); Finland, *ICTY Jurisdiction and Legal Assistance Act* (1994); Hungary, *Law on Cooperation with the ICTY* (1996); Iceland, *Law on Legal Aid to the ICTY* (1994); Italy, *Decree-Law on Cooperation with the ICTY* (1993); Netherlands, *Act on the Establishment of the ICTY* (1994); Romania, *Law on Cooperation with the ICTY* (1998); Spain, *Law on Cooperation with the ICTY* (1994).

¹¹⁵⁷ Australia, *ICC Act* (2002); Canada, *Crimes against Humanity and War Crimes Act* (2000); Denmark, *ICC Act* (2001); Finland, *ICC Act* (2000); France, *Law on Cooperation with the ICC* (2002); Germany, *Law on Cooperation with the ICC* (2002); Netherlands, *ICC Implementation Act* (2002); New Zealand, *International Crimes and ICC Act* (2000); Norway, *ICC Act* (2001); South Africa, *ICC Bill* (2001); Switzerland, *Law on Cooperation with the ICC* (2001); UK, *ICC Act* (2001); see also Trinidad and Tobago, *Draft ICC Act* (1999), Part III.

crimes against humanity committed in the territory of former Yugoslavia since 1 January 1991.

Cooperation shall be conducted in the manner stipulated in this Law, Statute of the Tribunal and Rules of Procedure and Evidence of the Tribunal.¹¹⁵⁸

The other provisions of the law namely deal with the "Procedure for gathering evidence upon request of the tribunal" (Part II); the "Transfer of responsibility for leading the criminal proceedings" (Part III); the "Pre-trial detention of the defendant and hand over to the tribunal" (Part IV); the "Legal Assistance to the Tribunal" (Part V); and the "Execution of verdicts of the tribunal" (Part VI).¹¹⁵⁹

National Case-law

1100. In the *Musema case* in 1997, Switzerland agreed to surrender to the ICTR an accused of Rwandan nationality arrested in Switzerland in 1995 for violations of the laws of war in Rwanda, pursuant to Article 109 of the Swiss Military Criminal Code as amended and provisions of the Decree on Cooperation with the International Tribunals.¹¹⁶⁰

Other National Practice

1101. In 1994, in its comments on the report of the Working Group on a draft statute for an international criminal court, Australia stated with regard to the provision on surrender of an accused person to the international tribunal (draft Article 63, now Article 89, of the 1998 ICC Statute) that:

[The draft provision] obliges States parties which have accepted the court's jurisdiction to surrender the accused person to the tribunal. This may be seen as cutting across generally accepted rules of extradition law where States retain the discretion not to extradite the person subject to the request. However, as regards the tribunal it may be argued that, by specifically consenting to jurisdiction, States have already agreed to the tribunal hearing the case and have given up the right not to hand over the accused person. The situation may therefore be distinguished from mere requests for extradition where no prior consent has been given to the exercise of jurisdiction by the courts of a foreign country and where, accordingly, it is entirely appropriate that the requested State retains the discretion not to extradite.¹¹⁶¹

1102. In 1994, in its comments on the report of the Working Group on a draft statute for an international criminal court, Belarus stated with regard to the provision on surrender of an accused person to the international tribunal (draft Article 63, now Article 89, of the 1998 ICC Statute) that:

¹¹⁵⁸ Bosnia and Herzegovina, Republika Srpska, *Law on Cooperation with the ICTY* (2001), Articles 1 and 2.

¹¹⁵⁹ Bosnia and Herzegovina, Republika Srpska, *Law on Cooperation with the ICTY* (2001), Parts II-VI.

¹¹⁶⁰ Switzerland, Federal Court, *Musema case*, Judgement, 28 April 1997.

¹¹⁶¹ Australia, Comments of 16 February 1994 on the report of the Working Group on a draft statute for an international criminal court, UN Doc. A/CN.4/458, 18 February 1994, p. 16.

In any case, the rule regarding priority should be applied unconditionally in cases involving the surrender of persons accused of crimes within the sphere of exclusive jurisdiction of the court.

It would be desirable to resolve in article 63 the question of the failure to surrender an accused person to the court, in violation of the provisions of the statute. In such situations, the court should be granted the right to request the United Nations Security Council to obtain the surrender of the accused person.¹¹⁶²

1103. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Bosnia and Herzegovina thanked the Netherlands for its financial and other contributions to the ICTY and stated that it hoped that “others will follow its example and heed the call for material, political, legal and legislative support for the Tribunal”.¹¹⁶³

1104. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Colombia stated that “we encourage the international community to cooperate more actively with the [ICTY] so that it can accomplish its task of bringing to justice those who committed atrocities during the war in the former Yugoslavia”.¹¹⁶⁴

1105. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Costa Rica stated that:

The lack of cooperation [with the ICTY] on the part of some Governments and local authorities, in violation of their international obligations, is scandalous. The authorities of the Republika Srpska, the Federation of Bosnia and Herzegovina and the Federal Republic of Yugoslavia (Serbia and Montenegro) must comply with their international obligations. The authorities of these entities must arrest and transfer to the custody of the Tribunal the accused who are in their territories. These authorities must also cooperate in the gathering of evidence and facilitate the participation of witnesses.¹¹⁶⁵

1106. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Croatia stated that:

Croatia was among the first countries to enact implementing legislation so as to institutionalize its cooperation with the [ICTY]. The Tribunal opened its Liaison Office in Zagreb, and the Croatian Government established its own office for Cooperation with the Tribunal . . .

Croatia does not condition its cooperation with the Tribunal upon the reciprocal cooperation of any other country. Croatia considers cooperation to be a legal, political and moral duty . . .

¹¹⁶² Belarus, Comments of 18 February 1994 on the report of the Working Group on a draft statute for an international criminal court, UN Doc. A/CN.4/458, 18 February 1994, p. 20, § 10.

¹¹⁶³ Bosnia and Herzegovina, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 8.

¹¹⁶⁴ Colombia, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 10.

¹¹⁶⁵ Costa Rica, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 17.

It should be duly noted that the Republic of Croatia recently used its good offices in the transfer of 10 additional Bosnian Croat indictees into the custody of the Tribunal.

... The work of the Tribunal, just like that of the future international criminal court and the international protection of justice in general, depends upon the cooperation of individual countries. It is the duty of the United Nations to encourage such cooperation or to take appropriate steps if needed.¹¹⁶⁶

1107. According to the Report on the Practice of Croatia, a suspect of Croatian nationality was surrendered to the ICTY on the basis that such surrender was not to be considered an "extradition" since the suspect was surrendered to an international tribunal rather than to another State.¹¹⁶⁷

1108. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Germany stated that it wished to "underline again the obligation of States to cooperate with the [ICTY] under Security Council resolution 827 (1993)". It further stated that:

[Germany] has made every effort to contribute to the prosecution of violations of humanitarian law in the Balkans and will continue to do so. Germany was one of those actively supporting the establishment of the [ICTY] right from the beginning. We have continued vigorously to support its work in the political and legal fields. We have also assisted with personnel and financial contributions... The cooperation of German authorities with the Tribunal is regulated in a statute passed by the German parliament in April 1995 [i.e. the Law on Cooperation with the ICTY (1995)]. [The German] Government extradited two men charged with war crimes to the Tribunal. The extradition of Duško Tadić by Germany to The Hague was the very first extradition to the Tribunal by a Member State. Germany has also declared its readiness to execute sentences handed down by the Tribunal. German law enforcement authorities cooperate closely with the Tribunal in order to ensure an effective and transnational prosecution of violations of humanitarian law. The efforts include special protection for those of the many refugees from Bosnia and Herzegovina on German territory who are required by the Tribunal as witnesses.¹¹⁶⁸

1109. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Hungary deplored "the absence of cooperation with the [ICTY] by certain countries and entities" and called upon all members of the international community and all international forums "to continue to support the Tribunal's work and to facilitate the fulfilment of its mandate".¹¹⁶⁹

1110. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Iran stated that:

Since the inception of the [ICTY], the Islamic Republic of Iran has strongly supported its various activities aimed at terminating the culture of impunity.

¹¹⁶⁶ Croatia, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, pp. 11–12.

¹¹⁶⁷ Report on the Practice of Croatia, 1997, Chapter 6.3.

¹¹⁶⁸ Germany, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, pp. 17–18.

¹¹⁶⁹ Hungary, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 19.

Accordingly, [Iran], as have done many other States, has already expressed its readiness to accept the convicted persons so that they can serve their sentences in Iranian prisons. However, the report [of the ICTY] indicates that some of the States or entities of the former Yugoslavia, in particular the so-called Republika Srpska, still resist full cooperation with the Tribunal and refuse to arrest and transfer the main indictees to face justice. Such intractable recalcitrance cannot and should not be tolerated by the international community and thus deserves to be condemned.¹¹⁷⁰

1111. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Italy stated that:

The greatest obstacle [to combat impunity of persons indicted by the ICTY] remains the failure by some States and entities in the former Yugoslavia to comply with their obligation to fully cooperate with the Tribunal, in particular with the Tribunal's orders to arrest and deliver indicted persons to The Hague. This obligation was confirmed and reinforced by the 1995 Dayton Agreement. Italy is of the view that it must be met in the most complete and effective way. Respect for State authority cannot be adduced as a pretext for not cooperating with the Tribunal.

... Italy has consistently supported the activity of the Tribunal and will continue to do so in order to ensure its complete success.¹¹⁷¹

1112. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Malaysia stated that:

The Dayton Peace Agreement, signed in December 1995 obliges its signatories to cooperate fully with the [ICTY] by executing the arrest warrants and delivering the indicted criminals to the Tribunal for trial in The Hague. However, to our utter dismay, the parties to the Agreement, notably the Federal Republic of Yugoslavia (Serbia and Montenegro) and the Serb entity, have persistently refused to meet their obligations, and seem to be getting away with it. The Federal Republic of Yugoslavia has not only defied the orders of the Tribunal, but has failed to ensure the Republika Srpska's compliance with the Dayton Agreement by the execution of arrest warrants issued for more than 40 indictees in its territory. We strongly deplore their failure, which constitutes a blatant violation of the relevant Security Council resolutions and their commitment to the Dayton Agreement and shows a gross disrespect for international law.

Full cooperation with the Tribunal by all parties in bringing the war criminals to justice is a fundamental obligation which must be honoured if genuine stability and lasting peace are to be consolidated in Bosnia and Herzegovina...

[Malaysia] also wishes to emphasize the need for the parties involved in the implementation of the Dayton Peace Agreement to extend their full cooperation to the Tribunal. In this regard, we commend the recent efforts by the Stabilization Force (SFOR) in arresting an indicted criminal in Serb territory.¹¹⁷²

1113. In 1994, during a debate in the Dutch parliament concerning the establishment of the ICTY, the point was made that a State, as regards its cooperation

¹¹⁷⁰ Iran, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 11.

¹¹⁷¹ Italy, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 8.

¹¹⁷² Malaysia, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 14.

with the Tribunal, may not raise the objection of statutes of limitation arising from its national legal system in order to refuse such cooperation. It was further stated that violations of the laws and customs of war as mentioned in Article 8 of the Criminal Law in Wartime Act as amended of the Netherlands were not subject to statutes of limitation.¹¹⁷³

1114. In 1997, when a question was raised by a member of the Dutch parliament concerning the measures taken in order to arrest suspected war criminals, the government of the Netherlands replied that it was in favour of issuing a list of information and photographs of persons indicted by the ICTY to the soldiers of the SFOR mission to ensure that persons suspected of war crimes were brought to trial before the Tribunal. It also stated that the government of the Netherlands had proposed this course of action to NATO on several occasions.¹¹⁷⁴

1115. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, the Netherlands stated that:

The [ICTY] is justified in asking Member States to put more of an effort into arresting indicted war criminals and bringing them before the Tribunal . . . We urge all those involved, directly or indirectly, to live up to their obligations and cooperate in advancing the course of justice.

We also appeal to all Member States to seek ways and means in the realm of their domestic jurisdiction of assisting the Tribunal in every way possible . . . This can be done, for instance, by actively tracing and handing over indicted persons to the Tribunal, by instituting proceedings against alleged war criminals in their domestic courts, and by allowing war criminals convicted by the Tribunal to be imprisoned within their borders.

. . . We wish to remind all States of their obligations, political and legal, under international law and of their duty to cooperate with the Tribunal under the terms of its Statute. We commend the Tribunal for drawing up model arrangements to this particular end and again urge Member States to seek early the conclusion and implementation of such arrangements.¹¹⁷⁵

1116. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Pakistan stated that:

Security Council resolution 827 (1993) called upon "all States" to cooperate with the [ICTY] in order to ensure its effective functioning. In this regard, we appreciate the cooperation extended by Croatia and the central authorities of Bosnia and Herzegovina. However, cooperation from the other parties is not satisfactory. Despite repeated appeals from the international community, one of the parties has not yet taken measures to enact legislation enabling it to cooperate with the Tribunal.

¹¹⁷³ Netherlands, Lower House of Parliament, Debates on the establishment of the International Criminal Tribunal for the former Yugoslavia, 1993–1994 Session, Doc. 23 542, No. 6, p. 3.

¹¹⁷⁴ Netherlands, Lower House of Parliament, Reply by the Minister of Defence to a question, 1996–1997 Session, 27 January 1997, Doc. 581, p. 1193.

¹¹⁷⁵ Netherlands, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 6.

...
[Pakistan] would like to welcome the cooperation extended to the Tribunal by the United Nations Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium (UNTAES) and the Stabilization Force (SFOR).¹¹⁷⁶

1117. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Russia stated that:

We continue to attach great importance to the work of the [ICTY]... However, we absolutely cannot agree with the attempts to describe as "cooperation" with the Tribunal or as "support" for its work preplanned actions for the armed seizure of suspects, in particular under the aegis of the current peacekeeping operation in Bosnia and Herzegovina... The problem of extradition to The Hague of persons indicted of war crimes should be resolved only through cooperation among the parties themselves with the International Tribunal, as was stated in the international documents on the Bosnian settlement, in particular in the decisions of the London Conference of 1996.¹¹⁷⁷

1118. In 1994, in its comments on the report of the Working Group on a draft statute for an international criminal court, Switzerland stated that:

Indeed, the cooperation thus contemplated between the national administrative and judicial authorities on the one hand and the court on the other seems to be essential in order to ensure the effective functioning of the Court. In this connection, however, the draft fails to pronounce on the surrender of nationals... this silence no doubt means that such surrender may be demanded by the court. However, certain countries refuse to extradite their nationals. Would it therefore not be preferable to determine the fate of the nationals of the State concerned by applying to it the principle of *aut dedere aut judicare*?¹¹⁷⁸

1119. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Turkey stated that:

[Turkey welcomes] the continuing cooperative approach [with regard to the ICTY] demonstrated by two States, Bosnia and Herzegovina and Croatia... On the other hand, it is regrettable that this cooperative attitude was not displayed by the other parties.

... Refusal to comply with [the commitments made in the 1995 Dayton Accords], after formal recognition of the Tribunal and the undertaking to cooperate with it, constitutes a violation of the Agreement.¹¹⁷⁹

1120. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, the US stated that:

¹¹⁷⁶ Pakistan, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 15.

¹¹⁷⁷ Germany, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 19.

¹¹⁷⁸ Switzerland, Comments of 8 February 1994 on the report of the Working Group on a draft statute for an international criminal court, UN Doc. A/CN.4/458, 18 February 1994, p. 37.

¹¹⁷⁹ Turkey, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 13.

We reaffirm [the ICTY] President Cassese's request that all States and entities cooperate fully with the [ICTY]. There is no justification for the near-total non-cooperation of Republika Srpska and the Federal Republic of Yugoslavia with the order of the Tribunal, particularly in the apprehension of indictees in areas under their control. The recent cooperation of the Government of Croatia in facilitating the surrender of indictees is commendable, but more cooperation from Croatia is required. The United States will continue to use every tool at its disposal to compel cooperation and to strengthen the capabilities of the [ICTY].

The United States joins with other Member States in continuing to support the work of the war crimes tribunals.¹¹⁸⁰

1121. In 1998, in response to the situation in Kosovo, but also referring to the other conflicts in the former Yugoslavia, the US Congress adopted a resolution by unanimous consent stating that:

The United States should engage with other members of the North Atlantic Treaty Organization and other interested states in a discussion of measures to be taken to apprehend indicted war criminals and persons indicted for crimes against humanity with the objective of concluding a plan of action that will result in these indictees' prompt delivery into the custody of the Tribunal.¹¹⁸¹

1122. The Report on the Practice of the SFRY (FRY) notes that:

In fact, the refusal to amend Article 17 of the FRY Constitution prohibiting extradition of own nationals, or to apply somewhat broader interpretation of its provisions, is an expression of the lack of political will to accept jurisdiction of the [ICTY] and, therefore, a sign of rejection of the obligation to recognise universal jurisdiction based on the Tribunal Statute. This position is clear from numerous statements regarding the calls to the FRY to extradite its nationals indicted by the Prosecutor of the Tribunal for war crimes.¹¹⁸²

III. Practice of International Organisations and Conferences

United Nations

1123. In a resolution on the former Yugoslavia adopted in 1992, the UN Security Council called upon States and international humanitarian organisations

to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council.¹¹⁸³

1124. In its resolution adopted in 1992 on the establishment of the UN Commission of Experts to examine and analyse violations of IHL committed in the

¹¹⁸⁰ US, Statement before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 16.

¹¹⁸¹ US, Congress, S. Con. Resolution 105 on the Sense of Congress Regarding the Culpability of Slobodan Milošević, 17 July 1998, *Congressional Record (Senate)*, pp. S8456–S8458.

¹¹⁸² Report on the Practice of the SFRY (FRY), 1997, Chapter 6.4.

¹¹⁸³ UN Security Council, Res. 771, 13 August 1992, § 5.

territory of the former Yugoslavia and in Bosnia and Herzegovina, the UN Security Council reaffirmed its call upon States and, as appropriate, international humanitarian organizations:

to collate substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions of 12 August 1949 being committed in the territory of the former Yugoslavia, and requests States, relevant United Nations bodies, and relevant organizations to make this information available within thirty days of the adoption of the present resolution and as appropriate thereafter, and to provide other appropriate assistance to the Commission of Experts.¹¹⁸⁴

1125. In its resolution on the establishment of the ICTY adopted in 1993 under Chapter VII of the UN Charter, the UN Security Council decided that:

All States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 29 of the Statute.¹¹⁸⁵

1126. In a resolution on Rwanda adopted in 1994, the UN Security Council called upon States and international humanitarian organisations “to collate substantiated information in their possession or submitted to them relating to grave violations of international humanitarian law committed in Rwanda during the conflict”.¹¹⁸⁶

1127. In 1994, in its resolution on the establishment of an International Tribunal for Rwanda adopted under Chapter VII of the UN Charter, the UN Security Council decided that:

All States shall cooperate fully with the International Tribunal and its organs in accordance with the present resolution and the Statute of the International Tribunal and that consequently all States shall take any measures necessary under their domestic law to implement the provisions of the present resolution and the Statute, including the obligation of States to comply with requests for assistance or orders issued by a Trial Chamber under Article 28 of the Statute, and requests States to keep the Secretary-General informed of such measures.¹¹⁸⁷

1128. In a resolution on Rwanda adopted in 1995, the UN Security Council:

1. *Urges* States to arrest and detain, in accordance with their national law and relevant standards of international law, pending prosecution by the International Tribunal for Rwanda or by the appropriate national authorities, persons found within their territory against whom there is sufficient evidence

¹¹⁸⁴ UN Security Council, Res. 780, 6 October 1992, § 1.

¹¹⁸⁵ UN Security Council, Res. 827, 25 May 1993, § 4.

¹¹⁸⁶ UN Security Council, Res. 935, 1 July 1994, § 2.

¹¹⁸⁷ UN Security Council, Res. 955, 8 November 1994, § 2.

that they were responsible for acts within the jurisdiction of the International Tribunal for Rwanda;

2. *Urges* States who detain persons referred to in paragraph 1 above to inform the Secretary-General and the Prosecutor of the International Tribunal for Rwanda of the identity of the persons detained, the nature of the crimes believed to have been committed, the evidence providing probable cause for the detentions, the date when the persons were detained and the place of detention.¹¹⁸⁸

1129. In its resolution adopted in 1995 authorizing the establishment of IFOR, the UN Security Council reaffirmed that:

All States shall cooperate fully with the International Tribunal for the Former Yugoslavia and its organs in accordance with the provisions of resolution 827 (1993) of 25 May 1993 and the Statute of the International Tribunal, and shall comply with requests for assistance or orders issued by a Trial Chamber under article 29 of the Statute, and calls upon them to allow the establishment of offices of the Tribunal.¹¹⁸⁹

1130. In a resolution adopted in 1997, the UN Security Council reiterated its call to all the States "in the region" (Eastern Slavonia, Baranja, and Western Sirmium of the Republic of Croatia), including the government of Croatia, "to cooperate fully with the International Tribunal for the Former Yugoslavia" and recalled "its encouragement by the increased cooperation of the Government of the Republic of Croatia with the Tribunal".¹¹⁹⁰

1131. In a resolution adopted in 1998 on the situation in Kosovo, the UN Security Council called upon the authorities of the FRY, the leaders of the Kosovo Albanian community and all others concerned "to cooperate fully with the Prosecutor of the [ICTY] in the investigation of possible violations within the jurisdiction of the Tribunal".¹¹⁹¹

1132. In 1995, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council reiterated that "all States shall cooperate fully with the International Tribunal established pursuant to its resolution 827 (1993) and its organs".¹¹⁹²

1133. In 1995, in a statement by its President on the situation in Bosnia and Herzegovina, the UN Security Council recalled "the establishment of the International Tribunal pursuant to its resolution 827 (1993)" and reiterated that "all States shall cooperate fully with the Tribunal and its organs".¹¹⁹³

1134. In a resolution adopted in 1994, the UN General Assembly requested States, as a matter of urgency "to make available to the [ICTY] expert personnel,

¹¹⁸⁸ UN Security Council, Res. 978, 27 February 1995, §§ 1–2.

¹¹⁸⁹ UN Security Council, Res. 1031, 15 December 1995, § 4; see also Res. 1034, 21 December 1995, § 12 and Res. 1037, 15 January 1995, § 20.

¹¹⁹⁰ UN Security Council, Res. 1145, 19 December 1997, § 11.

¹¹⁹¹ UN Security Council, Res. 1199, 23 September 1998, § 13.

¹¹⁹² UN Security Council, Statement by the President, UN Doc. S/PRST/1995/44, 7 September 1995, p. 2.

¹¹⁹³ UN Security Council, Statement by the President, UN Doc. S/PRST/1995/52, 12 October 1995, p. 2.

resources and services to aid in the investigation and prosecution of persons accused of having committed serious violations of international humanitarian law".¹¹⁹⁴ The General Assembly requested all States, in particular the FRY (Serbia and Montenegro), "to cooperate, as required under Security Council resolution 827 (1993), with the [ICTY] in providing evidence for investigations and trials and in surrendering persons accused of crimes within the jurisdiction of the Tribunal".¹¹⁹⁵

1135. In a resolution adopted in 1994 on the rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly called upon all States "to cooperate with the International Tribunal and the Office of the Prosecutor in the investigation and prosecution of persons accused of using rape as a weapon of war and in the provision of protection, counselling and support to victims and witnesses".¹¹⁹⁶

1136. In a resolution adopted in 1994 on the situation of human rights in Rwanda, the UN General Assembly urged States "to cooperate fully" with the ICTR.¹¹⁹⁷

1137. In a resolution adopted in 1995 on the situation of human rights in Rwanda, the UN General Assembly urged all States:

pursuant to Security Council resolution 978 (1995), to exert, without delay, every effort, including arrest and detention, in order to bring those responsible to justice in accordance with international principles of due process, and also urges States to honour their obligations under international law in this regard, particularly under the Convention on the Prevention and Punishment of the Crime of Genocide.¹¹⁹⁸

1138. In a resolution adopted in 1995 on the rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly reminded all States of their obligation

to cooperate with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 and also with the Office of the Prosecutor in the investigation and prosecution of persons accused of using rape as a weapon of war.¹¹⁹⁹

1139. In a resolution adopted in 1995 on the situation of human rights in Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), the UN General Assembly reminded all States of their obligation under Security Council resolution 827 (1993):

to cooperate with the [ICTY], including through compliance with requests for assistance and orders issued by a trial chamber of the Tribunal, and, in this regard,

¹¹⁹⁴ UN General Assembly, Res. 49/196, 23 December 1994, § 9.

¹¹⁹⁵ UN General Assembly, Res. 49/196, 23 December 1994, § 10.

¹¹⁹⁶ UN General Assembly, Res. 49/205, 23 December 1994, § 13.

¹¹⁹⁷ UN General Assembly, Res. 49/206, 23 December 1994, § 6.

¹¹⁹⁸ UN General Assembly, Res. 50/200, 22 December 1995, § 8.

¹¹⁹⁹ UN General Assembly, Res. 50/192, 22 December 1995, § 5.

urges the parties to allow the establishment of offices of the Tribunal in their territories and draws the attention of the Federal Republic of Yugoslavia (Serbia and Montenegro), the Republic of Croatia and the Republic of Bosnia and Herzegovina to their obligation to cooperate with the Tribunal, in particular to arrest, detain and facilitate the transfer to the custody of the Tribunal any and all indicted war criminals who reside in or transit through or are otherwise present in their respective territories.¹²⁰⁰

1140. In a resolution adopted in 1996 on the situation of human rights in Rwanda, the UN General Assembly urged all States:

to cooperate fully, without delay, with the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States, between 1 January and 31 December 1994, taking into account the obligations contained in Security Council resolutions 955 (1994) of 8 November 1994 and 978 (1995) of 27 February 1995.¹²⁰¹

1141. In a resolution adopted in 1996 on rape and abuse of women in the areas of armed conflict in the former Yugoslavia, the UN General Assembly reminded all States:

of their obligation to cooperate with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 in the investigation and prosecution of persons accused of using rape as a weapon of war.¹²⁰²

1142. In a resolution adopted in 1994, the UN Commission on Human Rights welcomed the establishment of the ICTY and urged that "all States provide all necessary and appropriate support to the Tribunal". It further urged all States and responsible authorities to cooperate with the ICTY, "including the provision of substantiated information and the apprehension of persons accused of violations of international humanitarian law".¹²⁰³ It reiterated this appeal in 1995.¹²⁰⁴

1143. In a resolution adopted in 1994 on the rape and abuse of women in the former Yugoslavia, the UN Commission on Human Rights called upon all States that hosted refugees "to provide the necessary assistance to the Commission of Experts in its efforts to interview or otherwise collect evidence for its investigation of the systematic practice of rape of women".¹²⁰⁵

1144. In resolutions on Rwanda adopted in 1995 and 1996, the UN Commission on Human Rights urged all States concerned to cooperate fully with the ICTR,

¹²⁰⁰ UN General Assembly, Res. 50/193, 22 December 1995, § 10.

¹²⁰¹ UN General Assembly, Res. 51/114, 12 December 1996, § 5.

¹²⁰² UN General Assembly, Res. 51/115, 12 December 1996, § 5.

¹²⁰³ UN Commission on Human Rights, Res. 1994/72, 9 March 1994, §§ 16 and 19.

¹²⁰⁴ UN Commission on Human Rights, Res. 1995/89, 8 March 1995, § 23.

¹²⁰⁵ UN Commission on Human Rights, Res. 1994/77, 9 March 1994, § 10.

taking into account the obligations contained in Security Council Resolutions 955 (1994) and 978 (1995).¹²⁰⁶

1145. In a resolution on the former Yugoslavia adopted in 1996, the UN Commission on Human Rights demanded that all States and parties to the 1995 Dayton Accords “meet their obligations to cooperate fully with the Tribunal, as required by Security Council resolution 827 of 25 May 1993, including with respect to surrendering persons sought by the Tribunal”. It also demanded that “all States arrest, detain and facilitate the transfer of . . . persons [indicted by the Tribunal] to the custody of the Tribunal and ensure adequate protection of witnesses who have appeared before the Tribunal”.¹²⁰⁷

1146. In a resolution adopted in 2000 on the situation of human rights in the FRY (Serbia and Montenegro), Croatia and Bosnia and Herzegovina, the UN Commission on Human Rights stressed “continuing obstruction of the work of the International Criminal Tribunal for the Former Yugoslavia”.¹²⁰⁸ The Commission further stated that it:

16. *Notes with grave concern* that Slobodan Milošević and other senior leaders of the Federal Republic of Yugoslavia (Serbia and Montenegro) continue to maintain positions of power despite their indictment for war crimes and crimes against humanity, that the Federal Republic of Yugoslavia (Serbia and Montenegro) has repeatedly ignored the orders of the International Criminal Tribunal for Yugoslavia to transfer indicted war criminals to The Hague for trial and has not transferred even one indictee to The Hague since the inception of the Tribunal;
17. *Stresses* the evidence that the most senior leaders of the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro) are responsible for the continuing refusal of the Federal Republic of Yugoslavia (Serbia and Montenegro) to meet its obligations to cooperate with the Tribunal;
18. *Demands*, in accordance with Security Council resolution 827 (1993) of 25 May 1993 and the Statute of the International Criminal Tribunal for the Former Yugoslavia, that the Federal Republic of Yugoslavia (Serbia and Montenegro) cooperate fully with the Tribunal and, in particular, permit immediate access to all parts of the Federal Republic of Yugoslavia (Serbia and Montenegro), firstly through prompt issuance of requested visas to officials of the Tribunal to conduct investigations;
...
20. *Calls upon* authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) to:
 - (a) Comply fully with the obligation to cooperate with the International Criminal Tribunal for the Former Yugoslavia;
...
36. *Welcomes* the transfer to the International Criminal Tribunal for the Former Yugoslavia by the Government of Croatia of indicted war criminals, including Mladen Naletilic (“Tuta”);

¹²⁰⁶ UN Commission on Human Rights, Res. 1995/91, 8 March 1995, § 5; Res. 1996/76, 23 April 1996, § 5.

¹²⁰⁷ UN Commission on Human Rights, Res. 1996/71, 23 April 1996, §§ 5 and 6.

¹²⁰⁸ UN Commission on Human Rights, Res. 2000/26, 18 April 2000, § 3(e).

- ...
45. *Calls upon* all parties to the Peace Agreement, especially the Government of the Federal Republic of Yugoslavia (Serbia and Montenegro), to meet their obligations to cooperate fully with the International Criminal Tribunal for the Former Yugoslavia, noting that there is no valid constitutional or statutory reason for failure to cooperate, and urges all parties to respect the “rules of the road” for the submission of cases to the Tribunal;
 46. *Urges* all States and the Secretary-General to support the Tribunal to the fullest extent possible, in particular by helping to ensure that persons indicted by the Tribunal stand trial before it, by ensuring that victims and witnesses are given adequate protection and by continuing to make available to the Tribunal adequate resources to aid in the fulfilment of its mandate;
 47. *Welcomes* the close cooperation between the Stabilization Force and the Tribunal that has led to a substantial number of arrests of persons indicted for war crimes, the most recent example of which is the arrest of Momcilo Krajisnik;
 48. *Calls upon* all indicted persons to surrender voluntarily to the custody of the Tribunal, as required by the Peace Agreement;
 49. *Urgently calls once again upon* authorities in the Federal Republic of Yugoslavia (Serbia and Montenegro) and in Bosnia and Herzegovina, including those of the Federation and in particular in the Republika Srpska, to apprehend and surrender for prosecution all persons indicted by the Tribunal, as required by Security Council resolution 827 (1993) of 25 May 1993 and the statement by the President of the Security Council of 8 May 1996, and calls upon all parties to cooperate in the apprehension and surrender of indictees who may be in their territory.¹²⁰⁹

1147. In a resolution adopted in 2001 on the situation of human rights in south-eastern Europe, the UN Commission on Human Rights urged all States and parties to the 1995 Dayton Accords to:

to meet their obligations to cooperate fully with the International Criminal Tribunal for the Former Yugoslavia, as required by Security Council resolution 827 (1993) of 25 May 1993 and all subsequent relevant resolutions, and in particular to comply with their obligations to arrest and transfer to the custody of the Tribunal all those indicted persons present in their territories or under their control.¹²¹⁰

The Commission also called upon the authorities of Bosnia and Herzegovina to “cooperate fully with the International Criminal Tribunal for the Former Yugoslavia, in particular for the apprehension of former Republika Srpska President Radovan Karadžić and former Bosnian Serb General Ratko Mladić”.¹²¹¹ It also welcomed:

the commitment of the Federal Republic of Yugoslavia to cooperate with the International Criminal Tribunal for the Former Yugoslavia, [noted] the first steps it has undertaken in this regard and [urged] all authorities of the Federal Republic of Yugoslavia to comply fully with their obligations to cooperate with the Tribunal,

¹²⁰⁹ UN Commission on Human Rights, Res. 2000/26, 18 April 2000, §§ 16–18, 20(a), 36 and 45–49.

¹²¹⁰ UN Commission on Human Rights, Res. 2001/12, 18 April 2001, § 10.

¹²¹¹ UN Commission on Human Rights, Res. 2001/12, 18 April 2001, § 19.

in particular concerning the apprehension and extradition of persons indicted for war crimes.¹²¹²

The Commission further suggested the appointment of a special representative of the Commission with the task to “closely monitor the situation, paying particular attention to those areas that remain a source of concern, including cooperation with the International Criminal Tribunal for the Former Yugoslavia”.¹²¹³

1148. In a resolution on impunity adopted in 2002, the UN Commission on Human Rights called upon States:

to continue to support the work of the International Criminal Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda and consider ways of supporting the initiatives to establish judicial mechanisms currently under consideration in a few countries in cooperation with the United Nations, and in this regard encourages the continuation or resumption, where needed, of discussions regarding the establishment of appropriate legal frameworks in accordance with international standards of justice, fairness and due process of law.¹²¹⁴

1149. In a resolution adopted in 1995 on the situation in the former Yugoslavia, the UN Sub-Commission on Human Rights welcomed the ICTY decision to implement its first indictments as well as:

the progress made by the Prosecutor of the International Criminal Tribunal and [called] on all States, as required under Security Council resolution 827 (1993) of 23 May 1993, to cooperate with the International Tribunal in providing information and evidence for investigations and trials and in the apprehension and surrender of persons accused of crimes within the jurisdiction of the Tribunal.¹²¹⁵

1150. In a resolution on Rwanda adopted in 1996, the UN Sub-Commission on Human Rights appealed “to the international community to provide the [ICTR] and the Government of Rwanda with the necessary means to enable them to prosecute and try those guilty of . . . genocide and massacres”. It further urged “all States in whose territory there are persons allegedly responsible for acts of genocide to arrest those persons so that they can be . . . extradited at the request of the International Criminal Tribunal or the Rwandan authorities”.¹²¹⁶

Other International Organisations

1151. In 1993 and 1995, the Parliamentary Assembly of the Council of Europe welcomed the establishment of the ICTY, insisting that “the perpetrators of

¹²¹² UN Commission on Human Rights, Res. 2001/12, 18 April 2001, § 25.

¹²¹³ UN Commission on Human Rights, Res. 2001/12, 18 April 2001, § 40(b).

¹²¹⁴ UN Commission on Human Rights, Res. 2002/79, 25 April 2002, § 7.

¹²¹⁵ UN Sub-Commission on Human Rights, Res. 1995/8, 18 August 1995, preamble and § 8.

¹²¹⁶ UN Sub-Commission on Human Rights, Res. 1996/3, 19 August 1996, § 4 and § 6

such offences be brought to justice with the fullest possible co-operation of those representing the sides concerned".¹²¹⁷

1152. In 1997, during plenary discussions in the UN General Assembly on a report of the ICTY, Luxembourg, speaking on behalf of the EU as well as the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia, Slovenia and Cyprus, stated that:

We would like to stress the need for unstinting cooperation by all States and all parties with the [ICTY], to enable it to perform its duties satisfactorily.

... The legal obligation to cooperate with the Tribunal is mentioned in article 29 of its statute. The handing over or transfer of indictees for whom arrest warrants have been issued is essential in order to assure the Tribunal's proper functioning and credibility. The European Union believes that the international community must see to it that article 29 of the statute is fully implemented...

... Whereas Croatia and the central authorities of Bosnia and Herzegovina have complied, to varying degrees, with the Tribunal's orders, the two entities that make up Bosnia and Herzegovina, the Republika Srpska and the Federation of Bosnia and Herzegovina and the Federal Republic of Yugoslavia has not, thus defying the authority of the United Nations...

Nothing can justify the non-execution of arrest warrants. It is essential that States adopt the necessary legislative, administrative and judicial measures to ensure the speedy execution of the orders issued by the Tribunal. Although many States have promulgated enforcement legislation to discharge their responsibilities, the European Union continues to be concerned that, generally speaking, the situation is unsatisfactory.

Moreover, the European Union reaffirms that it is imperative to give proper financial support and to ensure effective personnel management in the Tribunal...

The European Union and its member States will continue to make voluntary contributions to help the Tribunal's work; it will provide full support for its smooth functioning. To that end, a cooperative relationship with the various republics is contingent upon their compliance with the peace accords and their cooperation with the International Tribunal.¹²¹⁸

International Conferences

1153. No practice was found.

IV. Practice of International Judicial and Quasi-judicial Bodies

1154. Several indictments by the ICTY and ICTR have recalled the obligation upon States to cooperate with the international tribunals. For instance, in the *Karadžić and Mladić case* (Review of the Indictments) in 1996, the ICTY Trial Chamber, acting pursuant to Rule 61 of the ICTY Rules of Procedure and Evidence, stated that "the failure to effect personal service of the indictments and

¹²¹⁷ Council of Europe, Parliamentary Assembly, Rec. 1218, 27 September 1993; Res. 1066, 27 September 1995, § 7.

¹²¹⁸ EU, Statement by Luxembourg on behalf of the EU and associated States before the UN General Assembly, UN Doc. A/52/PV.44, 4 November 1997, p. 5.

to execute the warrants of arrest issued against Radovan Karadžić and Ratko Mladić may be ascribed to the refusal of Republika Srpska and to the Federal Republic of Yugoslavia to cooperate with the Tribunal".¹²¹⁹

V. Practice of the International Red Cross and Red Crescent Movement

1155. No practice was found.

VI. Other Practice

1156. In its report to the OSCE on a fact-finding mission to Chechnya in 1996, the International Helsinki Federation for Human Rights recommended that "the OSCE openly and vigorously support in principle the establishment of an appropriate international judicial process for investigating and prosecuting allegations of violations of humanitarian law committed by both parties to the conflict in Chechnya".¹²²⁰

¹²¹⁹ ICTY, *Karadžić and Mladić case*, Review of the Indictments, 11 July 1996, § 101.

¹²²⁰ International Helsinki Federation for Human Rights, Report to the OSCE: Fact-Finding Mission to Chechnya, 1–11 October 1996, Vienna, 16 October 1996, pp. 8–9.

APPENDICES

TREATIES

1864

GC

Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864.

1868

St. Petersburg Declaration

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, St. Petersburg, 29 November–11 December 1868.

1874

Extradition Treaty between Peru and France

Extradition Treaty between Peru and France, Paris, 30 September 1874.

1881

Extradition Treaty between Argentina and Spain

Extradition Treaty between Argentina and Spain, Buenos Aires, 7 May 1881.

1886

Extradition Treaty between Argentina and Belgium

Extradition Treaty between Argentina and Belgium, Brussels, 12 August 1886.

Extradition Treaty between Argentina and Italy

Extradition Treaty between Argentina and Italy, Rome, 16 June 1886.

1889

Extradition Treaty between Argentina and the UK

Extradition Treaty between Argentina and the United Kingdom, Buenos Aires, 22 May 1889.

Montevideo Treaty on International Criminal Law

Treaty on International Criminal Law concluded between Argentina, Bolivia, Paraguay and Uruguay, Montevideo, 23 January 1889.

1893

Extradition Treaty between Argentina and the Netherlands

Extradition Treaty between Argentina and the Netherlands, Buenos Aires, 7 September 1893.

1899

Hague Convention (II)

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

HR

Regulations concerning the Laws and Customs of War on Land, annexed to Convention (II) with Respect to the Laws and Customs of War on Land, The Hague, 29 July 1899.

Hague Convention (III)

Convention (III) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention of 22 August 1864, The Hague, 29 July 1899.

Hague Declaration concerning Asphyxiating Gases

Declaration (IV, 2) concerning Asphyxiating Gases, The Hague, 29 July 1899.

Hague Declaration concerning Expanding Bullets

Declaration (IV, 3) concerning Expanding Bullets, The Hague, 29 July 1899.

1902*Agreement Ending the Boer War*

Agreement between Great Britain and the Orange Free State and the South African Republic as to the Terms of Surrender of the Boer Forces in the Field, Pretoria, 31 May 1902.

1904*Extradition Treaty between Peru and the UK*

Extradition Treaty between Peru and the United Kingdom, Lima, 26 January 1904.

1906*GC*

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 6 July 1906.

1907*Hague Convention (IV)*

Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

HR

Regulations concerning the Laws and Customs of War on Land, annexed to Convention (IV) respecting the Laws and Customs of War on Land, The Hague, 18 October 1907.

Hague Convention (IX)

Hague Convention (IX) concerning Bombardment by Naval Forces in Time of War, The Hague, 18 October 1907.

Hague Convention (X)

Hague Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907.

1919*Extradition Treaty between Brazil and Peru*

Extradition Treaty between Brazil and Peru, Rio de Janeiro, 13 February 1919.

Treaty of Versailles

Treaty of Versailles, Versailles, 28 June 1919.

1921*Convention for the Suppression of Traffic in Women and Children*

International Convention for the Suppression of the Traffic in Women and Children, Geneva, 30 September 1921, amended by a Protocol adopted by the UN General Assembly, Res. 126 (II), 20 October 1947.

1922*Treaty on the Use of Submarines and Noxious Gases in Warfare*

Treaty on the Use of Submarines and Noxious Gases in Warfare between France, Italy, Japan, UK and US, Washington, D.C., 6 February 1922.

1925*Geneva Gas Protocol*

Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, 17 June 1925.

1926*Slavery Convention*

Convention to Suppress the Slave Trade and Slavery, adopted by the League of Nations, Geneva, 25 September 1926, as amended by the Protocol amending the Slavery Convention, adopted by the UN General Assembly, Res. 794 (VIII), 23 October 1953.

1928*Bustamante Code*

Convention on International Private Law, adopted at the 4th Panamerican Conference, Havana, 20 February 1928.

1929*GC*

Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929.

Geneva POW Convention

Convention relative to the Treatment of Prisoners of War, Geneva, 27 July 1929.

1930*Forced Labour Convention*

Convention concerning Forced or Compulsory Labour, ILO Convention No. 29, adopted by the ILO General Conference, Geneva, 28 June 1930.

1932*Extradition Treaty between Peru and Chile*

Extradition Treaty between Peru and Chile, Lima, 5 November 1932.

1933*Inter-American Convention on Extradition*

Inter-American Convention on Extradition, Montevideo, 26 December 1933.

1935*Roerich Pact*

Treaty on the Protection of Artistic and Scientific Institutions and Historic Monuments (Roerich Pact), Washington, D.C., 15 April 1935.

1944*Chicago Convention*

Convention on International Civil Aviation, Chicago, 7 December 1944, as amended by the Protocol relating to an Amendment to the Convention on International Civil Aviation, Montreal, 10 May 1984.

1945*IMT Charter (Nuremberg)*

Charter of the International Military Tribunal for Germany, concluded by the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland, and the Government of the Union of Soviet Socialist Republics, acting in the interests of all the United Nations and by their representatives duly authorized thereto, annexed to the London Agreement, London, 8 August 1945.

London Agreement

Agreement between the Government of the United States of America, the Provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the Prosecution and Punishment of the Major War Criminals of the European Axis, London, 8 August 1945.

UN Charter

Charter of the United Nations, adopted by the Conference on International Organisations, San Francisco, 26 June 1945.

1946*Paris Agreement on Reparation from Germany*

Agreement on Reparation from Germany, on the Establishment of an Inter-Allied Reparation Agency and on the Restitution of Monetary Gold, concluded between Albania, the United States of America, Australia, Belgium, Canada, Denmark, Egypt, France, the United Kingdom of Great Britain and Northern Ireland, Greece, India, Luxembourg, Norway, New Zealand, Netherlands, Czechoslovakia, Union of South Africa and Yugoslavia, Paris, 14 January 1946.

1947*Treaty of Peace between the Allied and Associated Powers and Bulgaria*

Treaty of Peace between the Allied and Associated Powers on the one part and Bulgaria on the other part, Paris, 10 February 1947.

Treaty of Peace between the Allied and Associated Powers and Finland

Treaty of Peace between the Allied and Associated Powers on the one part and Finland on the other part, Paris, 10 February 1947.

Treaty of Peace between the Allied and Associated Powers and Hungary

Treaty of Peace between the Allied and Associated Powers on the one part and Hungary on the other part, Paris, 10 February 1947.

Treaty of Peace between the Allied and Associated Powers and Italy

Treaty of Peace between the Allied and Associated Powers on the one part and Italy on the other part, Paris, 10 February 1947.

Treaty of Peace between the Allied and Associated Powers and Romania

Treaty of Peace between the Allied and Associated Powers on the one part and Romania on the other part, Paris, 10 February 1947.

1948*Brussels Treaty*

Treaty of Economic, Social and Cultural Collaboration and Collective Self-Defence, Brussels, 17 March 1948.

Genocide Convention

Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the UN General Assembly, Res. 260 A (III), 9 December 1948.

1949*Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others*

Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, adopted by the UN General Assembly, Res. 317 (IV), 2 December 1949.

GC I

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949.

GC II

Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949.

GC III

Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.

GC IV

Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

Karachi Agreement

Karachi Agreement Establishing a Cease-fire Line in the State of Jammu and Kashmir concluded between India and Pakistan, Karachi, 27 July 1949.

1950*ECHR*

European Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950, as amended by Protocol No. 11, Strasbourg, 11 May 1994.

Statute of the UNHCR

Statute of the Office of the United Nations High Commissioner for Refugees, adopted by the UN General Assembly, Res. 428 (V), 14 December 1950.

1951*Peace Treaty for Japan*

Treaty of Peace signed between the Allied Powers and Japan, San Francisco, 8 September 1951.

Refugee Convention

Convention relating to the Status of Refugees, adopted by the UN Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons convened pursuant to UN General Assembly Res. 429 (V), Geneva, 28 July 1951, as amended by the 1967 Protocol relating to the Status of Refugees, approved by the UN Economic and Social Council, Res. 1186 (XLI), 18 November 1966, and taken note of by the UN General Assembly, Res. 2198 (XXI), 16 December 1966.

1952*Convention on the Settlement of Matters Arising out of the War and the Occupation*

Convention on the Settlement of Matters Arising out of the War and the Occupation (with Annex), Bonn, 26 May 1952, also known as the Transference Treaty, as amended by Schedule IV to the Protocol on the Termination of the Occupation Régime in the Federal Republic of Germany, Paris, 23 October 1954.

Luxembourg Agreement between Germany and Israel

Agreement between the State of Israel and the Federal Republic of Germany (with Schedule, Annexes, Exchanges of Letters and Protocols), Luxembourg, 10 September 1952.

Protocol to the ECHR

Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Paris, 20 March 1950.

1953*Panmunjom Armistice Agreement*

Agreement between the Commander-in-Chief, United Nations Command, on the one hand, and the Supreme Commander of the Korean People's Army and the Commander of the Chinese People's Volunteers, on the other hand, concerning a Military Armistice in Korea, Panmunjom, 27 July 1953.

Constitution of the IOM

Constitution of the International Organization for Migration, Brussels, as adopted by a resolution dated 5 December 1951, 19 October 1953, as amended on 20 May 1987.

1954*Agreement on Cessation of Hostilities in Viet-Nam*

Agreement on the Cessation of Hostilities in Viet-Nam, concluded between France and the Democratic Republic of Vietnam, Geneva, 20 July 1954.

Hague Convention

Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

Hague Protocol

Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954.

Protocols to the Brussels Treaty on the WEU

Protocols to the 1948 Brussels Treaty establishing the Western European Union, Paris, 23 October 1954, also known as the Paris Agreements on the Western European Union.

1955*Austrian State Treaty*

State Treaty for the Re-establishment of an Independent and Democratic Austria (with Annexes and Maps), concluded between France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, the United States of America and Austria, accession of Australia, Brazil, Canada, Czechoslovakia, Mexico, New Zealand, Poland and Yugoslavia, Vienna, 15 May 1955.

1956*Joint Declaration on Soviet-Japanese Relations*

Joint Declaration by the Union of Soviet Socialist Republics and Japan concerning the restoration of diplomatic relations between the two countries, Moscow, 19 October 1956.

Supplementary Convention on the Abolition of Slavery

Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries convened by the UN Economic and Social Council pursuant to Res. 608 (XXI), Geneva, 7 September 1956.

Yoshida-Stikker Protocol

Protocol between the Government of the Kingdom of the Netherlands and the Government of Japan relating to settlement of the problem concerning certain types of private claims of Dutch nationals, following the Exchange of Letters between the Minister of Foreign Affairs of the Netherlands, Dirk U. Stikker, and the Prime Minister of Japan, Shigeru Yoshida, 7–8 September 1951, Tokyo, 13 March 1956.

1957*Convention concerning the Abolition of Forced Labour*

Convention concerning the Abolition of Forced Labour, ILO Convention No. 105, adopted by the ILO General Conference, Geneva, 25 June 1957.

European Convention on Extradition

European Convention on Extradition, Paris, 13 December 1957.

1959*Agreement concerning Payments on behalf of Norwegian Nationals Victimized by National Socialist Persecution*

Agreement concerning Payments on behalf of Norwegian Nationals Victimized by National Socialist Persecution (with Exchange of Notes) between the Federal Republic of Germany and Norway, Oslo, 7 August 1959.

European Convention on Mutual Assistance in Criminal Matters

European Convention on Mutual Assistance in Criminal Matters, Strasbourg, 20 April 1959.

1961*Single Convention on Narcotic Drugs*

Single Convention on Narcotic Drugs, adopted by the Conference of Plenipotentiaries for the Adoption of a Single Convention on Narcotic Drugs, New York, 30 March 1961.

1962*Extradition Treaty between Venezuela and Chile*

Extradition Treaty between Venezuela and Chile, Santiago de Chile, 2 June 1962.

1963*Protocol 4 to the ECHR*

Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 16 September 1963.

1965*Convention on the Elimination of Racial Discrimination*

International Convention on the Elimination of All Forms of Racial Discrimination, adopted by the UN General Assembly, Res. 2106 A (XX), 21 December 1965.

1966*ICCPR*

International Covenant on Civil and Political Rights, adopted by the UN General Assembly, Res. 2200 A (XXI), 16 December 1966.

ICESCR

International Covenant on Economic, Social and Cultural Rights, adopted by the UN General Assembly, Res. 2200 A (XXI), 16 December 1966.

1968*UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity*

Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted by the UN General Assembly, Res. 2391 (XXIII), 26 November 1968.

1969*ACHR*

American Convention on Human Rights, adopted by the OAS Inter-American Specialized Conference on Human Rights, San José, 22 November 1969, also known as Pact of San José.

Convention Governing Refugee Problems in Africa

Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted by the Sixth Ordinary Session of the OAU Assembly of Heads of State and Government, Addis Ababa, 10 September 1969.

Vienna Convention on the Law of Treaties

Convention on the Law of Treaties, Vienna, 23 May 1969.

1970*Convention on the Illicit Trade in Cultural Property*

Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, adopted by the 16th Session of the UNESCO General Conference, Paris, 14 November 1970.

Hague Convention for the Suppression of Unlawful Seizure of Aircraft

Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, 16 December 1970.

1971*Convention on Psychotropic Substances*

Convention on Psychotropic Substances, Vienna, 21 February 1971.

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation

Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, Montreal, 23 September 1971.

OAS Convention to Prevent and Punish Acts of Terrorism

Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes against Persons and Related Extortion That Are of International Significance, adopted by the Third Special Session of the OAS General Assembly, Washington, D.C., 2 February 1971.

1972*BWC*

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, opened for signature at London, Moscow and Washington, D.C., 10 April 1972.

Extradition Treaty between Argentina and the US

Extradition Treaty between Argentina and the United States of America, Washington, D.C., 21 January 1972, superseded by the 1997 Extradition Treaty between Argentina and the United States of America.

Protocol Amending the 1961 Single Convention on Narcotic Drugs

Protocol Amending the 1961 UN Single Convention on Narcotic Drugs, Geneva, 25 March 1972.

1973*Agreement on Ending the War and Restoring Peace in Viet-Nam*

Agreement on Ending the War and Restoring Peace in Viet-Nam, signed on behalf of the United States of America, the Republic of Viet-Nam, the Democratic Republic of Viet-Nam, and the Provisional Revolutionary Government of South Viet-Nam, Paris, 27 January 1973.

Convention on Crimes against Internationally Protected Persons

Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the UN General Assembly, Res. 3166 (XXVIII), 14 December 1973.

Extradition Treaty between Uruguay and the US

Treaty on Extradition and Co-operation in Penal Matters between Uruguay and the United States of America, Washington, D.C., 6 April 1973.

International Convention on the Suppression and Punishment of the Crime of Apartheid

International Convention on the Suppression and Punishment of the Crime of Apartheid, adopted by the UN General Assembly, Res. 3068 (XXVIII), 30 November 1973.

Protocol to the 1973 Agreement on Ending the War and Restoring Peace in Viet-Nam

Protocol on Ending the War and Restoring Peace in Viet-Nam concerning the Return of Captured Military Personnel and Foreign Civilians and Captured and Detained Vietnamese Personnel, signed on behalf of the United States of America, the Republic of Viet-Nam, the Democratic Republic of Viet-Nam, and

the Provisional Revolutionary Government of South Viet-Nam, Paris, 27 January 1973.

1974

Agreement on Repatriation of Detainees between Bangladesh, India and Pakistan
 Agreement on the Repatriation of Prisoners of War and Civilian Internees
 between Bangladesh, India and Pakistan, New Delhi, 9 April 1974.

Disengagement Agreement between Israel and Syria

Separation of Forces Agreement between Israel and Syria, Geneva, 31 May 1974.

*European Convention on the Non-Applicability of Statutory Limitations to
 Crimes against Humanity and War Crimes*

European Convention on the Non-Applicability of Statutory Limitations to
 Crimes against Humanity and War Crimes, Strasbourg, 25 January 1974.

NATO STANAG 2132

Standardization Agreement 2132, Edition 2, Documentation Relative to
 Medical Evacuation, Treatment and Cause of Death of Patients, North Atlantic
 Treaty Organization, Military Agency for Standardization, Brussels, 7 August
 1974.

1975

Additional Protocol to the European Convention on Extradition

Additional Protocol to the European Convention on Extradition, Strasbourg,
 15 October 1975.

1976

ENMOD Convention

Convention on the Prohibition of Military or Any Other Hostile Use of
 Environmental Modification Techniques, adopted by the UN General
 Assembly, Res. 31/72, 10 December 1976.

1977

AP I

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating
 to the Protection of Victims of International Armed Conflicts (Protocol I),
 Geneva, 8 June 1977.

AP II

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating
 to the Protection of Victims of Non-International Armed Conflicts (Protocol II),
 Geneva, 8 June 1977.

European Convention on the Suppression of Terrorism

European Convention on the Suppression of Terrorism, Strasbourg, 27 January
 1977.

OAU Convention against Mercenarism

Convention for the Elimination of Mercenarism in Africa, adopted by the OAU
 Council of Ministers at its 29th Session, Res. 817 (XXIX), Libreville, 3 July
 1977, OAU Doc. CM/817 (XXIX) Annex II Rev.3 (1977).

1978

Second Additional Protocol to the European Convention on Extradition

Second Additional Protocol to the European Convention on Extradition,
 Strasbourg, 17 March 1978.

1979*Convention on the Elimination of Discrimination against Women*

Convention on the Elimination of All Forms of Discrimination against Women, adopted by the UN General Assembly, Res. 34/180, 18 December 1979.

Convention on the Physical Protection of Nuclear Material

Convention on the Physical Protection of Nuclear Material, Vienna, 26 October 1979.

International Convention against the Taking of Hostages

International Convention against the Taking of Hostages, adopted by the UN General Assembly, Res. 34/146, 17 December 1979.

Peace Treaty between Israel and Egypt

Treaty of Peace between the Government of the State of Israel and the Government of the Arab Republic of Egypt, Washington, D.C., 26 March 1979.

1980*CCW*

Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

Protocol I to the CCW

Protocol on Non-detectable Fragments, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

Protocol II to the CCW

Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

Protocol III to the CCW

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980.

1981*ACHPR*

African Charter on Human and Peoples' Rights, adopted by the Eighteenth Ordinary Session of the OAU Assembly of Heads of State and Government, Nairobi, 27 June 1981, OAU Doc. CAB/LEG/67/3 rev.5.

1983*Protocol 6 to the ECHR*

Protocol No. 6 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the Abolition of the Death Penalty, Strasbourg, 28 April 1983.

1984*Convention against Torture*

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly, Res. 39/46, 10 December 1984.

Protocol Amending the Chicago Convention

Protocol Relating to an Amendment to the Convention on International Civil Aviation, Montreal, 10 May 1984.

Protocol 7 to the ECHR

Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, Strasbourg, 22 November 1984.

1985*Inter-American Convention against Torture*

Inter-American Convention to Prevent and Punish Torture, adopted by the Fifteenth Regular Session of the OAS General Assembly, Res. 783 (XV-O/85), Cartagena de Indias, 9 December 1985.

1987*Agreement to Establish Peace and Normalcy in Sri Lanka*

Indo-Sri Lankan Agreement to Establish Peace and Normalcy in Sri Lanka, Colombo, 29 July 1987.

Esquipulas II Accords

Procedure for the Establishment of a Firm and Lasting Peace in Central America, signed by the Presidents of Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua, Guatemala City, 7 August 1987, annexed to Letter dated 27 August 1987 from the Permanent Representatives of Costa Rica, El Salvador, Guatemala and Nicaragua to the UN addressed to the UN Secretary-General, UN Doc. A/42/521-S/19085, 31 August 1987.

European Convention for the Prevention of Torture

European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Strasbourg, 26 November 1987.

Extradition Treaty between Argentina and Italy

Extradition Treaty between Argentina and Italy, Rome, 9 December 1987.

Extradition Treaty between Spain and Argentina

Treaty between Spain and the Argentine Republic on Extradition and Judicial Assistance in Criminal Matters, Buenos Aires, 3 March 1987.

NATO STANAG 2067

Standardization Agreement 2067, Edition 5, Control and Return of Stragglers, North Atlantic Treaty Organization, Military Agency for Standardization, Brussels, 10 June 1987.

1988*Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation*

Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, Rome, 10 March 1988.

Extradition Treaty between Argentina and Australia

Extradition Treaty between Argentina and Australia, Buenos Aires, 6 October 1988.

Protocol of San Salvador

Additional Protocol to the American Convention on Human Rights in the Area of Social, Economic and Cultural Rights, adopted by the Eighteenth Regular Session of the OAS General Assembly, Res. 907 (XVIII-O/88), San Salvador, 17 November 1988.

1989*Extradition Treaty between Peru and Spain*

Extradition Treaty between Peru and Spain, Madrid, 28 June 1989.

Convention on the Rights of the Child

Convention on the Rights of the Child, adopted by the UN General Assembly, Res. 44/25, 20 November 1989.

Indigenous and Tribal Peoples Convention

Convention concerning Indigenous and Tribal Peoples in Independent Countries, ILO Convention No. 169, adopted by the ILO General Conference, Geneva, 27 June 1989.

Second Optional Protocol to the ICCPR

Second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the Abolition of the Death Penalty, adopted by the UN General Assembly, Res. 44/128, 15 December 1989.

UN Mercenary Convention

International Convention against the Recruitment, Use, Financing and Training of Mercenaries, adopted by the UN General Assembly, Res. 44/34, 4 December 1989.

US-Soviet Memorandum of Understanding on the Pursuit of Nazi War Criminals
Memorandum of Understanding concerning Cooperation in the Pursuit of Nazi War Criminals between the United States of America and the Union of Soviet Socialist Republics, Moscow, 19 October 1989.

1990*African Charter on the Rights and Welfare of the Child*

African Charter on the Rights and Welfare of the Child, adopted by the Sixteenth Ordinary Session of the OAU Assembly of Heads of State and Government, Res. 197 (XVI), Monrovia, 17–20 July 1990, OAU Doc. CAB/LEG/24.9/49 (1990).

Implementation Agreement to the German Unification Treaty

Vereinbarung zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik zur Durchführung und Auslegung des am 31. August 1990 in Berlin unterzeichneten Vertrags zwischen der Bundesrepublik Deutschland und der Deutschen Demokratischen Republik über die Herstellung der Einheit Deutschlands, Bonn, 18 September 1990.

US-Soviet Chemical Weapons Agreement

Agreement between the United States of America and the Union of Soviet Socialist Republics on Destruction and Non-Production of Chemical Weapons and on Measures to Facilitate the Multilateral Convention on Banning Chemical Weapons, Washington, D.C., 1 June 1990.

1992*Convention on Biodiversity*

Convention on Biological Diversity, adopted at the UN Conference on Environment and Development, Rio de Janeiro, 5 June 1992.

Extradition Treaty between Chile and Spain

Treaty on Extradition and Judicial Assistance in Criminal Matters between Chile and Spain, Santiago de Chile, 14 April 1992.

Finnish-Russian Agreement on War Dead

Agreement on Cooperation in Perpetuating the Memory of Finnish Servicemen in Russia and Russian (Soviet) Servicemen in Finland Who Fell in the Second World War, Helsinki, 11 July 1992.

India-Pakistan Declaration on Prohibition of Chemical Weapons

Declaration on the Complete Prohibition of Chemical Weapons between India and Pakistan, New Delhi, 19 August 1992.

1993*CIS Agreement on the Protection of Victims of Armed Conflicts*

Agreement on Primary Measures for Protection of Victims of Armed Conflicts, Commonwealth of Independent States, Moscow, 24 September 1993.

CWC

Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, 13 January 1993.

Extradition Treaty between Australia and Chile

Extradition Treaty between Australia and Chile, Canberra, 6 October 1993.

1994*Convention on the Safety of UN Personnel*

Convention on the Safety of United Nations and Associated Personnel, adopted by the UN General Assembly, Res. 49/59, 9 December 1994.

Extradition Treaty between Peru and Italy

Extradition Treaty between Peru and Italy, Rome, 24 November 1994.

Inter-American Convention on Violence against Women

Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, adopted by the Twenty-fourth Regular Session of the OAS General Assembly, Res. 1257 (XXIV-O/94), Belém do Pará, 9 June 1994.

Inter-American Convention on the Forced Disappearance of Persons

Inter-American Convention on the Forced Disappearance of Persons, adopted by the Twenty-fourth Regular Session of the OAS General Assembly, Res. 1256 (XXIV-O/94), Belém do Pará, 9 June 1994.

Quadripartite Agreement on Georgian Refugees and IDPs

Quadripartite Agreement on Voluntary Return of Refugees and Displaced Persons in the Republic of Georgia, between the Abkhaz and Georgian Sides, the Russian Federation and UNHCR, Moscow, 4 April 1994, annexed to Letter dated 5 April 1994 from the permanent representative of Georgia to the UN addressed to the President of the Security Council, UN Doc. S/1994/397, 5 April 1994, Annex II.

1995*Agreement between the Government of Croatia and UNCRO*

Agreement between the Government of the Republic of Croatia and the United Nations Peace Forces (UNPF)-United Nations Confidence Restoration Operation (UNCRO) on temporary measures in the areas formerly known as "Sector North" and "Sector South", Zagreb, 6 August 1995, annexed to Letter dated 7 August 1995 from the UN Secretary-General addressed to the President of the UN Security Council, UN Doc. S/1995/666, 7 August 1995, Annex III.

Agreement on Human Rights annexed to the Dayton Accords

General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 6, Agreement on Human Rights, signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska, Dayton, 22 November 1995.

Agreement on the Military Aspects of the Peace Settlement annexed to the Dayton Accords

General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 1A, Military Aspects of the Peace Settlement, signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska, Dayton, 22 November 1995.

Agreement on Refugees and Displaced Persons annexed to the Dayton Accords

General Framework Agreement for Peace in Bosnia and Herzegovina, Annex 7, Agreement on Refugees and Displaced Persons, signed by the Republic of Bosnia and Herzegovina, the Federation of Bosnia and Herzegovina and the Republika Srpska, Dayton, 22 November 1995.

Dayton Accords

General Framework Agreement for Peace in Bosnia and Herzegovina, initialled in Dayton, 21 November 1995, signed in Paris, 14 December 1995.

Protocol IV to the CCW

Protocol on Blinding Laser Weapons, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Vienna, 13 October 1995.

US-Germany Agreement concerning Final Benefits to Certain US Nationals Who Were Victims of National Socialist Measures of Persecution

Agreement between the Government of the Federal Republic of Germany and the Government of the United States of America concerning Final Benefits to Certain United States Nationals Who Were Victims of National Socialist Measures of Persecution, Bonn, 19 September 1995, also known as the Prinz Agreement.

1996

Agreement on the Normalization of Relations between Croatia and the FRY

Agreement on Normalization of Relations between the Republic of Croatia and the Federal Republic of Yugoslavia, Belgrade, 23 August 1996.

Amended Protocol II to the CCW

Protocol on Prohibitions on the Use of Mines, Booby-Traps and Other Devices, as amended, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 3 May 1996.

Israel-Lebanon Ceasefire Understanding

Israel-Lebanon Ceasefire Understanding, concluded between the United States of America, Israel and Lebanon, in consultation with Syria, 26 April 1996, also known as the Grapes of Wrath Understanding.

1997

Agreement of the Joint Working Group on Operational Procedures of Return

Agreement of the Joint Working Group on the Operational Procedures of Return between Croatia, UNTAES and UNHCR, Osijek, 23 April 1997, annexed to Letter dated 25 April 1997 from the Permanent Representative of Croatia to the UN addressed to the President of the UN Security Council, UN Doc. S/1997/341, 28 April 1997.

Estonian-Finnish Agreement on War Dead

Agreement on Cooperation in Acknowledging the Memory of the War Victims, concluded between Estonia and Finland, Parnu, 16 August 1997.

Extradition Treaty between Argentina and the US

Extradition Treaty between the Republic of Argentina and the United States of America, Buenos Aires, 10 June 1997.

Ottawa Convention

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, 18 September 1997.

1998*Draft Convention on Forced Disappearance*

Draft International Convention on the Protection of all Persons from Forced Disappearance, reprinted in Report of the sessional working group on the administration of justice, UN Doc. E/CN.4/Sub.2/1998/19, 19 August 1998, Annex.

ICC Statute

Statute of the International Criminal Court, adopted by the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome, 17 July 1998, UN Doc. A/CONF.183/9.

1999*Convention on the Worst Forms of Child Labour*

Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour, ILO Convention No. 182, adopted by the ILO General Conference, Geneva, 17 June 1999.

NATO STANAG 2070

Standardization Agreement 2070, Edition 4, Emergency War Burial Procedures, North Atlantic Treaty Organization, Military Agency for Standardization, Brussels, 6 April 1999.

Second Protocol to the 1954 Hague Convention

Second Protocol for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999.

2000*Agreement on the Foundation "Remembrance, Responsibility and the Future"*

Agreement between the Government of the United States of America and the Government of the Federal Republic of Germany concerning the Foundation "Remembrance, Responsibility and the Future", Berlin, 17 July 2000.

Austrian-Belarusian Agreement concerning the Austrian Reconciliation Fund

Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Republik Belarus über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 24 October 2000.

Austrian-Czech Agreement concerning the Austrian Reconciliation Fund

Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Tschechischen Republik über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 24 October 2000.

Austrian-Hungarian Agreement concerning the Austrian Reconciliation Fund

Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Republik Ungarn über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 24 October 2000.

Austrian-Polish Agreement concerning the Austrian Reconciliation Fund
Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Republik Polen über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 24 October 2000.

Austrian-Russian Agreement concerning the Austrian Reconciliation Fund
Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Russischen Föderation über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 27 November 2000.

Austrian-Ukrainian Agreement concerning the Austrian Reconciliation Fund
Abkommen zwischen der Österreichischen Bundesregierung und der Regierung der Ukraine über die Zusammenarbeit bei den freiwilligen Leistungen der Republik Österreich an ehemalige Sklaven- und Zwangsarbeiter des nationalsozialistischen Regimes, Vienna, 24 October 2000.

Austrian-US Executive Agreement concerning the Austrian Reconciliation Fund

Agreement between the Austrian Federal Government and the Government of the United States of America concerning the Austrian Fund "Reconciliation, Peace and Cooperation", Vienna, 24 October 2000.

Optional Protocol on Child Trade, Prostitution and Pornography

Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, adopted by the UN General Assembly, Res. 54/263, 25 May 2000, Annex II.

Optional Protocol on the Involvement of Children in Armed Conflicts

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts, adopted by the UN General Assembly, Res. 54/263, 25 May 2000, Annex I.

Peace Agreement between Eritrea and Ethiopia

Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the State of Eritrea, Algiers, 12 December 2000, also known as the Algiers Agreement.

Protocol on Trafficking in Persons

Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, adopted by the UN General Assembly, Res. 55/25, 15 November 2000, Annex II.

Protocol 12 to the ECHR

Protocol No. 12 to the European Convention for the Protection of Human Rights and Fundamental Freedoms concerning the general prohibition of discrimination, Rome, 4 November 2000.

2001

Amendment to Article 1 of the 1980 CCW

Amendment to Article I of the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (CCW), Geneva, 21 December 2001.

Annex A to the Austrian-US Agreement concerning the Austrian General Settlement Fund

Joint Settlement Statement on Holocaust Restitution, 17 January 2001, together with Diplomatic Note No. 14 from the US to Austria, Vienna, 23 January 2001 and Annexes A, B and C to the Agreement.

Washington Agreement between France and the US Concerning Payments for Certain Losses Suffered During World War II

Agreement between the Government of the United States of America and the Government of France Concerning Payments for Certain Losses Suffered During World War II, Washington, 18 January 2001.

2002

SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution

South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, Kathmandu, 5 January 2002.

Agreement on the Special Court for Sierra Leone

Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, Freetown, 16 January 2002, annexed to Letter dated 6 March 2002 from the UN Secretary-General to the President of the Security Council, UN Doc. S/2002/246, 8 March 2002, p. 17.

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the UN General Assembly, Res. 57/199, 18 December 2002.

Statute of the Special Court for Sierra Leone

Statute of the Special Court for Sierra Leone, annexed to the 2002 Agreement on the Special Court for Sierra Leone, Freetown, 16 January 2002, annexed to Letter dated 6 March 2002 from the UN Secretary-General to the President of the UN Security Council, UN Doc. S/2002/246, 8 March 2002, p. 29.

2003

Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights

Protocol to the African Charter on Human and Peoples Rights on the Establishment of an African Court on Human and Peoples' Rights, signed at Ouagadougou on 10 June 1998.

Protocol to the ACHPR on the Rights of Women in Africa

Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, Maputo, 11 July 2003.

STATUS OF RATIFICATIONS (as of 21 April 2004)

Country	1925 Geneva Gas Protocol	1935 Roerich Pact	1949 Geneva Conventions	1954 Hague Convention	1954 Hague Protocol	1966 ICESCR
Afghanistan	09.12.1986		26.09.1956			24.01.1983
Albania	20.12.1989		27.05.1957	20.12.1960	20.12.1960	04.10.1991
Algeria	27.01.1992		20.06.1960			12.09.1989
Andorra			17.09.1993			
Angola	08.11.1990		20.09.1984			10.01.1992
Antigua and Barbuda	27.04.1989		06.10.1986			
Argentina	12.05.1969		18.09.1956	22.03.1989		08.08.1986
Armenia			07.06.1993	05.09.1993	05.09.1993	13.09.1993
Australia	23.05.1930		14.10.1958	19.09.1984		10.12.1975
Austria	09.05.1928		27.08.1953	25.03.1964	25.03.1964	10.09.1978
Azerbaijan			01.06.1993	20.09.1993	20.09.1993	13.08.1992
Bahamas			11.07.1975			
Bahrain	09.12.1988		30.11.1971			
Bangladesh	20.05.1989		04.04.1972			05.10.1998
Barbados	16.07.1976		10.09.1968	09.04.2002		05.01.1973
Belarus			03.08.1954	07.05.1957	07.05.1957	12.11.1973
Belgium	04.12.1928		03.09.1952	16.09.1960	16.09.1960	21.04.1983
Belize			29.06.1984			
Benin	09.12.1986		14.12.1961			12.03.1992
Bhutan	19.02.1979		10.01.1991			
Bolivia	13.08.1985		10.12.1976			12.08.1982
Bosnia and Herzegovina			31.12.1992	12.07.1993	12.07.1993	01.09.1993
Botswana			29.03.1968	03.01.2002		
Brazil	28.08.1970	05.08.1936	29.06.1957	12.09.1958	12.09.1958	24.01.1992
Brunei			14.10.1991			
Darussalam						
Bulgaria	07.03.1934		22.07.1954	07.08.1956	09.10.1958	21.09.1970
Burkina Faso	03.03.1971		07.11.1961	18.12.1969	04.02.1987	04.01.1999
Burundi			27.12.1971			09.05.1990
Cambodia	15.03.1983		08.12.1958	04.04.1962	04.04.1962	26.05.1992
Cameroon	20.07.1989		16.09.1963	12.10.1961	12.10.1961	27.06.1984
Canada	06.05.1930		14.05.1965	11.12.1998		19.05.1976
Cape Verde	15.10.1991		11.05.1984			06.08.1993

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Country	1925 Geneva Gas Protocol	1935 Roerich Pact	1949 Geneva Conventions	1954 Hague Convention	1954 Hague Protocol	1966 ICESCR
Central African Republic	31.07.1970		01.08.1966			08.05.1981
Chad			05.08.1970			09.06.1995
Chile	20.07.1935	08.09.1936	12.10.1950			10.02.1972
China	13.07.1952		28.12.1956	05.01.2000	05.01.2000	27.03.2001
Colombia		20.02.1937	08.11.1961	18.06.1998	18.06.1998	29.10.1969
Comoros			21.11.1985			
Congo			04.02.1967			05.10.1983
Congo (Dem. Rep. of)			24.02.1961	18.04.1961	18.04.1961	01.11.1976
Cook Islands			11.06.2001			
Costa Rica			15.10.1969	03.06.1998	03.06.1998	29.11.1968
Côte d'Ivoire	27.07.1970		28.12.1961	24.01.1980		26.03.1992
Croatia			11.05.1992	06.07.1992	06.07.1992	12.10.1992
Cuba	24.06.1966	26.08.1935	15.04.1954	26.11.1957	26.11.1957	
Cyprus	12.12.1966		23.05.1962	09.09.1964	09.09.1964	02.04.1969
Czech Republic	16.08.1938		05.02.1993	26.03.1993	26.03.1993	22.02.1993
Denmark	05.05.1930		27.06.1951	26.03.2003	26.03.2003	06.01.1972
Djibouti			06.03.1978			05.11.2002
Dominica			28.09.1981			17.06.1993
Dominican Republic	08.12.1970	02.11.1936	22.01.1958	05.01.1960	21.03.2002	04.01.1978
Ecuador	16.09.1970		11.08.1954	02.10.1956	08.02.1961	06.03.1969
Egypt	16.12.1928		10.11.1952	17.08.1955	17.08.1955	14.01.1982
El Salvador		01.05.1936	17.06.1953	19.07.2001	27.03.2002	30.11.1979
Equatorial Guinea	20.05.1989		24.07.1986	19.11.2003		25.09.1987
Eritrea			14.08.2000			17.04.2001
Estonia	28.08.1931		18.01.1993	04.04.1995		21.10.1991
Ethiopia	07.10.1935		02.10.1969			11.06.1993
Fiji	20.03.1973		09.08.1971			
Finland	26.06.1929		22.02.1955	16.09.1994	16.09.1994	19.08.1975
France	10.05.1926		28.06.1951	07.06.1957	07.06.1957	04.11.1980
Gabon			26.02.1965	04.12.1961	04.12.1961	21.01.1983
Gambia	05.11.1966		20.10.1966			29.12.1978
Georgia			14.09.1993	04.11.1992	04.11.1992	03.05.1994
Germany	25.04.1929		03.09.1954	11.08.1967	11.08.1967	17.12.1973
Ghana	03.05.1967		02.08.1958	25.07.1960	25.07.1960	07.09.2000
Greece	30.05.1931		05.06.1956	09.02.1981	09.02.1981	16.05.1985
Grenada	03.01.1989		13.04.1981			06.09.1991
Guatemala	03.05.1983	16.09.1936	14.05.1952	02.10.1985	19.05.1994	19.05.1988
Guinea			11.07.1984	20.09.1960	11.12.1961	24.01.1978
Guinea- Bissau	20.05.1989		21.02.1974			02.07.1992
Guyana			22.07.1968			15.02.1977
Haiti			11.04.1957			
Holy See	18.10.1966		22.02.1951	24.02.1958	24.02.1958	

(cont.)

Country	1925 Geneva Gas Protocol	1935 Roerich Pact	1949 Geneva Conventions	1954 Hague Convention	1954 Hague Protocol	1966 ICESCR
Honduras			31.12.1965	25.10.2002	25.10.2002	17.02.1981
Hungary	11.10.1952		03.08.1954	17.05.1956	16.08.1956	17.01.1974
Iceland	02.11.1967		10.08.1965			22.08.1979
India	09.04.1930		09.11.1950	16.06.1958	16.06.1958	10.04.1979
Indonesia	20.01.1971		30.09.1958	10.01.1967	26.07.1967	
Iran (Islamic Rep. of)	05.11.1929		20.02.1957	22.06.1959	22.06.1959	24.06.1975
Iraq	08.09.1931		14.02.1956	21.12.1967	21.12.1967	25.01.1971
Ireland	29.08.1930		27.09.1962			08.12.1989
Israel	20.02.1969		06.07.1951	03.10.1957	01.04.1958	03.10.1991
Italy	03.04.1928		17.12.1951	09.05.1958	09.05.1958	15.09.1978
Jamaica	28.07.1970		20.07.1964			03.10.1975
Japan	21.05.1970		21.04.1953			21.06.1979
Jordan	20.07.1977		29.05.1951	02.10.1957	02.10.1957	28.05.1975
Kazakhstan			05.05.1992	14.03.1997	14.03.1997	
Kenya	06.07.1970		20.09.1966			01.05.1972
Kiribati			05.01.1989			
Korea (Dem. People's Rep. of)	04.01.1989		27.08.1957			14.09.1981
Korea (Rep. of)	04.01.1989		16.08.1966			10.04.1990
Kuwait	15.12.1971		02.09.1967	06.06.1969	11.02.1970	21.05.1996
Kyrgyzstan			18.09.1992	03.07.1995		07.10.1994
Lao (People's Dem. Rep.)	20.05.1989		29.10.1956			
Latvia	03.06.1931		24.12.1991	19.12.2003	19.12.2003	14.04.1992
Lebanon	17.04.1969		10.04.1951	01.06.1960	01.06.1960	03.11.1972
Lesotho	10.03.1972		20.05.1968			09.09.1992
Liberia	17.06.1927		29.03.1954			
Libyan Arab Jamahiriya	29.12.1971		22.05.1956	19.11.1957	19.11.1957	15.05.1970
Liechtenstein	06.09.1991		21.09.1950	28.04.1960	28.04.1960	10.12.1998
Lithuania	15.06.1933		03.10.1996	27.07.1998	27.07.1998	20.11.1991
Luxembourg	01.09.1936		01.07.1953	29.09.1961	29.09.1961	18.08.1983
Macedonia			01.09.1993	30.04.1997	30.04.1997	18.01.1994
Madagascar	02.08.1967		18.07.1963	03.11.1961	03.11.1961	22.09.1971
Malawi	14.09.1970		05.01.1968			22.12.1993
Malaysia	10.12.1970		24.08.1962	12.12.1960	12.12.1960	
Maldives	27.12.1966		18.06.1991			
Mali			24.05.1965	18.05.1961	18.05.1961	16.07.1974
Malta	21.09.1964		22.08.1968			13.09.1990
Marshall Islands						
Mauritania			30.10.1962			
Mauritius	12.03.1968		18.08.1970			12.12.1973
Mexico	28.05.1932	02.10.1936	29.10.1952	07.05.1956	07.05.1956	23.03.1981

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Country	1925 Geneva Gas Protocol	1935 Roerich Pact	1949 Geneva Conventions	1954 Hague Convention	1954 Hague Protocol	1966 ICESCR
Micronesia			19.09.1995			
Moldova (Rep. of)			24.05.1993	09.12.1999	09.12.1999	26.01.1993
Monaco	06.01.1967		05.07.1950	10.12.1957	10.12.1957	28.08.1997
Mongolia	06.12.1968		20.12.1958	04.11.1964		18.11.1974
Morocco	13.10.1970		26.07.1956	30.08.1968	30.08.1968	03.05.1979
Mozambique			14.03.1983			
Myanmar			25.08.1992	10.02.1956	10.02.1956	
Namibia			22.08.1991			28.11.1994
Nauru						
Nepal	09.05.1969		07.02.1964			14.05.1991
Netherlands	30.10.1930		03.08.1954	14.10.1958	14.10.1958	11.12.1978
New Zealand	24.05.1930		02.05.1959			28.12.1978
Nicaragua	05.10.1990		17.12.1953	25.11.1959	25.11.1959	12.03.1980
Niger	05.04.1967		21.04.1964	06.12.1976	06.12.1976	07.03.1986
Nigeria	15.10.1968		20.06.1961	05.06.1961	05.06.1961	29.07.1993
Niue						
Norway	27.07.1932		03.08.1951	19.09.1961	19.09.1961	13.09.1972
Oman			31.01.1974	26.10.1977		
Pakistan	15.04.1960		12.06.1951	27.03.1959	27.03.1959	
Palau			25.06.1996			
Panama	04.12.1970		10.02.1956	17.07.1962	08.03.2001	08.03.1977
Papua New Guinea	02.09.1980		26.05.1976			
Paraguay	22.10.1933		23.10.1961			10.06.1992
Peru	13.08.1985		15.02.1956	21.07.1989	21.07.1989	28.04.1978
Philippines	08.06.1973		06.10.1952			07.06.1974
Poland	04.02.1929		26.11.1954	06.08.1956	06.08.1956	18.03.1977
Portugal	01.07.1930		14.03.1961	04.08.2000		31.07.1978
Qatar	18.10.1976		15.10.1975	31.07.1973		
Romania	23.08.1929		01.06.1954	21.03.1958	21.03.1958	09.12.1974
Russian Federation	05.04.1928		10.05.1954	04.01.1957	04.01.1957	16.10.1973
Rwanda	11.05.1964		05.05.1964	28.12.2000		16.04.1975
Saint Kitts and Nevis	27.04.1989		14.02.1986			
Saint Lucia	21.12.1988		18.09.1981			
Saint Vincent and the Grenadines	24.03.1999		01.04.1981			09.11.1981
Samoa			23.08.1984			
San Marino			29.08.1953	09.02.1956	09.02.1956	18.10.1985
São Tomé and Príncipe			21.05.1976			
Saudi Arabia	27.01.1971		18.05.1963	20.01.1971		
Senegal	15.06.1977		18.05.1963	17.06.1987	17.06.1987	13.02.1978
Seychelles			08.11.1984	08.10.2003		05.05.1992
Sierra Leone	20.03.1967		10.06.1965			23.08.1996
Singapore			27.04.1973			

(cont.)

Country	1925 Geneva Gas Protocol	1935 Roerich Pact	1949 Geneva Conventions	1954 Hague Convention	1954 Hague Protocol	1966 ICESCR
Slovakia	16.08.1938		02.04.1993	31.03.1993	31.03.1993	28.05.1993
Slovenia			26.03.1992	28.10.1992	05.11.1992	06.07.1992
Solomon Islands	01.06.1981		06.07.1981			17.03.1982
Somalia			12.07.1962			24.01.1990
South Africa	24.05.1930		31.03.1952	18.12.2003		
Spain	22.08.1929		04.08.1952	07.07.1960	26.06.1992	27.04.1977
Sri Lanka	20.01.1954		28.02.1959			11.06.1980
Sudan	17.12.1980		23.09.1957	23.07.1970		18.03.1986
Suriname			13.10.1976			28.12.1976
Swaziland	23.07.1991		28.06.1973			26.03.2004
Sweden	25.04.1930		28.12.1953	22.01.1985	22.01.1985	06.12.1971
Switzerland	12.07.1932		31.03.1950	15.05.1962	15.05.1962	18.06.1992
Syrian Arab Republic	17.12.1968		02.11.1953	06.03.1958	06.03.1958	21.04.1969
Tajikistan			13.01.1993	28.08.1992	28.08.1992	04.01.1999
Tanzania (United Rep. of)	22.04.1963		12.12.1962	23.09.1971		11.06.1976
Thailand	06.06.1931		29.12.1954	02.05.1958	02.05.1958	05.09.1999
Timor-Leste			08.05.2003			16.04.2003
Togo	05.04.1971		06.01.1962			24.05.1984
Tonga	19.07.1971		13.04.1978			
Trinidad and Tobago	31.08.1962		24.09.1963			08.12.1978
Tunisia	12.07.1967		04.05.1957	28.01.1981	28.01.1981	18.03.1969
Turkey	05.10.1929		10.02.1954	15.12.1965	15.12.1965	23.09.2003
Turkmenistan			10.04.1992			01.05.1997
Tuvalu			19.02.1981			
Uganda	24.05.1965		18.05.1964			21.01.1987
Ukraine	07.08.2003		03.08.1954	06.02.1957	06.02.1957	12.11.1973
United Arab Emirates			10.05.1972			
United Kingdom	09.04.1930		23.09.1957			20.05.1976
United States of America	10.04.1975	13.07.1935	02.08.1955			
Uruguay	12.04.1977		05.03.1969	24.09.1999	24.09.1999	01.04.1970
Uzbekistan			08.10.1993	21.02.1996		28.09.1995
Vanuatu			27.10.1982			
Venezuela	08.02.1928	11.11.1936	13.02.1956			10.05.1978
Viet Nam	15.12.1980		28.06.1957			24.09.1982
Yemen	17.03.1971		16.07.1970	06.02.1970	06.02.1970	09.02.1987
Yugoslavia	12.04.1929		16.10.2001	11.09.2001	11.09.2001	12.03.2001
Zambia			19.10.1966			10.04.1984
Zimbabwe			07.03.1983	09.06.1998		13.05.1991
Total	133	10	191	109	88	149

Country	1966 ICCPR	1965 Convention on the Elimination of Racial Discrimination	1968 UN Convention on the Non- Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Afghanistan	24.01.1983	06.07.1983	22.07.1983		26.03.1975	22.10.1985
Albania	04.10.1991	11.05.1994	19.05.1971	13.06.2002	11.08.1992	
Algeria	12.09.1989	14.02.1972		24.06.1974	22.07.2001	19.12.1991
Andorra						
Angola	10.01.1992			07.11.1991		
Antigua and Barbuda		25.10.1988			29.01.2003	25.10.1988
Argentina	08.08.1986	02.10.1968	26.08.2003	11.01.1973	05.12.1979	20.03.1987
Armenia	23.06.1993	23.06.1993	23.06.1993	05.09.1993	07.06.1994	15.05.2002
Australia	13.08.1980	30.09.1975		30.10.1989	05.10.1977	07.09.1984
Austria	10.09.1978	09.05.1972			10.08.1973	17.01.1990
Azerbaijan	13.08.1992	16.08.1996	16.08.1996	25.08.1999		
Bahamas		05.08.1975		09.10.1997	26.11.1986	
Bahrain		27.03.1990			28.10.1988	
Bangladesh	06.09.2000	11.06.1979		09.12.1987	13.03.1985	03.10.1979
Barbados	05.01.1973	08.11.1972		10.04.2002	16.02.1973	
Belarus	12.11.1973	08.04.1969	08.05.1969	28.04.1988	26.03.1975	07.06.1988
Belgium	21.04.1983	07.08.1975			15.03.1979	12.07.1982
Belize	10.06.1996	14.11.2001		26.01.1990	20.10.1986	
Benin	12.03.1992	30.11.2001			25.04.1975	30.06.1986
Bhutan				26.09.2002	08.06.1978	
Bolivia	12.08.1982	22.09.1970	06.10.1983	04.10.1976	30.10.1975	
Bosnia and Herzegovina	01.09.1993	16.07.1993	01.09.1993	12.07.1993	15.08.1994	
Botswana	08.09.2000	20.02.1974			05.02.1992	
Brazil	24.01.1992	27.03.1968		16.02.1973	27.02.1973	12.10.1984
Brunei					31.01.1991	
Darussalam						
Bulgaria	21.09.1970	08.08.1966	21.05.1969	15.09.1971	02.08.1972	31.05.1978
Burkina Faso	04.01.1999	18.07.1974		07.04.1987	17.04.1991	
Burundi	09.05.1990	27.10.1977				
Cambodia	26.05.1992	28.11.1983		26.09.1972	09.03.1983	
Cameroon	27.06.1984	24.06.1971	06.10.1972	24.05.1972		
Canada	19.05.1976	14.10.1970		28.03.1978	18.09.1972	11.06.1981
Cape Verde	06.08.1993	03.10.1979			20.10.1977	03.10.1979
Central African Republic	08.05.1981	16.03.1971		01.02.1972		
Chad	09.06.1995	17.08.1977				
Chile	10.02.1972	20.10.1971			22.04.1980	26.04.1994
China		29.12.1981		28.11.1989	15.11.1984	
Colombia	29.10.1969	02.09.1981		24.05.1988	19.12.1983	
Comoros						

(cont.)

Country	1966 ICCPR	1965 Conven- tion on the Elim- ination of Racial Discrimi- nation	1968 UN Convention on the Non- Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Congo	05.10.1983	11.07.1988			23.10.1978	
Congo (Dem. Rep. of)	01.11.1976	21.04.1976		23.09.1974	16.09.1975	
Cook Islands						
Costa Rica	29.11.1968	16.01.1967		06.03.1996	17.12.1973	07.02.1996
Côte d'Ivoire	26.03.1992	04.01.1973		30.10.1990		
Croatia	12.10.1992	12.10.1992	12.10.1992	06.07.1992	08.10.1991	
Cuba		15.02.1972	13.09.1972	30.01.1980	21.04.1976	10.04.1978
Cyprus	02.04.1969	21.04.1967		19.10.1979	06.11.1973	12.04.1978
Czech Republic	22.02.1993	22.02.1993	22.02.1993	26.03.1993	05.04.1993	22.02.1993
Denmark	06.01.1972	09.12.1971		26.03.2003	01.03.1973	19.04.1978
Djibouti	05.11.2002					
Dominica	17.06.1993				08.11.1978	09.11.1992
Dominican Republic	04.01.1978	25.05.1983		07.03.1973	23.02.1973	
Ecuador	06.03.1969	22.09.1966		24.03.1971	12.03.1975	
Egypt	14.01.1982	01.05.1967		05.04.1973		01.04.1982
El Salvador	30.11.1979	30.11.1979		20.02.1978	31.12.1991	
Equatorial Guinea	25.09.1987	08.10.2002			16.01.1989	
Eritrea	22.01.2002	31.07.2001				
Estonia	21.10.1991	21.10.1991	21.10.1991	27.10.1995	21.06.1993	
Ethiopia	11.06.1993	23.06.1976			26.05.1975	
Fiji		11.01.1973			01.10.1973	
Finland	19.08.1975	14.07.1970		14.06.1999	04.02.1974	12.05.1978
France	04.11.1980	28.07.1971		07.01.1997	27.09.1984	
Gabon	21.01.1983	29.02.1980		29.08.2003		
Gambia	22.03.1979	29.12.1978	29.12.1978		21.11.1991	
Georgia	03.05.1994	02.06.1999	31.03.1995	04.11.1992	22.05.1996	
Germany	17.12.1973	16.05.1969			07.04.1983	24.05.1983
Ghana	07.09.2000	08.09.1966	07.09.2000		06.06.1975	22.06.1978
Greece	05.05.1997	18.06.1970		05.06.1981	10.12.1975	23.08.1983
Grenada	06.09.1991			10.09.1992	22.10.1986	
Guatemala	05.05.1992	18.01.1983		14.01.1985	19.09.1973	21.03.1988
Guinea	24.01.1978	14.03.1977	07.06.1971	18.03.1979		
Guinea- Bissau					20.08.1976	
Guyana	15.02.1977	15.02.1977				
Haiti	06.02.1991	19.12.1972				
Holy See		01.05.1969			04.01.2002	

(cont.)

(cont.)

Country	1966 ICCPR	1965 Conven- tion on the Elim- ination of Racial Discrimi- nation	1968 UN Convention on the Non- Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Honduras	25.08.1997	10.10.2002		19.03.1979	14.03.1979	
Hungary	17.01.1974	04.05.1967	24.06.1969	23.10.1978	27.12.1972	19.04.1978
Iceland	22.08.1979	13.03.1967			15.02.1973	
India	10.04.1979	03.12.1968	12.01.1971	24.01.1977	15.07.1974	15.12.1978
Indonesia		25.06.1999			19.02.1992	
Iran (Islamic Rep. of)	24.06.1975	29.08.1968		27.01.1975	22.08.1973	
Iraq	25.01.1971	14.01.1970		12.02.1973	19.06.1991	
Ireland	08.12.1989	29.12.2000			27.10.1972	16.12.1982
Israel	03.10.1991	03.01.1979				
Italy	15.09.1978	05.01.1976		02.10.1978	30.05.1975	27.11.1981
Jamaica	03.10.1975	04.06.1971			13.08.1975	
Japan	21.06.1979	15.12.1995		09.09.2002	18.06.1982	09.06.1982
Jordan	28.05.1975	30.05.1974		15.03.1974	27.06.1975	
Kazakhstan		26.08.1998				
Kenya	01.05.1972	13.09.2001	01.05.1972		07.01.1976	
Kiribati						
Korea (Dem. People's Rep. of)	14.09.1981		08.11.1984	13.05.1983	13.03.1987	08.11.1984
Korea (Rep. of)	10.04.1990	05.12.1978		14.02.1983	25.06.1987	02.12.1986
Kuwait	21.05.1996	15.10.1968	07.03.1995	22.06.1972	26.07.1972	02.01.1980
Kyrgyzstan	07.10.1994	05.09.1997		03.07.1995		
Lao (People's Dem. Rep.)		22.02.1974	28.12.1984		25.04.1973	05.10.1978
Latvia	14.04.1992	14.04.1992	14.04.1992		06.02.1997	
Lebanon	03.11.1972	12.11.1971		25.08.1992	26.03.1975	
Lesotho	09.09.1992	04.11.1971			06.09.1977	
Liberia		05.11.1976				
Libyan Arab Jamahiriya	15.05.1970	03.07.1968	16.05.1989	09.01.1973	19.01.1982	
Liechtenstein	10.12.1998	01.03.2000			06.06.1991	
Lithuania	20.11.1991	10.12.1998	01.02.1996	27.07.1998	10.02.1998	16.04.2002
Luxembourg	18.08.1983	01.05.1978			23.03.1976	
Macedonia	18.01.1994	18.01.1994	18.01.1994	30.04.1997	14.03.1997	
Madagascar	21.06.1971	07.02.1969		21.06.1989		
Malawi	22.12.1993	11.06.1996				05.10.1978
Malaysia					06.10.1991	
Maldives		24.04.1984			02.08.1993	

(cont.)

Country	1966 ICCPR	1965 Conven- tion on the Elimi- nation of Racial Discrimi- nation	1968 UN Convention on the Non- Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Mali	16.07.1974	16.07.1974		06.04.1987	25.11.2003	
Malta	13.09.1990	27.05.1971			07.04.1975	
Marshall Islands						
Mauritania		13.12.1988		27.04.1977		
Mauritius	12.12.1973	30.05.1972		27.02.1978	11.01.1973	09.12.1992
Mexico	23.03.1981	20.02.1975	15.03.2002	04.10.1972	08.04.1974	
Micronesia						
Moldova (Rep. of)	26.01.1993	26.01.1993	26.01.1993			
Monaco	28.08.1997	27.09.1995			30.04.1999	
Mongolia	18.11.1974	06.08.1969	21.05.1969	23.05.1991	14.09.1972	19.05.1978
Morocco	03.05.1979	18.12.1970		03.02.2003	21.03.2002	
Mozambique	21.07.1993	18.04.1983				
Myanmar						
Namibia	28.11.1994	11.11.1982				
Nauru						
Nepal	14.05.1991	30.01.1971		23.06.1976		
Netherlands	11.12.1978	10.12.1971			22.06.1981	15.04.1983
New Zealand	28.12.1978	22.11.1972			18.12.1972	07.09.1984
Nicaragua	12.03.1980	15.02.1978	03.09.1986	19.04.1977	07.08.1975	
Niger	07.03.1986	27.04.1967		16.10.1972	23.06.1972	17.02.1993
Nigeria	29.07.1993	16.10.1967	01.12.1970	24.01.1972	09.07.1973	
Niue						
Norway	13.09.1972	06.08.1970			01.08.1973	15.02.1979
Oman		02.01.2003		02.06.1978	31.03.1992	
Pakistan		21.09.1966		30.04.1981	03.10.1974	27.02.1986
Palau					03.02.2003	
Panama	08.03.1977	16.08.1967		13.08.1973	20.03.1974	13.05.2003
Papua New Guinea		27.01.1982			27.10.1980	28.10.1980
Paraguay	10.06.1992	18.08.2003			09.06.1976	
Peru	28.04.1978	29.09.1971	11.08.2003	24.10.1979	05.06.1985	
Philippines	23.10.1986	15.09.1967	15.05.1973		21.05.1973	
Poland	18.03.1977	05.12.1968	14.02.1969	31.01.1974	25.01.1973	08.06.1978
Portugal	15.06.1978	24.08.1982		09.12.1985	15.05.1975	
Qatar		22.07.1976		20.04.1977	17.04.1975	
Romania	09.12.1974	15.09.1970	15.09.1969	06.12.1993	26.07.1979	06.05.1983
Russian Federation	16.10.1973	04.02.1969	22.04.1969	28.04.1988	26.03.1975	30.05.1978

(cont.)

(cont.)

Country	1966 ICCP	1965 Conven- tion on the Elimina- tion of Racial Discrimi- nation	1968 UN Convention on the Non- Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Rwanda	16.04.1975	16.04.1975	16.04.1975	25.09.2001	20.05.1975 02.04.1991	
Saint Kitts and Nevis						
Saint Lucia		14.02.1990			26.11.1986	27.05.1993
Saint Vincent and the Grenadines	09.11.1981	09.11.1981	09.11.1981		13.05.1999	27.04.1999
Samoa						
San Marino	18.10.1985	12.03.2002			11.03.1975	
São Tomé and Príncipe					24.08.1979	05.10.1979
Saudi Arabia		23.09.1997		08.09.1976	24.05.1972	
Senegal	13.02.1978	19.04.1972		09.12.1984	26.03.1975	
Seychelles	05.05.1992	07.03.1978			11.10.1979	
Sierra Leone	23.08.1996	02.08.1967			29.06.1976	
Singapore					02.12.1975	
Slovakia	28.05.1993	28.05.1993	28.05.1993	31.03.1993	17.05.1993	28.05.1993
Slovenia	06.07.1992	06.07.1992	06.07.1992	05.11.1992	07.04.1992	
Solomon Islands		17.03.1982			17.06.1981	19.06.1981
Somalia	24.01.1990	26.08.1975				
South Africa	10.12.1998	10.12.1998		18.12.2003	03.11.1975	
Spain	27.04.1977	13.09.1968		10.01.1986	20.06.1979	19.07.1978
Sri Lanka	11.06.1980	18.02.1982		07.04.1981	18.11.1986	25.04.1978
Sudan	18.03.1986	21.03.1977			17.10.2003	
Suriname	28.12.1976	15.03.1984			06.01.1993	
Swaziland	26.03.2004	07.04.1969			18.06.1991	
Sweden	06.12.1971	06.12.1971		13.01.2003	05.02.1976	27.04.1984
Switzerland	18.06.1992	29.11.1994		03.10.2003	04.05.1976	05.08.1988
Syrian Arab Republic	21.04.1969	21.04.1969		21.02.1975		
Tajikistan	04.01.1999	11.01.1995		28.08.1992		12.10.1999
Tanzania (United Rep. of)	11.06.1976	27.10.1972		02.08.1977		
Thailand	29.10.1996	28.01.2003			28.05.1975	
Timor-Leste	18.09.2003	16.04.2003			07.05.2003	
Togo	24.05.1984	01.09.1972			10.11.1976	
Tonga		16.02.1972			28.09.1976	

(cont.)

Country	1966 ICCPR	1965 Conven- tion on the Elimi- nation of Racial Discrimi- nation	1968 UN Convention on the Non- Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	1970 Convention on the Illicit Trade in Cultural Property	1972 BWC	1976 ENMOD Convention
Trinidad and Tobago	21.12.1978	04.10.1973				
Tunisia	18.03.1969	13.01.1967	15.06.1972	10.03.1975	06.06.1973	11.05.1978
Turkey	23.09.2003	16.09.2002		21.04.1981	04.11.1974	
Turkmenistan	01.05.1997	29.09.1994			11.01.1996	
Tuvalu						
Uganda	21.06.1995	21.11.1980			12.05.1992	
Ukraine	12.11.1973	07.03.1969	19.06.1969	28.04.1988	26.03.1975	13.06.1978
United Arab Emirates		20.06.1974				
United Kingdom	20.05.1976	07.03.1969		01.08.2002	26.03.1975	16.05.1978
United States of America	08.06.1992	21.10.1994		02.09.1983	26.03.1975	17.01.1980
Uruguay	01.04.1970	30.08.1968	21.09.2001	09.08.1977	06.04.1981	16.09.1993
Uzbekistan	28.09.1995	28.09.1995		15.03.1996	11.01.1996	26.05.1993
Vanuatu					12.10.1990	
Venezuela	10.05.1978	10.10.1967			18.10.1978	
Viet Nam	24.09.1982	09.06.1982	06.05.1983		20.06.1980	26.08.1980
Yemen	09.02.1987	18.10.1972	09.02.1987		01.06.1979	20.07.1977
Yugoslavia	12.03.2001	12.03.2001	12.03.2001	11.09.2001	13.06.2001	
Zambia	10.04.1984	04.02.1972		21.06.1985		
Zimbabwe	13.05.1991	13.05.1991			05.11.1990	
Total	152	169	48	103	151	69

Country	1977 AP I	1977 AP II	1979	1980 CCW	1980 Protocol I to the CCW	1980 Protocol II to the CCW	1980 Protocol III to the CCW
			Convention on the Elimination of Discrimi- nation against Women				
Afghanistan			05.03.2003				
Albania	16.07.1993	16.07.1993	11.05.1994	28.08.2002	28.08.2002	28.08.2002	28.08.2002
Algeria	16.08.1989	16.08.1989	22.05.1996				
Andorra			15.01.1997				
Angola	20.09.1984		17.09.1986				
Antigua and Barbuda	06.10.1986	06.10.1986	01.08.1989				
Argentina	26.11.1986	26.11.1986	15.07.1985	02.10.1995	02.10.1995	29.09.1995	29.09.1995
Armenia	07.06.1993	07.06.1993	13.09.1993				
Australia	21.06.1991	21.06.1991	28.07.1983	29.09.1983	29.09.1983	29.09.1983	29.09.1983
Austria	13.08.1982	13.08.1982	31.03.1982	14.03.1983	14.03.1983	14.03.1983	14.03.1983
Azerbaijan			10.07.1995				
Bahamas	10.04.1980	10.04.1980	08.10.1993				
Bahrain	30.10.1986	30.10.1986	18.06.2002				
Bangladesh	08.09.1980	08.09.1980	06.11.1984	06.09.2000	06.09.2000	06.09.2000	06.09.2000
Barbados	19.02.1990	19.02.1990	16.10.1980				
Belarus	23.10.1989	23.10.1989	04.02.1981	23.06.1982	23.06.1982	23.06.1982	23.06.1982
Belgium	20.05.1986	20.05.1986	10.07.1985	07.02.1995	07.02.1995	07.02.1995	07.02.1995
Belize	29.06.1984	29.06.1984	16.05.1990				
Benin	28.05.1986	28.05.1986	12.03.1992	27.03.1989	27.03.1989		27.03.1989
Bhutan			31.08.1981				
Bolivia	08.12.1983	08.12.1983	08.06.1990	21.09.2001	21.09.2001	21.09.2001	21.09.2001
Bosnia and Herzegovina	31.12.1992	31.12.1992	01.09.1993	01.09.1993	01.09.1993	01.09.1993	01.09.1993
Botswana	23.05.1979	23.05.1979	13.08.1996				
Brazil	05.05.1992	05.05.1992	01.02.1984	03.10.1995	03.10.1995	03.10.1995	03.10.1995
Brunei	14.10.1991	14.10.1991					
Darussalam							
Bulgaria	26.09.1989	26.09.1989	08.02.1982	15.10.1982	15.10.1982	15.10.1982	15.10.1982
Burkina Faso	20.10.1987	20.10.1987	14.10.1987	26.11.2003	26.11.2003	26.11.2003	26.11.2003
Burundi	10.06.1993	10.06.1993	08.01.1992				
Cambodia	14.01.1998	14.01.1998	15.10.1992	25.03.1997	25.03.1997	25.03.1997	25.03.1997
Cameroon	16.03.1984	16.03.1984	23.08.1994				
Canada	20.11.1990	20.11.1990	10.12.1981	24.06.1994	24.06.1994	24.06.1994	24.06.1994
Cape Verde	16.03.1995	16.03.1995	05.12.1980	16.09.1997	16.09.1997	16.09.1997	16.09.1997
Central African Republic	17.07.1984	17.07.1984	21.06.1991				
Chad	17.01.1997	17.01.1997	09.06.1995				
Chile	24.04.1991	24.04.1991	07.12.1989	15.10.2003	15.10.2003		15.10.2003
China	14.09.1983	14.09.1983	04.11.1980	07.04.1982	07.04.1982	07.04.1982	07.04.1982
Colombia	01.09.1993	14.08.1995	19.01.1982	06.03.2000	06.03.2000	06.03.2000	06.03.2000
Comoros	21.11.1985	21.11.1985	31.10.1994				

(cont.)

Country	1977 AP I	1977 AP II	1979	1980 CCW	1980 Protocol I to the CCW	1980 Protocol II to the CCW	1980 Protocol III to the CCW
			Convention on the Elimination of Discrim- ination against Women				
Congo	10.11.1983	10.11.1983	26.07.1982				
Congo (Dem. Rep. of)	03.06.1982	12.12.2002	17.10.1986				
Cook Islands	07.05.2002	07.05.2002					
Costa Rica	15.12.1983	15.12.1983	04.04.1986	17.12.1998	17.12.1998	17.12.1998	17.12.1998
Côte d'Ivoire	20.09.1989	20.09.1989	18.12.1995				
Croatia	11.05.1992	11.05.1992	09.09.1992	02.12.1993	02.12.1993	02.12.1993	02.12.1993
Cuba	25.11.1982	23.06.1999	17.07.1980	02.03.1987	02.03.1987	02.03.1987	02.03.1987
Cyprus	01.06.1979	18.03.1996	23.07.1985	12.12.1988	12.12.1988	12.12.1988	12.12.1988
Czech Republic	05.02.1993	05.02.1993	22.02.1993	22.02.1993	22.02.1993	22.02.1993	22.02.1993
Denmark	17.06.1982	17.06.1982	21.04.1983	07.07.1982	07.07.1982	07.07.1982	07.07.1982
Djibouti	08.04.1991	08.04.1991	02.12.1998	29.07.1996	29.07.1996	29.07.1996	29.07.1996
Dominica	25.04.1996	25.04.1996	15.09.1980				
Dominican Republic	26.05.1994	26.05.1994	02.09.1982				
Ecuador	10.04.1979	10.04.1979	09.11.1981	04.05.1982	04.05.1982	04.05.1982	04.05.1982
Egypt	09.10.1992	09.10.1992	18.09.1981				
El Salvador	23.11.1978	23.11.1978	19.08.1981	26.01.2000	26.01.2000	26.01.2000	26.01.2000
Equatorial Guinea	24.07.1986	24.07.1986	23.10.1984				
Eritrea			05.09.1995				
Estonia	18.01.1993	18.01.1993	21.10.1991	20.04.2000	20.04.2000		20.04.2000
Ethiopia	08.04.1994	08.04.1994	10.09.1981				
Fiji			28.08.1995				
Finland	07.08.1980	07.08.1980	04.09.1986	08.05.1982	08.05.1982	08.05.1982	08.05.1982
France	11.04.2001	24.02.1984	14.12.1983	04.03.1988	04.03.1988	04.03.1988	18.07.2002
Gabon	08.04.1980	08.04.1980	21.01.1983				
Gambia	12.01.1989	12.01.1989	16.04.1993				
Georgia	14.09.1993	14.09.1993	26.10.1994	29.04.1996	29.04.1996	29.04.1996	29.04.1996
Germany	14.02.1991	14.02.1991	10.07.1985	25.11.1992	25.11.1992	25.11.1992	25.11.1992
Ghana	28.02.1978	28.02.1978	02.01.1986				
Greece	31.03.1989	15.02.1993	07.06.1983	28.01.1992	28.01.1992	28.01.1992	28.01.1992
Grenada	23.09.1998	23.09.1998	30.08.1990				
Guatemala	19.10.1987	19.10.1987	12.08.1982	21.07.1983	21.07.1983	21.07.1983	21.07.1983
Guinea	11.07.1984	11.07.1984	09.08.1982				
Guinea- Bissau	21.10.1986	21.10.1986	23.08.1985				
Guyana	18.01.1988	18.01.1988	17.07.1980				

(cont.)

(cont.)

Country	1977 AP I	1977 AP II	1979 Convention on the Elimination of Discrim- ination against Women	1980 CCW	1980 Protocol I to the CCW	1980 Protocol II to the CCW	1980 Protocol III to the CCW
Haiti			20.07.1981				
Holy See	21.11.1985	21.11.1985		22.07.1997	22.07.1997	22.07.1997	22.07.1997
Honduras	16.02.1995	16.02.1995	03.03.1983	30.10.2003	30.10.2003	30.10.2003	30.10.2003
Hungary	12.04.1989	12.04.1989	22.12.1980	14.06.1982	14.06.1982	14.06.1982	14.06.1982
Iceland	10.04.1987	10.04.1987	18.06.1985				
India			09.07.1993	01.03.1984	01.03.1984	01.03.1984	01.03.1984
Indonesia			13.09.1984				
Iran (Islamic Rep. of)							
Iraq			13.08.1986				
Ireland	19.05.1999	19.05.1999	23.12.1985	13.03.1995	13.03.1995	13.03.1995	13.03.1995
Israel			03.10.1991	22.03.1995	22.03.1995	22.03.1995	
Italy	27.02.1986	27.02.1986	10.06.1985	20.01.1995	20.01.1995	20.01.1995	20.01.1995
Jamaica	29.07.1986	29.07.1986	19.10.1984				
Japan			25.06.1985	09.06.1982	09.06.1982	09.06.1982	09.06.1982
Jordan	01.05.1979	01.05.1979	01.07.1992	19.10.1995	19.10.1995		19.10.1995
Kazakhstan	05.05.1992	05.05.1992	26.08.1998				
Kenya	23.02.1999	23.02.1999	09.03.1984				
Kiribati			17.03.2004				
Korea (Dem. People's Rep. of)	09.03.1988		27.02.2001				
Korea (Rep. of)	15.01.1982	15.01.1982	27.12.1984	09.05.2001	09.05.2001		
Kuwait	17.01.1985	17.01.1985	02.09.1994				
Kyrgyzstan	18.09.1992	18.09.1992	10.02.1997				
Lao (People's Dem. Rep.)	18.11.1980	18.11.1980	14.08.1981	03.01.1983	03.01.1983	03.01.1983	03.01.1983
Latvia	24.12.1991	24.12.1991	14.04.1992	04.01.1993	04.01.1993	04.01.1993	04.01.1993
Lebanon	23.07.1997	23.07.1997	16.04.1997				
Lesotho	20.05.1994	20.05.1994	22.08.1995	06.09.2000	06.09.2000	06.09.2000	06.09.2000
Liberia	30.06.1988	30.06.1988	17.07.1984				
Libyan Arab Jamahiriya	07.06.1978	07.06.1978	16.05.1989				
Liechtenstein	10.08.1989	10.08.1989	22.12.1995	16.08.1989	16.08.1989	16.08.1989	16.08.1989
Lithuania	13.07.2000	13.07.2000	18.01.1994	03.06.1998	03.06.1998		03.06.1998
Luxembourg	29.08.1989	29.08.1989	02.02.1989	21.05.1996	21.05.1996	21.05.1996	21.05.1996
Macedonia	01.09.1993	01.09.1993	18.01.1994	30.12.1996	30.12.1996	30.12.1996	30.12.1996
Madagascar	08.05.1992	08.05.1992	17.03.1989				
Malawi	07.10.1991	07.10.1991	12.03.1987				
Malaysia			05.07.1995				
Maldives	03.09.1991	03.09.1991	01.07.1993	07.09.2000	07.09.2000		07.09.2000

(cont.)

Country	1977 API	1977 AP II	1979	1980 CCW	1980	1980	1980
			Convention on the Elimination of Discrim- ination against Women		Protocol I to the CCW	Protocol II to the CCW	Protocol III to the CCW
Mali	08.02.1989	08.02.1989	10.09.1985	24.10.2001	24.10.2001	24.10.2001	24.10.2001
Malta	17.04.1989	17.04.1989	08.03.1991	26.06.1995	26.06.1995	26.06.1995	26.06.1995
Marshall Islands							
Mauritania	14.03.1980	14.03.1980	10.05.2001				
Mauritius	22.03.1982	22.03.1982	09.07.1984	06.05.1996	06.05.1996	06.05.1996	06.05.1996
Mexico	10.03.1983		23.03.1981	11.02.1982	11.02.1982	11.02.1982	11.02.1982
Micronesia	19.09.1995	19.09.1995					
Moldova (Rep. of)	24.05.1993	24.05.1993	01.07.1994	08.09.2000	08.09.2000	08.09.2000	08.09.2000
Monaco	07.01.2000	07.01.2000		12.08.1997	12.08.1997		
Mongolia	06.12.1995	06.12.1995	20.07.1981	08.06.1982	08.06.1982	08.06.1982	08.06.1982
Morocco			21.06.1993	19.03.2002		19.03.2002	
Mozambique	14.03.1983	12.11.2002	21.04.1997				
Myanmar			22.07.1997				
Namibia	17.06.1994	17.06.1994	23.11.1992				
Nauru				12.11.2001	12.11.2001	12.11.2001	12.11.2001
Nepal			22.04.1991				
Netherlands	26.06.1987	26.06.1987	23.07.1991	18.06.1987	18.06.1987	18.06.1987	18.06.1987
New Zealand	08.02.1988	08.02.1988	10.01.1985	18.10.1993	18.10.1993	18.10.1993	18.10.1993
Nicaragua	19.07.1999	19.07.1999	27.10.1981	05.12.2000	05.12.2000		05.12.2000
Niger	08.06.1979	08.06.1979	08.10.1999	10.11.1992	10.11.1992	10.11.1992	10.11.1992
Nigeria	10.10.1988	10.10.1988	13.06.1985				
Niue							
Norway	14.12.1981	14.12.1981	21.05.1981	07.06.1983	07.06.1983	07.06.1983	07.06.1983
Oman	29.03.1984	29.03.1984					
Pakistan			12.03.1996	01.04.1985	01.04.1985	01.04.1985	01.04.1985
Palau	25.06.1996	25.06.1996					
Panama	18.09.1995	18.09.1995	29.10.1981	26.03.1997	26.03.1997	26.03.1997	26.03.1997
Papua New Guinea			12.01.1995				
Paraguay	30.11.1990	30.11.1990	06.04.1987				
Peru	14.07.1989	14.07.1989	13.09.1982	03.07.1997	03.07.1997		03.07.1997
Philippines		11.12.1986	05.08.1981	15.07.1996	15.07.1996	15.07.1996	15.07.1996
Poland	23.10.1991	23.10.1991	30.07.1980	02.06.1983	02.06.1983	02.06.1983	02.06.1983
Portugal	27.05.1992	27.05.1992	30.07.1980	04.04.1997	04.04.1997	04.04.1997	04.04.1997
Qatar	05.04.1988						
Romania	21.06.1990	21.06.1990	07.01.1982	26.07.1995	26.07.1995	26.07.1995	26.07.1995
Russian Federation	29.09.1989	29.09.1989	23.01.1981	10.06.1982	10.06.1982	10.06.1982	10.06.1982
Rwanda	19.11.1984	19.11.1984	02.03.1981				

(cont.)

(cont.)

Country	1977 API	1977 AP II	1979	1980 CCW	1980	1980	1980
			Convention on the Elimination of Discrim- ination against Women		Protocol I to the CCW	Protocol II to the CCW	Protocol III to the CCW
Saint Kitts and Nevis	14.02.1986	14.02.1986	25.04.1985				
Saint Lucia	07.10.1982	07.10.1982	08.10.1982				
Saint Vincent and the Grenadines	08.04.1983	08.04.1983	04.08.1981				
Samoa	23.08.1984	23.08.1984	25.09.1992				
San Marino	05.04.1994	05.04.1994	10.12.2003				
São Tomé and Príncipe	05.07.1996	05.07.1996	03.06.2003				
Saudi Arabia	21.08.1987	28.11.2001	07.09.2000				
Senegal	07.05.1985	07.05.1985	05.02.1985	29.11.1999			29.11.1999
Seychelles	08.11.1984	08.11.1984	05.05.1992	08.06.2000	08.06.2000	08.06.2000	08.06.2000
Sierra Leone	21.10.1986	21.10.1986	11.11.1988				
Singapore			05.10.1995				
Slovakia	02.04.1993	02.04.1993	28.05.1993	28.05.1993	28.05.1993	28.05.1993	28.05.1993
Slovenia	26.03.1992	26.03.1992	06.07.1992	06.07.1992	06.07.1992	06.07.1992	06.07.1992
Solomon Islands	19.09.1988	19.09.1988	06.05.2002				
Somalia							
South Africa	21.11.1995	21.11.1995	15.12.1995	13.09.1995	13.09.1995	13.09.1995	13.09.1995
Spain	21.04.1989	21.04.1989	05.01.1984	29.12.1993	29.12.1993	29.12.1993	29.12.1993
Sri Lanka			05.10.1981				
Sudan							
Suriname	16.12.1985	16.12.1985	01.03.1993				
Swaziland	02.11.1995	02.11.1995	26.03.2004				
Sweden	31.08.1979	31.08.1979	02.07.1980	07.07.1982	07.07.1982	07.07.1982	07.07.1982
Switzerland	17.02.1982	17.02.1982	27.03.1997	20.08.1982	20.08.1982	20.08.1982	20.08.1982
Syrian Arab Republic	14.11.1983		28.03.2003				
Tajikistan	13.01.1993	13.01.1993	26.10.1993	12.10.1999	12.10.1999	12.10.1999	12.10.1999
Tanzania (United Rep. of)	15.02.1983	15.02.1983	20.08.1985				
Thailand			09.08.1985				
Timor-Leste			16.04.2003				
Togo	21.06.1984	21.06.1984	26.09.1983	04.12.1995	04.12.1995	04.12.1995	04.12.1995
Tonga	20.01.2003	20.01.2003					

(cont.)

Country	1977 AP I	1977 AP II	1979 Convention on the Elimination of Discrim- ination against Women	1980 CCW	1980 Protocol I to the CCW	1980 Protocol II to the CCW	1980 Protocol III to the CCW
Trinidad and Tobago	20.07.2001	20.07.2001	12.01.1990				
Tunisia	09.08.1979	09.08.1979	20.09.1985	15.05.1987	15.05.1987	15.05.1987	15.05.1987
Turkey			20.12.1985				
Turkmenistan	10.04.1992	10.04.1992	01.05.1997	19.03.2004	19.03.2004	19.03.2004	
Tuvalu			06.10.1999				
Uganda	13.03.1991	13.03.1991	22.07.1985	14.11.1995	14.11.1995	14.11.1995	14.11.1995
Ukraine	25.01.1990	25.01.1990	12.03.1981	23.06.1982	23.06.1982	23.06.1982	23.06.1982
United Arab Emirates	09.03.1983	09.03.1983					
United Kingdom	28.01.1998	28.01.1998	07.04.1986	13.02.1995	13.02.1995	13.02.1995	13.02.1995
United States of America				24.03.1995	24.03.1995	24.03.1995	
Uruguay	13.12.1985	13.12.1985	09.10.1981	06.10.1994	06.10.1994	06.10.1994	06.10.1994
Uzbekistan	08.10.1993	08.10.1993	19.07.1995	29.09.1997	29.09.1997	29.09.1997	29.09.1997
Vanuatu	28.02.1985	28.02.1985	08.09.1995				
Venezuela	23.07.1998	23.07.1998	02.05.1983				
Viet Nam	19.10.1981		17.02.1982				
Yemen	17.04.1990	17.04.1990	30.05.1984				
Yugoslavia	16.10.2001	16.10.2001	12.03.2001	12.03.2001	12.03.2001	12.03.2001	12.03.2001
Zambia	04.05.1995	04.05.1995	21.06.1985				
Zimbabwe	19.10.1992	19.10.1992	13.05.1991				
Total	161	156	177	94	92	83	88

Country	1984 Convention against Torture	1989 UN Mercenary Convention	1989 Convention on the Rights of the Child	1992 Convention on Biodiversity	1993 CWC	1994 Con- vention on the Safety of UN Personnel
Afghanistan	01.04.1987		28.03.1994	19.09.2002	24.09.2003	
Albania	11.05.1984		27.02.1992	05.01.1994	11.05.1994	30.03.2001
Algeria	12.09.1989		16.04.1993	14.08.1995	14.08.1995	
Andorra			02.01.1996		27.02.2003	
Angola			05.12.1990	01.04.1998		
Antigua and Barbuda	19.07.1993		05.10.1993	09.03.1993		
Argentina	24.09.1986		04.12.1990	22.11.1994	02.10.1995	06.01.1997
Armenia	13.09.1993		23.06.1993	14.05.1993	27.01.1995	
Australia	08.08.1989		17.12.1990	18.06.1993	06.05.1994	04.12.2000
Austria	29.07.1987		06.08.1992	18.08.1994	17.08.1995	06.09.2000
Azerbaijan	16.08.1996	04.12.1997	13.08.1992	03.08.2000	29.02.2000	03.08.2000
Bahamas			20.02.1991	02.09.1993		
Bahrain	06.03.1998		13.02.1992	30.08.1996	28.04.1997	
Bangladesh	05.10.1998		03.08.1990	03.05.1994	25.04.1997	22.09.1999
Barbados		10.07.1992	09.10.1990	10.12.1993		
Belarus	13.03.1987	28.05.1997	01.10.1990	08.09.1993	11.07.1996	29.11.2000
Belgium	25.06.1999	31.05.2002	16.12.1991	22.11.1996	27.01.1997	19.02.2002
Belize	17.03.1986		02.05.1990	30.12.1993	01.12.2003	
Benin	12.03.1992		03.08.1990	30.06.1994	14.05.1998	
Bhutan			01.08.1990	25.08.1995		
Bolivia	12.04.1999		26.06.1990	03.10.1994	14.08.1998	
Bosnia and Herzegovina	01.09.1993		01.09.1993	26.08.2002	25.02.1997	11.08.2003
Botswana	08.09.2000		14.03.1995	12.10.1995	31.08.1998	01.03.2000
Brazil	28.09.1989		24.09.1990	28.02.1994	13.03.1996	06.09.2000
Brunei			27.12.1995		28.07.1997	20.03.2002
Darussalam						
Bulgaria	16.12.1986		03.06.1991	17.04.1996	10.08.1994	04.06.1998
Burkina Faso	04.01.1999		31.08.1990	02.09.1993	08.07.1997	
Burundi	18.02.1993		19.10.1990	15.04.1997	04.09.1998	
Cambodia	15.10.1992		15.10.1992	09.02.1995		
Cameroon	19.12.1986	26.01.1996	11.01.1993	19.10.1994	16.09.1996	
Canada	24.06.1987		13.12.1991	04.12.1992	26.09.1995	03.04.2002
Cape Verde	04.06.1992		04.06.1992	29.03.1995	10.10.2003	
Central African Republic			23.04.1992	15.03.1995		
Chad	09.06.1995		02.10.1990	07.06.1994	13.02.2003	
Chile	30.09.1988		13.08.1990	09.09.1994	12.07.1996	27.08.1997
China	04.10.1988		02.03.1992	05.01.1993	25.04.1997	
Colombia	08.12.1987		28.01.1991	28.11.1994	05.04.2000	
Comoros			22.06.1993	29.09.1994		
Congo	30.07.2003		14.10.1993	01.08.1996		
Congo (Dem. Rep. of)	18.03.1996		27.09.1990	03.12.1994		
Cook Islands			06.06.1997	20.04.1993	15.07.1994	
Costa Rica	11.11.1993	20.09.2001	21.08.1990	26.08.1994	31.05.1996	17.10.2000

(cont.)

Country	1984 Convention against Torture	1989 UN Mercenary Convention	1989 Convention on the Rights of the Child	1992 Convention on Biodiversity	1993 CWC	1994 Con- vention on the Safety of UN Personnel
Côte d'Ivoire	18.12.1995		04.02.1991	29.11.1994	18.12.1995	13.03.2002
Croatia	12.10.1992	27.03.2000	12.10.1992	07.10.1996	23.05.1995	27.03.2000
Cuba	17.05.1995		21.08.1991	08.03.1994	29.04.1997	
Cyprus	18.07.1991	08.07.1993	07.02.1991	10.07.1996	28.08.1998	01.07.2003
Czech Republic	22.02.1993		22.02.1993	03.12.1993	06.03.1996	13.06.1997
Denmark	27.05.1987		19.07.1991	21.12.93	13.07.1995	11.04.1995
Djibouti	05.11.2002		06.12.1990	01.09.1994		
Dominica			13.03.1991	06.04.1994	12.02.2001	
Dominican Republic			11.06.1991	25.11.1996		
Ecuador	30.03.1988		23.03.1990	23.02.1993	06.09.1995	28.12.2000
Egypt	25.06.1986		06.07.1990	02.06.1994		
El Salvador	17.06.1996		10.07.1990	08.09.1994	30.10.1995	
Equatorial Guinea	08.10.2002		15.06.1992	06.12.1994	25.04.1997	
Eritrea			03.08.1994	21.03.1996	14.02.2000	
Estonia	21.10.1991		21.10.1991	27.07.1994	26.05.1999	
Ethiopia	14.03.1994		14.05.1991	05.04.1994	13.05.1996	
Fiji			13.08.1993	25.02.1993	20.01.1993	01.04.1999
Finland	30.08.1989		20.06.1991	27.07.1994	07.02.1995	05.01.2001
France	18.02.1986		07.08.1990	01.07.1994	02.03.1995	09.06.2000
Gabon	08.09.2000		09.02.1994	14.03.1997	08.09.2000	
Gambia			08.08.1990	10.06.1994	19.05.1998	
Georgia	26.10.1994	08.06.1995	02.06.1994	02.06.1994	27.11.1995	
Germany	01.10.1990		06.03.1992	21.12.1993	12.08.1994	22.04.1997
Ghana	07.09.2000		05.02.1990	29.08.1994	09.07.1997	
Greece	06.10.1988		11.05.1993	04.08.1994	22.12.1994	03.08.2000
Grenada			05.11.1990	11.08.1994		
Guatemala	05.01.1990		06.06.1990	10.07.1995	12.02.2003	
Guinea	10.10.1989	18.07.2003	13.07.1990	07.05.1993	09.06.1997	07.09.2000
Guinea-Bissau			20.08.1990	27.10.1995		
Guyana	19.05.1988		14.01.1991	29.08.1994	12.09.1997	
Haiti			08.06.1995	25.09.1996		
Holy See	26.06.2002		20.04.1990		12.05.1999	
Honduras	05.12.1996		10.08.1990	31.07.1995		
Hungary	15.04.1987		07.10.1991	24.02.1994	31.10.1996	13.07.1999
Iceland	23.10.1996		28.10.1992	12.09.1994	28.04.1997	10.05.2001
India			11.12.1992	18.02.1994	03.09.1996	
Indonesia	28.10.1998		05.09.1990	23.08.1994	12.11.1998	
Iran (Islamic Rep. of)			13.07.1994	06.08.1996	03.11.1997	
Iraq			15.06.1994			
Ireland	11.04.2002		28.09.1992	22.03.1996	24.06.1996	28.03.2002
Israel	03.10.1991		03.10.1991	07.08.1995		
Italy	12.01.1989	21.08.1995	05.09.1991	15.04.1994	08.12.1995	05.04.1999

(cont.)

(cont.)

Country	1984 Convention against Torture	1989 UN Mercenary Convention	1989 Convention on the Rights of the Child	1992 Convention on Biodiversity	1993 CWC	1994 Con- vention on the Safety of UN Personnel
Jamaica			14.05.1991	06.01.1995	08.09.2000	08.09.2000
Japan	29.06.1999		22.04.1994	28.05.1993	15.09.1995	06.06.1995
Jordan	13.11.1991		24.05.1991	12.11.1993	29.10.1997	
Kazakhstan	26.08.1998		12.08.1994	06.09.1994	23.03.2000	
Kenya	21.02.1997		30.07.1990	26.07.1994	25.04.1997	
Kiribati			11.12.1995	16.08.1994	07.09.2000	08.10.2003
Korea (Dem. People's Rep. of)			21.09.1990	26.10.1994		
Korea (Republic of)	09.01.1995		20.11.1991	03.10.1994	28.04.1997	08.12.1997
Kuwait	08.03.1996		21.10.1991	02.08.2002	28.05.1997	
Kyrgyzstan	05.09.1997		07.10.1994	06.08.1996	29.09.2003	
Lao (People's Dem. Rep.)			08.05.1991	20.09.1996	25.02.1997	22.08.2002
Latvia	14.04.1992		14.04.1992	14.12.1995	23.07.1996	
Lebanon	05.10.2000		14.05.1991	15.12.1994		25.09.2003
Lesotho	12.11.2001		10.03.1992	10.01.1995	07.12.1994	06.09.2000
Liberia			04.06.1993	08.11.2000		
Libyan Arab Jamahiriya	16.05.1989	22.09.2000	15.04.1993	12.07.2001	06.01.2004	22.09.2000
Liechtenstein	02.11.1990		22.12.1995	19.11.1997	24.11.1999	11.12.2000
Lithuania	01.02.1996		31.01.1992	01.02.1996	15.04.1998	08.09.2000
Luxembourg	29.09.1987		07.03.1994	09.05.1994	15.04.1997	30.07.2001
Macedonia	12.12.1994		02.12.1993	02.12.1997	20.06.1997	06.03.2002
Madagascar			19.03.1991	04.03.1996		
Malawi	11.06.1996		02.01.1991	02.02.1994	11.06.1998	
Malaysia			17.02.1995	24.06.1994	20.04.2000	
Maldives	20.04.2004	11.09.1991	11.02.1991	09.11.1992	31.05.1994	
Mali	26.02.1999	12.04.2002	20.09.1990	29.03.1995	28.04.1997	
Malta	13.09.1990		30.09.1990	29.12.2000	28.04.1997	
Marshall Islands			04.10.1993	08.10.1992		
Mauritania		09.02.1998	16.05.1991	16.08.1996	09.02.1998	
Mauritius	09.12.1992		26.07.1990	04.09.1992	09.02.1993	
Mexico	23.01.1986		21.09.1990	11.03.1993	29.08.1994	
Micronesia			05.05.1993	20.06.1994	21.06.1999	
Moldova (Rep. of)	28.11.1995		26.01.1993	20.10.1995	08.07.1996	
Monaco	06.12.1991		21.06.1993	20.11.1992	01.06.1995	05.03.1999
Mongolia	24.01.2002		05.07.1990	30.09.1993	17.01.1995	25.02.2004
Morocco	21.06.1993		21.06.1993	21.08.1995	28.12.1995	
Mozambique	14.09.1999		26.04.1994	25.08.1995	15.08.2000	
Myanmar			15.07.1991	25.11.1994		
Namibia	28.11.1994		30.09.1990	16.05.1997	24.11.1995	
Nauru			27.07.1994	11.11.1993	12.11.2001	12.11.2001
Nepal	14.05.1991		14.09.1990	23.11.1993	18.11.1997	08.09.2000

(cont.)

Country	1984 Convention against Torture	1989 UN Mercenary Convention	1989 Convention on the Rights of the Child	1992 Convention on Biodiversity	1993 CWC	1994 Con- vention on the Safety of UN Personnel
Netherlands	21.12.1988		06.02.1995	12.07.1994	30.06.1995	07.02.2002
New Zealand	10.12.1989		06.04.1993	16.09.1993	15.07.1996	16.12.1998
Nicaragua			05.10.1990	20.11.1995	05.10.1999	
Niger	05.10.1998		30.09.1990	25.07.1995	09.04.1997	
Nigeria	28.06.2001		19.04.1991	29.08.1994	20.05.1999	
Niue			20.12.1995	28.02.1996		
Norway	09.07.1986		08.01.1991	09.07.1993	07.04.1994	03.07.1995
Oman			09.12.1996	08.02.1995	08.02.1995	
Pakistan			12.11.1990	26.07.1994	28.10.1997	
Palau			04.08.1995	06.01.1999	03.02.2003	
Panama	24.08.1987		12.12.1990	17.01.1995	07.10.1998	04.04.1996
Papua New Guinea			02.03.1993	16.03.1993	17.04.1996	
Paraguay	12.03.1990		25.09.1990	24.02.1994	01.12.1994	
Peru	07.07.1988		04.09.1990	07.06.1993	20.07.1995	
Philippines	18.06.1986		21.08.1990	08.10.1993	11.12.1996	07.06.1997
Poland	26.07.1989		07.06.1991	18.01.1996	23.08.1995	22.05.2000
Portugal	09.02.1989		21.09.1990	21.12.1993	10.09.1996	14.10.1998
Qatar	11.01.2000	26.03.1999	03.04.1995	21.08.1996	03.09.1997	
Romania	18.12.1990		28.09.1990	17.08.1994	15.02.1995	29.12.1997
Russian Federation	03.03.1987		16.08.1990	05.04.1995	05.11.1997	25.06.2001
Rwanda			24.01.1991	29.05.1996	31.03.2004	
Saint Kitts and Nevis			24.07.1990	07.01.1993		
Saint Lucia			16.06.1993	28.07.1993	09.04.1997	
Saint Vincent and the Grenadines	01.08.2001		26.10.1993	03.06.1996	18.09.2002	
Samoa			29.11.1994	09.02.1994	27.09.2002	
San Marino			25.11.1991	28.10.1994	10.12.1999	
São Tomé and Príncipe			14.05.1991	29.09.1999	09.09.2003	
Saudi Arabia	23.09.1997	14.04.1997	26.01.1996	03.10.2001	09.08.1996	
Senegal	21.08.1986	09.06.1999	31.07.1990	17.10.1994	20.07.1998	09.06.1999
Seychelles	05.05.1992	12.03.1990	07.09.1990	22.09.1992	07.04.1993	
Sierra Leone	25.04.2001		18.06.1990	12.12.1994		
Singapore			05.10.1995	21.12.1995	21.05.1997	26.03.1996
Slovakia	28.05.1993		28.05.1993	25.08.1994	27.10.1995	26.06.1996
Slovenia	16.07.1993		06.07.1992	09.07.1996	11.06.1997	21.01.2004
Solomon Islands			10.04.1995	03.10.1995		
Somalia	24.01.1990					
South Africa	10.12.1998		16.06.1995	02.11.1995	13.09.1995	
Spain	21.10.1987		06.12.1990	21.12.1993	03.08.1994	13.01.1998
Sri Lanka	03.01.1994		12.07.1991	23.03.1994	19.08.1994	23.09.2003
Sudan			03.08.1990	30.10.1995	24.05.1999	

(cont.)

(cont.)

Country	1984 Convention against Torture	1989 UN Mercenary Convention	1989 Convention on the Rights of the Child	1992 Convention on Biodiversity	1993 CWC	1994 Con- vention on the Safety of UN Personnel
Suriname		10.08.1990	01.03.1993	12.01.1996	28.04.1997	
Swaziland	26.03.2004		07.09.1995	09.11.1994	20.09.1996	
Sweden	08.01.1986		29.06.1990	16.12.1993	17.06.1993	25.06.1996
Switzerland	02.12.1986		24.02.1997	21.11.1994	10.03.1995	
Syrian Arab Republic			15.07.1993	04.01.1996		
Tajikistan	11.01.1995		26.10.1993	29.10.1997	11.01.1995	
Tanzania (United Rep. of)			10.06.1991	08.03.1996	25.06.1998	
Thailand			27.03.1992	31.10.2003	10.12.2002	
Timor-Leste	16.04.2003		16.04.2003		07.05.2003	
Togo	18.11.1987	25.02.1991	01.08.1990	04.10.1995	23.04.1997	
Tonga			06.11.1995	19.05.1998	29.05.2003	
Trinidad and Tobago			05.12.1991	01.08.1996	24.06.1997	
Tunisia	23.09.1988		30.01.1992	15.07.1993	15.04.1997	12.09.2000
Turkey	02.08.1988		04.04.1995	14.02.1997	12.05.1997	
Turkmenistan	25.06.1999	18.09.1996	20.09.1993	18.09.1996	29.09.1994	29.09.1998
Tuvalu			22.09.1995	20.12.2002	19.01.2004	
Uganda	03.11.1986		17.08.1990	08.09.1993	30.11.2001	
Ukraine	24.02.1987	13.09.1993	28.08.1991	07.02.1995	16.10.1998	17.08.1995
United Arab Emirates			03.01.1997	10.02.2000	28.11.2000	
United Kingdom	08.12.1988		16.12.1991	03.06.1994	13.05.1996	06.05.1998
United States of America	21.10.1994				25.04.1997	
Uruguay	24.10.1986	14.07.1999	20.11.1990	05.11.1993	06.10.1994	03.09.1999
Uzbekistan	28.09.1995	19.01.1998	29.06.1994	19.07.1995	23.07.1996	03.07.1996
Vanuatu			07.07.1993	25.03.1993		
Venezuela	29.07.1991		13.09.1990	13.09.1994	03.12.1997	
Viet Nam			28.02.1990	16.11.1994	30.09.1998	
Yemen	05.11.1991		01.05.1991	21.02.1996	02.10.2000	
Yugoslavia	12.03.2001		12.03.2001	01.03.2002	20.04.2000	31.07.2003
Zambia	07.10.1998		06.12.1991	28.05.1993	09.02.2001	
Zimbabwe			11.09.1990	11.11.1994	25.04.1997	
Total	136	25	192	188*	162	71

*According to UN treaty database, the European Community approved this convention on 21.12.1993

Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
Afghanistan			11.09.2002	10.02.2003		24.09.2003
Albania	28.08.2002	28.08.2002	29.02.2000	31.01.2003		
Algeria			09.10.2001			
Andorra			29.06.1998	30.04.2001		30.04.2001
Angola			05.07.2002			
Antigua and Barbuda			03.05.1999	18.06.2001		
Argentina	21.10.1998	21.10.1998	14.09.1999	08.02.2001	07.01.2002	10.09.2002
Armenia						
Australia	22.08.1997	22.08.1997	14.01.1999	01.07.2002		
Austria	27.07.1998	27.07.1998	29.06.1998	28.12.2000	01.03.2002	01.02.2002
Azerbaijan					17.04.2001	03.07.2002
Bahamas			31.07.1998			
Bahrain						
Bangladesh	06.09.2000	06.09.2000	06.09.2000			06.09.2000
Barbados			26.01.1999	10.12.2002		
Belarus	13.09.2000	02.03.2004	03.09.2003		13.12.2000	
Belgium	10.03.1999	10.03.1999	04.09.1998	28.06.2000		06.05.2002
Belize			23.04.1998	05.04.2000		01.12.2003
Benin			25.09.1998	22.01.2002		
Bhutan						
Bolivia	21.09.2001	21.09.2001	09.06.1998	27.06.2002		
Bosnia and Herzegovina	11.10.2001	07.09.2000	08.09.1998	11.04.2002		10.10.2003
Botswana			01.03.2000	08.09.2000		
Brazil	04.10.1999	04.10.1999	30.04.1999	20.06.2002		27.01.2004
Brunei Darussalam						
Bulgaria	03.12.1998	03.12.1998	04.09.1998	11.04.2002	14.06.2000	12.02.2002
Burkina Faso	26.11.2003	26.11.2003	16.09.1998			16.04.2004
Burundi			22.10.2003			
Cambodia	25.03.1997	25.03.1997	28.07.1999	11.04.2002		
Cameroon			19.09.2002			
Canada	05.01.1998	05.01.1998	03.12.1997	07.07.2000		07.07.2000
Cape Verde	16.09.1997	16.09.1997	14.05.2001			10.05.2002
Central African Republic			08.11.2002	04.10.2001		
Chad			06.05.1999			28.09.2003
Chile	15.10.2003	15.10.2003	10.09.2001			31.07.2003
China	04.11.1998	04.11.1998				
Colombia	06.03.2000	06.03.2000	06.09.2000	05.08.2002		
Comoros			19.09.2002			

(cont.)

(cont.)

Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
Congo			04.05.2001			
Congo (Dem. Rep. of)			02.05.2002	11.04.2002		11.11.2001
Cook Islands						
Costa Rica	17.12.1998	17.12.1998	17.03.1999	07.06.2001	09.12.2003	24.01.2003
Côte d'Ivoire			30.06.2000			
Croatia	25.04.2002	25.04.2002	20.05.1998	21.05.2001		01.11.2002
Cuba						
Cyprus	22.07.2003	22.07.2003	17.01.2003	07.03.2002	16.05.2001	
Czech Republic	10.08.1998	10.08.1998	26.10.1999			30.11.2001
Denmark	30.04.1997	30.04.1997	08.06.1998	21.06.2001		27.08.2002
Djibouti			18.05.1998	05.11.2002		
Dominica			26.03.1999	12.02.2001		20.09.2002
Dominican Republic			30.06.2000			
Ecuador	16.12.2003	14.08.2000	29.04.1999	05.02.2002		
Egypt						
El Salvador	26.01.2000	26.01.2000	27.01.1999		27.03.2002	18.04.2002
Equatorial Guinea			16.09.1998		19.11.2003	
Eritrea			27.08.2001			
Estonia	20.04.2000	20.04.2000		30.01.2002		
Ethiopia						
Fiji			10.06.1998	29.11.1999		
Finland	11.01.1996	03.04.1998		29.12.2000		10.04.2002
France	30.06.1998	23.07.1998	23.07.1998	09.06.2000		05.02.2003
Gabon			08.09.2000	20.09.2000	29.08.2003	
Gambia			23.09.2002	28.06.2002		
Georgia				05.09.2003		
Germany	27.06.1997	02.05.1997	23.07.1998	11.12.2000		
Ghana			30.06.2000	20.12.1999		
Greece	05.08.1997	20.01.1999	25.09.2003	15.05.2002		22.10.2003
Grenada			19.08.1998			
Guatemala	30.08.2002	29.10.2001	26.03.1999			09.05.2002
Guinea			08.10.1998	14.07.2003		
Guinea-Bissau			22.05.2001			
Guyana			05.08.2003			
Haiti						
Holy See	22.07.1997	22.07.1997	17.02.1998			24.10.2001
Honduras	30.10.2003	30.10.2003	24.09.1998	01.07.2002	26.01.2003	14.08.2002
Hungary	30.01.1998	30.01.1998	06.04.1998	30.11.2001		
Iceland			05.05.1999	25.05.2000		01.10.2001

(cont.)

Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
India	02.09.1999	02.09.1999				
Indonesia						
Iran (Islamic Rep. of)						
Iraq						
Ireland	27.03.1997	27.03.1997	03.12.1997	11.04.2002		18.11.2002
Israel	30.10.2000	30.10.2000				
Italy	13.01.1999	13.01.1999	23.04.1999	26.07.1999		09.05.2002
Jamaica			17.07.1998			09.05.2002
Japan	10.06.1997	10.06.1997	30.09.1998			
Jordan		06.09.2000	13.11.1998	11.04.2002		
Kazakhstan						10.04.2003
Kenya			23.01.2001			28.01.2002
Kiribati			07.09.2000			
Korea (Dem. People's Rep. of)						
Korea (Rep. of)		09.05.2001		13.11.2002		
Kuwait						
Kyrgyzstan						13.08.2003
Lao (People's Dem. Rep.)						
Latvia	11.03.1998	22.08.2002		28.06.2002		
Lebanon						
Lesotho			02.12.1998	06.09.2000		24.09.2003
Liberia			23.12.1999			
Libyan Arab Jamahiriya					20.07.2001	
Liechtenstein	19.11.1997	19.11.1997	05.10.1999	02.10.2001		
Lithuania	03.06.1998	03.06.1998	12.05.2003	12.05.2003	13.03.2002	20.02.2003
Luxembourg	05.08.1999	05.08.1999	14.06.1999	08.09.2000		
Macedonia			09.09.1998	06.03.2002	19.04.2002	12.01.2004
Madagascar			16.09.1999			
Malawi			13.08.1998	19.09.2002		
Malaysia			22.04.1999			
Maldives	07.09.2000	07.09.2000	07.09.2000			
Mali	24.10.2001	24.10.2001	02.06.1998	16.08.2000		16.05.2002
Malta			07.05.2001	29.11.2002		09.05.2002
Marshall Islands				07.12.2000		
Mauritania			21.07.2000			
Mauritius	24.12.2002		03.12.1997	05.03.2002		
Mexico	10.03.1998		09.06.1998		07.10.2003	15.03.2002

(cont.)

(cont.)

Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
Micronesia						
Moldova (Rep. of)	08.09.2000	16.07.2001	08.09.2000			07.04.2004
Monaco		04.05.1997	17.11.1998			13.11.2001
Mongolia	06.04.1999			11.04.2002		
Morocco	19.03.2002	19.03.2002				22.05.2002
Mozambique			25.08.1998			
Myanmar						
Namibia			21.09.1998	26.06.2002		16.04.2002
Nauru	12.11.2001	12.11.2001	07.08.2000	12.11.2001		
Nepal						
Netherlands	25.03.1999	25.03.1999	12.04.1999	17.07.2001		
New Zealand	08.01.1998	08.01.1998	27.01.1999	07.09.2000		12.11.2001
Nicaragua	05.12.2000	05.12.2000	30.11.1998		01.06.2001	
Niger			23.03.1999	11.04.2002		
Nigeria			27.09.2001	27.09.2001		
Niue			15.04.1998			
Norway	20.04.1998	20.04.1998	09.07.1998	16.02.2000		23.09.2003
Oman						
Pakistan	05.12.2000	09.03.1999				
Palau						
Panama	26.03.1997	03.10.1999	07.10.1998	21.03.2002	08.03.2001	08.08.2001
Papua New Guinea						
Paraguay			13.11.1998	14.05.2001		27.09.2002
Peru	03.07.1997	03.07.1997	17.06.1998	10.11.2001		08.05.2002
Philippines	12.06.1997	12.06.1997	15.02.2000			26.08.2003
Poland		14.10.2003		12.11.2001		
Portugal	12.11.2001	31.03.1999	19.02.1999	05.02.2002		19.08.2003
Qatar			13.10.1998		04.09.2000	25.07.2002
Romania	25.08.2003	25.08.2003	30.11.2000	11.04.2002		10.11.2001
Russian Federation	09.09.1999					
Rwanda			08.06.2000			23.04.2002
Saint Kitts and Nevis			02.12.1998			
Saint Lucia			13.04.1999			
Saint Vincent and the Grenadines			01.08.2001	03.12.2002		
Samoa			23.07.1998	16.09.2002		
San Marino			18.03.1998	13.05.1999		
São Tomé and Príncipe			31.03.2003			
Saudi Arabia						

(cont.)

Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
Senegal		29.11.1999	24.09.1998	02.02.1999		03.03.2004
Seychelles	08.06.2000	08.06.2000	02.06.2000			
Sierra Leone			25.04.2001	15.09.2000		15.05.2002
Singapore						
Slovakia	30.11.1999	30.11.1999	25.02.1999	11.04.2002	11.02.2004	
Slovenia	03.12.2002	03.12.2002	27.10.1998	31.12.2001		
Solomon Islands			26.01.1999			
Somalia						
South Africa	26.06.1998	26.06.1998	26.06.1998	27.11.2000		
Spain	19.01.1998	27.01.1998	19.01.1999	24.10.2000	06.07.2001	08.03.2002 08.09.2000
Sri Lanka						
Sudan			13.10.2003			
Suriname			23.05.2002			
Swaziland			22.12.1998			
Sweden	15.01.1997	16.07.1997	30.11.1998	28.06.2001		20.02.2003
Switzerland	24.03.1998	24.03.1998	24.03.1998	12.10.2001		26.06.2002
Syrian Arab Republic						17.10.2003
Tajikistan	12.10.1999	12.10.1999	12.10.1999	05.05.2000		05.08.2002
Tanzania			13.11.2000	20.08.2002		
(United Rep. of)						
Thailand			27.11.1998			
Timor-Leste			07.05.2003	06.09.2002		
Togo			09.03.2000			
Tonga						
Trinidad and Tobago			27.04.1998	06.04.1999		
Tunisia			09.07.1999			02.01.2003
Turkey			25.09.2003			
Turkmenistan		19.03.2004	19.01.1998			
Tuvalu						
Uganda			25.02.1999	14.06.2002		06.05.2002
Ukraine	28.05.2003	15.12.1999				
United Arab Emirates						
United Kingdom	11.02.1999	11.02.1999	31.07.1998	04.10.2001		24.06.2003
United States of America		24.05.1999				23.12.2002
Uruguay	18.08.1998	18.08.1998	07.06.2001	28.06.2002		09.09.2003

(cont.)

(cont.)

Country	1995 Protocol IV to the CCW	1996 Amended Protocol II to the CCW	1997 Ottawa Convention	1998 ICC Statute	1999 Second Protocol to the 1954 Hague Convention	2000 Optional Protocol on the Involvement of Children in Armed Conflicts
Uzbekistan	29.09.1997					
Vanuatu						
Venezuela			14.04.1999	07.06.2000		23.09.2003
Viet Nam						20.12.2001
Yemen			01.09.1998			
Yugoslavia	12.08.2003		18.09.2003	06.09.2001	02.09.2002	10.10.2002
Zambia			23.02.2001	13.11.2002		
Zimbabwe			18.06.1998			
Total	75	76	141	93	21	71

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1863

Lieber Code

Instructions for the Government of Armies of the United States in the Field, prepared by Francis Lieber, promulgated as General Order No. 100 by President Abraham Lincoln, Washington D.C., 24 April 1863.

1874

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1880

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1913

Oxford Manual of Naval War

The Laws of Naval War Governing the Relations between Belligerents, adopted by the Institute of International Law, Oxford, 9 August 1913.

1919

Report of the Commission on Responsibility

Report submitted to the Preliminary Conference of Versailles by the Commission on Responsibility of the Authors of the War and on Enforcement of Penalties, Versailles, 29 March 1919.

1923

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Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, Part II, drafted by a Commission of Jurists, The Hague, December 1922–February 1923.

1938

ILA Draft Convention for the Protection of Civilian Populations against New Engines of War

Draft Convention for the Protection of Civilian Populations against New Engines of War, adopted by the International Law Association, Fortieth Conference, Amsterdam, 29 August–2 September 1938.

1943*Inter-Allied Declaration against Acts of Dispossession*

Inter-Allied Declaration against Acts of Dispossession Committed in Territories under Enemy Occupation or Control, as agreed between the Union of South Africa, United States of America, Australia, Belgium, Canada, China, Czechoslovak Republic, United Kingdom of Great Britain and Northern Ireland, Union of Soviet Socialist Republics, Greece, India, Luxembourg, Netherlands, New Zealand, Norway, Poland, Yugoslavia, and the French National Committee, London, 5 January 1943, also known as the London Declaration.

Moscow Declaration

Declaration concerning Atrocities, made at the Moscow Conference, signed by the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics and China, Moscow, 30 October 1943.

1945*Allied Control Council Law No. 10*

Allied Control Council Law No. 10: Punishment of Persons Guilty of War Crimes, Crimes against Peace and against Humanity, enacted by the Allied Control Council of Germany, composed of the United Kingdom of Great Britain and Northern Ireland, France, the United States of America and the Union of Soviet Socialist Republics, Berlin, 20 December 1945.

1946*IMT Charter (Tokyo)*

Charter of the International Military Tribunal for the Far East, approved by an Executive Order, General Douglas MacArthur, Supreme Commander for the Allied Powers in Japan, Tokyo, 19 January 1946, amended on 26 April 1946.

1948*American Declaration on the Rights and Duties of Man*

American Declaration on the Rights and Duties of Man, adopted by the Ninth International Conference of American States, Res. XXX, Bogotá, 2 May 1948.

UDHR

Universal Declaration on Human Rights, adopted by the UN General Assembly, Res. 217 A (III), 10 December 1948.

1950*Nuremberg Principles*

Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgement of the Tribunal, adopted by the International Law Commission, UN Doc. A/1316, New York, 5 June–29 July 1950.

UN Command Rules and Regulations

Rules of Criminal Procedure for Military Commissions of the United Nations Command, Tokyo, 22 October 1950.

1952*Luxembourg Agreement between Germany and the CJMC*

Agreement consisting of Protocol No. 1 drawn up by the Representatives of the Government of the Federal Republic of Germany and of the Conference on

Jewish Material Claims against Germany; and Protocol No. 2 drawn up by the Representatives of the Government of the Federal Republic of Germany and the Conference on Jewish Material Claims against Germany.

UN Flag Code

United Nations Flag Code, adopted by the UN Secretary-General on 11 November 1952, pursuant to UN General Assembly Res. 167 (II) of 20 October 1947, and rescinding the Flag Code issued on 19 December 1947.

1954

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³ This manual was adopted in its entirety by Article 12 of the Law on the Application of the Constitution of the Republika Srpska. According to the Report on the Practice of the Republika Srpska, it was applied in the context of the conflict in Bosnia and Herzegovina, Report on the Practice of Republika Srpska, 1997, Chapter 1.1.

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Loi du 20 juin 1947 relative à la compétence des juridictions militaires en matière de crimes de guerre, published in the Moniteur Belge, No. 177-178, 26-27 June 1947, p. 6304.

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Arrêté de l'Exécutif régional wallon relatif à l'apposition d'un sign distinctif sur les monuments et les sites protégés, 7 juin 1990, published in the Moniteur Belge, No. 180, 18 September 1990, F. 90-2294, p. 17817.

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Lithuania*Criminal Code as amended (1961)*

Lietuvos Respublikos baudziamas kodeskas (Criminal Code of the Republic of Lithuania) 26 June 1961, published in Valstybes zinios, No. 18-147, 1961, as amended on 9 June 1998.

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Lietuvos Raudonojo Kryziaus draugijos, Raudonojo Kryziaus ir Raudonojo Pusmenulio emblemos ir pavadinimo istatymas (Law on the Lithuanian Red Cross Society, the Red Cross and Red Crescent Emblem and Name), No. VIII-1978, 10 October 2000, published in Valsybe zinios, No. 89-2744, 2000.

Draft Decree on the Emblem (1999)

Draft Decree of the Government of the Republic of Lithuania relating to Regulations on the use of the Red Cross emblem, 1999.

Luxembourg*Emblem Law (1914)*

Loi concernant la protection des emblèmes de la Croix-Rouge, 18 décembre 1914, published in *Mémorial, Journal officiel du Grand-Duché de Luxembourg*, 1914.

Code of Criminal Investigation (1944)

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Loi du 2 août 1947 sur la répression des crimes de guerre, published in *Mémorial, Journal officiel du Grand-Duché de Luxembourg*, 1947, pp. 755–758.

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Loi du 24 décembre 1974 ayant pour objet l'imprescriptibilité des crimes de guerre, published in *Mémorial, Journal officiel du Grand-Duché de Luxembourg*, 1974, Volume II, pp. 2328–2329.

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Loi du 9 janvier 1985 relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949, published in *Mémorial, Journal officiel du Grand-Duché de Luxembourg*, 1985, pp. 24–27.

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Loi du 10 avril 1997 portant approbation de la Convention sur l'interdiction de la mise au point, de la fabrication, du stockage et de l'emploi des armes chimiques et sur leur destruction, faite à Paris, le 13 janvier 1993 (Law of 10 April 1997 approving the Convention) as amended, published in *Mémorial, Journal officiel du Grand-Duché de Luxembourg*, A-No. 23, 16 April 1997, p. 881, *Réctificatif (Corrigendum)* published in *Mémorial, Journal officiel du Grand-Duché de Luxembourg*, A-No. 33, 2 May 1997, p. 1164.

Blinding Laser Weapons Act (1999)

Loi du 29 avril 1999 portant approbation

- du Protocole sur l'interdiction ou la limitation de l'emploi des mines, pièges et autres dispositifs, tel qu'il a été modifié le 3 mai 1996 (Protocole II, tel qu'il a été modifié le 3 mai 1996), annexé à la Convention sur l'interdiction ou la limitation de l'emploi de certaines armes classiques qui peuvent être considérées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination du 10 octobre 1980, adopté à Genève, le 3 mai 1996;
- du Protocole additionnel à la Convention sur l'interdiction ou la limitation de l'emploi de certaines armes classiques qui peuvent être considérées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination du 10 octobre 1980, (Protocole IV intitulé Protocole relatif aux armes à laser aveuglantes), adopté le 13 octobre 1995, published in *Memorial, Journal officiel du Grand-Duché de Luxembourg*, ttt A-No. 50, 6 May 1999, pp. 1175–1176.

Law on the Prohibition of Anti-Personnel Mines (1999)

Loi du 29 avril 1999 portant approbation de la Convention sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction, signée à Ottawa le 4 décembre 1997, published in

Mémorial, Journal officiel du Grand-Duché de Luxembourg, A-No. 50, 6 May 1999, p. 1189.

Law on Cooperation with the International Tribunals (1999)

Loi du 18 mai 1999 introduisant certaines mesures visant à faciliter la coopération avec:

- 1) le Tribunal international créé par le Conseil de Sécurité des Nations Unies dans sa Résolution 827 du 25 mai 1993 pour le jugement des personnes présumées responsables de violations graves du droit international humanitaire commises sur le territoire de l'ancienne République fédérative socialiste de Yougoslavie depuis 1991
- 2) le Tribunal international créé par le Conseil de Sécurité des Nations Unies dans sa Résolution 955 du 8 novembre 1994 pour le jugement des personnes présumées responsables d'actes de génocide ou d'autres violations graves du droit international humanitaire commis sur le territoire du Rwanda et les citoyens rwandais présumés responsables de tels actes ou violations commis sur le territoire d'Etats voisins, entre le 1er janvier et le 31 décembre 1994,

published in Mémorial, Journal officiel du Grand-Duché de Luxembourg, A-No. 66, 11 June 1999, pp. 1435–1438.

Malawi

National Service Act (1951)

Act to make provision for securing and controlling the enlistment of persons for national service during an emergency and for purposes connected therewith, 10 April 1951, Laws of Malawi, Vol. III, Cap. 12:02, published in Government Gazette Notice, No. 15, 10 April 1951, pp. 1–7.

Geneva Conventions Act (1967)

An Act to enable effect to be given to certain International Conventions done at Geneva on the Twelfth Day of August, one thousand nine hundred and forty-nine and for purposes connected therewith, Act No. 18 of 1967, 24 July 1967, Laws of Malawi, Vol. III, Cap. 12:03, published in Malawi Gazette, Supplement, 9 August 1967, pp. 1–6.

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An Act to Provide for the Incorporation of the Malawi Red Cross Society and for Matters Incidental Thereto and Connected Therewith, 16 February 1968, Laws of Malawi, Vol. III, Cap. 18:09, published in Government Gazette Notice, No. 51, 16 February 1968, pp. 1–4.

Malaysia

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An Act to enable effect to be given to certain international conventions done at Geneva on the twelfth day of August, nineteen hundred and forty-nine, and for purposes connected therewith, Laws of Malaysia, Act 512 of 1962, 16 April 1962, first published as Act No. 5 of 1962 of the Federation of Malaya, in Gazette, Vol. VI, No. 4, 16 April 1962, pp. 19–25.

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An Act relating to the organisation, discipline, powers and duties of the Royal Malaysian Police, Laws of Malaysia, Act 344 of 1967, published as revised up to 1 September 1988 in Gazette, 29 September 1988.

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An Act to amend and consolidate the law relating to the establishment, government and discipline of the armed forces of Malaysia, Laws of Malaysia, Act 77 of 1972, published in Gazette, 4 May 1972, as amended by Acts A 440, A 583 and A 974.

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An Act to provide for the internal security of Malaysia, preventive detention, the prevention of subversion, the suppression of organised violence against persons and property in specified areas of Malaysia, and for matters incidental thereto, Laws of Malaysia, Act 82 of 1960, published in Gazette, No. 14, 6 July 1972; revised version of 1972, published in Gazette, 13 July 1972, pp. 9ff.

Official Secrets Act (1972)

An Act relating to the protection of official secrets, Laws of Malaysia, Act 88 of 1972, published in Gazette, No. 20, 28 September 1972.

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An Act relating to extradition of fugitive criminals, Laws of Malaysia, Act 479 of 1992, published in Gazette, No. 4, 20 February 1992, pp. 7–49.

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An Act relating to criminal offences, Laws of Malaysia, Act 574, published as revised up to 31 May 1997 in Gazette, 31 July 1997.

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An Act to implement the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Laws of Malaysia, Act 603 of 2000, 30 May 2000, published in Gazette, 15 June 2000, pp. 3–16.

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Loi No. 95 042/ANRM du 16 février 1995 portant Code de Justice Militaire au Mali, published in the Journal Officiel du Mali, No. 17, 15 September 1995, pp. 645–659.

Anti-Personnel Mines Order (2000)

Ordonnance No. 00-049/P-RM du 27 septembre 2000 portant mise en oeuvre de la Convention sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction, signée à Ottawa le 03 décembre 1997, published in the Journal Officiel du Mali, No. 32, 20 November 2000, pp. 1255–1257.

Penal Code (2001)

Loi No. 01-079 du 20 août 2001 portant Code pénal, published in the Journal Officiel Spécial du Mali, 1 February 2001, pp. 1–333.

Malta*Armed Forces Act as amended (1970)*

Malta Armed Forces Act to make provisions for the raising and maintenance of armed forces in Malta and to provide for matters connected therewith or ancillary thereto, enacted by Act XXVII of 1970, 22 September 1970, Cap. 220 of the Laws of Malta, as amended by Act XXXV of 1974, Act LVIII of 1974, Act XIII of 1975, Legal Notice 148 of 1975, Act XVIII of 1976, Act XXII of 1976, Act XX of 1980, Act XIII of 1983, Act VIII of 1990, Act XV of 1990, Act XXIV of 1995, Act X of 2000 and Act XII of 2000.

Red Cross Society Act (1992)

An Act to make provision for the recognition of the Soċjetà Maltija tas-Salib l-Ahmar – Malta Red Cross Society and for matters connected therewith, enacted by Act VI of 1992, 19 June 1992, Cap. 359 of the Laws of Malta, published in Supplement tal-Gazzetta tal-Gvern ta' Malta, No. 15,618, 19 June 1992, pp. A 164–A 175.

Mauritius*Geneva Conventions Act (1970)*

Geneva Conventions Act, RL3/37, 24 December 1970, published in Mauritius Laws 1996, Vol. 2, pp. 678–682.

Anti-Personnel Mines (Prohibition) Act (2001)

An Act to give effect to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Act No. 1 of 2001, 10 April 2001, published in Legal Supplement to the Government Gazette of Mauritius, No. 40, 28 April 2001, pp. 1–5.

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Constitución Política de los Estados Unidos Mexicanos, 31 January 1917, published in Diario Oficial de la Federación, 5 February 1917.

Penal Code as amended (1931)

Código Penal Federal, 13 August 1931, published in Diario Oficial de la Federación, 14 August 1931; updated version published as Código Penal Federal, edición 2000, published in Diario Oficial de la Federación, 12 June 2000, and in Código Penal Federal, Mexico, Editorial Porrúa (Colección Porrúa), 2000, 311 pp.

Code of Military Justice as amended (1933)

Código de Justicia Militar, 28 August 1933, published in Diario Oficial de la Federación, 31 August 1933; updated version published as Código de Justicia Militar (Tomo I), Mexico, Taller Autográfico (bajo la supervisión del Estado Mayor de la Defensa Nacional), 1996, 181 pp.

Decree on the Ratification of the Ottawa Convention (1998)

Decreto Promulgatorio de la Convención sobre la Prohibición del Empleo, Almacenamiento, Producción y Transferencia de Minas Antipersonal y sobre su Destrucción, hecha en Noruega, 10 June 1998, published in Diario Oficial de la Federación, 21 August 1998, pp. 2–9.

Moldova*Emblem Law (1999)*

Law on the use and protection of the emblem of the Red Cross, adopted by the Parliament on 12 November 1999, published in Monitorul Oficial al Republicii Moldova, No. 145–148 (538–541), 23 December 1999, pp. 4–6.

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Penal Code, adopted on 18 April 2002 under No. 985-XV, promulgated into Law by the Decree of the President No. 873-III on 6 September 2002, published in Monitorul Oficial al Republicii Moldova, No. 128-129, 13 September 2002, Article 1012 (the Presidential Decree is published under Article 1013).

Monaco*Emblem Law (1953)*

Ordonnance Souveraine No. 828 du 12 novembre 1953 réglementant l'emploi de l'emblème de la Croix-Rouge, published in the Journal de Monaco, No. 5.016, 23 November 1953, p. 810.

Anti-Personnel Mines Order (1999)

Ordonnance Souveraine No. 14.123 du 30 août 1999 relative à l'application de la Convention des Nations Unies sur l'interdiction de l'emploi, du stockage, de la production et du transfert des mines antipersonnel et sur leur destruction, published in the Journal de Monaco, No. 7406, 3 September 1999, pp. 1237–1238.

Morocco*Code of Military Justice (1956)*

Dahir du 10 novembre 1956 formant Code de justice militaire, published in the Bulletin officiel, 21 November 1956, pp. 1319ff.

Emblem Law (1958)

Dahir No. 1-58-256 du 29 octobre 1958 relatif à l'emploi de l'emblème du Croissant-Rouge, published in the Bulletin officiel, No. 2405, 5 December 1958, p. 1968.

Mozambique*Law on Criminal Punishment (1983)*

Lei No. 5/83, Determina que seja aplicada a pena de chicotada como medida punitiva e educativa aos autores, cúmplices e encobridores de vários crimes, consumados, frustrados ou tentados, 31 March 1983, published in Boletim da República, No. 13, Supplement, pp. 26 and 26(2).

Military Criminal Law (1987)

Lei dos Crimes Militares No. 17/87, 21 December 1987, published in Boletim da República, No. 50, 6th Supplement, 21 December 1987, pp. 418(19)–418(31).

Myanmar*Defence Services Act (1959)*

Defence Services Act, Act No. XLIII of 1959, 29 September 1959, published in Burma Gazette, 29 September 1959, Part I, pp. 1899ff.; amended by Defence Services (Amendment) Act, Act No. 23/1960, 5 October 1960, Defence Services (Amendment) Act, Act No. 39/1961, 1 July 1961, Defence Services (Amendment) Law, Act No. 11/1962, 20 June 1962 and Defence Services (Amendment) Law, Act No. 13/1989, 10 May 1985.

Namibia*Criminal Procedure Act (1977)*

Criminal Procedure Act, Act No. 51, 1977, assented to on 21 April 1977 by the Parliament of South Africa (as amended), published in South African Government Gazette, 248 pp.

Constitution (1990)

The Constitution of the Republic of Namibia, adopted on 9 February 1990, published in Government Gazette of the Republic of Namibia, No. 2, 21 March 1990, 80 pp.

Netherlands*Penal Code as amended (1881)*

Wet van 3 maart 1881 tot vaststelling van een Wetboek van Strafrecht (Law of 3 March 1881), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 35, 1 september 1886, pp. 1–124, as amended by Wet van 10 maart 1984 tot herziening van bepalingen

van het Wetboek van Strafrecht en van enkele andere wetten in verband met de indeling van strafbare feiten in geldboetecategorieën (Wet indeling geldboetecategorieën) (Law of 10 March 1984), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 91, 10 March 1984, entry into force 1 May 1984, pp. 1–25.

Extraordinary Penal Law Decree as amended (1943)

Besluit Buitengewoon Strafrecht (Extraordinary Penal Law Decree of 22 December 1943), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. D.61, 22 December 1943, pp. 1–10, entry into force: 4 September 1944, as amended by Besluit van 27 juni 1947, houdende nadere voorzieningen met betrekking tot de bijzondere rechtspleging, published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. H.206, 27 June 1947, pp. 1–20, and Wet van 10 juli 1947, houdende voorziening met betrekking tot de berechting van personen die in dienst bij of van den vijand zich hebben schuldig gemaakt aan oorlogsmisdrijven tegen de menselijkheid, published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. H.233, 10 July 1947, pp. 1–2.

Decree instituting the Commission for the Investigation of War Crimes (1945)

Besluit van 29 mei 1945, houdende vaststelling van het besluit opsporing oorlogsmisdrijven (Decree instituting the Commission for the Investigation of War Crimes of 29 May 1945), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. F. 85, 29 May 1945, pp. 1–4.

Definition of War Crimes Decree (1946)

Begripsomschrijving oorlogsmisdrijven 1946 (Definition of War Crimes Decree of 1946), published in Netherlands East Indies Statute Book Decree No. 44 of 1946, 1 June 1946, pp. 1–3.

Criminal Law in Wartime Act as amended (1952)

Wet Oorlogsstrafrecht, Wet van 10 juli 1952, houdende vaststelling van de Wet Oorlogsstrafrecht alsmede van enige daarmee verband houdende wijzigingen in het Wetboek van Strafrecht, het Wetboek van Militair Strafrecht en de Invoeringswet Militair Straf- en Tuchtrect, as amended by Wet Oorlogsstrafrecht, Wet van 14 juni 1990 tot wijziging van het Wetboek van Strafrecht, de Dienstplicht, de Wet gewetensbezwaren militaire dienst, de Militaire Ambtenarenwet 1931, het Besluit Buitengewoon Strafrecht, de Wet van 10 juli 1947 (stb H.233) en de Wet Oorlogsstrafrecht in verband met de herziening van het militair straf- en tuchtrect en ter afschaffing van de doodstraf, published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 369, 14 June 1990, pp. 1–5, by the Wet van 14 juni 1990 tot wijziging van de Wet op de rechterlijke organisatie, de Wet Oorlogsstrafrecht en de Noodwet rechtspleging, in verband met de nieuwe regels inzake de militaire strafrechtspraak, published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 372, pp. 1–2, and by the International Crimes Act (2003).

Act on the Surrender of Persons Suspected of War Crimes as amended (1954)

Wet van 19 mei 1954 tot overlevering inzake oorlogsmisdrijven (Law of 19 May 1954), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 215, 19 May 1954, pp. 560–561, entry into force: 3 February 1955, as amended by the International Crimes Act (2003).

Import and Export Act (1962)

(In- en uitvoerwet) In- en Uitvoerwet van 5 juli 1962, houdende een regeling op het gebied van de invoer en de uitvoer van goederen Wet 1962 (Import and Export Act of 1962), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 295, 5 July 1962, pp. 741–744, entry into force: 1 January 1963.

Military Criminal Code as amended (1964)

Wetboek van Militair Strafrecht, Wet van 27 april 1903, tot vaststelling van een Wetboek van Militair Strafrecht, published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 111, 1 January 1923, pp. 1–46, entry into force: 27 April 1903; Wetboek van Militair Strafrecht van 1964 (Military Criminal Code of 9 January 1964) as amended by Wetboek van Militair Strafrecht gewijzigd bij de wetten van 9 januari 1964, published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 9, 9 January 1964, pp. 73–85, as amended by Rijkswet van 14 juni 1990 tot wijziging van het Wetboek van Militair Strafrecht in verband met de herziening van het militair tuchtrecht en ter afschaffing van de doodstraf, published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 368, 14 June 1990, pp. 1–24.

Population Evacuation Act (1988)

Wet Verplaatsing Bevolking van 1988 (Population Evacuation Act of 1988), Wet van 4 februari 1988 tot wijziging van een aantal wetten in verband met het vervallen van artikel 201, vierde lid, van de Grondwet naar de tekst van 1972, published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 21, 4 February 1988, pp. 1–6.

Military Discipline Act (1990)

Rijkswet van 14 juni 1990 tot herziening van het militair tuchtrecht (Military Discipline Act), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 367, 14 June 1990, pp. 1–21, entry into force: 1 January 1991, Besluit van 30 november 1990, regelende de inwerkingtreding van de Wet militair tuchtrecht, de Wet militaire strafrechtspraak, de Rijkswet van 14 juni 1990 tot wijziging van het Wetboek van Militair Strafrecht in verband met de herziening van het militair tuchtrecht en ter afschaffing van de doodstraf (Stb 368) en de Rijkswet van 14 juni 1990 tot wijziging van het Wetboek van Militair Strafrecht in verband met de nieuwe regels inzake de militaire strafrechtspraak, published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), 30 November 1990, pp. 1–2.

Act on the Establishment of the ICTY (1994)

Wet tot instelling van het Internationaal Tribunaal voor vervolging van personen aansprakelijk voor ernstige schendingen van het internationaal humanitair recht op het grondgebied van het voormalige Joegoslavië sedert 1991 (Act of 21 April 1994 containing provisions relating to the establishment of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 308, 21 April 1994, pp. 1–5, entry into force: 4 May 1994.

Chemical Weapons Act (1995)

Uitvoeringswet verdrag chemische wapens, Wet van 8 juni 1995, houdende regels betreffende de uitvoering van het Verdrag tot verbod van de ontwikkeling, de produktie, de aanleg van voorraden en het gebruik van chemische wapens en inzake de vernietiging van deze wapens, ofwel de Uitvoeringswet verdrag chemische wapens, (Law of 8 June 1995), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 338, 4 July 1995, pp. 1–9, entry into force: 30 April 1997, Besluit van 22 april 1997 tot vaststelling van het tijdstip van inwerkingtreding van de Uitvoeringswet Verdrag chemische wapens en van het Uitvoeringsbesluit Verdrag chemische wapens, published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 181, 29 April 1997, pp. 1–18, entry into force: 30 April 1997.

ICC Implementation Act (2002)

Rijkswet van 20 juni 2002 tot uitvoering van het Statuut van het Internationaal Strafhof met betrekking tot de samenwerking met en bijstand aan het Internationaal Strafhof en de tenuitvoerlegging van zijn vonnissen (Uitvoeringswet Internationaal Strafhof) (Act of 20 June 2002 to implement the Statute of the International Criminal Court in relation to cooperation with and the provision of assistance to the International Criminal Court and the enforcement of its decisions) (International Criminal Court Implementation Act)), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 314, 27 June 2002, pp. 1–25, entry into force: 1 July 2002.

International Crimes Act (2003)

Wet van 19 juni 2003, houdende regels met betrekking tot ernstige schendingen van het internationaal humanitair recht (Wet internationale misdrijven) (Act of 19 June 2003 containing rules concerning serious violations of international humanitarian law (International Crimes Act)), published in Staatsblad van het Koninkrijk der Nederlanden (Statute Book of the Kingdom of Netherlands), No. 270, 2003, pp. 1–13, entry into force: 1 October 2003.

New Zealand*Geneva Conventions Act as amended (1958)*

An Act to enable effect to be given to certain International Conventions done at Geneva on the twelfth day of August, nineteen hundred and forty-nine, and for purposes connected therewith, Act No. 19 of 1958, 18 September 1958, published in The Statutes of New Zealand 1958, Vol. 11, pp. 85–219 (also applicable to the Cook Islands, Niue and Samoa), amended by the Act to amend the Geneva Conventions Act, Act No. 144 of 1987, 10 July 1987, published in The Statutes of New Zealand 1987, Vol. 4, printed under the authority of the New Zealand Government by V. R. Ward, Government Printer, Wellington, 1989, pp. 2149–2206.

Armed Forces Discipline Act (1971)

An Act to consolidate and amend certain enactments of the General Assembly of New Zealand and the Parliament of the United Kingdom relating to the discipline of and the administration of justice within those forces, Act No. 53 of 1971, 12 November 1971, published in The Statutes of New Zealand 1971, Vol. 23, pp. 33–212, as amended by Act No. 13 of 1976, Act No. 37 of 1980, Act No. 48 of 1981, Act No. 199 of 1985, Act No. 89 of 1988, Act No. 176 of

1988, Act No. 34 of 1997, Act No. 27 of 1998, Act No. 28 of 1999 and Act No. 55 of 2001.

Disarmament Act (1987)

An Act to establish in New Zealand a Nuclear Free Zone, to promote and encourage an active and effective contribution by New Zealand to the essential process of disarmament and international arms control, and to implement in New Zealand the following treaties:

- (a) The South Pacific Nuclear Free Zone Treaty of 6 August 1985 (the text of which is set out in the First Schedule to this Act);
- (b) The Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water of 5 August 1963 (the text of which is set out in the Second Schedule to this Act);
- (c) The Treaty on the Non-Proliferation of Nuclear Weapons of 1 July 1968 (the text of which is set out in the Third Schedule of this Act);
- (d) The Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean floor and in the Subsoil Thereof of 11 February 1971 (the text of which is set out in the Fourth Schedule to this Act);
- (e) The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction of 10 April 1972 (the text of which is set out in the Fifth Schedule to this Act).

Act No. 86 of 1987, 8 June 1987, published in *The Statutes of New Zealand 1987*, Vol. 2, printed under the authority of the New Zealand Government by V. R. Ward, Government Printer, Wellington, 1989, pp. 940–976.

International War Crimes Act (1995)

An Act to provide for New Zealand to assist –

- (a) The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991; and
- (b) The International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994; and
- (c) Other ad hoc tribunals that may be established by the Security Council of the United Nations under chapter VII of the Charter of the United Nations for the prosecution of violations of international humanitarian law –

in the performance of their functions, Act No. 27 of 1995, 9 June 1995, published in *The Statutes of New Zealand 1995*, Vol. 41, pp. 577–627.

Chemical Weapons Act (1996)

An Act to implement in the law of New Zealand the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Act No. 37 of 1996, 24 June 1996, published in *The Statutes of New Zealand*, 1996, Vol. 2, pp. 1044–1182.

Crimes (Internationally Protected Persons and Hostages) Amendment Act (1998)
Crimes (Internationally Protected Persons and Hostages) Amendment Act, Act No. 36 of 1998, 2 December 1998, published in *The Statutes of New Zealand 1998*, Vol. 41, pp. 343–359.

Anti-Personnel Mines Act (1998)

An Act to implement in the law of New Zealand the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Act No. 111 of 1998, 8 December 1998, published in *The Statutes of New Zealand 1998*, Vol. 3, pp. 1808–1836.

International Crimes and ICC Act (2000)

International Crimes and International Criminal Court Act 2000, Act No. 26 of 2000, 6 September 2000, published in *The Statutes of New Zealand 2000*, Vol. 1, pp. 589–797.

Nicaragua

Military Penal Law (1980)

Ley Provisional de los Delitos Militares, Decreto No. 600, 12 December 1980, published in *La Gaceta, Diario Oficial*, No. 296, 23 December 1980, pp. 2901–2910.

Constitution (1987)

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Act to provide for the investigation and the establishment of as complete a picture as possible of the nature, causes and extent of gross violations of human rights committed during the period from 1 March 1960 to the cut-off date contemplated in the Constitution, within or outside the Republic, emanating from the conflicts of the past, and the fate or whereabouts of the victims of such violations; the granting of amnesty to persons who make full disclosure of all the relevant facts relating to acts associated with a political objective committed in the course of the conflicts of the past during the said period; affording victims an opportunity to relate the violations they suffered; the taking of measures aimed at the granting of reparation to, and the rehabilitation and the restoration of the human and civil dignity of, victims of violations of human rights; reporting to the Nation about such violations and victims; the making of recommendations aimed at the prevention of the commission of gross violations of human rights; and for the said purposes to provide for the establishment of a Truth and Reconciliation Commission, comprising a Committee on Human Rights Violations, a Committee on Amnesty and a Committee on Reparation and Rehabilitation; and to confer certain powers on, assign certain functions to and impose certain duties upon that Commission and those Committees; and to provide for matters connected therewith, Act No. 34 of 1995, assented to on 19 July 1995; as amended by the Promotion of National Unity and Reconciliation Amendment Act, Act No. 87 of 1995, the Judicial Matters Amendment Act, Act No. 104 of 1996, the Promotion of National Unity and Reconciliation Amendment Act, Act No. 18 of 1997, and the Promotion of National Unity and Reconciliation Second Amendment Act, Act No. 84 of 1997.

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Venezuela

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Zambia*Defence Act as amended (1964)*

An Act to provide for the creation and maintenance in Zambia of a Defence Force consisting of an Army comprising the Regular Force of the Army, the Territorial Force of the Army, the Army Reserve and the Territorial Army Reserve, and an Air Force comprising the Regular Force of the Air Force, the Auxiliary Air Force, the Air Force Reserve and the Auxiliary Air Force Reserve; to charge the Defence Force with the defence of Zambia and with such other duty as may from time to time be determined by the President; to provide for the creation of a Defence Council to advise the President in matters of policy and matters affecting the command, discipline and administration of the Defence Force; to provide for the commissioning, appointment and transfer of officers in the Defence Force and to set out the terms and conditions of enlistment and service of soldiers in the Regular Force of the Defence Force; to provide the conditions of discharge of soldiers from the Regular Force and for their transfer to the Reserve Force; to provide for the discipline of the Defence Force and for the trial and punishment of members of the Force who commit such military offences as are set out in the Act, or civil offences; to make provision for the arrest of members of the Defence Force who commit an offence against any provision of the Act and for the investigation of and summary dealing with charges preferred against such members; to provide for the creation and constitution of courts-martial to try persons subject to military law under the Act, for the procedure to be followed by such courts-martial, for the awarding of punishments and for the confirmation, revision and review of proceedings of courts-martial and the review of summary findings and awards; to make provision for the carrying out of sentences of imprisonment awarded by courts-martial, for a right of appeal from the decision of a court-martial to the court of appeal and for the procedure in and the determination of such appeals; to provide for the enforcement of maintenance and affiliation orders against members of the Defence Force by deduction from pay and for the imposition of forfeitures and deductions from the pay of such members in certain circumstances; to set out the order of precedence of officers and soldiers of the Defence Force and to make provision for the command of the Army and the command of the Air Force and for the exemption of officers and soldiers

from serving as assessors in civil courts; to provide for the arrest of deserters and absentees without leave and for the bringing of such persons before a civil court; to set out the offences relating to military matters which are punishable by civil courts and to make provision with respect to evidence in proceedings under this Act, whether before a court-martial or a civil court; to provide for the composition of and enlistment of persons in the Territorial Force, for the training of persons enlisted in such Force, for the embodiment of such Force when necessary in the public interest, for the discharge of persons from that Force and for all other matters affecting the discipline of such Force; to set out the persons who are subject to military law under the Act and generally to provide for matters incidental to or connected with the foregoing; to repeal the Defence Act, 1955, and to give effect to the transitional provisions and savings set out in the Act, Act No. 45 of 1964, 18 September 1964, as subsequently amended, Chapter 131 of the Laws of Zambia, printed and published by the Government Printer, Lusaka, 267 pp.

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An Act to establish and incorporate the Zambia Red Cross Society and for matters incidental thereto and connected therewith, Act No. 9 of 1966, 22 April 1966, Chapter 545 of the Laws of Zambia, printed and published by the Government Printer, Lusaka, 5 p; revised version published, as Act No. 13 of 1994, in the Official Gazette, CAP. 307, pp. 3–5.

Zimbabwe

Criminal Procedure and Evidence Act as amended (1927)

An Act to consolidate and amend the law relating to procedure and evidence in criminal cases, and to make provision for other matters incidental to such procedure and evidence, 1 June 1927, amended several times, published in The Statute Law of Rhodesia, Vol. II, printed by the Government Printer, Salisbury, 1974, pp. 69–205.

Defence Act as amended (1972)

An Act to consolidate and amend the law relating to the Defence Council, the establishment, constitution, command, administration, organization, duties, conditions of service, training, co-operation with other Military Forces and discipline of the Defence Forces, the declaration of cantonments and protected areas, the requisitioning of buildings, vehicles and other things for the use of the Defence Forces in certain circumstances, the expropriation of land for defence purposes and the protection of defence stores; to provide for the publication of defence agreements and to create powers in connexion with the training of units of the Defence Forces; and to provide for matters incidental to or connected with the foregoing, Act No. 27/1972, 3 November 1972, published in Official Gazette, 3 November 1972, as amended by Act No. 37 of 1974, Act No. 23 of 1975, Act No. 35 of 1976, Act No. 51 of 1976, Act No. 2 of 1978, Act No. 41 of 1978, Act No. 29 of 1981, Statutory Instrument No. 363 of 1983, Act No. 21 of 1985, Statutory Instrument No. 324 of 1986, Act No. 3 of 1992 and Act No. 8 of 1993.

Missing Persons Act as amended (1978)

An Act to provide for the presumption of death of a person who is missing, or for the care and administration of the estate of such a person; and to provide for matters incidental to or connected with the foregoing, Act No. 28/1978, 10 November 1978, published in Official Gazette, 1978, as amended Acts No. 17/1979, 29/1981, 20/1994 and Statutory Instrument No. 856/1981.

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Amnesty Act, Chapter 9:02, 21 December 1979, published in Official Gazette, 1979.

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Geneva Conventions Act as amended (1981)

Act to enable effect to be given within Zimbabwe to the four Conventions signed at Geneva on the 12th August, 1949, dealing respectively with wounded and sick members of the armed forces in the field, with wounded, sick and shipwrecked members of the armed forces at sea, with treatment of prisoners of war and with protection of civilian persons in time of war; to repeal the Geneva Convention Act; and to provide for matters incidental to or connected with the foregoing, 1981, published in Official Gazette, No. 36, 1981, pp. 303–310 (and schedules), amended by the Act to amend the Geneva Conventions Act, 1996, published in Official Gazette, No. 22, 1997, pp. 191–258.

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An Act to provide for the extradition of persons between Zimbabwe and other countries and for matters incidental to or connected with the foregoing, Act No. 6 of 1982, 9 April 1982, published in Official Gazette, 1982, pp. 657–664.

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An Act to enable effect to be given within Zimbabwe to the Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction with its Annexes, Chapter 11:18, 1998, published in Official Gazette, No. 9, 1998.

Anti-Personnel Mines (Prohibition) Act (2000)

Act to enable effect to be given within Zimbabwe to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, signed at Oslo, Norway, on the 18th September, 1997, Act No. 17/2000 Chapter 11:19, 2000.

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Argentina

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The Prosecutor v. Duško Tadić aka "Dule", Judgement, Appeals Chamber, 15 July 1999, Case No. IT-94-1-A.

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Case of the Major War Criminals

Indictment:

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Judgement:

Trial of The Major War Criminals before the International Military Tribunal, Judgement, Nuremberg, 1 October 1946, Official Documents, Vol. I, p. 171.

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Case of the Major War Criminals

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Judgement:

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García Lanza de Netto v. Uruguay

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Communication No. 109/1981, Teresa Gómez de Voituret v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 10 April 1984, UN Doc. A/39/40, p. 164.

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P. Grant v. Jamaica

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Herrera Rubio v. Colombia

Communication No. 161/1983, Herrera Rubio v. Colombia, Views under Article 5(4) of the Optional Protocol, adopted on 2 November 1987, UN Doc. A/43/40, p. 190.

Hiber Conteris v. Uruguay

Communication No. 139/1983, Hiber Conteris v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 17 July 1985, UN Doc. A/40/40, p. 196.

Johnson v. Jamaica

Communication No. 588/1994, Errol Johnson v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 22 March 1996, UN Doc. A/51/40, Vol. II, p. 174.

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Kelly v. Jamaica

Communication No. 253/1987, Paul Kelly v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 8 April 1991, UN Doc. A/46/40, p. 241.

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Lumley v. Jamaica

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Marais v. Madagascar

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Martínez Machado v. Uruguay

Communication No. 83/1981, Raúl Noel Martínez Machado v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 4 November 1983, UN Doc. A/39/40, p. 148.

Martínez Portorreal v. the Dominican Republic

Communication No. 188/1984, Martínez Portorreal v. the Dominican Republic, Views under Article 5(4) of the Optional Protocol, adopted on 5 November 1987, UN Doc. A/43/40, p. 207.

Mukong v. Cameroon

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Communication No. 44/1979, Alba Pietraroia (on behalf of her father, Rosario Pietraroia, also known as Rosario Pietraroia (or Roya) Zapala) v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 27 March 1981, UN Doc. A/36/40, p. 153.

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Sala de Tourón v. Uruguay

Communication No. 32/1978, Lucía Sala de Tourón v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 31 March 1981, UN Doc. A/36/40, p. 120.

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Salgar de Montejo v. Colombia

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Communication No. 9/1977, Edgardo Dante Santullo Valcada v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 26 October 1979, UN Doc. A/35/40, p. 107.

Sequeria v. Uruguay

Communication No. 6/1977, Miguel A. Millán Sequeria v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 29 July 1980, UN Doc. A/35/40, p. 127.

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Communication No. 37/1978, Esther Soriano de Bouton v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 27 March 1981, UN Doc. A/36/40, p. 143.

Stephens v. Jamaica

Communication No. 373/1989, Lennon Stephens v. Jamaica, Views under Article 5(4) of the Optional Protocol, adopted on 18 October 1995, UN Doc. A/51/40, Vol. II, p. 1.

Terán Jijón v. Ecuador

Communication No. 277/1988, Juan Terán Jijón v. Ecuador, Views under Article 5(4) of the Optional Protocol, adopted on 26 March 1992, UN Doc. A/47/40, p. 261.

Teti Izquierdo v. Uruguay

Communication No. 73/1980, Ana María Teti Izquierdo (on behalf of her brother, Mario Alberto Teti Izquierdo) v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 1 April 1982, UN Doc. A/37/40, p. 179.

Thomas v. Jamaica

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Torres Ramírez v. Uruguay

Communication No. 4/1977, William Torres Ramírez v. Uruguay, Views under Article 5(4) of the Optional Protocol, adopted on 23 July 1980, UN Doc. A/35/40, p. 121.

Tshitenge Muteba v. Zaire

Communication No. 124/1982, Tshitenge Muteba v. Zaire, Views under Article 5(4) of the Optional Protocol, adopted on 24 July 1984, UN Doc. A/39/40, p. 182.

Wight v. Madagascar

Communication No. 115/1982, John Wight v. Madagascar, Views under Article 5(4) of the Optional Protocol, adopted on 1 April 1985, UN Doc. A/40/40, p. 171.

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Communication No. 289/1988, Dieter Wolf v. Panama, Views under Article 5(4) of the Optional Protocol, adopted on 26 March 1992, UN Doc. A/47/40, p. 277.

Z. P. v. Canada

Communication No. 341/1988, Z. P. v. Canada, Decision on admissibility, adopted on 11 April 1991, UN Doc. A/46/40, p. 297.

RESOLUTIONS ADOPTED BY THE UN SECURITY COUNCIL

Number	Date of adoption	Title
188	9 April 1964	Resolution on complaint by Yemen regarding British air attack on Yemeni territory
190	9 June 1964	Resolution urging the Government of South Africa to end the Rivonia trial against the leaders of the anti-apartheid movement
191	18 June 1964	Resolution on persons imprisoned, interned or sentenced to death for their opposition to the policy of apartheid
361	30 August 1974	Resolution on emergency UN humanitarian assistance to Cyprus
378	23 October 1975	Resolution on renewal of the mandate of UNEF
387	31 March 1976	Resolution on South Africa's military activities against Angola
392	19 June 1976	Resolution on killings and violence by the South African apartheid régime in Soweto and other areas
405	14 April 1977	Resolution condemning the armed aggression against Benin of 16 January 1977
417	31 October 1977	Resolution condemning the South African Government for its resort to massive violence and repression against the black people
419	24 November 1977	Resolution on assistance to Benin to repair the damage caused by the aggression of 16 January 1977
427	3 May 1978	Resolution on strengthening of the UN Interim Force in Lebanon and withdrawal of Israeli forces from Lebanon
436	6 October 1978	Resolution on a cease-fire in Lebanon
446	22 March 1979	Resolution on establishment of a commission to examine the situation relating to settlements in the Arab territories occupied by Israel
452	20 July 1979	Resolution on Israeli settlement policies in the occupied territories

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Number	Date of adoption	Title
455	23 November 1979	Resolution on Southern Rhodesia's policies towards Zambia
459	19 December 1979	Resolution on extension of the mandate of the UN Interim Force in Lebanon
463	2 February 1980	Resolution calling upon United Kingdom to create conditions in Southern Rhodesia which will ensure free and fair elections
465	1 March 1980	Resolution on Israeli settlement policies in the occupied territories
467	24 April 1980	Resolution condemning the deliberate shelling of the headquarters of the UN Interim Force in Lebanon
469	20 May 1980	Resolution on deportation of Palestinian leaders from territories occupied by Israel
471	5 June 1980	Resolution on assassination attempts against the Mayors of Nablus, Ramallah and Al Bireh
473	13 June 1980	Resolution calling upon South Africa to take measures to eliminate the policy of apartheid and grant to all South African citizens equal rights
475	27 June 1980	Resolution on policies of South Africa towards Angola
476	30 June 1980	Resolution on the status of Jerusalem
496	15 December 1981	Resolution deciding to send a commission of inquiry to Seychelles
507	28 May 1982	Resolution on South Africa's military activities against Seychelles
513	4 July 1982	Resolution on the civilian population in Lebanon
525	7 December 1982	Resolution on death sentences imposed on members of the African National Congress of South Africa
527	15 December 1982	Resolution on South Africa's military actions against Lesotho
533	7 June 1983	Resolution on death sentences imposed on 3 members of the African National Congress
540	31 October 1983	Resolution on the situation between the Islamic Republic of Iran and Iraq
546	6 January 1984	Resolution on South Africa's military attacks on Angola
552	1 June 1984	Resolution on attacks on commercial ships in the Gulf region
556	23 October 1984	Resolution demanding the immediate eradication of apartheid
560	12 March 1985	Resolution condemning the arbitrary arrests of members of the United Democratic Front in South Africa

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Number	Date of adoption	Title
564	31 May 1985	Resolution on humanitarian assistance to civilian persons in Lebanon
567	20 June 1985	Resolution on South Africa's military activities against Angola
569	26 July 1985	Resolution on sanctions against South Africa
571	20 September 1985	Resolution on South Africa's military activities against Angola
572	30 September 1985	Resolution on international relief to Botswana
579	18 December 1985	Resolution on hostage-taking and abduction
580	30 December 1985	Resolution on South Africa's military activities against Lesotho and compensation for Lesotho
581	13 February 1986	Resolution on South Africa's threats against States in southern Africa
582	24 February 1986	Resolution calling for cease-fire and exchange of prisoners between Iraq and the Islamic Republic of Iran
587	23 September 1986	Resolution on security of the personnel of the UN Interim Force in Lebanon
598	20 July 1987	Resolution requesting the Secretary-General to dispatch observers to supervise the cease-fire between Iraq and the Islamic Republic of Iran
610	16 March 1988	Resolution on death sentences imposed on 6 South Africans
612	9 May 1988	Resolution on chemical weapons use in the conflict between Iraq and the Islamic Republic of Iran
615	17 June 1988	Resolution on death sentences imposed on 6 South Africans
620	26 August 1988	Resolution on chemical weapons use in the conflict between Iraq and the Islamic Republic of Iran
623	23 November 1988	Resolution on death sentence imposed on an anti-apartheid activist in South Africa
638	31 July 1989	Resolution on incidents of hostage-taking and abduction
664	18 August 1990	Resolution on safety of third-State nationals in Iraq and Kuwait
666	13 September 1990	Resolution on the situation regarding foodstuffs in Iraq and Kuwait
667	16 September 1990	Resolution on Iraqi actions against diplomatic missions and their personnel in Kuwait
670	25 September 1990	Resolution on air embargo against Iraq

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Number	Date of adoption	Title
674	29 October 1990	Resolution on protection of third-State nationals in Iraq and Kuwait
677	28 November 1990	Resolution on Iraqi attempt to alter the demographic composition of Kuwait
678	29 November 1990	Resolution authorizing Member States to use all necessary means to implement Security Council resolution 660 (1990) and all relevant resolutions
681	20 December 1990	Resolution on Palestinian civilians under Israeli occupation
686	2 March 1991	Resolution on the end of hostilities in the Gulf region
687	3 April 1991	Resolution on restoration of the sovereignty, independence and territorial integrity of Kuwait
688	5 April 1991	Resolution on repression of the Iraqi civilian population, including Kurds in Iraq
692	20 May 1991	Resolution on establishment of the UN Compensation Fund and the UN Compensation Commission under Security Council Resolution 687 (1991)
699	17 June 1991	Resolution on destruction, removal or rendering harmless of weapons in Iraq
706	15 August 1991	Resolution authorizing States to permit the import of petroleum and petroleum products originating in Iraq sufficient to produce a sum to be determined by the Council
726	6 January 1992	Resolution on the deportation by Israel of 12 Palestinian civilians from the territories occupied by Israel
733	23 January 1992	Resolution calling for a complete embargo on deliveries of weapons and military equipment to Somalia
740	7 February 1992	Resolution on the political settlement of the situation in Yugoslavia
743	21 February 1992	Resolution on establishment of the United Nations Protection Force
746	17 March 1992	Resolution on humanitarian assistance to Somalia
751	24 April 1992	Resolution on establishment of a UN Operation in Somalia
752	15 May 1992	Resolution on political conditions in Bosnia and Herzegovina
757	30 May 1992	Resolution on sanctions against Yugoslavia

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Number	Date of adoption	Title
758	8 June 1992	Resolution on enlargement of the mandate and the strength of the UN Protection Force and humanitarian assistance to Bosnia and Herzegovina
761	29 June 1992	Resolution on deployment of additional elements of the United Nations Protection Force in Bosnia and Herzegovina
764	13 July 1992	Resolution on deployment of additional elements of the UN Protection Force in Bosnia and Herzegovina
770	13 August 1992	Resolution on humanitarian assistance to Sarajevo and other parts of Bosnia and Herzegovina
771	13 August 1992	Resolution on violations of humanitarian law in the territory of the former Yugoslavia and in Bosnia and Herzegovina
776	14 September 1992	Resolution on enlargement of the mandate of the UN Protection Force
779	6 October 1992	Resolution on implementation of the UN peace-keeping plan in Croatia
780	6 October 1992	Resolution on establishment of the Commission of Experts to Examine and Analyse the Information submitted pursuant to Security Council Resolution 771 (1992) on the situation in the former Yugoslavia
786	10 November 1992	Resolution on a ban on military flights in the airspace of Bosnia and Herzegovina
787	16 November 1992	Resolution demanding that all forms of interference from outside Bosnia and Herzegovina cease immediately
788	19 November 1992	Resolution on a general and complete embargo on all deliveries of weapons and military equipment to Liberia
794	3 December 1992	Resolution on measures to establish a secure environment for humanitarian relief operations in Somalia
798	18 December 1992	Resolution supporting initiative of the European Council to dispatch a fact-finding mission to Bosnia and Herzegovina
802	25 January 1993	Resolution on the situation in the UN Protected Areas in Croatia
804	29 January 1993	Resolution extending the mandate of the UN Angola Verification Mission II and demanding a cease-fire

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Number	Date of adoption	Title
808	22 February 1993	Resolution on establishment of an International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia
811	12 March 1993	Resolution demanding a cease-fire and inviting the Secretary-General to organize a meeting between the Angolan Government and UNITA
813	26 March 1993	Resolution on implementation of the peace process in Liberia
814	26 March 1993	Resolution on the expansion of the size and mandate of the UN Operation in Somalia II
819	16 April 1993	Resolution demanding that Srebrenica and the surrounding areas, Bosnia and Herzegovina, be treated as a safe area
820	17 April 1993	Resolution on the peace plan for Bosnia and Herzegovina and the strengthening of the measures imposed by the earlier resolutions on the situation in the former Yugoslavia
822	30 April 1993	Resolution on the conflict between Armenia and Azerbaijan
824	6 May 1993	Resolution on treatment of certain towns and surroundings in Bosnia and Herzegovina as safe areas
827	25 May 1993	Resolution on establishment of the International Tribunal for Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
834	1 June 1993	Resolution on extension of the mandate of the UN Angola Verification Mission II and the peace process in Angola
836	4 June 1993	Resolution extending the mandate of the UN Protection Force and authorizing the Force to use all necessary measures in reply to bombardments against the safe areas
837	6 June 1993	Resolution on unprovoked armed attacks against the personnel of the UN Operation in Somalia II on 5 June 1993
851	15 July 1993	Resolution on extension of the mandate of UN Angola Verification Mission II and implementation of the Peace Accords for Angola

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Number	Date of adoption	Title
853	29 July 1993	Resolution on the seizure of the district of Agdam and of all other recently occupied areas of Azerbaijan
859	24 August 1993	Resolution on a comprehensive political settlement of the situation in Bosnia and Herzegovina
864	15 September 1993	Resolution on extension of the mandate of the UN Angola Verification Mission II and possible arms and oil embargo against UNITA
865	22 September 1993	Resolution on continuation of the process of national reconciliation and political settlement in Somalia
868	29 September 1993	Resolution on security and safety of UN forces and personnel
874	14 October 1993	Resolution on settlement of the conflict in and around Nagorny Karabakh
876	19 October 1993	Resolution condemning violation of the cease-fire agreement and the killing of the Chairman of the Defence Council and Council of Ministers of the Autonomous Republic of Abkhazia
882	5 November 1993	Resolution on renewal of the mandate of the UN Operation in Mozambique and implementation of the General Peace Agreement for Mozambique
884	12 November 1993	Resolution on the conflict in and around Nagorny Karabakh
892	22 December 1993	Resolution on authorization of the phased deployment of additional military observers to the UN Observer Mission in Georgia
896	31 January 1994	Resolution on possible establishment of a peace-keeping force in Abkhazia, Georgia and on political settlement of the Abkhazia conflict
897	4 February 1994	Resolution on continuation of the UN Operation in Somalia II and the process of national reconciliation, reconstruction and political settlement in Somalia
898	23 February 1994	Resolution on establishment of a UN police component of the UN Operation in Mozambique and implementation of the General Peace agreement for Mozambique

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Number	Date of adoption	Title
904	18 March 1994	Resolution on measures to guarantee the safety and protection of the Palestinian civilians in territories occupied by Israel
906	25 March 1994	Resolution on extension of the mandate of the UN Observer Mission in Georgia and on political settlement of the situation in Abkhazia, Georgia
908	31 March 1994	Resolution on extension of the mandate and increase of the personnel of the UN Protection Force
912	21 April 1994	Resolution on adjustment of the mandate of the UN Assistance Mission for Rwanda due to the current situation in Rwanda and settlement of the Rwandan conflict
913	22 April 1994	Resolution on the situation in Bosnia and Herzegovina, particularly in the safe area of Gorazde and political settlement of the situation in the former Yugoslavia
917	6 May 1994	Resolution on expansion of the sanctions until the return of the legitimately elected President to Haiti
918	17 May 1994	Resolution on expansion of the mandate of the UN Assistance Mission for Rwanda and imposition of an arms embargo on Rwanda
923	31 May 1994	Resolution on renewal of the mandate of the UN Operation in Somalia II and process of national reconciliation in Somalia
925	8 June 1994	Resolution on extension of the mandate and deployment of the two additional battalions of the UN Assistance Mission for Rwanda and settlement of the conflict in Rwanda
929	22 June 1994	Resolution on establishment of a temporary multinational operation for humanitarian purposes in Rwanda until the deployment of the expanded UN Assistance Mission for Rwanda
931	29 June 1994	Resolution on an immediate and durable cease-fire in Yemen
935	1 July 1994	Resolution requesting the Secretary-General to establish a Commission of Experts to examine violations of international humanitarian law committed in Rwanda

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Number	Date of adoption	Title
940	31 July 1994	Resolution on authorization to form a multinational force under unified command and control to restore the legitimately elected President and authorities of the Government of Haiti and extension of the mandate of the UN Mission in Haiti
941	23 September 1994	Resolution on violations of international humanitarian law in Banja Luka, Bijeljina and other areas of Bosnia and Herzegovina under the control of Bosnian Serb forces
945	29 September 1994	Resolution on extension of the mandate of the UN Angola Verification Mission II and continuation of the efforts aimed at the earliest resolution of the Angolan crisis through negotiations within the framework of the Peace Accords
946	30 September 1994	Resolution on extension of the mandate of the UN Operation in Somalia II
947	30 September 1994	Resolution on extension of the mandate of the UN Protection Force and requesting the Secretary-General to report on progress towards implementation of the UN Peace-keeping Plan for Croatia and all relevant Security Council resolutions
950	21 October 1994	Resolution on extension of the mandate of the UN Observer Mission in Liberia and peace process in Liberia
952	27 October 1994	Resolution on extension of the mandate of the UN Angola Verification Mission II and reaching of an agreement for establishing an effective and sustainable cease-fire as a matter of urgency
954	4 November 1994	Resolution on extension of the mandate of the UN Operation in Somalia II for a final period until 31 Mar. 1995 and secure withdrawal of personnel and assets from Somalia
955	8 November 1994	Resolution on establishment of an International Tribunal for Rwanda and adoption of the Statute of the Tribunal
957	15 November 1994	Resolution on extension of the mandate of the UN Operation in Mozambique until the new Government of Mozambique takes office and completion of the residual operations prior to the withdrawal of the UN Operation in Mozambique on or before 31 Jan. 1995

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Number	Date of adoption	Title
959	19 November 1994	Resolution on efforts of the UN Protection Force to ensure implementation of Security Council resolutions on safe areas in Bosnia and Herzegovina
965	30 November 1994	Resolution on extension and expansion of the mandate of the UN Assistance Mission for Rwanda
968	16 December 1994	Resolution on establishment of a UN Mission of Observers in Tajikistan and on the process of national reconciliation
978	27 February 1995	Resolution on arrest and detention of persons responsible for acts within the jurisdiction of the International Tribunal for Rwanda
985	13 April 1995	Resolution on extension of the mandate of the UN Observer Mission in Liberia and establishment of the Security Council Committee on arms embargo against Liberia
987	19 April 1995	Resolution on security and safety of the UN Protection Force
993	12 May 1995	Resolution on extension of the mandate of the UN Observer Mission in Georgia and settlement of the conflict in Abkhazia, Georgia
994	17 May 1995	Resolution on withdrawal of the Croatian Government troops from the zone of separation in Croatia and full deployment of the UN Confidence Restoration Operation in Croatia
998	16 June 1995	Resolution on establishment of a rapid-reaction force within the UN Protection Force
999	16 June 1995	Resolution on extension of the mandate of the UN Mission of Observers in Tajikistan and on the process of national reconciliation
1001	30 June 1995	Resolution on extension of the mandate of the UN Observer Mission in Liberia and on national reconciliation in Liberia
1004	12 July 1995	Resolution demanding withdrawal of the Bosnian Serb forces from the safe area of Srebrenica, Bosnia and Herzegovina
1005	17 July 1995	Resolution on supply of an appropriate quantity of explosives for use in the demining operations in Rwanda

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Number	Date of adoption	Title
1008	7 August 1995	Resolution on extension of the mandate of the UN Angola Verification Mission III and monitoring of the compliance with the cease-fire in Angola
1009	10 August 1995	Resolution on compliance by Croatia with the agreement signed on 6 Aug. 1995 between Croatia and the UN Peace Forces/UN Protection Force, including the right of the local Serb population to receive humanitarian assistance
1010	10 August 1995	Resolution on access by international agencies to displaced persons in Srebrenica and Zepa and on release of detained persons in Bosnia and Herzegovina
1011	16 August 1995	Resolution on lifting of restrictions imposed by paragraph 13 of resolution 918 (1994) on the sale or supply of arms and matériel to the Government of Rwanda
1012	28 August 1995	Resolution on establishment of an international commission of inquiry in Burundi
1014	15 September 1995	Resolution on extension of the mandate of the UN Observer Mission in Liberia
1019	9 November 1995	Resolution on violations of international humanitarian law in the former Yugoslavia
1031	15 December 1995	Resolution on implementation of the Peace Agreement for Bosnia and Herzegovina and transfer of authority from the UN Protection Force to the multinational Implementation Force (IFOR)
1034	21 December 1995	Resolution on violations of international humanitarian law and of human rights in the territory of the former Yugoslavia
1036	12 January 1996	Resolution extending the mandate of the UN Observer Mission in Georgia
1037	15 January 1996	Resolution on establishment of the UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
1040	29 January 1996	Resolution on deterioration in the situation and efforts to facilitate a comprehensive political dialogue in Burundi
1041	29 January 1996	Resolution on extension of the mandate of the UN Observer Mission in Liberia and efforts to restore peace, security and stability in Liberia

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Number	Date of adoption	Title
1049	5 March 1996	Resolution requesting the Secretary-General to intensify the preparations for convening a regional conference for peace, security and development in the Great Lakes region
1052	18 April 1996	Resolution calling for an immediate cease-fire by all parties involved in military activities in Lebanon
1055	8 May 1996	Resolution on extension of the mandate of the UN Angola Verification Mission III and efforts to advance the peace process in Angola
1059	31 May 1996	Resolution on extension of the mandate of the UN Observer Mission in Liberia and the security situation in Liberia
1062	28 June 1996	Resolution on extension of the mandate of the UN Peace-keeping Force in Cyprus and restoration of confidence between the two communities in Cyprus
1064	11 July 1996	Resolution on extension of the mandate of the UN Angola Verification Mission III and efforts to advance the peace process in Angola
1065	12 July 1996	Resolution extending the mandate of the UN Observer Mission in Georgia
1067	26 July 1996	Resolution on the conclusions of the ICAO report on the shooting down of two civilian aircraft by the Cuban Air Force
1071	30 August 1996	Resolution on extension of the mandate of the UN Observer Mission in Liberia
1072	30 August 1996	Resolution on a comprehensive political settlement of the crisis in Burundi
1073	28 September 1996	Resolution on the situation in Jerusalem and the areas of Nablus, Ramallah, Bethlehem and the Gaza Strip
1075	11 October 1996	Resolution on extension of the mandate of the UN Angola Verification Mission III and efforts to advance the peace process in Angola
1076	22 October 1996	Resolution on the political, military and humanitarian situation in Afghanistan
1078	9 November 1996	Resolution requesting the Secretary-General to make all necessary arrangements to convene an international conference for peace, security and development in the Great Lakes region

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Number	Date of adoption	Title
1080	15 November 1996	Resolution on establishment of a multinational humanitarian intervention force for the Great Lakes region
1083	27 November 1996	Resolution on extension of the mandate of the UN Observer Mission in Liberia
1087	11 December 1996	Resolution on extension of the mandate of the UN Angola Verification Mission III
1088	12 December 1996	Resolution on authorization of the establishment of a multinational stabilization force (SFOR) and extension of the mandate of the UN Mission in Bosnia and Herzegovina
1089	13 December 1996	Resolution on extension of the mandate of the UN Mission of Observers in Tajikistan
1092	23 December 1996	Resolution on extension of the mandate of the UN Peace-keeping Force in Cyprus
1095	28 January 1997	Resolution on extension of the mandate of the UN Interim Force in Lebanon (UNIFIL)
1096	30 January 1997	Resolution on extension of the mandate of the UN Observer Mission in Georgia (UNOMIG)
1097	18 February 1997	Resolution on the 5-point peace plan for eastern Zaire
1099	14 March 1997	Resolution on extension of the mandate of the UN Mission of Observers in Tajikistan (UNMOT)
1118	30 June 1997	Resolution on establishment of the UN Observer Mission in Angola (MONUA)
1120	14 July 1997	Resolution on extension of the mandate of the UN Transitional Administration for Eastern Slavonia, Baranja and Western Sirmium
1122	29 July 1997	Resolution on extension of the mandate of the UN Interim Force in Lebanon (UNIFIL)
1124	31 July 1997	Resolution on extension of the mandate of the UN Observer Mission in Georgia (UNOMIG)
1127	28 August 1997	Resolution on measures against UNITA for non-compliance with its obligations under the Lusaka peace accords
1132	8 October 1997	Resolution on oil and arms embargo against Sierra Leone

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Number	Date of adoption	Title
1145	19 December 1997	Resolution on the establishment of a support group of civilian police monitors in the Danube region
1150	30 January 1998	Resolution on extension of the mandate of the UN Observer Mission in Georgia (UNOMIG)
1151	30 January 1998	Resolution on extension of the mandate of the UN Interim Force in Lebanon
1157	20 March 1998	Resolution on modalities of UN presence in Angola
1160	31 March 1998	Resolution on the imposition of an arms embargo against Yugoslavia
1161	9 April 1998	Resolution on the reactivation of the International Commission of Inquiry to investigate violations of the arms embargo against Rwanda
1164	29 April 1998	Resolution on extension of the mandate of the UN Mission of Observers in Angola (MONUA)
1165	30 April 1998	Resolution on the establishment of a 3rd Trial Chamber of the International Tribunal for Rwanda
1166	13 May 1998	Resolution on the establishment of a 3rd Trial Chamber of the International Tribunal for Yugoslavia
1173	12 June 1998	Resolution on measures against UNITA for non-compliance with its obligations under the Lusaka Protocol, relevant Security Council resolutions and the plan of the Special Representative to the Joint Commission
1180	29 June 1998	Resolution on extension of the mandate of the UN Observer Mission in Angola (MONUA) and the resumption of the withdrawal of its military component
1181	13 July 1998	Resolution on establishment of the UN Observer Mission in Sierra Leone (UNOMSIL)
1187	30 July 1998	Resolution on extension of the mandate of the UN Observer Mission in Georgia
1188	30 July 1998	Resolution on extension of the mandate of the UN Interim Force in Lebanon
1193	28 August 1998	Resolution on the situation in Afghanistan
1195	15 September 1998	Resolution on extension of the mandate of the UN Observer Mission in Angola (MONUA)

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Number	Date of adoption	Title
1199	23 September 1998	Resolution on the situation in Kosovo, Yugoslavia
1202	15 October 1998	Resolution on extension of the mandate of the UN Observer Mission in Angola (MONUA)
1203	24 October 1998	Resolution on agreements for the verification of compliance with the provisions of resolution 1199 (1998) on the situation in Kosovo, Yugoslavia
1206	12 November 1998	Resolution on extension of the mandate of the UN Mission of Observers in Tajikistan (UNMOT)
1208	19 November 1998	Resolution on the maintenance of the security and civilian and humanitarian character of refugee camps and settlements in Africa
1212	25 November 1998	Resolution on extension of the mandate of the UN Civilian Police Mission in Haiti (MIPONUH)
1213	3 December 1998	Resolution on extension of the mandate of the UN Observer Mission in Angola (MONUA)
1214	8 December 1998	Resolution on the situation in Afghanistan
1225	28 January 1999	Resolution on extension of the mandate of the UN Observer Mission in Georgia (UNOMIG)
1239	14 May 1999	Resolution on relief assistance to Kosovo refugees and internally displaced persons in Kosovo, the Republic of Montenegro and other parts of Yugoslavia
1244	10 June 1999	Resolution on the deployment of international civil and security presences in Kosovo
1261	25 August 1999	Resolution on children in armed conflicts
1264	15 September 1999	Resolution on establishment of a multinational peace force in East Timor
1265	17 September 1999	Resolution on protection of civilians in armed conflicts
1272	25 October 1999	Resolution on establishment of the UN Transitional Administration in East Timor (UNTAET)
1284	17 December 1999	Resolution on establishment of the UN Monitoring, Verification and Inspection Commission (UNMOVIC)

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Number	Date of adoption	Title
1291	24 February 2000	Resolution on extension of the mandate and expansion of the UN Organization Mission in the Democratic Republic of the Congo (MONUC)
1296	19 April 2000	Resolution on protection of civilians in armed conflicts
1312	31 July 2000	Resolution on establishment of the UN Mission in Ethiopia and Eritrea
1313	4 August 2000	Resolution on extension of the mandate of the UN Mission in Sierra Leone (UNAMSIL)
1314	11 August 2000	Resolution on the protection of children in situations of armed conflicts
1315	14 August 2000	Resolution on establishing a special court in Sierra Leone
1320	15 September	Resolution on deployment of troops and military observers within the UN Mission in Ethiopia and Eritrea (UNMEE)
1322	7 October 2000	Resolution on recent events in Jerusalem and other areas throughout the territories occupied by Israel
1325	31 October 2000	Resolution on women and peace and security
1329	30 November 2000	Resolution on increasing the membership of the International Tribunal for the Former Yugoslavia and the International Tribunal for Rwanda
1333	19 December 2000	Resolution on measures against the Taliban

RESOLUTIONS ADOPTED BY THE UN GENERAL ASSEMBLY

Number	Date of Adoption	Title	Voting Record
3 (I)	13 February 1946	Extradition and punishment of war criminals	Without a vote
92 (I)	7 December 1946	Official Seal and Emblem of the United Nations	Without a vote
95 (I)	11 December 1946	Affirmation of the Principles of International Law recognized by the Charter of the Nurnberg Tribunal	Without a vote
167 (II)	20 October 1947	United Nations Flag	52-0-3
170 (II)	31 October 1947	Surrender of war criminals and traitors	42-7-6
177 (II)	21 November 1947	Formulation of the principles recognized in the Charter of the Nurnberg Tribunal and in the judgement of the Tribunal	42-1-8
217 A (III)	10 December 1948	International Bill of Human Rights: A. Universal Declaration on Human Rights	48-0-8
260 A (III)	9 December 1948	Prevention and punishment of the crime of genocide	56-0-0
317 (IV)	2 December 1949	Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others	35-2-15
428 (V)	14 December 1950	Statute of the office of the United Nations High Commissioner for Refugees	48-5-4
794 (VIII)	23 October 1953	Transfer to the United Nations of the functions exercised by the League of Nations under the Slavery Convention of 25 September 1926	50-0-6

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Number	Date of Adoption	Title	Voting Record
1653 (XVI)	24 November 1961	Declaration on the prohibition of the use of nuclear and thermonuclear weapons	55-20-26
2106 A (XX)	21 December 1965	International Convention on the Elimination of All Forms of Racial Discrimination	106-0-1
2162 B (XXI)	5 December 1966	Question of general and complete disarmament	91-0-4
2189 (XXI)	13 December 1966	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	76-7-20
2198 (XXI)	16 December 1966	Protocol relating to the Status of Refugees	90-0-11
2200 A (XXI)	16 December 1966	International Covenant on Economic, Social and Cultural Rights, International Covenant on Civil and Political Rights and Optional Protocol to the International Covenant on Civil and Political Rights	Without a vote
2262 (XXII)	3 November 1967	Question of Southern Rhodesia	92-2-18
2312 (XXII)	14 December 1967	Declaration on Territorial Asylum	Without a vote
2326 (XXII)	16 December 1967	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	86-6-17
2338 (XXII)	18 December 1967	Question of the punishment of war criminals and of persons who have committed crimes against humanity	90-2-22
2391 (XXIII)	26 November 1968	Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity	58-7-36

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Number	Date of Adoption	Title	Voting Record
2443 (XXIII)	19 December 1968	Respect for and implementation human rights in occupied territories	60-22-37
2444 (XXIII)	19 December 1968	Respect for human rights in armed conflicts	111-0-0
2454 A (XXIII)	20 December 1968	Question of general and complete disarmament	107-0-2
2465 (XXIII)	20 December 1968	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	87-7-17
2546 (XXIV)	11 December 1969	Respect for and implementation of human rights in occupied territories	52-13-49
2547 (XXIV)	11 December 1969	Measures for effectively combating racial discrimination and the policies of apartheid and segregation in southern Africa	87-1-23
2548 (XXIV)	11 December 1969	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	78-5-16
2583 (XXIV)	15 December 1969	Question of the punishment of war criminals and of persons who have committed crimes against humanity	74-5-32
2597 (XXIV)	16 December 1969	Respect for human rights in armed conflicts	91-0-23
2603 A (XXIV)	16 December 1969	Question of chemical and bacteriological (biological) weapons	80-3-36
2603 B (XXIV)	16 December 1969	Question of chemical and bacteriological (biological) weapons	120-0-1
2662 (XXV)	7 December 1970	Question of chemical and bacteriological (biological) weapons	113-0-2

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Number	Date of Adoption	Title	Voting Record
2673 (XXV)	9 December 1970	Protection of journalists engaged in dangerous missions in areas of armed conflict	78-10-28
2674 (XXV)	9 December 1970	Respect for human rights in armed conflicts	77-2-36
2675 (XXV)	9 December 1970	Basic principles for the protection of civilian populations in armed conflicts	109-0-8
2676 (XXV)	9 December 1970	Respect for human rights in armed conflicts	67-30-20
2677 (XXV)	9 December 1970	Respect for human rights in armed conflicts	111-0-4
2707 (XXV)	14 December 1970	Question of Territories under Portuguese administration	94-6-16
2708 (XXV)	14 December 1970	Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples	93-5-22
2712 (XXV)	15 December 1970	Question of the punishment of war criminals and of persons who have committed crimes against humanity	55-4-33
2727 (XXV)	15 December 1970	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	52-20-43
2795 (XXVI)	10 December 1971	Question of Territories under Portuguese administration	105-8-5
2826 (XXVI)	16 December 1971	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	110-0-1
2827 A (XXVI)	16 December 1971	Question of chemical and bacteriological (biological) weapons	110-0-1
2827 B (XXVI)	16 December 1971	Question of chemical and bacteriological (biological) weapons	101-0-10

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Number	Date of Adoption	Title	Voting Record
2840 (XXVI)	18 December 1971	Question of the punishment of war criminals and of persons who have committed crimes against humanity	71-0-42
2852 (XXVI)	20 December 1971	Respect for human rights in armed conflicts	110-1-5
2853 (XXVI)	20 December 1971	Respect for human rights in armed conflicts	83-15-14
2854 (XXVI)	20 December 1971	Protection of journalists engaged in dangerous missions in areas of armed conflicts	96-2-20
2918 (XXVII)	14 November 1972	Question of Territories under Portuguese administration	96-2-20
2932 A (XXVII)	29 November 1972	General and complete disarmament	99-0-15
2933 (XXVII)	29 November 1972	Chemical and bacteriological (biological) weapons	113-0-2
3005 (XXVII)	15 December 1972	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	63-10-49
3020 (XXVII)	18 December 1972	Principles of international co-operation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity	105-0-18
3032 (XXVII)	18 December 1972	Respect for human rights in armed conflicts	103-0-25
3058 (XXVIII)	2 November 1973	Protection of journalists engaged in dangerous missions in areas of armed conflict	Without a vote
3068 (XXVIII)	30 November 1973	International Convention on the Suppression and Punishment of the Crime of Apartheid	91-4-26

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Number	Date of Adoption	Title	Voting Record
3074 (XXVIII)	3 December 1973	Principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity	94-0-29
3076 (XXVIII)	6 December 1973	Napalm and other incendiary weapons and all aspects of their possible use	103-0-18
3077 (XXVIII)	6 December 1973	Chemical and bacteriological (biological) weapons	118-0-0
3102 (XXVIII)	12 December 1973	Respect for human rights in armed conflicts	107-0-6
3103 (XXVIII)	12 December 1973	Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes	83-13-19
3113 (XXVIII)	12 December 1973	Question of Territories under Portuguese administration	105-8-16
3166 (XXVIII)	14 December 1973	Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents	Without a vote
3220 (XXIX)	6 November 1974	Assistance and co-operation in accounting for persons who are missing or dead in armed conflicts	95-0-32
3255 A (XXIX)	9 December 1974	Napalm and other incendiary weapons and all aspects of their possible use	108-0-13
3255 B (XXIX)	9 December 1974	Napalm and other incendiary weapons and all aspects of their possible use	98-0-27
3256 (XXIX)	9 December 1974	Chemical and bacteriological (biological) weapons	Without a vote
3318 (XXIX)	14 December 1974	Declaration on the Protection of Women and Children in Emergency and Armed Conflict	110-0-14
3319 (XXIX)	14 December 1974	Respect for human rights in armed conflicts	Without a vote

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Number	Date of Adoption	Title	Voting Record
3452 (XXX)	9 December 1975	Declaration on the Protection of All Persons from Being Subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Without a vote
3465 (XXX)	11 December 1975	Chemical and bacteriological (biological) weapons	Without a vote
3500 (XXX)	15 December 1975	Respect for human rights in armed conflicts	Without a vote
31/19	24 November 1976	Respect for human rights in armed conflicts	Without a vote
31/64	10 December 1976	Incendiary and other specific conventional weapons which may be the subject of prohibitions or restrictions of use for humanitarian reasons	Without a vote
31/65	10 December 1976	Chemical and bacteriological (biological) weapons	Without a vote
31/72	10 December 1976	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques	96-8-3
32/14	7 November 1977	Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights	113-3-18
32/44	8 December 1977	Respect for human rights in armed conflicts	Without a vote
32/77	12 December 1977	Chemical and bacteriological (biological) weapons	Without a vote
32/91 A	13 December 1977	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	132-1-1
32/152	19 December 1977	Incendiary and other specific conventional weapons which may be the subject of prohibitions or restrictions of use for humanitarian reasons	115-0-21
33/59 A	14 December 1978	Chemical and bacteriological (biological) weapons	Without a vote

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Number	Date of Adoption	Title	Voting Record
33/70	14 December 1978	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
33/113 A	18 December 1978	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	140-1-1
33/183	24 January 1979	Policies of apartheid of the Government of South Africa B. International mobilization against apartheid	122-4-0
34/72	11 December 1979	Chemical and bacteriological (biological) weapons	124-0-13
34/82	11 December 1979	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
34/90 A	12 December 1979	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	111-2-31
34/90 C	12 December 1979	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	140-1-4
34/93 A	12 December 1979	Policies of apartheid of the Government of South Africa A. Situation in South Africa	109-12-21

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Number	Date of Adoption	Title	Voting Record
34/93 H	12 December 1979	Policies of apartheid of the Government of South Africa H. Political prisoners in South Africa	109-12-21
34/140	14 December 1979	Drafting of an international convention against activities of mercenaries	Without a vote
34/146	17 December 1979	International Convention against the Taking of Hostages	Without a vote
34/169	17 December 1979	Code of conduct for law enforcement officials	Without a vote
34/180	18 December 1979	Convention on the Elimination of All Forms of Discrimination against Women	130-0-10
35/122 A	11 December 1980	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	141-1-1
35/122 B	11 December 1980	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	140-1-3
35/144 A	12 December 1980	Chemical and bacteriological (biological) weapons	Without a vote
35/144 B	12 December 1980	Chemical and bacteriological (biological) weapons	Without a vote
35/144 C	12 December 1980	Chemical and bacteriological (biological) weapons	78-17-36
35/153	12 December 1980	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote

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Number	Date of Adoption	Title	Voting Record
36/9	28 October 1981	Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights	120-17-9
36/55	25 November 1981	Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief	Without a vote
36/93	9 December 1981	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
36/96 A	9 December 1981	Chemical and bacteriological (biological) weapons	147-0-1
36/96 B	9 December 1981	Chemical and bacteriological (biological) weapons	109-1-33
36/147 A	16 December 1981	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	142-1-3
36/147 B	16 December 1981	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	142-1-3
36/147 C	16 December 1981	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	111-2-31

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Number	Date of Adoption	Title	Voting Record
36/147 D	16 December 1981	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	143-1-2
36/147 G	16 December 1981	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	140-1-2
37/7	28 October 1982	World Charter for Nature	111-1-18
37/79	9 December 1982	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
37/88 A	9 December 1982	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	134-1-1
37/88 B	9 December 1982	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	134-1-1
37/88 C	9 December 1982	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	112-2-21
37/88 D	9 December 1982	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	133-1-1

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Number	Date of Adoption	Title	Voting Record
37/98 A	13 December 1982	Chemical and bacteriological (biological) weapons A. Chemical and bacteriological (biological) weapons	95-1-46
37/98 B	13 December 1982	Chemical and bacteriological (biological) weapons B. Chemical and bacteriological (biological) weapons	Without a vote
37/98 C	13 December 1982	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	124-15-1
37/98 D	13 December 1982	Chemical and bacteriological (biological) weapons D. Provisional Procedures to uphold the authority of the 1925 Geneva Protocol	86-119-33
37/98 E	13 December 1982	Chemical and bacteriological (biological) weapons E. Chemical and bacteriological (biological) weapons	83-22-33
37/123 A	16 December 1982	The situation in the Middle East	87-22-31
37/194	18 December 1982	Principles of Medical Ethics	Without a vote
38/9	10 November 1983	Armed Israeli aggression against the Iraqi nuclear installations and its grave consequences for the established international system concerning the peaceful uses of nuclear energy, the non-proliferation of nuclear weapons and international peace and security	123-2-12
38/66	15 December 1983	United Nations Conference on Prohibitions or Restrictions of Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote

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Number	Date of Adoption	Title	Voting Record
38/69	15 December 1983	Israeli nuclear armament	99-2-39
38/79 A	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	110-2-29
38/79 B	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	146-1-1
38/79 C	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	147-1-1
38/79 D	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	115-2-27
38/79 E	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	146-1-1
38/79 F	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	144-1-1
38/79 G	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	116-2-28

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Number	Date of Adoption	Title	Voting Record
38/79 H	15 December 1983	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	145-1-1
38/101	16 December 1983	Situation of human rights and fundamental freedoms in El Salvador	84-14-45
38/180 A	19 December 1983	The situation in the Middle East	85-23-31
38/187 A	20 December 1983	Chemical and bacteriological (biological) weapons A. Prohibition of chemical and bacteriological weapons	98-1-49
38/187 B	20 December 1983	Chemical and bacteriological (biological) weapons B. Chemical and bacteriological (biological) weapons	Without a vote
39/46	10 December 1984	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment	Without a vote
39/56	12 December 1984	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
39/65 A	12 December 1984	Chemical and bacteriological (biological) weapons	118-16-14
39/65 C	12 December 1984	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	Without a vote
39/65 E	12 December 1984	Chemical and bacteriological (biological) weapons E. Chemical and bacteriological (biological) weapons	87-18-30

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Number	Date of Adoption	Title	Voting Record
39/95 A	14 December 1984	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	120-2-15
39/95 B	14 December 1984	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	140-1-3
39/95 D	14 December 1984	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	115-2-28
39/95 E	14 December 1984	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	143-1-1
39/119	14 December 1984	Situation of human rights and fundamental freedoms in El Salvador	93-11-40
40/33	29 November 1985	United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")	Without a vote
40/84	12 December 1985	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
40/92 A	12 December 1985	Chemical and bacteriological (biological) weapons A. Prohibition of Chemical and Biological Weapons	93-15-41
40/92 B	12 December 1985	Chemical and bacteriological (biological) weapons B. Chemical and bacteriological (biological) weapons	Without a vote

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Number	Date of Adoption	Title	Voting Record
40/92 C	12 December 1985	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	112-16-22
40/137	13 December 1985	Question of human rights and fundamental freedoms in Afghanistan	80-22-40
40/139	13 December 1985	Situation of human rights and fundamental freedoms in El Salvador	100-2-42
40/140	13 December 1985	Situation of human rights and fundamental freedoms in Guatemala	91-8-47
40/161 B	16 December 1985	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	137-1-6
40/161 C	16 December 1985	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	138-1-6
40/161 D	16 December 1985	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	109-2-34 (as regards the resolution as a whole); 136-1-7 (as regards operative paragraph 21)
40/161 E	16 December 1985	Report of the Special Committee to Investigate Israeli Practices Affecting the Human Rights of the Population of the Occupied Territories	126-1-19 (as regards the resolution as a whole); 110-2-33 (as regards operative paragraph 1)
41/35 A	10 November 1986	Policies of apartheid of the Government of South Africa, A. Situation in South Africa and assistance to liberation movements	130-8-18

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Number	Date of Adoption	Title	Voting Record
41/50	3 December 1986	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
41/58 A	3 December 1986	Chemical and bacteriological (biological) weapons A. Second Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (biological) and Toxin Weapons and on their Destruction	Without a vote
41/58 B	3 December 1986	Chemical and bacteriological (biological) weapons B. Prohibition of chemical and bacteriological weapons	100-11-43
41/58 C	3 December 1986	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	137-0-14
41/58 D	3 December 1986	Chemical and bacteriological (biological) weapons D. Chemical and bacteriological (biological) weapons	Without a vote
41/157	4 December 1986	Situation of human rights in El Salvador	110-0-40
42/30	30 November 1987	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effect	Without a vote
42/37 A	30 November 1987	Chemical and bacteriological (biological) weapons A. Chemical and bacteriological (biological) weapons	Without a vote

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Number	Date of Adoption	Title	Voting Record
42/37 C	30 November 1987	Chemical and bacteriological (biological) weapons C. Measures to uphold the authority of the 1925 Geneva Protocol and to support the conclusion of a Chemical Weapons Convention	Without a vote
42/96	7 December 1987	Use of mercenaries as a means to violate rights and to impede the exercise of the right of peoples to self-determination human	125-10-19
43/21	3 November 1988	The uprising (intifadah) of the Palestinian people	130-2-16
43/67	7 December 1988	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
43/74 A	7 December 1988	Chemical and bacteriological (biological) weapons A. Measures to uphold the authority of the 1925 Geneva Protocol and to support the conclusion of a Chemical Weapons Convention	Without a vote
43/74 B	7 December 1988	Chemical and bacteriological (biological) weapons B. Second Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (biological) Toxin Weapons and on Their Destruction	Without a vote
43/74 C	7 December 1988	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	Without a vote

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Number	Date of Adoption	Title	Voting Record
43/107	8 December 1988	Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination	125-10-21
43/173	9 December 1988	Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment	Without a vote
44/25	20 November 1989	Convention on the Rights of the Child	Without a vote
44/34	4 December 1989	International Convention against the Recruitment, Use, Financing and Training of Mercenaries	Without a vote
44/81	8 December 1989	Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination	125-10-21
44/115 A	15 December 1989	Chemical and bacteriological (biological) weapons A. Chemical and bacteriological (biological) weapons	Without a vote
44/115 B	15 December 1989	Chemical and bacteriological (biological) weapons B. Measures to uphold the authority of the 1925 Geneva Protocol and to support the conclusion of a Chemical Weapons Convention	Without a vote
44/128	15 December 1989	Elaboration of a 2nd Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of the Death Penalty	59-26-48
44/165	15 December 1989	Situation of human rights and fundamental freedoms in El Salvador	Without a vote

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Number	Date of Adoption	Title	Voting Record
45/57 A	4 December 1990	Chemical and bacteriological (biological) weapons	Without a vote
45/57 B	4 December 1990	A. Chemical and bacteriological (biological) weapons Chemical and Bacteriological (biological) weapons B. Implementation of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction and Preparations for the Third Review Conference of the Parties to the Convention	Without a vote
45/57 C	4 December 1990	Chemical and bacteriological (biological) weapons C. Measures to uphold the authority of the 1925 Geneva Protocol	Without a vote
45/58	4 December 1990	General and complete disarmament J. Prohibition of attacks on nuclear facilities	Without a vote
45/64	4 December 1990	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
45/111	14 December 1990	Basic Principles for the Treatment of Prisoners	Without a vote
45/112	14 December 1990	United Nations Guidelines for the Prevention of Juvenile Delinquency (The Riyadh Guidelines)	Without a vote
45/113	14 December 1990	United Nations Rules for the Protection of Juveniles Deprived of Their Liberty	Without a vote
45/170	18 December 1990	The situation of human rights in occupied Kuwait	144-1-0

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Number	Date of Adoption	Title	Voting Record
46/35 A	6 December 1991	Chemical and bacteriological (biological) weapons A. Third Review Conference of the Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (biological) and Toxin Weapons and on Their Destruction	113-2-14
46/35 B	6 December 1991	Chemical and bacteriological (biological) weapons B. Measures to uphold the authority of the 1925 Geneva Protocol	Without a vote
46/35 C	6 December 1991	Chemical and bacteriological (biological) weapons C. Chemical and bacteriological (biological) weapons	Without a vote
46/40	6 December 1991	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
46/134	17 December 1991	Situation of human rights in Iraq	129-1-17
46/136	17 December 1991	Situation of human rights in Afghanistan	Without a vote
46/182	19 December 1991	Strengthening of the coordination of humanitarian emergency assistance of the United Nations	Without a vote
46/216	20 December 1991	International cooperation to mitigate the environmental consequences on Kuwait and other countries in the region resulting from the situation between Iraq and Kuwait	135-0-1
46/242	25 August 1992	The situation in Bosnia and Herzegovina	136-1-5

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Number	Date of Adoption	Title	Voting Record
47/37	25 November 1992	Protection of the environment in times of armed conflict	Without a vote
47/39	30 November 1992	Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote
47/44	9 December 1992	The role of science and technology in the context of international security, disarmament and other related fields	Without a vote
47/52 E	9 December 1992	General and complete disarmament E. Second Review Conference of the Parties to the Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques	Without a vote
47/56	9 December 1992	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
47/80	16 December 1992	"Ethnic cleansing" and racial hatred	Without a vote
47/121	18 December 1992	The situation in Bosnia and Herzegovina	102-0-57
47/133	18 December 1992	Declaration on the Protection of All Persons from Enforced Disappearance	Without a vote
47/141	18 December 1992	Situation of human rights in Afghanistan	Without a vote
47/145	18 December 1992	Situation of Human Rights in Iraq	126-2-26
47/147	18 December 1992	Situation of human rights in the territory of the former Yugoslavia	Without a vote

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Number	Date of Adoption	Title	Voting Record
47/151	18 December 1992	International cooperation to mitigate the environmental consequences on Kuwait and other countries in the region resulting from the situation between Iraq and Kuwait	159-0-2
47/190	22 December 1992	Report of the United Nations Conference on Environment and Development	Without a vote
47/191	22 December 1992	Institutional arrangements to follow up the United Nations Conference on Environment and Development	Without a vote
48/30	9 December 1993	United Nations Decade of International Law	Without a vote
48/37	9 December 1993	Question of responsibility for attacks on United Nations and associated personnel and measures to ensure that those responsible for such attacks are brought to justice	Without a vote
48/65	16 December 1993	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
48/75 K	16 December 1993	General and complete disarmament K. Moratorium on the export of anti-personnel landmines	Without a vote
48/79	16 December 1993	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote

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Number	Date of Adoption	Title	Voting Record
48/88	20 December 1993	The situation in Bosnia and Herzegovina	109-0-57
48/92	20 December 1993	Use of mercenaries as a means to violate human rights and to impede the exercise of the right of peoples to self-determination	108-14-39
48/104	20 December 1993	Declaration on the Elimination of Violence against Women	Without a vote
48/116	20 December 1993	Office of the United Nations High Commissioner for Refugees	Without a vote
48/143	20 December 1993	Rape and abuse of women in the areas of armed conflict in the former Yugoslavia	Without a vote
48/144	20 December 1993	Situation of human rights in Iraq	116-2-43
48/152	20 December 1993	Situation of human rights in Afghanistan	Without a vote
48/153	20 December 1993	Situation of human rights in the territory of the former Yugoslavia: violations of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	Without a vote
48/157	20 December 1993	Protection of children affected by armed conflicts	Without a vote
49/10	3 November 1994	The situation in Bosnia and Herzegovina	97-0-61
49/50	9 December 1994	United Nations Decade of International Law	Without a vote
49/59	9 December 1994	Convention on the Safety of United Nations and Associated Personnel	Without a vote
49/75 D	15 December 1994	General and complete disarmament D. Moratorium on the exports of anti-personnel land-mines	Without a vote

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Number	Date of Adoption	Title	Voting Record
49/79	15 December 1994	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
49/86	15 December 1994	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
49/113	19 December 1994	Dissemination of the principles of the Rio Declaration on Environment and Development	Without a vote
49/126	19 December 1994	Agenda for development	Without a vote
49/169	23 December 1994	Office of the United Nations High Commissioner for Refugees	Without a vote
49/196	23 December 1994	Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	150-0-14
49/198	23 December 1994	Situation of human rights in the Sudan	101-13-49
49/199	23 December 1994	Situation of human rights in Cambodia	Without a vote
49/205	23 December 1994	Rape and abuse of women in the areas of armed conflict in the former Yugoslavia	Without a vote
49/206	23 December 1994	Situation of human rights in Rwanda	Without a vote
49/207	23 December 1994	Situation of human rights in Afghanistan	Without a vote
49/215	23 December 1994	Assistance in mine clearance	Without a vote
50/22 C	25 April 1996	The situation in the Middle East	64-2-65
50/44	11 December 1995	United Nations Decade of International Law	Without a vote

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Number	Date of Adoption	Title	Voting Record
50/70 O	12 December 1995	General and complete disarmament O. Moratorium on the exports of anti-personnel landmines	Without a vote
50/74	12 December 1995	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
50/79	12 December 1995	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
50/82	14 December 1995	Assistance in mine clearance	Without a vote
50/178	22 December 1995	Situation of human rights in Cambodia	Without a vote
50/189	22 December 1995	Situation of human rights in Afghanistan	Without a vote
50/192	22 December 1995	Rape and abuse of women in the areas of armed conflicts in the former Yugoslavia	Without a vote
50/193	22 December 1995	Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	144-1-20
50/197	22 December 1995	Situation of human rights in the Sudan	94-15-54
50/200	22 December 1995	Situation of human rights in Rwanda	Without a vote
51/30 B	5 December 1996	Strengthening of the coordination of humanitarian and disaster relief assistance of the United Nations, including special economic assistance: special economic assistance to individual countries or regions B. Assistance for the rehabilitation and reconstruction of Liberia	Without a vote

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Number	Date of Adoption	Title	Voting Record
51/30 G	13 December 1996	Strengthening of the coordination of humanitarian and disaster relief assistance of the United Nations, including special economic assistance: special economic assistance to individual countries or regions G. Assistance for humanitarian relief and the economic and social rehabilitation of Somalia	Without a vote
51/45 P	10 December 1996	Measures to uphold the authority of the 1925 Geneva Protocol	165-0-7
51/45 S	10 December 1996	General and complete disarmament S. An international agreement to ban anti-personnel landmines	155-0-10
51/45 T	10 December 1996	General and complete disarmament T. Status of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote
51/49	10 December 1996	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
51/54	10 December 1996	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
51/77	12 December 1996	The rights of the child	Without a vote (cont.)

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Number	Date of Adoption	Title	Voting Record
51/83	12 December 1996	Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination	117-17-39
51/98	12 December 1996	Situation of human rights in Cambodia	Without a vote
51/108	12 December 1996	Situation of human rights in Afghanistan	Without a vote
51/112	12 December 1996	Situation of human rights in the Sudan	100-16-50
51/114	12 December 1996	Situation of human rights in Rwanda	Without a vote
51/115	12 December 1996	Rape and abuse of women in the areas of armed conflict in the former Yugoslavia	Without a vote
51/134	13 December 1996	Israeli practices affecting the human rights of the Palestinian people in the occupied Palestinian territory, including Jerusalem	149-2-8
51/137	13 December 1996	Convention on the Safety of United Nations and Associated Personnel	Without a vote
51/157	16 December 1996	United Nations Decade of International Law	Without a vote
52/38 A	9 December 1997	General and complete disarmament: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction	142-0-18
52/38 H	9 December 1997	General and complete disarmament: Contributions towards banning anti-personnel landmines	147-0-15
52/38 T	9 December 1997	General and complete disarmament: Status of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote

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Number	Date of Adoption	Title	Voting Record
52/42	9 December 1997	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
52/47	9 December 1997	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
52/107	12 December 1997	The rights of the child	Without a vote
52/140	12 December 1997	Situation of human rights in the Sudan	93-16-58
52/145	12 December 1997	Situation of human rights in Afghanistan	Without a vote
52/167	16 December 1997	Safety and security of humanitarian personnel	Without a vote
53/26	17 November 1998	Assistance in mine action	Without a vote
53/77 L	4 December 1998	General and complete disarmament L. Measures to uphold the authority of the 1925 Geneva Protocol	168-0-5
53/77 N	4 December 1998	General and complete disarmament: Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction	147-0-21
53/77 R	4 December 1998	General and complete disarmament R. Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote

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Number	Date of Adoption	Title	Voting Record
53/81	4 December 1998	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
53/87	7 December 1998	Safety and security of humanitarian personnel and protection of United Nations personnel	Without a vote
53/116	9 December 1998	Traffic in women and girls	Without a vote
53/128	9 December 1998	The rights of the child	Without a vote
53/164	9 December 1998	Situation of human rights in Kosovo	122-3-34
54/54 B	1 December 1999	General and complete disarmament B. Implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction	139-1-20
54/54 E	1 December 1999	General and complete disarmament E. Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote
54/58	1 December 1999	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Without a vote
54/61	1 December 1999	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote

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Number	Date of Adoption	Title	Voting Record
54/78	6 December 1998	Israeli settlements in the Occupied Palestinian Territory, including Jerusalem, and the occupied Syrian Golan	149-3-3
54/151	17 December 1999	Use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination	110-16-35
54/183	17 December 1999	Situation of human rights in Kosovo	108-4-45
54/192	17 December 1999	Safety and security of humanitarian personnel and protection of United Nations personnel	Without a vote
54/263	25 May 2000	Optional protocols to the Convention on the Rights of the Child on the involvement of children in armed conflict and on the sale of children, child prostitution and child pornography	Without a vote
55/2	8 September 2000	United Nations Millennium Declaration	Without a vote
55/24	14 November 2000	The situation in Bosnia and Herzegovina	Without a vote
55/25	15 November 2000	United Nations Convention against Transnational Organized Crime	Without a vote
55/33 H	20 November 2000	General and Complete Disarmament H. Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction	Without a vote
55/33 J	20 November 2000	General and Complete Disarmament J. Measures to uphold the authority of the 1925 Geneva Protocol	163-0-5

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Number	Date of Adoption	Title	Voting Record
55/33 V	20 November 2000	General and Complete Disarmament V. Implementation of the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction	143-0-22
55/40	20 November 2000	Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction	Without a vote
55/73	4 December 2000	New international humanitarian order	Without a vote
55/116	4 December 2000	Situation of human rights in the Sudan	85-32-49
56/4	5 November 2001	Observance of the International Day for Preventing the Exploitation of the Environment in War and Armed Conflict	Without a vote
56/83	12 December 2001	Responsibility of States for internationally wrongful acts	Without a vote

RESOLUTIONS ADOPTED BY ECOSOC

Number	Date	Title	Voting Record
608 (XXI)	30 April 1956	Slavery	12-1-5
663 (XXIV)	31 July 1957	World social situation	Unanimously
		663 C Recommendations of the first UN Congress on the Prevention of Crime and the treatment of Offenders	
1158 (XLI)	5 August 1966	Question of punishment of war criminals and of persons who have committed crimes against humanity	22-0-2
1186 (XLI)	18 November 1966	Annual report of the United Nations High Commissioner for Refugees: Measures to extend the personal scope of the Convention of 28 July 1951 relating to the status of refugees	Without a vote
2075 (LXII)	13 May 1977	Report of the Committee on Crime Prevention and Control on its 4th session	Without a vote
2076 (LXII)	13 May 1977	Extension of the Standard Minimum Rules for the Treatment of Prisoners to persons arrested or imprisoned without charge	Without a vote
1979/38	10 May 1979	Disappeared persons	Without a vote
1980/4	16 April 1980	Measures to prevent the exploitation of prostitution	Without a vote
1980/41	2 May 1980	Conditions in which women are detained	Without a vote
1982/24	4 May 1982	Women and children under apartheid	35-1-6

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Number	Date	Title	Voting Record
1982/25	4 May 1982	Women and children refugees	Without a vote
1984/19	24 May 1984	Physical violence against detained women that is specific to their sex	Without a vote
1986/29	23 May 1986	Physical violence against detained women that is specific to their sex	Without a vote
1989/65	24 May 1989	Effective prevention and investigation of extra-legal, arbitrary and summary executions	Without a vote
1990/5	24 May 1990	Physical violence against detained women that is specific to their sex	Without a vote
1991/23	30 May 1991	Refugee and displaced women and children	Without a vote
1998/9	28 July 1998	Situation of women and girls in Afghanistan	Without a vote

RESOLUTIONS ADOPTED BY THE UN COMMISSION ON HUMAN RIGHTS

Number	Date	Title	Voting record
3 (XXI)	9 April 1965	Question of punishment of war criminals and of persons who have committed crimes against humanity	Unanimously (as regards to the resolution as a whole), 19-0-2 (as regards subparagraph (b) of operative paragraph 1)
1 (XXXIII)	15 February 1977	Question of the violation of human rights in the territories occupied as a result of hostilities in the Middle East	23-3-6
1 (XXXIV)	14 February 1978	Question of the violation of human rights in the occupied Arab territories, including Palestine	23-2-7
1 (XXXV)	21 February 1979	Question of the violation of human rights in the occupied Arab territories, including Palestine	20-2-9
1 (XXXVI)	13 February 1980	Question of the violation of human rights in the occupied Arab territories, including Palestine	28-3-8
29 (XXXVI)	11 March 1980	Human rights situation in Democratic Kampuchea	20-4-6
1 A (XXXVII)	11 February 1981	Question of the violation of human rights in the occupied Arab territories, including Palestine	31-3-8

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Number	Date	Title	Voting record
1982/1	11 February 1982	Question of the violation of human rights in the occupied Arab territories, including Palestine	Without a vote
1983/1	15 February 1983	Question of the violation of human rights in the occupied Arab territories, including Palestine	29-1-12
1983/5	15 February 1983	The right of peoples to self-determination and its application to peoples under colonial or alien domination or foreign occupation	28-9-4
1983/23	4 March 1983	Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its 35th session: discrimination against indigenous populations	Without a vote
1983/29	8 March 1983	Question of the violation of human rights and fundamental freedoms in any part of the world, with particular reference to colonial and other dependent countries and territories: situation of human rights in El Salvador	23-6-10
1984/1	20 February 1984	Question of the violation of human rights in the occupied Arab territories, including Palestine	29-1-11
1984/52	14 March 1984	Situation of human rights in El Salvador	24-5-13
1985/1	19 February 1985	Question of the violation of human rights in the occupied Arab territories, including Palestine	28-5-8
1985/36	13 March 1985	Situation of human rights in Guatemala	32-0-1
1986/1	20 February 1986	Question of the violation of human rights in the occupied Arab territories, including Palestine	29-7-6

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Number	Date	Title	Voting record
1986/24	10 March 1986	Situation in southern Africa	31-5-7
1986/39	12 March 1986	Situation of human rights in El Salvador	39-0-4
1986/40	12 March 1986	Question of human rights and fundamental freedoms in Afghanistan	28-9-5
1986/43	12 March 1986	Situation in southern Lebanon	25-1-17
1987/2	19 February 1987	Question of the violation of human rights in the occupied Arab territories, including Palestine	29-1-12
1987/6	19 February 1987	Situation in Kampuchea	29-8-3
1987/50	11 March 1987	Question of human rights in Cyprus	25-3-15
1987/51	11 March 1987	Situation of human rights in El Salvador	36-0-7
1987/54	11 March 1987	Situation of human rights in southern Lebanon	26-1-15
1987/58	11 March 1987	Question of human rights and fundamental freedoms in Afghanistan	26-8-7
1987/60	12 March 1987	Question of human rights in Chile	Without a vote
1987/61	12 March 1987	Situation in Sri Lanka	Without a vote
1988/1	15 February 1988	Question of the violation of human rights in the occupied Arab territories, including Palestine	31-1-11
1988/6	22 February 1988	Situation in Kampuchea	31-7-3
1988/7	22 February 1988	The use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	30-11-1
1988/13	29 February 1988	The adverse consequences for the enjoyment of human rights of political, military, economic and other forms of assistance given to colonial and racist régimes in southern Africa	32-7-4
1988/47	8 March 1988	Prosecution and punishment of all war criminals and persons who have committed crimes against humanity	Without a vote

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Number	Date	Title	Voting record
1988/65	10 March 1988	Situation of human rights in El Salvador	Without a vote
1988/66	10 March 1988	Situation of human rights in southern Lebanon	26-1-15
1989/2	17 February 1989	Question of violations of human rights in occupied Palestine	32-1-9
1989/9	23 February 1989	Implementation of the Programme of Action for the Second Decade to Combat Racism and Racial Discrimination	Without a vote
1989/20	6 March 1989	Situation in Kampuchea	35-7-1
1989/21	6 March 1989	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	32-10-1
1989/65	8 March 1989	Situation of human rights in southern Lebanon	30-1-12
1989/67	8 March 1989	Question of human rights and fundamental freedoms in Afghanistan	Without a vote
1989/68	8 March 1989	Situation of human rights and fundamental freedoms in El Salvador	Without a vote
1990/7	19 February 1990	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	Without a vote
1990/53	6 March 1990	Situation of human rights in Afghanistan	Without a vote
1990/54	6 March 1990	Situation of human rights in southern Lebanon	41-1-1
1990/77	7 March 1990	Situation of human rights in El Salvador	Without a vote
1991/4	15 February 1991	Situation in Afghanistan	Without a vote
1991/7	22 February 1991	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	Without a vote
1991/51	6 March 1991	Assistance to Guatemala in the field of human rights	Without a vote
1991/66	6 March 1991	Situation of human rights in southern Lebanon	41-1-0

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Number	Date	Title	Voting record
1991/67	6 March 1991	Situation of human rights in Kuwait under Iraqi occupation	41-1-0
1991/75	6 March 1991	Situation of human rights in El Salvador	Without a vote
1991/78	6 March 1991	Situation of human rights in Afghanistan	Without a vote
1992/6	21 February 1992	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	Without a vote
1992/19	28 February 1992	Situation of human rights in South Africa	Without a vote
1992/60	3 March 1992	Situation of human rights in Kuwait under Iraqi occupation	47-1-1
1992/68	4 March 1992	Situation of human rights in Afghanistan	Without a vote
1992/70	4 March 1992	Situation of human rights in Lebanon	49-1-1
1992/71	5 March 1992	Situation of human rights in Iraq	35-1-16
1992/S-1/1	14 August 1992	The situation of human rights in the territory of the former Yugoslavia	Without a vote
1992/S-2/1	1 December 1992	The situation of human rights in the territory of the former Yugoslavia	45-1-1
1993/2 A	19 February 1993	Question of the violation of human rights in the occupied Arab territories, including Palestine	26-16-5
1993/5	19 February 1993	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	Without a vote
1993/7	23 February 1993	Situation of human rights in the territory of the former Yugoslavia	Without a vote
1993/8	23 February 1993	Rape and abuse of women in the territory of the former Yugoslavia	Without a vote

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Number	Date	Title	Voting record
1993/11	26 February 1993	Implementation of the Programme of Action for the Second Decade to Combat racism and Racial Discrimination and launching of a Third Decade for Action to Combat Racism and Racial Discrimination	Without a vote
1993/33	5 March 1993	Human rights and forensic science	Without a vote
1993/45	5 March 1993	Right to freedom of opinion and expression	Without a vote
1993/60	10 March 1993	Situation of human rights in the Sudan	35-9-8
1993/66	10 March 1993	Situation of human rights in Afghanistan	Without a vote
1993/67	10 March 1993	Situation of human rights in Southern Lebanon	50-1-0
1993/83	10 March 1993	Effects of armed conflicts on children's lives	Without a vote
1994/7	18 February 1994	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	35-1-15
1994/37	4 March 1994	Torture and other cruel, inhumane or degrading treatment or punishment	Without a vote
1994/39	4 March 1994	Question of enforced disappearances	Without a vote
1994/58	4 March 1994	Assistance to Guatemala in the field of human rights	Without a vote
1994/59	4 March 1994	Assistance to the republic of Georgia in the field of human rights	Without a vote
1994/60	4 March 1994	Assistance to Somalia in the field of human rights	Without a vote
1994/67	19 March 1994	Civil defence forces	Without a vote
1994/72	9 March 1994	Situation of human rights in the territory of the former Yugoslavia: violations of human rights in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	Without a vote

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Number	Date	Title	Voting record
1994/74	9 March 1994	Situation of human rights in Iraq	34-1-18
1994/75	9 March 1994	Situation of human rights in Bosnia and Herzegovina	41-1-10
1994/77	9 March 1994	Rape and abuse of women in the territory of the former Yugoslavia	Without a vote
1994/79	9 March 1994	Situation of human rights in Sudan	35-9-9
1994/83	9 March 1994	Situation of human rights in Southern Lebanon	48-1-3
1994/84	9 March 1994	Situation of human rights in Afghanistan	Without a vote
1994/85	9 March 1994	Situation of human rights in Myanmar	Without a vote
1994/87	9 March 1994	Situation of human rights in Zaire	Without a vote
1994/94	9 March 1994	Effects of armed conflicts on children's lives	Without a vote
1995/5	17 February 1995	Use of mercenaries as a means of impeding the exercise of the right of peoples to self-determination	34-1-15
1995/7	16 January 1995	Question of Western Sahara	Without a vote
1995/8	17 February 1995	Violations of human rights in southern Africa: report of the Ad Hoc Working Group of experts	Without a vote
1995/29	3 March 1995	Minimum humanitarian standards	Without a vote
1995/35	3 March 1995	Special process dealing with the problem of missing persons in the territory of the former Yugoslavia	Without a vote
1995/51	3 March 1995	Assistance to Guatemala in the field of human rights	Without a vote
1995/55	3 March 1995	The situation of human rights in Cambodia	Without a vote
1995/56	3 March 1995	Assistance to Somalia in the field of human rights	Without a vote
1995/67	7 March 1995	Human rights situation in Southern Lebanon and the western Bekaa	48-1-4
1995/69	8 March 1995	Situation of human rights in Zaire	Without a vote

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Number	Date	Title	Voting record
1995/72	8 March 1995	Situation of human rights in Myanmar	Without a vote
1995/73	8 March 1995	Extra-judicial, summary or arbitrary executions	Without a vote
1995/74	8 March 1995	Situation of human rights in Afghanistan	Without a vote
1995/76	8 March 1995	Situation of human rights in Iraq	31-1-21
1995/77	8 March 1995	Situation of human rights in the Sudan	33-7-10
1995/79	8 March 1995	Rights of the child	Without a vote
1995/89	8 March 1995	Situation of human rights in the Republic of Bosnia and Herzegovina, in the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	44-0-7
1995/91	8 March 1995	Situation of human rights in Rwanda	Without a vote
1996/1	27 March 1996	Situation of human rights in Burundi	Without a vote
1996/13	11 April 1996	Human Rights and the environment	Without a vote
1996/41	19 April 1996	A permanent forum for indigenous people in the United Nations System	Without a vote
1996/53	19 April 1996	Right to freedom of opinion and expression	Without a vote
1996/54	19 April 1996	Situation of human rights in Cambodia	Without a vote
1996/71	23 April 1996	Situation of human rights in the Republic of Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	Without a vote
1996/73	23 April 1996	Situation of human rights in the Sudan	Without a vote
1996/74	23 April 1996	Extra-judicial, summary or arbitrary executions	Without a vote
1996/75	23 April 1996	Situation of human rights in Afghanistan	Without a vote
1996/76	23 April 1996	Situation of human rights in Rwanda	Without a vote
1996/80	23 April 1996	Situation of human rights in Myanmar	Without a vote

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Number	Date	Title	Voting record
1996/84	24 April 1996	Situation of human rights in the Islamic Republic of Iran	Without a vote
1996/85	24 April 1996	Rights of the child	Without a vote
1997/2	26 March 1997	Human rights in the occupied Syrian Golan	26-1-23
1997/38	11 April 1997	Torture and other cruel, inhumane or degrading treatment or punishment	Without a vote
1997/57	15 April 1997	Situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia (Serbia and Montenegro)	Without a vote
1997/58	15 April 1997	Situation of human rights in Zaire	Without a vote
1997/59	15 April 1997	Situation of human rights in the Sudan	Without a vote
1997/62	24 April 1997	Human rights in Cuba	19-10-24
1997/65	16 April 1997	Situation of human rights in Afghanistan	Without a vote
1997/77	18 April 1997	Situation of human rights in Burundi	Without a vote
1997/78	18 April 1997	Rights of the child	Without a vote
1998/1	27 March 1998	Question of the violation of human rights in the occupied Arab territories, including Palestine	31-1-20
1998/6	27 March 1998	The use of mercenaries as a means of violating human rights and impeding the exercise of the right of peoples to self-determination	35-9-8
1998/38	17 April 1998	Torture and other cruel, inhuman or degrading treatment or punishment	Without a vote
1998/52	17 April 1998	The elimination of violence against women	Without a vote
1998/53	17 April 1998	Impunity	Without a vote
1998/60	17 April 1998	Situation of human rights in Cambodia	Without a vote
1998/62	21 April 1998	Human rights situation in Southern Lebanon and western Bekaa	52-1-0
1998/63	21 April 1998	Situation of human rights in Myanmar	Without a vote

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Number	Date	Title	Voting record
1998/67	21 April 1998	Situation of human rights in the Sudan	31-6-16
1998/70	21 April 1998	The question of human rights in Afghanistan	Without a vote
1998/73	22 April 1998	Hostage-taking	Without a vote
1998/75	22 April 1998	Abduction of children from northern Uganda	24-1-27
1998/79	22 April 1998	Situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and the Federal Republic of Yugoslavia	41-0-12
1998/82	24 April 1998	Situation of human rights in Burundi	Without a vote
1999/1	6 April 1999	Situation of human rights in Sierra Leone	Without a vote
1999/10	23 April 1999	Situation of human rights in Burundi	Without a vote
1999/33	26 April 1999	The right to restitution, compensation and rehabilitation for victims of grave violations of human rights and fundamental freedoms	Without a vote
1999/36	26 April 1999	Right to freedom of opinion and expression	Without a vote
1999/S-4/1	27 September 1999	Situation of human rights in East Timor	Without a vote
2000/26	18 April 2000	Situation of human rights in Federal Republic of Yugoslavia (Serbia and Montenegro), the republic of Croatia and Bosnia and Herzegovina	44-1-18
2000/58	25 April 2000	Situation in the Republic of Chechnya	25-7-19
2000/S-5/1	19 October 2000	Grave and massive violations of the human rights of the Palestinian people by Israel	19-16-7
2001/7	18 April 2001	Question of the violation of human rights in the occupied Arab territories, including Palestine	28-2-22

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Number	Date	Title	Voting record
2001/12	18 April 2001	Situation of human rights in parts of south-eastern Europe	41-0-11
2001/18	20 April 2001	Situation of human rights in the Sudan	28-0-25
2001/24	20 April 2001	Situation in the Republic of Chechnya of the Russian Federation	22-12-19
2001/38	23 April 2001	Hostage-taking	Without a vote
2001/40	23 April 2001	Question of arbitrary detention	Without a vote
2001/42	23 April 2001	Elimination of all forms of religious intolerance	Without a vote
2001/46	23 April 2001	Question of enforced or involuntary disappearances	Without a vote
2001/66	25 April 2001	Convention on the Prevention and Punishment of the Crime of Genocide	Without a vote
2002/37	22 April 2002	Integrity of the judicial system	34-0-19
2002/60	25 April 2002	Missing persons	Without a vote
2002/79	25 April 2002	Impunity	Without a vote

RESOLUTIONS ADOPTED BY THE UN SUB-COMMISSION ON HUMAN RIGHTS

Number	Date of adoption	Title
15 (XXXIV)	10 September 1981	Question of the human rights of persons subjected to any form of detention or imprisonment
1982/17	7 September 1982	Question of the violation of human rights and fundamental freedoms, including policies of racial discrimination and segregation and of apartheid, in all countries, with particular reference to colonial and other dependent countries and territories
1983/12	5 September 1983	Question of the violation of human rights and fundamental freedoms: the situation in Guatemala
1983/18	5 September 1983	Question of the violation of human rights and fundamental freedoms: the situation in El Salvador
1984/23	29 August 1984	Question of the violation of human rights and fundamental freedoms: the situation in Guatemala
1984/26	30 August 1984	Question of the violation of human rights and fundamental freedoms: the situation in El Salvador
1985/8	28 August 1985	Consideration of the future work of the Sub-Commission [on Prevention of Discrimination and Protection of Minorities] and of the draft provisional agenda for the 39th session of the Sub-Commission
1985/18	29 August 1985	The situation in El Salvador
1985/26	29 August 1985	Question of the human rights of persons subjected to any form of detention or imprisonment
1985/27	30 August 1985	The situation in Chile
1985/28	30 August 1985	The situation in Guatemala
1987/18	2 September 1987	Situation in El Salvador
1987/19	2 September 1987	Violations of human rights in Cyprus
1988/10	31 August 1988	The situation in the Palestinian and Arab territories occupied by Israel

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Number	Date of adoption	Title
1988/13	1 September 1988	The situation of human rights in El Salvador
1988/27	1 September 1988	Respect for the right to life: elimination of chemical weapons
1989/4	31 August 1989	Situation in the Palestinian and other Arab territories occupied by Israel
1989/9	31 August 1989	Situation of human rights in El Salvador
1989/24	31 August 1989	Human rights in times of armed conflicts
1989/39	1 September 1989	Respect for the right to life: elimination of chemical weapons
1990/12	30 August 1990	Situation in the Palestinian and other Arab territories occupied by Israel
1991/4	23 August 1991	Situation in South Africa
1991/6	23 August 1991	Situation in the Palestinian and other Arab territories occupied by Israel
1992/9	26 August 1992	Situation in South Africa
1992/10	26 August 1992	Situation in the Palestinian and other Arab territories occupied by Israel
1992/13	27 August 1992	Situation of human rights in El Salvador
1992/18	27 August 1992	Situation of human rights in Guatemala
1992/20	27 August 1992	Situation in East Timor
1993/8	20 August 1993	Punishment of the crime of genocide
1993/11	20 August 1993	Situation in South Africa
1993/15	20 August 1993	Situation in the Palestinian and other Arab territories occupied by Israel
1993/16	20 August 1993	Situation of human rights in Guatemala
1993/17	20 August 1993	Situation in Bosnia and Herzegovina
1993/20	20 August 1993	Situation of human rights in Iraq
1993/23	23 August 1993	Situation of human rights in Peru
1994/1	9 August 1994	Situation in Rwanda
1995/3	18 August 1995	Situation of human rights in Iraq
1995/5	18 August 1995	Situation of human rights in Rwanda
1995/8	18 August 1995	Situation in the territory of the former Yugoslavia
1995/24	24 August 1995	Injurious effect of anti-personnel land-mines
1996/3	19 August 1996	Situation of human rights in Rwanda
1996/4	19 August 1996	Situation of human rights in Burundi
1996/5	19 August 1996	Situation of human rights in Iraq
1996/15	23 August 1996	Injurious effects of anti-personnel land-mines
1996/16	29 August 1996	International peace and security as an essential condition for the enjoyment of human rights, above all the right to life
1997/34	28 August 1997	Respect for humanitarian and human rights law provisions in United Nations peacekeeping operations

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Number	Date of adoption	Title
1997/36	28 August 1997	International peace and security as an essential condition for the enjoyment of human rights, above all the right to life
1998/18	21 August 1998	Systematic rape, sexual slavery and slavery-like practices during armed conflict, including internal armed conflict
1998/26	22 August 1998	Housing and property restitution in the context of the return of refugees and internally displaced persons
1999/16	26 August 1999	Systematic rape, sexual slavery and slavery-like practices
2000/24	18 August 2000	Role of universal or extraterritorial competence in preventive action against impunity
2001/16	16 August 2001	International protection for refugees and displaced persons
2001/22	16 August 2001	International cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity
2001/24	16 August 2001	The Social Forum

RESOLUTIONS ADOPTED BY OTHER INTERNATIONAL ORGANISATIONS

Organisation of African Unity (African Union)

African Commission on Human and Peoples' Rights

No.	Date	Title
1 (XI)	2–9 March 1992	Resolution on the Right to Recourse and Fair Trial
2 (XIV)	1–10 December 1993	Resolution on the promotion and the respect of International Humanitarian Law and Human and Peoples' Rights
4 (XVII)	13–22 March 1995	Resolution on anti-personnel mines

Assembly of Heads of State and Government

No.	Date	Title
197 (XXXVI)	9–11 July 1990	Resolution on the adoption of the African Charter on the Rights and Welfare of the Child
250 (XXXII)	8–10 July 1996	Resolution on the African Commission on Human and Peoples' Rights

Conference of African Ministers of Health

No.	Date	Title
7 (V)	24–29 April 1995	Resolution on health and prison
14 (V)	26–28 April 1995	Resolution on health and war

*Council of Ministers**Resolutions*

No.	Date	Title
1448 (LVIII)	21–26 June 1993	Resolution on refugees, returnees and displaced persons in Africa
1526 (LX)	6–11 June 1994	Resolution on respect for international humanitarian law and support for humanitarian action in armed conflicts
1588 (LXII)	21–23 June 1995	Resolution on refugees, returnees and displaced persons in Africa
1589 (LXII)	21–23 June 1995	Resolution on the regional Conference on assistance to refugees, returnees and displaced persons in the Great Lakes region
1593 (LXII)	21–23 June 1995	Resolution on the 1980 United Nations Convention on Certain Conventional Weapons and problems posed by the proliferation of anti-personnel mines in Africa
1628 (LXIII)	26–28 February 1996	Resolution on the revision of the 1980 United Nations Convention on Certain Conventional Weapons and Problems Posed by the Proliferation of Anti-Personnel Mines in Africa
1649 (LXIV)	1–5 July 1996	Resolution on Burundi
1650 (LXIV)	1–5 July 1996	Resolution on Liberia
1653 (LXIV)	1–5 July 1996	Resolution on refugees, returnees and displaced persons in Africa
1659 (LXIV)	1–5 July 1996	Resolution on the plight of African children in situation of armed conflicts
1662 (LXIV)	1–5 July 1996	Resolution on the international humanitarian law, water and armed conflict in Africa
2004 (LXVI)	28–31 May 1997	Resolution on the report of the Secretary-General on the situation in Angola

Decisions

No.	Date	Title
362 (LXVI)	28–31 May 1997	Report of the Commission of Twenty on the situation of refugees, returnees and displaced persons in Africa
363 (LXVI)	28–31 May 1997	Report of the Secretary-General on the question of antipersonnel landmines and the international efforts to reach a total ban

Council of Europe*Parliamentary Assembly**Resolutions*

No.	Date	Title
722	1 February 1980	Situation of human rights in Latin America
751	15 May 1981	Refugees from El Salvador
774	29 April 1982	Europe and Latin America – the challenge of human rights
816	21 March 1984	Situation in Cyprus
822	10 May 1984	Situation in Turkey
823	28 June 1984	Activities of the International Committee of the Red Cross (ICRC)
828	26 September 1984	Enforced disappearances
835	30 January 1985	Situation in Latin America
849	30 September 1985	War between Iraq and Iran
854	20 November 1985	Deteriorating situation in Afghanistan
881	1 July 1987	Activities of the International Committee of the Red Cross (ICRC) (1984–86)
904	30 June 1988	Protection of humanitarian medical missions
921	6 July 1989	Activities of the International Committee of the Red Cross (ICRC) (1987–88)
950	1 October 1990	Gulf crisis
954	29 January 1991	Gulf conflict
984	30 June 1992	Crisis in the former Yugoslavia
991	7 October 1992	Activities of the International Committee of the Red Cross (1989–1991)
994	3 February 1993	Massive and flagrant violations of human rights in the territory of former Yugoslavia
1010	28 September 1993	Situation of the refugees and displaced persons in Serbia, Montenegro and the former Yugoslav Republic of Macedonia
1011	28 September 1993	Situation of women and children in the former Yugoslavia

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No.	Date	Title
1019	25 January 1994	Humanitarian situation and needs of the refugees, displaced persons and other vulnerable groups in the countries of the former Yugoslavia
1022	27 January 1994	Humanitarian situation and needs of the displaced Iraqi Kurdish population
1047	10 November 1994	Conflict in Nagorno-Karabakh
1050	10 November 1994	Rwanda and the prevention of humanitarian crises
1055	2 February 1995	Russia's request for membership in the light of the situation in Chechnya
1066	27 September 1995	Situation in some parts of the former Yugoslavia
1077	24 January 1996	Albanian asylum-seekers from Kosovo
1085	24 April 1996	Activities of the International Committee of the Red Cross (ICRC), 1992-95
1119	22 April 1997	Conflicts in Transcaucasia

Recommendations

No.	Date	Title
855	2 February 1979	Statutory limitation of war crimes and crimes against humanity
868	5 June 1979	The missing political prisoners in Chile
945	2 July 1982	International humanitarian law
974	5 November 1983	Situation in Cyprus
1056	5 May 1987	National refugees and missing persons in Cyprus
1176	5 February 1992	Crisis in Yugoslavia: displaced populations
1150	24 April 1991	Situation of the Iraqi Kurdish population and other persecuted minorities
1189	1 July 1992	Establishment of an international court to judge war crimes
1198	5 November 1992	Crisis in former Yugoslavia
1218	27 September 1993	Establishing an international court to try serious violations of international humanitarian law
1239	14 April 1994	Cultural situation in the former Yugoslavia
1266	26 April 1995	Turkey's military intervention in northern Iraq and on Turkey's respect of commitments concerning constitutional and legislative reforms
1287	24 January 1996	Refugees, displaced persons and reconstruction in certain countries of the former Yugoslavia

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No.	Date	Title
1297	25 April 1996	The implementation of the Dayton Agreements for peace in Bosnia-Herzegovina
1305	24 September 1996	Humanitarian situation of the displaced persons in Georgia
1368	22 April 1998	Latest developments in the Federal Republic of Yugoslavia and the situation in Kosovo
1376	24 June 1998	Crisis in Kosovo and situation in the Federal Republic of Yugoslavia
1377	25 June 1998	Humanitarian situation of the Kurdish refugees and displaced persons in South-East Turkey and North Iraq
1384	24 September 1998	Crisis in Kosovo and situation in the Federal Republic of Yugoslavia
1385	24 September 1998	Kosovo refugees, asylum seekers and displaced persons
1427	23 September 1999	Respect for international humanitarian law in Europe
1495	24 January 2001	Environmental impact of the war in Yugoslavia on Southeast Europe

European Parliament

Date	Title
15 October 1982	Resolution on the situation in Lebanon
18 November 1982	Resolution on the events in Argentina
16 December 1982	Resolution on the discovery of mass graves in Argentina
11 January 1983	Resolution on the problem of missing persons in Cyprus
19 May 1983	Resolution on the statement by the Argentine military junta concerning the fate of the persons who have disappeared since the last coup d'état
13 October 1983	Resolution on the situation in Argentina
12 December 1985	Resolution on mass population transfers in Ethiopia and the expulsion of MSF
12 December 1985	Resolution on the situation in Afghanistan
12 March 1988	Resolution on the situation in Kosovo
20 May 1988	Resolution on the situation in Cyprus
15 December 1988	Resolution on human rights violations in Turkey
25 May 1989	Resolution on May Day events and the continuing aggravation of the domestic political climate in Turkey
12 July 1990	Resolution on the violation of human rights in Cyprus
11 March 1993	Resolution on the Rape of Women in former Yugoslavia
12 March 1993	Resolution on Human Rights in the world and Community human rights policy for the years 1991/92
15 December 1994	Resolution on the situation in Chechnya

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Date	Title
16 February 1995	Resolution on the humanitarian situation in Chechnya and the neighbouring republics of Ingushetia, Daghestan and Northern Ossetia
16 February 1995	Resolution on the human rights situation in Chechnya
16 March 1995	Resolution on human rights in Chechnya
16 November 1995	Resolution on the failure of the international conference on anti-personnel landmines and laser weapons
24 October 1996	Resolution on the Ottawa Conference on anti-personnel landmines
14 November 1996	Resolution on the situation in Abkhazia
16 July 1998	Resolution on Kosovo
8 October 1998	Resolution on the situation in Kosovo
14 January 1999	Resolution on the situation in Sierra Leone
16 March 2000	Resolution on violations of human rights and humanitarian law in Chechnya

League of Arab States

Council

No.	Date	Title
1778	20 July 1961	Measures adopted to assist Tunisia
1984	31 March 1964	The British Aggression Against Hurayb in Yemen
2676	15 September 1970	Geneva Protocol of 1925 relative to the Prohibition of the Use of Poisonous Gases in Times of War
4237	31 March 1983	Israeli Practices Against Civilians in the Occupied Arab Territories
4238	31 March 1983	Poisoning Arab Students and Professors in the Occupied Palestinian Territories
4430	28 March 1985	Israeli Occupation of Parts of South Lebanon and the Western Bekaa and Rashia, and the Arbitrary and Inhuman Practices contrary to International Laws, Charters and Morals
4646	6 April 1987	Developments of the Iraq/Iran War
4938	13 September 1989	The Iraq/Iran Situation
5038	31 August 1990	The Situation of Civilians as a Result of the Iraqi Occupation of Kuwaiti Territory
5039	31 August 1990	The Detention by Iraq of Nationals of Third Countries
5169	29 April 1992	Israeli Occupation of Parts of South Lebanon and the Western Bekaa and Implementation of Security Council Resolution No. 425
5231	13 September 1992	Bosnia and Herzegovina

(cont.)

No.	Date	Title
5324	21 September 1993	Israeli Occupation of Parts of South Lebanon and the Western Bekaa and Implementation of Security Council Resolution No. 425
5414	15 September 1994	Follow-up of the Intifada's Developments
5633	31 March 1997	The Occupied Arab Syrian Golan Heights
5635	31 March 1997	Lebanese Hostages and Prisoners in Israeli Places of Detention and Prisons

Organization of American States

General Assembly

No.	Date	Title
783 (XV-O/85)	9 December 1985	Inter-American Convention to Prevent and Punish Torture
1270 (XXIV-O/94)	10 June 1994	Respect for International Humanitarian Law
1335 (XXV-O/95)	9 June 1995	Respect for International Humanitarian Law
1408 (XXVI-O/96)	7 June 1996	Respect for International Humanitarian Law
1411 (XXVI-O/96)	7 June 1996	The Western Hemisphere as an Antipersonnel-Land-Mine-Free Zone
1550 (XXVIII-O/98)	2 June 1998	Assaults upon Freedom of the Press and Crimes against Journalists
1565 (XXVIII-O/98)	2 June 1998	Promotion of and Respect for International Humanitarian Law
1602 (XXVIII-O/98)	3 June 1998	Respect for International Humanitarian Law

Organization of the Islamic Conference

Conference of Ministers of Foreign Affairs

No.	Date	Title
49/19-P	31 July–5 August 1990	Cairo Declaration on Human Rights in Islam
1/5-EX	17–18 June 1992	Resolution on the situation in Bosnia and Herzegovina
1/6-EX	1–2 December 1992	Resolution on the situation in Bosnia and Herzegovina
1/22-P	10–12 December 1994	Resolution on the Palestinian cause and the Arab–Israeli conflict

(cont.)

No.	Date	Title
6/22-P	10–12 December 1994	Resolution on Bosnia and Herzegovina
36/23-P	9–12 December 1995	Resolution on the elimination of anti-personnel mines and mine clearing operations
27/24-P	9–13 December 1996	Resolution on anti-personnel mines and mine clearing operations
28/25-P	15–17 March 1998	Resolution on anti-personnel mines and mine clearing operations

RESOLUTIONS ADOPTED BY THE INTERNATIONAL CONFERENCE OF THE RED CROSS AND RED CRESCENT

4th International Conference of the Red Cross, Karlsruhe, 22–27 September 1887

Resolution VIII. Measures which have been or should be taken by the Societies in order to spread knowledge of the 1864 Geneva Convention in the army, in circles especially interested in its implementation and among the general public

15th International Conference of the Red Cross, Tokyo, 20–29 October 1934

Resolution IX. Teaching the principles of the Geneva Convention and of the Red Cross to youth

19th International Conference of the Red Cross, New Delhi, 28 October–7 November 1957

Resolution XIII. Draft rules for the limitation of the dangers incurred by the civilian population in time of war

Resolution XX. Reunion of dispersed families

Resolution XXIX. Young people and the Geneva Conventions

Resolution XXX. Practical means of spreading knowledge of the Geneva Conventions among young people

20th International Conference of the Red Cross, Vienna, 2–9 October 1965

Resolution IX. Reading of principles

Resolution XXI. Implementation and dissemination of the Geneva Conventions

Resolution XXIII. Tracing of burial places

Resolution XXIV. Treatment of prisoners of war

Resolution XXV. Application of the Geneva Conventions by the United Nations Emergency Forces

Resolution XXVI. Repression of violations of the Geneva Conventions

Resolution XXVIII. Protection of civilian populations against the dangers of indiscriminate warfare

Resolution XXX. Protection of civil medical and nursing personnel

Resolution XXXI. Protection of victims of non-international conflicts

Resolution XXXIII. Instruction of medical personnel in the Geneva Conventions

21st International Conference of the Red Cross, Istanbul, 6–13 September 1969

Resolution IX. Dissemination of the Geneva Conventions

Resolution X. Implementation of the Fourth Geneva Convention

Resolution XI. Protection of prisoners of war

Resolution XII. War crimes and crimes against humanity

Resolution XIII. Reaffirmation and development of the laws and customs applicable in armed conflicts

Resolution XIV. Weapons of mass destruction

Resolution XVI. Protection of civilian medical and nursing personnel

Resolution XVII. Protection of victims of non-international armed conflicts

Resolution XVIII. Status of combatants in non-international armed conflicts

22nd International Conference of the Red Cross, Teheran, 8–15 November 1973

- Resolution I. Activities of the International Committee of the Red Cross (ICRC)
- Resolution III. Application of the Fourth Geneva Convention in the Middle East
- Resolution IV. Application of the other Geneva Conventions in the Middle East
- Resolution V. The missing and dead in armed conflicts
- Resolution X. Elimination of racial discrimination
- Resolution XII. Implementation and dissemination of the Geneva Conventions
- Resolution XIII. Reaffirmation and development of international humanitarian law applicable in armed conflicts
- Resolution XIV. Prohibition or restriction of the use of certain weapons
- Resolution XIX. Exchange of prisoners of war in the Middle East

23rd International Conference of the Red Cross, Bucharest, 15–21 October 1977

- Resolution III. The Geneva Conventions and the Protocols
- Resolution VII. Dissemination of knowledge of international humanitarian law applicable in armed conflicts and of the fundamental principles of the Red Cross
- Resolution VIII. Taking of hostages
- Resolution X. Application of the Fourth Geneva Convention of 12 August 1949 in the occupied territories in the Middle East
- Resolution XI. Misuse of the emblem of the Red Cross
- Resolution XII. Weapons of mass destruction
- Resolution XIV. Torture
- Resolution XVIII. Red Cross Teaching Guide

24th International Conference of the Red Cross, Manila, 7–14 November 1981

- Resolution I. Wearing of identity discs
- Resolution II. Forced or involuntary disappearances
- Resolution III. Application of the Fourth Geneva Convention of 12 August 1949
- Resolution IV. Humanitarian activities of the International Committee of the Red Cross for the benefit of victims of armed conflicts
- Resolution VI. Respect for international humanitarian law and for humanitarian principles and support for the activities of the International Committee of the Red Cross
- Resolution VII. The Protocols Additional to the Geneva Conventions
- Resolution VIII. Identification of medical transport
- Resolution IX. Conventional weapons
- Resolution X. Dissemination of knowledge of international humanitarian law and of the Red Cross principles and ideals
- Resolution XI. International courses on the law of war
- Resolution XIII. Disarmament, weapons of mass destruction and respect for non-combatants
- Resolution XIV. Torture
- Resolution XV. Assistance to victims of torture
- Resolution XXI. International Red Cross aid to refugees

25th International Conference of the Red Cross, Geneva, 23–31 October 1986

- Resolution I. Respect for international humanitarian law in armed conflicts and action by the ICRC for persons protected by the Geneva Conventions
- Resolution II. The Protocols Additional to the Geneva Conventions
- Resolution III. Identification of medical transports
- Resolution IV. Dissemination of international humanitarian law and the principles and ideals of the Movement in the service of peace
- Resolution V. National measures to implement international humanitarian law

Resolution VI. International courses on law applicable in armed conflicts
Resolution VII. Work on international humanitarian law in armed conflicts at sea and on land

Resolution VIII. Protection of the civilian population in armed conflicts

Resolution IX. Protection of children in armed conflicts

Resolution X. Torture

Resolution XI. Assistance to victims of torture

Resolution XII. Assistance to victims of torture

Resolution XIII. Obtaining and transmitting personal data as a means of protection and of preventing disappearances

Resolution XV. Co-operation between National Red Cross and Red Crescent Societies and governments in the reuniting of dispersed families

Resolution XVI. The role of the Central Tracing Agency and National Societies in tracing activities and the reuniting of families

Resolution XVII. The Movement and refugees

Resolution XX. Assistance to children in emergency situations

26th International Conference of the Red Cross and Red Crescent, Geneva, 3–7 December 1995

Resolution I. International humanitarian law: From law to action. Report on the follow-up to the International Conference for the Protection of War Victims

Resolution II. Protection of the civilian population in period of armed conflict

Resolution IV. Principles and action in international humanitarian assistance and protection

27th International Conference of the Red Cross and Red Crescent, Geneva, 31 October–6 November 1999

Resolution I. Adoption of the Declaration and the Plan of Action

RESOLUTIONS ADOPTED BY THE COUNCIL OF DELEGATES OF THE INTERNATIONAL RED CROSS AND RED CRESCENT MOVEMENT

Session of 8–15 November 1973, Teheran

Resolution on action in the struggle against racism and racial discrimination

Session of 13–14 October 1983, Geneva

Resolution 4. Red Cross and human rights

Session of 27 November 1987, Rio de Janeiro

Resolution 2. Worldwide campaign for the protection of war victims

Resolution 4. Information and dissemination of international humanitarian law as a contribution to peace

Resolution 5. Formal commitment by the Movement to obtain the full implementation of the Geneva Conventions

Session of 28–30 November 1991, Budapest

Resolution 5. Use of the emblem by National Societies

Resolution 8. Dissemination of international humanitarian law and of the principles and ideals of the Movement

Resolution 9. The International Red Cross and Red Crescent Movement and refugees

Resolution 11. Protection of victims of war

Resolution 12. Humanitarian assistance in situations of armed conflict

Resolution 13. Protection of the civilian population against famine in situations of armed conflict

Resolution 14. Child soldiers

Session of 29–30 October 1993, Birmingham

Resolution 2. The International Conference for the Protection of War Victims

Resolution 3. Mines

Resolution 4. Child soldiers

Resolution 5. Armed protection of humanitarian assistance

Resolution 7. The Movement, refugees and displaced persons

Resolution 9. Respect for and dissemination of the Fundamental Principles: Final report

Resolution 11. Principles of humanitarian assistance

Session of 1–2 December 1995, Geneva

Resolution 5. Children in armed conflicts and Plan of action concerning children in armed conflict

Resolution 9. Armed protection of humanitarian assistance

Resolution 10. Anti-personnel landmines

Session of 25–27 November 1997, Seville

Resolution 2. The emblem

Resolution 4. National implementation of international humanitarian law

Resolution 5. International criminal court

Resolution 8. Peace, international humanitarian law and human rights

Session of 29–30 October 1999, Geneva

Resolution 2. Emblem

Resolution 8. Children affected by armed conflict

Resolution 10. Movement strategy on landmines

Resolution 11. International criminal court